

**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.	)	
	/	

**REPLY IN SUPPORT OF MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS FROM WELLS FARGO BANK, N.A.**

Special Litigation Counsel for the Trustee (“Special Litigation Counsel”) has moved this Court for an order compelling Wells Fargo Bank, N.A. (“Wells Fargo”) to produce documents, and hereby replies to Wells Fargo’s Response to the Motion to Compel and states:

**Wells Fargo’s Objections Are Untimely and Have Been Waived**

1. Wells Fargo has waived any objections that it may have to the Subpoena because it failed to serve any written objections to the Subpoena for over two months. *Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688, 697 (M.D. Fla. 2005) (“Failure to serve written objection to a subpoena within the time specified by Fed.R.Civ.P. 45 typically waives any objections the party may have.”). Only where there are unusual circumstances and for good cause does the failure to act timely not bar consideration of the objections. *Anwalt Energy Holdings, LLC v. The Falor Cos. Inc.*, 2008 WL 2268316 at \*1-2 (S.D. Ohio June 2, 2008) (finding that because none of the factors was present excusing a third parties failure to raise timely objections, those objections would not be considered).

2. Wells Fargo cannot show good cause or unusual circumstances which justify its failure to serve objections to the subpoena until nearly 3 months after the response to the

subpoena was due. Unlike the cases relied upon by Wells Fargo, here Wells Fargo has not acted in good faith, the subpoena is not overbroad, and counsel for Wells Fargo did not contact counsel for the Trustee until nearly 3 months after the time for response was due.

3. The Subpoena was issued on February 7, 2011 and had a response date of February 21, 2011.

4. Wells Fargo cannot claim it has acted in good faith when Wells Fargo did not even contact counsel for the Trustee until March 31, 2011 – over a month after the time to respond had passed and after counsel for the Trustee had sent unanswered follow up letters to the Records Custodian at Wells Fargo and James M. Strother, Executive Vice President, General Counsel Legal Group of Wells Fargo & Company. Once Wells Fargo's Legal Order Processing Department finally contacted counsel for the Trustee, Wells Fargo agreed to produce documents, without objection, by April 13, 2011. However, no documents were produced on April 13, 2011. On follow up the next day by counsel for the Trustee, the Legal Order Processing Department promised that documents would be delivered on April 19, 2011, again without objection. No documents were produced on April 19, 2011. When counsel for the Trustee again followed up after the lapsed deadline, counsel was assured that documents would be produced and were in the "close verification area". On April 27, 2011, the account statements were produced accompanied by a letter stating that "[t]his constitutes Wells Fargo Bank NA final response to your subpoena and this matter will be closed."

5. Counsel for the Trustee responded to Wells Fargo's April 27, 2011 letter stating that the production was inadequate and not fully responsive to the Subpoena and that the Trustee would file a motion to compel unless further document production would be forthcoming. Wells Fargo did not retain outside counsel until after receipt of this letter from counsel for the Trustee.

Wells Fargo's failure to retain outside counsel for nearly 4 months after being served with a subpoena cannot constitute good faith or unusual circumstances justifying their late responses and objections.

6. Although Wells Fargo is a non-party to this proceeding, it has produced documents, by its own admission, to only a couple of the requests contained within the Subpoena. Wells Fargo has failed to produce documents in response to the vast majority of document requests. As discussed below, the scope of discovery allowable under Rule 2004 is extremely broad and allows for the discovery requests at issue here. Although outside counsel was only recently retained, Wells Fargo had more than a reasonable amount of time under the circumstances to object to the subpoena and to produce documents. Wells Fargo's continued defiance of any and all deadlines imposed by the Subpoena or agreed to by the parties should not be rewarded by consideration by the Court of their extremely tardy objections raised only in response to the imminent filing of a motion to compel.

**The Scope of Discovery Allowed Under Rule 2004 Includes Wells Fargo's Emails,  
Electronic Documents, and Wire Transfer Policies and Procedures**

7. The scope of a Rule 2004 examination is very broad and has been characterized by Courts as being in the nature of a fishing expedition. *In re GHR Energy Corp.*, 33 B.R. 451, 453 (Bankr. D. Mass. 1983). "The purpose of a Rule 2004 examination is to assist a party in interest in determining the nature and extent of the bankruptcy estate, revealing assets, examining transactions and assessing whether wrongdoing has occurred." *In re Recoton Corp.*, 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004). A Rule 2004 examination is properly used to discover assets and reveal frauds. *In re GHR Energy Corp.*, 33 B.R. at 453.

8. In the context of Rule 2004, Courts have routinely granted persons entrusted with the responsibility of investigating potential causes of action held by the estate broad discovery in

assessing whether such claims exist and are worthwhile to pursue. *See In re Hughes*, 281 B.R. 224 (Bankr. S.D.N.Y. 2002). In *Hughes*, the court held that “the investigation of potential claims on behalf of a debtor is not an improper use of Rule 2004 discovery . . . Rule 2004 . . . provides courts with the authority to order examinations with respect to the financial matters of debtors as well as other matters affecting the administration of the estate.” *Hughes*, 281 B.R. at 226.

9. Here the Trustee is investigating why Wells Fargo allowed the debtors’ accounts to remain open and whether any wrongdoing by Wells Fargo occurred that would lead to potential claims by the Debtors’ estates against Wells Fargo. Wells Fargo now objects to Request No. 20, requesting production of email communications relating to the debtors’ accounts on the basis that the request is unduly broad and overly burdensome for a third party to comply with. Email communications which are relevant to this investigation are not subject to any discovery privilege merely because Wells Fargo needs to hire an outside vendor to conduct the search for electronic information. Wells Fargo is a sophisticated entity which is well acquainted with e-discovery practices and procedures. The Trustee is amenable to narrowing the search for responsive emails by custodian and search terms. Such narrowing should alleviate any of Wells Fargo’s concerns that Request No. 20 is overbroad or unduly burdensome.

10. Request No. 21 seeks “[a]ny and all Wachovia Bank policies and procedures pertaining to wire transfers.” Rule 2004 allows such discovery to occur. Although these policies and procedures are not unique to the Debtors’ accounts, any deviation from these policies and procedures in connection with the administration of the Debtors’ accounts clearly would be relevant to an inquiry regarding potential wrongdoing by Wells Fargo. Thus this request is within the scope of the Trustee’s Rule 2004 powers and he has good cause to seek such

documents. Accordingly, Wells Fargo should be compelled to produce documents responsive to the Request.

**Wells Fargo's Objections Relating to the SAR Privilege Are Overbroad**

11. The Trustee's Subpoena contained 34 document requests. Wells Fargo failed to produce any documents responsive to the following document requests: 2-13; 25, 27, and 33; on the basis that Wells Fargo is prohibited under Federal Law from producing such documents. The Trustee's Subpoena required Wells Fargo to produce, among other things, account investigation case summaries, e-mail communications from Wells Fargo employees involved in the fraud investigation, 314B requests, and any document that related to or supported any SAR generated by Wells Fargo. Wells Fargo failed to produce any of these critical documents, even though Wells Fargo has responsive documents that fall into these categories. The Trustee has in his files 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, Wells Fargo has refused to produce them or justify their withholding on the basis of any privilege.

12. There is no basis in federal law for Wells Fargo'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 Wells Fargo and must be produced. *Holihan*, 248 F. Supp. 2d at 187.

#### **Wells Fargo Lacks Standing to Assert Privacy Rights of Others**

13. Wells Fargo has objected to producing employee information on the grounds that employee information is personal and confidential. Wells Fargo lacks standing to assert the constitutional privacy rights of its employees. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936 (Fla. 2002) (finding that a party lacked standing to object to a discovery request by asserting the constitutional privacy rights of its employees.) There is no evidence that Wells Fargo has attempted to notify any of its employees about the Trustee’s request for information that may be contained in their personnel files. If Wells Fargo were truly concerned about the privacy rights of its employees, it would have made an effort to notify them about the Trustee’s discovery requests. Wells Fargo’s objection on these grounds is merely another effort to avoid responding to proper discovery requests. Therefore, these documents must be produced.

14. Accordingly, Special Litigation Counsel moves this Court for an order (1) compelling Wells Fargo to produce all documents responsive to the Subpoena within seven (7) days of the Order compelling production; (2) awarding Special Litigation Counsel’s attorney fees and costs in making this motion; and (3) and for such other relief as the Court deems just and proper.

Dated: June 8, 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 electronic mail on this 8<sup>th</sup> day of June, 2011 to counsel for Wells Fargo:

Heather Ries, Esq.  
Fox Rothschild, LLP  
Suite 700  
222 Lakeview Avenue  
West Palm Beach, FL 33401  
hries@foxrothschild.com

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 Neiwirth  
[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)

Heather L Ries on behalf of Interested Party Wells Fargo Bank, N.A.  
[hries@foxrothschild.com](mailto:hries@foxrothschild.com), [mbird@foxrothschild.com](mailto:mbird@foxrothschild.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:sstichter.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)

**Noticed by first-class U.S. mail 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

(undeliverable)

John G. Stumpf, President

and Chief Executive Officer

Wells Fargo Bank, NA

420 Montgomery Street

San Francisco, CA 94163