# Thawing Relations: The Friendly's Ice Cream Corp. Bankruptcy

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## Cast of Characters

**The Debtor - Friendly's Ice Cream**

*Friendly's Ice Cream Corporation* - Friendly Ice Cream Corporation ("FICC"), a Massachusetts corporation, was the primary debtor involved in the jointly administered bankruptcy.

*Friendly's Restaurant Franchise, LLC* - Friendly's Restaurant Franchise, a Delaware corporation, was a subsidiary of FICC that oversaw much of its restaurant franchising operation.

*Friendly's Realty I, LLC* - Friendly's Realty I, a Delaware corporation, was a subsidiary of FICC that owned real estate holdings.

*Friendly's Realty II, LLC* - Friendly's Realty II, a Delaware corporation, was a subsidiary of FICC that owned real estate holdings.

*Friendly's Realty III, LLC* - Friendly's Realty III, a Delaware corporation, was a subsidiary of FICC that owned real estate holdings.

*Harsha V. Agadi* – Mr. Agadi was the CEO and Chairman of FICC prior to and throughout the bankruptcy process.

*Steven C. Sanchioni* – Mr. Sanchioni was the Executive Vice President and Chief Financial Officer of FICC prior to and throughout the bankruptcy process.

*Amicus Wind Down Corporation* – Following the Section 363 sale, the remaining entity from the old Friendly's Ice Cream Corp. was aptly renamed. Amicus is Latin for "friend."

**The Investment Bank - Sun Capital**

*Sun Capital Partners Inc. ("Sun Capital")* – Sun Capital is a privately held global investment firm that specializes in leveraged buyouts.

*Sun Capital Partners IV, LP ("Sun Capital IV")* – Sun Capital IV is an affiliate of Sun Capital which financed a 2007 take-private purchase of FICC.

*Freeze Holdings, LP* – Freeze Holdings, LP is an affiliate of Sun Capital which sat atop the holding company ladder above Freeze, LLC and FICC.

*Freeze, LLC* – Freeze, LLC, was a Sun Capital affiliate and parent company of FICC that followed FICC into bankruptcy and was heavily involved in FICC's bankruptcy. Freeze was assigned all rights to the secured promissory note in 2008 and assigned these rights to Sundae shortly before FICC filed for bankruptcy.

*Freeze Group Holdings Corp. ("Freeze Holdings")* – Freeze Holdings was an affiliate of Sun Capital sitting just below Freeze, LLC in the holding company ladder above FICC.

*Freeze Operations Holding Corp. ("FOH")* – FOH was an affiliate of Sun Capital which executed the take-private purchase of FICC in 2007. FOH sat just below Freeze Holdings on the holding company ladder above FICC.

*Freeze Operations Corp. ("Freeze Operations")* – Freeze Operations was a subsidiary of FOH which merged with FICC as part of the 2007 acquisition by Sun Capital. Freeze Operations ceased to exist as a result of the merger.

*Sundae Group Holdings I ("Sundae")* – Sundae was an affiliate of Sun Capital and the holder of the largest debt FICC owed at the time of bankruptcy. Sundae was assigned the debt shortly before the bankruptcy filing.

**The Bankruptcy Players**

*The Honorable Kevin Gross* – Judge Gross was the United States Bankruptcy Judge for the District of Delaware who presided over the Friendly's Ice Cream bankruptcy.

*Roberta A. Deangelis* – Ms. Deangelis was the United States Trustee for Region 3 at the time of FICC's bankruptcy.

*T. Patrick Tinker* – Mr. Tinker was the Assistant U.S. Trustee in Wilmington, DE at the time of FICC's bankruptcy.

*Richard L. Schepacarter* – Mr. Schepacarter was a General Attorney in the Wilmington, DE office of the United States Trustee's office that was the primary contact for the United States Trustee during the FICC bankruptcy.

*Wells Fargo Capital Finance, Inc. ("Wells Fargo")* – Wells Fargo was FICC's primary secured creditor by way of a revolving credit facility. Wells Fargo was also the provider of Debtor in Possession financing during the course of FICC's bankruptcy.

*Committee of Unsecured Creditors ("OCC")* – The Committee of Unsecured Creditors was a committee appointed by the United States' Trustee to represent the interests of unsecured creditors through the bankruptcy process. The committee consisted of:

- FM Facility Maintenance, Hartford, CT
- The Bank of New York, New Albany, OH
- Pension Benefit Guaranty Corporation, Washington, DC
- GGP Limited Partnership, Chicago, IL
- KSL Media, Inc., Encino, CA
- The Coca-Cola Company, Atlanta, GA
- Realty Income Corporation, Escondido, CA

# Introduction

On October 5, 2011, Friendly's Ice Cream Corporation, along with its subsidiaries, filed a voluntary petition in the District of Delaware declaring Chapter 11 Bankruptcy. The Chapter 11 reorganization ultimately led to a successful credit-bid by Sun Capital, the primary prepetition owner of the business, to acquire substantially all the assets of the business.

This paper outlines the steps taken by Friendly's Ice Cream to shed underperforming restaurants and pension obligations as it fought to emerge from the setbacks of the Great Recession. Prepetition negotiations between secured creditors and Friendly's Ice Cream Corp. resulted in a reorganization strategy that would ultimately succeed. Nevertheless, active pushback by the Pension Benefit Guaranty Corporation, the Committee of Unsecured Creditors, and restaurant landlords managed to provide unsecured creditors a small scoop of the sundae.

This paper provides information about the process of a Chapter 11 Bankruptcy and tells the story of a successful pre-negotiated, insider-driven reorganization.

# Sweet Beginnings (Early Story of the Company)

**Founding**

In 1935, 20-year-old S. Prestley Blake and his 18-year-old brother, Curtis Blake, launched their first ice cream shop in Springfield, Massachusetts.[1] Against the social backdrop of the Great Depression, Prestley and Curtis set about to create a place that was welcoming and hopeful. Prestley Blake, reflecting on those founding years, mused, "we were two friendly guys and we wanted our little store to be a friendly place."[2] Consequently, with that dream and a $547 capital investment from their parents, they named their ice cream shop "Friendly."[3]

Starting out, the first customers could enjoy a double-dip cone for five cents.[4] Though ice cream was the only thing on the menu, the low prices and neighborly atmosphere made the shop a town favorite.[5] Consequently, by 1940, the Blake brothers opened a second store across town in West Springfield, adding hamburgers and coffee to the menu after a straw poll of their customers.[6]

As the United States entered the full throes of World War II, the Blake brothers closed their restaurants, hung a sign on the door saying, "When we win the war," and went off to serve in the war effort.[7]

**Expansion**

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[1] *Our Story*, FRIENDLY'S, https://perma.cc/22AN-ER47; Frances Romero, *The Not-So-Friendly Friendly's Brothers*, TIME (Aug. 23, 2011), https://perma.cc/CM64-MV4Y.

[2] S. PRESTLEY BLAKE WITH ALAN FARNHAM, A FRIENDLY LIFE: EDITED AND EXPANDED 10 (2015).

[3] Francis Storrs, *Friendly's: A Timeline*, THE BOSTON GLOBE (2010), https://perma.cc/57DK-CD6Y.

[4] *Id.*

[5] Christine-Marie Liwag Dixon, *The Untold Truth of Friendly's*, MASHED, https://perma.cc/7U6X-FVAD.

[6] *Id.*

[7] Storrs, *supra* note 3, https://perma.cc/57DK-CD6Y.

Reopening in 1945, Friendly Ice Cream rode the post-war boom, rapidly expanding into nearby towns.[8] By 1951, Friendly Ice Cream had 10 shops operating between Massachusetts and the nearby Connecticut border.[9] In 1960, Friendly Ice Cream debuted their new company headquarters in Wilbraham, Massachusetts, including its company offices and an ice cream plant.[10] By 1974, almost 500 Friendly restaurants were operating in the Northeast, Mid-Atlantic, and Midwest.[11]

## Buy-Outs

### *The Hershey Era*

After giving birth to their dream company and parenting it for over 40 years, the Blake brothers "retired" and sold their ownership stake to the Hershey Foods Corporation for approximately $164 million in 1979.[12] Hershey, hungry to diversify and expand, blended their confections into Friendly ice cream offerings and sprinkled new Friendly restaurants across a broader scoop of America.[13] Over 100 new restaurants popped up in the first five years and, by its 50th anniversary, Friendly's boasted 740 restaurants and over 34,000 employees.[14] By the late 1980s, annual sales figures doubled, largely due to new restaurants, but the chain still felt the squeeze from a legion of other growing fast-food establishments.[15] After several failed "express menu" experiments, Hershey elected to move on from the restaurant business before the 1980s ended.[16]

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[8] *Id.*

[9] Dixon, *supra* note 5, https://perma.cc/7U6X-FVAD.

[10] Storrs, *supra* note 3, https://perma.cc/57DK-CD6Y.

[11] *Friendly's Celebrates 75 Years in Business*, FRIENDLY'S, https://perma.cc/M83D-NKJE.

[12] Dixon, *supra* note 5, https://perma.cc/7U6X-FVAD.

[13] Friendly Ice Cream Corporation, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, https://perma.cc/6ZHY-33ZM.

[14] *Id.*

[15] *Id.*

[16] *Id.*

***The Tennessee Restaurant Group Era***

In a much-publicized leveraged buyout, the Tennessee Restaurant Company[17] purchased Friendly from Hershey Foods for $375 million in 1988.[18] "Chain Restaurant Wunderkind" Donald N. Smith[19] took over as Friendly CEO and Board Chairman, in addition to his role as CEO of the Tennessee Restaurant Company.[20] Fearing over-extension of the brand, Smith rolled back the expansion, closing over 100 restaurants in Florida, Ohio, and Virginia and carved out a leaner corporate structure.[21]

Shifting consumer preferences stalled the lofty expectations and growth did not come quickly under Smith. Hoping to jump-start the chain, Smith launched a franchise program and took the business, now denominated as "Friendly's," public in 1997.[22] However, FRND, Friendly's ticker symbol which debuted on the NASDAQ exchange at $18 per share and rose to $26 per share in six months, dropped to less than $5 by the fall of 1998.[23] Having hovered below the NASDAQ threshold, the company switched over to the American Stock Exchange in 2000 under the symbol FRN.[24]

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17 These Tennessee-based authors wish to note this misnomer, as the company was based in Chicago.

18 *Our Story*, *supra* note 1, https://perma.cc/22AN-ER47; Storrs, *supra* note 3, https://perma.cc/57DK-CD6Y; Julia Flynn Siler, *Hershey to Sell Its Restaurant Chain*, N.Y. TIMES, Aug. 9, 1988, at D1, https://perma.cc/B5SY-N77K.

19 Father of the Pizza Hut personal pan pizza and McDonald's breakfast menu. INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, *supra* note 13, https://perma.cc/6ZHY-33ZM.

20 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, *supra* note 13, https://perma.cc/6ZHY-33ZM.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Our Story*, *supra* note 1, https://perma.cc/22AN-ER47.

***The Founder Reemerges***

Though two decades removed from selling his ownership stake in the company, Prestley Blake looked on disapprovingly at the struggles of the business he referred to as "my baby."[25] Not one to fish through retirement peacefully while "his baby" floundered, Prestley Blake bought 892,000 shares of the company for roughly $2 million and publicly challenged Donald Smith's leadership.[26] Prestley filed suit against Smith in 2003, and accused Smith of misuse of corporate funds.[27] During the following annual shareholder meeting, Blake offered a low-interest $50 million loan out of pocket in exchange for Smith's repayment of allegedly misused funds. Management refused the offer.[28]

Adding another scoop of drama, Prestley's shareholder activism[29] aggravated his brother, prompting a public and publicized falling-out between the founders.[30] Prestley felt that the company was "being run into the ground by a pack of spendthrift managers more intent on lining their own pockets than on giving the public good hamburgers, good shakes, and good service."[31] Curtis feared the turmoil would only harm the company more.[32] Prestley responded by telling the Boston

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[25] BLAKE, *supra* note 2, at 2.

[26] INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, *supra* note 13, https://perma.cc/6ZHY-33ZM.

[27] *Id.*

[28] *Id.*

[29] BLAKE, *supra* note 2, at 4. Prestley Blake's shareholder activism has been well-documented and is used as a case study for MBA students at Harvard Business School. Fabrizio Ferri, V.G. Narayanan, and James Weber, *Shareholder Activists at Friendly Ice Cream (A)*, HARVARD BUSINESS SCHOOL CASE 108-024, April 2008. (Revised September 2008).

[30] Joanne Chen, *Behind the Counter of Friendly's*, THE DAILY BEAST (Nov. 28, 2017), https://perma.cc/EPH2-UF8X; Romero, *supra* note 1, https://perma.cc/CM64-MV4Y.

[31] BLAKE, *supra* note 2, at 4.

[32] Romero, *supra* note 1, https://perma.cc/CM64-MV4Y.

Globe, "I'm sorry my brother isn't with me on this, but I'm going to keep going because I know I'm right."[33] The business and family turmoil stirred and frothed for several years.

***Sun Capital Partners[34]***

The dust finally settled when Sun Capital Partners completed a take-private acquisition of Friendly's in 2007. Sun Capital paid roughly $15.50 per share, totaling $395 million.[35] However, Sun Capital's acquisition came on the eve of the Great Recession.

Sun Capital initiated its 2007 acquisition of Friendly's through a merger between FICC[36] and Freeze Operations, a wholly owned subsidiary of FOH.[37] To facilitate the merger, FICC, as the surviving corporation and new wholly owned subsidiary of FOH, initiated a cash tender offer on 8.375% Notes that it had issued

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[33] *Id.*

[34] Sun Capital Partners manifested its ownership over Friendly Ice Cream Corp., the subject of this paper, through various affiliate and subsidiary entities, as briefly discussed *infra*. This ownership structure will not be explored in great detail, beyond what is necessary for discussing the bankruptcy journey of Friendly's Ice Cream Corp. An organizational chart can be found in Annex A and all entity abbreviations are referenced in the Cast of Characters.

[35] Declaration of Steven C. Sanchioni of Friendly Ice Cream Corporation in Support of Debtors' Chapter 11 Petitions and First Day Motions. Case 11-13167 (KG). ("Declaration of Steven C. Sanchioni"). 3.pdf at 14.

[36] Friendly's Ice Cream Corp., the primary debtor discussed in this paper.

[37] Omnibus Objection of The Official Committee of Unsecured Creditors of Friendly Ice Cream Corporation, *et al.*, To (I) Debtor's Motion For Entry Of An Order Approving Bidding Procedures; (II) Debtor's Motion For Approval Of DIP Financing And Use Of Cash Collateral; And (III) Allowance of Prepetition Claims Of Sun Capital Partners, Inc., and Its Affiliates. Case 11-13167 (KG). ("OCC Omnibus Objection"). 242-1.pdf at 8, 242-0.pdf, 242-2.pdf, 242-3.pdf, 242-4.pdf, 242-5.pdf, 242-6.pdf. FOH, Freeze Operations Holding Corp., is one of the many Sun Capital affiliates used in the take-private purchase.

in 2004. Roughly 95.5% of the Noteholders accepted tender.[38] In conjunction with the tender offer, Sun Capital Partners IV,[39] FOH, and Freeze Holdings agreed to provide FICC with all financing necessary during the merger transactions.[40] In 2008, Freeze Holdings assigned the PIK Note to Freeze, LLC in 2008.[41] Freeze, LLC, both the primary owner of FICC and holder of FICC's largest debt, assigned FICC's debt to Sundae, another Sun Capital affiliate, in September 2011 in exchange for lending an additional $2 million to FICC. As part of this transaction, Freeze, LLC transferred roughly $6 million in total to FICC.[42]

On October 6, 2011, FICC and its subsidiaries filed for Chapter 11 Bankruptcy in the District of Delaware. Additionally, FICC's parent company, Freeze, LLC followed it into bankruptcy on October 14, 2011, fearing potential joint and several liability for FICC's missed contributions to the FICC Pension Plan under Title IV of the Employee Retirement Income Security Act.[43] Prior to the petition date, Friendly's operated or franchised approximately 490 restaurants.[44] Additionally, the business sold their ice cream in more than 7,000 supermarkets and employed more than 10,000 workers throughout the business.[45]

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[38] Declaration of Steven C. Sanchioni, 3.pdf at 8–9.

[39] Sun Capital Partners IV is another Sun Capital affiliate involved in the purchase of Friendly's Ice Cream Corp.

[40] OCC Omnibus Objection, 242-1.pdf at 8–9.

[41] OCC Omnibus Objection, 242-1.pdf at 9.

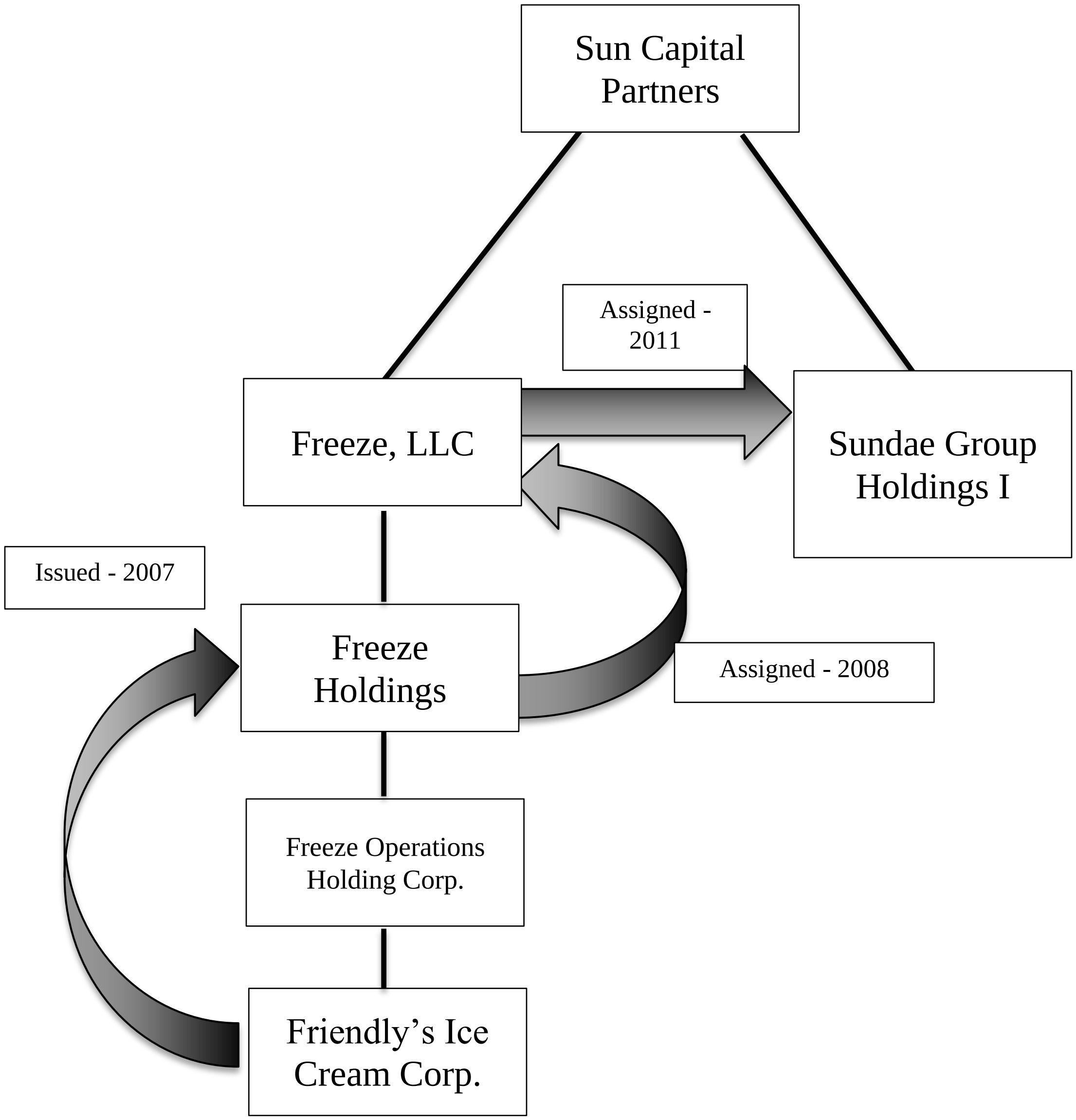
[42] Omnibus Objection of Pension Benefit Guaranty Corporation to (I) the Debtors Motion for Entry of an Order Approving Bidding Procedures and (II) Debtors Motion for Approval of Dip Financing and use of Cash Collateral. Case 11-13167 (KG). ("PBGC Omnibus Objection"). 241.pdf at 6.

[43] Declaration of Steven C. Sanchioni in Support of Debtors' Chapter 11 Motions and First Day Motions. Case No. 11-13303 (KG). ("Freeze Declaration"). Freeze4.pdf at 3, Freeze4-1.pdf.

[44] Disclosure Statement for the Debtors' Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code. Case 11-13167 (KG). ("First Disclosure Statement"). 813.pdf at 6.

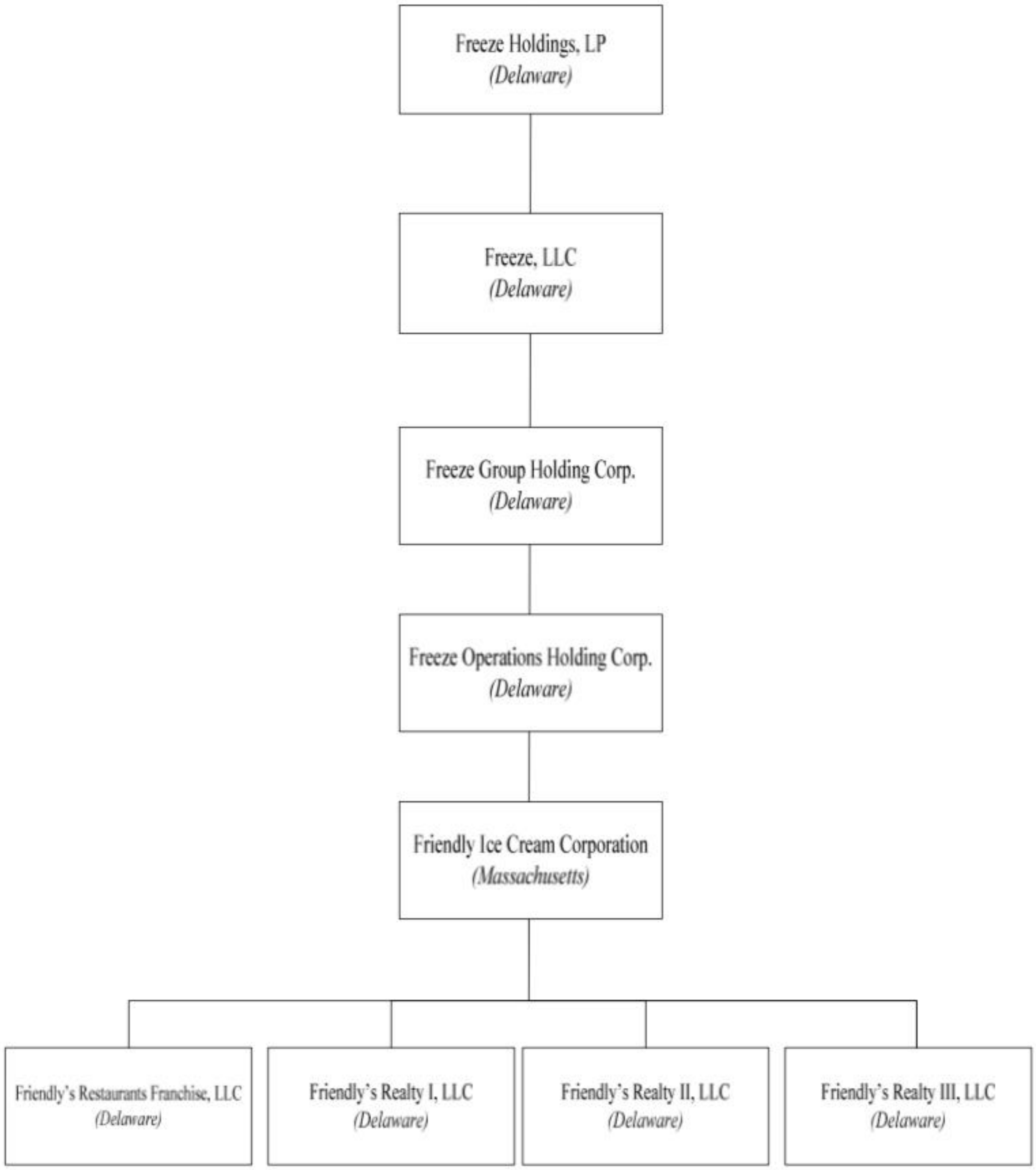
[45] *Id.*

**ANNEX A**
***Movement of the PIK Note Through the Sun Capital Structure***[46]




[46] This illustration diagrams the movement of the PIK Note throughout the Sun Capital structure. Several entities have omitted from the organizational structure for visual clarity.

***Prepetition Organizational Structure***[47]




[47] Freeze Declaration, 4-1.pdf.

## <u>The Milk Soured: What Led to Chapter 11</u>

From the perspective of Friendly's Ice Cream Corporation, three primary factors, all derived from the economic downturn, precipitated the need for reorganization: declining sales, rising costs, and unwieldy debt obligations.

**Falling Sales**

FICC, like all family dining restaurants, was the victim of reduced discretionary spending by consumers during the economic downturn that begain in 2007–2008. In the first eight months of 2011, company-operated restaurants experienced a 4.5% decline in sales while franchise-operated restaurants reported a 5.3% decline, accelerated from the respective 3.7% and 2.6% decline in sales the previous year.[48] Despite reduced customer traffic and spending, Friendly's attempted to turn the tide through revamped menu offerings and advertising campaigns, but the damage was unavoidable.[49] Despite weathering the storm better than the average comparable mid-scale and casual restaurant, FICC was overwhelmed by the economic conditions.[50]

**Rising Costs**

While discretionary spending decreased, commodity prices increased, which had a profound impact on the vertically integrated business. Most notably, rising costs of milk, cream, and meat took its toll on the Debtor.[51] In the years leading up to the filing, the price of butter increased by 57.5% and the price of milk rose by 22.2%.[52] Likewise, surging fuel prices struck the distribution side of the operation

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[48] Declaration of Steven C. Sanchioni, <u>3.pdf</u> at 9–10.

[49] <u>*Id.*</u> at 10.

[50] <u>*Id.*</u>

[51] <u>*Id.*</u>

[52] <u>*Id.*</u>

particularly hard.[53] FICC responded by raising prices and reducing employee outlays, but could not escape the impact of rising costs.[54]

## Debt Issues

### *Debt Structure*

Friendly's Ice Cream Corporation held three primary debts amounting to total obligations of over $297 million in addition to various unsecured debts: [55]

| Amount | Vehicle | Creditor |
|---|---|---|
| $21.5 MM + 14.9 MM | Secured Credit Facility | Wells Fargo Capital Finance |
| $267.7 MM | Secured Promissory Note | Sundae Group Holdings I |
| $7.8 MM | 8.375% Senior Subordinated Notes | Bank of New York as Trustee |

First, FICC was obligated under a first lien senior secured credit facility with Wells Fargo Capital Finance, Inc. from 2008. The credit facility provided for up $49 million of revolving credit secured by the entirety of the assets and capital stock of FICC, Freeze Operations Holding Corp., and Friendly's Restaurants Franchise.[56] At the time of filing, the Debtors had roughly $21.5 million in principal outstanding and an additional $14.9 million in letters of credit outstanding.[57]

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[53] *Id.*

[54] Declaration of Steven C. Sanchioni, 3.pdf at 10.

[55] First Disclosure Statement, 813.pdf at 6. A consolidated list of the creditors holding the 20 largest unsecured claims, comprised primarily of trade debts, can be found in Annex B.

[56] Declaration of Steven C. Sanchioni, 3.pdf at 7.

[57] *Id.*

Second, FICC was obligated under a subordinated secured promissory "payment-in-kind" note ("PIK Note")[58] with Sundae Group Holdings I, LLC from 2008.[59] The PIK Note was secured by a secondary lien on the aforementioned assets.[60] In September of 2011, Freeze, LLC, successor to the original lender, assigned its right, title, and interest to Sundae, the PIK Noteholder, in exchange for an additional $2 million under the PIK Note. Subsequent additional lending occurred, totaling $6 million after assignment. The total obligation amounted to $267.7 million and was junior in interest to the Debtors' obligation to Wells Fargo.

Third, FICC issued $175 million in unsecured 8.375% Senior Subordinated Notes in 2004 that was set to come due on June 15, 2012 under the Note Indenture.[61] In July of 2007, FICC in the midst of Sun Capital's take private purchase, tendered an offer on the Notes.[62] At filing, approximately $7.8 million in principal balance, excluding accrued interest, remained outstanding.

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[58] A PIK Note is a type of financing where the interest accrued in a given year is added to the debt in kind, rather than paid in cash installments. The amount owed under the PIK Note grows until maturity. This type of financing is frequently found in leveraged buy-outs. Payment-in-Kind, INVESTOPEDIA.COM, https://perma.cc/83V2-ALCF.

[59] Sundae was majority owned by one or more affiliates of Sun Capital Partners, Inc. and, notably, the Debtors' Chief Executive Officer held a minority ownership stake. Likewise, the Debtors' ultimate majority equity holders were also affiliates of Sun Capital Partners, Inc.

[60] Declaration of Steven C. Sanchioni, 3.pdf at 7–8.

[61] *Id.* at 8–9. Friendly's Restaurant's Franchise was the guarantor on these notes and The Bank of New York was the indentured trustee.

[62] *Id.*

***EBITDA Default*[63]**

In addition to the amount of the debt, the Adjusted EBITDA covenant requirements of the revolving credit facility and PIK Note proved to be a substantial impetus to the bankruptcy. Certain levels of EBITDA were covenanted in the prepetition senior secured revolving credit facility through Wells Fargo, and failure to maintain EBITDA above these levels would trigger default under the agreement.[64]

FICC, soon to be a Debtor under the Code, operated primarily in four discrete units of business: direct restaurant operation, franchising, foodservice, and retail and custom distribution.[65] These four discrete units generated revenues of $213.9 million, $11.5 million, 51.6 million, and $52.7 million respectively and $329.7 million collectively in the first eight months of 2011.[66] However, they generated only $1.5 million, $7.5 million, $6.5 million, and $2.3 million in Adjusted EBITDA respectively and $17.8 million[67] collectively in that same period.[68] In the months leading up to filing, these targets were not reached and an EBITDA covenant default occurred.[69]

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[63] Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA) is a financial performance indicator that reflects the earning potential of a company. EBITDA covenants are built into lending agreements with distressed companies to afford additional rights to the lender should the company get off track. EBITDA – Earnings Before Interest, Taxes, Depreciation and Amortization, INVESTOPEDIA.COM, https://perma.cc/WF3Z-K94Q.

[64] Declaration of Steven C. Sanchioni, 3.pdf at 3.

[65] *Id.* at 4.

[66] *Id.* at 5–6.

[67] In the Declaration in Support, FICC CFO Sanchioni claims that the first 8 months of 2011 generated $8.6 million in EBITDA, however the aggregate Adjusted EBITDA of the four discrete business units amounts to $17.8 million. As of publication, we have been unable to resolve this discrepancy.

[68] Declaration of Steven C. Sanchioni, 3.pdf at 5–6.

[69] *Id.* at 3.

**I Scream, You Scream, We All Scream for Bankruptcy**

Despite a negotiated temporary forbearance on August 31, 2011, FICC determined the outlook was gloomy due to the EBITDA covenant default, poor market conditions, and impending due date on the 8.375% Notes.[70] Consequently, the FICC Board of Directors elected to enter chapter 11 as an asset preservation strategy rather than continuing to kick the can down the road through repeated temporary forbearance agreements.[71]

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[70] *Id.* at 3–4, 11.

[71] *Id.*

**ANNEX B**

***Creditors Holding the Top 20 Largest Unsecured Claims***[72]

| | NAME OF CREDITOR, COMPLETE MAILING ADDRESS, AND EMPLOYEE, AGENT, OR DEPARTMENT OF CREDITOR FAMILIAR WITH CLAIM | NATURE OF CLAIM (bond debt, trade debt, bank loan, government contracts, etc.) | INDICATE IF CLAIM IS CONTINGENT, UNLIQUIDATED, DISPUTED, OR SUBJECT TO SETOFF | AMOUNT OF CLAIM (if secured, also state value of security) |
|---|---|---|---|---|
| 1. | PENSION BENEFIT GUARANTY CORPORATION<br>P.O. BOX 10308<br>SAN RAFAEL, CA 94912<br>FAX: (415) 482-9611 | PENSION | CONTINGENT / UNLIQUIDATED | UNKNOWN |
| 2. | BANK OF NEW YORK MELLON<br>101 BARCLAY STREET, FLOOR 8 WEST<br>NEW YORK, NY 10286<br>FAX: (212) 298-1915 | SENIOR SUBORDINATED NOTES | | 7,804,000 |
| 3. | FM FACILITY MAINTENANCE LLC<br>IPT HOLDING COMPANY LLC<br>DBA FM FACLITY MAINTENANCE<br>10 COLUMBUS BLVD, 4TH FLOOR<br>HARTFORD, CT 06106<br>FAX: (860) 466-7401 | TRADE DEBT | | 3,487,702 |
| 4. | KSL MEDIA INC<br>387 PARK AVENUE SOUTH<br>NEW YORK, NY 10016<br>FAX: (212) 352-5938 | TRADE DEBT | | 3,357,914 |
| 5. | ADVANTAGE IQ INC<br>1313 NORTH ATLANTIC 5TH FLOOR<br>SPOKANE, WA 99201<br>FAX: (509) 329-7287 | TRADE DEBT | | 1,300,000 |
| 6. | MERCURY WERKS<br>VALENCE PRINT MANAGEMENT LLC<br>DBA MERCURY WERKS<br>TOLLWAY PLAZA II, 15950 N. DALLAS PKWY, SUITE 730<br>DALLAS, TX 75248<br>FAX: (972) 993-3319 | TRADE DEBT | | 787,182 |
| 7. | THE VIA GROUP LLC<br>619 CONGRESS STREET<br>PORTLAND, ME 04101<br>FAX: (207) 761-9422 | TRADE DEBT | | 753,315 |
| 8. | ROCK-TENN CO<br>P.O. BOX 102064<br>ATLANTA, GA 30363<br>FAX: (678) 291-7865 | TRADE DEBT | | 735,564 |
| 9. | GREAT ATLANTIC & PACIFIC TEA CO INC<br>2 PARAGON DRIVE<br>MONTVALE, NJ 07645<br>FAX: (201) 505-3054 | CUSTOMER | | 699,629 |
| 10. | ALL STAR DAIRY ASSOCIATION<br>P.O. BOX 63 2599<br>CINCINNATI, OH 45263<br>FAX: (859) 255-3647 | TRADE DEBT | | 534,418 |
| 11. | KOCH MEAT COMPANY<br>P.O. BOX 71176<br>CHICAGO, IL 60694<br>FAX: (847) 384-5961 | TRADE DEBT | | 445,407 |
| 12. | HEINZ NORTH AMERICA<br>P.O. BOX 371605<br>PITTSBURGH, PA 15251<br>FAX: (610) 458-5807 | TRADE DEBT | | 419,920 |
| 13. | COCA COLA COMPANY<br>P.O. BOX 102190, 68 ANNEX<br>ATLANTA, GA 30368<br>FAX: (203) 905-3921 | TRADE DEBT | | 391,196 |

[72] Consolidated List of Creditors Holding the Top 20 Largest Unsecured Claims. Case 11-13167 (KG). 1-2.pdf at. 3–4.

| | NAME OF CREDITOR, COMPLETE MAILING ADDRESS, AND EMPLOYEE, AGENT, OR DEPARTMENT OF CREDITOR FAMILIAR WITH CLAIM | NATURE OF CLAIM *(bond debt, trade debt, bank loan, government contracts, etc.)* | INDICATE IF CLAIM IS CONTINGENT, UNLIQUIDATED, DISPUTED, OR SUBJECT TO SETOFF | AMOUNT OF CLAIM *(If secured, also state value of security)* |
|---|---|---|---|---|
| 14. | ZIMMERMAN & PARTNERS ADVERTISING INC<br>2200 W. COMMERCIAL BLVD, SUITE 300<br>FT LAUDERDALE, FL 33309<br>FAX: (954) 644-6000 | TRADE DEBT | | 329,711 |
| 15. | SARDILLI PRODUCE & DAIRY CO<br>212 LOCUST STREET<br>HARTFORD, CT 06114<br>FAX: (860) 525-2356 | TRADE DEBT | | 324,211 |
| 16. | MCCAIN FOODS INC<br>P.O. BOX 2464<br>CAROL STREAM, IL 60132<br>FAX: (630) 649-7345 | TRADE DEBT | | 316,029 |
| 17. | GARELICK FARMS<br>DEAN NORTHEAST LLC<br>PHILADELPHIA, PA 19178<br>FAX: (214) 303-4776 | TRADE DEBT | | 301,673 |
| 18. | ROCHESTER MEAT COMPANY<br>P.O. BOX 954793<br>ST LOUIS, MO 63195<br>FAX: (507) 289-1864 | TRADE DEBT | | 237,401 |
| 19. | CARGILL INC<br>1729 SYLVAN LANE<br>GLADWYNE, PA 19035<br>FAX: (484) 412-8726 | TRADE DEBT | | 190,052 |
| 20. | ECOLAB INC<br>2400 MAIN ST, SUITE 1<br>SAYREVILLE, NJ 08872<br>FAX: (981) 688-2144 | TRADE DEBT | | 188,009 |

## First Day Motions

Generally, first day motions and orders are governed by §§ 6001 and 4001 of the Federal Rules of Bankruptcy Procedure.[73] Rule 6001 requires 21 days' notice before the court may grant certain relief, "except to the extent that relief is necessary to avoid immediate and reparable harm."[74] Rule 4001 works in a similar fashion with respect to first-day financing motions. The rule requires a minimum of 14 days to pass after service of process prior to a final hearing on such motions.[75] However, relief may be granted in a preliminary hearing prior to the 14 day period to the extent "necessary to avoid immediate and irreparable harm to the estate pending a final hearing."[76] Generally, first day motions may be categorized in three distinct groups: motions that facilitate administration of the estate, motions that smooth day to day operations, and substantive motions.[77]

**Orders Facilitating Administration of the Estate**

In this bankruptcy, the first motion the court addressed was Friendly's motion for joint administration.[78] Friendly's and its affiliates moved for joint administration of their Chapter 11 cases under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure and Section 105(a).[79]

Rule 1015(b) provides that if "two or more petitions are pending in the same court by or against . . . a Debtor and an affiliate, the court may order a joint

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[73] MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 271-72 (Charles J. Tabb ed., 5th ed. 2015); *see also* Fed. R. Bankr. P. 4001, 6001.

[74] Fed. R. Bankr. P. 6001.

[75] BERNSTEIN & KUNEY, *supra* note 73, at 272.

[76] *Id*. at 272.

[77] *Id*. at 273–75.

[78] Debtors' Motion for Entry of an Order Directing Joint Administration of Their Chapter 11 Cases. ("Joint Administration Motion"). Case 11-13167 (KG). 2.pdf.

[79] FED. R. BANKR. P. 1015(b); 11 U.S.C. §105(a) (2016).

administration of the estates."[80] Section 105(a) of the Bankruptcy Code gives the court general power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code]." Here, joint administration allowed Friendly's and four of its affiliates to file motions and other documents all under one case and docket number, significantly alleviating the administrative burden.[81]

Additionally, Friendly's filed an application to employ Epiq Bankruptcy Solutions as notice and claims agent.[82] Retaining a claims agent allowed Friendly to shift the administrative burden, save significant resources associated with service of process on over 55,000 entities, and abide by local bankruptcy rules.[83]

Friendly's also filed a cash management system motion.[84] Through this motion, Friendly's asked the court for permission to continue to use the company's existing cash management system, 36 bank accounts, and business forms for their nearly 500 locations.[85] The continued use of this cash management system was critical for Friendly's to "control and monitor corporate funds, ensure cash availability and liquidity, comply with the requirements of their financing

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[80] Fed. R. Bankr. P. 1015.

[81] Declaration of Steven C. Sanchioni, 3.pdf at 13.

[82] Debtors' Motion for Entry of an Order Authorizing the Retention and Employment of Epiq Bankruptcy Solutions, LLC as Notice and Claims Agent for the Debtors and Debtors in Possession *Nunc Pro Tunc* To the Petition Date, Case 11-13167 (KG). 4.pdf.

[83] *Id.* at 4.

[84] Debtors' Motion for Entry of an Order (1) Authorizing the Debtors to (A) Continue Using the Cash Management System, (B) Maintain Existing Bank Accounts and Business Forms, and (C) Continue Intercompany Arrangements and (2) Granting Intercompany Claims Administrative Priority. Case 11-13167 (KG). ("Cash Management Motion"). 9.pdf.

[85] *Id.*

agreements and reduce administrative expenses by facilitating the movement of funds."[86]

Friendly's also filed a motion for interim approval of debtor in possession financing, as discussed *infra*.

**Day-to-Day Operations**

***Debtor's Utility Motion***

In keeping with the court's practice for first day hearings, the court approved Friendly's motion for continuation of utility service and approval of adequate assurance of payment to utility company.[87] At the time of the filing, Friendly's received utility services from approximately 380 utility providers, spending an average of $1.8 million each month.[88] Due to the importance of the services as well as the volume of providers, Friendly's paid $13,000 per month to Advantage IQ, Inc., to organize and pay a number of Friendly's utility providers.[89] Additionally, Friendly's paid utility providers directly for manufacturing operations in Wilbraham, MA and distribution centers in Chicopee, MA and York PA.[90]
Pursuant to Section 366of the Bankruptcy Code, Friendly's requested the "authority to pay the utilities in the ordinary course of business" and sought confirmation that their suggested "adequate assurance" provisions were satisfactory.[91]

Section 366 of the Bankruptcy code protects debtors by keeping utility providers from "altering, refusing, or discontinuing services to a [d]ebtor solely on account of unpaid prepetition amounts for a period of 30 days after a chapter 11

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[86] Id. at 4.

[87] Debtor's Motion for Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility. Case 11-13167 (KG). ("Utilities Motion"). 14.pdf.

[88] Id. at 8.

[89] Id. at 7.

[90] Id. at 7–8.

[91] Transcript of First Day Motions Before Honorable Kevin Gross United States Bankruptcy Court Judge. Case 11-13167 (KG). ("Hearing 1"). 87.pdf at 22.

filing."[92] Section 366 also protects utilities by allowing them to alter or discontinue service after the thirty day period if the Debtor has not "furnished 'adequate assurance' of payment in a form 'satisfactory' to the utility."[93]

Here, for purposes of adequate assurance, Friendly's asserted that the cash flow from operations, cash on hand, and adequate DIP financing was sufficient to cover postpetition utility service obligations.[94] Moreover, Friendly's deposited $900,000 into a segregated account for the benefit of utility providers for the duration of the case.[95] Friendly also put forth a list of procedures for utility providers in the event they required additional assurance.[96]

On October 6, 2011, after musing about the possibility of 17 million gallons of ice cream melting due to utility problems, the court granted Friendly's motion on an interim basis.[97] On October 24, 2011, after the agreed removal of a particular utility

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[92] Utility Motion, 14.pdf at 8.

[93] *Id.* at 8.

[94] *Id.* at 2.

[95] *Id.* at 3.

[96] *Id.*

[97] Hearing 1, 87.pdf at 22.

provider,[98] the Court overruled a couple of minor objections[99] and issued a final order granting the motion.[100]

## Substantive Orders

### *Customer Programs Motion*

Pursuant to Sections 105(a), 363, 1107(a) and 1008 of the Bankruptcy Code, Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure, and Local Rule 9013-1(m), Friendly's filed a motion to maintain and administer customer programs.[101] Friendly's customer programs consisted of charity partnerships, gift cards, gift certificates, discounts, coupons, warranties, and trade promotions.[102] Most notably, at the time of the filing, Friendly's had approximately $6.25 million in outstanding prepaid gift card liabilities.[103] No objections were filed and the Court issued a final order granting Friendly's motion.[104]

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[98] Objection of Sprague Energy Corp. to Debtors' Motion for Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility Services, And Request for Judicial Notice with Respect to Certain Matters Relating Thereto. Case 11-13167 (KG). ("Sprague Objection"). 154.pdf.

[99] Objection of the City of Westfield Gas & Electric Department to the Debtors' Motion for Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility Services (D.I. 14) and Request for Additional Adequate Assurance. Case 11-13167 (KG). 156.pdf; Objection of the City of Chicopee Electric Light Department to the Debtors' Motion for Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility Services (D.I. 14) and Request for Additional Adequate Assurance. Case 11-13167 (KG). 157.pdf.

[100] Final Order Determining Adequate Assurance of Payment for Future Utility Services. Case 11-13167 (KG). 215.pdf.

[101] Debtors' Motion for Entry of an Order Authorizing the Debtors to Maintain and Administer Customer Programs and Honor Prepetition Obligations Related Thereto. Case 11-13167 (KG). ("Customer Programs Motions"). 8.pdf.

[102] *Id.* at 4.

[103] *Id.* at 6.

[104] Order Authorizing the Debtors to Maintain and Administer Customer Programs and Honor Prepetition Obligations Related Thereto. Case 11-13167 (KG). 49.pdf.

***Prepetition Insurance Coverage***

Additionally, Friendly's requested relief from the automatic stay in order to maintain their 27 active insurance policies.[105] Friendly's cited the insurance policies' crucial role in preserving the value of their business as well as meeting the minimum requirements put forth in Section 1112(b)(4)(C).[106] There were no objections and the court entered a final order granting the motion.[107]

***Prepetition Tax Obligations***

Friendly's also filed a Motion to Pay Sales and Use Taxes.[108] At the time of filing, Friendly's had amassed: $1.9 million of unpaid sales and use taxes; $75,000 of unpaid state income and franchise taxes; $750,000 of unpaid personal and real property taxes; and $1 million of unpaid unemployment taxes.[109] Friendly's basis for relief was premised on the fact that certain taxes and fees were not property of the estate pursuant to Section 541(d) of the Bankruptcy Code and certain authorities would likely take action against the Debtors if the taxes remained unpaid. Friendly's argued that action would produce an unnecessary distraction and keep the Debtors from completing a "successful reorganization."[110] There were no objections and the Court entered a final order granting Friendly's motion.[111]

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[105] Debtors' Motion for Entry of an Order Authorizing the Debtors to Continue Prepetition Insurance Coverage and Related Practices. Case 11-13167 (KG). ("Insurance Motion"), 6.pdf at 3.

[106] Insurance Motion, 6.pdf at 10; 11 U.S.C. §112(b)(4)(C) (2016) (failure to maintain appropriate insurance that poses a risk to the estate or to the public is cause for dismissal).

[107] Order Authorizing the Debtors to Continue Prepetition Insurance Coverage and Related Practices Case 11-13167 (KG). 51.pdf.

[108] Debtors' Motion for Entry of an Order Authorizing the Debtors to Pay Certain Prepetition Taxes and Fees. ("Taxes Motions"). Case 11-13167 (KG). 11.pdf.

[109] *Id.* at 4–5.

[110] *Id.* at 6.

[111] Order Authorizing the Debtors to Pay Certain Prepetition Taxes and Fees Case 11-13167 (KG) 53.pdf.

### ***Prepetition Wages Motion***

Friendly's also filed a motion to authorize the payment of prepetition wages, salaries, other compensation, as well as a variety of other employee related benefits and expenses related to their approximately 10,300 employees.[112] Initially, the order was final only with respect to wages and compensation, but severance packages remained an issue. In the process of closing several stores, Friendly's dismissed a number of employees that had severance agreements in their contracts. Because some of the severance agreements provided for payments that were projected to be over the statutory claim cap of Section 502(b)(7), Friendly's asked for an order allowing the severance program to run temporarily while those items were reviewed. After Friendly's added language specifying certain severance caps for various categories of employees, the severance program was approved on a final basis.[113]

### ***Prepetition Debtors' Bender Motion***

Due to the nature of Friendly's business, Friendly's requested a relief from stay in order to pay certain agricultural liens, mechanics liens and other claims entitled to Section 503(b)(9) administrative expense priority under the Bankruptcy Code.[114] The chart below shows a breakdown of the amount due and relief requested for the various claims in the motion:[115]

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[112] Debtors' Motion for Entry of an Order Authorizing the Payment of Prepetition (A) Wages, Salaries, and Other Compensation, (B) Reimbursable Employee Expenses, and (C) Employee Medical and Similar Benefits Case 11-13167 (KG). ("Wages Motion"). 10.pdf.

[113] Transcript of Hearing Before Honorable Kevin Gross United States Bankruptcy. Case 11-13167 (KG). ("Transcript 3"). 298.pdf at 11.

[114] Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Pay Certain Prepetition Claims (A) Arising Under the Perishable Agricultural Commodities Act, (B) of Shippers, Warehousemen, and Other Lien Claimants, and (C) Arising Under Section 503(B)(9) of the Bankruptcy Code and (II) Granting Certain Related Relief Case 11-13167 (KG). ("Lienholders Motion"). 13.pdf.

[115] *Id.* at 10.

| | Estimated Payables as of Petition Date | Relief Sought |
|---|---|---|
| PACA Claims | $600,000 | $600,000 |
| Shipping Claims | $700,000 | $700,000 |
| Lien Claims | $7.1 million | $7.1 million |
| Section 503(b)(9) Claims | $8.5 million | $8.5 million |

The Perishable Agricultural Commodities Act ("PACA") passed by Congress "provides various protections to fresh fruit and vegetable sellers."[116] Courts have interpreted the statute to mean that assets covered by PACA are not property of a debtor's estate.[117] Section 503(b)(9) provides protection to certain vendors by classifying their claims as priority administrative expenses. Here, there were no objections to the motion and the Court entered an order granting the relief requested.[118]

***Prepetition Claims of Media Suppliers***

Friendly's also requested relief from stay to use $1.75 million it collected prepetition for "marketing fees to fund media advertising in the Franchisee markets."[119] Recognizing Friendly's request was consistent with the "'two recognized policies' of chapter 11 . . . preserving the going concern value and maximizing the value of property available to satisfy creditors,"[120] the court granted the order.[121]

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116 *Id.* at 5.

117 *Id.* at 5.

118 Order (I) Authorizing the Debtors to Pay Certain Prepetition Claims (A) Arising Under the Perishable Agricultural Commodities Act, (B) of Shippers, Warehousemen, and Other Lien Claimants, and (C) Arising Under Section 503(B)(9) of the Bankruptcy Code and (II) Granting Certain Related Relief. Case 11-13167 (KG). 57.pdf.

119 Debtors' Motion for Entry of an Order (I) Authorizing the Debtors topay Certain Prepetition Media Claims and (II) Granting Certain Related Relief. Case 11-13167 (KG). ("Media Claims Motion"). 12.pdf at 8.

120 *Id.* at 7.

***Moved to Second Day Hearing***

Although filed with the other first day motions, the following motions were heard at a later date:

1. Debtors' Motion for Entry of an Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property[122]

2. Debtors' Motion for Entry of an Order Authorizing and Approving (A) Rejection of Certain Unexpired Leases and (B) Abandonment of Certain Personal Property, Each Effective as of Vacation of Premises[123]

3. Debtors' Motion for Entry of (A) an Order Approving Bidding Procedures and Notice Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of all or Substantially all of the Assets of the Debtors Free and Clear of all Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief[124]

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[121] Order (I) Authorizing the Debtors to Pay Certain Prepetition Media Claims and (II) Granting Certain Related Relief. Case 11-13167 (KG). 54.pdf.

[122] Debtors' Motion for Entry of an Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property. Case 11-13167 (KG). ("Rejection Procedures Motion"). 5.pdf.

[123] Debtors' Motion for Entry of an Order Authorizing and Approving (A) Rejection of Certain Unexpired Leases and (B) Abandonment of Certain Personal Property, Each Effective as of Vacation of Premises. Case 11-13167 (KG). ("Lease Rejection Motion"). 7.pdf.

[124] Debtors' Motion for Entry of (A) an Order Approving Bidding Procedures and Notice Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of all or Substantially all of the Assets of the Debtors Free and Clear of all Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain

## Second Day Motions

**Interim Compensation and Reimbursement of Expenses for Professionals and Official Committee Members**

Friendly's also filed a motion to establish interim compensation and reimbursement of expenses for various professionals and official committee members.[125] The grounds for relief was premised upon Section 331 of the Bankruptcy Code which states "all professionals are entitled to submit applications for interim compensation and reimbursement of expenses every 120 days, or more often if permitted by the court."[126] The motion sought authorization to retain: "(a) Kirkland & Ellis LLP, as proposed restructuring co-counsel; (b) Pachuiski Stang Ziehl & Jones LLP, as proposed restructuring co-counsel; (c) GA Keen Realty Advisors, as proposed real estate advisor; (d) Duff & Phelps Securities, LLC, as financial advisor; and (e) Zolfo Cooper, LLC, as bankruptcy consultants and special financial advisors."[127] There were no objections to this motion and the Court entered an interim order granting the motion.[128]

**Sale, Transfer, or Abandonment of *De Minimis* Assets**

Pursuant to Section 363(b) of the Bankruptcy Code, debtors may sell or transfer assets outside of the ordinary course of business with court approval.[129]

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Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief. Case 11-13167 (KG). ("APA, Bidding, and Sale Motion"). 15.pdf, 15-2.pdf, 15-3.pdf, 15-4.pdf, 15-5.pdf.

[125] Debtors' Motion for Entry of an Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Official Committee Members. Case 11-13167 (KG). 99.pdf.

[126] *Id.* at 7.

[127] *Id.* at 3.

[128] Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Official Committee Members. Case 11-13167 (KG). 212.pdf.

[129] 11 U.S.C. § 363(b)(1) (2016) ("[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate").

Here, Friendly's motion, regarding *de minimis* assets, provided for two sets of procedures regarding the sale of assets dependent upon whether the aggregate selling price was less than $50,000 or between $50,000 and $500,000.[130] Friendly's also requested that the next omnibus hearing occur in twelve days, instead of the regular fourteen or seventeen days notice typically required for such a motion to be heard. The shortened notice motion was granted and only one objection was filed with respect to the actual procedures for selling *de minimis* assets.[131] In short, Huntington National Bank, a lien holder of five Dayton area Friendly's locations, wanted to ensure they were given notice of the sale or transfer of any assets located at their stores. Huntington's objection was accommodated with a hand-written addition to the final order providing for the notice requested.[132]

**Reject Lease or Executory Contract**

One of the primary reasons Friendly's filed for Chapter 11, was to eliminate ongoing obligations related to leases at 63 store locations.[133] Friendly's estimated that by rejecting the leases they would save approximately $5.3 million per year.[134] Per Section 365(a) of the Bankruptcy Code, a debtor, subject to the court's approval, may "reject any executory contract or unexpired lease."[135] Moreover, the decision to reject unexpired leases was a matter within the "business judgment" of the Debtor, which gave Friendly's a considerable amount of deference. Friendly's believed rejecting the leases was an "exercise of sound business judgment," Because the

[130] Debtors' Motion for Entry of an Order Approving Procedures for the Sale Transfer or Abandonment of De Minimis Assets. Case 11-13167 (KG). 120.pdf.

[131] Limited Objection to Debtors' Motion for Entry of an Order Approving Procedures for the Sale, Transfer, or Abandonment of De Minimis Assets (D.I. 120). Case 11-13167 (KG). ("Huntington Asset Objection"). 178.pdf.

[132] Order Approving Procedures for the Sale, Transfer, or Abandonment of De Minimis Assets. Case 11-13167 (KG). 218.pdf at 4.

[133] Declaration of Steven C. Sanchioni, 3.pdf at 25. ("The Debtors have ceased operations (or currently in the process of ceasing operations) at approximately 63 store locations as part of the Debtors' ongoing restructuring efforts.").

[134] Lease Rejection Motion, 7.pdf at 4.

[135] 11 U.S.C. § 365(a) (2016).

leases were attached to restaurants that were no longer operating or were underperforming, Friendly's considered the stores to be of no value to them as a going concern.[136] The motion also enabled Friendly's to abandon personal property found at the properties, if Friendly's determined the property was of "inconsequential value" or the cost of removing and storing it for future use exceeded the value of the property to the Debtors' estate.[137] Because each month brought about thousands of dollars in additional rent, it was imperative to Friendly's they be allowed to reject the leases as soon as possible. Therefore, Friendly's filed a motion[138] to expedite procedures for rejecting the leases in hopes of rejecting them prior to November 1, 2011.[139]

There were a number of objections to the aforementioned motions. Most of the objections pertaining to the motion focused on issues surrounding failure to give sufficient notice of rejection to third parties, the effective date of rejection, and the abandonment of personal property without providing information that the property is free of claims, liens and encumbrances of third parties.[140] The parties reached a

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136 Lease Rejection Motion, 7.pdf at 7.

137 *See* 11 U.S.C. § 554(a) (2016) (providing that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate).

138 Rejection Procedure Motion, 5.pdf.

139 Declaration of Steven C. Sanchioni, 3.pdf at 25.

140 Limited Objection of Holyoke Mall Company, L.P., Aviation Mall Newco, LLC and PCK Development Company, L.L.C. to Debtors' Motion for Entry of an Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property. Case 11-13167 (KG). 139.pdf; Limited Objection of The Macerich Company to Debtors' Motion for Entry of an Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property. Case 11-13167 (KG). 141.pdf; Limited Objection of National Industrial Portfolio Borrower, LLC to Debtors' Motion for Entry of an Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property. Case 11-13167 (KG). 152.pdf.

compromise wherein parties had ten days instead of seven to object to the proposed rejections after receiving notice.[141] Additionally, the parties added a provision addressing concerns related to notifying third parties.[142]

As with the procedure motion, there were a number of objections to the lease rejection motion. Specifically, Coventry Retail was concerned that perishable foods might be left behind.[143] The Debtors' addressed the concern by adding a new paragraph that stated: "Debtors will use commercially reasonable efforts to remove any remaining food products from the premises prior to relinquishing the premises."[144] A paragraph addressing payments made pursuant to the order and how they were subordinate to the DIP order was removed. Like the procedure motion, there were similar issues with the lease rejection motion pertaining to whether adequate notice to third parties was accounted for and whether the lessor would be liable to claims by those third parties.[145] Ultimately, the court found that there were already adequate measures reflected in the proposed order to ensure

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141 Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property. Case 11-13167 (KG). 210.pdf at 2.

142 *Id.* at 3. ("Parties objecting to a proposed rejection must file and serve a written objection . . . received by the following parties . . . counsel to Contract counterparty or Landlord (including sublessees) affected by rejection notice, if known . . . [and] any third party equipment or personal property lessor with an interest in any property to be abandoned, if known.").

143 Objection to Debtors' Motion for Entry of an Order Authorizing and Approving (A) Rejection of Certain Unexpired Leases and (B) Abandonment of Certain Personal Property, Each Effective as of Vacation of Premises. Case 11-13167 (KG). ("Coventry Rejection Motion Objection"). 143.pdf.

144 Order Authorizing and Approving (A) Rejection of Certain Unexpired Leases and (B) Abandonment of Certain Personal Property, Each Effective as of Vacation of Premises. Case 11-13167 (KG). 211.pdf at 3.

145 Limited Objection of Benoit Properties, Inc. to Motion of Debtors for Entry of an Order Authorizing and Approving (A) Rejection of Certain Unexpired Leases and (B) Abandonment of Certain Personal Property, Each Effective as of Vacation of Premises. Case 11-13167 (KG). ("Benoit Lease Rejection Objection"). 147.pdf.

that notice was given to third parties and that the lessor had means to assert claims against the Debtor in the event of a suit by a third party.[146]

[146] Transcript of Hearing Before Honorable Kevin Gross United States Bankruptcy Judge. Case 11-13167 (KG). ("Hearing 2"). 226.pdf. at 20-22.

## **Creditors Committee**

On October 12, 2011, the United States Trustee appointed the Official Committee of Unsecured Creditors ("OCC") pursuant to Section 1102(a)(1).[147] The OCC consisted of seven members: FM Facility Maintenance, The Bank of New York (℅ Bank of New York Mellon Trust Company), Pension Benefit Guaranty Corporation, GCP Limited Partnership, KSL Media, Inc., The Coca-Cola Company, and Realty Income Corporation.[148]

The OCC levied several objections, as discussed in depth *infra*. Most notably, the OCC successfully modified the bidding procedures, extending the bid deadline and requiring a funded wind-down budget from the successful bidder. Additionally, the OCC unsuccessfully argued for the PIK Note to be equitably subordinated under Section 510(c) and recharacterized as equity under the *AutoStyle Plastics* test.[149]

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[147] Notice of Appointment of Committee of Unsecured Creditors. Case 11-13167 (KG). 117.pdf.

[148] *Id.*

[149] OCC Omnibus Objection, 242-6.pdf at 7.

## DIP Financing

As a going-concern sale, it was necessary for the Debtor in Possession (DIP) to secure post-petition financing to continue the operation of the business. Because the bankruptcy was pre-negotiated, Wells Fargo, also a prepetition secured creditor, offered to provide Section 364 financing through an aggregate revolving loan agreement providing $71,378,664 of financing to the Debtor in Possession.[150]

**Initial DIP Financing Proposal**

First, Wells Fargo requested to lend on a senior secured and superpriority basis under Section 364(c).[151] As such, the DIP financing would receive priority over all administrative expenses outlined in Sections 503(b) and 507(b), would be secured by a lien on property of the estate not otherwise subject to a lien, and would be secured by a junior lien on property subject to a lien.[152] In order to assert this priority, the Debtor had to establish that "financing [was] not available otherwise" on an unsecured or administrative expense basis.[153] Though the search for alternative DIP financing was not exhaustive, the Debtors' investigated other possible sources and the statute imposed no duty to seek credit from all possible lenders.[154]

Second, Wells Fargo requested first priority priming lien treatment under Section 364(d).[155] Contending that consent by existing lienholders was unnecessary,

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[150] Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Granting Liens and Superpriority Claims. Case 11-13167 (KG). ("Debtors' DIP Motion"). 16.pdf at 6, 16-1.pdf, 16-2.pdf, 16-3.pdf, 16-4.pdf.

[151] *Id.* at 26.

[152] *Id.*; See also 11 U.S.C. § 364 (2016).

[153] BERNSTEIN & KUNEY, *supra* note 73, at 261.

[154] Debtors' DIP Motion, 16.pdf at 26–27; *see also* Bray v. Shenandoah Fed. Sav. & Loan Ass'n (*In re* Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986).

[155] Debtors' DIP Motion, 16.pdf at 27–28.

Wells Fargo insisted that the interest of existing lienholders was adequately protected, as required by Section 364(d)(1). Wells Fargo argued that the transaction would enhance the value of the Debtors' assets and contended that five factors justified first priority protection: (1) their post-petition financing offer was the best option available to the Debtor, (2) the financing was necessary to preserve the value of the estates, (3) the DIP facility would provide the Debtor access to $71.3 million, (4) the DIP facility was negotiated in good faith, and (5) the Debtors had provided adequate protection to the interests of other prepetition secured parties.[156]

Further emphasizing the adequate protection of the other prepetition secured parties, Wells Fargo pointed to "adequate protection package" offered by the Debtors.[157] This package:[158]

(1) included a pay down the prepetition secured credit agreement obligations with cash collected by the Debtors from business operations,

(2) perfected replacement liens in the collateral,[159]

(3) allowed priority administrative claims for the prepetition agent representing Wells Fargo under Section 507(b),

(4) periodic financial reporting and access to the business to verify compliance,

(5) allowance of Section 502 claims in connection with prepetition secured indebtedness,

(6) gave Sun Capital's pre-negotiated right to "credit bid" in relation to PIK Noteholder claims,

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156 *Id.* at 28–30.

157 *Id.* at 31.

158 Debtors' DIP Motion, 16.pdf at 31–32.

159 These were only subordinate to the professional fees carve-out, DIP liens, and permitted prior liens.

(7) continued accrual of interest on the PIK Note,[160] and

(8) paid accrued amounts to the prepetition lenders as they came due in connection with the prepetition first lien indebtedness upon entry of the final DIP order.[161]

Though not required, both the prepetition agent and PIK Noteholder consented to their protection as adequate under the DIP financing proposal.[162] This consent was the cherry on top of Wells Fargo's argument that other prepetition secured interests enjoyed adequate protection under Section 364(d)(1)(B).

Wells Fargo included three other notable features in the proposed DIP facility.

First, Wells Fargo included a "creeping roll-up" feature in the DIP facility. This meant that prepetition debt owed to Wells Fargo was paid with proceeds from the DIP facility and "rolled up" into the post-petition lending.[163] As a "creeping roll-up," all cash collected by the Debtors from operations and sale of assets would be used to pay down the prepetition indebtedness upon the closing of the DIP facility.[164]

Second, Wells Fargo included a "carve-out" provision, setting aside money from the DIP facility to cover unpaid fees owed to the U.S. Trustee and Clerk of the Bankruptcy Court and professional fees.[165]

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[160] Accrued and unpaid interest was not to be paid by the Debtors from the proceeds of the DIP facility or cash collateral as long as obligations remained outstanding from the DIP facility.

[161] Debtors' DIP Motion, 16.pdf at 31–32.

[162] *Id.* at 32.

[163] BERNSTEIN & KUNEY, *supra* note 73, at 264.

[164] Debtors' DIP Motion, 16.pdf at 17.

[165] *Id.* at 3, 10–12.

Third, Wells Fargo argued that the Debtor should be allowed to use cash collateral.[166] Though a debtor's use of cash collateral is restricted under Sections 363(c)(2) and (e), both the prepetition agent and PIK Noteholder consented to the use of cash collateral and prepetition interests were adequately protected.[167]

### Objections to the DIP Facility

The OCC took issue with the terms of the proposed DIP financing arrangement and raised numerous objections, all stemming from the belief that the DIP facility was "clearly designed to give Sun Capital a tactical advantage[] at the expense of unsecured creditors."[168] The OCC contended that the DIP facility was not "fair, reasonable[,] and adequate" and that "a heightened level of scrutiny applie[d] when a debtor seeks approval of a DIP facility to be provided by an insider."[169] Specifically, the OCC took issue with the fee limitations imposed on OCC professionals, 506(c) and 552(b) waivers, and the effects of the roll-up and adequate protection package on unsecured creditors.[170]

### DIP Financing Orders

In response to Wells Fargo's motion, various negotiations between the parties, and objections levied against the proposed DIP facility, the Court issued two interim orders regarding DIP financing and, eventually, a final order.

#### *First Interim Order*

On October 6, 2011, Judge Gross approved DIP financing through an interim order, setting the final hearing on the matter for October 24, 2011.[171]

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166 *Id.* at 32–34.

167 *Id.* at 33–34.

168 OCC Omnibus Objection, 242-4.pdf at 35.

169 *Id.* at 36–37.

170 *Id.* at 37–53.

171 Order (Interim) (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Granting Liens and Superpriority Claims, and

***Second Interim Order***

After reviewing the additional motions and objections related to DIP financing, Judge Gross moved the final hearing date to November 1, 2011 and modified several aspects of the first interim order.[172] Rather than borrowing to the extent of the proposed full DIP facility aggregate principal, Judge Gross limited borrowing to $56, 378,664.[173] Likewise, the "carve-out" cap on fees was increased from $150,000 to $225,000 for the first thirty days.[174] Additionally, the Court approved a 13-week cash flow budget in accordance with the DIP facility.[175]

***Final Order***

Judge Gross issued the final order related to DIP financing on November 2, 2011 and approved borrowing under the DIP facility to the full proposed principal amount.[176] The DIP facility was also granted liens under Section 364(c) and (d) as security for the post-petition lending.[177] Likewise, the carve-out for trustee, clerk, and professional fees was dramatically increased to an aggregate amount of

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(V) Scheduling a Final Hearing on the Debtors Motion to Incur Such Financing on a Permanent Basis. Case 11-13167 (KG). ("First Interim Order"). 56.pdf at 45.

[172] Order (SECOND INTERIM ORDER) (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Granting Liens and Superpriority Claims, and (V) Scheduling a Final Hearing on the Debtors Motion to Incur Such Financing on a Permanent Basis. Case 11-13167 (KG). ("Second Interim Order"). 216.pdf at 2.

[173] *Id.* at 3.

[174] *Id.*

[175] *Id.*

[176] Final Order (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Granting Liens and Superpriority Claims on a Permanent Basis. Case 11-13167 (KG). ("Final Order"). 282.pdf at 5, 47.

[177] *Id.* at 19–20.

$750,000.[178] Wells Fargo agreed to a marshalling concept, requiring the DIP lender to look to the assets encumbered prepetition prior to unencumbered assets, should the need to foreclose on assets arise.[179] The PBGC received investigative rights through the final order in addition to the investigative rights of the OCC as a whole.[180] Ultimately, Sun Capital was pleased with the final iteration of the DIP facility and Neil Herman, representing Sun Capital, told the Court, "[W]e think it's now better than better, or as they said in the Dumb and Dumber movies, more betterer [sic]."[181]

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[178] Final Order, 282.pdf at 20–25. This was one of the most-negotiated aspects of the DIP facility as the OCC expressed an interest in investigating claims thoroughly. Mindful of the "insider" nature of this bankruptcy, "the word that the [OCC] . . . brought to bear on this is vigilance." October 24 Hearing, 226.pdf. at 9.

[179] Response of Wells Fargo Capital Finance, Inc. To Omnibus Objection of The Official Committee of Unsecured Creditors of Friendly Ice Cream Corporation, Et Al. To (I) Debtors Motion for Entry of an order Approving Bidding Procedures; (II) Debtors Motion for Approval of DIP Financing and Use of Cash Collateral; and (III) Allowance of Prepetition Claims of Sun Capital Partners, Inc. and Its Affiliates. Case 11-13167 (KG). ("Response of Wells Fargo"). 253.pdf at 5.

[180] *Id.* at 6.

[181] Transcript 3, 298.pdf at 90.

## The 363 Sale

**Asset Purchase Agreement**

Prior to filing bankruptcy, Friendly's and their advisors negotiated extensively over the terms of a potential restructure or sale. They considered several restructuring arrangements, including issuing and taking on new debt.[182] After marketing their assets to a number of possible purchasers, a pre-negotiated plan with Sun Capital ("Purchaser") as the stalking horse bidder was selected. Then, Friendly's and the Purchaser entered into a tentative asset purchase agreement ("APA").

Generally, the APA provided that:

> Pursuant to Sections 105, 363, and 365 of the Bankruptcy Code Friendly's on the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser shall purchase, acquire and accept from Sellers, and Sellers shall sell, transfer, assign, convey and deliver to Purchaser, all of Sellers' right, title and interest in, to and under the Acquired Assets, free and clear of all pledges, security interests, Liens, Claims, Interests or Encumbrances (other than Permitted Liens).[183]

Two provisions in particular would attract a significant amount of attention: a proposed expense reimbursement provision providing for $1,000,000 payable to the stalking horse bidder in the event the agreement was terminated pursuant to Section 11.1(b) or Section 11.1(c) of the APA,[184] and a provision stating that no

[182] Debtors' Motion for Entry of (A) an Order Approving Bidding Procedures and Notice Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of All or Substantially All of the Assets of the Debtors Free and Clear of All Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief. Case 11-13167 (KG). ("APA, Bidding and Sale Motion"). 15.pdf at 4.

[183] APA, Bidding and Sale Motion, 15-3.pdf at 17.

[184] APA, Bidding and Sale Motion, 15.pdf at 5, 6.

obligation or liability under Friendly's employee benefit plan would be assumed by the Purchaser.[185]

**Bidding Procedures**

With the stalking horse bid and tentative APA in place, Friendly's filed a motion asking the Court to: approve the APA; approve the sale of their assets at auction; authorize the sale of their assets free and clear of liens, claims, encumbrances, and other interests; as well as authorize the assumption and assignment of certain executory contracts and unexpired leases to the Purchaser or successful bidder.[186]

The bidding procedures described, amongst other things, the assets available for sale, the details of a qualifying bid, the auction's configuration, and diligence provisions for prospective bidders and Friendly's. Some of the requirements for a qualifying bid included: a good faith deposit of $5,000,000 to an escrow account, terms that surpassed or matched those of the APA, and a minimum purchase price of $122,600,00 cash. The minimum bid was calculated by adding the projected remaining balance of the DIP facility, the Purchaser's credit bid, the $1 million expense reimbursement, the additional employee payment obligation provision found in the APA, and $500,000 cash.[187] Additionally, bidders were to identify which leases they were going to assume and assign.[188] In order for a lease to be assumed or assigned however, "the debtor must cure all monetary defaults and give adequate assurance of its ability to perform under the contract."[189] The original timeline proposed by Friendly's was as follows:[190]

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[185] APA, Bidding and Sale Motion, 15-3.pdf at 19.

[186] APA, Bidding, and Sale Motion, 15.pdf.

[187] *Id.* at 9.

[188] *Id.* at 8.

[189] Memorandum from Michael Friedman, Joon Hong, & Keith Sambur of Richards, Kibbe & Orbe LLP on Cure Claims in Bankruptcy: Delphi Bankruptcy Case Raises Issues to Clients & Friends of the Firm (January 25, 2008), https://perma.cc/XX5G-KFHB.

[190] APA, Bidding, and Sale Motion, 15-1.pdf.

| | |
|---|---|
| Cure Notice | 3 days from entry of bidding procedures. |
| Cure Amount (Both) | November 24, 2011. |
| Adequate Assurance of Future Performance Objections (Stalking Horse Wins) | November 24, 2011. |
| Bid Deadline | November 24, 2011. |
| Sale Objection | November 24, 2011. |
| Auction | December 1, 2011. |
| Adequate Assurance Objection to Buyer Other than Stalking Horse | December 5, 2011. |
| Sale Hearing | December 5, 2011. |
| List of Leases to be Assumed/Assigned at Closing | Filed within 5 business days of closing . |
| List of Leases Subject to Designation Rights | Filed within 5 business days of closing. |
| Auction Conduct/Selection Objection | December 1, 2011 |

However, Friendly's initial timeline only contained input from parties "inside the tent"[191] and, unfortunately, the parties left on the outside found the plan unsavory.

**Objections**

***Landlords***

As for the Landlords, their initial objections predominantly centered around a lack of adequate assurance information, a lack of cure information, and timing.[192]

Pursuant to section 365 of the Bankruptcy Code, debtors are responsible for providing adequate assurance regarding the proposed assignees' ability to perform

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[191] A phrase referring to parties involved in planning a pre-negotiated bankruptcy.

[192] Limited Objection of Holyoke Mall Company L.P., Aviation Mall Newco, LLC and PCK Development Company, L.L.C. to Debtors' Motion for Entry of (A) an Order Approving Bidding Procedures and Notice Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of all or Substantially all of the Assets of the Debtors Free and Clear of all Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief. 11-13167 (KG). ("Mall Landlords Objection to APA, Bidding, and Sale Motion"). 140.pdf at 3.

under leases the assignee will assume and assign.[193] Several landlords felt the bidding motion lacked the language necessary to facilitate the transmission of adequate assurance information in a "timely manner such that [the landlords] [could] evaluate the information and file objections" as needed,[194] and that the APA "preclude[d] the landlords from obtaining adequate assurance information with respect to the Stalking Horse Purchaser."[195] Additionally, a few landlords were concerned that having the cure amounts due on the same day as the auction was too early.

Despite the diligent negotiations amongst Friendly's, the creditor's committee, and other parties, several objections remained to be heard at the motion's hearing. On the day of the hearing, Friendly's suggested the following revised schedule for the bidding procedure:[196]

| | |
|---|---|
| Cure Notice | 3 days from entry of bidding procedures. |
| Cure Amount | December 22, 2011. |
| Adequate Assurance of Future Performance Objections (SH) | Sale Objection Date |
| Bid Deadline | December 20, 2011 |
| Sale Objection | December, 22, 2011 |
| Auction | December 22, 2011. |
| Adequate Assurance Objection Assumption (NSH) | Sale Objection |
| Sale Hearing | December 29, 2011. |
| List of Leases to be Assumed/Assigned at | Filed within 5 business days of closing . |

[193] 11 U.S.C. §§ 365(b)(1)(C), (f)(2) (2016).

[194] Mall Landlords Objection to APA, Bidding, and Sale Motion, 140.pdf at 4.

[195] *Id.* at 4 (quoting APA, Bidding, and Sale Motion, 15-3.pdf at 38).

[196] Certification of Counsel Regarding Order (A) Approving Bidding Procedures and Notice Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of all or Substantially all of the Assets of the Debtors Free and Clear of all Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief 11-13167 (KG). ("Bidding Procedure Certification & Approval Order"). 287-1.pdf., 287.pdf.

| | |
|---|---|
| Closing | |
| List of Leases Subject to Designation Rights | Filed within 5 business days of closing. |
| Auction Conduct/Selection Objection | NA **12/27** |

Darnestown, a landlord at a shopping center, had a number of unresolved objections.[197] First, they argued that having the cure objection date be the same as the auction date was too early and wanted all objection due dates after the auction, so that all the information about the successful bidder would be available.[198] Additionally, Darnestown argued that having a cure objection one day and a sale objection on another created a "double duty for counsel," which increased the landlords' expenses unnecessarily.[199]

Realty Income, Friendly's largest landlord with leases at over 120 locations, objected to the December 22 "adequate assurance" objection deadline.[200] They wanted to push the date back to the sale hearing in order to provide additional time to evaluate "adequate assurance" packages from non-stalking horse bidders.[201]

In addition to adequate assurance objections, a few landlords objected to the cure timeframe.[202] They objected due to a provision in the APA[203] which provided

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197 Transcript 3, 298.pdf at 26–27.

198 Objection of Darnestown Road Associates LP to Debtors' Motion for Entry of (A) an Order Approving Bidding Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of All or Substantially All of the Assets of the Debtors Free and Clear of All Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief. 11-13167 (KG).("Darnestown Road Objection to APA, Bidding, and Sale Motion"). 173.pdf.

199 Transcript 3, 298.pdf at 26–27.

200 *Id.* at 28.

201 *Id.* at 28.

202 Objection of Brixmor Property Group, Inc. and GGP Limited Partnership and Joinder of Brixmor Property Group, Inc. and GGP Limited Partnership in Objections of the Macerich Company and Holyoke Mall Company, L.P.., *Et Al.*, To Debtors' Motion for Entry of (A) an Order Approving Bidding Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense

the Purchaser with 210 days, starting from the petition date, to decide what to do with certain leases listed on the designation rights contract.[204] The landlords were concerned about the potential costs associated with being solicited multiple times for cure amounts over the course of such a lengthy period. Therefore, they asked the Court that the "cure deadline and the cure amounts not be due until . . . [a] lease is designated for assumption." [205]However, the Debtors contended that knowing the cure amount is imperative for a party to know whether they are going to assume a contract.

***A Lion in Sheep's Clothing***

Amongst the various landlord and omnibus objections, one objection was particularly unorthodox.[206] In a pleading with five parts and conclusory language, Continental Illinois Holding Corporation ("Continental Illinois") submitted a motion demanding the court appoint an independent trustee. Essentially, Continental Illinois accused Friendly's and their counsel of proposing "very funny" and "very cute" "disingenuous legal positions," in order to shed their obligations under the Employee Retirement Income Security Act of 1974 (ERISA).[207] At the hearing after a bit of confusion and "besmirching," Matthew W. Lechner, one of Continental's officers, claimed to be a prospective bidder. Lechner asserted the time frame for

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Reimbursement; (II) Authorizing the Sale of All or Substantially All of the Assets of the Debtors Free and Clear of All Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief. 11-13167 (KG). ("Brixmor GGP Objection"). 172.pdf at 6.

[203] APA, Bidding, and Sale Motion, 15-3.pdf at 24.

[204] Designation rights refer to "a debtor's ability to sell to a third party the estate's right to market, assume[,] and assign an unexpired lease of nonresidential real property." Robert N.H. Christmas, *Designation Rights - A New, Post-BAPCPA World*, 25 AM. BANKR. INST. J. 10, 63–64 (2006).

[205] Transcript 3, 298.pdf at 48.

[206] Ex Parte Application Request For Emergency Order Appointing an Independent Trustee Representing the Pension Plan; And General Motion For Order In Five Parts. 11-13167 (KG). ("Continental Illinois Motion"). 233.pdf.

[207] *Id.* at 3.

competing bids was inadequate for competing bidders to evaluate all the complexities present in the case.[208] While the substance hidden under Lechner's poorly articulated point hinted at a potentially more sinister reason for the bankruptcy, other than the soaring cost of butter, the court ultimately dismissed the request for lack of standing.

***Official Committee of Unsecured Creditors***

The Official Committee of Unsecured Creditors (OCC) submitted an omnibus objection, requesting modification of the asset purchase agreement and the proposed bidding procedures. [209]

The OCC's primary argument asserted that it was inappropriate for Sun Capital to use their $267 million subordinated promissory note to credit bid for Friendly's.[210] This debt, they claimed, was more properly characterized as equity. Citing factors from *Autostyle Plastics*,[211] they argued that four factors strongly suggest that the PIK note should be recharacterized as equity:

1. Form of interest - the interest earned on the note was in kind (added to the balance of the note), and extremely variable. As of September 2011, the interest was $116 million or 43% of principle, with no periodic payment schedule though the note was due in full on November 11, 2013. The lack of repayment suggested an equity contribution.[212]

2. Risk - the loan was extended, and repayment was based on the idea that the Debtor's fortunes would turn around. This risk allocation better aligned with an equity contributor than a lender. [213]

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[208] Transcript 3, 298.pdf at 21.

[209] *See generally* OCC Omnibus Objection, 242-0.pdf, 242-1.pdf, 242-2.pdf, 242-3.pdf, 242-4.pdf, 242-5.pdf, 242-6.pdf.

[210] OCC Omnibus Objection, 242-6.pdf at 57–58.

[211] *In re* AutoStyle Plastics, Inc., 227 BR 797 (Bankr. W.D. Mich. 1998).

[212] OCC Omnibus Objection, 242-6.pdf at 13.

[213] *Id.* at 14.

3. Insiders - "The paradigmatic situation for recharacterization is where the same individuals or entities control both the transferor and transferee." Here, Sun Capital controlled both Freeze, LLC and Sundae, the transferor and transferee. [214]

4. Use of Funds - the loan was extended to refinance a short term bridge loan in connection with the merger and not for general business purposes. The Debtor could not get outside funding, which suggests that this was not really a loan. No reasonable creditor would have done this deal. [215]

Given this dispute, the committee argued that (1) the right to credit bid can be abrogated "for cause," (2) courts have found cause where the creditor's lien was questioned or in dispute, (3) this credit bid is subject to dispute because the OCC objected to the subordinated claim on the grounds that it should be characterized as equity.[216] Therefore, the committee requested that Sun Capital be required to provide a bond in the amount they bid in case the court later disallows the credit bid.[217]

The unsecured creditors committee also proposed some modifications to the bidding procedures.[218] First, they requested an extension of the time when bidders could submit bids.[219] The original deadline was November 24, 2011 and the committee requested it be extended to December 20, to give non-insider bidders time for marketing and due diligence.[220] Second, the committee wanted to eliminate the restriction on the form of consideration for a bid, the original bidding procedures required a cash bid.[221] Third, the committee wanted to reduce the minimum bid

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[214] *Id.* at 15–16.

[215] *Id.* at 17.

[216] OCC Omnibus Objection, 242-3.pdf at 2–5.

[217] *Id.* at 4.

[218] OCC Omnibus Objection, 242-2.pdf at 10.

[219] OCC Omnibus Objection, 242-3.pdf at 9.

[220] *Id.* at 9–10.

[221] OCC Omnibus Objection, 242-4.pdf at 1–2.

requirement for non-stalking horse bidders, arguing that since the stalking horse's credit bid was in dispute, everyone else should not be held to the amount that Sun Capital can credit bid.[222]

Fourth, since a purchaser would only acquire the assets of Friendly's and not the liabilities, the committee wanted to require successful bidders to fund a wind-down budget contained in a Ch. 11 plan, which would provide payment for (1) allowed unpaid administrative claims, (2) allowed priority claims, and (3) additional amounts for other claims as agreed on.[223] Fifth, the committee requested permission to submit a bid in the form of their own Ch. 11 plan.[224] For all of these requests, the committee argued they were necessary to encourage third party bids ensure a robust sale process, thereby providing the greatest creditor recovery.[225]

The unsecured creditors committee also proposed a modification to the Asset Purchase Agreement ("APA").[226] They wanted to remove the provision that allowed the stalking horse to "exclude" an asset previously designated as "acquired."[227] The APA allowed 210 days to execute this change, even after the sale was approved.[228] The sale would only be approved if it was the highest and best offer, but this determination would be based in part on what assets were acquired. Allowing Sun Capital to bid on a group of assets yet retain the power to exclude some of those assets and liabilities after the sale was approved, would allow it to materially change whether its bid was highest and best after the fact.[229]

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[222] *Id.*

[223] *Id.*

[224] *Id.* at 2.

[225] OCC Omnibus Objection, 242-3.pdf at 7.

[226] OCC Omnibus Objection, 242-4.pdf at 2–3.

[227] *Id.*

[228] *Id.*

[229] *Id.*

***Pension Benefit Guaranty Corporation***

The Pension Benefit Guaranty Corporation (PBGC) is a federal corporation that "provides a safety net for participants in private-sector defined-benefit plans by insuring the participants' benefits under the plan."[230] Under Title IV of ERISA, when a pension plan terminates, PBGC "takes over the obligations . . . and pays the plan's benefits."[231] Since the pension plan was not provided for under the APA, and PBGC would then be responsible for the Debtor's $100 million pension liabilities,[232] they challenged portions of the bid and sale procedure.[233] PBGC's primary objection was substantially the same as the OCC and asserted that Sun Capital's subordinated debt was actually equity, and they should not be allowed to credit bid that debt in a bankruptcy sale.[234]

***United States Trustee***

The United States Trustee filed an omnibus objection, lodging complaints against the asset purchase agreement as well as the bidding procedures filed by the Debtor.[235] The two notable objections regarded the expense reimbursement provision[236] and privacy of customer data post-sale.[237]

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[230] An Overview of the Pension Benefit Guaranty Corporation, INVESTOPEDIA.COM, http://perma.cc/U57V-TVMH.

[231] PBGC Omnibus Objection, 241.pdf at 4.

[232] *Id.* at 5.

[233] *Id.*

[234] *Id.* at 10.

[235] United States Trustee's Objection to the Debtors Motion for Entry of (A) An Order Approving Bidding Procedures and Notice Procedures and (B) An Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of All or Substantially All of the Assets of the Debtors Free And Clear of All Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment Of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief. Case 11-13167 (KG). ("US Trustee Omnibus Objection"). 191.pdf.

[236] *Id.* at 6–7.

[237] *Id.* at 7–9.

The APA provided Sun Capital with an expense reimbursement of $1 million if "the parties close an alternative transaction."[238] The U.S. Trustee argued that under Third Circuit precedent, this was only allowed where necessary to "preserve the value of the estate."[239] When an insider or affiliate of an insider is the stalking horse bidder, this weighs against the approval of the expense.[240] The U.S. Trustee admitted that an expense reimbursement may also be necessary where a bidder may need the assurances to reimburse for negotiating the transaction or conducting due diligence.[241] The U.S. Trustee argued that this was not necessary in the case of an insider stalking horse bidder.[242] Though an expense reimbursement is sometimes needed to induce a bid, here, the stalking horse bidder did not need "encouragement" to bid.[243]

The U.S. Trustee also argued that Section 363(b)(1) allows the appointment of a consumer privacy ombudsman to protect the personally identifiable information (PII) of customers that may be included as part of the sale.[244]

***The Debtor Strikes Back***

The Debtor quickly filed a reply to all of these objections.[245] The approval of the bidding procedures, the Debtor asserted, was "integral to successful

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[238] Id. at 5.

[239] Id. at 6.

[240] Id.

[241] US Trustee Omnibus Objection, 191.pdf at 7.

[242] Id.

[243] Id.

[244] Id. at 8–9.

[245] Debtors' Omnibus Reply to Objections to (I) Debtors' Motion for Entry of an Order Approving Bidding Procedures; and (II) Debtors' Motion for Approval of DIP Financing and Use of Cash Collateral. Case 11-13167 (KG). ("Debtor's Omnibus Reply"). 259.pdf.

reorganization,"[246] for without the $35 million in new money, the Debtor would be "subject to a liquidity shortfall", and would not be able to continue operating.[247] This would result in a liquidation where fewer creditors would get paid.[248]

FICC also argued that the asset purchase agreement was consistent with Debtors' fiduciary duties to its creditors.[249] More than twenty four potential bidders had inquired about purchasing the company, and the Debtors' independent board member voted for the plan.[250]

This process, they claimed, was in the best interests of the estate and all constituencies as it was the best way to preserve value.[251]

The Debtor argued that the appointment of a privacy ombudsman was not necessary.[252] The privacy policy that Friendly's had in place prior to the bankruptcy covered their customers' personally identifiable information.[253] The privacy policy covered a sale of the business and would remain in place, since the business was being sold as a "going-concern."[254]

Defending the $1 million expense reimbursement provision, the Debtor noted that it was (1) reasonable, as it was smaller relative to deal size than is routine;[255] (2) negotiated in good faith, at arm's length, and approved by independent

[246] *Id.* at 5.

[247] *Id.* at 6.

[248] *Id.* at 3.

[249] *Id.* at 7.

[250] Debtors' Omnibus Reply, 259.pdf at 8–9.

[251] *Id.* at 9.

[252] *Id.* at 16.

[253] *Id.* at 16–17.

[254] *Id.* at 17.

[255] Debtors' Omnibus Reply, 259.pdf at 18.

director;[256] and (3) necessary to secure the stalking horse bid.[257] Without it, Sun Capital threatened not to bid, which would result either in a lower sale price or a liquidation where all creditors would receive less than they would in a sale under the APA.[258] The Debtor bodlyargued that the expense reimbursement "offer[ed] the only responsible choice for the Debtors in the satisfaction of their fiduciary duties."[259]

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[256] *Id.* 19.

[257] *Id.* at 18.

[258] *Id.*

[259] *Id.* at 20.

## The Settlement

To satisfy some of the objections of the PBGC, the US Trustee, and the OCC, the Debtor:[260]

- Changed the objection date for the assignment of leases for non-stalking horse bidders to December 22, 2011

- Moved the auction objection deadline to December 27, 2011.

- Lowered minimum bid amount from $122 million to $75 million.

- Added a provision providing that if the stalking horse bid fails, the winning bidder must take out the remaining DIP facility by December 30, 2011, and also provide adequate funds to continue the bankruptcy for an additional seven months.

- Moved the sale objections date to December 29, to enable a non-stalking horse bidder additional time to secure interim approval of replacement financing: prior to the new year when additional rent payments become due.[261]

- Required each qualified bid to include a wind-down budget that is "no less favorable" than the one provided by the stalking horse.[262]

- Allowed for other bidders to submit bids in the form of a plan of reorganization, in the event the stalking horse's second lien amount was deemed ineligible to credit bid[263]

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[260] First Amended Disclosure Statement for the Debtors First Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code. Case 11-13167 (KG). ("Amended Disclosure Statement"). 951.pdf at 8.

[261] Transcript 3, 298.pdf at 18-19.

[262] Bidding Procedure Certification & Approval Order, 287.pdf at 7–8.

[263] Bidding Procedure Certification & Approval Order, 287-1.pdf at 13–14.

- Lowered the minimum bid amount to $75 million from $122 million (this was a "plug number" representing the "projected amount of the DIP balance at or around the time of the bid deadline, plus approximately $1 million . . . the amount of the expense reimbursement . . . plus an overbid increment of $500,000"[264]

- Added a provision that expressly addressed valuing the pension plan in evaluating a bid

After reviewing these changes the court entered an order approving the asset purchase agreement and bidding procedures on November 3, 2012.[265]

Additionally, a provision providing that if the stalking horse bid fails, the winning bidder must take out the remaining DIP facility by December 30, 2011.[266] Lastly, a special provision providing General Electric Capital Corporation specific protection from limited credit bidding on assets they had liens on was added to the motion.[267]

In exchange for certain releases of liability, and to forestall further litigation on their ability to credit bid their subordinated note, Sun Capital:[268]

- Provided a $35 million-dollar post-petition DIP loan,

- Limited their credit bid of the $279 million dollar secured claim to $50 million dollars, and subordinated the balance,

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[264] Transcript 3, 298.pdf at 36.

[265] *Id.*

[266] This date was chosen so that Sun Capital would no longer have any ongoing funding obligations at the turn of the new year, when rent payments would come due. Transcript 3, 298.pdf at 18.

[267] Bidding Procedure Certification & Approval Order, 287-1.pdf at 16–17.

[268] *Id.* at 16.

- Funded a wind down budget of approx. $11.26 million dollars, which would settle all of the secured claims and some of the unsecured claims against Friendly's.

- Paid $2.75 million for the benefit of Debtor's Estates and Creditors,

- Expanded the assumed liabilities, including full cure costs of assumed leases,

- Provided for payment of certain severance claims (totaling $72,143) under the wind down budget.

The Debtor received no bidders, other than Sun Capital,[269] and so on January 9, 2012, the court entered the sale order approving the asset purchase agreement, the sale of substantially all the assets, and the assumption and assignment of certain executory contracts and leases.[270]

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[269] *Id.* at 8.

[270] Order (I) Approving the Asset Purchase Agreement; (II) Authorizing the Sale of All or Substantially All of the Assets of the Debtors Free and Clear of All Liens, Claims, Encumbrances and Other Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Relating Thereto; and (IV) Granting Related Relief. Case 11-13167 (KG). 592.pdf.

## **The Liquidating Plan**

As part of the final asset purchase agreement, wherein Sun Capital purchased "substantially all Friendly's assets," what remained of the Debtor agreed to change its name to Amicus Wind Down Corporation ("Amicus"),[271] as one of the assets Sun Capital purchased was the Friendly's name.[272] The name chase was to eliminate brand confusion as well as to ensure that Sun Capital received the intangible goodwill assets it had purchased.[273]

Once the sale was complete, Amicus filed a plan of liquidation that would form a liquidating trust to be overseen by a liquidating trustee.[274] This was funded by the wind down budget, financed as part of the asset purchase agreement.[275] The liquidating trust established an orderly process whereby the claims could be paid based on their priority.[276] The liquidating plan classified each claim and set the rate at which they would be paid.[277]

Along with the plan of liquidation, the Debtor filed a disclosure statement,[278] which, after court approval, was to be distributed to all claim holders, disclosing the information they need to intelligently vote on the plan.

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[271] Alternatively, Amicus could be thought of as "Old FICC," as the FICC that continued forward at this point was a distinct entity from Amicus due to the asset purchase agreement.

[272] First Disclosure Statement, 813.pdf at 5.

[273] *Id.*

[274] Chapter 11 Plan of Liquidation Filed by Amicus Wind Down Corporation. Case 11-13167 (KG). ("Plan of Liquidation"). 812.pdf.

[275] First Disclosure Statement, 813.pdf at 8.

[276] Plan of Liquidation, 812.pdf at 15.

[277] *Id.* at 19.

[278] First Disclosure Statement, 813.pdf.

PBGC objected to a waiver provision in the plan that was described in the disclosure statement:

> Notwithstanding anything contained herein to the contrary, on the effective date and effective as of the effective date . . . For the good and valuable consideration provided by each of the Debtor releasees and the third party releasees, . . . Each of the Debtors discharge and release and shall be deemed to have provided a full discharge and release to each Debtor releasee and *to each third party releasee* (and each such Debtor releasee and third party releasee so released shall be deemed fully released and discharged by the Debtors) and their respective property from any and all causes of action . . . . Notwithstanding anything contained herein to the contrary, on the effective date and effective as of the effective date, the releasing parties . . . Shall be deemed to be have provided a full discharge and release . . . *To the third parties and their respective property from any and all causes of action . . . Arising from or related in any way to the Debtors* . . . Arising from the chapter 11 cases or this plan. [279]

PBGC asserted that the language may be construed as to prevent it from pursuing claims against pension plan fiduciaries who may have been a part of the Debtor.[280] The Debtor disputed this interpretation of the releases and argued that this was more appropriately a *plan confirmation objection* rather than a disclosure statement objection.[281] Consequently, it filed a disclosure statement to an amended plan of liquidation that included a caveat explicitly stating that the waiver would not be effective as against any party other than Freeze and the Amicus Debtors from any debt owed to the Friendly's Ice Cream Corporation Cash Balance Pension Plan or the PBGC.[282] The PBGC could still collect any such liability from a third

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[279] Pension Benefit Guaranty Corporation's Objection to Debtors' Disclosure Statement for the Debtors' Plan of Liquidation. Case 11-13167 (KG). 893.pdf at 7–9. (emphasis added).

[280] *Id*. at 11.

[281] Debtors' Response to the Pension Benefit Guaranty Corporation's Objection to the Debtors' Disclosure Statement. Case 11-13167 (KG). 921.pdf at 8–10.

[282] Amended Disclosure Statement, 951.pdf at 15.

party, unless released by the release of claims agreement of Jan 9, 2012 signed by the PGBC.[283].

On April 20, 2012, the Court approved the disclosure statement noting that it adequately informed reasonable investors to make a judgement on acceptance or rejection of the plan.[284] Consequently, pursuant to the solicitation and voting procedures order, "solicitation packages" were distributed and the voting deadline was set for May 25, 2012.[285]

**Claim Categorization**

Under the Debtors' liquidating plan, claims were paid out in cascading fashion in accordance with the priority granted to a given claim.[286]

***Unclassified Claims***

Sitting atop the priority ladder, various unclassified claims were slated to receive the first-fruits of the liquidating plan.[287]

First, all assumed administrative claims were set to be paid in full in accordance with Sections 328, 330(a), 331.[288]

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[283] Id.

[284] Order Confirming Debtors' First Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code. Case 11-13167 (KG). ("Liquidating Plan Order"). 1123.pdf at 3–4, 1123-1.pdf.

[285] Id. at 4.

[286] A helpful illustration is that of the wedding champagne tower. Champagne flutes are stacked upon each other in shrinking concentric circles until a single flute sits perched above the rest. Once the celebrant fills this flute beyond capacity, the overflow cascades to the lower flutes *ad infinitum* or until the champagne runs out. In the same way, the plan of liquidation pays out in priority until the money runs out.

[287] Liquidating Plan Order, 1123-1.pdf at 9.

[288] Id.

Second, all remaining administrative claims were to be paid in full to the extent that the aggregate amount set forth for these claims in the wind down budget or received the consent of the OCC or liquidating trustee in accordance with Sections 328, 330(a), 331.[289]

Third, professional compensation claims were to be paid in full, provided that the Court approved the allowed amounts of compensation in accordance with Sections 327–331, 1103.[290]

Fourth, as provided for in the asset purchase agreement and sale order, all DIP claims were credit-bid in connection with the Section 363 sale and received no further distribution.[291]

Fifth, priority tax claims were paid in full through installment payments over a period of time not to exceed five years.[292] Full payment was not at issue because the aggregate amount did not exceed the amount set forth for tax claims in the wind down budget and no approval was necessary from the OCC or the liquidating trustee in accordance with Section 1129(a)(9)(C).[293]

***Classified Claims***

In addition to unclassified claims, the liquidating plan formed ten classes of claims from the remaining claims in accordance with Section 1122.[294] These classes consisted of claims aggregated by type of claim and impairment.

The classes of claims were impaired if the plan of liquidation "modifie[d] the rights that the class of creditors would otherwise have [had]."[295] However, the

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[289] *Id.* at 9–10.

[290] *Id.* at 10.

[291] *Id.*

[292] *Id.*

[293] Liquidating Plan Order, 1123-1.pdf at 10; 11 U.S.C. § 1129(a)(9)(C) (2016).

[294] 11 U.S.C. § 1122 (2016).

[295] BERNSTEIN & KUNEY, *supra* note 73, at 517.

classes of claims slated to be paid in full were unimpaired and maintained the rights held prior to the plan. An unimpaired class of claims, having no modification of its rights, was deemed to accept the plan in accordance with Section 1126(f).[296] In contrast, a fully impaired class of claims, which received no distribution under the liquidating plan, was deemed to reject the plan in accordance with Section 1126(g).[297] This impairment distinction between classes was important due to the power of impaired classes to vote whether to accept or reject the liquidating plan.[298]

1. *Other Priority Claims*

Class 1 consisted of other priority claims sitting below the unclassified claims on the priority ladder.[299] Class 1 claims received full satisfaction of their claims through the liquidation and therefore were not impaired in any way. Consequently, they were deemed to accept the plan in accordance with Section 1126(f).[300]

2. *Other Secured Claims*

Class 2 consisted of other secured claims, including all secured tax claims. Class 2 claims received full satisfaction of their claims through the liquidation and were therefore unimpaired. Consequently, they were deemed to accept the plan in accordance with Section 1126(f).[301]

3. *Secured Credit Agreement Claims*

Class 3 consisted of any and all claims held by Wells Fargo in accordance with the prepetition revolving credit facility to the extent that they had not yet been repaid in accordance with the DIP Order and DIP Credit Agreement with Wells Fargo. Class 3 claims received full satisfaction of their claims through the

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[296] 11 U.S.C. § 1126(f) (2016).

[297] 11 U.S.C. § 1126(g) (2016).

[298] Liquidating Plan Order, 1123-1.pdf at 11–13. *See generally* 11 U.S.C. § 1126 (2016).

[299] Liquidating Plan Order, 1123-1.pdf at 11.

[300] *Id.*

[301] *Id.* at 12.

liquidating plan and were unimpaired. Accordingly, Class 3 was deemed to accept the plan under Section 1126(f) in the same manner as Class 1 and Class 2.[302]

*4. Secured Promissory Note Claims*

Class 4 consisted entirely of secured promissory note claims derived from the prepetition PIK Note held by Sundae. This was a fully impaired class, as their claims were extinguished without receiving any distribution; thus, they were deemed to reject the plan in accordance with Section 1126(g).[303] Likewise, these claims were subordinated to the allowed claims in Class 5.[304] Despite the statutory rejection of the plan, Sundae's insider status as a party to the prior settlement altered its posture towards the liquidating plan from other fully impaired classes, as discussed *infra*.[305]

*5. General Unsecured Claims against Amicus Debtors*

Class 5 consisted of all general unsecured claims against the Amicus Debtors, excluding all PBGC general unsecured claims.[306] As an impaired class, Class 5 claims were slated to receive a *pro rata* distribution in accordance with the liquidating trust agreement that amounted to roughly 1.6-3.2% of the total debt.[307] Consequently, Class 5 was impaired, and entitled to vote on the liquidating plan.[308]

*6. General Unsecured Claims against Freeze Debtors*

Class 6 consisted of all general unsecured claims against Freeze Debtors, excluding all PBGC general unsecured claims.[309] This was a fully impaired class, as

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[302] *Id.*

[303] *Id.* at 12–13.

[304] *Id.* at 12.

[305] Liquidating Plan Order, 1123-1.pdf at 11.

[306] *Id.* at 13.

[307] *Id.*; Amended Disclosure Statement, 951.pdf at 10.

[308] Liquidating Plan Order, 1123-1.pdf at 13.

[309] *Id.*

these claims were extinguished without receiving any distribution and were deemed to reject the plan in accordance with Section 1126(g).[310]

*7. PBGC General Unsecured Claims*

Class 7 consisted of all general unsecured claims held by the Pension Benefit Guaranty Corporation.[311] As an impaired class, Class 7 claims were slated to receive a *pro rata* distribution in accordance with the liquidating trust agreement that amounted to roughly 1.6-3.2% of the total debt in this class.[312] Consequently, Class 5 was entitled to vote on the liquidating plan.[313]

*8. Section 510(b) Claims*

Class 8 consisted of all Section 510(b) claims which were claims for damages, reimbursement, or contribution allowed under Section 502 "arising from recission of a purchase or sale of a security" of the Debtors or their affiliates.[314] As a fully impaired class, their claims were cancelled, released, and extinguished without receiving any distribution and were deemed to reject the plan in accordance with Section 1126(g).[315]

*9. Intercompany Claims*

Class 9 consisted of any and all intercompany claims.[316] As a fully impaired class, their claims were cancelled, released, and extinguished without receiving any distribution, they and were deemed to reject the plan in accordance with Section 1126(g).[317]

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[310] *Id.*

[311] *Id.*

[312] *Id.*; Amended Disclosure Statement, 951.pdf at 10.

[313] Liquidating Plan Order, 1123-1.pdf at 13.

[314] *Id.* at 14; 11 U.S.C. § 510(b) (2016); *see also* 11 U.S.C. § 502 (2016).

[315] Liquidating Plan Order, 1123-1.pdf at 14.

[316] *Id.*

[317] *Id.*

*10. Equity Interests*

Class 10 consisted of all equity interests in the Debtors.[318] As a fully impaired class, all equity interests in the Debtors received no distribution and were conclusively deemed to reject the plan in accordance with Section 1126(g).[319]

***Voting on the Plan***

As discussed *supra*, unimpaired classes under the liquidating plan, Classes 1 (Other Priority Claims), 2 (Other Secured Claims), and 3 (Secured Credit Agreement Claims), were not entitled to vote under Section 1126(f) and were deemed to have accepted the liquidating plan.[320] Fully impaired classes under the liquidating plan, Classes 4 (Secured Promissory Note Claims), 6 (General Unsecured Claims Against the Freeze LLP Debtors), 8 (Section 510(b) Claims), 9 (Intercompany Claims), and 10 (Equity Interests), were not entitled to vote and were deemed to reject the liquidating plan in accordance with Section 1126(g).[321]

As a result, only Classes 5 (General Unsecured Claims Against Amicus Debtors) and 7 (PBGC General Unsecured Claims) were entitled to vote due to their impairment under the liquidating plan.[322] Under Section 1126(c), the liquidating plan could only be accepted by Classes 5 and 7 if each class's creditors "that h[e]ld at least two-thirds in amount and more than one-half in number of the allowed claims" voted to accept.[323]

Within Class 5 (General Unsecured Claims), 730 claimants (88.70%) voted to accept the liquidating plan while 93 (11.30%) voted to reject, easily clearing the 50%

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[318] Id.

[319] Id.

[320] Id. at 4, 6.

[321] Liquidating Plan Order, 1123-1.pdf at 4, 6.

[322] Id. at 5.

[323] For example, if the class has 10 creditors with a $1000 claim each, and six of the creditors cast ballots (four voting to accept the plan) the class has "accepted" the plan, despite the absent and contrary votes. Why? Because at least two-thirds of the amount (6*$1000) voted, and of that vote, more than one-half of the number (4 of 6) accepted the plan.

threshold.[324] Of the accepting class claimants, those holding claims valued at $8,542,434.87 (73.68%) voted to accept the plan while those holding claims valued at $3,051,819.97 (26.32%) voted to reject the plan, clearing the "two-thirds in amount" requirement.[325]

Within Class 7 (PBGC General Unsecured Claims), the sole claimant holding a claim valued at $119,314,734.00 voted to accept the plan.

Consequently, the voting results, as reflected in the following tabulation summary,[326] met the strictures of Section 1126(c):

| TOTAL BALLOTS COUNTED | | | | |
|---|---|---|---|---|
| VOTING CLASS | ACCEPT | | REJECT | |
| | AMOUNT | NUMBER | AMOUNT | NUMBER |
| Class 5<br>General Unsecured Claims against Amicus Debtors | $8,542,434.87<br>**73.68%** | 730<br>**88.70%** | $3,051,819.97<br>**26.32%** | 93<br>**11.30%** |
| Class 7<br>PBGC General Unsecured Claims | $119,314,734.00<br>**100%** | 1<br>**100 %** | $0.00<br>**0.00%** | 0<br>**0.00%** |

In addition to the voting classes, Class 4 (Secured Promissory Note Claims) consisted entirely of claims by Sundae, a party to the prior settlement agreement.

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[324] Declaration of Stephenie Kjontvedt on Behalf of Epiq Bankruptcy Solutions, LLC, Regarding Voting and Tabulation of Ballots Accepting and Rejecting the Debtors' First Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code. Case 11-13167 (KG). ("Declaration of Stephenie Kjontvedt"). 1102.pdf at 6. *See generally* 11 U.S.C. § 1126(c) (2016).

[325] Declaration of Stephenie Kjontvedt, 1102.pdf at 6.

[326] *Id.*

Consequently, though all claims were extinguished as part of the Section 363 sale, Class 4 consented to its treatment under the plan.[327]

The liquidating plan received the required support of voting classes under Section 1126(c).[328] Likewise, in accordance with Section 1129(b)(2)(C)(ii), the plan was properly "crammed down" on Classes 6, 8, 9, and 10 as holders of junior interests slated to be denied any distribution.[329]

**Confirmation of the Plan**

On June 5, 2012, Judge Kevin Gross confirmed the liquidating plan, finding that the plan met all of the requirements of Section 1129.[330]

Judge Gross found that the plan was in statutory compliance, as required by Section 1129(a)(1), meeting the demands of Sections 1122 and 1123.[331] The plan properly designated unclassified claims and properly separated nine classes of claims and one class of equity interests under valid business, factual, and legal bases.[332] The specification of treatment and implementation to all respective classes was likewise adequate under the plan.[333] Additionally the liquidating plan did not discriminate against any particular class.[334] The cancellation of all equity interests

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[327] Liquidating Plan Order, 1123.pdf at 11.

[328] *Id.* at 5

[329] *Id.* at 11.

[330] *Id.* at 1. *See generally* 11 U.S.C. § 1129 (2016).

[331] Liquidating Plan Order, 1123.pdf at 5; *see also* 11 U.S.C. §§ 1122, 1123, 1129(a)(10) (2016).

[332] Liquidating Plan Order, 1123.pdf at 6; *see also* 11 U.S.C. §§ 1122, 1123(a)(1), 1129(a)(10) (2016).

[333] Liquidating Plan Order, 1123.pdf at 6–7; *see also* 11 U.S.C. §§ 1123(a)(2), (a)(3), (a)(4), (a)(5) (2016).

[334] Liquidating Plan Order, 1123.pdf at 6–7; *see also* 11 U.S.C. §§ 1123(a)(2), (a)(3), (a)(4), (a)(5) (2016).

and discontinuation of all officers and directors under the plan rendered Sections 1123(a)(6) and (a)(7) inapplicable.[335] All discretionary components of the plan were likewise consistent with the requirements of Section 1123(b).[336]

Proponents of the plan properly solicited and notified all relevant parties throughout the process and complied with all court orders, meeting the requirements of Section 1129(a)(2).[337]

After reviewing the totality of the circumstances surrounding the formulation of the plan and without any valid objections, Judge Gross determined that the plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' estates.[338] Consequently, the plan was made in good faith, as required by Section 1129(a)(3).[339]

All professional services and expenses were properly accounted for and disclosed, as required by Section 1129(a)(4).[340] Given that officers and directors were not provided for in the plan (other than the liquidating trustee) and no governmental regulatory commissions had jurisdiction over the plan, Sections 1129(a)(5) & (6) were inapplicable.[341]

The plan additionally provided for greater recovery for holders of an allowed claim than they would receive if the bankruptcy had been converted to a Chapter 7

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[335] Liquidating Plan Order, 1123.pdf at 7; *see also* 11 U.S.C. § 1123(a)(6)(7) (2016).

[336] Liquidating Plan Order, 1123.pdf at 7; *see also* 11 U.S.C. § 1123(b) (2016).

[337] Liquidating Plan Order, 1123.pdf at 7–8; *see also* 11 U.S.C. § 1129(a)(2) (2016).

[338] Liquidating Plan Order, 1123.pdf at 7–8.

[339] Liquidating Plan Order, 1123.pdf at 8–9; *see also* 11 U.S.C. § 1129(a)(3) (2016).

[340] Liquidating Plan Order, 1123.pdf at 9–10; *see also* 11 U.S.C. §§ 1122, 1123, 1129(a)(10) (2016).

[341] Liquidating Plan Order, 1123.pdf at 10; *see also* 11 U.S.C. §§ 1129(a)(5) & (6) (2016).

complete liquidation.[342] As a result, the plan was in the best interest of the creditors in accordance with Section 1129(a)(7).[343]

Although Classes 4, 6, 8, 9, and 10 were deemed to reject the plan under Section 1126(g), the statute permits cramdown of the plan on those rejecting classes when "the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property."[344] In light of this provision and the voting results, cramdown of the plan occurred in accordance with Sections 1129(a)(8), (a)(10), and 1129(b).[345]

Likewise, the plan satisfied all remaining provisions of Section 1129 with less fanfare.[346] As a result, the First Amended Plan of Liquidation[347] was confirmed.[348] The liquidating plan established the liquidating trust, and the Court appointed *Solution Trust* as the liquidating trustee.[349]

After the payment of all allowed administrative claims and allowed priority tax claims with the proceeds of the wind down budget, excess monies were to promptly be returned to the purchaser.[350]

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342 Liquidating Plan Order, 1123.pdf at 10.

343 *Id.*; *see also* 11 U.S.C. § 1129(a)(7) (2016).

344 Liquidating Plan Order, 1123.pdf at 11; *see also* 11 U.S.C. §§ 1129(b)(2)(C)(ii) (2016).

345 Liquidating Plan Order, 1123.pdf at 11; *see also* 11 U.S.C. §§ 1129(a)(8) & 1129(b) (2016).

346 Liquidating Plan Order, 1123.pdf at 15–19; *see also* 11 U.S.C. §§ 1129(a)(11)–(16), 1129(b)–(e) (2016).

347 Debtors' First Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code. Case 11-13167 (KG). 948.pdf.

348 *See generally* Liquidating Plan Order, 1123.pdf.

349 *Id.*

350 Liquidating Plan Order, 1123-1.pdf at 15. The liquidating trust is still operating as of April 18, 2018.

**Terms of the Liquidating Trust**

The liquidating trust was established to administer and liquidate the liquidating trust assets, resolve all disputed claims, pursue any causes of action, and make all distributions to the beneficiaries as called for in the liquidating trust agreement.[351]

The liquidating trust was funded through the liquidating trust assets that vested free and clear of any liens and encumbrances.[352] Notably, the liquidating trust was not a successor-in-interest to the Debtor, thus, no claims against the Debtor passed to the liquidating trust.[353] The trust assets were made up of the funds from the wind down budget paid for by the purchasers of Friendly's Ice Cream, pursuant to the asset purchase agreement.[354]

To facilitate an orderly payment of claims, the liquidating trust established accounts or reserves of funds from which it would pay out particular claims.[355] The trust agreement provided that claims would first be paid from the reserves set aside for each category, and once the reserve was exhausted, the remaining claims would be paid for from the other liquidating trust assets.[356] Conversely, if money remained after all claims were paid, the balance would return to the "other liquidating trust assets" and made available to pay Class 5 and Class 7 unsecured claims *pro rata*.[357]

***Effect on Claims***

Under the terms of the plan of liquidation, the remaining obligations of the Debtors underneath the 8.375% Notes were cancelled as to the Debtor, but distribution was provided for under the plan.[358] All executory contracts and leases

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[351] Liquidating Plan Order, 1123-1.pdf at 9.

[352] Amended Disclosure Statement, 951.pdf at 11.

[353] *Id.*

[354] *Id.* at 9.

[355] *Id.* at 11.

[356] Amended Disclosure Statement, 951-1.pdf at 15–16.

[357] *Id.*

[358] Amended Disclosure Statement, 951-1.pdf at 21.

were deemed automatically rejected unless: (a) previously assumed by the Debtor, (b) designated pursuant to the sale order, or (c) the subject of a motion to accept or reject pending as of the effective date.[359] All claims due to the rejection of the leases had to be filed within 30 days.[360]

Section 1146(a), exempted all transactions and registrations from local taxes.[361]

The liquidating plan included two clauses that protected the Debtor. The first of clause preserved causes of action, stating that all causes of action that the Debtors could pursue were preserved unless explicitly waived or settled.[362] The absence of reference to a cause of action in the plan did not waive the claim. The second clause provided that rejection of an executory contract or unexpired lease pursuant to the plan did not release the other party from their preexisting obligations to the Debtors to, *inter alia*, provide warranties or continued maintenance on goods previously purchased or services previously received.[363]

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[359] *Id.* at 22–23.

[360] *Id.*

[361] *Id.* at 21

[362] *Id.* at 22–23.

[363] *Id.*

**ANNEX C**

***Anticipated Recoveries and Voting Rights Under the Liquidating Plan***[364]

| Class | Claims | Status | Voting Rights | Expected Recoveries |
|---|---|---|---|---|
| 1 | Other Priority Claims | Unimpaired | Deemed to Accept | 100% |
| 2 | Other Secured Claims | Unimpaired | Deemed to Accept | 100% |
| 3 | Secured Credit Agreement Claims | Unimpaired | Deemed to Accept | 100% |
| 4 | Secured Promissory Note Claims | Impaired | Deemed to Reject | 0% |
| 5 | General Unsecured Claims against Amicus Debtors | Impaired | Entitled to Vote | ~~[ ]~~**1.6–3.2**% |
| 6 | General Unsecured Claims against Freeze Debtors | Impaired | Deemed to Reject | 0% |
| 7 | PBGC General Unsecured Claims | Impaired | Entitled to Vote | ~~[ ]~~**1.6–3.2**% |
| 8 | Section 510(b) Claims | Impaired | Deemed to Reject | 0% |
| 9 | Intercompany Claims | Impaired | Deemed to Reject | 0% |
| 10 | Equity Interests | Impaired | Deemed to Reject | 0% |

[364] Amended Disclosure Statement, 951.pdf at 10.

## **Conclusion**

Through the Chapter 11 reorganization, Friendly's accomplished its primary goals.

First, the business emerged without its prepetition pension obligations and closed a significant swath of underperforming stores.[365] Liability under the pension plan, encompassing just under 6,000 former employees, was shifted to the Pension Benefit Guaranty Corporation.[366] Likewise, the jettisoning of underperforming stores, along with their respective lease obligations, allowed the new Friendly's to better compete in the tightening mid-scale restaurant sector.[367]

Second, Sun Capital, the primary prepetition owner, was able to reacquire Friendly's business through its credit-bid, repeating a successful strategy it used with other holdings.[368] Though Sun Capital's pre-negotiated credit-bid strategy received pushback, Sun Capital ended up being the only bidder at the table.[369]

While some reports lamented the closing stores and pension impact, most celebrated the results. In a period of numerous bankruptcies by notable national restaurant chains,[370] CEO Harsha Agadi publicly celebrated the quick completion of

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[365] Jim Kinney, *Friendly's Emerges from Chapter 11 Bankruptcy Protection After Closing More Stores,* MASSLIVE (Jan. 9, 2012, 11:18PM), https://perma.cc/E8FZ-VYUK. Friendly's closed 100 stores in total, including an additional 37 stores concurrent with its emergence from bankruptcy.

[366] Jenn Abelson, *Pension Agency Settles with Friendly's*, BOSTON GLOBE (Dec. 16, 2011), https://perma.cc/4GWU-83EN?type=image&.

[367] Declaration of Steven C. Sanchioni, 3.pdf at 3.

[368] Peg Brickley, *Friendly's to Stay with Sun Capital*, WALL ST. J., (Dec. 30, 2011), https://perma.cc/7CC2-CWQ8; *see also* Mike Spector, *Two Hats a Fit for Friendly's Owner*, WALL ST. J., (July 26, 2012, 11:25PM), https://perma.cc/YDN7-J5JY.

[369] Notice of Cancellation of Auction and Successful Bidder. Case 11-13167 (KG). 526.pdf at 1–2.

[370] Brian Baxter, *The Bankruptcy Files: Friendly's and Other Distressed Delicacies*, AMLAW DAILY, (Oct. 7, 2011, 5:42pM), https://perma.cc/5QEJ-V4L8. Some notable

the bankruptcy: "The completion of our financial and operational restructuring in just over three months is a significant accomplishment . . . . As a now better capitalized company, more able to compete in the casual family restaurant sector, we look forward to building on Friendly's rich 76-year-old history."[371]

Despite the quick completion of the bankruptcy, the liquidating trust continues to exist, resolving claims objections. On January 18, 2018, Judge Gross again extended the claims objection deadline to June 30, 2018.[372]

On June 20, 2016, Dean Foods, the largest dairy company in the United States,[373] purchased the manufacturing and retail ice cream business units of Friendly's Ice Cream for $155 million.[374] Dean Foods, owning the Friendly's brand, licensed back use of the brand to Friendly's restaurants, which have been severed from the manufacturing and retail business as part of the sale.

Despite the family feud that split Curtis and Prestley prior to the bankruptcy, the two brothers later came to reconcile.[375] Prestley, now 103, and

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other restaurant chains navigating bankruptcy around the same time include Perkins, Sbarro, Charlie Brown's Steakhouse, and Fuddruckers.

[371] Press Release, Friendly's Ice Cream Corporation, Company Successfully Completes Restructuring in Three Months (Jan. 9, 2012), *available at* PR NEWSWIRE, https://perma.cc/T2YF-5J9U.

[372] Order Granting Friendly's Liquidating Trust's Eighteenth Motion for Entry of an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9006(b) Extending the Time to Object to Claims. Case 11-13167 (KG). 1835.pdf at 1–2.

[373] Lydia Mulvaney and Shruti Singh, *In Testament to Healthy Milk Boom', Dean Raises DairyPure Prices*, BLOOMBERG, (Oct. 14, 2016, 12:02PM), https://perma.cc/3B58-7J3T.

[374] John Kell, *Dean Foods Places Bet on Ice Cream with Friendly's Deal*, FORTUNE (May 10, 2016), https://perma.cc/4JVA-BCW5.

[375] Jim Kinney, *Friendly's Co-founder Curtis Blake Celebrates 100th Birthday*, MASSLIVE (April 15, 2017), https://perma.cc/9FVU-S3YR.

Curtis, soon to be 101, continue to frequent the restaurants that bear the name of the small ice cream shop they opened 83 years ago.[376]

[376] *Id.*