UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-20518

MONITOR'S REPLY TO OBJECTION TO MOTION FOR ENTRY OF AN ORDER RECOGNIZING AND ENFORCING THE PLAN SANCTION ORDER OF THE QUÉBEC SUPERIOR COURT

Richter Advisory Group Inc. (the "Monitor") hereby replies to the objection filed by Canadian Pacific Railway Company ("CP") to the Monitor's Motion for Entry of an Order Recognizing and Enforcing the Plan Sanction Order of the Québec Superior Court (the "Objection").

PRELIMINARY STATEMENT

CP has consistently and unsuccessfully opposed the efforts of Montreal, Maine & Atlantic Canada ("MMA Canada"), the Monitor and the Trustee[1] to fashion an efficient and final resolution of the claims arising out of the Derailment. CP moved in the Québec Court for dismissal of the CCAA Proceeding on the basis of lack of jurisdiction. The Québec Court denied that motion. CP opposed entry of the Plan Sanction Order. The Québec Court overruled CP's objections and entered the Plan Sanction Order, which is a thoughtful 52 page decision that carefully considers, and adheres to, the overwhelming body of law in Canada permitting third-party releases in CCAA plans. CP now recycles many of the same arguments that have already

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[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in Motion for Entry of an Order Recognizing and Enforcing the Plan Sanction Order of the Québec Superior Court (the Enforcement Motion").

been heard, and rejected, by the Québec Court. CP is the only one of approximately 26 Defendants that has refused to settle the claims against it arising out of the Derailment.

By opposing the CCAA Plan (and the Chapter 11 Plan), CP seeks negotiating leverage. Indeed, the Québec Court stated that the "sole objective" of CP's challenge to the CCAA Plan was "to obtain a strategic negotiating advantage that would provide it with even more rights than it would have had if the parties had simply decided to settle the class action out of court." Plan Sanction Order at ¶ 16. Later in the opinion, Justice Dumas elaborated on CP's rights in an out of court settlement of the class action, as follows:

> [52] [CP] submits that the Plan does not grant CP the ordinary protections it would receive under the partial settlement of a class action in civil law.
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> [53] As already mentioned, nothing will prevent CP from defending itself in any action brought against it. If it is not liable, the action will be dismissed.
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> [54] If it claims that the damages were caused by a third-party, it may submit this argument even if such third-party is not involved in the proceedings.
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> [55] In fact, *there would be an advantage for CP [under the CCAA Plan, as opposed to an out of court settlement of the class action] as [CP] may continue to argue that the tragedy is everybody's fault, except its own.*

Plan Sanction Order at ¶¶ 52-55. (emphasis added).

Curiously, CP asserts that the CCAA Plan prevents CP from "raising defenses" against parties responsible for the Derailment. Objection at 7. The Plan Sanction Order directly contradicts CP's assertion. "[N]othing would prevent CP from defending itself in any action brought against it." Plan Sanction Order at ¶ 53. Moreover, "if CP is not liable, the action shall be dismissed against it. If it is liable, and third-parties also liable were released, CP will be released from the portion of liability attributable to the solidary debtors that were released." Plan Sanction Order at ¶¶ 57-58.

CP states throughout its Objection that the provisions of the CCAA Plan are "lopsided" and "unfair." Again, the Québec Court included a finding that directly contradicts CP's statements. "In fact, what would be unfair would be to allow CP to benefit from a release while it did not financially contribute to the Plan, contrary to the other co-defendants." Plan Sanction Order at 59. Further, "to accept the arguments presented by CP would undermine public confidence in the courts." Plan Sanction Order at ¶ 65. What CP really wants is to be released *without* making any contribution for the benefit of Derailment victims. Plan Sanction Order at ¶ 60 ("CP also submits that it should be released from its pro rata share of liability with MMA."). Justice Dumas, recognizing the unfairness of the result sought by CP, noted that it was not within his jurisdiction to make a decision to release CP from liability, and that any such decision should be made by the judge presiding over the proceedings in which CP is a defendant. Plan Sanction Order ¶¶ 61-62.

CP makes three basic arguments in opposition to the Enforcement Motion. The Monitor will address these in turn.

SPECIFIC RESPONSES

The CCAA Plan Satisfies The Requirements of Sections 1521, 1507, and 1506.

CP first argues that the enforcement of the Plan Sanction Order is not authorized by sections 1521 or 1507, and must be denied under section 1506 because it is "manifestly contrary to the public policy of the United States." In support of these arguments, CP cites to In re Vitro, 701 F.3d 1031 (5th Cir. 2012) and In re Treco, 240 F.3d 148 (2nd Cir. 2001). Neither case supports CP's arguments.

Vitro involved a Mexican plan in which insider guaranties were extinguished over the objection of note holders. Vitro at 1037. The 50% vote required for plan approval was met only by including insider claims. The 50% vote required for plan approval could not have been obtained without counting the votes of insiders. Id. 1039, 1067-68. The Vitro court acknowledged that under In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), "non-debtor releases may be approved in the United States under Chapter 15." Id. at 1068. Accordingly, plans containing third-party releases are not contrary to public policy of the United States. Vitro is distinguishable from Metcalfe in the following ways:

- In Vitro the affected creditors (the note holders) opposed the plan. Id. at 1037, 1067-68. In Metcalfe the affected creditors supported the plan "nearly unanimously." Id. at 1068.

- In Vitro, the significant claims of insiders recognized by the Mexican court "only existed by virtue of reshuffling of [related company] financial obligations." Id. at 1067. In Metcalfe, no such machinations occurred.

- In Vitro, the plan received the requisite 50% vote only because the objecting creditors were grouped for voting purposes into a class with the insiders. Id. at 1067. In Metcalfe, no such gerrymandering occurred.

- In Metcalfe, "the Canadian court's decision to approve the non-debtor release 'reflect[ed] similar sensitivity to the circumstances justifying approving such provisions.'" Id. at 1068. (quoting Metcalfe, 421 B.R. at 698). This sensitivity was "absent in the Mexican court's approval of the [Vitro] plan." Id.

In addition, the Fifth Circuit emphasized that the creditors affected by the non-debtor release did not receive anything close to what they were owed, and that equity retained substantial value. Id. at 1067. The court also pointed out that considerable insider financial shenanigans had occurred prior to and during the Mexican proceeding. For example, Vitro's subsidiaries were transferred from being debtors of Vitro to being the holders of claims against Vitro through a series of

financial transactions that were not disclosed until after Mexico's 270 day "suspicion period" (a period for avoiding fraudulent transfers) had expired. Id. at 1037-38. These claims provided the key votes for plan approval over the objections of note holders whose claims against insider guarantors were enjoined.

The court's recitation of the underlying facts leaves no doubt that the circumstances leading to plan approval were highly questionable and the outcome was drastically different from a U.S. bankruptcy case with similar debtor machinations. Accordingly, the Vitro court issued a "very limited holding on the facts of [the] case." Vitro at 1063, n. 34. The precise holding in Vitro was that the Bankruptcy Court did not abuse its discretion in denying enforcement of the Mexican plan:

> [W]e hold that Vitro has not met its burden of showing that the relief requested under the Plan—a non-consensual discharge of non-debtor guarantors—is substantially in accordance with the circumstances that would warrant such relief in the United States. In so holding, we stress the deferential standard under which we review the bankruptcy court's determination. It is not our role to determine whether the above-summarized evidence would lead us to the same conclusion. Our only task is to determine whether the bankruptcy court's decision was reasonable.

Id. at 1069.

Although the bankruptcy court's decision in Vitro had found that the protection of claims against non-debtors was a fundamental policy of the United States, the Fifth Circuit expressly declined to affirm that aspect of the bankruptcy court's decision. In re Vitro at 1052, 1069-70. As egregious as the facts in Vitro were, the Fifth Circuit noted that the bankruptcy court's "public policy "finding was inconsistent with the requirement that section 1506 be read narrowly. Id. at 1069. Accordingly, nothing in the Vitro decision even remotely stands for the proposition

that non-debtor releases are "manifestly contrary to a fundamental policy of the United States" for purposes of section 1506.

The facts of the MMA Canada case bear virtually no resemblance to those in Vitro. Every affected creditor who voted in the MMA Canada case has consented to the CCAA Plan. No creditor has opposed it. (The only opposition has come from CP – a joint tort-feasor.). Equity has retained nothing. No hint of financial improprieties exist. Moreover, the Québec Court, through the Plan Sanction Order, was a paradigm of "sensitivity to the circumstances" justifying third-party releases. The 52 page Order carefully considers all relevant precedent regarding third-party releases, as well as the circumstances of the MMA Canada case, before soundly rejecting every one of CP's arguments.

The court in Vitro noted that in the Fifth Circuit, non-consensual non-debtor releases are disfavored "outside the context of mass tort claims being channeled toward a specific pool of assets." Id. at 1066 (quoting from the underlying bankruptcy court decision). The third-party releases approved under the CCAA Plan *are* "in context of mass tort claims being channeled toward a specific pool of assets." There is no doubt whatsoever that if the Vitro court had been presented with the facts in the present case, it would have entered and order enforcing the CCAA Plan.

The Treco decision involves a case that was decided before chapter 15 was adopted[2] in which the Second Circuit refused the request of a Bahamian liquidator to order the Bank of New York to turn over funds until a determination had been made as to whether Bank of New York

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[2] The Treco analysis was under former section 304 of the Code, which was the predecessor chapter 15. In enacting chapter 15, "Congress elevated comity from a factor under § 304(c) to the introductory text of § 1507 'to make it clear that it is the central concept to be addressed.'" In re Vitro, 701 F.3d at 1064 (quoting H.R.Rep. No. 109-31, pt. 1, at 109).]

had a secured claim and/or rights of setoff. The case has no relevance whatsoever to the issues before this Court.

MMA Canada was not a Railroad at the Time it Filed the Chapter 15 Petition

CP next argues that MMA Canada is ineligible for chapter 15 protections because it is a railroad. Whether MMA Canada was at one time a railroad is irrelevant. The only relevant inquiry is whether MMA Canada was "railroad" when it filed its chapter 15 petition. In the Monitor's Verified Petition for Recognition of Foreign Proceeding and Related Relief dated July 20, 2015 [D.E. 2], the Monitor cited to eight different cases regarding the timing of determining eligibility under section 109 and under various chapters of the bankruptcy code. Verified Petition at ¶ 74. Each of those cases stands squarely for the proposition that eligibility is determined as of the date of filing under (or conversion to) a particular chapter. CP has not addressed those cases in its Objection, and has cited no cases whatsoever for a contrary proposition.

CP does not dispute, nor could it, that MMA Canada was not a railroad at the time it filed its chapter 15 petition. As set forth in the Verified Petition, as of June 30, 2014, MMA Canada sold all of its operating assets. Thereafter, MMA Canada no longer hauled freight, no longer owned trackage or facilities of any kind, and has none of the insurance coverage required for operation of a railroad. Verified Petition at ¶ 73. That the relevant time for determining eligibility is the date of filing has been further supported by an August 4, 2015 decision of the District of Delaware. In In re Irish Bank Resolution Corp., Ltd., 2015 WL 4634831 (D. Del. 2015), the court stated that the "plain language of the statute clearly indicates that the relevant time period to consider [for purposes of eligibility under § 109(b)] is the date of the filing of the

Chapter 15 petition, not the debtor's [entire operational history.]" Id. at *6 (quoting Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127, 133 (2nd Cir. 2013)). Nothing further remains to be said on this issue.

No Reason Exists to Delay Hearing the Monitor's Enforcement Motion

Finally, CP argues that enforcement of the Plan Sanction Order would be premature. This argument, like CP's other arguments, is misguided. CP points out that it has moved for leave to appeal the Plan Sanction Order, and that a hearing on its motion is scheduled for September 9, 2015. CP asserts that if leave to appeal is granted, then enforcement of the Plan Sanction Order in Canada would be stayed pending the outcome of the appeal. CP states, without elaboration, that enforcement of the order in the United States during the pendency of an appeal "could lead to an absurd result." Once again, CP's argument is hollow. The Monitor seeks merely to enforce the Plan Sanction Order in the United States. If the Plan Sanction Order is stayed in Canada, then it will be stayed in the United States. The Monitor does not ask the bankruptcy court to add to the provisions of the Plan Sanction Order.

It is for these reasons that other courts have granted motions for recognition and enforcement of foreign orders even though the possibility of appeals in the foreign courts remained open. In In re Sino-Forest Corp., 501 B.R. 655 (Bankr. S.D.N.Y. 2013), the court addressed this very issue:

> While an additional motion for leave to appeal may be filed in the Supreme Court of Canada, this Court sees no reason to await the outcome of such a motion (if it is made) before ruling on the pending matter; the issues raised are not novel here or in Canada, as this Court's decision in Metcalfe demonstrates.

Sino-Forest at 663.

The court in In re Rede Energia S.A., 515 B.R. 69 (Bankr. S.D.N.Y. 2014) was faced with this same issue, and reached the same result as in Sino-Forest. In Rede, a Brazilian court had approved a plan of reorganization. The foreign representative filed a chapter 15 petition in the United States seeking enforcement of the plan. A group of note holders (the "Ad Hoc Group") appealed from the plan approval order in Brazil. While that appeal was pending, the foreign representative filed a Chapter 15 case in the United States, and moved for enforcement of the Brazilian confirmation order. In determining to grant the enforcement motion notwithstanding the pendency of appeals, the court stated as follows:

> [T]he Plan Enforcement Relief does not prevent the Ad Hoc Group from continuing to assert its rights under Brazilian law in the pending appeals of the decisions of Brazilian Bankruptcy Court. In balancing the interests of the Rede debtors against those of the Ad Hoc Group, the Court concludes that the Plan Enforcement Relief passes muster under section 1522(a) and is relief that is proper under section 1521.

In re Rede Energia S.A., 515 B.R. at 94.

In this case, there is absolutely no reason to delay hearing on the Monitor's Enforcement Motion. CP may continue its efforts to appeal the Plan Sanction Order. If it is permitted to appeal, and if the pendency of such appeal causes the Plan Sanction Order to be stayed, then such stay would apply in the United States as well. Again, the Monitor seeks nothing more than an order recognizing and enforcing the Plan Sanction Order in the United States.

CP also argues that hearing on the Enforcement Motion should be forestalled until the Chapter 11 Plan is confirmed. This argument is unavailing. The outcome of the plan confirmation hearing is irrelevant to the relief sought in the Enforcement Motion. The Enforcement Motion stands on its own, and the relief sought therein is, on

its own, a key part of the process of effectuating the Settlement Agreements. The Settlement Agreements are, of course, key to funding the CCAA Plan and the Chapter 11 Plan. Any suggestion that the propriety of the third-party releases approved by the Plan Sanction Order should be determined in the context of the Chapter 11 Plan is misplaced. To approve the Enforcement Motion, this Court does not need to find that the third-party releases meet the standards for third-party releases in chapter 11 plans. As has been made abundantly clear in other decisions, in Chapter 15 cases, the bankruptcy court should be guided by principles of comity and should only decline to enforce a foreign order (such as the Plan Sanction Order) if doing so would be "manifestly contrary to the public policy of the United States." See, e.g., Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010; In re Sino-Forest Corp., 501 B.R. 655 (Bankr. S.D.N.Y. 2013).

CONCLUSION

A "unique and singular opportunity has presented itself in the hard-negotiated" Settlement Agreements: a significant return to persons with claims arising out of the Derailment.[3] The CCAA Plan and the Chapter 11 Plan provide the vehicles to pool at least $431 million in settlement payments, to avoid what would otherwise be years of costly litigation, and bring financial finality to the claims arising out of the Derailment. CP has chosen not to be part of the negotiated solution. That is CP's choice. CP is not in any way prejudiced by the process through which all other defendants have chosen to resolve claims. CP is free to defend itself, to point its finger at others, and to seek

3 See In re Fidelis, Inc., 481 B.R. 503, 518-19 (Bankr. E. D. Mo. 2012) (approving third-party releases in liquidating chapter 11 plan).

judgment reduction based on the liability of others. CP is already bound by the Plan Sanction Order in Canada. It should not be permitted to delay recognition and enforcement of the Plan Support Order in the United States, and its attempts to do so should be seen for what they are -- an attempt to gain negotiating advantage in CP's quest for a release without paying anything.

WHEREFORE, for the foregoing reasons, the objections asserted by CP should be rejected and overruled, and the relief sought by the Monitor should be granted.

Dated: August 19, 2015

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