

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

**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**

Now comes the Wheeling & Lake Erie Railway Company (“Wheeling”) and objects to the Chapter 11 Trustee’s Motion for Order Approving Compromise and Settlement With Irving Paper, Limited, Irving Pulp & Paper, Limited, and J.D. Irving, Limited (the “9019 Motion”) [D.E. # 307], filed by Robert J. Keach, the chapter 11 trustee in this case (the “Trustee”), for the reasons set forth herein.

PRELIMINARY STATEMENT

By the 9019 Motion, the Trustee seeks to resolve the contested matter which was initiated by the Trustee’s filing of his Motion for Order Pursuant to 11 U.S.C. § 542(b) (the “542(b) Motion”). That Motion sought to recover the outstanding balance of an account receivable owed to the Debtor, in the amount of \$885,733 (the “Irving Debt”), by certain of the Irving Companies (which Companies include Irving Paper Limited, Irving Pulp & Paper, Ltd., and J.D. Irving, Ltd.).¹ Wheeling claims a first priority security interest in and to the Irving Debt because it is an “account” within the meaning of that certain Security Agreement between Wheeling and Montreal, Maine & Atlantic Railway, Ltd. (the “Debtor”) and its affiliates, dated June 15, 2009, pursuant to which the Debtor and its affiliates granted Wheeling a security interest in all

¹ Capitalized terms not defined herein shall have the meaning set forth in the 9019 Motion.

accounts, proceeds thereof, and other collateral. Further, by virtue of this Court's Fourth and Fifth Interim Orders Authorizing Debtor to Use Cash Collateral and Granting Adequate Protection (the "Cash Collateral Orders") [D.E. 255 & 374], the entirety of the Irving Debt has been turned over to Wheeling, with the exception of \$150,000, which the Trustee may use (subject to Wheeling's security interest) in accordance with a cash collateral budget approved by the Court.

By its oral order dated September 11, 2013 [D.E. 210], this Court granted Wheeling the right to appear and be heard in the 542(b) Motion, with full rights as a party in such proceeding. On October 1, 2013, the Trustee, without consultation with Wheeling, filed a Stipulation Dismissing Motion for Order Pursuant to 11 U.S.C. § 542(b) (the "Stipulation") [D.E. 306] and shortly thereafter, he filed the 9019 Motion. Both the Stipulation and the 9019 Motion were filed without any discussion with Wheeling, and without its consent. The Stipulation is a nullity under Rule 7041 of the Federal Rules of Bankruptcy Procedure (made applicable to the 542(b) Motion by Rule 9014) because it is not signed by all of the parties to that contested matter. Moreover, leaving aside the doubtful notion that any "settlement" or "compromise" has been achieved in a contested matter wherein fewer than all parties thereto have consented, Wheeling has determined, after taking depositions of representatives of the Debtor and the Irving Companies, that the proposed compromise is highly improvident and prejudicial to Wheeling and to the Debtor's estate.

In summary, the 9019 Motion is flawed, and must be denied, for both procedural and substantive reasons, including the following:

- 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 has been 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. Consequently, that portion of the Irving Debt exceeding \$150,000 is no longer property of the estate, and the Trustee has no remaining authority to use it under any

circumstances. As such he has no authority to settle or compromise it. Further, Wheeling is a party to the 542(b) Motion proceedings but *it* has *not* consented to any settlement of the 542(b) Motion. 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.

- 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 as 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.
- 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.
- 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.
- 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 is imminent. 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.

In view of the foregoing, the Court should deny the 9019 Motion because it is procedurally and substantively flawed and motivated by a desperate need for cash that has now dissipated. The major stakeholder in the Irving Debt does not consent to the settlement, as it is based on false assumptions and inadequate factual development.

ARGUMENT

I. There Is No “Settlement” For The Court To Approve Because Wheeling Has Not Agreed To Settle The 542(b) Motion or To Compromise Its Interest In the Irving Debt.

The 9019 Motion seeks to compromise the entirety of the Irving Debt. If granted, it would not only compromise the estate’s interest in the Irving Debt (\$150,000), it would also compromise the remainder of the Irving Debt as to which the estate has no interest, *i.e.* all of the Irving Debt in excess of \$150,000. By virtue of the Fourth and Fifth Cash Collateral Orders, the remainder of the Irving Debt is required to be turned over to Wheeling for application to the Debtor’s indebtedness to Wheeling. Wheeling is the only party with an interest in that portion of the Irving Debt that exceeds \$150,000.²

As a threshold matter, there is no “settlement” that can properly be considered under Bankruptcy Rule 9019, because not all parties to the matter have agreed to settle. “A ‘settlement’ between only two parties to a multi-party lawsuit is not a settlement, and the procedure to approve a compromise under Fed. R. Bankr. P. 9019(a) cannot be used to impose an injunction on the non-settling parties.” *Overton’s, Inc. et al. v. Interstate Fire & Casualty Insurance Co. (In re Sportstuff)*, 430 B.R. 170, 179 (8th Cir. BAP 2010) (reversing order

² As to the \$150,000, under the Fourth and Fifth Cash Collateral Orders, Wheeling maintains its security interest in that amount, however, the Trustee has the right to use that amount, pursuant to Section 363(b) of the Bankruptcy Code.

approving settlement because relief under Rule 9019 improper when fewer than all parties to dispute purport to settle). The underlying principal, as noted by the United States Supreme Court in a different context, is that “parties who choose to resolve litigation through settlement may not dispose of the claims of a third party.” *In re D.J. Christie, Inc.*, Do. No. 11-40764, 2013 WL 2153188, at *7 (Bankr. D. Kan. May 17, 2013) (*quoting Local No. 92 v. City of Cleveland*, 48 U.S. 501, 529 (1986)). *See also In re Forty-Eight Insulations, Inc.*, 149 B.R. 860, 865 (N.D. Ill 1992) (affirming bankruptcy court order denying 9019 motion; “we are cognizant of the fact that settlement agreements work efficiently and fairly only when all parties with an interest in the conflict are represented in the settlement. . . . What the court refuses to do, however, is to approve a settlement which abolishes the rights of one party without even having consulted that party during the settlement talks.”).

The Trustee cannot seek approval of a “compromise” where not all of the stakeholders in the matter have agreed to the compromise. He cannot compromise a property interest held by Wheeling alone, *i.e.* all of the Irving Debt in excess of \$150,000. He fares no better under Rule 7041, upon which he purports to rely in his so-called “Stipulation” dismissing the 542(b) Motion, a stipulation signed by only two of three parties to that Motion. Rule 9014 of the Federal Rules of Bankruptcy Procedure makes a number of the rules pertaining to adversary proceedings (Rules 7001 *et. seq.*) applicable to contested matters, such as the 542(b) Motion. Among those rules is Rule 7041, which, in turn, incorporates by reference Rule 41 of the Federal Rules of Civil Procedure. Rule 41 provides in pertinent part:

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a

motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

In his Stipulation, the Trustee apparently purports to rely on subsection (a)(1)(A)(ii) of Rule 41 which governs a stipulation of dismissal signed by “all parties who have appeared[.]” Clearly, not all parties who have appeared in the 542(b) Motion proceedings have signed the Stipulation. Wheeling has not signed it. Hence, the Trustee’s Stipulation is defective and inoperative under Rule 41 and Bankruptcy Rule 7041.

Of course, Rules 41 and 7041 are procedural rules, but the point is that the applicable procedural rules do not cure the substantive flaws: Wheeling has not agreed to the compromise of its interest in the Irving Debt because the proposed compromise is improvident, as will be discussed below. Its interest has been confirmed by court order, and as such, there can be no compromise, nor any stipulation of dismissal, without its consent. Both the Rule 9019 Motion, as well as the Trustee’s Stipulation must fail because Wheeling, the exclusive owner of the major portion of the Irving Debt, has not agreed to settle.

II. The Purported Compromise Set Forth In The 9019 Motion Is Improvident, And Not Within The Range Of Reasonableness Because It Is Premised The False Assumption That The Irving Companies Effectuated A Setoff. As Such, The Compromise Cannot and Should Not Be Approved.

Apart from the procedural flaw of submitting for approval a compromise to which a major stakeholder, Wheeling, has not agreed, the compromise is also a bad idea on the merits—merits which the Trustee failed adequately to explore and consider in making a fast-paced deal with the Irving Companies. As a general proposition, Wheeling agrees with the Trustee that the First Circuit decision in *Jeffrey v. Desmond*, 70 F.3d 183 (1st Cir. 1995) is controlling authority. *Jeffrey* requires that in any proposed compromise in bankruptcy, the interest of creditors must be considered, and deference must be given to their views. Here, Wheeling is the *only* party and the

only creditor with an interest in the Irving Debt in excess of \$150,000, and the holder by far of the larger portion of the Irving Debt. Wheeling asserts that it is entitled to deference, indeed exclusive deference, to its views as to how its own property interests ought to be dealt with. Equally important is that such deference is warranted not only because Wheeling owns the larger share of the Irving Debt, but also because there are serious flaws in the Trustee's analysis of the merits of the proposed compromise.

As the 9019 Motion explicitly states, the Irving Companies' primary defense to the 542(b) Motion is based upon an alleged, pre-petition setoff of the Irving Debt against an indebtedness of the Debtor which the Irving Companies acquired by pre-petition assignments. The Trustee buys the Irving setoff story hook, line and sinker, stating in the 9019 Motion: "Following those assignments, on July 31, 2013 the Irving Companies setoff approximately \$761,000 of the debt owed by MMA against the amount owed by the Irving Companies to MMA[.]" 9019 Motion, ¶ 11. Having bought the setoff story, the Trustee justifies the proposed compromise on the uncertainties created by the application of Section 553 of the Bankruptcy Code to rights of setoff that are both acquired by pre-petition assignment, and exercised pre-petition. These uncertainties appear to drive the Trustee to avoid litigating the 542(b) Motion and risking the delays caused by an appeal. 9019 Motion, ¶ 14.

To be sure, if a right of setoff is acquired pre-petition, and if setoff is effectuated pre-petition, the remedies of the Debtor or the Trustee may be limited to the improvement-in-position test set forth in Section 553(b) of the Bankruptcy Code, or perhaps to avoidance under Section 547 of the Bankruptcy Code. The Trustee would be subject to the uncertainties inherent in applying these statutory provisions. But, if the right of setoff was acquired within 90 days of the filing of the petition, at a time when the Debtor was insolvent, and if the creditor holding the acquired right of setoff fails to effectuate the setoff prior to the filing of the Chapter 11 petition, then the story is entirely different—the right of setoff is lost altogether, and forever. See 11

U.S.C. 553(a)(2)(B).³ Based on the Trustee's assumption that the right of setoff acquired by the Irving Companies had been exercised prepetition, the Trustee ignored the threshold question of whether a setoff had been effectuated in the first instance and ignored the application of Section 553(a)(2)(B) to inchoate setoffs. Hence, he claims that the proposed compromise of the Irving Debt was within the range of reasonableness.

It might have been, if the underlying assumption of a prepetition setoff were accurate. But it is not. Discovery undertaken by Wheeling, including depositions under Rule 30(b)(6) (Bankruptcy Rule 7030) of both the Irving Companies and the Debtor reveal that, contrary to the claims made by Irving—and accepted at face value by the Trustee—no pre-petition setoff of the Irving Debt was made by the Irving Companies. And because the Irving Companies acquired the purported right of setoff within 90 days of the Debtor's Chapter 11 petition, at a time when it was plainly insolvent (after the Lac Megantic tragedy), the inchoate right of setoff has been lost forever under Section 553(a)(2)(B). There was no justification or cause for the Trustee to give away the store.

A. There Was No Setoff.

The setoff defense must be considered in view of the following facts established in discovery undertaken by Wheeling in respect of the 542(b) Motion:

³ Section 553(a) provides:

- (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that—
 - (1) the claim of such creditor against the debtor is disallowed;
 - (2) such claim was transferred, by an entity other than the debtor, to such creditor—
 - (A) after the commencement of the case; or
 - (B)
 - (i) after 90 days before the date of the filing of the petition; and
 - (ii) while the debtor was insolvent (except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561); or
 - (3) the debt owed to the debtor by such creditor was incurred by such creditor—
 - (A) after 90 days before the date of the filing of the petition;
 - (B) while the debtor was insolvent; and
 - (C) for the purpose of obtaining a right of setoff against the debtor (except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561).

- As of August 7, 2013, the Debtor owed approximately \$2.3 million (the “MMA Debt”) to one of the Irving Railroads, New Brunswick Southern Railway Company Ltd. (“NBSR”), or to an assignee of NBSR. 9019 Motion, ¶ 12.
- As of August 28, 2013, on the books and records of the Debtor, the Irving Companies owed the Debtor the amount of \$885,733 on certain invoices (the aforementioned Irving Debt), as set forth in the 9019 Motion.
- As memorialized in a series of assignments purportedly effectuated on July 12, July 23, and July 30, 2013, all within 90 days of the Debtor’s Chapter 11 petition (the “Assignments”), NBSR transferred approximately \$1.3 million of the MMA Debt to one or more of the Irving Companies (the “MMA Assigned Debt”). 9019 Motion, ¶ 11. Copies of the Assignments are attached hereto as **Exhibit A**.
- The Irving Companies contend that prior to August 7, 2013, they effectuated a setoff of approximately \$761,000 of the Irving Debt against the MMA Assigned Debt, thereby extinguishing \$761,000 of the Irving Debt to the Debtor.
- According to the Irving Companies, the setoff was effectuated when the Irving Companies paid \$761,000 of the MMA Assigned Debt to NBSR. See the deposition transcript of the Irving Companies’ general manager of corporate credit and finance, and their Rule 30(b)(6) designee, Karl Hansen (the “Hansen Depo. Tr.”, at [page]:[line]), 32:3-24 and Exhibit 4 thereto. The Hansen Depo. Tr. and related exhibits have been filed with the Court, together with this Objection. These *intra-company* payments are memorialized on certain account registers (the “Registers”) attached to the Hansen Depo. Tr. as Exhibit 4 thereto. That Exhibit 4 is also attached to this Objection as **Exhibit B**.
- These Registers show that the Irving Companies paid NBSR for the MMA Assigned Debt. Irving claims that the Registers evidence a completed setoff, and that they constitute the book entries effectuating the setoff. (Hansen Depo. Tr., 32:17-33:2.)
- Noticeably absent, however, is any record of the Irving Companies indicating that the Irving Debt (owed to the Debtor) was extinguished by virtue of the Assignments or by the payment made to NBSR for the same, nor any indication that the MMA Assigned Debt itself was paid or treated as paid, or has been eliminated in any record of the Irving Companies. Indeed, the only impact of the Assignments and the Registers is to record transfer of the MMA Debt from NBSR to the Irving Companies, and the payment for the same by the latter to the former. That’s it.
- The assignment of the MMA Assigned Debt from NBSR to the Irving Companies, and the payment of the MMA Assigned Debt by the Irving Companies is the only evidence proffered by Irving to prove a purported prepetition “setoff”. No other record of the Irving Companies shows an actual setoff—i.e. the satisfaction of the Irving Debt owed to MMA, or the satisfaction of the MMA Assigned Debt owed to the Irving Companies. Both debts remain

unaffected by the assignment. Mr. Hansen, who conceived of and implemented the Assignments and purported setoff, did not instruct Irving's accounting department to make any book entries to reflect a setoff. (Hansen Depo. Tr., 29:11-13.)

- Mr. Hansen never discussed the Assignments or their intended effect, or the purported setoff, with MMA, and does not know whether anyone else at the Irving Companies did. (Hansen Depo. Tr., 19:1-23, 22:22-23:3, 44:16-45:16.) MMA's CFO, Donald Gardner, confirmed in his deposition (which deposition is filed herewith and shall be referred to herein as "Gardner Depo. Tr., [page]:[line]") that he had not discussed the Assignments with Irving and that the Assignments were a matter internal to Irving that did not affect the Debtor's business relationship with the Irving Companies—and that he did not talk to or hear from anyone at the Irving Companies about the purported setoff. (Gardner Depo. Tr., 29:3-16, 31:14-33:24, 34:13-16.)
- The Debtor did not consent to the purported setoff, was unaware of it, and its records still reflect a payable to the Irving Companies as well as the Irving Debt as a receivable. (Gardner Dep. Tr., 36:6-16.) While Mr. Hansen testified that the Irving Companies told Mr. Gardner, "this is what we setoff, here are the invoices[,]" and "take this off your records because we have sent this money to Irving Railways," the document that Mr. Hansen points to as constituting this communication says no such thing, Mr. Gardner did not understand it to mean that a setoff was effectuated, and Mr. Gardner did not recall ever receiving correspondence from the Irving Companies to that effect. (Hansen Depo. Tr., 30:30:12-31:6, 32:17-24 and Exhibit 4; Gardner Depo. Tr., 33:25-34:34:12, 34:17-35:12, 36:17-25, 37:14-38:25.)
- Mr. Gardner's understanding of a setoff is a situation in which two parties who owe each other mutual debts compare amounts due, subtract the lesser amount from the greater amount, and the party owing a net balance pays the other party. (Gardner Depo. Tr., 82:16-44:7.) That is not what happened here, where one or more of the Irving Companies simply paid NBSR pursuant to the Assignments. (Hansen Depo. Tr., 32:3-24 and Exhibit 4.)
- Finally, Mr. Hansen did not know if anyone at the Irving Companies had instructed MMA that the Irving Companies had permanently resolved the MMA Assigned Debt or the Irving Debt. (Hansen Depo. Tr., 38:19-39:13.)

The forgoing facts—based on deposition testimony of the Rule 30(b)(6) representatives of the Irving Companies and the Debtor, and thus admissions against these parties—establish without doubt that no prepetition setoff was made. What happened is that a non-lawyer, Mr. Hansen, thought he understood how to effectuate a setoff and directed that steps be undertaken that he erroneously thought would do the job. Thus, Mr. Hansen directed that NBSR, one of the

Irving Railroads, assign to its affiliates, the Irving Companies, NBSR's account receivable from the Debtor. *See, e.g.*, the Assignments. He then directed the Irving Companies, as assignee of the Debtor's accounts, to pay NBSR for these assigned accounts, and the Irving Companies did so by transferring cash to NBSR in payment of a portion of the MMA Assigned Debt, as reflected in the Registers. (*See Hansen Depo. Tr.*, 23:9-1 and Exhibit 4). As a result, NBSR got its money for the assigned accounts (or a portion of them) and the Irving Companies wound up owning the MMA Assigned Accounts. That's all; nothing else transpired. No other accounts were affected—not the Irving Debt; not the MMA Assigned Debt (it was transferred, but not satisfied).

These facts do not establish a setoff. They establish only that NBSR transferred the MMA Assigned Debt to the Irving Companies, and the Irving Companies paid their affiliate for the same. This is not a setoff. By law, three elements are required in order for there to be a valid and effective setoff (the "Setoff Elements"). A creditor may rely upon a setoff only if it can establish the following: "(i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff." *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 19 (1995) (*citing Baker v. National City Bank of Cleveland*, 511 F.2d 101 (6th Cir. 1975), and *Normand Josef Enterprises, Inc. v. Ct. Nat. Bank*, 646 A.2d 1289 (Conn. 1994)) The *Baker* Court and the *Normand Josef Enterprises* Court both offer instructive guidance on understanding the inter-play between the intent requirement inherent in the Setoff Elements. For example, the *Normand Josef Enterprises* Court summarized its holding as follows:

We therefore hold that as a matter of law, a bank effectuates its right of setoff only after it has performed some *binding overt act* and has made *a record to evidence that action*. Furthermore, we hold that, consistent with the certainty and predictability required by banking operations in the commercial world, the *act must be unequivocal, objectively ascertainable and final in order to be overt and binding*.

Id. at 1299 (emphasis added). The *Baker* Court articulated a similar rationale: “[Setoff] ‘represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another.’” *Id.* (quoting *Studley v. Boylston Bank*, 229 U.S. 523, 528 (1913)). Although the Setoff Elements “take their particular meaning from the world of banking, they suggest the more basic principle applicable here: *setoff occurs only after the party holding the money acts to make its taking of the money permanent and indicates as much by canceling the other party’s debt in the amount taken.*” *Amoco Production Co. v. Fry*, 118 F.3d 812, 818 (D.C. Cir. 1997) (emphasis added).

In this case, there are no facts suggesting that the Irving Companies (the party claiming to have effectuated a setoff against the Debtor) have satisfied the Setoff Elements. Assuming, for discussion purposes, that the requisite element of intent is present, the Irving Companies never actually cancelled or satisfied either the MMA Assigned Debt or the Irving Debt. Both categories of debt remained outstanding on the books and records of the Irving Companies (and the Debtor as well). The only entity to have received any satisfaction of debt was NBSR, which got payment for a portion of the MMA Assigned Debt. In point of fact, as Mr. Hansen’s testimony unequivocally verifies, the Irving Companies never took the legally required steps to effectuate a prepetition setoff. There was no steps taken to cancel the MMA Assigned Debt or to treat it as having been satisfied by setoff; conversely, no steps were taken to cancel the Irving Debt, or to treat it as having been satisfied by setoff. Neither book entries nor any other overt action of the Irving Companies reflect any setoff. In this regard, the following colloquy from Mr. Hansen’s deposition is revealing:

19 Q Okay. All right. Did Irving inform the MMA that it

20 was permanently resolving the MMA's debt to Irving

21 Railroad?

22 A I have no idea.

23 Q Okay. And I think I may have asked you this, but bear

- 24** with me, did you have any discussions with anyone
25 within Irving about how to handle on the books the
1 payable that Irving Paper had to the MMA?
2 A No, I did not.
3 Q Okay. Do you know if anyone else did?
4 A I have no knowledge of that.
5 Q Okay. Did Irving inform the MMA that it was
6 permanently resolving Irving Paper's debt to the MMA
7 by effectuating a setoff?
8 A I have no knowledge of that either.
9 Q Okay. So you didn't have those kinds of
10 conversations?
11 A No, I did not.
12 Q And you don't know if anyone else did?
13 A No, I don't.

(Hansen Depo. Tr., 38:19-25 & 40:1-13.)⁴

Moreover, the only records produced in discovery purportedly evidencing the setoff are the Assignments, the Registers, and an e-mail to the Debtor enclosing the Registers. The Assignments reflect nothing but the transfer of the MMA accounts receivable from NBSR to the Irving Companies. The Registers do nothing but evidence the Irving Companies payment to NBSR for such assigned accounts. That is all that there is; these records comprise the entire universe of documents which Irving proffers to establish the setoff, but they do no such thing. They fail to demonstrate in any fashion (let alone an objectively ascertainable fashion, as required by *Normand Josef Enterprises*), the satisfaction of the Irving Companies' accounts payable to MMA (the Irving Debt, i.e. the latter company's account receivable, and Wheeling's collateral). There is nothing in these documents evidencing the alleged setoff—nothing evidences an act to permanently eliminate the obligation of the Irving Companies to pay the accounts owed to Debtor. Those accounts remained as open obligations on the books and records of the Debtor and, based upon the documents and testimony offered by the Irving

⁴ As noted above, the supposed setoff and elimination of (most of) the Irving Debt was news to MMA—the party whose receivable and payable supposedly were being setoff and eliminated. (Gardner Dep. Tr., 33:25-34:12, 34:17-35:12, 36:17-25, 37:14-38:25.) Indeed, MMA's records still reflect a payable to the Irving Companies as well as the Irving Debt as a receivable. (Gardner Dep. TR., 36:6-16.)

Companies, on the Irving Companies' books as well. *See Normand Josef Enterprises, Inc.*, 646 A.2d at 1299.

If there were any doubt about this, even the Irving Companies' own communications with the Debtor concerning the Assignments and the Registers fail to claim any elimination, by setoff, of the obligations of the Irving Companies to MMA. Thus, the email of Jim Mehan, of the Irving Companies, to Mr. Gardner, CFO of MMA states:

Don, I was asked to send you support for what invoices were paid to NBSR through assignments. As of today, the summary of invoices attached have been paid from Irving Paper, Irving Pulp & Paper and Irving Forest Products to NBSR.

See Hansen Depo. Tr., Exhibit 4.

This e-mail message informs MMA that the Irving Companies acquired the MMA Assigned Debt, and paid a portion of the same to their affiliate, NBSR. There is no claim of setoff. There is no claim, for example, that the MMA Assigned Debt has been satisfied by setoff against the Irving Debt. Conversely, there is no claim that the Irving Debt owed to MMA has been satisfied by setoff against the acquired MMA Assigned Debt. The message conveyed by the email is that the Irving Companies have bought and paid for the MMA Assigned Debt, and MMA should now pay the amounts owed to the Irving Companies. This is not a setoff.

This is the entire state of the record concerning a purported setoff. Simply put, there was none, and the Trustee's assumption that there was makes the 9019 Motion fundamentally flawed. Had a setoff been effectuated prior to the Debtor's filing of its Chapter 11 petition, the Trustee might well have something to fret about, but this is not the case. Under Section 553(a)(2)(B) of the Bankruptcy Code, the acquisition by the Irving Companies of a potentially offsetting claim, which acquisition was been made within 90 days of the MMA petition, after the tragedy at Lac Megantic which made MMA insolvent, is plainly of no effect and creates no enforceable setoff rights for the Irving Companies. Had this been correctly recognized by the Trustee, the 9019 Motion would never have been filed because the Trustee would have recognized the importance

of 553(a)(2)(B) of the Bankruptcy Code. The compromise proposed in the 9019 Motion is entirely improvident and without reasonable justification. The 9019 Motion must therefore be denied.

B. Irving Can Claim No “Constructive Trust”.

Lastly, according to the 9019 Motion, the Irving Companies also contend that MMA held whatever funds it owed to the Irving Companies in a “constructive trust” for the Irving Companies and their affiliated railroad company pursuant to a swap agreement (the “Swap Agreement”). Under the alleged Swap Agreement, whenever the Irving Companies paid an invoice owed to the Debtor, the Debtor was required, immediately, to use the funds so paid to pay any invoices issued to it by NBSR, the Irving Railroad, that arose by reason of the same shipment that gave rise to the MMA account. Thus, monies were swapped: Irving would pay MMA for rail shipments; and MMA would immediately use the money to pay the interline freight charges owed to NBSR.

While the Swap Agreement is disputed, the matter is irrelevant to the 542(b) Motion, because no swap occurred regarding the account in question—the Irving Companies have held on to the funds needed to satisfy the Irving Debt owed to MMA (approximately \$885,000) and have not paid it. There is nothing to which a “constructive trust”, if it existed, could attach. Thus, even if there were a swap agreement, MMA has never gotten the money to fund it, nor has it gotten any money to hold “in trust”, if there were any trust.

The thrust of Irving’s contention, however, appears to be that the Swap Agreement gave rise to a “constructive trust”, regardless of whether Irving actually paid an account. Thus, the Irving Companies claim that any money they *might* pay to the Debtor would, in their hands, be charged with a “constructive trust” and held for payment of the interline settlement charges owed to NBSR, the affiliated Irving Railroad.

The primary problem with Irving's claim to a constructive trust is that in this District, and in the First Circuit, no such constructive trust exists as a matter of law. *See In re Morales Travel Agency*, 667 F.2d 1069 (1st Cir. 1981). Indeed, it is plainly the law of this District that there are no "constructive trusts" for railroad interline freight charges. The point has been well articulated by Bankruptcy Judge Haines in *Aroostook Railroad Company v. Burlington Northern & Santa Fe Railway (In re Bangor & Aroostook Railroad)*, 320 B.R. 226 (Bankr. D. Me. 2005), *aff'd* Do. No. 06-141-B-H, 2007 WL 607867 (D. Me. Feb. 23, 2007) (Hornby, J.).

Judge Haines held that freight charges in that case were not held in trust, notwithstanding that the railroads had labeled their relationship one of trust, and his opinion is instructive for several reasons. First, Judge Haines noticed a split among the circuits stemming from two different lines of federal cases considering the same question—*In re Penn Central Transp. Co.*, 486 F.2d 519 (3d Cir. 1973) (concluding that interline freight charges are held in trust) and *Union Pacific Railroad Company v. Mortiz (In re Iowa Railroad Company)*, 840 F.2d 535 (7th Cir. 1988) (sharply criticizing *Penn Central*)—but ultimately dismissed *Penn Central* because it presents a federal common law approach that is not connected to a specific federal interest and conflicts with the Bankruptcy Code's distribution scheme. *Id.* at 238. Second, he also noted that, like in the 542(b) Motion, the putative trust funds were commingled with other funds, thereby negating any plausible inference that a trust had been created. *Id.* at 239. "One is not a 'mere conduit' when it exercises unrestricted dominion and control over funds—no matter that it may later have to reckon with its creditors." *Id.* at 240. Judge Haines gained support for this rationale from the First Circuit's decision in *In re Morales Travel Agency*, *supra*. In *In re Morales Travel Agency*, the First Circuit held that ticket receipts collected by an agent on behalf of a carrier were not held in trust for the carrier, notwithstanding an agreement declaring that the

receipts were to be held in trust, because the funds were commingled and there was no restriction on the agent's use thereof.⁵

The same rationale, denying applicability of a constructive trust, applies to the facts presently before the Court. Discovery in the 542(b) Motion has revealed several important facts. First, Mr. Hansen pointed to no written contract or trust agreement purporting to create a trust. While he contends that the Swap Agreement was designed to effectuate a similar result (simultaneous transfers), he conceded being unaware of whether funds allegedly owed to the Irving Companies by the Debtor were segregated or commingled. (Hansen Depo. Tr., 15:9-16:1-14.) Further, even if there were a written "trust" agreement, the Irving Debt was never funded—the money in question at all times remained in the treasury of the Irving Companies. Second, MMA did not recognize any such agreement, and did not consider payments from Irving to be held in trust, and it did not segregate those funds from others that it received. (Gardner Depo. Tr., 25:17-26:7.)

In a nutshell, First Circuit law, and the railroad cases in this District, disavow any constructive trust as between interline railroads. The facts of this case would not support the application of the doctrine, even if it were recognized—Irving held the money in question in its treasury and never paid the account to MMA; MMA routinely comingled all of its funds, and never recognized either a duty to subordinate or to treat payments it received in trust. As such, the constructive trust argument offers no support for the 9019 Motion. It is supported by neither fact nor law, and must be disregarded as grounds to support the 9019 Motion.

C. The Purported Setoff Is Ineffective As To Wheeling As A Secured Party Under The Maine Uniform Commercial Code.

⁵ In affirming Judge Haines's decision, Judge Hornby noted that "Judge Haines's well-written opinion is faithful to existing First Circuit precedent, namely *In re Morales Travel Agency*, 667 F.2d 1069 (1st Cir. 1980)." 2007 WL 607867.

As the Court is aware, the Debtor and its affiliates granted Wheeling a security interest in all of their accounts, including accounts receivable, such as the Irving Debt, pursuant to the Security Agreement. This grant of a security interest constitutes an “assignment” of the Irving Companies Debt, within the meaning of the Maine UCC.⁶ Because, as will be discussed below, the Irving Companies knew about the assignment before purporting to effectuate a setoff, they are barred from interposing such a defense pursuant to § 9-1404 of the Maine UCC⁷. This is black-letter law.

Section 9-1404 of the Maine UCC provides as follows:

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (2) through (5), the rights of an assignee are subject to:

(a) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(b) Any other defense or claim of the account debtor against the assignor that accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

Section 9-1404 codifies two common-sense rules. First, under subsection 1(a), the assignee—*e.g.* a secured creditor—takes an interest in an account subject to all defenses that could be interposed against the assignor and arising out of the same transaction. *See* 11 M.R.S.A. § 9-1404(1)(a). Thus, if MMA failed to deliver a shipment, or damaged Irving’s property in transit, Wheeling’s interest in the Irving account receivable would be subject to any claim for damages that Irving, as the shipper, might make.

⁶ “Even though Article 9 usually refers to a creditor with a security interest as a ‘secured party,’ a secured party with a security interest in accounts is the ‘assignee’ under section 9-318” of the Maine UCC, which is the predecessor to § 9-1404 of the Maine UCC. *Me. Farmers Exchange, Inc. v. Farm Credit of Maine, A.C.A.*, 2002 ME 18, ¶ 13 n.7, 789 A.2d 85, 89 (citing *In re Otha C. Jean & Assoc. Inc.*, 152 B.R. 219, 222-23 (E.D.Tenn. 1993) (noting that this is the general rule)). *See also Artoc Bank and Trust, Ltd. v. Apex Oil Co. (In re Apex Oil Co.)*, 975 F.2d 1365, 1369 (8th Cir. 1992) (“We see no meaningful difference between a security interest and an assignment for purposes of security. In fact, they appear to be the same thing under Article 9”).

⁷ The Wheeling Security Agreement is attached hereto as **Exhibit C**. By its terms, it is governed by Maine law, including the Maine UCC.

Second, and of relevance to this case, pursuant to subsection 1(b), once the account debtor (*i.e.* the obligor of the assigned account) receives notice of the assignment to the assignee (secured creditor), the account-debtor cannot interpose a defense against the assignee that arises out of a different transaction from the one that created the assigned account. *See* 11 M.R.S.A. § 9-1404(1)(b). In a nutshell, while subsection 1(a) permits a recoupment or performance defense; section 1(b) prohibits, after notice of the assignment of the account, a classic “setoff” defense with respect to the account that constitutes collateral for the assignee, *i.e.* the setoff of debts that arise outside of the account itself.

Thus, for the purpose of this case, once the Irving Companies received notice of the Wheeling’s security interest in accounts receivable, it could not (and cannot now) impose a defense, such as a setoff defense, that arises out of a transaction unrelated to the transaction that created the account itself. So, for example, once the Irving Companies received notice of the Wheeling’s security interest, it could not setoff against the account it owed MMA for shipping services (the Irving Debt) accounts that it acquired by assignment from its affiliate, NBSR, for shipping services that NBSR had rendered to MMA.

Discovery in the 542(b) Motion has revealed that the Irving Companies received actual notice of Wheeling’s security interest in MMA’s accounts no later than August 30, 2012—about eleven months before the purported setoff. (Hansen Depo. Tr., 49:20-50:1-4.) The Irving Companies, at Mr. Hansen’s direction, regularly obtained credit reports from Dunn & Bradstreet, once or twice yearly for “everybody we do business with[.]” (Hansen Depo. Tr., 50:1-12 & 52:12-21.) As Mr. Hansen testified, the Irving Companies obtained one such Dunn & Bradstreet report with respect to the Debtor on or about August 30, 2012 (the “D&B Report”), and that the D&B Report listed all UCC filings against the Debtor, including multiple entries reflecting Wheeling’s security interest in accounts of the Debtor, including accounts receivable. (Hansen Depo. Tr., 50:2-4; 51:8-11; Exhibit 5, p. 12.) As a result, from and after August 30, 2012, the

Irving Companies were on notice of the assignment of all accounts receivable to Wheeling. Because of this notification, the Irving Companies cannot assert against Wheeling defenses to payment of its MMA accounts that arise out of transactions unrelated to the transactions that created the account. As such, it cannot setoff against the Irving Debt any debts owed by MMA that arose from different transactions, such as the MMA Assigned Debt.

Bankruptcy courts have reached this very conclusion when applying the uniform version of § 9-1404 and its predecessor (§ 9-318). For example, in a case on all fours with the facts in this case, the United States Bankruptcy Court for the District of Delaware held that an account-debtor's receipt of a Dunn & Bradstreet report indicating the existence of a security interest in accounts that it owed, barred the account-debtor from asserting a setoff defense. Thus, in *In re Commun. Dynamics, Inc.*, 300 B.R. 220 (Bankr. D. Del. 2003), the Delaware Bankruptcy Court held that an account-debtor's receipt of a Dun & Bradstreet report disclosing the existence of a security interest in the account debtors account (the payee's accounts receivable) barred the offset of debts that arose from different transactions. This is precisely the case we have here—the Irving Companies have been on notice since August of 2012 of Wheeling's security interest in MMA accounts receivable by virtue of the D&B Report that they obtained in the ordinary course of their business.

The United States Court of Appeals for the Eighth Circuit reached virtually the same conclusion under § 9-404's predecessor (§ 9-318 of the pre-amendment UCC) and held that an account-debtor could not offset unrelated accounts against an account payable upon receipt of notice that the account payable constituted collateral for a secured creditor. *Artoc Bank and Trust, Ltd., v. Apex Oil Co. (In re Apex Oil Co.)*, 975 F.2d 1365, 1370 (8th Cir. 1992). In *In re Apex Oil Co.*, the Eighth Circuit held that a stamped notice on an invoice informing account-debtors that a bank had been “granted a *security interest* in the amount of this invoice” and directing payment to the secured party was sufficient to put the account-debtor on notice of the

assignment. Thus, the account-debtor had a duty to inquire about the security interest before attempting to effectuate a setoff.

At the very least, the notice should have raised a question in the mind of Apex, causing it to inquire about the security interest before setting off its account. . . . [n]otice under § 9.318 embraces those things that a reasonably diligent inquiry and exercise of the means of information at had *would have* disclosed. . . . At least where millions of dollars are at stake, as was the case here, a company acts unreasonably if it sets off a debt to it from another transaction, after being given notice of another's security interest in the amount due.

Id.

These cases control the outcome here. It is undisputed that the purported setoff rights, having been acquired by assignment from NBSR in July of 2013, arise from transactions different from those that created the Irving Debt in the first place. It is also undisputed that the Irving Companies received the D&B Report nearly a year before attempting to effectuate the setoff. As a result, they knew of Wheeling's security interest in MMA accounts receivable. Under the provisions of § 9-1404 of the Maine UCC, the governing law in this case, the Irving Companies may not offset the accounts assigned to them by NBSR against what they owe to MMA, the Debtor.

For this reason as well, the 9019 Motion must be denied.

CONCLUSION

It is quite apparent that the compromise proposed by the 9019 Motion is improvident and unwise, both from a procedural and a substantive perspective. It is procedurally defective because Wheeling, the major stakeholder in the subject account, does not consent to the compromise. It is substantively defective because the compromise is based on a false assumption as to controlling facts. This false assumption led the Trustee to fail to consider (as to an inchoate setoff) dispositive, favorable, and controlling law—Section 553(a)(2)(B) of the Bankruptcy Code.

The motivations that drove the Trustee to propose such an unwise compromise are readily apparent. When the 542(b) Motion was filed, on August 30, 2013, the Trustee had neither secured a loan commitment for post-petition financing, nor had the Court approved the loan commitment subsequently provided by Camden National Bank. As the Trustee revealed in his motion for authority to borrow from Camden National Bank, the loan was badly needed because the Trustee had grave concerns about running out of cash for railroad operations before a sale could be achieved. In a rush to bring in cash, at a time when the prospects for a loan were uncertain, the Trustee filed the 542(b) Motion. He sought an expedited hearing and then he settled it quickly, all without having allowed adequate time for discovery and without having undertaken adequate discovery. In a drive to bring in needed cash, the Trustee filed the 9019 Motion and requested an expedited hearing. Everything in this contested matter has been dramatically expedited in the quest for cash, and as a result, the time needed to conduct adequate discovery of the controlling facts and to consider available legal authorities, has been severely truncated.

Ironically, as this Objection is filed, the Trustee's urgent need for cash has subsided. The Trustee has obtained a substantial loan commitment from Camden National Bank and on October 9, 2012, the Court approved the proposed loan. As the Trustee has reported to the Court and parties-in-interest, the loan is expected to close not later than October 25, 2013.

While the Trustee's urgent need for cash has subsided, the collateral damage caused by his rush for approval of a deal with the Irving Companies has not. At this time, with a loan closing on the horizon, and the potential for a cash crunch eliminated, the Trustee persists in pressing a settlement that purports to compromise an asset that is no longer property of the estate, and that improvidently gives away value that should not be given away. Wheeling respectfully requests that the Court view the 9019 Motion not through the lens of a cash-starved debtor staring into the abyss, but rather from the perspective of a creditor that has superior

property rights to the asset in question and is not motivated to sacrifice the asset in the name of raising quick cash. When viewed through this lens, and when the facts of the case and controlling law are adequately and correctly considered, there can be no rationale for giving away Wheeling's rights to an \$885,000 account receivable. The Trustee's cash crisis has passed, and the time has come to approach the 542(b) Motion in a deliberate and considered fashion. When that is done, it becomes clear that the compromise embodied in the 9019 Motion is hasty and improvident and should be denied.

Requirements Of D. ME. LBR 9013-1(f)

1. Paragraph 1 of the 9019 Motion contains legal conclusions to which no response is required.
2. Paragraph 2 of the 9019 Motion contains legal conclusions to which no response is required.
3. Paragraph 3 of the 9019 Motion contains legal conclusions to which no response is required.
4. Paragraph 4 of the 9019 Motion contains legal conclusions to which no response is required.
5. Wheeling admits the allegations made in ¶ 5 of the 9019 Motion.
6. Wheeling admits the allegations made in ¶ 6 of the 9019 Motion.
7. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 7 of the 9019 Motion and therefore denies the same.
8. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 8 of the 9019 Motion and therefore denies the same.
9. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 9 of the 9019 Motion and therefore denies the same.

10. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 10 of the 9019 Motion and therefore denies the same.

11. Wheeling admits that the allegations contained in ¶ 11 of the 9019 Motion.

12. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 12 of the 9019 Motion and therefore denies the same.

13. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations regarding beliefs of the Trustee or the Irving Companies and therefore denies the allegations made in ¶ 13 of the 9019 Motion.

14. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in ¶ 14 of the 9019 Motion and therefore denies the same.

15. Wheeling denies the allegations made in ¶ 15 of the 9019 Motion.

16. Wheeling admits the allegations made in ¶ 16 of the 9019 Motion. Wheeling denies that the approval of the relief requested is appropriate.

17. Paragraph 17 of the 9019 Motion states various legal conclusions to which no responses are required.

18. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations regarding what the Trustee “believes” vis-à-vis the terms of the compromise and settlement and therefore denies the allegations made in the first sentence of ¶ 18 of the 9019 Motion. Wheeling denies the allegations made in the second sentence of ¶ 18 of the 9019 Motion. Wheeling admits that the Trustee has a reasonable probability of successfully litigating the 542(b) Motion and denies the remainder of the allegations made in the third sentence of ¶ 18 of the 9019 Motion. Wheeling admits the allegations made in the fourth sentence of ¶ 18 of the 9019 Motion. The allegations made in the fifth sentence of ¶ 18 of the 9019 Motion constitute legal conclusions to which no response is required. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in the sixth sentence of ¶ 18 of the 9019

Motion and therefore deny the same. Wheeling denies the allegations made in the seventh sentence of ¶18 of the Motion.

19. Wheeling denies the allegations made in the first sentence of ¶ 19 of the 9019 Motion. Wheeling lacks information sufficient to form a belief as to the truth or falsity of the allegations in the second sentence of ¶ 19 of the 9019 Motion and therefore deny the same. Wheeling denies the allegations made in the third sentence of ¶ 19 of the 9019 Motion. Wheeling admits the allegations made in the fourth sentence of ¶ 19 of the 9019 Motion. Wheeling denies the allegations made in the fifth sentence of ¶19 of the 9019 Motion.

20. Wheeling denies the allegations made in ¶ 20 of the 9019 Motion.

CONCLUSION

For the reasons 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 15, 2013

/s/ George J. Marcus

George J. Marcus

David C. Johnson

Andrew C. Helman

Counsel for Wheeling & Lake Erie Railway
Company

MARCUS, CLEGG & MISTRETТА, P.A.

One Canal Plaza, Suite 600

Portland, ME 04101

207.828.8000

EXHIBIT
A Page 1 of 18
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EXHIBIT
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Irving 3
10/19/13

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Forest Products Inc., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of one hundred thousand dollars and 00 cents (\$100,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Forest Products Inc.
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 12th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 12th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Forest Products, Inc., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Paper Limited., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of five hundred and twenty thousand dollars and 00 cents (\$520,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

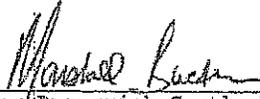
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Paper Limited
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.


New Brunswick Southern Railway
Company Limited

DATED as of the 12th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 12th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Paper Limited., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the Assignor and the Assignee have caused these presents to be duly executed by its properly authorized agents as of the day, month and year first above written.

SIGNED, AND DELIVERED)

in the presence of)

R. Cummings Brown)
per:)

New Brunswick Southern Railway
Company Limited

Marshall Buckley
Marshall Buckley

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Pulp & Paper Limited., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of three hundred and sixty thousand dollars and 00 cents (\$360,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

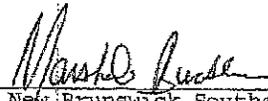
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Pulp & Paper Limited
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 12th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 12th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Pulp & Paper Limited., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom; including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Forest Products Inc., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of twenty eight thousand nine hundred seventy six dollars and eleven cents (\$28,976.11) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

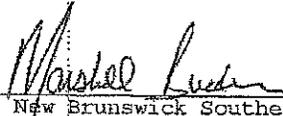
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Forest Products Inc.
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 23rd day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 23rd day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Forest Products, Inc., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Forest Products Inc., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of forty thousand dollars and 00 cents (\$40,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

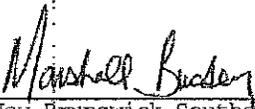
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Forest Products Inc.
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 30th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 30th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Forest Products, Inc., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART .

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Paper Limited., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of two hundred and twenty five thousand dollars and 00 cents (\$225,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

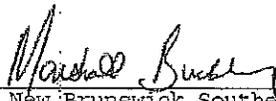
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Paper Limited
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 30th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 30th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Paper Limited., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART.

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, choses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

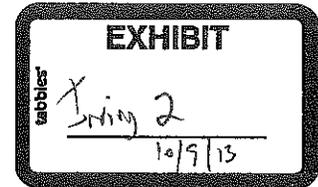
TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**CHAPTER 11 TRUSTEE'S MOTION FOR ORDER APPROVING
COMPROMISE AND SETTLEMENT WITH IRVING PAPER LIMITED,
IRVING PULP & PAPER, LIMITED, AND J. D. IRVING, LIMITED**

Robert J. Keach, the chapter 11 trustee in the above-captioned chapter 11 case, moves this Court for an order, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, approving a compromise and settlement with Irving Paper Limited, Irving Pulp & Paper, Limited, and J. D. Irving, Limited (collectively, "the Irving Entities") and affiliates of the Irving Entities (together with the Irving Entities, the "Irving Companies") on the terms set forth in this motion. The compromise and settlement resolves a dispute between the chapter 11 trustee and the Irving Companies concerning the trustee's attempts to recover money from the Irving Entities pursuant to the applicable sections of chapter 5 of the Bankruptcy Code. The chapter 11 trustee believes, in the exercise of his sound business judgment, that approval of the compromise and settlement is in the best interest of the estate of Montreal Maine & Atlantic Railway, Ltd. In further support of this motion, the movant states as follows:

JURISDICTION, VENUE, AND STATUTORY BASIS

1. The District Court has original but not exclusive jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 11 case to the Bankruptcy Court.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Bankruptcy Court has constitutional authority to enter final judgment in this proceeding.

3. Venue over this chapter 11 case is proper in this district pursuant to 28 U.S.C. § 1408, and venue over this proceeding is proper in this district pursuant to 28 U.S.C. § 1409.

4. The relief sought in this motion is predicated upon Rule 9019 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) and Rules 9013-1 and 9019-1 of the Bankruptcy Court’s local rules.

BACKGROUND

5. On August 7, 2013 (the “Petition Date”), Montreal Maine & Atlantic Railway, Ltd. (“MMA”) filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* MMA’s bankruptcy filing was precipitated by the train derailment in Lac-Mégantic, Québec on July 6, 2013 (the “Derailment”). The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. The Derailment also precipitated the filing by Montreal Maine & Atlantic Canada Co. (“MMA Canada”), MMA’s subsidiary, under Canada’s *Companies’ Creditors Arrangement Act*.

6. On August 21, 2013, the United States Trustee appointed Robert J. Keach (the “Trustee”) as the chapter 11 trustee pursuant to 11 U.S.C. § 1163.

7. MMA is a Delaware corporation that, since January 2003, has operated in an integrated, international shortline freight railroad system (the “System”) with MMA Canada. MMA and MMA Canada have fully-integrated business operations and accounting, with the MMA collecting most of the generated revenue and transferring to MMA Canada the funds required to pay its expenses.

8. The System has 510 route miles of track in Maine, Vermont and Québec and operates from its head office in Hermon, Maine. The System is a substantial component of the

transportation system of Northern Maine, Northern New England, Québec, and New Brunswick. Prior to the Petition Date, MMA employed approximately 179 people and operated about 15 trains daily.

9. As part of its ordinary course operations, MMA, in conjunction with two railroads affiliated with the Irving Entities, New Brunswick Southern Railway Company Ltd. ("NBSR") and Maine Northern Railway Company ("MNR" and together with NBSR, the "Irving Railroads") transport paper, pulp, wood products, and chemicals (the "Irving Freight Shipments") to and from manufacturing and processing facilities operated by one or more of the Irving Companies. Pursuant to haulage agreements among MMA and the Irving Railroads, MMA regularly receives from and delivers to the Irving Railroads, at interchange points where their respective rail lines connect, rail cars containing Irving Freight Shipments. In accordance with these haulage agreements, MMA bills the Irving Companies for the entire amount of freight charges owing with respect to the Irving Freight Shipments. The Irving Companies contend that MMA is obligated, upon receipt of payment, to remit to the Irving Railroads their share of such charges attributable to the rail services provided by the Irving Railroads in connection with such shipments. The Irving Companies are among MMA's largest customers and the Trustee contends that, as of August 28, 2013, the Irving Companies owed MMA a past due, outstanding balance of approximately \$885,733 on certain invoices. A true and correct copy of an MMA receivables aging is attached hereto as Exhibit A. The highlighted amounts on Exhibit A represent the past due invoices that total the outstanding balance of approximately \$885,733, which the Trustee claims to be due from the Irving Companies.

10. In addition to the interchange of Irving Freight Shipments, MMA and the Irving Railroads interchange freight shipments for third party shippers unrelated to the Irving Companies.

As of August 7, 2013, MMA owed NBSR approximately \$2.3 million and MNR approximately \$144,000 for freight charges earned by NBSR and MNR in connection with interline shipments.

11. On August 30, 2013, the Trustee filed the *Motion for Order Pursuant to 11 U.S.C. § 542(b)* [D.E. 124] (the “Section 542(b) Motion”) to recover the outstanding balance of \$885,733 from the Irving Companies.¹ The Irving Companies raised certain defenses against the Section 542(b) Motion. First, the Irving Companies allege that no money is owed to MMA and therefore nothing can be recovered pursuant to section 542(b). This allegation is based, in part, on a series of assignments effectuated on July 12, July 23, and July 30, 2013, pursuant to which NBSR transferred approximately \$1.3 million of NBSR’s claim against MMA to the Irving Companies. Following those assignments, on July 31, 2013 the Irving Companies setoff approximately \$761,000 of the debt owed by MMA against the amount owed by the Irving Companies to MMA. The Irving Companies contend that section 553(a) does not operate retroactively to limit or disallow a setoff effectuated before the petition date. They also contend that the setoff cannot be avoided pursuant to 11 U.S.C. § 547(b) and cite, in support of that contention, legislative history suggesting a Congressional intent to leave setoffs outside the operation of section 547.

12. Second, the Irving Companies and NBSR contend that the parties had a longstanding agreement and course of dealing that created an implied trust over a substantial portion of the money paid by the Irving Companies to MMA. In short, they contend that payments by the Irving Companies would be made only after MMA agreed to make immediate and concurrent payment of amounts owed by MMA to the Irving Railroads, which included the Irving Railroad’s share of the freight charges attributable to the Irving Freight Shipments. The Irving Companies refer to this as the “cash swap.” The parties do not disagree about the existence

¹ The Section 542(b) Motion also sought relief against Great Northern Paper. That aspect of the Section 542(b) Motion was resolved by a prior order of the Bankruptcy Court, and is not implicated by this motion.

of the “cash swap” as a longstanding practice; there is disagreement about the correct legal conclusion or conclusions to be drawn based on the existence of the “cash swap.”

13. The Trustee believes that NSBR’s transfer of claim to the Irving Companies is precisely the kind of improper setoff contemplated by section 553(a)(2)(B), and that section 547 operates to avoid that setoff. Further, the Trustee believes that because no written trust agreement exists between MMA and the Irving Companies, and because MMA was permitted to comingle the funds paid by the Irving Companies, there can be no implied trust agreement. The Irving Companies contend that a formal trust agreement is not required to create an implied or resulting trust. Moreover, the Irving Companies dispute the Trustee’s contention that MMA was permitted to comingle funds paid by the Irving Companies. They maintain that the agreement for a simultaneous swap of cash was, as a practical matter, intended to prevent the comingling of funds.

14. After the Section 542(b) Motion was filed, the Trustee and the Irving Companies engaged in formal and informal discovery. They also discussed the relative strengths and weaknesses of each party’s claims and defenses. The Irving Companies have indicated that, if the Court were to rule against them on both of their defenses, they would take an appeal.

15. The Trustee and the Irving Companies have reached a compromise and settlement to resolve the Section 542(b) Motion. The terms of that compromise and settlement are as follows:

a. The Irving Companies shall pay (a) \$150,000 to MMA’s estate, which payment shall be made within 2 business days after the entry of an order granting this motion (assuming that such order is not subject to any stay pending appeal); and (b) \$381,000 to MMA’s estate within 2 business days after an order on this motion has become final and non-appealable. The total amount payable to the estate on account of the compromise described herein is \$531,000, which is approximately 60% of the estate’s maximum gross recovery (\$885,000);

b. The Irving Companies’ payment of \$531,000 will be in full and final satisfaction of any and all claims and causes of action arising out of the invoices

attributable to the highlighted amounts on Exhibit A; and the Irving Companies shall be released from any and all liability related to such invoices;

c. The Trustee retains his right to bring any and all causes of action against the Irving Companies with respect to amounts owed by the Irving Companies to MMA that are not covered by the invoices attributable to the highlighted amounts on Exhibit A; and

d. The Irving Companies retain their rights to raise any and all defenses with respect to amounts owed by the Irving Companies to MMA that are not covered by the invoices attributable to the highlighted amounts on Exhibit A.

RELIEF REQUESTED

16. Pursuant to Rule 9019(a), the Trustee requests that the Court: (1) approve the compromise and settlement with the Irving Companies; and (2) approve service of the motion in the manner set forth herein.

BASIS FOR RELIEF

17. Rule 9019(a) provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). This Court has sound discretion to determine whether the proposed compromise is fair and equitable and in the best interest of the bankruptcy estate. *See Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995). In making this determination, the Court should consider: (i) the probability of success in the litigation of the claim being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and (iv) the paramount interest of creditors and a proper deference to their reasonable views. *See id.*, at 184; *In re High Voltage Eng’g Corp.*, 397 B.R. 579, 601 (Bankr. D. Mass. 2008). The *Jeffrey* factors are not, however, exclusive. *See In re Healthco, Int’l, Inc.*, 136 F.3d 45, 50 (1st Cir. 1998). Deference should be given to the trustee’s business judgment if the trustee can demonstrate that the settlement falls within a “range of reasonableness.” *In re Fibercore, Inc.*, 391 B.R. 647, 655 (Bankr D. Mass. 2008).

18. The Trustee believes that the terms of the compromise and settlement are fair and equitable, and that such compromise is in the best interest of MMA's estate. The factors articulated in Jeffrey warrant approval of the compromise and settlement. The Trustee believes he has a reasonable probability of successfully litigating the Section 542(b) Motion, but the Irving Companies have raised novel and nuanced defenses that are, at a minimum, credible. As is the case with all litigation, there is risk that the Trustee might not prevail. The second Jeffrey factor is not applicable to this proceeding, because, upon information and belief, the Irving Companies have sufficient resources to satisfy any judgment that might be entered against them. However, they have indicated an intent to appeal any adverse judgment and, as a result, any actual recovery could be months, if not years, down the road. This would unduly burden the estate with further expense and cause the Trustee to expend time that could otherwise be effectively utilized in managing MMA's operations.

19. In addition, a settlement with the Irving Companies also provides other benefits to the Estate. As mentioned above, MMA has numerous contractual relationships with NBSR and MNR, and the Irving Companies are a large customer of MMA. Given the significance of these relationships and the Irving Companies' expressed interest in acquiring some of MMA's assets or operations, the compromise and settlement represents sound business judgment. Finally, the settlement amount is approximately 60% of the total outstanding balance owed. Because the costs associated with continued litigation would necessarily reduce the recovery realized, the settlement amount falls squarely within the range of reasonableness.

20. Accordingly, the Trustee believes the motion should be granted because the compromise and settlement is in the best interest of MMA's estate.

NOTICE

21. Notice of this motion was served on the following parties on the date and in the manner set forth in the certificate of service: (1) the United States Trustee; (2) MMA's counsel; (3) the non-insider holders of the twenty (20) largest unsecured claims against MMA or, if applicable, the lawyers representing such holders; (4) applicable federal and state taxing authorities; (5) the holders of secured claims against MMA, or if applicable, the lawyers representing such holders; (6) counsel for the Irving Entities; and (7) others who have, as of the date of the motion, entered an appearance and requested service of papers in the chapter 11 case. In light of the nature of the relief requested in the motion, the Trustee requests that the Court approve service of the motion on the parties set forth above.

WHEREFORE, the Trustee requests that the Court enter an Order: (1) granting this motion; (2) approving, pursuant to Bankruptcy Rule 9019, the compromise and settlement; (3) finding that service to the parties and in the manner set forth is appropriate; and (4) granting such other further relief as may be appropriate.

Dated: October 1, 2013

ROBERT J. KEACH,
CHAPTER 11 TRUSTEE OF MONTREAL
MAINE & ATLANTIC RAILWAY, LTD.

By his attorneys:

/s/ Michael A. Fagone
Michael A. Fagone, Esq.
D. Sam Anderson, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle Street
P.O. Box 9729
Portland, ME 04104
Telephone: (207) 774-1200
Facsimile: (207) 774-1127
E-mail: mfagone@bernsteinshur.com



CustomerNo	CustomerName	Total	Current	30 Days	60 Days	90 Days	120 Days
IRVPAPS	IRVING PAPER	\$554,198.07	\$63,446.08	\$181,097.38	\$246,550.88	\$56,849.38	\$6,254.35
IRVPULP	IRVING PULP & PAPER	\$205,489.00	\$0.00	\$60,656.34	\$144,832.66	\$0.00	\$0.00
JDIRSTJ	J D IRVING LTD	\$159,230.85	\$10,628.08	\$71,305.40	\$52,806.54	\$10,446.79	\$14,044.04
MAI5600	MAINE NORTHERN RAILWAY	\$157,494.84	\$46,214.13	\$49,268.14	\$16,999.55	\$12,708.66	\$32,304.36
MNR	MAINE NORTHERN RAILWAY CO.	\$110,811.43	\$50,658.63	\$0.00	\$0.00	\$41,969.30	\$18,183.50
IRVPULP	IRVING PULP & PAPER	\$40,889.28	\$0.00	\$4,054.50	\$12,163.50	\$24,671.28	\$0.00
IRVOILS	IRVING OIL COMMERCIAL GP	\$3,138.75	\$147.25	\$1,038.50	\$1,116.00	\$837.00	\$0.00
NEW0651	NEW BRUNSWICK SO. RWY - C/R	\$725.60	\$22.12	\$0.00	\$147.30	\$17.14	\$539.04
IRWOOD	IRVING WOODLANDS LLC	\$200.00	\$0.00	\$0.00	\$0.00	\$0.00	\$200.00
JDIRSTL	J D IRVING LTD	\$25.00	\$0.00	\$0.00	\$0.00	\$0.00	\$25.00
NEW0671	NB SOUTHERN RAILWAY	\$2.97	\$0.00	\$13,800.00	\$8,179.00	\$0.00	-\$21,976.03
		\$1,232,205.79	\$171,116.29	\$381,220.26	\$482,795.43	\$147,499.55	\$49,574.26

C

SECURITY AGREEMENT

AGREEMENT made this 15th day of June, 2009, by and between **MONTREAL, MAINE & ATLANTIC CORPORATION**, a Delaware corporation with a place of business in Hermon, Penobscot County, Maine, **MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.**, a Delaware corporation with a place of business in Hermon, Penobscot County, Maine, and whose mailing address is 15 Iron Road, Hermon, ME 04401, **MONTREAL, MAINE & ATLANTIC CANADA CO.**, a Nova Scotia corporation with a place of business in Montreal, Quebec, Canada, and **LMS ACQUISITION CORPORATION**, a Delaware corporation with a place of business in Hermon, Penobscot County, Maine (hereinafter collectively called "Debtor") and **WHEELING & LAKE ERIE RAILWAY COMPANY**, a Delaware corporation with a place of business at Brewster, Ohio, and whose mailing address is 10 East First Street, Brewster, OH 44613 (hereinafter called "Secured Party").

Section I. Security Interest.

A. Debtor hereby grants to Secured Party a security interest in the Collateral described in Section II of this Agreement to secure the payment and performance of the Obligations defined in this Agreement. This Security Agreement is entered into with respect to transactions involving business and commercial purposes.

B. This Security Agreement secures the following Obligations:

(1) all obligations of Debtor to Secured Party evidenced by a Line of Credit Note of substantially even date in the original principal amount of Six Million Dollars and No Cents (\$6,000,000.00), as the same may be amended or extended (hereinafter referred to as "the Note") and all instruments, documents or agreements referenced or defined therein (such Note and other agreements being hereinafter collectively referred to as the "Loan Documents");

(2) any and all other liabilities of Debtor to Secured Party of every kind and description, direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising, and whether arising out of or under the Note, Loan Documents hereunder, or any other evidence of indebtedness of any kind or description;

(3) all costs incurred by Secured Party, directly or indirectly, for maintenance or preservation of the Collateral or to enforce any of Secured Party's rights under this Agreement or with respect to the Obligations or any of Secured Party's rights or remedies with respect to Debtor and/or any guarantor or other person liable for any of the Obligations, including, without limitation, reasonable attorneys fees and expenses incurred by attorneys for Secured Party;

(4) all obligations under any renewal, replacement, substitution, addition, modification, or extension of any of the foregoing; and

(5) any of the foregoing that arises after the filing of a petition by or against Debtor under the Bankruptcy Code, even if the obligations do not accrue because of the automatic stay under Bankruptcy Code § 362 or otherwise.

"Obligations" include obligations to perform acts and refrain from taking action as well as obligations to pay money.

C. Any term used in the Maine Uniform Commercial Code (Title 11, Maine Revised Statutes Annotated) as amended from time to time ("UCC") and not defined in this Agreement shall have the meaning given to the term in the UCC.

D. To the extent Debtor uses proceeds of a loan from Secured Party to purchase Collateral, Debtor's repayment of the loan shall apply on a "first-in-first-out" basis so that payment will be made in the chronological order that Debtor purchased such Collateral.

Section II. Collateral.

The Collateral of this Security Agreement is the following personal property of Debtor, wherever located, and inuring to the benefit of or owned by the Debtor now, or arising at any time in the future and wherever located as follows:

A. All Accounts and other rights to payment (including Payment Intangibles), whether or not earned by performance, including but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) that Debtor may have by law or agreement against any account debtor or obligor of Debtor.

B. All Inventory

C. All additions, accessions, substitutions, replacements, products to or for, and all cash or non-cash proceeds of any of the foregoing, including insurance proceeds.

Section III. Debtor's Representations and Warranties.

Debtor represents and warrants as follows:

A. Debtor has rights in or the power to transfer the Collateral, and Debtor has good and marketable title to the Collateral, free from any adverse claims, liens, security interests, encumbrances, or restrictions on pledge or transfer, except as created by this Agreement.

B. All information furnished by Debtor to Secured Party concerning the Collateral is, or will be at the time the same is furnished, accurate and complete in all material respects.

C. The office where Debtor keeps its records concerning Accounts is Hermon, Maine. Debtor will not remove any such records from Hermon, Maine, without the written consent of Secured Party.

D. All Collateral is located solely in the State of Maine, and shall not be removed from that location without the prior consent of Secured Party.

E. Debtor's exact legal name, place of residence (if Debtor is an individual), chief executive office, and state of incorporation or registration (if applicable) are as set forth in the first paragraph of this Security Agreement.

F. Until the Obligations are satisfied in full, Debtor agrees that it will not merge into or consolidate with any other entity or otherwise change Debtor's business structure, or sell all or substantially all of Debtor's assets, or change the state where Debtor is located, or change Debtor's name, without prior written notice to and consent of Secured Party.

Section IV. Accounts.

A. So long as Secured Party does not request that the account debtors be notified of the assignment of Accounts to Secured Party, Debtor shall receive all amounts due for services rendered or goods sold and shall make collections of all Accounts, and Debtor shall have full dominion and control over such proceeds and Accounts. Debtor will use all reasonable and diligent effort to collect Accounts when due.

B. At any time before or after default by Debtor hereunder, Debtor, when requested in writing by Secured Party, shall assign or endorse the Accounts, and all amounts due to Debtor for services rendered or goods sold, to Secured Party; shall notify account debtors that the Accounts have been assigned and should be paid to the Secured Party; and shall deliver to Secured Party, promptly upon receipt, all amounts due for services rendered or goods sold received by Debtor. Debtor, shall upon request of Secured Party, account for and pay over or deliver to Secured Party all such sums received from account collections and, pending such payment or delivery to Secured Party, Debtor will hold all such money and other proceeds in trust for Secured Party separate and apart from, and without in any manner commingling the same with, Debtor's funds, and Debtor will not use the same in the conduct of Debtor's business or for any other purpose.

C. At the time any Account becomes subject to a security interest in favor of Secured Party, Debtor warrants that such Account shall be valid and undisputed and that there shall be no setoffs or counterclaims against such Account except for disputes that may arise in the ordinary course of business have no material effect (financial or otherwise) in the aggregate upon Debtor.

Section V. Taxes, Assessments and Governmental Charges.

Debtor will pay promptly when due all taxes, assessments and governmental charges imposed upon Debtor or Debtor's Collateral, including without limitation, income, excise, sales, and use taxes.

Section VI. Prohibition on Other Security Interests or Financing Statements.

Except as expressly permitted by Secured Party, Debtor will not permit or suffer to exist any other security interest in or lien upon the Collateral nor any financing statement covering the Collateral to be on file in any public office except the financing statement in favor of Secured Party. Debtor will defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein. Secured Party, in the name of Debtor, may contest any claims made against Debtor wherein an adverse decision would impair Secured Party's security.

Section VII. Reports, Examinations, Inspections.

A. Debtor will immediately notify the Secured Party of any event causing loss or depreciation in value of the Collateral, and the amount of such loss or depreciation. Debtor will upon the request of Secured Party at any reasonable time furnish to Secured Party a report showing all Accounts and all other information relating to the Accounts as Secured Party may request.

B. Debtor will provide Secured Party with all such financial reports and data as required in the Loan Documents, and in addition, Debtor shall deliver such financial reports and data pertaining to the Collateral as Secured Party may reasonably request from time to time. Secured Party shall be entitled at its own expense to have audits made of Debtor during business hours by independent accountants, and to examine, inspect and make extracts from Debtor's books, electronically stored data, and other records.

C. Debtor and Secured Party may each inspect any Collateral in the other party's possession, at any time, upon reasonable notice.

Section VIII. Costs and Expenses Paid by Secured Party.

A. If Debtor fails to do so, Secured Party may, at its option, pay for, taxes, assessments or other charges on the Collateral; may discharge any security interest in or lien upon the Collateral. Any such payment made or expense incurred by Secured Party shall be added to the indebtedness of Debtor to Secured Party, shall be payable on demand, and shall be an Obligation secured by this Agreement.

B. Debtor shall pay to Secured Party on demand any and all expenses, including legal expenses and reasonable attorneys fees, incurred or paid by Secured Party for any purpose related to the Collateral or the Obligations, including, without limitation, expenses for (1) defending any claims against the Collateral; (2) enforcing any rights of Secured Party under this Agreement; (3) commencing, defending, intervening in or taking any other action in or with respect to any litigation or arbitration proceeding, including any bankruptcy, insolvency, or similar proceeding, relating to the Debtor or the Collateral.

Section IX. Financing Statements; Perfection.

A. Debtor authorizes Secured Party to file financing statements, amendments and continuations in its name at any time and from time to time until all Obligations secured hereby are paid in full, and in addition, Debtor agrees to execute a financing statement pursuant to the UCC in form satisfactory to Secured Party. Debtor shall pay all costs of filing any and all financing, continuation, or termination statements with respect to the security interest created by this Agreement.

B. So long as Debtor is not in default, Debtor shall have possession of the Collateral, except as expressly provided otherwise in this Agreement, and except to the extent Secured Party chooses to perfect its security interest in any Collateral by possession in addition to the filing of a financing statement. If any Collateral is in the possession of a third party, Debtor shall join with Secured Party in notifying the third party of Secured Party's security interest and obtaining an acknowledgment from the third party that it is holding the Collateral for the benefit of Secured Party.

C. Debtor will cooperate with Secured Party in obtaining control with respect to any Collateral consisting of Accounts.

Section X. Events of Default.

Debtor shall be in default under this Agreement upon the happening of any of the following events:

A. Any default by Debtor in the payment or performance of any of the Obligations, including the occurrence of any event of default as defined or set forth in the Loan Documents, subject to any applicable notice and cure provisions;

B. Debtor's failure to observe or perform any other covenant or agreement contained in this Security Agreement;

C. If applicable, any default under the terms of any guaranty held by or in favor of Secured Party of the indebtedness secured hereby, or under any agreement providing collateral for any such guaranty;

D. Breach by Debtor of, or the incorrectness of any representation or warranty contained in this Security Agreement, the Note, Loan Documents, or any of the other Obligations or any other agreement between Debtor and Secured Party;

E. Debtor shall be involved in financial difficulties as evidenced by:

(1) an attachment made on the Collateral or other assets of Debtor that is not discharged within thirty (30) days from the making thereof; or

(2) an admission in a written notice by Debtor to Secured Party of Debtor's inability to pay Debtor's debts generally as they become due; or

(3) the making of an assignment by Debtor for the benefit of creditors; or

(4) Debtor consenting to the appointment of a receiver for all or a substantial part of Debtor's property; or

(5) Debtor filing a petition in bankruptcy or for reorganization or the adoption of an arrangement under any federal or state bankruptcy or insolvency law, or the entry of an order for relief, or the entry of a court order without the consent of Debtor appointing a receiver or trustee for all or a substantial part of Debtor's property or for any other judicial modification or adjustment of the rights of creditors, which order is not vacated, set aside, or stayed within sixty (60) days of the date of its entry; or Debtor's insolvency meaning either that Debtor's liabilities exceed assets or that Debtor is unable to pay debts as the same come due;

F. Material uninsured loss, theft, substantial damage, destruction or encumbrance of any of the Collateral.

G. The encumbering or hypothecation or sale of any of the issued or authorized to be issued shares of stock of the Debtor, whether direct or indirect, and however occurring or arising.

H. Debtor or any guarantor of any of the Obligations is convicted of any offense that could result in the forfeiture of the Collateral, or the Collateral is subject to an order of forfeiture.

I. Secured Party receives a report from the Secretary of State of Maine or the Secretary of State of any other state where Debtor is located or where any Collateral is located indicating that Secured Party's security interest is not prior to all other security interests or other interests reflected in the report.

Section XI. Remedies.

A. If any event of default has occurred, the Secured Party may declare all Obligations secured hereby to be immediately due and payable and may exercise any and all rights and remedies available at law or in equity, including those available under the provisions of the Maine Uniform Commercial Code, and Secured Party shall have the right to pursue all such remedies separately, successively, or simultaneously. Secured Party may require Debtor to assemble the Collateral and make it available to Secured Party at a place to be designated by Secured Party. Debtor shall not be entitled to possess any of the Collateral after default, and Secured Party may enter upon and into the premises where Collateral may be located and remove the same. Such repossession shall not affect Secured Party's right to retain all payments made by Debtor prior thereto. Secured Party's acceptance of any payment subsequent to Debtor's default shall not affect any rights or obligations hereunder with respect to any subsequent payments or defaults.

B. Secured Party shall give such notice of any private or public sale or other disposition of Collateral as may be required by the UCC. Any requirement of reasonable notice shall be met, if notice is sent to Debtor or other person entitled thereto at least ten (10) days before the time of any sale or disposition of the Collateral, or any act contemplated.

C. Debtor shall pay to Secured Party on demand any and all expenses, including legal expenses and reasonable attorneys' fees, incurred or paid by the Secured Party in protecting or enforcing any rights of the Secured Party hereunder, including expenses incurred in taking possession of the Collateral, storing, and disposing of the same, or collecting the proceeds thereof.

D. If Secured Party elects to take possession of the Collateral, Secured Party shall have the right to continue to operate and manage Debtor's business for such period of time as Secured Party deems necessary in order to attempt to sell all of the Collateral as a going business.

E. Any proceeds of collection or enforcement or sale or other disposition of Collateral shall be applied first to expenses and reasonable attorneys' fees incurred by Secured Party and then to the satisfaction of the Obligations in such order as Secured Party may, in its sole discretion, determine, and Debtor shall remain liable for any deficiency.

F. After default, Secured Party may sell, lease, or otherwise dispose of any of the Collateral in its then present condition and Secured Party has no obligation to clean or repair the Collateral prior to sale. Secured Party may comply with any applicable state or federal law requirements in connection with a disposition of the Collateral. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties relating to title, possession, quiet enjoyment and the like. Any procedures allowed by this paragraph shall not be considered adversely to affect the commercial reasonableness of any sale of the Collateral.

G. No delay in accelerating the maturity of any Obligation or in taking any other action with respect to any event of default shall affect the rights of Secured Party later to take such action, and no waiver as to one event of default shall affect Secured Party's rights as to any other default.

H. Secured Party has no obligation to attempt to satisfy the Obligations by collecting them from any other person liable for them. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligations, all without affecting Secured Party's rights against Debtor. Debtor waives any rights it may have to require Secured Party to pursue any third party for any of the obligations.

I. Secured Party may exercise any rights or remedies set forth in the Loan Documents.

Section XII. Miscellaneous Provisions.

A. This Agreement may be amended only by the written agreement of Secured Party and Debtor. This Agreement, together with the Loan Documents, is the entire agreement of Debtor and Secured Party concerning the subject matter hereof. This Agreement restates the grant of security interests set forth in the Note and the other Loan Documents.

B. Debtor agrees to execute and deliver such additional documents and to do all such additional acts as Secured Party may reasonably request in order to evidence or perfect or maintain the priority of the security interest granted in this Agreement, or to effectuate the rights of Secured Party under this Agreement.

C. Any notice required by this Agreement shall be deemed to have been sufficiently given when a record has been (1) deposited in any United States postal box, with postage prepaid and properly addressed to the intended recipient, (2) received by telecopy, (3) received through the internet; or (4) personally delivered.

D. All rights of Secured Party hereunder shall inure to the benefit of the successors and assigns of Secured Party and all obligations of Debtor hereunder shall bind all persons who become bound as a debtor to this Security Agreement. Secured Party does not consent to any assignment by Debtor except as expressly provided in this Agreement.

E. This Security Agreement and all of the rights, remedies and duties of Secured Party and Debtor shall be governed by the laws of the State of Maine, except to the extent that the Maine Uniform Commercial Code provides for the application of the law of the state where Debtor is located.

F. If any provisions of this Agreement should be found to be void, invalid, or unenforceable by a court of competent jurisdiction, that finding shall only affect the provisions found to be void, invalid, or unenforceable, and shall not affect the remaining provisions of this Agreement.

Section XIII. Jury Trial Waiver.

DEBTOR AND SECURED PARTY AGREE THAT NEITHER OF THEM NOR ANY ASSIGNEE OR SUCCESSOR SHALL (A) SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM OR ANY OTHER ACTION BASED UPON, OR ARISING OUT OF, THIS AGREEMENT, ANY RELATED INSTRUMENTS, OR THE DEALINGS OR THE RELATIONSHIP BETWEEN OR AMONG ANY OF THEM, OR (B) SEEK TO CONSOLIDATE ANY SUCH ACTION WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED. THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY DISCUSSED BY DEBTOR AND SECURED PARTY, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS. NEITHER DEBTOR NOR SECURED PARTY HAS AGREED WITH OR REPRESENTED TO THE OTHER THAT THE PROVISIONS OF THIS PARAGRAPH WILL NOT BE FULLY ENFORCED IN ALL INSTANCES.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed under seal as of the day and year first above written.

WITNESS:

MONTREAL, MAINE & ATLANTIC CORPORATION

Norman Griffiths

By: M. Donald Gardner
M. Donald Gardner
Its CFO
Hereunto Duly Authorized

MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.

Norman J. Griffiths

By: M. Donald Gardner
M. Donald Gardner
Its CFO
Hereunto Duly Authorized

MONTREAL, MAINE & ATLANTIC CANADA CO.

Norman J. Griffiths

By: M. Donald Gardner
M. Donald Gardner
Its CFO
Hereunto Duly Authorized

LMS ACQUISITIONS CORPORATION

Norman J. Griffiths

By: M. Donald Gardner
M. Donald Gardner
Its CFO
Hereunto Duly Authorized
DEBTORS

WHEELING & LAKE ERIE RAILWAY COMPANY

[Signature]

By: [Signature]
Its Hereunto Duly Authorized
SECURED PARTY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

* * * * *

In re:

Montreal Maine & Atlantic Railway, Ltd.,

Debtor.

* * * * *

DEPOSITION OF: KARL HANSEN

BEFORE: Melissa L. Commeau, RPR, Notary Public,
at the offices of Rudman Winchell, 84 Harlow Street,
Bangor, Maine, on October 9, 2013, beginning at 10:20
a.m.

APPEARANCES

David S. Anderson, Esq. For Trustee of Montreal Maine &
Atlantic Railway

Alan R. Lepene, Esq. For Irving Pulp & Paper, Ltd.

Daniel L. Rosenthal, Esq. For Wheeling & Lake Erie Railway

DUVERNAY REPORTING

DEPONENT: KARL HANSEN

EXAMINATION

PAGE

By Mr. Rosenthal

3

* * * * *

EXHIBIT LIST

No. Marked	Description	
1	Notice of Deposition	4
2	Chapter 11 Document	10
3	Notice of Assignment	20
4	Documents	31
5	Risk Management	48
6	UCC Financing Statement	53

* * * * *

3

1 (This deposition was taken before Melissa L.
2 Commeau, RPR, Notary Public, at the offices of Rudman
3 Winchell, 84 Harlow Street, Bangor, Maine, on
4 October 9, 2013, beginning at 10:20 a.m.)
5 * * * * *
6 (Also present at the deposition was John Pappas.)
7 * * * * *
8 (The deponent was administered the oath by the
9 Notary Public.)
10 * * * * *
11 KARL HANSEN, called, after having been duly sworn on his
12 oath deposes and says as follows:
13 EXAMINATION
14 BY MR. ROSENTHAL:
15 Q Good morning, Mr. Hansen.
16 A Morning.
17 Q We met a few moments ago. My name is Dan Rosenthal,
18 and I'm the attorney for the Wheeling & Lake Erie
19 Railroad. You understand you're here to have your
20 deposition taken today?
21 A That's correct.
22 Q Have you ever had your deposition taken before?
23 A Yes.
24 Q So you're familiar with the process of questions and
25 answers and the court reporter taking down everything

4

1 we say on the record --
2 A Yes.
3 Q -- is that fair? Just a real quick refresher that
4 it's important that we communicate verbally, rather
5 than with nods of the head, shakes of the head, that
6 type of thing; does that sound familiar?
7 A Yeah.
8 Q I am going to try very hard to let you finish your
9 answers.
10 A Okay.
11 Q I am going to ask you to try to let me finish my
12 questions. It's high on the list of things that drive
13 court reporters crazy.
14 A Okay.
15 Q So we're off to a pretty good start, I think.
16 I want to start by handing -- Mr. Hansen, I
17 assume you know this, but I will say it anyway, if at
18 any point you feel that you need to take a break or
19 something like that, just let me know and we will
20 accommodate you.
21 A Okay.
22 (Deposition Exhibit Number 1, Notice of
23 Deposition, was marked for the record.)
24 BY MR. ROSENTHAL:
25 Q I am going to hand you what I have marked as Exhibit 1

5

1 to today's deposition. I'll just ask you if you have
2 ever seen this before?
3 A The first two pages, no; the last page, yes.
4 Q Okay. And you understand that that last page
5 represents a list of topics that my client wants to
6 ask Irving about?
7 A That is correct.
8 Q And that you have been designated by Irving to appear
9 to answer questions on those topics today?
10 A Yes.
11 Q And you're able to do so?
12 A Hopefully.
13 Q You can't say until you hear the questions, right?
14 But the topics are familiar to you?
15 A Yes.
16 Q Okay. What is your current position?
17 A I am the general manager, corporate credit and finance
18 for all JD Irving companies.
19 Q Okay. And are you employed by one particular company?
20 A I am employed by JD Irving, Ltd.
21 Q Okay. And is JD IRVING, Ltd. the parent of all of the
22 Irving companies?
23 A Well, for the sake of this, yes.
24 Q Okay. How long have you held your current position?
25 A Thirty-one years.

6

1 Q And prior to this current position, were you employed
2 by Irving?
3 A No.
4 Q By whom were you employed?
5 A Bank of Nova Scotia.
6 Q And what was your job at the Bank of Nova Scotia?
7 A International finance.
8 Q Let's go back and have you tell me what is the highest
9 level of education you've completed?
10 A University.
11 Q Okay. And when was that?
12 A Back in the '60s.
13 Q Okay. Did you graduate with a degree in finance?
14 A Institute of Canadian Bankers is what I went through.
15 Q Okay. And what was the first job that you had after
16 graduating?
17 A Bank of Nova Scotia.
18 Q Okay. And that was the international finance job that
19 you told me about?
20 A Well, it worked into it.
21 Q So what was it that you started in?
22 A Teller.
23 Q Okay. And worked your way up through the bank?
24 A Yeah.
25 Q Do you keep -- withdraw that.

7

1 Do you take any kind of continuing education
2 courses or anything like that?
3 A Just inhouse seminars and courses that we put on --
4 just internal -- company internal courses that are put
5 on.
6 Q And what kinds of things do those cover?
7 A They would cover certain aspects of international
8 finance, bankers would come in and give us updates on
9 the economies of various countries around the world.
10 We would then -- law firms would come up and give us
11 some business law as to what we should be looking for
12 and not looking for in terms of credit and financing
13 and so forth.
14 Q Okay. Can you just describe for me what your job
15 duties entail, in other words, what kind of work do
16 you do?
17 A Well, risk. Basically, my major role with the Irving
18 organization is to assess and -- assess risk and
19 protect the moneys of the Irving empire, their
20 receivables and --
21 Q And do you handle accounting work?
22 A No, I am not an accountant, no.
23 Q Okay. To whom do you report?
24 A I have a dual reporting. I report to Bill McClain, who
25 is the chief financial officer, and I also report to

8

1 Mr. Jim -- JD Irving, Mr. Jim Irving, who's the
2 president of JD Irving, Ltd.
3 Q Okay. And does Irving have inhouse accounting staff?
4 A Yes.
5 Q And do you work with those folks?
6 A Well, I work with them, yeah.
7 Q Do you deal directly with them in the course of your
8 dealings in your work for the company?
9 A Oh, yeah, from day to day I work with them, yeah.
10 Q Do you have accounting training?
11 A Some.
12 Q And what does that consist of?
13 A That would consist of numerous courses in -- I guess
14 it's the same thing as a CGA now in Canada, which is a
15 certified general accountant. Back when I was doing
16 it, it was a registered industrial accountant.
17 Q Okay. So in the course of your work, even though you
18 don't perform accounting functions, you may review
19 financial records, that type of thing?
20 A Yes, I review financial statements.
21 Q And do you look at the Irving company ledgers?
22 A What do you mean?
23 Q Well, let me withdraw it and kind of move on.
24 I want to mention a couple of background facts
25 that, I think, everybody agrees on, but I want to make

9

1 sure that when we talk today, that we are speaking the
2 same language, so bear with me.
3 Are you familiar with the fact that before --
4 well, that the Montreal Maine & Atlantic Railroad
5 hauled freight for certain Irving companies?
6 A Yes.
7 Q I'm going to call the Montreal Maine & Atlantic
8 Railroad MMA today.
9 A Yes.
10 Q The companies that the MMA hauled -- let me withdraw
11 that.
12 The MMA haul companies -- I'll withdraw that one,
13 too.
14 The MMA hauled freight for Irving Paper
15 companies; is that fair to say?
16 A Yes.
17 Q Okay. And I may use the term Irving Paper today.
18 A That's fine.
19 Q There were also a couple of railroads that Irving
20 owns, the New Brunswick Southern Railway company and
21 the Maine Northern Railway, first of all, those are
22 Irving companies; is that right?
23 A That is correct.
24 Q And when you told me earlier that you work for all of
25 the Irving companies, does that include those two

10

1 railroads?
2 A Yes, it does.
3 Q I may refer to those two jointly as Irving Railroad
4 today.
5 A Yes.
6 Q If at any point I am using terms and they don't make
7 sense to you, please tell me that and I will try to --
8 A Yeah.
9 Q -- be clearer about what I'm asking.
10 A Sure.
11 Q So part of the MMA's haulage of freight for Irving
12 Paper was then contracted out by MMA to Irving
13 Railroad, does that make sense -- Is that right?
14 A Yes.
15 Q Okay. And -- all right. I am going to show you what
16 I am marking as Exhibit 2.
17 (Deposition Exhibit Number 2, Chapter 11
18 Document, was marked for the record.)
19 BY MR. ROSENTHAL:
20 Q Have you ever seen that before?
21 A I don't believe I have.
22 Q Okay. Are you familiar with the existence of an
23 agreement between Irving and the MMA bankruptcy
24 trustee?
25 A Yes, I am.

11

1 Q Were you involved at all in the negotiation of that
2 agreement?
3 A No, I was not.
4 Q Are you aware of whether anyone at Irving was involved
5 in the negotiation of that agreement?
6 A It is my understanding that one of our corporate
7 lawyers, Bill Dever was involved in that.
8 Q Did you speak to Mr. Dever at all about it?
9 A No.
10 Q Okay. Do you know who, on behalf of the bankruptcy
11 trustee, Mr. Dever negotiated with?
12 A No, I do not.
13 Q Did anyone come to you and ask for your business
14 approval of an agreement?
15 A No, they did not.
16 Q Now, for some period of time, Irving Paper and MMA and
17 Irving Railroad had an agreement that I have seen
18 described as a swap agreement; does that sound
19 familiar?
20 A That is correct.
21 Q And under that agreement, Irving Paper would pay MMA
22 and then MMA would turn around and then immediately
23 pay Irving Railroad; is that right?
24 A Well, not quite.
25 Q Okay. What did I get wrong?

12

1 A There is a swap. It was -- I instituted the swap.
2 Q Okay.
3 A And the swap was Irving Paper would pay money to MMA
4 the same second that MMA paid money to NBSR, so it was
5 a system of -- by where I am going to pay you in the
6 same second you're going to pay me and that's what we
7 did.
8 Q And NBSR is the New Brunswick Southern Railroad?
9 A That is correct. Well, we're going to refer to it as
10 Irving Railways.
11 Q Fair enough.
12 A Because there are a couple of them.
13 Q Okay. All right. I just want to make sure the
14 record's clear when you said NBSR, it's --
15 A Well, it's the Irving Railways.
16 Q Okay. All right. So the deal was that MMA had to pay
17 Irving Railway and then immediately upon that
18 happening, then Irving Paper would pay MMA?
19 MR. LEPENE: Objection.
20 A No, same time frame.
21 BY MR. ROSENTHAL:
22 Q Same time?
23 A Yes.
24 Q Okay. And when was that agreement instituted?
25 A Several, several years ago.

13

1 Q Okay.
2 A Yes.
3 Q Was it ever -- was there ever a written agreement?
4 A No, there was not.
5 Q Was there ever an agreement written or otherwise that
6 the money paid in to MMA by Irving Paper would be
7 segregated from any other funds of the MMA?
8 MR. LEPENE: Can you just repeat that again?
9 MR. ROSENTHAL: Sure.
10 BY MR. ROSENTHAL:
11 Q Was there ever an agreement, whether written or
12 otherwise, that the MMA would take money coming into
13 it from Irving Paper and segregate that money from any
14 other MMA money?
15 A Well, that's the intent of the swap. The intent of
16 the swap was that I am going to say half the business,
17 half of the money that I'm sending out the door, half
18 of it is my own money that's supposed to come in the
19 door, so as far as I am concerned, that's my money,
20 and that's why we did the swap on a weekly basis was I
21 did not want to give them all my money and then sit
22 and wait for somebody to give me back my own money
23 because we did the work.
24 Q So you say my own money, you mean Irving?
25 A Yeah.

14

1 Q So what you want to make sure happens is that money
2 that one hand, call it paper, is paying out, comes
3 back into railroad right away?
4 A That's Irving, yes.
5 Q That's the what? I'm sorry.
6 A It's Irving. It's all Irving.
7 Q Yeah.
8 A Yeah.
9 Q All right. But in terms of MMA having any kind of
10 obligation to take this money from Irving and not
11 co-mingle it with any other funds, was there any kind
12 of agreement like that?
13 A Well --
14 MR. LEPENE: Excuse me --
15 A They didn't have time to.
16 MR. LEPENE: -- objection. What do you mean by
17 co-mingling?
18 BY MR. ROSENTHAL:
19 Q Put it in a bank account with other MMA money?
20 A I have no idea. All I know is we'd wire transfer the
21 money to them.
22 Q Yeah.
23 A They wire transferred the money to me the same day.
24 Q Okay.
25 A So in and out.

15

1 Q And you don't have any awareness of whether the
2 account to which Irving was wiring money at MMA was an
3 account that may have had any other MMA money in it?
4 A No knowledge.
5 Q Okay. It didn't matter under --
6 A No.
7 Q -- the swap?
8 A No.
9 Q Okay. Was there -- and -- was there any contractual
10 requirement, to your understanding, that MMA treat
11 that money coming in from Irving -- I am going to
12 withdraw that. I'm sorry.
13 The money coming in to Irving Railroad from MMA,
14 okay, under the swap, it sounds like it didn't matter
15 to Irving whether that was the same money that came
16 from Irving Paper as long as it was the same dollar
17 amount; is that fair to say? In other words -- well,
18 let me stop there. Does that question make sense to
19 you?
20 MR. LEPENE: Objection because it doesn't make
21 sense to me. What do you mean by the same money? Are
22 you talking -- what do you mean by the same money?
23 BY MR. ROSENTHAL:
24 Q Let me ask you, does the question make sense to you?
25 A No.

16

1 Q Okay. Let's just say that MMA had two bank accounts,
2 okay, Irving Paper wires money into one bank account
3 at MMA, MMA wires money from a totally different bank
4 account to Irving Railroad, was there any piece of the
5 swap agreement that would prevent that?
6 MR. LEPENE: Objection, lack of foundation.
7 You can answer.
8 A No.
9 BY MR. ROSENTHAL:
10 Q Are you aware of whether anything would prevent that?
11 A No.
12 Q Again, that wouldn't matter to Irving because Irving's
13 getting paid, right?
14 A Right.
15 Q And you were the guy who instituted the swap?
16 A Yeah.
17 Q So if you -- if there were some prohibition on that
18 practice, you would be aware of it, right?
19 A Not really. I don't -- I don't follow your train of
20 thought here. What difference does it make?
21 Q Let me turn that into a question.
22 A Okay.
23 Q Would it make a difference to you?
24 MR. LEPENE: What would make a difference?
25

17

1 BY MR. ROSENTHAL:
2 Q Whether the money came from the same account it was
3 wired into or a different account?
4 A No.
5 Q Okay.
6 A It wouldn't make any difference.
7 Q Fair enough. Fair enough. Now, at some point, Irving
8 Paper stopped paying MMA under the terms of the swap
9 agreement, correct?
10 A No.
11 Q Okay. Did the swap agreement stay in effect after the
12 derailment that occurred?
13 A Yes.
14 MR. LEPENE: Can you define for the record when
15 the derailment occurred --
16 MR. ROSENTHAL: Sure.
17 MR. LEPENE: -- so the record is clear?
18 MR. ROSENTHAL: Yeah.
19 BY MR. ROSENTHAL:
20 Q There was a derailment on July 6, 2013, of an MMA
21 train in Lac-Megantic, Quebec; you're familiar with
22 that?
23 A Yes.
24 Q Okay. That's what I am referring to when I say the
25 derailment. And you have to bear with the fact that I

18

1 am a little bit new to this case.
2 A Okay.
3 Q So I don't know what everyone takes for granite and
4 what everyone doesn't.
5 A Okay.
6 Q So after the derailment, did the swap agreement stay
7 in effect?
8 A In principle, yes.
9 Q In principle?
10 A Yes.
11 Q What do you mean by that?
12 A Mechanics, no; principle, yes.
13 Q Okay. Tell me what that means, please.
14 A Okay. The swap was -- we wire transfer money, you,
15 the same second, wire transfer money. Derailment
16 happens, their operation theoretically ceases. We
17 know enough about MMA and MMA's position financially
18 that signals trouble, so I knew that if I sent money
19 to MMA, they were in no position to send the money
20 back. So I used the same results with more
21 documentation.
22 Q So you set about a way to effectuate accomplishing the
23 same thing as the swap?
24 A Correct.
25 Q Without actually doing the swap; is that fair to say?

19

1 A Correct.
2 Q Okay. And what was it your plan called for?
3 A We did an assignment.
4 Q Okay.
5 A Of funds.
6 Q Can you tell me what that entailed?
7 A What that entailed is moneys that were owed to the
8 railway, Irving Railway, was assigned over to Irving
9 Paper and Irving Paper was able to offset that money
10 with moneys they would owe MMA.
11 Q And so that would enable Irving Railroad to be paid
12 without having to physically actually give the money
13 to the MMA?
14 A Right.
15 Q And I think you said this earlier, but the desire
16 there is to avoid a situation where you're paying
17 money over to MMA and the railroad will never get it
18 back?
19 A Correct.
20 Q And who came up with this plan?
21 A I did.
22 Q Okay. Did you discuss it with anyone at the MMA?
23 A No.
24 Q Did you document it with the MMA at all in terms of
25 writing a letter, something like that saying, here's

20

1 how we're going to do this?
2 A Yes.
3 Q Okay.
4 A Well, we -- yes.
5 Q Tell me about that correspondence.
6 A Our accounting folks sent them a document saying,
7 here's the moneys that we have offset, please amend
8 your records accordingly and offset these invoices as
9 not being owed.
10 Q Okay. So Irving went ahead and just implemented the
11 plan and then let the MMA know that it had done so; is
12 that fair to say?
13 A That's correct.
14 Q Okay.
15 (Deposition Exhibit Number 3, Notice of
16 Assignment, was marked for the record.)
17 BY MR. ROSENTHAL:
18 Q I'm handing you what I have marked as Exhibit 3. Have
19 you seen this before?
20 A Yes.
21 Q This is a collection of assignments from -- well, the
22 front page is a notice of assignment from the New
23 Brunswick Southern Railway to the MMA, correct?
24 A Yes.
25 Q Page 2 reflects an actual assignment from the Irving

21

1 Railroad to Irving Paper?
2 A Yes.
3 Q And the third page is a signature?
4 A Yes.
5 Q And then behind that first collection of three pages
6 is a series of additional collections of three pages
7 representing the same thing with different dollar
8 amounts and different dates; is that fair to say?
9 A That's correct.
10 Q And are those the assignments that you were referring
11 to a moment ago?
12 A Yes.
13 Q I have got a total here of six of them. Is that the
14 total number of assignments that actually was made?
15 A I am not sure.
16 Q Okay. Do you have reason to believe there may have
17 been more?
18 A No.
19 Q Okay. The total, by my math, and you're more than
20 welcome to challenge it, is \$1,273,976.10?
21 A That sounds correct.
22 Q Okay. That was going to be my question. You
23 anticipated it.
24 A Yeah.
25 Q And the notice of assignment on page 1 of each of

22

1 these assignment packages, is this the notification
2 that you mentioned a moment ago that your accounting
3 staff provided?
4 A No.
5 Q Okay.
6 A This -- when the assignments were done --
7 Q Mm-hmm.
8 A -- then this would have been mailed to MMA or sent to
9 MMA.
10 Q Okay.
11 A What I was referring to earlier was when Irving Paper
12 actually paid money to NBSR for the assignment, that's
13 when our accounting folks would send to MMA, this is
14 what we paid and so you don't owe -- you don't owe it
15 anymore to Irving Railways, so correct your books.
16 Q Okay. And did it state specifically -- well, let me
17 back up.
18 Was that notification that you just described
19 sent in one instance or each time a payment was made?
20 A Well, there was only one big payment, so it was only
21 once.
22 Q Okay. All right. Okay. So the cover page here on
23 each of these assignments is simply informing the MMA
24 that the assignment's actually been made?
25 A Yes.

23

1 Q And was there any discussion with the MMA about the
2 fact that that would be done?
3 A Not that I'm aware of.
4 Q Okay. Who's Marshall Buckley?
5 A Marshall Buckley is one of my assistants.
6 Q And who is Jim Mehan?
7 A Jim Mehan is the -- well, he is one of the
8 accountants, controllers, I guess, of JD Irving, Ltd.
9 Q Did Irving Paper pay any money to Irving Railroad in
10 exchange for these assignments?
11 A Yes, they -- yeah.
12 Q And how much was that?
13 A Off the top of my head \$780,000.
14 Q So Irving Paper got about a million two in ownership
15 of amounts that MMA owed and paid Irving Railroad
16 about \$780,000 for that; is that right?
17 A No.
18 Q Okay.
19 A No, you're misinterpreting that.
20 Q Okay.
21 A What it is is Irving did assignments for 1.2 million.
22 The 1.2 million is made up of amounts.
23 Q Yeah.
24 A Some of those amounts would have been physical charges
25 that could be seen, other amounts are amounts that are

24

1 in the system somewhere because they're moving
2 freight, so you never know what that number is. So
3 when you do an assignment, you do an assignment, say,
4 for \$300,000, then you do another assignment for
5 \$500,000, all right, so you have two assignments out
6 there for 800,000, but at the end of the day, you only
7 might be owed 600,000. All you get paid for is what
8 you're owed. So the number on the assignment, in my
9 mind, is irrelevant, we are just putting you on
10 notice, whatever that number is is what we are going
11 to get paid. This is so that we can trap any moneys
12 that -- in the system that you can't easily make
13 account of right away. Well, that's what that's
14 about.
15 Q Okay. So the payment of the 780 -- 780,000, more or
16 less, was payment of actual bills that the MMA owed
17 the Irving Railroad?
18 A Yes, you could actually see.
19 Q Yeah.
20 A Yes.
21 Q Separately from that, did Irving Paper actually pay
22 any consideration to Irving Railroad simply to get the
23 right to collect from the MMA?
24 A Absolutely not.
25 Q Okay. Did the Irving -- did Irving paper, by getting

25

1 these assignments, have any intention to ever actually
2 get money from MMA?
3 A Irving Paper get money from MMA?
4 Q Right.
5 A You better explain that. I don't understand that.
6 Q Irving Paper, by virtue of the assignments, received
7 Irving Railroad's right to be paid by MMA, right?
8 A Well, I suppose you can look at it that way.
9 Q Well, isn't that what was being assigned --
10 A No.
11 Q -- was Irving Railroad's right to be paid by MMA?
12 A No, the reason that the assignments were done is I
13 wanted an offset. I had no intentions of going to MMA
14 looking for money. I already had the money.
15 Q You just wanted to be able to keep it without paying?
16 A Right. I wanted an offset.
17 Q Right. Okay.
18 A So you do assignments to do offsets.
19 Q So there was never any intention that the party to
20 whom MMA -- MMA owed money was going to change hats
21 and money was just going to go -- instead of going to
22 the railroad, it was going to go to the paper company;
23 is that correct?
24 A Well, the way it works is the Irving Paper company had
25 bought the receivable for 100 percent of the

26

1 dollars --
2 Q Yeah.
3 A -- from NBSR, so now they were owed the debt by MMA,
4 so -- but they owed money to MMA, so they offset it.
5 Q Yeah. So money's actually not going to change hands?
6 A Right.
7 Q Okay. Okay. Is this something that you simply came
8 up with and effectuated or were there meetings at
9 Irving about this?
10 MR. LEPENE: Define something.
11 MR. ROSENTHAL: Sure.
12 BY MR. ROSENTHAL:
13 Q The assignment plan that you described earlier and we
14 have been talking about under Exhibit 3, is that
15 something that you simply implemented, decided to do,
16 or did you have meetings within the company?
17 A No, this is standard procedure. I do this all the
18 time.
19 Q Okay.
20 A So we did it.
21 Q Okay. So it's Irving's position that Irving
22 Paper's -- let me back up. Irving Paper owed some
23 money to MMA before the --
24 A Excuse me?
25 Q Irving Paper owed some money to MMA before these

1 assignments were done; is that correct?
 2 A Yes.
 3 Q And is it Irving's position that now that debt has
 4 been wiped out by virtue of the setoff?
 5 A Not all of it.
 6 Q Okay. There is some amount still owing?
 7 A Moneys that would be owing -- well, in order to answer
 8 this -- see, right now you've got this so-called
 9 settlement thing, so if you take that aside --
 10 Q Forget about that for the moment.
 11 A Okay. You take that aside and you're looking at it,
 12 then I would say that there would be no moneys owed by
 13 anybody to MMA by virtue of my assignments.
 14 Q Okay.
 15 A That was what's in my mind.
 16 Q So on Irving's books, there would have been at one
 17 time an account payable to MMA --
 18 A Yes.
 19 Q -- for rail freight charges, right?
 20 A That is correct.
 21 Q And Irving's position is that that's now been wiped
 22 out?
 23 A That was my position, yes.
 24 Q Okay. How is that actually -- how is that actually
 25 done? In other words, were there book entries made to

1 effectuate that?
 2 A Yeah, and that's -- copies of which we gave to MMA.
 3 Q So what -- tell me what those were.
 4 A Well --
 5 Q What were the book entries that Irving made?
 6 A Well, what would have happened would have been, they
 7 got the assignment. There was \$781,000 roughly that
 8 was -- could be seen that was owed by MMA to -- to the
 9 -- MMA owed to NB Southern, right?
 10 Q Mm-hmm.
 11 A So under the assignment, Irving Paper deducted
 12 \$781,000 for money they would owe to MMA and they sent
 13 that 781 over to NBSR, so that NBSR got paid for their
 14 receivable. And if there was any difference owing,
 15 that would go to MMA. In this particular case, due to
 16 the various different assignments, there was no money
 17 owed.
 18 Q So was there an actual book entry made adjusting the
 19 payable to MMA?
 20 A Yes, there had to be.
 21 Q Okay.
 22 A Yes.
 23 Q And does Irving keep one set of books for all of the
 24 Irving entities or --
 25 A No.

1 Q -- does Irving Paper have its own books? Sorry, I --
 2 let me try that again.
 3 Does Irving keep one set of books for all the
 4 entities?
 5 MR. LEPENE: Irving being whom?
 6 MR. ROSENTHAL: Well, fair question.
 7 BY MR. ROSENTHAL:
 8 Q Does Irving Paper keep its own set of books?
 9 A I would assume so. As I say, I am not in the
 10 accounting, so I would assume so.
 11 Q Okay. Did you instruct anybody in the accounting
 12 department to actually make book entries to reflect --
 13 A I did not.
 14 Q -- the setoff? Okay. Do you know if anyone else did?
 15 A I do not know that.
 16 Q Okay. If someone were responsible to instruct the
 17 accounting department to do that, would that have been
 18 you?
 19 A Not necessarily.
 20 Q Who else might it have been?
 21 A Well, it could have been the -- anyone. It could be
 22 the corporate controller. It could be the -- the
 23 accounting department for Irving Paper would have got
 24 a copy of the assignment, then they would act on that
 25 assignment, so the assignment itself would be the

1 instruction.
 2 Q And who would it be in the accounting department who
 3 would be responsible to do that?
 4 A I wouldn't know.
 5 Q Okay. Who is the -- you report to the CFO. Is he the
 6 head of the accounting department?
 7 A No, he's not.
 8 Q There's someone who reports to him?
 9 A Probably.
 10 Q Okay. Who is in charge of the accounting department?
 11 A I have no idea.
 12 Q Okay. So if we wanted to know what book entries, if
 13 any, were made to reflect setoffs, we would need to
 14 get the actual books of Irving Paper to find that
 15 information; is that fair to say?
 16 A I think you already have it.
 17 Q And it consists of the assignments themselves?
 18 A No.
 19 Q No?
 20 A It consists of what we sent on Gardner, telling him
 21 this is what we setoff, here are the invoices, and set
 22 them off.
 23 Q All right. So let's -- I think you're referring to --
 24 well, let me show you Exhibit 4.
 25 (Deposition Exhibit Number 4, Documents, was

31

1 marked for the record.)
2 BY MR. ROSENTHAL:
3 Q Have you seen that before?
4 A Yes.
5 Q Is this what you were referring to a moment ago?
6 A Yes.
7 Q All right. Now, page 1 of the document is an email
8 string. The first email is from Mr. Mehan to
9 Mr. Gardner, it appears anyway; is that right?
10 A Yeah, it appears it came from Jim -- Jim Mehan and
11 it's going to Marshall Buckley, the first one.
12 Q Okay. Let me ask you --
13 A And then --
14 Q Yeah. All right. And he says to Mr. Buckley, here's
15 the e-mail I sent to D. Gardner?
16 A Yeah.
17 Q And then below that we see him sending an email to
18 mdgardner@mmarail.com?
19 A Yes.
20 Q So he says here, Don, I was asked to send you support
21 for what invoices were paid to NBSR through
22 assignments.
23 A Mm-hmm.
24 Q Who asked him to do that?
25 A I have no idea.

32

1 Q All right. It wasn't you?
2 A No.
3 Q He says that he's sending support for what invoices
4 were paid to NBSR through assignments, so does that
5 mean that the records attached here are showing the
6 paper -- Irving Paper paying Irving Railroad pursuant
7 to the assignments?
8 A I would assume that, yes.
9 Q All right. And the attachment is a series of
10 spreadsheets and these are showing us specific
11 invoices in which Irving Paper has made payment to
12 Irving Railroad; is that right?
13 A That is correct.
14 Q And the payments reflect specific invoices from MMA to
15 Irving Railroad; is that right?
16 A Yes.
17 Q All right. And just to be clear, make sure I
18 understand this, this -- Irving's position is that
19 this is what reflects the setoff that you referred to;
20 is that correct?
21 A Well, as far as I know, it does, yes. This is what
22 was sent to Don Gardner saying, take this off your
23 records because we have sent this money to Irving
24 Railways.
25 Q Okay. Is there any other written communication from

33

1 Irving to Mr. Gardner on this topic of the setoff?
2 A Not that I'm aware of.
3 Q Okay. Let me ask you this, this may seem like a dumb
4 question, but why did Irving Paper actually physically
5 -- I'll withdraw the word physically -- pay Irving
6 Railroad money?
7 A Why did we actually physically do that?
8 Q Yeah.
9 A Because they're -- even though they're owned by the
10 same owner, they're separate companies with separate
11 bank accounts and separate lines of credit and
12 whatever, so we -- yeah.
13 Q So Irving Paper, by virtue of the assignments, had the
14 right to collect from the MMA or to try to do a setoff
15 directly, right? I mean, Irving Paper could have
16 taken the money it owed to MMA and just set it off
17 against the money that it now had the right to collect
18 under the assignments with no money changing hands,
19 correct?
20 A Say that again. What?
21 Q One way of effectuating a setoff would be that Irving
22 Paper could say, I owe you money MMA, but, you, MMA,
23 owe Irving Railroad and I now have the right to
24 collect that, so nobody's paying anybody?
25 A That's not legal.

34

1 Q You can't do that?
2 A No, it's two separate entities.
3 Q Even though you had the assignment?
4 A No, if I had -- that's why you do the assignment
5 because you have to assign over to the other company
6 your rights, your money, in order to have a setoff. I
7 just can't set it off because it happened to be an
8 Irving company.
9 Q But if you had the Irving Railroad's rights under the
10 assignment, in other words, if Irving Paper had Irving
11 Railroad's rights under the assignment, it could
12 simply have not paid MMA?
13 A No, you have --
14 Q You -- go ahead.
15 A Okay. MMA or NBSR -- I am going to pick up round
16 numbers so we all -- right. NBR -- NBSR is owed,
17 pardon the mistake, \$100,000 from MMA, okay?
18 Q Yeah.
19 A And they say, oh, gee, you know, I might not get paid
20 here, but this Irving company over here owes \$100,000
21 to MMA, right? But this Irving company cannot pay
22 this 100,000 by saying, well, MMA, you owe this outfit
23 over here.
24 Q Right.
25 A That doesn't work. So what you've got to do is Irving

35

1 Paper has to physically get that money assigned over
2 to them so they can offset, but either way Irving
3 Paper has to pay the \$100,000, but they don't pay it
4 to MMA, they pay to NBSR because they bought NBSR's
5 debt that MMA owed them.
6 Q You have kind of hit on my question.
7 A Okay.
8 Q I am trying to understand why it's still necessary to
9 pay Irving Railroad if Irving Railroad has assigned
10 away its right to be paid? I mean, Irving Railroad
11 has said --
12 A An assignment is nothing more than selling
13 something --
14 Q Okay.
15 A -- for -- I mean, sold it for a value of 100 percent
16 that was owed, so that NBSR got its money, okay?
17 Q So Irving Railroad's receivable from MMA --
18 A Irving Rail -- yeah.
19 Q -- was not wiped out by virtue of the assignment --
20 A Yeah.
21 Q -- to Irving Paper of the right to collect on that?
22 A Pardon me?
23 Q The assignment was from Irving Railroad to Irving
24 Paper of the right to collect the money that it may
25 owe the railroad?

36

1 A Well, assignment itself --
2 Q Yeah.
3 A -- doesn't wipe out the receivable. All it's saying
4 is, I am going to assign this to you, you get my money
5 for me, okay, is what basically an assignment says.
6 And the way that --
7 Q Okay.
8 A -- Irving Paper gets its money for the railway is
9 offsetting it because we owed them.
10 Q So Irving -- so then what Irving did was pay Irving --
11 Irving Paper paid Irving Railroad and then Irving
12 Paper would have a right to be paid by MMA or to do a
13 setoff, right?
14 A Yeah -- well, it's all playing on words here, but the
15 bottom line is that Irving Paper had the money, right?
16 Q Right.
17 A And they owed a bunch of money to MMA, so they could
18 either take the receivable that MMA owed to NBSR over
19 to them and deduct it and, theoretically, if there is
20 any difference, give it to MMA, right, or they could
21 give all the money to MMA and MMA pay NBSR. All the
22 assignment does is make sure that the moneys
23 rightfully owed to NBSR gets to NBSR.
24 Q Okay.
25 MR. LEPENE: Would this be a convenient time to

37

1 take a break?
2 MR. ROSENTHAL: Sure.
3 (Whereupon there was a break in the deposition at
4 11:02 a.m. and the deposition reconvened at 11:13
5 a.m.)
6 BY MR. ROSENTHAL:
7 Q Before the break, Mr. Hansen, we were talking about
8 the process of Irving Paper actually paying Irving
9 Railroad on the MMA invoices; do you recall that?
10 A Yes.
11 Q Were there any discussions within Irving about
12 handling this process that way or is that just
13 something that -- that you did because that's how you
14 believed it was supposed to be done?
15 A Well, no. It -- we have -- we had an arrangement with
16 MMA and that arrangement was to swap.
17 Q Right.
18 A After the accident, it was pretty clear in my mind
19 that the mechanics of the swap were going to be very
20 difficult for them to achieve, in other words,
21 instantaneous, I give you your money, you give me
22 mine, right? And you have to bear in mind that the
23 money that I'm giving out, 50 percent of that money is
24 belonging to me anyway because it's my railway, when I
25 say my, I am talking Irving, my railway is the one

38

1 that hauled the freight, right?
2 Q Right.
3 A So what I'm attempting to do here is I'm attempting to
4 do the swap and I am saying, well, gee, they can't do
5 the swap like we've done for the last seven years, so
6 we need the mechanics of how we're going to do it.
7 And this achieves the same result, so that's why we
8 did that.
9 Q Right. And the piece in which you effectuate, sort of
10 simulate the swap by having Irving Paper pay Irving
11 Railroad, that's just the piece I am zeroing in on,
12 was that something that was discussed internally?
13 A No.
14 Q You just --
15 A Did it.
16 Q Your decision to do it that way for -- for whatever
17 reason?
18 A Because it's got to be done.
19 Q Okay. All right. Did Irving inform the MMA that it
20 was permanently resolving the MMA's debt to Irving
21 Railroad?
22 A I have no idea.
23 Q Okay. And I think I may have asked you this, but bear
24 with me, did you have any discussions with anyone
25 within Irving about how to handle on the books the

39

1 payable that Irving Paper had to the MMA?
2 A No, I did not.
3 Q Okay. Do you know if anyone else did?
4 A I have no knowledge of that.
5 Q Okay. Did Irving inform the MMA that it was
6 permanently resolving Irving Paper's debt to the MMA
7 by effectuating a setoff?
8 A I have no knowledge of that either.
9 Q Okay. So you didn't have those kinds of
10 conversations?
11 A No, I did not.
12 Q And you don't know if anyone else did?
13 A No, I don't.
14 Q Would it be -- in your experience, would a
15 conversation like that take place with the MMA without
16 you knowing about it?
17 A It could.
18 Q Okay. Who would -- whose job title or who is the
19 person who -- if a conversation like that were to
20 occur, who would it be?
21 A Probably somebody in the accounts payable.
22 Q On Exhibit 4, which I see you have on the top of the
23 pile, adding up all the invoices, this is another one
24 of these moments when you may want to take my word for
25 the math --

40

1 A Okay.
2 Q -- but you don't have to, I added them all up and I
3 came up with 761,982.08.
4 A Okay.
5 Q Does that sound right?
6 A Sounds good, yeah.
7 Q Are there any other invoices that -- let me back --
8 withdraw that.
9 Are there any other MMA invoices to Irving
10 Railroad that Irving Paper paid Irving Railroad that
11 aren't shown here in Exhibit 4?
12 A No.
13 Q Okay. Now, I also looked at the trustee's motion
14 here, which is Exhibit 2 in your pile, and looking at
15 paragraph 9, it -- on page 3, it indicates in the very
16 last sentence of the paragraph, almost all the way
17 down the page, that there were past due invoices
18 totaling approximately \$885,733 that trustee, which
19 stands in for MMA, claims are due from the Irving
20 companies.
21 A Okay.
22 Q So what I'm wondering is the difference between 885
23 and 761, do you know what happened to that dollar
24 amount?
25 A Yes, Irving Paper still owes it --

41

1 Q Okay.
2 A -- to NBSR because it's part of the assignment, but
3 we -- but what happened was MMA filed for bankruptcy,
4 so we stopped everything at that stage because we
5 weren't too sure what we should be doing here, so once
6 the bankruptcy was filed, then a hold was put on the
7 whole thing, other than what was previously done was
8 done. So that is the balance that if MMA did not go
9 bankrupt would have been paid off to NBSR.
10 Q Okay. Let me try to walk through that. There's --
11 call it \$120,000, 125?
12 A Whatever, yeah.
13 Q That's money that the -- that Irving Paper owes the
14 MMA, but that Irving Paper takes the position that
15 it's allowed to setoff against the MMA debt to the
16 Irving Railroad, which Irving Paper now holds and
17 would pay the Irving Railroad; is that fair? I
18 mean --
19 A You're getting this all --
20 Q Well, there's a lot in there, so I can break it down,
21 if I need to.
22 A Okay.
23 Q I don't want to assume that, you know --
24 MR. LEPENE: And I think he's asked -- you've
25 asked, and he's answered that in his previous

42

1 testimony.
2 MR. ROSENTHAL: Well, I want to make sure on this
3 piece that I understand it.
4 BY MR. ROSENTHAL:
5 Q So let me try again.
6 A Okay.
7 Q There's some money out there, call it \$120,000, more
8 or less, that represents money that Irving Paper would
9 owe the MMA for haulage, correct?
10 A No.
11 Q Okay.
12 A They now owe NBSR.
13 Q They now owe NBSR by virtue of the setoff that you
14 talked about earlier today?
15 A By virtue of the assignments.
16 Q All right. So Irving Paper would have paid the Irving
17 Railroad that amount, but was concerned about the
18 bankruptcy filing and whatever effects that might
19 have?
20 A Correct.
21 Q And upon -- if Irving Paper had paid the Irving
22 Railroad that amount, it would -- Irving's position is
23 it would justify a setoff and Irving Paper wouldn't be
24 obligated to pay the MMA?
25 A Correct.

43

1 Q And that's all under the terms of the same setoff
2 arrangement that you talked about today?
3 A Correct.
4 Q Okay. All right. I know I have asked you about
5 accounting books and you have told me that's not your
6 domain, correct?
7 A Correct.
8 Q I'm going to ask you anyway, though, have you had any
9 conversations with anyone about how to handle -- let
10 me withdraw that.
11 We talked earlier about how to handle the
12 placement on the books of Irving Paper's payable to
13 MMA in light of this arrangement, right?
14 MR. LEPENE: Is there a question?
15 MR. ROSENTHAL: Well, it ended with a question,
16 right?
17 A If you say. Whatever.
18 BY MR. ROSENTHAL:
19 Q Do you recall talking about that earlier? Seriously,
20 do you remember me asking you about how Irving handled
21 the payable to the MMA on its books?
22 A I don't have any knowledge of how they would do that,
23 but --
24 Q Right.
25 A -- yeah.

44

1 Q Right. And that's what you told me and that's fine.
2 A Yeah.
3 Q I want to just ask you separately, though, as between
4 Irving Paper and Irving Railroad in terms of book
5 entries, do you have any idea how that was handled on
6 the books at Irving?
7 A No.
8 Q It's not your domain?
9 A No.
10 Q You didn't have any conversations with anybody about
11 that?
12 A No.
13 Q Did anyone who works for you have any conversations
14 with the accounting group about that?
15 A No, certainly not.
16 Q All right. And you personally -- did you talk to
17 Mr. Gardner about all of this at any point?
18 A No.
19 MR. LEPENE: Well, all of this?
20 BY MR. ROSENTHAL:
21 Q All of this meaning the setoff that we have been
22 talking about today?
23 A Well --
24 Q Let me start over.
25 A The swap or the setoff?

45

1 Q The setoff?
2 A The setoff being the -- these documents, right? I did
3 not talk to Mr. Gardner about the assignments.
4 Q Okay. Or about this -- the process of setoff?
5 A Or the process of the setoff.
6 Q Or about handling the payable on the books?
7 A Correct.
8 Q Extinguishing debts?
9 A Correct.
10 Q And is it fair to say that you did not instruct anyone
11 who works for you to have that kind of conversation
12 with Mr. Gardner?
13 A That is correct.
14 Q You're not aware of anyone else having that kind of
15 conversation with Mr. Gardner?
16 A I am not aware of it, no.
17 Q Okay. Do you know if Irving sent a certified return
18 receipt letter stating that the offset would be done?
19 A I'm not aware of it.
20 Q Is Irving Railroad a member of the American
21 Association of Railroads?
22 A I have no idea.
23 Q Do you know if MMA is?
24 A I have no idea.
25 Q Do you know if Irving subscribes to the Interline

46

1 Settlement System?
2 A I have no idea.
3 Q Who would know that within Irving?
4 A I would assume the people that run the railway.
5 Q Okay. Do you know if Irving Railroad subscribes to
6 the Railway Accounting Rules?
7 A I have no idea.
8 Q And, again, would that be someone within Irving
9 Railroad who would know that?
10 A That is correct.
11 Q Have you ever heard of something called mandatory rule
12 1 of the railway accounting rules?
13 A I have not.
14 Q All right. Now, you're aware, aren't you, that
15 Wheeling & Lake Erie Railroad has a security interest
16 in Irving's debt to the MMA?
17 A I have now, yes.
18 Q Okay. When did you first learn that?
19 A About two weeks ago.
20 Q Okay. How did you learn that?
21 A I learned that when our lawyer, William Dever, asked
22 me that question.
23 Q He asked you the question I just asked you?
24 A Yes.
25 Q All right. Do you know if anyone else, other than Mr.

47

1 Dever, knew that before two weeks ago?

2 A Not that I am aware of. I can 100 percent assure you

3 that none of my people knew about it.

4 Q Okay. And are your people the people within Irving

5 who would know about it?

6 A Yes.

7 Q Did Irving ever do a UCC search on the MMA?

8 A No.

9 MR. LEPENE: Do you know what a UCC search is?

10 THE WITNESS: Yes.

11 MR. ROSENTHAL: Fair question.

12 THE WITNESS: Yes, I do. Yes and no.

13 BY MR. ROSENTHAL:

14 Q Search for credit filings?

15 A Yes and no.

16 Q Yes, you know what it is; no, it wasn't done?

17 A Right.

18 Q Why not?

19 A Why?

20 Q Well, since I get to ask the questions, your job was

21 dealing with risk, right, you told me earlier?

22 A That's the purpose of the swap, no risk, no credit, no

23 risk.

24 Q Okay. So given that arrangement, you didn't consider

25 that there was any need to assess MMA's credit

48

1 worthiness?

2 A Well, there was no credit, so I didn't worry about it.

3 Q Okay.

4 A Because I had a swap.

5 Q Okay. I am showing you -- actually, I'm sorry.

6 (Deposition Exhibit Number 5, Risk Management,

7 was marked for the record.)

8 BY MR. ROSENTHAL:

9 Q Now I am showing you Exhibit 5. Have you ever seen

10 that before?

11 A Yes.

12 Q This is a Dun & Bradstreet report on the MMA?

13 A That is correct.

14 Q When did you first see this?

15 A A couple of weeks ago.

16 Q And is this after the discussion that you had with Mr.

17 Dever?

18 A Yes.

19 Q Who is -- well, is there someone named Joanne Kelter

20 at Irving?

21 A Yes.

22 Q Who is that?

23 A She works for me.

24 Q Okay. You see about maybe a quarter of way down the

25 page there are a couple of references to an e-mail

49

1 address Kelter.joanne@jdirving.com?

2 MR. LEPENE: Want to point it out to him?

3 MR. ROSENTHAL: Sure.

4 MR. LEPENE: And me, as well.

5 MR. ROSENTHAL: Yeah.

6 BY MR. ROSENTHAL:

7 Q Well, so on the left-hand side of the page --

8 A Right here you're talking about?

9 Q Right, exactly.

10 A Where it says endures billing reference?

11 Q Exactly.

12 A Yeah. Okay.

13 Q Kelter.joanne?

14 A Yeah.

15 Q That's Joanne Kelter?

16 A Yeah.

17 Q And it appears again on the right-hand side of the

18 page just a little bit down?

19 A Yes.

20 Q The date on the bottom right-hand corner of the

21 document is 8/30/2012?

22 A Yes.

23 Q And actually it says a little closer to halfway up the

24 page, attention: Joanne Kelter, report printed,

25 August 30, 2012, right?

50

1 A Mm.

2 Q So Ms. Kelter anyway had a copy of this as of August

3 30, 2012?

4 A She printed it, yeah.

5 Q Do you know why?

6 A Yeah.

7 Q Why?

8 A Because it's my instruction that everybody we do

9 business with we should review files at least twice a

10 year, so she would be holding -- or getting this

11 report, and other reports no doubt, for review as to

12 see what kind of shape MMA is in.

13 Q Okay. Now, why do that?

14 A Why?

15 Q Yeah.

16 A Well, because if we're going to do business with a

17 company and it has nothing to do with credit, it has

18 to do with longevity, are these people going to be

19 around for a while or are they going bankrupt two

20 weeks from now and maybe we shouldn't be doing

21 business with them, we should go and do business with

22 another railway.

23 Q Okay. So this would stand separately from doing a UCC

24 search in terms of the --

25 A Oh, yes, yeah.

51

1 Q Okay. One of the things that is contained in this
2 document if you look toward, let's say, page 11 there
3 is a heading that says public filings; do you see
4 that?
5 A Yeah.
6 Q And then it lists all the UCC filings?
7 A Yeah.
8 Q Then on page 12, there are two entries showing the
9 Wheeling & Lake Erie Company have UCC filings as to
10 MMA's accounts and proceeds?
11 A Yeah.
12 Q Okay. Did you -- well, let me withdraw that.
13 When Ms. Kelter got this report, did she talk to
14 you about it?
15 A She showed me at that time just quickly, yes.
16 Q Okay. Did you have any discussion about the MMA's
17 condition?
18 A No, other than the fact that their condition hasn't
19 changed. You can tell that by the first little -- if
20 you look at the front page where it says 6944, right
21 there.
22 Q Yeah.
23 A Okay. That means that they're two hairs from
24 bankruptcy.
25 Q Okay.

52

1 A And if you go back and do a report on MMA from the day
2 they have been in existence, you'll see 6944, which
3 means they're always two hairs from bankruptcy. So a
4 credit professional, that's what he looks at, or she,
5 that's what they look at. They don't bother -- if
6 there is a change of that --
7 Q Yeah.
8 A -- then they will go through the 38 pages here to find
9 out, well, why was there a change. Okay. But if
10 there is no change, if it's the same as it's always
11 been, then there is no change.
12 Q Okay. So it would -- was it Irving's practice to get
13 this report on the MMA twice a year?
14 A Well, we get reports on everybody all the time.
15 Q Okay.
16 A Because that's my policy.
17 Q Okay.
18 A So it could be twice a year, it could be once a year,
19 but it's got to be -- it's got to be, you know,
20 consistent. We have got to always know who we are
21 doing business with.
22 Q Okay. Did you ever see the UCC filings that were
23 referenced that I showed you a moment ago on page 12?
24 A No.
25 Q Okay.

53

1 (Deposition Exhibit Number 6, UCC Financing
2 Statement, was marked for the record.)
3 BY MR. ROSENTHAL:
4 Q I'm just going to show you Exhibit 6 and just ask you,
5 have you ever seen this before?
6 A No, I have not. I don't even know what it is.
7 Q Did you ever talk to the MMA about its obligations to
8 the Wheeling & Lake Erie Railroad?
9 A No.
10 Q Did you ever talk to MMA about its status with respect
11 to its creditors?
12 A No, I have not.
13 Q All right.
14 MR. ROSENTHAL: I think what I would like to do
15 is take a break, so off the record.
16 (Whereupon there was a break in the deposition at
17 11:31 a.m. and the deposition reconvened at 11:33
18 a.m.)
19 MR. ROSENTHAL: We don't have anything else. I
20 think we would like to know how the accounting was
21 done, you know, what book entries, if any, were made,
22 credits to --
23 MR. LEPENE: Again, I think you have the book
24 entries. I think that -- those sheets are from their
25 ledger, if you will.

54

1 MR. ROSENTHAL: Yeah.
2 MR. LEPENE: I mean, that -- I think that is --
3 those are the accounting entries.
4 MR. ROSENTHAL: So there aren't financials
5 somewhere?
6 MR. LEPENE: We'll follow up. I mean, you will
7 send me an email in terms of --
8 MR. ROSENTHAL: Yeah.
9 MR. LEPENE: -- what you mean, but --
10 MR. ROSENTHAL: Okay.
11 MR. LEPENE: And we will follow up, but my
12 understanding is, and maybe you can speak to this --
13 because I put the question to Bill. My understanding
14 is those are the entries.
15 MR. PAPPAS: And I haven't seen the document
16 you're talking about, so I can't say.
17 MR. ROSENTHAL: Why don't we do this, I don't
18 want to make you guys do this in real time, but I want
19 to put on the record that I am going to keep it open
20 and I didn't want to do that without talking to you
21 first to tell you I'm going to do that and you can --
22 sometimes people take offense when they say, you know,
23 I'm keeping it open and I don't want to have that
24 erupt, so
25 MR. LEPENE: Well, I think again we have got a

1 hearing scheduled --

2 MR. ROSENTHAL: Absolutely.

3 MR. LEPENE: -- for next Thursday?

4 MR. ROSENTHAL: Yeah.

5 MR. LEPENE: And this is in the context of

6 discovery relating to a motion to approve a 9019

7 settlement, so I think there are questions as to the

8 scope --

9 MR. ROSENTHAL: Yeah.

10 MR. LEPENE: -- of discovery that would be

11 permissible under these circumstances. So, obviously,

12 you can take whatever position you want.

13 MR. ROSENTHAL: Right.

14 MR. LEPENE: We will object to any further

15 discovery in this matter from any of the Irving

16 entities --

17 MR. ROSENTHAL: Yeah.

18 MR. LEPENE: -- with respect to this because we

19 think we have gone far beyond what is required under

20 the circumstances. Then if we don't reach -- if you

21 don't agree with that --

22 MR. ROSENTHAL: Yeah.

23 MR. LEPENE: -- then we'll go see the judge --

24 MR. ROSENTHAL: Yeah.

25 MR. LEPENE: -- basically.

1 today, sir. We are going to keep the deposition open

2 and follow up with Irving with respect to a few things

3 that we think we may need to learn that this witness

4 was unable to talk about. And with that, I am

5 finished for today. Thank you.

6 MR. LEPENE: Okay. And in response to that, I

7 have already made a statement on the record with

8 respect to our view relative to ongoing discovery. We

9 would oppose any further deposition of Mr. Hansen. We

10 don't think under the circumstances of the Rule 9019

11 motion that is before the Court that is scheduled to

12 be heard next week, there is any need or should be

13 allowed any further discovery of Irving witnesses, but

14 that's an issue that we can address at the appropriate

15 time if there -- if an effort is made is take further

16 discovery.

17 MR. ROSENTHAL: Fair enough. We can go off the

18 record.

19 (The deposition was concluded at 11:41 a.m.)

1 MR. ROSENTHAL: Fair enough. Did I cut you off?

2 I didn't mean to.

3 MR. LEPENE: No, I don't think so. The other

4 thing that I would point out, you have a deposition

5 scheduled for -- the deposition of Don Gardner

6 tomorrow --

7 MR. ROSENTHAL: Right.

8 MR. LEPENE: -- in Portland, so our hope would be

9 that once that deposition is concluded, we will have

10 completed all of the discovery relating to this

11 particular Rule 9019 motion because again our

12 position, and I want to make this very clear, is that

13 discovery under these circumstances should not be

14 open-ended --

15 MR. ROSENTHAL: Yeah.

16 MR. LEPENE: -- in that regard.

17 MR. ROSENTHAL: Fair enough.

18 MR. ANDERSON: So are you limiting your

19 deposition to Don Gardner because that wasn't my

20 understanding?

21 MR. ROSENTHAL: Well, we can go off.

22 (Whereupon there was a break in the deposition at

23 11:37 a.m. and the deposition reconvened at 11:39

24 a.m.)

25 MR. ROSENTHAL: I have nothing further for you

1 CERTIFICATE

2 I, Melissa L. Commeau, RPR, a Notary Public in

3 and for the State of Maine, hereby certify that

4 the within-named deponent was sworn to testify to

5 the truth, the whole truth, and nothing but the

6 truth, in the aforementioned cause of action.

7 I further certify that this deposition was

8 stenographically reported by me and later reduced

9 to print through computer-aided transcription and

10 that the foregoing is a full and true record of the

11 testimony given by the deponent.

12 I further certify that I am a disinterested

13 person in the event or outcome of the above-named

14 cause of action.

15 IN WITNESS WHEREOF, I subscribe my hand and

16 affix my seal this 9th day of October, 2013.

17

18

19 _____

20 MELISSA L. COMMEAU, RPR

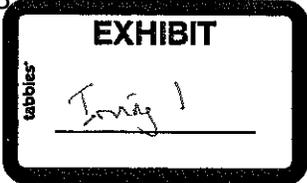
21 NOTARY PUBLIC

22 Court Reporter

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24 My commission expires: February 28, 2015.

25



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

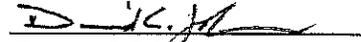
In re:)	
)	
Montreal Maine & Atlantic Railway Ltd.,	)	Case No. 13-10670
)	
Debtor.)	
)	

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that on Thursday, October 9, 2013, beginning at 10:00 a.m., counsel for Wheeling & Lake Erie Railway Company, pursuant to Rule 7030 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), incorporating by reference Rule 30(b)(6) of the Federal Rules of Civil Procedure (the "Federal Rules"), and made applicable to this matter pursuant to Bankruptcy Rule 9014(c), will take the deposition of **J.D. Irving, Ltd., Irving Paper Ltd., and Irving Pulp & Paper Ltd.** (collectively, the "Deponent") at Rudman Winchell, 84 Harlow Street, Bangor, Maine 04402, upon oral examination before a court reporter or another officer authorized by law to administer oaths. This deposition will be recorded by stenotype machine and will continue from day to day until completed. You are invited to attend and cross examine.

In accordance with Rule 30(b)(6) of the Federal Rules, the Deponent is required to designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, with respect to the specific areas of inquiry set forth in the attached Exhibit A. You are invited to attend and cross-examine.

Dated: October 2, 2013



George J. Marcus

David C. Johnson

Daniel L. Rosenthal

Counsel for Wheeling & Lake Erie Railway
Company

MARCUS, CLEGG & MISTRETTE, P.A.
One Canal Plaza, Suite 600
Portland, ME 04101
207.828.8000

EXHIBIT A

The matters for examination shall include the following:

1. The allegations made in the Chapter 11 Trustee's Motion for Order Approving Compromise and Settlement With Irving Paper Limited, Irving Pulp & Paper, Limited, and J.D. Irving (the "9019 Motion") [D.E. # 307] and the accompanying Exhibit A.

2. The negotiation and drafting of the 9019 Motion.

3. The assignment of claims (the "Claims") of New Brunswick Southern Railway Company ("NBSR"), Eastern Maine Railway Company ("EMR"), Irving Forest Products, Inc. ("IFPI") and/or Maine Northern Railway Company ("MNR"), against Montreal Maine & Atlantic Railway, Ltd., or any affiliate thereof ("MMA"), to J.D. Irving, Ltd., Irving Paper Ltd., and/or Irving Pulp & Paper Ltd. and/or any affiliate of any such entity (collectively, the "Irving Paper Company").

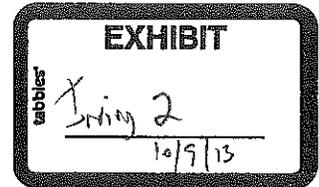
4. The purpose of, and reasons for, the assignment of the Claims by NBSR, EMR, and/or MNR to the Irving Paper Company.

5. The nature and extent of any payments made to NBSR, EMR and/or MNR in exchange for, or consideration of, the assignment of the Claims.

6. Wheeling's business relationship with MMA, including but not limited to any security interest of Wheeling with respect to MMA's accounts receivable, inventory and the proceeds thereof, including proceeds (collectively, the "Collateral"), including, but not limited, to when and how NBSR, EMR, IFPI, MNR and/or Irving Paper Company became aware of Wheeling's security interest in the Collateral.

8. Any right of setoff or recoupment asserted by NBSR, EMR, IFPI, MNR and/or Irving Paper Company as to any amounts owned by any one or more of those entities to MMA and *vice versa*.

9. Any actual setoff or recoupment made by NBSR, EMR, IFPI, MNR and/or Irving Paper Company with respect to obligations of any of such entities to MMA



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**CHAPTER 11 TRUSTEE'S MOTION FOR ORDER APPROVING
COMPROMISE AND SETTLEMENT WITH IRVING PAPER LIMITED,
IRVING PULP & PAPER, LIMITED, AND J. D. IRVING, LIMITED**

Robert J. Keach, the chapter 11 trustee in the above-captioned chapter 11 case, moves this Court for an order, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, approving a compromise and settlement with Irving Paper Limited, Irving Pulp & Paper, Limited, and J. D. Irving, Limited (collectively, "the Irving Entities") and affiliates of the Irving Entities (together with the Irving Entities, the "Irving Companies") on the terms set forth in this motion. The compromise and settlement resolves a dispute between the chapter 11 trustee and the Irving Companies concerning the trustee's attempts to recover money from the Irving Entities pursuant to the applicable sections of chapter 5 of the Bankruptcy Code. The chapter 11 trustee believes, in the exercise of his sound business judgment, that approval of the compromise and settlement is in the best interest of the estate of Montreal Maine & Atlantic Railway, Ltd. In further support of this motion, the movant states as follows:

JURISDICTION, VENUE, AND STATUTORY BASIS

1. The District Court has original but not exclusive jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 11 case to the Bankruptcy Court.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Bankruptcy Court has constitutional authority to enter final judgment in this proceeding.

3. Venue over this chapter 11 case is proper in this district pursuant to 28 U.S.C. § 1408, and venue over this proceeding is proper in this district pursuant to 28 U.S.C. § 1409.

4. The relief sought in this motion is predicated upon Rule 9019 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) and Rules 9013-1 and 9019-1 of the Bankruptcy Court’s local rules.

BACKGROUND

5. On August 7, 2013 (the “Petition Date”), Montreal Maine & Atlantic Railway, Ltd. (“MMA”) filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* MMA’s bankruptcy filing was precipitated by the train derailment in Lac-Mégantic, Québec on July 6, 2013 (the “Derailment”). The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. The Derailment also precipitated the filing by Montreal Maine & Atlantic Canada Co. (“MMA Canada”), MMA’s subsidiary, under Canada’s *Companies’ Creditors Arrangement Act*.

6. On August 21, 2013, the United States Trustee appointed Robert J. Keach (the “Trustee”) as the chapter 11 trustee pursuant to 11 U.S.C. § 1163.

7. MMA is a Delaware corporation that, since January 2003, has operated in an integrated, international shortline freight railroad system (the “System”) with MMA Canada. MMA and MMA Canada have fully-integrated business operations and accounting, with the MMA collecting most of the generated revenue and transferring to MMA Canada the funds required to pay its expenses.

8. The System has 510 route miles of track in Maine, Vermont and Québec and operates from its head office in Hermon, Maine. The System is a substantial component of the

transportation system of Northern Maine, Northern New England, Québec, and New Brunswick. Prior to the Petition Date, MMA employed approximately 179 people and operated about 15 trains daily.

9. As part of its ordinary course operations, MMA, in conjunction with two railroads affiliated with the Irving Entities, New Brunswick Southern Railway Company Ltd. ("NBSR") and Maine Northern Railway Company ("MNR" and together with NBSR, the "Irving Railroads") transport paper, pulp, wood products, and chemicals (the "Irving Freight Shipments") to and from manufacturing and processing facilities operated by one or more of the Irving Companies. Pursuant to haulage agreements among MMA and the Irving Railroads, MMA regularly receives from and delivers to the Irving Railroads, at interchange points where their respective rail lines connect, rail cars containing Irving Freight Shipments. In accordance with these haulage agreements, MMA bills the Irving Companies for the entire amount of freight charges owing with respect to the Irving Freight Shipments. The Irving Companies contend that MMA is obligated, upon receipt of payment, to remit to the Irving Railroads their share of such charges attributable to the rail services provided by the Irving Railroads in connection with such shipments. The Irving Companies are among MMA's largest customers and the Trustee contends that, as of August 28, 2013, the Irving Companies owed MMA a past due, outstanding balance of approximately \$885,733 on certain invoices. A true and correct copy of an MMA receivables aging is attached hereto as Exhibit A. The highlighted amounts on Exhibit A represent the past due invoices that total the outstanding balance of approximately \$885,733, which the Trustee claims to be due from the Irving Companies.

10. In addition to the interchange of Irving Freight Shipments, MMA and the Irving Railroads interchange freight shipments for third party shippers unrelated to the Irving Companies.

As of August 7, 2013, MMA owed NBSR approximately \$2.3 million and MNR approximately \$144,000 for freight charges earned by NBSR and MNR in connection with interline shipments.

11. On August 30, 2013, the Trustee filed the *Motion for Order Pursuant to 11 U.S.C. § 542(b)* [D.E. 124] (the “Section 542(b) Motion”) to recover the outstanding balance of \$885,733 from the Irving Companies.¹ The Irving Companies raised certain defenses against the Section 542(b) Motion. First, the Irving Companies allege that no money is owed to MMA and therefore nothing can be recovered pursuant to section 542(b). This allegation is based, in part, on a series of assignments effectuated on July 12, July 23, and July 30, 2013, pursuant to which NBSR transferred approximately \$1.3 million of NBSR’s claim against MMA to the Irving Companies. Following those assignments, on July 31, 2013 the Irving Companies setoff approximately \$761,000 of the debt owed by MMA against the amount owed by the Irving Companies to MMA. The Irving Companies contend that section 553(a) does not operate retroactively to limit or disallow a setoff effectuated before the petition date. They also contend that the setoff cannot be avoided pursuant to 11 U.S.C. § 547(b) and cite, in support of that contention, legislative history suggesting a Congressional intent to leave setoffs outside the operation of section 547.

12. Second, the Irving Companies and NBSR contend that the parties had a longstanding agreement and course of dealing that created an implied trust over a substantial portion of the money paid by the Irving Companies to MMA. In short, they contend that payments by the Irving Companies would be made only after MMA agreed to make immediate and concurrent payment of amounts owed by MMA to the Irving Railroads, which included the Irving Railroad’s share of the freight charges attributable to the Irving Freight Shipments. The Irving Companies refer to this as the “cash swap.” The parties do not disagree about the existence

¹ The Section 542(b) Motion also sought relief against Great Northern Paper. That aspect of the Section 542(b) Motion was resolved by a prior order of the Bankruptcy Court, and is not implicated by this motion.

of the “cash swap” as a longstanding practice; there is disagreement about the correct legal conclusion or conclusions to be drawn based on the existence of the “cash swap.”

13. The Trustee believes that NSBR’s transfer of claim to the Irving Companies is precisely the kind of improper setoff contemplated by section 553(a)(2)(B), and that section 547 operates to avoid that setoff. Further, the Trustee believes that because no written trust agreement exists between MMA and the Irving Companies, and because MMA was permitted to comingle the funds paid by the Irving Companies, there can be no implied trust agreement. The Irving Companies contend that a formal trust agreement is not required to create an implied or resulting trust. Moreover, the Irving Companies dispute the Trustee’s contention that MMA was permitted to comingle funds paid by the Irving Companies. They maintain that the agreement for a simultaneous swap of cash was, as a practical matter, intended to prevent the comingling of funds.

14. After the Section 542(b) Motion was filed, the Trustee and the Irving Companies engaged in formal and informal discovery. They also discussed the relative strengths and weaknesses of each party’s claims and defenses. The Irving Companies have indicated that, if the Court were to rule against them on both of their defenses, they would take an appeal.

15. The Trustee and the Irving Companies have reached a compromise and settlement to resolve the Section 542(b) Motion. The terms of that compromise and settlement are as follows:

a. The Irving Companies shall pay (a) \$150,000 to MMA’s estate, which payment shall be made within 2 business days after the entry of an order granting this motion (assuming that such order is not subject to any stay pending appeal); and (b) \$381,000 to MMA’s estate within 2 business days after an order on this motion has become final and non-appealable. The total amount payable to the estate on account of the compromise described herein is \$531,000, which is approximately 60% of the estate’s maximum gross recovery (\$885,000);

b. The Irving Companies’ payment of \$531,000 will be in full and final satisfaction of any and all claims and causes of action arising out of the invoices

attributable to the highlighted amounts on Exhibit A; and the Irving Companies shall be released from any and all liability related to such invoices;

c. The Trustee retains his right to bring any and all causes of action against the Irving Companies with respect to amounts owed by the Irving Companies to MMA that are not covered by the invoices attributable to the highlighted amounts on Exhibit A; and

d. The Irving Companies retain their rights to raise any and all defenses with respect to amounts owed by the Irving Companies to MMA that are not covered by the invoices attributable to the highlighted amounts on Exhibit A.

RELIEF REQUESTED

16. Pursuant to Rule 9019(a), the Trustee requests that the Court: (1) approve the compromise and settlement with the Irving Companies; and (2) approve service of the motion in the manner set forth herein.

BASIS FOR RELIEF

17. Rule 9019(a) provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). This Court has sound discretion to determine whether the proposed compromise is fair and equitable and in the best interest of the bankruptcy estate. *See Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995). In making this determination, the Court should consider: (i) the probability of success in the litigation of the claim being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and (iv) the paramount interest of creditors and a proper deference to their reasonable views. *See id.*, at 184; *In re High Voltage Eng’g Corp.*, 397 B.R. 579, 601 (Bankr. D. Mass. 2008). The *Jeffrey* factors are not, however, exclusive. *See In re Healthco, Int’l, Inc.*, 136 F.3d 45, 50 (1st Cir. 1998). Deference should be given to the trustee’s business judgment if the trustee can demonstrate that the settlement falls within a “range of reasonableness.” *In re Fibercore, Inc.*, 391 B.R. 647, 655 (Bankr D. Mass. 2008).

18. The Trustee believes that the terms of the compromise and settlement are fair and equitable, and that such compromise is in the best interest of MMA's estate. The factors articulated in Jeffrey warrant approval of the compromise and settlement. The Trustee believes he has a reasonable probability of successfully litigating the Section 542(b) Motion, but the Irving Companies have raised novel and nuanced defenses that are, at a minimum, credible. As is the case with all litigation, there is risk that the Trustee might not prevail. The second Jeffrey factor is not applicable to this proceeding, because, upon information and belief, the Irving Companies have sufficient resources to satisfy any judgment that might be entered against them. However, they have indicated an intent to appeal any adverse judgment and, as a result, any actual recovery could be months, if not years, down the road. This would unduly burden the estate with further expense and cause the Trustee to expend time that could otherwise be effectively utilized in managing MMA's operations.

19. In addition, a settlement with the Irving Companies also provides other benefits to the Estate. As mentioned above, MMA has numerous contractual relationships with NBSR and MNR, and the Irving Companies are a large customer of MMA. Given the significance of these relationships and the Irving Companies' expressed interest in acquiring some of MMA's assets or operations, the compromise and settlement represents sound business judgment. Finally, the settlement amount is approximately 60% of the total outstanding balance owed. Because the costs associated with continued litigation would necessarily reduce the recovery realized, the settlement amount falls squarely within the range of reasonableness.

20. Accordingly, the Trustee believes the motion should be granted because the compromise and settlement is in the best interest of MMA's estate.

NOTICE

21. Notice of this motion was served on the following parties on the date and in the manner set forth in the certificate of service: (1) the United States Trustee; (2) MMA's counsel; (3) the non-insider holders of the twenty (20) largest unsecured claims against MMA or, if applicable, the lawyers representing such holders; (4) applicable federal and state taxing authorities; (5) the holders of secured claims against MMA, or if applicable, the lawyers representing such holders; (6) counsel for the Irving Entities; and (7) others who have, as of the date of the motion, entered an appearance and requested service of papers in the chapter 11 case. In light of the nature of the relief requested in the motion, the Trustee requests that the Court approve service of the motion on the parties set forth above.

WHEREFORE, the Trustee requests that the Court enter an Order: (1) granting this motion; (2) approving, pursuant to Bankruptcy Rule 9019, the compromise and settlement; (3) finding that service to the parties and in the manner set forth is appropriate; and (4) granting such other further relief as may be appropriate.

Dated: October 1, 2013

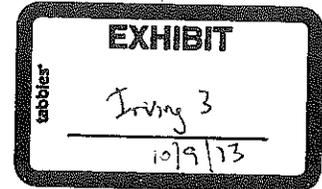
ROBERT J. KEACH,
CHAPTER 11 TRUSTEE OF MONTREAL
MAINE & ATLANTIC RAILWAY, LTD.

By his attorneys:

/s/ Michael A. Fagone
Michael A. Fagone, Esq.
D. Sam Anderson, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle Street
P.O. Box 9729
Portland, ME 04104
Telephone: (207) 774-1200
Facsimile: (207) 774-1127
E-mail: mfagone@bernsteinshur.com



CustomerNo	CustomerName	Total	Current	30 Days	60 Days	90 Days	120 Days
IRVPAPS	IRVING PAPER	\$554,198.07	\$63,446.08	\$181,097.38	\$246,550.88	\$56,849.38	\$6,254.35
IRVPULP	IRVING PULP & PAPER	\$205,489.00	\$0.00	\$60,656.34	\$144,832.66	\$0.00	\$0.00
JDIRSTJ	J D IRVING LTD	\$159,230.85	\$10,628.08	\$71,305.40	\$52,806.54	\$10,446.79	\$14,044.04
MAI5600	MAINE NORTHERN RAILWAY	\$157,494.84	\$46,214.13	\$49,268.14	\$16,999.55	\$12,708.66	\$32,304.36
MNR	MAINE NORTHERN RAILWAY CO.	\$110,811.43	\$50,658.63	\$0.00	\$0.00	\$41,969.30	\$18,183.50
IRVPULP	IRVING PULP & PAPER	\$40,889.28	\$0.00	\$4,054.50	\$12,163.50	\$24,671.28	\$0.00
IRVOILS	IRVING OIL COMMERCIAL GP	\$3,138.75	\$147.25	\$1,038.50	\$1,116.00	\$837.00	\$0.00
NEW0651	NEW BRUNSWICK SO. RWY - C/R	\$725.60	\$22.12	\$0.00	\$147.30	\$17.14	\$539.04
IRWOOD	IRVING WOODLANDS LLC	\$200.00	\$0.00	\$0.00	\$0.00	\$0.00	\$200.00
JDIRSTL	J D IRVING LTD	\$25.00	\$0.00	\$0.00	\$0.00	\$0.00	\$25.00
NEW0671	NB SOUTHERN RAILWAY	\$2.97	\$0.00	\$13,800.00	\$8,179.00	\$0.00	-\$21,976.03
		\$1,232,205.79	\$171,116.29	\$381,220.26	\$482,795.43	\$147,499.55	\$49,574.26



NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Forest Products Inc., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of one hundred thousand dollars and 00 cents (\$100,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Forest Products Inc.
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 12th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 12th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Forest Products, Inc., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the Assignor and the Assignee have caused these presents to be duly executed by its properly authorized agents as of the day, month and year first above written.

SIGNED, AND DELIVERED

in the presence of

R. Cumming Brown

) per:

New Brunswick Southern Railway
Company Limited

Marshall Buckley
Marshall Buckley

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Paper Limited., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of five hundred and twenty thousand dollars and 00 cents (\$520,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

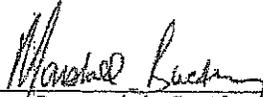
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Paper Limited
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.


New Brunswick Southern Railway
Company Limited

DATED as of the 12th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 12th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Paper Limited., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the Assignor and the Assignee have caused these presents to be duly executed by its properly authorized agents as of the day, month and year first above written.

SIGNED, AND DELIVERED)

in the presence of)

R. Cummings Brown)
per:)

New Brunswick Southern Railway
Company Limited

Marshall Buckley
Marshall Buckley

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Pulp & Paper Limited., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of three hundred and sixty thousand dollars and 00 cents (\$360,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

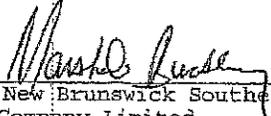
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Pulp & Paper Limited
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.


New Brunswick Southern Railway
Company Limited

DATED as of the 12th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 12th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Pulp & Paper Limited., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, choses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom; including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Forest Products Inc., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of twenty eight thousand nine hundred seventy six dollars and eleven cents (\$28,976.11) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

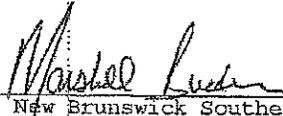
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Forest Products Inc.
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 23rd day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 23rd day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Forest Products, Inc., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Forest Products Inc., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of forty thousand dollars and 00 cents (\$40,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

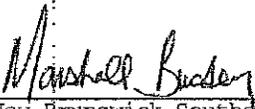
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Forest Products Inc.
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 30th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 30th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Forest Products, Inc., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART .

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, chooses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

NOTICE OF ASSIGNMENT

TO: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Hermon ME
04401-1136

NOTICE IS HEREBY GIVEN to you that the undersigned has as of this date assigned absolutely to Irving Paper Limited., (the "Assignee"), a duly incorporated company, all right title and interest of the undersigned in and to certain proceeds, sums, amounts or debts first due or accruing due from you to the undersigned in the total aggregate sum of two hundred and twenty five thousand dollars and 00 cents (\$225,000.00) as more particularly set forth in a certain Assignment entered into between the undersigned and the "Assignee" as of the date hereof.

A copy of the aforementioned Assignment is annexed hereto.

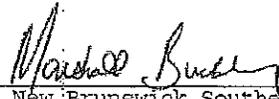
FURTHER TAKE NOTICE that all proceeds, sums, amounts and debts payable by you as aforesaid are payable to the Assignee at its office at:

Irving Paper Limited
300 Union Street 6th FLOOR
P.O. Box 5777
Saint John, NB
E2L 4M3

Attention: Mr. Jim Mehan

Telephone: 506-632-7910

and the Assignee's receipt thereof shall be a sufficient discharge to you of and from the said proceeds, sums, amounts and debts so paid by you to the Assignee, and this Notice shall be your sufficient authority for doing so.



New Brunswick Southern Railway
Company Limited

DATED as of the 30th day of July, A.D. 2013

ASSIGNMENT PACKAGE

THIS ASSIGNMENT made as of the 30th day of July, A.D., 2013

BY AND BETWEEN:

New Brunswick Southern Railway Company Limited, carrying on business in the province of New Brunswick, Canada and having an office in the city of Saint John, province of New Brunswick, (hereinafter called the "assignor")

OF THE FIRST PART

-- AND --

Irving Paper Limited., carrying on business in the City of Saint John, and in the province of New Brunswick, (hereinafter called the "assignee")

OF THE SECOND PART.

THIS INDENTURE WITNESSETH that for and in consideration of the sum of One Dollar (\$1.00) of lawful money of Canada and other good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged), the Assignor does hereby assign, transfer and set over unto the Assignee, its successors and assigns, the accounts receivable, trade accounts, choses in action, proceeds, sum, amounts and/or debts due or accruing due as set forth in Schedule "A" annexed hereto and all its right, title and interest therein and thereto or arising therefrom, including all rights of action and other rights which might hereafter accrue in respect of the same (hereafter collectively called the "Debts").

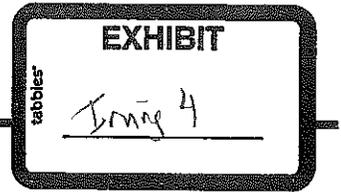
TO HAVE AND TO HOLD the Debts unto the Assignee, its successors and assigns absolutely.

AND the Assignor does hereby warrant that it has a valid and subsisting right to the Debts, that there are no outstanding assignments, charges or encumbrances against the Debts, that it has a good right and full power to assign the Debts, as herein provided, that it will not at any time receive any payment in respect of the Debts except in trust for the Assignee and that it will not do or commit any act whereby the Assignee may be prevented, delayed or hindered from receiving payment of the Debts.

AND the Assignor does hereby agree that it shall indemnify and hold harmless the Assignee from and against all liability, cost and expense incurred by the Assignee as a result of any claim brought against the Assignee regarding the Debts; provided, however, that in no event shall the liability of the Assignor exceed the amount of the Debts, that the liability of the Assignor is contingent upon prompt notification by the Assignee of any action commenced with respect to the Debts so as to allow the Assignor to join or otherwise assist the Assignee in the defence of any such action, and that the Assignor shall bear no liability under this paragraph for any compromise or settlement made by the Assignee without the consent of the Assignor.

AND the Assignor does nominate, constitute and appoint the Assignee as its attorney and in its name to deal with, demand and due for the Debts and to give valid and effectual receipts therefor, together with full power to release, discharge, compromise or otherwise effect settlement of the payment of the same, in whole or part, except as otherwise provided herein.

THIS INDENTURE shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.



Buckley, Marshall (IED)

From: Mehan, Jim (JDI)
Sent: September-10-13 1:41 PM
To: Buckley, Marshall (IED)
Subject: FW: Assignment Back Up
Attachments: Irving Pulp & Paper Limited.pdf; Irving Forest Products.pdf; Irving Paper Limited.pdf

Marshall
Here is the email I sent to D Gardner

From: Mehan, Jim (JDI)
Sent: Friday, August 02, 2013 5:48 PM
To: 'mdgardner@mmarail.com'
Cc: Mehan, Jim (JDI)
Subject: Assignment Back Up

Don,
I was asked to send you support for what invoices were paid to NBSR through assignments. As of today, the summary of invoices attached have been paid from Irving Paper, Irving Pulp & Paper and Irving Forest Products to NBSR.

If you need any additional information, let me know.

Jim

Jim Mehan, MBA, CMA | J.D. Irving, Limited – JDI Finance
300 Union Street, Saint John, NB E2L 4M3 ☎ (506) 632-7910 📠 (506) 343-7531



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Twitter

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R5604570

Prepayment Register

7/31/2013 12:19:43
Page - 2

Bank Account	00094567	ROYAL US MULTI-CURRENCY	Document Company	Invoice Number	Payment Amount	Tax	Discount Taken
Originalator	JALEBLAN		Living Pulp & Paper Limited				
Payment Instrument	T	Elec Funds Transfer(AVR & AFP)	Version				
Pay Through Date	12/31/2015						
Currency	USD						
..... Payee	Purchase Order						
..... Name / Mailing Address							
..... Document Number .....	..... Document Itm .....	..... Co .....	..... Due Date .....	..... Invoice Number .....	..... Payment Amount .....	..... Tax .....	..... Discount Taken
00895295	RAIL	00001	7/10/2013	245011	3,757.70		
00895014	RAIL	00001	7/10/2013	245012	4,100.08		
00895296	RAIL	00001	7/10/2013	245010	3,757.70		
00895763	RAIL	00001	7/14/2013	245069	3,757.70		
00895757	RAIL	00001	7/14/2013	245070	3,757.70		
00895973	RAIL	00001	7/17/2013	245213	3,757.70		
00895972	RAIL	00001	7/17/2013	245212	3,757.70		
00895971	RAIL	00001	7/17/2013	245211	3,757.70		
00895015	RAIL	00001	7/17/2013	245210	3,757.70		
00896310	RAIL	00001	7/18/2013	245253	4,100.08		
00896160	RAIL	00001	7/18/2013	245252	3,757.70		
00896169	RAIL	00001	7/18/2013	245251	3,757.70		
00896467	RAIL	00001	7/21/2013	245279	3,757.70		
00896465	RAIL	00001	7/21/2013	245278	3,757.70		
00896589	RAIL	00001	7/21/2013	245282	3,757.70		
00896587	RAIL	00001	7/21/2013	245281	3,757.70		
00896588	RAIL	00001	7/21/2013	245280	3,757.70		
00896656	RAIL	00001	7/24/2013	245411	4,001.62		
00896819	RAIL	00001	7/24/2013	245412	3,739.98		
00896818	RAIL	00001	7/24/2013	245413	3,739.98		
00896817	RAIL	00001	7/24/2013	245414	3,739.98		
Payment Amount					205,223.10		
Total Amount to be Processed					USD		205,223.10
Total Number of Payments to be Processed							1

7/31/2013 14:28:47
Page 1

SAB
USD

Create Payment Control Groups

R04570

Bank Account 00021041 GENERAL ACCOUNT-U.S.FUNDS
 Version APMANUAL2
 Originator KMCALLIS
 Payment Instrument T Elec Funds Transfer(A/R & A/P)
 Pay Through Date 12/31/2020
 Currency USD
 Approval Payee
 User ID Name / Mailing Address
 916113 NB SOUTHERN RAIL SJ USD

Document Invoice
 Ty Number 1742745 Supplier
 PV12506820 001 00111 677/2013 6004
 Payment Amount 25.00
 Discount Taken 25.00
 Payment Amount 25.00
 Supplier 1742745 MONTREAL RAILWAY

Total Amount to be Processed 25.00

Total Number of Payments to be Processed 1

25.00
1

Create Payment Control Groups

R04570

Bank Account 00022939 GENERAL ACCOUNT-U.S.FUNDS
 Version APMANUAL2
 Originator KMCALLIS
 Payment Instrument T Elec Funds Transfer(A/R & A/P)
 Pay Through Date 12/31/2020
 Currency USD

Approval User ID	Number	Payee Name / Mailing Address	Slub Message	Document Ty	Number	Co	Due Date	Invoice Number	Payment Amount	Discount Taken	Supplier Number
	916113	NB SOUTHERN RAIL S J USD	MMA 35620	FT	12482151	001	7/4/2013	71003194	747.13		2102517 MMA
			MMA 35633	FT	12523450	001	7/14/2013	71003193	747.13		
			MMA 74101	FT	12539524	001	7/28/2013	71003206	747.13		
			NOKL732590	FT	12548754	001	8/1/2013	71003205	733.23		
			MMA 74106	FT	12554658	001	8/2/2013	71003214	733.23		
			MMA 35614	FT	12554655	001	8/4/2013	71003217	733.23		
			MMA 35608	FT	12578080	001	8/4/2013	71003215	733.23		
			MMA 78060	FT	12578082	001	8/11/2013	71003219	733.23		
			NOKL732681	FT	12581135	001	8/11/2013	71003220	733.23		
			MMA 74107	FT	12581137	001	8/12/2013	71003222	733.23		
			NOKL732814	FT	12581145	001	8/12/2013	71003221	733.23		
			MMA 74103	FT	12449017	001	8/12/2013	71003223	733.23		
			MMA 75058	FT	12482278	001	7/4/2013	71003188	2,931.53		2102518 MMA NMJC
			MMA 35625	FT	12482280	001	7/14/2013	71003199	3,225.00		
			MMA 35817	FT	12482282	001	7/14/2013	71003200	3,225.00		
			MMA 35840	FT	12449021	001	7/14/2013	71003201	3,225.00		
			MMA 35642	FT	12482141	001	7/14/2013	71003190	5,775.98		2102523 MMA STJNS
			NOKL732576	FT	12529542	001	7/14/2013	71003192	5,775.98		
			MMA 74117	FT	12548760	001	7/28/2013	71003208	5,775.98		
			MMA 76057	FT	12449023	001	8/2/2013	71003212	5,668.52		
			MMA 35637	FT	12523456	001	7/14/2013	71003191	4,918.13		2102566 MMA STJNS
			MMA 35606	FT	12529554	001	7/26/2013	71003203	4,918.13		
			MMA 35624	FT	12529556	001	7/28/2013	71003209	5,283.63		
			NOKL733517	FT	12529552	001	7/28/2013	71003210	5,283.63		
			MMA 74105	FT	12554651	001	8/1/2013	71003211	4,826.63		
			MMA 35603	FT	12449019	001	8/4/2013	71003216	5,117.81		
			MMA 35615	FT	12449025	001	7/14/2013	71003189	7,044.48		2102573 MMA STJNS
			MMA 35645	FT	12482092	001	7/14/2013	71003183	7,044.48		
			MMA 35632	FT	12482154	001	7/14/2013	72000188	6,909.03		
			MMA 35646	FT	12482285	001	7/14/2013	71003195	6,909.03		
			NOKL732813	FT	12520265	001	7/14/2013	71003196	6,946.18		
			NOKL732667	FT	12520265	001	7/25/2013	71003202	6,909.03		

7/31/2013 14:29:47
Page - 3

*IFP
USA*

Create Payment Control Groups

Bank Account 00022938 GENERAL ACCOUNT-U.S.FUNDS

Version APMANUAL2

Originator KMCALLIS

Payment Instrument T Elec Funds Transfer(A/R & A/P)

Pay Through Date 12/31/2020

Currency USD

Approval User ID	Payee Name / Mailing Address	Document Ty	Document Num	Document Lim	Document Co	Due Date	Invoice Number	Payment Amount	Discount Taken	Supplier Number
	MMA 35638	FT	12528551	001	00173	7/28/2013	71003207	6,909.03		2102587 MMA WRIJC
	MMA 35630	FT	12548558	001	00173	8/2/2013	71003213	2,756.72		
	MMA 76064	FT	12557406	001	00173	8/5/2013	71003218	2,756.72		
								128,976.11		

Total Amount to be Processed 128,976.11

Total Number of Payments to be Processed

[Handwritten signature]

Prepayment Register

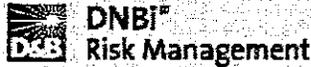
Bank Account	00169549	ROYAL US MULTICURRENCY	Document Company	Irving Paper Limited	Version	Invoice Number	Payment Amount	Tax	Discount Taken
Originator	JALEBLAN								
Payment Instrument	T	Elec Funds Transfer(A/R & A/P)							
Pay Through Date	12/31/2015								
Currency	USD								
Payee Name / Mailing Address	71643 NEWBRUNSWICKSOUTHERN								
Purchase Order									
	Ty	Document Number	Lim	Co	Due Date	Invoice Number	Payment Amount	Tax	Discount Taken
	PV	2876999 001	00002		4/15/2013	242020	2,080.26		
	PV	2877000 001	00002		4/15/2013	242021	2,080.26		
	PV	2873808 001	00002		5/14/2013	243133	2,083.83		
	PV	2875428 001	00002		6/13/2013	244216	2,087.04		
	PV	2875428 001	00002		6/13/2013	244217	2,087.04		
	PV	2875430 001	00002		6/13/2013	244219	2,087.04		
	PV	2875431 001	00002		6/13/2013	244218	2,087.04		
	PV	2875432 001	00002		6/13/2013	244228	2,087.04		
	PV	2875433 001	00002		6/13/2013	244227	2,087.04		
	PV	2875434 001	00002		6/13/2013	244226	2,087.04		
	PV	2875435 001	00002		6/13/2013	244225	2,087.04		
	PV	2875436 001	00002		6/13/2013	244224	2,087.04		
	PV	2875437 001	00002		6/13/2013	244223	2,087.04		
	PV	2875438 001	00002		6/13/2013	244222	2,087.04		
	PV	2875439 001	00002		6/13/2013	244221	2,087.04		
	PV	2875440 001	00002		6/13/2013	244220	2,087.04		
	PV	2875419 001	00002		6/18/2013	244301	13,021.54		
	PV	2875420 001	00002		6/18/2013	244302	2,087.04		
	PV	2875421 001	00002		6/18/2013	244303	2,087.04		
	PV	2875422 001	00002		6/18/2013	244304	2,087.04		
	PV	2875423 001	00002		6/18/2013	244305	2,087.04		
	PV	2875424 001	00002		6/18/2013	244306	2,087.04		
	PV	2875425 001	00002		6/18/2013	244307	2,087.04		
	PV	2875426 001	00002		6/18/2013	244308	2,087.04		
	PV	2875427 001	00002		6/18/2013	244309	2,087.04		
	PV	2880866 001	00002		6/20/2013	244421	2,087.04		
	PV	2880867 001	00002		6/20/2013	244412	2,087.04		
	PV	2880869 001	00002		6/20/2013	244409	2,087.04		
	PV	2880870 001	00002		6/20/2013	244410	2,087.04		
	PV	2880872 001	00002		6/20/2013	244411	2,087.04		
	PV	2880873 001	00002		6/20/2013	244413	2,087.04		
	PV	2880875 001	00002		6/20/2013	244414	2,087.04		

7/31/2013 12:19:43
Page 7

Prepayment Register

Bank Account	00169549	ROYAL US MULTICURRENCY	Document Company	Irving Paper Limited	Version	Invoice Number	Payment Amount	Tax	Discount Taken
Originator	JALEBLAN								
Payment Instrument	T	Elec Funds Transfer(M/R & A/P)							
Pay Through Date	12/31/2015								
Currency	USD								
..... Payee .....	..... Purchase Order								
Number	Name / Mailing Address	Description	Ty	Document Number	Inv Co	Due Date	Invoice Number		
		APP:DANGEVINE	PV	2985828 001 00002		7/23/2013	245377		2,059.90
		APP:DANGEVINE	PV	2985829 001 00002		7/23/2013	245378		2,059.90
		APP:DANGEVINE	PV	2985830 001 00002		7/23/2013	245372		2,059.90
		APP:DANGEVINE	PV	2985831 001 00002		7/23/2013	245371		2,059.90
		APP:DANGEVINE	PV	2985832 001 00002		7/23/2013	245370		2,059.90
		APP:DANGEVINE	PV	2985834 001 00002		7/23/2013	245369		2,059.90
		APP:DANGEVINE	PV	2985835 001 00002		7/23/2013	245368		2,059.90
		APP:DANGEVINE	PV	2990255 001 00002		7/30/2013	254411		2,059.90
		APP:DANGEVINE	PV	2990256 001 00002		7/30/2013	245510		2,059.90
		APP:DANGEVINE	PV	2990257 001 00002		7/30/2013	245509		2,059.90
		APP:DANGEVINE	PV	2990258 001 00002		7/30/2013	245508		2,059.90
		APP:DANGEVINE	PV	2990259 001 00002		7/30/2013	245507		2,059.90
		APP:DANGEVINE	PV	2990260 001 00002		7/30/2013	245506		2,059.90
		APP:DANGEVINE	PV	2990261 001 00002		7/30/2013	245505		2,059.90
		APP:DANGEVINE	PV	2990262 001 00002		7/30/2013	245504		2,059.90
		APP:DANGEVINE	PV	2990263 001 00002		7/30/2013	245503		2,059.90
		APP:DANGEVINE	PV	2989993 001 00002		8/4/2013	245558		2,059.90
		APP:DANGEVINE	PV	2989994 001 00002		8/4/2013	245559		2,059.90
		APP:DANGEVINE	PV	2989995 001 00002		8/4/2013	245560		2,059.90
		APP:DANGEVINE	PV	2989996 001 00002		8/4/2013	245561		2,059.90
		APP:DANGEVINE	PV	2989997 001 00002		8/4/2013	245562		2,059.90
		APP:DANGEVINE	PV	2989998 001 00002		8/4/2013	245563		2,059.90
		APP:DANGEVINE	PV	2989999 001 00002		8/4/2013	245564		2,059.90
		APP:DANGEVINE	PV	2990000 001 00002		8/4/2013	245565		2,059.90
		APP:DANGEVINE	PV	2990002 001 00002		8/4/2013	245566		2,059.90
		APP:DANGEVINE	PV	2990003 001 00002		8/4/2013	245567		2,059.90
		APP:DANGEVINE	PV	2989973 001 00002		8/6/2013	245637		2,059.90
		APP:DANGEVINE	PV	2989974 001 00002		8/6/2013	245636		2,059.90
		APP:DANGEVINE	PV	2989975 001 00002		8/6/2013	245635		2,059.90
		APP:DANGEVINE	PV	2989978 001 00002		8/6/2013	245634		2,059.90
		APP:DANGEVINE	PV	2989982 001 00002		8/6/2013	245633		2,059.90
		APP:DANGEVINE	PV	2989983 001 00002		8/6/2013	245631		2,059.90

EXHIBIT
 Irving 5
 10/9/13



Live Report : MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.

D-U-N-S® Number: 12-652-2692
 Endorsement/Billing Reference: kelter.joanne@dirving.com

D&B Address		Endorsement : kelter.joanne@dirving.com	
Address	15 Iron Rd Hermon Main Bangor, ME - 04401	Location Type	Headquarters
Phone	207 848-4200	Web	www.mmarall.com
Fax	207-848-4232		

Company Summary

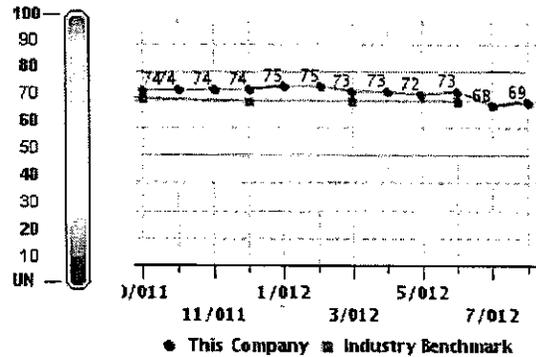
ATTN: Joanne Kelter
 Report Printed: August 30, 2012

Currency: Shown in USD unless otherwise indicated

Score Bar

PAYDEX®	69
Commercial Credit Score Class	4
Financial Stress Class	4
Credit Limit - D&B Conservative	40,000.00
D&B Rating	1R3

PAYDEX® Trend Chart



D&B 3-month PAYDEX®



When weighted by amount, Payments to suppliers average 14 Days Beyond Terms

D&B 12-month PAYDEX®



When weighted by amount, Payments to suppliers average 16 days beyond terms

D&B Company Overview

This is a headquarters location

Branch(es) or Division(s) exist	Y
Manager	ROBERT C GRINDROD, PTNR
Year Started	2003
Employees	230 (30 Here)
Financing	SECURED
SIC	4011
Line of business	Railroad line-haul operator
NAICS	482111
History Status	CLEAR

Public Filings

The following data includes both open and closed filings found in D&B's database on this company.

Record Type	Number of Records	Most Recent Filing Date
Bankruptcies	0	-
Judgments	0	-
Liens	0	-
Suits	0	-

Commercial Credit Score Class



The public record items contained herein may have been paid, terminated, vacated or released prior to today's date.

Financial Stress Score Class



Corporate Linkage

Subsidiaries (International)

Company	City , Country	D-U-N-S® NUMBER
Montréal, Maine & Atlantique Canada Cie	FARNHAM , CANADA	24-683-5651

Branches (Domestic)

Company	City , State	D-U-N-S® NUMBER
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.	ASHLAND , Maine	12-735-6173
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.	MILO , Maine	60-846-0742
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.	MILLINOCKET , Maine	78-056-6519
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.	MADAWASKA , Maine	83-735-8308
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.	MILO , Maine	88-326-6710
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.	JACKMAN , Maine	11-134-9978

Predictive Scores

Currency: Shown in USD unless otherwise indicated

Credit Capacity Summary

This credit rating was assigned because of D&Bs assessment of the companys creditworthiness. For more information, see the D&B Rating Key

D&B Rating : 1R3

Number of employees: 1R Indicates 10 or more employees
 Composite credit appraisal: 3 is fair

The 1R and 2R ratings categories reflect company size based on the total number of employees for the business. They are assigned to business files that do not contain a current financial statement. In 1R and 2R Ratings, the 2, 3, or 4 creditworthiness indicator is based on analysis by D&B of public filings, trade payments, business age and other important factors. 2 is the highest Composite Credit Appraisal a company not supplying D&B with current financial information can receive.

Below is an overview of the companys rating history since 01-15-2003

Number of Employees Total: 230 (30 here)

D&B Rating	Date Applied
1R3	03-06-2008

D&B Rating	Date Applied
1R4	09-13-2005
-	01-15-2003

Payment Activity:	(based on 46 experiences)
Average High Credit:	9,210
Highest Credit:	200,000
Total Highest Credit:	405,550

D&B Credit Limit Recommendation

Conservative credit Limit	40,000	5	4	3	2	1
Aggressive credit Limit:	100,000					
Risk category for this business :	MODERATE	High	Moderate		Low	

The Credit Limit Recommendation (CLR) is intended to serve as a directional benchmark for all businesses within the same line of business or industry, and is not calculated based on any individual business. Thus, the CLR is intended to help guide the credit limit decision, and must be balanced in combination with other elements which reflect the individual company's size, financial strength, payment history, and credit worthiness, all of which can be derived from D&B reports. Risk is assessed using D&Bs scoring methodology and is one factor used to create the recommended limits. See Help for details.

Financial Stress Class Summary

The Financial Stress Class and Percentile show this company in comparison with other companies just within US. The Financial Stress Score predicts the likelihood of a firm ceasing business without paying all creditors in full, or reorganization or obtaining relief from creditors under state/federal law over the next 12 months. Scores were calculated using a statistically valid model derived from D&Bs extensive data files. The Financial Stress Class of 4 for this company shows that firms with this class had a failure rate of 0.84% (84 per 10,000), which is 1.75 times higher than the average of businesses in D & B's database.

Financial Stress Class :



Moderate to high risk of severe financial stress, such as a bankruptcy, over the next 12 months.

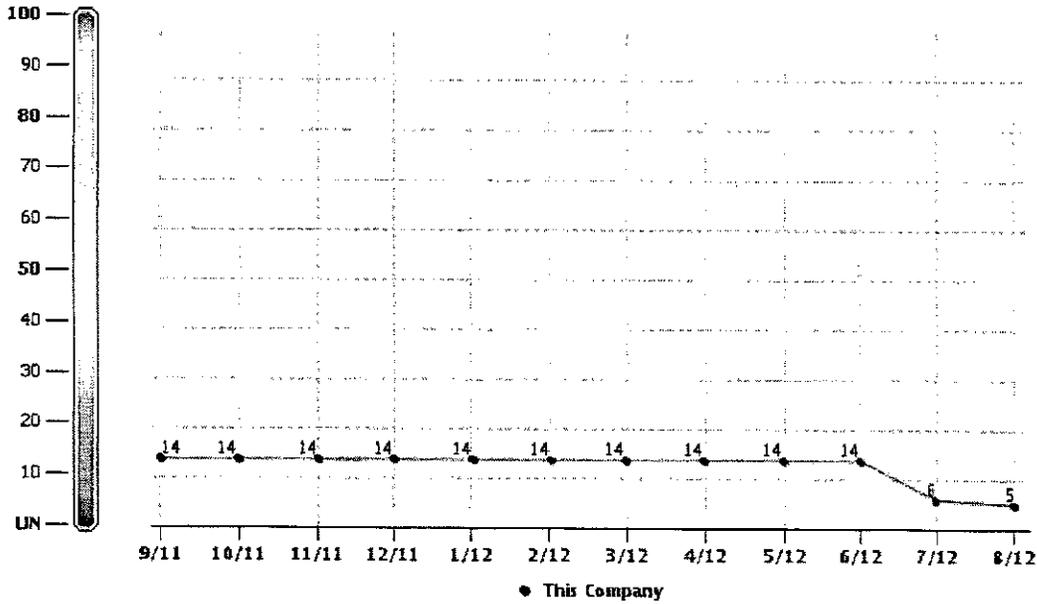
Probability of Failure:

- Among Businesses with this Class: **0.84 %** (84 per 10,000)
- Financial Stress National Percentile : **5** (Highest Risk: 1; Lowest Risk: 100)
- Financial Stress Score : **1373** (Highest Risk: 1,001; Lowest Risk: 1,875)
- Average of Businesses in D&Bs database: **0.48 %** (48 per 10,000)

The Financial Stress Class of this business is based on the following factors:

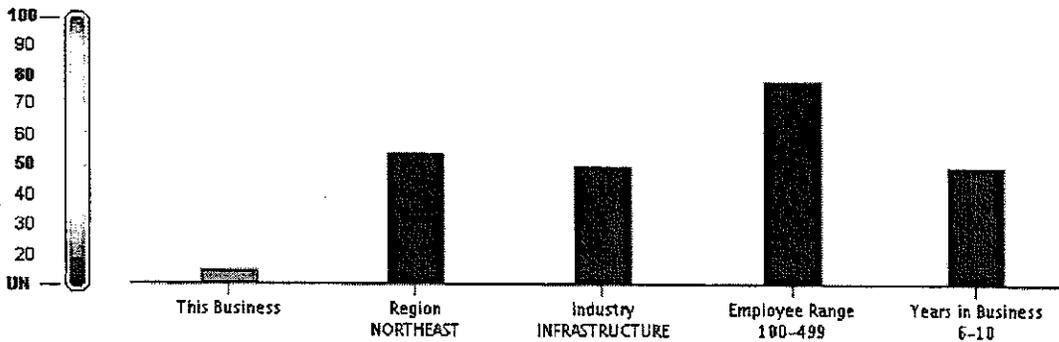
- Composite credit appraisal is rated fair.
- UCC Filings reported.
- High proportion of past due balances to total amount owing.
- High number of inquiries to D & B over last 12 months.
- Low proportion of satisfactory payment experiences to total payment experiences.
- High proportion of slow payment experiences to total number of payment experiences.

Financial Stress Percentile Trend:



Notes:

- The Financial Stress Class indicates that this firm shares some of the same business and financial characteristics of other companies with this classification. It does not mean the firm will necessarily experience financial stress.
- The Probability of Failure shows the percentage of firms in a given Class that discontinued operations over the past year with loss to creditors. The Probability of Failure - National Average represents the national failure rate and is provided for comparative purposes.
- The Financial Stress National Percentile reflects the relative ranking of a company among all scorable companies in D&Bs file.
- The Financial Stress Score offers a more precise measure of the level of risk than the Class and Percentile. It is especially helpful to customers using a scorecard approach to determining overall business performance.



Norms	National %
This Business	5
Region: NORTHEAST	48
Industry: INFRASTRUCTURE	43
Employee range: 100-499	75
Years in Business: 6-10	43

This Business has a Financial Stress Percentile that shows:

- Higher risk than other companies in the same region.
- Higher risk than other companies in the same industry.

- Higher risk than other companies in the same employee size range.
- Higher risk than other companies with a comparable number of years in business.

Credit Score Summary

The Commercial Credit Class and Percentile show this company in comparison with other companies just within US. The Commercial Credit Score predicts the likelihood that a company will pay its bills in a severely delinquent manner (90 days or more past terms), obtain legal relief from creditors or cease operations without paying all creditors in full over the next 12 months. Scores are calculated using a statistically valid model derived from D&B's extensive data files. The Credit Score class of 4 for this company shows that 31.5% of firms with this class paid one or more bills severely delinquent, which is 1.34 times higher than the average of businesses in D & B's database.

Credit Score Class :



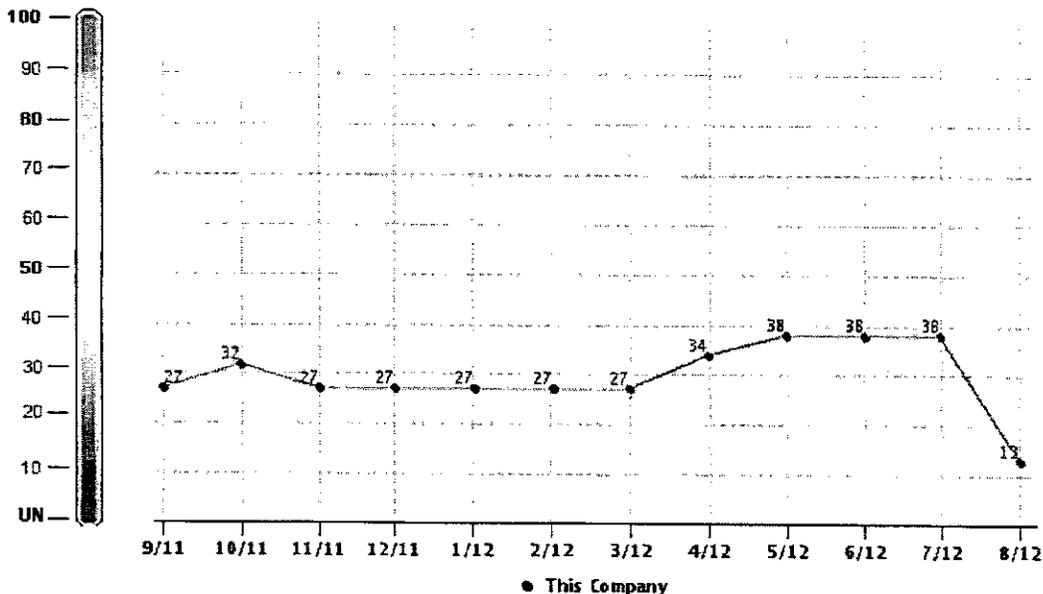
Incidence of Delinquent Payment

- Among Companies with this Classification: **31.50 %**
- Average compared to businesses in D&B's database: **23.50 %**
- Credit Score Percentile : **24** (Highest Risk: 1; Lowest Risk: 100)
- Credit Score : **394** (Highest Risk: 101; Lowest Risk:670)

The Credit Score Class of this business is based on the following factors:

- High proportion of past due balances to total amount owing.
- Most recent amount past due.
- Composite credit appraisal is rated fair.
- Insufficient number of payment experiences.
- Low number of satisfactory payments.
- Business does not own facilities.

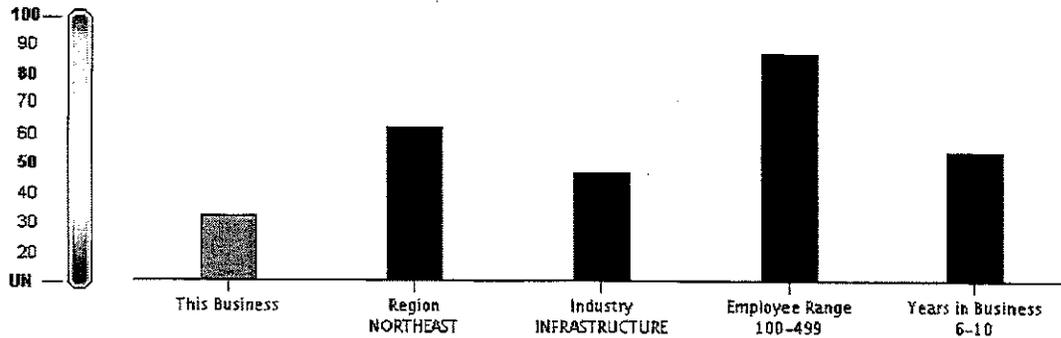
Credit Score Class Percentile Trend:



Notes:

- The Commercial Credit Score Risk Class indicates that this firm shares some of the same business and financial characteristics of other companies with this classification. It does not mean the firm will necessarily experience severe delinquency.

- The incidence of delinquency shows the percentage of firms in a given percentile that are likely to pay creditors in a severely delinquent manner. The average incidence of delinquency is based on businesses in D&B's database and is provided for comparative purposes.
- The Commercial Credit Score percentile reflects the relative ranking of a firm among all scorable companies in D&B's file.
- The Commercial Credit Score offers a more precise measure of the level of risk than the Risk Class and Percentile. It is especially helpful to customers using a scorecard approach to determining overall business performance.



Norms	National %
This Business	24
Region: NORTHEAST	57
Industry: INFRASTRUCTURE	40
Employee range: 100-499	85
Years in Business: 6-10	48

This business has a Credit Score Percentile that shows:

- Higher risk than other companies in the same region.
- Higher risk than other companies in the same industry.
- Higher risk than other companies in the same employee size range.
- Higher risk than other companies with a comparable number of years in business.

Trade Payments

Currency: Shown in USD unless otherwise indicated

D&B PAYDEX®

The D&B PAYDEX is a unique, weighted indicator of payment performance based on payment experiences as reported to D&B by trader references. Learn more about the D&B PAYDEX

Timeliness of historical payments for this company.

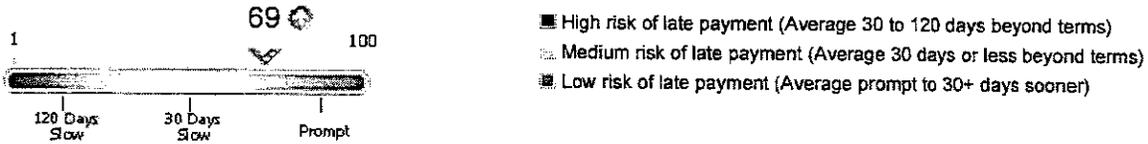
Current PAYDEX is	69	Equal to 16 days beyond terms (Pays more slowly than the average for its industry of 15 days beyond terms)
Industry Median is	70	Equal to 15 days beyond terms
Payment Trend currently is	↔	Unchanged, compared to payments three months ago

Indications of slowness can be the result of dispute over merchandise, skipped invoices etc. Accounts are sometimes placed for collection even though the existence or amount of the debt is disputed.

Total payment Experiences in D&Bs File (HQ)	46
Payments Within Terms (not weighted)	72 %
Trade Experiences with Slow or Negative Payments(%)	39.13%

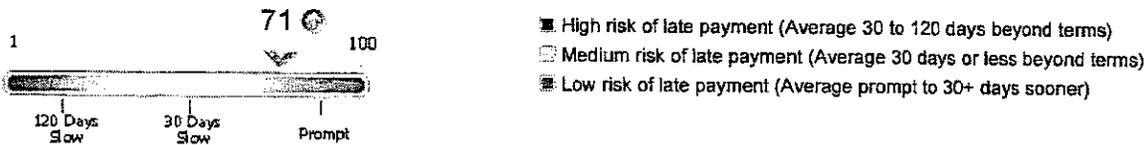
Total Placed For Collection	0
High Credit Average	9,210
Largest High Credit	200,000
Highest Now Owing	80,000
Highest Past Due	25,000

12-Month D&B PAYDEX



When weighted by amount, payments to suppliers average 16 days beyond terms

3-Month D&B PAYDEX



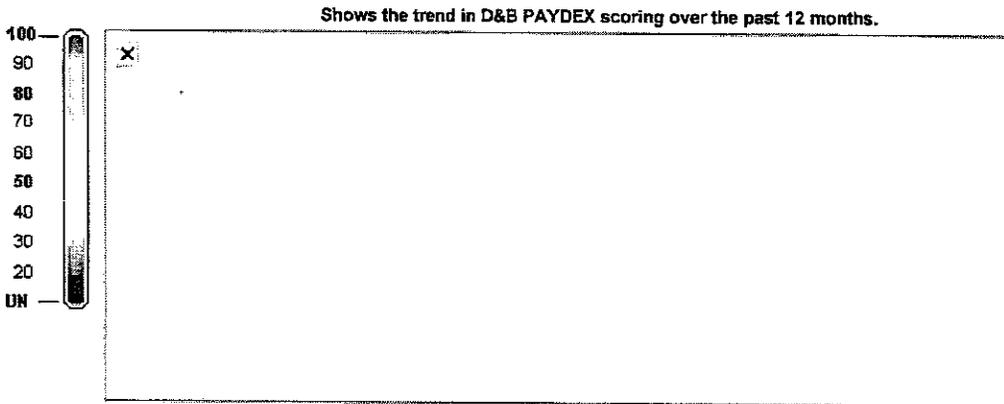
Based on payments collected over last 3 months.

When weighted by amount, payments to suppliers average 14 days beyond terms

D&B PAYDEX® Comparison

Current Year

PAYDEX® of this Business compared to the Primary Industry from each of the last four quarters. The Primary Industry is Railroad line-haul operator, based on SIC code 4011.

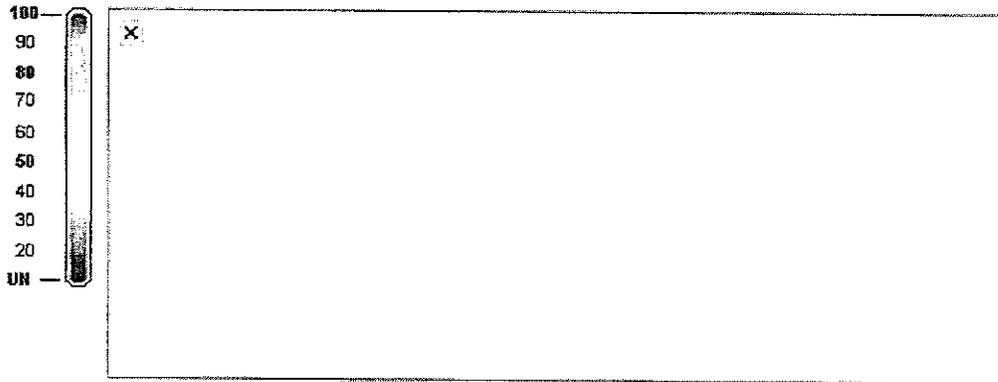


	9/11	10/11	11/11	12/11	1/12	2/12	3/12	4/12	5/12	6/12	7/12	8/12
This Business	74	74	74	74	75	75	73	73	72	73	68	69
Industry Quartiles												
Upper	76			77			77			76		
Median	71			70			70			70		
Lower	65			65			64			64		

- Current PAYDEX for this Business is 69, or equal to 16 days beyond terms
- The 12-month high is 75, or equal to 8 DAYS BEYOND terms
- The 12-month low is 68, or equal to 17 DAYS BEYOND terms

Previous Year

Shows PAYDEX of this Business compared to the Primary Industry from each of the last four quarters. The Primary Industry is Railroad line-haul operator, based on SIC code 4011.



Previous Year	09/10 Q3'10	12/10 Q4'10	03/11 Q1'11	06/11 Q2'11
This Business	76	76	76	76
Industry Quartiles				
Upper	76	76	76	76
Median	69	70	70	71
Lower	62	63	64	65

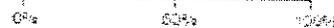
Based on payments collected over the last 4 quarters.

- Current PAYDEX for this Business is 69, or equal to 16 days beyond terms
- The present industry median Score is 70, or equal to 15 days beyond terms
- Industry upper quartile represents the performance of the payers in the 75th percentile
- Industry lower quartile represents the performance of the payers in the 25th percentile

Payment Habits

For all payment experiences within a given amount of credit extended, shows the percent that this Business paid within terms. Provides number of experiences to calculate the percentage, and the total credit value of the credit extended.

Credit Extended	# Payment Experiences	Total Amount	% of Payments Within Terms
Over 100,000	1	200,000	100%
50,000-100,000	0	0	0%
15,000-49,999	5	120,000	42%
5,000-14,999	9	65,000	54%
1,000-4,999	9	13,500	39%
Under 1,000	20	6,750	80%



Based on payments collected over last 24 months.

All Payment experiences reflect how bills are paid in relation to the terms granted. In some instances, payment beyond terms can be the result of disputes over merchandise, skipped invoices etc.

Payment Summary

- There are 46 payment experience(s) in D&Bs file for the most recent 24 months, with 26 experience(s) reported during the last three month period.
- The highest Now Owes on file is 80,000. The highest Past Due on file is 25,000

Below is an overview of the company's currency-weighted payments, segmented by its suppliers primary industries:

	Total Revd (#)	Total Amts	Largest High Credit	Within Terms (%)	Days Slow <31 31-60 61-90 90> (%) (%) (%)		
Top Industries							
Nonclassified	7	66,300	45,000	31	35	0	34 0
Misc equipment rental	4	9,500	7,500	89	11	0	0 0
Misc business service	3	21,000	20,000	99	1	0	0 0
Whol industrial suppl	2	16,000	15,000	94	6	0	0 0
Misc business credit	2	11,000	10,000	91	9	0	0 0
Railroad	2	15,000	10,000	33	0	0	0 67
Radiotelephone commun	2	10,000	5,000	75	25	0	0 0
Trucking non-local	2	2,750	2,500	55	0	45	0 0
Short-frm busn credit	2	2,750	2,500	100	0	0	0 0
Industrial launderer	2	3,500	2,500	14	86	0	0 0
Whol electrical equip	2	550	500	9	91	0	0 0
Petroleum refining	1	200,000	200,000	100	0	0	0 0
Transportation svcs	1	25,000	25,000	0	50	50	0 0
Courier service	1	10,000	10,000	0	100	0	0 0
Ret mail-order house	1	7,500	7,500	0	50	50	0 0
Whol auto parts	1	1,000	1,000	0	50	0	50 0
Management services	1	1,000	1,000	100	0	0	0 0
Misc water cargo trns	1	500	500	100	0	0	0 0
Whol durable goods	1	500	500	100	0	0	0 0
Hvy const eqpt rental	1	500	500	100	0	0	0 0
Whol hardware	1	250	250	50	50	0	0 0
Mfg cleaning products	1	250	250	100	0	0	0 0
Whol plumb/hydronics	1	250	250	100	0	0	0 0
Photocopying service	1	100	100	100	0	0	0 0
Insurance agent	1	50	50	100	0	0	0 0
Other payment categories							
Cash experiences	1	250	250				
Payment record unknown	0	0	0				
Unfavorable comments	1	50	50				
Placed for collections:							
With D&B	0	0	0				
Other	0	N/A	0				
Total in D&Bs file	46	405,550	200,000				

Accounts are sometimes placed for collection even though the existence or amount of the debt is disputed.

Indications of slowness can be result of dispute over merchandise, skipper invoices etc.

Detailed payment history for this company

Date Reported (mm/yy)	Paying Record	High Credit	Now Owes	Past Due	Selling Terms	Last Sale Within (month)
08/12	Slow 30-60	7,500	750	750		1 mo
	Slow 30-90	45,000	750	750		4-5 mos

	Slow 30-90	1,000	100	100		1 mo
07/12	Ppt	200,000	80,000	0		1 mo
	Ppt	20,000	20,000	0		1 mo
	Ppt	15,000	10,000	0		1 mo
	Ppt	5,000	5,000	0		1 mo
	Ppt	5,000	100	0		1 mo
	Ppt	1,000	50	0		1 mo
	Ppt	500	500	0		1 mo
	Ppt	500	500	0		1 mo
	Ppt	250	50	0		1 mo
	Ppt	100	0	0		2-3 mos
	Ppt	50	0	0		6-12 mos
	Ppt	50	0	0	N30	4-5 mos
	Ppt-Slow 30	1,000	1,000	500		1 mo
	Ppt-Slow 30	500	250	0		1 mo
	Ppt-Slow 60	2,500	250	250		2-3 mos
	Slow 25	1,000	500	500	N30	1 mo
	Slow 30	2,500	2,500	1,000		1 mo
	Slow 30	1,000	0	0	Lease Agreemnt	6-12 mos
	Slow 30	1,000	0	0		6-12 mos
	Slow 30-60	25,000	25,000	25,000	N30	1 mo
	(024) Bad debt	50	0	0	Cash account	4-5 mos
06/12	Ppt	7,500	1,000		Lease Agreemnt	
	Ppt	250	100	0	N30	1 mo
04/12	Ppt	5,000	5,000	0		1 mo
	Ppt-Slow 30	5,000	2,500	750		1 mo
	Slow 30	500	0	0		6-12 mos
03/12	Ppt-Slow 30	250	0	0		6-12 mos
	Slow 120	10,000	10,000	10,000		
02/12	Ppt	500	0	0	N30	1 mo
	Ppt	500	250	0	N30	1 mo
11/11	Ppt	500	0	0	N30	6-12 mos
	Ppt	250	0	0		6-12 mos
06/11	Ppt	2,500	1,000	0		1 mo
	Slow 20	10,000				1 mo
04/11	Slow 30	500	0	0		6-12 mos
03/11	Ppt	15,000	0	0		4-5 mos
02/11	Ppt	500	0	0		6-12 mos
11/10	Ppt	250	50	0		1 mo
	Ppt	50	0	0		6-12 mos
09/10	Ppt	10,000	50	0	Lease Agreemnt	
	Ppt	250	0	0	N15	6-12 mos
08/10	(045)	250			Cash account	1 mo
07/10	Ppt	500	0	0		6-12 mos

Payments Detail Key: 30 or more days beyond terms

Payment experiences reflect how bills are paid in relation to the terms granted. In some instances payment beyond terms can be the result of disputes over merchandise, skipped invoices, etc. Each experience shown is from a separate supplier. Updated trade experiences replace those previously reported.

Public Filings

Currency: Shown in USD unless otherwise indicated

Summary

The following data includes both open and closed filings found in D&B's database on this company.

Record Type	# of Records	Most Recent Filing Date
Bankruptcy Proceedings	0	-
Judgments	0	-
Liens	0	-
Suits	0	-
UCCs	27	01/14/11

The following Public Filing data is for information purposes only and is not the official record. Certified copies can only be obtained from the official source.

UCC Filings

Collateral All Assets
Type Original
Sec. Party LASALLE BANK NATIONAL ASSOCIATION ATTN: ROB HART, CHICAGO, IL
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 30119357
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE

Date Filed 2002-12-26
Latest Info Received 02/10/03

Collateral All Assets
Type Original
Sec. Party LASALLE BANK NATIONAL ASSOCIATION ATTN: ROB HART, CHICAGO, IL
Debtor MONREAL, MAINE & ATLANTIC CORPORATION
Filing No. 30119324
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE

Date Filed 2002-12-26
Latest Info Received 02/10/03

Collateral Negotiable instruments and proceeds - Accounts receivable and proceeds - Assets and proceeds - Building materials and proceeds
Type Original
Sec. Party UNITED STATES OF AMERICA BY SECRETARY OF TRANSPORTATION ACTING THROUGH ADMINISTRATOR OF FEDERAL RAILROAD ADMINISTRATION, WASHINGTON, DC
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 2010 4366435
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE

Date Filed 2010-12-10
Latest Info Received 01/03/11

Collateral Negotiable instruments and proceeds - Accounts receivable and proceeds - Assets and proceeds - Fixtures and proceeds - and OTHERS
Type Amendment
Sec. Party UNITED STATES OF AMERICA BY SECRETARY OF TRANSPORTATION ACTING THROUGH ADMINISTRATOR OF FEDERAL RAILROAD ADMINISTRATION, WASHINGTON, DC
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 2011 0156615
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE
Date Filed 2011-01-14
Latest Info Received 02/11/11
Original UCC Filed Date 2010-12-10
Original Filing No. 2010 4366435

Collateral Inventory and proceeds - Account(s) and proceeds
Type Original
Sec. Party WHEELING & LAKE ERIE RAILWAY COMPANY, BREWSTER, OH
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 2009 2731773
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE
Date Filed 2009-08-25
Latest Info Received 09/30/09

Collateral Inventory and proceeds - Account(s) and proceeds
Type Original
Sec. Party WHEELING & LAKE ERIE RAILWAY COMPANY, BREWSTER, OH
Debtor MONTREAL, MAINE & ATLANTIC CORPORATION
Filing No. 2009 2731526
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE
Date Filed 2009-08-25
Latest Info Received 09/30/09

Collateral Inventory
Type Original
Sec. Party FM INDUSTRIES, INC., FORT WORTH, TX
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 5011586 6
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE
Date Filed 2005-01-11
Latest Info Received 02/04/05

Collateral Assets
Type Original
Sec. Party STATE OF MAINE DEPARTMENT OF TRANSPORTATION, AUGUSTA, ME
Debtor MONTREAL MAINE AND ATLANTIC RAILWAY LTD
Filing No. 170674536
Filed With SECRETARY OF STATE/UCC DIVISION, AUGUSTA, ME

Date Filed 2004-11-30
Latest Info Received 12/09/04

Collateral Equipment
Type Original
Sec. Party MAINE LUBRICATION SERVICE, INC., PORTLAND, ME
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 169475038
Filed With SECRETARY OF STATE/UCC DIVISION, AUGUSTA, ME

Date Filed 2004-09-28
Latest Info Received 10/06/04

Collateral Equipment
Type Original
Sec. Party FCM RAIL, LTD., GRAND BLANC, MI
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 3262089 1
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE

Date Filed 2003-09-29
Latest Info Received 10/30/03

Collateral Leased Communications equipment including proceeds and products
Type Original
Sec. Party GREATAMERICA LEASING CORPORATION, CEDAR RAPIDS, IA
Debtor MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Filing No. 6328530 1
Filed With SECRETARY OF STATE/UCC DIVISION, DOVER, DE

Date Filed 2006-09-22
Latest Info Received 10/24/06

There are additional UCCs in D&Bs file on this company available by contacting 1-800-234-3867.

Government Activity

Activity summary

Borrower (Dir/Guar)	NO
Administrative Debt	YES
Contractor	NO
Grantee	NO
Party excluded from federal program(s)	NO

Possible candidate for socio-economic program consideration

Labour Surplus Area	N/A
Small Business	YES (2012)
8(A) firm	N/A

The details provided in the Government Activity section are as reported to Dun & Bradstreet by the federal government and other sources.

History & Operations

Currency: Shown in USD unless otherwise indicated

Company Overview

Company Name:	MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.
Street Address:	15 Iron Rd Hermon Main Bangor , ME 04401
Phone:	207 848-4200
Fax:	207-848-4232
URL:	http://www.mmarail.com
History	Is clear
Present management control	9 years

History

The following information was reported: 07/12/2011

Officer(s):	ROBERT C GRINDROD, PTNR EDWARD A BURKHARDT, PTNR FREDERICK JONES, PTNR
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The Maine Secretary of State's business registrations file showed that Montreal, Maine & Atlantic Railway, Ltd was registered as a Limited Partnership on November 13, 2002.

Ownership information provided verbally by Donald Gardner Jr, V Pre-Fin, on Feb 28 2011.

Business started 2003 by officers.

ROBERT C GRINDROD. 2003-present active here.

EDWARD A BURKHARDT. 2003-present active here.

FREDERICK JONES. Antecedents are unknown.

Business Registration

CORPORATE AND BUSINESS REGISTRATIONS PROVIDED BY MANAGEMENT OR OTHER SOURCE

The Corporate Details provided below may have been submitted by the management of the subject business and may not have been verified with the government agency which records such data.

Registered Name: Montreal Maine & Atlanta Corp.
Business type: CORPORATION
Corporation type: PROFIT
Date incorporated: Oct 22 2002
State of incorporation: DELAWARE
Filing date: Oct 22 2002
Where filed: SECRETARY OF STATE/CORPORATIONS DIVISION , DOVER , DE

Operations

07/12/2011

Operates line-haul railroads (100%).

Description: Has 100 account(s). Terms are Net 15 days. Sells to commercial concerns. Territory : United States & Canada.

Nonseasonal.

Employees: 230 which includes partners. 30 employed here.

Facilities: Shares 3,000 sq. ft. in a one story brick building.

Location: Central business section on main street.

Branches: This business has multiple branches, detailed branch/division information is available in Dun & Bradstreets linkage or family tree products.

SIC & NAICS

SIC:

Based on information in our file, D&B has assigned this company an extended 8-digit SIC. D&B's use of 8-digit SICs enables us to be more specific about a company's operations than if we use the standard 4-digit code.

The 4-digit SIC numbers link to the description on the Occupational Safety & Health Administration (OSHA) Web site. Links open in a new browser window.

4011 0000 Railroads, line-haul operating

NAICS:

482111 Line-Haul Railroads

Financials

Currency: Shown in USD unless otherwise indicated 

Company Financials: D&B

Additional Financial Data

The name and address of this business have been confirmed by D & B using available sources.

Key Business Ratios

D & B has been unable to obtain sufficient financial information from this company to calculate business ratios. Our check of additional outside sources also found no information available on its financial performance.

To help you in this instance, ratios for other firms in the same industry are provided below to support your analysis of this business.

UN = Unavailable

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UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)
 Lara Neumark 3122665941

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

MRDLAW
 676 N. MICHIGAN AVE., SUITE 2800
 CHICAGO IL 60611

DELAWARE DEPARTMENT OF STATE
 U.C.C. FILING SECTION
 FILED 04:08 PM 08/25/2009
 INITIAL FILING # 2009 2731526

SRV: 090806133



1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME
 MONTREAL, MAINE & ATLANTIC CORPORATION

OR

1b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

1c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
 15 IRON ROAD HERMON ME 04401 US

1e. TYPE OF ORGANIZATION 1f. JURISDICTION OF ORGANIZATION
 CORPORATION DE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

2e. TYPE OF ORGANIZATION 2f. JURISDICTION OF ORGANIZATION

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME
 WHEELING & LAKE ERIE RAILWAY COMPANY

OR

3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
 100 EAST FIRST STREET BREWSTER, OHIO OH 44513 US

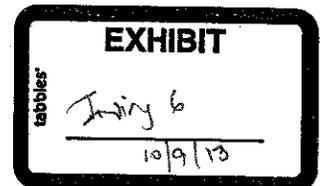
4. This FINANCING STATEMENT covers the following collateral:

All of Debtor's inventory, accounts and payment intangibles (as those terms are defined in the Uniform Commercial Code) whether now owned or hereafter acquired or arising and all proceeds including insurance proceeds thereof.

5. This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Affidavit If applicable

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (ADDITIONAL FEE) (optional) All Debtors Debtor 1 Debtor 2

8. OPTIONAL FILER REFERENCE DATA



UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

DELAWARE DEPARTMENT OF STATE
 U.C.C. FILING SECTION
 FILED 04:15 PM 08/25/2009
 INITIAL FILING # 2009 2731773
 SRV: 090806180

A. NAME & PHONE OF CONTACT AT FILER [optional]
 Lara Neumark 3122665941

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

MRODAP
 676 N. MICHIGAN AVE., SUITE 2800
 CHICAGO IL 60611

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME
 MONTEREAL, MAINE & ATLANTIC RAILWAY, LTD.

OR

1b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

1c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
 15 IRON ROAD BERMON ME 04401 US

1d. TYPE OF ORGANIZATION 1f. JURISDICTION OF ORGANIZATION
 CORPORATION DE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

2d. TYPE OF ORGANIZATION 2f. JURISDICTION OF ORGANIZATION

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME
 WHEELING & LAKE ERIE RAILWAY COMPANY

OR

3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
 100 EAST FIRST STREET BREWSTER OH 44513 US

4. This FINANCING STATEMENT covers the following collateral:

All of Debtor's inventory, accounts and payment intangibles (as those terms are defined in the Uniform Commercial Code) whether now owned or hereafter acquired or arising and all proceeds including insurance proceeds thereof.

6. This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum if applicable

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (optional) ADDITIONAL FEE

8. OPTIONAL FILER REFERENCE DATA

A1 Debtors Debtor 1 Debtor 2

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

DELAWARE DEPARTMENT OF STATE
 U.C.C. FILING SECTION
 FILED 04:28 PM 08/25/2009
 INITIAL FILING # 2009 2732276
 SRV: 090806299

A. NAME & PHONE OF CONTACT AT FILER [optional]	
Lara Neumark	3122655941
B. SEND ACKNOWLEDGMENT TO: (Name and Address)	
BRDLAW	
676 N. MICHIGAN AVE., SUITE 2800	
CHICAGO IL 60611	

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME IMS ACQUISITION CORPORATION					
OR	1b. INDIVIDUAL'S LAST NAME				
	FIRST NAME	MIDDLE NAME	SUFFIX		
1c. MAILING ADDRESS 15 IRON ROAD		CITY HERMON	STATE ME	POSTAL CODE 04401	COUNTRY US
	1e. TYPE OF ORGANIZATION CORPORATION		1f. JURISDICTION OF ORGANIZATION ME		

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME					
OR	2b. INDIVIDUAL'S LAST NAME				
	FIRST NAME	MIDDLE NAME	SUFFIX		
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY
	2e. TYPE OF ORGANIZATION		2f. JURISDICTION OF ORGANIZATION		

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR/SP) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME WHEELING & LAKE ERIE RAILWAY COMPANY					
OR	3b. INDIVIDUAL'S LAST NAME				
	FIRST NAME	MIDDLE NAME	SUFFIX		
3c. MAILING ADDRESS 100 EAST FIRST STREET		CITY BRISTOL	STATE OH	POSTAL CODE 44513	COUNTRY US

4. This FINANCING STATEMENT covers the following collateral:

All of Debtor's inventory, accounts and payment intangibles (as those terms are defined in the Uniform Commercial Code) whether now owned or hereafter acquired or arising and all proceeds including insurance proceeds thereof.

6.	<input type="checkbox"/> This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum. <input type="checkbox"/> (if applicable)	7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (ADDITIONAL FEE) <input type="checkbox"/> (optional)	<input type="checkbox"/> All Debtors	<input type="checkbox"/> Debtor 1	<input type="checkbox"/> Debtor 2
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8. OPTIONAL FILER REFERENCE DATA

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

DEPOSITION OF: ROBERT J. KEACH, in his capacity as
Chapter 11 Trustee of Montreal Maine & Atlantic Railway, Ltd.,
via DONALD GARDNER

Taken before Veronica L. Morrill, Registered Professional
Reporter, Notary Public in and for the State of Maine, on
October 10, 2013, at the offices of Marcus, Clegg & Mistretta,
One Canal Plaza, Suite 600, Portland, Maine, commencing at 10:04
a.m. pursuant to notice given.

DUVERNAY REPORTING, INC.
2 Merrill Road
Westbrook, ME 04092
207.854.2721

6

1 by reference onto the record here this
 2 morning.
 3 **MR. ROSENTHAL:** Yeah. And what I
 4 thought we would do is if you want to clarify
 5 or -- I mean, my understanding is -- and this
 6 is the reason I'm, you know, raising this --
 7 is that I would be asking you questions about
 8 the topics in the notice and that you would
 9 answer them to the extent that you can. And
 10 if you can't, then Mr. Fagone and I will have
 11 to talk afterwards about whether there is
 12 going to be any followup and what that might
 13 consist of. That's what I took away from our
 14 back and forth. Is that accurate in your
 15 view?
 16 **MR. FAGONE:** Yes. That's a fair
 17 summary.
 18 **MR. ROSENTHAL:** Okay.
 19 **MR. FAGONE:** What I want to make sure
 20 we're clear on, however, is that Mr. Gardner
 21 is not being tendered as the person with the
 22 most knowledge on all of the matters for
 23 examination listed on Exhibit A to the
 24 deposition notice.
 25 **MR. ROSENTHAL:** Yeah.

7

1 **MR. FAGONE:** He has substantial
 2 knowledge regarding at least matter number
 3 four. Okay? Beyond that, I guess I will
 4 leave it to the examination, but the trustee
 5 is not by making Mr. Gardner available
 6 conceding that he has the most knowledge with
 7 respect to any particular matters set forth on
 8 Exhibit A. And I'm happy to reserve rights
 9 with respect to what happens after this
 10 deposition this morning on anything else.
 11 **MR. ROSENTHAL:** Okay.
 12 **MR. FAGONE:** Okay.
 13 **BY MR. ROSENTHAL:**
 14 **Q.** Mr. Gardner, does any or all of that make
 15 sense to you?
 16 **A. Generally.**
 17 **Q.** In other words, do you understand what we're
 18 going to do here today?
 19 **A. In general terms, sure.**
 20 **Q.** Have you had your deposition taken before?
 21 **A. No.**
 22 **Q.** Let me just run through some real basic kind
 23 of ground rules here. The court reporter,
 24 Veronica, is here taking down everything that
 25 we say.

8

1 **A. Mmm-hmm.**
 2 **Q.** I'm going to be asking you questions.
 3 Hopefully you'll be able to answer them.
 4 Do you understand that piece of the
 5 process?
 6 **A. Mmm-hmm.**
 7 **Q.** She is only able to record words and not head
 8 shakes, and nods, and nonverbal communication.
 9 She can probably write down uh-huh, but it's
 10 better if you can answer yes, no, words type
 11 of --
 12 **A. I understand.**
 13 **Q.** Okay. I'm going to try very hard to let you
 14 finish your answers to my questions. And I'm
 15 going to ask you to try to let me finish my
 16 questions before you answer. Sometimes people
 17 talk over each other. And it creates a
 18 problem for the court reporter and the record.
 19 So can you try to follow that?
 20 **A. I will.**
 21 **Q.** If you need to take a break, let me know. If
 22 we are not in the middle of a question, we
 23 will accommodate you.
 24 **A. Okay.**
 25 **Q.** Okay? Now, can you tell me, sir, you are

9

1 currently employed by the MMA?
 2 **A. I am.**
 3 **Q.** What's your position?
 4 **A. I am the chief financial officer, but it's the**
 5 **vice president of administration and CFO.**
 6 **Q.** Okay. How long have you held that position?
 7 **A. Just over five years.**
 8 **Q.** Let me go back to ask you about your
 9 education. Did you graduate from college?
 10 **A. I did.**
 11 **Q.** What was your degree?
 12 **A. I have an economic -- a degree in economics,**
 13 **BA, from University of New Hampshire. And I**
 14 **have an MBA from Boston College in finance.**
 15 **Q.** When you left Boston College, did you go to
 16 work?
 17 **A. Yes.**
 18 **Q.** Where did you go to work?
 19 **A. Maine National Bank.**
 20 **Q.** What was your job there?
 21 **A. I was a financial analyst.**
 22 **Q.** And how long were you there?
 23 **A. A little over a year.**
 24 **Q.** Where did you go from there?
 25 **A. I joined Raytheon.**

10

1 Q. What did you do at Raytheon?
2 A. **Financial analyst.**
3 Q. How long were you at Raytheon?
4 A. **I believe almost four years.**
5 Q. Where did you go from Raytheon?
6 A. **A company called -- well, it's called now**
7 **ENSR, E-N-S-R. It's an environmental**
8 **consulting firm.**
9 Q. And was that another financial analyst job?
10 A. **There, yes, budgeting job.**
11 Q. How long were you there?
12 A. **About three years.**
13 Q. All right. And what was next?
14 A. **A company called Kazmaier Associates, which**
15 **was a private -- privately-held company in the**
16 **sporting goods industry.**
17 Q. How long were you there?
18 A. **Over a dozen years.**
19 Q. What kind of job was that?
20 A. **I was the -- ultimately the financial officer.**
21 **I went in as treasurer but became the**
22 **finance -- CFO.**
23 Q. Where did you go from there?
24 A. **I went to a distributor of construction**
25 **supplies, Genalco, and was the chief operating**

11

1 **officer for them for eight years.**
2 Q. Okay. And what was next?
3 A. **I went back to Kazmaier for about four**
4 **years --**
5 Q. Okay.
6 A. **-- in the same capacity or slightly broader in**
7 **terms of some operating role, including the**
8 **oversight of production facilities in**
9 **California.**
10 Q. Okay.
11 A. **So --**
12 Q. What was next?
13 A. **Then I came back from California -- we moved**
14 **to California. And then we moved back to**
15 **Maine, which I was living in Southern**
16 **California, moving to Maine. And came to work**
17 **for Maine Drilling and Blasting.**
18 Q. Okay. How long were you there?
19 A. **A little over two years. And then I joined**
20 **the railroad.**
21 Q. Okay. When you joined the railroad, is that
22 the current position --
23 A. **Yes.**
24 Q. -- that you hold now?
25 A. **Yes.**

12

1 Q. All right. I would like to mention or
2 reference a couple of background facts that I
3 don't think are disputed, but I just want to
4 make sure we're on the same page. Okay?
5 A. **Mmm-hmm.**
6 Q. Before August 7 of 2013 the MMA hauled freight
7 for certain Irving companies, correct?
8 A. **Correct.**
9 Q. And there are a couple of different Irving
10 companies that MMA hauled freight for. I'm
11 going to call them Irving Paper today.
12 A. **Okay.**
13 Q. Does that make sense?
14 A. **Yes.**
15 Q. MMA also contracted with two railroads; the
16 New Brunswick Southern Railway Company and the
17 Maine Northern Railway, to handle some piece
18 of that transportation?
19 A. **I understand.**
20 Q. I may refer to those railroads as Irving
21 Railroad today.
22 A. **Okay.**
23 Q. If at any point I'm using those terms in ways
24 that don't make sense to you, I would ask you
25 to tell me that. Okay?

13

1 A. **Very well.**
2 Q. And if there is a piece of your answer that
3 requires you to break down by a particular
4 entity, I'm going to ask you to do that.
5 A. **Mmm-hmm.**
6 Q. Okay?
7 A. **Okay.**
8 Q. All right. Let me show you what we marked
9 yesterday as Exhibit 2 to the Irving
10 deposition, and just ask if you have ever seen
11 this before?
12 A. **No, I haven't.**
13 Q. Okay. Were you involved at all in negotiation
14 of an agreement between the MMA bankruptcy
15 trustee and Irving?
16 A. **Was I -- no, I had no contact with any of the**
17 **Irving people.**
18 Q. Okay. Did you participate in making a deal
19 with Irving in the context of bankruptcy?
20 **MR. FAGONE:** I'm going to object to the
21 question to the extent it asked the witness to
22 reveal communications between him and the
23 Chapter 11 trustee or his advisors and
24 lawyers.
25 If your -- subject to that, you can go

14

1 ahead and answer. In other words, I don't
 2 want you to reveal communications you may have
 3 had with me or other lawyers employed by the
 4 Chapter 11 trustee.

5 **THE WITNESS:** I understand.

6 **A. That was the only -- that was to the extent**
 7 **that I was involved with whatever the**
 8 **negotiations were; was communicating with the**
 9 **trustee or his advisors.**

10 **BY MR. ROSENTHAL:**

11 **Q.** Dealing with the lawyers?

12 **A. Dealing with the lawyers.**

13 **Q.** All right. Are you familiar with something
 14 called a swap agreement between Irving and
 15 MMA?

16 **A. I don't believe there is any swap agreement.**

17 **Q.** Okay. Was there ever something called a swap
 18 agreement?

19 **A. No.**

20 **Q.** Was there an agreement between Irving and MMA
 21 relating to how payment would be handled as
 22 between Irving Paper and MMA and MMA and
 23 Irving Railroad?

24 **A. There is no written agreement, as far as I'm**
 25 **aware.**

15

1 **Q.** Okay. Was there a practice that applied to
 2 how payment would be handled --

3 **A. Yes.**

4 **Q.** -- between those three parties?

5 **A. Yes.**

6 **Q.** What was that practice?

7 **A. There are in my view two different approaches**
 8 **that were -- had been used over a period of**
 9 **time -- over the period of time I've been**
 10 **involved.**

11 **Q.** Okay.

12 **A. Early on it was the practice of every week the**
 13 **Irving companies, mainly the paper**
 14 **companies --**

15 **Q.** Mmm-hmm.

16 **A. -- would -- as far as I knew would tell us**
 17 **what they were going to pay the railroad.**

18 **Q.** Okay.

19 **A. And they would tell us what the railroad, MMA,**
 20 **was to pay their railroad. That was generally**
 21 **communicated to our controller, who has since**
 22 **passed away, and clerical people in our**
 23 **office.**

24 **Q.** And did MMA have any input on how this would
 25 be handled?

16

1 **A. Initially, no, but as time went on I objected**
 2 **to some of the demands of our payment, in that**
 3 **the payment to the railroad was governed by --**
 4 **I believe you're making reference to a**
 5 **commercial agreement. And that stipulates how**
 6 **things are to be invoiced and how they are to**
 7 **be paid between the railroads, particularly**
 8 **MMA paying the -- in this case the NBSR.**

9 **Q.** Okay.

10 **A. And the demand that I just explained of what**
 11 **we were to pay the NBSR did not follow that**
 12 **document.**

13 **Q.** What was that document that you're referring
 14 to? You said a minute ago that I was
 15 referring to a commercial agreement.

16 **A. Well, I've seen written -- there is a**
 17 **commercial agreement that has been referred**
 18 **to, dated sometime in January of 2003, between**
 19 **the NBSR and Montreal Maine & Atlantic**
 20 **Railroad setting the initial relationship in**
 21 **place when MMA was created.**

22 **Q.** Okay. And it was your view that the demands
 23 that Irving was making for how it would be
 24 paid didn't comply with that agreement?

25 **A. Yes.**

17

1 **Q.** Did you communicate that to anyone at Irving?

2 **A. Yes.**

3 **Q.** Who was that?

4 **A. Principally the person who was making the**
 5 **demand.**

6 **Q.** And who was that person?

7 **A. It was a lady, just gone blank on her name.**

8 **Q.** All right.

9 **A. But it was via e-mail.**

10 **Q.** Okay.

11 **A. And I did speak to her at one point.**

12 **Q.** What did she say?

13 **A. She would check it out, as I recall.**

14 **Q.** Did she?

15 **A. I believe she did.**

16 **Q.** Did anything change?

17 **A. Not at that time.**

18 **Q.** Was it the -- what was it about the demands
 19 that Irving was making that you felt didn't
 20 comply with the agreement?

21 **A. They were as much as two weeks sooner --**
 22 **requiring payment as much as two weeks prior**
 23 **to what the agreement would call for, for the**
 24 **payment terms.**

25 **Q.** Okay. What about the payment of money from

18

1 Irving to MMA? Did MMA have any input on when
2 and how much it would be paid by Irving for
3 amounts due?
4 **A. We made demands. And I don't mean that in a
5 legal demand, but I mean we requested
6 additional payments. They generally were also
7 outside of -- or beyond the terms by a few
8 days.**
9 **Q.** So, in other words, Irving was paying MMA
10 late, and demanding that at the same time MMA
11 turn that money back to MMA Railroad early.
12 Is that fair?
13 **A. That is correct.**
14 **Q.** Did you discuss with anyone at Irving, whether
15 it was the woman whose name who you can't
16 remember or anyone else, the basic concept of
17 Irving's requirement that these payments be
18 made simultaneously?
19 **A. Well, they weren't necessarily simultaneous
20 payments.**
21 **Q.** Okay. Let me back up and ask you that then.
22 Was there a practice of the money changing
23 hands at or around the same moment?
24 **A. Within a few days, yes.**
25 **Q.** A few days?

19

1 **A. Yes.**
2 **Q.** Okay. And was that something that Irving
3 insisted upon?
4 **A. Yes.**
5 **Q.** And MMA agreed to do it?
6 **A. Yes.**
7 **Q.** Why?
8 **A. It was -- the cash receipts that we obtain
9 from the Irving companies was considerably
10 more than that which we paid out. So standing
11 on a few days' principle would have cost us a
12 considerable amount of cash.**
13 **Q.** Okay.
14 **A. Meaning that if they were paying us \$300,000
15 to \$400,000 and we were paying them \$80,000, I
16 would have been remiss in fighting --**
17 **Q.** Sure.
18 **A. -- over a few days, in the context of where we
19 were.**
20 **Q.** Is there anything in writing that described
21 this arrangement?
22 **A. There were weekly e-mails saying here is what
23 we are sending. We expect -- I don't know if
24 those were the words, but you should be
25 sending...**

20

1 **Q.** Okay. You mentioned that this was the
2 arrangement early on. Did it change?
3 **A. It did.**
4 **Q.** When?
5 **A. It changed when the transportation of crude
6 oil became a substantial and significant
7 financial amount, let's put it that way.**
8 **Q.** When was that?
9 **A. I want to say May -- well, it was about May of
10 2012 --**
11 **Q.** Okay.
12 **A. -- although we had talked about it prior to
13 that for a couple of months.**
14 **Q.** And can you tell me about what the changes
15 consisted of?
16 **A. The first principle was that in order to pay
17 according to the commercial agreement we would
18 be paying in about 30 days from the time we
19 moved the train to the NBSR.**
20 **Q.** Okay.
21 **A. We were not being paid by the customer until
22 anywhere from, well, 35 to 60 days later,
23 because this was received traffic, and our
24 cash receipts for these trains was through the
25 interline settlement system, ISS.**

21

1 **Q.** So MMA was participating in that system?
2 **A. That's right.**
3 **Q.** And Irving was too?
4 **A. They -- no, they do not participate in the
5 interline settlement system or haven't for as
6 long as I've known.**
7 **Q.** Okay. I guess I got a little confused when
8 you said that the payment was being done
9 pursuant to that system -- or maybe I
10 misunderstood that. Let me ask you to tell
11 me -- kind of go back and tell me what you
12 were saying when you were talking about the
13 interline settlement system.
14 **A. The dollars became very substantial, millions
15 of dollars, or as much as a million dollars,
16 that we would have had to pay the Irving
17 railroads prior to our receipt of any cash
18 from the movement.**
19 **Q.** Okay.
20 **MR. FAGONE:** Can I interject? When you
21 say prior to our receipt of cash for the
22 movement, are you referring to receipt of cash
23 from the Irving Paper companies or from some
24 other payor?
25 **THE WITNESS:** No, some other payor.

22

1 **BY MR. ROSENTHAL:**
2 **Q.** Okay.
3 **A.** It had nothing to do with the paper company at
4 this point.
5 **Q.** So it's that payment from the other payor
6 that's subject to the interline settlement?
7 **A.** Mmm-hmm. That's right.
8 **MR. FAGONE:** I'm sorry. I just thought
9 that clarification might help.
10 **MR. ROSENTHAL:** It's no problem.
11 **BY MR. ROSENTHAL:**
12 **Q.** I understand -- is that the background to --
13 **A.** That --
14 **Q.** -- what changed?
15 **A.** -- as the background to the change.
16 **Q.** Okay.
17 **A.** At which point that item, as well as the other
18 activity that we were having that was just
19 going on, on a routine, generally we had a
20 greater leverage in terms of what we had to
21 pay them, and therefore I could --
22 **Q.** Them being the Irving Railroad?
23 **A.** The Irving Railroad. I could elicit better
24 adherence to terms.
25 **Q.** Okay. So what was the change to the terms

23

1 that you were able to receive?
2 **A.** Initially I wanted -- I would pay them the
3 amounts for the oil if the Irving Paper
4 companies would pay the amounts that were due
5 for the other transportation in -- within
6 terms.
7 **Q.** Okay. So did that call for -- let me withdraw
8 that.
9 Were you able to get to a practice with
10 Irving in which you got paid by the paper
11 company at or around the same time that you
12 paid the Irving Railroad?
13 **A.** It was last fall that I insisted I would not
14 pay the railroads unless I received what I
15 wanted. And at one point I suggested -- and
16 did, in fact -- deduct from what I paid the
17 railroad what the paper company owed the
18 railroad, MMA.
19 **Q.** Okay. And did this evolve to a point where
20 there were simultaneous or contemporaneous
21 payments?
22 **A.** What this evolved to was a relationship I then
23 had with a gentleman in their offices, Ryan
24 Ellis. And I was referred to him by the
25 president of the -- or the chief executive --

24

1 I'm not sure of the title quite honestly -- of
2 the railroad to work this out. And he was
3 pretty -- he understood what the situation
4 was. He understood the terms. And he is the
5 one that told me it was very difficult to do
6 what I had just done.
7 And then we began a relationship where
8 monthly, at least, he and I would determine
9 what cash would come. I would ask him for
10 certain amounts from the Irving companies. He
11 would report back. And I would report what I
12 was going to pay. The transaction generally
13 all happened within a week, within a current
14 week. I mean, we picked a week. It's not
15 within a week of the time we talked.
16 **Q.** Okay. So let me just be clear here. And I'm
17 not trying to beat a dead horse, but is it
18 your understanding that there was no agreement
19 in place that called for money to change hands
20 between Irving Paper and MMA at or -- at the
21 same time or within minutes, let's say, that
22 money would change hands from MMA to Irving
23 Railroad?
24 **A.** No.
25 **Q.** Okay. It's your understanding that there was

25

1 no such agreement?
2 **A.** No.
3 **Q.** No. Just for the record, no, it's not your
4 understanding or --
5 **A.** It is my understanding there was no agreement
6 that the transactions were occurring
7 simultaneously.
8 **Q.** Okay. Just because the word, agreement, can
9 be a loaded term, is it your understanding
10 that there was no such practice to actually do
11 that?
12 **A.** There was no practice to do that.
13 **Q.** Okay.
14 **A.** There are serious physical constraints and
15 currency issues that preclude that from ever
16 happening.
17 **Q.** Okay. Did MMA ever take money from Irving
18 Paper and kind of hold it in trust for the
19 railroad?
20 **MR. FAGONE:** Objection to form.
21 **BY MR. ROSENTHAL:**
22 **Q.** Do you understand what I mean by that?
23 **A.** Did we hold money in an escrow account or
24 anything of that nature?
25 **Q.** Correct.

26

1 **A. No.**
2 **Q.** Did you take Irving Paper money and put it in
3 a separate account from where other monies
4 coming into --
5 **A. No.**
6 **Q.** -- MMA would go?
7 **A. Never.**
8 **Q.** Now, at some point did Irving Paper stop
9 paying MMA's bills?
10 **A. This year, yes.**
11 **Q.** Okay. When was that?
12 **A. I believe it was -- let me answer it a**
13 **different way. I believe the last time they**
14 **paid us, paid MMA, was I want to say early**
15 **June.**
16 **Q.** Of 2013?
17 **A. Of 2013. It may have been May. I would have**
18 **to go back to check for sure.**
19 **Q.** Would it be fair to say there were invoices
20 out there for work that MMA performed that
21 Irving Paper didn't pay?
22 **A. Yes.**
23 **Q.** Did you talk to anyone at Irving about that?
24 **A. Not necessarily. No, I haven't other than --**
25 **excuse me. I had sent a note to this**

27

1 **gentleman, Ryan Ellis, and conveyed what I had**
2 **expected from him or from the Irving Paper**
3 **companies -- I believe that was done sometime**
4 **in June -- and had not heard anything from him**
5 **at that time.**
6 **Q.** And was what you expected, that you conveyed
7 in that note, was that you expected to be
8 paid?
9 **A. Yes.**
10 **Q.** Okay. Did you talk to either Mr. Ellis or
11 anyone else at Irving about why they weren't
12 paying?
13 **A. No. There was -- seemed their normal form.**
14 **Q.** Do you know what effect, if any -- let me
15 withdraw that.
16 There was a train derailment in July --
17 **A. Yes.**
18 **Q.** -- right?
19 **A. Yes.**
20 **Q.** Do you know if that played a role in Irving
21 Paper's not continuing to pay MMA?
22 **MR. FAGONE:** Objection to form.
23 **A. I wouldn't know. I would presume a lot of**
24 **things, but they never explicitly said**
25 **anything to me.**

28

1 **BY MR. ROSENTHAL:**
2 **Q.** Okay. Do you know if they had that
3 conversation with anyone else at MMA?
4 **A. I don't know.**
5 **Q.** The payment of MMA's bills to Irving Paper is
6 something that would be within your domain as
7 the CFO; is that right?
8 **A. Our payments to Irving Paper? We never paid**
9 **Irving Paper.**
10 **Q.** If I said that I misspoke. I meant payment by
11 Irving Paper to MMA.
12 **A. Yes.**
13 **Q.** That would fall within your area?
14 **A. Yes.**
15 **Q.** Did you follow up with MMA at any point about
16 outstanding bills, other than the note that
17 you mentioned to Mr. Ellis?
18 **A. No.**
19 **Q.** And I think -- I'm replaying that question in
20 my head. I think I just asked you if you
21 followed up with MMA. I meant to say did you
22 follow up with Irving Paper.
23 **A. No, I did not.**
24 **Q.** Okay.
25 **A. My only contact with anyone in the Irving**

29

1 **organization, after a period of time, had**
2 **resorted to Mr. Ellis, and no one else.**
3 **Q.** Okay. Now, at some point are you aware that
4 Irving Railroad assigned to Irving Paper its
5 claims to be paid by the MMA?
6 **A. I saw those documents, yes.**
7 **Q.** When did you become aware of that?
8 **A. Sometime in July.**
9 **Q.** And how did you become aware of that?
10 **A. Those documents -- copies of those were sent**
11 **to MMA.**
12 **Q.** Okay. Were they sent to you at MMA?
13 **A. I don't know. They ended up on my desk.**
14 **Q.** Fair enough. Did you ever talk to anyone at
15 Irving about that?
16 **A. No.**
17 **Q.** All right. So let me show you -- let me see
18 if we're on the same page -- what yesterday
19 was marked as Exhibit 3. Just take a minute
20 and look through those.
21 **A. Okay.**
22 **MR. FAGONE:** Dan, while the witness is
23 reviewing the document you've handed to him,
24 I'd just note for the record that the document
25 marked as Irving 3 is a three-page document

30

1 that's stapled. And you in fact handed him
2 six documents, only one of which is
3 identified. I assume Irving 3 you're
4 referring to all six of them?
5 **MR. ROSENTHAL:** Yes. The exhibit is a
6 package of six documents, six three-page,
7 stapled-together documents.
8 **BY MR. ROSENTHAL:**
9 **Q.** Have you seen those before?
10 **A. Yes.**
11 **Q.** Are those the assignments you were referring
12 to a minute ago?
13 **A. Yes, I'm not sure -- I don't know that I have**
14 **received all six of these documents.**
15 **Q.** Okay.
16 **A. It's more than one, but I couldn't tell you --**
17 **Q.** Do you know how many there were?
18 **A. More than one.**
19 **Q.** Okay. I'm going to represent to you that the
20 total dollar amount contained within
21 Exhibit Irving 3 is \$1,273,976.10?
22 **A. Okay.**
23 **Q.** Okay? Does that ring a bell in terms of the
24 dollar amount that Irving Railroad assigned to
25 Irving Paper?

31

1 **A. Not necessarily.**
2 **Q.** Okay. Is that something that you ever looked
3 into?
4 **A. No.**
5 **Q.** Okay.
6 **A. These -- let me -- as -- I did not receive**
7 **whatever number of these documents in one**
8 **envelope.**
9 **Q.** Okay.
10 **A. I received one. And a week later**
11 **approximately I received another one. So**
12 **it -- and these amounts don't register with**
13 **any specific amounts that were due.**
14 **Q.** Okay. What did you make of these when they
15 came across your desk?
16 **A. I didn't know what to make of them. It didn't**
17 **affect us in any way as far as I was**
18 **concerned. It didn't ask for acknowledgment.**
19 **It didn't ask for me to answer. I assumed it**
20 **was some matter of internal bookkeeping.**
21 **Q.** On the part of Irving?
22 **A. On the part of Irving and all their companies.**
23 **Q.** Okay. So you didn't view this as having any
24 effect on the business relationship between
25 MMA and Irving?

32

1 **A. No.**
2 **Q.** And as far as you were concerned to the extent
3 that bills were going to be paid in either
4 direction it was going to continue as it had.
5 Is that fair to say?
6 **A. It -- yes.**
7 **Q.** And I think you may have said this, I
8 apologize, but you didn't talk to anybody at
9 Irving about this?
10 **A. No.**
11 **Q.** All right. Let me show you what was marked as
12 Irving Exhibit 4 yesterday. And I'll just ask
13 you to take a look at it and let me know if
14 you have ever seen that before.
15 **A. I don't recall seeing that.**
16 **Q.** Okay. A little bit above the middle of page
17 one --
18 **A. Yeah.**
19 **Q.** -- it's an e-mail from Jim Mehan to
20 mdgardner@mmarail.com?
21 **A. That's correct.**
22 **Q.** Is that your e-mail address?
23 **A. It is.**
24 **Q.** And he addresses the e-mail to Don?
25 **A. Yes. I don't doubt that it was sent to me.**

33

1 **I'm sure it's there. I also note it's 6:00 on**
2 **a Friday night. I mean, that would probably**
3 **be fairly well buried by Monday morning.**
4 **Q.** Okay.
5 **A. Although, I mean, I could have seen it.**
6 **Again, I don't understand what the**
7 **significance of it was in relation to -- to**
8 **MMA, other than what invoices were paid to**
9 **NBSR. I wasn't focused on it.**
10 **Q.** Okay.
11 **A. I will also tell you -- I was just going to**
12 **say that five days later we filed for**
13 **bankruptcy.**
14 **Q.** Okay.
15 **A. I would suggest that any information coming**
16 **from J.D. Irving was not exactly the highest**
17 **priority in my...**
18 **Q.** Busy time?
19 **A. You think? Yes.**
20 **Q.** Yes. Did you talk to Mr. Mehan?
21 **A. No, I've never spoken to him.**
22 **Q.** Did you talk to anyone at Irving about this
23 e-mail?
24 **A. No.**
25 **Q.** Did you have any understanding of what Irving,

34

1 Mr. Mehan, were trying to tell you by virtue
 2 of this e-mail?
 3 **A. No.**
 4 **Q.** Did you have any understanding of what effect,
 5 if any, Irving intended these documents to
 6 have on the business relationship between MMA
 7 and Irving?
 8 **A. No.**
 9 **Q.** Did you consider the attachments to wipe out
 10 any debt that MMA had to -- I'm sorry -- that
 11 Irving Paper had to MMA?
 12 **A. No.**
 13 **Q.** Did you have any conversation with anyone at
 14 Irving about Irving Paper's debt to MMA being
 15 extinguished?
 16 **A. No one called me.**
 17 **Q.** Did you make any book entries on the MMA books
 18 relating to the receivable that MMA had from
 19 Irving Paper as a result of receiving Exhibit
 20 Irving 4?
 21 **A. No.**
 22 **Q.** Did you consider these documents to change
 23 MMA's obligations to pay Irving Railroad?
 24 **A. No.**
 25 **Q.** So just to be clear -- and I'm not trying to

35

1 be repetitive -- as of August 2 or let's say
 2 Monday, August 5, Monday morning, as far as
 3 you were concerned the status quo in terms of
 4 MMA's receivable from Irving Paper and payable
 5 to Irving Railroad remained the same. Is that
 6 fair to say?
 7 **MR. FAGONE:** Objection to form.
 8 **BY MR. ROSENTHAL:**
 9 **Q.** Do you understand my question?
 10 **A. Mmm-hmm.**
 11 **Q.** Would that be fair to say?
 12 **A. Yes, that's fair to say.**
 13 **Q.** Did you receive any other written
 14 correspondence from Irving relating to
 15 Irving's payable to MMA after August 2, 2013?
 16 **A. I don't recall.**
 17 **Q.** Did you have any conversations with anyone at
 18 Irving on that topic after August 2?
 19 **A. No.**
 20 **Q.** How about Irving's -- MMA's payable to Irving
 21 Railroad?
 22 **A. Yes.**
 23 **Q.** Did you receive any written correspondence
 24 about the status of that after August 2?
 25 **A. After August 2? I don't believe so.**

36

1 **Q.** Did you have any conversations with anyone at
 2 Irving about that --
 3 **A. I -- no.**
 4 **Q.** -- after August 2?
 5 **A. After August 2? I do not think so.**
 6 **Q.** As we sit here today, in your understanding
 7 does Irving Paper still have a payable to MMA?
 8 **A. Yes.**
 9 **Q.** So MMA's books would show a payable in
 10 whatever amount was owed?
 11 **A. On our books it's a receivable from the**
 12 **various Irving Paper companies.**
 13 **Q.** Correct. Fair enough.
 14 And would those books also show a payable
 15 by MMA to Irving Railroad?
 16 **A. Yes, it does.**
 17 **Q.** Do you recall ever receiving a piece of
 18 written correspondence from Irving saying:
 19 Amend your records, we have off set amounts
 20 that you're entitled to or that you owe?
 21 **A. No, I do not recall.**
 22 **Q.** If something like that came into MMA, would it
 23 land on your desk --
 24 **A. Yes.**
 25 **Q.** -- in the ordinary course?

37

1 **A. Yes.**
 2 **Q.** Did Irving ever send MMA a certified return
 3 receipt letter stating that an offset would be
 4 done?
 5 **A. I don't recall that.**
 6 **Q.** And, again, would that land on your desk in
 7 the ordinary course?
 8 **A. You would think, yes. In the whole context of**
 9 **what has transpired since the 2nd of August,**
 10 **documents could have gone to one or another**
 11 **attorneys's office as well.**
 12 **Q.** In light of the bankruptcy?
 13 **A. In light of the bankruptcy, yes.**
 14 **Q.** Let me represent to you that the amounts of
 15 the invoices -- well, let me back up a step.
 16 Okay? On page one of Exhibit Irving 4 --
 17 **A. Mmm-hmm.**
 18 **Q.** -- Mr. Mehan indicates that he was asked to
 19 send you support for what invoices were paid
 20 to NBSR through assignments.
 21 Do you have any idea what he's talking
 22 about there?
 23 **A. No. He was asked to send me support?**
 24 **Q.** Do you know what that means?
 25 **A. Other than these amounts are in hundred**

38

1 **thousand dollars increments and don't relate**
2 **to any amounts due -- I'm assuming though. I**
3 **don't know.**
4 **Q.** Okay. All right. If someone says that Irving
5 did a setoff, in other words, it took money
6 that Irving Paper owed to MMA and set it off
7 against amounts that Irving Railroad was
8 entitled to collect from MMA --
9 **A. Mmm-hmm.**
10 **Q.** -- is that correct in your understanding?
11 **MR. FAGONE:** Objection to form.
12 **A. No.**
13 **BY MR. ROSENTHAL:**
14 **Q.** Okay. It's not something that you're aware
15 of?
16 **A. No.**
17 **Q.** Okay.
18 **A. Let me ask you a question. What do you mean**
19 **I'm not aware of? I mean, they did it or**
20 **they're -- or they're suggesting they've done**
21 **it. So I guess I'm aware, but...**
22 **Q.** As we sit here today?
23 **A. Yes.**
24 **Q.** Were you aware of that back in August?
25 **A. No.**

39

1 **Q.** And as far as -- well, I'm going to withdraw
2 it because believe it or not I'm trying not to
3 ask you the same question over and over again.
4 **A. Okay.**
5 **Q.** Do you know if Irving is a member of the
6 American Association of Railroads?
7 **A. I do not know.**
8 **Q.** Do you know if they subscribe to the interline
9 settlement system?
10 **A. They haven't.**
11 **Q.** But MMA does?
12 **A. MMA does. We do the billing, and that's why**
13 **the commercial agreement was in place.**
14 **Q.** The commercial agreement between MMA and
15 Irving --
16 **A. Railroad.**
17 **Q.** -- Railroad?
18 Does the interline settlement system
19 require that there be a commercial agreement
20 like that?
21 **A. No.**
22 **Q.** So even though MMA was a member but Irving
23 Railroad wasn't --
24 **A. That's my understanding of what the basic**
25 **arrangement was to be, was that MMA would do**

40

1 **that portion; do the accounting, do the**
2 **billing, participate in the interline**
3 **settlement system, do the marketing.**
4 **Q.** So MMA was going to do those things because
5 Irving Railroad wasn't a member of the system?
6 Is that --
7 **A. That's right.**
8 **Q.** Okay. And does MMA subscribe to the Railway
9 Accounting Rules?
10 **A. Yes.**
11 **Q.** Are you familiar with mandatory rule one of
12 the Railway Accounting Rules?
13 **A. No.**
14 **Q.** Was that mandatory rule one ever a topic of
15 conversation between MMA and Irving?
16 **A. No, not that I was part of.**
17 **Q.** Fair enough.
18 Did you ever have any discussions with
19 Irving about Wheeling and Lake Erie's security
20 interest in -- let me back up. I'm going to
21 withdraw that question.
22 Are you aware that Wheeling and Lake Erie
23 Railroad has a security interest in MMA's
24 receivables from Irving Paper?
25 **A. Yes.**

41

1 **Q.** Did you ever talk to anyone at Irving about
2 that?
3 **A. No.**
4 **Q.** Did you ever send them any documents having to
5 do with that?
6 **A. No.**
7 **Q.** Did they ever ask you for your UCC -- for
8 Wheeling's UCC filings?
9 **A. No.**
10 **Q.** Did you ever talk to Irving about Irving doing
11 a UCC search on the MMA?
12 **A. No.**
13 **Q.** All right.
14 **MR. ROSENTHAL:** Let's go off the record,
15 take about, you know, five or ten minutes, and
16 I'll take a look at what I have and see
17 whether or not I'm done.
18 (Thereupon, a recess was taken, and then the
19 deposition continued as follows:)
20 **BY MR. ROSENTHAL:**
21 **Q.** Mr. Gardner, I want to ask you to just take a
22 look at Irving Exhibit 2, which I think you
23 have in your pile.
24 **A. Mmm-hmm.**
25 **Q.** If you would turn to page three, Paragraph 9,

42

1 about halfway through that paragraph there is
2 a sentence that says: The Irving companies
3 contend that MMA is obligated upon receipt of
4 payment to remit to the Irving Railroads their
5 share of such charges attributable to the rail
6 services provided by the Irving Railroads in
7 connection with such shipments.
8 Do you see that?
9 **A. Mmm-hmm.**
10 **Q.** Is it your understanding that that's correct?
11 **A. No.**
12 **MR. LEPENE:** Objection. Is the question
13 whether that's what the Irving companies
14 contend?
15 **MR. ROSENTHAL:** That's right. And so I
16 want to clarify the question. Okay?
17 **BY MR. ROSENTHAL:**
18 **Q.** I'm not asking you whether the Irving
19 companies contend that or not.
20 **A. Okay.**
21 **Q.** I'm asking you: Do you agree with that
22 contention?
23 **A. No.**
24 **Q.** Okay. And turning to page four, Paragraph 12,
25 the second sentence states: In short, they

43

1 contend that payments by the Irving companies
2 would be made only after MMA agreed to make
3 immediate and concurrent payment of amounts
4 owed by MMA to the Irving Railroads, which
5 included the Irving Railroads's share of the
6 freight charges attributable to the Irving
7 freight shipments.
8 Do you agree with that contention?
9 **A. No.**
10 **Q.** The Irving companies refer to this as the cash
11 swap. Do you see that sentence?
12 **A. Yes.**
13 **Q.** I know I asked you earlier about the term,
14 cash swap. Just to make sure I understand, is
15 it your testimony that you're not familiar
16 with anything called a cash swap?
17 **A. There was a practice, yes.**
18 **Q.** But you're not -- you haven't in the conduct
19 of your business used the term, cash swap?
20 **A. No.**
21 **Q.** Or heard the term, cash swap?
22 **A. Only recently.**
23 **Q.** Okay. In the context of this case?
24 **A. Yes.**
25 **MR. ROSENTHAL:** With that, I have

44

1 nothing further for you, Mr. Gardner. As we
2 talked about at the beginning, I will be
3 following up with Mr. Fagone on whether we
4 have anything additional we want to know, and
5 we will handle that as we have agreed to do.
6 Fair enough?
7 **MR. FAGONE:** Yes.
8 **MR. LEPENE:** Why don't you give me five
9 minutes to get organized, and then we'll
10 proceed.
11 **MR. FAGONE:** Take whatever time you
12 need. Off the record.
13 (Thereupon, a recess was taken, and then the
14 deposition continued as follows:)
15 **BY MR. ROSENTHAL:**
16 **Q.** We're back on. It's my understanding,
17 Mr. Gardner, that you may want to clarify or
18 expand upon something that you said earlier?
19 **A. Yes. The term, cash swap, as a term, I think**
20 **between Ryan Ellis and myself, we used that**
21 **term; we were going to swap cash.**
22 **Q.** Okay.
23 **A. So those words have been used together.**
24 **Q.** So let me just ask you when you and Mr. Ellis
25 used the term, how did you -- what did you

45

1 intend it to mean?
2 **MR. FAGONE:** Okay. You can answer with
3 respect to what you intended. I think the
4 question was what did you and Mr. Ellis
5 intend. Obviously you can answer with respect
6 to your intention.
7 **MR. ROSENTHAL:** Fair.
8 **A. My intention was that I would pay the**
9 **railroads if the Irving Paper Company would**
10 **pay me a specified amount.**
11 **BY MR. ROSENTHAL:**
12 **Q.** And do you have any understanding of what
13 Mr. Ellis intended?
14 **A. He seemed in agreement --**
15 **Q.** Okay.
16 **A. -- although his comment was he would always**
17 **inquire to the paper company, as to he**
18 **didn't -- in some ways he didn't appear to**
19 **control what the paper companies did.**
20 **Q.** Okay. So would it be fair to say that to the
21 extent that you used the term, cash swap,
22 you're not using that to refer to an
23 arrangement in which you, meaning MMA, were
24 required to pay Irving Railroad immediately
25 upon being paid by Irving Paper?

46

1 **MR. LEPENE:** Objection.
 2 **A. Correct.**
 3 **BY MR. ROSENTHAL:**
 4 **Q.** Does that conclude the clarification that you
 5 wanted to make?
 6 **A. Yes.**
 7 **MR. ROSENTHAL:** So with that, I'm all
 8 set. We can go back off.
 9 (Thereupon an off-the-record discussion
 10 occurred, and then the deposition continued as
 11 follows:)
 12 (Deposition Exhibit No. Irving Paper 1
 13 marked.)
 14 (Deposition Exhibit No. Irving Paper 2
 15 marked.)
 16 (Deposition Exhibit No. Irving Paper 3
 17 marked.)
 18 (Deposition Exhibit No. Irving Paper 4
 19 marked.)
 20 (Deposition Exhibit No. Irving Paper 5
 21 marked.)
 22 **EXAMINATION**
 23 **BY MR. LEPENE:**
 24 **Q.** Mr. Gardner, good morning.
 25 **A. Good morning.**

47

1 **Q.** My name is Alan Lepene. We have met before?
 2 **A. Yes.**
 3 **Q.** I'm the attorney for Irving Paper, Limited,
 4 Irving Pulp and Paper, Limited, and J.D.
 5 Irving, Limited, in connection with this
 6 particular matter.
 7 And I'm going to ask you a few questions
 8 with respect to your -- the testimony that you
 9 provided up to this point.
 10 Let me ask first: You had mentioned that
 11 there was a controller at the MMA who was
 12 involved in this --
 13 **A. Yes.**
 14 **Q.** -- arrangement with -- and I'll use the same
 15 term that Mr. Rosenthal used -- the Irving
 16 Paper companies and the swap arrangement?
 17 **A. Yes.**
 18 **Q.** Who was that?
 19 **A. Jocelyne Baranek.**
 20 **Q.** Did you say she's no longer with the company
 21 or --
 22 **A. She passed away a year ago. And she was**
 23 **disabled with a brain tumor the year prior to**
 24 **her death.**
 25 **Q.** Okay. The arrangement that you testified to

48

1 that has been referred to generally as the
 2 cash swap arrangement --
 3 **A. Yes.**
 4 **Q.** -- that had been in place for many years as
 5 between the Irving Paper companies and the
 6 Irving Railroads? And again, for the record,
 7 the Irving Railroads are the New Brunswick and
 8 Southern Railway Company and the Maine
 9 Northern Railway Company; is that correct?
 10 **A. Yes.**
 11 **Q.** How many years had that practice been in
 12 place?
 13 **A. I can attest that it was from 2008 on, but**
 14 **prior to that I believe it was operating.**
 15 **Q.** When you say you can attest that it was from
 16 2008 on --
 17 **A. That's when I was employed at MMA.**
 18 **Q.** Okay. So when you were employed this was
 19 practice that was already in place?
 20 **A. Yes.**
 21 **Q.** Do you know how many years prior to 2008 this
 22 practice had been in place?
 23 **A. I don't for sure.**
 24 **Q.** Okay. When was the MMA formed or established?
 25 **A. January 2003.**

49

1 **Q.** And you testified that there had been a
 2 commercial agreement in place between the MMA
 3 and the Irving Railroads as of January 2003;
 4 is that correct?
 5 **A. Correct.**
 6 **Q.** Okay. So do you know whether this practice --
 7 **A. Excuse me.**
 8 **Q.** Yes.
 9 **A. It's only the New Brunswick Southern Railroad.**
 10 **MNR is not a party to that.**
 11 **Q.** Okay. And do you know whether this practice,
 12 the so-called cash swap arrangement, then
 13 would go back all the way to January of 2003?
 14 **A. I have no reason to believe it didn't.**
 15 **Q.** Okay. So it's been in place for a very long
 16 time?
 17 **A. I believe so.**
 18 **Q.** Okay. Would you agree that it was the --
 19 something that was done in the ordinary course
 20 of business between the Irving companies on
 21 the one hand and MMA on the other?
 22 **A. Yes.**
 23 **Q.** And I think you testified that this practice
 24 involved an agreement to swap or exchange cash
 25 on a weekly basis; is that correct?

50

1 **A. It was an e-mail arrangement that was done**
 2 **each week.**
 3 **Q.** And that e-mail arrangement that was done each
 4 week provided the details of how the
 5 transaction would be implemented each week?
 6 **A. Correct.**
 7 **Q.** Did you receive copies of those e-mails?
 8 **A. I believe I did.**
 9 **Q.** Okay. How involved were you in the process?
 10 **A. To some extent I was not involved. And as**
 11 **times -- as it became more and more difficult**
 12 **in our cash management activities, I became**
 13 **more involved.**
 14 **Q.** Okay. When did it become more difficult in
 15 your cash management activities that resulted
 16 in your becoming more involved?
 17 **A. Specifically I couldn't tell you, but within a**
 18 **year or so of my arrival.**
 19 **Q.** Within a year following your arrival?
 20 **A. Following my arrival.**
 21 **Q.** So that would be sometime in 2009?
 22 **A. 2009.**
 23 **Q.** What was the reason for the cash management
 24 difficulties, if I'm paraphrasing correctly
 25 your term, that caused you to get more

51

1 involved?
 2 **A. Well, there were periods of time where the**
 3 **company, MMA, was losing money. And in the**
 4 **course of losing money, that put significant**
 5 **constraints on our cash.**
 6 **Q.** Okay. Now, in terms of the reasons for this
 7 arrangement, when you arrived and were
 8 employed by the MMA, did you inquire of anyone
 9 as to why this agreement was in place?
 10 **A. No.**
 11 **Q.** Okay. Did you understand why the agreement
 12 was in place?
 13 **A. I don't understand what your question is.**
 14 **Q.** Well, you arrived, and there was this
 15 agreement for what has been characterized as a
 16 cash swap. Did you have an understanding as
 17 to why that agreement was in place?
 18 **A. What I saw, as I arrived, was a practice of**
 19 **how we got paid. The only agreement that was**
 20 **provided to me was what I continue to refer to**
 21 **as the commercial agreement that was signed in**
 22 **2003.**
 23 **Q.** Well, you would agree there are various ways
 24 that people can agree to do things, correct?
 25 **A. Sure.**

52

1 **Q.** People can have oral agreements, can they not?
 2 **A. Yes.**
 3 **Q.** In your business career you've had oral
 4 agreements, haven't you?
 5 **A. Of course.**
 6 **Q.** You consider those agreements to be binding
 7 upon you, when you enter into an oral
 8 agreement, don't you?
 9 **A. Certainly.**
 10 **Q.** It's true that this arrangement involved
 11 exchange of e-mails over years --
 12 **A. Mmm-hmm.**
 13 **Q.** -- that implemented this practice, correct?
 14 **A. Yes, correct.**
 15 **Q.** So when you say there was no agreement, you
 16 really mean that you never saw a written
 17 agreement on a piece of paper that defined how
 18 this would work, correct?
 19 **A. Correct.**
 20 **Q.** Okay. But, in fact, you agree, do you not,
 21 that this practice was evidenced by
 22 performance of the parties over time, correct?
 23 **A. Yes.**
 24 **Q.** And this agreement was evidenced by the
 25 exchange of numerous e-mails back and forth

53

1 between the parties, correct?
 2 **A. Correct.**
 3 **Q.** And it was done in the ordinary course of
 4 business?
 5 **A. Yes.**
 6 **Q.** Now, you've been a financial analyst with an
 7 economics degree. You've had a long business
 8 career, correct?
 9 **A. Yes. Correct.**
 10 **Q.** You would agree with me, would you not, that
 11 the Irving companies were doing this because
 12 they did not want to incur credit exposure to
 13 the MMA, correct?
 14 **A. I believe so.**
 15 **Q.** And that was the basis for their wanting to do
 16 this arrangement, correct?
 17 **MR. FAGONE:** Objection to form.
 18 **BY MR. LEPENE:**
 19 **Q.** That's correct, isn't it?
 20 **A. I can't answer to their motives.**
 21 **Q.** That would be your understanding as a credit
 22 analyst, correct?
 23 **A. What I saw them doing was using their vendors**
 24 **and their payables to their advantage.**
 25 **Q.** To avoid credit exposure?

54

1 **A. Or to use financing from vendors which --**
 2 **which they were doing.**
 3 **Q.** Okay. Well --
 4 **A. By taking longer terms than what was stated,**
 5 **they were using MMA to finance part of their**
 6 **business, albeit minor, but none the less a**
 7 **financing source.**
 8 **Q.** That eventually changed though, correct? You
 9 were able to reach an understanding where
 10 the -- as far as the mechanics of the swap
 11 were concerned, amounts were being calculated
 12 based on payment terms, correct?
 13 **A. Correct.**
 14 **Q.** And that was the arrangement you worked out
 15 with Mr. Ellis, correct?
 16 **A. Correct.**
 17 **Q.** And that occurred over a year ago?
 18 **A. Yes.**
 19 **Q.** And so from that point forward you were
 20 satisfied that no one was taking advantage of
 21 the MMA to finance -- strike that.
 22 That Irving wasn't taking advantage of the
 23 MMA to finance its business, correct?
 24 **A. Correct.**
 25 **Q.** So that issue from your standpoint had been

55

1 successfully resolved more than a year ago?
 2 **A. Correct.**
 3 **Q.** This arrangement was really the functional
 4 equivalent of a setoff, wasn't it?
 5 **A. I don't know that I can answer that.**
 6 **Q.** Well, where the MMA -- excuse me. Where
 7 Irving was paying money to the MMA, and the
 8 MMA was then paying money back --
 9 **A. Mmm-hmm.**
 10 **Q.** -- correct, could that not have also been
 11 accomplished simply by netting out who owed
 12 what to whom, and just having one party pay
 13 the balance to the other?
 14 **A. Yes.**
 15 **Q.** That could have been done?
 16 **A. Yes.**
 17 **Q.** Okay. So that --
 18 **A. And I did it one time.**
 19 **Q.** Yes. I've seen the e-mails.
 20 **A. Okay.**
 21 **Q.** But that was the basis for my question that
 22 this arrangement was the functional equivalent
 23 of a setoff. You would agree with that,
 24 wouldn't you?
 25 **A. Yes.**

56

1 **Q.** Okay. Now, explain to me -- Mr. Rosenthal
 2 asked a few questions about this, but I want
 3 to be clear. In terms of how freight traffic
 4 destined to go to the Irving Paper facilities
 5 or freight traffic coming from the Irving
 6 facilities to their ultimate customer --
 7 **A. Mmm-hmm.**
 8 **Q.** -- that was going to be carried on the MMA --
 9 **A. Yes.**
 10 **Q.** -- how did that work physically? Do you
 11 understand the question?
 12 **A. No, I don't.**
 13 **Q.** I could tell by the way you were looking at me
 14 that you didn't.
 15 The MMA does not have right of way --
 16 doesn't own right of way or have tracks that
 17 go up to the Irving facilities, do they?
 18 **A. No.**
 19 **Q.** So in order to carry freight from the Irving
 20 facilities to its ultimate destination or to
 21 carry freight from -- or product that the
 22 Irving facilities need that is coming from
 23 wherever to get to the Irving facilities, that
 24 freight has to travel on more than just the
 25 MMA rail lines, correct?

57

1 **A. Correct.**
 2 **Q.** It has to be interchanged at some point with
 3 railroads that service the Irving Paper
 4 facilities; is that correct?
 5 **A. Correct.**
 6 **Q.** And those railroads were owned by J.D. Irving,
 7 correct?
 8 **A. I believe so.**
 9 **Q.** Those are the Irving Railroads?
 10 **A. Yes.**
 11 **Q.** That's really my question. So with that
 12 background, can you explain to me how freight
 13 would -- let's say a product being shipped
 14 from Montreal that's destined to go to an
 15 Irving facility that is being carried by the
 16 MMA, or product coming from an Irving facility
 17 that's destined to go to Montreal, how does
 18 that work?
 19 **A. The coming from Montreal we would receive it.**
 20 **MMA would receive the traffic probably from**
 21 **Canadian Pacific. We would then take it to**
 22 **Brownville Junction and interchange it with**
 23 **the NBSR. They would then carry the**
 24 **railcar -- pull the railcar to its**
 25 **destination, which would be I assume somewhere**

58

1 **in St. John, New Brunswick.**
 2 **Q.** Okay. Now, the freight charges for carrying
 3 it from the point that you got it from
 4 Canadian Pacific --
 5 **A. Yes.**
 6 **Q.** -- to Brownville Junction and then from
 7 Brownville Junction on the Irving Railroads to
 8 the Irving facilities --
 9 **A. Mmm-hmm.**
 10 **Q.** -- those freight charges, who would have the
 11 responsibility for billing Irving Paper for
 12 those freight changes?
 13 **A. Generally that would be what we call receive**
 14 **traffic coming from Montreal. It could be the**
 15 **shipper, whoever -- if it was some kind of**
 16 **chemical, the original shipper could have**
 17 **billed for the freight charges. And then we**
 18 **would have been paid through the ISS, or we**
 19 **could -- if it's collect we would bill the**
 20 **Irving Paper company and pay the NBSR for**
 21 **their portion, and potentially could pay the**
 22 **Canadian Pacific for their portion as well or**
 23 **whoever the other railroads might be involved.**
 24 **Q.** And just to make this concrete with respect to
 25 the issue that has brought all of us together

59

1 today, which is the trustee's motion to
 2 recover \$885,000 from the Irving Paper
 3 companies, correct?
 4 **A. Yes.**
 5 **Q.** That's what we are about here, correct?
 6 **A. Yes.**
 7 **Q.** You understand that?
 8 **A. I do.**
 9 **Q.** Okay. So those are charges that MMA has
 10 billed to the Irving Paper companies, correct?
 11 **A. Correct.**
 12 **Q.** Okay. And that represents freight service
 13 provided by the MMA?
 14 **A. Yes.**
 15 **Q.** And it also represents freight service that
 16 was provided by the Irving Railroads, correct?
 17 **A. Correct.**
 18 **Q.** Okay.
 19 **A. And it could provide for other railroads. I**
 20 **mean, it could have been the Canadian Pacific.**
 21 **It could have been the Union Pacific.**
 22 **Q.** But with respect to that \$885,000, the party
 23 that billed Irving Paper was the MMA?
 24 **A. Yes.**
 25 **Q.** Now, a -- would you agree that a substantial

60

1 portion of that \$885,000 represents freight
 2 charges that were earned by the Irving
 3 Railroads, correct?
 4 **A. By looking at the number I can't determine**
 5 **that.**
 6 **Q.** Well, is it fair to say that in terms of the
 7 freight that was carried to or from the Irving
 8 facilities, the Irving Railroads were
 9 involved?
 10 **A. Yes.**
 11 **Q.** Okay.
 12 **A. Yes.**
 13 **Q.** So you would agree that some portion of the
 14 \$885,000 --
 15 **A. Absolutely.**
 16 **Q.** Okay. What you're saying is: As you sit here
 17 today, you are unable to tell us how much of
 18 the \$885,000 is attributable to freight
 19 charges that were earned by the Irving
 20 Railroads?
 21 **A. Correct.**
 22 **Q.** And that could be a very substantial portion,
 23 couldn't it?
 24 **A. It could be any number.**
 25 **Q.** Could it be all of it?

61

1 **A. Unlikely.**
 2 **Q.** Okay. Could it be half?
 3 **A. Unlikely.**
 4 **Q.** Why do you say that? If you don't know as
 5 you're sitting here how much, why do you say
 6 it's unlikely to be half?
 7 **A. Because the Irving Paper Company ships to a**
 8 **variety of customers. They take product from**
 9 **a variety of sources, all of which I'm not**
 10 **truly familiar with, but a substantial bill,**
 11 **\$6,000, \$7,000 bill, indicates that that car**
 12 **is going a longer distance than the two -- the**
 13 **NBSR and MMA cover.**
 14 **Q.** But you haven't studied it?
 15 **A. No.**
 16 **Q.** So you're just speculating when you say it's
 17 unlikely that's it's half, correct? It's
 18 sheer speculation on your part, correct?
 19 **A. Well, it's experience. I mean, looking at the**
 20 **invoicing that I've seen from time to time,**
 21 **yeah, it is my estimate.**
 22 **Q.** It's your speculation.
 23 **A. Fine.**
 24 **MR. FAGONE:** It's okay. I think he
 25 asked you to speculate.

62

1 **THE WITNESS:** Okay.
2 **MR. LEPENE:** I asked whether he knew.
3 **MR. FAGONE:** Then you asked couldn't it
4 be.
5 **MR. LEPENE:** Okay.
6 **BY MR. LEPENE:**
7 **Q.** And the MMA then, in terms of again dealing
8 with Irving Paper Company, would collect all
9 of the freight charges that it billed. And
10 then the MMA was obligated to remit to the
11 Irving Railroads their share of those freight
12 charges that represented the services that
13 they had provided, correct?
14 **A. Correct.**
15 **Q.** And those charges in part were typically
16 included in this cash swap arrangement,
17 correct?
18 **A. Correct.**
19 **Q.** Now, you say that you weren't familiar with
20 the term, swap, until you and Ryan Ellis got
21 involved in this particular matter? Is that
22 what I heard you say before?
23 **A. Generally, yes.**
24 **Q.** Okay. And when did you and Ryan Ellis get
25 involved?

63

1 **A. About a year ago.**
2 **Q.** About a year ago. And what caused you and
3 Ryan Ellis to get involved?
4 **A. Primarily the changing -- the activity with**
5 **the oil business which precipitated a huge,**
6 **huge payable to the railroad for the**
7 **transportation of the crude oil. And if it**
8 **were to be paid under the terms -- it couldn't**
9 **be paid under the original terms.**
10 **Q.** Because of the size?
11 **A. Because of the size.**
12 **Q.** Okay.
13 **A. And it would require MMA advancing funds.**
14 **Q.** So that really -- an agreement was reached to
15 keep the oil shipments outside the swap
16 arrangement, correct?
17 **A. Correct.**
18 **Q.** Okay. And am I correct that prior to the oil
19 shipments coming into play, insofar as this
20 swap arrangement was concerned -- and I think
21 you testified to this previously -- Irving
22 Paper would, when these transactions were
23 consummated on a weekly basis, invariably be
24 paying more to the MMA than the MMA was paying
25 to the NBSR and the MNR, correct?

64

1 **A. Correct.**
2 **Q.** And, again, for the record, the MNR is the
3 Maine Northern Railway, and the NBSR in the
4 New Brunswick Southern Railway.
5 Okay. Have you gone back to look at any
6 of the e-mail traffic that preceded your and
7 Mr. Ellis getting involved?
8 **A. Some time ago, yes.**
9 **Q.** Okay. And so is it your testimony that if we
10 went back to look at e-mails between the two
11 companies that preceded your getting involved
12 with Mr. Ellis, there wouldn't be any
13 reference to swaps?
14 **A. None that I recall.**
15 **Q.** But you weren't, as you indicated, really
16 intimately involved in the mechanics of the
17 transaction, were you?
18 **A. I wasn't involved in making the transfers, no.**
19 **Q.** Well, did you supervise anyone who was?
20 **A. I did.**
21 **Q.** Did you get copies of the e-mails?
22 **A. I'm -- I've seen e-mails on a routine basis.**
23 **I don't remember whether I was actually copied**
24 **on them or if I asked for them.**
25 **Q.** So if we went back to 2010, 2009, and we

65

1 looked at your e-mail traffic, we wouldn't see
2 any reference to swap?
3 **A. I don't believe so.**
4 **Q.** Okay.
5 **MR. LEPENE:** Off the record.
6 (Thereupon an off-the-record discussion
7 occurred, and then the deposition continued as
8 follows:)
9 **BY MR. LEPENE:**
10 **Q.** All right. Let me, Mr. Gardner, hand you what
11 has been marked as Irving Paper Exhibit 1.
12 **A. Ah, Joanne Kelter. That's the lady's name.**
13 **Q.** For the record, the reference to Cathy Heldt
14 at the top is only going to be meaningful to
15 me because that's my secretary.
16 **A. Okay.**
17 **Q.** Her name appears because we downloaded it and
18 she printed it.
19 **A. Yeah. And those are all the -- at the very**
20 **top of the -- I mean, Brenda Tarr, Jocelyne**
21 **Baranek, Torrie Potter, those three people are**
22 **all in my office and work for me. Jocelyne**
23 **was the controller who has since passed away.**
24 **Q.** Okay. Now, I think the way to look at these,
25 since it's an e-mail string, is to start from

66

1 the back, if you will, although fortunately
 2 you just have to go down on the first page for
 3 this one, but as we go through others we may
 4 have to go back a few pages and then come
 5 forward in order to see the string.
 6 So you see that there is an e-mail from
 7 Joanne Kelter --
 8 **A. Mmm-hmm.**
 9 **Q.** -- who you just identified as the person at
 10 J.D. Irving that you had spoke with at one
 11 point?
 12 **A. Yes.**
 13 **Q.** And that was about the account payable
 14 situation --
 15 **A. Correct.**
 16 **Q.** -- which ultimately got resolved to your
 17 satisfaction about a year ago?
 18 **A. Yes.**
 19 **Q.** Okay. And then it's an e-mail dated
 20 August 10, 2011, to Brenda Tarr, Jocelyne
 21 Baranek, and Torrie Potter --
 22 **A. Yes.**
 23 **Q.** -- all of whom you say worked under your
 24 direction --
 25 **A. Correct.**

67

1 **Q.** -- at the MMA?
 2 **A. Correct.**
 3 **Q.** Okay. And in this e-mail, just looking at it,
 4 Joanne Kelter is advising her counterparts at
 5 the MMA that this week we will be sending the
 6 following payments along.
 7 Do you see that?
 8 **A. Yes.**
 9 **Q.** And that identifies amounts that will be
 10 coming from the paper companies, the Irving
 11 Paper companies?
 12 **A. Correct.**
 13 **Q.** And she says in return we are seeking payment
 14 for the following. Do you see that?
 15 **A. Yes.**
 16 **Q.** You also see that the subject of the e-mail --
 17 what is the subject of the e-mail?
 18 **A. Yes, swap details.**
 19 **Q.** Okay. So at least the people working for you
 20 understood this to be a swap, didn't they?
 21 **A. Apparently.**
 22 **Q.** Okay. And this was typical, was it not, in
 23 terms of the e-mail traffic that was sent
 24 back -- back and forth?
 25 **A. Yes.**

68

1 **Q.** Done at least weekly, if not more frequently?
 2 **A. Pretty much weekly.**
 3 **Q.** And this was done weekly from the time you
 4 arrived in 2008, so for the last five years,
 5 correct?
 6 **A. Yes, correct.**
 7 **Q.** And as far as you know this was the practice
 8 in the ordinary course that was done, going
 9 all the way back to 2003, correct?
 10 **A. Correct.**
 11 **Q.** Okay. Okay. Let me hand you what we have
 12 marked as Irving Paper Exhibit 2. And this is
 13 an e-mail from Brenda Tarr, someone who works
 14 under you at the MMA, correct --
 15 **A. Mmm-hmm, yes.**
 16 **Q.** -- to Bonnie Davis? Do you know who Bonnie
 17 Davis is?
 18 **A. I do not, no.**
 19 **Q.** Okay. CC Joanne Kelter. Joanne Kelter is the
 20 J.D. Irving --
 21 **A. Right.**
 22 **Q.** -- individual you identified before?
 23 **A. Right.**
 24 **Q.** And the subject of this e-mail is what?
 25 **A. Swap.**

69

1 **Q.** Okay. And then Brenda, your person reporting
 2 to you, in this e-mail says to Bonnie or
 3 Joanne: Is the swap going to be done for
 4 Monday.
 5 Do you see that?
 6 **A. Yes.**
 7 **Q.** I usually get a notification the day before
 8 the swap, and I haven't noticed anything yet.
 9 Do you see that?
 10 **A. Yes.**
 11 **Q.** I plan on wiring the money out to you on
 12 Monday. Correct?
 13 **A. Correct.**
 14 **Q.** Okay. Would it be a fair inference that this
 15 would contemplate a simultaneous exchange of
 16 cash, just looking at this e-mail?
 17 **A. Yes. The one exception to that is we weren't**
 18 **going to pay if we weren't collecting our**
 19 **receivable.**
 20 **Q.** Collecting your receivable from whom?
 21 **A. The Irving Paper company.**
 22 **Q.** That's the whole idea of a simultaneous
 23 exchange, isn't it? If they wire to you --
 24 **A. Well, it's a collection matter, right.**
 25 **Q.** They wire to you; you wire to them, correct?

70

1 **A. Correct.**
2 **Q.** Isn't that what simultaneous means?
3 **A. True.**
4 **Q.** Doesn't the context of this e-mail indicate to
5 you that this was going to be a simultaneous
6 wire? I plan on wiring the money out to you
7 on Monday. And her first question: Is the
8 swap going to be done for Monday.
9 Aren't they in effect agreeing that they
10 will simultaneously swap cash on Monday?
11 Isn't that true?
12 **A. That's true. You're aware that when we sent**
13 **money it was in Canadian dollars, and cash we**
14 **received was in U.S. dollars?**
15 **Q.** Okay. That's -- there are ways to get cash
16 converted, you know, correct?
17 **A. But they were different accounts in different**
18 **companies.**
19 **Q.** But the fact is that the payments, the wires,
20 were going to be simultaneous, correct?
21 **A. They were going to occur on the same day,**
22 **correct.**
23 **Q.** Occur on the same day. Okay.
24 Let me hand you what has been identified
25 as Irving Exhibit 3. This is an e-mail --

71

1 well, initiated first by Brenda Tarr, correct,
2 on September 20 at 1:30 -- well, no. I take
3 that back.
4 **MR. FAGONE:** No.
5 **BY MR. LEPENE:**
6 **Q.** I violated or ignored my own convention here.
7 This e-mail originally -- well, strike that.
8 The e-mails at the top would appear to
9 have been initiated first by Bonnie Davis of
10 J.D. Irving to Brenda Tarr, Jocelyne Baranek,
11 and Torrie Potter at 12:37 p.m. on September
12 20, 2011, correct?
13 **A. Mmm-hmm.**
14 **Q.** And Bonnie is saying to Brenda: Sure, Brenda,
15 I'll let Joanne know we're going to swap on
16 Monday, September 26, correct?
17 **A. Correct.**
18 **Q.** Okay. That would suggest to you, again, that
19 this is going to be done simultaneously,
20 correct?
21 **A. Yes.**
22 **Q.** Same day?
23 **A. Yes.**
24 **Q.** And then at 1:33 p.m. Brenda sends an e-mail
25 to Bonnie and Jocelyne Baranek and Torrie

72

1 Potter with a copy to Joanne Kelter: Bonnie,
2 we will have to do our swap on Monday. Do you
3 want to do the same.
4 Do you see that?
5 **A. Yes.**
6 **Q.** Okay. So, again, consistent with the notion
7 that swaps would be done on the same day,
8 correct?
9 **A. Correct.**
10 **Q.** I'm going to hand you what has been marked as
11 Irving Exhibit 4 --
12 (Thereupon, an off-the-record
13 discussion occurred, and then the
14 deposition continued as follows:)
15 **MR. LEPENE:** Irving Paper Exhibit 4 to
16 distinguish some of yours yesterday that were
17 marked as Irving exhibits.
18 **MR. ROSENTHAL:** Well, yeah.
19 **MR. LEPENE:** Is there a problem?
20 **MR. ROSENTHAL:** No, I don't have a
21 problem with it at all. Just to the extent I
22 referred to things earlier as Irving exhibits,
23 but those were exhibits to the Irving
24 deposition. I think you're making these as
25 Irving Paper, meaning Irving Paper's Exhibits

73

1 to today's deposition?
2 **MR. FAGONE:** Correct.
3 **MR. ROSENTHAL:** These are all going to
4 be exhibits.
5 **MR. FAGONE:** Anything that was shown
6 today will be attached to the transcript quite
7 obviously.
8 **MR. ROSENTHAL:** So we will be able to
9 figure it all out.
10 **BY MR. LEPENE:**
11 **Q.** Mr. Gardner, this -- again, I'm looking at
12 this from the back and moving forward. First,
13 an e-mail from Joanne Kelter to Brenda Tarr,
14 Jocelyne Baranek, and Torrie Potter dated
15 October 26, 2011, correct?
16 **A. Mmm-hmm.**
17 **Q.** And, again, the subject is swap details?
18 **A. Yes.**
19 **Q.** Okay. Joanne says: This week we will be
20 sending the following payments along. And she
21 identifies the various Irving Paper entities
22 and the payments that will be made?
23 **A. Right.**
24 **Q.** And then she says: In return we are seeking
25 payment for the following.

74

1 Do you see that?

2 **A. Yes.**

3 **Q.** And then she lists a whole bunch of invoices?

4 **A. Mmm-hmm.**

5 **Q.** And then at the end of e-mail on the last page

6 she says: I will require confirmation of

7 which invoices are to be paid prior to

8 releasing our wire to you.

9 **A. Correct.**

10 **Q.** Okay?

11 **A. Mmm-hmm.**

12 **Q.** And Brenda replies on October 27, which is

13 Thursday: Are we all set with swap as normal

14 for Friday, correct?

15 **A. Correct.**

16 **Q.** Again, consistent with simultaneous swaps

17 being made on the same day?

18 **A. Mmm-hmm.**

19 **Q.** And, in fact, Irving is saying that before

20 they release they want confirmation of which

21 invoices are being paid, correct?

22 **A. Correct.**

23 **Q.** Okay. Mr. Gardner, I've handed you what has

24 been marked as Irving Paper Exhibit 5.

25 **A. Mmm-hmm.**

75

1 **Q.** I think this one has a number of pages. And

2 we should start with the e-mail at the back

3 and move forward. And I think that is one

4 that is on the second page from Joanne Kelter

5 to Brenda Tarr, Jocelyne Baranek, and Torrie

6 Potter dated Wednesday, November 16, 2011.

7 Do you see that?

8 **A. Mmm-hmm, I do.**

9 **Q.** And Joanne says to her counterparts at the

10 MMA: This week we will be sending the

11 following payments along. And then she

12 identifies the Irving Paper payments that will

13 be made, correct?

14 **A. Correct.**

15 **Q.** She says: In return we are seeking payment

16 for the following. And then lists a whole

17 number of invoices, correct?

18 **A. Correct.**

19 **Q.** And then on the very last page, she says: I

20 will require confirmation of which invoices

21 are to be paid prior to releasing our wire to

22 you.

23 Do you see that?

24 **A. Mmm-hmm.**

25 **Q.** Consistent with some of the other e-mails we

76

1 have seen, correct?

2 **A. Correct.**

3 **Q.** Appears to be the standard operating

4 procedure, doesn't it?

5 **A. Yes.**

6 **Q.** And then Brenda responds with an e-mail on

7 Thursday, November 17, at 3:52 p.m. to Joanne

8 Kelter, Jocelyne Baranek, and Torrie Potter.

9 Do you see that?

10 **A. Yes.**

11 **Q.** In fact, there is a CC. Do you see who got

12 CCed on that?

13 **A. I was on this one.**

14 **Q.** You got that one. Okay. And Brenda says to

15 Joanne: We will be doing the following swap

16 this week for payment on Monday.

17 Do you see that?

18 **A. Yup.**

19 **Q.** It says: To the NBSR, and then they identify

20 the invoices and the payments that will be

21 made.

22 Do you see that?

23 **A. Mmm-hmm.**

24 **Q.** And it says to EMR. Do you know who EMR is?

25 **A. That is the Eastern Maine Railroad is my**

77

1 **understanding.**

2 **Q.** Yes.

3 **A. It's another Irving railroad.**

4 **Q.** It is another Irving railroad.

5 So to the Eastern Maine Railroad, for MNR,

6 which is the Maine Northern Railroad, again,

7 another Irving railroad, correct --

8 **A. Mmm-hmm.**

9 **Q.** -- and a certain dollar amount. And then it

10 says: In return we will be receiving from

11 NBSR \$133,289.57, U.S., correct?

12 **A. Yes.**

13 **Q.** Simultaneous swap, right?

14 **A. Mmm-hmm.**

15 **Q.** Consistent with what we have seen before?

16 **A. Yes.**

17 **Q.** And then just to follow the -- well, seems

18 again at the top of this it appears to be a

19 suggestion in an e-mail from Jocelyne Baranek

20 to Joanne Kelter, copy to Brenda Tarr, subject

21 swap details, this is November 23: We will

22 contact you Monday, November 28, to let you

23 know about the swap, correct?

24 **A. Mmm-hmm.**

25 **Q.** Do you see that?

78

1 **A. Yes.**
 2 **Q.** Okay. So I haven't had time -- I have got a
 3 big stack of e-mails here. Do you have any
 4 reason to believe that if we went through this
 5 we're going to see anything different than
 6 what we have already looked at?
 7 **A. No.**
 8 **Q.** Okay.
 9 **MR. FAGONE:** Can we go off the record
 10 for a second?
 11 (Thereupon an off-the-record discussion
 12 occurred, and then the deposition continued as
 13 follows:)
 14 **BY MR. LEPENE:**
 15 **Q.** Okay. Mr. Gardner, I'm going to direct you to
 16 the document that Mr. Fagone just asked you
 17 about off the record I guess it was. I think
 18 Mr. Fagone perhaps anticipated my next
 19 question.
 20 Take a look at Paragraph 12.
 21 **A. Okay.**
 22 **Q.** Mr. Rosenthal had asked you about
 23 Paragraph 12. Do you recall that?
 24 **A. Yes, I do.**
 25 **Q.** I think he asked you about the sentence in

79

1 Paragraph 12, the second sentence that reads:
 2 In short they -- I think the they refers to
 3 Irving, the Irving companies, correct?
 4 **A. Mmm-hmm.**
 5 **Q.** Contend that payments by the Irving companies
 6 would be made only after MMA agreed to make
 7 immediate and concurrent payment of amounts
 8 owed by MMA to the Irving Railroads, which
 9 included the Irving Railroads's share of the
 10 freight charges attributable to the Irving
 11 freight shipments.
 12 **A. Mmm-hmm.**
 13 **Q.** Mr. Rosenthal asked whether you agreed with
 14 that -- not that that was the contention, but
 15 whether you agreed that in fact the
 16 arrangement was that the Irving companies
 17 would only make payment after the MMA agreed
 18 to make immediate and concurrent payment of
 19 amounts owed by MMA to the Irving Railroads.
 20 And you said you didn't agree with that?
 21 **A. No, I don't. Not of late.**
 22 **Q.** I'm sorry?
 23 **A. Not -- not most recently, no.**
 24 **Q.** What do you mean by not most recently?
 25 **A. I -- MMA paid -- it was -- it was -- MMA made**

80

1 **the determination as to what was paid in the**
 2 **last 12 months.**
 3 **Q.** Based on the payments that were due in
 4 accordance with the payment terms under the
 5 agreement, the purchase orders or whatever --
 6 **A. Correct.**
 7 **Q.** -- between the two companies?
 8 **A. Correct.**
 9 **Q.** So that, in effect, you didn't want to be
 10 paying early?
 11 **A. Correct.**
 12 **Q.** You wanted to have the benefit of your payment
 13 terms?
 14 **A. I wanted to pay within the terms, which we**
 15 **did.**
 16 **Q.** For the last year that's the way the swap has
 17 worked, correct?
 18 **A. Correct.**
 19 **Q.** Recognizing that, nonetheless, the agreement
 20 was that Irving Paper would not pay the MMA
 21 unless there was a simultaneous return of
 22 payment of those amounts owed by the MMA to
 23 the Irving Railroads, correct?
 24 **A. I don't know what the Irving Railroad or**
 25 **Irving companies chose to do.**

81

1 **Q.** But that's what, in fact, happened?
 2 **A. That is --**
 3 **Q.** We have just looked at the e-mails, haven't
 4 we?
 5 **A. Yes. Those go back to almost over two years**
 6 **though.**
 7 **Q.** The e-mails indicate simultaneous payment,
 8 don't they?
 9 **A. Very well.**
 10 **Q.** Payments being made on the same day?
 11 **A. Mmm-hmm.**
 12 **Q.** Okay.
 13 **A. This says though that Irving companies set the**
 14 **criteria. And for the last 12 months that has**
 15 **not been the case.**
 16 **Q.** Well, for the last 12 months there has been an
 17 agreement to calculate the swap based on
 18 payment terms, correct?
 19 **A. Correct.**
 20 **Q.** And you were satisfied with that, correct?
 21 **A. I have been.**
 22 **Q.** And that's the way it worked?
 23 **A. Yes.**
 24 **Q.** And it's the functional equivalent of a
 25 setoff, as we indicated before, correct?

82

1 **A. Yes.**
2 **MR. LEPENE:** Want to give me just a few
3 minutes and perhaps we can get out of here.
4 (Thereupon, a recess was taken, and then the
5 deposition continued as follows:)
6 **MR. LEPENE:** I don't have anything
7 further at this time.
8 **EXAMINATION**
9 **BY MR. ROSENTHAL:**
10 **Q.** I have a couple of follow up questions.
11 Mr. Gardner, Mr. Lepene asked you a couple
12 of questions referring to something as being
13 the functional equivalent of a setoff.
14 Do you recall that?
15 **A. Yes.**
16 **Q.** I want to make sure I understand what you
17 understood that phrase to mean. And in
18 particular the word, setoff. When you heard
19 him asking you the phrase, functional
20 equivalent of a setoff, what did you
21 understand the word, setoff, to mean in that
22 context?
23 **A. I guess a deduction from a payment.**
24 **Q.** Did you attach to that term any legal meaning?
25 **A. No.**

83

1 **Q.** You're using it in a business vernacular or
2 sense --
3 **A. Yes.**
4 **Q.** -- is that fair to say?
5 **A. Yes.**
6 **Q.** So something being the functional equivalent
7 of a setoff, as you understand it, that would
8 mean an arrangement that works in the way that
9 a setoff would work; is that right?
10 **A. Yes.**
11 **Q.** Kind of accomplishes the same thing?
12 **A. Functionally -- it would accomplish the same**
13 **thing, yes.**
14 **Q.** It wouldn't actually be a setoff itself,
15 right?
16 **A. No. I mean, I don't know that I'm competent**
17 **to make that conclusion.**
18 **Q.** Fair enough.
19 And in a setoff, if one person owes
20 another -- start that over. Person A owes
21 Person B some money. Person B owes Person A
22 some money. There is a netting out, and
23 whoever owes who pays that amount?
24 **A. Correct.**
25 **MR. FAGONE:** Objection to form. Go

84

1 ahead.
2 **BY MR. ROSENTHAL:**
3 **Q.** As you understand it?
4 **A. Yes.**
5 **Q.** Okay. And that's between those two people who
6 owe each other in your understanding?
7 **A. Yes.**
8 **MR. ROSENTHAL:** Fair enough. I don't
9 have any further questions.
10 **MR. FAGONE:** I don't have any questions.
11 My examination was very succinct.
12 **MR. ROSENTHAL:** Well done.
13 **MR. FAGONE:** Thank you. I think we're
14 concluded. Do either of you want to put
15 anything on the record at this point about the
16 deposition?
17 **MR. ROSENTHAL:** I put what I wanted to
18 put on the record in terms of needing to
19 follow up.
20 **MR. LEPENE:** The only thing I would say
21 is that this is a deposition in the context of
22 a Rule 9019 motion to approve a settlement
23 that has been reached between the trustee and
24 the Irving Paper companies. And there is a
25 hearing next week.

85

1 **MR. FAGONE:** Wednesday.
2 **MR. LEPENE:** Next Wednesday I guess it
3 is or Thursday. What is today?
4 **MR. FAGONE:** I apologize. It's
5 Thursday.
6 **MR. LEPENE:** Next week a hearing on that
7 motion. So the discovery we have taken today
8 is in the context of that motion. And if for
9 some reason that motion is not approved or
10 granted, then I suspect there will be further
11 opportunity for us to meet again, Mr. Gardner.
12 **THE WITNESS:** Very well.
13 **MR. FAGONE:** Fine. We're content with
14 that. And we are all done.
15 (Thereupon, the reading and signing of the
16 deposition transcript was Not waived by
17 counsel in the presence of the witness.)
18 (Thereupon, at 12:22 p.m., the
19 above-proceedings were concluded.)
20 *****
21
22
23
24
25

CERTIFICATE

I, Veronica L. Morrill, RPR, Notary Public
 in and for the State of Maine, hereby certify
 that on **October 10, 2013**, personally appeared
 before me the within-named deponent who was
 sworn to testify the truth, the whole truth
 and nothing but the truth in the
 aforementioned cause of action; and the
 foregoing, as reduced to computer type, is a
 true and accurate record of the evidence as
 taken by me by means of stenotype.

I further certify that I am a
 disinterested person in the event or outcome
 of the aforementioned cause.

IN WITNESS WHEREOF, I subscribe my hand at
 Androscoggin, Maine, this 10th day of October
 2013.

 Veronica L. Morrill, RPR
 Notary Public
 My Commission Expires November 12, 2019

ERRATA

Deponent's Name: DONALD GARDNER
 Page and Change From: Change To: Reason:
 Line No.:

SIGNATURE PAGE

TO BE COMPLETED BY DEPONENT:

I, DONALD GARDNER, have read or had read
 to me the foregoing pages of my deposition and
 have noted any errors in form or substance of
 my testimony, together with their respective
 corrections and the reasons therefor on the
 following errata page.

(Signature)_____

(Date)_____

Name of person reading transcript to deponent if
 deponent cannot read:

* * * * *

TO BE COMPLETED BY NOTARY PUBLIC OR ATTORNEY:

I, _____, a Notary
 Public/Attorney, hereby acknowledge that the
 above-named deponent personally appeared
 before me and affixed his/her signature above
 as his/her own true act and deed.

DATED _____

My Commission Expires: _____

Title: Montreal Maine & Atlantic Railway, Ltd
 Jurisdiction: U.S. BANKRUPTCY COURT
 Date of deposition: October 10, 2013
 Errata return deadline: November 12, 2013
 Noticing party: DANIEL ROSENTHAL, ESQ.
 Reporter: VLM