UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

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

WRONGFUL DEATH VICTIMS' OBJECTION TO TRUSTEE'S MOTION FOR MORATORIUM ON PLAN PROCEEDINGS AND FOR OTHER RELIEF

The Unofficial Committee of Wrongful Death Claimants (the "Committee"), consisting of representatives (the "Wrongful Death Victims") of the estates of the 47 people killed in the massive explosion in Lac-Mégantic, Quebec, from the derailment of a train operated by the Debtor (the "Derailment"),[1] hereby objects to the Chapter 11 Trustee's (A) Proposed Agenda for Status Conference and (B) In the Alternative, Motion Pursuant to 11 U.S.C. § 105(d) and the Cross-Border Insolvency Protocol to Establish (i) a Moratorium on Plan Proceedings; (II) a Settlement Process; and (III) a Plan Process in the Event of Multiple Plans filed on February 14, 2014 [Docket No. 658] (the "Moratorium Motion"). Despite its high-minded tone, the Moratorium Motion does not seek to promote a consensual resolution of this Chapter 11 case but to advance the Trustee's own non-consensual proposal. The Moratorium Motion was designed as a "free shot" designed to block the Plan without facing the risk of exposing to judicial determination its arguments against the Plan on its merits. As a barely disguised grab for litigation advantage, the Moratorium Motion should be denied and the Court should proceed, as scheduled, with the hearing on approval of the Committee's disclosure statement.

[1] The victims and the representatives of their estates are listed in the Amended Verified Statement Concerning Representation of Unofficial Committee of Wrongful Death Claimants as Required by Fed. R. Bankr. P. 2019 filed by the Committee's counsel on January 28, 2014 [Docket No. 599]. Solely for the avoidance of doubt as to standing, this objection is filed on behalf of all members of the Committee as well as the Committee itself.

Relevant Background

1. On January 24, 2014, the Court entered an Order authorizing the sale of substantially all the assets of the Debtor and its wholly owned Canadian subsidiary, Montreal Maine & Atlantic Canada ("MMA Canada"). MMA Canada is a debtor under Canada's Companies' Creditors Arrangement Act in a proceeding before the Quebec Superior Court in Canada (the "Canadian Court"). The sale is expected to close later this month. At that point, the only significant remaining assets of the Debtor will be its interest in two companion insurance policies issued by XL Group Insurance and XL Insurance Company Limited (referred to collectively as "XL") each with a limit of $25 million of coverage for Derailment-related claims (the "XL Policies").[2] The Debtor is a named insured under the XL Policies, as is MMA Canada. Others who claim to be insureds under the XL Policies include affiliates of the Debtor such as Edward Burkhart and Rail World, Inc. and unaffiliated non-debtor third parties such as CIT Group, Inc. (the "Non-Debtor Insureds").

2. The Non-Debtor Insureds are among the defendants named in lawsuits filed by certain Wrongful Death Claimants in Illinois. Although the Debtor is not a party in any of the Illinois actions, the Trustee and other defendants moved to transfer these actions to the United States District Court for the District of Maine pursuant to 11 U.S.C. § 157(b)(5). Following a hearing held on January 31, 2014, the transfer motions remain *sub judice* before the Maine District Court.

3. On January 29, 2014, the Committee filed a chapter 11 plan [Docket No. 600]

[2] Although the Trustee argues that claims against third parties for damages sustained by the victims of the Derailment also constitute a significant asset of the estate, this assertion is belied by the Trustee's proposal to throw in a release of such claims against the Debtor's insiders as part of an insurance settlement. In any event, the Trustee's pursuit of such claims is both imprudent and unauthorized. See Wrongful Death Claimants' Motion to Bar Trustee's Prosecution of Derailment Claims Against Non-Debtor Defendants filed February 19, 2014 [Docket No. 674].

(the "Plan") and proposed form of disclosure statement therefor [Docket No. 601] (the "Disclosure Statement"). The Plan proposes, among other things, a method of allocation and distribution of the proceeds under the XL Policies to victims of the Derailment, and protects the victims from involuntary forfeiture of their claims against third parties. A hearing on the Disclosure Statement is scheduled for March 12, 2014.

4. Filing of the Plan precipitated a request by the Official Committee of Victims for a joint status conference between the U.S. Court and the Canadian Court to address, among other things, distribution of the XL Policies and the Committee's Chapter 11 Plan. This Court granted that request and on February 26, 2014, held a joint status conference with the Justice Gaetan Dumas of the Canadian Court. The Trustee reported that he was close to reaching a "settlement-in-principle" with XL and certain other parties for distribution of the proceeds of the XL Policies. Further remarks by the parties indicated that the "settlement" was premised on, among other things, issuance of injunctions barring claims against the Non-Debtor Insureds by the Wrongful Death Claimants, despite their objection to any such forfeiture of their own individual claims.[3] Furthermore, the Trustee has indicated that the entire distribution of proceeds would occur through the Canadian proceeding where wrongful death and personal injury claims lack the priority of distribution conferred by Section 1171(a) of the Bankruptcy Code.

Argument

5. Put aside, for the moment, the fact that the Trustee's proposal stands justice on its head – What public interest is served by empowering the Trustee, who represents an entity jointly responsible for a tragedy that robbed 47 families of a loved one, to negotiate releases for

[3] XL's objection to the Disclosure Statement filed on February 28, 2014 [Docket No. 691] confirms that this "settlement" is to be accomplished notwithstanding the objections of the Wrongful Death Claimants: "[I]f the Trustee is unable to reach the necessary agreements with one or more of those who claim a right to coverage under the policies, the Trustee and the XL Companies are prepared to proceed with their settlement over the objections of such third parties." XL Objection, page 2.

the benefit of non-debtor tortfeasors who are also jointly responsible for the tragedy? Also put aside the fact that the Trustee, after representing to the District Court that the insurance policy issued in Canada naming the Debtor as an insured is an important asset of the U.S. bankruptcy estate,[4] now proposes to abandon this asset to the Canadian bankruptcy estate in derogation of his own fiduciary duty to maximize the estate with which he has been entrusted. Put aside that, in so doing, the Trustee proposes to usurp Congress's judgment, expressed in Section 1171(a) of the Bankruptcy Code, that wrongful death and personal injury claims should receive distributive priority in a railroad case.[5] Further put aside the fact that as part of the same approach whereby the Trustee will discard a valuable asset belonging to the estate, the Trustee proposes to expropriate a valuable asset that does not belong to the estate, namely, the victims' claims against the Non-Debtor Insureds for their own wrongdoing leading to horrific loss of life. And finally, put aside the stunning display of invertebracy whereby the Trustee has for more than six months let the non-debtor tortfeasors hold hostage insurance proceeds for the Derailment victims in the amount of not less than $25 million – proceeds that even the insurer itself acknowledges to be due, defense costs being a separate obligation under the Canadian insurance policy that do not reduce the $25 million indemnity under that policy. Even if the Trustee's approach were at all defensible on the merits, his proposed "settlement" represents by his own admission a non-consensual, litigation-based approach to this case. The Moratorium Motion, which seeks to halt consideration of the Plan so that the Trustee can pursue this stratagem, offers no reason

[4] "And I started to give you the recitation of assets, but the most important sort of group of assets are really the following: First, their rights under insurance policies." Tr. of 1/3/14 Hr'g at 16-17 attached hereto as Exhibit A.

[5] If the Trustee believed his taunt that insurance proceeds are excepted *sub silentio* from the statutory priority for wrongful death and personal injury claims under Section 1171(a) of the Bankruptcy Code, he would have no need to try to circumvent Section 1171(a) by shipping those proceeds across the border where the Bankruptcy Code does not apply – but where the insurance proceeds will be subject to a different sort of priority, in the form of the priming lien for Monitor's fees already exceeding other sources of recovery, that the Trustee apparently finds more agreeable.

whatsoever why this Court should skew the procedural balance to favor the Trustee's approach over the Committee's.

6. Filing of the Plan and Disclosure Statement set into motion, as of right, a procedural sequence under the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. As the first step, Rule 3017(a) requires that "[e]xcept as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b), the court ***shall hold a hearing*** on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto." Fed. R. Bankr. P. 3017(a) (emphasis added). Rule 3017(b) further provides that "[f]ollowing a hearing the court ***shall determine*** whether the disclosure statement should be approved." Fed. R. Bankr. P. 3017(b) (emphasis added). When Congress has sought to make an action mandatory, it employs the word "shall" to express its intent. Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (use of "shall" indicates "the language of command," and leaves no room for the exercise of discretion by the trial court); Association of Civilian Technicians v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes…this word is generally imperative or mandatory").

7. The Trustee's reliance on Section 105(d)(2) of the Bankruptcy Code to override the requirements of Rule 3017 is misplaced. Section 105(d)(2) provides, in relevant part:

> The Court, on its own motion or on the request of a party in interest –
>
> > (2) ***unless inconsistent*** with another provision of this title or ***with applicable Federal Rules of Bankruptcy Procedure***, may issue an order at any such conference prescribing such limitations and

> conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—
>
> (A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
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> (B) in a case under chapter 11 of this title—
>
> (i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
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> (ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;
>
> (iii) sets the date by which a party in interest other than a debtor may file a plan;
>
> (iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
>
> (v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or
>
> (vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

(emphasis added). Since a moratorium on consideration of the Disclosure Statement is inconsistent with Fed. R. Bankr. P. 3017(a) and (b), it is impermissible under Section 105(d). In re Barnes, 308 B.R. 77, 80 (Bankr. D. Colo. 2004) (denying debtor's request under Section 105(d) for an extension to file disclosure statement as being inconsistent with other provisions of the Code).

9. For the Trustee to invoke Section 105(d) as authority to put the brakes on the Plan is contrary to the spirit as well as the letter of Section 105(d). The entire thrust of Section 105(d) is to speed up the plan process, not slow it down. The provision's general purpose is for cases to be handled "expeditiously and economically." And specifically concerning Chapter 11 plans, Section 105(d)(2)(B) provides a series of deadlines the Court may set in order to expedite the plan process. Nowhere does Section 105(d) provide support for derailing a plan process that

the Committee, with commendable expedition, has initiated without need for a Court-ordered deadline.

8. The Trustee is similarly incorrect in invoking the Cross-Border Insolvency Protocol as support for the Moratorium Motion. Although the Trustee touts his "settlement" as the type of cross-border "compromise" envisioned by the Protocol, the Trustee's "settlement" is not a compromise and the Protocol does not preclude consideration of the Plan. On the contrary, the Protocol expressly contemplates that parties in interest will pursue their substantive rights without prejudice by the Protocol. For example, the Protocol provides:

> 8. In accordance with the principles of comity and independence recognized herein, nothing contained herein shall be construed to:
>
> > e. authorize any action that requires the specific approval of one or both of the Courts under the Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or ***preclude the Debtors, the U.S. Trustee, any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other relevant jurisdiction including, without limitation, the rights of parties in interest to appeal from the decisions taken by one or both of the Courts***.
>
> 27. Except as specifically provided herein, neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall: (a) prejudice or affect the powers, rights, claims and defenses of the Debtors and their estates, the Estate Representatives, the U.S. Trustee or any of the Debtors' creditors under applicable law, including the Bankruptcy Code and the CCAA, and the orders of the Courts; or (b) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of Canada or the United States.

Cross-Border Protocol entered on September 4, 2013 [Docket No. 168], at ¶¶ 8, 27.

9. The Trustee's proposed delay is unnecessary to assure orderly consideration of the Disclosure Statement. The Trustee, XL and others have filed objections to the Disclosure Statement, claiming that the Plan is "facially unconfirmable" and the Disclosure Statement defective. Objections to the Disclosure Statement having been asserted and briefed, the Court should let the customary process unfold. The Committee has reached out to the objectors regarding proposed amendments to the Disclosure Statement and Plan designed to address the objections or at least narrow the differences between the parties' positions. And this Court can, as it always does, expeditiously adjudicate whatever objections have not been consensually resolved. If the Trustee truly believed that the Plan is facially unconfirmable, he would not have wasted this Court's time with the Moratorium Motion.

10. Finally, granting the relief sought by the Moratorium Motion would be counter-productive. By his own admission, the Trustee made no significant progress toward realizing insurance proceeds until very recently, that is, until after the Committee filed the Plan. Continued prosecution of the Plan is the best way to promote further progress in negotiations. While the Committee has structured the Plan to be confirmable with the support of actual Derailment victims even if opposed by the Trustee and other non-victims, the Committee has been and remains willing to negotiate key terms of the Plan. Parties preferring a different approach will not consider compromising with the Committee unless confirmation appears imminent. If there is any hope for the Trustee to change course and move beyond his "settlement" toward a fully consensual resolution of insurance issues, the best way to make this happen is to proceed toward confirmation of the Plan. If, on the other hand, the parties to the

"settlement" are committed to litigation rather than negotiation, all parties will be best served by proceeding expeditiously so as to keep a lid on the cost of this already expensive case.

11. For the reasons stated herein, the Court should deny the Moratorium Motion, consider the Disclosure Statement on its merits, and authorize the Committee to distribute the Disclosure Statement (with such changes as the Court may direct) to creditors to solicit their acceptance of the Plan.

Dated: March 5, 2014

/s/ George W. Kurr, Jr.
George W. Kurr, Jr.
GROSS, MINSKY & MOGUL, P.A.
23 Water Street, Suite 400
P. O. Box 917
Bangor, ME 04402-0917
Phone: (207) 942-4644 ext. 206
gwkurr@grossminsky.com

Daniel C. Cohn, *pro hac vice*
Taruna Garg, *pro hac vice*
MURTHA CULLINA LLP
99 High Street, 20th Floor
Boston, Massachusetts 02110
Phone: (617) 457-4000
Counsel for the Unofficial Committee of Wrongful Death Claimants