

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 11-13167 (KG)
	.	
	.	
FRIENDLY ICE CREAM	.	
CORPORATION,	.	824 North Market Street
	.	Wilmington, DE 19801
	.	
Debtor.	.	October 6, 2011
.....	.	8:07 a.m.

TRANSCRIPT OF FIRST DAY MOTIONS
BEFORE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	Pachulski, Stang, Ziehl & Jones, LLP
	By: LAURA DAVIS JONES, ESQ.
	919 North Market Street, 17th Floor
	Wilmington, DE 19899-8705

	Kirkland & Ellis, LLP
	By: ROSS M. KWASTENIET, ESQ.
	JAMES A. STEMPEL, ESQ.
	BRAD WEILAND, ESQ.
	NORA SCHWEIGHART, ESQ.
	300 North LaSalle
	Chicago, Illinois 60654

ECRO:	GINGER MACE
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Transcription Service:	Reliable
	1007 N. Orange Street
	Wilmington, Delaware 19801
	Telephone: (302) 654-8080
	E-Mail: gmatthews@reliable-co.com

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APPEARANCES (CONT'D):

For The Macerich
Company: Katten, Muchin, Rosenman, LLP
By: DUSTIN P. BRANCH, ESQ.
2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012

For The Macerich
Company, Brinkman
Properties Group,
Federal Realty
Investment Trust, GGP
Limited Partnership,
Pyramid Management
Corp.: Ballard Spahr, LLP
By: DAVID L. POLLACK, ESQ.
1735 Market Street
51st Floor
Philadelphia, PA 19103-7599

Ballard Spahr, LLP
LESLIE C. HEILMAN, ESQ.
919 North Market Street
11th Floor
Wilmington, DE 19801-3034

For Wells Fargo
Capital Finance: Paul Hastings
By: JESSE H. AUSTIN, III, ESQ.
600 Peachtree Street, N.E.
24th Floor
Atlanta, GA 30308

Paul Hastings
By: BRIAN R. KAPLAN, ESQ.
75 East 55th Street
New York, NJ 10022

Duane Morris
By: RICHARD W. RILEY, ESQ.
222 Delaware Avenue
Suite 1600
Wilmington, DE 19801-1659

For Coventry Retail: Connelly, Bove, Lodge & Hutz LLP
By: CHRISTINA M. THOMPSON, ESQ.
The Nemours Building
1007 North Orange Street
Wilmington, DE 19899

For HJ Heinz Co, LP: Reed Smith, LLP
By: J. CORY FALGOWSKI, ESQ.
1201 Market Street
Suite 1500
Wilmington, DE 19801

APPEARANCES (CONT'D):

For various landlords: Kelley, Drye & Warren, LLP
By: ROBERT L. LeHANE, ESQ.
101 Park Avenue
New York, NY 10178

For Sun Capital: Morgan, Lewis & Bockius
By: NEIL F. HERMAN, ESQ.
101 Park Avenue
New York, NY 10178-0060

Young, Conaway, Stargatt & Taylor, LLP
By: MICHAEL R. NESTOR, ESQ.
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801

For the U.S. Trustee: Office of the Unites States Trustee
By: RICHARD L. SCHEPACARTER, ESQ.
844 King Street
Suite 2207
Wilmington, DE 19801

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1 COURTROOM DEPUTY: Please rise.

2 THE COURT: Good morning, everyone. It's good to see
3 you all. Please be seated and I want to thank you for
4 accommodating my schedule today and starting a little bit
5 earlier than normal. But, I have some important business from
6 out of town for the Court this afternoon, so it was important
7 that we proceed this morning. Ms. Jones, good morning.

8 MS. JONES: Good morning, Your Honor. And you know
9 what a morning person I am.

10 THE COURT: I do.

11 MS. JONES: Your Honor, for the record, Laura Davis
12 Jones of Pachulski, Stang, Ziehl & Jones on behalf of Friendly
13 Ice Cream Corporation and related debtors.

14 THE COURT: Yes.

15 MS. JONES: Your Honor, let me start on behalf of all
16 of us and thank you for pushing us into your schedule. I know
17 you've had an incredibly busy week --

18 THE COURT: Yes.

19 MS. JONES: -- and now you've got an incredibly busy
20 afternoon --

21 THE COURT: Yes.

22 MS. JONES: -- and you still made time for us, so I
23 really appreciate that.

24 THE COURT: It's a pleasure, Ms. Jones. Believe me,
25 I know it's an important matter and the timing is obviously

1 important, as well.

2 MS. JONES: Thank Your Honor and we'll try to move
3 things along this morning, so we can get you out of here.

4 THE COURT: Thank you.

5 MS. JONES: Your Honor, we filed an amended agenda
6 late last evening.

7 THE COURT: Yes.

8 MS. JONES: I don't know if Your Honor's seen that.
9 It actually has -

10 THE COURT: I've seen it. I saw it this morning.

11 MS. JONES: It makes it, the morning a little lighter
12 as it moves two matters off of calendar.

13 THE COURT: Yes.

14 MS. JONES: So, hopefully that will be -- help a
15 little bit.

16 Your Honor, we did file these petitions late on
17 Tuesday. Your Honor, on behalf of the Kirkland team and our
18 firm, Your Honor, we want to thank Mr. Schepacarter for working
19 so quickly with us going through the motions and getting back
20 to us with comments. And pleased to tell Your Honor that we
21 have resolved all of the issues with the U.S. Trustee's Office.
22 Your Honor will see some black lines as we move through the
23 motions that reflect those changes.

24 THE COURT: Okay.

25 MS. JONES: But, otherwise we are -- we have

1 addressed all the issues raised by Mr. Schepacarter.

2 And, Your Honor, as I just referenced, we have the
3 pleasure of being co-counsel with Kirkland & Ellis --

4 THE COURT: Yes.

5 MS. JONES: -- on this case. Your Honor, I believe,
6 knows Mr. Stempel --

7 THE COURT: Yes.

8 MS. JONES: -- and Mr. Kwasteniet.

9 THE COURT: Yes.

10 MS. JONES: Your Honor, I'm going to yield and let
11 them take over from here.

12 THE COURT: All right. Thank you, Ms. Jones.

13 MS. JONES: Thank you.

14 THE COURT: We can all use some of your energy here
15 this morning. Mr. Kwasteniet, it's good to see you again.

16 MR. KWASTENIET: Good morning, Your Honor. We --
17 I've been busy since the last time I was in front of you.

18 THE COURT: I see. Yes.

19 MR. KWASTENIET: It's good to see you again.

20 THE COURT: Yes, sir.

21 MR. KWASTENIET: I want to echo Ms. Jones' comments
22 and thank Your Honor for scheduling us in this morning at 8
23 a.m. We really appreciate. We've got wages to fund and other
24 things to (indiscernible).

25 THE COURT: Exactly.

1 MR. KWASTENIET: It's important for the company that
2 we get in and we really appreciate you (indiscernible).

3 THE COURT: You bet. I certainly understand that,
4 Mr. Kwasteniet.

5 MR. KWASTENIET: And I want to echo her thanks also
6 to Mr. Schepacarter for working with us and giving us comments
7 quickly and I think we worked everything out. So, we greatly
8 appreciate that.

9 THE COURT: Yes. And the Court appreciates it, as
10 well, Mr. Schepacarter.

11 MR. SCHEPACARTER: You're welcome, Your Honor.

12 MR. KWASTENIET: Your Honor, I have a few
13 introductions I'd like to make. With us in the courtroom
14 today, Your Honor, we've got Steven Sanchioni. He's the
15 debtors' chief financial officer.

16 THE COURT: Yes. Good morning and welcome.

17 MR. KWASTENIET: He also submitted the first day
18 affidavit, Your Honor.

19 THE COURT: That's right.

20 MR. KWASTENIET: And next to him is Robert Sawyer.
21 He's the company's general counsel.

22 THE COURT: Mr. Sawyer, good to have you here, sir.

23 MR. KWASTENIET: And we also have several of the
24 company's advisors with us also. We've got David Orlofsky
25 (phonetic) --

1 THE COURT: Good morning.

2 MR. KWASTENIET: -- Rudolfo (phonetic) Cooper, Your
3 Honor.

4 THE COURT: Yes.

5 MR. KWASTENIET: They're acting as financial advisors
6 to the company. Also Ryan Bouley from Duff & Phelps --

7 THE COURT: Welcome.

8 MR. BOULEY: Good morning, Your Honor.

9 MR. KWASTENIET: -- the company's investment banker,
10 Your Honor.

11 THE COURT: Yes.

12 MR. KWASTENIET: Also with me from Kirkland & Ellis
13 is my partner, Jim Stempel.

14 THE COURT: Mr. Stempel, good to see you, again, sir.

15 MR. KWASTENIET: And my colleagues Brad Weiland and
16 Nora Schweighart.

17 THE COURT: Welcome to both of you. Good morning.

18 MR. KWASTENIET: Brad and Nora will each have some of
19 the first day pleadings, so as we move through the agenda, Brad
20 and Nora will present various motions.

21 THE COURT: Okay. That's wonderful.

22 MR. KWASTENIET: Your Honor, Friendly's Ice Cream
23 Corporation is a classic American company. It's interesting,
24 any time I'm involved in the filing of a new case, I tend to
25 get phone calls from friends in the restructuring industry

1 typically as people angling for, you know, perhaps a role with
2 the company or, you know, help or can you give me some
3 background facts and that kind of thing. I certainly got some
4 of those phone calls this week.

5 But, it was curious. I also some pretty interesting
6 phone calls. I got phone calls from people who called just to
7 say how important this company was --

8 THE COURT: Yes.

9 MR. KWASTENIET: -- you know, in their childhood
10 memories and it's a place they bring their kids. It's a place,
11 you know, any time they go visit their home town, a visit home
12 isn't complete without a visit to Friendly's. So, this is a
13 company that I think is, you know, a lot of people have deep
14 connections to.

15 THE COURT: Absolutely.

16 MR. KWASTENIET: Your Honor, we operate in 400 -- out
17 of approximately 490 locations in 16 states, primarily
18 concentrated on the east coast. We have approximately 10,000
19 employees --

20 THE COURT: Yes.

21 MR. KWASTENIET: -- so, this is a pretty important
22 company for all of those people, as well. And we sell ice
23 cream products in about 7,000 locations in 48 states.

24 THE COURT: And what did I read, was it seven million
25 gallons a year or something?

1 MR. KWASTENIET: I believe it's 17 million.

2 THE COURT: Seventeen million.

3 MR. KWASTENIET: Yes, Your Honor. Yes. It's a lot
4 of ice cream. Your Honor, the company has been negatively
5 impacted by the recent economic downturn. We're certainly
6 impacted by changes in discretionary spending, people just
7 going out to eat a less bit less often. Also, the last couple
8 of years have seen an increase in commodity and food prices --

9 THE COURT: Yes.

10 MR. KWASTENIET: -- that have squeezed, you know,
11 given the downturn, there's only so much, you know, cost
12 increase you can pass through on a milkshake before people
13 aren't going to buy it anymore.

14 And so, we have profits squeezed as a result of
15 rising food prices and a bit lower demand that have -- that's
16 really caused a pinch point for the company, Your Honor. We've
17 also had, you know, several under performance store locations,
18 so in conjunction with the filing, there is an operational
19 restructuring element also.

20 Your Honor, briefly, I'll give you a quick overview
21 on the capital structure of the company. We've got a first
22 lien revolving facility with Wells Fargo Bank. There's
23 approximately 21 million drawn on revolver as of the filing
24 date. And we've got about 15 million approximately in issued,
25 but undrawn, letters of credit outstanding. We also have a

1 second lien term note that's in the amount of \$267 million
2 that's owed to an affiliate of Sun Capital Partners. Also,
3 affiliates of Sun Capital are the majority equity owners of the
4 company, as well.

5 THE COURT: Yes.

6 MR. KWASTENIET: We also have the remaining stub bond
7 issuance. The company did a tender offer for an old bond
8 issuance several years ago and there's about seven and a half
9 million dollars or so that remains untendered, the unsecured
10 bonds.

11 Your Honor, as part of the next steps here going
12 forward, we are going to undertake an expedited operational
13 restructuring primarily centered around a rejecting
14 underperforming store leases. There's also going to be some
15 degree of renegotiation we anticipate with some of the
16 landlords, perhaps store locations that could become profitable
17 if we can adjust the rent to a market rent where perhaps we're
18 paying over market rent. So, Your Honor is likely to see going
19 forward, you know, some amount of activity, negotiations with
20 landlords and contract rejection type issues here. That's
21 going to be the primary focus of the operational restructuring.

22 Your Honor, we're also going to be seeking to conduct
23 a sale of the company as a going concern. We did file, along
24 with the rest of the first day papers, a motion to sell the
25 company and for approval of bid procedures. That's not up for

1 hearing today, Your Honor, but it's something that we'll set
2 for hearing at our -- we proseed to set at the second day
3 hearing --

4 THE COURT: Okay.

5 MR. KWASTENIET: -- in this case. The stalking horse
6 bidder, proposed stalking horse, is an affiliate of Sun
7 Capital.

8 THE COURT: Yes.

9 MR. KWASTENIET: And they anticipate on making a
10 credit bid of at least a portion of that \$267 million second
11 lien secured debt.

12 THE COURT: You've chosen a good name, Sundae.

13 MR. KWASTENIET: Yes. Yes. It is appropriate.

14 THE COURT: Yes.

15 MR. KWASTENIET: Your Honor, we did note in the first
16 day affidavit, I just wanted to state for the record, that the
17 proposed stalking horse buyer has had negotiations with the
18 management team.

19 THE COURT: Yes.

20 MR. KWASTENIET: This -- I think it's customary here,
21 but because it's an insider purchaser, we didn't want there to
22 be any suggestion that something is happening behind the scenes
23 that was any way, you know, nefarious. I think that this is
24 all just prudent and good planning. It's -- the management
25 team is basically agreed on terms of compensation going forward

1 should the Sun affiliate buy the company.

2 THE COURT: Okay.

3 MR. KWASTENIET: And the Sun affiliate has to agree
4 that, in certain instances, there would be severance paid even
5 if Sun isn't the buyer. Your Honor, this is all being funded
6 outside of the estate by the Sun entity and we'll make copies
7 of these agreements available to the U.S. Trustee and to the
8 committee is there's a committee formed. It's (indiscernible).
9 We wanted full disclosure, let you know that those kind of
10 negotiations have gone on and I think, from the company's
11 standpoint, it's important to know that the management team,
12 you know, has a future here and sort of what that's going to
13 look like. So, I think all these discussions are customary
14 (indiscernible).

15 THE COURT: Absolutely. I agree. I agree, Mr.
16 Kwasteniet.

17 MR. KWASTENIET: Your Honor, I'll also give a brief
18 overview and then I'll present the DIP motion at the end of the
19 case or at the end of the hearing today. But, the company has
20 secured a commitment for a \$71 million DIP facility. This
21 represents a significant increase over the amount of debt that
22 the company currently has through the Wells Fargo facility,
23 Your Honor, meaning that there's significant incremental or new
24 money that's coming in as part of the DIP loan.

25 Your Honor, the -- we are requesting 50.6 million in

1 borrowings on an interim basis with a balance to be authorized
2 pursuant to the final hearing. And then I'll finish my
3 presentation on the DIP later in the hearing.

4 THE COURT: Okay.

5 MR. KWASTENIET: At this point, Your Honor, I'd like
6 to yield the podium to my colleague, Brad Weiland, who will
7 start to walk us through the agenda.

8 THE COURT: All right. Thank you.

9 MR. KWASTENIET: Thank you.

10 THE COURT: Thank you, Mr. Kwasteniet. That was
11 helpful and thank you. Mr. Weiland, good morning.

12 MR. WEILAND: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. WEILAND: For the record, Brad Weiland of
15 Kirkland & Ellis for the debtors.

16 THE COURT: And let me just say to you that take your
17 time because this is obviously a very important matter and I'm
18 not looking to rush anyone here. I appreciate people, you
19 know, addressing it fairly -- as quickly as you have been, but
20 I'm prepared to allow it to take its course.

21 MR. WEILAND: Okay. Thank you, Your Honor.

22 THE COURT: Sure.

23 MR. WEILAND: I would just repeat the thanks that Ms.
24 Jones and Mr. Kwasteniet stated earlier. Thanks for
25 accommodating us this morning. Thanks to Mr. Schepacarter for

1 the quick turnaround on looking at our first day papers. If
2 it's acceptable to Your Honor, I think we'll just go through in
3 the order of the agenda.

4 THE COURT: Yes.

5 MR. WEILAND: I'll take you through the next four,
6 that's items three through six, before ceding the podium to my
7 colleague, Ms. Schweighart. And then I think, as Mr.
8 Kwasteniet mentioned, you'll see him again towards the end of
9 the agenda.

10 THE COURT: All right.

11 MR. WEILAND: So, the first motion we have up today
12 is motion for joint administration of these cases.

13 THE COURT: Not to steal your thunder here, but if I
14 don't -- this is not normally a controversial motion. Does
15 anyone object?

16 MR. WEILAND: I don't think so either.

17 THE COURT: Does anyone object to my entering the
18 order on this?

19 (No audible response)

20 THE COURT: All right. I'll be pleased to do so.

21 MR. WEILAND: Okay. Thank you, Your Honor. Your
22 Honor, as Mr. Kwasteniet also mentioned, Mr. Sanchioni filed a
23 declaration in support --

24 THE COURT: Oh, yes.

25 MR. WEILAND: -- of all our first day papers. He's

1 obviously here and available to testify should the need arise.
2 But, absent that, we move the declaration into evidence.

3 THE COURT: Does anyone object to the admission of
4 Mr. Sanchioni's declaration?

5 (No audible response)

6 THE COURT: Hearing no one, it is admitted and
7 obviously will serve as support for the first day motions.

8 MR. WEILAND: Great. Thank you, Your Honor. Moving
9 on, we have another motion that we don't view as controversial,
10 the motion to retain Epiq Bankruptcy Solutions as our notice
11 and claims agent. Given the size of these cases and the notion
12 that we may need to serve over 50,000 parties during the
13 pendency of these cases, we think that there's a real benefit
14 to having Epiq on board.

15 THE COURT: And it is required by our local rules, as
16 well, to you have the agent in place? Does anyone object?

17 (No audible response)

18 THE COURT: All right. Epiq is well-known with the
19 Court and I will approve the retention.

20 MR. WEILAND: Great. Thank you, Your Honor. The
21 next motion that we have up is a motion --

22 THE COURT: And you have all the orders, is that
23 right, Mr. Weiland?

24 MR. WEILAND: Yes, they --

25 THE COURT: You'll be handing all the orders to me?

1 MR. WEILAND: Yes, at the end of the hearing if it's
2 all right, we'll pass up all the orders at once.

3 THE COURT: Well, if there are changes with black
4 lines, it might be helpful for me to have them.

5 MR. WEILAND: Right. But, with the exception of
6 you'll see two black lines as we --

7 THE COURT: Okay.

8 MR. WEILAND: -- move through.

9 THE COURT: Good.

10 MR. WEILAND: There's no black line for the next
11 motion. This is the customer programs motion, Your Honor. The
12 debtors have a number of customer programs that are put in
13 place to foster good will and customer loyalty. They fall into
14 five main categories, charity events and partnerships, gift
15 cards and gift certificates, discounts and other coupons,
16 manufacturing warranties for the retail operations and then
17 other retail promotions for their supermarket and other retail
18 sales.

19 As we've noted, we vetted this with the U.S. Trustee.
20 Mr. Schepacarter added no comments to the order and, unless
21 Your Honor has any questions, we'd move to have the order
22 entered.

23 THE COURT: All right. Does anyone wish to be heard
24 on this motion?

25 (No audible response)

1 THE COURT: Well, I think it's clear that these
2 customer programs are particularly significant in this case.
3 We don't want to disappoint any parents or children and I know
4 that Friendly's relies upon its good name and its good will in
5 particular. And I am satisfied that in the absence of my
6 granting the relief, there would be immediate and irreparable
7 harm to the business and I will be pleased to grant the motion.

8 MR. WEILAND: Great. Thank you, Your Honor. The
9 next motion on the agenda is the cash management motion. And
10 on the order for the cash management motion, Mr. Schepacarter
11 did have some comments which we've incorporated.

12 THE COURT: Okay.

13 MR. WEILAND: If I could approach with a black line.

14 THE COURT: Please do. Yes, Mr. Weiland. That's
15 fine. Thank you.

16 MR. WEILAND: You're welcome, Your Honor.

17 THE COURT: Thank you, so much.

18 MR. WEILAND: Your Honor, again, the debtors have
19 almost 500 locations and a centralized cash management system
20 is absolutely necessary to maintain those operations across
21 that large number of locations. The cash management system
22 includes 36 bank accounts approximately which consists of
23 various collection accounts, deposit accounts, credit card
24 receipt accounts and disbursement accounts, as well as a
25 central concentration account which serves as the hub of the

1 cash management system.

2 The debtors do not have any investment activities
3 although they have asked for a waiver of Section 345. After
4 discussions with Mr. Schepacarter yesterday, we've agreed to
5 limit the waiver to an interim period of 75 days. The remains
6 of the motion deal with various inter-company transactions
7 which, based on the U.S. Trustee's comments, we've agreed to
8 limit to only debtor affiliates. So, there won't be any
9 inter-company transfers to any non-debtor companies here.

10 The debtors have also agreed, based on talking to the
11 U.S. Trustee, to transition to checks and business forms with
12 the debtor in possession stamp within ten days following entry
13 of the order for checks and business forms that they print
14 themselves and as soon as their existing stock depletes on
15 forms that are already in existence. Because there's a real
16 need for continued use of the cash management system here and
17 immediate relief is required, Your Honor, we'd request that the
18 order be entered unless you have any further questions.

19 THE COURT: Well, I certainly see the changes from
20 the United States Trustee's Office and they all are obviously
21 in keeping with that office's practice and are acceptable to
22 the Court. Does anyone have any comments or objection or
23 concerns?

24 (No audible response)

25 THE COURT: All right. Hearing no one, I will grant

1 the motion.

2 MR. WEILAND: Thank Your Honor. And as I mentioned,
3 I'll cede the podium to Ms. Schweighart.

4 THE COURT: Thank you. Good morning.

5 MS. SCHWEIGHART: Good morning, Your Honor. Nora
6 Schweighart of Kirkland & Ellis.

7 THE COURT: Good to have you here.

8 MS. SCHWEIGHART: Thank you. Thank you, very much.
9 The next item on the agenda, Your Honor, is Item Number 7.

10 THE COURT: Yes.

11 MS. SCHWEIGHART: This is the debtor's motion for
12 authority to continue prepetition insurance coverage --

13 THE COURT: Yes.

14 MS. SCHWEIGHART: -- and related practices. The
15 debtors are seeking to continue insurance coverage currently in
16 effect and to pay prepetition amounts related thereto. This
17 would include the maintenance of existing financing premiums.

18 In addition, the debtors seek authority to enter into
19 new policies and finance the new agreements in the
20 post-petition period. There were no changes to the proposed
21 form of order, Your Honor. So, unless Your Honor has any
22 questions, we'd request entry of this order.

23 THE COURT: All right. I don't have any questions.
24 Does anyone else have any concerns?

25 (No audible response)

1 THE COURT: Okay. Hearing no one, the motion is
2 certainly granted. It's essential and required, of course,
3 that the debtors maintain insurance and this will enable the
4 debtors to do so.

5 MS. SCHWEIGHART: Thank you, Your Honor. The next
6 item on the agenda, that's Item Number 8, is the debtor's
7 motion for authority to continue paying and honoring their
8 prepetition tax obligations. In this motion, Your Honor, the
9 debtors request authority to pay sales use and income,
10 franchise property and unemployment taxes, the business license
11 and other similar fees. For the avoidance of doubt, the
12 debtors request authority to pay these taxes that are due on a
13 current basis only.

14 However, for taxes that constitute trust fund taxes
15 or similar taxes that, if not paid, could potentially result in
16 the personal liability of the debtor's officers and directors,
17 the debtors are seeking authority to pay such taxes regardless
18 of when they came due.

19 The United States Trustee had minor comments to this
20 motion that the debtors believe they have addressed. So, with
21 that said, there are no changes to the proposed form of order.
22 So, unless your question -- Your Honor has any questions or
23 anyone wishes to be heard, we request entry of the order as
24 submitted to you.

25 THE COURT: All right. Thank you. I don't have any

1 questions. Does anyone else have any comments?

2 (No audible response)

3 THE COURT: All right. I will grant the motion.

4 It's obviously essential.

5 MS. SCHWEIGHART: Thank you, Your Honor.

6 THE COURT: And I want to make sure that the

7 gentlemen in the front row are relieved. Okay.

8 MS. SCHWEIGHART: Excellent. Thank you, Your Honor.

9 The next item on the agenda is Item Number 9, the debtor's
10 utility motion.

11 THE COURT: Yes.

12 MS. SCHWEIGHART: It's a standard motion. In this
13 motion, the debtor's requesting authority to pay the utilities
14 in the ordinary course of business and are also requesting
15 procedures to assure the adequate assurance of the utility
16 providers. If the debtor has no questions, we request entry of
17 the order.

18 THE COURT: All right. Does anyone else have any
19 questions or concerns?

20 (No audible response)

21 THE COURT: You know, as I was reading this, I was
22 just imagining 17 million gallons of ice cream melting because
23 of utility problems.

24 (Laughter)

25 THE COURT: I'm pleased to grant the motion. It is

1 in keeping with this Court's practice for first day hearings
2 and it is in good order.

3 MS. SCHWEIGHART: Okay. Thank you, Your Honor. This
4 brings me to Item Number 10 on the agenda, Your Honor. This is
5 the debtor's wages motion.

6 THE COURT: Yes.

7 MS. SCHWEIGHART: We do have a black line of the
8 proposed order of this motion for you.

9 THE COURT: All right.

10 MS. SCHWEIGHART: I have a copy here if you'd like to
11 see it.

12 THE COURT: Yes, please.

13 MS. SCHWEIGHART: If I might approach.

14 THE COURT: You certainly may approach.

15 MS. SCHWEIGHART: Thank you, very much.

16 THE COURT: Thank you. Good morning. Thank you.

17 MS. SCHWEIGHART: All right. Your Honor, the black
18 line you're holding represents comments from the United States
19 Trustee and I'll just walk you through them quickly. You'll
20 see in Paragraph 6 of the proposed -- revised proposed order
21 we've added a concept of interim approval of the debtor's
22 non-insider severance program --

23 THE COURT: Yes.

24 MS. SCHWEIGHART: -- whereby the debtors would be
25 authorized to make payments to non-insider employees under the

1 severance program up to a maximum amount of \$50,000 prior to
2 entry of a final order and proving the non-insider severance
3 program.

4 We will also write in, this is not reflected in your
5 black line, but we discussed with the United States Trustee
6 just this morning and we'll write into the proposed order that
7 we'll send up to you that no employee will be paid more than
8 the \$11,725 cap imposed by the bankruptcy court in the interim
9 period.

10 THE COURT: Yes.

11 MS. SCHWEIGHART: Also, Your Honor, in Paragraph 7 of
12 the revised order, we've added a provision requesting a final
13 hearing to consider on a final basis the debtor's non-insider
14 severance program. Those are the only edits to the proposed
15 order.

16 Next, to clarify, the debtors are not seeking Court
17 approval of any incentive plan such as a management incentive
18 plan, a key employee retention plan, a key employee incentive
19 plan or any other plan that would fall under Section 503(c)(1)
20 through (3) of the bankruptcy code. To the extent that the
21 debtors seek approval of such a plan, they will do so at a
22 separate motion on a later date.

23 THE COURT: All right. Fine.

24 MS. SCHWEIGHART: The debtors believe they have
25 addressed the U.S. Trustee's concern with respect to this

1 motion. So, unless anyone wishes to be heard or you have any
2 questions, we request entry of the order as revised.

3 THE COURT: Okay. Does anyone have any comments or
4 questions or objections?

5 (No audible response)

6 THE COURT: Hereto clearly, this is a matter which
7 satisfies Rule 6003 in that there would be immediate and
8 reparable harm where employees, the bank bone of these debtors,
9 to not be paid promptly and for their incentive and good will
10 not to be maintained. So, I will certainly grant the motion.

11 MS. SCHWEIGHART: Thank you, Your Honor. Your Honor,
12 the next item on the agenda is Item Number 11.

13 THE COURT: Yes.

14 MS. SCHWEIGHART: That's the debtor's bender motion.

15 THE COURT: Okay.

16 MS. SCHWEIGHART: As a preliminary note, Your Honor,
17 the debtors are seeking relief under this motion on a final
18 basis only. I believe the agenda says interim and final,
19 however we are seeking this relief on a final basis only. I
20 apologize for that.

21 In this motion, the debtors request authority to pay
22 certain prepetition claims arising under the Perishable
23 Agricultural Commodities Act, as well as the prepetition claims
24 of certain shippers, lien claimants and claims arising under
25 Section 503(b)(9) of the bankruptcy code. The United States

1 Trustee had no comments to the proposed form of order. He did
2 request some information which we will get to him in due
3 course, so unless the Court has any questions with respect to
4 this motion.

5 THE COURT: All right. Anyone else wish to be heard?

6 (No audible response)

7 THE COURT: I think that certainly Mr. Sanchioni's
8 declaration provides the evidentiary support for the granting
9 of this motion and I will do so.

10 MS. SCHWEIGHART: Thank you, Your Honor. All right.
11 And I'll cede the podium back to my colleague, Mr. Kwasteniet.

12 THE COURT: Okay. Thank you.

13 MS. SCHWEIGHART: And thank you, Your Honor, for the
14 pleasure.

15 THE COURT: Thank you. And we'll talk about
16 obviously the final hearing --

17 MR. KWASTENIET: Yes, I --

18 THE COURT: -- of the second date.

19 MR. KWASTENIET: -- plan to get to that at the
20 conclusion, Your Honor.

21 THE COURT: Yes.

22 MR. KWASTENIET: The next two items on the agenda,
23 Items 12 and 13, Number 12 is a motion seeking approval of
24 expedited procedures for assumption rejection of contracts and
25 abandonment of property, Your Honor. We have agreed, after

1 receiving comments from counsel to numerous landlords in the
2 case, that we'll put that over for hearing at the second day
3 hearing, Your Honor, that I believe that between now and then,
4 we should be able to accommodate various comments that we're
5 starting to receive from counsel of the various parties.

6 THE COURT: Certainly.

7 MR. KWASTENIET: If not, if we need to use the
8 hearing time, we will, but I don't expect that it will be
9 controversial, Your Honor.

10 THE COURT: I see our regular group of landlord
11 lawyers here, so I knew that they would have a say on this.

12 MR. KWASTENIET: Your Honor, we are, of course,
13 reserving the right to seek entry of that order nunc pro tunc
14 to the filing date should we need to. I don't want to be
15 prejudiced if we have a lease that we're going to notice out
16 for rejection next week or something.

17 Similarly, Your Honor, Number 13 on the agenda is a
18 motion to approve the rejection of various real property
19 leases. Similarly, we're going to put that over the second day
20 hearing, but reserve right to have the effective date of the
21 rejection be made retroactive or nunc pro tunc.

22 THE COURT: And maybe I can save the landlords a trip
23 to the podium by saying they obviously are reserving their
24 rights to opposed that treatment.

25 MR. KWASTENIET: Absolutely, Your Honor.

1 THE COURT: Yes.

2 MR. KWASTENIET: Your Honor, the next item on the
3 agenda going forward today in Number 14. It's the debtor's
4 motion for entry of an order authorizing us to pay certain
5 prepetition claims of media suppliers. Your Honor, within the
6 last month or so, the company's launched a major new
7 advertising campaign and we're particularly sensitive about the
8 advertising in the markets of our franchisees.

9 THE COURT: Sure.

10 MR. KWASTENIET: Your Honor, we have, of our
11 approximately 490 store locations, a little under half are
12 franchise locations. And, pursuant to our franchise
13 agreements, the franchisees pay various administrative costs to
14 the debtors and included in that is a fixed amount for, based
15 on a percentage of sales, for media expenditures.

16 And so, the media campaign that we launched several
17 weeks ago has been going well and it's being aired on TV
18 stations, and radio and billboards and the like. And we have a
19 real concern that if we don't pay the various media outlets,
20 first of all, Your Honor, they're not under long-term contract
21 with us, so we don't really have an ability to compel people to
22 continue to run new adds going forward. And so, if there's a
23 disruption in that and these franchisees have, in their minds,
24 prepaid for this, we think that that will be very damaging to
25 the franchisee relationship.

1 And beyond that, Your Honor, we think it's also
2 important to keep the adds going. We -- the company's made a
3 significant investment in this advertising campaign and
4 wouldn't want to see that undercut by the campaign suddenly
5 going off the air and, you know, within a few weeks of its
6 inception.

7 So, Your Honor, we request, pursuant to this motion,
8 authority to pay up to 1.75 million on account of prepetition
9 obligations owed to various media outlets. We do use a third
10 party service, a company we refer to as KSL. It's in the
11 motion.

12 THE COURT: Yes.

13 MR. KWASTENIET: They place -- and they typically act
14 as a conduit or a middle man for processing payments. They're
15 currently holding approximately 350,000 in money that we've
16 paid them prepetition and are looking for comfort that they can
17 go ahead and send that money where we direct it without concern
18 that they're going to be sued for receiving a preference or
19 something along those lines.

20 THE COURT: Certainly.

21 MR. KWASTENIET: So, Your Honor, unless -- but, we do
22 know that without this relief, we would suffer, could suffer,
23 irreparable harm. We think that the consequence could be
24 pretty immediate. Television stations and radio stations could
25 overnight decide that they're not going to run our adds

1 anymore. We think that that would be very prejudicial and
2 would really harm the relationships that we have with our
3 franchisees.

4 THE COURT: Okay. Anyone wish to be heard?

5 (No audible response)

6 THE COURT: Obviously, this is critical to the
7 ongoing operations of the debtors and, as you indicated, Mr.
8 Kwasteniet, result in immediate and irreparable harm, I think
9 and I find, based upon the evidence in the form of Mr.
10 Sanchioni's declaration. And I will grant the motion.

11 MR. KWASTENIET: Okay. Thank you, Your Honor. The
12 final item on the agenda for today is the debtor's motion for
13 interim approval of their DIP financing on an interim basis.
14 Your Honor, as I noted at the beginning of my presentation, we
15 have secured a DIP commitment in the amount of \$71.3 million.
16 The company has gone through and presented a -- prepared a
17 detailed 13-week budget.

18 THE COURT: Yes.

19 MR. KWASTENIET: The budget was attached as an
20 exhibit to the declaration of Mr. Bouley with -- that we filed
21 yesterday morning, Your Honor. At this point, I would cede to
22 move that declaration into evidence. Mr. Bouley's here and
23 available to testify. But, unless Your Honor has any questions
24 for him or anybody else objects to the admission of his
25 declaration, I think it would expedite the presentation if his

1 declaration was admitted into evidence.

2 THE COURT: Absolutely. Does anyone object to the
3 admission to evidence of the declaration?

4 (No audible response)

5 THE COURT: Hearing no one, it is admitted then, Mr.
6 Kwasteniet, and we can rely upon that in support --

7 MR. KWASTENIET: Great. Thank you, very much, Your
8 Honor.

9 THE COURT: -- of your motion.

10 MR. KWASTENIET: Your Honor, Wells Fargo, who's the
11 agent on the prepetition revolving facility, is also the agent
12 on the DIP facility. However, the new money that's being
13 provided under the DIP is being provided on a hundred percent
14 participation basis by an affiliate of Sun Capital Partners.

15 THE COURT: Yes.

16 MR. KWASTENIET: I did mention at the outset of the
17 hearing, the company's majority equity owner and also the
18 proposed stalking horse bidder here. So, this is a case where
19 the proposed bidder of the company is willing to fund the
20 operations of the company during the pendency of the case to
21 allow us to complete the operational restructuring we need to
22 do to stabilize the venter relationships, et cetera, and then
23 get to a sale hearing, Your Honor. Or when we talk about dates
24 at the end of the hearing, we're looking for that, for the sale
25 to happen relatively quickly. We're proposing a sale hearing

1 date in early December, but maybe we can talk about that in a
2 minute.

3 Your Honor, the DIP facility does have several
4 provisions that are required to be highlighted under Local Rule
5 4001-2 --

6 THE COURT: Yes.

7 MR. KWASTENIET: -- including, as is customary, a
8 506(c) waiver subject to entry of the final order. That's not
9 something we're asking for today, Your Honor. The facility
10 also does have a creeping role-up feature, meaning as receipts
11 come in, they go to pay down the prepetition facility. And if
12 the company needs borrowings, they're lent under the DIP
13 facility. So, it's not -- we're not converting the entire
14 prepetition facility into a DIP facility today, but that will
15 slowly evolve over time. As receipts come in, they'll be
16 relent as DIP lendings, Your Honor.

17 THE COURT: Yes.

18 MR. KWASTENIET: Your Honor, also the carve-out, at
19 least for the first 30 days of the case, the lender is capping
20 fees of the committee at 150,000. Again, that's for the first
21 30 days of the case and I assume that that will be an item that
22 the committee will negotiate when and if they are appointed.
23 But, that is required to be called out specifically.

24 And further, the debtors are, of course, making
25 various stipulations as to the validity of the prepetition

1 obligations and the liens. These are subject to the customary
2 investigation period and, in fact, in the case of the \$267
3 million debt that's owed to the affiliate of Sun Capital,
4 they've agreed to even a further extension of the normal
5 customary period. They've agreed to 75 days --

6 THE COURT: Okay.

7 MR. KWASTENIET: -- in the event of -- for a
8 committee and I believe 90 days, generally, for the parties in
9 interest.

10 So, I think that's not an extraordinary provision. I
11 think it's only extraordinary for shortening it in this case.
12 We're going with a customary provision for the Wells Fargo
13 facility and even a longer period than normal for the Sun
14 Capital facility, Your Honor.

15 THE COURT: And they'll be credit bidding as I
16 understand it --

17 MR. KWASTENIET: They will be.

18 THE COURT: -- and I assume that they will want any
19 issues relating to the validity of their liens to be determined
20 prior to the sale?

21 MR. KWASTENIET: Ideally, Your Honor, although I can
22 let counsel for the buyer address this point separately. I
23 believe that they'd also be prepared to go ahead with the bid
24 and close on the sale subject to disgorgement or --

25 THE COURT: All right.

1 MR. KWASTENIET: -- the like in the event that it
2 subsequently, Your Honor, subsequently determines that there
3 was a defect with the liens of the debt that they outbid.

4 Your Honor, we did conduct some marketing efforts
5 prepetition. Those were described in the Bouley affidavit.

6 THE COURT: Yes.

7 MR. KWASTENIET: However, given the value, the likely
8 value, of the company's assets relative to the amount of the
9 secured debt, ultimately the -- we didn't have any great hope
10 that the marketing effort was going to result in interested
11 third parties being willing to lend down on a junior and
12 unsecured basis. And, in fact, our suspicions were confirmed
13 by the marketing efforts conducting by Duff & Phelps.

14 Your Honor, I'll note here that the Wall Street
15 Journal actually broke a story late last week about the company
16 preparing for filing which ended up throwing operations into a
17 little bit of a turmoil. And so, it's an interesting tension
18 for us, just generally in these cases, when we suspect that a
19 marketing effort is likely to be futile and yet, at the same
20 time, wanting to build an appropriate record, when you start
21 reaching out to third parties, word starts getting out and then
22 before long, you've got yourself a story in the Wall Street
23 Journal and vendors calling in and employees concerned. And,
24 you know, the company's well-laid plans with their
25 communications, you know, messages and stuff, the word got out

1 a little bit ahead of us and so, it's just an interesting
2 message for us. Perhaps, for future cases, it may not always
3 be in the best interest of the company to shop what you suspect
4 may be a futile debt, but that is purely an aside, Your Honor.

5 THE COURT: I think you're setting me up for the next
6 case, Mr. Kwasteniet.

7 MR. KWASTENIET: I am. I think there may be a day
8 where I say remember that Friendly's hearing, Your Honor --

9 THE COURT: Yes.

10 MR. KWASTENIET: -- when I described that factor. We
11 were concerned about that, so I am planting a seed.

12 Absolutely.

13 Your Honor, we also confirmed with the existing
14 secured lenders that they were not willing to be primed by a
15 third party loan. So, the Bouley affidavit also sets forth,
16 Your Honor, that the company believes that the terms of the DIP
17 financing that we did secure, again, economics being provided
18 by the Sun affiliate, are on market terms. The DIP is at an
19 interest rate of LIBOR plus, I believe, three percent --

20 THE COURT: Yes.

21 MR. KWASTENIET: -- which is pretty low compared to
22 what we're seeing in a lot of other cases.

23 THE COURT: Sure.

24 MR. KWASTENIET: The fees are very modest. The DIP
25 lenders have certainly negotiated in good faith, Your Honor. I

1 believe that they're entitled to the good faith finding under
2 Section 364(e) and I also believe that the package that we've
3 negotiated for adequate protection for the prepetition lenders
4 is consensual and customary and I believe appropriate, Your
5 Honor.

6 So, unless Your Honor has any further questions, we
7 did have, since the filing of the DIP agreement, I don't
8 believe we have any changes to the proposed DIP order, is that
9 right?

10 (No audible response)

11 MR. KWASTENIET: Okay. No proposed modifications to
12 the DIP order that we filed, Your Honor. We have several
13 clean-up modifications to the credit agreement itself. I'm
14 happy to briefly describe those for you.

15 First, we just conformed it to the petition date and
16 case numbers and some of the administrative details we -- that
17 we didn't know. When we filed it, we've gone through and
18 filled in. We've also made several changes. The lenders have
19 agreed to several favorable modifications to the covenants and
20 the like related to various Arista provisions --

21 THE COURT: Okay.

22 MR. KWASTENIET: -- that just reflect the current
23 state of the company's Arista obligations. And then, we've
24 also made a few just grammatical and typo type of changes and
25 I'm happy to hand up a black line, Your Honor.

1 THE COURT: Please. Thank you, Mr. Kwasteniet. That
2 would be helpful. Thank you. Thank you much. Well, are there
3 any covenants, there obviously will be covenants, what are the
4 covenants relating to the sale provided?

5 MR. KWASTENIET: There are covenants related to the
6 sale, Your Honor. However, the covenants in the DIP facility
7 that are tied to the sale dates --

8 THE COURT: Yes.

9 MR. KWASTENIET: -- we've gotten a commitment from
10 the DIP lenders that if the purchaser agrees to modify the
11 dates under the purchase agreement, then the dates under the
12 DIP facility also are also modified.

13 THE COURT: All right. So, I'm always concerned that
14 if we aren't able to meet that date, Your Honor, that we'll be
15 creating an event of default.

16 MR. KWASTENIET: Yes, we have the same concern, Your
17 Honor, and we did build in the flexibility that to the extent
18 the purchaser -- obviously, the purchaser will make up its own
19 mind as to the dates set forth in its purchase agreement. But,
20 assuming, you know, we need to adjust those dates --

21 THE COURT: Yes.

22 MR. KWASTENIET: -- then the -- then we don't have
23 the additional threat of the DIP facility terminating or
24 defaulting.

25 THE COURT: All right. Thank you, sir. I see Mr.

1 Austin anxious to be heard and I'm pleased to hear from him.

2 Good morning, Mr. Austin.

3 MR. AUSTIN: Good morning, Your Honor. For the
4 record, Jesse Austin from the firm of Paul Hastings. We are
5 counsel to the prepetition agent under the credit facility,
6 Wells Fargo Capital Finance --

7 THE COURT: Yes.

8 MR. AUSTIN: -- who is the proposed agent under this
9 DIP facility. To address the Court's inquiry first, not only
10 is there an automatic kick out with the milestones under the
11 DIP if there's a modification agreeable by the purchaser, the
12 milestone is under -- the proposed milestone is in connection
13 with the 363 sale, we also had an additional, I think, two
14 weeks more than what the -- what's in the sale agreement
15 itself. So, there was already some recognition of possible
16 extra time in there.

17 But, we've also agreed that whatever they -- if they
18 move theirs out, we -- ours gets kicked out automatically.
19 Obviously, the outside day of the maturity date can't be
20 changed, but --

21 THE COURT: Right. Right.

22 MR. AUSTIN: -- outside from the modifications of the
23 milestones. That's how that would work.

24 THE COURT: That's good. Thank you. Good.

25 MR. AUSTIN: I wanted just to cover a couple other

1 points because it is important from the DIP lender's
2 perspective here, Wells Fargo, as well as Sun, who is actually
3 contributing most of -- is contributing all of the new funds
4 that are coming in by way of a participation under the Wells
5 Fargo commitment for there to be the 364(e) good faith finding.

6 As was noted, current -- the current revolver is
7 approximately -- is 21 and a half million dollars and there's
8 issued and outstanding letters of credit of \$14,878,000 in face
9 amount of LCs. Those LCs will be deemed issued under the new
10 facility, under the DIP facility. And then, as noted, the
11 revolver, as collections come in, will pay down the
12 prepetition. And as needs go, they're -- we'll fund up under
13 the DIP up the 21 and a half. And then the extent there's
14 funds needed above that, then they'll be drawn under
15 participation with Sun that's joining in the Wells facility.

16 I can say that this credit facility was fully
17 negotiated. It is modeled off of the existing prepetition
18 credit facility. So, from that standpoint, the parties were
19 able to move quickly in trying to finalize the terms.

20 With respect to the market terms, I, if anything,
21 these, under the circumstances of this today, these terms may
22 actually be deemed below market.

23 THE COURT: Yes.

24 MR. AUSTIN: Interest rates were not increased from
25 the prepetition. The only fee that's being paid here is

1 reflected in Mr. Bouley's declaration. There is a \$75,000
2 closing fee. That goes only to Wells Fargo. That is not going
3 to -- any portion of that not's going to Sun under the
4 circumstances. There are no additional fees that are being
5 charged outside of what was in the prepetition credit facility.
6 There's no liens on avoidance actions.

7 We do have something that might be unique in this
8 case's circumstances is that we may actually have some
9 leasehold mortgages. So, I know we have a number of them. I
10 don't think we have all of them. But, I also can say that we
11 haven't gotten any comments on Paragraph 19 from the landlords,
12 so I think we've actually have worked that one. So, this is
13 Case Number 2 where I think Ms. Heilman can say it worked.

14 THE COURT: Yes.

15 MR. AUSTIN: We still haven't fixed the carve-out.
16 That's the -- I can't deal with that one yet.

17 Because this -- in this instance, there is no priming
18 other than of ourselves.

19 THE COURT: Right.

20 MR. AUSTIN: Wells is priming itself and obviously
21 it's priming Sun a peak facility. Certainly by them providing
22 in the DIP facility, they are honestly consenting to that.
23 There are no other liens of what we're aware of that really are
24 out there. There are no other liens which we are effectively
25 priming under the circumstances.

1 And because these assets, these company's assets,
2 were fully encumbered in a pre-Chapter 11, certainly it is not
3 possible, in our view, for this debtor to obtain 364(c)
4 financing. I mean, I can't say this is a case where major
5 league baseball was ready to prepare and stand up and give a
6 credit facility.

7 THE COURT: Right.

8 MR. AUSTIN: So, from that standpoint, I think we've
9 satisfied the standards to get the good faith finding under the
10 364(d), but I did want to point all these points out to the
11 Court in addition to what's been pointed out by debtor's
12 counsel.

13 THE COURT: All right, Mr. Austin. Thank you.

14 MR. AUSTIN: Thank you.

15 THE COURT: And I think I appreciate the parties
16 making full disclosure of the terms and any departures which,
17 frankly, there were virtually none.

18 MR. AUSTIN: Right. Thank you.

19 THE COURT: Thank you, Mr. Austin. Mr. Herman, it's
20 good to see you again.

21 MR. HERMAN: Thank Your Honor. Your Honor, Neil
22 Herman, Morgan, Lewis & Bockius, for Sundae Group Holdings I,
23 LLC, Sundae Group Holdings II, LLC and various affiliated
24 entitled, including the ultimate equity owner of the debtors.

25 THE COURT: Yes.

1 MR. HERMAN: Your Honor, always a pleasure to be in
2 your court. My -- I have a few points to raise. The first is
3 on disclosure and I'm glad to hear that it's already been
4 disclosed, the various roles that my clients are holding.

5 THE COURT: Yes.

6 MR. HERMAN: But, just to make sure it's not lost in
7 all the papers and all the discussions, the equity owner is
8 ultimately at the top is going to be a Sun Capital entity.
9 There are affiliates of the equity owner who are the second
10 lien holder, the participant in the DIP, as well as the
11 stalking horse buyer, Your Honor. So, right from the first
12 minute of the first hearing and in all the pleadings, we want
13 to make sure that that was out there and clear.

14 THE COURT: Thank you. And it was certainly very
15 clear from all the papers.

16 MR. HERMAN: Thank Your Honor. The second part
17 relates to the first point which is that since the various Sun
18 entities are all over this case, we wanted to make sure that
19 the DIP loan was not a market loan. This is a below market,
20 better than market in many ways. You heard about the interest
21 rate. You heard about the milestones that automatically kick
22 out. You heard that Sun is not imposing any fees or sharing in
23 fees. The Sun second lien debt, the interest on that is not
24 getting paid during the period covered by the budget. There
25 are numerous economic and non-economic terms in this DIP loan

1 that respect the fact that we're mindful of the fact that it's
2 an affiliate of an insider. So, in our view, it's actually
3 better than market and below market.

4 And that also reflects, Your Honor, the point that in
5 the period of the investigation, rather than using 60 days for
6 Wells, we've used 75 days for the Sun Capital entities, so we
7 are mindful of our various hats that we wear in this case.

8 The last point, Your Honor, is that you may have
9 noticed that the DIP loan here terminates upon a closing of the
10 363 sale.

11 THE COURT: Yes.

12 MR. HERMAN: You have to read that provision in
13 connection with the asset purchase agreement that will be
14 presented to you initially at the bid proceedings hearing --
15 procedures hearing and at the sale hearing. That document
16 provides that Sun, the committee and the debtor will negotiate
17 a new wind-down budget which will take effect immediately after
18 this budget and this loan terminates. So, there will not be
19 any gap in the estate. There will be a continued ability to
20 fund and to wind down the estate. But, that provision is not
21 in this document. It's in the separate asset purchase
22 agreement.

23 Your Honor, that's all I have at this point. I just
24 wanted to make sure that there was full disclosure and also to
25 emphasize the point that we think it's a below market and

1 better than market DIP loan.

2 THE COURT: Well, thank you, Mr. Herman. And, I
3 guess, perhaps you've taken some of the steam out of parties
4 how might come along later and --

5 MR. HERMAN: Thank you.

6 THE COURT: -- complaint, but thank you, very much.
7 I agree. It's a very clean and certainly fair and reasonable
8 DIP financing, but does anyone else wish to be heard with
9 respect to the financing here?

10 MR. LeHANE: Good morning, Your Honor. Robert
11 LeHane, Kelley, Drye & Warren.

12 THE COURT: Yes, sir. Good to see you, again.

13 MR. LeHANE: Your Honor, we're counsel for numerous
14 landlords --

15 THE COURT: Yes.

16 MR. LeHANE: -- Realty Income Corporation which has
17 over 105 locations that are leased to corporate owned
18 Friendly's, 15 franchises, also DDR Corp, Jones Lang LaSalle
19 and Equity One.

20 Your Honor, echoing Mr. Kwasteniet's theme, my
21 daughter, vastly overestimating her father's involvement and
22 abilities, urged me to make sure that Friendly's stays open.

23 THE COURT: You bet.

24 MR. LeHANE: And I believe on behalf of the landlord
25 community though, we certainly would like to see a healthy

1 Friendly's survive this bankruptcy process. A very positive
2 beginning to the case and welcome is that the DIP order, the
3 interim DIP order, did cover both of those issues that
4 typically landlords raise --

5 THE COURT: Exactly.

6 MR. LeHANE: -- which would be whether or not there
7 is a direct lien on the leases. It's expressly carved out from
8 that in the interim order and the extent to which there's
9 essentially a status quo for the respect to the DIP lender's
10 ability to access the collateral in an event of any default. I
11 spoke to Mr. Austin, counsel for the debtor, as well, and was
12 very happy to see that language. I believe Mr. Herman may have
13 been involved, as well. And we're grateful for that and also
14 welcome the ability to discuss with counsel for the debtors the
15 lease rejection issues which have been moved off to another
16 date.

17 THE COURT: Yes, I was impressed with that language,
18 as well. I thought of you and Mr. Pollack and Mr. Branch when
19 I was reading it and Ms. Heilman, of course, when I was reading
20 it.

21 MR. LeHANE: Exactly. That's it, Your Honor. I just
22 wanted to comment -- note that for the record and hopefully
23 we'll be able to resolve any issues that come up before the
24 final DIP, as well. Thank you.

25 THE COURT: Very well. Thank you. Thank you, Mr.

1 LeHane. Thank you for being here this morning. No one else?

2 MR. KWASTENIET: Nobody else, Your Honor.

3 THE COURT: No.

4 MR. KWASTENIET: So, with that, Your Honor, I believe
5 that we have established the need for DIP financing. Certainly
6 irreparable harm to the company --

7 THE COURT: Absolutely.

8 MR. KWASTENIET: -- which was well-demonstrated by
9 the budget that we filed and I think that we've certainly
10 justified the good faith finding that we were requesting. So,
11 unless Your Honor has --

12 THE COURT: I agree. The terms are certainly, at the
13 very least, fair and reasonable and I'm very satisfied with the
14 necessity of the loan, of course, and that it was fully
15 negotiated in good faith and the terms are certainly far more
16 reasonable than I often see in these financing arrangements.
17 And I am -- I'll be delighted to approve it.

18 MR. KWASTENIET: Okay. Thank you, Your Honor.

19 THE COURT: But, I guess we need to talk about some
20 hearing dates now, don't we.

21 MR. KWASTENIET: Yes, I think we have a couple of
22 dates that I wanted to -- one date that I definitely want to
23 get on the calendar and then one date I want to hold and
24 reserve.

25 THE COURT: Yes.

1 MR. KWASTENIET: The first, Your Honor, is the second
2 day hearing in this matter. We have a firm training program
3 the week of October 24th that commences on, I think it's the
4 26th. So, we're wondering if you might have availability
5 Monday, October 24 or Tuesday, October 25th.

6 THE COURT: I think, if you don't mind, starting at
7 8:30.

8 MR. KWASTENIET: Certainly not, Your Honor.

9 THE COURT: I'm not making -- I'm not getting a lot
10 of fans on this one, but I have a trial scheduled at two
11 o'clock that I, frankly, don't know if it will be continued or
12 will proceed, but and I've got several hearing in between
13 there, between 8:30 and there. So, if we did it at 8:30, I
14 think that would be helpful.

15 MR. KWASTENIET: On which day, Your Honor?

16 THE COURT: On the 24th, I'm sorry.

17 MR. KWASTENIET: On the 24th --

18 THE COURT: Yes.

19 MR. KWASTENIET: -- so, Monday the 24th at 8:30.

20 THE COURT: Yes.

21 MR. KWASTENIET: Great. So, we would envision that
22 as the second day hearing, so that would be the hearing for the
23 final DIP order. Also to the extent that we only receive
24 interim order on the various pleadings today, we'd set them
25 over for final hearing --

1 THE COURT: You bet.

2 MR. KWASTENIET: -- on the 24th. And also the
3 various lease motions that we continued.

4 THE COURT: Is that all right? Is that date, does
5 that work for counsel? And the other thing I will say is, if
6 my trial doesn't proceed, I would also be willing, of course,
7 to make an adjustment to later in that day. Mr. Schepacarter,
8 good morning.

9 MR. SCHEPACARTER: Good morning, Your Honor. Richard
10 Schepacarter for the United States Trustee. Generally, I don't
11 ask the Court to change hearing dates, but we've had an
12 inundation of filings recently and coverage may be a problem
13 on that date. That date is also the date that Judge Fitzgerald
14 holds her --

15 THE COURT: Oh.

16 MR. SCHEPACARTER: -- asbestos hearing and I'm
17 involved in pretty much all the asbestos cases. So, that's
18 kind of a bad day for me. Maybe the 25th might work better for
19 me because I know I'm going to have to find somebody to cover
20 and --

21 THE COURT: Okay.

22 MR. SCHEPACARTER: -- we've already have a little bit
23 of a problem getting people to do certain things, especially at
24 8:30 in the morning because there's --

25 THE COURT: Yes, travel.

1 MR. SCHEPACARTER: Well, we have a couple moms in the
2 office that don't come in until 8:30 -- until 9:30, so --

3 THE COURT: Okay.

4 MR. SCHEPACARTER: -- it really gets thin. So, I was
5 thinking maybe the 25th would work better for me.

6 THE COURT: Very well.

7 MR. SCHEPACARTER: Even in the morning, it can be
8 eight o'clock.

9 THE COURT: Okay.

10 MR. SCHEPACARTER: That's not a big deal.

11 THE COURT: When are we going to be holding the
12 formation meeting in this case, if you even know yet?

13 MR. SCHEPACARTER: I do know. That's going to be
14 October 12th --

15 THE COURT: Oh, good.

16 MR. SCHEPACARTER: -- at one o'clock and that's at
17 the Doubletree.

18 THE COURT: Okay.

19 MR. SCHEPACARTER: So, that -- I think that's
20 helpful.

21 THE COURT: Good. Thank you, Mr. Schepacarter. That
22 is helpful. Does the 25th work then, Mr. Herman, Mr. Pollack?

23 MR. KWASTENIET: It works for the debtors, Your
24 Honor.

25 THE COURT: All right.

1 MR. HERMAN: Your Honor, it works for me, but I do
2 note that myself and most of the landlord community are going
3 to the ICSC law conference which is the annual conference for
4 the shopping center industry and it starts in Phoenix on the
5 26th. So, the -- it works for me, but I -- we may have some
6 problems with some of the landlord community for the 25th.
7 But, it does work for me on the 25th.

8 MR. POLLACK: Good morning, Your Honor. David
9 Pollack for various (indiscernible).

10 THE COURT: Good morning, Mr. Pollack. Welcome.

11 MR. POLLACK: How are you, Your Honor? And is Mr.
12 Herman noted, the ICSC law conference begins on the 26th and
13 lot of us are going out on the 25th which is probably a good
14 day for the hearing then from the debtor's standpoint, but for
15 the rest of us -- and I wouldn't want counsel to miss their
16 firm meeting that week either, so --

17 THE COURT: That's right.

18 MR. POLLACK: -- you know, that does present a
19 problem for us.

20 THE COURT: Well, is -- does the 21st work?

21 MR. POLLACK: The -- I understand Mr. Schepacarter's
22 problem. I don't know if later in the day works for him or for
23 you or whatever, but the 25th through the 28th are the four bad
24 days.

25 THE COURT: Right.

1 MR. POLLACK: So, any other day is fine.

2 THE COURT: Okay. And I'm sure that you would rather
3 have it sooner than later, Mr. Kwasteniet, so --

4 MR. KWASTENIET: We would, Your Honor, although I
5 think we have some concern that the 21st is a little tight.
6 Mr. Herman's unavailable that day.

7 THE COURT: All right.

8 MR. SCHEPACARTER: Richard Schepacarter for the
9 United States Trustee. We -- maybe later in on October 24th
10 could work --

11 THE COURT: Well, that's when --

12 MR. SCHEPACARTER: -- in the afternoon, usually like,
13 I hate to say three o'clock, but usually the asbestos calendar
14 is over by three o'clock in the afternoon, so hopefully --

15 THE COURT: Well, why don't we do this? I'm just
16 looking. Why -- if I have to break from the trial, I'll do
17 that. And if we made it say -- why don't we make this at three
18 o'clock if that works for people on the 21st. Is that going to
19 work, I mean, 24th?

20 MR. KWASTENIET: On the 24th, Your Honor?

21 THE COURT: Yes.

22 MR. KWASTENIET: Yes, that works for us.

23 THE COURT: Okay. I can only do this because my
24 scheduling assistant is out of town. Okay. And I have a
25 couple of weeks to --

1 THE COURT: Well, I think it's a sign of a good
2 hearing when the biggest controversy is when we're going to
3 schedule the next hearing.

4 THE COURT: I agree with you.

5 MR. KWASTENIET: Your Honor, there's one other date
6 that we wanted to put out there. Oh, I should also mention,
7 Your Honor, that the hearing on the 24th is also going to be
8 the day that we notice out the bid procedures --

9 THE COURT: That's right.

10 MR. KWASTENIET: -- motion. We did file that first
11 day. We're obviously not asking for relief on that at today's
12 hearing, but that will be set for hearing on the 24th.

13 THE COURT: That's fine.

14 MR. KWASTENIET: Your Honor, the only other date and
15 I'm only raising it because I know Your Honor's calendar is
16 pretty tight is we are going to be asking at the hearing on the
17 24th just that various dates and deadlines with respect to the
18 sale process.

19 THE COURT: Sure.

20 MR. KWASTENIET: And we are requesting a sale hearing
21 on or about December the 5th. So, I don't know how your
22 calendar looks in December, but if we can maybe pencil in a
23 time or find a time now to hold and reserve for the sale
24 hearing obviously not prejudging that Your Honor will enter the
25 bid procedures order, but --

1 THE COURT: Sure.

2 MR. KWASTENIET: -- in the event that we get that
3 granted, it makes sense to -- because we know that that's on
4 our calendar certainly.

5 THE COURT: Let me ask, would the 2nd be too soon for
6 the sale hearing, Friday, December the 2nd or even Thursday the
7 1st?

8 MR. KWASTENIET: Yeah, it might. Mr. Herman
9 confirmed my impulse which is that, if anything, we should
10 allow maybe more time rather than less time given that it is a
11 sale to an insider party. And I'm sure the committee will want
12 to make sure there's adequate time, as the debtors do, for
13 marketing to see if there's any other potential third parties.
14 So, maybe some time later unless Your Honor is unavailable for
15 a significant block of time in which case I think a hearing on
16 the 1st or 2nd isn't materially different than a hearing on the
17 5th. But --

18 THE COURT: Well --

19 MR. KWASTENIET: how your calendar looks later that
20 week.

21 THE COURT: -- I've got this big two-week trial in
22 Nortel --

23 MR. KWASTENIET: Okay.

24 THE COURT: -- which is a joint trial, potentially
25 joint trial, with Canada. But, I'm sure that Justice Morawetz

1 would not be sorry if we ended one day a little bit earlier.
2 I'm reluctant to do that on the first day, but how about on the
3 6th --

4 MR. KWASTENIET: Sure.

5 THE COURT: -- Tuesday the 6th. If we set this for,
6 perhaps, I'm just thinking if it's better to do it at the
7 beginning of the day or at the end of the day. And how about
8 if we set this for 3 p.m. --

9 MR. KWASTENIET: Certainly, Your Honor.

10 THE COURT: -- on the 6th, does that work for
11 everyone? And don't be bashful about raising scheduling
12 problems.

13 (No audible response)

14 THE COURT: Hearing no one, I am setting it for three
15 o'clock on the 6th of December, potentially. Obviously, we've
16 not approved --

17 MR. KWASTENIET: Certainly, subject to entry --

18 THE COURT: Understood.

19 MR. KWASTENIET: -- of the bid procedures order later
20 this month.

21 THE COURT: Sure. Okay.

22 MR. KWASTENIET: That concludes the debtor's agenda
23 for this morning, Your Honor. We thank you, again, for
24 accommodating us.

25 THE COURT: Thank you, all, for coming in early and

1 now you can go get a cup of coffee or two. And I'll just need
2 the forms of order when, you know, when we're -- Ms. Jones, you
3 anticipated. Yes. Thank you. Thank you.

4 MS. JONES: (Indiscernible), Your Honor.

5 THE COURT: Oh, good. I've been known to mess those
6 up. Friendly's sale hearing, three o'clock. And thank you,
7 counsel. I will see you back here in a couple of weeks
8 obviously, but if matters arise in the meantime, don't hesitate
9 to contact chambers.

10 MR. KWASTENIET: Thank you, very much, Your Honor.

11 THE COURT: We'll always find time for you.

12 MR. KWASTENIET: Right.

13 THE COURT: Thank you, all. Good rest of the day and
14 we'll stand in recess.

15 MR. KWASTENIET: Thank you, Your Honor.

16 THE COURT: Good day to you.

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C E R T I F I C A T I O N

I, Amy L. Rentner, certify that the foregoing is a correct transcript to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Amy L. Rentner

Date: October 7, 2011

AMY L. RENTNER