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 VICTIMS' OBJECTION TO CHAPTER 11 TRUSTEE'S MOTION ALLEGING NON-COMPLIANCE WITH FED. R. BANKR. P. 2019

The Unofficial Committee of Wrongful Death Claimants (the "Committee"), consisting of representatives (the "Wrongful Death Victims") of the estates of the 47 victims of the massive explosion in Lac-Mégantic, Quebec, from the derailment of a train operated by the Debtor (the "Derailment"),[1] hereby object to the Motion filed by the Chapter 11 Trustee 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 Failure to Comply [Docket No. 667] (the "2019 Motion"). Filed months after the submission of the Committee's initial Rule 2019 statement, the 2019 Motion is a thinly veiled attempt by the Trustee to forage information regarding client communications and fee arrangements for use in the Trustee's campaign to portray his unprovoked war on the Wrongful Death Victims as being somehow their fault for having engaged counsel, or the fault of their counsel for being engaged on a contingent-fee basis. Because the Committee's disclosures fully comply with Fed. R. Bankr. P. 2019 ("Rule 2019"), the Trustee's motion should be denied.

[1] The victims and the representatives of their estates are listed in the Amended Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019 filed by the Committee's counsel on January 28, 2014 [Docket No. 599]. Solely for the avoidance of doubt as to standing, this motion is filed on behalf of all members of the Committee as well as the Committee itself.

ARGUMENT

1. Rule 2019 provides, in relevant part, that in a chapter 11 case, "a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents…multiple creditors or security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another." Fed. R. Bankr. P. 2019. It is self-evident that the Committee is covered by the rule because it consists of non-affiliated creditors – namely, the Wrongful Death Victims – acting in concert to advance their common interests.

2. The purpose of the rule is straightforward: "[T]o advise the court that counsel is participating in the case and has the authority of its multiple clients to do so." In re ACandS, Inc., 462 B.R. 88, 96 n.8 (Bankr. D. Del. 2011). Courts have cautioned that "[r]ule 2019 is not a discovery tool but is to ensure that plans are negotiated and voted on by those authorized to act on behalf of real parties in interest in a case." In re Kaiser Aluminum Corp., 327 B.R. 554, 559 (D. Del. 2005). The Trustee has raised no basis whatsoever to doubt the authorization of the undersigned counsel to appear on behalf of the Wrongful Death Victims.

3. Rule 2019 was amended in 2011 to make it clear that the rule applies to *ad hoc* committees such as the Committee, and to address various controversies – none of them pertinent to this case – that had arisen in cases with complex capital structures where claims trading had occurred or was continuing during the Chapter 11 case. One question whether courts could or should compel disclosure of the acquisition price of claims held by members of a committee or other group acting in concert. The amendment resolved this issue in the negative by not requiring disclosure of acquisition price. Another issue was the question of whether the rule did or could compel disclosure of ownership of claims at multiple tiers of the capital

structure. The amendment resolved this issue in favor of requiring disclosure of any "disclosable economic interest" – broadly defined to cover "any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case." Fed. R. Bankr. P. 2019(a)(1). The amendment was drafted to capture holdings such as "short positions, credit default swaps, and total return swaps" not previously covered by the rule. 2011 Advisory Committee Notes to Fed. R. Bankr. P. 2019.

4. Fascinating though the foregoing issues might be, they have nothing to do with this case. It was clear even prior to the 2011 amendment that Rule 2019 applies to the Wrongful Death Victims as non-affiliated clients of the same law firms pursuing a coordinated effort in a Chapter 11 case. But neither before nor after the amendment are the required disclosures complicated. The Debtor does not have a complex capital structure. The Wrongful Death Victims are not buying and selling derivatives. The "economic interest[s] that could affect the legal and strategic positions a stakeholder takes in a . . . chapter 11 case" are straightforward – each of the Wrongful Death Victims lost a loved one in the Derailment tragedy – and have been fully disclosed. Undoubtedly certain of the Wrongful Death Victims also have claims against the Debtor for property damage, business interruption, and the like.[2]

What Rule 2019 Requires

5. The pertinent information required to be disclosed under Rule 2019(c) consists of four items:

> (1) the pertinent facts and circumstances concerning:
>
> (A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or

[2] This, too, has been disclosed. See ¶ 6 below. The undersigned counsel do not represent Wrongful Death Victims concerning these other claims.

(2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:
  (A) name and address;
  (B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and
  (C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed;
(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code:
  (A) name and address; and
  (B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and
(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

Fed. R. Bankr. P. 2019(c). Proper disclosure of all four items has been made.

The Rule 2019 Statements Complied with the Rule

6. The Committee has filed two statements under Rule 2019. On October 16, 2013, the Committee filed a Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019 [Docket No. 388] (the "Initial 2019 Statement") on behalf of the estate representatives of 42 out of 47 Wrongful Death Victims it represented at the time. On January 28, 2014, the Committee filed an Amended Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants As Required by Fed. R. Bankr. P. 2019 [Docket No. 599] (the "Amended 2019 Statement") on

behalf of the estate representatives of 47 Wrongful Death Victims.[3] Apart from reflecting addition of five clients, the later statement is the same as the initial statement, except for adding (at paragraph 3) that "[i]t is possible that certain of the Wrongful Death Claimants and/or certain beneficiaries of the decedents' estates that they represent hold other types of claims against the Debtor's estate, such as business interruption and property damage."

7. The first three items of Rule 2019(c), which are interrelated and somewhat duplicative, consist of the following:

- *Name and address of each Committee member:* Listed in exhibit to each statement.

- *Name and address of each creditor represented by the Committee:* Listed in exhibit to each statement.

- *Description of facts and circumstances of Committee formation:* "The Unofficial Committee was formed in response to statements of this Court at the hearing of September 13, 2013, on whether an official creditors' committee should be formed. Daniel C. Cohn was engaged as bankruptcy counsel and GMM[4] as local bankruptcy counsel for the Unofficial Committee, by the Wrongful Death Claimants' personal injury counsel, The Webster Law Firm of Houston, Texas; Meyers & Flowers, LLC of St. Charles, Illinois and Weller, Green, Toups & Terrell LLP of Beaumont, Texas (collectively, "Personal Injury Counsel"). Personal Injury Counsel had earlier engaged Murtha[5] and GMM to provide services related to the Debtor's Chapter 11 case on behalf of all of their respective clients having wrongful death claims against the Debtor."

- *For an "entity" (here, the law firms of Mr. Cohn and Mr. Kurr), the pertinent facts and circumstances of the employment of the entity, including at whose instance the employment was arranged:* "Daniel C. Cohn was engaged as bankruptcy counsel and GMM as local bankruptcy counsel for the Unofficial Committee, by the Wrongful Death Claimants' personal injury counsel . . . [who] had earlier engaged Murtha and GMM to provide services related to the Debtor's Chapter 11 case on behalf of all of their respective clients having wrongful death claims against the Debtor."

[3] For the Court's convenience, copies of the Initial 2019 Statement and the Amended 2019 Statement are attached as Exhibits A and B respectively.

[4] Earlier defined as Gross, Minsky & Mogul, P.A.

[5] Earlier defined as Murtha Cullina LLP.

- *Nature and amount of the Committee members' disclosable economic interests:* "The Wrongful Death Claimants hold unliquidated wrongful death claims against the Debtor's estate arising from the Disaster. It is possible that certain of the Wrongful Death Claimants and/or certain beneficiaries of the decedents' estates that they represent hold other types of claims against the Debtor's estate, such as business interruption and property damage. Except as described in this paragraph, the Wrongful Death Claimants hold no disclosable economic interest in relation to the Debtor."

- *Nature and amount of disclosable economic interests of an "entity" (here, the law firms of Mr. Cohn and Mr. Kurr):* "Murtha and GMM do not possess any claims against or interests in the Debtor."

- *With respect to each Committee member, the calendar quarter and year in which each disclosable economic interest was acquired:* "[T]he Unofficial Committee of Wrongful Death Claimants . . . consist[s] of the representatives the [*sic*] estates of the 47 victims of the massive explosion in Lac-Mégantic, Quebec, on July 6, 2013," that being, of course, the "date of acquisition" (in the sterile, for this context, language of Rule 2019) of each disclosable economic interest acquired within a year before the chapter 11 petition.

8. Finally, the fourth item required by Rule 2019(c) consists of "a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders." The Rule 2019 statements recited: "There is no written instrument concerning authorization of the Unofficial Committee to act on behalf of any party in interest."

9. One "entity," namely Murtha Cullina LLP, now has a written instrument concerning authorization to act for the Wrongful Death Victims and for the Committee. The letter agreement, which was executed between February 25 and March 2, 2014, is attached as Exhibit A to the Supplement to Amended Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019, of even date herewith [Docket No. 710].

The Trustee's Complaints

10. In the 2019 Motion, the Trustee argues that the Rule 2019 Statements do not satisfy the requirements of the rule because they "suggest that Murtha and GMM are

representing lawyers, not individuals with claims against MMA's estate." Rule 2019 Motion ¶ 15 (emphasis in original). This argument wholly ignores the first paragraph of the initial Rule 2019 Statement:

> ***Murtha and GMM are counsel to the Unofficial Committee of Wrongful Death Claimants*** (the "Unofficial Committee") in this case, consisting of the representatives the estates of 42 of the 47 victims of the massive explosion in Lac-Mégantic, Quebec, on July 6, 2013, resulting from derailment of the Debtor's train (the "Disaster") as identified in Exhibit A to this Statement (the "Wrongful Death Claimants"), ***and to the Wrongful Death Claimants themselves***.

(emphasis added). The fact that the firms of Murtha and GMM were engaged by the Wrongful Death Claimants' personal injury lawyers to serve as bankruptcy counsel for the Wrongful Death Claimants and the Committee – and, for that matter, that Murtha takes instructions from the personal injury lawyers as lead counsel to the Wrongful Death Claimants – does not change the identity of the clients being represented. If that were the case, then the co-counsel relationships of nearly every bankruptcy lawyer in this case with the non-bankruptcy lawyers who engaged them would be subject to doubt.

11. The Trustee also complains that the Rule 2019 Statements do not provide "the necessary quantum of information" relating to the formation of the Committee, in that they fail to identify "the name of each entity at whose instance the group or committee was formed for whom the group or committee has agreed to act." Rule 2019 Motion ¶ 19. The Trustee offers no basis for his assumption that there exist additional facts regarding the Committee's formation beyond those plainly stated in the Rule 2019 Statements.

12. The Trustee admits that what he is really after are details of contingent fee arrangements between the Wrongful Death Claimants and their counsel. Rule 2019 says nothing about disclosure of fee arrangements. The only case cited by the Trustee where disclosure of fee

arrangements was mandated, Baron & Budd, P.C. v. Unsecured Asbestos Claimants Committee (In re Congoleum Corp.), 321 B.R. 147 (D.N.J. 2005), is the exception that proves the rule. Facts before the bankruptcy court – not speculation by a trustee – pointed toward "abuse of fee sharing relationships, involving attorneys in connection with the prepetition process, to the end of conferring preferential security interests on the Appellants' clients" (the Appellants being the four law firms that were resisting disclosure). Id. at 160. The bankruptcy court characterized "the factual basis for ordering these disclosures as 'unprecedented.'" Id. at 166. While the District Court was perhaps deliberately vague, its concern and that of the bankruptcy judge appeared to be that a cabal of asbestos personal injury lawyers, akin to the bankruptcy rings of old, brought thousands of asbestos cases, traded referrals back and forth, and in Congoleum had muscled the debtor into granting security interests to creditors represented by certain favored law firms.

13. Here the Trustee points to no facts suggesting any sort of abuse, let alone abuse of such "unprecedented" magnitude as to have led the Congoleum court to stretch Rule 2019 to (likely beyond) its limits. The Trustee simply evinces a general prejudice against contingent fee lawyers. Even that does not explain just what is wrong with poor people, who cannot afford to hire lawyers on an hourly basis, engaging counsel on a contingent fee basis.

14. In general a contingent fee arrangement aligns the lawyer's interest with the client's, because the lawyer does not get paid unless the client recovers. In this case the interests of the Wrongful Death Victims and their personal injury lawyers are certainly aligned, as the Trustee admitted in a recent pleading where he described the Wrongful Death Victims' proposed chapter 11 plan as "designed to maximize the recovery [of the Wrongful Death Victims] and the contingent fee attorneys representing such victims." Trustee's Objection to the Disclosure

Statement Proposed by the Committee filed on February 25, 2014 [Docket No. 687], at page 26. Along similar lines, the Trustee characterizes the Wrongful Death Victims' lawyers as engaging in "a litigation tactic designed to ensure that the contingency fee lawyers can litigate the WD/PI Claims in Cook County, Illinois" (id. at 27) where, of course, the Wrongful Death Victims have the potential to recover from non-debtor parties many times the amount at which the Trustee seeks to cap their recovery through application of Maine or Quebec law.

15. Zealous representation of clients is an ethical obligation – more than that, a badge of honor – for any attorney. It is certainly not an abuse that should persuade this Court to grant the Trustee's request for unusual, unjustified and invasive disclosure, never mind sanctions and side-tracking of the chapter 11 plan that, however abhorrent to the Trustee, represents the Wrongful Death Victims' last best hope for justice.

Dated: March 5, 2014

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