

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<p>In re:</p> <p>FRIENDLY ICE CREAM CORPORATION, <i>et al.</i>,¹</p> <p style="text-align: center;">Debtors.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 11</p> <p>Case No. 11-13167 (___)</p> <p>(Joint Administration Requested)</p>
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**DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS
TO MAINTAIN AND ADMINISTER CUSTOMER PROGRAMS AND HONOR
PREPETITION OBLIGATIONS RELATED THERETO**

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this motion (this "Motion") for the entry of an order, substantially in the form attached hereto as **Exhibit A**, authorizing the Debtors to (a) maintain and administer customer programs and (b) honor prepetition obligations earned by and owing to their customers related thereto in the ordinary course of business and in a manner consistent with past practice. In support of this Motion, the Debtors respectfully state as follows.²

Jurisdiction and Venue

1. The 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.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Friendly Ice Cream Corporation (3130); Friendly's Restaurants Franchise, LLC (3693); Friendly's Realty I, LLC (2580); Friendly's Realty II, LLC (2581); and Friendly's Realty III, LLC (2583). The location of the Debtors' corporate headquarters and the Debtors' service address is: 1855 Boston Road, Wilbraham, Massachusetts 01095.

² The facts and circumstances supporting this Motion are set forth in the Declaration of Steven C. Sanchioni, Executive Vice President, Chief Financial Officer, Treasurer, and Assistant Secretary of Friendly Ice Cream Corporation, in Support of the Debtors' Chapter 11 Petitions and First Day Motions (the "First Day Declaration"), filed contemporaneously herewith.

3. The statutory bases for the relief requested herein are sections 105(a), 363, 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 6003 and 6004 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 seek entry of an order authorizing the Debtors to: (a) maintain and administer the Customer Programs (as defined herein); and (b) honor prepetition obligations related thereto in the ordinary course of business and in a manner consistent with past practice.

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.

The Debtors' Customer Programs

9. As owners and operators or franchisors of several hundred food service locations, and as manufacturers of food products sold in greater than 7,000 grocery and retail locations, the Debtors have developed their brands and designed various marketing strategies to generate business in the face of sophisticated competition. Among these strategies are certain customer

programs, promotions, and practices (collectively, the “Customer Programs”) designed to enhance revenues by, among other things, encouraging repeat business and developing new customer relationships in both the Debtors’ restaurant and retail businesses. As of the Petition Date, the Customer Programs include: (a) Charity Partnerships; (b) the Gift Card and Gift Certificate Program; (c) Restaurants Discounts; (d) Coupons; (e) Manufacturing Warranties; and (f) Trade Promotions; (each as defined herein).³

10. The Debtors believe that it is critically important to maintain their brands, goodwill, and customer loyalty by continuing to administer their Customer Programs in the ordinary course of business and to honor related prepetition obligations. In connection with these chapter 11 cases, the Debtors are seeking to reorganize their operations and restructure their consolidated balance sheet. The viability of the reorganized Debtors will depend in substantial part on the Debtors’ ability to preserve their goodwill, retain current customers, and develop new business. If the Debtors are unable to honor Customer Programs obligations, the Debtors’ brand assets could be immediately and irreparably harmed.

11. Continued use of the Customer Programs, on the other hand, will enable the Debtors to protect their customer base and revenue growth opportunities. Moreover, despite the importance of the Customer Programs to the Debtors’ marketing strategy, the impact of the Customer Programs-almost all of which is in the form of non-cash discounts and promotions-is not significant in comparison to the Debtors’ total revenues. Consequently, the Debtors seek the authority to maintain and administer the Customer Programs in the ordinary course of business.

³ This Motion provides an overview of the Debtors’ most significant Customer Programs. The relief requested herein is applicable with respect to all Customer Programs and is not limited to those Customer Programs discussed in this Motion. To the extent that there are any outstanding prepetition obligations related to Customer Programs not discussed herein, the Debtors, out of an abundance of caution, seek authority to honor such obligations.

A. Charity Partnerships.

12. The Debtors' Customer Programs include certain charitable programs in which the Debtors participate (the "Charity Partnerships"). Two current Charity Partnerships give rise to prepetition obligations. *First*, from time to time, the Debtors' restaurant locations partner with local charitable, not-for-profit organizations to raise funds for worthwhile community causes at "Family Fun Nights." At a Family Fun Night, a charitable organization invites guests to attend a gathering at a Friendly's restaurant, and the Debtors contribute a share of Family Fun Night sales proceeds to the co-host organization. Depending on the time of year, the Debtors contribute up to \$65,000 per month to charities participating in Family Fun Nights. Outstanding Family Fun Night obligations as of the Petition Date are less than \$10,000. *Second*, after a tornado in Western Massachusetts on June 1, 2011, the Debtors partnered with their vendors and customers at 140 restaurants throughout Massachusetts and Connecticut to match, dollar-for-dollar, contributions to the Pioneer Valley Red Cross tornado relief effort through July 10, 2011. As of the Petition Date, the Debtors outstanding obligations for the tornado relief contributions are approximately \$60,000.

13. Each of the Charity Partnerships are mutually-beneficial relationships between the Debtors and their not-for-profit partners and communities in which the Debtors do business because, along with their contributions to worthy causes, the Debtors enjoy the intangible benefits of community service, including publicity, name-recognition, and neighborhood goodwill. Moreover, the beneficiaries of the Charity Partnerships are Debtors' loyal customers and community members in need. Accordingly, the Debtors seek authority to continue to participate in existing and future Charity Partnerships and to honor related obligations in the ordinary course of business, whether arising prepetition or postpetition, consistent with past practices.

B. Gift Card and Gift Certificate Program.

14. Among the Debtors' Customer Programs is a customer gift card and gift certificate program (the "Gift Card and Gift Certificate Program"). Once purchased, a gift card or gift certificate may be used like cash at other Debtor- and franchisee-owned locations. With respect to gift cards, all Debtor- and franchisee-owned locations use a gift card program under which customers may purchase a gift card in-store or online which can be loaded in amounts ranging from \$5–100 per card. As of the Petition Date, approximately \$6.25 million of prepaid gift cards liabilities are outstanding.

15. With respect to gift certificates, the Debtors discontinued sales of new gift certificates more than eight years ago. Some gift certificates may remain outstanding, however, and the Debtors seek authority to honor those certificates if presented for redemption.

16. Moreover, in connection with the administration of the Gift Card and Gift Certificate Program, the Debtors, along with Bank of America Merchant Services, LLC ("BAMS") are parties to that certain Gift Card Processing Agreement, dated September 30, 2010 (the "Gift Card Agreement"), which provides for, among other things, the establishment and implementation of a stored value card program, gift card production, maintenance of a database of gift card dates, the authorization and processing of gift card transactions, a call center, and web-based support tools.

17. Under the terms of the Gift Card Agreement, the Debtors are required to pay BAMS's fees for their gift card services, certain amounts of which may have accrued, but remained unpaid as of the Petition Date (collectively, the "Gift Card Processing Fees"). Without BAMS's continued and uninterrupted services, the Debtors would lose a major avenue for conducting sales transactions in the ordinary course of their businesses. BAMS's failure to continue to issue and process customer gift cards would severely disrupt the Debtors' businesses,

adversely affect sales and negatively impact loyal customers. Accordingly, pursuant to this Motion, the Debtors seek authority to continue to pay these Gift Card Processing Fees, including any prepetition obligations, in the ordinary course of their businesses to avoid any interruption of their ability to issue, process, and service gift card transactions. The Debtors' ability to allow its customers to purchase gift cards is critical to their business and therefore their chapter 11 reorganization efforts. The Debtors estimate that, as of the Petition Date, approximately \$110,000 in Gift Card Processing Fees and card stock costs remain unpaid to BAMS. Such amounts are minimal when compared to the substantial harm to the Debtors operations and burden of having to seek a replacement gift card processor on an expedited basis. Thus, the Debtors seek authority to continue to administer the Gift Card and Gift Certificate Program in the ordinary course of business and to pay prepetition obligations related thereto.

C. Restaurant Discounts.

18. At their Debtor- and franchisee-owned locations, the Debtors offer certain discounts that encourage sales and have a positive impact on profits (collectively, the "Restaurant Discounts"). The Restaurant Discounts include:

- *Survey discounts*: Restaurant customers who complete an online guest experience survey earn a discount coupon for use toward future purchases;
- *Friendly's employee discounts*: The Debtors maintain a discount program for employees providing a discount on all in-house, carryout, or pre-pack purchases made at company-owned restaurants;
- *Military Personnel discounts*: The Debtors maintain a discount program for military personnel providing a discount on all in-house, carryout, or pre-pack purchases made at company-owned restaurants; and
- *Mall employee discounts*: The Debtors maintain discount programs for employees at shopping malls where the Debtors have a restaurant location. Mall employees represent a key group of repeat customers for shopping mall locations.

- *College Meal Plan Programs:* The Debtors maintain discount programs for college students who patronize the Debtors' restaurant facilities as part of their college or university meal plan.

19. The Restaurant Discounts are important parts of the Debtors' marketing strategy that engender goodwill and foster repeat business. Accordingly, the Debtors seek authority to continue the Restaurant Discounts in the ordinary course of business, whether generated prepetition or postpetition, consistent with past practices.

D. Promotional Coupons.

20. The Debtors have established certain promotional coupon programs designed to generate revenues across the Debtors' enterprise as well as to target specific customer segments (collectively, the "Coupons"). From time to time in the ordinary course of business, the Debtors offer sales and coupon based promotions for both restaurant and retail sales via the Debtors' internet site, social media, direct mail, shared mail, newspaper, and at the Debtors' restaurant locations to generate sales volume. The Coupons generate revenues by encouraging sales at the Debtors' store locations and targeting price-sensitive customers who may otherwise be unlikely to purchase the Debtors' products. The Debtors seek authority to continue these profit-generating promotions and to honor the Coupons in the ordinary course of business, whether issued prepetition or postpetition, consistent with past practices.

21. In connection with the administration of the Coupons, the Debtors and Carolina Manufacturers Services, Inc. ("CMS"), a national coupon redemption service, are parties to that certain Coupon Processing Agreement, dated November 9, 2007 (as amended and renewed from time to time, the "Coupon Processing Agreement"). The Debtors estimate that, as of the Petition Date, approximately \$30,000 in coupon processing fees are outstanding. Such amounts are minimal when compared to the substantial harm to the Debtors operations and burden of having to seek a replacement coupon processor on an expedited basis. Accordingly, the Debtors seek

authority, but not direction, to continue the Coupon Processing Agreement described herein in the ordinary course of business and to make payments to CMS on account of such programs in the ordinary course of business and consistent with past practice.

E. Manufacturing Warranties.

22. As manufacturer of food products for sale or resale in several hundred food service locations and over 7,000 grocery stores and other retail locations, the Debtors provide product liability warranties to retailers and co-packing customers (the "Manufacturing Warranties"). In some cases, the Manufacturing Warranties are provided by contract; in other cases, they are imposed as a matter of law. If the Debtors failed to honor the Manufacturing Warranties, penalties for breaching the Manufacturing Warranties could include customer product liability claims, retailer damage claims, and product recalls initiated by the Debtors, retailers, or government regulators. While Manufacturing Warranties liabilities are very difficult to estimate at any given time, retail returns are an appropriate proxy for the Debtors' Manufacturing Warranties obligations. In 2010, retail returns were approximately \$650,000. The Debtors seek authority to continue to honor the Manufacturing Warranties in the ordinary course of business, whether arising prepetition or postpetition, consistent with past practices.

F. Trade Promotions.

23. In the ordinary course of the Debtors' manufacturing business and trade with retailers, the Debtors compensate their retail customers for certain industry-standard marketing activities designed to boost sales of the Debtors products in the competitive retail marketplace (collectively, the "Trade Promotions"). The Trade Promotions include, among other things: (a) slotting fees, which are charges to have the Debtors' products placed on preferred shelves; (b) advertising performance allowances, which are allowances for retailers to prepare and publish local promotions; (c) case allowances, which are a volume-based discounts to incentivize

retailers to purchase more of the Debtors' products; and (d) account-specific promotions, which retailers specially design for Debtors' to maximize sales of their food products. The Trade Promotions are expenses necessary to promote the Debtors' sales at the grocery stores and other retail locations. Accordingly, for bookkeeping purposes, the Debtors record sales after reducing the amount of retail invoices by the estimated Trade Promotions charges. Then, the Debtors compensate retailers for the Trade Promotions either through a rebate following a retailer's payment or the retailer may deduct the promotion amount from the payment of their invoice. Accruals for Trade Promotions as of the Petition Date are approximately \$7.2 million. The Debtors seek authority to continue to honor their Trade Promotions obligations in the ordinary course of business, whether arising prepetition or postpetition, consistent with past practices.

Basis for Relief

A. The Doctrine of Necessity Authorizes the Debtors to Maintain the Customer Programs and Honor Customer Programs Obligations.

24. Courts generally acknowledge that, under appropriate circumstances, they may authorize a debtor to pay (or provide special treatment for) certain prepetition obligations. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821, 824-25 (Bankr. D. Del. 1999) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to the continued operation of the debtor's business); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (granting the debtor the authority to pay prepetition wages); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, (*In re James A. Phillips, Inc.*), 29 B.R. 391, 398 (Bankr. S.D.N.Y. 1983) (granting the debtor the authority to pay prepetition claims of suppliers who were potential lien claimants). When authorizing payments of certain prepetition obligations, courts have relied upon several legal theories rooted in sections 363(b) and 105(a) of the Bankruptcy Code.

25. Consistent with a debtor's fiduciary duties, where there is a sound business purpose for the payment of prepetition obligations, and where the debtor is able to "articulate some business justification, other than the mere appeasement of major creditors," courts have authorized debtors to make such payments under section 363(b) of the Bankruptcy Code. *See, e.g., Ionosphere Clubs*, 98 B.R. at 175 (finding that a sound business justification existed to pay prepetition wages); *In re James A. Phillips, Inc.*, 29 B.R. at 397 (relying upon section 363 as a basis to allow a contractor to pay the prepetition claims of suppliers who were potential lien claimants).

26. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Under section 105(a), courts may permit pre-plan payments of prepetition obligations when such payments are essential to the continued operation of the debtor's business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors' business reorganization plan. *See In re UNR Indus.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (permitting the debtor to pay prepetition claims of suppliers or employees whose continued cooperation is essential to the debtors' successful reorganization); *Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

27. In addition to the authority granted a debtor in possession under sections 363(b) and 105(a) of the Bankruptcy Code, courts have developed the “doctrine of necessity” or the “necessity of payment” rule, which originated in the landmark case of *Miltenberger v. Logansport, C. & S.W.R. Co.*, 106 U.S. 286 (1882). Since *Miltenberger*, courts have expanded their application of the doctrine of necessity to cover instances of a debtor’s reorganization, see *Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945) (holding, in a hotel reorganization matter, that the court was not “helpless” to apply the rule to supply creditors where the alternative was the cessation of operations), including the United States Court of Appeals for the Third Circuit, which recognized the doctrine in *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981).

28. In *Lehigh*, the Third Circuit held that a court could authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor. *Id.* (stating that a court may authorize payment of prepetition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); *see also In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that the necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims have been paid”); *Just for Feet*, 242 B.R. at 824–25 (noting that debtors may pay prepetition claims that are essential to continued operation of business); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (same).

29. The necessity of payment doctrine is designed to foster the rehabilitation of a debtor in reorganization cases, which courts have recognized is “the paramount policy and goal of Chapter 11.” *Ionosphere Clubs*, 98 B.R. at 176; *Just For Feet*, 242 B.R. at 826 (finding that

payment of prepetition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization.”); *see also In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally prohibited by the Bankruptcy Code”, but “[a] general practice has developed . . . where bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1490 (9th Cir. 1987) (finding that it is appropriate to provide for the “unequal treatment of pre-petition debts when [such treatment is] necessary for rehabilitation”); 3 COLLIER ON BANKRUPTCY ¶ 105.04[5][a] (15th ed. rev. 2004) (discussing cases in which courts have relied upon the “doctrine of necessity” or the “necessity of payment” rule to pay prepetition claims immediately).

30. The relief requested herein satisfies the doctrine of necessity standard. The Debtors submit that the relief requested represents a sound exercise of the Debtors’ business judgment, is necessary to avoid immediate and irreparable harm to the Debtors’ estates and is therefore justified under section 363(b), as well as under section 105(a) of the Bankruptcy Code and Bankruptcy Rule 6003. The necessity of the Customer Programs in the Debtors’ industry cannot be overstated. Many of the Customer Programs are standard practice in the Debtors’ industry. If the obligations under the Customer Programs are not honored, the Debtors risk alienating their customers and encouraging them to obtain services from the Debtors’ competitors. The failure to honor the Customer Programs could erode the Debtors’ hard-earned

reputation and brand loyalty, adversely affecting the Debtors' prospects for a successful reorganization.

31. The Debtors believe that the relief requested herein will pay dividends with respect to the long-term reorganization of their businesses, both in terms of profitability and the engendering of goodwill, especially at this critical time following the filing of these chapter 11 cases. Courts in this district recognize that retaining patronage and customer loyalty is critical to a debtor's prospects for a successful reorganization and, accordingly, routinely approve relief similar to that requested herein. *See, e.g., In re Neb. Book Co.*, No. 11-12005 (Bankr. D. Del. July 25, 2011) (granting customer programs relief up to \$23 million); *In re L.A. Dodgers LLC*, No. 11-12010 (Bankr. D. Del. June 28, 2011) (granting immediate final relief on first-day customer programs motion); *In re Ambassadors Int'l, Inc.*, No. 11-11002 (Bankr. D. Del. Apr. 5, 2011) (same); *In re Ultimate Acquisition Partners, LP*, No. 11-10245 (Bankr. D. Del. Feb. 23, 2011); *In re Summit Bus. Media Holding Co.*, No. 11-10231 (Bankr. D. Del. Jan. 28, 2011); *In re Appleseed's Intermediate Holdings LLC*, No. 11-10160 (Bankr. D. Del. Jan. 20, 2011); *In re Constar Int'l Inc.*, No. 11-10109 (Bankr. D. Del. Jan. 13, 2011) (granting customer programs relief up to \$4.71 million).⁴

B. Cause Exists to Authorize the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers.

32. The Debtors have sufficient funds to remit the amounts described herein in the ordinary course of business by virtue of expected cash flows from ongoing business operations and anticipated access to debtor in possession financing. Also, under the Debtors' existing cash management system, the Debtors have made arrangements to readily identify checks or wire

⁴ 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.

transfer requests as relating to an authorized payment on account of the Customer Programs. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and the Court should authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein.

The Requirements of Bankruptcy Rule 6003 are Satisfied

33. Pursuant to Bankruptcy Rule 6003, the Court may grant relief regarding a motion to pay all or part of a prepetition claim within 21 days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001).

34. Moreover, Bankruptcy Rule 6003 authorizes the Court to grant the relief requested herein to avoid harm to the Debtors' customers and other third parties. Unlike Bankruptcy Rule 4001, Bankruptcy Rule 6003 does not condition relief on imminent or threatened harm to the estate alone. Rather, Bankruptcy Rule 6003 speaks of "immediate and irreparable harm" generally. *Cf.* Bankruptcy Rule 4001(b)(2), (c)(2) (referring to "irreparable harm to the *estate*") (emphasis added). Indeed, the "irreparable harm" standard is analogous to the traditional standards governing the issuance of preliminary injunctions. *See* 9 COLLIER ON BANKRUPTCY ¶ 4001.06[3] (discussing source of "irreparable harm" standard under Rule 4001(c)(2)). Courts will routinely consider third party interests when granting such relief. *See, e.g., Capital Ventures Int'l v. Argentina*, 443 F.3d 214, 223 n.7 (2d Cir. 2006); *see also Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 761 (7th Cir. 2001).

35. There is no question the Debtors' failure to honor their Customer Programs would likely result in immediate and irreparable harm to the Debtors' customer relations. The Customer Programs are an integral part of the service and products provided by the Debtors to their customers. In addition, the Customer Programs are essential to the Debtors' success in retaining customer satisfaction, sustaining goodwill, and ensuring that the Debtors remain competitive notwithstanding the commencement of these chapter 11 cases. Restricting or canceling the Customer Programs could jeopardize customer relationships and irreparably harm the Debtors' reputation and ability to assure that customers continue to use Debtors' products and patronize their restaurants.

Satisfaction of Bankruptcy Rule 6004(a) and 6004(h)

36. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Notice

37. 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.

No Prior Request

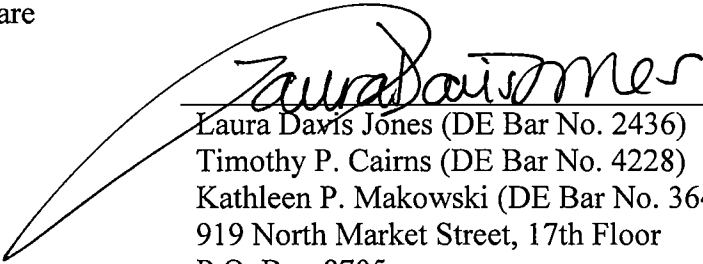
38. No prior request for the relief sought in this Motion has been made to this or any other court.

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

Dated: October 5, 2011
Wilmington, Delaware

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