

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

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

**WRONGFUL DEATH CLAIMANTS’ MOTION FOR RECONSIDERATION OF
ORDER GRANTING TRUSTEE’S MOTION FOR APPROVAL OF STIPULATION
WITH FEDERAL RAILROAD ADMINISTRATION**

The Unofficial Committee of Wrongful Death Claimants (the “Committee”), consisting of representatives of the estates of 42 out of the 47 victims (the “Wrongful Death Claimants”) of the massive explosion in Lac-Mégantic, Quebec, from the derailment of a train operated by the Debtor (the “Disaster”),¹ hereby moves, pursuant to Fed. R. Civ. P. 59, as made applicable by Fed. R. Bankr. P. 9023, for reconsideration of this Court’s order of October 18, 2013 [Docket No. 392] (the “Carveout Order”) granting the Trustee’s Motion to Approve and Authorize the Trustee to Enter Into Stipulation Concerning Carveout from the Collateral of the Federal Railroad Administration Pursuant to 11 U.S.C. §§105(a), 363(b), 506(c), 1163 and 1165 [Docket No. 257] (the “Carveout Motion”). The Committee seeks reconsideration to correct procedural and factual errors in the Carveout Order whereby the Court accepted as admissible evidence unsupported assertions made by the Trustee pertaining to the value of the estate’s waiver of claims under 11 U.S.C. § 506(c). Because no facts were presented by the Trustee (or any other party) to allow the Court to find that the estate’s waiver of claims under Section 506(c) had no

¹ The victims and the representatives of their estates are listed in Exhibit A to this Objection. 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. Counsel to the Committee is in the process of preparing the statement required by Fed. R. Bankr. P. 2019, and anticipates filing it within seven days.

value, the Court should reconsider its ruling in the Carveout Order. Upon reconsideration, the Committee requests that the Court deny the Carveout Motion in its entirety or, in the alternative, schedule an evidentiary hearing, as previously requested by the Committee, on the issue of whether the estate's waiver of claims under Section 506(c) has value.

As grounds therefor, the Committee states:

1. In the Carveout Motion, the Trustee sought approval of a stipulation with the Federal Railroad Administration (the "FRA") providing a \$5 million carveout solely for the payment of allowed fees and expenses of the Trustee and professionals retained by the Trustee. The stipulation permitted the FRA to terminate the Carveout at any time within thirty days' notice and provided the FRA with a waiver of any claims of the estate under Section 506(c).

2. The Committee objected to the Carveout Motion on several grounds. The Committee argued that by agreeing to waive the estate's claims under 506(c) of the Bankruptcy Code, the Trustee was allowing the FRA to purchase rights belonging to the bankruptcy estate. The Committee also objected to the Trustee's failure to protect the estate from being saddled with the costs relating to sale of the railroad if the FRA were to exercise its absolute discretionary right to terminate funding of the Chapter 11 estate. In addition to requesting a denial of the Carveout Motion, the Committee requested an evidentiary hearing and limited discovery on the issues raised in its objection.

3. At a non-evidentiary hearing held on October 1, 2013, the sole statement made by the Trustee regarding the value of the estate's waiver of Section 506(c) claim was as follows: "No. Your Honor what we are saying is that it is not untoward given what they are doing for us to give up the right to surcharge because we don't think the right to surcharge has any value and

in order to get them to do what they needed to do--.” H’rg on Carveout Motion, 10/1/13.² The Trustee presented no evidence at the hearing, nor did the Court indicate at any time that it would deem unsworn factual assertions made by parties as evidence.

4. By order dated October 18, 2013, the Court granted the Carveout Motion. In its Order, the Court noted that: “He [the Trustee] also stated that the waiver of the estate’s surcharge rights under § 506(c) is of no value because the estate has no preservation claims against FRA. No contrary assertions were made.” In a footnote to that same paragraph, the Court stated: “Counsel for the Group of 42 [the Committee] demanded an evidentiary hearing. However, during argument he made no demand to cross-examine the trustee or counsel for FRA concerning their assertions. Consequently, those assertions were taken as admissible evidence. Moreover, counsel for the Group of 42 made no proffer of contrary evidence. For these reasons, his request for an evidentiary hearing is denied.”

Basis for Reconsideration

5. “It is a well-settled policy in this circuit that a motion which asks the trial court to modify its earlier disposition of a case is properly treated as a motion to alter or amend the judgment under Rule 59(e) (made applicable by Fed. R. Bankr. P. 9023), or as a motion for relief from judgment under Fed. R. Civ. P. 60 (made applicable by Fed. R. Bankr. P. 9024).” Schwartz v. Schwartz (In re Schwartz), 409 B.R. 240, 250 (B.A.P. 1st Cir. 2008); see also Aybar v. Crispin-Reyes, 118 F.3d 10, 14 n.3 (1st Cir. 1997) (regardless of how it is characterized, post-judgment motion made within ten days of entry of judgment that questions correctness of judgment is properly construed under Rule 59(e)).

² A copy of the official transcript of the hearing on the Carveout Motion is being completed and will be filed as a supplement to this motion as soon as it becomes available.

6. “To meet the threshold requirements of a successful Rule 59(e) motion, the motion must demonstrate the reason why the court should reconsider its prior decision and must set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision.” Id. (internal quotations omitted). “[T]he moving party must establish a manifest error of law or fact or must present newly discovered evidence.” In re Schwartz, 409 B.R. at 250. “A motion to reconsider is appropriate where the court has clearly misunderstood a party, has made a decision outside the issues presented by the parties, has made an error not of reasoning but apprehension, or where there has been a significant change in the law or the facts since the court's prior ruling.” In re Int'l Gospel Party Boosting Jesus Groups, Inc., 464 B.R. 78 (Bankr. D. Mass. 2012).

7. Reconsideration of the Carveout Order is warranted because it is premised on a manifest error of fact, namely, that waiver by the bankruptcy estate of its right to recover expenses under Section 506(c) of the Bankruptcy Code (the “506(c) Waiver”) had no value. The Trustee presented no facts in his papers or at oral argument to establish that the 506(c) Waiver had no value. Nor could any such facts be presented, because the opposite is true.

8. The Trustee has acknowledged that “the Trustee and his various professionals have invested and are continuing to invest hundreds of hours of time, as well as expenses, in this Case” Trustee’s Motion for Expedited Hearing on the Carveout Motion [Docket No. 258] at ¶ 5. The investment of “hundreds of hours” translates into fees of well into six figures – a significant amount by any standard – and as this Court is well aware from its own vast experience in matters of this type, the fees of the Trustee and his professionals will ultimately be well into seven figures. A significant amount of these professional efforts are being used to bring about sale of the bankruptcy estate’s railroad, which is the FRA’s collateral. See id. Thus,

the *facts* presented to this Court by the Trustee actually support the position that the estate's claim against the FRA under Section 506(c),³ and hence the 506(c) Waiver, has significant value. Even assuming that it was reasonable to accept unsworn statements by the Trustee as proof of facts in the context of this hearing, the facts thus proved contravened the Trustee's *argument* that the 506(c) Waiver has no value.

9. It was a manifest error of law for this Court to accept as the basis for a finding of fact the Trustee's *argument* that the 506(c) Waiver had no value when the *facts* presented by the Trustee contravened his argument. In addition, it was undisputed and remains undisputable that funds promised by the FRA in exchange for the estate's waiver of its rights under Section 506(c) constitute property of the bankruptcy estate. As explained by the Fourth Circuit in Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet), 26 F.3d 481, 484 (4th Cir. 1994), "[w]hen a trustee recovers postpetition costs and expenses from a secured creditor pursuant to § 506(c), the recovered funds become available as an unencumbered asset for distribution to the unsecured creditors." Id.; see also In re Ben Franklin Retail Stores, 210 B.R. 315 (Bankr. N.D. Ill. 1997) (finding that Section 506(c) did not permit creditors within same class to receive different distributions even if secured creditor agreed to such an arrangement); In re Allen, 203 Bankr. 925, 930 (W.D. Va. 1997) (expenses incurred in selling the debtor's property and recovered by the trustee under § 506(c) from the secured creditor "are to be returned to the estate for distribution among any administrative claimants -- including the trustee"); United States Trustee v. Messer (In re Pink Cadillac Assocs.), 1997 U.S. Dist. LEXIS 4382, 15-16 (S.D.N.Y. Apr. 7, 1997) ("Section 506(c) does not entitle a trustee to recover personal compensation

³ Clearly the claim meets the legal standard of Section 506(c), and the Trustee did not attempt to argue otherwise. The fees for professionals' efforts to sell the railroad will unquestionably, upon completion of the sale, constitute "reasonable, necessary costs and expenses of preserving, or disposing of" the railroad, and will provide a benefit to the FRA. See 11 U.S.C. § 506(c).

directly from a secured creditor. Rather, it allows a trustee, acting in his statutory role as representative of the estate to recover the expenses incurred by the estate in preserving or disposing of the property securing the creditor's claim. If he recovers such expenses, the recovered funds become available as an unencumbered asset for distribution to the secured creditors.”) (internal citation and quotations omitted). Unlike the circumstances in In re SPM where the secured creditor chose to channel its own distribution – not property of the estate – to unsecured creditors, the funds that the Trustee is taking solely for the benefit for himself and his professionals in exchange for the *estate's* waiver of rights under Section 506(c) belong to the bankruptcy estate, not the FRA. The sole question on which this Court's decision turned was whether the estate's waiver of the right to collect those funds from the FRA had value.

10. Finally, in the context of the argument presented to the Court in the pleadings and at oral argument, it was manifest error for this Court to determine that the Committee did not dispute the Trustee's argument that the 506(c) Waiver had no value. The Committee did not and does not accept the proposition that the 506(c) Waiver has no value. The Committee argued:

Here the secured creditor is not channeling its own distribution to someone else on a voluntary basis. Rather, the FRA is purchasing from the estate a waiver of the estate's rights under Section 506(c). To put it another way, the funds that the Trustee is proposing to take for himself and his professionals are property of the estate, not the FRA.

Wrongful Death Claimants' Objection to Carveout Motion [Docket No. 292] at ¶ 15. This argument cannot fairly be construed other than to rest on the premise that the 506(c) Waiver has value. Indeed, the FRA confirmed at the hearing that it would not have entered into the carveout stipulation if the 506(c) Waiver were not included. See H'rg on the Carveout Motion. If the 506(c) Waiver had no value, then such a condition would be unnecessary. No facts or arguments presented by the Trustee or any other party support the conclusion in the Carveout Order that the

506(c) Waiver has no value. If the Court, upon reviewing the record, agrees, then the Carveout Motion should be denied because the funds that the Trustee is proposing to take for himself and his professionals are property of the estate. Otherwise, the Court should grant the request for an evidentiary hearing previously made by the Wrongful Death Claimants to allow the parties to present admissible evidence rather than just argument on the issue of whether the Trustee's waiver of the estate's claims under Section 506(c) has value.

For the reasons set forth above, the Court should, upon reconsideration of the Carveout Order, deny the Carveout Motion in its entirety or, in the alternative, grant an evidentiary hearing on the issue of whether the Trustee's waiver of the estate's claims under Section 506(c) have value.

Dated: November 1, 2013

Marie Semie Alliance, *et al.*

By their attorneys,

/s/ George W. Kurr, Jr.

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Exhibit A

1. The estate representatives are Seraphin Alliance (on behalf Alliance, Marie Semie); Elise Dubois Couture (on behalf of Beaudoin, David Lacroix); Pascal Charest (on behalf of Begnoche, Alyssa Charest); Pascal Charest (on behalf of Begnoche, Bianka Charest); Gaston Begnoche (on behalf of Begnoche, Talitha Coumi); Suzanne Bizier, Alain Bizier (on behalf of Bizier, Diane); Lisette Fortin-Bolduc, (on behalf of Bolduc, Stephane); Genevieve Dube (on behalf of Bouchard, Yannick); Michel Boulanger (on behalf of Boulanger, Eliane Parenteau); Louise Boulet (on behalf of Boulet, Marie-France); Colette Boulet, (on behalf of Boulet, Yves); Isabelle Boulanger, Rene Boutin, Sophie Boutin, Roxanne Boutin (on behalf of Frederic Boutin); Real Breton (on behalf of Breton, Genevieve); Yann Proteau (on behalf of Champagne, Karine); Cynthia Boule, Jean-Guy Boule, Alexandre Boule (on behalf of Sylvia Charron); Louise Courture (on behalf of Clusiaux, Kathy); Sonia Pepin; Jeremy Custeau, Theresa Pouliot, Michael Cousteau, Rejean Custeau, Kathleen Bedard, Simon Custeau, Richard Custeau, Sylvie Custeau (on behalf of Real Custeau); Therese Dubois (on behalf of Dubois, Denise); Joannie Proteau, (on behalf of Dubois, Maxime); Maude Faucher (on behalf of Faucher, Marie-Noelle); Sandy Bedard (on behalf of Guertin Jr., Michel); Raymond Lafontaine, Pierrette Boucher Lafontaine (on behalf of Lafontaine, Gaetan); Pascal Lafontaine (on behalf of Lafontaine, Karine); Clermont Pepin (on behalf of Lajeunesse, Éric Pépin); Marie-Eve Lapierre (on behalf of Lapierre, Stéphane); Diane Belanger (on behalf of Lapointe, Joannie); Marie Josee Grimard (on behalf of Latulippe, Henriette); Georgette Martin (on behalf of David Martin); Karine Paquet (on behalf of Paquet, Roger); Alexia Dumas-Chaput (on behalf of Pelletier, Mathieu); Robert Picard (on behalf of Picard, Louise Poirer); Mario Poulin (on behalf of Poulin, Marianne); Lily Rodrique (on behalf of Rodrique, Martin); Maxime Roy, Carol-Anne Roy (on behalf of Roy, Jean-Pierre); Lise

Doyon (on behalf of Roy, Kevin); Rejean Roy (on behalf of Roy, Melissa); Mario Sévigny (on behalf of Sévigny, Andrée-Anne); Michel Sirois, Solange Belanger (on behalf of Sirois, Jimmy); Richard Turcotte, Christine Pulin (on behalf of Turcotte, Elodie); Suzanne Bizier (on behalf of Turmel, Joanie); Annick Roy (on behalf of Veilleux, Jean-Guy); and Sophie Veilleux (on behalf of Veilleux, Richard).

2. The victims are Marie Semie Alliance, David Lacroix Beaudoin, Alyssa Charest Begnoche, Bianka Charest Begnoche, Talitha Coumi Benoche, Diane Bizier, Stephane Bolduc, Yannick Bouchard, Eliane Parenteau Boulanger, Marie France Boulet, Yves Boulet, Frederic Boutin, Genevieve Breton, Karine Champagne, Sylvia Charron, Kathy Clusiault, Real Custeau, Denise Dubois, Maxime Dubois, Marie-Noelle Faucher, Michael Guertin, Jr., Gaetan Lafontaine, Karine Lafontaine, Eric Pepin Lajeunesse, Stephanie Lapierre, Joannie Lapointe, Henriette Latulippe, David Martin, Roger Paquet, Mathieu Pelletier, Louise Poirer Picard, Marianne Poulin, Martin Rodrigue, Jean Pierre Roy, Kevin Roy, Melissa Roy, Andree-Anne Sevigny, Jimmy Sirios, Elodie Turcotte, Joanie Turmel, Jean-Guy Veilleux and Richard Veilleux.

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MONTREAL MAINE & ATLANTIC)	CASE NO. 13-10670-LHK
RAILWAY, LTD.)	
)	
Debtor)	
_____)	

CERTIFICATE OF SERVICE

I, Taruna Garg, hereby certify that I caused a copy of the *Motion for Reconsideration of Order Granting Trustee's Motion for Approval of Stipulation with Federal Railroad Administration* to be served via the Court's CM/ECF system on November 1, 2013 and by U.S. First Class Mail, as indicated, upon the parties listed on the attached Service List.

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