UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

Canadian Pacific Railway Company's reply to the trustee's memorandum of law in support of confirmation

Canadian Pacific Railway Company (CP) replies to the trustee's confirmation brief in order to highlight the sophistry of the gratuitous attacks on CP's standing and the unwarranted expansion of this Court's jurisdiction. CP absolutely has standing. And this Court clearly lacks jurisdiction to condone non-consensual, non-debtor third-party releases and injunctions.

I. CP's standing to object

1. In an effort to deny CP standing, the trustee contends that confirmation of a plan—containing releases and injunctions that would preclude CP from defending and seeking indemnification—will not adversely affect CP. The absurdity of this proposition is apparent. As already explained, CP rights will be pillaged. And the trustee's so-called "judgment reduction provision" impairs, rather than preserves, CP's rights.

2. 11 U.S.C. § 1109 governs the right to be heard in bankruptcy proceedings: A "party in interest ... may raise and may appear and be heard *on any issue* in a case under this chapter." (emphasis added). And "[a] party in interest may object to confirmation of a plan." 11 U.S.C. § 1128(b).

3. Section 1109(b) is "intended to confer broad standing at the trial level … and to continue in the tradition of encouraging and promoting greater participation in reorganization cases." *In re Global Indus. Techs., Inc.*, 645F.3d 201, 211 (3d Cir. 2011) (internal quotations omitted). The party in interest definition "'must be construed broadly to permit parties affected by a chapter 11 proceeding to appear and be heard.'" *Id.* (quoting *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985)). The list of potential interested parties is not restrictive; to the contrary, section 1109(b) "has been construed to create a broad right of participation in Chapter 11 cases." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 n.21 (3d Cir. 2004); *see also In re Global Indus. Techs.*, 645 F.3d at 210.

4. The First Circuit agrees: "Courts have generally construed the term 'party in interest' as used in 11 U.S.C. § 1109(b) liberally." *In re Summit Corp.*, 891 F.2d 1, 5 (1st Cir. 1989). Parties in interest include "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding," *In re James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992), or anyone who "has a sufficient stake in the proceeding so as to require representation." *In re Amatex Corp.*, 755 F.2d at 1042.[1]

5. Article III standing is even more expansive. When the harm suffered is "fairly traceable to the . . . challenged action; and redressable by a favorable ruling," Article III standing is satisfied. *Horne v. Flores*, 557 U.S. 433, 445, 129 S.Ct. 2579 (2009). The harm need not be great: "some specific, 'identifiable trifle' of injury" suffices. *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982) (quoting *United States v. Students Challenging Regulatory Agency*

[1] The trial level "person in interest" standard is broader than the appellate "persons aggrieved" test that the trustee seeks to enforce against CP. *See Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 642 (2d Cir. 1988). Regardless, CP's distinct pecuniary interest in the plan and in the confirmation satisfies heightened appellate standards. *See Gen. Motors Acceptance Corp. v. Dykes (In re Dykes)*, 10 F.3d 184, 187 (3d Cir. 1993).

Procedures (SCRAP), 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405 (1973)). The "critical question" is whether the party has "'such a personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction.'" *Horne*, 557 U.S. at 445, 129 S.Ct. 2579 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142 (2009)).

6. CP has plenty of standing to object to plan confirmation. To begin with, CP qualifies for party in interest status. As a creditor CP timely filed proofs of claim and voted against confirmation. The railroad asserts administrative, Class 7 and Class 13 claims. Each provision of the plan to which CP has objected directly affects CP's rights. In short, CP asserts its own rights, not the rights of others.

7. The trustee cannot seriously contend that CP will not be harmed by plan confirmation. Secret accords,[2] endorsed by the plan, strip CP of the ability to defend against unrelated litigation and obviate bargained-for rights without consideration or consent. This impairment is not assuaged, but rather augmented, by the so-called "judgment reduction provision" showcased for the first time in the latest confirmation order proposal.

8. The trustee's decree that Maine comparative fault law governs Quebec wrongful death actions and other private rights lawsuits venued throughout the United States amounts to no more than speculation. Choice of law principles, as decided in the various forums in which derailment litigation is pending, will ultimately determine liability allocations. Neither the trustee nor CP can say at this stage of the litigation which laws will apply.

[2] CP continues to maintain that unredacted settlement agreements must be disclosed. Without such disclosure, the affected parties lack adequate information. *See In re Lower Bucks Hosp.*, 2014 WL 2981215 (3d Cir. July 3, 2014) (holding that the court below correctly severed from a reorganization plan non-consensual third-party releases because of significant disclosure deficiencies: "Key terms of a plan of confirmation [sic], particularly those that release a non-debtor from claims by creditors, must be adequately disclosed.").

9. The trustee's "judgment reduction provision" is a Trojan horse. Rather than preserving CP's rights, that term handicaps any argument about comparative fault principles of a jurisdiction other than Maine applying. That limitation alone injures CP.

10. Finally, 11 U.S.C. § 1109(b) allows CP, as a party in interest, to be heard on "any issue." At the same time, the trustee must establish that every plan provision complies with applicable law. *In re Irving Tanning Co.*, 496 B.R. 644, 658 (B.A.P. 1st Cir. 2013) ("A plan proponent has the burden of proving by a preponderance of the evidence that the plan satisfies the applicable requirements."). Section 1109(b) and Article III afford CP with standing to object to any attempt by the trustee to make the required showing.

II. Jurisdiction

11. CP insists that this Court lacks jurisdiction to release non-debtor, third-party claims. The trustee responded that "related-to" jurisdiction enables this Court to approve the releases and injunctions. ECF No. 1684 ¶ 116. But a bankruptcy court's exercise of "related to" jurisdiction does not extend to the issuance of final orders or judgments. Instead the Code limits the Court to "proposed findings of fact and conclusions of law," subject to mandatory *de novo* district court review. 28 U.S.C. § 157(c)(1).

12. Bankruptcy courts can only render final "orders" and "judgments" in "core proceedings arising under title 11, or arising in a case under title 11." *Id.* § 157(b)(1). The trustee maintains that 28 U.S.C. § 157(c)(2) encompasses plan confirmation as a core proceeding. ECF No. 1684 ¶ 115. But a chapter 11 does not afford a jurisdictional or adjudicatory blank check.

13. The release of third-party claims, even in connection with plan confirmation, is not a core proceeding. If that were the case, third party claims, far beyond the broadest scope of bankruptcy court adjudicatory power ("related to" jurisdiction), could be shoe-horned into core

proceeding simply by liquidation/reorganization plan inclusion. The Code prohibits such machinations. *See, e.g., In re Digital Impact, Inc*., 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998) ("[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 the proposed plan, this Court could acquire infinite jurisdiction[]," and even if the court had jurisdiction to approve injunctions against releases of third party claims, such prerogative would have to be derived from "related to" jurisdiction, which would be "limited to proposing findings of fact and conclusions of law to the District Court").

14. The *only* way that a bankruptcy court could assert jurisdiction, if at all, to extinguish third-party claims would be through "related to" jurisdiction. *In re Medford Crossings N., LLC*, No. 07-25115, 2011 WL 182815, at *14 (Bankr. D.N.J. Jan. 20, 2011) ("[T]his court has 'related to' jurisdiction to consider the appropriateness of the Plan and the Third Party Releases and Injunctions contained therein.") (emphasis omitted); *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) ("[W]hatever the precise limits of a bankruptcy court's jurisdiction to approve a third-party non-debtor release and injunction in a plenary chapter 11 case, the important point for present purposes is that the jurisdictional limits derive from the scope of bankruptcy court 'related to' jurisdiction under 28 U.S.C. § 1334 . . .."); *In re Congoleum Corp.*, 362 B.R. 167, 190–91 (Bankr. D.N.J. 2007) ("[E]stablish[ing] that this Court has 'related to' jurisdiction to release non-debtor parties" is the "first hurdle" to approval of such a release).

15. A non-debtor's claim against another non-debtor originates outside of bankruptcy, so neither "aris[es] under title 11" nor "aris[es] in a case under title 11." 11 U.S.C. § 157(b)(1). *See, e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d at 224, 233 (chapter 11 plan cannot

permanently enjoin third-party claims because "related to" jurisdiction does not reach such claims); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 753 (5th Cir. 1995) ("Those cases in which courts have upheld 'related to' jurisdiction over third-party actions do so because the subject of the third party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate. Conversely, courts have held that a third-party action does not create 'related to' jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate.") (footnotes omitted).[3]

16. In sum, even if "related to" jurisdiction empowered the Court to approve third-party releases and injunctions as connected to plan confirmation, the Court could not finally release third-party claims.[4] Such an order can only be entered, if at all, by the district court "after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1); *see also In re Digital Impact, Inc*., 223 B.R. at 14 n.8 (bankruptcy court lacks "related to" jurisdiction to approve third-party releases in a chapter 11 plan, and "[e]ven if the Court assumed 'related to' jurisdiction over such actions, all parties must consent to a bankruptcy judge rather than an Article III judge entering judgment. Without such consent, [the] Court's role is

[3] *See also* Eamonn O'Hagan, *On A "Related" Point: Rethinking Whether Bankruptcy Courts Can "Order" The Involuntary Release of Non-Debtor Third-Party Claims*, 23 AM. BANKR. L. REV. 531, 540 (2015) ("[I]f 'related to' jurisdiction does exist over third-party claims, only a federal district court has the adjudicatory authority to finally order the involuntary release of such claims."); Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1, 50 (1998) ("By any analysis, the nondebtor actions that are 'adjudicated' through nondebtor releases are, at best, noncore, 'related to' actions, beyond the jurisdiction of a bankruptcy judge to finally adjudicate, without consent of the litigants.").

[4] In the only context in which the Bankruptcy Code permits third-party releases—i.e., plans addressing asbestos-related liability—bankruptcy courts still lack final adjudicatory authority. The Bankruptcy Code requires release approval "by the district court that has jurisdiction over the reorganization case." 11 U.S.C. § 524(g)(3)(A).

limited to proposing findings of fact and conclusions of law to the District Court.") (citations omitted).

17. CP objects to any final bankruptcy order that would confirm a plan including non-consensual, third-party releases or injunctions. With requisite consent lacking, the Court wants for both subject matter jurisdiction and final adjudicatory authority. Any strained interpretation of §§ 1334 and 157 to empower this Court to release third-party claims would unconstitutionally delegate Article III authority in contravention of *Stern v. Marshall* and other Supreme Court precedent. The claims that the trustee seeks to abrogate dwell far beyond the "public rights exception." The requested releases and injunctions implicate private rights between non-debtors. That relief would finally dispose of CP's claims. And permanently invalidating causes of action regardless of merit actually heightens—rather than minimizes—constitutional concerns.

III. The new proposed plan confirmation order departs from disclosure statement and plan terms

18. Incredibly, a new proposed plan confirmation order—filed after the close of business, one week before the confirmation hearing and after plan objections were due and votes were counted—contains material provisions, including the so-called "judgment reduction provision," omitted from the disclosure statement and the plan. *See* ECF No. 1685 ([Proposed] order confirming trustee's revised first amended plan of liquidation dated July 15, 2015 and authorizing and directing certain actions in connection therewith).

19. For example, paragraph 56 of the proposed order alters the rights of potential plaintiffs. Depending on which law the various courts might apply those plaintiffs could have enjoyed collection opportunities that the "judgment reduction provision" purports to trump. How that modification would have influenced the votes of those creditors cannot be known. And the proposed order releases MMA Canada, even though the CCAA order affords no such release.

If the CCAA proceeding had entered such a release, then Canadian law would have entitled CP to a reduction of the percentage of fault attributable to MMA Canada.

20. To make matters worse, subparagraphs 56(c) and (d) introduce the previously undisclosed concepts of Released Party "financial capability." How can CP determine the "financial capability" of an entity that is not a party to non-bankruptcy litigation, and what is the justification for attributing financially incapable Released Party's liability to CP? The trustee never raised this issue before, and the concept has yet to be vetted. Importantly financial capability is not a consideration for recognized *Pierringer* releases.

21. The proposed order and plan are inconsistent. By the proposed order, the trustee invites the Court to condone material changes in the plan without the benefit of creditor disclosure or voting. The Court cannot enter such an order without the trustee first submitting a new disclosure statement to creditors and filing an amended plan with the Court that reflects all changed provisions.

Conclusion

Standing for CP to object abounds, and jurisdiction to approve third-party releases and injunctions wants. CP should be heard. As CP's objections will establish, the trustee's plan cannot be confirmed.

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