UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re	)	**Chapter 11**
	)	**Case No. 13-10670**
MONTREAL MAINE & ATLANTIC RAILWAY, LTD.	)	
Debtor.	)	

STATEMENT OF THE UNITED STATES TRUSTEE
CONCERNING THE TRUSTEE'S
REVISED FIRST AMENDED PLAN OF LIQUIDATION, DATED JULY 15, 2015

William K. Harrington, the United States Trustee for Region One (the "United States Trustee"), submits the following Statement with respect to the Trustee's Revised First Amended Plan of Liquidation, dated July 15, 2015 (the "Plan"), filed by the Chapter 11 Trustee of Montreal, Maine & Atlantic Railway, Ltd ("MM&A"), Robert J. Keach (the "Trustee") at Docket Entry No. 1534.

A. THE ROLE OF THE UNITED STATES TRUSTEE

1. The United States Trustee is charged with monitoring chapter 11 plans as part of his overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. 28 U.S.C. § 586(a)(3);*United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that United States Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

2. Specifically, the United States Bankruptcy Code (the "Code") provides that the United States Trustee *"shall …* [monitor] plans and disclosure statements filed in cases under chapter 11 of title 11 and [file] with the court, in connection with hearings under sections 1125 and 1128 of such title, comments with respect to such plans and disclosure statements." 11 U.S.C. § 586(a)(3)(B)(emphasis added).

3. Further, pursuant to 11 U.S.C. § 307, the United States Trustee has standing to be heard with respect to this Comment.

4. The Trustee must demonstrate by a preponderance of the evidence that the Plan complies with the requirements set forth in section 1129(a) of the Code. *In re Irving Tanning Co.,* 496 B.R. 644, 658 (1st Cir. BAP (Me.) 2013) (citing *In re Salem Suede, Inc.,* 219 B.R. 922, 932 (Bankr. D. Mass. 1998)).

B. BACKGROUND[1]

5. As set forth in the Disclosure Statement, "[t]he primary objective of the plan is, in conjunction with the CCAA Plan, to compensate the victims of the Derailment from settlement funds created for their exclusive benefit, and also to distribute other undedicated Assets to other Holders of Claims. The Plan is funded in part by contributions and settlement agreements with various parties with potential liability arising out of the Derailment, and including, without limitation, such parties' insurance companies." Disclosure Statement at p. 9.

[1] The facts in this case have been well-established for the Court and, in large part, are undisputed. For purposes of this Statement, the United States Trustee relies on the factual recitation set forth in the Trustee's Revised First Amended Disclosure Statement for the Trustee's Plan of Liquidation Dated July 15, 2015 (the "Disclosure Statement")(Docket Entry No. 1535) and incorporates in this Comment the defined terms as set forth in the Disclosure Statement and the Plan.

6. There are twenty-three (23) Contributing Parties that have executed Settlement Agreements. All of the Contributing Parties are potentially liable to the victims of the Derailment. The Non-Settling Defendants include Canadian Pacific Railway Company and any parent, subsidiaries, or affiliates thereof.

7. On July 13, 2015, the CCAA Court entered the CCAA Approval Order.

8. The Settlement Agreements were approved as part of the CCAA Approval Order.

9. However, before any settlement is final and binding, this Court must also approve the Settlement Agreements. The Contributing Parties have conditioned their contributions to the settlement fund upon being released of all liability for any claims related to the Derailment that could be asserted by any creditor of the Debtor, regardless of whether that creditor votes in favor of the Plan, votes against the Plan, or receives a distribution under the Plan.

10. Further, all claims related to the Derailment, including claims of the Non-Settlement Defendants against one or more of the Contributing Parties, will be enjoined and ultimately extinguished.

C. ARGUMENT

11. Section 1123(b)(3)(A) of the Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A).

12. "It is the 'duty of a bankruptcy court to determine that a proposed compromise forming part of a [chapter 11] plan is fair and equitable.'" *In re Tribune Co.*, 464 B.R. 126, 158

(Bankr. D. Del. 2011) (quoting *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968)).

13. Further, the Court is required to approve any settlement or compromise contained in a chapter 11 plan pursuant to Federal Rule of Bankruptcy Procedure 9019.

14. It is the Trustee who has the burden of demonstrating to the Court that the Settlement Agreements "fall within the range of reasonableness." *Id.*

15. The factors a court considers when evaluating a settlement agreement under Fed. R. Bankr. P. 9019 include: (1) the probability of success in the litigation; (2) potential difficulties in collection; (3) the complexities of litigation; and (4) the paramount interest of creditors. *Jeffrey v. Desmond,* 70 F.3d 183, 185 (1st Cir. 1995). "It is axiomatic that settlement will always reduce the complexity and inconvenience of litigation …. The balancing of the complexity and delay of litigation with the benefits of settlement is related to the likelihood of success in that litigation." *Will v. Northwestern Univ. (In re Nutraquest, Inc.),* 434 F.3d 639, 646 (3d. Cir. 2006).

16. However, approval of the Settlement Agreements in the context of plan confirmation is complicated by two issues specific to this case. First, is the inclusion of broad third-party, or non-debtor, releases imbedded in the Settlement Agreements and the Plan. The second is the fact that although the Settlement Agreements are summarized in the Plan, the agreements themselves are not a part of the record in this case.

17. The First Circuit has not squarely addressed the issue of whether third-party, or non-debtor, injunctions and releases are permissible as a matter of law. See, *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d. 973, 983-84 (1st Cir. 1995). The First Circuit has noted that there

must be some effect on the debtor's estate stemming from the assertion of a non-debtors claim against another non-debtor before the bankruptcy court can enjoin the action. *In re G.S.F. Corp.* 938 F.2d. 1467, 1474 (1st Cir. 1991).

18. Those circuit courts which have concluded that such provisions are permissible have required an evidentiary record to support their factual findings of reasonableness, fairness and necessity. *See, In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 141 (2d Cir. 2005); *Eichenholz v. Brennan,* 52 F.3d 478 (3d Cir. 1995); *Behrmann v. National Heritage Foundation,* 663 F.3d 704, 712 (4th Cir. 2011); *In re Dow Corning,* 280 F.3d. 648, 658 (6th Cir. 2002); *In re Ingersoll, Inc.,* 562 F.3d 856, 865 (7th Cir. 2009); and *In re Seaside Engineering & Surveying, Inc.,* 780 F.3d 1070, 1079 (11th Cir. 2015).

19. A clear showing of necessity is required. *See In re Ingersoll,* 562 F.3d at 865 ("[I]t is important to note in all this what we are *not* saying. We are not saying that a bankruptcy plan purporting to release a [non-debtor] claim … is always-or even normally-valid. In the unique circumstances of this case, however, we believe it is").

20. Courts which have permitted third-party or non-debtor releases have also subjected the terms to "careful scrutiny" before approving them in the context of a chapter 11 plan. For instance, in *Tribune,* the court found no basis in the record to support any finding that certain third parties "related to" the debtor had made any contribution to the settlement or that a release of such parties was necessary to the reorganization. 464 B.R. at 188.

21. In evaluating nonconsensual third-party releases, a number of bankruptcy courts have applied the factors outlined in the case of *In re Master Mortg. Inv. Fund, Inc.,* 168 B.R. 930 (Bankr. W.D. Mo. 1994) – commonly referred to as the *Master Mortgage* factors. *See In re*

Charles Street African Methodist Episcopal Church of Boston, 499 B.R. 66 (Bankr. D. Mass. 2013); *In re M.J.H. Leasing, Inc.,* 328 B.R. 363 (Bankr. D. Mass. 2005). These factors, which are neither conjunctive nor exclusive, are: (1) whether there is identity of interest between the debtor and non-debtor party; (2) whether the non-debtor has contributed substantial assets to the debtor's reorganization; (3) whether such a release or injunction is essential to the debtor's reorganization; (4) whether a substantial majority of creditors agree on the issuance of an injunction; and (5) whether the Debtor's Chapter 11 plan provides a mechanism for all, or substantially all, of the claims of classes affected by the injunction. *In re Charles Street African Methodist Episcopal Church of Boston,* 499 B.R. at 100-101.

22. The evaluation of third party releases in the context of multi-party personal injury litigation also compels an analysis of the impact upon non-settling creditors whose claims for contribution and/or indemnity against co-defendants will be extinguished without receiving a reasonably equivalent exchange in return. On this issue, the *Tribune* court identified the need to provide such creditors with an appropriate credit or set-off against any judgment imposed against them, such as the method employed in the First Circuit which requires a reduction in any damage award against non-settling defendants by the amount equivalent to the settling defendants' proportionate liability. *See Austin v. Raymark,* 841 F. 2d. 1184 (1st Cir. 1988).

23. While an injunction for the benefit of non-debtors may be permissible in certain instances, the Trustee must establish an evidentiary basis in this case which justifies the issuance of the injunctive relief requested by the Trustee. *In re Behrmann,* 663 F.3d at 712-13.

24. Given the uncertainty, especially in the First Circuit, with respect to the authority of a bankruptcy court to grant relief to non-debtors from claims that may be asserted against

them by other non-debtors, there are examples of bankruptcy courts in the First Circuit doing so in the context of plan confirmation.[2] A careful analysis of those examples confirms that such relief is not routine.

25. In summary, the record established by the Trustee at the confirmation hearing should connect the releases granted to each non-debtor to the success of the Plan. The settlement of multi-party litigation should be evaluated consistent with the standards for approval of settlements and compromises outlined herein. Such relief, if granted at all, should be reserved to those whose contributions to the reorganization are substantial and critical to the success of the Plan. The Plan, itself, should have overwhelming support from those affected by the third-party releases. The imposition of releases favoring third parties must also be fair to those whose claims are extinguished.

[2] Mass. Bankruptcy Judges Feeney, Queenan and Hillman have all endorsed the *Master Mortgage Factors. See In re Salem Suede, Inc*. 219 B.R. 922 (Bankr. D. Mass. 1998); *In re Boston Harbor Marina Co*. 157 B.R. 726, 730 (Bankr. D. Mass 1993); *and In re Mahoney Hawkes, LLP,* 289 B.R. 285 (Bankr. D. Mass 2002). All three, however, denied confirmation after evaluating the evidence offered in support of the proposed third party releases. Bankruptcy Judge Hoffman's decision *in Quincy Medical Center, Inc.*, 2011 WL 5592907, reviewed the guidance forthcoming from the First Circuit Court of Appeals and the decisions of his colleagues. He approached each release separately and, while approving the discharge of certain claims, he declined to approve the debtor's releases of the Committee of Unsecured Creditors and of the debtor's directors and officers. He also limited the third party releases to those who actually voted for the plan.

Date: September 9, 2015

Respectfully submitted,
WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Stephen G. Morrell

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CERTIFICATE OF SERVICE

I, Stephen G. Morrell, being over the age of eighteen and an employee of the United States Department of Justice, U.S. Trustee Program, hereby certify that on September 9, 2015, I electronically filed the above Statement and this Certificate of Service, which were served upon each of the parties set forth on this Service List via U.S. mail, postage prepaid, on September 9, 2015.

All other parties listed on the Notice of Electronic Filing have been served electronically.

Dated at Portland, Maine this 9th day of September, 2015.

/s/ Stephen G. Morrell

Service List:

N/A