UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

REPLY OF XL COMPANIES IN SUPPORT OF CONFIRMATION OF THE TRUSTEE'S PLAN OF LIQUIDATION

XL Insurance Company Ltd. ("XL Insurance") and Indian Harbor Insurance Company ("Indian Harbor" and together with XL Insurance, the "XL Companies") hereby provide the following statement in reply to the objection of Canadian Pacific Railway Company ("CP") [D.E. 1657] (the "CP Objection") and in support of confirmation of the Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015 [D.E. 1534].

PRELIMINARY STATEMENT[1]

1. The XL Companies provided insurance to the Debtor (and MMA Canada), and under the policy issued by XL Insurance, a total of $25 million (CAN) in indemnity was available to compensate victims of the Derailment. The XL Companies made clear from the outset of the CCAA Proceedings in Canada (indeed, since the Derailment itself) that they were prepared to make those insurance proceeds available to victims, so long as the XL Companies receive customary and appropriate protections and releases, and so long as the manner in which

[1] Capitalized terms in the "Preliminary Statement" shall have the meanings ascribed to them elsewhere in the Reply.

they do so comports with the XL Companies' obligations to others who may claim a right to coverage under the policies.

2. The XL Companies worked constructively with the Monitor, the Trustee, and other parties in interest during the CCAA Proceedings and this chapter 11 case and ultimately entered into a Settlement Agreement with MMA Canada and the Trustee (subject, of course, to court approval) that provides a mechanism to make proceeds of the XL Policies available to Derailment victims. The Settlement Agreement provides for the XL Companies to buy back the XL Policies from MMA Canada and the Debtor for $25 million (CAN)—the amount of the indemnity obligation under the Policies—plus an additional amount of $5 million (USD), and for the XL Companies to receive releases and injunctions to be included in the plan of reorganization. The XL Companies agreed—and indeed requested—that the Settlement Agreement (in unredacted form) be included as an exhibit to the Plan and Disclosure Statement to provide full and fair notice to all parties in interest.

3. The Plan's releases and injunctions are appropriate. It is true that the granting of a non-debtor release is an exceptional power that is reserved for unusual cases. The XL Companies agree with the Trustee that the very high bar for granting such third-party injunctions has been met here. But in the unusual circumstances of this case, there is no reason why the Court would even need to reach that question. Here, identical releases and injunctions have been found by a court of competent jurisdiction presiding over the CCAA Proceedings in Canada to be proper as a matter of Canadian law. That determination has been recognized and enforced by this Court in a parallel chapter 15 case on comity grounds. The releases and injunctions in the Plan are similarly appropriate on grounds of comity. Approving them would simply reinforce—but not expand—the relief that this Court has already granted.

4. Moreover, the Plan's releases and injunctions in favor of *the XL Companies* are undoubtedly appropriate. The XL Settlement Agreement provides for the XL Companies to purchase the XL Policies back from the Debtor, and the XL Companies and are entitled to the protections against successor liability that bankruptcy law customarily provides to the buyers of estate assets under section 363 of the Bankruptcy Code. The Plan's injunctions and releases effectuate those protections.

5. For these reasons, CP's arguments in opposition to the confirmation of the Plan's injunctions and releases are not only wrong, but are beside the point. And CP's other arguments against confirmation are similarly unpersuasive with respect to the XL Companies.

BACKGROUND

6. Pre-petition, Montreal Maine & Atlantic Railway Ltd. (the "Debtor") operated an integrated, international shortline freight railroad system with Montreal, Maine & Atlantic Canada Co. ("MMA Canada"), an unlimited liability Canadian company and the Debtor's wholly-owned subsidiary. On July 6, 2013, a train operated by MMA Canada derailed in Lac-Mégantic, Québec, Canada (the "Derailment"), causing numerous fatalities, bodily injury to hundreds of people, and extensive property and environmental damage in Canada.

7. The Debtor is an insured under a Railroad Liability Insurance Policy, bearing number RRL003723801 and in effect from April 1, 2013 to April 1, 2014, issued by Indian Harbor (the "U.S. Policy"). The U.S. Policy, subject to conditions, exclusions, and limitations, provides insurance coverage for certain "covered injuries" arising from an "accident." The U.S. Policy is subject to a $25 million (USD) per occurrence limit and a $50 million (USD) policy aggregate limit.

8. MMA Canada is an insured under a Railroad Liability Insurance Policy, bearing the number RLC003808301 and in effect from April 1, 2013 to April 1, 2014, issued by XL Insurance (the "Canadian Policy" and together with the U.S. Policy, the "XL Policies"). The Canadian Policy, subject to conditions, exclusions, and limitations, provides insurance coverage for certain "covered injuries" arising from an "accident." The Canadian Policy is subject to a $25 million (CAN) per occurrence limit and a $50 million (CAN) policy aggregate limit. Under the terms of the Québec Civil Code, the terms of which have been incorporated into the Canadian Policy, payments made to satisfy the obligation to defend an insured against covered claims arising in Québec do not erode policy limits.

9. Each of the XL Policies contains a "Mutual Policy Exclusion." Endorsement #007 to the U.S. Policy provides that the U.S. Policy "shall not apply to any loss, cost, or expense for which coverage is applicable under" the Canadian Policy. Endorsement #009 to the Canadian Policy provides that the Canadian Policy "shall not apply to any loss, cost, or expense for which coverage is applicable under" the U.S. Policy. As a result, with respect to any particular accident, only one of the policies may be deemed the "applicable" policy.

10. The Canadian Policy is the "applicable policy" in respect of "any loss, cost or expense" arising out of the Derailment. The Canadian Policy is applicable because, among other things, the train derailment took place in Canada, all injuries and damage took place in Canada, and the Canadian and Québec governments are directly involved with respect to the Derailment.[2]

11. Various claims and demands arising out of the Derailment have been made against the Debtor, MMA Canada, and other insureds. Losses arising out of the Derailment will substantially exceed the applicable Canadian $25 million (CAN) per occurrence limit.

[2] *See generally* Trustee's Objection to Disclosure Statement [D.E. 687] ¶¶ 12-13.

12. On August 6, 2013, MMA Canada filed a petition for the issuance of an initial order with the Québec Superior Court (the "Canadian Court") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA," and the case commenced under the CCAA by MMA Canada, the "CCAA Proceedings"). Richter Advisory Group, Inc. (the "Monitor") was appointed as Monitor in connection with the CCAA Proceedings. On August 8, 2013, the Canadian Court issued an initial order (the "Initial Order") staying and enjoining certain actions against MMA Canada. In order to prevent claimants from accessing MMA Canada's insurance assets via direct actions or by claiming against non-debtors that may also claim coverage under MMA Canada's liability insurance, the Initial Order also stays actions against MMA Canada's liability insurers (including XL Insurance and Indian Harbor) and MMA Canada's directors and officers and employees to the extent such claims arise out of the Derailment.

13. On August 7, 2013, the Debtor filed a voluntary petition in this Court for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Proceeding"). On August 21, 2013, the United States Trustee appointed Robert J. Keach to serve as the Chapter 11 Trustee (the "Trustee") pursuant to section 1163 of the Bankruptcy Code.

14. On September 4, 2013, this Court entered an order adopting the Cross-Border Insolvency Protocol (the "Cross-Border Protocol") [D.E. 168], which was also adopted by the Canadian Court. The purpose of the Cross-Border Protocol is to, among other things: (a) harmonize and coordinate the Chapter 11 and CCAA Proceedings; (b) promote the orderly and efficient administration of the Chapter 11 and CCAA Proceedings to, among other things, maximize the efficiency of both Proceedings, reduce the costs associated therewith and avoid duplication of effort; (c) promote international cooperation and respect for comity among the

Courts, the Debtors, and other parties in interest in the Chapter 11 and CCAA Proceedings; and (d) facilitate the fair, open and efficient administration of the proceedings for the benefit of all of the debtors' creditors and other interested parties, wherever located. *See* Cross-Border Protocol [D.E. 126-1] ¶ 5. The spirit of the Cross-Border Protocol is to promote, where possible, coordination of the Chapter 11 and CCAA Proceedings and to avoid, where possible, conflicting rulings.

15. During the Chapter 11 and CCAA Proceedings, the Monitor, Trustee, the Debtor, and MMA Canada have engaged in settlement discussions with various parties identified as potentially liable for damages arising from the Derailment or insurance coverage therefore. As a result of these negotiations, a number of entities have entered into settlement agreements whereby the "Released Party" (as defined in those agreements and in the Plan) will contribute to a settlement fund in exchange for, *inter alia*, a full and final release of all claims arising out of the Derailment and claims against certain insurance policies of the Debtor and/or MMA Canada.

16. In March 2015, MMA Canada, the Trustee, and the XL Companies entered into a settlement agreement (the "XL Settlement Agreement"). The XL Settlement Agreement provides, among other things, that the XL Companies will purchase from the Debtor and MMA Canada "MMA's and the MMAC's remaining interests, if any and to the extent permitted by law, in each of the XL Policies, free and clear of any and all Interests of any and all Persons" for the "Settlement Amount." The "Settlement Amount" is comprised of an "Indemnity Payment" of $25 million (CAN) and an "Additional Payment" of $5 million (USD). By its terms, the XL Settlement Agreement is effective only upon the date on which orders of this Court and of the Canadian Court—approving, respectively, a chapter 11 plan and CCAA plan, approving the sale of the XL Policies to the XL Companies "free and clear of all claims and interest," and providing

for an injunction "permanently releasing and enjoining the enforcement, prosecution, continuation or commencement of any (a) Claim that any Person or Claimant holds or asserts or may in the future hold or assert against the XL Companies arising out of, in connection with and/or in any way related to any of the Policies and (b) Claim against any Released Party and/or Settling Defendant arising out of, in connection with and/or in any way related to the Policies or the Derailment"—become final and not subject to appeal.

17. On March 31, 2015, the Trustee filed its Plan of Liquidation (as later amended and supplemented the "Plan") and accompanying disclosure statement (as later amended and supplemented the "Disclosure Statement"). The XL Settlement Agreement was attached and publicly filed as an exhibit to the Plan and Disclosure Statement. [D.E. 1384, 1385-1; 1495-6; 1497-1; 1534; 1535].

18. Article X of the Plan contains releases and injunctions in favor of the Debtor, representatives of the Debtor's estate, and parties that executed a settlement agreement with the Debtor, including the XL Companies (collectively, "Released Parties"). In general terms and subject to limitations stated in the Plan, Article X releases and enjoins claims against settling parties that are not affiliates of the Debtor (defined in the Plan as the "Other Released Parties") relating to (a) the Debtor; (b) the Derailment, or (c) the Estate, (d) the Chapter 11 Case, (e) the Plan, (f) the Disclosure Statement, (g) the Settlement Agreements and/or (h) the XL Policies. Plan §§10.5(b)(v) & 10.6(b)(iii).

19. Also on March 31, 2015, the Monitor in the CCAA Proceedings filed the Plan of Compromise and Agreement, later amended by the Amended Plan of Compromise and Arrangement Dated June 8, 2015 (as amended and supplemented, the "CCAA Plan"). The CCAA Plan was crafted to work in conjunction with the Debtor's Plan in distributing funds to

victims of the Derailment and providing releases and injunctions in favor of settling parties. Like the Plan, the CCAA Plan includes a global injunction barring assertion of, among other things, any Derailment-related claims against certain settling parties, including the XL Companies (i.e. "Released Parties"), or any claims against or related to the XL Policies. *See* CCAA Plan, Art. 5 & Definition of "Claim" at 7-8. The CCAA Plan was attached as an exhibit to the Plan and Disclosure Statement.

20. On June 9, 2015, the "meeting of creditors" required under the CCAA was held in Lac-Mégantic, where the CCAA Plan was unanimously approved with 3,879 positive votes representing approximately $694 million (CAN) of claims. No negative votes were cast.

21. On July 13, 2015, the Canadian Court entered an order sanctioning the CCAA Plan (the "Sanction Order"). Among other things, the Sanction Order approved the releases, injunctions and exculpation provisions contained in the CCAA Plan, which mirror the third-party releases and injunctions contained in the chapter 11 Plan. [D.E. 1528, Ex. B].

22. On July 17, 2015, this Court entered an order approving, among other things, the Disclosure Statement, solicitation procedures, and notice procedures for confirmation of the Plan [D.E. 1544] (the "Disclosure Statement Order"). The CCAA Plan and the XL Settlement Agreement were attached as exhibits to the form of the Disclosure Statement approved by the Court in the Disclosure Statement Order. [D.E. 1535].

23. In accordance with the Disclosure Statement Order, the Confirmation Hearing Notice and the Derailment Claims Notice (as defined in the Disclosure Statement Order) each provided on the first page (in bold and all capital letters):

HOLDERS OF DERAILMENT CLAIMS AND THOSE WITH INTERESTS IN APPLICABLE INSURANCE ASSETS SHALL BE SUBJECT TO RELEASES AND INJUNCTIONS PRECLUDING PURSUIT OF ANY CLAIM AGAINST CERTAIN PARTIES IN ACCORDANCE WITH THE PLAN AND THE CCAA PLAN, AS WELL

AS THE CONFIRMATION ORDER, THE CHAPTER 15 RECOGNITION AND ENFORCEMENT ORDER, AND THE CCAA APPROVAL ORDER. HOLDERS OF DERAILMENT CLAIMS AND THOSE WITH INTERESTS IN APPLICABLE INSURANCE ASSETS SHOULD READ SUCH SECTIONS OF THE PLAN WITH GREAT CARE AND CONSULT WITH COUNSEL REGARDING SUCH RELEASES AND INJUNCTIONS.

The Derailment Claims Notice also reproduced the releases and injunctions contained in Article X of the Plan and stated (in bold and italics): "***In exchange for a share of the beneficial interests in the WD Trust, all Claims that the WD Trust Beneficiaries may hold against any and all of the Released Parties will be released, and WD Trust Beneficiaries will be forever barred, estopped, and enjoined from asserting those Claims against the Released Parties***."

24. On July 20, 2015, MMA Canada filed in this Court a petition for recognition under chapter 15 of the Bankruptcy Code [No. 15-20518, D.E. 1] (the "Chapter 15 Petition"). On the same date, MMA Canada filed a motion seeking entry of an order recognizing and enforcing the Plan Sanction Order, including the injunctions and releases contained in the CCAA Plan, under section 1507 of the Bankruptcy Code [No. 15-20518, D.E. 3] (the "Plan Sanction Recognition Motion").

25. On August 20, 2015, this Court held a hearing on MMA Canada's Plan Sanction Recognition Motion, and on August 26, 2015, this Court entered an order recognizing and enforcing the Sanction Order [No. 15-20518, D.E. 74] (the "Plan Sanction Recognition Order"). The Plan Sanction Recognition Order provides that "[t]he CCAA Plan and Plan Sanction Order, in their entirety, are hereby recognized, granted comity and given full force and effect in the United States and are binding on all persons subject to this Court's jurisdiction pursuant to sections 105(a), 1507, and 1521 of the Bankruptcy Code." Plan Sanction Recognition Order ¶ 2. And it specifically provides that the releases and injunctions in the CCAA Plan (which are reproduced in full in the Order) "are hereby recognized, granted comity and given full force and

effect in the United States and are binding on all Persons and other entities (as defined in section 101(15) of the Bankruptcy Code) subject to this Court's jurisdiction pursuant to sections 105(a), 1507, and 1521 of the Bankruptcy Code." *Id.* ¶ 3. The Court found that such relief "is necessary and appropriate, in the interest of the public and international comity, consistent with the public policy of the United States, warranted pursuant to section 105(a), 1507, and 1521 of the Bankruptcy Code, and will not cause any hardship to any party in interest that is not outweighed by the benefits of granting that relief." *Id.* ¶ H. The Court further found that such relief "is not manifestly contrary to the public policy of the United States, as prohibited by section 1506 of the Bankruptcy Code." *Id.* ¶ I. With respect to the releases and injunctions specifically, the Court found that "[e]ach of the releases and injunctions contained in this Order (i) is within the Court's jurisdiction, (ii) is essential to the success of the CCAA Plan, (iii) is an integral element of the CCAA Plan and to its effectuation and (iv) confers material benefits on, and is in the best interests of, MMA Canada and its creditors." *Id.* ¶ J.

26. On September 10, 2015, CP filed the CP Objection arguing, among other things, that the Plan's third-party releases and injunctions render the plan unconfirmable, the so-called Plan Settlement and Support Agreements are impermissible, the undisclosed settlement agreements incorporated by reference into the Plan cannot be approved, and the Plan was not proposed in good faith.

ARGUMENT

While, for the reasons advanced by the Trustee, the Plan is properly confirmable under the traditional analysis applicable to third-party releases under the Bankruptcy Code, *see, e.g.*, *In re Charles St. African Methodist Episcopal Church of Boston*, 499 B.R. 66, 100 (Bankr. D. Mass 2013); *In re Chicago Invs., LLC*, 470 B.R. 32, 96 (Bankr. D. Mass. 2012), the Plan's releases and

injunctions are appropriate here for two reasons regardless of whether they are confirmable under that traditional analysis. *First*, the Plan's releases and injunctions are confirmable on comity grounds. *Second*, the Plan's releases and injunctions in favor of *the XL Companies* are confirmable because the XL Settlement Agreement provides for the XL Companies to purchase the XL Policies back from the Debtor, and the Plan's releases and injunctions simply provide the protections to which the XL Companies are entitled in connection with that sale under section 363 of the Code. CP wholly ignores these grounds for approving the releases and injunctions, and its other arguments likewise fail with respect to the XL Companies.

I. The Plan Releases And Injunctions Should Be Confirmed On Comity Grounds

The releases and injunctions in the Plan are confirmable on comity grounds. This Court already so held in granting the Plan Sanction Recognition Motion, and confirming the Plan would simply provide the same relief. And even if MMA Canada had not filed a chapter 15 proceeding, the Plan, including its releases and injunctions, would still be confirmable on comity grounds.

Longstanding principles of international comity and cooperation are embodied in chapter 15 of the Bankruptcy Code, pursuant to which a U.S. court may recognize a foreign bankruptcy proceeding and grant "additional assistance" beyond mere recognition such as enforcing orders entered by a foreign court (11 U.S.C. §1507). *See In re Vitro SAB De CV*, 701 F.3d 1031, 1044 (5th Cir. 2012) ("Central to Chapter 15 is comity."); *Victrix S.S., Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("American courts have long recognized the need to extend comity to foreign bankruptcy proceedings."); *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("bankruptcy court's power to enforce orders entered by a foreign court under section 1507 "'is largely discretionary and turns on subjective factors that

embody principles of comity'"); *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 principals of comity and cooperation with foreign courts").

U.S. bankruptcy courts have recognized and enforced third-party releases granted in CCAA proceedings under chapter 15, even where the U.S. court would lack jurisdiction to grant such releases in the first instance. *See In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013); *Metcalfe* 421 B.R. at 698. For example, the court in *Metcalfe* enforced third-party non-debtor release and injunction provisions included in a CCAA Plan and Sanction Order notwithstanding the fact that the U.S. bankruptcy court likely lacked jurisdiction to approve such releases and injunctions as part of a chapter 11 plan. The court rejected the notion that the third-party releases violated public policy under section 1506,[3] explaining:

> A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. … The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. … The key determination … is whether the procedures used in Canada meet our fundamental standards of fairness.

Metcalfe, 421 B.R. at 697.

The *Metcalf* court went on to grant enforcement based on principals of comity, stating "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case." *Id.* at 696. The court noted that "when the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with

[3] Section 1506 provides that the court may refuse to recognize a foreign proceeding "if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings…. The U.S. and Canada share the same common law traditions and fundamental principles of law." *Id.* at 698.

The Bankruptcy Court for the Southern District of New York in *Sino-Forest* recently followed *Metcalf*, granting enforcement of third-party releases contained in a plan, confirmation order, and subsequent settlement order entered in CCAA proceedings based on principals of comity. There, the court noted, "the Plan has near unanimous support, that support does not rely on votes by insiders and the Canadian court's decision to approve the non-debtor release reflect[ed] similar sensitivity to the circumstances justifying approving such provisions as those considered by U.S. courts." *Sino-Forest*, 501 B.R. at 665-66 (internal quotation marks omitted).

This Court relied on these comity principles in granting the Plan Sanction Recognition Motion. In the Plan Sanction Recognition Order, the Court ordered that the CCAA Plan and Plan Sanction Order, including specifically, the releases and injunctions therein, "are hereby recognized, granted comity and given full force and effect in the United States and are binding on all Persons and other entities (as defined in section 101(15) of the Bankruptcy Code) subject to this Court's jurisdiction pursuant to sections 105(a), 1507, and 1521 of the Bankruptcy Code." Plan Sanction Recognition Order ¶¶ 2, 3.

The relief sought here is substantively the same as the relief granted in the Plan Sanction Recognition Order. The injunctions and releases in the Plan are the same in substance as the injunctions and releases in the CCAA Plan. The relief granted by this Court in the Plan Sanction Recognition Order—namely, enforcement of the releases and injunctions in the Plans by a U.S. Court—is the same relief that would be provided by confirming the Plan. The Court should confirm the injunctions and releases in the Plan on grounds of comity because doing so would

simply provide the same relief that the Released Parties already received under sections 1507 and 1521 of the Code.[4]

Confirmation of the releases and injunctions in the Plan would be appropriate on comity grounds even if MMA Canada had not filed a chapter 15 case. To be sure, issues of comity in bankruptcy have been litigated most often in the chapter 15 context since the advent of that chapter. But these well-established comity principles are general principles of common law that, even where not specifically codified as they are in chapter 15, properly inform the construction of any federal statutory scheme. For that reason, even in the absence of the chapter 15 case, it would be wholly appropriate for this court to grant the third-party releases and injunctions under chapter 11 by virtue of the decision to grant such releases and injunctions in the CCAA Proceedings, and ordinary common law principles of comity.

In the Plan Sanction Recognition Order, the Court found that each of the releases and injunctions in the CCAA Plan "(i) is within the Court's jurisdiction, (ii) is essential to the success of the CCAA Plan, (iii) is an integral element of the CCAA Plan and to its effectuation and (iv) confers material benefits on, and is in the best interests of, MMA Canada and its creditors," *id.* ¶ J, and that enforcement of those provisions was not contrary to public policy, *id.* ¶ H. The same is true of the releases and injunction in the Plan.

As this Court recognized in adopting the Cross-Border Protocol, neither the CCAA Proceeding nor the Chapter 11 Proceeding will be successful without a cross-border solution.

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[4] This case was not filed under chapter 15 because due to an apparent drafting error, operating railroads are ineligible for relief under chapter 15. *See* 11 U.S.C. § 109(b)(1); *id.* § 1501(c); *see also* Hon. Samuel L. Bufford, *Tertiary and Other Excluded Foreign Proceedings Under Bankruptcy Code Chapter 15*, 83 Am. Bankr. L.J. 165, 173 (2009) ("There appears to be no good policy reason for excluding a railroad … from chapter 15 assistance.… The exclusion of such cases … is inexplicable, except on the grounds of poor drafting.").

The spirit of the Cross-Border Protocol is, where possible, to promote coordination of the Canadian and U.S. cases and avoid conflicting rulings. For that reason, the Plan—including the injunctions and releases therein—was crafted to work in conjunction with the CCAA Plan. The success of both Proceedings depends on the successful resolution and settlement of the obligations of parties potentially liable for the Derailment, including relevant insurers, and payment by those parties of settlement proceeds into the estate for distribution to creditors. Thus, confirmation of the Plan—including the releases and injunctions therein—is also essential to the success of the CCAA Plan and is in the best interests of MMA Canada and its creditors. In addition, because the enforcement of the releases and injunctions in the CCAA Plan would not violate U.S. public policy, neither would confirmation of the coextensive releases and injunctions in the Plan. For these reasons, comity supports confirmation of the Plan.

II. In The Alternative, The Plan Releases And Injunctions In Favor Of The XL Companies Should Be Confirmed Pursuant To Section 363

Even if the Court were to find the Plan's releases and injunctions controversial—and it should not—it should nevertheless approve the releases and injunction in favor of the XL Companies. The XL Settlement Agreement provides for the XL Companies to purchase "MMA's and the MMAC's remaining interests, if any and to the extent permitted by law, in each of the XL Policies, free and clear of any and all Interests of any and all Persons." This sale of the Debtor's property "free and clear" of all interests is permitted under section 363 of the Bankruptcy Code, and the Plan's injunctions and releases in favor of the XL Companies provide the XL Companies with that protection from successor liability.

Section 363(b) allows the trustee, "after notice and hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate...." 11 U.S.C. § 363(b). The Debtor's rights in the insurance policies are estate property. *See Tringali v. Hathaway*

Machinery Co., Inc., 796 F.2d 553, 560 (1st Cir. 1986); *see also In re Dow Corning Corp.*, 198 B.R. at 244 ("There is no dispute that a debtor's interest in its insurance policies is property of the estate"); *accord In re Stinnett*, 465 F.3d 309, 312 (7th Cir. 2006). The Trustee therefore may sell those rights to the XL Companies pursuant to section 363.

Section 363(f) provides that a bankruptcy court may approve a sale "free and clear of any interest in such property" so long as:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in a bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Section 363(f) will be satisfied if any one of the conditions enumerated therein is met. *In re PBBPC, Inc.*, 467 B.R. 1, 8 (Bankr. D. Mass. 2012), *aff'd*, 484 B.R. 860 (B.A.P. 1st Cir. 2013).

The XL Companies may purchase the XL Policies from the estate "free and clear of any interests" because section 363(f)(2) is satisfied here. All holders of Derailment claims and all known insureds under the XL Policies were provided notice of the Plan's provisions releasing and enjoining claims against the XL Policies (i.e., transferring the XL Policies to the XL Companies free and clear of any interests). Holders of Derailment claims received the Derailment Claims Notice (in addition to other solicitation materials), and all known insureds under the XL Policies received at least the Confirmation Hearing Notice (and in, some cases, other solicitation materials as well). Any holders of Derailment claims or insureds under the XL Policies that voted in favor of the Plan expressly consented to the sale of the XL Policies "free and clear" of their interests. And to the extent any holders of Derailment claims or insureds

under the XL Policies did not vote in favor of the Plan, they should be deemed to have consented to the sale of the XL Policies "free and clear" of their interests for purposes of section 363(f)(2) because they received notice of the proposed sale and failed to object. *See BAC Home Loans Servicing LP v. Grassi*, No. 08-21085-JBH, 2011 WL 6096509, at *5 (B.A.P. 1st Cir. Nov. 21, 2011) ("This Panel, as well other courts in this circuit and nationally, views silence as implied consent sufficient to satisfy the consent requirement for approving a sale under § 363(f)(2)"); *In re Colarusso*, 280 B.R. 548, 559 (Bankr. D. Mass. 2002) (defendant impliedly consented to sale through conduct), *aff'd*, 295 B.R. 166, 175 (B.A.P. 1st Cir. 2003), *aff'd on other grounds*, 382 F.3d 51 (1st Cir. 2004); *see also In re James*, 203 B.R. 449, 453 (Bankr. W.D. Mo. 1997) (section 363(f)(2) satisfied where secured creditor had notice and failed to object to proposed sale and thus "implicitly conveyed its consent to the sale"); *In re Elliot*, 94 B.R. 343, 345-46 (E.D. Pa. 1988) (implied consent sufficient to authorize section 363(f)(2) sale; consent implied from non-debtor that "received notice of the proposed sale and also admits that it did not file any timely objection"). Accordingly, all entities with interests in the XL Policies have consented to the sale of the XL Policies "free and clear" of their interests.

Even if all entities with interests in the XL Policies did not consent to a sale "free and clear" of their interests, the XL Policies may still be sold "free and clear of any interests" because section 363(f)(5) is satisfied here. Any holder of an interest in the XL Policies may be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest as contemplated by section 363(f)(5) of the Bankruptcy Code. Indeed, the potential right to a money satisfaction is likely the only interest such interest holders could have in the XL Policies. For this reason, courts routinely approve the sale of insurance policies free and clear of claims pursuant to section 363(f)(5) of the Bankruptcy Code. *See, e.g., In re Thorpe Insulation Co.*, No.

07-19271 (BB) (Bankr. C.D. Cal. Nov. 25, 2008); *In re Burns and Roe Enters., Inc.*, No. 00-41610 (RG) (Bankr. D.N.J. Feb. 17, 2005). Thus, the XL Policies may be sold "free and clear" of any non-consenting interests pursuant to section 363(f)(5).

Section 363(e) further conditions a free and clear sale by requiring that each holder of an interest in the property being sold receive adequate protection. "It has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition." *In re Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988); *accord* 3 Alan Resnick & Henry Sommer, Collier on Bankruptcy ¶ 363.06[9], at 363-60 (16th ed. rev. 2015) ("The most common form of adequate protection is to have the … interest attach to the proceeds of the sale."). Here, as was the case in *Johns-Manville*, the Plan gives claimants with interests in the XL Policies the rights to the proceeds from the sale. Accordingly, section 363(e) is satisfied. *See In re Sunland, Inc.*, No. 13-13301-TR7, 2014 WL 7011747, at *5 (Bankr. D.N.M. Dec. 11, 2014) (approving sale of insurance policies free and clear and finding that §363(e) was satisfied where "interest in the insurance policies attached to the sales proceeds").

The XL Companies may therefore purchase the XL Policies from the estate "free and clear of any interests" under section 363 of the Bankruptcy Code.

In addition, the XL Companies are good faith buyers entitled to the protections afforded by section 363(m) of the Bankruptcy Code. A good faith buyer is "one who buys property in good faith and for value, without knowledge of adverse claims." *In re Mark Bell Furniture Warehouse*, Inc., 992 F.2d 7, 8 (1st Cir. 1993). The XL Companies purchased the XL Policies in good faith: There is no evidence of fraud or collusion with respect the negotiations leading up to the XL Settlement Agreement. To the contrary, the Trustee and the XL Companies negotiated

the terms of the Settlement Agreement in good faith and at arm's length. *See id.* at 8 ("'Good faith' purchaser status is precluded by, *inter alia*, fraud, collusion with the trustee, and taking 'grossly unfair advantage' of other bidders."). The XL Companies purchased the XL Policies for value: The XL Settlement Agreement requires the XL Companies to pay $25 million (CAN)—the full amount of the indemnity obligation under the XL Policies—plus an additional amount of $5 million (USD). And all known claims against the XL Policies will be addressed under the Plan; the XL Companies are not aware of any claim against the XL Policies other than those addressed by the Plan. Accordingly, the XL Companies are entitled to the protections afforded a good faith purchaser under section 363(m).

The releases and injunctions in favor of the XL Companies in the Plan simply release and enjoin any successor liability claims against the XL Policies. They do no more than effectuate the relief to which the XL Companies are already entitled under section 363 of the Bankruptcy Code—ownership of the XL Policies "free and clear" of any interests. Accordingly, they should be approved.

III. CP's Other Arguments Likewise Fail With Respect To The XL Companies

None of CP's other Arguments against confirmation of the Plan succeed with respect to the XL Companies.

First, CP complains that the Trustee has entered into "a covert post-petition 'Plan Support and Settlement Agreement' requiring setting parties to vote in favor of the plan." CP Objection at 20. But the XL Companies have entered into no such agreement—indeed, they are not even creditors of the Debtor entitled to vote on the Plan.

Second, CP asserts that section 10.5(a) of the Plan (which provides that in the event of any inconsistency between the Plan or confirmation order and a settlement agreement, the terms

of the settlement agreement control) and section 5.1 of the Plan (which incorporates the settlement agreements into the Plan by reference and provides for the approval of the settlement agreements by the Bankruptcy Court) may not be approved because the settlement agreements have not been disclosed. CP Objection at 21-22. But the XL Settlement Agreement has been disclosed; in addition to being attached as an exhibit to the Plan and Disclosure Statement, it was filed publicly on the docket (in unredacted form). Accordingly, it is entirely proper that the Plan provides for Bankruptcy Court approval of the XL Settlement Agreement, incorporates the XL Settlement Agreement into the Plan by reference, and provides that in the event of inconsistency between the Plan or confirmation order and the XL Settlement Agreement, the terms of the XL Settlement Agreement control.

Third, CP contends that the Plan fails the good faith requirement of section 1129(a)(3) of the Code because "the plan's obvious beneficiaries would be settling, non-debtor parties who receive blanket releases and injunctive protection" and because "secret agreements fund the plan." CP Objection at 29-30. To the contrary, the XL Settlement Agreement and related Plan provisions "were proposed in good faith and not by any means forbidden by law." 11 U.S.C. §1129(a)(3). Good faith under section 1129(a)(3) is generally interpreted to mean "honesty of purpose," *In re River Valley Fitness One Ltd. P'ship*, No. 01-12829, 2003 WL 22298573, at *3 (Bankr. D.N.H. Sept. 19, 2003), or "consistent with the objective and purposes of the Bankruptcy Code," *In re Weber*, 209 B.R. 793, 797 (Bankr. D. Mass. 1997). The XL Companies and Trustee are sophisticated parties that negotiated at arm's length. The result of those negotiations—the XL Settlement Agreement and related provisions in the Plan—are fully consistent with the objective and purposes of the Bankruptcy Code. The XL Settlement Agreement consensually resolves the XL Companies' liabilities to the estate and obligates the XL Companies to pay into

the estate for distribution to creditors the full amount of their indemnity obligation under the XL Policies plus an additional amount of $5 million. The releases and injunctions in the Plan and Settlement Agreement in favor of the XL Companies are consistent with (and have the same effect as) the protections to which the XL Companies are entitled under section 363 of the Bankruptcy Code as the buyer of an estate asset. And victims of the Derailment and other parties with an interest in the XL Policies received adequate notice of the terms of the XL Settlement Agreement, including the releases and injunctions therein.

CONCLUSION

For the foregoing reasons, the Court should enter an order overruling the CP Objection and confirming the Plan.

Dated: September 17, 2015

Respectfully Submitted,

/s/ Jeremy R. Fischer

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

CERTIFICATE OF SERVICE

I hereby certify that on this date, a true and correct copy of the *Reply of XL Companies in Support of Confirmation of the Trustee's Plan of Liquidation* was served electronically on all parties requesting notice in the above-captioned case via the Court's CM/ECF system.

Date: September 17, 2015

/s/ *Jeremy R. Fischer*

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