

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11
Case No. 16-12975 (SMB)

DUFOUR PASTRY KITCHENS INC.,

Debtor.

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**FINAL ORDER AUTHORIZING USE OF CASH
COLLATERAL BY DEBTOR PURSUANT TO 11 U.S.C. SECTION 363**

UPON the application (“Application”) of Dufour Pastry Kitchens, Inc., the above-captioned debtor and debtor-in-possession (the “Debtor”) which seeks authority to, inter alia, use cash collateral in which TD Bank, N.A. (“TD Bank”) has asserted perfected security interests pursuant to 11 U.S.C. Sections 363(c)(2) and 361 and Federal Rules of Bankruptcy Procedure 4001; and a hearing having been held on November 1, 2016 (the “First Interim Hearing”), and an Interim order having been entered on December 28, 2016; and a further interim hearing having been held on January 26, 2017 (the “Second Interim Hearing”), and a Second Interim order having been entered on January 31, 2017; and a final hearing on the Application having been held on May 16, 2017 (the “Final Hearing”), and it appearing that adequate notice of the Final Hearing having been given, no objections to the Application having been made, and upon the record taken at the Final Hearing, and all of the pleadings heretofore filed in this proceeding, it is hereby found and determined as follows:

A. On or about October 24, 2016 (the “Petition Date”) the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Code"), and has continued in possession of its property and the management of its business pursuant to 11 U.S.C. §§1107 and 1108.

B. As of the date hereof, the United States Trustee has not appointed an Official Creditors' Committee as provided for in Section 1102 of the Code. No trustee or examiner has been heretofore appointed in this proceeding.

C. For over thirty years, the Debtor, a woman-owned business, has made and sold premium frozen ready-to-bake puff pastry dough, tart shells, and hors d'oeuvres

D. The Debtor believes that on or about December 21, 2006, the Debtor entered into a U.S. Small Business Administration Note in favor of Commerce Bank N.A. ("Commerce"), (the "SBA Note") in which Commerce Bank extended credit to the Debtor in the original principal amount of \$670,000, with the total current approximate outstanding amount of \$250,000, at an interest rate equal to 10.75%.

E. The Debtor acknowledges that Commerce Bank filed a UCC-1 financing statement, a Continuation, and a Change in Organization's Name to "TD Bank, N.A. as successor by merger to Commerce Bank, N.A." with the New York Secretary of State which have been continued and have not lapsed.

F. As of the Petition Date, the Debtor believes that it was indebted to TD Bank in the approximate outstanding amount of \$250,000.

G. On March 19, 2014, US Foods, Inc. ("US Foods") filed a UCC-1 Financing Statement. However, the Debtor does not believe it executed any Note or Security Agreement in favor of US Foods. On January 26, 2016 US Foods filed a UCC-3 termination statement with the Secretary of the State of New York. US Foods therefore does not hold an enforceable or perfected security interest in the Debtor's assets and Cash Collateral (as defined below).

H. The use of the Debtor's personal property which potentially constitutes collateral of TD

Bank (the “Cash Collateral”) is essential to the continued preservation and maximization of the Debtor’s estate.

I. Continued use of the Cash Collateral on a final basis pending confirmation of a plan or dismissal or conversion of the Debtor’s Chapter 11 case is necessary to prevent immediate and irreparable harm to the Debtor’s estate in that without continued and final authorization to use the Cash Collateral, the Debtor’s ability to sustain its operations and meet its current necessary and integral business obligations will be impossible.

J. The value of Debtor’s estate will be maximized by the continuation of Debtor as a going business, and the use of the Cash Collateral is essential to such operation.

BASED UPON THE FOREGOING, it is hereby ORDERED as follows:

1. The Application is GRANTED on a final basis. Effective *nunc pro tunc* as of October 24, 2016 and continuing through and including either (a) confirmation of a plan or (b) conversion or dismissal of the Debtor’s Chapter 11 case (the “Final Period”), the Debtor is authorized to use the Cash Collateral on a final basis subject to the terms of this Order and in accordance with the budget annexed to the Application as Exhibit E, subject to a 10% variance or upon further consent of TD Bank or further order of this Court.

2. This Court has jurisdiction over these proceedings and the parties and property affected hereby pursuant to 28 U.S.C. §1334 and this is a “core” proceeding pursuant to 28 U.S.C. §157. Venue is proper in this Court pursuant to 28 U.S.C. §1408. Notice of relief sought herein was adequate and appropriate in the current circumstances of this Chapter 11 case as contemplated by 11 U.S.C. §102(1)(A) and Fed. R. Bankr. P. 4001(b)(2).

3. In addition to the existing rights and interests of TD Bank in the Cash Collateral

and for the purpose of adequately protecting them from Collateral Diminution,¹ TD Bank is hereby granted replacement liens ("Replacement Liens"), to the extent that said liens were valid, perfected and enforceable as of the Petition Date in the continuing order of priority of its pre-petition liens without determination herein as to the nature, extent and validity of said pre-petition liens and claims and to the extent Collateral Diminution occurs during the Chapter 11 case, subject to: (i) the claims of Chapter 11 professionals duly retained in the Chapter 11 case and to the extent awarded pursuant to Sections 330 or 331 of the Code; (ii) United States Trustee fees pursuant to 28 U.S.C. Section 1930, together with interest, if any, pursuant to 31 U.S.C. Section 3717 and any Clerk's filing fees; (iii) fees and expenses incurred in connection with any investigation of the nature, extent and validity of TD Bank's liens and security interests in an amount not to exceed \$10,000; and (iv) the fees and commissions of a hypothetical Chapter 7 trustee in an amount not to exceed \$10,000. In addition, the Replacement Liens granted hereby shall not attach to the proceeds of any recoveries of estate causes of action under Sections 542 through 553 of the Code.

4. Debtor shall, during the Final Period, as further adequate protection for the use of the Collateral, continue to make principal and interest payments under the SBA Note to TD Bank at the rate of \$4,000 per month.

5. All of the Debtor's expenditures shall be specifically accounted for in detailed monthly reports which the Debtor shall file with the Bankruptcy Court and provide a copy to the United States Trustee's Office, counsel for TD Bank and counsel to any official committee of unsecured creditors appointed in the Chapter 11 case no later than the twentieth (20th) of each

¹ For purposes of this Order, "Collateral Diminution" shall mean any diminution in value of TD Bank's interests in Debtor's property as of the Filing Date by reason of Debtor's use of Cash Collateral in

successive month.

6. The security interests and liens herein granted and regranted: (i) are and shall be in addition to all security interests, liens and rights of set-off existing in favor of TD Bank on the Petition Date; (ii) shall secure the payment of indebtedness to TD Bank in an amount equal to the aggregate Collateral used or consumed by the Debtor; and (iii) shall be deemed to be perfected without the necessity of any further action by TD Bank or the Debtor. Without limitation, therefore, TD Bank shall not be required to file financing statements or other documents in any jurisdiction or take any other action to validate or perfect the liens and security interests granted by this Order.

7. TD Bank reserve their right to hereafter request additional adequate protection and to object to the adequacy of the adequate protection granted herein.

8. The Debtor shall maintain all necessary insurance, including, without limitation, life, fire, hazard, comprehensive, public liability, and workmen's compensation as may be required, and obtain such additional insurance in an amount as is appropriate for the businesses in which the Debtor is engaged.

9. Notwithstanding anything to the contrary in this Order, the Debtor's authority to use the Collateral pursuant to this Order shall terminate immediately and automatically, (a) upon the fifth (5th) business day following the delivery of written notice to the Debtor, its bankruptcy counsel, counsel to any official committee of unsecured creditors or, if no committee has been appointed, then to the Debtor's 20 largest unsecured creditors, and counsel to the United States Trustee, by TD Bank of any breach or default by the Debtor of the terms and provision of this

accordance with this Order.

Order, unless the Debtor shall have cured such breach or default within such five (5) business day period, or (b) without notice of any kind upon the entry of an order of the Court providing for the dismissal or conversion of the Chapter 11 case to a Chapter 7 case or appointment of a trustee without the written consent of TD Bank.

10. The provisions of this Order shall remain in full force and effect unless modified or vacated by subsequent order of this Court with the consent of TD Bank and the Debtor. If any or all of the provisions of this Order are hereafter modified, vacated, or stayed by subsequent order of this Court or any other court, such stay, modification or vacation shall not affect the validity and enforceability of any lien, priority or benefit with respect to any indebtedness of the Debtor to TD Bank.

11. The findings contained in this Order are binding upon the Debtor and all parties in interest (including but not limited to any statutory committee subsequently appointed in the chapter 11 case), and any application of Collateral under this Order shall be infeasible, unless (a) an adversary proceeding or contested matter challenging the validity, enforceability or priority of the Collateral, the prepetition obligations to TD Bank (the "Prepetition Obligations"), the Replacement Liens, or the liens securing the Prepetition Obligations (the "Prepetition Liens") is properly commenced no later than sixty (60) days from the entry of this Order plus such additional time as the Court, for cause shown, authorizes, and (b) a final order is entered in favor of the plaintiff or movant in any such timely and properly filed adversary proceeding or contested matter. If no such adversary proceeding or contested matter is properly commenced as of such date, the Collateral and the Prepetition Obligations shall constitute allowed claims for all purposes in the Chapter 11 case and any subsequent Chapter 7 case, the Replacement Liens and

the Prepetition Liens shall be deemed legal, valid, binding, perfected, and the Collateral, the Prepetition Obligations, the Replacement Liens, and the Prepetition Liens shall not be subject to avoidance or any other similar challenge by any party in interest seeking to exercise the rights of the Debtor's estate, including, without limitation, and successor(s) thereto. If any such proceeding or contested matter is properly commenced, the Bankruptcy Court shall determine the validity, enforceability, and priority of the Collateral, the Prepetition Obligations, the Replacement Liens and the Prepetition Liens, but only with respect to and to the extent of the objections raised in such adversary proceeding or contested matter, and all other matters and objections not raised in such adversary proceeding or contested matter shall be deemed forever waived.

12. This Order shall be binding upon any subsequently appointed or elected trustee in a successor case under Chapter 7 of the Code.

13. The Bankruptcy Court shall retain jurisdiction with respect to all matters pertaining to this Order.

Dated: New York, New York
May 22nd, 2017

/s/ STUART M. BERNSTEIN
HONORABLE STUART M. BERNSTEIN
UNITED STATES BANKRUPTCY JUDGE