

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re)	
)	
)	
MONTREAL MAINE & ATLANTIC RAILWAY, LTD.)	CHAPTER 11
)	CASE NO. 13-10670-LHK
Debtor)	
)	

WRONGFUL DEATH CLAIMANTS’ OBJECTION TO TRUSTEE’S MOTION FOR APPROVAL OF STIPULATION WITH FEDERAL RAILROAD ADMINISTRATION

and

REQUEST FOR EVIDENTIARY HEARING

The representatives of the estates of 42 out of the 47 victims (the “Wrongful Death Claimants”) of the massive explosion in Lac-Mégantic, Quebec, from the derailment of a train operated by the Debtor (the “Disaster”)¹ hereby object to the Motion to Approve, and Authorize the Trustee to Enter Into, Stipulation Concerning Carve-Out from Collateral of the Federal Railroad Administration Pursuant to 11 U.S.C. §§ 105(a), 363(b), 506(c), 1163 and 1165 filed by Robert J. Keach in his capacity as Chapter 11 trustee (the “Trustee”) on September 16, 2013 [Docket No. 257] (the “Carve-Out Motion”), whereby the Trustee seeks this Court’s approval of a stipulation between the Trustee and the Federal Railroad Administration paying up to \$5 million to the Trustee and his professionals, and nothing for personal injury and wrongful death claims of equal priority (the “Stipulation”).

As grounds therefor, the Wrongful Death Claimants state:

¹ The victims and the representatives of their estates are listed in Exhibit A to this Objection.

The Wrongful Death Claimants' Perspective on the Chapter 11 Case

1. This is not a large case, nor should it be a very complicated one. The Trustee has identified three significant assets: (a) an operating railroad, (b) insurance policies with the maximum indemnity amount of \$25 million, and (c) evidence concerning the Disaster, for example, the locomotives and tanker cars that were involved.

2. Concerning the railroad, the Trustee has determined that it must be sold on a reasonably expedited basis. The Wrongful Death Claimants do not disagree. The Trustee has identified approximately \$30.5 million of liens encumbering the railroad assets, with a separate lien of \$6 million on accounts receivable. While the Trustee can be expected to use his best efforts to maximize the value of the railroad in the context of the need to sell quickly, nothing that the Trustee has said or the Wrongful Death Claimants have otherwise learned would indicate any likelihood that the railroad assets will sell for an amount exceeding the liens thereon. Accordingly, apart from the requirement inherent in a railroad case of considering the public interest, this case is little different from a garden variety Chapter 11 sale case where the assets are to be sold for the benefit of the secured party, in this case the Federal Railroad Administration ("FRA").

3. The insurance policies for the U.S. and Canadian debtors are similar to each other, except that the U.S. policy is a "wasting policy" under which payment of defense costs reduces the amount of indemnity coverage, while in Canada the payment of defense costs does not reduce the insurer's liability for indemnity. Both policies provide coverage for personal injury and wrongful death claims.² Assuming that the insurer will recognize that it faces liability of the full indemnity amount due under the insurance policies plus a substantial additional amount

² The Wrongful Death Claimants are in the process of studying whether and to what extent the policies cover claims besides theirs.

under the Canadian policy for defense costs, it should be possible to reach an early settlement. It cannot be disputed that the insurance will be insufficient to pay the insured claims. This unfortunate fact has the silver lining of simplifying the Chapter 11 case. There is no need for the estate incur the cost and delays required to value the insured claims. It will be sufficient for the Trustee to simply accept any reasonable agreement among the insured claimants establishing their *relative shares* of the insurance proceeds, and then provide the earliest possible distribution of proceeds.

4. The evidence concerning the Disaster that is in the Trustee's possession or control, while it does not have monetary value as such, is a critical asset of the bankruptcy estate. Initially, the Trustee is obligated to preserve and protect the evidence. It is expected that the evidence will then be made available to all parties with an interest therein, either through formal discovery or some other process.³

5. The paucity of assets in the U.S. and Canadian bankruptcies means that if the Wrongful Death Claimants are to receive fair compensation, most of it will need to come from non-debtor entities whose own wrongdoing helped cause the Disaster. For example, a management contract between Rail World, Inc. and the debtor railroads⁴ provides for Rail World, Inc. and Edward A. Burkhardt to be pervasively involved in managing the U.S. and Canadian debtors, and to receive fees exceeding \$500,000 per year for doing so. Accordingly, certain of the Wrongful Death Claimants have brought suit against Mr. Burkhardt and Rail World, Inc. as well as other parties, in the state courts of Illinois, where Mr. Burkhardt lives and Rail World, Inc. has its headquarters (the "Illinois Lawsuits"). Although originally named as

³ Disturbing information has recently been received by the Wrongful Death Claimants concerning possible spoliation. The Wrongful Death Claimants are in the process of assembling this information to share with the Trustee and other interested parties such as the Province of Quebec.

⁴ A copy of this agreement is on file with this Court as Exhibit A to a motion by the Trustee to reject the agreement. [Docket No. 261].

defendants in certain of the Illinois Lawsuits, the debtor railroads were dismissed from the cases once they commenced their Chapter 11 and CCAA cases respectively.

6. The Illinois Lawsuits continue to proceed against the non-debtor defendants. The defendants removed the Illinois Lawsuits to federal court, based on allegations of diversity of citizenship jurisdiction as well as bankruptcy jurisdiction arising from the pendency of this case. The Wrongful Death Claimants moved to remand on the basis that certain defendants are residents of Illinois and that there is no bankruptcy jurisdiction over the Illinois Lawsuits. One of the Illinois Lawsuits has already been remanded. Remand motions in the other Illinois Lawsuits have been scheduled for briefing, argument and decision by the District Court judge before whom they have been consolidated.

7. As the Wrongful Death Claimants pointed out in their motion (now withdrawn) for appointment of a creditors' committee, it is possible that the Chapter 11 case could serve as a forum to implement consensual settlements of claims by the Wrongful Death Claimants and others against non-debtor parties. Actions by the Trustee have now made this less likely. In moving to utilize 28 U.S.C. § 157(b)(5) to transfer the Illinois Lawsuits to the District Court for this District (the "Transfer Motion"), the Trustee has aligned himself with the non-debtor defendants in their transparent effort to delay and reduce recoveries against them by the Wrongful Death Claimants. Indeed, it appears based on similarity of pleadings that the Trustee and the defendants are actively coordinating their efforts. The Trustee has even engaged Chicago counsel to file a motion to intervene in the Illinois Lawsuits and to seek a stay thereof so that the later-filed Transfer Motion can be decided before the earlier-filed remand motions (the "Intervention/Stay Motion").

8. The Trustee has announced to the Wrongful Death Claimants that under Chapter 11 he has the power to settle their claims against third parties regardless of whether the Wrongful Death Claimants consent. Needless to say, the Wrongful Death Claimants disagree. The Chapter 11 case now threatens to take on a life of its own, detached from – indeed, antithetical to – the interests of claimants. Instead of serving as a neutral forum to assist in resolving litigation, the Chapter 11 case is spawning its own litigation, of which the Transfer Motion and Intervention/Stay Motion could prove to be only the beginning.

9. As the Chapter 11 case sinks in a morass of litigation, with spiraling professional fees and the prospect that creditor recoveries will be delayed for many years, the Wrongful Death Claimants are at a loss to understand what benefit to creditors can possibly result from the Trustee's attempt to hijack the Illinois Lawsuits.⁵ Of course, the Trustee has fiduciary duties to other creditors in addition to the Wrongful Death Claimants. But they would not benefit even if the Trustee were to gain control of the Illinois Lawsuits. This Court would not let the Trustee distribute to other creditors the proceeds of the Wrongful Death Claimants' causes of action. Other creditors have no reason to fear the contribution and indemnity claims against the estate that would be asserted by defendants who paid judgments rendered in the Illinois Lawsuits.

⁵ Apart from the question of what the Trustee seeks to accomplish by litigating against the Wrongful Death Claimants, the Trustee's litigation is premised on jurisdiction that does not exist. Federal courts do not have bankruptcy jurisdiction over litigation among non-debtors, such as the Illinois Lawsuits, just because the non-debtor defendants have a right to contribution or indemnity from the debtor.⁵ See, e.g., *In re W.R. Grace & Co.*, 591 F.3d 164 (3d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 5827 (U.S., Oct. 4, 2010). In holding that the federal courts lacked jurisdiction to enjoin, let alone adjudicate, the non-debtor litigation, the court stated:

[The non-debtor defendant] would first have to be found liable by its state courts and would then have to successfully bring an indemnification or contribution claim against [the debtor] in the Bankruptcy Court. This is precisely the situation in which we have found that related-to jurisdiction does not exist. Indeed, we have stated and restated that, in order for a bankruptcy court to have related-to jurisdiction . . . , that lawsuit must "affect the bankruptcy [] without the intervention of yet another lawsuit." [Citations omitted.]

Id. at 172-73.

Those claims would simply substitute for the Wrongful Death Claimants' claims, leaving the bankruptcy estate no worse off. In any event, other creditors would have no reason to care because at that point, having sold the railroad and distributed the insurance proceeds, there would be no assets.

10. Nor have other creditors requested the Trustee to seize control of the Wrongful Death Claimants' litigation. They have no need to. They almost certainly have claims of their own against the non-debtor parties, who in the aggregate appear to have the resources to pay damages from the Disaster many times over. Indeed, the Province of Quebec – which can be expected to assert substantial claims against the U.S. and Canadian debtors and against non-debtor parties for Disaster-related clean-up costs – has publicly stated that compensation of the Wrongful Death Claimants must come first.

11. In sum, the litigation program adopted by the Trustee will not benefit any party to whom he owes a fiduciary duty. The sole beneficiaries will be his strange bedfellows, the non-debtor defendants. The Wrongful Death Claimants will be directly and materially harmed by the probable delay in distributions, the near-certainty of diminished recoveries from the non-debtor defendants, and the absolute inevitability of mushrooming professional fees.

Basis for Objection

12. Against this backdrop, the Trustee seeks in the Motion the amazing sum of \$5 million for his own fees and those of his professionals, (a) without providing any explanation of why such a sum is needed, (b) without including a budget or estimate of how the money will be spent, (c) without providing for other claimants of equal priority even to get the leftovers – never mind the *pro rata* share to which they are entitled by statute – and (d) without protecting the estate from being stuck with costs relating to sale of the railroad if the FRA exercises its absolute

discretionary right to terminate funding of the Chapter 11 estate. These concerns will be detailed in sequence below.

13. *The Five Million Dollar Sum.* Before the Carve-Out Motion can be considered, an evidentiary hearing should be held to determine why so large a sum is necessary and what the Trustee intends to do with it. The hearing should be preceded by an opportunity for discovery. The Wrongful Death Claimants acknowledge the desirability of expediting determination of the Carve-Out Motion. Assuming that they have the Trustee's cooperation, the Wrongful Death Claimants will conduct their discovery on an expedited basis such that the evidentiary hearing can promptly be held.⁶

14. *The Rights of Other Administrative Claimants.* Even in non-railroad Chapter 11 cases where prepetition unsecured claims do not share administrative priority with estate-compensated professionals, a secured lender that wants the trustee to liquidate its collateral will typically agree to fund not only administrative expenses of the estate but also a distribution to prepetition creditors. The Stipulation, however, expressly provides for the money supplied by the FRA to be used solely to fund the Trustee and his professional fees. It does not appear from the Motion that the Trustee even attempted to obtain a benefit for prepetition creditors. Despite the obvious conflict between his interests and those of the Wrongful Death Claimants, he did not invite the Wrongful Death Claimants to participate in the negotiations. Rather, it appears that the Trustee negotiated solely for himself. The Stipulation has been structured as an end-run around Section 1171(a) of the Bankruptcy Code, which confers administrative priority on the Wrongful Death Claimants and any other personal injury claims.

⁶ The expedited discovery should also encompass the other objections set forth below if they are not sustained as a matter of law.

15. The Wrongful Death Claimants object to this arrangement on both procedural and substantive grounds. From a procedural perspective, the Trustee's personal interest in his negotiations with the FRA directly conflicted with the interests of the Wrongful Death Claimants. Only if some way could be found to cure this conflict would it be proper for this Court to consider granting the Carve-Out Motion or, more precisely, a revised version negotiated on a conflict-free basis. Substantively, the Wrongful Death Claimants object on the basis that they are entitled to a *pro rata* share of the \$5 million that the FRA has agreed to supply the estate. Even if the much-criticized SPM case⁷ could ever be applied in this situation, it does not rescue the proposed carve-out. Here the secured creditor is not channeling its own distribution to someone else on a voluntary basis. Rather, the FRA is purchasing from the estate a waiver of the estate's rights under Section 506(c). To put it another way, the funds that the Trustee is proposing to take for himself and his professionals are property of the estate, not the FRA.

16. *The Section 506(c) Waiver.* The Stipulation provides the FRA with an irrevocable waiver of the bankruptcy estate's rights under Section 506(c) of the Bankruptcy Code. Yet the FRA's obligation to fund administrative expenses is revocable upon 30 days' notice, in the FRA's absolute discretion. Thus, the Stipulation creates the possibility that the FRA will revoke funding at a time when the estate will be saddled with unpaid expenses related to the sale, yet have no right to recover those expenses under Section 506(c). The Wrongful Death Claimants raised this concern with the Trustee, who said he was not worried that the FRA would do such a thing. As the parties who will share the financial loss if the Trustee's faith in the FRA proves to be misplaced, the Wrongful Death Claimants respectfully request that this Court not approve the Stipulation unless amended so that either (a) the FRA is obligated to pay all sale-related costs or

⁷ *In re SPM Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993) (secured lender entitled to do whatever it wanted with proceeds from sale of its collateral in Chapter 7 case, including pay them to general unsecured creditors pursuant to an agreement with creditors' committee that had led to conversion of the case to Chapter 7).

(b) to the extent that any such costs are left unpaid by reason of a revocation notice from the FRA, the Section 506(c) waiver shall not apply.

Conclusion

17. For the reasons set forth above, the Carve-Out Motion should be denied as a matter of law and of this Court's discretion. More broadly, even acknowledging that trustees and creditors will not always see eye-to-eye, a case where the trustee is in conflict with his primary constituency on the most fundamental issues affecting creditor recoveries is simply not sustainable. The Trustee and the Wrongful Death Claimants should be encouraged to find a basis to work together toward a reasonably quick, reasonably inexpensive and reasonably successful outcome.

Marie Semie Alliance, *et al.*

By their attorneys,

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Exhibit A

1. The estate representatives are Seraphin Alliance (on behalf Alliance, Marie Semie); Elise Dubois Couture (on behalf of Beaudoin, David Lacroix); Pascal Charest (on behalf of Begnoche, Alyssa Charest); Pascal Charest (on behalf of Begnoche, Bianka Charest); Gaston Begnoche (on behalf of Begnoche, Talitha Coumi); Suzanne Bizier, Alain Bizier (on behalf of Bizier, Diane); Lisette Fortin-Bolduc, (on behalf of Bolduc, Stephane); Genevieve Dube (on behalf of Bouchard, Yannick); Michel Boulanger (on behalf of Boulanger, Eliane Parenteau); Louise Boulet (on behalf of Boulet, Marie-France); Colette Boulet, (on behalf of Boulet, Yves); Isabelle Boulanger, Rene Boutin, Sophie Boutin, Roxanne Boutin (on behalf of Frederic Boutin); Real Breton (on behalf of Breton, Genevieve); Yann Proteau (on behalf of Champagne, Karine); Cynthia Boule, Jean-Guy Boule, Alexandre Boule (on behalf of Sylvia Charron); Louise Courture (on behalf of Clusiaux, Kathy); Sonia Pepin; Jeremy Custeau, Theresa Pouliot, Michael Cousteau, Rejean Custeau, Kathleen Bedard, Simon Custeau, Richard Custeau, Sylvie Custeau (on behalf of Real Custeau); Therese Dubois (on behalf of Dubois, Denise); Joannie Proteau, (on behalf of Dubois, Maxime); Maude Faucher (on behalf of Faucher, Marie-Noelle); Sandy Bedard (on behalf of Guertin Jr., Michel); Raymond Lafontaine, Pierrette Boucher Lafontaine (on behalf of Lafontaine, Gaetan); Pascal Lafontaine (on behalf of Lafontaine, Karine); Clermont Pepin (on behalf of Lajeunesse, Éric Pépin); Marie-Eve Lapierre (on behalf of Lapierre, Stéphane); Diane Belanger (on behalf of Lapointe, Joannie); Marie Josee Grimard (on behalf of Latulippe, Henriette); Georgette Martin (on behalf of David Martin); Karine Paquet (on behalf of Paquet, Roger); Alexia Dumas-Chaput (on behalf of Pelletier, Mathieu); Robert Picard (on behalf of Picard, Louise Poirer); Mario Poulin (on behalf of Poulin, Marianne); Lily Rodrique (on behalf of Rodrique, Martin); Maxime Roy, Carol-Anne Roy (on behalf of Roy, Jean-Pierre); Lise

Doyon (on behalf of Roy, Kevin); Rejean Roy (on behalf of Roy, Melissa); Mario Sévigny (on behalf of Sévigny, Andrée-Anne); Michel Sirois, Solange Belanger (on behalf of Sirois, Jimmy); Richard Turcotte, Christine Pulin (on behalf of Turcotte, Elodie); Suzanne Bizier (on behalf of Turmel, Joanie); Annick Roy (on behalf of Veilleux, Jean-Guy); and Sophie Veilleux (on behalf of Veilleux, Richard).

2. The victims are Marie Semie Alliance, David Lacroix Beaudoin, Alyssa Charest Begnoche, Bianka Charest Begnoche, Talitha Coumi Benoche, Diane Bizier, Stephane Bolduc, Yannick Bouchard, Eliane Parenteau Boulanger, Marie France Boulet, Yves Boulet, Frederic Boutin, Genevieve Breton, Karine Champagne, Sylvia Charron, Kathy Clusiault, Real Custeau, Denise Dubois, Maxime Dubois, Marie-Noelle Faucher, Michael Guertin, Jr., Gaetan Lafontaine, Karine Lafontaine, Eric Pepin Lajeunesse, Stephanie Lapierre, Joannie Lapointe, Henriette Latulippe, David Martin, Roger Paquet, Mathieu Pelletier, Louise Poirer Picard, Marianne Poulin, Martin Rodrigue, Jean Pierre Roy, Kevin Roy, Melissa Roy, Andree-Anne Sevigny, Jimmy Sirios, Elodie Turcotte, Joanie Turmel, Jean-Guy Veilleux and Richard Veilleux.