

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

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In re : Chapter 11
  
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MONTREAL MAINE & ATLANTIC :
  
RAILWAY, LTD. : Case No. 13-10670 (LHK)
  
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Debtor. :
  
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**CIT GROUP, INC.’S JOINDER TO  
MOTIONS TO TRANSFER PERSONAL INJURY AND  
WRONGFUL DEATH LAWSUITS TO THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE PURSUANT TO 28 U.S.C. §§ 157(b)(5) AND 1334**

The CIT Group, Inc. (“*CIT*”) hereby joins and incorporates by reference herein the *Chapter 11 Trustee’s Motion to Transfer Personal Injury Tort and Wrongful Death Claims Pursuant to 28 U.S.C. §§ 157(b)(5)*, dated September 11, 2013 [D.I. 202] (the “*Trustee Motion*”),<sup>1</sup> and the *Motion to Transfer Certain Personal Injury Tort and Wrongful Death Lawsuits to the Maine District Court Pursuant to 28 U.S.C. §§ 157(b)(5) and 1334*, dated September 11, 2013 [D.I. 206], filed by Western Petroleum Corporation and Petroleum Transport Services, Inc. (together with the Trustee Motion, the “*Transfer Motions*”). For all of the reasons set forth in the Transfer Motions, as well as the additional reasons set forth below, CIT requests that this Court enter an order transferring the nineteen remaining PITWD Cases to this Court so that those cases can be centrally administered consistent with the underlying purposes and explicit language of 28 U.S.C. § 157(b)(5).

<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the respective meanings attributed to them in the Trustee Motion.

**PRELIMINARY STATEMENT**<sup>2</sup>

1. The PITWD Cases at issue here all stem from a single incident – an accident that the Plaintiffs themselves accuse the Debtor of having caused. In fact, this single incident is what precipitated the Debtor’s chapter 11 case. As the Plaintiffs concede, resolution of their claims against the Debtor and MMA Canada will be the primary focus of the chapter 11 case and the companion CCAA proceeding pending in Quebec. Yet the very same Plaintiffs who have stressed to the Bankruptcy Court the importance of using the chapter 11 case to protect their interests also seek to separate the Debtor from the PITWD Cases. This makes no sense. Only one court – this Court – has the authority to consolidate and coordinate the actions in a single forum, to determine the appropriate procedures for resolving claims against the Debtor, and to determine how the Debtor’s limited assets will be distributed among commercial as well as tort creditors. By exercising its authority under 28 U.S.C. § 157(b)(5) and transferring the PITWD Cases to this Court, this Court will ensure that the Plaintiffs’ claims – both against the Debtor and MMA Canada, as well as against the various other Defendants – proceed in a manner that prevents unnecessary duplication of efforts and expenditure of resources, fosters efficiency, protects the assets of the Debtor’s estate, and promotes fairness for all parties involved.

**THIS COURT IS THE APPROPRIATE VENUE FOR THE PITWD CASES**

**I. This Court Has Exclusive Authority to Determine the Appropriate Venue For the PITWD Cases**

2. As discussed in the Transfer Motions, 28 U.S.C. § 157(b)(5) grants this Court the exclusive authority to determine where the PITWD Cases should be heard. The determination under 28 U.S.C. § 157(b)(5) *must* be made by the district court in which the

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<sup>2</sup> Capitalized terms used but not otherwise defined in this Preliminary Statement or the Trustee Motion shall have the respective meanings ascribed to them below.

bankruptcy case is pending. *See Calumet Nat'l. Bank v. Levine*, 179 B.R. 117, 120-21 (N.D. Ind. 1995) (holding that the district court in a district other than where the bankruptcy case was pending did not have authority to grant the request for transfer because “both the plain language and legislative history of section 157(b)(5) make clear that the district court of the bankruptcy district is the court that chooses” and there is “little room for any other interpretation.”); *Hopkins v. Plant Insulation Co.*, 342 B.R. 703, 708 (D. Del. 2006) (“Because the [debtor’s] bankruptcy case is pending in the United States Bankruptcy Court for the District of Delaware, [the District Court of Delaware] has the *sole authority* to determine the appropriate venue...” (emphasis added)).

## **II. This Court Has Subject Matter Jurisdiction Over the PITWD Cases Because They Are “Related To” the Bankruptcy Cases**

3. No one disputes that, once the plaintiffs and defendants in the PITWD Cases (the “*Plaintiffs*” and “*Defendants*,” respectfully) file proofs of claim against the Debtor’s estate, the resolution of such claims clearly falls within the bankruptcy court’s “core” subject matter jurisdiction under 28 U.S.C. § 1334(b). Subject matter jurisdiction also exists to preside over the PITWC Claims pursuant to 28 U.S.C. § 1334(b) because they are “related to” the Debtor’s chapter 11 case under the well-established standard articulated by the Third Circuit in *Pacor, Inc. v Higgins*, 743 F.2d 984 (3d Cir. 1984), *overruled on other grounds by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), and adopted by the First Circuit. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1984), *abrogated on other grounds by Conn. Nat'l. Bank v. Germain*, 112 S.Ct. 1146 (1992); *Work/Family Dir., Inc. v. Children’s Discovery Ctrs., Inc. (In re Santa Clara Cty. Child Care Consortium)*, 223 B.R. 40, 45 (B.A.P. 1st Cir. 1998); *DeLuca v. McKenna (In re Remington Dev. Grp., Inc.)*, 180 B.R. 365, 368 (Bankr. D.R.I. 1995). Under *Pacor*, a proceeding is “related to” a bankruptcy case “if the outcome of that proceeding

could conceivably have *any effect* on the estate being administered in bankruptcy.” *Pacor*, 743 F.2d at 994 (emphasis added).

4. The United States Supreme Court has recognized that “related to” jurisdiction may exist over “suits between [nondebtor] parties which have an effect on the bankruptcy estate.” *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498, n. 5 (1995). Courts have found “related to” jurisdiction over third-party actions in a number of circumstances, including where such a “unity of interest” exists in the allegations against the debtor and nondebtor co-defendants that the debtor will inevitably become involved in the co-defendant litigation, where actions against a nondebtor co-defendant could result in the diminution of insurance proceeds available to the debtor, or where a nondebtor has a contractual right to indemnification from the debtor. All of these circumstances exist here.

**A. Because the PITWD Cases Arise From a Single Incident Involving the Debtor, “Related to” Jurisdiction Exists**

5. “Related to” jurisdiction exists over actions against a nondebtor if those actions arose out of a specific incident or nucleus of fact directly involving the debtor. *See, e.g., In re Dow Corning Corp.*, 86 F.3d 482, 493-94 (6th Cir. 1996) (finding “related to” jurisdiction, and noting that the litigation would “obviously” impact the bankruptcy proceeding and debtor’s estate where the state court litigation arose out of *the use of one product manufactured by Dow Corning* and the parties had potential contribution or indemnification claims against one another); *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 231 (3d Cir. 2004) (finding no “unity of interest” where the personal injury claims asserted against the various nondebtor defendants arose from “different products, involved different asbestos-containing materials, and were sold to different markets”); *NYCERS v. Ebbers (In re WorldCom, Inc. Secs. Litig.)*, 293 B.R. 308, 321 (S.D.N.Y. 2003) (noting that the relevant conduct of the nondebtor defendants and the debtor

were “indisputably intertwined” so the pending actions could conceivably impact the bankruptcy estate); *In re Frascella Enters.*, 349 B.R. 421, 434 (Bankr. E.D. Pa. 2006) (noting that where claims against nondebtor defendants were the same claims that would be asserted against the debtor there is an “identity of interest” between the parties that warrants consolidation of the claims).

6. Although the Plaintiffs attempted to separate the Debtor from the PITWD Cases after the Debtor’s chapter 11 filing, the resolution of those actions will invariably affect the handling and administration of the Debtor’s case. The Plaintiffs who asserted the PITWD Cases have formally appeared in the Debtor’s chapter 11 case and have announced their intention to assert claims in that case based on the same exact underlying facts and alleged harms asserted in the PITWD Cases. Accordingly, the PITWD Cases necessarily will involve, at a minimum, significant discovery from the Debtor and, more likely, full-scale litigation. Where a debtor will inevitably become involved in litigation, courts have found that a nexus exists to warrant a finding of “related to” jurisdiction. *See, e.g., Frascella*, 349 B.R. at 434 (finding an action was “related to” the bankruptcy case where, to protect the debtor’s interest, the debtor would need to be actively involved in the state court action because the relevant claims involved the debtor’s alleged unlawful activity); *In re Twinlabs Pers. Injury Cases*, 2004 WL 435083, at \*1 (S.D.N.Y. Mar. 8, 2004) (finding “related to” jurisdiction where defense of the claims against the nondebtor defendants would “invariably” involve the debtors); *see also In re Jefferson Cnty., Ala.*, 491 B.R. 277, 287-95 (Bankr. N.D. Ala. 2013) (applying the automatic stay to an action against a nondebtor where the debtor’s behavior was central to the dispute, the action would impose substantial discovery obligations on the debtor, and any decision in the action could have a potentially preclusive effect on future actions against the debtor).

7. Given the Debtor's central role in the Derailment, the Debtor will inevitably become involved in the litigation, whether through an adversary proceeding, contested matter arising out of a claim, or third-party discovery efforts. The inextricability of the events leading up to the Debtor's chapter 11 case, the PITWD Cases, and any claims asserted by Plaintiffs in the Debtor's chapter 11 case compels the conclusion that the PITWD Cases are "related to" the Debtor's chapter 11 case.

**B. The PITWD Cases Are "Related to" the Debtor's Chapter 11 Case Because CIT Has Rights Under the Debtor's Insurance Policies**

8. Courts have found that actions against a nondebtor are "related to" a bankruptcy case if the nondebtor and the debtor are both named insureds under the same insurance policy. *In re Dow Corning Corp.*, 86 F.3d 482, 494-95 (6th Cir. 1996); *see also A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.)*, 788 F.2d 994, 1008 (granting injunction against prosecution of claims against nondebtor co-defendants because such claims, if successful, would reduce the insurance funds available to the debtor's estate), *cert. denied*, 107 S. Ct. 251 (1986); *In re Quigley Co., Inc.*, 676 F.3d 45, 53 (2d Cir. 2012) (finding that bankruptcy court has "related to" jurisdiction over third-party lawsuit against nondebtor co-defendant where co-defendant shared insurance policy with debtor and prosecution of claims against co-defendant on asbestos claims would result in depletion of shared insurance proceeds), *cert. denied*, 133 S. Ct. 2849 (2013).

9. Indeed, under 28 U.S.C. § 1334(e), the district court in which the bankruptcy case is commenced has *exclusive* jurisdiction over property of the estate. In the context of shared insurance, therefore, courts have found "related to" jurisdiction because a debtor's insurance policies are considered property of the debtor's estate and prosecution of a claim against a co-insured nondebtor could potentially deplete proceeds available to the debtor –

thereby reducing assets available to the bankruptcy estate. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 232-33 (3d Cir. 2004); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988); *A.H. Robins*, 788 F.2d at 1008; *Am. Intern. Specialty Lines Ins. Co. v. Towers. Fin. Corp.*, 198 B.R. 55 (S.D.N.Y. 1996). As the Second Circuit has recognized, where a debtor shares insurance with a co-defendant, a judgment against the debtor is likely to “automatically result in liability” against the debtor. *Quigley*, 676 F.3d at 54; *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 233 (3d Cir. 2004) (recognizing that shared insurance, which had not been proven, would likely result in a finding of “related to” jurisdiction).

10. The Debtor leased railcars and locomotives from CIT’s affiliates<sup>3</sup> pursuant to several distinct leases and various schedules annexed thereto. Those leases required the Debtor to, and, to the best of CIT’s knowledge, the Debtor did, include the lessor and its affiliates and subsidiaries as additional insureds, and, in some instances, loss payees, on certain insurance policies. As a result, to the extent that a claim is prosecuted against CIT or an affiliated entity, any such CIT-related Defendant will look directly to those insurance policies to satisfy any judgment rendered against it. This fact alone has routinely been considered determinative to establishing “related to” jurisdiction.

**C. Because CIT Has a Contractual Right to Indemnification From The Debtor, “Related to” Jurisdiction Exists**

11. In addition to its status as an additional insured under certain of the Debtor’s insurance policies, CIT and its affiliates have a contractual right to indemnification from the Debtor under the relevant locomotive leases. “Related to” jurisdiction clearly exists when claims against a nondebtor give rise to an unqualified indemnification claim against a debtor. *Philippe v. Shape, Inc.*, 103 B.R. 355, 358 (D. Me. 1989) (finding that claims asserted

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<sup>3</sup> Although CIT is the sole named defendant, the lease relevant to the PITWD Cases is with a subsidiary of CIT.

against debtor's officers, directors, and employees were related to the debtor's bankruptcy case because debtor's bylaws expressly provided nondebtor defendants with a right to indemnification which was not subject to any conditions precedent); *see also A.H. Robins*, 788 F.2d at 1000 (in considering whether the automatic stay extends to claims against a nondebtor defendant, the court stated that where the nondebtor defendant has a contractual right to indemnification against the debtor, the proceeding against the nondebtor defendant affects the bankruptcy estate and is a basis for finding "related to" jurisdiction); *NYCERS v. Ebbers (In re WorldCom, Inc. Sec. Litig.)*, 293 B.R. 308, 321 (S.D.N.Y. 2003) (finding, among other things, that state court actions asserted against the nondebtor defendants who held a contractual right to indemnification against the debtor were related to the debtor's bankruptcy because "at the very least" the claims for contractual indemnification have a "conceivable effect on the bankruptcy estate); *Krafchick v. Zayre of East Providence, Inc.*, 137 B.R. 560 (D.Mass. 1991) (holding that because nondebtor defendant was a party to an indemnification agreement with the debtor whereby the debtor agreed to indemnify the nondebtor party for "any and all liability" the matter was "related to" the bankruptcy proceeding.).

12. Further, the Debtor and CIT's relationship extends beyond the indemnification – the parties share insurance and the parties' interests are inextricably intertwined. *See Fed.-Mogul Global, Inc.*, 282 B.R. 301, 309-10 (Bankr. D. Del. 2002) (finding that "related to" jurisdiction may be established despite a contingent or uncertain indemnification claim when the debtor's liability is intertwined with the nondebtor defendant's liability or the parties share insurance).

13. As referenced in the Transfer Motions, the Plaintiffs in the PITWD Cases have themselves made compelling arguments that support transfer of the PITWD Cases to this



Court. The Plaintiffs, in the *Wrongful Death Claimants' Motion for Formation of Creditors' Committee*, dated August 22, 2013 [D.I. 76] assert that wrongful death and personal injury claimants will be the largest constituency in the Debtor's chapter 11 case and tout the benefits of the "orderly and efficient" bankruptcy process over state court actions. By the Plaintiffs' own admission it is evident that the PITWD Cases will have more than a conceivable effect on MMA's chapter 11 case and, accordingly, all parties will benefit by the transfer of the PITWD Cases to this Court.

### **CONCLUSION**

14. For the foregoing reasons, CIT joins the Transfer Motions and requests that the Court enter an order transferring the PITWD Cases to the this Court and granting such other and further relief as may be appropriate.

Dated: September 12, 2013

Respectfully Submitted,

**THE CIT GROUP, INC.**

By their attorney:

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**CERTIFICATE OF SERVICE**

I, Edward S. MacColl, attorney for CIT Group, Inc. do hereby certify that on September 12, 2013, I made due service of the above filing by electronically filing the same and using the Court's CM/ECF system.

/s/ Edward S. MacColl  
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