

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:)
Montreal Maine & Atlantic Railway Ltd.,) Chapter 11
) Case No. 13-10670
Debtor)

ORDER APPROVING CARVE-OUT

This case arises from the July 6, 2013 derailment of one of the debtor's trains containing 72 carloads of crude oil and 5 locomotives in Lac-Megantic, Quebec, resulting in large explosions, destruction of part of the downtown area, a large quantity of spilled oil, and the known deaths of 47 people. Presently before the court is the Chapter 11 trustee's motion to approve a stipulated carve-out from the secured claim of Federal Railroad Administration ("FRA") to pay the allowed fees and expenses of the trustee and his professionals, in an amount not to exceed \$5 million.

Wheeling & Lake Erie Railway Company, ("Wheeling"), the holder of pre- and post-filing claims against the estate, and a group of 42 wrongful death victims (the "Group of 42") have objected to the carve-out. Each claims standing as an administrative claimant. They assert that the carve-out should be shared among all administrative claimants, that it was purchased by the trustee with a waiver of the estate's § 506(c) surcharge rights, and that the trustee breached his fiduciary duty to the estate by entering the stipulation.

A carve-out agreement "is generally understood to be an agreement by a party secured by all or some of the assets of the estate to allow some portion of its lien proceeds to be paid to others." Costa v. Robotic Vision Systems, Inc. (In re Robotic Vision Systems, Inc.), 367 B.R. 232, 37-38, n. 23 (1st Cir. B.A.P. 2007)(quoting In re U.S. Flow, 332 B.R. 792 (Bankr. W.D. Mich. 2005)). This is exactly what the trustee proposes. FRA is willing to transfer proceeds of

its secured claim to pay the fees of the trustee and his professionals, as allowed by the court, in an amount not to exceed \$5 million.

FRA has the sole right to the proceeds of sale of its collateral and it may share those proceeds with anyone it likes. See, e.g. Official Unsecured Creditors' Committee v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305, 1313 (1st Cir. 1993). Here, FRA is not simply a secured creditor; it is also the federal regulator of the debtor's business. As a regulator, the FRA is a guardian of the public interest; and, as such, it has a duty to insure that the railroad continues to operate to the fullest extent possible during the reorganization case. At the hearing, FRA's counsel stated that his client's willingness to carve-out funds for the trustee and his professionals was in furtherance of FRA's duty to regulate MMA's operations. Counsel made it very clear that FRA's offer was limited to the trustee and his professionals and that it would not have agreed if the carve-out was to be shared with other administrative claimants.

The trustee stated that the stipulation with FRA is the only way to insure payment of the trustee and his professionals. He also stated that the waiver of the estate's surcharge rights under § 506(c) is of no value because the estate has no preservation claims against FRA. No contrary assertions were made.¹

The trustee did not breach his fiduciary duty for two reasons: First, as stated above, the estate has no interest in the carve-out funds. Those funds are to be paid to the trustee and his professionals upon further order of this court. Until then they will remain the property of FRA. Second, the trustee's primary duty at this moment is to operate the railroad while he formulates a

¹ Counsel for the Group of 42 demanded an evidentiary hearing. However, during argument he made no demand to cross-examine the trustee or counsel for FRA concerning their assertions. Consequently, those assertions were taken as admissible evidence. Moreover, counsel for the Group of 42 made no proffer of contrary evidence. For these reasons, his request for an evidentiary hearing is denied.

plan. This duty entails paying professionals for services rendered as allowed by this court. The stipulation with FRA is in fulfillment of this duty. Indeed, a rejection of the carve-out by the trustee, because of FRA's refusal to share its property with other claimants, would have been a breach of his duty.

The objections are overruled and the carve-out stipulation is approved.

SO ORDERED.

DATED: October 18, 2013

A handwritten signature in black ink that reads "Louis H. Kornreich". The signature is written in a cursive style with a large initial "L".

Louis H. Kornreich, Chief Judge
U. S. Bankruptcy Court

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Date Created: 10/18/2013

Case: 13-10670

Form ID: pdf900

Total: 93

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