

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

In re:	:	Chapter 11
	:	
FRIENDLY ICE CREAM	:	Case No.11-13167 (KG)
CORPORATION, <i>et al.</i> , ¹	:	(Jointly Administered)
	:	
Debtors.	:	Hearing Date: October 24, 2011 at 3:00 p.m. (ET)
	:	Objection Deadline: October 17, 2011 at 4:00 p.m. (ET)
	:	
	:	Related to Docket No. 15
	:	

**LIMITED OBJECTION OF HOLYOKE MALL COMPANY, L.P., AVIATION MALL
NEWCO, LLC AND PCK DEVELOPMENT COMPANY, L.L.C. TO DEBTORS'
MOTION FOR ENTRY OF (A) AN ORDER APPROVING BIDDING PROCEDURES
AND NOTICE PROCEDURES AND (B) AN ORDER (I) APPROVING THE ASSET
PURCHASE AGREEMENT, INCLUDING EXPENSE REIMBURSEMENT; (II)
AUTHORIZING THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE ASSETS OF
THE DEBTORS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES
AND OTHER INTERESTS; (III) AUTHORIZING THE ASSUMPTION AND
ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED
LEASES; AND (IV) GRANTING RELATED RELIEF**

Holyoke Mall Company, L.P., Aviation Mall NewCo, LLC, and PCK Development Company, L.L.C. (the “Landlords”), by and through their attorneys, Menter, Rudin & Trivelpiece, P.C. and Ballard Spahr, LLP, respectfully submit this Limited Objection to the above captioned debtors’ (the “Debtors”) *Motion for Entry of (A) an Order Approving Bidding Procedures and Notice Procedures and (B) an Order (I) Approving the Asset Purchase Agreement, Including Expense Reimbursement; (II) Authorizing the Sale of all or Substantially all of the Assets of the Debtors Free and Clear of all Liens, Claims, Encumbrances and Other*

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.

Interests; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief (the “Motion”) (D.I. 15).

BACKGROUND

1. On October 5, 2011 (the “Petition Date”), the Debtors filed petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Court”). The Debtors operate their business as debtors in possession pursuant to 11 U.S.C. § 1107(a) and 1108.

2. Holyoke Mall Company, L.P. leases nonresidential real property to one of the Debtors, Friendly Ice Cream Corporation, in the Holyoke Mall, located in Holyoke, Massachusetts.

3. Aviation Mall NewCo, LLC leases nonresidential real property to one of the Debtors, Friendly Ice Cream Corporation, in the Aviation Mall, located in Queensbury, New York.

4. PCK Development Company, L.L.C. leases nonresidential real property to one of the Debtors, Friendly Ice Cream Corporation, in the Hudson Valley Mall, located in Kingston, New York. The leases between the Landlords and the Debtors are collectively referred to as the “Leases.” The premises leased by the Landlords to the Debtors are collectively referred to as the “Premises.”

5. Each of the Premises is located within a “shopping center” as the term is used in § 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086–87 (3d Cir. 1990).

6. On October 5, 2011, the Debtors filed the Motion seeking an order (i) approving bidding and notice procedures (the “Bidding Procedures”); (ii) approving the Asset Purchase

Agreement (the “APA”) agreed to by Sundae Group Holdings II, LLC (the “Stalking Horse Purchaser”); (iii) scheduling dates for an auction (the “Auction”) of substantially all of the Debtors’ assets and for a hearing to approve the sale of said assets (the “Sale Hearing”), including executory contracts and unexpired leases; and (iv) seeking other related relief. The Debtors attached a proposed order (the “Proposed Order”) to the Motion granting the relief sought in the Motion as to the Bidding Procedures as well as a copy of the APA, (Proposed Order, D.I. 15; APA, D.I. 15.)

7. The Debtors propose the following timeline for the sale of substantially all of their assets:

- **Cure Notices:** Sent within 3 business days of entry of bidding procedures order.
- **Cure Amount and Adequate Assurance of Future Performance Objections:** Due Thursday, November 24, 2011 at 4:00 p.m. (Thanksgiving).
- **Bid Deadline:** Thursday, November 24, 2011 at 4:00 p.m. (Thanksgiving).
- **Sale Objection:** Due Thursday, November 24, 2011 at 4:00 p.m. (Thanksgiving).
- **Auction:** Thursday, December 1, 2011 at 9:00 a.m.
- **Notice of Successful Bidder(s):** Filed promptly following selection of successful bidder and conclusion of auction.
- **Adequate Assurance Objections to Buyer Other Than Stalking Horse Purchaser:** Due Monday, December 5, 2011.
- **Sale and Lease Assumption/Assignment Hearing:** Monday, December 5, 2011.
- **List of Leases to be Assumed and Assigned at Closing:** Filed within 5 business days of closing.
- **List of Leases Subject to Designation Rights:** Filed within 5 business days of closing.

Limited Objection

I. Adequate Assurance Information and Adequacy of Notice

8. Section 365 of the Bankruptcy Code controls the assumption and assignment of non-residential real property leases, and requires, *inter alia*, that a debtor provide adequate assurance that a proposed assignee has the ability to perform under such lease as a condition to assume and assign the lease. 11 U.S.C. §§ 365(b)(1)(C) & (f)(2). The Debtors bear the ultimate burden of persuasion as to issues under 11 U.S.C. § 365. *See In re Rachels Industries, Inc.*, 109

B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *see also Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985).

9. Although the Motion and Bidding Procedures require that any prospective bidder provide certain adequate assurance information to the Debtors, there is no requirement that such information be given to the Landlords in a timely manner such that they can evaluate the information and file objections as may be necessary. (*See* Motion, ¶ 65; *see also* Bid Procedures, Art. 6.2(b).) Further, the APA appears to seek to preclude the Landlords from obtaining adequate assurance information with respect to the Stalking Horse Purchaser. The APA provides that:

The Motion shall reflect Purchaser's agreement to perform from and after the Closing under the Assigned Contracts, which, subject to Court approval shall be the *only* adequate assurance of future performance necessary to satisfy the requirements of Section 365 of the Bankruptcy Code in respect of the assignment to Purchaser of such Assigned Contracts.

(APA, 8.2 (emphasis added).)

10. The Landlords should be afforded sufficient time to evaluate adequate assurance information once it has been provided. Due process requires that "notice must be reasonably calculated to apprise interested parties of the pendency of an action and afford them an opportunity to present objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Sullivan v. Barnett*, 139 F.3d 158, 171 (3d Cir. 1998). As the Debtors do not seek to have the Sale Hearing scheduled until December 5, 2011, the Court should order that they provide adequate assurance information for the Stalking Horse Bidder at least twenty-one (21) days before the deadline to object to the sale and assumption of the Leases.

11. Furthermore, the Motion and related exhibits provide that the Debtors are to require other potential bidders or backup bidders to provide adequate assurance information, but

the Motion provides no deadline for providing the information to the Landlords. (*See Motion*, ¶ 65.) The Debtors ask for a Thursday, December 1, 2011 auction and that objections be due at the Sale Hearing on Monday, December 5, 2011. This is an insufficient amount of time for the Landlords to obtain and adequately review a third party bidder's adequate assurance information and prepare and file objections. Adequate assurance information regarding any alternative and backup bidders should be delivered to the Landlords at least five (5) business days before the deadline to object to a sale to bidders other than the Stalking Horse Purchaser.

12. The APA provides that the Stalking Horse Purchaser may designate certain unexpired leases to be held by the Debtors until 210 days after the Petition Date to May 2012. During this time, the Stalking Horse Purchaser may exercise lease designation rights and direct the Debtors to assume and assign any of the designated leases. The Court should not make a finding at the Sale Hearing or in the sale order regarding adequate assurance of future performance with regard to such designated leases. Assumption and assignment of such leases should not be considered until after the Debtors file a motion to assume and assign the leases on appropriate notice and include current adequate assurance information and proposed cure amounts.

13. The APA provides that the Stalking Horse Purchaser shall have the right to assign its rights under the APA to an affiliate or its lenders. (APA, Art. 12.3(a), (b).) These provisions violate the Landlords' right to adequate assurance of future performance, as there is no requirement of any disclosure of the assignee of the APA or that its adequate assurance information be timely provided to the Landlords.

14. It is not clear in the Motion or APA that a successful bidder will be liable for all accrued, but unbilled or not yet due, obligations under the Leases assigned to it. In fact, both the

Motion and APA provide for the sale of the Debtors' assets free and clear of all claims and interests that may encumber or relate to the acquired assets. (Motion, ¶¶ 46, 50; APA, Art. 2.1, 2.3(b), & 2.4(a)(ii), (a)(viii), (a)(xi).) Accrued, but unbilled or not yet due, obligations may include adjustments and reconciliations for periods prior to assumption and assignment of the Leases, as well as obligations to indemnify the Landlords for events occurring prior to assumption and assignment. The Debtors must ensure that all accrued, but unbilled charges, including year-end adjustments and reconciliations, if any, are paid in accordance with the terms of the Leases irrespective of whether those charges accrued before or after any assignment of the Leases. Any proposed assignee must assume all such obligations upon any assignment of the Leases. This result is mandated by the requirement that the Debtor provide adequate assurance of future performance under the terms of the Lease. *See* 11 U.S.C. §§ 365(b)(1)(A) and 365(f)(2). Section 365(b)(3) of the Bankruptcy Code specifically provides that, for purposes of Section 365(f), adequate assurance of future performance with regard to a lease of real property in a shopping center includes adequate assurance "of the source of rent and other consideration due under the lease." 11 U.S.C. § 365(b)(3)(A). Allowing the Leases to be transferred free and clear of claims and interests that arose pursuant to the Lease terms would violate § 365, as it would allow the Leases to be assumed and assigned without the full cure amount being paid or being subject to assurance of payment.

15. In addition to the monetary obligations that the Debtors must satisfy under § 365, the Landlords' Leases also provide that the Debtors must indemnify and hold the Landlords harmless with regard to existing claims, as well as with regard to events that may have occurred before assignment, but that are not made known to the Landlords or the Debtors until sometime after assumption. Claims for indemnity may include, but are not limited to, (i) claims for

personal injuries which occur at the Premises, where a Landlord is joined as a party defendant, (ii) damage and destruction to the property by Debtors or their agents, and (iii) claims for environmental damage or environmental cleanup. Any assignee must take the Leases according to their terms and accedes to not only the Debtor's full rights thereunder, but also its full responsibilities. Debtors and their assignees should, therefore, indemnify the Landlords and be required to evidence or obtain adequate insurance to guaranty that their indemnity responsibilities will be met.

II. Cure Notice and Determination of Cure Amounts

16. The Motion and APA provide that the Debtors shall provide the Landlords notice of proposed cure amounts (the "Cure Notice") for the Leases within three (3) business days of entry of the Proposed Order. The Court should require that the Cure Notice also be emailed to the counsel of record for the Landlords and be filed with the Court so as to ensure proper notice.

17. The Landlords' objections to cure amounts are to be due on November 24, 2011. Nevertheless, under the APA, the Debtors could seek to assume and assign leases subject to designation rights as late as May 2012. Cure amounts are likely to have changed in the intervening time. Objections to cure amounts for designated leases should not be due until after the Debtors file motions to assume and assign such leases with proposed cure amounts.

18. Finally, the Court should clarify in its Order that undisputed cure amounts should be paid at closing and that all disputed amounts shall be escrowed and determined at a hearing to be held within one month of the Sale Hearing.

III. Rent Obligations for Designated Leases

19. The APA provides that with regard to leases subject to lease designation rights:

Purchaser shall reimburse Sellers and thereby be *solely responsible* for all costs associated with the continuation by Sellers of such Designation Right Contract (as set forth in a budget reasonably acceptable to Purchaser) for the period from Closing through the earlier of (A) the date which is ten (10) days following the end of the Designation Right Period (or such earlier date that the Bankruptcy Court may allow for rejection of Contracts or Real Property Leases in the Bankruptcy Cases) and (B) the date which is ten (10) days following Sellers' receipt of written notice from Purchaser authorizing the rejection of such Designation Right Contract (or such earlier date that the Bankruptcy Court may allow for rejection of Contracts or Real Property Leases in the Bankruptcy Cases)
...

(APA, Art. 2.5(b) (emphasis added).) It should be clarified that the Debtors remain liable for all rent and charges under the Leases, irrespective of any agreement the Debtors may reach with any purchaser regarding reimbursement of such costs.

IV. The Sale Order

20. The Debtors have not filed a proposed sale order. The Court should require the Debtors to file a proposed sale order at least ten business days before the deadline to object to the sale and any assumption and assignment of unexpired leases.

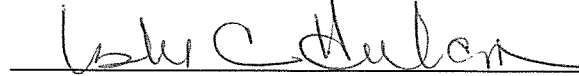
V. Joinder

21. The Landlords join in the objections of other landlords to the Motion to the extent they are not inconsistent with this Objection.

WHEREFORE, the Landlords respectfully request that the Court deny Debtors' Motion as to the Bidding Procedures, or, in the alternative, enter an Order consistent with this Objection and grant the Landlords such other and further relief as the Court deems just and proper.

Dated: October 17, 2011
Wilmington, Delaware

Respectfully submitted,



Leslie C. Heilman, Esquire (No. 4716)
BALLARD SPAHR, LLP
919 N. Market Street, 11th Floor
Wilmington, DE19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: heilmanl@ballardspahr.com

-and-

Kevin M. Newman, Esquire
Adam F. Kinney, Esquire
MENTER, RUDIN & TRIVELPIECE, P.C.
308 Maltbie Street, Suite 200
Syracuse, New York 13204-1498
Telephone: (315) 474-7541
Facsimile: (315) 474-4040
E-mail: kneuman@menterlaw.com
akinney@menterlaw.com

*Attorneys for Holyoke Mall Company, L.P.,
Aviation Mall NewCo, LLC and PCK Development
Company, L.L.C.*