

Date: 2/11/2014
Time: 10:00 a.m.
Place: Bangor

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

Montréal, Maine & Atlantic
Railway, Ltd.

Debtor

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Chapter 11
Case No. 13-10670

**OBJECTION TO AMENDED MOTION OF CHAPTER 11 TRUSTEE FOR ENTRY
OF AN ORDER PURSUANT TO 11 U.S.C. §§ 105(a) AND 502(b)(9), FED. R. BANKR.
P. 3002 AND 3003(c)(3), AND D. ME. LBR 3003-1 ESTABLISHING DEADLINE FOR
FILING PROOFS OF CLAIM AND PROCEDURES RELATING THERETO AND
APPROVING FORM AND MANNER OF NOTICE THEREOF**

NOW COME Yannick Gagné, Guy Ouellet, Serge Jacques and Louis-Serges Parent (the “Class Action Plaintiffs”), and object to the Amended Motion of Chapter 11 Trustee for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 502(b)(9), Fed. R. Bankr. P. 3002 and 3003(c)(3), and D. Me. LBR 3001-1 Establishing Deadline for Filing Proofs of Claim and Procedures Relating Thereto and Approving Form and Manner of Notice Thereof (the “Amended US Motion”) as follows:

I. INTRODUCTION

1. On July 6, 2013, a train derailed in Lac-Mégantic, Québec (the “Derailment”) on railroad track owned, operated, and maintained by Montreal, Maine & Atlantic Canada Co. (the “Canadian Debtor”). The Derailment set off multiple explosions, destroyed a significant portion of downtown Lac-Mégantic, and resulted in

the deaths of at least 47 people. Businesses, governments, and a large number of individuals suffered immense harm from the Derailment.

2. The Canadian Debtor is an unlimited liability company under Canadian law and is a subsidiary of the debtor in this case, the Montréal, Maine & Atlantic Railway, Ltd. (the “US Debtor”). See Amended Motion at ¶¶ 5, 8. As a result, the US Debtor, or its bankruptcy estate, may be liable for any deficiency in the payment of claims asserted against the Canadian Debtor. See Amended Motion at ¶ 8. Additionally, many, if not all, of the operations and actions of the Canadian Debtor were directed by the US Debtor. Accordingly, parties who suffered losses as a result of the Derailment have claims against not only the Canadian Debtor, but also the US Debtor.

3. On about July 15, 2013, the Class Action Plaintiffs filed a Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (the “Authorization Motion”) in the judicial district of Mégantic, Quebec (temporarily, hearings are being heard in Sherbrooke). The Authorization Motion sought to commence a class action against the Canadian Debtor, as well as the US Debtor, and other parties in connection with losses suffered as a result of the Derailment. See Affidavit of Yannick Gagné (the “Gagné Affidavit”) at ¶¶ 1-2; Affidavit of Guy Ouellet (the “Ouellet Affidavit”) at ¶¶ 1-2.

4. On August 7, 2013, the US Debtor filed a voluntary petition with this Court seeking relief as a debtor under 11 U.S.C. Chapter 11. On that same date, the Canadian Debtor filed for protection under Canada’s Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the “CCAA”), with the Québec Superior Court of

Justice (Commercial Division) (the “Superior Court”). On the following day, the Superior Court made an order granting the Canadian Debtor protection under the CCAA. See Motion for Order Adopting Cross-Border Insolvency Protocol (the “Protocol Motion”), Docket No. 126 at ¶ 3. As a result, further action against the US Debtor and the Canadian Debtor with respect to the Authorization Motion has been stayed.

5. Robert Keach (the Trustee”) is the duly appointed, acting, and qualified Chapter 11 trustee in this case. The Superior Court appointed the Richter Advisory Group Inc. (Richter Group Conseil Inc.) as monitor (the “Monitor”) and authorized foreign representative of the Canadian Debtor in the Canadian Debtor’s CCAA proceeding (the “CCAA Proceeding”). See Protocol Motion at ¶ 3.

6. On November 1, 2013, the Class Action Plaintiffs filed a motion (the “Representation Motion”) with the Superior Court in the CCAA Proceeding seeking an order appointing the Class Action Plaintiffs as representatives of the victims of the Derailment. The Representation Motion has yet to be heard by the Superior Court. Since the filing of the Representation Motion, the Class Action Plaintiffs have obtained over 1,500 proxies from victims of the Derailment, appointing the Class Action Plaintiffs as their representatives for all purposes, including the filing of proofs of claims and voting, in both this case and in the CCAA Proceeding. See Gagné Affidavit at ¶ 3; Ouellet Affidavit at ¶ 3.

7. On December 13, 2013, the Canadian Debtor filed a Motion for an Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date (the “Canadian Motion”) in the CCAA Proceedings. See Amended Motion at ¶ 11,

Exhibit A. On that same date, the Trustee filed its Motion of Chapter 11 Trustee for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 502(b)(9), Fed. R. Bankr. P. 3002 and 3003(c)(3), and D. Me. LBR 3001-1 Establishing Deadline for Filing Proofs of Claim and Procedures Relating Thereto and Approving Form and Manner of Notice Thereof (the “US Motion”) with this Court, along with a motion seeking an expedited hearing on that Motion. See Docket Nos. 496, 497. Hearings on these motions were scheduled to be held before this Court and the Superior Court on December 18, 2013, but were continued by agreement of the parties to February 11, 2014. See Docket Nos. 524, 525. On January 27, 2014, the Trustee filed the Amended Motion with this Court, replacing the US Motion, along with a motion requesting that an expedited hearing be held on the Amended Motion on February 11, 2014. See Docket Nos. 596, 597.

8. In the Amended Motion, the Trustee seeks to impose a bar date of May 31, 2014 for the filing of proofs of claim in this case. In the tragic circumstances of this case, and given the onerous claim forms and claim process which the Monitor has requested in the CCAA Proceeding, the proposed bar date provides insufficient time for the filing of claims by claimants. The Trustee has also asked that this Court permit the filing of claim forms in the Canadian Proceeding as provided in the Canadian Motion to, if properly completed, constitute the filing of proofs of claim in this case as well. Those forms, however, are extremely cumbersome and misleading, and do not comport with the requirements of the Bankruptcy Code or due process. Accordingly, the Class Action

Plaintiffs adamantly oppose the relief sought in the Amended Motion unless that relief is substantially modified from what the Trustee has requested.¹

II. DISCUSSION

The Proof of Claim Procedures Proposed By The Trustee Would Bar the Filing of a Class Claim, *Ab Initio*, and May Have the Practical Effect of Undermining Claimants' Ability To Participate In And/Or Benefit From These Proceedings

9. The Canadian Motion asks the Superior Court to permit the filing of claims in the CCAA Proceeding only by individual persons, estates, and corporations and to prohibit claim filings on a group or class basis, stating that the filing of group or class claims would make it impossible for the Monitor to carry out the processing of claims by each "class member". See Canadian Motion at ¶¶ 31-32. To further support this request, the Monitor states:

Moreover, the Chapter 11 Trustee informed Petitioner and the Monitor that the filing of group or class claims in the Chapter 11 proceedings would not be acceptable. Consequently, the filing of group of [sic] class claims in the present CCAA Proceedings would defeat one of the main purposes of this claims process which is to allow the deemed filing of the Proofs of claims in the Chapter 11 proceedings.

Canadian Motion at ¶ 33.

10. It is beyond doubt that the filing of a class-action proof of claim is permitted in bankruptcy proceedings in the United States. In re Trebol Motors Distributor Corp., 220 B.R. 500 (B.A.P. 1st Cir. 1998), the Panel held that:

The First Circuit has not addressed the issue of class claims in bankruptcy, but all of the circuit courts which have spoken have held that they are permitted. See Birting Fisheries v. Lane (In re Birting Fisheries, Inc.), 92 F.3d 939 (9th

¹ The Class Action Plaintiffs have also filed their opposition to the Canadian Motion in the CCAA Proceeding, along with a cross-motion seeking approval of a much simplified and expedited process to replace the Monitor's requested 78 page claim form, and modification of other claim procedures, as set forth in the Canadian Motion.

Cir.1996); Reid v. White Motor Corp., 886 F.2d 1462 (6th Cir.1989), cert. denied, 494 U.S. 1080, 110 S.Ct. 1809, 108 L.Ed.2d 939 (1990); In re Charter Co., 876 F.2d 866 (11th Cir.1989), cert. dismissed, 496 U.S. 944, 110 S.Ct. 3232, 110 L.Ed.2d 678 (1990); In the Matter of American Reserve Corp., 840 F.2d 487 (7th Cir.1988). We agree that class proofs of claim are permissible in cases under the Bankruptcy Code.

220 B.R. at 502.

11. The permissibility of class proofs of claim in bankruptcy proceedings was confirmed most recently by the Fourth Circuit in its 2012 decision in Gentry v. Siegel (“Gentry”), 668 F.3d 83 (4th Cir. 2012), in which that Court held that:

We agree with the Seventh Circuit’s conclusion that the authorization for the filing of proofs of claim should not be construed strictly. See In re American Reserve, 840 F.2d at 492–93 (noting that a strict ruling would effectively undermine the application of the class action rule). Thus, if proofs of claim may be filed by agents of creditors, they may also be filed by putative agents on a conditional basis. Reaching such a conclusion serves the same procedural goal that is served by allowing agents to file proofs of claims on behalf of creditors. We thus conclude that creditors may file proofs of claims for themselves and as putative agents for members of a class who are similarly situated.

668 F.3d at 90-91 (emphasis added). The Court then went on to note that “In construing the Bankruptcy Rules to permit the filing of a [sic] class proofs of claim, we join the vast majority of other courts that have considered the issue.” 668 F.3d at 91.

12. “[B]y recognizing class actions, the Bankruptcy Rules also recognize that putative class representatives can keep the class action process alive until the court decides the issue. Thus, we conclude that Rule 3001 should be construed to allow class proofs of claim, at least on a tentative basis, until the court rejects the class-action process.” 668 F.3d at 90. There is now no proceeding before this Court to determine whether the class action process should apply here or whether any proposed class or

classes of claims should be certified. Therefore, barring or discouraging putative class proofs of claim, either directly or indirectly through incorporation of any claims process in the CCAA Proceeding which eliminates their vitality there, is premature. Instead, the decision in Gentry sets forth the appropriate procedure for dealing with class proofs of claim:

Recognizing class proofs of claim has the salutary effect of putting trustees and other parties on notice of the representative claimants' intent to pursue a class action in the bankruptcy case, allowing them to agree or disagree through objections. And the representative claimants can then, upon an indication of an objection, file a Rule 9014 motion to authorize the application of Rule 7023. If the motion is granted, the procedure set forth in Civil Rule 23 would become applicable. Of course, if the bankruptcy court denies the motion, it should then establish a reasonable time within which the individual putative class members are allowed to file individual proofs of claim. *Cf. American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) (noting that "the commencement of the original class suit tolls running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status").

668 F.3d at 91.

14. In the Amended Motion, the Trustee does not directly seek to bar the filing of class proofs of claim in this case. However, his proposal to permit the filing of a claim in the CCAA Proceeding to constitute the filing of a proof of claim in this case is conditioned upon a process that does seek to bar the filing such claims. The overall effect will be that claimants will be precluded from participating in these proceedings through a representative/class process.

The Trustee's Proposed Claim Procedure Does Not Comport With Due Process

15. The Trustee recognizes that "issues of due process likely require that potential holders of Derailment Claims receive notices and proof of claim forms in

French, as well as English.” Amended Motion at ¶ 7. The Trustee does not, however, request or provide for any such notices or forms issued in connection with this case to be provided in both languages. The Trustee apparently feels that utilization of the claim form proposed in the Canadian Motion, which will be issued in both French and English, is sufficient to rectify this violation of due process since he is requesting that this Court provide that use of the form and claim procedures outlined in the Canadian Motion constitutes “adequate and sufficient due process”. See Amended Motion at ¶ 12(iii). The claim form proposed by the Monitor, however, consists of a 78 page document which would have to be navigated by any claimant. Furthermore, that claim form requires a claimant to provide an extraordinary amount of information in order to assert a claim. A claim form requesting similar, but apparently less, information has been characterized as a “procedurally improper, unilaterally imposed, grossly overbroad and burdensome discovery device that is designed, in the first instance, to perfunctorily ‘disallow’ masses of individual claim for procedural and clerical ‘errors’ or to entirely discourage the filing of claims due to the inability or burden imposed the comply with its onerous demands.” In re Congoleum Corporation, 2008 WL 314699 at *1 (Bankr. D.N.J. Feb. 4, 2008). In that asbestos related case, the court declined to require the use of a 24 page proof of claim form which demanded “an overwhelming amount of information”, such as Social Security numbers, employment histories, information concerning non-asbestos-related diseases, detailed medical histories, as well as deposition discovery from other proceedings, holding that “Allowing such a detailed and cumbersome request would be inequitable to the claimants to the extent not counterbalanced by the desire to streamline

claims.” 2008 WL 314699 at *3. Thus, the availability of the claim form proposed by the Monitor in both French and English does nothing to rectify the substantial due process defects arising from the Trustee’s failure to provide for issuance of proof of claim forms and instructions in this case in both languages. Accordingly, the Motion must be denied unless this shortcoming is rectified by requiring the issuance of proof of claim forms in this case and instructions for the same in both French and English.

16. In the Amended Motion, the Trustee proposes to provide additional notice of the bar date and claims procedures by publication in English in the Bangor Daily News, the Portland Press Herald, and the Wall Street Journal. See Amended Motion at ¶ 22. This ignores the fact that the Derailment occurred in a primarily French-speaking Province of Quebec and not in the United States. At no point has the Trustee proposed to publish any such notice in French in a publication which would ordinarily be read by claimants in the Lac-Megantic area. Due process requires more.

17. Generally, a court-ordered notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314. “Service by publication to a defendant in a foreign country is an acceptable alternative means of service under Rule 4(f)(3) . . . when . . . the publication is likely to reach the defendants”. In re Maxon Eng'g Services, Inc., 418 B.R. 653, 665-66 (Bankr. D.P.R. 2009). In this instance, publication of notice in newspapers located in the United States is not likely to reach many unknown holders of Derailment Claims, most of whom presumably live or conduct business in or around Lac-Megantic and not in Maine

or the rest of the United States. Furthermore, publication of any such notice solely in English clearly is not directed to providing claimants whose primary language is French with adequate notice of any bar date and the procedures for filing a proof of claim. Accordingly, the publication notice proposed by the Trustee does not comport with the requirements of due process.

The Proposed Bar Date Provides Insufficient Time For The Filing Of Proofs Of Claim In This Case And Does Not Take Class Proofs Of Claim Into Account

18. The Class Action Plaintiffs agree with the Trustee that a bar date is necessary here, just as it is in almost every Chapter 11 case. See Amended Motion at ¶ 16; F.R. Bankr. P. 3003(c)(2). In proposing May 31, 2014 as the bar date, the Trustee seems to consider only those factors which will aid him in processing claims in a timely and efficient manner. See Amended Motion at ¶ 17. Equal consideration must, however, be given to the needs and abilities of the approximately 6000 potential claimants located in or about Lac-Megantic, including infants, the disabled, the mentally challenged, the aged, the grieving, the impecunious, and, unfortunately, the injured and the dead. These claimants do not have the necessary wherewithal to obtain proper legal advice with respect to the bankruptcy laws of what to them is a foreign country. Furthermore, although it is extremely important to ensure that claim distributions to such claimants are made as soon as possible, this is not a case where further extension of a bar date will result in diminishment of estate assets through operational losses since substantially all of the US Debtor's assets are scheduled to be sold well prior to the Trustee's proposed bar

date. Accordingly, the bar date requested by the Trustee is far too soon having regard to the extraordinary amount of information being required in order to assert a claim.²

19. The procedure suggested by the Monitor in the Canadian Motion, which the Chapter 11 Trustee would adopt, impedes access to justice in at least the following ways:

- The claim forms are 78 pages long, with nine separate appendices, making them extremely confusing and onerous
- The forms must be completed on an individual basis, resulting in the denial of class action rights
- The forms require the holders of Derailment Claims to exercise their judgment in respect of complex legal issues, such as the quantification of unliquidated damages, and to indicate whether they hold claims against the Canadian Debtor, the US Debtor, or both;
- The forms require claimants to provide very specific details of their claims against the Debtor and all supporting documents giving rise to their claims – effectively, to the extent of information only otherwise available on discovery
- The forms make no mention of the availability of the Representative Plaintiffs and their counsel to assist individuals completing the form, but, instead, appear to suggest that the Monitor will provide them with advice at the proposed “information sessions”
- These “information sessions” will not provide claimants with legal advice or a legal advocate;
- The forms state that no funds have been allocated to satisfy the claims filed with the Monitor, a statement which will discourage the filing of claims

The cumulative impact of these defects will be to discourage the filing of Derailment Claims. Granting the Trustee’s request to permit filing of the Monitor suggested forms in the CCAA Proceeding to constitute proofs of claim filed in this case will transfer these

² An earlier bar date might be justified if the claim process proposed by the Trustee and the Monitor were modified as set forth in the Class Action Plaintiffs’ Motion to Establish Claim Procedures filed concurrently with this Objection.

defects to proceedings before this Court as well. If, however, this Court permits filing of these forms in the CCAA Proceeding to constitute proofs of claim filed in this case, then it should take into account that completion of these onerous and defective forms will require substantial time for those claimants who may actually file them with the Superior Court. As a result, the bar date suggested by the Trustee would, in that instance, be ludicrously short, and must be extended to September 30, 2014.

20. Additionally, any Order issued by this Court should make clear that the amount of any individual claim filed will not be binding upon the claimant in any class-action proceedings and that a failure to file a proof of claim will not bar an action for damages against third parties.

III. CONCLUSION

For the foregoing reasons, the Amended Motion must be denied or, in the alternative, can be granted only if: (a) the claim procedures and forms requested by the Monitor are modified in the manner set forth in the opposition to the Canadian Motion and the cross-motion filed by the Class Action Plaintiffs in the CCAA Proceeding; and (b) the Trustee modifies his requested claims procedure to meet the remaining objections to the same set forth herein.

Dated at Portland, Maine this 9th day of February, 2014.

/s/ F. Bruce Sleeper
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

Montréal, Maine & Atlantic
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Chapter 11
Case No. 13-10670

CERTIFICATE OF SERVICE

I certify that, on February 9, 2014, all parties listed on the Notice of Electronic Filing in this case were served electronically with a copy of the following documents (collectively, the “Documents”):

1. Objection to Amended Motion of Chapter 11 Trustee for Entry of an Order Pursuant To 11 U.S.C. §§ 105(a) and 502(b)(9), Fed. R Bankr. P. 3002 and 3003(c)(3), and D. Me. LBR 3003-1 Establishing Deadline for Filing Proofs of Claim and Procedures Relating Thereto and Approving Form and Manner of Notice Thereof
2. Class Action Plaintiffs’ Motion to Establish Claim Procedures and proposed Order regarding same
3. Affidavit of Yannick Gagné dated February 7, 2014
4. Affidavit of Guy Ouellet dated February 7, 2014
5. Motion for Emergency Hearing and To Limit Notice and proposed Order regarding same

I further certify that on that same date the Documents were served by e-mail upon the parties listed in Exhibit A to this Certificate at the e-mail addresses indicated in that

Exhibit and that the Documents were served upon the parties listed in Exhibit B to this Certificate by United States first class mail, postage prepaid, to the addresses listed in that Exhibit.

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EXHIBIT B

Served via U.S. First Class Mail:

Cattron Theimeg
58 W. Shenango Street
Sharpsville, PA 16150

Debroussailleurs GSL Inc
5646 Chemin Saint-Remi
St-Adien-De-Ham, PQ J0A 1C0
CANADA

Petro Sud-Ouest Inc.
619, Laurent
Granby, PQ J2G 8Y3
CANADA

Railway Company Limited
300 Union Street
Saint John, NB E2L 4Z2
CANADA

St. Lawrence & Atlantic RR
9001, boul. de l'Acadie
Bureau 600
Montreal, QC H4N 3H5
CANADA

Valero Marketing & Supply Co. c/o
Bill Kless, Chairman & CEO
One Valero Way
San Antonio, TX 78249-1616

Ville De Sherbrooke
145 Rue Wellington Nord
C P 610
Sherbrooke, QC J1H 5H9
CANADA

Internal Revenue Service
P.O. Box 7346
Philadelphia, PA 19101-7346

EPA New England, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Maine DEP
17 State House Station
Augusta, ME 04333-0017

OTT Communications
900-D Hammond Street
Bangor, ME 04401

Federal Railroad Administration
Attn: Assistant Chief Counsel
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Federal Railroad Administration c/o
Borden Ladner Gervais
1000, de La Gauchetiere W, Suite 900
Montreal, Quebec H3B 5H4
CANADA

FCM Rail, Ltd.
15173 North Road
Fenton, MI 48430

Town of Brownville
586 Main Road
Brownville, Maine 04414

Town of Houlton
21 Water Street
Houlton, ME 04730

Town of Jackman
369 Alt Main Trail
Jackman, ME 04945

Town of Millinocket
197 Penobscot Avenue
Millinocket, ME 04462

Town of Milo
6 Pleasant Street
Milo, ME 04463

Town of North Troy
Attn: Troy Town Clerk
142 Main Street
North Troy, VT 05859

Town of Presque Isle
12 2nd Street
Presque Isle, ME 04769

Town of Richford
Attn: Town of Richford Listers
94 Main Street
Richford, VT 05476

Frederick J. Williams
74 Bellevue Street
Compton, Quebec J0B 1L0
CANADA

Robert D. Thomas
49 Park Street
Dexter, ME 04930

Daniel Aube
308 St. Lambert Street
Sherbrooke, Quebec J1C 0N9flow
CANADA

State of Vermont
Vermont Department of Taxes
133 State Street
Montpelier, VT 05633

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55 rue Frontenac
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