

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re: CASE NO. 9:08-BK-04360-MGW
ULRICH FELIX ANTON ENGLER, CHAPTER 7
PRIVATE COMMERCIAL OFFICE, INC., (Substantively Consolidated)
and PCO CLIENT MANAGEMENT, INC.

Debtors.

**RESPONSE OF COMMERZBANK AG IN OPPOSITION TO MOTION FOR
TURNOVER OF TRUSTEE ROBERT E. TARDIF, JR.
AND MEMORANDUM OF LAW**

Commerzbank AG (“Commerzbank”), by and through undersigned counsel, hereby submits its Response in Opposition to the Motion of Trustee Robert E. Tardif, Jr. (“Trustee”) for Turnover (the “Motion”), and in support thereof states:

I. INTRODUCTION

Over two years ago, the Regional Court in Mannheim, Germany (the “Mannheim Court”) rejected the Trustee’s application for the very same relief he seeks here – the turnover of Bianca Borowski’s (“Borowski”) account at Commerzbank in Germany, account number XXXXXXXX1600 (the “Account”) – because the Trustee had no cognizable claim to the Account. The Trustee appealed, and a German appellate court affirmed the Mannheim Court’s decision. Yet, without even initially disclosing those conclusive decisions of the German courts, the Trustee now attempts a third bite at the apple by asking this Court to re-litigate exactly the same issue he lost in Germany. This Court should not countenance the Trustee’s improper effort to end-run the German courts. For this and other reasons explained below, the Motion should be denied.

First, under section 541(a)(3) of the Bankruptcy Code, the funds in the Account are not property of the debtors' estate until recovered, which they have not been, and therefore are not subject to turnover. The funds in the Account had been seized by German authorities prior to entry of a default final judgment against Borowski, and are being held by Commerzbank for the benefit of victims of debtors' criminal activities pursuant to a garnishment order of the Mannheim Court. Accordingly, the funds in the Account could not be recovered after seizure by the German authorities.

Second, even if the Account funds were property of the debtors' estate, which they plainly are not, the Trustee's request for an order to turnover funds fails to afford adequate protection, as required by 11 U.S.C. § 543(e), to the German authorities and victims of the debtors' alleged criminal scheme to defraud investors. This Court should not circumvent the legitimate rights of these other parties by ordering turnover of the Account funds.

Third, given that the Mannheim Court has already denied the Trustee's prior attempt to recover the Account funds, and given that the Mannheim Court's decision has been affirmed on appeal, this Court must bar re-litigation of the turnover issue under the doctrine of issue preclusion and honor the Mannheim Court's orders under principles of comity.

For all of these reasons, as explained more fully below, the Court should deny the Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Borowski's Account At Commerzbank

The Account was opened at Dresdner Bank AG¹ in 1998. (Declaration of Jürgen Holze (“Holze Decl.”) ¶ 4.)² Between December 7, 2006 and April 13, 2007, the sum of \$645,000 was transferred to the Account in three separate transactions from the account of debtor Private Commercial Office, Inc (“PCO”), at Suntrust Bank in Orlando, Florida. (Id.) PCO is a company in which debtor Ulrich Felix Anton Engler (“Engler”) was purportedly the sole owner and shareholder. (Bk. Dkt. Nos. 47, 51.)

B. The Petition For Chapter 7 Relief

On March 31, 2008, a group of creditors filed involuntary petitions for relief under chapter 7 of the Bankruptcy Code against Engler. (Bk. Dkt. No. 1.)³ On April 29, 2008, this Court entered an order granting petitioners/creditors’ motion for default as to Engler (Bk. Dkt. No. 8), and entered a separate order for relief (Bk. Dkt. No. 9). Pursuant to the order for relief, the Trustee was appointed as interim chapter 7 trustee on April 30, 2008. (Bk. Dkt. No. 10.)

On June 24, 2008, the Court granted the Trustee’s motion for substantive consolidation of Case No. 9:08-bk-04365 (Bankr. M.D. Fla. 2008), an involuntary chapter 7 petition which had been filed against PCO. (Bk. Dkt. Nos. 47, 51.) The Trustee’s motion for substantive consolidation raised, for the first time, the issue that Engler allegedly “engaged in a financial scheme to defraud various citizens of Germany,

¹ Commerzbank acquired Dresdner Bank AG. (Id.)

² The Holze Declaration is attached hereto as Exhibit 1.

³ All references to “Bk. Dkt. No.” are to this Court’s online docket in In re: Ulrich Felix Anton Engler, Private Commercial Office, Inc., and PCO Client Management, Inc., 9:08-bk-04360-MGW.

Austria and Switzerland by soliciting money with false promises of a high rate return on their investment.” (Bk. Dkt. No. 47, ¶ 4.)

On April 23, 2010, the Court granted the Trustee’s motion to substantively consolidate debtor PCO Client Management, Inc. (“PCOM”) (collectively with Engler and PCO, the “Debtors”) into the bankruptcy estates of Engler and PCO, *nunc pro tunc* to March 31, 2008. (Bk. Dkt. No. 161, 242.) The Trustee’s motion alleged that PCOM, like PCO, was a company owned solely by Engler, serving as a conduit through which Engler perpetrated his alleged “Ponzi scheme” to defraud investors. (Bk. Dkt. No. 161, ¶¶ 9,10.)

Additionally, the Trustee commenced one hundred and sixty-one adversary proceedings to avoid and recover fraudulent transfers and for unjust enrichment, arising from alleged funds transferred by the Debtors to various defendants. (Bk. Dkt. Nos. 139, 155, 186-194, 196-209, 211, 213, 215-227, 233-241, 243-250, 256-358, 360-61.) Notably, the Trustee did not commence an adversary proceeding against Commerzbank (or its predecessor) with respect to alleged fraudulent transfers, although he did commence such a proceeding against Borowski. (Bk. Dkt. No. 139.)

C. The Borowski Proceeding

On September 1, 2009, the Trustee commenced an adversary proceeding against Borowski, among others, for fraudulent transfers and to recover transfers from subsequent transferees (the “Borowski Proceeding”).⁴ (Bk. Dkt. No. 139.) The adversary complaint alleged, *inter alia*, that Borowski received the \$645,000 in the Account from Engler and/or PCO beginning on or about December 7, 2006, and ending on or about April 13, 2007. (Bk. Dkt. No. 139, ¶ 44.)

⁴ Tardif, Jr. v. Douglass, et. al., 9:09-ap-00632-MGW (Bankr. M.D. Fla. 2009).

A default was entered against Borowski on November 3, 2009. (Borowski Proceeding, Dkt. No. 15.) On September 30, 2010, a default final judgment was entered against Borowski in the Trustee's favor, ordering that the pre-petition transfers received by Borowski in the amount of \$645,000.00 be avoided pursuant to 11 U.S.C. §§ 544(b), 548(a)(1)(A), 548(a)(1)(B) and Chapter 726 of the Florida Statutes (the "Borowski Default Judgment"). (Borowski Proceeding, Dkt. No. 36, ¶¶ 1, 2.) The Borowski Proceeding was closed on March 20, 2013.

D. The Mannheim Prosecutor's Office Garnishment Of Account Funds

Meanwhile, on or about May 25, 2010, four months before entry of the Borowski Default Judgment, Commerzbank received a copy of a garnishment order dated May 18, 2010 (the "Garnishment Order") from the Mannheim Prosecutor's Office (the "Mannheim Prosecutor"), which executed on an order issued by the Mannheim Court on May 4, 2010, in connection with Engler's criminal activities (the "2010 Seizure Order"). (Holze Decl. ¶¶ 5-7 & Ex. 1.) Pursuant to the Garnishment Order, the Mannheim Prosecutor seized the Account funds and all of Borowski's rights with respect to the Account pursuant to German Code of Criminal Procedure ("StPO") sections 111b(1), 111f(1)S.1 and 111c(3), which authorize seizure of property rights to secure funds for the benefit of victims of a crime (*i.e.*, the defrauded investors). (*Id.* ¶¶ 6, 7 & Ex. 1.)

Nearly three years later, on January 15, 2013, the Trustee filed a claim with the Mannheim Court, seeking turnover of the Account funds under the StPO based on the Borowski Default Judgment. (*Id.* ¶ 12.) Despite no opposition from either Borowski or the Mannheim Prosecutor, on June 27, 2013, the Mannheim Court dismissed the Trustee's claim, holding that the Trustee failed to establish a claim to the seized Account funds under StPO because the Borowski Default Judgment alone was an insufficient basis

for the Trustee's claim. (Id. ¶¶ 13, 14 & Ex. 3.) Furthermore, as the Mannheim Court decided, the Trustee failed to demonstrate that the Borowski Default Judgment was enforceable in Germany. (Id.)

The Trustee immediately appealed the Mannheim Court's dismissal of his claim. On November 27, 2013, the Karlsruhe Higher Regional Court affirmed the Mannheim Court's decision, finding that the funds in the Account are not property of the estate and noting that turning over the funds in the Account to the Trustee would require the court to "set aside the seizure and attachment of the claim entirely" because "there would no longer be room for a protective measure ordered for the purpose of securing property under criminal law" (Bk. Dkt. No. 1168, Attachment 4-5.)

On March 4, 2013, the Mannheim Court sentenced Engler to 102 months of imprisonment (the "Criminal Judgment"). (Bk. Dkt. No. 1119, ¶ 10.) Critically here, the Criminal Judgment also stated that the \$645,000.00 in the Account was subject to confiscation pursuant to German law. (Bk. Dkt. No. 1119 & Ex. B.) On or around March 5, 2013, the Mannheim Court affirmed the 2010 Seizure Order up to \$645,000.00 (€474,152.83)⁵ and extended it for three additional years (the "2013 Seizure Order") in order to provide victims of Engler's criminal activities ample opportunity to submit a claim on the Account funds. (Holze Decl. ¶ 8 & Ex. 2.) Furthermore, as stated in the 2013 Seizure Order, the funds in the Account are subject to forfeiture under the German Criminal Code to the extent there are no conflicting claims of injured parties. (Id. ¶ 9 & Ex. 2.)

⁵ At current exchange rates, the dollar value of the €474,152.83 subject to the 2010 Seizure Order is now \$536,654.84. (Holze Decl. ¶3.)

E. The Trustee's Attempt To End-Run The Mannheim Court

Notwithstanding the Trustee's failure to obtain turnover of the funds from the Mannheim Court and the affirmance of the Mannheim Court's decision on appeal, the Trustee pursued his attempt to secure the funds through proceedings in this Court (without disclosing his prior efforts before the German courts to this Court). On March 27, 2013, pursuant to Local Rule 2002-4 for service by negative notice, the Trustee filed the Motion for Authority to Compromise Controversy (the "Compromise Motion") with respect to funds held in the Account, which had already been seized by German authorities. (Bk. Dkt. No. 922.) Commerzbank was not served a copy of this motion despite the fact that it is an interested party. Having received no opposition or objection, and without conducting a hearing, the Court granted the Compromise Motion with Borowski on April 26, 2013. (Bk. Dkt. No. 935). By virtue of the order, Borowski consented to the release of any and all funds contained in the Account (even though she had no authority to do so after the Mannheim Prosecutor seized the Account). (Bk. Dkt. No. 935.) Commerzbank also did not receive a copy of this order.

The Trustee then waited over two years before making the instant Motion to compel Commerzbank to turn over the Account. Remarkably, the Trustee still did not disclose to this Court the adverse orders of the German courts that have denied the Trustee's attempts to gain turnover of the Account in Germany. It was not until the Friday before the scheduled hearing on the Motion, September 4, 2015, and after the Trustee's counsel learned that Commerzbank would oppose the Motion, that the Trustee belatedly filed a notice attaching a copy of the German appellate decision that affirmed the Mannheim Court's denial of the Trustee's application for turnover of the Account. (Bk. Dkt. No. 1168.)

III. ARGUMENT

A. Turnover Is Improper Because The Account Is Not Property Of The Estate.

1. Fraudulently Transferred Property Is Not Part Of The Estate Until Recovered.

Pursuant to 11 U.S.C. § 541(a)(3), fraudulently transferred property does not become part of the estate until recovered.⁶ See Rajala v. Gardner, 709 F.3d 1031, 1038 (10th Cir. 2013) cert. denied sub nom. Rajala v. Lookout Windpower Holding Co., LLC, 134 S. Ct. 164, 197 L.Ed. 2d 41 (2013); see also In re Sherwood Investments Overseas Ltd., Inc., No. 6:10-AP-00158-KSJ, 2015 WL 4486470, at *21 (Bankr. M.D. Fla. July 22, 2015). The funds from the Account at issue have not been “recovered” and, therefore, are not part of the estate and subject to turnover.

In Rajala, the trustee of the bankruptcy estate appealed from an order of the district court granting motions to distribute to the debtor’s “insiders” approximately \$9 million held in escrow, which represented a portion of the purchase price of a wind power project developed by the debtor. Rajala, 709 F.3d at 1033. The Tenth Circuit analyzed the issue of what constitutes property of the bankruptcy estate and whether fraudulently transferred property is subject to the automatic stay before a trustee recovers the property through an avoidance action. Id. at 1032. The Tenth Circuit aligned itself with Second Circuit’s interpretation of section 541(a)(3), holding that the automatic stay does not

⁶ 11 U.S.C. § 541(a)(3) states:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

apply to fraudulently transferred property until the transfer is avoided under section 548 and the property is recovered under section 550. Id. at 1038-39.

Here, the German Prosecutor seized the Account pursuant to the Garnishment Order approximately four months prior to the Trustee obtaining the Borowski Default Judgment. Thus, notwithstanding the Borowski Default Judgment in the Trustee's favor, the Account funds still are not part of the bankruptcy estate until physically and legally recovered from Commerzbank. This obviously is not possible where the funds in the Account have been seized by German authorities prior to entry of the Borowski Default Judgment, and are otherwise being held by Commerzbank pursuant to the Mannheim Court's Garnishment Order and 2013 Seizure Order. (Holze Decl. ¶¶ 3, 18). The Borowski Default Judgment in and of itself cannot automatically convert the Account to estate property, especially when it was obtained by default without any due consideration, much less any mention, of the Garnishment Order. Thus, pursuant to the Garnishment Order, the funds in the Account are not property of the Debtors' estate and, therefore, are not subject to turnover pursuant to the Bankruptcy Code.

2. Borowski's Purported Consent To Release The Account Funds Was A Nullity.

Despite having knowledge of the Garnishment Order, the Trustee's Compromise Motion states that Borowski agreed "to resolve any and all claims of the estate against Borowski consenting to the release of any and all funds currently contained in the account seized by the German authorities." (Bk. Dkt. No. 922.) As the Trustee's Motion concedes, the Account funds were already seized by the German Prosecutor. The Motion, however, fails to mention that, pursuant to the Garnishment Order, Borowski's rights to the Account were also seized pursuant to the StPo. (Holze Decl. ¶ 7.) Thus,

Borowski had no authority to consent to turnover of the Account funds to the Trustee. See Santiago v. Sunset Cove Investments, Inc., 988 So. 2d 10, 11 (Fla. 2d DCA 2008) (“Although Mr. Santiago appears to be a source of the procedural problems that have arisen in this dispute, the circuit court could not order him to transfer property that he does not appear to currently own. Thus, we reverse the order on appeal.”); In re Winfrey Structural Concrete Co. v. Internal Revenue Service, 5 B.R. 389, 391 (Bankr. D. Col. 1980) (“It is clear however, that the seizure of property is tantamount to transfer of ownership.”) (internal citation omitted).

3. The Funds Are Subject To A Judicial Lien That Is Not Avoidable.

The Account is subject to the Garnishment Order, which effectively is a judicial lien that cannot be avoided. Indeed, this Court previously ruled that service of a writ of garnishment created a judicial lien on “debts or property” of the debtor under Florida law and, thus, was a “judicial lien” as defined by the Bankruptcy Code that precluded the Trustee’s avoidance of transfer under the Code. In re: Engler, 394 B.R. 598, 602-04 (Bankr. M.D. Fla. 2008).

In light of the Garnishment Order, and the 2013 Seizure Order that remains in full force and effect, the Account and its contents are not property of the estate. Accordingly, the Court should deny the Motion on these grounds alone.

B. Ordering Turnover Would Fail To Afford The German Prosecutor’s Interest In The Account Adequate Protection Under The Bankruptcy Code.

The equitable powers of the Bankruptcy Court do not permit it to order turnover of the Account funds seized by the German Prosecutor without adequate protection for the German Prosecutor’s interest in the Account funds, as well as the interests of other victims of Engler’s criminal activities. See 11 U.S.C. §§ 363(e), 542(a); In re Empire For

Him, Inc., 1 F.3d 1156, 1160 (11th Cir. 1993) (“Section 542(a) of the Bankruptcy Code authorizes the bankruptcy court to order the turnover of property of the estate, but only to the extent that the court provides adequate protection for those who have an interest in such property.”) (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 207, 103 S. Ct. 2309, 2314-15, 76 L.Ed. 2d 515 (1983)).

In In re Empire For Him, Inc., Capital Factors, Inc. (“CFI”) held funds that it collected on the debtor’s accounts at the time the debtor’s petition for relief under chapter 11 was filed. Id. at 1157. The debtor asked the bankruptcy court to order turnover of these funds pursuant to 11 U.S.C. § 542(a), which CFI opposed because it claimed a security interest in the funds. Id. The bankruptcy court found that CFI held a security interest in the funds, but it nonetheless refused to enforce the security interest for equitable reasons. Id. at 1558. As a result, the bankruptcy court ordered turnover of the funds and allowed CFI a general, unsecured claim against the estate for damages it claimed. Id. at 1557.

The Eleventh Circuit reversed, holding that the bankruptcy court did not properly exercise its general equitable powers by failing to afford adequate protection to CFI under 11 U.S.C. § 542(a). Id. at 1160 (“A bankruptcy court’s equitable power ‘must and can only be exercised within the confines of the Bankruptcy Code.’”) (quoting Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 969, 99 L.Ed 2d 169 (1988)). In so holding, the Eleventh Circuit found that 11 U.S.C. § 363, to which section 542(a) of the Bankruptcy Code refers, states that “‘the court . . . shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such

interest.” Id. (quoting 11 U.S.C. § 363(e)). Accordingly, the bankruptcy court’s order requiring CFI to turn over the subject funds to the debtor was vacated. Id.

In seeking turnover of the Account funds, the Trustee has not provided adequate protection of the German Prosecutor’s interest, pursuant to the Garnishment Order, in providing redress to the victims of Engler’s criminal activities or forfeiture to the German Prosecutor. Indeed, the Motion entirely overlooks its burden to demonstrate adequate protection of the German Prosecutor and the victims of Engler’s criminal activities. See In re Lawrence, 251 B.R. 630, 640 (S.D. Fla. 2000) aff’d, 279 F.3d 1294 (11th Cir. 2002). Clearly, ordering turnover without adequate protection of those interests would run afoul of the aforementioned provisions of the Bankruptcy Code. Accordingly, the Court should deny the Motion.

C. The Criminal Judgment And The Orders Of The Mannheim Court And German Appellate Court Should Be Enforced Under The Doctrine Of Issue Preclusion.

Issue preclusion bars litigants from arguing an issue that was previously decided by a court of competent jurisdiction, irrespective of the fact that a foreign court may have decided the issue. See Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L.Ed. 2d 155 (2008) (“Issue preclusion . . . bars ‘successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,’ even if the issue recurs in a different context of a different claim.”) (internal citation omitted); Cardenas v. Solis, 570 So. 2d 996, 998 (Fla. Dist. Ct. App. 1990) (“Modifiable foreign orders can be granted extraterritorial effect even though they might not be ‘final’ for purposes of res judicata.”) (citing Pilkington Bros. P.L.C. v. AFG Industries, 581 F.Supp. 1039, 1045 (D. Del. 1984)).

The Trustee already filed an unsuccessful claim with the Mannheim Court on January 15, 2013, seeking turnover of the Account funds under the StPO based on the Borowski Default Judgment. (Holze Decl. ¶ 12.) Despite no opposition from either Borowski or the Mannheim Prosecutor, the Mannheim Court dismissed the Trustee's claim, holding that the Trustee failed to establish a claim to the seized Account funds under the StPO because the Borowski Default Judgment alone was an insufficient basis for the Trustee's claim. (Holze Decl. ¶¶ 13, 14 & Ex. 3.) Furthermore, as the Mannheim Court decided, the Trustee failed to demonstrate that the Borowski Default Final Judgment was enforceable in Germany. (*Id.*) On November 27, 2013, that decision was affirmed on appeal on largely the same grounds. (Bk. Dkt. No. 1168.)

The Trustee's Motion – which initially failed to mention any of the above-referenced facts regarding his dismissed claim in the Mannheim Court and the affirmance of the dismissal on appeal – is a blatant attempt to circumvent the findings and mandates of the Mannheim Court. This Court, however, should enforce the Mannheim Court's order and bar re-litigating the exact same issue under the doctrine of issue preclusion. The Trustee was clearly aware of the German criminal proceedings, was given an opportunity to be heard, was ultimately denied by the Mannheim Court the same relief he seeks in this Motion, and then lost on his appeal from that decision. (Holze Decl. ¶¶ 12-14, 18 & Ex. 3; Bk. Dkt. No. 1168.)

Since the Mannheim Court has already ruled that the Trustee has no cognizable claim to the Account, and since that decision has already been affirmed on appeal in Germany, this Court should find that the Trustee's third attempt to litigate entitlement to the Account funds is barred by the doctrine of issue preclusion

D. The Criminal Judgment And Garnishment Order Of The Mannheim Court Should Be Enforced Under Principles Of Comity.

The 2013 Seizure Order is final, conclusive and binding and, therefore, Commerzbank is obligated to comply with the Mannheim Court's mandate. (Holze Decl. ¶¶ 10, 18 & Ex. 2.) Under principles of comity, this Court should defer to the prior determination of the Mannheim Court and should not interfere with the 2013 Seizure Order.

“International comity has been described by the Supreme Court as the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws.” JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (citing Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895)). With respect to adjudications and decrees of foreign courts, “international comity is clearly concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.” Altos Hornos de Mexico, 412 F.3d 418, 423 (internal citation and quotation omitted). “International Comity . . . involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction. Id. at 424 (internal citation omitted).

The Eleventh Circuit has repeatedly recognized the appropriateness of granting comity to the orders of foreign courts. Indeed, the Eleventh Circuit has held that it would be an abuse of discretion for a court to refuse to extend comity to the judgment of a

foreign court, particularly where, as here, the litigants had a fair hearing before the foreign tribunal. Belize Telecom, Ltd. v. Government of Belize, 528 F.3d 1298, 1306-07 (11th Cir. 2008) (reversing as abuse of discretion district court decision that did not defer to Belize judgment); see also Daewoo Motor Am., Inc. v. Gen. Motors Corp., 459 F.3d 1249, 1258-59 (11th Cir. 2006) (affirming district court's grant of comity to determinations in Korean bankruptcy case where appellant had notice and opportunity to participate in Korean proceedings); Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir.1994) (vacating injunction issued by district court that declined to abstain in deference to parallel German litigation).

The Mannheim Court's 2013 Seizure Order is final, conclusive and binding on Commerzbank. Even if this Court were to enter the relief requested by the Trustee, the 2013 Seizure Order restrains Commerzbank from turning over the Account funds without the Trustee first demonstrating that he has a recognizable claim to the Account funds under German law. (Holze Decl. ¶ 18 & Ex. 2.)

What is more, the Mannheim Court has dismissed the Trustee's claim, holding that the Trustee failed to establish a claim to the seized Account funds and failed to demonstrate that the Borowski Default Judgment was enforceable in Germany, and that decision has been affirmed on appeal. (Holze Decl. ¶¶ 13, 14 & Ex. 3; Bk. Dkt. No. 1168.) Thus, this Court should enforce the orders of the Mannheim Court under principles of comity and deny the Trustee's motion for turnover.

IV. CONCLUSION

WHEREFORE, based on the foregoing, Commerzbank respectfully requests that the Court deny the Trustee's Motion with prejudice.

Dated: September 9, 2015.

Respectfully submitted,

By: *s/ Brian C. Frontino*

Brian C. Frontino

Florida Bar No. 95200

Ralph Mora

Florida Bar No. 70039

STROOCK & STROOCK & LAVAN LLP

200 South Biscayne Blvd., Suite 3100

Miami, Florida 33131

Telephone: (305) 358-9900

Facsimile: (305) 789-9302

Email: bfrontino@stroock.com

lacalendar@stroock.com

Attorneys for Commerzbank AG