UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

TRUSTEE'S OBJECTION TO WRONGFUL DEATH CLAIMANTS' MOTION TO BAR TRUSTEE'S PROSECUTION OF DERAILMENT CLAIMS AGAINST NON-DEBTOR DEFENDANTS

Robert J. Keach, Esq., the chapter 11 trustee (the "Trustee") in the above-captioned case of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), hereby objects to the *Wrongful Death Claimants' Motion to Bar Trustee's Prosecution of Derailment Claims Against Non-Debtor Defendants* [D.E. 674] (the "Motion") filed by the so-called Unofficial Committee of Wrongful Death Claimants (the "Unofficial Committee"), which purportedly represents the estates of 47 victims of the July 6, 2013 train derailment in Lac-Mégantic, Québec. The Motion makes the extraordinary request that this Court bar "the Trustee's prosecution and/or settlement of **any claims** against non-debtor parties," including, primarily, the Trustee's litigation against World Fuel Services Corporation, World Fuel Services, Inc., Western Petroleum Company, World Fuel Services, Canada, Inc., and Petroleum Transport Solutions, LLC (collectively, the "WF Entities"), currently pending in *Keach v. World Fuel Services, Inc., et al.*, Adv. Pro. No. 14-1001-LHK (Bankr. D. Me.) (the "Adversary Proceeding"). For the reasons set forth below, the Motion is procedurally infirm, should be denied because the Unofficial Committee lacks standing to bring it, has no basis in fact or law, and seeks to interfere with, and bar, the Trustee's performance of his fiduciary duties. The Motion establishes one thing: that the so-called

Unofficial Committee is willing to say or do anything, including sabotaging the hope of recoveries for all other victims and stakeholders, in its vain hope of preserving the possibility of massive contingent fees from possible verdicts rendered by Cook County, Illinois juries. In support of the Objection, the Trustee further states as follows:

A. The Motion is Procedurally Infirm Because the Unofficial Committee is Not a Party to, and Has Not Sought to Intervene in, the Adversary Proceeding.

The Motion is premised on Caplin v. Marine Midland Grace Trust Co. of N.Y., 406 U.S. 416 (1972). In Caplin, the Supreme Court held that a bankruptcy trustee lacks standing to prosecute litigation against a third party on behalf of creditors when the debtor itself has no claim against the third party. *See* Caplin, 406 U.S. at 434. Caplin thus centers on whether a party has standing to bring a cause of action. Lack of standing, such as that addressed in Caplin, is ordinarily pled as an affirmative defense. *See* LINC Fin. Corp. v. Onwuteaka, 129 F.3d 917, 922 (7th Cir. 1997) (finding that affirmative defense regarding plaintiff's lack of standing must be raised in answer or is otherwise waived); Tower S. Prop. Owners Ass'n v. Summey Bldg. Sys., Inc., 47 F.3d 1165 (4th Cir. 1995) (finding that failure to assert lack of standing as affirmative defense resulted in waiver); N. Star Genetics, Ltd. v. Bata, No. CIV A3-00-57, 2001 WL 1820380, *2 (D.N.D. Aug. 9, 2001) (noting that "Defendant, under Rule 8 of the Federal Rules of Civil Procedure, must raise the defense of lack of standing or else it is waived."); Capital One, N.A. v. Knollwood Props. II, LLC, 98 A.D.3d 707, 707 (N.Y.A.D. 2 Dept. 2012) (finding that appellants waived lack of standing defense because it was not alleged in their answer); Law Offices of Colleen M. McLaughlin v. First Star Fin. Corp., 963 N.E.2d 968, 974 (Ill.App. 1 Dist. 2011) ("Lack of standing is generally considered an affirmative defense . . . .").

The Motion is thus based on an affirmative defense to the Adversary Proceeding. However, the Unofficial Committee is not a party to, and has not sought to intervene in, the

Adversary Proceeding. Accordingly, as a preliminary matter, the Motion is procedurally infirm and should be denied.

B. The Unofficial Committee Lacks Standing to Bring the Motion.

Standing under Article III of the Constitution requires that, among other things, the party has suffered an "injury in fact." *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual and imminent, not conjectural or hypothetical." Id. at 560-61 (internal quotations omitted).[1] Loss of a practical or strategic litigation advantage is insufficient to confer standing on the party asserting the loss. *See* In re Integra Realty Res., Inc., 262 F.3d 1089, 1102 (10th Cir. 2001); *see also* Austin Assocs. v. Howison (In re Murphy), 288 B.R. 1 (D. Me. 2002) (finding that "the fact that Appellant now has to defend in state court with respect to the assigned cases of action is not the kind of injury that gives it standing . . . ."). For example, in Integra Realty, the appellants argued that they had standing to appeal the order approving a settlement because the award of settlement funds to the post-confirmation trustee would "generate a war chest of funds" for the trustee which would make it more difficult for the appellants to defend their cases. Integra Realty, 262 F.3d at 1102. The Tenth Circuit disagreed and found that the appellants did not have standing because they did not have a legally protected interest in the settlement. Id. As explained in Integra, "it is not sufficient for Appellants to show merely the loss of some practical or strategic advantage in litigating their case." Id. At most, the appellants experienced a "tactical disadvantage" as a result of the settlement, which was insufficient to provide them with standing. Id. at 1103.

[1] Although this Court is not an Article III court, the Article III standing requirements nonetheless apply. *See* In re Amonskeag Bank Shares Inc., 239 B.R. 653, 657 n.3 (D.N.H. 1998).

The crux of the Motion is that, by bringing the Adversary Proceeding, and by potentially bringing other Derailment-related litigation, the Trustee might hinder the Unofficial Committee from executing its own legal strategy. However, the loss, or potential loss, of a strategic advantage, is insufficient to provide the Unofficial Committee with standing to bar the Trustee from prosecuting the Adversary Proceeding or any other Derailment-related litigation. Thus, the Unofficial Committee has no "injury in fact" sufficient to provide it with standing.

Further, the Motion describes the potential outcomes of the Adversary Proceeding to support the argument that the Unofficial Committee's legal strategy will be hindered by the Trustee's prosecution of Derailment-related litigation. The Unofficial Committee appears to be primarily concerned with the possibility that the Trustee might settle with the WF Entities and confer releases that would bind the personal injury and wrongful death victims. However, at this very early stage in the Adversary Proceeding, the Unofficial Committee's concerns are wholly conjectural, and do not constitute "actual and imminent" harms that would provide the Unofficial Committee with standing to bar prosecution of the Adversary Proceeding. Moreover, in the event the Trustee eventually reaches a settlement with the WF Entities, such settlement would be subject to the approval of this Court, and the Unofficial Committee would have an opportunity to be heard with respect to any settlement. Accordingly, there is no basis to bar the Adversary Proceeding in light of the purely speculative and remote harms alleged by the Unofficial Committee.

Additionally, the Unofficial Committee argues that "the Debtor's estate bears a significant risk of zero recovery from World Fuel" given Maine's comparative negligence laws, which would preclude recovery by a joint tortfeasor who is determined to be more than 50% liable for the Derailment. *See* Motion, ¶ 17. A determination of contributory negligence is a

factual determination to be made by the trier of fact. *See* Waslow v. Grant Thornton LLP (In re Jack Greenberg, Inc.), 240 B.R. 486, 519-20 (Bank. E.D. Pa. 1999). Accordingly, mere speculation that contributory negligence will apply is insufficient to bar a trustee from bringing causes of action to which contributory negligence might be a defense. *See* id. (finding that trustee had standing to bring professional negligence claims notwithstanding defendant's assertion that contributory negligence might apply). In this case, a determination of the relative fault of the WF Entities and the Debtor will require extensive discovery and fact-finding. As admitted by the Unofficial Committee itself, "the relative fault of the Debtor and World Fuel is at this point a matter of speculation." Motion, ¶ 17. The Adversary Proceeding is still in its infancy, and it has no certain outcome or effect; nor is the Trustee required to guarantee that he will prevail or obtain a specific recovery before commencing litigation. Accordingly, the allegation that contributory negligence might limit the Trustee's recovery from the WF Entities is pure speculation at best, and does not constitute an injury in fact sufficient to provide the Unofficial Committee with standing. The Motion should be denied.

C. Caplin is Wholly Distinguishable from This Case.

Although the Unofficial Committee attempts to make Caplin applicable to the facts of this case, it ultimately cannot do so. In fact, Caplin is wholly distinguishable from this case and provides no basis on which to grant the relief sought in the Motion. In Caplin, Webb & Knapp, Inc. ("W&K") was put into an involuntary bankruptcy under the former Bankruptcy Act by the Marine Midland Trust Company ("Marine Midland"). *See* Caplin, 406 U.S. at 418-19. Prior to the involuntary bankruptcy case, W&K was engaged in real estate activities and executed an indenture with Marine Midland that provided for the issuance of debentures by W&K. *See* id. at 417. Pursuant to the indenture, W&K promised that it would not incur or assume any

indebtedness unless it maintained an asset to liability ratio of 2:1. *See* id. at 417-18. Marine Midland was obligated under the indenture to ensure W&K's compliance with the terms of the indenture. *See* id. at 418. After the approval of the commencement of the involuntary bankruptcy case and the appointment of the chapter X trustee, the trustee began an investigation of W&K's assets and liabilities and concluded that Marine Midland had willfully or negligently failed to fulfill its obligations under the indenture. *See* id. at 419. Accordingly, the trustee filed an action against Marine Midland on behalf of the debenture holders, seeking recovery of the principal amount of the debentures as damages for Marine Midland's alleged failure to comply with the terms of the indenture. *See* id. at 420.

In holding that the chapter X trustee lacked standing to prosecute an action against Marine Midland on behalf of debenture holders, the Supreme Court found that nothing in the Bankruptcy Act or the Trust Indenture Act "enables [the chapter X trustee] to **collect money not owed to the estate**." Id. at 428 (emphasis added). The Supreme Court further found that **W&K itself did not have any claims against Marine Midland**. *See* id. at 429-30 ("Nowhere does petitioner argue that Webb & Knapp could make any claim against Marine. Indeed, the conspicuous silence on this point is a tacit admission that no such claim could be made."). In fact, the trustee's basis for bringing the suit against Marine Midland was his argument that, as reorganization trustee, he would have better access to information, and would be better able to discover claims, than would the debenture holders. *See* id. at 427. In light of these facts, the Supreme Court determined that the chapter X trustee lacked standing to bring the action against Marine Midland. *See* id. at 434.

Since Caplin, courts have uniformly held that Caplin extends only to cases in which a debtor or trustee seeks to pursue a claim on behalf of a third party. Caplin does not bar a debtor

or trustee from bringing or prosecuting a claim held by the debtor itself. *See, e.g.*, Dahar v. Raytheon Co. (In re Navigation Tech. Corp.), 880 F.2d 1491, 1494 (1st Cir. 1989) (holding that Caplin did not bar trustee from asserting claims of the estate); Regan v. Vinick & Young (In re Rare Coin Galleries of Am., Inc.), 862 F.2d 896 (1st Cir. 1988) (finding that trustee had standing to bring action in which he was asserting claims belonging to the debtor); Ranalli v. Ferrari (In re Unifi Commc'ns, Inc.), 317 B.R. 13, 17 (D. Mass. 2004) (holding that trustee has standing to bring causes of action belonging to the debtor); Marsh v. Levy (In re Martin Levy of Berlin D.M.D., P.C.), 416 B.R. 1, 8 (Bankr. D. Mass. 2009) (holding that trustee had standing to bring state law causes of action on behalf of the debtor, and thus Caplin did not apply); Official Comm. of Unsecured Creditors v. Foss (In re Felt Mfg. Co., Inc.), 371 B.R. 589, 610-11 (Bankr. D.N.H. 2007) (holding that unsecured creditors committee had standing to bring claims against former officers and directors of debtor for alleged breach of fiduciary duties, and that Caplin did not apply); Brandt v. Hicks, Muse & Co., Inc. (In re Healthco Intern., Inc.), 208 B.R. 288, 300 (Bankr. D. Mass. 1997) (holding that Caplin does not prohibit trustee from bringing causes of action that are property of the bankruptcy estate); Brandt v. Hicks, Muse & Co., Inc. (In re Healthco Intern., Inc.), 195 B.R. 971, 986 (Bankr. D. Mass. 1996) (same); *see also* Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118 (2d Cir. 1991) (noting that trustee still has standing, under Caplin, to assert claims held by the debtor); McHale v. Silicon Valley Law Grp., 919 F.Supp.2d 1045, 1051 (N.D. Ca. 2013) (stating that the Caplin "principle is limited . . . to instances in which a bankruptcy trustee seeks to pursue a claim on behalf of investors, as opposed to rectifying injuries to the estate itself."); In re Bridge Info. Sys., Inc., 325 B.R. 824, 832-33 (Bankr. E.D. Mo. 2005) ("Caplin merely stands for the proposition that a trustee only has the statutory right to assert claims on behalf of the debtor's estate and may not assert claims on

behalf of creditors . . . ."); Edwards Wood Prods., Inc. v. Thompson (In re Icarus Holdings, LLC), 290 B.R. 171, 177 (Bankr. M.D. Ga. 2002) (finding that "when the cause of action is property of the bankruptcy estate," the problems identified in Caplin "disappear."); Taberna Capital Mgmt., LLC v. Jaggi, No. 08 Civ. 11355(DLC), 2010 WL 1424002, *3 (S.D.N.Y. Apr. 9, 2010) (noting that Caplin does not apply when the claims that the trustee sues on are property of the estate).

Simply because an action might benefit creditors does not convert the action into one brought solely on behalf of such creditors. *See* Jack Greenberg, 240 B.R. at 506 (citing Caplin and stating that "[s]imply because the creditors of a[n] estate may be the primary or even the only beneficiaries of such a recovery does not transform the action into a suit by the creditors."); Gordon v. Basroon (In re Plaza Mortg. and Fin. Corp.), 187 B.R. 37 (Bankr. N.D. Ga. 1995) ("To find that the trustee has no standing to pursue causes of action belonging to the debtor because the recovery would only benefit the creditors is an absurd argument, given the fact that the trustee's goal is to make a distribution to creditors.").

The Unofficial Committee glosses over the fact that the Trustee only asserts claims against the WF Entities in the Adversary Proceeding that belong to the Debtor and constitute property of the estate. In so arguing, the Unofficial Committee cites to statements, taken out of context, made by the Trustee in oral argument. *See* Motion, ¶ 13. However, a review of the complaint filed by the Trustee in the Adversary Proceeding (the "Complaint") establishes that the Trustee is not asserting non-debtor causes of action against the WF Entities, but is in fact properly asserting claims held by the Debtor.

Specifically, the Complaint provides that "Robert J. Keach, solely in his capacity as the chapter 11 trustee of Montreal, Maine & Atlantic Railway, Ltd. . . . assert[s] direct claims

against" the WF Entities, and also "seek[s] disallowance of the Proofs of Claim filed by" the WF Entities. Complaint, p. 1. The Trustee alleges in the Complaint that, had the WF Entities "properly classified, identified, and labelled the Train's crude oil cargo, [the Debtor] could and would have taken steps that would have avoided the Derailment." Id. at ¶ 9. The Trustee alleges that the WF Entities "**owed a duty . . . to [the Debtor]** specifically to take reasonable measures to avoid or mitigate the dangers associated with the transport of their crude oil and to exercise reasonable care to ensure that the Train could be operated in a safe manner . . . ." Id. at ¶ 14 (emphasis added). The Trustee further alleges that **the WF Entities breached their duties to the Debtor**, which proximately **caused the Debtor to suffer "substantial injuries."** Id. at ¶ 16. (emphasis added). Such injuries include "(i) the costs and expenses associated with being named in the numerous suits, actions, and proceedings in various jurisdictions, which arise out of the Derailment; (ii) actual or potential liability for the claims made against [the Debtor] in such suits, actions, and proceedings; and (iii) the destruction of [the Debtor's] business operations." Id. Accordingly, "[b]y this action, **[the Debtor] seeks to recover damages** from" the WF Entities. Id. at ¶ 17 (emphasis added). The Complaint asserts two counts against the WF Entities. Count I asserts a claim of negligence, and Count II seeks disallowance of the proofs of claim filed by the WF Entities in this bankruptcy case.

The Trustee unquestionably has standing to seek disallowance of proofs of claim, including those filed by the WF Entities. *See* 11 U.S.C. § 502(a). Further, the Trustee unquestionably has standing to assert the Debtor's claim of negligence against the WF Entities. Without limitation, the accident allegedly caused primarily, if not exclusively, by the WF Entities caused damage to physical assets of the Debtor. Moreover, as a consequence of the accident and its aftermath, the assets of the Debtor, once valued at nearly $50 million, sold in a

competitive auction process for only about $16 million. These are direct damages to the Debtor and its estate, and the suits arising from them can only be asserted by the Trustee. The terms of the Complaint could not be more explicit that the Trustee is asserting the Debtor's claims against the WF Entities, and not claims held by the victims of the Derailment. Simply because any recovery from the Adversary Proceeding will be distributed to creditors does not transform the claims asserted in the Complaint into non-debtor claims. Caplin is wholly inapplicable to this case and does not provide the Unofficial Committee with a basis for the relief requested in the Motion.

D. The Motion Asserts Frivolous Allegations of Collusion.

Consistent with the conspiracy theories espoused by the Unofficial Committee throughout this case, the Motion alleges that the Adversary Proceeding is a product of the Trustee's "collusion" with the WF Entities.[2] *See* Motion, ¶ 21. According to the Unofficial Committee, the Trustee and the WF Entities have "coordinated their efforts even to the point of creating the appearance of collusion," such that "the Trustee's conflicting incentives render him unfit to fairly represent the interests of the Wrongful Death Victims in asserting their claims against World Fuel." Id. These bold accusations are apparently based on the Unofficial Committee's observations that both the Trustee and the WF Entities have sought transfer of the personal injury and wrongful death cases from Illinois state court to Maine, that the WF Entities filed proofs of claim against the Debtor in this bankruptcy case, and the fact that the Trustee brought the Adversary Proceeding at all. Id. Such accusations are so preposterous as to hardly warrant a response, but in any event, the Trustee states simply that his actions have been consistent with his fiduciary obligations to creditors of the Debtor, and in fact have positioned

[2] *See, e.g.*, Wrongful Death Claimants' Objection to Application for Order, Pursuant to Sections 328, 330, and 1103 of the Bankruptcy Code, Authorizing Employment and Retention of Paul Hastings LLP as Counsel to Official Committee of Victims, Effective as of December 10, 2013 [D.E. 609].

him directly adverse to the WF Entities, the very entities with whom the Unofficial Committee has accused him of conspiring. Further, to accuse a potential creditor of "collusion" because it filed proofs of claim against a debtor is, frankly, baffling. Finally, that the Trustee and the WF Entities have happened to agree on one legal position—namely, that the Derailment litigation should be transferred to Maine—is not evidence of collusion, coordination, or anything at all. The Unofficial Committee's accusations of collusion, baseless as they are, appear to be a desperate effort by the Unofficial Committee to bolster its otherwise untenable legal arguments.

Further, the Unofficial Committee's position that the Trustee's "coordination" or "collusion" with the WF Entities "render him unfit **to fairly represent the interests of the Wrongful Death Victims in asserting their claims against World Fuel**" illustrates the basic (perhaps willful) misunderstanding of the Unofficial Committee. As illustrated by a simple reading of the Complaint, the Trustee is not representing, or even attempting to represent, the interests of the personal injury and wrongful death claimants against the WF Entities. The Trustee is simply, consistent with his obligations in this case, representing the interests of, and asserting the claims of, the **Debtor** against the WF Entities. The facts of this case thus do not fit within the scope of Caplin, and the Motion must be denied.

E. Response to Factual Allegations as Required by D. Me. LBR 9013-1(f)

Pursuant to D. Me. LBR 9013-1(f), the Trustee responds to the factual allegations contained in paragraphs 1-9 of the Motion as follows. Paragraphs 10-23 of the Motion contain legal arguments which the Trustee has addressed above.

1. The allegations contained in ¶ 1 of the Motion are legal conclusions to which no response is required. To the extent a response is required, the Trustee denies the allegations contained in ¶ 1 of the Motion for the reasons set forth in this Objection.

2. The Trustee admits only that the Debtor operated the locomotive that was involved in the Derailment and that it was left unattended on the night of the Derailment. The remaining allegations contained in ¶ 2 are legal conclusions to which no response is required. To the extent a response is required, the Trustee denies the allegations contained in ¶ 2 of the Motion.

3. The Trustee admits only that, after the Derailment, lawsuits were commenced in Cook County, Illinois against the Debtor and other non-debtor defendants asserting claims arising out of, or related to, the Derailment. The remaining allegations contained in ¶ 3 are legal conclusions to which no response is required. To the extent a response is required, the Trustee denies the remaining allegations contained in ¶ 3 of the Motion.

4. The Trustee admits only that, subsequent to August 7, 2013, the Debtor was dismissed from the litigation pending in Cook County, Illinois. The Trustee denies the remaining allegations contained in ¶ 4 of the Motion.

5. The documents referenced in ¶ 5 of the Motion speak for themselves and thus no response is required.

6. The documents referenced in ¶ 6 of the Motion speak for themselves and thus no response is required. The Trustee denies the remaining allegations contained in ¶ 6 of the Motion. By way of further response, the Trustee states that at no point has he acted "in coordination" with the WF Entities or any of them, and such allegation is frivolous and has no basis in fact.

7. The documents referenced in ¶ 7 of the Motion speak for themselves and thus no response is required. The Trustee denies the remaining allegations contained in ¶ 7 of the

Motion. By way of further response, the Trustee states that at no point has he "coordinated" with the WF Entities or any of them, and such allegation is frivolous and has no basis in fact.

8. The documents referenced in ¶ 8 of the Motion speak for themselves and thus no response is required.

9. The document referenced in ¶ 9 of the Motion speaks for itself and thus no response is required.

WHEREFORE, for the reasons set forth in this Objection, the Trustee requests that the Motion be denied.

Dated: March 4, 2014

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

By his attorneys:

/s/ *Michael Fagone, Esq.*

Michael A. Fagone, Esq.
D. Sam Anderson, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle Street
P.O. Box 9729
Portland, ME 04104
Telephone: (207) 774-1200
Facsimile: (207) 774-1127
E-mail: mfagone@bernsteinshur.com