

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

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

**WRONGFUL DEATH CLAIMANTS APPLICATION FOR ALLOWANCE AND
PAYMENT OF ADMINISTRATIVE EXPENSES PURSUANT TO 11 U.S.C.
§§ 503(b)(3)(D) AND 503(b)(4)**

Pursuant to this Court’s “Order Establishing the Deadline for Filing Administrative Claims and Approving the Form and Manner of Notice Thereof” entered on October 21, 2014 [Docket No. 1158] (“Administrative Bar Date Order”), the 47 holders of claims for wrongful death and personal injury identified in the affidavits appearing at docket numbers 754 and 756 in this case (“Wrongful Death Claimants”) hereby submit this application for allowance and payment of administrative expenses pursuant to 11 U.S.C. §§ 503(b)(3)(D) and (4) for their costs and professional fees incurred in making a substantial contribution in this case. In further support thereof, the Wrongful Death Claimants respectfully submit the following:

A. *Background*

1. The Debtor commenced this case by filing a voluntary petition for relief under chapter 11 of Title of the United States Code (the “Bankruptcy Code”) in this Court on August 7, 2013 (“Petition Date”). The Debtor is a “railroad” within the meaning of 11 U.S.C. §101(44), and this is a case concerning a railroad, and the provisions of Subchapter IV of chapter 11 of the Bankruptcy Code apply to this case.

2. On or about August 21, 2013, the United States Trustee appointed Robert J. Keach as the chapter 11 trustee in this case (“Trustee”) pursuant to 11 U.S.C. § 1163.

B. *The Wrongful Death Claimants and the Administrative Bar Date Order*

3. The Wrongful Death Claimants hold claims against the Debtor and its bankruptcy estate for personal injury and wrongful death (“Derailment Claims”) related to the derailment of a railroad near Lac-Mégantic, Quebec in 2013 (“Derailment”). The Derailment Claims are entitled to be paid as an administrative expense pursuant to 11 U.S.C. § 1171.

4. Pursuant to paragraph 2 of the Administrative Bar Date Order, “[e]ach person or entity. . . that holds or asserts an administrative claim, as set forth in 11 U.S.C. § 503(b), against the Debtor’s estate” must file an application for payment of such administrative claim by 5:00 p.m. on December 1, 2014 (“Administrative Claims Bar Date”).

5. In addition to their Derailment Claims, the Wrongful Death Claimants are entitled to administrative claims pursuant to 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4) for their fees and expenses incurred and to be incurred in making a substantial contribution in this case. The Wrongful Death Claimants seek allowance and payment of an administrative expense claim for these fees and expenses pursuant to this Application, as required by paragraph 2 of the Administrative Bar Date Order.

C. *The Wrongful Death Claimants are Entitled to Allowance and Payment of Administrative Expenses For Their Actual and Necessary Expenses Pursuant to 11 U.S.C. § § 503(b)(3)(D) and (4)*

6. Section 503(b)(3)(D) states in pertinent part:

(b) After notice and a hearing, there shall be allowed administrative expenses. . . including –

. . .

(3) the actual, necessary expenses . . . incurred by –

. . .

(D) a creditor. . . in making a substantial contribution in a case under chapter. . . 11 of this title.

7. There is no dispute that each Wrongful Death Claimant is a “creditor” including for purposes of section 503(b)(3)(D) of the Bankruptcy Code. “Creditor” is defined in 11 U.S.C. § 101(10)(A) as an “entity that has a claim against the debtor that arose at the time of or before the [Petition Date].” “Claim” broadly includes a “right to payment” from the Debtor, “whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured” pursuant to section 101(5)(A) of the Bankruptcy Code.

8. The Wrongful Death Claimants submit that they have made, and will continue to make, a substantial contribution in this case. The Bankruptcy Code does not define the phrase “substantial contribution” in section 503(b)(3)(D), and the cases are not uniform on the criteria to be used to determine whether a creditor, such as the Wrongful Death Claimants, have made a substantial contribution. The issue of whether and to what extent the Wrongful Death Claimants have made a substantial contribution is one of fact. *Pierson & Gaylen v. Creel & Atwood*, 785 F.2d 1249 (5th Cir. 1986), *see generally*, 4 Collier on Bankruptcy, ¶ 503.10[5] at 503-82 (16th rev. ed. 2014). Generally courts have required that the contribution provide a tangible, demonstrable, direct or material benefit, or have used some similar adjective to characterize when a benefit is substantial. *See, e.g., In re Cellular 101, Inc.*, 307 F.3d 1096 (9th Cir. 2004). “[S]ervices which substantially contribute to a case are those which foster and enhance, rather than retard or interrupt the progress of reorganization.” *Pierson & Gaylen v. Creel & Atwood*, *supra*, 785 F.2d at 1253, *quoting In re White Motor Credit Corp.*, 50 Bankr. 885, 892 (Bankr. N.D. Ohio 1985) (*quoting In Re Richton Intern'l Corp.*, 15 Bankr. 854, 856 (Bankr. S.D.N.Y. 1981)). “[T]he policy aim of authorizing fee awards to creditors is to “promote meaningful

creditor participation in the reorganization process." *Pierson & Gaylen v. Creel & Atwood*, *supra*, 785 F.2d at 1253 (citations and internal quotation omitted).

9. The facts that will establish that the Wrongful Death Claimants' benefit satisfied the "substantial contribution" test continue to evolve and occur. The Wrongful Death Claimants believe in the aggregate they have the largest claims in this case. Consistently, the Wrongful Death Claimants have cooperated with the Trustee in his efforts to formulate and implement a confirmable plan of reorganization, and are playing a leadership role commensurate with the magnitude and significance of their claims. The Wrongful Death Claimants' contributions to date as well as their anticipated contributions prior to confirmation of a plan "foster and enhance, rather than retard or interrupt the progress of reorganization." *Id.*

D. ***The Wrongful Death Claimants are Entitled to an Administrative Expense Claim Under 11 U.S.C. § 503(b)(4) for The Reasonable Compensation For Services Rendered and to be Rendered by Their Attorneys***

10. Section 503(b)(4) provides in pertinent part as follows:

(b) After notice and a hearing, there shall be allowed administrative expenses. . . including –

. . .

(4) reasonable compensation for professional services rendered by an attorney or an account of [a creditor entitled to an administrative expense for expenses under section 503(b)(3)(D)], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses, incurred by such attorney or accountant.

11. Thus, the Wrongful Death Claimants, who are entitled to recovery of expenses pursuant to 11 U.S.C. § 503(b)(3)(D), are also entitled to an administrative expense for the professional services of an attorney and accountant under 11 U.S.C. § 503(b)(4). Allowance of a professional compensation claim under section 503(b)(4) is not conditioned upon allowance of a

claim for expenses under § 503(b)(3)(D). All that is necessary is that the Wrongful Death Claimants are eligible to be awarded a § 503(b)(3)(D) claim (which, as noted above, they are), even if the Wrongful Death Claimants have not actually incurred any expenses allowable as an administrative expense under § 503(b)(3)(D). *In re Sedona Inst.* 220 B.R. 74, 79 (B.A.P. 9th Cir. 1988); *In re R.L. Adkins Corp.*, 505 B.R. 770, 776 (Bankr. N.D. Tex. 2014).

12. Here, the attorneys for the Wrongful Death Claimants are playing an important and leading role that provides a significant contribution to this case. The involvement of the Wrongful Death Claimants' attorneys has fostered, and will continue to foster, a confirmable plan that will allow for distributions to the most aggrieved creditors. However, as the Wrongful Death Claimants' efforts that support their substantial contribution claims, and the efforts of their attorneys, are ongoing, the Wrongful Death Claimants final substantial contribution claims remain unliquidated, but are expected to be liquidated as part of the plan process, prior to confirmation of a chapter 11 plan in this case.

WHEREFORE, the Wrongful Death Claimants respectfully pray that the Court allow this Application, and award them claims entitled to administrative priority status pursuant to 11 U.S.C. § 503(b)(3)(D) and 11 U.S.C. § 503(b)(4) in such amounts as they demonstrate and that this Court determines as of the Effective Date of a chapter 11 plan is appropriate, and further the Wrongful Death Claimants pray that the Court award them such other and further relief to which they may be entitled.

Marie Semie Alliance, *et al.*

By their attorney,

Respectfully submitted,

Dated: December 1, 2014

/s/ George W. Kurr, Jr.
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CERTIFICATE OF SERVICE

I, George W. Kurr, Jr., Esquire, of the firm Gross, Minsky & Mogul, P.A., attorneys for the Estates of Marie Semie Alliance, et al, Wrongful Death Claimants hereby certify that on December 1, 2014, I electronically filed **WRONGFUL DEATH CLAIMANTS APPLICATION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSES PURSUANT TO 11 U.S.C. §§ 503(b)(3)(D) AND 503(b)(4)** with the Court via the CM/ECF electronic filing system which will send notification of such filing to the attorneys/parties of record who have registered as CM/ECF participants.

/s/ George W. Kurr, Jr., Esq.
George W. Kurr, Jr., Esq.