

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**CHAPTER 11 TRUSTEE’S REPLY TO OBJECTION TO TRUSTEE’S APPLICATION
TO EMPLOY SHAW, FISHMAN, GLANTZ AND TOWBIN, LLC
AS SPECIAL COUNSEL**

Robert J. Keach, the chapter 11 trustee (the “Trustee”) appointed in the above-captioned chapter 11 case of Montreal Maine & Atlantic Railway, Ltd. (“MMA” or the “Debtor”), hereby replies to the *Objection to Trustee’s Application to Employ Shaw, Fishman, Glantz and Towbin, LLC as Special Counsel* [Docket No. 357] (the “Objection”) filed by the informal committee (the “Informal Committee”) allegedly representing the interests of certain wrongful death victims and the representatives of the probate estates of certain victims of the July 6, 2013 train derailment (the “Derailment”) in Lac-Mégantic, Québec to the *Application for Order, Pursuant to Sections 327 and 328 of the Bankruptcy Code, Authorizing the Employment of Shaw Fishman Glantz & Towbin LLC as Special Counsel to the Trustee, Nunc Pro Tunc to September 11, 2013* [Docket No. 282] (the “Retention Application”). The Trustee seeks, via the Retention Application, to employ the law firm of Shaw Fishman Glantz & Towbin LLC (“Shaw Fishman”) pursuant to sections 327(e) and 328(a) of the Bankruptcy Code as the Trustee’s local counsel in connection with the Derailment-related litigation filed in Illinois state and federal courts (the “Derailment Litigation”), with such retention being effective as of September 11, 2013. The Informal Committee contends that Shaw Fishman “has a non-waivable conflict of interest and that the

Trustee has failed to offer any legitimate reason to expend estate funds to participate in” the Derailment Litigation. *See* Objection, at 1. For the reasons set forth below, the Objection is premised on misapprehensions of fact and law, including the Illinois Rules of Professional Conduct, and is aimed at preventing the Trustee from retaining any lawyer, not just Shaw Fishman, so as to stymie the Trustee’s efforts to centralize the Derailment Litigation. The Objection should be overruled.

A. Retention of Shaw Fishman under Section 329(e) is Permissible; Section 327(a) is Not Applicable.

1. Much of the Objection concerns the Informal Committee’s allegations regarding the so-called “non-waivable conflict of interest” arising from the fact that Jay S. Geller (“Geller”) is currently “of counsel” with Shaw Fishman, was formerly a partner with the Trustee’s firm, Bernstein, Shur, Sawyer & Nelson, P.A., and currently represents certain defendants in the Derailment Litigation, including Western Petroleum Company, and Petroleum Transport Solutions, LLC (collectively, the “WFS Defendants”). The Objection goes so far as to state that:

It is impossible to imagine how Shaw-Fishman [sic] can advocate effectively for the Trustee while its ‘of counsel’ associated attorney, Jay Geller, is representing the interests of potential defendants that have made claims against the estate and the Trustee has committed to sue. The addition of Shaw-Fishman into the mix is even more disturbing in that **all the actions by the Trustee and tortfeasors represented by Mr. Geller have been coordinated with the intent to deprive the Wrongful Death Claimants of their right to pursue their claims in their forum of choice.**

Objection at p. 10 (emphasis added).

2. Putting aside the Informal Committee’s conspiracy theory (which has no basis in fact), the Objection misapprehends the purpose for which the Trustee seeks to retain Shaw Fishman.

3. First, the Informal Committee relies on section 327(a) for its argument that Shaw Fishman cannot be retained due to a “non-waivable conflict of interest.” Objection at p. 8-10. However, the Trustee seeks to retain Shaw Fishman under section 327(e), not Section 327(a). Section 327(e) of the Bankruptcy Code provides:

The trustee, with the court’s approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate ***with respect to the matter on which such attorney is to be employed.***

11 U.S.C. § 327(e) (emphasis added). The “disinterestedness” standard applicable to section 327(a) professionals is not implicated by the Retention Application.

4. Consideration of the retention of Shaw Fishman under section 327(e) depends, therefore, on the scope of Shaw Fishman’s retention as set forth in the Retention Application. The Retention Application, and the *Declaration of Brian L. Shaw, Esq. in Support of the Application for Order, Pursuant to Sections 327 and 328 of the Bankruptcy Code, Authorizing the Employment of Shaw Fishman Glantz & Towbin LLC, as Special Counsel to the Trustee, Nunc Pro Tunc to September 11, 2013* (the “Shaw Declaration”), clearly provide that the Trustee seeks to retain Shaw Fishman as “local counsel with regard to the various wrongful death and related cases filed against MMA in Illinois state and federal courts.” Shaw Declaration at Exh A. Accordingly, if the Derailment Litigation is transferred to a forum outside of Illinois, Shaw Fishman’s representation of the Trustee will conclude. In essence, Shaw Fishman is assisting the Trustee with a venue dispute.

5. Currently, there is no actual adversity between the WFS Defendants and the Trustee or MMA’s estate with respect to the venue dispute. If and when the Derailment Litigation is transferred to a forum outside of Illinois, the WFS Defendants very well may assert

claims against MMA, and the Trustee may assert claims against the WFS Defendants on behalf of MMA. However, as stated above, if and when the Derailment Litigation is transferred outside of Illinois, Shaw Fishman's retention will conclude. The Objection is thus premature at this stage.

B. No Conflict of Interest Between the Trustee and Shaw Fishman Exists; Even If a Conflict Existed, the Trustee Has Waived It Given the Ethical Wall Established by Shaw Fishman.

6. The Informal Committee cites to Rule 1.7 of the Illinois Rules of Professional Conduct to support its argument that "ethical constraints prohibit the engagement of Shaw-Fishman." Objection at 5. For the reasons set forth below, Rule 1.7 is wholly inapplicable in this context and does not prohibit the engagement of Shaw Fishman.

7. First, as explained above, section 327(e) authorizes the Trustee to retain Shaw Fishman for a "specified special purpose," provided that Shaw Fishman "does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e). In light of the limited nature of Shaw Fishman's proposed retention, and the current lack of any actual adversity between Shaw Fishman (through Mr. Geller's representation of the WFS Defendants) and the Trustee, there is simply no conflict of interest between the Trustee and Shaw Fishman.

8. The same analysis establishes that no conflict exists for purposes of Rule 1.7. The representation by Mr. Geller of the WFS Defendants is not currently adverse to the Trustee or MMA, and there is little or no risk, much less a "significant risk," as stated in Rule 1.7, that Shaw Fishman's limited representation of the Trustee in a venue dispute while the Derailment Litigation is pending in Illinois will be "materially limited" by Mr. Geller's representation of the

WFS Defendants, given that MMA and the WFS Defendants are not currently adverse to each other as to venue. *See* Ill. S.Ct. Rs. Prof. Conduct, R. 1.7 (eff. Jan. 1, 2010).

9. However, even assuming the existence of a conflict or the risk of a conflict, the Trustee has appropriately waived such conflict in light of Shaw Fishman having established an ethical wall around Mr. Geller. The nature of the ethical wall is set forth in detail in the Shaw Declaration:

Mr. Geller and Shaw Fishman have established a protocol to eliminate the possibility that information subject to the attorney client privilege or work product doctrine are shared between Mr. Geller and Shaw Fishman, either intentionally or inadvertently. Pursuant to the protocol, the following measures, *inter alia*, have been taken: (a) Shaw Fishman personnel and Mr. Geller have agreed not to share any information regarding the Case or related matters; (b) Shaw Fishman personnel and Mr. Geller have agreed not to discuss in each other's presence any information regarding the Case or related matters; (c) Mr. Geller has agreed to maintain, and is currently maintaining, all documents, files and information pertaining to Western Petroleum on the servers of the Law Office of Jay S. Geller and no such information is being maintained on Shaw Fishman's servers; and (d) Shaw Fishman has blocked Mr. Geller from accessing any documents, files and information on its server relating to Shaw Fishman's representation of the Trustee, including the electronic preclusion of Jay Geller from any access to document files, Outlook files and applications coded with the unique client number designated to Shaw Fishman's representation of the Trustee in connection with the Case and related matters.

Shaw Declaration, ¶ 7. Further, Mr. Geller works out of his office in Portland, Maine and is in Chicago or Northbrook, Illinois at Shaw Fishman's office at most a few times a year, making it highly unlikely that Mr. Geller and any of the Shaw Fishman attorneys would inadvertently discuss this case in front of each other. Accordingly, Shaw Fishman has already adopted extensive procedures to eliminate the remote chance that any conflict arises between the Trustee and Shaw Fishman, and the Trustee has thus appropriately waived any potential conflict that might exist.

i. The Informal Committee Does Not Have Standing to Raise the Existence of a Conflict in Any Event.

10. Importantly, the Informal Committee does not even have standing to assert a conflict or violation of Rule 1.7 of the Illinois Rules of Professional Conduct. Rule 1.7 “applies to ‘current clients’ and is designed, therefore, to protect clients.” Friedman v. Bhalala, 2013 WL 2641189 at *12 (Ill.App. 2 Dist. June 7, 2013) (citing Ill. S.Ct. Rs. Prof. Conduct, R. 1.7 (eff. Jan. 1, 2010)). A plaintiff asserting a conflict in violation of Rule 1.7 must first establish the existence of an attorney-client relationship in order to have a cause of action under Rule 1.7. *See id.* “Absent a complaint by the affected client, a party has no status to object to the representation of an adverse party by an attorney of his choice.” Renard v. Columbia Broadcasting Sys., Inc., 467 N.E. 2d 1090, 1094 (Ill. App. Ct. 1984). The Informal Committee has not alleged that it is, and of course it is not, a client of Shaw Fishman, and the Informal Committee thus has no standing to raise Rule 1.7.

C. The Informal Committee’s Purpose in Filing the Objection is Simply to Attempt to Preclude the Trustee from Pursuing His Effort to Centralize the Derailment Litigation.

11. Although the Informal Committee purports to object to the Retention Application based on the alleged conflict between the Trustee and Shaw Fishman, the Informal Committee also declares that the Trustee should not be able to retain any counsel in the Derailment Litigation. Objection at p. 11. The Informal Committee argues that, “[r]egardless of what law firm the Trustee might hire, his desire to incur legal expenses in litigation that will have no effect on the ultimate distribution of this estate cannot be justified.” *Id.* The Informal Committee concludes that the Trustee’s desire to participate and be represented in the Derailment Litigation stems from the Trustee having “aligned himself with the tortfeasors against the victims,” and describes such desire as a “subtle and sinister” and a “fool’s errand.” *Id.* at 2, 10.

12. In fact, the Objection is riddled with inflammatory and accusatory rhetoric that is, in the Trustee's view, unprofessional and unjustified. Instead of responding to each accusation and piece of rhetoric, the Trustee simply notes that he is not acting in concert with any person or entity for any purpose. In seeking to having the Derailment Litigation transferred and centralized pursuant to 28 U.S.C. § 157(b)(5), the Trustee is pursuing an objective that he believes, in the exercise of his judgment and in accordance with his fiduciary duties, to be in the best interests of MMA's estate. Further, in seeking transfer of the Derailment Litigation pursuant to section 157(b)(5), the Trustee is simply asking the District court to perform the "gatekeeping" mechanism created by Congress. The Trustee does not presume or assume what the District Court will decide. In the event, the Trustee's motives can hardly be characterized as "sinister" when he is merely pursuing a course of action contemplated by Congress.

13. The Informal Committee has made clear that it objects to the Trustee's efforts to transfer the Derailment Litigation, and has the right to be heard, in the proper forum, with respect to those issues. However, the tactical maneuvering represented by the Objection, and the Informal Committee's attempt to preclude the Trustee from retaining any counsel whatsoever to represent it in the Derailment Litigation, should not be countenanced by this Court.

14. For the reasons set forth in this Reply, the Trustee requests that the Court overrule the Objection and authorize the retention of Shaw Fishman.

Dated: October 28, 2013

ROBERT J. KEACH,
CHAPTER 11 TRUSTEE OF MONTREAL
MAINE & ATLANTIC RAILWAY, LTD.

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