IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 15
ARCTIC GLACIER INC., *et al.*[1]	:	Case No. 12-10605 (KG)
Debtors in a Foreign Proceeding.	:	**RE: Docket Nos. 45 and 46**

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

CPPIB Credit Investments Inc. ("CPPIB"), 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 (collectively "West Face"), as debtor in possession lenders (the "Lenders") to Arctic Glacier International, Inc. ("AGII") and its affiliated debtors (collectively, the "Debtors") in the above-captioned chapter 15 cases (the "Chapter 15 Cases") hereby submit this omnibus response (the "Response") to (i) the *Objection to Verified*

[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); and (xxx) Wonderland Ice, Inc. (8662). The Debtors' executive headquarters is located at 625 Henry Avenue, Winnipeg, Manitoba, R3A 0V1, Canada.

Petition for Recognition of Foreign Main Proceeding and for Related Relief (Docket No. 45, the "Recognition Objection"), and (ii) the *Motion of the Putative Class Action Representatives for an Order Withdrawing Approval of Provisional DIP Financing* (Docket No. 46, the "Withdrawal Motion"). In support of this Response, the Lenders respectfully state as follows:

PRELIMINARY STATEMENT

By the Recognition Objection and the Withdrawal Motion, the Class Reps (as defined below) seek to unnecessarily delay and derail the Debtors' Chapter 15 Cases based on purported rights that they have no standing to assert and would force the Debtors into a free fall liquidation. Indeed, the Class Reps' Recognition Objection and Withdrawal Motion are largely premised on the Class Reps' attempted enforcement of a criminal sentence of probation between the United States and AGII, which is entirely inappropriate for a private citizen to do. Moreover, the Class Reps are neither a party nor an intended beneficiary of this criminal order. Validating the Class Reps' baseless assertions would require an unprecedented usurpation of the government's power to enforce criminal laws and would ask this Court to expand its jurisdiction beyond what is appropriate.

Assuming that the Class Reps even had standing to assert their arguments before this Court, the balance of the Class Reps' arguments fail because:

- The liens and charges granted to the Lenders in respect of the DIP Financing do not constitute a "transfer" under the relevant definition of that term in a criminal judgment;
- The Class Reps' interpretation of the Debtors' criminal sentence is not supported by the sentence itself or the facts surrounding the Debtors' petitions;
- Failure to recognize the Chapter 15 Cases and the validity of the DIP Commitment and related DIP Charge constitutes an Event of Default under the DIP Facility and the potential liquidation of the Debtors that could result from the loss of financing would be detrimental to all creditors, including the

- Section 364(e) of the Bankruptcy Code requires that the validity of the DIP Financing be upheld.

In short, accepting any of the arguments made by the Class Reps would lead to the very outcome that the Lenders endeavored to prevent with their rescue financing — a complete destabilization of the Debtors' business because they otherwise would have no access to the working capital financing that they desperately need. If the Class Reps' arguments were to prevail, the Debtors would be put back into their prepetition predicament — with completely insufficient liquidity to operate their business. This is nothing more than a leverage play by a potentially out-of-the-money creditor constituency seeking to extort value for itself by threatening to utterly undermine a case and force a liquidation.

FACTUAL BACKGROUND

1. On February 22, 2012 (the "Petition Date"), the Debtors commenced a proceeding in the Canadian Court (the "Canadian Proceeding"), and obtained approval in the Canadian Proceeding of the Initial Order, which, among other things, granted certain protections to the Lenders in respect of a postpetition financing facility (the "DIP Facility"). Also on the Petition Date, Alvarez & Marsal Canada Inc., in its capacity as the court-appointed monitor and authorized foreign representative (the "Monitor") filed the Verified Petition (Docket No. 7)[2] and 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 (Docket No. 4, the "Provisional Relief Motion").

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Verified Petition.

2. The Provisional Relief Motion was granted on February 23, 2012 (Docket No. 28, the "Provisional Relief Order"). The relief granted in the Provisional Relief Order includes, among other things: (i) interim enforcement of the Initial Order, including the authorization to enter the DIP Facility and grant the Lenders the DIP Charge; (ii) application of the protections of section 364(e) of the Bankruptcy Code for the benefit of the Lenders; and (iii) a stay of any action to execute on the Debtors' assets within the territorial jurisdiction of the United States, other than with respect to the DIP Facility, in accordance with sections 1519(a)(1), 1519(a)(3), 1521(a)(7), and 362 of the Bankruptcy Code.

3. The Debtors obtained the DIP Facility to address their pressing liquidity concerns. In both the Verified Petition and the Provisional Relief Motion, the Monitor reveals that without the additional source of liquidity provided by the DIP Facility, "Arctic Glacier expects to run out of cash to continue operations in no more than two (2) weeks after entry of the Initial Order." (Provisional Relief Motion ¶ 17; Verified Petition ¶ 44.)

4. The Lenders provided the Debtors with rescue financing through the DIP Facility in reliance on the protections of the Initial Order, the Provisional Relief Order, and the eventual entry of an order granting full recognition of the Canadian Proceeding. Indeed, the Arctic Glacier DIP Facility Term Sheet, dated February 21, 2012 (Docket No. 39 Ex. A, the "DIP Term Sheet") provides for the DIP Facility funding on certain conditions. Before the Debtors received any of the DIP Facility Stage 1 Availability funds (as defined in the DIP Term Sheet), the Initial Order must have been entered. (DIP Term Sheet at 10.) Before the Debtors receive any of the Stage 2 Availability funds (as defined in the DIP Term Sheet), an order granting final recognition of the Canadian Proceeding must be entered in this Court. (DIP Term Sheet at 12.) Moreover, the failure to meet the conditions precedent to the Stage 1 and Stage 2

5. The Events of Default under the DIP Term Sheet also include, among others: (i) the lack of fulfillment of any other conditions precedent in the DIP Term Sheet, (ii) the issuance of any court order adverse to the Lenders, (iii) the issuance of any court order lifting a stay, (iv) the issuance of any court order staying, reversing, vacating or modifying the DIP Facility, and (v) the initiation of any challenge to the validity or enforceability of the DIP Charge, the DIP Facility, and related agreements. (DIP Term Sheet at 19-20.)

6. Through the DIP Facility, the Lenders will make available to the Debtors an aggregate amount of US$24 million and CAD$26 million, with US$10 million and CAD$15 million immediately available upon the entry of the Initial Order and the Provisional Relief Order.

7. After a hearing, on February 23, 2012, the Bankruptcy Court for the District of Delaware (the "Court") granted the provisional relief requested in the Provisional Relief Motion, which as noted above included certain key protections for the Lenders and an automatic stay in accordance with sections 1519(a)(1), 1519(a)(3), 1521(a)(7), and 362 of the Bankruptcy Code. The hearing on the recognition order is scheduled for March 16, 2012.

8. On March 9, 2012, indirect purchaser plaintiffs in the pending class action litigation titled *In re Packaged Ice Antitrust Litig.*, Case No. 08-MD-01952 (E.D. Mich.) (the "Class Reps") filed the Recognition Objection and the Withdrawal Motion. The Recognition Objection and the Withdrawal Motion raise the Class Reps' concerns regarding the Debtors'

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9. In the Recognition Objection and the Withdrawal Motion, among other things, the Class Reps argue that the Criminal Judgment's condition that AGII may not "without the permission of the probation officer, sell, assign, or transfer its assets" or commit "waste" bars the Debtors from entering into the DIP Facility and its related court-approved liens and charges. (Withdrawal Motion ¶¶ 18, 23.) The Class Reps also argue that the Debtors' grant of liens in connection with the DIP Facility constitutes the Debtors' transfer of their assets, because under section 101(54)(A) of the Bankruptcy Code, the definition of "transfer" includes the "creation of a lien." (Withdrawal Motion ¶ 20.)

RESPONSE

I. THE CLASS REPS LACK STANDING TO ASSERT VIOLATIONS OF THE CRIMINAL JUDGMENT AND SHOULD NOT FORCE THIS COURT TO INAPPROPRIATELY AUGMENT ITS JURISDICTIONAL REACH

A. The Class Reps Lack Standing to Bring the Recognition Objection and the Withdrawal Motion

10. Under settled law, the Class Reps have no standing to assert the Criminal Judgment for their benefit in these Chapter 15 Cases, especially when the party with standing (*i.e.* the United States Department of Justice) was served and did not respond. (*See* Affidavit of Service at Ex. A. (Feb. 28, 2012) (Docket No. 37) (evidencing service of the Chapter 15 documents on United States Department of Justice)).

11. The law is clear that private citizens are not suited to play the role of the prosecution. The United States Supreme Court has held, in a long line of precedential opinions, that individual citizens lack standing to enforce criminal laws. *See, e.g., Linda R.S. v. Richard*

[3] Withdrawal Motion Ex. 7 (the "Criminal Judgment").

D., 410 U.S. 614, 619 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.") (citing *Younger v. Harris*, 401 U.S. 37 (1971)). Further, Supreme Court precedent establishes that an individual citizen may not object to the discretion of government in prosecuting or not prosecuting alleged criminal activities, if that citizen is not the one being targeted for enforcement. *Linda R.S.*, 410 U.S. at 619 ("The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."). Under the Supreme Court's precedential decision in *Linda R.S.*, the Class Reps may not challenge the relief requested by the Debtors because they have no legally cognizable interest in the extent or manner of the Debtors' prosecution. Objecting to the recognition of the Chapter 15 Cases and the approval of the DIP Facility on this basis directly contravenes settled case law.

12. Moreover, the Class Reps do not have standing to enforce the Criminal Judgment for the simple reason that they are not a party to that judgment and cannot enforce its terms. The United States Supreme Court and federal courts in this District and elsewhere have consistently held that consent decrees[4] may not be enforced by non-parties in collateral proceedings, whether or not the non-parties were intended beneficiaries of such decrees. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) ("[A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it."); *SEC v. Dollar Gen. Corp.*, 378 F. App'x. 511, 515 (6th Cir. 2010) (non-party to SEC consent decree could not enforce provisions benefitting it even where non-party to consent

[4] "Consent decree" is "a court decree that all parties agree to." *Black's Law Dictionary* 441 (8th ed. 2004).

decree was co-defendant in underlying civil litigation); *Coca-Cola Bottling Co. of Elizabethtown Inc. v. Coca-Cola Co.*, 654 F. Supp. 1419, 1431-33 (D. Del. 1987) (engaging in detailed analysis to determine whether parties invoking consent decree were same as those to original decree). The Class Reps are not parties to the Criminal Judgment or the plea agreement executed between AGII and the U.S. Department of Justice. Accordingly, the Class Reps may not attempt to enforce the provisions of the Criminal Judgment or the plea agreement in these collateral proceedings, regardless of whether they were the intended beneficiaries of those agreed decrees.

B. This Court Lacks Jurisdiction to Enforce the Criminal Judgment

13. The Class Reps' pleadings in these Chapter 15 Cases are premised on the alleged violations of the Criminal Judgment that would result from the Court's recognition of the Canadian Proceeding and grant of other related relief. (*See* Withdrawal Motion ¶ 18.) This Court, however, does not have jurisdiction to determine any of the alleged violations of the Criminal Judgment.

14. It is well-settled that Bankruptcy Courts do not have jurisdiction to determine criminal matters. *Phila. Hous. Auth. v. Rainey (In re White)*, Bankruptcy Nos. 92–11320S, 93–0312S, 1993 WL 224661, at *2 (Bankr. E.D. Pa. June 21, 1993) ("This court has no criminal jurisdiction. That jurisdiction lies in the district courts, 18 U.S.C. § 3231, or perhaps the state courts. We therefore cannot make any determinations of criminal penalties against the Defendants under . . . any . . . law."); *see also In re Szabo Contracting Inc.*, 283 B.R. 242, 255 (Bankr. N.D. Ill. 2002) ("All federal criminal jurisdiction is vested solely in the district court and not in the bankruptcy court."). As such, the Class Reps' assertions regarding the Criminal Judgment are not properly litigated in this forum.

C. This Court Does Not Have Authority to Issue Orders in the Canadian Proceeding

15. In their Withdrawal Motion, the Class Reps request that this Court "modify its order to eliminate authorization" that permits the use of AGII's funds to advance defense costs to AGII's former officers.[5] (Withdrawal Motion ¶ 23.) The Provisional Relief Order, consistent with the scope of Chapter 15 of the Bankruptcy Code, merely *recognized* the Canadian Court's Initial Order and granted the Monitor certain related relief to that provided in the Canadian Initial Order. It did not authorize the Debtors to advance defense costs; only the Canadian Court may grant such relief. The Class Reps do not cite any support, nor can they, for the proposition that this Court has the authority to order the Canadian Court to modify the Initial Order.

16. The Class Reps' argument that recognition of the Canadian Proceeding would be "manifestly contrary to the public policy of the United States" because the Canadian Court may not accept a class proof of claim is meritless. (Recognition Objection ¶ 14.) Indeed, as even Chapter 15 recognitions of Canadian proceedings that deny asserted rights to jury trials have been held to not be "manifestly contrary" to public policy, it would be a stretch to suggest that a right to file a class action claim is a more fundamental right that justifies liquidating a company. *See Muscletech Research & Dev. Inc. v. Aguilar (In re Ephedra Prods. Liab. Litig.)*, 349 B.R. 333, 336-37 (S.D.N.Y. 2006) ("[a]s Judge Cardozo so lucidly observed: 'We are not so

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[5] The Class Reps assert that AGII's indemnification of its former officers is illegal in Delaware. (Withdrawal Motion ¶ 23.) These assertions are incorrect. Indemnification provisions such as those complained of here are legal under the relevant provisions of the Delaware General Corporation Law. *See* 8 Del. C. § 145(a) ("A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative . . . if the person acted in good faith."). Moreover, termination of a proceeding through "judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith." *Id.*

provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.") (internal quotations omitted).

II. THE CLASS REPS' INTERPRETATION OF THE CRIMINAL JUDGMENT IS NOT SUPPORTED BY LAW OR FACT

A. The Class Reps' Arguments Depend on Improper Interpretation of the Criminal Judgment

17. Assuming that the Class Reps had the authority to enforce the provisions of the Criminal Judgment in these Chapter 15 Cases (which they do not), the relief requested by the Monitor in the Verified Petition and Provisional Relief Motion does not violate the Criminal Judgment.

18. The Class Reps primarily argue that the Criminal Judgment's condition that AGII may not "without the permission of the probation officer, sell, assign, or transfer its assets" or commit "waste" bars the Debtors from entering into the DIP Facility and its related court-approved liens and charges. (Withdrawal Motion ¶¶ 18, 23.) The Class Reps further argue that the Debtors' grant of liens in connection with the DIP Facility constitutes the Debtors' transfer of their assets, because under section 101(54)(A) of the Bankruptcy Code, the definition of "transfer" includes the "creation of a lien." (Withdrawal Motion ¶ 20.) Both contentions are wrong.

19. First, section 101 of the Bankruptcy Code makes clear that the applicability of the defined terms found therein are relevant only to the provisions "of this title," *i.e.* the provisions of the Bankruptcy Code. Thus, the definition of "transfer" found in section 101 of the Bankruptcy Code has no relevance to a judgment entered in an antitrust criminal proceeding outside of bankruptcy. In fact, the word "transfer," when used as a verb, is defined in *Black's Law Dictionary* as either "1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control

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B. Adopting Class Reps' Interpretation of the Criminal Judgment Leads to Absurd Results

20. If the restriction on the Debtors' "transfer" of assets were taken to the logical conclusion that the Class Reps imply, the Debtors would need to seek a probation officer's approval for every single transaction that they enter into – from a draw on their prepetition revolving credit facility to the sale of each and every bag of ice they distribute. *See* 11 U.S.C. § 101(54)(D) (defining transfer as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property."). Such a broad construction of the word transfer clearly would lead to absurd results that were not contemplated in the drafting of the Criminal Judgment insofar as it would deprive a corporation of its ability to operate and manage its business without governmental consent at every turn of the road. In fact, the restrictions on the Debtors' transfer of assets are contained in the section entitled "Standard Conditions of Supervision," indicating that these terms were not considered or carefully tailored to the Debtors' actual business

[6] Moreover, as a matter of policy, the Debtors should not be allowed to contract away their right to file for bankruptcy or to obtain debtor-in-possession financing. Specifically, the Debtors' right to obtain the DIP Facility should not and cannot be ceded in a probation order.

operations. This condition is simply a boilerplate term found in every form AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants.

C. The Class Reps' Interpretation of Criminal Judgment Does Not Comport with Certain Key Facts

21. Several facts demonstrate that the Class Reps' interpretation of the Criminal Judgment is flawed. The Debtors continued to draw on their prepetition revolving credit facility after entry of the Criminal Judgment but before they defaulted on their obligations in September 2011, and filed for bankruptcy with the probation officer and Department of Justice fully informed of these facts. If one were to agree with the Class Reps' interpretation, the result would be that the Debtors' continued draws under their prepetition revolving credit facility after the entry of the Criminal Judgment (but before the default) would have been impermissible under the terms of their probation. Indeed, the Debtors made draws on their revolving credit facility after entry of the Criminal Judgment. Moreover, if the proceedings and the DIP Facility somehow violated the Criminal Judgment, the appropriate parties at the Department of Justice who were notified of the Debtors' Canadian restructuring proceeding and the impending U.S. restructuring proceeding could and should have raised objections, but they did not.

III. FAILURE TO RECOGNIZE THE CHAPTER 15 CASES WOULD RESULT IN THE LOSS OF FINANCING TO THE DETRIMENT OF ALL CREDITORS

22. The Class Reps' Recognition Objection and Withdrawal Motion are contrary to the Class Reps' own interests, as the relief requested by the Monitor in the Verified Petition and Provisional Relief Motion is necessary to the Debtors' survival and any reorganization. In both the Verified Petition and the Provisional Relief Motion, the Monitor reveals that without the additional source of liquidity provided by the DIP Facility, "Arctic Glacier expects to run out of cash to continue operations in no more than two (2) weeks after

23. Further, the failure of the Debtors to obtain certain of their requested relief would be an Event of Default under the DIP Term Sheet. (DIP Term Sheet at 12, 19.) If any of the Events of Default listed in the DIP Term Sheet were to occur, the Debtors could be unable to borrow under the DIP Facility. This, in turn, would create insurmountable liquidity constraints that were the very reason for the Debtors' filing for relief in the first place. The Events of Default under the DIP Term Sheet also include, among others: (i) the lack of fulfillment of any other condition precedent in the DIP Term Sheet, (ii) the issuance of any court order adverse to the Lenders, (iii) the issuance of any court order lifting a stay, (iv) the issuance of any court order staying, reversing, vacating or modifying the DIP Facility, and (v) the initiation of any challenge to the validity or enforceability of the DIP Charge, the DIP Facility, and related agreements. (DIP Term Sheet at 19-20.) Thus, granting the Class Reps' objection and motion would again implicate the Debtors' severe liquidity concerns because it would result in the Debtors' default under the DIP Term Sheet and could lead to a complete loss of financing – a result that surely would not inure to the benefit of the unsecured creditors represented by the Class Reps. In light of these facts, it is difficult to see how the Class Reps are prejudiced at all by the relief requested by the Debtors in these Chapter 15 Cases.

IV. SECTION 364(e) OF THE BANKRUPTCY CODE REQUIRES THAT THE VALIDITY OF THE DIP FINANCING BE UPHELD

24. In the Withdrawal Motion, the Class Reps seek the withdrawal of this Court's orders to the extent they approve the DIP Financing and grant to the Lenders liens on the Debtors' assets. (Withdrawal Motion at 2.) However, as any withdrawal of this Court's approval of the DIP Facility may not affect the validity of the debt, the Class Reps are not entitled to any relief.

25. Section 364(e) of the Bankruptcy Code, which was expressly applied to the DIP Facility in the Provisional Relief Order, provides that:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e). Section 364(e) has been interpreted as limiting the effect of any reversal or modification of an order approving a debtor's incurrence of postpetition financing outside of the ordinary course of its business. *Resolution Trust Corp. v. Swedeland Dev. Grp., Inc. (In re Swedeland Dev. Grp., Inc)*, 16 F.3d 552, 562 (holding section 364(e) limits the effects of reversal of court order authorizing postpetition financing). Further, where funds authorized in a debtor-in-possession financing have been released to the debtor, an appeal of the order authorizing such financing may be moot, as the court would not be able to grant effective relief. *Id.* at 563. Accordingly, since the DIP Facility was approved in the Provisional Relief Order and afforded the protections of section 364(e) of the Bankruptcy Code, the Class Reps may not seek to invalidate the DIP Facility debt or any of the liens incurred in respect of the DIP Facility. Since funds (available as Stage 1 Availability) were first distributed to the Debtors on March 1, 2012

any attempt of the Class Reps to invalidate the already extended portion of the DIP Facility is now moot. *Id.*

26. Moreover, the Class Reps' assertions that the Debtors and the Monitor did not act in good faith, even if true, have absolutely no relevance to the section 364(e) protections afforded to the Lenders. (*See* Withdrawal Motion ¶ 29.) Section 364(e) of the Bankruptcy Code provides that a reversal or modification of a debtor-in-possession financing order cannot affect the validity of the debt incurred "*to an entity that extended such credit in good faith.*" 11 U.S.C. § 364(e) (emphasis added). Noticeably absent from the protections provided in section 364(e) is any requirement that a debtor itself act in good faith in order for those protections to be granted to a DIP lender. Accordingly, the Class Reps' assertions that the Debtors and Monitor acted in bad faith, even if assumed to be valid, have no relevance to the section 364(e) protections provided to the Lenders in respect of the DIP Facility. Thus, pursuant to section 364(e) of the Bankruptcy Code, the Class Reps may not seek to invalidate the DIP financing provided to the Debtors.

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CONCLUSION

27. For the foregoing reasons, the Recognition Objection and the Withdrawal Motion should be denied and the Debtors should be provided with the relief requested in the Verified Petition and the Provisional Relief Motion.

Dated: March 13, 2012
Wilmington, DE

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