**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

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| 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** |
| | **Hearing Date: TBD** |

**MOTION OF THE PUTATIVE CLASS ACTION REPRESENTATIVES FOR AN ORDER WITHDRAWING APPROVAL OF PROVISIONAL DIP FINANCING**

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

putative class representatives of unsecured creditors and retail purchasers of the Debtors' and their co-conspirators' packaged ice in 17 states, hereby move for an order withdrawing approval of Provisional DIP Financing("Provisional Order") and the denial of the proposed DIP Financing going forward.[3]In support, the Class Reps respectfully represent as follows:

**PRELIMINARY STATEMENT**

The Monitor procured the Provisional Order (D.I. #4) in violation of the terms of Arctic Glacier International Inc.'s ("AG US") probation. That probation was part of a sentence handed down in the United States District Court for the Southern District of Ohio for AG US's guilty plea to a violation of § 1 of the Sherman Act (15 U.S.C. § 1). The terms of probation prohibit AG US, "without permission from the probation officer, [to] sell, assign or transfer its assets." (Ex. 7, at 2 (Condition No. 6); Aff. Ex. L).[4]The Provisional Order does just that: its assigns interests in AG USowned assets without the probation officer's approval.

Indeed, the Provisional Order also violates the "waste" prohibition of the probation because, pursuant to the Provisional Order, AG US's assets may be used, through the DIP Financing, to secure payment of the defense costs in ongoing civil litigationof former AG US officerswho also pled guilty to antitrust crimes. In the follow-on civil litigation, arising just from

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

[3]Capitalized terms used herein but not otherwise defined herein shall have the meanings ascribed to such terms in 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 (the "Monitor's Motion") [D.I. #4].

[4] Citations in the form: "Ex." are to the accompanying Appendix; "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].

what the officers pled guilty to, Arctic Glacier Inc. ("AG CAN"), the Canadian operating company, has agreed to pay the former officers' defense costs and also to indemnify them, as well as to not claw-back the defense costs that it advanced in the criminal cases (which resulted in guilty pleas).

Inexplicably, the Monitor's Motion (and the papers in support) do not reveal the restrictions imposed by the probation,even though it was annexed to the supporting affidavit of Keith McMahon. The Monitor's Motion also omits other material facts. These material omissions demonstrate a lack of good faith, and are an independent basis to rescind the Provisional Order.[5]

## STATEMENT OF FACTS

**AG US's Criminal Case:Probation Was Intended to Protect Class Reps**

1. On October 13, 2009, AG US entered into a plea agreement for a violation of 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 in a conspiracy to allocate customers of packaged 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. (Doc. #11 at 5). (Ex. 2). The former officers' plea agreements contain identical language. (Exs. 3-5)

2. Class Reps purchased Arctic Glacier brand (and that of AG US' co-conspirators) packaged ice at retail establishments throughout the United States, including Lawrence Acker, Patrick Simasko and Wayne Stanford who purchased in Southeastern Michigan and the Detroit metropolitan area. Several of the Class Reps intervened in the AG US criminal case under the

[5]A G US's and AG CAN's senior management has made inconsistent statements or promises that have not been satisfied in other federal courts. Class Reps respectfully submit that the Court should be hesitant to accept statements made by the Debtors at face-value.

Crime Victims Rights Act (18 U.S.C. § 3771) ("Criminal Interveners"), and objected to the proposed plea agreement.

3. In response to the Criminal Interveners' objections, the United States Government insisted on probation designed to protect AG US's assets for eventual collection by those affected by the antitrust conspiracy:

> As a result of what [Criminal Interveners]had to say, we ensured — and we took great order of time, of the Court's time, ... — to ensure that probation was a portion of the plea agreement, which as Your Honor indicated at the time of the hearing, you did not believe was a part of it. That was a critical issue on the part of the petitioners in this case: to ensure that probation was established.

*United States v. Arctic Glacier Int'l Inc.*, No. 1:09-cr-00149-HJW at 9 (S.D. Ohio Feb. 11, 2010) (Ex.10, at 9).

4. Indeed, the government relied on the availability of AG US's assets to satisfy the Criminal 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.

*Id.*at 103 (Ex. 6, at 103)

5. The Court imposed probation. In particular, the probation provides, "[t]he defendant organization **shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets.**" *Id.* (Ex. 7, at 2 (Condition No. 6)) (emphasis added).

6. The law firm Jones Day represents the Debtors here, as well as representing the AG entities in the ongoing MDL civil litigation, and represented AG US inthe criminal case. Jones Day also representsthe former AG US officers in the *Stanford* civil litigation (discussed below). A member of Jones Day is attorney of record on the criminal judgment imposing

probation. (Ex. 7, at 1)

**The Class Reps' Civil Litigation - Nationwide Class Action**

7. Class Reps are putative class representatives of consumers in 17 states. In 2008, some of the Class Reps brought an action for damages, arising from Debtor's and its officers' antitrust crimes, under various state laws. Those remaining Class Reps brought subsequent actions that have been consolidated for pre-trial purposes ("MDL") by the Judicial Plan on Multidistrict Litigation in the United States District Court for the Eastern District of Michigan ("MDL Court"). (Ex. 9)

8. Class Reps allege that the three principal packaged ice producers in the United States, including AG US, carved the United States into three territories (one for each producer) and agreed not to compete with each other. Evidence of the conspiracy includes admissions made by participants (Arctic Glacier, Home City and Reddy Ice); guilty pleas by AG US, AG US'sformer officers and Home City to a violation of Section 1 of the Sherman Act for allocating customers and territories in Southeast Michigan (these same officers had nationwide responsibilities), Reddy Ice's suspension of an officer for violating company policy, defendants' attempts to intimidate and bribe a whistleblower, issuance of a search warrant against Reddy Ice in Texas (even though it does no business in Michigan, indicating suspicion of a wider conspiracy), 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 various complaints stated a plausible claim thata nationwide conspiracy existed even though the government limited its prosecution to Michigan, for lack of evidence. *See, e.g., In re Packaged Ice Antitrust Litigation,* 723 F.Supp.2d 987, 1015 (E.D. Mich. 2010) (allegations "plausibly suggest that these Defendants participated in a nationwide conspiracy to allocate customers and territories and

raises a reasonable expectation that discovery will reveal evidence of illegal agreement").

9. On December 12, 2011, the MDL Court sustained the material parts of the Class Reps' complaint. It dismissed, without prejudice, some plaintiffs' claims, that had been newly added. *In re Packaged Ice Trust Antitrust Litigation*, No. 08-MD-01952, 2011 WL 6209188 (E.D. Mich. Dec. 13, 2011) The dismissed plaintiffs' complaints were refiled in various federal courts throughout the country, and those claims are now consolidated in the MDL Court. The MDL Court has authorized immediate class certification discovery to go forward.

**AG US's Exposure**

10. AG US admitted that itsconspiracy affected $50.7 million of commerce in Michigan. (Ex. 2, at 4 &Ex. 6, at 17) In addition to Michigan, AG US has joint and several exposure for the artificially inflated prices that were absorbed by consumers in 16 otherstates from 2001 until at least 2008. Application of a historically conservative 10% overcharge (i.e., the price increase AG US and its co-conspirators could charge consumers because of the antitrust violation) to the sales of all defendants in the 16 states – based on securities filings – yields damages that swamp all creditors' claims.[6] It yields $17,100,000 after trebling based on AG US's admission of $50.5 million in affected Michigan commerce alone. The Class Reps expect to establish that they absorbed the entirety of the overcharge passed onto them by retailers.[7]

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[6] Academic literature demonstrates that overcharge likely will exceed 10%. For example, a study of 800 cartel-overcharges reports a mean overcharge of 29% and median overcharge of 19%. *Cartel Overcharges: Survey and Meta-Analysis*, by John M. Connor (March 10, 2005 draft).

[7] *See, e.g., Lorix v.Crompton Corp.*, 736 N.W.2d 619, 631 (Minn. 2007) ("As an end user, plaintiff is the party most likely to be injured by an anticompetitive overcharge because she is the only party in the chain of purchase who cannot pass on part or all of that overcharge"); *See, e.g.*, Schaefer, 16 Wm. and Mary L. Rev. 883, 920 (1975) ("commodities sold to multiproduct retailers for resale to the ultimate consumer ... [have] the likelihood of a highly elastic supply curve [which] would convince an expert witness that all or most of an illegal overcharge was

**Material Omissions in the McMahon Affidavit**

11. AG US also admitted that the "amount-in-controversy" in the Kansas consumer class action exceeded $27,000,000. David Potter, an AG Vice President, submitted a declaration "in support of" the removal petition of co-defendants. (*See* Exhibit 14 at 12) That declaration averred that AG US's sales in Kansas were more than $27,000,000. (*Id.* at 11-12). Those numbers were prepared under "Keith McMahon's supervision." (*Id.* at 14) According to the removal petition of AG US's co-defendants, that AG US "supported," Kansas consumers may seek damages for the full consideration (*i.e.*, the total revenue from ice sold) paid for all packaged ice bought in Kansas.(*See Id.* at 4-5) Thus, according to the removal petition, AG US is exposed to a $27,000,000 judgment in Kansas alone on the Class Reps' claims for just AG US's sales calculated under "Mr. McMahon's supervision."

12. McMahon's affidavitonly avers "certain significant civil actions in the U.S. and Canada arising from the same or similar allegations, the most critical of which have been settled or (with respect to certain state attorney general investigations) have been dormant for some time," (Aff. ¶ 101) and "Arctic Glacier is unable to predict . . . the final outcome of the remaining U.S. lawsuits . . . or any potential effects these may have on Arctic Glacier or itsoperations." (Aff. ¶106) The affidavit does not disclose, however, the admission that the Class Reps' class action can result in a judgment in excess of $27,000,000 for Kansas consumers alone based on calculations prepared under McMahon's supervision.

**Michigan Action Against Former Officers:**
**Indemnification and Joint Representation**

13. In 2010 (some 8 weeks after their judgments of conviction became final) Wayne Stanford (one of the Class Reps) brought a class action against the three former AG US officers

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passed on to the consumers").

for damages. He sought damages arising **only** from the crimes to which the officers pleaded guilty. Defendants answered the complaint.

14. Jones Day appeared on behalf of the former officers – it is also representing AG USand AG CAN in the MDL, and AG US before this Court.Mr. Stanford offered to settle with one or more of the former officers for complete immunity in exchange for their honest cooperation in the prosecution of the cases against the co-conspirators. To thwart such a settlement (and disclosure of the full scope of the conspiracy), AG CAN agreed (1) to defend and indemnify the former officers and (2) not to claw-back the advance of the defense costs in the criminal cases, in which the former officers were convicted on their guilty pleas. However, these agreements provided that if the former officers acted contrary to AG's "stated instructions," AG CAN could claw-back all advanced defense costs (in the criminal and civil cases), and cease to pay any further costs in the civil case. (collectively at Ex. 15)

15. In a hearing regarding the potential disqualification of Jones Day (for its joint representation of potentially adverse parties), the MDL Court summarized the import of the agreements:

> THE COURT: Did you discuss with them the fact that inthe Canadian agreements with them and Jones Day that Arctic had said that both Canadian law and their board's, I guess, parameters provided that there could be situations where ifthey stated certain things, that they could not only lose indemnification but also have a clawback of possible fees thatArctic Glacier paid to you if they talked about things but indicated they were acting inimicable to the corporation's best interest or violations of law?
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> * * *
>
> THE COURT: Okay. In terms of the statements that clients might make in the U.S. litigation, these two civil cases that you are independently consulting with them on, did you also talk to them about the potential – or make them awareof the potential with regard to lack of indemnification and clawback if certain matters were to be admitted by them?

> MR. MICHAEL (one of the individual's lawyers): Judge, we certainly would – and, again, I apologize. I don't want to be seen as dancing.

*In re Packaged Ice Antitrust Litig.*, Hr'g Tr., (Feb. 3, 2011) (Ex. 16, at 16).

16. AG US maintained that even if these agreements constituted "waste," its (AG US's) probation was not violated because only AG US was a party to the probation – AG CAN is the entity financing the civil defense and not clawing back advances from the criminal cases. AG CAN justified the agreements because it stated that "[e]ach of the Individuals is a former officer of Arctic Glacier Inc. [AG CAN]." *Stanford v. Corbin*, 10-cv-11689, Dkt. #21 at 21 (Ex. 17) However, AG US, through its general counsel, and each individual admitted under oath at the sentencing hearing that AG US and the former officers committed their crimes while employed by AG US. (Exs. 18 - 21)

17. The MDL Court denied the disqualification motion, holding that the conflict had been consented to at the time, but might not be consentable in the future. The MDL Court found the conflict consentable because (1) it characterized as "valid" the indemnification agreements, but did not analyze their legality, and (2) it relied on AG CAN's general counsel's statement during the hearing that he "anticipates" that AG CAN will be able pay the defense costs in the future.*In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 611894 at *5 (E.D. Mich. Feb. 11, 2011) ("The Court rejects Plaintiffs' unsubstantiated assertion that Arctic Glacier lacks the financial capability of delivering on its promise to pay the individual Defendants' legal fees and to indemnify them in the event of an adverse judgment. The Court was able to question Arctic Glacier's corporate secretary, Mr. Hugh Adams, who was present at the hearing on February 3, 2011, regarding the company's financial ability to fulfill its obligations under the various retainer and indemnification agreements. Mr. Adams represented to the Court that Arctic Glacier has been able to pay all requested legal fees and intends to be able to continue to do so

going forward"); (hearing transcript is Ex. 16).

## ARGUMENT

### I. PROVISIONAL DIP FINANCING SHOULD CEASE AND PROPOSED DIP FINANCING SHOULD BE DENIED BECAUSE IT VIOLATES AG US's PROBATION AND THE DEBTORS HAVE EXHIBITED BAD FAITHBEFORE THE COURT

#### A. The Provisional Relief Order Continues to ViolateAG US's Probation and The Proposed Financing Would Further Violate AG US's Probation

18. AG US violated its probation when this Court authorized the use of its assets as collateral for the provisional DIP financing. Condition 6 of AG US's probation (Ex. 7,at 2) requires that AG US obtain "permission from the probation officer, [to] sell, assign or transfer its assets." The application for financing does not allege such permission was requested or obtained.[8]

19. The failure to seek permission from the sentencing court deprived the Class Reps of valuable rights that were a critical reason inthe government's recommendation ofacceptance of AG US's plea agreement (see ¶3-4 above). The probationary sentence was designed to protect the Class Reps 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, footnote added) The Sixth Circuit affirmed acceptance of the plea agreement 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).

20. Indeed, the government also recommended acceptance of the plea agreement based on its belief (not corrected by Jones Day, counsel for AG US in these proceedings as well)

[8] 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.")

that AG US's assets would be available to the crime victims, including Class Reps, for execution in the United States. As stated above at ¶3, the availability of assets to the crime victims was a crucial element in the court imposing probation. 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 a 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.

21. This Court should not continue to be a party to AG US's probation violation. *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"). Comity dictates respect for the sentence handed down by the United States District Court 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).

22. Even if the Court isdisinclined to deny the DIP Financing over AG US's assets, the Court should at least require AG US to abide by the terms of its probation and obtain permission from the probation officerbefore it grants the DIP Financing over AG US's assets. The Court should also limit the DIP Financing's secured by liens on Debtors to pay only for Debtors' expenses and not those of its Canadian parents.

### B. Financing Should Not Be Used To Defend or Indemnify Former Officers In Violation of AG US's Probation

23. Condition 6 of AG US's probation also prohibits "waste." (Ex.7, ¶ 2) The DIP Financing allows for **continued** financing of the former AG US officers' defense costs in

connection with the Stanford civil action– where the action seeks damages **solely** from the conduct to which these individuals pled guilty. Although AG CAN is advancing the defense costs, the governing law is immaterial – the advance of defense costs in these circumstances is illegal under Delaware law, Canadian law and against public policy of both the United States and Canada. The use of AG US's assets to secure more assets to fund these illegal activities constitutes waste and thus, violates AG US's probation.[9] This Court should modify its order to eliminate authorization for any such financing.

24. The Delaware Code expressly limits the circumstances where corporate officers can be indemnified or defense costs advanced. The purpose of these limitations is "to ensure that corporate officials do not evade the consequences of their own misconduct in such a way that they are rewarded for or encouraged to violate applicable laws." *Stockman v. Heartland Indus. Partners, L.P.*, CIV.A. 4227-VCS, 2009 WL 2096213 at *10 (Del. Ch. July 14, 2009). The Delaware Code provides:

> a) A corporation shall have power to indemnify any person who ... is a party ... to any ... suit ... by reason of the fact that the person ... was a[n] ... officer ... of the corporation ... against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action ... if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action ... by 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 and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

8 Del. C. § 145.

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[9] Indeed, Arctic Glacier Income Fund has spent about $19 million in defense costs, and has expressed no interest in minimizing those expenses. It has expressed absolutely no interest in settling Class Reps' claims amicably during the nearly four-year litigation.

25. An officer who commits antitrust offenses such as entering into customer allocation conspiracies cannot be viewed as having acted in "good faith and in a manner reasonably believed to be in ... the best interests of the corporation." As the legislative history makes plain,

> limitations ... must necessarily be placed on the power to indemnify in order to prevent the statute from undermining the substantive provisions of the criminal law and corporation law. If indemnification in criminal proceedings were to be included within the scope of the statute, **the full deterrent effect of the anti-trust law, for example**, could be maintained only where the party involved had no reasonable cause to believe his conduct was unlawful.

*Stockman*,2009 WL 2096213 at *10 (quoting legislative history) (emphasis added).

26. The Fourth Circuit's interpretation of another state's indemnification statute is identical to this legislative history. It explained,

> An agent who has intentionally participated in illegal activity ... against third persons cannot be said to have acted in good faith, even if the conduct benefits the corporation. For example, **corporate executives who participate in a deliberate price-fixing conspiracy could not be found to have acted in good faith, even though they may have reasonably believed that a deliberate flouting of the antitrust laws would increase the profits of the corporation.**

*In re Landmark Land Co. of Carolina, Inc.*, 76 F.3d 553, 565 (4th Cir. 1996) (citations omitted; emphasis added).

27. Not surprisingly, Canadian law is identical on this point. The Indirect Purchaser Plaintiffs in the MDL Court submitted the Declaration of Gregory D. Wrigglesworth, a Canadian law expert. *Stanford v. Corbin*, 10-cv-11689, Dkt. #28-2 (Ex. 22) Mr. Wrigglesworth demonstrated that neither indemnification nor the advance of defense costs is available under the circumstances. He explained, "the test [is] ... whether the individual acted honestly, in good faith, and with a reasonable belief that their conduct is lawful." (*Id.*, ¶ 11) He further explained, "the intention of the legislation [is] to impose liability on directors and officers personally, without

indemnification, in order to discourage them from acting ... in an illegal fashion." (*Id.*, ¶ 11) He determined that because each Individual's "guilty plea requires an admission of each of the elements of the crime ... , including the *mens rea,* it would appear that this would give rise to a reasonable apprehension that the individuals have engaged in improper conduct." (*Id.*, ¶ 13)[10]

28. In any event, Delaware law, applicable in this bankruptcy, provides that "the law of a foreign jurisdiction cannot be used to interpret a contract provision in a manner repugnant to the public policy of Delaware." *J.S. Alberici Const. Co., Inc. v. Mid-W. Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000). In *J.S. Alberici Const. Co*, the Delaware Supreme Court refused to honor an indemnification agreement governed by Kansas law because to do so would be "clearly repugnant to the public policy of Delaware." 750 A.2d at 521, *see also James Cape & Sons Co. ex rel. Polsky v. Streu Const. Co.*, 2009 WI App 154, 321 Wis. 2d 604, 614-615, 775 N.W.2d 117, 123, *review denied*, 321 Wis. 2d 522 (2009) (holding that insurance for "criminal [antitrust] conspiracy" violated public policy). The same result should apply here. The defense and indemnification agreements here are clearly repugnant to public policy and unenforceable. Payments pursuant to those agreements constitute waste. Now that AG US's assets have been assigned or transferred to procure financing to fund those expenses, AG US has also committed waste in violation of the Probation Order.

### C. Provisional DIP Financing Should Cease and Proposed DIP Financing Should be Denied For Bad FaithBecause the Monitor, Debtor and Lenders Omitted Material Facts from the Monitor's Motion

29. The Monitor's Motion for DIP Financing omitted material information, including (1) AG US's probation that required approval by the probation department to "sell, transfer or assign" its assets, (2) the government's recommendation to the Court that AG US's plea

[10] The MDL Court noted characterized the agreements as "valid," but offered no analysis of whether the agreements were in fact lawful or appropriate.

agreementwas predicated on the availability of AG US's assets for execution in the United States and (3) based on information from Keith McMahon, AG US's acknowledgement that the "amount-in-controversy" in the Kansas action alone exceeds $27,000,000, andthat the Class Reps' could result in a judgment that would swamp AG US. Each of these omissions violated the duty of good faith and candor, and warrants withdrawal of the DIP Financing order.

30. 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,

> The very minimum requirement for fair dealing was the elementary obligation of full disclosure of all its interests, and the burden was on it to show at least that such disclosure was made. ... 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 (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 jurisdictionalintegrity 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), (*quoting In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir.1986).

31. The failure to disclose material information in support of an application justifies withdrawal of an order as not obtained in good faith. For example, in *In re RVP, Inc.*, 269 B.R.

851 (Bankr. D. Idaho 2001), the court withdrew approval of assumption of an executory contract because of a material omission in the approval application. The court explained,

> [t]here is a duty of candor toward the Court which includes an obligation to disclose material facts. It was inappropriate for Debtor to present its Motion or its Order allowing assumption under § 365(a) without disclosing or addressing the facts known to Debtor which were relevant to that issue. . . . [T]his provides compelling reason to reconsider the Order.

269 B.R. at 854.

32. The Monitor's Motionand supporting papers fail to disclose facts that go to the core of the propriety of the Provisional Order.The Court should,therefore,withdrawits approval of the DIP Financing because the Monitor's Motion was not filed in good faith.

**WHEREFORE**, for the reasons stated above, the Class Reps respectfully request thatthe Court withdraw its order approving DIP Financing and the imposition of any lien on, or assignment of, AG US's assets.

Dated: March 9, 2012
Wilmington, Delaware

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