UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER RECOGNIZING AND ENFORCING THE PLAN SANCTION ORDER OF THE QUÉBEC SUPERIOR COURT

Richter Advisory Group Inc. is the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. ("MMA Canada") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C 36, as amended (the "CCAA"), pending before the Québec Superior Court of Justice (Commercial Division) (the "Québec Court"). The Monitor has commenced a chapter 15 case ancillary to the Canadian Proceeding by filing the Verified Petition for Recognition of Foreign Proceeding and Related Relief (the "Chapter 15 Petition").

The Monitor filed a motion (the "Motion") contemporaneously herewith, pursuant to sections 105(a), 1507, and 1521 of title 11 of the United States Code (the "Bankruptcy Code"), for entry of an order recognizing and enforcing the Plan Sanction Order of the Québec Court dated July 13, 2015, including any extensions or amendments thereof (the "Plan Sanction Order") sanctioning MMA Canada's Amended Plan of Compromise and Arrangement dated June 8, 2015 (as the same may be amended, revised or supplemented in accordance with its

terms, the "CCAA Plan").[1] The Monitor respectfully files this Memorandum of Law in support of the Motion:

JURISDICTION AND VENUE

1. The United States District Court for the District of Maine (the "District Court") has original but not exclusive jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 15 case to this Court.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

3. Venue over this chapter 15 case is proper in this district pursuant to 28 U.S.C. § 1410.

4. The statutory predicates for the relief requested herein are sections 105(a), 1507, and 1521 of the Bankruptcy Code.

PRELIMINARY STATEMENT

5. On July 6, 2013, an unmanned eastbound MMA/MMA Canada train with 72 carloads of crude oil and 5 locomotive units, derailed in Lac-Mégantic, Quebec (the "Derailment"). The transportation of the crude oil began in New Town, North Dakota, by the Canadian Pacific Railway Co. ("CP") and MMA Canada later accepted the rail cars from CP at CP's yards in Montreal, Quebec. The crude oil was to be transported via the Saint-Jean-Lac-Mégantic line through Maine to its ultimate destination in Saint John, New Brunswick.

6. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, resulting in the death of 47 people.[2] A large quantity of oil was released into the

[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the *Motion for Entry of an Order Recognizing and Enforcing the Plan Sanction Order of the Québec Superior Court*.

environment, necessitating an extensive cleanup effort which is still ongoing. As a result of the Derailment and the related injuries, deaths, and property damage, lawsuits were filed against MMA and MMA Canada both in the United States and Canada.

7. Accordingly, MMA Canada, along with MMA, faced significant claims for wrongful death, property and environmental damage, among other claims. Meanwhile, although MMA Canada deployed efforts to maintain railway transportation services where possible to its customers in Québec, its railway transportation services were greatly reduced in Québec, and were reduced by MMA in the United States, as a result of the unavailability to transit through Lac-Mégantic, greatly decreasing MMA and MMA Canada's cash flow.

8. Faced with significant claims resulting from the Derailment, and in light of the reduced service capacity of both MMA and MMA Canada as a result of the Derailment and the resulting decrease in cash flow, MMA Canada commenced the Canadian Proceeding to protect all stakeholders, including the individuals asserting claims related to the Derailment. MMA Canada filed the CCAA Plan for the purpose of maximizing the value of assets for all creditors and to create fair and efficient process for liquidating claims by and against MMA Canada. On June 9, 2015, the statutorily required meeting of creditors was held (the "Meeting of Creditors") in Lac-Mégantic, where the CCAA Plan was approved with 3,879 positive votes representing approximately (CDN) $694 million of claims. No negative votes were cast. The Plan Sanction Order was entered on July 13, 2015.

9. Once recognition of a foreign proceeding is granted, chapter 15 of the Bankruptcy Code authorizes this Court to, among other things, provide further assistance in the United States to a foreign representative with respect to a foreign proceeding. Such assistance is consistent

[2] A forty-eighth death resulted when a volunteer fireman who had worked in the post-Derailment recovery effort committed suicide. Accordingly, a total of 48 decedents' estates may hold claims, *inter alia*, for wrongful death.

with longstanding principles of comity and the statutory purposes of chapter 15 to facilitate and foster cooperation in cross-border insolvency proceedings by, *inter alia*, enforcing in the United States an order entered in the foreign proceeding.

10. As set forth below, enforcement of the Plan Sanction Order in the United States is authorized and warranted under section 105(a), 1507, and 1521 of the Bankruptcy Code. Granting the relief sought herein will best assure the fair and efficient administration of the Canadian Proceeding and the implementation of the CCAA Plan in accordance with the principles underlying chapter 15 of the Bankruptcy Code. Moreover, such relief is consistent with the relief afforded by the United States courts in other ancillary chapter 15 cases involving proceedings under the CCAA.

BACKGROUND

11. For a more complete description of MMA Canada's business and circumstances leading to the Canadian Proceeding and the entry of the Plan Sanction Order, the court is respectfully referred to the Chapter 15 Petition and the Motion and the documents cited therein. Additionally, the documents relating to the Canadian Proceeding are available on the Monitor's website at:

http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co.

ARGUMENT

A. Enforcement of the Plan Sanction Order is Warranted Because it Provides Relief Similar to and Consistent with the Relief Available under the Bankruptcy Code

12. In connection with the recognition of the Canadian Proceeding, the Monitor seeks enforcement in the United States of the Plan Sanction Order of the Québec Court.

13. The Plan Sanction Order provided MMA Canada with relief that is similar to and consistent with the relief that is available under the Bankruptcy Code and routinely approved in connection with confirmation of chapter 11 plans. Specifically, the Plan Sanction Order approved the terms of the CCAA Plan, which, as described in greater detail in the Motion, generally provides for, among other things:

(a) the Settlement Fund consisting of approximately CDN $182,300,000 and US $198,900,000 to be distributed to claims arising out of the Derailment;

(b) the creation of a cash reserve for future payment of approved administrative expenses;

(c) a claims procedure and reconciliation process for claims against MMA Canada;

(d) the release of certain claims against MMA Canada;

(e) the release of claims against certain named current or former directors and officers of MMA Canada, excluding therefrom claims of the type specified under Section 3.3 of the Plan; and

(f) the release and exculpation of the Monitor.

14. Additionally, the Plan provides a mechanism through which certain third parties that entered into settlement agreements with MMA Canada and the chapter 11 trustee in the Chapter 11 Case will obtain the benefit of global releases and injunctions.

15. Other terms of the Plan Sanction Order includes, among other things:

(a) authorization of the Monitor to take all steps and actions necessary or appropriate to implement the Plan;

(b) specific terms related to the compromise and releases of Affected Claims as set out in the CCAA Plan;

(c) a permanent stay and injunction related to all claims released under the CCAA Plan; and

(d) a request for foreign aid and recognition from other courts.

B. Sections 105(a), 1507, and 1521 Authorize and Warrant Enforcement of the Plan Sanction Order

16. Section 105(a) provides that a court "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" which, includes the purposes explicitly set forth in section 1501 of the Bankruptcy Code including fostering cooperation, greater legal certainty, fair and efficient administration, maximization of stakeholder value, and the rescue of financially distressed businesses in the context of cross-border insolvency cases. 11 U.S.C. §§ 105(a) and 1501(a).

17. Moreover, sections 1507 and 1521 of the Bankruptcy Code embody the principles of comity and provide a statutory basis for providing a foreign representative with relief, including the enforcement of orders issued by foreign courts staying legal actions or confirming insolvency plans.

18. Section 1507 provides that a court "may provide additional assistance to a foreign representative under this title or under other laws of the United States." 11 U.S.C. § 1507. Additionally, section 1521 provides a general grant of authority that "[u]pon recognition of a foreign proceeding . . . where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of any creditors, the court may grant any appropriate relief." 11 U.S.C. § 1521(a). Section 1521(a) also sets forth a non-exhaustive list of specific types of relief a court may grant a foreign representative such as staying the commencement or continuation of actions, staying execution against the debtor's assets, entrusting administration or realization of the debtor's assets within the United States, and granting any additional relief that is available to a trustee. Id. at 1521(a)(1)-(7). Once it is determined that the relief requested is available and warranted under section 1507 and/or 1521, the court should grant relief unless

doing so would be "manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

C. The Principles of Comity Embodied in Chapter 15 Strongly Favor Enforcement of the Plan Sanction Order

19. Once a foreign proceeding receives recognition under chapter 15 of the Bankruptcy Code, longstanding principles of international comity embodied in chapter 15 heavily weigh in favor of enforcing the Plan Sanction Order in the United States. "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings." Victrix S.S., Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987). The definition of comity comes from a Supreme Court case granting enforcement to a judgment obtained by a foreign bankruptcy trustee:

> "Comity" . . . is recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-164 (1895).

20. Accordingly, granting comity to judgments in foreign proceedings is appropriate as long as parties are provided the fundamental protections assured to litigants in the United States. *See* id. at 202-03 (applying comity analysis to French judgment obtained by foreign liquidator against U.S. citizens, and finding it was "satisfied that [ ] there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries . . . .").

21. Furthermore, the importance of granting comity is heightened in the insolvency context because the collective nature of insolvency proceedings requires that "the assets of a debtor are dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities." Cunard S.S. Co., Ltd. v. Salen Reefer Services AB, 773 F.2d 452, 456-58 (2d Cir. 1985). Accordingly, in considering judgments rendered by foreign courts in insolvency matters, comity may be withheld only if its extension would cause American creditors to be "treated in some manner inimical to this country's policy of equality." Id. at 459.

22. Even prior to the enactment of the Bankruptcy Code, courts respected principles of comity as a matter of common law, enforcing foreign insolvency decisions in the United States if the foreign proceeding afforded due process and our most fundamental public policies were not undermined. *See e.g.*, Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 537 (1883) (enforcing Canadian restructuring of bonds over objection of United States bondholders, explaining that "every person who deals with a foreign corporation impliedly subjects himself to [the] laws of the foreign government[, and] anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."). With the enactment of the Bankruptcy Code, courts were provided with statutory authority to extend comity to foreign decisions in cross-border insolvency cases under former section 304 of the Bankruptcy Code, which Congress then repealed and replaced with chapter 15 in 2005.

23. The purpose of chapter 15 is to continue and enhance the United States' long history of granting comity in cross-border insolvency proceedings. *See* 11 U.S.C. § 1501; In re

Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) (chapter 15 "specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief."); 11 U.S.C. § 1525 ("[T]he [ancillary] court shall cooperate to the *maximum extent possible* with a foreign court") (emphasis added); 11 U.S.C. § 1509(b) ("If the court grants recognition under section 1517, and subject to limitations that the court may impose consistent with the policy of this chapter . . . (3) a court in the United States *shall* grant comity or cooperation to the foreign representative.") (emphasis added).

24. Comity is appropriate here because the Plan Sanction Order sought to be enforced was issued by a court of competent jurisdiction in Canada. United States courts consistently note that orders emanating from a common law jurisdiction akin to that of the United States are particularly deserving of comity. *See* In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd., Inc., 238 B.R. 25, 67 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) ("[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." (internal quotations and citations omitted)).

25. Accordingly, the principles of international comity embodied in chapter 15 weigh strongly in favor of enforcement of the Plan Sanction Order.

D. The Plan Sanction Order Should Be Enforced

26. Most, if not all, of the relief provided in the Plan Sanction Order are forms of relief plainly available and commonly approved in chapter 11 cases. For instance, cash reserves for administrative claims, global releases, injunctions, and claims procedures are all provisions commonly provided for in chapter 11 plans. Moreover, the terms of the CCAA Plan are

authorized under the general grant of authority under section 1521(a). [Under section 1522(a), a court may grant relief under section 1519 and 1521 as long as "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a). In light of the unanimous support for the CCAA Plan received from the 130 creditors who attended the Meeting of Creditors (resulting in 3,879 positive votes representing approximately $694 million of claims) MMA Canada's creditors, the CCAA Plan clearly provides "sufficient protection" of the interests of those parties in satisfaction of section 1522(a).

27. To the extent any relief provided in the Plan Sanction Order is not available under section 1521 of the Bankruptcy Code, including the provisions of the Plan Sanction Order releasing or limiting the liability of certain third parties, such relief is authorized under section 1507 of the Bankruptcy Code. *See* In re Vitro S.A.B. de CV, 701 F.3d 1031, 1059 (5th Cir. 2012) (concluding that enforcement of non-debtor releases in foreign plan is authorized by section 1507 but not section 1521) (citing In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y 2010)).

28. Several courts have enforced CCAA plans containing broad third party non-debtor releases and injunction provisions like the ones in the CCAA Plan. See e.g., Metcalfe, 421 B.R. 685, 697. In Metcalfe, the court enforced a CCAA plan containing non-debtor releases protecting participants in the Canadian commercial paper market that had been approved by the Canadian court as appropriate under applicable Canadian law. Id. at 698-700. See also In re Sino-Forest Corp., No. 13-10361 (MG) D.E. 16 (Bankr. S.D.N.Y April 15, 2013) (enforcing plan sanction order including entirety of plan injunction and release provisions).

29. Here, none of the creditors or stakeholders in the Canadian Proceeding that might otherwise have asserted claims against third parties with liability arising from the Derailment

objected to this aspect of the CCAA Plan.[3] Indeed, the CCAA Plan was approved at the Meeting of Creditors with 3,879 positive votes, representing approximately (CDN) $694 million claims. (No negative votes were cast). Further, the enforcement of non-debtor releases under section 1507 of the Bankruptcy Code is all the more appropriate where, as here, the CCAA Plan containing such releases received unanimous approval by affected creditors in the Canadian Proceeding. *Cf.* Vitro, 701 F.3d 1066-67 (distinguishing Metcalfe as a case involving "near unanimous approval" and refusing to enforce non-debtor releases in Mexican plan upon finding majority of affected creditors did not support plan).

30. Moreover, just as in Metcalfe and Sino-Forest, the CCAA Plan satisfied all of the factors that must be considered when granting relief under section 1507 of the Bankruptcy Code. Further weighing in favor of enforcement, comity is the overarching factor in section 1507. See e.g., In re Bd. of Directors of Telecom Argentina S.A., No. 05-17811 (BRL), 2006 WL 686867, at *23 (Bankr. S.D.N.Y Feb. 24, 2006) ("The importance of comity is well noted in the newly enacted chapter 15 of the Bankruptcy Code that has incorporated concepts of section 304(c)(2) with the major difference that comity is elevated as the prime consideration for the grant of ancillary relief to a foreign representative."), *aff'd sub nom.* Argo Fund Ltd. v. Bd. of Dirs. of Telecom Argentine, S.A. (In re Bd. of Dirs. of Telecom Argentina, S.A.), 528 F.3d 162, 171 (2d Cir. 2008) (describing comity as "ultimate consideration" under former section 304); In re Petition of Garcia Avila, 296 B.R. 95, 108 n.14 (Bankr. S.D.N.Y. 2003) (noting that draft proposals of chapter 15 eliminated comity as individual factor in lieu of including it in preamble of statute to emphasize its importance as primary consideration when granting additional assistance to foreign insolvency proceeding).

[3] CP objected to the CCAA Plan on other grounds, including an assertion that the Quebec Court lacked jurisdiction, which objection was overruled by the Quebec Court's Order dated July 13, 2015, a copy of which is annexed to the Clement Declaration.

31. Thus, when considering whether a foreign representative's request for relief is authorized under section 1507 of the Bankruptcy Code, a court must consider whether, consistent with the principles of international comity, granting such relief will reasonably ensure the: (a) just treatment of all holders of claims against or interests in the debtor's property; (b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (c) prevention of preferential or fraudulent dispositions of property of the debtor; (d) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (e) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns. 11 U.S.C. § 1507(b).

32. Similar to Metcalfe and Sino-Forest, the CCAA Plan was the result of extensive negotiations between the Monitor, the chapter 11 trustee, MMA Canada and various third parties, ultimately receiving unanimous approval of all who voted and approval of the court. Further, prior to entry of the Plan Sanction Order, the Monitor and MMA Canada obtained the support of many of the other major parties in the Canadian Proceeding, including the federal government of Canada, the Province of Québec, the town of Lac-Mégantic, the representatives of the plaintiffs in the class action, counsel for the estates of the victims of the Derailment and all entities named as defendants (other than CP) in lawsuits arising out of the Derailment. There is similarly no suggestion by any party that the CCAA Plan facilitates a preferential or fraudulent disposition of MMA Canada's property.

33. Given the process by which the CCAA Plan was developed and the degree of support it has received, the only conclusion to be reached is that entry of the Plan Sanction Order was fair and impartial. Moreover, the CCAA Plan expressly provides that the Monitor may

commence a proceeding in the United States under chapter 15 of the Bankruptcy Code to seek recognition of the CCAA Plan and the Plan Sanction Order in order to confirm that both are binding and effective in the United States. See Plan Sanction Order, ¶ 125. The Monitor thus respectfully submits that the Court should enter an order giving full force and effect to the Plan Sanction Order, and thus the CCAA Plan, in the United States. Doing so is entirely consistent with long standing principles of international comity and cooperation, and the Plan Sanction Order was not entered in circumstances that could be considered fundamentally unfair.

E. The Relief Requested is not Manifestly Contrary to the Public Policy of the United States

34. The primary limitation on relief under chapter 15 is section 1506 of the Bankruptcy Code, which provides that a court may refuse to take an action governed by chapter 15 if such "action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The legislative history of section 1506 makes clear that the public policy exception should be "narrowly interpreted" and is restricted to "the most fundamental policies of the United States." In re Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y 2006) (citing H.R. REP. NO. 109-31(I), at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172).

35. Accordingly, consistent with longstanding comity case law in the United States, courts have held that the public policy exception "should be interpreted restrictively" and that "a foreign judgment should generally be accorded comity if its proceedings are . . . fair and impartial." Ephedra, 349 B.R. at 90-91 (internal citations omitted).

36. Analyzing section 1506 of the Bankruptcy Code in the context of a foreign representative's request to enforce a CCAA plan containing non-debtor releases, the court in Metcalfe explicitly found that enforcing such releases was not manifestly contrary to a

fundamental policy in the United States. *See* Metcalfe, 421 B.R. at 697 (noting that "this public policy exception is narrowly construed" and enforcing third-party releases in CCAA plan).

37. This Court should reach the same conclusion here. Creditors unanimously approved the CCAA Plan at the June 9, 2015 Meeting of Creditors. Pursuant to settlements with 25 "Released Parties," the estates of MMA Canada and MMA will receive approximately (CDN) $431 million[4] which will be used to pay claims. Those settlements are contingent on entry by this Court of an order recognizing and enforcing the Plan Sanction Order. Of the 26 parties named in various litigation as having potential liability for damages arising from the Derailments, all but one – CP – have agreed to settle. The $431 million to be paid pursuant to these settlements represents an extraordinary result for the estates of MMA Canada and MMA. Not surprisingly, at the Meeting of Creditors in Lac-Mégantic on June 9, 2015, 3,879 positive votes (and no negative votes) were cast in favor of the CCAA Plan. These votes represented (CDN) $694 million in claims. Under these facts, it cannot be said that enforcing the Plan Sanction Order in the United States runs afoul of section 1506 of the Bankruptcy Code.

CONCLUSION

WHEREFORE, the Monitor requests that the Court enter an order (a) recognizing and enforcing the Plan Sanction Order of the Québec Court dated July 13, 2015, including any extensions or amendments thereof; and (b) granting such other and further relief as is appropriate under the circumstances.

[4] Canadian funds are calculated using and exchange rate of approximately $1.25 Canadian to $1.00 U.S., which was the approximate rate as of June 8. 2015. The actual amount available for distribution will fluctuate along with the exchange rate.

Dated: July 20, 2015

RICHTER ADVISORY GROUP INC., MONITOR AND FOREIGN REPRESENTATIVE OF MONTREAL MAINE & ATLANTIC CANADA CO.

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