

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

)	
In re)	Chapter 11
)	Case No. 13-10670
MONTREAL MAINE & ATLANTIC)	
RAILWAY, LTD.)	
)	
Debtor.)	
)	

**OBJECTION OF THE UNITED STATES TRUSTEE TO
WRONGFUL DEATH CLAIMANTS’ MOTION TO MODIFY
ORDER CONCERNING FORMATION OF CREDITORS’ COMMITTEE**

The United States Trustee (the “U.S. Trustee”), by and through his undersigned counsel, hereby objects to the Wrongful Death Claimants’ Motion to Modify Order Concerning Formation of Creditors’ Committee (the “Motion”)(Docket Entry # 476). In support of his Objection, the U.S. Trustee states as follows:

I. PRELIMINARY STATEMENT

The Movants style the Motion as one to modify the Court’s Order of October 18, 2013 (the “Order”), which Order authorized the United States Trustee to appoint a committee of victims injured in the July 6, 2013 accident in Lac-Mégantic, Quebec (the “Derailment”). The Movants allege that they are entitled to this relief because the committee appointed in response to the Order (the “Committee”), as constituted as of December 9, 2013, is “fatally flawed.”

Despite its title, the Motion is an inappropriate attempt by the Movants to re-litigate their objection to the formation of a committee – an objection that was overruled by this Court in October. Since that time, the Movants have formed an “unofficial committee” and have chosen not to participate in the official committee formation process - despite being invited to do so. Instead of taking action consistent with their stated desire of non-participation, the Movants self-

servingly argue that their affirmative decision not to participate creates a “fatal flaw” in the validly-appointed Committee’s ability to represent the creditors who suffered loss as a result of the Derailment (the “Derailment Creditors”). As is demonstrated below, this argument fails because the Committee, as currently constituted, adequately represents the interests of the Derailment Creditors.

The Movants have also raised potentially legitimate issues as to the eligibility of one of the appointed members to serve on the Committee. However, as is also demonstrated below, the eligibility issue raised as to this individual does not materially impact the Committee’s ability to properly carry-out its fiduciary duties and obligations.

Following the entry of the Order, the U.S. Trustee engaged in an extensive process to solicit interest in service on the Committee from *all* of the various constituencies identified by this Court as needing representation in this case. In response, the U.S. Trustee received sufficient interest, despite Movants decision not to participate, to form a representative committee. After holding a formation meeting in Carrabassett Valley, Maine on November 22, 2013, the U.S. Trustee appointed a committee to represent the interest of all Derailment Creditors. As currently constituted, the Committee has four members. As noted above, the Movants have questioned the eligibility of one of the members of the Committee. However, no such challenge has been raised with respect to the remaining Committee members. These members, despite the nature of their individual claims, are fiduciaries charged with acting in the interest of all of the Derailment Creditors, even those creditors who chose not to participate in the formation process.

The alleged “fatal flaws” cited by the Movants provide no factual justification for the relief requested. Furthermore, the Movants provide no legal justification for their request.

Pursuant to 11 U.S.C. § 1102, the Court may, if requested: (1) order the United States Trustee to appoint additional committees if necessary to ensure adequate representation; (2) order the United States Trustee to change committee membership if necessary to ensure adequate representation; (3) order that a committee not be appointed in a small business case; or (4) order the United States Trustee to increase membership to include a creditor that is a small business concern.

In this case, the Court ordered the U.S. Trustee to appoint a committee. The U.S. Trustee has validly made its appointment. The Movants have not requested a change in the membership to ensure adequate representation or to include a small business concern. The Court does not have another role in the appointment process or in determining committee composition. In other words, the United States Bankruptcy Code (the “Code”) does not provide for the type of relief requested by the Movants.

II. FACTUAL BACKGROUND

1. On August 7, 2013 (the “Petition Date”), Montreal Maine & Atlantic Railway, Ltd. (“MMA”) filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* MMA’s bankruptcy filing was precipitated by Derailment. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. The Derailment also precipitated the filing by Montreal Maine & Atlantic Canada Co., MMA’s subsidiary, under Canada’s *Companies’ Creditors Arrangement Act*.

2. On August 21, 2013, the U.S. Trustee appointed Robert J. Keach (the “Trustee”) as the chapter 11 trustee pursuant to 11 U.S.C. § 1163.

3. Shortly after the Derailment and prior to the Petition Date, a number of wrongful death claimants, including the Movants, filed claims in state court in Illinois against MMA, among other parties (the “Tort Litigation”). The Tort Litigation, which alleges negligence in the transportation of the ill-fated crude from western Canada to Lac-Mégantic, was removed by the state court defendants to the United States District Court for the Northern District of Illinois.

4. Presently, a motion to transfer the Tort Litigation to the United States District Court for the District of Maine is pending, and is supported by the Trustee and opposed by the wrongful death claimants.

5. A class action suit was also initiated in Canada. No class has been certified to date.

6. On August 22, 2013, the Movants filed a motion seeking the formation of a committee of wrongful death claimants. Docket Entry # 76.

7. On August 30, 2013, an informal committee of Quebec claimants (including persons who suffered property damage and governmental entities) filed their own motion for committee formation, seeking the formation of an official Quebec victims committee, including the Province of Quebec and the town of Lac-Mégantic. Docket Entry # 127.

8. The Trustee opposed both motions, asserting that no committee was necessary. Docket Entry # 212.

9. The U.S. Trustee supported the formation of a committee of eligible persons holding claims arising from the Derailment. Docket Entry # 213.

10. On October 18, 2013, the Court entered the Order, authorizing the U.S. Trustee to appoint a committee to represent all the victims of the Derailment. Docket Entry # 391.

11. Following the entry of the Order, the U.S. Trustee engaged in extensive efforts to identify eligible persons willing to serve on a committee and solicited such creditors to determine interest. Despite the non-participation of the Movants in this process, the U.S. Trustee received interest from a sufficient number of the Derailment Creditors to form a committee.

12. Upon information and belief, the attorneys representing the wrongful death claimants made a conscious decision not to participate in the process of committee formation.

13. To further aid in the formation process, the U.S. Trustee held a formation meeting at the public library in the town of Carrabassett Valley, Maine on November 22, 2013. At the meeting, the U.S. Trustee informed all those present of his decision to appoint a three person committee including Megane Turcotte, Serge Jacques and Jacinthe LaCombe.

14. The U.S. Trustee presided at the formation meeting.

15. Before the meeting adjourned, the U.S. Trustee provided the members and their proxies with an overview of the role of the Committee, the duties of its members, and their authority to participate in the case, including the Committee's right to employ professionals on its behalf.

16. On November 27, 2013, the U.S. Trustee filed an Appointment and Notice of Appointment of Committee of Creditors. Docket Entry # 460.

17. On December 10, 2013, the U.S. Trustee filed an Amended Appointment and Notice of Appointment of Committee of Creditors, adding Pierre Paquet as the fourth member of the Committee. Docket Entry # 478.

III. ARGUMENT

18. The essence of the Motion is the assertion that the U.S. Trustee has failed to constitute a broadly representative committee of victims of the Derailment. The Movants

conclude that the appropriate remedy is the abandonment of that effort and the disbanding of the Committee.

19. The allegation that the U.S. Trustee's efforts have failed is imaginary. If that allegation could be proven, the Movants would have pointed to objective evidence of dysfunction in the Committee. The closest the Movants' come to objectivity is the observation of the undisputed fact that those serving on the Committee do not hold wrongful death claims.

20. Disbanding the Committee before it begins its work on behalf of all victims of the Derailment would be extraordinary and unprecedented. There is no provision of the Code which contemplates such a precipitous act. At best, the Movants may seek the relief provided by section 1102(a)(4) of the Code, which provides, in relevant part, that “[o]n request of a party in interest and after notice and hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders.”

11 U.S.C. § 1102(a)(4).¹

21. The plain language of the Code does not permit a disbanding of the Committee as requested by the Movants.²

¹ Courts have employed a series of factors in conducting an “adequate representation” analysis. They include the ability of the committee to function, the nature of the case, the standing and desires of the various constituencies, the ability of creditors to participate in the case without an official committee, the possibility that different classes would be treated differently under a plan and need representation, and the motivation of the movant. *See In re The Shorebank Corp., et al*, 467 B.R. 156, 161 (Bankr. E.D. Ill. 2012).

² The Court may undertake an independent determination of whether a change in committee composition is necessary. This independent determination should not be confused with either an appellate or administrative review of the U.S. Trustee's appointments. *Id.* at 162. The U.S. Trustee has not engaged either in fact finding or deciding issues of law and, accordingly, is not required to provide a rationale or make a record with respect to his appointments. *See In re JNL Funding Corp.*, 438 B.R. 356, 362 (Bankr. E.D. N.Y. 2010).

A. Role of the United States Trustee.

22. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to title 11 of the Code. The U.S. Trustee is also obligated to perform the duties prescribed under title 11 and title 28 and such additional duties consistent with title 11 and title 28 as the Attorney General may prescribe. These duties are part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994)(noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990)(describing the U.S. Trustee as a "watchdog"). One of the specific statutory functions of the U.S. Trustee is to appoint additional committees when directed to do so by the Court in chapter 11 cases as soon as practicable after the order for relief. *See* 11 U.S.C. §1102(a)(1).

B. Appointment of Committees in Chapter 11 Cases by the United States Trustee.

23. Section 1102(a) of the Code provides that:

(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under ... chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States Trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) On request of a party in interest in a case in which the debtor is a small business debtor and for cause, the court may order that a committee of creditors not be appointed.

(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.

11 U.S.C. § 1102(a)(1) - (4).

C. The Court's Role in Creditors' Committees.

24. Section 1102(a)(1) - (4) sets forth the Court's role in the appointment of official committees. The Court may, if requested:

- order the United States Trustee to appoint additional committees if necessary to ensure adequate representation;
- order the United States Trustee to change committee membership if necessary to ensure adequate representation;
- order that a committee not be appointed in a small business case;
- order the United States Trustee to increase membership to include a creditor that is a small business concern.

11 U.S.C. § 1102(a)(1) - (4).

25. By the 1986 amendments to the Code, Congress removed administrative tasks such as forming creditors' committees from the Courts. Forming creditors' committees is now exclusively the U.S. Trustee's responsibility. The majority of decisions addressing the issue of court review of the U.S. Trustee's appointment of committees have held that the Court cannot circumvent the United States Trustee's decision, even by invoking 11 U.S.C. § 105. *See, e.g., In re Dow Corning Corp.*, 212 B.R. 258, 262-262 (E.D. Mich. 1997); *Smith v. Wheeler Technology, Inc.*, 139 B.R. 235, 239 (9th Cir. BAP 1992); *In re New Life Fellowship, Inc.*, 202 B.R. 994, 996-

97 (Bankr. W.D. Okla. 1996); *In re Victory Markets, Inc.*, 196 B.R. 1, 4-6 (Bankr. N.D.N.Y. 1995), *appeal dismissed*, 195 B.R. 9 (N.D.N.Y. 1996), *motion for rehearing denied*, 1996 WL 365675 (N.D.N.Y. 1996); *In re Hills Stores Co.*, 137 B.R. 4, 8 (Bankr. S.D.N.Y. 1992); *In re Drexel Burnham Lambert Group, Inc.*, 118 B.R. 209, 211 (Bankr. S.D.N.Y. 1990); *In re Gates Engineering Co., Inc.*, 104 B.R. 653, 654 (Bankr. D. Del. 1989).³

26. The Court's authority does not extend to reviewing the U.S. Trustee's decision to appoint or exclude members of the Committee *de novo*. Rather, the Court simply determines whether there is adequate representation. *In re ShoreBank*, 467 B.R. 156, 162 (Bankr. N.D. Ill. 2012) ("there is nothing for a court to review—other than the bare decision itself" to see if the committee is adequately representative.)

27. The Movants provide no legal basis for the Court to take the extraordinary and unprecedented action requested. Furthermore, the Movants fail to allege facts, which if determined to be true, would support a finding that committee membership must be changed "to ensure adequate representation."

28. The Movants can be credited with discerning Mlle. Turcotte's age and bringing that fact to the attention of the UST within hours of filing their Motion. As a result, Committee membership has already been changed by the U.S. Trustee to address the eligibility issue, and the U.S. Trustee, consistent with its statutorily imposed duties, will continue to investigate the matter to determine if further action is warranted.

³ In those cases in which a court held that it could review United States Trustee committee decisions, the majority have applied the deferential "arbitrary and capricious" or "abuse of discretion" standards. *See, e.g., In re Barney's, Inc.*, 197 B.R. 431, 438 (Bankr. S.D.N.Y. 1996); *In re America West Airlines*, 142 B.R. 901, 902 (Bankr. D. Ariz. 1992); *In re Columbia Gas Sys., Inc.*, 133 B.R. 174, 176 (Bankr. D. Del. 1991); *In re First RepublicBank Corp.*, 95 B.R. 58, 60 (Bankr. N.D. Tex. 1988).

29. As the Committee is currently constituted, with or without Mlle. Turcotte, the Movants are adequately represented.

30. The fact is that no committee could be appointed pursuant to the Order that would satisfy the Movants. They are adequately represented in this case by an experienced and skillful team of lawyers who have already argued that any committee composed of claimants with varying interests cannot adequately represent the interests of wrongful death plaintiffs. The Court rejected that argument and its order is final.

31. The Movants are not entitled to again challenge the Court's order concerning the Movants' attempts to thwart committee formation - through the present Motion. It must be denied.

IV. RESPONSE

In accordance with D. Me. LBR 9013-1(f), The U.S. Trustee responds to the allegations contained in the motion as follows:

1. Paragraph 1 of the Motion seeks to construe pleadings previously filed in this case, the terms of which speak for themselves.
2. Paragraph 2 of the Motion seeks to characterize prior proceedings in this case and to attribute certain motives to the Movants. No facts are alleged to which a response is necessary.
3. Paragraph 3 of the Motion seeks to construe certain portions of the Order, the terms of which speak for themselves.
4. Paragraph 4 of the Motion seeks to construe certain portions of the Order, the terms of which speak for themselves.

5. Paragraph 5 of the Motion seeks to construe certain remarks made by the Court in the course of the October 1, 2013 Hearing in this case, which remarks speak for themselves. The U.S. Trustee denies the remaining allegations contained in paragraph 5 of the Motion.

6. The U.S. Trustee admits that Megane Turcotte has stated that she is 17 years old, a fact not previously known to the U.S. Trustee. The U.S. Trustee further admits that Mlle. Turcotte did not attend the formation meeting in person. The U.S. Trustee admits that no mention was made of her age at the meeting, though the question of her age was addressed at the interview of her proxy, Madame Roy-LaRoche. The U.S. Trustee is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 6 of the Motion and, therefore, denies the same.

7. The U.S. Trustee is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Motion and, therefore, denies the same.

8. The U.S. Trustee denies the allegations contained in paragraph 8 of the Motion.

9. The U.S. Trustee is without knowledge or information sufficient to form a belief as to truth of the allegations contained in paragraph 9 of the Motion and, therefore, denies the same.

10. The U.S. Trustee denies the allegations contained in paragraph 10 of the Motion.

11. The U.S. Trustee denies the allegations contained in paragraph 11 of the Motion.

12. The U.S. Trustee denies the allegations contained in paragraph 12 of the Motion.

V. CONCLUSION

WHEREFORE, The U.S. Trustee requests that the Court, after hearing, enter an Order denying the Motion and grant to the parties in this case such further relief as is just.

Dated at Portland, Maine this 24th day of December, 2013.

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

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CERTIFICATE OF SERVICE

I, Jennifer H. Pincus, being over the age of eighteen and an employee of the United States Department of Justice, U.S. Trustee Program, hereby certify that on December 24, 2013, I electronically filed the forgoing Objection of the United States Trustee to Wrongful Death Claimants' Motion to Modify Order Concerning Formation of Creditors' Committee and this Certificate of Service, which were served upon each of the parties set forth on this Service List via U.S. mail, postage prepaid, on December 24, 2013. All other parties listed on the Notice of Electronic Filing have been served electronically.

Dated at Portland, Maine this 24th day of December, 2013.

/s/ Jennifer H. Pincus

Service List:

N/A