UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

Canadian Pacific Railway Company's reply memorandum to the trustee's objection to motion to compel

Introduction

1. None of the trustee's objections to Canadian Pacific Railway Company's (CP) motion to compel persuade, and the constant drumbeat about CP's "commercial advantage" and "litigation leverage" motivations want for record support. The objections ignore agreement discoverability in the chapter 11 plan confirmation context and Rule 26, 37 and 11 U.S.C. § 107(a-b) liberality. Instead, the trustee embraces an overarching rationalization: the Canadian proceedings made the settlement agreements secret, so out of respect this Court should condone the cover up, regardless of U.S. law. That argument fails; disclosure should be ordered.

Argument

I. The objections discount U.S. discovery obligations

2. As a threshold matter, the trustee disregards the criteria that govern motions to compel. The objections fail to mention a single discovery rule. "It is well established that discovery is a liberal process broadly defined as allowing unrestricted access to sources of information." *In re Amezaga*, 195 B.R. 221, 225 (D.P.R. 1996). "While it is difficult to formulate an exact rule regarding relevancy, the term should be construed liberally and with common sense." *Id.* Relevance cannot be gainsaid, and CP certainly satisfied Rule 26(b)(1)'s

lesser standard of being "reasonably calculated to lead to discovery of admissible evidence." Settlements upon which a chapter 11 plan is founded could not be more relevant.

3. The trustee justifies stealth by pretending to be "barred from producing pursuant to [the CCAA Sealing Order]."[1] Hemming Decl., Ex. A. But a Canadian order cannot determine U.S. discovery duties. The trustee goes on to maintain that two other orders prohibit production: the CCAA Sanction Order[2] and this this Court's chapter 15 Enforcement Order.[3] While these arguments lack merit, they have nevertheless been waived: the trustee did not advance such objections in response to CP discovery. *Brenford Environmental Systems, L.P. v. Pipeliners of Puerto Rico, Inc.*, 269 F.R.D. 143 (D.P.R. 2010) (a responding party that fails to state timely objection waives those objections).

4. The trustee feigns that CP will not be harmed because "any confirmation order will include the Judgement Reduction Provision." Trustee's Objection, ¶¶ 5, 24. The import of *Austin v. Raymark*, which the trustee says "will provide CP the relief to which it is entitled[,]" remains a mystery. 841 F.2d 1184 (1st Cir. 1988). In *Austin* the First Circuit deemed Maine law to approve *Pierringer* settlements. And the appellate court went on to interpret the operation of those common-place agreements. But what variety of a "Judgment Reduction Provision," would be applied depends on an as yet undertaken choice of law determination. *In re Tribune Co.*, recognized "three basic methods for judgment reduction in bar orders":

> (i) pro rata (which apportions an equal share of liability to each defendant), (ii) proportionate fault method (under which the jury assesses the relative culpability of both settling and non-settling defendants and the non-settling defendants pay a commensurate percentage of the judgment), and (iii) pro tanto (which reduces a

[1] An English translation of the CCAA Sealing Order is an exhibit to ECF Doc. No. 1491.

[2] An English translation of the CCAA Sanction Order is ECF Doc. No. 1550.

[3] This Court's Enforcement Order ECF's Doc. No. 74 in the chapter 15 docket.

> non-settling defendant's liability for a judgment in the amount paid by the settling defendant(s)).

464 B.R. 208, 223 (Bankr. D. Del 2011).

5. The record does not support the assumption that Maine law governs the resolution of wrongful death actions brought by Quebec residents on behalf of those who died in Quebec. Different suits in different states and in Canada name CP, and no court has made a choice of law determination. And the CCAA Sanction Order, which the trustee trumpets as providing the same "Judgement Reduction Provision" relief, is silent on the issue. Trustee Objection, ¶ 10. Paragraphs 60-61 punt regarding whether the CCAA Sanction Order protects CP from MMA – the corporation and employees of which that have been criminally charged – liability and instead states that "will be decided by the judge seized with the action against CP."

II. Canadian proceedings cannot bind this Court

6. The trustee argues that the two CCAA orders and one from this Court prevent disclosure. In essence, the trustee contends that the settlement agreements enjoy confidentially in Canada, so comity and this Court's chapter 15 Enforcement Order preclude disclosure in this country. That argument fails for several reasons.

7. First, as CP's opening brief demonstrates, the CCAA Sealing Order merely requires filing under seal if CP proffers redacted agreements to contest chapter 11 plan confirmation.[4] The Canadian ruling does not preclude the trustee from disclosing the settlement agreements for chapter 11 plan confirmation or otherwise. And while the settlements are not part of the Canadian public record, the CCAA Sanction Order does not dictate U.S. discoverability or chapter 11 disclosure.

[4] The CCAA Sealing Order's "canvassing [of] Canadian law on the production of confidential settlement agreements" (Trustee Objection, ¶ 14) has no effect; the U.S. Bankruptcy Code and the U.S. Rules of Civil Procedure govern a decision regarding CP's motion to compel.

8. The non-binding nature of the CCAA orders south of the border was confirmed by the trustee during the July 15, 2015 Disclosure Statement hearing:

> Trustee: Justice Dumas' sanction order contains the specific order that the settlement agreements shall be sealed and not become part of the public record subject to further order of the court. …..
>
> Court: …. I understand the [cross border insolvency] protocol, but *if I were to determine that the settlement agreement should be released, that order doesn't stop me from doing it*. ……
>
> Trustee: … No, *it certainly doesn't stop you* ….

ECF Doc. No 1533 (audio of hearing at 2 hours and 20-21 minutes) (emphasis added). Hence, this Court must independently decide whether unredacted agreements should be produced. While the Cross Border Insolvency Protocol (*see* ECF Doc. Nos. 168 and 126-1, Ex. A) recognizes comity, comity does not thwart the force of U.S. law. Protocol at ¶¶ 7, 8(b) & (e).[5]

9. Second, as this Court acknowledged and the monitor conceded, U.S. enforcement of the CCAA Sanction Order does not dictate this Court's determination of U.S. discovery obligations in this separate chapter 11 proceeding:

> Court: Okay. And if I enter the order, *if I enter the [Enforcement] order as you want me to do, it, in no way, affects my ability to do anything that I think has to be done under the Code*, including but not limited to say that the settlement agreements must all be (inaudible) or -- I'm not saying I'm going to do that -- but *I want to make sure that there's representation in what I believe is the law, also, is that the sanction order doesn't curtail this court in any way whatsoever.*
>
> Monitor: *I believe that to be the case, Your Honor, yes*. Thank you.

Chapter 15 ECF Doc. No. 83 (transcript at 12:10-20) (emphasis added); *see also* ECF Doc. No. 58 (audio of hearing at approximately 11 minutes and 38 seconds).

10. In other words, the holding that "[t]he CCAA Plan and Plan Sanction Order [] are hereby recognized, granted comity and given full force and effect in the United States" does not

[5] These Protocol provisions were discussed in CP's opening brief at paragraph 14.

"curtail [] in any way whatsoever" this Court's treatment of the settlement agreements in this chapter 11 proceeding. *Id*; Chapter 15 ECF Doc. No. 74 at ¶ 2. The Sanction Order does no more than recognize that settlement agreements are not part of the *Canadian* record.

11. At a minimum, judicial estoppel prevents an Enforcement Order effect about face. Contrary to prior representations during the chapter 15 proceeding, the trustee now maintains the opposite of no "curtail[ment]":

> The cumulative effect of the CCAA Sealing Order, the Sanction Order and this Court's Enforcement Order [] is the creation of a protective order precluding CP from receiving the Settlement Agreements in any form other than what has already been permitted by order (collectively, the "Protective Order").

Trustee Objection, ¶ 20.

12. The trustee definition of a "Protective Order" – a compilation of CCAA orders and this Court's Enforcement Order – is anything but that. To start with, this Court never entered the protective order that the trustee extols. Therefore case law about traditional protective orders – like ECF Doc. No. 1325 entered in this proceeding but never mentioned by the trustee – has no relevance. Neither the "Protective Order" that the trustee conjures up nor ECF Doc. No. 1325 precludes settlement agreement production. The absence of grounds to modify the "Protective Order" is beside the point. This Court never entered a protective order, having the effect for which the trustee hopes.

13. Third, comity does not permit a trustee to trample upon the "open book" and "fish bowl" hallmarks of chapter 11 proceedings and liberal U.S. discovery. *In re Alterra Healthcare Corp.*, 353 B.R. 66, 73 (Bankr. D. Del. 2006). The U.S. Trustee agrees. In those circuits that have approved third party release plans (notably not the First Circuit), the courts "required an evidentiary record to support [] factual findings of reasonableness, fairness and necessity," which demands settlement agreement full disclosure. ECF Doc. No. 1651 at ¶ 18. *See also* ECF Doc.

No. 1459 (U.S. Trustee opposing concealment of the settlement agreements as a violation of federal law); *see also* ECF Doc. No. 1659 (Wheeling and Lake Erie Railway Company opposition to settlement agreements non-disclosure). Just saying that consideration is adequate or that disclosure threatens settlement is not enough.

14. No "comity" case law deals with a request to circumvent federal law. For instance, *In re Brierly*, applied comity because England's Insolvency Act and the Bankruptcy Code both permitted the sought after discovery. 145 B.R. 151, 165-66 (Bankr. S.D.N.Y. 1992). The court found the laws to be "analogous" and "strikingly similar." *Id.* Comity cannot sanction the non-disclosure of settlement agreements that are central to plan confirmation. Even the trustee recognizes that comity cannot "violate[] U.S. public policy." Trustee Objection, ¶ 15.

15. Likewise, the trustee acknowledges that comity can be indulged only if enforcement of foreign rulings would not be "repugnant to the law of the United States." *Id.* U.S. policy dictates transparency in all chapter 11 plan documents. 11 U.S.C. § 107 condones limited exceptions to full disclosure, but the trustee fails to qualify for §107(b) treatment. Simply put, the nondisclosure of settlements that are integral to a chapter 11 plan contravenes U.S. bankruptcy law and discovery principles. The failure to address these issues essentially admits that the Code does not countenance the privacy in which the trustee wants the confirmation process to be conducted. And the failure to produce unquestionably relevant documents cannot begin to be squared with Rules 26 and 37.

16. Finally, in the past, the trustee told this Court that agreement disclosure would afford the settling parties the "right to terminate, period." ECF Doc. No 1533 (audio of hearing at 2 hours and 19 minutes). And in response to the Court's inquiry about severability in the "template" XL agreement, the trustee stated that the severability provision "doesn't apply to the

disclosure provisions in the non-disclosed agreements." *Id.* (audio of hearing at two hours and twenty minutes). Hence the Court was led to believe that a disclosure order would undo the settlements. This Court needs to review the unredacted agreements: the trustee's representations about settlement terms are not correct.[6]

17. CP's counsels' review of the redacted agreements reveals no "right to terminate period". The confidentiality provision states that the trustee will file the agreements under seal "*unless* [the] court refuses to allow filing under seal." The clause mentions no repercussions if the court declines to indulge secrecy. In the event this Court eschews evasiveness, nothing requires the settlements to be undone.

18. The severability provision in the template XL settlement states as follows:

> If *any provisions of this Agreement*, or the application thereof, shall for any reason or to any extent be construed by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement, and application of such provisions to other circumstances, shall remain in effect and be interpreted so as best to reasonably effect the intent of the Parties. Notwithstanding the foregoing, all of the conditions precedent in this Agreement will remain in full force and effect following any determination that any other provisions of this agreement are invalid or unenforceable.

ECF Doc. No. 1385-1, Ex. A at ¶ 6.11 (emphasis added). Contrary to the trustee's representation about agreements that the Court has not seen, the severability provisions in many of the secret agreements are the same and preserve the "any provisions of th[e] Agreement" clause. In sum,

[6] On September 17, 2015 the trustee filed a motion to approve a stipulation between the trustee and the official committee of victims. That accord would provide unredacted copies of all the settlements to counsel for the committee. ECF Doc. No. 1681. The motion states the undisclosed agreements "may be terminated if disclosed to the public prior to the effective date of the Plan." *Id.*, ¶ 7. If the Court orders disclosure, no such right to terminate is apparent. And notably the trustee offers no justification for providing the agreements to counsel to the committee but not to CP. The trustee's provision of varying levels of settlement disclosure to different parties mocks the openness with which the bankruptcy process must proceed.

the trustee makes up a Hobson choice by inaccurately menacing about settlement vitiation. The Court should review the agreements and order disclosure.

Conclusion

19. Since the days of the founding fathers, candor and full disclosure have animated U.S. legal proceedings. The Rules of Civil Procedure and the Bankruptcy Code enshrine those doctrines. What the trustee attempts to do contravenes the very *raison d'être* of American jurisprudence. The relevance of the settlement agreements and the interest of CP in these proceedings are beyond cavil. The rules and the law do not countenance the trustee's attempt to keep CP in the dark.

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