

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MAINE

<hr/>		)	
In re		)	
		)	
MONTREAL MAINE & ATLANTIC		)	CHAPTER 11
RAILWAY, LTD.		)	CASE NO. 13-10670-LHK
		)	
	Debtor	)	
<hr/>		)	

**WRONGFUL DEATH CLAIMANTS’ OPPOSITION TO MOTION OF OFFICIAL COMMITTEE OF VICTIMS SEEKING MODIFICATION OF COMMITTEE APPOINTMENT ORDER TO AUTHORIZE COMMITTEE TO FULLY PARTICIPATE IN WRONGFUL DEATH PROCEEDINGS PENDING BEFORE MAINE DISTRICT COURT**

The representatives of the estates of the victims (the “Wrongful Death Claimants<sup>1</sup>”) of the massive explosion in Lac-Mégantic, Quebec, from the derailment of a train operated by Montreal Maine & Atlantic Railway, Ltd. (the “Debtor”) with civil actions against parties other than the Debtor (the “Illinois Actions”) hereby file the following Opposition to the Motion of Official Committee of Victims Seeking Modification of Committee Appointment Order to Authorize Committee to Fully Participate in Wrongful Death Proceedings Pending before Maine District Court (the “Motion”), stating as follows:

**Brief Background**

On July 6, 2013, a train operated by the Debtor and carrying twenty carloads of volatile petroleum products derailed in Lac-Mégantic, Quebec, causing several massive explosions which killed 47 people. Starting in late July 2013, certain Wrongful Death Claimants filed civil actions

---

<sup>1</sup> The individual Wrongful Death Claimants on whose behalf this opposition is filed are those individuals named in the Amendment to Wrongful Death Claimants’ Motion to Bar Trustee’s Prosecution of Derailment Claims against Non-Debtor Defendants, Docket No. 800.

against the Debtor and nine other defendants in the Circuit Court of Cook County, Illinois. Following the filing of Debtor's bankruptcy petition, the Wrongful Death Claimants dismissed Debtor from cases pending in Cook County.

On September 13, 2013, the Trustee asked the United States District Court for the District of Maine ("District Court") for an order transferring the Wrongful Death Claimants' suits to the District Court from the United States District Court for the District of Illinois pursuant to 28 U.S.C. § 157(b)(5). Following briefing and hearing on the motion, the District Court granted the Trustee's motion. Pursuant to the District Court's order, the remaining 19 Illinois Actions were transferred to the District Court.

Following the denial of a motion to reconsider, two of the Wrongful Death Claimants, Annick Roy and Marie-Josée Grimard<sup>2</sup> filed a Notice of Appeal with the United States Court of Appeals for the First Circuit. (Docket No. 1:13-MC-00184-NT at 235.) The appeal remains pending.

Concurrently with the Notice of Appeal, Ms. Roy and Ms. Grimard filed a Motion for Stay of Proceedings Pending Appeal. (Id. at 236.) Although the parties initially disagreed on some aspects of the stay, the District Court ultimately entered a Consent Order Staying Proceedings Pending Appeal in 1:13-MC-00184-NT. (Id. at 253.) The actions subject to the stay remain stayed subject to the terms and conditions set forth therein.

---

<sup>2</sup> On March 24, 2014, 16 similar cases were voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). The Defendants to the dismissed actions have, however, disputed the effectiveness of the dismissals.

### Argument

**1. The Motion filed by the Official Committee of Victims motion is premature.**

The timing of the Motion filed by the Official Committee of Victims (the “Committee”) is curious. As noted above, the Wrongful Death Proceedings that have been transferred to the District Court were stayed, by agreement, on June 17, 2014. The stay will remain in place until the earliest of:

(i) the entry of an Order of [the District Court] dissolving the stay, (ii) the final disposition of the appeal taken by the Movants, inter alia, of the Section 157(b)(5) Transfer Order currently pending before the United States Court of Appeals for the First Circuit, Case No. 14-1485, and (iii) 30 days after notice is filed on [the District Court’s] docket by any of the parties whose express consent the entry of this Order is premised on, provided, however, that termination of the stay pursuant to (iii) of this Paragraph shall be without prejudice to the rights of any party to seek to re-impose the stay and the [the District Court] to grant such request.

(Docket No. 1:13-MC-00184-NT at 235.)

Accordingly, to the extent that the Committee may contemplate filing a motion in the District Court or otherwise “tak[ing] any action(s) in the Wrongful Death Proceedings pending before the Maine District Court,” no such filings or actions are permissible at this point.

Perhaps the parties will reach a global settlement with Debtor and the other Defendants in the Wrongful Death Proceedings; perhaps the First Circuit will vacate the decision of the District Court. In either event, then (like now) there would be no proceedings in the District Court in which the Committee could take any action.

In light of the stay that is in place and given the uncertainty surrounding the future course of the Wrongful Death Proceedings in the District Court, it would be premature for this Court to issue any order authorizing the Committee to take any action therein; there is, and may

be, no matter in which any action can be taken.

For this reason, the Wrongful Death Claimants ask that this Court deny the Motion.

**2. The Committee cannot participate in the Wrongful Death Proceedings in District Court under 11 U.S.C. § 1103(c)(5).**

In the event that this Court decides that the Motion is not premature, the Motion must be denied, with prejudice, because it asks this Court to grant authority that is not allowed under 11 U.S.C. § 1103(c)(5).

As the Committee notes, this Court's Order Authorizing the Appointment of a Victims' Committee (the "Order"), authorized the appointment of the Committee. (Docket No. 391.) The Committee, however, ignores the reason for its existence.

In the Order, this Court noted that the motion seeking the appointment of the victims' committee was "grounded on § 1102(a)(2), which allows the court to order the appointment by the United States Trustee of 'additional committees of creditors or of equity security holders . . . to assure adequate representation . . . .' See 11 U.S.C. § 1102(a)(2)." (Order at 2.)

After some discussion about whether the appointment was necessary "to assure adequate representation of the proponents," (Order at 2-3), this Court ultimately concluded that the Committee had met its burden of establishing "the need of representation in the formulation of a plan which will determine the extent to which victims will share in any distribution." (Order at 3.) This Court also concluded that the following circumstances warranted the exercise of this Court's discretion to appoint such a committee:

A victims' committee will (1) provide an extra-judicial forum for victims with claims of different kinds to develop a common approach to case administration, the development of a plan and any issue in the case; (2) allow victims to speak with one voice when appropriate on any issue in the case without hampering the rights of any individual party-in-interest; (3) give official standing and voice to

victims who may be without one in these proceedings; and (4) give the trustee and other parties a point of contact and negotiating partner on a plan and any other issue in the case.

(Order at 3.) Finally, this Court ordered that the Committee “shall not . . . be empowered to perform any duties beyond those enumerated in § 1103(c)(1) and (3) without specific leave of court.” (Order at 4.)

Now that it exists for the reasons set forth in the Order, the Committee seeks more power because it “is considering various strategies with respect to the Wrongful Death Proceedings that will benefit victims, such as the filing of a motion before the Maine District Court.” (Docket No.1077 at 2.) Previously, however, the Committee sought the appointment to give the victims “a representative to negotiate on their collective behalf and provide vital information to them regarding the progress of this case,” and to “work with ‘representatives of various categories of claimants to develop an efficient process for liquidating claims and distributing funds.” (Docket No. 127 at 7.) Although the Wrongful Death Proceedings were then pending (albeit not in Maine) at the time of the Motion of Informal Committee of Quebec Claimants for Appointment of Creditors’ Committee pursuant to [11 U.S.C. §] 1102(a)(2), the Committee did not then ask this Court for any authority vis-à-vis the pending state-court tort litigation.

A creditors’ committee, like the Committee here, is a creature of statute that derives its power from the Bankruptcy Code, specifically Section 1103. Although the Committee does not expressly base its current request to participate in the Wrongful Death Proceedings on Section 1103(c)(5)—indeed, the Committee cites **no** authority in support of its request—it is plain that the catchall provision of Section 1103(c) is the only arguable basis on which the Committee’s request could lay.

Section 1103(c)(5) provides that a committee appointed under Section 1102 may “perform such other services as are in the interest of those represented.” As a matter of statutory construction, however, Section 1103(c)(5) does not grant a committee power beyond its participation in the bankruptcy case. See 7 Collier on Bankruptcy § 1103.05[1][f] at 1103-24 (“A committee should be limited, however, to taking actions in connection with the case.”). At least one bankruptcy court has held that because the powers contained in Section 1103(c)(1)-(4) all relate to committee powers that can be exercised within the chapter 11 case in which the committee was created, then so too is the power contained in Section 1103(c)(5). See In re Dow Corning Corp., 199 B.R. 896, 901-02 (Bkrtcy. E.D.Mich. 1996) aff’d 1998 WL 180596 (6th Cir. 1998) (unpublished) (applying principle of eiusdem generis to interpretation of Section 1103(c)(5), which means “where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.”).<sup>3</sup>

Although not always invoking the principle of statutory construction set forth in In re Dow Corning, other courts have rejected proposed committee activity that that does not relate directly to the bankruptcy or to the formulation of a plan. For instance, in In re Eagle–Picher

---

<sup>3</sup> The Bankruptcy Court gave an example of how Section 1103(c)(5) would function under its construction:

Therefore, a reasonable construction of § 1103(c)(5) is that a committee can perform such other services within the bankruptcy case as are in the interest of those represented. For example, § 1103(c) does not in so many words authorize a committee to make a motion to dismiss the case or to convert the case to chapter 7. Nor does it say that a committee may oppose a cash collateral agreement, or for that matter, any motion brought under § 362, § 363, § 364 or § 365. But these must be the kinds of “other services” that § 1103(c)(5) contemplates.

199 B.R. at 902 (emphasis in original).

Industries, Inc., the court noted that Section 1103 “does not grant a committee blanket authority to represent its constituency in matters outside and independent of the bankruptcy case.” 167 B.R. 102, 104 (Bankr.S.D.Ohio 1994) (quoting In re Johns–Manville Corp., 52 B.R. 879, 884 (Bankr.S.D.N.Y.1985), aff'd, 60 B.R. 842 (S.D.N.Y.1986), rev'd on other grounds, 801 F.2d 60 (2d Cir.1986)). From there, the court held that an equity committee had exceeded its statutory authority by opposing delisting of the debtor's stock before the board of directors of the New York Stock Exchange because, even if this action were in the interest of the committee's constituents, § 1103 does not grant committees such extensive authority to represent its constituents in matters beyond the bankruptcy proceedings.

The Sixth Circuit Court of Appeals, in an unpublished decision affirming the bankruptcy court's decision in In re Dow Corning, Corp., cited above, concluded that legislative lobbying was not among the activities authorized by § 1103(c)(5), even where it would benefit the committee's constituents. 1998 WL 180596 \* 4 (6th Cir. 1998) (unpublished); see also Official Committee of Unsecured Creditors of WorldCom, Inc. v. S.E.C., 467 F.3d 73, 79-80 (2nd Cir. 2006) (questioning committee's authority to appeal SEC litigation to which it was not a party).

It is apparent here that the activities for which the Committee seeks authorization—namely the “authority to file a motion(s) or take an action(s) in the Wrongful Death Proceeding” (Docket No. 1077 at 8)—is the same type of action (i.e., activities that are outside the bankruptcy) that the other courts have said exceeds a committee's statutory authority. It is also fair to question whether further action in the Wrongful Death Proceedings by the Committee will really benefit its constituents. Increased Committee activity will increase costs to an estate whose only real asset is an insurance policy, thereby decreasing the funds available for priority creditors,

some of whom the Committee purports to represent. Those constituents are represented by counsel in the Wrongful Death Proceedings and the Debtor is not a party to those lawsuits. It is difficult to discern any benefit that would inure if the Committee is allowed to participate in the Wrongful Death Proceedings. Indeed, the Committee, in its motion, does not tell the Court either what activities in which it wants to engage or how those activities would benefit its constituents.

For the reasons given above, this Court should deny the Committee's motion.

**3. This Court should not give the Committee unlimited authority to "fully participate" in the Wrongful Death Proceedings.**

The Committee, in its proposed order, asks this Court for authorization "to file any motion(s) and to take any action(s) in the Wrongful Death Proceedings pending before the Maine District Court," subject only to the District Court's orders with "respect to the propriety or merits of any such motion(s) or action(s)." (Docket No. 1077 at 20-21.) The requested authorization stands in stark contrast to the second footnote in the Committee's motion, which states that the Committee "has no intention of getting involved in the litigation of the individual claims asserted in the Wrongful Death Proceedings (or in any discovery with respect to such claims)." (Docket No. 1077 at 2 n.2.)

The foregoing, of course, begs the question of what exactly is the Committee's intention with respect to the authorization it is seeking. The Committee only, obliquely, cites a possible desire to file motions or take actions in the Wrongful Death Proceedings. It gives this Court nothing concrete.

Despite its protestations to the contrary, the Committee is seeking a "blank check" that



would allow it to “fully participate,” for some unexplained reason, in the Wrongful Death Proceedings. As noted, the plaintiffs are represented by counsel in the Wrongful Death Proceedings. Without some further elaboration as to what the Committee intends to do or hopes to accomplish through its participation in the Wrongful Death Proceedings, its request for authorization should be denied.

**4. The Committee is asking this Court to rule on its ability to participate in the Wrongful Death Proceedings.**

Through its motion, the Committee asks this Court for its blessing “to ensure that that the Committee may proceed before the Maine District Court.” (Docket No. 1077 at 8.) To the extent that this Court grants the Committee with authority to file motions or take action in the Wrongful Death Proceeding, it should make clear that such authorization does not constitute any opinion (or binding authority) from this Court that the Committee has standing to participate in the Wrongful Death Proceeding or that intervention under Fed. R. Civ. P. 24 is otherwise proper. Questions of intervention and standing are for the District Court to fully answer in the first instance because those answers directly implicate the litigation before it.

However, it appears that the Committee believes that the District Court should only be able to, later, decide whether its motions or actions have “any legal merit”—not whether it can participate in the cases in the first instance. Such an order would violate principles of comity.

Thus, to the extent that this Court grants the Committee’s motion, all issues such as whether the Committee has standing to participate and/or whether it can intervene in the Wrongful Death Proceedings should be reserved for the District Court.

Marie Semie Alliance, *et al.*

By their attorneys,

Date: September 5, 2014

/s/ George W. Kurr, Jr., Esq.

George W. Kurr, Jr., Esq.  
GROSS, MINSKY & MOGUL, P.A.  
23 Water Street, Suite 400  
P. O. Box 917  
Bangor, ME 04402-0917  
Phone: (207) 942-4644 ext. 206  
Fax: (207) 942-3699  
gwkurr@grossminsky.com

/s/ Joseph M. Bethony, Esq.

Joseph M. Bethony, Esq.  
GROSS, MINSKY & MOGUL, P.A.  
Phone: (207) 942-4644 ext. 233  
jmbethony@grossminsky.com

#### CERTIFICATE OF SERVICE

I, George W. Kurr, Jr., Esquire, of the firm Gross, Minsky & Mogul, P.A., attorneys for the Estates of Marie Semie Alliance, et al, Wrongful Death Claimants hereby certify that on September 5, 2014, I electronically filed **WRONGFUL DEATH CLAIMANTS' OPPOSITION TO MOTION OF OFFICIAL COMMITTEE OF VICTIMS SEEKING MODIFICATION OF COMMITTEE APPOINTMENT ORDER TO AUTHORIZE COMMITTEE TO FULLY PARTICIPATE IN WRONGFUL DEATH PROCEEDINGS PENDING BEFORE MAINE DISTRICT COURT** with the Court via the CM/ECF electronic filing system which will send notification of such filing to the attorneys/parties of record who have registered as CM/ECF participants.

/s/ George W. Kurr, Jr., Esq.

George W. Kurr, Jr., Esq.