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.	)	
	)	**Re D.I. Nos: 50, 53, 54, 57**

REPLY OF THE CLASS REPS TO THE RESPONSES OF THE MONITOR, DEBTORS, AND LENDERS

The Class Reps respectfully submit this reply to the responses of the Monitor, Debtors and Lenders (collectively, the "Proponents") in opposition to the Class Reps' Objection to Verified Petition For Recognition of Foreign Main Proceeding and for Related Relief (the "Objection")and Motion for the Putative Class Action Representatives for an Order Withdrawing Approval of Provisional Financing (the "Motion"). As demonstrated below, the Objections should be sustained and the motion granted because:

- the Probation Order does not permit the creation of the lien for DIP financing and the wholesale restructuring or liquidation of the Debtors without approval of the government;

[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. (947S); (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 OVl, Canada.

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- AG US did not request or obtain such permission from the government; and
- comity dictates that this Court respect the judgment entered in the United States District Court for the Southern District of Ohio, and not permit AG US to violate its probation.

Even if the Court were inclined to grant the Verified Petition, any such grant should be conditioned on (1) the Class Reps being permitted to file class proofs of claim and proceed as a class action – rights that the Monitor contends the Class Reps have in Canada – and (2) any liquidation proceedings taking place in the MDL Court or this Court.

ARGUMENT

Comity Dictates Respect for the Judgment in the Criminal Case

1. As explained in Class Reps' objections and motion, fundamental principles of comity dictate respect for the judgment of the United States District Court for the Southern District of Ohio (the "Criminal Court"), particularly in a criminal case and in preference to the court of another country. The importance of comity cannot be overstated:

> [t]he federal courts long have recognized that the principle of comity requires federal district courts-courts of coordinate jurisdiction and equal rank-to exercise care to avoid interference with each other's affairs. The concern manifestly is . . . to avoid rulings which may trench upon the authority of sister courts . . . .

Save Power Ltd. v. Syntek Fin. Corp., 121 F.3d 947, 950 (5th Cir. 1997) (citations omitted). Comity is particularly appropriate here as the "bankruptcy court is a court of equity, and is guided by equitable doctrines," *American United Mut. Life Ins. Co. v. City of Avon Park, Fla.*, 311 U.S. 138, 145 (1940), and the Class Reps would lose the protections of the Probation Order if comity were disregarded.

2. The Proponents offer no justification for this Court to dispense with comity and disregard the other federal court's criminal judgment – intended to remediate AG US's crime and protect U.S. victims – in favor of another country's court. The Proponents' contention that the

Class Reps' require "standing" to "enforce" the criminal judgment is a straw man. Class Reps, as unsecured creditors, have standing to ask this Court to respect the Criminal Court's judgment. Indeed, once this Court is aware of the true facts, it has the power to deny the Verified Petition and withdraw the DIP financing *sua sponte*. *See, e.g., In re Chinichian,* 784 F.2d 1440, 1443 (9th Cir. 1986) (citations omitted) ("It would be absurd to hold that the bankruptcy court is powerless to correct a fraud unless first requested by an interested party. . . . [A]bankruptcy court is a court of equity. As a court of equity, it may look through form to the substance of a transaction and devise new remedies where those at law are inadequate.")

3. The Class Reps do not seek relief that might require "standing" in connection with the criminal case. They have not, for example, initiated criminal proceedings for a probation violation or sought to recover damages for a probation violation. The Proponents' cases regarding standing in a criminal case are inapposite. [Monitor's Reply at ¶6-8; Lenders' Response at ¶10-12; Debtors' Response at ¶10-12]

4. The Proponents' other contentions are equally unavailing. A **criminal** judgment of probation that would have the effect of preventing a bankruptcy filing is not against public policy. Convicted felons forfeit constitutional rights, such as, *inter alia*, the right to travel, freedom of association, to be free from warrantless searches and the right to vote. Forfeiture of the right to file a bankruptcy petition pales in comparison. The Proponents' characterization of a criminal conviction as a "consent decree" is simply wrong. Congress has expressly provided that non-party litigants can rely on a judgment in an antitrust case (*i.e.*, a criminal conviction) as opposed to a consent decree. 15 U.S.C. § 16;[2] *see, e.g., Gen. Elec. Co. v. City of San Antonio,*

[2] 15 U.S.C. § 16 (emphasis added) provides:

334 F.2d 480, 487 (5th Cir. 1964)("We agree with the conclusions reached by the 7th and 9th Circuits. The exclusionary proviso of Section 5(a) does not apply to judgments entered on pleas of guilty by defendants in criminal antitrust actions, and judgments entered on such pleas constitute prima facie evidence of the violation of antitrust laws.") AG US **admitted** its guilt. It did not plead *nolo contendere*.

5. As demonstrated above, comity principles would not justify disregarding another court's judgment even if, *assuming arguendo*, a party before this Court was not the intended beneficiary. Here, the Class Reps were the intended beneficiary of the probation. AG US incorrectly contends that the probation was not intended to benefit the Class Reps. (Debtors' Response at ¶ 13) In doing so, AG US quotes a transcript out of context. Class Reps sought significant other relief that was denied because, as Class Reps believe, they were improperly excluded from offering input in plea negotiations. Even though the Court did not believe that the plea agreement authorized probation, the government insisted on **(and AG US acquiesced in)** probation in response to Class Reps' concerns:

> As a result of what they had to say, we ensured -- and we took great order of time, of the Court's time, and we apologize -- to ensure that probation was a portion of the plea agreement, which as **Your Honor indicated at the time of the hearing, you did not believe was a part of it.** That was a critical issue on the part of the petitioners in this case: to ensure that probation was established. And great effort, myself **and Mr. Majoras [a Jones Day partner]** ensured that probation was available to Arctic Glacier in this case.

> A final judgment or decree . . . rendered in any . . . criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding **brought by any other party** against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Hearing Tr. of Feb. 16, 2010 at 9 (D.I. #10) (emphasis added).[3] It is also irrelevant whether Condition 6 is "standard." Probation was imposed because of the Class Reps' concerns and the "standard terms" were thought to be sufficient to protect the Class Reps.

The Chapter 15 Petition and DIP Financing Violate AG US's Probation

6. AG US admits that it has not received permission from the probation officer to obtain the DIP financing or file the Chapter 15 petition. Instead, the Proponents appear to argue that because (1) the Department of Justice and the probation department were served with the Verified Petition and AG US informed them of the filings **after AG US** made the filings and (2) neither party, has, thus far, appeared in this case, that such lack of objection should be taken as explicit permission. However, the burden is on AG US **to obtain** permission, not on the government to intervene and object.[4] Thus, the only question is whether the DIP financing and the proceedings contemplated by the Chapter 15 petition would violate the condition that prohibits AG to "sell, transfer or assign its assets."

7. Whatever might be said about the implications of the Probation Order on AG US's ordinary course of business activities, a major restructuring or liquidation of AG US or AG

[3] AG US cites to the Magistrate Judge's decision denying disqualification However, the District Judge's decision (reviewing the Magistrate's Judge's decision) vindicated the Class Reps. Although the District Judge ultimately affirmed the Magistrate Judge's decision, the District Judge held that the Magistrate Judge erred by relying on Jones Day's declarations and not conducting an evidentiary hearing. As noted in the Class Reps' papers (Motion at ¶ 17), the District Judge denied disqualification because of the indemnification. The District Judge held that there was a conflict, but that it could be consented to at that point in the case. The District Judge made clear, however, that "the Court and the parties [must] remain vigilant in monitoring that potential [for a nonconsentable conflict] throughout the litigation." *In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 611894 at *3 (E.D. Mich. Feb. 11, 2011). No such monitoring would be necessary if the Class Reps' motion were "strategic" or "smoke and mirrors."

[4] Tellingly the most that the Proponents can aver in their declarations is that the Departments were served. The averment that a Jones Day lawyer called the probation officer and confirmed that the probation officer had received the pleadings is both inadmissible hearsay and, more to the point, completely irrelevant. The Class Reps do not contend that the pleadings were not served – rather, they contend that AG US did not take the affirmative steps of informing the probation office of the critical terms of the financing and the planned sale process, and seek **and obtain** the probation office's actual consent to such an undertaking before the process began.

US's grant of a superior lien to its assets for financing **to benefit its Canadian parent** falls easily within the prohibition.

At a Minimum, the Monitor Should Be Required To Stipulate to Allow the Class Reps To File a Class Proof of Claim, Proceed as a Class Action and Allow any Estimation Proceedings to Take Place in this Court or the MDL Court

8. The Proponents do not address the alternative laid out in the Objection – namely that if this Court were to grant the Verified Petition, that it should condition such grant on certain protections being provided to the Class Reps. The Monitor does contend that Canadian law may allow the Class Reps to file class proofs of claim and proceed as a class action. However, neither the Monitor nor the other Proponents explicitly agree or stipulate that such should be ordered in any grant of the Verified Petition. They simply ignore the issue altogether.

9. Although the Court should not grant the Chapter 15 petition because it would violate the judgment of probation, the Court minimally should require the Monitor to stipulate to providing these protections if the Court were inclined to grant the Petition. The Monitor will suffer no prejudice because it contends that the Class Reps have these rights in any event.

10. In addition, to at least provide the Class Reps some protection intended by the probation, the Court should require that any liquidation or estimation proceeding of the Class Reps' claims take place in the MDL Court or this Court. *See, e.g., In re Qimonda AG Bankr. Litig.*,433 B.R. 547, 570 (E.D. Va. 2010)("Deference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding. . . cannot be cured by the adoption of additional protections")

The Motion to Withdraw Provisional Relief Was Timely

11. The Motion was timely. The Provisional Order provides, "[a]ny party in interest may make a motion seeking from ... this Order, by filing a motion on not less than seven (7)

business days' written notice . . . and the Court will hear such motion on a date to be scheduled by the Court." The Provisional Order imposes no deadline for when such a motion is required. It only provides that no hearing will take place until the Monitor is given seven (7) business days' written notice.

12. Rather than wait seven (7) business days, all the Proponents have responded to the Motion. And a motion to shorten was in fact filed, and granted. (D.I. No. 51) Accordingly, there would be no prejudice, but only inefficiency by delaying hearing the Motion on March 16, 2012.

WHEREFORE, the Court should (1) sustain the Objection and deny the Chapter 15 Petition and (2) withdraw approval of the DIP Financing.

Dated: March 14, 2012
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on this 14th day of March, 2012, I caused copies of the *Reply of the Class Reps to the Responses of the Monitor, Debtors, and Lenders* to be served on the attached service list in the manner indicated.

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