

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.,

Debtor.

Chapter 11

Case No. 13-10670 (LHK)

**RESPONSE OF OFFICIAL COMMITTEE OF VICTIMS TO OBJECTION OF
WRONGFUL DEATH CLAIMANTS TO COMMITTEE'S MOTION SEEKING TO
EMPLOY AND RETAIN PAUL HASTINGS LLP AS COUNSEL,
EFFECTIVE AS OF DECEMBER 10, 2013**

The Official Committee of Victims (the "Committee") appointed in the chapter 11 case of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), by and through its undersigned proposed counsel, hereby files this response (the "Response") to the objection [Docket No. 609] (the "Objection") filed by the Unofficial Committee of Wrongful Death Claimants (the "Wrongful Death Claimants") to the *Application For Order, Pursuant To Sections 328, 330, And 1103 Of Bankruptcy Code, Authorizing Employment And Retention Of Paul Hastings LLP As Counsel To Official Committee Of Victims, Effective As Of December 10, 2013* [Docket No. 559] (the "Application"). In support of the Response, the Committee states as follows:

RESPONSE

A. Paul Hastings' Representation Of Committee Is Permissible Under Maine Law

1. Certain Paul Hastings attorneys (excluding any Firm attorney involved in this chapter 11 case) represent World Fuel Services Corporation ("World Fuel") in connection with regulatory and compliance issues related to the payment industry. Those matters are **completely unrelated** to this chapter 11 case (or to anything remotely connected to this case) and neither

Mr. Despins, Mr. Fong nor any other employee of the Firm representing the Committee are involved in any World Fuel matter. Counsel for the Wrongful Death Claimants attempts to manufacture a conflict by selectively citing to the Firm's Application, which states that the amount billed by the Firm to World Fuel during the 2013 fiscal year constituted approximately .01% of the Firm's total annual revenue. *See* Objection, at 4. However, counsel for the Wrongful Death Claimants conveniently omits mentioning that, as explained in the affidavit of Luc Despins attached to the Application, World Fuel had agreed to execute a waiver which was being documented.¹ In fact, **World Fuel has executed such waiver to confirm that the Firm is free to be adverse to World Fuel in this case.**

2. Counsel for the Wrongful Death Claimants inaccurately state that Paul Hastings' representation of World Fuel in matters unrelated to the chapter 11 case represents a "non-waivable conflict of interest for Paul Hastings under Maine law." Objection, at 4. To the contrary, Maine law clearly permits the Committee's retention of Paul Hastings in this case. The Maine Rules of Professional Conduct provide that:

[A] lawyer shall not represent a client if the representation involves a concurrent conflict-of-interest. A concurrent conflict-of-interest exists if:

(1) the representation of one client would be directly adverse to another client, even if representation would not occur in the same matter or in substantially related matters; or

(2) there is a significant risk that the representation of one or more clients would be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Me. R. Prof. Conduct 1.7(a).

¹ *See Affidavit Of Luc A. Despins In Support Of Application For Order, Pursuant To Sections 328, 330, And 1103 Of Bankruptcy Code, Authorizing Employment And Retention Of Paul Hastings LLP As Counsel To Official Committee Of Victims, Effective As Of December 10, 2013* [Docket No. 559], at Ex. 1, p. 12.

3. Paul Hastings disagrees that the representation of World Fuel in matters unrelated to the chapter 11 case would materially limit the Firm's ability to zealously advocate on behalf of the Committee and all the victims of the derailment. Regardless, counsel for the Wrongful Death Claimants selectively fails to mention that the Maine Rules of Professional Conduct in fact permit a client to waive any potential conflict of interest:

Notwithstanding the existence of a concurrent conflict-of-interest under paragraph [1.7](a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer would be able to provide competent and diligent representation to each affected client; and

(2) each affected client gives informed consent, confirmed in writing.

Me. R. Prof. Conduct 1.7(b).

4. World Fuel is not a client of Mr. Despins or Mr. Fong and neither attorney has worked on any matters for World Fuel. Accordingly, the attorneys for Paul Hastings who represent the Committee reasonably believe that they can provide competent and diligent counsel to the Committee in matters regarding World Fuel. Further, World Fuel has provided consent for Paul Hastings to represent the Committee in the chapter 11 case in contested matters where the Committee may be adverse to World Fuel and the Committee also has given its consent to this dual representation.²

5. Paul Hastings has similarly satisfied the requirements of the Maine Bar Rules regarding conflicts of interests. The Maine Bar Rules prohibit a lawyer's simultaneous representation of "more than one client in the same matter or group of *substantially related*

² In fact, the Application, which was reviewed by each member of the Committee, disclosed this issue and the Application was executed by the co-chairs of the Committee. In addition, the Committee has also agreed to retain Perkins Olson as local and conflicts counsel. Therefore, Perkins Olson may prosecute matters against World Fuel to the extent Paul Hastings cannot. *See e.g., In re Caldor, Inc.*, 193 B.R. 165, 177 (Bankr. S.D.N.Y. 1996) ("If a conflict arises [the parties] can retain special counsel or financial advisors, as necessary.").

matters when the matter or matters are the subject of litigation or any other proceeding for dispute resolution and the clients are opposing parties.” *See* Maine Bar Rules 3.4(c)(1) (emphasis added). This provision does not apply here because Paul Hastings’ representation of World Fuel in regulatory and compliance matters is not related at all to the chapter 11 case.

6. The Maine Bar Rules further provide that “[i]n all other cases, if a conflict of interest exists, a lawyer may not undertake or continue simultaneous representation of more than one client except with the informed consent of each affected client to representation of the others. Consent is required even though representation will not occur in the same matter or in substantially related matters.” *Id.* at 3.4(c)(2). Representation would involve a conflict of interest if there is “a substantial risk that the lawyer’s representation of one client would be materially and adversely affected by the lawyer’s duties to another current client, to a former client, or to a third person, or by the lawyer’s own interests.” *Id.* at 3.4(b)(1). As explained above, the tenuous connection between World Fuel and the Paul Hastings’ attorneys representing the Committee undercut any argument that there is a substantial risk that Paul Hastings’ representation of the Committee may be materially and adversely affected. Nonetheless, World Fuel has consented to Paul Hastings’ representation of the Committee in matters where the Committee may be adverse to World Fuel.

7. As demonstrated above, Paul Hastings has satisfied the Maine Rules of Professional Conduct, the Maine Bar Rules and the Firm is capable and fully prepared to act in the best interests of the Committee and the victims of the derailment.

B. Committee’s Proposed Retention Of Paul Hastings Does Not Violate Section 1103(b) Of The Bankruptcy Code

8. Counsel for the Wrongful Death Claimants also inaccurately interpret section 1103(b) of the Bankruptcy Code as prohibiting the Committee’s retention of Paul Hastings.

Section 1103(b) provides that:

An attorney or accountant employed to represent a committee appointed under section 1102 of this title *may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case.* Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

11 U.S.C. § 1103(b) (emphasis added).

9. Counsel for the Wrongful Death Claimants glosses over the language of the statute. In *Daido Steel Co. v. Official Comm. of Unsecured Creditors*, 178 B.R. 129, 131 (N.D. Ohio 1995), the court considered the committee’s application to retain Brouse & McDowell (“B&M”) as its bankruptcy counsel. B&M also represented a potential purchaser of the Debtor’s assets in “matters not related to the bankruptcy proceedings.” *Id.* at 130. In approving the committee’ retention of B&M, the court found that section 1103(b) only prohibits an attorney from representing adverse parties in the same case.

10. The *Daido* court undertook an examination of the language and history of section 1103(b). First, the court noted that the phrase “in connection with” refers to the word “represent.” *Id.* (citing 5 Collier on Bankruptcy, § 1103.03 at 1103-9 (15th ed. 1994) (“With respect to attorneys and accountants, the committee may appoint such professional persons to represent the committee so long as any other party *represented* by such attorney *in connection with the case* does not have an adverse interest to the interests represented by the committee.”)) (emphasis in original).

11. The court also noted that prior to its amendment in 1984, section 1103(b) provided: “A person employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity in connection with the case.” *Id.* Citing to the related House Report to the 1984 amendment to section 1103(b), the *Daido* court quoted: “the bill requires that an attorney for a creditors’ committee cease representation of creditors in connection with the case. ***It does not require the attorney to cease representation of the creditors in matters unrelated to the case.***” *Id.* (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 104-5 (1977) (emphasis added)). “Rather than prohibiting all dual representation in connection with the bankruptcy case, the section [1103(b)] now prohibits only dual representation in connection with the case where the represented parties have adverse interests. Nothing suggests that the phrase ‘in connection with the case’ is to be given a meaning different than that it held prior to the amendment.” *Id.*; *see also Exco Res. v. Milbank*, 2003 U.S. Dist. LEXIS 1442, at *20-21 (S.D.N.Y. Jan. 28, 2003) (stating that committee counsel “violates § 1103(b) if it simultaneously represents both the Committee and another party, with an interest adverse to the committee, in matters related to the bankruptcy proceeding. Section 1103(b) is not violated if [committee counsel] represents an entity with an adverse interest in a matter unrelated to the bankruptcy case . . .”). The *Daido* court’s interpretation of section 1103(b) was cited approvingly by the court in *In re Caldor*, a decision cited by counsel to the Wrongful Death Claimants in their Objection. Objection, at 5 (*citing In re Caldor*, 193 B.R. 165 (Bankr. S.D.N.Y. 1996) (overruling objection to Committee’s retention of professionals)).³ Since Paul

³ The decision in *In re Tri Mfg. & Sales Co.*, 51 B.R. 178 (Bankr. S.D. Ohio 1985) is entirely distinguishable from the facts of this case. In *Tri Mfg.*, counsel for the creditors’ committee also represented a former general manager of the Debtor, who worked for a competitor of the debtor. *Id.* at 179. The court based its decision to vacate its order approving the retention of committee counsel on the fear that the committee and the former general manager may have conflicting view on the course of the bankruptcy case. *Id.* at 180. In this case, World Fuel is

Hastings is not representing World Fuel in the chapter 11 case or matters related to the case, section 1103(b) is not implicated.

12. Paul Hastings also does not have an “interest materially adverse to the estate” such that it is disinterested under section 101(14) of the Bankruptcy Code. *See* 11 U.S.C. § 101(14) (providing that a “disinterested person” is one who, among other things, does not have “an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders” for “any reason.”).⁴ The phrase “interest materially adverse to the interest of the estate” is not defined in the Code. Courts in the First Circuit interpret those words to mean “the possessing or asserting of any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant or possessing a predisposition under circumstances that render such a bias against the estate real.” *See White v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. (In re CK Liquidation Corp.)*, 408 B.R. 1, 7 (B.A.P. 1st Cir. 2009) (citation omitted). In *CK Liquidation*, the First Circuit B.A.P. was confronted with an issue where a creditor had brought a claim against counsel for the trustee (“S&L”). *Id.* at 2-3. In connection with the creditor’s claim against S&L, the trustee hired Mintz Levin as special counsel. *Id.* at 3. A party objected to Mintz Levin’s final fee application on the grounds that Mintz Levin was not disinterested because Mintz Levin was represented by S&L in litigation unrelated to the bankruptcy case. *Id.*

represented by its own counsel and its views will have no impact on how Paul Hastings advises the Committee or how it acts in this case.

⁴ Even though section 1103(b) is the only statutory provision that applies to the Committee’s right to select counsel, at least one case has held that, notwithstanding the language of section 1103, the disinterested and adverse interest requirements of section 327(a) also apply to the retention of counsel for a committee under section 1103. *See In re Caldor*, 193 B.R. at 170-171. Section 327(a) concerns solely the employment of professionals by a trustee or a debtor and requires that the professional not hold an adverse interest to the estate and that the professional be disinterested under section 101(14).

at 7. The First Circuit B.A.P. chose not to disturb a prior ruling of the bankruptcy court which held that Mintz Levin did not have a disqualifying conflict of interest because of its connection with S&L. *Id.* Specifically, the trustee in *CK Liquidation* explained that S&L represented Mintz Levin in two lawsuits brought by former clients against the firm, and that neither case involved bankruptcy issues or the bankruptcy case and that “should Mintz Levin determine that it is in the best interest of the estate to pursue any claims against S&L, the current representation would not prohibit investigation into, or the bringing of, such claims.” *Id.* (citations omitted).⁵

13. Here, Paul Hastings’ representation of World Fuel in matters unrelated to the chapter 11 case would not lessen the value of the Debtor’s estate or create a dispute where the estate is a rival claimant or create a bias against the estate that is real. As in *CK Liquidation*, Paul Hastings may represent the Committee in contested matters where the Committee may be adverse to World Fuel. In light of World Fuel’s consent to Paul Hastings’ representation of the Committee, the Wrongful Death Claimants have not demonstrated that Paul Hastings has a disqualifying conflict of interest which prohibits the Firm’s representation of the Committee in this case. The Committee chose to employ Paul Hastings as its counsel and that choice is entitled to deference. *See Exco Res. v. Milbank*, 2003 U.S. Dist. LEXIS 1442, at *12-13 (“A party’s choice of counsel is entitled to great deference. Disqualification motions are viewed with disfavor because they interfere with a party’s right to employ the counsel of its choice. Mere speculation will not suffice to establish sufficient grounds for disqualification.”).

⁵ The cases cited by counsel to the Wrongful Death Claimants to support their accusation that Paul Hastings has a materially adverse interest to the estate are inapposite. *In re Asher*, 168 B.R. 614, 616 (Bankr. N.D. Ohio 1994) is distinguishable because the conflict in that case arose when proposed co-counsel to the trustee held stock in a bank which was paying the debtor and the trustee was making a demand on the bank to turnover those payments to the trustee. *In re Martin*, 817 F.2d 175, 183 (1st Cir. 1987) involved a situation where a party was granting a mortgage to a law firm as security for the payment of its fees. Lastly, *Rome v. Braunstein*, 19 F.3d 54, 60 (1st Cir. 1994) is distinguishable as well because the counsel in that case represented a chapter 7 debtor and a chapter 11 estate that held claims against the chapter 7 debtor.

C. The Proposed Rates of Paul Hastings' Professionals are Reasonable in Light of the Facts and Circumstances of This Case

14. The proposed billing rates of Paul Hastings' professionals are entirely appropriate in light of complexities of this chapter 11 case and the speculative nature of Paul Hastings' ability to receive any compensation. The First Circuit Court of Appeals has held that out-of-town billing rates are appropriate if the complexities of a particular case require the particular expertise of non-local counsel. *See Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) (stating that "if the client needs to go to a different city to find that specialist, he will expect to pay the rate prevailing in that city. In such a case, there is no basis for concluding that the specialist's ordinary rate is unreasonably high."). Out-of town billing rates are also appropriate if such rates compensate the attorney for the "risk that the lawsuit would be unsuccessful and no fee at all would be obtained." *Id.* at 41; *see also Williams v. Poulos*, 1995 U.S. App. LEXIS 10667, at *11-12 (1st Cir. May 12, 1995) (providing that out-of-town rates may be applied if "the case is an undesirable one which capable attorneys within the forum community are not willing to prosecute or defend . . .").

15. Here, Paul Hastings' proposed billing rates are appropriate for several reasons. First, at this juncture, it is highly speculative whether Paul Hastings will be able to collect any compensation awarded by the Court. In the Application, Paul Hastings has stated it will not seek to have its fees paid out of the \$25 million liability proceeds of that certain liability insurance policy that the Debtor maintains with XL Insurance Company Ltd. Further, there is no carve-out from the collateral of the Federal Railroad Administration or other secured creditors for the fees of the Committee's professionals. Thus, the ability of Paul Hastings to actually receive any compensation is dependent on whether the parties in this case will be able to increase the assets

of the estate such that Paul Hastings may be paid. Is it this uncertain nature of Paul Hastings' retention that makes this case an undesirable one and which would, in fact, justify a much higher hourly rate. Counsel for the Wrongful Death Claimants chooses to ignore the realities of the case and instead selectively focuses only on Mr. Fong's customary rates. However, the appropriateness of Paul Hastings' proposed billing rates is buttressed by Mr. Despins' voluntary agreement to charge half his customary hourly rate. Viewed as a whole, Paul Hastings' attorneys are providing a discount from their customary rates even though there is a possibility that the Firm may not be compensated at all in this case.

16. Second, this case is a multi-layered cross-border mass tort case involving litigation in both the United States and Canada. Mr. Despins is admitted to practice in both jurisdictions. Thus, the hiring of Paul Hastings enabled the Committee to be involved in the CCAA Proceedings without the expense of hiring local Canadian counsel. Mr. Despins is also fluent in French, which is the native language spoken by all members of the Committee. Accordingly, Paul Hastings' proposed rates are appropriate in light of the expertise of Paul Hastings' attorneys and the Firm's willingness to represent the Committee without certainty of compensation. *See e.g., In re RFS Ecusta, Inc.*, 2008 U.S. Dist. LEXIS 18919, at *6 (W.D.N.C. Feb. 19, 2008) (finding the New York billing rate charged by bankruptcy counsel was proper and appropriate because, among other things, had counsel failed, "they would have been paid nothing for their accrued fees and they would not have been reimbursed hundreds of thousands of dollars of their own funds which they advanced to the pay the required ongoing expenses of the litigation.").

WHEREFORE, the Committee respectfully requests that the Court enter an order (i) overruling the Objection, (ii) granting the Application and (iii) granting such other relief as this Court may deem just and proper.

Dated: February 10, 2014

Respectfully submitted,

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Proposed Co-counsel to the Official Committee of Victims

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE**

In re:

**MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.,**

Debtor.

Chapter 11

Case No. 13-10670 (LHK)

CERTIFICATE OF SERVICE

I, Richard P. Olson, hereby certify that I am over eighteen years old and caused true and correct copies of the following motion to be served electronically upon all interested parties as set forth in the ECF list on February 10, 2014:

- Response of Official Committee of Victims to Objection of Wrongful Death Claimants to Committee's Motion Seeking to Employ and Retain Paul Hastings LLP as Counsel, Effective as of December 10, 2013 [Docket No. 630]

Dated: February 10, 2014

s/ Richard P. Olson _____

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