UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	)	
	)	
Montreal Maine & Atlantic Railway Ltd.,	)	**Case No. 13-10670**
	)	
Debtor.	)	
	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF WHEELING & LAKE ERIE RAILWAY COMPANY'S OBJECTION TO CHAPTER 11 TRUSTEE'S MOTION FOR ORDER APPROVING COMPROMISE AND SETTLEMENT WITH IRVING PAPER LIMITED, IRVING PULP & PAPER, LIMITED, AND J.D. IRVING, LIMITED

Upon the conclusion of a telephonic status conference held on October 16, 2013, with respect to the Trustee's 9019 Motion in the above entitled matter, and the objection of Wheeling & Lake Erie Railway Company ("Wheeling")[1] to such Motion, (the "9019 Objection"), the Court invited the parties to submit further written arguments regarding the authority of the Court to entertain the 9019 Motion in view of Wheeling's objection thereto and the lack of a "settlement" of the matter among all parties in interest. Because Wheeling continues to object to any purported "settlement," without its consent, of property rights in which holds an exclusive interest, it files this supplemental memorandum of law in further opposition to the 9019 Motion (the "Supplemental Brief").

PRELIMINARY STATEMENT

1. In the telephonic status conference held October 16, 2013 with respect to the Trustee's 9019 Motion, the Court indicated its intention to dismiss the 9019 Motion because

[1] Capitalized terms not defined herein shall have the meaning set forth in the 9019 Objection.

Wheeling had not consented to the "settlement" of its property rights in respect of the Irving Debt, but the Court reserved a final decision pending further briefing and oral argument.

2. Wheeling has briefed many of the relevant procedural and substantive issues that are raised by the 9019 Motion and that are germane to the concerns expressed by the Court. Wheeling's opposition thereto, as set forth in its previously filed 9019 Objection, is reaffirmed, and Wheeling respectfully refers the Court to that Objection. By this Supplemental Brief, Wheeling reviews the principal reasons that preclude entry of an order approving the 9019 Motion over Wheeling's objection. These reasons are even more compelling than when the Trustee initiated his 542(b) and 9019 proceedings, in view of a recent Order of this Court, specifically, the Sixth Interim Order Authorizing Debtor To Use Cash Collateral and Granting Adequate Protection (the "Sixth Cash Collateral Order") [D.E. 376], authorizing use of Wheeling cash collateral. The impact of this recent Order will be discussed below. In addition, Wheeling also addresses an issue raised by the Court in the October 16, 2013, status conference that Wheeling had not earlier addressed. Specifically, the Court observed that the 9019 Motion purported to settle the issues raised in the Trustee's 542(b) Motion, yet that Motion is (and was) procedurally improper because the Trustee cannot proceed by way of a contested matter for turnover of property in circumstances such as those presently before the Court. The Court correctly observed that this case presents a multi-party dispute as to the entitlement of the Trustee to the so-called Irving Debt, the property sought to be turned over. This dispute implicates both the amount and validity of the Trustee's claim to that property, as well as the identity of the party entitled to receive such property. In these circumstances, collection or turnover of the property must be sought by way of an adversary proceeding pursuant to Bankruptcy Rule 7001. In a rush to collect money, the Trustee has bypassed Rule 7001 and all of the requirements for procedural and substantive due process embodied in the adversary proceeding rules.

3. As will be discussed below, the Court's rejection of this rush to judgment is well founded and beyond reproach. Further, Wheeling continues to withhold its consent to the settlement of its property rights thereby vitiating any notion of a "settlement", and believes that in any case, the proposed settlement is improvident under the circumstances. As such, the 9019 Motion must be finally dismissed.

ARGUMENT

I. Wheeling's Arguments Made in Its 9019 Objection Must Now Be Considered In Light of A Recent Order of The Court, By Which All Of The Trustee's Interest In The Irving Debt Has Been Transferred To Wheeling.

4. In the 9019 Objection, Wheeling set forth several objections to the purported "settlement" of the 542(b) Motion described by the Trustee. For the purpose of this Supplemental Brief, we defer consideration of the objections that go to the merits of the proposed compromise and focus on the structural and procedural impediments to approval of the proposed compromise that the Court has identified. In this respect, the fundamental objection originally raised by Wheeling can be summarized as follows:

- As a threshold matter, there is no "settlement" for the Court to Approve. By virtue of this Court's Fourth and Fifth Cash Collateral Orders, all of the Irving Debt, with the exception of $150,000 was to be turned over to Wheeling, and Wheeling has been authorized to apply the Irving Debt in satisfaction of the amounts owed by the Debtor to Wheeling. By virtue of these orders, that portion of the Irving Debt exceeding $150,000 is no longer property of the estate, and Wheeling is the only party with an interest therein. The Trustee has no remaining authority to hold it, or use it under any circumstances. Nor can the Trustee compromise or settle an interest in property, after it has been turned over to a third party, Wheeling, as authorized by the Court. Thus, as a threshold matter, both as a matter of substance and procedure, there is no "settlement" before the Court: Wheeling has not agreed to compromise its own portion of the Irving Debt, and as a party to the 542(b) Motion, it has not agreed to settle it. *See* 9019 Objection, pp. 4-6.

5. Nearly contemporaneous with the filing of Wheeling's 9019 Objection, expressing the concerns set forth above, the Court entered its Sixth Cash Collateral Order dated

October 11, 2013. [D.E. 376.] In paragraph 5 of the Sixth Cash Collateral Order, the Court ordered as follows:

> [T]he Trustee shall establish a segregated escrow account (the "Wheeling AR Escrow") and shall deposit therein any and all amounts collected by the Trustee, *without deduction*, from the payment of accounts receivable that were created at any time prior to the date of the Closing, including prior to the Petition Date (the "Pre-Closing A/R"). The Trustee shall remit the proceeds of any and all Pre-Closing A/R to Wheeling on or before the 5th of each month without further Court Order."

Sixth Cash Collateral Order (emphasis added). [D.E. 376.]

6. The language "accounts receivable that were created at any time prior to the date of Closing, including prior to the Petition Date" includes, of course, the Irving Debt, as the Irving Debt constituted an account receivable of the Debtor as of both the Petition Date and the Closing (which occurred on October 18, 2013). It is noteworthy that although the Sixth Cash Collateral Order was negotiated by the Trustee and Wheeling, and entered by the Court *after* the filing of the 542(b) Motion, the 9019 Motion, and Wheeling's assertion of its rights with respect to the Irving Debt, the Sixth Cash Collateral Order contained no qualification or limitation on the duty of the Trustee to turn over the Irving Debt, in its entirety, to Wheeling. Thus, while the Fourth and Fifth Cash Collateral Orders reserved for the Trustee the authority to use the first $150,000 of collections with respect to the Irving Debt (albeit subject to Wheeling's security interest therein) those provisions were omitted from and are superseded by the requirements of the Sixth Cash Collateral Order. That Order requires that after closing of the borrowing facility with Camden National Bank (which occurred on October 18, 2013) all proceeds of the Irving Debt (and all other accounts receivable) must be deposited in a segregated account and turned over to Wheeling.

7. Pursuant to the Sixth Cash Collateral Order, The Trustee has unequivocally relinquished *any* claim to the Irving Debt, because all accounts receivable proceeds "without

deduction" are required to be deposited in a segregated account, can no longer be used by the Trustee, and are further required to be turned over to Wheeling.[2]

8. Thus, at this time, the Trustee holds no property right or interest in the Irving Debt; it is no longer a "debt that is property of the estate" subject to turnover. 11 U.S.C. § 542(b). At most, the Trustee will have a brief, bare legal title to the proceeds of the Irving Debt, pending performance of its obligation to turn every penny of it over to Wheeling, but that is only if proceeds of the Irving Debt are paid to the Trustee rather than Wheeling directly. *See* 11 U.S.C. § 542(b) & (d); *Boyer v. Boyer (In re Boyer)*, 104 B.R. 496, 499 (Bankr. S.D. Fla. 1989) ("The Debtor does not maintain any equitable interest in the proceeds, and therefore, the Trustee who succeeds to the Debtor's interest cannot exercise rights greater than the Debtor's rights."); *In re Ace Indus., Inc.*, 65 B.R. 199, 200 (Bankr. W.D. Mich. 1986) ("With respect to the third category of property [certain items of tangible personal property], the Court would rule that insofar as property held by GRP is owned by Reid personally, this Court has no jurisdiction to order turnover. This Court does not have jurisdiction over property which is not property of a bankruptcy estate.").

9. Notwithstanding the clear import of the Sixth Cash Collateral Order, by the 9019 Motion, the Trustee somehow believes that he can reach back into the receivable in question, the Irving Debt, and compromise and discharge that which he has turned over to Wheeling. If there was ever any doubt about this novel and extraordinary contention, the Court's Sixth Cash Collateral Order removes it: *all* accounts receivable are to be turned over to Wheeling *without deduction.*

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[2] This is further buttressed by the budget projections filed by the Trustee in support of his request for additional authority to use Wheeling's cash collateral. *See* Declaration of Fred C. Caruso in Support of (I) Chapter 11 Trustee's Motion for Order: (A) Authorizing Debtor to Obtain Post-Petition Financing; and (B) Granting to Camden National Bank Post-Petition Security Interest and (II) Trustee's Continued Use of Cash Collateral (the "Caruso Declaration") [D.E. 359] at Exhibit B. Specifically, the Trustee's budget projections state that "[i]t is assume[d] new financing begins for w/e 10/18 and all collections of AR for Sales and Misc Income existing at 10/11 are remitted to Wheeling and not available to fund the operations of MMA. AR for Sales created post w/e 10/11 begin to collect in w/e 11/15." Caruso Declaration, Exhibit B n.1.

10. The Court's rejection of the Trustee's efforts to compromise and settle property rights that it no longer owns was entirely correct when the Court articulated its views on October 16, 2013. In view of the Sixth Cash Collateral Order, the Court's reasoning is even more compelling. The 9019 Motion must be denied. *See In re Speir*, 190 B.R. 657, 665 (Bankr. N.D. Ala. 1995) (bankruptcy trustee lacks authority to compromise (a) secured creditor's interest or (b) non-estate property). *See also Romagosa v. Thomas (In re Van Diepen, P.A.)*, 236 F.App'x 498, 502 (11th Cir. 2007) (stating general principal that bankruptcy court cannot approve a settlement agreement involving non-estate property; property recovered following fraudulent transfer, however, was property of the estate); *In re Derivium Capital, LLC*, 380 B.R. 392, 401-02 (Bankr. D.S.C. 2007) (no authority to settle personal claims of creditors; such claims are not property of the estate); *In re Cent. Illinois Energy, L.L.C.,* 406 B.R. 371, 374 (Bankr. C.D. Ill. 2008) (trustee lacks authority to bring the claims of certain directors and officers of the debtor and, therefore, has no power to release such claims); *In re Manousos*, 233 B.R. 907, 910 (Bankr. D. Conn. 1999) ("Clearly, the trustee cannot seek to compromise claims which are not property of the estate[.]").

II. Because The Proceeding Underlying the 9019 Motion Was Not Properly Brought, The Court Cannot Grant A 9019 Motion That Purports To Compromise It.

11. The 9019 Motion seeks to compromise the issues pending before this Court in the contested matter initiated by the Trustee in his 542(b) Motion. Yet, as the Court pointed out in the October 16, 2013 status conference, the 542(b) Motion is and was not the proper procedure for adjudication of the issues surrounding the Irving Debt. Such issues can be adjudicated only in an adversary proceeding commenced pursuant to Bankruptcy Rule 7001, where Wheeling's due process rights are preserved. Because Wheeling was not accorded its due process rights (in fact they were substantially abridged by the speed with which the Trustee has pressed this matter), any effort to force a compromise is improper and unlawful.

A. <u>Because The 542(b) Motion Was Procedurally Improper, Compromise Of Such Motion In The 9019 Motion Is Also Improper</u>.

12. In the status conference, the Court correctly stated the applicable rules regarding actions seeking turnover of assets from third parties, *i.e.* non-debtors, where entitlement to the asset is disputed, such as in the 542(b) Motion. *See Hinsley v. Boudloche (In re Hinsley)*, 149 F.3d 1179 (5th Cir. 1998) ("[A]s such, a request for turnover relief against someone other than the debtor must be commenced by complaint rather than by motion."); *Camall Co. v. Steadfast Ins. Co. (In re Camall Co.)*, 16 F. App'x 403, 407 (6th Cir. 2001) (affirming denial of turnover motion on procedural grounds; "The Bankruptcy Rules require that a party seeking a turnover file that request as an adversary proceeding rather than as a motion in another bankruptcy proceeding."); *Matter of Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) ("Even if the Roukas had established standing, their claim would fail on procedural grounds. A turnover action is an adversary proceeding which must be commenced by a properly filed and served complaint. Bankruptcy Rule 7001."); *Smith v. Wheeler Technology, Inc. (In re Wheeler Tech., Inc.)*, 139 B.R. 235, 240 (B.A.P. 9th Cir. 1992) ("Rule 7001 requires an action to recover property to be brought as an adversary proceeding."). Thus, a request for turnover must proceed by way of an adversary proceeding. Fed. R. Bankr. P. 7001.

13. The purpose of requiring turnover of assets from third parties to be pursued by way of an adversary proceeding when the obligation to make the turnover is disputed, is to ensure that parties are not denied due process in a summary fashion in a turnover order, which is an exercise of the court's equitable power (subject to the remedy of contempt). *Satelco, Inc. v. N. Am. Publishers, Inc. (In re Satelco)*, 58 B.R. 781 (Bankr. N.D.Tex. 1986). This principal is no more applicable in any case than in this one. Here, the Trustee has completely flouted these protections in his rush to raise cash—a need that is no longer present due to the Trustee's having closed his loan facility with Camden National Bank.

14. The 542(b) Motion was filed on August 30, 2013. [D.E. 124.] When it was filed, the Trustee sought an expedited hearing on the Motion, which was set for September 4, 2013, about 5 days after filing. Then the Motion was continued to October 1, 2013, following a scheduling conference at which the Court entered an order granting Wheeling full rights of discovery and participation with respect to the 542(b) Motion and ordered briefing by September 27, 2013. [D.E. 162 & 210.] Abruptly, before the continued hearing, on October 1, 2013, the Trustee filed his Stipulation Dismissing Motion for Order Pursuant to 11 U.S.C. § 542(b) (with the ostensible purpose of trying to cut Wheeling off from discovery). [D.E. 306.] On the same day, the Trustee filed the 9019 Motion, and this too was expedited, with a request for hearing on October 17, 2013. [D.E. 307 & 324.]

15. The 542(b) Motion and the 9019 Motion have proceeded at break-neck speed, with only limited opportunities for discovery. These artificial limitations on discovery are particularly troublesome given the complexities of the issues raised by this case. Reference is made to the substantive reasons compelling Wheeling to consider the proposed compromise to be extremely improvident and to reject it. These issues are set forth in Wheeling's 9019 Motion and repeated in the footnote below, for the Court's reference.[3]

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[3] The substance of these objections are as follows:

- The "settlement" set forth in the 9019 Motion is improvident. The 9019 Motion is fundamentally flawed in its own right, on the merits. It presupposes and is premised on the false assumption made by the Trustee that prior to the August 7, 2013 filing of the Debtor's Chapter 11 petition, the Irving Companies effectuated an offset of the Irving Debt against amounts that they claimed the Debtor owed to the Irving Companies. This alleged indebtedness of the Debtor to the Irving Companies was acquired by the Irving Companies by assignment, within 90 days preceding the Debtor's Chapter 11 filing, and while the Debtor was plainly insolvent (it was acquired shortly after the tragedy in Lac Megantic). Wheeling tested, in discovery, the assumption made by the Trustee that the Irving Companies had actually effectuated a setoff of the Irving Debt against the obligations of the Debtor that they had acquired immediately prior to the filing of the Debtor's Chapter 11 petition. Discovery revealed, to the contrary, that the Trustee's assumption is in error, and that the Irving Companies made no such setoff. As such, the fundamental premise of the settlement is erroneous, and under Section 553(a) of the Bankruptcy Code, the Irving Companies acquired right of offset is ineffective and invalid on its face. As a result, the settlement is ill-founded and entirely unreasonable. *See* 9019 Objection, pp. 6-15.

16. The Trustee's rush to judgment and the severe abridgement of the time for discovery has been highly prejudicial to Wheeling. Here is an example of the kind of prejudice that Wheeling has already suffered in this matter. A critical issue in the case (one of several) is when the Irving Companies actually effectuated a set off of the Irving Debt, if they ever did so. On October 9, 2013, Wheeling took the Rule 30(b)(6) deposition of the designated Irving representative concerning this very issue: Was a setoff effectuated and if so, when, and what book entries were made in Irving's books and records to show it? As reported in the 9019 Objection, the Irving representative, while maintaining that a setoff had been made prior to August 7, 2013, the Petition Date, did not know what book entries had been made, if any, nor did he know when any such entries were made. He did not know what book entries had been made, if any, to effectuate the discharge of the Irving account payable to MMA (*i.e.*, the Irving Debt). *See* excerpt of testimony of Karl Hansen, contained in Wheeling's 9019 Objection, p. 12-13. Because this is a critical issue in the case, immediately following the deposition, counsel for

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- The "settlement" cannot be supported by a "constructive trust" theory. In some federal circuits, it has been recognized that when a shipper pays a rail carrier, the rail carrier holds all or a portion of the payment in trust, for payment of invoices issued by other rail carriers that provided portions of the rail services necessary to deliver the shipper's goods. In the First Circuit, and in this District, the "constructive trust" theory has been expressly rejected. The "constructive trust" theory cannot support any claim of the Irving Companies; nor can it support a settlement. *See* 9019 Objection, pp. 15-17.

- Because Wheeling holds a valid and perfected security interest in the Irving Debt and the Irving Companies were, at all relevant times, on notice of this fact, any alleged setoff of the Irving Debt was ineffective under the Maine Uniform Commercial Code. Discovery has revealed that as early as August 30, 2012, the Irving Companies were on notice of Wheeling's security interest in accounts. As such, pursuant to § 9-1404 of Title 11 of the Maine Revised Statutes (the "Maine UCC"), the Irving Companies are barred from exercising any set off right acquired after that date with respect to the Irving Debt. *See* 9019 Objection, pp. 17-21.

- The 542(b) Motion and 9019 Motion are based on a desperate need for cash that no longer exists by virtue of this Court's approval of the Debtor's borrowing from Camden National Bank. Finally, the primary impetus of the Trustee in pressing an expedited hearing of the 542(b) Motion and an expedited hearing of the 9019 Motion was to raise cash quickly because the Trustee feared running out of cash before he could complete a sale of the Debtor's assets. At the time of filing these Motions, the Trustee had not received a binding commitment from Camden National Bank to make a loan to fund operations, nor any court approval of the same. These circumstances have changed. Closing on a loan with Camden occurred on October 18, 2013. The Trustee no longer has a desperate need to raise cash, and there is no further need to enter into an improvident settlement for the sole purpose of raising cash quickly. *See* 9019 Objection, pp. 22-23.

Wheeling asked counsel for the Irving Companies to provide information that the Rule 30(b)(6) deponent was unable to provide. A portion of that information was provided to Wheeling counsel on Saturday, October 26, 2013, by the email message (exclusive of attachments) attached to this Supplemental Memorandum as **Exhibit A**.

17. Even though the deposition of the Irving Rule 30(b)(6) designee took place on October 9, 2013, critical information that such designee should have known at his deposition, but did not, was supplied on October 26, 2013, about ten days following the date originally set for the hearing on the merits of the 9019 Motion (October 17, 2013). Now, Wheeling does not concur with the contention that the materials provided two days ago are dispositive of the setoff issue, but the point is that these critically important materials were not available to the Irving Rule 30(b)(6) designee when he was deposed, and were just now provided. Wheeling does not suggest bad faith on the part of Irving; rather, it points out that even attributing to Irving an effort to comply with its discovery obligations in good faith, Irving was unable to provide materials responsive to Wheeling's discovery request until two days ago. Wheeling obviously has not had an adequate opportunity to analyze this information, nor any opportunity to depose a suitable witness (or witnesses) with respect to this information. To push forward with a proposed substantial compromise and reduction of the Irving Debt, over Wheeling's objection, and under these circumstances, is the worst kind of denial of due process. This is particularly so because there is absolutely no reason to truncate discovery in this case, nor to force Wheeling to proceed without adequate opportunity to investigate the facts.

18. The point here is that the denial of due process by attempting to pursue the Irving Debt in a contested matter, without any opportunity for meaningful discovery, on an expedited basis, and without any rational reason to rush given that the Trustee's need for cash has subsided following the closing with Camden, is particularly egregious given the amounts involved, the complexities of the issues at hand, and the compelling need for discovery.

19. The Court had it right in the status conference: The Trustee cannot use the 542(b) Motion as the foundation for a compromise motion, when the 542(b) Motion itself was improper, and when the pursuit of that Motion deprived Wheeling of its due process rights. The entire process initiated by the Trustee—in a rush to raise money—is procedurally and substantively flawed and must be rejected.[4]

B. The Settlement Provision In The Fourth And Fifth Cash Collateral Orders Permitting the Trustee to Seek An Order For A Compromise Over Wheeling's Objection Does Not Provide The Trustee Authority To Disregard Wheeling's Due Process Rights.

20. In the Fourth and Fifth Cash Collateral Orders, the Trustee agreed that it would not settle the Irving Debt without Wheeling's consent, or an order of the Court (the "Settlement Provision"). The Trustee may suggest that the implication of this language is that the Trustee would be permitted to seek approval of a "settlement" by the Court, over Wheeling's objection. The first observation that needs to be made is that the Settlement Provision must be deemed superseded by the Sixth Cash Collateral Order. By virtue of the preceding Orders, the Fourth and Fifth Cash Collateral Orders, the Trustee at least had some stake—up to $150,000—in the Irving Debt. But that stake was eliminated in the Sixth Cash Collateral Order, as discussed above. By virtue of that Order, the Trustee no longer has any stake in the Irving Debt. So whatever justification might have existed to permit the Trustee to seek a settlement over Wheeling's objection pursuant to the Settlement Provision, it is now gone. The Settlement Provision no longer serves any relevant purpose.

21. Second, even if the Settlement Provision were deemed to have continued operative effect, that provision cannot be used to justify the extraordinary action that the Trustee proposes in this case. It certainly cannot be used as a vehicle to deny Wheeling of its property

[4] If the court declines to dismiss the 9019 Motion or otherwise determines to go forward with an evidentiary hearing with respect to the 542(b) Motion on November 4, 2013, then Wheeling requests that such hearing be continued and that the Court set a scheduling order for discovery.

rights without compensation and due process. To be sure, one might imagine circumstances in which this Court could approve a settlement over Wheeling's objection. For example, if the Trustee established that Wheeling was fully and adequately secured, such that settlement of the Irving Debt would not render Wheeling undersecured, then the Court might be able to impose a settlement upon Wheeling. Similarly, if the disputed settlement terms were immaterial, such as a matter of timing of payment, then the Court might determine that Wheeling is nonetheless adequately protected and impose a compromise.

22. But there is no law or rule that allows the Court to simply take away Wheeling's property rights without any determination that it is otherwise adequately protected by other collateral. Yet that is precisely what the Trustee proposes in the 9019 Motion. He seeks to bargain away a claim of $885,000 for payment of $531,000, a $354,000 discount (a claim in which the Trustee has no remaining stake), without any assurance that Wheeling will not be hurt by the bargain. Whatever permission might be deemed given to the Trustee by the Settlement Provision, clearly, it does not include permission to transfer away Wheeling's collateral over its objection and without any adequate protection for its interests. The Trustee is entirely misguided to suggest that the Settlement Provision constitutes authority to deprive Wheeling of its property rights without due process and without adequate protection.

23. Finally whatever the Settlement Provision means, it expressly requires that any order to compromise the Irving Debt be "entered after due and adequate notice and hearing." Pursuant to the Bankruptcy Code's rules of construction, 11 U.S.C. § 102(1), the phrase "'after notice and a hearing', *or a similar phrase*—(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances[.]" (Emphasis added). Section "102(1) is founded in fundamental notions of procedural due process." *Western Auto Supply Co. v. Savage Arms (In re Savage Indus.)*, 43 F.3d 714, 721 (1st Cir. 1994) (holding that a sale pursuant to § 363 did not eliminate claims of

successor liability where there was inadequate notice to parties in interest of the chapter 11 proceeding). The Settlement Provision must be interpreted consistent with § 102(1)'s requirement of procedural due process and provides no authority to compromise the Irving Debt without such due process and in the slapdash manner proposed by the Trustee. Wheeling is entitled to the full protections afforded to litigants in adversary proceedings under Part VII of the Bankruptcy Rules. "An adversary proceeding is a separate lawsuit within the context of a case and has all of the attributes of a lawsuit, including *all due process* service requirements as well as application, with adaptation, of the Federal Rules of Civil Procedure." 2 COLLIER PAMPHLET EDITION 2013, p. 366 (Alan N. Resnick & Henry J. Sommer eds., Mathew Bender) (emphasis added). The Settlement Provision cannot be used to undermine this requirement. *See In re Fiorilli*, 196 B.R. 83, 86 (Bankr. N.D. Ohio 1996). ("This Court does not intend to exercise its permissive powers under 11 U.S.C. § 102[1] to contravene specifically announced rights of parties to a pending case unless the party who attempts to evoke the Court's § 102 powers can demonstrate a need for such contravention and also ensure that the fullest measure of due process has been afforded to any affected party.").

24. As previously discussed, Wheeling is entitled to have its rights adjudicated in an adversary proceeding, and to be accorded full discovery and other procedural rights. Nothing in the Settlement Provision abridges these rights, nor requires the Court to countenance a rushed, haphazard, and unnecessarily expedited contested matter.

CONCLUSION

As pointed out in Wheeling's 9019 Objection, whatever factors motivated the Trustee to proceed with the 542(b) Motion and the 9019 Motion in an expedited fashion, without full regard for Wheeling's rights in the Irving Debt, including its rights to contest any claimed reduction of the debt and to undertake full discovery, have now been removed. The Trustee has closed on the Camden National Bank loan, and the Court has, in consideration thereof, entered its order

turning over to Wheeling all of the estate's interests in all accounts receivable, including the Irving Debt, "without deduction". Under these circumstances, there is no justification for consideration of a compromise of the Irving Debt as to which Wheeling objects, nor for consideration of either the merits of the claims with respect to the Irving Debt, or the merits of a Rule 9019 compromise with respect thereto, without the consent of all parties having an interest in the Irving Debt, and without proper deference to the Federal Rules of Bankruptcy Procedure. For these reasons and those set forth herein, Wheeling respectfully requests that the Court enter an Order:

A. Denying the relief requested in the 9019 Motion;

B. Finding that the compromise and settlement is not appropriate under Rule 9019 of the Federal Rules of Bankruptcy Procedure and applicable case law; and

C. Granting such other relief as the Court deems just and appropriate.

Dated: October 28, 2013

/s/ George J. Marcus
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David C. Johnson
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CERTIFICATE OF SERVICE

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties and at the addresses set forth on the Service List attached hereto either electronically or via first class mail, postage prepaid, on 28th day of October, 2013.

/s/ Holly C. Pelkey
Holly C. Pelkey
Legal Assistant

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Manual Notice List

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EXHIBIT
A

Subject: FW: MMA/Irving Setoffs
Attachments: IFP MMA Overview 1021 d1 (with supporting documentation) (4).pdf; IPL MMA Overview 1021 d1 (with supporting documentation).pdf; IPP MMA Overview 1021 d1 (with supporting documentation).pdf

From: <Lepene>, Alan <Alan.Lepene@thompsonhine.com>
Date: Saturday, October 26, 2013 1:11 PM
To: Daniel Rosenthal <dlr@mcm-law.com>
Cc: George Marcus <GJM@mcm-law.com>, "Michael Fagone (mfagone@bernsteinshur.com)" <mfagone@bernsteinshur.com>
Subject: MMA/Irving Setoffs

Dan,

In response to your follow-up questions regarding the exercise of setoffs by the various Irving paper companies against amounts owed to MMA, please see the attached which provides a summary and explanation of the setoffs and supporting documentation. As you will see, setoffs were, in fact, exercised on the books and records of the paper companies at the end of July, 2013.

While I recognize that this is an issue that goes to the merits of the controversy and the reasonableness of the settlement, and thus is not an issue that the parties will be arguing on October 31, nonetheless, let me know if you have any questions with respect to the attached.

Regards, Alan

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