UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re	)	
MONTREAL MAINE & ATLANTIC RAILWAY, LTD.	)	CHAPTER 11 CASE NO. 13-10670-LHK
Debtor	)	

WRONGFUL DEATH VICTIMS' OMNIBUS RESPONSE TO OBJECTIONS TO DISCLOSURE STATEMENT

The Unofficial Committee of Wrongful Death Claimants (the "Plan Proponent"), consisting of representatives (the "Wrongful Death Victims") of the estates of the 47 people killed in the massive explosion in Lac-Mégantic, Quebec, from the derailment of a train operated by the Debtor (the "Derailment"),[1] in its capacity as proponent of the Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants [Docket No. 600] (the "Plan") and, in connection therewith, having filed the proposed Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants [Docket No. 601] (the "Disclosure Statement"), submits this omnibus response to the objections to the Disclosure Statement filed by, respectively, (1) the Trustee,[2] (2) XL Insurance Company Ltd. and Indian Harbor Insurance Company (the "Insurer"),[3] (3) Edward A. Burkhardt, Rail World, Inc. and Rail World Locomotive Leasing LLC (the "Rail

[1] The victims and the representatives of their estates are listed in the Amended Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019 filed by the Committee's counsel on January 28, 2014 [Docket No. 599]. Solely for the avoidance of doubt as to standing, this Response is filed on behalf of all members of the Committee as well as the Committee itself.

[2] Trustee's Objection to Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants filed on February 25, 2014 [Docket No. 687].

[3] Objection of XL Insurance Company Ltd. and Indian Harbor Insurance Company for Approval of Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants filed on February 28, 2014 [Docket No. 691].

World Parties"),[4] (4) the Official Committee of Victims (the "Official Committee"),[5] and (5) Western Petroleum Corporation and Petroleum Transport Services, Inc. ("World Fuel Entities").[6]

The Plan has been proposed by the 47 individuals who lost loved ones in the Derailment. As such, they hold the largest claims in this case. The aggregate total of the wrongful death claims may end up being exceeded by the environmental clean-up costs expended by the Province of Quebec (the "Province"); however, it appears unlikely that the Province will file a claim in this case or an objection to the Plan.[7] It is worth noting that two of the objectors are fiduciaries rather than actual creditors, and the three others are litigation adversaries of the Wrongful Death Victims. The World Fuel Entities and the Rail World Parties are defendants in lawsuits brought by the Wrongful Death Victims in the United States and by the uncertified class action plaintiffs in Canada (the "Putative Class Representatives"), while the Insurer is on the hook for indemnity and defense costs in those legal actions.

The Objectors' Request for Delay

All of the objectors assert that the Court should delay consideration of the Disclosure Statement and the Plan itself in favor of an alternative scheme being pursued by the Trustee and

[4] Objection of Edward A. Burkhardt, Rail World, Inc. and Rail World Locomotive Leasing LLC to Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants filed on February 28, 2014 [Docket No. 695].

[5] Joinder of Official Committee of Victims to Trustee's Objection to Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants filed on February 28, 2014 [Docket No. 692].

[6] WFS Entities' (I) Joinder in the Objection of the Chapter 11 Trustee and (II) Objection to the Unofficial Committee of Wrongful Death Claimants' Disclosure Statement filed on March 4, 2014 [Docket No. 700].

[7] This Court will recall that although the Province participated in the February 26, 2014 status conference, it stated on the record that it did so solely as a participant in the CCAA case. Moreover, even though the Province is reportedly furious that its citizens who lost loved ones in the Derailment disaster engaged American contingent fee lawyers to seek justice for them, the Province has relied solely on other parties such as the Trustee and the Official Committee to campaign against the Wrongful Death Victims and their counsel in this case. The Province has declined to speak even with the Wrongful Death Victims' bankruptcy counsel, let alone their personal injury lawyers, although this unusual and rather undignified conduct may reflect other sensitivities besides fear of being deemed to submit to this Court's jurisdiction.

others towards a cross-border compromise. No plan embodying that scheme has been filed either in this case or in the CCAA case. The scheme requires an approved plan in the CCAA case because that is the only way to get the injunctions against Derailment victims' pursuit of their claims against non-debtor defendants which form the foundation of the scheme. However, despite the objectors' party line invoking the holy grail of coordinated plans on both sides of the border, the announced scheme is unconfirmable as a chapter 11 plan because it will not be able to satisfy the requirement that claims with administrative priority, including those of the Wrongful Death Victims, be paid in full on the effective date of the plan unless the holders agree to less favorable treatment. 11 U.S.C. § 1129(a)(9). The Trustee's only other path to Court approval would be to proceed by motion under Fed. R. Bankr. P. 9019(a), under which he might attempt to claim the benefit of the deferential "business judgment" standard and avoid subjecting his scheme to the requirements of Section 1129. Apart from other flaws, this stratagem would fail because settlements may not be used to circumvent the Bankruptcy Code's priority scheme.[8] In sum, even if the objectors' request for delay in considering the Plan were a valid objection to the adequacy of a disclosure statement – which it is not – granting the request for delay so as to permit coordinated plans on both sides of the border is a path to nowhere because the Trustee does not have a plan to propose.

Summary of Actual Objections

Apart from the request for delay, the objections break down into two categories: (1) various reasons why the Plan is alleged to be patently unconfirmable such that it would be a

[8] Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414, 424 (U.S. 1968)(("The requirements . . . that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations."); Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452 (2d Cir. 2007) (reversing approval of settlement that deviated from Bankruptcy Code's rule of priorities); In re AWECO, Inc., 725 F.2d 293, 298 (5th Cir. 1984)(concluding that "a bankruptcy court abuses its discretion in approving a [pre-plan] settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors.").

waste of time and resources for this Court to consider the Disclosure Statement, and (2) asserted deficiencies in the Disclosure Statement itself. Because of extensive duplication among the objectors, this Response is organized by ground for objection rather than by objector. To help the Court and the parties keep track, a list of the asserted objections, the objectors by whom asserted, and the pages or paragraphs of each objection where the discussion can be found are set forth in the following chart:

Plan is Patently Non-confirmable Because . . .					
	Trustee	Insurer	Rail World Parties	WFS Entities	Official Committee
1. Diverts Majority of Proceeds to WD Victims	¶ 43-44, 26-27			Joins Trustee Objection	Joins Trustee Objection
2. Compels XL to Pay Under the Policies		¶ 21-24			
3. Appropriates Rights of Non- Debtor Insureds	p. 22, 23		¶ 11	Joins Trustee Objection	Joins Trustee Objection
4. Violates Stay Order of CCAA	p. 19	¶ 25-27		Joins Trustee Objection	Joins Trustee Objection
5. Permits Direct Action vs. Insurer by Troester Estate		¶ 28-29			
6. A Plan Cannot Limit District Court Jurisdiction	p. 18-19			Joins Trustee Objection, p. 3-6	Joins Trustee Objection
7. Fails to Address Claims that Also have Admin. Priority	¶ 45-46			Joins Trustee Objection	Joins Trustee Objection
8. Fails to Satisfy Best Interests of Creditors Test	p. 27-29			Joins Trustee Objection	Joins Trustee Objection
9. Unofficial Committee Lacks Standing to Propose Plan	p. 23-25			Joins Trustee Objection	Joins Trustee Objection

Disclosure Statement Fails to Provide Information Concerning . . .					
	Trustee	Insurer	Rail World Parties	WFS Entities	Official Committee
10. XL Insurance Policies	p. 33			Joins Trustee Objection	Joins Trustee Objection
11. Other Admin. Claimants' Potential Recoveries	p. 33-34			Same	Same
12. Standing of Unofficial Committee	p. 34			Same	Same
13. Trustee's Litigation versus World Fuels	p. 34			Same	Same
14. Traveler's Ins. Settlement and 45G Tax Credits	pp. 34-35			Same	Same
15. Liquidation Analysis	p. 35			Same	Same
16. Chapter 5 Causes of Action	p. 35			Same	Same
17. Consequence for Plan if 157(b)(5) Motion Granted	p. 35			Same	Same
18. Non-Debtor Insureds			¶ 13		

Each of the "patent unconfirmability" objections (1 through 9 in the chart above) is addressed either through explanation of why the objection is mistaken or how the Plan has been amended to address the objection, or in some instances a combination of both. On the theory that greater disclosure can never hurt, most of the Disclosure Statement objections (10 through 18 in the chart above) is addressed by amending the Disclosure Statement. Black-lined versions of the Plan and Disclosure Statement showing revisions from these documents as filed with the Court on January 29, 2014, are submitted herewith as Exhibits A and B respectively.

By meeting the objectors' criticisms of the Disclosure Statement almost entirely through revisions rather than argument about whether the Disclosure Statement already met the "adequate information" standard, the Plan Proponent hopes to save time, money and tedium. Similarly with respect to the Plan, the Plan Proponent has tried wherever possible to accommodate the objectors' expressed concerns rather than defend non-essential aspects of the Plan. This accounts for most of the tweaks that the Plan Proponent has made to the Plan. When the Plan Proponent shared proposed Plan revisions with the objectors and solicited their comments, the Plan Proponent was informed by the Trustee and the Official Committee that based on the "new" plan and disclosure statement, they would seek . . . delay.[9]

The Plan Proponent respectfully submits that the objectors, all of whom are or are represented by sophisticated counsel, will by the time of the hearing have had plenty of time to digest the documentary revisions. Disclosure statements are particularly amenable to resolution of objections through discussions among counsel as contemplated by this Court's local rule 3016-1. The Trustee and the Official Committee should not be rewarded for their failure to engage constructively with the Plan Proponent by obtaining their tactical objective of delay.

RESPONSE TO SPECIFIC OBJECTIONS

1. The Plan Does Not Improperly Divert Proceeds to Wrongful Death Victims.

The Trustee argues that the Plan improperly allocates proceeds to the Wrongful Death Victims on a priority basis because Section 1171(a) is inapplicable to the distribution of proceeds under the "Canadian Policy."[10] This assertion is incorrect, and the Trustee's objection never quite explains its basis. If by referring to the "Canadian Policy" as being the policy responsible

[9] The Plan Proponent has, however, had cordial discussions concerning the Plan and Disclosure Statement with other key parties.

[10] Terms defined in the Plan and not otherwise defined in this Response are employed in this Response with the same meaning as defined in the Plan.

for payment of Derailment victims' claims, the Trustee means to imply that geography has anything to do with the matter, he is entirely mistaken. The U.S. Debtor and the Canadian Debtor are named insureds under both policies. Since the U.S. Debtor has an interest in both policies, the policies themselves and the proceeds thereof constitute property of the Debtor's estate under Tringali v. Hathaway Machinery Co., 796 F.2d 553, 560-561 (1st Cir. 1986). As the Trustee correctly observes, proceeds of an insurance policy are not "free assets" available to all creditors; no one other than claimants insured by the policies may share the proceeds. In re Mahoney Hawkes, LLP, 289 B.R. 285, 295 (Bankr. D. Mass. 2002). In this case, the insurance policy appears to insure all claims for damage resulting from the Derailment, including (contrary to the customary exclusion with which this Court may be familiar under most contemporary forms of comprehensive general liability policy) environmental claims.

The situation just described presents two issues: (1) Assuming that the CCAA would treat the proceeds as an asset of the Canadian Estate, how can the interests of the two estates be reconciled; and (2) Does the administrative priority under Section 1171(a) apply to whatever portion of the proceeds is distributed through the U.S. Estate? These might be difficult issues indeed if the Plan were designed, as the Trustee alleges, to improperly divert insurance proceeds from Other Derailment Claims to the Wrongful Death Victims. Actually the Plan is designed for the opposite purpose: To divide insurance proceeds among non-governmental insured claims[11] *pro rata* in accordance with the valid amounts of such claims, even though wrongful death and personal injury claimants have a legitimate argument that they should receive a greater than ratable share of the proceeds in recognition of the priority of their claims under the Bankruptcy Code, albeit not under the CCAA.

[11] The exclusion of governmental insured claims reflects the publicly-stated commitment of the Province of Quebec to forego a distribution of insurance proceeds so as to enhance distributions to non-governmental Derailment victims.

To understand how the Plan effectuates the *pro rata* division of insurance proceeds requires an explanation of the Plan's architecture. Although all Derailment victims have claims against both the U.S. Debtor and the Canadian Debtor, the Plan avoids a costly, wasteful and duplicative claims-allowance and distribution process by dividing responsibility for Derailment Claims between the U.S. Estate and the Canadian Estates so that any given claim will receive a distribution from only one estate. Code Section 1171(a) provides the means to implement this division. Claims entitled to priority under Code Section 1171(a) – that is, wrongful death claims, and personal injury claims that are filed in the U.S. Case – are designated to receive distributions from the U.S. Estate because their priority will exclude Other Derailment Claims from distribution in any event. The Plan leaves Other Derailment Claims to be addressed in the Canada (through distribution of insurance proceeds through the CCAA Case or otherwise) but protects them from double-dipping by Derailment WD Claimants and Derailment PI Claimants (*i.e.*, seeking a distribution through the Canadian Case as well as under the Plan) by barring Derailment WD Claimants and Derailment PI Claimants from asserting claims in the Canadian Case. Derailment WD Claims and Derailment PI Claimants are protected from double-dipping (*i.e.*, sharing in Plan distributions) by Other Derailment Claims through enforcement of the Code Section 1171(a) priority with regard to all assets of the U.S. Estate, including insurance proceeds.

One revision to the Plan reflected in Exhibit A is a change in the definition of Derailment PI Claimant to include only personal injury claimants who choose to file a claim in the U.S. Case. Personal injury claimants who do not file a claim in the U.S. Case are now to be treated as Other Derailment Claims, with their claims filed, allowed and paid through the Canadian Case. This change resulted from discussions with the Putative Class Representative leading the Plan Proponent to conclude that the Putative Class Representative's active advocacy in Canada on

behalf of personal injury claimants, which has no equivalent in the U.S. Case, favored the Canadian Case and potentially the Canadian class action as the best fora to maximize recoveries by personal injury claimants. Reflecting this shift of claims responsibility from the U.S. Case to Canada, the "default" split of insurance proceeds between the U.S. and Canada has been revised from 75-25 to 67-33.

The Plan effectuates the *pro rata* division of insurance proceeds by offering the Monitor a choice. He can accept the "default" split of 67-33 if he agrees with the Plan Proponent's ballpark estimate that roughly 67% in amount of the non-governmental Derailment Claims will, under the Plan, receive their distributions through the Plan and about 33% in amount will receive distributions in Canada. If the Monitor disagrees with this estimate, he can negotiate a different split with the Plan Proponent before the Effective Date or the Plan Fiduciary thereafter. If no agreement is reached, then the Plan provides for the Plan Fiduciary to seek a joint order of this Court and the Canadian Court dividing insurance proceeds between the two estates *pro rata* in accordance with Allowed Amounts of Derailment WD Claims and Derailment PI Claims (on the U.S. side) and the Monitor's good faith estimate of the aggregate amount of Other Derailment Claims (to be paid in Canada). In sum, the Plan provides reasonable assurance that every Derailment Claim will receive a *pro rata* distribution of insurance proceeds. There is no basis for the Trustee's allegation that the Plan "diverts" an unfair share of insurance proceeds to the Wrongful Death Victims.

As explained above, the Plan does rely on application of the priority of Code Section 1171(a) to insurance proceeds as the means to effectuate a *pro rata* distribution of those proceeds in the context of related chapter 11 and CCAA cases in which (at least according to the Official Committee and the Putative Class Representatives) claimants other than the Derailment WD

Claimants would rather be paid in Canada. Contrary to the Trustee's assertion that Code Section 1171(a) does not apply to proceeds of the XL Insurance Policies, such application is required by both the language and legislative history of Code Section 1171(a). The language of that section accords priority to wrongful death and personal injury claims without exempting insurance proceeds or any other category of estate asset. And the legislative history of Code Section 1171(a) indicates the importance Congress placed on prioritizing claims for physical injury over property-related or financial claims.

Describing the enactment of Section 77(n) (the former iteration of Section 1171(a) which afforded administrative expense priority to personal injury claims of railroad employees), the Supreme Court explained:

> We have held that earnings, while a railroad is in possession of the court and operated by its receivers, "are not necessarily and exclusively the property of the mortgagees" but are subject to the payment of claims which have superior equities as these may be found to exist. Claims having such equities may be accorded priority in payment although they arose prior to the receivership. It is manifest that the reasonable classification of claims as entitled to priority because of superior equities may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceedings.

Carpenter v. Wabash R. Co., 309 U.S. 23, 28 (U.S. 1940) (internal citations omitted). The Trustee has not demonstrated any basis why the "superior equities" of wrongful death and personal injury claimants in respect of "distribution of assets in bankruptcy proceedings" do not apply to proceeds of insurance *covering wrongful death and personal injury claims.* In sum, the Plan provisions affording priority to the proceeds under the XL Insurance Policies to the Derailment WD Claimants and Derailment PI Claimants are entirely consistent with the plain language and history of Section 1171(a).

The Trustee's objection to the application of Code Section 1171(a) to proceeds of the XL Insurance Policies also fails because the Trustee lacks standing to assert it. As noted in In re Mahoney Hawkes, LLP, 289 B.R. 285, 295 (Bankr. D. Mass. 2002), "what comes into the estate from [a liability] 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.'" Id. The Trustee, as successor to the Debtor's status as a named insured, has no pecuniary interest, legal right or any other stake in which particular claims get paid with proceeds of the XL Insurance Policies so long as the claims are covered by the policies. It is therefore baffling why the Trustee has chosen to interject himself into an inter-creditor issue in which the estate has no interest. But whatever the Trustee's motives, they cannot generate standing as to an issue in which the estate that the Trustee represents has no interest.

The standing problem is particularly acute when the Trustee and other objectors are trying to leapfrog customary procedure to defeat the Plan at the stage of disclosure statement approval. At the actual hearing on confirmation of the Plan, this issue will not even need to be addressed unless the holder of an Other Derailment Claim actually files an objection asserting that proceeds of the XL Insurance Policies are excepted from Code Section 1171(a). Why would a claimant go to the trouble and expense of asserting that objection when Code Section 1171(a) is being utilized to effectuate that very claimant's right to a *pro rata* distribution in Canada, where it is presumably more convenient for all or at least the vast majority of such claimants? The Trustee and other objectors are just stirring the pot by raising this issue (really, for the reasons stated above, a *non*-issue) at the disclosure statement stage.

2. The Plan Does Not Improperly Compel XL to Make Payment Under the Policies.

The Insurer has objected that the Plan under certain circumstances would compel the Insurer to make payment under one of its policies. The Plan Proponent's theory that the Insurer

might find some benefit in being compelled to pay turned out to be wrong. Accordingly, the Amended Plan deletes in its entirety any provision requiring payment of the proceeds under the XL Policies through a non-consensual resolution. See Amended Plan § 5.4 (deletion of former § 5.4(f)).

3. The Plan Does Not Appropriate the Rights of Non-Debtor Insureds.

The Trustee and the Rail World Parties complain about former Section 5.4(f) from a different perspective, arguing that compelling the Insurer to pay the Estate appropriates the rights of the Non-Debtor Insureds in the XL Insurance Policies. Although the Trustee lacks standing because (as noted above) the Debtor is not a claimant under the XL Insurance Policies, the Rail World Parties clearly do have standing. By dropping Section 5.4(f), the Amended Plan completely addresses this objection. As amended, the Plan does not compel the Insurer to make any payment under any circumstances. Just to make sure there is no misunderstanding of the provisions of Section 5.4 addressing possible insurance settlements, there has been added Section 5.4(h) stating: "Nothing in this Section 5.4 shall be construed as authorization for an Insurance Settlement to contain any provision adversely affecting the rights of the Non-Debtor Insureds under the XL Insurance Policies without their consent, except as permitted by applicable law."

Regarding disclosure, a paragraph has been added to the Disclosure Statement describing this protection of the rights of the Non-Debtor Insureds. See Amended Disclosure Statement, p. 17 (top).[12]

4. The Plan Does Not Violate the Order Entered in the Canadian Case.

The Trustee and XL also attack former Section 5.4(f) of the Plan by arguing that it violates the CCAA order imposing a stay of actions against certain third parties including XL

[12] All references to pages of the Amended Disclosure Statement refer to the black-lined version thereof submitted as Exhibit B hereto.

and actions affecting property of the Canadian Debtor. Removal of the much-maligned Section 5.4(f) moots this objection. For the record, the Plan Proponent disagrees with the assumption concerning the extra-territorial effect of orders entered in the Canadian Case that underlies the objection.[13] Various provisions of the Bankruptcy Code and orders of this Court do in fact contravene the CCAA stay order, especially if that order is applied extra-territorially. Even so, the Plan is structured so as avoid bringing the U.S. Case and the Canadian Case into conflict.

5. The Plan Permits Direct Action Against the Insurer by a Beneficiary.

The Insurer objected to Section 4.7 of the Plan as authorizing a direct action by the Troester estate against the Insurer contrary to applicable law. While the Plan Proponent regards this as an overly paranoid interpretation, Section 4.7 of the Amended Plan adds the parenthetical "but only if and to the extent permitted by applicable non-bankruptcy law" and thereby eliminates any possible ambiguity.

6. The Plan Does Not Improperly Permit this Court to Decide Venue Under Section 157(b)(5) or Strip the Courts of Jurisdiction Over the Illinois Actions.

There is no merit to the Trustee's and the WFS Entities' contention that Plan provisions permitting the Wrongful Death Victims to litigate their state court actions in the forum of their choice improperly permit this Court to decide venue over the Illinois Actions pursuant to Section 157(b)(5), improperly divest the federal courts of jurisdiction over the Illinois Actions, or improperly strip this Court and the Maine District Court of the power to decide whether related to jurisdiction exists over such actions. Relatedly, the Trustee would require the Disclosure

[13] To have effect beyond the boundaries in which it was issued, "[a] foreign judgment must first be recognized and reduced to a judgment in the enforcing United States court." Victoria de la Mata v. Amer. Life Insur. Co., 771 F. Supp. 1375, 1380 (D. Del. 1991). No CCAA order has been accorded such recognition. The Cross-Border Protocol does not require reciprocal recognition or enforcement of orders issued by the Canadian Court; rather, it emphasizes the independence of each court. This is not a Chapter 15 case, and in any event, railroads are expressly excluded from Chapter 15. 11 U.S.C. § 1501(c)(1). Given that the U.S. Case involves a domestic corporation as the Debtor and more extensive assets and operations than the Canadian Debtor, there is no cause for deference to the Canadian Court beyond the civilities that are very properly being observed by the two judges.

Statement to say that if the motions of the Trustee and the World Fuel Entities under Section 157(b)(5), now pending before the District Court, are granted then the Plan is non-confirmable.

The Plan does indeed provide that, after the Effective Date, "related to" bankruptcy jurisdiction will no longer exist over the Illinois Actions and any other actions by Derailment victims against Non-Debtor Entities, or indeed by any creditor of the Debtor against any non-Debtor party. Amended Plan § 5.6(a) and (e). The only exception is that the Plan expressly recognizes any orders by the Canadian Court to stay claims against the Canadian Debtor, and to stay assertion of claims in Canada against anyone else. Amended Plan § 5.6(b). The Plan Proponent respectfully submits that these provisions are entirely proper.

There is nothing unusual about plan provisions that define the federal courts' remaining bankruptcy jurisdiction after the plan's effective date. While the law sets the "outer limits of jurisdiction," a plan may specify that a narrower scope of jurisdiction is retained after its effective date. Grossman v. Murray, 214 B.R. 271, 277 (Bankr. D. Mass. 1997). Plan provisions limiting post-effective-date jurisdiction are fully enforceable. Hosp. and Univ. Property Damage Claimants v. Johns-Manville Corp., 7 F.3d 32, 34 (2d Cir. 1993) (refusing to assert jurisdiction over claim objections excluded from the court's jurisdiction under the plan and confirmation order while noting "[t]he bankruptcy court's post-confirmation jurisdiction ... is defined by reference to the Plan"). Thus, following confirmation, "the plan itself must be the primary guide as to the court's post-confirmation jurisdiction." In re Aylesbury Inn, Inc., 121 B.R. 675, 677 (Bankr. N.D.N.Y. 1990).

The fact that a motion is pending before the District Court concerning (in part) whether federal courts under current circumstances have "related to" jurisdiction over the Illinois Actions – with no plan having been confirmed – does not change the issue in the least. Even if Judge

Torresen were to decide that the Illinois Actions fall within the "outer limits of jurisdiction," a plan may permissibly specify that the federal courts will not such retain jurisdiction after confirmation. Nor is there, in this regard, any distinction between the District Court and this Court; all bankruptcy jurisdiction is defined as district court jurisdiction (see 28 U.S.C. § 1334), with bankruptcy courts exercising such jurisdiction as they do pursuant to reference by the district courts (see id. § 157(a)). For these reasons, the objection is meritless.

As a back-stop, the Amended Plan provides that if this Court determines that the Plan Proponent must (whether as a matter of legal requirement or comity) obtain an order of the District Court in order for Section 5.6 of the Plan to be effective, then the Plan Proponent shall promptly seek such order and its entry shall be a condition to the Effective Date. Amended Plan §§ 5.6(g), 10.1(b).

In sum, Section 5.6 of the Plan permissibly restricts the scope of post-confirmation bankruptcy jurisdiction and does not render the Plan unconfirmable. Concerning the Trustee's request for further disclosure, the Amended Disclosure Statement describes the disagreement between the Plan Proponent and Trustee on this issue, at pages 16-17.

7. The Plan Does Not Fail to Address Potential Claims Having the Same Priority as the Wrongful Death Claimants.

The Trustee objects that the Plan does not address rights of claims having priority status equal to that of those of the Wrongful Death Claimants, citing claims for environmental clean-up costs of Canadian governmental units and subrogation claims arising from payments to victims from a public fund established by the Province. The Trustee makes a fair point. Accordingly, the Plan and Disclosure Statement now address these subjects. The Amended Plan defines "Administrative Derailment Claim" as an Other Derailment Claim that is entitled to administrative priority. Amended Plan § 1.6. The operative provision concerning such Claims

states that to the extent Allowed, any such claim shall be paid in full in cash on the Effective Date except as otherwise agreed by the holder thereof. Amended Plan § 2.5. The provision goes on to recite that the Province of Quebec has, through its commitment to let Derailment victims have insurance proceeds otherwise collectible by the Province, otherwise agreed. Id. The Province's commitment is implemented under the Plan by subordinating the Province's Claim to Allowed Class 5 Claims (*i.e.*, Derailment WD Claims and Derailment PI Claims) or in some other manner agreed between the Province and the Plan Fiduciary. Id.

Concerning subrogation Claims, the Amended Plan adds a provision expressly recognizing the rights of holders of Claims for contribution, indemnity and subrogation. Consistent with the statutory scheme in regard to such Claims,[14] the Plan provides that upon payment in full of a Derailment victim's Claim, the payor steps into the shoes of the Derailment victim regarding Plan distributions, but only to the extent that the payor's Claim is Allowed (for example, a common law indemnity claim asserted by a tortfeasor who himself bore some measure of responsibility for the victim's injury would be disallowed under applicable non-bankruptcy law). Amended Plan § 5.6(c).

By way of disclosure, the Disclosure Statement now includes two paragraphs describing the possibility that the Province will file a Claim and the consequences thereof. Amended Disclosure Statement, p. 18. In summary, given that no Canadian governmental unit has asserted claims against the Debtor or, for that matter, even appeared before this Court (in fact the Province expressly declined for its attendance at the February 26 status conference to constitute an appearance in the U.S. Case), it is doubtful that the Province or any other Canadian governmental unit will file a Claim and thereby submit to this Court's jurisdiction and waive sovereign immunity. See, e.g., Arecibo Cmty. Health Care, Inc. v. Puerto Rico, 270 f.3d 17 (1st

[14] See 11 U.S.C. §§ 502(e), 509.

Cir. 2000) (pursuant to Code Section 106(b), proof of claim by a state waives its immunity from counterclaims arising from the same transaction or occurrence, even if they would result in an affirmative recovery against the state). The Amended Disclosure Statement does acknowledge, however, that "legal complications triggered by the Province's filing of a claim could jeopardize Plan distributions and entail much time and expense to resolve." Amended Disclosure Statement, p. 18. Concerning the rights of entities asserting claims for contribution and the like, the Amended Disclosure Statement describes their rights under the newly-added Plan provision. Id., p. 17.

Based on the foregoing provisions, the Plan Proponent has addressed, both substantively and as a matter of disclosure, the Trustee's objection that the Plan is patently unconfirmable by reason of the rights of claimants sharing the Derailment WD Claimants' administrative priority.

8. The Plan Will Not be Unconfirmable by Reason of the Best Interests of Creditors Test.

The Trustee argues that the Plan fails to satisfy the confirmation requirement of Code Section 1173(a)(2), which contains a railroad-specific version of the best interests of creditors test with which this Court is familiar under Section 1129(a)(7). The special railroad aspects of the best interests test have no effect in this case because all railroad operations are being sold. The Trustee argues that the administrative expense priority for wrongful death and personal injury claims under Section 1171(a) does not apply in chapter 7 cases. From this he appears to argue that holders of Other Derailment Claims, who will receive no distribution in the U.S. Case, would receive more in a hypothetical chapter 7 case, so that the Plan flunks the "best interests" test.

The Trustee's position represents the kind of "gotcha" argument that deserves to fail, and always does. Not surprisingly, the Trustee offers no authority for the absurd proposition that

Sections 1171(a) and 1173(a)(2) interrelate in the mutually destructive way that he proposes. The statutory interpretation proffered by the Trustee would mean that a liquidating plan could never be confirmed in a railroad case involving wrongful death or personal injury claims, or for that matter claims entitled to payment of 100 cents on the dollar under the "six month rule" embodied in Code Section 1171(b),[15] because non-priority creditors would always be able to argue that they would receive the priority creditors' money in a hypothetical chapter 7 case – an absurd result indicating that these two provisions were not intended to interrelate as he proposes. (For that matter, it would be impossible to confirm a plan even in an operating case, unless the railroad's revenues were sufficient not only to cover current expenses but also the Section 1171 priority claims – a burden completely inconsistent with the public policy of saving railroads wherever possible.)

Adding Code Section 1174 to the mix further highlights the absurdity. If a plan of liquidation cannot be proposed, the only alternative under the railroad subchapter is liquidation under Section 1174, wherein the trustee is directed "to collect and reduce to money all of the property of the estate in the same manner as if the case were a case under chapter 7 of this title," but the distributive provisions of the railroad subchapter, including Section 1171, remain in place. So the Trustee's argument is that in a railroad case, a plan embodying liquidation can be defeated on the basis that . . . it will distribute funds according to the exact same priorities that the Trustee himself would be required to follow in a liquidation under Section 1174. Further compounding the absurdity of the Trustee's interpretation, if some personal injury claims or six-month claims happen to have already been paid at the time the best interest test is applied (a likely occurrence in the typical multi-year railroad reorganization) while others were not, only

[15] On equitable grounds, there developed a doctrine in equity receiverships that claims for goods and services supplied to a railroad within six months before its receivership were accorded administrative priority. [cite]

the unpaid claims would "change priority" for purposes of the best interest test even though their statutory priority is governed by the exact same words of the exact same section, Section 1171(a).

The statutory conundrum, such as it is, admits of an easy solution because in contrast to many other situations in which Congress's drafting leaves something to be desired, here the intended statutory scheme is perfectly clear. The hypothetical chapter 7 case with which distributions under the Plan should be compared is a chapter 7 case in which claims under Section 1171 are paid on an administrative priority basis. In fact, Section 1171(a) says that personal injury and wrongful death claims "shall be paid as an administrative expense," without adding anything to suggest that if the payment did not occur by the time of conversion to a hypothetical chapter 7 case, the administrative priority would be lost. The Bankruptcy Code specifies that when a chapter 11 case is converted to chapter 7, administrative expenses incurred in the chapter 11 case continue to have priority as such, subject only to the prior payment of chapter 7 administrative expenses. 11 U.S.C. § 726(a)(1) and (b). So whether viewed as the correct construction based on the words of the statute, a superior construction because consonant with the statutory scheme, or as the construction necessary to avoid an absurd result, Code Section 1173(a)(2) is properly construed to refer to a hypothetical chapter 7 case in which Section 1171 claims have the same distributive priority as other subchapter IV administrative expenses, including the fees of the Trustee.

The Trustee's "best interest" objection also flounders on the facts of this particular case. First, the supposition that there will in fact be insurance proceeds to distribute in this case is, at present, speculative. At this moment an estimated distribution of zero is more sustainable than the "substantial funds" posited by the Trustee. And what if insurance proceeds are received?

Even without administrative expense priority, the Derailment WD Claimants and Derailment PI Claimants would in a hypothetical chapter 7 case share those proceeds solely with other claims covered by the XL Insurance Policies. Since non-Derailment creditors will receive nothing under the Plan and would receive nothing in a chapter 7 liquidation, the Plan passes the best interest test as to them. As for Other Derailment Claims, the Trustee erroneously treats them as receiving nothing under the Plan. In fact what they receive is the waiver by the Derailment WD Claimants and Derailment PI Claimants of the right that they would otherwise have to receive distributions in the Canadian Case. This valuable benefit is conferred *by the Plan itself* and would need to valued in order to compare what Other Derailment Claims will receive under the Plan versus in a hypothetical chapter 7 liquidation.

Finally, despite the Trustee's attempt to invent objections that might be raised by actual creditors who are as disgruntled as he is, there is no indication that any such creditor will actually file an objection to confirmation of the Plan. The Trustee himself will not have standing to raise this objection in the context of Plan confirmation. If raised by the holder of an actual Other Derailment Claim, the Plan Proponent will have the opportunity to reason with the claimant. At worst, it will be necessary to resort to the safety valve that has now been incorporated into the Amended Plan. If this Court were to allow a "best interest" objection because the holder of an Other Derailment Claim prevails on the statutory interpretation issue and demonstrates that his distribution in a hypothetical chapter 7 case would exceed his distribution under the Plan, that excess amount will be paid "off the top" from the Compensation Fund as a means of settling the objection, so long as the aggregate amount of such "off the top" distributions does not exceed $200,000. Amended Plan § 5.5.

In sum, the "best interest" issue raised by the Trustee does not render the Plan patently unconfirmable.

9. There is No Basis for the Trustee's Argument that the Plan Proponent Lacks Standing to Propose a Plan.

As more thoroughly explained in the Committee's Objection to the Trustee's Motion Alleging Non-Compliance with Fed. R. Bankr. P. 2019 filed on March 5, 2014 [Docket No. 711], the Committee has fully complied with disclosure requirements under Fed. R. Bankr. P. 2019. No further disclosure is required.

10. The Disclosure Statement Contains Adequate Information Concerning the XL Insurance Policies.

As demanded by the Trustee's objection, the Amended Disclosure Statement now contains two pages of detailed discussion of the XL Insurance Policies, potential settlement structures and provisions, and the impact of the Plan. Amended Disclosure Statement, pp. 11-12. The Amended Disclosure Statement also makes it clear that the Estate's interest in the XL Insurance Policies rests upon its status as an insured under the policies rather than the country in which a policy was issued. The Plan Proponent believes that there is no disagreement with the Trustee or the Insurer on the basic facts concerning the policies, including that the XLIC Policy (a/k/a the Canadian Policy) was triggered by Derailment Claims, except that the Plan Proponent asserts and the Insurer denies that the language of the Indian Harbor Policy (a/k/a the U.S. Policy) may also be triggered. The parties' respective positions on this issue are disclosed in paragraph E(2) on page 11 of the Amended Disclosure Statement. The Plan Proponent respectfully submits that the Amended Disclosure Statement contains adequate information about the XL Insurance Policies.

The Plan Proponent has not included the Trustee's astonishing statement that the defendants who are being sued would have the legal right to hold up distribution to Derailment

victims of proceeds of the XLIC Policy (the "Canadian policy" under which defense costs are paid over and above the $25 million per occurrence indemnity amount) even if the Insurer paid such proceeds to the Estate. As to the indemnity portion of the policy, this statement is wildly incorrect absent some further unstated assumption. Since the Trustee has refused to discuss Disclosure Statement amendments with the Plan Proponent, there is nothing further that the Plan Proponent can do at this time.

11. The Disclosure Statement Contains Adequate Information Concerning Potential Recoveries by Holders of Other Derailment Claims That May Assert Administrative Priority.

As demanded in the Trustee's objection, the Plan Proponent has added two paragraphs to the Disclosure Statement dealing with this subject. Amended Disclosure Statement, p. 18. The additional material discloses the possibility that the Province of Quebec may file an administrative priority claim for its environmental clean-up costs, discloses the Plan Proponent's position that such claim would not be entitled to priority, describes the treatment of such claim under the Amended Plan, and expresses the Plan Proponent's view that filing of a claim by the Province is unlikely, especially given that the Plan faithfully implements the Province's commitment for insurance proceeds to be distributed entirely to Derailment victims. The Plan Proponent respectfully submits that the Amended Disclosure Statement provides adequate information on this topic.

12. The Disclosure Statement Contains Adequate Information Concerning the Plan Proponent's Standing.

For the reasons explained in the Committee's Objection to the Trustee's Motion Alleging Non-Compliance with Fed. R. Bankr. P. 2019 filed on March 5, 2014 [Docket No. 711], the Committee has fully complied with disclosure requirements under Fed. R. Bankr. P. 2019. There is no other basis for the Trustee to attack the Plan Proponent's standing. No further information

is required for the Disclosure Statement. The Trustee's objection asks the Plan Proponent to state "in the Unofficial Committee's estimation, why the Plan is superior to the negotiated and coordinated cross-border plan envisioned by the Trustee." The answer is contained in the Amended Disclosure Statement:

> The Trustee has indicated his intention to develop a plan providing a framework for a comprehensive settlement of the liability not only of the Debtor and the Canadian Debtor but also various third parties. No such settlement has in fact been offered, and the Derailment WD Claimants have explained to the Trustee the reasons why it is inconceivable that such a settlement would be acceptable to them. The Derailment victims themselves are in a far better position to maximize their own recoveries from non-Debtor parties that share responsibility for the Derailment disaster. In order to obtain a comprehensive settlement, the Trustee would need to supply non-bankrupt defendants with a release of, or an injunction against, not only the Debtor's own claims but also the claims of individual victims of the Derailment. The Victims' Committee believes that the Bankruptcy Code does not permit that to be done over the victims' objection. The Trustee has stated his intention to proceed regardless of the Derailment WD Claimants' objection. Against this backdrop, the non-Debtor defendants will not have to, and therefore will not, offer fair value to settle the victims' claims. Whether naively or deliberately, the Trustee is playing into the defendants' hands by joining with them to delay the day of reckoning when they must face the Derailment victims in court, whether in the Illinois Actions, the class action pending in Quebec, or some other forum. The Plan will bring these delays to an end by permitting all Derailment victims to pursue their legal rights through the non-bankruptcy court system.
>
> The Trustee's persistence in pursuing a scheme that cannot succeed over the objection of his most important constituency, the Wrongful Death Victims who suffered the devastating loss of loved ones in the Derailment disaster is morally bankrupt. Any attempt by the Trustee to proceed according to his stated intentions would lead to years of litigation with the potential to delay creditors' recoveries, to result in a huge accumulation of fees to the Trustee and his professionals (which the Bankruptcy Code requires be paid prior to all types of claims other than wrongful death and personal injury claims), and to result in smaller creditor recoveries even if the Trustee ultimately prevails in the litigation. In the course of the litigation, the Trustee would inevitably take positions that would tend to depress the value of victims' claims against financially healthy defendants who (in the view of the Victims' Committee) bear heavy responsibility for the Derailment disaster just like the Debtor. If the Trustee were truly concerned about the victims' welfare, the Victims' Committee believes he would work cooperatively with the Derailment WD Claimants rather than against them.

> The Plan represents a superior approach to the Trustee's scheme. Under the Plan, former Senator George Mitchell will try to achieve a settlement of the proceeds of the XL Insurance Policies, with the proceeds to be divided *pro rata* among the Derailment victims. But since these proceeds will inevitably fall far short of full compensation for the victims and the debtors themselves have no assets with which to pay claims, the Plan makes it clear that bankruptcy will no longer stand in the way of legal actions by the victims against others who share responsibility for the Derailment disaster.

Amended Disclosure Statement, pp. 27-28.

13. <u>The Disclosure Statement Contains Adequate Information Concerning the Trustee's Litigation Against World Fuel.</u>

As demanded in the Trustee's objection, the Amended Disclosure Statement adds a section summarizing the Trustee's action against World Fuel, as well as the Wrongful Death Victims' motion to bring it to a halt. Amended Disclosure Statement, pp. 13-14.

14. <u>The Disclosure Statement Contains Adequate Information Concerning the Traveler's Insurance Settlement and the 45G Tax Credits.</u>

As demanded in the Trustee's objection, the Amended Disclosure Statement adds sections summarizing the Traveler's insurance settlement and the 45G tax credits. Amended Disclosure Statement, pp. 12-13. Relatedly, the Amended Disclosure Statement adds information on the Trustee's recent agreement wherein he committed the Estate to pay these funds to the FRA rather than Derailment victims. Amended Disclosure Statement, p. 5.

15. <u>The Disclosure Statement Contains an Adequate Liquidation Analysis.</u>

As demanded by in the Trustee's objection, the Amended Disclosure Statement beefs up the discussion of the liquidation alternative, and explains why a financial forecast of various liquidation scenarios cannot be prepared. Amended Disclosure Statement, pp. 28-29.

16. <u>The Disclosure Statement Contains Adequate Information Concerning Chapter 5 Causes of Action.</u>

Despite the Trustee's objection, the Disclosure Statement already included a section on avoidance actions. However, the Amended Disclosure Statement adds a sentence explaining that

no value can be placed on potential avoidance actions at this time. Amended Disclosure Statement, pp. 25-26.

17. <u>The Disclosure Statement Contains Adequate Information Concerning the Consequences for the Plan if the Motions to Transfer the Illinois Actions are Granted.</u>

The Trustee's objection is based on the premise that success in his motion to transfer the Illinois Actions to Maine would be the death knell for the Plan, as it relates to protection of the rights of all creditors to pursue actions against Non-Debtor Entities in the forum of their choice. The Amended Disclosure Statement adds a paragraph describing the Trustee's and the Plan Proponent's views on this subject. Amended Disclosure Statement, pp. 15-16.

18. <u>The Disclosure Statement Contains Adequate Information Concerning the Non-Debtor Insureds under the XL Insurance Policies.</u>

To accommodate the objection of the World Fuel Entities, the Plan Proponent added extensive material on the Non-Debtor Insureds and their rights under the XL Insurance Policies. Amended Disclosure Statement, pp. 11-12 and 17.

CONCLUSION

This Court should deny the objectors' request for further delay, should determine that the Amended Plan is not patently non-confirmable (the Plan Proponent would welcome this Court's determination that the Amended Plan is patently confirmable, but that is not the applicable standard in connection with a hearing on adequacy of a disclosure statement), and should approve the Amended Disclosure Statement as containing adequate information for voting creditors to make an informed decision on acceptance of the Amended Plan.

Dated: March 10, 2014

/s/ George W. Kurr, Jr.
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