

Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory bases for the relief requested herein are sections 105(a), 365(a), and 554(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Bankruptcy Rules").

Relief Requested

4. By this Motion, the Debtors respectfully request the entry of an order, substantially in the form attached hereto as Exhibit A, authorizing and approving the Debtors' (a) rejection of the Leases set forth on Exhibit 1 to Exhibit A, and (b) abandonment of the Personal Property in the Debtors' sole discretion, each effective as of the date the Debtors vacate the applicable premises (and in no event later than October 31, 2011).

Background

5. As described in the First Day Declaration, the Debtors are a leading full-service, family-oriented restaurant chain and provider of ice cream products in the Eastern United States. The Debtors' operations include approximately 490 restaurants located in 16 states. In addition to their restaurant operations, the Debtors manufacture a complete line of premium ice cream products distributed to more than 7,000 supermarkets and other third party retail locations in 48 states. The Debtors and their affiliates maintain their national headquarters in Wilbraham, Massachusetts, and employ over 10,000 workers across the country. In the first eight months of 2011, the Debtors' generated \$329.7 million in revenue and \$8.6 million in adjusted EBITDA.

6. In recent years, the restaurant industry—including the Debtors’ businesses—has been hurt by the significant U.S. economic downturn and increased food costs. New advertising campaigns and cost-cutting programs implemented by the Debtors have successfully mitigated certain negative effects on their businesses; however, the Debtors have not been immune to the effects of the economy and rising food prices, and their financial performance has suffered significantly.

7. As the Debtors’ liquidity position deteriorated, the Debtors struggled to meet their debt service obligations and failed to satisfy financial covenants under their prepetition revolving credit agreement, resulting in a default. Prior to their chapter 11 filing, the Debtors successfully negotiated a forbearance agreement with their senior secured lenders and a further extension of credit under their prepetition subordinated secured note in order to explore available restructuring alternatives. After careful review and extensive negotiations, the Debtors determined that a chapter 11 filing, coupled with an expedited operational restructuring and an efficient sale of the Debtors’ assets, was the best and most efficient way to maximize a return for the Debtors, their estates, and all parties in interest.

8. On the date hereof (the “Petition Date”), each of the Debtors filed a petition with the Court under chapter 11 of the Bankruptcy Code to permit them to restructure their balance sheets and operations to restore profitability. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases, and no committees have been appointed or designated. Concurrently with the filing of this Motion, the Debtors have requested procedural consolidation and joint administration of these chapter 11 cases.

Leases to Be Rejected

9. As of the Petition Date, the Debtors operate approximately 250 stores across 13 states. The Debtors have ceased operations (or currently are in the process of ceasing operations) at approximately 64 store locations as part of the Debtors' prepetition and ongoing restructuring efforts.

10. Generally, the Debtors do not own the real property on which their restaurants (including the approximately 64 non-operating restaurants) are or were operated. Instead, the Debtors lease nonresidential real property from numerous lessors and other counterparties. By this Motion and in order to maximize the value of their estates, the Debtors seek to reject the Leases for store locations at which the Debtors have ceased operations prior to the Petition Date (or will cease operations shortly, in any event prior to October 31, 2011).

11. The Leases to be rejected provide no benefit to the Debtors' estates or these chapter 11 cases. By rejecting the Leases, the Debtors believe that they will be able to save approximately \$5.3 million per year. Currently, the Debtors continue to be obligated to pay rent under the Leases even though they have ceased or will have ceased operations at the respective premises. Moreover, in addition to their obligations to pay rent under the Leases, the Debtors also are obligated to pay for certain property taxes, utilities, insurance, and other related charges associated with the Leases. The Debtors have determined in their business judgment that such costs, with the concomitant costs of operating store locations at the Premises, constitute an unnecessary drain on the Debtors' resources.

12. Additionally, after careful consideration, the Debtors have determined that the costs of the Leases exceed any marginal benefits received from potential assignments or subleases of the Leases should be rejected. In considering their options with respect to the Leases prior to the Petition Date, the Debtors and their advisors evaluated the possibility of

certain assignments or subleases of the Leases. The Debtors have determined that the transactional costs and postpetition occupancy costs associated with marketing the Leases exceeds any marginal benefit received from potential assignments or subleases.

13. Accordingly, in an effort to reduce postpetition administrative costs and in the exercise of the Debtors' sound business judgment, the Debtors believe that the rejection of the Leases, as set forth on Exhibit 1 to the Order attached hereto as Exhibit A and effective as of the Petition Date is in the best interests of the Debtors, their estates, and their creditors.

Personal Property to Be Abandoned

14. Additionally, the Debtors have also evaluated all of the personal property that may be located at the Premises and have determined that the Personal Property is of inconsequential value and/or the cost of removing and storing the Personal Property for future use or marketing and sale exceeds its value to the Debtors' estates. Further, the Debtors' use of the majority of the Personal Property has been for location-specific purposes. Since the Debtors either have closed or are closing the store locations at the Premises, the Debtors believe that the Personal Property no longer is necessary for the Debtors' business operations.

15. Accordingly, in an effort to reduce postpetition administrative costs and in the exercise of the Debtors' sound business judgment, the Debtors believe that the abandonment of the Personal Property is appropriate and in the best interests of the Debtors, their estates, and their creditors.

Basis for Relief

A. Rejection of the Leases Effective as of the Petition Date Is Appropriate and Provides the Debtors with Significant Cost Savings.

16. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, "subject to the court's approval, may . . . reject any executory contract or unexpired lease of the

debtor.” 11 U.S.C. § 365(a). The decision to assume or reject an executory contract or unexpired lease is a matter within the “business judgment” of the debtor. *See Nat’l Labor Relations Bd. v. Bildisco & Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982) (“The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.” (citation omitted)); *see also Glenstone Lodge, Inc. v. Buckhead Am. Corp. (In re Buckhead Am. Corp.)*, 180 B.R. 83, 88 (Bankr. D. Del. 1995). Application of the business judgment standard requires a court to approve a debtor’s business decision unless the decision is the product of bad faith, whim or caprice. *See Lubrizol Enters., Inc. v. Richmond Metal Finishes*, 756 F.2d 1043, 1047 (4th Cir. 1985). Further, “[t]his provision allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely performed.” *Stewart Title Guar. Co. v. Old Republic Nat’l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (citation omitted).

17. Rejection of an unexpired lease is appropriate where such rejection would benefit the estate. *See Sharon Steel Corp. v. Nan Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 39–40 (3d Cir. 1989). Upon finding that a debtor has exercised its sound business judgment in determining that rejection of certain contracts or leases is in the best interests of its creditors and all parties in interest, a court should approve the rejection under section 365(a). *See In re Federal Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003); *In re Bradlees Stores, Inc.*, 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996), *appeal dismissed*, 210 B.R. 506 (S.D.N.Y. 1997); *In re Summit Land Co.*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (holding that absent extraordinary circumstances, court approval of a debtors’ decision to assume or reject an executory contract “should be granted as a matter of course”).

18. The Leases are not a source of potential value for the Debtors' future operations, creditors or interest holders. Even if certain of the Leases constitute below-market leases, the Debtors' obligations to pay, for example, postpetition rent, real estate taxes, utilities, insurance, and other related charges diminishes any potential value received from an assignment or sublease, specifically given the relatively short term remaining in each Lease. Accordingly, the Debtors have determined that the Leases constitute unnecessary drains on the Debtors' resources and, therefore, rejection of the Leases reflects the Debtors' exercise of sound business judgment.

B. The Abandonment of Personal Property Is Appropriate.

19. Further, the abandonment of the Personal Property is appropriate and authorized by the Bankruptcy Code. *See* 11 U.S.C. § 554(a). Section 554(a) provides 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.” *Id.* Courts generally give a debtor in possession great deference to its decision to abandon property. *See, e.g., In re Vel Rey Props., Inc.*, 174 B.R. 859, 867 (Bankr. D.D.C. 1994) (“Clearly, the court should give deference to the trustee’s judgment in such matters.”). Unless certain property is harmful to the public, once a debtor has shown that it is burdensome or of inconsequential value to the estate, a court should approve the abandonment. *Id.*

20. The Debtors have determined that the costs of moving and storing the Personal Property would far outweigh any benefit to the Debtors' estates. Further, any efforts by the Debtors to move or market the Personal Property could unnecessarily delay the Debtors' surrender of the Premises and the rejection of the Leases. Accordingly, it is in the best interests of the Debtors and their estates for the Debtors, in their sole discretion, to abandon the Personal Property located on the Premises.

21. Courts in this and other jurisdictions have approved relief similar to the relief requested herein. *See, e.g., In re Visteon Corp.*, No. 09-11786 (Bankr. D. Del. June 23, 2009); *In re Circuit City Stores, Inc.*, No. 08-35653 (Bankr. E.D. Va. Nov. 10, 2008); *In re Buffets Holdings, Inc.*, No. 08-10141 (Bankr. D. Del. Feb. 13, 2008); *In re Pope & Talbot, Inc.*, No. 07-11738 (Bankr. D. Del. Dec. 13, 2007); *In re Movie Gallery, Inc.*, No. 07 33849 (Bankr. E.D. Va. Oct. 17, 2007); *In re Calpine Corp.*, No. 05-60200 (Bankr. S.D.N.Y. Dec. 21, 2005); *In re Tower Auto., Inc.*, No. 05-10578 (Bankr. S.D.N.Y. Feb. 3, 2005); *In re Cornerstone Propane, L.P.*, No. 04-13856 (Bankr. S.D.N.Y. June 10, 2004); *In re Spiegel, Inc.*, No. 03-11540 (Bankr. S.D.N.Y. Mar. 18, 2003).³

Notice

22. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the agent for the Debtors' prepetition secured lenders and the agent for the Debtors' proposed postpetition debtor-in-possession financing facility; (c) the indenture trustee for the Debtors' prepetition unsecured noteholders; (d) the top 20 unsecured creditors; and (e) any party that may have a particular interest in this Motion. As this Motion is seeking "first day" relief, within two business days of the hearing on this Motion, the Debtors will serve copies of this Motion and any order entered in respect to this Motion as required by Local Bankruptcy Rule 9013-1(m). The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

³ Because of the voluminous nature of the orders cited herein, such orders are not attached to this Motion. Copies of these orders are available upon request of the Debtors' proposed counsel.

No Prior Request

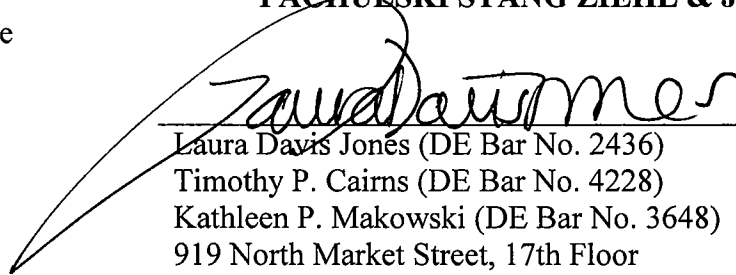
23. No prior request for the relief sought in this Motion has been made to this or any other court.

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WHEREFORE, the Debtors respectfully request that the Court enter an order granting the relief requested herein and granting such other and further relief as is just and proper.

Dated: October 5, 2011
Wilmington, Delaware

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