IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	:	**Chapter 11**
In re:	:	
	:	**Case No. 11-13167 (KG)**
FRIENDLY ICE CREAM CORPORATION, *et al.*,	:	**Jointly Administered**
	:	
Debtors.[1]	:	**Related Docket Nos. 16 and 242**
	:	

RESPONSE OF WELLS FARGO CAPITAL FINANCE, INC. TO OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF 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

Wells Fargo Capital Finance, Inc. ("Wells Fargo" and, as administrative agent for the DIP Lender, the "DIP Agent"), by and through its undersigned proposed counsel, respectfully submits this Response (the "Response")[2] to the *Omnibus Objection of the Official Committee of Unsecured Creditors of 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*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Friendly Ice Cream Corporation (3130); Friendly's Restaurants Franchise, LLC (3693); Friendly's Realty I, LLC (2580); Friendly's Realty II, LLC (2581); and Friendly's Realty III, LLC (2583).

[2] Capitalized terms that are used but not defined in this Response have the meanings ascribed to them in the *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* [Docket No. 16] or the *Interim Order (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to Section 364 of the Bankruptcy Code, (II) Authorizing the Use of Cash Collateral Pursuant to Sections 105, 361, 362 and 363 of the Bankruptcy Code, (III) Granting Adequate Protection to the Prepetition Secured Parties Pursuant to Sections 361, 362,363 and 364 of the Bankruptcy Code, (IV) Granting Liens and Superpriority Claims, and (V) Scheduling a Final Hearing on the Debtors' Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rules 4001(B) and 4001(C)* [Docket No. 56].

Partners, Inc. and Its Affiliates [Docket No. 242] (the "Committee Objection"). In support of this Response, Wells Fargo respectfully states as follows:

PRELIMINARY STATEMENT

1. Since the appointment of the Official Committee of Unsecured Creditors (the "Committee") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), the DIP Agent, the Debtors, Sundae Group Holdings II, LLC ("Sundae"), and the Committee have engaged in extensive negotiations concerning the proposed final order approving debtor-in-possession financing (the "Proposed Final DIP Order").[3] As a result of these negotiations, the DIP Agent, the Debtors, and Sundae have agreed to numerous changes and clarifications requested by the Committee to the Proposed Final DIP Order. Nevertheless, several issues remain contested, necessitating the filing of this Response.

2. As stated at the first day hearing in these Chapter 11 Cases by both counsel to the DIP Agent and Sundae, the DIP Facility Agreement and the Proposed Final DIP Order, both as originally filed, took an evenhanded, non-aggressive approach from the outset. For example, the interest rate provided for in the DIP Facility Agreement did not change from the rate set forth in the Prepetition Credit Agreement, the only fee provided for on account of the DIP Facility is a closing fee of $75,000 paid to the DIP Agent, the Proposed Final DIP Order does not provide for liens on avoidance actions, and the order did not provide for a full "roll-up" on day one of the Chapter 11 Cases but, rather, for a "creeping roll-up" of the Prepetition First Lien Indebtedness over time. Moreover, the milestones to which the DIP Facility is tied extend past the proposed sale hearing and automatically adjust if the sale is delayed. The Proposed Final DIP Order was evenhanded by design because the DIP Agent, the Debtors, and Sundae did not want the DIP

[3] A revised form of Proposed Final DIP Order will be filed with the Court on the date hereof.

Facility to become a distraction from the main objective in these Chapter 11 Cases: the orderly sale of the Debtors' assets. In addition to its inherent reasonableness, the Proposed Final DIP Order is substantially similar to a number of recent orders approving debtor-in-possession financing that have been entered in this District, including by this Court, and the provisions contained therein are routine and ordinary.

3. Since the appointment of the Committee, and as a result of discussions and negotiations with the Committee's counsel, the DIP Agent, the Debtors, and Sundae have agreed to further revisions of the Proposed Final DIP Order to address the comments received from the Committee. **As a result, the Committee has already received most of what it has asked for.** The DIP Agent, however, cannot agree to the remaining demands of the Committee. The DIP Agent, on behalf of the DIP Lender, must be covered for the deal-risk that it assumes in connection with the DIP Facility and its agreement for the Debtors to use cash collateral. The Committee is overreaching in connection with the remaining provisions at issue and, in doing so, is attempting to turn a reasonable DIP Facility into one that is prejudicial to the DIP Agent and the DIP Lender. Moreover, the provisions at issue are standard in this District and are consistent with numerous other orders approving debtor-in-possession financing. In agreeing to these standard provisions, the Debtors have exercised their sound business judgment. The DIP Agent therefore requests that the Court overrule the Committee Objection as to these remaining issues, approve the DIP Motion, and enter the Proposed Final DIP Order.

RESPONSE

A. Entering into the DIP Facility Documents is in the Exercise of the Debtors' Sound Business Judgment

4. Bankruptcy courts generally defer to a debtor's business judgment on its decision to borrow money, provided that such judgment does not run afoul of the provisions of, and

policies underlying, the Bankruptcy Code. *See, e.g.*, *Trans World Airlines, Inc. v. Travellers Int'l AG (In re Trans World Airlines, Inc.)*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (approving postpetition loan and receivables facility because such facility reflected sound and prudent business judgment); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("[C]ases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit parties in interest.").

5. The Debtors' decision to enter into the DIP Facility Documents is an exercise of the Debtors' sound business judgment. As set forth in the DIP Motion, the Debtors have made a concerted, good-faith effort to obtain credit on the most favorable terms that are available, and the Debtors have indicated that the DIP Facility represents the fairest and best debtor-in-possession financing available to them. The terms and conditions of the DIP Facility were negotiated by the parties in good faith and at arm's length, and are fair and reasonable. They also are consistent with the terms found in numerous orders approving debtor-in-possession financing that have been approved in this District and by this Court.

B. Numerous Objections Raised by the Committee Have Been Resolved Consensually

6. The Proposed Final DIP Order, as filed with the Court on October 5, 2011 (the "Petition Date"), was negotiated and drafted with an eye towards reasonableness. It was intended to reflect standard terms and conditions, and intentionally erred on the side of being less aggressive than other orders approving debtor-in-possession financing approved in this District. Notwithstanding this evenhanded approach, the Committee presented to the DIP Agent, the Debtors, and Sundae a laundry list of material changes. The parties engaged in extensive

negotiations, resulting in the acceptance of many of the Committee's demands in the Proposed Final DIP Order, including points asserted in the Committee Objection. The demands listed in the chart below, among others, are now reflected in the Proposed Final DIP Order:

COMMITTEE ISSUE	**RESOLUTION**	**RELEVANT PARAGRAPH IN PROPOSED FINAL DIP ORDER**
Cap on Committee's professional fees during first 30 days of the Chapter 11 Cases.	This provision has been removed from the Proposed Final DIP Order.	*See* Proposed Final DIP Order, ¶ 5.
Unwinding of "creeping roll-up" and disgorgement of payments in the event that Lender Claim is successfully prosecuted.	This provision has been included in the Proposed Final DIP Order.	*See* Proposed Final DIP Order, ¶ 12(a).
Prepetition Secured Party Administrative Claim and Roll-Up Amounts satisfied from Encumbered Assets prior to Unencumbered Assets.	This provision has been included in the Proposed Final DIP Order.	*See* Proposed Final DIP Order, ¶¶ 3, 12(d).
Accrual of interest on Subordinated Note.	This provision has been modified to reflect that the Subordinated Noteholder reserves its right to assert a claim for interest on account of the Subordinated Note, as provided in the Subordinated Note Documents, that has accrued during the pendency of the Chapter 11 Cases and that Committee has the right to object to the allowance of such claim.	*See* Proposed Final DIP Order, ¶ 12(g).

COMMITTEE ISSUE	RESOLUTION	RELEVANT PARAGRAPH IN PROPOSED FINAL DIP ORDER
Disgorgement of current interest on Prepetition First Lien Indebtedness and professional fees and expenses of Prepetition Agent and Prepetition Lenders.	This provision has been included in the Proposed Final DIP Order such that current interest, fees and expenses shall be subject to disgorgement if a Lender Claim is successfully prosecuted.	*See* Proposed Final DIP Order, ¶¶ 13, 14.
Committee consultation on 13-Week Budget.	The Proposed Final DIP Order has been modified to provide that the 13-Week Budget and any revisions shall be prepared in consultation with the Committee.	*See* Proposed Final DIP Order, ¶¶ 2(b), 11.
Committee's right to object to professional fees of Prepetition Agent, the DIP Agent and the DIP Lender.	This provision has been included in the Proposed Final DIP Order. The Proposed Final DIP Order also has been modified to clarify that the Prepetition Agent, the DIP Agent and the DIP Lender may be represented by a **single** local counsel.	*See* Proposed Final DIP Order, ¶ 14.
Debtors not authorized to pay fees and expenses of Sundae, its subsidiaries or affiliates.	The provision has been included in the Proposed Final DIP Order.	*See* Proposed Final DIP Order, ¶ 14.
Notice and reports, including financial updates and analysis, provided by the Debtors to the DIP Agent, the DIP Lender, the Prepetition Agent or the Prepetition Lenders should be provided to the Committee.	The Proposed Final DIP Order has been modified to provide that all financing information or periodic reporting delivered by the Debtors to the DIP Agent, the DIP Lender or the Prepetition Secured Parties pursuant to the terms of the DIP Facility Documents or the Proposed Final DIP Order shall be simultaneously provided by the Debtors to the Committee.	*See* Proposed Final DIP Order, ¶ 12(e).

COMMITTEE ISSUE	RESOLUTION	RELEVANT PARAGRAPH IN PROPOSED FINAL DIP ORDER
Notification and opportunity for the Committee to object to modifications to the DIP Facility.	The provision has been included in the Proposed Final DIP Order.	*See* Proposed Final DIP Order, ¶ 24(b).

C. The Remaining Issues Compensate the DIP Lender for its Deal-Risk, Are Routinely Granted in DIP Orders in This District, and Reflect the Debtors' Business Judgment

7. There still remain a handful of demands made by the Committee to which the DIP Agent cannot agree. Inclusion of the Committee's terms would result in the DIP Agent and the DIP Lender being inadequately covered for the deal-risk associated with entering into the DIP Facility, providing postpetition funding for the Debtors, and consenting to their use of cash collateral. The DIP Lender has a right to be compensated for the deal-risk it is assuming. In recognition of that right, these points, as agreed to by the DIP Agent, the Debtors and Sundae, are routinely granted in DIP orders in this District. Moreover, the Debtors have agreed to these points in the sound exercise of their business judgment. The outstanding deal issues are as follows:

8. *Cap on Committee Fees in Connection with Investigation of Claims*. The Proposed Final DIP Order contemplates that the fees that may be incurred by Committee professionals in connection with investigating claims against the Prepetition Secured Parties will be capped at an amount that is significantly higher than is typical. *See* Proposed Final DIP Order, ¶ 5. Such fees are routinely capped in DIP orders that have been approved in this District. *See In re Perkins and Marie Callender's, Inc.*, Case No. 11-11795 (KG) (Bankr. D. Del. July 12, 2011) (attached hereto as **Exhibit A**; fees capped at $50,000); *In re Harry & David Holdings, Inc.*, Case No. 11-10884 (MFW) (Bankr. D. Del. May, 10, 2011) (fees capped at $75,000); *In re*

American Safety Razor Company, LLC, Case No. 10-12351 (MFW) (Bankr. D. Del. Aug. 27, 2010) (fees capped at $50,000); *In re Magic Brands, LLC,* Case No. 10-11310 (BLS) (Bankr. D. Del. May 17, 2010) (fees capped at $100,000). The Proposed Final DIP Order, upon information and belief, provides for a far higher cap than is generally approved. For example, a $150,000 cap was recently approved by this Court in *In re NewPage Corporation*, Case No. 11-12804 (KG) (Bankr. D. Del. October 5, 2011) (attached hereto as **Exhibit B**). The Committee, therefore, has absolutely no cause for complaint with respect to the cap that will be set forth in the Proposed Final DIP Order.

9. *Bankruptcy Code Sections 506(c) and 552(b) Waivers*. In addition to granting the DIP Lender the priorities and liens expressly specified in section 364 of the Bankruptcy Code, this Court also has the power to authorize the Debtors' proposed waiver of its rights under sections 506(c) and 552(b) of the Bankruptcy Code because such waivers are part of the "whole package" of adequate protection negotiated between the Debtors and the DIP Lender. *See In re Defender Drug Stores, Inc.*, 145 B.R. 312, 316 (9th Cir. B.A.P. 1992) ("Bankruptcy courts…have regularly authorized postpetition financing arrangements containing lender incentives beyond the explicit priorities and liens specified in section 364."). These waivers are an integral part of the conditions agreed to between the Debtors and the DIP Lender in consideration of the funding of the DIP Facility and consensual use of cash collateral, and the Debtors have exercised their reasonable business judgment in agreeing to these waivers.

10. In addition, without the 506(c) waiver, the DIP Lender could effectively be forced to pay twice for preserving its own collateral. The Debtors have prepared a DIP budget that specifies the postpetition costs and expenses that the Debtors intend to incur and pay during these chapter 11 cases. By funding the DIP Facility and consenting to the use of its cash

collateral, the DIP Lender is essentially assessing a surcharge on its own collateral because such costs are already incorporated into the DIP budget. If this Court does not authorize the 506(c) waiver, the Debtors could conceivably use the proceeds of the DIP Lender's loans and collateral to pay other expenses, and also be allowed to assert a 506(c) claim against the DIP Lender, effectively allowing the Debtors to double-dip. This result is not the intent of the Debtors or the DIP Lender.

11. Moreover, the right to use section 506(c) of the Bankruptcy Code to recover the costs of preserving or disposing of collateral securing an allowed secured claim is expressly limited to a trustee or a debtor in possession. *See* 11 U.S.C. 506(c) and 1107; *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S.1, 6 (2000) (holding that only a trustee or a debtor in possession may seek recovery under section 506(c) of the Bankruptcy Code). As such, in accordance with Supreme Court precedent, the Committee does not have the right to assert a 506(c) claim, and the Debtors, as debtors in possession, are well within their discretion to agree to waive section 506(c) claims as consideration provided to the DIP Lender for funding the DIP Facility and agreeing to the consensual use of cash collateral.

12. Finally, courts in this district have routinely granted section 506(c) and 552(b) waivers. *See In re Majestic Star Casino, LLC*, Case No. 09-14136 (KG) (Bankr. D. Del. September 9, 2011) (attached hereto as **Exhibit C)**; *In re Perkins and Marie Callender's, Inc.*, Case No. 11-11795 (KG) (Bankr. D. Del. July 12, 2011); *In re Harry & David Holdings, Inc.*, Case No. 11-10884 (MFW) (Bankr. D. Del. May, 10, 2011); *In re American Safety Razor Company, LLC*, Case No. 10-12351 (MFW) (Bankr. D. Del. Aug. 27, 2010); *In re NEC Holdings Corporation*, Case No. 10-11890 (PJW) (Bankr. D. Del. July 16, 2010); *In re Magic Brands, LLC,* Case No. 10-11310 (BLS) (Bankr. D. Del. May 17, 2010); *In re Point Blank Solutions,*

Inc., Case No. 10-11255 (PJW) (Bankr. D. Del. May 12, 2010); *In re Orleans Homebuilders, Inc.*, Case No. 10-10684 (Bankr. D. Del. Apr. 16, 2010). Accordingly, Wells Fargo requests that the Court approve the section 506(c) and 552(b) waivers requested in connection with the proposed DIP facility because it is typical and appropriate under the circumstances.

13. *Liens on Unencumbered Assets*. The Proposed DIP Order contains a "marshalling" concept, whereby the DIP Lender will first seek satisfaction from previously encumbered assets prior to seeking satisfaction from previously unencumbered assets. It is fair and reasonable, however, for the DIP Agent, on behalf of the DIP Lender, in consideration of providing the DIP Facility and agreeing to the use of cash collateral, to receive liens on previously unencumbered assets subject to this "marshalling" concept.

14. *Right to Credit Bid*. The DIP Agent, on behalf of the DIP Lender, and the Subordinated Noteholder should be allowed to credit bid the full amount of the Prepetition Secured Indebtedness and the DIP Facility. The Committee's concern is rendered moot, however, by the timing that has been agreed upon by the parties with respect to the Committee's challenge to the Prepetition Secured Indebtedness, if any, and the auction process. In the event that the Committee challenges the Prepetition Secured Indebtedness, then such challenge will be heard by the Court and resolved, and the validity of liens and claims will be determined, prior to the sale hearing.

15. *Event of Default Caused by Sundae*. The DIP Facility is structured such that an Event of Default would be deemed to occur in the event that Sundae fails to provide requested Advances under the Participation Agreement between the DIP Agent and Sundae. This provision is necessary to reflect the business deal agreed to by the DIP Agent, the Debtors, and Sundae. The parties have not agreed that the DIP Agent would fund Advances in the event that

Sundae does not do so, and it is inappropriate for the Committee to attempt to compel the DIP Agent to fund Advances when it has not so agreed.

16. *Milestones*. The DIP Facility is appropriately tied to the Debtors' ability to achieve certain case milestones. The purpose of the Chapter 11 Cases – as articulated from the first day – is to effectuate an expeditious sale of the Debtors' assets pursuant to section 363 of the Bankruptcy Code. The DIP Facility is being funded with the goal of realizing the asset sale, and the amounts available under the DIP Facility and the 13-Week Budget have been set with a view towards the time needed to complete the sale process. The milestones will ensure that the available funds will suffice for the Debtors to complete the sale process, and that such process occurs in a timely fashion. As the Committee, the Debtors, Sundae and the DIP Agent have agreed upon a schedule for the sale to occur, there is no reason for the Committee to be concerned about the inclusion of the milestones.

17. *Events of Default*. The Proposed Final DIP Order provides that, upon an Event of Default under the DIP Facility, the Committee shall be entitled to an emergency hearing before the Court to determine whether an Event of Default has occurred and is continuing. It is appropriate that any hearing be limited to the occurrence and continuation of an Event of Default. The purpose of any such emergency hearing would not be to reopen the merits of the Event of Default at issue, as the Events of Default would be approved in connection with the DIP Facility. Rather, the only issue for consideration should be whether an Event of Default has occurred and continues.

CONCLUSION

18. The Proposed Final DIP Order, as filed on the Petition Date, was, by design, evenhanded and reasonable. Upon receiving extensive comments from the Committee, the DIP Agent, the Debtors, and Sundae made numerous concessions to the Committee. The Committee received much of what they asked for, including points asserted in the Committee Objection. The DIP Agent cannot, however, make further concessions on the handful of outstanding issues that remain. To do so would result in the DIP Agent and DIP Lender entering into a DIP Facility that does not adequately cover them for the deal-risk they are assuming. Moreover, the Proposed Final DIP Order reflects terms that are typically included in orders approving debtor-in-possession financing entered in this District and by this Court, and also has been agreed to by the Debtors in their sound business judgment. The DIP Agent therefore requests that the Committee Objection be denied and the Proposed Final DIP Order be entered in its current form.

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Dated: October 31, 2011
Wilmington, Delaware

/s/ *Richard W. Riley*

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