

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

In re:)	
)	Chapter 11
FRIENDLY ICE CREAM CORPORATION, <i>et al.</i> , ¹)	Case No. 11-13167 (KG)
)	
Debtors.)	Jointly Administered
)	
)	Hearing Date: Oct. 24, 2011 at 3 p.m. (ET)
)	Objection Deadline: Oct. 19, 2011 at 4 p.m. (ET)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER
APPROVING PROCEDURES FOR THE SALE, TRANSFER, OR
ABANDONMENT OF DE MINIMIS ASSETS**

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, approving procedures for the sale, transfer, or abandonment of De Minimis Assets (as defined herein). In support of this Motion, the Debtors respectfully state as follows.

Jurisdiction and Venue

1. The United States Bankruptcy Court for the District of Delaware (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.

3. The statutory bases for the relief requested herein are sections 105(a), 363(b), 363(f), and 363(m) of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 2002 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Relief Requested

4. By this Motion, the Debtors respectfully request entry of an order, substantially in the form attached hereto as **Exhibit A**, authorizing and approving the implementation of expedited procedures to (a) effectuate, from time to time, sales or transfers of surplus, obsolete, non-core, or burdensome assets (the “De Minimis Assets”) in any individual transaction or series of related transactions to a single buyer or group of related buyers with a selling price equal to or less than \$500,000 free and clear of all liens, claims, interests, and encumbrances (collectively, the “Liens”), with such Liens attaching to the proceeds with the same validity, extent, and priority as had attached to the assets immediately prior to the sale or transfer; (b) abandon a De Minimis Asset to the extent that the Debtors determine that a sale thereof cannot be consummated at a price greater than the cost of liquidating such De Minimis Asset; and (c) pay those necessary fees and expenses, if any, incurred in the sale, transfer, or abandonment of De Minimis Assets, including, but not limited to, commission fees to agents, brokers, auctioneers, and liquidators.

Background

5. On October 5, 2011 (the “Petition Date”), each of the Debtors filed a petition with the Court under sections 101–1532 of the Bankruptcy Code. 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. On October 6, 2011, the Court entered an order authorizing the joint administration and procedural consolidation of these chapter 11 cases pursuant to

Rule 1015(b) of the Bankruptcy Rules. 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.

6. The Debtors are a leading full-service, family-oriented restaurant chain and provider of ice cream products in the Eastern United States. As of the Petition Date, the Debtors' operations included 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, as of the Petition Date, employed 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.

The De Minimis Asset Sale/Transfer Procedures

7. The Debtors propose to sell or transfer each of the De Minimis Assets for the highest and best offer received, taking into consideration the exigencies and circumstances in each such sale or transfer, under the following procedures (the "De Minimis Asset Sale Procedures"):

- a. With regard to sales or transfers of the De Minimis Assets in any individual transaction or series of related transactions to a single buyer or group of related buyers with an aggregate selling price² equal to or less than \$50,000:
 - i. The Debtors are authorized to consummate such transaction(s) if the Debtors determine in the reasonable exercise of their business judgment that such sales or transfers are in the best interests of the

² For purposes of these procedures, selling price shall refer to the Debtors' estimate of the net proceeds of any sale transaction.

estates, without further order of the Court or notice to any party;
and

- ii. Any such transaction(s) shall be free and clear of all Liens, with such Liens attaching only to the sale or transfer proceeds with the same validity, extent, and priority as had attached to the De Minimis Assets immediately prior to such sale or transfer.
- b. With regard to the sales or transfers of the De Minimis Assets in any individual transaction or series of related transactions to a single buyer or group of related buyers with an aggregate selling price greater than \$50,000 and up to or equal to \$500,000:
- i. The Debtors are authorized to consummate such transaction(s) without further order of the Court if the Debtors determine in the reasonable exercise of their business judgment that such sales or transfers are in the best interests of the estates, subject to the procedures set forth herein;
 - ii. Any such transaction(s) shall be free and clear of all Liens, with such Liens attaching only to the sale or transfer proceeds with the same validity, extent, and priority as had attached to the De Minimis Assets immediately prior to such sale or transfer;
 - iii. The Debtors shall give written notice of each such sale (the "Sale Notice") to (a) the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee"); (b) counsel to the agent for the Debtors' prepetition secured lenders and the agent for the Debtors' postpetition debtor in possession financing facility; (c) the indenture trustee for the Debtors' prepetition unsecured noteholders; (d) counsel to any statutory committee of unsecured creditors appointed in these chapter 11 cases, and until such appointment, the top 20 unsecured creditors; (e) counsel to the Stalking Horse Purchaser, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103, Attn: David A. Gerson; and (f) those persons who have formally appeared and requested service in this proceeding pursuant to Bankruptcy Rule 2002 (collectively, the "Notice Parties") at least seven (7) business days prior to the closing of such sale or transfer;
 - iv. The content of the Sale Notice shall consist of (a) identification of the De Minimis Assets being sold or transferred, (b) identification of the purchaser of the assets, (c) the purchase price, and (d) the significant terms of the sale or transfer agreement;
 - v. If no written objections from any of the Notice Parties are filed within seven (7) business days after the date of receipt of such Sale

Notice, then the Debtors are authorized to immediately consummate such sale or transfer;

- vi. If any Notice Party files a written objection to any such sale or transfer with the Court within seven (7) business days after receipt of such Sale Notice, then the relevant De Minimis Asset shall only be sold or transferred upon either the consensual resolution of the objection by the parties in question or further order of the Court after notice and a hearing.

8. Notwithstanding the foregoing, the Debtors are mindful of their duty to maximize the value of their estates and will use commercially reasonable efforts to market all De Minimis Assets proposed to be sold in an effort to obtain the highest consideration for all of their assets.

9. To the extent such De Minimis Assets cannot be sold at a price greater than the cost of liquidating such assets, the Debtors seek authority to abandon such De Minimis Assets in accordance with the following procedures (the "De Minimis Asset Abandonment Procedures"):

- a. The Debtors shall give written notice of the abandonment (the "Abandonment Notice") to the Notice Parties;
- b. The Abandonment Notice shall contain a reasonably detailed description of the De Minimis Assets to be abandoned and the Debtors' reasons for such abandonment;
- c. If no written objections from any of the Notice Parties are filed with the Court within seven (7) business days after the date of receipt of such Abandonment Notice, then the Debtors are authorized to immediately proceed with the abandonment; and
- d. If a written objection from any Notice Party is filed with the Court within seven (7) business days after receipt of such Abandonment Notice, then the relevant De Minimis Asset shall only be abandoned upon either the consensual resolution of the objection by the parties in question or further order of the Court after notice and a hearing.

Basis for Relief

A. The De Minimis Asset Sale Procedures Are Appropriate Under Section 363(b) of the Bankruptcy Code.

10. Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of

the estate.” 11 U.S.C. § 363(b)(1). Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of the estate, bankruptcy courts routinely authorize sales of a debtor’s assets if such sale is based upon the sound business judgment of the debtor. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re Trans World Airlines, Inc.*, No. 01-00056, 2001 Bankr. LEXIS 980, at *29 (Bankr. D. Del. Apr. 2, 2001).

11. Prior to, and during the course of these chapter 11 cases, the Debtors have evaluated their businesses and have determined to cease operations at certain locations. The Debtors have and continue to identify locations that do not add value to their estates, necessarily creating the need to dispose of facilities, equipment, fixtures, and other assets. To that end, the Debtors have proposed the De Minimis Asset Sale and Abandonment Procedures, whereby they can consummate the sale, effectuate the transfer of, or abandon the De Minimis Assets during the pendency of these chapter 11 cases.

12. If the requested relief is granted, the Debtors will be able to avoid many unnecessary costs associated with operating, storing, and liquidating De Minimis Assets that have little to no commercial value to the Debtors’ going-forward businesses. Moreover, the De Minimis Asset Sale and Abandonment Procedures will provide the Debtors with necessary flexibility during the chapter 11 cases, and thus are in the best interests of the Debtors’ estates and creditors. Further, the procedures proposed will afford parties with an interest in the De Minimis Assets the opportunity to object to their sale or abandonment and obtain a hearing if necessary.

B. The De Minimis Asset Sale Procedures Are Appropriate Under Section 363(f) of the Bankruptcy Code.

13. Section 363(f) of the Bankruptcy Code permits a debtor to sell property free and clear of another party's interest in the property if: (a) applicable nonbankruptcy law permits such a "free and clear" sale; (b) the holder of the interest consents; (c) the interest is a lien and the sales price of the property exceeds the value of all liens on the property; (d) the interest is in bona fide dispute; or (e) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest.

14. The Debtors propose to sell or transfer the De Minimis Assets in a commercially reasonable manner in an effort to obtain the highest consideration for such assets, and expect that the value of the proceeds from such sales or transfers will fairly reflect the value of the property sold. The Debtors further propose that any party with a Lien on a De Minimis Asset sold or transferred pursuant to this Motion shall have a corresponding security interest in the proceeds of such sale or transfer. Moreover, the Debtors propose that the failure to object to the entry of the order approving this Motion along with failure to file a timely objection to a Sale Notice, shall be deemed "consent" to any sales or transfers pursuant to the order within the meaning of section 363(f)(2) of the Bankruptcy Code. As such, the requirements of section 363(f) of the Bankruptcy Code would be satisfied for any proposed sales or transfers free and clear of liens, encumbrances, and other interests.

C. Sales of De Minimis Assets Will be Entitled to the Protections of Section 363(m) of the Bankruptcy Code.

15. Section 363(m) of the Bankruptcy Code provides in relevant part that the reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of

the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal. 11 U.S.C. § 363(m). While the Bankruptcy Code does not define “good faith,” the Third Circuit in *In re Abbotts Dairies of Pennsylvania, Inc.*, provided that:

The requirement that a purchaser act in good faith . . . speaks to the integrity of [the purchaser’s] conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser’s good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d 143, 147 (3rd Cir. 1986) (emphasis omitted) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978) (interpreting Bankruptcy Rule 805, the precursor of section 363(m)). The Debtors submit that any agreement that results in the sale of De Minimis Assets will be an arm’s-length transaction entitled to the protections of section 363(m), and the Debtors ask that section 363(m) be deemed to apply to each sale of De Minimis Assets in accordance with the De Minimis Asset Sale Procedures.

D. The De Minimis Asset Abandonment Procedures Are Appropriate Under Section 554(a) of the Bankruptcy Code.

16. Section 554(a) of the Bankruptcy Code provides that “[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. § 554(a). The Debtors expect to take all reasonable steps to sell De Minimis Assets not needed in their operations. The costs associated with sales of certain De Minimis Assets, however, may exceed any possible proceeds thereof. The inability to consummate a commercially reasonable sale of De Minimis Assets would indicate that these assets have no meaningful monetary value to the Debtors’ estates. Further, the costs of storing and maintaining such De Minimis Assets may burden the Debtors’ estates and weigh in favor of deserting such assets. Accordingly, the Debtors contend that, in

such circumstances, the abandonment of De Minimis Assets pursuant to the De Minimis Asset Abandonment Procedures is in the best interest of the Debtors' estates.

17. In light of the demonstrable benefits of streamlined procedures to sell, transfer, or abandon De Minimis Assets, courts in this and other districts have approved similar procedures in other chapter 11 cases. *See, e.g., In re Visteon Corp.*, No. 09-11786 (Bankr. D. Del. July 16, 2009) (asset sale procedures authorized for sales of up to \$10,000,000 and abandonment procedures); *In re Flying J, Inc.*, No. 08-13384 (Bankr. D. Del. Feb. 19, 2009) (asset sale procedures authorized for sales of up to \$5,000,000); *In re Leiner Health Prods. Inc.*, No. 08-10446 (Bankr. D. Del. Apr. 4, 2008) (same for sales of up to \$500,000 and abandonment procedures); *In re Dura Auto. Sys., Inc.*, No. 06-11202 (Bankr. D. Del. Apr. 25, 2007) (same for sales of up to \$2,500,000 and abandonment procedures); *In re Fleming Cos.*, No. 03-10945 (Bankr. D. Del. May 21, 2003) (same for sales of less than \$6,500,000 and abandonment procedures authorized). For the foregoing reasons, the Debtors believe that granting the relief requested herein is appropriate and in the best interests of their estates and their creditors.

Notice

18. 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' postpetition debtor in possession financing facility; (c) the indenture trustee for the Debtors' prepetition unsecured noteholders; (d) the top 20 unsecured creditors; and (e) all entities that have filed a request for service of filings in these chapter 11 cases pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

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

[Remainder of Page Intentionally Left Blank]

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 12, 2011
Wilmington, Delaware

PACHULSKI STANG ZIEHL & JONES LLP



Laura Davis Jones (DE Bar No. 2436)
Timothy P. Cairns (DE Bar No. 4228)
Kathleen P. Makowski (DE Bar No. 3648)
919 North Market Street, 17th Floor
P.O. Box 8705
Wilmington, Delaware 19899-8705 (Courier 19801)
Telephone: (302) 652-4100
Facsimile: (302) 652-4400
Email: ljones@pszjlaw.com
tcairns@pszjlaw.com
kmakowski@pszjlaw.com

- and -

James A. Stempel (admitted *pro hac vice*)
Ross M. Kwasteniet (admitted *pro hac vice*)
Jeffrey D. Pawlitz (admitted *pro hac vice*)

KIRKLAND & ELLIS LLP

300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
Email: james.stempel@kirkland.com
ross.kwasteniet@kirkland.com
jeffrey.pawlitz@kirkland.com

*Proposed Co-Counsel to the Debtors
and Debtors in Possession*