UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

TRUSTEE'S CONSOLIDATED RESPONSE TO MOTIONS FOR APPOINTMENT OF CREDITORS' COMMITTEE FILED BY CERTAIN WRONGFUL DEATH CLAIMANTS AND THE INFORMAL COMMITTEE OF QUÉBEC CLAIMANTS

Robert J. Keach, the chapter 11 trustee appointed pursuant to 11 U.S.C. § 1163 (the "Trustee") in the above-captioned case (the "Case"), hereby responds (the "Response") to: (i) the *Wrongful Death Claimants' Motion for Formation of Creditors' Committee* [Docket No. 76] (the "Flowers Claimants' Motion"), allegedly filed by 18 representatives of certain probate estates, and allegedly joined by 15 other representatives of certain decedents [Docket No. 78] (collectively, the "Flowers Claimants"), all of whom assert claims against Montreal Maine & Atlantic Railway, Ltd. (the "Debtor" or "MMA"), *inter alia*, for wrongful death and/or personal injuries resulting from the July 6, 2013 train derailment (the "Derailment") in Lac-Mégantic, Québec; and (ii) the *Motion of Informal Committee of Québec Claimants for Appointment of Creditors' Committee Pursuant to Bankruptcy Code Section 1102(a)(2)* [Docket No. 127] (the "Québec Committee Motion") filed by the Informal Committee of Québec Claimants (the "Québec Committee"), which is comprised of a) the government of the Province of Québec, Canada, b) the municipality of Lac-Mégantic, Québec, and c) the representatives of a Canadian class action lawsuit brought by victims of the Derailment. Both the Québec Committee Motion and the Flowers Claimants' Motion

(collectively, the "Motions") seek an order directing the United States Trustee (the "UST") to appoint an official committee in this Case, pursuant to 11 U.S.C. § 1102(a)(2).

INTRODUCTION

While the Trustee has emphasized many times the importance of the interests of the Derailment victims and believes that certain members of the Québec Committee in particular can and should play an important and positive role in the Case, the Trustee submits that the Flowers Claimants and the Québec Committee (collectively the "Movants") have each failed to meet the high burden of proof necessary for appointment of a committee in this case. Appointment of a committee or committees in this Case would be unnecessary, financially burdensome, and potentially detrimental to all creditors, including, importantly, the very creditors such a committee would purport to represent—the victims of the Derailment. As a matter of law, the Trustee serves as the fiduciary of all creditors, including the victims of the Derailment. Further, the victims of the Derailment, and the other parties associated with the Québec Committee, are already ably represented by experienced and knowledgeable counsel who have appeared and participated in this Case from its earliest days. The Flowers Claimants have brought, and continue to attempt to prosecute, numerous lawsuits in Chicago (which lawsuits were recently removed to the United States District Court for the Northern District of Illinois precedent to a possible transfer to Maine). There is simply no danger that the Flowers Claimants or the members of the Québec Committee will be deprived of a "seat at the table," disenfranchised, or otherwise excluded or marginalized from the administration of this Case. Appointment of a committee or committees pursuant to section 1102(a)(2) would simply result in fee shifting and unnecessarily increase the administrative costs of this Case, raising the threat that any such committee's professionals would be entitled to payment of their professional fees and expenses on a par with the claims of the

Derailment victims, unless express limitations were placed on the compensation of such professionals. In support of this Response, the Trustee states as follows:

BACKGROUND

1. On August 7, 2013 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"). Also on August 7, 2013, the Debtor's wholly-owned Canadian subsidiary, Montreal Maine & Atlantic Canada Co. ("MMA Canada"), filed for protection from creditors in a concurrent proceeding under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "Canadian Proceeding"). On August 21, 2013, the UST appointed the Trustee to serve in the Case pursuant to 11 U.S.C. § 1163.

2. The Debtor and MMA Canada operate a fully integrated, international shortline freight railroad system involving 510 route miles of track located in Maine, Vermont, and Québec.

3. As this Court is aware, the Case and the Canadian Proceeding were precipitated by the Derailment, which resulted in the loss of 47 lives, the destruction of a substantial portion of downtown Lac-Mégantic, significant environmental damage, the disruption of local businesses, and the evacuation of certain residents of Lac-Mégantic.

4. Subsequent to the Derailment, twenty lawsuits, asserting claims arising out of, or related to, the Derailment, were commenced in the Circuit Court for Cook County, Illinois, thirteen of which asserted claims against the Debtor (collectively, the "Illinois Actions"). Subsequent to the Petition Date, the Illinois Actions were removed to the United States District Court for the Northern District of Illinois. The Trustee intends to file a motion under 28 U.S.C.§157(b)(5) allowing the United States District Court for the District of Maine (the "Maine District Court") and/or this Court to properly determine the location for the trial of the Illinois Actions.

5. Also subsequent to the Derailment, certain Canadian claimants filed a motion in the Superior Court of Québec, seeking authorization to bring a class action against, among others, the Debtor and MMA Canada, for damages resulting from the Derailment (the "Canadian Class Action"). The Canadian Class Action and the Illinois Actions are hereinafter collectively referred to as the "Derailment Litigation."

RESPONSE TO MOTIONS

A. Role of the Trustee as a Fiduciary of All Creditors

6. As acknowledged in both Motions, section 1161 of the Bankruptcy Code specifically provides that section 1102(a)(1), which compels the UST to appoint a committee of unsecured creditors "as soon as practicable after the order for relief," does "not apply in a case concerning a railroad." *See* 11 U.S.C. §§ 1102(a)(1), 1161. The legislative history behind section 1161 indicates that Congress deemed the mandatory appointment of a committee pursuant to section 1102(a)(1) "inappropriate in railroad reorganizations." S. Rep. 95-989 (1978). The mandatory appointment of a committee in a railroad reorganization case would be "incompatible . . . with the requirement that a trustee be appointed" pursuant to 11 U.S.C. § 1163. *See* Robert W. Blanchette and Clifford W. Losh, *Railroad Reorganization,* in 1981 Norton Ann. Surv. Bankr. L. 6 (1981). Section 1163 compels the Secretary of Transportation, "as soon as practicable after the order for relief," to submit a list of five disinterested persons to the UST, from which list the UST must appoint a trustee to serve in the railroad reorganization case. 11 U.S.C. § 1163.

7. A trustee appointed pursuant to section 1163 acts as a fiduciary for all creditors, including victims of the Derailment such as the Flowers Claimants and the victims of the Derailment represented by the Québec Committee. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355-56 (1985) (stating that chapter 11 trustee is acts in a fiduciary capacity for all creditors). As the Trustee has represented on the record before this Court, given

section 1171(a) and the possibility that environmental claims could achieve administrative status in this Case, this Case is being administered primarily for the benefit of victims of the Derailment, and the Trustee serves as a fiduciary for these victims as well as of the Debtor's estate's other creditors. Accordingly, the Trustee's position on the necessity (or lack thereof) for appointment of official committees in this case is relevant, and weighed heavily, in light of the Trustee's fiduciary duties to all creditors and lack of motivation to favor one group of creditors over another. *See* In re Orfa Corp. of Phila., 121 B.R. 294, 299 (Bankr. E.D. Pa. 1990); In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 85 B.R. 13, 14 (Bankr. S.D.N.Y. 1988).

8. The centralized governance of railroad reorganization cases under a single trustee is the latest step in the evolution of railroad reorganization law, which has its origins in the railroad equity receiverships of the late 1800s. These equity receiverships were heavily dominated by committees of creditors; as described in one article, "[w]hile the railroad was in receivership, committees of various groups of creditors would be formed. Subsequently, the committees would meet and agree upon a plan of reorganization, appointing a new reorganization committee to effectuate the plan." Edward S. Adams, *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B.U. L. Rev. 581, 586 (1993). The inefficiencies and expenses of this committee-dominated reorganization approach gradually led to incorporating railroad reorganizations into section 77 of the Bankruptcy Act. *See* Warner Fuller, *The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations—A Survey*, 7 Law & Contemp. Prob. 377, 384 (1940). Unlike the equity receivership system, section 77 gave centralized control over the railroad reorganization process to the Interstate Commerce Commission, which was responsible for formulating the railroad's plan of reorganization. *See "Compulsory" Mergers Under Section 77 of the Bankruptcy Act*, 64 Yale L.J. 282, 282 (1954). Centralized control over the railroad reorganization process now lies with the trustee appointed under section 1163.

Congress thus made clear its intention to move away from the committee-dominated railroad reorganization process of the past, going so far as to expressly provide that section 1102(a)(1) does not apply in railroad bankruptcy cases. Committees in railroad cases were to be a rarity.

B. Appointment of an Official Committee under Section 1102(a)(2) is "Extraordinary Relief," is Subject to a High Standard, and Should be Granted Only if Absolutely Necessary to Assure Adequate Representation of the Flowers Claimants and Québec Committee

9. In light of the fact that section 1102(a)(1) does not apply in this Case, the Flowers Claimants and the Québec Committee both rely on section 1102(a)(2) as the authority for appointment of a committee in this Case. Section 1102(a)(2) provides that

> [o]n 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.

11 U.S.C. § 1102(a)(2) (emphasis added).

10. Appointment of a committee under section 1102(a)(2) is "an extraordinary remedy that courts are reluctant to grant." *See, e.g.*, In re Residential Capital, LLC, 480 B.R. 550, 557 (Bankr. S.D.N.Y. 2012); In re Dana Corp., 344, B.R. 35, 38 (Bankr. S.D.N.Y. 2006); In re Winn-Dixie Stores, Inc., 326 B.R. 853, 857 (Bankr. M.D. Fla. 2005); In re Garden Ridge Corp., 2005 WL 523129 at *3 (Bankr. D. Del. Mar. 2, 2005). Indeed, "because appointment of additional committees involves substantial cost and expense to the estate, such a request should rarely be granted." In re New Bern Riverfront Dev., LLC, 2010 WL 1254880 at *1 (Bankr. E.D.N.C. Mar. 25, 2010); *see also* In re Eastman Kodak Co., 2013 WL 4413300 at *2 (Bankr. S.D.N.Y. Aug 15, 2013) (stating that appointment of an additional committee under section 1102(a)(2) "constitutes extraordinary relief and is the exception rather than the rule in chapter 11 cases.").

11. Courts approach a request under section 1102(a)(2) in two stages. First, the movant has the burden of proving that the appointment of a committee under section 1102(a)(2) is

necessary to assure the adequate representation of the moving party. *See* Dana Corp., 344 B.R. at 38; Residential Capital, 480 B.R. at 587; In re Spansion, Inc., 421 B.R. 151, 156 (Bankr. D. Del. 2009); In re Enron Corp., 279 B.R. 671, 685 (Bankr. S.D.N.Y. 2002); Mirant Americas Energy Mktg., L.P. v. Official Comm. Of Unsecured Creditors of Enron Corp., 2003 WL 22327118, *3 (S.D.N.Y. Oct. 10, 2003) ("The statute clearly requires an initial determination of whether a party is adequately represented.").

12. Although the Bankruptcy Code does not provide a framework for determining whether is a party is "adequately represented," courts generally consider the following factors in deciding whether appointment of an additional official committee is necessary to ensure adequate representation:

1. The ability of the committee to function;
2. The nature of the case;
3. The standing and desires of the various constituencies;
4. The ability for creditors to participate in the case even without an official committee and the potential to recover expenses pursuant to section 503(b);
5. The delay and additional cost that would result if the court grants the motion;
6. The tasks that a committee or separate committee is to perform; and
7. Other factors relevant to the adequate representation issue.

Dana Corp., 344 B.R. at 38. No one factor is dispositive, and the circumstances of the particular chapter 11 case determines the amount of consideration given to each factor. Id.

13. Second, if the court determines that there is a lack of adequate representation, the court then must decide whether it should exercise its discretion and order the appointment of an additional committee. *See* Enron Corp., 279 B.R. at 685. "The court's ability to exercise discretion, even once inadequate representation is found, is arguably derived from the use of the word 'may' in 11 U.S.C. § 1102(a)(2)." Id. Discretionary considerations include the following:

1. The cost associated with the appointment;
2. The time of the application;
3. The potential for added complexity; and
4. The presence of other avenues for creditor participation.

Id. "[A] Court's exercise of discretion 'gives rise to a concern for cost, since the appointment of additional committees is closely followed by applications to retain attorneys and accountants.'" Ad Hoc Bondholders Grp. v. Interco Inc. (In re Interco Inc.), 141 B.R. 422, 424 (Bankr. E.D. Mo. 1992 (quoting In re Beker Indus. Corp., 55 B.R. 945, 949 (Bankr. S.D.N.Y. 1985)) (internal quotations omitted).

14. Accordingly, the standard for appointment of an additional committee under section 1102(a)(2) is "high," as use of the word "necessary" in section 1102(a)(2) indicates that appointment of an additional committee must be "absolutely required," "essential," or "indispensable." In re ShoreBank Corp., 467 B.R. 156, 164-65 (Bankr. N.D. Ill. 2012).

15. The high threshold for appointment of a committee under section 1102(a)(2) is illustrated by the vast number of cases in which courts have denied parties' requests to appoint an additional official committee, including committees of personal injury or tort claimants. *See, e.g.*, Dana Corp., 344 B.R. at 40 (denying motion to appoint committee of asbestos claimants because claimants were adequately represented by unsecured creditors committee and the cost of an additional committee would not be justified); *see also* In re E. Me. Elec. Coop., 121 B.R. 917, 933 (Bankr. D. Me. 1990) (denying motion for appointment of committee of members of rural electric cooperative because members were adequately represented, and noting that members were "free . . . to establish an informal committee . . . ."); Spansion, 421 B.R. at 163-64 (denying motion for appointment of committee of equity holders because movants were "well organized, well represented by counsel, and adequate to the task of representing its interests without 'official' status."); Winn-Dixie, 326 B.R. at 857 (denying motion to appoint committee of retirement plan participants and stating that "an additional committee would not provide a benefit to the overall administration of the estate."); In re Agway, Inc., 297 B.R. 371, 374 (Bankr. N.D.N.Y. 2003)

(denying motion to appoint committee of retirees, notwithstanding the fact that movants were willing to limit the amount of compensation that would be paid from the debtor's estate; such agreement "does not . . . negate the fact that [appointment] would add an additional layer of expense which at this time does not appear warranted."); Enron, 279 B.R. at 694-95 (denying motion to appoint committee of trade creditors and committee of creditors of debtor's subsidiary and stating that "[t]he bottom line is whether the estate should fund the role of the Movants . . . . The only missing component is the Movants' access to immediate compensation for their efforts. Their ability to be compensated has not been foreclosed, and the Movants may file an appropriate application for administrative expense payment for substantial contribution to the estate . . . ."); Interco, 141 B.R. at 425 (denying motion to appoint committee of debenture holders, in part because movants could "effectively participate in the final stages of the reorganization proceedings without official committee representation."); Orfa Corp., 121 B.R. at 299 (denying motion to appoint additional committee for one of several related debtors, in part to "avoid[] . . . the additional and unnecessary administrative costs that would result if another committee and a potential enclave of professionals is appointed."); Kodak, 2013 WL 4413300 at *1 (denying motion to appoint committee of equity holders because committee was unnecessary and "the costs of such a committee would be unreasonable in light of any possible benefits."); In re Eastman Kodak Co., 2012 WL 2501071 at *3 (Bankr. S.D.N.Y. June 28, 2012) (denying motion to appoint committee of equity holders because, among other things, "given the quality of the legal talent hired by the Shareholders, there is no reason to conclude that the Shareholders cannot be represented ably through an unofficial, or *ad hoc*, committee."); New Bern Riverfront Dev., 2010 WL 1254880 at *1 (denying motion to appoint committee of equity holders and stating that "[t]he movants may rely on their common counsel to adequately protect their special interests in this case."); Garden Ridge, 2005 WL 523129 at *3-5 (denying motion to appoint committee of

landlords because movants were adequately represented by unsecured creditors committee, as well as informal committee, and informal committee could later seek reimbursement under "substantial contribution" provision of section 503(b)); Mirant Americas Energy Mktg., 2003 WL 22327118 at *13 (affirming bankruptcy court order denying motion to appoint committee of energy merchants on the basis that, among other things, energy merchants were adequately represented by unsecured creditors committee).

16. Although this case does not involve the appointment of an "additional" committee, per se, it does involve the appointment of an additional fiduciary to serve the same interests. Given the nonapplicability of section 1102(a)(1), therefore, appointment of a committee under section 1102(a)(2), as requested by the Flowers Claimants and the Québec Committee, and in light of the Trustee's role in this Case, should be subject to the high standard applicable to the appointment of additional committees. As discussed below, the requests to appoint committees set forth in the Motions fail to meet this high standard.

i. The Victims of, and the Entities Impacted by, the Derailment, Including the Flowers Claimants and the Québec Committee, are Adequately Represented in this Case by the Trustee and/or Experienced, Qualified, and Able Counsel

17. The Trustee, as stated above, is unequivocally acting in a fiduciary capacity with respect to all creditors of the Debtor, and particularly the victims of the Derailment. Neither the Flowers Claimants nor the Québec Committee have alleged or even suggested that the Trustee is unable to fulfill his fiduciary duties to the parties impacted by the Derailment; rather, these parties merely want an "official representative to participate in the pivotal aspects of this case . . . and [who] will be able to express their collective concerns to the Court and other parties" (Québec Committee Motion at ¶ 22), and a means to provide the Derailment victims with "an effective voice" and "reasonable notice and an opportunity to be heard" (Flowers Claimants' Motion at ¶¶

3-4). This role is already being fulfilled by the Trustee. The "ability" of the Trustee "to function," and to adequately fulfill his fiduciary duties, is simply not an issue in this Case.

18. Additionally, the nature of this Case, and specifically the fact that some of the Movants are administrative expense claimants under section 1171, ensures that the Case will be administered with a focus on these claimants.

19. Further, the Movants are clearly represented by qualified, skilled, and knowledgeable counsel who have already appeared before this Court in the earliest days of this Case. Certain victims of the Derailment have already filed multiple lawsuits outside of this Court. In the case of the Québec Committee, an informal committee has already been formed. At no point have these parties been deprived of a "seat at the table," and given the Trustee's focus on these creditors, there is no risk that any of these parties will be deprived of due process, inadequately represented or considered during any sale process or the process of formulating a plan of reorganization. The Trustee has made it abundantly clear that a seat at the table has been reserved for these claimants. The Québec Committee and the Flowers Claimants are thus clearly able to participate in this Case without appointment of any official committee. Moreover, these claimants may seek allowance of their legal fees and expenses as administrative expenses pursuant to 11 U.S.C. § 503(b)(3)(D), which provides administrative expense status to expenses incurred "in making a substantial contribution in a case under chapter . . . 11." 11 U.S.C. § 503(b)(3)(D); *see, e.g.*, Spansion, 421 B.R. at 164 (noting same).

20. In light of the above, the additional, significant expense that would result if official committees were appointed is not warranted, and would only be to the detriment of these claimants and the effective administration of this Case. As this Court is aware, the Trustee must maximize the limited resources of the Debtor for the benefit of all creditors, and especially the 1171 administrative claimants. Burdening the estate with the costs of additional professionals will

only sap what limited resources of the Debtor exist. As set forth above, while cost alone is not a dispositive factor, courts heavily weigh this aspect when considering whether to appoint a committee under section 1102(a)(2). Where adequate representation already exists, courts are extremely reluctant to burden the estate with the additional professional fees incurred by a committee. *See, e.g.*, Agway, *supra*; Orfa Corp., *supra*; Kodak, *supra*. The "additional cost" factor should weigh heavily in this Case.

ii. The "Discretionary Factors" Weigh Heavily Against Appointment of Committees

21. As discussed above, the cost of appointing a committee or committees counsels against granting the Motions. The movants are already more than adequately represented by able, experienced counsel who have appeared before this Court and who are closely following the proceedings of this Case. No showing has been made that such movants would not continue to be adequately represented through their current counsel or via an informal committee (which, in the case of the Québec Committee, already exists). The costs of retaining counsel for the proposed committees, as well as any financial advisors and other professionals, would be significant and ultimately duplicative and unnecessary. This added financial burden would only diminish the distributions to victims of the Derailment, whose claims would be paid, on par, with the professional fees and expenses of their counsel, should an official committee or committees be appointed.

CONCLUSION

For the reasons set forth above, the Trustee believes that the Motions should be denied.

Dated: September 11, 2013

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

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