File No. CI 12-01-76323

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

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

TWENTY-SIXTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
December 8, 2017

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1.0 INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

1.10 On April 12, 2017, the Canadian Court issued an order (the "**Stay Extension Order**") extending the Stay Period to December 15, 2017.

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

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

i. the Unitholder Claims Process;

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

iii. the Arctic Glacier Parties' receipts and disbursements for the period from March 25 to December 1, 2017;

iv. the Monitor's activities since the date of the Twenty-Fifth Report (April 3, 2017); and

b) provide information in support of the Monitor's motion returnable December 13, 2017 for an order, among other things:

i. extending the Stay Period to September 28, 2018; and

ii. approving the Ninth Report of the Monitor dated February 26, 2013 and attached without appendices as **Appendix "B"**, the Eighteenth Report of the Monitor dated October 1, 2014 and attached without appendices as **Appendix "C"**, the Nineteenth Report of the Monitor dated November 7, 2014 and attached without appendices as **Appendix "D"**, and the Twenty-Fifth Report of the Monitor dated April 3, 2017 and attached without appendices as **Appendix "E"**, as well as this Twenty-Sixth Report.

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

2.0 TERMS OF REFERENCE

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

2.2 The Monitor has reviewed the information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards

("**CASs**") pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion and does not provide any other form of assurance contemplated under CASs in respect of the Information.

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

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

3.0 THE UNITHOLDER CLAIMS PROCESS

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

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

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

c) On June 2, 2015, the Canadian Court issued an order approving the Unitholder Claims Process to identify and determine all Initial Distribution Claims, O&T Claims and O&T Indemnity Claims that may be asserted or made in whole or in

part against AGIF and/or its Officers and Trustees, as the case may be. All claims were withdrawn except for those asserted by the Brodski Parties.

d) On July 8, 2015, the U.S. Court recognized the Unitholder Claims Procedure Order (the "**U.S. Unitholder Claims Procedure Recognition Order**"), which enumerated several steps, culminating in the Brodski Parties commencing an adversary proceeding (the "**Brodski Proceeding**") by filing a complaint on October 30, 2015 in the U.S. Court (the "**Brodski Complaint**"). The Brodski Parties asserted Initial Distribution Claims and O&T Claims, both in the amount of $1,966,568.18, plus reasonable attorney's fees and costs, prejudgment interest, punitive damages, and treble damages, which have not been quantified (the "**Brodski Claims**"). The Brodski Parties named AGIF as well as the individual Trustees of AGIF as defendants in the Brodski Complaint.

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

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

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

3.2 The parties fully briefed the Appeal. At the time of the Twenty-Fifth Report, the District Court for the District of Delaware (the "**District Court**") had not yet ruled on the appeal.

3.3 On June 14, 2017, the District Court released its Memorandum Opinion in the matter. The District Court affirmed the U.S. Court's Dismissal Order. A copy of the Memorandum Opinion is attached hereto as **Appendix "F"**.

3.4 On July 12, 2017, the Brodski Parties filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit (the "**Third Circuit Court**"). A copy of the press release announcing the Memorandum Opinion and the Notice of Appeal is attached hereto as **Appendix "G"**.

3.5 On September 22, 2017, the Third Circuit Court released a Briefing and Scheduling Order. In accordance with that order, the Brodski Parties filed their brief and the joint appendix in November 2017. In accordance with that order, AGIF and the other defendants filed their reply brief on December 1, 2017. The Briefing and Scheduling Order required the Brodski Parties to file their Reply within fourteen days of service of the defendants' brief.

3.6 In November, 2017, the Brodski Parties contacted the defendants to request an extension to file their Reply to December 23, 2017, which the defendants agreed to. Upon reporting the agreement to the Third Circuit Court, the Third Circuit Court granted an additional six days beyond the period agreed to thereby making the Reply due on or before December 29, 2017.

Insurance Coverage in Respect of Brodski Complaint

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

3.8 As at the date of the Twenty-Fifth Report, defense costs of approximately $779,000 had been incurred and paid by the Monitor on behalf of the Arctic Glacier Parties and invoices for those defense costs had been supplied to the insurer with a request for reimbursement.

3.9 The insurer has since completed its review of the invoices submitted and approved $485,162 for payment. The Monitor has received $364,802 of the approved amount, the remainder of which was withheld by the insurer as payment of the Retention (deductible) amount.

3.10 Of the remaining $293,800 not approved for payment by the insurer:

a) approximately $26,800 relates to an invoice that appears to have been overlooked by the insurer and which will be re-submitted with a request for reimbursement, together with invoices totaling approximately $13,600 for defense costs that have been incurred and paid by the Monitor on behalf of the Arctic Glacier Parties since the time the first group of invoices were submitted;

b) approximately $23,550 was paid directly to the respective law firm in error. The Monitor is seeking repayment of this amount from that law firm;

c) approximately $161,800 was incurred following the defendants having been made aware by the Brodski Parties of their intention to pursue a claim, but prior to the date of the Brodski Complaint, which the provisions of the insurance policy consider to be the date of the claim for insurance purposes. The insurer has denied payment of this amount on the basis that the invoices pre-date the "insurance claim"; and

d) the remaining $81,600 was denied for payment on the basis that the associated rates and/or services exceed those covered by the insurance.

3.11 The Monitor and AGIF are considering the insurer's position and will engage in discussions with the insurer.

4.0 POST-PLAN IMPLEMENTATION DATE TRANSACTIONS

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

4.2 As of the date of the Twenty-Fifth Report, 23 of the 28 subsidiaries of AGII had been dissolved and all tax filings completed. The remaining five subsidiaries consisted of one subsidiary in Texas and four subsidiaries in New York for which the Monitor had filed Requests for Dissolution and was awaiting responses from the respective state authorities.

4.3 Since the date of the Twenty-Fifth Report, the dissolution of the subsidiary in Texas has been completed.

4.4 With respect to the subsidiaries in New York, the Monitor received a Response to Request for Consent to Dissolution of a Corporation for each of the New York subsidiaries indicating that since the corporations were involved in bankruptcy proceedings, the requests would be manually reviewed and notification of any requirements that must be met prior to the approval of the request for consent to dissolution would be provided.

4.5 After a period of time passed without receiving any such notifications, the Monitor contacted the State of New York to enquire about the status of the Requests for Dissolution. The Monitor was advised that the consents to dissolution were being withheld based on the State's belief that certain corporate income tax returns had not been filed. The Monitor explained that all required corporate income tax returns for the Arctic Glacier Parties had been filed on time. The Monitor has been communicating with the State of New York to resolve the error in the State's records. Once the New York subsidiaries are wound up, Step 12 of the Schedule B steps will have been completed.

4.6 The Monitor has been preparing to complete the remaining Schedule B Steps so that once the State of New York consents to the requested dissolutions, the remaining AGII subsidiaries can be dissolved and the subsequent remaining steps, including the wind-up or dissolution AGII and AGI, a final distribution, and the de-listing of AGIF's Trust Units on the Final Distribution Date can be promptly completed.

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

5.0 RECEIPTS AND DISBURSEMENTS SINCE THE TWENTY-FIFTH REPORT

5.1 During the period from March 25 to December 1, 2017 (the "**Reporting Period**"), the Applicants had Canadian dollar net cash outflows of approximately $107,600 and U.S. dollar net cash outflows of approximately $107,300.

5.2 Excluding transfers between the Monitor's U.S. and Canadian dollar trust bank accounts, receipts during the Reporting Period were approximately CAD$23,730 and $468,100 and consisted of the payment from the Companies' insurer in respect of defense costs associated with the Brodski Proceeding, tax refunds and deposit interest.

5.3 Disbursements, also excluding transfers between the Monitor's U.S. and Canadian dollar trust bank accounts, consisted primarily of U.S. dollar professional fees and expenses totaling approximately $59,000 and Canadian dollar professional fees and expenses of approximately CAD$667,000 (which collectively include fees and expenses paid to the Monitor, its legal counsel, the CPS, the Applicants' legal counsel, the Applicants' tax consultants, and other professionals involved with these CCAA Proceedings). Also

included in disbursements are other expenses comprised of income taxes, fees paid to Directors and Trustees, and disbursements of an administrative nature totaling a net amount of approximately $16,600 and CAD$136,000.

5.4 As at December 1, 2017, the Monitor is holding approximately $19.6 million and CAD$71,000, all of which is being held in interest-bearing accounts in the name of the Monitor, on behalf of the Applicants.

5.5 The Plan provides that certain reserves and cash pools be maintained in respect of the remaining obligations of the estates. The funds held by the Monitor on behalf of the Applicants as at December 1, 2017, are divided among the reserves and cash pools as follows: Insurance Reserve, approximately $721,000; and Administrative Costs Reserve, approximately $18.86 million, and CAD$71,000.

5.6 It is the Monitor's and the Arctic Glacier Parties' view that it is not appropriate to make a distribution until the Brodski Claims which, as indicated in Section 3.1 of this Twenty-Sixth Report, are not quantifiable at present, have been resolved. It is the Monitor's intention to complete the Post-Plan Implementation Date Transactions and Schedule B Steps as quickly as possible to be in a position to make a Final Distribution once all such transactions and steps are completed and the Brodski Claims are finally resolved. Based on the information currently available, the Monitor believes that it is more cost-effective to make only one distribution, the Final Distribution, which will maximize returns to Unitholders.

6.0 THE STAY EXTENSION

6.1 Pursuant to the Initial Order and subsequent Orders of the Canadian Court, the Stay Period was granted and extended until December 15, 2017. The Monitor requests an extension of the Stay Period to September 28, 2018.

6.2 The Monitor believes that an extension of the Stay Period until September 28, 2018 is appropriate, as it will allow the Monitor, in consultation with the Applicants, to among other things, continue implementing the steps contemplated by the Plan and will provide time for the Third Circuit Court to rule on the appeal in the Brodski Proceeding.

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

7.0 ACTIVITIES OF THE MONITOR

7.1 In addition to the activities of the Monitor described above, the Monitor's activities from the date of the Twenty-Fifth Report, being April 3, 2017, have included the following:

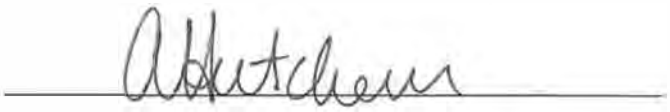
- responding to inquiries from Unitholders and other stakeholders;
- continuing to make non-confidential materials filed with the Canadian Court and with the U.S. Court publicly available on the Website;
- preparing this Twenty-Sixth Report;
- continuing to act as foreign representative in the Chapter 15 Proceedings;

- continuing to fulfill the Monitor's responsibilities pursuant to the Claims Procedure Order and the Claims Officer Order;
- communicating with insurance adjusters and with various plaintiffs' counsel regarding certain open insurance claims;
- communicating with the Arctic Glacier Parties' insurer in respect of finalizing a "buy-out" policy that would address any and all remaining unresolved liability insurance claims;
- attending the April, 2017 Stay Extension Motion;
- maintaining estate bank accounts, overseeing the accounting for the Applicants' receipts and disbursements pursuant to the Transition Order, and reviewing professional fee invoices and providing same to the CPS for review; and
- preparing and filing GST/HST returns and various other statutory returns and communicating with CRA and certain government bodies in the United States, as appropriate in respect of same.

*****

All of which is respectfully submitted to the Court of Queen's Bench this 8th day of December, 2017.

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



Per: Alan J. Hutchens, Senior Vice-President

Appendix "A"

Appendix "A"

List of Applicants

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

Appendix “B”

File No. CI 12-01-76323

THE QUEEN'S BENCH
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. AND THE ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (COLLECTIVELY, "THE APPLICANTS")

NINTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
FEBRUARY 26, 2013

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Appendix B - **Transition Order**

Appendix C - **Claims Procedure Order**

Appendix D - **Correspondence from counsel for Desert Mountain dated February 19, 2013**

Appendix E - **SEDAR Report**

Appendix F – **October 11, 2012 Letter from counsel for the Monitor to counsel for Desert Mountain**

Appendix G – **E-Mail from counsel to the Monitor to the Court dated July 24, 2012**

Appendix H – **Desert Mountain Proofs of Claim (without attachments)**

Appendix I - **Eighth Report of the Monitor (without appendices)**

Appendix J - **U.S. District Court Order dated February 20, 2013**

Appendix K – **AGIF Code of Ethics**

Appendix L - **AGIF Second Amended and Restated Declaration of Trust**

1.0 INTRODUCTION

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

1.2 The Monitor has previously filed eight reports with this Honourable Court. Capitalized terms not otherwise defined in this Ninth Report are as defined in the Initial Order or in the reports previously filed with this Honourable Court by the Monitor.

1.3 As reported in the Monitor's Sixth Report dated August 29, 2012 (the "**Sixth Report**"), on June 7, 2012, Arctic Glacier, LLC (formerly known as H.I.G. Zamboni LLC), an affiliate of H.I.G. Capital ("**HIG**" or the "**Original Purchaser**"), and the Applicants, excluding AGIF (the "**Vendors**") entered into an asset purchase agreement (as amended by an Assignment, Assumption and Amending Agreement dated July 26, 2012, the "**APA**"), pursuant to which the Original Purchaser agreed to purchase all of the Vendors' assets except the Excluded Assets, and would assume all of the Vendors' liabilities except the Excluded Liabilities (the "**Assumed Liabilities**"), on an "as is, where is" basis (the "**Sale Transaction**").

1.4 The Sale Transaction was approved by an Approval and Vesting Order dated June 21, 2012 (the "**Approval and Vesting Order**") granted by this Honourable Court on a hearing held on such date (the "**Sale Approval Hearing**").

1.5 Pursuant to the provisions of the APA, the Original Purchaser designated certain of its affiliates to acquire the Assets and entered into a Designated Purchaser Agreement with its designees Arctic Glacier, LLC, Arctic Glacier U.S.A., Inc., and Arctic Glacier Canada, Inc. (collectively, the "**Purchaser**"). The vesting of the Assets in the Purchaser was approved by this Honourable Court pursuant to an Amended and Restated Approval and Vesting Order dated July 12, 2012.

1.6 The U.S. Court issued an Order dated July 18, 2012 recognizing the Amended and Restated Approval and Vesting Order.

1.7 The Sale Transaction contemplated by the APA closed effective 12:01 a.m. on July 27, 2012. On that date, the Monitor delivered the Monitor's Certificate to the Purchaser and subsequently filed same with the Court.

1.8 As a consequence of the Sale Transaction, the business formerly operated by the Applicants is now being operated by the Purchaser. As such, and in anticipation of the closing of the Sale Transaction (the "**Closing**"), the Applicants sought and obtained the Transition Order dated July 12, 2012. Among other things, the Transition Order provides that, on and after the Closing, the Monitor is empowered and authorized to take such additional actions and execute such documents, in the name of and on behalf of the Applicants, as the Monitor considers necessary in order to perform its functions and fulfill its obligations as Monitor, or to assist in facilitating the administration of these CCAA Proceedings. A copy of the Transition Order is attached as **Appendix "B"**.

1.9 As a result of the Closing, the Monitor is holding significant funds for distribution. Accordingly, in the Sixth Report, the Monitor recommended a claims process to identify and determine the claims of creditors of the Applicants (the "**Claims Process**").

1.10 On September 5, 2012, this Honourable Court issued an order approving the Claims Process and, among other things, authorizing, directing and empowering the Monitor to take such actions as contemplated by the Claims Process (the "**Claims Procedure Order**"). The U.S. Court recognized the Claims Procedure Order by Order dated September 14, 2012. A copy of the Claims Procedure Order is attached as **Appendix "C"**.

1.11 This report (the "**Ninth Report**") is being filed by the Monitor in respect of a motion brought by Desert Mountain Ice, LLC ("**Desert Mountain**") pursuant to a Notice of Motion dated October 15, 2012 (the "**DMI Motion**"). In essence, the DMI Motion is seeking the payment by the Applicants and/or the Purchaser of $12,500,000 plus certain other amounts pursuant to a purchase option (the "**Purchase Option**") contained in a lease dated May 25, 2006 between Desert Mountain and the Applicant Arctic Glacier California Inc. ("**AGCI**") (as amended, the **"Arizona Lease**") that Desert Mountain claims has been deemed to have been exercised.

1.12 Prior to the service of the DMI Motion and after the Closing, the Monitor was contacted by current counsel for Desert Mountain to discuss the treatment of the Arizona Lease under such transaction. Since being contacted by such counsel, the Monitor has attempted, on a without prejudice basis, to assist Desert Mountain, the Applicants and the Purchaser to reach a commercial resolution of the matters at issue in the DMI Motion. The Monitor has facilitated and participated in numerous bi-lateral and multi-lateral

meetings, negotiations and discussions with respect to the Arizona Lease. The Monitor engaged in these activities since it believed that reaching a commercial resolution to this dispute without resorting to contested litigation was in the best interests of the estate and its stakeholders. The Monitor also believed that a commercial resolution was possible due to the continuing landlord/tenant relationship that exists between Desert Mountain and the Purchaser. The Monitor facilitated the exchange of oral and written proposals between Desert Mountain and the Purchaser that were aimed at reaching a revised commercial landlord/tenant relationship on a go-forward basis. Despite these efforts, which have been ongoing for many months and continued in the weeks prior to the filing of this Ninth Report, no resolution to the issues raised in the DMI Motion has been achieved.

1.13 The Monitor has engaged in an independent review of the evidence and documentation concerning the issues raised in the DMI Motion. The Monitor has reviewed the affidavits and briefs filed by Desert Mountain, the Applicants and the Purchaser and the documents produced by the parties in the course of the litigation. The Monitor or its counsel attended the cross-examinations conducted with respect to the DMI Motion. The Monitor has delivered this Ninth Report to address certain aspects of the DMI Motion that have been raised by the parties to the litigation, including certain matters that have been discussed in previous reports of the Monitor.

1.14 The Monitor has presented certain portions of this Ninth Report in chronological order as a means of assisting the Court in assessing the issues raised in the DMI Motion. However, the Monitor notes that the issues raised in the Applicants' and Purchaser's affidavits and briefs concerning which party is responsible to satisfy the Purchase Option

should it be payable are only relevant to the DMI Motion if this Honourable Court first determines that Desert Mountain is entitled to relief amending, modifying or affecting the Approval and Vesting Order as it relates to the Arizona Lease. It is the Monitor's view that the Approval and Vesting Order, as a final order of this Court that has not been appealed, should stand.

1.15 Further information regarding these proceedings can be found on the Monitor's website at http://www.alvarezandmarsal.com/arcticglacier.

2.0 TERMS OF REFERENCE

2.1 In preparing this Ninth Report, A&M has necessarily relied upon unaudited financial and other information supplied, and representations made, by certain former senior management of Arctic Glacier ("**Senior Management**") certain of whom are continuing to operate the Arctic Glacier business for the Purchaser. Although this information has been subject to review, A&M has not conducted an audit or otherwise attempted to verify the accuracy or completeness of any of the information of the Applicants. Accordingly, A&M expresses no opinion and does not provide any other form of assurance on or relating to the accuracy of any information contained in this Ninth Report, or otherwise used to prepare this Ninth Report.

2.2 Certain of the information referred to in this Ninth Report consists of financial forecasts and/or projections or refers to financial forecasts and/or projections. An examination or review of financial forecasts and projections and procedures, in accordance with standards set by the Canadian Institute of Chartered Accountants, has not been performed. Any future-oriented financial information referred to in this Ninth Report

was prepared based on estimates and assumptions provided by Senior Management. Readers are cautioned that since financial forecasts and/or projections are based upon assumptions about future events and conditions that are not ascertainable, actual results will vary from the projections, and such variations could be material.

2.3 The information contained in this Ninth Report is not intended to be relied upon by any prospective purchaser or investor in any transaction with the Applicants.

2.4 Unless otherwise stated, all monetary amounts contained in this Ninth Report are expressed in United States dollars, which is the Applicants' common reporting currency.

3.0 THE ARIZONA LEASE

3.1 As part of its diligence leading up to the commencement of the CCAA Proceedings and the implementation of the SISP approved by the Initial Order, the Monitor became aware that the Applicants' operations in Arizona involved a facility leased pursuant to the terms of the Arizona Lease (the "**Arizona Facility**"). Through its involvement with the SISP, the Monitor was aware that potential purchasers were asking questions of the Applicants and their Financial Advisor with respect to the Purchase Option set out in Section 24 of the Arizona Lease. Participants in the SISP were encouraged to provide a bid for the assets of the Applicants that dealt with the Purchase Option and the Arizona Lease in a manner that was beneficial to the Applicants' stakeholders as a whole, including Desert Mountain.

3.2 The Monitor also became aware during the course of the SISP that potential purchasers may not be willing to assume the obligations set out in the Arizona Lease as part of any sale transaction (i) as a result of the legal and financial terms of the Arizona Lease; and

(ii) due to the Applicants' loss of a significant customer in Arizona to a competitor shortly before the bid deadline. With respect to the status of the Applicants' Arizona operations in 2011, on February 19, 2013, counsel for Desert Mountain sent correspondence to counsel for the Monitor enclosing a memorandum dated August 15, 2011 from the Applicants' President and CEO (Keith McMahon) to the Applicants' employees that contains, among other things, information regarding the favourable state of the Applicants' operations in Arizona at that time. A copy of such correspondence and attached memorandum are attached as **Appendix "D"**.

4.0 THE SALE TRANSACTION

(i) The HIG Bid Letter

4.1 In accordance with the timelines set out in the SISP, H.I.G. Capital (an affiliate of the Purchaser) provided a bid letter to the Financial Advisor and the Monitor dated June 4, 2012 (the "**Bid Letter**"). In accordance with the directions to potential bidders who were participating in the SISP, the Bid Letter stated that the Purchaser would be responsible for any required payment with respect to the Purchase Option. The HIG Bid Letter was the highest offer received with the fewest conditions to closing. In addition to being by far the best bid received under the SISP, the HIG bid was the only Qualified Bid that included the assumption of the Arizona Lease and/or the payment of the Purchase Option at no cost to the Applicants. According to the Bid Letter:

> The purchase price includes an amount of US$12.5 million representing the price of the Tolleson facility [i.e. the Arizona Facility], based on the deemed exercise of the put option set out in the Tolleson lease. Should the property be acquired for a lower price, the amount will be adjusted accordingly with no negative impact to the Vendors, subject to the potential upside described below.

> While H.I.G. is prepared to purchase the Tolleson facility for the full put price of US$12.5 million, H.I.G. proposes to share in any purchase price reduction negotiated with the Tolleson landlord prior to closing. Specifically, H.I.G. will increase its purchase price by an amount corresponding to 25% of the amount of any reduction in the required payment for the put. . . . If no savings are negotiated, H.I.G. will bear the full cost of the required payment (US$12.5 million).

4.2 As described in the Fourth Report of the Monitor dated June 15, 2012 (the "**Fourth Report**") filed in support of the Applicants' motion seeking approval of the Sale Transaction, on June 7, 2012, the Monitor advised the Special Committee that one or more Qualified Bids had been received in accordance with the SISP. The Monitor also confirmed that the terms of the court-approved SISP had been followed. The Monitor, after consulting with the Financial Advisor, the CPS and the Applicants, and after taking into account the evaluation criteria set out in paragraph 27 of the SISP, recommended to the Special Committee that the Qualified Bid submitted by HIG be selected. The Financial Advisor and the CPS concurred with the Monitor's recommendation. The Special Committee accepted the Monitor's recommendation and authorized the Applicants to enter into the APA.

4.3 A description of the treatment of the Arizona Lease under the Final Bids received under the SISP was provided by the Monitor and disclosed to the Court in the Confidential Appendix to the Fourth Report dated June 18, 2012 (the "**Confidential Appendix**"). The Confidential Appendix contained confidential and sensitive information concerning the bids received in Phase II of the SISP and was sealed pursuant to the terms of the Approval and Vesting Order. The Confidential Appendix was subsequently unsealed pursuant to an Order of this Honourable Court dated November 29, 2012.

(ii) The Asset Purchase Agreement

4.4 Section 2.05 of the APA (as amended) provides that the Purchase Price payable to the Vendors under the Sale Transaction is "$422,000,000 plus the dollar value of (i) the price paid by the Vendors for the purchase of the land and building at 600 South 80th Avenue, Tolleson, Arizona; (ii) the Petty Cash; and (iii) the Assumed Liabilities, subject to adjustment as provided in Section 2.07".

4.5 According to the Affidavit of Bruce Robertson, the CPS of the Applicants, sworn October 31, 2012 (the "**Robertson Affidavit**"), the legal and financial risk of the Arizona Lease was specifically transferred to the Purchaser pursuant to the terms of the APA through two separate mechanisms. The Robertson Affidavit states that if the Vendors elected to exercise the Purchase Option or otherwise purchase the Arizona Facility prior to the Closing for another amount negotiated with Desert Mountain, the Purchaser would acquire the Arizona Facility on Closing as an Asset of the Applicants and would pay the Applicants any amount that the Applicants actually paid to purchase the Arizona Facility prior to Closing. Second, the Robertson Affidavit states that the APA provides that the "Assumed Liabilities" are paid by the Purchaser. Section 2.03 of the APA sets out what is included in the "Assumed Liabilities" and provides that "the Purchaser will assume, fulfill, perform and discharge . . . all Liabilities arising from or in connection with the performance of any of the Assigned Contracts (or breach thereof) after the Time of Closing". According to the Robertson Affidavit, if the Applicants did not acquire the Arizona Facility prior to Closing, the Purchaser would take an assignment of the Arizona Lease and assume all obligations under the Arizona Lease, including the rights and obligations associated with the Purchase Option, as an Assumed Liability.

4.6 In the Affidavit of Brian McMullen of the Purchaser sworn October 31, 2012 (the "**McMullen Affidavit**"), the Purchaser disagrees with the Applicants' interpretation of the APA. According to the McMullen Affidavit, the inclusion of a reference to the purchase of the Arizona Facility in section 2.05 of the APA was originally provided for in the event a payment was required by the Vendors to Desert Mountain prior to Closing. However, when the Approval and Vesting Order was obtained which overrode the Purchase Option, no further amount was payable or paid by the Applicants to Desert Mountain, and consequently, upon Closing, the Arizona Lease was acquired as a leasehold interest by the Purchaser. With respect to the argument that the deemed exercise of the Purchase Option was an "Assumed Liability", the McMullen Affidavit states, among other things, that if the Purchase Option was triggered by the Sale Transaction, it was triggered at the time of Closing (not after it) and therefore does not fall within the definition of Assumed Liabilities. The Applicants contend that, due to the mechanism in the Arizona Lease which provides that the closing of the Purchase Option transaction will not occur until "the first business day after the thirtieth day after Landlord's receipt of Tenant's notice exercising the Purchase Option", any obligation to satisfy the Purchase Option occurred after Closing.

4.7 Another interpretation of these provisions of the APA is simply that the Purchaser has agreed in section 2.05 to add to the Purchase Price for the Assets "the price paid by the Vendors for the purchase of the land and building at [the Arizona Facility]", whether the Vendors are required to make such purchase before, contemporaneous with or after the Closing of the Sale Transaction.

4.8 During the periods that the Applicants (i) were negotiating the APA with HIG based on the framework set out in the Bid Letter; (ii) seeking court approval of the Sale Transaction by this Honourable Court and the US Court; and (iii) preparing for the Closing of the Sale Transaction, the Monitor had no reason to question that the legal and financial risk of the Arizona Lease was to be assumed by and be the responsibility of the Purchaser. While counsel for the parties were discussing the Assignment, Assumption and Amending Agreement in the days immediately prior to Closing, counsel for the Monitor and the Applicants were informed by Purchaser's counsel that the Purchaser's interpretation of the APA and the Approval and Vesting Order was that the Purchaser would be taking an assignment of the Arizona Lease and was not required to satisfy the Purchase Option should it be payable as a consequence of the Sale Transaction.

4.9 It has been the Monitor's stated view throughout in its discussions with the Purchaser that the APA was intended to fully protect the estate in the event that the Purchase Option was payable as a result of the Sale Transaction. The Monitor does recognize that the parties to the litigation have differing views on the interpretation of the APA and thus notes the following additional factors that have helped form the Monitor's view: (i) the language in the Bid Letter that the Purchaser will bear the full cost of any required payment of the Purchase Option; (ii) the purpose of the SISP and the Sale Transaction was for the Applicants to enter into a Sale Transaction that would not see it retaining surplus assets unless specifically stipulated to be an "Excluded Asset"; (iii) the Purchase Price is explicitly defined in order to reimburse the Vendors if they had purchased the Arizona Facility; and (iv) the APA as a whole provides that the Purchaser is to broadly assume the liabilities of the Vendors, including those arising under the Arizona Lease.

5.0 THE SALE APPROVAL HEARING

(i) Notice of the Sale Approval Hearing

5.1 One week after the execution of the APA, on June 14, 2012, the Applicants served their motion materials in support of the approval of the Sale Transaction. The details of such service are set out at paragraph 8 of the Robertson Affidavit. The court materials were served on contractual counterparties by the Applicants' U.S. Noticing Agent on June 14, 2012 via first class mail.

5.2 Desert Mountain has raised issues regarding the form and manner of notice it was provided in connection with the Sale Approval Hearing. In his cross-examination with respect to the DMI Motion, the principal of Desert Mountain, Robert Nagy, states that he was not served with the motion materials for the Sale Approval Hearing heard June 21, 2012 until approximately one week after the court hearing (i.e. between June 28 and July 3, 2012). No other party who was served with the materials for the Sale Approval Hearing in the manner described in the Robertson Affidavit has contacted the Monitor taking any issue with the timing, form or manner of service.

5.3 The Monitor notes that the motion materials for the Sale Approval Hearing were posted on its website on June 15, 2012. The Monitor also notes based on a review of AGIF's SEDAR filings that the APA was not filed on SEDAR until June 20, 2012. A copy of AGIF's SEDAR filings from the relevant period that show the filing of the APA as a "Material Document" is attached as **Appendix "E"**.

5.4 On June 26, 2012, notice of the U.S. recognition hearing brought by the Monitor in its capacity as foreign representative of the Applicants, and scheduled for July 17, 2012, was

served on Desert Mountain by the Applicants' U.S. Noticing Agent. At no time prior to the U.S. recognition hearing did any representative of Desert Mountain contact the Monitor in its capacity as foreign representative of the Applicants with respect to the U.S. recognition hearing.

5.5 The motion briefs delivered by the Applicants and the Purchaser refer to certain evidence provided by Mr. Nagy during his cross-examination concerning (i) his knowledge of and involvement and interest in the CCAA Proceedings; (ii) his knowledge of how to obtain information with respect to the CCAA Proceedings; (iii) his involvement with HIG prior to the submission of HIG's Bid Letter with respect to the potential acquisition of the Applicants' business; (iv) his communications with the Applicants regarding the potential treatment of the Arizona Lease by bidders or the Applicants as part of any transaction that may result from the SISP; and (v) his belief that it was unnecessary to retain counsel upon his review of the court materials concerning the Sale Transaction.

5.6 When the Monitor was first contacted by current counsel for Desert Mountain with respect to issues surrounding the Arizona Lease, the Monitor provided its views on certain procedural issues relating to the Sale Approval Hearing. In particular, in a letter dated October 11, 2012, the Monitor stated that Desert Mountain was provided with proper notice of the Sale Approval Hearing and that the Monitor is not aware of any fact or circumstance that would suggest that an amendment or variance of the Approval and Vesting Order would be appropriate. The Monitor believes that all of the Applicants' stakeholders, including Desert Mountain, were afforded a sufficient and appropriate opportunity to participate in the CCAA Proceedings, and in particular, the Sale Approval Hearing by (i) contacting the Monitor by e-mail or through its dedicated hotline to raise

any questions or concerns a stakeholder may have; (ii) contacting the Monitor's counsel whose particulars are noted on the Monitor's website to raise any questions or concerns a stakeholder may have; and/or (iii) retaining counsel to participate in the CCAA Proceedings. The Monitor in particular notes that Desert Mountain was provided with numerous opportunities to participate in the CCAA Proceedings, including receiving a memorandum from the Applicants, engaging in multiple discussions with representatives of the Applicants, and engaging in discussions with the Purchaser prior to the submission of the Bid Letter, and did not to retain counsel to do so. In all of the circumstances of the case, including after reviewing the materials associated with the DMI Motion and considering Desert Mountain's knowledge about the CCAA Proceedings and its ability to participate in such proceeding by retaining counsel or otherwise, the Monitor's view with respect to the Approval and Vesting Order as set out in the October 11, 2012 letter has not changed, including the treatment of the Purchase Option contained therein. A copy of the October 11, 2012 letter is attached as **Appendix "F"**.

(ii) Materials before the Court at the Sale Approval Hearing

5.7 Desert Mountain also argues that the Applicants and the Purchaser failed to make full and frank disclosure of all material facts related to the Arizona Lease in conjunction with the Sale Approval Hearing. The Monitor notes that the court materials that were not filed on a confidential basis did not make specific reference to the Arizona Lease and the Purchase Option and that these issues were not otherwise specifically brought to the attention of the Court. However, as set out above, there were references to the Arizona Lease in the Confidential Appendix, including a description of how each final bidder proposed to deal with the Arizona Lease as part of an overall transaction.

5.8 Multiple communications had occurred between Mr. Nagy and representatives or advisors of the Applicants, and in one instance with the participation of the Monitor. In addition to these communications, as a result of (i) the general publicity associated with this case in Winnipeg; (ii) the ability for stakeholders to obtain information with respect to the CCAA Proceedings through customary means such as the Monitor's Website, the Applicants' public disclosure and otherwise; and (iii) the service of the motion materials for the Sale Approval Hearing on all contractual counterparties, the Monitor believed that Mr. Nagy was aware of the Sale Transaction and the requirement for court approval. Mr. Nagy could have easily contacted the Applicants, the Monitor or their respective counsel, or retained counsel to appear before the Court at the Sale Approval Hearing, but did not do so.

(iii) Form of Approval and Vesting Order

5.9 Desert Mountain has also raised an issue with respect to certain modifications to the draft Approval and Vesting Order that were made between the time of service of the court materials for the Sale Approval Hearing and the Sale Approval Hearing itself. The final form of Approval and Vesting Order deleted certain language originally found at paragraph 4 which provided that the "Assigned Contracts shall not be or be deemed to be amended or modified by the terms of this Order". The remainder of the end of the original paragraph 4 was largely incorporated in paragraph 10 of the final Approval and Vesting Order. Paragraph 4 of the draft Order was deleted as it did not reflect the commercial reality of the effect of an Order assigning contracts under the CCAA. For example, contracts are assigned that can contain clauses stipulating that the contract is not to be assigned without the counterparty's consent which would be considered an

amendment or modification of the contract. Paragraph 10 of the Approval and Vesting Order requires that the Purchaser comply with its obligations under the APA which included the assumption of the Assumed Liabilities and the performance of its obligations under the Assigned Contracts.

(iv) The Closing of the Sale Transaction

5.10 As previously described in the Sixth Report, certain modifications to the Sale Transaction were required by the Purchaser and agreed to by the Applicants immediately prior to the Closing. The effect of these modifications was a reduction in the proceeds of sale of between approximately $9 million and $14 million, depending on the quantum of the Closing Working Capital. Once these modifications were agreed to by the Applicants and the Purchaser, the Monitor sent an e-mail on July 24, 2012 to Madam Justice Spivak in order to inform the Court of the modifications to the approved Sale Transaction. The Monitor's e-mail also reflects the fact that the Purchaser would assume the Arizona Lease on Closing. The e-mail further stated that the effect of such assumption was that the $12.5 million payment referred to in the APA will not be paid "at this time as contemplated by the APA". The Monitor felt that it was important to inform the Court that this payment would not be made "at this time" as a revised purchase price would be reflected in the press release to be issued by the Applicants after Closing. A copy of the July 24, 2012 e-mail is attached as **Appendix "G".**

5.11 As set out above, the Monitor filed its Monitor's Certificate with respect to the Closing of the Sale Transaction on July 27, 2012. It is the Monitor's view that the filing of the Monitor's Certificate does not change the rights and obligations of the parties set out in the APA, nor does it affect the transfer to the Purchaser of the legal and financial

responsibility for the Arizona Lease, including for any payment of the Purchase Option as a result of the Sale Transaction.

(v) Assignment of the Arizona Lease

5.12 As set out in the Monitor's letter to counsel for Desert Mountain dated October 11, 2012, it is the Monitor's view that notice was properly given to Desert Mountain with respect to the Sale Approval Hearing and that the Monitor does not believe that an amendment or variance of the Approval and Vesting Order with respect to its treatment of the Arizona Lease is appropriate. The Monitor notes that the parties to this litigation have provided arguments on whether or not it was appropriate in the Approval and Vesting Order to suspend the operation of the Purchase Option for the purposes of the Sale Transaction and to assign the Arizona Lease to the Purchaser in those circumstances. It appears that the parties have chosen to raise these arguments to put the Court in a position to consider issues relating to the Arizona Lease that may have been argued had Desert Mountain retained counsel and appeared at the Sale Approval Hearing.

5.13 With respect to the portions of the Approval and Vesting Order assigning the Assigned Contracts to the Purchaser, the Monitor repeats its comments set out at paragraph 5.12 of the Fourth Report which stated as follows: "The APA provides for the assignment of the Assigned Contracts by Court order in the event that consents are not obtained from the counterparties. The draft Approval and Vesting Order contains a provision ordering the assignment of the Assigned Contracts pursuant to Section 11.3 of the CCAA. The Monitor approves of the proposed assignment of the Assigned Contracts. It is the Monitor's view that the Purchaser will be able to perform the obligations under the Assigned Contracts and in light of the fact that the Purchaser is acquiring the Business it

is appropriate for an order to be made assigning the Assigned Contracts". The evidence demonstrates that the Purchaser has performed its obligations under the Arizona Lease as an Assigned Contract through the payment of ongoing rent (not taking into account the ongoing dispute concerning the Purchase Option).

6.0 CLAIMS PROCESS

6.1 As described in the Eighth Report of the Monitor dated November 23, 2012 (the "**Eighth Report**"), in addition to the DMI Motion, Desert Mountain has submitted a Proof of Claim (on a secured basis), as well as a DO&T Proof of Claim, in the Claims Process, seeking payment of the amount of $12.5 million (plus certain additional amounts) in respect of the Purchase Option. The Proofs of Claim relies on, *inter alia*, the Notice of Motion and initial affidavit of Robert Nagy filed with respect to this motion. Paragraph 36 of the Supplementary Affidavit of Robert Nagy sworn November 7, 2012 states that Desert Mountain and Robert Nagy personally have filed claims in the Claims Process seeking to recover the Purchase Option amount, to protect their rights pending the determination of the within motion. Mr. Nagy has also filed a Proof of Claim that includes, *inter alia*, a claim for the $500,000 personal guarantee he had provided to Roynat with respect to the mortgage on the Arizona Facility. Copies of the Desert Mountain Proof of Claim and DO&T Proof of Claim (without attachments) are collectively attached as **Appendix "H".** A copy of the Eighth Report without appendices is attached as **Appendix "I"**.

6.2 As described herein, the Monitor has engaged in an independent review of the facts and circumstances surrounding the Arizona Lease and the matters set out in the DMI Motion and the Desert Mountain Proofs of Claim. As the issues relating to the Arizona Lease are

currently before the Court in a contested hearing, the Monitor did not believe it was appropriate to formally respond to the Proof of Claim pursuant to the Claims Procedure Order prior to the adjudication of the issues set out in the DMI Motion. The Monitor notes that certain of the observations contained in this Ninth Report will equally apply to the Proofs of Claim filed by Desert Mountain.

7.0 DESERT MOUNTAIN APPEAL OF U.S. RECOGNITION ORDER

7.1 As described in the Sixth Report, on July 31, 2012, Desert Mountain filed a Notice of Appeal from the U.S. Order recognizing the Amended and Restated Approval and Vesting Order. On August 14, 2012, Desert Mountain filed a statement of issues on appeal (the "**Statement of Issues**"). The Statement of Issues identifies the following issues on appeal: (i) whether the U.S. Court erred with respect to recognizing and enforcing the Amended and Restated Approval and Vesting Order; and (ii) whether the U.S. Court erred in authorizing and approving, to the extent provided for in the Amended and Restated Approval and Vesting Order, the assignment of the Assigned Contracts.

7.2 The Monitor has been provided with a "Show Cause" notice from the United States District Court for the District of Delaware (the "**U.S. District Court**") dated January 16, 2013. Pursuant to such notice, Desert Mountain was required prior to February 20, 2013 to show cause as to why the appeal should not be dismissed. Desert Mountain provided a response to the "Show Cause" notice and the U.S. District Court ordered on February 20, 2013 that "Desert Mountain has shown cause why the above-captioned appeal should not be dismissed". A copy of the U.S. District Court Order dated February 20, 2013 is attached as **Appendix "J"**. A mediation of Desert Mountain U.S. appeal has been scheduled for March 27, 2013.

8.0 THE ARIZONA LEASE TRANSACTION

8.1 The Arizona Facility is owned by Desert Mountain which is indirectly owned by Robert Nagy. Mr. Nagy is the former Chief Executive Officer of AGI and a former trustee of AGIF. Desert Mountain was indirectly acquired by Mr. Nagy as part of the same overall transaction that saw the Applicants acquire six ice companies located in California in May 2006. Upon such acquisition, the Arizona Facility was then leased to AGCI on financial terms equivalent to the required payments under the Roynat mortgage on the property and other expenses. Mr. Nagy stated in his cross-examination that he did not invest any of his own money in the Arizona Facility, but provided a pledge of 250,000 units of AGIF and a personal guarantee of $500,000.

8.2 The Applicants have stated that any payment of the Purchase Option to Desert Mountain, and in effect Mr. Nagy, would give Mr. Nagy a windfall at the expense of creditors and unit holders. The Applicants refer to AGIF's Code of Conduct and Ethics (the "**Code of Conduct**") and argue that under the law of fiduciary duty Mr. Nagy cannot profit from the acquisition of the Arizona Facility. A copy of the Code of Conduct is attached as **Appendix "K".**

8.3 Canadian business corporations statutes generally provide that transactions with the corporation in which a director or officer has an interest will not be void or voidable if certain disclosure requirements are met. Typically, an officer is required to disclose his or her interest in the transaction as soon as he or she becomes aware of the transaction. The extent of the disclosure required is fact-specific.

8.4 AGIF's Second Amended and Restated Declaration of Trust made as of December 6, 2004 contains a conflict of interest policy that obliges a trustee to disclose in writing the

nature and extent of the interest and forbids the trustee from voting on resolutions relating to the actual or potential conflict. The Code of Conduct forbids trustees, officers and directors from engaging in activities that present a conflict of interest, however waivers of such conflicts by the Board of Trustees are contemplated by the Code of Conduct. A copy of AGIF's Declaration of Trust is attached as **Appendix "L"**.

8.5 The Monitor notes from its document review the following with respect to the 2006 Arizona Lease transaction:

(i) Memoranda from the former Chief Financial Officer of AGI to the Board of Directors/Trustees dated February 12 and April 3, 2006 noted that AGI would take title to the Arizona Facility as part of the California transaction;

(ii) A subsequent memorandum from the Chief Financial Officer to the Boards dated May 4, 2006 stated that Mr. Nagy would indirectly acquire Desert Mountain and the Arizona Facility for $10 million and noted that Desert Mountain, in its capacity as landlord, would be a related party;

(iii) On May 8, 2006, the AGIF Board of Trustees approved a resolution effecting the overall California transaction. One of the recitals to the resolution indicated that a corporation related to AGI would purchase Desert Mountain and would enter into a lease with AGCI. The resolution also stated that the acquisition of the Arizona Facility was conditional upon and in conjunction with the California transaction; and

(iv) Based on its review, the Monitor found no evidence as to whether or not Mr. Nagy either recused himself from either AGIF's deliberations concerning the

entering into of the Arizona Lease as part of the overall California transaction or from voting on such transaction.

9.0 CONCLUSION

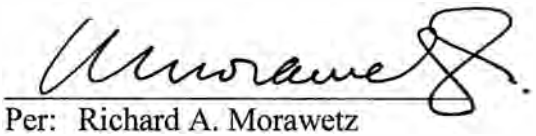
9.1 As set out above, the Monitor has been actively involved in attempting to facilitate a commercial resolution to the dispute between the Applicants, the Purchaser and Desert Mountain concerning the treatment of the Arizona Lease under the Sale Transaction. The Monitor believed that it was in the best interests of the estate to attempt to resolve this dispute to prevent the cost, uncertainty and distraction of prolonged litigation. The Monitor and its counsel have had numerous discussions with the principals of the parties to the litigation and their counsel in an attempt to develop a creative solution to the dispute. Unfortunately, despite these efforts, no resolution to the dispute has been achieved.

9.2 The Monitor has provided this Ninth Report to assist the Court in its consideration of the issues raised by the parties to the DMI Motion. The Monitor intends to incorporate any guidance received from the Court in its response to Desert Mountain's Proof of Claim submitted in the Claims Process.

*****

All of which is respectfully submitted to this Honourable Court this 26th day of February, 2013.

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



Per: Richard A. Morawetz
Senior Vice President

Appendix “C”

No. CI 12-01-76323

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. AND THE ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (COLLECTIVELY, "THE APPLICANTS")

EIGHTEENTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
OCTOBER 1, 2014

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Appendix N – Monitor's April 2, 2014 letter

1.0 INTRODUCTION

1.1 Pursuant to an order of The Court of Queen's Bench (Winnipeg Centre) (the "**Court**") dated February 22, 2012 (the "**Initial Order**"), Alvarez & Marsal Canada Inc. ("**A&M**") was appointed as Monitor (the "**Monitor**") in respect of an application filed by Arctic Glacier Income Fund ("**AGIF**"), Arctic Glacier Inc. ("**AGI**"), Arctic Glacier International Inc. ("**AGII**") and those entities listed on **Appendix "A"**, (collectively the "**Applicants**", together with Glacier Valley Ice Company L.P., the "**Arctic Glacier Parties**") seeking certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The proceedings commenced by the Applicants under the Initial Order are referred to herein as the "**CCAA Proceedings**". The CCAA Proceedings were subsequently recognized as a foreign main proceeding (the "**Chapter 15 Proceedings**") by the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**").

1.2 This report (the "**Eighteenth Report**") is being filed by the Monitor in respect of a motion brought by Martin McNulty ("**McNulty**") pursuant to a Notice of Motion dated September 12, 2014 (the "**McNulty Motion**"). McNulty seeks an Order:

a) striking the appointment of the Honourable John D. Ground as a Claims Officer in respect of the McNulty Claim (defined below); and

b) requiring the Monitor to consult with McNulty and Arctic Glacier in determining an appropriate process for resolving the McNulty Claim.

1.3 For the reasons set out below, it is the Monitor's view that the McNulty Motion should be dismissed.

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

2.0 TERMS OF REFERENCE

2.1 In preparing this Eighteenth Report, the Monitor has necessarily relied upon representations made by certain former senior management of the Arctic Glacier Parties. Accordingly, the Monitor expresses no opinion and does not provide any other form of assurance on or relating to the accuracy of any information contained in this Eighteenth Report or otherwise used to prepare this Eighteenth Report.

2.2 The information contained in this Eighteenth Report is not intended to be relied upon by any investor in any transaction with the Applicants or in relation to any transfer or assignment of the units of AGIF.

2.3 Unless otherwise stated, all monetary amounts contained in this Eighteenth Report are expressed in United States dollars, which is the Applicants' common reporting currency.

3.0 THE COURT-ORDERED SERVICE REQUIREMENTS

3.1 As is customary in CCAA proceedings, the Initial Order sets out the prescribed manner for service on interested parties in these CCAA Proceedings. A copy of the Initial Order is attached hereto as **Appendix "B"**.

3.2 The Initial Order sets out the procedure pursuant to which the Service List is created and maintained. Paragraph 66 of the Initial Order reads:

> 66. THIS COURT ORDERS that counsel for the Arctic Glacier Parties shall prepare and keep current a service list ("**Service List**") containing the name and contact information (which may include the address, telephone number and facsimile number or email address) for service to: the Arctic Glacier Parties; the Monitor; ***and each creditor or other interested Person who has sent a request, in writing, to counsel for the Arctic Glacier Parties to be added to the Service List.*** The Service List shall indicate whether each Person on the Service List has elected to be served by email or facsimile, and failing such election the Service List shall indicate service by email. The Service List shall be posted on the website of the Monitor at the address indicated in paragraph 67 herein. ***For greater certainty, creditors and other interested Persons who have received notice in accordance with paragraph 64(b) of this Order and/or have been served in accordance with paragraph 65 of this Order, and who do not send a request, in writing, to counsel for the Arctic Glacier Parties to be added to the Service List, shall not be required to be further served in these proceedings.*** [emphasis added]

3.3 The Initial Order is clear that interested Persons are required to provide a request, in writing, to be added to the Service List. Neither McNulty nor his counsel requested that they be added to the Service List. Nonetheless, on December 3, 2013, after McNulty's Counsel objected to the fact that they had not been served with motion materials, the Monitor added McNulty's counsel to the Service List in these CCAA Proceedings.

3.4 In addition, as required by the Initial Order, from the start of these CCAA Proceedings, the Monitor has maintained the Website on which the Service List, Initial Order, and all materials filed in these CCAA Proceedings and the Chapter 15 Proceedings have been posted.

3.5 To assist in noticing and service in the Chapter 15 Proceedings, the Arctic Glacier Parties retained KCC LLC ("**KCC**"). From the beginning of these CCAA Proceedings, KCC's list of creditors has included all of McNulty's known counsel, including Dan Low and Dan Kotchen (collectively, "**McNulty's Counsel**"). Andrew Paterson Jr., another lawyer representing McNulty, was also included on the KCC list of creditors.

3.6 Not all materials filed in the Chapter 15 Proceedings are served on every creditor on the list of creditors as to do so would be prohibitively expensive and would unnecessarily deplete the Applicants' assets. KCC has advised the Monitor that McNulty's Counsel were served with the materials for the motion seeking recognition of the Initial Order in the Chapter 15 Proceedings. These materials included a copy of the Initial Order.

3.7 Furthermore, two days after the Initial Order was granted, the Arctic Glacier Parties filed a notice of bankruptcy in the Michigan Court in respect of McNulty's litigation against the Arctic Glacier Parties and others pending in the Michigan Court (the "**Michigan Action**"). The Notice of Bankruptcy Filing is attached hereto as **Appendix "C"**. It expressly refers to the Initial Order.

3.8 Pursuant to the Electronic Filing Policies and Procedures of the Michigan Court, the Notice of Electronic Filing generated by the electronic docket system when a document is filed constitutes service of that document on all registered users of the system. Jones Day, counsel to the Arctic Glacier Parties with carriage of the Michigan Action (the "**Arctic Glacier Parties' U.S. Counsel**"), has advised the Monitor that McNulty's Counsel is a registered user of the system and, as such, would have received a Notice of Electronic Filing of the Notice of Bankruptcy Filing.

4.0 THE CLAIMS PROCESS

The Court Grants the Claims Procedure Order

4.1 On August 30, 2012, the Monitor served its notice of motion and supporting motion materials, including its Sixth Report, seeking an order approving a claims process with respect to the Arctic Glacier Parties (the "**Claims Process**") and, among other things,

authorizing, directing and empowering the Monitor to take such actions as contemplated by the Claims Process (the "**Claims Procedure Order**"). On the same date, the Monitor served its motion materials for its motion in the U.S. Court seeking an order recognizing the Claims Procedure Order. Both sets of materials were posted on the Monitor's website. A copy of the Monitor's Sixth Report dated August 29, 2012, without appendices, is attached as **Appendix "D"**.

4.2 At the time, McNulty's Counsel had not requested that they be added to the Service List and were not served with the materials. In the Chapter 15 Proceedings, the materials were served on a subset of the list of creditors that did not include McNulty's Counsel.

4.3 On September 5, 2012, this Honourable Court issued the Claims Procedure Order, a copy of which is attached as **Appendix "E"**. On September 14, 2012, the U.S. Court issued an Order recognizing the Claims Procedure Order. The McNulty Motion does not object to any terms of the Claims Procedure Order.

4.4 The Claims Procedure Order contemplated a further order of the Court to establish an appropriate process for resolving disputed Claims. In particular, paragraph 45 reads:

> **45 THIS COURT ORDERS** that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Arctic Glacier Parties and the applicable Claimant, the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute.

4.5 In addition, the Claims Procedure Order contemplates that if a Dispute Notice is filed in respect of any Class Claim made on behalf of the Indirect Purchaser Claimants, then the Monitor shall appoint a special claims officer who is a lawyer resident and licensed to

practice in the U.S., amongst other things. In particular, paragraph 47 of the Claims Procedure Order reads:

> **47 THIS COURT ORDERS** that, notwithstanding any provision of this Order, in the event that a dispute is raised in a Dispute Notice in respect of any Class Claim made on behalf of the Indirect Purchaser Claimants in the Indirect Purchaser Litigation, the Monitor shall appoint a special claims officer for the purpose of determining such dispute, which special claims officer:
>
> (a) is a lawyer resident and licensed to practice in the United States of America;
>
> (b) has substantial experience as counsel in U.S. antitrust class actions; and
>
> (c) is acceptable to each of the Arctic Glacier Parties, the Monitor and the applicable Class Representative, provided that, should the parties fail to agree on a special claims officer within a reasonable time, the Monitor shall apply for directions pursuant to this Order to appoint a special claims officer with the qualifications set out in subparagraphs (a) and (b).

4.6 The Claims Procedure Order was not appealed.

Claims Package Sent to McNulty's Counsel

4.7 The Claims Procedure Order required the Monitor to post a copy of the Proof of Claim Document Package on the Website, publish notices in certain named newspapers, and send a copy of the Proof of Claim Document Package to all known Creditors. The Proof of Claim Document Package expressly refers to the Claims Procedure Order and the Website in several places, including the Notice to Claimants against the Arctic Glacier Parties and the Claimant's Guide to Completing the Proof of Claim Form for Claims against the Arctic Glacier Parties.

4.8 On or about September 12, 2012, the Monitor sent a copy of the Proof of Claim Document Package to McNulty's Counsel.

McNulty Files a Proof of Claim

4.9 The Claims Procedure Order established a Claims Bar Date of October 31, 2012.

4.10 As stated in previous reports of the Monitor, on or around October 12, 2012, the Monitor received a Proof of Claim from McNulty (the "**McNulty Proof of Claim**"), a former employee of the Applicants, in the amount of $13.61 million (the "**McNulty Claim**"). The McNulty Proof of Claim simply attached the Amended Complaint in the Michigan Action without providing supporting evidence or further detail. A copy of the McNulty Proof of Claim is attached as **Appendix "F"**.

4.11 Although McNulty's Counsel complied with the Claims Procedure Order by filing the McNulty Proof of Claim, they did not ask the Monitor or the Arctic Glacier Parties or their respective counsel why they had not been served with the motion materials filed to obtain the Claims Procedure Order or the U.S. Order recognizing the Claims Procedure Order. Furthermore, McNulty's Counsel did not ask to be added to the Service List at that time.

4.12 The McNulty Claim relates to the Michigan Action, which is outstanding litigation against the Applicants, Reddy Ice, Home City and certain former employees of the Applicants, pending in the Michigan Court. McNulty alleges that AGIF, AGI and AGII engaged in an unlawful conspiracy and enterprise with certain individuals and competing distributors of packaged ice to boycott his employment in the packaged ice industry (the tortious interference with prospective economic advantage claim). McNulty also alleges that the named Arctic Glacier Parties violated the RICO Act by allegedly blackballing him from finding employment in the packaged ice industry in retaliation for his cooperation with the U.S. authorities in their investigations of the industry, as well as

allegedly offering McNulty bribes to stop cooperating with the government (the RICO claim).

4.13 Certain evidence produced in the Michigan Action was subject to two protective orders, which effectively prevented the Monitor from assessing the evidence in respect of the McNulty Claim. Copies of the two protective orders dated November 8, 2010, and July 26, 2011, respectively, are attached as **Appendix "G"**. As is set out below, the Arctic Glacier Parties and the Monitor moved for an order in the Michigan Court permitting the Monitor and certain participants in these CCAA Proceedings to review the protected evidence.

The Court Grants the Claims Officer Order

4.14 As of March 4, 2013, the Monitor had received 75 Proofs of Claim asserting claims against the Applicants. As set out above, paragraph 45 of the Claims Procedure Order contemplates that if a dispute raised in a Dispute Notice was not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Arctic Glacier Parties and the applicable Claimant, then the Monitor would seek directions from the Court concerning the appropriate process for resolving the dispute. The plain meaning of the Claims Procedure Order limits the Monitor's obligation to consult with the Claimant to the question of whether the dispute was resolved in a satisfactory time and manner. It does not oblige the Monitor to consult on the appropriate process for resolving the dispute.

4.15 As of March 4, 2013, the Monitor had reviewed the 75 Proofs of Claim received and had the view that certain Claims, including the Indirect Purchaser Claim, the Johnson Claim, and the McNulty Claim, likely would not be resolved on a consensual basis without the

assistance of a third party adjudicator. Therefore, on March 5, 2013, the Monitor served its notice of motion and supporting motion materials, including the Monitor's Tenth Report, for a motion seeking the appointment of claims officers to adjudicate claims that could not be resolved consensually. At the time, McNulty's Counsel had not requested to be included on the Service List and was not served with the motion. A copy of the Monitor's Tenth Report dated March 5, 2013, without appendices, is attached as **Appendix "H"**.

4.16 On March 7, 2013, this Honourable Court issued the requested order appointing the Claims Officers (the "**Claims Officer Order**"). A copy of the Claims Officer Order is attached as **Appendix "I"**. On May 7, 2013, the U.S. Court issued an Order recognizing the Claims Officer Order.

4.17 The Claims Officer Order, among other things, appoints the Honourable Jack Ground as a Claims Officer in this proceeding (in this capacity, "**Claims Officer Ground**"). The Honourable Jack Ground has been appointed as a claims officer in other CCAA proceedings, most notably in the *Canwest* restructuring. The Honourable Jack Ground was called to the bar of Ontario in 1959 and practiced as a corporate and commercial lawyer at Osler, Hoskin & Harcourt LLP for more than thirty years. In 1991, he was appointed to the Ontario Superior Court of Justice, where he served until his retirement in June 2007.

4.18 The Claims Officer Order also provides that in the event that a dispute raised in a Notice of Dispute is not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Arctic Glacier Parties and the applicable Creditor, the Monitor shall

refer the dispute raised in the Notice of Dispute to either a Claims Officer or to the Court.

Paragraph 11 reads:

> **11 THIS COURT ORDERS** that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Monitor, in consultation with the Arctic Glacier Parties and the applicable Creditor, the Monitor shall refer the dispute raised in the Dispute Notice either to a Claims Officer or to the Court (or, in the case of a Class Claim of the Indirect Purchaser Claimants, to a Special Claims Officer) for adjudication. The decision as to whether the Claim and/or DO&T Claim should be adjudicated by a Claims Officer or by the Court shall be in the sole discretion of the Monitor.

4.19 Paragraph 11 of the Claims Officer Order makes it clear that the decision as to whether the Claim should be adjudicated by a Claims Officer or by the Court is in the sole discretion of the Monitor.

The Arctic Glacier Parties and the Monitor Move to Amend the Protective Orders

4.20 On April 30, 2013, the Arctic Glacier Parties and the Monitor filed an unopposed joint motion in the Michigan Court seeking the ability for the Monitor to intervene in the Michigan Action. McNulty's Counsel had the opportunity to review drafts of the motion materials before they were filed with the Court. The Initial Order was attached to the motion.

4.21 Also on April 30, 2013, the Arctic Glacier Parties and the Monitor filed an unopposed motion in the Michigan Court seeking amendments to the protective orders. The Initial Order was attached to this motion, which was served on McNulty's Counsel.

4.22 On June 4, 2013, the Michigan Court granted an Order Modifying the Discovery Protective Order to permit materials produced in the McNulty Action to be used for the prosecution, defence and adjudication of the McNulty Claim in these CCAA

Proceedings. In addition, the Order permitted the Monitor, its counsel, any Claims Officer, as such term is defined in the Claims Officer Order, the CPS and this Honourable Court to view the protected material. A copy of the Order Modifying the Discovery Protective Order is attached as **Appendix "J"**.

The Monitor Refers the McNulty Claim to Claims Officer Ground

4.23 After receiving information previously sealed by the Michigan Court, and after consulting with the CPS on behalf of the Applicants as required by the Claims Procedure Order, the Monitor issued a Notice of Disallowance with respect to the McNulty Claim on September 12, 2013 (the "**Notice of Disallowance**"). The Monitor disallowed the McNulty Claim in its entirety because the evidence available to the Monitor does not support the McNulty Claim. The Monitor intends to file a copy of the Notice of Disallowance with this Honourable Court under seal in accordance with the Protective Orders as modified by the Order Modifying the Discovery Protective Order.

4.24 On September 19, 2013, in accordance with the Claims Procedure Order, McNulty filed a Dispute Notice with the Monitor. The Dispute Notice did not provide any new or additional information with respect to the McNulty Claim.

4.25 On November 11, 2013, counsel to the Monitor contacted McNulty's Counsel and stated: "The Monitor, Richard Morawetz, and I thought it would make sense for us to have a call to discuss the status of the McNulty Claim prior to the Monitor taking steps to refer the matter to a Claims Officer pursuant to the Claims Procedure Order".

4.26 On November 12, 2013, the Monitor, counsel for the Monitor, and McNulty's Counsel attended a call. During the call, the Monitor suggested that a more detailed Dispute

Notice would assist the Monitor in understanding the basis for the McNulty Claim. The Monitor and its counsel also advised that the Monitor would likely refer the McNulty Claim to Claims Officer Ground by the end of the following week (November 22). During the call, McNulty's Counsel raised the question of using a U.S.-trained lawyer as the Claims Officer for the McNulty Claim. The Monitor and its counsel explained that the circumstances of this case did not require a specialized claims officer and that the Claims Officer Order had been granted months before and would be followed. McNulty's Counsel did not state that the Monitor should not refer the matter to Claims Officer Ground.

4.27 On November 19, 2013, McNulty's Counsel advised the Monitor that they intended to file a more detailed Dispute Notice. In response, Monitor's counsel again advised that the Monitor intended to refer the McNulty Claim to Claims Officer Ground for adjudication. Neither the Monitor nor Monitor's counsel received a response to this communication or any objection to the referral to Claims Officer Ground.

4.28 On November 22, 2013, in accordance with the Claims Officer Order, the Monitor referred the McNulty Claim to Claims Officer Ground for adjudication. A copy of the letter referring the McNulty Claim to Claims Officer Ground for adjudication is attached as **Appendix "K"**.

McNulty's Counsel Objects to Claims Officer Ground

4.29 On December 3, 2013, McNulty's Counsel wrote to Claims Officer Ground asking him not to hear the McNulty Claim on the basis, among other reasons, that the McNulty Claim should be resolved in the United States by an adjudicator familiar with the applicable U.S. law. McNulty's Counsel also stated that the Arctic Glacier Parties' U.S.

Counsel stated that they would be amendable to choosing a claims adjudicator based in the United States. Finally, McNulty's Counsel raised a concern about the appearance of bias because Claims Officer Ground was affiliated with Osler, Hoskin & Harcourt LLP (Monitor's counsel) for more than 30 years. A copy of McNulty's Counsel's December 3, 2013 letter is attached as **Appendix "L"**.

4.30 On December 3, 2013, Paula Render, of the Arctic Glacier Parties' U.S. Counsel, wrote to McNulty's Counsel and objected to the characterization of her position. She stated:

> I object to your referring... to only part of our conversation about the appointment of a claims officer. I told you that Arctic Glacier might be amenable, but that I did not know the Canadian process and that it was not my decision to make. Please make the correction at your first opportunity.

4.31 To date, the Monitor is not aware of McNulty's Counsel correcting the record. Despite the request made on December 3, 2013, McNulty's Counsel continues to reiterate the incomplete description of the Arctic Glacier Parties' U.S. Counsel's statements. McNulty's Counsel did not include a copy of the Arctic Glacier Parties' U.S. Counsel's objection to that incomplete description in their materials on this motion.

4.32 In addition, although McNulty's Counsel did not comply with the process set out in the Initial Order for being added to the Service List, the Monitor added McNulty's Counsel to the Service List on December 3, 2013, and posted the revised Service List to the Website.

4.33 On December 6, 2013, the Monitor's counsel wrote to Claims Officer Ground in response to the December 3, 2013 correspondence from McNulty's Counsel, stating, among other things, that his appointment as Claims Officer was valid in all respects as a proper exercise of the authority granted to the Monitor pursuant to paragraph 11 of the Claims

Officer Order. In addition, the Monitor's counsel explained that pursuant to the Canadian Judicial Council's Ethical Principles for Judges, Judges are permitted to hear cases where their former firms are counsel after a cooling off period of 2, 3 or 5 years (depending on local tradition).[1] As Claims Officer Ground was appointed to the Ontario Superior Court of Justice in 1991, more than twenty-three years passed before he was appointed as a Claims Officer in this case, which is ample time for any appearance of bias to fade. A copy of the Monitor's December 6, 2013 letter is attached as **Appendix "M"**.

4.34 On December 9, 2013, McNulty provided to the Monitor further information supplementing his Dispute Notice. The Monitor intends to file a copy of the second Dispute Notice with this Honourable Court under seal in accordance with the Protective Orders as modified by the Order Modifying the Discovery Protective Order.

Claims Officer Ground Requests Guidance from this Honourable Court

4.35 On April 2, 2014, the Monitor wrote to Claims Officer Ground and advised that, despite numerous discussions between the parties, McNulty's objection to Claims Officer Ground's appointment had not been withdrawn. The Monitor requested a procedural case conference to discuss a timetable and procedural steps for the adjudication of the McNulty Claim. A copy of the Monitor's April 2, 2014 letter is attached as **Appendix "N"**.

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[1] Canadian Judicial Council's Ethical Principles for Judges, p. 52: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

4.36 On April 14, 2014, the Monitor, counsel for the Arctic Glacier Parties and McNulty's Counsel attended a conference call appearance before Claims Officer Ground. Claims Officer Ground indicated that the parties should bring a motion before this Honourable Court to seek guidance on whether he can adjudicate the McNulty Claim in light of McNulty's Counsel's objection.

4.37 On June 20, 2014, McNulty's Counsel confirmed that they had, that day, retained the assistance of Canadian counsel.

5.0 CONCLUSION

5.1 For the reasons set out in this Eighteenth Report, the Monitor hereby respectfully recommends that this Honourable Court deny the relief requested by McNulty in his notice of motion.

*****

All of which is respectfully submitted to this Honourable Court, this 1st day of October, 2014.

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

Per: Richard A. Morawetz, Senior Vice President

Appendix “D”

No. CI 12-01-76323

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. AND THE ADDITIONAL APPLICANTS LISTED ON APPENDIX "A" HERETO (COLLECTIVELY, "THE APPLICANTS")

NINETEENTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
NOVEMBER 7, 2014

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Appendix I – Look-Back Periods Under the Voluntary Disclosure Process

Appendix J – Form of Specialized Notice

1.0 INTRODUCTION

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

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

1.3 The Sale Transaction for substantially all of the Arctic Glacier Parties' business and assets closed on July 27, 2012. The business formerly operated by the Arctic Glacier Parties continues to be carried on by the Purchaser (Arctic Glacier, LLC, formerly H.I.G. Zamboni, LLC). In addition, the Monitor continues to hold significant funds for distribution.

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

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

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

1.7 Following the deemed Creditors' Meeting and the Unitholders' Meeting held on August 11, 2014, the Canadian Court issued an order on September 5, 2014 that, among other things, sanctioned and approved the Plan (the "**Sanction Order**"), which is attached as Appendix "**C**". On September 16, 2014, the U.S. Bankruptcy Court entered an Order recognizing and giving full effect in the United States to the Sanction Order. A copy of this U.S. Bankruptcy Court Order is attached as Appendix "**D**".

1.8 As more particularly described in the Seventeenth Report of the Monitor dated August 26, 2014 (the "**Seventeenth Report**"), the Monitor noted that:

a) the implementation of the Plan is conditional upon the fulfillment of certain conditions precedent on or prior to the Plan Implementation Date;

b) one of the conditions precedent to implementation of the Plan is that the Monitor and the CPS be satisfied that (i) all tax returns required to be filed by or on behalf of the Arctic Glacier Parties have or will be duly filed in all appropriate jurisdictions; and (ii) all taxes required to be paid in respect thereof have or will be paid (the "**10.3(d) Condition**");

c) based on the enquiries made by the Monitor, the Monitor became aware that certain of the Arctic Glacier Parties did not file required sales tax returns (and in some cases,

obtain associated documents in respect thereof) or collect and remit required sales taxes in certain U.S. states and localities (the "**Outstanding States**") where the Arctic Glacier Parties conducted business and completed sales (the "**Sales Tax Issue**");

d) the Monitor and the Arctic Glacier Parties planned to investigate the Sales Tax Issue and determine whether such sales tax returns ought to have been filed, whether any sales tax liabilities for the Arctic Glacier Parties exist and remain outstanding, and what measures, if any, would be necessary to address the Sales Tax Issue; and

e) the Monitor would file a subsequent report to provide an update in respect of the Sales Tax Issue and its impact, if any, on the Plan, including, without limitation, the various reserves contemplated in the Plan and any consequent delay in the then anticipated Plan Implementation Date of October 15, 2014.

1.9 On October 15, 2014, the Monitor issued the Supplement to the Seventeenth Report of the Monitor (the "**Seventeenth Report Supplement**"), which advised stakeholders that certain conditions precedent to the Plan Implementation Date had not been fulfilled, that the Monitor and the Applicants continued to work diligently towards satisfying all conditions precedent to Plan implementation, and that the Monitor would provide additional information to stakeholders in the form of a court report in the following weeks. A copy of the Seventeenth Report Supplement is attached hereto as Appendix "**E**".

1.10 The purpose of this Nineteenth Report is to provide the Canadian Court, the U.S. Bankruptcy Court, Affected Creditors, Unitholders and other interested parties with:

a) information regarding the status of the fulfillment of conditions precedent to implementation of the Plan;

b) an update in respect of the Sales Tax Issue and its impact on the anticipated Plan Implementation Date;

c) information in support of the Monitor's motion, filed in its capacity as foreign representative of the Arctic Glacier Parties, returnable December 12, 2014 in the U.S. Bankruptcy Court for an order, among other things (the "**U.S. Plan Implementation Order**", the proposed form of which is attached hereto as Appendix "**F**"):

   a. establishing reserves that will limit the maximum claim of various U.S. state and local sales taxing authorities in the Outstanding States (the "**Taxing Authorities**") for asserted sales taxes and/or associated interest and penalties, and approving the noticing procedures and deadlines for the Taxing Authorities to dispute the determination of such reserves;

   b. approving the form and manner of notice provided to such Taxing Authorities;

   c. declaring that the process followed by the Monitor and the CPS to ascertain potential sales tax liability, and the steps taken by the Monitor and the CPS to address any outstanding sales tax obligations and liabilities, are:

i. sufficient to fulfill the 10.3(d) Condition (as defined herein); and

ii. fair and reasonable under the circumstances, consistent with the Monitor's and the CPS's duties under the Initial Order, the Recognition Order and applicable U.S. law, and is in the best interests of the Arctic Glacier Parties, the Taxing Authorities, the creditors of the Arctic Glacier Parties, the Unitholders and all other parties with an interest in the CCAA Proceedings and the concurrent Chapter 15 Proceedings;

d. providing that the contents of Confidential Appendix "**G**", as described further herein, be sealed, kept confidential and not form part of the public record; and

e. providing related relief; and

d) information regarding the anticipated Plan Implementation Date, assuming that the U.S. Plan Implementation Order is granted on December 12, 2014.

1.11 The Monitor will be preparing and serving a separate report prior to November 25, 2014 to provide the Canadian Court, the U.S. Bankruptcy Court, Affected Creditors, Unitholders and other interested parties with updated information in respect of, among other things, the proposed extension of the stay of proceedings, the funds available for distribution to Unitholders and the activities of the Monitor.

1.12 Further information regarding the CCAA Proceedings and the concurrent Chapter 15 Proceedings, and all previous reports of the Monitor, can be found on the Monitor's

website at *http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries*.

2.0 TERMS OF REFERENCE

2.1 In preparing this Nineteenth Report, the Monitor has necessarily relied upon unaudited financial and other information supplied, and representations made, by certain former senior management of the Arctic Glacier Parties, including the Arctic Glacier Parties' former Director of Tax ("**Senior Management**"). Although this information has been subject to review, the Monitor has not conducted an audit or otherwise attempted to verify the accuracy or completeness of any of the information provided by Senior Management. The steps taken by the Monitor to obtain the information set out in this Nineteenth Report are set out in detail below.

2.2 Certain of the information referred to in this Nineteenth Report consists of "forward-looking information" within the meaning of applicable securities laws, including financial forecasts and/or projections or refers to financial forecasts and/or projections. An examination or review of financial forecasts and projections and procedures, in accordance with standards set by the Canadian Institute of Chartered Accountants, has not been performed. Any future-oriented financial information and forward-looking statements are not guarantees of future events and involve risks and uncertainties that are difficult to predict. Any future-oriented financial information referred to in this Nineteenth Report was, in part, prepared based on estimates and assumptions provided by

Senior Management. Readers are cautioned that since financial forecasts and/or projections are based upon assumptions about future events and conditions that are not ascertainable, actual results may vary from the projections, and such variations could be material.

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

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

3.0 CONDITIONS PRECEDENT TO IMPLEMENTATION OF THE PLAN

Background

3.1 As set out in the Fifteenth Report of the Monitor dated August 7, 2014 (the "**Fifteenth Report**"), the Plan was developed by the Monitor, the Arctic Glacier Parties and their respective counsel and financial and tax advisors, including KPMG LLP. The Fifteenth Report provides detailed information about the Plan. As described in the Seventeenth Report, certain amendments were made to the Plan after the Creditors' Meeting and Unitholders' Meeting. The amendments were made to clarify distribution and payment mechanics and were required to give better effect to the implementation of the Plan and

the Sanction Order. Updated information in respect of certain aspects of the Plan, specifically as it relates to the status of the conditions precedent to Plan implementation and the anticipated Plan Implementation Date, is provided in this Nineteenth Report.

3.2 Implementation of the Plan is conditional upon the fulfillment of certain conditions precedent on or prior to the Plan Implementation Date. As of the date of this Nineteenth Report, all of these conditions have been fulfilled, except the 10.3(d) Condition. Subject to the satisfaction or waiver of the conditions precedent to Plan implementation and certain reserves set out in the Plan, the Plan provides for the distribution of Available Funds now held by the Monitor to creditors to the extent of their Proven Claims and for the distribution of any surplus of the Available Funds to Unitholders.

Status of the 10.3(d) Condition

3.3 At the time of the Seventeenth Report, the Monitor and the CPS were in the process of investigating the Sales Tax Issue in order to satisfy the 10.3(d) Condition in a timely manner.

3.4 In this investigation and pursuant to the court-approved Transition Services Agreement, the Monitor obtained historical sales and certain U.S. state sales tax information, as further described herein, from the Purchaser's (hereinafter referred to as "**New Arctic Glacier**") Chief Accounting Officer, who was previously employed as the Arctic Glacier Parties' Director of Tax. Additionally, the Applicants retained the Genetelli Consulting Group ("**Genetelli**"), a U.S. tax consultant firm comprised of tax law attorneys and

specialists, to review and provide advice in respect of the U.S. state sales tax position of the Arctic Glacier Parties in certain U.S. states. Based on such information and advice, as well as certain of the Annual Reports of the Arctic Glacier Parties, the Monitor notes the following:

a) the Arctic Glacier Parties that were established and conducted business in the United States (collectively, the "**U.S. Arctic Glacier Parties**") had approximately $677 million in sales (the "**Total Sales**") during the period of January 1, 2009 to July 27, 2012 (the "**Data Period**[1]");

b) of the Total Sales, approximately $598.7 million, representing approximately 88.4% of the Total Sales, were made in U.S. states that do not impose sales taxes and/or were reported by the applicable U.S. Arctic Glacier Parties by way of filed sales tax returns, and all taxes required to be paid in respect thereof have been paid by the applicable U.S. Arctic Glacier Parties;

c) of the Total Sales, approximately $78.3 million, representing approximately 11.6% of the Total Sales, were not reported by the applicable U.S. Arctic Glacier Parties by way of filed sales tax returns (the **"Reviewable Sales**[2]**"**);

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[1] The Monitor notes that sales information for the U.S. Arctic Glacier Parties prior to January 1, 2009 is not readily available. Additionally and as described earlier, the Monitor notes that the Sale Transaction for substantially all of the Arctic Glacier Parties' business and assets closed on July 27, 2012, the last day of the Data Period.

[2] In addition to sales of ice, Reviewable Sales include sales of equipment by ICEsurance Inc. and royalty income generated by Ice Perfection Systems Inc. from licensing the use of the Arctic Glacier logo in various U.S. states.

d) approximately $72.0 million of the Reviewable Sales (or 91.9%) appear to be exempt from sales tax based on an exemption that is generally available in respect of sales of ice made for resale (as more particularly described herein); and

e) the balance of the Reviewable Sales (approximately $6.3 million, representing less than 1% of Total Sales) are potentially subject to sales tax, depending on the applicable laws of the various U.S. states.

3.5 The information reviewed by the Monitor demonstrated that the U.S. Arctic Glacier Parties, in the vast majority of cases, complied with their respective obligations to file sales tax returns and pay sales taxes in respect thereof during the Data Period. As noted above, the Sales Tax Issue is limited to a very small percentage of Reviewable Sales (approximately 8% of the Reviewable Sales and less than 1% of the Total Sales). The Monitor and the CPS are not aware of any concerns regarding the payment of any other types of taxes or the non-filing of any other types of tax returns that have not, or will not, be dealt with pursuant to the Plan, the Orders granted in the CCAA Proceedings and the concurrent Chapter 15 Proceedings, or otherwise. As such, the Monitor and the CPS have concluded that achieving a satisfactory resolution to the Sales Tax Issue, as proposed herein, is sufficient to satisfy the 10.3(d) Condition in the Plan.

3.6 Since August 26, 2014, the date of the Seventeenth Report, the Monitor and the CPS have continued to investigate the Sales Tax Issue and take steps towards fulfilling the 10.3(d) Condition in a practical and efficient manner. The Monitor and the CPS' analysis of the

Sales Tax Issue and their proposed approach for fulfilling the 10.3(d) Condition are described in this Nineteenth Report.

3.7 In addition and as more particularly described in this Nineteenth Report, the Monitor notes that it did not receive any Proofs of Claim or DO&T Proofs of Claim from Taxing Authorities in the Outstanding States in respect of sales taxes of the Identified U.S. AG Parties (as defined herein) prior to the Claims Bar Date. The Taxing Authorities were advised of the Claims Bar Date either directly or pursuant to the various court-approved newspaper publications under the Claims Procedure Order. The Plan also provides for a release of Claims, including Claims that have been barred or extinguished pursuant to the Claims Procedure Order or the Claims Officer Order. All Taxing Authorities known to the Monitor at the time (including all state Taxing Authorities) were served with materials in connection with the Plan, the Sanction Order and the U.S. Order recognizing and giving full effect in the United States to the Sanction Order. Accordingly, the Monitor and the Applicants are reserving all rights provided for in the Claims Procedure Order and the Claims Process Order with respect to the Taxing Authorities' claims that cannot be resolved consensually.

4.0 SALES TAX ISSUE AND PROPOSED APPROACH TO THE 10.3(D) CONDITION

Background

4.1 In conducting due diligence in respect of the 10.3(d) Condition, the Monitor made numerous inquiries of New Arctic Glacier, as the holder of the books and records of the

Applicants. Through such inquiries, as more particularly described below, it came to the Monitor's attention that certain of the U.S. Arctic Glacier Parties (collectively, the "**Identified U.S. AG Parties**"):

a) may not have complied with sales tax[3] return filing requirements in certain U.S. states; and/or

b) may have incurred sales tax liabilities in certain U.S. states that remain outstanding.[4]

Process for Determining the Identified U.S. AG Parties

4.2 The Monitor, in consultation with the CPS, implemented and followed the process and procedures set out below to determine the Identified U.S. AG Parties.

4.3 The Monitor requested that New Arctic Glacier provide it with certain information to enable it to determine the existence of any potential outstanding sales tax obligations of any of the U.S. Arctic Glacier Parties.

4.4 In response to this request, the Arctic Glacier Parties' former Director of Tax provided the Monitor with certain information, including the following in respect of the U.S. Arctic Glacier Parties:

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[3] Any reference to "sales tax" herein includes transaction privilege tax in the state of Arizona and general excise tax in the state of Hawaii, which are imposed in those respective states instead of a sales tax.

[4] In such instances, sales taxes would not have been collected and remitted.

a) schedules setting out sales during the Data Period, segregated by U.S. Arctic Glacier Party and U.S. state (collectively, the "**Sales Schedules**");

b) detailed information with respect to the sales transactions of each of the U.S. Arctic Glacier Parties during the Data Period, segregated by division and U.S. state (collectively, the "**Sales Transaction Detail**");

c) a schedule of the divisions, indicating which of the U.S. Arctic Glacier Parties each belonged to; and

d) schedules of the U.S. states in which each of the U.S. Arctic Glacier Parties filed U.S. sales tax returns during the Data Period.

4.5 As the 10.3(d) Condition incorporates both a "filing" component and a "payment" component, the Monitor and the CPS concluded that the 10.3(d) Condition is only concerned with Reviewable Sales of the Identified U.S. AG Parties in those Outstanding States that impose sales taxes (a list of which is attached hereto as Appendix "**H**").

4.6 The Monitor analyzed such Reviewable Sales of the Identified U.S. Arctic Glacier Parties and discovered that, in certain instances, sales were recorded as having been made in the incorrect state for the applicable company. The Arctic Glacier Parties' former Director of Tax advised that this was due to incorrect customer addresses having been entered into the accounting system in certain instances. In such cases, the applicable sales were reclassified by the Monitor to the correct U.S. state, following discussions with the Arctic Glacier Parties' former Director of Tax.

The Concept of "Nexus"

4.7 The Monitor is advised by Genetelli that nexus is a legal concept that refers to the minimum level of connection that must exist so as to permit a U.S. state to require a seller to register for and file sales tax returns in the respective U.S. state. The Monitor is also advised by Genetelli that while the minimum level of connection that must exist to constitute nexus differs across the U.S. states, the threshold that must be satisfied to establish such a minimum level of connection is relatively low.

4.8 Accordingly, nexus is important for determining the scope of any potential sales tax obligations of the Identified U.S. AG Parties in respect of the Reviewable Sales, as its presence or absence is a key factor in determining whether a requirement exists to register for and file sales tax returns and collect and remit sales taxes. Because the determination of nexus is based on a multi-faceted test that differs across the U.S. states, it is unclear whether nexus exists for each of the Identified U.S. AG Parties in each of the Outstanding States. However, the maximum possible claim of the Taxing Authorities in respect of sales tax remittance obligations would occur if nexus existed for each of the Identified U.S. AG Parties in each of the Outstanding States.

Sales Categorization

4.9 Based on advice received from Genetelli, the next step taken by the Monitor was to review and categorize the Reviewable Sales to determine the likelihood that such sales would result in a sales tax liability of the Identified U.S. AG Parties. Based on a review

of the customer name shown in the Sales Transaction Detail provided by New Arctic Glacier, the Monitor categorized the Reviewable Sales into the following categories (collectively, the "**Sales Categories**"):

a) "sales directly to the end user";

b) "sales made for resale"; or

c) "sales to Third Party Service Providers," being sales to restaurants, golf courses and other similar entities that use ice for a variety of purposes in the operation of such businesses.

4.10 Based on advice received from Genetelli, the Monitor understands that the sales tax treatment differs in respect of each of the aforementioned Sales Categories as follows:

a) Sales Directly to End Users: Sales of ice directly to an end user (who is not a Third Party Service Provider) for human consumption or for other purposes may be taxable in certain Outstanding States and the sales tax treatment of such sales varies across the Outstanding States. Where such sales are made, sales tax returns should be filed by the seller, and where such sales are taxable, sales taxes should be collected and remitted to the applicable Taxing Authority by such seller.

b) Sales Made for Resale: Sales of ice made to customers who are, in turn, re-selling it to their customers, are not taxable for sales tax purposes in the Outstanding States,

provided that such resale intention can be evidenced by documentation acceptable to the applicable Taxing Authority.[5]

c) Sales to Third Party Service Providers: Sales of ice to Third Party Service Providers may be taxable in certain Outstanding States and the sales tax treatment of such sales varies across the Outstanding States. Where such sales are made, sales tax returns should be filed by the seller, and where such sales are taxable, sales taxes should be collected and remitted to the applicable Taxing Authority by such seller.

Approach to the Various Sales Categories

Sales Directly to End Users and Sales to Third Party Service Providers

4.11 The Monitor was advised by Genetelli that there is a lack of uniform tax treatment regarding sales of ice directly to end users and to Third Party Service Providers across the Outstanding States. In addition, there is a relatively small amount of potential sales taxes at issue compared to the costs that would be incurred in determining this issue on a state-by-state basis. Accordingly, for the sole purpose of setting aside sufficient funds to satisfy any potential outstanding sales tax liability pursuant to the process proposed below in this Nineteenth Report, in order to comply with the 10.3(d) Condition, the Monitor and the CPS estimated the maximum possible claim of the Taxing Authorities in

[5] The treatment described above is applicable to "sales made for resale" in each of the Outstanding States except for Hawaii. Under the Hawaii general excise tax, manufacturers are generally taxed on wholesale (i.e., resale) transactions at the reduced rate of 0.5%.

respect of sales tax remittance obligations on the basis that nexus existed for each of the Identified U.S. AG Parties that incurred such sales in each of the Outstanding States and that all such sales are taxable.

Sales Made for Resale

4.12 The Monitor has not set aside funds for potential sales taxes on sales of ice for resale given that such sales, in the circumstances described above, are not taxable. In order to determine which sales would fall into this category, the Monitor categorized sales of ice as sales made for resale only when the customer name shown in the Sales Transaction Detail and other readily available information clearly demonstrated that such sales were to groceries, supermarkets or other stores that resell ice to customers for consumption.

4.13 Taxing authorities generally require evidence that sales were made for resale. Genetelli has advised that evidence that sales were indeed for resale is often provided in the form of resale certificates obtained from customers at the time of conducting business with such customer. However, Genetelli has also advised that Taxing Authorities will generally accept other forms of evidence as well, including sales invoices and details regarding the purchaser of the ice. In addition, Genetelli has advised that, on audit, Taxing Authorities will provide a period of time during which a taxpayer may obtain resale certificates from customers in cases where they may not have already been obtained, or provide alternative evidence in lieu of such resale certificates.

4.14 The Monitor was advised by the Arctic Glacier Parties' former Director of Tax that historical sales invoices, and certain other documents, can be provided from the Arctic Glacier Parties' books and records. Accordingly, it is reasonable to conclude that in the event Taxing Authorities request evidence supporting the sales made by the Identified U.S. AG Parties for resale, such evidence can be produced, albeit this would undoubtedly be a time consuming and costly exercise.

Quantitative Results of the Monitor's Sales Tax Analysis

4.15 As described above, the Monitor has reviewed the sales directly to end users and to Third Party Service Providers by the Identified U.S. AG Parties in the Outstanding States, sales made in Hawaii (all of which were for resale), where Genetelli has advised the Monitor that such sales are taxable at a reduced wholesale rate, and sales of equipment by ICEsurance Inc. Based on the information obtained from New Arctic Glacier, the Monitor estimates that the aggregate value of such sales totals approximately $6.3 million[6] (representing less than 1% of Total Sales).

4.16 A schedule that provides a breakdown of such sales directly to end users and to Third Party Service Providers during the Data Period by applicable Identified U.S. AG Party and Outstanding State is included in Confidential Appendix "**G**".

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[6] Based on advice received from Genetelli, this figure does not include royalty income generated by Ice Perfection Systems Inc. from licensing the use of the Arctic Glacier logo in various U.S. states.

4.17 In order to estimate the maximum potential aggregate outstanding sales tax liability of the Identified U.S. AG Parties for the sole purpose of setting aside sufficient funds to satisfy any potential outstanding sales tax liability pursuant to the process proposed below in this Nineteenth Report, the Monitor required (a) sales tax, penalty and interest rates of the Outstanding States; and (b) a determination of an appropriate period of time over which such estimate should be calculated.

Applicable Sales Tax, Penalty and Interest Rates

4.18 Genetelli provided the Monitor with the sales tax rates in each of the Outstanding States, as well as the rates imposed for penalties and interest potentially chargeable in each of the Outstanding States in respect of the failure to duly collect and remit sales taxes and file sales tax returns. The various tax rates provided by Genetelli, and utilized by the Monitor in determining the estimated amount of potential sales tax liability in each of the Outstanding States, were the highest combined state and local tax rates at the time the information was provided to the Monitor.[7]

Liability Look-Back Periods Based on the Voluntary Disclosure Process

4.19 Genetelli has advised that taxpayers in the Outstanding States may apply for participation in a voluntary disclosure process (a "**Voluntary Disclosure Process**"). Under a

[7] A charge for sales tax generally consists of a state tax component and a local tax component. Local tax rates generally vary within a state. To be conservative, the highest combined state and local tax rates were used for all sales in a state.

Voluntary Disclosure Process, taxpayers contact sales tax authorities and attempt to negotiate agreements whereby the taxpayer agrees to file returns (or provide return information) and pay tax arrears for a limited number of years, often referred to as the "look-back period". In return, the taxing authorities typically agree to waive unpaid taxes potentially owing for years prior to the look-back period, as well as all penalties that could have otherwise been imposed.

4.20 Genetelli has advised that eligibility requirements and circumstances for taxpayers to utilize the Voluntary Disclosure Process vary among the Outstanding States. Following a review of the information provided by the Arctic Glacier Parties' former Director of Tax and Genetelli's advice regarding general Voluntary Disclosure Process eligibility requirements in the Outstanding States, nothing has come to light that would, in the view of the Monitor or Genetelli, disqualify any of the Identified U.S. AG Parties from participating in the Voluntary Disclosure Process in any of the Outstanding States.

4.21 Accordingly, Genetelli provided the Monitor with a schedule setting out the typical look-back periods under the Voluntary Disclosure Process in each of the Outstanding States, which is attached hereto as Appendix "**I**". The Monitor, in consultation with the CPS, used these U.S. State specific look-back periods as a proxy for the appropriate period of time that should be considered in calculating the potential aggregate outstanding sales tax liability of the Identified U.S. AG Parties in each of the Outstanding States (the "**Liability Look-Back Periods**"). The Monitor believes that applying the U.S. state specific look-back periods under the Voluntary Disclosure Process as the basis for the

Liability Look-Back Periods is fair and reasonable given that the Voluntary Disclosure Process would most likely have been available to each of the Identified U.S. AG Parties in each of the applicable Outstanding States.

4.22 The Monitor and the CPS further note that they fully and carefully considered utilizing the Voluntary Disclosure Process to resolve the Sales Tax Issue. However, for reasons more particularly described below, it became apparent to the Monitor and the CPS that the Voluntary Disclosure Process would not be an appropriate means to deal with the Sales Tax Issue given the unique circumstances of the U.S. Arctic Glacier Parties and the interests of the various stakeholders involved in the CCAA Proceedings and the concurrent Chapter 15 Proceedings.

4.23 The Monitor notes that, in certain instances, the Liability Look-Back Period applicable to certain U.S. states is 3 years, which is less than the Data Period of 3 years and 208 days. In such cases, any sales made during the first year of the Data Period (2009) were reduced on a *pro rata* basis, such that only sales for the applicable Liability Look-Back of 3 years would remain.

4.24 In addition, the Monitor notes that, in certain instances, the Liability Look-Back Periods applicable to certain states extend beyond the duration of the Data Period. In such instances, the Monitor does not have actual sales information relating to the entire applicable Liability Look-Back Period. For the purpose of estimating the potential aggregate outstanding sales tax liability of the Identified U.S. AG Parties in these

instances, the Monitor (a) used the available sales information for the Data Period and calculated the average daily sales amounts during the Data Period for each of the Identified U.S. AG Parties in each of the Outstanding States, and (b) then multiplied each average daily sales amount by the number of days by which the applicable Liability Look-Back Period exceeded the Data Period. Based on a review of the Annual Reports for the ten year period from 2002 through 2011, the sales of the U.S. Arctic Glacier Parties in all but two of the years prior to the Data Period were lower than any of the years within the Data Period. Accordingly, the Monitor believes that this method of estimating sales prior to the Data Period is generous because sales generally increased during the Data Period.

Estimate of Aggregate Sales Tax Amount

4.25 Based on the Sales Schedules, the Liability Look-Back Periods and the tax, interest and penalty rates provided by Genetelli, the Monitor estimates the maximum potential aggregate outstanding sales tax liability of the Identified U.S. AG Parties in the Outstanding States is approximately $775,000, including estimated penalties and estimated interest accrued to December 31, 2014 (the "**Aggregate Sales Tax Amount**"). However, the Monitor notes that the resulting estimate does not constitute an admission by the Identified U.S. Arctic Glacier Parties that such amount is owed or will be paid to the Taxing Authorities. Rather, the estimate provides for an upper limit of any potential sales tax liability of the Arctic Glacier Parties pursuant to the process proposed in this Nineteenth Report. A schedule that provides a breakdown of these estimated potential

sales tax liabilities by applicable Identified U.S. AG Party and Outstanding State is included in Confidential Appendix "**G**".

4.26 The Aggregate Sales Tax Amount was calculated on the conservative basis that nexus existed for each of the Identified U.S. AG Parties that incurred sales for the entirety of each applicable State Liability Look-Back Period in each of the Outstanding States and that all such sales were fully taxable. Furthermore, maximum potential tax, interest and penalty rates were used in calculating the Aggregate Sales Tax Amount. Therefore, the Aggregate Sales Tax Amount reflects what is considered to be the maximum potential outstanding sales tax liability of the Identified U.S. AG Parties during the applicable Liability Look-Back Periods.

Proposed Process and Timing in Respect of the Sales Tax Issue and Plan Implementation

4.27 In order to fulfill the 10.3(d) Condition in a timely manner and in light of the information and analysis described in this Nineteenth Report and the unique circumstances of the U.S. Arctic Glacier Parties, the Monitor and the CPS propose to take the steps described below in respect of the Reviewable Sales of the applicable Identified U.S. AG Parties in each of the Outstanding States.

Establishment of the Administrative Sales Tax Reserve

4.28 The Monitor will earmark $2 million of the $10 million Administrative Costs Reserve (such earmarked portion being the "**Administrative Sales Tax Reserve**") to provide a

reserve for the payment of any outstanding sales taxes, interest and penalties payable by any of the Identified U.S. AG Parties. The Plan provides that the Administrative Costs Reserve is to be established on the Plan Implementation Date and held by the Monitor, on behalf of the Arctic Glacier Parties, for the purpose of paying the Administrative Reserve Costs, which include, *inter alia*, amounts in respect of existing or future taxes that are or may become payable.

4.29 The proposed quantum of the Administrative Sales Tax Reserve represents a multiple of approximately 2.5 times the value of the Aggregate Sales Tax Amount.[8] The Monitor and the CPS are satisfied that there is sufficient availability in the Administrative Costs Reserve for the Administrative Sales Tax Reserve and that the quantum of the Administrative Sales Tax Reserve is fair and reasonable in the circumstances.

Approval of State Sales Tax Liability Caps

4.30 The Monitor and the Applicants propose that the U.S. Bankruptcy Court approve of certain limits (the "**State Sales Tax Liability Caps**") to the amount of sales tax and associated penalties and interest that can be claimed by Taxing Authorities in each of the Outstanding States, as provided in the form of U.S. Plan Implementation Order. The amount of the State Sales Tax Liability Cap that is applicable to each Outstanding State is included in Confidential Appendix "**G**". These State Sales Tax Liability Caps reflect a

[8] A multiple of 2.5 times the value of the Aggregate Sales Tax Amount equals $1,937,165. Accordingly, the Monitor has earmarked $2 million for the Administrative Sales Tax Reserve.

multiple of approximately 2.5 times the potential sales tax liability, inclusive of penalties and interest, of each Identified U.S. AG Party in each applicable Outstanding State, as calculated through the methodology described above. Accordingly, the aggregate amount of the State Sales Tax Liability Caps is equal to the Administrative Sales Tax Reserve.

Notice to Taxing Authorities

4.31 Concurrently with the service of this Nineteenth Report, the Monitor has served each Taxing Authority with a specialized notice (the "**Specialized Notice**") in the form attached as Appendix "**J**". The Specialized Notice that was served to each individual Taxing Authority specifies, among other things, the estimated potential sales tax liability, if any, of each applicable Identified U.S. AG Party in the applicable Outstanding State and the applicable State Sales Tax Liability Cap. Copies of the Specialized Notices are included in Confidential Appendix "G".

4.32 The Monitor proposes that Taxing Authorities be provided with more than 21 days following the service of this Nineteenth Report and the Specialized Notices to review this Nineteenth Report and the applicable Specialized Notice and to raise any objections.

U.S. Plan Implementation Order

4.33 The Monitor has scheduled a hearing before the U.S. Bankruptcy Court on December 12, 2014 (the "**U.S. Sales Tax Hearing**") to request that the U.S. Bankruptcy Court grant the proposed form of U.S. Plan Implementation Order. The proposed form of U.S. Plan Implementation Order provides, among other things, that:

a) by following the process described herein, the Monitor and the CPS will be deemed to have satisfied the 10.3(d) Condition;

b) the Administrative Sales Tax Reserve and the State Sales Tax Liability Caps, and the process undertaken by the Monitor to calculate them (including underlying assumptions), are fair and reasonable under the circumstances;

c) any Taxing Authority which failed to file a notice of objection to the U.S. Plan Implementation Order prior to 4:00 p.m. (Eastern Time) on December 2, 2014 will be prohibited from objecting to the U.S. Plan Implementation Order and/or asserting a claim for sales taxes or associated penalties and interest beyond the amount of the applicable Sales Tax Liability Cap;

d) each Taxing Authority will be subject to the release and injunction provisions of the Plan, the Sanction Order and the Recognition Order;

e) in respect of the Sales Tax Issue, each Taxing Authority will be prohibited from receiving a distribution under the Plan in excess of the value of the applicable Sales Tax Liability Cap;

f) the Monitor and the CPS, on behalf of the Arctic Glacier Parties, will have the authority to agree by stipulation and agreed order with a Taxing Authority, prior to a distribution to such Taxing Authority under the Plan, on an appropriate amount, if any, to be paid out of the Administrative Sale Tax Reserve to such Taxing Authority, or an alternative limit to the amount of sales taxes and associated interest and penalties that such Taxing Authority

can claim, that is lower than such Taxing Authority's State Sales Tax Liability Cap; and

g) the U.S. Bankruptcy Court will retain jurisdiction to resolve any dispute in respect of the amount of any claim by a Taxing Authority and the U.S. Bankruptcy Court's jurisdiction over such dispute may be invoked by the Monitor upon notice to a Taxing Authority.

4.34 Pursuant to paragraph 4.33(f) above, if the U.S. Plan Implementation Order is granted, the Monitor will be contacting each of the applicable Taxing Authorities to negotiate and resolve any claims for outstanding sales tax liability (inclusive of penalties and interest).

Rationale for Approach

4.35 The Monitor and the CPS submit that any approach to fulfilling the 10.3(d) Condition must appropriately address the payment and/or satisfaction of the Identified U.S. AG Parties' potential outstanding sales tax liabilities and obligations while minimizing further delays to the Plan Implementation Date. The proposed approach accomplishes these goals.

Ensuring Payment of All Sales Tax Liabilities and Obligations

4.36 The Administrative Sales Tax Reserve will provide sufficient funds to pay sales tax liabilities and obligations due from the Identified U.S. AG Parties relating to the State Liability Look-Back Period. As described above, the Aggregate Sales Tax Amount was calculated conservatively on the basis that nexus existed for each of the Identified U.S.

AG Parties that incurred sales for the entirety of each applicable State Liability Look-Back Period and that all such sales were fully taxable in each of the Outstanding States. Furthermore, maximum potential tax, interest and penalty rates were used in calculating the Aggregate Sales Tax Amount, and the Administrative Sales Tax Reserve represents a multiple of approximately 2.5 times the Aggregate Sales Tax Amount.

Minimizing Delay

4.37 The proposed approach provides for the payment of outstanding sales tax liabilities to be made by way of the Administrative Costs Reserve, thereby limiting further delays to the Plan Implementation Date.

4.38 Assuming that the proposed form of U.S. Plan Implementation Order is granted on December 12, 2014, the Plan will be implemented following the expiration of any applicable appeal period and result in an anticipated Plan Implementation Date on or about January 8, 2015, provided, however, that the Monitor reserves the right to implement the Plan prior to the expiration of any applicable appeal period if, in the Monitor's sole and absolute discretion, and with the advice of counsel, it is appropriate under the circumstances, assuming there is no court-ordered stay pending appeal. This assumes that any objections made by Taxing Authorities are resolved consensually among the applicable parties prior to the U.S. Sales Tax Hearing, or by the U.S. Bankruptcy Court at the U.S. Sales Tax Hearing, in a manner that is acceptable to the

Monitor, the CPS and the Arctic Glacier Parties, acting reasonably, and the U.S. Plan Implementation Order is not appealed.

Available Alternatives

4.39 The Monitor is advised by Genetelli that undertaking the Voluntary Disclosure Process for each of the applicable Identified U.S. AG Parties in each of the Outstanding States would take significant time, require considerable expense and would cause further significant delays to the Plan Implementation Date. Furthermore, distributions to Unitholders would be reduced without any corresponding benefit to another party. Accordingly, the Monitor submits that the proposed approach is a better and more practical alternative.

4.40 Further, the approach proposed herein is based on, and akin to, the Voluntary Disclosure Process and hence, is not considered to prejudice the Outstanding States. The approach also recognizes the unique circumstances of the U.S. Arctic Glacier Parties and the interests of the various stakeholders involved in the CCAA Proceedings and the concurrent Chapter 15 Proceedings. Accordingly, the Monitor and the CPS are of the view that the proposed process described in this Nineteenth Report is balanced and fair, and should ensure payment of all potential sales tax liabilities of the applicable Identified U.S. AG Parties in each of the Outstanding States in the same manner as would otherwise be available to the Identified U.S. AG Parties under a Voluntary Disclosure Process, and in a manner that does not further delay the implementation of the Plan and that utilizes

the Arctic Glacier Parties' resources in the manner that is in the best interests of the Applicants and their stakeholders.

4.41 In addition, Genetelli has advised the Monitor that Taxing Authorities do not typically require companies to pay penalties under the Voluntary Disclosure Process. As the Aggregate Sales Tax Amount includes potential penalties and the Sales Tax Reserve is a multiple of the Aggregate Sales Tax Amount, the Administrative Sales Tax Reserve reflects an amount that the Monitor and the CPS believe is significantly higher than the potential liability that may have been owed in the event that the Identified U.S. AG Parties utilized the Voluntary Disclosure Process.

Reserves and Distribution Cash Pools

4.42 As described in the Fifteenth Report, the reserves and distribution cash pools contemplated by the Plan are comprised of the Available Funds and will be used to fund the Administrative Costs Reserve, the Insurance Deductible Reserve, the Unresolved Claims Reserve, the Affected Creditors' Distribution Cash Pool, and the Unitholders' Distribution Cash Pool.

4.43 The Seventeenth Report indicated that, following the settlement of the Johnson Claim, the CAD$12.188 million amount remaining that was previously reported as being earmarked as part of the Unresolved Claims Reserve in respect of the Johnson Claim (as defined in the Seventeenth Report) may be required to satisfy the 10.3(d) Condition. This will no longer be required provided that the proposed form of U.S. Plan Implementation

Order is granted and no appeal is raised during the applicable appeal period in connection therewith.

Reservation of Rights

4.44 As more particularly described above, the Canadian Court approved a Claims Process pursuant to the Claims Procedure Order and the Claims Officer Order. These Orders were both recognized by the US Bankruptcy Court. The Monitor did not receive any Proofs of Claim or DO&T Proofs of Claim from Taxing Authorities in the Outstanding States in respect of sales taxes prior to the Claims Bar Date, nor have any such Proofs of Claim or DO&T Proofs of Claim been received from such Taxing Authorities as of the date of this Nineteenth Monitor's Report. Pursuant to the Claims Procedure Order, any Person (a "**Non-filer**") that did not file a Proof of Claim or DO&T Proof of Claim such that the Proof of Claim or DO&T Proof of Claim was received by the Monitor on or before the Claims Bar Date is forever barred from making or enforcing such Claim or DO&T Claim against the Arctic Glacier Parties or against any Directors, Officers or Trustees, as applicable, and such Claims or DO&T Claims shall be forever extinguished. Additionally, the Claims Process Order provides that Non-filers shall be forever barred from making or enforcing a Claim or DO&T Claim as against any other Person who could claim contribution or indemnity from the Arctic Glacier Parties or any Directors, Officer or Trustees, as applicable.

4.45 The Monitor notes that not all of the Taxing Authorities were sent a claims package as part of the Claims Process. Nonetheless, in such cases, the Taxing Authorities would have been advised of the Claims Bar Date pursuant to the various court-approved newspaper publications under the Claims Procedure Order. In addition, the Plan provides for a release of Claims, including Claims that have been barred or extinguished pursuant to the Claims Procedure Order or the Claims Officer Order, and all Taxing Authorities known to the Monitor at the time (including all state Taxing Authorities) were served with materials in connection with the Plan, the Sanction Order and the U.S. Order recognizing and giving full effect in the United States to the Sanction Order. Accordingly, the Monitor and the Applicants are reserving all rights provided for in the Claims Procedure Order and the Claims Process Order with respect to the Sales Tax Issue that cannot be resolved consensually.

5.0 UNITHOLDER DISTRIBUTION RECORD DATE

5.1 The Monitor will determine a Unitholder Distribution Record Date at least 21 days prior to the Plan Implementation Date, in accordance with the Plan. Pursuant to the Plan, subject to the proposed form of U.S. Plan Implementation Order being granted and the expiration of the applicable appeal period in connection therewith, the Transfer Agent shall distribute a Unitholder Distribution, on behalf and for the account of AGIF, soon after the Plan Implementation Date by way of cheque sent by prepaid ordinary mail or by way of wire transfer to each Registered Unitholder, as of the applicable Unitholder

Distribution Record Date, that the Transfer Agent is aware of and has contact information in respect of, based on each Registered Unitholder's Pro Rata Share, (a) for such Registered Unitholder, in respect of Trust Units held by such Registered Unitholder solely for and on behalf of itself, as applicable; or (b) for distribution by such Registered Unitholder to (i) Beneficial Unitholders, as applicable, or (ii) Nominees or the agents of such Nominees for subsequent distribution to the applicable Beneficial Unitholders.

5.2 The Monitor will cause notices of the Unitholder Distribution Record Date to be published in the *Globe and Mail* (National Edition), the *Wall Street Journal* (National Edition) and the *Winnipeg Free Press.* Assuming the proposed form of U.S. Plan Implementation Order is granted, AGIF will issue a press release confirming the distribution amount and payment date after such information is determined. The Monitor will cause such distribution, on behalf of AGIF, in accordance with the Plan.

5.3 Assuming that the U.S. Plan Implementation Order is granted, the Administrative Sales Tax Reserve will represent more than the Identified U.S. AG Parties' maximum potential outstanding sales tax liability. However, it is anticipated that the Identified U.S. AG Parties' actual sales tax liability may only be a small portion of the Administrative Sales Tax Reserve. Therefore, there is a potential that a significant portion of the Administrative Sales Tax Reserve will not be required to satisfy the sales tax liability. Pursuant to the Plan, any final remaining balance held in the Administrative Costs Reserve, which includes any remaining amount in the Administrative Sales Tax Reserve, will ultimately be distributed to the Transfer Agent and then paid to the Unitholders on a

pro rata basis, unless the cost of making any such payment is prohibitive relative to the final remaining balance.

6.0 SEALING ORDER

6.1 The Monitor is seeking a sealing order for the Confidential Appendix as it contains commercially sensitive information concerning the Identified U.S. AG Parties' historical sales in the Outstanding States. Disclosure of this commercially sensitive information could negatively affect New Arctic Glacier as such information can be used by its competitors. As such, the Monitor has requested an order sealing the Confidential Appendix.

7.0 THE MONITOR'S COMMENTS AND RECOMMENDATIONS

7.1 Excluding the Sales Tax Issue, the Monitor and the CPS are not aware of any concerns regarding the payment of taxes or the non-filing of tax returns that have not, or will not, be dealt with pursuant to the Plan, the Orders granted in the CCAA Proceedings and the concurrent Chapter 15 Proceedings, or otherwise. As such, the Monitor and the CPS have concluded that achieving a satisfactory resolution to the Sales Tax Issue, as proposed herein, is sufficient to satisfy the 10.3(d) Condition in the Plan.

7.2 Based on the information provided to the Monitor and the CPS by the Arctic Glacier Parties and New Arctic Glacier, as well as the information and advice received from

Genetelli, the Monitor and the CPS have concluded that the process to address the Sales Tax Issue described in this Nineteenth Report is fair and reasonable in the circumstances.

7.3 Accordingly, for the reasons set out in this Nineteenth Report, the Monitor, in its capacity as the foreign representative of the Arctic Glacier Parties, hereby respectfully recommends that the U.S. Bankruptcy Court grant the relief being requested by it in its motion regarding the U.S. Plan Implementation Order.

*****

All of which is respectfully submitted to the U.S. Bankruptcy Court this 7th day of November, 2014.

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

Per: Richard A. Morawetz, Senior Vice President

Appendix “E”

No. CI 12-01-76323

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. AND THE ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (COLLECTIVELY, "THE APPLICANTS")

TWENTY-FIFTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
APRIL 3, 2017

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1.0 INTRODUCTION

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

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

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

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

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

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

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

1.8 The Monitor's Nineteenth Report to Court dated November 7, 2014, described the Monitor's discovery that certain U.S. sales tax returns may not have been filed and that certain associated sales taxes may not have been collected and remitted in certain U.S. states and localities (the "**Outstanding States**") where the Arctic Glacier Parties had conducted business (the "**U.S. Sales Tax Issue**"). Also on November 7, 2014, A&M, in its capacity as Monitor and as foreign representative of the Applicants, served motion materials in the U.S. Court in connection with the U.S. Sales Tax Issue (the "**U.S. Sales Tax Motion**").

1.9 The U.S. Sales Tax Motion was heard by the U.S. Court on December 12, 2014, and the U.S. Court granted an order (the "**U.S. Plan Implementation Order**") that, among other things:

a) established limits on the maximum potential claims of various U.S. state and local sales taxing authorities (the "**Taxing Authorities**") in the Outstanding States for sales taxes and/or associated interest and penalties (the **State Sales Tax Liability Caps**" and, individually, a "**State Sales Tax Liability Cap**");

b) authorized and directed the Monitor to establish a reserve from the Administrative Costs Reserve in the amount of $2,000,828, being the aggregate amount of the State Sales Tax Liability Caps (the "**Sales Tax Reserve**");

c) approved deadlines for the Taxing Authorities to dispute the quantum of the State Sales Tax Liability Caps;

d) approved the form and manner of notice provided to such Taxing Authorities; and

e) declared that the process followed by the Monitor and the CPS to ascertain potential sales tax liabilities, and the steps taken by the Monitor and the CPS to address any outstanding sales tax obligations and liabilities were, among other things, sufficient to satisfy the condition precedent to Plan implementation set out in Section 10.3(d) of the Plan (together, the "**U.S. Sales Tax Liability Process**"), being that (i) all tax returns required to be filed by or on behalf of the Arctic Glacier Parties had been or would be duly filed in all appropriate jurisdictions; and (ii) all taxes required to be paid in respect thereof had been or would be paid.

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

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

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

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

1.11 On June 2, 2015, the Canadian Court issued an order approving a claims process to identify and determine certain potential claims relating to the Initial Distribution (the "**Unitholder Claims Process**") and, among other things, authorizing, directing and empowering the Monitor to take such actions as contemplated by the Unitholder Claims Process (the "**Unitholder Claims Procedure Order**"). The Unitholder Claims Process provided for a Unitholder Claims Bar Date of July 28, 2015, in respect of claims against AGIF arising from any action or omission on or after the setting of the Initial Distribution Record Date in connection with the Initial Distribution ("**Initial Distribution Claims**"), or claims against AGIF's Officers or Trustees in connection with an action or omission occurring on or after the setting of the Initial Distribution Record Date in connection with or related to the Initial Distribution ("**O&T Claims**").

1.12 Following completion of the U.S. Sales Tax Liability Process, the fulfillment of all obligations of the Monitor thereunder, and the full and complete resolution of any potential liabilities thereunder, on December 6, 2016, the U.S. Court issued an order (the "**Sales Tax Reserve Release Order**").

1.13 The Sales Tax Reserve Release Order, among other things, declared that the Monitor and Debtors had fulfilled all obligations in connection with the U.S. Sales Tax Liability

Process and that the Debtors had no further liabilities in connection with the Potential Sales Tax Liability in the United States. In addition, the U.S. Court declared that the Sales Tax Reserve was released and the funds held therein were available to be used in accordance with the Amended Plan. A copy of the Sales Tax Reserve Release Order is attached hereto as **Appendix "B"**.

1.14 On September 8, 2016, the Canadian Court issued an order (the "**Stay Extension Order**") extending the Stay Period to April 21, 2017.

1.15 The purpose of this Twenty-Fifth Report is to provide the Canadian Court, the U.S. Court, Affected Creditors, Unitholders and other interested parties with an update regarding:

a) the Claims Process;

b) the Unitholder Claims Process;

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

d) the Arctic Glacier Parties' receipts and disbursements for the period from August 13, 2016 to March 24, 2017; and

e) the Monitor's activities since the date of the Twenty-Fourth Report (August 30, 2016).

1.16 Further information regarding these CCAA Proceedings and the concurrent Chapter 15 Proceedings, and all previous reports of the Monitor, can be found on the Monitor's

website at http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries (the "**Website**").

2.0 TERMS OF REFERENCE

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

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

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

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

3.0 THE CLAIMS PROCESS

3.1 In this section, all capitalized terms not defined elsewhere have the meaning ascribed to them in the Claims Procedure Order and Claims Officer Order.

3.2 The McNulty Claim, the only Unresolved Claim as of the date of the Twenty-Fourth Report, has since been resolved through a settlement between the Arctic Glacier Parties and McNulty (the "**McNulty Claim Settlement**"), as announced by AGIF by way of press release issued January 24, 2017. Under the terms of the settlement, AGIF and its subsidiaries collectively paid $400,000 in full satisfaction of all claims asserted by McNulty against the Applicants and their current and former officers, directors, employees, agents and attorneys. A copy of the press release is attached hereto as **Appendix "C"**.

3.3 In accordance with the McNulty Claim Settlement, on February 8, 2017 McNulty's legal counsel filed a Motion for Voluntary Party Dismissal with the United States Court of Appeals for the Sixth Circuit to dismiss, with prejudice, his claim against certain former employees of the Arctic Glacier Parties in his suit against Reddy Ice Holdings, Inc. and Home City Ice Company, Incorporated.

3.4 As a result of the McNulty Claim Settlement and in accordance with the Amended Plan, $400,000 (the Proven Claim Amount in respect of the McNulty Claim) was deemed to have been transferred from the Unresolved Claims Reserve to the Affected Creditors' Distribution Cash Pool and then paid therefrom by the Monitor on behalf of the Arctic Glacier Parties as directed in the settlement.

3.5 As the McNulty Claim – the last Unresolved Claim – has been finally determined and all Proven Claim Amounts have been paid, in accordance with section 7.3 of the Amended Plan, the balance remaining in the Unresolved Claims Reserve is deemed to be transferred to the Administrative Costs Reserve. As a result, $13,669,198 is deemed to have been transferred from the Unresolved Claims Reserve into the Administrative Costs Reserve and the Unresolved Claims Reserve is terminated.

4.0 THE UNITHOLDER CLAIMS PROCESS

4.1 As described in paragraphs 3.1 to 3.13 of the Twenty-Fourth Report:

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

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

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

d) On July 8, 2015, the U.S. Court recognized the Unitholder Claims Procedure Order (the "**U.S. Unitholder Claims Procedure Recognition Order**"), which enumerated several steps, culminating in the Brodski Parties commencing an adversary proceeding (the "**Brodski Proceeding**") by filing a complaint in the U.S. Court (the "**Brodski Complaint**"). The Brodski Parties asserted Initial Distribution Claims and O&T Claims, both in the amount of $1,966,568.18, plus reasonable attorney's fees and costs, prejudgment interest, punitive damages, and treble damages, which have not been quantified (the "**Brodski Claims**"). The Brodski Parties named AGIF as well as the individual Trustees of AGIF as defendants in the Brodski Complaint.

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

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

g) The Brodski Parties filed a Notice of Appeal on July 19, 2016 to appeal the Dismissal Order (the "**Brodski Appeal**").

4.2 Since the Twenty-Fourth Report, the parties have fully briefed the Appeal.

4.3 The District Court has the appeal under reserve. There are no timelines within which the Court must release its ruling.

Insurance Coverage in Respect of Brodski Complaint

4.4 As discussed in the Twenty-Fourth Report, both before and after approval and implementation of the Plan, the Arctic Glacier Parties took steps to ensure that the insurance coverage then in place was maintained for the protection of the Arctic Glacier Parties in the event that a claim (such as the Brodski Complaint) was advanced. Following the filing of the Brodski Complaint, notice was delivered to the Arctic Glacier Parties' insurer, which notice has been acknowledged. Coverage has been confirmed, subject to all terms and conditions of the insurance policy, including payment by the Arctic Glacier Parties of the Retention (deductible) amount of CDN$150,000 and the insurer's reservation of rights.

4.5 To date, defense costs of approximately $868,000 have been incurred in respect of the Brodski Complaint. As previously reported, the insurer has confirmed coverage of these costs subject to the limitations of the policy. It is anticipated that the vast majority of the defense costs will be covered. To date, invoices for approximately $89,000 of these defense costs have been sent directly to the Arctic Glacier Parties' insurer for payment and have been paid in full directly by the insurer. The remaining defense costs of approximately $779,000 incurred to date were paid by the Monitor on behalf of the Arctic Glacier Parties. Invoices for these defense costs have been supplied to the insurer with a request for reimbursement. The insurer is completing its review of these accounts. Any defense costs incurred going forward will be submitted directly to the insurer for review and payment directly of the covered portion.

5.0 POST-PLAN IMPLEMENTATION DATE TRANSACTIONS

5.1 Pursuant to the Plan, each of the Arctic Glacier Parties, or the Monitor on their behalf, as the case may be, were to take certain steps after the Plan Implementation Date (the "**Post-Plan Implementation Date Transactions**").

5.2 In order to facilitate the satisfaction of Proven Claims and the distribution that was made to the Unitholders, Schedule "B" to the Plan lists a series of specific steps, assumptions, distributions, transfers, payments, contributions, reductions of capital, settlements and releases of various of the Arctic Glacier Parties (the "**Schedule B Steps**") that are deemed to occur in the order and as provided for in the Plan.

5.3 Since the Plan Implementation Date, the Arctic Glacier Parties and their legal counsel, with the assistance of the Monitor, have been working to complete the Post-Plan Implementation Date Transactions and the Schedule B Steps. The Post-Plan Implementation Date Transactions and Schedule B Steps must be completed in a specific order, which requires the Arctic Glacier Parties and their legal counsel, with the assistance of the Monitor, to wait for regulatory or other authorities to complete their processes before the next step can be completed.

5.4 As of the date of this Report, all of the 28 subsidiaries of AGII have been dissolved and all tax filings completed, except for one subsidiary in Texas and four subsidiaries in New York. The documents necessary to dissolve the subsidiary in Texas have been filed and the Monitor is waiting for the Certificate of Dissolution to be issued in respect of same, and the Monitor has requested authorization from the State of New York to dissolve the

subsidiaries in New York and is awaiting a response to same. Once these subsidiaries are wound up, Step 12 of the Schedule B steps will have been completed.

5.5 The Monitor is preparing to complete the remaining Schedule B Steps so that they can be completed promptly once the States of Texas and New York confirm that the remaining AGII subsidiaries have been dissolved. These subsequent steps include winding up or dissolving AGII and AGI, making a final distribution, and causing AGIF's Trust Units to cease to be listed and traded on the Canadian Securities Exchange on (and for greater certainty, not prior to) the Final Distribution Date.

5.6 The Monitor will provide further updates in respect of the Post-Plan Implementation Date Transactions and the Schedule B Steps in subsequent reports.

6.0 RECEIPTS AND DISBURSEMENTS SINCE THE TWENTY-FOURTH REPORT

6.1 During the period from August 13, 2016 to March 24, 2017 (the "**Reporting Period**"), the Applicants had Canadian dollar net cash outflows of approximately $367,000 and U.S. dollar net cash outflows of approximately $1.2 million.

6.2 Excluding transfers between the Monitor's U.S. and Canadian dollar trust bank accounts, receipts during the Reporting Period were approximately CAD$19,250 and $46,600 and consisted of tax refunds and deposit interest.

6.3 Disbursements, also excluding transfers between the Monitor's U.S. and Canadian dollar trust bank accounts, consisted primarily of U.S. dollar professional fees and expenses totaling approximately $300,000 and Canadian dollar professional fees and expenses of

approximately CAD$950,000 (which collectively include fees and expenses paid to the Monitor, its legal counsel, the CPS, the Applicants' legal counsel, the Applicants' tax consultants, and other professionals involved with these CCAA Proceedings). In addition, disbursements include the payment of $400,000 in respect of a settlement of the McNulty Claim, discussed above in Section 3.0 of this Twenty-Fifth Report. Also included in disbursements are other expenses comprised of income taxes, fees paid to Directors and Trustees, and disbursements of an administrative nature totaling approximately $41,000 and CAD$100,000.

6.4 As at March 24, 2017, the Monitor is holding approximately $19.7 million and CAD$179,000, all of which is being held in interest-bearing accounts in the name of the Monitor, on behalf of the Applicants.

6.5 The Plan provides that certain reserves and cash pools be maintained in respect of the remaining obligations of the estates. The funds held by the Monitor on behalf of the Applicants as at March 24, 2017, are divided among the reserves and cash pools as follows: Insurance Reserve, approximately $721,000; and Administrative Costs Reserve, approximately $18.97 million, and CAD$178,700.

6.6 It is the Monitor's and the Arctic Glacier Parties' view that it is not appropriate to make a distribution until the Brodski Claims, which as indicated in Section 4.1 of this Twenty-Fifth Report are not quantifiable at present, have been resolved. It is the Monitor's intention to complete the Post-Plan Implementation Date Transactions and Schedule B Steps as quickly as possible to be in a position to make a Final Distribution once all such transactions and steps are completed and the Brodski Claims are finally resolved. Based

on the information currently available, the Monitor anticipates that making only a Final Distribution will maximize returns to Unitholders as it is more cost-effective.

7.0 THE STAY EXTENSION

7.1 Pursuant to the Initial Order and subsequent Orders of the Canadian Court, the Stay Period was granted and extended until April 21, 2017. The Monitor requests an extension of the Stay Period to December 15, 2017.

7.2 The Monitor believes that an extension of the Stay Period until December 15, 2017 is appropriate, as it will allow the Monitor, in consultation with the Applicants, to among other things, continue implementing the steps contemplated by the Plan and will provide time for the District Court to rule on the appeal in the Brodski Proceeding.

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

8.0 ACTIVITIES OF THE MONITOR

8.1 In addition to the activities of the Monitor described above, the Monitor's activities from the date of the Twenty-Fourth Report, being August 30, 2016, have included the following:

- continuing to work through the ongoing Post-Plan Implementation Date Transactions, including the merger, wind-up, liquidation, termination and/or dissolution of certain of the Arctic Glacier Parties in accordance with the Plan;

- responding to inquiries from Unitholders and other stakeholders;
- continuing to make non-confidential materials filed with the Canadian Court and with the U.S. Court publicly available on the Website;
- preparing this Twenty-Fifth Report;
- continuing to act as foreign representative in the Chapter 15 Proceedings;
- continuing to fulfill the Monitor's responsibilities pursuant to the Claims Procedure Order and the Claims Officer Order;
- communicating with insurance adjusters and with various plaintiffs' counsel regarding certain open insurance claims;
- attending the September 2016 Stay Extension Motion;
- preparing and filing various statutory returns in respect of payments made to and deductions at source withheld, as required, from payments made during 2016 to Directors/Trustees;
- maintaining estate bank accounts, overseeing the accounting for the Applicants' receipts and disbursements pursuant to the Transition Order, and reviewing professional fee invoices and providing same to the CPS for review;
- preparing the 2016 year-end accounting information required by the Companies' tax consultant in order to prepare and file the 2016 income tax returns;
- arranging for the preparation and filing of the annual Statement of Trust Income Allocation and Designation of AGIF for 2016; and

- preparing and filing GST/HST returns and various other statutory returns and communicating with CRA and certain government bodies in the United States, as appropriate in respect of same.

*****

All of which is respectfully submitted to the Court of Queen's Bench this 3rd day of April, 2017.

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

Per: Alan J. Hutchens, Senior Vice-President

Appendix “F”

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re: Arctic Glacier International, Inc., Debtors in a Foreign Proceeding.	)	Chapter 15 Bank. No. 12-10605 (KG)
Eldar Brodski Zardinovsky a/k/a Eldar Brodski a/k/a Eldar Brodski (Zardinovsky), EB Books, Inc., EB Design, Inc., EB Online, Inc., EB Imports, Inc., Lazdar Inc., Eldar Brodski Inc., Y Capital Advisors Inc., Valley West Realty Inc., Ruben Brodski, Ruben Brodski Inc., Ester Brodski, and Yehonathan Brodski, Appellants, v. Arctic Glacier Income Fund, James E. Clark, Gary A. Filmon, David R. Swaine, and Hugh A. Adams, Appellees.	)	Adv. Proc. No. 15-51732 (KG) Civ. No. 16-617 (SLR)

Kevin S. Mann, Esquire, of Cross & Simon, LLC, Wilmington, Delaware. Counsel for Eldar Brodski Zardinovsky a/k/a Eldar Brodski a/k/a Eldar Brodski (Zardinovsky), EB Books, Inc., EB Design, Inc., EB Online, Inc., EB Imports, Inc., Lazdar Inc., Eldar Brodski Inc., Y Capital Advisors Inc., Valley West Realty Inc., Ruben Brodski, Ruben Brodski Inc., Ester Brodski, and Yehonathan Brodski.

Paul N. Heath, Esquire, Marcos A. Ramos, Esquire, and Brendan J. Schlauch, Esquire, of Richards Layton & Finger, P.A., Wilmington, Delaware; David Woodcock, Esquire, Mark W. Rasmussen, Esquire, Arielle S. Tobin, Esquire, and Allison L. Fuller, Esquire, of Jones Day, Dallas, Texas. Counsel for Arctic Glacier Income Fund, James E. Clark, Gary A. Filmon, David R. Swaine, and Hugh A. Adams.

MEMORANDUM OPINION

Dated: June 14, 2017
Wilmington, Delaware

ROBINSON, Senior District Judge

I. INTRODUCTION

Appellants Eldar Brodski Zardinovsky and others (collectively "plaintiffs")[1] filed this appeal on July 19, 2016. (D.I. 1) The appeal arises from an opinion and order entered by the bankruptcy court on July 13, 2016 dismissing a post-petition adversary proceeding complaint filed by plaintiffs against debtor Arctic Glacier Income Fund ("AGIF") and defendants James E. Clark, Gary A. Filmon, David R. Swaine, and Hugh A. Adams (collectively, the "individual defendants,"[2] and together with AGIF, the "defendants"). *Zardinovsky, et al. v. Arctic Glacier Income Fund, et al. (In re Arctic Glacier Int'l, Inc.)*, 2016 WL 3920855, No. 15-51732 (KG) (Bankr. D. Del. July 13, 2016).

Following confirmation of AGIF's Plan of Arrangement ("Plan") under Canada's Companies' Creditors Arrangement Act (the "CCAA"), plaintiffs purchased units in AGIF between December 16, 2014 and January 22, 2015. On January 22, 2015, pursuant to the Plan's distribution procedure, defendants made distributions to those who held units as of December 15, 2014 – in other words, to those who sold their units to plaintiffs. The complaint alleges that under U.S. securities law, defendants should have made distributions to plaintiffs, rather than to the selling unitholders.[3] Defendants moved to dismiss the complaint on the bases that: (i) various releases contained in the confirmed Plan and confirmation orders insulate defendants from liability, and (ii) under the doctrine of *res judicata*, defendants were only obligated to make distributions pursuant to the Plan, not U.S.

[1] EB Books, Inc., EB Design, Inc., EB Online, Inc., EB Imports, Inc., Lazdar Inc., Eldar Brodski Inc., Y Capital Advisors Inc., Valley West Realty Inc., Ruben Brodski, Ruben Brodski Inc., Ester Brodski, and Yehonathan Brodski.

[2] Individual defendants James E. Clark, Gary A. Filmon, and David R. Swaine were at all relevant times trustees of AGIF; individual defendant Hugh A. Adams was at all relevant times secretary of AGIF.

[3] "Unitholder" is the term used in the Plan (as defined herein) for shareholders.

securities law and, therefore, defendants violated no law in making the distributions. The bankruptcy court agreed with defendants and dismissed the complaint. *See Arctic*, 2016 WL 3920855, at *1. For the reasons set forth herein, the court will affirm.

II. BACKGROUND[4]

A. Insolvency Proceedings

AGIF was an income trust based in Canada which owned a group of companies that manufactured and distributed packaged ice.[5] AGIF was listed on the Canadian Securities Exchange ("CSE") under the symbol "AG.UN." AGIF's units traded on the U.S.-based Over-The-Counter ("OTC") market under the symbol "AGUNF." (A7, ¶ 34; A11, ¶ 55) On February 22, 2012, AGIF and its affiliates commenced insolvency proceedings in Canada under the CCAA. (A6, ¶ 26) The same day, the Canadian court appointed a monitor, and the monitor commenced ancillary proceedings in the bankruptcy court under Chapter 15 of the Bankruptcy Code. In the CCAA proceedings, under the supervision of the monitor and the Canadian court, AGIF sold substantially all of its assets, and the proceeds were sufficient to pay AGIF's secured creditors in full. (A5, ¶ 27) The remaining proceeds were held by the monitor pending determination of the amount of creditor claims and the filing of the Plan to govern distribution of the remaining proceeds to unsecured creditors and, to the extent that all creditors could be paid in full, to make distributions to AGIF's unitholders.

B. Plan, Sanction Order, and Recognition Order

AGIF held a meeting of unitholders to consider and vote on the Plan, and notice of the meeting was provided to all unitholders. (*See* A350-401) The Canadian court determined there had been sufficient notice of the meeting to unitholders, as well as

[4] The bankruptcy court set forth a detailed summary of the factual and procedural background in its memorandum opinion. *See Arctic*, 2016 WL 3920855, at *1-*14.
[5] Citations to "A__" are to the appendix filed in support of plaintiffs' opening brief (D.I. 9).

sufficient service of documents related to the meeting. (A587, ¶ 3) The Plan was approved by 99.81% of all unitholders who voted, and over 65% of unitholders voted. (A199; A441-43) The Plan and orders contained provisions that released defendants from liability for any actions or omissions related to, arising out of, or connected with the Plan. Each unitholder was deemed to have consented and agreed to all provisions of the Plan, including the releases. (A592, ¶ 19(a)) The Plan, once approved, was binding not only on unitholders but also on their "successors and assigns." (A161, ¶ 1.3) The Canadian court approved and sanctioned the Plan pursuant to the CCAA on September 5, 2014 (the "Sanction Order"). The plan implementation date occurred on January 22, 2015. (A8-9, ¶¶ 39, 45; A584-604) The Sanction Order declared that the terms of the Plan governed the conduct of AGIF and related parties as of the date of signing, and authorized them "to take all steps and actions necessary or appropriate to implement the Plan":

> [T]he Arctic Glacier Parties,[6] the Monitor and the CPS,[7] as the case may be, **are hereby authorized and directed to take all steps and actions necessary or appropriate to implement the Plan in accordance with and subject to its terms and conditions, and enter into, adopt, execute, deliver, complete, implement and consummate all of the steps, . . . distributions,** payments, deliveries, allocations, instruments, agreements and releases contemplated by, and subject to the terms and conditions of, the Plan, and all such steps and actions are hereby approved. Further, to the extent not previously given, all necessary approvals to take such actions shall be and are hereby deemed to have been obtained from the Directors, Officers, or Trustees, as applicable . . . .

(A589-90, ¶ 12) On September 16, 2014, the bankruptcy court entered an order (A460-66) ("Recognition Order")[8] recognizing the Sanction Order and giving "full force and effect in the

[6] "Arctic Glacier Parties" is defined in the Plan as including AGIF and various other entities, but not the individual defendants. (*See* A151, § 1.1)

[7] "CPS" is defined in the Plan as "7088418 Canada Inc. o/a Grandview Advisors and any successor thereto appointed by the CCAA Court." (A153, § 1.1) CPS, together with the monitor, were empowered under the Sanction Order to administer and distribute available funds under the Plan. (*See* A598, ¶ 34)

[8] The Sanction Order and the Recognition Order are referred to collectively herein as the "Orders."

United States" to its provisions. (A462, ¶ 2) The Recognition Order provided that "due and sufficient notice" of both the motion seeking approval and the Sanction Order itself had been given and that "no other or further notice need be provided." (A461)

C. Distribution Procedures Under the Plan and Orders

The Plan provides detailed procedures for the distribution to unitholders. Section 6.2 limits distributions "to each Registered Unitholder, as of the applicable Unitholder Distribution Record Date." (A168, § 6.2) Section 6.2 of the Plan provided that the monitor would declare a record date that would determine which unitholders were eligible to receive the distribution, and that the transfer agent would pay the distribution to each registered unitholder as of the record date. Specifically, the Plan provided:

> The Monitor shall declare a Unitholder Distribution Record Date prior to any distribution . . . . On the Plan Implementation Date or on any Distribution Date, as the case may be, the Monitor shall transfer amounts as determined by the Monitor in accordance with the [Plan] . . . to the Transfer Agent . . . . [I]n no event later than five (5) Business Days following receipt of the Unitholder Distribution, **the Transfer Agent shall distribute each Unitholder Distribution . . . to each Registered Unitholder, as of the applicable Unitholder Distribution Record Date** . . . based on each Registered Unitholder's Pro Rata Share . . . .

(A168, § 6.2) (emphasis added) The Plan further provided that the unitholder distribution record date must be "at least 21 days prior to a contemplated Unitholder Distribution . . ." (A159, § 1.1)

Section 8.3 of the Plan provides the steps and transactions to be undertaken on the plan implementation date:

> **The steps, transactions, settlements and releases** to be effected in the implementation of the [Plan] **shall occur**, and be deemed to have occurred, **in the following order without any further act of formality . . .**
>
> (a) the Monitor . . . shall use the Available Funds to fund the following reserves and distribution cash pools in the order specified below:
>
> (i) Administrative Costs Reserve;
> (ii) Insurance Deductible Reserve;
> (iii) Unresolved Claims Reserve;
> (iv) Affected Creditors' Distribution Cash Pool; and

> (v) Unitholders' Distribution Cash Pool;
>
> and administer such reserves and distribution cash pools pursuant to and in accordance with the [Plan];
>
> * * *
>
> (d) the steps, assumptions, distributions, transfers, payments, contributions, liquidations, dissolutions, wind-ups, reduction of capital, settlements and releases set out in Schedule "B" of the [Plan] shall be deemed to be completed in the order specified therein . . .

(A174, § 8.3) (emphasis added) Schedule "B" to the Plan provides specific instructions as to steps to be taken on the plan implementation date:

> In order to effect the wind-up, liquidation and dissolution of certain of the Arctic Glacier Parties to facilitate the satisfaction of Proven Claims and a distribution by the Fund to Unitholders pursuant to and in accordance with the [Plan], the following steps, assumptions, distributions, transfers, payments, contributions, liquidations, dissolutions, wind-ups, reduction of capital, settlements and releases shall be deemed to occur (a) immediately after the completion of the step set out in Section 8.3(c) of the [Plan]; (b) in the order specified in this Schedule "B"; and (c) in the manner specified in this Schedule "B".

(A187, Sch. B) Schedule B of the Plan provides specific instructions as to the last step in the distribution procedures:

> [AGIF] shall be deemed to have paid a distribution to each Unitholder in the amount of their Pro Rata Share of the Unitholders' Distribution Cash Pool immediately following the completion of Steps 1 through 29 above and such amount shall be transferred by the Monitor to the Transfer Agent and distributed by the Transfer Agent to the Unitholders in accordance with Section 6.2 of the [Plan].

(A197, Step 30) Section 8.3 only allows for distributions "in accordance with" the Plan (*i.e.*, § 6.2); Schedule "B" only allows for distributions "in accordance with Section 6.2 of the . . . Plan." (A187)

The Sanction Order provides that distributions shall be made in accordance with the CCAA, the Plan, and court orders, under the exclusive authority of the monitor:

> THIS COURT ORDERS AND DECLARES that, in addition to the Monitor's prescribed rights under the CCAA, and the powers granted by this Court to the Monitor and the CPS, as the case may be, the powers granted to the Monitor and the CPS are expanded as may be required, and the Monitor and CPS are empowered and authorized before, on or after the Plan Implementation Date, to take such additional actions and execute such documents . . . **as the Monitor and the CPS consider necessary or desirable** in order to perform their respective functions

> and fulfill their respective obligations under the Plan, the Sanction Order and any Order of this Court in the CCAA Proceedings and to facilitate the implementation of the Plan and the completion of the CCAA Proceedings, including to . . . (ii) **administer and distribute the Available Funds**, (iii) establish, hold, administer and **distribute . . . the Unitholders' Distribution Cash Pool**, . . . (v) **effect distributions to the Transfer Agent in respect of distributions to be made to Unitholders** . . . and, in each case where the Monitor or the CPS, as the case may be, takes such actions or steps, **they shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons including the Arctic Glacier Parties, and without interference from any other Person.**

(A598-99, ¶ 34 (emphasis added)) Thus, the Sanction Order empowers the monitor to administer and distribute funds to unitholders "without interference from any other Person" including the Arctic Glacier Parties. (*Id.*) Further, the definition of "Person" includes any "Government Authority" or any agency, regulatory body, officer or instrumentality thereof or any entity, wherever situated or domiciled." (A157, § 1.1) Government Authority is defined as "any government, regulatory or administrative authority . . . or other law, rule or regulation-making or enforcing entity having or purporting to have jurisdiction on behalf of any nation . . . ." (A156, § 1.1)

E. U.S. Securities Laws Governing Distributions

Plaintiffs do not appear to dispute that defendants made the distribution to unitholders in accordance with the Plan. Rather, plaintiffs contend that defendants did not comply with U.S. securities laws, which required making the distribution to plaintiffs, and this contention is central to each of the claims in the complaint. The bankruptcy court set forth a thorough explanation of the relevant statutes and rules in its opinion,[9] the substance of which the parties do not appear to dispute. For the purposes of this memorandum opinion, the court will briefly summarize the relevant authorities.

Rule 10b-17 of the Securities and Exchange Act of 1934 establishes an issuer's mandatory set of disclosures if it trades on the OTC market and wishes to make a

[9] *See Arctic*, 2016 WL 3920855, at *5-*7.

distribution. (A11, ¶ 56) Notice of a distribution must be given to the Financial Industry Regulatory Authority ("FINRA")[10] no later than ten days prior to the record date of an issuer's offer of dividends.[11] (A11 ¶ 58; 17 C.F.R. § 240.10b-17(a) and (b)(1); *In re THCR/LP Corp.*, 2006 WL 530148 at *4 (Bankr. D.N.J. Feb. 17, 2006)). The SEC gave FINRA power to regulate payment of dividends. FINRA Rule 6490 ("Rule 6490") creates procedures within FINRA for review and determination of the sufficiency of requests to issue dividends. (A12, ¶¶ 63, 66; SEC Release No. 34-62434 (July 1, 2010) at *1)

FINRA is authorized by the SEC to adopt and administer the Uniform Practice Code ("UPC"), "the rules and regulations governing [OTC] secondary market securities transactions." *THCR/LP,* 2006 WL 530148 at *4. The UPC sets forth a basic framework of rules governing broker-dealers with respect to the settlement of OTC Securities and governs how distributions by securities issuers must be allocated to the holders of securities. *See* SEC Release No. 62434 (July 1, 2010), n.8. FINRA lacks privity[12] with issuers of OTC Securities: "FINRA does not impose listing standards for securities and

[10] FINRA is a self-regulatory organization that regulates the OTC secondary market pursuant to authority granted by the Securities and Exchange Commission ("SEC"). (A2, ¶ 1) It is the successor to the National Association of Securities Dealers, Inc. ("NASD"). FINRA "has the authority to determine the date on which a holder of AGIF units trading in the United States . . . has to own such units in order to receive a dividend." (A7, ¶ 34) "FINRA processes requests to announce and publish certain corporate actions [including cash dividends and distributions] from issuers whose securities are quoted on the OTC . . . [and] publishes these announcements on the Daily List on its website." (A7-A8, ¶¶ 35-37)

[11] This memorandum opinion will also refer to "distributions" and "dividends" interchangeably. *See Arctic*, 2016 WL 3920855, at *1, n.3.

[12] Despite the lack of privity between FINRA and issuers, the SEC notes the following possible consequences of an issuer failing to observe the requirements of Rule 10b-17:

> The other commenter questioned whether the proposed fees for providing Company-Related Action processing services might cause issuers to effect corporate actions without notifying FINRA. In response to this point, FINRA noted that an issuer that fails to notify FINRA of a proposed corporate action, as required by Rule 10b-17 is potentially violating an anti-fraud rule of the federal securities laws and stated that where it has actual knowledge of issuer noncompliance with Rule 10b-17, FINRA will use its best efforts to notify the Commission.

SEC Release No. 62434 (July 1, 2010) (footnotes omitted).

maintains no formal relationship with, or direct jurisdiction over, issuers." *Id.* at *2-3. UPC 11140 determines which unitholders are entitled to a distribution. *See* NASD Notice to Members 00-54 (August 2000).[13] The UPC provisions determine which unitholders are entitled to a distribution by setting two dates: the "record date" and the "ex-dividend date" ("ex-date"). *See THCR/LP*, 2006 WL 530148, at *5.

The **record date** refers to "the date fixed by the . . . issuer for the purpose of determining the holders of equity securities . . . entitled to receive dividends . . . or any other distributions." *Id.* (citing UPC Rule 11120(e)). The record date is the date on which one must be registered as a shareholder on the stock book of a company in order to receive a dividend declared by that company. Thus, the record date determines to whom the issuer sends the distribution. "The fact that an individual is the holder of record on the record date, however, does not necessarily mean that such person is entitled to retain the dividend." *Id.* at *6 (quoting *Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 732 F.2d 859, 861 (11th Cir. 1984).

"In terms of entitlement, the **ex-dividend** date is the dividing line . . . When stock is sold prior to the ex-dividend date, the right to a dividend goes with the stock to the purchaser, rather than staying with the seller." *Id.* (citations omitted) (emphasis added). When stock is sold on or after the ex-date, it is "traded without a specific dividend or distribution."[14] (A14-15, ¶ 70; UPC Rule 11120(c); *THCR/LP Corp.*, 2006 WL 530148 at *5) The ex-date can only be set by FINRA and determines which unitholder is ultimately entitled to the distribution. *THCR/LP*, 2006 WL 530148 at *5. "Taken together, these two dates

[13] For convenience, Rule 10b-17, Rule 6490, SEC Release No. 62434, UPC 11140, and NASD Notice to Members 00-54 are referred to hereinafter as the "FINRA Rules."
[14] Thus, the ex-date also determines the date when the price of the security is adjusted downward to reflect loss of the right to the distribution. *See* NASD Notice to Members 00-54 at *1.

delimit the timeframe during which a security, when sold, carries with it from the seller to the buyer the right to receive a distribution." *Id.*; UPC 11140.

The ex-date generally precedes the record date, in which case the stockholder legally entitled to the dividend is the individual to whom the dividend is sent. *THCR/LP*, 2006 WL 530148, at *6. On the other hand, if the record date precedes the ex-date, and the security is sold during the period between the two, the seller of the security (who held the security on the record date) will receive the full, unadjusted price for the security, as well as the distribution. However, the purchaser of the security – who is the holder on the ex-date – will be legally entitled to the distribution. Under such circumstances, the seller will be obligated to remit the value of the dividend to the buyer. *See e.g., Silco, Inc. v. United States*, 779 F.2d 282, 284 (5th Cir. 1986).

The FINRA Rules and the Plan's distribution procedures differ in two important respects relevant to the appeal. First, with respect to notification requirements, the Plan and orders make no mention of any obligations to notify FINRA, or to otherwise observe any authority beyond the CCAA and the Plan. (A168, § 6.2; A598, ¶ 34) Indeed, under the Sanction Order, compliance with any outside authority falls within the monitor's discretion, and defendants and the monitor are released from liability for disregard of such authority. (*See* A598, ¶ 34; A601, ¶ 40) The FINRA Rules, on the other hand, require that the issuer notify FINRA ten days prior to the record date, and "further advise FINRA of, *inter alia*, the date and amount of the dividend payment, and obtain FINRA's approval." (A14, ¶ 69; Rule 10b-17; Rule 6490)

Second, under the FINRA Rules, the size of the distribution may lead to a different allocation. A dividend payment of 24% or less of the value of the subject security will invoke UPC 11140(b)(1), which provides that "the date designated as the 'ex dividend' date shall be the second business day preceding the record date if the record date falls on a business

day, or the third business day preceding the record date if the record date falls on a day designated by the Committee as a non-delivery date." UPC 11140(b)(1). Where the dividend is 25% or greater of the value of the subject security, UPC 11140(b)(2) applies, requiring that "the ex-dividend date shall be the first business day following the payable date." UPC 11140(b)(2).

F. Distributions Made Under the Plan

On November 18, 2014, the monitor issued a report[15] disclosing an "Estimated Unitholders' Distributed Cash on the Plan Implementation Date" of approximately USD $0.153 per share. (A6, ¶ 30) The report predicted a plan implementation date around January 8, 2015. (*Id.*) On December 11, 2014, AGIF published legal notices in the *Wall Street Journal*, the *Winnipeg Free Press*, and the *Globe & Mail*, announcing that the unitholder distribution record date would be December 18, 2014. (A553, A555, A557) On December 15, 2014, AGIF issued a press release announcing that "unitholders of the Fund as of December 18, 2014 will be entitled to receive the initial distribution from the Fund pursuant to the [Plan]," but adding that the distribution amount had not yet been established. (A6, ¶ 31) AGIF posted the press release, as well as a material change report, on SEDAR:[16]

> [AGIF] (the "Fund") announced on December 11, 2014 that unitholders of the Fund as of December 18, 2014 will be entitled to receive the initial distribution from the Fund pursuant to the Plan of Compromise or Arrangement . . . approved by the unitholders on August 11, 2014 (the "Plan"). The date and value of this distribution will be announced by way of a press release once such information is determined.

(A563) Due to the three-day processing period for securities sales, only purchasers on or before December 15, 2014, would have been registered unitholders as of the December 18,

[15] The monitor issued periodic reports for purposes of public disclosure regarding AGIF. (A6, ¶ 29)

[16] SEDAR is the electronic filing system for the disclosure documents of public companies and investment funds across Canada.

2014 record date. (A6-7, ¶ 32) AGIF did not notify FINRA of its planned dividend. As a result, FINRA did not set an ex-date for AGIF units. (A7, ¶¶ 33-34)

Beginning on December 16, 2014, plaintiffs began purchasing AGIF units on the OTC market from the selling unitholders who had acquired their shares prior to confirmation of the Plan. (A10, ¶ 50; A1400-02, ¶¶ 18-19) Plaintiffs continued to purchase units up to and including January 22, 2015. (A10-11, ¶¶ 50-55) The complaint does not allege that plaintiffs were unaware of AGIF's public disclosures. (A1-25; A39, ¶ 5)

On January 9, 2015, another press release announced that AGIF would implement the Plan as soon as possible:

> As previously announced by the Fund on December 15, 2014, the date and value of the initial distribution to unitholders of the Fund, as contemplated in the Plan, will be announced by way of a press release once such information is determined.

(A569) AGIF issued yet another press release on January 21, 2015, disclosing that the plan implementation date would be the next day, January 22, 2015, and that "unitholders of the Fund as of December 18, 2014 (the 'Record Date') were entitled to receive an initial distribution from the Fund pursuant to the Plan of $0.155570 USD per unit of the Fund held on the Record Date." (A44, ¶ 16; A571)

On January 22, 2015, AGIF distributed through a transfer agent $0.155570 USD per unit to the unitholders of record as of December 18, 2014. (A8, ¶¶ 39-40) At this time, AGIF units were trading at approximately $0.20 per unit. (*Id.*, ¶ 40) AGIF did not notify FINRA of the January 22 payable date. (*Id.*, ¶ 39) Given the three-day processing delay, plaintiffs allege that the de facto and unofficial ex-date for the dividend was December 16, 2014 – the day after the last day on which a holder would have had to purchase units in order to receive the dividend. (A6-7, ¶¶ 32-34; A8-9, ¶¶ 41-42) As plaintiffs began purchasing units on December 16, 2014, they did not receive the dividend. (A10, ¶¶ 47, 49-50)

On January 23, 2015, the Investment Industry Regulatory Organization of Canada ("IIROC") imposed a "trading halt" on AGIF units trading on the CSE, listing the reason for the halt as "Pending Company Contact." (A574) FINRA also halted trading of AGIF units on the OTC market, citing Halt Code "U1," which refers to "Foreign Regulatory Halt." (A579) IIROC and FINRA lifted the trading halts on January 28, 2015. (A9, ¶ 44) When trading resumed, the average unit price decreased by 75%, from a closing price of approximately $0.21 per unit on January 22, 2015, to $0.05 per unit. (A9, ¶ 45) The decrease in unit price reflected the loss of the right to a dividend. (*Id.*)

G. The Adversary Proceeding

On October 30, 2015, plaintiffs initiated the adversary proceeding by filing the complaint.[17] Plaintiffs assert that defendants "may pay dividends only with the approval of [FINRA] . . . and then only to holders of the securities that FINRA recognizes as having a right to receive the dividend in accordance with FINRA's rules." (A2, ¶ 1) According to plaintiffs, because the distributions were greater than 75% of the value of the security, UPC 11140(b)(2) applied, and plaintiffs were entitled to the dividend because they held units on the payable date (January 22, 2015), the day before the ex-date. (A10, ¶ 52) "[I]nstead of paying [p]laintiffs the almost $2 million in dividends they were entitled to receive, [defendants] paid the dividends to the parties who sold the units of AGIF to [p]laintiffs." (A2, ¶ 1) Plaintiffs allege that "Defendants violated securities rules and regulations by failing to disclose material information relating to AGIF's decision to pay dividends that caused the price of AGIF units to be wrongfully inflated by approximately 75% . . . resulting in steep losses to [p]laintiffs." (A2, ¶ 2) Plaintiffs further allege that individual defendant Adams, AGIF's Secretary, admitted in a telephone conversation on or about March 5, 2015, that "he

[17] *See Zardinovsky, et al. v. Arctic Glacier Income Fund, et al.*, Adv. No. 15-51732 (KG) (Bankr. D. Del.). (A1-25)

had observed after the issuance of the [December 15, 2014] Press Release that there was no change in the market price of AGIF units," that the press release "should have caused the share price to have fallen by 75% on December 16, 2014, the first day units supposedly began to trade without the right to receive the dividend," and "that despite this awareness . . . [d]efendants affirmatively decided not to take any corrective." (A16-17, ¶¶ 77-78) The complaint asserts six causes of action, including:

> **Counts I and II –** Common law negligence claims against all defendants based on (i) alleged breach of their duty under the FINRA Rules to pay dividends to plaintiffs; and (ii) alleged breach of their duty "to comply with all relevant statutes, rules, regulations, authorities and agreements concerning the establishment of the ex-date" in connection with the distribution. (A18-19, ¶¶ 85, 86, 89, 90)
>
> **Count III** – Breach of fiduciary duty against the individual defendants based on their alleged failure "to ensure that dividend payments intended for unitholders were paid to [p]laintiffs" as required by the FINRA Rules. (A19, ¶ 93)
>
> **Count IV –** Negligent misrepresentation against AGIF based on alleged failure "to disclose material information" related to the distribution, including: (i) that AGIF would disregard the FINRA Rules, (ii) that AGIF would "unilaterally establish the ex-date without the review and approval of a regulator or exchange," and (iii) that "the trading price of AGIF's stock had not appropriately adjusted downward to reflect" AGIF's decision to announce a record date but not an ex-date under the FINRA Rules. (A20, ¶¶ 97-98)
>
> **Count V** – Violation of FINRA Rules against AGIF for its alleged failure to disclose material facts including: its disregard of FINRA Rules, its unilateral establishment of the ex-date, and the fact that stock did not appropriately adjust downward after the unitholder distribution record date had passed. (A21, ¶¶ 104-107)
>
> **Count VI** – Common law fraud against AGIF for its alleged failure to comply with the FINRA Rules and to fully disclose the same material information mentioned above with regard to the claims for negligent misrepresentation and violation FINRA Rules. (A22-24, ¶¶ 114-123)

Plaintiffs seek compensatory damages on all counts, reasonable attorney fees and costs, prejudgment interest, punitive and treble damages, and the Plan distribution. (A24)

On January 21, 2016, defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). (A33-77) Following the completion of briefing (A1135-81; A1388-1412) and oral argument (*see* D.I. 15-3), the bankruptcy court dismissed the

complaint on two separate grounds: (i) the Plan's distribution procedure is a final adjudication that supersedes any conflicting obligations that plaintiffs seek to impose through the asserted claims; and (ii) the releases contained in the Plan and Orders barred plaintiffs' claims. *See Arctic*, 2016 WL 3920855 at *15-*21. On July 19, 2016, plaintiffs filed this appeal. (A1730)

III. STANDARDS OF REVIEW

The court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1), which provides for appeals of "final judgments orders, and decrees" of the bankruptcy court. 28 U.S.C. § 158(a)(1). The bankruptcy court's dismissal of the adversary proceeding is a final order. (A728-29) When reviewing an order, judgment, or decree on appeal from a bankruptcy court, the appellate court reviews the bankruptcy court's legal determinations *de novo*, its factual findings for clear error, and its exercise of discretion for abuse thereof. *See In re United Healthcare Systems Inc.*, 396 F.3d 247, 249 (3d Cir. 2005). Where an issue involves mixed questions of law and fact, the appropriate standard is either plenary review or utilization of a mixed standard. *See The Hertz Corp. v. ANC Rental Corp. (In re ANC Rental Corp.)*, 280 B.R. 808, 814 (D. Del. 2002), *aff'd In re ANC Rental Corp.*, 57 Fed. Appx. 912 (3d Cir. 2003).

IV. ISSUES RAISED ON APPEAL

Plaintiffs assert the following issues on appeal: (i) whether the bankruptcy court erred in holding that the doctrine of *res judicata* bars plaintiffs' claims, even though the Plan and Orders did not address the legal obligations on which they base their claims; (ii) whether the bankruptcy court erred in holding that the doctrine of *res judicata* bars plaintiffs' claims, even though the violations of law on which plaintiffs base their claims post-dated the Plan and Orders; and (iii) whether the bankruptcy court erred in holding that the releases contained in the Plan and Orders bar plaintiffs' claims, even though enforcement of the

releases would violate the Due Process Clause of the U.S. Constitution. (D.I. 8 at 3)

V. DISCUSSION

A. The Plan and Orders Preclude Plaintiffs' Claims

1. Doctrine of *Res Judicata* bars plaintiffs' claims

In opposition to the motion to dismiss, plaintiffs did not dispute that, as a matter of law, defendants were required, under both U.S. and Canadian law, to comply with every aspect of the Plan, including making distributions to unitholders in accordance with the Plan.[18] Nor do the parties dispute that defendants in fact made distributions in accordance with the Plan's procedures. (*See* A1157, ¶ 51 (arguing plaintiffs "do not to hold [d]efendants liable because of any acts **in accordance with** the Plan and Recognition Order") (emphasis in original)) Rather, plaintiffs argued that defendants had "concurrent and additional obligations" not addressed by the Plan with respect to making the distributions, including taking steps to comply with FINRA requirements, and that defendants' failure to comply with those additional obligations predicated the claims in the complaint. Because the Plan neither address the alleged concurrent and additional FINRA compliance obligations nor posed any conflict, plaintiffs argued that the Plan did not preclude their claims. (*See id.*)

The bankruptcy court rejected this argument, determining "the Plan's distribution procedure is an adjudication, and to the extent that there is a conflict between that adjudication and the FINRA Rules, the Plan will supersede." *Arctic*, 2016 WL 3920855 at *15. Because plaintiffs' claims sought to impose additional duties on defendants based upon FINRA Rules, the bankruptcy court determined plaintiffs' claims must be dismissed. *See id.* at *16-*17. The bankruptcy court concluded that the imposition of any such

[18] *See* 11 U.S.C. § 1142 (debtor "shall carry out the plan and shall comply with any orders of the court"); A974-76 (debtor must "generally do all such acts and things in relation to [its] property and the distribution of the proceeds among [its] creditors as may be . . . directed by the court by any special order.").

additional obligations would conflict with the Plan, which provided "one, and only one" procedure for making distributions. *See id.* "In other words, when faced with conflicting obligations under the Plan and the FINRA Rules, [d]efendants must follow the former, notwithstanding the latter." *Id.*

Plaintiffs continue to argue on appeal that defendants failed to comply with additional obligations outside of the Plan's distribution procedures which included disclosures under the FINRA Rules. (*See* D.I. 8 at 20-21) Plaintiffs argue that there was "nothing in the Plan that eliminated [defendants'] common law and statutory obligations to make" the FINRA disclosures, nor did the Plan establish a "comprehensive scheme delineating exactly what information [defendants] were and were not required to disclose to potential investors," thus the Plan did not preclude the disclosure obligations. (*Id.* at 22) Conversely, defendants argue that the Plan established an exclusive procedure for distributions and that the bankruptcy court reached the correct conclusion under well settled case law that plaintiffs claims were precluded by the Orders under the doctrine of *res judiciata*. (*See* D.I. 10 at 17)

Res judicata "gives dispositive effect to a prior judgment if a particular issue, although not litigated, could have been raised in the earlier proceedings." *Bd. of Trs. of Trucking Emps. of N.J. Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 504 (3d Cir. 1992). This equitable doctrine requires: "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privities; and (3) a subsequent suit based on the same cause of action." *Id.* (citations omitted). For claim preclusion purposes, a plan confirmation order is a final order on the merits. *In re Bowen*, 174 B.R. 840, 846 (Bankr. S.D. Ga. 1994) ("An order confirming a plan of reorganization possesses all the requisite elements of common law *res judicata*.")

The court agrees the Plan sets forth an exclusive procedure for distribution to unitholders in section 6.2 (A168), and it is a final order on the merits. *See E. Minerals &*

Chem. Co. v. Mahan, 225 F.3d 330, 334 (3d Cir. 2000). To the extent plaintiffs assert that defendants failed to satisfy their obligations under the Plan, the Plan imposed no obligations on defendants to comply with FINRA Rules or any authority outside the CCAA and court orders. *In re Howe*, 913 F.2d 1138, 1143 (5th Cir. 1990) (stating it is "well settled that a plan is binding upon all parties once it is confirmed and that all questions that could have been raised pertaining to such plan are *res judicata*"). To the extent plaintiffs assert that the Plan's distribution procedure omitted important procedures under the FINRA Rules, which defendants were required to undertake, plaintiffs are barred from re-litigating any aspect of the Plan, including its distribution procedures. *In re Szostek*, 886 F.2d 1405, 1408, 1413 (3d Cir. 1989) (confirmed plan is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation); 11 U.S.C. § 1127. To the extent plaintiffs assert that the Plan's distribution procedures conflicted with FINRA Rules, directing distributions to the wrong unitholders, the Plan must supersede. *See Bowen*, 174 B.R. at 847 ("the binding effect of a confirmed plan of reorganization is such that *res judicata* applies even when the plan contains provisions that are arguably contrary to applicable law . . . [c]onsequently, challenges to a confirmed plan of reorganization which allege that the plan is contrary to applicable law, either bankruptcy or otherwise, are bound to be unsuccessful."); *Karathansis v. THCR/LP Corp.,* 2007 WL 1234975, *5 n.18 (D.N.J. Apr. 25, 2007), *aff'd* 298 Fed. App'x 120 (3d Cir. 2008) (prior decision interpreting "UPC 11140 as to trump the confirmed plan constitutes an errant conclusion of law"). The bankruptcy court correctly concluded that the *res judicata* effect of the Plan and Orders preclude plaintiffs' claims.

Plaintiffs further argue that, in reaching the conclusion that their claims are barred under the doctrine of *res judicata*, the bankruptcy court overlooked a critical fact: all events on which plaintiffs base their claims occurred after the confirmation of the Plan. (*See* D.I. 8

at 15) According to plaintiffs, "it is well settled law that the doctrine of *res judicata* is inapplicable to claims based on post-confirmation acts" and, therefore, the Plan and Orders could not have addressed or resolved plaintiffs' claims. (*Id.*; D.I. 16 at 2-3) Plaintiffs cite *Donaldson* and *J&K Adrian Bakery* in support, but both cases are factually distinguishable and involved unrelated post-confirmation wrongful conduct.

In *Donaldson,* the bankruptcy court approved a chapter 11 plan requiring two principals of a corporation, who were its sole officers and shareholders, to guarantee payments to taxing authorities for which they were personally liable, along with partial payments on account of unsecured claims. *See Donaldson v. Bernstein*, 104 F.3d 547, 554 (3d Cir. 1997). After paying the tax obligations, the reorganized debtor failed to make remaining payments as required by the plan, claiming that adverse business conditions caused it to miss its payments. Thereafter, the chapter 11 case was reopened and converted to chapter 7. *See id.* at 551. The chapter 7 trustee filed an action against defendants alleging that they obtained confirmation of the plan under false pretenses, knowing they would not fund the plan after payment of the tax debts for which they were personally liable, and seeking damages on the basis of post-confirmation breach of fiduciary duty for allegedly having diverted business opportunities and funds from the reorganized debtor to a separate company they owned and controlled. The *Donaldson* court determined that the action was not barred by the doctrine of *res judicata* because "claims for post-confirmation acts are not barred by the *res judicata* effect of the confirmation order." *Id.* at 555. Unlike this case, however, defendants in *Donaldson* failed to comply with the terms of the chapter 11 plan. *See id.* ("[t]he gravamen of the trustee's complaint is that [defendants] breached their fiduciary duty after plan confirmation by failing to comply with [the plan] and by diverting [debtor's] business opportunities).

In *J&K Adrian Bakery,* the court considered whether to dismiss a complaint asserting

claims relating to a chapter 11 debtor's alleged damage to property it occupied under a commercial lease. *See J&K Adrian Bakery, LLC v. Dayton Superior Corp. (In re Dayton Superior Corp.)*, 2013 WL 153744, *1 (Bankr. D. Del. Jan. 15, 2013). The debtor confirmed a chapter 11 plan in October 2009, which required rejection damages claims to be filed within 30 days of the date debtor vacated the leased premises. *Id*. In November 2009, plaintiff filed a rejection damages claim. *Id*. at *2. In August 2010, following negotiations, the bankruptcy court entered a stipulated order resolving the amount of plaintiff's rejection damages claim. *Id*. However, debtor failed to vacate the property until January 2011, during which period the property damage occurred. *Id.* While the confirmation order barred all claims not filed within a specified period "unless otherwise ordered by this court," the court permitted the action for post-confirmation property damage to go forward based upon, *inter alia*, (i) the court's authority to "otherwise order" under the express language of the confirmation order, and (ii) the court's analysis of equitable considerations. *Id*. at *5.

The doctrine of *res judicata* is meant to give dispositive effect to a prior judgment of a particular issue, which although not litigated could have been raised in the earlier proceedings. (*See id*.) Here, the distribution procedure issues were addressed before Plan confirmation and entry of the Orders. Upon confirmation, the Plan's distribution procedure became a final judgment that was binding on all parties and cannot be re-litigated. The cases cited by plaintiffs involve different facts and do not require a different result.

2. Plaintiffs offer no way to harmonize conflicting obligations under the Plan and FINRA Rules

Plaintiffs further argue on appeal that the bankruptcy court erred in ruling that the Plan must supersede the FINRA Rules because there is no conflict between the two. (*See* D.I. 8 at 16-20) According to plaintiffs, the Plan and FINRA Rules address the same post-confirmation issue – dividend distributions – and the bankruptcy court was required to

harmonize them under the Third Circuit's ruling in *Karathansis*. (*See id.* at 12) The bankruptcy court considered whether the Plan's distribution procedures could be harmonized with FINRA Rules under plaintiffs' suggested approaches and concluded they could not be harmonized. *See Arctic*, 2016 WL 3920855 at *15-*17. Plaintiffs argue this holding was in error because nothing in the Plan precluded compliance with FINRA Rules, and defendants could have sought FINRA approval and paid the dividend in accordance with FINRA Rules under two different approaches. First, plaintiffs argue that distribution in separate "tranches" was permissible under the Plan and would have enabled compliance with FINRA. (*See id.* at 16-17) Plaintiffs further argue that defendants could have made distributions to both the selling unitholders under the Plan **and** to plaintiffs under the FINRA Rules. (*See id.* at 19) Despite the fact that some distributions would have been made twice, plaintiffs argue this was not only permissible under the Plan but also required under Third Circuit law. Because compliance with FINRA Rules would conflict with the terms of the Plan and Orders, the court finds no error in the bankruptcy court's conclusion that the two cannot be harmonized and the Plan must supersede.

a. Requiring payment in tranches would conflict with the Plan

Defendants' dividend payment amounted to approximately 75% of the value of the subject security. (A8, ¶ 40) In opposition to the motion to dismiss, plaintiffs argued that defendants could have made distributions in "tranches" or separate, smaller distributions (*e.g.*, 24%, 24%, and 3%) without running afoul of the FINRA Rules. (*See* D.I. 15, 4/19/16 Hr'g. Tr. at 48:7-14; 80:9-13) A dividend payment of 24% of the value of the subject security would have invoked UPC 11140(b)(1), rather than UPC 11140(b)(2). Subsection (b)(1), which applies to smaller dividends, provides that "the date designated as the 'ex dividend' date shall be the second business day preceding the record date . . ." UPC 11140(b)(1). As the bankruptcy court observed, the procedure defendants followed when

announcing and distributing dividends in December 2014 through January 2015 was consistent with both subsection (b)(1) of UPC 11140 and the Plan:

> On Monday, December 15, 2014, [d]efendants announced that Thursday, December 18, 2014, would be the Unitholder Distribution Record Date. Given that the OTC sale process takes three days, the de facto ex-date thus became Tuesday, December 16, 2014, i.e., this was the date as of which a new security holder would not be entitled to the dividend. UPC 11140(b)(1) also selects December 16 as the ex-date because it is exactly two days before the December 18 Unitholder Distribution Record Date. As the actual dividend distribution occurred on January 22, 2015, the procedure followed by AGIF was also consistent with the Plan, which requires that "the Transfer Agent shall distribute each Unitholder Distribution . . . to each Registered Unitholder, as of the applicable Unitholder Distribution Record Date," [which must be] "at least 21 days prior to a contemplated Unitholder Distribution."

Arctic, 2016 WL 3920855 at *15 (internal citations and footnotes omitted). Thus, as the bankruptcy court determined, for distributions of 24% or less, there is no conflict between UPC 11140(b)(1) and the Plan's distribution procedures, as both allocate the distribution to the same unitholders. However, where, as here, the dividend is 25% or greater of the value of the subject security, UPC 11140(b)(2) applies, requiring that "the ex-dividend date shall be the first business day following the payable date." UPC 11140(b)(2). Under subsection (b)(2), the ex-date would be January 23, 2015, the day **after** the payable date of January 22, 3015, whereas the Plan required that the unitholder distribution record date – "the dividing line between recipients and non-recipients of the distribution" – occur at least 21 days **before** the payable date. Thus, for larger dividends, such as the dividend at issue, here, the FINRA Rules plainly conflict with the Plan's distribution procedures. *Arctic*, 2016 WL 3920855 at *15-*16.

In opposition to the motion to dismiss, plaintiffs argued that distribution via multiple smaller tranches was both permissible under the Plan and would have harmonized the Plan with FINRA Rules. (*See* D.I. 15, 4/19/16 Hr'g. Tr. at 48:7-14; 80:9-13) The bankruptcy court could not reconcile plaintiffs' suggestion with the Plan for several reasons. First, the

tranches proposal "places a limitation on the Plan's dividend procedure" whereas "the Plan makes no distinction between small and large dividends" and "[i]ts procedure is clearly intended to apply to any dividend, of whatever size." *Arctic*, 2016 WL 3920855 at *16. Moreover, the bankruptcy court concluded that "[t]o impose on the Plan FINRA's distinction between small and large dividends is to conclude that the Plan is not comprehensive as to its distribution procedure, even though it indicates that it is." *Id.* To do so also would have "limit[ed] the Monitor's discretion in making distributions, contrary to the Sanction Order's prohibition of such limitations," thus the bankruptcy court concluded that plaintiffs' tranches proposal did not offer a way to harmonize the Plan. *Id.*

On appeal, plaintiffs argue that there was no basis for the bankruptcy court to conclude that the Plan was comprehensive, as it does not set forth the number of dividend payments, the amounts of the payments, the currency in which payments must be made, or what was to occur during the period between Plan confirmation and the distribution to unitholders. (*See* D.I. 8 at 18) Plaintiffs further argue that the Sanction Order did not "prohibit limitations" on the monitor's discretion – rather, the bankruptcy court inferred this – and with respect to post-confirmation events, all inferences should be drawn in favor of interpreting a bankruptcy Plan in a manner consistent with statutes and regulations. (*See id.* at 17-18). Conversely, defendants argue that the Plan does not allow for the monitor to modify the amount or timing of distributions, and the bankruptcy court properly held that the Plan presented "one, and only one" path for making distributions. (*See* D.I. 10 at 19)

The court agrees that the Plan permits no limitation on the monitor's discretion, is comprehensive as to its distribution procedure, and does not include a procedure for separate distributions. In accordance with the Sanction Order, the monitor is obligated only to follow the CCAA, the Plan, and the Orders. (A598, ¶ 34 (the monitor or CPS "shall be exclusively authorized and empowered to [make distributions], to the exclusion of all other

Persons, including the Arctic Glacier Parties, and without interference from any other Person.")) As the bankruptcy court notes, where the Plan imposes applicable law requirements, it does so explicitly. *Arctic*, 2016 WL 3920855 at *16 (citing Plan at A170-72, §§ 6.10(a), 6.10(b), 6.11, 6.13). The Plan does not subject the monitor to any applicable law requirements in discharging its obligations under the distribution procedures set forth in section 6.2. (A168) The Plan is also comprehensive. Section 8.3 and Schedule "B" of the Plan provide a sequence of steps that must begin on the plan implementation date – the date on which funds are transferred to pay unitholder distributions. (*See* A157, §1.1; A168, § 6.2 (setting forth distribution procedure); A187-A197, Sch. B (listing 29 separate steps for distribution) The Plan's distribution procedure plainly does not contemplate distribution in separate tranches. The Plan requires the monitor to "transfer amounts as determined by the Monitor in accordance with the [Plan] . . . from the Unitholders' Distribution Cash Pool . . . to the Transfer Agent." (A167-68, §§ 2.6, 6.2) The unitholders' distribution cash pool is defined as "an amount equal to the Available Funds less the amounts used to fund the: (a) Administrative Cost Reserve; (b) Insurance Deductible Reserve; (c) Unresolved Claims Reserve; and (d) Affected Creditors' Distribution Cash Pool." (*Id.*) These provisions are a mathematical formula with which the monitor was required to comply in order to make the distribution. The explicit language of the Plan permits no modification with respect to either the amount or timing of a distribution. The cases cited by plaintiffs do not require a different conclusion.[19]

[19] Of the cases cited by plaintiffs that required application of a provision of a confirmed bankruptcy plan, all are distinguishable. The only such case cited within this circuit is *Sunbeam-Oster Co. v. Lincoln Liberty*, 145 B.R. 823 (W.D. Pa. 1992). In that case, the court considered whether the bankruptcy court had erred in awarding interest on an allowed claim where the confirmed plan was silent on the issue. Other cases cited by plaintiffs required the court to determine whether the confirmed plan conflicted with another court order, not FINRA rules. *See Dana Corp. v. Fireman's Fund Ins. Co.*, 169 F. Supp. 2d 744 (N.D. Ohio 1999); *In re Diaz*, 459 B.R. 86 (Bankr. C.D. Cal. 2011). In *Miller v. U.S. (In re*

b. Requiring separate distributions to plaintiffs would violate Plan

In opposition to dismissal, plaintiffs argue that a second way to harmonize the Plan with FINRA Rules was to require distributions under both the Plan and FINRA Rules, even if that results in paying some dividends twice – once to the selling unitholders and once to plaintiffs – and cited the *Karathansis* case in support. (*See* A1158-59, ¶¶ 57-60) The bankruptcy court rejected plaintiffs' argument, concluding that a separate distribution to plaintiffs would violate the Plan and Orders. *See Arctic*, 2016 WL 3920855 at *17. The bankruptcy court observed that paying twice would violate the Sanction Order "by impos[ing] an obligation on the Monitor that the Monitor did not choose." (*Id.* (citing Sanction Order ¶ 34)) Moreover, "[i]t would constitute an additional step in the Plan's distribution procedure, something the Plan does not allow." (*Id.* (citing A174, ¶ 8.3; A187, Sch. B))

On appeal, plaintiffs argue that, under *Karathansis,* the bankruptcy court was required, but failed, to harmonize the Plan with the FINRA Rules which would require distribution to plaintiffs. (*See* D.I. 8 at 13) Although this would result in making some distributions twice, plaintiffs argue that this was the solution reached in the *Karathansis* case, which was affirmed by the Third Circuit and is binding authority. (*See id.*) According

Miller), 284 B.R. 121 (N.D. Cal. 2002), the court was required to address an ambiguous plan provision and interpreted the provision in accordance with the Bankruptcy Code.

Neither *Holywell Corp. v. Smith*, 503 U.S. 47 (1993), nor *Ohio v. Kovacs*, 469 U.S. 274 (1985), involved the application of any provision of a confirmed plan. In *Holywell*, the trustee of the estate was required to file tax returns as the assignee of property of the estate despite the fact that the plan was silent about the payment of income tax. *See Holywell*, 503 U.S. at 47. In *Kovacs*, the state filed a complaint seeking a declaration that debtor's obligation to clean up a waste disposal site was not dischargeable in bankruptcy, and the Supreme Court held that the obligation was a "debt" or "liability on a claim" subject to discharge. *See Kovacs*, 469 U.S. at 274. Plaintiffs cite the following statement by the court: "[W]e do not question that anyone in possession of the site – whether it is [the debtor] or another . . . – must comply with the environmental laws of the State of Ohio" (D.I. 8 at 14), but it is unclear how this case supports plaintiffs' position.

to plaintiffs, neither the bankruptcy court nor the defendants identified any substantive difference between AGIF's Plan and the bankruptcy plan at issue in *Karathansis,* and the bankruptcy court distinguished that case without any basis for doing so. (*See id.* at 19; D.I. 16 at 9).

Conversely, defendants argue that plaintiffs' proposal would "harm the unitholders who did not trade their units by reducing later distributions" and "subject [defendants] to liability for not following the Plan from unitholders who did not receive their pro rata share." (D.I. 10 at 22-23) Defendants assert that an express purpose of the Plan was "to provide for the distribution of any surplus of the Available Funds to each Unitholder in the amount of their Pro Rata Share." (*See* A162, § 2.1(c)) The term "Pro Rata Share" is defined in the Plan as "the percentage that the Trust Units held by a Unitholder at the applicable Unitholder Distribution Record Date bears to the aggregate of all Trust Units, calculated as at the applicable Unitholder Distribution Record Date." (A157, § 1.1) According to defendants, "[p]aying a distribution twice would violate these provisions because each unitholder then would not receive its pro rata share as of the applicable record date," which would necessarily subject defendants to liability for failure to comply with the Plan. (See D.I. 10 at 23) Defendants further argue that plaintiffs have misconstrued the holding of *Karathansis*, which they contend did not require the Plan and FINRA Rules to be harmonized and did not suggest that defendants were obligated to follow the FINRA Rules. (*See* D.I. 10 at 21)

In *Karathansis*, former shareholders claimed they were entitled to receive a distribution under a bankruptcy plan because they held shares on the record date established by the plan, even though they sold their shares before the effective date of the plan. *See Karathansis*, 2007 WL 1234975 at *1. The debtors disagreed, arguing that under UPC 11140 (the same rule plaintiffs rely on here), distributions must be paid to subsequent

purchasers, and not to the holders as of the record date (as required by the plan). *See id.* at *4. The bankruptcy court in that case ruled that the FINRA Rules trumped the plan and that the dividend should be distributed to the purchasing shareholders. *See id.* On appeal, the district court reversed the bankruptcy court's ruling, holding that (1) the FINRA Rules did not supersede the plan, and (2) the plan allocated the dividend to selling shareholders and thus the selling shareholders should be paid the dividend. *See id.* at *8. *Karathansis* therefore supports the bankruptcy court's ruling that defendants were obligated to make distributions in accordance with the Plan, notwithstanding the FINRA Rules.

Plaintiffs argue that this reading of the *Karathansis* decision is "incomplete" and that it "disregards the ruling that the FINRA rules and the terms of the Plan had to be harmonized" and that "compliance with both FINRA rules and the Plan was necessary to harmonize the two." (*See* D.I. 8 at 13-14, n.5) The court disagrees. While the *Karathansis* court noted that the plan and UPC 11140 could be read in harmony and also "recognize[d] that the net effect of its holding is that the Debtor may have to pay twice," this was only because the debtors in that case had already mistakenly made distributions under the FINRA Rules and were now required to pay according to the "plain and unambiguous" terms of the bankruptcy plan, which controlled.[20] *Karathansis* does not suggest that, had the debtors paid first in accordance with the plan, debtors would have been required to pay again in order to satisfy the FINRA Rules – the outcome that plaintiffs espouse here. *Karathansis* does not provide a basis for the relief that plaintiffs seek in the complaint.

Under well settled case law, defendants had a duty to comply with the Plan – not the FINRA Rules. *See Howe*, 913 F.2d at 1143 (it "is well settled that a plan is binding upon all

[20] Importantly, the *Karathansis* court did not address the possible unjust enrichment that could arise from such an outcome and remanded to the bankruptcy court for further proceedings. *See Karathansis*, 2007 WL 1234975, at *9.

parties once it is confirmed"); *see Karathansis*, 2007 WL 1234975 at *9 (holding FINRA Rules did not supersede plan). The court agrees with the bankruptcy court's conclusion that the FINRA Rules imposed conflicting obligations on defendants – not "concurrent and additional obligations" – and that the Plan controls. Absent the Plan being procured by fraud, or plaintiffs establishing a due process violation, the doctrine of *res judicata* bars plaintiffs from now contesting the Plan's distribution procedure, "even if only to argue that the procedure omits important steps that [d]efendants should have been required to take." *Arctic*, 2016 WL 3920855 at *17. While *res judicata* is a sufficient basis to affirm the bankruptcy court's dismissal of the complaint, the court will also consider the merits of plaintiffs' appeal of the bankruptcy court's conclusion that the releases contained in the Plan and Orders provided an additional basis for dismissal.

B. Plaintiffs' Claims Are Barred by Releases in the Orders and Plan

1. Discharges and releases

The Plan and Orders contained broad release provisions shielding defendants from liability for any actions or omissions related to, arising out of, or connected with the Plan.

a. The Plan

Section 9.1 of the Plan contains the following broad release:

> **On the Plan Implementation Date** and in accordance with the sequential steps and transactions set out in Section 8.3 of the [Plan], **the Arctic Glacier Parties**, the Monitor, Alvarez and Marsal Canada Inc. and its affiliates, the CPS, **the Trustees, the Directors and the Officers**, **each and every present and former employee** who filed or could have filed an indemnity claim or a DO&T Indemnity Claim against the Arctic Glacier Parties . . . and any Person claiming to be liable derivatively through any or all of the foregoing Persons (the "**Releasees**") **shall be released and discharged from any and all demands, claims, actions, causes of action**, counterclaims, suits, . . . and other recoveries **on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert**, . . . whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, **existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the**

> **date on which actions are taken to implement the [Plan] that are in any way related to, or arising out of or in connection with the Claims, the Arctic Glacier Parties' business and affairs whenever or however conducted, the [Plan], the CCAA Proceedings**, any Claim that has been barred or extinguished pursuant to the Claims Procedure Order or the Claims Officer Order . . . **and all claims arising out of such actions or omissions shall be forever waived and** released (other than the right to enforce the Arctic Glacier Parties' obligations under the [Plan] . . .) **all to the full extent permitted by applicable law**,[21] provided that **nothing in the [Plan] shall release or discharge a Releasee from any obligation created by or existing under the [Plan] or any related document**.

(A175-76, § 9.1 (emphasis added)) This release is effective as of the plan implementation date (January 22, 2015).[22]

b. The Sanction Order

The Canadian court explicitly approved the Plan's broad release provision in the Sanction Order: "[T]he Plan (including without limitation the . . . releases set out therein) is hereby sanctioned and approved pursuant to the CCAA." (A588 ¶ 9; *see also* A595, ¶ 28 (ordering and declaring that "the releases contemplated by the Plan are approved"); A589, ¶ 11 (implementing releases as of the plan implementation date)) The Sanction Order also included broad authorization and approval of any steps and actions taken by defendants that are related to distributions:

> THIS COURT ORDERS that the Monitor, the Transfer Agent **and any other Person** required to make any distributions, payments, deliveries or allocations or take any steps or actions related thereto pursuant to the Plan **are hereby authorized and directed to complete such distributions**, payments, deliveries or allocations and to take any such related steps or actions, as the case may be, in accordance with the terms of the Plan, **and such distributions, payments, deliveries and allocations, and the steps and actions related thereto, are hereby approved**.

[21] The Plan defines "Applicable Law" as:

> any law, statute, regulation, code, ordinance, principle of common law or equity, municipal by-law, treaty, or order, domestic or foreign . . . having the force of law, of any Government Authority having or purporting to have authority over that Person, property, transaction, event or other matter and regarded by such Government Authority as requiring compliance.

(A151, § 1.1)

[22] A8-9, ¶¶ 39, 45 (asserting "Plan Implementation Date" is January 22, 2015).

(A591, ¶ 16 (emphasis added)) The Sanction Order also specifically released all claims arising out of payment of the distribution:

> THIS COURT ORDERS that **none of the Monitor, the CPS, the Trustees, the Arctic Glacier Parties, or any individuals related thereto shall incur any liability as a result of payments and distributions to Unitholders**, in each case on behalf of AGIF, once such distribution or payment has been made by the Monitor to, and confirmation of receipt has been received by the Monitor from, the Transfer Agent.

(A600-01, ¶ 40 (emphasis added)) The Sanction Order further deems each unitholder as having consented to the provisions of the Plan in their entirety, including the releases, and provides that if there is any conflict between the Plan and any other agreement, the Plan shall control:

> THIS COURT ORDERS that, as of the Plan Implementation Date [*i.e.*, January 22, 2015], **each** Affected Creditor and **Unitholder shall be deemed to have consented and agreed to** all of the provisions of the Plan in their entirety, and, in particular, each Affected Creditor and **Unitholder shall be deemed**: (a) **to have granted, executed and delivered** to the Monitor and the Arctic Glacier Parties all documents, consents, **releases**, assignments, waivers or agreements, statutory or otherwise, required to implement and carry out the Plan in its entirety; and (b) to have agreed that if there is any conflict between the provisions of the Plan and the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor or Unitholder and the Arctic Glacier Parties as of the Plan Implementation Date, the provisions of the Plan take precedence and priority, and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

(A592, ¶ 19 (emphasis added)) Finally, paragraph 29 of the Sanction Order provides an injunction applicable to all "Releasees," which, as defined in § 9.1 of the Plan, includes all defendants:

> THIS COURT ORDERS that **all Persons** shall be permanently and forever barred, estopped, stayed and **enjoined, from and after the Effective Time** [*i.e.*, 12:01 a.m. on the Plan Implementation Date of January 22, 2015], in respect of **any and all Releasees**, from: (i) commencing, conducting or continuing in any manner, directly or indirectly, **any action, suits, demands or other proceedings of any nature or kind whatsoever** (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) **against the Releasees** . . . (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suit or demand, including without limitation by way of contribution or indemnity or other relief, in common law or in equity, for breach of trust or breach of fiduciary duty, under the provisions of any statute or regulation, or other proceedings or any nature

> or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Releases . . . or (v) taking any actions to interfere with the implementation or consummation of the Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan.

(A595-96, ¶ 29)

c. The Recognition Order

Pursuant to the Recognition Order, the bankruptcy court gave all provisions in the Sanction Order "full force and effect in the United States" and further declared that no liability can arise from AGIF's compliance with the Plan: "Neither the Debtors nor the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and this Sanction Recognition Order." (A465, ¶ 9) The Recognition Order further: grants defendants a broad release that was substantially the same as the one in the Plan, discharging any claims "whether known or unknown, matured or unmatured" arising out of or "in any way related" to the Plan, the bankruptcy proceedings, or AGIF's business affairs:

> Debtors . . . the Trustees, the Directors and the Officers . . . shall be released and discharged from any and all demands . . . including any and all claims . . . whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereinafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the [Plan] that are in any way related to, arising out of or in connection with the Claims, the Debtor's business and affairs whenever or however conducted, the Plan, the Canadian Proceedings and the Chapter 15 Cases . . .

(A463-64, ¶ 5)

2. The releases are sufficiently broad to bar plaintiffs' claims

In opposition to dismissal, plaintiffs argued that the release in paragraph 9 of the Recognition Order, which states that AGIF shall not "incur any liability as a result of acting in accordance with the terms of the Plan and this Sanction Recognition Order," is inapplicable to their claims because plaintiffs "do not seek to hold [d]efendants liable because of any

acts **in accordance with** the Plan and Recognition Order." (A1157, ¶ 51 (emphasis in original)) Rather, plaintiffs asserted "liability is predicated on defendants' disregard of its concurrent and additional obligations under U.S. law that did not conflict in any respect with the Plan or Recognition Order." (*Id.*)

The bankruptcy court determined that the releases contained in the Plan and Orders were sufficiently broad to encompass plaintiffs' claims, which are all "predicated on not having received distributions." *See Arctic*, 2016 WL 3920855, at *18. In reaching this conclusion, the bankruptcy court observed that the releases: took effect on the plan implementation date of January 22, 2015 (A175-76, § 9.1; A589, ¶ 11; A592, ¶ 19; A595-96, ¶ 29); covered the period during which the alleged acts of misconduct occurred (December 2014 through January 22, 2015, when defendants made the distribution) (A463-64, ¶ 5); prohibited all claims against defendants "in any way related to, or arising out of or in connection with the Claims, the Arctic Glacier Parties' business and affairs whenever or however conducted, the [Plan], the CCAA Proceedings. . ." (A175-76, ¶ 9.1; *see also* A463 at ¶ 5); specifically prohibited "any liability as a result of payments and distributions to Unitholders . . ." (A600-01, ¶ 40); and included any actions or omissions (A175-76, § 9.1 ("all claims arising out of such actions or omissions shall be forever waived and released"). *See Arctic*, 2016 WL 3920855 at *18 (summarizing releases). The bankruptcy court rejected the "concurrent and additional obligations" argument in the context of the releases as well. *See id.* The bankruptcy court concluded that plaintiffs' claims, predicated on not having received the distributions, "clearly relate to, arise out of, or are in connection with the Plan's distribution procedure, whether the procedure as implemented involved actions taken for the benefit of the Selling Unitholders, or omissions of actions that would have benefitted [p]laintiffs." *Id.* at *18 (holding such actions call within § 9.1 of the Plan). The court finds no basis to disturb this conclusion. Plaintiffs' briefing on appeal does not substantively address

the scope of the releases. Rather, plaintiffs assert that they are either not bound by the releases or that any enforcement of the releases would be in violation of their rights to due process. The court finds no merit in plaintiffs' additional arguments addressed below.

3. Plaintiffs are bound by the releases

In opposition to the motion to dismiss, plaintiffs argued that they were not bound by the releases because their claims arose after the dates that the Plan and Confirmation Orders were entered, and they had no connection to defendants as of those dates. (*See* A1154-56) The bankruptcy court rejected this argument, holding that the Plan was binding not only on the unitholders who voted to approve the Plan and participated in the bankruptcy proceedings, but also on their "successors and assigns" which include plaintiffs. *Arctic*, 2016 WL 3920855 at *19. On appeal, plaintiffs argue that the bankruptcy court "erred because it assumed, without undertaking an appropriate analysis, that the [selling unitholders] assigned [to plaintiffs] rights and obligations under the Plan (or that [defendants] somehow succeeded to such rights and obligations)" but "did not explain this or identify a recognized test for what constitutes an assignment." (D.I. 8 at 24) The court disagrees that the bankruptcy court did not undertake an appropriate analysis. In reaching its conclusion that plaintiffs stepped into the shoes of the selling unitholders, and acquired no greater rights than the selling unitholders, the bankruptcy court relied on the *KB Toys* case, affirmed by the Third Circuit. *See Arctic*, 2006 WL 3920855 at *20 (citing *In re KB Toys*, 470 B.R. 331, 343 (Bankr. D. Del. 2012), *aff'd*, 736 F.3d 247 (3d Cir. 2013)).

In *KB Toys*, a chapter 11 trustee objected to proofs of claim filed by a purchaser of debtors' trade claims ("ASM") on the ground that the original claimants, from whom ASM purchased its claims, were in possession of avoidable preferences that they had yet to turn over or repay, thus the purchased claims must be disallowed under section 502(d) of the Bankruptcy Code. *See KB Toys*, 470 B.R. at 331. Under section 502(d), a bankruptcy

claim is disallowed if a claimant receives property that is avoidable or recoverable by the bankruptcy estate. *See* 11 U.S.C. § 502(d). In objecting to the claims, the trustee did not allege that ASM itself received an avoidable transfer, but rather that ASM's claims must be disallowed because each original claimant received a preferential transfer before transferring its claim to ASM. Conversely, ASM argued its claims should not be disallowed under section 502(d) because: (i) "any claim of any entity" as used in section 502(d) referred only to the claimant and, consequently, the disability was a personal allowance that remained with the original claimant; and (ii) its claims were entitled to protections of a good faith purchaser under section 550(b)[23] of the Bankruptcy Code.

The bankruptcy court disallowed ASM's claims, concluding that a claims purchaser holding a trade claim is subject to the same section 502(d) challenge as the original claimant: as the bankruptcy court put it, under section 502(d), "[d]isabilities attach to and travel with the claim." *Id.* at 335. In reaching this conclusion, the bankruptcy court carefully examined the text of the statute and the legislative history of section 502(d), noting that its predecessor, section 57g of the 1898 Bankruptcy Act, dealt with the right of a creditor to share in the debtor's assets within the distributive scheme of the statute, and provided that claims were not allowed until the creditor surrendered the preferential transfers to the estate. *Id.* at 336. Because section 57g established the basis for allowance or disallowance of particular claims, the legislative history supported a consistent interpretation

[23] Section 550 of the Bankruptcy Code governs the liability of a transferee of an avoided transfer, and subsection (b) provides that: "[t]he trustee may not recover . . . from a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or any immediate or mediate good faith transferee of such transferee." 11 U.S.C. § 550(b).

of its statutory successor, section 502(d), that disabilities travel with claims. *See id.*[24] On appeal, the Third Circuit agreed with the bankruptcy court's analysis:

> The language of section 502(d) states that "any claim of any entity" who received an avoidable transfer shall be disallowed. Thus, the statute operates to render a category of claims disallowable – those that belonged to an entity who had received an avoidable transfer. Further, the statute provides that such claims cannot be allowed until the entity who received the avoidable transfer, or the transferee, returns it to the estate. 11 U.S.C. § 502(d) (stating that the trustee shall disallow such claims "unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable ..."). Accordingly, "any claim" falling into this category of claims is disallowable until the avoidable transfer is returned. Because the statute focuses on claims – and not claimants – claims that are disallowable under § 502(d) must be disallowed no matter who holds them.

KB Toys, 736 F.3d at 252-53.

While plaintiffs argue on appeal that the bankruptcy court erroneously determined that defendants succeeded to the rights and obligations of the selling unitholders without undertaking an appropriate analysis, defendants do not attempt to distinguish the transfer of a claim against a debtor in the course of the debtor's bankruptcy proceedings in *KB Toys* from the transfer of an equity security in the course of a debtor's bankruptcy proceedings here, or why a substitution of parties was not effected thereby. *Compare* Fed. R. Bankr. P. 3001(e)(2) (stating, with regard to the transfer of a claim ". . . the transferred shall be substituted for the transferor"); Black's Law Dictionary 1470 (8th ed. 2004) ("substitute" means "one who stands in another's place"); *Carnegia v. Georgia Higher Educ. Assistance Corp.*, 691 F.2d 482, 483 (11th Cir. 1982) (claim transfer "constituted a substitution of parties with no change in the nature of the claim"); Rhodes, Transfer of Stock § 7.1 (7th ed., April 2017 update) ("As a general rule, the [stock] transferee takes no greater rights and is

[24] The bankruptcy court further rejected ASM's argument that it was entitled to the protections of a good faith purchaser argument, holding that ASM was a "sophisticated entity," well aware of the bankruptcy process, who had access to both the SOFA and the Original Claimants, and thus, was on "constructive notice" of the potential preference actions and could have discovered the potential for disallowance under section 502(d) with "very little due diligence." *See KB Toys,* 470 B.R. at 342.

subject to the same liabilities as the [stock] transferor"). The Plan and Orders unambiguously provide that all unitholders are deemed to have approved the releases, whether they voted to approve the Plan or not, and that all unitholders are bound by the releases, including successors and assigns. (A592 at ¶ 19; A180-81 at ¶ 11.1 (deeming Plan approved by all unitholders); A161 at § 1.3 (providing releases apply to successors and assigns)) If purchasers of units are not "successors and assigns" of the unitholders as contemplated by the Plan, plaintiffs offer no alternative interpretation. As successors and assigns of the selling unitholders, plaintiffs acquired the same rights and obligations that the selling unitholders had in the units under the provisions of the confirmed Plan.

Plaintiffs' only attempt to distinguish *KB Toys* appears to hinge entirely on the distinction between a sale and an assignment. Plaintiffs argue that "[a]lthough [plaintiffs] did acquire their units," there was no assignment, because "those units did not come with all of the rights and obligations established by the Plan." (*Id.* at 26). Because there was no assignment, plaintiffs reason, they are not bound by the releases. Plaintiffs argue that "an assignment does not exist where only part of the assignor's interests in the property is transferred or where an assignor retains control over the fund or the right to receive funds. (*See id.* at 8, 26) Plaintiffs reason that, if an assignment had occurred, then plaintiffs would have received the distribution on account of the purchased units. (*See id.* at 23, 26) "Given that the [Selling] Unitholders undeniably retained rights under the Plan after they sold their units, an assignment from such unitholders to [plaintiffs] did not occur." (*See id.* at 26) Because the original claimants in *KB Toys* "did not retain contract rights relating to the property" they transferred – *i.e.*, their trade claims – plaintiffs argue that *KB Toys* has no application here. (*See* D.I. 8 at 26, n.8)

The bankruptcy court in *KB Toys* noted that the terms "assignment" and "sale" are not easily distinguishable and that, in the bankruptcy context, "use of the distinction

between the two terms has been widely criticized." *Id.* at 340 (citing criticisms). It further noted that "[t]he Bankruptcy Code does not define 'sale' or 'assignment,' although the [Bankruptcy] Code definition of 'transfer' arguably includes both." *Id*. at 340.[25] The bankruptcy court in *KB Toys* court went on to observe that, even if there was a principled way to distinguish between an assignment and a sale of the claims at issue, such an exercise in the context of its section 502(d) analysis, was "unhelpful and unrevealing of the appropriate outcome." *See id.* at 341. The distinction offers little assistance here as well. Plaintiffs' argument that the selling unitholders "retain[ed] contract rights relating to the property" and, thus, plaintiffs are not bound by the releases, is unpersuasive in light of the nature of the property transferred: selling unitholders could transfer, and plaintiffs could acquire, only those rights attached to the units as of the date they were purchased. The rights attached to the units on the date they were purchased did not include the right to receive distributions under the Plan. This does not alter the conclusion that transfer of units from the selling unitholders to plaintiffs intended to vest in plaintiffs any "present rights" in the units assigned – the right to receive future distributions – along with the obligations the units carried under the Plan. *See Miller v. Wells Fargo Bank. Intern. Corp.*, 540 F.2d 548, 55 (2d Cir. 1976) The court agrees with defendants: "to rule that a party that buys a bankruptcy claim after plan confirmation is not bound by the terms of the plan would completely undermine the certainty and finality a plan must provide in order to be effective."

[25] *See KB Toys*, 470 B.R. at 341 n.11 (explaining same). Section 101(54)(D) of the Bankruptcy Code defines "transfer" as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D). As the *KB Toys* court explained: "According to Black's Law Dictionary, a 'sale' is 'the transfer of property or title for a price' (citing Uniform Commercial Code § 2-106(1)), while an 'assignment' is 'a transfer of rights or property.' Therefore, a 'transfer' of property can be either an assignment or a sale." *KB Toys,* 470 B.R. at 341 n.11 (internal citations omitted).

(D.I. 10 at 29); *see also* 11 U.S.C. § 1127 (restricting post-confirmation plan modifications); *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 169 (3d Cir. 2012) (public policy of affording finality to bankruptcy judgments fosters confidence in finality of confirmed plans and facilitates successful reorganizations).

Plaintiffs further argue that even if they could be regarded as assignees of selling unitholders, plaintiffs' specific claims were never held by the selling unitholders and, thus, as a matter of law, the transferring unitholders could not have bound their assignees by any release. (*See* D.I. 8 at 26) According to plaintiffs, their claims are based on legal rights independent of, and separate from, the rights that the selling unitholders may have possessed: common law tort claims grounded in defendants' acts of negligence and fraud occurring after Plan confirmation, which resulted in injuries to plaintiffs and not the selling unitholders. (*See id.*) The court agrees with defendants that this argument fails to recognize that the Plan and Orders bar all claims related to payments and distributions to unitholders by any person. (*See* D.I. 10 at 30) The Plan specifically bars any claims that "**any Person** may be entitled to assert . . . whether known or unknown, matured or unmatured . . . foreseen or unforeseen, **existing or hereinafter arising**.") (A175-76, § 9 (emphasis added)). The broad language covers all claims, including those in existence at the time the Plan was approved and those arising after the fact, made by "any Person" in connection with the Plan's distribution procedure. The cases cited by plaintiffs do not address the enforceability of a plan release against an entity that buys a claim after plan confirmation and compel no different outcome. [26]

[26] *See Medtronic AVE Inc. v. Advanced Cardiovascular Systems*, 247 F.3d 44 (3d Cir. 2001) (determining whether manufacturer's pending patent infringement claims against competitor were subject to mandatory arbitration under a third-party's arbitration agreement with competitor following manufacturer's acquisition of the third party); *Longacre Master Fund, Ltd. v. ATS Automation Tooling Sys., Inc.*, 496 F. App'x 135, 139 (2d Cir. 2012) (determining sufficiency of allegations in breach of contract dispute between buyer of

4. Enforcement of the releases does not violate due process

While the bankruptcy court recognized that "there are limits to the types of claims from which defendants can be shielded by a release," it also noted that the only relevant law plaintiffs proffered as being beyond the reach of the releases is the Due Process Clause of the U.S. Constitution. *Arctic*, 2016 WL 3920855 at *18. A release is ineffective if a plaintiff's due process rights were violated in the confirmation of the plan. *See Bowen*, 174 B.R. at 844. In opposition to the motion to dismiss, plaintiffs argued that "releases and/or discharges of claims in bankruptcy are unenforceable where, as here, claims arose after the date of the discharge or release and the plaintiffs' interests were not represented in the underlying bankruptcy proceeding." (A1152-53, ¶ 41) Plaintiffs cited the Third Circuit's decision in *Chemetron* in support. *See Jones v. Chemetron*, 212 F.3d 199 (3d Cir. 2000). (A1154, ¶ 48) In *Chemetron*, a plaintiff who was not yet born as of the date of a discharge in bankruptcy asserted personal injury claims based on his mother's exposure to toxic chemicals. *Chemetron*, 212 F.3d at 200. The Third Circuit held that the discharge did not prevent claimant from pursuing his personal injury claims because

> [he] had no notice of or participation in the *Chemetron* reorganization plan. No effort was made during the course of the bankruptcy proceeding to have a representative appointed to receive notice for and represent the interests of future claimants. Therefore, whatever claim [plaintiff] may now have was not subject to the bankruptcy court's bar date order and was not discharged by that court's confirmation order.

Id. at 210 (citation omitted). The bankruptcy court distinguished that case: "Unlike the *Chemetron* plaintiff, who was not yet born at the time of the bankruptcy discharge, [p]laintiffs here purchased units from the Selling Unitholders, who were either themselves appropriately noticed of the Plan and release it contained, or were the 'successors and

bankruptcy claim and seller); *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548 (2d Cir. 1976) (addressing trustee's claim to recover, as voidable preferences, payments by debtor).

assigns' of unitholders who participated in the bankruptcy proceeding." *Arctic*, 2016 WL 3920855 at *19.

Plaintiffs argue on appeal that the bankruptcy court erred in distinguishing *Chemetron*, which held that a due process violation occurs when a party whose claims are barred did not have both (i) notice of the plan, and (ii) its interests represented in in connection with the bankruptcy proceedings. (*See* D.I. 8 at 28-30) According to plaintiffs, the Canadian court should have "appointed [someone] to represent the interests of claimants in the position of the [plaintiffs]" – presumably, purchasers of units on the OTC "Pink" market[27] – and because it did not, the releases are ineffective under Third Circuit's decision in *Chemetron*. (*See id.*)

The court finds no merit in plaintiffs' attempt to analogize their position with that of the unborn personal injury claimant in *Chemetron*. The record demonstrates that unitholders received sufficient notice of the meeting, the Plan, and its releases. (*See* A356-401, ¶¶ 1.7, 5.10; A587, ¶ 3) The Plan was accepted by 99.81% of the unitholders who voted on it. (A218-19) Each unitholder was deemed to have consented and agreed to all of the provisions of the Plan in their entirety." (A592 at ¶ 19; *see also* A180-81 at ¶ 11.1) The Plan explicitly provides that it is binding not only on the selling unitholders but also on their

[27] See generally http://www.otcmarkets.com/marketplaces/otc-pink. The website provides that the OTC Marketplace is for "broker-dealers to trade all types of securities without requiring company involvement." (*See* A1125; http://www.otcmarkets.com/learn/otc101-faq) Companies listed on the OTC Link have been described by the SEC as "among the most risky investments." (*See* A1133; http://www.sec.gov/answers/pink.htm) The website also includes the following warning:

> With no minimum financial standards, this market includes foreign companies that limit their disclosure, penny stocks and shells, as well as distressed, delinquent, and dark companies not willing or able to provide adequate information to investors. As Pink requires the least in terms of company disclosure, investors are strongly advised to proceed with caution and thoroughly research companies before making any investment decisions.

http://www.otcmarkets.com/marketplaces/otc-pink.

"successors and assigns." (A161 at § 1.3) The record demonstrates that the selling unitholders received appropriate notice sufficient to satisfy due process and an opportunity to be heard regarding confirmation of the Plan. Unlike the unborn claimant in *Chemetron*, plaintiffs bought claims from unitholders who had notice of the insolvency proceedings and participated in those proceedings. The complaint does not allege that the due process rights of selling unitholders were violated during the bankruptcy proceedings, nor does it allege that plaintiffs did not have notice of the bankruptcy proceedings or the Plan.

The bankruptcy court correctly concluded that plaintiffs' claims are barred by the doctrine of *res judicata* and by the releases contained in the Plan and Orders. Based on the foregoing, the court need not consider the additional bases on which defendants assert that dismissal of the adversary proceeding should be affirmed.[28]

VI. CONCLUSION

For the foregoing reasons, the bankruptcy court's opinion and order are affirmed, and plaintiffs' appeal is denied. An appropriate order shall issue.

[28] Defendants contend that: (i) the fraud claims must be dismissed because there is not a single factual allegation that defendants acted with the requisite scienter; (ii) the misrepresentation claims fail as a matter of law because plaintiffs have not adequately alleged actionable omissions or justifiable reliance; and (iii) the negligence claims do not satisfy pleading requirements because plaintiffs cannot show as a matter of law that defendants owed plaintiffs any duty to comply with Rule 10b-17 or the FINRA Rules. (*See* D.I. 10 at 34-39)

Appendix “G”

Arctic Glacier Income Fund Provides Update on Claims Litigation

Winnipeg, July 20, 2017 – Arctic Glacier Income Fund (CNSX:AG.UN) (the "**Fund**") announced that on June 14, 2017, the United States District Court for the District of Delaware released its Memorandum Opinion in the matter of *Brodski et al v AGIF et al*. The District Court affirmed the bankruptcy court's dismissal of the Brodski Plaintiffs' claim against AGIF and the other defendants. On July 12, 2017, the Brodski Plaintiffs filed a Notice of Appeal with the United States District Court for the District of Delaware.

More information about the Applicants' proceedings under the *Companies' Creditors Arrangement Act* can be found on the website maintained by Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants at http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries.

Forward-Looking Statements

Certain statements included herein constitute "forward-looking statements". All statements, other than statements of historical fact, included in this release that address future activities, events, developments or financial performance are forward-looking statements. These forward-looking statements can be identified by the use of forward-looking words such as "may", "should", "will", "could", "expect", "intend", "plan", "estimate", "anticipate", "believe", "future" or "continue" or the negative thereof or similar variations. These forward-looking statements are based on certain assumptions and analyses made by the Fund and its management, in light of their experiences and their perception of historical trends, current conditions and expected future developments, as well as other factors they believe are appropriate in the circumstances. Investors are cautioned not to put undue reliance on such forward-looking statements, which are not a guarantee of performance and are subject to a number of uncertainties, assumptions and other factors, many of which are outside the control of the Fund, which could cause actual results to differ materially from those expressed or implied by such forward-looking statements. Important factors that could cause actual results to differ materially from those expressed or implied by such forward-looking statements include, among other things, the CCAA process. Readers are cautioned that the foregoing list is not exhaustive. Such forward-looking statements should, therefore, be construed in light of such factors. If any of these risks or uncertainties were to materialize, or if the factors and assumptions underlying the forward-looking information were to prove incorrect, actual results could vary materially from those that are expressed or implied by the forward-looking information contained herein. All forward-looking statements attributable to the Fund, or persons acting on its behalf, are expressly qualified in their entirety by the cautionary statements set forth above. Readers are cautioned not to place undue reliance on the forward-looking statements contained herein, which reflect the analysis of the management of the Fund, as appropriate, only as of the date of this release. For more information regarding these

and other risks, readers should consult the Fund's reports on file with the applicable securities regulatory authorities accessible online by going to SEDAR at www.sedar.com. The Fund is under no obligation, and the Fund expressly disclaims any intention or obligation, to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except as required by applicable law.

About the Fund

Arctic Glacier Income Fund trust units are listed on the Canadian National Stock Exchange under the trading symbol AG.UN. There are 350.3 million trust units outstanding.