IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 11-13167 (KG)
FRIENDLY ICE CREAM CORPORATION, *et al.*,	)	Jointly Administered
	)	
Debtors.	)	

OMNIBUS OBJECTION OF PENSION BENEFIT GUARANTY CORPORATION TO (I) THE DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING BIDDING PROCEDURES AND (II) DEBTORS' MOTION FOR APPROVAL OF DIP FINANCING AND USE OF CASH COLLATERAL

PRELIMINARY STATEMENT

The Pension Benefit Guaranty Corporation (PBGC) objects to: (1) Debtors' Motion for Entry of (A) an Order Approving Bidding Procedures and Notice Procedures and (B) an Order (I) Approving 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 Assumptions and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief ("Bidding Procedures Motion"); and (2) 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 ("DIP Financing Motion").

Each and every party to this bankruptcy, including the Debtors, the debtor in possession lender, and the asset purchaser is an affiliate of Sun Capital Partners, Inc. ("Sun Capital"). The focus of PBGC's objection is the proposed credit bid of all, or materially all, of the Debtors'

assets. The Sun Capital affiliate that proposes to act as the Stalking Horse for the sale of Debtors' assets, Sundae Group Holdings II, and the Sun Capital affiliate that funds the Debtors in this proceeding (Sundae Group Holdings I), act in parallel to hurry the purchase of the Debtors' material assets. Under the process proposed by the Debtors and their other Sun Capital affiliates, they would abandon the Debtors' pension plan and leave PBGC and all of the Debtors' unsecured creditors with little or no recovery, and would eliminate safeguards in Chapter 11 intended to protect PBGC's interests as well as those of other unsecured creditors.

PBGC joins in the "Omnibus Objection of the Official Committee of Unsecured Creditors of the Friendly Ice Cream Corporation, *Et Al*., to (I) Debtors' Motion for Entry of an Order Approving Bidding Procedures; (II) Debtors' Motion for Approval of DIP Financing and Use of Cash Collateral; and (III) Allowance of Prepetition Claims of Sun Capital Partners Inc., and Its Affiliates." Among the objections raised there, it is paramount to PBGC that its right as an unsecured creditor to investigate the status of the secured claim asserted by Sundae Group Holdings I and II as the basis of its credit bid, and to pursue a full objection to that claim at an appropriate time, is preserved. There are serious questions about the secured status of that claim, and indeed whether Sundae Group Holdings II is even a creditor of Debtors. In addition to the issues raised by the Committee, recent transactions between Sundae Group Holdings II, LLC ("Sundae II"), Sundae Group Holdings I, LLC ("Sundae I"), and the parent of the Debtors, Freeze, LLC raise additional serious questions about the validity of the secured lien claim. Indeed, available information suggests that neither Sundae I nor Sundae II owns the purported secured claim, which is instead the property of Freeze, LLC or one of its affiliates. If accurate, even assuming that there is a secured claim, neither Sundae I nor Sundae II hold it, and thus

should not be authorized to make a credit bid. Unless these questions are resolved in favor of the proposed bidders, the credit bid should fail.

BACKGROUND

I. PBGC and the Employee Retirement Income Security Act

PBGC is the United States government agency that administers the nation's pension plan termination insurance program pursuant to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461 (2006 & Supp. III 2009). The program guarantees a secure, predictable retirement for more than 33.8 million American workers.[1] PBGC's funds come from four sources: insurance premiums paid by employers; assets in terminated pension plans; recoveries from employers of terminated plans; and investment income.

A defined benefit pension plan is "one where the employee, upon retirement, is entitled to a fixed periodic payment," as set forth in the plan. *See Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 154 (1993). Employers must set aside adequate funds to pay the pensions they have promised their workers. Accordingly, the Internal Revenue Code ("IRC") and ERISA provide that the employer and each member of its controlled group are jointly and severally liable to pay minimum funding contributions to the pension plan.[2] *See* 26 U.S.C. § 412(b)(1) & (2) (2009) (effective for pension plan years beginning after Dec. 31, 2007); *see* 29 U.S.C.A. § 1082(b)(1) & (2) (2009) (same).

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[1] *See* 2010 PBGC Annual Management Report at p.2, http://www.pbgc.gov/docs/2010_annual_report.pdg

[2] A group of trades or business under common control, referred to as a "controlled group," includes, for example, a parent and its 80% owned subsidiaries. Another example includes brother-sister groups of trades or business under common control. *See* 29 U.S.C. § 1301(14)(A), (B); 26 U.S.C. § 414(b), (c); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

The minimum funding obligation continues through the year in which the pension plan is terminated in accordance with Title IV of ERISA. *See* Rev. Rul. 79-237, 1979-2 C.B. 190. If PBGC is required to take over the pension plan after termination, it collects any amounts owed to the pension plan, including any unpaid contributions. *See* 29 U.S.C. § 1342(d).

A pension plan can terminate only if it meets the stringent requirements of Title IV of ERISA. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). If an underfunded plan — one that does not have sufficient assets to provide employees all of their promised benefits — satisfies the requirements in Title IV of ERISA for termination, PBGC typically takes over the pension plan and pays the plan's benefits subject to statutory limitations. *See* 29 U.S.C. §§ 1322, 1341, 1342, 1361. Upon termination, the employer and each member of its controlled group become jointly and severally liable to PBGC for the amount of unfunded benefit liabilities, plus interest as of the pension plan's termination date. *See* 29 U.S.C. § 1362(b)(1)(A). The amount of unfunded benefit liabilities is the value of the benefit liabilities as of the pension plan termination date, based on assumptions prescribed by PBGC, over the current value of the pension plan's assets. *See* 29 U.S.C. § 1301(a)(18); *see also* 29 C.F.R. §§ 4044.41-4044.75.

II. Debtors' Defined Benefit Pension Plan and PBGC

Friendly Ice Cream Corporation, one of the Debtors, is the sponsor of the Friendly Ice Cream Corp. Cash Balance Pension Plan, a defined benefit pension plan covered by Title IV ("Pension Plan"). PBGC intends to file joint and several contingent claims against all the Debtors (as members of the controlled group) for (i) unfunded benefit liabilities, 29 U.S.C. § 1362(b); (ii) employer contributions due to the Plan, 29 U.S.C. § 1342(d); and (iii) unpaid premiums, 29 U.S.C. § 1307. Under the terms of the proposed Asset Purchase Agreement, the

buyer will purchase Friendly's assets, but not assume the Pension Plan.[3] Unless those terms are changed so that the buyer assumes the Pension Plan, the Plan may terminate because the estate will be not be an ongoing business after the asset sale and will have no material assets. *See* 29 U.S.C. § 1342. The largest of PBGC's claims in the event of a termination — the unfunded benefits liability claim — is estimated to exceed $100 million.

In the event of plan termination, PBGC will also have the same claims against other members of the controlled group of the Pension Plan's sponsor, including Freeze, LLC and its affiliates. 29 U.S.C. § 1362.

III. The Debtors and the Subordinated Secured Promissory Note

Sun Capital interests are intermingled throughout this bankruptcy ("Friendly Bankruptcy"). Sun Capital affiliate Freeze, LLC or its affiliates own the Friendly Debtors, while other affiliates provide the debtor in possession funding through Sundae I, and are the proposed asset purchaser, Sundae II. The Chief Executive Officer of Friendly is also a minority owner of Sundae I, the holder of the Subordinated Secured Promissory Note ("Subordinated Note," or "Note"), which underlies the credit bid at issue here.[4]

The features and the circumstances of the Subordinated Note suggest that it is actually equity, not debt. For example, the Note is between affiliates; there is no fixed interest rate and no scheduled interest payment; not a dollar has ever been paid on the note; and no sinking fund to provide repayments was established. Friendly's financial performance, and the composition of its capital structure at the time of the "going private transaction," suggests that the Debtors were insolvent at the time of the Note's inception.

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[3] Asset Purchase Agreement at §§ 2.4, 4.9, and 6.4.

[4] Sanchioni Affidavit at page 7.

Further, a series of transactions occurred on the eve of Friendly's bankruptcy that resulted in the Subordinated Note being assigned from Freeze, LLC, Friendly's direct or indirect parent, to Sundae I. Steven Sanchioni, the Executive Vice President and Chief Financial Officer of Friendly, filed Friendly's first day declaration.[5] There he described Friendly's capital structure, explaining that the Debtors have two secured creditors, Wells Fargo Capital Finance Inc., and Sundae I, which holds the Subordinated Note of approximately $260 million. As Mr. Sanchioni explained, the history of the Subordinated Note is complex:

> On September 9, 2011, Freeze, LLC … assigned its right, title, and interest in the [Subordinated Note] to the PIK Noteholder [Sundae I] in exchange for, among other things, the agreement to lend an additional $2 million … to fund the Debtors operations and a commitment to lend certain amounts.[6]

Ultimately, Sundae I provided the Debtors an additional $6 million, in two payments, one on September 26, 2011, and the second on September 30, 2011. The Debtors filed their petition on October 5, 2011.

On October 14, 2011, Freeze, LLC, the owner of the Subordinated Note until September 9, 2011, and the Debtors' direct or ultimate corporate parent, filed its own Chapter 11 petition in this Court. In Freeze's petition, assets are valued between $50,000,001- $100 million,[7] but, Mr. Sanchioni's affidavit in the Freeze Bankruptcy suggests that the only assets of Freeze at the time of its bankruptcy consisted of its stock in Friendly.[8] Mr. Sanchioni's affidavit in Freeze did not mention the assignment of the Subordinated Note to Sundae I on September 9, 2011.

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[5] Sanchioni Affidavit at page 7-8.

[6] *Id*.

[7] Freeze petition at page 1.

[8] In Mr. Sanchioni's first day declaration of the Freeze Bankruptcy filing, the Freeze Debtors are described as "non-operating entities that either, directly or indirectly, own all or the substantially

Based upon the facts disclosed by both the Debtors and Freeze:

- Until September 9, 2011, Freeze, LLC held the Subordinated Note, which has been valued by Sundae I and the Debtors as $267 million;
- On September 9, 2011, Freeze, LLC assigned the Subordinated Note to Sundae I, which then transferred $6 million to Friendly. The last payment of $2 million to Friendly was made on September 30, 2011, and increased the outstanding amount of the Subordinated Note;
- Shortly thereafter [the Debtors' motion does not state when], the Subordinated Note was assigned to Sundae II (Debtors' Motion for, *inter alia*, an order approving bidding procedures, at 30);
- On October 6, 2011, less than a month after the Subordinated Note was assigned to Sundae I, Friendly and its affiliates filed this Chapter 11 proceeding. On the same day, Debtors filed this motion, seeking approval of a credit bid based upon the assigned Subordinated Note, which now apparently resides with Sundae II. The proposed value of the asset sale is said to be $120 million.
- On October 14, 2011, Freeze, LLC and its affiliated Freeze entities filed Chapter 11 petitions. Describing their assets to be $50 million or more, the Freeze Debtors are also described as merely holding companies of the Friendly Debtors. The only listed creditor of Freeze is PBGC.

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majority of the equity of the Friendly Ice Cream Corporation … and certain of its affiliates…." Sanchioni Affidavit at page 2.

The Asset Purchase Agreement for Friendly's assets by Sundae II provides that the Pension Plan will not be transferred to Sundae II,[9] leaving Friendly's estate with no material assets and, because of the Friendly Debtors' credit bid, no material amount of cash. Thus, if that agreement were consummated, the termination of the Pension Plan seems likely. If the Pension Plan terminates, PBGC estimates that its largest claim will exceed $100 million.

The Freeze Debtors, as direct and indirect parents of the Friendly Debtors, are also liable to PBGC's claims regarding the Pension Plan's termination. However, according to the Freeze Debtors at the time of their petition, the assets of Freeze were substantially limited to the stock of the bankrupt Friendly. A major asset of Freeze, LLC, the Subordinated Note that was valued by Friendly Debtors at $267 million, was assigned a month before the Friendly Chapter 11 filing, and six weeks before the Freeze Chapter 11 filing, to an affiliate of Sun Capital that now seeks to fund the Friendly Bankruptcy and further assigned to another affiliate that seeks to acquire Friendly assets. If the sale proposed by the Debtors and other Sun Capital affiliates occurs, the $6 million payments to Freeze will have resulted in the acquisition of Friendly assets — valued by the Debtors at $120 million — apparently with no material recoveries to creditors of the Debtors.

In addition, as a result of the assignment, Freeze is apparently insolvent, despite the large amount of assets declared in its bankruptcy petition.

[9] Asset Purchase Agreement at § 2.4.

ARGUMENT

Section 363(k) states: "At a sale … of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and … may offset such claim against the purchase price of such property." The inquiry here is whether the Subordinated Note should be considered equity, and whether Sundae II holds an "allowed secured claim."[10]

Courts have held that debts assertedly owed to insiders require close scrutiny. *Pepper v. Litton*, 308 U.S. 295, 306 (1939). Moreover, a sale process involving an insider is subject to the close scrutiny of the Court. See In re Crown Village Farm, LLC, 415 B.R. 86, 93 (Bankr. D. Del. 2009) (holding that the sale process will be under close scrutiny where the stalking horse bidder is an insider); see also In re Firstmark Corp., 46 F.3d 653, 656 (7th Cir. 1995).

PBGC joins in the Committee's objection to Debtors' Proposed Bidding Procedures Order, and the Debtors' Proposed DIP Order, and adopts the arguments that the proposed Bidding Procedures and the DIP Financing Order violate the Bankruptcy Code under controlling law. PBGC separately objects to any provisions of the proposed Orders that unreasonably limit PBGC's right, as an unsecured creditor of the Debtors, to object to the Subordinated Note Claim, including the circumstances of its creation, purported ownership, validity, perfection, and its

[10] *See Coulter v. Blieden*, 104 F.2d 29, 33 (8th Cir. 1939) ("it is error to accept or consider a bid on behalf of the holder of a secured claim which is in litigation where an order for the sale of property requires the sale to be for cash and unconditional"); *Morgan Stanley Dean Witter Mort. Capital, Inc. v. Alon USA LP (In re Akard St. Fuels, L.P.)*, No. 01-1977, 01-2066, 01-2018, 2001 WL 1568332, at *3 (N.D. Tex. Dec. 4, 2001) (denying lender's ability to credit bid where lender's liens were subject to a challenge and lender was capable of bidding cash at the auction and later recovering the cash if it proved its liens); *In re Daufuskie Island Properties, LLC,* 441 B.R. 60, 64 (Bankr. D.S.C. 2010) (lien holder not allowed to credit bid its claimed liens or security interests because the validity of the liens or security interests were unresolved); *Nat'l Bank of Commerce v. McMullan (In re McMullan),* 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996) (the holder of a lien the validity of which has not been determined may not bid its lien).

character as equity or debt, and the credit bid by Sundae II based upon its status as holder of the Subordinated Note. PBGC, reserving all its rights to object to the Subordinated Note claim, should be given a full and fair opportunity to investigate the nature of the Note and the circumstances surrounding how Sundae II became the Note's holder**,** and reserves its right to object at the appropriate time.

A. <u>The Subordinated Note is equity, not debt, and does not constitute an allowed secured claim that supports Debtors' and Sundae II's credit bid proposal</u>.

PBGC has reviewed the arguments in the brief of the Unsecured Creditors Committee, and expressly joins the arguments made therein asserting that the instrument being used in the stalking horse bid of Sundae II is really equity, and not debt.[11]

The Third Circuit has held that the ultimate inquiry of the nature of an instrument as debt or equity is "whether the parties called an instrument one thing when in fact intended it as something else." *In re Submicron Systems Corp*., 432 F.3d 448, 456 (3d Cir. 2006). Courts generally have identified a number of factors to guide the analysis.[12] The Third Circuit has refused to adopt a mechanical test for the debt/equity analysis, *Submicron* at 455. This court has considered factors articulated in the Sixth Circuit's *AutoStyle Plastics* decision in discerning the intent of the parties.[13] *Friedman's Liquidating Trust v. Goldman Sachs Credit Partners (In re Friedman's, Inc.)*, 452 B.R. 512, 520–24 (Bankr. D. Del. 2011). The *AutoStyle Plastics* factors are: 1) the names given to the instruments, if any, evidencing the indebtedness; 2) the presence or

[11] Omnibus Objection of the Official Committee of Unsecured Creditors of the Friendly Ice Cream Corporation, *Et Al*., Preliminary Objection to the Subordinated Note Claim at 57.

[12] *See, e.g., In Roth Steel Tube Co. v. Comm'r*, 800 F.2d 625 (6th Cir. 1986); *Pontiac Serv., Inc. v. Comm'r*, 730 F.2d 634, 638 (11th Cir. 1984); *In re N&D Properties, Inc*., 799 F.2d 726, 733 (11th Cir. 1986); *In re Hillsborough Holdings Corp*., 176 B.R. 223, 248 (M.D. Fla. 1994).

[13] *In re AutoStyle Plastics, Inc*., 269 F.3d 726 (6th Cir. 2001).

absence of a fixed maturity date and schedule of payments; 3) the presence or absence of a fixed rate of interest and interest payments; 4) the source of repayments; 5) the adequacy or inadequacy of capitalization; 6) the identity of interest between the creditor and the stockholder; 7) the security, if any, for the advances; 8) the corporation's ability to obtain financing from outside lending institutions; 9) the extent to which the advances were subordinated to the claims of outside creditors; 10) the extent to which the advances were used to acquire capital assets; and 11) the presence or absence of a sinking fund to provide repayments.

The Third Circuit has found that the court's ultimate task is to scrutinize a transaction "according to an objective test of economic reality to determine its true economic nature." *Cohen v. KB Mezzanine Fund II, L.P. (In re SubMicron Sys. Corp.)*, 291 B.R. 314, 323 (Bankr. D. Del. 2003), *aff'd*, 432 F.3d 448 (3d Cir. 2006). However, the *AutoStyle Plastics* factors provide a starting point for this scrutiny. *Friedman's Liquidating Trust* at 520-24. Overwhelmingly, the *AutoStyle Plastics* factors in this case suggest that the Subordinated Note is equity masquerading as a debt instrument.

A brief review of certain features of the Subordinated Note and other circumstances suggest that the Note should be characterized as equity, not debt:

- Friendly, from the beginning of the going private transaction, was in a precarious financial state, its financial performance has always been poor, and at the time of the going private transaction, and after, was poorly capitalized;
- The Note's interest rate was not fixed. Instead, the interest rate was calculated based upon the financial performance of Friendly during the specific period. Under the Note, the interest rate could be (and was) as high as 30%;

- The holder of the Note, Freeze, was a Sun Capital affiliate that held the equity of Friendly;
- No sinking fund to provide payments was ever established, and Friendly never made any payments under the Note.
- There was no realistic chance that Friendly would ever be able to pay the Note

PBGC must be given a full and fair opportunity to investigate this issue further, because the consequences of the sale to Sundae II in a credit bid are critical to PBGC and other unsecured creditors.

B. Sundae I's secured position in this bankruptcy may be derived from asset transfers that violate Bankruptcy Code section 548.

Unlike the previous issue discussed — i.e., whether the Note is actually debt, or properly equity — this issue involves whether Sundae II (or Sundae I) can appropriately be the holder of the Note. The Debtors and the Debtors in the Freeze Bankruptcy provided facts in their pleadings that raise serious questions.

The Subordinated Note, originally owned by Freeze, LLC, was transferred to a Sun Capital affiliate within a few weeks immediately prior to the Friendly and Freeze bankruptcy filings. Friendly Ice Cream Corp., borrower, and Freeze Group Holding Corporation, lender, entered into the Subordinated Note dated January 11, 2008, to borrow $100 million on January 11, 2008, another $26.5 million on March 11, 2008, and an additional $19.5 million on June 5, 2008, totaling $146 million in aggregate principal balance. On September 9, 2011, Freeze, LLC, (as successor to the original lender) assigned its right, title, and interest in the Subordinated Note to Sundae I in exchange for three payments of $2 million (total $6 million) to the Debtors. On October 6, 2011, less than one month after the Subordinated Note was assigned to Sundae I,

Friendly and its affiliates filed this Chapter 11 proceeding. On October 14, 2011, Freeze, LLC (original owner of the Subordinated Note) and its affiliates filed Chapter 11 petitions.

Thus, on the eve of bankruptcy, the holder of the Note, Freeze, assigned the Note to an affiliate, first Sundae I and then Sundae II, for little or no value, yet the proposed value of Sundae II's credit bid, based upon the Note, is approximately $120 million. Freeze's only disclosed creditor in the Freeze bankruptcy petition is PBGC.

Fraudulent conveyance law is designed to protect creditors from transactions that unfairly drain the pool of assets available to pay creditor's claims. 11 U.S.C. § 548 (2006); 5 *Collier Bankruptcy Manual* ¶ 548.01[1][a] (16th ed. 2001). The goal is "to make available to creditors those assets of the debtor that are rightfully a part of the bankruptcy estate, even if they have been transferred away." *Buncher Co. v. Official Com. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 250 (3d Cir. 2000). Assets that have been inappropriately transferred to others, including affiliates, must be pulled back into the estate. *See* 11 U.S.C. § 550.

The relationships among Sun Capital and the parties to both the Freeze Bankruptcy and this proceeding, the interlocking management of Friendly and Freeze (Mr. Sanchioni is both the Chief Financial Officer of the Debtors and the "Authorized Officer" of Freeze), and the interlocking ownership of the parties (the Chief Executive Officer of Friendly is a minority owner of the Subordinated Noteholder, Sundae I) raise questions regarding the assignment of the Note that, at a minimum, require investigation. It is undisputed that Freeze's assets (the Subordinated Note) were transferred to an affiliate (Sundae I) on the eve of the Debtors' petition, and that PBGC is the largest — indeed, the only — disclosed creditor of Freeze.[14] Even assuming that the various Sun Capital affiliates acted in good faith, under section 548 of the

[14] *See*, Freeze Petition, Attachment 2.

Bankruptcy Code intent to defraud is *not* required; instead constructive fraud can be found where the debtor:

> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1)(B)(2006). Thus, the Bankruptcy Code prevents, or provides remedies for, certain asset transfers that harm creditors, irrespective of intent.

Based only on the Debtors' filings so far in both the Freeze Bankruptcy and this proceeding, it appears that (1) in assigning the approximately $260 million Subordinated Note, which is now valued at a minimum of $120 million for the credit bid, for $6 million of payments to Friendly, Freeze did not receive reasonably equivalent value;[15] (2) Freeze — whose other material asset was stock in Friendly Ice Cream, which was on the eve of bankruptcy — was or became insolvent with the assignment of the Subordinated Note;[16] and (3) Freeze believed that it would incur debts that it could not pay. *See supra*.

Accordingly, PBGC should be given a full and fair opportunity to investigate the assignment of the Subordinated Note to Sundae I and Sundae II.

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[15] Whether a transfer is made for "reasonably equivalent value" is a question of fact. *See In re Fruehauf Trailer Corp.*, 444 F.3d 203, 212 (3d Cir. 2006).

[16] Under section 101(32) of the Bankruptcy Code, "insolvency" is a factual test. Essentially, section 101 defines "insolvent" as "financial condition such, that the sum of such entity's debt is greater than all of such entity's property, at a fair valuation …." 11 U.S.C. § 101(32)(A). In calculating insolvency, contingent assets must be valued to "take into consideration the likelihood of that event occurring from an objective standpoint." *Mellon Bank v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In Re R.M.L. Inc.)*, 92 F.3d 139, 156 (3d Cir. 1996).

C. The proposed credit bid of Sundae II should be denied unless PBGC has reasonable opportunity to object.

Obviously, if the Subordinated Note is equity, not debt, Sundae II's credit bid is unsustainable. Further, given the circumstances after the assignment, it may be that neither of the Sundae entities actually holds the Subordinated Note, and thus the secured claim. PBGC requests that it have a fair opportunity to investigate Sundae II's credit bid, and to object to the Subordinated Note claim or Sundae II's status as holder of the Subordinated Claim. It is unclear that the assignment of the Subordinated Note from Freeze, LLC to Sundae I is enforceable, and that Sundae I was the "holder of the lien" that, now assigned to Sundae II, underlies the credit bid.

Further, if this claim is in dispute, the holder of the claim may not exercise an offset. A secured creditor's right to credit bid is limited by the "unless the court for cause orders otherwise" language in section 363(k).[17] Section 363 gives courts the discretion to decide what is "cause" and the flexibility to provide an appropriate remedy by conditioning credit bids on a case-by-case basis.[18] A secured creditor can be denied the right due to a bona fide dispute as to the validity of the creditor's claim or lien status.

If the assignment of the Subordinated Note to Sundae I violated section 548 or comparable law, a remedy to the Freeze estate is set forth in section 550, i.e., "the property may be transferred" to the Freeze estate. The bidding procedures, especially the ability of Sundae II to credit bid, are in question. Further, because the credit bid includes no material consideration other than the secured claim itself, if the sale is consummated, there may be no protections to the

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[17] *In re Philadelphia Newspapers, LLC,* 599 F.3d 298, 315-16 (3d Cir. 2010).

[18] *See In re River Road Hotel Partners, LLC,* No. 09-30029, 2010 WL 6634603 at *1 (Bankr. N.D. Ill. Oct. 5, 2010); *In re NJ Affordable Homes Corp.* No. 05-60442, 2006 WL 2128624 at *16 (Bankr. D.N.J. June 29, 2006).

Freeze estate and PBGC as its creditor. There is no certainty that Sundae I and Sundae II have any assets to satisfy an order by the Freeze court if the secured claim is challenged and ultimately disallowed. To avoid this uncertainty, the Court could require Sundae I and Sundae II to provide sufficient security to provide protections to the estate and creditors.[19]

Accordingly, PBGC respectfully requests the Court's approval for PBGC to investigate the Subordinated Note, the accompanying secured claim, and the resulting credit bid. PBGC also requests that the credit bid be denied based upon the current record.

D. Bidding procedures should be modified to encourage assumption of the Pension Plan.

It is almost always preferable to Pension Plan participants that the Pension Plan continues and is not terminated by PBGC. Continuation of the Pension Plan can also benefit the Debtors' estates and their creditors, because it would avoid a claim by PBGC for the Pension Plan's unfunded benefit liabilities against each of the Debtors. Accordingly, the Debtors should encourage bidders to assume the Pension Plan. To do so, the Debtors should make two modifications to the bidding procedures.

First, the procedures should require all bidders to state in their bids whether they intend to assume the Pension Plan. Second, the bidding procedures should provide that in determining the

[19] *See In re Octagon Roofing*, 123 B.R. 583 (Bankr. N.D.Ill. 1991) (bank entitled to credit bid subject to requirement that it post an irrevocable letter of credit in order to protect the estate in the event the lien is avoided as a fraudulent conveyance.) *See also In re Diebart Bancroft*, No. 92-3744 & 92-3745,1993 WL 21423 at *5 (E.D.La. Jan. 26, 1993) (allowing secured creditor to credit bid but requiring bid to include enough cash to cover a potential lien challenge, with cash to be in escrow until lien-priority issues determined); *In re Miami Gen. Hosp., Inc.*, 81 B.R. 682, 688 (S.D.Fla. 1988) (approving credit bid sale in light of stipulation preserving trustee's right to challenge secured claim and creditor's obligation to pay cash in amount of any disallowed portion of claim); *Bank of Nova Scotia v. St. Croix Hotel Corp. (In re St. Croix Hotel Corp.),* 44 B.R. 277, 279 (Bankr. D.V.I. 1984) (permitting bank to credit bid full amount of claim pending resolution of adversary proceeding challenging claim where bank agreed to pay cash for any amount of claim disallowed).

successful bid to be submitted to the Court for approval, the Debtors will give credit for the value of the liabilities under the Pension Plan that the bidder agrees to assume. Accordingly, the successful bid for the Debtors' assets should be the one that provides the greatest total amount of consideration to the Debtors, including any pension liabilities transferred to the purchaser. Additionally, PBGC requests that the Debtors provide to PBGC copies of the bids, and that the Asset Purchase Agreement be modified so that it clearly excludes any personnel or pension-related records.

PBGC requests that any successful bidder who proposes to assume the Pension Plan provide sufficient information for the agency to assure itself of the bidder's financial wherewithal.

CONCLUSION

Wherefore, PBGC requests the Court deny Debtor's Proposed Bidding Procedures and DIP Order as filed.

Dated: October 28, 2011
Washington, D.C.

Respectfully submitted,

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