

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**  
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In re:

Procom America, LLC,  
  
Debtor.

Case No.: 8:20-bk-03522-MGW  
Chapter 7

**PETER GAAL’S RESPONSE IN OPPOSITION TO TRUSTEE’S  
MOTION TO EXTEND DEADLINE TO COMMENCE AVOIDANCE ACTION**

Peter Gaal (“Gaal”), a citizen and resident of Hungary, by and through his undersigned counsel, specially appears<sup>1</sup> for the limited purpose of opposing the Trustee’s Motion to Extend Deadline to Commence Avoidance Actions (Doc. 348) (the “Motion”) to the extent that it pertains to extending the time for bringing avoidance actions against Gaal, and states as follows:

**I. Introduction**

1. The Trustee’s Motion seeks a blanket nine month extension of the Section 546 deadline for the Trustee to file all avoidance actions. The legal basis asserted in the Motion for the requested extension is that the Trustee requires additional time to investigate transfers made to Gaal “and his related foreign entities.”

2. As discussed more fully below, all transfers to Gaal and any other affiliates of the Debtor were fully disclosed in the Debtor’s bankruptcy schedules, and the Trustee has been in possession since the inception of this case of financial records of the Debtor from which the Trustee can verify the accuracy and completeness of the scheduled transfers to insiders.

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<sup>1</sup> Gaal reserves all rights to contest jurisdiction of the Bankruptcy Court and personal jurisdiction and is appearing specially for the sole purpose of objecting to the Motion.

3. Accordingly, the Motion fails to state a valid basis for extending the deadline for filing avoidance actions as to Gaal.

## **II. Prior Disclosures**

4. Although this case was commenced as an involuntary bankruptcy, the Debtor has fully performed its duties under the Bankruptcy Code to cooperate with the Trustee in providing documents and information concerning the Debtor's bankruptcy estate.

5. Shortly after the filing of the case, the Trustee filed his Emergency Motion to Compel Turnover (Doc. 19) (the "Turnover Motion"), which sought turnover of a broad range of financial records of the Debtor, including "all books and records" of the Debtor. (Doc. 19, ¶ 12). In response to the Turnover Motion, complete bank account records for the Debtor and all accounting records were provided to the Trustee. At the final hearing on the Turnover Motion on June 11, 2020, Trustee's counsel advised the Court that the Debtor had substantially complied with the Turnover Motion. The fee application for special counsel to the Trustee in this case (Doc. 160) states:

10. At the June 11, 2020 hearing on the Motion to Compel Turnover, the parties confirmed substantial compliance with the Court's interim orders on the Motion to Compel Turnover and confirmed that no further ruling or order was required on the Motion to Compel Turnover.

11. Following the June 11, 2020 hearing, the Debtor and its principal Peter Gaal provided additional documentation and temporary access to the Debtor's CRM software, which Walters Levine Lozano & DeGrave reviewed and delivered to the Chapter 7 Trustee.

(Doc. 160, ¶¶ 10 and 11.) The documents turned over include Debtor's Quickbooks and all bank statements for the Debtor. (Doc. 28).

6. Complete schedules (398 pages) were timely filed by the Debtor (Doc. 70). The schedules include a complete listing of all transfers from the Debtor to Gaal. (Doc. 70 at 322-

324). The Trustee asserted these fully disclosed transfers as a basis for seeking relief in subsequent motions. (Doc. 268, ¶ 8 and Ex. 2) (“Debtor’s transfers to insiders totaling \$10,264,672.88 in the one-year period preceding the Petition Date (see Exhibit 2 hereto) amply establish that the relief sought herein is necessary and appropriate”) and (“A copy of the Procom America, LLC Insider Payments And Transfers May 8, 2019 – May 8, 2020 document included with the Schedules at CM/ECF pp. 322 through 324 is attached hereto as Exhibit 2.”)); (Doc. 275 at 11) (“Gaal has attempted to abandon the Debtor in the United States and hide in Hungary with \$10,264,672.88 in transfers from the Debtor to him, Procom Consulting and Procom Investments KFT in the one year period preceding the petition date”).

7. Not only has the Trustee had possession of the Debtor’s paper files and computer records since the order for relief was entered, the Debtor’s outside accountant (Kevin Riggs) was interviewed for more than an hour by Trustee’s counsel on June 1, 2020 (Doc. 160-1 at 6), and Gaal appeared and answered all questions that were posed at the meeting of creditors on June 22, 2020 (Doc. 263-2). Gaal’s testimony at the creditors’ meeting included testimony confirming the transfers from the Debtor to Gaal that were disclosed in the schedules. (Doc. 263-2 at 17-19, 21-25).<sup>2</sup> The Trustee has also noticed the Rule 2004 examinations of the managers of the Debtor’s business, Debra Watkins and Nikkoletta Montgomery. (Docs. 139, 195.) The Debtor’s outside accountant and accounting firm, Kevin Riggs and Renaissance Consulting, have produced additional documentation (including Gaal’s personal tax returns), and Mr. Riggs has been examined under Rule 2004 concerning any transfers to Gaal or other insiders. (Doc. 310-1 at 120-134.)

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<sup>2</sup> Contrary to the Trustee’s assertion in the Motion, there was no “agreement” that Gaal would sit for a Rule 2004 examination. Gaal answered each and every question posed to him, with the exception of providing the personal cell phone number of a Hungarian employee of a non-debtor Hungarian affiliate (which is prohibited under applicable EU regulations). The transcript of the creditors’ meeting is 93 pages. (Doc. 263-2).

8. While the Trustee would clearly like to use a Rule 2004 “fishing expedition” to obtain post-judgment discovery concerning collectability and subsequent transferees before the Trustee files an avoidance complaint against Gaal as the initial transferee, this is not a valid basis for extending the deadline under Section 546.

9. To the contrary, given the robust financial discovery already provided to the Trustee, there is no basis for extending the deadline for filing avoidance actions against Gaal.

### **III. Argument**

#### **A. Enlarging the Statute of Limitations Is Not the Norm**

10. Enlarging a statute of limitations is discretionary rather than automatic and is not the norm. *See Jackson v. Astrue*, 506 F. 3d 1349, 1354 (11th Cir. 2007) (“This result should not be surprising in view of the deference congressionally mandated periods of limitation demand.”) (*citing Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (“Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.”))).

11. As a general rule, statutes of limitation (including 11 U.S.C. § 546) are strictly construed to provide certainty and fairness to potential defendants. *In re Lyons*, 130 B.R. 272, 281 (Bankr. N.D. Ill. 1991) (avoidance action time barred under section 546(a)); *Wiscovitch-Rentas v. Super Roof & General Contractor*, 405 B.R. 397, 400-01 (Bankr. D. P.R. 2009) (same); *see also Burnett v. New York Centr. R.R. Co.*, 380 U.S. 424, 428 (1965) (“Statutes of limitations are primarily designed to assure fairness to defendants. ... ‘The theory is that ... the right to be free of stale claims in time comes to prevail over the right to prosecute them.’”); *Dedmon v. Falls Products Inc.*, 299 F. 2d 173, 178 (5th Cir. 1962) (A statute of limitations “is a statute of repose, designed to compel suit within a reasonable time in the interest of society, serving to prevent perjuries,

frauds, and mistakes. Its purpose is to force a litigant to get moving, and to get moving fast – to pursue every avenue of relief promptly, while the evidence is fresh and the witnesses available.”).

**B. Limitations on Bankruptcy Court’s Ability to Enlarge Section 546(a) Limitations Period**

12. A bankruptcy court has discretion to enlarge the section 546(a) two year limitation period to initiate avoidance actions in appropriate circumstances. *See IBT International, Inc. v. Northern (In re International Administrative Services, Inc.)*, 408 F.3d 689, 699-702 (11th Cir. 2005) (“*IAS*”). The bankruptcy court may either (i) consider equitable principles in evaluating whether to toll the period, or (ii) extend the period for cause pursuant to Bankruptcy Rule of Procedure 9006(b) (“Rule 9006(b)”). *See id.*

13. While *IAS* has been cited as holding that the deadline for filing avoidance actions in Section 546 may be extended in advance under Bankruptcy Rule 9006 "for cause," some Bankruptcy Judges have interpreted *IAS* to hold only that equitable tolling may be a basis for extending the section 546 deadline if an avoidance action defendant raises the 546 statute of limitations deadline as an affirmative defense. *See In re Walnut Hill, Inc.*, 2018 WL 2672242, at \*2 (Bankr. D. Conn. June 1, 2018) (rejecting argument that Rule 9006 may be used to extend the deadline in Section 546) ("Upon closer examination, the holding of the Circuit Court [in *IAS*] relied upon the doctrine of equitable tolling, which had been interposed after a statute of limitations defense was asserted in a pending adversary proceeding.").

14. The reported decisions, including the Eleventh Circuit in *IAS* and this Court in *In re Fundamental Long Term Care, Inc.*, 501 B.R. 784 (Bankr. M.D. Fla. 2013) (“*Fundamental*”), focus and rely on equitable tolling (rather than Rule 9006(b)) to enlarge section 546(a)’s limitation period. Equitable tolling is to be used sparingly<sup>3</sup> and is appropriate “[w]here, despite the exercise

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<sup>3</sup> *See Wiscovitch-Rentas*, 405 B.R. at 401.

of due diligence, a trustee fails to timely bring an avoidance action due to fraud or extraordinary circumstances beyond the trustee's control ...” *IAS*, 408 F.3d at 700 (citations omitted). The two situations where it is appropriate to equitably toll the section 546(a) limitations period involve either (1) active fraud [active concealment] which consists of “affirmative acts or representations calculated to, and in fact do, prevent the discovery of the cause of action”; or (2) “negligent” fraud [negligent concealment] wherein the defendant does not actively conceal the fraud, but the plaintiff, acting with due diligence, fails to discover the fraud. *Id.* at 701–02.

15. Here, the Trustee has failed to allege a valid basis for extending the Section 546 avoidance action deadline as to Gaal under either an equitable tolling or “cause” analysis.

**C. There Is No Basis to Equitably Toll Section 546(a)’s Limitations Period.**

16. There is no basis to equitably toll section 546(a)’s time period to initiate avoidance actions where, as here, there has been no concealment [whether active or negligent]. To the contrary, the facts of this case are markedly distinguishable from the facts in *IAS* and *Fundamental*. Both *IAS* and *Fundamental* involved convoluted webs of entities and a multitude of transactions that the Trustee was required to unravel in order to analyze and allege a valid fraudulent transfer claim. By contrast, this case involves disclosed and documented transfers of cash to identified initial transferees.

17. In *IAS*, the debtor filed a voluntary bankruptcy only after pursuing a “purge and plunder scheme” by creating dozens of foreign and domestic transferees for the sole purpose of hiding assets. *IAS*, 408 F.3d at 696. After a trustee was appointed, the targeted entities “delayed document production, withheld discovery responses, and simply ‘lost’ records of the asset transfers.” *Id.* The debtor and transferee “went to extreme lengths to hide their activities,” with the result that “it took months to assemble and ascertain the different mechanisms ... behind the

IAS transfers.” *Id.* at 702. Under those circumstances, the Eleventh Circuit held it appropriate to enlarge the period to commence an avoidance action against those transferees, *id.* at 699, and ruled that the trustee had demonstrated adequate basis for such an extension due to the transferee’s concealment of the transactions. *See id.* at 702. Indeed, the court went further and held that the trustee could demonstrate both due diligence and “extraordinary circumstances” that had precluded an earlier filing. *See id.* at 700-01; *see also Astrue*, 506 F. 3d at 1354 (describing *IAS* as applying an “extraordinary circumstances” standard to tolling the statute of limitations set forth in 11 U.S.C. § 546(a)).

18. Similarly, *Fundamental* involved a complicated tangle of transactions and a defunct debtor with no books and records. In *Fundamental*, seemingly endless and wide ranging discovery disputes with an assortment of parties impeded and delayed the trustee’s efforts to obtain the **debtor’s** books and records and identify the **debtor’s** assets (including potential causes of action on behalf of the estate). *Id.* at 786-87.

19. Here, unlike in *IAS* and *Fundamental*, there has been no concealment or delays in obtaining the Debtor’s books and records and no extraordinary circumstances that have impeded the Trustee’s investigation. On the contrary, all the transfers by the Debtor to Gaal were fully disclosed in the Debtor’s schedules, Gaal testified about the transfers at the meeting of creditors, and complete bank statements for the Debtor that show each and every transfer to Gaal were provided to the Trustee at the inception of the case. The Trustee has also obtained additional information about the transfers and testimony from the Debtor’s accountant. If the Trustee truly believes there is a purported avoidance action claim against Gaal (as his counsel has made repeated reference to at multiple hearings), he is already in a position to assert that claim and there is no need to enlarge the limitation period. Additionally, unlike in *Fundamental* where the potential

targets were already defendants in a fraudulent transfer and alter ego lawsuit, Gaal will suffer real harm because he, as a potential target, should not have to wait in limbo longer than Section 546's prescribed limitation period to find out if the Trustee is going to seek to avoid the disclosed transfers that Gaal admittedly received from the Debtor.

**D. There Is No Cause to Extend Section 546(a)'s Limitations Period Under Rule 9006(b)**

20. Assuming Rule 9006 provides a valid basis for extending the Section 546 deadline, the Trustee cannot demonstrate cause under Rule 9006(b) to warrant extending the time period to initiate avoidance actions against Gaal. Rule 9006(b) does not grant a litigant an extension as a matter of right, but allows extensions "for cause shown." Fed. R. Bankr. P. 9006(b). No extension is warranted if a litigant, without adequate justification, fails to timely pursue its claims. *See In re Carlson*, 380 B.R. 906 (Bankr. S.D. Fla. 2008) (denying extensions pursuant to Bankruptcy Rules 4003(b) and 4004(b), which allow extensions "for cause").

21. Cause does not exist to extend the avoidance action deadline against Gaal in this case. As explained in detail above, there has been no concealment; rather, there has been full and complete disclosure about the transfers by the Debtor to Gaal and the Trustee has not provided an adequate justification for enlarging the limitations period. The Trustee has long ago identified Gaal as a target and, with the information already provided, is in a position to bring his avoidance action claim if he indeed believes it to be viable. In fact, at the hearing held on January 25, 2022, counsel for the Trustee acknowledged that the Trustee had sufficient information to prepare an avoidance complaint against Gaal.

**E. Conclusion**

22. In summary, regardless of the standard to be applied in ruling on the requested extension, the Trustee is not entitled to the extension. Unlike *IAS* and *Fundamental*, which

involved a complicated web of transactions and transfers, the transfers to Gaal and other initial transferees<sup>4</sup> in this case are disclosed transfers of money by the Debtor that are easily discernible from the Debtor's books and records which have been in the Trustee's possession since the inception of this case.

23. Because there is no basis to extend or toll the statutory time period to initiate avoidance actions against Gaal under Section 546, the Motion should be denied as it relates to Gaal.

Dated: February 3, 2022.

/s/ Lynn Welter Sherman  
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*Counsel for Peter Gaal*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 3, 2022 a true and correct copy of the above and foregoing has been electronically filed with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to all CM/ECF registered recipients.

/s/ Lynn Welter Sherman  
Lynn Welter Sherman

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<sup>4</sup> 11 U.S.C. § 550(f) provides the deadline for recovering avoided transfers from subsequent transferees.