

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. 5

**LIMITED OBJECTION OF THE MACERICH COMPANY TO THE DEBTORS’
MOTION FOR ENTRY OF AN ORDER AUTHORIZING AND APPROVING
EXPEDITED PROCEDURES FOR (A) REJECTION OF EXECUTORY CONTRACTS
AND UNEXPIRED LEASES AND (B) ABANDONMENT OF PERSONAL PROPERTY**

The Macerich Company (hereinafter, “Landlord”) hereby files this limited objection (the “Objection”) to the Debtors’ Motion For Entry Of An Order Authorizing And Approving Expedited Procedures For (A) Rejection Of Executory Contracts And Unexpired Leases And (B) Abandonment Of Personal Property (the “Rejection Procedures Motion”),² and respectfully represents as follows:

I. BACKGROUND FACTS

1. Friendly Ice Cream Corporation and its affiliated co-debtors (collectively, the “Debtors”), filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on October 5, 2011. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.³

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

² Terms not otherwise defined herein shall have the meanings ascribed to them in the Rejection Procedures Motion, and accompanying documents.

³ Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

2. The Debtors lease restaurant space (the "Premises") from the Landlord pursuant to unexpired leases of nonresidential real property (individually, a "Lease," and collectively, the "Leases") at the locations (the "Centers") set forth in detail on Schedule A hereto. The Leases are leases "of real property in a shopping center" as that term is used in Section 365(b)(3). *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

3. On October 5, 2011, the Debtors filed the Rejection Procedures Motion. The Landlord does not oppose expedited procedures to deal with the rejection of the Leases, but such procedures must adequately protect the Landlords.

II. ARGUMENT

A. **The rejection of any Lease should not become effective until the later of surrender and turnover of the Premises, free and clear of any personal property interests or third party objections, and seven (7) days after the filing of the Rejection Notice.**

5. The Rejection Procedures Motion provides that upon the filing of a Rejection Notice, Landlords and other interested parties will have seven (7) days to object to the proposed rejection. *See* Rejection Procedures Motion at ¶ 10(c).⁴ The Debtors then propose that the rejection of the Leases be effective not before the date of service of the Rejection Notice; (the "Rejection Date"). *See* Rejection Procedures Motion at ¶ 10(a).

6. At least with respect to non-residential real property leases, the Rejection Date should be defined as the later of: (a) seven (7) days after the filing and service of the Rejection Notice; (b) the date set forth in the Rejection Notice; (c) the date the Debtors vacate the Premises (as required by the Lease)⁵ and turn over keys, "key codes," and alarm codes to the Landlord (or to the mall managers or to the mall management office where the Premises are located), or if not returning the keys provide written notice that Landlord may re-key the Premises; and (d) the date

⁴ The proposed procedures seek to have objections filed *and served* not later than ten (7) after filing the Rejection Notice. *See* Rejection Procedures at ¶ 10(c). This is hard to track, cumbersome, and unnecessary with most parties receiving email notification of the filing. The procedures should simply require that the objections be filed not less than seven (7) days after service of the Rejection Notice.

⁵ In order to vacate the Premises under the Leases, the Debtors must return the Premises to the Landlords in "broom clean" condition. This means that the Debtors must remove all signs, shelves, personal property, moveable trade fixtures, inventory, and Debtor-owned furniture, fixtures and equipment ("FF&E").

otherwise ordered by the Bankruptcy Court. In addition, the Debtors should provide written confirmation that the Debtors have unequivocally vacated the Premises, which written confirmation includes information necessary to effect the transfer utilities to the affected Landlord, as well as other information to facilitate transition of the Premises. Lastly, the Rejection Date should not occur if third parties have yet to remove their property from the Premises.

7. Rejection that relates back to the service of the Rejection Notice is inconsistent with the Bankruptcy Code, as it creates potential significant and unnecessary liabilities to the Landlord. Relating the Rejection Date back to the Rejection Notice effectively bifurcates the legal act of rejection from the actual turnover of possession of the Premises to the Landlord. The bifurcation, in turn, creates a gap period where neither party controls the space and where the Debtors insurance may not cover damage to persons or property.

8. The Rejection Date potentially terminates the Debtors' insurable interest in the Lease or Premises. Therefore, if the Rejection Date relates back to the Rejection Notice, the Debtors' insurance may not cover later discovered damages to persons or property during this gap period. During such period, the Debtors may have ceased operations at the Premises and ceased monitoring or securing the Premises, while at the same time, the Landlord has no ability or legal right to possess or control the Premises. This creates up to 7 days where the Landlord may bear sole liability for any claims with respect to injury to persons or damage to property, during a time when the Landlord has no control over the possession or security at the Premises.

9. In addition, the Debtors must have any third parties personal property or equipment lessors remove their property prior the Rejection Date, and they should provide the Rejection Notice to any third party that may have property at the Premises. Rejection should not occur until such parties have removed their property, and providing the Rejection Notice to such parties allows them to removal of such property prior any proposed rejection date. This, in turn, facilitates that any property left at the Premises after the proposed rejection date can be abandoned to the Landlords free and clear of claims, interests and encumbrances, and without

liability to the Debtors or third parties as set forth below. Having parties entering onto the Premises during the potential gap-period does not make practical sense, and more importantly, it squarely puts the Landlords at risk for liability for damage to persons or property before they have possession and control of the Premises, and when they are potentially without recourse against the Debtors' insurance. Therefore, such parties must have the opportunity to remove their property prior to the Rejection Date.

10. Finally, in the event a party other than the Landlord objects to the rejection of the Leases, the effective date of rejection must be the later of the Rejection Date (as set forth above), and the date that the Court enters an order authorizing rejection of such Lease. This is consistent with Section 365 and protects the rights of the Landlord in the event a delay occurs through no fault of their own. Rejection of a lease is generally not effective until it is so ordered by the Bankruptcy Court. Until the entry of the rejection order, a debtor is obligated to pay the full amount of rent specified in the lease, and otherwise perform all obligations. *See In re Thinking Machines Corp.*, 67 F.3d 1021, 1025-1028 (1st Cir. 1995) (reversing judgment of District Court setting rejection date as of the motion filing date); *In re Federated Department Stores, Inc.*, 131 B.R. 808, 815 (S.D. Ohio 1991) (reversing bankruptcy court's approval of retroactive rejection as requested by debtor); *In re Arizona Appetito's Stores, Inc.*, 893 F.2d 216 (9th Cir. 1990); *In re Worth's Stores, Corp.*, 130 B.R. 531 (Bankr. E.D. Mo. 1991); *In re Paul Harris Stores, Inc., et al.*, 148 B.R. 307 (S.D. Ind. 1992); *Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.)*, 27 F.3d 401 (9th Cir. 1994). Pending the resolution of such objection, the Landlord cannot market or otherwise control its Premises. In the situation of an objection by a third party, there is no reason to permit any retroactive rejection of the Leases.

11. Having the date of rejection relate back to the date of filing the Rejection Notice, after the expiration of the objection period, shifts all the risk of loss for this period to the Landlord. This is not supportable by the Bankruptcy Code and is contrary to the policy of Section 365. Instead, the Rejection Date should upon the later of: (a) seven (7) days after the filing and service of the Rejection Notice; (b) the date set forth in the Rejection Notice; (c) the

date the Debtors vacate the Premises (as required by the Lease) and turn over keys, "key codes," and alarm codes to the Landlord (or to the mall managers or to the mall management office where the Premises are located), or if not returning the keys provide written notice that Landlord may re-key the Premises; and (d) the date otherwise ordered by the Bankruptcy Court.

B. The rejection procedures should provide for the removal of all personal property prior to rejection, with all property left at the Premises after rejection abandoned to Landlord free and clear of claims, encumbrances and interests, and without any liability to third parties.

12. The proposed order does provide for the abandonment of property by the Debtors, but it should clarify that upon abandonment, the Landlord may remove such property without liability. The abandonment of property can result in significant costs to Landlord as a debtor often leaves its vacated space cluttered with inventory, supplies and FF&E. This leaves the Landlord with the task of cleaning up the Premises, removing and/or disposing remaining property, and potentially dealing with any unknown third party security interests that may exist with respect to the abandoned property. Resolving this issue at the outset will benefit the Debtors and assist in minimizing administrative rent exposure. In re Pacific-Atlantic Trading Co., 27 F.3d 401 (9th Cir. 1994).

13. Providing that, upon the Rejection Date, the Landlord (or other designee) may dispose of any remaining personal property or FF&E, in its sole discretion, free and clear of all liens, claims, encumbrances, and interests or other rights of third parties, and without any liability to the Debtors or any third party, assures that all parties have notice to remove their property from the Premises prior to the Rejection Date, and that failure to do so may result in the disposal of such property by the Landlord. Additionally, it does not burden the Landlord by requiring them to store property for the benefit of the Debtors or third parties (with whom the Landlord has no contract, but which potentially subjects Landlord to claims of liability with respect to such property). To do otherwise, shifts the risk of loss to the Landlord, as well as puts it in the position of providing forced storage for the benefit of the Debtors or third parties.

14. It does not serve the purposes of the Bankruptcy Code to shift these obligations to the Landlord. If the Debtors seek to reject their Leases through an expedited process, the Debtors must: (a) remove of all property as required by the Leases; (b) include procedures to adequately protect the Landlord's rights and interests; or (c) agree that the costs arising from removal, storage, or potential liability for dealing with third party security interests or equipment leases shall be an administrative expense of the bankruptcy estate. The Debtors must be held responsible for the Landlord's legitimate claims arising from the removal and disposal of such property, as well as costs associated with the restoration of the Premises to the condition required under the Leases.

15. Finally, the Debtors seek authority to remove FF&E. The Landlord does not object to the removal of property owned by the Debtors, but the Debtors cannot remove property that belongs to the Landlord or has become property of the Landlord under the applicable Leases.

C. Landlord joins in the objections of other landlords.

15. To the extent not inconsistent with the relief sought herein, Landlord join in any opposition to Rejection Procedures Motion.

III. CONCLUSION

In order to protect the interests of the Landlord, Landlord requests that the Court modify any final order on rejection procedures to incorporate the changes set forth above, and grant such other and further relief as may be just and proper.

Dated: October 17, 2011
Wilmington, Delaware

Respectfully submitted,



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