UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re	CASE NO. 9:08-bk-04360-MGW
ULRICH FELIX ANTON ENGLER, PRIVATE COMMERCIAL OFFICE, INC., and PCO CLIENT MANAGEMENT, INC.,	CHAPTER 7 (Substantively Consolidated)
Debtors. _____/	

CHAPTER 7 TRUSTEE'S REPLY TO SUNTRUST BANK'S SUPPLEMENTAL RESPONSE TO TRUSTEE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY AND FOR SANCTIONS [DOC. 927]

ROBERT E. TARDIF, JR. (the "Trustee"), as Chapter 7 Trustee for the substantively consolidated bankruptcy estates of Ulrich Felix Anton Engler, Private Commercial Office, Inc., and PCO Client Management, Inc. ("Engler," "PCO," and "PCOM," respectively, or collectively the "Debtors"), by and through undersigned counsel, hereby files his Reply to SunTrust Bank's Supplemental Response To Trustee's Motion To Compel Production Of Documents And Testimony And For Sanctions [Doc. 927] (the "Response"), and states in support thereof as follows:

Factual and Procedural Background

This involuntary bankruptcy case was commenced approximately four months after the County Court of Mannheim, Germany issued an international warrant for Ulrich Engler's ("Engler") arrest for perpetrating a massive Ponzi scheme and approximately one month before the Public Prosecutor's Office of Mannheim, Germany issued a request for Engler's arrest and extradition to the United States Government. Thereafter, 1,227 Proofs of Claim in the aggregate amount of $318,132,754.01 were filed in the Engler bankruptcy case and 210 Proofs of Claim in

the aggregate amount of $205,085,382.63 were filed in the Private Commercial Office, Inc. ("PCO") bankruptcy case.

On November 8, 2010, this Court entered an order authorizing the Trustee to issue subpoenas for 2004 examinations *duces tecum* to the Debtors' financial institutions. *See* Doc. Nos. 512 and 517. In an effort to discharge his duties to the Debtors' creditors, the Trustee caused a subpoena to be served on SunTrust Bank ("SunTrust") on February 8, 2011 in order to obtain documents and testimony pertaining to the $164.6 million which flowed into and out of the Debtors' accounts at SunTrust in the four year period preceding the March 31, 2008 petition date (the "Petition Date"). *See* Doc. 614-1 (the "Subpoena"). In response to the Subpoena and correspondence from creditors demanding answers, SunTrust embarked on a 14 month campaign to obstruct and thwart the Trustee's discovery efforts. As a result, the Trustee was forced to spend substantial time and estate resources prosecuting motions to compel and to enforce court orders requiring SunTrust to cooperate with his discovery efforts. *See, e.g.*, Doc. Nos. 614, 628, 636, 658, 659, 670, 673, 682, 683, 690, 699, 703, 764, 765, 778, 801, 811, 826, and 832. For instance, SunTrust: (a) failed to respond to 30 of 34 document requests; (b) failed to respond to e-mail or voice mail messages from Trustee's counsel; (c) failed to attend a duly-noticed hearing on June 7, 2011; (d) designated corporate representatives who lacked knowledge or were not prepared or permitted to testify concerning the 13 designated deposition topics at mutually coordinated depositions on February 13, 2012; and (e) refused to produce *any* paper(s) from the "box of documents" supposedly held by its fraud detection department based upon overboard, blanket assertions of the suspicious activity report ("SAR") privilege set forth at 12 C.F.R. 21.11(k).

In order to resolve these issues, this Court entered an order on April 10, 2012 which, *inter alia*, required SunTrust to "produce each and every document withheld on the basis of the SAR privilege to Chambers, under seal, for *in camera* review on or before April 13, 2012." *See* Doc. 826. The purpose of the Court's review was to determine which documents were subject to production to the Trustee pursuant to Bankruptcy Rule 2004 because they were generated or received in the ordinary course of the bank's business, were part of its standard business practice of investigating suspicious activity, or were otherwise discoverable as "supporting documentation" underlying a SAR.

Meanwhile, after being a fugitive of justice for nearly 5 years, Engler was arrested on July 25, 2012 by special agents and officers of the United States Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI), ICE's Enforcement and Removal Operations (ERO), the U.S. Marshals Service and the Las Vegas Metropolitan Police Department. On or about August 16, 2012, Engler was deported to the Federal Republic of Germany to stand trial on charges relating to the Ponzi scheme perpetrated primarily through use of the SunTrust accounts and was incarcerated in Mannheim prison. Engler thereafter cooperated with law enforcement authorities, pled guilty to the crimes, and was sentenced to a term of imprisonment of 8 years and 6 months on or about March 4, 2013.

SunTrust does not dispute that the "box of documents" reflects Engler's use of the SunTrust accounts in connection with the Ponzi scheme or Engler's guilty plea and sentencing on the Ponzi scheme charges. Despite these facts and this Court's year-long *in camera* review of the "box of documents," SunTrust now implores this Court to disregard its prior orders and to discontinue its review based upon the District Court's recent dismissal of creditor aiding and

abetting claims against SunTrust on statute of limitations grounds with prejudice. SunTrust's arguments are misplaced and should be rejected.

Initially, the Trustee notes that this Court's prior orders and its effort to ensure enforcement of those orders through the *in camera* review are not subject to reversal, modification, or cessation because of orders entered by a different court, on different claims between different parties, for different purposes and having different consequences. The Trustee remains entitled to discovery within the scope of Bankruptcy Rule 2004 and which he sought pursuant to the Subpoena he validly served on SunTrust over 2 years ago. As held in numerous cases, SunTrust remains obligated to produce all documents which were generated or received in the ordinary course of its business, were part of its standard business practice of investigating suspicious activity, or were otherwise discoverable as "supporting documentation" underlying a SAR relating to the Debtors' SunTrust accounts. Put simply, whatever statute of limitations defense SunTrust may have had to unrelated creditor claims have no bearing whatsoever on SunTrust's obligations to produce discovery relevant to the Trustee's investigation of this case pursuant to his duties as Trustee.

To be sure, the Trustee continues to have a pecuniary interest in the creditor aiding and abetting claims pending against Wells Fargo Bank, N.A. ("Wells Fargo") – which, incidentally, the District Court did not dismiss – by virtue of the Amended Joint Prosecution and Cooperation Agreement approved by this Court, and the "box of documents" subject to the *in camera* review continues to be highly relevant to those claims. *See* Doc. Nos. 831 and 837. Although SunTrust may prefer that the Trustee start discovery anew in the District Court suit, this Court has previously recognized that it may conduct the *in camera* review notwithstanding the pendency of the District Court suit in light of the significant time and expense devoted to these discovery

issues before this Court. *See* Doc. 832, p. 46, lines 7 – 12. Moreover, SunTrust would be rewarded for its obstructive discovery tactics at the expense of the Debtor's creditors were this Court to disregard its prior orders and discontinue the *in camera* review.

For these reasons, the Trustee respectfully submits that the *in camera* review should proceed to conclusion, documents within the scope of Bankruptcy Rule 2004 should be produced to the Trustee forthwith, SunTrust should be required to produce knowledgeable and prepared witnesses for a 2004 examination at mutually convenient dates and times within 30 days of the document production, and the Trustee should be awarded his reasonable fees and costs for SunTrust's obstructive discovery tactics over the course of 14 months.

Legal Authority

I. The Permissible Scope of a Rule 2004 Examination.

As stated previously, this Court entered an order on November 8, 2010 authorizing the Trustee to issue subpoenas for, and to conduct, Rule 2004 examinations *duces tecum* of the Debtors' financial institutions. *See* Doc. 517. On February 8, 2011, the Trustee caused a Subpoena to be served on SunTrust in order to obtain documents and testimony pertaining to the $164.6 million which flowed into and out of the Debtors' accounts at SunTrust in the four year period preceding the Petition Date. *See* Doc. 614-1.

Bankruptcy Rule 2004(a) states that on "motion of any party in interest, the court may order the examination of any entity." Fed. R. Bankr. P. 2004(a). Examinations are permitted as long as they relate to the "acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate . . . ." Fed. R. Bankr. P. 2004(b). "Rule 2004 examinations are appropriate for revealing the nature and extent of the bankruptcy estate . . . and for 'discovering assets, examining transactions, and

determining whether wrongdoing has occurred." *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002). "In general, a large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, upon any reasonable surmise that they have assets of the debtor. . . . The examination . . . *is of necessity to a considerable extent a fishing expedition*." *In re Foerst*, 93 F. 190, 191 (S.D.N.Y. 1899) (emphasis supplied). Courts have recognized and permitted a Rule 2004 examination to be "exploratory and groping." *Sachs v. Hadden*, 173 F.2d 929, 931 (2d Cir. 1949). As a result, Rule 2004 examinations properly "cut a broad swath through the debtor's affairs, those associated with him, and those who might have had business dealings with him." *In re Johns-Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984) (citations omitted). Courts have consistently held that the range of discoverable subject matter in a Rule 2004 examination is "'unfettered and broad.'" *In re Dinubilo*, 177 B.R. 932, 939 (E.D. Cal. 1993) (quoting *In re GHR Energy Corp*., 33 B.R. 451, 453 (Bankr. D. Mass. 1983)); *In re Ecam Publications, Inc.*, 131 B.R. 556, 559 (Bankr. S.D.N.Y. 1991) (same). This is because Rule 2004 helps to "ensure, 'no viable cause of action is lost' and that 'all possible claims … have been identified.'" *In re Whitley*, 2011 WL 6202895 (Bankr. M.D.N.C. Dec. 13, 2011) (citing Robert J. Keach & Halliday Moncure, *Rule 2004 as a Prelitigation Tool in a Post-Twombley/Iqbal World: Part I*, 29 Am. Bankr. Inst. J. 28, 80 Oct. 2010 (citing *In re Mirant Corp.*, 326 B.R. 354, 367 (Bankr. N.D. Tex. 2005)).

The broad scope of Rule 2004 has been repeatedly recognized in this district. In *In re Marathe*, 459 B.R. 850, 856 (Bankr. M.D. Fla. 2011) (Glenn, J.), the court stated that "[t]he purpose of Rule 2004 of the Federal Rules of Bankruptcy Procedure is to provide a tool to parties to a bankruptcy, particularly trustees, to obtain information concerning the conduct or property

of the debtor, and any matters that may affect the administration of the bankruptcy estate." (citations and internal quotation marks omitted). Furthermore, "the broad scope of a 2004 examination arises out of its purpose. Particularly in Chapter 7 cases, such as here, it is an investigatory device trustees can use in order to quickly gather the information they need in order to do their job properly. *In re J & R Trucking, Inc.*, 431 B.R. 818, 821 (Bankr. N.D. Ind. 2010).

Consistent with this purpose, the phrase "any entity" in Rule 2004 is "not limited to the debtor or its agents, but is properly extended to creditors and third parties who have had dealings with the debtor. *Id.* at 858-59 (citations omitted). The only "nexus" to the case that is required "is that the witness have knowledge of the debtor's acts, conduct, liabilities or financial condition which relate to the administration of the bankruptcy estate. *Id.* at 860 (citations and internal quotation marks omitted).

Non-parties, such as SunTrust, are subject to Rule 2004 examinations through subpoena and *must* obey them unless they offer an *adequate* excuse. *Orbit One Comm'cns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 106 (S.D.N.Y. 2008) (emphasis supplied). Although SunTrust offers many excuses, none are adequate. Mere claimed difficulty in complying with a subpoena is legally insufficient. Rather, "compliance must be beyond the realm of possibility, not just difficult to achieve, before a party will be exonerated in a contempt proceeding." *Barcia v. Sitkin*, 1997 WL 66785, at *2 (S.D.N.Y. Feb. 14, 1997) (citing *Badgley v. Santacroce*, 800 F.2d 33, 36-37 (2d Cir. 1986)).

II. The limited scope of the SAR-privilege.

The Trustee acknowledges that he is not entitled to production of SARs, draft SARs, and documents which *explicitly reveal* that a SAR was issued with regard to the Debtors' SunTrust accounts. However, as held in numerous cases, SunTrust remains obligated to produce all

documents which were generated or received in the ordinary course of its business, were part of its standard business practice of investigating potentially fraudulent activity, or were otherwise discoverable as "supporting documentation" underlying (but not referencing) a SAR relating to the Debtors' SunTrust accounts.

In *In re Whitley*, 2011 WL 6202895 (Bankr. M.D.N.C. Dec. 13, 2011), for example, the court determined that a trustee was entitled to conduct a 2004 examination of, and to obtain documents from, a bank utilized by the debtor in the course of a Ponzi scheme. Citing to several cases regarding the scope of 2004 examinations and the parameters of the SAR privilege, the court rejected the bank's argument that compliance with the following discovery requests would require it to violate applicable federal law and ordered production of such documents to the Trustee:

> (a) All bank documents relative to the accounts of the [d]ebtor that were generated in the ordinary course of business to include, but not be limited to, all computer generated reports wherein any account of the [d]ebtor was identified as having suspicious and/or unusual, irregular or improper account activity.
>
> (b) All documents relating to any investigation or inquiry by the bank or its agents of any account of the [d]ebtor.
>
> (c) All documents which would evidence any response to the investigation and the findings, or observation, notes of any such investigation relative to account activity of the [d]ebtor, including suspicious activity.
>
> (d) All documents which would evidence any follow-up concerning suspicious activity to include any written explanations which the [d]ebtor may have given to the bank regarding the [d]ebtor's account activity (to include any business activity).
>
> (e) Any documents furnished by the [d]ebtor to the bank to support any statements made by the [d]ebtor to explain his account activity, including suspicious activity.

> (f) Any documents obtained by the bank from any source whatsoever relating to any investigation the bank may have made into the account activity of the [d]ebtor, including suspicious activity.

Id. at *4. (Citations omitted). The court's holding in *Whitley* is consistent with the "common theme in the cases in which a bank or lending institution has invoked the SAR privilege" that "the SAR privilege is limited to the SAR and information contained therein [but] does not apply to the supporting documentation. . . [or] the internal bank reports or memorandum generated by the bank regarding such an investigation." *Id.* at *4 (citing *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001) (also noting in most cases the disclosure of supporting documentation would not reveal the filing of an SAR and such documentation cannot be shielded from otherwise appropriate discovery simply because it has some connection to an SAR) and *Freedman & Gersten, LLP v. Bank of America, N.A.*, 2010 WL 5139874, at *3 (D.N.J. Dec. 8, 2010) (noting that it is a standard business practice for banks to investigate suspicious activity and documents or facts produced in the ordinary course of business are necessary and relevant for purposes of the plaintiff's discovery)). *Accord Bank of China v. St. Paul Mercury Ins. Co.*, 2004 WL 2624673, at *5 (S.D.N.Y. Nov. 18, 2004) (noting that the facts giving rise to the filing of a SAR are discoverable if those facts are available in, *e.g.*, a document created in the ordinary course of the bank's business); *U.S. v. Holihan*, 248 F. Supp. 2d 179, 187 (W.D.N.Y. 2003) (noting any supporting documentation which would not reveal either the fact that a SAR was filed or its contents cannot be shielded from otherwise appropriate discovery based solely on its connection to a SAR); *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 814 (N.D. Ill. 2002) (stating that "[n]othing in the Act or regulations 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"); and

Regions Bank v. Allen, 33 So. 3d 72, 77 (Fla. 5th DCA 2010) (stating "[a] bank may not cloak its internal reports and memoranda with a veil of confidentiality simply by claiming they concern suspicious activity or concern a transaction that resulted in the filing of a SAR").

Accordingly, the Trustee remains entitled to the production of documents which were generated or received by SunTrust in the ordinary course of its business, which were part of its standard business practice of investigating suspicious activity, or which were otherwise discoverable as "supporting documentation" underlying a SAR pertaining to the Debtors' SunTrust accounts.

Conclusion

Pursuant to court authorization, the Trustee served a Subpoena on SunTrust on February 8, 2011 seeking documents and testimony within the scope of Bankruptcy Rule 2004. Unfortunately for the Debtors' creditors, SunTrust responded to the Subpoena with a 14 month campaign to obstruct and thwart the Trustee's discovery efforts. Now, more than a year after the Court entered an order providing for an *in camera* review of the "box of documents" in order to ensure enforcement of its prior orders, SunTrust implores this Court to disregard its prior orders and to discontinue the review. SunTrust is not entitled to special treatment in this bankruptcy case and certainly should not be rewarded for its obstructive discovery tactics. The Trustee respectfully submits that the *in camera* review should proceed to conclusion, documents within the scope of Bankruptcy Rule 2004 should be produced to the Trustee forthwith, SunTrust should be required to produce knowledgeable and prepared witnesses for a 2004 examination at mutually convenient dates and times within 30 days of the document production, and the Trustee should be awarded his reasonable fees and costs for SunTrust's obstructive discovery tactics over the course of 14 months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Chapter 7 Trustee's Reply to SunTrust Bank's Supplemental Response To Trustee's Motion To Compel Production Of Documents And Testimony And For Sanctions has been furnished to all creditors and/or interested parties registered on the Court's CM/ECF System and was also posted on the website "englerbk.com" in accordance with the Order Granting Trustee's Motion To Establish Certain Notice, Case Management And Administrative Procedures [Doc. 451], on the 13th day of April, 2013.

By:/s/ Robert F. Elgidely
Robert F. Elgidely, Esq.