

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:)
Montreal Maine & Atlantic Railway Ltd.,) Chapter 11
) Case No. 13-10670
Debtor)

ORDER APPROVING EMPLOYMENT

Robert J. Keach, the trustee in this railroad reorganization case has applied to employ Shaw Fishman Glantz & Towbin LLC (“Shaw Fishman”) to represent him for a limited purpose in the U.S. District Court for the District of Northern Illinois. Shaw Fishman began representing the trustee on or about September 11, 2013. The trustee seeks retroactive approval from that date forward. Forty-two wrongful death claimants in the bankruptcy case object to the employment of Shaw Fishman. These claimants have appeared individually and collectively through counsel and have self-designated themselves as the informal committee of wrongful death claimants (the “Group of 42”).¹

Before the commencement of this bankruptcy case, many of the members of the Group of 42 had commenced civil actions in Illinois state court against the debtor and other defendants, including Western Petroleum Corporation and Petroleum Transport Services, Inc. (collectively,

¹ The trustee’s application to employ Shaw Fishman is premised upon 11 U.S.C. § 327(e). As stated by the Group of 42, § 327(e), which contains no disinterested requirement, relates to the employment of an attorney that has represented the debtor. Clearly, (e) does not apply in this instance. The appropriate standard for the employment of Shaw Fishman under these circumstances is contained in 11 U.S.C. § 327(a). Like (e), (a) requires that the professional to be employed hold or represent no interest adverse to the estate; but, additionally, (a) requires that the professional be a disinterested person as defined in 11 U.S.C. § 101(14). This additional requirement appears to be of no consequence here because a disinterested person is one who is not a creditor, equity security holder, or an insider of the debtor; is not and was not, within two years of the bankruptcy, a director, officer, or employee of the debtor; and does not hold a materially adverse interest to estate, its creditors, or equity security holders. See 11 U.S.C. § 101(14). Nothing in this paltry record suggests that Shaw Fishman possesses any of these troublesome attributes. The only question under § 327(a) is: Does Shaw Fishman represent an interest that is adverse to the estate?

the “WPC parties”). These civil actions, which have been removed to the Illinois federal court, arise from the devastation that occurred upon the derailment of a train operated by the debtor in Lac-Megantic, Quebec.

Following the commencement of this bankruptcy case, the debtor was dismissed as a defendant in each civil action. Motions are now pending in the Illinois federal court to remand those civil actions to the state court. The trustee opposes remand. He has asked the U.S. District Court for the District of Maine to transfer the Illinois civil actions to the Maine federal court pursuant to 28 U.S.C. § 157(b)(5).² The trustee has entered an appearance through Shaw Fishman in the Illinois federal court to seek a stay of action on the remand motions until after the trustee’s motion to transfer is decided by the Maine federal court. It is for this limited purpose that the trustee has applied for authority to employ Shaw Fishman. The WPC parties and CIT Group, Inc. have joined the trustee in his efforts to transfer the civil actions to Maine.

Members of the Group of 42 are the parties seeking remand in Illinois and they are the only parties opposing the trustee’s request to employ Shaw Fishman. Specifically, under 11

² 28 U.S.C. §157(b)(5) provides:

The district court shall order that personal injury and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The trustee’s reasons for seeking a transfer of civil actions in which the debtor is not a defendant are unclear. My understanding of § 157(b)(5) is that the Maine federal court is required to apply its bankruptcy jurisdiction under 28 U.S.C. § 1334 to decide whether the wrongful death claims are to be tried in the Maine district court or in the district court in which the claims arose. At this point there are no facts in the record before me pointing one way or the other as to whether the Illinois federal court is the district in which the claims arose. Moreover, the ability of the Maine federal court to exercise its discretion in this regard may not be hampered by the remand of the civil actions to the Illinois state court. Those issues are for the district court.

U.S.C. § 327, they assert that Shaw Fishman represents an interest that is adverse to the estate; that Shaw Fishman is not a disinterested person;³ and that the services to be provided by Shaw Fishman are unnecessary.

The assertion that Shaw Fishman represents an interest that is adverse to the estate stems from attorney Jay Gellar's of counsel relationship with Shaw Fishman. Gellar represents the WPC parties in this bankruptcy case. The WPC parties are defendants in the civil actions pending in Illinois. The Group of 42 suggests that Gellar's undisputed relationship with Shaw Fishman establishes that Gellar's representation of the WPC parties extends to Shaw Fishman. Because the interests of the WPC parties may be adverse to the estate in future litigation, the Group of 42 contends that Shaw Fishman represents interests that are adverse to the estate.

Without making a finding or reaching a conclusion on whether the of counsel relationship between Gellar and Shaw Fishman establishes that Shaw Fishman currently represents the WPC parties in this bankruptcy case, I will assume that to be so. This brings us to the question of whether such representation presents a conflict that would bar Shaw Fishman's employment by the trustee for the limited purpose of pursuing a stay of the remand proceedings in the Illinois federal court.

The Group of 42 offers that Rules 1.7 and 1.10 of the Illinois Rules of Professional Conduct support the conclusion that Shaw Fishman has been and will be engaged in prohibited multiple representation.⁴ I do not draw that conclusion from those rules.

³ Shaw Fishman appears to be disinterested for the reasons discussed in footnote 1.

⁴ The Illinois Rules of Professional Conduct provide:

Rule 1.7. Conflict of Interest: Current Clients

Like the trustee, the WPC parties are seeking a transfer of the Illinois federal cases to Maine, so it appears that they are at one with the estate on that issue. Given the limited purpose

(a) Except as provided in paragraph (b), 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 will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and with former judges, arbitrators, mediators or other third-party neutrals is governed by Rule 1.12.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

of the trustee's request, the Illinois Rules do not restrain Shaw Fishman from representing the estate.

Finally, the Group of 42 argues that employment of Shaw Fishman is unnecessary because the debtor is not a named defendant in any of the cases pending in Illinois. Necessity is not a requirement of § 327(a), though it surely is an element of permissible compensation and reimbursement under 11 U.S.C. § 330. Necessity will be addressed at the appropriate time and nothing in this order will preordain the outcome of a ruling on Shaw Fishman's compensation and expenses. For the moment, I am not going to second guess the trustee's strategy and tactics. He has undertaken a course of action that he deems to be in the estate's best interest. We'll see how it turns out as the pages unfold in the federal district courts of Maine and Illinois.

The trustee also asks that employment of Shaw Fishman be effective retroactive to September 11, 2013. Under D. Me. Local Bankruptcy Rule 2014-2, an application to employ, if filed within 30 days of the commencement of the case, will be effective as of the filing date. Here, the application to employ was filed on September 27, 2013, more than 30 days after the commencement date. Even so, post facto employment may be authorized if "the particular circumstances attendant to the application are sufficiently extraordinary to warrant after-the-fact approval." *In re Jarvis*, 53 F. 3d 416, 420 (1st Cir. 1995). Given the complexity of the case and the limited nature of the proposed engagement, the sixteen days of post facto employment are understandable and permissible.

The application to employ the Shaw Fishman firm is granted, effective September 11, 2013, for the limited purpose of intervening in the Illinois federal actions, if necessary, and appearing before that court to request deferral of consideration of the remand motions until the

Maine District Court has ruled on his § 157(b)(5) motion.

SO ORDERED.

DATED: November 13, 2013

A handwritten signature in black ink, reading "Louis H. Kornreich". The signature is written in a cursive style with a large initial "L".

Louis H. Kornreich, Chief Judge
U. S. Bankruptcy Court

District/Off: 0100-1

User: kford

Date Created: 11/13/2013

Case: 13-10670

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