APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17-1677

[Filed September 14, 2018]

Joe R. Whatley, Jr., solely in his capacity as the WD Trustee of the WD Trust	)
Plaintiff - Appellant	)
v.	)
Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Corporation; Soo Line Railroad Company	)
Defendants - Appellees	)

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: March 13, 2018
Filed: September 14, 2018

Before GRUENDER, BEAM, and KELLY, Circuit Judges.

BEAM, Circuit Judge.

Joe Whatley, Trustee of the wrongful death claimants' trust (WD Trust), appeals the district court's order finding that his claim under the Carmack Amendment, 49 U.S.C. § 11706, against Canadian Pacific Railway was untimely. We reverse and remand for further proceedings.

I. BACKGROUND

On June 29, 2013, a train carrying crude oil left New Town, North Dakota, destined for an oil refinery near Saint John, New Brunswick, in Canada. The bill of lading for the train's cargo designated Western Petroleum Company[1] (WFE) as the shipper, Irving Oil Ltd. as the consignee, and Canadian Pacific Railway (CP) as the carrier. (CP is the parent company of the other rail defendants, including Soo Line Railroad Company, and we will refer to the defendants collectively as CP). The bill of lading was drafted and issued by CP and accepted by WFE through an online process. The online form did not indicate or designate any particular tariffs, price lists or any limitations of liability by CP. Soo Line transported the train from New Town, North Dakota, to just over the Canadian border. From there, Canadian Pacific took the train to its rail yard outside of Montreal, Quebec, where it turned the train over to Montreal Maine & Atlantic Railway (MAR) Canada.

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[1] Western Petroleum is one of several related entities that we collectively refer to as the World Fuel Entities (WFE).

Around midnight on July 5, 2013, MAR parked the train on the main tracks and left it unattended. At some point early in the morning of July 6, 2013, the unattended train began rolling downhill toward Lac-Mégantic, Quebec. As the runaway train entered Lac-Mégantic, sixty-three of the train's seventy-two tanker cars derailed, spilling crude oil and causing a series of massive explosions. The derailment and subsequent explosions killed approximately forty-seven people and destroyed nearly the entire town of Lac-Mégantic. Obviously, neither the tanker cars nor the cargo made it to the intended destination and Irving did not receive the shipment.

On August 7, 2013, MAR filed for bankruptcy protection. On November 5, 2013, WFE sent a notice of damages related to the derailment to CP. This letter notified CP that it was making a claim under Canadian law, and expressly stated that it was not making a claim under the Carmack Amendment. See 49 U.S.C. § 11706 (codifying the exclusive remedy for the liability of rail carriers under receipts and bills of lading). This WFE letter further stated that a Carmack Amendment claim would be sent at a later date. On November 27, 2013, CP responded to WFE by denying the Canadian claim, and by noting that the Canadian claim was indeed not a claim pursuant to the Carmack Amendment. CP also stated in the November 27 denial that,

> even if [WFE] were to submit a proper *Carmack Amendment* claim, CP's liability, if any, could not exceed the value of the lading (crude oil) and would not encompass rail-car damage claims or indemnity against third-party tort or governmental environmental claims. Those matters

> unquestionably go beyond the value of the property that CP received for transportation.

Appellant's App. at 1944.

On April 4, 2014, WFE sent a notice of claim to CP under the Carmack Amendment for all damages arising out of the derailment, including any amounts that WFE might be liable for to injured parties or for environmental cleanup. CP sent a letter in response to WFE on April 24 acknowledging that the April 4 claim was proper notice for the Carmack Amendment claim, and that WFE's November 5 claim was under Canadian law, but ultimately disallowing the Carmack Amendment claim based upon WFE's alleged negligent conduct.[2]

Irving sent CP a letter on April 16, 2015, notifying it of potential derailment claims under various laws, including the Carmack Amendment. CP did not respond to Irving's letter. In October 2015, a bankruptcy court in Maine confirmed the MAR bankruptcy plan, and the federal district court in Maine adopted this order. CP withdrew its objections to confirmation of the plan. As may be relevant, the bankruptcy plan tolled any and all applicable limitations periods.

WFE and Irving settled its negligence claims against MAR's Chapter 11 Trustee and the Canadian insolvency

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[2] In its November 2013 and April 2014 denial letters, CP references several different tariffs, including ones that allegedly incorporate the Uniform Straight Bill of Lading. Addendum at 21-24; 28-31. However, the actual tariffs or their contents are apparently not in the record. In a submission to a Canadian Minister of the Environment, WFE references a similar tariff which allegedly incorporates the Uniform Straight Bill of Lading. App. at 2246.

monitor for $110 million U.S. dollars and $75 million in Canadian currency, respectively. The Trustee assigned Whatley, the Trustee of the WD Trust, the rights of both WFE and Irving to bring any possible claims against CP under the Carmack Amendment. Whatley brought claims pursuant to the Carmack Amendment in the District Court of North Dakota on behalf of WFE and Irving on April 12, 2016. CP filed an answer to the complaint in May 2016, and a motion for judgment on the pleadings or in the alternative, for summary judgment, in November 2016, seeking to dismiss the Carmack Amendment claims as untimely and for other reasons. In March 2017, the district court granted the motion. The court rejected Whatley's arguments that CP was barred by res judicata from denying the claims because it did not object when the bankruptcy Trustee was considering whether to assign the Carmack Amendment claims to the WD Trust. The court determined that it should consider WFE's and Irving's claims separately, and ruled that WFE's Carmack Amendment claim was untimely because suit was not filed within two years of the denial letter sent by CP on November 27, 2013. The court further held that while Irving had standing to pursue its claim, it was also untimely because it did not provide notice of the claim within nine months of the incident. The district court did not specify whether the ruling was on the pleadings or on summary judgment grounds. Whatley appeals.

II. DISCUSSION

A motion for judgment on the pleadings is reviewed de novo and should be granted only if the moving party has clearly demonstrated that no material issue of fact remains and the moving party is entitled to judgment as a matter of law. Elnashar v. U.S. Dep't of Justice, 446 F.3d 792, 794

(8th Cir. 2006). We construe the facts in the complaint as true, and all reasonable inferences are drawn in the plaintiff's favor. Id. When matters outside the pleadings are considered by the court, the motion shall be treated as one for summary judgment. McAuley v. Fed. Ins. Co., 500 F.3d 784, 787 (8th Cir. 2007).

The Carmack Amendment "imposes upon 'receiving rail carrier[s]' and 'delivering rail carrier[s]' liability for damage caused during the rail route under the bill of lading, regardless of which carrier caused the damage." Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 98 (2010) (alterations in original) (quoting 49 U.S.C. § 11706(a)). Its purpose is to relieve cargo owners "of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." Reider v. Thompson, 339 U.S. 113, 119 (1950). To help achieve this goal, the Carmack Amendment constrains carriers' ability to limit liability by contract. 49 U.S.C. § 11706(c).

As noted, a claim under the Carmack Amendment is the exclusive remedy to recover under a bill of lading. The statute sets forth the following language regarding when claims for recovery can be made:

> A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it *under this section* and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

49 U.S.C. § 11706(e) (emphasis added). Thus, the statute sets forth the floor–the minimum period which a carrier must give the shipper to give notice of a claim under section 11706. See Louisiana & W. R.R. Co. v. Gardiner, 273 U.S. 280, 284 (1927) (noting that similar language from an earlier version of the Carmack Amendment was not "intended to operate as a statute of limitation" but rather was meant to "restrict[] the freedom of carriers to fix the period within which suit could be brought"). An appendix to the implementing regulation, 49 C.F.R. pt. 1035, on the other hand, appears to set forth a clear time limitation. See 49 C.F.R. pt. 1035, App. B, § 2(b) (stating that when a carrier fails to deliver cargo, "[a]s a condition precedent to recovery, claims must be filed in writing with the [carrier] . . . within nine months after a reasonable time for delivery has elapsed" and further specifying that a lawsuit must be filed "within two years and one day from the day" the carrier gave written notice denying the claim). The regulation states that rail carriers "are required to use straight bills of lading as prescribed in Appendix . . . B." 49 C.F.R. pt. 1035.1(a).[3] The record in the instant matter contains a rather generic bill of lading but there is nothing specific in the bill of lading in this record about whether the

[3] However, we are perplexed by the fact that this regulation appendix language seems to mandate a nine-month notice and two-year lawsuit ceiling when the unambiguous statute sets a floor for these same time limits. This makes the regulation completely at odds with the statute; for instance, the regulation *requires* that notice of a claim be given *within* nine months, while the statute clearly states that a carrier may not provide a period of *less* than nine months for filing a claim. 49 C.F.R. pt. 1035, App. B, § 2(b); 49 U.S.C. § 11706(e). However, the validity of this particular regulation has not been called into question in this case and we express no opinion on the subject.

parties agreed to the uniform language set forth in the regulation.

Whatley pleaded a prima facie case under the Carmack Amendment by setting forth facts establishing: (a) that WFE delivered the cargo to CP in good order and condition; (b) that the cargo did not arrive; and (c) the amount of damages incurred. See Mo. Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964) (listing elements of prima facie case under the Carmack Amendment). Thus, if the district court erred in finding the claim to be untimely, reversal is warranted at this stage of the proceedings–either judgment on the pleadings or summary judgment. Although Whatley has been assigned the right to bring claims for both entities, because WFE and Irving are somewhat differently situated, we discuss them separately.

A. WFE

As stated, it is unclear from the current record whether the parties agreed to the uniform language from the regulation appendix setting a nine-month time period for notice, and a two-year (and a day) time limit for filing suit from the date that the claim was denied. Because of the outcome of our WFE analysis, we will assume that those time limits did, indeed, apply to WFE in this case. Given that assumption, unless the November 2013 exchange of correspondence between WFE and CP can be construed as a claim and a denial under the Carmack Amendment, WFE's claim based upon the claim letter and denial in April 2014 make Whatley's April 2016 lawsuit timely in any event.

Whatley alleges that the claims in the complaint were timely pursuant to the April 4, 2014, notice, the April 24,

2014, response and the filing of this April 12, 2016, suit in federal court. It is clear that WFE timely filed its notice of claim by sending its Carmack Amendment notice on April 4, 2014. The incident occurred on July 7, 2013. April 4 is less than nine months later. Thus, the essence of WFE's dispute centers on the effect of the November 27, 2013, denial issued by CP for WFE's Canadian claims. If, as CP asserts, the November denial was a blanket denial of all claims, including any possible future Carmack Amendment claims, the two-year "limitations" period bars Whatley's claim because it ran in November 2015. If, however, the November 2013 denial did not affect the future, as-yet-to-be-asserted Carmack Amendment claims, the suit was timely brought within two years of the CP denial in April 2014.

CP alleges WFE's written notice in November 2013 started the two-year clock, and the fact that the November 5, 2013, letter from WFE specifically disclaims any reference to a Carmack Amendment claim does not matter because the notice of claim need not reference the Carmack Amendment; instead, CP asserts, any form of claim denial starts the limitations period, citing Adams Express Co. v. Croninger, 226 U.S. 491 (1913); Gulf Rice Arkansas, LLC v. Union Pacific Railroad Co., 376 F. Supp. 2d 715 (S.D. Tex. 2005); Zarnoski-McCathern v. Eagle Van Lines, No. 04-CV-0155, 2005 WL 292439 (N.D. Tex. Feb. 8, 2005); and Conagra, Inc. v. Burlington Northern, Inc., 438 F. Supp. 1266, 1268 (D. Neb. 1977) ("Any written document which identifies the damaged shipment and indicates an intention to hold the carrier responsible is sufficient."), in support of its arguments.

The two Texas district court cases are quite distinguishable as they involve shippers' attempts to bring

state law claims against the carriers, and once the cases were removed to the Texas federal district courts, the courts appropriately found the state claims preempted by the Carmack Amendment. Gulf Rice Ark., 376 F. Supp. 2d at 719; Eagle Van Lines, 2005 WL 292439, at *2. Moreover, the courts in these cases analyzed the specific language of the agreements entered into by the parties to assess timeliness, and therefore these cases do not support the assertion that any form of claim denial will start the running of a two-year limitations period as a matter of law. See Gulf Rice Ark., 376 F. Supp. 2d at 724; Eagle Van Lines, 2005 WL 292439, at *3. And the Burlington Northern case cited by CP is not at all on point; in that case the issue was whether the Carmack Amendment notification needed to be a "[d]etailed documentation of the claim," rather than a simple notice. 438 F. Supp. at 1268. It was not a situation where a claim other than one under the Carmack Amendment was initially alleged or a matter discussing the adequacy of a denial. Id. The Croninger case is one of the first few Supreme Court cases construing the Carmack Amendment, which was enacted in 1906 as an amendment to the Interstate Commerce Act (although the Amendment has been altered and recodified over the last century). See Kawasaki Kisen Kaisha, 561 U.S. at 96. Among other things, Croninger addressed the shipper's limited recovery options when it elected a lower shipping rate in exchange for releasing its goods at the standard value of the goods. 226 U.S. at 509. While Croninger does stand for the proposition that common law claims against carriers are preempted by the Carmack Amendment, id. at 510-11, nothing in Croninger suggests that a carrier can preemptively deny a Carmack Amendment claim before it has been asserted.

Here we have the unusual situation where the first claim made was pursuant to Canadian law. According to the November letter, WFE was required by Canadian law to submit notice of this claim within four months of the occurrence. WFE's November 5 notice expressly denied that WFE was making its Carmack Amendment claim, and noted that it would do so at a later time. The statute itself defines a Carmack Amendment claim as one being brought "under this section." 49 U.S.C. § 11706(e). Indeed, if WFE had failed to make its April 2014 claim, CP might be arguing that the November notice did not assert a Carmack Amendment claim. See, e.g., Am. Rock Salt Co., LLC v. Norfolk S. Corp., 387 F. Supp. 2d 197, 204 (W.D.N.Y. 2005) (holding that shipper who gave written notice that it *would be* filing a claim "at some unspecified later date" but did not do so within nine months, did not adequately preserve its Carmack Amendment claim). To be sure, American Rock Salt is a bit distinguishable because the "will be filing" notice contained no specifics about damages. Id. at 203. Here, by necessity and due to the operation of Canadian law, damages (in the amount of approximately $4.9 million) were mentioned in the November 2013 correspondence. But equally clear in WFE's November correspondence was the notation that WFE was not yet making its Carmack Amendment claim. When it ultimately gave its Carmack Amendment notice in April 2014, WFE asked for damages in the amount of $6,670,593.27 and also noted that other damages (for property and wrongful death) were yet to be determined. We think it would be unwise policy, and actually unfair in this unusually complicated multi-national case, to allow the carrier to start the two-year clock when the shipper had not yet broken the huddle. We certainly agree that a denial starts the clock; but according to the statute, the denial must be from a claim brought "under this section." 49 U.S.C. § 11706(e). WFE's November claim

was assuredly and explicitly not brought pursuant to 49 U.S.C. § 11706. Accordingly we reverse the district court's grant of judgment on the pleadings (or summary judgment) as to Whatley's claim on behalf of WFE.

B. Irving

Whatley's Irving claim is more problematic because Irving first gave notice in April 2015. If, indeed, the time limitations presumed in the previous section applied to the bill of lading in this case, Whatley's claim on behalf of Irving could be time-barred. Whatley alleges that since Irving was not a party to the bill of lading, it was not bound by any possible nine-month period for bringing suit. And, Irving alleges it was not required to provide notice of a claim until it was able to calculate its damages with reasonable precision. Because many of the claims against Irving were not alleged until the MAR bankruptcy case took shape, and the bankruptcy plan was confirmed in October 2015, Irving argues that its claim, made in April 2015, was as timely as reasonably possible. Finally, it alleges that the bankruptcy plan tolled any applicable statutes of limitations, including ones that may apply to the Carmack Amendment claims. However, CP points out that Irving cannot both escape the timing rules (that CP alleges are in the bill of lading and tariffs) and reap the benefits of the damages provisions by way of the bill of lading through the Carmack Amendment.

More persuasively, however, Whatley alleges that there is a genuine dispute over the very existence of contractual terms in the bill of lading providing for a nine-month notice period and a two-year suit limitation, precluding both dismissal on the pleadings or summary judgment as a matter of law. Whatley alleged in the pleadings that the bill of lading did not contain terms setting forth the nine-month

notice and two-year period for bringing suit. And as previously noted, the specific language and/or the tariffs themselves do not appear to be in the record on appeal. This omission and factual dispute precludes judgment on the pleadings or summary judgment in favor of CP with regard to Irving's claims. See Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 707-08 (4th Cir. 1993) (holding that the record was insufficient to determine whether contractual time limits applied to bar the Carmack Amendment claim, and thus, remand was warranted); Tr. of Oral Decision, In re: Maine Montreal & Atlantic Ry., Ltd., Adv. No. 13-01033 (Bankr. D. Me. June 22, 2018) (rejecting argument that the bill of lading governing the same train at issue in the instant dispute automatically incorporated the terms of the uniform bill of lading). Although WFE may have arguably conceded this point, see ante n.2, Irving has not. If on remand it becomes clear that the nine-month notice and two-year lawsuit limits contractually apply, then Irving's Carmack Amendment claim is untimely, unless Irving's tolling arguments, based upon MAR's bankruptcy action, are meritorious. As the district court did not address Irving's tolling arguments below, we leave it to the district court to discern the applicability of any tolling, if necessary.

III. CONCLUSION

Accordingly, we reverse and remand for proceedings consistent with this opinion.

GRUENDER, Circuit Judge, concurring in part and dissenting in part.

Over the past several decades, deregulation has revolutionized the law governing the interstate shipment of goods. *See* 22 Richard A. Lord, *Williston on Contracts* § 59:1 (4th ed. 2018). While these changes have given

shippers and carriers greater freedom in making contracts, in this case the law mandated the contractual terms at issue. For this reason, I disagree that there is a genuine dispute over the contractual terms governing Whatley's Irving Oil claim, and I respectfully dissent from Part II.B of the court's decision. Because the two-year limitation on Whatley's WFE claim ran from the April 24, 2014 denial letter rather than the November 27, 2013 denial letter, I agree that the WFE claim is timely and concur in that portion of the court's opinion and judgment.

For shipments subject to the Carmack Amendment, rail carriers must use the uniform straight bill of lading prescribed by federal regulations.[4] 49 C.F.R. § 1035.1; *id.* pt. 1035, apps. A, B; *see also C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 478 (9th Cir. 2000) (explaining that rail and water carriers, but not motor carriers, must use the uniform straight bill of lading). Under § 2(b) of the uniform straight bill of lading, claims involving a failure to make delivery must be filed in writing with the carrier "within nine months after a reasonable time for delivery has elapsed." 49 C.F.R. pt. 1035, app. B. Likewise, § 2(b) permits a lawsuit to be filed "only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has

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[4] The Carmack Amendment does not necessarily apply to rail shipments. As part of the deregulation of the transportation industry, "shippers and carriers [may] sidestep federal regulation of transportation agreements by entering into private contracts" that are not subject to the Carmack Amendment, 49 U.S.C. § 11706, but instead are governed by 49 U.S.C. § 10709. *Babcock & Wilcox Co. v. Kansas City S. Ry.*, 557 F.3d 134, 138 (3d Cir. 2009); *see also* 1 Saul Sorkin, *Goods in Transit* § 5.02 n.167 (2018). But the parties here have made no argument that this contract is governed by § 10709. On the contrary, Whatley states that his claims arise under § 11706.

disallowed the claim or any part or parts thereof specified in the notice."[5] *Id.*

As the court points out, it is not clear from the record whether WFE and Irving Oil expressly agreed to this language. *Ante*, at 7. But because the uniform bill of lading is required by federal law, the time limitation requirements bind the parties regardless. *See Comsource Indep. Foodservice Cos. v. Union Pac. R.R.*, 102 F.3d 438, 443-44 (9th Cir. 1996); *Glenn Hunter & Assocs. v. Union Pac. R.R.*, No. 3:01-CV-7602, 2003 WL 403178, at *1 (N.D. Ohio Jan. 22, 2003) ("The omission of the required language does not relieve the Union Pacific of its effect, because the applicable regulation requires the inclusion of that

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[5] As Whatley notes, 49 U.S.C. § 11706(e) requires a minimum of nine months for claims and two years for instituting suits but otherwise allows parties to negotiate limitations periods. Before the ICC Termination Act of 1995, these floors were codified at 49 U.S.C. § 11707(e) and applied to carriers *generally*. For rail and water carriers, the Interstate Commerce Commission ("ICC") prescribed the uniform straight bill of lading, which mandated the precise time periods described above. *See* Bills of Lading, 58 Fed. Reg. 60797 (Nov. 18, 1993) (to be codified at 49 C.F.R. pt. 1035); Bills of Lading, 9 I.C.C.2d 1137 (1993). Thus, there was no inconsistency between the statute, which generally gave carriers the freedom to impose time limitations by rule or contract subject to the statutory floors, and the regulation, which imposed more stringent standards on rail and water carriers by requiring them to use the uniform straight bill of lading. The ICC Termination Act transformed § 11707 and created separate statutory provisions for different types of carriers. 49 U.S.C. § 11706 (rail carriers), § 14706 (motor carriers and freight forwarders), § 15906 (pipeline carriers). But because the ICC Termination Act contains a savings clause stipulating that previous ICC regulations remain in force, Pub. L. No. 104-88, § 204, 109 Stat. 803, 941 (1995), there is no reason to read § 11706(e) as casting doubt on the continuing validity of 49 C.F.R. § 1035.1.

language in the bill of lading."); 2 Sorkin, *supra* n.1, § 10.02 ("If the contractual limitation of action is provided for in the tariff and regulations, no other notice[] is required to the shipper."). Consequently, I disagree with the court that "there is a genuine dispute over the very existence of contractual terms in the bill of lading" that precludes dismissal of the untimely Irving Oil claim.

Under the uniform straight bill of lading, Irving Oil had nine months after "a reasonable time for delivery has elapsed" to submit its claim to Canadian Pacific, but it did not submit any claim until April 16, 2015. Given that the accident occurred on July 6, 2013, this was well more than nine months after a reasonable time for delivery had elapsed. *See Imperial News Co. v. P-I-E Nationwide, Inc.*, 905 F.2d 641, 644 (2d Cir. 1990) (finding 124 days "more than a reasonable time" for delivery). Whatley tries to excuse Irving Oil's failure to submit a timely claim by arguing that it waited until it could calculate damages with reasonable precision in light of the ongoing bankruptcy proceedings. *See Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 905 n.10 (2d Cir. 1980). But Whatley did not make this argument below. *Gap, Inc. v. GK Dev., Inc.*, 843 F.3d 744, 748 (8th Cir. 2016) ("Ordinarily, this court will not consider an argument raised for the first time on appeal." (internal quotation marks omitted)). And in any event, a party cannot wait until its total financial burden is clear to bring a claim if it reasonably knows the value of the damaged cargo. *See 5K Logistics, Inc. v. Daily Express, Inc.*, 659 F.3d 331, 336 (4th Cir. 2011). Moreover, Irving Oil could at least have filed a partial claim. *See Am. Rock Salt Co. v. Norfolk S. Corp.*, 387 F. Supp. 2d 197, 205 (W.D.N.Y. 2005). Indeed, the fact that WFE filed its claim within a year of the accident undermines Whatley's argument that

Irving Oil was unable to file a claim until almost two years had lapsed.[6] *See id.*

I join the court's opinion and judgment on the more difficult question of the timeliness of the WFE claim. And though Canadian Pacific has made several other arguments that might justify dismissal of that claim, I agree that we should allow the district court to consider them in the first instance.

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[6] For these reasons, the Irving Oil claim would be untimely even if the limitations periods are tolled pursuant to Whatley's interpretation of the bankruptcy plan. Under that plan, statutes of limitations must be tolled from the Execution Date—here March 2, 2015—to the Plan Implementation Date. By the time the tolling period began, however, Irving Oil's claim was already untimely.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

1:16-CV-00074-BRW-CSM

[Filed March 24, 2017]

JOE R. WHATLEY, JR., solely in his capacity as Trustee of the WD Trust PLAINTIFF	)
VS.	)
CANADIAN PACIFIC RAILWAY LIMITED, *et al.* DEFENDANTS	)

ORDER

Pending are Defendants' Motions for Judgment on the Pleadings (Doc. Nos. 40, 54), Defendants' Motion to Stay Discovery (Doc. No. 63), and Plaintiff's Motion for Hearing (Doc. No. 72). Responses and replies have been filed.[1] As set out below, Defendants' Motion for Judgment on the Pleadings (Doc. No. 54) is GRANTED – all other Motions (Doc. Nos. 40, 63, 72) are MOOT.

[1] Doc. Nos. 45, 46, 48, 50, 51, 69, 70, 76, 83, 84, 77, 82, 85.

I. BACKGROUND[2]

On June 29, 2013, Train 282 and its 72[3] tanker cars laden with crude oil left New Town, North Dakota destined for an oil refinery near Saint John, New Brunswick (Canada). Just before midnight on July 5, Train 282's engineer (and lone occupant) parked Train 282 on the main tracks and left it unattended. Shortly after midnight, Train 282 – still unattended – began rolling downhill toward Lac-Mégantic, Quebec. As the runaway train entered Lac-Mégantic, 63 of its tanker cars derailed, spilling their crude oil and causing a series of massive explosions. The derailment and subsequent explosions killed 47 people and destroyed nearly the entire town of Lac-Mégantic – neither the tanker cars nor their cargo made it to their destination.[4]

The bill of lading for Train 282's cargo designated Western Petroleum Company ("Western Petroleum") as the shipper, Irving Oil Company ("Irving Oil") as the consignee, and Canadian Pacific Railway Limited (Canadian Pacific") as the carrier.[5] Canadian Pacific is the parent company of the other Defendants.

Soo Line Railroad Company transported Train 282 from New Town, North Dakota to just over the Canadian

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[2] Unless otherwise noted, the facts in the Background section are taken from Plaintiff's Complaint, and are not in dispute.

[3] It appears that Train 282 may have left New Town with 78 tanker cars, but 6 of them were "bad-ordered en route." Doc. No. 1-10.

[4] There appears to be a dispute as to whether any of the crude oil actually made it to the refinery. *See* Defendants' Answers (Doc. Nos. 24-27).

[5] Doc. No. 1-10.

border.[6] From there, Canadian Pacific took Train 282 to its rail yard just outside of Montreal, Quebec, where it turned Train 282 over to Maine & Atlantic Railway Canada ("MM&A Canada"). Although no one was operating Train 282 when it derailed, MM&A Canada was the last railway company to operate it before it derailed.

About a month after the derailment, MM&A Canada and its United States parent company, Montreal Maine & Atlantic Railroad ("MM&A"), filed for bankruptcy protection.[7] Plaintiff is the trustee of the wrongful-death-claimants' trust created by MM&A's bankruptcy estate.[8] The bankruptcy trustee assigned Plaintiff the rights of the shipper and consignee to bring claims under the Carmack Amendment.[9]

Defendants Motion for Judgment on the Pleadings, which alternatively seeks summary judgment takes a shotgun approach: Plaintiff lacks standing, the claim is untimely, the relief sought is not available, etc.[10] Plaintiff asserts that Defendants' Motion is without merit, that "Defendants are barred and estopped from raising the arguments made in the Motion," and that Defendants

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[6] *Id.*

[7] Additionally, at least 39 individual lawsuits sprang up in the United States – all were consolidated in the District of Maine. See, *In re: Lac-Mégantic Train Derailment Litigation*, No. 1:16-CV-01001-JDL, Doc. No. 29 (D. Me. Sept. 28, 2016).

[8] Doc. Nos. 1, 41.

[9] 49 U.S.C. § 11706.

[10] Doc. Nos. 55, 83.

improperly rely on matters outside the pleadings or on inadmissable evidence.[11] Because Plaintiff's claim is untimely, I do not address Defendants' other arguments for dismissal, or Plaintiff's responses to those arguments.

II. STANDARD

A motion for judgment on the pleadings "should only be granted if the moving party has clearly demonstrated that no material issue of fact remains and the moving party is entitled to judgment as a matter of law."[12] A motion for judgment on the pleadings is evaluated under the same standard as a motion to dismiss for failure to state a claim.[13] The facts set out in the complaint are taken as true and all reasonable inferences are drawn in Plaintiff's favor.[14]

Judgment on the pleadings is only appropriate if "it appears beyond doubt that plaintiff can prove no set of facts to warrant a grant of relief."[15] In determining whether judgment on the pleadings is appropriate, courts look only to the complaint, exhibits attached to the complaint, and materials necessarily embraced by the pleadings.[16]

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[11] Doc. No. 69.

[12] *Elnashar v. U.S. Dep't of Justice*, 446 F.3d 792, 794 (8th Cir. 2006).

[13] *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

[14] *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 787 (8th Cir. 2007) (citing *Botz v. Omni Air Int'l*, 286 F.3d 488, 490 (8th Cir. 2002)).

[15] *Knieriem v. Grp. Health Plan, Inc.*, 434 F.3d 1058, 1060 (8th Cir. 2006).

[16] *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993) (citing *Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976)).

"Documents necessarily embraced by the pleadings include documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading."[17] If a court considers matters outside of these sources, it may nonetheless convert the motion to one for summary judgment under Rule 56.[18]

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds.[19] The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.[20]

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should be granted only when the movant has

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[17] *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) (internal quotations and citations omitted).

[18] Fed. R. Civ. P. 12(d), 56; *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003).

[19] *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56.

[20] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

established a right to the judgment beyond controversy.[21] Nevertheless, summary judgment promotes judicial economy by preventing trial when no genuine issue of fact remains.[22] A court must view the facts in the light most favorable to the party opposing the motion.[23] The Eighth Circuit has also set out the burden of the parties in connection with a summary judgment motion:

> [T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*,"[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.[24]

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[21] *Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

[22] *Id.* at 728.

[23] *Id.* at 727-28.

[24] *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted)).

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.[25]

III. DISCUSSION

Although Plaintiff's Carmack claim is the lone claim set out in the Complaint, it is essentially two claims – one for the shipper, and one for the consignee. Accordingly, I will address the claim as if it were two independent claims – the shipper's claim, and the consignee's claim.

Defendants assert that both claims are untimely, but for different reasons. First, the shipper's claim is untimely because the shipper did not file suit within two years and a day of receiving Defendants' claim-denial letter. Second, the consignee's claim is untimely because the consignee did not give notice of its claim "within nine months after a reasonable time for delivery has elapsed."[26] Plaintiff asserts "Defendants are barred and estopped from raising the arguments made in the Motion."[27]

A. *Res Judicata* or Issue Preclusion

The "arguments made in the Motion," relevant here, are that the shipper's claim and the consignee's claims are untimely, and the consignee lacks standing to bring a claim on the bill of lading. The gist of Plaintiff's argument is that because Defendants did not object when the bankruptcy court was considering whether to assign the Carmack

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[25] *Anderson*, 477 U.S. at 248.

[26] Doc. No. 55.

[27] Doc. No. 71-2.

claims to Plaintiff, Defendants are now barred from defending the merits of those claims.

First, concerning the "arguments raised in the Motion," Plaintiff overestimates the strength of *res judicata* and collateral estoppel – and the helpfulness of the cases cited. Although Plaintiff cites several cases on this issue, none are on point.

Plaintiff asserts that *GOE Lima*[28] is "particularly instructive."[29] There, a mechanical contractor and an ethanol producer had a contract that included an arbitration clause. The ethanol producer filed for bankruptcy relief. The mechanical contractor filed a breach-of-contract claim, and the ethanol producer filed a counterclaim. The ethanol producer asked the bankruptcy court to stay the adversarial proceeding so the parties could arbitrate their disputes. Over the mechanical contractor's objection, the bankruptcy court stayed the case pending arbitration.

Next, the ethanol producer's rights to its counterclaim were assigned to another entity (the "assignee") through a court-approved settlement agreement and a confirmed plan of liquidation. The mechanical contractor did not object to the assignment and even initiated arbitration proceedings after the assignment was complete. Then, in an about face, the mechanical contractor sought to have the stay lifted, and argued the assignment was invalid and the arbitration clause could not be enforced by the assignee. The court held that the mechanical contractor was precluded from

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[28] *In re GOE Lima, LLC*, No. 08-35508, 2012 WL 930250, at *1 (Bankr. N.D. Ohio Mar. 19, 2012).

[29] Doc. No. 71.

attacking the assignment's validity because it "could have and should have raised the issue of the validity of the assignment . . . by objecting to the court's approval of the [s]ettlement [a]greement and to confirmation of the [p]lan."[30] The court also would not hear the mechanical contractor's arguments against enforcing the arbitration clause because the court had already decided that issue.

In *GOE Lima*, the mechanical contractor attacked the *assignment* of a claim. Here, Defendants are attacking the *merits* of the claim assigned. Accordingly, *GOE Lima* is not helpful. Moreover, MM&A's underlying bankruptcy case did not address the merits of the Carmack claims – nor would it have made sense for it to do so. Because Defendants had neither the obligation nor opportunity to defend the merits of the assigned Carmack claims, they are not barred from doing so now.

B. The Carmack Amendment

A claim under the Carmack Amendment is the exclusive remedy to recover under a bill of lading.[31] Accordingly, Plaintiff's claim is governed by the Carmack Amendment.

Plaintiff asserts that Carmack claims have no time limitations, and the bill of lading contained no express notice of a limitations period.[32] Both arguments fail.

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[30] *In re GOE Lima, LLC*, No. 08-35508, 2012 WL 930250, at *5 (Bankr. N.D. Ohio Mar. 19, 2012)

[31] *S.E. Express Co. v. Pastime Amuse. Co.*, 299 U.S. 28, 29 (1936); *Fulton v. Chicago, Rock Island & P. R. Co.*, 481 F.2d 326, 332 (8th Cir. 1973).

[32] Doc. No. 69.

Federal regulation sets the time limits for recovery on a bill of lading – regardless of whether expressly noticed on the bill of lading.[33] When a carrier fails to deliver cargo, "claims must be filed in writing with the [carrier] within nine months after a reasonable time for delivery has elapsed."[34] A lawsuit must be filed within two years and a day from the day the carrier gives written notice that it is denying the claim (or any part of the claim).[35] "Where claims are not filed or suits are not [filed] in accordance with the foregoing provisions, no carrier [will] be liable, and such claims will not be paid."[36]

C. The Shipper's Carmack Claim

Since the cargo never made it to its destination, claims on the bill of lading must have been made "within nine months after a reasonable time for delivery has elapsed."[37] Plaintiff asserts that notice of the claim was given on April 4, 2014 (the "April Claim") and denied on April 24, 2014 (the "April Denial").[38] Defendants assert that the claim was first made on November 5, 2013 (the "November Claim"),

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[33] 49 C.F.R. pt. 1035, app. B, § 2(b); *5K Logistics, Inc. v. Daily Exp., Inc.*, 659 F.3d 331, 338 (4th Cir. 2011) (time limitations are "expressly contemplated by statute and standard in the industry").

[34] 49 C.F.R. pt. 1035, app. B, § 2(b).

[35] *Id.*

[36] *Id.*

[37] 49 C.F.R. pt. 1035, app. B, § 2(b).

[38] Doc. No. 69.

and denied on November 27, 2013 (the "November Denial").[39]

Plaintiff insists that the November Claim and November Denial "are outside of the pleadings, not part of the public record, and contradict the allegations set forth in the Complaint, they may not be considered as part of the Motion pursuant to Rule 12."[40] Recognizing that Defendants' Motion also seeks summary judgment, Plaintiff also asserts that they "cannot be used to support the Motion" because the documents are inadmissable hearsay.[41] "Finally," Plaintiff asserts, "the documents fail, on their face, to support the Defendants' contention" because the November Claim expressly states that it is "not a claim under Carmack."[42]

First, it appears the documents are embraced by the pleadings. Defendants' Answers assert that notice of a claim was first given on November 5, 2013.[43] No party disputes the authenticity of the documents – in fact, Plaintiff swears under oath that the documents are authentic.[44] Accordingly, even if the documents are outside of the pleadings, there is no dispute over their authenticity, so they raise no genuine dispute as to a material fact.

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[39] Doc. No. 55.

[40] Doc. No. 69.

[41] *Id.*

[42] Doc. No. 69 (emphasis in original).

[43] Doc. Nos. 24-27.

[44] Doc. No. 71.

The November Claim is titled "Notice of Loss, Damage or Delay."[45] The first paragraph of the November Claim states that the shipper is making a claim against Defendants "for all losses sustained as a consequence of the derailment of [Train 282] . . . including but certainly not limited to the loss, damage or delay of the shipper's goods on Train 282, and of all affected railcars." Under the heading, "Proviso and reservation of rights" the November Claim reads:

> **This Notice of Loss, Damage or Delay is submitted at this time by the Notifying Parties,** without prejudice to any of its or their rights to bring any or all of their claims in any venue or jurisdiction available to them, and without prejudice to any of its or their rights to plead and rely upon the laws of the United States of America or of Canada as are or may be applicable. Without limiting any of the foregoing or any rights of the Notifying Parties this Notice of Loss Damage or Delay is submitted at this time and shall be if and as may be required considered as a sufficient and comprehensive Notice to at all times satisfy any requirement of notice under the Railway Traffic Liability Regulations [Canada] SOR/91-488, providing for service of a notice of loss of goods, or delay, or damage to goods, in printed or electronic form, which is to be received by the originating carrier or delivering carrier within four months after a reasonable period for delivery of the goods has expired, in the case of loss, or within four months after delivery of the goods, where damage

[45] Doc. No. 71-13.

> or delay is claimed. This Notice shall be without any waiver or limitation whatsoever of the rights of the Notifying Parties under the laws of the United States of America, including the *Carmack Amendment* (49 U.S.C. § 11706), which provides a period of not less than 9 months for filing a notice of claim against a rail carrier and the rules of the Surface Transportation Board (49 C.F.R. Part 1005), entitled "*Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage*." The Notifying Parties will submit a separate notice of claim in accordance with the aforementioned provisions of U.S. law at the appropriate time.[46]

Plaintiff asserts that the November Claim did not meet the notice requirements under the Carmack Amendment.[47] Although notice is a condition precedent to recovery on a Carmack claim, notice is to be construed in a "practical way."[48] "The crux of the notice is whether it apprises the carrier of the basis for the claim and that reimbursement will be sought."[49] "Any written document which identifies the damaged shipment and indicates an intention to hold

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[46] *Id.* (emphasis in original).

[47] Doc. No. 69.

[48] *Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 198 (1916).

[49] *S & H Hardware & Supply Co. v. Yellow Transp., Inc.*, 432 F.3d 550, 554 (3d Cir. 2005).

the carrier responsible is sufficient."[50] Notice that is sufficient in all other respects, but which cites to laws under which recovery is preempted or unavailable (for example, state law,[51] common law,[52] or Canadian law[53]) is sufficient notice. Where a derailment destroys cargo, even actual notice has been held sufficient, since "formal notice could not have accomplished anything more."[54]

It is undisputed that the November Claim was in writing, was delivered within nine months, identified the shipment, and notified the carrier that the shipper was asserting a claim. Specifically, the shipper informed

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[50] *Conagra, Inc. v. Burlington N., Inc.*, 438 F. Supp. 1266, 1268 (D. Neb. 1977); *Union P. R. Co. v. Beemac Trucking, LLC*, 929 F. Supp. 2d 904, 920 (D. Neb. 2013).

[51] See, e.g., *Zarnoski-McCathern v. Eagle Van Lines*, No. 2:04-CV-0155-J, 2005 WL 292439, at *3 (N.D. Tex. Feb. 8, 2005) (general denial of state-law claims was sufficient denial of Carmack claims); *Gulf Rice Arkansas, LLC v. Union Pacific Railroad Co.*, 376 F.Supp.2d 715, 719 (S.D. Tex. 2005) (recharacterizing state-law claim for common-carrier liability as a Carmack claim).

[52] *Adams Express Co. v. Croninger*, 226 U.S. 491, 507 (1913).

[53] The Carmack Amendment expressly applies to all shipments from the United States to adjacent foreign countries, such as Canada, transported on a through bill of lading. See, e.g., Gordon Hearn and Jeffrey R. Simmons, *Conflict of Laws Considerations, Shipping Between the United States and Canada*, 56 No. 12 DRI For Def. 66 (Dec. 2014).

[54] *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F.2d 179, 182 (7th Cir. 1949) ("Obviously, the same rule would uniformly apply under similar facts to all other shippers and carriers."); but see, *Perini-N. River Associates v. Chesapeake & O. Ry. Co.*, 562 F.2d 269, 271 (3d Cir. 1977).

Defendants of a claim for "all losses sustained as a consequence of the derailment of [Train 282] . . . including but certainly not limited to the loss, damage or delay of the shipper's goods on Train 282, and of all affected railcars."[55] Accordingly, the November Claim satisfies the Carmack Amendment's notice requirement.

The ticking of the Carmack Amendment's two-year-and-a-day clock began when the shipper received Defendants' denial of any part of the claim.[56] "A disallowance or denial is clear, final and unequivocal when the only conclusion that can be rationally apprehended is that the defendant refuses to allow any further advancement of some part of the plaintiff's claim."[57]

At a minimum, the November Denial unequivocally refused Plaintiff's claim that exceeded the value of the laden crude oil (for example, railcar damage, indemnity against third-party tort or environmental claims, and "liability for indirect and consequential damage, as well as punitive and special damages").[58] The November Denial also denied Defendants were responsible for Train 282 while it was in MM&A's control because the shipper chose MM&A Canada over a more expensive alternative.[59]

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[55] Doc. No. 71-13.

[56] *Zarnoski-McCathern*, No. 2:04-CV-0155-J, 2005 WL 292439, at *3 (N.D. Tex. Feb. 8, 2005).

[57] *Id.*

[58] Doc. No. 71-14.

[59] *Id.*

Defendants denied lading liability altogether because the shipper misrepresented the classification of the crude oil.[60]

In fine, Defendants' November Denial made it clear that Defendants denied all liability–including liability under the Carmack Amendment. Accordingly, the shipper's two-year-and-a-day limitation period started to run on November 27, 2013.

Plaintiff asserts that, even if Carmack claims have a limitation period, and it began to run on November 27, 2013, the Complaint was timely because the limitation period was tolled from June 8, 2015, through December 22, 2015.[61] Plaintiff is mistaken as to when it began.

According to MM&A's Liquidation Plan, which tolled the limitations period, the tolling period began on "the Execution Date" as defined in the shipper's settlement agreement with MM&A.[62] The settlement agreement defined the "Execution Date" as "the first day upon which all Parties have executed this Amendment."[63] It is undisputed that date was November 23, 2015.[64] Accordingly, the tolling period began on November 23, 2015 – leaving the shipper four days from the day the tolling period ended to timely file suit.

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[60] Doc. No. 71-14 ("That fraud obviates any [Defendants'] lading liability to [the shipper].").

[61] Doc. No. 69.

[62] Doc. Nos. 1-7, 1-8.

[63] Doc. No. 1-6.

[64] *Id.*, pp. 44-46 of 49.

It is undisputed that the tolling period ended on December 22, 2015.[65] Plaintiff's Complaint was filed on April 12, 2016 – about four months too late. Accordingly, the Carmack claim on behalf of the shipper is untimely.

D. The Consignee's Carmack Claim

1. Standing

Plaintiff overestimates Defendants' standing argument. Defendants do not claim that Plaintiff does not stand in the shoes of the consignee. Instead, Defendants assert that because the consignee was neither the shipper nor recipient of the cargo (since the crude oil never made it), the consignee – and therefore Plaintiff – lacks standing to bring a claim on the bill of lading.[66] Although none of the citations provided by the parties are a world of clarity on this point, there appears to be some authority allowing a consignee to bring a Carmack claim against a carrier.

In *Kansas City Southern Railway Company v. Mixon-McClintock Co.*, a shipment of mules was sent from Kansas City, Missouri, to Mariana, Arkansas.[67] When the mules arrived, many of them were "greatly injured and bruised, [or died] soon after . . . on account of the injuries received."[68] The consignee sued the carrier on the bill of

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[65] Doc. No. 1-6 (tolling period ended on the "Effective Date" of the Plan); Doc. No. 1-7 ("Whereas, on December 22, 2015, the Effective Date of the Plan occurred").

[66] Doc. No. 55.

[67] *Kansas City S. R. Co. v. Mixon-McClintock Co.*, 107 Ark. 48 (1913).

[68] *Id.*

lading.[69] The court held, that the carrier "would not be heard to complain that the consignee to whom it expressly agreed to deliver the stock was without authority to bring suit for the damage thereto."[70] Accordingly, Plaintiff has standing to sue on behalf of the consignee.

2. Timeliness

The consignee was required to give notice "within nine months after a reasonable time for delivery has elapsed."[71] It is undisputed that neither the November Claim nor the April Claim were submitted on behalf of the consignee.[72] Plaintiff does not allege that the consignee provided timely notice. Instead, Plaintiff, who previously asserted standing as a party to the bill of lading, asserts that because the consignee was "not a negotiating or executing party" to the bill of lading, no notice was required.[73] "It is settled law that the notice requirement applies to all claims against carriers for losses."[74]

The consignee sent Defendants a letter dated April 16, 2015 – nearly two years after the derailment – stating that the consignee had a "potential claim [against Defendants]

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[69] *Id.*

[70] *Id.*

[71] 49 C.F.R. pt. 1035, app. B, § 2(b).

[72] Doc. Nos. 71-13, 71-15.

[73] Doc. No. 69. I note the irony of Plaintiff accusing Defendants of "arguing out of both sides of their mouth on this issue."

[74] *S & H Hardware & Supply Co. v. Yellow Transp., Inc.*, 432 F.3d 550, 556 (3d Cir. 2005); see also, 49 C.F.R. pt. 1035, app. B, § 2(b).

for certain losses, damages, and/or liabilities, [related to Train 282's derailment]."[75] The letter specifically contemplated a potential claim under the Carmack Amendment.[76]

Because the consignee did not give Defendants written notice of its claim until April 16, 2015 – more than 21 months after the derailment – Plaintiff's claim brought on behalf of the consignee is untimely.

CONCLUSION

Based on the findings of fact and conclusions of law set out above, Defendants Motion (Doc. No. 54) is GRANTED – all other pending motions are MOOT.

IT IS SO ORDERED this 24th day of March, 2017.

/s/ Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

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[75] Doc. No. 1-12.

[76] *Id.*

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

1:16-CV-00074-BRW-CSM

[Filed March 24, 2017]

JOE R. WHATLEY, JR., solely in his capacity as Trustee of the WD Trust PLAINTIFF	)
VS.	)
CANADIAN PACIFIC RAILWAY LIMITED, *et al.* DEFENDANTS	)

JUDGMENT

Consistent with the order entered today, judgment is entered in favor of Defendants. Accordingly, this case is DISMISSED with prejudice.

IT IS SO ORDERED this 24th day of March, 2017.

/s/ Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-1677

[Filed November 15, 2018]

Joe R. Whatley, Jr., solely in his capacity as the WD Trustee of the WD Trust	)
Appellant	)
v.	)
Canadian Pacific Railway Limited, et al.	)
Appellees	)

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:16-cv-00074-BRW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

November 15, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

APPENDIX D

49 C.F.R. § 1005.2 Filing of claims.

(a) Compliance with regulations. A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) Minimum filing requirements. A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and: (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; *Provided, however*, That where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.

(c) Documents not constituting claims. Bad order reports, appraisal reports of damage, notations of shortage or

damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) Claims filed for uncertain amounts. Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

(e) Other claims. If investigation of a claim develops that one or more other carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim shall communicate with each such other carrier and, prior to any agreement entered into between or among them as to the proper disposition of such claim or claims, shall notify all claimants of the receipt of conflicting or overlapping claims and shall require further substantiation, on the part of each claimant of his title to the property involved or his right with respect to such claim.

49 C.F.R. § 1035.1 Requirement for certain forms of bills of lading.

(a) All common carriers, except express companies, engaged in the transportation of property other than livestock and wild animals, by rail or by water subject to the Interstate Commerce Act are required to use straight bills of lading as prescribed in Appendix A and B to this part, or order bills of lading as prescribed in Appendix A and B to this Part, except that order bills of lading shall:

(1) Be entitled "Uniform Order Bill of Lading" and be designated as "Negotiable" on the front (appendix A to this part);

(2) Indicate consignment "to the order of * * * " on the front (appendix A to this part); and

(3) Provide for endorsement on the back portion (appendix B to this part).

(b) All such bills of lading:

(1) May be either documented on paper or issued electronically;

(2) May be a copy, reprographic or otherwise, of a printed bill of lading, free from erasure and interlineation;

(3) May vary in the arrangement and spacing of the printed matter on the face of the form.

49 C.F.R. Pt. 1035, App. B

APPENDIX B TO PART 1035—CONTRACT TERMS AND CONDITIONS

Contract Terms and Conditions

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the

property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own

cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly

sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier, may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it, and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the

property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is,

such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be

due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc." and of other statutes of the United States according carriers by water the protection of limited liability as well as the following subdivisions of this section: and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is

necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York–Antwerp Rules of 1924, sections 1 to 15, inclusive, and sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenance, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be

liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

49 U.S.C. § 11706. Liability of rail carriers under receipts and bills of lading

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by--

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a

place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

(b) The rail carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the rail carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.

(2) A rail carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on trains carrying passengers.

(3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which--

(A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or

(B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

(d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.

(2)(A) A civil action under this section may only be brought--

(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(B) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim

against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection--

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

APPENDIX E

NOTICE OF LOSS, DAMAGE OR DELAY

Dated November 5, 2013

TO:

(1) Canadian Pacific Railway Company[1]

c/o Damage Prevention & Claim Services

14 Fultz Boulevard, Winnipeg MB, R3Y 0L6

Email: contact_dpfc@cpr.ca and Fax: 1-877-685-3555

And also to CPR at its registered, executive and head office, located at:

Suite 500, 401 - 9th Avenue S.W., Calgary, Alberta T2P 4Z4

c/o Chief Legal Officer and Corporate Secretary (CPRL and CPRC), P.A. Guthrie, Q.C.

Email: Paul_Guthrie@cpr.ca and Fax: 1-403-319-6770

[1] "CPR" "Canadian Pacific" "CP" and "CPRC" refer to Canadian Pacific Railway Company ("CPRC"), wholly owned by Canadian Pacific Railway Limited ("CPRL"). This Notice shall also constitute and be understood to extend to and include notice to CPRL and to each of its principal subsidiaries (including, without reserve, CPRC and Soo Line Corporation, Soo Line Railroad Company, and Dakota, Minnesota & Eastern Railroad Corporation), insofar as any participated in any respect of any aspect of the subject movements of rail traffic.

This Notice of Loss, Damage or Delay is submitted by World Fuels Services Corporation ("WFSC"), World Fuels Services, Inc. ("WFSI"), and Western Petroleum Company ("WPC") (collectively the "Notifying Parties") to the Canadian Pacific Railway Company ("CPR") (including any of its subsidiaries, associated or affiliated railway companies listed in Appendix A of Certificate of fitness No. 96001-3 issued by the Canadian Transportation Agency by its Decision No. 396-R-2007) and to the parent owner of CPRC, CPRL, for all losses sustained as a consequence of the derailment of Unit Train 606-282 ("Train 282") on July 6, 2013 near Lac-Mégantic, Québec, on the line of the Montreal, Maine & Atlantic Canada Co. ("MMAC"), a wholly-owned subsidiary of Montreal, Maine & Atlantic Railway, Ltd. (together, here described as "MMA"). The Notifying Parties are submitting this Notice to CPR as the originating carrier that issued a through bill of lading for transportation of Train 282 pursuant to a joint through rate, and as the rail carrier which obtained possession of the goods on Train 282 at their point of origin. The Notifying Parties assert that the carrier CPR is liable to them for the losses related to this traffic described in this Notice, including but certainly not limited to the loss, damage or delay of the Notifying Parties' goods on Train 282, and of all affected railcars.

AND TO:

(2) **Montreal, Maine & Atlantic Railway, Ltd. and its wholly-owned subsidiary Montreal, Maine & Atlantic Canada Co.**[2]

c/o M. Donald Gardner, Jr., VP Finance & Administration, CFO,

15 Iron Road, Hermon, Maine (U.S.A.) 04401-9621

E-mail: mdgardner@mmarail.com Fax: 1-207-848-4341

c/o counsel of record for MMA collectively in CCAA proceedings:

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[2] This Notice shall constitute and be understood to extend to and include notice to each of the Montreal, Maine & Atlantic Canada Co. and Montreal, Maine & Atlantic Railway, Ltd. Montreal, Maine & Atlantic Railway, Ltd. (MMA) and its wholly-owned subsidiary Montreal, Maine & Atlantic Canada Co. (MMAC), which at the material time held Certificate of Fitness No. 02004-3 issued by the Canadian Transportation Agency (Agency) pursuant to section 92 of the *Canada Transportation Act, S.C. 1996, c. 10, as amended.*

In particular this Certificate of Fitness in Canada permitted "*MMAC to operate a railway: between Saint-Jean, Quebec and Lennoxville, Quebec; ...* ; *and between Lennoxville, Quebec and the Canada/United States border near Boundary, Quebec; and by virtue of an interchange agreement with the Canadian Pacific Railway Company, on the Canadian Pacific Railway Company's Adirondack Subdivision between Saint-Jean, Quebec and Saint-Luc Junction, Quebec.*" The derailment of Train 282 on July 6, 2013 near Lac-Mégantic, Quebec, was on the line of the Montreal, Maine & Atlantic Canada Co., owned and operated by MMA collectively.

Gowling Lafleur Henderson LLP, Attention: Denis St-Onge

1, Place Ville-Marie, 37th Floor, Montréal QC H3B 3P4

E-mail: denis.st-onge@gowlings.com ; Fax : 1-514-876-9519

And also to: counsel to MMA, Pierre Legault, of Gowling Lafleur Henderson LLP

E-mail: pierre.legault@gowlings.com ; Direct Fax : 1-514-876-9599

And also to: the Monitor, CCAA proceedings:

Richter Advisory Group, Inc., c/o Gilles Robillard

1981 McGill College, Montreal, QC H3A 0G6

E-mail: grobillard@richter.ca Fax: 1-514-934-3504

And also to: counsel of record for the Monitor, (Richter Advisory Group Inc.):

Woods LLP, c/o Sylvain Vauclair

2000, avenue McGill College, suite 1700, Montreal, QC H3A 3H3

E-mail: svauclair@woods.qc.ca Fax : 1-514-284-2046

This Notice of Loss, Damage or Delay is submitted by the Notifying Parties to MMA for all losses sustained as a consequence of the derailment of Train 282 on July 6, 2013 near Lac-Mégantic, Québec, on the MMA line. The

Notifying Parties are submitting this Notice to MMA as a carrier on whose line of railway Train 282 was located at the time of the derailment, during the course of the rail movement pursuant to the through bill of lading issued under a joint through rate to destination by CPR for transportation of Train 282. The Notifying Parties provide notice that MMA is also liable to them for the losses related to this traffic described in this Notice, including but not limited to the loss, damage or delay of the Notifying Parties' goods on Train 282, and of all affected railcars.

Proviso and reservation of rights:

This Notice of Loss, Damage or Delay is submitted at this time by the Notifying Parties, without prejudice to any of its or their rights to bring any or all of their claims in any venue or jurisdiction available to them, and without prejudice to any of its or their rights to plead and rely upon the laws of the United States of America or of Canada as are or may be applicable. Without limiting any of the foregoing or any rights of the Notifying Parties, this Notice of Loss, Damage or Delay is submitted at this time and shall be, if and as may be required, considered as a sufficient and comprehensive Notice to at all times satisfy any requirement of notice under the *Railway Traffic Liability Regulations, [Canada] (SOR/91-488),* providing for service of a notice of loss of goods, or delay or damage to goods, in printed or electronic form, which is to be received by the originating carrier or delivering carrier within four months after a reasonable period for delivery of the goods has expired, in the case of loss, or within four months after delivery of the goods, where damage or delay is claimed. This Notice shall be without any waiver or limitation whatsoever of the rights of the Notifying Parties under the laws of the United States of America, including

the *Carmack Amendment* (49 U.S.C. § 11706), which provides a period of not less than 9 months for filing a notice of claim against a rail carrier, and the rules of the Surface Transportation Board (49 C.F.R. Part 1005), entitled *"Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage."* The Notifying Parties will submit a separate notice of claim in accordance with the aforementioned provisions of U.S. law at the appropriate time.

I. Background Information on Train 282 & particulars of contracting.

On July 6, 2013, Train 282 consisted of one buffer car and 72 tank cars containing petroleum crude oil (STCC 4910165) (UN/NA Code: UN1267) to be transported from New Town North Dakota (U.S.A.) through to destination, Saint John, New Brunswick (Canada). CPR issued Waybill No. 243537 (attached as EXHIBIT 1) and an unnumbered bill of lading (EXHIBIT 2). The bill of lading identifies WPC as the "Shipper," Irving Oil Ltd: as the "Consignee," and WFSC as the party to be billed. WFSI held title to the crude oil and was the entity actually invoiced by CPR for Train 282 (EXHIBIT 3). WPC is also the lessee of the railcars.

CPR originated Train 282 at New Town on June 29, 2013, obtaining possession of the Notifying Parties' goods and the railcars at their point of origin, and transported Train 282 to CPR's Côte Saint-Luc Yard, in the greater Montreal area, Quebec, where, on July 5, 2013, it interchanged Train 282 with MMA. On the evening of July 5th, MMA parked Train 282 on its mainline track at Nantes, Quebec, and left Train 282 unattended. Early the following morning, July 6, 2013, the unattended Train 282

began to roll down a grade towards Lac-Mégantic, where, 63 of the 72 tank cars derailed, spilling their contents; there was an ensuing fire, loss of 47 lives, and property and environmental damage.

II. Summary of the Notifying Parties' Losses.

Except for the value of the lost freight (goods), the Notifying Parties' losses cannot be determined with greater specificity at this time. Many of these losses are not yet fully known because they are continuing to accrue and/or the Notifying Parties' liability has not yet been determined. In addition the Notifying Parties have suffered and shall foreseeably incur the costs and expense of all counsel and contracted expertise, and the risk of costs and loss in projected and pending suits, actions or proceedings in multiple jurisdictions. Such losses and costs cannot yet be determined, and CPR and MMA are put on notice of all such prospective losses.

A. Value of Freight.

The derailment resulted in a total loss of the cargo (goods) in each of 63 cars destroyed at Lac-Mégantic. Each of the 63 derailed tank cars contained approximately 32,000 US gallons of petroleum crude oil with the derailed cars containing a total of 42,254 barrels of oil. The crude oil had been sold FOB destination to Irving Oil Ltd., the consignee for Train 282, and had a full value, including the 9 railcars referenced below, of $4,968,334.82 (U.S. Dollars). The Notifying Parties reserve all rights to establish and seek recovery of the full value of the goods, including the added freight and other charges and customs duties as may have been paid or were payable, all costs and expense associated with causing these railcars and all cargo therein to be further moved to delivery at destination, including, if

required, any inspection to enable their forwarding to destination plus any accruing prejudgment interest on all losses, so as to make the Notifying Parties whole.

In addition to notice of the loss of freight claims as to the 63 railcars, for each of the 9 railcars within Train 282 not destroyed at Lac-Mégantic, but removed to MMA's Farnham Yard, the delivery of the railcars and of the goods within these 9 railcars has been delayed beyond the reasonable period for delivery or as contracted, as a result of the breach by CPR of its contractual undertaking to the Notifying Parties, and the neglect or refusal of the rail carriers CPR and MMA to meet their statutory level of service obligations to the Notifying Parties and their contractual and statutory or other obligations and undertakings with or to each other. Whether the customer will assert any damage to the goods is as yet undeterminable, before delivery to and acceptance by a customer for such goods. Loss to the Notifying Parties as a result of the delay in delivery has also been suffered, including but not limited to all costs and expense associated with causing these railcars and, all cargo therein to be further moved to delivery at destination, including, if required, any inspection and any trans-loading of the goods from any of the 9 railcars to enable their forwarding to destination. **This Notice of Loss, Damage or Delay therefore additionally gives notice for any damage to or delay in the transportation of the goods within these 9 railcars.** Particulars of the amount of such damage are not presently available to or known by the Notifying Parties.

B. Damaged or Destroyed Railcars.

The 63 derailed tank cars were destroyed beyond repair. WPC leased those cars from six different lessors. If those lessors are unable to recoup the casualty value of the

destroyed cars from MMA in accordance with the AAR Interchange Rules, WPC may be responsible under the terms of its leases. Another railcar which was not derailed and destroyed, car ACFX 73452, also suffered apparent damage. Transport Canada issued a Detention Notice for this car on October 25, 2013 based on structural damage that the car sustained at the Lac-Mégantic derailment. The Notifying Parties assert that it is the obligation of MMA and CPR to repair this damage and to transport the crude oil cargo (goods) that is contained in car ACFX 73452 to its final destination. Costs of further inspection and any repair, if assessed to or payable by the Notifying Parties, are as yet unknown. In addition to the destroyed tank cars and to car ACFX 73452, one or more of the remaining 8 tank cars and buffer car may have been damaged and the lessors may demand that WPC or any of the Notifying Parties pay for additional inspection and testing, movement to shop and repairs. Consequently, the Notifying Parties are unable to determine the precise amount of their losses for all damaged or destroyed railcars at this time, and they put the CPR and MMA on notice of all such prospective losses.

C. Other Potential Liabilities.

In addition to the foregoing damage to the Notifying Parties' cargo and railcars, the Notifying Parties have incurred, and will continue to be exposed to, other losses for alleged liabilities arising from the derailment. These include, but are not limited to, environmental clean-up costs that have been imposed by the Quebec government in Order 628 issued under *section* 114.1 of the provincial *Environment Quality Act, c.Q-2,* on July 29, 2013, as amended by Order 628-A, issued on August 14, 2013 . In addition, the Notifying Parties are co-defendants in multiple lawsuits filed by victims of the derailment and

their relatives. To the extent that the foregoing liabilities may be recoverable under *Railway Traffic Liability Regulations, [Canada] (SOR/91-488)*, this Notice shall constitute appropriate and timely notice to CPR and MMA that the Notifying Parties may seek to recover from them all such losses for or arising from any such alleged liabilities.

III. Contact Information.

Please address all correspondence concerning this Notice to **the Notifying Parties**, care of:

R. Alexander Lake
SVP, General Counsel & Corporate Secretary
World Fuel Services Corporation
9800 NW 41st Street
Miami, FL, 33178, USA
(305) 428-8233 (office)
(305) 392-5645 (fax)
alake@wfscorp.com (e-mail)

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

APPENDIX F

CANADIAN PACIFIC

William M Tuttle
General Counsel U.S.

Suite 1000
120 South 6th St.
Minneapolis MN
55402

Tel 612 904 5967
Fax 612 851 5647

bill_tuttle@cpr.ca

VIA U.S. MAIL AND EMAIL (alake@wfscorp.com)

November 27, 2013

Mr. R. Alexander Lake
SVP, General Counsel & Corporate Secretary
World Fuel Services Corporation
9800 NW 41st Street
Miami, FL 33178

RE: Notice of Loss, Damages or Delay

Dear Mr. Lake:

Enclosed and served upon you via U.S. Mail and electronic mail, please find Canadian Pacific's Disallowance of Loss, Damage and Delay Claims. Copyholders are receiving by email only.

Sincerely,

/s/William M. Tuttle
William M. Tuttle
General Counsel – U.S.

cc: Ken Peel (ken@fcrplaw.ca)
Donal Gardner, Jr. (mdgardner@mmarail.com)
Denis St-Ogne (denis.st-ogne@gowlings.com)
Pierre Legault (pierre.legault@gowlings.com)
Gilles Robillard (grobillard@richter.ca)
Sylvain Vauclair (svauclair@woods.qc.ca)
Enrico Fortini (eforlini@fasken.com)
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Paul Guthrie
Patrick Riley
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Disallowance of Loss, Damage and Delay Claims

November 27, 2013

To: World Fuels Services Corporation, World Fuel Services, Inc., and Western Petroleum Company (collectively Notifying Parties).

c/o R. Alexander Lake
SVP, General Counsel & Corporate Secretary
World Fuel Services Corporation
9800 NW 41st Street
Miami, FL 33178, USA
alake@wfscorp.com

Canadian Pacific Railway Company for itself and for its parent, subsidiary, and affiliated companies (CP) disallows the Notifying Parties' Notice of Loss, Damage, or Delay follows:

Jurisdiction

The Notifying Parties submitted their claim under Canadian law – namely the *Railway Traffic Regulation [Canada] [SOR/91-488)*. But claims for damaged or delayed goods on Train 282 are governed by United States law – namely, the *Carmack Amendment*, 49 U.S.C. § 11706. By invoking Canadian law, the Notifying Parties have failed to submit a valid claim.

All Notifying Parties are United States corporations. Notifying Parties tendered Train 282 to CP in the United States at New Town, North Dakota, and the substantial portion of CP's movement of Train 282 took place in the United States. Hence, as Sandra Brown's August 19, 2013 letter on behalf of Notifying Parties acknowledges, the *Carmack Amendment* (49 U.S.C. § 11706) governs the

relationship between CP, as carrier, and any Notifying Party, as shipper. In fact, ¶ 23 of the Notifying Parties' Contestation of the Quebec Minister of Sustainable Development, Environment, Wildlife, and Parks Order insists that U.S. law governs lading claims.

Importantly, the *Carmack Amendment* limits lading claim liability to the person "entitled to recover under the ... bill of lading." As the designated shipper, that person would appear to be Western Petroleum, and no other Notifying Party entity. Further the *Carmack Amendment* restricts carrier liability to "the actual loss or injury to the property" received for transportation. Thus, even if Western Petroleum were to submit a proper *Carmack Amendment* claim, CP's liability, if any, could not exceed the value of the lading (crude oil) and would not encompass rail-car damage claims or indemnity against third-party tort or governmental environmental claims. Those matters unquestionably go beyond the value of the property that CP received for transportation.

Even though U.S. law delineates the rights and obligations of CP, as carrier, and Western Petroleum, as shipper, regarding lading claims, that statutorily prescribed relationship does not restrict CP's right to plead and to rely upon the laws of Canada, including the Province of Quebec, bearing on any extra-contractual claims, tort claims, statutory claims, rail-car-damage claims, or indemnity against third party extra-contractual claims arising out of the Lac Mégantic derailment. In other words the statute governing the shipper/carrier lading claim relationship does not go beyond that context.

CP Tariff

Items 41, 61, and 81 of CP Tariff 1 provide that "[b]y ordering service from CP you are agreeing to and accepting the terms and conditions published in CP tariffs in effect at the time you place your order." Similarly, Item 120 provides "[b]y sending shipping instructions for a shipment to move CP you are agreeing to and accepting the terms and conditions published in CP's tariffs in effect at the time you send the shipping instructions." In recognition of World Petroleum's acceptance of those terms and conditions, Richard Neville's July 22, 2013 letter to Keith Creel recognized that CP tariffs govern CP's rights and obligations regarding Train 282.

Tariff 1 specifies that the rules of Tariff 1 through 10 apply to all shipments carried on CP. Item 200 ¶ 1. And Item 200 ¶ 2 specifies that shipments originating in the United States will be deemed to use a U.S. Uniform Straight Bill of Lading, which is exactly the shipping document under which Train 282 moved – again confirming the applicability of U.S. law. Item 200 ¶ 11(b) also subjects this U.S. originating shipment (Train 282) to U.S. law, the *Carmack Amendment,* 49 U.S.C. § 11706.

And contrary to Notifying Parties' contention that CP contracted with Montreal, Maine and Atlantic Railroad to move Train 282, in ¶ 4 of Item 200, Tariff 1, Western Petroleum represented and warranted to CP that Western Fuels controlled the routing of Train 282, which is exactly what happened in the case. As Item 130 specifies, "[f]or shipments traveling to or from other railways, you request which other railway(s) and where the interchange will occur." Train 282 moved beyond the Montreal area via Montreal, Maine and Atlantic Railroad despite the availability of an alternative, although more expensive,

routing to the St. John's refinery. According to the governing tariffs that decision was Western Petroleum's to make. Hence, upon interchange with MM&A, CP's responsibility for and control over Train 282 ceased.

And since Train 282 carried hazardous commodities in private cars, CP Tariff 8 and Tariff 6 applied. Those tariffs made Western Petroleum responsible for the safety and suitability of the cars in which the crude oil was to be transported: the safety and suitability of DOT -111 rail cars are the basis for many of the claims now pending in various jurisdictions against the Notifying Parties. *See* Tariff 8, Item 20 & Tariff 6, Item 2.

Besides that, Tariff 1, Item 120 requires the shipper to submit accurate shipping instructions and offers help if shippers have questions about shipping instruction obligations. Yet even though Item 122 requires, for ensuring safety, accurate disclosures of hazardous commodity "Packing Groups," Western Fuel misrepresented that information: the crude oil was designated as Packing Group 3, rather than the accurate classification, Packing Group 2. That fraud obviates any CP lading liability to Notifying Parties.

Additionally, Tariff 1, Item 200 ¶¶ 11(f) & (j) disclaims liability for indirect and consequential damage, as well as punitive and special damages. Nevertheless, the Notifying Parties' Notice seeks exactly those damages, including damages the Notifying Parties will incur as a result of the litigation, as well as the cost of defense, spawned by the Lac Mégantic derailment.

Finally, Tariff 1, Item 200 ¶¶ 11(u) and 13 specify that CP will only be liable for loss and damage that is directly and proximately caused by or the result of CP's intentional

acts or omissions, or negligence. No CP act, omission, or negligence caused or contributed to the Lac Megantic derailment. To avoid tariff fault liability limitations, shippers must request and pay for Full Liability Transportation coverage (49 U.S. C. § 11706). Item 200 ¶ 11(w). Notifying Parties failed to make a Full Liability Transportation selection or payment.

Contact information

William M. Tuttle
Canadian Pacific
Suite 1000
120 South 6th Street
Minneapolis, MN 55402
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Bill_Tuttle@cpr.ca

APPENDIX G

EXHIBIT A

Sheahan and Partners G.R. Environment and Litigation
4620 Sainte-Catherine Street West,
Westmount, Quebec H3Z 1S3
T. 514 507 9146 / F. 514 507 9846

N:628 Montréal, August 9, 2013

TO: **The Minister of Sustainable Development, Environment, Wildlife and Parks (the "Minister")**

BY: **Western Petroleum Company,** legal person duly constituted, having its head office at 9531 W 78th Street, suite 102, Eden Prairie, Minnesota 55344, United States

World Fuel Services Corporation, legal person duly constituted, having its head office at 9800 N.W. 41st Street, suite 400, Miami, Florida 33178 United States

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APPLICATION FOR REVIEW

Order n°628 issued by the Minister of Sustainable Development, Environment, Wildlife and Parks on July 29, 2013 (the "**Emergency Order**")

To the Honourable Minister,

The Emergency Order at issue was aimed at four parties: Montréal, Maine & Atlantique Canada Cie, Montréal, Maine & Atlantic Railway Ltd. (collectively "**MMA**"), Western Petroleum Company ("**WPC**"), and World Fuel Services Corporation ("**WFSC**") and provides, in accordance with section 5 of the *Act respecting administrative justice*, the parties to whom it is addressed the opportunity to submit observations regarding the Emergency Order within ten (10) days following the date of notification of the Emergency Order. For the record, WPC and WFSC both received the Emergency Order on August 1st, 2013. It was however agreed between the undersigned counsel and the attorneys of the Ministry of Sustainable Development, Environment, Wildlife and Parks ("**MSDEWP**") that the delay to provide the application for review under the EQA would be August 9, 2013.

Since the issuance of the Emergency Order, WPC and WFSC have deployed all necessary due diligence to ensure that the terms of the Emergency Order are being complied with, under reserve of their right to seek review and to contest it in accordance with section 96 of the

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[p.6]

attached as Schedule 2 because it coordinated the entrustment of the shipment to Canadian Pacific.

Because the crude oil was never owned by WFSC or WPC, the Emergency Order is improperly directed against these parties.

Moreover, WFSI is not the owner of the crude oil because ownership effectively transferred to MMA when that company assumed the right to dispose of or to sell the

spilled crude oil after the derailment. As discussed above, WPC entrusted the tank cars and crude oil to Canadian Pacific under a through bill of lading issued in New Town, North Dakota. Because the point of origin of the shipment was in the United States, we have been informed by U.S. counsel it is subject to the Carmack Amendment discussed above. See 49 U.S.C. § 11706(a), Schedule 3. Under Canadian choice of law principles, the Carmack Amendment governs the parties' respective rights and obligations with respect to the crude oil after the derailment. *See* Article 3111 CCQ as a result of item 200-2 of Canadian Pacific Tariff 1 rules and regulations incorporating by reference the U.S. Uniform Straight Bill of Lading which is therefore expressly designated as the applicable U.S. law.

According to U.S. counsel, under the Carmack Amendment, Canadian Pacific and MMA became jointly and severally liable for the actual loss and damage to the cargo once the derailment occurred. See 49 U.S.C. § 11706 referred to above. As such, either railroad had the right to salvage and dispose of or sell the compromised crude oil on its own account. Once a railroad does so, it has effectively exercised ownership rights over the oil and the railroad has the right to dispose of the oil however it sees fit. In that circumstance, WFSI's recourse under 49 U.S.C. § 11706 is to be compensated for the actual loss and damage by one of the railroads, including the origin carrier that was originally entrusted with the goods (Canadian Pacific in this instance). Consistent with these principles, MMA asserted immediately after the derailment that it is the owner of the crude oil that was damaged and released from the tank cars, and has exercised its right to reclaim and dispose of or sell that compromised crude oil. WFSI did not contest MMA's doing so. Consequently, WFSC, WPC and

WFSI relinquished any ownership in the crude oil they had when MMA assumed its right to dispose of and sell the compromised oil after the derailment.

Paragraph 5:

To the extent that the statements contained in paragraph 5—stating that "section 8 of the *Regulation respecting hazardous materials* ("**RRHM**") provides that it is prohibited to emit, deposit, release or discharge a hazardous material into the environment or into a sewage system, or to allow the emission, deposit, release or discharge"—are directed at WPC or WFSC, it is incorrect to do so.

The Emergency Order is directed at WFSC and WPC solely by virtue of their alleged ownership of the spilled crude oil. Setting aside the fact that these companies were never the owners of

* * *

APPENDIX H

NOTICE OF CLAIM

Dated April 4, 2014

TO:

Canadian Pacific Railway Company
c/o Damage Prevention & Claim Services
14 Fultz Boulevard, Winnipeg MB, R3Y 0L6
E-mail: contact_dpfo@cpr.ca
Fax: 1-877-685-3555

This Notice of Claim is submitted by World Fuel Services Corporation ("WFSC"), World Fuel Services Inc. ("WFSI"), and Western Petroleum Company ("WPC") (collectively "Claimants") to the Canadian Pacific Railway Company ("CPR"), Canadian Pacific Railway Limited ("CPRL"), CPRC and Soo Line Corporation ("CPRC"), Soo Line Railroad Company ("Soo Line"), and Dakota, Minnesota & Eastern Railroad Corporation ("DME") (collectively "CPR entities"), pursuant to 49 U.S.C. § 11706, for losses sustained as a consequence of the derailment of Unit Train 606-282 ("Train 282") on July 6, 2013 near Lac Mégantic, Quebec. Claimants assert that the CPR entities are liable to Claimants for the losses described in this Notice.

This Notice of Claim is submitted at this time by the Claimants without prejudice to any of their rights to bring any or all of their claims in any venue or jurisdiction available to them, and without prejudice to any of their rights to plead and rely upon the laws of the United States of America or Canada as are applicable.

I. Background Information on Train 282.

On July 6, 2013, Train 282 consisted of one buffer car and 72 tank cars[1] containing petroleum crude oil (STCC 4910165) to be transported from New Town, ND (U.S.A.) through to destination at Saint John, New Brunswick (Canada). CPR issued Waybill No. 243537 (attached as EXHIBIT 1) and an unnumbered bill of lading (EXHIBIT 2). The bill of lading identifies CPR as the origin carrier that issued a through bill of lading for transportation of Train 282. Train 282 moved pursuant to a joint through rate. The bill of lading identifies WPC as the "Shipper," Irving Oil Ltd. as the "Consignee," and WFSC as the party to be billed. WFSI held title to the crude oil and was the entity invoiced by CPR for Train 282 (EXHIBIT 3).

CPR originated Train 282 at New Town on June 29, 2013, obtaining possession of the Claimants' cargo and rail cars at their point of origin, and transported the Train to CPR's Côte Saint-Luc Yard, in the greater Montreal area, Quebec, where, on July 5, 2013, it interchanged Train 282 with the Montreal, Maine & Atlantic Canada Co. ("MMA").[2] Claimants did not contract separately with MMA. Early the following morning, July 6, 2013, the Train rolled towards Lac-Mégantic, where 63 of the 72 tank cars derailed, spilling their contents; there was an ensuing fire, loss of 47 lives, and property and environmental damage.

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[1] Although Train 282 consisted of 78 tank cars when it departed New Town, ND, 6 cars were bad-ordered en route, leaving only 72 cars on the Train at the time of the derailment.

[2] The Montreal, Maine & Atlantic Canada Co. is owned and operated by Montreal, Maine & Atlantic Railway, Ltd., and all references herein to "MMA" shall encompass both entities.

II. Claimants' Losses.

Claimants' determinable and calculable losses, as of the filing of this Notice, are as follows:

Lost Cargo	$4,346,429.30
Damaged or Destroyed Rail Cars	$2,324,163.97
Environmental Clean-Up Expenses	To be determined
Wrongful Death, Personal Injury, Property Damage, and Other Litigation Loss	To be determined
TOTAL DETERMINABLE/ CALCULABLE DAMAGES AS OF APRIL 4, 2014	$6,670,593.27

Except for the costs incurred for the lost cargo and some costs related to damaged or destroyed railcars, the foregoing summary of Claimants' losses cannot be determined or calculated with greater specificity at this time. Many of these losses are not yet fully known because they are continuing to accrue and/or Claimants' responsibility, if any, has not yet been determined. In addition, the Claimants have suffered and shall foreseeably incur costs and expense of all counsel and contracted expertise, and the risk of costs and loss in projected and pending suits, actions or proceedings in multiple

jurisdictions. Therefore, Claimants reserve the right to supplement this Notice as such losses accrue and the amount of such losses becomes known. Through this Notice, Claimants assert that the CPR entities are liable for all such losses as they accrue.

A. Lost Cargo.

The derailment resulted in a total loss of the cargo in each of the 63 cars damaged or destroyed at Lac-Mégantic. Each tank car contained approximately 30,000 US gallons of petroleum crude oil. The 63 derailed cars collectively contained a total of 42,254 barrels of oil. The crude oil had been sold FOB destination to Irving Oil Ltd., the consignee for Train 282, for $4,346,429.30. The transaction price is supported by the invoices attached as EXHIBIT 4. Claimants assert that the CPR entities are liable to them for the full value of the lost and destroyed cargo.

B. Damaged or Destroyed Rail Cars.

The 63 derailed tank cars were damaged or destroyed beyond repair. WPC leased those cars from six different lessors. Claimants expect that the lessors will attempt to recoup the casualty value of the damaged or destroyed cars from MMA; if the lessors are not successful at recouping the full value of the rail cars (or any value at all), Claimants assert that the CPR entities are liable for the remaining costs and expenses related to this loss.

Claimants are unable to determine the precise amount of their losses for damaged or destroyed rail cars at this time. Nevertheless, Claimants have attempted to provide as complete an estimate as possible based upon information currently known. EXHIBIT 5 is a spreadsheet that, for each destroyed rail car, identifies the Lessor, car number, and casualty value. The estimated casualty values have

been provided by the lessors in correspondence attached as EXHIBIT 6. Several of the lessors, however, have not yet provided Claimants with casualty values and may not do so until the status of their claims against MMA in bankruptcy have been resolved. In the meantime, Claimants continue to experience losses from continuing rental obligation under the leases as shown in EXHIBIT 7. Even for those lessors that have provided casualty values for their tank cars, the amount of Claimants' liability, if any, under the terms of their leases has not been determined.

The amount in this Notice of $2,324,163.97 is based upon the known casualty values identified in EXHIBIT 5 and currently known rental obligations identified in EXHIBIT 7. Claimants will supplement this Notice with additional casualty values and rental payments as they become known and when the tank car lessors demand payment from the Claimants.

In addition to the 63 derailed railcars, one or more of the remaining 9 non-derailed tank cars may have been damaged and the lessors may demand that Claimants pay for such repairs or damage. If and when such claims are made against the Claimants, this Notice will be amended. Claimants assert that the CPR entities are liable for all of these costs and expenses.

C. Environmental Clean-Up Expenses.

When Train 282 derailed, 63 rail cars released their contents into the environment. Claimants are involved in proceedings involving the Minister of Sustainable Development, Environment, Wildlife and Parks (the "Minister") before the *Tribunal Administratif du Québec* through which they are contesting two Orders issued by the Minister (EXHIBIT 8). Claimants expect that there

could be additional environmental actions brought against them. To the extent that Claimants are held liable and incur loss related to environmental assessments and clean-up costs, containment and recovery efforts, or other environmental loss ("Clean Up Expenses"), such losses are included in this Notice. The precise amount of both the Clean Up Expenses and Claimants' portion of such Clean Up Expenses has not yet been determined. Claimants assert that the CPR entities are liable for Claimant's portion of such costs, and Claimants will amend this Notice periodically to report additional costs as they accrue.

D. Personal Injury, Wrongful Death, Property Damage, and Other Litigation Loss.

Claimants are co-defendants in multiple lawsuits filed by victims of the derailment and their relatives. EXHIBIT 9 is a list of all known actions as of the date of this Notice. Claimants are also co-defendants in a lawsuit filed by MMA's trustee in the United States Bankruptcy Court for the District of Maine (EXHIBIT 10) and anticipate that future claims may be filed against them, including claims for personal injury, wrongful death, property damage, indemnification, and other claims related to the July 6, 2013 derailment. Although no action or claim has resulted in the imposition of liability upon Claimants at this time, to the extent that Claimants may incur any liability or loss (including settlements) in any of these actions or claims, such losses are included within the scope of this Notice. In addition, Claimants have incurred, and will continue to incur, costs to defend these legal actions and claims, for which Claimants assert that the CPR entities are responsible. Claimants will amend this Notice as and when such amounts accrue and are determinable. Claimants

assert that the CPR entities are liable for all of these costs and expenses.

IV. Contact Information.

Please address all correspondence concerning this Notice to the Claimants, care of:

R. Alexander Lake
SVP, General Counsel & Corporate Secretary
World Fuel Services Corporation
9800 NW 41st Street
Miami, FL, 33178, USA
(305) 428~8233 (office)
(305) 392~5645 (fax)
alake@wfscorg.com (e-mail)

APPENDIX I

Disallowance of Carmack Amendment claims

April 24, 2014

To: World Fuels Services Corporation, World Fuel Services, Inc., and Western Petroleum Company (collectively Claimants).

c/o R. Alexander Lake
SVP, General Counsel & Corporate Secretary
World Fuel Services Corporation
9800 NW 41st Street
Miami, FL 33178, USA
alake@wfscorp.com

Canadian Pacific Railway Company for itself and for its parent, subsidiary, and affiliated companies (CP) disallows Notice of Claim follows:

Jurisdiction

In November of 2013 Claimant submitted a claim under Canadian law – namely the *Railway Traffic Regulation [Canada] [SOR/91-488]* for damages associated with Train 282's derailment. In April those same Claimants submitted a claim regarding Train 282 under United States law – namely, the *Carmack Amendment*, 49 U.S.C. § 11706.

All Claimant are United States corporations. Claimants tendered Train 282 to CP in the United States at New Town, North Dakota, and the substantial portion of CP's movement of Train 282 took place in the United States. As a result, the *Carmack Amendment* (49 U.S.C. § 11706)

together with CP's tariffs govern the relationship between CP, as carrier, and any Claimant, as shipper. In fact, ¶ 23 of the Notifying Parties' Contestation of the Quebec Minister of Sustainable Development, Environment, Wildlife, and Parks Order insisted that U.S. law governs lading claims.

Importantly, the *Carmack Amendment* limits lading claim liability to the person "entitled to recover under the . . . bill of lading." As the designated shipper, that person would appear to be Western Petroleum, and no other Claimant entity. Further the *Carmack Amendment* restricts carrier liability to "the actual loss or injury to the property" received for transportation. Thus in the event of a proper *Carmack Amendment* claim, CP's liability, if any, could not exceed the value of the lading (crude oil) and would not encompass rail-car damage claims or indemnity against third-party tort or governmental environmental claims. Those matters unquestionably go beyond the value of the property that CP received for transportation.

Even though U.S. law delineates the rights and obligations of CP, as carrier, and Western Petroleum, as shipper, regarding lading claims, that statutorily prescribed relationship does not restrict CP's right to plead and to rely upon the laws of Canada, including the Province of Quebec, bearing on any extra-contractual claims, tort claims, statutory claims, rail-car-damage claims, or indemnity against third party extra-contractual claims arising out of the Lac Megantic derailment In other words the statute governing the shipper/carrier lading claim relationship does not go beyond that context.

CP Tariff

Items 41, 61, and 81 of CP Tariff 1 provide that "[b]y ordering service from CP you are agreeing to and accepting the terms and conditions published in CP tariffs in effect at the time you place your order." Similarly, Item 120 provides "[b]y sending shipping instructions for a shipment to move CP you are agreeing to and accepting the terms and conditions published in CP's tariffs in effect at the time you send the shipping instructions." In recognition of World Petroleum's acceptance of those terms and conditions, Richard Neville's July 22, 2013 letter to Keith Creel insisted that CP tariffs govern CP's rights and obligations regarding Train 282.

Tariff 1 specifies that the rules of Tariff 1 through 10 apply to all shipments carried on CP. Item 200 ¶ 1. And Item 200 ¶ 2 specifies that shipments originating in the United States will be deemed to use a U.S. Uniform Straight Bill of Lading, which is exactly the shipping document under which Train 282 moved – again confirming the applicability of U.S. law. Item 200 ¶ 11(b) also subjects this U.S. originating shipment (Train 282) to U.S. law, the *Carmack Amendment*, 49 U.S.C. § 11706.

And contrary to Claimant's contention that CP contracted with Montreal, Maine and Atlantic Railroad to move Train 282, in ¶ 4 of item 200, Tariff 1, Western Petroleum represented and warranted to CP that Western Petroleum controlled the routing of Train 282, which is exactly what happened in the case. As Item 130 specifies, "[f]or shipments traveling to or from other railways, you request which other railway(s) and where the interchange will occur." Train 282 moved beyond the Montreal area via Montreal, Maine and Atlantic Railroad despite the availability of an alternative, although more expensive,

routing to the refinery in St. John NB. According to the governing tariffs, that decision was Western Petroleum's to make. Hence, upon interchange with MM&A, CP's responsibility for and control over Train 282 ceased.

And since Train 282 carried hazardous commodities in private cars, CP Tariff 8 and Tariff 6 applied. Those tariffs made Western Petroleum responsible for the safety and suitability of the cars in which the crude oil was transported: the safety and suitability of DOT-111 rail cars are the basis for many of the claims now pending in various jurisdictions against the Claimants. *See* Tariff 8, Item 20 & Tariff 6, Item 2.

Besides that, Tariff 1, Item 120 requires the shipper to submit accurate shipping instructions and offers help if shippers have questions about shipping instruction obligations. Yet even though Item 122 requires, for ensuring safety, accurate disclosures of hazardous commodity "Packing Groups," Western Petroleum misrepresented that information: the crude oil was designated as Packing Group 3, rather than the accurate classification, Packing Group 2. That fraud obviates any CP lading liability to Notifying Parties.

Additionally, Tariff 1, Item 200 ¶¶ 11(f) & (j) disclaims liability for indirect and consequential damage, as well as punitive and special damages. Nevertheless, the Claimants' claims seek that exact relief, including damages the Claimants will incur as a result of the litigation, as well as the cost of defense, spawned by the Lac Megantic derailment.

Finally, Tariff 1, Item 200 ¶¶ (u) and 13 specify that CP will only be liable for loss and damage that is directly and proximately caused by or the result of CP's intentional acts,

omissions, or negligence. No CP act, omission, or negligence caused or contributed to the Lac Megantic derailment. To avoid tariff fault liability limitations, shippers must request and pay for Full Liability Transportation coverage (49 U.S.C. § 11706). Item 200 ¶ 11(w). Claimants failed to make a Full Liability Transportation selection or payment.

Contact information

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