UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL MAINE & ATLANTIC RAILWAY, LTD. Debtor.	Bk. No. 13-10670 Chapter 11

TRUSTEE'S OBJECTION TO DISCLOSURE STATEMENT FOR CHAPTER 11 PLAN DATED JANUARY 29, 2014 PROPOSED BY THE UNOFFICIAL COMMITTEE OF WRONGFUL DEATH CLAIMANTS

Robert J. Keach, the chapter 11 trustee (the "Trustee"), submits this objection (the "Objection") to the *Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants* [D.E. 601] (the "Disclosure Statement") filed in relation to the *Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants* [D.E. 600] (the "Plan") filed by the Unofficial Committee of Wrongful Death Claimants (the "Unofficial Committee").[1]

As discussed below, the Plan, on its face, cannot be confirmed, nor can this Court even consider confirmation of the Plan. Consideration of the Plan would require this Court to decide the proper venue of the PITWD Cases initially brought in Illinois state court. Pursuant to 28 U.S.C. § 157(b)(5), only the United States District Court for the District of Maine can decide the proper venue for the PITWD Cases, and indeed is currently deciding that issue, having taken the Trustee's and other parties' motions for transfer under section 157(b)(5) under advisement, following briefing and argument. Accordingly, this Court lacks the jurisdiction and authority to move forward with consideration of the Plan, and further consideration of the Plan would

[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them *infra*.

constitute an unwarranted interference with the District Court's exclusive authority under section 157(b)(5).

Additionally, for the reasons set forth below, the Plan is patently nonconfirmable under several provisions of the Bankruptcy Code, including sections 1129(a)(1), 1129(a)(2), 1129(a)(3), 1129(a)(11), 1129(b), 1173(a)(2), 1173(a)(4), and 1123(a)(5). Without limiting the foregoing, among the significant and fatal flaws of the Plan is that its very filing violates the stays imposed by the Initial Order entered in the Canadian Case, and is further premised on violation of the terms of the Initial Order and the CCAA. The Unofficial Committee—which has, to date, failed to disclose the terms of its representation—has no standing to even propose a Plan. Moreover, the entire Plan, on its face, is based on simply ignoring, or directly misappropriating, uncontroverted and settled property interests of other parties, including of other victims of the Derailment not represented by the Unofficial Committee.

Simply put, the Plan constitutes a litigation tactic, and is far from a good faith attempt to resolve the numerous and complex cross-border issues in these cases. In so objecting, the Trustee does not seek to diminish the rights and claims of victims of the Derailment. However, as illustrated below, there is no easy route to a quick distribution of available liability insurance proceeds, as the Plan would suggest. Rather, distribution of the insurance proceeds, as well as development of a plan that maximizes value for all creditors, including the Derailment victims, requires a thoughtful, negotiated, and coordinated cross-border solution, eventually embodied in coordinated plans filed and approved in each case, and approved by both Courts. The Plan cannot, under any circumstances, achieve the negotiated and coordinated cross-border result that is essential in these cases and cannot as a matter of law, satisfy the requirements for

confirmation. Accordingly, because the Plan is patently nonconfirmable, the Disclosure Statement, which itself suffers from a lack of adequate disclosures, cannot be approved.

I. BACKGROUND

1. On August 7, 2013 (the "Petition Date"), Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor") filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* The Debtor's bankruptcy filing was precipitated by the train derailment in Lac-Mégantic, Québec on July 6, 2013 (the "Derailment") and the business interruption and litigation that subsequently ensued. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and killed 47 people.

2. The same factors also precipitated the filing by MMA Canada (together with MMA, the "Debtors"), MMA's subsidiary, under Canada's *Companies' Creditors Arrangement Act* (the "Canadian Case") in Québec Superior Court in Canada (the "Canadian Court"). Richter Advisory Group Inc. has been appointed as the monitor (the "Monitor") in the Canadian Case.

3. As set forth in the initial order of the Canadian Court in that proceeding (the "Initial Order"), a stay was granted precluding any "proceeding or enforcement process" against MMA Canada or any action affecting MMA Canada's "Property" (the "Canadian Stay"). Initial Order, ¶ 7.

4. Specifically, paragraph 7 of the Initial Order provides that:

> [U]ntil and including September 6, 2013, or such later date as the Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Petitioner, or affecting the Petitioner's business operations and activities (the "**Business**") or the Property (as defined herein below), including as provided in paragraph 7 herein below except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Petitioner or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court, the whole subject to subsection 11.1 CCAA. Without limiting the generality of the foregoing, Proceedings include all proceedings in

> Canada and in the United States of America or elsewhere taken or that may be taken against, inter alia, the Petitioner and/or Montreal Maine & Atlantic Railway Ltd. ("**MM&AR**"), and/or their liability insurer ("**Liability Insurer**") and/or other members of the Petitioner's corporate group (the "**Petitioner's Corporate Group**") and/or against any of the respective directors, officers or employees of any members of the Petitioner's Corporate Group, in connection with the derailment that occurred on July 6, 2013 in Lac-Mégantic, province of Québec, that involved the derailment of the freight train operated by the Petitioner (the "**Derailment**") and include, without limitation, proceedings with respect to the claims set forth in paragraph 25 of the Petition, including the Order issued by the Minister of Environment on July 29, 2013, pursuant to Section 114.1 of the Environment Quality Act, R.S.Q., c. Q-2 ("**EQA**") . . . (the "**Cleanup Order**") with respect to its financial or monetary implications only and any other claim made or that may be made in anyway related to the Derailment (collectively, the "**Train Derailment Claims**"). The members of the Petitioner's Corporate Group are listed in Schedule "A" hereto and the members of Petitioner's Corporate Group, and their respective directors, officers or employees and the Liability Insurer, who are defendants to such proceedings are listed in Schedule "B" hereto and are collectively referred to herein as the "Non-Petitioner Defendants."

Initial Order, ¶ 7. Included in the Petitioner's corporate group, and protected by the Canadian Stay, are Montreal Maine & Atlantic Corporation, LMS Acquisition Corp., MMA, and MMA Canada. *See* Initial Order, Sched. A. Also protected by the Canadian Stay, as listed on Schedule B to the Initial Order, are Earlston Associates L.P., Edward Burkhardt, Robert Grindrod, Gaynor Ryan, Donald Gardner, Joe McGonigle, Thomas Harding, the XL Group (as defined below), and XL Limited (as defined below). *See* Initial Order, Sched. B.

5. Paragraph 8 of the Initial Order provides that:

> [D]uring the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Petitioner nor against any person deemed to be a director or an officer of the Petitioner under subsection 11.03(3)CCAA (each, a "**Director**," and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Petitioner where it is alleged that any of the Directors is under any law liable in such capacity for the payment or performance of such obligation or which relate to the Derailment. Notwithstanding the foregoing, the stay ordered pursuant to this paragraph 8 does not apply to any proceeding against the Directors with respect to their statutory obligations under any labour and employment legislation.

Initial Order, ¶ 8.

6. By various orders of the Canadian Court, the Initial Order was amended to extend the Canadian Stay up to and including March 12, 2014. Accordingly, the Canadian Stay remains in effect.

7. On August 21, 2013, the U.S. Trustee appointed the Trustee in this chapter 11 case. As a consequence of the Trustee's appointment, mandatory in a railroad reorganization case, the Debtor's exclusive right to file a plan terminated. *See* 11 U.S.C. §§ 1163, 1121(c)(1).[2]

8. On September 4, 2013, the Court entered an order adopting the *Cross-Border Insolvency Protocol* [D.E. 168], which governs the conduct of all parties in interest in this case and the Canadian Case. The Canadian Court also adopted the Protocol. The purpose of the Protocol is to, among other things, (a) harmonize and coordinate the activities before this Court and the Canadian Court, (b) promote the orderly and efficient administration of the chapter 11 case and the Canadian Case to, among other things, maximize the efficiency of both proceedings, reduce the costs associated therewith and avoid duplication of effort, and (c) facilitate the fair, open and efficient administration of the proceedings for the benefit of all of the Debtors' creditors and other interested parties, wherever located. *See* Protocol, ¶ 5.

9. Pursuant to an order dated on October 18, 2013 [D.E. 391], this Court authorized and directed the U.S. Trustee to appoint a victims' committee in this chapter 11 case. On November 27, 2013 and December 10, 2013, the U.S. Trustee appointed the members of the Official Committee of Victims (the "Official Committee"). In addition to the members of the Official Committee, the government of the Province of Québec and the City of Lac-Mégantic, Québec apparently serve as *ex officio* members of the Official Committee.

[2] The effect of these provisions is to, apparently, eliminate exclusivity altogether in railroad cases, perhaps on the assumption that regulatory involvement would eliminate any chaos over competing plans.

A. The Debtors' Railroad Liability Insurance Policies

10. Prior to the Petition Date, MMA and MMA Canada each obtained railroad liability insurance. XL Group Insurance ("XL Group") issued Policy No. RRL003723801 to MMA for the period April 1, 2013 through April 1, 2014 (the "U.S. Policy"). XL Insurance Company Limited ("XL Limited" and, together with the XL Group, "XL") issued Policy No. RLC003808301 to MMA Canada for that same period (the "Canadian Policy" and, together with the U.S. Policy, the "Policies").

11. Pursuant to Endorsement #001 to the U.S. Policy and Endorsement #004 to the Canadian Policy, in addition to MMA and MMA Canada, "Montreal, Maine and Atlantic Corporation, and/or LMS Acquisition Corporation . . . and/or Rail World as Managers and/or owners, investors as their interests may appear and any subsidiary, associated or financial controlled company that way, may now, or thereafter be constituted, or acquired, including any other entity under the Insured's control of which it assumes active management," are "Named Insureds" under the Policies. Certain other entities, including certain lessors of rolling stock, among others, are also insured with respect to "Railroad Operations" conducted on behalf of MMA and/or MMA Canada, to the extent such "Railroad Operations" are covered by the Policies. *See* Endorsement #003 to U.S. Policy; Endorsement #006 to Canadian Policy.[3]

12. Endorsement #007 to the U.S. Policy provides that the U.S. Policy "shall not apply to any loss, cost, or expense for which coverage is applicable" under the Canadian Policy. Endorsement #009 to the Canadian Policy similarly provides that the Canadian Policy "shall not apply to any loss, cost, or expense for which coverage is applicable" under the U.S. Policy.

[3] CIT Group/Equipment Financing Inc. ("CIT") are also insureds pursuant to pursuant to paragraph 20G of Section IV of the Canadian Policy.

13. Accordingly, the Policies cannot, by their terms, apply to the same incident; thus, there is no set of facts where both the U.S. Policy and the Canadian Policy would provide coverage. In this case, all of the parties, including counsel to the Unofficial Committee, concede that only the Canadian Policy is "active" and covers claims arising out of or related to the Derailment, including wrongful death and personal injury claims.[4]

14. The Canadian Policy is protected by the Canadian Stay. *See* Initial Order, ¶ 7.

15. Moreover, MMA is a named insured under the Canadian Policy, and any proceeds of the Canadian Policy constitute property of MMA's bankruptcy estate under 11 U.S.C. § 541(a). *See* Tringali v. Hathaway Machinery Co., 796 F.2d 553, 560-561 (1st Cir. 1986) (holding that both liability policy and proceeds thereof are property of chapter 11 estate even if proceeds of policy can only be paid to tort plaintiffs or third parties); In re Mahoney Hawkes, LLP., 289 B.R. 285, 295 (Bankr. D. Mass. 2002) (liability policy; court follows Tringali and "hold[s] that the proceeds of the Policy are property of the estate."); In re Focus Capital, Inc., 2014 WL 117314 at *7-9 (Bankr. D.N.H., Jan. 10, 2014) (follows Tringali with respect to errors and omissions policy and holds that "the Policy and its proceeds are part of the bankruptcy estate.").

16. However, the fact that the proceeds of the Canadian Policy constitute property of MMA's estate does not mean that such proceeds are "free assets" available for distribution to all creditors and subject to the priority scheme of the Bankruptcy Code. *See* Mahoney Hawkes, 289 B.R. at 295. As explained in Mahoney Hawkes,

> This holding [that proceeds of an insurance policy are property of the estate], however, is not dispositive of the issue of separate classification. After holding that the proceeds of a liability policy were property of the estate, the First

[4] *See* Letter dated February 14, 2014 filed by counsel to the Unofficial Committee, D.E. 92, in Case No. 1:13-mc-00184-NT (D. Me.), attached hereto as **Exhibit A**.

> Circuit went on to state that what comes into the estate from such a policy is a "debtor's right to have the insurance company pay money to satisfy one kind of debt—debts accrued through, for example, the insured's negligent behavior." [quoting Tringali, 796 F.2d at 560]. ***[The First Circuit in Tringali] was not suggesting that the proceeds of a liability policy become part of the general fund available for distribution to all creditors.***
>
> The Debtor's interest in the proceeds of the policy is precisely that identified in Tringali. ***The malpractice claimants have the right to receive some property of the estate that general unsecured creditors cannot receive. They are, in effect, multiple secured creditors having claims against a single fund. Separately classifying their claims does not violate Granada Wines.***

Mahoney Hawkes, 289 B.R. at 295 (emphasis added).

17. Accordingly, under Tringali, a debtor has the right to control the distribution of proceeds of an insurance policy to insureds and beneficiaries under the policy only. Tringali does **not** hold that proceeds of an insurance policy come into an estate, unfettered and part of the general fund available for distribution to all creditors, to which priorities would attach.

B. The Section 157(b)(5) Proceedings in the United States District Court for the District of Maine and Claims of Non-Debtor Co-Defendants Against the Policies and Proceeds

18. Between July 22, 2013 and August 14, 2013, the representatives and administrators of the estates of some of the deceased victims of the Derailment commenced civil actions against MMA and various other defendants (the "Non-Debtor Defendants") in the Circuit Court of Cook County, Illinois (the "Circuit Court").

19. On August 29, 2013, all twenty of these civil actions were removed to the United States District Court for the Northern District of Illinois (the "Illinois District Court"). The removal of these cases was effectuated pursuant to 28 U.S.C. §§ 1331, 1332, 1334(b), 1441, 1446, and 1452.

20. On September 8, 2013, one of the civil actions was voluntary dismissed by the plaintiff. On September 9, 2013, each of the plaintiffs in the remaining cases voluntarily dismissed, without prejudice, MMA as a defendant.

21. As of September 10, 2013, nineteen of the twenty cases originally commenced in the Circuit Court and later removed to the Illinois District Court (the "PITWD Cases") remained pending in that court.

22. On September 11, 2013, the Trustee filed a motion pursuant to 28 U.S.C. § 157(b)(5) (the "Section 157(b)(5) Motion") requesting that the United States District Court for the District of Maine (the "Maine District Court") transfer the PITWD Cases to Maine, the district in which this case is pending. Western Petroleum Corporation and Petroleum Transport Services, Inc., two Non-Debtor Defendants, also filed a transfer motion under 28 U.S.C. § 157(b)(5). The plaintiffs in the PITWD Cases filed a response objecting to the Section 157(b)(5) motion.

23. On September 12, 2013, one of the PITWD Cases was remanded back to the Circuit Court. Accordingly, eighteen PITWD Cases remained pending in the Illinois District Court.

24. On September 18, 2013, a plaintiff in one the PITWD Cases pending in the Illinois District Court moved for an order remanding his action back to the Circuit Court. Accordingly, on September 23, 2013, the Trustee filed a *Motion for Order (I) Staying Ruling on Abstention or Remand and (II) Granting Leave to Intervene for a Limited Purpose* (the "Trustee's Stay Motion") requesting the Illinois District Court to defer any ruling on remand or abstention until the Maine District Court ruled on the Section 157(b)(5) Motion. The plaintiff objected to the Trustee's Stay Motion. Similar remand motions were filed in the other PITWD

Cases. Also on September 18, 2013, the Illinois District Court reassigned all of the PITWD Cases pending before various judges to one judge, United States District Judge Bucklo.

25. The Illinois District Court took the various motions for remand and the Trustee's Stay Motion under advisement.

26. On October 18, 2013, the plaintiffs in the PITWD Cases filed a motion to stay the Section 157(b)(5) Motion (the "Wrongful Death Claimants' Stay Motion") requesting that the Maine District Court stay further action on the Section 157(b)(5) Motion until the Illinois District Court ruled on the pending motions before that court. The Trustee opposed this motion. The Maine District Court reserved ruling on the Wrongful Death Claimants' Stay Motion on November 4, 2013.

27. On November 20, 2013, the Illinois District Court stayed the rulings on the remand motions in the PITWD Cases until after the Maine District Court decided the Section 157(b)(5) Motion.

28. On January 31, 2014, the Maine District Court held oral arguments regarding the Section 157(b)(5) Motion and response thereto, and the Wrongful Death Claimants' Stay Motion and response thereto, ultimately taking the matters under advisement. As of the date hereof, the Maine District Court has not rendered a decision.

29. Among the reasons why the PITWD Cases are claimed to be related to this case and therefore within the Maine District Court's and bankruptcy court's jurisdiction, and therefore should be transferred to Maine under § 157(b)(5), is that some of the Non-Debtor Defendants are also named insureds under the U.S. Policy and/or the Canadian Policy. Specifically, Edward Burkhardt, certain Rail World entities and CIT—all Non-Debtor Defendants—are named and/or additional insureds under the one or both of the Policies.

30. Edward Burkhardt is a former member of MMA's board of directors. Rail World and Mr. Burkhardt are Non-Debtor Defendants, and the plaintiffs in the PITWD cases have argued that they are central defendants in the cases. Rail World asserts that it has rights against MMA under indemnification provisions in a management agreement, and a Rail World affiliate asserts that it has indemnification rights under a locomotive lease. Mr. Burkhardt also asserts that he has automatic indemnity rights under the MMA governance documents.

31. CIT has stated that it will seek to satisfy any judgment against it from the proceeds of the Canadian Policy. If CIT is liable to the plaintiffs in the PITWD Cases, and if CIT is entitled to indemnification from MMA's estate, CIT, as a named and/or additional insured, contends that it has a lien upon or property rights in the Canadian Policy and its proceeds.

C. The Formation of the Unofficial Committee

32. Between August 22, 2013 and September 3, 2013, law firms Murtha Collina LLP ("Murtha") and Gross, Minsky & Mogul, P.A. ("GMM") filed several papers with this Court and appeared in this case on behalf of the representatives of the estates of 18 victims of the Derailment (the "18 Claimants").[5] During that same time period, GMM separately filed a motion and appeared in this case on behalf of the representatives of the estates of 15 additional victims of the Derailment (the "15 Claimants"). *See* D.E. 78.

33. On September 27, 2013, Murtha and GMM filed the *Wrongful Death Claimants' Withdrawal of Their Motion for Formation of Creditors' Committee* [D.E. 291] (the "Withdrawal Notice") on behalf of an unofficial committee comprised of the representatives of the estates of

[5] *See, e.g.,* Wrongful Death Claimants' Motion for Formation of Creditors' Committee [D.E. 76]; Wrongful Death Claimants' Reservation of Rights Concerning Employment of Chapter 11 Professionals [D.E. 150]; Motion for Expedited Hearing of Wrongful Death Claimants' Motion for Formation of Creditors' Committee [D.E. 171]; Wrongful Death Claimants' Objection to Motion of "Informal Committee of Quebec Claimants" for Appointment of Creditors' Committee [D.E. 214].

42 victims of the Derailment (the "42 Claimants"). The 42 Claimants include the 18 Claimants, the 15 Claimants, and the representatives of the estates of an additional 9 victims of the Derailment. *See* Withdrawal Notice, Exh. A. In the Withdrawal Notice, it was represented that "the legal representatives of 42 of those killed in the [Derailment] have agreed to work together in this case as the Unofficial Committee of Wrongful Death Claimants[.]" Id., ¶ 1. Presumably, this agreement "to work together" was made on or before September 27, 2013.

34. Almost three weeks later, on October 16, 2013, Murtha and GMM filed the *Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019* [D.E. 388] (the "Original 2019 Statement"). The Original 2019 Statement provides, in pertinent part, that:

> [Murtha] was engaged as bankruptcy counsel and GMM as local bankruptcy counsel for the Unofficial Committee, **by the Wrongful Death Claimants' personal injury counsel**, The Webster Law Firm of Houston, Texas; Meyers & Flowers, LLC of St. Charles, Illinois and Weller, Green, Toups & Terrell LLP of Beaumont, Texas (collectively, "Personal Injury Counsel"). **Personal Injury Counsel had earlier engaged Murtha and GMM** to provide services related to the Debtor's Chapter 11 case on behalf of all of their respective clients having wrongful death claims against the Debtor.

Original 2019 Statement, at ¶ 2 (emphasis added).

35. The Original 2019 Statement was later amended to reflect, in part, that the Unofficial Committee now allegedly consists of the representatives of the estates of 47 victims of the Derailment. *See Amended Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019* [D.E. 599] (the "Amended 2019 Statement"). The Amended 2019 Statement contains language identical to the language quoted above. *See* Amended 2019 Statement, at ¶ 2.3. Thus, Murtha and GMM apparently represent certain personal injury counsel, not the underlying wrongful death

claimants, and, upon information and belief, speak to and take instruction from only such personal injury counsel.

36. On February 18, 2014, the Trustee filed the *Chapter 11 Trustee's Motion for an Order (I) Determining That the Unofficial Committee of Wrongful Death Claimants Failed to Comply with Fed. R. Bankr. P. 2019 and (II) Imposing Sanctions for Such Failure* [D.E. 667] (the "2019 Motion"). The 2019 Motion argues that neither the Original 2019 Statement nor the Amended 2019 Statement disclose adequate (or any) information regarding, among other things, who or what the Unofficial Committee represents, the formation of the committee, and compensation arrangements, such as contingent fees or other similar sharing relationships or arrangements. Specifically, both the Original 2019 Statement and the Amended 2019 Statement suggest that Murtha and GMM are representing **lawyers**, not individuals with claims against MMA's estate.

37. The 2019 Motion requests, among other things, that the Court strike all of the Unofficial Committee's filings (including the Plan and Disclosure Statement) and prohibit them or their counsel from being heard or intervening in this case until they comply with Rule 2019.

D. Key Terms of the Unofficial Committee's "Plan"

38. On January 29, 2014, the so-called Unofficial Committee filed the Plan and Disclosure Statement. The Plan contemplates that administration of the Plan will be accomplished by a plan fiduciary appointed pursuant to section 6.1 of the Plan (the "Plan Fiduciary"). *See* Plan, § 6.1.

39. The Plan is premised on the inaccurate assertion that "the only material asset available to satisfy victims' claims appears [to] be the insurance policies of the U.S. and Canadian bankruptcy estates." Plan, p. 1. Specifically, the Plan focuses on distribution of the

proceeds of the Policies. The Plan notes that the Policies "are intertwined in that any indemnity payment under either policy reduces the available amount under the other such that a maximum of $25 million in indemnity is available under the policies collectively." Plan, p. 2. However, the Plan ignores the fact admitted by counsel to the Unofficial Committee, shown in Exhibit A, that **only** the Canadian Policy is active, and that the two Policies cannot, by their terms, apply to the same incident; thus, there is no set of facts where both of the Policies would provide payment. Since the Plan is premised upon both Policies being relevant, it is nonconfirmable on that basis alone.

40. Essential to the Plan is the forced allocation of claims arising out of or related to the Derailment (the "Derailment Claims"). The Plan divides the pool of Derailment Claims into two categories: (i) wrongful death and personal injury claims (the "WD/PI Claims"), classified in Class 5 of the Plan; and (ii) all other Derailment Claims (the "Other Derailment Claims"), classified in Class 6 of the Plan. *See* Plan at § 5.3. The Plan provides that the WD/PI Claims "may be asserted in the U.S. Case," and that any recoveries obtained by such claims from this case "shall be the only recovery" on the WD/PI Claims. Id. at § 5.3(a). Holders of the WD/PI Claims therefore "waive the right to file, otherwise assert, or recover on account of such claims in the Canadian Case." Id.

41. The Other Derailment Claims, consisting of, among other things, claims for property and environmental damage resulting from the Derailment, "may be asserted in the Canadian Case," but shall be deemed disallowed if filed in this case. Plan, § 5.3(b). Any recoveries from the Canadian Case on the Other Derailment Claims "shall be the only recovery on account of such Claims in either the U.S. Case or the Canadian Case." Id.

42. The Plan is premised upon the assumption that the WD/PI Claims are entitled to administrative priority pursuant to 11 U.S.C. § 1171(a), but glosses over the fact that certain of the Other Derailment Claims may be entitled to priority status as well. *See* Plan, § 4.6 ("No funds will be available in the U.S. Case to pay Class 6 Claims because Code Section 1171(a) requires payment in full of wrongful death and personal injury claims before payment of Class 6 Claims.").

43. The apparent purpose of the forced allocation provisions of the Plan is to ensure that the administrative expense priority of 11 U.S.C. § 1171(a) applies to the WD/PI Claims even if the assets available to pay such claims belong to MMA Canada's estate; the 1171(a) priority has no duplicate in the CCAA and, if the WD/PI Claims were filed in the Canadian Case, and satisfied thereunder, no such priority would apply.

44. More critically, the Plan also ignores that the section 1171(a) priority is irrelevant to, and plays no role in, the distribution of the proceeds of the Canadian Policy, which must be distributed, *pro rata*, to all victims of the Derailment **as well as** other named or additional insureds under the Canadian Policy. As established by the First Circuit in Tringali, proceeds of the Canadian Policy are not "free" assets available for distribution to all creditors. *See* Tringali, 796 F.2d at 560-61; Mahoney Hawkes, 289 B.R. at 295; Focus Capital, 2014 WL 117314 at *7-9. Thus, the Plan violates controlling First Circuit authority.

45. Additionally, certain other types of claims may be entitled to proceeds of the Canadian Policy and may be entitled to priority status equal to that of the WD/PI Claims. For example, environmental remediation claims arising out of or related to the Derailment that are held by the Canadian federal government, the government of Québec, and the City of Lac-

Mégantic may be entitled to administrative priority. *See* In re Stevens, 68 B.R. 774, 781, 784 (D. Me. 1987).

46. Additionally, since the Derailment the government of Québec has established a $60 million victims fund, which provides financial assistance to victims of the Derailment, including the approximately 2,000 residents of Lac-Mégantic who were forced to evacuate after, and/or suffered personal injuries and/or property damage as a result of, the Derailment. Pursuant to section 118 of the Civil Protection Act, RSQ, c S-2.3, the Québec government is subrogated to the victims who receive financial benefits from the victims fund. Many of the recipients of assistance from the victims fund are personal injury claimants whose claims may be entitled to administrative expense priority under section 507(a)(2) by virtue of section 1171(a). Accordingly, those claims of the Québec government relating to payments made to personal injury victims may be subrogated to the priority of the victim's claim as well.

47. Despite the fact that only the Canadian Policy can provide coverage with respect to the Derailment, and despite the equal rights of **all** Derailment victims in the proceeds of the Canadian Policy, the Plan provides for the following allocation of proceeds of the Policies:

a. **Omnibus Insurer Settlement Scenario**: If the Plan Fiduciary enters into an "Omnibus Insurer Settlement," meaning a settlement among the Plan Fiduciary, MMA Canada, and XL, and if MMA Canada does not object to the Plan, MMA will receive 75% of the proceeds of the Policies, and MMA Canada will receive the remaining 25% of the proceeds of the Policies. Plan, § 5.4(b)(i). The Plan provides that this is the "preferred alternative." Id. at § 5.4(a).

   If MMA Canada objects to the Plan, the proceeds of the Omnibus Insurer Settlement will be allocated between MMA and MMA Canada pursuant to an agreement between MMA and MMA Canada. If no agreement can be reached, the proceeds will be allocated pursuant to the joint determination of this Court and the Canadian Court based on the ratio of Derailment WD Claims and Derailment PI Claims (apparently deemed liabilities solely of MMA) to Non-PI/WD Derailment Claims (apparently deemed liabilities

solely of MMA Canada), other than any claims asserted by Québec. Plan, § 5.4(c).[6]

b. **U.S.-Only Insurer Settlement Scenario**: If the Plan Fiduciary enters into a "U.S.-Only Insurer Settlement," meaning a settlement between the Plan Fiduciary and the XL Group only, MMA will receive 100% of the proceeds of the U.S. Policy, meaning that no funds will be available for distribution to MMA Canada under the Canadian Policy. Plan, § 5.4(d).

c. **Non-Settlement Scenario**: If neither an Omnibus Insurer Settlement nor a U.S.-Only Insurer Settlement has been reached by the Plan's Effective Date, and regardless of whether MMA Canada accepts or rejects the Plan, XL shall be required to pay $18,750,000 (an amount equal to 75% of the proceeds of the Policies) to MMA, and the U.S. Policy shall be cancelled. Plan, § 5.4(f).

48. Thus, in the worst-case scenario where the Plan Fiduciary is unable to reach any insurance settlement, and notwithstanding the fact that only the Canadian Policy is active, the Plan contemplates distribution of 75% of the proceeds of the Policies to holders of WD/PI Claims.

49. All of the proceeds from the Canadian Policy or the U.S. Policy (to the extent it applies at all) will be deposited into a "Compensation Fund," along with certain other assets, pursuant to section 5.5 of the Plan. Plan, § 5.5. The holders of allowed WD/PI Claims are entitled to a *pro rata* share of the Compensation Fund. Id. No other creditor or claimant is entitled to distributions from the Compensation Fund.

50. In addition to receiving a distribution from the Compensation Fund, the holders of WD/PI Claims "may commence or continue litigation in any forum against any Non-Debtor

[6] This default provision should the parties be unable to reach an insurance settlement does not save the Plan. As noted by the Third Circuit in American Capital, the mere provision of an alternative option in an otherwise nonconfirmable plan is not sufficient to achieve confirmation. In re Am. Capital Equip., LLC, 688 F.3d 145, 160 (3d Cir. 2012). Moreover, this provision invites the Courts to rewrite the Plan in order to save it. It is not the job of this Court and/or the Canadian Court to write or re-write a plan for the Unofficial Committee; indeed, that is beyond the Courts' power. *See* Sterling Healthcare, Inc. v. Am. Int'l Specialty Lines Ins. Co. (In re Baltimore Emergency Svcs. II, LLC), 334 B.R. 164, 171 (Bankr. D. Md. 2005) ("The court does not have jurisdiction to rewrite Debtors' plan of reorganization."); Sunflower Racing, Inc. v. Mid-Continent Racing & Gaming Co. I, 226 B.R. 665, 670 (D. Kan. 1998) ("The Court does not rewrite plans of reorganization. It only rules on whether or not they are confirmable . . . ."); In re Roesner, 153 B.R. 328, 335 (Bankr. D. Kan. 1993) (same).

Entity alleged to have caused or contributed to causation of the Derailment, or injury or death or other damages resulting from the Derailment." Plan, § 5.6(a). This provision by definition conflicts with the proposed immediate distribution of proceeds of the Canadian Policy to holders of WD/PI Claims, as a number of Non-Debtor Defendants also have or may assert claims under the Policies, and distribution of the proceeds of either of the Policies cannot occur until litigation against the Non-Debtor Defendants who are also named or additional insureds has concluded.

II. ARGUMENT

A. The Plan Cannot Be Confirmed Because It Would Require This Court to Decide the Venue of the PITWD Cases; Pursuant to 28 U.S.C. § 157(b)(5), Only the District Court Can Decide the Venue of the PITWD Cases.

The Plan cannot even be considered until after the Maine District Court rules on the Section 157(b)(5) Motion. Section 157(b)(5) provides that:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5).

As one circuit court noted: "The purpose of Section 157(b)(5) is 'to centralize the administration of the estate and to eliminate the 'municipality of forums for the adjudication of parts of a bankruptcy case.'" A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1011 (4th Cir. 1986) cert denied. 479 U.S. 876, 107 S. Ct. 251, 93 L. Ed. 2d 177 (1986); *see also* In re N. E. Compounding Pharm., Inc. Prods. Liab. Litig., 496 B.R. 256 (D. Mass. 2013) (providing for a transfer of wrongful death and personal injury claims under section 157(b)(5)).

Central aspects of the Plan would require this Court to rule on matters before the Maine District Court as a consequence of the Section 157(b)(5) Motion, which this Court has neither jurisdiction nor authority to do. Specifically, the Plan is hinged on holders of WD/PI Claims

having the ability to litigate their claims against Non-Debtor Defendants in the forum of their choosing, notwithstanding section 157(b)(5) and the pendency of the Section 157(b)(5) Motion. *See* Plan, § 5.6(a). Under the express terms of section 157(b)(5), only the Maine District Court may rule on the proper venue of the PITWD Cases, and until that court rules, and any such ruling becomes a final order, the Plan cannot move forward in any respect. Accordingly, this Court has no authority to move forward with consideration of the Plan, because such consideration would constitute an unwarranted interference with the District Court's exclusive authority under section 157(b)(5).

B. The Plan Violates the Initial Order and the Canadian Stay.

As set forth above, the Initial Order provides that the Canadian Stay extends to, and protects, the Canadian Policy and the additional insureds thereunder. Without first obtaining or even seeking relief from the Canadian Stay, the Plan contemplates violation of that Stay by appropriating the rights of MMA Canada, MMA, and certain Non-Debtor Defendants in the proceeds of the Canadian Policy and distributing those proceeds **only** to the holders of WD/PI Claims. The Plan must fail at the outset because of its blatant violation of Canadian law and its violation of an order issued by the Canadian Court.

C. The Plan is Facially Nonconfirmable.

Additionally, the Plan is fatally flawed and nonconfirmable. A court may refuse to approve a disclosure statement if it describes a plan that cannot be confirmed. *See, e.g.,* In re E. Me. Elec. Coop., Inc., 125 B.R. 329, 333 (Bankr. D. Me. 1991) ("If the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is 'impossible,' the court should exercise its discretion to refuse to consider the adequacy of disclosures.") (*quoting* In re Cardinal Congregate I, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990)); In re Petit, 189 B.R. 227, 228

(Bankr. D. Me. 1995) (same); *see also* In re Am. Capital Equip., LLC, 688 F.3d 145, 153-54 (3d Cir. 2012) (citing cases); In re Franklin Indus. Complex, Inc., 386 B.R. 5, 10 (Bankr. N.D.N.Y. 2008) (noting that courts may disapprove a disclosure statement containing adequate information if the court has concerns about "whether or not the plans to which they relate can be confirmed at the particular stage of the case."); In re Main St. AC, Inc., 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) (same); In re Mkt. Sq. Inn, Inc., 163 B.R. 64, 68 (Bankr. W.D. Pa. 1994) (same). The court's equitable powers under section 105(a) permit a court to control its own docket and avoid having to "proceed with the time-consuming and expensive proposition of hearings on a disclosure statement and plan when the plan may not be confirmable . . . ." Am. Capital Equip., 688 F.3d at 154; *see also* In re Dakota Rail, Inc., 104 B.R. 138, 145 (Bankr. D. Minn. 1989) (noting that the court has an obligation "not to subject the estate to the expense of soliciting votes and seeking confirmation of the plan" where "the disclosure statement *on its face* relates to a plan that cannot be confirmed.") (emphasis in original).

A plan is facially nonconfirmable where (1) confirmation defects cannot be overcome by voting results and (2) the confirmation defects concern matters in relation to which there is no dispute of material facts or the facts have been fully developed at the disclosure statement hearing. *See* Am. Capital Equip., 688 F.3d at 154-55. Section 1129(a) of the Bankruptcy Code enumerates the requirements that must be satisfied in order for a plan to be confirmed. *See* 11 U.S.C. § 1129(a). Section 1129(a) applies to plans filed in railroad reorganization cases. *See* 11 U.S.C. § 1173(a)(1). A disclosure statement will not be approved, and a plan will not be confirmed, if one or more of the section 1129(a) requirements cannot be met. *See, e.g.*, E. Me. Elec. Coop., *supra*; Am. Capital Equip., *supra*.

Here, the Disclosure Statement relates to, and describes the terms of, a plan that fails to satisfy the requirements of section 1129(a) in several significant ways. These confirmation defects cannot be overcome by voting, and they arise from well-established facts that are not in dispute. Accordingly, the Disclosure Statement cannot be approved and no additional resources of this Court should be expended with respect to the Disclosure Statement or the Plan. Further, the Disclosure Statement fails to provide adequate information and cannot satisfy section 1125(a).

i. The Plan Does Not Provide Adequate Means for Implementation under Section 1123(a)(5) and Therefore Does Not Satisfy Section 1129(a)(1).

Section 1129(a)(1) provides that a court "shall confirm a plan only if . . . [t]he plan complies with the applicable provisions of" the Bankruptcy Code, including section 1123(a)(5) of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Section 1123(a)(5) of the Bankruptcy Code mandates that, "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Where a plan fails to provide adequate means for its implementation, the plan cannot be confirmed. *See* In re Irving Tanning Co., 496 B.R. 644, 666 (1st Cir. BAP 2013) (holding that "the preemptive scope of § 1123(a)(5) does not extend to the state laws in question, and therefore the Plan violates applicable nonbankruptcy law and may not be confirmed.").

The preemptive scope of section 1123(a)(5) is not without limitation. *See* Irving Tanning, 496 B.R. at 661. Specifically, "the preemptive effect of § 1123(a) cannot extend to laws defining and protecting the property rights of third parties." Id. at 664. Accordingly, a plan that proposes to appropriate the property rights of third parties cannot be confirmed under sections 1123(a)(5) and 1129(a)(1). *See* Irving Tanning, 496 B.R. at 664 (finding that, "by appropriation of the Self-Insurance Funds, the Plan undisputedly would transgress the state-law

property rights of Acstar and the Maine authorities" and could not be confirmed); *see also* In re Jason Realty, L.P., 59 F.3d 423, 430 (3d Cir. 1995) (finding that proposed plan could not use rents that were not property of the estate as source of plan funding); In re Union Meeting Partners, 160 B.R. 757, 767 (Bankr. E.D. Pa. 1993) (finding that plan was not confirmable where plan would be funded by rents owned by secured party); In re Surma, No. 11-37991-MBK, 2014 WL 413572, *5 (Bankr. D.N.J. Feb. 4, 2014) (holding that plan premised on use and allocation of previously assigned rents was patently unconfirmable, warranting disapproval of disclosure statement).

The Plan clearly violates section 1123(a)(5) because it is hinged on appropriation of the contract and property rights of non-debtor third parties in and to the proceeds of the Policies. As stated above, both of the Policies indicate that certain non-debtor third parties, such as Rail World and rolling stock lessors, such as CIT, are insureds under one or both of the Policies. Several of the insureds are also Non-Debtor Defendants in the PITWD Cases, and assert claims under the Policies in relation to the Derailment. Despite these facts, the Plan proposes that **all** of the proceeds of the Policies will be distributed to Derailment Claims, regardless of the claims of non-debtor third parties. Section 1123(a)(5) and the case law thereunder are clear that a plan proposing to appropriate a third party's rights cannot be confirmed. Accordingly, the Plan fails under section 1129(a)(1) and section 1123(a)(5).

Further, as discussed above, the Plan violates the express terms of the Initial Order and the Canadian Stay, without first obtaining relief from the Canadian Stay. The Plan thus fails to provide adequate means for its implementation because it is premised on violation of applicable law.

The Plan also fails to provide adequate means for its implementation because it simply cannot be consummated as written. Section 5.6(a) of the Plan provides that, in addition to receiving the proceeds of the Policies, the holders of WD/PI Claims can at time the same pursue litigation against Non-Debtor Defendants in their chosen forum for claims arising out of or related to the Derailment. However, again, the Plan ignores that certain of the Non-Debtor Defendants are also insureds under the Policies and have claims under the Policies for coverage of Derailment-related liability they may face. Accordingly, holders of WD/PI Claims cannot simultaneously capture all of the proceeds of the Policies while pursuing litigation against the Non-Debtor Defendants who may also have claims under the Policies as a result of that litigation; none of the insurance proceeds can be distributed while such lawsuits are pending against the Non-Debtor Defendants. The Plan simply cannot function, as a practical matter, and cannot be confirmed.

ii. The Unofficial Committee Has Not Complied with Section 1129(a)(2) Because the Unofficial Committee Has Not Established That It Has Standing to Propose a Plan.

Section 1129(a)(2) requires that "[t]he proponent of the plan" comply with the Bankruptcy Code. 11 U.S.C. § 1129(a)(2); *see also* Tenn-Fla Partners v. First Union Nat. Bank of Fla., 229 B.R. 720, 732-33 (W.D. Tenn. 1999) (finding that, pursuant to section 1129(a)(2), a plan proponent must "comply with all other applicable provisions of the Bankruptcy Code . . ."). Among the provisions of the Bankruptcy Code with which a plan proponent must comply is section 1121(c). *See, e.g.,* In re GPX Intern. Tire Corp., No. 09-20170-JNF, 2010 WL 6595321, *4 (Bankr. D. Mass. July 21, 2010) (finding that debtor and creditors' committee had satisfied section 1129(a)(2) because, among other things, they were proper plan proponents under section 1121(c)); In re DLH Master Land Holding, LLC, No. 10-30561-HDH-11, 2011 WL 5883881, *2

(Bankr. N.D. Tex. Nov. 23, 2011) (finding that debtor complied with section 1129(a)(2) because, among other things, it was a "proper proponent" of the plan pursuant to section 1121(c)).

Pursuant to 11 U.S.C. § 1121(c), a party in interest may file a plan once a trustee is appointed in a case. *See* 11 U.S.C. § 1121(c)(1). The Bankruptcy Code does not define "party in interest," but instead lists who constitutes a party in interest. *See* In re El Commandante Mgmt. Co., LLC, 359 B.R. 410, 416 (Bankr. D.P.R. 2006). Section 1121(c) provides that a party in interest includes "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee." 11 U.S.C. § 1121(c). The scope of section 1121(c) is limited by "principles of standing," and a determination of who may be a party in interest "is determined on a case-by-case basis, after considering whether or not the person has a sufficient stake in the outcome of the case." El Commandante Mgmt., 359 B.R. at 417. The "real party in interest is the party that has the legal right which is sought to be enforced or is the party entitled to bring suit." In re Ionosphere Clubs, Inc., 101 B.R. 844, 849-51 (Bankr. S.D.N.Y. 1989) (finding that consumer group allegedly representing interests of ticketholders was not a party in interest and did not have standing to be heard); *see also* Savage & Assocs., P.C. v. K&L Gates LLP (In re Teligent, Inc.), 640 F.3d 53, 60-61 (2d Cir. 2011) (noting that a party in interest must have a direct financial stake in the outcome of the case); In re Old Carco LLC, 500 B.R. 683, 691 (Bankr. S.D.N.Y. 2013) (noting that a party in interest must have a financial or legal stake in the outcome of the matter at issue).

The Unofficial Committee does not have standing under section 1121(c)(1) to propose a Plan because it has not established that it is a party in interest under section 1121(c). As indicated above, both the Original 2019 Statement and the Amended 2019 Statement are ambiguous as to what the Unofficial Committee is, who is in the so-called committee and who, if

anyone, the Unofficial Committee represents, and in fact suggest that counsel to the Unofficial Committee were retained to represent personal injury attorneys, not the victims of the Derailment.[7] No engagement letters or details regarding the retention of counsel to the Unofficial Committee have been provided, and no details regarding compensation have been disclosed. Pending resolution of the issues raised in the 2019 Motion, the Unofficial Committee does not have standing under section 1121(c) to propose a plan, and the Unofficial Committee cannot comply with section 1129(a)(2).

iii. The Plan Was Not Proposed in Good Faith as Required under Section 1129(a)(3).

Section 1129(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). In determining whether a plan meets the requirements of section 1129(a)(3), courts look to "whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." Am. Capital Equip., 688 F.3d at 156 (internal quotations omitted). Among the objectives of the Bankruptcy Code is the "maximum recovery by and fair distribution to creditors." Search Mkt. Direct, Inc. v. Jubber (In re Paige), 685 F.3d 1160, 1179 (10th Cir. 2012) (internal quotations omitted); *see also* In the Matter of Fiesta Homes of Ga., Inc., 125 B.R. 321, 325 (Bankr. S.D. Ga. 1990) (same). When evaluating whether a plan has been proposed in good faith under section 1129(a)(3), the court must consider "the totality of the circumstances surrounding the formulation of the plan." In re

[7] The personal injury counsel—whether as potential creditors of other creditors (their clients) or as fiduciaries to their clients—are not parties in interest under sections 1109 and 1121(c) of the Code. *See* Krys v. Official Comm. of Unsecured Creditors of Refco, Inc., 505 F.3d 109, 117 (2d Cir. 2007) (stating that "[t]o the extent that the rights of a party in interest are asserted, those rights must be asserted by the party in interest, not someone else."); *see also* In re Innkeepers USA Trust, 448 B.R. 131, 142-44 (Bankr. S.D.N.Y. 2011) (finding that holder of beneficial interest in trust was not a party in interest); In re Saint Vincents Catholic Med. Cts. of N.Y., 429 B.R. 139, 149-51 (Bankr. S.D.N.Y. 2010) (citing Refco and finding that state court plaintiffs lacked standing); In re Lehman Bros. Holdings Inc., No. 11 Civ. 3760(RJS), 2012 WL 1057952, *5 (S.D.N.Y. Mar. 26, 2012) (noting that "a creditor of a creditor is not a party in interest.") (internal quotations omitted).

River Valley Fitness One Ltd. P'ship, No. 01-12829-JMD, 2003 WL 22298573, *3 (Bankr. D.N.H. Sept. 19, 2003).

The totality of the circumstances surrounding the Unofficial Committee and its Plan indicate that the Plan was proposed in bad faith and is designed to maximize the recovery of only certain victims of the Derailment and the contingent fee attorneys representing such victims, to the detriment of all others, and in contravention of state law contract and property rights and Canadian law. Although the Plan suggests that creditors could somehow realize the proceeds of both of the Policies, the plain language of the Policies provides that only one policy, namely, the Canadian Policy, will apply to claims arising out of or related to the Derailment. Notwithstanding the plain language of the Policies, the Plan would divert the vast majority of the proceeds of the only "live" liability insurance policy—the Canadian Policy—to the Compensation Fund for the benefit of holders of WD/PI Claims. Holders of the WD/PI Claims could only seek recovery from this case, whereas holders of all other Derailment Claims (including the substantial property damage and environmental claims) would be barred from asserting claims in this case, and would instead be limited to seeking recovery in the Canadian Case. The clear purpose of these provisions is to ensure that the administrative expense priority of 11 U.S.C. § 1171(a) applies to the WD/PI Claims. As noted above, the 1171(a) priority has no duplicate in the CCAA and, if the WD/PI Claims were filed in the Canadian Case, and satisfied thereunder, no such priority would apply. Accordingly, the Plan fails to provide a maximum recovery and fair distribution to creditors, because it siphons substantial value from MMA Canada's estate to pay only a subset of the Derailment Claims, notwithstanding the fact that certain of the Other Derailment Claims may be entitled to the benefits of the Canadian

Policy, and notwithstanding the fact that the section 1171(a) priority cannot and does not attach to proceeds of the Canadian Policy under settled First Circuit law.

Further, given the Unofficial Committee's failure to provide adequate and necessary disclosures as required under Rule 2019, the proposal of the Plan is by definition not in good faith. Creditors, parties in interest, and this Court are entitled to understand the role of the Unofficial Committee, its relationship with the victims it purportedly represents, and the compensation arrangements between the Unofficial Committee and its constituents, in order to ensure that the Plan is proposed in good faith and is not affected by conflicts of interest (*i.e.*, is not designed to ensure that the attorneys associated with the Unofficial Committee obtain substantial contingency fees). Given the Unofficial Committee's repeated failure to make proper disclosures to this Court, and the clear intention of the Plan to direct the majority of the policy proceeds to only a subset of creditors, the Plan cannot satisfy section 1129(a)(3).

Finally, the Plan was proposed without any attempt at negotiating or coordinating a cross-border resolution of the significant and complex issues in these cases. Instead, the Plan is simply a unilateral attempt to draw the majority of the insurance proceeds despite settled property rights of other insureds and other victims, and/or is merely a litigation tactic designed to ensure that the contingency fee lawyers can litigate the WD/PI Claims in Cook County, Illinois despite the pendency of the Section 157(b)(5) Motion. Regardless, the Plan was proposed with complete disregard for the Initial Order and the Protocol and was not proposed in good faith.

iv. The Plan Does Not Satisfy the Best Interests of Creditors Test under Section 1173(a)(2).

Section 1173(a)(2) requires that, in order for a plan to be confirmed, the plan must provide that

> [e]ach creditor or equity security holder will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the value of property that each such creditor or equity security holder would so receive or retain if all of the operating railroad lines of the debtor were sold, and the proceeds of such sale, and the other property of the estate, were distributed under chapter 7 of this title on such date . . . .

11 U.S.C. § 1173(a)(2). The "best interests of creditors" test under section 1173(a)(2) is similar to that set forth in section 1129(a)(7), except that, "since a railroad cannot liquidate its assets and sell them for scrap to satisfy its creditors, the test focuses on the value of the railroad as a going concern. That is, the test is based on what the assets, sold as operating rail lines, would bring." H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 425 (1977). Thus, the test under section 1173(a)(2) differs from the test under section 1129(a)(7) only in that it "requires that a confirmable plan provide greater value than the liquidation value of the [railroad] line." In re Dakota Rail, Inc., 946 F.2d 82, 85 (8th Cir. 1991); In re Del. & Hudson Railway Co., 124 B.R. 169, 175 (D. Del. 1991) (same).

In performing a liquidation analysis under section 1173(a)(2) or section 1129(a)(7), the plan proponent can take into account only the property and claims that would exist in a chapter 7 case. *See* Sumski v. Sanchez (In re Sanchez), 270 B.R. 322 (Bankr. D.N.H. 2001) (finding that because a chapter 7 trustee would not be able to liquidate the debtor's post-petition personal injury claim, "it should not be included as property of the estate for purposes of Chapter 7 hypothetical liquidation analysis"); *see also* Forbes v. Forbes (In re Forbes), 215 B.R. 183, 190 (8th Cir. 1997) (finding that post-petition cause of action would not be included in property of the estate for purposes of the liquidation analysis under the best interests of creditors test); In re Washington Mut., Inc., 442 B.R. 314, 359-60 (Bankr. D. Del. 2011) (finding that liquidation analysis should not factor in effect of third-party releases, given that "there is no mechanism under chapter 7 to grant third party releases to non-debtors," in contrast to chapter 11); In re

Cowger, No. 13-71433, 2014 WL 318241, *7 (Bankr. C.D. Ill. Jan. 29, 2014) ("In working through the Chapter 7 liquidation analysis, it is only the Chapter 7 administrative expenses which are deducted," not both chapter 7 and chapter 13 administrative expenses).

In this case, performance of a liquidation analysis under section 1173(a)(2) requires a radical change to the landscape of claims in this case. The only basis on which the WD/PI Claims are entitled to priority administrative expense status is 11 U.S.C. § 1171(a). Section 1171(a) does not apply in chapter 7 cases. Accordingly, any liquidation analysis performed with respect to a plan filed in this case must account for the fact that, in a chapter 7 case, WD/PI Claims would be general unsecured claims.

Performance of a liquidation analysis with respect to the Plan, in light of the fact that the WD/PI Claims are not entitled to priority status in a hypothetical chapter 7 scenario, clearly establishes that the Plan is not confirmable. The Plan relies on the priority status of the WD/PI Claims pursuant to section 1171(a) to provide holders of such claims with substantial distributions, while holders of the Other Derailment Claims will receive nothing. Plan, § 4.6. However, in a hypothetical liquidation scenario, claims in Class 5 and Class 6 would have the same priority as general unsecured claims. Accordingly, because the Other Derailment Claims in Class 6 would receive nothing on their claims, while holders of WD/PI Claims—also holding general unsecured claims in the hypothetical chapter 7 scenario—would receive substantial funds, the Plan does not satisfy section 1173(a)(2) with respect to Class 6 claimants.

v. The Plan is Not Feasible as Required under Section 1129(a)(11).

Section 1129(a)(11) provides that a plan may only be confirmed if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . ." 11 U.S.C. § 1129(a)(11). Section 1129(a)(11) thus requires

that a plan be feasible, and "requires the court to make an independent determination as to whether the Plan is workable and has a reasonable likelihood of success." In re Charles St. African Methodist Episcopal Church of Boston, 499 B.R. 66, 108-09 (Bankr. D. Mass. 2013) (finding that plan was not feasible as required under section 1129(a)(11) because of plan's high level of debt service, lack of working capital reserves, and lack of creditworthiness of guarantor). Even a plan proposing a liquidation process must be feasible under section 1129(a)(11). *See* Am. Capital Equip., 688 F.3d at 156. "The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts of the case." In re Castle Arch Real Estate Inv. Co., LLC, No. 11-35082, 2013 WL 2467974, *9 (Bankr. D. Utah June 7, 2013) (internal quotations omitted). A plan that is hinged on "uncertain and speculative" sources of funding does not meet the standards of section 1129(a)(11). *See* Am. Capital Equip., 688 F.3d at 156.

The linchpin of the Plan is the diversion of proceeds of the Canadian Policy to certain holders of WD/PI Claims, in violation of the CCAA, as well as in derogation of the state law property and contract rights of the non-debtor named insureds under the Canadian Policy. Further, the Plan contemplates immediate distribution of proceeds of the Canadian Policy to certain holders of Derailment Claims, while at the same time permitting holders of WD/PI Claims to pursue litigation against Non-Debtor Defendants who are also named insureds under the Canadian Policy. The Plan also suggests that somehow both of the Policies can apply, when in fact, as provided by the plain language of the Policies themselves, only one of the Policies will provide coverage in relation to the Derailment. In short, the Plan is riddled with internal contradictions, depends on the naïve (at best) requirement that the proceeds of the Canadian Policy be turned over to the U.S. bankruptcy estate, and is premised on the violation of rights of

non-debtor third parties. The Plan is simply not workable, and is therefore not feasible under section 1129(a)(11).

vi. The Plan Unfairly Discriminates Between Derailment Claims.

Section 1123(a)(4)—combined with section 1122—mandates like treatment of like claims under a plan.[8] Moreover, section 1129(b)(1) requires that a plan "not discriminate unfairly" and be "fair and equitable . . . with respect to each class of claims . . . that is impaired under, and has not accepted, the plan." *See* 11 U.S.C. § 1129(b)(1). The unfair discrimination standard "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." In re Armstrong World Indus., Inc., 348 B.R. 111, 121 (D. Del. 2006); *see also* In re Barney & Carey Co., 170 B.R. 17, 25 (Bankr. D. Mass. 1994) (noting that "some fair and reasonable differences in treatment among classes" may be permitted, but that "the discrimination must be fair and supported by a rational basis."). The relevant comparison under section 1129(b)(1) is between "categories of creditors who hold similar legal claims against the debtor," such as priority claims. Corestates Bank, N.A. v. United Chem. Tech., Inc., 202 B.R. 33, 47 n.12 (E.D. Pa. 1996). A presumption of unfair discrimination arises when there is: (i) a dissenting class; (ii) another class of the same priority; and (iii) a difference in treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class, or (b) an allocation of materially greater risk to the dissenting class in relation to its proposed distribution. Armstrong World Indus., 348 B.R. at 121.

In this case, the Plan cannot be confirmed because it unfairly discriminates among similarly situated creditors by providing a significant recovery to the holders of the WD/PI Claims and **no** recovery to holders of the Other Derailment Claims and non-debtor insureds,

[8] The Plan also improperly separates Derailment Claims with identical legal rights into separate classes. *See* Granada Wines, Inc. v. N.E. Teamsters & Trucking Indus. Pension Fund, 748 F.2d 42, 46-47 (1st Cir. 1984).

despite their identical legal rights in the proceeds of the Canadian Policy.[9] The Plan on its face provides for a different treatment of Class 5 and Class 6 claims, which treatment results in a materially lower percentage recovery for Class 6. Specifically, Class 6 claims receive nothing under the Plan, whereas Class 5 claims potentially receive all of the proceeds of the Canadian Policy. Further, the only potential distribution to holders of Class 6 claims is from the Canadian Case. Given that the Plan seeks to divert the bulk of the proceeds of the Canadian Policy to this case, and given that the majority of assets are property of MMA's estate, not MMA Canada's estate, Class 6 claimants bear a significant risk of receiving nothing on their claims should the Plan be effectuated and Class 6 claimants be limited to a recovery from the Canadian estate. Accordingly, the Plan patently discriminates between the WD/PI Claims and the Other Derailment Claims, notwithstanding their mutual priority status and equal entitlement to insurance proceeds.

vii. The Disclosure Statement Cannot Be Approved Because It Does Not Contain Adequate Information.

The Disclosure Statement should not be approved, even if the Court finds that the Plan is not fatally flawed on its face (which it is). In order for a disclosure statement to be approved, it must contain "adequate information," which is defined as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable . . . a hypothetical investor . . . to make an informed judgment about the plan." 11 U.S.C. § 1125(a). "The precise contours of 'adequate information' were vaguely drawn by Congress so that bankruptcy courts might exercise their discretion to limn them in view of each case's peculiar circumstances." In

[9] Because voting has not yet it occurred, it is technically unknown whether Class 6, in which Other Derailment Claims are classified, will vote against the Plan, but given that the Plan: (i) proposes to divert the proceeds of the Canadian Policy to fund the Plan; and (ii) bars holders of the Other Derailment Claims from obtaining any recovery under the Plan, it can be fairly assumed that Class 6 will vote against the Plan.

re Oxford Homes, Inc., 204 B.R. 264, 269 (Bankr. D. Me. 1997). Here, the Disclosure Statement does not meet this standard.

1. The Disclosure Statement Does Not Contain Adequate or Accurate Information about the Policies.

The Disclosure Statement contains misleading and inadequate information regarding the Policies. First, the Disclosure Statement suggests that both of the Policies could apply to the Derailment, when in fact the terms of the Policies are clear that they cannot. Second, the Disclosure Statement fails to acknowledge the non-debtor parties who assert claims under the Policies, including Non-Debtor Defendants who would be the target of litigation under section 5.6(a) of the Plan. The Disclosure Statement suggests that distribution of insurance proceeds can occur quickly and easily while WD/PI Claimants simultaneously prosecute litigation against other named insureds under the Policies; however, distribution of any insurance proceeds would necessarily be stayed pending the outcome of that litigation and determination of the Non-Debtor Defendants' liability, and thus their claims under, the Policies. Third, the Disclosure Statement lacks any disclosures with respect to the risks and difficulties of attempting to divert the Canadian Policy and its proceeds to this case.

The Disclosure Statement must contain adequate and accurate information regarding the Policies in order to satisfy section 1125(a), given that the Plan hinges on the Policies as its source of revenue.

2. The Disclosure Statement Does Not Contain Adequate Information with Respect to the Expected Recoveries on Other Derailment Claims.

The Disclosure Statement indicates that Class 6 claims—the Other Derailment Claims—are entitled to nothing under the Plan, notwithstanding the potential administrative priority of some or all of these claims and their equal right to proceeds of the Canadian Policy. The

Disclosure Statement merely provides that, while "Holders of Other Derailment Claims will receive no distribution under the Plan . . . they will receive the benefit of the waiver by Derailment WD Claimants and Derailment PI Claimants of their right to file claims in the Canadian Proceeding." Disclosure Statement, p. 12. The Disclosure Statement must provide holders of Other Derailment Claims with a more specific idea of their expected recovery from the Canadian estate, which, if all of the insurance proceeds are diverted to this case, will be nothing.

3. The Disclosure Statement Should Provide Adequate Information about the Unofficial Committee, Its Role in This Case, and the Support (or Lack Thereof) from Canadian Constituencies

The Disclosure Statement is woefully bereft of any information regarding the Unofficial Committee, including all of the information required to be disclosed pursuant to Rule 2019. Creditors and parties in interest are entitled to information regarding the Unofficial Committee when evaluating the Plan to ensure that no conflicts of interest are informing the terms of the Plan. Further, despite the apparent cross-border nature of these cases, the Disclosure Statement fails to identify what, if any, attempts were made at negotiating with Canadian constituencies and parties in interest, such as the Québec government, and why, in the Unofficial Committee's estimation, the Plan is superior to the negotiated and coordinated cross-border plan envisioned by the Trustee.

4. The Disclosure Statement Fails to Provide Any Information with Respect to Certain Key Aspects of This Case

Finally, the Disclosure Statement fails to address several significant key aspects of this case. Specifically, the Disclosure Statement makes no mention of the Trustee's post-petition litigation against World Fuels and its affiliates, and the impact of that litigation on the estate and for creditors. The Disclosure Statement also contains no mention of funds derived from the

Trustee's settlement with Travelers Casualty Insurance Company or the funds obtained from the assignment of MMA's claims to 45G tax credits. The Disclosure Statement's liquidation analysis is virtually nonexistent, and it provides no information regarding the existence or value of any chapter 5 causes of action. The Disclosure Statement fails to note that a ruling granting the Section 157(b)(5) Motion would prevent confirmation or consummation of the Plan. In short, the Disclosure Statement fails to provide parties in interest and stakeholders with any information, much less adequate information, regarding fundamental aspects of a complex cross-border case, and it cannot be approved.

III. CONCLUSION

For the reasons stated herein, the Plan is fatally flawed and facially nonconfirmable. Accordingly, the Disclosure Statement, which itself fails to provide adequate information, cannot be approved.

Dated: February 25, 2014

ROBERT J. KEACH, CHAPTER 11 TRUSTEE OF MONTREAL MAINE & ATLANTIC RAILWAY, LTD.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL MAINE & ATLANTIC RAILWAY, LTD. Debtor.	Bk. No. 13-10670 Chapter 11

CERTIFICATE OF SERVICE

I, Maire B. Corcoran Ragozzine, being over the age of eighteen and an attorney at Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that, on February 25, 2014, I filed the *Trustee's Objection to Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants* via the Court's CM/ECF electronic filing system. Parties who were served via CM/ECF are listed on the attached Service List.

Dated: February 25, 2014

/s/ Maire B. Corcoran Ragozzine
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