

ENTERED

AUG 9 2002

K.R.W.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

FILED
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In re:)	Chapter 11
)	
POLYMER GROUP INC., et al.,¹)	Case No. 02-05773-W
)	(Jointly Administered)
Debtors.)	

ORDER PURSUANT TO 11 U.S.C. §§ 327(a) AND 328(a) AND FED. R. BANKR. P. 2014(a), 2016 AND 5002 AUTHORIZING THE RETENTION AND EMPLOYMENT OF DRESDNER KLEINWORT WASSERSTEIN, INC. AND THE PROSPECTIVE RETENTION AND EMPLOYMENT OF MILLER BUCKFIRE LEWIS & COMPANY, LLC AS FINANCIAL ADVISOR AND INVESTMENT BANKERS TO THE DEBTORS AND DEBTORS IN POSSESSION

Upon consideration of the application (the "Application") of the debtors for entry of an order authorizing the retention and employment of Dresdner Kleinwort Wasserstein, Inc. ("DrKW") and the prospective retention and employment of Miller Buckfire Lewis & Co., LLC ("MBL") as financial advisor and investment bankers to the Debtors, and for the approval of the proposed terms of such employment set forth in the Engagement Letter² dated as of October 2, 2001, attached as Exhibit B to the Application; and due notice of the Application having been given; and the Court having been advised that certain objections made by the United States Trustee (the "UST") and the Official Committee of Unsecured Creditors (the "Committee") were resolved; and the Court having conducted hearings on July 8, 2002 and July 30, 2002 to consider

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- Debtors are the following entities: Polymer Group, Inc., PGI Polymer, Inc., PGI Europe, Inc., Chicopee, Inc., FiberTech Group, Inc., Technetics Group, Inc., Fibergol Corporation, Fabrene Corp., Fabrene Group LLC, PNA Corp., FNA Polymer Corp., FNA Acquisition, Inc., Loretex Corporation, Dominion Textile (USA) Inc., Poly-Bond Inc., FabPro Oriented Polymers, Inc., PGI Asset Management Company, PGI Servicing Company, Pristine Brands Corporation, PolyIonix Separation Technologies, Inc., Bonlam (S.C.), Inc.
 - Capitalized terms not defined herein shall have the same meaning as in the Application.

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the UST's remaining objections; and after due deliberation and sufficient cause appearing therefor, the Court hereby enters its findings of fact, conclusions of law and Order, as follows:

FINDINGS OF FACT

1. DrKW has agreed to reduce its proposed fees in the manner reflected in this Order.

As so reduced, DrKW's fees compare favorably to the fees charged in other comparable Chapter 11 cases.

2. The Engagement Letter includes an attachment that sets forth certain Indemnification Provisions, to which the UST objects. The first paragraph of the Indemnification Provisions provides as follows:

“In connection with the engagement of Dresdner Kleinwort Wasserstein, Inc. (“DrKW”) as financial advisor to Polymer Group, Inc. (the “Company”), the Company hereby agrees to indemnify and hold harmless DrKW and its affiliates, their respective directors, officers, agents, employees and controlling persons, and each of their respective successors and assigns (collectively, the “indemnified persons”), to the full extent lawful, from and against all losses, claims, damages, liabilities and expenses incurred by them which (A) are related to or arise out of (i) actions or alleged actions taken or omitted to be taken (including any untrue statements made or any statements omitted to be made) by the Company or (ii) actions or alleged actions taken or omitted to be taken by an indemnified person with the Company's consent or (B) are otherwise related to or arise out of DrKW's activities under DrKW's engagement. The Company will not be responsible, however, for any losses, claims, damages, liabilities or expenses pursuant to clause (B) of the preceding sentence which are finally judicially determined to have resulted primarily from the gross negligence, bad faith or willful misconduct of the person seeking indemnification hereunder.”

3. The Engagement Letter provides that DrKW is “an independent contractor with no fiduciary or agency relationship to the company or to any other party.”

4. The Debtors, with the assistance of DrKW, negotiated the terms of a proposed restructuring prior to filing their Chapter 11 petitions. DrKW is familiar with the Debtors'

business, and the continuing presence of DrKW and MBL, as the debtors' financial advisor and investment banker, will facilitate the Debtors' efforts to obtain approval of their disclosure statement and plan, obviating the delay which could result if a new financial advisor and investment banker were to be employed.

5. The Debtors, the Debtors' pre-petition Bank Group and the Debtors' largest bondholder (CSFB Global Opportunities Fund) all indicated their support at the July 8, 2002, hearing for the Application, including the Indemnification Provisions, and the Committee stated that all of its objections were resolved by the modifications reflected in paragraphs 1 and 2 of the Order, set forth hereinbelow.

6. DrKW does not represent an interest materially adverse to the interests of the Debtors or their estates, creditors or equity interest holders and is a "disinterested person" as that term is defined in section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code.

CONCLUSIONS OF LAW

1. Section 328(a) of the Bankruptcy Code permits the employment of professionals on "any reasonable terms and conditions of employment." 11 U.S.C. § 328(a).

2. After reviewing the case law cited to the Court and considering the pleadings and testimony, the Court has reached three conclusions. First, it is not convinced that an investment banker is analogous to a trustee or corporate director or officer who, by law, may be excused from liability for mere negligence. Second, the Court believes that, in non-bankruptcy settings, investment bankers generally receive indemnification agreements as conditions of employment. Third, the Court cannot approve the Indemnification Provisions as they were originally

presented. As explained in the following paragraphs, the Court concludes that the cited case law, both published and unpublished, indicates that this agreement should be modified before being approved.

3. Of the published cases, the majority view is that there is no *per se* prohibition of indemnification agreements and that these agreements will be reviewed on a case-by-case basis to determine their reasonableness. *See In re Metricom, Inc.*, 275 B.R. 364, 375 (Bankr. N.D. Cal. 2002); *In re Joan and David Halpern, Inc.*, 248 B.R. 43, 47 (Bankr. S.D.N.Y. 2000); *aff'd* No. 00 Civ. 3601 (JSM), 2000 WL 1800690 (S.D.N.Y.); *In re Gillett Holdings, Inc.*, 137 B.R. 452, 458-59 (Bankr. D. Colo. 1991). That said, a review of the published cases indicates that indemnification agreements as a condition of employment between a debtor and an investment banker are not favored. *See Metricom*, 275 B.R. at 375 (denying the approval of indemnification clause as its terms were not proved to be reasonable); *Gillett Holdings*, 137 B.R. at 457-59 (denying the applications to retain investment bankers and expressing “grave concerns” regarding broad indemnification agreements that, in this case, were unacceptable to the court); *In re Mortgage & Realty Trust*, 123 B.R. 626, 632 (Bankr. C.D. Cal. 1991) (authorizing the employment of investment bankers but rejecting the indemnification provisions, finding the indemnification unreasonable); *In re Allegheny Int’l. Inc.*, 100 B.R. 244, 247 (Bankr. W.D. Penn. 1989) (modifying indemnification agreement to provide that the debtor shall not indemnify the investment banker for the banker’s negligence or breaches of fiduciary duty). One published opinion approved an indemnification agreement, holding that the common law allows parties to contract for indemnification, including indemnification for ordinary negligence, but that there

may not be indemnification for cases of bad faith or intentional or reckless indifference to the party to which one has a fiduciary obligation. *See Halpern*, 248 B.R. at 47.

4. More recent and unpublished decisions by several bankruptcy courts, however, indicate that indemnification agreements have been allowed. *See Robiner v. Jay Alix & Assoc. (In re LTV Steel Co., Inc. et al.)*, C/A No. 4:01CV1116 (N.D. Ohio Nov. 16, 2001); *In re Motient Corp., et al.*, C/A Nos. 02-80125, 02-80126, 02-80128 and 02-80129-RGM (Bankr. E.D. Va. May 9, 2002); *In re Midway Airlines Corp.*, C/A No. 01-02319-5-ATS (Bankr. E.D. N.C. Sept. 25, 2001); *In re GS Indus., Inc., et al.*, C/A No. 01-30319 (GRH) (Bankr. W.D. N.C. May 15, 2001); *In re Heilig-Meyers Company, et al.*, C/A No. 00-34533 (DOT) (Bankr. E.D. Va. Nov. 14, 2000). However, the Court notes that several of the unpublished decisions approving an indemnification agreement qualify or modify the agreement, typically with the following provisions: (1) the debtor agrees to indemnify the investment banker only for losses, claims, or damages based upon the investment banker's services as described in the engagement letter; however, there is no indemnification for claims based upon the investment banker's acts that are outside the scope of the engagement letter; and (2) before the earlier of confirmation or the close of the case, if the investment banker seeks indemnity or payment from the debtor based upon the parties' indemnification agreement, the investment banker must petition the court. *See In re Startec Global Communications Corp.*, C/A No. 01-25013 (DK) (Bankr. D. Md. May 10, 2002); *In re Kmart Corp., et al.*, C/A No. 02-B-02474 (Bankr. N.D. Ill. Apr. 24, 2002); *In re Covad Communications Group, Inc.*, C/A No 01-10167 (JJF) (Bankr. D. Del. Nov. 21, 2001); *In re AMF Bowling Worldwide, Inc., et al.*, C/A No. 01-61119-DHA (Bankr. E.D. Va. Oct. 22, 2001); *In re W.R. Grace & Co., et al*, C/A No. 01-01139 (JJF) (Bankr. D. Del. Jun. 22, 2001); *In re*

Washington Group Int'l. Inc., et al., C/A No. BK-N-01-31627 (Bankr. D. Nev. Jun. 13, 2001); *In re United Artists Theatre Co., et al.*, C/A No. 00-03514 (SLR) (Bankr. D. Del. Nov. 14, 2000).

In addition, courts made other sensible modifications in these unpublished orders. For example, some courts have required the investment bankers, when seeking reimbursement for counsel fees, to submit a fee application and support it with time records. *See Kmart*, C/A No. 02-B-0247; *In re Rhythms Netconnections, Inc., et al.*, C/A Nos. 01-B-14283-14287 (BRL) (Bankr. S.D.N.Y. Oct. 18, 2001). Also some courts have expanded the scope of what debtors are not required to indemnify by ruling that debtors will not indemnify for losses, claims, and damages that have resulted primarily from the investment banker's bad faith (or lack of good faith), self-dealing, and breach of fiduciary duty. *See Startec*, C/A No. 01-25013; *In re AMF Bowling*, C/A No. 01-61119-DHA; *Rhythms Netconnections*, C/A Nos. 01-B-14283-14287 (BRL). Further, other courts, including two in the Fourth Circuit, narrowed the scope of the indemnification agreement so the debtors had no obligation to indemnify the investment banker for claims brought by the debtor, a trustee, or other representative of the bankruptcy estate based upon the investment banker's negligence or willful misconduct.³ *See Startec*, C/A No. 01-25013; *In re AMF Bowling*, C/A No. 01-61119-DHA; *Rhythms Netconnections*, C/A Nos. 01-B-14283-14287 (BRL). Another court preserved the debtors', UST's, and committee's rights to object to indemnification provisions if a circuit appeals court issued a ruling regarding indemnification agreements during the bankruptcy case. *See Startec*, C/A No. 01-25013. Finally, another court ruled that a claim

3. The Court recognizes a variation of this provision wherein Debtor's agreement does not effectively release DrKW for negligence in advance but, in the event Debtor pursues a formal action for negligence against DrKW and DrKW prevails, Debtor would pay DrKW the costs DrKW incurred in defending the action.

for indemnification would not be entitled to administrative expense priority (*see Kmart*, C/A No. 02-B-02474), and another court eliminated a provision that limited or capped the investment banker's liability to the debtor in the amount of the total fees the bank was to receive for providing financial services to the debtor. *See Startec*, C/A No. 01-25013.

5. While the Court will not approve the Indemnification Provisions in the form attached to the Engagement Letter, DrKW and MBL have agreed to certain modifications to the Indemnification Provisions that are set forth below in the Order and that include some of the modifications described in the prior paragraph. As so modified, the Indemnification Provisions are reasonable and will be approved.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. The Application is GRANTED and APPROVED; *provided, however*, that the Engagement Letter shall be deemed to have been modified as follows:

(a) A new Section 2(f) shall be deemed to have been added to the Engagement Letter, as follows:

"f. Monthly Advisory Fees paid to DrKW for periods after May 12, 2002 shall be credited against the Restructuring Transaction Fee payable to DrKW pursuant to subparagraph 2(b) hereof as follows: (i) the full amount of any Monthly Advisory Fees that are actually paid to DrKW with respect to the first six months after May 12, 2002 will be credited against the Restructuring Transaction Fee; and (ii) one-half of any Monthly Advisory Fees that are actually paid to DrKW with respect to the period after November 12, 2002 will be credited against the Restructuring Transaction Fee. Monthly Advisory Fees paid to DrKW for periods prior to May 12, 2002 will not be credited against other fees."

(b) Section 2(b) of the Engagement Letter shall be deleted in its entirety and replaced with the following:

"If at any time during the term of this engagement or within the nine full months following the termination of this engagement (including the term of this engagement, the "Fee Period"), (x) any Restructuring is consummated or (y) (1) a definitive agreement or Plan to effect a Restructuring is entered into and (2) concurrently therewith or within 12 months thereafter (including following the expiration of the Fee Period), such Restructuring is consummated pursuant to such definitive agreement or Plan, and DrKW has not previously terminated this agreement pursuant to paragraph 6 hereof, DrKW shall be entitled to receive a transaction fee (a "Restructuring Transaction Fee"), contingent upon the consummation of a Restructuring and payable at the closing thereof, equal to \$5,000,000.00."

(c) The definition of "Financing" in Section 1(c) of the Engagement Letter shall be replaced with the following:

"For purposes of this agreement, the term "Financing" shall mean a public or private issuance, sale or placement of the equity, equity-linked or debt securities, instruments or obligations of the Company with one or more lenders and/or investors, or any loan or other financing, including any "debtor in possession financing" or "exit financing" in connection with a case under the Bankruptcy Code or a rights offering (each such lender or investor, an "Investor") but shall not include (i) any securitization of the Company's accounts receivables or similar financing or any sale and leaseback of a portion of the Company's assets which involve the participation of The CIT Group or General Electric Capital Corporation, or (ii) any financing provided by CSFB Global Opportunities Partners, L.P. ("CSFB") substantially similar to the Term Sheet dated as of May 10, 2002, between the Company and CSFB, as the same may be amended or modified by CSFB and the Company from time to time, or (iii) any financing by any other party holding debt securities issued by the Company."

(d) Paragraph 5 of the Engagement Letter shall be modified by deleting the following language:

“; provided, however, that in no event shall the Covered Persons' aggregate liability to the Company or any person asserting claims on behalf of the Company or in the Company's right exceed the fees DrKW actually receives from the Company pursuant to its engagement hereunder, unless there is a final judicial determination of willful misconduct or bad faith specified in this sentence.”

(e) The last sentence of the first paragraph of the “Indemnification Provisions” attached to the Engagement Letter shall be replaced by the following:

“The Company shall have no obligation to provide indemnification, contribution or reimbursement to any person, however, for any losses, claims, damages, liabilities or expenses pursuant to clause (B) of the preceding sentence which are finally judicially determined to have resulted primarily from (i) the gross negligence, reckless or willful misconduct, self-dealing, or breach of fiduciary duty of the person seeking indemnification hereunder or (ii) conduct by the person seeking indemnification hereunder that was not in good faith or that such person did not reasonably and prudently believe was in the best interests of the Company. Furthermore, the Company shall have no obligation to provide indemnification, contribution or reimbursement to any person in connection with a claim (i) that is made or brought by the Company or by a duly-appointed bankruptcy trustee or other Court-appointed representative of the Company’s bankruptcy estates, and (ii) that results in a final judicial determination that such person is liable to the Company (or to a bankruptcy trustee or Court-appointed representative, as the case may be) by reason of such person’s negligence, gross negligence, reckless or willful misconduct, self-dealing, or breach of fiduciary duty.”

2. In addition, the Court’s approval of the “Indemnification Provisions” shall be subject to the following conditions:

(a) the Debtors are authorized to indemnify, and shall indemnify, DrKW and/or MBL in accordance with the terms of the Engagement Letter as modified herein, including the Indemnification Provisions as modified above, for any claim arising from, related to, or in connection with the services covered by the Engagement Letter, but not for any claim arising from, related to, or in connection with the performance of any services other than those covered by the Engagement Letter, unless such services and indemnification therefor are approved by this Court;

(b) the Debtors shall have no obligation to indemnify DrKW or any person, or to provide contribution or reimbursement to DrKW or any person, for any claim or expense that is settled prior to a final judicial determination of such claim if this Court, after notice

and a hearing, determines that such claim or expense is one for which DrKW or such person is not entitled to receive indemnity, contribution or reimbursement under the terms of the Engagement Letter as modified by this Order;

(c) if DrKW and/or MBL believes that it is entitled to the payment of any amounts by the Debtors on account of the Debtors' indemnification, contribution and/or reimbursement obligations under the Engagement Letter (as modified by this Order) with respect to any loss, damage, liability or expense incurred before the earlier of (i) the entry of an order confirming a Chapter 11 plan in these cases (that order having become a final order no longer subject to appeal), and (ii) the entry of an order closing these Chapter 11 cases, DrKW and/or MBL must file an application therefor in this Court, and the Debtors may not pay any such amounts to DrKW and/or MBL before the entry of an order by this Court approving the payment. This subparagraph (d) is intended only to specify the period of time under which the Court shall have jurisdiction over any request for fees and expenses by DrKW and/or MBL for indemnification, contribution or reimbursement and not as a provision limiting the duration of the Debtors' obligation to indemnify DrKW and/or MBL; and

(d) if DrKW and/or MBL seek reimbursement for counsel fees pursuant to the preceding subparagraph, such request shall be supported by time records and expense invoices and records that typically are required to be submitted by counsel retained as professionals pursuant to Section 327 of the Bankruptcy Code, and such counsel fees and expenses shall be subject to review for reasonableness pursuant to the standards set forth in Section 330 and 331 of the Bankruptcy Code.

3. In accordance with sections 327(a) and 328(a) of the Bankruptcy Code and Bankruptcy Rules 2014(a), 2016 and 5002, the Debtors are authorized to retain and employ DrKW as their financial advisor and investment bankers for the purpose of providing financial advisory, investment banking and other related services in connection with Debtors' Chapter 11 Cases in accordance with the terms of the Engagement Letter as modified by paragraph 1 of this Order, including the Indemnification Provisions.

4. DrKW will provide such financial advisory and investment banking services as DrKW and the Debtors shall deem appropriate and feasible in order to advise the Debtors in the course of these Chapter 11 Cases as contained in, but not limited to, the Engagement Letter, as modified by paragraph 1 of this Order.

5. DrKW's assignment of the Engagement Letter, as modified by paragraph 1 of this Order, to MBL, and the termination upon such assignment of DrKW's retention as the Debtors' financial advisor and investment bankers, are hereby approved. Promptly after the entry of this Order, MBL shall file an affidavit of disinterestedness pursuant to and in compliance with sections 330 and 331 of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules and orders of this Court (the "MBL Affidavit"), and shall serve copies of the MBL Affidavit on: (i) the Office of the United States Trustee for the District of South Carolina; (ii) counsel for the Agent to the proposed DIP Lender; (iii) counsel for the Agent to the Bank Group; (iv) counsel to the Committee; and (v) all parties requesting notice under Federal Rule of Bankruptcy Procedure 2002. The Debtors' retention of MBL as their financial advisor and investment bankers pursuant to the terms of the Engagement Letter, as modified by paragraph 1 of this Order, is hereby approved upon the expiration of twenty (20) days' notice of

MBL's filing of the MBL Affidavit, unless a party in interest files and serves on counsel for the Debtors and on MBL, on or before such date, an objection based on the subject matter of the MBL Affidavit, or the Court determines to hold a hearing in light of the MBL Affidavit, in which case the Court shall schedule and hold a hearing on whether MBL is a "disinterested person" under section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code or holds an interest materially adverse to the Debtors, their estates, creditors or equity interest holders. If no objection is filed as set forth in this Order, the Debtors' retention of MBL as their financial advisor and investment bankers is hereby approved.

6. The fees to be paid to DrKW and/or MBL pursuant to the terms of the Engagement Letter, and the Indemnification Provisions contained therein, are approved and shall be subject to the standard of review provided in section 328(a) of the Bankruptcy Code and not subject to any other standard of review under sections 330 and 331 of the Bankruptcy Code; *provided, however*, that the UST (but no other party) shall have the right to object pursuant to the standards of sections 330 and 331 of the Bankruptcy Code; and *provided further*, that the Court shall retain its own right to review applications pursuant to the standards of sections 330 and 331 of the Bankruptcy Code.

7. Subject to the foregoing, awards of compensation and expenses shall be sought by DrKW and/or MBL pursuant to the procedures set forth in sections 330 and 331 of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules and orders of this Court.

8. DrKW and MBL will maintain detailed records of any actual or necessary costs and expenses in excess of \$25 incurred in connection with these Chapter 11 Cases.

9. This Court shall retain exclusive jurisdiction to construe and enforce the terms of the Application, the Engagement Letter, and this Order.

10. To the extent that this Order is inconsistent with any prior order or pleading, or with the Application, the Engagement Letter, and other employment documents related thereto, with respect to DrKW and MBL, the Debtors, and their successors and assigns, the terms of this Order shall govern.

Dated: August 8, 2002



JOHN E. WAITES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

BRENDA K. ARGOE
CLERK OF COURT

DISTRICT OF SOUTH CAROLINA
1100 LAUREL STREET
POST OFFICE BOX 1448
COLUMBIA, SOUTH CAROLINA 29202

TELEPHONE (803)765-5436

DATE: August 9, 2002
TO: George Cauthen
intake mailbox
RE: 02-5773W

Pursuant to Local Bankruptcy Rule 2002-1, the clerk of court is authorized to delegate certain noticing functions. Please serve the documents according to the instructions provided. If a mailing matrix is not provided, you may order a copy through the intake division of the clerk's office.

____ **Notice of objection to proofs of claim or interest.** A copy of the objection to proofs of claim or interest should be served with the notice on parties in interest, including the U.S. Trustee. Local Bankruptcy Rule 2002-1

____ **Notice of hearing or notice of opportunity for a hearing on your.** It will be necessary for you to serve all creditors and/or parties in interest. Local Bankruptcy Rule 2002-1

✓ **Notice of entry of an order.** It will be necessary for you to serve all creditors and/or parties in interest. Federal Rules Bankruptcy Procedure 2002(m), Local Bankruptcy Rule 2002-1(b)

The document should be served ~~as or before~~. When service has been completed, please furnish this office with a certificate of such service, specifying the document served, the date and method of service, the parties served, and your name, address, telephone number and district court identification number (Local Bankruptcy Rule 9010-1).

BRENDA K. ARGOE, Clerk of Court

BY: Karen Weathers
Karen Weathers, Deputy Clerk

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

AUG 9 2002

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KAREN R. WEATHERS *KRW*
Deputy Clerk

*Caution for
Service*