

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:)
)
Montreal Maine & Atlantic Railway Ltd.,) **Chapter 11**
) **Case No. 13-10670**
)
Debtor.)

**WHEELING & LAKE ERIE RAILWAY COMPANY'S
MOTION TO ENFORCE CASH COLLATERAL ORDERS**

Now comes the Wheeling & Lake Erie Railway Company ("Wheeling") and requests that the Court enter an order enforcing the terms of the various cash collateral orders that have been in effect since the inception of this case, including the most recent and current Sixth Interim Order Authorizing Debtor to Use Cash Collateral and Granting Adequate Protection, dated October 11, 2013 (the "Sixth CC Order") [D.E. # 376]. More specifically, Wheeling asks that the Court order Robert J. Keach, the chapter 11 trustee (the "Trustee") for Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), consistent with the terms of the various cash collateral orders, to:

- A. Pay to Wheeling the proceeds of *all* accounts receivable generated before October 18, 2013, the date of the closing of the loan facility provided to the Trustee by Camden National Bank (the "Closing"), including (i) all accounts receivable generated before August 7, 2013 (the "Petition Date"); and (ii) all accounts receivable which the Trustee has described as "Canadian" accounts receivable (the "Canadian Receivables").
- B. Provide a complete accounting of all collections of accounts receivable received by the Debtor and expended by the Debtor as of the date hereof, including (i) collections and expenditures of the proceeds of such Canadian Receivables; and (ii) collection and expenditures of proceeds of accounts receivable generated both before and after the Petition Date.
- C. Provide a complete accounting of all accounts receivable generated by the Debtor after the Petition Date, and not heretofore collected, which accounts receivable serve as adequate protection for the Debtor's use of Wheeling's cash collateral.
- D. Provide Wheeling with additional adequate protection to the extent that said accounting requires the same.

JURISDICTIONAL STATEMENT

1. On August 7, 2013, the Montreal, Maine & Atlantic Railway, Ltd. (the “Debtor”) filed a voluntary petition for relief under chapter 11 of 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”). On August 21, 2013, the United States Trustee appointed Robert J. Keach, Esq. (the “Trustee”) to serve as Chapter 11 Trustee in the Debtor’s Chapter 11 case (the “Case”) pursuant to 11 U.S.C. § 1163.

2. The Debtor is a Delaware corporation that has, since January of 2003, operated in an integrated, shortline freight railroad system with its affiliate, Montreal Maine & Atlantic Co. (“MMA Canada”). On August 7, 2013, MMA Canada filed for protection from creditors in a concurrent proceeding under Canada’s Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the “CCAA”).

3. This Court has jurisdiction of this Motion pursuant to 28 U.S.C. §§ 157 and 1334 as well as the standing order of the United States District Court for the District of Maine (the “District Court”) dated August 1, 1984, pursuant to which all cases filed in Maine under the Bankruptcy Code are automatically referred by the District Court to this Court. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The relief requested by the Motion is based upon, *inter alia*, 11 U.S.C. §§ 105(a), 361, 363, 364. This is a core matter, pursuant to 28 U.S.C. § 157(b)(2)(A), (D), (K), and (M).

PROCEDURAL AND FACTUAL BACKGROUND

4. On June 15, 2009, Wheeling provided the Debtor and, *inter alia*, MMA Canada, with a \$6,000,000 secured line of credit pursuant to the terms of that certain Line of Credit Note (the “LOC”) and that certain Security Agreement. A copy of the LOC is attached hereto as **Exhibit A**. A copy of the Security Agreement is attached hereto as **Exhibit B**. Wheeling timely and properly perfected its security interest in the collateral described in the Security Agreement by filing a UCC-1 Financing Statement with the Secretary of State of Delaware on August 25,

2009 (the "Financing Statement"). A true and accurate copy of the Financing Statement is attached hereto as Exhibit C.

5. Pursuant to the Security Agreement and to secure the Debtor's obligations under the LOC, the Debtor granted Wheeling a first priority security interest in and to the Debtor's accounts, accounts receivable, rights to payment (including payment intangibles), inventory, and the proceeds thereof, including insurance proceeds (collectively, the "Collateral"), whether then owned by the Debtor or thereafter acquired. Pursuant to the LOC, the Debtor obtained advances thereunder by submitting borrowing base certificates to Wheeling on the 20th of each month that were used to establish the value of eligible accounts receivable and inventory against which value Wheeling advanced loans to the Debtor.

6. As of the Petition Date, the Debtor had fully drawn down the LOC. As a result, as of that date, the Debtor was indebted to Wheeling in the principal amount of \$6,000,000, plus interest, fees, costs of collection and other applicable charges.

7. Since the Petition Date, the Court has entered multiple orders permitting the Debtor, and then the Trustee, to use Wheeling's cash collateral under specific terms and conditions (collectively, the "Prior CC Orders") [*see* D.E. # 51, 98, 173, 255, and 374]. Currently, that use of cash collateral is governed by the Sixth CC Order.

8. As a general matter, the Prior CC Orders and the Sixth CC Order allowed the Debtor, and then the Trustee, to use Wheeling's cash collateral in accordance with budgets approved by the Court. In exchange, and as and for adequate protection, Wheeling was granted a "replacement lien" in all accounts receivable generated by the Debtor after the Petition Date, as well as a superpriority administrative expense claim, to the extent that the replacement lien failed to provide adequate protection to Wheeling. *See, e.g.*, Sixth CC Order, ¶¶ 9 and 10.

9. In or about October of 2013, the Trustee negotiated an agreement with Camden National Bank (the "Bank") whereby the Bank would provide the Trustee with post-petition

funding for railroad operations. That agreement was memorialized in the Trustee's Motion for Order: (A) Authorizing Debtor to Obtain Post-Petition Financing; and (B) Granting to Camden National Bank Post-Petition Liens [D.E. # 337]. The Court approved the Bank financing facility in an order entered on October 9, 2013 [D.E. # 367], and the loan transaction closed on October 18, 2013. As of that date, pursuant to the Sixth CC Order, the Trustee was obligated to cease using Wheeling's cash collateral to fund the operations of the railroad, and to use only proceeds of the Bank financing facility for such purpose.

10. In recognition of the fact that the Bank would be the Trustee's post-petition lender and that Trustee would cease using Wheeling's cash collateral as of the Closing, the Sixth CC Order established the following mechanism for the continued adequate protection of Wheeling:

On and after the date of the Closing, and as and for additional adequate protection, the 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 payments 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. Nothing herein shall prohibit Wheeling from asking for an order granting relief from stay for purposes of collecting Pre-Closing [sic] AR.

Sixth CC Order, ¶ 5 (emphasis added).

11. Both the Sixth CC Order and the Prior CC Orders provided Wheeling with replacement liens in accounts, inventory, and proceeds of accounts acquired by the Debtor on or after the Petition Date in amounts equal to the dollar value of the Debtor's and the Trustee's post-petition use of Wheeling's cash collateral. *See e.g.*, Sixth CC Order, ¶ 9.

12. The Sixth CC Order also (and consistent with the Prior CC Orders) imposed certain weekly reporting requirements on the Trustee. Sixth CC Order, ¶ 8; Fifth Interim Order Authorizing Debtor To Use Cash Collateral and Granting Adequate Protection (the "Fifth CC Order") [D.E. # 374], ¶ 5. Among other things, and pursuant to

the Sixth CC Order, the Trustee has provided Wheeling with weekly summaries of accounts receivable collected by the Trustee post-Closing, together with an accounting of disbursements made to Wheeling pursuant to the terms of the Sixth CC Order (collectively, the “Wheeling Activity Reports”). See Sixth CC Order, ¶ 5. As an example, a true and accurate copy of the Wheeling Activity Report through the week ending January 24, 2014 (the “1/24/14 Wheeling Activity Report”) is attached hereto as **Exhibit D**.

13. Notwithstanding the terms of the Sixth CC Order, the Trustee has failed to escrow and turn over to Wheeling the proceeds of collection of *all* accounts receivable generated by the Debtor prior to the Closing. The Trustee has taken the position that accounts receivable of the Debtor generated prior to the Closing by the provision of services to Canadian customers – i.e., the so-called Canadian Receivables – do *not* constitute Wheeling’s cash collateral, are not, therefore, Pre-Closing A/R (as that term is defined in the Sixth CC Order), and do not need to be escrowed and then turned over to Wheeling pursuant to ¶ 5 of the Sixth CC Order.

14. Upon information and belief, as of the date of this Motion, the aggregate amount of these withheld Canadian Receivables (and other withheld collections of Wheeling Collateral) are reflected on page 2 of the 1/24/14 Wheeling Activity Report, which contains a list of “Deposits Not Escrowed per Above” that totals \$636,927.96 as of the end of last week. This amount includes acknowledged Canadian Receivables of \$195,740.82.

15. Notwithstanding the failure of the Trustee to escrow the collections of Canadian Receivables and potentially other collections of Wheeling collateral, and then to disburse them to Wheeling, these collected funds are collateral of Wheeling, and the proceeds thereof constitute Wheeling’s cash collateral. Because these funds are in fact

Pre-Closing A/R, the Trustee is required to pay to Wheeling *all* of these funds pursuant to the terms of the Sixth CC Order.

16. The fact that the Canadian Receivables are Wheeling's Collateral is established by, *inter alia*, the documents attached to this Motion as Exhibits A, B, and C, and the sworn testimony of M. Donald Gardiner, Jr., the Debtor's Chief Financial Officer. In a hearing held on January 23, 2014, in connection with Wheeling's claim to proceeds of that certain Track Maintenance Agreement with respect to the so-called Section 45G Tax Credits, Mr. Gardiner testified as follows:

- All accounting work for both the Debtor and MMA Canada were provided by Mr. Gardner and his staff at the Debtor's and MMA Canada's Hermon, Maine headquarters;
- The Debtor and MMA Canada operate as an integrated railroad line headquartered in Hermon, Maine;
- All invoices for services rendered by the Debtor and its affiliate railroads, as an integrated railroad line, were issued exclusively by the Debtor. This includes invoicing for services rendered in Canada, and invoices for services to Canadian customers, and/or services rendered by MMA Canada.
- MMA Canada never issued any invoices for so-called Canadian Receivables or for any other services;
- All payments received for accounts receivable, regardless of where they were generated, were payments on account of invoices rendered by the Debtor from its Hermon, Maine offices¹;
- All accounts receivable were booked as assets of the Debtor, regardless of whether the underlying services were provided by the Debtor or MMA Canada; and
- When generating and certifying the borrowing base certificates required to draw on the LOC provided by Wheeling, the Debtor certified that all of its accounts receivable, including the so-called Canadian Receivables, were

¹ Mr. Gardner testified that there were year-end allocations of revenue and expenses between the Debtor and MMA Canada, but this was done only for tax purposes.

accounts receivable of the Debtor. Wheeling made advances to the Debtor in reliance on these borrowing base certificates².

All of this, of course, is completely consistent with the undisputed fact that the Debtor and MMA Canada operated, in Mr. Gardner's words, "an *integrated*, international shortline freight railroad system." Affidavit of M. Donald Gardner, Jr. In Support of First Day Pleadings, ¶ 6 [D.E. # 11] (emphasis added).

17. Given the documentary record, Mr. Gardner's sworn testimony and prior affidavits, and for the reasons set forth below, it is clear that (a) the so-called Canadian Receivables are accounts receivable *of the Debtor*; and (b) that the payment proceeds of the same are Wheeling's cash collateral. As such, *any* post-petition payments received by the Trustee on account of the Canadian Receivables constitute Wheeling's Collateral. Moreover, the proceeds of Canadian Receivables received by the Trustee on or after October 18, 2013, were required to be held in escrow and then turned over to Wheeling pursuant to ¶ 5 of the Sixth CC Order, but they were not.

18. The failure of the Debtor and the Trustee to escrow and turn over to Wheeling the proceeds of Pre-Closing Canadian Receivables (and other amounts) mandates the requirement that the Trustee provide a complete accounting of *all* amounts collected by the Debtor and the Trustee since the Petition Date, including Canadian Receivables, and the use and disposition of the same. Accordingly, Wheeling requests that Court order the Trustee to provide Wheeling with a complete accounting of any and all collections and use of accounts receivable, including the Canadian Receivables during the period of time between the Petition Date and the date of this

² It appears that the Trustee has continued this convention in his post-petition weekly reporting. Attached hereto as *Exhibit E* is a true and accurate copy of the "MMA Analysis of Borrowing Base Certificates Draft at 1/24/2014," which was received by Wheeling on January 28, 2014. A review shows that the "Total Gross A/R" component of the certificate appears to include both U.S. accounts receivable ("MMA Freight" and "MMA Misc") as well as Canadian Receivables ("MCC Freight" and "MCC Misc").

Motion, and hereafter, to ensure that Wheeling is being adequately protected for the same, and that the Trustee is complying with the Sixth CC Order

ARGUMENT

A. The Canadian Receivables Are Wheeling's Collateral And Are Governed By the Terms of the Sixth CC Order.

19. To date, the only accounts receivable that the Trustee has claimed are not Wheeling Collateral are the so-called Canadian Receivables. Yet, given the content of the documents annexed hereto and the sworn testimony of Mr. Gardner (both at hearings and in various declarations filed by the Court), there can be no doubt but that Wheeling has a valid, perfected and first priority security interest in all these Canadian Receivables.

20. As Mr. Gardner testified, the Debtor is the entity that issues invoices for all services rendered by it and its "integrated system," including by MMA Canada. This means that the Canadian Receivables were created as soon as the Debtor issued its invoices for services rendered to Canadian customers. When these receivables were created, they were accounts receivable of the Debtor.

21. Further, as Mr. also Gardner testified, the accounts receivable so generated were booked and recorded as assets of the Debtor. It was only after proceeds of accounts receivable were collected by the Debtor that the Debtor and its affiliates would make allocations for tax and other purposes.

22. If there were any doubt but that the so-called Canadian Receivables were actually accounts receivable of the Debtor, such doubt would be entirely eliminated by the fact that it was the usual and ordinary practice of the Debtor to certify so-called Canadian Receivables as its own accounts receivable for the purpose of obtaining draws under the Wheeling LOC (*see, e.g.*, Exhibit E). *Certainly, if the Canadian Receivables were accounts receivable of the Debtor for*

the purpose of borrowing money from Wheeling, they should also be accounts receivable of the Debtor for the purpose of paying the money back.

Wheeling Is Entitled to Additional Adequate Protection For the Pre-Petition Canadian Receivables, Any Post Petition Canadian Receivables, And Any Other Cash Collateral Utilized By The Debtor and the Trustee Since The Petition Date.

23. As was discussed above and as evidenced by the data in 1/24/14 Wheeling Activity Report, the Trustee has accounted for the receipt of a substantial amount of money post Closing, \$636,927.96, which appears to include the receipt of Canadian Receivables. However, rather than escrowing such collections and paying them to Wheeling, the Trustee has, apparently, used such collections in the operations of the railroad. The foregoing sum of \$636,927.96 does not include collections of Canadian Receivables (or other collections) during the period between the Petition Date and the Closing, and the use thereof.

24. For the reasons set forth above, collections of all accounts receivable, including Canadian Receivables, made both before the Closing and after the Closing are Wheeling's cash collateral and, to the extent that they have been utilized by the Trustee and not paid to Wheeling, Wheeling must be provided with adequate protection for that use pursuant to the terms of the Prior CC Orders.

25. As such, Wheeling respectfully requests that the Court order the Trustee to provide an accounting of (a) *all* collections of accounts receivable, including Canadian Receivables, from the Petition Date through the date hereof; (b) *all* accounts receivable, including Canadian Receivables now held by the Trustee, but not heretofore collected; (c) *all* disbursements and expenditures of the collections referred to in (a) above, including the \$636,927.96 as disclosed in the 1/24/14 Wheeling Activity Report.

26. Wheeling further respectfully requests that the Trustee be ordered to provide to it adequate protection on account of the collection and use of Canadian Receivables and any other assets that may constitute Wheeling's cash collateral since the Petition Date³.

CONCLUSION

For the reasons set forth herein, Wheeling respectfully requests that the Court enter an Order:

- A. Requiring the Trustee to pay over the proceeds of *all* of the accounts receivable – including Canadian Receivables – collected by the Debtor and/or the Trustee after the Closing;
- B. Requiring the Trustee to provide a complete accounting of (i) all collections of accounts receivable, including Canadian Receivables, received during the period of time between August 7, 2013 and the date hereof; and (b) any disbursement of these funds, including the disbursement of the \$636,927.96 as disclosed on page 2 of the 1/24/14 Wheeling Activity Report;
- C. Requiring the Trustee to provide a complete accounting of all accounts receivable generated between August 7, 2013 and the date hereof, but not heretofore collected;
- D. Ordering the Trustee to provide additional adequate protection to Wheeling for any disbursement of Canadian Receivables or other Wheeling cash collateral to a party other than Wheeling; and
- E. Granting such other relief as the Court deems just and appropriate.

³ Wheeling reserves the right to request specific forms of adequate protection after analyzing the results of the proposed accounting.

Dated: January 30, 2014

/s/ David C. Johnson

George J. Marcus

David C. Johnson

Andrew C. Helman

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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, proposed Order and Notice of Hearing 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 30th day of January, 2014.

/s/ Holly C. Pelkey

Holly C. Pelkey
Legal Assistant

Mailing Information for Case 13-10670

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:)
)
Montreal Maine & Atlantic Railway Ltd.,) Chapter 11
) Case No. 13-10670
)
Debtor.)

**ORDER ON WHEELING & LAKE ERIE RAILWAY COMPANY'S MOTION TO
ENFORCE CASH COLLATERAL ORDERS**

Upon consideration of the Wheeling and Lake Eire Railway Company's *Motion to Enforce Cash Collateral Orders* (the "Motion"), a hearing having been held, and the Court having heard the arguments of counsel, it is hereby **ORDERED, ADJUDGED, and DECREED** as follows:

1. Service of the Motion, as described therein, constitutes adequate service and notice of the Motion upon all parties in interest.
2. The Motion is hereby GRANTED, as follows:
 - A. The Trustee¹ is hereby ordered to escrow and then pay over to Wheeling all accounts receivable – including Canadian Receivables – generated by the Debtor and the Trustee before the Closing;
 - B. The Trustee shall, within seven (7) days of entry of this Order, provide Wheeling with a complete accounting of (i) all collections of accounts receivable, including Canadian Receivables, received during the period of time between August 7, 2013 and the date hereof; and (b) any disbursement of those funds, including the disbursement of any of the \$636,927.96 as disclosed on page 2 of the 1/24/14 Wheeling Activity Report; and
 - C. Following Wheeling's receipt of the accounting, the Court shall, at the request of Wheeling, schedule another hearing on the Motion to consider the issue of additional adequate protection for Wheeling. The parties shall have the right to file briefings regarding the issue of adequate protection prior to the continued hearing.

Dated: _____, 2014

Hon. Louis H. Kornreich
United States Bankruptcy Judge

¹ Defined terms shall have the same meanings as ascribed to them in the Motion unless otherwise noted herein.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:)
)
Montreal Maine & Atlantic Railway Ltd.,) **Chapter 11**
) **Case No. 13-10670**
)
Debtor.)

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **Tuesday, February 18, 2014, at 10:00 a.m.** a hearing will be held at the United States Bankruptcy Court, 202 Harlow Street, Bangor, Maine, on ***Motion to Expedite Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Orders*** (the "Expedited Hearing Motion").

If any party in interest shall have an objection to the Expedited Motion, such party shall assert an objection at the hearing. Such objecting party shall also file with the Court a written statement setting forth the basis for such objection **on or before February 13, 2014**, and concurrently serve (by facsimile and first class U.S. mail, postage prepaid) upon counsel for Wheeling & Lake Erie Railway Company, David C. Johnson, Esq., MARCUS, CLEGG & MISTRETTA, P.A., One Canal Plaza, Suite 600, Portland, ME 04101-4035, facsimile no. 207-773-3210. Unless an objecting party appears at the hearing to assert the basis for such objection before the Bankruptcy Court, and timely files a written statement, such objection shall be deemed to have been waived and abandoned.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE RELIEF REQUESTED IN THE EXPEDITED HEARING MOTION MAY BE GRANTED BY DEFAULT WITHOUT FURTHER NOTICE OR HEARING.

If the Expedited Hearing Motion is granted at that time, the Court will immediately thereafter conduct a preliminary hearing to consider, and may grant at that time ***Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Orders*** (the "CC Enforcement Motion").

If any party in interest shall have an objection to the CC Enforcement Motion, such party shall assert an objection at the hearing. Such objecting party shall also file with the Court a written statement setting forth the basis for such objection **on or before February 13, 2014**, and concurrently serve (by facsimile and first class U.S. mail, postage prepaid) upon counsel for Wheeling & Lake Erie Railway Company, David C. Johnson, Esq., MARCUS, CLEGG & MISTRETTA, P.A., One Canal Plaza, Suite 600, Portland, ME 04101-4035, facsimile no. 207-773-3210. Unless an objecting party appears at the hearing to assert the basis for such objection before the Bankruptcy Court, and timely files a written statement, such objection shall be deemed to have been waived and abandoned.

Dated: January 30, 2014

/s/ David C. Johnson

George J. Marcus

David C. Johnson

Andrew C. Helman

Counsel for Wheeling & Lake Erie Railway
Company

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