IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re MONTREAL MAINE & ATLANTIC RAILWAY, LTD. Debtors.	Chapter 11 Case No. 13-10670

OBJECTION OF EDWARD A. BURKHARDT, RAIL WORLD, INC., AND RAIL WORLD LOCOMOTIVE LEASING, LLC TO DISCLOSURE STATEMENT FOR CHAPTER 11 PLAN DATED JANUARY 29, 2014 PROPOSED BY THE UNOFFICIAL COMMITTEE OF WRONGFUL DEATH CLAIMANTS

Edward A. Burkhardt ("Burkhardt"), Rail World, Inc. ("Rail World"), and Rail World Locomotive Leasing, LLC ("Rail World Locomotive," and collectively with Burkhardt and Rail World, the "Rail World Parties")[1] hereby file this objection to the Disclosure Statement (the "Disclosure Statement") for Chapter 11 Plan (the "Plan") Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants (the "Unofficial Committee") [Dkt. No. 601]. In support of their objection, the Rail World Parties state as follows:

[1] The Rail World Parties are each named as a defendant in the so-called "PITWD Cases" (*see* Trustee's Objection to the Disclosure Statement at ¶ 21) originally filed in the Circuit Court of Cook County, Illinois and later removed to the United States District Court for the Northern District of Illinois. The PITWD Cases are subject to the motion to transfer to the United States District Court for the District of Maine pursuant to 28 U.S.C. § 157(b)(5), which is currently pending. Other individuals with a relationship to the Debtor and the Rail World Parties, including certain directors and officers of Rail World, the Debtor and MMA Canada, have been named as defendants in a class action petition filed in Quebec, Canada. These individuals, as well as certain unnamed directors and officers of Rail World, the Debtor and MMA Canada, and other entities represented by undersigned counsel, are parties in interest in this bankruptcy case to the extent that the Unofficial Committee's proposed plan affects their rights in insurance policies or otherwise. Accordingly, such individuals and entities reserve all rights to join this objection to the Disclosure Statement or otherwise assert their rights as parties in interest in this bankruptcy case.

BACKGROUND

1. The train derailment in Lac-Mégantic, Quebec, on July 6, 2013, is believed to have resulted in the death of 47 people and caused significant property and environmental damage. Shortly after the accident, on August 7, 2013 (the "Petition Date"), Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in this Court, and MMA's Canadian subsidiary, Montreal, Maine & Atlantic Canada ("MMA Canada"), filed a concurrent proceeding under Canada's Companies' Creditors Arrangement Act in the Canadian Superior Court in Quebec (the "Canadian Court").

2. The Canadian Court promptly issued a stay (the "Canadian Stay") prohibiting any "proceeding or enforcement process," including all proceedings in connection with the derailment "in Canada and in the United States of America" against MMA and MMA Canada, their liability insurer, members of their "Corporate Group" and the directors, officers and employees of any member of the Corporate Group. The Corporate Group includes, in addition to MMA and MMA Canada, Maine Montreal & Atlantic Corporation (the direct corporate parent of MMA) and LMS Acquisition Corp. (a "sister" company to MMA). The Canadian Stay is included in paragraph 7 of the Initial Order entered in the Superior Court for the Province of Quebec, District of Montreal on August 8, 2013. By various orders of the Canadian Court, the Canadian Stay was extended up to and including March 12, 2014.

3. On August 21, 2013, the U.S. Trustee appointed Robert J. Keach (the "Trustee") as the Chapter 11 Trustee in this Chapter 11 case. As a consequence of the

Trustee's appointment, mandatory in a railroad reorganization case, the Debtor's exclusive right to file a plan terminated. *See* 11 U.S.C. § 1121(c)(1).

4. On September 4, 2013, the Bankruptcy Court and the Canadian Court entered a Cross-Border Insolvency Protocol governing the conduct of all parties in interest in this case and the Canadian Case [Dkt. No. 168]. Among other benefits, the Protocol allows the respective United States and Canadian courts to communicate and coordinate activities and defer to the judgment of each other where appropriate, underscoring the international comity considerations that surround the Lac-Mégantic derailment and resulting court actions. The Protocol established the mechanism by which this Court and the Canadian Court approved the joint status conference held on February 26, 2014.

5. Prior to the Petition Date, MMA and MMA Canada obtained separate railroad liability insurance (the "US Policy," the "Canadian Policy," and, together, the "Policies") from Indian Harbor Insurance Company and XL Insurance Company Limited, respectively. As fully described in the *Trustee's Objection to Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants* [Dkt. 687] (the "Trustee's Objection"), each of MMA, MMA Canada, Montreal, Maine and Atlantic Corporation, LMS Acquisition Corporation, Rail World, and Rail World Locomotive, among others, are "Named Insureds" under the Policies. In addition, Mr. Burkhardt, as chairman of MMA and MMA Canada, as well as other MMA and MMA Canada directors and officers (whether named or unnamed in the PITWD Cases or the Canadian class action) are "Insureds" under the Polices.

6. In addition to coverage under the Polices, Mr. Burkhardt and the other directors and officers of MMA and MMA Canada are expressly indemnified by MMA and MMA Canada under each entity's respective bylaws and articles of incorporation. Rail World is also indemnified by MMA under a certain Management Agreement dated January 8, 2008, between MMA and Rail World.[2] And, while it is Rail World Leasing's understanding that none of its locomotives were involved in the derailment, nevertheless, Rail World Leasing is also indemnified by MMA under a July 1, 2012 Lease Agreement.

ARGUMENT

I. The Disclosure Statement is Premature and Is a Distraction from the Constructive Negotiations Toward a Negotiated Resolution to the MMA Bankruptcy and CCAA Proceedings

7. Whether intentional or not, the effect of the Unofficial Committee's insistence to move forward with its proposed Plan and the Disclosure Statement is to short-circuit and distract from the productive, on-going discussions toward a cross-border solution which have been supported by the overwhelming majority of stakeholders that participated in the February 26, 2014 joint status conference before this Court and the Canadian Court. As discussed at the joint conference, there is strong and building momentum toward important settlements and a possible plan framework that may resolve the most difficult and contentious issues in these cross-border cases. Each hour that is diverted by the stakeholders in this process to deal with the Unofficial Committee's premature and ill-conceived Plan is an hour that could be spent on efforts to reach an agreement that would, at the very least, allow the proceeds of the Policies to be

[2] The above-referenced governing documents of MMA and MMA Canada, the management agreement, and the lease agreement are part of the record before the District Court of Maine in Case No. 13-MC-00184-NT and can be found at Dkt. Nos. 46 and 53.

distributed to victims of the Lac-Mégantic tragedy, let alone provide them additional funds from other sources.

8. Although "exclusivity" may have expired with the appointment of the Trustee, *see* 11 U.S.C. Sec. 1121(c), that does not mean that the plan process should devolve into a free-for-all in which various stakeholders rush to this Court with competing, self-serving plans. It is within this Court's power and discretion to table the Unofficial Committee's Disclosure Statement and Plan and allow for the negotiation process that the Trustee accurately summarized at the joint status conference to proceed. *See In re Franklin Industrial Complex, Inc.*, 386 B.R. 5, 10 (Bankr. N.D.N.Y. 2008) ("[T]he Court concludes that under the current circumstances as discussed above, the best course to follow is to postpone the hearing on the disclosure statements until some, if not all, the issues have been resolved . . ."); *In re Sunflower Racing, Inc.*, 218 B.R. 972, 977 (D. Kansas 1998) ("Several courts have held that a bankruptcy court has the authority pursuant to section 105 to defer hearings on a creditor's disclosure statement or on other important matters.").

9. Much in the same way that the February 26, 2014 joint status conference accelerated the settlement discussions described by the Trustee during that conference, appropriate benchmarks can and should be used to ensure the process moves forward as expeditiously as possible. A consensual resolution by the many stakeholders in these cases is far from certain at this stage, and, ultimately, it may be necessary for the Court to entertain competing plans or other proposals from the Unofficial Committee and other parties in interest. But it is far more efficient and productive to proceed in an organized

fashion that provides the greatest opportunity for a negotiated solution than to entertain the piecemeal approach to which the Unofficial Committee has subscribed.

II. The Disclosure Statement Should Not Be Approved Because it Fails to Provide Adequate Information and Because it Describes a Plan of Reorganization Which Cannot Be Confirmed

10. Even if the consideration of the Disclosure Statement were to go forward, the Disclosure Statement should not be approved. The Trustee's Objection sets forth in detail numerous valid and compelling objections to approval of the Disclosure Statement, any one of which mandates the Court deny its approval. The Disclosure Statement describes a proposed Plan which cannot be confirmed for numerous reasons, among them that the proposed Plan would violate the rights of the Rail World Parties and other expressly named insureds to receive defense costs and coverage under the Policies.

11. Under the proposed Plan, the proceeds of the Policies (the terms and conditions of which are incorrectly described by the Unofficial Committee)[3] would be distributed and the Policies cancelled with no recognition of the rights of the non-debtor insureds to receive defense costs and indemnity coverage under the Policies. *See* Plan at § 5.4. At the same time, the Plan would permit litigation to continue or commence against these very same insured parties, after their defense and indemnity rights are taken away. A plan which so clearly violates the express rights of a party to an insurance contract is facially unconfirmable pursuant to 11 U.SC. § 1129(a)(3). *See In re American Capital Equipment, Inc.*, 405 B.R. 415, 423 (Bankr.W.D. Pa. 2009) (plan which proposed settlement in violation of insurer's state law rights of consent was proposed in bad faith in

[3] *See* the Trustee's Objection at ¶ 39.

violation of Section 1129(a)(3)). This Court should not entertain a disclosure statement which proposes a plan that is patently unconfirmable on its face. *See In re Eastern Maine Elec. Co-op, Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991) ("If the disclosure statement describes a plan that is so fatally flawed that confirmation is impossible, the court should exercise its discretion to refuse to consider the adequacy of disclosures.") (additional citations omitted).

12. The Disclosure Statement also fails because it omits even the most basic and necessary information to enable a party to understand how the Plan can work. The fundamental purpose of a disclosure statement is to provide sufficient information to enable an informed voting process. *See In re Ferretti*, 128 B.R. 16, 18 (Bankr. D.N.H. 1991); *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1002 (Bankr. D. Mass. 1991). "[D]isclosure is the pivotal concept in reorganization practice under the code." *In re Lisanti Foods, Inc.*, 329 B.R. 491, 507 (D.N.J. 2005). As such, before acceptances or rejection of the Unofficial Committee's Plan may be solicited, the Court must also find that the Disclosure Statement contains adequate information. 11 U.S.C. § 1125(b). Section 1125(a)(1) defines "adequate information" as "information of a kind, and in sufficient detail, as far as is reasonably practicable . . . that would enable . . . a hypothetical investor of the relevant class to make an informed judgment about the plan . . ." 11 U.S.C. § 1125(a)(1).

13. While a determination of what constitutes "adequate information" is made on a case-by-case basis, *In re Oxford Homes, Inc.*, 204 BR. 264, 269 (Bankr. D. Me. 1997), even a cursory review of the Disclosure Statement reveals that the Unofficial Committee has not included "adequate information." The foundation of the Unofficial

Committee's Plan is the diversion of the proceeds of the Policies to holders of wrongful death and personal injury claims while clearing a path for continued litigation against non-debtor parties, including the non-debtor parties who would otherwise be insured under the Policies. *See* Plan at § 5.5. Yet, nothing in the Disclosure Statement describes how the Plan would, legally, divest the non-debtor insured entities of their rights in the Policies while permitting litigation against those very same parties to proceed. In fact, the Disclosure Statement does not even touch on the subject of the non-debtor insureds rights under the Policies, it completely ignores those rights.

14. The glaring lack of disclosure regarding how the Unofficial Committee's Plan proposes to overcome the legal rights of the non-debtor insureds in the Policies is just the most obvious example of how the Disclosure Statement fails to include the basic information necessary to evaluate the Unofficial Committee's proposed plan. The Court should not approve this Disclosure Statement.

CONCLUSION

For the reasons set forth herein and in the Trustee's Objection, the Court should deny approval of the Disclosure Statement.

Dated: February 28, 2014

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/s/ *Patrick C. Maxcy*

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