File 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 PROPOSED 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**"),

Application UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.1985, c.C-36, AS AMENDED

NOTICE OF MOTION
before the Honourable Madam Justice Spivak
HEARING DATE: October 22, 2012 at 2:00 P.M.

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OCT 15 2012

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File No. 423611-1

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 PROPOSED 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**"),

Application UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C.1985, c.C-36, AS AMENDED

NOTICE OF MOTION

DESERT MOUNTAIN ICE, LLC ("Desert Mountain") will make a motion before the Honourable Madam Justice Spivak on Monday, October 22, 2012, at 2:00 p.m., or as soon after that time as the motion can be heard, at the Law Courts Complex, 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR:

1. An order granting leave to Desert Mountain to file this motion, to the extent required under the Initial Order;

2. An order compelling the Applicants and Arctic Glacier U.S.A., Inc., Arctic Glacier Canada Inc. and Arctic Glacier, LLC, formerly H.I.G. Zamboni, LLC, (collectively the "Purchaser") to pay to Desert Mountain the amount of $12,500,000.00 U.S. funds, together with such interest, charges and costs as required, pursuant to s. 24 of a Lease

and Option Agreement made between Desert Mountain and Arctic Glacier California Inc., one of the Applicants, dated May 25, 2006 (the "Lease"), monetary default thereunder in said amount and paragraph 9 of the Sale Approval Order of June 21, 2012, such default continuing to and including the date hereof;

3. In the alternative, an order to amend or vary the Sale Approval Order as necessary to:

(a) specifically require immediate payment by the Purchaser and the Applicants to Desert Mountain of said amount of $12,500,000 plus all interest, charges and costs required pursuant to the Lease and the Purchase Option in the Lease and monetary default thereunder;

(b) delete any provision thereof which purports to remove the Purchase Option from the Lease or otherwise amend or modify the Lease;

(c) delete any provision thereof which purports to remove the ability of Desert Mountain to enforce the Purchase Option as against the Applicants and the Purchaser;

4. In the further alternative, an order for advice and directions relative to addressing the failure of the Applicants and the Purchaser to satisfy the outstanding monetary default referred to herein and otherwise to honour specific representations made at the hearing of the Sale Approval Motion on June 21, 2012 for the Sale Approval Order, including that all monetary default under Assigned Contracts would be cured by payment on or before Closing by the Applicants and/or the Purchaser through the proposed form of order, without exception;

5. Costs on a solicitor and client basis;

6. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. On May 25, 2006, Desert Mountain, as landlord, entered into the Lease with Arctic Glacier California Inc., one of the Applicants herein, as tenant, for land and building (the "Arizona Facility"), including therein specialized ice making equipment critical to the business of the Applicants, located at 600 South 80th Avenue, Tolleson, Arizona.

2. The Arizona Facility was the only property of the Applicants in the State of Arizona for its business in that area, was critical to the over-all business of the Applicants and was included in property critically required by the Purchaser in its purchase of the business of the Applicants.

3. At all material times, the Lease in all its terms, including the Purchase Option as herein referred to, was well known to the Applicants, the Purchaser and the Monitor.

4. The Lease provided in s. 24 thereof for a binding Purchase Option at a price of $12,500,000.00, plus interest, charges and costs as required (collectively the "Purchase Option Amount"), deemed to be automatically exercised by the tenant upon the occurrence of one or more events, including specifically a sale by Arctic Glacier Inc. of greater than 50% of its world wide operations on a consolidated basis within any continuous six month period.

5. In May, 2012, the Applicants, by Memorandum of their legal counsel dated May 16, 2012, approached Desert Mountain seeking to amend the Lease and particularly the Purchase Option, or suffer considerable prejudice, with notice of such Memorandum to the Monitor but no amendment was agreed upon by Desert Mountain. It was expressly acknowledged in the Memorandum that, without the requested amendment to the Lease, the Applicants would incur a monetary obligation after May 25, 2012 to pay $12,500,000, being the Purchase Option Amount.

6. At no time did the Applicants or the Purchaser seek or obtain any consent from Desert Mountain to an assignment of the Lease.

7. On or about June 7, 2012, the Applicants entered into an Asset Purchase Agreement (the "APA") with the Purchaser for the sale of greater than 50% of their world wide operations on a consolidated basis, including the Lease, which APA was approved by this Honourable Court, without material change, on June 21, 2012 through the Sale Approval Order, thereby triggering the Purchase Option, including liability for immediate payment of the Purchase Option Amount.

8. The Lease was an Assigned Contract, as defined under the APA, and as specifically referenced as such in Exhibit "D" to the Affidavit of Keith McMahon, President and Chief Executive Officer of the Applicants, sworn June 13, 2012 (the "McMahon Affidavit"), the Lease being strictly subject to the Purchase Option.

9. The APA provided, *inter alia*, that:

(d) the Purchaser will purchase all assets and liabilities of the Applicants, including all rights and obligations under Assigned Contracts, save and except for Excluded Assets and Excluded Liabilities; the Lease and the

Purchase Option were not an Excluded Asset nor an Excluded Liability under the APA, each as expressly defined therein;

(e) pursuant to articles 2.05 and 2.06, and Appendix 2.06, the Applicants would purchase the Arizona Facility for $12,500,000 (the Purchase Option Amount) and the Purchaser would purchase the Arizona Facility from the Applicants for the same amount, increasing the Purchase Price under the APA by the same amount;

(f) the Purchase Price was sufficient to satisfy all known creditor claims;

(g) all liabilities under Assigned Contracts would be assumed and satisfied by the Purchaser or, to the extent of monetary default thereunder, paid as cure costs by either the Applicants or the Purchaser on or before the Closing of the APA.

10. On June 8, 2012, the Applicants publicly announced by Press Release, Exhibit "C" to the McMahon Affidavit, that it had entered into a binding agreement for the sale of substantially all of its business and assets to the Purchaser, subject to court approval, such approval granted June 21, 2012 by the Sale Approval Order, and subsequent U.S. Sale Approval Order, which Press Release provided in part that the Purchaser will assume the Applicants' current trade payables, its leases and certain contractual obligations, with proceeds sufficient to pay all remaining known creditors.

11. On or about July 18, 2012, or earlier, the Purchaser went into possession of and control of more than 50% of the world wide operations of the Applicants on a consolidated basis as provided for in the Purchase Option, including Keith McMahon

acting as Chief Executive Officer and President of at least Arctic Glacier Canada Inc., one of the entities within the Purchaser that was purchasing the Canadian operations.

12. At all material times prior to the Closing of the APA on July 27, 2012, there was due and owing by the Applicants to Desert Mountain the Purchase Option Amount, the Purchase Option deemed to have been exercised by the tenant by reason of the APA, approved by this Honourable Court on June 21, 2012, i.e. a monetary default under the Lease was in existence, known to the Applicants, the Purchaser and the Monitor.

13. On July 26, 2012, one day before Closing, the Applicants and the Purchaser entered into an Assignment, Assumption and Amending Agreement whereby article 2.05 of the APA was deleted but replaced with the following article, repeating that the Purchase Price would be increased by said amount of $12,500,000, being the price to be paid by the Applicants for the Arizona Facility, to be reimbursed dollar for dollar through addition to the Purchase Price to be paid by the Purchaser:

> "The purchase price payable to the Vendors for the Assets (such amount being hereinafter referred to as the "**Purchase Price**") will be $422,000,000 plus the dollar value of (i) the price paid by the Vendors for the purchase of the land and building at 600 South 80th Avenue, Tolleson, Arizona; (ii) the Petty Cash; and (iii) the Assumed Liabilities, subject to adjustment as provided in Section 2.07."

14. On June 21, 2012, the Applicants and the Purchaser represented to this Honourable Court through the Notice of Motion, the McMahon Affidavit, the Applicant's Brief and through oral submissions by legal counsel that all monetary liabilities arising from the Assigned Contracts, whether by assumption by the Purchaser or by payment by the Applicants or by the Purchaser on or before Closing, would be satisfied, without exception, pursuant to the mandatory requirement of s.11.3(4) of the *Companies*

Creditors Arrangement Act (the "CCAA") and as provided for in paragraph 9 of the proposed Sale Approval Order appended to the Notice of Motion, including in particular:

(a) all owned real property and all leased property, without exception, were essential to the business being purchased as a going concern and would be purchased by the Purchaser;

(b) the Purchaser was responsible for all Assumed Liabilities, including all Assigned Contracts and the rights and obligations thereunder, including all leases of real property, or breach thereof;

(c) pursuant to s. 11.3(4) of the CCAA, all monetary default under any Assigned Contract must be paid and would be paid, without exception, as a term of and on or before Closing, either by the Purchaser or by the Applicants;

(d) there was no known prejudice or adverse effect to any counter-party to the Assigned Contracts if the court ordered an assignment of the Assigned Contracts to the Purchaser;

(e) the Court had jurisdiction to vest title to all Assets free and clear of all Claims as defined in the proposed Sale Approval Order, but such vesting of title would be without any monetary prejudice to any counter-party;

(f) there were no claims under Excluded Liabilities or otherwise known, not to be paid, that would effect anyone's rights, if the order as requested was granted, including any rights of counter-parties under Assigned Contracts;

(g) there were no issues, including any lack of jurisdiction, in granting the order sought and that any changes to the proposed Sale Approval Order appended to the Notice of Motion were merely "more words" and did not represent any material change to the substance of said order or constitute prejudice to any counter-parties.

15. Notwithstanding said representations, the Applicants, the Purchaser and the Monitor knew or ought to have known on June 21, 2012 or, in any event prior to Closing on July 27, 2012, that:

(a) Desert Mountain had not agreed to amend the Lease in any respect and had not been requested to give nor had it given its consent to any assignment of the Lease;

(b) the failure to pay the Purchase Option Amount to Desert Mountain on the sale by the Applicants of more than 50% of the world wide assets of the Applicants did cause a monetary default under the Lease prior to or on the Closing;

(c) the Purchase Option was in effect and Desert Mountain was expressly relying upon same for payment of the Purchase Option Amount, if more than 50% of the world wide assets of the Applicants were sold;

(d) neither the Applicants nor the Purchaser intended to pay the Purchase Option Amount on or before Closing, notwithstanding the express contemplation of purchase of the Arizona Facility in the APA through Articles 2.05 and 2.06 and Appendix 2.06 and the express requirements

of s. 11.3(4) of the CCAA for payment of all monetary default on Assigned Contracts;

(e) the Purchaser did want an assignment of the Lease, but did not want the Purchase Option included therein or enforceable by Desert Mountain;

(f) no notice had been given to Desert Mountain of the express intention to assign the Lease, delete the Purchase Option entirely therefrom, and otherwise refuse to pay the Purchase Option Amount.

16. None of the issues in paragraph 15 hereof were disclosed to the Court as part of the Notice of Motion materials or submissions thereon seeking the Sale Approval Order nor were they disclosed to the Court on or prior to the Closing on July 27, 2012.

17. Desert Mountain was fully relying upon the matters stated in paragraph 15(a), (b) and (c) hereof, but had no notice or knowledge of the intention of the Applicants and the Purchaser as provided in paragraphs 15(d), (e) and (f) hereof, only discovering same after July 27, 2012 on default of payment of the Purchase Option Amount.

18. The Purchase Option and the Purchase Option Amount and the failure to pay same did and does constitute a monetary default under an Assigned Contract , in particular the Lease, and did not arise by reason of:

a) the Applicants' insolvency (in fact, the Applicants are not insolvent based on representations made to date);

b) the commencement of these CCAA proceedings; or

c) the failure of the Applicants' to perform a non-monetary obligation.

19. The proposed Sale Approval Order attached as Appendix 1 to the Notice of Motion for the Sale Approval Order, and in particular paragraph 4 thereof, expressly provided in the last sentence that "Notwithstanding anything contained in this order. . . . Assigned Contracts shall not be or be deemed to be amended or modified by the terms of this Order", thereby protecting the interests of Desert Mountain.

20. Said sentence in its entirety was deleted from the final Sale Approval Order without notice to Desert Mountain, but to the extreme prejudice of Desert Mountain, with representation by counsel to the Court on June 21, 2012 that no material change was being made to the proposed order aforesaid, just "more words" to suit the U.S. court process.

21. Said change to the proposed Sale Approval Order, without notice to Desert Mountain, was a material and prejudicial change to the interests of Desert Mountain.

22. The Court had no jurisdiction pursuant to the CCAA, or otherwise, to delete or vest out a material term of an Assigned Contract and in particular the Purchase Option, without the express consent and agreement of Desert Mountain, neither of which were obtained or sought through the Notice of Motion with sufficient particularity to identify the relief sought as against Desert Mountain and challenged herein.

23. Had Desert Mountain been aware of any intention to assign the Lease without payment of the Purchase Option Amount, it would have specifically objected to the Sale Approval Order on June 21, 2012 and on the hearing of the motion for the U.S. Sale Approval Order, as may be required, requiring full payment of the Purchase Option Amount as an express condition of such orders. Desert Mountain has filed an appeal of the U.S. Sale Approval Order.

24. Through failure to fully disclose in the Motion and supporting material, and in submissions made, the intent to fully remove the Purchase Option without payment of the Purchase Option Amount on or before the Closing, or at any time, Desert Mountain was materially misled as to the nature of the relief sought by the Applicants as it related to Desert Mountain.

25. It was unreasonable to expect Desert Mountain to appreciate the intentions of the Applicants and the Purchaser, as provided in paragraph 15 hereof, based on the Notice of Motion.

26. Notwithstanding said monetary default, known to all parties, and representations made, the Purchase Option Amount was not paid by the Purchaser to the Applicants or by the Applicants to Desert Mountain or by the Purchaser to Desert Mountain on or before Closing or at any time and despite demands made, no payment has been made, in breach of the Lease, and in breach of the representations made as aforesaid, and in breach of paragraph 9 of the Sale Approval Order.

27. The Purchaser has purported to enter into the Arizona Facility as a tenant, without the consent of Desert Mountain but has refused to acknowledge the Purchase Option or pay the Purchase Option Amount or honour all obligations assumed under the Lease, including the Purchase Option, including particularly the requirement to pay all monetary default and thereby pay the Purchase Option Amount pursuant to the Lease and the Purchase Option therein, based on a Change of Control as expressly defined in the Lease to include a sale of more than 50% of the world wide operations of the Applicants.

28. Said entry into possession by the Purchaser without payment of the Purchase Option Amount is unlawful and in breach of the Sale Approval Order.

29.

a) *The Companies Creditors Arrangement Act*, s. 11.3, and in particular 11.3(4);

(b) Queen's Bench Rule 59.06.

30. Such further and other grounds as counsel may advise and this Honourable Court may permit.

31. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

(a) The Notice of Motion and attached Appendix 1, the proposed Sale Approval Order, previously filed;

(b) The Affidavit of Keith McMahon sworn June 13, 2012, previously filed;

(c) The Brief of the Applicants in support of the Notice of Motion dated June 20, 2012 and in particular paragraphs 14 – 21 thereof, previously filed;

(d) The Transcript of Proceedings on June 21, 2012, and specifically the representations of counsel for the Applicants, the Purchaser and the Monitor as contained therein;

(e) The Affidavit of Robert Nagy, sworn October 9, 2012;

(f) Such further and other materials as counsel may advise and this Honourable Court may permit.

DATED: October 15, 2012

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