

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

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| IN RE: |) Chapter 11 |
| |) |
| |) Case No. 11-13167 (KG) |
| FRIENDLY ICE CREAM CORPORATION, <i>et al.</i> , ¹ |) |
| |) Jointly Administered |
| |) |
| Debtors. |) Obj. Deadline: Oct. 17, 2011 @ 4 p.m. EST |
| |) Hearing Date: Oct. 24, 2011 @ 3 p.m. EST |

**OBJECTION TO DEBTORS’ MOTION FOR ENTRY OF INTERIM
AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION
FINANCING, (II) AUTHORIZING USE OF CASH COLLATERAL, (III) GRANTING
ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES,
AND (IV) GRANTING LIENS AND SUPERPRIORITY CLAIMS (D.I. 16)**

Huntington National Bank (“Huntington”), by and through its undersigned counsel, hereby submits its objection (the “Objection”) to *Debtor’s Motion for Entry of Interim And Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Granting Liens and Superpriority Claims* (the “Final DIP Motion”) [D.I. 16]. In support of its objection to the Final DIP Motion, Huntington respectfully states as follows:

BACKGROUND

A. The Chapter 11 Cases

1. On October 5, 2011 (the “Petition Date”), the Debtors filed voluntary petitions in the United States Bankruptcy Court for the District of Delaware under chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

¹ The Debtors in these cases, and their federal tax identification numbers, are as follows: 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, MA 01095.

2. On October 5, 2011, the Debtors filed their *Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Granting Liens and Superpriority Claims* [D.I. 16] (the “Interim DIP Motion”).

3. On October 6, 2011, this Court entered its *Interim Order (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Granting Liens and Superpriority Claims, and (V) Scheduling a Final Hearing on the Debtors’ Motion to Incur Such Financing on a Permanent Basis* [D.I. 56] (the “Interim DIP Order”).

4. Pursuant to the Interim DIP Order, a final hearing on the Final DIP Motion has been scheduled for October 24, 2011 at 3 p.m. (EST).

B. The 4th Day Loan

5. On information and belief, 4th Day Hospitality LLC (“4th Day”), an Ohio limited liability company, entered into four franchise agreements with Friendly’s Restaurants Franchise, LLC on February 18, 2004 to operate a Friendly’s franchise at four locations (the “Troy Friendly’s,” the “Vandalia Friendly’s,” the “Kettering Friendly’s,” and the “Beaver Creek Friendly’s”).

6. On information and belief, 4th Day entered into a franchise agreement with Friendly’s Restaurants Franchise, LLC on April 30, 2006 in order to operate a Friendly’s franchise at the Miamisburg location (the “Miamisburg Friendly’s,” together with the Troy Friendly’s, Vandalia Friendly’s, Kettering Friendly’s, and Beaver Creek Friendly’s, the “Dayton Area Friendly’s”).

7. On information and belief, 4th Day entered into a lease with Atlanta Real Estate II, LLC for premises located at 8270 Springboro Pike, Miamisburg, Ohio on March 10, 2005 (the "Miamisburg Lease").

8. On April 5, 2006, 4th Day entered into a loan agreement (the "4th Day Loan") with Sky Bank, a subsidiary of Sky Financial Group, Inc. (attached hereto as **Exhibit A**). The terms of the loan included a principal amount of \$775,000 maturing over ten years at an initial interest rate of 8.5%. The obligation was secured by a Security Agreement that granted lender a security interest in all of 4th Day's business assets, including business assets of the Dayton Area Friendly's franchises (the "4th Day Business Assets").

9. On April 5, 2006, 4th Day entered into a security agreement (the "Loan Security Agreement") with Sky Bank that secured Sky Bank's interest in the 4th Day Loan. The 4th Day Business Assets constituted the collateral and included, *inter alia*, equipment, fixtures, inventory, accounts, instruments, chattel paper, general intangibles and deposit accounts. *See* Loan Security Agreement (attached hereto as **Exhibit B**).

10. On April 21, 2006, Sky Bank filed a "UCC Financing Statement" with the Ohio Secretary of State validly perfecting its secured interest under the 4th Day Loan in "all inventory, chattel paper, accounts, equipment and general intangibles" and "all account proceeds" of 4th Day Hospitality LLC. *See* UCC Financing Statement, filed 4/19/2006, File # OH0010108864 (attached hereto as **Exhibit C**).

C. The Sky Bank Promissory Note

11. On April 5, 2006, 4th Day entered into a business loan agreement with Sky Bank in the amount of \$100,000, at an initial interest rate of 8.5%, and a maturity date of April 5, 2007 (the "Sky Bank Promissory Note") (attached hereto as **Exhibit D**).

12. On April 5, 2006, 4th Day entered into a security agreement (the “Note Security Agreement”) with Sky Bank that secured Sky Bank’s interest in the Sky Bank Promissory Note. The 4th Day Business Assets constituted the collateral and included, specifically, “all inventory, chattel paper, accounts, equipment and general intangibles.”

13. On April 21, 2006, Sky Bank filed a “UCC Financing Statement” with the Ohio Secretary of State validly perfecting its secured interest under the Sky Bank Promissory Note in “all inventory, chattel paper, accounts, equipment and general intangibles” and “all account proceeds” of 4th Day Hospitality LLC. See UCC Financing Statement, filed 4/19/2006, File # OH00101086517 (attached hereto as **Exhibit E**).

14. On April 2, 2007, the Sky Bank Promissory Note was amended as follows: the interest rate was increased to 9.25% and the maturity date was revised forward to July 5, 2007.

15. On May 3, 2007, the Sky Bank Promissory Note was amended as follows: the maturity date was revised forward to July 5, 2008.

D. Huntington Acquires Sky Bank Loan and Note

16. On September 21, 2007, Huntington acquired Sky Bank (as well as Sky Bank’s interest in the 4th Day Loan, the Sky Bank Promissory Note, and all validly perfected security interests in the 4th Day Business Assets, Miamisburg Cash Collateral, and the Miamisburg Friendly’s Equipment). As a result, Huntington National Bank is now owner of the Sky Bank Promissory Note (hereinafter, the “Huntington Promissory Note”) and the collateralized lender under the 4th Day Loan.

17. On July 16, 2008, the Huntington Promissory Note was amended as follows: the interest rate was revised downward to 4.25% and the maturity date was revised forward to February 5, 2009. The Huntington Promissory Note was subsequently amended five times,

extending the maturity date to September 5, 2011 and revising the principal downward to \$99,894.55.

18. On information and belief, as of October 11, 2011, the current balance on the 4th Day Loan is \$439,168.10, the interest owed is \$4,960.20, and the late charges incurred are \$850.56 (or a total of \$444,978.86). The outstanding balance is collateralized by equipment at the Dayton Area Friendly's locations as well as all cash, accounts receivable or other cash collateral owned by any of the franchised locations or 4th Day Hospitality, LLC. Huntington's security interest under the 4th Day Loan is validly perfected with the Ohio Secretary of State.

19. On information and belief, as of October 11, 2011, the current balance on the Huntington Promissory Note is \$99,894.55, the interest owed is \$1,128.26, and the late charges incurred are \$17.44 (or a total of \$101,040.25). The outstanding balance is collateralized by equipment at the Dayton Area Friendly's locations as well as all cash, accounts receivable or other cash collateral owned by any of the franchised locations or 4th Day Hospitality, LLC. Huntington's security interest under the Huntington Promissory Note is validly perfected with the Ohio Secretary of State.

E. 4th Day's Transfer of Collateral to Debtors

20. On information and belief, as of October 3, 2011 (the "Termination Date"), 4th Day had ceased operation of the Dayton Area Friendly's. 4th Day entered into an agreement with Friendly's Restaurants Franchise, LLC terminating all five franchise agreements (attached hereto as **Exhibit F**).

21. As of the filing of this Objection, Huntington believes that, since the Termination Date, one or more of the Debtor entities continues to operate the Dayton Area Friendly's locations and possesses the equipment, cash and accounts receivable of 4th Day now present at

each location, including the 4th Day Business Assets, the Miamisburg Cash Collateral, and the Miamisburg Friendly's Equipment (collectively, the "Huntington Collateral"). Huntington is unaware of what security interests, if any, the Debtors have in the Huntington Collateral or the terms by which the Debtor entities came into legal possession of the Huntington Collateral.

F. Miamisburg Friendly's Equipment Lien Priority and Value

22. On March 29, 2006, Atlanta Real Estate II, LLC signed a landlord release (the "Landlord Release") abdicating any senior lien interest it may have had in "all inventory, chattel paper, accounts, equipment and general intangibles" at the Miamisburg Friendly's location in favor of Sky Bank (the "Miamisburg Friendly's Equipment"). As a result of the Landlord Release, Huntington now has the senior security interest in the Miamisburg Friendly's Equipment.

23. On information and belief, validly perfected senior security interests in the equipment and other property at the Troy Friendly's, Vandalia Friendly's, Kettering Friendly's, and Beaver Creek Friendly's locations are owned by GE Capital Franchise Finance Corporation. The lien rights of GE Capital Franchise Finance Corporation do not extend to the Miamisburg Friendly's. Therefore, Huntington also has the senior security interest in the cash, accounts receivable and other cash collateral of 4th Day present at the Miamisburg Friendly's location (the "Miamisburg Cash Collateral").

24. On July 20, 2011, 4th Day caused to be conducted by Frank McCullough, Auctioneer and Certified Appraiser, an *Inventory & Appraisal of the Friendly's Restaurant at 8270 Springboro Pike, Miamisburg, OH 45342*, valuing the equipment at the Miamisburg Friendly's location at not less than \$85,370 fair market value (the "Appraisal") (attached hereto as **Exhibit G**).

25. As a result of GE Capital Franchise Finance Corporation's senior lien interest in 4th Day's Dayton Area Friendly's (except the Miamisburg Friendly's) equipment, cash and accounts receivable, Huntington believes it has the second senior lien interest in these 4th Day Business Assets. Huntington also continues to have the senior lien interest in the Miamisburg Cash Collateral and, as stated above, the Landlord Release also grants Huntington the senior lien interest in the Miamisburg Friendly's Equipment, in which GE Capital Franchise Finance Corporation has no interest and is not secured.

BASIS FOR OBJECTION

A. As a Threshold Matter, Friendly's Has No Interest in the Miamisburg Friendly's Equipment, Miamisburg Cash Collateral or the Other 4th Day Business Assets

26. Pursuant to the Loan Security Agreement and the Note Security Agreement, Huntington possesses (1) a validly perfected senior security interest in the Miamisburg Friendly's Equipment, valued at not less than \$85,370, (2) a validly perfected senior security interest in the accounts receivable and cash collateral of the Miamisburg Friendly's locations, and (iii) a junior security interest in all of 4th Day's business assets, including, but not limited to, cash-on-hand, accounts receivable, equipment and any other cash collateral, either belonging to 4th Day or located at any of the Dayton Area Friendly's locations, other than the Miamisburg Friendly's location.

27. Although 4th Day has ceased its franchise agreement with Friendly's Franchise Restaurants, LLC, the Termination Agreement does not purport to, and does not, affect Huntington's secured status with respect to the Huntington Collateral. Furthermore, Huntington is unaware of any security interest any of the Debtor entities had in any of the Miamisburg Friendly's Equipment, Miamisburg Cash Collateral, or any of the other 4th Day Business Assets prior to the Termination Date, and therefore avers that none of the Debtor entities had any such

interest, whether in the form of a lien or any other security instrument. To the extent that any Debtor entity now purports to control, or controls or uses any of the Cash Collateral, Huntington asserts that the Cash Collateral as defined does not include the Huntington Collateral because Friendly's has no interest in it.

28. Finally, Huntington is unaware of any security interest any Debtor entity took in the Miamisburg Friendly's Equipment, the Miamisburg Cash Collateral or any of the other 4th Day Business Assets at or after the Termination Date, or in what capacity, if any, any Debtor entity now operates the Dayton Area Friendly's restaurants and thus controls their equipment or sweeps their deposit accounts. If such security interest now exists, it was either not lawful for 4th Day to offer such security interest as part of any termination agreement or sale of its assets, or the Debtor entity that purchased such interest now has a security interest junior to Huntington (and GE Capital Franchise Corporation, if applicable) and Huntington is therefore entitled to adequate protection.

B. In the Alternative, if the Debtors have or are Seeking a Security Interest in the Miamisburg Friendly's Equipment, Miamisburg Cash Collateral, or the 4th Day Business Assets, Huntington is Entitled to Adequate Protection Pursuant to Section 364(d)(1) and Section 363(e), or Huntington is a Permitted Prior Lienholder as Defined in the Interim DIP Order

1. *The Final DIP Motion's DIP Financing Agreement (and the superpriority liens) do not adequately protect Huntington's interest in the Huntington Collateral*

29. The Final DIP Motion seeks court authority for the proposed DIP Facility Agreement² pursuant to section 364 of the Bankruptcy Code as well as authority to use Cash Collateral pursuant to section 363 of the Bankruptcy Code. Final DIP Motion, ¶ 3.

30. The Debtors request authority to obtain postpetition financing in the form of the DIP Facility Agreement pursuant to section 364. Final DIP Motion, ¶ 25. In relevant part, the

² Defined terms in this section reflect the same terms as defined in the Final DIP Motion.

Debtors seek to obtain this financing by securing its DIP Lenders with a lien that is “senior to or equal to existing liens on the encumbered property” pursuant to section 364(d)(1). Final DIP Motion, ¶ 33. The Debtors concede that this first priority priming lien requires the adequate protection of any interests third parties may have in the assets secured. *Id.*, ¶ 33.

31. Although all parties with an interest must receive adequate protection pursuant to section 364(d)(1), the Debtors concede that only the Prepetition Secured Parties will receive adequate protection, including, *inter alia*, pay downs of obligations under the Prepetition Secured Credit Agreement, fully perfected replacement liens on the Cash Collateral subject only to the DIP Liens and Permitted Prior Liens,³ administrative expenses for the Prepetition Lenders, financial reporting guarantees, and accrual of interest (with respect to the Subordinated Noteholder). Final DIP Motion, ¶ 42. There is no provision for the adequate protection of any other senior lienholders in Debtors’ assets, whether equipment, cash, accounts receivable, or any other form of cash collateral, other than of the interests of the Prepetition Secured Parties or the Permitted Prior Lienholders.

32. Pursuant to section 364(c) of the Bankruptcy Code, a debtor-in-possession who is unable to obtain unsecured credit financing may seek court approval of DIP financing securitized by liens on the debtor’s property. Section 364(c) specifically states:

If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title; (2) secured by a lien on property of the estate

³ Permitted Prior Liens is a defined term in the Interim DIP and Cash Collateral Motion meaning “only such liens and security interests that are (a) valid, enforceable, non-avoidable liens and security interests that are perfected prior to the Petition Date (or perfected after the Petition Date to the extent permitted by section 546(b) of the Bankruptcy Code), (b) but not subject to avoidance, reduction, disallowance or subordination pursuant to the Bankruptcy Code or applicable non bankruptcy law and (c) senior in priority to the Prepetition Liens under applicable law...”. Interim DIP Motion, ¶ 4.

that is not otherwise subject to a lien; or (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

33. Section 364(c) does not allow court approval of DIP financing securitized by a senior lien on property of the estate that is already subject to an otherwise validly perfected lien. However, section 364(d)(1) authorizes such a priming lien if the previously senior lienholder is given adequate protection of its interest in the collateral:

The court, after notice and a hearing may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if (A) the trustee is unable to obtain such credit otherwise; and (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(d)(1). Adequate protection may be in the form of adequate protection fees, interest payments, administrative claims, or replacement liens. *See, e.g., In re Continental Airlines Inc.*, 154 B.R. 176, 180–81 (Bankr. D. Del. 1993). Replacement liens, however, are usually appropriate only when the property liened has sufficient value to support both the replacement lien and the new, senior DIP lien. *See In re Mosello*, 195 B.R. 277 (Bankr. S.D.N.Y. 1997). It is the trustee's burden to prove that lien interests to be subordinated are adequately protected. *See* 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 364.05[1] (16th ed.).

34. Because Huntington Bank has validly perfected liens in the Huntington Collateral, the trustee may not grant a prospective DIP lender a senior lien on the equipment, cash, and accounts receivable pursuant to section 364(d)(1) of the Bankruptcy Code unless the trustee first adequately protects Huntington's interests in the Huntington Collateral. Accordingly, Huntington respectfully objects to the Final DIP Order's proposed DIP Facility Agreement (and

the accompanying superpriority priming liens) unless and until (i) Huntington is adequately protected under section 364(d)(1) in substantially the same manner as the Prepetition Secured Parties and/or (ii) Huntington is declared a Permitted Prior Lienholder whose security interest in the Huntington Collateral is not primed by the new liens authorized by the proposed Final DIP Order.

2. *The Final DIP Motion's Authorization of Debtors' Use of Cash Collateral Does Not Adequately Protect Huntington's Interest in the Huntington Collateral*

35. In addition to requesting court approval of the proposed DIP financing liens, the Debtors' Final DIP Motion also seeks authority to use the Debtors' secured cash collateral on a permanent basis. Final DIP Motion, ¶ 44. Pursuant to section 363(e) of the Bankruptcy Code, any time debtor property is proposed to be used or sold such use or sale is conditional on the debtor taking measures to adequately protect the interests of any entities in such property. 11 U.S.C. § 363(e). Section 363 thus requires adequate protection of third party interests in debtor-controlled equipment or cash collateral outside of the DIP financing context. *See id.*

36. The Debtors concede that section 363(e) applies to the Cash Collateral sought to be used by the Debtors and that any entity with such an interest must be adequately protected. However, the Debtors (a) assert that all parties with an interest in the Cash Collateral have consented and/or (b) absent such consent, the Prepetition Secured Parties' interest are adequately protected because of the various adequate protection measures described above. Final DIP Motion, ¶¶ 44-47. In a footnote, the Debtors state that they "are not aware of any entity other than the Debtors and the Prior Lenders that has or purports to have an interest in the Cash Collateral." Final DIP Motion, fn.9. Presumably, if additional parties with an interest in the Cash Collateral were to have or purport to have such an interest, they would also be adequately protected by the Debtors.

37. Huntington believes that if the Huntington Collateral is found by this Court to be among the Cash Collateral (as defined in the Interim DIP Motion), that it is just such an “entity other than the Debtors and the Prior Lenders that has or purports to have an interest in the Cash Collateral” as described in footnote 9. *First*, Huntington has validly perfected liens in the equipment and cash collateral at the Miamisburg Friendly’s location, as well as validly perfected liens in the cash and accounts receivable of all of the remaining Dayton Area Friendly’s locations. *Second*, Huntington has not consented to the use of the Huntington Collateral and, therefore, with respect to the Miamisburg Friendly’s Equipment, the Miamisburg Cash Collateral, and the other 4th Day assets secured by the Note Security Agreement and the Loan Security Agreement, Huntington is entitled to adequate protection of its interest in whatever Cash Collateral Debtors propose to use, sell or lease in substantially the same form as the Prepetition Secured Parties described in the Interim DIP Order. *See* Interim DIP Order, ¶ 13. Therefore, the Debtors have two choices: they may adequately protect Huntington’s interests in the Huntington Collateral pursuant to section 363(e) with a replacement lien or some other recognized form of adequate protection, or they must carve out the Huntington Collateral and cede their authority to use such cash collateral. Absent one of these protections, Huntington respectfully objects to the Final DIP Motion’s proposed authorization of Debtors’ use of the Cash Collateral.

3. *Huntington Should Be Declared a Permitted Prior Lienholder as Defined in the Interim DIP Order*

38. Pursuant to the terms of the proposed Final DIP Order, certain Permitted Prior Liens, as defined in the Interim DIP Order, will not be primed by the Prepetition Secured Parties and, thus, with respect to the DIP Facility Agreement’s proposed priming liens, will not require adequate protection because such liens will not be subordinated to the DIP Liens. According to

the Interim DIP Order, the Permitted Prior Liens include “such liens and security interests that are (a) valid, enforceable, non-avoidable liens and security interests that are perfected prior to the Petition Date;...(b) but not subject to avoidance, reduction, disallowance or subordination pursuant to the Bankruptcy Code;...and (c) senior in priority to the Prepetition Liens under applicable law...”. Interim DIP Order, ¶ 4.

39. The Loan Security Agreement and the Note Security Agreement that collateralize the Huntington Collateral constitute such Permitted Prior Liens. *First*, these liens are validly perfected with the Ohio Secretary of State and were perfected prior to the Petition Date; *second*, the liens are senior in priority to the Prepetition Liens under Ohio law; and, *third*, such liens are presumptively non-avoidable because they were validly perfected more than two years before the Petition Date. *See, e.g.*, 11 U.S.C. §§ 542 to 550. By declaring the Huntington Collateral liens Permitted Prior Liens as defined in the Interim DIP Order, the Court will effectively remove the Huntington Collateral from the pool of Cash Collateral subject to the DIP Liens and make adequate protection under section 364(d)(1) unnecessary with respect to the Debtors’ authority to use such cash collateral.

CONCLUSION

Huntington is a secured party with respect to assets previously owned by 4th Day Hospitality, LLC and currently in possession of the Debtors. In connection with the Final DIP Motion, it appears that the Debtors intend to acquire liens on the assets which constitute the Huntington Collateral, including the cash generated by the operation of the Dayton Area Friendly’s. The Debtors have not proposed to provide adequate protection to Huntington with respect to their proposed use of cash collateral or the granting of superpriority liens in connection with the proposed DIP Facility. Absent the inclusion of appropriate protections to Huntington in

the interim and final DIP/cash collateral orders, the Court should not approve the Debtor's Final DIP Motion.

WHEREFORE, for the foregoing reasons Huntington respectfully requests that the Final DIP Motion be denied except to the extent it is modified consistent with this Objection, and for such other relief as is just and proper.

Date: October 17, 2011
Wilmington, DE

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