

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF RHODE ISLAND

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In re:	:	
NEWPORT CREAMERY, INC.	:	BK No. 01-13196
Debtor	:	Chapter 7
	:	
ANDREW S. RICHARDSON, TRUSTEE OF	:	
THE NEWPORT CREAMERY, INC.	:	
Plaintiff	:	
v.	:	A.P. No. 01-1118
	:	
ROBERT E. SWAIN,	:	
ROCOMI ENTERPRISES, LLC,	:	
NEWPORT CREAMERY, L.P.,	:	
NEWBERG, L.P.,	:	
NEWHART, L.P., and	:	
TARPON HIGHLANDS DEVELOPMENT	:	
CORPORATION	:	
Defendants	:	

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**ORDER GRANTING REQUEST FOR PRELIMINARY INJUNCTION AND GRANTING,  
IN PART, TRUSTEE'S EMERGENCY MOTION FOR ADMINISTRATIVE ORDERS**

A continued hearing was held on September 18, 2001, on the Trustee's requests for a preliminary injunction and other emergency relief. On September 14, 2001, the Trustee's request for a temporary restraining order was granted, preventing the Defendants from transferring, encumbering, selling, or assigning any asset of any value including, but not limited to, cash or funds on deposit, without the prior approval of the Chapter 7 Trustee.

At the hearing, the Trustee offered the following evidence, which is uncontroverted and which is accepted as fact. Keith Lowey, CPA,

reviewed the financial records of the Debtor and determined that financial records were unavailable, without explanation. Among the missing records were original source documents including bank statements and leases. Based upon the records that were available, Lowey uncovered more than 160 "questionable" transactions, totaling over \$4,000,000. These entries represented cash out from the Debtor to Robert Swain and his wife Linda or other entities controlled by Swain, with no evidence of consideration passing to the Debtor on account of these payments. Lowey also determined, based on the Debtor's audited financial statements dated a few weeks after the purchase of Newport Creamery by Swain in late March of 1999, that the company carried \$1.8 million in unsecured trade debt and tax obligations-- not unusual for a business the size of Newport Creamery, Inc. According to the Debtor's schedules, however, the Debtor's unsecured debt had escalated to over \$8 million as of the date of the petition.

Lowey's investigation also revealed that in April of 2001, the ice cream manufacturing plant and related equipment and real estate were apparently transferred by Swain to a new company-- Newport Creamery Food Services, that this new company had no checking account until August 10, 2001, and that in addition to paying inflated prices for product from Newport Creamery Food Services, the Debtor paid the majority of the operating expenses of this new entity which is also

controlled by Swain. In the period June 25, 2001, through August 31, 2001, \$750,953 was paid by the Debtor to or for the benefit of Newport Creamery Food Services. Included in this number is \$271,661 for product purchased by the Debtor, at least some of which was priced above market.

The trustee also called Peter Scotti, a real estate appraiser who analyzed five restaurant locations, formerly owned by the Creamery, but conveyed by Swain to another Swain entity, Newport Creamery, L.P., which were then leased back to the Debtor. Scotti compared those properties with restaurant locations rented by the Debtor from unrelated third parties and found that the Debtor paid significantly higher rent per square foot in the five stores leased to the Debtor by Swain and/or his related entities. Scotti also found when he compared the rent as a percent of annual revenue per store, that the five Swain stores were in the range of 10.1% to 14.5 %, whereas unrelated stores were in the range of 3.3 % to 8.6%. This evidence strongly supports the accusation that Swain and his related entities were using Newport Creamery as a personal cash cornucopia, until it was no longer able to support such abuse.

The only response by the Defendants is in the affidavits of Robert Swain, who failed to appear and was not made available for cross examination. All of Swain's affidavits contain unsupported conclusory

statements which are given no weight.

Courts in this circuit dealing with preliminary injunction issues use a four-part test that takes into account (1) the movant's likelihood of success on the merits, (2) the potential for irreparable injury, (3) a balancing of the relevant equities, and (4) the effect on the public interest. See *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991); *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 892 (1st Cir. 1988). "The heart of the matter is whether 'the harm caused plaintiff without the injunction, *in light of* the plaintiff's likelihood of eventual success on the merits, outweighs the harm the injunction will cause defendants.'" *United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 7 (1st Cir. 1987) (*quoting Vargas-Figueroa v. Saldana*, 826 F.2d 160, 162 (1st Cir. 1987)).

The Trustee and his professionals had been in place one week prior to the instant hearing, and in that short time they uncovered a disturbing amount of information establishing a consistent pattern on the part of the Swains and their related entities of draining cash from the Debtor, causing the unsecured debt of the company to go from \$1.8 million to over \$8 million in approximately two years- leaving the Debtor in critical financial condition. These activities commenced almost as soon as the ink was dry on the closing documents in March 1999, and continued even post-petition, until new management was put in

place. Accordingly, I find that the trustee has clearly met his burden of establishing the likelihood of success on the merits.

The potential for irreparable injury to the estate, without a preliminary injunction in place, is high. Swain has demonstrated a propensity to move large sums of cash out of the Debtor even during this bankruptcy proceeding. Without an injunction to preserve whatever is left, and based on Swain's track record until now, any unprotected assets that are subject to this litigation will probably evaporate.

In balancing the relative equities, I must look at "the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld." *Narragansett Indian Tribe*, 934 F.2d at 5. In the balance, Swain has offered no evidence of potential harm to him and/or his entities by a preliminary injunction, and he and his related entities have had the benefit of over \$4,000,000 transferred from the Creamery since he took over. In maintaining the status quo, the Trustee's ability to obtain a return of liquid and easily transferred assets will be maintained, and the balancing of equities clearly favors the injunction.

Aside from the public's interest in seeing that bankruptcy laws aimed at recovering fraudulent transfers and distributing assets for the benefit of creditors are enforced, the public interest is not affected by this decision. See *O'Donnell v. Royal Business Group, Inc.*

(*In re Oxford Homes, Inc.*), 180 B.R. 1, 14 (Bankr. D. Me. 1995).

For the foregoing reasons, and based on the entire record in this case during its pendency here and in Florida, the Trustee's request for a preliminary injunction is granted, and it is ORDERED that the Defendants: Robert E. Swain, Racomi Enterprises, LLC, Newport Creamery, L.P., Newberg, L.P., Newhart, L.P. and Tarpon Highlands Development Corporation, their agents, officers, employees, successors and assigns are enjoined and restrained from transferring, encumbering, selling, or assigning any asset of any value including but not limited to cash or funds on deposit, without the prior approval of the Chapter 7 Trustee, until either a subsequent order is entered modifying or amending this order or until the Complaint is heard and determined, whichever occurs sooner. If the Defendants feel that the Trustee is unreasonably withholding his consent to any transfer prohibited by this order, they may seek approval from this Court for such transfer or expenditure.

Additionally, based upon the evidence, the Trustee's request for emergency relief is granted in part, i.e., the Trustee is authorized to market and offer for sale the assets of Newport Creamery, L.P. and all assets transferred to Newport Creamery Food Services after April 2001, as a package sale of the assets within the Debtor's estate.<sup>1</sup> Within

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<sup>1</sup> The Trustee has waived his request to include the assets of Newhart, L.P. and Newberg, L.P. as part of his marketing efforts, because he intends to close the restaurants at those locations.

twenty-four hours of receipt of any offer from a bona fide purchaser, the Trustee shall communicate the terms of the offer in writing to any secured party having an interest in the assets being sold, and to the Defendants herein. If the Trustee proposes to sell the assets, he should file a motion pursuant to 11 U.S.C. § 363, whereupon all interested parties will be given the opportunity to object and be heard.

Finally, the Debtor has filed an Emergency Motion for Expedited Discovery, an Emergency Motion for Accounting Records, and an Emergency Motion to Compel Production of Documents. The Trustee is ORDERED to file responses to those motions on or before Tuesday September 25, 2001, and a hearing will be held on Thursday, September 27, 2001, at 9:30 a.m. on these pleadings. Additionally, the parties are ordered to file a discovery plan pursuant to Fed. R. Civ. P. 26(f) on or before Tuesday, September 25, 2001. A pre-trial conference in the above captioned adversary proceeding is scheduled for Thursday, September 27, 2001 at 9:30 a.m.

Dated at Providence, Rhode Island, this 21<sup>st</sup> day of September, 2001.

/s/ Arthur N. Votolato

Arthur N. Votolato  
U.S. Bankruptcy Judge