IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
FRIENDLY ICE CREAM CORPORATION, *et al.*,[1]	)	Case No. 11-13167 (___)
Debtors.	)	(Joint Administration Requested)

DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION MEDIA CLAIMS AND (II) GRANTING CERTAIN RELATED RELIEF

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this motion (this "Motion") for the entry of an order (the "Order"), substantially in the form attached hereto as **Exhibit A**, authorizing the Debtors to pay Media Claims of Franchisee Media Stations (as such terms are defined herein) in the ordinary course of business. In support of this Motion, the Debtors respectfully state as follows.[2]

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.

[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"), Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the "Local Bankruptcy Rules").

Background

4. 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.

5. In recent years, the restaurant industry—including the Debtors' businesses—have 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.

6. 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.

7. 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 Media Claims and Franchisee Restaurants

8. As set forth in the First Day Declaration, nearly half of the Debtors' restaurants are operated under franchise agreements, whereby franchisees (the "Franchisees") have contracted for the right to operate a Friendly's restaurant. Franchising offers the Debtors the benefit of stable cash flows based on one-time licensing fees and monthly royalties and marketing fees based on store performance. The marketing fee is typically equal to approximately 3.5% of monthly total sales, and is utilized by the Debtors to develop advertising content and for television media buys. Specifically, 0.75% of the marketing fee is used to fund

general overhead and production costs and the remaining 2.75% of the marketing fee is used by the Debtors to fund media purchases.

9. The Debtors utilize KSL Media, Inc. ("KSL"), a third-party company to negotiate and purchase air-time slots with media stations in the various markets in which the Debtors and the Franchisees operate.[3] In the ordinary course of business, KSL negotiates media buys on a monthly basis and invoices the Debtors for the total estimated amounts. The Debtors pay KSL's invoices, and KSL, in turn, satisfies local media station obligations, at which point the Debtors' advertisements are cleared to run. KSL secures media runs for both the Debtor-owned markets, as well as the Franchisee-operated markets. In some instances, both Debtor-owned and Franchisee-operated stores coexist in the same market. As set forth above, a material portion of the media expenses incurred by the Debtors to secure advertising is funded by the Franchisees' monthly marketing fees.

10. In the months leading up to the filing of these chapter 11 cases, the Debtors collected approximately $1.75 million of obligations on account of media buys for advertisements that have not yet aired in Franchisee media markets.[4] In the weeks leading up to the Petition Date, the Debtors launched a media campaign that they refer to as the "High Five" campaign. This campaign is designed to enhance restaurant operations, improve the guest experience, and strengthen the Debtors' retail business. The campaign is an important initiative that is designed to boost company performance. The Debtors had intended to utilize the $1.75 million in marketing fees collected from the Franchisees to fund advertising in the

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3 The Debtors contract The VIA Group LLC ("VIA") to develop their media content. VIA, in turn, contracts with KSL to complete the media buys.

4 The Debtors submitted $350,000 to KSL in the week prior to the Petition Date on account of such obligations. At the time of the filing, KSL had advised the Debtors that it still was in possession of that amount.

Franchisees' markets; however, absent the relief requested by the Motion, the Debtors will be unable to do so.

11. This limitation is significant given that, since becoming aware of the Debtors' potential chapter 11 filing, various media stations operating in the Franchisee markets (the "Franchisee Media Stations") have contacted the Debtors and stated that the scheduled media runs will not occur absent payment of the prepetition obligations owed (the "Media Claims"). The Franchisee Media Stations are generally not subject to long-term contracts and cannot be compelled to run advertisements. Because the Franchisees have already paid the Debtors for advertising costs, the Debtors will suffer significant damage in Franchisee relationships if there is a disruption in advertising in the Franchisee markets.

Relief Requested

12. By this Motion, the Debtors seek entry of an order authorizing, but not directing, the Debtors to pay the Media Claims of Franchisee Media Stations.

Basis For Relief

13. Courts have authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of certain claims); *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to allow contractor to pay prepetition claims); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) ("Bankruptcy courts recognize that section 363 is a source for authority to make critical vendor payments, and section 105 is used to fill in the blanks.").

14. In addition, the Court may authorize payment of prepetition claims in appropriate circumstances based on 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 a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Under section 105(a) of the Bankruptcy Code, courts may permit pre-plan payments of prepetition obligations when essential to the continued operation of a debtor's businesses. *See In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999). Specifically, the Court may use its power under section 105(a) of the Bankruptcy Code to authorize payment of prepetition obligations pursuant to the "necessity of payment" rule (also referred to as the "doctrine of necessity"); *Ionosphere Clubs*, 98 B.R. at 176 (Bankr. S.D.N.Y. 1989). A bankruptcy court's use of its equitable powers to "authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *Id.* at 175-176 (citing *Miltenberger v. Logansport, C. & S.W. Ry. Co.*, 106 U.S. 286 (1882)).

15. The United States Court of Appeals for the Third Circuit recognized the "necessity of payment" doctrine in *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981). 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 courts may authorize payment of pre-petition claims when there "is the possibility that the creditor will employ an immediate economic sanction, failing such payment"); *see also In re Penn Central Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding 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"); *In re Just for Feet*, 242 B.R. at 824-45 (noting that, in the Third Circuit, debtors may pay pre-petition 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).

16. This flexible approach is particularly critical where a prepetition creditor—here, the Franchisee Media Stations—are critical to the Debtors' continuing operations. In *In re Structurlite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988), the bankruptcy court stated that "a bankruptcy court may exercise its equity powers under section 105(a) of the Bankruptcy Code to authorize payment of prepetition claims where such payment is necessary 'to permit the greatest likelihood of survival of the debtors and payment of creditors in full or at least proportionately.'" *Id.* The court explained that "a *per se* rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the [Bankruptcy] Code." *Id.* at 932.

17. Allowing the Debtors to pay Media Claims, pursuant to all or some of the above-referenced provisions, is especially appropriate where, as here, doing so is consistent with the "two recognized policies" of chapter 11 of the Bankruptcy Code—preserving going concern value and maximizing the value of property available to satisfy creditors. *See Bank of Am. Nat'l Trust & Savs. Assoc. v. 203 N. LaSalle St. P'Ship.*, 526 U.S. 434, 453 (1999). Indeed, reflecting the recognition that payment of prepetition claims of certain essential creditors is, in fact, both critical to a debtor's ability to preserve going-concerns and maximize creditor recovery—thereby increasing prospects for a successful reorganization—courts in this district regularly grant relief consistent to that which the Debtors are seeking in this Motion. *See, e.g., In re Neb. Book Co.*, No. 11-12005 (Bankr. D. Del. July 21, 2011); *In re Barnes Bay Dev. Ltd.*, No. 11-10792 (Bankr. D. Del. Mar. 21, 2011); *In re Constar Int'l Inc.,* No. 11-10109 (Bankr. D. Del. Jan. 13, 2011); *In*

re Appleseed's Intermediate Holdings LLC, Case No. 11-10160 (KG) (Bankr. D. Del. Feb. 23, 2011); *In re OTC Holdings Corp.*, Case No. 10-12636 (Bankr. D. Del. Sept. 17, 2010); *In re Am. Safety Razor Co., LLC*, Case No. 10-12351 (Bankr. D. Del. Aug. 23, 2010); *In re NEC Holdings Corp.*, Case No. 10-11890 (Bankr. D. Del. July 13, 2010); *In re Orleans Homebuilders, Inc.*, Case No. 10-10684 (Bankr. D. Del. Apr. 6, 2010); *In re Neenah Enters., Inc.*, Case. No. 10-10360 (Bankr. D. Del. Mar. 8, 2010); *In re Atrium Corp.*, Case No. 10-10150 (Bankr. D. Del. Feb. 22, 2010); *In re Visteon Corp.*, Case No. 09-11786 (Bankr. D. Del. June 19, 2009); *In re Tropicana Entm't LLC*, Case No. 08-10156 (KJC) (Bankr. D. Del. May 30, 2008).[5]

18. The Debtors collected the $1.75 million in marketing fees to fund media advertising in the Franchisee markets. As discussed above, the "High Five" advertising campaign is an important initiative that is still in its early stages. The inability of the Debtors to apply the marketing fees to satisfy Media Claims in Franchisee markets could short circuit the success of the "High Five" campaign. Moreover, because the Francisees have already paid the Debtors for advertising costs in their respective markets, any disruption in media runs in Franchisee markets will upset the ongoing business relationships between the Debtors and the Franchisees and may materially limit the Debtors' ability to continue the growth of their business into new markets through existing or new Franchisees.

19. For these reasons, the Debtors believe the relief requested herein is vitally necessary to preserve the value of their estates for the benefit of all stakeholders in these chapter 11 cases and should be granted.

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[5] 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.

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

20. 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 transfer requests as relating to an authorized payment in respect of the relief requested herein. 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

21. Under Bankruptcy Rule 6003, this Court may authorize the Debtors to satisfy the Media Claims because such 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(c)(2)).

22. As described above, and in the First Day Declaration, absent the relief requested herein, the Debtors' operations will be subject to potentially severe disruption. Media stations have indicated that they will refuse to run a significant amount of their advertisements, which may prove especially detrimental given the early success of the "High Five" campaign. Moreover, absent the relief requested herein, the Debtors' relationship with their Franchisees will be in jeopardy. As set forth above, Franchisee operations play a key role in the Debtors'

business by both providing sizable monthly cash flows as well as improving the intrinsic value of the Debtors' brand and expanding the markets in which the Debtors are able to operate. . Accordingly, the Debtors respectfully submit that the relief requested herein is necessary to avoid immediate and irreparable harm and, therefore, Bankruptcy Rule 6003 is satisfied.

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

23. 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

24. 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 with a particular interest in the 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.

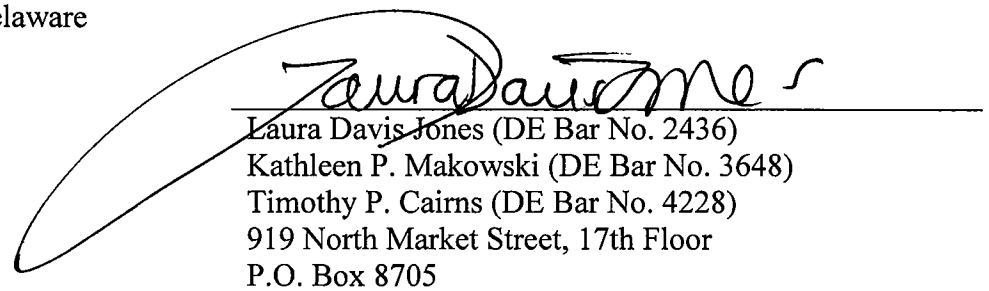
No Prior Request

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

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

Dated: October 5, 2011
Wilmington, Delaware

PACHULSKI STANG ZIEHL & JONES LLP



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