
In re: : UNITED STATES BANKRUPTCY COURT
: FOR THE DISTRICT OF NEW JERSEY
SAAWAN FOOD : CHAPTER 11
DISTRIBUTORS CORP. d/b/a :
MET FOOD MARKET, : Case No.: 98-42395 (NLW)
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: :
Debtor. : Hearing Date: _____, 1998
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**BRIEF IN SUPPORT OF MOTION OF DEBTOR FOR
AUTHORIZATION TO USE CASH COLLATERAL**

On the Brief:
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STATEMENT OF FACTS

All of the following facts are set forth in the supporting Application of the Debtor. For the convenience of the Court and other parties-in-interest, the Debtor repeats and incorporates by the entirety of its Application below.

The Debtor is a family owned business and operates a 8000 square foot retail supermarket for the benefit of the general public. The Debtor filed the within Chapter 11 proceeding on September 29, 1998 (the "Petition Date"). On the same day, the Court entered a Certificate of Retention of Debtor-In-Possession.

As set forth in its Chapter 11 Petition, the Debtor has three (3) secured creditors; namely, Habib American Bank, PRDT, Inc., and White Rose Corporation. The total of secured debt is approximately \$432,000.00.

Prior to the Petition Date, on or about May 12, 1998, the Debtor and its principals entered into a contract (the "Purchase Contract") with PRDT, Inc. ("PRDT") and its principal, John Manetas ("Manetas") to purchase the store now occupied by the Debtor for the sum of \$350,000.00 plus the actual cost of inventory. This sale also included a New Jersey liquor license, stock in trade, fixtures, equipment, inventory, etc. A copy of the Contract is annexed as Exhibit A to the Debtor's supporting Application submitted herewith. The inventory was subsequently valued by PRDT at \$65,000.00. After the Debtor took possession of the store, however, it discovered that a substantial portion of this inventory was already expired or closing to being expired. Consequently, most of this inventory could not be sold and was discarded. To date, the Debtor has not received the liquor license from PRDT.

Pursuant to the Purchase Contract, the Debtor executed two (2) promissory notes to PRDT; the first note for \$238,000.00 payable at 8.75% interest per annum, payable in one hundred twenty (120) equal installments of \$2,982.78 monthly; and the second note in the principal amount of \$65,000.00 for the inventory, payable in three (3) equal and

consecutive monthly installments of \$21,666.67 on June 30, 1998, July 30, 1998 and August 30, 1998. Copies of both notes are collectively annexed as Exhibit B to the Debtor's Application. Each note is purportedly secured by a security interest upon the Debtor's fixtures, equipment, stock in trade, and all other goods thereafter acquired. Each of these notes are personally guaranteed by the Debtor's principals.

On or about May 28, 1998, the Debtor entered into a lease with Manetas, who is the owner of the premises now occupied by the Debtor, for a term of ten (10) years at the monthly rental of \$4,200.00 for years 1-5, and \$4,410.00 for years 6-10. The Debtor's principals also personally guaranteed the Debtor's leasehold obligations with Manetas. A copy of the lease is annexed as Exhibit C to the Debtor's Application. Including real estate taxes and insurance, the Debtor's is currently paying \$5999.00 per month for its premises.

Prior to the Petition Date, in April 1998 the Debtor executed a series of loan documents to Habib American Bank, pursuant to which the Debtor received the sum of \$125,000.00 at 10.50% interest payable in sixty (60) monthly installments of \$2,687.00. This loan was personally guaranteed by the Debtor's President, Syed M. Rizvi. Pursuant to the loan document captioned "General Loan and Security Agreement", a copy of which is attached as Exhibit D to the Debtor's Application, Habib purports to hold a security interest in the Debtor's cash collateral.¹ The Debtor is uncertain which creditor has the superior

¹ Pursuant to Section 1 of the General Loan and Security Agreement, the collateral which is purportedly subject to Habib American Bank's security interest is defined as follows:

The term "Collateral" shall mean the following property of the Borrower, whether now or hereafter existing or now owned or hereafter owned or hereafter acquired and wherever located, of every kind and description: all personal property and fixtures, including but not limited to, inventory, equipment, goods, accounts (including, but not limited to, factored accounts assigned to the Bank), documents and the goods covered thereby, chattel paper, instruments, notes, drafts, acceptances, securities, policies, and certificates of insurance, contract rights, general intangibles, patents, trademarks, the balance of every deposit account of the Borrower with the Bank and any other claim of

perfected security interest in its cash collateral; PRDT or Habib American Bank? (A UCC search has been ordered by Debtor's counsel, but has not been received as of this date).

On or about June 1, 1998, the Debtor executed a Collateral Assignment of Lease and Conditional Assumption ("Collateral Assignment") in favor of White Rose Food Corp. ("White Rose") in consideration for White Rose's agreement to extend credit to the Debtor with regard to the sale and delivery of certain food products. Under the Collateral Assignment, the Debtor assigned all of its right, title and interest as a tenant under its commercial lease with Manetas. A copy of the Collateral Assignment is annexed as Exhibit E to the Debtor's Application. On or about June 3, 1998, the Debtor also received a license from White Rose to use the name "MET." A copy of this License is annexed as Exhibit F to the Debtor's Application.

Prior to the Petition Date, on or about September 4, 1998 PRDT and its principal Manetas filed suit against the Debtor based on an alleged default under the Purchase Contract and corresponding promissory notes. That suit is captioned *Manetas, et al., vs. Saawan Food Distributors Corp., et al.*, Superior Court of New Jersey, Law Division, Bergen County, Docket No.: L-8274-98. On the same date, Manetas also filed a complaint to evict the Debtor from his premises. The eviction action is captioned *Manetas vs. Saawan Food Distributors Corp.*, Superior Court of New Jersey, Law Division, Special Civil Part, Landlord/Tenant.

In addition, prior to the Petition Date White Rose filed suit against the Debtor by Order to Show Cause seeking the issuance of a writ of replevin with respect to certain

the Borrower against the Bank, monies, credits, claims, demands, rights and interests of the Borrower, and all other property of the Borrower, tangible or intangible, and shall include all substitutions, replacements, additions and accessions thereto and therefor and the proceeds and ducts of all of the foregoing, whether the same be cash, accounts,

inventory, and possession of the Debtor's premises in accordance with the Collateral Assignment. That action is captioned *White Rose Food Corp. vs. Saawan Food Distributors Corp., et al.*, Superior Court of New Jersey, Law Division, Middlesex County, Docket No.: L-7428-98. On August 18, 1998, the Debtor, with its back against the wall, entered into a Consent Order with White Rose which required the Debtor to, among other things, pay White Rose the sum of \$750.00 per day in cash to reduce its indebtedness to White Rose. A copy of this Consent Order is annexed as Exhibit G to the Debtor's Application.

As set forth in the operating budget annexed as Exhibit H to the Debtor's Application, if the Debtor were operating at full capacity (i.e. a full inventory) its monthly operating expenses would total approximately \$123,000.00. This operating budget includes certain items which, because of the pre-petition dispute with White Rose, the Debtor is not currently able to put on its shelves. This includes dairy products, frozen foods, paper products, plastic products, coffee, tea, detergents, soaps, cereals, rice, condiments, seasonings, baby food and diapers, and pet supplies. The monthly expenses for these products totals \$23,200.00. If the Debtor's business operations were to continue "status quo", the Debtor needs approximately \$100,000.00 to meet its expenses for the month of October. This figure is obtained by subtracting \$23,200.00 from \$123,000.00.

In the next several weeks, the Debtor expects to secure a new supplier for these products, the sale of which produces a 33 percent profit for the Debtor. The Debtor is currently negotiating with two (2) new suppliers for the purchase and delivery of dairy products, frozen foods and grocery items. The Debtor understands that any contract with a new supplier would be subject to Court approval on notice to its creditors.

chattel paper, instruments, notes , drafts, acceptances, contract rights or general intangibles.

Based on the Debtor's brief history of operations, when the Debtor was operating at full capacity its gross sale receipts were \$31,500/week or \$126,000.00/month. In the first two (2) months of its business, June and July 1998, the Debtor averaged \$126,000.00 in monthly sales. Due to White Rose's refusal to continue supplying the Debtor with dairy products, frozen foods and grocery items, monthly sales, and White Rose's refusal to permit the Debtor to continue selling existing inventory, the Debtor suffered a substantial decline in its business. For the month of August, gross sale receipts decreased to \$98,000.00, and then to \$78,000.00 for the month of September. The drop in sales was also due to White Rose's refusal to provide the Debtor with sale circulars and window signs for their products. White Rose often ran weekly sales or "specials" on a number of items. A large part of the Debtor's business was generated by these weekly sales or specials. Without these weekly sales or specials, the Debtor's regular customers thought the store was going out of business.

With the holiday season readily approaching, the Debtor anticipates that daily and monthly revenues will exceed the pre-petition levels reached in June and July 1998 as soon as a new supplier is obtained for dairy products, frozen foods and grocery items. The Debtor projects gross sale receipts of between \$135,000.00 to \$140,000.00 for the months of November and December 1998. See Exhibit H hereto. For the month of October, if a new supplier is not found for dairy products, frozen foods and grocery items the Debtor expects to generate gross sale receipts of approximately \$79,000.00.

The Debtor currently employs sixteen (16) people. The Debtor's monthly payroll is \$15,200.00. The Debtor uses Paychex for its payroll, which is due this week. Pending a final hearing, the Debtor respectfully requests the Court to enter an Interim Order authorizing the use of a minimum of \$100,000.00 in cash collateral for the month of

October. Absent this relief, the Debtor respectfully submits that it will sustain irreparable harm. In fact, a large part of the Debtor's business is dedicated to providing delivery service to elderly residents in nearby areas who are physically unable to do their shopping at the store. Without the use of cash collateral, the Debtor will not be able to continue serving its elderly clientele.

LEGAL ARGUMENT

THE DEBTOR WILL SUSTAIN IRREPARABLE HARM UNLESS THE COURT PERMITS THE USE OF CASH COLLATERAL

The Bankruptcy Code is designed to accommodate dual purposes: on the one hand to provide the debtor with a “fresh start” and an opportunity to reorganize, and on the other, to maximize recovery for creditors while ensuring an equitable distribution to similarly situated creditors. *Crocker National Bank v. American Mariner Industries*, 734 F.2d 427, 431 (9th Cir. 1984). The Code provides a balancing of interests. Cash collateral may not be used without either: a) the consent of the creditor with a security interest in the cash collateral, or (b) an order from the court authorizing such use in accordance with the provisions of Section 363. *11 U.S.C. §363(c)(2)*.

Subsection (3) of §363 requires that the court prohibit or condition the use of cash collateral as is necessary to provide adequate protection of the secured party's interest. Cash collateral cannot be used if the expenditure is not related to the operation, care, maintenance and preservation of the bankruptcy estate. *See In re Morning Star Ranch Resorts*, 64 B.R. 818, 823 (Bankr. D.Colo. 1986)(“operation, care, preservation and maintenance of the estate are the only proper uses of cash collateral”)

As defined in the Code, the term “cash collateral” means “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products offspring, rents, or profits of property....” *11 U.S.C Section 363 (a)*.

In order to operate and pay its employees, landlords, utilities and suppliers, the Debtor herein must have cash. In this District, an Interim Order Authorizing Use of Cash

Collateral ("Interim Order") has been approved for use during the initial minimum fifteen (15) day period prescribed by *Fed. R. Bankr. P. 4001* pending a Final hearing. At a minimum, the Debtor respectfully requests entry of an Interim Order so as to be able to continue its business operations without interruption.

Section 361 of the Code lists three (3) non-exclusive methods of providing adequate protection: They are:

- (1) periodic cash payments to the secured creditor in an amount equal to the decrease in the creditor's interest in the property. *Section 361 (1)*.
- (2) an additional or replacement lien equal to the decrease in the creditor's interest in the property. *Section 361 (2)*.
- (3) any other relief, other than entitling the secured creditor to an administrative claim under *Section 503(b)(1)*, that will result in the realization of the "indubitable equivalent of the creditor's interest in the property. *Section 361(3)*.

It also has been held that a debtor can provide adequate protection by presenting a viable plan of reorganization which meets the debtor's statutory obligations to the secured creditor. *In re Antell, 155 B.R. 921 (Bankr. E.D.Pa. 1992)*.

The burden of proof is on the Debtor to show that the value of the secured creditors' collateral is protected and will not be diminished by the debtor's use of cash collateral. Conversely, the burden of proof is on each of the secured creditors with respect to the validity priority and extent of their security interest in the cash collateral. *11 U.S.C. 363(o)(1)*. Because cash collateral is generally regarded as the highest and best form of collateral, there is a high standard for providing adequate protection of the lender's interest. *3 Collier on Bankruptcy, Section 363.05 at 363-36 (15th ed. Revised 1996)*. See also *Freightliner Market Dev. Corp. v. Silver Wheel Freight Lines, Inc., 823 F. 2d 362, 368 (9th Cir.1987)*. Nonetheless, the Court should look to all of the collateral which secures the

creditor's claim in the context of an adequate protection hearing for the use of cash collateral. A secured creditor is not entitled to any particular collateral to satisfy its debt, but rather is ultimately entitled to receive the cash value of its secured claim. *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L. E. d. 2d 740 (1988).

CONCLUSION

Based on the supporting Application and testimony to be adduced at the hearing, the Debtor respectfully submits that it will be able to meet its burden of proof for the use of cash collateral. Accordingly, the Debtor respectfully requests entry of an Interim Order authorizing the use of cash collateral pending a final hearing. Absent this relief, the Debtor will be irreparably harmed.

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Attorneys for Debtor/Debtor-In-Possession

By: _____
Glenn R. Reiser

Dated: October ____, 1998