

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

IN RE:)
)
ULRICH FELIX ANTON ENGLER;) Case No. 9:08-bk-04360-MGW
PRIVATE COMMERCIAL OFFICE, INC. :) Chapter 7
and PCO CLIENT MANAGEMENT, INC.,))

Debtor.)
_____ /

**MOTION FOR EXTENSION OF TIME FOR FILING NOTICE OF APPEAL AND
MEMORANDUM OF LAW**

SunTrust Bank (“SunTrust”), pursuant to 8002(c) of the Federal Rules of Bankruptcy Procedure, respectfully moves the Court for an order extending the time for filing a notice of appeal of the Order Granting Motion to Enforce the Court’s Order Compelling Production of Documents and, Motion for Sanctions Against SunTrust Bank (“Sanctions Order”) [D.E. 658] entered on June 14, 2011 by SunTrust to the United States District Court for the Middle District of Florida, and in support hereof states as follows:

I. FACTUAL BACKGROUND

1. On February 7, 2011, Special Counsel for the Trustee executed a Subpoena for Rule 2004 Deposition Duces Tecum (the “Subpoena”) which included a lengthy document request. The document request served along with the Subpoena included 34 separate requests, many of which SunTrust is 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 Subpoena include, but are not limited to: (1) 314(b)

¹ A detailed analysis of the implications of the Act is provided in SunTrust’s Emergency Motion for Reconsideration and for Relief from the Sanctions Order Entered Against SunTrust Bank and Incorporated Memorandum of Law.

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 Subpoena directed SunTrust to respond on or before February 21, 2011, merely seven days after the execution of the Subpoena.

3. Certain documents responsive to the Subpoena were ultimately produced by SunTrust's Special Litigation Counsel for the Trustee on or about March 1, 2011.

4. Subsequently, on April 11, 2011, Special Litigation Counsel for the Trustee filed its Motion to Compel Production of Documents from SunTrust Bank, asserting that SunTrust had not fully complied with its Subpoena.

5. 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." [D.E. 628] (emphasis added). 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").

6. On May 10, 2011, the very same day that the 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.

7. 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”). [D.E. 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 attorney’s fees and costs incurred in filing the Sanctions Motion. The Sanctions Motion also requested an expedited hearing.

8. 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. SunTrust’s representatives are included on the Certificate of Notice associated with the Notice of Hearing, however, SunTrust never received notice of the same. Accordingly, SunTrust was simply unaware of the hearing.

9. Apparently, on June 7, 2011, the hearing on the Sanctions Motion proceeded before this Court.

10. 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 [D.E. 658] (the “Sanctions Order”) which directed SunTrust Bank to comply with the Court’s Original Order [D.E. 628] on or before Tuesday, June 14, 2011. Additionally, despite the fact that attorney’s 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.

11. However, the 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 Order by the date it was directed to comply.

12. In fact, SunTrust was unaware of the hearing or the Sanctions Order until approximately 5:00 p.m. on June 14, 2011, when an attorney at Shutts & Bowen LLP, who was aware of the Sanctions Order by being copied electronically, forwarded same to SunTrust.

13. Special Counsel to the Trustee also 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's Emergency Motion for Reconsideration and for Relief from the Sanctions Order Entered Against SunTrust Bank and Incorporated Memorandum of Law ("Motion for Reconsideration") promptly followed on June 20, 2011. [D.E. 670].

14. SunTrust's Motion for Reconsideration asserted that SunTrust provided the Trustee with all documents responsive to the Subpoena that could be divulged pursuant to federal law in full and complete compliance with the Original Order. Moreover, the Motion for Reconsideration asserted that SunTrust's failure to attend the hearing on the Trustee's Sanctions Motion to present evidence refuting the Trustee's position was the direct result of the fact that, for reasons unknown, SunTrust did not receive the Notice of Hearing.

15. On June 22, 2011, this Court filed a Notice of Hearing on SunTrust's Emergency Motion for Reconsideration and for Relief from the Sanctions Order Entered Against SunTrust Bank and Incorporated Memorandum of Law, scheduling the hearing for July 7, 2011. [D.E. 672].

16. SunTrust seeks a final determination from this Court of SunTrust's Emergency Motion for Reconsideration prior to filing a notice of appeal, as a favorable ruling on its Motion for Reconsideration would eliminate the need to appeal the Order.

17. SunTrust believes its timely Emergency Motion for Reconsideration and for Relief from the Sanctions Order Entered Against SunTrust Bank filed on June 20, 2011 [D.E. 670] tolls the time period for filing an appeal during the pendency of such motion. *See* Fed. R. Bankr.P. 8002(b). Rule 8002(b) lists the following motions as having a tolling effect: a motion to amend or make additional findings of fact under Rule 7052; a motion to alter or amend a judgment under Rule 9023; a motion for a new trial under Rule 9023; or a motion for relief from judgment or order under Rule 9024 if filed within fourteen days after entry of the judgment or order. Having filed its Motion for Reconsideration under Rules 9023 and 9024, the time period for filing an appeal has been tolled.

18. Nonetheless, in an extreme abundance of caution, SunTrust files this Motion for an Extension of Time for Filing Notice of Appeal in order to preserve its right to an appeal should this Court find that SunTrust's Motion for Reconsideration does not toll the time period for filing an appeal and to defend against any claim that SunTrust missed its appellate filing deadline. If SunTrust's Motion for Reconsideration does not toll the time to appeal, which SunTrust believes it does, then SunTrust must file a notice of appeal no later than June 28, 2011—before the July 7, 2011 hearing on SunTrust's Motion for Reconsideration.

19. SunTrust files this Motion for Extension of Time to File a Notice of Appeal for the proper purpose of avoiding the filing of an appeal if this Court grants its Motion for Reconsideration.

II. MEMORANDUM OF LAW

Under Rule 8002(c) of the Federal Rules of Bankruptcy Procedure, a party may request an extension of time for filing a notice of appeal. The request must be made before the expiration of the period otherwise prescribed by the rule, that is, within fourteen (14) days after

the entry of the final judgment, order or decree. *See In re Simpson*, 215 B.R. 885 (B.A.P. 10th Cir. 1998). Prior to the expiration of the 14-day period for filing a notice of appeal, Rule 8002(c) does not require a showing of excusable neglect or special circumstances. *See In re Betacom of Phoenix, Inc.*, 250 B.R. 376 (also suggested factors for the court's consideration when deciding whether to grant an extension of time for the notice of appeal).

Here, SunTrust is filing this Motion for Extension of Time to File a Notice of Appeal before the 14-day period which ends on June 28, 2011. Further, SunTrust is seeking the extension for a proper purpose as there is a need to await the outcome of SunTrust's Motion for Reconsideration before SunTrust can determine whether filing a notice of appeal is necessary. *See generally In re Betacom of Phoenix*, 250 B.R. at 381. As such, this Court should grant SunTrust an extension of time to file a notice of appeal.

WHEREFORE, SunTrust Bank respectfully requests that this Court enter an Order extending the time for filing the notice of appeal by SunTrust to the United States District Court for the Middle District of Florida from the Order Granting Motion to Enforce the Court's Order Compelling Production of Documents and, Motion for Sanctions Against SunTrust Bank in accordance with Rule 8002(c) of the Federal Rules of Bankruptcy Procedure.

CERTIFICATE OF GOOD FAITH CONFERENCE

On June 23, 2011 the undersigned counsel attempted to contact Trustee's Special counsel in order to determine whether or not the Trustee objects to the relief requested. The Trustee's Special counsel was unable to be reached. However, the undersigned counsel left Trustee's Special counsel a voicemail informing him of SunTrust's intention to file this motion. The undersigned will update this certificate as appropriate.

Respectfully Submitted,

GRAYROBINSON, P.A.
201 N. Franklin Street (33602)
Suite 2200
Post Office Box 3324
Tampa, Florida 33601-3324
(813) 273-5000
(813) 273-5145 (fax)
Attorneys for SunTrust Bank

/s/ Mark D. Schellhase
David S. Hendrix, Esquire
Florida Bar No. 827053
Mark D. Schellhase
Florida Bar No. 57103
Alissa M. Ellison, Esquire
Florida Bar No. 15992

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 23th of June, 2011 to: Ulrich Felix Anton Engler, Private Commercial Office, Inc., and PCO Client Management, Inc. (Non-Debtor), 1217 Cape Coral Parkway, Apt. 121, Cape Coral, FL 33904; and to David A. Samole, Esq., Kozyak, Tropin & Throckmorton, P.A., Special Litigation Counsel for the Trustee, 2525 Ponce De Leon, 9th Floor, Coral Gables, FL 33134.

/s/Mark D. Schellhase
Mark D. Schellhase