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Hearing Date: May 5, 2017  
Hearing Time: 10:00 a.m.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

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In re:

THE FRESH ICE CREAM COMPANY LLC.,  
  
Debtor.

Chapter 11  
Case No. 17-40716 (ess)

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**DEBTOR’S MOTION SEEKING ENTRY OF: (I) SALE PROCEDURES ORDER (A) APPROVING ASSET PURCHASE AGREEMENT BETWEEN THE DEBTOR AND DGI VENTURES, INC. FOR THE PURCHASE OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES, SUBJECT TO HIGHER AND BETTER OFFERS, (B) AUTHORIZING THE USE OF THE CONTRACT DEPOSIT, (C) APPROVING A BREAK-UP FEE AND EXPENSE REIMBURSEMENT, (D) APPROVING THE BIDDING PROCEDURES AND MANNER OF NOTICE AND (E) SCHEDULING AN AUCTION AND SALE APPROVAL HEARING; AND (II) SALE APPROVAL ORDER: (A) CONFIRMING THE RESULTS OF THE AUCTION AND AUTHORIZING THE CONSUMMATION OF THE SALE IN ACCORDANCE THEREWITH, (B) GRANTING THE SUCCESSFUL BIDDER GOOD FAITH STATUS, AND (C) GRANTING RELATED RELIEF**

**TO: THE HONORABLE ELIZABETH S. STONG,  
UNITED STATES BANKRUPTCY JUDGE:**

The Fresh Ice Cream Company LLC, the above captioned debtor and debtor-in-possession ("Debtor"), by its attorneys DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, hereby files this motion ("Motion") pursuant to sections 105(a), 363(b), (f) and (m), 503, and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), Rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (h), 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the

“Bankruptcy Rules”) and Rules 6004-1 of the Local Rules for the United States Bankruptcy Court for the Eastern District of New York (the “Local Rules”) and Administrative Order No. 557 issued by Chief Bankruptcy Judge for the Eastern District of New York on March 29, 2010 which governs assets sales in Bankruptcy, for the entry of two Orders:

- **Sale Procedures Order** (substantially in the form annexed hereto as **Exhibit A**):
  - (i) approving the Asset Purchase Agreement between the Debtor and DGI Ventures, Inc. (“Purchaser”) dated April 18, 2017, providing for the purchase and sale of substantially all of the Debtor’s assets (“Assets”), free and clear of all liens, claims and encumbrances, subject to higher and better offers (the “APA<sup>1</sup>”, a copy of which is annexed hereto as **Exhibit B**), (ii) authorizing the Debtor’s immediate use of the contract deposit in accordance with the terms of the APA, (iii) approving a break-up fee and expense reimbursement for the Purchaser, (iv) approving bidding procedures, annexed hereto as **Exhibit C** to govern the auction (the “Auction”) and the manner of notice and (v) scheduling an Auction and sale approval hearing to confirm the results of the Auction (“Sale Approval Hearing”); and
- **Sale Approval Order** (i) confirming the results of the Auction and authorizing the consummation of the sale in accordance therewith, (ii) granting the successful bidder good faith status and (iii) granting such other relief as is just and proper.

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the APA.

**JURISDICTION AND VENUE**

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O).

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

3. This proceeding has been initiated pursuant to Bankruptcy Code §§ 105(a), 363(b), (f) and (m), 503, and 507, Bankruptcy Rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (h), 9007 and 9014, and Local Rule 6004-1.

**BACKGROUND**

4. On February 17, 2017, (the “Filing Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Thereafter the Debtor’s proceeding was referred to this Court for administration under the Bankruptcy Code.

5. The Debtor has continued as a debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

6. An official committee of unsecured creditors (“Creditors Committee”) was recently appointed by the United States Trustee and same is represented by the law firm of Westerman Ball Ederer Miller Zucker & Sharfstein, LLP.

7. No trustee or examiner has been heretofore appointed in this proceeding.

8. The Debtor owns and operates a frozen dairy and non-dairy dessert company under the well-known ice cream brand name *Steve’s Ice Cream*. The Debtor develops, produces, manufactures (through third parties) and distributes its products to distributors and national retailers throughout the Northeast and West Coast.

9. Since acquiring the business in 2008, David Stein (“Stein”) has acted as its

manager, focusing the business on wholesale distribution as opposed to its former model of retail “mix-ins” ice cream parlors which is how the storied brand began in 1973.

10. The Debtor was forced to file bankruptcy after several years of challenges with both prior management as well as its packaging, all of which resulted in losses and reduction of working capital. These challenges landed the Debtor in a vicious cycle as the loss of working capital and mounting creditor issues crippled the Debtor’s operations.

### **The Debtor’s Marketing Efforts**

11. Once the Debtor’s principal was able to resolve the prior management issues and take greater control of the day to day operations of the company, it became clear that a strategic transaction was necessary in order for the Debtor to survive, let alone grow.

12. As a veteran of the food industry and specifically the ice cream industry, Stein quickly reached out to a variety of potential strategic players in order to explore the possibility of a cash infusion either in the way of new investment or a loan. He also contacted other parties to see if there was interest in a possible acquisition of the company and/ or its assets. This process has been ongoing for several years, and over the last twelve months Stein has focused nearly all of his time to this end having engaged in dialogue with no less than twenty-two (22) different potential strategic partners. Several parties engaged in extensive due diligence, including one who elected not to proceed just prior to a closing (on a major investment), whose promises the Debtor unfortunately relied upon to its detriment.

13. These efforts have continued since the Filing Date and ultimately resulted in the negotiation and execution of the APA, which the Debtor believes is a fair market value price for the Assets.

14. The Debtor’s decision in conducting a pre-confirmation sale of the Assets under

§363 of the Bankruptcy Code, as opposed to approving a sale of its assets through a chapter 11 process, was based upon the Debtor's inability to sustain operations due to a lack of working capital, together with its restricted use of cash collateral in the Chapter 11 case.

15. The Debtor still has a loyal customer base, but each and every order that it is unable to fill jeopardizes the valuable brand recognition and "real estate" (retail shelf space) which it has worked so hard to obtain. Given the competitiveness in the Debtor's industry, keeping its product on the shelf and in the market place is key to preserving and protecting the value of the Debtor's Assets. The Debtor believes that the time necessary to accomplish a sale of its Assets through a chapter 11 plan, especially given the outside date that the Purchaser has required to Close, could jeopardize the sale in its entirety at worst, and at best, will result in a significantly diminished recovery to the creditors of the estate.

### **The Asset Purchase Agreement**

16. On April 18, 2017, after arms-length negotiations, the Debtor and the Purchaser executed the APA. Subject to this Court's approval of higher and/or better offers through an auction process, the Debtor seeks approval to sell the Assets to the Purchaser on the following terms and conditions:

#### **A. The APA**<sup>2</sup>

**Seller:** The Fresh Ice Cream Company LLC

**Purchaser:** DGI Ventures, Inc.

**Purchase Price:** The purchase price for the Assets shall be One Million Dollars (\$1,000,000.00), subject to adjustment.

**Deposit.** The Purchaser shall pay to Seller \$100,000 upon execution of the APA which shall be held by the Debtor's counsel in escrow until entry of

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<sup>2</sup> The following summary is qualified entirely by the terms of the APA. To the extent there are any inconsistencies between the description of the APA contained herein and the terms and conditions of the APA, the terms of the APA shall control.

the Sale Procedures Order, at which time it may be used by the Debtor for the purchase of new finished inventory of ice cream pints and materials, including ingredients and packaging used to produce such new finished inventory. The Purchaser shall be entitled to an allowed administrative expense claim in the Bankruptcy Case in the amount of the Deposit until such time as it is applied to the Purchase Price at Closing or returned pursuant to Section 8 of the APA.

**Balance.** The balance of the Purchase Price, after crediting the full amount of the initial Deposit and any adjustments pursuant to Section 2.3 of the APA, shall be due and payable, by bank or cashier's check or wire transfer, at Closing.

**Assets to be Sold:**

All of the assets of the Debtor of any kind, tangible and intangible, and wherever located, including without limitation, (i) any or all inventories of finished goods, ingredients, and packaging materials on hand at Closing (collectively, "Inventory") as set forth on Schedule 1.1(i)<sup>3</sup>; (ii) all storage or manufacturing equipment as set forth on Schedule 1.1(ii); (iii) customer contracts, relationships and lists as set forth in Schedule 1.1(iii); (iv) contracts with suppliers, distributors and co-packers as set forth on Schedule 1.1(iv) ("Operating Contracts"); (v) all of the Seller's Intellectual Property and Confidential Information (as hereinafter defined), including but not limited to the Intellectual Property and Confidential Information set forth on Schedule 1.1(v); and (vi) all right, title and interest in any or all unfilled purchase orders pending at the Closing that were entered into in the ordinary course of business, as set forth on Schedule 1.1(vi).

**Excluded Assets:**

The Debtor's (i) cash and cash equivalents; (ii) accounts receivable; (iii) the Purchase Price; (iv) any causes of action which the Debtor may have against third parties, related and unrelated to the Bankruptcy Case; (v) corporate books and records of the Debtor; (vi) the Operating Contracts listed on Schedule 1.2(vi); (vii) any Inventory listed on Schedule 1.2(vii); or (viii) any unfilled purchase orders listed in Schedule 1.2(viii) (collectively, the "Excluded Assets").

**Representations and Warranties:**

The representations and warranties and covenants are customary for a transaction of this type, including, without limitation, representations and warranties regarding the authority to enter into the sale transaction, (non) existence of brokers, violation of laws or contracts and condition

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<sup>3</sup> The term "Schedule(s)" shall mean the corresponding schedule annexed to the APA and as such schedule may be updated and/ or amended as provided for therein.

of the Assets, status of customers and contracts.

**Closing Date:** The Closing shall take place at the offices of Debtor’s counsel no later than ten (10) days after entry of the Sale Approval Order (assuming the waiver by the Bankruptcy Court of the 14-day stay, otherwise the closing shall be fifteen (15) days after the entry of the Sale Approval Order), unless otherwise agreed by the parties in writing. The foregoing notwithstanding, in the event that the Closing has not occurred by June 30, 2017 and the parties have not mutually agreed to an extension of such deadline in writing, either party shall have the right to terminate this Agreement by serving written notice pursuant to Section 8 of the APA.

**B. “Extraordinary” Provisions**

17. The APA contains the following provisions which the Bankruptcy Court deems “Extraordinary Provisions” and as such, are hereby separately disclosed:

**Engagement of Debtor’s Principal:** The APA contemplates that the Purchaser’s obligation to close is conditioned upon entering into an employment or consulting agreement with Stein on terms and conditions mutually acceptable to both parties.

**Use of Deposit:** The APA contemplates that upon entry of the Sale Procedures Order, Debtor’s counsel shall be authorized to release the Deposit from its escrow account to the Debtor in order that the Debtor may use the Deposit for the purchase of new finished inventory of ice cream pints and materials, including ingredients and packaging used to produce such new finished inventory. The Purchaser shall be entitled to an allowed administrative expense claim in the Bankruptcy Case in the amount of the Deposit until such time as it is applied to the Purchase Price at Closing, or repaid pursuant to Section 8 of the APA.

**Relief from Bankruptcy Rule 6004(h)** Although not expressly set forth in the APA, the Debtor hereby seeks relief from the fourteen-day stay imposed by Bankruptcy Rule 6004(h) in the event that observing the stay shall result in a Closing after the June 30, 2017 closing deadline.

**RELIEF REQUESTED AND BASIS THEREFORE**

18. By this motion, the Debtor seeks entry of two orders: (i) the Sale Procedures Order; and (ii) Sale Approval Order.

**A. The Proposed Bidding Procedures and Auction Notice**

19. The Sale of the Assets pursuant to the APA is subject to higher and/or better offers. In order to ensure that the highest and best offer is received the Debtor has established the proposed Bidding Procedures to govern the submission of competing bids at an Auction. These Bidding Procedures have been negotiated extensively with the Purchaser and are contained in the APA.

20. The Debtor contemplates a marketing and due diligence period of approximately thirty (30) days, with an ultimate bidding deadline of June 5, 2017 (“Bidding Deadline”). However, the Debtor reserves the right to extend the Bidding Deadline if it determines that such extension will enhance the bidding process.

21. As set forth above, the Debtor has already marketed the Assets extensively throughout the frozen dessert and general food industry over the past twelve (12) months, if not longer. Given Stein’s efforts on this front and given his extensive experience and contacts in the industry, the Debtor is confident that all parties who may have been interested in acquiring the Assets have been contacted or provided notice in various forms that the Assets were and remain available for sale.

22. The foregoing notwithstanding, the Debtor intends to serve the Sale Procedures Order, together with a formal Notice of Auction and Bidding Procedures, on all parties who the Debtor has previously communicated with regarding an investment or sale as well as additional parties which Stein and the Creditors’ Committee believe may have an interest in bidding. This list will include over thirty industry investors, brand owners, ice cream companies, distributors and other food industry players. In addition, each and every creditor and interest holder will receive such notice. The Debtor believes that the foregoing notice, especially when considering that the industry is well aware and likely “watching” the instant chapter 11 proceeding, constitutes



more than sufficient marketing efforts to ensure that any party who may be truly interested in bidding, will be adequately notified.

23. The Bid Procedures further provide that in order to participate in the Auction, the bidder must be deemed a Qualified Bidder by the Debtor which shall be determined in its reasonable business discretion. Such determination shall be based upon each prospective bidder's demonstration of financial wherewithal to consummate the transaction as well as its compliance with all other terms and conditions set forth in the APA and Sale Procedures Order.

24. To submit a Qualified Competing Bid, such bid must (i) offer to purchase the Assets in an amount not less than \$1,200,000 and upon the terms and conditions substantially similar to or better than those set forth in the APA, (ii) deposit in escrow with the Debtor's counsel, an amount equal to ten percent (10%) of its initial bid, (iii) not be conditioned on obtaining financing or the outcome of unperformed due diligence, (iv) not be conditioned upon the Bankruptcy Court's approval of any bid protections, such as break-up fees, termination fees, expense reimbursement, or similar type of payment, and (v) is accompanied by a copy of the APA clearly and conspicuously marked to show any amendments and modifications thereto. It should be noted that a bid may take the form of either an asset sale, a chapter 11 plan or some other form of strategic transaction.

25. The Purchaser shall be deemed a Qualified Bidder in the amount of \$1,000,000.

26. In the event bids, other than that of the Purchaser, are received prior to the Bid Deadline, an Auction will be conducted on June 7, 2017. A hearing to approve the Successful Bidder will be held before the Bankruptcy Court shortly thereafter, subject to the Court's availability. The Successful Bidder will be required to close within fourteen (14) days of entry of the Sale Approval Order.

27. As part of the Bidding Procedures, the Debtor seeks approval of a Break-Up Fee of 3% of the Purchase Price (\$30,000) and an additional Expense Reimbursement, subject to verification, of up to \$30,000. (The Break-Up fee and the Expense Reimbursement are referred to in the aggregate as the “Termination Fee”). The Termination Fee, plus the repayment of the Deposit are payable to the Purchaser upon the Closing of an Alternative Transaction.

28. In addition, the Bidding Procedures provide that bidding increments shall be not less than \$20,000 following the initial overbid. However, the Debtor reserves its right to increase or reduce such amount in its reasonable discretion if it determines that a modification will encourage more competitive bidding or is otherwise appropriate.

29. In addition to the designation of the highest and best bid at Auction, the Debtor shall also have the right to designate a Back-Up Bidder whose deposit shall be held in escrow until the Closing of a transaction with the Successful Bidder. In the event that the Successful Bidder is unable or unwilling to close, the Back-Up Bidder shall be obligated to proceed to Closing.

30. In determining whether bidding procedures governing the sale of a debtor’s assets are adequate, Court have consistently deferred to the debtor’s business judgment for their specific industry. See, *In re Integrated Resources, Inc.*, 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992) (holding that where overbid procedures are negotiated by the chapter 11 debtor, the business judgment rule applies and said procedures are “presumptively valid”). The purpose of bidding procedures is to solicit the highest and best bid, which would in turn best benefit the creditors. *In re Financial News Network Inc.*, 980 F.2d 165 (2nd. Cir. 1992) (stating that the bankruptcy court's principal responsibility relating to bidding procedures that govern sale is to secure best possible bid for benefit of creditors).

31. Thus, courts deem appropriate those bidding procedures intended to maximize the value of the debtor's estate. *See, e.g., Financial News*, 980 F.2d at 170-71 (allowing bidder to supplement one of two bids for Chapter 11 debtor's assets after bidding was closed since the revision was consistent with both rules by which particular auction was being conducted and reasonable expectations of bidders); *Integrated Resources*, 147 B.R. at 656-57.

32. The Debtor believes that the Bidding Procedures, as set forth in more detail in Exhibit C are fair, reasonable, likely to encourage competitive bidding, and will result in the highest and best price for the Assets at Auction. Furthermore, the Bidding Procedures will permit all parties truly interested in acquiring the Assets an opportunity to submit a bid that can be weighted or compared against the APA.

**B. The Break-Up Fee and Expense Reimbursement are Appropriate**

33. It has become an established practice in chapter 11 cases to approve break-up fees and other forms of bidding procedures in connection with the sale of significant assets pursuant to section 363 of the Bankruptcy Code. *See, e.g., Integrated Resources*, 147 B.R. at 662; *In re 995 Fifth Ave. Assoc., L.P.*, 96 B.R. 24 (Bankr. S.D.N.Y. 1989). Break-up fees enhance the bidding process by inducing a "white knight" to submit a bid by providing compensation for the risks it is undertaking and to cover the costs of due diligence. *995 Fifth Ave. Assoc.*, 96 B.R. at 28.

34. Generally, Courts approve break-up fees unless they are unreasonable or appear more likely to chill the bidding process than to enhance it. *Integrated Resources*, 147 B.R. at 662. When examining whether break-up fees are reasonable and appropriate, the Courts examine (1) the relationship between the parties negotiating the break-up fee for any self-dealing or taint; (2) whether the fee hampers, as oppose to enhances, bidding; and (3) whether the amount of the break-up fee is unreasonable as compared to the purchase price. *Id.*

35. The Termination Fee in this instance is appropriate since (1) the Debtor and the Purchaser negotiated at arms-length through separate legal counsel, (2) it provides both an incentive for the Purchaser to enter into the APA as well as a protection given the investment it is required to make and effort it is required to employ in conducting its due diligence and negotiating the APA, all the while not knowing whether it will be the successful bidder, and (3) the amount of the Break-Up Fee is only 3% of the Purchase Price, and when taken together with the Expense Reimbursement is only a maximum of 6%.

36. The amount of the Termination Fee is in the same order of magnitude as break-up fees approved in other cases. *See, e.g., Financial News*, 98 F.2d at 167 (approving \$8.2 million, or 5.5% break up fee on a \$149.3 million sale); *LTV Aerospace and Defense Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 198 B.R. 848, 861 (Bankr. S.D.N.Y. 1996) (approving \$20 million, or 4.4% break-up fee on \$450 million offer); *Integrated Resources*, 147 B.R. at 662 (approving break up fee representing 3.2% of bidders expenses, or 1.6% of the purchaser price). *Compare, In re Twenver, Inc.*, 149 B.R. 954, 956 (Bankr. D.Colo. 1992) (denying break-up fee of 10% of bid).

37. In addition to the factors stated above, the Termination Fee will provide a minimum floor bid on which other bidders may rely upon. The Purchaser has stated that it will not provide the deposit or move forward as the stalking horse buyer absent approval of the Termination Fee, which was extensively negotiated by the parties' respective counsel.

38. Accordingly, under the circumstances, the Debtor submits that both the Break-Up Fee and Expense Reimbursement are reasonable and appropriate.

**C. The Proposed Manner of Notice of Sale is Adequate**

39. Bankruptcy Rule 2002(a) and (c) requires the Debtor to notify creditors of the

proposed sale of the Assets, including the date, time and place of the Auction, terms of the Sale, and the deadline for filing any objections.

40. The Debtor proposes to comply with these requirements by serving via first class mail within three (3) days of entry of the Sale Procedures Order copies of: (i) Sale Procedures Order and (ii) Bidding Procedures.

41. The Debtor proposes to serve the following parties: (i) the Office of the U.S. Trustee; (ii) counsel to the Purchaser; (iii) all taxing authorities; (iv) counsel to the Creditors' Committee; (v) all known creditors of the Debtor; (vi) all potential buyers known by the Debtor as having previously expressed interest in acquiring any of the Assets, (vii) all of the Debtor's interest holders and (viii) all parties that have requested notice pursuant to Bankruptcy Rule 2002.

42. The Debtor submits that the foregoing notice fully complies with the requirements set forth in Bankruptcy Rule 2002 and 6004. Based upon the foregoing, the Debtor respectfully requests that this Court approve the manner of the notice proposed above.

**D. The Auction**

43. If the Debtor receives one or more Qualified Competing Bids in addition to the APA, the Debtor will conduct the Auction to select the highest or best bid for the Assets (the "Successful Bid"). The Auction, which shall be transcribed or recorded to the extent required under New York local practice, shall be held at 10:00 a.m. (prevailing Eastern time) on June 7, 2017, at the offices of at the offices of DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, White Plains, NY 10601, or such other location as shall be agreed by the Debtor and the Creditors' Committee and timely communicated to all entities entitled to attend the Auction.

44. The Debtor, in consultation with the Creditors' Committee, will conduct the

Auction in any manner and upon any terms and conditions satisfactory to the Court, permitted by the APA, and consistent with the Bidding Procedures, that will achieve the maximum value for the Assets. Such terms and conditions may include, by way of example, one or more rounds of sealed or open bids from the Purchaser and any Qualified Bidder who submitted a Qualified Competing Bid. The initial bid at the Auction shall be the highest or otherwise best bid, as determined by the Debtor in its reasonable discretion, as among the Purchaser's bid and any Qualified Competing Bids, and such initial bid shall be announced to the Purchaser and any other Bidder submitting a Qualifying Competing Bid at the commencement of the Auction.

45. At the conclusion of the Auction, the Debtor shall submit the Successful Bid to the Court at the Sale Approval Hearing, for entry of a Sale Approval Order. Any Bid that fails to comply with the Bidding Procedures or any other procedures established at the Auction may be refused.

46. If no Qualified Competing Bids are received, the Debtor and the Purchaser intend to seek immediate Court approval of the APA without conducting an Auction.

47. Prior to the conclusion of the Auction, the Debtor, in consultation with the Creditors' Committee, will (a) review and evaluate the Purchaser's bid and each Qualified Competing Bid, (b) identify the highest or otherwise best offer for the Assets received at the Auction (such bid, the "Successful Bid" and the bidder making such bid, the "Successful Bidder") as well as the Back-Up Bidder and (c) communicate to the Purchaser and the Qualified Competing Bidders the identity of the Successful Bidder, the Back-Up Bid, and the details of each. These determinations shall be final, subject to approval by the Court at the Sale Approval Hearing.

48. The sale of the Assets shall be pursuant to Section 363 (b) and (f) of the

Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in pertinent part, "The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." §363 (f) of the Code states as follows:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

49. The conditions set forth in 11 U.S.C. §363(f) are in the disjunctive, which means that only one of the tests must be met. The Debtor believes that the Purchase Price for the sale of the Assets in this manner is in the best interests of the estate and its creditors, for a variety of reasons, including the following: (i) the Debtor believes that the Purchase Price represents the highest and best price for the Assets; (ii) the Purchase Price is adequate and represents fair market value of the Assets to be sold; and (iii) the sale proceeds will be sufficient to satisfy all administrative and secured creditors of the estate with a substantial return to the unsecured creditors pursuant to a liquidating chapter 11 plan.

50. It is therefore submitted that Section 363(f) is satisfied and an immediate sale of the Assets is in the best interests of creditors and the estate and will prevent unnecessary, irreparable harm to the creditors and the estate.

51. Since the Auction contemplated hereby is not in the ordinary course, its authorization requires notice and a hearing pursuant to Section 363(b) of the Code. Auction sales are specifically authorized under the Bankruptcy Code and F.R.B.P. Rule 6004(f) provides that, “All sales not in ordinary course of business may be by private sale or public auction.”

52. It is within the discretion of the Court to determine whether to approve or disapprove of a method for the disposition of property. *In re Alves*, 52 B.R. 353 (Bankr. D.R.I. 1985); *See, generally, In re Stogsdill*, 102 B.R. 587 (Bankr. W.D. Tex. 1989). As stated above, the Assets include substantially all of the Debtor’s operating assets, other than the Excluded Assets.

53. If, following the entry of the Sale Approval Order, the Successful Bidder fails to consummate the Sale because of a breach or failure to perform on the part of the Successful Bidder, the Back-Up Bid will be deemed the new Successful Bid, and the Debtor will be authorized, but not required, to consummate the Sale with the bidder who submitted the Back-Up Bid without further order of the Court. In such case, the good faith deposit of the Successful Bidder shall be forfeited to the Debtor and the Debtor shall have the right to seek any and all other remedies and damages from the defaulting Successful Bidder to the extent permissible under the applicable purchase agreement and law.

54. All of the sale proceeds will be received by the Debtor, with all liens, claims, interests and encumbrances, to attach to the proceeds in accordance with Section 363(f) of the Bankruptcy Code, and shall be held in escrow by Debtor’s counsel pending further order of the Bankruptcy Court.

55. The Debtor respectfully submits that the APA, subject to higher and better offers received at an Auction, will provide the greatest recovery for the Debtor’s estate than would be



provided by any other available alternative. In addition, the terms and conditions of the APA will be tested in the market through an auction process, which will support the fairness and reasonableness of the consideration being received. Therefore, the Debtor requests that the Court authorize and approve the APA and the sale of the Assets in the method and manner set forth herein.

**E. Protections as a Good Faith Purchaser**

56. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser's interest in property purchased from a debtor notwithstanding that the sale conducted under Section 363(b) is later reversed or modified on appeal. *See Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994) ("Section 363(m) . . . provides that good faith transfers of property will not be affected by the reversal or modification of an unstayed order, whether or not the transferee knew of the pendency of the appeal").

57. The selection of the Successful Bidder will be the product of an arm's-length, good-faith negotiation in a competitive purchasing process. Based on the record to be made at the Sale Approval Hearing, the Debtor will request a finding that the Successful Bidder is a good-faith purchaser entitled to the protections of Section 363(m) of the Bankruptcy Code.

**F. Request For Debtor To Use Deposit Prior to Closing**

58. The Debtor has negotiated with Purchaser for the use, prior to the sale and Closing, of the Deposit in order to manufacture new inventory. This will avoid the need for the Debtor to essentially sit dormant pending sale and Closing and help preserve the tradename and going concern value of the Debtor. Given that inventory is included in the Assets, the use of the Deposit can only benefit the estate. The Debtor will be able to take and fill new purchase orders thereby allowing it to maintain (limited) operations, generate profits (cash) pending closing. On

the other hand, the longer that the Debtor is unable to operate or to accept and fulfill purchase orders, the more its market share is diminished as is the value of the brand and the Assets.

59. In exchange for the use of the Deposit, Purchaser has merely requested treatment of the amount that is actually used as an administrative claim as well as a credit at closing, dollar for dollar, to the extent that the value (at cost) of the newly manufactured inventory (not otherwise on hand at the time of the APA execution) at Closing, is less than \$100,000.

60. The use of the Deposit can only serve to benefit the estate and its creditors as it protects if not significantly maximizes the value of the Assets to be sold and enables the Debtor to operate and generate profits in the interim period.

F. **Waiver of the 14-day Stay**

61. The APA provides that if the Closing does not occur by June 30, 2017, the Purchaser may terminate the APA. This was a term specifically insisted upon by the Purchaser and Debtor has no reason to believe that such deadline will be extended.

62. As such, , the Debtor submits that cause exists to justify a waiver of the 14-day stay in order that it may close immediately upon entry of the Sale Approval Order and avoid the potential termination by the Purchaser of the APA.

**CONCLUSION**

63. For all of the foregoing reasons, the Debtor respectfully requests entry of (i) the Sale Procedures Order, substantially in the form annexed hereto as Exhibit A and (ii) entry of the Sale Approval Order, in a form to be sufficiently in advance of the Sale Approval Hearing, together with such other and further relief as this Court deems just and proper.

**WHEREFORE**, the Debtor respectfully requests that the Court grant all of the relief requested herein, together with such other and further relief as is just and proper under the circumstances.

Dated: White Plains, New York  
April 21, 2017

DELBELLO DONNELLAN WEINGARTEN  
WISE & WIEDERKEHR, LLP  
*Attorneys for the Debtor*  
One North Lexington Avenue, 11<sup>th</sup> Floor  
White Plains, New York 10601  
(914) 681-0200

By: /s/ Erica R. Aisner  
Erica R. Aisner

**ASSET PURCHASE AGREEMENT**

**by and among**

**THE FRESH ICE CREAM COMPANY LLC,  
a Delaware limited liability corporation**

**and**

**DGI VENTURES, INC.,  
a Delaware corporation**

**Dated as of April 18, 2017**

## **ASSET PURCHASE AGREEMENT**

This Asset Purchase Agreement (“Agreement”), made as of April 18, 2017, by and among THE FRESH ICE CREAM COMPANY LLC, a Delaware limited liability corporation (the “Seller”) and DGI VENTURES, INC., a Delaware corporation (the “Purchaser”).

### **WITNESSETH:**

WHEREAS, Seller is engaged in the business of developing, producing, manufacturing, marketing, distributing and selling ice cream, non-dairy frozen dessert and other frozen dessert-related products (the “Business”);

WHEREAS, the Seller is currently in Chapter 11 bankruptcy, which case is pending in the Eastern District of New York, Brooklyn Division (“Bankruptcy Court”), bearing Case No. 17-40716(ess) (“Bankruptcy Case”) and is a debtor-in-possession pursuant to 11 U.S.C. Section 1107 and 1108; and

WHEREAS, Purchaser desires to purchase the Seller’s Business by acquiring substantially all of its assets free and clear of all liens, claims, encumbrances and interests of any kind pursuant to 11 U.S.C. §363(b), (f) and (m), subject to higher and better offers, and Seller desires to sell such Business to Purchaser, all upon the terms and conditions set forth in this Agreement; and

WHEREAS, this Agreement is subject to the approval of the Bankruptcy Court.

NOW, THEREFORE, in consideration of the mutual covenants herein set forth and for the benefits to be derived from the consummation of the transactions contemplated hereby, the parties agree as follows:

1. **Purchase and Sale of Assets.**

1.1 Subject to the terms and conditions, based upon the representations and warranties hereinafter set forth and except as otherwise provided herein, Purchaser agrees to purchase, accept and pay for, and Seller agrees to sell and assign to Purchaser at the Closing (as hereinafter defined), all of the assets of the Seller of any kind, tangible and intangible, and wherever located, including without limitation, (i) any or all inventories of finished goods, ingredients, and packaging materials on hand at Closing (collectively, “Inventory”) as set forth on Schedule 1.1(i); (ii) all storage or manufacturing equipment as set forth on Schedule 1.1(ii); (iii) customer contracts, relationships and lists as set forth in Schedule 1.1(iii); (iv) contracts with suppliers, distributors and co-packers as set forth on Schedule 1.1(iv) (“Operating Contracts”); (v) all of the Seller’s Intellectual Property and Confidential Information (as hereinafter defined), including but not limited to the Intellectual Property and Confidential Information set forth on Schedule 1.1(v); and (vi) all right, title and interest in any or all unfilled purchase orders pending at the Closing that were

entered into in the ordinary course of business, as set forth on Schedule 1.1(vi) (collectively, the “Assets”).

(a) For purposes of this Agreement, “*Confidential Information*” shall mean all non-public information, which may include without limitation: trade secrets, ideas, samples, plans, strategies, research, experimental work, development work, designs, prototypes, inventions, specifications, slogans, descriptions, sayings, mottos, position concepts and statements, mission concepts and statements, tag lines, names, media, formulas, formulations, ingredient combinations, flavors, flavor combinations, flavor types and profiles, flavor-making techniques and methods, including without limitation any of the foregoing and their like related to any current, future, or proposed products, brands, sub-brands, co-brands, campaigns, line extensions, parlors or retail stores or any other goods or services or any manner of executing, delivering, commercializing, exploiting or advertising the same.

(b) For purposes of this Agreement, “*Intellectual Property*” shall mean intellectual property owned by and/or assigned to Seller, including but not limited to any state or federal trademarks and all common law rights and goodwill associated with the trademarks, all inventions, whether patentable or not, ideas, know-how, data, Confidential Information, copyrights, patents, trade secrets, trademarks, logos, domain names, designs, license rights, GS1/U.P.C. Company prefix number, any registrations or applications relating to any of the foregoing, and any other rights of a similar nature or character whether now existing or hereafter created, developed, arising, or otherwise coming into being, in any jurisdiction.

1.2 The Assets shall not include (i) cash and cash equivalents; (ii) accounts receivable; (iii) the Purchase Price; (iv) any causes of action which the Seller may have against third parties, related and unrelated to the Bankruptcy Case; (v) corporate books and records of the Seller; (vi) the Operating Contracts listed on Schedule 1.2(vi); (vii) any Inventory listed on Schedule 1.2(vii); or (viii) any unfilled purchase orders listed in Schedule 1.2(viii) (collectively, the “Excluded Assets”).

1.3 Purchaser shall have the right to inspect all Inventory set forth on Schedule 1.1(i) as of the date hereof (the “Existing Inventory”) and all purchase orders and reject any or all Existing Inventory or purchase orders in its sole discretion.

1.4 No later than ten (10) business days prior to Auction, Seller shall provide a list on Schedule 2.3(i) of all Inventory purchased after the date hereof (the “New Inventory”). Purchaser shall have the right to inspect all New Inventory and reject any or all New Inventory which it deems, in its reasonable discretion, defective or unsaleable, or without an acceptable remaining shelf life. All accepted New Inventory shall be reflected in Schedule 2.3(i), and all rejected New Inventory shall be reflected in Schedule 2.3(ii).

1.5 Purchaser shall designate in writing, no later than five (5) business days prior to the Auction, which Inventory (including Existing Inventory and New Inventory) and

purchase orders it intends to assume, which shall be reflected in an amended Schedule 1.1(i) and Schedule 1.1(vi), respectively, and the Inventory and purchase orders not assumed by Purchaser shall be reflected in Schedule 1.2(vii) and Schedule 1.2(viii), respectively.

1.6 On the business day prior to the Closing Date (as hereinafter defined), Seller shall provide Purchaser with (x) an updated Schedule 1.1(i) and Schedule 1.2(vii), which shall collectively reflect the Inventory levels (including Existing Inventory and New Inventory) on that date; (y) an updated Schedule 1.1(vi) and Schedule 1.2(viii) to reflect unfilled purchase orders pending as of the date thereof; and (z) an updated Schedule 2.3(i) and Schedule 2.3(ii) to reflect all New Inventory existing on that date together with the value of such inventory; provided, that Purchaser shall continue to have the right to inspect and reject any or all Existing Inventory, New Inventory and purchase orders in accordance with Sections 1.3 and 1.4.

1.7 The Assets are being conveyed AS-IS, WHERE-IS, without any representations, warranties or conditions of any kind, except as expressly provided in Section 4.

2. **Purchase Price.** The purchase price for the Assets shall be One Million Dollars (\$1,000,000.00), subject to adjustment pursuant to Section 2.3 below (as adjusted, the “Purchase Price”).

2.1 **Deposit.** Purchaser shall pay to Seller a contract deposit in the amount of \$100,000.00 (the “Deposit”) upon execution of this Agreement. The Deposit shall be non-refundable except as otherwise set forth herein and shall be held by Seller’s counsel in escrow until entry of the Sale Procedures Order (defined below) at which time it may be used by the Seller for the purchase of new finished inventory of ice cream pints and materials, including ingredients and packaging used to produce such new finished inventory. The Purchaser shall be entitled to an allowed administrative expense claim in the Bankruptcy Case in the amount of the Deposit until such time as it is applied to the Purchase Price at Closing or returned pursuant to Section 8.

2.2 **Balance.** The balance of the Purchase Price, after crediting the full amount of the initial Deposit and any adjustments pursuant to Section 2.3, shall be due and payable, by bank or cashier’s check or wire transfer, at Closing.

2.3 **Adjustment for Inventory.** If the value of the New Inventory set forth on Schedule 2.3(i) provided pursuant to Section 1.6 is less than \$100,000, Purchaser shall receive a dollar for dollar credit to the Purchase Price in its favor.

2.4 **Assumption of Liabilities. THE PURCHASER SHALL NOT ASSUME OR BE DEEMED TO HAVE ASSUMED OR IN ANY WAY HAVE ANY RESPONSIBILITY FOR ANY DEBT, OBLIGATION, CLAIM OR LIABILITY OF SELLER WHATSOEVER, INCLUDING ANY DEBT, OBLIGATION, CLAIM OR LIABILITY RELATING TO THE ASSETS OR THE BUSINESS ARISING FROM OR RELATED TO EVENTS, ACTS OR OMISSIONS PRIOR TO THE CLOSING DATE.**

3. **Closing.** Subject to the conditions precedent set forth herein, the closing hereunder (the "Closing") shall take place at the offices of Seller's counsel no later than ten (10) days after entry of the Sale Approval Order (defined below) (assuming the waiver by the Bankruptcy Court of the 14-day stay, otherwise the closing shall be fifteen (15) days after the entry of the Sale Approval Order), unless otherwise agreed by the parties in writing (the "Closing Date"). The foregoing notwithstanding, in the event that the Closing has not occurred by June 30, 2017 and the parties have not mutually agreed to an extension of such deadline in writing, either party shall have the right to terminate this Agreement by serving written notice pursuant to Section 8 herein.

4. **Representations and Warranties of Seller.** The Seller represents and warrants to the Purchaser as follows, as of the date hereof and as of the Closing Date:

4.1 **Organization and Existence of the Seller.** Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware, and has the power to carry on its business in the manner and at such locations as that business is currently being conducted. The Seller does not have any subsidiaries, nor does it own or have any direct or indirect interest in or control over any corporation, partnership, limited liability company, joint venture or other entity of any kind.

4.2 **Authorization of Transaction.** Subject to the approval of the Bankruptcy Court, the Seller has full power and authority to execute and deliver this Agreement and each of the documents contemplated hereby (together with this Agreement, the "Operative Documents") and to perform its obligations hereunder and thereunder. Seller has taken such action as may be necessary for Seller to execute, deliver and perform each such Operative Document.

4.3 **Binding Obligations.** Subject to the approval of the Bankruptcy Court, this Agreement constitutes, and upon execution by the Seller each other Operative Document will constitute, the valid and legally binding obligations of Seller, enforceable in accordance with their respective terms.

4.4 **No Violation.** Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereunder will (i) violate any statute, regulation, injunction, judgment, order, decree or ruling to which the Seller is subject, nor will it require the authorization or approval of, or the filing of any notice with any governmental agency or authority; or (ii) result in a violation or breach of any term or provision of, or require consent or constitute a default under, the Seller's operating agreement or any contract or agreement to which the Seller is a party or by which it is bound; or (iii) result in any lien, encumbrance or other charge upon any of the Assets.

4.5 **Brokers.** The Seller has not employed any broker, finder or agent, nor has Seller otherwise dealt with or become in any way obligated for any consultant's, broker's, finder's, agent's or similar fee with respect to the transactions contemplated by this Agreement.

4.6 **Trade Names and Other Intellectual Property.**



(a) Schedule 1.1(v) sets forth a true and complete list of all registered trademarks, patents, domain names, flavors and formulas used in the Business. Seller is the exclusive owner of, or is licensed to use, all Intellectual Property. Seller's rights in all such Intellectual Property are freely transferable. There are no claims, complaints, notices or demands of any other person pertaining to any of such Intellectual Property. No proceedings have been instituted, or are pending or to the knowledge of Seller threatened, which challenge the rights of Seller in respect thereof.

(b) Seller has not granted any licenses or other rights to others in Intellectual Property owned or licensed by Seller. To the knowledge of Seller, no other person is infringing on the rights of Seller in any of its Intellectual Property.

(c) To the Seller's knowledge, the present and contemplated business, activities and products of Seller do not infringe any Intellectual Property of any other person. No proceeding charging Seller with infringement of any adversely held Intellectual Property has been filed or, to Seller's knowledge, is threatened to be filed.

4.7 ***Customers and Operating Contracts.*** Seller has no oral or written agreements with any customers. Other than the contract listed in Schedule 1.2(vi), Seller has no oral or written agreements with any suppliers, distributors or co-packers. Seller has provided to Purchaser a complete and accurate list of all customer relationships and lists, suppliers, distributors and co-packers.

4.8 ***Inventory.*** Schedules 1.1(i) and 1.2(vii) collectively set forth a true, correct and complete list of the Inventory levels and Debtor's actual cost therefore. Schedule 2.3 sets forth a true, correct and complete list of the New Inventory.

4.9 ***Purchase Orders.*** Schedules 1.1(vi) and 1.2(viii) collectively set forth a true, correct and complete list of unfilled purchase orders pending as of such date.

5. **Representations and Warranties by Purchaser.** Purchaser represents and warrants to the Seller as follows, as of the date hereof and as of the Closing Date:

5.1 ***Organization and Existence.*** The Purchaser is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has the power to own its property and to carry on its business as it is currently being conducted.

5.2 ***Authorization of Transaction.*** The Purchaser has full power and authority to execute and deliver this Agreement and each of the other Operative Documents, and to perform its obligations hereunder and thereunder. The Purchaser has taken such action, including obtaining approval by its Board of Directors, as may be necessary for the Purchaser to execute, deliver and perform each such Operative Document.

5.3 ***Binding Obligations.*** This Agreement constitutes, and upon execution each other Operative Document will constitute, the valid and legally binding obligations of Purchaser, enforceable in accordance with their respective terms.

5.4 ***No Violation.*** Neither the execution nor delivery of this Agreement nor the consummation of the transactions contemplated hereunder will result in a violation or breach of any term or provision of, or constitute a default under, the Purchaser's Certificate of Incorporation or Bylaws or any contract or agreement to which Purchaser is a party or to which Purchaser is subject.

5.5 ***Brokers.*** The Purchaser has not employed any broker, finder or agent, nor has Purchaser otherwise dealt with or become in any way obligated for any consultant's, broker's, finder's, agent's or similar fee with respect to the transactions contemplated by this Agreement.

5.6 ***Condition of Property.*** Purchaser expressly acknowledges that, except as expressly set forth in this Agreement and/or in any documents and/or instruments executed and/or delivered by or on behalf of Seller in connection with this Agreement (the "Express Representations"), neither Seller, nor any person acting on behalf of Seller, nor any person or entity which prepared or provided any of the materials reviewed by Purchaser in conducting its due diligence, nor any direct or indirect officer, director, partner, member, shareholder, employee, agent, representative, accountant, advisor, attorney, principal, affiliate, consultant, contractor, successor or assign of any of the foregoing parties (Seller, and all of the other parties described in the preceding portions of this sentence (other than Purchaser) shall be referred to herein collectively as the "Exculpated Parties") has made or shall be deemed to have made any oral or written representations or warranties, whether expressed or implied, by operation of law or otherwise. Purchaser is acquiring the Assets based solely on its own independent investigation and inspection of the property and not in reliance on any information provided by Seller, or any of the other Exculpated Parties, except for the representations expressly set forth herein.

6. **Conditions to Closing.**

6.1 Purchaser's obligation to purchase the Assets is expressly conditioned upon:

(a) ***Seller's Representations.*** Seller's representations and warranties set forth in this Agreement being true and accurate in all material respects on the Closing Date, as if made on such date.

(b) ***Performance by Seller.*** Seller shall have performed all of the covenants, agreements and obligations and complied with all conditions which are required to be performed or complied with by Seller prior to the Closing.

(c) ***Bankruptcy Court Approval.*** Entry of a Sale Approval Order by the Bankruptcy Court which is final and non-appealable.

(d) *Employment Agreement with David Stein.* Execution of an employment agreement between Seller's Manager, David Stein, and the Purchaser, on terms and conditions which are acceptable to both parties.

(e) *Material Adverse Change.* From the date of this Agreement, there has been no material adverse change in any of the Assets, individually or in the aggregate, including but not limited to any adverse change in Seller's brand equity or customer relationships.

(f) *Delivery of Intellectual Property.* Seller shall deliver all Intellectual Property and Confidential Information including all documentation necessary to effectuate the transfer of all associated registrations.

(g) *Delivery of Purchase Orders.* Seller shall deliver copies of all unfilled pending purchase orders.

(h) *Supply Agreements.* Purchaser shall have secured all supply or license agreements necessary to run the Business following Closing.

6.2 Seller's obligation to sell the Assets is expressly conditioned upon:

(a) *Purchaser's Representations.* Purchaser's representations and warranties set forth in this Agreement being true and accurate in all material respects on the Closing Date, as if made on such date;

(b) *Performance by Purchaser.* Purchaser shall have performed all of the covenants, agreements and obligations and complied with all conditions which are required to be performed or complied with by Purchaser prior to the Closing;

(c) *Payment of Purchase Price.* Payment of the Purchase Price by Purchaser at Closing by cash or certified check or immediately available funds by wire transfer or a combination thereof; and

(d) *Bankruptcy Court Approval.* Entry of Sale Approval Order by the Bankruptcy Court which has become final and non-appealable.

## 7. **Bankruptcy Court Procedure**

7.1 *Sale Motion.* On or before three (3) business days after the date of execution and delivery of this Agreement, Seller shall file with the Bankruptcy Court a motion ("Sale Motion") (including all supporting papers, proposed bidding procedures (the "Bid Procedures"), and notices), in a form and substance reasonably satisfactory to the Purchaser, seeking an order (the "Sale Procedures Order") approving this Agreement and the notice and

procedure for a public auction (“Auction”) and sale of the Assets.

7.2 **Sale Approval Order.** The Seller shall use its best efforts to schedule the Auction thirty (30) days, but in no event more than forty-five (45) days, after entry of the Sale Procedures Order and shall seek entry of an Order approving the results of the Auction (“Sale Approval Order”) no more than five (5) business days after the Auction, or as soon thereafter as the Court’s calendar will reasonably allow.

7.3 **Bid Procedures.** The Bid Procedures shall provide, among other things, that, in order to participate in the Auction, each prospective bidder must previously have delivered to Seller proof of financial wherewithal to consummate the transaction. Upon such demonstration and compliance with all other terms and conditions set forth in this Agreement and the Sale Procedures Order for a prospective bidder, Seller, in its reasonable business judgment, shall determine whether such persons qualify as a bidder (a “Qualified Bidder”). Purchaser shall constitute a Qualified Bidder for all purposes. Seller further agrees that the terms and conditions of the Auction, as proposed in the Sale Motion, shall require, inter alia, (i) that the Qualified Bidder offers to purchase the Property upon the terms and conditions substantially similar to or better than those set forth in this Agreement (including, without limitation, by requiring the Qualified Bidder to deposit in escrow with the Seller’s counsel on or prior to the date of the Auction, an amount equal to ten percent (10%) of its initial bid), (ii) that such offer not be conditioned on obtaining financing or the outcome of unperformed due diligence by the Qualified Bidder, (iii) that such offer is not conditioned upon the Bankruptcy Court’s approval of any bid protections, such as break-up fees, termination fees, expense reimbursement, or similar type of payment, (iv) is accompanied by a copy of this Agreement marked to show any amendments and modifications thereto, (v) that the initial higher and better offer for the Property be at least \$200,000 higher than the Purchase Price set forth in this Agreement which amount consists of (1) a termination fee in the amount of (x) \$30,000, plus (y) reimbursement of actual and verifiable expenses incurred by Purchaser up to \$30,000 (the sum of (x) and (y), the “Termination Fee”), (2) an initial overbid amount of \$100,000 which overbid amount is sufficient to repay Purchaser for the Deposit, and (3) a net benefit to the Seller’s bankruptcy estate in the amount of \$40,000, and that subsequent higher and better offers be in increments of not less than \$20,000 (such initial and subsequent higher and better offers, each a “Qualified Competing Bid”) . For the avoidance of doubt, Purchaser shall not be subject to the minimum bidding increment insofar as it does not need to submit a competing bid that is a greater amount than a Qualified Competing Bid. Instead, Purchaser shall be permitted to match any Qualified Competing Bid with Purchaser’s bid still being deemed higher than the Qualified Competing Bid by virtue of the higher net benefit to the estate than in the event of an Alternative Transaction (i.e. due to the estate’s incurrence of the cost of the Termination Fee). At Auction, the Seller shall designate both the highest and best bidder as well as a second highest and best bidder (“Back-Up Bidder”). In the event a Qualified Competing Bid is approved by the Bankruptcy Court (an “Alternative Transaction”), upon closing of such Alternative Transaction, Seller shall pay from closing proceeds to Purchaser, (a) return of the full amount of Purchaser’s initial Deposit and (b) the Termination Fee, upon which Purchaser shall have no other claims against the Seller or the Assets.

8. **Termination.**

8.1 ***Termination of Agreement.*** This Agreement may be terminated as provided below:

(a) Purchaser and Seller may terminate this Agreement by mutual written consent at any time prior to the Closing;

(b) Purchaser may terminate this Agreement by giving written notice to Seller at any time prior to the Closing (i) in the event Seller has breached any representation, warranty or covenant contained in this Agreement in any material respect, or (ii) in the event the Bankruptcy Court rejects the Sale Motion or the motion requesting entry of the Sale Approval Order;

(c) Seller may terminate this Agreement by giving written notice to Purchaser at any time prior to the Closing in the event Purchaser has breached any representation, warranty or covenant contained in this Agreement in any material respect;

(d) Either party may terminate this Agreement if the Closing shall not have occurred on or before June 30, 2017 (or such later date to which the Closing Date is mutually extended to in writing by the parties); provided, that if the Closing shall not have occurred by such date due to a material breach of this Agreement by a party, then such party may not terminate this Agreement under this Section 8.1(d); and

(e) In the event that a Sale Approval Order is entered which authorizes an Alternative Transaction, unless such Order approves the Purchaser as the Back-Up Bidder, in which case the termination of this Agreement would be effective upon the closing of the Alternative Transaction.

8.2 ***Effect of Termination.*** Except as otherwise set forth herein, if any party terminates this Agreement pursuant to Section 8.1, all rights and obligations of the parties hereunder shall terminate and neither party shall have any liability to the other (except that nothing herein shall affect or impair any liability for damages that may result from the party then in breach). In the event that this Agreement is terminated for any reason, the full amount of the initial Deposit shall be promptly returned to the Purchaser.

9. **Additional Terms.**

9.1 **Expenses.** Except for the Termination Fee, the parties shall bear all costs and expenses (including without limitation legal fees and expenses) that they may incur in connection with the negotiation, preparation, execution and delivery of this Agreement, and any other documents contemplated hereby. The Seller shall pay any and all sales, use, excise or other taxes or charges applicable to the transactions contemplated by this Agreement.

9.2 **Notices.** Any notice, demand or request required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been given when delivered by hand, one day after transmittal by an internationally recognized overnight courier service, or three days after being sent by registered or certified mail, return receipt requested, postage prepaid, in each case addressed as follows:

If intended for Seller: c/o David Stein  
278 6<sup>th</sup> Street, Apt. 3-B  
Brooklyn, New York 11215

with a copy of any  
notice to the Seller: Erica R. Aisner, Esq.  
DelBello Donnellan Weingarten  
Wise and Wiederkehr, LLP  
One North Lexington Avenue, 11<sup>th</sup> Floor  
White Plains, NY 10601

If intended for Purchaser: DGI Ventures, Inc.  
c/o Dean Foods Company  
Attn: General Counsel  
2711 N. Haskell Ave, Ste 3400  
Dallas, TX 75204

with a copy of any  
notice to Purchaser to: Liz Boydston  
Norton Rose Fulbright US LLP  
2200 Ross Avenue, Suite 3600  
Dallas, TX 75201

or to such other address as either party may designate from time to time by written notice in the manner set forth above.

9.3 **Entire Agreement.** This Agreement (including the schedules and exhibits hereto), together with all other Operative Documents executed by the parties, constitutes the entire agreement among the parties with respect to the subject matter hereof and supersedes all prior memoranda, correspondence, conversations and negotiations.

9.4 **Counterparts.** This Agreement may be executed in any number of counterparts and, as so executed, shall constitute one agreement binding on all the parties hereto, notwithstanding that the parties may not have executed the same counterpart. Facsimile transmissions, or electronic transmissions in .pdf format, of any executed original document and/or retransmission of any executed facsimile or .pdf transmission shall be deemed to be the same as the delivery of an executed original.

9.5 **Succession and Assignment.** This Agreement shall be binding upon and inure to the benefit of the parties named herein and their respective heirs, successors and permitted assigns. No party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written approval of the other party.

9.6 **Headings.** The headings of the sections of this Agreement have been assigned for convenience only and shall not be construed as limiting, defining or affecting the substantive terms of this Agreement.

9.7 **Amendments.** This Agreement may be amended or waived only by a writing executed by the parties hereto. No waiver of any breach of this Agreement shall be deemed to be a waiver of any subsequent breach of a similar or like nature.

9.8 **Construction.** The parties intend that each representation, warranty and covenant contained herein shall have independent significance. If any party has breached any representation, warranty or covenant contained herein in any respect, the fact that there exists another representation, warranty or covenant relating to the same subject matter (regardless of the relative levels of specificity) which the party has not breached shall not detract from or mitigate the fact that the party is in breach of the first representation, warranty or covenant.

9.9 **Severability.** Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

9.10 **Further Assurances.** Each of the parties hereto, both before and after the Closing, shall take such further actions and execute such additional documents as may be necessary or reasonably requested from time to time by the other party to consummate the transactions contemplated hereby.

9.11 **Jurisdiction and Venue.** In the event of a dispute hereunder, the parties agree to submit to the exclusive jurisdiction of the United States Bankruptcy Court, Eastern District of New York (Brooklyn Division) for the resolution thereof, until such time as the Bankruptcy Case is closed. Following such closure, the parties agree to submit to the jurisdiction of the Federal and State Courts of the State of New York.

9.12 **Governing Law.** This Agreement shall be governed by and construed according to the laws of the State of New York.

IN WITNESS, WHEREOF, the parties hereto have set their hands and seals on the day, month and year first above written.

THE FRESH ICE CREAM COMPANY, LLC  
Seller

DGI VENTURES, INC.  
Purchaser

By: \_\_\_\_\_  
David Stein, Manager

By: Edwin Hinson  
Edwin Hinson  
VP, General Manager – Ice Cream



IN WITNESS, WHEREOF, the parties hereto have set their hands and seals on the day, month and year first above written.

THE FRESH ICE CREAM COMPANY, LLC  
Seller

By:   
\_\_\_\_\_  
David Stein, Manager

DGI VENTURES, INC.  
Purchaser

By: \_\_\_\_\_  
Edwin Hinson  
VP, General Manager – Ice Cream

## Schedules to Asset Purchase Agreement

### **Schedule 1.1(i) – Inventory**

The following quantities and costs are estimated based on and qualified by: (a) reporting by Hanson Logistics of finished goods as “Available Inventory” held at Hobart, IN; (b) stocks of ingredient and packaging inventories stored in 2016 at third party premises. All inventories are subject to physical inspection by Purchaser.

Type	Description	Location	Case/Pack	Quantity	Unit Cost	Extended Cost
Finished Goods	Small Batch Bourbon Vanilla Ice Cream	Hobart, IN	6-pints	903	8.8752	8,014.31
Finished Goods	Salty Caramel Ice Cream	Hobart, IN	6-pints	2,152	9.0063	19,381.56
Finished Goods	Southern Banana Pudding Ice Cream	Hobart, IN	6-pints	4,351	9.6669	42,060.68
Finished Goods	Brooklyn Blackout Cake	Hobart, IN	6-pints	56	9.8562	551.95
Finished Goods	Whoopie Pies & Sweet Cream Ice Cream	Hobart, IN	6-pints	1,270	10.7754	13,684.76
Finished Goods	Manhattan Cherry Chip Ice Cream	Hobart, IN	6-pints	256	10.1525	2,599.04
Finished Goods	Thai Peanut Butter Pretzel Ice Cream	Hobart, IN	6-pints	9	12.0000	108.00
Finished Goods	Burnt Sugar Vanilla DF	Hobart, IN	6-pints	618	9.4834	5,860.74
Finished Goods	Speculoos Cookie Butter DF	Hobart, IN	6-pints	1,882	9.4459	17,777.18
Finished Goods	Wildflower Honey Pistachio DF	Hobart, IN	6-pints	809	12.3120	9,960.41
Subtotal						119,998.63
Ingredient	Coconut Cream	W. Hartford, CT	LBS	1,440	1.5200	2,188.80
Ingredient	Pea Protein	W. Hartford, CT	LBS	572	2.7499	1,572.94
Ingredient	Locust Bean Gum	W. Hartford, CT	LBS	35	5.3081	185.78
Ingredient	DF Cookie Dough	Manchester, CT	LBS	2,300	3.0000	6,900.00
Ingredient	Blackberry Jam	Manchester, CT	LBS	1,000	3.0000	3,000.00
Ingredient	Vanilla Cookie Crumble	Manchester, CT	LBS	600	4.0000	2,400.00
Subtotal						16,247.52
Packaging	Blackberry Crumble Pint Cup	Manchester, CT	EACH	3,960	0.12193	482.84
Packaging	Blackberry Crumble Pint Lid	Manchester, CT	EACH	3,960	0.08535	337.99
Packaging	Mint Cacao Chip DF Pint Cup	Manchester, CT	EACH	5,940	0.12193	724.26
Packaging	Mint Cacao Chip DF Pint Lid	Manchester, CT	EACH	5,940	0.08535	506.98
Packaging	Choc Chip Cookie Dough DF Pint Cup	Manchester, CT	EACH	5,940	0.12193	724.26
Packaging	Choc Chip Cookie Dough DF Pint Lid	Manchester, CT	EACH	5,940	0.08535	506.98
Subtotal						3,283.31
<b>TOTAL</b>						<b>139,529.46</b>

### **Schedule 1.1(ii) – Equipment**

The following equipment is located at Royal Ice Cream (Manchester, CT):

1. One (1) Taylor Batch Freezer
2. Assorted small wares
3. End of list

### **Schedule 1.1(iii) – Customers**

1. Current and historical customer lists provided in hard copy
2. End of list

### **Schedule 1.1(iv) – Operating Contracts**

None

### **Schedule 1.1 (v) – Intellectual Property**

1. Product formulae for the following flavors (provided in hard copy)
  - a. Chocolate Salty Caramel
  - b. Burnt Sugar Vanilla
  - c. Cold Brewed Cinnamon Coffee
  - d. Blueberry Lemon Icebox Cake
  - e. S'MORES
  - f. Speculoos Cookie Butter
  - g. Wildflower Honey Pistachio
  - h. Salty Caramel
  - i. Brooklyn Blackout Cake
  - j. Small Batch Bourbon Vanilla
  - k. Southern Banana Pudding
  - l. Mexican Chili Chocolate
  - m. Blackberry Crumble
  - n. Whoopie Pies & Sweet Cream
  - o. Salty Caramel
  - p. Malty Toffee Pretzel
  - q. Pistachio Fig Jam
  - r. S'MORES with Vegan Marshmallow & Gluten Free Graham Crackers
  - s. Cinnamon Coffee
2. Trade dress (artwork provided in digital copy)
3. Domain names:
  - a. [www.stevesicecream.com](http://www.stevesicecream.com)
  - b. [www.craftcollective.com](http://www.craftcollective.com)
4. Trademarks
  - a. US PTO Registration No. 1158272
  - b. US PTO Registration No. 3861345
  - c. US PTO Registration No. 4084176
  - d. US PTO Registration No. 4372734

### **Schedule 1.1(vi) – Purchase Orders**

The following purchase orders have been received and not shipped; all are subject to cancellation or acceptance of delivery appointment by the respective customer prior to shipment.

Customer	PO Number	PO Date	PO Gross Dollar Amount
DPI – Tualatin, OR	408439	3/27/17	1,296.00
KeHE – Aurora, CO	2560069	3/14/17	6,868.41
KeHE – Bloomington, IN	2549510	3/14/17	3,659.47
KeHE – Chino, CA	2537694	3/13/17	7,595.53
DPI – Tualatin, OR	405324	3/13/17	1,296.00
KeHE – Dallas, TX	2553394	3/07/17	6,808.32
KeHE – Portland, OR	2547280	2/28/17	2,978.64
DPI – Tualatin, OR	399046	2/13/17	
UNFI – Moreno Valley, CA	446185690	2/09/17	6,808.32
KeHE – Stockton, CA	2498312	1/31/17	7,233.84
KeHE – Aurora, CO	2517868	1/25/17	6,846.50

UNFI – Greenwood, IN	3833278	1/23/17	2,160.00
KeHE – Bloomington, IN	2513509	1/19/17	5,191.34
KeHE – Stockton, CA	2512460	1/18/17	6,808.32
UNFI – Sarasota, FL	3825956	1/16/17	1,944.00
Wakefern	715466		6,912.00
Wakefern	714495		7,128.00
KeHE – Flower Mound, TX	2482887	1/09/17	2,021.22

**Schedule 1.2(vi) – Excluded Operating Contracts**

Manufacturing Agreement for Steve’s Ice Cream, dated February 29, 2016, between The Fresh Ice Cream Company LLC and Schoep’s Ice Cream Company Inc.

## **Bidding Procedures**

Set forth below are the bidding procedures (the “Bidding Procedures”) pursuant to which The Fresh Ice Cream Company LLC (the “Seller”) is authorized to conduct an auction for the sale (the “Sale”) of the Assets (as defined below), pursuant to the terms substantially in the form of that certain Asset Purchase Agreement between the Seller and DGI Ventures, Inc. (the “Purchaser”), dated as of April 18, 2017 (the “APA”), a copy of which is on file with the United States Bankruptcy Court for the Eastern District of New York (the “Bankruptcy Court”) and is available to interested parties by contacting counsel to the Seller, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, NY 10601, Attention: Jonathan S. Pasternak, Esq., Telephone: (914) 681-0200, Facsimile: (914) 684-0288, email: jpasternak@ddw-law.com.

These Bidding Procedures have been approved by the Bankruptcy Court pursuant to an Order dated May \_\_\_\_\_, 2017 (the “Sale Procedures Order”). Capitalized terms used but not defined herein shall have the meanings ascribed to them in the APA. In the event of any inconsistency between the provisions of these Bidding Procedures and the provisions of the APA, the provisions of the APA shall control.

The Seller has determined that: (A) the transactions contemplated by the APA shall be subject to competitive bidding as set forth in these Bidding Procedures; (B) the transfer of the Seller’s rights, title and interests in and to the Assets shall be subject to approval by the Bankruptcy Court pursuant to Sections 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”); and (C) the Sale shall be subject to such other closing conditions and other terms and conditions as are set forth in the APA.

## **Bidding Process**

These Bidding Procedures describe, among other things, the Assets available for sale, the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Assets, the manner in which bids become Qualified Competing Bids (as defined below), the receipt and negotiation of bids received, the conduct of any Auction (as defined below), the ultimate selection of the Successful Bidder (as defined below), the designation of a Back-Up Bidder (as defined below), and the Bankruptcy Court’s approval thereof (collectively, the “Bidding Process”).

### Assets To Be Sold

The Seller is offering for sale substantially all of the Seller's assets related to the Business, as described in the APA and related exhibits, schedules, and annexes (as more specifically defined in the APA, the "Assets").

### Notice And Bid Deadline

Within three (3) Business Days following the entry of the Sale Procedures Order or as soon as reasonably practicable thereafter, the Seller may provide notice, in form and substance satisfactory to the Purchaser and the Creditors' Committee, of the Sale, the Bidding Procedures, the time and place of the Auction (as defined below), the time and place of the Sale Hearing (as defined below), and the objection deadline for the Sale Hearing to potential bidders who may wish to participate in the Bidding Process by submitting higher and better offers ("Competing Bids") to purchase the Assets.

Any person or entity other than the Purchaser that desires to submit a Competing Bid (a "Bidder") must do so in writing, provided that such Competing Bid satisfies all of the requirements for Qualified Competing Bids (as set forth below) and is received by Seller's counsel: DelBello Donnellan Weingarten Wise & Wiederkehr LLP, Attention: Jonathan S. Pasternak, Esq., One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, New York 10601 by **June 5, 2017 not later than 12:00 p.m. (ET)** (the "Bid Deadline") (unless the Seller should extend the Bid Deadline in its sole and reasonable discretion). Upon receipt, the Seller shall provide copies of all Competing Bids to counsel for the Creditors' Committee.

### Qualified Competing Bids

To be considered a qualified Competing Bid (a "Qualified Competing Bid"), each Competing Bid must be received by the Bid Deadline and must comply with all of the following requirements:

- (a) it is in writing and is irrevocable through a closing of the sale of the Assets on or before June 30, 2017;
- (b) it includes a duly authorized and executed asset purchase agreement substantially in the form of the APA together with all exhibits thereto, as well as copies of such materials marked to show any amendments and modifications to the APA (the "Marked Agreement");
- (c) it provides for (i) a cash purchase price for the Assets, expressed in U.S. Dollars, of not less than One Million Two Hundred Thousand Dollars (\$1,200,000);
- (d) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Debtor to make a reasonable determination as to the Bidder's financial and other capabilities to consummate the transaction contemplated by the Marked Agreement;

- (e) it is not conditioned on any contingencies, such as, without limitation: (i) the outcome of unperformed due diligence by the Bidder on or following the Bid Deadline, and/or (ii) obtaining financing;
- (f) it includes an acknowledgement and representation that the Bidder: (i) has had an opportunity to conduct any and all required diligence regarding the Assets prior to making its offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Assets or the completeness of any information provided in connection therewith or the Auction; and (iv) is not entitled to any expense reimbursement or break-up fee in connection with its bid;
- (g) it includes evidence, in form and substance reasonably satisfactory to the Debtor, of authorization and approval from the Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery, and closing of the Marked Agreement; and
- (h) it is accompanied by a good faith deposit ("Good Faith Deposit") in the form of a wire transfer (to a bank account specified by the Seller), certified check or such other form acceptable to the Seller, payable to the order of the Seller (or such other party as the Seller may determine) in an amount equal to 10% of the amount of the bid which good Faith Deposit shall be not less than One Hundred Twenty Thousand Dollars (\$120,000).

For the avoidance of doubt, and notwithstanding the foregoing, any overbid submitted by the Purchaser at any Auction on substantially the same terms as its initial offer (apart from any increase in the net benefit to the Seller) shall be a Qualified Competing Bid.

#### Break-Up Fee

Recognizing the value and benefits that the Purchaser has provided to the Seller by entering into the APA, as well as the Purchaser's expenditure of time, energy and resources, the Seller has agreed that it will, under the circumstances set forth in the APA and as set forth in the Sale Procedures Order, pay to the Purchaser a break-up fee equal to three percent (3%) (the "Break-Up Fee") plus an Expense Reimbursement (as defined in the APA and to the extent provided in the APA) of up to an additional Thirty Thousand Dollars (\$30,000.00). The Break-Up Fee and Expense Reimbursement shall be payable on the terms and subject to the conditions set forth in the APA.

#### Auction

The Seller, in consultation with the Creditors' Committee, shall make a determination whether a Competing Bid constitutes a Qualified Competing Bid. If the Seller receives one or more Qualified Competing Bids in addition to the APA, the Seller will conduct an auction (the "Auction") of the Assets to select the highest or best bid for the Assets (the "Successful Bid" and

the bidder making such bid, the “Successful Bidder”). The Auction, which shall be transcribed or recorded to the extent required under New York local practice, shall be held at **10:00 a.m. (prevailing Eastern time) on June 7, 2017**, at the offices of DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, NY 10601, or such other location as shall be timely communicated to all entities entitled to attend the Auction.

Bidding for the Assets at the Auction shall be in increments of at least Twenty-Thousand Dollars (\$20,000.00) or any greater or lesser amount which the Seller deems appropriate in order to encourage competitive bidding. In each bidding round at the Auction, and in any other bidding process, the Purchaser’s bid shall be deemed to consist of, and be valued at, the sum of (a) the Purchase Price or any such greater purchase price as is submitted during the Auction, plus (b) the Break-Up Fee amount, plus (c) the maximum Expense Reimbursement amount. The Seller shall have the reasonable discretion to conduct the Auction in any manner and upon any terms and conditions satisfactory to the Court, permitted by the APA, and consistent with these Bidding Procedures, that will achieve the maximum value for the Assets.

Prior to the conclusion of the Auction, the Seller shall communicate to the Purchaser and the Qualified Competing Bidders the identity of the Successful Bidder and the Back-Up Bidder and the details of each bid. This determination by the Seller, in consultation with the Creditors’ Committee, shall be final, subject to approval by the Bankruptcy Court.

At the conclusion of the Auction, the Seller shall submit the Successful Bid to the Court at the Sale Approval Hearing (as defined below), for entry of a Sale Approval Order. Any Bid that fails to comply with the Bidding Procedures or any other procedures established at the Auction may be refused.

If no Qualified Competing Bids are received, the Auction shall not occur, the APA shall be deemed the Successful Bid and the Seller and the Purchaser shall immediately pursue Bankruptcy Court approval of the APA.

#### Designation of Back-Up Bidder

If the auction is conducted, the party with the second highest or otherwise best Qualified Competing Bid, as determined by the Seller in the exercise of its reasonable business judgment, in consultation with the Creditors’ Committee, shall be required to serve as a back-up bidder (the “Back-Up Bidder”) and keep such bid (the “Back-Up Bid”) open and irrevocable until the earlier of 5:00 p.m. prevailing Eastern Time on the date that is (i) June \_\_, 2017 or (ii) the closing of the Sale with the Successful Bidder.

In the event that the successful bidder is unable or unwilling to close, the Back-Up Bidder shall be deemed the Successful Bidder and shall be obligated to proceed to Closing in accordance with the Sale Procedures Order and the Marked Agreement. The Good Faith Deposit of any defaulting Successful Bidder or Back-Up Bidder shall be forfeited to the Seller, and the Seller specifically reserves its right to seek any and all other remedies and damages from any defaulting Successful Bidder or



Back-Up Bidder to the extent permissible under the applicable Marked Agreement and applicable law.

Sale Hearing

A hearing to approve the sale of the Assets to the Purchaser or other Successful Bidder will be held on June \_\_\_\_, 2017 at [\_\_:00 \_m.], before Elizabeth S. Stong, United States Bankruptcy Judge, United States Bankruptcy Court for the Eastern District of New York, 271-C Cadman Plaza East, Courtroom 3585, Brooklyn, New York 11201 (the “Sale Approval Hearing”).

If no Qualified Competing Bids are timely submitted and no objections to the proposed sale, the Court may enter the Sale Approval Order without holding a Sale Approval Hearing. If timely objections to the proposed transaction are received, then the Seller will seek Court approval at a Sale Approval Hearing. Closing of a sale of the Assets is expressly conditioned upon entry of the Sale Approval Order as described in the APA and Sale Motion.

Free Of Any And All Liens, Claims, Interests, and Encumbrances

All of the rights, title, and interests of the Seller in and to the Assets, or any portion thereof, to be acquired will be sold, conveyed, transferred, and assigned free and clear of all Liens, Claims, Interests, and Encumbrances pursuant to Section 363 of the Bankruptcy Code, such Liens, Claims, Interests, and Encumbrances to attach to the net proceeds of the sale of such Assets.