UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

In re:	)	Chapter 11
MONTREAL MAINE & ATLANTIC RAILWAY, LTD.,	)	Case No. 1:13-MC-00184
Debtor.	)	

WFS ENTITIES' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STAY THE CHAPTER 11 TRUSTEE'S MOTION TO TRANSFER

Western Petroleum Corporation ("WPC") and Petroleum Transport Solutions, LLC ("PTS," and together with WPC, the "WFS Entities") file this response in opposition to Plaintiffs' motion for a stay of all proceedings on the Chapter 11 Trustee's motion to transfer the U.S. Wrongful Death Actions to this Court.[1] In opposition, the WFS Entities state as follows.

INTRODUCTION[2]

Plaintiffs' stay motion is procedurally improper and lacks legal support. It should be summarily denied. In late September, this Court entered a procedural order requiring that all responses to the Trustee's transfer motion be filed by October 15, 2013. Instead of complying with that order, Plaintiffs "responded" by filing an entirely new motion, styled as the *Motion of Wrongful Death Claimants to Stay Chapter 11 Trustee's Motion to Transfer*. In it they ask for an indefinite stay of the proceedings on the Trustee's transfer motion, and if their request is denied, they ask for fourteen more days to respond to that motion. This attempted unilateral alteration of the Court's order should not be countenanced.

[1] *See* [D. Me. Dkt. Nos. 1 & 8]; *see also* Plaintiffs' Mem. in Supp. of Mot. to Remand [N.D. Ill. Dkt. No. 47-1], attached hereto as **Exhibit 1**.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *Motion to Transfer Certain Personal Injury Tort and Wrongful Death Lawsuits to the Maine District Court Pursuant to 28 U.S.C. §§ 157(B)(5) and 1334* [D. Me. Dkt. Nos. 1].

Put simply, Plaintiffs have not opposed the Trustee's transfer motion. And the October 15 response deadline is now past. On that basis alone, the Court can, and should, disregard the stay motion and consider the Trustee's transfer motion unopposed.[3] Delay serves only Plaintiffs, while it hurts the administration of MMA's bankruptcy estate by further draining the estate's already-scarce reserves of time and money. That ultimately means lower recoveries for MMA's many creditors, including these Plaintiffs.

Even if the Court considers the stay motion on the merits, the motion should be denied. There is no legal or practical reason for this Court to wait to decide the motion to transfer until the Illinois District Court rules on remand. The overwhelming weight of authority instructs that when, as here, a motion to transfer actions related to a bankruptcy case is pending alongside a motion to remand, transfer should be decided first, and remand second. That sequence is preferred because, among other things, it allows the court in the district where the bankruptcy case is pending—the "home court," with its greater knowledge of and interest in the bankruptcy case—to decide the remand motion. The "home court presumption" is particularly strong where, as here, the actions at issue involve personal injury tort and wrongful death claims. That is because 28 U.S.C. § 157(b)(5) gives the home court—this Court—the *exclusive* authority to determine where those actions will be tried. In fact, transferring personal injury and wrongful death actions to the home court prior to deciding whether to remand them has been called "mandatory." *Atlas v. Chrysler, LLC*, No. 3:09-cv-294, 2009 WL 4782101, at *1 (S.D. Miss. Dec. 8, 2009).

[3] The WFS Entities filed an independent transfer motion, which Plaintiffs also have not opposed. Hence, contemporaneously with this response, the WFS Entities are filing a Notice of Unopposed Motion to Transfer, which requests, among other things, that the Court either (a) grant the WFS Entities' unopposed motion to transfer, or (b) set a deadline of a few days for Plaintiffs to file any response and then proceed to adjudicate the motion.

Plaintiffs' contrary notion—that remand *must* be decided before transfer—is incorrect. It runs afoul of both case law and Congress' intent to centralize bankruptcy-related, personal injury tort and wrongful death claims in the home bankruptcy forum. It should come as no surprise then that the various arguments Plaintiffs advance in support of a stay have no material legal support. With no leg to stand on, Plaintiffs resort to making strained analogies to plainly inapt rules and procedures—namely, the "first-to-file rule" and multidistrict litigation procedures—that have never once been the basis for granting a stay in circumstances like these.

In short, Plaintiffs' stay motion should be denied, and the Court should grant the transfer motion as unopposed, or proceed to consider the motion to transfer on the merits.

ARGUMENT

Each argument Plaintiffs make for staying this Court's consideration of the Trustee's transfer motion is fundamentally flawed and will be addressed in turn. But first, it is important to address Plaintiffs' oft-repeated, yet always-incorrect, argument that "there is no [federal] 'related-to' jurisdiction over the [U.S. Wrongful Death Actions]." (Stay Motion ¶¶ 15-16.)

A. Federal Jurisdiction Exists Over The U.S. Wrongful Death Actions Under 28 U.S.C. § 1334.

Federal district courts have jurisdiction over all civil proceedings that "arise under," "arise in," or are "related to" cases under the Bankruptcy Code. 28 U.S.C. § 1334(b). The First Circuit has recognized that "the statutory grant of 'related-to' jurisdiction is quite broad." *In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 105 (1st Cir. 2005). "Congress deliberately allowed the cession of wide-ranging jurisdiction to the bankruptcy courts to enable them to deal efficiently and effectively with the entire universe of matters connected with bankruptcy estates." *Id*. (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Thus, related-to jurisdiction lies "as long as the outcome of the litigation 'potentially [could] have some effect on the

bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the bankrupt estate.'" *Id.* (quoting *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991), *abrogated on other grounds by Conn. Nat'l Bank v. Germain*, 112 S. Ct. 1146 (1992)). One reason related-to jurisdiction is so broad "is to force into the bankruptcy court suits to ***which the debtor need not be a party*** but which ***may*** affect the amount of property in the bankrupt estate." *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161-62 (7th Cir. 1994) (emphases added); *accord e.g.*, *Haber v. Massey*, 904 F.Supp.2d 136, 145 (D. Mass. 2012) ("[T]he test for relation to requires only that the lawsuit have a conceivable effect on the bankrupt estate. Certainty, or even the likelihood, of such an effect on the bankruptcy estate is not required.") (quotation marks and citations omitted). Moreover, determining whether related-to bankruptcy jurisdiction exists is a fact-specific inquiry, *Boston Reg'l*, 410 F.3d at 107, so it is particularly important that, where possible, the court with the closest connection to, and strongest interest in, the bankruptcy case—here this Court—decide the issue.

The U.S. Wrongful Death Actions relate to MMA's bankruptcy case because they will necessarily affect the amount or allocation of property of MMA's estate. For instance, the Trustee—who is the party most knowledgeable about MMA's estate, and who is the only party that owes a fiduciary duty to maximize the estate's value for the benefit of all stakeholders, including Plaintiffs—has stated that the U.S. Wrongful Death Actions "will undoubtedly alter the MMA's liabilities and impact the handling and administration of the estate." (Trustee Mot. to Stay & Intervene at ¶ 17.)[4] And even Plaintiffs themselves recognize that the outcome of the

[4] [N.D. Ill. Dkt. No. 50], attached hereto as **Exhibit 2**.

various wrongful death and personal injury claims will result in "hundreds of millions of dollars" in liability for the MMA estate. (Committee Mot. ¶ 2)[5]

Also, a judgment rendered against any nondebtor defendant will inevitably lead to contractual or common law indemnity, contribution, or subrogation claims against MMA's bankruptcy estate. Indeed, the MMA estate's schedule of creditors already lists claims of fifteen separate entities or individuals—including nearly all of the defendants—for "indemnification and/or contribution in connection with wrongful death litigation and other claims."[6] *See In re Dow Corning Corp.*, 86 F.3d 482, 494 (6th Cir. 1996) ("potential for [debtor] being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy" and thus "related to" federal jurisdiction); *In re A.H. Robins Co.*, 788 F.2d 994, 1001-02 (4th Cir. 1986) ("[A]ctions 'related to' the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insureds under the policy are to be stayed under Section 362(a)(3).").

In addition, adjudicating Plaintiffs' claims against MMA's bankruptcy estate will require a determination of liability and damages based on precisely the same facts and issues that are presented in the U.S. Wrongful Death Actions. That is because Plaintiffs' claims against MMA and the nondebtor defendants are virtually identical. Those claims are not going to be tried twice, given the attendant duplication of costs, waste of judicial resources, and potential for inconsistent results. Either the U.S. Wrongful Death Actions will be decided as part of the bankruptcy claims allowance process—as they should be, considering they represent, in tandem

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5 [Me. Bankr. Dkt. No. 76] (the "Committee Motion")

6 [Me. Bankr Dkt. No. 216], relevant portions of which are attached hereto as **Exhibit 3**.

with Plaintiffs' claims against MMA, by-far the largest claims in MMA's bankruptcy estate—or they will be heard in another court where the Trustee will be forced to intervene as a party, thereby pulling his time, attention, and resources away from administering the estate. Thus, Plaintiffs' position that the U.S. Wrongful Death actions could not have ***any conceivable effect*** on MMA's bankruptcy case does not withstand scrutiny.

B. The Overwhelming Weight Of Authority Counsels That Transfer Should Be Decided Before Remand.

Plaintiffs' argument that this Court *cannot* decide the Trustee's transfer motion until the Illinois District Court rules on remand lacks any legal foundation. (*See* Stay Motion ¶ 8 ("Deference to the Illinois District Court is *required* under the removal and remand provisions of 28 U.S.C. § 1452") (emphasis added).) It is simply not the case that remand must be decided before transfer; rather, "[t]he weight of authority" has it the other way around. *In re Allegheny Health, Educ. and Research Corp.*, No. 98–25773, 1999 WL 1033566, at *1 (Bankr. E.D. Pa. Nov. 10, 1999) (citing cases). Nor is it the case that the Illinois District Court "is *solely empowered* to adjudicate motions to remand." (Stay Motion ¶ 8.) This Court has just as much authority as the Illinois District Court to consider Plaintiffs' remand arguments if and when those arguments are before this Court.

Transfer would not preclude Plaintiffs' remand argument at all. In reality, the remand motion would likely be among the first matters that this Court (or the Maine Bankruptcy Court on reference from this Court) would decide after the U.S. Wrongful Death Cases are transferred here. The reason Plaintiffs fight transfer so strenuously is because they wager it will be easier for them to convince the Illinois District Court, which has no connection to MMA's bankruptcy case, that the U.S. Wrongful Death Actions are completely unrelated to the bankruptcy. Of

course, the absurdity of that notion will not be lost on the Illinois District Court once it understands, as Plaintiffs themselves have previously explained, that:

- "Wrongful death and personal injury claimants will be by far the largest constituency in [the bankruptcy case]." (Committee Motion ¶ 2.)
- "Given the horrific circumstances of the Disaster and the Debtor's role in it, wrongful death verdicts in the hundreds of millions of dollars can be expected." (*Id.* at ¶ 2.)
- "Confirmation of a Chapter 11 plan will require support from the wrongful death and personal injury claimants" and Plaintiffs will provide "a negotiating partner in connection with the Chapter 11 plan and other aspects of [the bankruptcy case] – thus enhancing the likelihood of a successful outcome. (*Id*. at ¶ 5.)
- "[The] wrongful death and personal injury claimants are almost certainly covered by insurance" and they have "claims against wrongdoers *other than the Debtor*, which may be affected by orders entered or a plan confirmed in [the bankruptcy case]." (*Id*. at ¶ 8.)

Thus, the stay motion is nothing more than Plaintiffs' attempt to buy time to see if their improbable gamble before the Illinois District Court pays off. And that is *all* the stay motion is, for it has no basis in law.

Rather, the law says that where motions to transfer and remand are pending simultaneously, the "actions should be transferred to the 'home' court of the bankruptcy to decide the issue of whether to remand or abstain from hearing the action." *Allegheny Health*, 1999 WL 1033566 at *1 (granting a motion to transfer a lawsuit between two *nondebtors* to the court where the bankruptcy was pending, and allowing that court to decide the pending motion to remand); *see also In re Wedlo, Inc.*, 212 B.R. 678, 679 (Bankr. M.D. Ala. 1996) (The court where "the chapter 11 case is pending is in the best position to determine the issues underlying the motion to remand, abstain, or dismiss."); *In re Aztec Indus.*, 84 B.R. 464, 467 (Bankr. N.D. Ohio 1987) ("[T]he proper role of the 'conduit' court [is] to transfer the action to the 'home' bankruptcy court to decide the issue of whether to remand or abstain from hearing the action.")

(citing cases); *Colarusso v. Burger King Corp.*, 35 B.R. 365, 366-68 (Bankr. E.D. Pa. 1984) (same); *Stamm v. Rapco Foam, Inc.*, 21 B.R. 715, 723-25 (Bankr. W.D. Pa. 1982) (same).

That approach—transfer first, and adjudicate putative remand issues second—comports with the oft-cited "home court presumption," which provides that the court where the bankruptcy case is pending is the proper venue to adjudicate all bankruptcy-related litigation, including those suits that have been filed in other state or federal courts. *See Stamm v. Rapco Foam, Inc.*, 21 B.R. 715, 723–24 (Bankr. W.D. Pa. 1982); *In re B&L Oil Co.*, 834 F.2d 156, 159 n.8 (10th Cir. 1987) ("In a bankruptcy case, a paramount consideration is speedy and economic administration of the bankruptcy case. This consideration underlies the general rule that the court where the bankruptcy case is pending is the proper venue for all related proceedings within the court's jurisdiction."); *Shared Network Users Group, Inc. v. Worldcom Techs., Inc.*, 309 B.R. 446, 452 (E.D. Pa. 2004) ("[T]he overwhelmingly significant factor, outweighing all others, is the judicial economy to be achieved in having the entire controversy decided in one forum, in this case the bankruptcy court which is already administering the [Debtors'] bankruptcy."); *In re Vital Link Lodi, Inc.*, 240 B.R. 15, 19 (Bankr. W.D. Mo. 1999) ("[T]here is a strong presumption in favor of placing venue in the district where the bankruptcy case is pending."); *Consol. Lewis Inv. Corp. v. First Nat'l Bank of Jefferson Parish*, 74 B.R. 648, 651 (E.D. La. 1987) (finding that "it is clear the 'interest of justice' is best served by allowing the Bankruptcy Court . . . the opportunity to review all lawsuits with a nexus to [the Debtors'] bankruptcy.").

The logic behind applying the home court presumption to competing motions to transfer and remand is sound. It is illustrated in *Aztec Industries*, 84 B.R. at 467, where a federal court in Ohio transferred an action to the home court in Oklahoma without first considering a pending motion to remand:

> Obviously, the Oklahoma Court is more familiar with the pending bankruptcy case and what may be required for its efficient administration. In addition, the Court which would try the case can better evaluate all the interests involved, and determine its own expertise in the particular areas of the law which form the basis of the action, as well as its own scheduling and time constraints. This Court's speculation on these matters would not be an adequate substitute for a knowledgeable determination based upon the actual facts and circumstances. Moreover, allowing the Oklahoma Court to rule on the remand minimizes the potential conflicts which could arise due to differences in controlling authority between the Courts. Accordingly, a final ruling on the venue issues, and the many sub-issues which have been raised within the context of venue, remand, and abstention, should be left to the "home" Bankruptcy Court in Oklahoma.

Courts have found the home court presumption to be even stronger where, as here, the debtor (or in this case the Chapter 11 Trustee) supports transferring the related actions into the bankruptcy case, and where, as here, the actions sought to be transferred involve personal injury tort and wrongful death claims, thus implicating 28 U.S.C. § 157(b)(5).[7] *See Atlas*, 2009 WL 4782101 at *1 (finding, in a wrongful death case, that the home court presumption "is even more persuasive when transfer is [made] *mandatory*" under [s]ection 157(b)(5)) (emphasis added); *Whittingham v. CLC of Laurel, LLC*, No. 2:06cv11–KS–MTP, 2006 WL 2423104, at *1 (S.D. Miss. Aug. 22, 2006) (granting transfer because "28 U.S.C. § 157(b)(5) leaves little doubt that the ultimate venue of the trial in the personal injury case should be determined by the District Court where the bankruptcy case is pending," and holding that plaintiff's motions for remand and abstention should be left to transferee court); *Wise v. Cypress Manor Care Ctr., Inc.*, No. Civ.A. 05–1555, 2006 WL 149032, at *2 (W.D. La. Jan.19, 2006) (granting Section 157(b)(5) transfer of wrongful death claim; noting "[w]hether to abstain or proceed . . . is a question for the district court in which the bankruptcy is pending, not this Court").

[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*." (Emphasis added).

The authority just cited reveals that, for years, courts have been transferring bankruptcy-related litigation to the districts where the bankruptcy cases are pending without first deciding motions to remand. Doing so is particularly appropriate in the context of personal injury tort and wrongful death cases such as these because Congress vested the home court with the power to decide where such cases should be adjudicated. While it is true that having motions for transfer and remand pending in separate district courts is atypical (a product of Section 157(b)(5)), it is also true that no case—or any argument Plaintiffs make—changes the sound legal and practical reasons behind the general rule that transfer should be decided first. The Court should, therefore, reject Plaintiffs' request for a stay based on the unsupported and mistaken argument that remand must be decided before transfer.

C. This Court, Not the Illinois District Court, Should Determine Whether There Is Bankruptcy Jurisdiction Over the U.S. Wrongful Death Actions.

In a series of unsupported arguments, Plaintiffs claim that the Illinois District Court, rather than this Court, should decide whether bankruptcy subject matter jurisdiction exists over the U.S. Wrongful Death Actions. They do so even though the Illinois District Court has no relationship to or knowledge of MMA's bankruptcy case (and never will), and this Court (along with the bankruptcy court that is a unit of this Court) is ultimately responsible for that case. As discussed above in Section A, whether bankruptcy jurisdiction exists turns entirely on the degree of relatedness between the U.S. Wrongful Death Actions and MMA's bankruptcy case. It defies both legal precedent and common sense for Plaintiffs to argue that the Illinois District Court should conduct the bankruptcy jurisdiction analysis when that issue is squarely before *this* Court in the context of the transfer motion. It is therefore no wonder that each of Plaintiffs' arguments on this point fails.

Plaintiffs begin by claiming that the wholly inapplicable "first-to-file rule" requires this Court to defer its decision on transfer solely because Plaintiffs' remand motion was filed first. The first-to-file rule is an uncodified, discretionary "rule" intended to maintain comity among federal courts. It recognizes that where two essentially identical lawsuits are filed in sister courts, the first-filed one is generally preferred where "prosecution of both would entail duplicative litigation and a waste of judicial resources." *S.W. Indus., Inc. v. Aetna Cas. & Sur. Co.*, 653 F. Supp. 631, 634 (D.R.I. 1987) (citing *Small v. Wageman*, 291 F.2d 734, 736 (1st Cir. 1961)). The rule applies only where "the same parties are attempting to litigate the same issues in sister courts." *McGlynn v. Credit Store, Inc.*, 234 B.R. 576, 580 (D.R.I. 1999).

Here, there are not two *identical lawsuits* pending before this Court and the Illinois District Court; there are two *non-identical motions*. The motions involve different parties (e.g., the Trustee is not a party to the remand motion)[8] and raise different issues (transfer and remand). So the rule just does not apply. Indeed, Plaintiffs have not cited (and the WFS Entities have not found) a single case applying the first-to-file rule to competing transfer and remand motions in the bankruptcy context. Nor does there appear to be a single instance where the rule has been invoked as a reason for a home court to defer deciding bankruptcy subject matter jurisdiction. None of the cases Plaintiffs cite are remotely analogous to the situation here. Not one even contains the word "bankruptcy" let alone raises a bankruptcy issue. Thus, Plaintiffs' first-to-file argument lacks any persuasive force and should be rejected.

[8] In fact, Plaintiffs have opposed the Trustee's efforts to intervene in the Illinois District Court on the basis that the Trustee lacks standing. In doing so, and by arguing here that this Court should defer its ruling on transfer until the Illinois District Court rules on remand, Plaintiffs effectively seek to silence the one party with the most knowledge about, and interest in, how and whether the U.S. Wrongful Death Actions will affect the MMA bankruptcy case.

Next, Plaintiffs claim that Section 157(b)(5) does not give this Court a "special charter to decide the issue" of whether the U.S. Wrongful Death Actions are related-to MMA's bankruptcy case. (Stay Motion ¶ 11.) Section 157(b)(5), they argue, "does not confer jurisdiction or govern which court determines whether federal courts have jurisdiction[;] [r]ather, the statute comes into play, if at all, only once it has been determined that federal courts have jurisdiction over the personal injury and wrongful death claims at issue." (*Id.*) The WFS Entities agree that Section 157(b)(5) is not jurisdictional. At some point this Court will have to decide if it has related-to jurisdiction over the U.S. Wrongful Death Actions. That is why the Trustee's transfer motion and this response discuss the myriad ways those actions—which were a leading factor in MMA's decision to file bankruptcy, and will be the source of the MMA-estate's largest liability—are related-to MMA's bankruptcy case. Conversely, Plaintiffs argue in the stay motion that this Court lacks related-to jurisdiction. Thus, while Plaintiffs chose not to oppose the Trustee's transfer motion on the merits, both sides' arguments about the scope of this Court's jurisdiction have been presented to the Court and are ripe for decision.

For their next argument, Plaintiffs point to the "analogous situation" of a transfer to the Judicial Panel on Multidistrict Litigation. (*Id.* at ¶ 12). But they ignore that courts in both the Seventh and First Circuits routinely stay proceedings in the transferor court—including ruling on remand motions—until the transferee MDL court decides jurisdictional issues, such as motions to transfer. *See, e.g.*, *Tench v. Jackson Nat'l Life Ins. Co.*, No. 99 C 5182, 1999 WL 1044923, at *1 (N.D. Ill. Nov. 12, 1999) (Bucklo, J.) ("Under these circumstances, *i.e.*, pending a decision by the MDL Panel whether to add a case, stays are frequently granted to avoid duplicative efforts and preserve valuable judicial resources."); *Paul v. Aviva Life & Annuity Co.*, No. 09-1038, 2009 WL 2244766, at *1 (N.D. Ill. July 27, 2009) (granting motion to stay before deciding remand

motion: "If the JPML transfers this action, we will no longer have jurisdiction over pretrial matters and this court would have wasted judicial resources by addressing various pretrial motions that could have been resolved in the transferee court."); *D'Amico v. Guidant Sales Corp.*, C.A. No. 07-301 S, 2007 WL 3003181, at *2 (D.R.I. Oct. 11, 2007) ("It is considered a general rule by some courts that federal courts should 'defer ruling on pending motions to remand in MDL litigation until after the JPMDL has transferred the case to the MDL panel.'"). These courts find it promotes consistency and judicial economy to allow the MDL court, rather than the transferor court, to decide jurisdictional issues. *See Paul*, 2009 WL 2244766, at *1 ("[W]e 'run the risk of expending valuable judicial resources familiarizing [our]self with the intricacies of a case that may be coordinated or consoli[dated] for pretrial purposes in another court."). The same considerations weigh in favor of this Court deciding whether bankruptcy related-to jurisdiction exists here.

As was discussed at length in Section A above, related-to jurisdiction is broadly defined to include any civil action where the outcome "could conceivably have any effect on the estate being administered in bankruptcy." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citing *Pacor*, 743 F.2d at 994). That includes suits "between third parties [that] have an effect on the bankruptcy estate," such as the U.S. Wrongful Death Actions. *Celotex*, 514 U.S. at 308, n.5. As was discussed in Section B, the predominant rule among courts is to defer, whenever possible, to the court where the bankruptcy case is pending to make judgments about the matters that may be related-to the bankruptcy case. By setting a ruling date on the remand motion for December 6, 2013, the Illinois District Court has followed that deferential course, allowing this Court time to act on the question of transfer.

D. If This Court Decides The Related-To Jurisdiction Question, There Is No Real Threat of Inconsistent Rulings.

Plaintiffs offer no authority for their assertion that "inconsistent adjudications" could result if this Court decides the jurisdictional issues before the Illinois District Court. If this Court decides that it has related-to jurisdiction in the course of considering the transfer motion, then the Illinois District Court will never reach the issue. That is because this Court would, presumably, not simply stop once it determines that it has jurisdiction; instead the Court would likely also grant the transfer motion, which would take all of the U.S. Wrongful Death Actions out of the Illinois District Court and place them in this Court in exactly the same procedural posture. Conversely, if this Court decides that it does not have related-to jurisdiction, such that U.S. Wrongful Death Actions could not become part of the MMA's bankruptcy case, then the Illinois District Court would likely permissively abstain from (or equitably remand) the proceedings without ever having to reach the related-to jurisdiction question. All parties would be bound by that decision and the U.S. Wrongful Death Actions would proceed in state court. The notion that the parties face any true threat of inconsistent rulings is—like each of Plaintiffs' other arguments—simply not credible.

Moreover, all of the authority cited here makes clear that the orthodox way courts adjudicate cases in these situations—with the putative transferee forum (here, the District of Maine) assessing both related-to jurisdiction and the propriety of transfer under Section 157(b)(5)—does not result in administrative problems or inconsistent rulings. Rather, centralizing adjudication in the district where the bankruptcy case is pending *promotes*

consistency and better-informed decisions about the fair disposition of cases affecting the bankruptcy estate and the various creditor constituencies involved.[9]

CONCLUSION

For all of the foregoing reasons, the WFS Entities respectfully request the Court enter an order: (i) denying Plaintiffs' stay motion; and (ii) either (a) granting the Trustee's transfer motion as unopposed, or (b) requiring Plaintiffs to file a response to the Trustee's transfer motion promptly so that the Court may decide that motion on the merits.[10]

Dated: October 23, 2013

/s/ Jay S. Geller

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[9] There is no need to address Plaintiffs' argument in paragraph 14 of the stay motion because the defendants in the U.S. Wrongful Death Actions are no longer pressing their diversity jurisdiction arguments.

[10] Under this Court's Local Rule 7(e), responses to motions seeking injunctive relief may be up to 20 pages long. The WFS Entities respectfully submit that by requesting to stay these proceedings, Plaintiffs' motion effectively seeks such relief, making the 20-page limit applicable to this response. However, if the Court disagrees, then the WFS Entities will promptly file a separate motion requesting leave to file an oversized brief.

CERTIFICATE OF SERVICE

I, Jay S. Geller, attorney for Western Petroleum Company and Petroleum Transport Solutions, LLC, electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all persons registered for ECF. All copies of documents required to be served by Fed. R. Civ. P. 5(a) have been so served.

Dated: October 23, 2013

/s/ Jay S. Geller
Attorney for Defendants Western Petroleum Company & Petroleum Transport Solutions, LLC

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNICK ROY, as Special Administrator of the ESTATE OF JEAN-GUY VEILLEUX, Deceased, Plaintiff, v. MONTREAL, MAINE and ATLANTIC RAILWAY, INC., RAIL WORLD, INC., EDWARD BURKHARDT, individually, WORLD FUEL SERVICES CORPORATION, WESTERN PETROLEUM COMPANY, PETROLEUM TRANSPORT SOLUTIONS, LLC, DAKOTA PLAINS TRANSLOADING, LLC, DAKOTA PETROLEUM TRANSPORT SOLUTIONS, LLC., DAKOTA PLAINS MARKETING, LLC., and DPTS MARKETING, LLC, Defendants.	No. 13-cv-06192

CHAPTER 11 TRUSTEE'S MOTION FOR ORDER (I) STAYING RULING ON ABSTENTION OR REMAND AND (II) GRANTING LEAVE TO INTERVENE FOR A LIMITED PURPOSE

Robert J. Keach, the chapter 11 trustee of Montreal Maine & Atlantic Railway, Ltd., hereby moves this Court for an order deferring any ruling on remand or abstention in this civil action until the United States District Court for the District of Maine has ruled on a request to transfer this civil action and several related civil actions to the District of Maine pursuant to 28 U.S.C. § 157(b)(5). As set forth more fully below, section 157(b)(5) confers exclusive authority on the United States District Court for the District of Maine to determine the proper venue for

trial of this civil action and the other related actions. Accordingly, deferral of any ruling on abstention or remand, pending a ruling from the United States District Court for the District of Maine is appropriate, if not required. Anything else will exacerbate the procedural morass of litigation arising of a tragic train derailment in Québec, a result demonstrably at odds with the obvious Congressional intent to centralize certain types of tort claims relating to a chapter 11 debtor.

In addition, because the Plaintiff has voluntarily dismissed Montreal, Maine & Atlantic ("MMA") as a defendant, the chapter 11 trustee hereby requests leave to intervene as a party defendant for the sole and limited purpose of asking this court to defer any ruling on abstention or remand.

In further support of this request, the movant states as follows:

BACKGROUND

1. On August 7, 2013, MMA filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq* (the "Bankruptcy Case"). MMA's bankruptcy filing was precipitated by the train derailment in Lac-Mégantic, Québec on July 6, 2013 (the "Derailment"). The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. The Derailment also precipitated the filing by Montreal Maine & Atlantic Canada Co. ("MMA Canada"), MMA's subsidiary, under Canada's *Companies' Creditors Arrangement Act* case (the "Canadian Proceeding").

2. On August 8, 2013, an initial order staying all proceedings against any of MMA Canada's directors or employees was entered in the Canadian Proceeding. A true and correct copy of the initial order is attached hereto as **Exhibit A**. On September 4, 2013, an order extending the stay was entered in the Canadian Proceeding. The extended stay is effective until

October 9, 2013. A true and correct copy of the order extending the initial stay is attached hereto as **Exhibit B**.

3. On August 16, 2013, certain petitioners filed the *Second Amended Motion to Authorize the Brining of a Class Action* (the "Canadian Class Action") in the Canadian Proceeding. A true and correct copy of the Canadian Class Action is attached here to as **Exhibit C**. The Canadian Class Action covers all persons and entities residing in, owning or leasing property in, operating a business in, and/or who were physically present in Lac-Mégantic, including their estate, successor, spouse or partner, child, grandchild, parent, grandparent, and sibling, who suffered a loss of any nature or kind relating to or arising directly or indirectly from the Derailment.

4. On August 21, 2013, Robert J. Keach (the "Trustee") was appointed as the chapter 11 trustee in the Bankruptcy Case pursuant to 11 U.S.C. § 1163.

5. On August 22, 2013, plaintiffs in civil actions similar to this one moved the bankruptcy court for an order appointing a creditors' committee [Bankruptcy Case, D.E. 76] (the "Wrongful Death Committee Motion"). A true and correct copy of the Wrongful Death Committee Motion is attached hereto as **Exhibit D**. The Plaintiff has joined in the Wrongful Death Committee Motion.

6. On August 30, 2013, a motion was filed in the bankruptcy court to appoint a committee representing some of the same persons covered by the Canadian Class Action [Bankruptcy Case, D.E. 127] (the "Québec Claimants Committee Motion"). A true and correct copy of the Québec Claimants Committee Motion is attached hereto as **Exhibit E**.

7. On September 11, 2013, the Trustee filed a motion pursuant to 28 U.S.C. § 157(b)(5) (the "Section 157(b)(5) Motion"), which is currently pending in the United States

District Court for the District of Maine (the "Maine District Court"). A true and correct copy of the Section 157(b)(5) Motion is attached hereto as **Exhibit F**. The Section 157(b)(5) Motion requests, that this civil action, along with the 17 other civil actions pending before this Court, and the one civil action previously pending before this Court and remanded to the Circuit Court of Cook County, Illinois be transferred to the Maine District Court.[1]

8. On September 18, 2013, the Plaintiff moved this Court for an order remanding this civil action back to the Circuit Court of Cook County, Illinois. *See* Motion to Remand [D.E. 47].

REQUESTED RELIEF AND INCORPORATED MEMORANDUM OF LAW

A. The Court Should Defer Ruling on Abstention or Remand Pending Ruling on the Section 157(b)(5) Motion.

9. Section 157(b)(5) provides as follows:

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

28 U.S.C. § 157(b)(5) (emphasis added). The purpose of this section is to centralize the adjudication of claims, and the express language of the statute confers authority on the Maine District Court to determine the proper venue for trial of this civil action. *See e.g.,* Whittingham v. CLC of Laurel, LLC, 2006 WL 2423104, at *1 (S.D. Miss. Aug. 22, 2006) ("the ultimate venue of the trial in the personal injury case should be determined by the District Court where the bankruptcy case is pending"). As noted in a leading bankruptcy treatise:

> Section 157(b)(5) provides that venue of the PITWD trial is to be determined by the district court in which the title 11 case is pending. This unusual, perhaps unique, provision empowers a court other than that in

[1] The Trustee is aware that this Court recommended that this civil action along with the other similar civil actions be reassigned to Judge Bucklo's calendar. *See* [D.E. 49].

> which the litigation is pending to decide where the trial is to take place. The court in which the title 11 case is pending has the options of trying the case itself or directing that the trial occur in the district court for the district where the claim arose.

1-3 Collier on Bankruptcy ¶ 3.06[3] (16th ed. 2010) (emphasis added).

10. Given the pendency of the Section 157(b)(5) Motion, the Trustee believes that this Court cannot and, in any event, should not take any further action in this civil action until the Maine District Court has ruled on the Section 157(b)(5) Motion. Because the Maine District Court has the ultimate power to determine venue of the personal injury and wrongful death claims, the Maine District Court necessarily has authority to consider any procedural motions filed in this civil action if the resolution of such motions might have some bearing on the trial of the claims. *See* Calumet National Bank v. Levine, 179 B.R. 117, 120 (N.D. Ind. 1995) ("Under section 157(b)(5), the district court for the bankruptcy district has sole authority for ultimately fixing venue for [personal injury tort/wrongful death] actions against debtors."). Accordingly, the appropriate course of action is to defer ruling on any motions, including any motions seeking abstention or remand, because the Maine District Court must first determine the venue in which this civil action should proceed.

11. Moreover, deferring to the Maine District Court with respect to all issues involved in this civil action preserves judicial resources and promotes consistency and economy. *See* id. at 121 ("[A] purpose behind section 157(b)(5) is making it possible for a single forum to oversee the many claims and proceedings that might arise in or affect a bankruptcy case."). In cases involving transfer and remand motions, courts have held that the "transferee" court under section 157(b)(5) is the proper forum to decide the remand motion. *See* Whittingham, 2006 WL 2423104, at *1 ("Plaintiff has filed a Motion for Remand and Request for this Court to abstain. This issue needs to be considered as a part of the big picture. The District Court in Georgia [with

jurisdiction over the bankruptcy] should consider this issue."); *see also* Calumet National Bank, 179 B.R. at 123 (court stayed all proceedings while debtor-defendant pursued section 157(b)(5) motion and deferred ruling on pending motions because "whichever court ultimately takes the case should be the one that rules on the remaining argument"); *cf.* Jackson ex rel. Jackson v. Johnson & Johnson, Inc., 2001 WL 34048067, at *6 (W.D. Tenn. April 3, 2001) (holding that transferee court in multidistrict litigation is "a proper authority to decide the remand motion" and "[t]he general rule is for federal courts to defer ruling on pending motions to remand in [multidistrict litigation]" until after the case is transferred).

12. The Plaintiff has voluntarily dismissed MMA as a defendant in this case. *See* Notice of Voluntary Dismissal of Defendant, Montreal, Maine and Atlantic Railway, LTD. [D.E. 35]. Dismissal of MMA, however, does not alter the fact that this civil action is related to the Bankruptcy Case, and is also related to the companion Canadian Proceeding. "Related to" jurisdiction is broadly defined to include any civil action whose outcome "could conceivably have any effect on the estate being administered in bankruptcy." Celotex Corp. v. Edwards, 514 U.S. 300, 306 (1995). An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate." Id. The action "need not be against the debtor or the debtor's property to invoke 'related to' jurisdiction under Section 1334(b)[.]" Hopkins v. Plant Insulation Co., 342 B.R. 703, 710 (D. Del. 2006); *see also* Celotex Corp., 514 U.S. at 307, n.5 ("Proceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate."); In re Boston Regional Medical Center, Inc., 410 F.3d 100, 105 (1st Cir. 2005) ("related to" jurisdiction enables bankruptcy courts "to deal efficiently and effectively with the entire universe of matters

connected with bankruptcy estates."); In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991) (related proceedings must "potentially have some effect on the bankruptcy estate[.]").

13. Notwithstanding the dismissal of MMA from this civil action, the case still has numerous connections to the Bankruptcy Case and to the Canadian Proceeding. First, the Canadian Class Action purports to encompass all of the same parties, including many of the same defendants, as this civil action. There is a conflict between the law applicable and recovery available in this civil action and the Canadian Class Action. The resolution of this conflict will unquestionably have an effect on the Bankruptcy Case. This conflict must be resolved and section 157(b)(5) is the only way to resolve it. The merits of the Section 157(b)(5) Motion will be determined by the Maine District Court, but that court should also resolve this conflict. *See, e.g.,* In re Pan Am Corp., 16 F.3d 513, 517 (2nd Cir. 1994) ("[T]he plaintiffs are Scottish citizens and the law in question is British. Florida's only interest in the plaintiffs' cases is that two of the defendants were incorporated there. We can find no abuse of discretion by the district court in its decision to order a transfer of all the cases from Florida to the Southern District of New York, the site of the Pan Am bankruptcy proceeding.).

14. Second, the Plaintiff's conduct in the Bankruptcy Case supports that this civil action is "related to" the Bankruptcy Case. By filing (or joining) the Wrongful Death Committee Motion, the Plaintiff and other claimants acknowledge their intent to involve themselves in the Bankruptcy Case in a material way, and to submit to the Maine District Court's jurisdiction. The Wrongful Death Committee Motion asserts that:

> The prospect of being sued in the tort system, probably in many different lawsuits in multiple jurisdictions, cannot be comforting to the Debtor's affiliates and other parties that might share the Debtor's liability for claims arising from the Disaster. These constituencies will benefit by utilizing the orderly and efficient process, and the certainty of closure, that a consensual Chapter 11 plan can provide in the mass tort context, as a far superior

> alternative to the risk of being subject to uncertainty, duplication of effort, inconsistent results, indefinite duration and ever-burgeoning expense in the tort system. In sum, parties that potentially share liability for the Disaster should welcome the opportunity to deal with bodily injury claimants inside the Chapter 11 tent, rather than outside.

Wrongful Death Committee Motion, ¶ 6. Having the Maine District Court decide all of the procedural aspects of this civil action coincides with the purpose of centralizing adjudication of claims, which is the driving force behind 28 U.S.C. § 157(b)(5).

16. Third, defendant Edward Burkhardt, as a director of MMA Canada, is protected against this civil action by the stay in effect in the Canadian Proceeding. The stay in the Canadian Proceeding has extraterritorial effect on this civil action and any continuation of this civil action against Edward Burkhardt violates that stay.

17. Despite dismissing the MMA as a defendant, this civil action and the other related civil actions will undoubtedly alter the MMA's liabilities and impact the handling and administration of the estate. The claimants even concede as much since the Wrongful Death Committee Motion outlines the several ways in which personal injury tort and wrongful death claims could conceivably have an effect on the estate. For example, in the Wrongful Death Committee Motion, the claimants support their need for a committee because the "[w]rongful death and personal injury claimants will be by far the largest constituency in [the bankruptcy case]" and "[g]iven the horrific circumstances of the Disaster and the Debtor's role in it, wrongful death verdicts in the hundreds of millions of dollars can be expected." Id. at ¶ 2. The claimants also assert that "[c]onfirmation of a Chapter 11 plan will require support from the wrongful death and personal injury claimants" and that the claimants will provide "a negotiating partner in connection with the Chapter 11 plan and other aspects of [the bankruptcy case] – thus enhancing the likelihood of a successful outcome. Id. at ¶ 5. The claimants even allege that the

"wrongful death and personal injury claimants are almost certainly covered by insurance" and they have "claims against wrongdoers other than the Debtor, which may be affected by orders entered or a plan confirmed in [the Bankruptcy Case]. Id. at ¶ 8. Based on the above, this civil action will have an effect on the Bankruptcy Case and so the Maine District Court should decide all of the issues affecting the trial.

18. In addition, as a result of dismissing MMA from this civil action, the Plaintiff will be required to assert any claims against MMA by filing a proof of claim in the Bankruptcy Case and in the Canadian Proceeding. The filing of any such claims, with respect to MMA and/or MMA Canada, will submit the Plaintiff to the jurisdiction of the bankruptcy court.

B. The Trustee Should Be Granted Leave to Intervene Pursuant to Fed. R. Civ. P. 24(a)(2) and/or (b) For the Limited Purpose of seeking the relief described in this Motion.

19. As a technical matter, MMA is not a party to this civil action. However, the Trustee has standing to make this request to the Court under 28 U.S.C. § 157(b)(5). To the extent the Court disagrees, the Trustee should be granted leave to intervene for the limited purpose of making this request.

20. Federal Rule of Civil Procedure 24(a)(2) provides intervention where a movant:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In addition, Rule 24(b)(1) permits intervention for a party who:

> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b)(1)(A), and (B). The Trustee does not believe the dismissal of MMA as a defendant somehow precludes him from asking this Court to defer any rulings pending the

outcome of the Section 157(b)(5) Motion. However, to the extent necessary, the Trustee requests leave to intervene under Rules 24(a)(2) and/or (b) for the sole and limited purpose of asking the Court to defer rulings on abstention or remand pending the outcome of the Section 157(b)(5) Motion.

CONCLUSION

WHEREFORE, based on the foregoing, the Trustee requests that the Court enter an order (I) staying ruling on abstention or remand until the United States District for the District of Maine has ruled on the Section 157(b)(5) Motion; (II) granting leave to intervene for a limited purpose; and (III) granting such other further relief as may be appropriate.

Dated: September 23, 2013

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

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNICK ROY, as Special Administrator of the ESTATE OF JEAN-GUY VEILLEUX, Deceased,	)	
Plaintiff,	)	
vs.	)	
	)	**No. 1:13-cv-06192**
MONTREAL, MAINE and ATLANTIC RAILWAY, INC., RAIL WORLD, INC., EDWARD BURKHARDT, individually, WORLD FUEL SERVICES CORPORATION, WESTERN PETROLEUM COMPANY, PETROLEUM TRANSPORT SOLUTIONS, LLC, DAKOTA PLAINS TRANSLOADING, LLC, DAKOTA PETROLEUM TRANSPORT SOLUTIONS, LLC., DAKOTA PLAINS MARKETING, LLC., and DPTS MARKETING, LLC,	)	**Honorable Elaine E. Bucklo**
	)	**TRIAL BY JURY DEMANDED**
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND

The Plaintiff, Annick Roy, as Special Administrator of the Estate of Jean-Guy Veilleux, deceased, by and through her undersigned counsel, hereby submits the following memorandum of law in support of her motion to remand:

INTRODUCTION

Shortly after midnight on July 6, 2013, an unattended parked freight train hauling seventy-two tankers filled with crude oil rolled downhill seven and one-half miles before derailing in the

town of Lac-Mégantic, rupturing several of the tankers and resulting in an explosion and fire that killed forty-seven people, injured scores of others and turned the picturesque community into a scene from a war zone.

On July 22, 2013, Annick Roy, as Special Administrator of the Estate of Jean-Guy Veilleux, filed her Complaint against ten separate defendants seeking damages under Illinois Wrongful Death Statute (740 ILCS 180, *et seq.*) in the Circuit Court of Cook County as Case No. 2013-L-8534 (the "Wrongful Death Action"). On August 29, 2013, two of the defendants, Western Petroleum Company ("WPC") and Petroleum Transport Solutions, LLC ("PTS"),[1] filed their Joint Notice of Removal asserting federal jurisdiction based upon: (1) diversity of citizenship under 28 U.S.C. §1332; and, (2) Chapter 11 bankruptcy "related to" jurisdiction under 28 U.S.C. §1334(b).[2]

A review of the allegations in the Complaint and the applicable law reveals that neither statute invests this Court with jurisdiction. First, this case cannot be removed based upon diversity jurisdiction because two of the defendants are Illinois residents. Likewise, this case does not "relate to" the MMA bankruptcy in that MMA is not a party and the Plaintiff's claims against the independently-liable, non-debtor tortfeasors will not affect the size or distribution of MMA's bankruptcy estate. In any event, even if "related to" jurisdiction could be established, 28 U.S.C. §1334(c)(2) mandates that this Court abstain from exercising its concurrent jurisdiction over this state action. For these reasons, as more fully discussed below, Plaintiff's motion should be granted, and this case remanded back to the Plaintiff's chosen forum, the Circuit Court of Cook County, Illinois.

[1] WPC and PTS are also referred collectively in this Memorandum as "Removants"
[2] WPC and PTS made the identical jurisdictional arguments in another Lac-Mégantic wrongful death case, *Grimard v. Western Petroleum*, Case No. 13-cv-06197 which were rejected by Judge Shadur resulting in its remand on September 12, 2013.

ARGUMENT

A defendant may remove a civil action originally brought in state court to federal court only if the action is within the original jurisdiction of the federal district court. 28 U.S.C. § 1441. The procedures for removing a case to federal court are set forth in 28 U.S.C. §1446. The removal statute is construed strictly, and any doubts should be resolved in favor of remand to state court. *Doe v. Allied-Signal, Inc.,* 985 F.2d 908, 911 (7th Cir. 1993).

I. This Case is Not Removable Under Diversity Jurisdiction Because Two of the Defendants are Citizens of Illinois.

Removants argue that removal is proper because of diversity of citizenship under 28 U.S.C. §1332. 28 U.S.C. §1441(b) expressly provides, however, that removal based upon diversity of citizenship is improper "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." The 'forum defendant' rule developed because there is no reason to "presume bias" on the part of the local courts when there is an in-state defendant, and this is especially true where there is no in-state plaintiff. *Morris v. Nuzzo*, 718 F.3d 660, 668 (7th Cir. 2013).

Defendants RailWorld and Burkhardt are Illinois citizens, and thus this case cannot be removed based upon diversity of citizenship. Removants acknowledge that RailWorld and Burkhardt are Illinois citizens, but proclaim without any explanation that these defendants "…shall not be considered for purposes of determining diversity jurisdiction, as these are fraudulently joined defendants."[3] Removants are wrong.

A defendant seeking removal based on alleged fraudulent joinder has the "heavy burden" of proving that, after the court resolves all issues of law and fact in the plaintiff's favor, there is no possibility that the plaintiff can establish a cause of action against the diversity-defeating defendant

[3] See Par. 20 on p. 6 Notice of Removal.

in state court. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992). Any doubts regarding removal are resolved in favor of the plaintiff's choice of forum in state court. *Boyd v. Phoenix Funding Corp.*, 366 F.3d 524, 529 (7th Cir.2004).

The allegations in the Complaint clearly establish a cause of action against RailWorld and Burkhardt due to their direct participation in management decisions that forced MMA to adopt negligent operational procedures that contributed to the tragedy at Lac- Mégantic. (See Complaint ¶¶ 50-85; 87-95). As the Illinois Supreme Court explained in *Forsythe v. Clark USA, Inc.* 224 Ill.2d 274, 290 (2007):

> …*direct participant liability is a valid theory of recovery under Illinois law*. Where there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy *and* carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability. [emphasis added]

Illinois not only recognizes direct participant liability to hold a controlling parent corporation liable for injuries caused by the operations of a subsidiary, but also as the mechanism to hold an officer, director or owner of a corporation personally liable for torts in which they directly participate. *McDonald v. Frontier Lanes, Inc.* 1 Ill.App.3d 345, 357-8 (1st Dist., 1971). Personal liability for the direct participation of corporate officers and directors was confirmed in *Zahl v. Krupa*, 399 Ill.App.3d 993, 1014 (2nd Dist., 2010) which includes a discussion of Illinois case law which hold that corporate officials can be personally liable for ordering, and therefore participating in, negligent or intentional tortious conduct.

Because the Complaint properly alleges claims for direct participant liability against RailWorld and Burkhardt, Removants have not and cannot meet their heavy burden to establish fraudulent joinder. As no evidence, let alone compelling evidence, has been presented that the

forum defendants were fraudulently joined, WPC's and PTS' removal based on original subject matter jurisdiction under §1332 is a patent violation of §1441(b)(2).

II. This Court Does Not Have Jurisdiction Under Bankruptcy Law.

A. This Case is Not "Related to" the MMA Bankruptcy Under the Appropriate Test.

Removants also argue that this Court has original jurisdiction under 28 U.S.C. §1334(b), which allows federal jurisdiction for any "civil proceedings arising under title 11, or arising in or related to cases under title 11." Although MMA was originally named as a defendant, Plaintiff voluntarily dismissed MMA as a defendant pursuant to F.R.C.P. 41(a)(1)(A)(1).

Despite the absence of the debtor as a party, Removants contend that they can establish "related to" federal jurisdiction under §1334(b) simply by alleging that a judgment obtained by Plaintiff against non-debtor tortfeasors may affect the amount of property in the bankruptcy estate.[4] To support its expansive view of the scope of "related to" bankruptcy jurisdiction, Removants cite *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), stating that: "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." (quoting *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984))".[5]

Respondents misstate the law, as the Seventh Circuit has expressly rejected the sweeping test articulated in *Pacor* in favor of a "more limited" and "more helpful definition of the bankruptcy court's 'related-to' jurisdiction". *In re Matter of Fedpak Systems, Inc.*, 80 F.3d 207, 213 (1995).

[4] See par. 8 on p. 3 Notice of Removal.

[5] See par. 8 on p. 3-4 Notice of Removal.

Under the Seventh Circuit test, "a case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution [i.e., the debtor's estate] or the allocation of property among creditors." *Id.* at 213-214.

As the Seventh Circuit explained, "related to" jurisdiction is interpreted narrowly "to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts." *Id.* at 214. Additionally, "common sense cautions against an open-ended interpretation of the "related to" statutory language 'in a universe where everything is related to everything else.'" *Id.*

In *FedPak*, the Seventh Circuit held that the bankruptcy court did not have jurisdiction to later interpret its own order when resolution of the dispute would not affect the amount of assets available for distribution to creditors of the estate. *Id* at 214. The Court reached this conclusion even though it recognized that one of the litigants, who had purchased assets from the debtors' estate, might sue to rescind the purchase of assets from the debtor. *Id* at 212.

Applying the proper test, it is clear that this case is not "related to" the bankruptcy of MMA. The Complaint states claims against the defendants for their own negligence, and does not seek to recover any damages against MMA. Resolution of this Wrongful Death Action does not have any financial impact on the bankruptcy estate or the apportionment of the estate amongst MMA's creditors, and thus is not "related to" the bankruptcy proceedings. *See generally Home Insurance Co. v. Cooper & Cooper*, 889 F.2d 746 (7th Cir. 1989) (Declaratory action regarding availability of insurance coverage not "related to" bankruptcy because the action did not have a financial impact on the bankruptcy estate, even though there was a "nexus" between the action and the bankruptcy, and it would have been convenient to resolve all questions concerning the policy in

the bankruptcy court). *See also In the Matter of Xonics*, 813 F.2d 127, 131 (7th Cir. 1987) (Dispute among creditors does not "relate to" bankruptcy estate.)

No Seventh Circuit decision has adopted the expansive scope of §1334(b) jurisdiction under *Pacor* demanded by Removants. The Seventh Circuit cases cited by Removants do not support their position, and do not apply the *Pacor* test. To the contrary, these decisions refuse to read the term "related to" broadly, but rather limit its applicability to situations where the debtors's property is directly affected by the lawsuit. *See Zerand Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161-162 (7th Cir. 1994) ("The reference to cases related to bankruptcy cases is primarily intended to encompass tort, contract and other legal claims by and against the debtor…").

Removants provide a quote from *In re Teknek*, 563 F. 3d 639, 649 (7th Cir. 2009) for their proposition that removal is appropriate where a defendant's liability is dependent upon the party's conduct "with respect to the corporate debtor."[6] This is a complete distortion of the holding in *Teknek* accomplished by truncating the relevant sentence and omitting its context:

> The case *sub judice*, however, is distinct from both *Koch* and *Fisher*. ***In both of those cases, the creditors' claims against the non-debtor fiduciaries depended on the non-debtor's misconduct with respect to the corporate debtor.*** In *Koch*, the oil companies sought to hold the member-owners liable based on their alleged breach of fiduciary duties to the debtor, and in *Fisher*, the creditor-investors' fraud claims were based on the accomplices' looting of the debtor corporation in which the plaintiffs had invested. In this regard, general claims and claims that are "related to" the bankruptcy seemingly always involve transfers *from the debtor* to a non-debtor control person or entity. *Id* at 649. [emphasis added to highlight truncation].

Far from supporting Removants' position, *Teknek* confirms that this Wrongful Death Action does not meet the "related to" threshold established by the Seventh Circuit. Simply put, Plaintiff's direct claims against the Co-Defendants are in no way dependent upon the Co-Defendants misconduct with respect to the bankrupt MMA; but rather, are wholly dependent upon Co-

[6] Paragraph 8 on page 4 Notice of Removal.

Defendants misconduct with respect to the Plaintiff. Accordingly, under the *Teknek* analysis, the Complaint is not related to MMA's bankruptcy, and this Court lacks jurisdiction under §1334.

B. Removal is Not Proper Under the *Pacor* Test.

Even if the more expansive *Pacor* test were to be adopted in the Seventh Circuit, the matter at hand would fall well short of the §1334(b) "related to" threshold. In *Pacor*, the plaintiff brought a product liability action in Pennsylvania for work related exposure to asbestos distributed by Pacor, and Pacor filed a third party complaint impleading Johns-Manville, the original manufacturer of the asbestos. After Manville filed for bankruptcy, Pacor sought to remove the case to federal bankruptcy court. Applying its broad 'conceivably could have any effect on the estate' test, the Third Circuit nevertheless held that removal was not proper and remanded. The Court found that the personal injury case would have no effect on the bankruptcy estate, and at best was a "mere precursor to the potential third party claim for indemnification by Pacor against Manville." 743 F.2d at 995. The Court recognized that the outcome of the Pacor action would in no way bind the bankruptcy estate, in that it could not determine any rights, liabilities or course of action of the debtor. *Id.* Furthermore, since the bankrupt was not a party to the Pacor action, the Court noted that it could not be bound by *res judicata* or collateral estoppel. *Id.* Finally, even if the plaintiff prevailed in its claim against Pacor, Manville would still be able to relitigate any issue or adopt any position in response to a claim brought by Pacor. *Id.* "Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried." *Id.*

In re Federal-Mogul Global, Inc., 282 B.R. 301, 303-4 (Bkrtcy.D.Del., 2002) also applied the *Pacor Test* in the context of asbestos product liability lawsuits brought against numerous co-

defendants. After one of the co-defendants filed for bankruptcy, the plaintiffs in many of the state suits immediately began severing or dismissing the claims against the debtor-defendant to permit their cases against the solvent parties to go forward. This aim was thwarted, however, by a massive campaign by the solvent defendants of removing claims on the theory that these claims were related to the pending bankruptcy. In response, as in the matter at hand, the solvent co-defendants removed the actions asserting that their common law contribution and indemnity claims against the bankrupt satisfied §1334(b) "related to" jurisdiction under the *Pacor Test.*

Noting that the *Pacor Court* remanded a similar asbestos product liability suit, the *Federal-Mogul Court* cautioned that "a valid statement of principle does not necessarily produce a usable rule, and whether a controversy 'could have any effect on the estate' will not always be self-evident." *Id* at 306. In remanding all of the cases back to state court, the Court explained the limited scope of federal jurisdiction under §1334(b), even under the *Pacor Test*:

> The narrow holding of *Pacor* was that a mere common-law indemnity claim by a non-debtor co-defendant of a debtor will not "alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)" in a way that "impacts upon the handling and administration of the bankruptcy estate." *Id.* at 994. That common facts would be litigated against the co-defendant did not matter, because no resolution of a factual issue would be binding on the debtor's estate. The potential for a judgment against the debtor posed by the existence of a suit against the non-debtor was not only contingent (the non-debtor defendant might prevail) but it was indirect—any material effect on the estate would require yet another lawsuit. *Id.* at 995.

Similarly, Plaintiff's claims against the defendants here have absolutely no effect on the bankrupt MMA, which is no longer a party to this lawsuit. A successful verdict against any or all of the defendants will not cost MMA one cent, or otherwise have any effect on the bankruptcy estate. While defendants may in the future choose to file contribution or indemnification claims against MMA, the *Pacor Court* made clear that this does not entitle a defendant to removal of the

state law claims. 743 F.2d at 995. Thus, even under the *Pacor Test*, the Complaint is not "related to" the MMA bankruptcy for purposes of jurisdiction under §1334(b), and the case must be remanded.

III. ABSTENTION PRINCIPLES REQUIRE REMAND.

A. Even If "related to" Jurisdiction Could Be Established, §1334(c)(2) Mandates Remand.

Even if Removants could establish "related to" federal subject matter jurisdiction under §1334(b), under 28 U.S.C. §1334(c)(2), a federal court must abstain from exercising its concurrent jurisdiction where: (1) the state law claim is a noncore proceeding; (2) there is no independent basis for federal jurisdiction other than the bankruptcy proceeding; (3) plaintiff has commenced the action in state court; and (4) the state court can timely adjudicate the matter. *Official Comm. Of Unsecured Creditors of Wickes, Inc. V. Wilson*, 2006 WL 1457786 at *2.

In *Foushee v. Griffin*, 494 F.Supp.2d 898, 899 (N.D. Ill. 2007), the plaintiff, injured in a collision, sued the truck driver and his employer. After the employer company filed for bankruptcy, defendants removed the case to federal court. Despite the bankrupt's continued role as a party in the case, the Court remanded the matter back to state court based on mandatory abstention under §1334(c)(2).

Like *Foushee*, remand is required in this case under §1334(c)(2) because all four criteria for mandatory abstention are satisfied. As in *Foushee*, the Plaintiff at bar has already commenced a state court action involving claims which do not invoke any substantive right created by federal bankruptcy law, nor does the Notice of Removal reveal any legitimate basis for federal jurisdiction other than MMA's bankruptcy proceeding. *Id* at 899, *see also Reeves v. Pfizer, Inc.* 880 F.Supp.2d

926 (S.D. Ill. 2012) (Remand of product liability case mandated by §1334(c)(2)). Accordingly, §1334(c)(2) mandates that the case be remanded to the Circuit Court of Cook County.

B. Even If "related to" Jurisdiction Could Be Established, Equitable Remand Is Warranted under §1334(c)(1).

Finally, even if this case does not qualify for mandatory abstention, this court may still remand the action on any equitable ground pursuant to 28 U.S.C. §1334(c)(1). The Seventh Circuit has set forth twelve factors for a court to consider in evaluating permissive 'equitable abstention': (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state-law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 6 F.3d 1184, 1189 (7th Cir., 1993).

In *Klohr v. Martin & Bayley, Inc*, 2006 WL 1207141 *5-6 (S.D. Ill., May 4, 2006), a product liability suit where the plaintiff filed for bankruptcy, although the Court found that the 'timeliness' factor to establish mandatory abstention was not met, it nonetheless remanded the suit based on equitable abstention, reasoning:

> The Seventh Circuit Court of Appeals has warned that "[t]he use of the Bankruptcy Code to obtain a favorable forum should not be encouraged." *United States Brass Corp.*, 110 F.3d at 1265; *see also Borgini*, 2005 WL 2205714, at *3 ("[T]he removal of the state court action to this Court unquestionably represents 'forum shopping[.]' There are no bankruptcy law issues presented in the matter; there is no independent basis for federal jurisdiction, and, as a personal injury case with a jury demand, this Court must refer the matter for trial to the District Court."). As a last matter, the Court concludes that considerations of comity obviously favor remand of a case that was filed in state court and arises entirely under state law. *[citation omitted]*. Also, in the Court's view, it is prejudicial to Plaintiffs to be required to litigate their claims in a court that they did not select.

"Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative." *Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189; *see also In re Borgini*, 2005 WL 2205714, at *2 (Bankr.C.D.Ill. Aug. 25, 2005).

In *Fuller v A.W. Chesterton, Inc*., 2009 WL 2855368, *3 (S.D.Ill., 2009), the plaintiff filed a product liability case for asbestos exposure against several defendants, including a bankrupt party. The Court, *sua sponte*, remanded the case pursuant to §1334(c)(1), reasoning:

> In view of the fact that state-law issues predominate overwhelmingly over bankruptcy issues in this case, and giving effect both to Ms. Fuller's choice of forum and the Court's policy of permitting state courts to resolve matters of state law, this case will be remanded to state court under principles of permissive abstention and equitable remand.

In the matter at hand, the Plaintiff, as is her right, chose an Illinois court for redress alleging that the remaining Defendants are directly liable for their negligent conduct that led to the Lac-Mégantic disaster. In what can only be characterized as blatant forum shopping, Removants now attempt to exploit the bankruptcy of an unrelated tortfeasor as a mechanism to deprive Plaintiff of her chosen forum. This conduct cannot be countenanced and warrants equitable remand in any event under §1334(c)(1).

CONCLUSION

No reasonable basis for federal subject matter jurisdiction is set forth in the Notice of Removal, and therefore, this Court must remand this action, and may, under 28 U.S.C. §1447(c) order Removants to reimburse Plaintiff's costs and expenses, including attorney fees, incurred as a result of the improper removal of this action from state court. In any event, should the Court find that there was in fact a basis for the removal of this action under 28 U.S.C. §1334(b), this Court must or should abstain from exercising this Court's concurrent jurisdiction and remand pursuant to 28 U.S.C. §1334(c)(2) or 28 U.S.C. §1334(c)(1).

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order:

A. That remands this case back to the Circuit Court of Cook County, Illinois; and

B. That awards Plaintiff reasonable attorney's fees and costs incurred in conjunction with prosecuting the remand of this case.

DATED: September 18, 2013.

Respectfully submitted,

MEYERS & FLOWERS

/ s / Peter J. Flowers

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