

Clerk's stamp

|                               |
|-------------------------------|
| CLERK OF THE COURT<br>FILED   |
| MAY 06 2013                   |
| JUDICIAL CENTRE<br>OF CALGARY |

FORM 27  
[RULE 6.3 AND 10.52(1)]

COURT FILE NUMBER

1301-04364

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

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

AFFIDAVIT OF FRANZ AUER

Sworn May 04, 2013

ADDRESS FOR SERVICE AND CONTACT  
INFORMATION OF PARTY FILING THIS  
DOCUMENT

JENSEN SHAWA SOLOMON DUGUID HAWKES  
LLP / PALIARE ROLAND ROSENBERG ROTHSTEIN  
LLP / SISKINDS LLP  
800, 304 - 8 Avenue SW  
Calgary, Alberta T2P 1C2

Robert Hawkes, Q.C./Gavin Price  
Phone: 403 571 1544  
Fax: 403 571 1528  
File: 11121.019

Massimo (Max) Starnino/Gregory Ko  
Phone: 416 646 7431  
Fax: 416 646 4301

Daniel E.H. Bach/S. Sajjad Nematollahi  
Phone: 416 362 8334  
Fax: 416 362 2610

I, Franz Auer, of Sturgeon County, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am the plaintiff in the proposed class action styled *Auer v Poseidon Concepts Corp. et al.*, Court File Number 1301-00935 (the "Alberta Action"), filed in this Court on January 22, 2013 against Poseidon Concepts Corp. ("Poseidon"), Scott Dawson, Lyle Michaluk, Matt MacKenzie and Harley Winger (collectively, the "Class Action Defendants"). As such, I have personal knowledge of the facts and matters sworn to in this Affidavit except where stated to be based on information, in which case I have disclosed the source of that information and I believe that information to be true.
2. Proposed class actions arising from similar facts and allegations have been commenced against the Class Action Defendants by Joanna Goldsmith in the Ontario Superior Court of Justice, styled *Goldsmith v Poseidon Concepts Corp. et al.*, Court File Number: CV-12-46873600CP (the "Ontario Action"), and by Marian Lewis in the Quebec Superior Court styled *Lewis v Poseidon Concepts Corp. et al.*, Court File Number: 500-06-000633-129 (the "Quebec Action"). Hereinafter, I refer to myself and the plaintiffs in the Ontario and Quebec Actions as the "Class Action Plaintiffs".
3. I herein refer to the Alberta, Ontario and Quebec Actions, collectively, as the "Class Actions".
4. I swear this Affidavit in response to Poseidon's notice to extend the stay of proceedings herein and in support of the Class Action Plaintiffs' motion for advice and directions as to the scope of the stay provisions in the Initial Order in relation to several pending motions in the Class Actions, a Representation Order and access to information.

#### I. OVERVIEW OF MOTION

5. I am a 69 year old retiree. I invested in Poseidon and lost \$33,840, representing over a quarter of my life savings. In addition to my personal loss, the total loss to Poseidon shareholders is estimated to be between \$600 and \$700 million. Meanwhile, I am advised by my counsel, Robert Hawkes, and believe to be true, that three of the directors and officers named in the Class Actions, Scott Dawson, Lyle Michaluk and Harley Winger sold shares of Poseidon in 2011 and 2012 for gross proceeds of approximately \$29.3 million. Attached hereto as **Exhibit "A"** is a document retrieved from SEDI showing the particulars of Poseidon share sales by the defendant directors and officers.
6. I, along with the other proposed representative plaintiffs, have brought this motion in order to ensure that our interests and the interest of those in a similar situation are adequately represented and that we have an opportunity to meaningfully participate in these proceedings. In particular, we wish to ensure that we can obtain appropriate indemnities in connection with the costs that may be incurred as a result of our role and actions on behalf of class members, to ensure that class members have a meaningful

voice in these proceedings, and to ensure that any decisions that may affect the rights of class members are made on an informed basis.

## II. DEFINED TERMS

7. Unless otherwise stated or the context otherwise indicates, capitalized terms used in this Affidavit have the meanings assigned to them in the Amended Statement of Claim, filed February 20, 2013 (the "Amended Claim"), a copy of which is attached hereto as Exhibit "B".

## III. THE RISE AND FALL OF POSEIDON

8. Poseidon is a company formed pursuant to Alberta law, with its main offices in Calgary, Alberta and operations and offices in the United States. Poseidon is the continuation of a company called Open Range Energy Corp. ("Open Range"), which was a public company that traded on the TSX under the ticker symbol "ONR." On November 1, 2011, Open Range implemented a re-organization transaction pursuant to the Alberta *Business Corporations Act* (the "Arrangement"). Poseidon continued as Open Range's successor after the Arrangement. Attached hereto as Exhibit "C" is a copy of Poseidon's press release dated November 1, 2011 relating to the Arrangement.
9. Poseidon operated a tank rental business servicing the needs of the Canadian and American oil and natural gas sectors. Poseidon's shares started trading on the TSX on November 4, 2011 under the ticker symbol "PSN," and continued to be traded on the TSX during the relevant period. Attached hereto as Exhibit "D" is a copy of Poseidon's press release dated November 3, 2011, relating to the listing of Poseidon's shares on the TSX.
10. Poseidon quickly became a billion-dollar-market-cap company. From the outset, the company reported significant quarterly revenues, with some quarters reporting revenues in excess of \$50 million. These revenues are summarized by the following chart:

| Period (as at the end of) | Revenue                |
|---------------------------|------------------------|
| Q4 2011                   | \$34.5 million         |
| Q1 2012                   | \$52.1 million         |
| Q2 2012                   | \$55 million           |
| Q3 2012                   | \$41 million           |
| <b>TOTAL</b>              | <b>\$182.6 million</b> |

11. On November 14, 2012, Poseidon released its consolidated financial results, for the fiscal period ending September 30, 2012 (Q3 2012). In a related press release, Poseidon advised that it was recording a write-off of \$9.5 million in accounts receivable due to bad or uncollectible debt. At the time of the press release, and after the write-off of \$9.5 million, Poseidon still had \$125.5 million in accounts receivable, a large portion of which was outstanding for in excess of 120 days. Attached hereto as **Exhibits "E"** and **"F"** are copies of Poseidon's press release and Q3 2012 interim consolidated financial statements, both dated November 14, 2012.
12. On December 27, 2012, Poseidon issued a further press release disclosing, among other things, that a special committee of its board of directors (the "Special Committee") had been formed to investigate the concerns surrounding the write-off of \$9.5 million accounts receivable. In addition, Poseidon advised that it would write-down additional accounts receivable, and that the write-down could be significant. Attached hereto as **Exhibit "G"** is a copy of Poseidon's press release dated December 27, 2012.
13. On February 14, 2013, Poseidon announced the preliminary results of the Special Committee's investigation. Poseidon disclosed that, among other things, approximately \$95 million to \$106 million of Poseidon's \$148.1 million revenue purportedly accrued in the first nine months of 2012 should not have been recorded as revenue, and that approximately \$94 million to \$102 million of accounts receivable recorded in the first nine months of 2012 should not have been recorded as accounts receivable. Additionally, Poseidon disclosed that its financial reports relating to the first three quarters of 2012 were not prepared in accordance with the applicable accounting standards, nor with Poseidon's own accounting principles and policies. Poseidon further cautioned that those financial statements should not be relied upon. Attached hereto as **Exhibit "H"** is a copy of Poseidon's press release dated February 14, 2013.
14. Within a few hours after Poseidon's announcement on February 14, 2013, the Alberta Securities Commission prohibited any trading in Poseidon's securities. A copy of the Alberta Securities Commission's February 14, 2013 Cease Trade Order is attached hereto as **Exhibit "I"**.
15. On April 9, 2013, Poseidon issued a press release announcing, among other things, that further investigation by the Special Committee had given rise to questions with respect to recorded revenues in Poseidon's 2011 annual financial statements. Attached hereto as **Exhibit "J"** is a copy of Poseidon's press release dated April 9, 2013.
16. On April 17, 2013, the Toronto Stock Exchange (the "TSX") issued a press release advising that Poseidon's common shares would be delisted from the TSX effective May 17, 2013. A copy of that April 17, 2013 press release is attached hereto as **Exhibit "K"**.

#### IV. CLASS ACTION LITIGATION AGAINST POSEIDON ET AL.

##### *A. The Claims*

17. The Class Actions were commenced following Poseidon's release of its Q3 2012 interim consolidated financial results on November 14, 2012.
18. The Class Actions assert statutory and common law claims against Poseidon, and the named directors and officers, for violations of securities law, secondary market misrepresentation, negligence and negligent misrepresentation.
19. The Class Actions allege that the Class Action Defendants issued materially false and misleading information about Poseidon's financial position, financial performance and cash flow, and reported inflated revenues, accounts receivable and assets during the fiscal periods relevant to the Class Actions.

##### *B. The Defendants*

20. The Class Actions have been brought against Poseidon, and its current and former directors and officers: Scott Dawson, Lyle Michaluk, Matt MacKenzie and Harley Winger.
21. The following are the directors and officers named in the Class Actions and the positions they have occupied with Poseidon, from time to time, derived from Schedule "H" to the Affidavit of Leigh Cassidy, sworn on April 9, 2013 in connection with the CCAA application (the "Cassidy Affidavit") and Poseidon's disclosure documents from November 2012 through April 2013:

| Defendant      | Position                        | Period                        |
|----------------|---------------------------------|-------------------------------|
| Scott Dawson   | Director                        | Nov. 1, 2011 – Present        |
|                | Chairman of the Board           | Nov. 1, 2011 – Present        |
|                | Executive Chairman of the Board | Nov. 10, 2012 – Dec. 27, 2012 |
|                | Interim CEO and President       | Dec. 27, 2012 – Apr. 9, 2013  |
| Lyle Michaluk  | Director                        | Nov. 1, 2011 – Dec. 24, 2012  |
|                | CEO                             | Nov. 1, 2011 – Dec. 27, 2012  |
|                | CFO (Interim)                   | Dec. 27, 2012 – Feb. 26, 2013 |
| Matt MacKenzie | CFO                             | Nov. 1, 2011 – Dec. 27, 2012  |
| Harley Winger  | Director                        | Nov. 1, 2011 – April 9, 2013  |

22. Attached hereto as **Exhibits "L", "M", "N" and "O"** are copies of Poseidon's press releases, respectively dated, November 19, 2012, December 27, 2012, February 26, 2013 and April 9, 2013 relating to managerial and directorial changes at Poseidon from November 2012 through April 2013.

*C. The Proceedings*

23. On November 27, 2012 Siskinds LLP ("Siskinds") commenced the Ontario Action by way of a Statement of Claim. A Fresh as Amended Statement of Claim was filed on February 19, 2013, a copy of which is attached hereto as **Exhibit "P"**.
24. On December 3, 2012, Siskinds Desmeules, Avocats ("Siskinds Desmeules"), the Montreal office of a Quebec City law firm affiliated with Siskinds, commenced the Quebec Action by way of a Motion for Leave and to Authorize the Bringing of a Class Action. An amended petition was filed on March 26, 2013, a copy of which is attached hereto as **Exhibit "Q"**.
25. The Alberta Action was commenced on January 22, 2013 by way of a Statement of Claim. The Amended Claim was filed on February 20, 2013.
26. The Alberta and Ontario Actions have been brought on behalf of all persons and entities who purchased or otherwise acquired Poseidon's securities on or prior to February 14, 2013, other than (a) residents of Quebec (except those who are precluded from participating in a class action by virtue of art. 999 of the *Code of Civil Procedure*), and (b) certain persons and entities that are affiliated with Poseidon and the director and officer defendants (the "Excluded Persons") (together, the "Outside of Quebec Class").
27. The Quebec Action has been brought on behalf of persons and entities who purchased or otherwise acquired Poseidon's securities on or prior to February 14, 2013, and who were resident in the Province of Quebec at the time of acquisition, other than (a) those persons or entities who cannot participate in a class action in Quebec, and (b) the Excluded Persons (the "Quebec Class"). I am advised by Mr. Hawkes, and do believe, that art. 999 of Quebec's *Code of Civil Procedure* precludes companies that have more than 50 employees from participating in a class action.
28. Prior to the commencement of Poseidon's insolvency proceedings pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA"), I was advised by Mr. Hawkes that it was the intention of counsel to litigate the matters on behalf of the Outside of Quebec Class in Alberta. I am advised by Mr. Hawkes, and do believe, that the Quebec Action seeks to represent a distinct class, and that the litigation in Quebec was to continue independently.
29. I am advised by Mr. Hawkes, and do believe, that a number of United States-based law firms have filed, or have indicated an interest in pursuing, securities class actions in the United States against Poseidon and certain of its current or former directors and

officers. The lead plaintiff motion is scheduled to be heard on May 17, 2013 in the United States District Court for the Southern District of New York.

30. During the relevant period, Poseidon's common shares traded over-the-counter in the United States. I am advised by Mr. Hawkes, and do believe, that based on information available through Bloomberg databases, approximately 95% of trading volume during the relevant period occurred in Canada, and approximately 5% happened in the United States.

## **V. LEGAL PROCEEDINGS AGAINST OTHER ENTITIES**

### *A. Class Action in Quebec against National Bank of Canada*

31. On February 22, 2013, Siskinds Desmeules commenced a proceeding in Quebec against National Bank of Canada by way of a Motion for Leave and to Authorize the Bringing of a Class Action, attached hereto as **Exhibit "R"** (the "Quebec National Bank Action").
32. The plaintiff, Mr. Adam Kegel alleges that National Bank of Canada was a "promoter" and "influential person" of Poseidon within the meaning of the Quebec securities law, and that it influenced the release of certain Poseidon documents that contained misrepresentations.
33. The Quebec National Bank Action has been brought on behalf of those persons and entities who acquired Poseidon's securities on or prior to February 14, 2013, other than: 1) those persons who are precluded from participating in a class action in Quebec by operation of art. 999 of the Quebec *Code of Civil Procedure*, 2) those persons who choose to not be part of the Quebec National Bank Action, 3) and certain excluded persons and entities affiliated with Poseidon, National Bank of Canada and their respective officers and directors.
34. I am informed by Mr. Hawkes that he understands that National Bank of Canada is a member of the Lending Syndicate in the CCAA Proceeding.

### *B. Class Action in Ontario against National Bank of Canada*

35. On February 19, 2013, Siskinds commenced a proceeding in Ontario against National Bank of Canada by way of a Notice of Application pursuant to Part XXIII.1 of the Ontario *Securities Act*. An Amended Notice of Application was filed on April 8, 2013, attached hereto as **Exhibit "S"** (the "Ontario National Bank Action").
36. The applicant, Ms. Goldsmith alleges that National Bank of Canada was a "promoter" and "influential person" of Poseidon within the meaning of the applicable provincial securities legislation, and that it influenced the release of certain Poseidon documents that contained misrepresentations.

37. The Ontario National Bank Action has been brought on behalf of those persons and entities who acquired Poseidon's securities on or prior to February 14, 2013, and includes those who: 1) cannot participate in the Quebec National Bank Action (as explained above) by virtue of the Quebec *Code of Civil Procedure*, or 2) choose to not be part of the Quebec National Bank Action. The Ontario National Bank Action proposed class excludes certain persons and entities affiliated with Poseidon, National Bank of Canada and their respective officers and directors.

*C. Class Action against the Underwriters*

38. On February 20, 2013, by way of a Statement of Claim attached hereto as **Exhibit "T"**, Siskinds commenced a proceeding in Ontario against certain financial institutions that acted as underwriters in connection with Poseidon's public offering of common shares pursuant to a prospectus dated January 26, 2012 (the "Underwriters Action").
39. The defendant underwriters include: National Bank Financial, Inc. (an indirect, wholly-owned subsidiary of National Bank of Canada), BMO Nesbitt Burns Inc., CIBC World Markets Inc., Haywood Securities Inc., Peters & Co. Limited, Canaccord Genuity Corp., Cormark Securities Inc., Dundee Securities Ltd., and FirstEnergy Capital Corp.
40. The Underwriters Action has been brought on behalf of those persons and entities who acquired Poseidon's shares in the offering to which the prospectus dated January 26, 2012 related.

**VI. THESE CCAA PROCEEDINGS**

41. On April 9, 2013, Poseidon and certain of its affiliate entities (the "Applicants") sought and obtained interim protection under the *CCAA* by order of this Court, attached hereto as **Exhibit "U"** (the "Initial Order").
42. I am advised by Mr. Hawkes, and do believe, that:
  - (a) Paragraph 13 of the Initial Order has suspended any proceedings against the Applicants or affecting the Applicants' business or property;
  - (b) Paragraph 19 of the Initial Order has suspended any proceedings against current or former directors or officers of the Applicants to the extent that such proceedings relate to obligations on the part of the Applicants for which the directors and officers are liable in their capacity as such;
  - (c) Paragraph 14(b) of the Initial Order provides that members of the Lending Syndicate may proceed with any actions, suits or proceedings against the Applicants;
  - (d) Paragraph 15 of the Initial Order provides that no party shall be precluded from taking action against the Applicants or their current or former directors or

officers (including the director and officer defendants in the Class Actions) where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law; and

- (e) I and the other Class Action Plaintiffs should be permitted by virtue of para. 15 of the Initial Order to take such action as against Poseidon, Dawson, Michaluk, MacKenzie and Winger, as necessary to comply with the prescribed three-year limitation periods in the pertinent securities acts, in order to preserve the Class Action Plaintiffs' and the putative class members' rights under securities law.

43. Soon after the Initial Order was made public, my lawyers engaged in a number of without prejudice discussions with certain stakeholders to the CCAA proceedings in an effort to determine the direction of the proceedings and to seek out certain assurances that these proceedings would not compromise the interests of the Class Action Plaintiffs and the class of investors they seek to represent.

44. On April 24, 2013, my lawyer in the CCAA proceedings sent a letter to the Applicants' lawyer in order to communicate our concerns in relation to the CCAA proceedings as structured by the Initial Order and to seek certain assurances that the proceedings would not unduly affect the Class Action claims. The letter dated April 24, 2012 is attached hereto as **Exhibit "V"**.

45. The letter took the position that the Class Action Plaintiffs were willing to allow the CCAA proceedings to proceed without much involvement, as long as the Applicants would agree to toll the applicable limitation periods and provide the assurance that the CCAA proceedings would not have the effect of compromising any of the Class Action Plaintiffs' claims against insurance held by Poseidon or against any of Poseidon's directors and officers or other third parties.

46. The letter stated that in the absence of such assurances, the Class Action Plaintiffs would seek an order before this Court providing for (i) directions permitting pending class action motions to proceed, (ii) a representation order, and (iii) access to information. To date, the Applicants' lawyer has provided no response to the letter.

47. The letter was copied to the lawyers for the Monitor, the directors and officers named as defendants in the Class Action, and the Lending Syndicate.

## **VII. STATUS OF THE CLASS ACTIONS**

### *A. Pending Motions and Limitation Periods*

48. I am advised by Mr. Hawkes, and do believe, that the Class Action Plaintiffs assert both statutory and common law claims against the Class Action Defendants.

49. I am advised by Mr. Hawkes, and do believe, that in order to pursue the statutory rights of action for secondary market misrepresentation, the Class Action Plaintiffs need to

seek and obtain leave of the courts in Alberta, Ontario and Quebec. I am advised that the pertinent securities legislation of the provinces and territories of Canada impose statutory limitation periods in regard to those claims, which is generally three years after the release of the disclosure document that contained a misrepresentation.

50. The first disclosure document of Poseidon that the Class Action Plaintiffs allege to have contained misrepresentations was filed publicly on the website called SEDAR on October 11, 2011. That document was an information circular and proxy statement dated September 30, 2011, which was issued in connection with the Arrangement of Open Range. Accordingly, my understanding is that the statutory limitation period applicable to that document could expire as early as October 11, 2014.
51. I am advised by Mr. Hawkes, and do believe, that the applicable class proceedings legislation in Alberta, Ontario and Quebec suspend the running of any limitation periods that may be applicable to a cause of action asserted in a class action. However, the decision of the Ontario Court of Appeal in *Sharma v. Timminco Ltd.*, 2012 ONCA 107 ("Timminco"), suggests that the limitation periods applicable to the statutory rights of action for secondary market misrepresentation may not be suspended until such time that leave of the court has been obtained. I am advised by Mr. Hawkes that *Timminco* is not binding on the courts in Alberta and Quebec, and that class counsel take the position that any limitation periods applicable to the statutory rights of action for secondary market misrepresentation have been suspended by the operation of the class proceedings legislation. However, there is a concern that the Class Action Plaintiffs' and the classes' claims pursuant to the securities acts of the pertinent provinces may be exposed to the expiration of the said statutory limitation periods if the law is as was decided by the Ontario Court of Appeal in *Timminco*.
52. I am advised by Mr. Hawkes, and do believe, that in order to preserve the Class Action Plaintiffs' and the putative classes' statutory claims for secondary market misrepresentation, it is necessary to take action to proceed with leave motions pursuant to the pertinent securities acts. I am advised by Mr. Hawkes, and do believe, that the final determination of a leave motion (including the determination of any potential appeals) often takes many months, if not years. For example:
  - (a) In the *IMAX Class Action*, the plaintiffs commenced the action in September 2006, and moved for leave in November 2006. The motion was argued in December 2008, and leave was granted by reasons issued more than 3 years after the motion had been brought in December 2009 (*Silver v. Imax Corp*, [2009] O.J. No. 5573). The defendants sought leave to appeal to the Ontario Divisional Court, which was denied in February 2011 (*Silver v. Imax Corp*, 2011 ONSC 1035 (Div. Ct.));
  - (b) In the *CIBC Class Action*, the plaintiffs commenced the action in July 2008, and moved for leave in January 2010. This motion was heard in February and April 2012, and leave was denied by reasons issued in July 2012, solely because the

three-year limitation period, as set out in *Timminco*, had expired (*Green v Canadian Imperial Bank of Commerce*, 2012 ONSC 3637); and

- (c) In the *Sino-Forest Class Action*, the plaintiffs commenced the action in June 2011, and moved for leave in March 2012. Shortly after that, Sino-Forest obtained protection under the CCAA, and the defendants entered into tolling agreements with the plaintiffs. The CCAA stay in this case expired in February 2013, and the parties have scheduled the timeline for the leave motion, which is expected to be heard in February 2014.

53. I am advised by Mr. Hawkes, and do believe, that:

- (a) in respect of the Alberta Action, prior to the Initial Order being granted, my lawyers sought, but have not yet obtained, a fiat from the Honourable Justice Strekaf (who is case managing the class action) to file the securities act leave and certification application. Further a motion to approve a funding agreement is anticipated;
- (b) in respect of the Ontario Action, a motion for leave pursuant to the Ontario *Securities Act* and certification has been served on the Class Action Defendants but no further steps have been taken. Further a motion to approve a funding agreement is anticipated; and
- (c) in respect of the Quebec Action, an amended motion for leave to pursue the statutory claims as against the Class Action Defendants and for certification has been filed and served, but the Honourable Judge presiding over the case in Quebec has deferred to this Honourable Court to delineate the scope of the stay; (collectively, the "Pending Class Action Motions").

54. I have instructed my lawyers to propose tolling agreements to the Class Action Defendants in regard to the statutory limitation periods applicable to the Class Action Plaintiffs' and the putative classes' statutory claims. My lawyers have proposed to the Class Action Defendants to enter into those tolling agreements in order to alleviate the aforementioned concerns but, as of the date of this affidavit, the Class Action Defendants have not yet agreed to enter into tolling agreements.

#### *B. Pending Funding Agreement Approval Motions*

- 55. I undertook to act as a representative plaintiff in the Alberta Action because I believe that it is important that Poseidon and the named directors and officers be held accountable for their actions, and to recover compensation for the losses suffered by class members as a result of the defendants' conduct.
- 56. While I am prepared to act on behalf of other Poseidon shareholders, I cannot afford to incur more strain on my personal finances. Therefore, in connection with the Alberta

Action, I entered into a third-party funding agreement (the "Funding Agreement") with Claims Funding Australia PTY Ltd. ("Claims Funding") on April 9, 2013.

57. The Funding Agreement provides me with funding for out of pocket expenses in relation to the Alberta Action, as well as for these CCAA proceedings. The Funding Agreement also ensures that I will be indemnified if adverse costs awards are ordered against me. Poseidon and the other Class Action Defendants will have the assurance that any costs awards, which they may benefit from, will be covered by the Funding Agreement.
58. The Funding Agreement, however, must be approved by the Court, since it may compromise the recoverability of class members. I would like my lawyer to proceed with the motion to approve the Funding Agreement.
59. Mr. Hawkes has advised me that the plaintiff in the Ontario Action, Ms. Joanna Goldsmith, has signed the Funding Agreement on April 2, 2013 in connection with the Ontario Action. The Class Action Defendants have been served with motions for court approval of the Funding Agreement in connection with the Ontario action, but that no further steps have been taken in regard thereto.
60. Mr. Hawkes has advised me that the Quebec Action is not covered under the Funding Agreement because the Province of Quebec administers a litigation funding system and, in the circumstances of the Quebec Action, it is not yet necessary or in the best interests of the Quebec class members to seek separate funding from the Province of Quebec.

### **VIII. COMPOSITION OF THE CLASSES IN THE CLASS ACTIONS**

61. I am advised by Mr. Hawkes, and do believe, that based on information available through Bloomberg databases, before trading in Poseidon's stock was halted on February 14, 2013, approximately 90% of Poseidon's 81.1 million outstanding common shares were held by retail investors, like myself.
62. I am advised by Mr. Hawkes, and do believe, that after the commencement of the Class Actions, and as at April 26, 2013, approximately 1,788 individuals have registered with Siskinds, advising that they are members of the putative classes in the Class Actions. I am advised that approximately 1,355 of those individuals have disclosed to Siskinds the number of shares they acquired during the class period, and that the total number of shares stated to have been acquired during that period is approximately 10,026,154.
63. Poseidon owes me and the other shareholders of record as at December 31, 2012, payment of declared dividends for the month of December that had been scheduled for payment on January 15, 2013. On January 11, 2013, Poseidon deferred the payment of those dividends. Based on Poseidon's approximately 81.1 million outstanding shares as at December 31, 2012, I believe the debt owed to shareholders of record, corresponding to the payment of declared dividends as at December 31, 2012 totals approximately \$7.3 million. Attached hereto as Exhibits "W" and "X" are copies of Poseidon's press

releases dated October 18, 2012 and January 11, 2013, respectively, declaring and then deferring the dividends.

#### **IX. REPRESENTATIVE PLAINTIFFS**

64. I am retired and now make investments in the secondary market to supplement my income, which is largely sustained by benefits under the Canadian Pension Plan. Prior to retiring I worked as a pilot, and previous to that I operated a bakery. I have a commercial airline transport licence and a Journeyman Baker's Certificate. The \$33,840 loss that I incurred from my investments in Poseidon totals approximately 26% of my total retirement investment portfolio. This loss has been devastating for me and my wife. As a result of the investment loss, I now suffer from ongoing sleeplessness and bouts of anxiety. Further, my wife's retirement plans have been put off indefinitely, as we are dependent on her income in order to cover our expenses.
65. I am advised by Mr. Hawkes, and I do believe, that Joanna Goldsmith is the proposed representative plaintiff in the Ontario Action. She is a banker at a Canadian credit union, with the intention of retiring in August 2013. Ms. Goldsmith has 35 years of experience in the financial sector. Ms. Goldsmith purchased 2,500 shares in early November 2012. Ms. Goldsmith sold those Poseidon shares immediately after the November 14, 2012 disclosure and incurred a \$22,865 loss.
66. I am advised by Mr. Hawkes, and I do believe, that Marian Lewis is the proposed representative plaintiff in the Quebec Action. Ms. Lewis is 65 years old. She is now retired, but previously worked in an administrative role in an accounting department. Ms. Lewis purchased 200 shares on January 13th, 2012 at \$13.20/share and subsequently sold her shares on November 15th, 2012 at \$5.91/share.
67. I am advised by Mr. Hawkes, and I do believe, that Mohamed Ramzy wishes to be added as a representative plaintiff in the Alberta Action. Mr. Ramzy is a retired professional engineer, having retired in July of 2012. Mr. Ramzy lost \$349,497.33 from his and his immediate family members' investments in Poseidon, representing a 20% loss to Mr. Ramzy's retirement investments. As a result of this loss, he is currently evaluating whether he will have to return to work. Mr. Ramzy has found the loss to be emotionally straining.

#### **X. COUNSEL TO THE REPRESENTATIVE PLAINTIFFS**

68. Paliare Roland Rosenberg Rothstein LLP ("Paliare Roland"), the firm appointed by the Class Action Plaintiffs to deal with these insolvency proceedings, has significant experience representing groups in complex insolvency matters. Among other engagements, Paliare Roland has acted as insolvency counsel to:
  - (a) the class action plaintiffs in the insolvency of Sino-Forest;

- (b) various unions in the restructuring of Stelco, Air Canada, Algoma, Collins & Aikman and Slater Steel;
- (c) committees representing non-unionized employees in the restructuring of Fraser Papers and Cinar; and
- (d) various public companies who were dissident noteholders in Canada's non-bank Asset Backed Commercial Paper market.

69. Jensen Shawa Solomon Duguid Hawkes LLP ("JSS"), who has carriage of the Alberta Action, is a well-established class action firm with significant experience and expertise in securities class actions. JSS has acted as:

- (a) lead Alberta counsel for the class plaintiffs in the Aurelian Class Action;
- (b) counsel for the proposed class plaintiffs in Assante Wealth Management and Paramount, two significant securities class actions currently before the courts in Alberta; and
- (c) defence counsel for certain defendants in the HMS and MoneyMart class actions.

70. Siskinds and Siskinds Demeules, who have carriage of the Ontario and Quebec Actions, are well-established class action firms with significant experience and expertise in securities class actions. Siskinds has acted in approximately 20 securities class actions and 2 derivative proceeding settlements approved by courts, including, most recently, the easyhome, SunOpta, CV Technologies, Bear Lake Gold, PetroKazakhstan, Gildan Activewear, Canadian Superior Energy, Redline Communications, Gammon Gold, and Arctic Glacier securities class action settlements.

71. Siskinds has acted as co-counsel for plaintiffs in the Sino-Forest Class Action, in which partial settlement with the defendant, Ernst & Young for \$117 million was recently approved by the Ontario Superior Court of Justice in the context of the Sino-Forest CCAA proceedings (*Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2013 ONSC 1078; appeal pending).

## XI. ACCESS TO INFORMATION

72. In support of the Applicants' CCAA application, Mr. Leigh Cassidy has sworn an Affidavit dated April 9, 2013. On April 18, 2013, the Applicants' court-appointed monitor filed its First Report to Court in these proceedings. However, to date, there has been no meaningful disclosure about the events that lead to these CCAA proceedings, including the practices that lead to the overstatement of revenue by Poseidon, the individual or individuals who may have played a central role in those events, the true nature of Poseidon's assets and their fair value, Poseidon's liabilities and Poseidon's sale or restructuring process.

73. Publicly available information suggests that some of the individuals who may have been involved in negligent acts or serious misconduct may continue to hold positions at Poseidon and may influence these CCAA proceedings, including Poseidon's contemplated sale or restructuring.
74. According to the Cassidy Affidavit, Neil Richardson has a significant interest in a company called Total Water Management LLC ("TWM") that has been providing, and continues to provide, consultancy services to Poseidon. Richardson has been a director of Poseidon since November 2011, and continues to hold that position.
75. Michaluk and MacKenzie, who were, respectively, Poseidon's CEO and CFO during the relevant period were only terminated recently, on or about February 26, 2013, at the recommendation of the Special Committee. Winger, another defendant in the Class Actions, continued to be a director of Poseidon until April 9, 2013.
76. Further, in 2011 and 2012, Dawson, Michaluk and Winger sold Poseidon shares for gross proceeds of approximately \$29.3 million. Attached hereto as **Exhibit "Y"** is a document retrieved from SEDI showing the particulars of Poseidon share sales by the defendant directors and officers.
77. I am informed by Mr. Hawkes, and do believe, that in such circumstances it is important that the Class Action Plaintiffs be placed on an even footing with other stakeholders, so that they are in a position to anticipate and respond to events as they arise in these proceedings. This includes access to information pertaining to assets and liabilities of the Applicants, including the assets' fair value, and Poseidon's contemplated sale or restructuring, as well as information relevant to the Class Action Plaintiffs' and the classes' claims against Poseidon, the directors and officers and third parties.
78. A memorandum dated February 19, 2013 from TD Securities on behalf of Poseidon's lenders to Dawson, filed as Schedule "U" to the Cassidy Affidavit, suggests that Poseidon's lenders may have access to undisclosed information about the investigation undertaken by the Special Committee.
79. Plain and meaningful disclosure of information is particularly important in the circumstances of this case, having regard to the remarkable events leading up to the commencement of these proceedings.

SWORN BEFORE ME at Sturgeon County, in  
the Province of Alberta, this 03 day of May,  
2013.

041K

2-2



Franz Auer

A Commissioner for Oaths in and for the  
Province of Alberta

Trent J. Kulchar  
Barrister & Solicitor

{00653457 v1}