

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

JOSEPH A. KOSTELECKY,

Defendant.

Case No. 1:17-cr-15

PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(A) of the Federal Rules of Criminal Procedure, the United States of America, by its attorneys, Anna G. Kaminska and Jason M. Covert, Department of Justice, Criminal Division, Fraud Section; the defendant, Joseph A. Kostelecky (“Defendant”); and Defendant’s counsel, Andrew R. Shoemaker and Alexander F. Reichert, agree to the following:

1. Defendant acknowledges that the Indictment charges, in Counts One through Five, a violation of 18 U.S.C. § 1343 (Wire Fraud); and, in Count Six, a violation of 15 U.S.C. §§ 78j(b) and 78ff(a) and 17 C.F.R. § 240.10b-5 (Securities Fraud).

2. Defendant has read the Indictment, and Defendant’s attorneys have fully explained the Indictment to Defendant.

3. Defendant fully understands the nature and elements of the charged crimes.

4. Defendant will voluntarily plead guilty to Count Four (Wire Fraud) and Count Six (Securities Fraud) of the Indictment (hereinafter the “Charges”).

5. The parties agree that this Plea Agreement shall be filed as part of the Court record and be governed by Federal Rule of Criminal Procedure 11(c). The parties

specifically agree that Rule 11(c)(1)(C) does not apply. If the United States makes the non-binding recommendations specified in this Plea Agreement, then Defendant acknowledges that the United States' obligations under this agreement will have been fulfilled. Except as provided in Rule 11(c)(5), the Court's refusal to accept any or all terms of the Plea Agreement does not give Defendant a right to withdraw Defendant's guilty pleas.

6. Defendant will plead guilty because Defendant is in fact guilty of the Charges. In pleading guilty, Defendant acknowledges the following:

(a) To prove the offense alleged in Count Four of the Indictment, charging a violation of 18 U.S.C. § 1343, that is, Wire Fraud, the government must prove each of the following elements beyond a reasonable doubt:

*First.* That the defendant knowingly and intentionally devised or intended to devise a scheme to defraud and to obtain money or property by means of materially false and fraudulent pretenses, representations, and promises as described in the Indictment;

*Second.* That the scheme to defraud employed false material representations, pretenses, and promises;

*Third.* That the defendant acted with a specific intent to defraud; and

*Fourth.* That the defendant transmitted or caused to be transmitted by means of wire communications, in interstate commerce, any writing, sign, signal, picture, or sound for the purpose of executing the scheme.

(b) To prove the offense alleged in Count Six of the Indictment, charging a violation of 15 U.S.C. §§ 78j(b) and 78ff(a) and 17 C.F.R. § 240.10b-5, that is,

Securities Fraud, the government must prove each of the following elements beyond a reasonable doubt:

*First.* That the defendant knowingly and willfully devised or intended to devise a scheme to defraud as described in the Indictment;

*Second.* That the scheme to defraud employed false material representations, pretenses, and promises;

*Third.* That the defendant acted with a specific intent to defraud; and

*Fourth.* That the defendant did so in connection with the purchase or sale of a security of a publicly traded company.

7. As part of this Plea Agreement, Defendant further acknowledges that the following facts are true:

- (a) From in and around November 2011 to in and around December 2012, Defendant, a resident of Dickinson, North Dakota, served as the highest-ranking officer of Poseidon Concepts Corporation (“Poseidon”) in the United States.
- (b) Poseidon was a Canadian oil and gas services company based in Calgary, Alberta, but it conducted business in the United States through its wholly owned subsidiary located in Denver, Colorado. Poseidon’s employees in the United States, including Defendant, worked at the corporate headquarters in Denver and at the field office in Dickinson.
- (c) Poseidon became a public company in or around November 2011. Poseidon’s common stock was traded publicly in Canada and listed on the Toronto Stock Exchange. Poseidon’s stock was sold and purchased in the United States through “Over The Counter” transactions. The stock traded in the United States under the ticker symbol “POOSF” and was a security pursuant to 15 U.S.C. § 78c(a)(10).
- (d) In connection with Poseidon’s listing on the Toronto Stock Exchange, Poseidon filed periodic reports containing the company’s financial statements with the Alberta Securities Commission, and it also

published financial information on Poseidon's company website. Through its financial reporting and public statements, including press releases, Poseidon disclosed its financial information to Poseidon's shareholders and the investing public, including in the United States.

- (e) From in and around November 2011 to in and around May 2012, Defendant served as Poseidon's Senior Vice President. In and around May 2012, Defendant was promoted to Executive Vice President, a position that he held until on or about January 10, 2013, when he ultimately resigned from the company.
- (f) Poseidon's principal business in the United States was the supply of above-ground fluid-storage tanks to oil and gas companies engaged in hydraulic fracturing. Most fracturing jobs could be completed within a period of several weeks.
- (g) In connection with a typical drilling operation, oil and gas companies often required large-capacity reservoirs to hold the fluid used to fracture rock, and Poseidon marketed its technology as an innovative and environmentally sound alternative to in-ground wells. Poseidon supplied the tanks to its customers through rental agreements, and it generated revenues from these arrangements.
- (h) Defendant personally, and at times with others acting under his direction and control, marketed to potential and existing customers Poseidon's above-ground storage tanks. In addition, Defendant personally, and at times with others acting under his direction and control, negotiated the associated rental arrangements with Poseidon's customers.
- (i) Poseidon's customers sometimes agreed to rent tanks on a short-term basis, often times for only a few days or weeks, until a particular fracturing operation was completed. In this context, the customers could agree to pay Poseidon a daily rate for the rental of a tank that would be filled and used at a drilling site on a limited basis, and the daily rate then could be discounted if the customer agreed to use the tank over a longer period of time. Other customers altogether declined to rent any Poseidon tanks. Virtually no customer ever agreed, in writing, to any long-term tank rental with Poseidon, meaning a tank rental that lasted for more than one year.
- (j) In his role as the only senior executive in the United States, Defendant oversaw Poseidon's operations in Denver and in Dickinson and directed

the accounting staff to book the arrangements from purported tank rentals in the company's accounting records and invoice its customers.

- (k) Poseidon's consolidated financial statements combined the financial results of the parent company and its holdings. The consolidated balance sheet, income statement, and cash-flow statements thus reflected Poseidon's activities in both Canada and the United States. The overwhelming majority of Poseidon's revenue stemmed from its operations in the United States, which was comprised largely of the tank-rental business. During the first three quarters of 2012, the proportion of revenues attributable to operations in the United States was as high as 94%.
- (l) From at least in and around November 2011 and continuing into in and around December 2012, Defendant devised, intended to devise, and executed a scheme to defraud the investing public by falsely inflating Poseidon's reported revenue, which were published beginning in 2012, by tens of millions of dollars.
- (m) Despite knowing that customers either had not committed to using Poseidon tanks at all or had committed to using them for only a limited period of time, Defendant routinely instructed accounting staff to book arrangements and generate invoices that purportedly related to long-term rental contracts. When accounting staff would ask Defendant for documentation to support the various invoices and resulting revenue, Defendant would give explicit directions to staff regarding what arrangements to record and falsely assure them that signed contracts existed, or that invoicing was appropriate even in the absence of signed contracts. As a result of his directives, Poseidon staff billed customers and booked revenue as accounts receivable for tanks or for periods of time to which the customers never had agreed.
- (n) For example, on May 23, 2012, a clerk in Poseidon's accounting staff asked other staff and in-house counsel for copies of tank-rental agreements to support outgoing invoices that Defendant directed her to send: "I'm hoping you can help me out. I'm trying to locate all of the current contracts so we can invoice for them. I really only need the first 3 pages that have the dates, tanks, amounts and the effective dates of each contract." The next day, after another member of the accounting staff copied Defendant and suggested that the clerk contact Defendant's assistant in Dickinson for such contracts, Defendant responded and instructed the clerk, "Why are we waiting on this? Invoice off what I have provided you!!"

- (o) By at least the second quarter of 2012, Poseidon's management had grown concerned about the increasingly large and aged receivables from contract revenue and pressed Defendant regarding its collectability. Defendant made continued false assurances regarding the existence and collectability of long-term contract revenue.
- (p) On August 24, 2012, for example, after repeated efforts to obtain from Defendant the purported contracts to support the outgoing invoices, the company's Controller specifically asked him, "The crux of the matter Joe, is do we have signed contracts (lease agreements, term sheets) to validate what we are billing on these contracts? I see some on the server but they do not equate to what we have been billing on the majority of these contracts." The Controller then expressed his reservations about the continued revenue booking in the absence of supporting documentation: "I don't feel like it [is] appropriate to book any of these old adjustments (or even going forward existing contract revenue) until finance has . . . something on file, executed by the customer to denote that they are obligated to pay for tanks." Defendant thereafter responded, providing false assurances about having signed contracts on file when, in fact, he knew that they did not exist: "There are only 3 vendors all which are small that do NOT have a signed contract!! And I would argue the fact that 'the majority' using your words, of agreements do not equate." Defendant then confirmed to the Controller, "[W]e have all documentation."
- (q) During the calendar year 2012, Poseidon issued and published four sets of quarterly financial statements, as follows:
  - i. On March 22, 2012, Poseidon issued its audited year-end consolidated financial statements for the 12 months ending on December 31, 2011 ("Year-End 2011"), reporting revenues of \$78,767,000 CAD. Of the Year-End 2011 revenues, approximately 67% purportedly were generated in the United States.
  - ii. On May 9, 2012, Poseidon issued its unaudited interim condensed consolidated financial statements for the three months ending on March 31, 2012 ("Q1 2012"), reporting revenues of \$52,129,000 CAD. Of the Q1 2012 revenues, approximately 81% purportedly were generated in the United States.

- iii. On August 8, 2012, Poseidon issued its unaudited interim condensed consolidated financial statements for the three and six months ending on June 30, 2012 (“Q2 2012”), reporting revenues of \$54,875,000 CAD for Q2 2012 and \$107,004,000 CAD for the first six months of 2012. Of the Q2 2012 revenues, approximately 94% purportedly were generated in the United States.
- iv. In its last public filing on November 14, 2012, Poseidon issued its unaudited interim condensed consolidated financial statements for the three months ending on September 30, 2012 (“Q3 2012”), reporting revenues of \$41,116,000 CAD for Q3 2012 and \$148,120,000 CAD for the first nine months of 2012. Approximately 85% of the Q3 2012 revenues purportedly were generated in the United States.
- (r) In each public filing, Poseidon’s reported revenue included large accounts-receivable balances and extraordinary increases in revenue over the same period in the previous year. But Poseidon’s revenue growth was falsely inflated by Defendant’s fraudulent directives to book arrangements for customers that had not agreed to long-term tank rentals and his false representations and assurances that the large and aged accounts-receivable balance remained collectable.
- (s) As part of and in furtherance of the scheme, Defendant continued to falsely represent that the long-term contract revenue was supported by signed contracts and collectable.
- (t) On or about November 21, 2012, Defendant fraudulently caused Poseidon to make a public filing falsely reporting that he had purchased 125,000 shares of Poseidon stock the previous day. In truth and in fact, Defendant never made any such purchase.
- (u) Between November 14, 2012 and February 15, 2013, Poseidon informed the investing public that much of its previously reported revenue was not collectable. During this same period, Poseidon’s common stock lost 98.6% of its value, falling from \$13.10 per share to \$0.18 per share. Total loss to shareholders from the scheme was \$886,075,482 USD.
- (v) On February 14, 2013, Poseidon issued a press release advising that the board of directors preliminarily had determined the following in relation to booked contract revenue:



- i. "Approximately \$95 million to \$106 million . . . of the [c]ompany's \$148.1 million in revenue for the 9 months ended September 30, 2012 should not have been recorded as revenue in the [c]ompany's financial statements";
- ii. "[A]pproximately \$94 million to \$102 million . . . of the [c]ompany's \$125.5 million accounts receivable as of September 30, 2012 should not have been recorded in the Company's financial statements as accounts receivable"; and
- iii. "As a result of the foregoing, the first, second and third quarter 2012 financial statements . . . will be restated and the [c]ompany advises investors that they should no longer rely on the [f]inancial [s]tatements."

(w) On or about May 17, 2013, Poseidon's stock was delisted from trading on the Toronto Stock Exchange.

8. Defendant agrees that he committed all the essential elements of the Charges.

This statement of facts is not intended to be a complete accounting of all the facts and events related to the offenses charged in this case. The limited purpose of this statement of facts is to demonstrate that a factual basis exists to support Defendant's guilty pleas to Count Four and Count Six of the Indictment.

9. Defendant understands that the following maximum penalties apply to the Charges:

Count Four (Wire Fraud)

Imprisonment:	20 years
Fine:	\$250,000
Supervised Release:	3 years
Special Assessment:	\$100

Count Six (Securities Fraud)

Imprisonment:	20 years
Fine:	\$5,000,000



Supervised Release: 3 years

Special Assessment: \$100

Defendant agrees to pay the Clerk of United States District Court the total special assessment on or before the day of sentencing.

10. Defendant understands that by pleading guilty Defendant surrenders rights, including:

(a) The right to a speedy public jury trial and related rights, as follows:

(i) A jury would be composed of twelve (12) lay persons selected at random. Defendant and Defendant's attorneys would help choose the jurors by removing prospective jurors "for cause," where actual bias or other disqualification is shown; or by removing jurors without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict. The jury would be instructed that Defendant is presumed innocent and that it could not return a guilty verdict unless it found Defendant guilty beyond a reasonable doubt.

(ii) If a trial were held without a jury, then the Judge would find the facts and determine whether Defendant was guilty beyond a reasonable doubt.

(iii) At a trial, whether by a jury or Judge, the United States is required to present witness testimony and other evidence against Defendant. Defendant's attorneys can confront and examine them. In turn, the defense can present witness testimony and other evidence. If witnesses for Defendant

refuse to appear voluntarily, Defendant can require their attendance through the subpoena power of the Court.

(iv) At trial, Defendant has a privilege against self-incrimination; thus, Defendant can decline to testify. No inference of guilt can be drawn from Defendant's refusal to testify. Defendant can choose to testify, but he cannot be required to testify.

(b) Defendant has a right to remain silent. However, under terms of the Plea Agreement, the Judge will likely ask Defendant questions about Defendant's criminal conduct to ensure that there is a factual basis for Defendant's pleas.

11. Defendant understands that by pleading guilty Defendant is giving up all of the rights set forth in the prior paragraph, and there will be no trial. Defendant's attorneys have explained those rights and the consequences of Defendant's waiver.

12. The Court shall impose a sentence sufficient to comply with purposes set forth in the Sentencing Reform Act. In doing so, the Court shall consider factors set forth in 18 U.S.C. § 3553(a), and must consult and take into account the U.S. Sentencing Commission, Guidelines Manual, (Nov. 2018) ("U.S.S.G."). Defendant understands that the United States will fully apprise the District Court and the United States Probation and Pretrial Services Office of the nature, scope, and extent of Defendant's conduct, including all matters in aggravation and mitigation relevant to the issue of sentencing. The United States expressly reserves the right to appeal from an unreasonable sentence.

13. This Plea Agreement is binding only upon the Department of Justice, Criminal Division, Fraud Section. It does not bind any United States Attorney's Office,

nor does it bind any state or local prosecutor. They remain free to prosecute Defendant for any offenses under their jurisdiction. This Plea Agreement also does not bar or compromise any civil or administrative claim.

14. Defendant understands the United States reserves the right to notify any local, state, or federal agency by whom Defendant is licensed, or with whom Defendant does business, of Defendant's convictions.

15. The parties agree that the base offense level under the Sentencing Guidelines for Defendant's conduct is 7. (U.S.S.G. § 2B1.1(a)(1)).

16. The parties further agree that the following upward adjustments are applicable in this case:

- +30. Loss of more than \$550,000,000. (U.S.S.G. § 2B1.1(b)(1)(P)).
- +2. Offense involved 10 or more victims. (U.S.S.G. § 2B1.1(b)(2)(A)(i)).
- +4. Offense substantially endangered the solvency or financial security of an organization that was a publicly traded company. (U.S.S.G. § 2B1.1(b)(17)(B)(ii)).
- +4. Offense involved a violation of securities law, and at the time of the offense Defendant was an officer of a publicly traded company.

17. The parties agree that the following downward adjustments are applicable in this case:

- None other than acceptance of responsibility, as noted below.

18. At sentencing, the United States agrees to recommend a 2-level downward adjustment for acceptance of responsibility, provided Defendant clearly demonstrates

acceptance of responsibility. (U.S.S.G. § 3E1.1(a)). The United States further agrees to move for an additional 1-level downward adjustment for timely notifying the United States of Defendant's intention to enter a guilty plea, thus permitting the Court and the United States to allocate their resources efficiently. (U.S.S.G. § 3E1.1(b)).

19. Nothing in this Plea Agreement prohibits Defendant from making arguments in mitigation at sentencing with respect to the factors under 18 U.S.C. § 3553(a).

20. Neither the Court nor the Probation Office is a party to the Plea Agreement. Neither the Court nor the Probation Office is bound by the Plea Agreement as to determining the Sentencing Guideline range. The Court may depart from the applicable Guidelines range if the Court, on the record, states factors not contemplated by the U.S. Sentencing Commission to justify the departure. Both parties reserve the right to object to any departure. See U.S.S.G. § 1B1.1, comment. (n.1) (defining "departure"). There may be other adjustments the parties have not agreed upon.

21. At sentencing, the United States will:

(a) Recommend that restitution be ordered in this case pursuant to 18 U.S.C. §§ 2259 and 3663A, which Defendant agrees may include restitution arising from all relevant conduct, not limited to that arising from the offenses of conviction alone. The United States does not object to waiving interest on the restitution amount ordered or allowing Defendant to pay the restitution amount in installments as determined by the Court; and

(b) Recommend that Defendant forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, property, real and personal, that

constitutes or is derived from proceeds traceable to the commission of the Charges. The parties hereby agree to the entry of a forfeiture money judgment in the amount of \$50,739.25 in U.S. currency, and the United States agrees not to seek execution of any forfeiture order in excess of this amount.

(c) Recommend that Defendant be ordered to pay the \$200 special assessment; and

(d) Seek the dismissal of Counts One, Two, Three, and Five of the Indictment.

22. Defendant acknowledges and understands that if Defendant violates any term of this Plea Agreement, engages in any further criminal activity, or fails to appear for sentencing, the United States will be released from its commitments. In that event, this Plea Agreement shall become null and void at the discretion of the United States, and Defendant will face the following consequences: (1) all testimony and other information Defendant has provided at any time to attorneys, employees, or law-enforcement officers of the government, to the Court, or to the Federal Grand Jury, may be used against Defendant in any prosecution or proceeding; and (2) the United States will be entitled to reinstate previously dismissed charges and/or pursue additional charges against Defendant and to use any information obtained directly or indirectly from Defendant in those additional prosecutions. Defendant expressly waives Defendant's rights under Rule 410 of the Federal Rules of Evidence and agrees that all factual statements made in this Plea Agreement are admissible against him should he fail to plead guilty pursuant to this agreement or move to withdraw his pleas or to set aside his convictions. Nothing in this

agreement prevents the United States from prosecuting Defendant for perjury, false statement(s), or false declaration(s), if Defendant commits such acts in connection with this agreement or otherwise.

23. Defendant acknowledges that the provisions of 18 U.S.C. §§ 2259 and 3663A require the Court to order restitution. Defendant agrees to pay restitution as may be ordered by the Court. Defendant acknowledges and agrees that the Court will order Defendant to make restitution for all loss caused by Defendant's conduct, regardless of whether counts of the Indictment will be dismissed as part of this Plea Agreement. Defendant further agrees to grant the United States a wage assignment, liquidate assets, or complete any other tasks the Court finds reasonable and appropriate for the prompt payment of any restitution or fine ordered by the Court.

24. Defendant shall give complete and truthful information and/or testimony concerning his participation in the offenses of conviction. Upon demand, Defendant shall submit a personal financial statement under oath and submit to interviews by the United States and/or the U.S. Probation Office regarding his capacity to satisfy any fines or restitution. Defendant expressly authorizes the government to immediately obtain a credit report on Defendant in order to evaluate his ability to satisfy any financial obligation imposed by the Court. Defendant understands that he has a continuing obligation to pay as soon as possible any financial obligation imposed by the Court.

25. Defendant and Defendant's attorneys acknowledge that no threats, promises, or representations exist beyond the terms of this Plea Agreement.

26. **Defendant's Waiver of Appeal.** Defendant acknowledges, having been advised by his attorneys, of Defendant's rights to appeal the convictions or sentence in this case, including the appeal right conferred by 18 U.S.C. § 3742, and to challenge the convictions or sentence collaterally through post-conviction proceedings, including proceedings under 28 U.S.C. § 2255. Defendant understands these rights, and in exchange for the concessions made by the United States in this Plea Agreement, Defendant hereby knowingly and voluntarily waives these rights, except as specifically reserved herein. Defendant's waiver of these rights includes, but is not limited to, a waiver of all rights to appeal or to collaterally attack, other than as set forth herein: Defendant's convictions or sentence; all non-jurisdictional issues; any assessment or restitution order; the constitutionality of the applicable Guidelines; and the constitutionality of the statute(s) to which Defendant is pleading guilty or under which Defendant is sentenced, or to argue that the admitted conduct does not fall within the scope of the statute(s). Defendant reserves the right to appeal a sentence of imprisonment imposed above the upper end of the applicable Guidelines range or an order of forfeiture in excess of the amount agreed to by the parties, and the right to appeal or to collaterally attack the convictions or sentence based on a claim of ineffective assistance of counsel that challenges the validity of the guilty pleas or this waiver.

27. By signing this Plea Agreement, Defendant further specifically waives Defendant's right to seek to withdraw Defendant's pleas of guilty, pursuant to Federal Rules of Criminal Procedure 11(d), once the pleas have been entered in accordance with this agreement. The appellate court will enforce such waivers. Defendant agrees that any



attempt to withdraw Defendant's pleas will be denied, and any appeal of such denial should be dismissed.

28. Defendant understands that by pleading guilty he will be convicted, and that any individual convicted who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future. Defendant's attorneys have explained this consequence of his guilty pleas.

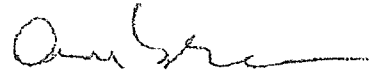
29. The parties hereby agree to abide by the provisions of Rule 32(f) of the Federal Rules of Criminal Procedure. The parties acknowledge their obligation to use good-faith efforts to resolve any disputes regarding the Presentence Investigation Report (PSIR) through a presentence conference or other informal procedures.

30. Defendant acknowledges reading and understanding all provisions of the Plea Agreement. Defendant and Defendant's attorneys have discussed the case and reviewed the Plea Agreement. They have discussed Defendant's constitutional and other rights, including, but not limited to, Defendant's plea-statement rights under Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure.

AGREED:

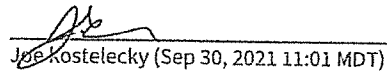
JOSEPH S. BEEMSTERBOER  
Acting Chief

Dated: September 30, 2021



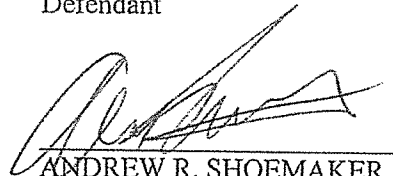
By: ANNA G. KAMINSKA  
JASON M. COVERT  
Attorneys for the United States

Dated: Sep 30, 2021

  
Joe Kostelecky (Sep 30, 2021 11:01 MDT)

JOSEPH A. KOSTELECKY  
Defendant

Dated: 9/30/21



ANDREW R. SHOEMAKER  
ALEXANDER F. REICHERT  
Attorneys for Defendant