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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

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**MOTION FOR AN ORDER (I) SCHEDULING  
A PRELIMINARY HEARING ON DEBTOR’S MOTION REQUESTING  
USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. §363(c)(2) AND  
BANKRUPTCY RULE 4001, (II) AUTHORIZING THE DEBTOR’S USE  
OF CASH COLLATERAL ON AN INTERIM BASIS AND PROVIDING  
ADEQUATE PROTECTION THEREFORE PURSUANT TO 11 U.S.C.  
§§361 AND 362, AND (III) SCHEDULING A FINAL HEARING**

The Fresh Ice Cream Company LLC., the above captioned debtor and debtor-in-possession (the "Debtor"), by its proposed attorneys, DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP and its Managing Member, David Stein, files this motion (the "Motion") for entry of an Order Scheduling a Preliminary Hearing on the Debtor’s Motion Requesting the Use of Cash Collateral, (II) Authorizing Debtor’s Use of Cash Collateral Pursuant to 11 U.S.C. §363 and Providing Adequate Protection Therefor Pursuant to 11 U.S.C. §§361 and 362 and (III) Scheduling a Final Hearing, respectfully state and represent as follows:

### **Jurisdiction**

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

2. The statutory bases for the relief requested herein are §§ 105(a), 361, 362 and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”), and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

### **Background**

3. On February 17, 2017, (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and the management of its business affairs as debtors-in-possession pursuant to §§1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or statutory committee has been appointed.

4. The Debtor owns and operates a frozen dairy and non-dairy product distribution company under the well-known ice cream brand name *Steve’s Ice Cream*. The Debtor distributes high quality frozen dairy and non-dairy products to over 12 national retailers including Whole Foods throughout the Northeast and West Coast.

5. Since acquiring the business in 2008, David Stein has acted as its manager, focusing the business on distribution as opposed to its former model of retail “mix-ins” ice cream parlors.

6. In the past 2 years, the company has faced significant challenges with its packing facilities and well as prior management which resulted in the Debtor being forced to ship product at discount in 2015, causing losses and a reduction of working capital.

7. Recently, the Debtor was unable to continue its debt service to its 2 secured creditors described below, and a former landlord obtained a judgment and froze the Debtor's operating account.

8. The Debtor's desire is to utilize the bankruptcy process in order to generally restructure and reorganize its affairs as well as explore options for expansion, the raising of capital and other strategic transactions. Properly capitalized, the Debtor believes it could greatly increase revenues and profitability. The Debtor believes that with the help of counsel it will be able to restructure its affairs and propose a plan of reorganization that it is in the best interests of its creditors and affords them the greatest recovery possible.

9. The Debtor believes it will be able to utilize Chapter 11 to obtain additional financing and/or capital in order to ramp up sales and revenues, restructure its liabilities and/or achieve a strategic transaction taking advantage of the good will and significant value in the Debtor's trademark and other intangible assets.

#### **The Pre-Petition Secured Debt**

10. April 25, 2014 the Debtor entered into a Loan and Security Agreement with Empire State Certified Development Corporation ("ESCDC") pursuant to which ESCDC extended credit to the Debtor in the original principal amount of \$500,000, with the total current approximate outstanding amount having been reduced via payments to approximately \$426,000, at an interest rate equal to the prime rate plus 275 basis points (approximately 5%). A copy of the Loan and Security Agreement, Mortgage Note, UCC-1 Financing Statements and related loan documents (collectively, the "ESCDC Loan Documents") are annexed as **Exhibit A**.

11. Upon information and belief, FICC Lender, LLC, an entity owned by Andrew FICC, a creditor and shareholder of the Debtor, ("FICC") is the successor in interest to ESCDC

by way of assignment dated February 3, 2017. On February 3, 2017, FICC filed a UCC-3 financing statement amendment memorializing the assignment of the ESCDC Loan Documents and UCC-1 financing statement to FICC. The FICC assignment documents are herein after referred to as the “FICC Assignment Documents” and are annexed hereto as **Exhibit B**.

12. The ESCDC Loan and Security Agreement provides, *inter alia*, that ESCDC shall be granted a security interest in, a lien on and a pledge and assignment of all of the Debtor’s personal property and fixtures, including, *inter alia*, all accounts, chattel paper, investment property, deposit accounts, documents, equipment, fixtures, furniture, general intangibles, goods, instruments, inventory, machinery, money, causes of action and all proceeds and products generated therefrom.

13. This language is tracked in both the Security Agreement dated April 25, 2014 and the UCC-1 Financing Statement filed with the Delaware secretary of State (the Debtor’s state of incorporation) contained in the ESCDC Loan Documents.

14. As of the Petition Date, the Debtor was indebted to FICC as assignee of ESCDC in the approximate outstanding amount of \$426,917.96.

15. The Debtor submits that the value of the Debtor’s assets far exceed the Debtor’s indebtedness to FICC, providing him with a substantial “equity cushion”.

**The S.O.S. Capital, Inc. Pre-Petition Secured Debt**

16. In 2016, the Debtor obtained 2 separate loans from S.O.S. Capital, Inc. (“SOS”) in the respective amounts of \$100,000 and \$75,000, respectively.

17. Specifically, on March 23, 2016, the Debtor entered into a Purchase and Sale Agreement with SOS in the loaned amount of \$100,000 at an interest rate of 15% per annum . A copy of the Purchase and Sale Agreement, together with a Security Agreement and Limited

Guaranty and Confession of Judgment of Guarantor is annexed hereto as **Exhibit C**.

18. The Security Agreement grants SOS a lien and security interest in all forms of monetary payments received by the Debtor, essentially its accounts and cash.

19. On July 5, 2016, the Debtor entered into an additional Purchase and Sale Agreement with SOS in the loaned amount of \$75,000 at an interest rate of 15% per annum . A copy of the Purchase and Sale Agreement, together with a Security Agreement and Limited Guaranty and Confession of Judgment of Guarantor is annexed hereto as **Exhibit D**.

20. The loans were to be rapid from the Debtor's daily bank account balances and were in fact partially repaid in that fashion.

21. As of the Petition Date, the Debtor believes it owes SOS the approximate sum of \$112,000.

22. A UCC-1 Financing Statement was filed with the Delaware Secretary of State in favor of Corporation Services Company As Representative ("CSC"), describing the secured party as being granted a lien in all assets of the Debtor, a copy of which is annexed hereto as **Exhibit E**. The Debtor believes that CSC is the representative of SOS but has not completed its investigation into same.

### **Relief Requested**

23. The Debtor submits this Motion pursuant to Bankruptcy Code §363(c)(2)(B) and 361 and 362 and Bankruptcy Rule 4001(b) with respect to the Debtor's request for authority to use property which may constitute Collateral in which FICC and SOS are likely to assert a security interest, substantially in accordance with the terms and conditions set forth in the proposed Interim Order (the "Order") annexed hereto as **Exhibit F**. The Debtor believes that FICC and SOS are the only parties that may have a perfected security interest in the Debtor's

property which may constitute, *inter alia*, Cash Collateral<sup>1</sup>.

24. The proposed Order grants the Debtor the authority to use the Collateral pursuant to Bankruptcy Code §§363 (c)(1) and (2) and Bankruptcy Rule 4001(c) to the extent necessary to continue the operation of its business and to preserve the value of its estate during the course of the Chapter 11 case.

25. Section 363(a) of the Bankruptcy Code states as follows:

“In this section, “cash collateral” means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of properties subject to a security interest as provided in Section 552(b) of this title, whether existing before or after the commencement of a case under this title.”

26. Section 363(c)(1) of the Bankruptcy Code provides as follows:

"(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing".

27. Section 363(d) of the Bankruptcy Code provides as follows:

"(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(e), or 362(f) of this title".

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<sup>1</sup> The Debtor currently owes Hanson Logistics (“Hanson”) its warehouseman, approximately \$50,000. Hanson is likely to assert a first priority secured claim against the Debtor’s inventory warehoused at its location. The Debtor intends, by separate stipulation and motion, to satisfy the Hanson pre-petition secured debt in exchange for release of the inventory. Hanson will be served with this Motion for notice purposes.

28. Accordingly, pursuant to § 363(c)(2) of the Bankruptcy Code, the consent of the Secured Creditors or authority from this Court is required to use Collateral in which they hold perfected security interests.

### **Adequate Protection**

29. The purpose of adequate protection is to ensure that the secured creditor receives the value for which it bargained pre-bankruptcy. In re Swedeland Development Group, Inc., 16 F.3d 552 (3<sup>rd</sup> Cir. 1994); In re Dunes Casino Hotel, 69 B.R. 784, 793 (Bankr. D.N.J. 1986), citing In re Coors of the Cumberland, 19 B.R. 313 (Bankr. M.D. Tenn. 1982). See also, In re 495 Central Park Ave. Corp., 136 B.R. 626 (Bankr. S.D.N.Y. 1992). Adequate protection is designed to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization. In re Nice, 355 B.R. 554, 563 (Bankr. N.D. Va. 2006) (“adequate protection is solely a function of preserving the value of the creditor’s secured claim as of the petition date due to a debtor’s continued use of the collateral”).

30. Because the term “adequate protection” is not defined in the Bankruptcy Code, the precise contours of the concept are necessarily determined on a case-by-case basis. MBank Dallas, N.A. v. O’Connor (In re O’Connor), 808 F.2d 1393 (10<sup>th</sup> Cir. 1987). In re Snowshoe Co., 789 F.2d 1085, 1088 (4<sup>th</sup> Cir. 1086); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996); In re Beker Industries Corp., 58 B.R. 725 (Bankr. S.D.N.Y. 1986); see also In re JKJ Chevrolet, Inc., 190 B.R. 542, 545 (Bankr. E.D.Va. 1995) (adequate protection is a flexible concept that is determined by considering the facts of each case).

31. The Order provides that, as adequate protection for the Debtor’s use of FICC’s and SOS’s Collateral and in consideration for the use of the Collateral, the Debtor shall grant FICC and SOS replacement liens in all of the Debtor’s pre-petition and post-petition assets and

proceeds, including the Collateral and the proceeds of the foregoing, to the extent that FICC and SOS had valid security interests in pre-petition assets of this kind on the Petition Date and in the continuing order of nature, extent, validity and priority that existed as of the Petition Date (the “Replacement Liens”).

32. The Replacement Liens shall be subject and subordinate only to: (a) United States Trustee fees payable under 28 U.S.C. Section 1930 and 31 U.S.C Section 3717; (b) professional fees of duly retained professionals in this Chapter 11 case as may be awarded pursuant to Sections 330 or 331 of the Code or pursuant to any monthly fee order entered in the Debtor’s Chapter 11 case; (c) the fees and expenses of a hypothetical Chapter 7 trustee to the extent of \$20,000; and (d) the recovery of funds or proceeds from the successful prosecution of avoidance actions pursuant to sections 502(d), 544, 545, 547, 548, 549, 550 or 553 (“Avoidance Actions”) of the Bankruptcy Code (collectively, the “Carve-Outs”).

33. The Debtor submits that, in order to preserve the Debtor’s estate and ensure the viability of the Debtor during the Chapter 11 case, FICC and SOS should be granted Replacement Liens with the same nature, extent and validity of their pre-petition liens, subject to further investigation by the debtor or any creditors or committee appointed in the Debtor’s Chapter 11 case.

### **The Budget**

34. The Debtor proposes to use Collateral only for ordinary and necessary limited operating expenses in connection with the ordinary operation of the Debtor’s business substantially in accordance with the operating budget annexed hereto as **Exhibit G** (the “Budget”). The Debtor believes that the Budget includes all reasonable, necessary and foreseeable expenses to be incurred in the ordinary course of operating the Debtor’s business for



the period set forth in the Budget. The Debtor believes that the use of Collateral in accordance with the Budget will provide the Debtor with adequate liquidity to pay ordinary course payable administrative expenses as they become due and payable during the period covered by the Budget without any significant diminution in value of the SBA collateral.

35. It is submitted that in light of (a) the “equity cushion” in the Debtor’s assets and (b) the adequate protection being proposed herein, FICC and SOS will be adequately protected for the use of its cash collateral.

### **LEGAL BASIS FOR RELIEF REQUESTED**

36. Typically, a motion for authority to use cash collateral may commence no earlier than 14 days after service of the motion pursuant to Bankruptcy Rule 4001(b)(2). However, that same rule provides that the court may conduct a preliminary hearing before such 14 day period expires under certain circumstances.

37. Federal Rule of Bankruptcy Procedure 9006(c) provides as follows:

*(c) Reduction.*

(1) *In General.* Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

(2) *Reduction Not Permitted.* The court may not reduce the time for taking action under Rules 2002 (a)(4) and (a)(8), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

38. Thus, the Federal Rules of Bankruptcy Procedure specifically authorize the Court to hear an application such as the Application herein on shortened notice, for cause shown.

39. The Debtor respectfully submits that sufficient cause exists for scheduling a hearing on shortened notice to consider the Application and refers the Court to the Affirmation

of Dawn Kirby, Esq. pursuant to Local Bankruptcy Rule 9077-1(a) in support of an order scheduling hearing on shortened notice, submitted herewith.

**Request For Waiver Of Stay**

40. The Debtor further seeks a waiver of the stay of the effectiveness of the Order that may be imposed by any applicable Bankruptcy Rule. As set forth above, the use of Collateral is essential to prevent potentially irreparable damage to the Debtor's value and ability to reorganize. Accordingly, the Debtor submits that sufficient cause exists to justify a waiver of any stay imposed by the Bankruptcy Rules, to the extent applicable.

**Notice**

41. This Motion is being served on notice to the Secured Creditors, all other parties asserting secured claims against the Debtor, the United States Trustee and all other parties entitled to notice pursuant to Bankruptcy Rule 4001(d), including but not limited to the Debtor's twenty (20) largest unsecured creditors.

**WHEREFORE**, the Debtor respectfully requests use of cash collateral in accordance with the terms of the annexed proposed Order and this Application, together with such other and further relief as is just and proper under the circumstances.

Dated: White Plains, New York  
February 17, 2017

Respectfully submitted,

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THE FRESH ICE CREAM COMPANY, LLC

By: /s/ David Stein  
David Stein, Managing Member