

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

**In Re:**

**ULRICH FELIX ANTON ENGLER;  
PRIVATE COMMERCIAL OFFICE, INC.;  
PCO CLIENT MANAGEMENT, INC.**

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

**Chapter 7 cases  
(Substantively Consolidated)**

**Debtor(s).**

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**MOTION TO ALLOW UNITED STATES BANKRUPTCY COURT JUDGES  
ALEXANDER L. PASKAY AND MICHAEL G. WILLIAMSON TO JOINTLY  
PRESIDE OVER FINAL EVIDENTIARY HEARING ON JUNE 17, 2010**

Fidelity National Timber Resources, Inc. f/k/a Fidelity National Ranch Properties, Inc. (“Fidelity Timber”) and Fidelity National Financial, Inc. (“FNF”) (collectively, “Movants”), by and through their undersigned counsel, hereby move and request the Court to allow the Honorable Alexander L. Paskay and the Honorable Michael G. Williamson to jointly preside over the Final Evidentiary Hearing on June 17, 2010 on the Chapter 7 Trustee’s Motion to Substantively Consolidate Non-Debtor Douglas Investments, LLC with and into the Debtors’ Bankruptcy Estates (“Motion to Consolidate”) (Doc. 212), along with related motions now set for a Final Evidentiary Hearing on June 17, 2010 (“FEH”), and, in support thereof, state as follows:

**Introduction**

1. While the movants acknowledge requesting two bankruptcy judges to preside over the same hearing is an extraordinary request, the Movants believe the pending matters would benefit greatly from such an arrangement. This case and related proceeding were filed in the Ft. Myers division and as such were assigned to Judge Paskay. This FEH was scheduled in

Tampa before Judge Williamson who heard some discovery related matters, but this case remains assigned to Judge Paskay.

2. If lent to the decision-making process in the FEH, Judge Paskay's unique experience with this case, including his familiarity with the Debtors' assets and liabilities, other of the Trustee's consolidation attempts, and the history of the transaction between Non-Debtors Fidelity Timber and Douglas Investments, Inc., including the multiple filings and hearings in both the main case and subsequent adversary proceeding, will benefit this Court's determinations on the matters *sub judice*.

3. Additionally, given the Trustee's decision to call German witnesses to testify in German, Judge Paskay is additionally qualified to assist in the fact-finding, to the extent the German nationals have any testimony relevant to the issues at stake.<sup>1</sup> Judge Paskay has presided over cases and proceedings where German language testimonial and documentary evidence has been critical to the decision making process.<sup>2</sup> In this case, Judge Paskay is uniquely qualified to question the German witnesses in their native language to assist in determining both the substance of their testimony and the demeanor of the witnesses, a sense wholly lost through the mere services of an interpreter.

### **General Background**

4. 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

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<sup>1</sup> See the Trustee's Expedited Motion for Authorization to Incur Expenses For Travel Of German Witnesses And German Interpreter In Connection With Evidentiary Hearing on the Motion to Consolidate Douglas Investments (Doc. 389)

<sup>2</sup> In re: Wachsmuth, 272 B.R. 766 (Bankr. M.D. Fla. 2001)(Court required to review applicable limitations period by reviewing German domestic law and interpreting the applicable provisions in the German language version of the foreign law). See also In re: Gross, 278 B.R. 557 (Bankr. M.D. Fla. 2002) (propriety of ancillary proceeding found where German Trustee met threshold jurisdictional requirements).

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.

5. 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. 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. Engler was represented to Fidelity Timber to be Douglas Investments' lender and also held out PCO as his company.

6. 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. 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 such loans.

7. 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") for which substantial consideration was exchanged.

8. For good reason, to date, the Trustee has been noticeably unable to articulate any facts to support either the actual fraudulent or constructively fraudulent conduct of the Defendants, as no such facts exist.

9. On April 20, 2010, the Trustee filed the Motion to Consolidate, claiming, *inter alia*, Douglas Investments was a nominee and/or mere conduit of the Debtors. Interestingly, the Trustee has been unable to explain away the exchange for value defenses which exist *sub judice*.

### **Basis for Relief**

10. On March 31, 2008, involuntary petitions were filed against Ulrich Felix Anton Engler (“Engler”) and Private Commercial Office, Inc. (“PCO”) (collectively, the “Debtors”) under Chapter 7 of the United States Bankruptcy Code. On April 29, 2008, the Court entered Orders for Relief against the Engler and PCO (Doc. 9), and on June 24, 2008, the Court—specifically, Judge Paskay—entered an Order substantively consolidating the assets and liabilities of the Debtors’ bankruptcy estates (Doc. 51).

11. On December 16, 2008, Fidelity Timber filed a Motion for Relief from Stay (Doc. 99) (“Stay Motion”), seeking relief to allow Fidelity Timber to commence proceedings in Idaho to foreclosure its rights under an installment land sales contract with Douglas Investments, LLC, a non-debtor (“Douglas Investments”). Pursuant to Judge Paskay’s Order Directing a Response to the Stay Motion (Doc. 99), the Trustee filed a Response to the Stay Motion (Doc. 106), opposing relief from the stay and professing to hold a lien on the property pursuant to an agreement between the Debtors and Douglas Investments. On January 23, 2009, Judge Paskay presided over a lengthy hearing on the Stay Motion, and granted the Stay Motion over the Trustee’s opposition (Doc. 116).

12. On January 22, 2010, Fidelity Timber and FNF filed a Motion to Dismiss the Fidelity Adversary (Adv. 09-1026 Doc. 6). In the Motion to Dismiss, Fidelity Timber and FNF argued, among other reasons, that the Trustee had failed to plead any ultimate facts to support his claims, including failure to plead any facts relating to the value exchanged between Douglas Investments and Fidelity Timber. Judge Paskay conducted a lengthy hearing on February 17, 2010, at which time counsel for the Trustee and undersigned counsel extensively discussed the relationship between Engler, PCO, Douglas Investments, Fidelity Timber, and FNF. Ultimately, Judge Paskay denied the Motion to Dismiss, allowing the Fidelity Adversary to proceed.

13. Now, a year and a half after this Court granted the Defendants stay relief to pursue its state court rights foreclose out Douglas Investments, after the Trustee has intervened and begun defending the state court foreclosure litigation (presumably on behalf of Douglas Investments), after the Trustee reached a settlement with Douglas Investments causing all of the assets to be turned over to the Trustee, the Trustee seeks to consolidate non-debtor entities and assets into its estate.

14. In furtherance thereof, on June 1, 2010, the Trustee filed an Expedited Motion for Authorization to Incur Expenses For Travel Of German Witnesses And German Interpreter In Connection With Evidentiary Hearing on the Motion to Consolidate (“Motion for Authorization”) (Doc. 389). In the Motion for Authorization, the Trustee indicated he intended to call three or four German witnesses who speak German as their native language. While the Trustee does not specifically state an interpreter will be necessary at trial, the Trustee does request authorization to incur expenses “for the services of a German interpreter.”

15. Interestingly, the undersigned requested the Trustee make all of the German nationals available for deposition prior to the FEH and, thus far, the Trustee has refused

indicating that he thought it sufficient that the undersigned would conduct its discovery and interrogation all at the FEH without any ability to prepare. Without addressing the merits of the Trustee's position, any FEH where new witnesses will be testifying in a foreign language will necessarily create a difficult trial environment warranting additional assistance and involvement of the Court.

16. Accordingly, while the Movants have the utmost respect and confidence that the Honorable Michael G. Williamson will grant the appropriate relief based upon the facts and evidence in the record and presented at trial, the Movants believe allowing Judge Paskay to jointly preside over the trial will contribute immeasurably to the ultimate determination of the matters at hand.

WHEREFORE, Fidelity National Timber Resources, Inc., and Fidelity National Financial, Inc. respectfully request this Court enter an Order allowing the Honorable Alexander Paskay to jointly preside over the Final Evidentiary Hearing on June 17, 2010 on the Chapter 7 Trustee's Motion to Substantively Consolidate Non-Debtor Douglas Investments, LLC with and

into the Debtors' Bankruptcy Estates and granting Defendants all other relief to which they are entitled at law or in equity.

Respectfully submitted,

**SHUMAKER, LOOP & KENDRICK, LLP**

By: /s/ Steven M. Berman

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*Counsel for Fidelity National Timber*

*Resources, Inc. and Fidelity National*

*Financial, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 6, 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: Robert F Elgidely, Esq., Genovese Joblove & Battista PA, Bank of America Tower - 44th Floor, 100 Southeast Second Street, Miami, FL 33131; and Douglas Szabo, Esq., Henderson, Franklin, Starnes, & Holt, P.A., 1715 Monroe Street, P.O. Box. 280, Fort Myers, FL 33902.

/s/ Steven M. Berman

**Steven M. Berman, Esq.**