

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

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

Robert J. Keach, the chapter 11 trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. ("MMA"), hereby objects to the *Wrongful Death Claimants' Motion for Reconsideration of Order Granting Trustee's Motion for Approval of Stipulation with Federal Railroad Administration* [Docket No. 424] (the "Motion for Reconsideration") filed by counsel to the so-called Unofficial Committee of Wrongful Death Claimants (the "Unofficial Committee"). The Motion for Reconsideration seeks reconsideration of the *Order Approving Carve-Out* [Docket No. 392] (the "Carve-Out Order"), which grants the *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* [Docket No. 257] (the "Carve-Out Motion").

As discussed below, the Unofficial Committee has not met the high standard for reconsideration under Rule 59(e). The Court did not commit a manifest error of law, and the Unofficial Committee has not identified any evidence, let alone newly discovered evidence, that might warrant reconsideration. The Unofficial Committee made a request for an evidentiary hearing, and then appeared at a hearing and failed to offer any evidence. Having failed in that

respect, the Unofficial Committee now renews its request for an evidentiary hearing. The Carve-Out Order demonstrates that the Court was aware of the request for an evidentiary hearing, that the Court was cognizant of the Unofficial Committee's failure to offer evidence, and that the Court would have approved the Stipulation as a sound exercise of the Trustee's business judgment in any event. There was no reason for the Court to conduct an evidentiary hearing then and there is no reason for that to happen now. The Motion for Reconsideration should be denied summarily.¹

A. The Unofficial Committee Has Failed to Meet the Standard for Reconsideration under Rule 59(e).

1. "Rule 59(e) motions are granted only where the movant shows a manifest error of law or newly discovered evidence." Kansky v. Coca-Cola Bottling Co. of New England, 492 F.3d 54, 60 (1st Cir. 2007). The standard for reconsideration under Rule 59(e) is very high, and indeed "[i]t is very difficult to prevail" on such motions. Marie v. Allied Home Mtg. Corp., 402 F.3d 1, 7 n.2 (1st Cir. 2005); Matos v. Rivera (In re Matos), 478 B.R. 506, 516 (1st Cir. B.A.P. 2012) ("Rule 59(e) motions are generally denied because of the narrow purpose for which they are intended.").

2. The Unofficial Committee does not suggest it has newly discovered evidence warranting reconsideration, but instead states that the Carve-Out Order "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 . . . had no value." Motion for Reconsideration at ¶ 7.

3. The Unofficial Committee's argument fails at the outset. The Carve-Out Order was not premised on the assertion that the 506(c) rights had no value. Instead, the order was

¹ The Trustee requests waiver of the requirements of D. Me. LBR 9013-1(f) given that the Motion for Reconsideration, and the Trustee's objection, are focused on the narrow issue of whether reconsideration is appropriate in this context and are not concerned with factual disputes.

premised on the Court's finding that the Stipulation was an appropriate exercise of the Trustee's business judgment and was in fulfillment of the Trustee's fiduciary duty to MMA's creditors, including members of the Unofficial Committee. As explained by the Trustee at the Hearing:

MR. KEACH: . . . given what [the FRA] is doing for us to give up the right to surcharge because we don't think the right to surcharge has any value. . . .

THE COURT: This all comes down to a Trustee's business judgment.

MR. KEACH: Absolutely, Your Honor. And since the trustee is the holder of that right, the Trustee has exercised his business judgment in order, and it's the only way incidentally for this estate to be administered—the only way. The Trustee has exercised his business judgment to give up the Trustee's right to pursue that claim on behalf of the estate in order to [permit] this estate to be administered.

...

. . . the FRA made it very clear very early that it had no interest in funding 1171A claims or operating losses of the estate that was off the table. That just wasn't available to me and we got the best option we could to get the estate administered.

Hrg. Tr. at 113:4-16; 139:24-25; 140:1-3.

4. The Court accurately summarized the Trustee's exercise of his business judgment as follows:

The trustee stated that the stipulation with FRA is the only way to insure payment of the trustee and his professionals. He 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.

...

[T]he trustee's primary duty at this moment is to operate the railroad while he formulates a plan. This duty entails payment of professionals for services rendered as allowed by this court. The stipulation with FRA is in fulfillment of this duty.

Carve-Out Order, pp. 2-3.

5. The Court was clearly aware of the argument raised by the Unofficial Committee in the Motion for Reconsideration—namely, that the 506(c) surcharge rights had value—but nonetheless found that the Trustee's primary duty is to administer this case, and that the Carve-

Out is necessary to fulfill that primary duty. *See id.* Given that the Unofficial Committee was, and still is, unable to proffer any evidence to contradict the Trustee's assertions regarding the value of the 506(c) claims, and that the Court has determined that the Stipulation is a reasonable exercise of the Trustee's business judgment, there is no basis for reconsideration of the Carve-Out Order.

B. The Unofficial Committee Waived Its Rights to Contest the Trustee's Assertions Regarding the Value of the § 506(c) Rights and Request an Evidentiary Hearing.

6. The Unofficial Committee seeks to correct its own failures: failure to demand the right to cross-examine the Trustee or the FRA at the Hearing regarding the value of the section 506(c) rights, and failure to offer relevant evidence at all. As noted by the Court in the Carve-Out Order:

Counsel for the [Unofficial 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 [Unofficial Committee] made no proffer of contrary evidence.* For these reasons, his request for an evidentiary hearing is denied.

Carve-Out Order, p. 2 n.1 (emphasis added). The Court specifically asked counsel to the Unofficial Committee, at the end of the Hearing, if he had anything further to add; counsel to the Unofficial Committee stated simply: "Nothing." Transcript of Hearing ("Hrg. Tr."), 141:6.

7. The Unofficial Committee was given a full and fair opportunity to present its arguments against the Stipulation, both in writing and orally on the record at the Hearing. The Unofficial Committee is presumed to have deliberately decided to waive its right to offer evidence on the value of the 506(c) rights at the time of hearing and cannot use Rule 59(e) to now seek such relief. *See Pomerleau v. W. Springfield Pub. Schools*, 362 F.3d 143, 147 n.2 (1st Cir. 2004) ("Of course, Rule 59(e) 'does not provide a vehicle for a party to undo its own procedural failures' or to 'advance arguments that could and should have been presented . . .

prior to judgment.”) (*quoting DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 34 (1st Cir. 2001)). Further, the Unofficial Committee is still unable to proffer evidence to contradict the Trustee’s assertions regarding the 506(c) waiver, suggesting that an evidentiary hearing would be fruitless and a waste of estate and Court resources in any event.

C. The Unofficial Committee is Not Entitled to an Evidentiary Hearing in Any Event.

8. The Motion for Reconsideration further fails to the extent the Unofficial Committee assigns error to the fact that the Court failed to hold an evidentiary hearing on the merits of the Stipulation. The Bankruptcy Code provides that where “notice and a hearing” is required prior to approval of a particular motion, parties are entitled only to such notice and hearing “as is appropriate in the particular circumstances.” 11 U.S.C. § 102(1)(A). Where the record is sufficiently developed to allow the bankruptcy court to draw the necessary inferences on the matter before it, the court is not required to hold an evidentiary hearing. *See C-TC 9th Ave. P’ship v. Norton Co. (In re C-TC 9th Ave. P’ship)*, 113 F.3d 1304, 1312 (2d Cir. 1997) (finding that record provided ample evidence on which the court could base its decision to dismiss chapter 11 bankruptcy case; evidentiary hearing was not required). Additionally, a court will deny a request for evidentiary hearing where a party fails to identify what evidence it would produce at such hearing. *Yehud-Monosson USA, Inc. v. Fokkena (In re Yehud-Monosson USA, Inc.)*, 458 B.R. 750, 756 (8th Cir. B.A.P. 2011).

9. In this case, as discussed above, the Unofficial Committee has failed to allege any facts or proffer any evidence that would suggest an evidentiary hearing is necessary or warranted. Nor is the Unofficial Committee entitled to an evidentiary hearing merely because it has requested one. This Court had before it sufficient facts on which to base the Carve-Out Order and did not err in failing to hold an evidentiary hearing on the Stipulation.

10. In short, the Unofficial Committee has failed to meet the high burden established by Rule 59(e) and has provided this Court with no basis on which to reconsider the Carve-Out Order. The Trustee requests that the Court deny the Motion for Reconsideration.

Dated: November 18, 2013

ROBERT J. KEACH,
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DISTRICT OF MAINE**

In re:

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Debtor.

Bk. No. 13-10670
Chapter 11

CERTIFICATE OF SERVICE

I, Kara Mercier, being over the age of eighteen and an employee at Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that on this date the *Trustee's Objection to Wrongful Death Claimants' Motion for Reconsideration of Order Granting Trustee's Motion for Approval of Stipulation with Federal Railroad Administration* was filed via the Court's CM/ECF electronic filing system and served upon all parties receiving notice through the CM/ECF system.

Dated: November 18, 2013

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