CANADA

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

SUPERIOR COURT
(Commercial Division)

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

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

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

Debtor-Petitioner

-and-

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

Monitor

AFFIDAVIT OF ROBERT J. KEACH, ESQ. AS CHAPTER 11 TRUSTEE

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

1. I am the chapter 11 trustee (the "Trustee") in the chapter 11 case (the "Chapter 11 Case") of Montreal Maine & Atlantic Railway, Ltd. ("MMA"), Bankruptcy Case No. 13-10670. MMA is the parent company of the Debtor in this proceeding under the CCAA ("MMA Canada").

2. I am a shareholder at Bernstein, Shur, Sawyer & Nelson, Portland, Maine ("BSSN"). I am a Fellow of the American College of Bankruptcy and a Past President (2009-2010) of the American Bankruptcy Institute ("ABI"). I have appeared as a panelist on national

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

3. This affidavit is submitted in connection with the Trustee's opposition to the Cross-Motion of the Class Action Plaintiffs For an Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date (the "Cross Motion") and in response to the letter to the Court dated January 30, 2014 by Mr. Daniel E. Larochelle (the "Larochelle Letter"). The Affidavit sets forth my opinion on various points of U.S. law and sets forth certain facts regarding the Chapter 11 Case of MMA.

4. All facts set forth herein are based on my personal knowledge, on information supplied to me by the professionals I have retained in the Chapter 11 Case, including, but not limited to, information supplied to me by my counsel, BSSN, on my review of relevant documents, or on my opinion based upon my experience and knowledge of MMA's operations and assets. If I were called to testify, I could and would testify competently to the facts set forth herein, and regarding my opinion of relevant U.S. law, as both a fact and expert witness.

A. The XL Liability Policy is Claimed as Property of the Chapter 11 Estate.

5. Among the assets of the Chapter 11 estate of MMA is the liability policy issued by XL Insurance Company, Ltd., a copy of which is attached hereto as **Exhibit A** (the "XL

Liability Policy"). (The XL Liability Policy is central to the proposed plan referred to in the Larochelle Letter and, therefore, the Cross Motion.) MMA is a named insured under the XL Liability Policy. As shown on **Exhibit B**, the XL Liability Policy is listed as an asset on the Schedule of the Assets filed in the Chapter 11 Case. Under the terms of the XL Liability Policy, any settlement requires MMA's consent. Under controlling law in the First Circuit, the circuit in which the Chapter 11 Case is pending, both the XL Liability Policy and the proceeds of the XL Liability Policy are unquestionably property of the MMA bankruptcy estate pursuant to 11 U.S.C. § 541 (Bankruptcy Code § 541). Tringali v. Hathaway Machinery Company, 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.").

As the Mahoney Hawkes, LLP court stated

> There is only one insurer in this case. Although the Debtor represented that it has not filed objections to claims, the total of the claims listed in the Claims Register Report vastly exceeds the payment offer by CNA. The Policy is a liability policy. These facts, in essence, are not different from those in Tringali. Contrary to the assertion of the Committee, under these facts the First Circuit held that the proceeds of a liability policy are estate property. 796 F. 2d at 560. I am constrained to following Tringali and hold that the proceeds of the Policy are property of the estate.

289 B.R. at 295. The Focus Capital court, referring to both Tringali and another case decided within the First Circuit, In re CyberMedica, Inc., 280 B.R. 12, 16 (Bankr. D. Mass. 2002), elaborated on this point and the important policies behind the Tringali holding:

> Applying the Cybermedica test to the facts of this case leads to a straightforward result. The majority of the claims against the Debtor's estate, at this stage, appear to implicate the coverage in the Policy. These claims relate to losses suffered by claimants availing themselves of the Debtor's investment advisory services. Indeed, the Debtor established a separate bar date specifically to ensure that this type of creditor would be able to file a claim that would be covered under the Policy.
>
> The Policy, on its face, has the potential to provide coverage to this very type of claim. The Policy provides direct liability coverage to the Debtor for wrongful acts committed while acting as an investment advisor. Without the Policy proceeds, the estate will have little or nothing to pay these claims. The estate is worth more with the Policy and its proceeds than without.
>
> The [tort plaintiffs] argue that because they and not the Debtor would receive the insurance proceeds, that the Debtor has no equitable or legal interest in the insurance proceeds. This argument ignores the economic benefit the Policy provides to the estate. The Debtor paid the premiums on the Policy to guard itself against these types of claims. The Policy proceeds benefit the Debtor by covering claims it would otherwise be responsible to pay from other funds. The Policy thus provides a direct and substantial benefit to the estate and increases its value. Indeed, without the Policy proceeds the Debtor would have little or nothing to pay its debts.
>
> Accordingly, the Policy and its proceeds are part of the bankruptcy estate.

2014 WL 117314 at *8 - *9.

6. The Larochelle Letter and the Cross Motion, to the extent they suggest that the proceeds of the XL Liability Policy can be quickly distributed solely in the CCAA proceedings, ignore the fact that such proceeds are claimed to be property of the MMA bankruptcy estate. The Larochelle letter and the Cross Motion also ignore the fact that several parties other than

victims of the Derailment (as defined below) are named insureds under the XL Liability Policy or claim to have direct rights to the proceeds of the policy. The plan suggested in the Larochelle Letter ignores those claims and the claimed contractual and/or property rights of those parties, as detailed below. Disposition of the proceeds of the XL Liability Policy requires, in my opinion, a coordinated, cross-border plan, filed in both the CCAA case and the Chapter 11 Case, negotiated among various constituencies in each case, and adjudicated in accordance with the Cross Border Protocol.

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 XL Liability Policy and Proceeds.

7. 28 U.S.C. § 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.

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).

8. 28 U.S.C. § 1334(b), the basic jurisdictional provision for U.S. bankruptcy courts, provides that:

> Except as provided in subsection (e)(2) and notwithstanding, any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to cases under title 11 (emphasis supplied).*

9. A true and correct copy of the decision rendered in In re New England Compounding Pharmacy, Inc. Products Liability Litigation, 496 B.R. 256 (D. Mass. 2013) is

attached hereto as **Exhibit C**; this decision addresses the two sections of title 28 of the United States Code cited above, and provides for a transfer of wrongful death and personal injury claims under section 157(b)(5).

10. On July 6, 2013, one of MMA's eastbound trains derailed in Lac-Mégantic, Québec (the "Derailment"), resulting in various explosions and fires, as well as other damages, causing forty-seven (47) deaths.

11. 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"). The Circuit Court is part of the Illinois state court system.

12. 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.

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

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

15. 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 where the Chapter 11 Case was 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. Other Non-Debtor Defendants filed pleadings in support of the Section 157(b)(5) Motion.

16. 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.

17. 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") in this civil action 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.

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

19. 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.

20. 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.

21. 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 of this affidavit, the Maine District Court has not rendered a decision.

22. Among the reasons why the PITWD Cases are claimed to be related to the Chapter 11 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 XL Liability Policy. Specifically, Edward Burkhardt, certain Rail World entities and CIT Group, Inc. ("CIT"), all Non-Debtor Defendants, are, or claim to be, named insureds under the XL Liability Policy.

23. Rail World, Inc. is affiliated with MMA, and Edward Burkhardt is a former member of MMA's board of directors and a shareholder of the holding company that is the ultimate corporate parent of MMA. 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. *See* **Exhibit D** attached (excerpt of Management Agreement between

Rail World and MMA). Mr. Burkhardt also asserts that he has automatic indemnity rights under the MMA governance documents. *See* **Exhibit E** attached (excerpt of MMA's by-laws). Counsel to Rail World and Mr. Burkhardt filed the letter attached hereto as **Exhibit F** with the Maine District Court to establish their status as named insureds under the XL Liability Policy.

24. Another Non-Debtor Defendant, CIT, has stated that it will seek to satisfy any judgment against it from the proceeds of the XL Liability Policy. CIT filed the pleading attached as **Exhibit G**, among others, with the Maine District Court. If CIT is liable to the plaintiffs in the PITWD Cases, and if CIT is entitled to indemnification from MMA's estate, CIT contends that it has a lien upon or property rights in the XL Liability Policy and its proceeds.

C. The Terms of the Ad Hoc Group Plan in the Chapter 11 Case

25. On January 29, 2014, the "Unofficial Committee of Wrongful Death Claimants" (the "Unofficial Committee"), purportedly on behalf of the plaintiffs in the PITWD Cases and 28 other family members and/or representatives of the estates of deceased victims of the Derailment (collectively, the "WD/PI Claimants"), filed a proposed chapter 11 plan (the "Plan") and accompanying disclosure statement in the Case. A copy of the Plan, as filed, is attached hereto as **Exhibit H**. The bankruptcy court in the Chapter 11 Case has not acted on the Plan or its disclosure statement.

26. The Plan's premise is 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. These policies include the XL Liability Policy, the so-called "Canadian" policy. Accordingly, distributions to the WD/PI Claimants are contingent on the fiduciary appointed under the Plan (the "Plan Fiduciary") reaching a settlement regarding the Canadian and U.S. insurance policies. The Plan acknowledges that "a maximum of $25 million in indemnity is

available under the policies collectively." Plan, p. 2. (In fact, only one of the policies, the XL Liability Policy, is applicable, and it has both MMA and MMA Canada, as well as numerous other parties, as named insureds.)

27. Specifically, the Plan contemplates that 75% of the proceeds from **both** the Canadian and U.S. insurance policies shall be paid to MMA's estate for distribution to the WD/PI Claimants, with the remaining 25% of the proceeds to remain with the Canadian estate for distribution to all other holders of Derailment-related claims, including holders of property damage and environmental claims. Plan, § 5.4(b)(i). Alternatively, if the Plan Fiduciary only reaches a settlement regarding the U.S. insurance policy, 100% of the proceeds of the U.S. insurance policy will be retained by MMA's estate. Id. at § 5.4(d). Should the Plan Fiduciary be unable to reach a settlement with respect to both the Canadian and U.S. insurance policies, or the U.S. insurance policy only, prior to the Plan's effective date, the "Insurer" is required to pay $18,750,000 to MMA's estate.

28. The Plan further provides that the WD/PI Claimants "waive the right to file, otherwise assert, or recover on account of such claims in the Canadian Case." Plan, § 5.3(a). Claims arising from or related to the Derailment that are not wrongful death or personal injury claims may only be asserted in, and recover pursuant to, the Canadian case. Id. at § 5.3(b). The Plan provides that holders of Derailment claims may prosecute claims against third parties in any forum, notwithstanding the pendency of the Chapter 11 Case or this proceeding. Id. at § 5.6(a).

29. The Trustee contends that the Plan is nonconfirmable under the Bankruptcy Code for a number of reasons, including, without limitation, the following: (a) the Plan ignores the fact that only the XL Liability Policy is active, and that the two policies referred to in the Plan cannot, by their terms, apply to the same incident; thus, there is no set of facts where both

policies would provide payments; (b) the Plan ignores and/or violates the contractual and/or property rights of various named insureds to the XL Liability Policy; (c) by allowing pursuit of claims against Non-Debtor Defendants, while at the same time providing for distribution of the proceeds of the XL Liability Policy, the Plan simply implodes; since Non-Debtor Defendants are named insureds and have claims under the policy, none of the proceeds can be distributed while such lawsuits are pending against the named insureds; (d) the Plan violates that absolute priority rule and the rules against discrimination among like claims by distributing substantial sums to some claimants while distributing nothing to claims of equal or superior legal priority; and (e) the Plan violates 11 U.S.C. § 1174. However, the Plan, were it to proceed, is directly at odds with the Plan described in the Larochelle Letter (the "Class Action Plaintiff's Plan") which would direct the distribution of the proceeds of the XL Liability Policy in very different ways.

30. The Class Action Plaintiff's Plan simply seems to ignore the existence of the Chapter 11 Case, and disregards the fact that the XL Liability Policy and the proceeds thereof are claimed to be property of the Chapter 11 estate, a position supported by the controlling U.S. law cited above. (This does not mean, of course, that the CCAA estate does not have similar claims). The Class Action Plaintiff's Plan also disregards and violates the contractual and/or property rights of other named insureds with potential equal priority claims to the proceeds of the XL Liability Policy.

31. The Trustee believes that all of the victims of the Derailment should, in a negotiated settlement and a cross-border plan, receive the proceeds of the XL Liability Policy, as well as receive a distribution from certain other assets of the Chapter 11 estate and the CCAA estate, including proceeds of causes of action brought by the Trustee. (A copy of the Trustee's complaint against World Fuel Services and affiliates is attached as **Exhibit I**.) The Trustee does

not seek to diminish the rights and claims of such victims or to direct such funds to other claimants. However, the above discussion simply illustrates that there is no easy route to a quick distribution of the proceeds of the XL Liability Policy; in my view, such a distribution will require a negotiated, coordinated cross-border solution, eventually embodied in coordinated plans filed and approved in each case.

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

ROBERT J. KEACH, ESQ.
Chapter 11 Trustee of Montreal Maine & Atlantic Railway, Ltd.

STATE OF MAINE
COUNTY OF CUMBERLAND

February 7, 2014

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

Notary Public/Attorney
My Commission Expires:

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