No. 17-1108

In the United States Court of Appeals for the First Circuit

IN RE: LAC MEGANTIC TRAIN DERAILMENT LITIGATION

ANNICK ROY, as special administrator of THE ESTATE OF JEAN-GUY VEILLEUX, deceased; individually and as next friend of minor, F.R.V.; SAMUEL AUDET; BELAND AUDET; EMANUEL BAILLARGEON; SANDRA BAILLARGEON; JEAN BOYLE BARRETT BEAUDOIN; GABRIEL BEAUDOIN; JOCELYN BEAUDOIN; RAYMOND BEAUDOIN; YVES BERNIER; GERARD BOLDUC; MARIE CLAUDE BOUCHARD; MICHEL BOUCHARD; SUZIE BOUCHARD; PIERRETTE BOUCHER LAFONTAINE; ROUVILLE BOUCHER; MICHEL BOULANGER; DANIEL BOULE; PIERRE BOULET; PIERRETTE BOULET; HELENE BOURGEOIS; GHISLAIN CHAMPAGNE; LINE CHAMPAGNE; DENIS CHAREST; PASCAL CHAREST; DANIEL CHARRIER; SYLVAIN COTE; ANNETTE DOYON; DENISE DUBOIS; MARTIAL DUPIUIS; SERGE FAUCHER; YVES FAUCHER; LEA FAVREAU; FRANCE FORTIER; YANNICK GAGNE; DANIEL GENDRON; MELANIE GERHARD; GRAVURE MEGANTIC; MARIO GRIMARD; GROUP EXCA INC.; NANCY GUAY; ERIC JOUBERT; JEANNOT LABRECQUE; DANIELLE LACHANCE; LUCILLE LACHANCE; PIERRETTE LACHANCE; SYLVIE LACROIX; ANGELIQUE LAFONTAINE; ANNA LAFONTAINE; CHRISTIAN LAFONTAINE; CLEMENT LAFONTAINE; EXCA LAFONTAINE; JONATHAN LAFONTAINE; JOSIE LAFONTAINE; LISA LAFONTAINE; LUC LAFONTAINE; MARILOU LAFONTAINE; ROSEMARY LAFONTAINE; LOUISE LAJEUNESSE; GUILLAUME LAPIERRE; HENRIETTE LATULIPPE; MARCEL LAVOIE; MAYLA; MARCHE VALIQUETTE LTEE; JOSEE MORIN; CLEMENT PEPIN; YANNICK PEPIN; FRANCE PICARD; LOUISETTE PICARD; MATHIEU PICARD; CLAUDE PLANTE; MANON RODRIGUE; DORIS ROY; GARAGE JEAN ROY; JEAN-GUY ROY; GINETTE ROY; JULIE ROY; SERVICES ESTHTIQUES MALYA; BERNARD ST-HILAIRE; BILLY TURCOTTE; CELINE TURCOTTE; MARC VACHON; LOUISE VALIQUETTE; PHILIPPE VALIQUETTE; RENE BOUTIN; SOPHIE BOUTIN; ROXANNE BOUTIN; CAROLINE TREMBLAY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF GUY BOLDUC, DECEASED; AS NEXT FRIEND OF S.B., A MINOR; AND AS NEXT FRIEND OF A-C.B., A MINOR; JACQUES BOLDUC; SOLANGE GAUDREAULT; MARIO BOLDUC; CYNTHIA BOULE, individually and as representative of the estate of sylvie charron, deceased; and as next friend of A.B., A MINOR; JEAN-GUY BOULE; THERESE POULIOT, individually and as representative of the estate of real custeau, deceased;

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SIMON CUSTEAU, individually and as next friend of J.C., a minor; SONIA PEPIN; RICHARD CUSTEAU; SYLVIE CUSTEAU, individually and as representative of the estate of SUZANNE CUSTEAU, deceased; MICHAEL CUSTEAU; KARINE LAFONTAINE; REJEAN CUSTEAU; CLAUDE TURMEL; KATHLEEN BEDARD; KIM TURMEL, individually and as next friend of A.L., a minor; as next friend of M.L., a minor; as next friend of L-A.N., a minor and as next friend of E.N., a minor; JOSEE BOLDUC; VINCENT NADEAU; GUYLAINE ST-LAURENT, as representative of the estate of NATACHAT GAUDREAU, deceased; JOANIE TURMEL; CHANTAL GAUDREAU; FRANCOIS POULIN, individually and as representative of the estate of LUCIE VADNAIS, deceased; ESTEL BLANCHET; SYLVIE VADNAIS; PAULINE THEBERGE; ELISABETH VADNAIS; DIANE GIROUX RODRIGUE, as representative of the estate of JACQUES GIROUX, DECEASED; MARIE-EVE POULIN; ANDRE GIROUX; SERGE MORIN, individually and as co-representative of the estate of KAVEN MORIN, deceased; RAYMOND LAPOINTE; NANCY DUCHARME, individually and as co-representative of the estate of KAVEN MORIN, deceased; JOANNIE LAPOINTE; KATHLEEN MORIN; LUCIE BOUTIN; MICHAEL VALLERAND; GENEVIEVE BRETON; GINETTE DOSTIE; TAXI MEGANTIC ENR; FIDUCIE FAMILIALE FRANCOIS JACQUES, individually and on behalf of the estate of DOMINIK LEBLANC; SOCIETE DE GESTION JEAN-PIERRE JACQUES INC.; DUBE EQUIPMENT DE BUREAU INC.; 9020-1468 QUEBEC INC.; VIA BEAUTE SANTE ENR; BOLDUC CHAUSSURES LTE; CLINIQUE DENTAIRE MARIE-PIER DUBE INC.; MICHEL CHARLAND; SOCIETE EN COMMANDITE PROJET SHIER; JEAN VADNAIS; ISABELLE BEAUDRY; CLERMONT PEPIN, as special administrator of the estate of ERIC PEPIN-LAJEUNESSE, deceased; PASCAL LAFONTAINE, as special administrator of the estate of KARINE LAFONTAINE, deceased; LOUISE COUTURE; MARIO SEVIGNY; MARC-ANTOINE SEVIGNY; LOUISE BRETON; GINETTE CAMERON; MANON BOLDUC; SANDY BEDARD, as special administrator of the estate of MICHEL GUERTIN, JR.; HERBERT RATSCH, as special administrator of the estate of WILLFRIED HEINZ RATSCH, deceased; GENEVIEVE DUBE; MICHELLE GABOURY, as special administrator of the estate of KEVIN ROY, deceased; GASTON BEGNOCHE, as special administrator of the estate of TALITHA COUMI BEGNOCHE, deceased; DAVE LAPIERRE; MARIE-EVE LAPIERRE; LISETTE BOLDUC; STEVE BOLDUC; MAUDE FAUCHER; KARINE PAQUET; GUY PAQUET, as special administrators of the estate of ROGER PAQUET, deceased; JACQUES MARTIN; SOLANGE BELANGER, as special administrator of the estate of JIMMY SIROIS, deceased; GUY BOULET; ELISE DUBOIS-COUTURE, as special administrator of the estate of DAVID LACROIX-BEAUDOIN, deceased; LILY RODRIGUE; REJEAN ROY, as special administrator of the estate of MLISSA ROY, deceased; ALEXIA DUMAS-CHAPUT, as special administrator of the estate of

(caption continued on following page)

MATHIEU PELLETIER, deceased; THERESA POULAN DUBOIS, as special administrator of the estate of DENISE DUBOIS, deceased; CHRISTIANE MERCIER, as special administrator of the estate of MARIANNE POULIN, deceased; ROBERT PICARD; JUSTINE LAPOINTE; ERIC BILODEAU, as special administrator of the estate of KARINE CHAMPAGNE, deceased; MICHELINE VEILLEUX; RICHARD TURCOTTE, as special administrator of the estate of ELODIE TURCOTTE, deceased; MARIE-JOSEE GRIMARD, as special administrator of the estate of HENRIETTE LATULIPPE, deceased; ALAINE BIZIER, individually and as representative of the estate of DIANE BIZIER, deceased; STEVE ROY, individually and on the behalf of minor Y.R.; ISABELLE BOULANGER, individually and as representative of the estate of FREDERIC BOUTIN, deceased; COLETTE LACROIX BOULET; JOANNE PROTEAU, as special administrator of the estate of MAXIME DUBOIS, deceased; GABRIELLE LAPOINTE; HELEN LYNN BARRETT BEAUDOIN; MALYA; PIERRE PICARD; BOUTIQUE DE LA GARE INC.,

Plaintiffs - Appellants,

MAURICE GAGNE; JACQUES GRENIER; BAR LAITIER; JOSEE LAJEUNESSE; LAMBREQUIN; LISA FLEURY LARANGE; LOGI-BEL; MARCHE METRO; ANDRE MARTIN; MELISSA ROBERT, individually and as next friend of ELYKA RICHARD and MEGANE RICHARD; MUSI-CAFE; NETTOYEUR MODERNE SENC; MELANIE POIRER; POULET FRIT IDEAL; PATRICK RODRIGUE; JEAN TANGUAY; THE HERITAGE BUILDING; JEAN-YVES FORTIN; ERIC LAVALLEE; ANNIE-JULIE BLAIS; JACQUES DUBE; GERALD RODRIGUE; CLAUDETTE RODRIGUE; JULIE HAMEL, individually and as next friend of NATHAN FOUQUET; FREDERIC FOUQUET; LORRAINE BEAUDOIN-LANGLOIS; 9219-0610 QUEBEC INC, d/b/a Ariko Restorant & Bar; MIRKO COUTURE; JEAN-FRANCOIS DROUIN; MARIE-CLAUDE PEPIN-VERDO; SYLVAIN RANCOURT; CLEMENTE RANCOURT; NICOLE LAPIERRE; ANTOINE LECLERC; CLAUDE CHARRON; PHARMACIENS INC.; VARIETE CLAUDE CHARRON INC; VARIETE CLAUDE CHARRON; CENTRE FUNERAIRE JACQUES ET FILS INC.; JEAN-PIERRE JACQUES; FRANCOIS JACQUES; CAROL BEGIN; JEAN DUBE; ANDRE FLUET DUBE; PASCAL HALLE; ANGELE GODBOUT; DENISE POULIN; DENIS BOLDUC; MARIE-PIER DUBE, individually and as next friend of L.C., a minor, and as next friend of X.C., a minor; JACQUES LAPRISE; STEVEN HALLE; GESNER BLENKHORN; ANDRE VALIQUETTE; PASCALE LACROIX; GORDON BEAUDOIN; FORCE ACTION NUTRITION,

Plaintiffs,

v.

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CANADIAN PACIFIC RAILWAY COMPANY,
Defendant - Appellee,

SOO LINE RAILROAD COMPANY, d/b/a Canadian Pacific Railway; DELAWARE AND HUDSON RAILROAD COMPANY INC., d/b/a Canadian Pacific Railway; DAKOTA MINNESOTA AND EASTERN RAILROAD CORPORATION, d/b/a Canadian Pacific Railway; CANADIAN PACIFIC RAILWAY LIMITED,
Defendant.

On Appeal from the United States District Court
for the District of Maine (Bangor)

PLAINTIFFS-APPELLANTS' BRIEF

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February 14, 2020

Counsel for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 28, each of the following plaintiffs-appellants states that it has no parent corporations and no publicly held company owns 10% or more of its stock:

9020-1468 Quebec Inc

9219-0610 Quebec Inc

Bolduc Chaussures LTE

Bolduc Centre Funeraire Jacques Et Fils Inc

Bolduc Clinique Dentaire Marie-Pier Dube Inchas

Dube Equipment De Bureau Inc

Group Exca Inc

Via Beaute Sante ENR

The Heritage Building

Taxi Megantic Enr

Societe En Commandite Projet Shier

Societe De Gestion Jean-Pierre Jacques Inc

Services Esthtiques Malya

Pharmaciens Inc

Nettoyeur Moderne SENC

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Forty-seven people in Lac-Mégantic died when a ghost train carrying dangerous railcars filled with extremely volatile crude oil derailed and erupted outside their homes in the middle of the night, incinerating a significant portion of the town. In these cases, the families of those killed seek to hold accountable the railroad that accepted the shipment of misclassified, dangerously packaged oil and transported it from the extraction site in North Dakota, through several U.S. states, and into Canada. Due in significant part to the railroad conglomerate's evasiveness and conflicting claims about its presence in the U.S. and the role of its domestic subsidiaries, the plaintiffs sought to amend their complaint to ensure it named the correct defendant. But they never got the chance: The district court denied leave to amend and granted the railroad's motion to dismiss on the same day—effectively foreclosing relief. When the plaintiffs sought to correct the technical pleading problem in a post-judgment Rule 59(e) motion, the district court again refused, this time without explanation. Because this procedurally complex appeal raises significant questions about Federal Rule of Civil Procedure 15(a)(2)'s liberal amendment standard and its interaction with Rule 59(e), oral argument is warranted.

INTRODUCTION

Just after midnight on July 6, 2013, an unmanned Canadian Pacific train carrying more than two million gallons of crude oil from North Dakota barreled into the middle of the town of Lac-Mégantic, Quebec. As the train hit a tight curve at 65 miles per hour, tankers holding the oil left the tracks, striking one another, rupturing, and spilling more than a million gallons of oil into the town's streets, homes, businesses, manholes, and storm sewers. The oil quickly ignited and exploded, incinerating everything and everyone nearby. Downtown Lac-Mégantic was leveled. Forty-seven people were killed.

In the aftermath of this disaster, the families of those killed attempted to hold the companies that bore responsibility accountable. Every day, trains leave the oil-rich Bakken formation of North Dakota with millions of gallons of flammable oil and travel over a thousand miles, rumbling through Midwestern towns on their way to refinery locations along the coasts. Yet this Canadian Pacific train was using outdated and low-cost DOT-111 tank cars that were long known to be unsafe—they have been called the "Ford Pinto of rail cars." And the cars were filled with oil that was misclassified as relatively safe to transport, even though everyone knew it was just the opposite—Bakken oil is the most volatile crude found anywhere in the United States.

One of the companies that the families of those killed in the explosion sued was Canadian Pacific, the rail-transportation conglomerate headquartered in Canada. Although once focused on transcontinental passenger travel, it had scaled up its commercial operations to take advantage of the recent Bakken oil boom that has made North Dakota the second-biggest oil producing state in the country. In public filings, Canadian Pacific repeatedly identified itself as "the common carrier" of the train involved in the accident and acknowledged that it both "accept[ed]" the misclassified oil in North Dakota and agreed to "transport" it in DOT-111 cars.

After it was sued, though, Canadian Pacific changed its tune. The company moved to dismiss the families' complaints against it, asserting for the first time that it did "not operate" the train at the Bakken formation after all, "never handled the cars" in the U.S., and "did not see the train" until it crossed into Canada. Instead, it pointed the finger at its own U.S. corporate subsidiaries, insisting that one of them—without identifying which one—"took the train from North Dakota to across the border." In the same motion to dismiss, Canadian Pacific admitted that all of its U.S. subsidiaries "do business as 'CP' or 'Canadian Pacific'" and "use[] the Canadian Pacific trade name." But regardless, Canadian Pacific told the district court that dismissal was justified because these subsidiaries were "separate" and "distinct" from Canadian Pacific and "not named in th[e] lawsuit."

This is not the first time that Canadian Pacific has relied on its obscure web of corporate affiliates to try to escape liability. As other courts have observed, the "Canadian Pacific empire" can make it difficult to ascertain which entity is responsible. And that difficulty is compounded in a case like this—a case in which, as the bankruptcy trustee for the Lac-Mégantic crash put it, Canadian Pacific "repeatedly concealed which, if any, subsidiaries were involved in the movement of the Train." For this reason, other courts have freely allowed plaintiffs to amend their complaints to capture the relevant Canadian Pacific affiliate by "correcting the situation and amending the caption." And Canadian Pacific has even been warned by at least one federal judge that it "would be well advised to cooperate in straightening out the record—preferably without the need for formal discovery."

That did not happen here. The district court denied the plaintiffs an opportunity to amend and instead dismissed their complaint. It first held that permitting any amendment to add the three domestic subsidiaries identified by Canadian Pacific would be futile because—even though discovery had yet to occur—the proposed complaint did not allege *which* of the three subsidiaries was negligent in transporting the Bakken oil. But when the plaintiffs renewed their effort to amend in a post-judgment Rule 59(e) motion—noting that Canadian Pacific had, in a different proceeding, recently identified Canadian Pacific's Illinois-based subsidiary "Soo Line, not any other defendant," as the "originating

carrier"—and attached a revised complaint specifically alleging that it was Soo Line that was responsible, the district court denied the motion without further explanation.

The Federal Rules of Civil Procedure do not permit courts to take such an inflexible approach to amendment. Rule 15(a)(2)'s liberal amendment standard embodies "one of the basic policies of the federal rules—that pleadings are not an end in themselves but are only a means to assist in the presentation of a case to enable it to be decided on the merits." 6 Wright & Miller, *Federal Practice & Procedure* § 1473 (3d ed.). The rule—which extends to post-judgment motions to amend following dismissal on the pleadings—cautions that a court should "freely give" leave to amend "where the interests of justice so require." That mandate, the Supreme Court stressed in another case involving amendment under Rule 59(e), "is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Because the district court failed to do so here, this Court should reverse.

JURISDICTIONAL STATEMENT

The consolidated cases now on appeal were originally filed in Texas and Illinois state court but removed to the federal district courts in those jurisdictions under 28 U.S.C. § 1334. *See, e.g.*, JA1338. Holding that the cases were "related to" a bankruptcy proceeding pending in the Bankruptcy Court of the District of Maine, the U.S. District Court for the District of Maine granted transfer of the

cases, assumed jurisdiction over them under 28 U.S.C. § 157(b)(5), and stayed them pending the completion of the bankruptcy proceeding. *See* JA1502-1538.

After the bankruptcy proceeding concluded, the district court lifted the stay, granted a motion to dismiss under Federal Rule of Civil Procedure Rule 12, denied the plaintiffs' motion for leave to amend the complaint under Federal Rule of Civil Procedure Rule 15, and entered a judgment of dismissal without prejudice on September 28, 2016. JA1136-61, Add. 1-8. On October 26, 2016, the plaintiffs sought reconsideration of the court's orders under Federal Rule of Civil Procedure 59(e) "for the limited purpose" of reconsidering the judgment to allow a revised second amended complaint. JA1162-69. On January 9, 2017, the district court denied the motion in a one-line docket entry. *See* JA29. The plaintiffs filed a Notice of Appeal as to all three orders on January 19, 2017. JA1283-85.

Canadian Pacific has moved to dismiss this appeal for lack of jurisdiction. *See* Mot. to Dismiss or for Summary Disposition of Appeal, Case No. 17-1108 (1st Cir. April 20, 2017). Although all relevant motions were brought and decided under the Federal Rules of Civil Procedure, Canadian Pacific argues that the Bankruptcy Rules apply to these proceedings and that, under Bankruptcy Rule 9023, "the reconsideration motion [was] untimely because it was not filed within 14 days of the entry of judgment." *Id.* at 1-2; *see also id.* at 5-6 (arguing that,

"[b]ecause an untimely reconsideration motion has no tolling effect," the time for filing the notice of appeal had expired).

That is wrong. As the plaintiffs explained in their opposition brief, *see* Appellants' Response to Mot. to Dismiss, Case No. 17-1108 (1st Cir. May 1, 2017), the Bankruptcy Rules do not apply—and have never been applied—to these cases. The district court expressly invoked the Federal Rules, not the Bankruptcy Rules, as governing the cases. *See, e.g.*, JA1545 (identifying the governing rules as including "the Federal Rules of Civil Procedure, the [district court's] Local Rules," and "any applicable state rules of civil procedure"); JA38 (directing that filings "shall be governed by the Federal Rules of Civil Procedure and the Local Rules"). And the court uniformly applied the Federal Rules. *See, e.g.*, JA1420 (dismissing released parties "pursuant to Federal Rule of Civil Procedure 54(b)"); JA1425 (consolidating cases "pursuant to Federal Rule of Civil Procedure 42(a)"); JA1136-59 (granting motion to dismiss under Rule 12(b)(2) and 12(b)(5)); Add. 2-7 (denying motion "pursuant to Federal Rule of Civil Procedure 15(a)(2)"). The parties, too, consistently understood that the Federal Rules would apply throughout. *See, e.g.*, JA40 (seeking dismissal "[a]s allowed by Federal Rules of Civil Procedure 12(b)(2), (5) & (6)"); JA387 (seeking leave to amend "pursuant to Fed. R. Civ. P. 15(a)").

Although Canadian Pacific doesn't dispute that the district court applied the Federal Rules, it argues that applying them here is nonetheless invalid. In its view,

any case in federal court on "related to" bankruptcy jurisdiction automatically "invokes the Bankruptcy Rules." Reply to Response to Mot. to Dismiss 2, Case No. 17-1108 (1st Cir. May 8, 2017); *see id.* at 5 (arguing that "the district court's mention of the Federal Rules of Civil procedure cannot make an untimely appeal timely or afford appellate jurisdiction that does not exist"). But courts have rejected this argument. As the Seventh Circuit has explained, a district court has discretion to "determine[]" whether to "apply the Bankruptcy Rules in appropriate cases." *Diamond Mortg. Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1241 (7th Cir. 1990). Here, the district court determined that application of the Federal Rules was appropriate—a determination that Canadian Pacific has not appealed.[1]

Because the Federal Rules apply, and the Rule 59 motion was timely filed under those rules (as Canadian Pacific does not dispute), this Court has jurisdiction.

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[1] Canadian Pacific identifies several cases applying the Bankruptcy Rules, but they all involved *bankruptcy proceedings*. *See In re Celotex Corp.*, 124 F.3d 619, 623 (4th Cir. 1997) (applying Bankruptcy Rules to non-core proceeding "referred to the bankruptcy court"); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1238 (3d Cir. 1994) (applying Bankruptcy Rules to adversary proceeding); *Diamond Mortg.*, 913 F.2d at 1241 (holding that Bankruptcy Rules may apply to adversary proceedings); *see also Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283, 1286 (11th Cir. 2016) (same). In that context, it makes sense to apply the Bankruptcy Rules "without regard to judicial forum" because "bankruptcy proceedings" can be "conducted in the bankruptcy court or in the district courts." *Diamond Mortg.*, 913 F.3d at 1242. But here, the cases are not (and never have been part of) bankruptcy proceedings, so the district court rightly applied the Federal Rules. *See* JA1536 (distinguishing these cases from "any proceedings or contested matters in the underlying chapter 11 bankruptcy case").

STATEMENT OF THE ISSUE

The district court ended the plaintiffs' claims by simultaneously dismissing their complaint and rejecting—based on an unrelated and technical issue of pleading—an amended complaint that would have rendered dismissal unnecessary. Did the court abuse its discretion when it summarily denied the plaintiffs' post-judgment motion under Rule 59(e) for leave to file an amended complaint that resolves the technical pleading issue?

STATEMENT OF THE CASE

I. Factual background

A. The volatility and remoteness of the crude oil extracted from the Bakken formation.

Named for a North Dakotan farmer on whose land the formation was initially discovered, the Bakken Formation is a rock formation that stretches hundreds of thousands of square miles below the surface of Montana, North Dakota, and parts of Canada. JA1172; "Son of Bakken formation namesake remains reserved," Associated Press (Dec. 3, 2012), https://perma.cc/32CS-5ME8. The formation, created more than 330 million years ago, sits about two miles underground. Richard M. Pollastro, Laura N.R. Roberts, and Troy A. Cook, "Geologic Assessment of Technically Recoverable Oil in the Devonian and Mississippian Bakken Formation," U.S. Geological Survey at 2, 5, 8 (2013).

Crude oil—the liquid form of naturally-occurring, unprocessed petroleum—has been extracted from the Bakken Formation for more than sixty years. JA1172. For most of that time, the amount of crude extracted from the formation was relatively limited. "Son of Bakken formation namesake remains reserved," Associated Press, https://perma.cc/32CS-5ME8. But over the last decade, as advances in hydraulic fracking and drill technology made drilling more cost-effective, extraction at the site "skyrocketed." Operation Safe Delivery Update, Pipeline and Hazardous Materials Safety Administration (PHMSA) at 1 (July 23, 2014), https://perma.cc/MT22-G5NH ("PHMSA Report"). The Bakken oil boom has made North Dakota the second-biggest oil-producing state in the U.S. John Frittelli et al., Cong. Research Serv., R43390, U.S. Rail Transportation of Crude Oil: Background and Issues for Congress," at 3 (2014).

Bakken oil is not like most other American oil. Crude oil extracted from other locations around the country carries a relatively high "flash point"—meaning it is less likely to ignite if confronted with a heat source. *See* PHMSA Report at 1-2, 16. Bakken crude, however, is extremely volatile. It contains a host of gases not found in other crude oil and has a higher vapor pressure. *Id.* at 1. Together, as the oil industry has long known, the presence of these chemicals lowers Bakken oil's flash point and increases its "ignitability and flammability." *Id.*; JA1173. Shipping

Bakken crude, in the words of one federal agency, "increase[s] [the] risk of a significant incident." PHMSA Report at 16.

But it has to be shipped. North Dakota has no oil refinery infrastructure, so Bakken oil is transported to refineries on trains over "extremely long distances"—often stretching more than a thousand miles. PHMSA Report at 16; Frank Byrt, "Railroads Are on a Fast Track, Thanks to Bakken Oil," CNBC (Sept. 5, 2012), https://perma.cc/3U4W-ND7W. The result has been a windfall for a small number of rail companies. "Among the biggest beneficiaries" of the demand for Bakken crude oil have been "the owners of the two main rail links to the region, Canadian Pacific Railway and Burlington Northern." Byrt, "Railroads," https://perma.cc/3U4W-ND7W. In 2008, just 9,500 carloads of crude oil were transported by rail from the Bakken; by 2013, that number jumped to nearly 440,000. Frittelli at 4. The trains rumbling through Midwestern towns now "routinely contain[] more than 100 tank cars" filled with "at least 2.5 million gallons" of highly flammable crude. PHMSA Report at 16.

Canadian Pacific, once a railway focused on transcontinental passenger travel, made plans to leverage its "significant Bakken presence" by "aggressively adding" to its "base of 1,000 miles of track" in the region. Byrt, "Railroads," https://perma.cc/3U4W-ND7W. In 2011, its trains carried about 23,000 barrels of oil a day. In 2012, the year before the accident, the company set its sights on a

hauling capacity of 125,000 barrels a day—aiming for a quick five-fold increase to its potential throughput to take advantage of the newly accessible oil resources. *Id.*

B. Canadian Pacific transports Bakken oil in the dangerous "soda can" oil tanker car.

Transporting hazardous materials by rail carries significant risks. For decades, accidents involving the most commonly used railcar for transporting hazardous materials—the DOT-111—have put towns along Canadian Pacific tracks and train routes in near-constant danger. Accidents like the one in Lac-Mégantic have occurred before. In 1989 in Helena, Montana, an unsecured and unattended train carrying hazardous materials rolled down a slope, derailing and exploding in a town at night. National Transportation Safety Board (NTSB) Rep. No. RAR-89/05 (Feb. 2, 1989). More than two decades later, in 2011, another train carrying hazardous materials derailed in the middle of the night in Tiskilwa, Illinois; a resulting "intense fire" caused "three of the tank cars to fail and erupt in massive fireballs." NTSB Rep. No. RAB-13/02 at 2 (Aug. 14, 2013). The decades in between these incidents were marked by similar derailments and resulting explosions: Cherry Valley, Illinois; Tamaroa, Illinois; New Brighton, Pennsylvania; Arcadia, Ohio. NTSB Safety Recommendation at 1-2 (March 2, 2012) ("2012 Report"); *see also* NTSB Safety Recommendation at 1 (Feb. 3, 2005); NTSB Rep. No. RAR-05/01 (Jan. 25, 2005); NTSB Rep. No. RAR-08/02 (May 13, 2008);

"Ohio Fire Contained After Explosion," Associated Press (Feb. 6, 2011), https://perma.cc/YD6K-CBWT.

In each incident, the trains were carrying hazardous materials in the bellies of DOT-111 tankers, whose round appearance and thin exterior is sometimes likened to that of a soda can. *See, e.g.*, David Schaper, "The Long Wait On Safety Rules For The 'Soda Can' Of Rail Cars," NPR (April 15, 2014), https://perma.cc/CW7W-9MZA. The tankers have also been called "the Ford Pinto of rail cars." *See, e.g.*, Jim Snyder, "Revamping 'Ford Pinto' of Rail Cars Urged by Group," Bloomberg News (Aug. 28, 2013), https://perma.cc/5H9K-PVQK. In the wake of the Helena accident in 1991, the NTSB worried over the railcars' design, noting its "extreme[] concern" "about the level of protection provided by tank cars" that carry materials "potentially hazardous to human life and property." NTSB Safety Recommendation (July 1, 1991). The DOT-111 cars, data suggested at the time, were more likely than others to leak, ignite, and explode. *Id.* at 2. And even in 1991, these safety problems were nothing new. The NTSB noted that "[t]he inadequacy of the protection provided by [DOT-111] tank cars for certain dangerous products has been evident for many years in accidents investigated by the Safety Board." *Id.*

By March 2012—more than twenty years later—the NTSB's concern had escalated to alarm. It issued urgent safety recommendations directed at improving

the most obvious flaws in the tankers' design. The old cars' shells and heads were too thin; their bottom outlet valves were prone to failure; and they lacked protective measures that would guard against ruptures, like "metal jackets, head shields, and strong protective housings for top fittings." 2012 Report at 2. It was "clear[]," the agency concluded, that "the heads and shells" of the railcars "can almost always be expected to breach in derailments that involve pileups or multiple car-to-car impacts." *Id.* As a result, it recommended "a phase-out of existing tank cars to other [non-hazardous] service" "unless the existing cars are retrofitted." 2012 Report at 4-5. A few months after the agency issued this recommendation, another train pulling DOT-111 railcars carrying hazardous materials derailed and erupted in Columbus, Ohio. NTSB Rep. No. RAB-14/08 (2014), https://perma.cc/L7PA-W3B2.

Even so, in 2013, Bakken oil was often shipped in DOT-111 tank cars, 98,000 of which were in use to transport flammable liquids at the time of the Lac-Mégantic disaster. Transportation Safety Board of Canada, R13D0054, Railway Investigation Report at 37 (2014) ("Railway Investigation Report"). And like other DOT-111 shipments of volatile material, Bakken shipments in these railcars are especially prone to leak, ignite, and explode. Derailments and resulting fires in Aliceville, Alabama; Casselton, North Dakota; and Lynchburg, Virginia all involved a combination of DOT-111 cars and Bakken crude. PHMSA Report at 2;

Anna Louie Sussman, "Alabama Oil-Train Derailment Raises Questions About Crude Shipment Safety," Reuters (Nov. 11, 2013), https://perma.cc/R5TF-RKZ8; Bart Jansen, "NTSB: Track damage at site of 2014 derailment in Va.," USA Today (Aug. 21, 2015), https://perma.cc/4FTG-NM5T; John Hageman, "Rail industry phasing out tank cars involved in Casselton derailment ahead of deadline," The Bismarck Tribune (Oct. 24, 2017).

In 2013, because of the massive increase in crude oil shipments, more crude was spilled in U.S. train accidents than in all such accidents between 1975 and 2012 combined. Brad Plumer, "Another oil train explodes in West Virginia. Here's why this keeps happening," Vox News (Feb. 17, 2015), https://perma.cc/2RH7-DK45. In 2013, the most prominent and deadly of these derailments incinerated downtown Lac-Mégantic, Quebec.

C. Canadian Pacific agrees to transport the Lac-Mégantic shipment of Bakken oil.

The Lac-Mégantic shipment originated in late June 2013, when Irving Oil placed an order for 78 tanker cars of Bakken crude. JA1179. To fulfill the order via rail, more than two million gallons of oil would travel from New Town, North Dakota to Irving's refinery in Saint John, New Brunswick, Canada (the "Irving Shipment"). JA1179. Along the way, the train would travel more than a thousand miles through the Midwest, traversing the states of Minnesota, Wisconsin, Illinois, and Michigan and wending its way through those states' major cities. Railway

Investigation Report at 6-7, 55. Montreal, Maine & Atlantic Railway (MM&A) and Canadian Pacific would carry out the shipment. JA1184.

After receiving the order from Irving, various suppliers cobbled together the oil from eleven producers operating different wells throughout the Bakken site. JA1179. To get the oil onto a train, the producers sent tanker trucks to a rail-loading facility in New Town, where the trucks would pump the oil into railcars. JA1179-80. Canadian Pacific and its subsidiaries owned the railroad tracks that serviced the loading facility. JA1180. Each railcar loaded at the facility could fit three truckloads' worth of oil, and the resulting shipment contained a blend of volatile crude oil from multiple Bakken sources. JA1179-81. The shippers then submitted to Canadian Pacific a bill of lading—a document that lists (among other things) what is being shipped and where it is headed. JA1187.

D. Canadian Pacific fails to ensure that the oil it is shipping is appropriately classified and safely transported.

To guard against the risks of shipping such hazardous materials, shippers are required to correctly classify their shipments. JA1175, 1179, 1180-81. Classifying ensures that hazardous materials are packed for shipping in an appropriate container (here, an appropriate railcar) that minimizes risk, and that responders to an emergency know how to manage the release of a substance in the event of an accident. *See, e.g.*, PHMSA Mission, PHMSA (June 25, 2019),

https://perma.cc/F67K-FVXS; Railway Investigation Report at 49-50; 49 U.S.C. § 5101 *et. seq*.

The guidelines for classification and appropriate shipment of hazardous materials are set by the PHMSA, a federal agency. Under that agency's guidelines, Bakken crude oil is a flammable liquid assigned to "Hazard Class" 3. PHMSA Report at 3-4. Within this class, a shipper is supposed to assign the oil to a Packing Group—I, II, or III—based on how flammable it is, with Packing Group I being the most flammable and therefore the most dangerous. *Id.* Testing suggests that most Bakken oil belongs in Packing Group I. *Id.* at 16. But the oil in the Irving Shipment was never tested to determine its appropriate hazard class or packing group. JA1180. When it ultimately left New Town, North Dakota on Canadian Pacific's cars, the oil was designated as "Packing Group III," the least flammable type. JA1180.

That error was significant. For instance, if the oil had been assigned to the correct packing group, a single engineer would not have been permitted to drive the train. *See* JA809. What is more, misclassifying the cargo as Packing Group III meant that any inspectors or emergency responders would have thought that the contents were not all that volatile; that they were packaged appropriately; and that the train represented "a low danger." JA1180.

E. The Canadian Pacific train derails and explodes in Lac-Mégantic, killing forty-seven people.

At around 11:25 pm on July 5, the train stopped in Nantes, Quebec, where its single engineer parked it. He set the brakes and then—following company policy—shut down the train's locomotives with the exception of the lead engine, left for a hotel, and went to sleep. JA1185-86; Railway Investigation Report at 14, 16. Not long after, a fire broke out in the lead engine. JA1185. Firefighters who came to the scene shut it down, as MM&A policy told them to do, and put the fire out. JA1186.

Without power, the lead engine's air brake stopped working. JA1186. Eventually, lacking sufficient brakes to hold the locomotives and oil cars, the train started rolling downhill toward the town of Lac-Mégantic. JA1186. At about 1:15 a.m., the unattended train entered the middle of town. JA1186; Railway Investigation Report at 5. When the train hit a curve, many of the DOT-111 cars left the tracks and, after rupturing, spilled more than a million gallons of oil into the town's streets, homes, businesses, manholes, and storm sewers. JA1186. The oil quickly ignited and exploded, killing 47 people. JA1186. Forty buildings were destroyed and the spilled oil contaminated the town, including a nearby lake. Railway Investigation Report at i.

II. Procedural background

In the wake of the disaster, the families of many of those killed in the explosion brought suit against the companies involved. *See* JA1502. In all, 37 families filed state-law wrongful-death cases in Cook County, Illinois, and two filed in Texas state court. *See* JA704-08.

A. The wrongful death cases are removed and then transferred to Maine.

After the Illinois and Texas cases were on file, several defendants successfully removed almost all of them to federal court. JA1489-1528. Once there, the cases were stayed, *see* JA1504, pending the resolution of a request brought by some of the defendants, along with the trustee in MM&A's pending bankruptcy proceedings, to have all the cases transferred to the District of Maine under 28 U.S.C. §§ 157(b)(5) and 1334(b). JA1489-97, 1501. Taken together, these twin provisions authorize a federal court to order the transfer of cases that may be "related to" a pending bankruptcy proceeding, *see* § 1334(b), and confer discretion on "the district court in which the bankruptcy case is pending" to "order that personal injury tort and wrongful death cases shall be tried" in that district, *see* § 157(b)(5).

The District of Maine granted the transfer request and ordered all the wrongful-death cases transferred to the district to be tried there. JA1489, 1498. Although none of cases involved claims against MM&A (the debtor in the

bankruptcy proceeding), the court nonetheless concluded that the claims met the "bankruptcy-relatedness" standard under § 157. *See* JA1522-1527.

B. After transfer, the wrongful death cases are stayed.

After the cases were transferred, the district court issued a new series of orders indefinitely staying them all. JA1529-1532; JA1533-1542; JA1543-1557. These orders tolled "all deadlines" under the Federal Rules of Civil Procedure and the local rules, and mandated that the stay remain in effect until MM&A's bankruptcy was final. JA1543-1557. The orders also granted the plaintiffs "leave to amend their respective complaints retroactively *nunc pro tunc* . . . to add parties and claims related to the Derailment" after the stay was lifted, so long as such an amendment would not "resurrect any cause of action already barred by any applicable statute of limitations." JA1549.

As a result of the stay, the cases sat dormant until the completion of the bankruptcy proceeding. In June and July of 2015, the plaintiffs filed amended complaints adding Canadian Pacific as a defendant. Motion for Leave to File an Amended Complaint, Dkt. 176, Case No: 1:14-cv-0013 (Jun. 12, 2015); Amended Complaint, Dkt. 1, Case No. 1:15-MC-0022-JDL (July 2, 2015). In adding Canadian Pacific, the plaintiffs relied on statements made by the company during the bankruptcy proceeding. There, the railroad disclosed that it had originated the shipment and shipped the oil, a representation the bankruptcy court adopted. *See In*

re Montreal Maine & Atl. Ry., Ltd., 2015 WL 3604335, at *1 (D. Me. June 8, 2015) (noting that "Canadian Pacific operated Train 282 from New Town to Cote Saint-Luc, Québec"); *see also* Memorandum in Support of Mot. to Withdraw the Reference, Dkt. 1-1, Case No. 1:15-MC-0022-JDL (Jan. 15, 2015).

C. Once the bankruptcy proceeding terminates, Canadian Pacific moves for dismissal under Rule 12(b) and the plaintiffs move to amend the complaint under Rule 15(b).

The bankruptcy proceeding ended in 2015 when the bankruptcy court entered an order confirming the plan for Chapter 11 liquidation and the district court affirmed. *See In re Montreal Maine & Atlantic Rwy., Ltd.*, 2015 WL 7431192 (Bankr. D. Me. Oct. 9, 2015) (*aff'd In re Montreal Maine & Atlantic Rwy., Ltd.*, 2015 WL 7302223 (D. Me. Nov. 18, 2015)). As part of the bankruptcy, all the defendants in these cases but one—Canadian Pacific—agreed to settle. JA1412.

Once the stay was finally lifted, *see* JA1321, several things happened. *First*, the plaintiffs filed a Rule 54(b) motion to dismiss those defendants that, as part of the bankruptcy plan, had entered into settlement agreements. *See* JA1411-15. The district court granted the motion, JA1416-21, leaving Canadian Pacific as the lone remaining defendant in the thirty-seven wrongful death cases, JA1425. To streamline the process for resolving the remaining motions, the court also entered an order "deem[ing]" them "as having been filed in all of the Recently Transferred Cases" and "consolidat[ing] into one docket all thirty-nine cases arising from the

Lac-Mégantic derailment pursuant to Federal Rule of Civil Procedure 42(a)." JA1425.

Second, Canadian Pacific sought dismissal under Federal Rule of Civil Procedure 12(b)(1), (2), (5), and (6) of the first amended complaint. JA40-75. Although it had earlier identified itself as the entity that operated the train from North Dakota, it argued that the complaint should be dismissed for (1) lack of personal jurisdiction because it was not "'at home' in Maine or the United States," did "not own tracks in the U.S.," and with limited exceptions did "not operate in the U.S."; (2) inadequate service of process because it had "authorized no U.S. agent to accept service of the[] complaints"; (3) forum non conveniens because (in its view) "Quebec is the proper forum"; and (4) failure to state a claim because "federal law preempts any claim against U.S. railroad conduct." JA40-41.

Specifically, it stated that the train was "not under CP's control" in the U.S.; that CP "first became involved" in Canada; that Canadian Pacific had "no meaningful contacts with the U.S." and is "anything but 'at home'" there; and that the plaintiffs' allegations to the contrary were "spurious." JA44-45. To support these claims, the company attached an affidavit of a senior vice president at Canadian Pacific stating that "CP conducts almost no business in the United States" and that the railroad "did not begin to operate the train that was interchanged with [MM&A] . . . until the train crossed the border into Canada."

JA102-03. Even so, Canadian Pacific carefully avoided identifying which of its subsidiaries had moved the train. JA102-03; JA40-75.

Third, the plaintiffs—responding to Canadian Pacific's new arguments about its role in the disaster—filed a motion for leave to amend the operative complaint under Federal Rule of Civil Procedure 15(a), attaching what would have been the second amended complaint in the case (after the first that added Canadian Pacific). JA387-92. The proposed new complaint did not seek to add any additional claims or "alter[] the legal theories" contained in the operative complaint. JA390. Instead, it sought only to include as defendants the three Canadian Pacific U.S. subsidiaries that Canadian Pacific had identified. JA388.

D. The district court simultaneously grants the motion to dismiss against Canadian Pacific and denies leave to add Canadian Pacific's domestic subsidiaries.

The district court simultaneously granted the defendant's motion to dismiss and denied leave to amend the complaint. *See* JA1136-1159; Add. 1.

1. The district court grants the motion to dismiss against Canadian Pacific on personal jurisdiction, service of process, and forum non conveniens grounds.

On the motion to dismiss, the district court held that there could be no general jurisdiction over Canadian Pacific—the only defendant in the operative complaint—because the "undisputed record evidence establishes that [it] is a Canadian corporation without continuous and systematic activity in the United

States." JA1142. And although the district court acknowledged that the company "admitted" that its U.S. subsidiaries were "doing business as Canadian Pacific or Canadian Pacific Railway, conduct[ed] U.S. operations," and "operated the train" that "ultimately derailed from North Dakota to the Canadian border," it held that none of those admissions "constitutes evidence that [Canadian Pacific], as opposed to its subsidiaries, did or failed to do anything on U.S. soil." JA1144.

The court's focus on Canadian Pacific's exclusively Canadian character also led it to grant dismissal on forum non conveniens grounds. The court acknowledged the "strong presumption in favor of the plaintiff's forum choice," but it concluded that the "rationale for opposing *forum non conveniens* dismissal . . . hinges on the alleged acts and inaction of parties other than [Canadian Pacific]." JA1156. As the court saw it, these other parties—Canadian Pacific's domestic subsidiaries—were not yet formally in the case, so it could not consider their conduct as a relevant factor in the analysis. JA1156 (reasoning that non-parties' alleged conduct was not "a viable basis for keeping the case in a U.S. court"). Ultimately, it found that the balance tipped in favor of dismissal on this basis. JA1157. Given these (non-merits) grounds for dismissal, the court chose not to reach the defendant's Rule 12(b)(6) preemption arguments.

2. The district court denies leave to add Canadian Pacific's domestic subsidiaries for futility.

At the same time that it granted Canadian Pacific's motion to dismiss, the district court also denied the plaintiffs' Rule 15(a)(2) motion for leave to amend to add three domestic subsidiaries of Canadian Pacific, including the Soo Line Railroad Company, as defendants. *See* Add. 1. In reaching this conclusion, the district court did not address whether adding these parties would have cured the personal jurisdiction, service, and forum non conveniens defects that led to the dismissal of the operative complaint. Instead, it raised a new concern: that adding these parties (and the additional allegations regarding their allegedly negligent conduct) would be insufficient to state a claim and so was futile. *See* Add. 2.

The court acknowledged that the proposed amendments sought to add Canadian Pacific's domestic subsidiaries as defendants and alleged that they were (1) operating "under the 'Canadian Pacific' brand," and (2) responsible for "transport[ing] seventy-two DOT-111 tankers filled with mislabeled volatile crude oil" through the United States. Add. 4. But it read the proposed amended complaint as treating "all of the [Canadian-Pacific]-related entities as a single entity" and pressing a "common enterprise" claim. Add. 4. It reasoned that such an approach—"treat[ing] [Canadian Pacific] as including all five companies"—could not "survive the *Iqbal* pleading standard because that treatment is not supported by any facts beyond the bare conclusory allegations that [Canadian

Pacific] operates a transcontinental railway . . . *through* its subsidiaries." Add. 4-5 (noting the absence of any "factual allegations" concerning Canadian Pacific's "corporate governance and operations, or that of its subsidiaries").

The plaintiffs had argued that "the purpose of the proposed amendment was 'to capture those affiliates that . . . were the ones operating the train.'" Add. 5. But the court faulted the plaintiffs for failing to allege *which* domestic subsidiary was responsible. Add. 6 (noting that, at argument on the motion, the plaintiffs identified Soo Line "as the vehicle through which Canadian Pacific operated this train" but that the proposed complaint did not specifically "allege that Soo Line, or any other [Canadian Pacific] subsidiary, operated the train before it crossed the U.S.-Canadian border"). Concluding that all the remaining relevant factual allegations were "tainted" by the same defect, the court denied the motion for leave to amend "for futility." Add. 7.

E. After the plaintiffs move for reconsideration to amend the complaint and cure the technical pleading defect, the district court denies the request without explanation.

Shortly after the district court entered judgment and dismissed the complaints, the plaintiffs sought reconsideration under Rule 59(e) and sought leave to file a revised second amended complaint. *See* JA1162-69 (noting that the simultaneous denial of leave to amend coupled with the dismissal without prejudice

operated as a dismissal *with* prejudice, therefore foreclosing a Rule 15(a) motion and requiring any leave to amend be filed via a Rule 59(e) motion).

While Canadian Pacific's earlier motion to dismiss was pending, the company disclosed—in an unrelated proceeding in North Dakota (in which it was represented by the same lawyers)—that it was Soo Line that originated and moved the shipment across the United States, and Soo Line that had (along with Canadian Pacific) issued the bill of lading for the train. Trustee's Mot. for Leave to File Third Amended Complaint, Dkt. 210, Case No. 1:14-AP-1001 at 7-8 (Bankr. D. Me. Aug. 8, 2016). At the request of the bankruptcy trustee in Maine, it filed a new affidavit stating that no other Canadian Pacific subsidiaries were involved and that "Soo Line Railroad Company moved Train 282 from its origin in New Town, North Dakota to just across the U.S./Canada border." Affidavit of James Clements, Dkt. 211-10, Case No. 1:14-AP-1001 at 7-8 (Bankr. D. Me. Aug. 8, 2016). Soo Line variously did its business as Canadian Pacific Railway, Canadian Pacific Railway Company, and Canadian Pacific; was directed by Keith Creel, Canadian Pacific's President and Chief Operating Officer; and was run out of Creel's office in Franklin Park, Illinois, JA1171-3, 1180—which is, by the company's own admission, "arguably" the site of "Canadian Pacific's most important real estate in its rail network." Claire Bushey, "Why Canadian Pacific

needs every inch of its Bensenville rail yard," Crain's Chicago Business (Jan. 26, 2018), https://perma.cc/5HKU-W497.

Armed with this information, the plaintiffs attached a second revised amended complaint to their motion that clarified Soo Line's responsibility. JA1170-91. The plaintiffs explained that the version of the complaint that served as the basis of the motion for leave to amend "was never subjected to a formal motion to dismiss," and no party was aware that the allegations regarding Canadian Pacific's domestic subsidiaries "were insufficient" "until the Court's ruling." JA1162-69 (observing that, had the plaintiffs "been aware of the need to plead additional facts in the proposed amended complaint, they would have done so").

The plaintiffs also pointed out that the court's basis for denying leave to amend—the failure to state a claim based on the lack of specificity regarding which Canadian Pacific subsidiaries were responsible for operating the train—was "eminently curable." JA1164. The revised version of the complaint attached to the plaintiffs' motion specifically alleged that it was Soo Line Railroad, the Minnesota company operating under the name Canadian Pacific, that operated the train in the United States from North Dakota to the Canadian border. JA1187 (alleging that "Soo Line was the originating carrier of the Irving Shipment from New Town, North Dakota," that it "issued the Bill of Lading," and that it "initiated the transport of the dangerous and misclassified cargo"); *see also* JA1165 (explaining

that the revised complaint focused on conduct that "occurred exclusively in the United States by a United States company").

And the revised second amended complaint added specific factual allegations identifying Soo Line as the subsidiary responsible for negligence regarding both the use DOT-111 tank cars and the handling of the volatile oil. For instance, it alleged that despite its "awareness of the well-known rupture risk of DOT-111 tank cars, Soo Line transported the Irving Shipment using DOT-111 tank cars, which had not been retrofitted to reduce the risk of rupture in the event of a derailment." JA1189. It also included similar allegations that Soo Line knew "that crude oil produced from the Bakken Formation is often explosive and can self-ignite at low ambient temperatures" and yet "failed to conduct and failed to require the Suppliers to conduct a proper investigation and analysis of the Irving Shipment of crude oil, resulting in the misclassification of the danger posed by the Irving Shipment." JA1189; *see also* JA1165 (noting that the revised complaint identified all of Soo Line's "operational management and control" decisions as made from its Chicago offices and that those decisions were negligent, were "implemented in North Dakota," and "contributed to the disaster"). In support of these allegations, the plaintiffs attached documentation to the revised second amended complaint, including the bill of lading and employment contracts showing that Soo Line was run from offices in Chicago.

Canadian Pacific opposed this effort to cure, arguing that the new allegations were still insufficient to state a claim and so futile. JA1272-73. But the railroad also raised a new argument related to the timing of the request: It argued that, because the wrongful death cases were initially transferred to the District of Maine as "related to" the MM&A bankruptcy proceeding, it was the Bankruptcy Rules, not the Federal Rules of Civil Procedure, that "controlled" the cases. *See* JA1268. That mattered, Canadian Pacific said, because although the Federal Rules provide 28 days to file a reconsideration motion, the Bankruptcy Rules cut that time in half to 14 days. And here, although the motion to cure was timely filed under the Federal Rules, it would not have been if the Bankruptcy Rules governed. *See* JA1263 (arguing that the motion was untimely on this basis).

On January 9, 2017, the district court denied the plaintiffs' motion without comment in a one-line docket entry. *See* JA29. This appeal followed. JA1283-85.

STANDARD OF REVIEW

The procedural posture of this case "requires a somewhat nuanced statement of the standard of review." *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 792 (1st Cir. 1995). Ordinarily, this Court reviews for abuse of discretion both a district court's denial of a motion for leave to amend a complaint under Rule 15(a) and its denial of a motion to reopen judgment under Rule 59(e) to permit amendment. *Id.* A district court's denial of leave to amend "without any justifying

reason," however, is necessarily an abuse of discretion. *Foman*, 371 U.S. at 182. Likewise, a court's denial of leave to amend on the ground that amendment would be futile is a question of law, for which an error is also an abuse of discretion. *See Rife v. One W. Bank, F.S.B.*, 873 F.3d 17, 20 (1st Cir. 2017) ("Although we ordinarily review a district court's denial of leave to amend for abuse of discretion, we review de novo the district court's determination of futility."); *see also D'Agostino v. ev3, Inc.*, 845 F.3d 1, 6 (1st Cir. 2016). Those principles are equally true whether the court's denial is made before entry of judgment under Rule 15(a) or in response to a post-judgment motion under Rule 59(e). *See Carlo*, 49 F.3d at 792-93 (applying de novo review to a district court's denial of leave to amend raised in a post-judgment motion to reconsider); *Foman*, 371 U.S. at 182. Thus, this Court's "review in this case is actually de novo." *D'Agostino*, 845 F.3d at 6.

SUMMARY OF ARGUMENT

The district court's dual decisions dismissing the plaintiffs' complaint and denying them leave to amend put an end to the plaintiffs' claims and left them with a single procedural path for resolving the technical pleading problem that the court identified. The plaintiffs followed that established path, moving under Rule 59(e) to alter the court's judgment to permit filing an amended complaint. The district court's summary denial of that motion was an abuse of discretion.

As this Court has held, in accord with the Supreme Court and other circuits, a plaintiff's Rule 59(e) motion to amend a complaint is subject to the same standard that more generally governs amendments under Rule 15(a). *Ondis v. Barrows*, 538 F.2d 904, 909 (1st Cir. 1976). At least during a case's early stages, where dismissal is based on a pleading defect and the parties have not yet engaged in significant discovery or other case development, the interests of finality that Rule 59(e) is designed to protect "dwindle to nothing." *Id.* Those interests thus must give way to the core policy rationale behind Rule 15(a)—and the rules as a whole—that technical defects should not prevent courts from deciding a case on its merits.

This Court should therefore review the district court's denial of the plaintiffs' Rule 59(e) motion under Rule 15(a)'s liberal-amendment standard. Rule 15(a) affords district courts discretion to grant or deny leave to amend, but that discretion is severely restricted by the rule's requirement that leave be "freely" granted. Under such limited discretion, a court may deny a motion to amend based only on a substantial reason that is apparent or declared in the record. The district court here, however, denied the plaintiffs' motion with no explanation at all. Reversal is thus required by the Supreme Court's decision in *Foman*, which held that a court's summary denial of a motion to amend under Rule 59(e) is an abuse of discretion. 371 U.S. at 182. In the absence of reasons for the court's decision, there is no exercise of discretion to which this Court could defer.

In any event, the record does not show the existence of any of the limited circumstances on which the district court could have validly denied the plaintiffs' motion. The proposed amendment would not have been futile because the proposed complaint that the plaintiffs attached to the motion cured the defects that the district court had identified. Nor is there any evidence of undue delay or bad faith on the plaintiffs' part. Although the case has been pending for some time, that delay is almost entirely due to bankruptcy-related stays and cannot be attributed to the plaintiffs. The plaintiffs' need to amend does not result from lack of diligence, but from Canadian Pacific's recalcitrance and misleading statements designed to obscure the true responsible party among its complex web of affiliates. And at this early procedural stage of the case, Canadian Pacific cannot raise any credible claim that it would be prejudiced by allowing the plaintiffs to name the correct defendant.

The court's denial of the plaintiffs' motion was thus inconsistent with Rule 15(a)'s requirements and an abuse of discretion.

ARGUMENT

A plaintiff may seek to amend a complaint in the district court "either as a separate initiative or as part of [a] motion for reconsideration." *Viqueira v. First Bank*, 140 F.3d 12, 20 (1st Cir. 1998). As long as a case is pending in the district court, a plaintiff may directly move to amend under Rule 15(a). *See Fisher v. Kadant,*

Inc., 589 F.3d 505, 508-09 (1st Cir. 2009). "If, however, a motion to amend is filed *after* the entry of judgment, the district court lacks authority to consider the motion under Rule 15(a) unless and until the judgment is set aside." *Id.* In that case, the only option available to plaintiffs—and the proper procedural course—is to ask the district court for leave to amend in a motion to reconsider under Rule 59(e) or Rule 60. *See id.* "As a practical matter," a plaintiff's requests to amend and to reconsider "will be made simultaneously and decided together." 6 Wright & Miller, *Federal Practice & Procedure* § 1489; *see also Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 231 (3d Cir. 2011) ("[T]he appropriate manner to dispose of [leave to amend sought by Rule 59(e) motion] is to consider the motions together and determine what outcome is permitted by consideration of the Rule 15(a) factors.").

That is the procedural path that the plaintiffs followed here. The district court's denial of leave to amend and dismissal of the plaintiffs' complaint on the same day was a final judgment that deprived it of authority to entertain further amendments under Rule 15(a). *See Mirpuri v. ACT Mfg., Inc.*, 212 F.3d 624, 628 (1st Cir. 2000). The plaintiffs thus sought to correct the technical pleading problem by the only means still available to them: asking the court to reconsider its judgment under Rule 59(e) to permit them to file an amended complaint. The district court's denial of that motion without explanation disregarded Rule 15(a)'s core policy of liberally permitting amendments so that cases can be heard on their merits—

thereby depriving the families of those killed in the Lac-Mégantic disaster of any recourse—without any finding that the case involves one of the limited set of circumstances that might have justified its decision to do so. The court's summary denial of the plaintiffs' Rule 59(e) motion was thus "inconsistent with the spirit of the Federal Rules" and an abuse of discretion. *Foman*, 371 U.S. at 182. This Court should reverse.

I. Rule 15(a) requires a district court to "freely give" leave to amend even after a dismissal on the pleadings.

Under Federal Rule of Civil Procedure 15(a)(2), a district court has discretion to grant or deny a plaintiff's motion to amend a complaint. *Carlo*, 49 F.3d at 792. "In the context of motions to amend pleadings," however, "'discretion' may be misleading, because" Rule 15(a) "evinces a bias in favor of granting leave to amend." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003). "The rule cautions … that the court should 'freely give' leave to amend where the interests of justice so require." *U.S. ex rel. D'Agostino v. EV3, Inc.*, 802 F.3d 188, 192 (1st Cir. 2015) (quoting Fed. R. Civ. P. 15(a)(2)). And that mandate, the Supreme Court has stressed, "is to be heeded." *Foman*, 371 U.S. at 182.

The "freely given" standard "reflect[s] the 'liberal' amendment policy underlying Rule 15." *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 154 (1st Cir. 2004). The standard implements "one of the basic policies of the federal rules—that pleadings are not an end in themselves but are only a means to assist in

the presentation of a case to enable it to be decided on the merits." 6 Wright & Miller, *Federal Practice & Procedure* § 1473; *see Coon v. Grenier*, 867 F.2d 73, 76 (1st Cir. 1989) (noting the rules' "philosophy that actions should ordinarily be resolved on their merits"). The importance of that policy choice has only increased in recent years, as federal courts have begun subjecting plaintiffs to more stringent pleading standards. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Without liberal amendment as a safety valve, many plaintiffs with meritorious claims would inevitably end up, like the plaintiffs here, out of court for technical and easily curable pleading deficiencies—a result "entirely contrary to the spirit of the Federal Rules of Civil Procedure." *Foman*, 371 U.S. at 181.

Rule 15's liberal-amendment policy remains in force even after the district court has already dismissed a plaintiff's complaint and entered final judgment in a case. *See Council for Emp. & Econ. Energy Use v. WHDH Corp.,* 580 F.2d 9, 13 (1st Cir. 1978); *see also Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 293 (4th Cir. 2018) (post-judgment motions to amend "should generally be granted in light of ... policy to liberally allow amendment"). At that point, however, amending the complaint requires a motion to reopen the case under Rule 59(e) or Rule 60, and Rule 15's "receptive approach" to amendments must thus be "coordinated with … values attaching to the integrity of final judgments." *Ondis*, 538 F.2d at 909; *see also Williams v. Citigroup Inc.*, 659 F.3d 208, 214 (2d Cir. 2011) ("Post-judgment motions

for leave to replead must be evaluated with due regard to both the value of finality and the policies embodied in Rule 15."); *United States ex rel. Roop v. Hypoguard USA, Inc.,* 559 F.3d 818, 824 (8th Cir. 2009). "The interplay of these competing policies requires some flexibility" to take into account the case's posture at the time of its dismissal. *Ondis*, 538 F.2d at 909.

"[A]t one extreme" is a district court's dismissal of a case—as here—"simply on the pleadings." *Id.* The showing required to satisfy Rule 59(e)'s standard at that point "need not be as formidable as it would be following a ruling on the merits." *Id.* Indeed, where a timely motion "follow[s] a dismissal based on a technical defect in the pleadings," the required showing under Rule 59(e) "dwindle[s] to nothing." *Id.* In those circumstances, the interests behind Rule 15's policy against deciding a case on "mere technicalities" are at their strongest, while the countervailing interest in finality is, at most, minimal. *Foman,* 371 U.S. at 181. For that reason, "leave to amend should be liberally granted following dismissal on the pleadings." *Council for Employment*, 580 F.2d at 13.

"As a case progresses," however, "the burden on a plaintiff seeking to amend a complaint becomes more exacting." *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 12 (1st Cir. 2004). "Particularly disfavored are motions to amend whose timing prejudices the opposing party by requiring a re-opening of discovery with additional costs, a significant postponement of the trial, and a likely major

alteration in trial tactics and strategy." *Id.* Yet, even after trial and a verdict on the merits, Rule 15's policy of resolving claims on their merits prohibits a district court from denying a motion to amend without good reason. *See Vargas v. McNamara*, 608 F.2d 15, 19 (1st Cir. 1979) (reversing denial of leave to amend after trial); *see also* Fed. R. Civ. P. 15(b) (governing amendments during and after trial).

The posture of this case is identical to the first "extreme" this Court identified in *Ondis*, for which Rule 59(e)'s required showing "dwindle[s] to nothing." 538 F.2d at 909. The district court dismissed the plaintiffs' complaint "simply on the pleadings," before any discovery had occurred. *Id.* The case at the time of dismissal was thus still in its earliest stages.

Moreover, the court based its denial of leave to amend purely on a "technical defect"—the complaint's use of the collective term "CP" to refer to Canadian Pacific and its subsidiary companies. Add. 4. Although allegations against a group of defendants "can be and usually are to be read in such a way that each defendant is having the allegation made about him individually," *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997), the district court held that the plaintiffs' "treatment of all of the [Canadian Pacific] entities as a single entity" here did "not satisfy the *Iqbal* pleading standard" even though Soo Line was named as a defendant in the complaint. Add. 4. That was a problem that the plaintiffs could easily have cured and, in fact, did cure in the proposed complaint submitted with

their Rule 59(e) motion. *See Thomas v. Town of Davie*, 847 F.2d 771, 771, 773 (11th Cir. 1988) (reversing denial of Rule 59(e) motion for leave to amend a dismissed complaint because the complaint's defects were "easily curable").

At this early stage of the case, where the pleading defect identified by the district court is both technical and curable, "leave to amend should be liberally granted." *Council for Employment*, 580 F.2d at 13; *see Hayden v. Grayson*, 134 F.3d 449, 455 (1st Cir. 1998) (permitting amendment is "especially appropriate … when the trial court has dismissed the complaint for failure to state a claim" (quoting *Griggs v. Hinds Junior Coll.*, 563 F.2d 179, 180 (5th Cir. 1977)); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 236 (2d Cir. 1985) ("[I]n the preliminary stages of the lawsuit, the trial court should permit discovery and freely grant leave to amend the complaint under Rule 15."). To foreclose Rule 15's liberal-amendment policy at the pleading stage, based only on the fact that the district court chose to immediately enter final judgment instead of first giving the plaintiffs an opportunity to fix the technical defect, would advance no legitimate finality interests, needlessly deprive victims of recourse for their injuries, and elevate formalism over the fundamental policies embodied in the federal rules. *See Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) ("[A] district court may not deny such a motion simply because it has entered judgment against the plaintiff ….."). As the Supreme Court wrote in *Foman*—another case involving a post-judgment

motion to amend under Rule 59(e)—plaintiffs in these circumstances "ought to be afforded an opportunity to test [their] claim on the merits." 371 U.S. at 182.

Employing the liberal-amendment standard here is in no way inconsistent with this Court's holding that "the liberal leave to amend language of Rule 15(b)" does not apply until the district court has "set aside its judgment pursuant to [a] motion to reconsider under Rule 59(e)." *U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 128 (1st Cir. 2013). This Court in *Ondis*, too, noted that "once a judgment is entered[,] the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or 60." 538 F.2d at 909. Thus, at a minimum, a plaintiff seeking to amend a complaint after judgment must make a "timely motion" under one of those rules. *Id.* But the court also recognized that the rules must be read "in harmony with one another," and that the "showing required" on a motion for reconsideration under Rule 59 or Rule 60 (such as "excusable neglect") must therefore be "coordinated with" the liberal-amendment policy reflected in Rule 15. *Id.* As the Eighth Circuit has explained, "the customary Rule 59(e) standard, which bars attempts to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment" is "ill-suited to the task of determining when a plaintiff who has failed to plead" adequately "should be permitted, post-judgment, to try again." *Roop*, 559 F.3d at 823; *see Judge v. City of Lowell,* 160 F.3d 67, 79 (1st Cir. 1998) (applying Rule

15(a)'s standards to a district court's denial of leave to amend raised in a post-judgment motion to reconsider); *Carlo*, 49 F.3d at 792-93 (same).

In particular, to hold that the requirements of Rule 59(e) bar a post-judgment amendment "following a dismissal based on a technical defect in the pleadings"—as in this case—would flatly contradict this Court's holding in *Ondis*. 538 F.2d at 909. It would also violate the Supreme Court's decision in *Foman*, a case involving exactly those facts. *See id.* (noting that *Foman* "disapproves of blindly restricting leave to amend after dismissals simply on the pleadings"); *see also Williams*, 659 F.3d at 214 ("The *Foman* holding cannot be reconciled with the proposition that the liberal spirit of Rule 15 necessarily dissolves as soon as final judgment is entered."). And it would create a split with the numerous other circuits that have held that Rule 59(e)'s requirements merge with those of Rule 15(a) under those circumstances.[2]

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[2] *See*, *e.g.*, *Spicer v. Westbrook*, 751 F.3d 354, 367 (5th Cir. 2014) (a motion to amend under Rule 59(e) "should be governed by the same considerations controlling the exercise of discretion under rule 15(a)"); *Williams*, 659 F.3d at 213 ("Our precedents make clear … that considerations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment."); *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 193 (4th Cir. 2009) ("[A] post-judgment motion to amend is evaluated under the same legal standard—grounded on Rule 15(a)—as a similar motion filed before judgment was entered."); *Roop*, 559 F.3d at 823 (even after judgment, a district court "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claim on the merits"); *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1077 (11th Cir. 2004) ("[D]isposition of a Rule 59(e) motion based on a proposed amendment to

For those reasons, this Court should review the district court's denial of the plaintiffs' Rule 59(e) motion here "in light of the limited discretion afforded by Rule 15(a)" and the rule's policy of permitting claims to be resolved on their merits. *Rosenzweig*, 332 F.3d at 864.

II. The district court abused its limited discretion under Rule 15(a).

A. No apparent or declared reason supports the district court's denial of leave to amend.

Under the limited discretion afforded to district courts by Rule 15(a), a court should allow amendment "absent an apparent or declared reason such as futility of amendment." *Rife*, 873 F.3d at 20-21. Without such a "substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 36 (1st Cir. 1988); *see also Ondis*, 538 F.2d at 909 ("[S]ome justification is required for a refusal.").

There is no "apparent or declared reason" for the district court's denial of the plaintiffs' motion for leave to amend under Rule 59(e) here. Indeed, the court denied the motion—thus leaving the plaintiffs with no further recourse on their

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the complaint is governed by the same considerations controlling a motion to amend under Rule 15(a)."); *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002) ("Where a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and Rule 59 inquiries turn on the same factors."); *Cureton v. National Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001) (same); *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989) (on a post-judgment motion to amend, "in accordance with Rule 15, 'leave shall be freely given when justice so requires'").

claims—without providing *any* explanation for its decision. The circumstances here are thus indistinguishable from those in *Foman*, where the Supreme Court held that a district court abused its discretion by summarily denying a motion to amend under Rule 59(e). 371 U.S. at 182. As the Court wrote there, a district court's "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.* The district court's failure to explain its denial of the plaintiffs' motion thus alone requires reversal.

B. The proposed amendment was not futile.

Despite the absence of any basis in the record for the district court's decision, Canadian Pacific will likely argue that the court's denial of the plaintiffs' Rule 59(e) motion was justified because the proposed amendment would have been futile. The district court denied the plaintiffs' earlier motion to amend under Rule 15(a) solely on that basis, holding that the proposed amended complaint's "treatment of all of the [Canadian Pacific] entities as a single entity does not satisfy the *Iqbal* pleading standard." Add. 4. The only even arguably "apparent" explanation for the court's subsequent denial of the plaintiffs' request for reconsideration under Rule 59(e) is thus that the court continued to consider amendment futile. *See Adams v. Watson*, 10 F.3d 915, 919 (1st Cir. 1993). But although "futility may be a proper reason for

denying a motion to amend" in general, it was not "a valid one in this case." *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 8 (1st Cir. 1983).

The plaintiffs filed their previous Rule 15(a) motion in order to "capture those affiliates" that they had recently "learned were the ones operating the train." Add. 5-6. Their proposed amended complaint thus added as defendants three U.S. subsidiaries of Canadian Pacific, including Soo Line. JA398. The complaint alleged that Canadian Pacific operates as a common enterprise with those subsidiaries under the "Canadian Pacific" brand, and asserted wrongful-death claims against the companies collectively. JA419.

The district court held the proposed amendment futile for a single reason: The "factual allegations contained in the proposed amendment relate[d] to all of the [Canadian Pacific] affiliates rather than any one company." Add. 4. The court concluded that those allegations failed to satisfy *Iqbal* because they did not specifically "allege that Soo Line, or any other [affiliate], operated the train before it crossed the U.S.-Canadian border." Add. 6. And the allegation that the subsidiaries acted together as a common enterprise did not solve that problem, the court held, because the complaint lacked factual allegations about the companies' "corporate governance and operations" or "other facts that would support a reasonable inference that the common enterprise assertion is true." Add. 4-5.

The proposed complaint attached to the plaintiffs' Rule 59(e) motion directly resolves that technical defect. The complaint, unlike the earlier proposed amendment rejected by the court, alleges a wrongful death claim against a single Canadian Pacific subsidiary: Soo Line. The complaint specifically alleges that Soo Line operated the train until it crossed the border with Canada and that the company, in doing so, engaged in the negligent acts that led to the disaster. It no longer contains collective allegations against multiple subsidiaries. Nor does it contain the allegations of a common enterprise that the district court found wanting.

The proposed complaint, in other words, "cure[s] the deficiency identified by the court." *Judge*, 160 F.3d at 80. And because it is therefore "sufficient to survive [a] motion to dismiss" under *Iqbal*, "the motion to amend was not futile." *Adams*, 10 F.3d at 925. Where, as here, a plaintiff's "motion to reconsider and its proposed amended complaint clarifie[s] or cure[s] an otherwise fatal ambiguity in the complaint, outright dismissal should not ordinarily be perpetuated by either a district or appellate court." *Bos. & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 868 (1st Cir. 1993).

If the district court considered the amendment futile for some *other* reason, that reason does not appear in the record. In the absence of an explanation by the district court, this Court cannot defer to the court's decision by speculating about

what its reason might have been. *See Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 4 (1st Cir. 1983) (holding that the Court will defer only when the basis for denial "is apparent or declared"). The district court's decisions have already presented the plaintiffs with a moving target. When Canadian Pacific moved to dismiss on the ground that it is not susceptible to jurisdiction in the United States, the plaintiffs moved to amend their complaint to resolve that problem by adding the domestic subsidiaries responsible for operating the train here. But even as it granted the motion to dismiss, the court rejected the proposed amendment that would have rendered dismissal unnecessary, relying on a *new* ground—that the proposed complaint's allegations lacked specificity as to particular defendants—not raised in Canadian Pacific's motion to dismiss. The plaintiffs, with their Rule 59(e) motion, have now also resolved that alternative defect. If the district court intended to deny the plaintiffs' motion on yet *another* ground, the court should at least have stated its reasons and given the plaintiffs an opportunity to address them. *See Ballou v. Gen. Elec. Co.*, 393 F.2d 398, 400 (1st Cir. 1968) ("[I]f a complaint is dismissed for failure to state a claim upon which relief could be granted, . . . not only should leave to amend be granted but for their guidance in amending, plaintiffs should also be informed of the reason.").

This is not a case involving a plaintiff's "repeated failure to cure deficiencies by amendments previously allowed." *Villanueva v. United States*, 662 F.3d 124, 127

(1st Cir. 2011). In cases like this one, which "combine[] a complex commercial reality with a long, multi-prong complaint," "pleading defects may not only be latent, and easily missed or misperceived without full briefing and judicial resolution; they may also be borderline, and hence subject to reasonable dispute." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 191 (2d Cir. 2015). "Without the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies." *Attestor Value Master Fund v. Republic of Argentina*, 940 F.3d 825, 833 (2d Cir. 2019). To deny the plaintiffs in these circumstances the chance to replead based on reasons that the district court never even articulated would "violate[] the liberal spirit of Rule 15" while making it impossible for them to challenge the court's decision. *Loreley Fin.*, 797 F.3d at 191; *see Attestor Value Master Fund*, 940 F.3d at 833 (disapproving of "denials of requests to amend when a plaintiff did not previously have a district court's ruling on a relevant issue").

If the district court did base denial of the plaintiff's Rule 59(e) motion on an undisclosed theory of futility, this Court should therefore reverse and allow the court to explain that theory.

C. No other valid reason supports the district court's denial.

Aside from futility, the "limited reasons for denying a pre-judgment motion to amend" include "undue delay, bad faith or dilatory motive," and "undue

prejudice to the opposing party." *Villanueva*, 662 F.3d at 127; *Torres-Alamo v. Puerto Rico*, 502 F.3d 20, 25 (1st Cir. 2007). Canadian Pacific did not argue below that the district court should deny the plaintiffs' Rule 59(e) motion for any of those reasons. Nor did the district court rely on them in its order denying the motion. "In the absence of some finding on these points by the district court," this Court "cannot ascribe [the court's] decision to them." *Farkas v. Texas Instruments, Inc.*, 429 F.2d 849, 851 (1st Cir. 1970). Nor, as a court of review, can it make those findings in the first instance on the district court's behalf.[3]

Moreover, although a district court's discretion to deny leave to amend is limited, the decision is nevertheless a discretionary one. *See D'Agostino*, 802 F.3d at 195. None of the conditions for validly denying leave to amend "*mandate* the denial," and the district court here "made no findings sufficient to permit [this Court] to predict confidently how it would have" exercised its discretion even if it had found those conditions satisfied. Because the "matter is one committed to the sound discretion of the district court," the plaintiffs are "entitled to have [the] court exercise that discretion under the proper legal standard." *Id.*; *see Vargas*, 608 F.2d at

[3] Canadian Pacific did argue below that the plaintiffs' Rule 59(e) motion was untimely, but only because the motion did not meet the fourteen-day deadline for a motion to reconsider under the bankruptcy rules. JA1263-74. But, as explained in the jurisdictional statement above, the timing of motions in this case is governed not by the bankruptcy rules but by the rules of civil procedure.

19 (absent a proper exercise of discretion, the case "must go back to the district court for redetermination of the motion to amend").

In any event, nothing in the record supports the existence of a reason that would have justified denial of the plaintiffs' motion.

1. There is no basis for finding undue delay or bad faith by the plaintiffs.

There is no basis in the record for concluding that the plaintiffs unduly delayed filing their motion to amend under Rule 59(e) or that the filing reflects bad faith. To begin with, the plaintiffs cannot be blamed for initially naming Canadian Pacific as a defendant in this case. Although the train that caused the disaster was operated in the United States by Soo Line, it was branded as a "Canadian Pacific" train. All of the company's U.S. subsidiaries "use[] the Canadian Pacific trade name" and "do business as 'CP' or 'Canadian Pacific.'" And Canadian Pacific made the plaintiffs' resulting confusion worse by telling the bankruptcy court that, as the "common carrier" of the doomed train, it was the one responsible for originating and transporting the shipment from the Bakken site—a representation that the court accepted. *See In re Montreal*, 2015 WL 3604335, at *1 ("Canadian Pacific operated Train 282 from New Town to Cote Saint-Luc, Québec."); Memorandum in Support of Mot. to Withdraw the Reference.

The plaintiffs reasonably relied on Canadian Pacific's own representations of its responsibility until the company, in its motion to dismiss, asserted for the first

time that it had "never handled the cars" in the United States. JA49. Instead, the company revealed that a "separate U.S. subsidiary took the train from North Dakota to across the border"—though it pointedly declined to name the subsidiary that was responsible. JA63. Just two weeks after Canadian Pacific filed its motion—even before their opposition to the motion was due—the plaintiffs moved to amend under Rule 15(a), attaching a proposed complaint that added three Canadian Pacific subsidiaries, including Soo Line, as defendants. Two weeks is not a "delay" for purposes of Rule 15(a)—much less an "undue" one. Nor can the plaintiffs' reliance on Canadian Pacific's own representations be said to be "bad faith" on the plaintiffs' part.

The district court ultimately denied leave to file the proposed complaint on the ground that the complaint did not specify *which* subsidiary was the negligent one. But, again, that failure is more attributable to Canadian Pacific than to the plaintiffs. Even as it denied its own responsibility, the company took pains in its motion to dismiss to avoid naming Soo Line as the real responsible party. *See* JA45 (attributing responsibility to "subsidiaries of a Canadian parent—distinct from [Canadian Pacific] and not named in this lawsuit, but doing business as Canadian Pacific"); JA54 (blaming a "separate U.S. subsidiary"). Because Canadian Pacific must have known about Soo Line's role, its careful avoidance of the company's name stymied the plaintiffs' efforts to identify the real responsible party. As a result

of that strategy, the earliest that the plaintiffs could have learned that Soo Line was the company that had actually originated and moved the shipment in the United States was five months *after* they had filed their proposed complaint, on May 26, 2016, when Canadian Pacific admitted it in an unrelated North Dakota case. Trustee's Motion at 7-8.

Although "complaints cannot be based on generalities," "some latitude has to be allowed where a claim looks plausible based on what is known." *Pruell v. Caritas Christi,* 678 F.3d 10, 15 (1st Cir. 2012). That is especially true where, as here, the "information needed [is] in the control of defendants" and the plaintiffs have not yet had the opportunity to conduct discovery. *Id.* As another court has observed, the "Canadian Pacific empire"—made up of a variety of affiliated corporations operating under the same trade name—can make it difficult for plaintiffs to determine the responsible entity. *See Brown v. Delaware & Hudson Ry. Co.*, 1991 WL 197300, at *1 (E.D. Pa. Sept. 30, 1991) (deferring decision on Canadian Pacific's motion to dismiss and advising the company to "cooperate in straightening out the record"). And Canadian Pacific has—apparently intentionally—made that task even more difficult here by "repeatedly conceal[ing] which, if any, subsidiaries were involved in the movement of the Train." Trustee's Motion at 11.

In these circumstances, the plaintiffs cannot be charged with either undue delay or bad faith for failing to get it right the first time. The adequacy of a complaint under current pleading standards "is not always a clear line; and when the district judge asks for more specifics, a serious effort to flesh out the complaint is fairly to be expected." *Pruell*, 678 F.3d at 14. That is precisely what the plaintiffs did here—in the only way left available to them—when they moved for reconsideration under Rule 59(e) within the 28 days provided by Rule 59(e), attaching a proposed complaint that remedied the district court's concern.

It is true that, overall, significant time passed between the filing of the plaintiffs' original complaints and their motion to amend under Rule 59(e). That delay, however, was solely a function of the stays entered in this case, which tolled "all deadlines" under the Federal Rules of Civil Procedure. Shortly after the cases were removed to federal court, they were stayed pending resolution of the motions to transfer the case to Maine. JA1529-38, 1543-37. And after transfer was granted, the cases were again stayed until the completion of the bankruptcy proceedings. This Court does not "permit denial of leave to amend to be premised" solely on time elapsed since "commencement of the action" where "most of the delay is attributable not to plaintiff" but to the court. *Farkas*, 429 F.2d at 851. And even if the plaintiffs *had* caused some delay, that could not be used to deny them the right to amend here, because the district court's stay order expressly granted them "leave

to amend their respective complaints retroactively *nunc pro tunc* … to add parties and claims" after the stay was lifted. JA1550.

Finally, "courts may not deny an amendment solely because of delay and without consideration of the prejudice to the opposing party." *Carter v. Supermarkets Gen. Corp.*, 684 F.2d 187, 192 (1st Cir. 1982). As explained below, the defendants would suffer no prejudice from the plaintiffs' proposed amendment here.

2. Canadian Pacific would suffer no undue prejudice from the amendment.

The defendants have made "no showing or claim of prejudice" resulting from the plaintiff's proposed amendment. *Farkas*, 429 F.2d at 851. Nor can there be any real argument that they will be "seriously prejudiced by allowing amendment at this relatively early stage of the litigation." *D'Agostino*, 802 F.3d at 195. Because of the long stay resulting from the bankruptcy proceedings, there has thus far been no discovery or other significant development of the case. Permitting the complaint to be amended would thus not, for example, require reopening discovery or a postponement of trial. *See Klunder v. Brown Univ.*, 778 F.3d 24, 34-35 (1st Cir. 2015) ("Most often, … prejudice takes the form of additional, prolonged discovery and a postponement of trial."); *Glassman v. Computervision Corp.*, 90 F.3d 617, 622 (1st Cir. 1996). Nor would the defendants be prejudiced by adding Soo Line as a defendant, given that the company has long known that it was the proper defendant in the case and concealed that fact from the plaintiffs. On the contrary, dismissal "would

be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit … only because the plaintiff misunderstood a crucial fact about his identity." *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 550 (2010).

CONCLUSION

The Court should reverse the district court's denial of the Rule 59(e) motion.

Respectfully submitted,

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February 14, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,837 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Baskerville font.

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February 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system:

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ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE: LAC MÈGANTIC TRAIN DERAILMENT LITIGATION	)	**1:16-cv-01001-JDL**

ORDER ON THE PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

This cases arises from a July 6, 2013, train derailment and explosion in Lac Mégantic, Quebec, as discussed in greater detail in this court's Order on Canadian Pacific Railway Company's Amended Motion to Dismiss. The derailment spawned litigation in both Illinois and Texas, with multiple plaintiffs (the "Plaintiffs") asserting claims for negligence and wrongful death against a multitude of defendants, all of whom have since settled with the exception of Canadian Pacific Railway Company ("CP").

The cases which comprised the Illinois and Texas litigation are all now before this court, having been ordered transferred to the District of Maine by me pursuant to the authority established in 28 U.S.C. § 157(b)(5).[1] On April 26, 2016, all thirty-nine cases were consolidated into the instant case, and four fully-briefed substantive

[1] For a list of individual case numbers, see ECF No. 1 at 1. Two cases that were originally filed in the Circuit Court of Cook County, Illinois, *Roy v. Western Petroleum Co., et al.,* 1:14-cv-00113, and *Grimard v. Rail World, Inc., et al.,* 1:15-cv-00250, were removed to the U.S. District Court for the Northern District of Illinois before being transferred to the District of Maine in 2014. Another 35 cases followed the same trajectory from the Circuit Court of Cook County to the Northern District of Illinois before being transferred to the District of Maine in 2016, along with two cases from the U.S. District Court for the Northern District of Texas. *See Audet, et al. v. Devlar Energy Marketing, LLC, et al.,* 1:16-cv-00105-JDL; *Boulanger, et al. v. Arrow Midstream Holdings, LLC, et al.,* 1:16-cv-00106-JDL.

motions (the "Common Motions") were deemed filed as to all parties. ECF No. 1 at 2. One of the Common Motions was the Plaintiffs' Motion for Leave to File a Second Amended Complaint (ECF No. 3), which was originally filed in December 2015 by the plaintiffs in *Roy v. Western Petroleum Co., et al.,* 1:14-cv-00113, ECF No. 248; and *Grimard v. Rail World, Inc., et al.,* 1:15-cv-00250, ECF No. 83. Oral argument on the Common Motions, including the Plaintiffs' Motion for Leave to File a Second Amended Complaint, took place on July 13, 2016.

In their motion, the Plaintiffs seek to add CP's corporate parent and affiliates as defendants. For the reasons explained below, I deny the motion.

I. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 15(a)(2), the Court "should freely give leave [to amend] when justice so requires." Accordingly, leave to amend should be granted where there is no "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility...." *Foman v. Davis,* 371 U.S. 178, 182 (1962); *see also Chiang v. Skeirik,* 582 F.3d 238, 244 (1st Cir. 2009). If leave to amend is sought before discovery is complete and neither party has moved for summary judgment, an amendment will be denied if the proposed amendment fails to state a claim and is, therefore, futile. *See Hatch v. Dept. for Children, Youth and Their Families,* 274 F.3d 12, 19 (1st Cir. 2001). "Futility" is gauged by the criteria of Rule 12(b)(6). *Id.*

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible

on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). In considering the merits of a motion to dismiss, the Court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Gargano v. Liberty Intern. Underwriters, Inc.,* 572 F.3d 45, 48 (1st Cir. 2009). The Court must examine the factual content of the complaint and determine whether those facts support a reasonable inference "that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. The complaint must contain "sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Id.* (quoting *Twombly,* 550 U.S. at 570) (internal quotations omitted). "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." *Haley v. City of Boston,* 657 F.3d 39, 46 (1st Cir. 2011) (internal citations omitted).

II. ANALYSIS

The proposed second amended complaint adds CP's Canadian parent corporation, Canadian Pacific Railway Limited ("CPL"), as a defendant. ECF No. 3-1 at 5, ¶ 2. CPL is headquartered in Calgary, Alberta, Canada. *Id.* The proposed second amended complaint also adds as defendants CP's three U.S. affiliates: the Soo Line Railroad Company ("CP-Soo"), which is incorporated in Minnesota; the Delaware and Hudson Railway Company, Inc. ("CP-D&H"), which is also incorporated in Minnesota; and the Dakota, Minnesota & Eastern Railroad Company ("CP-DM&E"), which is incorporated in Delaware. *Id.*

The proposed second amended complaint also contains two new pertinent allegations: that CPL operates the four subsidiary corporations as a common enterprise under the "Canadian Pacific" brand, *id.* at 26, ¶ 156, and, that CPL "directly and/or through its subsidiaries, operates a transportation, logistics, and management company which maintains over 14,000 miles of track extending throughout Canada and into the U.S. industrial centers of Chicago, Newark, Philadelphia, Washington, New York City, and Buffalo[,]" *id.* at 26, ¶ 155; *see also id.* at 5-6, ¶ 2.

Throughout the proposed second amended complaint, "CP" is treated as including all five companies, and therefore, the remaining factual allegations contained in the proposed amendment relate to all of the CPL affiliates rather than any one company. *See id.* at 26, ¶ 156. Thus, for example, alleging that "CP transported seventy-two DOT-111 tankers filled with mislabeled volatile crude oil from New Town, North Dakota to Cote Saint-Luc[,]" *id.* at 27, ¶ 159, the proposed second amended complaint treats CPL, CP, CP-Soo, CP-D&H, and CP-DM&E as a single entity in the allegation. This is true for every allegation levied against "CP" in the proposed second amended complaint. *See id.* at 26-35, ¶ ¶ 155 - 175.

The proposed second amended complaint's treatment of all of the CPL-related entities as a single entity does not satisfy the *Iqbal* pleading standard because that treatment is not supported by any facts beyond the bare conclusory allegations that CPL "operates a transcontinental railway . . . *through* its subsidiaries[,]" ECF No. 3-1 at 5, ¶ 2 (emphasis added); *see also id.* at 26, ¶ 155, and that it operates such a

railway "as a common enterprise under the 'Canadian Pacific' brand," *id.* at 26, ¶ 156. Absent from the proposed amendment are factual allegations concerning CPL's corporate governance and operations, or that of its subsidiaries, or any other facts that would support a reasonable inference that the common enterprise assertion is true. *See* ECF No. 3-1.

I also note that the Plaintiffs' Motion for Leave to File Second Amended Complaint contains no discussion of the common enterprise issue. *See* ECF No. 3. Instead, the Plaintiffs assert that "further investigation since the filing of the original complaint has revealed additional parties whom Plaintiff[s] believe[ ] are or may be responsible" for the derailment and explosion. *Id.* at 4. This assertion does not shed light on how the facts alleged in the proposed second amended complaint support the conclusion that CPL and its affiliates are in fact a common enterprise. The Plaintiffs also argue that their proposed second amendment is not futile because they have alleged that "Defendants breached [their] duty to Plaintiff[s] by taking certain actions inconsistent with [their] knowledge of . . . the known risks associated with DOT-111 tank cars or the explosive nature of [Bakken Formation oil]." *Id.* at 5. Yet the proposed second amended complaint does not allege which defendant or defendants had such knowledge, nor how their relationship to CPL constituted a common enterprise.

Furthermore, at the July 13, 2016 hearing, the Plaintiffs argued that the purpose of the proposed amendment was "to capture those affiliates that we subsequently learned were the ones operating the train and join them in the

complaint[,]" ECF No. 25 at 82:2-4, and that "the allegations are that they acted as a common enterprise because Soo Line was the vehicle through which Canadian Pacific operated this train[,]" *id.* at 83:3-5. Yet the proposed second amended complaint does not allege that Soo Line, or any other CPL subsidiary, operated the train before it crossed the U.S.-Canadian border. *See* ECF No. 3-1.

The Plaintiffs also contended at the hearing that "[t]here is a common enterprise claim under Illinois law that has also been asserted." ECF No. 25 at 82:6-7. I presume that this is a reference to the fact that Counts One and Two of the proposed second amended complaint, which assert claims for wrongful death and in-concert negligence[2] under the Illinois Wrongful Death Act, 740 ILCS 180, *et seq.,* list CPL and its four subsidiaries as the defendants. *See* ECF No. 3-1 at 26, 30. However, the Plaintiffs do not cite to any specific provision of the Illinois Wrongful Death Act, *see id.* at 26-35, and they offer no explanation for how this Illinois statute serves to support their contention that CP and its corporate affiliates operated as a common enterprise, *see id.*; *see also* ECF No. 3.

Because "a court considering a motion to dismiss can choose to begin by identifying pleadings that . . . are no more than conclusions [and] are not entitled to the assumption of truth[,]" *Iqbal,* 556 U.S. at 679, I conclude that the plaintiffs' common enterprise allegation is too conclusory "to remove the possibility of relief from

[2] In Count Two, the Plaintiffs assert that Defendants World Fuel Service Corporation and Dakota Plains Holdings, Inc. (the "Suppliers") acted "in concert" with Defendants Edward Burkhardt, Rail World, Inc., and the Montreal, Maine & Atlantic Railroad (the "Railworld Shippers") and CP (defined to include CPL and all of its subsidiaries) to transport the shipment of oil from North Dakota to Quebec. *See* ECF No. 3-1 at 30, ¶ 168. The "in concert" allegation is not focused upon the relationship between CP and its corporate affiliates. *See id.*

the realm of mere conjecture[.]" *Haley,* 657 F.3d at 46. The plaintiffs' other factual allegations are tainted because they follow from the common enterprise allegation—i.e., they contend that "CP," defined as all five Canadian and U.S. companies, acted or failed to act so as to be liable to the plaintiffs. *See* ECF No. 3-1 at 27-35, ¶¶ 157-175.

For the foregoing reasons, the Plaintiffs' motion for leave to file a second amended complaint (ECF No. 3) is **DENIED** for futility.

SO ORDERED.

This 28th day of September 2016.

JON D. LEVY
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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JUDGEMENT OF DISMISSAL

In accordance with the Order on Canadian Pacific Railway Company's Amended Motion to Dismiss entered by the Court on September 28th , 2016;

JUDGMENT of dismissal without prejudice is hereby entered.

CHRISTA K. BERRY,

CLERK

By: /s/Michelle Thibodeau,

Deputy Clerk

Dated September 28, 2016