UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	Chapter 15
ARCTIC GLACIER INTERNATIONAL INC., *et al.*,[1]	:	Case No. 12-10605 (KG)
	:	(Jointly Administered)
Debtors in a Foreign Proceeding.	:	**Ref. Docket Nos. 7, 28, 35, 45, & 46**

MONITOR'S: (I) REPLY TO OBJECTION TO VERIFIED PETITION FOR RECOGNITION OF FOREIGN MAIN PROCEEDING AND FOR RELATED RELIEF; AND (II) OBJECTION TO MOTION OF THE PUTATIVE CLASS ACTION REPRESENTATIVES FOR AN ORDER WITHDRAWING APPROVAL OF PROVISIONAL DIP FINANCING

Alvarez & Marsal Canada Inc., in its capacity as the court-appointed monitor and authorized foreign representative (the "Monitor") of the above-captioned debtors (collectively, the "Debtors") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), pending before the Court of Queen's Bench of Winnipeg Centre (the "Canadian Court"), by its undersigned counsel hereby submit this reply (the "Reply") to the *Objection to Verified Petition for Recognition of Foreign Main Proceeding and for Related Relief* (the "Objection") and the

[1] The last four digits of the United States Tax Identification Number or Canadian Business Number, as applicable, follow in parentheses: (i) Arctic Glacier California Inc. (7645); (ii) Arctic Glacier Grayling Inc. (0976); (iii) Arctic Glacier Inc. (4125); (iv) Arctic Glacier Income Fund (4736); (v) Arctic Glacier International Inc. (9353); (vi) Arctic Glacier Lansing Inc. (1769); (vii) Arctic Glacier Michigan Inc. (0975); (viii) Arctic Glacier Minnesota Inc. (2310); (ix) Arctic Glacier Nebraska Inc. (7790); (x) Arctic Glacier New York Inc. (2468); (xi) Arctic Glacier Newburgh Inc. (7431); (xii) Arctic Glacier Oregon, Inc. (4484); (xiii) Arctic Glacier Party Time Inc. (0977); (xiv) Arctic Glacier Pennsylvania Inc. (9475); (xv) Arctic Glacier Rochester Inc. (6989); (xvi) Arctic Glacier Services Inc. (6657); (xvii) Arctic Glacier Texas Inc. (3251); (xviii) Arctic Glacier Vernon Inc. (3211); (xix) Arctic Glacier Wisconsin Inc. (5835); (xx) Diamond Ice Cube Company Inc. (7146); (xxi) Diamond Newport Corporation (4811); (xxii) Glacier Ice Company, Inc. (4320); (xxiii) Ice Perfection Systems Inc. (7093); (xxiv) ICEsurance Inc. (0849); (xxv) Jack Frost Ice Service, Inc. (7210); (xxvi) Knowlton Enterprises Inc. (8701); (xxvii) Mountain Water Ice Company (2777); (xxviii) R&K Trucking, Inc. (6931); (xxix) Winkler Lucas Ice and Fuel Company (0049); (xxx) Wonderland Ice, Inc. (8662). The Debtors' executive headquarters is located at 625 Henry Avenue, Winnipeg, Manitoba, R3A 0V1, Canada.

Motion of the Putative Class Action Representatives for an Order Withdrawing Approval of Provisional DIP Financing (the "Withdrawal Motion") filed by the indirect purchaser plaintiffs (the "IP Plaintiffs") in the class action litigation styled *In re Packaged Ice Antitrust Litig.*, Case No. 08-MD-01952 (E.D. Mich.).

PRELIMINARY STATEMENT

The IP Plaintiffs' Objection and Withdrawal Motion do not present meritorious grounds to deny recognition of the Canadian Proceeding. The IP Plaintiffs' accusations of bad faith are unfounded. They lack standing to complain of alleged probation violations of Arctic Glacier International Inc. ("AG-US"). Their contention that Canadian law prohibits class claims is wrong, as demonstrated by the Canadian case law they cite. Finally, the relief requested in the untimely filed IP Plaintiffs' Withdrawal Motion should be denied as it is duplicative of their Objection and will be rendered moot by this Court's decision whether or not to recognize the Canadian Proceeding. In addition, the Monitor joins in and incorporates by reference herein the additional responses set forth in (a) the *Debtors' Consolidated Response to Objection to Verified Petition and Motion for Withdrawal of DIP Financing* (the "Debtors' Response"), and (b) the *Omnibus Response of CPPIB Credit Investments Inc., West Face Long Term Opportunities Master Global Master L.P., West Face Long Term Opportunities Master Fund L.P., and West Face Long Term Opportunities Limited Partnership to (I) Objection to Verified Petition for Recognition of Foreign Main Proceeding and for Related Relief and (II) Motion of the Putative Class Action Representatives for an Order Withdrawing Approval of Provisional DIP Financing*, (the "DIP Lenders' Response," and together with the Debtors' Response and the Reply, the "Responses"), each dated March 13, 2012.

As demonstrated in the *Verified Petition of Alvarez & Marsal Canada Inc., as Foreign Representative of Arctic Glacier Inc. and Certain of its Affiliates, for: (I) Recognition of Foreign Main Proceedings; and (II) Certain Related Relief* [Docket No. 7] (the "Verified Petition") and supporting materials previously filed by the Monitor, the Canadian Proceeding clearly meets every element necessary to qualify as a foreign main proceeding, as such term is defined in section 1502(4) of title 11 of the United States Code (the "Bankruptcy Code"). The IP Plaintiffs' Objection need not and should not deprive the Debtors, their other creditors, and the Debtors' stakeholders of the benefits of final recognition, which due to liquidity constraints and conditions of the DIP Facility is necessary to allow the Debtors to continue going-concern operations, conduct a robust sales process, and thus maximize the value of their assets for the benefit of all stakeholders.

RESPONSE

I. This Court Should Overrule The IP Plaintiffs' Objection to Recognition

1. In the Objection, the IP Plaintiffs assert the following three primary arguments against recognition: (a) the Monitor and the Debtors did not satisfy a duty of candor to this Court in connection with the Verified Petition and supporting documents; by allegedly failing to disclose certain aspects of Canadian law and "material terms" of a plea agreement to which AG-US is a party; (b) the entry of the Recognition Order would violate AG-US probation terms; and (c) the CCAA does not permit the filing of a class claim, such that the Canadian Proceeding is therefore manifestly contrary to United States public policy. For the reasons discussed below, each of those arguments fail.

A. *The IP Plaintiffs' Assertions of Bad Faith are Meritless*

2. The IP Plaintiffs' assertion that the Monitor and the Debtors have not satisfied their duty of candor to the Court is an unfounded and careless argument. In asserting

this argument, the IP Plaintiffs erroneously conflate disclosure to the Court with notice and an opportunity to be heard for creditors.

3. The Monitor ensured that proper notice of the Debtors' chapter 15 cases (the "Chapter 15 Cases") and the Canadian Proceeding was provided to creditors so that they would have the opportunity to present their objections to the Court based on their own assessments of the facts and law. That is one of the primary reasons why this Court's *Order Granting Provisional Relief* [Docket No. 28] entered by this Court on February 23, 2012 was provisional; it was to grant the Debtors and the DIP Lenders important temporary relief and protections and to preserve the status quo while notice pursuant to the Court's *Order Scheduling Hearing and Specifying the Form and Manner of Service of Notice* [Docket No. 30] (the "Notice Order") was effectuated. In the Verified Petition and its supporting documents, the Monitor and the Debtors disclosed to the Court, and thus, to the Debtors' creditors and other parties in interest, what they believe to be the material aspects of AG-US's plea agreement (the "Plea Agreement")[2] and the Canadian law governing the Canadian Proceeding.[3] The IP Plaintiffs believe other aspects are more important, and have told the Court why in their Objection. That signifies only that the IP Plaintiffs disagree with the assessment of the Monitor and the Debtors, of which the IP Plaintiffs were provided ample notice. It is hardly a basis to cry bad faith.

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2 The Plea Agreement was entered into by AG-US and the Department of Justice, Antitrust Division (the "DOJ"), in the case styled U.S. v. Arctic Glacier International, Inc., Case No. 09-00149 (S.D. Ohio Oct. 13, 2009) [Docket No. 11].

3 In addition, the Withdrawal Motion claims that the Monitor and the Debtors failed to disclose an alleged admission by AG-US in a Kansas civil action where federal jurisdiction was disputed that the "amount in controversy" in that action could be more than $27,000,000. Withdrawal Motion ¶ 29. As that alleged admission, if it has any relevance at all, pertains to the value of the IP Plaintiffs' litigation claims, it is not a matter that is germane to this Recognition Hearing.

4. The Monitor and the Debtors have fulfilled their obligation to provide sufficient and timely notice to the Debtors' constituencies. The Monitor and the Debtors have no generalized duty to anticipate every possible basis on which any creditor could object to final recognition of the Canadian Proceeding, and the IP Plaintiffs cite no case suggesting that they do.[4] In these Chapter 15 Cases, the noticing process has worked the way it should, and the IP Plaintiffs' own Objection is proof.

5. In addition, as to the Plea Agreement, the Monitor provided notice of these Chapter 15 Cases to the DOJ, and to AG-US's supervising probation office, the parties that possess standing (which the IP Plaintiffs do not) to contest any alleged breach of the Plea Agreement and probation terms. See Declaration of Paula Render, dated March 13, 2012, attached to the Debtors' Response [hereinafter, the "Render Declaration"] ¶¶ 10-13. The IP Plaintiffs attempt to fortify a flawed objection with accusations of bad faith should be summarily rejected.

B. *The IP Plaintiffs Lack Standing to Assert the DOJ's Rights*

6. The IP Plaintiffs assert that the Debtors' entry into the post-petition secured credit facility (the "DIP Facility") is a violation of AG-US's terms of probation. Objection ¶ 10-12. That assertion is factually incorrect. See Render Declaration ¶ 9. But as a threshold matter, the IP Plaintiffs lack standing to make this objection. They are not parties to

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[4] Instead, the precedents cited by the IP Plaintiffs in support of their bad faith argument are entirely inapposite to this dispute. See American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940) (reversing confirmation of municipality's reorganization plan where fiscal agent representing municipality was also representing holders of municipality's bonds and did not disclose its conflict of interest to creditors); In re SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999) (chapter 11 petition dismissed as bad faith filing because debtor was financially healthy, had not incurred significant litigation costs, and alleged no credible reason for filing other than gaining litigation advantage); In re R.V.P., Inc., 269 B.R. 851 (Bankr. D. Idaho 2001) (setting aside order authorizing debtor to assume executory contract on the grounds that debtor failed to disclose to court its default under the contract and debtor failed to provide sufficient notice to supplier, the other party to the contract, so that supplier could appear and defend its interests).

the Plea Agreement or the *Judgment Order*[5] of the United States District Court for the Southern District of Ohio enforcing the Plea Agreement and containing the terms of probation. Even if the IP Plaintiffs' assertions of probation violations were correct, which they are not, it is the DOJ that is the proper party to raise those arguments. As of this filing, the Monitor and the Debtors are aware of no objection to recognition from the DOJ or the probation department supervising AG-US, both of which were served with notice pursuant to the Notice Order.

7. In order to claim standing to be heard on issues relating to the Plea Agreement, the IP Plaintiffs must satisfy not only the requirements of section 1109(b) of the Bankruptcy Code but also well-developed federal prudential standing requirements. Courts have denied prudential standing in instances where a party is merely seeking to assert the rights of a third party. See, e.g., Kane v. Johns-Manville Corp., 843 F.2d 636, 645 (2d Cir. 1988); In re Century Glove, Inc., Case No. 90-400, 1993 WL 239489, at *3 (D. Del. Feb. 10, 1993). As the Second Circuit has explained:

> Though this limitation is not dictated by the Article III case or controversy requirement, the third-party standing doctrine has been considered a valuable prudential limitation, self-imposed by the federal courts. In *Singleton,* the Supreme Court articulated two important policies justifying such a limitation: "first, the courts should not adjudicate [third-party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights."

Johns-Manville, 843 F.2d at 643, citing Singleton v. Wulff, 428 U.S. at 114. Those policies are clearly implicated here. The DOJ brought the criminal case against AG-US and settled with AG-US. It is both better positioned than the IP Plaintiffs to assert its rights under the Plea Agreement and better informed than the IP Plaintiffs as to what its rights are.

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[5] U.S. v. Arctic Glacier International, Inc., Case No. 09-00149 (S.D. Ohio Mar. 3, 2010) [Docket No. 54].

8. Prudential standing limitations may be imposed by a bankruptcy court despite the broad ambit of Section 1109(b). "[C]ourts are, with increasing frequency, using the doctrine of standing to cut off parties who attempt to raise the rights of other parties who have not advanced their own interests." In re Myers, 168 B.R. 856, 862 (Bankr. D. Md. 1994); see also In re Refco Inc., 505 F.3d 109, 117 (2d Cir. 2007) (stating that standing under section 1109(b) does not exist for a party seeking to assert a right that is purely derivative of another party's rights in the bankruptcy proceeding); In re Innkeepers USA Trust, 448 B.R 131 (Bankr. S.D.N.Y. 2011) (denying standing under 1109(b) to certain of the debtors' preferred shareholders that were seeking, in their capacity as CMBS certificateholders, to assert the rights of a CMBS trust). The prudential limitation on a party's ability to assert the rights of another is

> particularly relevant in the bankruptcy context[,] [as] [b]ankruptcy proceedings regularly involve numerous parties, each of whom might find it personally expedient to assert the rights of another party even though that other party is present in the proceedings and is capable of representing himself.

Myers, 168 B.R. at 863, citing Johns-Manville, 843 F.2d at 644. Here, the IP Plaintiffs argue that this Court's recognition of the Canadian Proceeding would violate the terms of AG-US's probation and assert that other probation terms were breached when the Debtors granted liens as security for the DIP Facility. Objection ¶ 12. Therefore, the IP Plaintiffs ask the Court to deny recognition. The IP Plaintiffs are not party to the Plea Agreement. The fact that the IP Plaintiffs claim to have intervened[6] in the criminal prosecution of AG-US is irrelevant to their standing as they are non-parties to the Plea Agreement. Objection ¶ 2. Nor are the IP Plaintiffs aligned in interest with the DOJ, as their interests as civil litigants are far narrower than those of the DOJ,

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6 Contrary to the IP Plaintiffs' statements, the IP Plaintiffs were not "intervenors" in the criminal proceeding but appeared under the auspices of the Crime Victims' Rights Act, 18 U.S.C. § 3771. Render Declaration ¶ 4.

which is concerned with enforcement of U.S. laws and deterrence of offenders, among other matters.[7] The IP Plaintiffs' Objection improperly asserts the rights of the DOJ and therefore presents "precisely the situation where the third-party standing limitation should apply." Johns-Manville, 843 F.2d at 645.

C. *The IP Plaintiffs Erroneously Interpret Canadian Law*

9. The IP Plaintiffs mistakenly assert that the CCAA does not allow the filing of class proofs of claim and is therefore contrary to United States public policy. This assertion is incorrect, and ignores the flexibility inherent in the CCAA. As a threshold matter, the CCAA does not explicitly prohibit or allow the filing of a class claim. Much like the Bankruptcy Code, the CCAA does not contain provisions outlining the treatment of all claims of alleged creditors and the methods by which such parties may assert their claims. That lack of explicit statutory guidance, however, does not mean that the Canadian Court is prohibited from accepting a class claim pursuant to a claims procedure order. Rather, the Monitor is advised by its Canadian counsel, Osler Hoskin & Harcourt LLP ("Osler"), that the CCAA does not prohibit the filing of a class claim.

10. Contrary to the IP Plaintiffs' assertions, the MuscleTech court in Canada did not refuse to consider class claims because of their inherent status as class claims, but disallowed those claims on the basis that they were filed after the expiration of a court-approved deadline for filing proofs of claim. MuscleTech Research & Development (Re), (Aug. 16, 2006) 06-CL-6241 (Ont. Sup. Ct. Jus.). In MuscleTech, other tort claimants had been granted representative status in the proceedings and settlements had already been entered into on the

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7 The Mission Statement of the U.S. Department of Justice is "To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." http//www.justice.gov.

basis of the quantum of claims that existed upon the expiration of the claims bar date. Indeed, the MuscleTech court noted that there was no prohibition in the CCAA on class claims and specifically stated that "a representative claim may therefore be possible." Id. ¶ 37. A copy of the MuscleTech decision is annexed hereto as Exhibit A.

11. In further support of the proposition that class claims are not prohibited by Canadian law, annexed hereto as Exhibit B is a true and correct copy of a recent claims procedure order entered in the Priszm Income Fund CCAA proceeding. Priszm Income Fund (Re), (June 29, 2011) CV-11-9159 (Ont. Sup. Ct. Jus.). This claims procedure order provides for the filing of representative claims against one or more directors or officers of the CCAA applicant. Not only could a similar claims procedure order entered by the Canadian Court allow the IP Plaintiffs to file a class claim, but it would also preserve the IP Plaintiffs' due process rights by providing a forum in which the IP Plaintiffs can be heard on all matters related to their alleged claim.

12. Confronting the differences between Canadian and U.S. law in MuscleTech's chapter 15 cases, the United States District Court for the Southern District of New York observed that a Canadian claims procedure that denied certain claimants the right to a jury trial was not manifestly contrary to United States public policy. See In re MuscleTech Research & Development Inc., 349 B.R. 333, 335-36 (S.D.N.Y. 2006) (holding that "neither § 1506 nor any other law prevents a United States court from giving recognition and enforcement to a foreign insolvency procedure for liquidating claims simply because the procedure alone does not include a right to jury"). In this case, where the CCAA does not exclude the possibility of a class claim and where a claims procedure order has not yet been entered or considered by the Canadian Court, it would be contrary to well-established principles of comity for this Court to

predetermine that the Canadian Court's claims procedures will be manifestly contrary to United States public policy.

13. Bankruptcy courts throughout the United States have uniformly recognized that a proceeding under the CCAA is a collective proceeding that "consider[s] the rights and obligations of all creditors." In re British Am. Ins. Co. Ltd., 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010); see also In re Catalyst Paper Corp., Case No. 12-10221 (Bankr. D. Del. Mar. 5, 2012); In re Angiotech Pharmaceuticals, Inc. Case No. 11-10269 (Bankr. D. Del. Feb. 22, 2011); In re EarthRenew IP Holdings LLC, Case No. 10-13363 (Bankr. D. Del. Oct. 22, 2010); In re Grant Forest Products, Case No. 10-11132 (Bankr. D. Del. April 19, 2010); In re Fraser Papers, Inc., Case No. 09-12123 (Bankr. D. Del. July 13, 2009); In re Biltrite Rubber (1984), Inc., Case No. 09-31432 (Bankr. N.D. Ohio Apr. 2, 2009); In re Nortel Networks Corporation, Case No. 09-10164 (Bankr. D. Del. Jan. 14, 2009); In re MAAX Corp., Case No. 08-11443 (Bankr. D. Del. July 14, 2008); In re Destinator Technologies Inc., Case No. 08-11003 (Bankr. D. Del. June 6, 2008). Despite the IP Plaintiffs' assertions, the Canadian Proceeding undoubtedly provides for the controlled adjustment of the Debtors' liabilities for the benefit of all creditors. There is no question that the Initial Order of the Canadian Court is consistent with the CCAA. There is nothing in the record to support any concern that the Canadian Court is unwilling or unable to fairly interpret and enforce the CCAA's statutory mandates or to provide affected U.S. creditors with notice and an opportunity to be heard.

14. In view of those facts and the ample precedent that a CCAA proceeding does not unduly prejudice U.S. creditors, there can be no assertion that this Court's recognition of the Canadian Proceeding as a foreign main proceeding would fall within the narrow definition of "manifestly contrary" to United States public policy. See Ackermann v. Levine, 788 F.2d

830, 842 (2d Cir. 1986) (recognizing the "narrowness of the public policy exception to enforcement [of foreign judgments]" and noting "[a]s Justice Cardozo so lucidly observed: 'We are not so provincial to say that every solution to a problem is wrong because we deal with it otherwise at home'").

15. Based on the foregoing, this Court should overrule the Objection and recognize the Canadian Proceeding as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code and grant the additional relief requested in the Verified Petition, including the application of section 364(e) of the Bankruptcy Code to and for the benefit of the lenders under the DIP Facility.

II. The IP Plaintiffs' Withdrawal Motion is Untimely and Duplicative

16. The Withdrawal Motion should be quashed as untimely and the relief requested therein should be denied as duplicative of the Objection. Local Rule 9006-1 requires that "all motion papers shall be filed and served . . . at least fourteen (14) days (and an additional three (3) days if service is by mail) prior to the hearing date." All creditors received notice that the Recognition Hearing Date would be March 16, 2012. All creditors were served with that notice no later than Friday, February 24, 2012 pursuant to the Notice Order. Consequently, the IP Plaintiffs had the opportunity, which they did not take, to file the Withdrawal Motion in a timely way to be heard on March 16, 2012. Even if they had not had that opportunity, the IP Plaintiffs could have moved for shortened notice pursuant to Local Rule 9006-1(e). They did not. Consequently, the Withdrawal Motion should be quashed. In the alternative, this Court should deny the Withdrawal Motion at the Recognition Hearing, as the Monitor, the Debtors, and the DIP Lenders have addressed the issues it raises in the Responses.

17. Time is of the essence for the Debtors, and the IP Plaintiffs should not be permitted to delay a decision on recognition past the previously scheduled Recognition Hearing date, of which the IP Plaintiffs had ample notice. For the reasons described more fully above, and in the Debtors' Response and the DIP Lender's Response, the Debtors will be unable to conduct a robust sales process for the benefit of all creditors, and continue going-concern operations, without access to the complete DIP Facility. The alternative is likely a forced liquidation of the Debtors' assets.

18. The DIP Facility Commitment Letter conditions Stage 2 Availability on, among other things, entry of a Recognition Order by this Court. Commitment Letter at p. 12. Events of Default as to the DIP Facility include "the issuance of any court order staying, reversing, vacating or otherwise modifying the terms of the DIP Facility or DIP Charge." Id. at p. 20. Access to Stage 2 Availability is necessary for the Debtors to continue going-concern operations, meet payroll obligations, and advance the sales process. As described more fully in the First Report of the Monitor, which the Monitor has filed concurrently herewith, the sales process has already garnered indications of interest from a number of credible bidders. See First Report of the Monitor ¶ 5.3, 5.4, 5.8. Delaying recognition due to the untimely filed Withdrawal Motion would jeopardize access to the DIP Facility and consequently put the sales process at risk. The IP Plaintiffs, as creditors allegedly holding contingent, unliquidated, unsecured claims, should not be permitted to derail a process previously approved by the Canadian Court in the Initial Order and currently being implemented by the Debtors and the Monitor.

19. Moreover, the Withdrawal Motion is largely duplicative of the IP Plaintiffs' Objection. The Withdrawal Motion essentially seeks the same relief as the Objection in that, should the Court deny recognition of the Canadian Proceeding, the Canadian Court's

Initial Order provisions authorizing the DIP Facility would not be enforceable as to U.S. assets of the Debtors. As this Court will necessarily adjudicate the IP Plaintiffs' request for relief as part of its consideration of final recognition, the Withdrawal Motion will be moot following the Court's decision. For the reasons described herein, the relief requested in the untimely filed Withdrawal Motion should be denied on a final basis at the Recognition Hearing, or the Withdrawal Motion should be quashed.

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CONCLUSION

WHEREFORE, the Monitor respectfully requests that this Court overrule the Objection, deny or quash the Withdrawal Motion, and enter the Recognition Order, as proposed, giving full force and effect to the Initial Order in the United States, and grant such other and further relief as this Court deems just and proper.

Dated: March 13, 2012
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Matthew B. Lunn

Robert S. Brady (No. 2847)
Matthew B. Lunn (No. 4119)
Ryan M. Bartley (No. 4985)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

- and -

WILLKIE FARR & GALLAGHER LLP
Marc Abrams
Mary K. Warren
Alex W. Cannon
787 Seventh Avenue
New York, New York 10019-6099
Telephone: (212) 728-8000
Facsimile: (212) 728-8111

Co-Counsel to the Monitor and Foreign Representative

EXHIBIT A

MuscleTech Decision

2006 CarswellOnt 4929, 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131

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2006 CarswellOnt 4929, 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131

Muscletech Research & Development Inc., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

In the Matter of Muscletech Research and Development Inc. and Those Entities Listed on Schedule "A" Hereto

Ontario Superior Court of Justice [Commercial List]

Mesbur J.

Heard: July 31, 2006
Judgment: August 16, 2006[FN*]
Docket: 06-CL-6241

Counsel: Fred Myers, David Bish for Applicants

Kevin P McElcheran for Representative Plaintiffs

James H. Grout, Kyla Mahar for Krys Osborne, on behalf of herself and all other similarly situated Calfornia consumers

Derrick Tay for Iovate Health & Sciences, DIP Lender

Jeff Carhart for Ad hoc Tort Claimants Committee

Natasha MacParland for Monitor, RSM Richter Inc.

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Company was granted protection under Act to resolve large number of lawsuits — Call for claims order provided for broad notice to potential claimants — Creditors not filing proof of claim before specified date were barred from making claim — Four claimants purported to file proofs on behalf of all other similarly situated persons — Claimants had uncertified class actions pending in United States — Other creditors brought motion to prohibit representative claims — Motion granted — Act did not expressly prohibit representative claims but none had yet been allowed — This was not appropriate case to exercise discretion to allow claims because process under Act adequately protected interests of potential claimants — Claimants had as much notice and opportunity to file proofs as those who did —

Absence of additional claims suggested they may not exist — Increasing potential claims after others were settled would prejudice success of process — Representative claims could continue as individual claims.

Cases considered by *Mesbur J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1999), 1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy" — considered

s. 121(1) — considered

s. 124 — considered

s. 124(1) — considered

s. 124(3) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 12(1) "claim" — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10 — considered

MOTION by creditors under *Companies' Creditors Arrangement Act* to prohibit representative claims.

2006 CarswellOnt 4929, 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131

Mesbur J.:

Nature of the motions:

1 These motions raise the question of whether plaintiffs in uncertified class actions may file claims in the claims process in this CCAA proceeding on behalf of themselves and all other similarly situated plaintiffs. The applicant, the Monitor, the DIP lender and the Ad Hoc Tort Claimants Committee all take the position that claims filed in this manner are a nullity, and should be forever barred.

2 Mr. McElcheran, on behalf of four plaintiffs in four yet-uncertified US class actions, and Mr. Grout and Ms. Mahar for a plaintiff in a yet-uncertified class action in California all are of the view that there is jurisdiction under the CCAA to permit such representative claims, and either the claims should be permitted, or alternatively, the stay of proceedings imposed by the CCAA should be lifted to allow them to proceed to certification motions in the United States for their respective actions. I will refer to Mr. McElcheran's clients as the "Representative Plaintiffs", and Mr. Grout's clients as the "California Consumers".

Some history:

3 The applicants, whom I will refer to collectively as "Muscletech", are comprised of the applicant, Muscletech, and its various subsidiaries and related companies listed in Schedule "A". Muscletech is a Canadian company. Historically, it was in the business of the manufacture and sale of dietary supplements. Some of these supplements contained the chemical ephedra, while others contained what have been referred to as prohormones. Muscletech was not alone in selling supplements containing these compounds. A number of American companies did so as well. Because of problems surrounding the compounds, Muscletech's products have ceased to contain them since 2002. Nevertheless, there was significant litigation, particularly in various states in the United States, brought by the consumers of these products, against both Muscletech and other companies.

4 The litigation is essentially of two kinds. The ephedra litigation primarily concerns those consumers of products containing ephedra who allege they have suffered physical damages as a result of using these products. The parties here refer to that litigation as the Products Liability litigation. The prohormone litigation has been brought by consumers of products containing prohormone who allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, must have contained a controlled substance, namely anabolic steroids. In the first instance, the prohormone consumers complain of being the victims of false and misleading advertising. In the second, they complain of being illegally sold a controlled substance.

5 For the purposes of this motion, there are several of these lawsuits that are important. First, there is the group of four yet to be certified class actions relating to prohormone claims. These have been described as the Hannon Claim, the Hochberg Claim, the Rodriguez Claim and the Guzman Claim, or collectively, the Representative Plaintiffs' Claims.

6 The Hannon Claim was commenced in the State of Florida. The Hochberg and Rodriguez claims were commenced in New York State, and the Guzman claim was commenced in California. Using the multi-district litigation (MDL) provisions available in the United States, all four proceedings have been moved to the United States District Court for the Southern District of New York (the "U.S. District Court") in New York City, to be managed, along with all the other related ephedra litigation by Justice Rakoff of that court. As I have said, I will refer to these four claims as the "Representative Plaintiffs' Claims", and to the plaintiffs in them as the "Representative Plaintiffs".

7 In addition to the Representative Plaintiffs' Claims, there is a further yet-to-be-certified class action in the United States that is germane to this motion. It has been described as the California Consumers' Claim. Unlike the

Representative Plaintiffs' Claims, the California Consumers' Claim is an ephedra claim, seeking damages for personal injuries. I refer to this action as the "California Consumers' Claim", and its plaintiffs as the "California Consumers". The California Consumers participated on the motion simply to support the Representative Plaintiffs' position; they seek no relief themselves.

8 In January 2006, Muscletech sought and was granted CCAA protection in this court. The initial stay has been extended throughout the proceedings to August 11, 2006.[FN1] As the applicants' factum puts it, seeking CCAA protection was done "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" against the applicants and others. These lawsuits relate to the products that Muscletech and others sold.

9 Once the initial order was granted, the Monitor commenced ancillary proceedings in the USA under Chapter 15 of the U.S. Bankruptcy Code. These proceedings are before the U.S. District Court as well. As a result of these ancillary proceedings, there is a similar stay in the U.S.

10 At the same time, the Monitor also applied for a Temporary Restraining Order and Preliminary Injunction (TRO/PI Application) in the U.S. District Court, to prohibit anyone commencing or continuing any products liability actions. The TRO/PI application was granted. That application is referred to as the "Adversary Proceeding" under Chapter 15 of the U.S. Bankruptcy Code.

11 On February 8, 2006, an Ad Hoc committee of products liability claimants sought and was granted representative status in this CCAA proceeding. On March 3, 2006, this court made a Call for Claims order. American counsel for both the Representative Plaintiffs and the California Consumers were served with the motion and draft order in relation to the Call for Claims order, just as they have been served throughout these CCAA proceedings. Although many interested parties made submissions concerning the terms of the order both before the hearing and at the hearing itself, counsel for the Representative Plaintiffs and California Consumers did not. They took no steps, as did the Ad Hoc Committee, to obtain representative status, or direction as to how they might put forward their claims.

12 As I have mentioned, Muscletech sought and obtained an order in the USA bankruptcy court, recognizing and enforcing the Ontario CCAA order, including its automatic stay. The Call for Claims order was similarly recognized and approved by Judge Rakoff in the U.S. District Court on March 22, 2006. Judge Rakoff is managing all the ephedra litigation, as well as the motions to recognize and enforce orders made here under these CCAA proceedings, and the Adversary Proceeding as well.

13 The Call for Claims order established a process for calling for what were defined as both "claims" and "product liability claims". The object of the order was to identify everyone with any kind of claim against Muscletech, its affiliates, and some defined Third Parties. The process envisions "a person" completing a proof of claim, with particulars of the claim, and sending it to the Monitor.[FN2] In this way, the Monitor could identify what Mr. Tay for the DIP lender has called the "total universe of potential claims". The Call for Claims order does not set the process for deciding on the validity of any of the claims. Its purpose is simply to identify them.

14 The Call for Claims order set out comprehensive definitions of what constitutes both types of claims, as well as an elaborate method of giving broad notice to anyone who might have a claim. In this case, the order required the Monitor to send a package containing a proof of claim and other necessary information to all known creditors of Muscletech. It also required that the Monitor file these documents and the Call for Claims order electronically on the U.S. District Court's website in all three pieces of litigation there. These are described in the Call for Claims order as the "U.S. Chapter 15 Proceedings", the "U.S. Chapter 15 Adversary Proceedings" and the "U.S. MDL Proceedings". The order required the Monitor to publish notices to creditors in the national edition of the *Globe and Mail* newspaper, the *Wall Street Journal*, and *USA Today*. The Monitor was also required to post copies of the documents and Call for Claims order on the Monitor's website. The Monitor did all these things.

15 All proofs of claim were to be filed by May 8, 2006. This date was defined in the order as the Claims Bar date. Any creditor who has not filed a proof of claim by that date is forever barred from making or enforcing any claim, and is not entitled to participate as a creditor in the CCAA proceedings, or to vote at any meeting of creditors. Prior to the Claims Bar date, the members of the Ad Hoc Tort Claimants Committee filed individual proofs of claim. The California Consumers also filed individual proofs of claim.

16 On May 8, the Representative Plaintiffs, (that is, Hannon, Hochberg, Rodriguez and Guzman), filed proofs of claim, claiming to do so on their own behalves, and "on behalf of all other similarly situated persons". Unlike the Representative Plaintiffs, the California Consumers filed individual proofs of claim. Even though they have done so, they support the Representative Plaintiffs' position on this motion.

17 The monitor received some 33 ephedra claims, both from the California Consumers individually, and from others, including the members of the Ad Hoc Tort Committee. The only prohormone claims the monitor has received are from the Representative Plaintiffs. No other individual claims relating to prohormones have been filed.

18 After the claims bar date, this court made a Claims Resolution order. That order, dated June 8, 2006 provided, among other things, for a method for the monitor to review proofs of claim, accept or reject them, and for a claims resolution process for resolving disputed claims. The Claims Resolution order is subject to an earlier Mediation Order, which provided for mediation of ephedra claims. Of the 33 ephedra claims filed, 30 have already been settled through the mediation process. The mediation process is part of a larger mediation process in New York, in the context of the much broader ephedra litigation that Judge Rakoff is managing. This litigation is referred to as the MDL, or multi-district litigation, in the U.S.

19 No one has appealed the Call for Claims order. No one moved to vary its terms, prior to the claims bar date. No one has appealed the Claims Resolution order. None of the Representative Plaintiffs have taken any steps in the United States (where their class actions are pending), to lift the stay of proceedings there to permit their actions to proceed to certification.

The parties and their positions:

20 On these motions the applicants take the position that the proofs of claims by the Representative Plaintiffs are a nullity, since there is no provision in either the CCAA or any of the court orders that permit these claims to be made either as representative claims, or class action claims. They say that to allow these claims would unreasonably delay the CCAA process, and would undermine the process that has already been established, which all stakeholders rely on.

21 The DIP lender supports the applicants' position. The DIP lender takes the position that if the proposed claims were allowed, there is a potential for significant prejudice to the DIP lender who is funding the process, and will ultimately fund any plan of compromise. The DIP lender has already settled with a significant number of other tort claimants (albeit ephedra, as opposed to prohormone claimants). The DIP lender says it reached its settlement on the basis of a particular "known universe" of claims. It suggests that allowing these indeterminate claims, and claimants, at this late date, would prejudice its position.

22 The Ad Hoc Committee of Tort Claimants supports the applicants as well. The Committee takes the position that even before the Call for Claims order was made, it was able to obtain an order allowing it to participate as a Committee in the CCAA process and obtain what is called representative status in the proceedings. It says that if the Ad Hoc Committee was able to do so within the CCAA process, these other proposed claimants could, and should have done the same. Since the other proposed claimants did not, and took no steps to appeal the Call for Claims order, and indeed, declined to participate in the motion in which its terms were set, they should be barred from doing so at this late date.

23 The Monitor also supports the applicants' position, saying the CCAA process gave the Representative Plaintiffs adequate opportunity to file individual claims. The forms were readily accessible in plain English. The Products Liability claimants, that is, the members of the Ad Hoc Committee, were able to put individual claims forward in the CCAA process and the Representative Plaintiffs had the same opportunity to participate in exactly the same way. Lastly, the Monitor says that the CCAA process is far more economic than the lengthy process of certification of class actions, particularly in the USA, where certification would have to take place. To allow this new process to be overlaid on the existing CCAA process would be cumbersome, excessively expensive and time consuming.

24 All those opposing the Representative Plaintiffs' Claims and California Consumers suggests that the real motivation for putting these claims forward is to obtain and secure payment of significant legal fees for the lawyers involved, rather than to reap any meaningful benefits for any class participants. I need not comment on what is essentially a bald allegation. I mention it only to make the record of the parties' positions complete.

25 Both the Representative Plaintiffs and the California Consumers take a contrary view. They say their clients' claims should not be defeated on what they describe as essentially procedural grounds. They suggest that fairness requires that they be permitted to file in this way. They say the current CCAA process is not so far advanced that there would be undue prejudice to any of the other stakeholders, if their proofs of claims were allowed to be filed as representative claims.

The law and analysis:

26 The first question to consider is whether the CCAA permits representative claims, or class action claims. The next issue is whether this particular CCAA process adequately protected the interests of this potential group of claimants. Lastly, given the inherent jurisdiction of the court, I must also address whether this case might be an appropriate case to exercise my discretion and permit the Representative Plaintiffs' Claims to proceed in some fashion at this time.

Does the CCAA permit representative claims?

27 The CCAA neither expressly permits nor forbids representative claims. The CCAA defines "claim" in s. 12(1). It says that for the purposes of the CCAA, "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." Thus, to determine what a CCAA "claim" is, one must turn to the *Bankruptcy and Insolvency Act*, and the definition of debts "provable in bankruptcy".

28 Section 121(1) of the BIA deals with "claims provable", and says:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason on any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

29 The BIA has a mechanism to determine whether a contingent or unliquidated claim is a provable claim. The mechanism is found in section 135(1.1), which provides:

> The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

30 A determination under s. 135(1.1) is "final and conclusive", unless within a thirty day period after the trustee serves a notice of disallowance, the person to whom the notice of disallowance was sent appeals the trustee's decision.

31 Section 124 of the BIA deals with the proof of claims. First, it provides in subsection (1) that creditors shall prove claims. It says: "Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made." The section goes on, in subsection (3) to deal with who may make proof of claims. The subsection says: "The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person authorized, it shall state his authority and means of knowledge."

32 The term "creditor" is not specifically defined in the CCAA. The applicants therefore point to the definition of "creditor" in the Call for Claims order itself. There, creditor is defined as "any *Person* having a Claim or a Product Liability Claim" [emphasis added]

33 From the interplay of the sections of the CCAA and the BIA, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriquez and Guzman personally.

34 While this interpretation may be technically correct, it is also clear that representative orders of some kind have been used in other CCAA proceedings[FN3], and even in this case.[FN4] In addition, there have been cases in which a stay has been lifted in order to permit a potential class proceeding to file certification materials,[FN5] while in other cases, a motion to lift the stay for that purpose and to file a class claim have been denied.[FN6] As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted.[FN7]

35 It is noteworthy here, that even though Farley J made an order granting a "representation and ancillary order regarding funding" to the Ad Hoc Committee in this proceeding, there was no order permitting "representative" claims to be filed; each member of the committee filed an individual proof claim with the monitor.

36 From this I conclude that while it is possible at least to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed. Canadian courts have not yet permitted a filing of a proof of claim by a plaintiff in an uncertified class proceeding on behalf of itself and other members of the class. At best, our courts have at least once lifted a stay to permit the filing of certification materials. Any steps beyond that would be the subject of a further motion.[FN8] In the case of *Re Air Canada*, however, there was no suggestion that certification motions were going to be made in a foreign jurisdiction, as would be the case here.

37 While a representative claim may therefore be possible, the next question is whether this is a proper case to either permit this kind of "representative" claim, without the necessity of the individual members of the class filing claims, or whether the stay should be lifted to permit certification motions to proceed in the United States. This involves a discussion first of whether the orders here gave adequate protection to this potential group or groups of creditors, and second, whether this might be an appropriate case for the court to exercise its discretion and grant the relief the Representative Plaintiffs seek.

Did the CCAA process adequately protect the interests of these potential claimants?

38 When I consider the CCAA process here, I am drawn inescapably to the conclusion that it adequately protected the interests of these potential claimants, had they availed themselves of the process as other claimants did.

39 The Ad Hoc committee obtained a representation order, and participates on that basis, although its members filed individual proofs of claim. Even the California Consumers filed individual claims. If the members of the Representative Plaintiff's proposed class had wished to file proofs of claim, they had as much notice and opportunity to do so as anyone else. This is particularly so since the required notices were published not only in two American nation-wide newspapers, but also in three locations on the U.S. District Court's website. Not a single "similarly situated" person, other than Hannon, Hochberg, Rodriguez and Guzman filed a proof of claim. They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests there may be no other claimants at all. The process adequately protected the interests of these potential claimants. They simply chose not to utilize that process.

Should the court exercise its discretion?

40 While the court clearly has a broad discretion in CCAA matters[FN9] , I am not persuaded that this is a proper case to exercise that discretion either to allow the representative claims as they are, or to lift the stay to permit certification motions to proceed.

41 First, representative claims *per se*, have not been recognized in Canadian jurisprudence in the context of CCAA proceedings. It is clear that rule 10 of the *Rules of Civil Procedure* permits the court to "appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

42 Rule 10, however, is generally used in estates and trusts cases, or as what has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act*, particularly in pension fund disputes.[FN10] I was referred to no case in which the rule was specifically used in CCAA proceedings to permit the filing of a representative or class claim. I do not see rule 10 as useful in these CCAA proceedings, which has created its own process and procedures. Here, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.

43 Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made by the Representative Plaintiffs and California Consumers should have been made before Farley J when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.

44 The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

Disposition:

45 The applicants' motion is therefore granted, and the representative plaintiffs' motion is dismissed. To be clear, the "representative" claims are to be considered as individual claims for each of Hannon, Hochberg, Rodriguez and Guzman. As the parties have agreed, there will be no order as to costs.

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Formulations Ltd.

MT Canadian Supplement Trademark Ltd.

Mt Foreign Supplement Trademark Ltd.

MC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a NEW HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

Motion granted.

FN* Additional reasons at *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 5484, 25 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

FN1 Since hearing this motion, I have granted an order extending the stay to November 10 of this year. Judge Rakoff has made a similar order in the corresponding US litigation.

FN2 See "Notice to Creditors Re: Notice of Call for Claims and Product Liability Claims", Schedule "E" to the call for claims order.

FN3 See, for example, *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]). See also the order of Blair J. in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* dated July 29, 1998, in which he appointed representative counsel for various groups of claimants. It is noteworthy, however, that he did not provide for the filing of representative proofs of claim in the order.

FN4 See the reasons of Farley J. dated February 6, 2006 at paragraph 8, in which he says: "I understand that later this

week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]" Again, nothing in the order permitted a representative *claim* to be filed.

FN5 *Re Air Canada*, Court File # 03-CL-4932. Endorsement of Farley J dated September 24, 2003.

FN6 *Re Canadian Red Cross*, *supra*

FN7 *Re Canadian Red Cross*, note 2, above, at page 197

FN8 *Re Air Canada*, note 5, above at paragraph 18.

FN9 The *CCAA* has been described as having a "broad remedial purpose", and cases have stated the Act should be given a large and liberal interpretation. See Holden & Morawetz *The 2006 Annotated Bankruptcy and Insolvency Act*, [Carswell, 2006] pp 1163-64, and these cases referred to there.

FN10 See *Overview* to rule 10, Killeen, Morton and James, *Ontario Superior Court Practice*

END OF DOCUMENT

EXHIBIT B

Priszm Income Fund Claims Procedure Order

Court File No. CV-11-9159-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 29TH
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 2011

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC. AND KIT FINANCE INC.

(the "**Applicants**")

ORDER
(D&O Claims Solicitation Procedure)

THIS MOTION, made by Priszm Income Fund, Priszm Canadian Operating Trust, Priszm LP, Priszm Inc. and Kit Finance Inc. (collectively, the "**Priszm Entities**") for an order approving a procedure for the solicitation of claims against their current and former directors and officers, 2279549 Ontario Inc. in its capacity as the Chief Restructuring Officer of the Priszm Entities, Deborah Papernick, and Jim Robertson and 2289500 Ontario Inc., in its capacity as Chief Restructuring Officer of the Priszm Entities and authorizing and directing FTI Consulting Canada Inc., in its capacity as the Court-appointed monitor of the Priszm Entities (the "**Monitor**") to administer the D&O Claims Solicitation Procedure (as defined below) in accordance with its terms, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Deborah Papernick sworn June 23, 2011 and the Third Report of the Monitor, and on hearing the submissions of counsel to the Priszm

Olymel, JMC

Entities, the Monitor, Prudential Investment Management Inc., Yum! Restaurants International (Canada) Company, 2279549 Ontario Inc., Deborah Papernick, Jim Robertson, 2289500 Ontario Inc., Sysco Canada and 20 VIC Management Inc., Ivanhoe Cambridge Inc., Morguard Investments Limited, Retrocom Mid-Market REIT, Primaris Retail Real Estate Investment Trust, and Oxford Properties Group Inc., no one appearing for any other person on the Service List, although properly served as appears from the affidavit of service, filed:

DEFINITIONS

1. **THIS COURT ORDERS** that for purposes of this Order, in addition to the terms defined elsewhere herein, the following terms shall have the following meanings:

   a) "**Applicants**" means Priszm Income Fund, Priszm Canadian Operating Trust, Priszm Inc. and Kit Finance Inc.;

   b) "**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;

   c) "**CCAA**" means the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36;

   d) "**Court**" means the Ontario Superior Court of Justice (Commercial List);

   e) "**D&O Claim**" means an Initial D&O Claim or a Subsequent D&O Claim;

   f) "**D&O Claims Solicitation Procedure**" means the procedures outlined in this Order, as they may be amended by further order of the Court, including the Schedules hereto;

   g) "**D&O Creditor**" means any Person asserting a D&O Claim;

   h) "**Directors and Officers**" means

      i) the current and former directors of any of the Priszm Entities;

      ii) the current and former officers of any of the Priszm Entities;

      iii) Deborah Papernick and 2279549 Ontario Inc., in its capacity as Chief Restructuring Officer of the Priszm Entities; or

iv) Jim Robertson and 2289500 Ontario Inc., in its capacity as Chief Restructuring Officer of the Priszm Entities;

i) "**Filing Date**" means March 31, 2011;

j) "**FTI Claims Site**" means https://cmsi.ftitools.com/priszm;

k) "**Information Submission Form**" means a form substantially in accordance with the form attached hereto as **Schedule "C"**;

l) "**Initial D&O Claims Bar Date**" means 5:00 p.m. (Eastern Standard time) on ~~August 19~~, 2011, or any later date ordered by the Court; September 15, or representative class of persons

m) "**Initial D&O Claim**" means any right of any Person against one or more of the Directors and Officers which arose as a result of their position, supervision, management or involvement as Director and Officer, where such right arose on or before June 30, 2011, and whether enforceable in any civil, administrative or criminal proceedings;

n) "**Initial Order**" means the Initial Order of the Honourable Mr. Justice Morawetz dated March 31, 2011, as extended, amended and restated from time to time, including the Amended and Restated Initial Order of the Honourable Madam Justice Mesbur dated April 29, 2011;

o) "**Monitor's Website**" means http://cfcanada.fticonsulting.com/priszm;

p) "**Notice to Creditors of Initial D&O Claims Bar Date**" means the notice for publication substantially in the form attached as **Schedule "A"**;

q) "**Notice to Creditors of Subsequent D&O Claims Bar Date**" means the notice for publication substantially in the form attached as **Schedule "B"**;

r) "**Person**" means any individual, partnership, firm, joint venture, trust, entity, corporation, unincorporated organization, trade union, pension plan administrator, pension plan regulator, governmental authority or agency, employee or other association, or similar entity, howsoever designated or constituted; representative of a class of D&O Creditors

s) "**Subsequent D&O Claims Bar Date**" means 5:00 p.m. (Eastern Standard time) on a date to be determined by the Priszm Entities, in consultation with the Monitor, or any later date ordered by the Court; or representative class of persons

t) "**Subsequent D&O Claim**" means any right of any Person against one or more of the Directors and Officers which arose as a result of their position, supervision, management or involvement as a Director and Officer, where such right arose after June 30, 2011 and before the Subsequent D&O Claims Bar Date, and whether enforceable in any civil, administrative or criminal proceedings; and

u) "**Supporting Documentation Submission Form**" means a form substantially in accordance with the form attached as **Schedule "D"**.

ADMINISTRATION OF THE D&O CLAIMS SOLICITATION PROCEDURE

2. **THIS COURT ORDERS** that the D&O Claims Solicitation Procedure shall govern the solicitation of D&O Claims against the Priszm Entities and shall be administered by the Monitor through the FTI Claims Site, except as otherwise provided for in this Order.

3. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA and under the Initial Order, is hereby directed and empowered to take such actions and fulfill such roles as are contemplated by this Order.

SOLICITATION OF INITIAL D&O CLAIMS

4. **THIS COURT ORDERS** that:

a) the Monitor shall cause the Notice to Creditors of Initial D&O Claims Bar Date to be published in each of *The Globe and Mail* (national edition) and *La Presse* as soon as practicable after the date of this order; and

b) the Monitor shall cause the Notice to Creditors of Initial D&O Claims Bar Date to be posted on the Monitor's Website as soon as practicable after the date of this order and cause it to remain posted until its discharge as Monitor of the Priszm Entities.

5. **THIS COURT ORDERS** that any Person that wishes to assert an Initial D&O Claim must either:

a) file their Initial D&O Claim together with all relevant supporting documentation via the FTI Claims Site at https://cmsi.ftitools.com/priszm by no later than the Initial D&O Claims Bar Date; or

b) if the Person is unwilling or unable to submit its Initial D&O Claim via the FTI Claims Site, file an Information Submission Form and Supporting Documentation Form with the Monitor by no later than the Initial D&O Claims Bar Date.

6. **THIS COURT ORDERS** that any D&O Creditor with an Initial D&O Claim who does not file proof of such an Initial D&O claim in accordance with the D&O Claims Solicitation Procedure by the Initial D&O Claims Bar Date shall be forever barred from asserting or enforcing such Initial D&O Claim against any of the Directors and Officers and the Directors and Officers shall not have any liability whatsoever in respect of such Initial D&O Claim, and such Initial D&O Claim shall be forever barred and extinguished.

SOLICITATION OF SUBSEQUENT D&O CLAIMS

7. **THIS COURT ORDERS** that the Priszm Entities, in consultation with the Monitor, will establish a Subsequent D&O Claims Bar Date.

8. **THIS COURT ORDERS** that the Monitor shall publish the Notice to Creditors of Subsequent D&O Claims Bar Date in each of *The Globe and Mail* (national edition) and *La Presse* as soon as practicable after the Subsequent D&O Claims Bar Date has been set and not less than four (4) weeks prior to the Subsequent D&O Claims Bar Date.

9. **THIS COURT ORDERS** that the Monitor shall cause the Notice to Creditors of Subsequent D&O Claims Bar Date to be posted on the Monitor's Website as soon as practicable after the Subsequent D&O Claims Bar Date has been set not and not less than four (4) weeks prior to the Subsequent D&O Claims Bar Date and cause the notice to remain posted until its discharge as Monitor of the Priszm Entities.

10. **THIS COURT ORDERS** that any Person that wishes to assert a Subsequent D&O Claim must either:

a) file their Subsequent D&O Claim together with all relevant supporting documentation via the FTI Claims Site at https://cmsi.ftitools.com/priszm by no later than the Subsequent D&O Claims Bar Date; or

b) if the Person is unwilling or unable to submit its Subsequent D&O Claim via the FTI Claims Site, file an Information Submission Form and Supporting Documentation Form with the Monitor by no later than the Subsequent D&O Claims Bar Date.

11. **THIS COURT ORDERS** that any D&O Creditor with a Subsequent D&O Claim who does not file proof of such a Subsequent D&O claim in accordance with this D&O Solicitation Procedure by the Subsequent D&O Claims Bar Date shall be forever barred from asserting or enforcing such Subsequent D&O Claim against any of the Directors and Officers and the Directors and Officers shall not have any liability whatsoever in respect of such Subsequent D&O Claim, and such Subsequent D&O Claim shall be forever barred and extinguished.

GENERAL PROVISIONS

12. **THIS COURT ORDERS** that any D&O Creditor who wishes to submit their D&O Claim by filing the Information Submission Form and the Supporting Documentation Submission Form may download a copy of the Information Submission Form and the Supporting Documentation Submission Form from the Monitor's Website at http://cfcanada.fticonsulting.com/priszm. A D&O Creditor may also request a copy of the Information Submission Form and the Supporting Documentation Submission Form by contacting the Monitor by facsimile, email, courier, personal delivery or prepaid mail.

13. **THIS COURT ORDERS** that references to the singular include the plural and to the plural include the singular.

14. **THIS COURT ORDERS** that any D&O Creditor who submits the Information Submission Form and the Supporting Documentation Submission Form authorizes the Monitor to input the information contained therein to the FTI Claims Site and that

the Monitor shall have no liability for the information submitted other than as a result of gross negligence or wilful misconduct.

15. **THIS COURT ORDERS** that for the purposes of the D&O Claims Solicitation Procedure, all D&O Claims which are denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada noon spot rate of exchange for exchanging the currency to Canadian dollars on the Filing Date.

16. **THIS COURT ORDERS** that any document, notice or communication required to be delivered to the Monitor by a D&O Creditor pursuant to the terms of this Order must be delivered either:

a) via the FTI Claims Site at https://cmsi.ftitools.com/priszm; or

b) by facsimile, email or electronic transmission, personal delivery, courier or prepaid mail to:

FTI Consulting Canada Inc.
In its capacity as Monitor of Priszm Income Fund, Priszm Canadian Operating Trust, Priszm LP, Priszm Inc. and Kit Finance Inc.
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto ON M5K 1G8

Attention: Rachel Gillespie
Telephone: (416) 649-8057
Facsimile: (416) 649-8101
E-mail: rachel.gillespie@fticonsulting.com

17. **THIS COURT ORDERS** that in the event that the day on which any notice or communication required to be delivered pursuant to the D&O Claims Solicitation Procedure is not a Business Day then such notice or communication shall be required to be delivered on the next Business Day.

18. **THIS COURT ORDERS** that in the event of any strike, lock-out or other event which interrupts postal service in any part of Canada, all notices and communications during such interruption may only be delivered by email, facsimile transmission,

personal delivery or courier and any notice or other communication given or made by prepaid mail within the seven (7) day period immediately preceding the commencement of such interruption, unless actually received, shall be deemed not to have been delivered. All such notices and communications shall be deemed to have been received, in the case of notice by email, facsimile transmission, personal delivery or courier prior to 5:00 p.m. (local time) on a Business Day, when received, if received after 5:00 p.m. (local time) on a Business Day or at any time on a non-Business Day, on the next following Business Day, and in the case of a notice mailed as aforesaid, on the fourth business day following the date on which such notice or other communication is mailed.

19. **THIS COURT ORDERS** that the Monitor is authorized to use reasonable discretion as to adequacy of compliance with respect to the manner in which proof of D&O Claims and other notices are completed and executed and may, where it is satisfied that a D&O Claim has been adequately filed or proven, waive strict compliance with the requirements of this D&O Claims Solicitation Procedure; provided that nothing in this Order shall confer upon the Monitor the discretion or authority to amend or to extend the Initial D&O Claims Bar Date or the Subsequent D&O Claims Bar Date.

20. **THIS COURT ORDERS AND REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United Sates and of any notion or state to act in aid of and be complimentary to this court in carrying out the terms of this D&O Claims Procedure Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 2 9 2011

PER/PAR:

Schedule "A"

NOTICE TO CREDITORS AND OTHERS OF INITIAL D&O CLAIMS BAR DATE

**IN RESPECT OF CLAIMS AGAINST
THE CURRENT AND FORMER DIRECTORS AND OFFICERS OF
PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST,
PRISZM INC., PRISZM LP AND KIT FINANCE INC.
(collectively, the "Priszm Entities") AND/OR DEBORAH PAPERNICK AND/OR
2279549 ONTARIO INC. AND/OR JIM ROBERTSON AND 2289500 ONTARIO INC.
(collectively, the "Directors and Officers")**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C.1985, c. C-36, as amended

TO: CREDITORS AND TO ANY OTHER PERSON OR PARTIES

**NOTICE OF D&O CLAIMS SOLICITATION PROCEDURE
AND INITIAL D&O CLAIMS BAR DATE**

PLEASE TAKE NOTICE that this notice is being published pursuant to an order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated June 29, 2011 (the "**D&O Claims Solicitation Procedure Order**"). Any capitalized terms used herein but not defined have the meaning attributed to them in the D&O Claims Solicitation Procedure Order.

Any Person that believes that it has a claim against one of more Directors and Officers (as defined above) which arose as a result of the Directors and Officers' position, supervision, management or involvement as a Director and Officer on or before June 30, 2011 (an "**Initial D&O Claim**") should either:

a) go to https://cmsi.ftitools.com/priszm (the "**FTI Claims Site**") to create a user account and submit their Initial D&O Claim by following the instructions provided on the FTI Claims Site; or

b) D&O Creditors with an Initial D&O Claim who are unable or unwilling to use the FTI Claims Site may complete and deliver the Information Submission Form and the Supporting Documentation Submission Form available on the Monitor's Website at http://cfcanada.fticonsulting.com/priszm. A D&O Creditor may also request a copy of the Information Submission Form and the Supporting

Documentation Submission Form by contacting the Monitor by telephone at 1-855-492-6215 or (416) 739-2920, by fax at (416) 649-8101, by email at rachel.gillespie@fticonsulting.com or by mail at the address set out below.

The D&O Claim information required to be submitted by the FTI Claims Site must be submitted by or the Information Submission Form and Supporting Documentation Submission Form must be received by mail, fax, email, courier or hand delivery by the Monitor by **no later than 5:00 p.m. (Eastern Standard Time) on August 19, 2011** or such other date as ordered by the Court (the "**Initial D&O Claims Bar Date**").

INITIAL D&O CLAIMS WHICH ARE NOT RECEIVED BY THE INITIAL D&O CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

Notice of a claims bar date with respect to D&O Claims arising after June 30, 2011 will be posted on the Monitor's website, http://cfcanada.fticonsulting.com/priszm and published in *The Globe and Mail* (national edition) and *La Presse* once the Subsequent D&O Claims Bar Date is set by the Priszm Entities in consultation with the Monitor.

Address of the Monitor:

Priszm Income Fund and/or
Priszm Canadian Operating Trust and/or
Priszm Inc. and/or
Priszm LP and/or
Kit Finance Inc.
c/o FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of the Priszm Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto ON M5K 1G8

Attention: Rachel Gillespie

Telephone: (416) 649-8057
Facsimile: (416) 649-8101
E-mail: rachel.gillespie@fticonsulting.com

Dated at _____ this _____ day of _____, 2011.

Schedule "B"

NOTICE TO CREDITORS AND OTHERS OF SUBSEQUENT D&O CLAIMS BAR DATE

IN RESPECT OF CLAIMS AGAINST THE CURRENT AND FORMER DIRECTORS AND OFFICERS OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC., PRISZM LP AND KIT FINANCE INC. (collectively, the "Priszm Entities") AND/OR DEBORAH PAPERNICK AND/OR 2279549 ONTARIO INC. AND/OR JIM ROBERTSON AND 2289500 ONTARIO INC. (collectively, the "Directors and Officers")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C.1985, c. C-36, as amended

TO: CREDITORS AND TO ANY OTHER PERSON OR PARTIES

NOTICE OF D&O CLAIMS SOLICITATION PROCEDURE AND SUBSEQUENT D&O CLAIMS BAR DATE

PLEASE TAKE NOTICE that this notice is being published pursuant to an order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated June 29, 2011 (the "**D&O Claims Solicitation Procedure Order**"). Any capitalized terms used herein but not defined have the meaning attributed to them in the D&O Claims Solicitation Procedure Order.

Any person who believes that it has a claim against one of more Directors and Officers (as defined above) which arose as a result of such Director's or Officer's position, supervision, management or involvement as a Director or Officer of a Priszm Entity after June 30, 2011 (a "**Subsequent D&O Claim**") should either:

a) go to https://cmsi.ftitools.com/priszm (the "**FTI Claims Site**") to create a user account and submit their Subsequent D&O Claim by following the instructions provided on the FTI Claims Site; or

b) D&O Creditors with a Subsequent D&O Claim who are unable or unwilling to use the FTI Claims Site may complete an Information Submission Form and the Supporting Documentation Submission Form, available on the Monitor Website at http://cfcanada.fticonsulting.com/priszm. A D&O Creditor may also request

a copy of the Information Submission Form and the Supporting Documentation Submission Form by contacting the Monitor by telephone at 1-855-492-6215 or (416) 739-2920, by fax at (416) 649-8101, by email at rachel.gillespie@fticonsulting.com or by mail at the address set out below.

The D&O Claim information required to be submitted by the FTI Claims Site must be submitted by or the Information Submission Form and Supporting Documentation Submission Form must be received by mail, fax, email, courier or hand delivery by the Monitor by **no later than 5:00 p.m. (Eastern Standard Time) on ●, 2011** or such other date as ordered by the Court (the "**Subsequent D&O Claims Bar Date**").

SUBSEQUENT D&O CLAIMS WHICH ARE NOT RECEIVED BY THE SUBSEQUENT D&O CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

Address of the Monitor:

Priszm Income Fund and/or
Priszm Canadian Operating Trust and/or
Priszm Inc. and/or
Priszm LP and/or
Kit Finance Inc.
c/o FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of the Priszm Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto ON M5K 1G8

Attention: Rachel Gillespie

Telephone: (416) 649-8057
Facsimile: (416) 649-8101
E-mail: rachel.gillespie@fticonsulting.com

Dated at _____ this _____ day of _____, 2011.

Schedule "C"

INFORMATION SUBMISSION FORM

IN RESPECT OF CLAIMS AGAINST THE CURRENT AND FORMER DIRECTORS AND OFFICERS OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC., PRISZM LP AND KIT FINANCE INC. (collectively, the "Priszm Entities") AND/OR DEBORAH PAPERNICK AND/OR 2279549 ONTARIO INC. AND/OR JIM ROBERTSON AND 2289500 ONTARIO INC. (collectively, the "Directors and Officers")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.1985, c. C-36, as amended

---

Information Submission Form

Add Contact

Name _____

Attention _____

Address 1 _____

Address 2 _____

City _____

State/Province _____

ZIP/Postal Code _____

Country _____

Phone _____

Fax _____

Email _____

Type ☐ Assignee ☐ Attorney ☐ CC only ☐ Claimant

Notice ☐ None ☐ Notice only ☐ Primary contact

Add Claim

Claim Amount _____

Currency _____

Debtor Company Name _____

Claim Type ☐ Pre-Filing ☐ Subsequent

Classification ☐ Secured ☐ Unsecured

Category ☐ Employee ☐ Former Employee ☐ Guarantee ☐ Landlord

☐ Deficiency ☐ Trade ☐ Other: _____

(continued on page 2)

Security Type* ☐ Security Agreement ☐ Statutory Lien

*If you are asserting security pursuant to a security agreement, please ensure that you attach the relevant materials, including a copy of your security agreement.

Comments – Please add any comments that may assist us in reviewing your claim.

_____

_____

_____

_____

_____

Future correspondence

All future correspondence will be directed to the email designated in the contact details unless you specifically request that hardcopies be provided.

☐ Hardcopy of correspondence required

Acknowledgement

Signature _____

Date _____

Schedule "D"

SUPPORTING DOCUMENTATION SUBMISSION FORM

**IN RESPECT OF CLAIMS AGAINST
THE CURRENT AND FORMER DIRECTORS AND OFFICERS OF
PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST,
PRISZM INC., PRISZM LP AND KIT FINANCE INC.
(collectively, the "Priszm Entities") AND/OR DEBORAH PAPERNICK AND/OR
2279549 ONTARIO INC. AND/OR JIM ROBERTSON AND 2289500 ONTARIO INC.
(collectively, the "Directors and Officers")**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C.1985, c. C-36, as amended

Supporting Documentation Submission Form

Contact Details

Name _____

Attention _____

Address 1 _____

Address 2 _____

City _____

State/Province _____

ZIP/Postal Code _____

Country _____

Phone _____

Fax _____

Email _____

Supporting Documentation

Please attach hard copies of your supporting documentation to this form.

Comments

_____

_____

_____

_____

_____

Future correspondence

All future correspondence will be directed to the email designated in the contact details unless you specifically request that hardcopies be provided.

☐ Hardcopy of correspondence required

Acknowledgement

Signature _____

Date _____

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC. AND KIT FINANCE INC.

Court File No: CV-11-9159-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

D&O CLAIMS SOLICITATION PROCEDURE O R D E R

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

Lawyers for the Applicants