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: 28, 35**

OBJECTION TO VERIFIED PETITION FOR RECOGNITION OF FOREIGN MAIN PROCEEDING AND FOR RELATED RELIEF

The indirect purchaser plaintiffs in the pending class action litigation titled *In re Packaged Ice Antitrust Litig.*, Case Number: 08-MD-01952 (E.D. Mich.) (the "Class Reps"),[2] as

[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.

[2] The individual indirect purchaser plaintiffs are: Lawrence J. Acker, Brian W. Buttars, James Feeney, Lehoma Goode, Ainello Mancusi, Ron Miastkowski, Brandi Palombella, Patrick Simasko, Wayne Stanford, Joe Sweeney, Beverly Herron, Nathan Croom, Robert DeLoss, Ian Groves, Karen Prentice, John Spellmeyer, Rich Aust, Brian Rogers, Wilton E. Spencer, Jr. and Samuel Winnig. The order appointing Wild Law Group PLLC as interim co-lead counsel for the indirect purchaser class is annexed as Exhibit 1 to the Appendix in Support of Objection To

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putative class representatives of unsecured creditors and retail purchasers of the Debtors'and their co-conspirators' packaged ice in 17 states, hereby submit this objection (the "Objection") to 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 Proceeding and (II) Certain Related Relief (the "Verified Petition"). In support of the Objection, the Class Reps respectfully represent as follows:

Background

1. On October 13, 2009, Arctic Glacier International Inc. ("AG US") entered into a plea agreement for a violation of the Sherman Antitrust Act, 15 U.S.C. § 1. AG US and three of its former officers each admitted that from January 1, 2001 to July 17, 2007, they "participated ina conspiracy to allocate customers ofpackaged ice sold in southeastern Michigan and the Detroit, Michigan metropolitan area." *United States v. Arctic Glacier International Inc.*, Case No. 1:09-cr-00149-HJW (S.D. Ohio 2009)(the "Criminal Case") (Dkt #11) (Ex2 at 5). The former officers' plea agreements have identical language. (Ex 3 at 5; Ex 4 at 5;Ex 5 at 5).[3]

2. The Class Reps purchased Arctic Glacier brand (and that of AG US' co-conspirators) packaged ice at retail establishments throughout the United States. The Class Reps paid artificially inflated prices for the packaged ice because of AG US's criminal conduct.

Verified Petition For Recognition Of Foreign Main Proceeding And Motion For Relief From The Provisional Order (the "Appendix").

[3] Citations in the form: "Ex." are to the Appendix attached to the Motion of the Putative Class Action Representatives for an Order Withdrawing Approval of Provisional DIP Financing, which will be filed concurrently with this Objection; "VP" are to the Verified Petition [D.I. #7]; "Aff." are to the Affidavit of Keith McMahon, sworn to on February 21, 2012 [Exhibit B to D.I. #2]; "Mot." are to the Motion Of Alvarez & Marsal Canada Inc., As Foreign Representative Of Arctic Glacier International Inc. And Certain Of Its Affiliates, For An Order Granting Certain Provisional Relief [D.I. #4]; and "Ord." are to the Order Granting Provisional Relief [D.I. #28].

Several of the Class Reps intervened in the Criminal Case under the Crime Victims Rights Act (18 U.S.C. § 3771) (the "Criminal Case Interveners"), and objected to the plea agreement.

3. In response to the Criminal Interveners' objections, the United States Government insisted on probation for the purpose of protecting AG US's assets for eventual collection by the victims. Indeed, the Government relied on the availability of AG US's assets to satisfy the Criminal Case Interveners' claims when it recommended acceptance of the plea agreement:

> For them to try to shelter their assets . . . into Canada is absurd. They have hard assets in the United States. If a civil judgment is obtained, . . . they could attach . . . the assets here in the United States. . . . [I]t just seems absurd . . . that a company . . . doing business in the United States, obtains the vast majority of their revenue from the United States, . . . would be able to shift their revenue to Canada and make it unobtainable to a civil judgment obtained in the United States.

United States v. Arctic Glacier International Inc., Case No. 1:09-cr-00149-HJW (S.D. Ohio 2009) (the "Criminal Case") (Ex. 6, at 103).

4. The Court in the Criminal Case imposed probation. The conditions of probation provide, *inter alia*, "[t]he defendant organization **shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets.**"("Probation Order", Ex. 7 at 3, Condition No. 6, emphasis added).

5. In 2008, certain of the Class Reps brought actions for damages under the various state laws arising from AG US's and its officers' antitrust crimes. The Class Reps are now putative class representatives on behalf of consumers in 17 states. They allege a federal claim for injunctive relief under § 16 of the Clayton Act and claims for damages under the antitrust and consumer protection laws of 17 states. The actions have been consolidated for pre-trial purposes by the Judicial Plan on Multidistrict Litigation in the United States District Court for the Eastern District of Michigan (the "MDL Court").

6. The Class Reps allege that the three principal packaged ice producers in the United States, including Debtors, carved the United States into three territories (one for each) and agreed not to compete with each other. Evidence of the conspiracy includes: admissions made by participants; guilty pleas by AG US, its former officers and others to a violation of Section 1 of the Sherman Act; and economic behavior that would have been implausible in the absence of the conspiracy. (Ex. 8 at ¶ 1& ¶¶ 44-63) The MDL Court held that the Consolidated Class Action Complaint "sufficiently plead a [nationwide] conspiracy."*In re Packaged Ice Antitrust Litig.*, 08-MDL-1952, 2011 WL 6178891 (E.D. Mich. Dec. 12, 2011) (citation omitted),*reconsideration denied,* 08-MD-01952, 2012 WL 10684 (E.D. Mich. Jan. 3, 2012).[4]

7. The MDL Court has authorized immediate class certification discovery to go forward.

8. On February 22, 2012, the above-captioned Debtors filed petitions for arrangement in the Canadian courts (the "Canadian Proceedings") under the Canadian Companies' Creditors Arrangement Act, R.S.C. 1985, c. 36, as amended (the "CCCA"). Immediately thereafter, the Debtors filed the Verified Petition under consideration by this Court, seeking relief pursuant to Chapter 15 of the United States Bankruptcy Code (the "Bankruptcy Code").

9. The Verified Petition and the supporting affidavit downplay and minimize the significance of the Criminal Case and the Probation Order. Specifically,the Verified Petition and affidavit disclose the Probation Order only to acknowledge the payment schedule for AG's $9,000,000 fine. (VP at ¶ 17; Aff. at ¶ 103) Neither the Verified Petition nor the supporting

[4] Certain of Class Reps' claims were dismissed without prejudice. *Id.* These Class Reps subsequently filed new complaints asserting the dismissed claims. Their new actions have now been consolidated in the MDL Court. (Ex. 9)

affidavit mentions the important conditions imposed on AG US by the Probation Order, including the prohibition of transferring, selling or assigning AG US' assets without permission of the Probation Department. (VP at ¶ 17; Aff. at ¶ 103)

Argument

A. The Court Should Not Grant the Verified Petition

10. The above-captioned Debtors, including AG US, seek to invoke the authority and jurisdiction of this Court to recognize the Canadian Proceedings as foreign main proceedings under Chapter 15 of the Bankruptcy Code, and to utilize this Court's power to invoke the relief provided by various sections of the Bankruptcy Code, including Sections 362, 363, 364 and 365. Such relief violates the terms of the Probation Order. Moreover, granting the relief requested in the Verified Petition could have the effect of depriving the Class Reps, and those class members they hope to represent, of the protections of United States law, including, but not limited to, the right to proceed as a class in litigation against AG US and the other Debtors, and the right to file a class proof of claim in any insolvency proceeding involving AG US. Failure to recognize these rights would spell the death knell of any compensation to the individuals harmed by AG US's crimes.

11. The foreign recognition (without permission from the probation officer) violates AG US's probation and would deprive the Class Reps of valuable rights. Protection of the Class Reps' rights was an important motivation for the Government's recommendation to the United States District Court for the Southern District of Ohio to accept AG US's plea agreement. That probationary sentence was designed to protect the victims of AG US's misconduct from precisely what has now happened. As the Government explained, "[a]s a result of what [the Criminal Interveners] had to say we ensured . . . that probation was a portion of the plea

agreement." (Ex. 10 at 9)The Sixth Circuit affirmed acceptance of the plea agreement in the Criminal Case because "the district court afforded them the status of crime victims." *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010) (denying Criminal Interveners' mandamus petition for review of acceptance of the plea agreement).

12. Indeed, AG US violated its probation when it sought this Court's authority to use its assets as collateral for the DIP financing. Under the DIP Facility Term Sheet (Aff. at Ex. Q), AG US is a Credit Party and Guarantor and gives lien to secure the DIP facility. That lien constitutes a "transfer." 11 U.S.C.A. § 101 ("The term "transfer" means . . . the creation of a lien"). As such, it violates Condition 6 of the Probation prohibiting transfers without permission of the probation officer.[5]

13. This Court should not be a party to AG US' probation violation. Such a result is prohibited under 15 U.S.C. § 1506 because it "would be manifestly contrary to the public policy of the United States." *Id.* ("nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States"); *see, e.g., In re Toft,* 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (denying foreign recognition because "the relief sought by the Foreign Representative is banned under U.S. law"). Moreover, comity dictates respect for the sentence handed down by the United States District for the Southern District of Ohio, *see, e.g.,Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997), and the authority of the probation department. *See, e.g., U.S. Commodity Futures Trading Comm'n v. Amaranth Advisors, LLC*; 523 F. Supp. 2d 328, 335 (S.D.N.Y. 2007).Further, Section 1521(d) of the Bankruptcy Code indicates that the Court

[5]Probation has been revoked for far less egregious violations, such as failure to comply with reporting requirements. *See, e.g., Higdon v. United States*, 627 F.2d 893, 900 (9th Cir. 1980) ("a judge may revoke probation for noncompliance with reporting requirements.").

should respect the Probation Order. *Id.* (the Court "may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.")

14. Recognition of the Canadian Proceedings would be manifestly against public policy because, even in the absence of the Probation Order, the Canadian Proceedings would effectively deprive the Class Reps of the ability to pursue their claims. Canadian law does not appear to allow, as U.S. law does, class proof of claims, *compare In re Trebol Motors Distributor Corp.*, 220 B.R. 500 (B.A.P. 1st Cir. 1998) (class proof of claims are permitted in bankruptcy court) *withRe MuscleTech Research and Development*, [2006] O.J. No. 3300 (S.C.J.) (QL) (refusing to consider class proof of claims) (Ex. 11), and might not even recognize and protect class action lawsuits brought by indirect purchasers from antitrust violators. *Compare, e.g., In re Static Random Access memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 617 (N.D. Cal. 2009) (certifying multi-state indirect purchaser damages class action) *with Pro-Sys Consultants Ltd. et al. v. Microsoft Corporation et al.* (B.C.) (Civil) (By Leave) (34282) and *Sun-Rype Products Ltd. et al. v. Archer Daniels Midland Company et al.* (B.C.) (Civil) (By Leave) (34283) (Exs. 12 & 13, respectively).[6]The absence of class action treatment would spell the death knell of the Class Reps' claims and is contrary to the public policy of the United States. In explaining the importance of class actions, the Supreme Court held:

> the Advisory Committee [governing Fed. R. Civ. P. 23(b)(3)] had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all. . . . The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

[6] The Supreme Court of Canada has granted review to decide whether class actions for indirect purchasers are cognizable under Canadian law.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citations omitted).

15. Because recognition of the foreign proceedings would deprive the Class Reps of the right to pursue a class action, recognition "would be manifestly contrary to the public policy of the United States."11 U.S.C. § 1506; *see also Andrus v. Digital Fairway Corp.*, Case No. 3:08-cv-119-O, 2009 WL 1849981, *1, n.1, (N.D. Tex. June 26, 2009). Accordingly, the Court should deny the Verified Petition for this independent reason. *See, e.g., In re Qimonda*, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011) (court refused to apply German law in a foreign main proceeding where such law did not protect statutory rights of intellectual property holders).

16. The Debtors apparent violation of their duty of candor to the Court is an independent ground to deny the relief sought in the Verified Petition. The Supreme Court has "emphasized that full disclosure [is] the minimum requirement." *American United Mut. Life Ins. Co. v. City of Avon Park, Fla.*, 311 U.S. 138, 145 (1940). In explaining that the bankruptcy court can deny relief when confronted with abuses or misconduct, the Court emphasized,

> A bankruptcy court is a court of equity, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. These principles are a part of the control which the court has over the whole process of formulation and approval of plans of composition or reorganization, and the obtaining of assents thereto.

311 U.S. at 145-6 (citations omitted). Similarly, the Third Circuit held, "[a] debtor who attempts to garner shelter under the Bankruptcy Code . . . must act in conformity with the Code's underlying principles. . . . A good faith standard protects the judicial integrity of the bankruptcy courts by rendering their equitable weapons available only to those debtors and credits with clean hands." *In re SCG Carbon Corp.*, 200 F.3d 154, 161 (3d Cir. 1999).

17. The Monitorand Debtors here appear to have failed in their duty of candor to the Court in two material respects. First, the Monitor and Debtors did not disclose to the Court the

material terms and conditions of the Probation Order. Second, the Monitor appears to have neglected to inform the Court that there are significant differences between Canadian and U.S. law as regards class proofs of claims and class action lawsuits brought by indirect purchasers (i.e., U.S. law recognizes the right to proceed as a class in indirect purchaser antitrust actions and file class proofs of claim, and Canadian law does not appear to permit it).

B. In the Alternative, the Court Should Condition the Granting of the Verified Petition on Certain Conditions

18. Accordingly, if the Court is inclined to grant the Verified Petition, it should condition its order on affirmative protections of the rights of the U.S. victims of the Debtors' criminal conduct. The Court should require that the Debtors comply with the terms of the Probation Order in connection with any financing or sale that involves their U.S. assets. Further, the Court should require that any liquidation of the claims of the Class Reps, and the class they seek to represent, occur in the U.S. courts, with full protection of the rights granted to them to proceed as a class. Indeed, the Class Reps would suffer a severe hardship without the benefit of their appointed counsel who has been litigating their claims since mid-2008. Finally, the Court should require that the Class Reps be permitted to file a class proof of claim in the Canadian Proceeding. These conditions are essential to protect the rights granted to the Class Reps by U.S. law.

19. Section 1521 of the Bankruptcy Code describes the relief that the Court *may* grant upon recognition of a foreign proceeding. *See* 11 U.S.C. § 1521(a) ("the court may, at the request of the foreign representative, grant any appropriate relief . . . ."); 11 U.S.C. § 1521(b) ("the court may, at the request of the foreign representative, entrust the distribution . . . provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected."). Obviously, the statute's use of the word "may" implies that the Court is not

required to grant the requested relief, or, as requested here, the Court may condition the relief granted on appropriate limitations. *See also* 11 U.S.C. § 1522(b) ("the court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate . . . ."); *In re International Banking Corp. B.S. C.*, 439 B.R. 614, 627-28 (Bankr. S.D.N.Y. 2010) (sections 1521(b) and 1522 were intended to give courts "broad latitude to mold relief to meet specific circumstances"); *In re Sivec SRL*, 2011 WL 3651250, Case No. 11-80799-TRC (Bankr. E.D. Okla. 2011) (recognizing an Italian insolvency proceeding as a foreign main proceeding, but nonetheless lifting the automatic stay and allowing a lawsuit against the debtor to proceed in U.S. Court, for purposes of protecting U.S. creditor's rights); *In re Qimonda*, 462 B.R. at 185 (Bankr. E.D. Va. 2011) (refusing to apply German law in a foreign main proceeding where such law did not protect statutory rights of intellectual property holders). Accordingly, the Court, if it is inclined to grant the Verified Petition, should condition the grant in such a way as to protect the interests of U.S. creditors, including the Class Reps and the members of the class they seek to represent.

WHEREFORE, the Class Reps respectfully request the Court to deny the Verified Petition or, if the Court is inclined to grant the requested relief, it condition such grant so as to protect the rights of the Class reps and the members of the class they seek to represent.

Dated: March 9, 2012
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on this 9th day of March, 2012, I caused copies of the *Objection to Verified Petition for Recognition of Foreign Main Proceeding and for Related Relief* to be served on the attached service list in the manner indicated.

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