

1301-04364

COURT FILE NUMBER

COURT

COURT OF QUEEN'S BENCH OF
ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

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

**AND IN THE MATTER OF
POSEIDON CONCEPTS CORP.,
POSEIDON CONCEPTS LTD.,
POSEIDON CONCEPTS LIMITED
PARTNERSHIP AND POSEIDON
CONCEPTS INC.**

DOCUMENT

ORIGINATING APPLICATION

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

Norton Rose Canada LLP
3700 Devon Tower
400 Third Avenue SW
Calgary, Alberta T2P 4H2
Phone: 403-267-8222
Fax: 403-264-5973
Attention: Howard A. Gorman
File No. 01024529-0001

NOTICE TO THE RESPONDENT(S)

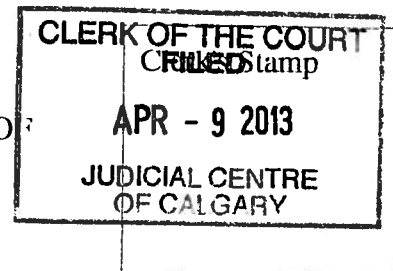
This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the Application is heard as shown below.

Date: April 9, 2013
Time: 2:30 p.m.
Where: Calgary Courts Centre, 601 - 5th Street SW, Calgary, Alberta
Before: The Honourable Mr. Justice K.D. Yamauchi

Go to the end of this document to see what you can do and when you must do it.



Basis for this claim

1. Poseidon Concepts Corp. ("PSN"), Poseidon Concepts Ltd. ("Poseidon Ltd."), Poseidon Concepts Limited Partnership (the "Partnership"), and Poseidon Concepts Inc. ("Poseidon USA"), (PSN, Poseidon Ltd., the Partnership and Poseidon USA shall hereinafter be referred to collectively as the "Applicants") are a companies to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "CCAA") applies.
2. The Applicants are insolvent, and are all related parties.
3. The Applicants require a stay of proceedings in order to restructure their business for the benefit of its stakeholders.
4. A Plan under the CCAA is in the best interest of the Applicants and their stakeholders.
5. Such other grounds as are set forth in this Originating Application.
6. The provisions of the CCAA and the equitable jurisdiction of this Court.
7. Such further and other grounds as counsel may advise and this Court may permit.

Remedy Sought

8. An order dispensing with service of the Notice of Application on all creditors of the Applicants and deeming service to be good and sufficient.
9. Leave, if required, to bring this application on short or no notice.
10. An order pursuant to the CCAA granting an interim stay order pursuant to Section 11 of the CCAA and pursuant to this Court's jurisdiction relating to the Partnership and Poseidon USA, on the terms substantially as set out in the draft Initial Order attached hereto as Schedule "A".
11. Staying all proceedings and remedies taken or that might be taken in respect of the Applicants or any of their property, except as otherwise set forth in the Initial Order or otherwise permitted by law.
12. Authorizing the Applicants to carry on business in a manner consistent with the preservation of their property and business.
13. Appointing PricewaterhouseCoopers Inc. ("PwC") as monitor of the Applicants in these proceedings.
14. Approving certain charges as set out herein.
15. Approving certain agreements as set out herein.
16. Approving a sales process as set out herein.

17. Such further and other relief as this Honourable Court may deem just.
18. This Originating Application, including the attachments hereto.
19. The Affidavit of Leigh Cassidy dated April 9, 2013.

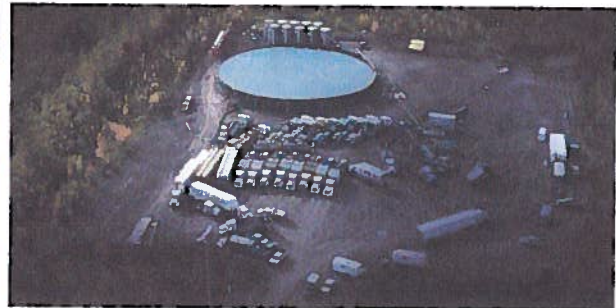
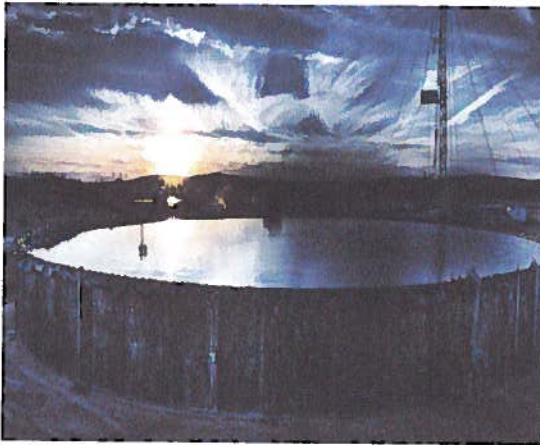
Evidence in support of this application

OVERVIEW AND CORPORATE STRUCTURE

20. PSN is a corporation amalgamated under the laws of the Province of Alberta as evidenced by a certificate from the Registrar of Corporations (Alberta) attached as Schedule "B".
21. As outlined in PSN's Annual Information Form "AIF" filed on the System for Electronic Document Analysis and ("SEDAR") on March 29, 2012, attached as Schedule "C", PSN was formed under the laws of the Province of Alberta on November 30, 2005 as "Open Range Energy Corp." by amalgamation pursuant to a plan of arrangement under the *Business Corporations Act* (Alberta). On November 1, 2011, PSN completed a corporate reorganization (the "Separation Transaction") by way of a plan of arrangement which separated the tank rental business and exploration and production business into two distinct public companies. In connection with the Separation Transaction, PSN changed its name to "Poseidon Concepts Corp.". PSN is a publicly-traded company that had traded on the Toronto Stock Exchange under the trading symbol "PSN".
22. As further stated in the AIF:
 - (i) The Partnership was formed under the *Partnership Act* (Alberta) on November 5, 2010 pursuant to a limited partnership certificate with PSN, as initial limited partner, and Poseidon Ltd., as the general partner. Attached as Schedule "D" is the Notice to Amend Certificate of Limited Partnership dated November 1, 2011 evidencing that PSN directly and indirectly owns 100% of the interest in the Limited Partnership.
 - (ii) Poseidon Ltd. was incorporated under the *Business Corporations Act* (Alberta) on April 22, 2010 as "Poseidon Concepts Corp." and changed its name to "Poseidon Concepts Ltd." on October 21, 2011 in connection with the Separation Transaction.
 - (iii) Poseidon U.S.A. was incorporated on November 9, 2010 in the State of Delaware under the Delaware Code.
23. Poseidon Ltd. and Poseidon USA are wholly-owned direct or indirect subsidiaries of PSN as evidenced by their respective shareholder registers which are attached as Schedule "E".

BACKGROUND AND BUSINESS OPERATIONS

24. As outlined in the AIF, following the Separation Transaction, the Applicants' sole business activity has been the development and lease of the modular storage tanks for fracking fluid ("Tank Systems"). The geographical deployment of the Tank Systems is stated to have grown since the first commercial deployment in June 2010. The Applicants' core markets include most of the significant oil and liquids-rich natural gas plays in Alberta, British Columbia and the U.S. The Tank Systems are stated to have been deployed in Alberta's Deep Basin, British Columbia's Montney play, the North Dakota and Montana Bakken, the Niobrara Shale and Denver-Julesburg Basin in Colorado and Wyoming, the Piceance Basin in Colorado, the Anadarko Basin in Oklahoma, the Marcellus Basin in Pennsylvania, the Utica Shale in Ohio, the Haynesville Shale in Louisiana, the San Joaquin Basin in California, the Green River Basin in Wyoming and the Mississippi Lime in Oklahoma, among others.
25. The Tank Systems, examples of which are shown below, (retrieved from PSN's website www.poseidonconcepts.com.) were manufactured in five models: (i) the 4,500 barrel-capacity Neptune model, (ii) the 9,000 barrel-capacity Triton model, (iii) the 18,000 barrel-capacity Poseidon model, (iv) the 26,500 barrel-capacity Odyssey model, and (v) the 41,000 barrel-capacity Atlantis model.



26. As stated in the AIF, the Tank Systems are fabricated by two independent manufacturers, one in Canada and one in the U.S. The tank liners and associated materials for the Tank Systems are fabricated by third-party manufacturers. The Applicants have entered into manufacturing agreements with each of the above-mentioned manufacturers that provide for the protection of the confidential design specifications of the Tank Systems and its component parts.
27. The Applicants' records indicate that as of April 4, 2013 the Applicants' fleet of Tank Systems is comprised of 435 units.
28. According to the attached Schedule "F", as at April 4, 2013, the Applicants have 61 employees. The Applicants have also engaged a number of contractors, consultants and

service providers to assist with its field operations, including the transportation, set-up, and tear-down of the Tank Systems.

SENIOR MANAGEMENT

29. On February 26, 2013, PSN announced by way of press release, a copy of which is attached as Schedule "G" that Mr. Lyle Michaluk, Poseidon's Former Chief Executive Officer and then Interim Chief Financial Officer effective December 27, 2012 was no longer with PSN. Mr. Matt MacKenzie, the former Chief Financial Officer prior to December 27, 2012 also was no longer with PSN. In addition, PSN has engaged Whitewater Inc. ("Whitewater") to provide the services of Mr. Leigh Cassidy, CA, CFA, as a consultant to assist with the financial aspects of the Applicants.
30. Accordingly, the current directors and remaining interim officer of PSN as indicated in the register of directors and officers from PSN's minute book, a copy of which is attached as Schedule "H", are as follows:

<i>Name</i>	<i>Position(s) Held</i>
A. Scott Dawson	Director, Chairman and Interim Chief Executive Officer
Harley Winger	Director
Dean Jensen	Director
Neil Richardson	Director

31. Concurrent with the filing of this Originating Application Messrs. Winger and Jensen are resigning as directors of PSN. Their respective resignations are attached as Schedule "I".

ASSETS AND LIABILITIES

32. The Applicants' unaudited first, second and third quarter 2012 financial statements as filed on the Canadian Securities Administrator's website www.sedar.com ("SEDAR") (collectively, the "Financial Statements") are attached as Schedules "J", "K" and "L" respectively.
33. As disclosed on February 14, 2013 in the press release filed on SEDAR and attached as Schedule "M", the Board of Directors of PSN determined, on a preliminary basis, based on the interim report of the Special Committee and its advisors, that, primarily related to the long term take-or-pay agreements:
- approximately \$95 to \$106 million (subject to detailed quantification by the Applicants) of the Applicants' \$148.1 million in revenue for the 9 months ended September 30, 2012 should not have been recorded as revenue in the Applicants' financial statements; and
 - as a result of recording the foregoing revenues, approximately \$94 to \$102 million (subject to detailed quantification by the Applicants) of the Applicants' \$125.5 million accounts receivable as at September 30, 2012 should not have been recorded in the Applicants' financial statements as accounts receivable.

As a result of the foregoing, PSN disclosed that the Financial Statements would need to be restated and PSN advised investors that they should no longer rely on the Financial Statements as well as the corresponding Management's Discussion & Analysis. Further, PSN advised that all previous guidance with respect to the Applicants' business should no longer be relied upon.

34. Attached as Schedule "N" are the Applicants' audited financial statements for the period ending December 31, 2011 ("2011 Annual Financials") filed on SEDAR on March 22, 2012. Attached as Schedule "O" is a draft press release to be filed on SEDAR on April 9, 2013 indicating that "based upon the investigation by the Poseidon Special Committee, questions have arisen with respect to the recorded revenues in the 2011 Annual Financials. At this time, it is uncertain whether or not a restatement of the 2011 Annual Financials is required."

EVENTS LEADING TO THIS ORIGINATING APPLICATION

35. The 2011 Annual Financials state that the Applicants' accounts receivables was approximately \$53,595,000 and their revenue was approximately \$78,767,000. Note 3(J) of the 2011 Annual Financials state the Applicants' revenue recognition policy as follows:

- Fracturing fluid tank rental revenues are generally derived from the provision of rentals and related services which are based on contracts that include fixed or determinable prices based on daily rental rates. Revenue is recognized when there is persuasive evidence of an arrangement, tank rentals and related services are provided, the rate is fixed and determinable and collectability is reasonably assured.

36. The Applicants' accounts receivables and cumulative revenue were stated in the Financial Statements as follows:

	Accounts Receivable (thousands)	Revenue (thousands)
Q1 Financials	\$83,018	\$52,129
Q2 Financials	\$118,641	\$107,004
Q3 Financials	\$125,516	\$148,120

37. The Applicants' third quarter financial statements were released on November 14, 2012 and included a write off of approximately \$9.5 million for bad debt of the accounts receivable which, as stated in the accompanying press release, was attributed to difficulties in certain collections.
38. On November 27, 2012 a class action lawsuit was commenced against the Applicants and certain of PSN's officers and directors alleging, among other things, that the defendants

made statements that were materially false and misleading regarding the Applicants' financial position, financial performance and cash flows, overstate the Applicants' incomes and reported inflated assets. Among other relief, the Ontario action as amended claims \$600,000,000 in damages. Subsequent class action lawsuits were filed in the provinces of Alberta and Quebec and in the Southern District of New York, USA. A copy of each of the class action lawsuits is attached hereto as Schedule "P".

39. Attached as Schedule "Q" is a press release filed on SEDAR on December 27, 2012 announcing that PSN established a Special Committee of the Board of Directors to review and address various issues arising from the write-off of certain accounts receivable and matters related thereto. In addition PSN announced that it was suspending the payment of future undeclared dividends, effective January 16, 2013, and in the press release filed on SEDAR January 11, 2013 attached as Schedule "R" was suspending payment of the dividend payable to shareholders on January 15, 2013.
40. The Special Committee engaged Norton Rose Canada LLP ("NRC") as counsel to the Special Committee. NRC engaged Ernst & Young Inc. to assist NRC in its role as counsel to the Special Committee.
41. As previously stated in paragraph 30 herein, on February 14, 2012, the Board of Directors determined, on a preliminary basis, based on the interim report of the Special Committee and its advisors, that, primarily related to the long term take-or-pay agreements:
 - approximately \$95 to \$106 million (subject to detailed quantification by the Applicants) of the Applicants' \$148.1 million in revenue for the 9 months ended September 30, 2012 should not have been recorded as revenue in the Applicants' financial statements; and
 - as a result of recording the foregoing revenues, approximately \$94 to \$102 million (subject to detailed quantification by the Applicants) of the Applicants' \$125.5 million accounts receivable as at September 30, 2012 should not have been recorded in the Company's financial statements as accounts receivable.

CREDIT AGREEMENT

42. PSN is a party to a Credit Agreement (the "Credit Agreement") dated as of June 29, 2012 among PSN, The Toronto-Dominion Bank, HSBC Bank Canada, The Bank Of Nova Scotia and National Bank Of Canada (the "Lenders"). A copy of the Credit Agreement is attached as Schedule "S". Each of Poseidon Ltd., the Partnership and Poseidon USA are guarantors under the Credit Agreement.
43. As of March 31, 2013 PSN owes approximately \$77,527,018 to its Lenders under the Credit Agreement.
44. As a result of the foregoing issues with revenue and accounts receivable in the Financial Statements, in a press release filed on SEDAR on February 20, 2013, attached as Schedule "T", PSN indicated that it was in default under its Credit Agreement.

Subsequently, on February 19, 2013, the Lenders sent PSN a Notice of Default, a copy of which is attached as Schedule "U".

INTERIM FINANCING

45. Century Services LP (the "Interim Lender") has agreed to provide the Applicants with interim-financing (the "Interim Financing") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures in the maximum amount of \$6,000,000. The terms and conditions of the Interim Financing are set forth in the commitment letter ("Commitment Letter") between the Applicants and the Interim Lender dated as of April 8, 2013 attached as Schedule "V".
46. The key terms of the Interim Financing are as follows:
 - (a) the maximum amount of available under the Interim Financing is \$6,000,000 payable on a draw basis with a minimum first draw amount of \$3,000,000 ("First Draw") and a subsequent draw of up to a further \$3,000,000 ("Subsequent Draw") upon completion of satisfactory due diligence as determined by the Interim Lender in its sole discretion which due diligence must be satisfied within 7 days of the Borrower's request for a subsequent draw and payment of a processing fee;
 - (b) interest is calculated at the rate of 16% per annum and is payable monthly on the principal due on maturity;
 - (c) the Interim Financing facility is to be repaid on the earliest of the following:
 - (i) 4 month term following the date of closing with a minimum term of 3 months;
 - (ii) the date on which the Applicants complete all requirements of a Plan of Arrangement in the CCAA Proceedings;
 - (iii) the date on which the Stay Period in CCAA Proceedings is lifted or terminated;
 - (d) The Applicants' liability under the Interim Financing facility shall be secured by way of a loan agreement, a promissory note, guarantees, general security agreements, a demand collateral mortgage against PSN's commercial property located in Edson, Alberta and assignments and other security;
 - (e) The Applicants must secure a first ranking charge in favour of the Interim Lender (subject only to the requested Administration Charge and a Directors and Officers Charge requested herein) over the entirety of the Applicants' present and after acquired property (subject to the exceptions outlined in the Commitment Letter) in order to secure repayment of the Interim Financing Facility;
 - (f) The Applicants are to pay to the Interim Lender a non-refundable facility fee of 2% of the First Draw of the Interim Financing facility upon acceptance of the

Commitment Letter and a further 2% fee if the Subsequent Draw is made. A further fee of 2% of the outstanding amount will be payable if a renewal is made after the initial term. In addition, the Applicants are required to pay a monthly monitoring fee of \$10,000 (plus out of pocket costs) due on the last day of each month and PSN has paid a non-refundable processing fee of \$30,000 when it accepted the Commitment Letter, and a further non-refundable processing fee of \$20,000 if a request for a subsequent draw is made.

CASH FLOW PROJECTIONS

47. Attached as Schedule "W" are the cash flow projections for the Applicants (the "Cash Flow Projections") for the period ending July 28, 2013.
48. Management of the Applicants has worked with Ernst & Young Inc. to prepare the Cash Flow Projections. Ernst & Young Inc. has made certain suggestions about the Cash Flow Projects, which have been incorporated therein, and PwC has not expressed any concern over the reasonableness of the Cash Flow Projections.

KEY EMPLOYEE RETENTION PROGRAM

49. The Applicants have implemented a key employee retention program ("KIERP") for certain of its key employees in part to help restore the confidence of the Applicants' customers, suppliers and, most importantly, the Applicants' employees. Agreements were entered into with certain key employees of the Applicants, generally in the form as attached as Schedule "X" hereto (the "Old KIERP").
50. Under the Old KIERP, in order to be eligible for a retention bonus, employees must remain actively employed and in compliance with the Applicants' policies and procedures, and continue to perform their job with consistent and sustained competency as of each payout date. 50% of the retention bonus shall be payable on May 31, 2013, and 50% of the retention bonus is to be paid on November 30, 2013.
51. In light of the Poseidon CCAA proceedings, Poseidon proposes a revised KIERP Program for its employees (the "New KIERP") to be secured by the Directors and Officers Charge, on the following terms:
 - (a) Eligible employees will receive payment under the Old KIERP on the earlier of July 31, 2013 or the conclusion of a transaction involving Poseidon or substantially all of its assets and such payment will be pro rated to July 31, 2013; plus
 - (b) Eligible employees will also participate in an incentive pool (the "IP"), whereby TWM receives 2/3 and Eligible Employees 1/3 (up to an amount equal to their entitlement from April 9, 2013 onward under the Old KIERP). The IP is calculated on the following from April 9, 2013 to the date of a transaction:
 - (i) 3% of the United States accounts receivable collections over \$800,000 to \$2.8 million; plus

- (ii) 5% of the United States accounts receivable collections over \$2.8 million; plus
- (iii) an additional 2% of the United States accounts receivable collections greater than \$4.8 million to \$6.8 million; plus
- (iv) 10% of the net proceeds of any sale of surplus assets; plus
- (v) 2% of the net realization from any transaction in excess of the sum of any interim financing under the CCAA on the first \$10 million; plus
- (vi) 3% of the next \$5.0 million in excess of 51 b) v); plus
- (vii) 4% of the excess of 51 b) vi).

TOTAL WATER MANAGEMENT LLC ("TWM")

- 52. TWM is a US limited liability corporation in which Neil Richardson, a director of the Applicants, maintains a significant managing interest.
- 53. TWM has provided services to the Applicants over the last several months.
- 54. PSN has entered into an advice, management and consultancy agreement for TWM to provide services to the Applicants through the CCAA proceedings pursuant to an agreement dated April 9, 2013, a copy of which is attached as Schedule "Y", (the "TWM Services Agreement").
- 55. The terms of the TWM Services Agreement include the following:
 - (a) TWM's fees are to be included in the Administration Charge;
 - (b) TWM is to be paid a weekly fee; and
 - (c) TWM is entitled to receive 2/3 of the IP fund.

SOLICITATION PROCESS

- 56. On April 8, 2013 the Applicants entered into an engagement letter ("Engagement Letter") with Ernst & Young Orenda Corporate Finance Inc. ("EYO") whereby EYO will (subject to approval of this Honourable Court) act as financial advisor to the Applicants. As financial advisor, EYO will conduct a process (the "Solicitation Process"), as outlined in Schedule "Z" to solicit offers from interested parties for a possible transaction involving the business of the Applicants, including but not limited to a sale of all or some of the Applicants' assets, a reorganization, a recapitalization or the restructuring of existing loans. A copy of the Engagement Letter is attached as Schedule "AA".
- 57. The steps outlined in the Solicitation Process will provide the Applicants with a reasonable procedure to fully canvass opportunities to sell, restructure or recapitalize the Applicants' business. Provided that the Solicitation Process results in one or more offers

that Applicants consider acceptable, it would be the Applicants intention to accept the most favourable such offer, subject to Court approval, and bring that offer to this Honourable Court for approval.

58. The Applicants are requesting the Approval of EYO as financial advisor to the Applicants pursuant to the Engagement Letter and be authorized, *nunc pro tunc*, to enter into the Engagement Letter and are directed to carry out and perform their obligations thereunder (including payment of amounts due to be paid pursuant to the terms of the Engagement Letter) and the Engagement Letter shall be binding upon the Applicants.

OTHER CHARGES

59. As are typical in CCAA proceedings in this jurisdiction, the Applicants request an Administration Charge and a Directors and Officers Charge, each in the sum of up to \$1,000,000.
60. The Administration Charge shall include protection for the fees of Poseidon's counsel, the Monitor, its counsel, EYO, Whitewater and TWM.
61. The Director and Officers Charge shall include protection for employees accrued and accruing salaries and vacation pay, including under the Old KERP and the New KERP.

ALBERTA SECURITIES COMMISSION

62. On February 14, 2013 the Alberta Securities Commission issued a cease trade order against PSN. The cease trade order prohibits all trading or purchasing in PSN securities until the cease trade order has been revoked or varied by the Alberta Securities Commission. Subsequent cease trade orders were also issued by the Ontario Securities Commission and the British Columbia Securities Commission on March 11, 2013 and February 18, 2013 respectively. A copy of these cease trade orders are attached as Schedule "BB".

TORONTO STOCK EXCHANGE LISTING

63. PSN's common shares are listed on the Toronto Stock Exchange ("TSX") under the stock symbol "PSN". Attached as Schedule "CC" is a press release from the Investment Industry Regulatory Organization of Canada indicated that the common shares of PSN had been halted as of February 15, 2013.

MONITOR

64. PwC has consented to act as Monitor under the CCAA proceedings. Attached as Schedule "DD" is a copy of the Consent to Act as Monitor signed by PwC.

Applicable Acts and regulations

65. The CCAA, the Judicature Act and such further and other acts and regulations as counsel may advise and this Honourable Court may permit.

How the Application is proposed to be heard or considered

66. In person, before the Honourable Mr. Justice K.D. Yamauchi at the Calgary Courts Centre, 601 - 5th Street SW, Calgary, Alberta, on Tuesday, the 9th day of April, 2013 at 2:30 p.m. or so soon thereafter as counsel may be heard.

AFFIDAVIT EVIDENCE IS REQUIRED IF YOU WISH TO OBJECT.**WARNING**

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).

DATED at the City of Calgary, in the Province of Alberta, on the 9th day of April, 2013.

NORTON ROSE CANADA LLP

Per:

Howard A. Gorman
Counsel for Poseidon Concepts Corp.,
Poseidon Concepts Ltd., Poseidon
Concepts Limited Partnership and
Poseidon Concepts Inc.