IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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IN RE:	)	
	)	Case No. 9:08-bk-04360-MGW
ULRICH FELIX ANTON ENGLER;	)	
PRIVATE COMMERCIAL OFFICE, INC.:	)	Chapter 7
and PCO CLIENT MANAGEMENT, INC.,)		
	)	
Debtor.	)	

_____/

RESPONSE TO TRUSTEE'S MOTION COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY AND FOR SANCTIONS AGAINST SUNTRUST BANK

SunTrust Bank ("SunTrust"), by and through the undersigned counsel, files its Response to the Chapter 7 Trustee's Motion to Compel Production of Documents and Testimony and for Sanctions Against SunTrust Bank (the "Motion to Compel") and states as follows:

I. FACTUAL BACKGROUND

On April 30, 2008, Robert E. Tardif, Jr. was appointed as the Chapter 7 Trustee ("Trustee") in this mater. The law firm of Kozyak Tropin & Throckmorton, P.A. ("Special Counsel") was thereafter appointed as Special Counsel for the Trustee. On February 7, 2011, the Trustee, through Special Counsel, executed a Subpoena for Rule 2004 Deposition Duces Tecum (the "Original Subpoena") which included a lengthy document request. A true and correct copy of the Original Subpoena is attached hereto as Exhibit "A." The document request served along with the Original Subpoena included 34

separate requests, many of which SunTrust was prohibited from responding to in any meaningful manner pursuant to the prohibitions contained in the Annunzio-Wylie Anti-Money Laundering Act (the "Act").[1] For example, the documents requested by the Original Subpoena included, but were not limited to all: (1) 314(b) requests; (2) investigation reports; (3) documents provided in compliance with the U.S.A. Patriot Act and the Bank Secrecy Act/Anti-Money Laundering Act; and (4) all documents provided to any Federal, State or local governmental agency.[2] The Original Subpoena directed SunTrust to respond on or before February 21, 2011, merely seven days after the execution of the Original Subpoena.

Certain documents responsive to the Original Subpoena were ultimately produced by SunTrust to the Trustee's Special Counsel on or about March 1, 2011. Subsequently, on April 11, 2011, Special Counsel for the Trustee filed its Motion to Compel Production of Documents from SunTrust Bank, asserting that SunTrust had not fully complied with its Original Subpoena. After conferring, Special Counsel and SunTrust agreed to the form of an Agreed Order Granting the Trustee's Motion to Compel. The text of the agreed order specifically agreed to by Special Counsel and SunTrust stated that "SunTrust Bank shall produce all of the documents and information in its possession responsive to the Subpoena "***that may be divulged pursuant to Federal law*** by Friday, May 13, 2011."

[1] A detailed analysis of the implications of the Act is provided below.

[2] All of these requests were aimed at obtaining Suspicious Activity Reports ("SARs") which are reports provided by financial institutions to the Financial Crimes Enforcement Network. As discussed below, under the Act, production of any SARs-related information is prohibited and a financial institution can be subject to both criminal and civil sanctions if it discloses any information which would lead to the disclosure of the existence or the non-existence of a SAR.

(Doc. 628) (emphasis added).[3] The Order further specified that SunTrust Bank would provide a privilege log for any documents withheld on the basis of privilege. This Order was later executed by the Court on May 10, 2011 (the "Original Order").

On May 10, 2011, the very same day that the Original Order was entered, SunTrust also provided the Trustee with all additional documents responsive to the Subpoena that could be divulged pursuant to federal law in full and complete compliance with the Original Order. SunTrust also provided a cost estimate for all other documents it could provide under Federal law. Despite SunTrust's complete compliance with the Original Order, on or about May 20, 2011, Special Counsel for the Trustee filed its Motion to Enforce the Court's Order Compelling Production of Documents and for Sanctions against SunTrust Bank (the "Sanctions Motion"). (Doc. 636). The Sanctions Motion asserted that SunTrust had failed to comply with the Original Order, and further requested that the Court award the Trustee its attorneys' fees and costs incurred in filing the Sanctions Motion. The Sanctions Motion also requested an expedited hearing on the same. On or about May 26, 2011, a Notice of Hearing was issued setting the Motion for hearing on June 7, 2011 at 11:30 a.m. However, for reasons unknown, SunTrust did not receive the notice of this hearing. Accordingly, SunTrust was simply unaware of the hearing.

Apparently, on June 7, 2011, the hearing on the Sanctions Motion proceeded before this Court. Although SunTrust did not receive notice of the hearing, and was

[3] Since any documents that would reveal the existence or the non-existence of a SAR are prohibited from disclosure under Federal law, any such documents, to the extent they exist, were exempt from disclosure under the Original Order.

consequently not in attendance at the hearing to present any argument or evidence to defend itself, the transcript reflects that Special Counsel for the Trustee stated that:

> There is strong evidence which suggests that there is substantial additional documents that are responsive to our document requests which have not been produced, (including crucial emails between Tony Scott and other SunTrust employees involved in the fraud investigation of the subpoenaed accounts, as well as 314(b) requests, investigation case summaries and other things of that nature.)

See Exhibit "D" to SunTrust's Motion for Reconsideration (Doc. 670), at p.4, ¶ 7-14. (emphasis added).

At the conclusion of the hearing, the Court directed Special Counsel to the Trustee to prepare an appropriate order. The Court subsequently entered an Order Granting the Trustee's Motion to Enforce the Court's Order Compelling Production of Documents and for Sanctions Against SunTrust Bank (Doc. 658) (the "Sanctions Order") which directed SunTrust Bank to comply with the Court's Original Order (Doc. 628) on or before Tuesday, June 14, 2011. Additionally, despite the fact that attorneys' fees were not addressed at the hearing, the Court further ordered SunTrust to immediately pay the Trustee's Special Counsel $3,250.00 in fees and $75.00 in costs.

However, the Sanctions Order was not dated until June 14, 2011, which is the very same day that SunTrust was ordered to comply with the Order. Moreover, the service list reflects that the Order was sent by First Class U.S. Mail to SunTrust on June 14, 2011, meaning that SunTrust could not have received—and did not receive—the Sanctions Order by the date it was directed to comply.

Special Counsel to the Trustee forwarded a copy of the Sanctions Order via electronic mail to SunTrust at approximately 7:19 p.m. on June 15, 2011, one day after

the Sanctions Order directed compliance. SunTrust promptly filed its Emergency Motion for Reconsideration and for Relief from the Sanctions Order Entered Against SunTrust Bank (Doc. 670) (the "Motion for Reconsideration"). On July 7, 2011, this Court held a hearing on SunTrust's Motion for Reconsideration. At said hearing, the Court was very clear that any documents prohibited from disclosure under the Act should not be provided based on the legal implications of the Act which are discussed in great detail below. The Court further stated that any such documents could not be revealed by including them on a privilege log. Despite the Court's clear ruling, Special Counsel for the Trustee and counsel for SunTrust could not agree on the form of an Order granting SunTrust's Motion for Reconsideration and the parties both submitted proposed orders to this Court for consideration. Notably, despite the clear ruling by this Court and the confines of the Act which prohibit disclosure of the existence or non-existence of any SARs or related information, the Trustee's Order proposed that SunTrust be required to list any documents withheld based on the prohibition found in the Act on a privilege log. (Doc. 690). Simply put, despite the Court's statements during the hearing, by virtue of its proposed order, the Trustee was once again seeking to have this Court direct SunTrust to violate the Act and subject itself to both civil and criminal sanctions by requiring it to list any documents – which may or may not exist – that were withheld based on the prohibitions found in the Act on a privilege log, thereby explicitly acknowledging their existence or non-existence.

This Court, aptly recognizing this untenable situation, ultimately entered SunTrust's proposed Order which required SunTrust to produce certain limited

documentation subject to the Trustee's Payment for the same, but explicitly held that "SunTrust is not required to produce a draft SAR or internal memorandum prepared as part of a financial institution's process for complying with federal reporting requirements or any other document that would disclose the existence of a SAR or whether a SAR has been filed." (Doc. 699, ¶7). The Order further directed Outside Counsel for SunTrust to review all documents responsive to the Subpoena and certify to the Court that the SAR privilege had been appropriately applied and that no documents or communications generated as part of SunTrust's ordinary practice of investigating suspicious activity were inappropriately withheld from production. (Doc. 699, ¶8). All documents not subject to the SAR privilege or other privilege were required to be produced only after of payment from the Trustee by SunTrust. (Doc. 699, ¶¶ 4, 8).

SunTrust was also required to provide the Trustee with a privilege log for any responsive document withheld due to a privilege, however, in contrast to the Trustee's proposed order, the Court was very clear that "[a]ny documents withheld based on the prohibitions found in the Annunzio-Wylie Anti-Money Laundering Act **shall *not* be listed on the privilege log** as such a disclosure would tend to establish the existence or non-existence of a SAR in violation of federal statutes." (Doc. 699, ¶ 9)(emphasis added).

Only July 29, 2011, Outside Counsel for SunTrust filed the required certification that it had reviewed all applicable documents and, without revealing the existence or nonexistence of a SAR, Outside Counsel certified that SunTrust had appropriately applied the SAR privilege as found in the Act and cited the reasoning found in *Regions*

Bank v. Allen, 33 So. 3d 72 (Fla. 5th DCA 2010). (Doc. 703). Previously, on July 22, 2011, Outside Counsel for SunTrust had also once again provided Special Counsel with a cost estimate for every category of documents that SunTrust could disclose. A true and correct copy of this correspondence is attached hereto as Exhibit "B." SunTrust had also directly provided the cost estimate for all of the banking transactions including all wire transfer information, which cost estimate is attached hereto as Exhibit "C." Although SunTrust even indicated that it would provide a limited number of documents, such as policies and procedures, at its own expense, Special Counsel for the Trustee never contacted SunTrust to arrange for payment for any of the documents or to specify which, if any documents it still wanted given the cost estimate. It is perplexing that the Trustee's counsel fought for these documents and is continuing to assert that SunTrust has not provided documents, but has refused to offer payment for any of the applicable wire transfer information or even bothered to contact counsel for SunTrust to discuss payment or production.

Four months later in November 2011, Special Counsel for the Trustee finally contacted Outside Counsel – not to seek or request any documents, or offer payment for the same, but rather to discuss the possibility of a 2004 examination. SunTrust agreed to the 2004 Examination, a subpoena for the 2004 Examination was issued, and a 2004 examination was thereafter held on February 13, 2012 of three SunTrust representatives. A true and correct copy of the Subpoena is attached hereto as Exhibit "D." The Subpoena and noticed topics for the 2004 examination seemed innocuous enough on their face – in fact, Outside Counsel was seemingly going to comply with the Court's previous

Order as the topics were limited to information and investigations "performed by SunTrust in the ordinary course of SunTrust's administration of those accounts." (Doc. 801-5, ¶ 11). Accordingly, on its face, it appeared that the questioning would not extend to any issues surrounding the existence or non-existence of SARs or SARs related material, and it seemed that Special Counsel for the Trustee was going to respect the confines placed on the testimony by virtue of the Act.

However, despite this Court's previous order making it clear that SunTrust could not disclose any information that would tend to reveal the existence or the non-existence of a SAR, the line of questioning presented at the 2004 Examinations delved straight into the issues surrounding SARs. For example, John Barry of SunTrust was questioned directly as follows: **"I'm inquiring as to the bank's knowledge of facts whether or not a SAR was issued."** (Deposition of John Barry, p. 34, lns. 13-14). As admitted by the Trustee in the Motion to Compel, counsel for SunTrust did not explicitly instruct the deponents not to answer any questions presented during the Examinations. Rather, the instruction routinely given was as follows:

> If he has any independent knowledge of it that would not relate to any SAR or SAR-related material, should they exist or not exist, he may answer the questions. If his sole knowledge comes from SAR-related materials, whether they exist or do not exist, he cannot testify as to what is found in SAR-related materials.

(Deposition of John Barry, p. 20, lns 14-21).

This instruction was appropriate given the implications of the Act and the deponents were specifically directed to testify as to any information that was not SAR related or was obtained in the ordinary course of SunTrust's banking activity.

Additionally, any and all testimony – and documents – which could be provided under the confines of the Act have been provided. Unfortunately, Special Counsel for the Trustee is not satisfied that SunTrust was unable to testify as to the existence or the non-existence of any potential SARs, and consequently to any potential investigations that might have occurred, and is once again attempting to have this Court direct SunTrust to violated federal law and subject itself to both criminal and civil sanctions by requiring it to divulge information that it simply cannot.

II. LEGAL ARGUMENT

A. Legal Standard Surrounding the Disclosure of SARs or SAR-related Material.

In 1992, Congress passed the Annunzio-Wylie Anti-Money Laundering Act (the "Act") which requires banks to report suspicious activities to the appropriate federal authorities. *Cotton v. Privatebank and Trust Co.*, 235 F. Supp. 2d 809, 812 (N.D. Ill. 2002). The laudable goal of the requirements contained in the Act was to encourage banks to make such reports related to criminal activities. *Id.* In fact, the stated purpose of the Act is to:

> require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

31 U.S.C § 5311.

In line with this goal, and to encourage banks to provide such reports, the Act provides immunity to banks and further prohibits disclosure of a suspicious activity report ("SAR") or any information that would reflect the existence of a SAR. *See* 31

U.S.C. § 5318(g)(2); 31 C.F.R. § 1020.320. Specifically, 31 U.S.C. § 5318(g)(2) expressly provides:

> (A) In general. -- If a financial institution or any director, officer, employee, or agent of any financial institution, voluntarily or pursuant to this section or any other authority, reports a suspicious transaction to a government agency --
>
> (i) the financial institution, director, officer, employee, or agent may not notify any person involved in the transaction that the transaction has been reported . ...

Likewise, 31 C.F.R. § 1020.320 provides, in relevant part:[4]

> (e) Confidentiality of SARs. A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this chapter.
>
> (1) Prohibition on disclosures by banks--
>
> (i) General rule. No bank, and no director, officer, employee, or agent of any bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any bank, and any director, officer, employee, or agent of any bank that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.
>
> (ii) Rules of Construction. Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:
>
> (A) The disclosure by a bank, or any director, officer, employee, or agent of a bank, of:
>
> (1) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency, or any

[4] The term "FinCen" as referenced in the Statutes refers to the Financial Crimes Enforcement Network of the United States Department of Treasury.

> Federal regulatory authority that examines the bank for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the bank to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the bank complies with the Bank Secrecy Act; or
>
> (2) The underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures:
>
> (i) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or
>
> (ii) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or
>
> (B) The sharing by a bank, or any director, officer, employee, or agent of the bank, of a SAR, or any information that would reveal the existence of a SAR, within the bank's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

Simply put, the Act specifically and explicitly requires banks to decline production of a SAR or any information that would lead to the disclosure of a SAR in response to a non-law enforcement subpoena. The Act further requires banks to notify FinCen of any request for such information.[5] In fact, the rules and regulations included in the Act are so significant that the Act includes considerable civil and criminal penalties for violations including civil penalties of up to $100,000.00 and criminal penalties including fines of up to $250,000.00 and/or imprisonment of up to five years. 31 U.S.C. §§ 5321 and 5322.

It is clear that "the prohibition against disclosing a SAR protects from discovery not just the SAR and its contents, **but also information that would disclose**

[5] Accordingly, SunTrust has reported the Trustee's Special Counsel and the Trustee's continued attempts to obtain protected information to FinCen as required by the Act.

preparation of a SAR." *Regions Bank v. Allen*, 33 So. 3d 72 (Fla. 5th DCA 2010) (citing *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004) (emphasis added)). The Act "creates an unqualified discovery and evidentiary privilege." *Id*. (*citing Whitney*, 306 F. Supp. 2d at 682). However, it has been held that "supporting documentation" underlying a SAR that is discoverable is limited to information that is "***generated or received in the ordinary course of a bank's business*** is discoverable." *Id*. (emphasis added)(*citing Whiteny*, 306 F.Supp.2d at 682; *U.S. v. Holihan*, 248 F. Supp. 2d 179 (W.D.N.Y 2003)).

In applying this analysis, it has been held that the Act essentially creates two separate categories or "buckets" of supporting documents described as follows:

> The first category represents the factual documents which give rise to suspicious conduct. These are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business. The second category is documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself. These are not to be produced because they would disclose whether a SAR has been prepared or filed." (*Cotton, supra*, 235 F.Supp.2d at p. 815.) **Thus, transactional and account documents such as wire transfers, statements, checks, and deposit slips are the types of documents generated in the ordinary course of business that are subject to discovery**. (*Cotton*, 235 F. Supp. 2d at p. 814.) Such documents would be prepared regardless of whether a financial institution has an obligation to report suspicious activity to the federal government.
>
> **By contrast, a draft SAR or internal memorandum prepared as part of a financial institution's process for complying with federal reporting requirements is generated for the specific purpose of fulfilling the institution's reporting obligation**. These types of documents fall within the scope of the SAR privilege because they may reveal the contents of a SAR and disclose whether "a SAR has been prepared or filed." (12 C.F.R. § 21.11(k) (2005). Unlike transactional documents, which are evidence of suspicious conduct, draft SAR's and other internal memoranda or forms that are part of the process of filing SAR's are created to report suspicious conduct.

Id. Regions, 33 So. 2d at 76; *See also United States v. LaCost*, 2011 WL 1542072 (C.D. Ill. April 22, 2011). (emphasis added). Simply put, any documentation or information that may reveal the content of a SAR or whether a SAR has been prepared or filed is prohibited from disclosure.

So significant are the prohibitions found in the Act recently, on March 2, 2012, issued a "SAR Confidentiality Reminder" to financial institutions, reminding them, "and in particular, the lawyers that advise them," of the confidentiality surrounding SARs. A true and correct copy of the SAR Confidentiality Reminder is attached hereto as Exhibit "E." FinCen expressly reinforced the fact that "**any information that would reveal the existence of a SAR**" should not be disclosed and further stated that it "is concerned that an increasing number of private parties, who are not authorized to know the existence of filed SARs, are seeking SARs from financial institutions for use in civil litigation and other matters." FinCen emphasized that the unauthorized "disclosure of SARs compromises the essential role SARs play in protecting our financial system and in preventing and detecting crimes and terrorist financing . . . The success of the SAR reporting system depends upon the financial sector's confidence that these reports will be appropriately protected." The SAR Confidentiality Reminder also reiterates the stiff civil and criminal penalties associated with disclosure and directed financial institutions that receive a subpoena or request for SAR information, such as SunTrust in this instance, to "immediately" contact FinCen's Office of Chief Counsel.[6] The SAR Confidentiality

[6] In compliance with the Act, SunTrust has been forced to report the ongoing activity in this case to FinCen on a number of occasions.

Reminder not only reinforces a financial institution's responsibility to keep all SAR information confidential, but also reinforces the absolute necessity of keeping this information confidential to prevent financial crimes and terrorist activity. The significance of these protections and prohibitions cannot be disputed.

This Court has recognized and appreciated the implications of the Act in adopting the reasoning in *Regions Bank v. Allen*, 33 So. 3d 72 (Fla. 5th DCA 2010) in determining what information SunTrust must produce with respect to its investigation of the subpoenaed accounts. Specifically, the Court adopted and cited the reasoning of *Regions* as laid out in full text above in its previous order. (Doc. 699, ¶ 6) (*citing Regions* at 76-77). Although Special Counsel for the Trustee does not appear to argue with the applicable standard, the Trustee refuses to accept that there are no investigative materials or information which can be shared by SunTrust without disclosing the existence or the non-existence of a SAR. Moreover, the Trustee seems uninterested in obtaining the documents generated in SunTrusts's ordinary course of business that he is entitled to – such as account information and wire transfers – as SunTrust has made such documents available since the beginning of this dispute, but the Trustee has failed to arrange for payment of the same. The resulting effect is that Special Counsel for the Trustee is continuously requesting information which cannot be disclosed under federal law.

B. SUNTRUST HAS COMPLIED WITH FEDERAL LAW IN ITS PRODUCTION OF DOCUMENTS AND NO OTHER DOCUMENTS CAN BE COMPELLED WITHOUT VIOLATING THE ACT.

Despite the clear mandates of the Act as seen above and this Court's Order, the Trustee boldly asserts in his Motion to Compel that there is no basis whatsoever in

federal law for SunTrust's withholding of Documents. (Doc. 801, p. 10). The Trustee is once again blatantly attempting to gain access to documents which SunTrust is prohibited from disclosing under federal law. The Trustee asserts that "SunTrust has gone overboard in asserting a blanket SAR privilege to *every* document in the possession of its fraud department." (Doc. 801, p.11). However, neither the Trustee nor his Special Counsel appreciates the nature of any documents which may or may not exist and may be in the possession of the fraud department. Outside Counsel for SunTrust has reviewed every relevant document in SunTrust's possession and has certified that SunTrust has appropriately applied the Act in accordance with the standard set for in *Regions*. John Barry, who serves as vice president and in-house counsel to SunTrust, was also questioned as to SunTrust's compliance with this Court's previous Order and he testified as follows:

> Q.: And it is the bank's position that the bank is in full compliance with the court order and that not a single document in that box was subject to production?
>
> A.: David Hendrix had certified to that effect. And yes, it is bank's position that we have vigorously complied with the judge's previous order.

(Deposition of John Barry, p. 23, lns. 4-10).

The Trustee specifically takes issue with the fact that John Barry, prior to reviewing any documents which may exist, had previously indicated that he believed SunTrust had been tipped off by American Express. (Doc. 801, p. 12). At his deposition, John Barry testified as to the American Express communication as follows:

> Q.: When did SunTrust first learn the information that was provided by American Express?

> Counsel for SunTrust: If you have independent knowledge of that, go ahead and testify. If that knowledge comes [from] any documents that may or not be related to a SAR and you have no independent knowledge, I'll instruct you not to answer.
>
> A.: I can't answer that questions counselor.

***

> Q.: Are you instructing him not to provide the date at the time that SunTrust learned information about the accounts?
>
> Counsel for SunTrust: If he has any independent knowledge of it that would not related to any SAR or SAR-related material, should they exist or not exist, he may answer the questions. If his sole knowledge comes from SAR-related materials, whether they exist or do not exist, he cannot testify as to what is found in SAR-related materials.
>
> Q.: Without revealing whether a SAR has been issued or not in this case, when did SunTrust first learn about any investigation of PCO or Ulrich Engler?
>
> Counsel for SunTrust: Same Objection.
>
> Q.: When did SunTrust first come into possession of the press release that you mention was attached to this e-mail?
>
> A.: On the basis of prior objections I wouldn't be able to answer that question.

Therefore, SunTrust has expressly testified that it cannot speak to, much less produce, documents it may or may not possess relative to its communications (or non-communications) with American Express without violating the prohibitions of the Act. While SunTrust understands why the Trustee would desire this information, the Act cannot be violated simply to satisfy the Trustee's curiosity or so that the Trustee can

decide whether it wants to bring suit against SunTrust. This information is protected, regardless of the purpose it is sought.

The Trustee also makes the wholly unsupportable proposition that 314(b) waivers are not protected under the Act. This position is patently at odds with the clear and precise directive of the Annunzio-Wylie Anti-Money Laundering Act. Specifically, as seen above, there are very limited, specifically delineated exceptions to the Act. One such exception is the disclosure by a bank to another financial institution. 31 C.F.R. § 1020.320(e)(1)(A)(2). In turn, Section 314(b) of the U.S. Patriot Act and 31 C.F.R. § § 1010.540 allows **financial institutions** to share information otherwise prohibited from disclosure with **other financial institutions** in furtherance of the Act even though disclosure of such information is otherwise prohibited. Although 314(b) communications allow financial institutions to share SAR related information with **each other** in certain situations, it does not authorize public disclosure of the communication the financial institutions may have had. In fact, such a result would defeat the entire purpose of the Act as the mere fact that a 314(b) communication is necessary or has occurred at all tends to establish the existence of information that is protected under the Act, thereby necessitating a special waiver for financial institutions to share this information. In fact, financial institutions are even required to apply appropriate procedures to protect shared information in the same manner it would protect its own information. *See generally*, *Corporate Compliance Answer Book,* "The Bank Secrecy Act, Information Sharing,"

26.10 PLI (2012). Therefore, any communications had under 314(b) are prohibited from disclosure.[7]

The Trustee has also requested that this Court review any documents, to the extent they exist, in an *in camera* inspection. (Doc. 801, p. 16). While this suggestion may make logical sense at first blush (and would seemingly put an end to the Trustee's attempts to obtain information it is not authorized to obtain), the request once again misses the confines and prohibitions of the Act. There is no exception in the Act for production of any confidential documents to a Court for review. The existence or non-existence of any such documents are simply prohibited from disclosure at all. Additionally, if this Court is forced to review the documents – to the extent any such documents exist – SunTrust would have to report the disclosure to the Court to FinCen. Moreover, if the Court reviews the documents (once again, to the extent they exist), and is unable to ascertain what they are, the significance of the documents, or who the documents were obtained from or sent to, this Court may inadvertently order the production of documents which are SARs related or contain communications under the 314(b) waiver, thereby violating the Act unknowingly himself. Lastly, if this Court reviews any documents and then determines no documents should be produced, the

[7] SunTrust is aware that the Trustee is in possession of a document drafted by another financial institution that references communications had under 314(b). SunTrust does not know how the Trustee obtained this document and this document serves as the basis of many of the Trustee's arguments that SunTrust is withholding documents and communications. However, because the document at issue references 314(b) communications, this document should not have ever been disclosed because it reveals that confidential information sharing occurred and the Act was therefore violated when this document was produced. Despite this fact, the Trustee has filed the document referencing the purported 314(b) communication with this Court, utilized it as the basis for numerous lines of questioning, and is even using it as the focal point of a lawsuit that it filed against Wells Fargo. Simply put, the Trustee has continually violated the Act by filing this document in public records and disclosing it for public consumption and should immediately cease such activity.

existence of SAR-related material would all but have been disclosed in direct contravention of the prohibitions in the Act.

Simply put, SunTrust has provided all documents which it is allowed to disclose under the Act. To require SunTrust to provide any additional documents would be directing SunTrust to violate federal law.

C. SUNTRUST PRODUCED KNOWLEDGEABLE WITNESSES AS TO THE NOTICED 30(b)(6) DEPOSITION TOPICS.

The Trustee's main argument in support of his position that SunTrust failed to produce a knowledgeable deponent in response to the 30(b)(6) deposition topics is that SunTrust refused "to produce a designee for Topics 11, 12, and 13." (Doc. 801, p. 14). In turn these areas of topics are listed below:

> 11. Any investigation of the Engler Accounts that was performed by SunTrust ***in the ordinary course of SunTrust's administration of those accounts,***, including but not limited to any investigation conducted by SunTrust's Compliance Department and any communications SunTrust had with any other banks regarding these investigations.
>
> 12. The communications and circumstances surrounding SunTrust's decision to close the Engler Accounts.
>
> 13. SunTrust's policies and procedures established to satisfy the Bank Secrecy Act, the Patriot Act, Anti-Money Laundering regulations, and "know your customer requirements," and SunTrust's application of those policies and procedures regarding the opening, monitoring, administering, and closing the Engler Accounts.

(Doc. 801-5, p. 7)(emphasis added). However, despite the Trustee's contentions, John Barry testified that he was knowledgeable as to the information identified in topics 11 and 12. (Deposition of John Barry, p. 7, lns. 23-25). Mr. Barry also testified that he was

very familiar with the PCO/Engler file. (Deposition of John Barry, p. 13, lns. 1-23). As to the issue of any fraud investigation, the following testimony occurred:

> Q.: Mr. Barry, are you prepared today to tell me any facts about the PCO or Engler fraud known by SunTrust Bank?

***

> A: I did answer your questions already. I mentioned to you previously that our EFM department had no filed on this. And I also mentioned that any other answers would be a contravention of federal law and to the judge's order regarding the existence or non-existence of a SAR.
>
> Q.: Are you preparing to testify as to the facts underlying SunTrust's decision to close the accounts?
>
> A.: On the same objection I would have restrict my testimony to what has already been said regarding the danger or revealing the existence, or lack thereof, of a SAR.

(Deposition of John Barry, p. 38, ln. 16- p. 39 ln. 8). The Trustee simply refuses to believe that SunTrust has no investigatory documents that would not reveal the existence or non-existence of a SAR and similarly refuses to accept that the circumstances surrounding the account closings may reveal the existence or non-existence of a SAR. Moreover, the Trustee admitted that deponent Suzanne Splading was prepared to testify as to SunTrust's policies and procedures regarding account openings, "know your customer" policy and SunTrust's policies with regard to documents created in connection with deposit accounts, thereby satisfying category 13. (Doc. 801, p. 8). Therefore, it was not that knowledgeable deponents were not presented for topics 11-13. The Trustee simply wasn't satisfied with SunTrust's responses given the confines of the Act.

Additionally, the Trustee argues that SunTrust should have obtained a protective order prior to the deposition. However, as seen above, this Court had previously entered an Order prohibiting the disclosure of any information covered under the Act. Also, as seen above, the areas of topics provided in the subpoena seemed to be within the limits of the Court's previous Order in that it limited its questioning to investigations "conducted in the ordinary course of SunTrust's administrations of those accounts." (Doc. 801-5). The Trustee's Special Counsel simply was not satisfied with the responses indicating that there were no investigations that could be disclosed under the Act. Moreover, and perhaps even more importantly, Special Counsel's questioning went far beyond this point, even directly asking SunTrust to disclose the existence or the non-existence of SARs, which issue has already been addressed by this Court. SunTrust certainly should not have been required to anticipate this. Therefore, the Trustee's Motion to Compel should be Denied.

D. FURTHER DISCOVERY SHOULD BE PROHIBITED AS THE APPLICABLE STATUTE OF LIMITATIONS HAS RUN, RENDERING ANY DISCOVERY FUTILE AT THIS POINT.

It is presumed that the Trustee is seeking the documents and SARs-related information to file some form of a Complaint against SunTrust.[8] However, SunTrust closed the PCO account on June 28, 2007. Therefore, under any statue of limitations

[8] Notably, the Trustee has filed a similar suit against Wells Fargo under similar circumstances. The case is currently pending in the Middle District, Ft. Meyers Division as Case number, 2:11-CV-695-FtM-29 DNF. Significantly, that Complaint is almost entirely based on the alleged 314(b) communication which should not have been disclosed at all. Again, the Trustee is blatantly perpetuating the disclosure of SARs material in violation of federal law by filing this document on multiple occasions in the public record..

analysis, the statute of limitations would have run four years later, or on June 28, 2011. *See generally* Fla. Stat. § 95.11 and § 726.110.

Despite this fact, the Trustee has still not filed suit and never even followed up or offered payment for any documents it is entitled to – specifically, documents such as the wire transfer information and other banking information generated in SunTrusts's ordinary course of business. It is unclear as to why the Trustee did not feel it necessary to pay for and obtain required documents such as the wire transfer information as soon as possible. It is also unclear as to why the Trustee did not even seek the 2004 Examination until November 2011 – after the Statute of Limitations had been filed. By all appearances, Special Counsel is attempting to obtain documents that it know that it may not obtain under applicable federal law in an attempt to make it appear as if SunTrust is improperly withholding documents, thereby preventing a Complaint to be timely filed within the statute of limitations – which is simply not the case. Since the inception of this case, the Trustee was well aware that SunTrust had a financial relationship with PCO and has had ample time to obtain any documents or information it deemed necessary within the confines of applicable law (although it is unclear what documents it needed to simply file an action and subsequently engage in the litigation discovery process). Again, the Trustee has failed to pay for any documents it is entitled to, and instead is continuing to raise the same arguments over and over again despite the fact that SunTrust has offered evidence on multiple occasions that it has provided all information and documents that it is permitted to provide under federal law. As the statute of limitations has past, the

discovery is sought is futile and unnecessary as it cannot be used to support a viable cause of action and the assets of the estate should not be utilized in this manner.

III. CONCLUSION

In sum, the Trustee is seeking information which SunTrust simply cannot disclose. This is putting SunTrust in a precarious situation by having to be forced to fight with the Trustee's Special counsel on a consistent basis to avoid violating applicable federal law, all the while without being able to disclose what, if any, documents it might be in possession of. Such continued attempts to obtain privilege information should not be allowed.

WHEREFORE, SunTrust Bank respectfully requests that this Court enter an order denying the Trustee's Motion to Compel, to instruct the Trustee to refrain from its continued attempts to obtain information protected under the Act, and for such other and further relief as this Court deems appropriate.

Respectfully Submitted,

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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 13th day of March, 2012 to:

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