

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

In re:

FISKER, INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 24-11390 (TMH)

(Jointly Administered)

Hearing Date and Time:
January 9, 2025 at 10:00 a.m. (ET)

Objection Deadline Date and Time:
January 2, 2025 at 4:00 p.m. (ET)

**MOTION OF VISTACAL LUXURY IMPORTS, INC. FOR ENTRY
OF AN ORDER ALLOWING (I) LATE FILED CLAIM AS
TIMELY FILED AND (II) ADMINISTRATIVE EXPENSE CLAIM**

Creditor Vistacal Luxury Imports, Inc. (“**Vistacal**”), by and through the undersigned counsel, hereby requests entry of an order pursuant to Rule 9006(b) of the Federal Rules of Bankruptcy Procedure (i) granting leave to file a late proof of claim in the above captioned matter, and deeming such proof of claim timely filed; and (ii) allowing Vistacal's Administrative Expense Claim (as defined below). In support of this motion (the “**Motion**”), Vistacal respectively states as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the “**Court**”) has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware,

¹ The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors’ corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.



dated February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases is proper under 28 U.S.C. §§ 1408 and 1409.

2. The bases for the relief requested herein are Section 105(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9006.

THE BANKRUPTCY CASES

3. On June 17, 2024, and June 19, 2024 (the “**Petition Dates**”) each of the six Debtors filed voluntary petitions for relief under the Bankruptcy Code. The cases are jointly administered under Case No. 24-11390.

4. On August 5, 2024, the above-captioned debtors (collectively, the “**Debtors**”) filed the *Motion of Debtors for Entry of an Order (I) Establishing Certain Bar Dates for Filing Proofs of Claim Against the Debtors, and (II) Granting Related Relief, Including Notice and Filing Procedures* [Docket No. 377] (the “**Bar Date Motion**”).

5. On August 19, 2024, the Court entered the *Order (I) Establishing Certain Bar Dates for Filing Proofs of Claim Against the Debtors, and (II) Granting Related Relief, Including Notice and Filing Procedures* [Docket No. 458] (the “**Bar Date Order**”). Pursuant to the Bar Date Order, any claim arising before the Petition Date was required to be filed within twenty-one (21) days from service of the bar date notice (the “**General Bar Date**”). Further, pursuant to the Bar Date Order any person or entity whose claim is allowable under §503(b) and §507(a)(2) of the Bankruptcy Code as an administrative expense is not required to file proofs of claim.

6. On August 30, 2024, the Debtors filed the *Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation of Fisker Inc. and Its Debtor Affiliates* [Docket No. 498] (together with all schedules and exhibits thereto, and as may be modified, amended or supplemented from time to time, the “**Plan**”).

7. Pursuant to a certificate of service dated October 5, 2024 [Docket No. 643], Vistacal was (incorrectly) served notice of the *Fourth Notice of Rejection of Certain Executory Contracts and/or Unexpired Leases (and the Abandonment of Property* [Docket No. 605], on September 30, 2024 (the “**Certificate of Service**”). Pursuant to the Certificate of Service, Vistacal was supposedly served by email to moranj@autonation.com.

8. On October 16, 2024, the Court entered the *Findings of Fact, Conclusions of Law, and Order, Approving the Disclosure Statement on a Final Basis, Confirming the Debtors’ Joint Chapter 11 Plan of Liquidation, and Granting Related Relief* (the “**Confirmation Order**”) [Docket No. 722].

VISTACAL'S CLAIMS

9. Vistacal sublets property in Vista, California to the Debtors pursuant to a sublease entered November 3, 2023. The Debtors vacated the property in late September 2024 and failed to pay rent for the months of October and November, 2024. The agreement between Vistacal and Debtors was governed by the *Sublease Agreement dated November 3, 2023 by and between VISTACAL LUXURY IMPORTS INC., a Delaware corporation and FISKER GROUP INC., a Delaware corporation, doing business as “Fisker”* (the “**Sublease Agreement**”) for the property located at 1715 Hacienda Dr., Vista, CA and as more particularly described in the Original Sublease (the “**Premises**”), as affected by that certain Commencement Date Agreement dated December 1, 2023 entered by and between Sublandlord and Subtenant.

10. Pursuant to the Sublease Agreement, notices should be directed to the below addresses (the “**Notice Address**”):

Notices. All notices given herein shall be in writing, shall be addressed to the party to be notified at the address set forth below or at such other address as such party may designate for itself from time to time by notice hereunder, and shall be deemed to have been validly served, given or delivered upon written evidence of receipt or rejections thereof, if sent via (i) U.S. Postal

Service, certified mail, return receipt requested with proper prepaid postage, (ii) U.S. Postal Service Priority Mail, with prepaid postage, (iii) a reputable overnight delivery carrier that provides confirmation of delivery (e.g. FedEx), or (iv) hand delivery:

To Sublandlord: VISTACAL LUXURY IMPORTS INC.
c/o AutoNation
200 SW 1st Avenue, 14th Floor
Fort Lauderdale, Florida 33301
Attn: Vice President, Corporate Real Estate Services

With a copy to: VISTACAL LUXURY IMPORTS INC.
c/o AutoNation
200 SW 1st Avenue, 14th Floor
Fort Lauderdale, Florida 33301
Attn: Senior Real Estate Counsel

11. The Proof of Claim to be filed by Vistacal will reflect a claim amount of approximately \$1,096,500 attributable to the pre-petition period, which consists of the following components: (a) \$1,020,000 in rent attributable to the pre-petition period; and (b) \$76,500 in taxes attributable to the pre-petition period.

12. In addition to the amounts set forth above, the creditor further asserts a post-petition administrative expense claim in the total amount of \$541,780 (the “**Administrative Expense Claim**”). The Administrative Expense Claim consists of the following: (a) \$170,000 (September & October base rent); (b) \$255,000 (3 months of due upon default pursuant to the Sublease Agreement); (c) \$76,500 (real estate taxes due from 12/1/23 – 6/30/24); (d) \$22,819.56 (real estate taxes due from 7/1/24 – 10/31/24); (e) \$11,218.86 (utilities due from tenant’s occupation 12/2024 to 09/2024); and (f) \$6,200.00 (guard services for Sept. and October)

RELIEF REQUESTED

13. Given the Debtors’ failure to provide actual notice to Vistacal, Vistacal seeks leave to file its claim pursuant to Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

BASIS FOR REQUESTED RELIEF

14. Vistacal should be permitted to file a proof of claim because its inability to file a claim before the Bar Date is attributable to excusable neglect. Bankruptcy Rule 9006(b)(1) provides as follows:

In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bank. P. 9006(b)(1).

15. The determination of whether neglect to file a timely claim is excusable under Bankruptcy Rule 9006(b)(1) “is an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993). “[R]elevant circumstances surrounding the party’s omission . . . include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of [creditor], and whether [creditor] acted in good faith.” *Id.* (citation and footnote omitted). The balance of the foregoing factors weigh in favor of permitting the filing of Vistacal’s claims.

16. Importantly, when analyzing potential prejudice in filing late claims in Chapter 11 proceedings as opposed to Chapter 7 proceedings, the *Pioneer* Court also recognized that the goal of Chapter 11 is to “rehabilitate the debtor and avoid forfeitures by creditors,” that the emphasis of the court is not as much on prompt closures as with Chapter 7 claims, and that adopting a “flexible understanding” of excusable neglect is in full “accord with the policies underlying chapter 11 and the bankruptcy rules.” *Id.* In determining whether a party’s neglect of a deadline is excusable, the Supreme Court found that “the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.* at 395. Such

circumstances include: “the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Id.*; *see also In re Weinraub*, 351 B.R. 779, 781 (Bankr. S.D. Fla. 2006) (citing *Pioneer Inv. Servs. Co.*, 507 U.S. at 395).

17. Here, consideration of the factors taken together supports the conclusion that the late filing of Vistacal’s proof of claim is the result of excusable neglect.

I. The Debtors and Other Creditors Will Not Be Prejudiced by Allowing Vistacal to File their Claims.

13. First, the potential prejudice to the Debtor of allowing Vistacal to file its proof of claim past the deadline is minimal. Under the *Pioneer* test, the “central inquiry is whether the debtor will be prejudiced” by the late filed claim. *See Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.)*, 62 F.3d 730, 738 (5th Cir. 1995). The Debtors and other creditors will not be prejudiced by allowing Vistacal to file its claim. The Third Circuit has adopted a multi-factor test for prejudice, including: (i) the size of the claim with respect to the size of the estate; (ii) whether allowing the late claim would have an adverse impact on the judicial administration of the case; (iii) whether the plan was filed or confirmed with knowledge of the existence of the claim; (iv) the disruptive effect that the late filing would have on the plan or upon the economic model upon which the plan was based; (v) and whether allowing the claim would open the floodgates to other similar claims. *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 126 (3d Cir. 1999).

a. Vistacal’s Claims Are Minimal in Comparison to the Total Asserted Claims.

14. Inclusion of Vistacal’s claims will have minimal effect on Debtors’ estates and case administration. Vistacal’s claims, if allowed, would constitute less than 1% of estimated aggregate

claims of between \$1.4 billion and \$1.5 billion *See* Disclosure Statement filed at Docket No. 714 at Article VI.A, page 38. Vistacal's claims are minimal compared to the aggregate amount of total claims.

b. Allowing Vistacal to File its Claim Will Have Little to No Impact on the Administration of the Estates.

15. Allowing Vistacal to file its claim now will have little impact on the administration of the Debtors' cases. The Claims reconciliation process has only just begun, and pursuant to the Disclosure Statement, recoveries to creditors will be an extensive and ongoing endeavor, which

c. The Plan Was Confirmed with Knowledge of Vistacal's Claims.

16. The Plan was confirmed with knowledge of Vistacal's claims. It is evident that based on the Fourth Notice of Rejection, the Debtors were aware of the claims.

d. Allowing Vistacal to File its Claim Will Not Disrupt the Economic Model of the Plan

17. As stated above, allowing Vistacal to file its claims will not disrupt the economic model of the Plan. The Plan's framework accounts for variables like Vistacal's late-filed claims.

e. Allowing Vistacal to File its Claim Will Not Open the Floodgates

25. Allowing Vistacal to file a late proof of claim will not "open the floodgates" to future claims against Debtors. The Debtors' awareness of Vistacal's claims during the confirmation process differentiates Vistacal from other creditors coming forward after the Effective Date.

f. Vistacal Will Be Prejudiced if Not Permitted to Assert its Claim

26. While the foregoing factor analysis shows that the estate will *not* be prejudiced if Vistacal is permitted to file its claim, Vistacal would suffer significant prejudice if it was not permitted to file its claim. Vistacal would be denied all monetary recovery for the damages suffered.

II. Vistacal Acted in Good Faith, and its Delay Was Excusable.

27. Finally, Vistacal's conduct was in good faith. Courts have declined to find bad faith in these circumstances absent "evidence of a deliberate or tactical delay." See *Premier Membership Services, LLC*, 276 B.R. 709, 716 (Bankr. S.D. Fla. 2002) (citing *O'Brien Env'tl. Energy*, 188 F.3d 116, 128-29 (3d Cir. 1999)). Vistacal acted in good faith in seeking leave to file its claim late. It never properly received notice of the Bar Date. In examining the reason for the delay in filing a proof of claim, the debtor's role is essential in determining whether the claimant's neglect was excusable. *O'Brien*, 188 F.2d at 128-29; see also *Chemetron Corp. v. Jones*, 72 F.3d 341, 350 (3d Cir.1995) (remanding issue of analysis of excusable neglect under *Pioneer* standard to bankruptcy court upon finding that bankruptcy court and district court failed to adequately consider, *inter alia*, debtor's role in contributing to delay).

28. The Debtors never provided Vistacal with correct notice of the Bar Date despite its status as a known creditor. See *In re New Century TRS Holdings, Inc.*, 465 B.R. 38, 46 (Bankr. D. Del. 2012). A "known" creditor is one whose identity is either known or "reasonably ascertainable" by the debtor. *Id.* citing *Chemetron Corp.*, 72 F.3d at 341. "A creditor's identity is reasonably ascertainable if that creditor can be identified through reasonably diligent efforts." *Id.* (internal quotations and citations omitted.) "A debtor need not be omnipotent or clairvoyant, but need only do what is reasonable under the circumstances to provide notice to ascertainable creditors." *New Century*, 465 B.R. at 46. Reasonableness is determined in each case by the totality of the circumstances. *Id.* at 47.

29. Vistacal did not receive notice of the Bar Date Order nor the Plan, which post-dates the Fourth Rejection Notice. The Certificate of Service, filed in connection with the Fourth Notice notes that the Rejection Notice was emailed to: Moranj@autonation.com and mailed to: (1) 200

SW 1st Av. 14th Floor, Fort Lauderdale, FL 33301, and (2) 1715 Hacienda Drive, Vista, CA, 92081. [See Docket No. 643]. This address is not Vistacal's Notice Address, as provided in the Sublease Agreement.

30. In the Third Circuit, it is well established that to bind a creditor to a claims bar date, known creditors must receive “actual notice.” A long line of cases establishes that the paradigmatic means for providing “actual notice” is by mail to a creditor’s last known address. *See In re: Cyber Litigation Inc.*, No. 20-12702 (CTG), 2021 WL 5047512 (Bankr. D. Del. Oct. 28, 2021) (holding the notice provided to creditor failed to meet the requirements of Bankruptcy Rule 2002, which specifically requires 21 days’ notice by mail. In *Cyber Litigation*, the parties stipulated that the bar date notice was mailed to creditor’s old address, not creditor’s last known address.); *see also In re Freedom Communications Holdings*, 472 B.R. 257, 262 (Bankr. D. Del. 2012) (“here, as is generally the case, mailing a notice to a party's last known address is 'reasonably calculated' to provide actual notice”).

31. Thus, the Bar Date Order must be mailed to the creditor’s last known address, and e-mail alone will not suffice, to constitute actual notice. Thus, the Debtors, despite their awareness of the claim, failed to provide Vistacal with sufficient notice of the Bar Date.

32. The totality of the circumstances in this case—*i.e.* not receiving timely and sufficient information with which to identify the Bar Date caused Vistacal’s delay in seeking the relief requested herein. Vistacal have acted in good faith, and any delay in seeking authority to file a late proof of claim was unintentional and simply due to excusable neglect as defined in *Pioneer*. Vistacal acted without delay in contacting the Debtors and did not wait years to seek leave to file claim as the claimants did in the *New Century* and *Chemetron*. The Debtors were fully aware of

Vistacal's claims during Plan confirmation. Because the balance of prejudice weighs strongly in Vistacal's favor, equity supports allowing Vistacal to file its claim.

CONCLUSION

WHEREFORE, Vistacal respectfully request the enter the proposed order, substantially in the form attached hereto as **Exhibit A**: (i) granting Vistacal leave to file a late proof of claim and deeming its claim as timely filed pursuant to Bankruptcy Rule 9006(b), and (ii) granting such other relief as the Court deems just and proper.

Dated: Wilmington, Delaware
December 20, 2024

AKERMAN LLP

/s/ Andrew Dupre

Andrew S. Dupre (#4621)
222 Delaware Avenue, Suite 1710
Wilmington, Delaware 19801
Telephone: (302) 596-9200
andrew.dupre@akerman.com

Counsel to Vistacal Luxury Imports Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 20, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day by transmission of Notices of Electronic Filing generated by CM/ECF to those parties registered to receive electronic notices of filing in this case.

By: /s/ Andrew Dupre
Andrew Dupre

EXHIBIT A
PROPOSED ORDER

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

In re:

FISKER, INC., *et al.*,

Debtors.²

Chapter 11

Case No. 24-11390 (TMH)

(Jointly Administered)

**ORDER GRANTING MOTION OF VISTACAL LUXURY IMPORTS INC. FOR
ENTRY OF AN ORDER ALLOWING (I) LATE FILED CLAIM AS TIMELY FILED
AND (II) ADMINISTRATIVE EXPENSE CLAIM**

Upon the motion of Vistacal Luxury Imports Inc. (“**Vistacal**”) for leave to file late proofs of claim pursuant to Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedures, and proper notice having been provided, and sufficient cause appearing therefor; it is hereby ORDERED that:

1. Vistacal is hereby granted leave to file a proof of claim by no later than February 1, 2025 and may submit its claim electronically *via* the “Submit Electronic Proof of Claim (ePOC)” tab of the website maintained by the Debtors' claims agent, Kurtzman Carson Consultants, LLC, at <https://www.veritaglobal.net/fisker>.

2. Once submitted, Vistacal’s claims shall be marked on the Official Claims Register as timely filed.

3. Vistacal's Administrative Expense Claim shall be allowed in the amount of \$541,738.42 and treated in accordance with the Plan.

² The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors’ corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

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

In re:

FISKER, INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 24-11390 (TMH)

(Jointly Administered)

Hearing Date:

January 9, 2025 at 10:00 a.m. (ET)

Objection Deadline:

January 2, 2025 at 4:00 p.m. (ET)

**NOTICE OF MOTION OF VISTACAL LUXURY IMPORTS, INC. FOR ENTRY
OF AN ORDER ALLOWING (I) LATE FILED CLAIM AS
TIMELY FILED AND (II) ADMINISTRATIVE EXPENSE CLAIM**

PLEASE TAKE NOTICE that on December 20, 2024, Vistacal Luxury Imports, Inc. (“**Vistacal**”), by and through undersigned counsel, filed the *Motion for Entry of an Order Allowing (i) Late Filed Claim as Timely Filed and (ii) Administrative Expense Claim* (the “**Motion**”) with the United States Bankruptcy Court for the District of Delaware (the “**Court**”).

PLEASE TAKE FURTHER NOTICE that any responses or objections to approval of the relief requested in the Motion must be (a) in writing; (b) filed with the Clerk of the Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, on or before **January 2, 2025 at 4:00 p.m. (ET)** (the “**Objection Deadline**”); and (c) served so as to be received on or before the Objection Deadline by the undersigned counsel to Vistacal.

PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE MOTION WILL BE HELD ON JANUARY 9, 2025 AT 10:00 A.M. (ET) BEFORE THE HONORABLE THOMAS M. HORAN AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 6th FLOOR, COURTROOM #1, WILMINGTON, DELAWARE 19801.

PLEASE TAKE FURTHER NOTICE THAT ONLY OBJECTIONS MADE IN WRITING AND TIMELY FILED AND RECEIVED IN ACCORDANCE WITH THE PROCEDURES ABOVE WILL BE CONSIDERED BY THE COURT AT SUCH HEARING.

¹ The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors’ corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: Wilmington, Delaware
December 20, 2024

AKERMAN LLP

/s/ Andrew S. Dupre

Andrew S. Dupre (#4621)
222 Delaware Avenue, Suite 1710
Wilmington, Delaware 19801
Telephone: (302) 596-9200
andrew.dupre@akerman.com

Counsel to Vistacal Luxury Imports, Inc.

CERTIFICATE OF SERVICE

I, Andrew S. Dupre, hereby certify that on December 20, 2024, a true and correct copy of the foregoing *Notice of Motion* was served upon all interested parties by CM/ECF.

/s/ Andrew S. Dupre
Andrew S. Dupre