

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
FRIENDLY ICE CREAM CORPORATION, <i>et al.</i> , <sup>1</sup>	:	Case No. 11-13167 (KG)
	:	(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)
	:	Extended to October 19, 2011 @4:00 p.m.
	:	
	:	Related to Docket No. 15
	:	

**OBJECTION OF BRIXMOR PROPERTY GROUP, INC. AND GGP LIMITED PARTNERSHIP AND JOINDER OF BRIXMOR PROPERTY GROUP, INC. AND GGP LIMITED PARTNERSHIP IN OBJECTIONS OF THE MACERICH COMPANY AND HOLYOKE MALL COMPANY, L.P., *ET AL.*, 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**

TO THE HONORABLE KEVIN GROSS,  
UNITED STATES BANKRUPTCY JUDGE:

Brixmor Property Group, Inc. (“Brixmor”), and GGP Limited Partnership (“GGP and collectively, the “Objecting Landlords”), by and through their undersigned attorneys, hereby make this Objection and join in the Limited Objections of The Macerich Company and Holyoke

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<sup>1</sup> 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.

Mall Company, L.P., *et al.* to Debtors<sup>2</sup> 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 (the “Motion”), and in support thereof aver:

1. Objecting Landlords are the owners or agents for the owners of various shopping centers in which Debtors operate restaurants pursuant to written leases (the “Leases” and each a “Lease”) which are affected by the relief sought by the Motion.

2. All of Objecting Landlords’ premises are premises located in shopping centers, as that term is used in 11 U.S.C. § 365(b)(3). *See In Re: Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990). The premises affected by the Motion are:

LOCATION	CITY/STATE	LANDLORD
Cayuga Mall	Ithaca, NY	Brixmor
Dalewood Shopping Center	Hartsdale, NY	Brixmor
Enfield Square	Enfield, CT	Brixmor
Sunshine Square	Medford, NY	Brixmor
Neshaminy Mall	Neshaminy, PA	GGP
White Marsh Mall <sup>3</sup>	White Marsh, MD	GGP
Woodbridge Center	Woodbridge, NJ	GGP

<sup>2</sup> On October 14, 2011 Freeze, LLC and certain related entities filed petitions under Chapter 11 of the Bankruptcy Code (Case Nos. 11-13303-06-KK). These entities appear to be the direct or indirect parent entities for Debtors. It is unclear at this point what affect these filings may have on Debtors’ cases in general or this Motion in particular.

<sup>3</sup> This is a franchise location that may, nevertheless, be affected by the Motion.

3. By the Motion Debtors seek *inter alia*, approval of various bidding procedures (the “Bid Procedures”), approval of the possible sale of some or all of Debtors’ non-residential real property leases and procedures for the assumption of various contracts and leases. (See, Motion at Docket # 15). This objection addresses only the Bid Procedures portion of the Motion.

4. The Macerich Company (“Macerich”) and Holyoke Mall Company, L.P., *et al.* (“Holyoke”), have filed Limited Objections (See Docket No. 142 with regard to Macerich and Docket No. 140 with regard to Holyoke) to Debtors’ Motion. Those Limited Objections challenge, *inter alia*, the following issues:

- Failure to provide for dissemination of adequate assurance information and failure to detail the basic information to be provided.
- Insufficient time to respond if the winning bidder is other than the stalking horse bidder.
- Improper timing for cure objections for leases that are subject to designation rights.
- Failure to provide adequately for rental obligations of leases subject to designation rights.
- Debtors’ attempt to excise any alleged anti-assignment provisions from the Leases [and citations to only pre-2005 BAPCPA Amendment cases regarding this issue—ignoring the 2005 change to Section 365(f)].

- The attempt to assign leases free and clear of all claims and the failure to provide for payment of year-end adjustments. (See, *infra*)
- Premature waiver of Bankruptcy Rules 6004 and 6006.

Objecting Landlords hereby join in the aforesaid Limited Objections and the pleadings filed with regard thereto as fully as though the allegations thereof were set forth at length herein.

### **Additional Objections**

5. In addition to the allegations and arguments set forth by Macerich and Holyoke, Objecting Landlords set forth below certain additional, or expanded, objections to the Motion.

### **Operations During Designation Period**

6. The Asset Purchase Agreement (“APA”) contemplates that the Purchaser will have Designation Rights with regard to certain leases post-Closing. During that period of time it appears that the employees at the restaurants will continue to be the employees of Debtors but that in all other respects, the restaurants will be under the control of the Purchaser. There is also a reference to a Transition Agreement, but it is unclear whether or not the Transition Agreement covers the operation of the Designation Period restaurants by the Purchaser. Debtors and/or the Purchaser must submit for review by Objecting Landlords any proposed agreement covering the operation of the restaurants during the Designation Period and that agreement must provide, at a minimum, for the Purchasers’ agreement to abide by all of the terms and conditions of Objecting Landlords’ Leases including, but not limited to, the provision of any and all insurance required by the Leases and the inclusion of Objecting Landlords as additional insureds, as may be required by said Leases. Objecting Landlords reserve the right to object to any agreements covering the Designation Period once said agreements have been submitted for

review. Any such agreements must be submitted at least ten (10) business days prior to the Objecting Deadline.

**Two Hundred Ten (210) Day Designation Period**

7. The Motion requests that there be a two hundred ten (210) day Designation Period with regard to various contracts and leases. Any such request is premature since no motion to extend the time to assume or reject leases beyond the statutory one hundred twenty (120) day period has been filed. Indeed, the schedule proposed for the sale of Debtors' assets contemplates a Closing that will occur within the 120 period. Accordingly, it is conceivable that if and when an extension motion is filed, Debtors will not be able to convince this Court that an extension is either required or warranted. Accordingly, any bid procedures order entered at this time should only provide for a one hundred twenty (120) day Designation Period unless or until an appropriate motion is filed and granted.

**Attendance at Auction**

8. Debtors propose to limit attendance at the Auction to the Debtors, their advisors, representatives of the Creditors Committee and their advisors, the Qualified Bidders, and potentially, certain other limited parties. Objecting Landlords are interested creditors from both the standpoint of being unsecured creditors with regard to rejected leases and being parties to non-residential real property leases which may very well be considered for assumption and assignment to the Purchaser. As such, Objecting Landlords have a vested interest in the proceedings at the Auction. Indeed, many times in the past landlords have provided invaluable information to Debtors and the Committee with regard to competing bidders and the acceptability of such bidders to the landlords if assumption and assignment of the landlords' leases are being considered. There is no reason that the proposed auction should be held behind

closed doors with interested creditors prohibited from attending. Objecting Landlords recognize that unless they become Qualified Bidders they may not participate in the auction process itself. Nevertheless, there is no reason to exclude Objecting Landlords from the Auction. Indeed, as mentioned above, there may well be advantages to both the Debtors and the Committee in receiving input from any landlords that are present.

### **Provision for Payment of Year End Adjustments**

9. As noted in the Macerich and Holyoke Limited Objections, neither the Motion nor the APA provide for the payment of accrued but unbilled year-end adjustments by either the Debtors or the Purchaser. Rather, the Motion seeks to have the Debtors sell their assets free and clear of any and all claims, liens, *etc.* Unbilled and accruing year-end adjustments certainly fit within the term “claims” as defined by the Bankruptcy Code. Moreover, it is clear from the provisions of the APA that the Purchaser is only prepared to assume post-Closing liabilities which accrue on or after the Closing Date. Thus, to the extent that there are year-end adjustments due for the period from January 1, 2011 through and including the Closing Date, the Purchaser is not currently assuming those liabilities.

10. Moreover, it also appears from the APA that Debtors believe that the only amounts owing and due to Objecting Landlords, and others similarly situated, is the payment of any cure amounts due for each assumed and assigned lease. However, year-end adjustments, not having been billed but only accruing, cannot possibly be defaults under the various Leases and the Bankruptcy Code only requires that a debtor cure defaults. Thus, Objecting Landlords’ year-end adjustments are left in “never never land” paid by neither the Debtors or the Purchaser. Accounting for the payment of the year end adjustments is certainly part of the adequate assurance of future performance that must be provided by Debtors and/or the Purchaser. In

virtually every case involving non-residential real property leases, that liability is an obligation of the purchaser when it comes due under the terms of the lease (or in default thereof, there is often a set aside of a separate escrow of the debtor's funds to make sure that the year end adjustments are, indeed, paid when they come due).

11. While the year-end adjustment issue is likely one that should be deferred until the Sale Hearing, Objecting Landlords believe that it is an issue that needs to be raised at this time so that the Debtors and Purchaser may make proper provision for the coverage of those liabilities in both the APA and the Sale Order.

**Reservation of Rights**

12. Objecting Landlords reserve the right to make such other and further objections as may be appropriate once a procedures order has been entered.

**Joinder in Other Landlord Objections**

13. Objecting Landlords hereby join in the objections filed by Debtors' other landlords to the extent that such objections are not inconsistent with the provisions hereof.

**WHEREFORE**, Objecting Landlords pray for relief consistent with the foregoing objections; and for such other and further relief as may be just and required under all of the circumstances

Dated: October 19, 2011  
Wilmington, Delaware

Respectfully submitted,

/s/ Leslie C. Heilman

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