UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

OBJECTION TO CANADIAN PACIFIC RAILWAY COMPANY'S MOTION FOR ESTIMATION AND TEMPORARY ALLOWANCE OF ITS CLAIM PURSUANT TO RULE 3018(a) OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR PURPOSES OF ACCEPTING OR REJECTING THE DEBTOR'S [SIC] PLAN OF REORGANIZATION

Robert J. Keach, the chapter 11 trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), hereby objects (the "Objection") to *Canadian Pacific Railway Company's Motion for Estimation and Temporary Allowance of Its Claim Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Purposes of Accepting or Rejecting the Debtor's [sic] Plan of Reorganization* [D.E. 1623] (the "3018 Motion"). In support of this Objection, the Trustee respectfully states as follows:

PRELIMINARY STATEMENT[1]

1. While stylized as a mere motion for temporary allowance of a claim for voting purposes, the 3018 Motion is in actuality another step—albeit a pointless one—in CP's ploy to delay confirmation of the Plan to extort settlement leverage over the victims of the Derailment. Even if taken at face value, the 3018 Motion must be denied on the merits because (a) in neglecting to contravene the assertions raised in the Claim Objection, CP has failed to meet its burden, and (b) the factors to be considered in assessing the propriety of temporary allowance weigh against CP.

[1] Capitalized terms used but not defined in this Preliminary Statement shall have the meanings set forth below.

RELEVANT BACKGROUND

2. On July 15, 2015, the Trustee filed the *Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015* [D.E. 1534] (as may be amended, the "Plan") and the *Revised First Amended Disclosure Statement with Respect to Trustee's Plan of Liquidation Dated July 15, 2015* [D.E. 1535].

3. On July 17, 2015, this Court entered the *Order (I) Approving Proposed Disclosure Statement; (II) Establishing Notice, Solicitation and Voting Procedures; (III) Scheduling Confirmation Hearing; and (IV) Establishing Notice and Objection Procedures for Confirmation of the Plan* [D.E. 1544] (the "Disclosure Statement Order"). In accordance with the Disclosure Statement Order, the Trustee commenced solicitation of votes to accept the Plan. *See Affidavit of Service of Solicitation Materials and Chapter 15 Documents* [D.E. 1562].

4. On August 7, 2015, the Trustee filed an objection [D.E. 1581] (the "Claim Objection"[2]) to proof of claim No. 92-2 filed by Canadian Pacific Railway Company ("CP"). The facts set forth in the Claim Objection are incorporated by reference as if fully set forth herein.

5. On August 27, 2015, CP filed the 3018 Motion.[3]

ARGUMENT

A. The Legal Standard

6. Bankruptcy Rule 3018(a) provides that "[n]otwithstanding objection to a claim or interest, the court after notice and hearing ***may*** temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." Fed. R.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan or the Claim Objection, as applicable.

[3] The Trustee requests a waiver of Local Rule 9013-1(f). In light of the compound nature of the allegations and legal conclusions set forth in each paragraph of the 3018 Motion, a simple "admit/deny" response is impractical and, in any event, each of the allegations set forth in the 3018 Motion is addressed in the body of this Objection.

Bankr. P. 3018(a) (emphasis added). The plain language of Rule 3018(a) indicates that whether a claim is temporarily allowed for voting purposes is not mandatory, but rather is subject to the court's discretion. *See* In re Frascella Enters., Inc., 360 B.R. 435, 458 (Bankr. E.D. Pa. 2007); Stone Hedge Props. v. Phoenix Capital Corp. (In re Stone Hedge Props.), 191 B.R. 59, 65 (Bankr. M.D. Pa. 1995) (noting permissive language in Rule 3018(a)).

7. When determining whether to temporarily allow a claim for voting purposes, courts consider the following factors: (a) the manner in which the claim was initially scheduled by the debtor; (b) the proof of claim filed by the creditor; and (c) the objection of the debtor. *See* Stone Hedge, 191 B.R. at 65.

8. Significantly, the claimant has the burden of proof in demonstrating entitlement to temporary allowance of its claim. *See* Stone Hedge, 191 B.R. at 65 (in determining whether to temporarily allow claim for voting purposes, finding that claimant bore burden of proving claim); In re Armstrong, 294 B.R. 344, 354 (B.A.P. 10th Cir. 2003) ("[T]he burden of proof should be on the claimant to present sufficient evidence that it has a colorable claim capable of temporary evaluation."); In re FRG, Inc., 121 B.R. 451, 456 (Bankr. E.D. Pa. 1990) ("[T]he allocation of the burdens of proofs [sic] in the B.Rule 3018(a) estimation process is the same as in deciding objections to proofs of claim . . . with, as at trial, the burden of proving [a claimant's] case by a preponderance of the evidence upon the claimant.").

9. Furthermore, Rule 3018(a) "specifically and elastically provides that a court may, for the purposes of voting, temporarily allow a claim or interest **in an amount which the court deems proper**." Pension Benefit Guaranty Corp. v. Enron Corp. (In re Enron Corp.), No. 04 Civ. 5499, 2004 WL 2434928, *5 (S.D.N.Y. Nov. 1, 2004) (emphasis in original) (quoting Matter of Johns-Manville Corp., 68 B.R. 618, 631 (Bankr. S.D.N.Y. 1986)). The court

must ensure that voting power is commensurate with the claimant's ***actual economic interest***. *See* id.

B. CP Has Failed to Satisfy Its Burden of Proof, and Thus, Its Claim Should Not Be Estimated or Temporarily Allowed in Any Amount

10. While Bankruptcy Rule 3018(a) permits the Court to exercise its discretion to temporarily allow a disputed claim for purposes of voting on a plan, the claimant has the burden of proof to demonstrate that its claim should be estimated or temporarily allowed in any amount. *See* Stone Hedge, 191 B.R. at 65; Armstrong, 294 B.R. at 354; FRG, 121 B.R. at 456.[4] Once a sufficient objection to a claim is filed, the *prima facie* nature of the proof of claim "bursts" and the creditor has the burden of coming forward to establish its claim. *See* FRG, 121 B.R. at 456-57 (where "the objector has gone forward with evidence, [ ] any presumption in favor of the claimant vanishes. This disposition is similar to the "bursting bubble" theory of the impact of presumptions, which . . . we believe is properly applied [in the context of motions for relief under Bankruptcy Rule 3018].").

11. While the CP Claim may have enjoyed *prima facia* validity prior to the Claim Objection having been filed, the Claim Objection "burst[] [CP's] bubble," and CP must establish—over the Trustee's Claim Objection—why its claim should be temporarily allowed for voting purposes. *See* FRG, 121 B.R. at 456; *see also* Stone Hedge, 191 B.R. at 65; Armstrong, 294 B.R. at 354. The 3018 Motion must therefore establish by a preponderance of the evidence, using the following three factors, that temporary allowance is warranted: (a) the manner in which the claim was initially scheduled by the debtor; (b) the proof of claim filed by the creditor; and (c) the objection of the debtor. *See* Stone Hedge, 191 B.R. at 65.

[4] Indeed, in the 3018 Motion, CP cites to Stone Hedge and a different decision in the Armstrong case to support certain other allegations, *see* 3018 Mot. ¶¶ 12, 14, 17, 18, and yet neglects to acknowledge or apply this fundamental principle.

12. The 3018 Motion does nothing to establish the validity of the CP Claim. The 3018 Motion merely reiterates certain of the allegations made in the CP Claim, which the Trustee refuted in the Claim Objection.[5] Indeed, the 3018 Motion addresses *none* of the objections raised by the Trustee in the Claim Objection, and thus fails the relevant prong of the Stone Hedge test. *See generally* 3018 Motion. Moreover, the Trustee's claims against CP, which constitute a complete counterclaim to the CP Claim, have survived CP's motion to dismiss, thus negating completely CP's contention that the Claim Objection (which consists of the claims in the Trustee's adversary proceeding and the Claim Objection itself) is without legal and factual support. Accordingly, and, *inter alia*, for the same reasons its motion to dismiss was denied, CP has failed to sustain its burden of proof, and the 3018 Motion should thus be denied in its entirety. *See* Stone Hedge, 191 B.R. at 65; Armstrong, 294 B.R. at 354; FRG, 121 B.R. at 456.

C. The Court Should Not Exercise Its Discretion to Temporarily Allow CP's Claim for Voting Purposes

13. Regardless of whether the Court determines that CP has met its burden of proof, the Court should decline to temporarily allow the CP Claim in any amount for voting purposes. Whether a claim is temporarily allowed for voting purposes is subject to the court's discretion. *See* Frascella Enters., Inc., 360 B.R. 435, 458 (Bankr. E.D. Pa. 2007); Stone Hedge, 191 B.R. at 65 (noting permissive language in Rule 3018(a)). The court must ensure that voting power is

[5] In the 3018 Motion, CP asserts that the Claim Objection "comes without any factual or legal support and contravenes the Trustee's prior position admitting damages with respect to at least some of the liquidated claims. See ECF No. 538." 3018 Mot. ¶10. As an initial matter, the Trustee refutes the whole of this assertion, and reiterates the facts and arguments set forth in the Claim Objection and maintains the consistency thereof with the Trustee's prior positions taken in this Case. But perhaps more importantly, CP's citation, which purports to support the validity of its assertion, is to an entirely irrelevant document that provides no such support: docket entry 538 is the *Notice of (A) Sale of Substantially All of the Assets of Montreal, Maine & Atlantic Railway, Ltd. and Montreal, Maine & Atlantic Canada Co.; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Procedure for Determining Cure Amounts* [D.E. 538]. The Court should thus disregard this assertion, as well as the other assertions in the 3018 Motion lacking factual support, in its entirety.

commensurate with the claimant's ***actual economic interest***. *See* Enron, 2004 WL 2434928, at *5 (citations omitted).

14. The CP Claim does not warrant estimation or temporary allowance for two main reasons. ***First***, for the uncontested reasons set forth in the Claim Objection, the proper value of the CP Claim is zero. Rule 3018(a) "specifically and elastically provides that a court may, for the purposes of voting, temporarily allow a claim or interest **in an amount which the court deems proper**." Enron, 2004 WL 2434928, *5 (emphasis in original). To the extent the Court elects to exercise its discretion and temporarily allow the CP Claim in any amount, for the unrefuted reasons set forth in the Claim Objection, that amount should be $0. *See* id.; *see also* In re Lichtin/Wade, LLC, No. 12-00845-8, 2013 WL 1788545, at *4 (Bankr. E.D.N.Y. Apr. 26, 2013) (reducing claim for voting purposes from over $131,000 to $9,885).

15. ***Second***, CP's claim does not warrant temporary allowance because it is not commensurate with CP's actual economic interest in confirmation of the Plan. The court must ensure that any voting power awarded to the holder of a disputed claim is commensurate with the claimant's ***actual economic interest*** in the case. *See* Enron, 2004 WL 2434928, *5 (citations omitted). CP does not seek the ability to vote on the Plan in order to protect its interests with respect to its alleged $710,099.90 Class 13 General Unsecured Claim. Rather, as a non-settling defendant being sued by the Trustee, the Quebec government and the Derailment victims for hundreds of millions of dollars, CP seeks the ability to vote in order to erect an obstacle to confirmation of the Plan as leverage over the Derailment victims—attempting to hold confirmation of the Plan hostage until the victims agree to a settlement of CP's liability for the Derailment that is favorable to CP. As Justice Dumas (presiding over the CCAA Case) has already found, CP's "sole objective" is to "defeat the proposed [CCAA] Plan [ ] or to obtain a strategic negotiating advantage that would provide it with even more rights than it would have

if the parties had simply decided to settle the class action out of court."[6] This Court should not countenance such an objective—particularly from an entity not acting in its capacity as a creditor of the estate, and when at the expense of the victims of the Derailment. *See* id.[7]

16. In support of various assertions underpinning its alleged entitlement to temporary allowance of its claim, CP mis-cites several cases and cites to cases that are inapposite. In particular, In re Amarex, Inc.[8] is cited in support of the proposition that "[t]he Bankruptcy Code and the courts favor temporary allowance of disputed claims so as to facilitate voting." 3018 Mot. ¶ 13. The Court in Amarex did not go nearly so far. While the Court did state that permitting the claimants in that case to vote even though some may eventually be disallowed was "more in keeping with the spirit of Chapter 11," 61 B.R. at 303, the facts at hand were vastly different than those at bar. In Amarex, the debtor sought entry of order disallowing 275 claims on the basis that the holder of each claim was recipient of preferential transfer. Id. at 302. Final adjudication of the disputed claims would have required an individual hearing on each claim, which was infeasible prior to the deadline for voting on the plan. And declining temporary allowance would have had the effect of "disenfranchise[ing] a substantial part of the unsecured claims." Id. at 302-03. Temporary allowance was thus "favored" in that situation due to the vast number of claims subject to objection: 275 claims comprised a "substantial part" of the unsecured claims pool. Id. In this case, the Claim Objection will not disenfranchise a "substantial part" of the Debtor's pool of unsecured claimants. Rather, the Claim Objection seeks to *en*franchise those unsecured creditors with

[6] *See* Order of the CCAA Court dated 13 July 2015, No. 450-11-000167-134, ¶ 16.

[7] Indeed, Justice Dumas's finding, without more, would result in the designation of CP's vote under 11 U.S.C. § 1126(d). *See, e.g.*, Dish Network Corp. V. DBSD North America (In re DBSD North America), 634 F.3d 79, 101-05 (2d Cir. 2011) (finding that designation of creditor's vote was proper where creditor was "less interested in maximizing the return on its claim than in diverting the progress of the proceedings to achieve and outside benefit"). Thus, there is no point in temporarily allowing CP's claim only to designate it later.

[8] 61 B.R. 301 (Bankr. W.D. Okla. 1985).

legitimate unsecured claims, protecting them from the dilutive effect of permitting the vote of an illegitimate, overstated claim by CP—the single non-settling defendant, whose interests in Plan confirmation are singularly its forestallment.

17. Similarly, and despite CP's implication to the contrary, the Trustee is not abusing the plan process, which might otherwise justify granting the 3018 Motion. CP cites In re Armstrong[9] for the proposition that "[t]emporary allowance is necessary to prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditors." 3018 Mot. ¶ 17. The Trustee does not contest the principle that plan proponent abuse should not be countenanced. But, despite CP's baseless assertions of same, no such abuse exists here. First, as CP acknowledges, the complaint filed against CP on May 18, 2015 in the Trustee's adversary proceeding included an objection to CP's claims. *See* 3018 Mot. ¶ 8. The August 7, 2015 Claim Objection—still more than a month before the voting deadline—merely reiterated that already-filed objection and incorporated same. *See* Claim Obj. at 1, n.1; *see also* 3018 Mot. ¶ 10. CP has had many months to seek allowance (temporary or otherwise) of its claim; it has certainly not been shy about litigating other issues. In addition, the Trustee has objected to six proofs of claim (including CP's claim) in advance of the deadline to vote on the Plan, seeking to streamline the voting process and ensure fair vote tabulation for the benefit of holders of valid claims. For the uncontroverted reasons set forth in the Claim objection, the CP Claim is not such a valid

[9] 292 B.R. 678 (B.A.P. 10th Cir. 2003).

claim.[10] For the benefit of such holders of *valid* claims, the CP Claim should thus not be temporarily allowed for voting purposes.

18. Accordingly, the Court should decline to exercise its discretion to temporarily allow the CP Claim in any amount because the value of the CP Claim should be set at zero, the relevant factors wright against temporary allowance, and the equities do not favor furnishing CP with additional leverage over the Derailment victims.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Trustee requests that the Court enter an order (i) sustaining this Objection; (ii) declining to estimate or temporarily allow the CP Claim; and (iii) granting such other and further relief as may be just.

Dated: September 8, 2015

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

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[10] Even if valid, given the asserted size of CP's Claim, a vote in that amount would have no effect on the outcome of the vote in Class 13 or on compliance with 11 U.S.C. § 1129(a)(10), and there is no compelling reason to temporarily allow CP's Claim to provide for creditor democracy. Based on preliminary voting results, as of September 8, 2015, at least twenty-two (22) non-insider creditors in Class 13 holding more than $17 million in claims have voted to accept the Plan.