CANADA

PROVINCE OF QUEBEC
DISTRICT OF SAINT-FRANÇOIS
N°: 450-11-000167-134

SUPERIOR COURT
(Commercial Division)

(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. C. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

MONTREAL, MAINE & ATLANTIC CANADA CO. (MONTREAL, MAINE & ATLANTIQUE CANADA CIE)

Debtor-Petitioner

-and-

RICHTER ADVISORY GROUP INC. (RICHTER GROUPE CONSEIL INC.)

Monitor

AFFIDAVIT OF ROBERT J. KEACH, ESQ. AS CHAPTER 11 TRUSTEE WITH RESPECT TO U.S. LAW ON CLASS PROOFS OF CLAIM

I, the undersigned, Robert J. Keach, Esq., carrying on business at 100 Middle St, Portland, ME 04101, United States, solemnly declare the following:

1. I am the chapter 11 trustee (the "Trustee") appointed in the chapter 11 bankruptcy case of Montreal Maine & Atlantic Railway, Ltd. ("MMA"), filed in the United States Bankruptcy Court for the District of Maine. MMA is the parent company of the Debtor in this proceeding under the CCAA ("MMA Canada").

2. I am a shareholder at Bernstein, Shur, Sawyer & Nelson, P.A., in Portland, Maine. I am a Fellow of the American College of Bankruptcy and a Past President (2009-2010) of the American Bankruptcy Institute ("ABI"). I have appeared as a panelist on national bankruptcy, lender liability and creditors' rights programs, and I am the author of several articles on

bankruptcy and creditors' rights appearing in the ABI Law Review, Commercial Law Journal and ABI Journal, among other publications. I am a contributing author to *Collier Guide to Chapter 11: Key Topics and Selected Industries* (2011 Ed.). I have been recognized as a "Star Individual" in Corporate M&A/Bankruptcy in Chambers USA, in Best Lawyers in America (15-Year Certificate), and by New England Super Lawyers (Bankruptcy and Top 100 Lawyers in New England regardless of specialty). I am also certified in Business Bankruptcy by the American Board of Certification.

3. This affidavit is submitted in connection with the Trustee's opposition to the Cross-Motion of the Class Action Plaintiffs For an Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date (the "Cross Motion") and in response to the letter to the Court dated January 30, 2014 by Mr. Daniel E. Larochelle (the "Larochelle Letter"). The affidavit sets forth my opinion on various points of U.S. law and sets forth certain facts regarding the Chapter 11 Case of MMA. Specifically, this affidavit addresses the extent to which class claims may be filed in bankruptcy cases pursuant to title 11 of the United States Code (the "Bankruptcy Code"), the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and case law construing the same. With respect, the U.S. law cited on this subject in the Plan of Argument supporting the Cross-Motion is incomplete. If I were called to testify, I could and would testify competently to the facts set forth herein, and regarding my opinion of relevant U.S. law.

4. The Bankruptcy Code is silent on the extent to which class claims may be filed on behalf of individual claimants. Bankruptcy Rule 7023 makes Rule 23 of the Federal Rules of Civil Procedure (the "Civil Rules"), which governs class certification, applicable to adversary proceedings. *See* Fed. R. Bankr. P. 7023.

5. However, the claims allowance process is a "contested matter" under Bankruptcy Rule 9014, and Bankruptcy Rule 9014 does not expressly apply Bankruptcy Rule 7023 to contested matters. *See* Fed. R. Bankr P. 9014(c) (indicating which of the rules under Part VII of the Bankruptcy Code apply to contested matters). Claimants seeking class certification must instead request application of Bankruptcy Rule 7023 to a contested matter pursuant to that provision of Bankruptcy Rule 9014(c) stating that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Id.[1]

6. Accordingly, "while class proofs of claim in bankruptcy are not prohibited, the right to file one is not absolute." In re Motors Liquidation Co., 447 B.R. 150, 156-57 (Bankr. S.D.N.Y. 2011). Whether Bankruptcy Rule 7023 will apply to permit the filing of class proofs of claim is solely within the bankruptcy court's discretion. *See* id. at 157; Gentry v. Circuit City Stores, Inc. (In re Circuit City Stores, Inc.), 439 B.R. 652, 658 n.6 (E.D. Va. 2010); In re Bally Total Fitness of Greater N.Y., 402 B.R. 616, 619 (Bankr. S.D.N.Y. 2009); In re Ephedra Prods. Liab. Litig., 329 B.R. 1, 4 (S.D.N.Y. 2005); In re Craft, 321 B.R. 189, 198 (Bankr. N.D. Tex. 2005); In re Lear Corp., 2012 WL 443951, *9, n.11 (Bankr. S.D.N.Y. Feb. 10, 2012).

7. When determining whether to exercise their discretion to apply Bankruptcy Rule 7023, courts consider the following factors:

a) Whether the class claimant moved to extend the application of Bankruptcy Rule 7023 to its proof of claim;
b) Whether the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy; and
c) Whether the claims which the proponent seeks to certify fulfill the requirements of Bankruptcy Rule 7023.

[1] Notwithstanding the fact that Bankruptcy Rule 9014(c) applies to contested matters, objection to a class proof of claim is not a "necessary prerequisite" to filing a motion seeking class certification. *See* In re Ephedra Prods. Liab. Litig., 329 B.R. 1, 7 (S.D.N.Y. 2005). Indeed, claimants seeking class certification may file a motion seeking application of Bankruptcy Rule 7023 as soon as the chapter 11 petition is filed. Id.

See Bally Total Fitness, 402 B.R. at 620; *see also* Motors Liquidation, 447 B.R. at 157. Bankruptcy courts may decline to apply Bankruptcy Rule 7023 if doing so would "gum up the works" or otherwise delay administration of the bankruptcy case. *See* Ephedra Prods., 329 B.R. at 5. Bankruptcy courts may also consider whether the class was certified prior to the petition date, and whether the members of the putative class received notice of the bar date. *See* Teta v. Chow (In the Matter of TWL Corp.), 712 F.3d 886, 893 (5th Cir. 2013).

8. Assuming, however, that the court determines to exercise its discretion and apply Bankruptcy Rule 7023, the movants must then establish that class certification would be consistent with the goals of bankruptcy and that they have met the requirements of Bankruptcy Rule 7023. A request for class certification must fail if any one of the requirements of Bankruptcy Rule 7023 is not met. *See* TWL Corp., 712 F.3d at 894.

9. Bankruptcy Rule 7023, which incorporates Civil Rule 23, provides that:

> (a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> 1) The class is so numerous that joinder of all members is impracticable;
> 2) There are questions of law or fact common to the class;
> 3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> 4) The representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Types of Class Actions.** A class action may be maintained **if Rule 23(a) is satisfied and** if:
>
> 1) Prosecuting separate actions by or against individual class members would create a risk of:
>
> A. Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> B. Adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the

individual adjudications or would substantially impair or impede their ability to protect their interests;

2) The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
3) The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
    A. The class members' interests in individually controlling the prosecution or defense of separate actions;
    B. The extent and nature of any litigation concerning the controversy already begun by or against class members;
    C. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
    D. The likely difficulties in managing a class action.

Fed. R. Bankr. P. 7023 (emphasis added).

10. In this case, assuming that the movants have met the prerequisites enumerated in Bankruptcy Rule 7023(a), the only conceivable basis on which class certification could be granted is under Bankruptcy Rule 7023(b)(3). Subsection (b)(3) requires consideration of two separate requirements: (1) the predominance of common issues; and (2) the superiority of class action treatment. Fed. R. Bankr. P. 7023(b)(3); *see also* Motors Liquidation, 447 B.R. at 158.

11. The "predominance of common issues" prong is not satisfied, and class certification is not appropriate, "[w]hen resolution of class questions will still require case-by-case analysis of facts with respect to each member of the class," such as in cases involving tort claims. Motors Liquidation, 447 B.R. at 159-60 (noting that "[c]ivil actions involving mass torts are often not certified for class action treatment . . . because so many individualized legal and individualized damages inquiries are ultimately required."); *see also* In re W.R. Grace & Co., 398 B.R. 368, 381 (D. Del. 2008) (denying class certification where "[m]any of the issues raised were specific to a finite number of claims and did not lend themselves to resolution as a class as

these matters could be better addressed on a 'claimant-by-claimant' basis or as part of smaller groups of similarly situated claimants."); In re Worldcom, Inc., 343 B.R. 412, 429 (Bankr. S.D.N.Y. 2006) (finding that individual issues predominated where issue of each class member's reliance on allegedly fraudulent statements would have to be individually determined).

12. Additionally, courts often decline to find class action treatment to be superior to the claims adjudication process already in place in bankruptcy cases, given the simplicity and efficiency afforded by the bankruptcy process. *See* Motors Liquidation, 447 B.R. at 163; In re Blockbuster, Inc., 441 B.R. 239, 241 (Bankr. S.D.N.Y. 2011); Bally Total Fitness, 402 B.R. at 622 (stating that "'superiority' has no place in bankruptcy."); Worldcom, 343 B.R. 412, 429 (Bankr. S.D.N.Y. 2006) (same). As explained in Blockbuster,

> Courts agree that . . . "superiority of the class action vanishes when the 'other available method' is bankruptcy, which consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost. In efficiency, bankruptcy is superior to a class action because in practice small claims are often 'deemed allowed' under § 502(a) for want of objection, in which case discovery and fact-finding are avoided altogether."

Blockbuster, 441 B.R. at 241 (quoting Ephedra Prods., 329 B.R. at 9).

13. Under the above authorities, I believe that it is highly unlikely that a U.S. bankruptcy court would allow to be filed a class claim encompassing all of the various types of claims held by all of the types of victims of the derailment, including wrongful death, personal injury, property damage, environmental damage, emotional injury, business interruption and other claims.

14. Given the above-cited law, if the claims process advocated by the Cross Motion were to be adopted for this CCAA case, I would have to withdraw my consent to deemed filing of Derailment Claims in the U.S. Chapter 11 Case by virtue of filing a claim in the CCAA case and indicating on the CCAA claim form (by checking a box) that a claim was also asserted

against MMA. In that instance, I would propose and recommend that all Derailment Claims against MMA be separately filed in the Chapter 11 Case.

IN WITNESS WHEREOF I, Robert J. Keach, Esq., hereunder set my hand and seal this the 7th of February, 2014.

Robert J. Keach, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.

STATE OF MAINE
COUNTY OF CUMBERLAND

February 7, 2014

Personally appeared before me the above-named Robert J. Keach, Esq. and acknowledged under oath that the foregoing was true to the best of his personal knowledge, information and belief.

Notary Public/Attorney
My Commission Expires:

AUBREY L. CUMMINGS
Notary Public, Maine
My Commission Expires October 21, 2017