

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
FRIENDLY ICE CREAM CORPORATION, <i>et al.</i> , ¹)	Case No. 11-13167 (___)
Debtors.)	(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER
AUTHORIZING AND APPROVING EXPEDITED PROCEDURES FOR
(A) REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES
AND (B) ABANDONMENT OF PERSONAL PROPERTY**

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this motion (this "Motion") for the entry of an order, substantially in the form attached hereto as **Exhibit A**, authorizing and approving (a) expedited procedures for rejecting executory contracts and unexpired leases of personal and non-residential real property and (b) the abandonment of certain personal property. In support of this motion, the Debtors respectfully state as follows.²

Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

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). The location of the Debtors' corporate headquarters and the Debtors' service address is: 1855 Boston Road, Wilbraham, Massachusetts 01095.

² The facts and circumstances supporting this Motion are set forth in the Declaration of Steven C. Sanchioni, Executive Vice President, Chief Financial Officer, Treasurer, and Assistant Secretary of Friendly Ice Cream Corporation, in Support of the Debtors' Chapter 11 Petitions and First Day Motions (the "First Day Declaration"), filed contemporaneously herewith.

3. The statutory bases for the relief requested herein are sections 365(a) and 554 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Bankruptcy Rules”).

Relief Requested

4. The Debtors seek entry of an order approving and authorizing the proposed procedures (the “Rejection Procedures”) in connection with (a) the rejection of any executory contract, lease, sublease, or interest in such lease or sublease, including any amendments or modifications thereto (each a “Contract” and, collectively, “Contracts”) during the course of these chapter 11 cases and (b) the abandonment of personal property in connection therewith, as specified herein.

Background

5. As described in the First Day Declaration, the Debtors are a leading full-service, family-oriented restaurant chain and provider of ice cream products in the Eastern United States. The Debtors’ operations include approximately 490 restaurants located in 16 states. In addition to their restaurant operations, the Debtors manufacture a complete line of premium ice cream products distributed to more than 7,000 supermarkets and other third party retail locations in 48 states. The Debtors and their affiliates maintain their national headquarters in Wilbraham, Massachusetts, and employ over 10,000 workers across the country. In the first eight months of 2011, the Debtors’ generated \$329.7 million in revenue and \$8.6 million in adjusted EBITDA.

6. In recent years, the restaurant industry—including the Debtors’ businesses—has been hurt by the significant U.S. economic downturn and increased food costs. New advertising

campaigns and cost-cutting programs implemented by the Debtors have successfully mitigated certain negative effects on their businesses; however, the Debtors have not been immune to the effects of the economy and rising food prices, and their financial performance has suffered significantly.

7. As the Debtors' liquidity position deteriorated, the Debtors struggled to meet their debt service obligations and failed to satisfy financial covenants under their prepetition revolving credit agreement, resulting in a default. Prior to their chapter 11 filing, the Debtors successfully negotiated a forbearance agreement with their senior secured lenders and a further extension of credit under their prepetition subordinated secured note in order to explore available restructuring alternatives. After careful review and extensive negotiations, the Debtors determined that a chapter 11 filing, coupled with an expedited operational restructuring and an efficient sale of the Debtors' assets, was the best and most efficient way to maximize a return for the Debtors, their estates, and all parties in interest.

8. On the date hereof (the "Petition Date"), each of the Debtors filed a petition with the Court under chapter 11 of the Bankruptcy Code to permit them to restructure their balance sheets and operations to restore profitability. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases, and no committees have been appointed or designated. Concurrently with the filing of this Motion, the Debtors have requested procedural consolidation and joint administration of these chapter 11 cases.

Proposed Rejection Procedures

9. The Debtors are parties to hundreds of Contracts. During the course of these chapter 11 cases, the Debtors intend to review these Contracts to determine whether they benefit the estates and support the Debtors' business plan. As a result of this review, the Debtors may reject certain Contracts pursuant to section 365 of the Bankruptcy Code. The Debtors have devised the Rejection Procedures to facilitate such rejection efforts.

A. Rejection Procedures.

10. The Debtors seek the entry of an order authorizing and approving the following rejection procedures (the "Rejection Procedures") for Contracts:

- a. Rejection Notice. The Debtors will file a notice (the "Rejection Notice") to reject a Contract or Contracts pursuant to section 365 of the Bankruptcy Code, which Rejection Notice shall set forth, among other things: (i) the Contract(s) to be rejected; (ii) the names and addresses of the counterparties to such Contract(s); (iii) the effective date of the rejection for each such Contract(s), which date may not be before the date of service of the Rejection Notice (the "Rejection Date"); and (iv) the deadlines and procedures for filing objections to the Rejection Notice (as set forth below).
- b. Service of the Rejection Notice. The Debtors will serve the Rejection Notice (i) by an overnight delivery service upon the Contract counterparties or landlords affected by the Rejection Notice; and (ii) by email or facsimile upon: (a) the U.S. Trustee; (b) counsel to the Committee; (c) counsel to the agent for the Debtors' prepetition secured credit facility; (d) counsel to the indenture trustee for the Debtors' prepetition notes; (f) counsel to the agent for the Debtors' proposed postpetition financing facility; and (g) those persons who have formally appeared and requested service in this proceeding pursuant to Bankruptcy Rule 2002.
- c. Objection Procedures. Parties objecting to a proposed rejection must file and serve a written objection so that such objection is filed with the Court and is actually received by the following parties (collectively, the "Objection Service Parties") no later than seven (7) calendar days after the date the Debtors serve the relevant Rejection Notice: (a) counsel to the Debtors, Kirkland & Ellis LLP, 300 North LaSalle, Chicago, Illinois 60654, Attn: Ross M. Kwasteniet, and Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, Wilmington, Delaware 19899-8705, Attn: Laura Davis Jones; (b) the U.S. Trustee; (c) counsel to the Committee; (d) counsel to the agent for the Debtors' prepetition secured credit facility; (e) counsel to the indenture trustee for the Debtors' prepetition

notes; (f) counsel to the agent for the Debtors' proposed postpetition financing facility; and (g) those persons who have formally appeared and requested service in this proceeding pursuant to Bankruptcy Rule 2002.

- d. Certificate of No Objection. If an objection to the rejection of any Contract(s) is/are not timely filed, the Debtors shall file with the Court a certificate of no objection with a proposed order rejecting such Contract(s) with the effective date of such rejection to be as set forth in the Rejection Notice or such other date to which the Debtors and the counterparty or counterparties to such Contract(s) have agreed.
- e. Unresolved Objections. If an objection to the rejection of any Contract(s) is/are timely filed and not withdrawn or resolved, the Debtors shall file a notice for a hearing to consider the objection for the Contract(s) to which such objection relates. If such objection is overruled or withdrawn, such Contract(s) shall be rejected with the Rejection Date to be as set forth in the Rejection Notice or such other date to which the Debtors and the counterparty to such Contract(s) have agreed.

11. The Debtors further request that counterparties to Contracts that are rejected pursuant to the Rejection Procedures be required to file a proof of claim relating to the rejection of such Contracts, if any, by the later of (a) the claims bar date established in these chapter 11 cases, if any, and (b) thirty (30) days after the Rejection Date.

B. Abandonment of Property.

12. Additionally, the Rejection Procedures permit the Debtors to abandon certain personal property in connection with the rejection of any Contract. In connection with their Contract analysis, the Debtors also will evaluate personal property that may be located at premises leased under Contracts that may be rejected. In some cases, the Debtors may determine that such personal property is of inconsequential value and/or the cost of removing and storing the personal property for future use or marketing and sale exceeds its value to the Debtors' estates.³

³ The Debtors' use of much of their personal property has been for location-specific purposes. Since the Debtors would be closing the locations subject to rejected Contracts, the Debtors believe that any abandoned personal property no longer would be necessary for the Debtors' business operations.

13. Accordingly, in an effort to reduce postpetition administrative costs and in the exercise of the Debtors' sound business judgment, the Debtors believe that the abandonment of such personal property is appropriate and in the best interests of the Debtors, their estates, and their creditors.

14. The Debtors believe that the Rejection Procedures provide a fair and efficient manner for rejecting Contracts and will enable the Debtors to efficiently administer their estates and minimize unnecessary postpetition obligations while also providing parties in interest with adequate notice of Contract rejections and an opportunity to object to such relief within a definitive time period.

Basis for Relief

15. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, "subject to the court's approval, may . . . reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). The decision to reject an executory contract or unexpired lease is a matter within the "business judgment" of the debtor. *See Nat'l Labor Relations Bd. v. Bildisco & Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982) ("The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the 'business judgment' test." (citation omitted)); *see also Glenstone Lodge, Inc. v. Buckhead Am. Corp. (In re Buckhead Am. Corp.)*, 180 B.R. 83, 88 (Bankr. D. Del. 1995). Application of the business judgment standard requires a court to approve a debtor's business decision unless the decision is the product of bad faith, whim, or caprice. *See Lubrizol Enters., Inc. v. Richmond Metal Finishes*, 756 F.2d 1043, 1047 (4th Cir. 1985). Further, "[t]his provision allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely

performed.” *Stewart Title Guar. Co. v. Old Republic Nat’l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (citation omitted).

16. Moreover, section 554 of the Bankruptcy Code permits abandonment of property of the estate where such property is burdensome or of inconsequential value and benefit to the estate. 11 U.S.C. § 554(a). Section 554(a) provides that “[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” *Id.* Courts generally give a debtor in possession great deference to its decision to abandon property. *See, e.g., In re Vel Rey Props., Inc.*, 174 B.R. 859, 867 (Bankr. D.D.C. 1994) (“Clearly, the court should give deference to the trustee’s judgment in such matters.”). Unless certain property is harmful to the public, a court should approve the abandonment. *See id.* As with executory contract and unexpired lease rejection, the determination to abandon property is within the Debtors’ business judgment. *See, e.g., Frostbaum v. Ochs*, 277 B.R. 470, 475 (E.D.N.Y. 2002); *In re Cult Awareness Network, Inc.*, 205 B.R. 575, 579 (Bankr. N.D. Ill. 1997).

17. The Debtors are parties to a substantial number of Contracts and have property worthy of abandonment. As the Debtors and the purchaser of the Debtors’ assets, if any, continue to review these agreements, and any associated personal property, they likely will identify a number of Contracts that must be rejected. In some cases, the Debtors may determine that personal property needs to be abandoned. Employing the Rejection Procedures will minimize the Debtors’ postpetition obligations if the Debtors determine, in their sole discretion, that any lease or contract is unlikely to yield sufficient value to justify the expense of assuming or maintaining such lease or contract throughout these chapter 11 cases, and, further, that any personal property is of *de minimis* value to the Debtors’ estates or of a value less than the cost of

removing such property. The Rejection Procedures also afford parties in interest the opportunity to appear and be heard. In addition, the Rejection Procedures will save substantial legal expense and Court time that would otherwise be incurred if multiple hearings were held on separate motions with respect to every Contract that the Debtors determine should be rejected.

18. Similar rejection procedures have been approved in similar contexts by this and other courts. *See, e.g., In re Visteon Corp.*, No. 09-11786 (Bankr. D. Del. July 16, 2009); *In re Sun-Times Media Grp., Inc.*, No. 09-11092 (Bankr. D. Del. Apr. 28, 2009); *In re Leiner Health Prods., Inc.*, No. 08-10446 (Bankr. D. Del. Apr. 4, 2008); *In re Dura Auto. Sys., Inc.*, No. 06-11202 (Bankr. D. Del. Dec. 22, 2006); *In re Three A's Holdings, L.L.C.*, No. 06-10886 (Bankr. D. Del. Sept. 25, 2006); *In re Tower Auto., Inc.*, No. 05-10578 (Bankr. S.D.N.Y. Mar. 17, 2005). Accordingly, the Debtors believe adoption of the Rejection Procedures is in the best interest of their estates.⁴

Notice

19. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the agent for the Debtors' prepetition secured lenders and the agent for the Debtors' proposed postpetition debtor-in-possession financing facility; (c) the indenture trustee for the Debtors' prepetition unsecured noteholders; and (d) the top 20 unsecured creditors. As this Motion is seeking "first day" relief, within two business days of the hearing on this Motion, the Debtors will serve copies of this Motion and any order entered in respect to this Motion as required by Local Bankruptcy Rule 9013-1(m). The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

⁴ Because of the voluminous nature of the orders cited herein, such orders are not attached to this Motion. Copies of these orders are available upon request of the Debtors' proposed counsel.

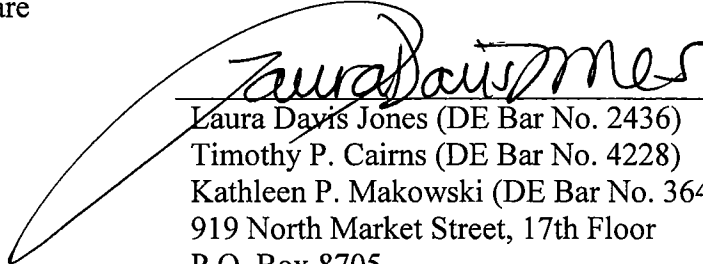
No Prior Request

20. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter an order granting the relief requested herein and granting such other further relief as is just and proper.

Dated: October 5, 2011
Wilmington, Delaware

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