

EXHIBIT

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

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IN RE: :
: :
ULRICH FELIX ANTON ENGLER : Case No. 9:08-bk-04360-MGW
: Chapter 7
Debtor :
- - - - - X

U.S. Courthouse
801 N. Florida Avenue
Tampa, Florida 33602
July 7, 2011
10:00 A.M.

TRANSCRIPT OF HEARING

- (1) Emergency Motion for Reconsideration and for Relief from Sanctions Order (Doc. No. 658) by SunTrust Bank (Doc. #670); Trustee's Response (Doc. #682);
- (2) Motion by SunTrust Bank to Extend Time for Filing Notice of Appeal (Doc. #673).

BEFORE THE MICHAEL G. WILLIAMSON
UNITED STATES BANKRUPTCY JUDGE

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING
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1 P R O C E E D I N G S

2 (Whereupon, the proceedings were commenced
3 at 10:04 a.m.)

4 THE COURTROOM DEPUTY: All rise. This Honorable
5 Court is again in session.

6 THE COURT: Please be seated.

7 THE COURTROOM DEPUTY: Case No. 08-4360,
8 Ulrich Engler.

9 THE COURT: We'll take appearances.

10 MR. VON BORKE: May it please the Court, Brett
11 (inaudible).

12 THE COURT: Stand at the lectern, please.

13 MR. VON BORKE: May it please the Court, Brett von
14 Borke, from Kozyak Tropin & Throckmorton, special litigation
15 counsel to the Trustee.

16 THE COURT: Okay. It's Van Gore (phonetic).

17 MR. VON BORKE: von Borke.

18 THE COURT: von Borke. Okay. Thank you.

19 MR. HENDRIX: Good morning, Your Honor. David
20 Hendrix, from the law firm of GrayRobinson. To my right is
21 my associate Alissa Ellison and I have two representatives
22 of SunTrust Bank present here today.

23 I represent SunTrust Bank. We are third-party
24 subpoena participants in this action, not a party to the
25 case.

1 THE COURT: Okay. Thank you, Mr. Hendrix.

2 Very well. The Court has before it a motion
3 for reconsideration that has been filed by SunTrust. As
4 I understand the background here, there has been
5 communications back and forth between the Trustee of the
6 Engler estate and the bank about a subpoena that was issued
7 on February 7th, 2011. Production was due on, I believe,
8 February 21st.

9 Thereafter, some relatively amicable discussions
10 ensued between Trustee's counsel and Mr. McDonald, at
11 SunTrust. There was some initial correspondence, a letter
12 of February 14th, indicating that they were seeking the
13 account opening documents, account statements and wire
14 transfer records. And I believe those documents were
15 produced on March 1st, 2011.

16 MR. VON BORKE: That is correct, Your Honor.

17 THE COURT: Okay. Then there was a follow-up
18 letter from the Kozyak law firm to Mr. McDonald, requesting
19 additional information. And that was not forthcoming,
20 resulting in the Trustee's motion to compel. The parties
21 again talked and an order was entered on May 10th, 2011,
22 which was, I believe, an agreed order, docket number 628.

23 And SunTrust was to produce all of the documents
24 pursuant to that order by May 13th, with a privilege log.
25 That, apparently, wasn't done, with the result that there

1 was a motion to enforce the Court's order that was filed on
2 May 20th and a notice of hearing was sent out. It looks
3 like the motion was served on Richard McDonald and then
4 there was a Supplemental Certificate of Service, indicating
5 service on John Barry of SunTrust.

6 The Notice of Hearing was sent out by the Court,
7 which served the same individuals. When we had a hearing on
8 June 7th, nobody showed up. So I granted the motion. And
9 counsel prepared an order, which was sent in pretty
10 promptly, such that I was able to enter it a week later on
11 June 14th.

12 Now the order requires service on the same day as
13 the I entered it. I don't know how that got by. Mary must
14 have been out that day because she would not usually let
15 something like that get by. But, anyway, it required
16 payment of fees and required production.

17 Obviously, it fell through the cracks somewhere at
18 SunTrust because they weren't here. And so the bank has now
19 moved for reconsideration. It's my practice, generally, in
20 situations like this to deal with these situations on the
21 merits. Moreover, this is complicated by federal laws
22 dealing with suspicious activity reports and the
23 confidentiality that those must be accorded.

24 And so my thought here today -- I don't want to
25 cut off any argument -- is just to get down to, at the end

1 of the day, what is the bank required and in fact permitted
2 to produce under the applicable laws and where do we have
3 disagreements on that.

4 And in that respect, the Trustee has filed a
5 response to the bank's motion, listing a number of
6 categories. I'm looking at pages 6 and 7 of the Trustee's
7 response, which is docket number 682. And I think the issue
8 is whether or not those are protected or, rather than
9 protected, whether the bank is prohibited from producing
10 some or all of those documents.

11 Now with that preamble, let me ask counsel for
12 both parties: Does that put us in the ballpark of where we
13 are? Yes.

14 MR. VON BORKE: Your Honor, if I may just clarify?
15 In our response to SunTrust's motion to vacate, pages 6 and
16 7, we made two arguments. First, setting aside the SAR's
17 privilege that SunTrust has used to withhold production of
18 certain documents, there are clearly whole categories of
19 documents that would not come under the SAR's privilege.

20 THE COURT: Right. Right.

21 MR. VON BORKE: And so those are the categories of
22 documents that have not been produced to date.

23 And then there's a second category of documents,
24 which is the documents they're withholding based on the
25 SAR's privilege and where we have, I think, sharp

1 disagreement about what they're obligated to produce.

2 THE COURT: Okay. Well, let me -- I'm not sure if
3 I understood that. What you're saying is there's some
4 things that they haven't produced that clearly aren't SAR's
5 documents and then there are certain things that are SAR's
6 documents that you believe that they have a duty to -- okay,
7 well, then I'll hear from you on that, because that is --
8 and maybe be -- now looking at your listing on pages 6 and
9 7, are some of these documents in one category, as opposed
10 to the other?

11 MR. VON BORKE: Yes, Your Honor. With respect to
12 pages 6 and 7, these are what we call the non-SAR's
13 privileged documents. For example, SunTrust's policies and
14 procedures --

15 THE COURT: Sure.

16 MR. VON BORKE: -- pertaining to wire transfers.

17 THE COURT: Right. I understand.

18 MR. VON BORKE: That, we believe, would not fall
19 under the SAR's privilege but that's a category of documents
20 responsive to Request 21 of the Trustee's subpoena and no
21 documents have been --

22 THE COURT: No, I understand. Okay. So all of
23 these, you believe, you've listed in the bullet points in
24 pages 6 and 7, it's your position that these are not SAR's
25 documents?

1 MR. VON BORKE: Yes, Your Honor, that's correct,

2 THE COURT: So we'll hear from them on that,

3 Now where are the category of other documents? Is
4 that down at the bottom of page 7?

5 MR. VON BORKE: At the bottom of page 7, SunTrust
6 has never answered the subpoena. And so there are
7 additional categories of documents we don't believe would
8 fall under the SAR's protection. But since we don't know
9 whether or not -- because they never answered, we don't know
10 whether or not SunTrust has any of those categories of
11 documents responsive to the subpoena.

12 We believe, based on the nature and types of
13 accounts, that they would, but those categories of documents
14 haven't been produced.

15 THE COURT: Okay.

16 MR. VON BORKE: And with respect to the SAR's
17 documents, there was a -- we obtained a document from
18 Wachovia/Wells Fargo that --

19 THE COURT: Right. I saw that. It was some -- it
20 looks like a SAR document that somehow got into your hands.

21 MR. VON BORKE: Well, actually, on the document,
22 it says, Your Honor, "No SAR was filed."

23 THE COURT: Right.

24 MR. VON BORKE: And so it doesn't disclose the
25 existence of a SAR --

1 THE COURT: Okay.

2 MR. VON BORKE: -- and it was activity conducted
3 in Wells Fargo/Wachovia's regular course of business of
4 investigating suspicious activity. As such, they produced
5 it to the Trustee.

6 And so how we know that there was investigatory
7 actions taken at SunTrust is because of this Case
8 Investigation Summary prepared by Wells Fargo and the
9 information that they --

10 THE COURT: Okay. So your position is that
11 investigatory activity that SunTrust did in the normal
12 course of their business -- in other words, if Congress had
13 never passed any of these laws, they would be doing that
14 kind of investigation, but that would not fall under the SAR
15 protection or exclusion?

16 MR. VON BORKE: Right. The Trustee doesn't
17 disagree with SunTrust's position that SARs themselves, or
18 documents that disclose the existence of a SAR, you know,
19 are protected under the Anti-Money Laundering Act.

20 Our position is, though, those documents that
21 don't disclose the existence of a SAR, the underlying
22 documents, those are discoverable. And as, for example, in
23 the Freedman vs. Bank of America case that we cited in our
24 brief, the court held essentially, you know, those documents
25 that occurred prior to the filing of a SAR are discoverable

1 because courts -- banks, through their regular course of
2 business, conduct investigations related to suspicious
3 activity. Those aren't intended to be protected by the Act,
4 because they don't disclose the existence of a SAR, nor are
5 they a SAR themselves.

6 THE COURT: Okay. Well, let me hear from
7 Mr. Hendrix on that, as we define the issues. Let me ask
8 you first, Mr. Hendrix, do you contend that any of the
9 documents on pages 6 and 7 in the bullet points are not
10 discoverable either because of the SAR's laws or some other
11 privilege?

12 MR. HENDRIX: I do not believe the documents in
13 pages 6 and 7 are subject to SAR's laws, Judge. However,
14 what they were subject to is an agreement between the
15 parties not to produce them. And this is found in the early
16 February correspondence that the Court has already referred
17 to.

18 There is one additional piece of correspondence
19 the Court did not refer to. And that's after the subpoena
20 was served, the Kozyak law firm was provided with a cost
21 estimate to provide Trustee's counsel for a full response.
22 Trustee's counsel has that cost estimate. It is \$22,600.
23 It is so large because in one of the three accounts listed
24 there were 12,000 wire transfers. Those wire transfers are
25 all multiple pages and there is a cost for copying and there

1 is an hourly expense that is quoted.

2 Counsel for the Trustee then negotiated with
3 SunTrust Bank to limit the production to only three areas.
4 And that would be the account-opening documents, the
5 account statements, and the wire transfers. And that
6 is memorialized in the February 11 -- I'm sorry,
7 February 14th letter.

8 Then comes the order, to which everyone at
9 SunTrust Bank thought applied to the agreement between the
10 parties as to what we are providing. We are happy to
11 provide these materials. That's not an issue.

12 However, they are subject to our cost estimate and
13 as all third-party subpoena recipients in Federal Court in
14 the State of Florida are entitled to, we're entitled to be
15 paid for our costs and expenses associated with that.

16 There may be privilege issues with some of those
17 documents that are not SARs-related. However, SunTrust Bank
18 was always under the understanding of the agreement between
19 the parties, where we were only producing those three areas.

20 Then came the March 11 letter, which requested
21 e-mails for Tony Scott, who has not been an employee for
22 some time and there are no e-mails, because SunTrust keeps
23 e-mails for only 30 days. And then they want all of the
24 internal reports related to the SAR, through the 314(b)
25 request. The 314(b) request refers to that Wachovia

1 document. 314(b) is more fully described, Judge, as
2 31 CFR Section 1010.540.

3 314(b) is that provision under the Anti-Money
4 Laundering Act which allows banks to talk to each other,
5 with the same safe harbor provision. Wachovia may have
6 released a document referring to this subject matter with
7 SunTrust and that in no way waives SunTrust's enforcement of
8 the protections afforded to hypothetical SARs. Because, of
9 course, I'm not allowed to tell anyone whether one does or
10 does not exist under the Statute or under the Code of
11 Regulations.

12 So we have no problem producing these documents,
13 provided, of course, the cost estimate is provided and we're
14 paid to produce those documents. No problem. They're
15 separate and aside from our SAR argument.

16 I will note for the record that some of these
17 documents requested, the financial records, they're actually
18 a public record because SunTrust is, of course, a publicly
19 traded entity and a publicly regulated entity. And some of
20 the financial records they've asked for are available on the
21 Internet or through the FDIC Internet and they're certainly
22 available on the SunTrust website, but neither here nor
23 there.

24 Have I addressed completely the issues on pages 6
25 and 7, sir?

1 THE COURT: Okay. And then what about the bottom
2 of page 7?

3 MR. HENDRIX: We believe those are in fact
4 SAR-related or don't exist at all.

5 THE COURT: If SAR didn't exist, you wouldn't be
6 preparing these reports?

7 MR. HENDRIX: We may or may not.

8 THE COURT: Well, I mean if the purpose of the SAR
9 exclusion is to encourage compliance by insuring that
10 compliance won't result in generating reports that would not
11 otherwise be kept in the ordinary course of the bank, but if
12 the bank was -- if these are "ordinary course of business
13 bank documents," then they're not protected by SAR. At
14 least, that's my reading of the cases that you cited.

15 MR. HENDRIX: Correct. However, if they're only
16 created in a case for the sole purpose of a hypothetical SAR
17 and the bank doesn't produce them on every transaction, then
18 they would be associated with a SAR and not an ordinary
19 course argument, would be the distinction. An account
20 statement is printed monthly and mailed out to all of the
21 account holders, ordinary course of business, a deposit
22 stub, a wire transfer request, any preprinted form that we
23 can all, as depositors and account holders, obtain from the
24 bank as to our accounts.

25 I would actually agree with them, in the ordinary

1 course of business, an internal investigative report,
2 ordinary course of business, any documents that would go
3 with an internal investigative report, unless it's not an
4 internal investigative report, unless it is related to
5 exclusively the creation of a theoretical SAR.

6 These could be ordinary course of business
7 transactions. However, I'm not entirely certain that
8 SunTrust Bank actually filled out any of these reports in
9 this particular case.

10 THE COURT: Okay. Well, it sounds like we may not
11 be far off on the issues here. Let me ask Mr. von Borke.

12 First of all, with respect to your items on
13 pages 6 and 7, the bank's response is they will produce
14 those but there are costs associated with those. What is
15 the Trustee's position on that?

16 MR. VON BORKE: We understand that. It's just
17 that SunTrust has not ever produced the documents, even
18 after our request. As just to counsel's point, Your Honor,
19 the original agreement was we'll narrow the documents that
20 SunTrust produce; let us have an opportunity to look at
21 them, with the expectation, like Mr. McDonald said, come
22 back and let us know what additional documents you want.
23 And that's reflected in our March 11th letter --

24 THE COURT: Right.

25 MR. VON BORKE: -- where we say we would like

1 these additional documents. So, I mean, we're more than
2 happy to pay for these documents. In fact, we've asked for
3 them to produce them on numerous occasions. They've never
4 provided us with a supplemental cost estimate. We
5 understand that we're obligated to pay and we will pay
6 for the documents that we've requested.

7 THE COURT: Okay. And so then --

8 MR. VON BORKE: Well, Your Honor, may I just
9 address the hypothetical SAR point?

10 THE COURT: Okay, let's talk about it. I think
11 maybe that's where we still have some disagreement.

12 MR. VON BORKE: And if you look at the Wachovia
13 Case Investigation Summary, it was Exhibit G to our motion,
14 which was inadvertently not included until this morning,
15 Your Honor --

16 THE COURT: Well, actually, it was included a
17 couple other places. But let me get that other one. Yeah,
18 it was Exhibit E, I think, to something --

19 MR. VON BORKE: Correct. It was 628 --

20 THE COURT: Is this the Investigation's Case
21 Summary?

22 MR. VON BORKE: Yes, sir.

23 THE COURT: Okay.

24 MR. VON BORKE: And this is information that's
25 obtained from the 314(b) request that Tony Scott, at

1 SunTrust Bank, issued.

2 THE COURT: Now Mr. Hendrix says that the 314(b)
3 request is something that falls within an exception to SAR.
4 Under my reading 31 CFR 1020.320, subparagraph (e),
5 subparagraph (1), subparagraph Romanette (ii), subparagraph
6 (a), subparagraph (2), subparagraph Romanette (i), which is
7 the underlying facts, transactions and documents upon which
8 a SAR is based, including but not limited to disclosures to
9 another financial institution for the preparation of a joint
10 SAR.

11 Am I correct, that's the exception that
12 Mr. Hendrix is on? In other words, they can disclose to
13 another bank. Is there another -- am I looking at the wrong
14 provision?

15 MR. HENDRIX: Judge, I'd respectfully request that
16 you look at 31 CFR 1010.540. And if I may approach, we had
17 it prepared for you.

18 THE COURT: I don't think you cited that in your
19 papers.

20 MR. HENDRIX: I believe I did, Judge. I looked at
21 it just a couple of minutes ago in our motion.

22 THE COURT: Where -- well, you quoted from the one
23 I just cited. Where, in your papers? Not that you had to,
24 but just so for my reference.

25 MR. HENDRIX: I will find it. Page 13, Your

1 Honor.

2 THE COURT: Well, I see there is a cite. You just
3 don't quote it.

4 MR. HENDRIX: I do not quote it. If I may
5 approach?

6 THE COURT: Is it different than the Reg that I
7 cited?

8 MR. HENDRIX: Yes.

9 THE COURT: Okay.

10 MR. HENDRIX: If I may?

11 THE COURT: Where are you going? Mr. Hendrix,
12 you've got to go to her. You don't walk up here --

13 MR. HENDRIX: Thanks, Your Honor.

14 Okay, this is Tab 7 --

15 THE COURT: Of what? Tab 7?

16 MR. HENDRIX: 21 --

17 THE COURT: 21.

18 MR. HENDRIX: -- is the Statute. Tab 7 was our
19 brief.

20 THE COURT: Okay. And what subparagraph?

21 MR. HENDRIX: Subparagraph (b)(1) and subparagraph
22 (b)(2), (b)(3) and (b)(4) of the section, financial
23 institution or an association of financial institutions may,
24 under the protection of safe harbor from liability,
25 described in paragraph number (5) of this section, transmit,

1 receive or otherwise share information with other financial
2 institutions.

3 THE COURT: Okay. I've got you.

4 MR. HENDRIX: This is the section that's commonly
5 referred to as 314(b).

6 THE COURT: Okay. Gotcha. Why do they call it
7 314(b)?

8 (Discussion off the record.)

9 MR. HENDRIX: I'm told -- what page?

10 MS. ELLISON: It's the Public Law number of the
11 Patriot Act before it was codified.

12 THE COURT: Oh, okay. So this is the Reg and it's
13 referring to the Public Law. Okay.

14 MS. ELLISON: Yes, Your Honor.

15 THE COURT: Okay. Very good. Okay, so what
16 you're saying -- and I don't know that it's not in -- I mean
17 I think the Reg gets you there anyway. But your point is
18 that the banks have the right to share information relating
19 to the preparation of SAR. That's your argument. I
20 understand. Mr. von Borke has an argument maybe to the
21 contrary.

22 And would it be your view that Wachovia should not
23 have produced this?

24 MR. HENDRIX: It would be our view because the
25 Patriot Act, U.S.C. and the CFR, as codified, all state a

1 bank may not note the existence or lack of existence,
2 thereby the double negative, of the existence of an S-A-R.
3 And by application of 314(b) and the safe harbor provision
4 in paragraph, I believe it's (b)(5) of 314(b), they don't
5 get to say in any document that we didn't talk to SunTrust
6 about the hypothetical SAR. And their document, whether it
7 says there is or is not an SAR, Wachovia may well have had
8 an SAR, because they're required to deny it --

9 THE COURT: Right.

10 MR. HENDRIX: -- it's moot.

11 THE COURT: Okay. Mr. von Borke.

12 MR. VON BORKE: Well, I think the Investigation's
13 Case Summary is instructive because it says, "Scott also
14 advised SunTrust had not be able to identify any specific
15 BSA, Bank Secrecy Act, violations. But recent activity with
16 the client had led to increase suspicion."

17 I think that, in and of itself, reveals that there
18 was a full host of investigatory action undertaken at
19 SunTrust completely unrelated to any generation of a SAR for
20 the purpose of any SAR. And what we're asking for are those
21 documents that would have occurred in the ordinary course of
22 business, because there must have been communications with
23 Tony Scott and other individuals, talking about this
24 increase of suspicious activity that he refers to.

25 And so we know that there was this investigatory

1 activity. If it doesn't disclose the existence of a SAR, if
2 it's not the SAR itself, it's not protected.

3 THE COURT: Well, I think Mr. Hendrix doesn't
4 disagree with that.

5 I think Mr. Hendrix, you did indicate earlier that
6 if this is an ordinary course of business internal
7 investigation report that is otherwise unrelated to the
8 preparation of a SAR --

9 MR. HENDRIX: Uh-huh.

10 THE COURT: -- then you would agree that's
11 discoverable.

12 MR. HENDRIX: Absolutely.

13 THE COURT: I think you're saying the same things.
14 And, of course, it will be for them to interpret first
15 whether it falls within that category.

16 But let me recap then where we are because,
17 number (1) -- and putting aside the history, as we must
18 sometimes in what are, in a sense, discovery disputes,
19 although this involves a third -- a non-party.

20 The bank will produce the documents listed at
21 pages 6 and 7 of the Trustee's response, at 682, but will
22 first provide a cost estimate for each category. The
23 parties will meet and confer and go over that and the
24 Trustee will decide what costs they're willing to pay for
25 what categories; okay?

1 So, what I would be doing is I'd be granting the
2 bank's motion for rehearing. Since they weren't here last
3 time, I don't think they had -- they didn't have the level
4 of notice that I would have been comfortable with, and so
5 we're going to hear this de novo and on the merits. Based
6 on that, my order that I entered recently for sanctions, and
7 so forth, will be vacated.

8 Mr. von Borke, I will be asking you to do these
9 orders, so make sure you take good notes.

10 I will require the bank to produce the items
11 listed in 6 and 7, conditioned upon the Trustee paying the
12 reasonable expenses and I'll retain jurisdiction if there is
13 a dispute over what's reasonable. But based on what you all
14 have said here, it sounds like you're in the ballpark on
15 that.

16 I will also require the bank to produce any
17 internal investigation reports that are typically prepared
18 by the bank in the ordinary course of business and are
19 unrelated to the preparation of a SAR or would otherwise
20 disclose the preparation of a SAR. And I think that the
21 case -- let me find it -- the Regions Bank case, I think,
22 has a good discussion just generally of the types of
23 communications that would be not subject to SAR and the
24 types of things that would be subject to SAR.

25 And let me read from that:

1 "Transactional and account documents such as wire
2 transfers, statements, checks, deposit slips or other
3 types of documents generated in the ordinary course of
4 business. Such documents would be prepared, regardless
5 of whether a financial institution has an obligation to
6 report suspicious activity to the federal government.

7 "By contrast, a draft SAR or internal memorandum
8 prepared as part of a financial institution's process
9 for complying with federal reporting requirements is
10 generated for the specific purpose of fulfilling the
11 institution's reporting obligations. These types of
12 documents fall within the scope of the SAR privilege
13 because they may reveal the contents of a SAR and
14 disclose whether 'a SAR has been prepared or filed.'
15 Unlike transactional documents, which are evidence of
16 suspicious conduct, draft SAR's and other internal
17 memoranda or forms that are part of the process of
18 filing SAR's are created to report suspicious conduct."

19 So, that will be our guiding language and the
20 bank will be under an obligation to give their counsel,
21 obviously, access to all of these documents. I'll look to
22 Mr. Hendrix and his firm to file a privilege log, certifying
23 that they have looked at these and if they are privileged,
24 that they are privileged because they fall within this
25 description.

1 MR. VON BORKE: Your Honor, if I may, there is
2 case law and precedent for an *in camera* review of these
3 documents due to the abuse that can occur when --

4 THE COURT: Okay. Well, I'll reserve jurisdiction
5 for consideration of an *in camera* review if there's a
6 dispute. In fact, if you feel that they've gone way
7 overboard in just blanket asserting the SAR privilege on
8 things that you don't think should be, then I'll reserve
9 jurisdiction to do that. It's the last thing I want to do
10 is do an *in camera* review of a bunch of bank documents.

11 Mr. Hendrix, any suggestions or thoughts?

12 MR. HENDRIX: Yes, Your Honor, I'd like to address
13 the privilege log. Typically, a privilege log identifies
14 the document and then identifies the privilege associated
15 with that document. I am precluded from actually
16 identifying any particular document.

17 THE COURT: Well, you'll have to describe them in
18 a general way, I suppose. Maybe you could certify that you
19 have reviewed all documents and that -- I guess you can't
20 say that I've reviewed the SAR report that was filed with
21 the Government on this date, because that would indicate the
22 existence of a SAR report.

23 If you are asserting something other than the SAR
24 privilege, which I doubt that you would be, but certainly
25 that would be something you would have to put on the

1 privilege log. I think maybe it's sufficient, and let's
2 discuss this a little bit, for you to certify that you've
3 reviewed all documents that are responsive and have
4 determined that some are subject to exclusion.

5 MR. HENDRIX: Forgive me for being pedantical.
6 The pronoun "you" is collective to my client and myself, or
7 is it isolated to myself?

8 Hypothetically, if a SAR existed, I've been a bank
9 lawyer for a long time, I've never seen one, I've known a
10 bank to want to let me see one. If you're ordering me to
11 review whatever it is that they have that may or may not be
12 viewed as a SAR, we will of course live with that order.

13 However, we have an in-house counsel, who has
14 already testified to this Court in an affidavit and he's
15 present here today, that he has already reviewed what
16 documents there are or are not. And I believe the language
17 in his affidavit was: SunTrust has provided what is
18 available under federal law to provide, I believe was his
19 language.

20 I'm happy to re-conduct the review. I'm happy to
21 do oversight of that, at your order, and look at whatever he
22 looked at to come to that determination and I can make a
23 certification to the Court. I believe SunTrust would
24 require -- because they have never once, in the 15 years
25 I've represented this bank, never let me anywhere near such a

1 document. And it is their policy, under their understanding
2 of the Anti-Money Laundering Act, that they don't let people
3 do that.

4 THE COURT: Right. Well, you know, frankly, it's
5 rare for this Court to get into these types of documents
6 also. And the reason for that is we don't get many Engler
7 cases.

8 MR. HENDRIX: Uh-huh.

9 THE COURT: We get a lot of Ponzi schemes and
10 things, but this is a massive fraud, I mean, of
11 international dimension, you know, tens, if not hundreds of
12 millions of dollars missing. So, you know, this is the kind
13 of case that this is going to come up in.

14 And so it isn't that, you know, if no one has ever
15 thought of asking, this is the case. And this is a
16 fiduciary trying to bring money in. I mean we've got, I
17 don't know, thousands of creditors, many of whom who are
18 Germans who were investing in this American investment
19 opportunity.

20 MR. HENDRIX: No one from SunTrust suggests any
21 nefarious motivation in the subpoena, Judge.

22 THE COURT: Right.

23 MR. HENDRIX: We understand the Trustee has a job
24 to do.

25 THE COURT: Fair enough.

1 Okay, Mr. von Borke, any further thoughts?

2 MR. VON BORKE: No, Your Honor.

3 THE COURT: And I would like, Mr. Hendrix, for you
4 to actually look over the bank's shoulder on this and you,
5 yourself, get comfortable --

6 MR. HENDRIX: Yes, sir.

7 THE COURT: -- with the position that the bank has
8 taken to insure that it falls within the language and the
9 fine line of internal ordinary course investigative
10 reporting that the bank would otherwise be doing anyway and
11 things that fall over that line --

12 MR. HENDRIX: Understood.

13 THE COURT: -- so that you would get a second pair
14 of eyes on that. Okay.

15 MR. HENDRIX: Yes, sir.

16 THE COURT: So, I look to Mr. von Borke to do a
17 draft of an order and share it with Mr. Hendrix. And if you
18 all can't resolve your disputes, send me two orders. Make
19 sure you say who wants which one and I'll make a decision.

20 But I think we've covered what needs to be
21 covered.

22 THE COURTROOM DEPUTY: Judge, do you want to
23 address the second item on the calendar?

24 THE COURT: Do we need to do anything on this
25 motion?

1 MR. VON BORKE: No. I can withdraw it at this
2 point.

3 THE COURT: Very well. It's withdrawn in open
4 court and no further action will be taken on that motion.

5 Okay, is there anything else we can do in the
6 Engler case here this morning?

7 (No response.)

8 THE COURT: Okay. Very well. Thank you all.

9 MR. VON BORKE: Thank you, Your Honor.

10 MR. HENDRIX: Thank you.

11 THE COURT: This hearing is concluded.

12 (Whereupon, the hearing concluded at 10:39 a.m.)
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CERTIFICATE OF REPORTER

STATE OF FLORIDA :

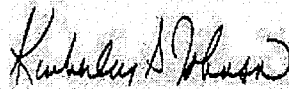
COUNTY OF HILLSBOROUGH :

I, Kimberley S. Johnson, Official Court Reporter and Notary Public, do hereby certify that the foregoing proceeding was reported by me at the time and place therein designated and that the foregoing pages constitute a true and correct copy of my reporting.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the foregoing action.

BE IT KNOWN that I shall not attest to the accuracy or content of any other than the original transcription herein set forth, excepting copies that are made by me by whatever means, containing my original signature only.

WITNESS my hand this 8th day of July, 2011, at Tampa, Hillsborough County, Florida.



Kimberley S. Johnson, CVR
Certified Verbatim Reporter
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Commission Expiration: 8/29/13