IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	*	
FRIENDLY ICE CREAM CORPORATION, et al.,[1]	*	Case No. 11-13167 (KG)
	*	(Chapter 11)
Debtor.		

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OBJECTION OF DARNESTOWN ROAD ASSOCIATES LP TO DEBTORS' MOTION FOR ENTRY OF (A) AN ORDER APPROVING BIDDING 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

Darnestown Road Associates LP ("DRA" or the "Lessor"), by its undersigned counsel, respectfully submits this Objection (the "Objection") to the above captioned debtors' (the "Debtors") *Motion for Entry of (A) an Order Approving Bidding 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, states as follows.

Introduction

By the Motion, the Debtors seek the Court's approval of procedures for the proposed sale of all or substantially all of their assets to an affiliate of the Debtor's equity sponsor, on only ten

days' notice, and in connection therewith, approval of the "potential" assumption and assignment of designated nonresidential real property leases (the "Designated Leases") on inadequate notice and with inadequate information available to the counterparties to such "potentially" Designated Leases. The Lessor objects to the Motion, which proposes an impermissible sale and procedures for bidding and "potential" assumption and assignment of the Lease (defined below) that deprive the Lessor of the appropriate notice and due process. Indeed, the Motion for authorization to assume and assign the Designated Leases should be denied outright in that it is not a proper request for relief, but rather is a phantom motion, since neither the Lessor nor any of the other lessors affected are on proper notice that their particular Designated Lease will actually be assumed and/or assigned. The consequence of this phantom motion is that the Lessor has been deprived of the required notice and process mandated by the Bankruptcy Code in 11 U.S.C. § 365.

Additionally, the Debtors are in default under the Lease for, among other various obligations, their obligations to pay rent, including their obligations under 11 U.S.C. § 365 to pay post-petition rent for the month of October. Moreover, the Debtors have made no provision for the payment of post-petition rent pending the resolution of the Motion and have failed to even acknowledge their obligation to do so. Accordingly, pending the disposition of the Motion, an order should be entered requiring the Debtors to pay post-petition rent as an administrative obligation, separate and apart from the mandatory cure of pre-petition defaults in respect of assumption and assignment. The Lessor does not consent to assumption and assignment of the lease (the "Lease") of Lessor's nonresidential real property located at 8404 Broad Street, Richmond, Virginia. Additionally, the Lessor joins in the objections of those other

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[1] The Debtors in these chapter 11 cases are Friendly Ice Cream Corporation, Friendly's Restaurants

counterparties who have raised similar and other objections[2] and incorporates those objections herein as if fully stated.

BACKGROUND

1. Pursuant to a lease (the "Lease") originally entered into by the Lessor's predecessor in interest, Fountain Square Shopper's World Associates LP, the Lessor leases nonresidential real property located at 8404 West Broad Street, Richmond, Virginia. The leased property located within the Fountain Square Shopping Center, a shopping center as that term is defined by 11 U.S.C § 365 (b)(3).

2. On October 5, 2011 (the "Petition Date"), the Debtors' filed the above captioned cases, which are jointly administered under the lead case of 11-13167 (KG).

3. On the Petition Date, the Debtors filed the Motion, seeking approval of proposed bidding procedures, the sale of all or substantially all of the Debtors' assets free and clear of liens and encumbrances, authorizing the assumption and assignment of certain Designated Leases, and providing for certain procedures with respect to the cure and assumption and assignment of the Designated Leases. [3]

4. On October 5, 2011, the date on which the Debtors filed the Motion, the Debtors sent the Lessor a letter asserting that, in connection with their restructuring efforts and in connection with the assumption and rejection of the lease, GA Keen Realty Advisors ("Keen")

Franchise, LLC; Friendly's Realty I, LLC; Friendly's Realty II, LLC; and Friendly's Realty III, LLC.

[2] Specifically, the Lessor joins in and incorporates herein as if fully set forth the objections of *the Macerich Company* [D.I. 142], *Aviation Mall NewCo, LLC, Holyoke Mall Company, L.P., and PCK Development Company, L.L.C.* [D.I. 140], *Simon Property Group, Inc.* [150], and *Kimco Westmont 614, Inc. Potomac Rub, LLC And Garden State Pavilions Center, LLC* [D.I. 155] (collectively, the "Other Objecting Lessors").

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

would contact the Lessor to discuss the Lease. The Lessor was never contacted by Keen in this regard.[4]

OBJECTION

A. The Motion for Authorization to Assume and Assign the Designated Leases is a Phantom Motion for Which the Court May Not Grant Relief

5. The Debtors' request for authorization to assume and assign the Designated Leases is an improper request. The Motion only seeks authority to "potentially" assume and assign the Designated Leases and does not include a list of those leases that are actually proposed to be assumed and assigned.[5] Rather, the Debtors propose to bind the Lessor to an assumption and assignment that may or may not occur, making the Motion facially defective. In effect, the Lessor is held hostage to the possibility of the entry of an order authorizing assumption and assignment of the Lease, or to the alternate possibility of rejection, without the ability to either obtain adequate assurance of future performance and be assured of a proper cure, or to be provided adequate notice of rejection. This violates the requirement that the Debtors must clearly communicate to the Lessor in an unequivocal manner their intentions to either assume or reject and in doing so must manifest an unconditional and unambiguous decision. *In re Diamond Head Emporium, Inc.,* 69 B.R. 487, 493, 69 B.R. 487 (Bankr. D. Hawaii 1987) (citations and quotations omitted). Here, the Debtors' Motion is both conditional and ambiguous and must therefore be denied.

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[4] Notwithstanding the objections herein, the Lessor is willing to engage in discussions with the Debtors regarding the Lease, provided that the Debtors supply the Lessor with such information as is necessary for the Lessor to evaluate the information and to obtain an understanding of the real impact of any proposed disposition of the Lease upon its rights under the Lease and under the applicable law.

[5] The Debtors attempt to utilize a procedure that is more appropriately embodied in a plan of reorganization, wherein the assumption and rejection of such leases is included as part of the plan framework, but with all the appropriate protections provided by the disclosure, solicitation and voting process, all of which are denied to the Lessor by the workings of the Motion.

B. The Proposed Sale is an Impermissible Sub Rosa Plan for the Sale of Substantially All the Debtors' Assets to an Insider

6. The Motion proposes the sale of all or substantially all of the Debtors' assets outside of a chapter 11 plan to an affiliate of an insider and on only ten days' notice. Accordingly, the Motion should be denied as an impermissible *sub rosa* plan, which is intended to deprive creditors of the due process and notice the Bankruptcy Code imposes upon debtors in chapter 11 and to avoid the solicitation and disclosure process that should accompany what amounts to the disposal of all of the Debtors' assets. *See In re Decora Industries, Inc.* 2002 WL 32332749, 8 (D.Del. 2002) (A debtor cannot short circuit the requirements of 11 U.S.C. § 1101 *et seq.* for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of "all" or "substantially all" assets without the benefit of a confirmed plan or a court-approved disclosure statement), citing *In re Braniff Airways Inc.,* 700 F.2d 935 (5th Cir.1983).

7. Instead, the Debtors attempt to lock in creditors' rights within mere weeks of the filing of the Debtors' Petitions and without the due process and protections to which creditors are entitled under chapter 11. As of this time, the Debtors have not disclosed the identity of any other possible arms-length purchasers to whom they attempted to market the assets pre-petition. Rather, the only disclosure made is that "After extensive negotiations over the terms of a potential restructuring or sale, the Debtors secured a stalking horse bidder from their largest prepetition secured lender." Declaration of Steven C. Sanchioni of Friendly Ice Cream Corporation In Support of Debtors' Chapter 11 Petitions and First Day Motions (the "Sanchioni Affidavit") at 4. In a footnote, it is disclosed that the Stalking Horse Bidder is an affiliate of the Debtors' equity sponsor. *Id.* The identity of the Stalking Horse Bidder is not disclosed in the

Motion. Rather, parties in interest must turn to the Sanchioni Affidavit and the proposed Asset Purchase Agreement (the "APA") to learn that the Stalking Horse Bidder, Sundae Group Holdings II, LLC, is an affiliate of and the assignee of Sundae Group Holdings I, LLC, which is majority owned by the Debtors' ultimate majority equity holders.[6] Thus, it appears that the Stalking Horse Bidder is an insider assignee of an obligation of the Debtors to another insider, which is to comprise the Stalking Horse Bidder's credit bid and that the Debtors propose to transfer substantially all of the property of the estates, free and clear of liens and claims of creditors, to an affiliated entity, created just two months prior to the filing of the Debtors cases.[7]

8. Additionally, as set forth more fully in the Objection of the Macerich Company [D.I. 142], in which the Lessor joins, the sale process as proposed permits the imposition of cure amounts and the determination of the Lessor's rights in respect of same without sufficient notice,

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[6] The description of the ownership relationships is highly confusing. The Sanchioni Affidavit states:

> "The PIK Noteholder [Sundae Group Holdings I, LLC] is majority owned, indirectly, by one or more affiliates [unidentified] of Sun Capital Partners, Inc. Certain co-investors, including the Debtors' Chief Executive Officer, are minority owners of the PIK Noteholder [Sundae Group Holdings I, LLC]. The Debtors' ultimate majority equity holders are also affiliates of Sun Capital Partners, Inc. On September 9, 2011, Freeze, LLC (as successor to the original lender under the Secured Promissory Note, Freeze Group Holding Corp.) assigned its right, title, and interest in the Secured Promissory note to the PIK Noteholder to lend an additional $2 million under the PIK Note to fund the Debtors' operations and a commitment to lend certain additional amounts…. The PIK Note [Secured Promissory Note] is guaranteed by Freeze Operations Holding Corp. and Friendly's Restaurant Franchise, LLC, and is secured by substantially all of the assets of FICC, Freeze Operations Holding Corp., and Friendly's Restaurant Franchise, LLC."

Sanchioni Affidavit at 7-8. To further understand the relationships of all these affiliated entities, it is necessary to turn to the exhibit to the Declaration of Steven C. Sanchioni In Support of Debtors' Chapter 11 Petitions and First Day Motions filed in the case of Freeze, LLC (the "Freeze, LLC First Day Affidavit"). See D.I. 4, Case Number 11-13303-KG. As the Exhibit to the Freeze, LLC First Day Affidavit shows, Freeze, LLC, the assignor of the PIK Note, which is to be credit bid by the affiliated Stalking Horse Bidder, Sundae Group Holdings II, LLC, is the indirect parent of the Debtors. Moreover, the four successive parent entities of the Debtors, Freeze Operations Holding Corp., Freeze Group Holding Corp., Freeze, LLC, and Freeze Holdings, LLC have all filed chapter 11 cases of their own. Thus, it appears that the Stalking Horse Bidder is an insider assignee of an obligation of the Debtors to another insider, which is to comprise the Stalking Horse Bidder's credit bid.

[7] As set forth in the electronic database of entities on the official website maintained by the State of Delaware, Department of State, Division of Corporations, https://delecorp.delaware.gov/tin/controller, Sundae Group Holdings II, LLC was formed on August 31, 2011, just two months prior to the filing of the Debtors' cases. Sundae Group

without proper disclosure and scrutiny, and without appropriate time for discovery in the event the Lessor objects to assumption and assignment or to the appropriate cure or determines that adequate assurance of future performance cannot been provided by the Successful Bidder, to whom the Debtors' assumption and assignment rights and obligations under section 365 are to be transferred under the proposed sale. Moreover, the proposed order provides that the terms of the order approving the bidding procedures will govern over the terms of any proposed plan.

9. The Debtors should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets. This is especially so since the proposed Stalking Horse Bidder is an affiliate of the Debtors' equity holder and a sale of substantially all of the Debtors' assets outside a plan of reorganization. As a result, the Debtors bear the burden of proving that they have satisfied the requirements of Section 363(f), the good faith finding under Section 363(m), and the heightened scrutiny required by non-bankruptcy law for insider transactions. *In re Summit Global Logistics, Inc.* 2008 WL 819934, 9 (Bankr.D.N.J. 2008); *In re Medical Software Solutions,* 286 B.R. 431, 455 (Bankr.D.Utah 2002) ("[W]hen a pre-confirmation [Section] 363(b) sale is of all, or substantially all, of the Debtor's property, and is proposed during the beginning stages of the case, the sale transaction should be 'closely scrutinized, and the proponent bears a heightened burden of proving the elements necessary for authorization.' ").

10. Furthermore, since the proposed transaction is a sale of substantially all the Debtors' assets outside of a chapter 11 plan and prior to chapter 11 plan confirmation, the Debtors must also prove (1) a sound business purpose for the sale; (2) the proposed sale price is fair; (3) the Debtors have provided adequate and reasonable notice; and (4) the buyer has acted in

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Holdings I, LLC the assignee of the PIK Note from Freeze, LLC, and the assignor of the PIK Note to Sundae Group

good faith. *In re Exaeris, Inc.,* 380 B.R 741, 744 (Bankr.D.Del. 2008) (Gross, J.) (denying proposed sale of all assets to insider outside of plan); *In re Lionel Corp.,* 722 F.2d 1063, 1071 (2d Cir.1983). Here, the Debtors have not provided adequate and reasonable notice, nor demonstrated that the proposed sale is fair,[8] or that the insider buyer has acted in good faith. Moreover, there does not appear to be a sound justification for conducting the sale in such a hasty fashion and, as discussed more specifically below, without sufficient disclosure or due process. Accordingly, as in *In re Exaeris, Inc.,* the Motion must be denied. 380 B.R. at 746-747.

C. Joinder in the Objections of the Other Objecting Lessors

11. For the reasons set forth below and more fully in the objections of the Other Lessors, all arguments of which are incorporated herein by reference, the Motion must further be denied for the following reasons:

a. Pursuant to section 365(b)(3), the Lease is a Shopping Center lease. The Motion fails to provide the Lessor with the heightened adequate assurance protections with respect to Shopping Center leases required by Section 365(b)(3)(A) – (D). Moreover, any assumption and assignment must remain subject to all provisions of the Lease.

b. The proposed lightning fast sale deadlines deprive the Lessor of the benefits of section 365 and adequate due process, by among other things:

Holdings II, LLC, was also formed on August 31, 2011.

[8] The Debtors maintain in the Motion that the standard applied to the decision to sell all assets in the manner proposed is the business judgment standard. *See* Motion at 23. However, Delaware law is clear that a higher standard applies when the sale of the debtor's assets is to be to an insider. *See In re Crown Village Farm, LLC,* 415 B.R. 86, 93, 415 B.R. 86 (Bankr. D.Del. 2009) (Gross, J.) (close scrutiny of the Court required in sale process where the stalking horse is an insider).

(i) requiring objections to the sale, the cure notice and adequate assurance (if the Stalking Horse Bidder is the Successful Bidder) to be filed on November 24 (Thanksgiving), which is prior to the auction and prior to the disclosure of the identity of the Successful Bidder;

(ii) the auction is set for Thursday, December 1, with notice of the identity of the Successful Bidder to be filed on December 1, with the sale and lease assumption/assignment hearing and adequate assurance objection deadline (only applicable if not the Stalking Horse Bidder) all set for Monday, December 5, which is ***only 2 business days later and prior to the disclosure the leases subject to Designation*****;**

(iii) failing to require any provision of adequate insurance information to the Lessor(s); and

(iv) no time is provided to prepare for an evidentiary hearing, or for discovery and briefing and, even if time was allowed, the denial of the essential information precludes the Lessor from being able to prepare for such a hearing in any event.

Under any permutation of the above schedules, the Lessor must file objections to cure, adequate assurance (without any information thereto) and to the assumption and assignment before even knowing whether the Lease is among those that are to be assumed and assigned. Further, the Successful Bidder is allowed additional time until May 2012 to designate certain of the leases for assumption and assignment, but the Lessor is not provided any further notice, information regarding adequate assurance, or opportunity to object to such delayed designations. This is a complete denial of due process and should not be approved.

c. The cure procedure does not require that the Debtors or the Successful Bidder cure all defaults under the Lease and compensate the Lessor for any actual pecuniary loss

as a result of the defaults, and, as well, fails to provide for the payment of charges that have not yet been reconciled from pre-petition periods or for unbilled but accrued charges arising under the Lease prior to the closing of the sale. Moreover, there is no requirement for payment of the cure amounts upon closing or the deposit of the cure amounts into an escrow account for disputed cures. This is especially troubling since the Stalking Horse Bidder, for instance, is being permitted to credit bid for the Debtors' assets, including for the purchase of the Lease, for the amount that is owed by the Debtors to the Stalking Horse Bidder under the subordinated note PIK Note, which was held by an equity holder of the Debtors and apparently was assigned in anticipation of the proposed sale to an affiliate of the Debtors' equity holder.[9] Consequently, the sale should not be free and clear of all obligations to for a proper cure, including but not limited to unbilled but accrued charges.

d. The Lessor's right to adequate assurance is further stripped away by the right of the Stalking Horse Bidder to assign its rights under the APA to an affiliate or to its lenders without disclosure of such an assignee and without any adequate information of the assignee provided to the Lessor.

e. The due process provisions of Bankruptcy Rules 6004 and 6006 should not be waived, thus cutting off the Lessor's appellate rights and rights to a stay pending appeal, as proposed in the Motion and provided in the proposed Order.

12. To the extent consistent with this Objection, the Lessor joins in and incorporates by reference all other objections of the Other Lessors as if fully set forth herein.

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[9] Indeed, the sale process appears to be structured so as to ensure that the Stalking Horse Bidder will be the Successful Bidder. The Bidding Procedures provide that the Stalking Horse Bidder is entitled to a $1,000,000 expense reimbursement in the event that another Successful Bidder is identified, and that the Stalking Horse Bidder may apply that expense reimbursement as an additional credit bid in order to generate a higher bid than the third party bidder.

D. Provision Should Be Made Requiring the Debtors to Pay Post-Petition Rent and To Comply with their Post-petition Obligations Pending Approval of the Sale and Pending the Actual Assumption and Assignment or Rejection of the Lease

13. The Debtors have made no provision for the payment of post-petition rent pending the resolution of the Motion and have failed to even acknowledge their obligation to do so. Accordingly, pending the disposition of the Motion, an order should be entered requiring the Debtors to pay post-petition rent as an administrative obligation, separate and apart from the mandatory cure of pre-petition defaults in respect of assumption and assignment. This requirement is absolutely necessary in view of the due process deficiencies of the proposed Bidding Procedures, Cure Notice and procedures and the possibility that the Lessor may not even know for months whether the Lease is to be assumed and assigned or rejected.

E. Reservation of Rights

14. The Lessor reserves all rights, including but not limited to, the rights to (i) raise any additional objections in connection with any actual assumption or assignment of the Lease, once the actual assignee (or further successor assignee) is identified; (ii) raise further objections to an assignment of the Lease to a Successful Bidder, following the provision of information regarding adequate assurance of future performance; (ii) require any proposed assumption and assignment to comply with all terms in the Lease; (iv) object to the procedures for designation of the Lease once they are proposed; and (v) to raise any further relevant objections to the assumption and assignment of the Lease.

WHEREFORE, for the reasons set forth herein, the Lessor respectfully requests that the Court enter an Order denying the Motion and granting such other and further relief as is just and proper under the circumstances.

Dated: October 19, 2011
Wilmington, Delaware

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