

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**TRUSTEE'S CONSOLIDATED RESPONSE TO CLASS ACTION PLAINTIFFS'
MOTION TO ESTABLISH CLAIMS PROCEDURES AND OBJECTION
TO AMENDED BAR DATE MOTION**

Robert J. Keach, the chapter 11 trustee (the "Trustee") appointed in the above-captioned chapter 11 case of Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor"), files this consolidated response to the *Class Action Plaintiffs' Motion to Establish Claims Procedures* [D.E. 625] (the "Class Claims Motion") and the *Objection to Amended Motion of Chapter 11 Trustee for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 502(b)(9), Fed. R. Bankr. P. 3002 and 3003(c)(3), and D. Me. LBR 3003-1 Establishing Deadline for Filing Proofs of Claim and Procedures Relating Thereto and Approving Form and Manner of Notice Thereof* [D.E. 624] (the "Objection") filed by Yannick Gagné, Guy Ouellet, Serge Jacques and Louis-Serges Parent (collectively, the "Class Action Plaintiffs").

1. The Class Action Plaintiffs object to the claims bar date procedures set forth in the *Amended Motion of Chapter 11 Trustee for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 502(b)(9), Fed. R. Bankr. P. 3002 and 3003(c)(3), and D. Me. LBR 3003-1 Establishing Deadline for Filing Proofs of Claim and Procedures Relating Thereto and Approving Form and Manner of Notice Thereof* [D.E. 596] (the "Amended Bar Date Motion") filed by the Trustee and the corresponding *Motion for an Order Approving a Process to Solicit*

Claims and for the Establishment of a Claims Bar Date (the “Canadian Bar Date Motion”) filed by the monitor (the “Monitor”) appointed in the CCAA proceeding (the “Canadian Case”) of Montreal Maine & Atlantic Canada, Co. (“MMA Canada”). The Objection is premised on the Class Action Plaintiffs’ arguments that the bar date and claims process proposed by the Trustee and the Monitor would: (i) bar the filing of class proofs of claim; (ii) violate due process because only the claim forms issued in the Canadian Case, and not the claim forms and publication notices issued by the Trustee, will be published in French and English; and (iii) not provide claimants with sufficient time to file proofs of claim. As discussed below, these arguments are without merit. The Class Claims Motion should be denied, and the Objection overruled.

A. The Class Claims Motion Must Be Decided in Conjunction with the Cross-Motion Filed with the Canadian Court.

2. In response to the Canadian Bar Date Motion, the Class Action Plaintiffs filed a plan of argument and cross-motion (the “Cross-Motion”) with the Québec Superior Court (the “Canadian Court”) seeking, among other things, authority to file “class-wide representative claims.” Class Claims Motion, Exh. B, p. 14. The hearing on the Canadian Bar Date Motion and the Cross-Motion has been continued to February 26, 2014.

3. Although the Class Claims Motion does not directly seek authority to file a class proof of claim in this case, the motion does seek to replace the process jointly proposed by the Trustee and the Monitor with the Class Action Plaintiffs’ own bar date and claims process, which includes the ability to file a class claim in the Canadian Case. Accordingly, because the relief sought in the Class Claims Motion is intertwined with, and contingent upon, the relief sought in the Cross-Motion, any hearing on and decision with respect to the Class Claims Motion must be coordinated with the Canadian Court and cannot occur prior to the Canadian Court’s ruling on

the Cross-Motion. The Class Action Plaintiffs' request that this Court hold a hearing on the Class Claims Motion on February 11, 2014 is, therefore, inappropriate and premature.

B. The Class Claims Motion Should be Denied in Any Event Because the Class Action Plaintiffs Have Not Sought Class Certification under Rule 23 and Cannot Meet the Requirements of Rule 23.

4. Although the Class Action Plaintiffs argue that the filing of class claims is permitted in bankruptcy cases, this argument fails to acknowledge the high burden, and procedural requirements, that must be met in order for the filing of class claims to be permissible. In fact, the Bankruptcy Code is silent on the extent to which class claims may be filed on behalf of individual claimants. Bankruptcy Rule 7023 makes Rule 23 of the Federal Rules of Civil Procedure (the "Civil Rules"), which governs class certification, applicable to adversary proceedings. *See* Fed. R. Bankr. P. 7023. However, the claims allowance process is a "contested matter" under Bankruptcy Rule 9014, and Bankruptcy Rule 9014 does not expressly apply Bankruptcy Rule 7023 to contested matters. *See* Fed. R. Bankr. P. 9014(c) (indicating which of the rules under Part VII of the Bankruptcy Code apply to contested matters). Claimants seeking class certification must instead request application of Bankruptcy Rule 7023 to a contested matter pursuant to that provision of Bankruptcy Rule 9014(c) stating that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." *Id.*¹

5. Accordingly, "while class proofs of claim in bankruptcy are not prohibited, the right to file one is not absolute." In re Motors Liquidation Co., 447 B.R. 150, 156-57 (Bankr. S.D.N.Y. 2011). Whether Bankruptcy Rule 7023 will apply to permit the filing of class proofs

¹ Notwithstanding the fact that Bankruptcy Rule 9014(c) applies to contested matters, objection to a class proof of claim is not a "necessary prerequisite" to filing a motion seeking class certification. *See In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 7 (S.D.N.Y. 2005). Indeed, claimants seeking class certification may file a motion seeking application of Bankruptcy Rule 7023 as soon as the chapter 11 petition is filed. *Id.*

of claim is solely within the bankruptcy court's discretion. *See id.* at 157; Gentry v. Circuit City Stores, Inc. (In re Circuit City Stores, Inc.), 439 B.R. 652, 658 n.6 (E.D. Va. 2010); In re Bally Total Fitness of Greater N.Y., 402 B.R. 616, 619 (Bankr. S.D.N.Y. 2009); In re Ephedra Prods. Liab. Litig., 329 B.R. 1, 4 (S.D.N.Y. 2005); In re Craft, 321 B.R. 189, 198 (Bankr. N.D. Tex. 2005); In re Lear Corp., 2012 WL 443951, *9, n.11 (Bankr. S.D.N.Y. Feb. 10, 2012).

6. When determining whether to exercise their discretion to apply Bankruptcy Rule 7023, courts consider the following factors:

- a) Whether the class claimant moved to extend the application of Bankruptcy Rule 7023 to its proof of claim;
- b) Whether the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy; and
- c) Whether the claims which the proponent seeks to certify fulfill the requirements of Bankruptcy Rule 7023.

See Bally Total Fitness, 402 B.R. at 620; *see also Motors Liquidation*, 447 B.R. at 157. Bankruptcy courts may decline to apply Bankruptcy Rule 7023 if doing so would “gum up the works” or otherwise delay administration of the bankruptcy case. *See Ephedra Prods.*, 329 B.R. at 5. Bankruptcy courts may also consider whether the class was certified prior to the petition date, and whether the members of the putative class received notice of the bar date. *See Teta v. Chow (In the Matter of TWL Corp.)*, 712 F.3d 886, 893 (5th Cir. 2013).

7. Assuming, however, that the court determines to exercise its discretion and apply Bankruptcy Rule 7023, the movants must then establish that class certification would be consistent with the goals of bankruptcy and that they have met the requirements of Bankruptcy Rule 7023. A request for class certification must fail if any one of the requirements of Bankruptcy Rule 7023 is not met. *See TWL Corp.*, 712 F.3d at 894.

8. Bankruptcy Rule 7023, which incorporates Civil Rule 23, provides that:

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- 1) The class is so numerous that joinder of all members is impracticable;
- 2) There are questions of law or fact common to the class;
- 3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- 4) The representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained **if Rule 23(a) is satisfied and** if:

- 1) Prosecuting separate actions by or against individual class members would create a risk of:
 - A. Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - B. Adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
- 2) The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- 3) The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - A. The class members' interests in individually controlling the prosecution or defense of separate actions;
 - B. The extent and nature of any litigation concerning the controversy already begun by or against class members;
 - C. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - D. The likely difficulties in managing a class action.

Fed. R. Bankr. P. 7023 (emphasis added).

9. In this case, assuming that the Class Action Plaintiffs have met the prerequisites enumerated in Bankruptcy Rule 7023(a), the only conceivable basis on which class certification could be granted is under Bankruptcy Rule 7023(b)(3). Subsection (b)(3) requires consideration of two separate requirements: (1) the predominance of common issues; and (2) the superiority of class action treatment. Fed. R. Bankr. P. 7023(b)(3); *see also* Motors Liquidation, 447 B.R. at 158.

10. The “predominance of common issues” prong is not satisfied, and class certification is not appropriate, “[w]hen resolution of class questions will still require case-by-case analysis of facts with respect to each member of the class,” such as in cases involving tort claims. Motors Liquidation, 447 B.R. at 159-60 (noting that “[c]ivil actions involving mass torts are often not certified for class action treatment . . . because so many individualized legal and individualized damages inquiries are ultimately required.”); *see also* In re W.R. Grace & Co., 398 B.R. 368, 381 (D. Del. 2008) (denying class certification where “[m]any of the issues raised were specific to a finite number of claims and did not lend themselves to resolution as a class as these matters could be better addressed on a ‘claimant-by-claimant’ basis or as part of smaller groups of similarly situated claimants.”); In re Worldcom, Inc., 343 B.R. 412, 429 (Bankr. S.D.N.Y. 2006) (finding that individual issues predominated where issue of each class member’s reliance on allegedly fraudulent statements would have to be individually determined).

11. Additionally, courts often decline to find class action treatment to be superior to the claims adjudication process already in place in bankruptcy cases, given the simplicity and efficiency afforded by the bankruptcy process. *See* Motors Liquidation, 447 B.R. at 163; In re Blockbuster, Inc., 441 B.R. 239, 241 (Bankr. S.D.N.Y. 2011); Bally Total Fitness, 402 B.R. at

622 (stating that “‘superiority’ has no place in bankruptcy.”); Worldcom, 343 B.R. 412, 429 (Bankr. S.D.N.Y. 2006) (same). As explained in Blockbuster,

Courts agree that . . . “superiority of the class action vanishes when the ‘other available method’ is bankruptcy, which consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost. In efficiency, bankruptcy is superior to a class action because in practice small claims are often ‘deemed allowed’ under § 502(a) for want of objection, in which case discovery and fact-finding are avoided altogether.”

Blockbuster, 441 B.R. at 241 (quoting Ephedra Prods., 329 B.R. at 9).

13. In this case, it would be inappropriate to permit to be filed a class claim encompassing all of the various types of claims held by all of the types of victims of the derailment, including wrongful death, personal injury, property damage, environmental damage, emotional injury, business interruption and other claims. Additionally, the Class Action Plaintiffs are unable (and, indeed, have not even attempted) to establish that the class claims process is superior to the already-streamlined and efficient claims adjudication process in place in bankruptcy cases.

14. Further, a decision regarding whether the Class Action Plaintiffs may file a class proof of claim cannot occur until after the parties have been permitted to take discovery and this Court has held an evidentiary hearing. Such a hearing cannot take place on one day’s notice, with no opportunity to take discovery and after a summary hearing.

C. The Other Arguments Set Forth in the Class Claims Motion Are Without Merit.

15. The other arguments of the Class Action Plaintiffs are simply and wholly without merit. The Class Action Plaintiffs argue that the Trustee’s bar date and claims process violates due process because the Trustee does not propose publishing bar date and other notices in both French and English. However, the bar date and claims process proposed by the Trustee was

coordinated with the bar date and claims process proposed by the Monitor. As acknowledged by the Class Action Plaintiffs, the claim form to be issued by the Monitor will be issued in both French and English, and will contain detailed information regarding the bar date and claims process. There is no need to have the Trustee duplicate the work of the Monitor by also issuing claims forms and notices in French and English, given that the Trustee and the Monitor have carefully coordinated the bar date and claims process in a way that comports with due process in an efficient and streamlined manner.

16. Additionally, the Class Action Plaintiffs object to the Amended Bar Date Motion on the basis that it fails to provide potential claimants with sufficient time to file claims. Interestingly, however, the Class Action Plaintiffs suggest remedying this alleged defect by moving the bar date sooner, from May 31, 2014 (as proposed by the Trustee and the Monitor) to April 30, 2014, thereby providing potential claimants with even less notice.

17. In summary, the Class Action Plaintiffs seek to replace the carefully negotiated and coordinated bar date and claims process proposed by the Trustee and the Monitor with a hastily assembled claims process that would permit the Class Action Plaintiffs to file class claims in spite of the requirements of Rule 23, and without regard to the Canadian Court's approval or denial of the Cross-Motion. The Trustee submits that the Class Claims Motion should be denied, and the Objection overruled.

Dated: February 10, 2014

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

By his attorneys:

/s/ Michael Fagone

Michael A. Fagone, Esq.

D. Sam Anderson, Esq.

BERNSTEIN, SHUR, SAWYER & NELSON, P.A.

100 Middle Street

P.O. Box 9729

Portland, ME 04104

Telephone: (207) 774-1200

Facsimile: (207) 774-1127

E-mail: mfagone@bernsteinshur.com

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MONTREAL MAINE & ATLANTIC
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Chapter 11

CERTIFICATE OF SERVICE

I, Angela L. Stewart, being over the age of eighteen and an employee of Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that, on February 10, 2014, I filed the following documents via the Court's CM/ECF electronic filing system:

- Trustee's Consolidated Response to Class Action Plaintiffs' Motion to Establish Claims Procedures and Objection to Amended Bar Date Motion [D.E. 632]; and
- Trustee's Objection to Motion for Emergency Hearing and to Limit Notice [D.E. 633].

A list of the parties who were served with the above referenced documents via CM/ECF are identified on the attached Service List.

Dated: February 10, 2014

/s/ Angela L. Stewart
Angela L. Stewart, Paralegal

BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029
(207) 774-1200

SERVICE LIST

Served via CM/ECF:

D. Sam Anderson, Esq. on behalf of Attorney Bernstein, Shur, Sawyer & Nelson

sanderson@bernsteinshur.com,

acummings@bernsteinshur.com;sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com

D. Sam Anderson, Esq. on behalf of Trustee Robert J. Keach

sanderson@bernsteinshur.com,

acummings@bernsteinshur.com;sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com

Aaron P. Burns on behalf of Interested Party New England Independent Transmission Company, LLC

aburns@pearcedow.com, rpearce@pearcedow.com,lsmith@pearcedow.com

Richard Paul Campbell on behalf of Creditor Progress Rail Services Corporation

rpcampbell@campbell-trial-lawyers.com, mmichitson@campbell-trial-lawyers.com

Roger A. Clement, Jr., Esq. on behalf of Attorney Verrill Dana LLP

rclement@verrilldana.com, nhull@verrilldana.com;bankr@verrilldana.com

Roger A. Clement, Jr., Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.

rclement@verrilldana.com, nhull@verrilldana.com;bankr@verrilldana.com

Roger A. Clement, Jr., Esq. on behalf of Trustee Robert J. Keach

rclement@verrilldana.com, nhull@verrilldana.com;bankr@verrilldana.com

Daniel C. Cohn, Esq. on behalf of Creditor Estates of Marie Alliance, et al

dcohn@murthalaw.com, njoyce@murthalaw.com

Maire Bridin Corcoran Ragozzine, Esq. on behalf of Defendant Robert J. Keach, in his capacity as Chapter 11 Trustee of Maine Montreal and Atlantic Railway, Ltd.

mcorcoran@bernsteinshur.com,

sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com;acummings@bernsteinshur.com;kfox@bernsteinshur.com;kquirk@bernsteinshur.com

Maire Bridin Corcoran Ragozzine, Esq. on behalf of Trustee Robert J. Keach

mcorcoran@bernsteinshur.com,

sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com;acummings@bernsteinshur.com;kfox@bernsteinshur.com;kquirk@bernsteinshur.com

Keith J. Cunningham, Esq. on behalf of Creditor Eastern Maine Railway Company

kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Keith J. Cunningham, Esq. on behalf of Creditor Maine Northern Railway Company
kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Keith J. Cunningham, Esq. on behalf of Creditor New Brunswick Southern Railway Company
kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Debra A. Dandeneau on behalf of Creditor CIT Group, Inc.
, arvin.maskin@weil.com

Joshua R. Dow, Esq. on behalf of Creditor Canadian Pacific Railway
jdow@pearcedow.com, rpearce@pearcedow.com; smith@pearcedow.com

Joshua R. Dow, Esq. on behalf of Creditor Canadian Pacific Railway Co.
jdow@pearcedow.com, rpearce@pearcedow.com; smith@pearcedow.com

Michael A. Fagone, Esq. on behalf of Attorney Bernstein, Shur, Sawyer & Nelson
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Defendant Robert J. Keach, in his capacity as Chapter 11 Trustee of Maine Montreal and Atlantic Railway, Ltd.
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Plaintiff Robert J. Keach
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Trustee Robert J. Keach
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Daniel R. Felkel, Esq. on behalf of Creditor Dakota Plains Transloading, LLC, Dakota Petroleum Transport Solutions LLC, Dakota Plains Marketing LLC
dfelkel@troubhheisler.com

Jeremy R. Fischer on behalf of Interested Party Indian Harbor Insurance Company
jfischer@dwmlaw.com, aprince@dwmlaw.com

Jeremy R. Fischer on behalf of Interested Party Railroad Acquisition Holdings LLC
jfischer@dwmlaw.com, aprince@dwmlaw.com

Jeremy R. Fischer on behalf of Interested Party XL Insurance Company, Ltd.
jfischer@dwmlaw.com, aprince@dwmlaw.com

Isaiah A. Fishman on behalf of Creditor C. K. Industries, Inc.
ifishman@krasnowsaunders.com, ryant@krasnowsaunders.com; cvalente@krasnowsaunders.com

Peter J. Flowers on behalf of Creditor Estates of Stephanie Bolduc
pjf@meyers-flowers.com

Christopher Fong, Esq. on behalf of Creditor Informal Committee of Quebec Claimants
christopherfong@paulhastings.com

Christopher Fong, Esq. on behalf of Creditor Official Committee of Victims
christopherfong@paulhastings.com

Taruna Garg, Esq. on behalf of Creditor Estates of Marie Alliance, et al
tgarg@murthalaw.com, cball@murthalaw.com; kpatten@murthalaw.com

Jay S. Geller on behalf of Creditor Western Petroleum Corporation
jgeller@maine.rr.com

Craig Goldblatt on behalf of Interested Party XL Insurance Company, Ltd.
craig.goldblatt@wilmerhale.com

Frank J. Guadagnino on behalf of Creditor Maine Department of Transportation
fguadagnino@clarkhillthorpreed.com

Michael F. Hahn, Esq. on behalf of Creditor Bangor Savings Bank
mhahn@eatonpeabody.com,
clavertu@eatonpeabody.com; dcroizier@eatonpeabody.com; jmiller@eatonpeabody.com; dgerry@eatonpeabody.com

Andrew Helman, Esq. on behalf of Creditor Wheeling & Lake Erie Railway Company

ahelman@mcm-law.com, bankruptcy@mcm-law.com

Andrew Helman, Esq. on behalf of Plaintiff Wheeling & Lake Erie Railway Company
ahelman@mcm-law.com, bankruptcy@mcm-law.com

Paul Joseph Hemming on behalf of Creditor Canadian Pacific Railway Co.
pheemming@briggs.com, pkringen@briggs.com

Seth S. Holbrook on behalf of Creditor Atlantic Specialty Insurance Company
holbrook_murphy@msn.com

Nathaniel R. Hull, Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.
nhull@verrilldana.com, bankr@verrilldana.com

David C. Johnson on behalf of Creditor Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com, djohnson@mcm-law.com

David C. Johnson on behalf of Plaintiff Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com, djohnson@mcm-law.com

Jordan M. Kaplan, Esq. on behalf of Creditor Brotherhood of Locomotive Engineers and Trainmen
jkaplan@zwerdling.com, mwolly@zwerdling.com

Robert J. Keach, Esq. on behalf of Trustee Robert J. Keach
rkeach@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; kquirk@bernsteinshur.com

Curtis E. Kimball, Esq. on behalf of Creditor Center Beam Flat Car Company, Inc.
ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Curtis E. Kimball, Esq. on behalf of Creditor First Union Rail
ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Curtis E. Kimball, Esq. on behalf of Creditor J. M. Huber Corporation
ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Thomas Addison Knowlton, Esq. on behalf of Creditor Maine Revenue Services
Thomas.a.knowlton@maine.gov

Andrew J. Kull, Esq. on behalf of Creditor Estate of Jefferson Troester
akull@mittelassen.com, ktrogner@mittelassen.com

George W. Kurr, Jr. on behalf of Creditor Estates of David Lacroix Beaudoin

gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Estates of Marie Alliance, et al
gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Estates of Stephanie Bolduc
gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Real Custeau Claimants et al
gwkurr@grossminsky.com, tmseymour@grossminsky.com

Alan R. Lepene, Esq. on behalf of Creditor Eastern Maine Railway Company
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Creditor Maine Northern Railway Company
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Creditor New Brunswick Southern Railway Company
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party Irving Paper Limited
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party Irving Pulp & Paper, Limited
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party J.D. Irving, Limited
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Edward MacColl, Esq. on behalf of Creditor CIT Group, Inc.
emaccoll@thomport.com, bbowman@thomport.com; jhuot@thomport.com; eakers@thomport.com

Benjamin E. Marcus, Esq. on behalf of Interested Party Railroad Acquisition Holdings LLC
bmarcus@dwmlaw.com, hwhite@dwmlaw.com; dsoucy@dwmlaw.com

Benjamin E. Marcus, Esq. on behalf of Interested Party XL Insurance Company, Ltd.
bmarcus@dwmlaw.com, hwhite@dwmlaw.com; dsoucy@dwmlaw.com

George J. Marcus, Esq. on behalf of Creditor Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com

George J. Marcus, Esq. on behalf of Plaintiff Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com

Patrick C. Maxcy, Esq. on behalf of Creditor Rail World, Inc.

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Defendant LMS Acquisition Corp.

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Defendant Montreal Maine & Atlantic Corporation

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Other Prof. Edward A. Burkhardt, Robert Grindrod, Gaynor Ryan, Joseph McGonigle, Donald M. Gardner, Jr., Cathy Aldana, Rail World, Inc, Rail World Holdings, LLC, Rail World Locomotive Leasing, LLC and Earlston As

patrick.maxcy@dentons.com

John R McDonald, Esq. on behalf of Creditor Canadian Pacific Railway Co.

jmcdonald@briggs.com, mjacobson@briggs.com

Kelly McDonald, Esq. on behalf of Creditor Camden National Bank

kmcdonald@mpmlaw.com, kwillette@mpmlaw.com

Kelly McDonald, Esq. on behalf of Creditor GNP Maine Holdings, LLC

kmcdonald@mpmlaw.com, kwillette@mpmlaw.com

James F. Molleur, Esq. on behalf of Creditor Brotherhood of Locomotive Engineers and Trainmen

jim@molleurlaw.com,

all@molleurlaw.com; tanya@molleurlaw.com; jen@molleurlaw.com; barry@molleurlaw.com; kati@molleurlaw.com; martine@molleurlaw.com; Jessica@molleurlaw.com

Ronald Stephen Louis Molteni, Esq. on behalf of Interested Party Surface Transportation Board

moltenir@stb.dot.gov

Victoria Morales on behalf of Creditor Maine Department of Transportation

Victoria.Morales@maine.gov,

rhotaling@clarkhillthorpreed.com, Toni.Kemmerle@maine.gov, ehocky@clarkhill.com, Nathan.Moulton@maine.gov, Robert.Elder@maine.gov

Dennis L. Morgan on behalf of Creditor Fred's Plumbing & Heating, Inc.

dmorgan@coopercargillchant.com, hplourde@coopercargillchant.com

Stephen G. Morrell, Esq. on behalf of U.S. Trustee Office of U.S. Trustee

stephen.g.morrell@usdoj.gov

Kameron W. Murphy, Esq. on behalf of Creditor Midwest Railcar Corporation
kmurphy@tuethkeaney.com, gcasey@tuethkeaney.com

Office of U.S. Trustee
ustpregion01.po.ecf@usdoj.gov

Richard P. Olson, Esq. on behalf of Creditor Informal Committee of Quebec Claimants
rolson@perkinsolson.com, jmoran@perkinsolson.com; lkubiak@perkinsolson.com

Jeffrey T. Piampiano, Esq. on behalf of Interested Party XL Insurance Company, Ltd.
jpiampiano@dwmlaw.com, aprince@dwmlaw.com; hwhite@dwmlaw.com

Jennifer H. Pincus, Esq. on behalf of U.S. Trustee Office of U.S. Trustee
Jennifer.H.Pincus@usdoj.gov

William C. Price on behalf of Creditor Maine Department of Transportation
wprice@clarkhill.com, rhotaling@clarkhillthorpreed.com

Joshua Aaron Randlett on behalf of Defendant Travelers Property Casualty Company of America a/k/a) Travelers Insurance Company
jrandlett@rwl.com, kmorris@rwl.com

Joshua Aaron Randlett on behalf of Interested Party Travelers Property Casualty Company of America
jrandlett@rwl.com, kmorris@rwl.com

Elizabeth L. Slaby on behalf of Creditor Maine Department of Transportation
bslaby@clarkhillthorpreed.com

F. Bruce Sleeper, Esq. on behalf of Creditor Guy Ouellet
bankruptcy@jbgh.com

F. Bruce Sleeper, Esq. on behalf of Creditor Louis-Serges Parent
bankruptcy@jbgh.com

F. Bruce Sleeper, Esq. on behalf of Creditor Serge Jacques
bankruptcy@jbgh.com

F. Bruce Sleeper, Esq. on behalf of Creditor Yannick Gagne
bankruptcy@jbgh.com

John Thomas Stemplewicz on behalf of Creditor United States of America
john.stemplewicz@usdoj.gov

Deborah L. Thorne, Esq. on behalf of Creditor GATX Corporation

deborah.thorne@btlaw.com

Timothy R. Thornton on behalf of Creditor Canadian Pacific Railway Co.

pvolk@briggs.com

Mitchell A. Toups on behalf of Interested Party Wrongful Death, Personal Injury, Business, Property and Environmental Clients as of September 1, 2013

matoups@wgttlaw.com, jgordon@wgttlaw.com

Jason C. Webster, Esq. on behalf of Creditor Estates of David Lacroix Beaudoin

jwebster@thewebsterlawfirm.com, dgarcia@thewebsterlawfirm.com; hvicknair@thewebsterlawfirm.com

William H. Welte, Esq. on behalf of Creditor Atlantic Specialty Insurance Company

wwelte@weltelaw.com

Elizabeth J. Wyman, Esq. on behalf of Creditor Maine Department of Transportation

liz.wyman@maine.gov, eve.fitzgerald@maine.gov

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

CERTIFICATE OF SERVICE

I, Angela L. Stewart, being over the age of eighteen and an employee of Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that, on February 10, 2014, I filed the following documents via the Court's CM/ECF electronic filing system:

- Trustee's Consolidated Response to Class Action Plaintiffs' Motion to Establish Claims Procedures and Objection to Amended Bar Date Motion [D.E. 632]; and
- Trustee's Objection to Motion for Emergency Hearing and to Limit Notice [D.E. 633].

A list of the parties who were served with the above referenced documents via CM/ECF are identified on the attached Service List.

Dated: February 10, 2014

/s/ Angela L. Stewart
Angela L. Stewart, Paralegal

BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029
(207) 774-1200

SERVICE LIST

Served via CM/ECF:

D. Sam Anderson, Esq. on behalf of Attorney Bernstein, Shur, Sawyer & Nelson

sanderson@bernsteinshur.com,

acummings@bernsteinshur.com;sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com

D. Sam Anderson, Esq. on behalf of Trustee Robert J. Keach

sanderson@bernsteinshur.com,

acummings@bernsteinshur.com;sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com

Aaron P. Burns on behalf of Interested Party New England Independent Transmission Company, LLC

aburns@pearcedow.com, rpearce@pearcedow.com,lsmith@pearcedow.com

Richard Paul Campbell on behalf of Creditor Progress Rail Services Corporation

rpcampbell@campbell-trial-lawyers.com, mmichitson@campbell-trial-lawyers.com

Roger A. Clement, Jr., Esq. on behalf of Attorney Verrill Dana LLP

rclement@verrilldana.com, nhull@verrilldana.com;bankr@verrilldana.com

Roger A. Clement, Jr., Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.

rclement@verrilldana.com, nhull@verrilldana.com;bankr@verrilldana.com

Roger A. Clement, Jr., Esq. on behalf of Trustee Robert J. Keach

rclement@verrilldana.com, nhull@verrilldana.com;bankr@verrilldana.com

Daniel C. Cohn, Esq. on behalf of Creditor Estates of Marie Alliance, et al

dcohn@murthalaw.com, njoyce@murthalaw.com

Maire Bridin Corcoran Ragozzine, Esq. on behalf of Defendant Robert J. Keach, in his capacity as Chapter 11 Trustee of Maine Montreal and Atlantic Railway, Ltd.

mcorcoran@bernsteinshur.com,

sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com;acummings@bernsteinshur.com;kfox@bernsteinshur.com;kquirk@bernsteinshur.com

Maire Bridin Corcoran Ragozzine, Esq. on behalf of Trustee Robert J. Keach

mcorcoran@bernsteinshur.com,

sspizuoco@bernsteinshur.com;astewart@bernsteinshur.com;acummings@bernsteinshur.com;kfox@bernsteinshur.com;kquirk@bernsteinshur.com

Keith J. Cunningham, Esq. on behalf of Creditor Eastern Maine Railway Company

kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Keith J. Cunningham, Esq. on behalf of Creditor Maine Northern Railway Company
kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Keith J. Cunningham, Esq. on behalf of Creditor New Brunswick Southern Railway Company
kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Debra A. Dandeneau on behalf of Creditor CIT Group, Inc.
, arvin.maskin@weil.com

Joshua R. Dow, Esq. on behalf of Creditor Canadian Pacific Railway
jdow@pearcedow.com, rpearce@pearcedow.com; smith@pearcedow.com

Joshua R. Dow, Esq. on behalf of Creditor Canadian Pacific Railway Co.
jdow@pearcedow.com, rpearce@pearcedow.com; smith@pearcedow.com

Michael A. Fagone, Esq. on behalf of Attorney Bernstein, Shur, Sawyer & Nelson
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Defendant Robert J. Keach, in his capacity as Chapter 11 Trustee of Maine Montreal and Atlantic Railway, Ltd.
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Plaintiff Robert J. Keach
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Trustee Robert J. Keach
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Daniel R. Felkel, Esq. on behalf of Creditor Dakota Plains Transloading, LLC, Dakota Petroleum Transport Solutions LLC, Dakota Plains Marketing LLC
dfelkel@troubhheisler.com

Jeremy R. Fischer on behalf of Interested Party Indian Harbor Insurance Company
jfischer@dwmlaw.com, aprince@dwmlaw.com

Jeremy R. Fischer on behalf of Interested Party Railroad Acquisition Holdings LLC
jfischer@dwmlaw.com, aprince@dwmlaw.com

Jeremy R. Fischer on behalf of Interested Party XL Insurance Company, Ltd.
jfischer@dwmlaw.com, aprince@dwmlaw.com

Isaiah A. Fishman on behalf of Creditor C. K. Industries, Inc.
ifishman@krasnowsaunders.com, ryant@krasnowsaunders.com; cvalente@krasnowsaunders.com

Peter J. Flowers on behalf of Creditor Estates of Stephanie Bolduc
pjf@meyers-flowers.com

Christopher Fong, Esq. on behalf of Creditor Informal Committee of Quebec Claimants
christopherfong@paulhastings.com

Christopher Fong, Esq. on behalf of Creditor Official Committee of Victims
christopherfong@paulhastings.com

Taruna Garg, Esq. on behalf of Creditor Estates of Marie Alliance, et al
tgarg@murthalaw.com, cball@murthalaw.com; kpatten@murthalaw.com

Jay S. Geller on behalf of Creditor Western Petroleum Corporation
jgeller@maine.rr.com

Craig Goldblatt on behalf of Interested Party XL Insurance Company, Ltd.
craig.goldblatt@wilmerhale.com

Frank J. Guadagnino on behalf of Creditor Maine Department of Transportation
fguadagnino@clarkhillthorpreed.com

Michael F. Hahn, Esq. on behalf of Creditor Bangor Savings Bank
mhahn@eatonpeabody.com,
clavertu@eatonpeabody.com; dcroizier@eatonpeabody.com; jmiller@eatonpeabody.com; dgerry@eatonpeabody.com

Andrew Helman, Esq. on behalf of Creditor Wheeling & Lake Erie Railway Company

ahelman@mcm-law.com, bankruptcy@mcm-law.com

Andrew Helman, Esq. on behalf of Plaintiff Wheeling & Lake Erie Railway Company
ahelman@mcm-law.com, bankruptcy@mcm-law.com

Paul Joseph Hemming on behalf of Creditor Canadian Pacific Railway Co.
pheemming@briggs.com, pkringen@briggs.com

Seth S. Holbrook on behalf of Creditor Atlantic Specialty Insurance Company
holbrook_murphy@msn.com

Nathaniel R. Hull, Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.
nhull@verrilldana.com, bankr@verrilldana.com

David C. Johnson on behalf of Creditor Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com, djohnson@mcm-law.com

David C. Johnson on behalf of Plaintiff Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com, djohnson@mcm-law.com

Jordan M. Kaplan, Esq. on behalf of Creditor Brotherhood of Locomotive Engineers and Trainmen
jkaplan@zwerdling.com, mwolly@zwerdling.com

Robert J. Keach, Esq. on behalf of Trustee Robert J. Keach
rkeach@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; kquirk@bernsteinshur.com

Curtis E. Kimball, Esq. on behalf of Creditor Center Beam Flat Car Company, Inc.
ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Curtis E. Kimball, Esq. on behalf of Creditor First Union Rail
ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Curtis E. Kimball, Esq. on behalf of Creditor J. M. Huber Corporation
ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Thomas Addison Knowlton, Esq. on behalf of Creditor Maine Revenue Services
Thomas.a.knowlton@maine.gov

Andrew J. Kull, Esq. on behalf of Creditor Estate of Jefferson Troester
akull@mittelassen.com, ktrogner@mittelassen.com

George W. Kurr, Jr. on behalf of Creditor Estates of David Lacroix Beaudoin

gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Estates of Marie Alliance, et al
gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Estates of Stephanie Bolduc
gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Real Custeau Claimants et al
gwkurr@grossminsky.com, tmseymour@grossminsky.com

Alan R. Lepene, Esq. on behalf of Creditor Eastern Maine Railway Company
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Creditor Maine Northern Railway Company
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Creditor New Brunswick Southern Railway Company
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party Irving Paper Limited
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party Irving Pulp & Paper, Limited
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party J.D. Irving, Limited
Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Edward MacColl, Esq. on behalf of Creditor CIT Group, Inc.
emaccoll@thomport.com, bbowman@thomport.com; jhuot@thomport.com; eakers@thomport.com

Benjamin E. Marcus, Esq. on behalf of Interested Party Railroad Acquisition Holdings LLC
bmarcus@dwmlaw.com, hwhite@dwmlaw.com; dsoucy@dwmlaw.com

Benjamin E. Marcus, Esq. on behalf of Interested Party XL Insurance Company, Ltd.
bmarcus@dwmlaw.com, hwhite@dwmlaw.com; dsoucy@dwmlaw.com

George J. Marcus, Esq. on behalf of Creditor Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com

George J. Marcus, Esq. on behalf of Plaintiff Wheeling & Lake Erie Railway Company
bankruptcy@mcm-law.com

Patrick C. Maxcy, Esq. on behalf of Creditor Rail World, Inc.

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Defendant LMS Acquisition Corp.

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Defendant Montreal Maine & Atlantic Corporation

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Other Prof. Edward A. Burkhardt, Robert Grindrod, Gaynor Ryan, Joseph McGonigle, Donald M. Gardner, Jr., Cathy Aldana, Rail World, Inc, Rail World Holdings, LLC, Rail World Locomotive Leasing, LLC and Earlston As

patrick.maxcy@dentons.com

John R McDonald, Esq. on behalf of Creditor Canadian Pacific Railway Co.

jmcdonald@briggs.com, mjacobson@briggs.com

Kelly McDonald, Esq. on behalf of Creditor Camden National Bank

kmcdonald@mpmlaw.com, kwillette@mpmlaw.com

Kelly McDonald, Esq. on behalf of Creditor GNP Maine Holdings, LLC

kmcdonald@mpmlaw.com, kwillette@mpmlaw.com

James F. Molleur, Esq. on behalf of Creditor Brotherhood of Locomotive Engineers and Trainmen

jim@molleurlaw.com,

all@molleurlaw.com; tanya@molleurlaw.com; jen@molleurlaw.com; barry@molleurlaw.com; kati@molleurlaw.com; martine@molleurlaw.com; Jessica@molleurlaw.com

Ronald Stephen Louis Molteni, Esq. on behalf of Interested Party Surface Transportation Board

moltenir@stb.dot.gov

Victoria Morales on behalf of Creditor Maine Department of Transportation

Victoria.Morales@maine.gov,

rhotaling@clarkhillthorpreed.com, Toni.Kemmerle@maine.gov, ehocky@clarkhill.com, Nathan.Moulton@maine.gov, Robert.Elder@maine.gov

Dennis L. Morgan on behalf of Creditor Fred's Plumbing & Heating, Inc.

dmorgan@coopercargillchant.com, hplourde@coopercargillchant.com

Stephen G. Morrell, Esq. on behalf of U.S. Trustee Office of U.S. Trustee

stephen.g.morrell@usdoj.gov

Kameron W. Murphy, Esq. on behalf of Creditor Midwest Railcar Corporation
kmurphy@tuethkeeney.com, gcasey@tuethkeeney.com

Office of U.S. Trustee
ustpregion01.po.ecf@usdoj.gov

Richard P. Olson, Esq. on behalf of Creditor Informal Committee of Quebec Claimants
rolson@perkinsolson.com, jmoran@perkinsolson.com; lkubiak@perkinsolson.com

Jeffrey T. Piampiano, Esq. on behalf of Interested Party XL Insurance Company, Ltd.
jpiampiano@dwmlaw.com, aprince@dwmlaw.com; hwhite@dwmlaw.com

Jennifer H. Pincus, Esq. on behalf of U.S. Trustee Office of U.S. Trustee
Jennifer.H.Pincus@usdoj.gov

William C. Price on behalf of Creditor Maine Department of Transportation
wprice@clarkhill.com, rhotaling@clarkhillthorpreed.com

Joshua Aaron Randlett on behalf of Defendant Travelers Property Casualty Company of America a/k/a) Travelers Insurance Company
jrandlett@rwl.com, kmorris@rwl.com

Joshua Aaron Randlett on behalf of Interested Party Travelers Property Casualty Company of America
jrandlett@rwl.com, kmorris@rwl.com

Elizabeth L. Slaby on behalf of Creditor Maine Department of Transportation
bslaby@clarkhillthorpreed.com

F. Bruce Sleeper, Esq. on behalf of Creditor Guy Ouellet
bankruptcy@jbgh.com

F. Bruce Sleeper, Esq. on behalf of Creditor Louis-Serges Parent
bankruptcy@jbgh.com

F. Bruce Sleeper, Esq. on behalf of Creditor Serge Jacques
bankruptcy@jbgh.com

F. Bruce Sleeper, Esq. on behalf of Creditor Yannick Gagne
bankruptcy@jbgh.com

John Thomas Stemplewicz on behalf of Creditor United States of America
john.stemplewicz@usdoj.gov

Deborah L. Thorne, Esq. on behalf of Creditor GATX Corporation

deborah.thorne@btlaw.com

Timothy R. Thornton on behalf of Creditor Canadian Pacific Railway Co.

pvolk@briggs.com

Mitchell A. Toups on behalf of Interested Party Wrongful Death, Personal Injury, Business, Property and Environmental Clients as of September 1, 2013

matoups@wgttlaw.com, jgordon@wgttlaw.com

Jason C. Webster, Esq. on behalf of Creditor Estates of David Lacroix Beaudoin

jwebster@thewebsterlawfirm.com, dgarcia@thewebsterlawfirm.com; hvicknair@thewebsterlawfirm.com

William H. Welte, Esq. on behalf of Creditor Atlantic Specialty Insurance Company

wwelte@weltelaw.com

Elizabeth J. Wyman, Esq. on behalf of Creditor Maine Department of Transportation

liz.wyman@maine.gov, eve.fitzgerald@maine.gov