

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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC. AND ARCTIC GLACIER INTERNATIONAL INC. AND

THE ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO:

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., APPLICANT APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED

Applicants,

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

---

TRANSCRIPT OF PROCEEDINGS before The Honourable Madam Justice Spivak, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 16th day of October, 2013.

---

APPEARANCES:

MR. M. WASSERMAN, MR. D. JACKSON and MR. J. DACKS, for the Monitor  
MR. R. MORAWETZ, Monitor  
MR. K. MCELCHERAN and MR. J.J. BURNELL, for the Applicants  
MR. W. LESLIE, for Desert Mountain and Peggy Johnson  
MR. M. NEWMAN, for Keith Burrows and Robert Nagy  
M. MILANI, Q.C., for the Trustees of Arctic Glacier Income Fund  
MS. M. KONYUKHOVA, for the purchaser, H.I.G.  
J. LEE, Q.C., for Indirect Purchasers  
MR. R. KERSEY, for management claimants  
MR. A. CANNON, U.S. counsel for the Monitor (via teleconference)  
MR. B. ROBERTSON, Chief Process Supervisor, for management claimants (via teleconference)  
MS. M. PATERSON, counsel for the monitor (via teleconference)  
MR. M. SPEAKER, for Stoneline (via teleconference)  
MR. A. DODGE, for Indaba Capital (via teleconference)  
MR. M. SHANDRO, for Fulcra Asset Management (via teleconference)

## INDEX

	Page
PROCEEDINGS	1
SUBMISSION BY MR. WASSERMAN	5
SUBMISSION BY MR. DACKS	7
SUBMISSION BY MR. LEE	33
SUBMISSION BY MR. DACKS	34
SUBMISSION BY MS. KONYUKHOVA	62
SUBMISSION BY MR. MCELCHERAN	66
SUBMISSION BY MR. LESLIE	74
SUBMISSION BY MR. DACKS	81
SUBMISSION BY MS. KONYUKHOVA	84
RULING BY THE COURT	88
PROCEEDINGS	93

1 OCTOBER 16, 2013

2

3 THE CLERK: All right, we're now on the record.  
4 This is the matter of the Companies Creditors Act and  
5 Arctic Glacier Income Fund and others.

6 THE COURT: Good morning.

7 THE CLERK: Please be seated.

8 MR. JACKSON: Good morning, My Lady.

9 UNIDENTIFIED PERSON: Good morning, My Lady.

10 THE COURT: Do we have enough chairs for  
11 everyone?

12 MR. JACKSON: We actually do, My Lady, it's  
13 just --

14 THE COURT: All right.

15 MR. JACKSON: It is a little tight.

16 THE COURT: All right.

17 MR. JACKSON: For the purposes of the monitor,  
18 Jackson, counsel for -- Manitoba counsel for the monitor.  
19 If I could deal with the appearances, My Lady.

20 THE COURT: Sure.

21 MR. JACKSON: With me today, on behalf of the  
22 monitor, is Mr. Mark Wasserman and Jeremy Dacks, My Lady.

23 MR. WASSERMAN: Good morning, My Lady.

24 MR. DACKS: Good morning.

25 THE COURT: Good morning.

26 MR. JEREMY: On behalf of the applicants this  
27 morning, Mr. Kevin McElcheran.

28 MR. MCELCHERAN: Good morning, My Lady.

29 THE COURT: Good morning.

30 MR. JACKSON: And J.J. Burnell is also here.

31 MS. BURNELL: Good morning, My Lady.

32 THE COURT: Good morning.

33 MR. JACKSON: On behalf of Desert Mountain, My  
34 Lady, Mr. D. Wayne Leslie.

1 THE COURT: Good morning.

2 MR. LESLIE: Good morning, My Lady.

3 MR. JACKSON: On behalf of Robert Nagy and Keith  
4 Burrows, Mr. Mark Newman, My Lady.

5 THE COURT: Good morning.

6 MR. NEWMAN: Good morning, My Lady.

7 MR. JACKSON: On behalf of -- or counsel for the  
8 trustees of Arctic Glacier Income Fund, Mr. Mike Milani,  
9 Q.C.

10 THE COURT: Good morning.

11 MR. MILANI: Good morning, My Lady.

12 MR. JACKSON: On behalf of the purchaser, H.I.G.,  
13 My Lady, Maria Konyukhova.

14 MS. KONYUKHOVA: Good morning, My Lady.

15 THE COURT: Good morning.

16 MR. JACKSON: Canadian counsel to Wild Law Group,  
17 which are Canadian counsel for the indirect purchasers, My  
18 Lady, Mr. Jeff Lee, Q.C.

19 MR. LEE: Good morning, My Lady.

20 THE COURT: Good morning. I'm sorry, I missed  
21 your name.

22 MR. LEE: Last name is Lee, L-E-E. First initial  
23 "J".

24 THE COURT: All right. Thanks.

25 MR. LEE: Thank you.

26 MR. JACKSON: And on behalf of certain of the  
27 management claimants, My Lady, Mr. Robin Kersey.

28 THE COURT: Good morning.

29 MR. KERSEY: Good morning, My Lady.

30 MR. JACKSON: Also in attendance this morning, in  
31 court, My Lady, is Mr. Richard Morawetz.

32 THE COURT: Good morning.

33 MR. MORAWETZ: Good morning, My Lady.

34 MR. JACKSON: Now, what I understand, My Lady, as

1 you know, we also have the teleconference facility --

2 THE COURT: Yes.

3 MR. JACKSON: -- and my understanding of who is  
4 on the line and we should double check that but, first of  
5 all, Mr. Alex Cannon, the U.S. counsel, for the monitor.

6 THE COURT: All right. Good morning.

7 MR. CANNON: Thank you.

8 MR. JACKSON: The chief process supervisor, Mr.  
9 Bruce Robertson.

10 THE COURT: Good morning.

11 MR. ROBERTSON: Good morning, My Lady.

12 MR. JACKSON: Also, counsel, for the monitor, out  
13 of (inaudible) in Toronto, Mary Paterson.

14 MS. PATERSON: Good morning, My Lady.

15 THE COURT: Good morning.

16 MR. JACKSON: A, a unit holder, Stoneline, which  
17 is one of the unit holders of Arctic Glacier Income Fund,  
18 Mr. Matthew Speaker, S-P-E-A-K-E-R.

19 THE COURT: Good morning.

20 MR. SPEAKER: Good morning.

21 MR. JACKSON: And at this stage, those are the  
22 only four that I am aware of, that are appearing by  
23 teleconference but perhaps we should canvass to see if  
24 there is anyone else on the line before we proceed.

25 THE COURT: Is there anyone on the line that we  
26 haven't identified?

27 MR. DODGE: I'm actually Andy Dodge for Indaba  
28 Capital (inaudible).

29 THE COURT: I'm sorry, I'm having a hard time  
30 hearing you, could you repeat that please.

31 MR. DODGE: Andy Dodge from Indaba Capital, we're  
32 unit holders.

33 THE COURT: All right.

34 THE CLERK: Was it Andy Dodge?

1 MR. JACKSON: It's Andy Dodge and I just didn't  
2 get what the unit --

3 MR. DODGE: D-O-D-G-E, like the car.

4 THE CLERK: Yes. And who is the client?

5 MR. JACKSON: Sorry, who is your client, Andy?

6 MR. DODGE: (Inaudible.)

7 MR. JACKSON: Oh, he's the holder?

8 UNIDENTIFIED PERSON: He's the unit holder.

9 MR. JACKSON: Okay.

10 THE CLERK: Who is he representing then?

11 MR. JACKSON: He's the unit holder.

12 THE COURT: Himself.

13 MR. JACKSON: Himself. And then was there one  
14 more besides Andy?

15 MR. DODGE: I'm sorry, for, for Indaba Capital,  
16 I-N-D-A-B-A Capital.

17 THE COURT: I-N-D-A-B-A?

18 MR. DODGE: Capital, correct.

19 THE COURT: All right.

20 MR. JACKSON: Oh, Indaba.

21 THE COURT: Right.

22 MR. JACKSON: Yeah, that's -- Andrew, you're for  
23 Indaba?

24 MR. DODGE: For Indaba, yeah, correct.

25 MR. JACKSON: I-N-D-A-B-A, My Lady.

26 THE COURT: All right. You're going to prepare a  
27 list of appearances?

28 MR. JACKSON: Yes, My Lady.

29 THE COURT: Thank you.

30 THE CLERK: I think there was someone else on the  
31 phone.

32 MR. JACKSON: Yeah, who else besides Andy?

33 MR. SHANDRO: Matt Shandro for Fulcra Asset  
34 Management.

1 THE CLERK: Just spell your last name, please.

2 MR. SHANDRO: S-H-A-N-D-R-O.

3 THE CLERK: And the client?

4 MR. SHANDRO: And we're unit holders, as well.

5 THE CLERK: The name of the client?

6 MR. JACKSON: Fulcra, F-U-L-C-R-A.

7 THE CLERK: Thank you.

8 MR. JACKSON: Fulcra Asset Management.

9 THE CLERK: Thank you.

10 MR. SHANDRO: Correct.

11 MR. JACKSON: Thank you. I believe those cover  
12 the appearances, My Lady. Can I turn the matter over now  
13 to Mr. Wasserman on behalf of the monitor.

14 THE COURT: Sure.

15 MR. WASSERMAN: Good morning, My Lady.

16 THE COURT: Good morning.

17 MR. WASSERMAN: I'm going to give a brief sort of  
18 overview of what we're going to try to achieve here today  
19 and then Mr. Dacks is going to stand up and walk you  
20 through the report and address any questions you may have,  
21 and then I believe Mr. McElcheran is going to make some  
22 submissions and then I'm not sure whether any other counsel  
23 are going to make some submissions and then I think Mrs. --  
24 Ms. Konyukhova is going to deal with a costs award that  
25 she's seeking on behalf of her client.

26 So, briefly, and I'm going to be very brief, Mr.  
27 Dacks is going to deal with the lion's share of monitor  
28 submissions today. But briefly, the monitor is very  
29 pleased with the progress that's been made in the claims  
30 process, we've been able to settle the majority of the  
31 outstanding claims or provisionally settle the majority of  
32 the outstanding claims with the exception of the cost issue  
33 raised by the purchaser.

34 I am not sure if you have had an opportunity to

1 see the materials that were delivered by the purchaser,  
2 after the close of business yesterday but if, if you  
3 haven't, I am sure there are copies here which can be  
4 passed up to you.

5 Other than that, the monitor has not been  
6 notified by any party on the service list opposing any of  
7 the relief that's been sought, the monitor has had multiple  
8 conversations with unit holders, several unit holders --

9 THE COURT: Did you just -- just on that issue of  
10 the costs --

11 MR. WASSERMAN: Yes.

12 THE COURT: -- for my benefit, it was e-mailed to  
13 me by Mr. Jackson --

14 MR. WASSERMAN: Yes.

15 THE COURT: -- late last night.

16 MR. WASSERMAN: Yes.

17 THE COURT: I saw it this morning. To say that I  
18 am unimpressed with the late filing of that issue is an  
19 understatement but leaving that aside, was the -- were,  
20 were you notified about this issue, did you receive the  
21 letter at the same time?

22 MR. WASSERMAN: We, we were notified of the issue  
23 late on Monday evening, that we were going to be served  
24 with materials seeking a motion for costs. We were then  
25 sent the materials at the same time that -- or shortly  
26 before you would have received the materials but we  
27 received it yesterday, as well.

28 THE COURT: All right. Well, we'll have to  
29 address that as it --

30 MR. WASSERMAN: Okay, I mean --

31 THE COURT: -- as it, as it arises.

32 MR. WASSERMAN: Okay, so -- but just on that, on  
33 that issue, and you'll hear more from us in reply after Ms.  
34 -- to the extent Ms. Konyukhova makes any submissions. The



1 monitor is not supportive of any costs in the  
2 circumstances, we're not supportive that any costs be paid  
3 to the purchaser and we note, and I think this is important  
4 to understand, the settlement that was reached on the  
5 Desert Mountain motion, with the assistance of Justice  
6 Martin, which we'll go into in greater detail, is  
7 conditional upon the fact that no costs be awarded on that  
8 motion. So the effect of a cost award on that settlement,  
9 potentially, would derail the settlement. There would be a  
10 condition in the settlement that would not be met and,  
11 therefore, the settlement would not be able to proceed  
12 unless there was a renegotiated outcome on that. So I just  
13 wanted to make that clear at this stage.

14 As I was indicating that we haven't been  
15 contacted by anybody, there's been several calls with the  
16 unit holders, those calls have been positive, the feedback  
17 that we have received from the report thus far from the  
18 stakeholders has been positive. And again, a lot of work  
19 and time and effort has gone into achieving these  
20 settlements, not only on behalf of the estate and the  
21 monitor but with all the counterparties to the settlement,  
22 including the indirect purchasers, including Mr. Nagy,  
23 including the board and the, the management on the changing  
24 control claims.

25 So I'm going to turn it over to Mr. Dacks --

26 THE COURT: All right.

27 MR. WASSERMAN: -- who is going to go through a  
28 more detailed analysis of the issues.

29 MR. DACKS: Good morning.

30 THE COURT: Good morning.

31 MR. DACKS: My Lady, Jeremy Dacks for the  
32 monitor.

33 THE COURT: Yes.

34 MR. DACKS: My Lady, you should have before you

1 the monitor's notice of motion with the attached two draft  
2 orders.

3 THE COURT: Yeah, let me get it. Thank you.

4 MR. DACKS: Yeah. And the reason we have two  
5 draft orders is should this court be inclined to grant the  
6 approval order with respect to the indirect purchaser  
7 settlement, that specific order will be taken down to Judge  
8 Gross, in the United States, for recognition, so that's why  
9 we broke up the orders into two --

10 THE COURT: All right.

11 MR. DACKS: -- into two separate orders.

12 You should also have the 13th report of the  
13 monitor, dated October 10th, 2013 and the monitor's motion  
14 brief. Those are all the materials that were filed in  
15 addition to the letter provided from Stikeman's late  
16 yesterday.

17 My Lady, the last time that we were before you  
18 with respect to this matter was on June 13th, 2013, when  
19 the stay period was extended until October 18th. My Lady  
20 stated, at the time, that the court wished to give the  
21 monitor and the applicants additional time, you may recall,  
22 beyond September 30th, 2013 which was the original proposed  
23 stay extension date, to allow us to continue to deal with  
24 the claims process prior to coming back to court.

25 My Lady, as things turned out that was a very  
26 pressing decision. As detailed in the 13th report,  
27 substantial progress has been made in the claims process  
28 and as Mr. Wasserman indicated, including settling a  
29 reaching provisional settlement with respect to the  
30 majority of the outstanding claims, including the indirect  
31 purchaser claim.

32 I set out in the monitor's notice of motion there  
33 are four main heads of relief being sought by the monitor  
34 today. First, an order extending the stay of proceedings

1 with respect to the applicants until February 7th, 2014 and  
2 as you will hear in detail the proposed stay extension date  
3 was chosen in part based on the projected timeline  
4 necessary to seek U.S. Bankruptcy Court approvals for the  
5 indirect purchaser settlements. Second, the monitor is  
6 seeking an order approving the proposed Desert Mountain  
7 settlement. Third, we're seeking an order in respect of  
8 and facilitating the proposed settlement of the indirect  
9 purchaser claim, including the granting of the proposed  
10 class counsel charge in the amount of U.S. \$200,000 and an  
11 order approving the 13th report of the monitor and the  
12 activities described therein.

13 So that is the specific relief being sought,  
14 there is a lot of information in the, in the report and  
15 we'll go through it in some detail. I propose to take you  
16 through the report in some detail considering it has been  
17 almost four months since we have been before this court.  
18 There has been a lot of activity since the June 13th  
19 hearing, a lot of positive activity and progress from the  
20 monitor's perspective.

21 I will focus on a general overview of the claims  
22 process, including the tables and summaries of the claims  
23 set out in the report, and will cover in some detail the  
24 Desert Mountain and indirect purchaser settlements. I am  
25 also happy, of course, to focus on any particular aspect of  
26 the report in greater detail and to answer any questions  
27 you may have.

28 THE COURT: All right.

29 MR. DACKS: So, My Lady, I propose to start with  
30 the summary of current status of the claims process which  
31 can be found on page 5 of the report. We recognize that  
32 the report is quite long and the monitor felt it was  
33 important to include this type of executive summary in the  
34 report.

1           The monitor notes that six significant matters  
2 have been dealt with during the most recent stay period.  
3 First, and probably most importantly, a proposed settlement  
4 has been reached with respect to the indirect purchaser  
5 claim which was filed in the claims process in the amount  
6 of at least 463 million dollars. Due to the magnitude and  
7 uncertainty inherent in this claim, a settlement of the  
8 indirect purchaser claim is a necessary pre-condition to  
9 any creditor or stakeholder distribution.

10           The proposed settlement involves a maximum estate  
11 outlay of 4.15 million dollars --

12           THE COURT: Sorry, say that again.

13           MR. DACKS: The maximum estate outlay, so  
14 monies --

15           THE COURT: Yes, okay.

16           MR. DACKS: -- going out of the estate to resolve  
17 the claim is 4.15 million dollars. And I pause to note  
18 that that's the maximum outlay, it may be less, and we'll  
19 discuss that.

20           The 4.15 million dollars is comprised of the 3.95  
21 million dollar maximum settlement amount and the proposed  
22 class counsel charge of \$200,000. Based on litigation  
23 budgets obtained by the monitor, the proposed settlement  
24 avoids further legal costs in defending the claim that  
25 would, in all likelihood, have exceeded the cost of the  
26 proposed settlement.

27           The proposed settlement also provides a mechanism  
28 for the estate to retain a portion of the settlement in  
29 certain circumstances, and we'll go through that in greater  
30 detail.

31           In reaching a settlement the monitor was also  
32 cognizant that although it felt that the applicants had a  
33 very strong defence to the claim, there are risks involved  
34 in any litigation and a positive result for the estate

1 could not be assured. Thus, the monitor believes that a  
2 settlement of the claim on the terms of the proposed  
3 settlement agreement is fair, reasonable, and in the best  
4 interests of the estate. The proposed settlement is  
5 subject to obtaining the Canadian approval order from this  
6 court and the approval of the U.S. Bankruptcy Court.

7 Again, by way of summary, the second point is  
8 that with the assistance of the Honourable Justice Martin  
9 as part of Manitoba's JADR program, the applicants, Desert  
10 Mountain and the monitor also reached a comprehensive  
11 settlement of the Desert Mountain motion and related  
12 matters. The settlement is subject to this court's  
13 approval and like the proposed indirect purchaser  
14 settlement is attached as an appendix to the court report.

15 This settlement, as Mr. Wasserman stated, is also  
16 contingent on an order being obtained deeming the Desert  
17 Mountain motion abandoned with prejudice and without cost  
18 to any party.

19 The third significant area of activity is that  
20 the Ontario Court, with jurisdiction over the Canadian  
21 direct purchaser class action, has approved the settlement  
22 of that class action on a final basis and thus, the  
23 Canadian direct purchaser claim has been accepted in the  
24 amount of Canadian two million dollars. You will recall we  
25 had a separate motion before you, in March, on that.

26 THE COURT: Yes.

27 MR. DACKS: Fourth, proposed settlements have  
28 been achieved in respect of the change of control claims.  
29 Although these settlements are not subject to court  
30 approval the monitor has provided its comprehensive  
31 analysis of those claims in the 13th report. When we get  
32 to that section of the report I will discuss the next steps  
33 proposed with respect to those claims and in court we have  
34 representatives of all the change of control claimants, Mr.

1 Milani, Mr. Newman, Mr. Kersey.

2 Fifth, the vast majority of the insurance related  
3 proofs of claim have been resolved. And six, on the tax  
4 front the applicant's Canadian and U.S. 2012 tax returns  
5 have been filed with the appropriate federal and state  
6 taxing authorities. Since the filing of the tax returns  
7 the Canada Revenue Agency has formally withdrawn its marker  
8 claim -- you may recall that a marker claim was filed in  
9 the claims process because the taxes had not yet been filed  
10 prior to the claims bar dates and the CRA has withdrawn  
11 that claim after the taxes were filed.

12 With respect to the U.S. taxes the monitor is  
13 engaged in ongoing dialogue with the IRS concerning the  
14 U.S. tax returns and the IRS marker claim.

15 My Lady, as set out at paragraph 2.3 of the  
16 report, given the significant progress made with respect to  
17 the outstanding claims in the claims process, and based on  
18 the monitor's analysis of the unresolved proofs of claim  
19 and other obligations of the estate, and subject to the  
20 implementation of the provisional settlements achieved,  
21 including obtaining court approval when necessary, it is  
22 the monitor's view that creditors holding proven claims  
23 will have their claims satisfied in full and the monitor  
24 anticipates there will be a distribution to unit holders.

25 Moving forward into the claims process, which is  
26 the bulk of the 13th report, perhaps My Lady could turn  
27 over to page 9 of the report and we'll walk through the  
28 overview tables in the same manner as we did during our  
29 last attendance.

30 The table at page 9 of the report is the same  
31 table that was included in previous reports and shows the  
32 proofs of claim filed. It shows that approximately 83  
33 proofs of claim, totalling approximately U.S. 548 million  
34 dollars in claims have been filed.

1           Moving forward in the report to the table on page  
2 11, an earlier version of this table was included in the  
3 12th report and discussed in detail at the June 13th court  
4 hearing. I'll ask you to quickly turn over to page 13  
5 because this is a new table in this report. It is the same  
6 chart from page 11, reproduced, but it assumes that the  
7 provisional settlements set out in the report are  
8 finalized, as planned, with all necessary approvals being  
9 obtained. That's the title at the top, status of claims  
10 assuming provisional settlements are finalized.

11           The monitor felt that it was very important that  
12 the court and the applicant stakeholders have a clear  
13 picture of the status of claims assuming that the  
14 settlements are finalized. And I propose to briefly walk  
15 you through those two tables right now.

16           So moving back to the table on page 11, which  
17 represents the status of the claims process today, as  
18 discussed at our last appearance once the total amount of  
19 the top two columns, being the proven claims and the claims  
20 withdrawn or disallowed on a final basis, once the total of  
21 those two columns equals 83, the amount of the claims that  
22 have been filed, the claims process will be complete.

23           So as set out on the table, there are currently  
24 six proven claims, including the two deemed proven claims  
25 that we have had from the beginning of the U.S. direct  
26 purchaser claimants of 10 million dollars and the  
27 Department of Justice claim, approximately seven million  
28 dollars.

29           Moving down to the next line of accepted claims,  
30 there have been four accepted claims in the amount of  
31 approximately 2.5 million dollars and that's where we find  
32 the accepted claim of the Canadian direct purchaser claims  
33 after the Ontario court made its order.

34           And then moving down the list you see there have

1    been --

2               THE COURT:   Yes.

3               MR. DACKS:   -- there have been 40 claims that  
4   have been either withdrawn or disallowed on a final basis,  
5   so very good progress made there.

6               THE COURT:   Where do you see 40?

7               MR. DACKS:   Forty, in the right hand side --

8               THE COURT:   Oh, I see.   Okay, yes.

9               MR. DACKS:   Yes.

10              THE COURT:   I'm with you.

11              MR. DACKS:   Because claims -- sometimes claims  
12   are either withdrawn or sometimes the monitor sends out a  
13   disallowance, the 21 day period expires and then it's --

14              THE COURT:   All right.

15              MR. DACKS:   -- deemed disallowed.

16              So there are currently four claims that are  
17   disputed.   In the, in the first column of the claims  
18   entirely disallowed, notice of dispute received, the 13.9  
19   million --

20              THE COURT:   Yes.

21              MR. DACKS:   -- the bulk of that is the McNulty  
22   claim, which we'll discuss briefly, which was filed in the  
23   amount of 13.61 million.   So the vast majority of that  
24   amount is from that claim.

25              THE COURT:   Sorry, how much was the McNulty  
26   claim?

27              MR. DACKS:   The McNulty claim was filed in the  
28   amount of 13.61 million --

29              THE COURT:   All right.

30              MR. DACKS:   -- dollars.

31              The next line down is the Peggy Johnson claim of  
32   12.26 million dollars and the monitor has reproduced the  
33   note at the bottom of this table that notes that the Peggy  
34   Johnson claim may, in fact, be greater than the face amount



1 set out on the proof of claim, based on the information  
2 provided in Ms. Johnson's notice of dispute which we'll  
3 discuss in a few minutes.

4 The next line down, of outstanding insurance  
5 claims, in bold, shows that there are only three left plus  
6 one of the disputed claims is an insurance claim so there  
7 are four unresolved insurance claims. At the time of the  
8 12th report there were 18 unresolved insurance claims. So  
9 as I stated, the vast majority of the insurance claims have  
10 been resolved during the most recent stay period. So  
11 that's the number three beside the 500,000, in bold.

12 Then, there are a list of 19 claims that have  
13 been, that have been provisionally settled and those  
14 include the Desert Mountain claim, the indirect purchaser  
15 claim, some smaller claims filed by the New York State  
16 Workers Compensation Board, and the change of control  
17 claims.

18 Finally, there are a few additional claims, the  
19 most significant of which is the claim of the California  
20 Franchise Tax Board in the amount of 2.194 million dollars  
21 which you can see towards the bottom of the chart and that  
22 claim is subject to an indemnity obligation in favour of  
23 the applicants and then we have the IRS marker claim.

24 So assuming that the settlements move forward and  
25 are approved and implemented, there are very few claims  
26 left in the claims process, the most significant being  
27 McNulty, Johnson and the IRS.

28 If My Lady could flip forward to the next table  
29 and look at the proven claim category and the claims  
30 withdrawn or disallowed on a final basis category, we see  
31 that the proven claim number goes from six on table 11 to  
32 22 on the table on page 13. That represents the settlement  
33 of the IPP claim and the change of control claims.

34 THE COURT: I'm sorry, I'm missing where you are.

1 MR. DACKS: Okay, if, if you --

2 THE COURT: Oh, 22, term six.

3 MR. DACKS: Yes.

4 THE COURT: I see. But where -- so that's  
5 reflected in the 34. I got it.

6 MR. DACKS: Yeah.

7 THE COURT: Okay.

8 MR. DACKS: And then --

9 THE COURT: The 34 million.

10 MR. DACKS: Exactly. So you, so you go from --

11 THE COURT: Yeah.

12 MR. DACKS: -- 19.5 million dollars in proven  
13 claims to 34.49 million and you go from six proven claims  
14 to 22 proven claims.

15 The next line that states: Claims withdrawn or  
16 disallowed on a final basis, you go from 40 claims to 43  
17 claims because as part of the settlements of the New York  
18 Workers Comp claim and the Desert Mountain claim, those  
19 claims will be withdrawn.

20 So on the table on page 11 we have 40 claims  
21 withdrawn or disallowed, on the table on page 13, we have  
22 43 claims withdrawn or disallowed. So you have the 19  
23 provisional settlements extrapolated onto the next table  
24 and from our discussions with unit holders they appreciated  
25 this, this additional information to see -- to project  
26 forward to see where we're going.

27 And then as you can -- and then we have the rest  
28 of the information is the same down the list, we can see  
29 that there are six claims that were in the middle of the 21  
30 day dispute period, as we speak. If there are no disputes  
31 those claims will move to the claims withdrawn or  
32 disallowed column, that will go from 43 to 49 and then we  
33 have the remaining claims that we have discussed. So as  
34 you can see, assuming things go as planned, the vast

1 majority of the claims will have been dealt with.

2 And, My Lady, at the end of my submissions I  
3 propose to review one additional table that's found at the  
4 end of the report in, in Section 7.

5 THE COURT: That tells us how much money is left  
6 after these -- yeah.

7 MR. DACKS: And that table brings everything  
8 together, it brings the "R" and "D" together, the receipts,  
9 the disbursements, the money on hand, the provisional  
10 settlements and sets out the real picture, going forward.

11 So I will proceed to now discuss some of the more  
12 significant claims unless you have any questions about  
13 those initial set of tables.

14 THE COURT: No, I think I understand them.  
15 Thanks.

16 MR. DACKS: Okay. Briefly, with respect -- and  
17 I'm now on page 15 of the report -- there is a discussion  
18 of the Canadian direct purchaser claim on page 15 --

19 THE COURT: Yes.

20 MR. DACKS: -- but at a hearing on September 6,  
21 2013 the Ontario court approved the settlement of the  
22 Canadian direct purchaser claim as being fair and  
23 reasonable and in the best interests of the Canadian retail  
24 litigation claimants. As such, in accordance with your  
25 March 7th, 2013 order, the claim has been accepted in the  
26 amount of two million dollars, Canadian.

27 I also note that the process that is being  
28 contemplated for court approval of the indirect purchaser  
29 claim is the same process that we went through with respect  
30 to this claim whereby this court authorized the execution  
31 of the settlement agreement on behalf of the applicants  
32 then the court, with jurisdiction over the underlying class  
33 action dealt with the actual approval of the settlement and  
34 we're planning to travel the same road with the indirect

1 purchaser settlement.

2           The next claim discussed in the report is the  
3 McNulty claim of 13.61 million dollars, one of the two  
4 significant outstanding claims in the claims process for  
5 which no settlement has been reached.

6           Briefly, the McNulty claim stems from a lawsuit  
7 against the applicants, certain of their former employees  
8 and other parties and alleges that the defendants engaged  
9 in an unlawful conspiracy to boycott Mr. McNulty from  
10 obtaining employment in the packaged ice industry.

11           Since the date of the 12th report and after the  
12 Michigan court modified its protective orders to allow the  
13 monitor to review information relevant to the McNulty  
14 claim, My Lady may recall we had to go through that extra  
15 step because a lot of the information was placed under seal  
16 because of the DOJ investigation.

17           THE COURT: Yes.

18           MR. DACKS: The monitor issued a notice of  
19 disallowance with respect to the McNulty claim. In that  
20 disallowance the monitor disallowed the McNulty claim in  
21 its entirety because the evidence available does not  
22 support Mr. McNulty's allegations. Mr. McNulty  
23 subsequently recently provided a notice of dispute.

24           With respect to next steps, pursuant to the  
25 claims procedure order the monitor intends to explore  
26 whether a consensual resolution to the claim can be reached  
27 and if no resolution can be reached, the monitor will refer  
28 the dispute to a claims officer.

29           Starting on page 18 of the report we have the  
30 discussion of the indirect purchaser claim.

31           THE COURT: Now, just, just back to the McNulty  
32 claim --

33           MR. DACKS: Yeah, sure.

34           THE COURT: -- for a second. Mr. Leslie, you're

1 acting for Mr. McNulty, as, as I recall --

2 MR. LESLIE: No.

3 MR. DACKS: No, no.

4 THE COURT: Oh, you're not. So sorry, I thought  
5 you were.

6 MR. DACKS: No, Mr. McNulty, no, Mr. Leslie is  
7 acting for Ms. Johnson on the --

8 THE COURT: Oh, okay, I'm --

9 MR. DACKS: -- Peggy Johnson claim.

10 THE COURT: -- confused then, is anyone acting  
11 for Mr. McNulty?

12 MR. DACKS: Yes, Mr. McNulty is represented by a  
13 counsel in the United States --

14 THE COURT: Okay.

15 MR. DACKS: -- who was -- who are representing  
16 Mr. McNulty in the litigation that was stayed when the CCAA  
17 and Chapter 15 proceedings started. We have spoken to  
18 them, U.S. counsel for the applicants have spoken to Mr.  
19 McNulty's counsel, they are the ones who filed both the  
20 original proof of claim and the notice of dispute. No  
21 resolution has yet been reached but the on -- the dialogue  
22 is ongoing.

23 THE COURT: All right. So that's going to go to  
24 either of the two claims officers --

25 MR. DACKS: Correct.

26 THE COURT: -- that I have appointed. Do we have  
27 any idea of timing of that?

28 MR. DACKS: Well, the notice of dispute was only  
29 recently --

30 THE COURT: All right.

31 MR. DACKS: -- filed and pursuant to the claims  
32 procedure order, we feel it's incumbent on the monitor to  
33 make one last attempt to try to resolve it.

34 THE COURT: Um-hum.

1           MR. DACKS: If that doesn't resolve -- result in  
2 a quick resolution, I suspect it will be sent to the claims  
3 officers within the next few weeks.

4           THE COURT: Okay. Thank you.

5           MR. DACKS: So on page 18, we, we have the  
6 discussion in the report of the indirect purchaser claim  
7 and you may want to have open the, the approval order being  
8 sought which was, was attached as appendix two to the  
9 notice of motion.

10           So as set out in the notice of motion, the  
11 monitor is seeking certain relief in the form of the  
12 Canadian approval order in respect of the provisional  
13 settlement of this claim. And that proposed order is  
14 modelled after two previous orders granted in this  
15 proceeding. First, it is modelled after the March 7th,  
16 2013 Canadian direct purchase order in that it provides the  
17 authority for the monitor and for the chief process  
18 supervisor, on behalf of the applicants, to enter into the  
19 settlement, settlement agreement. Then, it provides that  
20 the settled amount of the indirect purchaser claim will be  
21 considered a proven claim in the claims process if the  
22 court of competent jurisdiction, in this case the U.S.  
23 Bankruptcy Court, approves the settlement.

24           Second, the proposed class counsel charge  
25 paragraph of the order, which is paragraph six, is modelled  
26 after the order that this court previously granted to the  
27 U.S. direct purchasers in this proceeding on May 15th, 2012  
28 where counsel for the U.S. direct purchasers were granted a  
29 charge to facilitate their participation in these  
30 proceedings. And I will go through that in more detail,  
31 those orders are attached to our, our motion brief.

32           And you may recall that the director purchaser  
33 charge which was in the amount of \$100,000 was discharged  
34 through a previous order of the court after payment of

1 those fees.

2 I -- and I propose to go through the orders later  
3 but I thought I should lay that out now, prior to  
4 describing the settlements.

5 THE COURT: Okay.

6 MR. DACKS: Okay. The report goes through the  
7 long history of matters relating to the indirect purchaser  
8 claim, filed in the amount of at least 463 million dollars.  
9 The claim was filed by class counsel, represented here  
10 today by Mr. Lee, pursuant to the specific procedure  
11 provided for in the claims procedure order. It was filed  
12 on behalf of a class of U.S. retail purchasers of packaged  
13 ice who are located in 16 different states. It is based on  
14 an alleged conspiracy between the applicants, Reddy Ice,  
15 and Home City, with respect to the market allocation for  
16 packaged ice.

17 As set out in paragraph 4.24 of the report, prior  
18 to the CCAA proceedings, one of the applicants and three of  
19 their former employees plead guilty to a single criminal  
20 anti-trust violation in the United States. Thus, the  
21 monitor has always been aware that there was a possibility,  
22 despite the strong factual and legal arguments to the  
23 contrary, of an adverse decision with respect to the  
24 indirect purchaser claim.

25 The report details the extensive efforts  
26 undertaken by the applicants and the monitor to deal with  
27 the indirect purchaser claim during these proceedings,  
28 including obtaining the claims procedure order that  
29 provided for a special claims officer to adjudicate the  
30 claim. Attending a mediation before the Honourable former  
31 Justice George Adams to seek an early resolution the claim,  
32 entering into a stipulation approved by the U.S. Bankruptcy  
33 Court to allow for certain discovery with respect to the  
34 claim, and commencing the adjudicator process before the

1 special claims officer, the Honourable Vaughn R. Walker.

2 As set out, beginning at paragraph 4.31 of the  
3 report, the applicants, the monitor and class counsel have  
4 reached a provisional settlement which is attached as  
5 appendix "E" to the monitor's report and has been executed  
6 by class counsel. It is being held in escrow by the  
7 monitor, pending receipt of the Canadian approval order,  
8 should this court be inclined to grant the order.

9 The settlement is then subject to the two stage  
10 approval process in the United States. The material terms  
11 of the settlement are set out in the report and can be  
12 summarized as follows:

13 The indirect purchaser claim will be allowed in  
14 the claims process in the maximum amount of 3.95 million  
15 dollars. With respect to the settlement class, itself,  
16 members of the settlement class who submit a properly  
17 completed claim form will be entitled to receive six  
18 dollars for the purchase of three to 10 bags of ice from  
19 one of the defendants during the class period. In order to  
20 receive more than six dollars, a claimant must show proof  
21 of purchase for each bag of packaged ice exceeding 10 bags  
22 and claimants will receive an additional 60 cents for each  
23 properly claimed bag above 10 bags of ice.

24 The quantum of these payments and the number of  
25 bags of ice that are being required are modelled after the  
26 provisional settlement reached by the same class of  
27 indirect purchasers with one of the co-defendants, Home  
28 City.

29 The agreement provides for a comprehensive  
30 release of the applicants, current or former directors,  
31 officers and employees, the CPS, the monitor and certain  
32 other parties. A comprehensive release of the former  
33 employees was very important to the applicants and the  
34 monitor because, as you have seen from the claims process,



1 certain indemnity claims have been filed. So the  
2 litigation had to be resolved completely in order to allow  
3 those indemnity claims to be dealt with, we couldn't be in  
4 a situation where there were trailing indemnity claims and  
5 further litigation after the settlements.

6 And moving down, I'm now on page 23 of the  
7 report, class counsel will seek from the U.S. Bankruptcy  
8 Court an award of attorneys' fees, not to exceed 33 and a  
9 third percent of the maximum settlement amount and  
10 reimbursement of attorneys' costs, not to exceed \$350,000.

11 And then with respect to the class counsel  
12 charge, in a similar manner as was done with the U.S.  
13 direct purchaser plaintiffs --

14 THE COURT: What's the difference between  
15 attorneys' fees and attorneys' costs, are we talking about  
16 costs and disbursements?

17 MR. DACKS: Yeah. Well, attorneys' fees are  
18 costs of class counsel, the wild log -- the class -- the  
19 counsel that was appointed by the Michigan court to be head  
20 counsel.

21 THE COURT: All right.

22 MR. DACKS: Attorneys' costs is defined in the  
23 settlement agreement as including other counsel involved or  
24 not class counsel, including Mr. Lee --

25 THE COURT: I see.

26 MR. DACKS: -- their U.S. bankruptcy counsel, and  
27 then, you're correct, other fees and disbursements, data  
28 hosting charges, you know, that, that, that type of fees  
29 and expenses.

30 So with respect to the class counsel charge, in  
31 the amount of \$200,000, the monitor has agreed to seek the  
32 charge due to the complex cross-border process that must be  
33 undertaken in order to implement the proposed settlement  
34 agreement.

1           I can tell you that reaching a proposed  
2 settlement agreement was difficult, both from a pure  
3 negotiating perspective and just simply complex because we  
4 have a class action moving forward in a Michigan court,  
5 being dealt with in a cross-border insolvency proceeding  
6 where the main proceeding is in Canada, but where the  
7 ultimate determination of the fairness and reasonableness  
8 of the, of the settlement will be in the U.S. Bankruptcy  
9 Court. It -- the agreement is complex but we think it  
10 works and we think it is the appropriate way to move  
11 forward and that's why we're seeking the class counsel  
12 charge, as we did earlier on in this proceeding for the  
13 U.S. direct purchaser plaintiffs.

14           The --

15           THE COURT: Okay, but help me out with this --

16           MR. DACKS: Yes.

17           THE COURT: -- because -- and I, I say this,  
18 appreciating how delicately a balance, I'm sure the --

19           MR. DACKS: Yes.

20           THE COURT: -- negotiation was. But I just, for  
21 my own edification --

22           MR. DACKS: Absolutely.

23           THE COURT: -- in terms of the class counsel  
24 charge, I mean what we're talking about, essentially, is  
25 the timing of the, of the legal payment. Like why is it in  
26 the form of a charge as opposed to an additional fee at the  
27 end of the day?

28           MR. DACKS: Well, I think it's, it's, it's in  
29 the --

30           THE COURT: Help me out with why that's needed.

31           MR. DACKS: Well, it's, it's in the form of a  
32 charge because the -- as the CCAA states, in 11.521(c), the  
33 court has the ability to grant a charge to facilitate the  
34 indirect purchaser claimant's effective participation in

1 the CCAA proceedings.

2           This charge reflects the fact that in a, in a, in  
3 a regular class action you wouldn't need this kind of  
4 charge, in a regular class action, which is complex enough,  
5 you have a normal settlement agreement where you have a  
6 contingency fee, in this case the requested fee is 33 and a  
7 third percent, and then you have the regular costs and  
8 disbursements.

9           This charge reflects the unique nature of what is  
10 going on here in a cross-border insolvency proceeding with  
11 a CCAA proceeding and a Chapter 15 proceeding and the extra  
12 effort, time, expense, costs that, that is going to go into  
13 resolving this claim on behalf of, of the estate and it's  
14 really -- reflects the fact that we have to work together  
15 now to get this claim approved by the two courts. We're  
16 going to have to have a distribution mechanism with a  
17 claims administrator, that's going to be complex, it's --  
18 and it's recognizing that this is in a CCAA proceeding and  
19 not just in a normal class action settlement.

20           There were other ways to do this but the monitor  
21 felt this was the most appropriate way, recognizing that  
22 this is an insolvency process and it is a way that  
23 maximizes, or I should say minimizes, the outlay from the  
24 estate.

25           MR. MCELCHERAN: If I could interject, briefly,  
26 it's Kevin McElcheran. Just to add one more feature to  
27 this, there is a difference just -- not just timing.

28           This, this part is in your discretion, it's not  
29 -- the other part of the costs and fees are subject to the  
30 U.S. part of the approval. So in this context, in addition  
31 to all the things that have just been said, Mr. Dacks says,  
32 this is to cover something else, the added feature of the  
33 fact we've involved in the insolvency process but as, as  
34 you are the judge dealing with the insolvency process, it's

1 part of your discretion to grant this, this part of the  
2 order which will survive, regardless of the, of the -- what  
3 the court in the U.S. might consider about the attorneys'  
4 fees on the class action which will be in their  
5 jurisdiction. I'm right in that, am I not?

6 MR. DACKS: Yes, that's -- that is correct.

7 MR. MCELCHERAN: Okay.

8 MR. DACKS: And I, I would also mention that the  
9 purpose of the charge from, from the monitor's perspective,  
10 this is, this is a great benefit to the stakeholders as a  
11 whole. As we stated, there can be no distributions without  
12 a resolution of the indirect purchaser claim so the general  
13 class of unsecured creditors and then the unit holders are  
14 going to derive the benefit should this court grant the  
15 Canadian approval order and the two orders in the U.S.  
16 court are approved of having a resolved settlement now.

17 THE COURT: All right.

18 MR. DACKS: And perhaps -- I'm going to, I'm  
19 going to continue to talk about the indirect purchaser  
20 claim and the other benefits and then maybe we can come  
21 back to the charge if there is any further questions.

22 THE COURT: I think you've answered it.

23 MR. DACKS: Okay.

24 THE COURT: Thank you.

25 MR. DACKS: The last point I would like to  
26 mention about the actual terms of the settlement agreement,  
27 itself, is that to the extent of the value of the claims  
28 submitted by the indirect purchaser claimants, in the  
29 claims process to be run by the claims administrator, plus  
30 all of the fees and expenses associated with the  
31 settlement, total less than the maximum settlement amount,  
32 the monitor will retain the remainder of the maximum  
33 settlement amount for distribution to the applicant  
34 stakeholders. And although I hesitate to use numbers I

1 think that numbers may be of assistance to the court. I  
2 just caution that these numbers are just numbers I'm  
3 picking out of the air but I think it's important that the  
4 court understands how this mechanism works. And this is  
5 discussed at paragraph 4.33 of the report.

6           So the maximum settlement amount is 3.95 million  
7 dollars. Assuming that the U.S. court approves the 33 and  
8 a third percent class counsel fee, plus the \$350,000 other  
9 costs and expenses, plus whatever it costs to do the  
10 advertising and the other costs of the claims  
11 administrator, let's just assume that there's two million  
12 dollars left over. If a hundred thousand indirect  
13 purchaser claimants submit claim forms, properly executed  
14 claim, claim forms and a claims administrator approves  
15 them, and they're all for six dollars each, that would be  
16 \$600,000. That would be the amount going to the settlement  
17 class. In that totally hypothetical scenario, I stress,  
18 there would be 1.4 million dollars staying with the estate.  
19 So you can see that depending on the amount of claims that  
20 come forward and there will be a robust advertising process  
21 that has to be approved by the U.S. court, there can be  
22 some residual value in this for the estate and it is  
23 possible that the entire maximum settlement amount will not  
24 need to be paid.

25           We thought that this was in the context of a  
26 class action settlement in an insolvency context, a good  
27 way to move forward, it allows the actual claimants to  
28 receive what they deserve, based on the settlement and will  
29 allow the estate to retain the remaining amounts of the  
30 money.

31           In other cases that My Lady may be familiar with,  
32 often times there is a charitable or a (inaudible)  
33 distribution at the end of a class action, this will be  
34 something that we will be discussing before the U.S. courts

1 but important for this court to know, as well, we felt that  
2 it was appropriate in this case to allow the stakeholders  
3 of the insolvent company to benefit from any amounts not  
4 claimed by the settlement class.

5 So unless you have any questions concerning the  
6 actual mechanics of the settlement agreement I will move  
7 forward. The next step, should this court grant the  
8 Canadian approval order will be a hearing to seek the U.S.  
9 preliminary approval order before Judge Gross, in Delaware,  
10 which hearing has been provisionally scheduled for November  
11 18th, recognizing that there is a 21 day noticing period in  
12 the United States.

13 The final approval hearing will be set at the  
14 time of the November 18th hearing before Judge Gross and is  
15 anticipated to be in very early 2014.

16 So, in summary, the monitor recommends that this  
17 court grant the Canadian approval order as it believes that  
18 the proposed settlement agreement represents a fair and  
19 reasonable resolution of the indirect purchaser claim and  
20 is in the best interest of the estate for the following  
21 reasons.

22 First, as I stated before, the total  
23 consideration to be given in exchange for a resolution of  
24 the indirect purchaser claim and the underlying litigation  
25 is less than would likely be spent in litigating the matter  
26 before the special claims officer.

27 Second, due to the guilty pleas to anti-trust  
28 violations in the United States, there can be no assurance  
29 that the applicants would have been successful in the  
30 litigation before the special claims officer.

31 Third, and perhaps most importantly, the  
32 agreement provides an element of certainty and timing that  
33 cannot be achieved through litigating the matter before the  
34 special claims officer which litigation was estimated to

1 last at least several years.

2 And fourth, no distributions could be made to  
3 holders of proven claims without the implementation of the  
4 proposed settlement agreement and the agreement will allow  
5 for stakeholder distributions in a timely manner.

6 So, My Lady, if you wish I am happy to walk you  
7 through the terms of the requested Canadian approval order  
8 right now or we can wait until the end of my submissions on  
9 the remainder of the report. It --

10 THE COURT: I'll leave it to your discretion, I  
11 mean, we're talking about it, I'm happy for you to do it --

12 MR. DACKS: Sure.

13 THE COURT: -- right now.

14 MR. DACKS: I mean -- and I know that Mr. Lee  
15 might have a few comments to make --

16 THE COURT: All right.

17 MR. DACKS: -- as well but --

18 THE COURT: So why don't we do that.

19 MR. DACKS: -- I think it probably makes sense --

20 THE COURT: Yeah, I think it does.

21 MR. DACKS: -- while it's fresh in our minds --

22 THE COURT: Yes.

23 MR. DACKS: -- to just walk through the, the  
24 draft order.

25 So, paragraph three, and Mr. and Mr. -- and  
26 we've, we've brought tried up orders and the only change in  
27 this order in addition to the appearances will be in  
28 paragraph three where we now know that it was attached in  
29 the form as appendix "E" to the report to replace the star.

30 So paragraph three provides that:

31

32 The chief process supervisor, Mr.  
33 Robertson, on behalf of the three  
34 applicant defendants, and the

1 monitor, are granted the authority  
2 to enter into the settlement  
3 agreement, substantially in the  
4 form attached as the appendix to  
5 the monitor's report to settle the  
6 claim which settlements shall be  
7 subject to approval by the U.S.  
8 Bankruptcy Court.  
9

10 And I just pause, the reason we're saying  
11 substantially in the form of, is it's possible that when  
12 we're before Judge Gross he is going to say I want the  
13 notice period to be slightly tweaked or some other change,  
14 so we wanted to have that ability to, to, to do whatever we  
15 needed to do, non-substantive changes but, you know, to, to  
16 appease whatever changes need to be made by -- based on the  
17 U.S. court.

18 Paragraph four deals with the proven claim point  
19 and states that:

20  
21 Should approval of the settlement  
22 by the U.S. Bankruptcy Court be  
23 granted, the claim filed in this  
24 proceeding will be deemed to be  
25 accepted by the monitor in  
26 accordance with the terms and  
27 conditions of the settlement in an  
28 amount not to exceed 3.95 million  
29 which amount of 3.95 million shall  
30 constitute the maximum amount of  
31 the proven claim, again taking  
32 into account that it may be less  
33 based on the retention concept we  
34 just discussed.



1 Fifth.

2

3 Provides the monitor with the  
4 authority, without further order  
5 of the court, to make the payments  
6 contemplated in the settlement  
7 agreement to the claims  
8 administrator for the noticing and  
9 administration costs.

10

11 Again, the notice program will be approved by the  
12 U.S. court if the U.S. court is so inclined and we wanted  
13 to give the monitor the ability to, to pay to the claims  
14 administrator for the newspaper advertisements, direct  
15 mailing, anything else that's going to be done to notify  
16 the claimants.

17 Six, we have the class counsel charge, again  
18 which is modelled after the previous May 15th, 2012 order  
19 of the court and states that:

20

21 Class counsel shall be entitled to  
22 the benefit of and are hereby  
23 granted a charge in the amount of  
24 U.S. \$200,000 on the property as  
25 security for the professional fees  
26 and disbursements of class  
27 counsel.

28

29 And you can see towards the bottom there's  
30 language that states, as we did with the direct purchaser  
31 charge:

32

33 Shall be deemed discharged  
34 immediately on payment of

1 professional fees and  
2 disbursements of class counsel in  
3 the amount of U.S. \$200,000 that  
4 are separate and apart from the  
5 attorneys' fees and attorneys'  
6 costs.

7  
8 Again, recognizing this is for something else,  
9 this is for -- to recognize the participation in the  
10 cross-border insolvency proceeding.

11 The rest of the -- of this order is the usual --  
12 the authority to take additional steps, execute additional  
13 documents and then the specific authority to seek the two  
14 U.S. court orders, to implement the settlements and then  
15 the, the normal protections for the monitor that we've had  
16 in our, in our previous orders.

17 So that's the indirect purchaser order, it was --  
18 it's attached as an exhibit to the actual settlement  
19 agreement, itself, was negotiated between ourselves, the  
20 applicants and class counsel and in the submission of the  
21 monitor, as we said in our motion brief, we think it's in  
22 the best interests of the estate to move forward with this  
23 order.

24 We did include in our motion brief and perhaps  
25 I'll address this case law in the context of the Desert  
26 Mountain settlement, because it's an actual settlement  
27 being approved, but we have provided case law from around  
28 the country, from British Columbia, Ontario and Alberta,  
29 where courts have granted approval of settlements in CCAA  
30 proceedings prior to a plan of arrangement being filed and  
31 when we go through the Desert Mountain settlement, I'll  
32 read you some quotes from Nortel. Although we're not  
33 seeking approval of this settlement, we're seeking the  
34 authority to execute it, we felt that that case law is

1 equally applicable to the type of unique order we're being  
2 -- moving forward with here to execute the agreement then  
3 subject to the U.S. Bankruptcy Court approval.

4 We have not received any comments from anyone on  
5 the service list with respect to the wording of the draft  
6 order which was included in our materials filed last week.

7 So that's all I have on the indirect purchaser  
8 claim, I know that Mr. Lee might want to make a few  
9 submissions on behalf of --

10 THE COURT: Sure, why don't --

11 MR. DACKS: -- class counsel, and maybe Mr.  
12 McElcheran as well.

13 THE COURT: Why don't we do that now?

14 MR. LEE: Thank you, My Lady. I appear as  
15 Canadian counsel to Wild Law Group, PLLC, which is the U.S.  
16 class counsel for this purchaser group, who are the subject  
17 of the proposed settlement. We're here today to support  
18 the monitor's motion seeking approval of the indirect  
19 purchaser settlement and seeking approval of the class  
20 counsel charge.

21 With respect to the request for approval of the  
22 settlement, itself, My Lady, I can indicate that class  
23 counsel have investigated the claims of the indirect  
24 purchaser claimants, have analyzed the evidence available  
25 to them, including certain evidence obtained by way of  
26 discovery, and have reviewed the law of the 16 claimed  
27 states applicable to these claims and as a result of that  
28 review have concluded that, from the perspective of that  
29 class, the proposed settlement is fair and reasonable, is  
30 adequate to the named plaintiffs and the class members and  
31 is in the best interests of the named plaintiffs and the  
32 settlement class members and we, therefore, support the  
33 request for an order approving the settlement.

34 With respect to the proposed class counsel charge

1 I have little to add to what my friend, Mr. Dacks said.  
2 The settlement contemplates the monitor seeking an order  
3 granting the class counsel charge, the monitor's 13th  
4 report points out the exceedingly complex nature of the  
5 claim, due to its cross-border nature and the fact that it  
6 engages the law of 16 different claim states.

7 So, in light of that, in light of the monitor's  
8 recommendation to the court that the proposed charge is  
9 necessary to facilitate the participation in these  
10 proceedings of the indirect purchaser claimant's, we submit  
11 the charge is, is appropriate and we support the request  
12 for same. We've had input into the proposed form of order  
13 and are satisfied it does the job.

14 THE COURT: All right, thank you.

15 MR. LEE: Thank you.

16 MR. MCELCHERAN: My Lady, I'll --

17 THE COURT: Yes.

18 MR. MCELCHERAN: Mr. McElcheran. I will defer  
19 until after Mr. Dacks has made all of his submissions. I  
20 will have some short submissions after that, I don't want  
21 to comment on nothing, other than the support which we  
22 said.

23 THE COURT: Okay.

24 MR. MCELCHERAN: I don't want to say any more at  
25 this point.

26 MR. DACKS: My Lady, the next matter dealt with  
27 in the report is the Desert Mountain settlement. And what  
28 I propose to do is to go through the Desert Mountain  
29 settlement --

30 THE COURT: I'm just wondering, do we want to do  
31 that?

32 MR. DACKS: Well, we can do that last, if you --

33 THE COURT: Last.

34 MR. DACKS: -- if you wish.

1 THE COURT: Well, I'm just -- I'm --

2 MR. DACKS: I, I suspect that I will be putting  
3 aside a Desert Mountain settlement, I'll be another 15, 20  
4 minutes, going through the remainder of the reports.

5 THE COURT: I'm just wondering about for the  
6 other counsel that are present here for the other matters.

7 MR. DACKS: We're happy, whatever, whatever works  
8 for everyone.

9 THE COURT: I'm in your hands. You know the  
10 issues but ...

11 MR. DACKS: I'm not -- I suspect that many other  
12 counsel might stay to --

13 THE COURT: All right.

14 MR. DACKS: During the Desert Mountain portion of  
15 the -- maybe Mr. Lee would, would leave, I ...

16 THE COURT: Okay. All right. So we're not going  
17 to save any time so you go in the order you think you, you  
18 -- you're most comfortable with.

19 MR. DACKS: Okay. Well, I mean maybe -- I think  
20 that we should go through everything --

21 THE COURT: Sure.

22 MR. DACKS: -- and then we'll come back to Desert  
23 Mountain.

24 THE COURT: Okay.

25 MR. DACKS: I think that that may, that that  
26 makes the most sense. Let me just flip forward.

27 So the, the next matter that, that I will speak  
28 to is the Peggy Johnson claim.

29 THE COURT: Yes.

30 MR. DACKS: Which is described on page 32 of the  
31 report. And this claim has been -- and Ms. Johnson is  
32 represented by Mr. Leslie, who is in the court today.

33 THE COURT: Sorry, what page in your report?

34 UNIDENTIFIED PERSON: Page 32.

1 MR. DACKS: Page 32 of the monitor's report.

2 THE COURT: Okay.

3 MR. DACKS: Now, this claim has been set out in  
4 detail in previous monitor's reports and is essentially a  
5 claim for royalty payments, termination of a royalty  
6 agreement and for the extinguishment of a licence and it's  
7 set out in previous reports. Although the face amount of  
8 the claim is for approximately 12.26 million dollars, the  
9 notice of dispute states that the quantum is to be  
10 determined upon full disclosure as part of the claims  
11 adjudication process.

12 But since we were last before you the monitor  
13 referred the Johnson claim to claims officer the Honourable  
14 Jack Ground for adjudication with the consent of Mr.  
15 Leslie. Counsel to the parties participated in an initial  
16 telephone conference call with Justice Ground on September  
17 17th, 2013 and at that time agreed to work together to  
18 attempt to develop an agreed upon case management time  
19 table.

20 The next telephonic conference call with Justice  
21 Ground is set for November 22nd, 2013, the purpose of that  
22 call will be to resolve any disputes that may exist with  
23 respect to a case management timetable. Your, your claims  
24 officer order of March 7th makes it clear that the claims  
25 officers have full discretion and full ability to deal with  
26 procedural matters so even if we do agree on a case  
27 management timetable, which I am hopeful we will be able to  
28 do with Mr. Leslie, Justice Ground still has to review it,  
29 consider it, and offer any comment. So that is what is to  
30 happen on November 22nd. And afterwards, if we are unable  
31 to reach a mutual resolution to the claim, it will proceed  
32 to an adjudication before Justice Ground in the ordinary  
33 course and we'll report back on the status of it prior to  
34 our next court hearing.

1           The next section of the report deals with the  
2 change of control claims and that portion starts on page  
3 34. The change of control claims were filed by certain  
4 former management employees of the applicants and by the  
5 applicants, directors and trustees. In previous reports  
6 the monitor had noted that it was investigating these  
7 claims and will be filing a specific report with respect to  
8 these claims which is comprised of this section of the 13th  
9 report.

10           There is no specific relief being sought today  
11 with respect to these claims, however, we should turn  
12 forward to paragraph 4.71 which is the last paragraph of  
13 this section on page 41 of the report. And as set out in  
14 that paragraph:

15  
16           The monitor, in consultation with  
17 the applicants, through the chief  
18 process supervisor, has the  
19 ability to accept, revise or  
20 disallow claims pursuant to the  
21 claims procedure order without  
22 further order of the court.  
23 However, in light of the nature of  
24 the change of control claims and  
25 unit holder inquiries during these  
26 proceedings the monitor believed  
27 it was appropriate to disclose its  
28 proposed resolution of the change  
29 of control claims prior to  
30 accepting the claims in the  
31 revised amounts as set out in the  
32 report on a final basis.

33  
34           So if you turn to page 42 of the report, in the

1 second line with the sentence that states unless.

2

3 The report states that unless by  
4 October 30th, 2013 any stakeholder  
5 of the applicants seeks formal  
6 relief from the court by filing  
7 with the court and serving on the  
8 service list, an application and  
9 supporting materials objecting to  
10 the monitor's recommended  
11 treatment of the management claims  
12 and the board claims and setting  
13 out the basis for such objection  
14 the monitor intends to accept the  
15 revised management change of  
16 control claims, the revised  
17 additional claimant's claim and  
18 the revised board claims, as  
19 described.

20

21 As Mr. Wasserman mentioned since the filing of  
22 the report last Thursday the monitor and the chief process  
23 supervisor have been contacted by several unit holders to  
24 discuss the report, generally, and the change of control  
25 claims, in particular. No materials have been filed with  
26 respect to the claim since the filing of the report and the  
27 monitor will report back to the court as to whether any  
28 stakeholder takes any formal steps to object to the  
29 resolution of these claims.

30 THE COURT: Yeah, but is there any indication  
31 that that might be taking place?

32 MR. DACKS: We don't know. We, we, we have not  
33 received any indication, no one has told us if they have  
34 retained counsel or they will be doing so. Although, to be



1 fair, the report has been out there for about a week so  
2 there is another two weeks until October 30th but we have  
3 received no indication that there will be further  
4 proceedings with respect to these claims.

5 THE COURT: But this, this, this approach, it's  
6 not reflected in the order that you're asking me sign.

7 MR. DACKS: No.

8 THE COURT: It's just you're telling the court  
9 this.

10 MR. DACKS: Where -- yes.

11 THE COURT: All right. But I have some questions  
12 about that. So in the absence of that, let's say you  
13 didn't seek that, that --

14 MR. DACKS: Let's say we didn't provide this type  
15 of disclosure --

16 THE COURT: Yeah.

17 MR. DACKS: -- of the report.

18 THE COURT: Or, or, or that, you know, you,  
19 you're -- what, what would normally be the case, if someone  
20 wanted to take a position on the issue of the -- these  
21 payments?

22 MR. DACKS: Well, I think what would -- I mean,  
23 the claimant's procedure order provides the monitor with  
24 the ability to resolve claims.

25 THE COURT: Yes.

26 MR. DACKS: So, for example, we've resolved a  
27 whole bunch of claims --

28 THE COURT: Right.

29 MR. DACKS: -- in this process, we've given  
30 disclosure about it. If, if someone wanted to come to  
31 court to object to a, to a claim being resolved they could.  
32 Your claimant's procedure order actually deals with this  
33 issue so it might make sense to turn it over --

34 THE COURT: Yeah, take me to that.

1 MR. DACKS: It's a --

2 THE COURT: So I --

3 MR. DACKS: It's a --

4 THE COURT: -- I just want to understand --

5 MR. DACKS: Yeah.

6 THE COURT: -- how this in any way --

7 MR. DACKS: It's a --

8 THE COURT: -- deviates from that or --

9 MR. DACKS: Well, there is --

10 THE COURT: -- how it works with it.

11 MR. DACKS: -- there is real -- no real deviation  
12 from that other than the fact that the monitor felt that  
13 this type of disclosure was appropriate due to the unique  
14 nature of these claims.

15 Paragraph 50 of the claims procedure order, dated  
16 September 5th, which is on page 23 of the claims procedure  
17 order at tab "B", appendix "B", are you there?

18 THE COURT: Yes, I am.

19 MR. DACKS: Yeah. States that:

20

21 This court orders that the  
22 monitor, the Arctic Glacier  
23 parties and any person (but only  
24 to the extent such person may be  
25 affected with respect to the issue  
26 on which directions are sought)  
27 may at any time and with such  
28 notice as the court may require,  
29 seek directions from the court  
30 with respect to this order and the  
31 claims process set out herein.

32

33 So to date in this proceeding no one has -- no  
34 stakeholder has taken upon themselves to seek any

1 directions from the court but that is part of the order  
2 that you made and that is the avenue that, that people can  
3 take.

4 With respect, with respect to the change of  
5 control claims, we have provided for what the monitor  
6 thinks is an appropriate way to move forward. We could  
7 have just accepted the claims or rejected the claims, we  
8 wanted to give everyone the opportunity, if they wish, to  
9 move forward and to bring the matter to the court's  
10 attention.

11 So it's partially dealt with in paragraph 50 of  
12 the report, but we thought that considering the fact that  
13 we've been saying in our reports, for some time, and those  
14 reports have been approved by the court without objection  
15 from any of the stakeholders that there would be a change  
16 of control report. We felt it was appropriate to provide a  
17 mechanism and a clear mechanism for, if people want to do  
18 something with these change of control claims, that they  
19 have to do something before October 30th. We need  
20 finality, the claimants deserve certainty, so that's why we  
21 have chosen to move forward in this direction.

22 THE COURT: Yeah, and, and I understand that, I,  
23 I certainly see where the monitor is coming from. My  
24 question to you, though, is that if for some reason someone  
25 were to come forward after that time, in light of paragraph  
26 15 of my order, I mean, are you saying this somehow  
27 abridges that timing or --

28 MR. DACKS: No, I --

29 THE COURT: -- imposes a timeline or modifies my  
30 order because you're really just telling me this is what  
31 you're going to do and if someone comes forward after that  
32 time --

33 MR. DACKS: I think --

34 THE COURT: -- I would have to deal with it,

1 would I not?

2 MR. DACKS: I think if someone came forward after  
3 that time, I mean pursuant to the claims procedures order  
4 the claim would be final at that point.

5 THE COURT: Yes.

6 MR. DACKS: It would be, it would be -- in the  
7 same way that a lot of other claims have become final.

8 THE COURT: Yes.

9 MR. DACKS: I personally believe that it would be  
10 a significant uphill battle for someone to do something at  
11 that time as it would be for them to do -- to try to seek  
12 directions with respect to any other claim. I am sure that  
13 counsel for the change of control claimants would be  
14 commenting to the extent necessary that --

15 THE COURT: No, no, I appreciate --

16 MR. DACKS: Yeah.

17 THE COURT: -- all of that and -- but the point  
18 is there would be an argument on whether or not --

19 MR. DACKS: There's always an argument.

20 THE COURT: That -- what you're, what you're  
21 telling me though now is that, that this is not modifying  
22 or changing --

23 MR. DACKS: No.

24 THE COURT: -- my order.

25 MR. DACKS: Not in our view.

26 THE COURT: In fact, I'm not ordering anything.

27 MR. DACKS: Correct.

28 THE COURT: You're just --

29 MR. DACKS: And you will recall --

30 THE COURT: -- giving me a --

31 MR. DACKS: -- we, we did something --

32 THE COURT: -- FYI.

33 MR. DACKS: It's an FYI. We did something  
34 somewhat similar to this early on in this proceeding in a

1 much smaller matter. There was --

2 THE COURT: Yes.

3 MR. DACKS: You may recall that there was an  
4 insurance payment that needed to be made to the company's  
5 insurer with respect to the resolution of a former class  
6 action or -- I can't remember how much it was, about  
7 \$200,000 and what we said in our report was that the  
8 monitor believed that that payment should be made, we're  
9 going to make it within two weeks, if any -- no one  
10 objects. No one objected, the monitor made that payment.

11 And we're doing something similar here, we're  
12 giving the stakeholders, the people with a real economic  
13 interest, a view into the monitor's recommendation. And  
14 just, and just to be clear, the monitor recommends and  
15 supports the resolution of these claims in the manner set  
16 out in the report.

17 So if someone wants to retain counsel and to move  
18 -- bring the matter back to the court we felt it was  
19 appropriate to give enough time for the report to be  
20 digested, for us to deal with any inquiries but also not to  
21 drag it out too long because, in the monitor's view, these  
22 claimants do have -- should have proven claims in the  
23 revised amounts and they need to be able to move on with a  
24 level of certainty that we think the resolution provides to  
25 both the estates and to the claimants.

26 THE COURT: All right.

27 MR. MCELCHERAN: I'm going to jump up again. I'm  
28 going to jump up again. I -- just to, just to bring your  
29 attention to the other parts of the order.

30 THE COURT: Yes.

31 MR. MCELCHERAN: The main point is in the claims  
32 procedure order the monitor has a job of accepting claims.

33 THE COURT: Yes.

34 MR. MCELCHERAN: And so -- and that's in Section

1 -- paragraph 30, 32 or 30 -- sorry, 33, 32 and 33, in that  
2 area. So the point is, he's just telling the world I'm  
3 going to do that, that's -- and it's really not to tell  
4 you, it's not really an FYI so much for you, as it is for  
5 anyone else who may be a person who, under paragraph 50 of  
6 the claims order might want to bring a motion for  
7 directions with the information of what the monitor  
8 proposes to do. So in that motion -- my submission, if we  
9 go past October 30th, and the monitor actually does accept  
10 the claims as they have been re-filed, that is the end,  
11 there is no, there is no subsequent process.

12 MR. DACKS: And the monitor agrees with that.  
13 We've -- we can't prevent someone from trying to do  
14 something but we certainly agree with that.

15 MR. MCELCHERAN: And because --

16 THE COURT: But it would be unlike anything else,  
17 any other claim that's accepted by the monitor, if, if the  
18 monitor accepts the claim and someone other than the person  
19 making the claim wants to come forward and somehow  
20 challenge it ...

21 MR. DACKS: We would say that that is not  
22 something that, that they are able to do at that point.

23 THE COURT: Yeah.

24 MR. MCELCHERAN: Because you, because you  
25 delegated that authority.

26 THE COURT: Yes, I understand that and -- okay.  
27 The point is you're not, you're not imposing a -- you're  
28 not -- it doesn't change what my order -- what the claims  
29 order --

30 MR. DACKS: No.

31 THE COURT: -- provided for.

32 MR. DACKS: No.

33 THE COURT: That was my real question, it does  
34 not.

1 MR. DACKS: No.

2 THE COURT: And, in fact, I seem to recall on an  
3 earlier occasion where the issue of this was raised as to  
4 whether, for example, Mr. Leslie, on behalf of his, his  
5 client, at one point could raise it, and there was a whole  
6 issue as to whether the status of a person who is not the  
7 recipient of the -- or who is not the person filing the  
8 claim could even question or challenge the monitor's  
9 decision but we're not, we're not going there, I understand  
10 what, I understand what --

11 MR. DACKS: Okay.

12 THE COURT: -- this is intended to be.

13 MR. DACKS: No problem. So My Lady, I don't  
14 intend to go through these claims in the same detail as the  
15 indirect purchaser claim but I will provide an overview of  
16 the -- of what we have done with these claims.

17 Let me just grab the report.

18 So the monitor conducted a thorough review of the  
19 change of control claims, we -- the monitor reviewed  
20 extensive documentation in respect of these claims from the  
21 books and records of the applicants. The additional  
22 information reviewed by the monitor included minutes of  
23 compensation committee minutes, minutes of board meetings,  
24 information packages provided to trustees and board members  
25 in advance of such meetings, reports and documents, payroll  
26 records and e-mail communications.

27 The monitor attended at the offices of the  
28 corporate secretary of the applicants, reviewed publically  
29 available annual information circulars and reports and  
30 consulted with an executive compensation specialist.

31 So with respect to the management claims, eight  
32 former members of senior management submitted claims  
33 predominantly for change of control payments. Those eight  
34 former members are collectively represented by Mr. Kersey

1 and Mr. Newman. Mr. Kersey represents seven of them, Mr.  
2 Newman represents one of them.

3 The definition of change of control is set out at  
4 paragraph 4.56 of the report as being:

5  
6 The sale by AGI, Arctic Glacier  
7 Inc., of greater than 50 percent  
8 of its worldwide operations on a  
9 consolidated basis within any  
10 continuous six month period.

11  
12 Seven of the eight members of former management  
13 had contracts that provide for a specific payment on a  
14 change of control and an additional payment on termination.  
15 The other claimants simply had a payment upon termination  
16 in his contract.

17 So the monitor's observations are set out at  
18 paragraph 4.63 of the report with respect to the management  
19 claims as follows:

- 20
- 21 1. All of the management claimants  
22 had employment contracts  
23 agreements that provided for  
24 change of control payments.
  - 25 2. The closing of the sale  
26 transaction constituted a change  
27 of control pursuant to the  
28 contracts.
  - 29 3. The existence of the change of  
30 control payments were disclosed in  
31 publically available annual  
32 information circulars.
  - 33 4. With respect to the termination  
34 change of control provisions the



1 monitor questioned whether the  
2 sale transaction resulted in a  
3 termination of the claimants as  
4 they were not formally terminated  
5 by AGI, rather they accepted  
6 employment with the purchaser and  
7 carried out the same duties as  
8 before.

9 The management change of control  
10 claimants disagreed with any  
11 assertion that the termination  
12 provisions do not apply.

13  
14 Which is reflected in the settlement that was reached.

15  
16 5. The compensation expert  
17 consulted by the monitor was of  
18 the view that while the quantum of  
19 the change of control multiples  
20 are higher than typical, change of  
21 control payments to senior  
22 management are not uncommon and in  
23 the report the monitor also noted  
24 that management played an imported  
25 role in the restructuring of the  
26 business and in achieving the  
27 going concern sale transaction  
28 that's now allowing the monitor to  
29 distribute money to the applicant  
30 stakeholders.

31 7. Certain claimants continued to  
32 assist the monitor in its ongoing  
33 administration of the estate.

34

1           So the resolution that was reached, My Lady, is  
2 that following lengthy without prejudice negotiations  
3 between the monitor and counsel for the management change  
4 of control claimants a resolution was achieved resulting in  
5 the claimants resubmitting their proofs of claim to reflect  
6 a 20 percent to 50 percent reduction of the termination  
7 portion of the claim which, you will recall, was the area  
8 where there was probably the most dispute. The only real  
9 area of dispute. Further, the additional claimant agreed  
10 to a reduction of 20 percent of his claim.

11           There is a chart on page 39 of the report which  
12 summarizes the proposed resolution to the claims and as set  
13 out in the chart -- I don't know if you have it in front of  
14 you, it's on page 39 at the top.

15           THE COURT: Okay.

16           MR. DACKS: The total reduction in the amount of  
17 the claims was approximately 1.42 million dollars.

18           So unless there's any questions on the management  
19 change of control claims, I propose to briefly discuss the  
20 board claims.

21           THE COURT: Okay.

22           MR. DACKS: So members of the board also filed  
23 claims for change of control payments in the amount of  
24 approximately 2.4 million dollars. And with respect to the  
25 board claims, the monitor notes that one, they were agreed  
26 to as set out in minutes of the compensation committee and  
27 that there are no formal written contracts. The board  
28 payments were disclosed in AGIS annual reports and  
29 information circulars. Importantly, the board claimants  
30 remained actively and continuously engaged during these  
31 proceedings and under their stewardship the applicants  
32 completed the sale transaction for the benefit of their  
33 stakeholders.

34           And fourth, the compensation expert consulted by

1 the monitor stated he is unaware of similar change of  
2 control payments for members of Canadian boards of  
3 directors.

4 The monitor and the board claimants' independent  
5 counsel, Mr. Milani, reached an agreement with respect to  
6 the board claims whereby the board claimants have agreed to  
7 accept amounts equal to two-thirds of the payments to which  
8 they believe they are entitled. They will be filing  
9 revised claims totaling approximately 1.54 million dollars,  
10 a total reduction of approximately \$860,000.

11 Thus, the combined reduction to the management  
12 and board change of control claims is 2.28 million dollars.  
13 And although there is no relief being sought today with  
14 respect to these claims, at paragraph 4.69 of the report  
15 the monitor set out its views with respect to these  
16 settlements as being in the best interests of the  
17 applicants and their stakeholders, eliminating the  
18 potential for protracted litigation and the associated  
19 legal costs, providing certainty for the estate and  
20 reflecting the monitor's assessment of the merits of these  
21 claims.

22 And as we have already discussed, unless a  
23 stakeholder follows the procedure set out in the report,  
24 the monitor intends to accept the claims in the manner  
25 described in the report on a final basis on October 30th,  
26 2013, two weeks from today.

27 I have some brief comments on the remainder of  
28 the report but I wonder if any of the change of control  
29 claimants' counsel have any comments. Mr. Milani, or ...

30 MR. MILANI: I don't at this stage, My Lady,  
31 unless you have any questions for us.

32 THE COURT: No, that's fine, thank you.

33 MR. KERSEY: And I'm in the same position, My  
34 Lady.

1 MR. NEWMAN: Nothing, My Lady.

2 THE COURT: All right.

3 MR. DACKS: Okay.

4 THE COURT: Does anyone else have any comments to  
5 make on this aspect of the report?

6 All right.

7 MR. DACKS: There's a few other things that I  
8 would like to highlight in the report. The tax claims are  
9 described at paragraph 4.72 and subsequent.

10 With respect to the Canadian tax returns, the  
11 trust return for AGIF was filed on March 31st, 2013 and  
12 there were no taxes payable. The 2012 corporate tax return  
13 for AGI was filed on June 28th, 2013 and the resultant tax  
14 -- they obviously don't want to listen to the tax part  
15 so ...

16 And the resulting taxes in the amount of \$703,000  
17 were paid. Subsequent to the filing of the return the  
18 monitor had several discussions with the CRA and is very  
19 happy to report that on August 15th the CRA withdrew its  
20 marker claim in the claims process, a significant milestone  
21 in moving forward to stakeholder distributions.

22 With respect to the U.S. taxes, in order to  
23 obtain a necessary extension to file the tax returns the  
24 monitor remitted payments in March in the amount of 9.3  
25 million dollars to the federal and state taxing  
26 authorities. These were preliminary payments necessary to  
27 obtain an extension and they were based on the information  
28 that the monitor had at the time which was preliminary in  
29 nature.

30 On August 29th, the U.S. 2012 federal corporate  
31 tax return was filed and showed a loss for tax purposes,  
32 with no taxes payable. The state returns were also filed  
33 and reflected taxes payable in the amount of approximately  
34 1.13 million dollars. So, as set out in the report, as of

1 September 30th the monitor had received state tax refunds  
2 of approximately \$543,000 and on October 2nd, 2013,  
3 received the U.S. federal tax refund of approximately six  
4 million dollars.

5 The monitor notes that since the filing of the  
6 U.S. federal return, the monitor has been in communication  
7 with the IRS and has been informed that the IRS is  
8 reviewing the U.S. federal return, even though the tax  
9 refund has already been issued. The monitor intends to  
10 continue its dialogue with the IRS with respect to its  
11 marker claim.

12 So unless My Lady has any questions with respect  
13 to the next portions of the report, which deal with the New  
14 York Workers Comp claims, insurance matters and the  
15 reconciliation, I propose to move on to the proposed plan  
16 of arrangement.

17 Okay, I propose to plan briefly the plan of  
18 arrangements unless you have ...

19 THE COURT: All right.

20 MR. DACKS: So as we set out, the monitor sets  
21 out, at page 48 of the report, as a result of the  
22 compromises and settlements obtained with respect to most  
23 of the significant claims filed in the claims process, it  
24 may be possible to streamline the process to distribute the  
25 monies being held by the monitor to the applicant  
26 stakeholders through a plan of arrangement or otherwise.

27 Based on discussions between the chief process  
28 supervisor and/or the monitor and certain unit holders it  
29 appears that the majority of unit holders would prefer to  
30 see a distribution mechanism that sees a payment on a  
31 account of the equity position as soon as possible as  
32 opposed to attempting to continue their (inaudible) with a  
33 reconstituted AGIF.

34 So during the proposed extended stay period the

1 monitor intends to work with the CPS and KPMG, the  
2 applicants' tax advisor, to develop a distribution  
3 mechanism to propose to the court and the applicant  
4 stakeholders. And it's really through the settlements and  
5 in particular the indirect purchaser settlement that we can  
6 now move forward in this manner.

7           Section 6 of the report deals with the receipts  
8 and disbursements since the 12th report. I don't intend to  
9 go through them in detail but I do note that the six  
10 million dollar U.S. federal tax refund was received after  
11 the end of the reporting period, so that's why, at  
12 paragraph -- which is set out at paragraph 6.4 of the  
13 report.

14           THE COURT: Yes.

15           MR. DACKS: And that's why 6.5 states the monitor  
16 is currently holding approximately 120.5 million dollars in  
17 interest bearing bank accounts on behalf of the applicants.

18           So this now takes us to the final chart in the  
19 report, the table on page 51 which is titled Summary of  
20 Perspective Financial Position Approving Provisional  
21 Settlements are Finalized.

22           So what we have done is bring the information  
23 from the tables earlier on in the report and the monitor  
24 has put forward in this chart kind of the, the -- a  
25 projected statement of financial -- prospective financial  
26 position.

27           So we have the funds currently being held by the  
28 monitor, 120.5 million, less the proven claims, and again,  
29 that proven claim number assumes that all of the  
30 settlements are finalized in the amounts contemplated.

31           Then we have the proposed Desert Mountain payment  
32 of 1.25, the small payment in respect of the New York  
33 Workers Compensation Board claims, and then we have what's  
34 left over to be dealt with and again, we can see how the

1 McNulty claim and the Johnson claim are by far the biggest  
2 claims left over, in addition to the IRS claim.

3           So we have a number at the bottom of 52.295  
4 million dollars which is projected and which is subject to  
5 many, many different issues, many different possibilities,  
6 and what that number does not take into effect are ongoing  
7 administration costs of the CCAA proceedings, wind down  
8 costs, any interest to be paid on proven claims, the  
9 finalization of tax matters, insurance matters, and other  
10 matters dealt with in the report.

11           It also shows, reflects the full amount of the  
12 McNulty and Johnson claim, so should there be a settlement  
13 at less than the amount of the filed claims or an  
14 adjudication that results in an amount payable that's less  
15 than the filed claims, that would increase the amount  
16 available for distribution.

17           So we felt there was -- the monitor felt it was  
18 important to put this table in here so people can see very  
19 clearly where they're going but I think the -- all the  
20 stakeholders need to recognize that there is still some  
21 work to do, there is still some claims to resolve and we'll  
22 keep on replicating this chart in our, in our subsequent  
23 reports so people can see exactly how things are tracking.

24           Section 8 of the report deals with activities of  
25 the monitor that are not dealt with elsewhere in the  
26 report. Section 9 deals with the specific request for a  
27 stay extension and includes the monitor's statement that  
28 the applicants have acted and continue to act in good faith  
29 and with due diligence, as required by the CCAA for an  
30 extension of the stay of proceedings to be granted.

31           That's all I had on the report other than the  
32 Desert Mountain matter. Mr. McElcheran, did you want to  
33 make some submissions at this point?

34           MR. MCELCHERAN: I was going to reserve my

1 submissions until we dealt with the Desert Mountain part  
2 from, from the monitor's counsel and then, then I'll deal  
3 with all my submissions at one time.

4 THE COURT: All right. Why don't we take a short  
5 break now --

6 MR. DACKS: Sure.

7 THE COURT: -- and then we'll come back and deal  
8 with the remaining issues.

9 THE CLERK: Order, please rise.

10

11 (BRIEF RECESS)

12

13 THE CLERK: All right, we're back on the record  
14 and court is reopened. Please be seated.

15 MR. DACKS: So, My Lady, I think what I will do  
16 is I will go through the Desert Mountain settlement in the  
17 same manner as I have the other settlement. I'll leave  
18 aside the cost point because there are -- you know, we  
19 should go through the actual settlement --

20 THE COURT: All right.

21 MR. DACKS: -- describe what we have done and  
22 then we'll deal with the cost issue.

23 THE COURT: All right.

24 MR. DACKS: So the monitor and the applicants are  
25 very pleased that a settlement has been reached with  
26 respect to the Desert Mountain matter which, as you are  
27 aware, has been the subject of significant litigation in  
28 these proceedings.

29 The proposed settlement resolves all matters  
30 relating to a host of interrelated claims and issues,  
31 including the Desert Mountain motion, itself, the Desert  
32 Mountain proof of claim, the Desert Mountain director and  
33 officer proof of claim --

34 THE COURT: One second, I just want to get this



1 down.

2 MR. DACKS: Yes.

3 THE COURT: What's the third one?

4 MR. DACKS: Yes, we had the Desert Mountain  
5 motion.

6 THE COURT: Yes.

7 MR. DACKS: The Desert Mountain proof of claim.

8 THE COURT: Yes.

9 MR. DACKS: The Desert Mountain director and  
10 officer proof of claim. The guarantee claim filed by the  
11 principal of Desert Mountain, Mr. Nagy, and any remaining  
12 issues relating to the Arizona lease which we have  
13 discussed in detail before this court.

14 This portion of the report starts at paragraph  
15 4.39 on page 26.

16 THE COURT: Yes.

17 MR. DACKS: Desert Mountain submitted a proof of  
18 claim and the director and officer proof of claim seeking  
19 payment of 12.5 million dollars with respect to a purchase  
20 option contained in the lease for the applicant's former  
21 facility located in Tolleson, Arizona.

22 THE CLERK: Can you spell it?

23 MR. DACKS: Sorry, Tolleson? T-O-L-L-E-S-O-N.

24 Desert Mountain also filed a motion in this court  
25 seeking payment of the purchase option from either the  
26 purchaser or the applicants.

27 Mr. Nagy also filed a proof of claim in his  
28 personal capacity of which approximately \$548,000 worth of  
29 claims related to the Arizona lease, including Mr. Nagy's  
30 personal guarantee of the lease in the amount of \$500,000.

31 At the suggestion of this court the parties to  
32 the Desert Mountain motion, being the applicants, the  
33 purchaser, Desert Mountain and the monitor attended a  
34 judicially assisted dispute resolution conference before

1 the Honourable Mr. Justice Martin on June 19th that  
2 resulted in the Desert Mountain settlement. The settlement  
3 also has the benefit of resolving the other aspects of Mr.  
4 Nagy's personal claim but those aspects are not subject to  
5 court approval.

6 After --

7 THE COURT: But the settlement reached resolved  
8 all matters.

9 MR. DACKS: Resolved all matters but there is a  
10 distinction here, Mr. Nagy also had other claims in the  
11 estate --

12 THE COURT: Yes.

13 MR. DACKS: -- and since we had worked together  
14 to resolve all the Desert Mountain claims we said we should  
15 keep going --

16 THE COURT: All right, but those --

17 MR. DACKS: -- resolve everything.

18 THE COURT: -- weren't resolved on the June 19th,  
19 those were resolved afterwards.

20 MR. DACKS: They were resolved -- but there was  
21 an agreement on June 19th to work cooperatively to resolve  
22 them at the same -- you know, within the same document.  
23 Those, those other claims aren't subject to court approval.

24 THE COURT: All right.

25 MR. DACKS: So at paragraph 4.44 of the report,  
26 the material terms of the settlement are outlined and as I  
27 mentioned, the actual (inaudible) of settlement are  
28 attached to the report at tab -- at appendix "F".

29 I think it's "F", Mr. -- yeah. Payment of -- so  
30 the first term is payment of 1.25 million dollars within  
31 seven business days of court approval of a settlement to  
32 counsel for Desert Mountain in trust. The money will then  
33 be released to Desert Mountain upon certain conditions of  
34 the settlement being satisfied.

1           Second, the parties shall exchange mutual  
2 releases. And third, upon the making of the 1.25 million  
3 dollar payment and the exchange of certain of the releases,  
4 first the Desert Mountain motion, and this is what we'll be  
5 discussing in a few minutes, I suspect, the Desert Mountain  
6 motion shall be deemed to be abandoned with prejudice and  
7 without cost to any party to the Desert Mountain motion.  
8 The settlement is conditional on such an order being  
9 granted, there is no settlement without an abandonment  
10 without costs. And I'll have further submissions on this  
11 in response to Ms. Konyukhova.

12           Second, the Desert Mountain proof of claim, the  
13 Desert Mountain director and officer proof of claim and the  
14 guaranteed proof of claim shall be deemed to be  
15 automatically withdrawn from the claims process.

16           And third, Desert Mountain shall take all steps  
17 necessary to dismiss, again with prejudice and without  
18 costs, its pending appeal of the U.S. sale of recognition  
19 order. This settlement ties up a lot of loose ends for the  
20 estate.

21           The monitor submits that the Desert Mountain  
22 settlement is in the best interests of the applicants and  
23 their stakeholders. The monitor noted in its report that  
24 the purchaser is not contributing to the proposed Desert  
25 Mountain settlement, however, the monitor recommended the  
26 settlement be approved for the reasons set out on pages 30  
27 and 31 of the 13th report, for the following reasons.

28           First, the Desert Mountain settlement resolves a  
29 significant group of interrelated proofs of claim and  
30 litigation in the CCAA proceedings at a reasonable cost  
31 when compared to the potential exposure and it resolves, as  
32 I have said, all outstanding matters and issues related to  
33 the Arizona lease.

34           The settlement will result in the saving of

1 considerable legal costs and will create certainty going  
2 forward. It will save the expense of preparing for and  
3 attending the four day hearing before Justice Dewar,  
4 scheduled for December, and any resultant appeals. The  
5 full amount of the claim will not need to be tied up while  
6 the litigation progresses.

7 Third, the quantum of the settlement represents  
8 10 percent of the amount of the purchase option being  
9 claimed by Desert Mountain and, in the monitor's view,  
10 represents a reasonable compromise in all of the  
11 circumstances in light of the litigation risk.

12 The settlement includes the withdrawal of the  
13 \$548,000 guaranteed proof of claim and the withdrawal of  
14 the U.S. appeal. It also includes the withdrawal of the  
15 two proofs of claim filed by Desert Mountain in these  
16 proceedings.

17 An important point about those withdrawals is  
18 that there was no guarantee that the December motion would  
19 have resolved the proof of claim issues as well and there  
20 may have been exposure to the applicants on these claims,  
21 even if they were successful before Justice Dewar and any  
22 appeal from the motion itself. We go into some detail in  
23 our report on that point.

24 As such, the monitor provided its recommendation,  
25 at the top of page 32 of the report, and submits that the  
26 court issue an order approving the Desert Mountain  
27 settlement and providing that the Desert Mountain motion be  
28 abandoned with prejudice and without cost to any party once  
29 the terms of the Desert Mountain settlement are met.

30 The parties participated in the JADR process,  
31 which did its job and has been able to allow the monitor  
32 and the applicants to resolve the very significant piece of  
33 the outstanding estate of Arctic Glacier.

34 I, I think now I'll ask if you have any questions

1 about the mechanics of the settlement, itself, quantum,  
2 you know how it's all proposed to work and then we can deal  
3 with the cost issue afterwards.

4 THE COURT: My questions deal with the cost  
5 issues.

6 MR. DACKS: Okay.

7 THE COURT: So I'll let you -- I don't know how  
8 you want to proceed.

9 MR. DACKS: Well, I think, I think, I think that  
10 it would be -- personally I think it would be appropriate  
11 for Ms. Konyukhova to, to, to, to go first. We, as Mr.  
12 Wasserman stated, we found out that this would be happening  
13 for the first time around ten o'clock on Thanksgiving  
14 Monday. We received the materials the same time that Mr.  
15 Jackson did, and forwarded it on to you, after the close of  
16 business yesterday, so I think it would make sense to, to  
17 hear from the purchaser and then I know at least three of  
18 us will be responding, myself, Mr. McElcheran and Mr.  
19 Leslie. If that, if that's okay.

20 THE COURT: Yeah. I, I have some questions about  
21 the JADR --

22 MR. DACKS: Sure.

23 THE COURT: -- but I don't know if I should ask  
24 you this now or wait or?

25 MR. DACKS: I'm happy to --

26 THE COURT: Let me ask you this.

27 MR. DACKS: Yes.

28 THE COURT: Did the purchasers assert a cost  
29 claim in the course of the JADR?

30 MR. DACKS: No. At, at the JADR, the purchaser  
31 attended, the --

32 THE COURT: Yes.

33 MR. DACKS: -- the -- a principal of H.I.G. with  
34 one of Ms. Konyukhova's colleagues.

1 THE COURT: Ms. Konyukhova was not there --  
2 MR. DACKS: No.  
3 THE COURT: -- at the JADR?  
4 MS. KNYUKHOVA: I was not at the JADR.  
5 THE COURT: All right. Thank you.  
6 MR. DACKS: Her -- Ms. Pilon, another --  
7 THE COURT: Yes, I understand that --  
8 MR. DACKS: -- counsel at Stikeman --  
9 THE COURT: -- I just wondered --  
10 MR. DACKS: -- was there. Yeah.  
11 THE COURT: Okay, so -- all right.  
12 MR. DACKS: And the parties, as in any type of  
13 mediation, we're together, we're apart. Mr. Justice Martin  
14 was doing what he, what he felt was appropriate.  
15 It was scheduled for two days --  
16 THE COURT: Yes.  
17 MR. DACKS: -- we were able to resolve it on the  
18 first day so we didn't have to proceed to a second day.  
19 In, I would say, around the mid-afternoon of the first day,  
20 we were told by Mr. Justice Martin that the purchaser would  
21 not be contributing to any, any settlement and was planning  
22 to leave the mediation. We said that, well, we're not, not  
23 happy about that but if that --  
24 THE COURT: Did that happen?  
25 MR. DACKS: And that happened, the, the principal  
26 of H.I.G. left the mediation, I would say mid, mid to late  
27 afternoon, Mr. McElcheran, is that ...  
28 MR. MCELCHERAN: Yeah, early in the afternoon,  
29 and the settlement came after that.  
30 MR. DACKS: And, and then --  
31 THE COURT: All right.  
32 MR. DACKS: -- after the purchaser left, Mr.  
33 Justice Martin encouraged the remaining participants in the  
34 mediation, being Desert Mountain, represented by Mr. Leslie

1 and the applicants and the monitor to keep at it.

2 THE COURT: The point is that before the, the  
3 purchaser left there was no assertion of costs and there  
4 was no indication that that was going to be an issue.

5 MR. DACKS: No.

6 THE COURT: In fact, there's no indication that  
7 was going to be an issue until you received that on Monday?

8 MR. DACKS: Well, we, we were, we were contacted  
9 and I might ask Mr. Wasserman to --

10 THE COURT: Okay.

11 MR. DACKS: -- stand on this, we were contacted  
12 asking for a copy of the proposed settlement agreement last  
13 Tuesday which we provided to the Stikeman Elliott firm at  
14 that time which, which contained these, these provisions.  
15 But I think that almost more importantly, when the  
16 purchaser has known -- we, we told the purchaser that a  
17 settlement had been reached at the mediation, I think it  
18 was even the same day or the next day when we were, when we  
19 were -- had finished the mediation and the purchaser knew  
20 that the court hearing was going to be on October 16th, it  
21 was settled in late June. The purchaser did not know about  
22 the quantum of the settlement payment or any other details  
23 concerning the settlement until last Tuesday but in the  
24 monitor's submission could not have thought that the  
25 settling parties would have agreed, unilaterally, to pay  
26 their costs after not staying for the mediation and without  
27 them contributing to the settlement.

28 THE COURT: Okay.

29 MR. DACKS: So I'm -- from, from the monitor's  
30 perspective, the purchaser unilaterally chose to leave the  
31 JADR conference without tying up any loose ends that it may  
32 have felt existed.

33 THE COURT: Okay. I think I should hear from --

34 MR. MCELCHERAN: I'm going to move back here --

1 THE COURT: Okay, sure.

2 MR. MCELCHERAN: -- and let her take this seat.

3 MS. KONYUKHOVA: Good afternoon, My Lady.

4 THE COURT: Good afternoon.

5 MS. KONYUKHOVA: Maria Konyukhova for, for the  
6 purchaser. I will deal with the, the issue of the timing  
7 of the delivery of, of the purchaser's request for costs  
8 and the bill of costs at a late time and, and I do  
9 apologize for the late delivery, however, the purchaser did  
10 not know that there would be a no costs provision in either  
11 the settlement agreement or the orders being sought today  
12 until it received a copy of the settlement agreement which  
13 was after numerous requests and was only last Tuesday.

14 Since then and since the, the receipt of the  
15 materials on -- the motion materials on Thursday afternoon,  
16 we have worked as quickly as possible with our client to  
17 obtain instructions.

18 The -- it could have been done quicker,  
19 absolutely, but it's not as if we had since August or July  
20 to figure out with our client what they would like to do on  
21 this motion.

22 As soon as we knew that the client -- that the --

23 THE COURT: Well, you certainly didn't think that  
24 you were going to be given costs?

25 MS. KONYUKHOVA: We did not think we would be  
26 given costs, at the same time we didn't know that the order  
27 would provide that there would be no costs as a requirement  
28 or a condition to the settlement. There was no discussion  
29 of costs, as far as I know, at the mediation, perhaps Mr.  
30 Wasserman or McElcheran can, can confirm that. I have -- I  
31 can request Ms. Pillon, who was at the GDI to confirm that  
32 but I don't think there was any discussion, at all, of  
33 costs to any parties. And that's why this issue became an  
34 urgent issue only last week, when we learned that there



1 would be no costs provided for us specifically in the  
2 settlement agreement and in the order.

3 The reason, of course, (inaudible) aside, the  
4 reason the purchaser is seeking costs is that it has  
5 asserted that it is not responsible for any of the payments  
6 that are being sought by the landlord.

7 THE COURT: And just, just to -- let's be clear  
8 on the context here so I understand your position because I  
9 think I do. So -- because you reference 37.12(4) --

10 MS. KONYUKHOVA: Yes, yes, My Lady.

11 THE COURT: And 57.011 and what I understand is,  
12 is that the purchaser is saying -- and those provisions  
13 deal with abandonment, that on an abandonment of a motion  
14 that -- as a respondent you are entitled to costs?

15 MS. KONYUKHOVA: Yes, My Lady.

16 THE COURT: So you're, you're seeking costs, in  
17 effect, from, from the applicants of the motion, Desert  
18 Mountain.

19 MS. KONYUKHOVA: Yes, My Lady.

20 THE COURT: That is what is being done in this  
21 proceeding today.

22 MS. KONYUKHOVA: Yes.

23 THE COURT: All right.

24 MS. KONYUKHOVA: Yes.

25 THE COURT: And you're, you're referring the  
26 court to the factors that the court should consider in  
27 exercising its discretion.

28 MS. KONYUKHOVA: Exactly, My Lady.

29 THE COURT: All right. And, in fact, your  
30 assertion of costs is, in essence, a solicitor/client --  
31 you're seeking solicitor/client costs?

32 MS. KONYUKHOVA: Yes. Yes. My Lady, we have  
33 submitted a bill of costs that is, that is in the --

34 THE COURT: But you're -- yes, that it was

1 attached to your letter.

2 MS. KONYUKHOVA: Right.

3 THE COURT: Right. But it's not a tariff cost,  
4 it's, it's solicitor/client costs. You're seeking \$185,000  
5 of costs plus disbursements, as I understand it.

6 MS. KONYUKHOVA: Yes. It's actually closer to  
7 190,000 but yes, My Lady, we're seeking costs because in,  
8 in your -- it is in your discretion, under Rule 57, to  
9 award costs in any amount without reference to the tariffs.

10 THE COURT: Yes.

11 MS. KONYUKHOVA: That is why we have not attached  
12 the tariff rates because we believe in the motion of this  
13 complexity, the tariff rates are inapplicable.

14 THE COURT: Yes. And, in fact, I might ask Mr.  
15 Jackson if he wouldn't be so kind, or Mr. Leslie, to let me  
16 know what the tariff costs would be in, in this kind of  
17 thing, a ballpark but I think we're talking about  
18 significantly less than -- like -- in any event, it would,  
19 it would be nowhere near what you're seeking here.

20 MS. KONYUKHOVA: My Lady, I, I can assure you  
21 we've, we've ballparked, in preparing for this, we've  
22 looked at the tariff rates, yes, they would be  
23 significantly lower than, than what, what the actual costs  
24 incurred in this matter were and as I said, it is -- it's  
25 the purchaser's submission that in a motion of this  
26 complexity that required the, the expenditures that were  
27 actually incurred by the purchaser and other parties, the  
28 tariff rates are, are simply not applicable. That's --  
29 that is the purchaser's submission and that is why it is  
30 requesting the costs in the amount that it's, that it's  
31 incurred.

32 THE COURT: And my understanding from looking at  
33 the bill of costs that was proposed is not only are you  
34 requesting the costs of responding to the motion but you're

1 also including the costs related to the JDR?

2 MS. KONYUKHOVA: We're including costs that were  
3 incurred in the -- yes, in the entire dealing with this  
4 motion. One of the, one of the settlement discussions was  
5 actually meant to be a hearing, that was then converted  
6 into settlement discussions, and the purchaser did  
7 participate in at least one of the days of the JADR.

8 The reason, it left it early, again based solely  
9 on its belief that it's not responsible for any of the  
10 issues that are being raised by the landlord, however, it  
11 did incur significant costs as, as evidenced by, by our  
12 bill of costs.

13 So, as, as I mentioned, Your Honour (sic), the,  
14 the sole reason we are here is not because we dispute that  
15 the settlement is in the best interest of the estate and  
16 its stakeholders, we agreed with, with the monitor that it  
17 is in the interest of the estate and its stakeholders.  
18 However, the purchaser already contributed a significant  
19 amount in, in its purchase of the Arctic Glazier's assets.  
20 It already contributed significantly to the benefit of the  
21 estate and the stakeholders.

22 There was no reason for it to be brought into the  
23 motion that was brought by Mr. -- by Desert Mountain and  
24 the purchaser has maintained consistently that it is --

25 THE COURT: Well, I just want to be clear on  
26 that. You're saying there was no reason for it to be  
27 brought in. What do you mean?

28 MS. KONYUKHOVA: Simply that the purchaser has  
29 denied any responsibility for any of the amounts claimed by  
30 the landlord since the landlord launched its motion. The  
31 purchaser is, in the end, not a party to the settlement  
32 agreement, it has not been held responsible for any of the  
33 amounts that are being paid over to the landlord. And that  
34 is the reason we have maintained from the very beginning,

1 or the purchaser has maintained from the very beginning  
2 that it should not have been a party to the motion and  
3 should not have been put to the expense of participating in  
4 any of the steps in the motion.

5 I am happy to walk you through, My Lady, through  
6 the costs that were actually incurred. They are not  
7 unreasonable. The motion required significant review of  
8 documents, it required three days of cross-examinations  
9 over two separate attendances in Winnipeg. It required the  
10 purchaser's counsel to attend in Winnipeg on several  
11 occasions, as well as the representative of the purchaser  
12 to attend from San Francisco.

13 In addition to the lengthy cross-examinations the  
14 purchaser and its counsel attended on two separate  
15 occasions for hearings and settlement discussions, again  
16 which, in the end, ended up being only as between the  
17 estate and the landlord.

18 My Lady, subject, subject to any questions you  
19 may have with respect to our request for costs, those are  
20 my submissions.

21 THE COURT: No, I'll hear from the other parties,  
22 thank you. I may have questions after I hear from them.

23 MS. KONYUKHOVA: Thank you, My Lady.

24 MR. MCELCHERAN: I'm going to go first if --  
25 McElcheran, for the record.

26 I guess this -- if you don't mind, I'm going to  
27 step back a little bit and not deal with the costs  
28 immediately but I'll come back to that.

29 The -- we're in a phase in this case where the,  
30 the benefit of the transaction was a very important  
31 transaction for all the parties, but the benefit needs to  
32 be distributed, that's an important function of the, of the  
33 process and that, as you have seen from the monitor's  
34 report, enormous effort has gone into resolving disputes,

1 solving it, taking 80 odd claims and getting them down to  
2 basically two and dealing with those issues requires  
3 compromise, requires the parties -- it takes the central  
4 part of the, the applicants and the monitor down a journey  
5 of trying to find the right path to avoid having disputes  
6 at the time associated with it, the cost associated with  
7 it, to undermine the very good work that's been done here  
8 for moving this business through and generating a very good  
9 result for everyone.

10           And it, it -- the process, I mean it's not --  
11 this is not a back clapping situation, it's not -- we're  
12 not looking for, this is the job, it's what's supposed to  
13 happen here. So, and I -- in fact, if you look at -- and  
14 getting court supervision through the process is also  
15 important so I -- the reason why I wanted to take it that  
16 way, there's two things that happened in this case which  
17 has been very helpful. One of them, at your instance and  
18 other, and that is that mediation process, again trying to  
19 bring the parties together to spend one day or two days to  
20 get a resolution of issues where people have -- people get  
21 -- come over the hurdles that are necessary in order to  
22 make essential resolution that preserves value for the  
23 estate and that happened in the context of the indirect  
24 purchaser litigation and it had a potential for, you know,  
25 mirroring this case in a restructuring process, in a, in a --  
26 you know, interminable (phonetic) litigation for a long, long  
27 time and ultimately undermined the very benefit we're,  
28 we're designed to achieve, which is to deliver value to the  
29 stakeholders.

30           So we used -- had a mediation process, it went a  
31 long way, didn't get it done that particular day but it was  
32 the starting point of a good resolution of the IPP  
33 settlement.

34           The same thing happened at your instance in

1 respect of the Desert Mountain claims and, and the result  
2 of that is a -- my -- is now in jeopardy over, in my mind,  
3 a completely unreasonable request for costs.

4           And the thing that Justice Martin did, that was  
5 most important, the thing that I was most impressed with  
6 the process, was getting -- was dealing with the, with the  
7 fact that a purchaser whose fingerprints were all over that  
8 dispute, all over it, in our respectful submission, was  
9 ultimately the party that should have been responsible to  
10 have us still stay at the table, the two of us left, after  
11 they walked off, to get a deal done, and that -- and have  
12 that frustrated by them coming out now and saying gee, I  
13 want my costs, because of course I was right all along, is,  
14 aside from being frustrating for the parties that  
15 participated in the process, is -- undermines the very  
16 purpose of the JADR in a sense and (inaudible) work that  
17 Justice Martin did in keeping my client and me at the table  
18 without their -- with them walking away and ultimately  
19 coming to a deal that makes sense and it does all the  
20 things that a settlement should do and you should approve  
21 as it was negotiated and without putting the burden of  
22 costs on any party, they can deal with their own costs,  
23 they've got lots of money.

24           So -- and I wanted to, to talk to you -- mention  
25 to you one of the cases that's in the brief, that's of  
26 Justice -- it's in the -- arises from the Calpine case and  
27 it's a Justice Romaine decision. And just to take you to a  
28 couple of points which I thought were really helpful about  
29 your process, your decision, about what you're doing here.

30           Now, I, I -- unfortunately my copy of the brief  
31 came along and one -- so I got an e-mail, I'm not sure  
32 where it is.

33           MR. DACKS: I'll -- with the Calpine case?

34           MR. MCELCHERAN: Yeah.

1 THE COURT: Yeah, it's tab 5.

2 MR. DACKS: Tab 5.

3 MR. MCELCHERAN: Tab 5.

4 And in that decision -- the case was -- that was  
5 again a very difficult complex cross-border case, this one  
6 has -- its complexities I think are gone and this is not as  
7 complex but the claims process between the estates is a  
8 problem and there was an overall omnibus settlement that  
9 was brought before the court to approve and some of the  
10 claimants were objecting to it and so she was dealing,  
11 Justice Romaine, was dealing with those issues and dealing  
12 with the arguments made by parties trying to --  
13 interopertives to prevent the settlement from happening and  
14 she was concerned, the question what do I do when I'm in a  
15 CCAA process, what's an appropriate way to deal with  
16 settlements that are not the plan, which is the big  
17 settlement, but are things along the way which build  
18 towards overall resolution of the case.

19 So if you look at page 8 where she's talking  
20 about -- it's page 8 of her decision, at paragraph 15. And  
21 so in the case the withdrawal was -- this is paragraph 15  
22 and this is just to set the stage, I'm going to come to the  
23 -- a couple of points I want to --

24 THE COURT: No, I'm not, I'm not with you because  
25 my paragraph 15 isn't -- where are you?

26 MR. DACKS: There's two decisions.

27 MR. MCELCHERAN: I'm in --

28 THE COURT: Oh.

29 MR. DACKS: There's two decisions --

30 THE COURT: I'm sorry, I'm in the wrong -- that's  
31 why.

32 MR. MCELCHERAN: That's my fault.

33 THE COURT: I'm in the -- okay, let me just get  
34 the other decision. Okay, I'm with you.

1           MR. MCELCHERAN:   Okay, at paragraph 15 on page 8  
2 of that --

3           THE COURT:   Yeah.

4           MR. MCELCHERAN:       -- referring to ad hoc  
5 committee's objections.

6           THE COURT:   All right.

7           MR. MCELCHERAN:   So the ad hoc committee argues  
8 that U.S. debtors' claims that were withdrawn are untested  
9 and unmeritorious.   This like, you know, what you're  
10 hearing just now is that the purchasers must be -- must  
11 have been vindicated because they're not contributing to  
12 the settlement and since we're not contributing that just  
13 demonstrates that we shouldn't have had to (inaudible).  
14 Well, that's not been tested and we -- one might have  
15 tested it, in fact, we're not going to give release, so in  
16 any event, if we're to go ahead -- so there -- certainly  
17 their claim to be not responsible is untested.

18  
19                       "(And) certainly ... claims have  
20 not been tested through  
21 litigation.   However, it is the  
22 very nature of settlement to  
23 withdraw claims in order to avoid  
24 protracted and costly litigation.  
25 While the Ad Hoc Committee may  
26 consider U.S. Debtor's claims  
27 unmeritorious, (they're asking)  
28 their saying so does not make it  
29 so.   The fact remains that the  
30 U.S. Debtors have agreed, as part  
31 of the GSA, which is the  
32 settlement, to withdraw claims  
33 that otherwise would have to be  
34 adjudicated,           likely           at



1                   considerable time and expense."

2

3                   So dealing with any settlement means that there  
4 are issues that are unresolved, unlitigated, don't know who  
5 would have won, that's the point, is to avoid -- so we have  
6 that scenario here, and that's, and that's the way it  
7 should be because the cost of doing that would have been a  
8 burden to the estate.

9                   So I wanted to just take you through then to a  
10 couple of -- how she starts then dealing with the question  
11 about how to approach approval of the settlement that's  
12 before the matter is completed and this is page 19.

13                  And I'm (inaudible) the middle of paragraph 64 of  
14 her decision, this sentence is about seven lines down,  
15 towards the right of the page. She's describing that  
16 settlement. She says:

17

18                   "The GSA resolves most of those  
19 issues in a reasonably equitable  
20 and rationale manner, provides for  
21 a mechanism by which a number of  
22 remaining issues may be resolved  
23 in the court of one jurisdiction  
24 or the other, and, by (release of  
25 the) release for sale --"

26

27                  Anyway, I don't want to go into the detail, but  
28 merely point out resolves big issues on both states so  
29 therefore advances the cause of resolving the case.

30                  And then page 21, and this is, this is her --  
31 referring to the three cases she had analyzed where deals  
32 had been approved by a court or settlements involved in  
33 them and she says, and this is in paragraph 74, about six  
34 lines down, towards the middle of the paragraph, the

1 sentence starts: As recognized.

2

3 "As recognized in Red Cross, Air  
4 Canada and Playdium, transactions  
5 that occur during the process (of  
6 the) of a restructuring and before  
7 a plan is formally tendered and  
8 voted upon often do affect the  
9 size of the estate of the debtor  
10 available for distribution."

11

12 And paragraph 75.

13

14 "That is why settlements and major  
15 transactions that require Court  
16 approval and a consideration of  
17 whether they are fair, reasonable  
18 and beneficial to (all) creditors  
19 as a whole."

20

21 The whole.

22

23 "It is clear from the case law  
24 that a Court of approval  
25 settlements and major transactions  
26 can and often is given over the  
27 objections of one or more parties.  
28 The Court's ability to do this is  
29 a recognition of its authority to  
30 act in the greater good consistent  
31 with the purpose and spirit within  
32 the confines of legislation."

33

34 So that's why I wanted to start from going back.

1 Where we -- why would we -- we're here to, to put the stamp  
2 of approval on a couple of very big deals which advance  
3 estate for the general benefit of the estate as a whole and  
4 it's my submission allowing this cost request to kibosh a  
5 significant part of that is -- would be -- it's within your  
6 jurisdiction not to grant that -- not to permit that to  
7 happen, to grant a relief in the manner that's requested  
8 and in my submission would be consistent with these, these  
9 principles which have been accepted by other courts as  
10 being consistent with the purpose of legislation and the  
11 benefit it has to all of the parties in the estate.

12 I don't have any other submissions, I have no  
13 other submissions right now.

14 THE COURT: So what you're saying to me is quite  
15 apart from whatever considerations I might have in a  
16 standard 37.12.57 kind of application for costs on a  
17 settlement following motion. When I look at the CCA  
18 context here, there is additional reasons why this -- there  
19 should be no granting of costs because the implications are  
20 it, to use your words, kibosh's the settlement.

21 MR. MCELCHERAN: Right. And, and I -- and also  
22 -- and specifically because of, as I said, I wanted to make  
23 sure you were aware of, of how the impact on the estate of,  
24 you know of that medication because that -- the medication  
25 is -- the good work that was done there was for -- it was  
26 hard thing for us, as an estate, to take into account and  
27 say look, we're not going to get a settlement from those  
28 guys, we think they -- or a settlement and contribution,  
29 and you're going to have to, for the good of the estate,  
30 buck up and take it on and deal with it even though we  
31 don't think we have any liability Mr. (inaudible) hear from  
32 -- Mr. Leslie, I'm sure, had different -- a completely  
33 different view about it but the point of it was that we  
34 went to that mediation a long way apart, all the parties

1 were. I am -- in the terms of where the merits lie and  
2 that they continue, all of us continue to hold our strong  
3 belief in our legal position but because that mediation, in  
4 the spirit of what we're trying to accomplish here, the  
5 parties overcome that and even when one of them, in my  
6 respectful submission, I said to Justice Martin at the  
7 time, that's not fair for you to let them out of the room  
8 but we still stayed there and did a deal because it was in  
9 the interest of the estate.

10 So allowing him, at this point, it's an added  
11 feature, a non-CCAA feature, it's a feature related to the  
12 actual case, I would say it's another reason in addition to  
13 the CCAA.

14 THE COURT: Meaning that you're saying it  
15 undermines the whole process?

16 MR. MCELCHERAN: Yes. It puts -- makes a waste  
17 of it.

18 MR. LESLIE: My Lady, to a certain degree I may  
19 be a bit repetitive, trying to consolidate that which I  
20 received knowledge of for the first time yesterday  
21 afternoon, about one o'clock, I saw an e-mail that  
22 indicated that they may be filing something with this court  
23 and at six o'clock last night I received their letter to  
24 you and accompanying bill of costs which was a solicitor  
25 and client bill of costs, clearly, and something that, with  
26 all due respect, in the Manitoba courts, solicitor and  
27 client costs are rarely, if ever, granted and I can akin  
28 back to at least two fraud trials that were highly  
29 successful for every dime and yet this court did not award  
30 solicitor and client costs.

31 But be that as it may, what you have heard is, is  
32 the effort that was put in before Justice Martin on June 19  
33 at the request of this court for the parties to be present  
34 and, as you heard, the purchaser and its counsel decided to

1 leave early on day one and were made aware, immediately,  
2 that there was a settlement. And essentially we've gone  
3 forward, almost four full months and they obviously were  
4 aware there was no request from them for any contribution  
5 otherwise obviously the settlement would have been  
6 contingent on them contributing.

7           They obviously were aware that if they wanted  
8 some costs they should be asking for it because on October  
9 the 16th it would come forward, it wouldn't be in their  
10 interest or our interest to somehow put in their oh, we'll  
11 reserve their right to ask for costs when they get here.  
12 One would like to think reasonable counsel, in dealing with  
13 their client, would say there is a settlement, you are not  
14 being asked to contribute if you want to say anything we  
15 should say it immediately because we can't show up on  
16 October 16th and say to this court, for the first time, oh,  
17 jeez, we want costs and not only do we want costs, but we  
18 want solicitor/client costs because we've denied any  
19 wrongdoing.

20           I, I find it hard to believe that lies in the  
21 mouth of a reasonable party making a submission before this  
22 court.

23           They say, and Ms. Konyukhova confirms, they're  
24 not opposing the settlement, what a surprise, they're not  
25 contributing anything to it and walked away early but the  
26 settlement that they're not opposing says no costs to  
27 anybody, as a consequence the court approves that, they  
28 don't get any costs. What they're not opposing denies them  
29 costs.

30           If it's not --

31           THE COURT: Well, what's your, what's your point,  
32 they're trying to --

33           MR. LESLIE: Well, my point being, if you're not  
34 opposing the settlement, the settlement says it's abandoned

1 with prejudice, without cost to any party. They're a party  
2 so therefore it's without cost to any party and they're not  
3 opposing that, they don't get costs. Did they know the  
4 intricacies of that? No. But they certainly knew that if  
5 they wanted something arising out of a settlement, they  
6 didn't have to wait four months, less two days, they could  
7 have done that in the first month, the second month.

8           And that's not unlike what this litigation has  
9 been about because you may recall the motion was filed in  
10 October of 2012 which gave rise to an appearance in this  
11 court, I believe on October 22, with the assistance of the  
12 monitor we've worked out a timetable for the litigation to  
13 move it along because there were pressing issues on my  
14 client, including its lender. And that translated into a  
15 schedule for discoveries, cross-examination, excuse me, in  
16 December and the order was Arctic first, Mr. Robertson,  
17 Chief Process Supervisor, Mr. McMullen second, and then Mr.  
18 Nagy. And Mr. McMullen decided he couldn't wait around and  
19 left town. We were prepared to accommodate and have Mr.  
20 Nagy go forward, even though we hadn't examined Mr.  
21 McMullen, and we were only able to bring Mr. McMullen back  
22 after considerable effort in February for a hearing before  
23 you in March, and as it transpired, while we followed the  
24 schedule to get our briefs and everything in, H.I.G.'s  
25 brief came in at the last minute and as a consequence we  
26 couldn't proceed in March and the calendar shoved us back.

27           Now here we are with Desert Mountain just finding  
28 out that they're asking for costs, four months after the  
29 settlement and I, and I look at that in the situation  
30 where, in fact, Desert Mountain has been successful to a  
31 significant degree in receiving relief yet they say Desert  
32 Mountain should pay their costs and Ms. Konyukhova says,  
33 and hopefully I'm saying her name correctly, well, they  
34 were very involved in contributing to the purchase price

1 and if they want to raise that argument, and it's our  
2 position, as Mr. McElcheran says, they were instrumental in  
3 why this motion was brought, that they were the author.  
4 That the transaction Your Ladyship approved on June 21 of  
5 '12 had a purchase price of 434.5 million dollars. That  
6 included the Desert Mountain purchase under the option of  
7 12.5. That's what you approved. What they closed on July  
8 27 was a payment of around 413 million dollars because  
9 they, and it's in our brief, asked for a discount or they  
10 would walk away.

11 One of the things they took out was the purchase  
12 of Desert Mountain and that was the crux of our motion  
13 beyond a number of collateral issues and agreements entered  
14 into not disclosed and numerous supported allegations of  
15 failure to disclose on the part of H.I.G. and as it  
16 transpires, Arctic got dragged into it.

17 So to say, well, gee, we've paid a lot for this  
18 business, what they publically said they were paying and  
19 what they actually paid were a totally different thing.  
20 I then --

21 THE COURT: When you talk about the allegations  
22 on the failure to disclose, disclose by H.I.G., you mean  
23 the fact that they were going to then, afterwards,  
24 negotiate so that they wouldn't pay for the Desert  
25 Mountain.

26 MR. LESLIE: Correct. I mean, it -- I could  
27 probably spend --

28 THE COURT: I don't --

29 MR. LESLIE: -- two days --

30 THE COURT: Trust me, I don't really want to get  
31 into --

32 MR. LESLIE: I didn't think you did, My Lady.

33 THE COURT: -- that detail. But I, I -- but, but  
34 the conduct of the party in, in contributing to the need

1 for the motion in the first place is a relevant factor for  
2 my consideration --

3 MR. LESLIE: Yes. And that --

4 THE COURT: -- on costs.

5 MR. LESLIE: -- as I say, that -- obviously, you  
6 know, I comment well, we had to make disclosure of some  
7 documents, what a surprise. Desert Mountain didn't have  
8 anything and so, of course, for them to peel back the  
9 layers to try to find out what was going on, required a  
10 tremendous amount of work by them and to get to the root of  
11 what consequently translated into their brief and when you  
12 have a bid letter that says we -- don't tell -- a side  
13 agreement don't tell Desert Mountain but we're going to try  
14 to reduce the price but if we can't reduce the price we'll  
15 pay the full 12 million five, and then the agreement  
16 includes specifically that they will buy for the same price  
17 that Arctic pays under the purchase option and then by the  
18 time the deal closes, notwithstanding the agreement you  
19 approved, says they'll buy, they don't buy. And the  
20 recourse then of Desert Mountain is to say well, they're --  
21 you know, this is going to cost too much or hey, I, I have  
22 been wronged and they bring forward their application.

23 And, and you then have this conduct which, I  
24 would submit, H.I.G. strategically has attempted to thwart  
25 the efforts by Desert Mountain to get to a solution shown  
26 by the difficulty with the cross-examination, shown by the  
27 inability to argue the motion in March when we were ready  
28 to go, shown by leaving the JADR and then, as I have  
29 already said and I am repeating myself, asking last night,  
30 we want solicitor/client cost because why, well, we denied  
31 liability. And I find it incredulous that they could  
32 somehow say well, because we have denied we are entitled to  
33 solicitor and client costs, notwithstanding all of that  
34 which I have said. There is absolutely no foundation in



1 that short letter that would suggest to our courts and the  
2 authorities that I haven't been able to pull together but I  
3 can think of --

4 THE COURT: It's Young and Young.

5 MR. LESLIE: Pardon me?

6 THE COURT: It's the Supreme Court of Canada --

7 MR. LESLIE: Yeah.

8 THE COURT: Young and Young.

9 MR. LESLIE: Solicitor and clients costs are  
10 extremely extraordinary and in the Province of Manitoba,  
11 affirmed by Mr. Melaney (phonetic) in Saskatchewan, you  
12 just don't see it. And you asked the question and I, I  
13 roughly did it, but it was also a calculation off our  
14 tariff, it's well under \$5,000. I mean, what we're seeing  
15 is what goes in the Province of Ontario but normally when  
16 you see a cost award you see it at the end of a  
17 determination of fault. In other words, a finding by a  
18 court that Desert Mountain was absolutely dead wrong in the  
19 allegations it made.

20 With all due respect, Desert Mountain believes  
21 that it was absolutely right in its allegations but Desert  
22 Mountain is not a giant monolith, H.I.G. is a giant  
23 monolith, and it's apparent it will litigate you to the end  
24 of the earth and walked away a compromise for any number of  
25 reasons is a compromise as Justice Romaine says in a CCAA  
26 setting, it works and the system is flexible, under CCAA,  
27 to make it work, the consequence of which is Desert  
28 Mountain looks at, Mr. Nagy looks at it, if you're  
29 successful before Justice Dewar in December there will be  
30 an appeal. If you lose you will have to appeal.

31 There is the directors' allegations that they  
32 were complacent in what occurred and you carry on with that  
33 aspect. A multiplicity of litigation which is very  
34 expensive and if I charge the rate that my learned friends

1 from Ontario charged, (a), I would have retired long ago  
2 but my client certainly wouldn't have been able to hire me  
3 in this province.

4 In any event, to reduce it down to its bare  
5 essential, My Lady, this is a request which, in my  
6 respectful submission, is nothing other than a delay tactic  
7 knowing that there is a December hearing trying to lever  
8 some money out of parties that went to extreme effort to  
9 come up with what was a practical, reasonable solution,  
10 with certainty for a multiplicity of matters and this court  
11 has the ability to grant an order within a CCAA proceeding,  
12 exactly as that which is sought and which is not opposed  
13 and that is that there will be a settlement approved and it  
14 will be with prejudice, without costs to any party.

15 And unless you have any questions, My Lady,  
16 beyond that --

17 THE COURT: Just to be clear on what you're  
18 saying in terms of the conduct of the litigation, you're  
19 saying that Mr. McMullen was not produced that, that there  
20 was no --

21 MR. LESLIE: He --

22 THE COURT: -- adherence to the timelines?

23 MR. LESLIE: There was, there was a  
24 cross-examination scheduled in December, at my offices, Mr.  
25 Robertson first, Mr. McMullen second, Mr. Nagy third. Mr.  
26 Robertson's examination was going well into the afternoon,  
27 cross-examination, and Mr. McMullen said I've got a  
28 business meeting, I can't stay around, and left. And it  
29 was look, we've got to get this done, I can't stay around,  
30 and left.

31 And so what were we going to do, short of tying  
32 him down, and, and that wouldn't have been productive. So  
33 that then meant getting a new date which turned out to be  
34 early February which caused everybody on the hustle to get

1 everything ready for Your Ladyship on, and I'm guessing at  
2 the date but I think it was March 2 or 3 and everything was  
3 filed and yet H.I.G.'s material came in voluminous and late  
4 and all of a sudden that date blew up and I was left to  
5 explain to my client why we're not able to argue our case  
6 and I explained to him that, in part, it was vagaries of  
7 litigation but in my view it was in a large part the fault  
8 of H.I.G. running from what I would submit was a good case  
9 on behalf of Desert Mountain.

10 And I, I still, to this moment, do not understand  
11 how four months could go by, on somebody as sophisticated  
12 as H.I.G., to say gee, we didn't realize we wouldn't be  
13 able to claim costs because we didn't know what was in  
14 their settlement, that, that defies any concept of  
15 reasonableness.

16 And what it obviously does do is throw the  
17 settlement out the window and on we go to see Justice  
18 Dewar, on December 2nd, and all four, if they were even  
19 able to establish they were successful on the motion on our  
20 tariff would be under \$5,000. And, of course, they haven't  
21 -- we haven't argued the motion, all we've done is exchange  
22 documents and had some cross-examinations and the bulk of  
23 the work was done in a JADR which they decided they didn't  
24 want to stay because they didn't want to pay. One can turn  
25 it around the other way and say well, why did you bother  
26 coming in the first place? But that's for, for them to  
27 sort out in their own mind.

28 Thank you, My Lady.

29 THE COURT: Thank you.

30 MR. DACKS: My Lady, we've heard argument from  
31 Mr. McElcheran and Mr. Leslie and I'm going to try not to  
32 be repetitive but the monitor feels so strongly about this  
33 issue that I, I am going to go through some, some  
34 repetition and some additional comments.

1           We've heard from Ms. Konyukhova that it was  
2 H.I.G.'s position that they would not be responsible,  
3 they're getting into the merit, they would not be  
4 responsible for the 12.5 million dollars. The monitor has  
5 made it clear to this court on numerous occasions, echoing  
6 Mr. McElcheran's position, that it is the monitor's  
7 position that should it ever have been determined that the  
8 12.5 million dollar purchase option was payable, that the  
9 asset purchase agreement with the purchaser was intended to  
10 fully protect the applicants' estate in such a scenario.

11           The monitor filed a detailed ninth report that  
12 was filed specifically in respect to the Desert Mountain  
13 motion. The monitor stated that throughout the discussions  
14 with H.I.G. that the APA was intended to fully protect the  
15 estate, full stop. This position can be of no surprise to  
16 the purchaser at this point and Mr. Leslie touched on a  
17 little bit of this but the monitor set out four factors in  
18 the ninth report that helped form the monitor's view.  
19 There was the language in the H.I.G. bid letter, that  
20 stated the purchaser would bear the full cost of any  
21 required payments of the purchase option.

22           The purpose of the SISP (phonetic) and the sale  
23 transaction was for the applicants to enter into a sale  
24 transaction that would not see it retaining surplus  
25 asserts. The definition of the purchase price was  
26 explicitly defined in order to reimburse Arctic with  
27 respect to the Arizona facility and the APA, as a whole,  
28 provides the purchasers to broadly assume the liabilities  
29 of the vendors, including those arising under the Arizona  
30 lease.

31           As you've heard, the purchaser and its counsel  
32 attended the JADR conference before the Honourable Mr.  
33 Justice Martin. The purchaser decided to leave prior to  
34 its conclusion, without offering any contribution to the

1 settlement. They could have stayed, they could have easily  
2 stayed, even if they were not going to contribute. If they  
3 had cared about this, if they were concerned about costs,  
4 they could have stayed. They did not.

5 As you've heard, after the purchaser left, and it  
6 was a difficult moment for the monitor and for the estate  
7 and for Desert Mountain, I presume, Mr. Justice Martin  
8 urged us to stay. None of us wanted to stay, we were  
9 upset, but the remaining parties agreed to stay and, and  
10 found a way, in the context of a CCAA proceeding, to reach  
11 the Desert Mountain settlement which is supported by the  
12 monitor for the reasons set out in the report that I have  
13 gone through, despite no contribution being made by the  
14 purchaser.

15 And just to be clear, the purchaser has known  
16 that a settlement was reached since June, since I believe  
17 the day of, June 19th or the next day. They knew when the  
18 court hearing was scheduled for. As I stated before the  
19 purchaser did not know about the quantum of the settlement  
20 payment or other details concerning the settlement but to  
21 use a word that Mr. Leslie used, it's incredulous to think  
22 that we would have sat around that table, when trying to  
23 find a difficult CCAA compromise and said, oh, and we're  
24 also going to pay H.I.G. their costs.

25 We received a request, last Tuesday, for a copy  
26 of the settlement agreement. You'll notice, and I think  
27 this is an important fact -- I'll ask you just to turn over  
28 the, the, the settlement agreement, the minutes of  
29 settlement, which is -- it says it's made as of June 19th,  
30 2013 because that was the day of the mediation, this is  
31 appendix "F" of the report, the very --

32 THE COURT: Yeah, I got it.

33 MR. DACKS: If you go to the very end of it, it  
34 says: Signed the 7th day of October. Because we were

1 still working on the mechanics and especially with respect  
2 to the resolution of Mr. Nagy's personal claim which, in  
3 good faith, we had agreed to do on June 19th and we spent a  
4 considerable amount of time dealing with.

5           October 7th was last Monday. The purchaser got a  
6 copy of the agreement before ten o'clock the following day,  
7 it was only signed on the Monday, they got it the next day.  
8 The purchaser, as I stated, unilaterally chose to leave the  
9 JADR conference without tying up their loose ends. It is  
10 the monitor's view that it was disingenuous at best for the  
11 purchaser to lie in the weeds until the 11th hour to make  
12 this request in circumstances would have left the mediation  
13 early and in the monitor's view is, in fact, getting a  
14 windfall in this situation of not being required to  
15 contribute to the settlement. But as Mr. McElcheran said,  
16 we've all worked very hard in the CCAA to reach compromises  
17 in a timely manner to create certainty and to distribute  
18 the funds being currently held by the monitor.

19           The monitor does not support any costs award in  
20 any amount being made to the purchaser. The monitor's view  
21 would be no different if this was a regular piece of  
22 litigation or in a CCAA, purely on the facts and based on  
23 the Manitoba rules, the monitor does not believe there  
24 should be a cost award. The CCAA overlay only serves to  
25 make that position even clearer.

26           It's interesting to note, also, that all of the  
27 other parties to the litigation have agreed to bear their  
28 own costs in light of a settlement which, in the monitor's  
29 view, is in the best interest of the estate. The  
30 purchaser's attempt to derail the settlement when no  
31 contribution is required from it and that will prevent the  
32 purchaser from incurring further legal fees and a potential  
33 adverse result in a motion in an amount of 12.5 million  
34 dollars, in the monitor's view is inappropriate and

1 irresponsible.

2           The monitor strongly believes that the request  
3 for costs from the purchaser should be rejected and that  
4 this court has the jurisdiction under, under the CCAA and  
5 the inherent jurisdiction to do so. In addition, the  
6 monitor notes, as has been said, that the court has a  
7 jurisdiction under the Manitoba rules, Rule 37.12(4) to  
8 order that no costs should be awarded with respect to an  
9 abandoned motion.

10           Subject to any questions you have, those are my  
11 submissions.

12           THE COURT: Thank you. Do you have any response?

13           MS. KONYUKHOVA: Yes, My Lady, just a couple of  
14 brief points, again starting with the issue of timing.  
15 It's ironic that it's Mr. Leslie that's raising the issues  
16 of lying in the weeds, considering that the motion that he  
17 brought all of the parties had objected to, partly on the  
18 basis that his client has been lying in the weeds while  
19 they knew full well of the motion to assign the lease when  
20 it had the motion materials in time to object at the  
21 approval hearing and did not do so, and only many, many  
22 weeks later did he raise the issue of, of the put.

23           So it's -- again ironic comment from, from him  
24 now that H.I.G. was lying in the weeds with respect to this  
25 costs request.

26           Secondly, with respect to, to the timing of this  
27 request, again it's, it's incredulous that, that all of the  
28 parties to the settlement agreement, when they're of the  
29 view that H.I.G. is as unreasonable as they're -- they view  
30 it to be, they didn't contact us or H.I.G. and stated that  
31 the settlement agreement provides for no costs from any  
32 party.

33           So they waited four moments to advise H.I.G. that  
34 the settlement agreement affects H.I.G. negatively and that

1 it provides for no costs to be payable by any party.

2 So as much as H.I.G. may be guilty of not  
3 thinking ahead, of whether costs -- what were the cost  
4 provisions in the settlement agreement, so are all of the  
5 other parties to the settlement agreement in that they  
6 didn't put any thought into what would be H.I.G.'s reaction  
7 on finding out that the settlement agreement provided for  
8 no costs.

9 The -- Mr. Leslie and, and Mr. McElcheran raised,  
10 in part, the merits of this motion and again, of course, we  
11 don't want to get into the merits, the many materials and  
12 cross-examinations and so on that deal with it show just  
13 how much the -- how long a hearing on the merits would be,  
14 however, it's, it's, it's disingenuous, I would say, to say  
15 that H.I.G. wouldn't have been held responsible for the  
16 payments that are being claimed by, by Desert Mountain. It  
17 was H.I.G.'s position from the very beginning that the  
18 lease was properly assigned on full notice to the landlord,  
19 to Desert Mountain, that the monitor made full disclosure  
20 of the assignment in its report, that the approval hearing  
21 went on notice to the landlord, who did not object at the  
22 time, that the approval order vested out the put and that  
23 was, again, on notice to the landlord.

24 THE COURT: But not on notice to the court.

25 MS. KONYUKHOVA: Your Honour (sic), I -- again, I  
26 would say the, the monitor can speak to what disclosure was  
27 made but all of the disclosure was made, that was made by  
28 the applicants and the monitor, spoke to the assignment of  
29 the lease and the vesting out of the put. Again, Mr. Dacks  
30 may be in a better position to speak to whether that was  
31 full disclosure or not but the landlord, who was fully  
32 aware of that motion, could have been at that -- could have  
33 been present at the motion and objected to it at that time.

34 In any event, whether the approval order would



1 have been held up, H.I.G.'s position was that if it wasn't,  
2 it wouldn't have been H.I.G.'s responsibility to pay for  
3 that put. It was H.I.G.'s position that under the APA it  
4 was the estate that was liable for the put, had it been  
5 payable. And that position is -- would have been the  
6 position of H.I.G. had this hearing proceeded in December  
7 and if H.I.G. was successful, as it maintains it would have  
8 been, it would have been entitled to claim costs.

9 Now, the monitor and the estate felt that it's  
10 better, it's in the benefit of the estate and its  
11 stakeholders to settle this matter quickly, without the,  
12 the adjudication on the issues. And what they're  
13 essentially requesting this court to do is to have H.I.G.  
14 which maintains it wouldn't have been responsible and would  
15 have been entitled to costs in December, it's requesting  
16 that H.I.G. sponsor that settlement agreement by foregoing  
17 its costs -- its extensive costs in, in defending this  
18 motion.

19 Now, much has been said about the, the  
20 solicitor/client costs and how inappropriate that is in  
21 this, in this province, again there is a, there is a lot of  
22 room between the solicitor/client costs which we have  
23 submitted to, to evidence, what has been incurred by H.I.G.  
24 in trying to defend itself against the motion and between  
25 the tariff costs which, again, are not mandatory in, in --  
26 on this motion.

27 My Lady, subject to, to any questions, those are  
28 my submissions.

29 THE COURT: Thank you. All right. What I would  
30 like to do is take some time. I will try to do this very  
31 quickly. Why don't we say -- it's one o'clock anyways and  
32 -- why don't we, why don't we say we'll, we'll break till  
33 1:45, at this point, and I'll try and just get back to you  
34 on this -- primarily this contested issue and then we'll go

1 from there.

2 If I need a few minutes more, the clerk will let  
3 you know. All right.

4 THE CLERK: Order, please rise.

5

6 (LUNCHEON RECESS)

7

8 THE CLERK: All right, we're back on the record.

9 EXCERPT FROM OCTOBER 16, 2013  
10

11 THE COURT: Thank you.

12 I am providing my reasons at this time but  
13 reserve the right to edit or amplify them should a  
14 transcript be required.

15 In June 2012 the court approved a sale of the  
16 assets of Arctic Glacier to the purchaser, H.I.G. Zamboni.  
17 Subsequent to that time, Desert Mountain filed a motion and  
18 proofs of claim, seeking payment of 12.5 million dollars  
19 pursuant to a purchase option contained in an Arizona lease  
20 from either H.I.G. Zamboni, the purchaser, or Arctic  
21 Glacier, the applicants.

22 Desert Mountain asserted amongst other grounds, a  
23 lack of notice of the sale approval motion as well as a  
24 failure to make fair and full disclosure to the court of  
25 all material facts at the time of the sale approval order.  
26 Other related claims were filed by Mr. Nagy, the principal  
27 of Desert Mountain.

28 All parties to the Desert Mountain motion and the  
29 monitor attended a judicially assisted dispute resolution  
30 conference before Justice Martin on June 13, 2013. A  
31 resolution of all issues and claims related to the purchase  
32 option and the Arizona lease was achieved between the  
33 monitor, the applicants and Desert Mountain. The purchaser  
34 did not contribute to the settlement that was reached. In

1 fact, the purchaser left the mediation part way through  
2 without asserting any claim for costs before the remaining  
3 parties reached a settlement.

4 The purchaser was advised however, that a  
5 settlement had been reached. The settlement calls for the  
6 payment of 1.25 million dollars to Desert Mountain from the  
7 estate and the exchange of releases between the applicants,  
8 Desert Mountain, Mr. Nagy and the monitor. The settlement  
9 provides that upon payment and the exchange of releases,  
10 Desert Mountain's motion shall be deemed to be abandoned  
11 with prejudice and without costs. The settlement is  
12 conditional upon a order being obtained to this effect.

13 The monitor seeks a motion approving the Desert  
14 Mountain settlement. In connection with that motion, the  
15 purchaser is now seeking solicitor/client costs in the  
16 amount of \$190,000 being the fees and disbursements  
17 incurred in responding to the Desert Mountain motion and  
18 participating in settlement discussions in the JADR.

19 The purchaser relies on Queen's Bench Rules  
20 37.12(4) and 57.01(1) and argues it is entitled to costs as  
21 Desert Mountain is deemed to have abandoned its application  
22 as a result of the settlement reached and there was no  
23 reason for it to have been brought into the motion in the  
24 first place.

25 To begin with, there is absolutely no merit to  
26 the purchaser's claim for solicitor/client costs in this  
27 case. Solicitor/client costs are ordered in rare and  
28 exceptional circumstances. In Young v. Young, [1993] 4  
29 S.C.R. 3, the Supreme Court of Canada held that  
30 solicitor/client costs are generally to be awarded only  
31 where there has been reprehensible, scandalous or  
32 outrageous conduct. (See also the Manitoba Court of Appeal  
33 decision of McMurachy v. Red River Valley Mutual (1994), 92  
34 Man.R. (2d) 225. There is no basis for such an

1 extraordinary award here. As was pointed out by counsel  
2 for Desert Mountain tariff costs are in the range of  
3 \$5,000.

4 Apart from of this, I am not of the view that  
5 there should be any award of costs to the purchaser. Costs  
6 are discretionary and Queen's Bench Rule 57.01(1) outlines  
7 the factors that the court may consider in this regard.

8 I do not accept the purchaser's position that  
9 this was an abandoned motion entitling it to costs. This  
10 was a settlement achieved between some of the parties with  
11 a mechanism to conclude the settlement reached. This is  
12 not a situation where the purchaser is entitled to costs  
13 because of the result, i.e., an adjudication in its favour.  
14 Its position has not been tested. In fact, the purchaser  
15 has obtained an advantage by the settlement: the  
16 abandonment of Desert Mountain's motion and any exposure  
17 that might entail without any contribution on its part.  
18 Moreover, the context of this motion in the first place and  
19 the conduct of the purchaser during its course does not  
20 warrant any award of costs in its favour.

21 I reject the suggestion that there was no need  
22 for the purchaser to be a party to this motion. The  
23 purchaser was a principal participant in creating the very  
24 situation that led to the filing of Desert Mountain's  
25 motion in the first place. And without reaching any  
26 conclusion as to the merits of the Desert Mountain motion  
27 which raised complex factual and legal issues, there were  
28 significant concerns raised about whether there was full  
29 and frank disclosure to the court at the time of the sale  
30 approval and obtaining the vesting order. Further, there  
31 were significant issues about whether the APA agreement  
32 insulated the estate from any exposure to Desert Mountain's  
33 claim. I agree with the suggestion of counsel for the

1 applicant that the purchaser's fingerprints are all over  
2 this dispute.

3           As well, the conduct of the purchaser during the  
4 course of this motion militates against a cost order in its  
5 favour. To concentrate on the most fundamental aspect, the  
6 purchaser initially participated in the mediation and then  
7 left without making any claim for costs. It was aware of  
8 the results of the mediation immediately and took no steps  
9 for four months to assert any such claim. It is only on  
10 the eve of the motion to approve the settlement that such a  
11 claim is being made.

12           The purchaser claims that it was only recently  
13 that it became aware that the settlement was conditional  
14 upon no costs to any party. It is I agree, incredulous  
15 that the purchaser would believe that it was going to be  
16 paid its costs when it left the mediation without  
17 contributing to a settlement and did not assert any claim.  
18 I agree with the characterization that the purchaser chose  
19 to leave the JADR without tying up loose ends and it is  
20 disingenuous, at best, for them to lie in the weeds and  
21 only now assert this claim.

22           An award of costs in these circumstances does  
23 undermine the entire JADR process. This claim for costs  
24 strikes me as tactical, a last minute attempt to prevent or  
25 delay the court's approval of the settlement today, quite  
26 apart from any lack of consideration to the other parties  
27 and the court from the lack of notice.

28           As all counsel opposing the purchaser's request  
29 have highlighted, the settlement is dependent on a court  
30 order of approval with the provision that no costs be  
31 awarded to any of the parties. Aside from a consideration  
32 of this matter as an exercise of the court's discretion  
33 regarding the costs of a motion, there is also a basis to  
34 reject this claim in the context of the motion for approval

1 of the Desert Mountain settlement under the CCAA. I agree  
2 that the Desert Mountain settlement is in the best  
3 interests of the applicants and all stakeholders. It  
4 resolves a significant collection of interrelated claims,  
5 avoids any potential liability of the estate, saves  
6 considerable legal costs and provides certainty. It is  
7 fair and reasonable, beneficial to all stakeholders and is  
8 consistent with the purpose and spirit of the CCAA. I have  
9 no hesitation in approving the settlement and rejecting the  
10 purchaser's claim for costs on this ground as well.

11 I am now going to turn to the remaining issues.  
12 The stay period shall be extended until February 7th, 2014.  
13 The applicant has acted in good faith and with due  
14 diligence.

15 There will be an order in the form provided to  
16 facilitate the implementation of the proposed indirect  
17 purchasers' settlement agreement. This authorizes the CPS  
18 and monitor to execute the proposed agreement and the  
19 granting of the class counsel charge. I accept, for all  
20 the reasons outlined, that the proposed settlement  
21 agreement is fair and reasonable and is in the best  
22 interests of the applicants, their creditors, and the other  
23 stakeholders. It resolves a huge claim, avoids significant  
24 legal costs, and allows the monitor to distribute the funds  
25 in a timely manner.

26 Is there anything else I need to address,  
27 counsel?

28 MR. DACKS: I don't, I don't think so. The, the  
29 forms of order have not changed since their -- since  
30 service last week, other than, I guess adding the parties  
31 that were here and filling in some blanks.

32 Previous attendances, we had tried to set the  
33 next stay extension hearing date. I don't know if we

1 wanted to do that now or to Mr. Jackson's office at a later  
2 date.

3 THE COURT: You've extended to February 7th, what  
4 day of the week is that, if you don't mind? Is that a  
5 Friday?

6 MR. DACKS: I believe so.

7 THE COURT: All right.

8 MR. DACKS: I do.

9 THE COURT: I know Friday is going to be a  
10 problem for me so we're not going to leave it --

11 MR. DACKS: Yeah, and we wouldn't want to --

12 THE COURT: -- in any event.

13 MR. DACKS: -- we wouldn't want to leave it till  
14 the final day anyways so ...

15 THE COURT: Right. I'm wondering if Sharon  
16 Phillips is around. The reason I'm saying that is I  
17 already know I have a four week trial and then some, some  
18 days in that week already booked. It would be best, while  
19 everybody is here, to try and secure a date. How's that  
20 Wednesday or Thursday for everybody?

21 MR. DACKS: So is the Friday --

22 MR. MCELCHERN: The 7th, the 7th is a Friday --

23 THE COURT: Friday is not possible.

24 MR. MCELCHERN: -- the 5th is a, is a Wednesday.

25 MR. DACKS: Is a Wednesday. Yeah, that's  
26 certainly -- that's fine.

27 UNIDENTIFIED PERSON: That's fine.

28 MR. DACKS: That's certainly fine with the  
29 monitor.

30 THE COURT: So we should ask for the 5th or even  
31 the 6th although the -- probably the 5th is better, is  
32 that --

33 MR. MCELCHERN: Sure.

34 THE COURT: -- better for counsel?

1 MR. DACKS: Sure.

2 THE COURT: All right. Let's see if Ms. Phillips  
3 is around and we can set that.

4 THE CLERK: That's fine. Okay.

5 THE COURT: All right.

6 (UNIDENTIFIED PERSON): Wednesday the 5th at?

7 THE COURT: Wednesday the 5th at 10:00.

8 MR. MCELCHERAN: Wednesday the 5th.

9 THE CLERK: Is that good for counsel?

10 MR. DACKS: Yes.

11 MR. MCELCHERAN: Yes. Thank you. Thank you.

12 MR. JACKSON: My Lady --

13 THE COURT: Yes.

14 MR. JACKSON: -- as Mr. Dacks pointed out, we  
15 don't propose that the proposed forms warrant change other  
16 than to add the appearances and I'll add one other comment,  
17 or question --

18 THE COURT: Yes.

19 MR. JACKSON: -- with respect to the stay  
20 extension and approval of the Desert Mountain, the Desert  
21 Mountain motion.

22 THE COURT: Yes.

23 MR. JACKSON: The only changes are with respect  
24 to identifying all counsel and the other represented  
25 parties in the conference call and I have inserted all of  
26 those in the form of the order for the indirect purchase  
27 plan settlement and I can provide you with two copies of  
28 that, My Lady, to start with.

29 THE COURT: Okay. Madam Clerk, do you have a  
30 pen, please?

31 THE CLERK: I do.

32 THE COURT: Thank you.

33 MR. JACKSON: And assuming it's satisfactory, My  
34 Lady, if I could request that you sign two, one for your



1 file and one that I can take with me to the Registrar or  
2 the civil motions coordinator's desk to arrange for a  
3 certified true copy for the U.S. court.

4 THE COURT: Sorry, and save for the appearances,  
5 it's exactly the same, Mr. Jackson, is that what you said?

6 MR. JACKSON: Yes. Except for one other item,  
7 and that is in paragraph three, as Mr. Dacks' already  
8 alerted you to --

9 THE COURT: Yes.

10 MR. JACKSON: -- in paragraph three we specify  
11 that it is appendix "E" for the 13th report --

12 THE COURT: Yes.

13 MR. JACKSON: -- to the 13th report --

14 THE COURT: All right.

15 MR. JACKSON: -- which is the settlement  
16 agreement.

17 THE COURT: All right. So I've signed both  
18 orders, thanks.

19 MR. JACKSON: That's a good question. My Lady,  
20 as Mr. Dacks has pointed out, the question is whether we  
21 can get a transcript of your reasons with respect to the  
22 settlement of the indirect purchasers claim in case it's --  
23 we need it for the U.S. court.

24 MR. DACKS: In case, in case Judge Gross would be  
25 interested in it.

26 THE COURT: Sure. What, what needs to be done is  
27 that should just be requested --

28 MR. DACKS: Okay.

29 THE CLERK: (Inaudible.)

30 THE COURT: And -- yeah, from, from Transcription  
31 Services, it will come to me and I will review it and then  
32 it can be issued. It's probably going to have everything  
33 here but --

34 MR. DACKS: Right. That, that -- I think that's

1 fine, I think the -- Judge Gross is always interested in  
2 knowing what, what happened up here.

3 THE COURT: That's fine. All right.

4 MR. JACKSON: In which case I can complete the  
5 necessary forms for ordering that transcript, My Lady.

6 THE COURT: What's your timing on that, if you  
7 don't mind, it's the 18th, did you say?

8 MR. DACKS: I, I believe that the, the U.S.  
9 materials will likely be filed some time towards the end of  
10 next week, it's a 21 day notice period hearing on November  
11 18th so the materials need to be filed by October 20th.  
12 Mr. Cannon is on the phone, he would know better than I.

13 MR. CANNON: Yes. Justice Spivak, this is Alex  
14 Cannon, how are you today?

15 THE COURT: Good, thank you.

16 MR. CANNON: I'm just making sure you can hear  
17 me. Thank you. The -- we need to get our U.S. papers on  
18 file by the end of next week or in any event, no later than  
19 October 28th, however, if that's a problem for the court,  
20 getting it ready in that period of time, we could probably  
21 file it a few days later, after we submit our motion  
22 papers.

23 THE COURT: All right. I'm going to suggest, Mr.  
24 Jackson, that you request an expedited transcript --

25 MR. JACKSON: Precisely.

26 THE COURT: -- and I will attend to it. I can  
27 tell this, you want me to attend to it before a six week  
28 jury trial that I am about to start so I will, I will  
29 ensure that I do that.

30 MR. JACKSON: Does that start next week, My Lady?

31 THE COURT: No, it starts the beginning of  
32 November, so ...

33 MR. JACKSON: Perfect. Then I think the timing  
34 is just right.

1 THE COURT: Yeah.

2 MR. JACKSON: With respect to the other order, My  
3 Lady --

4 THE COURT: Yes.

5 MR. JACKSON: -- which contains the usual stay  
6 extension provisions, the approval of the Desert Mountain  
7 settlement and, and the miscellaneous relief, I have two  
8 versions, just because I'm a little uncertain on one point.  
9 I have certainly included today's appearances in it, as I  
10 had with the other form or order. The question I have is  
11 whether we need to make reference to the bill of costs  
12 that's been filed.

13 As you know, typically refer to the motion  
14 materials and notice of motion, the 13th report, and I've  
15 got two versions, one's -- one which includes reference to  
16 the bill of costs filed by the purchaser and that is the  
17 other thing because I'm not sure it's actually filed,  
18 you --

19 THE COURT: And, in fact, I'm glad you raised  
20 that, I think it needs -- I think there needs to be  
21 reference to it, there needs to be some record of the fact  
22 that that was requested and then what was requested, what  
23 the court had and that it was dealt with.

24 MR. JACKSON: In which case, My Lady, I can  
25 provide you with two copies of the version.

26 THE COURT: Did you refer to the letter as well?

27 MR. JACKSON: No, I referred to the --

28 THE COURT: Just the bill of costs.

29 MR. JACKSON: -- bill of costs.

30 THE COURT: That's fine.

31 MR. JACKSON: I thought that was more  
32 appropriate, My Lady.

33 THE COURT: That's fine.

34 MR. JACKSON: And just so you can find that, it

1 is in the second paragraph, second paragraph of the  
2 preamble.

3 THE COURT: Yes. And --

4 MR. JACKSON: Where I put the notice of motion  
5 and the 13th report of the monitor and the bill of costs of  
6 the purchasers and identified the three purchasers.

7 THE COURT: Now, I see that, I'm just thinking  
8 that -- so to the extent this was a disposition of the  
9 motion, Mr. Leslie's motion, that wouldn't necessarily be  
10 caught up in a approval of a settlement. I mean, is, is  
11 that -- that, that will, that will take care of -- this  
12 will, this will ensure that that resolves the  
13 disposition --

14 MR. JACKSON: Well, paragraph six should cover  
15 that.

16 THE COURT: -- of your motion without a need for  
17 any other further order.

18 MR. LESLIE: Yes, that's --

19 THE COURT: I think so.

20 MR. LESLIE: -- that's what we -- in looking at  
21 that paragraph six, that --

22 THE COURT: Yeah, okay.

23 MR. LESLIE: -- normally we would be filing a  
24 notice of abandonment and this right here then shall be  
25 deemed to be abandoned, with prejudice or costs.

26 THE COURT: Yeah. Okay, that's sufficient.

27 MR. DACKS: But --

28 MR. LESLIE: That would cover it off.

29 MR. DACKS: -- I think, My Lady, but there, but  
30 there is one point that we had discussed with Mr. Leslie.  
31 The way that it works is the settlement payment will be  
32 paid to Mr. Leslie in trust and then once the conditions  
33 happen then it gets disbursed to Desert Mountain and there  
34 was a suggestion that we should ask you whether or not the

1 court would want something like a monitor's certificate  
2 filed, noting that that happened or if we should report on  
3 it on our next report.  
4 We -- it --  
5 THE COURT: I'm in your hands.  
6 MR. DACKS: Okay.  
7 THE COURT: I mean --  
8 MR. DACKS: I think we'll -- we can just deal  
9 with that in our next report. Sometimes --  
10 THE COURT: Yeah.  
11 MR. DACKS: -- the court file --  
12 THE COURT: I mean, I'm sure if there is any  
13 difficulty I am going to hear about it  
14 MR. DACKS: I'm, I'm sure you will.  
15 THE COURT: So, so I'm going to --  
16 MR. DACKS: So I think we'll just deal with it --  
17 THE COURT: -- assume in the absence --  
18 MR. DACKS: -- in our next report.  
19 THE COURT: -- of hearing anything from you, that  
20 everything went as, as --  
21 MR. DACKS: Okay.  
22 THE COURT: -- anticipated. Is that fair?  
23 MR. DACKS: Yes.  
24 THE COURT: Okay.  
25 MR. JACKSON: So in which case, My Lady, if I can  
26 impose upon you to sign two copies of it --  
27 THE COURT: All right.  
28 MR. JACKSON: -- in which case you can have one  
29 for the file and I have one that I can take down to the  
30 motions coordinator.  
31 THE COURT: Okay.  
32 MR. JACKSON: Thank you, My Lady.  
33 THE COURT: You're welcome. Anything else,  
34 counsel? Are we done?

1 MR. JACKSON: Just thank you for --  
2 MR. DACKS: No, thank you very much.  
3 MR. JACKSON: -- your indulgence and --  
4 THE COURT: All right. Good afternoon.  
5 MR. MCELCHERAN: Good afternoon.  
6 MR. JACKSON: Good afternoon. I've got the  
7 two -- I've got two of the same order, with respect, My  
8 Lady, I've got the two copies of the motion for stay  
9 extension -- oh, here is the other two. We're not going to  
10 keep them or do you want me to just --  
11 THE COURT: No, I think Madam Clerk will keep  
12 one.  
13 THE CLERK: (Inaudible).  
14 MR. JACKSON: Thank you so much.  
15 THE COURT: Yeah.  
16 THE CLERK: (Inaudible) that one.  
17 THE COURT: Okay.  
18 THE CLERK: That's good.  
19  
20 (PROCEEDINGS CONCLUDED)

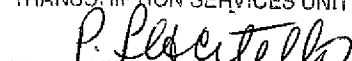
**CERTIFICATE OF TRANSCRIPT**

I hereby certify the foregoing pages of printed matter, numbered 1 to 100, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.



PAMELA S. PESCITELLI  
COURT TRANSCRIBER

CERTIFIED COURT TRANSCRIPT  
FROM THE OFFICE OF  
TRANSCRIPTION SERVICES UNIT

  
TRANSCRIPTION SERVICES UNIT