No. CI 12-01-76323

THE QUEEN'S BENCH
WINNIPEG CENTRE

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 WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. AND THE ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (COLLECTIVELY, "THE APPLICANTS")

TWENTY-SEVENTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
SEPTEMBER 11, 2018

TABLE OF CONTENTS

INDEX TO APPENDICES

1.0 INTRODUCTION

1.1 Pursuant to an order of The Court of Queen's Bench (Winnipeg Centre) (the "**Canadian Court**") dated February 22, 2012 (the "**Initial Order**"), Alvarez & Marsal Canada Inc. ("**A&M**") was appointed as Monitor (the "**Monitor**") in respect of an application filed by Arctic Glacier Income Fund ("**AGIF**"), Arctic Glacier Inc. ("**AGI**"), Arctic Glacier International Inc. ("**AGII**") and those entities listed on **Appendix "A"** (collectively the "**Applicants**", together with Glacier Valley Ice Company L.P., the "**Arctic Glacier Parties**"), seeking certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The proceedings commenced by the Applicants under the Initial Order are referred to herein as the "**CCAA Proceedings**". The United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**") recognized the CCAA Proceedings as a foreign main proceeding and appointed the Monitor as foreign representative of the Applicants by Order dated March 16, 2012.

1.2 The Monitor has previously filed twenty-six reports with the Canadian Court. Capitalized terms used but not otherwise defined in this report (the "**Twenty-Seventh Report**") are as defined in the orders previously granted by, or in the reports previously filed by the Monitor with, the Canadian Court, and the Applicants' consolidated plan of compromise or arrangement dated May 21, 2014, as amended on August 26, 2014 and January 21, 2015, as may be further amended, supplemented or restated from time to time in accordance with the terms therein (the "**Plan**").

1.3 The sale transaction for substantially all of the Arctic Glacier Parties' business and assets (the "**Sale Transaction**") closed on July 27, 2012. The Monitor continues to hold significant funds as a result of the Sale Transaction and other receipts.

1.4 On September 5, 2012, the Canadian Court issued an order approving a claims process to resolve claims against the Arctic Glacier Parties (the "**Claims Process**") and, among other things, authorizing, directing and empowering the Monitor to take such actions as contemplated by the Claims Process (the "**Claims Procedure Order**"). The Claims Procedure Order provided for a Claims Bar Date of October 31, 2012, in respect of the Proofs of Claim and the DO&T Proofs of Claim. The U.S. Court recognized the Claims Procedure Order by an Order dated September 14, 2012. Eighty-three parties filed Proofs of Claim with the Monitor.

1.5 The Claims Procedure Order contemplated a further order of the Canadian Court to provide an appropriate process for resolving disputed Claims. Accordingly, on March 7, 2013, the Canadian Court issued such an Order (the "**Claims Officer Order**"). The Claims Officer Order, among other things, provided that in the event that a dispute raised in a Notice of Dispute was not settled within a time period or in a manner satisfactory to the Monitor, in consultation with the Arctic Glacier Parties and the applicable Creditor, the Monitor would refer the dispute raised in the Notice of Dispute to either a Claims Officer or to the Canadian Court.

1.6 On May 21, 2014, the Canadian Court issued an order (the "**Meeting Order**") with respect to the Plan. On June 6, 2014, the U.S. Court entered an Order recognizing and giving full force and effect in the United States to the Meeting Order.

1.7 Following a meeting of the unitholders and a deemed meeting of the Affected Creditors, on September 5, 2014, the Canadian Court issued an order that, among other things, sanctioned and approved the Plan (the "**Sanction Order**"). On September 16, 2014, the U.S. Court entered an order recognizing and giving full force and effect to the Sanction Order in the United States.

1.8 On January 22, 2015 (the "**Plan Implementation Date**"), the Plan was successfully implemented after the Monitor certified that the conditions precedent set out in Section 10.3 of the Plan had been satisfied or waived in accordance with the Plan. Accordingly, on the Plan Implementation Date and pursuant to the Plan, the Monitor, on behalf of the Applicants, among other things:

a) used the Available Funds to fund the reserves and distribution cash pools set out in the Plan;

b) distributed the Affected Creditors' Distribution Cash Pool to each Affected Creditor in the amount of such creditor's Proven Claim; and

c) transferred $54,498,863.58 (the "**Initial Distribution**") from the Unitholders' Distribution Cash Pool to the Transfer Agent for distribution to Registered Unitholders as of December 18, 2014 (the "**Initial Distribution Record Date**").

1.9 On June 2, 2015, the Canadian Court issued an order approving a claims process to identify and determine certain potential claims relating to the Initial Distribution (the "**Unitholder Claims Process**") and, among other things, authorizing, directing and empowering the Monitor to take such actions as contemplated by the Unitholder Claims Process (the "**Unitholder Claims Procedure Order**"). The Unitholder Claims Process

provided for a Unitholder Claims Bar Date of July 28, 2015, in respect of claims against AGIF arising from any action or omission on or after the setting of the Initial Distribution Record Date in connection with the Initial Distribution ("**Initial Distribution Claims**"), or claims against AGIF's Officers or Trustees in connection with an action or omission occurring on or after the setting of the Initial Distribution Record Date in connection with or related to the Initial Distribution ("**O&T Claims**").

1.10 On December 13, 2017, the Canadian Court issued an order (the "**Stay Extension Order**") extending the Stay Period to September 28, 2018.

1.11 The purpose of this Twenty-Seventh Report is to:

a) provide the Canadian Court, the U.S. Court, Affected Creditors, Unitholders and other interested parties with an update regarding:

i. the Unitholder Claims Process;

ii. post-Plan implementation steps to be completed by the Arctic Glacier Parties and the Monitor;

iii. the Arctic Glacier Parties' receipts and disbursements for the period from December 2, 2017 to September 7, 2018;

iv. the Monitor's activities since the date of the Twenty-Sixth Report (December 8, 2017); and

b) provide information in support of the Monitor's motion returnable September 18, 2018 for an order, among other things:

i. extending the Stay Period to March 22, 2019; and

ii. approving this Twenty-Seventh Report.

1.12 Further information regarding these CCAA Proceedings and the concurrent Chapter 15 Proceedings, and all previous reports of the Monitor, can be found on the Monitor's website at http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries (the "**Website**").

2.0 TERMS OF REFERENCE

2.1 In preparing this Twenty-Seventh Report, the Monitor has relied upon unaudited financial information, books and records and financial information of the Arctic Glacier Parties (collectively, the "**Information**").

2.2 The Monitor has reviewed the information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards ("**CASs**") pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion and does not provide any other form of assurance contemplated under CASs in respect of the Information.

2.3 The information contained in this Twenty-Seventh Report is not intended to be relied upon by any investor in any transaction with the Arctic Glacier Parties or in relation to any transfer or assignment of the Trust Units of AGIF.

2.4 Unless otherwise stated, all monetary amounts contained in this Twenty-Seventh Report are expressed in United States dollars, which is the Arctic Glacier Parties' common reporting currency.

3.0 THE UNITHOLDER CLAIMS PROCESS

3.1 As described in paragraph 3.1 of the Twenty-Fifth Report:

a) Certain persons contacted AGIF and/or the Monitor shortly after the Plan Implementation Date to assert that they were entitled to but did not receive a portion of the Initial Distribution.

b) One unitholder asserted that he (and corporations controlled by him and certain family members) were entitled to, but did not receive, approximately $2 million of the Initial Distribution (the "**Brodski Parties**").

c) On June 2, 2015, the Canadian Court issued an order approving the Unitholder Claims Process to identify and determine all Initial Distribution Claims, O&T Claims and O&T Indemnity Claims that may be asserted or made in whole or in part against AGIF and/or its Officers and Trustees, as the case may be. All claims were withdrawn except for those asserted by the Brodski Parties.

d) On July 8, 2015, the U.S. Court recognized the Unitholder Claims Procedure Order (the "**U.S. Unitholder Claims Procedure Recognition Order**"), which enumerated several steps, culminating in the Brodski Parties commencing an adversary proceeding (the "**Brodski Proceeding**") by filing a complaint on

October 30, 2015 in the U.S. Court (the "**Brodski Complaint**"). The Brodski Parties asserted Initial Distribution Claims and O&T Claims, both in the amount of $1,966,568.18, plus reasonable attorney's fees and costs, prejudgment interest, punitive damages, and treble damages, which have not been quantified (the "**Brodski Claims**"). The Brodski Parties named AGIF as well as the individual Trustees of AGIF as defendants in the Brodski Complaint.

e) On January 21, 2016, the defendants in the Brodski Complaint filed a motion to dismiss in respect of the Brodski Complaint (the "**Motion to Dismiss**"). On April 19, 2016, the U.S. Court heard oral arguments.

f) On July 13, 2016, the U.S. Court issued a Memorandum Opinion addressing the Motion to Dismiss and granting the Motion to Dismiss in its entirety (the "**Dismissal Order**").

g) The Brodski Parties filed a Notice of Appeal on July 20, 2016 to appeal the Dismissal Order (the "**Brodski Appeal**").

3.2 As described in paragraphs 3.2 to 3.6 of the Twenty-Sixth Report:

a) The parties fully briefed the Appeal. At the time of the Twenty-Fifth Report, the District Court for the District of Delaware (the "**District Court**") had the appeal under reserve.

b) On June 14, 2017, the District Court released its Memorandum Opinion in the matter. The District Court affirmed the U.S. Court's Dismissal Order.

c) On July 12, 2017, the Brodski Parties filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit (the "**Third Circuit Court**"). That Appeal was fully briefed.

3.3 Since the date of the Twenty-Sixth Report, the Third Circuit Court required the parties to attend an oral argument on March 22, 2018. On August 20, 2018, the Third Circuit Court released its unanimous decision, in which it affirmed the decision of the District Court. Copies of the Judgement and the Precedential of the Third Circuit Court, dated August 20, 2018 are attached as **Appendix "B".**

3.4 The Brodski Parties had 14 days to file a petition for a rehearing of the matter. No such petition has been filed.

3.5 Furthermore, the Monitor understands that the Brodski Parties have until November 19, 2018 to petition the United States Supreme Court (the "**Supreme Court**") for a writ of certiorari to review the decision of the Third Circuit Court. Pursuant to the Rules of the Supreme Court, review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted by the Supreme Court only for compelling reasons.

3.6 If the Brodski Parties do not appeal the Third Circuit's decision, the Monitor expects to complete the necessary steps to make a final distribution and conclude the CCAA proceedings in the near term. However, if the Brodski Parties do appeal and the Supreme Court determines in its discretion to grant the petition of writ of certiorari, the Monitor will need to wait for determination by the Supreme Court before taking steps to make a final distribution and conclude the CCAA proceedings.

Insurance Coverage in Respect of Brodski Complaint

3.7 As discussed in the Twenty-Fifth Report, following the filing of the Brodski Complaint, notice was delivered to the Arctic Glacier Parties' insurer who acknowledged the notice and confirmed coverage, subject to all terms and conditions of the insurance policy, including payment by the Arctic Glacier Parties of the Retention (deductible) amount of CDN$150,000 and the insurer's reservation of rights.

3.8 As at the date of the Twenty-Sixth Report and described therein, the insurer had approved $485,162 of the defense costs submitted by the Monitor on behalf of the Arctic Glacier Parties for reimbursement and, net of the deductible amount that was withheld by the insurer, the Monitor received $364,802.

3.9 Since that time, additional defense costs of approximately $137,000 have been incurred and paid by the Monitor on behalf of the Arctic Glacier Parties and invoices for those defense costs have been supplied to the insurer with a request for reimbursement.

3.10 The insurer has reviewed those invoices and has approved and remitted payment to the Monitor of approximately $111,000 of those costs.

3.11 Amounts submitted for reimbursement but not approved by the insurer include those: (i) incurred prior to the date of the Brodski Complaint, which pursuant to the provisions of the insurance policy pre-date the "insurance claim"; and (ii) for which the associated rates and/or services exceed those stipulated in the insurance policy as being covered.

3.12 The Monitor has recently submitted additional invoices to the insurer totaling approximately $69,000 for defense costs for which it is seeking reimbursement from the insurer.

4.0 POST-PLAN IMPLEMENTATION DATE TRANSACTIONS

4.1 As discussed in the Twenty-Fifth Report, pursuant to the Plan, each of the Arctic Glacier Parties, or the Monitor on their behalf, as the case may be, were to take certain steps after the Plan Implementation Date (the "**Post-Plan Implementation Date Transactions**"), including the completion of a series of specific steps, assumptions, distributions, transfers, payments, contributions, reductions of capital, settlements and releases of various of the Arctic Glacier Parties listed in Schedule "B" to the Plan (the "**Schedule B Steps**").

4.2 As of the date of the Twenty-Sixth Report, 24 of the 28 subsidiaries of AGII had been dissolved and all tax filings completed. The remaining four subsidiaries were subsidiaries in the State of New York (the "**State**"). The Monitor filed Requests for Dissolution and the State issued a Response to Request for Consent to Dissolution of a Corporation for each of the subsidiaries indicating that since the corporations were involved in bankruptcy proceedings, the requests would be manually reviewed and notification of any requirements that must be met prior to the approval of the request for consent to dissolution would be provided.

4.3 After a period of time passed without receiving any such notifications, the Monitor contacted the State to enquire about the status of the Requests for Dissolution. The

Monitor was advised that the consents to dissolution were being withheld based on the State's belief that certain corporate income tax returns for the 2014 and 2015 tax years had not been filed. The Monitor explained that all required corporate income tax returns for the Arctic Glacier Parties had been filed on time. The State requested that the Monitor re-send the requested returns, which the Monitor couriered to the State in June 2018.

4.4 When the Monitor again followed up with the State to confirm that its records had been updated for the returns submitted, the Monitor was advised that while the records now indicated that the 2015 returns had been received and processed, those for the 2014 tax year remained outstanding.

4.5 The Monitor explained that the returns for both the 2014 and 2015 tax years had been re-sent together in a single courier package and so should both have been received. However, the State indicted that was not what its system indicated.

4.6 The Monitor has had extensive communications with the State and is continuing to work to provide the State with all requested information, which the State has indicated it will process on an expedited basis. Once the New York subsidiaries are wound up, Step 12 of the Schedule B steps will have been completed.

4.7 Once the State consents to the requested dissolutions, the remaining AGII subsidiaries can be dissolved and the subsequent remaining steps, including the wind-up or dissolution of AGII and AGI, a final distribution, and the de-listing of AGIF's Trust Units on the Final Distribution Date can be promptly completed.

4.8 The Monitor will provide further updates in respect of the Post-Plan Implementation Date Transactions and the Schedule B Steps in its next report.

5.0 RECEIPTS AND DISBURSEMENTS SINCE THE TWENTY-SIXTH REPORT

5.1 During the period from December 2, 2017 and September 7, 2018 (the "**Reporting Period**"), the Applicants had Canadian dollar net cash outflows of approximately $5,400 and U.S. dollar net cash outflows of approximately $627,100.

5.2 Excluding transfers between the Monitor's U.S. and Canadian dollar trust bank accounts, receipts during the Reporting Period were approximately CAD$3,560 and $311,000 and consisted predominantly of amounts paid by the Companies' insurer in respect of defense costs associated with the Brodski Proceeding and deposit interest.

5.3 Disbursements, also excluding transfers between the Monitor's U.S. and Canadian dollar trust bank accounts, consisted primarily of U.S. dollar professional fees and expenses totaling approximately $196,000 and Canadian dollar professional fees and expenses of approximately CAD$305,000 (which collectively include fees and expenses paid to the Monitor, its legal counsel, the CPS, the Applicants' legal counsel, the Applicants' tax consultants, and other professionals involved with these CCAA Proceedings). Also included in disbursements are other expenses comprised of fees paid to Directors and Trustees and disbursements of an administrative nature totaling a net amount of approximately $52,500 and CAD$147,000, as well as approximately $339,600 in respect of a premium under a commutation/buy-out agreement with the Companies' insurer (the

"**Buy-Out Agreement**") representing the buy-out premium as well as outstanding deductible amounts owing regarding concluded claims.

5.4 As at September 7, 2018, the Monitor is holding approximately $18.95 million and CAD$65,700, all of which is being held in interest-bearing accounts in the name of the Monitor, on behalf of the Applicants.

5.5 The Plan provides that certain reserves and cash pools be maintained in respect of the remaining obligations of the estates. Following the execution of the Buy-Out Agreement and the payment of approximately $339,600 thereunder to the Companies' insurer, the Companies have no further obligations in respect of deductible amounts. Accordingly, and in accordance with the provisions of the Plan, the remaining balance of approximately $390,000 in the Insurance Reserve was transferred to the Administrative Costs Reserve. As at the date of this Twenty-Seventh Report, all funds held by the Monitor on behalf of the Companies are part of the Administrative Costs Reserve.

5.6 It is the Monitor's and the Arctic Glacier Parties' view that it is not appropriate to make a distribution until the Brodski Claims which, as indicated in Section 3.1 of this Twenty-Seventh Report, are not quantifiable at present, have been resolved. It is the Monitor's intention to complete the Post-Plan Implementation Date Transactions and Schedule B Steps as quickly as possible to be in a position to make a Final Distribution once all such transactions and steps are completed and the Brodski Claims are finally resolved.

6.0 THE STAY EXTENSION

6.1 Pursuant to the Initial Order and subsequent Orders of the Canadian Court, the Stay Period was granted and extended until September 28, 2018. The Monitor requests an extension of the Stay Period to March 22, 2019.

6.2 The Monitor believes that an extension of the Stay Period until March 22, 2019 is appropriate, as it will allow the Monitor, in consultation with the Applicants, to among other things, continue implementing the steps contemplated by the Plan and will provide time for the Brodski Proceeding to either conclude or for the Brodski Parties to petition the United States Supreme Court for a writ of certiorari to review the decision of the Third Circuit Court.

6.3 The Monitor believes that the Arctic Glacier Parties have acted and continue to act in good faith and with due diligence in advancing the administration of these CCAA Proceedings.

7.0 ACTIVITIES OF THE MONITOR

7.1 In addition to the activities of the Monitor described above, the Monitor's activities from the date of the Twenty-Sixth Report, being December 8, 2017, have included the following:

- responding to inquiries from Unitholders and other stakeholders;
- continuing to make non-confidential materials filed with the Canadian Court and with the U.S. Court publicly available on the Website;

- preparing this Twenty-Seventh Report;
- continuing to act as foreign representative in the Chapter 15 Proceedings;
- continuing to fulfill the Monitor's responsibilities pursuant to the Claims Procedure Order and the Claims Officer Order;
- communicating with insurance adjusters and with various plaintiffs' counsel regarding certain open insurance claims;
- attending the December 2017 Stay Extension Motion;
- maintaining estate bank accounts, overseeing the accounting for the Applicants' receipts and disbursements pursuant to the Transition Order, and reviewing professional fee invoices and providing same to the CPS for review; and
- preparing and filing GST/HST returns and various other statutory returns and communicating with CRA and certain government bodies in the United States, as appropriate in respect of same.

*****

All of which is respectfully submitted to the Court of Queen's Bench this 11th day of September, 2018.

Alvarez & Marsal Canada Inc., in its capacity as Monitor of Arctic Glacier Income Fund, Arctic Glacier Inc., Arctic Glacier International Inc. and the other Applicants listed on Appendix "A".

Per: Alan J. Hutchens, Senior Vice-President

Appendix "A"

Appendix "A"

List of Applicants

Arctic Glacier California Inc.
Arctic Glacier Grayling Inc.
Arctic Glacier Lansing Inc.
Arctic Glacier Michigan Inc.
Arctic Glacier Minnesota Inc.
Arctic Glacier Nebraska Inc.
Arctic Glacier Newburgh Inc.
Arctic Glacier New York Inc.
Arctic Glacier Oregon Inc.
Arctic Glacier Party Time Inc.
Arctic Glacier Pennsylvania Inc.
Arctic Glacier Rochester Inc.
Arctic Glacier Services Inc.
Arctic Glacier Texas Inc.
Arctic Glacier Vernon Inc.
Arctic Glacier Wisconsin Inc.
Diamond Ice Cube Company Inc.
Diamond Newport Corporation
Glacier Ice Company, Inc.
Ice Perfection Systems Inc.
ICEsurance Inc.
Jack Frost Ice Service, Inc.
Knowlton Enterprises, Inc.
Mountain Water Ice Company
R&K Trucking, Inc.
Winkler Lucas Ice and Fuel Company
Wonderland Ice, Inc.

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2522

In re: ARCTIC GLACIER INTERNATIONAL, INC., et al.
Debtors in a Foreign Proceeding

ELDAR BRODSKI ZARDINOVSKY, a/k/a Eldar Brodski,
a/k/a Eldar Brodski (Zardinovsky); EB BOOKS, INC;
EB DESIGN, INC; EB ONLINE, INC; EB IMPORTS, INC;
LAZDAR, INC; ELDAR BRODSKI, INC; Y CAPITAL ADVISORS, INC;
VALLEY WEST REALTY INC; RUBEN BRODSKI; RUBEN BRODSKI, INC;
ESTER BRODSKI; YEHONATHAN BRODSKI,
Appellants

v.

ARCTIC GLACIER INCOME FUND; JAMES E. CLARK; GARY A. FILMON;
DAVID R. SWAINE; HUGH A. ADAMS

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1:16-cv-00617)
District Judge: Honorable Sue L. Robinson

Argued March 22, 2018

Before: SMITH, *Chief Judge*, and HARDIMAN and BIBAS, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Delaware and was argued on March 22, 2018.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** by this Court that the judgment of the District Court entered on June 14, 2017, is **AFFIRMED**. Costs will be taxed against Appellants. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: August 20, 2018

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

August 20, 2018

David B. Gordon
Mitchell Silberberg & Knupp
437 Madison Avenue
25th Floor
New York, NY 10022

Autumn H. Patterson
Jones Day
2727 North Harwood Street
Dallas, TX 75201

Marcos A. Ramos
Richards Layton & Finger
920 North King Street
One Rodney Square
Wilmington, DE 19801

Mark W. Rasmussen
Jones Day
2727 North Harwood Street
Dallas, TX 75201

Brendan J. Schlauch
Richards Layton & Finger
920 North King Street
One Rodney Square
Wilmington, DE 19801

David R. Woodcock
Jones Day
2727 North Harwood Street
Dallas, TX 75201

RE: In re: Arctic Glacier International

Case Number: 17-2522
District Court Case Number: 1-16-cv-00617

ENTRY OF JUDGMENT

Today, **August 20, 2018** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Stephanie Becker/tmm, Case Manager
267-299-4926

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2522

In re: ARCTIC GLACIER INTERNATIONAL, INC., et al.
Debtors in a Foreign Proceeding

ELDAR BRODSKI ZARDINOVSKY, a/k/a Eldar Brodski, a/k/a Eldar Brodski (Zardinovsky); EB BOOKS, INC; EB DESIGN, INC; EB ONLINE, INC; EB IMPORTS, INC; LAZDAR, INC; ELDAR BRODSKI, INC; Y CAPITAL ADVISORS, INC; VALLEY WEST REALTY INC; RUBEN BRODSKI; RUBEN BRODSKI, INC; ESTER BRODSKI; YEHONATHAN BRODSKI,
Appellants

v.

ARCTIC GLACIER INCOME FUND; JAMES E. CLARK; GARY A. FILMON; DAVID R. SWAINE; HUGH A. ADAMS

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1:16-cv-00617)
District Judge: Honorable Sue L. Robinson

Argued March 22, 2018

Before: SMITH, *Chief Judge*, and HARDIMAN and BIBAS,
Circuit Judges

(Filed: August 20, 2018)

David B. Gordon, Esq. [ARGUED]
Mitchell Silberberg & Knupp
437 Madison Avenue
25th Floor
New York, NY 10022
Counsel for Appellants

Autumn H. Patterson, Esq.
Mark W. Rasmussen, Esq. [ARGUED]
David R. Woodcock, Esq.
Jones Day
2727 North Harwood Street
Dallas, TX 75201

Marcos A. Ramos, Esq.
Brendan J. Schlauch, Esq.
Richards Layton & Finger
920 North King Street
One Rodney Square
Wilmington, DE 19801
Counsel for Appellees

OPINION OF THE COURT

BIBAS, *Circuit Judge.*

Buying shares in a bankrupt company can be perilous business. Here, shareholders were on notice of Arctic Glacier's bankruptcy proceedings, were represented throughout those proceedings, and voted overwhelmingly to confirm the company's reorganization Plan. So their shares were subject to its benefits (its dividend-distribution scheme) as well as its burdens (its implementation particulars and releases of claims relating to the Plan). When appellants, the Brodskis, bought their shares from those shareholders, they stepped into their shoes. So the Brodskis bought shares subject to the Plan's terms, including the terms that governed post-confirmation acts taken to carry out the Plan.

The Brodskis argue that the Plan's releases of liability do not apply to them because they are not transferees and because due process forbids releasing their claims. But the Plan came along with the shares, and the Brodskis were on notice. So we will hold them, like all buyers, to the terms of their bargain.

I.

On review of this motion to dismiss, we take as true the factual allegations in the complaint: Arctic Glacier Income Fund is a Canadian income trust. It owns a company that manufactures and distributes packaged ice across Canada and the

United States. In 2012, after a rough patch, Arctic Glacier filed for bankruptcy under the Companies Creditors' Arrangement Act, Canada's analogue of Chapter 11 of our Bankruptcy Code. Because Arctic Glacier operates in both countries, it filed for and received recognition under Chapter 15. That recognition granted the Canadian reorganization Plan (in Canada, an "arrangement") full effect in the United States. *See* 11 U.S.C. §1521(a).

Under the Plan, Arctic Glacier was to sell its assets and distribute the proceeds to a list of creditors, giving lowest priority to shareholders (technically, "unitholders" in the trust). The Plan imposed few limits on the discretion of the Monitor (the Canadian analogue of a trustee) to sell and distribute assets, and even fewer limits on when or how much the Monitor could distribute to shareholders. But the Plan required that the Monitor give 21 days' notice of any distribution.

The Plan also included broad releases of liability. The releases insulated Arctic Glacier and its officers from any claim "in any way related to, or arising out of or in connection with" the bankruptcy. App. 248 (§9.1). The only exceptions were for claims to enforce the Plan, those for gross negligence or willful misconduct, and those whose release was not "permitted by applicable law." *Id.*; App. 546.

The Monitor sold Arctic Glacier's assets and repaid the creditors in full. From the remaining funds, the Monitor was set to distribute dividends to the shareholders. On December 11, 2014, Arctic Glacier published legal notices announcing that the shareholders as of December 18 would be "entitled to receive the initial distribution from [Arctic Glacier] pursuant

to the Plan." App. 628, 630. Four days later, Arctic Glacier announced the same information in a press release. It also posted that information on the Monitor's website and on Canada's database of corporate disclosures.

None of these notices specified how much Arctic Glacier would distribute or when. And Arctic Glacier did not notify the Financial Industry Regulatory Authority (FINRA) of its planned distribution. (FINRA is a self-regulatory organization charged by the Securities and Exchange Commission with regulating distributions on, and publishing corporate disclosures for, the U.S. Over-the-Counter Market.) Nor did the Plan incorporate, or even refer to, FINRA's rules.

Central to FINRA's rules is its distinction among dates. The "record date" determines who is *entitled to receive* the dividend from the company. FINRA, *Uniform Practice Code* §11120(f) (2010). The issuing company must send the dividend payment to the shareholders of record as of that date. *Id.* The "ex-date" or "ex-dividend date" is the date on which the right to *retain* the dividend no longer travels with the share from the seller to the buyer. *Id.* §§11120(d), 11140. The owner of the share immediately before the ex-date is the one "entitled to retain the dividend." *Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 732 F.2d 859, 861 (11th Cir. 1984). If the shareholder sells a share after the record date but before the ex-date, the seller will receive the dividend from the company but must send that amount to the buyer. *Id.*; *In re Arctic Glacier Int'l, Inc.*, 255 F. Supp. 3d 534, 542 (D. Del. 2017) (citing *Silco, Inc. v. United States*, 779 F.2d 282, 284 (5th Cir. 1986) (per curiam)). Finally, the "payable date" is the date on which

the company *disburses* the dividend. *See* FINRA, *Uniform Practice Code* § 11140(b)(2).

Those distinctions matter. FINRA treats dividends worth less than 25% of a share's value differently from those worth more, setting different ex-dates for each. *Id.* § 11140(b). By contrast, the Plan spoke of a "Unitholder Distribution Record Date" and a "Unitholder Record Date." App. 231 (§ 1.1). It never mentioned an ex-date or a payable date, but instead used "Distribution Date" and "Plan Implementation Date." App. 227, 229, 240 (§§ 1.1, 6.2). And it never distinguished between dividends worth more than 25% of a share's value and those worth less, eliding FINRA's distinction.

The Plan also elided FINRA's distinction between record dates and ex-dates. The Plan provided that "Registered Unitholder[s]" not only receive "transfer[s]," but are also "entitled to the benefits of a distribution." App. 230, 240 (§§ 1.1, 6.2). Those provisions did not use FINRA's distinction between shareholders entitled to receive a dividend and shareholders entitled to retain them. App. 230 (§ 1.1).

Despite Arctic Glacier's announcements about the distribution, its share price held steady until January 22, 2015. Arctic Glacier noticed this stasis and found it puzzling, as its shares no longer traded with the right to the dividend and should have lost value equal to the dividend. But Arctic Glacier did nothing to respond to the stasis or to clarify who would be entitled to the dividend and when.

Between December 16 and January 22, the Brodskis bought more than 12,600,000 Arctic Glacier shares on the Over-the-

Counter Market. On January 21, the Monitor announced that the next day it would distribute a dividend of 15.5557 cents per share to shareholders as of December 18. The Monitor never told FINRA that it planned to pay the dividend. So FINRA never specified who would be entitled to the dividend and never circulated information about it.

Because the dividend payment per share was roughly 75% of the share price, the Brodskis argue, FINRA would have set an ex-date of January 23, 2015, the day after the distribution. So under FINRA's rules, the shares that the Brodskis had bought over the previous five weeks would have entitled them to the dividend. But Arctic Glacier did not follow FINRA's rules and did not pay the dividend to the Brodskis. On January 23, Canadian and American regulators froze trading in Arctic Glacier's shares. When they let trading resume, the share price plunged from 21 to 5 cents, reflecting the value of the paid-out dividend.

The Brodskis sued Arctic Glacier and four of its officers, claiming that Arctic Glacier owed them the dividend but never paid them. Count 1 of their complaint asserts that the defendants negligently failed to pay the Brodskis the dividend under the Plan. Count 2 asserts that they negligently, without FINRA's approval, specified that shareholders as of December 18 would be entitled to dividends. Count 3 asserts that the officers breached a fiduciary duty they owed to the Brodskis. Count 4 asserts that Arctic Glacier negligently failed to disclose material information. And Counts 5 and 6 assert that, by not disclosing this information, Arctic Glacier committed securities fraud and common-law fraud.

The Bankruptcy Court dismissed the complaint, holding that both the releases and res judicata barred the suit. The District Court affirmed for the same reasons. We review the Bankruptcy Court's and District Court's legal determinations de novo. *In re Makowka*, 754 F.3d 143, 147 (3d Cir. 2014).

II.

The Brodskis' claims rest on nonbankruptcy law: The officers allegedly violated their fiduciary duty, Arctic Glacier allegedly deceived the Brodskis, and both the company and its officers were allegedly negligent in setting the ex-date and not paying the Brodskis. But the releases bar all these claims.

A. Confirmed plans are res judicata, and *Holywell* is not to the contrary.

First, the Brodskis argue that a plan can never insulate a debtor from liability for post-confirmation acts. We reject this argument.

When a bankruptcy court enters a confirmation order, it renders a final judgment. 8 *Collier on Bankruptcy* ¶1141.01[4], at 1141-11 (Richard Levin & Henry J. Sommer eds., 16th ed. 2017). That judgment, like any other judgment, is res judicata. *Id.* It bars all challenges to the plan that could have been raised. Challengers must instead raise any issues beforehand by objecting to confirmation. *Id.* A plan's preclusive effect is a principle that anchors bankruptcy law: "[A] confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation." *Donaldson v. Bernstein*, 104 F.3d 547, 554 (3d Cir. 1997) (quoting *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989)); *see also Travelers Indem.*

Co. v. Bailey, 557 U.S. 137, 152 (2009). Thus, the entire Plan is res judicata, including its releases.

Seeking to skate around the Plan's releases, the Brodskis claim that the Plan cannot bar liability for post-confirmation acts. They rely on *Holywell Corp. v. Smith*, quoting a single sentence from the end of the opinion: "[W]e do not see how [a confirmed plan] can bind the United States or any other creditor with respect to post[-]confirmation claims." 503 U.S. 47, 58 (1992). The Brodskis interpret this lone sentence as holding that bankruptcy plans can never bar liability for any post-confirmation acts. (They also treat *Holywell* and other Chapter 11 doctrines as applicable to this Chapter 15 recognition proceeding. That may well be right, but we need not resolve the issue. We assume the same without deciding so.)

Holywell laid down no such broad rule. In that case, a Chapter 11 plan set up a trust and appointed a trustee to oversee the liquidation of the debtors' property. "The plan said nothing about whether the trustee had to file income tax returns or pay any income tax due." *Id.* at 51. Yet the trustee claimed that the United States, a creditor, should have objected to the plan's confirmation if it wished to preserve its right to collect taxes on the income generated by the liquidation. *Id.* at 58. In rejecting that argument, the Supreme Court noted that the tax liability arose after confirmation. *Id.* Unlike the Brodskis here, the government in *Holywell* did not directly challenge how the trustee implemented the plan.

Holywell cannot bear the weight that the Brodskis put on it. Its facts, its language, and its logic do not apply to post-confirmation acts that carry out a bankruptcy plan. By definition, a

debtor can implement its plan only after the bankruptcy court confirms it. And a confirmed plan is a binding plan. So the Brodskis' overreading of a single sentence in *Holywell* would nullify the res judicata effect of confirmed plans and, with it, much of Chapter 11. We do not read *Holywell* that broadly. It casts no doubt on the rule that confirmed plans can bar liability for post-confirmation acts.

This is not to say that a plan's preemptive scope can be unlimited. The Code authorizes preemption of laws related to financial condition, but preemption beyond that line is suspect. *See* 11 U.S.C. § 1142(a) (providing that plan implementation preempts "any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition"). *Compare In re Federal-Mogul Global Inc.*, 684 F.3d 355, 381-82 (3d Cir. 2012) (holding that, under 11 U.S.C. § 1123(a), the preemptive scope of a plan's contents can extend beyond financial condition, but noting that its preemptive "scope is not unbounded" and warrants scrutiny), *with PG&E v. California ex rel. Cal. Dep't of Toxic Substances Control*, 350 F.3d 932, 937 (9th Cir. 2003) (holding that a plan cannot preempt nonbankruptcy laws unrelated to financial condition). We need not wade into these waters, though, because the Brodskis have not preserved any objection to the scope of the Plan's preemption.

In sum, a confirmation order is a final judgment that bars later challenges to the plan. And *Holywell* does not bar plan terms authorizing or limiting liability for post-confirmation acts that implement the plan. So here, the Plan's terms control.

B. The Plan did not require paying the Brodskis.

Nothing in the Plan required paying the Brodskis. Instead, they claim that Arctic Glacier could have harmonized the Plan with FINRA by following both sets of rules. But the Plan neither incorporated FINRA's rules nor contemplated them in its structure. And its provisions, even when consistent with FINRA, did not so much as refer to or draw on FINRA's regulatory scheme. So if FINRA's rules imposed obligations on Arctic Glacier, those obligations did not arise from the Plan. And suits to redress FINRA violations must overcome the Plan's releases of liability.

C. The releases bar the Brodskis' claims.

The Plan's releases were res judicata as to the initial shareholders. The Plan, including its releases, came along with the shares that the Brodskis bought from those shareholders. And the Plan, including its releases, carried the same res judicata effect. So any nonbankruptcy claims based on the Brodskis' ownership are subject to the Plan and must overcome its releases. They do not.

The releases waived liability for Arctic Glacier and its officers. App. 247-48. And they extended to all claims arising out of the bankruptcy, including distributions under the Plan. *Id.* The only exceptions were for suits brought to enforce the Plan, suits alleging gross negligence or willful misconduct, and suits whose release would conflict with other "applicable law." *Id.*; App. 546 (¶14).

The Brodskis have not asserted gross negligence or willful misconduct. Nor have they claimed that the releases conflict

with otherwise applicable law. In particular, they have never argued that FINRA's rules qualify as "applicable law" and so survive the releases to trump the Plan's distribution rules. They did not preserve that argument in the Bankruptcy Court, in the District Court, or in this Court. So we need not address how broadly a plan can sweep when it purports to preempt otherwise applicable laws.

Instead of arguing that the releases do not cover their claims, the Brodskis attack the releases on two fronts. First, the Brodskis claim that they are not subject to the releases because buying shares of stock did not make them transferees. Second, they claim that the Due Process Clause forbids applying the releases to them. Neither claim succeeds.

1. *Buyers are transferees*. To state the first argument is to refute it. Buying a share of stock is a transfer. The buyer is a transferee. *Transferee*, in *Black's Law Dictionary* 1727 (10th ed. 2014) ("One to whom a property interest is conveyed."). The share comes with both the Plan's benefits and its burdens. So the Brodskis were transferees and took the shares with all their associated benefits and burdens, including the releases.

As our Court has explained, a claim in bankruptcy may be transferred. *In re KB Toys Inc.*, 736 F.3d 247, 249 (3d Cir. 2013). When it is, the transferee assumes the same limitations as the transferor. *Id.* at 251-52. Otherwise, buyers could revive disallowed claims, laundering them to receive better treatment in new hands. *Id.* at 252. The same holds for shares.

Nor can the Brodskis claim that they were not represented and could not have objected to the Plan. The shareholders who sold to them were represented. And when the Brodskis bought the shares, they were on notice of the Plan that came with them.

2. *Due process does not limit plans' effects on those who had notice and representation.* For similar reasons, the Brodskis' due-process claim fails. They rely on our decision in *Jones v. Chemetron Corp.*, 212 F.3d 199 (3d Cir. 2000). But that case is inapposite.

In *Chemetron*, one plaintiff was not yet born when Chemetron dumped radioactive rubble. 212 F.3d at 202, 209. That plaintiff was not represented in the bankruptcy reorganization. And Chemetron's bankruptcy plan did not set up a trust to pay future claims. *Id.* at 210. So, this Court held, his claim was not discharged in bankruptcy. *Id. Chemetron* thus holds that due process requires giving claimants notice or representation before discharging their claims in bankruptcy. *See also Wright v. Owens Corning*, 679 F.3d 101, 107-09 (3d Cir. 2012); *In re Amatex Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985).

Chemetron is not a case about buyers and sellers transferring shares and the plan that travels with them. Nor does *Chemetron* extend the Due Process Clause to buyers who had notice by publication and representation by their sellers but wish to undo the terms of their bargain. So the Brodskis, like the sellers from whom they bought, are subject to the releases. And the Brodskis do not dispute that the language of the releases bars their claims.

* * * * *

The Brodskis bought shares in a bankrupt company. They had notice of that bankruptcy and knew how the Plan bore on their purchase. And they bought from sellers who were represented in the bankruptcy proceedings. They therefore received due process and are bound by the Plan, including its releases, and its res judicata effect. The confirmed Plan properly authorized post-confirmation acts to implement its terms and released liability for those acts. So we will affirm.