

IN THE UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
www.flsb.uscourts.gov

IN RE: )  
 )  
ULRICH FELIX ANTON ENGLER; ) Chapter 7  
PRIVATE COMMERCIAL OFFICE, INC.; ) CASE NO. 9:08-bk-04360-MGW  
and PCO CLIENT MANAGEMENT, INC. )  
 )  
Debtor. )  
\_\_\_\_\_ /

**MOTION TO ENFORCE THE COURT’S ORDER  
COMPELLING PRODUCTION OF DOCUMENTS AND  
FOR SANCTIONS AGAINST SUNTRUST BANK  
(Expedited Hearing Requested)<sup>1</sup>**

SunTrust Bank (“SunTrust”) failed to comply with the Court’s Agreed Order [D.E. 618] compelling it to produce all documents responsive to Special Litigation Counsel for the Trustee’s (“Trustee”) subpoena on or before May 13, 2011. Despite the Court’s Order, SunTrust instead produced only 17 pages of documents. SunTrust’s production was neither made in good faith nor complete as whole categories of documents that are in SunTrust’s possession were not produced and no corresponding privilege log was provided to justify its withholding on any basis of privilege. Accordingly, the Trustee moves this Court to enforce the Court’s Order compelling SunTrust to produce all documents responsive to the Subpoena and for sanctions to recover the attorneys’ fees and costs incurred in the filing of this Motion.

**I. RELEVANT HISTORY**

1. The Trustee served SunTrust with a Subpoena for Rule 2004 Deposition *Duces Tecum* (the “Subpoena”) which included a document production request. A copy of the Subpoena and Affidavit of Service is attached as Exhibit A.

<sup>1</sup> The Trustee is filing its Motion on an expedited basis because SunTrust Bank failed to comply with the Court’s Order and Trustee is entitled to the documents that SunTrust Bank agreed to and has been ordered to produce.

2. Pursuant to the Subpoena, SunTrust was required to produce documents in response to thirty-four document requests on or before February 21, 2011. Among other things, the Trustee's Subpoena identified certain accounts and requested with respect to those accounts that SunTrust produce the following: (1) investigation case summaries; (2) e-mail communications from Tony Scott and other SunTrust employees involved in the fraud investigation; (3) 314B requests; and (4) any document that related to or supported any SAR generated by SunTrust.

3. On February 11, 2011, the Trustee spoke by telephone with Mr. Richard McDonald, Operations Analyst from SunTrust, regarding the Subpoena. The Trustee and Mr. McDonald agreed that SunTrust would produce certain documents responsive to the Subpoena and any additional responsive documents requested by the Trustee at a later date.

4. On February 14, 2011, the Trustee sent a letter to Mr. McDonald memorializing the agreement reached during the February 11, 2011 telephone call. The Trustee requested that SunTrust provide it with the account opening documents, account statements, and wire transfer records for the accounts identified in the Subpoena and authorized payment of the charges associated with the production of those documents. A copy of the February 14, 2011 letter is attached as Exhibit B.

5. The documents requested in the February 14, 2011 letter were produced to the Trustee on or about March 1, 2011.

6. On March 11, 2011, the Trustee sent another letter to Mr. McDonald, requesting that certain additional responsive documents, including crucial e-mail communications and investigative reports related to the accounts subpoenaed that involve the subject matter of this investigation, be produced or that Mr. McDonald contact the Trustee no later than March 17, 2011. A copy of the March 11, 2011 letter is attached as Exhibit C.

7. SunTrust failed to produce the documents requested in the March 11, 2011 letter and neither Mr. McDonald nor any other representative from SunTrust responded to that letter.

8. On April 11, 2011, the Trustee moved this Court for an Order Compelling SunTrust to produce all documents responsive to the Trustee's Subpoena [D.E. 614].

9. Shortly thereafter, the Court set the Trustee's Motion to Compel for hearing [D.E. 615] and scheduled it for May 5, 2011.

10. On May 4, 2011, the Trustee and John Barry, in house counsel at SunTrust, negotiated an agreement to resolve the parties' dispute. SunTrust agreed to produce all documents responsive to the Trustee's Subpoena while preserving its right to withhold production of documents protected from disclosure under federal law. The parties also agreed that the production and corresponding privilege log would be provided by SunTrust on or before May 13, 2011. The parties submitted an agreed order to the Court reflecting their agreement.

11. The Court entered the Agreed Order Granting Trustee's Motion to Compel Production of Documents from SunTrust Bank [D.E. 628] on May 10, 2011.

12. On May 10, 2011, Mr. Barry from SunTrust provided the Trustee with 17 pages of documents responsive to the Subpoena without a privilege log and informed the Trustee that he would call to discuss the production at a later date. A copy of the May 10, 2011 e-mail along with SunTrust's production is attached as Exhibit D. SunTrust has neither contacted the Trustee nor responded to any e-mail communications sent by the Trustee to SunTrust.

## **II. ARGUMENT**

13. SunTrust failed to comply with the Court's Order [D.E. 628] compelling it to produce all documents responsive to the Trustee's Subpoena. SunTrust's production of a mere 17 pages of documents is further evidence of its failure to act in good faith, as SunTrust is in possession of documents responsive to the Subpoena that it has neither produced nor identified on any

corresponding privilege log. Furthermore, there is no basis in federal law to withhold these responsive documents. The Court must enforce its Order and require SunTrust to produce all documents responsive to the Trustee's Subpoena and sanction SunTrust requiring it to pay the attorneys' fees and costs associated with the filing of this unnecessary Motion.

14. The Trustee's Subpoena contained 34 document requests. (See Ex. A.) SunTrust failed to produce any documents responsive to the following document requests: 2-13; 15-18; 20-28; and 30-34. The Trustee's Subpoena required SunTrust to produce, among other things, account investigation case summaries, e-mail communications from Tony Scott and other SunTrust employees involved in the fraud investigation, 314B requests, and any document that related to or supported any SAR generated by SunTrust. SunTrust failed to produce any of these critical documents, even though SunTrust has responsive documents that fall into these categories. The Trustee obtained from Wachovia Bank an Investigation Case Summary (attached as Exhibit E) stating that it received "a 314B request from Tony Scott at SunTrust bank." Furthermore, Scott informed Wachovia that it was investigating the subject accounts due to "increased suspicious activity." *Id.* Despite having underlying documents and e-mail communications that are responsive to the Trustee's Subpoena, SunTrust has refused to produce them or justify their withholding on the basis of any privilege.

15. There is no basis in federal law for SunTrust's withholding of these responsive documents. While federal law prohibits the disclosure of SARs and their contents, 12 C.F.R. 21.11(k)(2011), it does not extend to the underlying documents or information upon which the SARs are based. *See United States v. Holihan*, 248 F. Supp. 2d 179, 187 (W.D. N.Y. 2003) ("Despite the prohibition against a bank's disclosure of the existence of a[] SAR, any supporting documentation remains discoverable."); *Cotton v. Privatebank*, 235 F. Supp. 2d 809, 814 (N.D. Ill. 2002) ("Nothing in the Act regulation prohibits the disclosure of the underlying factual

documents which may cause a bank to submit a SAR. Furthermore, those underlying documents do not become confidential by reason of being attached or described in a SAR.”); *Weil v. Long Island Savs. Bank*, 195 F. Supp. 2d 383 (E.D. N.Y. 2001) (same). Therefore, these documents, along with all the other responsive documents, cannot be withheld by SunTrust and must be produced. *Holihan*, 248 F. Supp. 2d at 187.

16. The Trustee also seeks its attorneys’ fees and costs associated with filing this Motion. “A court may impose sanctions for litigation misconduct under its inherent power.” *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1306 (11th Cir. 2009). “The court’s inherent power derives from the court’s need to ‘manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Eagle Hosp.*, 561 F.3d at 1306 (citation omitted). Courts routinely sanction third parties and award attorneys’ fees and costs for violation of court orders compelling the production of documents. *See In re Gulf Northern Transp., Inc.*, 289 B.R. 452, 454-55 (Bankr. M.D. Fla.2003) (awarding trustee attorneys’ fees and costs as a sanction against third party who failed to produce documents subject to the court’s order compelling production of those documents.) Here, SunTrust failed to comply with the Court’s Order and has required the Trustee to file this Motion and engage in unnecessary motion practice. Accordingly, the Trustee is entitled to recover its attorneys’ fees and costs. *See id.*

**WHEREFORE**, the Trustee requests that the Court enforce its Order Granting Trustees Motion to Compel and require SunTrust to produce all documents responsive to the Subpoena in five days and award the Trustee its attorneys’ fees and costs incurred in the filing of this Motion.

Dated: May 20, 2011

Respectfully Submitted,

KOZYAK TROPIN & THROCKMORTON, P.A.  
Special Litigation Counsel for the Trustee  
2525 Ponce De Leon, 9<sup>th</sup> Floor  
Coral Gables, Florida 33134  
Tel: (305) 372-1800  
Fax: (305) 372-3508  
Email: tr@kttlaw.com

By: /s/ David A. Samole

Thomas A. Tucker Ronzetti  
Florida Bar No. 965723  
David A. Samole  
Florida Bar No. 582761  
Brett E. von Borke  
Florida Bar No. 0044802

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served (i) via the Court's CM/ECF notification to those parties who are registered CM/ECF participants in this case and (ii) was furnished by U.S. Mail on this 20<sup>th</sup> day of May, 2011 to: Ulrich Felix Anton Engler, Private Commercial Office, Inc., and PCO Client Management, Inc. (Non-Debtor), 1217 Cape Coral Parkway, Apt. 121, Cape Coral, FL 33904; Laurie Pennington, 200 South Orange Avenue, Orlando, Florida 32801; and Richard McDonald, SunTrust Banks Subpoena Services, 7455 Chancellor Drive, Orlando, Florida 32809.

By: /s/ David A. Samole  
David A. Samole

**SERVICE LIST**

**IN RE ULRICH FELIX ANTON ENGLER  
CASE NO. 08-bk-04360-MGW**

**9:08-bk-04360-MGW Notice will be electronically mailed to:**

C Stephen Allen on behalf of Defendant Mississippi Realty Trust  
[csapa1@msn.com](mailto:csapa1@msn.com)

Kirsten I. Baier on behalf of Trustee Robert Tardif  
[kbaier@fowler-white.com](mailto:kbaier@fowler-white.com)

Jeffrey P Bast on behalf of Defendant Fort Myers Lincoln Mercury, Inc.  
[jbast@bastamron.com](mailto:jbast@bastamron.com), [jdepina@bastamron.com](mailto:jdepina@bastamron.com); [jeder@bastamron.com](mailto:jeder@bastamron.com)

Steven M Berman on behalf of Creditor FIDELITY NATIONAL FINANCIAL, INC.  
[sberman@slk-law.com](mailto:sberman@slk-law.com)

Alexandra D Blye on behalf of Plaintiff Robert E. Tardif, Jr., as Trustee for the Chapter 7  
Bankruptcy Estates of Ulrich Felix Anton Engler and Private Commercial Office, Inc.  
[ablye@gjb-law.com](mailto:ablye@gjb-law.com)

David C Cimo on behalf of Plaintiff Robert Tardif  
[dcimo@gjb-law.com](mailto:dcimo@gjb-law.com), [gjbecf@gjb-law.com](mailto:gjbecf@gjb-law.com)

Roberta A Colton on behalf of Attorney Ronald Neiworth  
[racolton@trenam.com](mailto:racolton@trenam.com), [jcarminati@trenam.com](mailto:jcarminati@trenam.com)

Robert F Elgidely on behalf of Accountant Soneet Kapila  
[relgidely@gjb-law.com](mailto:relgidely@gjb-law.com), [sanderson@gjb-law.com](mailto:sanderson@gjb-law.com); [vlambdin@gjb-law.com](mailto:vlambdin@gjb-law.com); [chopkins@gjb-law.com](mailto:chopkins@gjb-law.com); [ablye@gjb-law.com](mailto:ablye@gjb-law.com)

Joseph G Foster on behalf of Defendant Habitat For Humanity of Collier County, Inc.  
[jfoster@porterwright.com](mailto:jfoster@porterwright.com), [smueller@porterwright.com](mailto:smueller@porterwright.com); [jpacheco@porterwright.com](mailto:jpacheco@porterwright.com)

Mariaelena Gayo-Guitian on behalf of Plaintiff Robert Tardif  
[mguitian@gjb-law.com](mailto:mguitian@gjb-law.com), [chopkins@gjb-law.com](mailto:chopkins@gjb-law.com); [ktoland@gjb-law.com](mailto:ktoland@gjb-law.com); [ablye@gjb-law.com](mailto:ablye@gjb-law.com)

Charles G Geitner on behalf of Defendant SAI Fort Myers M, LLC  
[cgeitner@hinshawlaw.com](mailto:cgeitner@hinshawlaw.com), [zharrington@hinshawlaw.com](mailto:zharrington@hinshawlaw.com), [tbelichki@hinshawlaw.com](mailto:tbelichki@hinshawlaw.com)

Zachary A. Harrington on behalf of Defendant SAI Fort Myers M, LLC  
[zharrington@hinshawlaw.com](mailto:zharrington@hinshawlaw.com)



Richard Johnston on behalf of Creditor Autoquest of Southwest Florida, Inc.  
[richard.johnston@fowlerwhite.com](mailto:richard.johnston@fowlerwhite.com), [cynthia.ferguson@fowlerwhite.com](mailto:cynthia.ferguson@fowlerwhite.com);  
[ann.greulich@fowlerwhite.com](mailto:ann.greulich@fowlerwhite.com)

William Lazenby on behalf of Defendant Monex Deposit Company, L.P.  
[wlazenby@eandflaw.com](mailto:wlazenby@eandflaw.com), [aboucher@eandflaw.com](mailto:aboucher@eandflaw.com)

Stephen R Leslie on behalf of Defendant Angelika Neumeier-Fuchs  
[sleslie.ecf@srbp.com](mailto:sleslie.ecf@srbp.com), [srbpecf@srbp.com](mailto:srbpecf@srbp.com); [mclift@srbp.com](mailto:mclift@srbp.com)

Peter H Levitt on behalf of Creditor JPMorgan Chase Bank, N.A.  
[plevitt@shutts-law.com](mailto:plevitt@shutts-law.com)

David T Lupo on behalf of Defendant Reiner Straub  
[dlupo@cohenlaw.com](mailto:dlupo@cohenlaw.com), [bwisher@cohenlaw.com](mailto:bwisher@cohenlaw.com)

Helge Naber on behalf of Creditor Renate ZINK  
[helge.naber@naberpc.com](mailto:helge.naber@naberpc.com), [dawn.mcgee@naberpc.com](mailto:dawn.mcgee@naberpc.com)

Ronald G Neiwirth on behalf of Petitioning Creditor Anneliese Schmitt  
[rgn@fowler-white.com](mailto:rgn@fowler-white.com), [mlf@fowler-white.com](mailto:mlf@fowler-white.com)

Cory J Person on behalf of Defendant St. John the Evangelist Catholic Church  
[cperson@butlerpappas.com](mailto:cperson@butlerpappas.com), [jklages@butlerpappas.com](mailto:jklages@butlerpappas.com)

Norman L Schroeder on behalf of Creditor ALVION AG  
[nschroeder@nlsbankruptcy.com](mailto:nschroeder@nlsbankruptcy.com)

Elliot D Schuler on behalf of Creditor Markus Hermanek  
[elliott.d.schuler@bakernet.com](mailto:elliott.d.schuler@bakernet.com)

Darrin R Schutt on behalf of Defendant Finduconsult AG  
[darrin.schutt@schuttlaw.com](mailto:darrin.schutt@schuttlaw.com)

Scott A. Stichter on behalf of Defendant Angelika Neumeier-Fuchs  
[sstichter.ecf@srbp.com](mailto:ssstichter.ecf@srbp.com), [srbpecf@srbp.com](mailto:srbpecf@srbp.com); [mclift@srbp.com](mailto:mclift@srbp.com)

Douglas B Szabo on behalf of Creditor Diamond District, LLC  
[douglas.szabo@henlaw.com](mailto:douglas.szabo@henlaw.com), [maria.figueroa@henlaw.com](mailto:maria.figueroa@henlaw.com)

Robert E Tardif  
[rtardif@comcast.net](mailto:rtardif@comcast.net), [graceheidkamp@gmail.com](mailto:graceheidkamp@gmail.com); [blkenney2@comcast.net](mailto:blkenney2@comcast.net)  
[rtardif@ecf.epiqsystems.com](mailto:rtardif@ecf.epiqsystems.com)

Robert E Tardif, Attorney for Trustee on behalf of Plaintiff Robert Tardif  
[rtardif@comcast.net](mailto:rtardif@comcast.net), [graceheidkamp@gmail.com](mailto:graceheidkamp@gmail.com); [blkenney2@comcast.net](mailto:blkenney2@comcast.net)

Seth P. Traub on behalf of Creditor FIDELITY NATIONAL FINANCIAL, INC.  
[straub@slk-law.com](mailto:straub@slk-law.com), [khobolth@slk-law.com](mailto:khobolth@slk-law.com)

United States Trustee - FTM7  
[USTPRegion21.TP.ECF@USDOJ.GOV](mailto:USTPRegion21.TP.ECF@USDOJ.GOV)

John L Urban on behalf of Creditor Congro Finanz AG  
[urban@urbanthier.com](mailto:urban@urbanthier.com), [bryan@urbanthier.com](mailto:bryan@urbanthier.com); [abosi@urbanthier.com](mailto:abosi@urbanthier.com); [deliz@urbanthier.com](mailto:deliz@urbanthier.com);  
[menichiello@urbanthier.com](mailto:menichiello@urbanthier.com)