

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC  
RAILWAY, LTD.

Debtor.

Case. No. 1:13-mc-00184-NT  
1-14-cv-00113-NT

**TRUSTEE’S OMNIBUS RESPONSE TO (A) NOTICE OF PLAINTIFFS ANNICK ROY (O/B/O JEAN-GUY VEILLEUX), MARIE-JOSEE GRIMARD (O/B/O HENRIETTE LATULIPPE) TERMINATING STAY AND (B) MOTION OF OFFICIAL COMMITTEE OF VICTIMS FOR ORDER, PURSUANT TO COURT’S MARCH 23, 2015 STAY ORDER, TO REIMPOSE STAY AND SCHEDULING HEARING**

Robert J. Keach, the chapter 11 trustee appointed pursuant to 11 U.S.C. § 1163 (the “Trustee”) in the above-captioned case (No. 13-10670, the “Case”), hereby responds (the “Response”) to: (A) the *Notice of Plaintiffs Annick Roy (o/b/o Jean-Guy Veilleux), Marie-Josée Grimard (o/b/o Henriette Latulippe) Terminating Stay* [D.E. No. 280; No. 1-14-cv-00113-NT, D.E. No. 163] (the “Stay Termination Notice”) and (B) the *Motion of Official Committee of Victims for Order, Pursuant to Court’s March 23, 2015 Stay Order, to Reimpose Stay and Scheduling a Hearing* [D.E. No. 282] (the “Motion”). In support of the Response, the Trustee respectfully states as follows:

**RELEVANT BACKGROUND**

1. On March 23, 2015, the District Court for the District of Maine (the “Court”) entered the *Order Amending and Restating Consent Order Staying Proceedings Pending Appeal in 1:13-mc-00184-NT* [D.E. No. 277] (the “Amended Consent Order”).<sup>1</sup> The Amended Consent Order was agreed to as among the Trustee, the Official Committee of Victims (the “Committee”)

<sup>1</sup> Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Motion or the Amended Consent Order, as applicable. The Amended Consent Order amends the *Consent Order Staying Proceedings Pending Appeal in 1:13-mc-00184-NT* [D.E. No. 253].

and Plaintiffs Annick Roy (o/b/o Jean-Guy Veilleux) and Marie-Josée Grimard (o/b/o Henriette Latulippe) (together, the “WD Plaintiffs”). Pursuant to the Amended Consent Order, among other things, the Transferred Actions were all stayed pending termination of the stay in accordance with the terms of the Amended Consent Order. One manner of termination was on 30 days’ notice by any party to the Transferred Actions, and the Amended Consent Order preserved the ability of the Committee to seek to reimpose the stay upon any such termination.

2. On March 31, 2015, the Trustee filed the *Trustee’s Plan of Liquidation Dated March 31, 2015* [No. 13-10670, D.E. No. 1384] (the “Plan”) and the Monitor filed the CCAA Plan, which each contemplate, among other things, settlements of certain wrongful death claims with certain defendants (collectively, the “Settlements”). Pursuant to their terms, the Settlements do not become effective until, among other things, the effective date of the Plan. The Trustee has requested that a hearing on confirmation of the Plan be scheduled for August 20, 2015. *See* No. 13-10670, D.E. No. 1432. The effective date of the Plan will, therefore, occur after August 20, 2015.

3. On May 7, 2015, the WD Plaintiffs filed the Stay Termination Notice, providing notice of termination of the stay imposed by the Amended Stay Order (the “Wrongful Death Stay”) in accordance with the terms of the Amended Stay Order. Prior to filing the Stay Termination Notice, counsel to the WD Plaintiffs (“Plaintiffs’ Counsel”) discussed the Stay Termination Notice with the Trustee who, in compliance with his fiduciary duties, considered the costs and benefits to the estate of terminating the Wrongful Death Stay. With certain assurances from Plaintiffs’ Counsel and the modifications noted below, the Trustee determined that the Stay Termination Notice was consistent with the Plan and would also serve to incentivize the remaining non-settling defendants to join the Settlements.

4. Both prior to and after the filing of the Stay Termination Notice, counsel to the Committee broached with the Trustee his thesis that, based on his review of the Form Engagement Letter (as defined below), Plaintiffs' Counsel would not be entitled to a contingent fee with respect to a given Wrongful Death Plaintiff absent having filed a complaint for such Wrongful Death Plaintiff in advance of resolution of such claim through settlement (the "Condition to Fees"). The Trustee has consistently taken the position—as has the Bankruptcy Court—that this is a matter between the Plaintiffs' Counsel and their clients, and in any event, the Plan provides for payment of fees only with proof of entitlement to payment.

5. On May 18, 2015, the Committee filed the Motion, pursuant to which the Committee seeks to re-impose the Wrongful Death Stay until June 30, 2015 (the "Stay Reimposition"), which will be terminated as of June 8, 2015 pursuant to the Stay Termination Notice and in accordance with the Amended Consent Order. The Committee seeks the Stay Reimposition in order to preclude Plaintiffs' Counsel from filing complaints for the WD Plaintiffs in advance of the CCAA Court's approval of the Settlements, thus—according to the Committee—precluding satisfaction of the Condition to Fees.

6. Under applicable statutes of limitations, the time period for the WD Plaintiffs to file complaints related to the Derailment may expire as early as July 6, 2015.

### **RESPONSE**

7. The Committee's expressed concerns are based upon nothing more than speculation, and presume to probe matters that are well outside the province of the Committee's mandate<sup>2</sup>—indeed, beyond the jurisdiction of this Court.<sup>3</sup> And even if the Committee's concerns

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<sup>2</sup> This is hardly the first time the Committee has strayed from its limited role. Given changes in the case since the Committee's formation and the fact that all victims are now otherwise ably represented, the Committee is likely no longer needed and should be disbanded. This is, of course, a matter for the Bankruptcy Court and not this Court.

<sup>3</sup> Plaintiffs' Counsel are not estate-retained professionals under Bankruptcy Code sections 327 and 328 and thus Plaintiffs' Counsel's fees are not reviewable under Bankruptcy Code section 330. In addition, Plaintiffs' Counsel

were well-founded, the relief sought in the Motion would not remedy those concerns. Finally, the benefits to the estate of terminating the Wrongful Death Stay in accordance with the Stay Termination Notice outweigh the benefits (if any) of the Stay Reimposition, all as set forth below.<sup>4</sup>

8. As an initial matter, the Committee's allegations constitute an unwarranted and unsubstantiated attack on the motives of Plaintiffs' Counsel, who have been active and good-faith participants in negotiation of the Settlements, which have generated over CAD \$300,000,000 for payment to victims of the Derailment. In support of the Committee's allegation that the WD Plaintiffs' desire to lift the Wrongful Death Stay is a thinly veiled attempt by Plaintiffs' Counsel to secure entitlement to a contingency fee, the Committee attaches an unexecuted form of retainer agreement with blanks (the "Form Engagement Letter") that the Committee does not (and cannot) assert has been executed by any of the WD Plaintiffs. Indeed, Plaintiffs' Counsel have represented to the Trustee that the Form Engagement Letter is not typical of the versions executed by the WD Plaintiffs, so it is far from clear that the Committee's concern that Plaintiffs' Counsel is motivated by the Condition to Fees is even justified. At bottom, the Committee asks the Court to reimpose the Wrongful Death Stay *in case* the actual engagement letters signed by the WD Plaintiffs have the same fee structure as the Form Engagement Letter.<sup>5</sup>

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represent the WD Plaintiffs individually and not as a class, and thus Plaintiffs' Counsel's fees are not reviewable as awarded under Rule 23 of the Federal Rules of Civil Procedure.

<sup>4</sup> The Trustee's Response is conditioned upon the WD Plaintiffs' agreement to (a) abstain from naming Irving Oil Limited, Irving Oil Company, Limited, Irving Oil Operations General Partner Limited and Irving Oil Commercial G.P., and any affiliate, predecessor, successor or assign in any newly filed case, (b) immediately stay all newly filed cases against Settling Defendants and Released Parties (as defined in the Plan) after filing, and (c) continue the stay as to all Transferred Cases, all as represented in part by the WD Plaintiffs in the Stay Termination Notice.

<sup>5</sup> Apart from the speculative nature of the Committee's request, the fee structure between the WD Plaintiffs and their counsel is simply not the Committee's concern. The Bankruptcy Court has already indicated that third parties do not have standing to examine or contest a lawyer's advisory arrangement with his client. *See* Hr'g Tr. Mar. 19, 2014 (No. 13-10670) (The Court: "Whether or not those firms have been duly authorized by those individuals to take any position in this court is a matter between those individuals and those lawyers. Other parties-in-interest don't have standing to determine whether or not there has been compliance with the Bar rules of this jurisdiction or any other jurisdiction.").

9. Even taking as true the Committee's unwarranted speculation, and presuming that the engagement letters governing the WD Plaintiffs' relationship with their counsel has a fee structure akin to the Form Engagement Letter, the Committee's requested relief is either unnecessary or insufficient to remedy its concern. The Committee implicitly argues that reimposing the Wrongful Death Stay until after approval by the CCAA Court of the Settlements will preclude Plaintiffs' Counsel from satisfying the Condition to Fees. *See* Mot. ¶¶ 4, 6. But the Condition to Fees, assuming it even exists, either (a) became unsatisfiable (as to new complaints) upon execution of the agreements documenting the Settlements (the "Settlement Agreements"), as the claims would have been settled in advance of any new complaints having been filed, or (b) will not be satisfied as to any complaints until the effective date of the Plan, as that is a condition precedent to effectiveness of the Settlements.<sup>6</sup> If the proper interpretation of the Condition to Fees is the former, the relief requested is unnecessary because the Settlements would have occurred weeks ago in connection with execution of the Settlement Agreements, well in advance of new complaints having been filed. If the proper interpretation of the Condition to Fees is the latter, the relief requested is insufficient because Plaintiffs' Counsel could satisfy the Condition to Fees after the proposed June 30, 2015 Wrongful Death Stay expiry by filing new complaints in advance of the effective date of the Plan.<sup>7</sup> Accordingly, the Court should not grant relief that fails to solve even the speculative problem posited by the Committee.

10. Finally, the benefits of leaving the Stay Termination Notice undisturbed and denying the Motion are clear. First and foremost, out of basic fairness to the WD Plaintiffs, it is important to avoid jamming Plaintiffs' Counsel with a tight timeframe so that they may ensure that

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<sup>6</sup> The Trustee reserves all rights on this issue.

<sup>7</sup> Committee counsel has acknowledged that Plaintiffs' Counsel must be permitted to file complaints on behalf of the WD Plaintiffs in advance of the July 6, 2015 statute of limitations expiry, so the relief requested in the Motion cannot be fashioned to extend the Wrongful Death Stay beyond the point at which the Condition to Fees could not be satisfied under any interpretation.

the statute of limitations on their clients' claims is not at risk. Second, the ability to terminate the Wrongful Death Stay in order to file new complaints is a component of the deal embodied in the Settlements, which are in the best interests of the Debtor's estates, and the Committee's attempt to upset that component threatens the integrity of the delicate balance struck by the Settlement Agreements. And third, terminating the Wrongful Death Stay in accordance with the Stay Termination Notice will enable the Trustee to negotiate with defendants named in any new actions in advance of the Settlements being approved by the CCAA Court, thus increasing the pressure on any non-settling defendants for the benefit of the Debtor's stakeholders.

11. However, the Trustee's consent to the Stay Termination Notice is not unconditional, but is premised on agreement by the WD Plaintiffs to (a) abstain from naming Irving Oil Limited, Irving Oil Company, Limited, Irving Oil Operations General Partner Limited and Irving Oil Commercial G.P. and any affiliate, predecessor, successor or assign in any newly filed case, (b) immediately stay all newly filed cases against Settling Defendants and Released Parties after filing, and (c) continue the stay as to all Transferred Cases, all as represented in part by the WD Plaintiffs in the Stay Termination Notice.

**CONCLUSION**

For the reasons set forth above, the Trustee requests that (a) the Stay Termination Notice be effective in accordance with the terms of the Amended Consent Order, to the extent modified to include the agreements detailed above, and (b) the Motion be denied.

Dated: June 1, 2015

**ROBERT J. KEACH,  
CHAPTER 11 TRUSTEE OF MONTREAL  
MAINE & ATLANTIC RAILWAY, LTD.**

By his attorneys:

*/s/ Robert J. Keach* \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I, Robert J. Keach, Esq., of Bernstein, Shur, Sawyer & Nelson, P.A., hereby certify that on June 1, 2015, I electronically filed the *Trustee's Omnibus Response to (A) Notice of Plaintiffs Annick Roy (O/B/O Jean-Guy Veilleux), Marie-Josée Grimard (O/B/O Henriette Latulippe) Terminating Stay and (B) Motion of Official Committee of Victims for Order, Pursuant to Court's March 23, 2015 Stay Order, to Reimpose Stay and Scheduling Hearing* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys/parties of record who have registered as CM/ECF participants.

Dated: June 1, 2015

ROBERT J. KEACH,  
CHAPTER 11 TRUSTEE OF MONTREAL  
MAINE & ATLANTIC RAILWAY, LTD.

By his attorneys:

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