UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

WHEELING & LAKE ERIE RAILWAY COMPANY'S OBJECTION TO THE TRUSTEE'S MOTION TO APPROVE, AND AUTHORIZE THE TRUSTEE TO ENTER INTO, STIPULATION CONCERNING CARVE-OUT FROM COLLATERAL OF THE FEDERAL RAILROAD ADMINISTRATION PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 506(c), 1163 AND 1165

Now comes the Wheeling & Lake Erie Railway Company ("Wheeling") and objects to the above-referenced Motion (the "Motion"),[1] filed by Robert J. Keach, the chapter 11 trustee in this case (the "Trustee"), seeking authority to enter into a stipulation (the "Stipulation") with the Federal Railroad Administration ("FRA"). This is a partial objection. Wheeling has no objection to the carve-out described in the Stipulation (the "Carve-Out"), nor to making the proceeds of the Carve-Out (the "Carve-Out Funds") available to satisfy administrative expense claims held by persons or entities providing services to and for the benefit of, and for the preservation of the Estate in this bankruptcy case. Wheeling contends, however, that to the extent that it has a claim allowable under § 503(b) of Title 11 of the United States Code (the "Bankruptcy Code"), and is therefore entitled to priority over all administrative expense claims in this case, (its "Superpriority Claim"), then it should be entitled to have such claim satisfied first from the Carve-Out Funds, in accordance with §§ 503 and 507 of the Bankruptcy Code and this Court's prior orders.

[1] Capitalized terms not defined herein shall have the meaning set forth in the Motion.

PRELIMINARY STATEMENT

It is well-settled that the Trustee is a fiduciary of the estate ("Estate") of Montreal, Maine & Atlantic Railway, Ltd. (the "Debtor"). He owes fiduciary duties to *all* creditors of the Debtor and its Estate. The Trustee is, accordingly, duty-bound to administer the Estate, and funds that come into his possession, from whatever source, in accordance with his fiduciary duties to creditors. At a minimum, this fiduciary duty requires that creditors who are similarly situated be treated equally and fairly. Thus, while the Trustee is to be commended for obtaining the Carve-Out, he is bound by his duties as a fiduciary to distribute the Carve-Out Funds fairly among similarly situated creditors, specifically those creditors who have provided post-petition credit. In this regard, it may well be appropriate for the Trustee to use the Carve-Out Funds to pay his fees, those of his law firm, Bernstein, Shur, Sawyer, & Nelson ("BSSN"), and the fees of others who provide goods or services to the Trustee. But none of these creditors has any right or entitlement to payment that is superior to Wheeling's Superpriority Claim. In fact, the opposite is true.

By law (§§ 503(b) and 507 of the Bankruptcy Code), and by virtue of the terms of prior orders entered by this Court, *see, e.g.,* Fourth Interim Order Authorizing Debtor To Use Cash Collateral and Granting Adequate Protection (this Order, and prior cash collateral orders entered into in this case are referred to herein as the "Cash Collateral Orders") [D.E. 255]), Wheeling's Superpriority Claim is entitled to be paid before payment of all other administrative claims, including the fees of the Trustee, his firm, and other vendors. There is good reason for this. Wheeling has been granted the Superpriority Claim by virtue of the Cash Collateral Orders in order to provide it adequate protection on account of the Estate's use of Wheeling's cash collateral to fund its operations. If the replacement lien granted by the Court pursuant to the Cash Collateral Orders fails adequately to protect Wheeling, then the Superpriority Claim

provides compensation for credit involuntarily granted by Wheeling to the Estate. The Bankruptcy Code appropriately recognizes claims for such involuntary extensions of credit under § 507(b), and grants such claims priority as to all other administrative claims in a bankruptcy case. The Trustee, having identified a source of Estate funds which can be used to satisfy the administrative claims of those voluntarily providing credit to the estate cannot, consistent with his fiduciary duties and the terms of the Cash Collateral Orders, exclude the claims of those who provided the Estate credit involuntarily, such as Wheeling.

By this Objection, Wheeling seeks an order of this Court approving the Stipulation, but only on the proviso that all proceeds received by the Estate pursuant to the Carve-Out described therein, be distributed first in satisfaction of Wheeling's Superpriority Claim, and only after that claim has been satisfied, to holders of other administrative claims.

ARGUMENT

1. The Trustee Owes Fiduciary Duties to the Estate and all Creditors, Including Wheeling.

The Trustee has been appointed pursuant to § 1163 of the Bankruptcy Code. As a trustee under the Bankruptcy Code, the Trustee is the "representative of the estate" under § 323(a) of the Bankruptcy Code. He owes fiduciary duties to *all* creditors of the Estate, including administrative, secured, unsecured, and priority creditors. He is required to treat all creditors fairly.

> The trustee in bankruptcy has many important duties to perform, as enumerated in Sec. 47 of the Bankruptcy Act, 11 U.S.C.A. § 75. Basically he is charged with all the duties and responsibilities of the liquidation, distribution, and administration of the bankrupt's estate. He is the most important officer in the administration of the estate and stands in a fiduciary relationship to all creditors. It is, therefore, important that a trustee should be wholly free from all entangling alliances or associations that might in any way control his complete independence and responsibility.

In re Deena Woolen Mills, Inc., 114 F.Supp. 260, 267 (D. Me. 1953). *Accord Wolf v. Kupetz (In re Wolf & Vine, Inc.)*, 118 B.R. 761, 771 (Bankr. C.D. Cal. 1990) ("[a] bankruptcy trustee is a fiduciary of each creditor of the estate . . . As such, he has a duty to treat all creditors fairly and to exercise that measure of care and diligence that an ordinarily prudent person under similar circumstances would exercise." (Internal quotation omitted)). As a fiduciary, the Trustee owes "the duties of good faith, trust, confidence, and candor." *In re Jackson*, 388 B.R. 40, 42 (Bankr. W.D.N.Y. 2008). The same rules apply in railroad cases. *E.g., In re Chicago, R.I. & P. Ry. Co.*, 162 F.2d 606, 614 (7th Cir. 1947) (railroad case; "Mr. Colnon's duty as trustee was to represent all creditors, not one group. There should be, for the trustee, no two sides to this controversy.").

Moreover, in circumstances such as these where the Trustee is required to obtain the Court's approval before entering into the Stipulation, "the court's consideration must also include an assessment of whether the proposal is consistent with the trustee's fiduciary responsibilities since under no circumstances may the trustee act on behalf of the estate in a manner inconsistent with the duties imposed upon him as a fiduciary." *In re Engman*, 395 B.R. 610, 629 (W.D. Mich. 2008).

What this fiduciary duty means in this Case, and in respect of the Stipulation, is that the Trustee may not to arbitrarily favor any one Creditor or group of creditors over another. The Stipulation, however, would benefit the Trustee and those firms that he retains to assist him, but not other administrative creditors who provide credit for the preservation of the estate—such as Wheeling, in respect of its Superpriority Claim. There is no reason in fairness or otherwise which supports treating one category of administrative creditors who provide credit to the Estate more favorably than another. This is particularly true in consideration of the following factors: (1) By law (*e.g.*, § 507(b)), the disfavored administrative creditor, Wheeling, is entitled to priority over the favored administrative creditors (the Trustee and his retained agents); (2) The

Court has entered the Cash Collateral Orders, each of which requires that Wheeling's Superpriority Claim be paid prior to any administrative claim, including the Trustee's (more on this point below); and (3) The Trustee's duty of fairness requires heightened scrutiny because he and his law firm are the primary beneficiaries of the proposed Stipulation.

There are good and sufficient reasons to have the Carve-Out—the Estate requires funds to pay for its administration—and the Trustee may, consistent with his fiduciary duties, limit the beneficiaries of the Carve-Out to those entities who provide post-petition credit to the Estate. But there is no basis to discriminate among such creditors, and discrimination against Wheeling is particularly pernicious because Wheeling is an involuntary provider of credit in respect of its Superpriority Claim, and the Bankruptcy Code and the Cash Collateral Orders expressly provide that its administrative claims are entitled to priority over all other administrative claims. Compliance with the requirements of the Bankruptcy Code, the prior orders of this Court, as well as the Trustee's fiduciary duties, requires that the Stipulation, if approved, be approved only with the proviso that Wheeling's Superpriority Claim be preserved as to the Carve-Out Funds.

2. <u>The Cash Collateral Order Requires Wheeling Be Paid Ahead of All Other Administrative Expense Claimants. The Trustee Is Estopped To Argue Otherwise</u>.

As set forth above, each of the Cash Collateral Orders all provide that Wheeling's Superpriority Claim shall have "priority over all other claims allowable under Section 507(a)(2)" of the Bankruptcy Code. *See, for example,* the Fourth Interim Cash Collateral Order, p. 4, ¶ 4. These Orders are all binding on the Trustee and they are the law of this case, which is clear from the text of the Cash Collateral Order itself:

> The terms and conditions of this Order shall be in effect and immediately enforceable upon its entirety by the Clerk of the Court and shall be binding against the Trustee, the Debtor, the estate and/or any trustee subsequently appointed in this case, whether under Chapter 7 or Chapter 11 of the Bankruptcy [C]ode, and notwithstanding any potential application of Bankruptcy Rule 6004(g), 7062 or 9014; and not be stayed absent (a) an application by a party-in-interest for such stay in conformance with Bankruptcy Rule 8005, and (B) a

> hearing upon notice to the Debtor, [Wheeling] and the UST. [Fourth Interim Cash Collateral Order, p. 7, ¶ 8.]

However one defines the Trustee's fiduciary duties, clearly these duties include compliance with Orders of the Court—and priority must be given to Wheeling's Superpriority Claim over all other administrative claims (including the Trustee's).

Moreover, as a matter of law, the Trustee is judicially estopped from taking a position contrary to the above-quoted provisions of the Cash Collateral Orders in respect of the priority of the Superpriority Claim over all other administrative claims (including the Trustee's). Writing for the Bankruptcy Appellate Panel for the First Circuit, Judge Haines has appropriately noted that a party who expressly consents to the provisions of a cash collateral order, and derives a benefit therefrom, cannot challenge the agreed-to provision at a later date when the provision is no longer convenient, such as when the case appears to be administratively insolvent.[2] *Costa v. Robotic Vision Systems, Inc. (In re Robotic Vision Systems, Inc.)*, 367 B.R. 232 (BAP 1st Cir. 2007). In this case, Judge Haines, writing for the BAP concluded that a secured creditor that had consented to entry of an order approving use of cash collateral with a carve-out for professional fees, and granting the secured creditor a potential super-priority administrative expense claim, was estopped from arguing that the carve-out funds could not be used to pay professional fees where there were insufficient funds for the creditor's super-priority claim. The BAP concluded that the secured creditor was judicially estopped from taking a position contrary to that which it had agreed to earlier in the case because (1) the secured creditor's later position was clearly inconsistent with its earlier assent to the establishment of the carve-out funds; (2) the secured creditor, among others, was successful in obtaining entry of the cash collateral order based on its original position; and (3) the secured creditor's change-of-position would have given it an unfair

[2] While the BAP noted, in some length, its concern that carve-out arrangements may be problematic when cases are administratively insolvent because such agreements may skirt the priority rules of the Bankruptcy Code, the BAP denied the appeal on other grounds.

advantage or imposed an unfair detriment on estate professionals, who had relied upon there being a source of funds for the fees.

Judge Haines' analysis with respect to judicial estoppel in *Robotic Visions Systems* is equally applicable here. The Trustee has actively participated in, and sought approval of, the Court's prior orders authorizing the use of Wheeling's cash collateral, each containing the express provision giving Wheeling's Superpriority Claim priority over the Trustee's fees and those of the firms he may employ. He has now brought funds into the Estate by virtue of the Carve-Out, but he chooses to ignore his agreement that the Wheeling's Superpriority Claim be paid before all other administrative claims. This new, later position imposes an unfair detriment on Wheeling, which consented to the Cash Collateral Order based on the express authority therein that its Superpriority Claim would be just that—a super-priority claim coming ahead of other administrative expense claims, from whatever source of funds the Estate might acquire. The principles of judicial estoppel bar the Trustee from now seeking a contrary arrangement with respect to the Carve-Out Funds.

3. <u>The SPM Case And Its Progeny Provide Ample Authority For a Carve-Out; However, SPM Also Makes It Clear That Where The Recipient Of Carve-Out Funds Is An Estate Fiduciary, Such Funds Must Be Distributed By The Fiduciary In Compliance With Fiduciary Duties</u>.

The Trustee hangs his hat on *Official Unsecured Creditors' Committee v. Stern (In re SPM Manufacturing, Corp.)*, 984 F.2d 1305 (1st Cir. 1993), and its progeny. While *SPM* and its progeny indeed provide authority for a Carve-Out, such as the one proposed here, where the Trustee errs is in his conclusion that as the proposed beneficiary of the Carve-Out, he can do whatever he wants with the funds created by the Carve-Out, because it is, essentially, "found money". But what the Trustee fails to recognize is that the First Circuit in *SPM*, while approving carve-outs in general, made it clear that the *recipient* of carve-out funds matters. Thus, in that case, the First Circuit focused on the nature of the *recipient* of the carve-out funds as well as the

parties that entered into the carve-out agreement. The court rejected the *SPM* Chapter 7 trustee's argument that the estate should receive the carve-out funds, for the benefit the estate as a whole, rather than the Official Unsecured Creditors' Committee, as agreed between the Committee and a secured creditor:

> [The trustee] contend[s], any agreement negotiated by the Committee should have been negotiated to benefit the estate as a whole . . . We do not accept this contention, as it seems based on the erroneous assumption that the Official Unsecured Creditors' Committee is a fiduciary for the estate as a whole.

Id. at 1315. The First Circuit held that the Creditors Committee in *SPM* was not an estate fiduciary, but the clear implication of *SPM* is that where the beneficiary of a carve-out is an estate fiduciary, the rules are different: the fiduciary is not at liberty to enter into an agreement to receive and distribute the carve-out funds in derogation of his fiduciary duties.

The First Circuit is not alone in reaching this conclusion regarding carve-out funds. Other courts have held the similarly. For example, in *In re Goffena*, 175 B.R. 386 (Bankr. D. Mo. 1994), the Bankruptcy Court held that proceeds of a secured creditor's collateral, consensually sold and made available to a trustee in a carve-out, had to be shared with all administrative priority creditors and could not be used to favor the trustee by providing a source for his compensation while also disregarding the rights of other administrative priority claims. The *Goffena* Court expressly rejected the trustee's arguments in that case, which were based on *SPM*, that a secured creditor would be free to provide the estate with proceeds of its collateral for use only to satisfy the Trustee's fees and expenses.

> The Chapter 7 Trustee is not a creditor of the estate, as was the class represented by the unsecured creditors committee in *SPM*. All of the funds generated by the sale of FCB collateral came into the bankruptcy estate to be distributed according to the provisions of the Bankruptcy Code[.]

Id. at 391. That is because a trustee is a fiduciary of a debtor's estate and receives any such funds in his fiduciary capacity—not personally: "Having so rewarded the estate (and not the

Trustee individually, for the Trustee is a fiduciary for the estate), the sum allocated for the Trustee's fee is property of the bankruptcy estate to be distributed pursuant to § 726." *Id.* at 392. *See also In re Dinsmore Tire Ctr., Inc.*, 81 B.R. 136, 138 (Bankr. S.D. Fla. 1987) (trustee attempted to charge collateral of secured creditor upon its sale for his fees; "However, this is a recovery by the trustee *for the estate.* There is no authorization for the trustee to retain this money as his personal compensation. To the extent that the order of August 6, 1984 could be interpreted otherwise, it is corrected and superseded by this Order.").

The issue at hand has also been addressed by the BAP for the First Circuit, although no controlling decision on the matter has been issued by the BAP. *See Robotic Vision Systems, supra.* In *Robotic Vision Systems*, Judge Haines noted conflicting authority on whether funds distributed to certain administrative claimants pursuant to a carve-out must be re-distributed in accordance with the Bankruptcy Code's priority scheme if a case is administratively insolvent (*i.e.* disgorgement), in order to ensure that similarly situated creditors are treated the same.[3] *Id.* at 238. And he expressed skepticism over whether a carve-out dedicating funds to the payment of a specific professional is appropriate when it turns out that a case is administratively insolvent. *Id.* at 238 n.25. While *Robotic Vision Systems* did not resolve these questions, Judge Haines correctly identified the issues at hand: if a carve-out provides some administrative creditors with more favorable treatment than other similarly situated administrative creditors, then the favored creditors might be required to disgorge the money received from a carve-out.

This Court needs to recognize and deal with these same issues in this case, and in respect of the Motion. As indicated by the First Circuit in *SPM*, and in other cases that rely on *SPM*, the Trustee is not at liberty to favor himself, his firm and his retained professionals over other entities, such as Wheeling, who provide credit for the administration of the Estate. This is

[3] "In instances where multiple administrative claimants exist, each is 'similarly situated' to the others." *Id.* at 238 n.24.

particularly true where an estate might be insolvent. In a nutshell, the Trustee's fiduciary (and legal) duties require that Wheeling's Superpriority Claim be satisfied by Carve-Out Funds before such funds are used to satisfy other administrative creditors.

REQUIREMENTS OF D. ME. LBR 9013-1(f)

1. Wheeling admits all of the allegations in ¶ 1 of the Motion except those related to the appropriate statutory and rule predicates for relief.

2. Wheeling admits the allegations in ¶ 2 of the Motion.

3. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 3 of the Motion and, therefore, denies the same.

4. Wheeling admits the allegations in ¶ 4 of the Motion.

5. Wheeling admits the allegation in ¶ 5 of the Motion that § 1171 of the Bankruptcy Code governs this case and the rights of tort claimants. The remainder of ¶ 5 contains opinion or legal conclusions to which no response is needed but such allegations are denied to the extent that a response is required.

6. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 6 of the Motion and, therefore, denies the same.

7. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 7 of the Motion and, therefore, denies the same.

8. Paragraph 8 of the motion refers to the Stipulation, a document that speaks for itself. To the extent that a response is required, Wheeling

9. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 9 of the Motion and, therefore, denies the same.

10. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 10 of the Motion and, therefore, denies the same.

11. Paragraph 11 of the Motion refers to the Stipulation, which is a document that speaks for itself.

12. Paragraph 12 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 12 of the Motion.

13. Paragraph 13 states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling admits that the Trustee seeks approval of the Stipulation but denies any other allegations.

14. Paragraph 14 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 14 of the Motion.

15. Paragraph 15 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 15 of the Motion.

16. Paragraph 16 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 16 of the Motion.

17. Paragraph 17 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 17 of the Motion.

18. Paragraph 18 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 18 of the Motion.

19. Paragraph 19 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 19 of the Motion.

20. Paragraph 20 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 20 of the Motion.

21. Paragraph 21 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 21 of the Motion.

22. Paragraph 22 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 22 of the Motion.

23. Paragraph 23 of the Motion states a legal conclusion to which no response is required. To the extent that a response is required, Wheeling denies the allegations in ¶ 23 of the Motion.

CONCLUSION

For the foregoing reasons, Wheeling respectfully requests that the Court enter an order approving the Motion subject to the proviso that the Superpriority Claim held by Wheeling be paid first from any and all Carve-Out Funds made available for distribution by the Trustee, and that the Court grant such other and further relief as it deems just and proper

Dated: September 27, 2013

/s/ George J. Marcus
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CERTIFICATE OF SERVICE

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and caused a true and correct copy of the above document to be served upon the parties and at the addresses set forth on the attached **SERVICE LIST**, either electronically or by first class U.S. mail, postage prepaid, on the 27th day of September, 2013.

/s/ Holly C. Pelkey
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