IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	)	
	)	
Montreal Maine & Atlantic Railway Ltd.,	)	**Case No. 13-10670**
	)	
Debtor	)	
	)	

OBJECTION TO TRUSTEE'S APPLICATION TO EMPLOY SHAW, FISHMAN, GLANTZ AND TOWBIN, LLC AS SPECIAL COUNSEL

The informal committee representing the interests of the wrongful death victims and the representatives of the probate estates[1] of the 42 victims[2] (the "Wrongful Death Claimants") hereby object to the Trustee's Motion to Employ Shaw, Fishman, Glantz and Towbin, LLC ("Shaw-Fishman") as special counsel, on the basis that Shaw-Fishman has a non-waivable conflict of interest and that the Trustee has failed to offer any legitimate reason to expend estate funds to participate in the Illinois litigation. As grounds therefor, the Wrongful Death Claimants state:

INTRODUCTION

In complete disregard of this Court's repeated admonitions to limit administrative expenses

[1] The estate representatives are Marie Precieuse Salomon, Milliana Alliance, Lisette Fortin-Bolduc, Genevieve Dube, Mylaine Dube, Laurie Dube, Louise Boulet, Jean Boulet, Colette Boulet, Champagne Ghislain, Danielle Lachance, Germaine Faucher, Maude Faucher, Tristan Lecours,Sandy Bedard, William Guertin, Arianne Guertin, Clermont Pepin, Marie-Eve Lapierre, Dave Lapierre, Nancy Valler, Diane Belanger, France Picard, Christiane Mercier, Elie Rodrique, Maxime Roy, Carol-Anne Roy, Lise Doyon, Sherley Roy, Rejean Roy, Louise Breton, Mario Sévigny, Marc-Antoine Sévigny, Michel Sirois, Solange Belanger, Richard Turcotte, Christine Pulin, Suzanne Bizier, Annick Roy and Sophie Veilleux.

[2] The victims are Marie Semie Alliance, Stephanie Bolduc, Yannick Bouchard, Marie France Boulet, Karine Champagne, Marie-Noelle Faucher, Michael Guertin, Jr., Stephanie Lapierre, Joannie Lapointe, Marianne Poulin, Martin Rodrique, Jean Pierre Roy, Kevin Roy, Melissa Roy, Andree-Anne Sevigny, Jimmy Sirios, Elodie Turcotte and Joanie Turmel.

to those necessary to operate the railroad until it can be orderly liquidated, the Trustee is fully engaged in a coordinated campaign with other tortfeasors who share responsibility for the disaster to deny the Wrongful Death Claimants their right to choose the forum where they prosecute their claims against non-debtor parties. Despite the fact that the Montreal, Maine and Atlantic Railway, Inc. ("MMA") is not a defendant in the Illinois lawsuits, the Trustee has joined forces with World Fuel, Western Petroleum Company ("WPC") and Petroleum Transport Solutions, LLC ("PTS") to accomplish the removal of the wrongful death cases; not only from the jurisdiction of Illinois state court, but also from the venue of the federal court in the Northern District of Illinois. While the non-debtor tortfeasors' motivation to impose a forum which caps wrongful death recoveries is readily apparent, the Trustee's inducement to participate in the hijacking of the Wrongful Death Claimants' lawsuits is more subtle and sinister.

As the Trustee has indicated that the estate may be insolvent, his efforts should be focused on the operation of the railroad until it can be orderly liquidated. Attorneys for World Fuel, WPC and PTS, however, have enlisted the Trustee to do everything in his power to accomplish a transfer of the wrongful death suits to a forum with caps. In return, the Trustee seeks to artificially enhance the estate by obtaining the tortfeasors' agreement to pay any settlement of such personal injury claims into the bankruptcy estate.

The development and accomplishment of such a plan demands tight coordination and cooperation amongst each of the party's professionals. Accordingly, the Trustee and the non-debtor tortfeasors have assembled a team with remarkable ties. The Declaration of Brian Shaw, filed in support of the Trustee's Application, reveals that Jay Geller not only serves as 'of counsel' with the firm of Shaw-Fishman, but also has a close relationship with the Trustee. This

is quite significant as Mr. Geller represents several of the non-debtor tortfeasors named as defendants in the Illinois wrongful death lawsuits. This revelation, coupled with the Trustee's assertion that bankruptcy court jurisdiction can be established by his pledge to sue these same non-debtor tortfeasors, manifest a patent conflict in violation of not only 11 U.S.C.A. § 327, but also Rule 1.7(b)(3) of the Illinois Rules of Professional Conduct ("IRPC").

Finally, even if the Trustee was applying to engage a firm which was not conflicted, nothing in the Application suggests a proper purpose for the engagement. Merely indicating a desire to hire counsel to engage in litigation cannot justify the expense, particularly where the MMA is not even a named party.

For these reasons, more fully developed below, the Trustee's application to engage Shaw-Fishman must be denied.

PROCEDURAL BACKGROUND

The background provided by the Trustee in his Application does not reveal the extent of the Trustee's involvement with the Wrongful Death Claimants' lawsuits in Illinois (the direct pleadings/actions by the Trustee are set out in bold):

A. Beginning on July 22, 2013, the first twelve wrongful death lawsuits seeking damages under Illinois Wrongful Death Statute (740 ILCS 180, *et seq.*) were filed against a multitude of defendants, including MMA, WPC, PTS and World Fuel.

B. On August 7, 2013, MMA filed its petition for bankruptcy relief.

C. Beginning on August 14, 2013, seven additional wrongful death lawsuits were filed in Illinois which did not include the MMA as a defendant.

D. On August 29, 2013, WPC and PTS, removed all of the wrongful death cases pending in state court to the Northern District of Illinois, asserting that: (i) complete diversity exists to establish original federal court jurisdiction under 28 U.S.C. §1332; and, (ii) the Wrongful Death Action is "related to" MMA's bankruptcy under 28 U.S.C. §1334(b) and

therefore removal is mandated under 28 U.S.C. §1452.[3]

E. **On August 30, 2013, the Trustee filed his Consent to the removal on behalf of the MMA.**[4]

F. On September 9, 2013 pursuant to Fed. R. Civ. P. 41(a)(1)(A)(1), the plaintiffs filed a Notice of Voluntary Dismissal of the MMA as a defendant in all cases in which it had been named.[5]

G. On September 9, 2013, a Motion to remand was filed by one of the wrongful death plaintiffs in a case pending before Judge Shadur.[6]

H. On September 12, 2013, Judge Shadur, after granting WPC's and PTS' joint motion to present a copy of their §157(b)(5) transfer motion that they planned to file in the Maine District Court and, after hearing argument, **including argument from the Trustee's counsel,** remanded Case No. 13-c-6197 to state court holding that removal was improper under 28 U.S.C. § 1441(b)(2).[7]

I. On September 13, 2013, defendants, WPC and PTS, filed their §157(b)(5) motion with the U.S. District Court in Maine to transfer this case and all other wrongful death cases involving victims of the Lac-Mégantic disaster.[8] **Likewise, on the very same day and citing the same grounds as WPC and PTS, the Trustee filed his §157(b)(5) motion to transfer this case to Maine.**[9]

J. On September 17, 2013, a hearing was held on WPC and PTS' motion to consolidate. Although Wrongful Death Claimants did not object to the consolidation**, the Trustee's counsel appeared and argued in favor of consolidation.**[10]

K. On September 18, 2013, motions to remand were filed by the plaintiffs in the remaining wrongful death cases which had been transferred to federal court.[11]

L. On September 18, 2013, the remaining wrongful death cases which had been transferred to federal court were consolidated in front of Judge Bucklo.[12]

M. **On September 23, 2013, the Trustee filed his Motion to Intervene for the limited**

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[3] For example, see *Grimard v Montreal, Maine and Atlantic, et al*, 1:13-cv-06197, Docket Entry #27.Docket Entry #3.
[4] For example, see *Grimard v Montreal, Maine and Atlantic, et al*, 1:13-cv-06197, Docket Entry #27.Docket Entry #9.
[5] For example, see *Grimard v Montreal, Maine and Atlantic, et al*, 1:13-cv-06197, Docket Entry #35.
[6] *Grimard v Rail World, et al*, 1:13-cv-06197, Docket Entry #34.
[7] *Grimard v Rail World, et al*, 1:13-cv-06197, Docket Entry #38.
[8] See *In Re: Montreal & Atlantic Railway Ltd.*, 1:13-mc-00184-NT, Docket Entry #2.
[9] See Exhibit F of Trustee's Motion to Stay/Intervene.
[10] See for example, Roy v *Rail World, et al*, 1:13-cv-06192, Docket Entry #44.
[11] See for example, Roy v *Rail World, et al*, 1:13-cv-06192, Docket Entry #47.
[12] Roy v *Rail World, et al*, 1:13-cv-06192, Docket Entry #49.

purpose of staying Judge Bucklo from ruling on plaintiffs motion to remand.[13]

ARGUMENT

I. Ethical Constraints Prohibit The Engagement Of Shaw-Fishman.

A. Shaw-Fishman's Acceptance Of The Engagement Violates Rule 1.7 Of Illinois Rules Of Professional Conduct.

Rule 1.7 of the Illinois Rules of Professional Conduct ("IRPC") prohibit a lawyer from taking an engagement if either: "(1) the representation of one client will be directly adverse to another client; or, (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The Trustee is represented by his own firm, Bernstein, Shur, Sawyer & Nelson, P.A. ("Bernstein-Shur"). The Declaration of Brian Shaw, attached to the Trustee's Application, states that Jay Geller, who maintains an 'of counsel' association with Shaw-Fishman, was formerly a partner with Bernstein-Shur and currently represents WPC. The Declaration of Brian Shaw further indicates that while the Trustee and Mr. Geller were partners they served as "co-chair of the firm's Business Restructuring and Insolvency Group until December 31, 2011".[14] Although not directly disclosed in the body of Mr. Shaw's Declaration, the engagement letter attached as 'Exhibit A' to his Declaration further reveals that Jay Geller also represents World Fuel, another named defendant being sued by the Wrongful Death Claimants and which is the parent of WPC.[15] Not revealed in either the Declaration or the engagement letter is whether Jay Geller also represents Petroleum Transport Solutions, LLC ("PTS"), another defendant in the

[13] Roy v *Rail World, et al*, 1:13-cv-06192, Docket Entry #50.
[14] Declaration of Brian L. Shaw, Esq., Docket 282-1, p. 3.
[15] See Exhibit A to Trustee's Application, Declaration of Brian L. Shaw, Esq., Docket 282-1, p. 8.

wrongful death action, and a wholly owned subsidiary of WPC.

IRPC Rule 1.10 provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." The term "firm", for purposes of Rule 1.10, extends to 'of counsel' relationships, as encompassed by Comment 2 to Rule 1.0 of the IRPC:

> Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

Despite Shaw-Fishman's 'of counsel' relationship with an attorney who represents at least two of the tortfeasors being sued by the Wrongul Death Claimants, the Trustee makes the remarkable representation in his Application that "...the partners and employees of Shaw Fishman do not have any connection with, or any interest adverse to the Trustee, the Debtor, the Debtor's creditors, any other party in interest...".[16] In addition to the obvious conflict that WPC and World Fuel have with the Wrongful Death Claimants, the Trustee's representation is even more surprising in light of his stated belief that the transfer of the Illinois wrongful death

[16] Trustee's Application to Hire Shaw-Fishman, Docket 282, p. 5.

claims is appropriate so that he may act as the ultimate arbitrator of all claims between all parties.[17] Finally, the Trustee is fully aware that WPC and PTS have filed a Memorandum in support of its pending Motion to Transfer pending in the Maine District Court wherein it asserts that they will likely bring claims against the estate: "Many or all of the defendants in the U.S. Wrongful Death Actions have claims against MMA, including (i) direct claims arising from the Derailment and (ii) indirect claims by virtue of subrogation should the defendants be required to pay anything to the Plaintiffs."[18]

The Trustee asserts that his intention to sue World Fuel and WPC justifies his efforts to deny the Wrongful Death Claimants their chosen forum. At the same token, the Trustee requests this Court's blessing to hire a law firm with an 'of counsel' relationship with these same target defendants who have filed claims against the estate. As IRPC Rule 1.7(b)(3) prohibits waiver or cure of conflicts where the attorney would essentially be advocating against his own client, Shaw-Fishman's suggestion that this problem can be quarantined by an internal Chinese Wall is unavailing.[19] ILPC Rule 1.7(b)(3) expressly prohibits an attorney from the assertion of "a claim by one client against another client represented by the lawyer in the same

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[17] From transcript of October 1, 2013 proceedings US Bankruptcy Court, District of Maine, BK No 13-10670. The following language appears from Trustee Keach and can be found on Court Audio at 02:54:02: Trustee Keach:

> "....I think your Honor believes, I certainly believe, that this case is going to have to centrally address after the sale of the railroad, after that issue of the public interest is addressed, this case is going to have to address the best way to centralize and adjudicate those various competing claims against various like defendants in order to develop a fair compensation system for the victims, and a fair compensation system for the victims across the board not only the wrongful death victims but other victims that may have equal priority. For that reason we have come to the belief, I have come to the belief, that having a committee that has limited investigative powers that speaks to that spectrum of victims to talk to in connection with the formation of that centralized resolution has some merit, for all the reasons your Honor has talked about. "

[18] See In Re: Montreal, Maine & Atlantic Railway, Ltd, 1:13-mc-00184-NT, Docket 2-1, P. 6, Par. 13.

[19] Declaration of Brian L. Shaw, Esq., Docket 282-1, p. 3. "...a protocol to eliminate the possibility that information subject to the attorney client privilege or work product doctrine are shared between Mr. Geller and Shaw Fishman, either intentionally or inadvertently."

litigation or other proceeding before a tribunal." Simply put, Shaw-Fishman is prohibited from advocating the rights of the Trustee in favor of World Fuel and WPC in Chicago, while Ray Geller advocates the rights of World Fuel and WPC against the Trustee in Maine.

B. The Trustee's Attempt To Appoint Shaw-Fishman Violates 11 U.S.C.A. § 327.

Bankruptcy Code requirements concerning disclosure of conflicts of interest exist in addition to counsel's ethical obligations under state law. *Hansen, Jones & Leta, P.C. v. Segal*, 220 B.R. 434, 455 (D. Utah, 1998). While Illinois Rules of Professional Conduct bar Shaw-Fishman from accepting employment in this matter, 11 U.S.C.A. §327 directed the Trustee to avoid the conflict in the first place. The conflict of interest requirements of section 327 are more stringent than those of nonbankruptcy law. *In re R & R Associates of Hampton*, 248 B.R. 1, 7 (Bkrtcy.D.N.H., 2000).

Under 11 U.S.C. § 327(a), a trustee is empowered to employ attorneys and other professionals; however, it bars the engagement of professionals who may have a conflict of interest:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys ... that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

The Bankruptcy Code defines "disinterested person" as a person who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14) (1994). Courts interpreting § 101(14) have required that professionals be free of any "scintilla of personal interest" which might impact

upon the professional's decisions in estate matters. *In re Asher,* 168 B.R. 614, 617 (Bankr.N.D.Ohio 1994). Professionals are expected to tender "undivided loyalty" and provide "untainted advice." *Rome v. Braunstein,* 19 F.3d 54, 58 (1st Cir.1994).

In *In re El San Juan Hotel Corp*, 239 B.R 635, 646-7 (1st Cir. 1999), the First Circuit provided some common sense guidelines for a Trustee to follow when hiring attorneys:

> In determining whether the requirements of disinterestedness and absence of a materially adverse interest have been met, the court of appeals of this circuit examines whether the targeted interest creates a "meaningful incentive to act contrary to the best interests of the estate and its sundry creditors—an incentive sufficient to place those parties at more than acceptable risk—or the reasonable perception of one." *In re Martin,* 817 F.2d 175, 180 (1st Cir.1987). "The test is neither subjective, nor significantly influenced by the court-appointed professional's 'protestations of good faith,' ... but contemplates an objective screening for even the 'appearance of impropriety'." *Rome,* 19 F.3d at 58.[Rome v. Braunstein, 19 F.3d 54 (1st Cir., 1994).]

As further explained in *Rome v Braunstein*, 19 F.3d 54, 58 (1st Cir., 1994), "[t]hese statutory requirements-disinterestedness and no interest adverse to the estate-serve the important policy of ensuring that all professionals appointed pursuant to section 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." The crux of the problem is that the Trustee has a duty to evaluate and investigate potential claims, and "a lawyer cannot represent a trustee for the purpose of investigating [potential claims against] another, valuable client." *Granite Partners,* 219 B.R. at 37. "The attorney must look to all sources of recovery available to the estate and avoid any interest adverse to the estate which would render the search impossible." *Kagan v. Stubbe (In re El San Juan Hotel Corp.),* 239 B.R. 635, 646 (B.A.P. 1st Cir.1999); *see also In re Adam Furniture Indus., Inc.,* 158 B.R. 291, 301 (Bankr.S.D.Ga.1993) ("Once counsel represents clients with conflicting interests, counsel may compromise representation of one client by failing to aggressively investigate or prosecute claims against the other client."); *In re Paolino,* 80 B.R. 341, 344–45 (Bankr.E.D.Pa.1987).

It is impossible to imagine how Shaw-Fishman can advocate effectively for the Trustee while its 'of counsel' associated attorney, Jay Geller, is representing the interests of potential defendants that have made claims against the estate and the Trustee has committed to sue. The addition of Shaw-Fishman into the mix is even more disturbing in that all the actions by the Trustee and tortfeasors represented by Mr. Geller have been coordinated with the intent to deprive the Wrongful Death Claimants of their right to pursue their claims in their forum of choice.

II. As The Wrongful Death Cases Are Not Related To The Bankruptcy Estate, There Is No Need For The Trustee's Involvement.

Even if no conflict existed, the Trustee's Application to expend the estate's monies in the Illinois litigation must be denied. The Trustee has not articulated any legitimate purpose for intervening in the wrongful death cases pending in Illinois. The only basis that the Trustee asserts is the rather vanilla statement in Paragraph 10 of his Application: "As long as litigation is pending in Illinois, the Trustee will require the services of local counsel".[20] This terse statement of purpose provides no assistance in determining how the expenditure of funds is necessary or beneficial to the estate when MMA is not a party to the action.

In fact, as set forth in the Wrongful Death Claimants' Memorandum in support of their pending motion to remand, a copy of which is attached as 'Exhibit A', the wrongful death cases belong in state court as there is no original federal subject matter jurisdiction, nor can 'related to' concurrent federal court jurisdiction be established under 28 U.S.C. 1334(b).[21] Further, even

[20] Trustee's Application, Par. 10, p. 3.
[21] Memorandum in support of Motion to Remand attached is from Roy v *Rail World, et al*, 1:13-cv-06192, Docket Entry #47.

if jurisdiction could be established under §1334(b), mandatory or equitable remand back to state court is appropriate.[22]

Rather than representing the interests of the estate, the only inference that can be drawn with respect to the Trustee's participation in the Illinois wrongful death litigation is that he has aligned himself with the tortfeasors against the victims. Regardless of what law firm the Trustee might hire, his desire to incur legal expenses in litigation that will have no effect on the ultimate distribution of this estate cannot be justified. Employment of Shaw-Fishman or any other law firm on this fool's errand will further deplete Debtor's assets, further reducing the funds available to pay administrative claims, such as those that may be filed by the Wrongful Death Claimants. Given the lack of justification presented by the Trustee, the Court should reject the Trustee's application to employ additional Special Counsel.

For these reasons, Wrongful Death Claimants respectfully request that this Court deny the Trustee's Application for Order authorizing employment of Special Counsel, and for such other and further relief as the Court deems just and proper.

Marie Semie Alliance, *et al.*

By their attorneys,

/s/ George W. Kurr, Jr.

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[22] Motion to Remand attached is from Roy v *Rail World, et al*, 1:13-cv-06192, Docket Entry #47.

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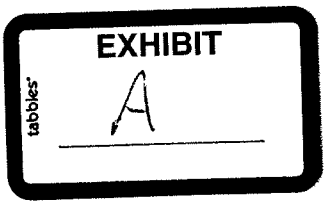

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNICK ROY, as Special Administrator of the ESTATE OF JEAN-GUY VEILLEUX, Deceased,	)	
Plaintiff,	)	
vs.	)	
	)	**No. 1:13-cv-06192**
MONTREAL, MAINE and ATLANTIC RAILWAY, INC., RAIL WORLD, INC., EDWARD BURKHARDT, individually, WORLD FUEL SERVICES CORPORATION, WESTERN PETROLEUM COMPANY, PETROLEUM TRANSPORT SOLUTIONS, LLC, DAKOTA PLAINS TRANSLOADING, LLC, DAKOTA PETROLEUM TRANSPORT SOLUTIONS, LLC., DAKOTA PLAINS MARKETING, LLC., and DPTS MARKETING, LLC,	)	**Honorable Elaine E. Bucklo**
	)	**TRIAL BY JURY DEMANDED**
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND

The Plaintiff, Annick Roy, as Special Administrator of the Estate of Jean-Guy Veilleux, deceased, by and through her undersigned counsel, hereby submits the following memorandum of law in support of her motion to remand:

INTRODUCTION

Shortly after midnight on July 6, 2013, an unattended parked freight train hauling seventy-two tankers filled with crude oil rolled downhill seven and one-half miles before derailing in the

town of Lac-Mégantic, rupturing several of the tankers and resulting in an explosion and fire that killed forty-seven people, injured scores of others and turned the picturesque community into a scene from a war zone.

On July 22, 2013, Annick Roy, as Special Administrator of the Estate of Jean-Guy Veilleux, filed her Complaint against ten separate defendants seeking damages under Illinois Wrongful Death Statute (740 ILCS 180, *et seq.*) in the Circuit Court of Cook County as Case No. 2013-L-8534 (the "Wrongful Death Action"). On August 29, 2013, two of the defendants, Western Petroleum Company ("WPC") and Petroleum Transport Solutions, LLC ("PTS"),[1] filed their Joint Notice of Removal asserting federal jurisdiction based upon: (1) diversity of citizenship under 28 U.S.C. §1332; and, (2) Chapter 11 bankruptcy "related to" jurisdiction under 28 U.S.C. §1334(b).[2]

A review of the allegations in the Complaint and the applicable law reveals that neither statute invests this Court with jurisdiction. First, this case cannot be removed based upon diversity jurisdiction because two of the defendants are Illinois residents. Likewise, this case does not "relate to" the MMA bankruptcy in that MMA is not a party and the Plaintiff's claims against the independently-liable, non-debtor tortfeasors will not affect the size or distribution of MMA's bankruptcy estate. In any event, even if "related to" jurisdiction could be established, 28 U.S.C. §1334(c)(2) mandates that this Court abstain from exercising its concurrent jurisdiction over this state action. For these reasons, as more fully discussed below, Plaintiff's motion should be granted, and this case remanded back to the Plaintiff's chosen forum, the Circuit Court of Cook County, Illinois.

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[1] WPC and PTS are also referred collectively in this Memorandum as "Removants"

[2] WPC and PTS made the identical jurisdictional arguments in another Lac-Mégantic wrongful death case, *Grimard v. Western Petroleum*, Case No. 13-cv-06197 which were rejected by Judge Shadur resulting in its remand on September 12, 2013.

ARGUMENT

A defendant may remove a civil action originally brought in state court to federal court only if the action is within the original jurisdiction of the federal district court. 28 U.S.C. § 1441. The procedures for removing a case to federal court are set forth in 28 U.S.C. §1446. The removal statute is construed strictly, and any doubts should be resolved in favor of remand to state court. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

I. This Case is Not Removable Under Diversity Jurisdiction Because Two of the Defendants are Citizens of Illinois.

Removants argue that removal is proper because of diversity of citizenship under 28 U.S.C. §1332. 28 U.S.C. §1441(b) expressly provides, however, that removal based upon diversity of citizenship is improper "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." The 'forum defendant' rule developed because there is no reason to "presume bias" on the part of the local courts when there is an in-state defendant, and this is especially true where there is no in-state plaintiff. *Morris v. Nuzzo*, 718 F.3d 660, 668 (7th Cir. 2013).

Defendants RailWorld and Burkhardt are Illinois citizens, and thus this case cannot be removed based upon diversity of citizenship. Removants acknowledge that RailWorld and Burkhardt are Illinois citizens, but proclaim without any explanation that these defendants "...shall not be considered for purposes of determining diversity jurisdiction, as these are fraudulently joined defendants."[3] Removants are wrong.

A defendant seeking removal based on alleged fraudulent joinder has the "heavy burden" of proving that, after the court resolves all issues of law and fact in the plaintiff's favor, there is no possibility that the plaintiff can establish a cause of action against the diversity-defeating defendant

[3] See Par. 20 on p. 6 Notice of Removal.

in state court. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992). Any doubts regarding removal are resolved in favor of the plaintiff's choice of forum in state court. *Boyd v. Phoenix Funding Corp.*, 366 F.3d 524, 529 (7th Cir.2004).

The allegations in the Complaint clearly establish a cause of action against RailWorld and Burkhardt due to their direct participation in management decisions that forced MMA to adopt negligent operational procedures that contributed to the tragedy at Lac- Mégantic. (See Complaint ¶¶ 50-85; 87-95). As the Illinois Supreme Court explained in *Forsythe v. Clark USA, Inc.* 224 Ill.2d 274, 290 (2007):

> ...*direct participant liability is a valid theory of recovery under Illinois law*. Where there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy *and* carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability. [emphasis added]

Illinois not only recognizes direct participant liability to hold a controlling parent corporation liable for injuries caused by the operations of a subsidiary, but also as the mechanism to hold an officer, director or owner of a corporation personally liable for torts in which they directly participate. *McDonald v. Frontier Lanes, Inc.* 1 Ill.App.3d 345, 357-8 (1st Dist., 1971). Personal liability for the direct participation of corporate officers and directors was confirmed in *Zahl v. Krupa*, 399 Ill.App.3d 993, 1014 (2nd Dist., 2010) which includes a discussion of Illinois case law which hold that corporate officials can be personally liable for ordering, and therefore participating in, negligent or intentional tortious conduct.

Because the Complaint properly alleges claims for direct participant liability against RailWorld and Burkhardt, Removants have not and cannot meet their heavy burden to establish fraudulent joinder. As no evidence, let alone compelling evidence, has been presented that the

forum defendants were fraudulently joined, WPC's and PTS' removal based on original subject matter jurisdiction under §1332 is a patent violation of §1441(b)(2).

II. This Court Does Not Have Jurisdiction Under Bankruptcy Law.

A. This Case is Not "Related to" the MMA Bankruptcy Under the Appropriate Test.

Removants also argue that this Court has original jurisdiction under 28 U.S.C. §1334(b), which allows federal jurisdiction for any "civil proceedings arising under title 11, or arising in or related to cases under title 11." Although MMA was originally named as a defendant, Plaintiff voluntarily dismissed MMA as a defendant pursuant to F.R.C.P. 41(a)(1)(A)(1).

Despite the absence of the debtor as a party, Removants contend that they can establish "related to" federal jurisdiction under §1334(b) simply by alleging that a judgment obtained by Plaintiff against non-debtor tortfeasors may affect the amount of property in the bankruptcy estate.[4] To support its expansive view of the scope of "related to" bankruptcy jurisdiction, Removants cite *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), stating that: "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." (quoting *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984))".[5]

Respondents misstate the law, as the Seventh Circuit has expressly rejected the sweeping test articulated in *Pacor* in favor of a "more limited" and "more helpful definition of the bankruptcy court's 'related-to' jurisdiction". *In re Matter of Fedpak Systems, Inc.*, 80 F.3d 207, 213 (1995).

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[4] See par. 8 on p. 3 Notice of Removal.

[5] See par. 8 on p. 3-4 Notice of Removal.

Under the Seventh Circuit test, "a case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution [i.e., the debtor's estate] or the allocation of property among creditors." *Id.* at 213-214.

As the Seventh Circuit explained, "related to" jurisdiction is interpreted narrowly "to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts." *Id.* at 214. Additionally, "common sense cautions against an open-ended interpretation of the "related to" statutory language 'in a universe where everything is related to everything else.'" *Id.*

In *FedPak*, the Seventh Circuit held that the bankruptcy court did not have jurisdiction to later interpret its own order when resolution of the dispute would not affect the amount of assets available for distribution to creditors of the estate. *Id* at 214. The Court reached this conclusion even though it recognized that one of the litigants, who had purchased assets from the debtors' estate, might sue to rescind the purchase of assets from the debtor. *Id* at 212.

Applying the proper test, it is clear that this case is not "related to" the bankruptcy of MMA. The Complaint states claims against the defendants for their own negligence, and does not seek to recover any damages against MMA. Resolution of this Wrongful Death Action does not have any financial impact on the bankruptcy estate or the apportionment of the estate amongst MMA's creditors, and thus is not "related to" the bankruptcy proceedings. *See generally Home Insurance Co. v. Cooper & Cooper*, 889 F.2d 746 (7th Cir. 1989) (Declaratory action regarding availability of insurance coverage not "related to" bankruptcy because the action did not have a financial impact on the bankruptcy estate, even though there was a "nexus" between the action and the bankruptcy, and it would have been convenient to resolve all questions concerning the policy in

the bankruptcy court). *See also In the Matter of Xonics*, 813 F.2d 127, 131 (7th Cir. 1987) (Dispute among creditors does not "relate to" bankruptcy estate.)

No Seventh Circuit decision has adopted the expansive scope of §1334(b) jurisdiction under *Pacor* demanded by Removants. The Seventh Circuit cases cited by Removants do not support their position, and do not apply the *Pacor* test. To the contrary, these decisions refuse to read the term "related to" broadly, but rather limit its applicability to situations where the debtors's property is directly affected by the lawsuit. *See Zerand Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161-162 (7th Cir. 1994) ("The reference to cases related to bankruptcy cases is primarily intended to encompass tort, contract and other legal claims by and against the debtor…").

Removants provide a quote from *In re Teknek*, 563 F. 3d 639, 649 (7th Cir. 2009) for their proposition that removal is appropriate where a defendant's liability is dependent upon the party's conduct "with respect to the corporate debtor."[6] This is a complete distortion of the holding in *Teknek* accomplished by truncating the relevant sentence and omitting its context:

> The case *sub judice,* however, is distinct from both *Koch* and *Fisher*. ***In both of those cases, the creditors' claims against the non-debtor fiduciaries depended on the non-debtor's misconduct with respect to the corporate debtor.*** In *Koch,* the oil companies sought to hold the member-owners liable based on their alleged breach of fiduciary duties to the debtor, and in *Fisher,* the creditor-investors' fraud claims were based on the accomplices' looting of the debtor corporation in which the plaintiffs had invested. In this regard, general claims and claims that are "related to" the bankruptcy seemingly always involve transfers *from the debtor* to a non-debtor control person or entity. *Id* at 649. [emphasis added to highlight truncation].

Far from supporting Removants' position, *Teknek* confirms that this Wrongful Death Action does not meet the "related to" threshold established by the Seventh Circuit. Simply put, Plaintiff's direct claims against the Co-Defendants are in no way dependent upon the Co-Defendants misconduct with respect to the bankrupt MMA; but rather, are wholly dependent upon Co-

[6] Paragraph 8 on page 4 Notice of Removal.

Defendants misconduct with respect to the Plaintiff. Accordingly, under the *Teknek* analysis, the Complaint is not related to MMA's bankruptcy, and this Court lacks jurisdiction under §1334.

B. Removal is Not Proper Under the *Pacor* Test.

Even if the more expansive *Pacor* test were to be adopted in the Seventh Circuit, the matter at hand would fall well short of the §1334(b) "related to" threshold. In *Pacor*, the plaintiff brought a product liability action in Pennsylvania for work related exposure to asbestos distributed by Pacor, and Pacor filed a third party complaint impleading Johns-Manville, the original manufacturer of the asbestos. After Manville filed for bankruptcy, Pacor sought to remove the case to federal bankruptcy court. Applying its broad 'conceivably could have any effect on the estate' test, the Third Circuit nevertheless held that removal was not proper and remanded. The Court found that the personal injury case would have no effect on the bankruptcy estate, and at best was a "mere precursor to the potential third party claim for indemnification by Pacor against Manville." 743 F.2d at 995. The Court recognized that the outcome of the Pacor action would in no way bind the bankruptcy estate, in that it could not determine any rights, liabilities or course of action of the debtor. *Id.* Furthermore, since the bankrupt was not a party to the Pacor action, the Court noted that it could not be bound by *res judicata* or collateral estoppel. *Id.* Finally, even if the plaintiff prevailed in its claim against Pacor, Manville would still be able to relitigate any issue or adopt any position in response to a claim brought by Pacor. *Id.* "Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried." *Id.*

In re Federal-Mogul Global, Inc., 282 B.R. 301, 303-4 (Bkrtcy.D.Del., 2002) also applied the *Pacor Test* in the context of asbestos product liability lawsuits brought against numerous co-

defendants. After one of the co-defendants filed for bankruptcy, the plaintiffs in many of the state suits immediately began severing or dismissing the claims against the debtor-defendant to permit their cases against the solvent parties to go forward. This aim was thwarted, however, by a massive campaign by the solvent defendants of removing claims on the theory that these claims were related to the pending bankruptcy. In response, as in the matter at hand, the solvent co-defendants removed the actions asserting that their common law contribution and indemnity claims against the bankrupt satisfied §1334(b) "related to" jurisdiction under the *Pacor Test.*

Noting that the *Pacor Court* remanded a similar asbestos product liability suit, the *Federal-Mogul Court* cautioned that "a valid statement of principle does not necessarily produce a usable rule, and whether a controversy 'could have any effect on the estate' will not always be self-evident." *Id* at 306. In remanding all of the cases back to state court, the Court explained the limited scope of federal jurisdiction under §1334(b), even under the *Pacor Test*:

> The narrow holding of *Pacor* was that a mere common-law indemnity claim by a non-debtor co-defendant of a debtor will not "alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)" in a way that "impacts upon the handling and administration of the bankruptcy estate." *Id.* at 994. That common facts would be litigated against the co-defendant did not matter, because no resolution of a factual issue would be binding on the debtor's estate. The potential for a judgment against the debtor posed by the existence of a suit against the non-debtor was not only contingent (the non-debtor defendant might prevail) but it was indirect—any material effect on the estate would require yet another lawsuit. *Id.* at 995.

Similarly, Plaintiff's claims against the defendants here have absolutely no effect on the bankrupt MMA, which is no longer a party to this lawsuit. A successful verdict against any or all of the defendants will not cost MMA one cent, or otherwise have any effect on the bankruptcy estate. While defendants may in the future choose to file contribution or indemnification claims against MMA, the *Pacor Court* made clear that this does not entitle a defendant to removal of the

state law claims. 743 F.2d at 995. Thus, even under the *Pacor Test*, the Complaint is not "related to" the MMA bankruptcy for purposes of jurisdiction under §1334(b), and the case must be remanded.

III. ABSTENTION PRINCIPLES REQUIRE REMAND.

A. Even If "related to" Jurisdiction Could Be Established, §1334(c)(2) Mandates Remand.

Even if Removants could establish "related to" federal subject matter jurisdiction under §1334(b), under 28 U.S.C. §1334(c)(2), a federal court must abstain from exercising its concurrent jurisdiction where: (1) the state law claim is a noncore proceeding; (2) there is no independent basis for federal jurisdiction other than the bankruptcy proceeding; (3) plaintiff has commenced the action in state court; and (4) the state court can timely adjudicate the matter. *Official Comm. Of Unsecured Creditors of Wickes, Inc. V. Wilson*, 2006 WL 1457786 at *2.

In *Foushee v. Griffin*, 494 F.Supp.2d 898, 899 (N.D. Ill. 2007), the plaintiff, injured in a collision, sued the truck driver and his employer. After the employer company filed for bankruptcy, defendants removed the case to federal court. Despite the bankrupt's continued role as a party in the case, the Court remanded the matter back to state court based on mandatory abstention under §1334(c)(2).

Like *Foushee*, remand is required in this case under §1334(c)(2) because all four criteria for mandatory abstention are satisfied. As in *Foushee*, the Plaintiff at bar has already commenced a state court action involving claims which do not invoke any substantive right created by federal bankruptcy law, nor does the Notice of Removal reveal any legitimate basis for federal jurisdiction other than MMA's bankruptcy proceeding. *Id* at 899, *see also Reeves v. Pfizer, Inc.* 880 F.Supp.2d

926 (S.D. Ill. 2012) (Remand of product liability case mandated by §1334(c)(2)). Accordingly, §1334(c)(2) mandates that the case be remanded to the Circuit Court of Cook County.

B. Even If "related to" Jurisdiction Could Be Established, Equitable Remand Is Warranted under §1334(c)(1).

Finally, even if this case does not qualify for mandatory abstention, this court may still remand the action on any equitable ground pursuant to 28 U.S.C. §1334(c)(1). The Seventh Circuit has set forth twelve factors for a court to consider in evaluating permissive 'equitable abstention': (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state-law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir., 1993).

In *Klohr v. Martin & Bayley, Inc*, 2006 WL 1207141 *5-6 (S.D. Ill., May 4, 2006), a product liability suit where the plaintiff filed for bankruptcy, although the Court found that the 'timeliness' factor to establish mandatory abstention was not met, it nonetheless remanded the suit based on equitable abstention, reasoning:

> The Seventh Circuit Court of Appeals has warned that "[t]he use of the Bankruptcy Code to obtain a favorable forum should not be encouraged." *United States Brass Corp.*, 110 F.3d at 1265; *see also Borgini*, 2005 WL 2205714, at *3 ("[T]he removal of the state court action to this Court unquestionably represents 'forum shopping[.]' There are no bankruptcy law issues presented in the matter; there is no independent basis for federal jurisdiction, and, as a personal injury case with a jury demand, this Court must refer the matter for trial to the District Court."). As a last matter, the Court concludes that considerations of comity obviously favor remand of a case that was filed in state court and arises entirely under state law. *[citation omitted]*. Also, in the Court's view, it is prejudicial to Plaintiffs to be required to litigate their claims in a court that they did not select.

"Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative." *Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189; *see also In re Borgini*, 2005 WL 2205714, at *2 (Bankr.C.D.Ill. Aug. 25, 2005).

In *Fuller v A.W. Chesterton, Inc.*, 2009 WL 2855368, *3 (S.D.Ill., 2009), the plaintiff filed a product liability case for asbestos exposure against several defendants, including a bankrupt party. The Court, *sua sponte*, remanded the case pursuant to §1334(c)(1), reasoning:

> In view of the fact that state-law issues predominate overwhelmingly over bankruptcy issues in this case, and giving effect both to Ms. Fuller's choice of forum and the Court's policy of permitting state courts to resolve matters of state law, this case will be remanded to state court under principles of permissive abstention and equitable remand.

In the matter at hand, the Plaintiff, as is her right, chose an Illinois court for redress alleging that the remaining Defendants are directly liable for their negligent conduct that led to the Lac-Mégantic disaster. In what can only be characterized as blatant forum shopping, Removants now attempt to exploit the bankruptcy of an unrelated tortfeasor as a mechanism to deprive Plaintiff of her chosen forum. This conduct cannot be countenanced and warrants equitable remand in any event under §1334(c)(1).

CONCLUSION

No reasonable basis for federal subject matter jurisdiction is set forth in the Notice of Removal, and therefore, this Court must remand this action, and may, under 28 U.S.C. §1447(c) order Removants to reimburse Plaintiff's costs and expenses, including attorney fees, incurred as a result of the improper removal of this action from state court. In any event, should the Court find that there was in fact a basis for the removal of this action under 28 U.S.C. §1334(b), this Court must or should abstain from exercising this Court's concurrent jurisdiction and remand pursuant to 28 U.S.C. §1334(c)(2) or 28 U.S.C. §1334(c)(1).

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order:

A. That remands this case back to the Circuit Court of Cook County, Illinois; and

B. That awards Plaintiff reasonable attorney's fees and costs incurred in conjunction with prosecuting the remand of this case.

DATED: September 18, 2013.

Respectfully submitted,

MEYERS & FLOWERS

/ s / Peter J. Flowers

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re	**)CHAPTER 11**
MONTREAL MAINE & ATLANTIC RAILWAY, LTD.	**)CASE NO. 13-10670**
Debtor	**)**

CERTIFICATE OF SERVICE

I, Tina M. Seymour, hereby certify that I am over eighteen years old and caused true correct copies Estates of Marie Semie Alliance, et al Wrongful Death Claimants' Objection to Chapter 11 Trustee's Application to Employ Shaw, Fishman, Glantz and Towbin, LLC as Special Counsel as it appears on the Court Docket Entry # 282 to be electronically served upon all interested parties as set forth in the ECF list, on the 8th day of October, 2013.

DATED: October 8, 2013

/s/ Tina M. Seymour
Tina M. Seymour, Legal Assistant
to George W. Kurr, Jr., Esquire, Bar #1116