

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
THE DEBTORS TO CONTINUE PREPETITION INSURANCE
COVERAGE AND RELATED PRACTICES**

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 the Debtors to (a) continue insurance coverage currently in effect and pay any prepetition amounts related thereto, (b) maintain existing financing of insurance premiums, and (c) enter into new insurance policies and financing agreements during the postpetition period. In support of this Motion, the Debtors respectfully state as follows.²

Jurisdiction and Venue

1. The United States Bankruptcy Court for the District of Delaware (the "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).

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.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105(a), 361, 363, 364, 503, 541, and 1112 of title 11 of the United States Code (the “Bankruptcy Code”), Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9003-1(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. By this Motion, the Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A**, authorizing the Debtors to (a) continue insurance coverage currently in effect and pay any prepetition amounts related thereto, (b) maintain existing financing of insurance premiums, and (c) enter into new policies and financing agreements during the postpetition period.

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.

Description of the Debtors Insurance Coverage

I. The Debtors' Insurance Policies.

9. As set forth in the First Day Declaration, in the ordinary course of business, the Debtors maintain 27 active insurance policies that are maintained and administered by several

third-party insurance carriers (collectively, the “Insurance Carriers”). Collectively, these policies provide coverage for, among other things, general commercial liability, franchisor’s errors and omissions, commercial automobile liability, motor freight cargo, commercial equipment liability, commercial crime liability, employment practices liability, fiduciary liability, directors and officers liability, directors and officers excess liability, commercial excess liability (umbrella), corporate kidnap and extortion liability, punitive damages, contaminated products, excess liability, workers’ compensation liability,³ and business travel accident liability, including any new or similar policies entered into by the Debtors due to expiration or otherwise (collectively, the “Insurance Policies”). A schedule of the current Insurance Policies is attached hereto as **Exhibit B** and is incorporated herein by reference.⁴ The Debtors estimate that the obligations relating to prepetition periods to be paid pursuant to the relief requested in this Motion are in an amount not to exceed \$150,000 in the aggregate, \$130,000 of which may become due and payable in the first 21 days of these cases.

10. From time to time, in the ordinary course of their businesses, the Debtors set up installment payment programs with their insurance carriers, or, alternatively, finance the

³ The Debtors seek authority to continue to administer their prepetition insurance coverage policies and practices related to workers’ compensation pursuant to the *Debtors’ Motion for Entry of an Order Authorizing the Payment of Prepetition (A) Wages, Salaries, and Other Compensation, (B) Reimbursable Employee Expenses, and (C) Employee Medical and Similar Benefits* (the “Wages Motion”), filed concurrently herewith.

⁴ Given the size, complexity, and number of business units that the Debtors operate, it is possible that certain of the Debtors’ Insurance Policies may have been inadvertently omitted from the list of Insurance Policies. Accordingly, **Exhibit B** represents a non-exhaustive list of Insurance Policies and the Debtors reserve the right, pursuant to the terms and conditions of this Motion and without further order from this Court, to amend **Exhibit B** to add any Insurance Policies that were omitted therefrom and to request that the relief requested herein apply equally to all such Insurance Policies. In the event the Debtors add any Insurance Policies to **Exhibit B**, the Debtors will serve this Motion, any order approving same, and a revised version of **Exhibit B** upon the issuer(s) of any such Insurance Policy or Policies, the Office of the United States Trustee, counsel to the agent for any debtor-in-possession financing facility, counsel to the agent for the Debtors’ prepetition secured facility, counsel to the indenture trustee of the Debtors’ prepetition secured notes, and any official committee(s) appointed in these chapter 11 cases.

premiums on certain of these Insurance Policies (collectively, the “Financed Policies”). The Financed Policies are identified and labeled as such on Exhibit B. The Debtors estimate that the financed premium obligations relating to pre-petition periods to be paid pursuant to the relief requested in this Motion are in an amount not to exceed \$25,000 in the aggregate, \$20,000 of which may become due and payable in the first 21 days of these cases.

11. In addition to the Debtors’ deductible and self-insured retention obligations, the Debtors serve as the administrator under certain of the Insurance Policies. Specifically, the Debtors self-administer their Insurance Policies relating to general liability, medical only worker’s compensation, and employment practices liability claims (the “Self-Administered Policies”). Under the Self-Administered Policies, the Debtors process claims asserted pursuant to such policies and fund those claims on an accrual basis. Pursuant to this Motion, the Debtors request authority to continue to process and make payments on claims that may arise in the ordinary course of business subsequent to the Petition Date. Importantly, failure to comply with their contractual obligations under the Self-Administered Policies likely would cause a default under the Insurance Policies, resulting in increased processing and administrative costs to the Debtors’ estates.

12. Continuation of the Insurance Policies during these chapter 11 cases is essential to the preservation of the Debtors’ businesses, property, and assets. Moreover, in many cases, insurance coverage such as that provided by the Insurance Policies is required by the diverse regulations, laws, and contracts that govern the Debtors’ commercial activities. The Debtors do not believe that they need Court approval to maintain their existing Insurance Policies or to amend, extend, or renew them in the ordinary course of business, but seek the relief requested herein out of an abundance of caution.

13. Additionally, the Debtors seek authorization to revise, supplement, or change their Insurance Policies, make required postpetition payments and settlements related thereto, including payments on account of deductibles or self-insured retention, as needed, and enter into new Insurance Policies in the ordinary course of business. Although the Debtors believe that these postpetition activities are ordinary course transactions that do not require Court approval, out of an abundance of caution and to provide comfort to their contract counterparties, the Debtors seek, by this Motion, entry of an order authorizing them to engage in the foregoing postpetition activities.

II. The Debtors' Insurance Broker.

14. In connection with the Insurance Policies, the Debtors have entered into insurance brokerage agreements (collectively, the "Brokerage Agreements") under which the Debtors obtain services from Marsh USA Inc. and Lockton Companies, LLC (collectively, the "Insurance Brokers"). The Insurance Brokers assist the Debtors in obtaining comprehensive insurance coverage for the Debtors' operations in the most cost-effective manner possible. In particular, the Insurance Brokers assist the Debtors with the procurement and negotiation of the Insurance Policies from Insurance Carriers, enabling the Debtors to obtain policies on advantageous terms and at competitive rates.

15. The Debtors pay brokerage fees (the "Brokerage Fees") to the Insurance Broker as a flat annual fee or part of the premiums on the Insurance Policies on a monthly or annual basis depending on the Insurance Policy. As of the Petition Date, the Debtors do not believe they owe any prepetition Brokerage Fees.

Basis for Relief

16. The Court should authorize the Debtors to maintain their Insurance Policies and to pay prepetition amounts related to their Insurance Policies. Courts generally acknowledge that,

under appropriate circumstances, they may authorize a debtor to pay (or provide special treatment for) certain prepetition obligations. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821, 824-25 (Bankr. D. Del. 1999) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to the continued operation of the debtor's business); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (granting the debtor the authority to pay prepetition wages); *Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.)*, 29 B.R. 391, 398 (Bankr. S.D.N.Y. 1983) (granting the debtor the authority to pay prepetition claims of suppliers who were potential lien claimants). When authorizing payments of certain prepetition obligations, courts have relied upon several legal theories rooted in sections 363(b) and 105(a) of the Bankruptcy Code.

17. Consistent with a debtor's fiduciary duties, where there is a sound business purpose for the payment of prepetition obligations, and where the debtor is able to "articulate some business justification, other than the mere appeasement of major creditors," courts have authorized debtors to make such payments under section 363(b) of the Bankruptcy Code. *See, e.g., Ionosphere Clubs*, 98 B.R. at 175 (finding that a sound business justification existed to pay prepetition wages); *In re James A. Phillips, Inc.*, 29 B.R. at 397 (relying upon section 363 as a basis to allow a contractor to pay the prepetition claims of suppliers who were potential lien claimants).

18. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Under section 105(a),

courts may permit pre-plan payments of prepetition obligations when such payments are essential to the continued operation of the debtor's business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors' business reorganization plan. *See In re UNR Indus.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (permitting the debtor to pay prepetition claims of suppliers or employees whose continued cooperation is essential to the debtors' successful reorganization); *Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

19. In addition to the authority granted a debtor in possession under sections 363(b) and 105(a) of the Bankruptcy Code, courts have developed the "doctrine of necessity" or the "necessity of payment" rule, which originated in the landmark case of *Miltenberger v. Logansport, C. & S.W.R. Co.*, 106 U.S. 286 (1882). Since *Miltenberger*, courts have expanded their application of the doctrine of necessity to cover instances of a debtor's reorganization, *see Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945) (holding, in a hotel reorganization matter, that the court was not "helpless" to apply the rule to supply creditors where the alternative was the cessation of operations), including the United States Court of Appeals for the Third Circuit, which recognized the doctrine in *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981).

20. In *Lehigh*, the Third Circuit held that a court could authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor. *Id.* (stating that a court may authorize payment of prepetition claims when there "is the possibility that the creditor will employ an immediate economic sanction, failing such payment"); *see also*

In re Penn Cent. Transp. Co., 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that the necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims have been paid”); *Just for Feet*, 242 B.R. at 824–25 (noting that debtors may pay prepetition claims that are essential to continued operation of business); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (same).

21. The necessity of payment doctrine is designed to foster the rehabilitation of a debtor in reorganization cases, which courts have recognized is “the paramount policy and goal of Chapter 11.” *Ionosphere Clubs*, 98 B.R. at 176; *Just For Feet*, 242 B.R. at 826 (finding that payment of prepetition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization.”); *see also In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally prohibited by the Bankruptcy Code,” but “[a] general practice has developed . . . where bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1490 (9th Cir. 1987) (finding that it is appropriate to provide for the “unequal treatment of pre-petition debts when [such treatment is] necessary for rehabilitation”); 3 COLLIER ON BANKRUPTCY ¶ 105.04[5][a] (15th ed. rev. 2004) (discussing cases in which courts have relied upon the “doctrine of necessity” or the “necessity of payment” rule to pay prepetition claims immediately).

22. In light of the importance of maintaining insurance coverage with respect to the Debtors' business activities, it is in the best interests of the Debtors' estates and all parties in interest to maintain the Insurance Policies pursuant to sections 105(a) and 363(b) of the Bankruptcy Code. Failure to pay premiums and related insurance expenses when due may harm the Debtors' estates in several ways. First, the Debtors' insurance companies may refuse to renew the Debtors' Insurance Policies, which will require the Debtors to obtain replacement policies and possibly to reconfigure their risk management program. This in turn would require the commitment of significant resources and could result in less favorable coverage or terms from the Debtors' insurers. Second, the Debtors' Insurance Carriers could attempt to terminate the Debtors' existing Insurance Policies, which could create uncertainty as to the Debtors' ability to continue operating their businesses given the myriad regulatory and contractual requirements imposed on the Debtors to maintain specific amounts and types of insurance coverage. Any purported termination of the Debtors' Insurance Policies and any material change in the terms thereof would place additional strain on the Debtors' management and employees, who benefit from the Debtors' insurance coverage.

23. The Debtors submit that it is in the best interests of their estates to continue to maintain the Insurance Policies, as well as to revise, extend, supplement, or change insurance coverage, as necessary, pursuant to section 363(b)(1) of the Bankruptcy Code. Indeed, the Insurance Policies are essential to the preservation of the value of the Debtors' businesses, properties, and assets, and their ability to successfully prosecute these chapter 11 cases. The Insurance Policies protect the Debtors and other parties in interest from losses caused by casualty, natural disaster, fraud, or another unforeseen event. This concern is so paramount that, under section 1112(b)(4)(C) of the Bankruptcy Code, "failure [of a debtor] to maintain

appropriate insurance that poses a risk to the estate or to the public” is “cause” for mandatory conversion or dismissal of a chapter 11 case. 11 U.S.C. § 1112(b)(4)(C).

24. Courts in this district and other jurisdictions regularly grant similar relief to chapter 11 debtors, authorizing, among other things, such debtors to maintain insurance coverage and premium financing of insurance policies where, as here, it is in the best interest of the estates. *See, e.g., In re L.A. Dodgers LLC*, No. 11-12010 (Bankr. D. Del. July 26, 2011); *In re Ambassadors Int’l, Inc.*, No. 11-11002 (Bankr. D. Del. Apr. 5, 2011); *In re OTC Holdings Corp.*, No. 10-12636 (Bankr. D. Del. Aug. 27, 2010); *In re NEC Holdings Corp.*, No. 10-11890 (Bankr. D. Del. June 11, 2010); *In re MiddleBrook Pharms., Inc.*, No. 10-11485 (Bankr. D. Del. May 4, 2010); *In re Atrium Corp.*, No. 10-10150 (Bankr. D. Del. Feb. 23, 2010); *In re Int’l Aluminum Corp.*, No. 10-10003 (Bankr. D. Del. Jan. 6, 2010); *In re Stallion Oilfield Servs. Ltd.*, No. 09-13562 (Bankr. D. Del. Oct. 20, 2009); *In re Masonite Corp.*, No. 09-10844 (Bankr. D. Del. Mar. 17, 2009); *In re Muzak Holdings, LLC*, No. 09-10422 (Bankr. D. Del. Feb. 12, 2009); *In re ACG Holdings, Inc.*, No. 08-11467 (Bankr. D. Del. July 16, 2008); *In re Pierre Foods Inc.*, No. 08-11480 (Bankr. D. Del. July 16, 2008); *In re Linens Holding Co.*, No. 08-10832 (Bankr. D. Del. May 2, 2008); *In re Hoop Holdings, LLC*, No. 08-10544 (Bankr. D. Del. March 28, 2008); *In re Sharper Image Corp.*, No. 08-10322 (KG) (Bankr. D. Del. Feb. 20, 2008).⁵

**Cause Exists to Authorize the Debtors’ Financial Institutions
to Honor Checks and Electronic Fund Transfers**

25. The Debtors have sufficient funds to remit the amounts described herein in the ordinary course of business by virtue of expected cash flows from ongoing business operations and anticipated access to debtor in possession financing. Also, under the Debtors’ existing cash

⁵ 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.

management system, the Debtors have made arrangements to readily identify checks or wire transfer requests as relating to an authorized payment in respect of the Insurance Policies. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and the Court should authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested herein.

The Requirements of Bankruptcy Rule 6003 are Satisfied

26. Pursuant to Bankruptcy Rule 6003, the Court may grant relief regarding a motion to pay all or part of a prepetition claim within 21 days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001). As described above, the Debtors need their insurance to remain in place uninterrupted. Failure to make the payments required by the Debtors' Insurance Policies, including the Financed Policies, could have disastrous effects on the Debtors' attempts to restructure in chapter 11. Indeed, termination of the Insurance Policies due to any such non-payment likely would deprive the Debtors of the ability to operate their business under the laws of the states in which the Debtors conduct business. Occurrence of any one or more of these events essentially would stop all flow of revenue, which potentially could result in irreparable harm to the Debtors' current and future operations. In addition, section 1112(b)(4)(C) of the Bankruptcy Code provides that "failure to maintain appropriate insurance that poses a risk to the estate or to the public," is "cause" for mandatory conversion or

dismissal of a chapter 11 case. Consequently, the Debtors seek authority to continue payments to insurance providers and premium financiers.

27. Accordingly, to the extent that the Debtors are required to make any payments related to prepetition obligations with respect to the Insurance Policies, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003 to support immediate payment of such obligations.

Satisfaction of Bankruptcy Rules 6004(a) and 6004(h)

28. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Notice

29. 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; (d) the top 20 unsecured creditors; and (e) any party that may have a particular interest in this Motion. 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.

No Prior Request

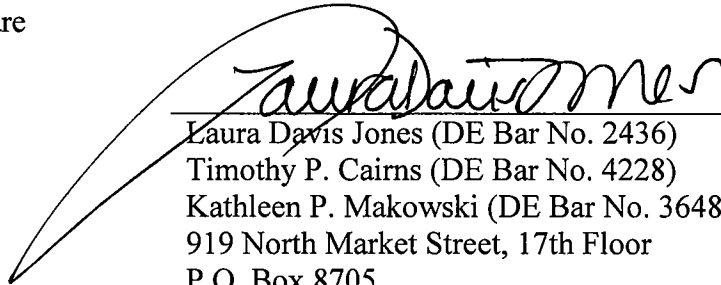
30. No prior request for the relief sought in this Motion has been made to this or any other court.

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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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