UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

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

WFS ENTITIES' (I) JOINDER IN THE OBJECTION OF THE CHAPTER 11 TRUSTEE AND (II) OBJECTION TO THE UNOFFICIAL COMMITTEE OF WRONGFUL DEATH CLAIMANTS' DISCLOSURE STATEMENT

Western Petroleum Corporation and Petroleum Transport Services, Inc. (together, the "WFS Entities") (i) join in the Chapter 11 Trustee's objection to the disclosure statement filed by the so-called Unofficial Committee of Wrongful Death Claimants (the "Unofficial Committee"),[1] and (ii) object independently to the Unofficial Committee's disclosure statement,[2] which was filed in relation to the Unofficial Committee's proposed chapter 11 plan.[3] In support of this joinder and objection, the WFS Entities respectfully state as follows.

Preliminary Statement

The WFS entities agree with the other objecting parties that the Unofficial Committee's plan and disclosure statement are merely a litigation tactic to further the Unofficial Committee's

[1] *See Trustee's Objection to Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by Unofficial Committee of Wrongful Death Claimants* [Dkt. No 687].

[2] *See Disclosure Statement for Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants* [Dkt. No. 601]. Although the deadline to object to the Unofficial Committee's disclosure statement was February 28, 2014, the Unofficial Committee agreed to extend that deadline to March 4, 2014, at the WFS Entities' request.

[3] *See Chapter 11 Plan Dated January 29, 2014 Proposed by the Unofficial Committee of Wrongful Death Claimants* [Dkt. No. 600].

primary goal in these proceedings: to prevent the transfer of nineteen wrongful death actions arising out of the Lac Mégantic derailment from Illinois courts to the Maine District Court under 28 U.S.C. § 157(b)(5). This is clear from both the timing of the filing of the plan and disclosure statement, and the plain language of the plan itself. Actions such as these hurt the legitimate interests of the many parties affected by the derailment that are participating constructively in these coordinated cross-border proceedings.

As explained at length by the Trustee, and for the additional reasons stated below, the chapter 11 plan proposed by the Unofficial Committee is "patently unconfirmable." Further, regardless of the unconfirmability of the Unofficial Committee's plan, interested parties should be given a reasonable opportunity to pursue a global resolution of the complex, cross-border issues implicated by the U.S. and Canadian bankruptcy proceedings. The Court should, therefore, refuse to approve the Unofficial Committee's disclosure statement, consistent with well settled law in this area.

Joinder in Chapter 11 Trustee's Objection

The WFS Entities agree with the Trustee's position that the Unofficial Committee's disclosure statement should not be approved because the chapter 11 plan it proposes (a) violates the Initial Order and the Canadian Stay, (b) fails to provide the "adequate information" required by section 1125 of the Bankruptcy Code, and (c) is so "'fatally flawed' that confirmation is 'impossible.'" *In re Eastern Maine Elec. Co-Op, Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991) (refusing to approve a disclosure statement for a plan of reorganization that violated the Bankruptcy Code's priority scheme). Because the Trustee's objection correctly identifies (and discusses at length) many of the reasons why the Unofficial Committee's disclosure statement should not be approved, the WFS Entities hereby join in the Trustee's objection.

The WFS Entities' Objection

The WFS Entities also separately object to the Unofficial Committee's disclosure statement on two grounds, both of which address the plan's patent unconfirmablity. Courts have recognized that "[i]t is now well accepted that a court may disapprove of a disclosure statement ... if the plan could not possibly be confirmed"—*i.e.*, where the plan is "patently unconfirmable." *In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999); *accord In re El Comandante Mgmt. Co., LLC*, 359 B.R. 410, 415 (Bankr. D.P.R. 2006); *In re Mahoney Hawkes, LLP*, 289 B.R. 285, 294 (Bankr. D. Mass. 2002); *In re Felicity Assocs., Inc.*, 197 B.R. 12, 14 (Bankr. D. R.I. 1996).[4] A plan is patently unconfirmable where (1) confirmation "defects [cannot] be overcome by creditor voting results" and (2) those defects "concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing." *In re Monroe Well Servs., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987). The WFS Entities submit that the two plan defects discussed below cannot be overcome by voting. They also are purely legal in nature and do not involve or implicate any genuine disputes of material fact.

First, the Plan inappropriately proposes to wrest away from the Maine District Court matters that the court currently has under advisement, and to effectively decide those matters in the Unofficial Committee's favor—namely, the motions of the Trustee and the WFS Entities to transfer to the Maine District Court, pursuant to 28 U.S.C. § 157(b)(5), nineteen Illinois wrongful death actions filed by various individuals who are allegedly members of the Unofficial

[4] Reviewing the unconfirmability of a plan of reorganization at the disclosure statement stage is appropriate because it "avoid[s] engaging in a wasteful and fruitless exercise of sending the disclosure statement to creditors and soliciting votes on the proposed plan when the plan is unconfirmable on its face." *In re Atlanta W. VI*, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988).

Committee. Specifically, Section 5.6(a) of the Unofficial Committee's plan provides all claimants with "the right to commence or continue litigation in *any forum* against any Non-Debtor Entity on account of any claim, including claims for which the U.S. Debtor or the Canadian Debtor may share liability *or that may on any other basis be, or asserted to be, related to*" MMA's bankruptcy case (emphases added). Whether the Illinois wrongful death actions, which assert claims against various non-debtor defendants including the WFS Entities, are "related to" MMA's bankruptcy case such that they should be transferred to the Maine District Court under section 157(b)(5) is precisely the issue that presently is *sub judice* in that court. If the Maine District Court finds that the Illinois actions are related to this bankruptcy case, then section 157(b)(5) provides that court with exclusive authority to determine where those actions should be tried.[5] Section 5.6(a) of the plan not only would decide in the Unofficial Committee's favor the very issue that is *sub judice* in the Maine District Court, but also would give individual claimants, rather than the Maine District Court, the power to decide the venue for claims that are related to this bankruptcy case. Thus, Section 5.6(a) directly contravenes section 157(b)(5), "the entire purpose of which is to centralize administration of the bankruptcy estate." *In re Triad Group, Inc.*, No. 13–C–1307, 2014 WL 580778, at *3 (E.D. Wis. Feb. 14, 2014); *see also In re Pan Am Corp.*, 16 F.3d 513, 516 (2d Cir. 1994) ("Congress enacted section 157(b)(5) to expand the district court's venue-fixing powers with an eye to centralizing the adjudication of a bankruptcy case."). For this reason alone, the plan cannot be confirmed and the disclosure statement should not be approved.

[5] 28 U.S.C. § 157(b)(5) provides that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

Second, and independently, the proposed plan inappropriately attempts to strip this Court and the Maine District Court (and indeed any court) of the power to determine whether "Derailment Claims" (defined to include all "PITWD Claims" and all other claims for damages as a result of the derailment) against non-debtor third parties are related to the bankruptcy case under 28 U.S.C § 1334. Specifically, Section 5.6(e) of the plan provides:

> **Related-to Jurisdiction**. From and after the Effective Date, no action prosecuted by the holder of any Derailment Claim against any Non-Debtor Entity shall be, or shall be deemed to be, "related to" the Case as those words are used in 28 U.S.C. § 1334.

This section, like Section 5.6(a) cited above, is an attempt by the Unofficial Committee to keep the Illinois actions—and indeed every other action "for damages as a result of the derailment," whether filed now or in the future—outside the jurisdiction of this Court and the Maine District Court. However, the Supreme Court has stated that "a federal court always has jurisdiction to determine its own jurisdiction." *U.S. v. Ruiz*, 536 U.S. 622, 628 (2002). The Unofficial Committee cannot, by virtue of an injunction-like provision in the Plan, deny this Court—or any other federal court—the right to determine whether it has jurisdiction over the wide variety of matters that may come before it. That is particularly true because case law recognizes that the very purpose of "related to" jurisdiction is to allow federal courts, including bankruptcy courts working with district courts in their districts, to globally and efficiently resolve the universe of claims related to a bankruptcy case, and thereby benefit all affected parties and the judicial system as a whole. *See, e.g., In re PRS Ins. Grp., Inc.*, 335 B.R. 77, 83-84 (Bankr. D. Del. 2005) ("The purpose of section 1334 is to centralize proceedings in the bankruptcy court."); *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) ("The jurisdictional grant in [section] 1334(b) was a distinct departure from the jurisdiction conferred under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis

of jurisdiction."); *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984) (By enacting section 1334(b), "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.").

Finally, even if the Court chooses not to reach the "patently unconfirmable" issue, the Court nevertheless should refrain from considering whether to approve the disclosure statement at this time under sections 105(a) and (d) of the Bankruptcy Code, and under its inherent authority to control its own docket. *In re Kehn Ranch, Inc.*, 41 B.R. 832, 833 (Bankr. D.S.D. 1984) ("the [c]ourt's inherent powers and 11 U.S.C. § 105 enable it to control its own docket."). Bankruptcy Rule 2002(b) provides that disclosure statement hearings are to be scheduled after parties receive "*not less than* 28 days' notice." Yet nothing prevents a court from scheduling such a hearing following the expiration of such period. Here, every party in interest except the Unofficial Committee has expressed a willingness to participate in good faith negotiations in the hope of reaching a global resolution of the complex, cross-border issues inherent in the U.S. and Canadian bankruptcy proceedings. Time should be allowed for those discussions to occur. In the meantime, the Court need not discount the desires of every other party in interest and accede to the demands of just one constituency.

Conclusion

As stated above and in the Trustee's objection, the Unofficial Committee's plan is patently unconfirmable because it purports to, among other things, (i) wrest from the Maine District Court matters that are currently under advisement and block that court from fulfilling its statutory role to decide where personal injury and wrongful death claims related to this bankruptcy case should be tried, and (ii) effectively enjoin all courts, following the plan's

effective date, from deciding whether claims against non-debtor third parties arising out of the derailment are related to this bankruptcy case. In addition, the plan process initiated by the Unofficial Committee undermines the prospects for a global resolution of the complex, cross-border issues inherent in the U.S. and Canadian bankruptcy proceedings. For these reasons, the WFS Entities respectfully submit that the Court should decline to approve the Unofficial Committee's disclosure statement.

Dated: March 4, 2014

/s/ Jay S. Geller

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