UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC RAILWAY, LTD., Debtor.	Bk. No. 13-10670 Chapter 11

THE TRUSTEE'S MOTION FOR ENTRY OF AN ORDER (I) ENFORCING THE RELEASES AND INJUNCTIONS CONTAINED IN THE CONFIRMATION ORDER AND CONFIRMED PLAN OF LIQUIDATION AND (II) AWARDING COSTS AND ATTORNEY'S FEES[1]

Robert J. Keach, as trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), hereby moves this Court, pursuant to sections 105(a), 1141, and 1142 of title 11 of the United States Code (the "Bankruptcy Code"), for entry of an order (i) enforcing the Releases and Injunctions provided for in the *Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015 (as amended October 8, 2015)* [D.E. 1795] (the "Plan")[2], which was confirmed by the Court on October 9, 2015 [D.E. 1801] (the "Confirmation Order"), as against Zurich American Insurance Company ("Zurich") and Lexington Insurance Company ("Lexington" and together with Zurich, the "Insurance Plaintiffs"), and (ii) imposing sanctions on the Insurance Plaintiffs in the form of the costs and expenses of the Trustee in connection with bringing this motion (the "Motion").[3] In support of this Motion, the Trustee states as

[1] Capitalized terms used but not defined herein have the same meaning ascribed to such terms as in the Plan.

[2] The Plan was filed as Exhibit A to the Trustee's proposed *Order Confirming Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015 and Authorizing and Directing Certain Actions in Connection Therewith* [D.E. 1795]. The Court is also referred to the *Trustee's Revised First Amended Plan of Liquidated Dated July 15, 2015* [D.E. 1534].

[3] The Insurance Plaintiffs' actions, detailed below, also violate the automatic stay, 11 U.S.C. § 362(a)(3), continued in force by the Plan, and this Motion should also be read as a motion to enforce the automatic stay as continued. In addition, the Insurance Plaintiffs' actions violate the Chapter 15 Recognition and Enforcement Order [Case No. 15-

follows:

PRELIMINARY STATEMENT

1. In direct contravention of this Court's order confirming the Plan (as well as the Chapter 15 Recognition and Enforcement Order) – which, among other things, permanently enjoins the pursuit of claims related to the Derailment against Released Parties – the Insurance Plaintiffs seek to continue their lawsuit against a Released Party, Western Petroleum Company ("Western Petroleum"), for claims arising out of the Derailment (the "Action"). *See, e.g.*, Plan, §§ 10.5(b)(iv), 10.6(b)(iii). Specifically, as stated in the Insurance Plaintiffs' Summary Judgment Motion (as defined herein and attached as **Exhibit B**), their claims for breach of contract arise out of the following factual allegations:

> Plaintiffs' insured/subrogor, Trinity Industries Leasing Company ("TILC"), leased the thirteen tank cars in question to Defendant pursuant to the terms and conditions of a Railroad Car Lease Agreement signed by the parties. Defendant used the tank cars to carry a cargo of crude oil from New Town, North Dakota to an oil refinery in Saint John, New Brunswick (Canada). The train transporting the cargo of crude oil derailed in Lac-Mégantic on July 6, 2013, resulting in the destruction of the thirteen tank cars in question, among others, and the release and ignition of vast quantities of crude oil. The explosions and fire that ensued destroyed a substantial portion of downtown Lac-Mégantic and are presumed to have killed 47 people.

Summary Judgment Motion, ¶ 2.

2. The Plan, however, is unequivocal in its release of all claims by all Persons, and its injunction against the assertion of any claims by any Person, against the Released Parties, which includes Western Petroleum. *See* Plan, § 1.112; *see also* Plan, Exhibit 2, p. 7. As such, the Action directly contravenes the Confirmation Order and the Releases and Injunctions providing Western Petroleum with a release of all liabilities related to the Derailment and exculpation from all related litigation.

20518, D.E. 74]. The Trustee will join in the Monitor's motion to enforce that order.

3. The Insurance Plaintiffs are aware of the release and injunction provisions of the Plan; yet nevertheless refuse to cease their pursuant of the Action, baselessly, and without credible legal or factual support, arguing they are not bound by either the Plan or the Confirmation Order. *See* July 14, 2015 letter from counsel for the Insurance Plaintiffs to counsel for Western Petroleum (the "July Letter"), a copy of which is attached hereto as **Exhibit A**. The Plaintiff's position is entirely untenable and flies in the face of the unquestioned jurisdiction and authority of this Court.

4. For these reasons, and as more fully set forth herein, the Trustee seeks an order from the Court enforcing the Plan and the Confirmation Order and directing the Insurance Plaintiffs to dismiss, with prejudice, the Action, and further requiring the Insurance Plaintiffs to pay all costs and expenses of the Trustee in prosecuting this Motion.

JURISDICTION AND VENUE

5. The United States District Court for the District of Maine (the "District Court") has original, but not exclusive, jurisdiction over this chapter 11 case pursuant to 28 U.S.C. § 1334(a) and over this Motion pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a) and Rule 83.6 of the District Court's Local Rules, the District Court has authority to refer and has referred this chapter 11 case to this Court. Additionally, this Court has jurisdiction to consider the Motion pursuant to Article 11 of the Plan.

6. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court has constitutional authority to enter judgment in this proceeding. Venue in this chapter 11 case is proper in this district pursuant to 28 U.S.C. § 1408, and venue in this action is proper in this district pursuant to 28 U.S.,C. § 1409.[4] The relief requested in the Motion is predicated on

[4] Rule 7001(7) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") expressly provides that an adversary proceeding includes "a proceeding to obtain an injunction or other equitable relief, *except when*

sections 105, 1141, and 1142 of the Bankruptcy Code.

7. This Court has both the authority and discretion to rule on the Motion and is uniquely situated to interpret and enforce the Confirmation Order and Plan. "A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization." Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.), 304 F.3d 223, 230 (2nd Cir. 2002) (citations omitted); *see also* Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195, 2205 (2009) (finding that the "Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior order."); In re Texaco, Inc., No. 87-20142 (RDD), Hrg. Tr., May, 28, 2010, at 2:19-25 (Bankr. S.D.N.Y. 2010) (finding that the bankruptcy court had jurisdiction to enforce a confirmation order it had entered twenty-two years earlier); In re Residential Capital, LLC, 512 B.R. 179, 190 (Bankr. S.D.N.Y. 2014) (enforcing third party release and injunction in plan and finding sanctions awardable); In re Charter Commc'ns, No. 09-11435 (JMP), 2010 WL 502764, at *3 (Bankr. S.D.N.Y. Feb. 8, 2010) (stating that the bankruptcy court "unquestionably has the authority and discretion to rule on the Enforcement Motion and consider whether the causes of action [brought in another court] have been released and should be enjoined"). Moreover, this Court retained jurisdiction "with respect to all matters concerning this Order, including, without limitation, hearing a petition for relief by a Barred Person or any other party in interest in the event that a court or tribunal hearing the Derailment-Related Cause of Action fails to apply the judgment reduction provisions of this Order." Confirmation Order, ¶ 70. Accordingly, this Court is the appropriate forum to enforce the provisions of the Confirmation Order and to stop the Insurance Plaintiffs' willful violations

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a…chapter 11…plan provides for the relief." Fed. R. Bankr. P. 7001(7) (emphasis added). Given that the injunction here is provided for under the Plan, the Trustee properly seeks the relief requested herein by motion. *See* In re Worldcorp, Inc., 252 B.R. 890, 895 (Bankr. D. Del. 2000) ("[A]n adversary proceeding is not necessary where the relief sought is the enforcement of an order previously obtained.").

of the Plan and Confirmation Order.

BACKGROUND

A. The Bankruptcy Case

8. On July 6, 2013, one of the Debtor's eastbound trains derailed in Lac-Mégantic, Québec. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and killed 47 people. As a result of the Derailment, MMA filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On August 21, 2013, the Trustee was appointed in MMA's bankruptcy case pursuant to 11 U.S.C. § 1163.

9. On July 15, 2015, the Trustee filed the Plan, which was subsequently amended. On October 9, 2015, the Court entered the Confirmation Order.

10. Since the commencement of the Case, the Trustee and others have engaged in settlement discussions with various parties identified as potentially liable for damages arising from the Derailment (including, among others, Western Petroleum). As a result of the settlement discussions, approximately 25 groups of affiliated entities entered into settlement agreements, whereby such parties agreed to contribute to a settlement fund in exchange for, *inter alia*, a full and final release of all claims related to the Derailment. The Settlement Agreements were approved in connection with the Plan.

11. As set forth below, the Plan provides the Released Parties with the Releases effective against all Persons (as that terms is defined in the Plan) of all Claims, including, without limitation, all Derailment Claims, as well as the Injunctions, which extend to all actions, or the continued prosecution of any action, by any Persons against the Released Parties for such Claims.

D. The Action against Western Petroleum

12. On January 28, 2015, the Insurance Plaintiffs commenced the Action against Western Petroleum, seeking to recover $1,124,322.82 for an alleged breach of contract related to the Derailment. Thereafter, on September 23, 2015, the Insurance Plaintiffs filed their *Motion for Summary Judgment* (the "Summary Judgment Motion"), a copy of which is attached hereto as **Exhibit B**. As set forth in the Summary Judgment Motion, the Insurance Plaintiffs are "seeking to recover $1,124,322.82 for the value of thirteen railroad tank cars that were destroyed in a derailment that occurred on July 6, 2013 in Lac-Mégantic, Quebec (Canada)." Summary Judgment Motion, ¶ 1.

13. Western Petroleum has informed the Insurance Plaintiffs of the Confirmation Order and the Release and Injunction provisions of the Plan. Nevertheless, the Insurance Plaintiffs are continuing to pursue the Action. Indeed, the Summary Judgment Motion amazingly and brazenly includes a request for declaratory relief that this Court cannot confirm the Plan or order the Releases or Injunctions or, alternatively, that the Plan (or Confirmation Order) does not prevent the continuation of the Action, a direct and unprecedented collateral attack on this Court's exclusive jurisdiction and authority to make such a determination, and a request utterly and completely without basis in the law.[5] *See* Summary Judgment Motion, §§ 34-43.

RELIEF REQUESTED

14. By this Motion, the Trustee requests entry of an order, pursuant to sections 105, 1141, and 1142 of the Bankruptcy Code, (i) enforcing the Releases and Injunctions, including, without limitation, enjoining the Insurance Plaintiffs from continuing the Action against Western

[5] Indeed, the Summary Judgment Motion is replete with miscitations of applicable law, particularly relating to the Fifth Circuit's holding in *Vitro*.

Petroleum and requiring dismissal, with prejudice, of the Action, and (ii) imposing sanctions on the Insurance Plaintiffs for such knowing and willful violation of this Court's orders in the form of the reasonable, documented costs and expenses of the Trustee in connection with bringing this Motion.

BASIS FOR RELIEF

15. The Insurance Plaintiffs' claims against Western Petroleum fall squarely within the Releases and Injunctions. Accordingly, the Court should enforce the Plan, Releases and Injunctions, prevent the Insurance Plaintiffs from continuing the Action against Western Petroleum, require dismissal of the Action with prejudice, and award the Trustee its reasonable attorneys' fees and costs incurred in bringing this Motion.

A. The Insurance Plaintiffs' Claims Have Been Released and Are Enjoined by the Plan and Confirmation Order

16. The Releases and the Injunctions encompass the Insurance Plaintiffs' claims, and, as a result, the Action is enjoined by the Plan.

17. Specifically, the Plan provides that:

> [A]ll Persons and entities shall unconditionally release, and hereby are deemed to forever unconditionally release each of the Other Released Parties...from any and all Derailment Claims, Causes of Action, and all other Claims…whenever arising…that are based upon, arise from and/or are related to events and/or circumstances that occurred or existed on or prior to the Effective Date, relating in any way to the Derailment[.]

Plan, § 10.5(b)(iii). Additionally, the Plan further provides that:

> [A]ll Persons and entities…shall be, and are hereby deemed to be, permanently barred, enjoined, and restrained from commencing, pursuing, prosecuting, continuing or asserting against the Other Released Parties, any and all Derailment Claims, Causes of Action and all other Claims, including, without limitation, Claims or Causes of Action for any and all past, present and future rights…whether based on…contract…concerning, arising from or relating to any actual or alleged past, present or future act, omission, defect, incident, event or circumstance, including, without limitation, all Claims released pursuant to

> Section 10.5…that are based upon, arise from and/or are related to events and/or circumstances that occurred or existed on or prior to the Effective Date in any way relating to or in connection with…the Derailment[.]

Plan, § 10.6(b)(iii).

18. "Other Released Parties" is defined to mean "the Released Parties other than the Affiliated Released Parties." Plan, § 1.96. The "Released Parties" includes "the persons or entities listed on Exhibit 2 to this Plan." Western Petroleum is among the entities listed on Exhibit 2, *see* Plan, Exhibit 2, p. 7, and does not fall within the definition of "Affiliated Released Parties." *See* Plan, § 1.9. As such, the Plan releases Western Petroleum from all Claims that may be asserted by any Person, and enjoins any Person from asserting, or continuing to assert, such Claims.

19. Additionally, the breach of contract cause of action asserted by the Insurance Plaintiffs is clearly a "Derailment Claim," as that claim is defined in the Plan. The Plan defines "Derailment Claim" to mean "all Claims by any Persons or entities against the Debtor, MMA Canada, or any other third-party, Person or entity arising out of or relating to the Derailment, including but not limited to those Claims set forth in Sections 1.52, 1.53, 1.55, 1.57 and 1.58." Plan, § 1.50. In any event, the cause of action asserted by the Insurance Plaintiffs is a "Claim." Plan, § 1.36, 10.5(a). Accordingly, the Plan, by its express terms, releases any and all Claims, including Derailment Claims, against, among others, Western Petroleum, and enjoins any Person, including the Insurance Plaintiffs, from asserting such claims. *See* Plan, §§ 10.5(b)(vi), 10.6(b)(iii).

20. In light of the foregoing, and because the Insurance Plaintiffs are asserting a Claim against a Released Party and, therefore, are bound by the Releases and the Injunctions, the Trustee requests that the Court enter an order enforcing the Plan and order the Insurance

Plaintiffs to cease and desist the pursuit of any claims against Western Petroleum, including continuing the Action, and ordering the Insurance Plaintiffs to dismiss the Action with prejudice. *See* Residential Capital, 512 B.R. at 190-92 (granting a party's request to enforce the third party release and plan injunction provisions of a chapter 11 plan and finding sanctions appropriate under 28 U.S.C. § 1927 and other authorities); *see also* In re Charter Commc'ns, 2010 WL 502764, at *5 (Bankr. S.D.N.Y. Feb 8, 2010) (enforcing confirmed plan of reorganization to enjoin plaintiffs' lawsuit against non-debtor beneficiaries of their party release).[6]

B. The Trustee is Entitled to Attorneys' Fees and Costs

21. In light of the circumstances under which the Trustee was forced to seek to enforce the Plan against the Insurance Plaintiffs, the Trustee is entitled to be reimbursed for the attorneys' fees and expenses reasonably incurred in bringing this Motion. *See* Residential Capital, 512 B.R. at 190; *see also* In re Cohoes Indus. Terminal, Inc., 931, F.2d 222, 230 (2d Cir. 1991) ("A bankruptcy court may impose sanctions pursuant to 28 U.S.C. § 1927 if it finds that '[an] attorney's actions are so completely without merit as to require the conclusion that they must have been taken for some improper purpose such as delay.") (*citing* Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986)); In re Gorshtein, 285 B.R. 118, 124 (Bankr. S.D.N.Y. 2002) (granting sanctions pursuant to 11 U.S.C. § 105(a)); In re French Bourekas, Inc., 175 B.R. 517, 523-525 (Bankr. S.D.N.Y. 1994) (granting sanctions under 28 U.S.C. § 1927 and 11 U.S.C. § 105(a)).

22. Insurance Plaintiffs' counsel was repeatedly advised of the Releases and the Injunctions afforded by the Plan. The Insurance Plaintiffs' refusal to acknowledge the validity of

[6] Additionally, it should be noted that the Insurance Plaintiffs have brought the Action as the subrogees of Trinity Industries Leasing Company ("Trinity"). *See* Summary Judgment Motion, ¶¶ 2, 28. Trinity, similar to Western Petroleum, is a Released Party under the Plan. *See* Plan, § 1.112; *see also* Plan, Exhibit 2, p. 5. Accordingly, Trinity, as a Released Party, is subject to, and the beneficiary of, the Releases and Injunctions, thereby depriving the Insurance Plaintiffs of any standing to continue the Action. *See* Plan, ¶¶ 10.5(b)(v), (vi), 10.6(b)(iii).

these provisions of the Plan, and their impact on the Action, forced the Trustee to expend valuable time and effort preparing and filing this Motion. The Trustee, therefore, requests he be awarded his attorneys' fees and costs reasonably incurred to enforce this Court's order.

CONCLUSION

In light of the foregoing, the Trustee requests that the Court enter an Order ordering the Insurance Plaintiffs to cease the pursuit of their claims against Western Petroleum and to dismiss the Action with prejudice, and awarding the Trustee his attorneys' fees and costs related to this matter, and granting such other and further relief as appropriate.

Dated: October 13, 2015

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

By his attorneys:

/s/ Timothy J. McKeon

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EXHIBIT
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July 14, 2015

VIA E-MAIL
Leslie Smith
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Re: **Zurich North American Insurance Co. and Lexington Insurance Co. a/s/o Trinity Industries, Inc. v. Western Petroleum Company; Civil Action No. 3-15-cv-0684-M**
Date of Loss: July 6, 2013
Loss Location:Lac-Mégantic, Canada

Dear Leslie and Kate:

I received the following from one of our bankruptcy attorneys, Jason Binford, who was kind enough to provide me with an analysis of the ability of a bankruptcy court to eliminate the contractual claim we bring against Western Petroleum. The analysis follows:

On or about March 31, 2015, the Trustee in the Chapter 11 case of Montreal, Maine & Atlantic Railway, Ltd. (the "Debtor") filed a Plan of Liquidation (the "Plan") in the United States Bankruptcy Court for the District of Maine (the "Maine Bankruptcy Court"). The Plan, as currently proposed, includes releases not only of the Debtor and certain creditors, but also broadly-worded releases of claims by third parties against creditors (the "Third Party Releases"). Our understanding is that the Trustee is moving forward in his efforts to obtain an order from the Maine Bankruptcy Court confirming the Plan (the "Confirmation Order"). We further understand that Western Petroleum is taking the position that the entry of the Confirmation Order will put into place the Third Party Releases, thus preventing Trinity from further pursuit of its lawsuit against Western Petroleum in the United States District Court for the Northern District of Texas, pending before Judge Barbara Lynn. Unfortunately for Western Petroleum, but fortunately for the tenets of due process and personal property rights, the substantive rights of parties in the United States are not so easily destroyed. While bankruptcy law may allow the impairment of certain contract rights relating to a bankruptcy case, the power of a bankruptcy court is not unlimited. In fact, Supreme Court jurisprudence over the past several years

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demonstrates that Article III judges will carefully scrutinize whether a non-Article III bankruptcy judge has improperly – and unconstitutionally – exceeded the purposefully limited powers granted to a bankruptcy judge under the Bankruptcy Code. We believe that when and if Western Petroleum ever seeks to enforce the Third Party Releases in Judge Lynn's court, those issues will be front and center.

With respect to releases of non-debtor parties, Fifth Circuit case law has made clear that such releases violate Bankruptcy Code section 524(e) and the entry and enforcement of such releases is outside the power of a bankruptcy court. *See In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (citing several prior Fifth Circuit cases, including *Feld v. Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). A decision by Judge Harlin Hale of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is also notable. *In In re Vitro*, 473 B.R. 117 (Bankr. N.D. Tex. 2012) Judge Hale refused to accept a foreign representative's argument that Chapter 15 of the Bankruptcy Code required the court to enforce third party releases approved by a Mexican Court. As to such third party, release, Judge Hale stated:

> Generally speaking the policy of the United States is against the discharge of claims for entities other than a debtor in an insolvency proceeding, absent extraordinary circumstances not present in this case. Such policy was expressed by Congress in Bankruptcy Code Section 524, and in numerous cases in this circuit. *See, e.g., Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). This protection of third part claims is described in terms of jurisdiction and also as a policy.

Id. at 131 (emphasis added). Therefore, because the third party releases were against public policy, neither Bankruptcy Code sections 1507 nor 1521 required their enforcement. The Fifth Circuit affirmed Judge Hale's ultimate holding, but not on the specific public policy grounds. *See* 701 F.3d 1031 (2012). Rather, the Fifth Circuit held that disallowing such releases is within the discretion of a bankruptcy judge under section 1507. That is not to say, however, that the Fifth Circuit disagreed with any of Judge Hale's determination that third party releases are unenforceable under Bankruptcy Code section 1521 as contrary to the public policy of the United States. Rather, the Fifth Circuit did not find it necessary to get to that point; the discretion provided under section 1507 resolved the issue. *Id.* at 1069-70. Nevertheless, Judge Hale's determinations with respect to third party releases approved by a foreign court, and the related public policy implications, remain persuasive analysis of the matters directly at issue in this case. Moreover, Judge Lynn sits in the same district and division as Judge Hale and we know from personal professional experience that she holds him, and his analysis of bankruptcy law, in high regard. As such, there is no reason to believe that Judge Lynn would find a different non-binding bankruptcy court decision (such as *In re Metcalfe & Mansfield Alternative Investments*, 421 B .R. 685 (Bankr. S.D.N.Y. 2010) more persuasive than Judge Hale's analysis in *In re Vitro*. We are certain that Judge Lynn will make her decision in the context of an indisputable fact: it is

settled Fifth Circuit law that third party releases are contrary to the Bankruptcy Code and contrary to public policy. To put it another way, the view of the Fifth Circuit is that any bankruptcy judge approving such releases has exceeded his or her authority.

We acknowledge that other circuits have allowed third party releases in bankruptcy plans under certain circumstances. The First Circuit, however, has not taken a position the issue. *See In re Mahoney Hawkes, LLP*, 289 B.R. 285, 298 (Bankr. D. Mass. 2002) (citing *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983-84 (1st Cir. 1995) and noting that the First Circuit has "identified but not ruled on [the] issue."). In the context of an injunction imposed against a third party under Bankruptcy Code section 105(a) during the course of a bankruptcy case, the First Circuit has held that allowing such an injunction would represent an "extraordinary exercise of discretion" on the part of a bankruptcy judge. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1474 (1st Cir. 1991). If the First Circuit considers a section 105(a) injunction during a bankruptcy court extraordinary, a third party release in a plan intended to stand for all time would have to be seen as beyond the pale. Moreover, there is no decision from the Maine Bankruptcy Court on the matter. Thus, consider the issue from Judge Lynn's perspective. She will be presented with definitive Fifth Circuit case law that third party releases are not authorized under the Bankruptcy Code and against public policy, and Western Petroleum will be unable to point to any contrary First Circuit case law. We believe that under these circumstances, refusing to enforce the Third Party Release will not be a close call.

In addition, Western Petroleum may be tempted to believe that once the Maine Bankruptcy Court enters the Confirmation Order, national enforcement of the Third Party Releases will take place in the Maine Bankruptcy Court as the simple and uncomplicated matter of a court enforcing the terms of its final order. In other words, Western Petroleum may be under the impression that Judge Lynn's view of these matters is immaterial. Such a position would be short-sighted and simplistic. While bankruptcy courts have jurisdiction to enforce their orders, that jurisdiction is not boundless. In fact, following confirmation of a plan, it is well-accepted that the "related to" jurisdiction of a bankruptcy court under 28 U.S.C. § 1334(b) narrows. Once again, the Fifth Circuit has issued a definitive holding directly on this issue. *See In re Craig's Stores of Texas, Inc.*, 266 F.3d 388, 390 (5th Cir. 2001). As for the First Circuit, it has held that post-confirmation related to jurisdiction does not necessarily narrow in the context of a liquidating plan. *See In re Boston Regional Medical Center, Inc.*, 410 F.3d 100 (1st Cir. 2005). However, the First Circuit's decision was in the context of a "debtor (or a trustee acting to the debtor's behalf) commenc[ing] [post-confirmation] litigation designed to marshal the debtor's assets for the benefit of its creditors pursuant to a liquidating plan of reorganization . . . ." Clearly, the "related to" jurisdiction that Western Petroleum would seeking to be enforce would not be an action commenced or continued by the Debtor or the Trustee (since neither are a party), nor would recovery for or against Western Petroleum augment the Debtor's estate in any way.

The fact is that placing something into a Plan or a Confirmation Order does not independently grant a bankruptcy court jurisdiction. As stated by a bankruptcy court specifically with respect to third party releases in a plan, "[i]f proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply including their release in a proposed plan, this Court would acquire infinite jurisdiction." *In re Digital Impact, Inc.*, 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998). Ultimately, we believe that Judge Lynn, as an Article III judge, will feel it her responsibility to determine whether the Maine Bankruptcy Court had the jurisdiction to enter the Third Party Releases. Based on the applicable case law and public policy issues, she will determine that the Maine Bankruptcy Court greatly exceeded its jurisdiction in purporting to extinguish litigation where neither party is the Debtor or a successor to the Debtor. As such, the litigation between Trinity and Western Petroleum will proceed, notwithstanding contrary (and unenforceable) language in the Plan.

My purpose is not to engage in an exchange of letters/briefs, but to give you something to share with your client in hope that it might move the matter more towards a peaceful resolution of the claims arising from the lease. I think we would agree that the issue is somewhat novel. I hope this gives you reason for you to believe that we take your views seriously.

We have not heard a response to our reduced $1.1 million demand. Please be mindful that there is a claim for attorney's fees, which is permitted under the lease and Texas law. The sooner we settle the case, the more flexible we will be with respect to the claim for attorney's fees.

We have agreed to several extensions of time to permit the parties to focus energy and resources on the settlement of this simple and limited claim.

I look forward to hearing from you.

Very truly yours,

KANE RUSSELL COLEMAN & LOGAN PC

By: _____
Lawrence T. Bowman

LTB/jds

cc: Jason Binford
David Fisk
Gini Mattson
Pamela Moore

EXHIBIT
B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ZURICH AMERICAN INSURANCE COMPANY and LEXINGTON INSURANCE COMPANY,	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO. 3:15-CV-00684-M**
V.	§	
	§	
WESTERN PETROLEUM COMPANY,	§	
Defendant.	§	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs move the Court to render summary judgment against Defendant, as authorized by Rule 56 of the Federal Rules of Civil Procedure.

INTRODUCTION/SUMMARY OF MOTION

1. Plaintiffs are Zurich American Insurance Company and Lexington Insurance Company; Defendant is Western Petroleum Company. On January 28, 2015, Plaintiffs sued Defendant in state court for breach of contract, seeking to recover $1,124,322.82 for the value of thirteen railroad tank cars that were destroyed in a derailment that occurred on July 6, 2013 in Lac-Mégantic, Quebec (Canada). On March 2, 2015, Defendant removed the case to federal court and later filed its answer on July 16, 2015, denying liability.

2. Plaintiffs seek final summary judgment on their breach of contract claim. Plaintiffs' insured/subrogor, Trinity Industries Leasing Company ("TILC"), leased the thirteen tank cars in question to Defendant pursuant to the terms and conditions of a Railroad Car Lease Agreement signed by the parties. Defendant used the tank cars to carry a cargo of crude oil from New Town, North Dakota to an oil refinery in Saint John, New Brunswick (Canada). The train

transporting the cargo of crude oil derailed in Lac-Mégantic on July 6, 2013, resulting in the destruction of the thirteen tank cars in question, among others, and the release and ignition of vast quantities of crude oil. The explosions and fire that ensued destroyed a substantial portion of downtown Lac-Mégantic and are presumed to have killed 47 people.

3. Pursuant to the terms and conditions of the Railroad Car Lease Agreement, Defendant agreed to reimburse TILC and Plaintiffs (as TILC's subrogee) for all losses, damages, costs and expenses, including attorney's fees, in any way arising out of, or resulting from, the condition, storage, use, loss of use, maintenance or operation of the thirteen tank cars. Despite TILC's and Plaintiffs' demands for reimbursement for the value of the tank cars, Defendant has refused to honor its obligation under the contract and, therefore, has breached the contract.[1]

4. In addition to final summary judgment on their breach of contract claim, Plaintiffs seek a partial summary judgment on an issue of law – whether a confirmed Chapter 11 plan of reorganization may enjoin non-creditor third parties from pursuing litigation against non-debtor parties in any forum. The operators of the train at the time of the derailment were Montréal Maine & Atlantic Railway, Ltd. ("MMAR") and Montréal Maine & Atlantic Canada Co. ("MMA Canada"). After the derailment, MMAR filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Maine (the "Maine Bankruptcy Court"), while MMA Canada commenced proceedings in the Superior Court of Canada seeking relief from creditors under Canada's *Companies' Creditors Arrangement Act* ("CCAA"). On June 8, 2015, MMAR's Chapter 11 bankruptcy trustee (the "Trustee") and Defendant, along with its affiliated entities, announced the conclusion of an agreement whereby, subject to Court approval in Canada and in the United States, Defendant and

[1] Plaintiffs also claim that Defendant has breached other provisions in the contract by refusing to pay for the value of the tank cars at issue, but those contractual obligations are beyond the scope of this motion for summary judgment.

its affiliated entities will contribute $110,000,000 to the Trustee's fund for settling claims arising out of or relating to the derailment. In exchange, Defendant and its affiliated entities claim that they will receive a full and final release of all claims arising out of the derailment, including any claims for contribution and/or indemnity (including contractual indemnity) asserted by third parties, as well as the protection of a global injunction barring assertion of any derailment related claims against Defendant. As discussed in detail below, based on Fifth Circuit precedent, a non-consensual, non-debtor release through a bankruptcy proceeding is unenforceable as against public policy, notwithstanding any contrary assertions in a plan of reorganization, a confirmation order or other judicial proclamation.

SUMMARY JUDGMENT EVIDENCE

5. Plaintiffs' motion for summary judgment is based on the following evidence, which is attached hereto and incorporated by reference:

Exhibit A	Railroad Car Lease Agreement (TRINITY 0001-0013)
Exhibit B	Rider Four (4) to Railroad Car Lease Agreement (TRINITY 0014-0015)
Exhibit C	Rider Seven (7) to Railroad Car Lease Agreement (TRINITY 0016-0018)
Exhibit D	Letter from Trinity Industries Leasing Company to Western Petroleum Company (TRINITY 0083-0102)
Exhibit E	Defendant's Answer to Original Petition, Jury Demand, and Request for Disclosure
Exhibit F	Transportation Safety Board of Canada Railway Investigation Report (TRINITY 00375-00565)
Exhibit G	Affidavit of Val Mansfield
Exhibit H	Affidavit of Gini Mattson
Exhibit H-1	Letter from Zurich American Insurance Company to Western Petroleum Company (TRINITY 0083-0102)
Exhibit I	Affidavit of David H. Fisk

Exhibit I-3 Letter from Kane Russell Coleman & Logan PC to Western Petroleum Company (TRINITY 0083-0102)

Exhibit J First Amended Disclosure Statement for the Trustee's Plan of Liquidation Dated July 7, 2015

Exhibit K Joint Report Regarding Contents of Scheduling Order

FACTS

6. TILC and Defendant entered into a Railroad Car Lease Agreement (the "Lease") dated April 24, 2006, pursuant to which TILC agreed to lease certain railroad cars to Defendant Western Petroleum.[2]

7. After April 2006, TILC and Defendant executed riders to the Lease, which became part of the Lease.[3]

8. The cars described in the riders, which were owned by Trinity Rail Leasing 2012, LLC ("TRL 2012"), were leased to Defendant subject to the terms and conditions in the Lease.[4]

9. Article 22 of the Lease requires Defendant to "indemnify … [TILC] … **from all … losses, damages, costs and expenses, including attorney's fees, in any way arising out of, or resulting from, the condition, storage, use, loss of use, maintenance or operation of the cars**, or any other cause whatsoever except to the extent the same results from [TILC]'s negligence or except to the extent a railroad has assumed full responsibility and satisfies such responsibility."[5]

[2] ***Exhibit A***, Railroad Car Lease Agreement; *see also* ***Exhibit E***, Defendant's Answer to Original Petition, Jury Demand, and Request for Disclosure, p. 4.

[3] ***Exhibit A***, Lease Agreement; ***Exhibit B***, Rider Four (4) to Railroad Car Lease Agreement; ***Exhibit C***, Rider Seven (7) to Railroad Car Lease Agreement; *see also* ***Exhibit E***, Defendant's Answer, p. 4.

[4] ***Exhibit A***, Lease Agreement, p. 1; ***Exhibit B***, Rider Four, p. 1; ***Exhibit C***, Rider Seven, p. 1; *see also* ***Exhibit E***, Defendant's Answer, p. 4.

[5] ***Exhibit A***, Lease Agreement, p. 5 (emphasis added).

10. Pursuant to Article 32 of the Lease, the Lease is interpreted under and performance is governed by the laws of the State of Texas.[6]

11. On July 6, 2013, thirteen tank cars leased by TILC to Defendant pursuant to the terms and conditions in the Lease were destroyed in a derailment that occurred in Lac-Mégantic, Quebec, Canada.[7]

12. Defendant was using the thirteen tank cars at issue to transport petroleum crude oil from New Town, North Dakota to Saint John, New Brunswick (Canada).[8]

13. By letter dated February 28, 2014, TILC demanded that Defendant pay the settlement value of the thirteen tank cars at issue, as determined by Rule 107 of the American Association of Railroads (AAR) Interchange Rules, within ten days of Defendant's receipt of the letter.[9]

14. To date, Defendant has not paid TILC for the value of the thirteen tank cars at issue.[10]

15. Pursuant to an insurance policy issued by Plaintiffs to Trinity Industries, its subsidiaries, and other legal entities in which Trinity Industries had management control or ownership, including TILC and TRL 2012, Plaintiffs each subsequently paid $562,161.41 for the value of the thirteen tank cars at issue, while Trinity Industries was responsible for a $50,000 deductible.[11]

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[6] ***Exhibit A***, Lease Agreement, p. 9.

[7] ***Exhibit E***, Defendant's Answer, p. 6; ***Exhibit F***, Transportation Safety Board of Canada Railway Investigation Report, p. 6 (TRINITY 00390).

[8] ***Exhibit F***, Railway Investigation Report, p. 6 (TRINITY 00390).

[9] ***Exhibit D***, Letter from Trinity Industries Leasing Company to Western Petroleum Company; *see also* ***Exhibit E***, Defendant's Answer, p. 7.

[10] ***Exhibit E***, Defendant's Answer, p. 7.

[11] ***Exhibit G***, Affidavit of Val Mansfield; ***Exhibit H***, Affidavit of Gini Mattson.

16. By letters dated August 28, 2014 and October 22, 2014, Plaintiffs notified Defendant of their subrogation interests and demanded that Defendant pay the value of the thirteen tank cars at issue.[12]

17. To date, Defendant has not paid Plaintiffs for the value of the thirteen tank cars at issue.[13]

18. Defendant's parent company, World Fuel Services Corporation, recently entered into a settlement agreement with the Trustee and MMA Canada to resolve claims related to the July 6, 2013 derailment in Lac-Mégantic.[14]

19. At the time of the derailment, MMAR and MMA Canada were the operators of the train, including the thirteen railcars at issue.[15]

20. On August 7, 2013, MMAR filed for Chapter 11 bankruptcy protection in Maine, while MMA Canada commenced proceedings seeking similar protection in Canada under the CCAA on August 8, 2013.[16]

21. On July 7, 2015, the Trustee filed a First Amended Plan of Liquidation (the "Plan") in the Maine Bankruptcy Court.[17]

22. The Plan, as currently proposed, includes a release not only of MMAR and certain creditors, but also broadly-worded purported releases of claims by third parties against creditors (the "Third Party Releases").[18]

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[12] ***Exhibit H***, Mattson Affidavit; ***Exhibit H-1***, Letter from Zurich American Insurance Company to Western Petroleum Company; ***Exhibit I***, Affidavit of David H. Fisk; ***Exhibit I-3***, Letter from Kane Russell Coleman & Logan PC to Western Petroleum Company; *see also* ***Exhibit E***, Defendant's Answer, p. 7.

[13] ***Exhibit E*** Defendant's Answer, p. 7; ***Exhibit H***, Mattson Affidavit; ***Exhibit I***, Fisk Affidavit.

[14] ***Exhibit J***, First Amended Disclosure Statement for the Trustee's Plan of Liquidation Dated July 7, 2015, p. 34 (discussing the settlement agreement reached with World Fuel Services Corporation and its affiliates).

[15] ***Exhibit J***, First Amended Disclosure Statement, p. 21-22.

[16] ***Exhibit J***, First Amended Disclosure Statement, p. 21-22.

[17] ***Exhibit J***, First Amended Disclosure Statement, Exhibit A. The original plan was filed on March 31, 2015.

23. The Trustee is moving forward in his efforts to obtain an order from the Maine Bankruptcy Court confirming the Plan (the "Confirmation Order"), which is set for hearing on September 24, 2015.[19]

ARGUMENTS & AUTHORITIES

Summary Judgment Standard

24. Summary judgment is proper in a case in which there is no genuine dispute of material fact. FED. R. CIV. P. 56(a); *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A plaintiff moving for summary judgment satisfies its burden by submitting summary-judgment proof that establishes all elements of its claim as a matter of law. *San Pedro v. United States*, 79 F.3d 1065, 1068 (11th Cir. 1996). Plaintiff must show that no reasonable trier of fact could find other than for plaintiff. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986).

Final Summary Judgment: Breach of Contract

25. Plaintiffs are entitled to summary judgment on their breach of contract claim because the undisputed facts in this case and Plaintiffs' summary-judgment evidence conclusively establish each essential element. The essential elements of Plaintiffs' breach of contract claim are the following: (1) there is a valid, enforceable contract; (2) Plaintiffs are proper parties to sue for breach of the contract; (3) Plaintiffs' subrogor performed, tendered performance, or was excused from performing its contractual obligations; (4) Defendant breached the contract; and (5) Defendant's breach caused Plaintiffs injury. *See Marquis Acquisitions, Inc. v. Steadfast Ins. Co.*, 409 S.W.3d 808, 813 (Tex. App.—Dallas 2013, no pet.).

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[18] ***Exhibit J***, First Amended Disclosure Statement, Exhibit A. p. 49-53.

[19] ***Exhibit K***, Joint Report Regarding Contents of Scheduling Order.

26. **Enforceable Contract.** The Lease is a valid and enforceable written contract signed by both Plaintiffs' subrogor, TILC, and Defendant. "Under standard contract principles, the presence or absence of signatures on a written contract is relevant to determining whether the contract is binding on the parties." *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 209 (Tex. App.—El Paso 2004, no pet.). Defendant's signature on the Lease is "strong evidence" that Defendant unconditionally assented to its terms. *See id*. (citing 1 Arthur Linton Corbin, Corbin on Contracts § 2.10, at 168 (Joseph M. Perillo rev., 1993)). Since both TILC and Defendant signed the Lease,[20] the summary judgment evidence demonstrates as a matter of law that both parties manifested their assent to its terms. *See J & D Aircraft Sales, LLC v. Cont'l Ins. Co.*, CIV.A.3:03-CV-0007-B, 2004 WL 2389445, at *13 (N.D. Tex. Oct. 26, 2004).

27. **Proper Party.** Under Texas law, an insurer paying a claim under a policy is subrogated to any cause of action its insured may have against a third party responsible for the insured's injury. *Texas Ass'n of Cntys. Cnty. Gov't Risk Mgmt. Pool v. Matagorda Cnty.*, 52 S.W.3d 128 (Tex. 2000); *Am. Zurich Ins. Co. v. Barker Roofing, L.P.*, 387 S.W.3d 54, 61 (Tex. App.—Amarillo 2012, no pet.) (citing *TX. C.C., Inc. v. Wilson/Barnes Gen. Contractors, Inc.*, 233 S.W.3d 562, 566 (Tex. App.—Dallas 2007, pet. denied)).

28. In this case, TILC is a signatory to the Lease in its individual capacity to the extent it is the owner of the cars subject to the Lease and as manager for the benefit of the relevant car owner to the extent it is not the owner of the cars subject to the Lease.[21] Plaintiffs made payments totaling $1,124,322.82 under the policy that it issued to Trinity Industries, its subsidiaries, and other legal entities in which Trinity Industries had management control or

[20] ***Exhibit A***, Lease Agreement; ***Exhibit B***, Rider Four; ***Exhibit C***, Rider Seven.

[21] ***Exhibit A***, Lease Agreement, Art. 31, p. 9.

ownership, including TILC and TRL 2012.[22] Accordingly, Plaintiffs (as subrogees of TILC) are proper parties to assert an action for breach of contract against Defendant.

29. **Performance.** TILC's primary contractual obligations under the Lease were to lease Defendant certain railroad cars and to deliver the cars to Defendant in exchange for a monthly rental fee per car.[23] TILC substantially performed the contract by leasing the thirteen tank cars in question to Defendant and delivering them to Defendant for Defendant's use.[24]

30. **Defendant Breached Contract.** Whether a defendant breached a contract is a question of law for the court, not a question of fact for a jury. *Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419, 432 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 253, n. 3 (Tex. App.—Dallas 1990, no writ). "[W]hen facts are undisputed or conclusively established, there is no need to submit issues thereon to the jury." *Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 805, 808 (Tex. App.—Houston [14th Dist.] 1996), writ denied (Sept. 12, 1996) (citing *Sullivan v. Barnett*, 471 S.W.2d 39, 44 (Tex.1971)).

31. Here, the existence of the contract and Defendant's failure to pay TILC or Plaintiffs for the value of the thirteen tank cars at issue is undisputed.[25] The Lease requires Defendant to reimburse TILC (and Plaintiffs as subrogees of TILC) "from all … losses, damages, costs and expenses, including attorney's fees, in any way arising out of, or resulting from, the condition, storage, use, loss of use, maintenance or operation of the cars."[26] Defendant has refused to perform this contractual obligation and, therefore, has breached the contract. *See Tennessee Gas Pipeline Co. v. Lenape Res. Corp.*, 870 S.W.2d 286, 302 (Tex. App.—San

[22] ***Exhibit G***, Mansfield Affidavit; ***Exhibit H***, Mattson Affidavit.

[23] ***Exhibit A***, Lease Agreement; ***Exhibit B***, Rider Four; ***Exhibit C***, Rider Seven.

[24] ***Exhibit A***, Lease Agreement; ***Exhibit B***, Rider Four; ***Exhibit C***, Rider Seven.

[25] ***Exhibit E***, Defendant's Answer, p. 4 & 7.

[26] ***Exhibit A***, Lease Agreement, Art. 22, p. 5.

Antonio 1993), writ granted (June 22, 1994), aff'd in part, rev'd in part, 925 S.W.2d 565 (Tex. 1996) ("A breach of contract occurs when a party fails or refuses to do something that it has promised to do").

32. **Breach Caused Injury.** Defendant's breach caused injury to Plaintiffs, who suffered a monetary loss as a result of the breach. The thirteen tank cars at issue were destroyed in the derailment.[27] The value of the cars at the time of their destruction was $1,174,322.82, as determined by Rule 107 of the AAR Interchange Rules.[28] Plaintiffs made payments to Trinity and its affiliated legal entity TRL 2012 totaling $1,124,322.82 – the value of the cars less the applicable $50,000 deductible.[29]

33. **Attorney's Fees.** Plaintiffs are also entitled to recover reasonable and necessary attorney's fees in prosecuting this suit under Article 22 of the Lease, which provides for the recovery of "costs and expenses, including attorney's fees."[30] The affidavit of Plaintiffs' attorney establishes that Plaintiffs are entitled to attorney's fees in the amount of $73,096.50 as a matter of law.[31] In the alternative, Plaintiffs ask the Court to take judicial notice of the usual and customary attorney's fees in this district.

Partial Summary Judgment:
Purported Release in Liquidation Plan Is Unenforceable in This Case

34. As indicated in the Joint Report Regarding Contents of Scheduling Order (Document No. 27), Defendant is taking the position that the entry of the Confirmation Order will put into place the Third Party Releases, thus preventing Plaintiffs from further pursuit of this

[27] ***Exhibit E***, Defendant's Answer, p. 6.

[28] ***Exhibit G***, Mansfield Affidavit.

[29] ***Exhibit G***, Mansfield Affidavit; ***Exhibit H***, Mattson Affidavit.

[30] ***Exhibit A***, Lease Agreement, p. 5.

[31] ***Exhibit I***, Fisk Affidavit.

breach of contract action against Defendant.[32] Whether a bankruptcy court has the power to release claims against a non-debtor is a question of law. *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995).

35. Unfortunately for Defendant, but fortunately for the tenets of due process and personal property rights, the substantive rights of parties in the United States are not so easily destroyed. While bankruptcy law may allow the impairment of certain contract rights relating to a bankruptcy case, the power of a bankruptcy court is not unlimited. In fact, Supreme Court jurisprudence over the past several years demonstrates that Article III judges will carefully scrutinize whether a non-Article III bankruptcy judge has improperly and unconstitutionally exceeded the purposefully limited powers granted to a bankruptcy judge under the Bankruptcy Code. *See, e.g., Stern v. Marshall*, 131 S. Ct. 2594, 2612-21, 180 L. Ed. 2d 475 (2011) (discussing, at length, the obligation of Article III courts to vigilantly guard the province of the Article III judiciary in order properly preserve the constitutional separation of powers).

36. With respect to releases of non-debtor parties, Fifth Circuit case law has made clear that such releases violate Section 524(e) of the Bankruptcy Code and the entry and enforcement of such releases is outside the power of a bankruptcy court. *E.g., In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (citing several prior Fifth Circuit cases, including *Feld v. Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)); *accord Lowenschuss*, 67 F.3d at 1401 (stating the Ninth Circuit "has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors").

37. *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (Bankr. N.D. Tex. 2012) – a decision by Judge Harlin Hale of the United States Bankruptcy Court for the Northern District of Texas,

[32] ***Exhibit K***, Joint Report.

Dallas Division, is also notable. In *Vitro*, Judge Hale refused to accept a foreign representative's argument that Chapter 15 of the Bankruptcy Code required the court to enforce third party releases in a reorganization plan approved by a Mexican court. As to such third party release, Judge Hale stated:

> Generally speaking the policy of the United States is against the discharge of claims for entities other than a debtor in an insolvency proceeding, absent extraordinary circumstances not present in this case. Such policy was expressed by Congress in Bankruptcy Code Section 524, and in numerous cases in this circuit. *See, e.g., Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). This protection of third part claims is described in terms of jurisdiction and also as a policy.

Id. at 131. Therefore, because the third party releases were against public policy, neither Sections 1507 nor 1521 of the Bankruptcy Code required their enforcement. On appeal, The Fifth Circuit affirmed Judge Hale's ultimate holding, but not on the specific public policy grounds. *See In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012).

38. With respect to Section 1521, the Fifth Circuit stated that "a non-consensual, non-debtor release through a bankruptcy proceeding, is generally not available under United States law" and the Fifth Circuit "has explicitly prohibited such relief." *Id*. at 1059 (citing *In re Pac. Lumber Co.*, 584 F.3d 229, 251-52 (5th Cir.2009) (discharge of debtor's debt does not affect liability of other entities on such debt and denying non-debtor release and permanent injunction); *In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir.1995) ("Section 524 prohibits the discharge of debts of nondebtors.")).

39. Rather, the Fifth Circuit held that disallowing such releases is within the discretion of a bankruptcy judge under Section 1507. *Vitro*, 701 F.3d at 1060-61 & 1069. That is not to say, however, that the Fifth Circuit disagreed with any of Judge Hale's determination that third party releases are unenforceable under Bankruptcy Code Section 1521 as contrary to the public policy of the United States. The Fifth Circuit simply did not find it necessary to get to

that point; the discretion provided under Section 1507 resolved the issue. *Id*. at 1069-70. Nevertheless, Judge Hale's analysis and determinations regarding third party releases approved by a foreign court and the related public policy implications directly relate to the issue of the enforceability of the purported non-debtor releases in the Plan and are instructive.

40. Some circuits allow third party releases in bankruptcy plans, but only in rare or unusual circumstances. *E.g., In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-43 (2d Cir. 2005) (involving challenge to releases that permanently enjoined creditors from suing various non-debtors and determining that bankruptcy court's findings were insufficient to show that truly unusual circumstances rendered releases important to success of the plan); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (involving whether bankruptcy court has authority to enjoin non-consenting creditors' claims against a non-debtor to facilitate a reorganization plan under Chapter 11 and finding that the record produced by the bankruptcy court did not support a finding of "unusual circumstances" such that it was proper to enjoin non-consenting creditors' claims). In *Metromedia*, the Second Circuit observed:

> Courts have approved nondebtor releases when: the estate received substantial consideration, *e.g.*, *Drexel Burnham*, 960 F.2d at 293; the enjoined claims were "channeled" to a settlement fund rather than extinguished, *MacArthur Co. v. Johns–Manville Corp.* (*In re Johns–Manville Corp.*), 837 F.2d 89, 93–94 (2d Cir.1988); *Menard–Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694, 701 (4th Cir.1989); the enjoined claims would indirectly impact the debtor's reorganization "by way of indemnity or contribution," *id.;* and the plan otherwise provided for the full payment of the enjoined claims, *id.* Nondebtor releases may also be tolerated if the affected creditors consent. *See In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir.1993).

Metromedia, 416 F.3d at 142. In *Dow Corning*, the Sixth Circuit held:

> [W]hen the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization,

> namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Dow Corning, 280 F.3d at 658. While the bankruptcy estate of MMAR will receive substantial consideration from Defendant, there is no provision in the Plan for the full payment of Plaintiffs' claim.[33] Furthermore, there is no indemnity relationship between MMAR and Plaintiffs. Plaintiffs breach of contract claim against Defendant is not, in essence, a suit against MMAR and will not deplete the assets of MMAR's estate. Finally, Plaintiffs are not creditors in or parties to MMAR's bankruptcy proceeding or MMA Canada's CCAA proceeding, and Plaintiffs have not contributed any assets to the reorganization of MMAR or MMA Canada.

41. It is important to note that the First Circuit has not taken a position the issue. *See In re Mahoney Hawkes, LLP*, 289 B.R. 285, 298 (Bankr. D. Mass. 2002) (noting that the First Circuit has "identified but not ruled on [the] issue.") (citing *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983-84 (1st Cir. 1995)). In the context of an injunction imposed against a third party under Section 105(a) of the Bankruptcy Code during the course of a bankruptcy case, the First Circuit has held that allowing such an injunction would represent an "extraordinary exercise of discretion" on the part of a bankruptcy judge. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1474 (1st Cir. 1991). If the First Circuit considers a Section 105(a) injunction during a bankruptcy court extraordinary, a third party release in a plan intended to stand for all time would have to be seen as beyond the pale.

[33] ***Exhibit J***, First Amended Disclosure Statement, Exhibit A.

42. While bankruptcy courts have jurisdiction to enforce their orders, that jurisdiction is not boundless. In fact, following confirmation of a plan, it is well-accepted that the "related to" jurisdiction of a bankruptcy court under 28 U.S.C. § 1334(b) narrows. Once again, the Fifth Circuit has issued a definitive holding directly on this issue. *See In re Craig's Stores of Texas, Inc.*, 266 F.3d 388, 390 (5th Cir. 2001). As for the First Circuit, it has held that post-confirmation related to jurisdiction does not necessarily narrow in the context of a liquidating plan. *See In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100 (1st Cir. 2005). However, the First Circuit's decision was in the context of a "debtor (or a trustee acting to the debtor's behalf) commenc[ing] [post-confirmation] litigation designed to marshal the debtor's assets for the benefit of its creditors pursuant to a liquidating plan of reorganization …." *Id*. at 107. Clearly, the "related to" jurisdiction that Defendant is seeking to enforce is not be an action commenced or continued by MMAR or the Trustee (since neither are a party), nor would Plaintiffs' recovery against Defendant augment MMAR's estate in any way.

43. Placing something into a Plan or a Confirmation Order does not independently grant a bankruptcy court jurisdiction. As stated by a bankruptcy court specifically with respect to third party releases in a plan, "[i]f proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply including their release in a proposed plan, this Court would acquire infinite jurisdiction." *In re Digital Impact, Inc.*, 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998). Ultimately, it is this Court's responsibility to determine whether the Maine Bankruptcy Court has the jurisdiction to enter the Third Party Releases. Based on the applicable case law and public policy issues, the Maine Bankruptcy Court will greatly exceed its jurisdiction in purporting to extinguish litigation where

neither party is the debtor or a successor to the debtor. As such, the litigation between Plaintiffs and Defendant should proceed, notwithstanding contrary and unenforceable language in the Plan.

CONCLUSION

44. The Lease is a valid and enforceable contract entered into between TILC and Defendant. TILC substantially completed and performed its obligations under the Lease, while Defendant materially breached its express obligation to indemnify TILC from all losses, damages, costs and expenses, including attorney's fees, in any way arising out of, or resulting from, the condition, storage, use, loss of use, maintenance or operation of the thirteen tank cars at issue. Plaintiffs have sustained a monetary loss as a result of Defendant's refusal to reimburse Plaintiffs the $1,124,322.82 they paid to Trinity and TRL 2012 for the value of the cars.

45. Regarding the enforceability of the purported releases in the Plan, it is settled Fifth Circuit law that third party releases are contrary to the Bankruptcy Code and contrary to public policy. To put it another way, the view of the Fifth Circuit is that any bankruptcy judge approving such releases has exceeded his or her authority. Therefore, the broad third-party purported releases in the Plan cannot be enforced against Plaintiffs in this action.

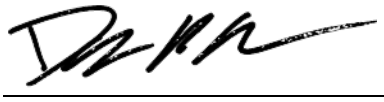
PRAYER

46. For these reasons, Plaintiffs, Zurich American Insurance Company and Lexington Insurance Company, submit this matter to the Court for its ruling, with notice to Defendant, Western Petroleum Company, and pray that the Court grant this motion and sign a final summary judgment. Plaintiffs move for summary judgment on all issues, all claims, all theories of damages, and all parties. Plaintiffs waive all causes of action and relief not requested in this motion. In the alternative, Plaintiffs move for an order for partial summary judgment specifying

that the Plan will not enjoin Plaintiffs from pursuing their breach of contract claims against Defendant in this action.

Respectfully submitted,

KANE RUSSELL COLEMAN & LOGAN PC

BY: 

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CERTIFICATE OF SERVICE

I do hereby certify that all counsel of record listed below are being served with a true and correct copy of Plaintiffs' Motion for Summary Judgment by e-mail transmission and certified mail, on this 23rd day of September 2015, pursuant to the Federal Rules of Civil Procedure.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC RAILWAY, LTD., Debtor.	Bk. No. 13-10670 Chapter 11

ORDER THE TRUSTEE'S MOTION FOR ENTRY OF AN ORDER (I) ENFORCING THE RELEASES AND INJUNCTIONS CONTAINED IN THE CONFIRMATION ORDER AND CONFIRMED PLAN OF LIQUIDATION AND (II) AWARDING COSTS AND ATTORNEY'S FEES

Upon consideration of the *Trustee's Motion for Entry of an Order (I) Enforcing the Releases and Injunctions Contained in the Confirmation Order and Confirmed Plan of Liquidation and (II) Awarding Costs and Attorneys' Fees* (the "Motion'), filed by Robert J. Keach, as Trustee of Montreal Maine & Atlantic Railway, Ltd.; and it appearing that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that venue of this chapter 11 case and the Motion in this district is proper pursuant to 28 U.S.C. § 1408 and 1409; and it appearing that this proceeding on the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b); and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and the Court having found that the Insurance Plaintiffs' actions violate, and are in contempt of, the Releases and Injunctions and that the relief requested in the Motion is necessary to enforce the Plan, Releases and Injunctions; and after due deliberation and sufficient cause appearing therefor; it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:[1]

1. The Motion is granted in its entirety.

[1] Capitalized terms used but not defined herein have the same meaning ascribed to such terms as in the Motion.

2. The Plaintiffs are hereby enjoined from the continued prosecution of the Action against Western Petroleum, and shall dismiss the Action, with prejudice, within five (5) days following the entry of this Order.

3. The Trustee and/or Western Petroleum are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

4. The Plaintiffs shall reimburse the Trustee for his attorneys' fees and costs related to bringing and prosecuting the Motion in the amount set forth in the Trustee's Affidavit of Costs and Expenses filed with the Court at the hearing on the Motion.

5. All objections to the Motion or the relief requested therein, if any, that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits.

6. This Court shall retain jurisdiction with respect to all matters arising or related to the enforcement of this Order.

Dated: _____, 2015

_____
The Honorable Peter J. Cary
Chief Judge, United States Bankruptcy
Court for the District of Maine