

1 OFFICE OF THE UNITED STATES TRUSTEE

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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN MARIANA ISLANDS**
15 **BANKRUPTCY DIVISION**

16 In re

Case No. 1:24-bk-00002
(Chapter 11)

17 IMPERIAL PACIFIC INTERNATIONAL
18 (CNMI), LLC,

19 Debtor and
20 Debtor-in-Possession.

Final Hearing:
Date: June 21, 2024
Time: 8:30 a.m. (ChST)
Chief Judge: Hon. Ramona V. Manglona

[Related Docket Entries: #12, 19, 30, 31, 47,
53, 84, 86, 87, 111, and 112]

21 **UNITED STATES TRUSTEE’S SECOND SUPPLEMENTAL STATEMENT**
22 **REGARDING DEBTOR’S MOTION FOR ORDER AUTHORIZING DEBTOR TO**
23 **OBTAIN POSTPETITION INDEBTEDNESS**

24 The United States Trustee, by and through her attorney, hereby submits this Second
25 Supplemental Statement (“Second Supp. Statement”) regarding the Debtor’s Motion for Order
26 Authorizing Debtor to Obtain Postpetition Secured Indebtedness (“DIP Financing Motion”).

27 The United States Trustee has authority and standing to make this statement since its
28 responsibilities include, among other things, supervising “the administration of cases ... under



1 Chapter 11” of the Bankruptcy Code. 28 U.S.C. § 586(a)(3).

2 **I. BACKGROUND**

3 1. On April 23, 2024, Debtor filed a Motion for Order Authorizing Debtor to Obtain
4 Postpetition Secured Indebtedness (“Motion for DIP Financing”), Dkt. #12. Debtor’s Motion for
5 DIP Financing seeks authority to incur secured debtor-in-possession financing (“DIP Financing”)
6 from lender Loi Lam SIT (“DIP Lender”) through a post-petition loan up to \$7,000,000 secured
7 by a junior lien and superpriority claim against the estate.
8

9 2. On an interim basis, Debtor sought up to \$400,000 secured by a junior lien and
10 superpriority claim against the estate upon the entry of an interim order approving the DIP
11 Facility.

12 3. On April 24, 2024, the United States Trustee filed a Statement regarding Debtor’s
13 First Day Motions including, inter alia, objections to Lender’s request for interim approval of at
14 \$400,000 loan to Debtor secured by a junior lien and superpriority claim against the estate
15 pertaining to Debtor’s Motion for DIP Financing, Dkt. #19.
16

17 4. On May 10, 2024, the Debtor filed a Reply, Dkt. #47, in which Lender made a
18 substantial concession by abandoning his request for a junior lien and superpriority claim against
19 the estate.

20 5. On May 30, 2024, the Court heard oral argument on interim approval of Debtor’s
21 Motion for DIP Financing.
22

23 6. On June 11, 2024 the Court entered an Interim Order granting in part, on an
24 interim basis on the terms set forth therein, the Debtor’s Motion for DIP Financing up to
25 \$400,000 in post-petition financing as an administrative expense claim, Dkt. #112 (the “Interim
26 Order”).
27
28

1 7. Paragraph 3 of the Interim Order provides: “Lender shall transfer the Carve Out
2 amount of \$100,000.00 of the Initial Advance to the Client Trust Account of Choi & Ito,
3 Debtor’s general bankruptcy counsel.”

4 **II. UNITED STATES TRUSTEE’S COMMENTS REGARDING DEBTOR’S**
5 **COUNSEL HOLDING “CARVE-OUT” PROFESSIONAL FEE FUNDS IN**
6 **CLIENT TRUST FUND ACCOUNT AND NOT IN DEBTOR’S DIP ACCOUNT**

7 Pursuant to the Interim Order, the Lender’s interim loan to Debtor in the amount of
8 \$400,000 was approved, on an interim basis, as an administrative expense claim (subject to certain
9 carve-outs, to share ratably with all other administrative expense claims) for actual post-petition
10 advances made by the Lender to the Debtor for authorized budget expenses. From the loan
11 proceeds, the Lender’s administrative expense claim is subject to carve outs for quarterly fees,
12 chapter 7 trustee compensation (in the event of liquidation), and up to \$100,000 in professional
13 fees. Although the professional’s fees are “carved-out” from the Lender’s administrative expense
14 claim, such professional fees are not carved-out from other post-petition administrative expense
15 claims and may only be paid upon Court approval (and, in the event the estate is administratively
16 insolvent, are subject to disgorgement to share ratably with any other unpaid non-Lender post-
17 petition administrative expense claims).

18
19 Paragraph 3 of the Interim Order provides: “Lender shall transfer the Carve Out amount of
20 \$100,000.00 of the Initial Advance to the Client Trust Account of Choi & Ito, Debtor’s general
21 bankruptcy counsel.” The United States Trustee respectfully submits that Paragraph 3 should be
22 deleted from any future interim order or final DIP Financing order.
23

24 Allowing Debtor’s counsel to hold \$100,000 in budgeted amounts for professional funds
25 in its client trust account, instead of being held in debtor-in-possession bank account (“DIP bank
26 account”) arguably elevates Debtor’s counsel to a secured creditor to the extent it is in possession
27

1 of this cash and its fees are earned. To avoid any confusion or ambiguity over the status of these
2 funds, the United States Trustee submits these funds should be held in a DIP bank account to
3 ensure the funds are unmistakably designated as “property of the estate” subject to all creditors’
4 rights. The United States Trustee is not opposed to Debtor establishing a separately labeled DIP
5 bank account to hold these funds so long as Debtor’s counsel’s rights to the funds are limited to
6 the “carve-out” from the Lender’s administrative expense claim (and, in the event of administrative
7 insolvency subject to pro-rata distribution to all equal priority administrative expense claims).
8

9 Before Paragraph 3 is incorporated into any future interim order or final order, the parties
10 in interest in this case should have an opportunity to be heard. Paragraph 3 was neither discussed
11 in the Amended Term Sheet and nor briefed prior to entry of the Interim Order. Paragraph 3 is a
12 de facto post-petition retainer for the benefit of Debtor’s counsel. Although post-petition retainers
13 are not *per se* impermissible, Debtor and Debtor’s counsel should seek advance authorization,
14 upon notice and hearing,¹ for authorization to take a post-petition retainer and should establish by
15 motion the appropriateness of a post-petition retainer.²
16
17

18 ¹ In determining whether an atypical fee procedure is appropriate, the Bankruptcy Appellate
19 Panel of the Ninth Circuit considers the following factors:

20 “[A] fee retainer procedure ... may be authorized [where]: 1. The case is an
21 unusually large one in which an exceptionally large amount of fees accrue each
22 month; 2. The court is convinced that waiting an extended period for payment
23 would place an undue hardship on counsel; 3. The court is satisfied that counsel
24 can respond to any reassessment in one or more of the ways listed above; and 4.
25 The fee retainer procedure is, itself, the subject of a noticed hearing prior to any
26 payment thereunder.”

27 *In re Knudsen Corp.*, 84 B.R. 668, 672–673 (BAP 9th Cir. 1988).

28 ² The following factors are relevant to considering the appropriateness of a post-petition retainer
in Chapter 11:

1 Alternatively, if Debtor’s counsel is allowed to retain funds in its client trust account, the
2 Court should make clear that such funds are property of the estate until the Court approves and
3 awards any fee application made by Debtor’s counsel, and that no attorney lien or other priority
4 attaches to such funds except for the “carve-out” from the Lender’s administrative expense claims,
5 and that if fees are not approved any funds in excess of the approved compensation must be turned
6 over to the estate.
7

8
9 **III. CONCLUSION**

10 For the forgoing reasons, the United States Trustee requests any future interim order or
11 final DIP Financing order delete paragraph 3 of the Interim Order or otherwise adequately
12 address the United States Trustee’s comments raised above.
13

14 DATE: Honolulu, Hawaii, June 14, 2024.

15 Tiffany L. Carroll
16 Acting United States Trustee

17 By /s/ Neil Verbrugge
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19
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21 In determining whether a post-petition retainer in Chapter 11 is justified, the
22 Court must consider several recognized factors, plus special factors which
23 include, but are not necessarily limited to: (1) the retainer's economic impact on
24 the debtor's ongoing business operation; (2) the retainer's economic impact on the
25 ability of the debtor to reorganize; (3) the amount and reasonableness of the
26 retainer; (4) the reputation of debtor's counsel; and (5) the ability of debtor's
27 counsel to disgorge such payments at the conclusion of the case should this Court
28 determine that the fees paid to counsel are not justified.

In re Jefferson Bus. Ctr. Assocs., 135 B.R. 676, 680 (Bankr. D. Colo. 1992).