

**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 (I) OBJECTION TO WRONGFUL DEATH CLAIMANTS'
MOTION TO DETERMINE COMPLIANCE WITH FED. R. BANKR. P. 2019 AND (II)
REQUEST FOR SANCTIONS**

Robert J. Keach, the chapter 11 trustee, hereby objects to the Wrongful Death Claimants' Motion to Determine Compliance with Fed. R. Bankr. P. 2019 [D.E. 762] (the "Motion"). The Motion seeks an order declaring that the self-titled "Unofficial Committee of Wrongful Death Claimants" has remedied its failures to comply with Rule 2019.¹ The Motion should be denied, because—somewhat stunningly under the circumstances—the Unofficial Committee has not corrected its failures. Further, the Trustee requests that this Court award attorney's fees and costs against counsel to the Unofficial Committee pursuant to 28 U.S.C. § 1927. In support of this objection, the Trustee states as follows:

The Court conducted a hearing on March 12, 2014 at which time the Court determined that the Unofficial Committee and its counsel failed to comply with Rule 2019. In response to the Court's order [D.E. 753] (the "2019(e) Order"), the Unofficial Committee filed three things:

- a. Second Amended Verified Statement of Bankruptcy Counsel Concerning Representation of Wrongful Death Claimants As Required by Fed. R. Bankr. P. 2019 [D.E. 754] (the "Third Rule 2019 Statement");
- b. Declaration of Ted A. Meyers, Esq. [D.E. 754-1] (the "Meyers Declaration"); and

¹ Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Chapter 11 Trustee's Motion for an Order (I) Determining that the Unofficial Committee of Wrongful Death Claimants Failed to Comply with Fed. R. Bankr. P. 2019 and (II) Imposing Sanctions for such Failure [D.E. 667] (the "2019(e) Motion").

c. Declaration of Mitchell Toups, Esq. [D.E. 756] (the “Toups Declaration”).

After the Third Rule 2019 Statement, the Meyers Declaration and the Toups Declaration were filed, the Unofficial Committee filed the Motion.

A. The Third Rule 2019 Statement Fails to Disclose the Authority Given to Murtha, GMM, the Group, or the Committee to Act on Behalf of Creditors.

The Meyers Declaration provides that:

All of the Wrongful Death Claimants have executed engagement letters authorizing the Law Firms to take all necessary action to investigate and to prosecute any and all claims for personal injuries and/or death arising from the Derailment.

Meyers Declaration, at ¶ 3. The Meyers Declaration does not indicate whether there is one engagement letter signed by forty estate representatives, whether there are forty engagement letters, or some other number of engagement letters. The Toups Declaration contains a similar statement with respect to eleven of the wrongful death claimants. *See* Toups Declaration, at 3. The Third Rule 2019 Statement—presumably on the veracity of the Meyers Declaration and the Toups Declaration—recites that personal injury counsel is authorized, pursuant to engagement agreements, “to take all necessary action to investigate and to prosecute any and all claims for personal injury and/or death arising from the Disaster.” Third Rule 2019 Statement, at ¶ 2.

There is no engagement letter attached to the Meyers Declaration. There is no engagement letter attached to the Third Rule 2019 Statement. Given the concerns expressed by the Court during the hearing on March 12, it is difficult to fathom how the Unofficial Committee can contend that it has now complied with Rule 2019 when it has admitted the existence of multiple engagement letters but failed to provide them. *See* Fed. R. Bank. P. 2019(c)(4). Contrary to prior representations made by Murtha and GMM, this is not a situation where there is no instrument evidencing the authority of the “entity, group, or committee to act on behalf of

creditors” Id. Two declarations signed under oath inform the Court that there are engagement letters, yet those engagements letters are not provided.

Instead of providing the engagement letters, the Unofficial Committee relies on the “Letter Agreement,” which was filed with the Court before the March 12 hearing, with respect to Rule 2019(c)(4). *See Motion*, at ¶ 5. In particular, the Third Rule 2019 Statement alleges that “[t]here is no written instrument concerning authorization of Bankruptcy Counsel, the Group or the Committee except for the Letter Agreement.” Third Rule 2019 Statement, at ¶ 7. There is no way to reconcile this statement in the Third Rule 2019 Statement with prior representations to the Court on this point. In particular, Murtha and GMM represented that “[t]here is no written instrument concerning authorization of the Unofficial Committee to act on behalf of any party in interest.” *See Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019 [D.E. 388]* at ¶ 3. That is a startling lack of candor given the now-confirmed existence of engagement letters allegedly authorizing personal injury counsel to take a broad range of action, including retaining bankruptcy counsel who suggested that an unofficial committee be formed.

In any event, the Letter Agreement, standing alone, does not answer the authority question; if it had, the Court would not have entered the 2019(e) Order. The Court directed the Unofficial Committee and their counsel to disclose evidence of the source and scope of authority provided to counsel, yet the Third Rule 2019 Statement fails to do that. For these reasons, the Court should deny the Motion.

B. As a Result of Continued Non-Compliance, Sanctions should be Imposed and the Trustee should be Awarded Attorneys’ Fees and Costs.

In the event of non-compliance, Rule 2019 provides the Court with great latitude in imposing sanctions. The Court may:

- (A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;
- (B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received the entity, group, or committee; or
- (C) grant other appropriate relief.

Fed. R. Bankr. P. 2019(e)(2) (emphasis added). Rule 2019 squarely incorporates the Court's inherent power to award attorney's fees and costs pursuant to 28 U.S.C. § 1927. Section 1927 provides that:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Rule 2019's requirements are plain and clear. The Unofficial Committee and their counsel have had months to comply with Rule 2019. They have been ordered to do what the rule requires them to do. Yet they persist in their failures. As a result of these failures, the Trustee was forced to expend time and valuable estate resources filing and prosecuting the 2019(e) Motion. The 2019(e) Order specifically prohibited the Unofficial Committee or their counsel from participating in this case until they complied with Rule 2019. That order also set a hearing on any attempted compliance with Rule 2019 for April 8, 2014. Nevertheless, the Unofficial Committee filed a response to the Trustee's bar date motion (even though that motion had already been granted) in violation of the Rule 2019(e) Order. The Trustee again had to spend time and money defending the response and related frivolous motions for emergency hearings.

The Third Rule 2019 Statement still fails to comply with Rule 2019 and does not even remotely address any of the points raised by the Court at the March 12, 2014 hearing. The Trustee, yet again, is forced to spend time and money to defend the Motion and a motion for

emergency hearing that lacks any emergency basis or relation to the Motion. This is precisely the circumstance envisioned by section 1927. *See* Empresas Omajede, Inc. v. Bennazar-Zequeira, 213 F.3d 6, 9-10 (1st Cir. 2000) (finding that award of attorney's fees and costs was justified under 28 U.S.C. § 1927 where appellants frivolously multiplied proceedings "at a cost of considerable time and money to [Appellee] as well as to the courts."); Anderson v. McGowan (In re Anderson), 128 B.R. 850, 856-58 (D.R.I. 1991) (awarding attorney's fees and costs because attorney did not act reasonably in his inquiry into the law and acted vexatiously by filing an appeal that lacked legal support); and Benson v. Cortelleso (In re Cortelleso), 2012 WL 768153, *1, 2-3 (Bankr. D.R.I. March 8, 2012). For these reasons, the Court should continue to prohibit the Unofficial Committee and their counsel from participating in the case until they have complied with Rule 2019 and should award sanctions in the amount of the Trustee's attorney's fees and costs incurred as a result of the Unofficial Committee's conduct.

WHEREFORE, for the reasons set forth in this Objection, the Trustee respectfully requests that the Court (i) deny the Motion; (ii) prohibit the Unofficial Committee and its counsel from being heard or intervening in the case pending their compliance with Rule 2019; and (iii) award the Trustee his attorney's fees and costs.

Dated: March 18, 2014

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

/s/ Robert J. Keach

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CERTIFICATE OF SERVICE

I, Karla M. Quirk, being over the age of eighteen and an employee of Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that, on March 18, 2014, I filed the *Chapter 11 Trustee's (I) Objection to Wrongful Death Claimants' Motion to Determine Compliance with Fed. R. Bankr. P. 2019 and (II) Request for Sanctions* via the Court's CM/ECF electronic filing system and served upon all parties receiving notice through the CM/ECF system.

Dated: March 18, 2014

/s/ Karla M. Quirk
Karla M. Quirk, Paralegal

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