

**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  
Chapter 7 case  
(Substantively Consolidated)**

**Debtor.**

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**MOTION IN LIMINE**

Fidelity National Timber Resources, Inc. (“Fidelity Timber”), and Fidelity National Financial, Inc. (“FNF”) (collectively, the “Fidelity Parties”), pursuant to Rules 16 and 26 of the Federal Rules of Civil Procedure and Rules 7016 and 7026 of the Federal Rules of Bankruptcy Procedure, hereby file this, their Motion *In Limine* in advance of the Final Evidentiary Hearing scheduled on the Trustee’s Motion to Substantively Consolidate Non-Debtor, Douglas Investments, LLC with and into the Debtors’ Bankruptcy Estates (“Motion to Consolidate”) (Doc. 212) and, in support thereof, states as follows:

**Background**

*The Bankruptcy and Fidelity Adversary Proceeding*

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”), pursuant to Chapter 7 of the United States Bankruptcy Code.

2. On April 29, 2008, this Court entered Orders for Relief against the Debtors, and on April 30, 2008, the Court entered an Order approving Robert E. Tardif, Jr.'s appointment as the Chapter 7 Trustee (the "Trustee").

3. On December 28, 2009, the Trustee filed a Complaint to Avoid and Recover Fraudulent Transfers and for Unjust Enrichment (the "Complaint") against the Fidelity Parties, seeking to avoid and recover alleged fraudulent transfers pursuant to sections 548(a)(1)(A), 548(a)(1)(B), 544(b) (applying Florida Statutes §§ 726.105, 726.106, and 726.108), and 550 of the Bankruptcy Code.

4. Specifically, the Trustee sought to avoid and recover as much as \$11,750,000.00 in payments made by a non-debtor to Fidelity Timber on an installment land sales contract in exchange for the rights acquired by the non-debtor (the "Fidelity Adversary").

*Discovery of Soneet Kapila in the Adversary Proceeding*

5. On March 23, 2010, as part of the Trustee's Rule 26 Disclosures in the Fidelity Adversary, the Trustee disclosed Soneet Kapila as a person likely to have discoverable information because Mr. Kapila had "conducted a forensic accounting analysis of the Debtor's bank accounts, and, therefore, has knowledge concerning he Debtor's receipts and disbursements."

6. Mr. Kapila was not disclosed as having any knowledge regarding the alleged Ponzi scheme or fraudulent conduct of the Debtors or Douglas Investments, LLC alleged by the Trustee in the Complaint.

7. On March 25, 2010, Fidelity took the deposition of Mr. Kapila ("Kapila Deposition"). A copy of the transcript of the Kapila Deposition is attached as **Exhibit 1**.

8. At the end of the Kapila Deposition, Steven Berman, counsel for the Fidelity Parties, and Robert Elgidely, counsel for the Trustee, discussed continuing the deposition pending further services by Mr. Kapila:

Mr. Berman: I don't have any further questions at this time. I'm inclined to conclude the deposition with the proviso that since we received documents only recently, I expect that we'll be able to work together if there's something that comes up in the documents that you produced in the Rule 26 disclosures that we have additional questions about if we need to resume briefly to get those questions answered.

Mr. Elgidely: Yeah, I have no problem with you actually continuing the deposition. We are going to be retain[ing] Soneet for some additional services, so you know, its likely that those services will be relevant to this proceeding. And I have no problem with you continuing in light of those broader –

Mr. Berman: Do you have any idea when that additional retention is going to be?

Mr. Elgidely: Soon.

(Kapila Tr., 78:18 – 79:11). In the Fidelity Adversary, the Trustee never supplemented his initial disclosures nor notified the Fidelity Parties regarding a change in scope of Mr. Kapila's retention, knowledge or opinion.

*Trustee's Motion for Consolidation and discovery related thereto*

9. On April 20, 2010, about one month after the Kapila Deposition, the Trustee filed his Motion To Consolidate, which is now *sub judice*, and on May 5, 2010, the Fidelity Parties filed their opposition to the Motion to Consolidation (Doc. 363).

10. On May 28, 2010, this Court entered its Order Scheduling Final Evidentiary Hearing and Shortening Deadline to Respond to Discovery Requests, which set the Motion to Consolidate for a final evidentiary hearing on June 17, 2010 ("FEH") and shortened written discovery to seven business days.

11. On May 26, 2010, the Fidelity Parties served upon the Trustee discovery requests related to the Motion to Consolidate, including their Request for Production and Interrogatories.

12. Among other things, the Interrogatories requested the Trustee identify all persons “to have any knowledge concerning any allegations or issues raised in the Motion to Consolidate.”

13. On the evening of June 1, 2010, the Trustee filed his Expedited Motion/Application to Pay Expenses For Travel Of German Witnesses And German Interpreter In Connection With the Motion to Consolidate (Doc. 389) (“Travel Expense Motion”), identifying for the first time persons the Trustee intended to call to testify at the FEH.

14. Accordingly, while awaiting the Trustee’s responses to the Interrogatories and the Request for Production, on June 2, 2010, the undersigned counsel contacted Mr. Elgidely via e-mail requesting dates these never previously disclosed identified and unidentified witnesses would be available for deposition prior to the FEH. A true and correct copy of the June 2, 2010 e-mail is attached as **Exhibit 2**. Mr. Elgidely did not respond to this e-mail.

15. In order to comply with the Local Rules, later on June 2, 2010, and in an effort to take the German witnesses depositions as close to the FEH as possible so as to not disrupt travel plans, the Fidelity Parties issued a Notice of Taking Deposition of Trustee’s Trial Witnesses scheduling such depositions for June 16, 2010 (Doc. 391), the day before the FEH. A true and correct copy of the Notice of Taking Deposition is attached as **Exhibit 3**.

16. This Notice of Taking Deposition scheduled depositions of the witnesses recently revealed in the Travel Expense Motion—Dr. Reinhard Hofmann, Mrs. Dorte Sander, and Mr. Ger Baur, as well as Unnamed Creditors to testify at the FEH on June 17, 2010 yet to be identified by the Trustee, and any Other Unidentified Witnesses the Trustee intends to call at the

FEH on June 17, 2010 yet to be identified by the Trustee. As of the service of the Notice of Taking Deposition, the Trustee had still not revealed his trial witnesses in full, pursuant to the pending discovery requests served in preparation for the FEH.

17. Minutes after receiving the Notice of Taking Deposition, Mr. Elgidely communicated with the undersigned that he would not produce the German witnesses for deposition purportedly because “of time limitations caused by their arrival date.” A true and correct copy of Mr. Elgidely’s June 2, 2010 e-mail is attached as **Exhibit 4**.

18. In response, undersigned counsel reiterated that the Fidelity Parties needed to take the deposition of the Trustee’s trial witnesses. The undersigned stated

We are not able to waive that discovery and do not wish to try this matter by ambush. We made accommodations for you to take any of our client representatives and former employees prior to your trial and expect you to do the same with respect to your German nationals.

A true and correct copy of Steve Berman’s June 2, 2010 e-mail is attached as **Exhibit 5**. Mr. Elgidely did not respond to this e-mail either.

19. On June 7, 2010, the Trustee served his responses to the Fidelity Parties’ discovery requests. Among other disclosures, the Trustee listed Mr. Kapila and Carol Fox, CPA as persons with “knowledge concerning the Debtors’ banking records, the Debtors’ books and records which have been made available to them, transfers to and from Douglas Investments, LLC, and the schedules and reports prepared as a result of their forensic accounting services.”

20. Additionally, on June 7, 2010, the Trustee produced a Report of Expert submitted by Mr. Kapila, which purports to “provide an expert opinion as to whether the Engler Entities operated as a Ponzi scheme” (the “Kapila Report”). A copy of the Kapila Report is attached as **Exhibit 6**. No prior disclosure by the Trustee, in the main case or in the Fidelity Adversary,

indicated Mr. Kapila had been retained to present expert testimony regarding a Ponzi scheme. In fact, Mr. Kapila had previously disclaimed any knowledge of whether transfers from the Debtors to Douglas Investments were in furtherance of a Ponzi scheme.

21. As the Fidelity Parties had already, some five days earlier, noticed the taking of the deposition of any other trial witnesses, the undersigned believed the Trustee would produce any trial witnesses by June 16, 2010 or would work out an alternative schedule for depositions<sup>1</sup>.

22. On June 9, 2010, the Trustee filed an Expedited Motion to Allow Dr. Reinhard Hofmann of the Manheim, Germany Public Prosecutors Office to Participate in the June 17, 2010 Evidentiary Hearing by Video Conferencing (Doc. 399).

23. On June 14, 2010, following receipt of the Court's Order granting this motion and consistent with the above-described deposition notice, the undersigned contacted the Trustee's counsel to arrange to take Dr. Hofmann's deposition to be taken via video conference, if that was more convenient to Dr. Hofmann. A true and correct copy of the June 14, 2010 e-mail is attached as **Exhibit 7**. No response was received from Mr. Elgidely.

24. On June 15, 2010, counsel again contacted Mr. Elgidely regarding the "logistics" of Dr. Hofmann's deposition and for further information regarding the identity of witnesses the Trustee intended to call at trial – lay or expert. A true and correct copy of the June 15, 2010 e-mail is attached as **Exhibit 8**. Again, no response was received from Mr. Elgidely.

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<sup>1</sup> This is especially true because between June 7 and June 16, 2010, the undersigned coordinated with the Trustee's counsel and participated in two depositions in Ft. Myers, Florida, one deposition in Sonoma, California, one deposition in Whitefish, Montana and one deposition in Elgin, Illinois, all before being prepared to take all remaining trial witnesses' depositions the day prior to the FEH, yet the Trustee failed to produce both its expert witness and its German witness(es) whose anticipated testimony was the subject of two separate motions which were addressed on an emergency basis.

25. Not one witness, including Ms. Fox and Dr. Hofmann, appeared for deposition on June 16, 2010. A true and correct copy of the Certificates of Non-Appearance for each category of witnesses identified in the Notice of Taking Deposition is attached as **Composite Exhibit 9**.

26. Nevertheless, at about 5:00 p.m. on June 16, 2010, in response to the undersigned's request to disclose trial witnesses expected to be called at the FEH, the Trustee communicated with the undersigned disclosing that both Dr. Hofmann and Carol Fox, CPA, would be called to testify at the FEH. No other German nationals who would have purportedly had "time limitations caused by their arrival date" were identified as witnesses for the Evidentiary Hearing. Neither Dr. Hofmann (now appearing at the FEH by video) nor Ms. Fox (who is located in South Florida) appeared for deposition pursuant to the Notice of Taking Deposition.

#### **BASIS FOR RELIEF**

27. At the Kapila Deposition, Mr. Kapila testified that, as of the date of the Kapila Deposition, he had only reviewed the Debtor's bank records, which evidenced transfers and loans from the Debtors to other entities, including, but not limited to, Douglas Investments. (Kapila Tr., 55:16 – 56:4).

28. Further, at the Kapila Deposition, Mr. Kapila testified he had not performed any analysis of Douglas Investments' use of funds for various acquisitions, including those payments made to the Fidelity Parties, because he did not have the necessary records available to him to perform such analysis. (Kapila Tr. Pg. 57:7 – 58:14).

29. Finally, at the Kapila Deposition, Mr. Kapila testified the only information he had regarding subsequent transfers of funds (from Douglas Investments), which were initially transferred from the Debtor, was based on an Affidavit of David Douglas, the principal of

Douglas Investments, prepared in conjunction with state court litigation in Idaho, as well as the inferences Mr. Kapila was able to draw based on limited information available to him in the Debtors' bank records. (Kapila Tr. pg 58:7-14; pg 70:18 – 72:23).

30. In fact, Mr. Kapila expressly disclaimed having any opinion as to the nature or purpose of any transfers of funds by Douglas Investments to the Fidelity Parties, including whether any such transfers were in furtherance of a Ponzi scheme. (*e.g.* Kapila Tr. pgs 72 – 75).

31. In the Kapila Report, however, Mr. Kapila references his review of documents that were expressly not available to him at the time of the Kapila Deposition, and asserts opinions which he expressly disclaimed sufficient knowledge on which to opine at the Kapila Deposition.

32. This Court is entitled to broad discretion and authority in controlling and managing pretrial discovery matters to ensure that cases move to a reasonably timely and orderly conclusion. *Perez v. Miami-Dade County*, 297 F.3d 1255, 1263 (11th Cir. 2002).

33. The overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result. *See United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958). The scope of discovery under Rule 26 is broad and the Federal Rules of Civil Procedure “strongly favor full discovery whenever possible.” *Farnsworth v. Procter and Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

34. In the 14 days between receiving the Trustee's discovery responses, including the Kapila Report and the motions relating to appearances of German nationals as trial witnesses, the Fidelity Parties in good faith scheduled five (5) depositions in California, Montana, Illinois and



Florida so that the parties could utilize deposition testimony at the FEH. Yet, the Trustee refused to produce his own purported expert, Mr. Kapila or Ms. Fox, or Dr. Hofmann, now appearing via video conferencing.

35. Instead, the Trustee has resorted to trial by ambush, the very thing the undersigned predicted back on June 2, 2010 in communication with the Trustee's counsel.

36. Accordingly, this Court can and should preclude any witness who did not appear for deposition, including Dr. Hofmann and Ms. Fox, from testifying at the FEH.

WHEREFORE, Fidelity National Timber Resources, Inc. and Fidelity National Financial, Inc. respectfully requests that this Court enter an Order prohibiting the trial testimony of Dr. Reinhard Hofmann and Carol Fox, CPA, and granting such other and further relief as is just and appropriate.

**SHUMAKER, LOOP & KENDRICK, LLP**

By: /s/ Steven M. Berman

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*Counsel for Fidelity National Timber  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 17, 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.

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