

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

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In re:

THE FRESH ICE CREAM COMPANY LLC,  
*dba Craft Collective*  
*dba Steve's Ice Cream*

Chapter 11  
Case No. 17-40716 (ess)

Debtor.

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**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**

Upon the motion (the “Motion”) of The Fresh Ice Cream Company LLC, the above captioned debtor and debtor-in-possession in the above-captioned Chapter 11 case (the “Debtor”), by its attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, seeking entry of an Order (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>”), (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 to govern the Auction and the manner of notice and (v) scheduling Auction and Sale Approval Hearing; a hearing having been held to consider the Motion on May 5, 2017, and upon due deliberation thereon, it is hereby

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

~~**ORDERED**, that the relief requested in the Part I of the Motion is granted in its entirety; and it is further~~

**ORDERED**, that the Debtor shall be authorized to use the Deposit in accordance with the terms of the APA, except that the Deposit shall be held by Debtor's counsel in escrow and upon presentation of a valid written purchase order and request for release by the Debtor in an amount necessary to manufacture product to fulfill the respective purchase order, Debtor's counsel shall be authorized to release same to the Debtor; and it is

**ORDERED**, that the Debtor is authorized to conduct the Auction for the sale of the Assets in accordance with the Bidding Procedures annexed hereto as Exhibit A, which Bidding Procedures are hereby approved and incorporated herein; and it is further

**ORDERED**, that, unless otherwise extended by Debtor's counsel, the deadline for submitting bids to become Qualified Bids is **June 5, 2017 at 12:00 p.m.**, at the offices of Debtor's counsel, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, New York 10601, Attn: Jonathan S. Pasternak, Esq.; and it is further

**ORDERED**, that if any Qualified Bids are received in accordance with the Bidding Procedures, the Debtor will conduct an Auction commencing on **June 7, 2017 at 10:00 a.m.**, at DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, New York 10601 or such other location as shall be timely communicated to all entities entitled to attend the Auction; and it is further

**ORDERED**, that the Break-Up Fee in the amount of \$30,000 and the Expense Reimbursement in the amount of up to \$30,000 to the Purchaser are hereby approved, effective immediately, and shall be payable as set forth in the APA; and it is further

**ORDERED**, that a hearing shall be held before the Honorable Elizabeth S. Stong, United States Bankruptcy Judge, at the United States Bankruptcy Courthouse, 271-C Cadman Plaza East, Courtroom 3585, Brooklyn, New York 11201 on June 13, 2017 at 3:00 p.m., or as soon thereafter as counsel may be heard (the “Sale Approval Hearing”), to confirm the results of the Auction, authorize the sale of the Assets and authorize the assumption or rejection of the Debtor’s executory contracts, based upon the results of the Auction, and grant such other related relief as may be deemed necessary or proper by the Court; and it is further

**ORDERED**, that objections to the relief to be considered at the Sale Approval Hearing shall be filed by June 9, 2017 at 4:00 p.m. with the Bankruptcy Court at the Court’s website <https://ecf.nyeb.uscourts.gov/cgi-bin/login.pl> (password and log in required), with a copy delivered directly to Chambers and served upon: (a) counsel to the Debtor, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, New York 10601, Attn: Jonathan S. Pasternak, Esq.; (b) counsel to the Creditors’ Committee, Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, 1201 RXR Plaza, Uniondale, New York 11556, Attn: William C. Heuer, Esq.; and (c) counsel to the Purchaser, Dean Foods Company, 2711 N. Haskell, Suite 3400, Dallas, Texas 75204, Attn: Yuki Whitmire; and it is further

**ORDERED**, that, notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry; and it is further

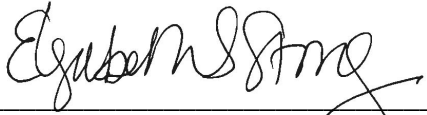
**ORDERED**, that to the extent that this Order is inconsistent with any prior order or pleading with respect to the Motion in this case, the terms of this Order shall govern; and it is further;

**ORDERED**, that the Court ~~shall~~ may retain jurisdiction over any matter or dispute arising from or relating to the implementation of this Order; and it is further

**ORDERED**, that (a) the manner of notice of the Sale is hereby approved and (b) the Debtor shall serve this Order along with the Bidding Procedures upon: (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 Acquired Assets, (vii) all of the Debtor's interest holders and (viii) all parties that have requested notice pursuant to Bankruptcy Rule 2002 within three (3) business days of entry of this Order.

**Dated: Brooklyn, New York  
May 5, 2017**



  
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**Elizabeth S. Stong**  
**United States Bankruptcy Judge**

## **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 procedures set out in Bidding Procedures and the provisions of the APA, the provisions of these Bidding Procedures 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 Official Committee of Unsecured 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. Potential purchasers and other interested parties, who have expressed interested in the Assets, will be notified by overnight delivery and, where email contact information is known, by email.

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 and the Committee<sup>1</sup> (in their reasonable discretion), or an Order of the Bankruptcy Court, extends the Bid Deadline). Upon receipt, the Seller shall provide copies of all Competing Bids to counsel for the Committee.

### Qualified Competing Bids

To be considered a qualified Competing Bid (a "Qualified Competing Bid"), which determination shall be made by Seller's counsel and the Committee Chair, 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;

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<sup>1</sup> In order to avoid any appearance of impropriety, given that the Purchaser intends to employ David Stein, the Seller's principal, all material decisions regarding the Auction (e.g. extension of deadlines, whether a bid is a Qualifying Competing Bid, modifications to initial overbid or bidding increments and determination of the highest and best bid and the second highest and best bid) shall be made by (i) Seller's Counsel and (ii) the Committee's counsel and Chair of the Committee or its designee (together, the "Committee Chair"). Moreover, no less than three (3) days prior to the Bid Deadline, Purchaser shall provide to counsel to the Committee a copy of any employment or similar agreement with David Stein, to the extent that one exists as of that date.

- (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 or such other formal term sheet as may be appropriate in light of the bid (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 One Hundred Thousand Dollars (\$1,100,000);
- (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 Seller, in consultation with the Committee Chair 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 Seller, , 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 Ten Thousand Dollars (\$110,000).

**PLEASE NOTE**, the Seller reserves the right to commence bidding at the Auction in an amount up to, but no greater than, One Million Two Hundred Thousand Dollars (\$1,200,000). This increase in initial bid shall be based upon the value (at cost) of inventory on hand as of the

close of business one (1) business day prior to the Auction, less the value (cost) of inventory on hand as of the date of the APA.

**PLEASE TAKE FURTHER NOTE**, that an offer of employment to, or entry into a consulting agreement with, Seller's principal, David Stein, is not required to be deemed a Qualified Competing Bid and the existence or terms of such an offer or agreement shall not be considered in the determination of the highest and best bid.

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's Counsel and Committee Chair, 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** ("Auction Date"), 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. The Auction Date may not be extended without an Order of the Bankruptcy Court absent consent of the Seller, the Purchaser and the Committee.

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 and the Committee, 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 shall be made by the Seller's Counsel and the Committee Chair and 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 Seller's counsel and the Committee Chair, 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 13, 2017 at 3:00 p.m. before the Honorable 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.

Modification or Amendment of Procedures

To the extent that changes to these bidding procedures are considered useful and appropriate by the Committee, the Committee Chair and counsel to the Committee will confer with counsel to the Debtor, regarding any necessary modifications or amendments. Counsel to the Committee, the Committee Chair, and counsel to the Debtor shall consult with Purchaser and its counsel prior to making any such modification or amendment and in the event of an objection by the Purchaser, no modification or amendment of the procedures shall be implemented in the absence of a Bankruptcy Court Order.