

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

In Re:

**ULRICH FELIX ANTON ENGLER; and
PRIVATE COMMERCIAL OFFICE, INC.**

Case No. 9:08-BK-04360-ALP

Debtor.

**Chapter 7 cases
(Substantively Consolidated)**

**MOTION FOR RECONSIDERATION OF ORDER GRANTING
TRUSTEE'S MOTION TO APPROVE COMPROMISE AND SETTLEMENT (DOC. 230)
AND OPPOSITION TO TRUSTEE'S MOTION TO SUBSTANTIALLY CONSOLIDATE
NON-DEBTOR DOUGLAS INVESTMENTS, LLC
WITH AND INTO DEBTOR'S BANKRUPTCY ESTATES (DOC. 212)**

Fidelity National Timber Resources, Inc. f/k/a Fidelity National Ranch Properties, Inc. ("Fidelity Timber"), and Fidelity National Financial, Inc. ("FNF"), by and through their undersigned counsel, pursuant to Rules 1015, 9019, 9023 and 9024 and 11 U.S.C. § 105, hereby file this their Motion for Reconsideration of Order Granting Trustee's Motion to Approve Compromise of Controversy and Settlement (Doc. 230) and Opposition to Trustee's Motion to Substantively Consolidate Non-Debtor Douglas Investments, LLC with and into the Debtors' Bankruptcy Estates (Doc. 212), and, in support thereof, states as follows:

Factual Background

The Bankruptcy

1. On March 31, 2008 (the "Petition Date"), certain petitioning creditors filed involuntary petitions against the Debtors, Ulrich Felix Anton Engler ("Engler") and Private Commercial Office, Inc. ("PCO") (collectively, the "Debtors"), under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. (Doc. 1)

2. On April 29, 2008, the Court entered Orders for Relief against the Debtors (Doc. 9), and on April 30, 2008, the Court entered an Order approving Robert E. Tardif, Jr.'s appointment as the Chapter 7 Trustee (the "Trustee"). On June 24, 2008, the Court entered an Order substantively consolidating the assets and liabilities of the Debtors' bankruptcy estates (Doc. 51)

Douglas Investments' Installment Land Sale Contract With Fidelity Timber

3. On or about November 9, 2006, Fidelity Timber, as Seller, entered into a Vacant Land Real Estate Purchase and Sale Agreement with Engler Land Investments LLC ("Engler Land") or its assigns, as Buyer, for the sale of approximately 3,000 acres of real property in Teton and Madison Counties, Idaho (the "Property") for the sum of \$20,000,000.00 (the "Purchase Agreement"). By agreement between Engler Land and Douglas Investments, LLC ("Douglas Investments"), Engler Land's interest under the Purchase Agreement was thereafter assigned to Douglas Investments. A copy of the assigned Purchase Agreement is attached as **Exhibit 1**.

4. Pursuant to the terms of the Purchase Agreement, Fidelity Timber retained title to the Property and the purchase price for the Property was to be made by Douglas Investments, as assignee, in biannual installments following the payment of an initial deposit. *See* Purchase Agreement, Schedule A, page 3.

5. Pursuant to the Purchase Agreement, notwithstanding Fidelity Timber's retention of title, as of the Initial Closing, Douglas Investments was entitled to, and did in fact take, possession of the Property and continued the development of the Property.

6. The Initial Closing of the Property, as that term is defined in the Purchase Agreement, occurred on or about December 22, 2006. The initial earnest money deposit pursuant to the Purchase Agreement was paid to Fidelity Timber by PCO on behalf of Douglas Investments. Mr. Engler indicated to Fidelity Timber that he would be Douglas Investments' lender and also held out PCO as his company.

7. Subsequent payments, including the remainder of the initial installment payment at closing, were made by Douglas Investments. Discovery in an adversary proceeding brought by the Trustee against Fidelity Timber and FNF (Case No. Case No. 9:09-ap-01026-ALP) has revealed that for each installment payment made by Douglas Investments to Fidelity Timber, Douglas Investments borrowed money from Engler pursuant to a Business Loan Agreement for each loan. Such loans provided for Douglas Investments to grant a security interest in the Property, in addition to other property.

8. Subsequent to the Petition Date, Douglas Investments, who is Fidelity Timber's creditor, transferred, for no additional consideration, a mortgage lien to the Trustee, as is evidenced by the mortgage dated November 14, 2008, and recorded on the same date. The mortgage was filed with this Court at Docket 99, Exhibit C.

9. Such transfer of an interest in real estate post-dated the loans, and constitutes avoidable fraudulent transfers from Douglas Investments to the Trustee.

Fidelity Timber Obtains Relief from Stay to Pursue Foreclosure

10. Douglas Investments failed to make a payment due on September 1, 2008 pursuant to the Purchase Agreement. Accordingly, pursuant to Idaho law, Fidelity Timber had the right to proceed in a state court foreclosure proceeding to foreclose out Douglas Investments' rights and to enforce Fidelity Timber's rights under the Purchase Agreement.

11. On December 16, 2008, Fidelity Timber filed a Motion for Relief From Stay in this Court (Doc. 99), seeking relief from the automatic stay or modifying the automatic stay as appropriate, sufficient to allow Fidelity Timber the opportunity to foreclose all rights in the Purchase Agreement, including any right arising out of the mortgage given and recorded post-petition by the Trustee.

12. On February 3, 2010, the Court granted the Motion for Relief from Stay, with the proviso that Fidelity Timber could only pursue foreclosure through entry of a Final Judgment, but could not set a foreclosure sale until permitted to do so by further order of this Court (Doc. 116).

13. On March 13, 2009, Fidelity Timber filed a foreclosure complaint in Idaho state court (the "Idaho Foreclosure"). The Idaho Foreclosure remains pending, and the Trustee has intervened, standing in the Debtors' shoes.

14. As a result of Douglas Investments' failure or inability to continue ongoing development of the Property and the lapse of certain development permits, the Idaho Foreclosure is likely to result in a significant deficiency against Douglas Investments.

Adversary Proceeding Against Douglas Investments and Fidelity Timber

15. On September 1, 2009, the Trustee filed an adversary complaint against Douglas Investments, among others, to recover purported fraudulent transfers from the Debtors to Douglas Investments, including those funds loaned to Douglas Investments to make payments pursuant to the Purchase Agreement (Case No. 9:09-ap-00632-ALP) (the “Douglas Adversary”).

16. On December 28, 2009, the Trustee filed an adversary complaint against Fidelity Timber, among others, to recover purported fraudulent transfers from the Debtors to Fidelity Timber, which the Trustee claims were sent by the Debtors to Douglas Investments and then to Fidelity Timber, and which were admittedly made on account of the Purchase Agreement. (Case No. 9:09-ap-01026-ALP) (the “Fidelity Adversary”).

17. On February 24, 2010, prior to any real discovery in the Fidelity Adversary, the Trustee filed a Motion to Approve Compromise of Controversy and Settlement of the Douglas Adversary (Doc. 166), wherein Douglas Investments, amongst others, agreed to transfer certain real property and other interests to the Trustee that had purportedly been purchased with funds provided by the Debtors (the “Douglas Motion to Compromise”). Among the interests to be transferred to the Trustee pursuant to the settlement agreement was “all legal, contractual, and equitable rights, title and interests in and to” the Purchase Agreement (the “Douglas Settlement Agreement”) (*See* Doc. 166, Ex. B, ¶7(a)). Essentially, the Trustee then would succeed to whatever rights the Debtors and Douglas Investments had in the Purchase Agreement and the Property.

18. The Court conducted a hearing on the Douglas Motion to Compromise on April 9, 2010, at which time the Court granted the Douglas Motion to Compromise.¹

¹ The Order memorializing the Court’s oral ruling was entered on April 22, 2010 (Doc. 230).

19. The very next week—the week April 12, 2009—the parties in the Fidelity Adversary conducted crucial depositions of representatives of Fidelity Timber and third-party witnesses, including Douglas Investments’ Idaho attorney.

20. During these depositions, and during the deposition of David Douglas (Douglas Investments’ principal and owner) on April 28, 2010, it was revealed that the Douglas Settlement Agreement would divest Douglas Investments of all its assets, leaving Douglas Investments insolvent without any ability to pay its creditors, including Fidelity Timber.

Trustee’s Seeks Consolidation of An Insolvent Non-Debtor Entity

21. On April 20, 2010, notwithstanding the Douglas Settlement Agreement, and the Trustee’s attempts to divest Douglas Investments of all its assets to the detriment of Douglas Investments’ creditors, the Trustee filed his Motion to Substantively Consolidate Non-Debtor Douglas Investments, LLC with and into the Debtors’ Bankruptcy Estates (“Motion to Consolidate”) (Doc. 212). Indeed, it is curious why the Trustee even seeks consolidation considering the Trustee already plans to divest Douglas Investments of all its assets pursuant to its settlement of the Douglas Adversary. The purpose of consolidation is dubious at best.

22. For the reasons set forth below, the Court should reconsider and vacate its Order Granting the Douglas Motion to Compromise, and deny consolidation of the Debtors’ bankruptcy estates with that of Douglas Investments. In the alternative, Fidelity Timber seeks permission from this Court, pursuant to the *Barton* Doctrine, to bring an action against the Trustee pursuant to either state law fraudulent transfer or, upon a potential bankruptcy filing by or against Douglas Investments, claims under 11 U.S.C. §§ 544, 547, 548, and 550.

BASIS FOR RELIEF

A. This Court Should Reconsider and Vacate its Order on the Douglas Motion to Compromise

23. It is generally recognized that the law favors compromise of disputes over litigation for litigation sake. *In re Bicoastal Corp.*, 164 B.R. 1009 (Bankr. M.D.Fla. 1993). In the bankruptcy context, a Bankruptcy Court has broad discretion to approve a compromise, and it should do so unless the proposed settlement “falls below the lowest point in the range of reasonableness.” *Id.*

24. In considering a compromise, the Court should also consider the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion. *Matter of Foster Mortg. Corp.*, 68 F.3d 914 (5th Circ. 1995). In exercising its discretion, the Court may also balance the reasonableness of the compromise against the fact situation of each case. *In re Present Co., Inc.*, 141 B.R. 18 (Bankr. W.D.N.Y. 1992).

25. Here, the settlement between Douglas Investments and the Trustee will divest Douglas Investments of all its assets, to the detriment of Douglas Investments’ remaining creditors—a fact not revealed in the Douglas Motion to Compromise or to this Court prior to its approval of the Douglas Settlement Agreement.

26. As a result of the Douglas Settlement Agreement, the Trustee will, in effect, become the recipient of a fraudulent transfer from Douglas Investments, for which the Trustee and the bankruptcy estate are liable to Fidelity Timber and Douglas Investments’ other creditors, if any, pursuant to Florida law and other applicable law.

27. As such, this Court should reconsider and vacate its Order granting the Douglas Motion to Compromise.

B. This Court Should Deny the Motion to Consolidate

28. As set forth in the Trustee's Motion to Consolidate, a bankruptcy court has jurisdiction to substantially consolidate a non-debtor corporate entity with a debtor's bankruptcy estate pursuant to its general equitable powers, although such an approach is "somewhat unorthodox." *In re Alico Mining, Inc.*, 278 B.R. 586 (Bankr. M.D.Fla. 2002). It is well-established law, however, that consolidation with a non-debtor entity can only be accomplished by destroying the independent legal existence of the non-debtor entity by removing its corporate shield and establishing with competent and persuasive evidence that it is nothing more than an alter ego of the debtor. *Id.*

29. Substantive consolidation may be based on a finding that it would be more equitable to all parties to allow consolidation under circumstances of the case, by showing that the affairs of the entities are inextricably intertwined or that creditors dealt with them as a single economic unit. *Id.* Before ordering consolidation however, a bankruptcy court must conduct a searching inquiry to ensure that consolidation yields benefits that would offset the harm it inflicts on objecting parties. *Id.* Moreover, the proponent of consolidation must show substantial identity between the entities to be consolidated, and that consolidation is necessary to avoid some harm or to realize some benefit. *Id.*

30. Factors to consider whether the proponent has made the required prima facie showing are as follows: (1) presence or absence of consolidated financial statements for entities whose estates are to be consolidated; (2) unity of interest and ownership; (3) existence of parent and intercorporate guarantees on loans; (4) degree of difficulty in segregating and ascertaining individual assets and liability; (5) existence of transfers of assets without formal observance of corporate formalities; (6) commingling of assets and business functions; and (7) profitability of

consolidation at single physical location. *Id.*, see also *In re Optical Technologies, Inc.*, 221 B.R. 909 (Bankr. M.D.Fla. 1998).

31. Other factors noted by the Eleventh Circuit in *Eastgroup Properties v. Southern Motel Ass'n Ltd.*, 935 F.2d 245 (11th Cir. 1991), include: 1) the parent owning the majority of the subsidiary's stock; (2) the entities having common officers or directors; (3) the subsidiary being grossly undercapitalized; (4) the subsidiary transacting business solely with the parent; and (5) both entities disregarding the legal requirements of the subsidiary as a separate organization.

32. The Trustee has failed to present any competent or persuasive evidence to meet *any* of these factors. The Trustee simply states conclusively that “sufficient cause exists to support a substantive consolidation” of Douglas Investments with the Debtors’ bankruptcy estates. Similarly, the Trustee states that the benefits of consolidation “overwhelmingly” outweighs any prejudice, but fails to state even one benefit.²

33. There is no evidence to support the majority of the factors listed above. The only connection the Trustee can make between the Debtors and Douglas Investments is that Engler rented a home owned by David Douglas, the principal of Douglas Investments. There is no common ownership between Douglas Investments and the Debtors. The only business connection between the Debtors and Douglas Investments is that one of the Debtors, or a related business, made loans to Douglas Investments and such loan proceeds were used to make payments on the real estate investments made by Douglas Investments.

34. While the Trustee asserts that it may be difficult to segregate the assets and liabilities of the Debtors and Douglas Investments, the Trustee’s accountants have already done so, as evidenced by the attachments to the Complaint and the Douglas Settlement Agreement, as

² Indeed, given that the Douglas Settlement Agreement divests Douglas Investments of all its assets, there are no benefits to be obtained from consolidation.

well as the fairly bold assertions of the Trustee's counsel at a hearing on Fidelity Timber and FNF's Motion to Dismiss the Fidelity Adversary Proceeding that his financial expert had conducted a detailed forensic analysis.

35. The Trustee states, without any support or example, that there exists "transfers of assets without formal observance of corporate formalities." To the contrary, as is now clear from discovery, Douglas Investments executed a Business Loan Agreement for the transfers received from the Debtors.

36. Such agreements, as they relate to Douglas Investments' payments under the Purchase Agreement, are attached as **Composite Exhibit 2**.

37. Indeed, in the Trustee's Response to the Fidelity Motion for Relief from Stay (Doc. 106), the Trustee states that it was Douglas Investments' intent to transfer a mortgage interest in the Idaho Property as security for the Debtors' loans to Douglas Investments. No such transfers of interest would have been necessary if the parties weren't observing corporate formalities.

38. The Trustee incorrectly asserts that Douglas Investments and the Debtors have common officers or directors. In reality, Engler is the only principal of Private Commercial Office, Inc. and David Douglas is the only principal of Douglas Investments. There are no common officers or directors, as show by the entity documents attached as **Composite Exhibit 3**. The Trustee has certainly now learned the facts from the course and conduct of a number of depositions.

39. The Trustee also incorrectly asserts that there exists commingling of assets and business functions, yet identifies no such assets or functions. Douglas Investments received loans from Engler. Engler received promissory notes in return, and on at least one occasion filed

a mortgage against property purchased with the loan proceeds (the property subject to the Purchase Agreement). The Trustee has identified numerous properties that were purchased by Douglas Investments in Douglas Investments' name or in the name of entities controlled by David Douglas. There are no commingled assets.

40. Finally, the Trustee states consolidation is necessary because Douglas Investments was a nominee and/or mere conduit of the Debtors. Again, there is no evidence to support this blanket statement. In fact, this allegation was expressly denied by Douglas Investments in the Douglas Adversary and the Douglas Motion to Compromise notes Douglas Investments' consistent denial of any liability.

41. Notwithstanding the lack of any support for the bald assertions in the Trustee's Motion to Consolidate, there is no apparent benefit to the Debtors' estate in consolidation. In fact, the only benefit of consolidation appears to inure to the Trustee himself.

42. The Trustee already divested Douglas Investments of all its assets, effectively pushing it into insolvency. Thus, no hard assets can be consolidated into the Debtors' estate. The only asset apparently to be consolidated is Douglas Investments' Chapter 5 avoidance claims under the Bankruptcy Code, requested by the Trustee in the final paragraph of its Motion to Consolidate.

43. Clearly, the sole purpose of the Motion to Consolidate is the Trustee's efforts to control Douglas Investments post-insolvency, and to prevent the filing of a separate adversary proceeding which will ultimately lead to the avoidance of the transfer of all of Douglas Investments' property to the Trustee himself.

44. In sum, the Trustee wants to take all of Douglas Investments' property, leaving Douglas Investments' creditors with nothing, and then to control whether Douglas Investments or its creditors sue the Trustee to avoid fraudulent transfers.

45. The Trustee has failed to meet his burden to establish consolidation of Douglas Investments with the Debtors is appropriate. Indeed, the Trustee's Motion to Consolidate is plagued with the same vague and unsupported statements that litter the Trustee's adversary complaints. Accordingly, this Court should deny the Motion to Consolidate.

WHEREFORE, Fidelity National Timber Resources, Inc., respectfully request this Court enter an Order (i) vacating its Order Granting Trustee's Motion to Approve Compromise of Controversy and Settlement (Doc. 230), or, in the alternative, authorizing the filing of actions against the Trustee on account of the fraudulent transfers from Douglas Investments, (ii) deny the Trustee's Motion to Substantively Consolidate Non-Debtor Douglas Investments, LLC with and Into the Debtors' Bankruptcy Estates (Doc. 212), and (iii) grant Fidelity Timber and FNF all other relief to which they are entitled at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2010, the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Steven M. Berman
Steven M. Berman, Esq.