

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
In re:)
SOUTHEAST WAFFLES, LLC) Case No. 3:08-07552
Debtor.) Chapter 11
) Judge Lundin

THE DEADLINE FOR FILING A TIMELY RESPONSE IS: SEPTEMBER 8, 2008
IF A RESPONSE IS TIMELY FILED, THE HEARING WILL BE: SEPTEMBER 9, 2008, 9:00 a.m., U.S.
Bankruptcy Court, Courtroom 2, Second Floor, Customs House, 701 Broadway, Nashville, Tennessee 37203

NOTICE OF CORRECTED MOTION TO APPOINT EXAMINER – EMERGENCY HEARING
REQUESTED

Applicant Stites & Harbison PLLC, counsel for SunTrust Bank, has asked that this Court order the appointment of an examiner pursuant to 11 U.S.C. § 1104.

YOUR RIGHTS MAY BE AFFECTED. If you do not want the Court to grant the attached Motion, or if you want the Court to consider your views on the Motion, then on or before **September 8, 2008**, you or your attorney must:

1. File with the Court your written response or objection explaining your position. **PLEASE NOTE: THE BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE REQUIRES ELECTRONIC FILING. ANY RESPONSE OR OBJECTION YOU WISH TO FILE MUST BE SUBMITTED ELECTRONICALLY. TO FILE ELECTRONICALLY, YOU OR YOUR ATTORNEY MUST GO TO THE COURT WEBSITE AND FOLLOW THE INSTRUCTIONS AT <https://ecf.tnmb.uscourts.gov>.**

If you need assistance with Electronic Filing, you may call the Bankruptcy Court at (615) 736-5584. You may also visit the Bankruptcy Court in person at 701 Broadway, First Floor, Nashville, TN (Monday-Friday, 8 a.m. to 4 p.m.)

2. **Your response must state that the deadline for filing responses is September 8, 2008, the date of the scheduled hearing is September 9, 2008, and that the Motion to which you are responding is the *Corrected Motion to Appoint Examiner – Emergency Hearing Requested*.**

3. You must serve your response or objection by electronic service through the Electronic Filing System described above. You must also mail a copy of your response or objection to the undersigned and to any party in interest required to receive notice under the applicable rules of Court who does not receive electronic notice.

If a timely response is filed before the deadline stated above, the hearing will be held at the time and place indicated. **THERE WILL BE NO FURTHER NOTICE OF THE HEARING DATE.** You may check whether a timely response has been filed by calling the Clerk's office at (615) 736-5584 or viewing the case on the Court's web site at www.tnmb.uscourts.gov. If you received this notice by mail, you may have three additional days in which to file a timely response under Rule 9006(f) of the Federal Rules of Bankruptcy Procedure.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the Motion and may enter the attached order granting that relief.

Date: August 31, 2008

Signature: /s/ Madison L. Martin
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**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE**

IN RE:)	
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SOUTHEAST WAFFLES, LLC,)	CASE NO. 08-07552
)	CHAPTER 11
Debtor.)	
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**CORRECTED MOTION TO APPOINT EXAMINER – EMERGENCY HEARING
REQUESTED**

The purpose of this Corrected Motion is to correct and withdraw certain erroneous allegations made in paragraph 8 of the original Motion. Please see paragraph 8 for those corrections and withdrawals.

SunTrust Bank (“SunTrust”) requests that this Court order the appointment of an examiner pursuant to 11 U.S.C. § 1104. SunTrust requests an emergency hearing on this motion based on the facts set forth herein. In support of this Motion, SunTrust will show as follows:

FACTS

1. Southeast Waffles, LLC (the “Debtor”) filed this Chapter 11 case on August 25, 2008 (the “Petition Date”). No creditor’s committee has been appointed. No Chapter 11 trustee or examiner has been appointed.

2. The Debtor operates 113 Waffle House® restaurants in Tennessee, Alabama, Mississippi and Kentucky. On information and belief, it is the largest Waffle House franchisee.

3. The Debtor has approximately 2100 hourly employees, approximately 120 salaried employees and approximately 12 employees who work at the Debtor's corporate headquarters in Nashville, Tennessee.

4. From approximately 1999 until March, 2007, SunTrust was the Debtor's principal lender. In approximately 2003, SunTrust's loan to the Debtor was assigned to SunTrust's special assets department as a result of the Debtor's financial performance. *See* Declaration of Byron P. Kurtgis dated August 29, 2008 ("Kurtgis Declaration") filed simultaneously herewith, at ¶ 2. Debtor moved the loan to First Bank in March, 2007, but retained certain treasury management functions at SunTrust, and kept open certain deposit accounts. *Id.* at ¶ 3.

5. According to the Debtor's Managing Member: "Approximately two weeks before the Petition Date, the employee in charge of the Debtor's accounting abruptly resigned. Since that time, the Debtor has been investigating certain accounting irregularities related to its financial situation, but more time and effort will be required to complete this work." *See* Amended Declaration of James L. Shaub, II in Support of First Day Motions at ¶ 11 (Docket No. 14) (the "Shaub Declaration").

6. The Shaub Declaration does not even point to the tip of the iceberg that makes up the "accounting irregularities" plaguing this Debtor, much of which remain unknown to SunTrust. What SunTrust does know, or believes to be true based on what has been said so far, is that:

- a) In early August, 2008, SunTrust discovered that it had been the victim of a massive check kiting scheme perpetrated over several months by the Debtor using the Debtor's accounts at SunTrust and First Bank. The

scheme has resulted in a loss to SunTrust of approximately \$3.7 million.
See Kurtgis Declaration at ¶ 4.

- b) SunTrust's loss is attributable entirely to checks written by the Debtor to itself on one or more of the Debtor's accounts at SunTrust and First Bank. The loss includes items drawn on one of the Debtor's accounts at SunTrust, and other items drawn a Debtor's accounts at First Bank, which were deposited into one of the Debtor's accounts at SunTrust, and later returned by First Bank. *See Kurtgis Declaration at ¶ 5.*
- c) After discovering the scheme, SunTrust immediately contacted representatives of the Debtor and First Bank in an effort to investigate the kite activity, determine its duration, who was involved, the purpose of the scheme, and the use of the funds generated by the activity. *See Kurtgis Declaration at ¶ 6.*
- d) On August 13, 2008, the Debtor's chief manager, James L. Shaub, II., advised SunTrust that he had discovered that the Debtor's bookkeeper, Becky Sullivan, had been involved in a "circular kite." *See Kurtgis Declaration at ¶ 7.*

7. According to the Debtor's franchisor, the Debtor's expenses have been and continue to be grossly excessive in relation to industry standards, due in part to extravagant payments to Debtor's principals.

8. In its original Motion, counsel for SunTrust stated at paragraph 8:

"A few weeks before this case was filed, James Shaub, the Debtor's Managing Member, conveyed his interest in his Belle Meade residence to his wife and placed an additional \$1.6 million deed of trust on that residence."

The above paragraph is erroneous and it is hereby withdrawn. The real estate records do not reflect a transfer by Mr. Shaub to Mrs. Shaub but instead reflect that Mrs. Shaub has had sole title to the residence since 1999¹, the date the home was originally purchased. The real estate records also reflect that on July 28, 2008, a deed of trust securing \$1,625,000 was filed on the residence in favor of Nashville Bank and Trust Company and that on July 29, 2008, SunTrust Bank released its prior deed of trust on the residence dated April 8, 2004, in the original principal amount of \$1,870,321.65. Counsel for SunTrust has been advised that all or substantially all of the proceeds of a loan made by Nashville Bank and Trust Company secured by the deed of trust recorded on July 28, 2008 were used to pay off the SunTrust loan secured by the deed of trust released on July 29, 2008.

9. Waffle House, Inc., the franchisor, conducted its own investigation in August 2008 and on that basis issued a franchise termination letter on the alleged basis of insolvency. Waffle House has not shared all of its findings, but it has agreed to share them with an examiner.

10. On information and belief, the Debtor has failed on at least three occasions over the past three years to withhold and pay trust fund taxes totaling million of dollars to

¹ Specifically, the General Warranty Deed recorded on September 24, 1999 at Book 11674, Page 666-69 in the Register's Office for Davidson County reflects that the 1103 Belle Meade Blvd residence was conveyed to "Anna McIntyre Shaub, married." SunTrust reserves its rights as to the legal effect of that conveyance and does not intend to prejudice any other person's rights as to the legal effect of that conveyance.

the federal government. Monies generated from the check kiting scheme may have been used in part to pay the IRS. As of the Petition Date, notwithstanding recent payments to the IRS from check kiting monies, the Debtor owes the IRS over \$1 million for failure to pay trust fund taxes.

11. The Debtor's list of its twenty (20) largest creditors indicates that Treetop Enterprises, Inc. n/k/a Ezell Holdings, LLC ("Treetop") has an unsecured claim in the approximate amount of **\$4,574,523.04**, which, on information and belief, represents purchase money debt for the restaurant business the Debtor bought from Treetop in 1999. SunTrust is owed \$3.7 million, unsecured, as a result of the kiting scheme. *See List of Creditors Holding 20 Largest Unsecured Claims*, at Docket No. 5.

12. As a result of these "accounting irregularities," creditors and parties in interest in this case cannot determine how the Debtor has actually performed or how it can perform under the right circumstance.

BASIS FOR RELIEF

13. Section 1104 of the Bankruptcy Code governs the appointment of an examiner in Chapter 11 proceedings and provides in pertinent part as follows:

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if —

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

(d) If the court orders the appointment of a trustee or examiner . . . then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as . . . examiner . . . in the case.

11 U.S.C. §§ 1104 (c) and (d).

14. 11 U.S.C. § 1104(a) provides that the Court shall appoint a trustee or examiner for cause, including incompetence or gross mismanagement. Under the plain language of § 1106(b), the court can appoint an examiner and empower the examiner to perform any duties of the trustee or debtor-in-possession. Section 1106(b) states:

An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor-in-possession not to perform.

As one commentator describes it:

In addition to investigative duties, an examiner is required to perform any other duties of a trustee that the court orders the debtor in possession not to perform, except to the extent the court orders otherwise. It is also “within the court’s discretion to give the examiner additional duties as the circumstances warrant.” Thus examiners have fulfilled expanded or specialized roles in various cases In some instances courts have appointed examiners with expanded powers in order to avoid some of the consequences resulting from the appointment of a trustee, including, for example, displacement of the debtor’s management. (citations omitted)

4 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d § 79:24 (Clark, Boardman, Callaghan 1997).

15. The appointment of an examiner is mandatory if, as appears to be the case here, the requirements of Section 1104(c)(2) have been met. *Morgenstern v. Revco D.S., Inc.* (*In re Revco D.S., Inc.*), 898 F.2d 498, 500-01 (6th Cir. 1990). It is also appropriate to appoint an examiner when there has been an unexplained loss of assets and possible

fraudulent conveyances or a deficiency in the debtor's operating reports. *In re Gilman Services, Inc.*, 46 B.R. 322, 327 (Bankr. D. Mass. 1985).

16. An examiner's statutory role is to investigate "any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management if the debtor." 11 U.S.C. § 1104(b); *In re Gilman*, 46 B.R. at 327; *In re Bradlees Stores*, 209 B.R. at 39 ("[t]he main purpose of an examiner ... is primarily investigative"). The Bankruptcy Code further provides for the duties of an examiner upon appointment. In pertinent part, Section 1106 of the Bankruptcy Code provides that "[a]n examiner appointed under section 1104(d) of this title shall perform the duties specified in [11 U.S.C. § 1106(a)](3) and (4)" 11 U.S.C. § 1106(b). Pursuant to this cross-reference, Section 1106(a)(3) accordingly provides in effect that "except to the extent that the court orders otherwise, an examiner shall investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan." 11 U.S.C. § 1106(a)(3).

17. An examiner may also employ professionals to assist the examiner in carrying out its duties under certain facts and circumstances. As set forth above, although the Bankruptcy Code does not expressly authorize an examiner to employ professionals, the size and complexity of the examiner's investigation may warrant the examiner employing such professionals. *See Southmark Corp. v. Southmark Personal Storage, Inc.*, 113 B.R. 280 (Bankr. N.D. Tex. 1990). In this case, it would be appropriate for an

examiner to have the power to conduct Rule 2004 examinations and to issue subpoenas as necessary or appropriate.

RELIEF SOUGHT

18. SunTrust requests the Court to order an appointment of an examiner and charge the examiner with the following responsibilities:

(a) Investigate the kite activity, determining its duration, who was involved, the purpose of the scheme, and the use of funds generated by the activity;

(b) Review the operating history of the Debtor with any eye toward developing historical EBITDA, comparing actual expenditures with appropriate expenditures to see what the Debtor should have been generating as net income;

(c) Develop a pro forma (with some input from the franchisor) showing what type of net income the Debtor can generate based on models in the industry;

(d) Determine actual claims against the company and actual claims by the company against insiders and affiliates; and

(e) Other examinations as instructed by the Court.

BASIS FOR EMERGENCY HEARING

19. SunTrust requests an emergency hearing on this Motion on Tuesday, **September 9, 2008 at 9:00 a.m.**, same time as cash collateral hearing.

SunTrust estimates that the time required for the hearing will be between one and two hours. An emergency hearing is necessary because in light of the Debtor's pre-petition history, creditors and parties in interest need to know quickly what has transpired and who is responsible in order to make decisions in this case necessary to protect the estate and the going concern value of the business. If the Court orders the appointment of an

examiner on September 9th, then some time will be required before the U.S. Trustee appoints the examiner. The examiner will need time to conduct an investigation.

THEREFORE, SunTrust moves the Court to set an Emergency Hearing on this Motion, and upon hearing the Motion, to enter an Order directing the appointment of an examiner with responsibilities as set forth herein.

Respectfully submitted,

/s/ Madison L. Martin

Robert C. Goodrich, Jr. (BPR No. 10454)

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**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE**

IN RE:)	
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SOUTHEAST WAFFLES, LLC,)	CASE NO. 08-07552
)	CHAPTER 11
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**ORDER DIRECTING APPOINTMENT OF EXAMINER
UNDER 11 U.S.C. §§ 1104(C) AND 1106**

This matter came before this Court on the upon the *Motion to Appoint Examiner – Emergency Hearing Requested* filed on behalf of SunTrust Bank on August 29, 2008 (the “Examiner Motion”). The Court having considered the Examiner Motion pursuant to 11 U.S.C. §§ 1104(c) and 1106, and it appearing to the Court that adequate notice has been given; and the Court having determined that the legal and factual bases set forth in the Examiner Motion establish that the appointment of an examiner is mandatory or is otherwise appropriate in this case;

IT IS THEREFORE ORDERED THAT:

1. The Examiner Motion shall be and is hereby GRANTED to the extent set forth herein;
2. An examiner (the “Examiner”) shall be appointed in accordance with 11 U.S.C. § 1104(c)(2) forthwith; and

3. The scope of the investigation proposed in the Examiner Motion is hereby approved; and
4. This order shall not prejudice any party's right to ask the Court to assign specific additional duties to the Examiner at any time; and
5. the Court shall retain jurisdiction over any matters arising from or relating to the implementation or interpretation of this Order .

This order was signed and entered electronically as indicated at the top of the first page.

APPROVED FOR ENTRY:

/s/ Madison L. Martin

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2008, a copy of the foregoing *Corrected Motion to Appoint Examiner – Emergency Hearing Requested*, and the proposed *Order Directing Appointment of Examiner Under 11 U.S.C. §§ 1104(c) and 1106* was filed electronically with the Clerk’s office and served on all parties accepting electronic service through the CM/ECF system. Parties may also access this filing through the Court’s ECF system.

/s/Madison L. Martin

Madison L. Martin