

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.,

Debtor.

Bk. No. 13-10670

Chapter 11

**LIMITED AND CONDITIONAL OBJECTION OF OFFICIAL COMMITTEE
OF VICTIMS TO CHAPTER 11 TRUSTEE'S MOTION FOR ENTRY OF AN
ORDER AUTHORIZING FILING OF SETTLEMENT AGREEMENTS UNDER SEAL**

The Official Committee of Victims (the "Victims' Committee") appointed in the chapter 11 case of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), by and through its undersigned counsel, hereby files this limited and conditional objection (the "Limited Objection") to the Chapter 11 Trustee's *Motion For Entry of an Order Authorizing Filing of Settlement Agreements Under Seal*, filed April 21, 2015 [Docket No. 1397] (the "Motion"). In support of this Limited Objection, the Victims' Committee respectfully represents as follows:¹

Objection

1. The Victims' Committee has made several requests of the Trustee over several weeks now to obtain unredacted copies of the Settlement Agreements for review on a confidential basis. The Victims' Committee is even prepared initially, and subject to further order of the Court, to limit its access to the Settlement Agreements to only counsel to the Victims' Committee. This request is entirely warranted. Indeed, the Victims' Committee is a court appointed committee that has a duty to at least review these agreements in their entirety. Although in the *Trustee's Omnibus Reply to Objections Filed in Response to the Trustee's*

¹ Capitalized terms used herein shall have the meaning ascribed to them in the Trustee's Motion.

Motion for Entry of An Order Authorizing Filing of Settlement Agreements Under Seal, filed July 7, 2015 [Docket No. 1491] (the “Omnibus Reply”), the Trustee’s states a willingness “if and only if the Released Parties provided prior written consent,” to provide copies of **redacted** versions the Settlement Agreements to, among others, the U.S. Trustee and counsel to the Victim’s Committee (Omnibus Reply ¶ 9(b)), this is not a sufficient solution because the redacted Settlement Agreements that the Trustee expresses a willingness to provide will be redacted for “financial terms,” a broad term that allows for widespread and largely discretionary redaction. Omnibus Reply ¶ (9)(a). The Victims’ Committee, as an official Court appointed committee has an absolute right to review the Settlement Agreements in unredacted form. Thus, faced with the alternative of not having full access to the Settlement Agreements, the Victims’ Committee has no choice but to file this Limited Objection.

2. However, the Victims’ Committee remains willing to enter into an appropriate confidentiality agreement so that it may review **unredacted** versions of the Settlement Agreements and be in a position to fulfill its fiduciary duty in connection with the Plan. The Victims’ Committee believes such an arrangement would be a fair compromise to the sealing dispute that would protect the Released Parties while also ensuring that creditors are being adequately protected. To the extent the Trustee and/or the Released Parties remain unwilling to agree to such a basic request or to the extent the Court believes such access is not required, the Victims’ Committee will address any further arguments regarding the Motion at the hearing.

Victims Committee Has an Absolute Right to Review Unredacted Versions of Settlement Agreements

3. The mere concept that a court-appointed committee would not have unlimited access to the Settlement Agreements submitted for approval by Court is shocking. Tellingly, in

the only case cited by the Trustee to support filing a settlement agreement under seal, *In re Dana Corp.*, 412 B.R. 53 (S.D.N.Y. 2008), the debtors shared underacted copies of the settlement agreements with the official statutory creditors' committee appointed in the case. Furthermore, the *Dana* debtors' emphasized this fact in arguing that concerns regarding the degree of disclosure of the settlement agreements were unfounded: "Your Honor the estate guardians have seen these agreements and can evaluate their reasonableness. Your Honor has seen them, the creditors' committee has seen them as a fiduciary for all the creditors, so we think those concerns of the objective [sic] parties are not well founded." *In re Dana Corp*, Case No. 06-10354 (BRL) November 15, 2007 Hearing Transcript, filed September 3, 2008 [Docket No. 8319] at. 27:14-19 (emphasis added). Indeed, the District Court in *Dana* noted this fact favorably in determining that there were "sufficient facts in the public record for the bankruptcy court to approve the settlement agreements even through the full settlement agreements were filed under seal," stating that "[i]t should be noted that the complete settlement agreements were submitted to the bankruptcy court and also made available to the Creditors' Committee." *In re Dana Corp.*, 412 B.R. at Fn 2 (emphasis added).

Information Sharing Critical to Victims' Committee's Role in Chapter 11 Case

4. Open communication and information sharing between chapter 11 debtors and official committees is essential for an official committee to fulfil the critical rule contemplated for official committees by the Bankruptcy Code. *See In re MF Global Holdings Ltd.*, No. 11-15059 MG, 2012 WL 734195, at *2 (Bankr. S.D.N.Y. Mar. 6, 2012) (approving information sharing stipulation between committee and chapter 11 Trustee and noting that "[a]n official committee of creditors plays a pivotal role in the bankruptcy process. The Function of an official creditors committee is to aid, assist and monitor the debtor to ensure that the unsecured creditors'

views are heard and their interests promoted and protected”) (quoting *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 514 (S.D.N.Y. 1994)); 7-1103 Collier on Bankruptcy P1103.05(b) (“Frequent and regular communication and consultation [with the official committee] is essential to achieve the purposes of chapter 11. No major decision should be taken by the debtor in a chapter 11 without prior consultation with the committee.”). As the *MF Global* Court explained: “The Committee plays an important role in the Chapter 11 cases, and the Chapter 11 Debtors’ information-sharing with the Committee is important to the Committee’s effectiveness.” *Id.*

5. Broad and active participation by official committee’s has been recognized as an essential element of the chapter 11 process since the Bankruptcy Code’s inception. Indeed, the legislative history of section 1103 of the Bankruptcy Code, which sets forth the powers and duties of official committees, makes clear that Congress envisioned a broad participatory role for committees in chapter 11 cases, particularly in connection with the plan formulation process. H.R. Rep. No. 595, 95th Cong., 1st Sess. 401, 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6357 (“[C]ommittees will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected. They will also provide supervision of the debtor in possession and of the trustee, and will protect their constituents’ interests.”). Here the Plan proposed by the Trustee, and in particular the treatment of holders of Derailment Wrongful Death Claims (as defined in the Plan), is dependent on the Settlement Agreements. Thus, in order to fulfill its role in this case, the Victims’ Committee not only has a right to review unredacted versions of the Settlement Agreements, but needs to in order to properly fulfil its statutorily prescribed fiduciary duties to those it represents.

6. Additionally, under section 1103(c)(3) of the Bankruptcy Code, an official statutory committee has a fiduciary duty to “participate in the formulation of a plan [and] advise those represented by such committee of such committee’s determination as to any plan formulated” 11 U.S.C. § 1103(c)(3). In order to advise the Victims’ Committee, counsel to the Victims’ Committee will necessarily need to have access to unredacted versions of the Settlement Agreements, which contain information that will, in part, dictate the treatment of the Victims’ Committee’s constituency under the Plan. *See In re Structurlite Plastics Corp.*, 91 B.R. 813 (Bankr. S.D. Ohio 1988) (requiring debtor to provide creditor’s committee with drafts of agreements pertaining to an asset sale and noting that “Committee should be provided with sufficient information to evaluate and take a position on the potential sale”). What is true in the context of an asset sale is even more applicable in the context of a chapter 11 plan because “participation in the formulation of a plan represents the foremost of a committee’s functions.” *Id.* Although counsel to the Victims’ Committee is well aware of the terms of the Plan, it is perfectly normal and standard practice for counsel to “due diligence” settlements submitted to the court for approval. The Victims’ Committee is unable to properly carry out its duties without access to unredacted versions of the Settlement Agreements upon which the Plan is premised.

7. At the same time, however, the need to balance the confidentiality of the information contained in the Settlement Agreements with the Victims’ Committees’ right to access information to fulfill its duties is commonly recognized by courts. *In re Refco Inc.*, 336 B.R. 187, 196 (Bankr. S.D.N.Y. 2006) (noting Committee must keep communications with debtor confidential, not only to uphold its fiduciary duty to creditors, but also to facilitate obtaining information necessary to properly perform its functions). However, this concern is easily remedied through entry into an appropriate confidentiality agreement prior to providing

copies of the Settlement Agreement to the Victims' Committee. Indeed, confidentiality agreements between debtors and court appointed statutory committees "ha[ve] become common place in chapter 11 cases." *In re MF Global*, at *6 (compiling cases where confidentiality stipulations had been approved by courts, including in *In re Mesa Air Grp.*, No. 10-10018 (Bankr.S.D.N.Y. Feb. 25, 2010) (Docket No. 365) and *In re Metaldyne Corp.*, No. 09-13412 (Bankr.S.D.N.Y. July 20, 2009) (Docket No. 459); *In re Tronox Inc.*, No. 09-10156 (Bankr.S.D.N.Y. Feb. 27, 2009) (Docket No. 208); *In re Frontier Airlines Holdings, Inc.*, No. 08-11298 (Bankr.S.D.N.Y. June 3, 2008) (Docket No. 315); and *In re Dana Corp.*, No. 06-10354 (Bankr. S.D.N.Y. March 29, 2006) (Docket No. 737)).

8. What the Victims' Committee is requesting offers a practical solution to the conflicting interests of the Trustee and the Released Party on the one hand, and those seeking full public disclosure on the other hand – disclosure of the unredacted Settlement Agreements (subject to appropriate confidentiality obligation) to the Victims' Committee as a fiduciary of all creditors. Such an arrangement protects the interest of unsecured creditors while also ensuring that the salient terms the Released Parties are concerned with are still protected.

Waiver of Requirements of Local Rule 9013-1(f)

9. In light of the limited and conditional nature of this response to the Disclosure Statement Motion, the Victims' Committee respectfully requests that the Court waive the requirements of Local Bankruptcy Rule 9013-1(f) requiring that any response to a motion admit or deny each allegation of the motion.

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WHEREFORE, the Victims' Committee respectfully requests that the Court enter an order approving the Motion on the condition that the Trustee provide unredacted versions of the Settlement Agreements to the Victims' Committee and granting such other relief as this Court may deem just and proper.

Dated: July 14, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2015, I electronically filed the Limited and Conditional Objection of Official Committee of Victims to Trustee's Motion for Entry of an Order Authorizing Filing of Settlement Agreements Under Seal, with the Clerk of Court using the CM/ECF system which will send notification of such filing to the parties of record who have registered as CM/ECF participants.

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