

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

In Re:)	
)	
SOUTHEAST WAFFLES, LLC)	Case No. 308-07552
d/b/a WAFFLE HOUSE,)	Chapter 11
)	Judge Lundin
Debtor.)	

**RESPONSE OF FIRSTBANK IN OPPOSITION
TO MOTION OF DEBTOR TO USE CASH COLLATERAL
(HEARING AT 9:00 A.M. ON SEPTEMBER 9, 2008)**

FirstBank files this Response in opposition to the Motion filed by the Debtor to use cash collateral and would show unto the Court as follows:

1. FirstBank is the primary creditor of the Debtor. FirstBank claims a lien in substantially all of the assets of Debtor other than leasehold estates. FirstBank is owed approximately \$12,000,000.00.

2. The Court authorized the interim use of cash collateral at a hearing held on August 26, 2008. The Court then scheduled an interim hearing on September 9, 2008 followed by an additional hearing on October 7, 2008.

3. Since the Court authorized the interim use of cash collateral on August 26, 2008, the Debtor has provided FirstBank virtually no information regarding the monies received by the Debtor or the expenditures made by the Debtor. During this period of time, the Debtor moved the bank account from which it paid accounts payable from FirstBank to Regions Bank. This further hampers FirstBank's ability to determine how its cash collateral has been used.

4. The only documentation received by FirstBank since the August 26, 2008 hearing is attached as Exhibit A. This purports to be a budget for the weeks of August 31 through October 4, 2008. This document is seriously deficient in that it is prepared on the cash basis method of accounting and provides no information as to expenses that have been incurred but are unpaid.

5. FirstBank requested more information, including accrual based financial statements and information regarding the unpaid taxes, largest creditors and compensation paid to Mr. Shaub, the principal of the Debtor. That information has not been provided. See response from counsel for the Debtor attached as Exhibit B.

6. The Internal Revenue Service filed a proof of claim on Friday, September 5, 2008, a copy of which is attached as Exhibit C. This proof of claim indicates that the Debtor failed to pay withholding taxes for the fourth quarter of 2006 and the first, second and third quarters of 2007. These obligations for unpaid taxes total over \$1,800,000.00, plus additional penalties of over \$900,000.00. The proof of claim further stated that the records of the IRS show that no returns were filed for the period ending June 30, 2008 and that no taxes were deposited for the quarter ending September 30, 2008. The Debtor disputes the failure to file returns and pay the taxes in 2008, but apparently does not dispute the fact that it failed to pay over \$1,800,000.00 of withholding taxes in 2006 and 2007.

7. The Debtor was engaged in a massive check-kiting scheme immediately prior to its filing Chapter 11. This check-kiting scheme resulted in a loss to SunTrust of approximately \$3,700,000.00. Based upon the massive check-kiting scheme and the Debtor's failure to pay withholding taxes in 2006 and 2007, FirstBank is very concerned about the integrity of the Debtor's records.

8. Despite the huge losses associated with the check-kiting scheme, to FirstBank's knowledge, the Debtor has taken no steps to recover any of the money that was obtained from SunTrust by the check-kiting scheme.

9. FirstBank believes that further use of cash collateral should be conditioned upon the Debtor hiring an outside management firm to manage the Debtor's affairs and finances. Until a party other than the current management is in charge of the Debtor's affairs, FirstBank and the other creditors are put at risk.

10. FirstBank requests that the use of cash collateral be conditioned upon the Debtor hiring Waffle House, Inc. as a manager. A draft of a proposed management contract, which is subject to further negotiation, is attached as Exhibit D.

11. FirstBank requests that the Court condition any further use of cash collateral on a prohibition of any further payments to James Shaub, the principal of the Debtor. Mr. Shaub has withdrawn over \$1,000,000.00 in each of the last two fiscal years, while at the same time the Debtor was not paying its withholding taxes and was engaged in a massive check-kiting scheme. Until all material facts related to the Debtor's financial affairs are determined, FirstBank believes it is not appropriate to allow Mr. Shaub to withdraw any more money from the Debtor.

WHEREFORE, FirstBank prays that the Court condition the use of cash collateral on the conditions set forth above and that FirstBank be granted such other and further relief as the Court finds to be just and proper.

Respectfully submitted,

NEAL & HARWELL, PLC

By: /s/ James R. Kelley

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by the Court's ECF system to all parties registered to receive electronic notice on this 8th day of September, 2008

/s/ James R. Kelley

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