

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	Chapter 15
POSEIDON CONCEPTS CORP.,)	Case No. 13-15893 HRT
)	
Debtor in foreign proceeding.)	<i>(Jointly Administered)</i>

**SECOND MOTION FOR AUTHORITY TO ALLOW THE PC DEBTORS AND THE
MONITOR TO MAKE INTERIM DISTRIBUTION TO THE LENDING SYNDICATE**

PricewaterhouseCoopers Inc. (the “Monitor”), as the court-appointed monitor and authorized foreign representative of Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership, and Poseidon Concepts Inc. (collectively referred to as the “PC Debtors”) in the proceeding pending in the Court of Queen’s Bench of Alberta, Canada (the “Canadian Proceeding” or the “Canadian Court”) under the Companies’ Creditors Arrangement Act (the “CCAA”), by and through its undersigned counsel, Lewis Roca Rothgerber LLP, hereby files its Second Motion for Authority to Allow the PC Debtors and the Monitor to Make Interim Distribution to the Lending Syndicate (the “Motion”). In support of the Motion, the Monitor states as follows:

BACKGROUND

1. The PC Debtors initiated a proceeding under the CCAA on April 9, 2013. On April 9, 2013, the Canadian Court issued its CCAA Order.

2. On April 12, 2013, the Monitor filed four Chapter 15 petitions on behalf of the PC Debtors (collectively, the “Petitions”). On the same date, the Monitor filed its Motion for Order Directing Joint Administration of the Debtors’ Cases [Docket No. 8]. On April 15, 2013, the Court entered its Order Directing Joint Administration of the PC Debtors’ Chapter 15 Cases [Docket No. 12].

3. In conjunction with the Petitions, the Monitor, as the foreign representative in each case, also filed Petitions for Recognition as Foreign Main Proceeding Pursuant to Sections 1515 and 1517 of the Bankruptcy Code and Related Relief [Docket No. 3]. On May 15, 2013, the Court entered its Order Granting Recognition as a Foreign Main Proceeding and Related Relief [Docket No. 60].

4. On April 22, 2013, the Monitor filed its Omnibus Motion for Order (A) Authorizing the Sale of Assets Free and Clear of Liens, Claims and Interests; (B) Authorizing the Debtor to Employ Ernst & Young Orenda Corporate Finance Inc. as Financial Advisor; and (C) Approving Procedures for Sale of Assets [Docket No. 22] (the “Sale Procedures Motion”). Thereafter, on May 10, 2013, the Court entered its Order approving the Sale Procedures Motion [Docket No. 55].

5. On May 31, 2013, the Monitor filed its Motion for Order Approving Sale of Assets Free and Clear of Liens, Claims and Interests [Docket No. 83] (the “Sale Motion”). As specified in the Sale Motion, the party designated as having submitted the highest and best bid and therefore the successful bidder was Rockwater Energy Solutions, Inc. (“Rockwater”)

6. On June 19, 2013, the Court entered its Amended Order Authorizing the Sale of the Purchased Assets Free and Clear of All Liens, Claims and Interests, approving the sale to Rockwater [Docket No. 119]. The sale of the PC Debtors’ assets to Rockwater closed on June 24, 2013.

7. On July 3, 2013, the Monitor filed its Motion for Authority to Allow the PC Debtors and the Monitor to Make Interim Distribution to the Lending Syndicate. [Docket No. 134] The Lending Syndicate consists of certain prepetition secured lenders, including The Toronto-Dominion Bank, as lead lender, along with the participating bank lenders, HSBC Bank Canada, National Bank of Canada and the Bank of Nova Scotia.

8. On July 26, 2013, the Court entered its Order Granting Motion for Authority to Allow the PC Debtors and the Monitor to Make Interim Distribution to the Lending Syndicate. [Docket No. 140] On July 30, 2013, the proposed interim distribution to the Lending Syndicate was made in the amount of \$31.4 million (the “First Interim Distribution”). The remaining outstanding indebtedness owed by the PC Debtors to the Lending Syndicate is approximately \$47.8 million.

9. On August 16, 2013, the Canadian Court approved the sale of PC Canada’s real property located in Edson, Alberta to Dacam Holdings Ltd. for \$870,000. The transaction closed on August 23, 2013 and proceeds totaling \$876,994.92 (inclusive of a property tax adjustment) were remitted to, and are currently being held by the Monitor’s Canadian counsel.

A. Interim Distribution From the Sale Proceeds

10. On September 6, 2013, in the Canadian Proceeding, the Monitor filed his Thirteenth Report to the Court, dated September 6, 2013 (the “Thirteenth Report”), a copy of which is attached hereto as **Exhibit A**. The Thirteenth Report was filed in conjunction with the Monitor’s Application To: (1) Extend Stay; (2) Approve Negotiated Adjustments; (3) Approve Interim Distribution; (4) Approve Claims Process; and (5) Enhance Monitor Powers (the “Application”), a copy of which is attached hereto as **Exhibit B**.

11. On September 10, 2013, the Monitor supplemented the Thirteenth Report with the Monitor’s Fourteenth Report to the, dated September 10, 2013 (“Fourteenth Report”), a copy of which is attached as **Exhibit C**. The Fourteenth Report contains the Monitor’s Revised Cash Flow Forecast for the period September 14, 2013 through February 1, 2014. On September 12, 2013, the Monitor filed his Fifteenth Report to the, dated September 12, 2013 (“Fifteenth Report”), a copy of which is attached as **Exhibit D**, to which the Monitor attached a copy of the executed Purchase Price Adjustment Agreement.

12. Pursuant to the Application, the Monitor sought, *inter alia*, to make an additional interim distribution to the Lending Syndicate. In support of the Application and as set forth in the Thirteenth Report, the Monitor represented the following to the Canadian Court:

(a) As a result of certain adjustments made pursuant to the Asset Purchase Agreement, the net amount received by the PC Debtors from the sale of their assets to Rockwater is anticipated to be approximately \$45,109,096 (the "Sale Proceeds"). This represents a reduction of \$2,060,189 from the amount previously reported and is a result of negotiations conducted between Rockwater, the PC Debtors and the Lending Syndicate. The Monitor has recommended approval of the proposed settlement.

(b) The amount of \$27,403,000 from the Sale Proceeds has previously been distributed to the Lending Syndicate as part of the First Interim Distribution.

(c) From the Sale Proceeds remaining after the First Interim Distribution, the Monitor intends to hold back and reserve for the following potential claims:

(i) \$2.06 million will be withheld for payment to Rockwater representing the negotiated adjustment in the sale price mentioned above;

(ii) On the basis of claims filed in the US proceeding, the Monitor has identified claims from creditors asserting possessory liens in the aggregate amount of \$1,942,135, which will be withheld;

(iii) The Monitor has requested the initiation of a similar claims process in the Canadian proceeding and estimates, based on a review of the PC Debtors' books and records, that the Canadian possessory lienholders will assert claims in the amount of approximately \$500,000. The Monitor has reserved \$1.5 million, or 300% of the potential Canadian lienable amounts, for this purpose.

13. Based on the foregoing, the Monitor has calculated that \$15,134,000 is available from the Sale Proceeds for a second interim distribution to the Lending Syndicate.

B. Interim Distribution from Cash On Hand

14. In addition to the Sale Proceeds, the Monitor has also determined that an interim distribution to the Lending Syndicate is appropriate from net cash operating funds on hand in the approximate amount \$362,000. The Monitor has determined that the PC Debtors had a net cash balance on hand of approximately \$3.48 million as of August 26, 2013 ("Net Cash On Hand"). In determining the interim distribution to the Lending Syndicate from the Net Cash On Hand, the Monitor has calculated the following amounts that are to be reserved for purposes of paying ongoing obligations of the PC Debtors, as follows:

(a) Incentive pool payments due to employees and TWM - \$386,000

(b) Balance of transaction fee payable to EYO - \$229,000

- (c) Operating costs, professional fees and general provisions - \$500,000
- (d) Administration charge - \$1,000,000
- (e) Directors' charge - \$1,000,000

15. Based on the foregoing, the Monitor is prepared to make an interim distribution from the Net Cash On Hand in the amount of \$362,000.

C. Canadian Court's Authorization and Approval of the Second Interim Distribution Application

16. On September 12, 2013, the Canadian Court, after a hearing, entered an Order approving a second interim distribution to the Lending Syndicate (the "Second Distribution Order"), a copy of which is attached hereto as **Exhibit E**. The Second Distribution Order, in relevant part, provides the following:

- a. The Purchase Price Adjustment Agreement, appended as Appendix A to the Monitor's Fifteenth Report is hereby approved.
- b. The Monitor shall distribute to the Lending Syndicate the sum of \$15,134,000.
- c. [The Debtors] shall distribute to the Lending Syndicate the sum of \$362,000 from cash on hand.
- d. The Monitor has made appropriate provision for the Priority Claims, both in Canada and the United States.

Distribution Order, p. 2.

RELIEF REQUESTED

17. By and through this Motion, the Monitor seeks recognition of the Canadian Court's Second Distribution Order authorizing an interim distribution in the amount of \$15,496,000 million to the Lending Syndicate. The Distribution Order approves the payment of \$15,134,000 from the Rockwater Sale Proceeds and \$362,000 million from the Net Cash On Hand, for a total interim distribution of \$15,496,000 (the "Second Interim Distribution"). Accordingly, the Monitor requests this Court's grant of comity and cooperation in the form of its recognition of the Distribution Order issued by the Canadian Court in the Canadian Proceeding which authorizes the Second Interim Distribution.

BASIS FOR RELIEF REQUESTED

18. Section 1509(b) of the Bankruptcy Code provides that:

If the Court grants recognition under Section 1517, and subject to any limitations

that the court may impose consistent with the policy of this chapter –

...

- (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and
- (3) a court in the United States *shall* grant comity or cooperation to the foreign representative.

11 U.S.C. § 1509(b)(2)-(b)(3) (emphasis added). Here, the Monitor has been designated as the foreign representative for the PC Debtors. Therefore, the Monitor seeks comity and cooperation in the form of recognition of the Second Distribution Order.

19. While the language set forth in Section 1509(b)(3) is mandatory, it is subject to any limitations the Court may impose consistent with the policy of Chapter 15. However, the public policy exception should be “narrowly interpreted” and is restricted to “the most fundamental policies of the United States.” *In re Ephedra Prod. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006).

20. In considering whether to grant relief, it is not necessary that the result achieved in a foreign bankruptcy proceeding be identical to that which would be had in the United States. It is sufficient if the result is “comparable.” *In re Schimmelpenninck*, 183 F.3d 147, 364 (5th Cir. 1999); *Overseas Inns S.A.P.A. v. United States*, 911 F.2d 1146, 1148 (5th Cir. 1990). The framework for analyzing requests for comity or assistance in Chapter 15 proceedings was analyzed by the Fifth Circuit in *In the Matter of Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1056 (5th Cir. 2012), as follows:

First, because Section 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions. Other courts have held that, where the requested relief is explicitly provided for under Section 1521, it is necessary to consider Section 1507. Second, if Section 1521(a)(1)-(7) & (b) does not list the requested relief, a court should decide whether it can be considered “appropriate relief” under Section 1521(a). This in turn requires consideration of whether such relief has previously been provided under Section 304. Third, only if the requested relief appears to go beyond the relief previously available under Section 304 or currently provided for under United States law, should a court consider Section 1507. This approach recognizes that relief under Section 1507 “is in nature more extraordinary” than that provided under Section 1521, as a result of which “the test for granting the relief is more rigorous.” It also acknowledges that, while Section 1507’s broad grant of assistance is intended to be a “catchall,” it cannot be used to circumvent restrictions present in other parts of Chapter 15, nor to provide relief otherwise available under other provisions.

(Citations omitted.)

21. While authorization of the Second Interim Distribution is not specifically enumerated in Section 1521(a)(1)-(7), the payment of an interim distribution does fall within the language of “any additional relief” contained in Section 1521(a)(7). Here, the Monitor seeks authority to allow the Debtor to make a Second Interim Distribution on the claim of the Lending Syndicate. A review of reported decisions in the United States reveals that interim distributions are commonly authorized by bankruptcy courts under a variety of contexts. *See, e.g., In re Energy Coop., Inc.*, 173 B.R. 363, 372-373 (N.D. Ill. 1994) (“the Trustee’s motion for an interim distribution of 20% to general unsecured creditors is granted.”); *In re Griffin Trading Co.*, 270 B.R. 883, 904 (N.D. Ill. 2001) (“The trustee may make an interim distribution”); *In re Field*, 226 B.R. 178, 185 (Bankr. S. Car. 1998) (“The trustee may, at his discretion, propose an interim distribution to other creditors.”); *In re Inspire Ins. Solutions, Inc.*, 2006 WL 6508275 *5 (Bankr. N.D. Tex. May 18, 2006) (unpublished disposition) (“the Court therefore finds that it is appropriate to authorize the Trustee to make interim distributions”); *In re Industria Office Bldg. Corp.*, 171 F.2d 890, 893 (3d Cir. 1949) (“we cannot say that the court below abused its discretion in authorizing the interim distribution.”).

22. Also, as reflected in the Thirteenth Report, the Monitor has carefully analyzed the potential claims which may take priority over the lien interests asserted by the Lending Syndicate. *Id.* at pp. 10-12. The Monitor has also calculated those postpetition obligations which remain to be satisfied from operating capital and has reserved a sufficient amount to also satisfy those claims. *Id.*

23. Under these circumstances, including the fact that the proposed Second Interim Distribution has previously been authorized and approved by the Canadian Court, the Monitor asserts that the proposed distribution falls within the spirit, purpose and intent of Chapter 15 and requests the Court grant this Motion.

WHEREFORE, the Monitor respectfully requests that the Court enter its Order authorizing the proposed Second Interim Distribution to the Lending Syndicate in the amount of \$15,134,000 from the Sale Proceeds and \$362,000 from the Net Cash Operating Proceeds, for a total of \$15,496,000, and requests such other and further relief as is appropriate.

Respectfully submitted this 16th day of September, 2013.

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