

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

TRUSTEE'S BRIEF REGARDING 45G TAX CREDITS

Robert J. Keach, the chapter 11 trustee (the "Trustee"), submits this brief regarding the extent of the security interests of Wheeling & Lake Erie Railway Company ("Wheeling") in and to money created by the assignment of eligible railroad track miles by Montreal Maine & Atlantic Railway, Ltd. (the "Debtor" or "MMA") to KM Strategic Investments, LLC ("KMSI") for tax purposes pursuant to 26 U.S.C. § 45G.

I. INTRODUCTION

Chapter 11 reflects a Congressional determination that the rights of a debtor and its creditors need to be balanced in order to achieve the statutory goals of rehabilitating debtors and maximizing value. In this case, Wheeling attempts to upset that careful balancing by arguing from an incorrect factual position (namely, that it has a security interest in the collateral involved) and reasoning to an incorrect legal conclusion (namely, that Debtor's estate should not be permitted to retain and use the value that was created by the Trustee and the Debtor's post-petition efforts). As demonstrated below, both of these are erroneous positions and the Court should reject them.

There is nearly \$500,000 of value sitting in an escrow account, pending a determination by this Court regarding the parties' respective entitlements to that money. For the reasons set

forth below, the Trustee believes that Wheeling does not have an interest in that money and, even if Wheeling could demonstrate an interest in the money, the Court should allow the Trustee to use the money to fund the continued operation of the Debtor's business pending a sale. That approach is consistent with the balancing of interests in a chapter 11 case. That approach is consistent with the public interest that must be considered by the Court pursuant to section 1165 of the Bankruptcy Code. Wheeling's preferred approach is consistent with Wheeling's interests.

II. BACKGROUND

A. The Wheeling Line of Credit Note and Wheeling's Security Interests.

1. Pursuant to that certain Line of Credit Note dated as of June 15, 2009 (the "LOC Note"), Wheeling provided a line of credit of up to \$6.0 million to MMA, Montreal, Maine & Atlantic Canada Co. ("MMA Canada"), Montreal, Maine & Atlantic Corporation ("MMA Corp."), and LMS Acquisition Corporation ("LMS").

2. To secure their obligations under the Wheeling LOC, MMA, MMA Canada, MMA Corp., and LMS entered into a security agreement with Wheeling dated June 15, 2009 (the "Security Agreement"). MMA, MMA Canada, MMA Corp., and LMS granted security interests in the "Collateral." The Security Agreement defines "Collateral" as:

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.

Security Agreement, at § II. The Collateral does not include deposit accounts, general intangibles, or real estate and fixtures (including railbeds and tracks).

3. The Security Agreement provides that “all of the rights, remedies and duties of the 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.” MMA is located, for purposes of the UCC, in Delaware. *See* 11 M.R.S.A § 9-1307(5).

4. Wheeling filed a UCC-1 financing statement with the Delaware Department of State on August 25, 2009.

5. Wheeling did not take any steps to perfect a security interest in assets owned by MMA Canada. For the period from June 1, 2013 through December 31, 2013, approximately 52% of the cash collections by MMA and MMA Canada came from Canadian customers. In other words, a significant portion of the cash receipts during the relevant period came from collection of Canadian accounts in which Wheeling does not have a perfected security interest.

6. As of June 1, 2013, the unpaid principal balance of the LOC was \$5,450,000. The unpaid principal balance of the LOC Note was \$6.0 million as of July 31, 2013. In other words, the LOC Note was fully drawn as of July 31, 2013 and remained fully drawn on August 7, 2013 (the “Petition Date”).

B. Assignment of Railroad Track Pursuant to 26 U.S.C. § 45G and the Agreement.

7. Section 45G of the IRC provides for a “railroad track maintenance credit” (the “45G Credit”) in “an amount equal to 50 percent of the qualified railroad track maintenance expenditures paid or incurred by an eligible taxpayer during the taxable year.” 26 U.S.C. § 45G(a). For purposes of section 45G, the term “qualified railroad track maintenance

expenditures” means “gross expenditures . . . for maintaining railroad track (including roadbed, bridges, and related tax structures) owned or leased as of January 1, 2005 by a Class II or Class III railroad” 26 U.S.C. § 45G(d). MMA is a Class II or Class III railroad for purposes of the IRC and makes certain qualified railroad track maintenance expenditures (the “Qualified Expenditures”).

8. Section 45G permits qualified railroads to assign railroad track miles, solely for tax purposes, to an “eligible taxpayer.” Id. at § 45G(b)(1)(B)(ii); 26 C.F.R. § 1.45G-1(d). An eligible taxpayer includes “any person that transports property using the rail facilities . . . of a Class II railroad or Class III railroad during the taxable year, but only is an eligible taxpayer with respect to the miles of eligible railroad track assigned to the person for that taxable year by that Class II railroad or Class III railroad” 26 C.F.R. § 1.45G-1(b)(3)(ii).

9. MMA cannot obtain 45G Credits because it does not have sufficient tax liabilities to offset any 45G Credits. As a result, MMA engaged a broker, Mickelson & Company, LLC (the “Broker”) to assist it with assigning certain miles of railroad track for purposes of section 45G of the IRC.

10. On or about April 26, 2013, MMA and KMSI entered into that certain Track Maintenance Agreement (the “KMSI Agreement”), a true and correct copy of which is attached hereto as Exhibit A. As consideration for the assignment of railroad track miles, KMSI “agrees to make payments . . . with respect to the 2013 Track . . . in an aggregate amount of up to \$2,884,000 (the “2013 Expenditure Commitment”)” KMSI Agreement, § 1.01(a). The amount of the 2013 Expenditure Commitment is based, dollar-for-dollar, on the amount of Qualified Expenditures that MMA projects it will make in 2013. The 2013 Expenditure Commitment is subject to adjustment pursuant to section 1.02 of the KMSI Agreement should

MMA make less Qualified Expenditures than the 2013 Expenditure Commitment, or KMSI fails to make payments for the assigned track when it is required to do so. *See id.* at § 1.02(c).

11. The KMSI Agreement further provides that, “upon receipt during 2013 of certification by [MMA] . . . that [MMA has] made the requisite dollar amount of expenditures, KMSI will satisfy its 2013 Expenditure Commitment by prompt payment . . . for such assignments” *Id.* at § 1.03. MMA’s right to payment of the KMSI Qualified Expenditures under the Agreement is contingent upon MMA certifying to KMSI that it has made Qualified Expenditures and the amount thereof. *See KMSI Agreement* at § 1.03.

12. As consideration for KMSI essentially reimbursing MMA for any Qualified Expenditures it makes, MMA is required, within 10 business days of receipt of any payment from KMSI, to issue shipping credits (the “Shipping Credits”) to KMSI in amount equal to 52.5% of the KMSI Qualified Expenditures. *See KMSI Agreement* at § 1.05(a). MMA is entitled to retain the remaining 47.5% of the KMSI Qualified Expenditures.

13. Pursuant to IRS regulations, the assignment of railroad track for purposes of 45G Credits is treated as being made at the close of the assignor-railroad’s taxable year in which the assignment was made. *See* 26 C.F.R. § 1.45G-1(d)(3). Accordingly, all assignments of railroad track by MMA to KMSI are deemed to have been made on December 31, 2013.

C. The Debtor’s Bankruptcy Filing and Post-Petition Financing from Camden National Bank.

14. On August 7, 2013, the Debtor filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* On August 21, 2013, the Trustee was appointed by the United States Trustee. *See* Docket No. 64.

15. On October 4, 2013, the Trustee filed the *Chapter 11 Trustee’s Motion for Order: (A) Authorizing Debtor to Obtain Post-Petition Financing; and (B) Granting to Camden*

National Bank Post-Petition Security Interests [D.E. 337] (the “Motion to Borrow”). Pursuant to the Motion to Borrow, the Trustee sought authority to enter into a revolving line of credit (the “Camden LOC”) with Camden National Bank (“Camden National”) in the maximum amount of \$3,000,000.

16. The Debtor’s obligations under the Camden LOC were to be secured by a first mortgage and security interest on all assets located in the United States that secure the debt owed by MMA to the Federal Railroad Administration (the “FRA”). The proceeds of the Camden LOC were to be used by the Debtor for working capital needs.

17. Pursuant to an order entered by this Court on October 9, 2013, the Court granted the Motion to Borrow [D.E. 367] (the “Borrowing Order”). The loan and security documents relating to the Camden LOC were effective as of October 18, 2013. Since October 18, 2013, MMA has, on a weekly basis, remitted all proceeds of accounts receivable in which Wheeling has a perfected security interest to Wheeling, and has paid Wheeling for all inventory consumed. Specifically, since October 18, 2013, MMA has paid Wheeling approximately \$1 million, and escrowed another \$200,000 for Wheeling’s benefit.

18. On December 2, 2013, the Trustee filed the *Motion for Order (I) Authorizing Assignment of Tax Credits and (II) Granting Related Relief* [D.E. 463] (the “45G Motion”). The 45G Motion did not seek authority for the Trustee to assume the KMSI Agreement pursuant to 11 U.S.C. § 365, and the Trustee has not, at any time, assumed or taken steps to assume the KMSI Agreement.

19. Wheeling objected to the 45G Motion on the basis that it is entitled to adequate protection for MMA’s use of the KMSI Payments. After a hearing held before this Court on December 11, 2013, the Court granted the 45G Motion, with all rights of the Trustee and

Wheeling reserved with respect to the application and use of funds generated by the Assignment. See D.E. 511. The Trustee and Wheeling were ordered to file simultaneous briefs regarding Wheeling’s interest, if any, in and to proceeds received by MMA in relation to the Assignment.¹

D. Certification of Qualified Expenditures and Payments Made by KMSI.

20. As pertinent to the issues set forth in this brief, during 2013, the following transactions occurred:

Date Range of Qualified Expenditures	Amount of Qualified Expenditures	Certification Date	Amount of Shipping Credits Issued	Amount of Commission	Net Benefit to MMA
6/1/2013-7/31/13	\$514,518.00	12/11/13	\$289,741.73	\$10,486.00	\$251,661.27
8/1/13-8/7/13	\$37,371.00				
8/8/13-8/31/13	\$128,131.00	12/11/13	\$119,414.40	\$4,321.80	\$103,719.80
9/1/13-10/17/13	\$99,325.00				
10/18/13-12/31/13	\$338,101.00	12/13/13	\$177,455.25	\$6,422.20	\$154,132.55
TOTAL	\$1,117,355.00		\$586,611.38	\$21,230.00	\$509,513.62
Payment to Wheeling					(\$19,000.00)
NET TOTAL					\$490,513.62

21. As shown in the above table, MMA made a total of \$551,889 in Qualified Expenditures prior to the Petition Date (the “First Qualified Expenditures”). After the Petition Date, and through October 17, 2013, MMA made a total of \$227,456 in Qualified Expenditures (the “Second Qualified Expenditures”). After the closing on the Camden LOC, from October 18,

¹ In connection with the resolution of a dispute regarding turnover of property of the estate, the Court ordered the Trustee to pay \$19,000 of the KMSI Payments to Wheeling. See D.E. 495, at ¶ 7. Other than that payment of \$19,000, the remainder of the estate’s share is sitting an account under an escrow arrangement.

2013 through December 31, 2013, MMA made a total of \$338,010 in Qualified Expenditures (the “Third Qualified Expenditures”).

22. The Qualified Expenditures were funded from a variety of sources, including sources in which Wheeling does not have a perfected security interest. For example, more than half of the Debtor’s cash receipts from June 1, 2013 through December 31, 2013 were received from Canadian account debtors. Additionally, after October 18, 2013, the Qualified Expenditures were funded exclusively from the proceeds of the Camden LOC or other sources of cash that are not subject to Wheeling’s security interests.

23. The First Qualified Expenditures and the Second Qualified Expenditures were certified to KMSI on December 11, 2013. The Third Qualified Expenditures were certified to KMSI on December 13, 2013. Copies of those certifications are attached hereto as **Exhibit B**.

24. Thereafter, KMSI issued payment to MMA in relation to the First Qualified Expenditures, the Second Qualified Expenditures, and the Third Qualified Expenditures in the gross amount of \$1,117,355.00, of which a total of \$586,611.38 was returned to KMSI by MMA through redemption of Shipping Credits. MMA also paid an aggregate of \$21,230.00 in commissions to the Broker. Accordingly, a net amount of \$509,513.62 remains for the benefit of MMA (the “KMSI Payments”).²

25. Based on current projections, the Trustee will require an additional \$1 million of operating cash to fund operations through the closing on the sale of MMA’s assets. There will not be sufficient availability on the Camden LOC to provide the needed liquidity, as the Trustee expects to reach the maximum available borrowing in the next several weeks. Accordingly, the Trustee requires use of the KMSI Payments to increase the likelihood that operations can

² As noted above, MMA paid \$19,000 to Wheeling pursuant to an order on the so-called “Irving 542 Motion.” That leaves approximately \$490,000 (\$509,513.62 minus \$19,000) in escrow pursuant to the terms of the Court’s order on the 45G Motion.

continue without additional financing, pending the closing of the sale of the railroad system to a purchaser or purchasers.

III. ARGUMENT

A. **Wheeling Bears the Burden of Establishing the Validity, Priority, and Extent of Its Interest, If Any, in and to the KMSI Payments.**

Section 363(p)(2) of the Bankruptcy Code provides that “the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.” 11 U.S.C. § 363(p)(2). Where a party’s underlying objection to a debtor’s use of property is premised on or involves the extent of that party’s interest in such property, the burden is on the objecting party to establish its interest. *See id.*; *see also In re Corse*, 486 B.R. 241, 244 (Bankr. D.R.I. 2013). Wheeling’s objection to the 45G Motion [D.E. 470] is premised on Wheeling’s asserted interest in the post-petition KMSI Payments as proceeds of Wheeling’s prepetition collateral. Accordingly, Wheeling bears the burden of establishing the validity, priority, and extent of its asserted interests. *Id.*

B. **Wheeling Does Not Have a Lien on the Debtor’s Real Estate or the Track Miles and Therefore Does Not Have Security Interest in the KMSI Agreement or the KMSI Payments.**

Wheeling does not have a mortgage or lien on any of the real estate on which the tracks are located or a security interest in the track miles assigned to KMSI for tax purposes. Wheeling’s security interests are limited to “accounts,” “inventory,” “payment intangibles,” and the proceeds of the same. None of those statutorily-defined terms include the track miles that were assigned to KMSI or the underlying real estate where the track is located. Therefore, by definition, the KMSI Payments, which arise directly from the assignment of those track miles, cannot be proceeds or products of Wheeling’s collateral and Wheeling has no security interest in the KMSI Payments. *See The Business Bank v. White (In re Timothy Dean Restaurant & Bar)*,

342 B.R. 1, 28-30 (Bankr. D. Dist. Col. 2006) (holding that bank, which did not have a security interest in debtor's rights under a lease, but did have security interest in general intangibles, did not have security interest in proceeds received by debtor under settlement agreement to the extent such proceeds related to resolution of lease-related claims); Miller v. Norwest Bank Minn. N.A. (In re Inv. & Tax Svcs., Inc.), 148 B.R. 571, 575 (Bankr. D. Minn. 1992) (holding that bank's security interest in debtor's contractual rights to payment and choses in action was insufficient to give bank a security interest in proceeds of life insurance policy where policy was not specifically pledged to bank). Like the lease in Timothy Dean and like the insurance policy in Miller v. Norwest, the real estate that gave rise to the track miles assigned to KMSI was not part of the secured creditor's collateral.

Wheeling may try to avoid this inevitable conclusion by characterizing the KMSI Agreement as a "payment intangible," asserting a security interest in the KMSI Agreement and, then, in an attempt at a "bootstrap" argument, asserting that the KMSI Payments are proceeds of the KMSI Agreement, rather than proceeds of the sale of the track miles. This attempt should be rejected. The interposition of an agreement does not give Wheeling a security interest in something in which it did not otherwise have a lien or security interest.

The proceeds of the assignment of the track miles—in which Wheeling does not have a security interest—do not become proceeds of a payment intangible just because a written document is used to transfer the track miles. If that were the case, the proceeds of the sale of real estate would be subject to the security interest of a creditor with no mortgage on the real estate but simply an interest in payment intangibles merely because a purchase and sale agreement was used in the conveyance. That result, of course, defies common sense and is not the law. *See*

Timothy Dean, Miller, supra. This transaction was, purely and simply, an assignment of the track miles, in which Wheeling had no, and has no, security interest.³

C. Section 552 Prevents Wheeling’s Security Interest from Attaching to the KMSI Payments Even if the Prepetition KMSI Agreement Was the Collateral Rather Than the Track Miles.

Section 552(a) provides that, except as set forth in section 552(b), “property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.” 11 U.S.C. § 552(a). Thus, section 552(a) of the Bankruptcy Code states the general rule that property acquired after the commencement of the bankruptcy is not subject to prepetition liens. *See Arkison v. Frontier Asset Mgmt., LLC (In re Skagit Pacific Corp.)*, 316 B.R. 330, 335-37 (9th Cir. BAP 2004); *In re Cafeteria Operators, L.P.*, 299 B.R. 400, 403-04 (Bankr. N.D. Tex. 2003).

Section 552(b)(1) provides a “narrow exception” to the rule set forth in section 552(a). *See Philip Morris Capital Corp. v. Bering Trader, Inc. (In re Bering Trader, Inc.)*, 944 F.2d 500, 502 (9th Cir. 1991). Section 552(b)(1) provides, in relevant part, that:

[i]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds . . . of such property, then such security interest extends to such proceeds . . . acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to the extent, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552(b)(1). The section 552(b)(1) exception, by its terms, applies only to post-petition proceeds generated from pre-petition collateral. *See* 11 U.S.C. § 552(b)(1); *see also N.*

³ The Trustee is not a party to the KMSI Agreement and that agreement has not been assumed pursuant to 11 U.S.C. § 365. Given those indisputable facts, the Court should treat the KMSI Payments as being generated by a post-petition agreement between the Trustee and KMSI, not as being generated by the pre-petition agreement. Viewed that way, the money received from KMSI cannot be subject to Wheeling’s pre-petition security interests.

H. Bus. Dev. Corp. v. Cross Baking Co. Inc. (In re Cross Baking Co., Inc.), 818 F.2d 1027, 1032 n.6 (1st Cir. 1987) (*quoting* 4 Collier on Bankruptcy ¶ 552.02, at 552-7 (15th ed. 1987) (“section 552(b) ‘creates an exception for *proceeds generated by prepetition collateral*, and not for property acquired by the debtor or the estate postpetition or proceeds of the same.”) (emphasis in original). Courts applying section 552(b) draw a distinction between property acquired after the petition date (with respect to which section 552(a) cuts off a pre-petition security interest), and proceeds generated after the petition date from property acquired pre-petition (to which a pre-petition security interest may remain attached). *See, e.g., Timothy Dean Restaurant*, 342 B.R. at 23 (noting that section 552 “restricts a creditor’s lien to property acquired by the debtor before the filing of the debtor’s bankruptcy.”); Sandage Real Estate, Inc. v. Liebe (In re Liebe), 41 B.R. 965, 968 (Bankr. N.D. Iowa 1984) (finding that creditor “cannot assert a security interest in the PIK proceeds because the collateral generating those proceeds was not acquired by the Debtors prior to commencement of bankruptcy.”); In re Barbara K. Enter., No. 08-11474 (MG), 2008 WL 2439649 at *10 (Bankr. S.D.N.Y. June 16, 2008) (“While the distinction between after-acquired property . . . and ‘proceeds’ of pre-petition collateral . . . is not always clear, many courts take guidance from the Supreme Court’s decision in *Local Loan Co. v. Hunt*, 292 U.S. 234, 243 (1934), which forbade ‘the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective or even arising from, or connected with, preexisting property, but brought into being solely as the fruit of the subsequent labor of the bankrupt.’”) (*citing* 5 Collier on Bankruptcy ¶ 552.01). More specifically, “[t]he burden to establish that the exception provided by §552(b) applies rests with the creditor asserting a lien on postpetition proceeds, profits, products or offspring.” Boston Fin. Corp. v. Bush (In re Titan Indus., Inc.), No. MW 00-104, 2001 WL 36381910, *4 (1st Cir. B.A.P. 2001) (*citing, inter alia, In re Ledis*,

259 B.R. 472, 478 (D. Mass. 2001)); *see also* In re Patio & Porch Sys. Inc., 194 B.R. 569, 573 (Bankr. D. Md.1996).

- i. As of the Petition Date, MMA had no rights in the KSMI payments and therefore Wheeling did not have an interest in the KMSI Payments.*

Section 9-1203 of the Maine UCC provides that “[a] security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral” 11 M.R.S.A. § 9-1203(1). For a security to become enforceable against the debtor and third parties, three requirements must be met: (i) value has been given; (ii) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (iii) the debtor has authenticated a security agreement. *Id.* at. § 9-1203(2)(c). The first and third requirements are not in contest here. The second requirement—that the debtor have rights in the collateral—is directly at issue.

If a debtor’s rights to collateral vest or accrue after the petition date, such that a creditor’s security interest cannot attach as of the petition date, section 552(a) terminates the creditor’s security interest in such collateral. *See* Brandt v. Fleet Capital Corp. (In re TMC Electronics), 279 B.R. 552, 555, 560-61 (Bankr. N.D. Cal. 1999) (holding that bank’s security interest in tax refunds did not extend to post-petition refund issued with respect to year in which bankruptcy petition was filed; debtor’s interest in tax refund does not vest until the end of the tax year, on December 31, and debtor had filed bankruptcy petition on December 21); *see also* In re Don Connolly Const. Co., Inc., 110 B.R. 976, 979 (Bankr. M.D. Fla. 1990) (finding that creditor had failed to provide any evidence that “the Secretary [of the Treasury] made its determination regarding Debtor’s right to the tax refund” prior to the petition date, and thus court could not find that right to the tax refund arose prepetition).

With respect to accounts receivable specifically, “[a] debtor has no rights in an accounts receivable until the debt is owed. In other words, a security interest in an accounts receivable cannot be perfected until it has attached by means of the debtor having delivered goods or performed services which cause the account to come into existence.” Nat’l City Bank of Ind. v. All-Phase Elec. Supply Co., 790 N.E.2d 488, 490 (Ind. Ct. App. 2003) (quoting Int’l Underwriters, Inc. v. Kinnamon, Schneider and Hugh Interiors, Inc., 513 A.2d 1318 (Del. 1986)); see also Matter of Coppie, 728 F.2d 951, 953 (7th Cir. 1984) (noting that “debtor would acquire some rights in the future accounts receivable when the accounts receivable came into existence.”); U.S. Lines (S.A.), Inc. v. The U.S.A. and Chemical Bank (In re McLean Indus.), Inc., 132 B.R. 247, 264 (Bankr. S.D.N.Y. 1991) (“The Code recognizes that a security interest does not attach and cannot be perfected in . . . accounts receivable until the debtor acquires rights in them.”) (reversed on other grounds); Ralls & Assocs., Inc. v. Am. Nat’l Bank & Trust Co. (In re Ralls & Assocs., Inc.), 114 B.R. 744, 747 (Bankr. W.D. Okla. 1990) (finding that “prospective accounts receivable” was not sufficient for bank’s lien to attach); Juengel Const. Co. v. Moening, 1978 WL 4602, *3 (E.D. Mo. Oct. 18, 1978) (“Since a debtor has no rights in an account until it comes into existence . . . the Lemay Bank could not have received a property interest in the accounts until taxpayer itself received that interest after performing services for the plaintiff.”); In re PNC Bank, Del. v. Berg, 1997 WL 527978 at *9 (Del. Super. Jan. 31, 1997) (same).

In this case, as of the Petition Date, MMA had no rights whatsoever to the KMSI Payments. MMA’s right to such funds was triggered by MMA properly certifying the Qualified Expenditures, which it did not do until post-petition, and which it could not do until post-petition

with respect to the Second Qualified Expenditures and the Third Qualified Expenditures.⁴ MMA's rights to payment under the KMSI Agreement arose after the Petition Date, and the KMSI Payments arose after the Petition Date. Accordingly, Wheeling's interest in MMA's right to payment of the KMSI Payments could not attach prior to the Petition Date because MMA had no rights in the KMSI Payments as of the Petition Date. *See* 11 M.R.S.A. § 9-1203(1). The KMSI payments were not acquired before the Petition Date. Section 552(a) prevents Wheeling's security interest from attaching to the KMSI payments.⁵

ii. *The KMSI Payments do not constitute "proceeds" for purposes of section 552(b)(1).*

Further, Wheeling cannot avail itself of the "proceeds" exception under section 552(b)(1) because the KMSI Payments do not constitute "proceeds" of Wheeling's pre-petition collateral. The legislative history to section 552 provides, quite clearly, that "[t]he term 'proceeds' is not limited to the technical definition of that term in the UCC, but covers any property into which property subject to the security interest is converted." H.R. Rep. No. 95-595, at 377 (1978). The legislative history thus indicates that section 552(b) refers to "proceeds" not as defined under state law, but based on a "federal concept of proceeds [that] is based on a conversion model. Thus, section 552(b) permits the secured creditor's prepetition lien to extend only to postpetition 'property into which [collateral] is converted,' and not to postpetition property that is generated by or arises from the collateral." G. Ray Warner, *Article 9's Bankrupt Proceeds Rule: Amending*

⁴ Both the Second Qualified Expenditures and the Third Qualified Expenditures were not even made until after the Petition Date, meaning that it would have been impossible for the Debtor to certify these Qualified Expenditures, and obtain a right to payment from KMSI for these particular expenditures, before the Petition Date.

⁵ The First Circuit's decision in Cadle Co. v. Schlichtmann, 267 F.3d 14 (1st Cir. 2001), is easily distinguishable. That case involved a pre-petition security interest in accounts receivable. The account receivable in question was converted into cash before the debtor filed his chapter 7 bankruptcy case. Id. at 19. In other words, the existence and the amount of the secured creditor's collateral were both fully and finally determined before the bankruptcy intervened. That is obviously not the case here. Moreover, Schlichtmann did not address the operation of the "equities of the case" exception in section 552(b)(1).

Bankruptcy Code Section 552 Through the UCC “Proceeds” Definition, 46 Gonz. L. Rev. 521, 539 (2010-2011). Accordingly, courts have relied on this “federal concept” of proceeds, rather than the definition of “proceeds” under the UCC, when construing section 552(b). *See, e.g., Great-West Life & Annuity Assur. Co. v. Parke Imperial Canton, Ltd.*, 177 B.R. 843, 851 (Bankr. N.D. Ohio 1994) (finding that proceeds has “unique meaning” under section 552(b), and relying on legislative history, rather than UCC, for such meaning); *In re Lawrence*, 41 B.R. 36, 36 (Bankr. D. Minn. 1984) (citing legislative history and finding that prepetition security interest in farm products did not extend to milk produced post-petition); *see also Brever v. State Bank of Young America (In re Kohls)*, 94 B.R. 1006, 1010 n.8 (Bankr. D. Minn. 1987) (noting that proceeds as used in section 552(b) does not have UCC definition).

Courts applying the conversion model of proceeds have found that “proceeds” of a prepetition contract arise when “the contract itself is exchanged based on its intrinsic value.” *See, e.g., In re Rumker*, 184 B.R. 621, 626 (Bankr. S.D. Ga. 1995); *see also In re Mintz*, 192 B.R. 313, 320 (Bankr. D. Mass. 1996); *cf. United Va. Bank v. Slab Fork Coal Co. (In re Slab Fork Coal Co.)*, 784 F.2d 1188, 1190 (4th Cir. 1986) (finding that funds received from post-petition assignment of contract constituted proceeds subject to secured creditor’s security interest). Performance of a contract does not give rise to proceeds; rather, performance of a contract gives rise to an account receivable. *See id.* Likewise, accounts receivable arising post-petition do not constitute proceeds of pre-petition collateral. *See Cross Baking*, 818 F.2d at 1032.

Wheeling’s collateral in this case, if any, consists of funds generated by MMA’s assignment of track miles. At no point did MMA assign, transfer, or otherwise dispose of the KMSI Agreement in a way that would generate proceeds as contemplated by section 552(b)(1).

In other words, the KMSI Agreement was not “converted” to some property to which Wheeling’s security interest could attach. Instead, MMA’s post-petition performance under the KSMI Agreement—namely, MMA’s certification of Qualified Expenditures—generated a right to payment from KMSI. The KMSI Payments are the proceeds of that right to payment. Accordingly, the post-petition funds in this case arise from an account generated post-petition, and are not subject to Wheeling’s security interest under section 552(b)(1).

However, even if a state law, as opposed to the prevailing federal definition of “proceeds” were applicable and the KMSI payments were found to fall within the technical definition of “proceeds” of a contract, Wheeling still cannot establish a security interest in the “proceeds” of the KMSI Agreement. Wheeling must still establish that it has a security interest in the KMSI Payments as “identifiable proceeds.” *See* 11 M.R.S.A. § 9-1315(1)(b) (providing that “[a] security interest attaches to any identifiable proceeds of collateral”). Section 9-1315(2)(b) requires the secured party to “identif[y] the proceeds by a method of tracing” if such proceeds are commingled with other property. *Id.* at § 9-1315(2)(b); *see also Official Comm. of Unsecured Creditors vs. UMB Bank, N.A. (In re Residential Capital, LLC)*, 501 B.R. 549, 617 (Bankr. S.D.N.Y 2013) (noting that secured party has the burden of tracing funds to identifiable cash proceeds); *In re Oriental Rug Warehouse Club, Inc.*, 205 B.R. 407, 413-14 (Bankr. D. Minn. 1997) (disallowing creditor’s secured claim because of creditor’s failure to trace proceeds). “Thus, once a debtor deposits cash proceeds into an account and commingles it with other money, the identifiability of a secured creditor’s proceeds is destroyed unless the secured creditor can prove the money currently in the debtor’s account corresponds to its collateral.” *Skagit Pacific*, 316 B.R. at 338. The secured creditor bears the burden of tracing the proceeds. *See In re Willis Enter.*, 478 B.R. 388, 393 (Bankr. D. Idaho 2012); *Residential Capital*, 501 B.R.

at 549. To satisfy its burden, the secured creditor “must provide documentation of its identifiable or traced proceeds.” Skagit Pacific, 316 B.R. at 338.

Here, Wheeling cannot meet its burden of establishing that the payments under the KMSI Agreement constitute its identifiable proceeds. The Trustee assumes that Wheeling will argue that (a) it had a lien on pre-petition accounts and proceeds of the same; (b) that those proceeds were collected by MMA and used to fund the eligible expenditures later certified to KMSI; and (c) that the KMSI Payments resulting from the certifications are the “proceeds” of the pre-petition accounts. The Court should reject this argument, because it overlooks the fact that MMA funded the eligible expenditures from a variety of sources: proceeds of US accounts receivable, proceeds of Canadian accounts receivable, real estate revenue, the money obtained from draws on the Camden LOC. All of that money was deposited in MMA’s bank accounts and was commingled before any eligible expenditures were made. There is simply no way that Wheeling can meet its burden of tracing, on a dollar-for-dollar basis, the proceeds from the pre-petition accounts that Wheeling has a lien on to the expenditures of funds to the KMSI Payments. Therefore, to the extent that Wheeling fails to provide sufficient documentation tracing the Qualified Expenditures to its collateral, or is otherwise unable to “identify” the KMSI Payments as identifiable proceeds of its collateral, Wheeling cannot assert an interest in the KMSI Payments.

D. The Equities of the Case Preclude Wheeling from Enforcing Any Security Interest in Rights to Payment.

- i. The Court should apply the equities of the case exception to preclude Wheeling from enforcing any security interest in the KMSI Payments.*

Even if Wheeling could meet its burden of establishing that section 552(b)(1) applies to the KMSI Payments—because the prepetition KMSI Agreement, not the track miles, is the

collateral, the right to such payments did not arise entirely postpetition, and Wheeling can trace the proceeds—the Court should apply the “equities of the case” exception to preclude Wheeling from enforcing such security interest. Section 552(b)(1) provides that a court must consider the “equities of the case” in determining the extent to which a security interest in post-petition proceeds of pre-petition collateral should be enforced. *See* 11 U.S.C. § 552(b)(1).

As one court has noted, summarizing the basic purpose of the exception, “[a]s a general matter, the equities of the case provision is intended to prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code, which favors giving debtors a fresh start.” Patio & Porch Sys. 194 B.R. at 575 (citations and internal quotation marks omitted). This exception provides courts with the ability to ensure that the position of a secured creditor is not unjustly improved as a result of expenditures made by the debtor or the estate from estate funds. *See* Cross Baking, 818 F.2d at 1033 (stating that “the ‘equities of the case’ proviso is a legislative attempt to address those instances where expenditures of the estate enhance the value of proceeds, which, if not adjusted, would lead to an unjust improvement of the secured party’s position.”); *see also* Bruce H. White & William L. Medford, *Section 552’s Hidden Threat to Secured Creditors: There Goes Your Equity Cushion*, 25-May Am. Bankr. Inst. J. 28 (May 2006) (“Where a bankruptcy estate puts significant effort into disposing encumbered property, or man hours are used to finish incomplete inventory that increase the amounts realized from such disposition, the equities of the case may require the court to apportion the proceeds.”)

This exception provides courts with the ability to ensure that the position of a secured creditor is not unjustly improved as a result of expenditures made by the debtor or the estate from estate funds. *See* Cross Baking, 818 F.2d at 1033 (stating that “the ‘equities of the case’

proviso is a legislative attempt to address those instances where expenditures of the estate enhance the value of proceeds, which, if not adjusted, would lead to an unjust improvement of the secured party's position.”). As the United States Bankruptcy Court for the Southern District of New York recently held, section 552 operates to bar the extension of a creditor's security interest to proceeds of a postpetition transfer even where the asset sold is a product of, or has been enhanced by, a blend of collateral, unencumbered assets and post-petition labor of the debtor's employees and professionals:

Section 552(b) is intended to cover after-acquired property that is directly attributable to prepetition collateral, without addition of estate resources.” 5 Collier on Bankruptcy ¶ 552.02[2][a] (emphasis added). Here, even if JSN Collateral was used to generate goodwill (either by maintaining or improving the value of assets or by diminishing liabilities), Debtor resources were used as well. The Debtors improved the value of the assets sold to Ocwen by negotiating settlements with government entities and RMBS Trustees. That involved time, effort, and expense by the Debtors' estates. The Debtors did not merely take some JSN Collateral and convert it into goodwill without any other resources. That means that the goodwill is not the proceeds of JSN Collateral. See In re Delco Oil, Inc., 365 B.R. 246, 250 (Bankr.M.D.Fla.2007) (“The concept of proceeds is only implicated when one asset is disposed of and another is acquired as its substitute.”) (internal quotation marks omitted). Even if a portion of the goodwill was directly attributable to JSN Collateral, without any other additional resources, the JSNs have failed to separate the value of that goodwill. Thus, the JSNs have not met their burden of establishing a lien on goodwill generated postpetition.

Residential Capital, 501 B.R. at 612.

The equities of the case exception should be applied to preclude Wheeling from asserting a security interest in any portion of the KMSI Payments. As indicated above, the Debtor funded the Qualified Expenditures from a variety of sources, including sources in which Wheeling does not have a security interest (*e.g.*, Camden National loan proceeds and proceeds of Canadian accounts receivable). Further, Wheeling has had no involvement in the Debtor's post-petition operations, and did not in any way participate in negotiations with KMSI or assist in obtaining the KMSI Payments. Additionally, Wheeling has never sought relief from the automatic stay,

undoubtedly because Wheeling realizes that its position is best protected through the continued operation of the Debtor's business (including the collection of receivables in the ordinary course).⁶ Now that the Trustee's efforts have resulted in the KMSI Payments, Wheeling would like this Court to order the KMSI Payments turned over to Wheeling. Payment of any portion of the KMSI Payments to Wheeling would result in a windfall to Wheeling, and the equities of the case should apply to prohibit Wheeling from asserting any interest in the KMSI Payments.

Even where assertion of a security interest is not wholly precluded, courts will apply the equities of the case exception by adjusting the secured creditor's interest in collateral by the amount of expenditures made by the debtor or the estate to enhance the value of such collateral. *See, e.g., In re Newfound Lake Marina, Inc.*, No. 04-12192 MWV, 2008 WL 2045821, at *1 (Bankr. D.N.H. May 12, 2008) (reducing secured creditor's interest in real estate collateral by \$100,000 where debtor spent \$100,000 on legal counsel to enhance the collateral by obtaining the necessary permits to convert the real property into a dock and condominium complex); *In re Photo Promotion Assocs., Inc.*, 61 B.R. 936 (Bankr. S.D.N.Y. 1986) (finding that it would be inequitable to permit creditor to claim proceeds of photography orders as its collateral where debtor had to borrow funds to complete the orders and obtain payment); *In re Qmect, Inc.*, No. 04-41004 T, 2006 WL 2038367 (Bankr. N.D. Cal. June 2, 2006) (apportioning proceeds between secured creditor and debtor when postpetition assets were purchased or created with the secured creditor's collateral, provided the secured creditor could trace the proceeds to its prepetition collateral); *In re Cafeteria Operators, L.P.*, 299 B.R. 400, 410 (Bankr. N.D. Tex. 2003) (secured

⁶ Although Wheeling has benefited from the operation of the business post-petition, Wheeling has done nothing to facilitate such operations. Another creditor, the FRA, has shouldered the burden of ensuring that the Debtor and then the Trustee had sufficient liquidity to conduct the business (by subordinating its mortgages to the liens securing the Camden LOC) and has taken steps to ensure that there is a source of payment for the allowed fees and expenses of the Trustee and his professionals (by agreeing to a carve-out). Wheeling has done nothing of the sort, but has benefited from the operation of the business since the Petition Date. The Court can and should consider these facts when weighing the relative equities.

creditor with security interest in inventory could not claim entirety of proceeds generated from food service business when “all the cash is not proceeds of [secured creditor’s] secured interest in inventory, but instead represents, in large part, the proceeds of Debtor’s post-petition toil and effort.”); In re Delbridge, 61 B.R. 484, 491 (Bankr. E.D. Mich. 1986) (endorsing a mathematical calculation under the equities of the case exception according to relative contributions by a secured creditor with an interest in cows and milk and the farmer with regarding to milk produced postpetition.); U.S. v. Van Vactor (In re Crouch), 51 B.R. 331 (Bankr. D. Or. 1985) (when government had a security interest in perennial crops, which had been planted prepetition, the postpetition proceeds were to be shared proportionately among the government and all parties who contributed to the crop production

Although the Trustee submits that Wheeling would be unable to establish that its Collateral was used to fund any portion of the Qualified Expenditures, Wheeling is certainly unable to establish that its Collateral was used to fund the Third Qualified Expenditures. The Third Qualified Expenditures were made after the closing of the Camden LOC, and all or a portion of such expenditures were paid for with draws under the Camden LOC or from proceeds of accounts receivable generated after October 18, 2013, in which Wheeling has no interest. In other words, the Third Qualified Expenditures were made from the estate’s resources, not Wheeling’s, and the resulting KMSI Payments related to the Third Qualified Expenditures would not exist had MMA not sources other than Wheeling’s collateral. Allowing Wheeling to benefit from MMA’s use of these proceeds would unjustly improve the position of Wheeling. The same is true to the extent that funds that were not Wheeling’s collateral were used in connection with the First Qualified Expenditures and the Second Qualified Expenditures. While the Trustee believes that Wheeling should not be permitted any security interest in the KMSI Payments for

the reasons detailed above, at a minimum, the Court should apportion the KMSI Payments between the estate and Wheeling, with the vast majority of those funds going to the estate.

IV. CONCLUSION

For the reasons set forth herein, Wheeling's objection to the 45G Motion should be overruled. Either Wheeling never had any security interest in the track miles (and therefore cannot claim an interest in the proceeds thereof) or section 552(a) of the Bankruptcy Code precludes Wheeling from enforcing an interest in the KMSI Payments, and Wheeling cannot establish that the section 552(b) exception applies. Moreover, even if such a security interest could be asserted in the KMSI Payments as proceeds of pre-petition collateral, the Court should not allow the interest under the equities of the case exception, as granting Wheeling any interest in such KMSI Payments would be simply to grant to Wheeling an unwarranted windfall at the estate's expense.

Dated: January 21, 2014

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



TRACK MAINTENANCE AGREEMENT

THIS TRACK MAINTENANCE AGREEMENT (the “**Agreement**”) dated as of April 26, 2013, by and between the MONTREAL, MAINE & ATLANTIC RAILWAY, LTD. (“**Railroad**”), MONTREAL, MAINE & ATLANTIC CORPORATION (“**MM&A Parent**”) and KM STRATEGIC INVESTMENTS, LLC, a Delaware limited liability company (“**KMSI**”).

RECITALS

A. Pursuant to Section 45G of the Internal Revenue Code of 1986, as amended (“**Section 45G**”), certain “eligible taxpayers” are entitled to federal income tax credits equal to 50 percent of “qualified railroad track maintenance expenditures” paid or incurred (the “**Tax Credits**”);

B. Pursuant to Section 45G(c)(2), KMSI and its affiliates transport property using the rail facilities of the Railroad, making KMSI an “eligible taxpayer” for these purposes and giving KMSI a natural interest in the maintenance and improvement of the track on which the Railroad operates;

C. Under Section 45G(b), the Tax Credits are limited to \$3,500 times the number of railroad track miles owned or leased by the eligible taxpayer, but the Railroad may assign its railroad track miles to other eligible taxpayers for purposes of this limitation;

D. Congress has recently passed legislation, which has been signed into law by the President, that extends Section 45G to apply to expenditures during 2012 and 2013; and

E. KMSI is willing to make payments as provided herein, and the Railroad is willing to assign the railroad track miles (solely for purposes of Section 45G) so as to permit KMSI to claim certain Tax Credits for 2013 based on those payments, upon the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the terms and conditions contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby conclusively acknowledged, the parties agree as follows:

ARTICLE I

EXPENDITURES, TAX CREDITS

1.01 Expenditure Commitments.

- (a) 2013 Expenditure Commitment. Subject to the terms and conditions of this Agreement, KMSI agrees to make payments as specified herein with respect to the 2013 Track (as defined below) in an aggregate amount of up to \$2,884,000 (the “**2013 Expenditure Commitment**”), as the 2013 Expenditure Commitment may be adjusted pursuant to Section 1.02.

- (b) Qualified Railroad Track Maintenance Expenditures. For purposes hereof, the term “**Qualified Railroad Track Maintenance Expenditures**” shall mean expenditures (whether or not otherwise chargeable to capital account) during 2013 for maintaining the 2013 Track (including, without limitation, roadbed, bridges, and related track structure) that are certified by the Railroad as being “qualified railroad track maintenance expenditures” within the meaning of Section 45G, together with any amounts that are treated as such under applicable tax regulations. Notwithstanding anything in this Agreement to the contrary, Qualified Railroad Track Maintenance Expenditures shall not include expenditures (i) for or related to any substance, material or waste that is listed, regulated or subject to remediation under or pursuant to any environmental law, as “hazardous,” “toxic,” “radioactive,” or words of similar meaning or effect, including petroleum and petroleum products; (ii) with respect to track located outside the United States; or (iii) with respect to any miles of track which were not owned or leased by a Class II or Class III railroad as of January 1, 2005 (the “**Excluded Track**”). On or before June 30, 2013, Railroad will provide KMSI with a schedule in substantially the form provided for prior years (the “**2013 Maintenance Schedule**”) setting forth in reasonable detail the major projects and general types of expenses expected to be paid or incurred by Railroad during 2013 (such amounts paid or incurred being the “**2013 Qualified Expenditures**,” or the “**Qualified Expenditures**”).

1.02 Assignment of Track; Adjustments; Tax Credits.

- (a) Assignment of Track. As consideration for KMSI’s agreement to make the payments specified herein, and subject to the terms and conditions hereof, Railroad hereby “assigns” to KMSI (within the meaning of Section 45G(b)) the miles of track owned or leased by Railroad identified on Schedule A attached hereto (collectively, the “**2013 Track**” or the “**Track**”) solely for purposes of Section 45G for the year 2013. The parties acknowledge that miles of track owned or leased by Railroad that are not identified on Schedule A are not assigned and are retained by Railroad.
- (b) Limitations on Assignment. No ownership or other rights in and to the Track shall be deemed to be assigned hereunder, and this shall not be construed as an assignment of rights with respect to the Track for any other purpose.
- (c) Adjustments to Assigned Track Miles; Expenditure Commitments.
- (i) If the Qualified Railroad Track Maintenance Expenditures by the Railroad for 2013 are less than the 2013 Expenditure Commitment, or KMSI fails to make payments for the assigned Track when obligated to do so, the number of miles of 2013 Track assigned to KMSI by Railroad hereunder for purposes of Section 45G for 2013 shall be proportionately reduced, without further action of any party.

- (ii) If Railroad sells, abandons or otherwise disposes of any miles of 2013 Track to an unrelated party prior to December 31, 2013 (or if Railroad determines after the date hereof that the appropriate mileage for 2013 is smaller than the number of miles set forth herein), the Railroad will not be treated as being in breach of its obligations hereunder, and the 2013 Expenditure Commitment shall be automatically reduced (without further action by either party) to an amount equal to \$7,000 times the remaining number of miles of 2013 Track; provided that if KMSI has made, or committed to third parties to make, KMSI Qualified Expenditures in excess of the amended 2013 Expenditure Commitment, the Railroad shall reimburse KMSI for such KMSI Qualified Expenditures (together with interest at a rate of 8% per annum, compounded monthly, from the date of payment by KMSI) or (if KMSI has not yet paid for such KMSI Qualified Expenditures) assume responsibility for and promptly pay for such expenditures (adjusted to take into account any associated Shipping Credits already issued).
- (iii) The number of miles of Track assigned to KMSI hereunder for purposes of Section 45G for 2013 may be increased upon written agreement of KMSI and the Railroad. In the event the Railroad acquires additional miles of railroad track during 2013, the Railroad shall provide written notice thereof to KMSI. KMSI shall then have ten (10) business days to decide whether it desires to include the additional miles hereunder and shall provide written notice to the Railroad of its decision within such time frame. In the event KMSI agrees to include the additional miles of railroad track hereunder, such additional miles shall be deemed to be part of the "2013 Track" and the 2013 Expenditure Commitment shall be automatically increased to an amount equal to \$7,000 times the increased total number of miles of Track for such year. In the event KMSI decides not to include such miles hereunder or fails to provide written notice to the Railroad within such time frame, the Railroad shall retain all rights to such miles and may, in its discretion, assign them to another party.
- (iv) The parties agree to amend Schedule A as may be necessary to reflect any adjustments to the number of miles of Track assigned to KMSI hereunder for purposes of Section 45G.
- (v) With respect to the miles of Track assigned, the parties agree that (except as otherwise provided in this Agreement KMSI, rather than the Railroad, will be entitled to claim any Tax Credits relating to such miles and to its related KMSI Qualified Expenditures for 2013, and the Railroad agrees that it will not claim any Tax Credits based on such miles or such KMSI Qualified Expenditures for such calendar year and will not assign such miles or Tax Credits to any person or entity other than KMSI for such calendar year.

- (vi) If Railroad has not yet paid any amounts due hereunder or that may be past due with respect to Shipping Credits, any reduction in the miles of Track assigned hereunder with respect to a year under subsection 1.02(c)(i) will be deferred until all such amounts have been paid in full (and, if such amounts are not paid in full by the end of such year, such reduction shall not occur) provided that KMSI provides written notice to Railroad of such delinquency and Railroad fails to cure such delinquency promptly after receipt of such notice.

1.03 Requests for Expenditures. The parties intend that payments by KMSI for the assignment of Track be treated as qualified railroad track maintenance expenditures as provided in the last sentence of Treasury Regulations Section 1.45G-1(c)(3)(i). Accordingly, upon receipt during 2013 of certification by the Railroad in the form of Exhibit B attached hereto that Railroad have made the requisite dollar amount of expenditures, KMSI will satisfy its 2013 Expenditure Commitment by prompt payment (subject to credit limitations) to the appropriate Railroad for such assignments (in an amount not to exceed the amounts certified for that Railroad). Any other requested Qualified Expenditures by KMSI shall only be made upon the prior written approval of KMSI. (Payments by KMSI under this Section 1.03 shall constitute “**KMSI Qualified Expenditures**” for the relevant calendar year.) Notwithstanding any other provision herein, Railroad will retain the sole authority to make all decisions regarding track maintenance, including without limitation the timing of any maintenance, whether to perform maintenance, the amounts to be expended and the appropriate persons to perform maintenance.

1.04 General Maintenance Expenditures. The Railroad represents that during 2013 it expects to expend amounts for general maintenance services necessary in connection with the day-to-day maintenance and repair of the Track. On or before June 30, 2013, Railroad will provide KMSI with a description of such general maintenance services expected to be paid or incurred for 2013, together with Railroad’s budget for such services, in substantially the form provided for prior years (herein, the “**2013 General Maintenance Schedule**”). Pursuant to Section 1.03 above, the Railroad may certify 2013 Qualified Expenditures in connection with such items and services reflected on such schedules.

1.05 Shipping Credits; Indemnity.

- (a) Issuance of Shipping Credits. As consideration for KMSI’s payments hereunder, within ten (10) business days of its receipt of any payment thereof, Railroad shall execute and deliver to KMSI shipping credits in the form of Exhibit A attached hereto (the “**Shipping Credits**”) in an amount equal to 52.5% of the KMSI Qualified Expenditures (reduced by any amounts for which Shipping Credits were previously issued by Railroad hereunder). No later than December 31, 2013, KMSI shall make final payments hereunder in respect of the Qualified Expenditures for 2013 and the Railroad shall issue the final Shipping Credits for 2013.
- (b) Use of Shipping Credits. The Shipping Credits may only be applied to
 - (i) amounts owed to the Railroad by KMSI or its affiliates for transportation services provided on the Railroad’s rail facilities from time to time from the date

hereof through and including December 31, 2014, and (ii) amounts owed to the Railroad by KMSI or its affiliates for transportation services on other railroads during such time period to the extent the Railroad is obligated to collect payment for such services. The Shipping Credits shall be used first for the account of KMSI and its affiliates, but if the forecasted shipping business of KMSI and its affiliates with the Railroad is not adequate to fully utilize the Shipping Credits, KMSI may assign the Shipping Credits (with the consent of the Railroad, such consent not to be unreasonably withheld) to any other shipper using the Railroad's track facilities for application against the types of transportation service charges described above. Any portion of the Shipping Credits that have not been used as of December 31, 2013 may be negotiated by KMSI (with the consent of the Railroad, such consent not to be unreasonably withheld) with any third party shippers using the Railroad's rail facilities. In addition, upon written request by KMSI, Railroad will redeem for cash any Shipping Credits that have not been utilized 30 days after issuance (or by such other date as the parties agree).

- (c) Records. Railroad shall maintain records of the amount of Shipping Credits issued hereunder, the use of such Shipping Credits, and the assignment thereof.
- (d) Indemnification. In addition to other amounts herein, Railroad will indemnify and hold harmless KMSI and its affiliates from any claims or actions, threatened or filed and whether groundless, false or fraudulent (all of the foregoing, collectively, "**Claims**"), brought by any Person (other than the Railroad or KMSI or its affiliates) or any joinder, impleader or similar action brought by the Railroad, that directly or indirectly relate to or arise out of or in connection with this Agreement, the Qualified Expenditures, any work done in connection with such Qualified Expenditures or any rights of KMSI with respect to any Track or other property arising in connection with such Qualified Expenditures and the resulting losses, damages, expenses, attorneys' fees and court costs, whether incurred by settlement or otherwise, and whether such Claims or actions are threatened or filed prior to or after the termination of this Agreement; provided that the Railroad shall not indemnify or hold harmless KMSI or its affiliates for their gross negligence or willful misconduct. If KMSI or its affiliates receive notice of a Claim, they shall give written notice thereof to the Railroad describing the asserted Claim and the amount thereof. If any legal proceedings are instituted or any Claim is asserted by any third party in respect of which KMSI or its affiliates may be entitled to indemnity hereunder, they shall give the Railroad written notice thereof describing the asserted Claim. A delay in giving such notice shall only relieve the Railroad to the extent the Railroad suffers actual prejudice because of the delay. Railroad shall have the right, at its option and expense, to participate in the defense of such Claim, but not to control the defense, negotiation or settlement thereof, which control shall at all times rest with KMSI (or its affiliates), unless the Claim involves only money damages (not an injunction or other equitable relief), in which case the Railroad may assume such control through counsel of its choice and at its expense, but KMSI and its affiliates shall continue to have the right to be represented, at their own expense, by counsel of their choice in connection with the defense of such Claim. If the

Railroad does not assume control of the defense of such Claim, KMSI shall retain control of the defense, negotiation or settlement of the Claim. KMSI shall not, without the prior written consent of the Railroad (which consent will not be unreasonably withheld), settle any proceeding or Claim or consent to entry of any judgment relating thereto which would bind or impose any obligation upon the Railroad except in the case of (i) Claims relating solely to injunctive relief or (ii) Claims involving monetary damages if the Railroad is afforded the opportunity to assume control of the defense, negotiation or settlement of the Claim, and Railroad declined to assume the same. If the Railroad does assume control of the defense of such a proceeding or Claim, it will not, without the prior written consent of KMSI or its affiliates (which consent will not be unreasonably withheld), settle the proceeding or Claim or consent to entry of any judgment relating thereto which does not include as an unconditional term thereof the giving by the claimant to KMSI and its affiliates a release from all liability in respect of the proceeding or Claim. KMSI shall reasonably cooperate with Railroad, at Railroad's expense, in connection with the defense, negotiation or settlement of any such proceeding or Claim. Notwithstanding anything contained in this Section 1.05(d), Article VII will govern the tax indemnity rights and obligations of the parties with respect to the Qualified Expenditures and this Section 1.05(d) shall not apply to Claims relating to tax issues.

1.06 2014 Option. KMSI shall have an option to enter into a transaction with Railroad for the Section 45G Tax Credits or similar credits available with regard to the next taxable year of Railroad beginning after 2013 for which such credits are available (the "**New Credit Period**") on substantially the same economic terms and conditions (including representations, warranties and indemnities) as contained in this Agreement for the Tax Credits available with regard to calendar year 2013; provided, however, that Railroad may, by written notice to KMSI, designate certain Track so that Railroad or its affiliates may themselves claim Tax Credits with respect to such Track on their own tax returns. In the event Railroad or its affiliates determine not to claim such Tax Credits on their own tax returns, Railroad will promptly give written notice of such determination to KMSI, and KMSI will have an option (exercisable by written notice within 120 days) with respect to such Track and such Tax Credits on the same terms as if Railroad had never made a contrary determination. If the percentage of qualified expenditures that gives rise to a credit or other relevant terms are altered by statute or regulation, the parties will consider in good faith appropriately adjusting the terms and conditions. The option may be exercised by KMSI upon written notice on or prior to the 120th day from the beginning of the New Credit Period (or, if later, the 30th day after enactment of the statute extending Section 45G to such period), with closing to occur within 30 days, the parties agreeing to use commercially reasonable efforts to agree on final documentation by that time. Notwithstanding anything herein to the contrary, the Railroad may immediately terminate KMSI's option rights under this Section 1.06 if KMSI has defaulted under this Agreement and failed to cure such default within any applicable cure period.

1.07 Assignment of Miles Upon Railroad Default. As provided in Section 1.02(c)(vi), if Railroad has not paid amounts due hereunder, any reduction in miles assigned hereunder is deferred until all such amounts have been paid in full. Similarly, to provide comfort to KMSI that Railroad will continue to pay all amounts for which it is obligated, Railroad hereby assigns to KMSI for purposes of Section 45G for 2014 (or such other year that is the first year after 2013

for which Tax Credits are available) all of the Track that was assigned for 2013. Upon payment by Railroad of all amounts for which it is obligated hereunder, such miles will revert to Railroad (subject to KMSI's option under Section 1.06). The reversion of such miles will be deferred until such amounts are paid in full (and, if such amounts are not paid in full by the end of 2014 or such other year that is the first year after 2013 for which Tax Credits are available, such reversion shall not occur), provided that KMSI provides written notice of such delinquency to Railroad and the Railroad fails to cure such delinquency promptly after receipt of such notice. Railroad agrees to take such further actions and to execute such further documents (including documents confirming the assignment of Track or assigning such Track) as may be necessary to give effect to this Section 1.07, and covenant not to assign to any other party any Track that has been assigned to KMSI under this Section 1.07 but has not yet reverted to Railroad. To the extent such miles revert to Railroad as provided hereunder, such miles shall be treated by the parties as not having been assigned by Railroad to KMSI under Section 45G(b)(2) for the calendar year in which the miles revert.

ARTICLE II

RAILROAD'S WARRANTIES AND REPRESENTATIONS

The Railroad hereby makes the following warranties and representations to KMSI:

2.01 Organization and Qualification. Railroad is a corporation validly organized and existing and in good standing under the laws of the state of its incorporation and is duly qualified or registered in each jurisdiction in which the nature of such corporation's activities requires qualification or registration. Railroad has the full power and authority to own its property and conduct its business substantially as presently conducted by it and has the full power and authority to enter into and perform its obligations under this Agreement.

2.02 Due Authorization. The execution, delivery, and performance by Railroad of this Agreement (i) has been duly authorized by all necessary corporate action; (ii) does not require any approval or consent of or any filing with any governmental agency or authority or any approval or consent of any other person other than those already obtained; and (iii) does not and will not conflict with or result in a violation of or a default under any provision of its Certificate of Incorporation or By-Laws or any contract, instrument, agreement, or writing binding upon or applicable to it or its property or any law or governmental regulation or court decree or order binding upon or applicable to it or any of its property.

2.03 Validity. The Agreement is the legal, valid, and binding obligation of the Railroad and is enforceable against the Railroad in accordance with its terms subject only to bankruptcy, insolvency, reorganization, moratorium, or similar laws affecting the enforceability of rights of creditors generally or equitable principles which may limit the right to obtain equitable remedies.

2.04 Accuracy of Financial Information. All financial information provided by the Railroad to KMSI in connection with the negotiation and preparation of the Agreement is complete and accurate and presents fairly the financial condition of the Railroad as of the date thereof. There has not been any material adverse change in the financial condition of the

Railroad since the date of the most recent financial statements pertaining to the Railroad which have been furnished to KMSI. Railroad will notify KMSI of any material adverse change in its financial condition prior to December 31, 2013, and will upon reasonable request by KMSI during 2013 provide financial information to KMSI sufficient to permit it to conclude that there has been no such change. If, after review of such information and consultation in good faith with Railroad, KMSI determines that there has been a material adverse change in the financial condition of Railroad, KMSI's obligations to make payments hereunder for 2013 will be suspended until (i) Railroad provides a letter of credit, escrow or similar security device satisfactory to KMSI or (ii) Railroad provides written notice to KMSI that it will not be able to do so, in which case KMSI's Expenditure Commitment will be reduced to equal the amounts paid by KMSI to date (and the miles of Track assigned adjusted accordingly hereunder).

2.05 Title to Track. The Railroad has good and marketable title to the owned Track, and valid leasehold interests in the leased Track, subject to liens, charges, and encumbrances of record customary in the railroad industry.

2.06 Requested Expenditures. The amounts certified by the Railroad under Section 1.03 (and any other Qualified Expenditures requested) shall be "qualified railroad track maintenance expenditures" within the meaning of Section 45G and shall not include any amounts in respect of Excluded Track.

2.07 Track. Except as otherwise noted on Schedule A, the Railroad has owned or leased all of the Track since January 1, 2005, and shall retain such ownership or lease rights through December 31, 2013. Except as otherwise provided in this agreement, the number of miles of railroad track owned or leased by the Railroad as of December 31, 2013, and assigned to KMSI for purposes of Section 45G hereunder for 2013, will equal or exceed 412 miles, and such track will be owned or leased by the Railroad within the meaning of Section 45G(b) as of December 31, 2013.

2.08 Tax Year. Railroad has a taxable year that commences January 1 and ends December 31 of each year.

ARTICLE III

KMSI'S WARRANTIES AND REPRESENTATIONS

KMSI hereby makes the following warranties and representations to the Railroad:

3.01 Organization and Qualification. KMSI is a limited liability company validly organized and existing and in good standing under the laws of the state of Delaware and is duly qualified or registered in each jurisdiction in which the nature of such limited liability company's activities requires qualification or registration. KMSI has the full power and authority to own its property and conduct its business substantially as presently conducted by it and has the full power and authority to enter into and perform its obligations under this Agreement.

3.02 Due Authorization. The execution, delivery, and performance by KMSI of this Agreement (i) have been duly authorized by all necessary limited liability company action; (ii) do not require any approval or consent of or any filing with any governmental agency or

authority or any approval or consent of any other person other than those already obtained; and (iii) do not and will not conflict with or result in a violation of or a default under any provision of its Certificate of Formation or Operating Agreement or any contract, instrument, agreement, or writing binding upon or applicable to them or their property or any law or governmental regulation or court decree or order binding upon or applicable to them or any of their property.

3.03 Validity. This Agreement is the legal, valid, and binding obligation of KMSI and is enforceable against KMSI in accordance with its terms subject only to bankruptcy, insolvency, reorganization, moratorium, or similar laws affecting the enforceability of rights of creditors generally or equitable principles which may limit the right to obtain equitable remedies.

3.04 Tax Credits. KMSI has made an independent investigation and evaluation of the availability of the Tax Credits and has used, and shall continue to use, commercially reasonable efforts to comply with the terms of the Internal Revenue Code and all other applicable law relating to the Tax Credits.

3.05 Tax Year. KMSI's taxable year commences January 1 and ends December 31 of each year.

ARTICLE IV

COVENANTS OF RAILROAD

4.01 Requirements under Section 45G. Railroad agrees to reduce the tax basis of the Track to the extent required by Section 45G or regulations thereunder. In addition, as long as this Agreement remains in effect, without the prior written consent of KMSI, the Railroad shall not claim a tax credit under Section 45G for the 2013 Track for calendar year 2013, and shall not attempt to assign the miles of Track to any other party for the purposes of claiming a tax credit under Section 45G for calendar year 2013, unless otherwise permitted by this Agreement.

4.02 Maintenance of Tax Representations. The Railroad shall cause all of the tax representations in Section 7.02 to continue to be true from the date hereof through December 31, 2013.

4.03 Insurance. Railroad agrees to maintain at its own cost and expense during the term of this Agreement the following insurance that will protect KMSI from all claims for damages to persons and to property that may arise from any operations related to this Agreement. Railroad shall provide to KMSI a certificate of insurance that is acceptable to KMSI evidencing such insurance, and periodically as needed thereafter to show continuing coverage. Such insurance coverages shall be independent of the indemnity provisions of this Agreement and are not designed solely to guarantee payment of Railroad's indemnity obligations.

- (a) **Railroad Liability Insurance** with coverage no more restrictive than that provided for by standard form liability coverage generally maintained in the railroad industry. Such insurance shall include products and completed operations, employer's liability (including FELA) and contractual liability coverages, and shall name KMSI as an additional insured on such policy, and on the Railroad's Excess/Umbrella policies, for all liability arising out of the

Railroad's operations, with all such insurance being primary to and not in excess of any other insurance available to KMSI. Such insurance shall not exclude or limit coverage in any way for work to be performed by the Railroad, including construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing. Railroad acknowledges that in no event will KMSI's insurance, including but not limited to any SIR or deductible, be considered "other insurance" under the terms of the Railroad's policies; and

- (b) **Automobile Liability Insurance**, covering all owned, non-owned, hired and leased vehicles, with contractual liability coverage.

Any property insurance maintained by Railroad shall be required to include a waiver of the right of subrogation against KMSI. The above described insurance shall include a requirement that the insurer provide KMSI with thirty (30) days' written notice prior to the effective date of any cancellation or material change of the insurance. All self-insured retentions ("SIRS") and deductibles shall be the responsibility of and to the account of the Railroad.

The insurance required in (a) and (b) above will be maintained for a period of five years after termination of this Agreement. Further, if the insurance coverage in (a) and (b) is written on a claims-made basis, Railroad warrants that the retroactive date shall be no later than the effective date of this Agreement.

4.04 Maintenance of Existence. The Railroad shall, and shall cause each of its subsidiaries to, maintain and preserve its corporate existence in good standing under all applicable law and shall maintain all qualifications or registrations which may be necessary under applicable law for the business and operations conducted by the Railroad or its subsidiaries.

4.05 Books and Records. The Railroad shall, and shall cause each of its subsidiaries to, keep books and records reflecting all of its business affairs and transactions in accordance with generally accepted accounting principles.

4.06 Cooperation on Tax Matters. The Railroad agrees to furnish or cause to be furnished to KMSI, upon request, as promptly as practicable, such information (including access to the relevant portions of any books and records) and assistance as is reasonably necessary for the filing of any tax return, for the preparation for any audit, and for the prosecution or defense of any claim, suit or proceeding relating to any proposed tax adjustment, or for any other reasonable business purpose, including access to and the cooperation of the Railroad's auditors and other tax advisors. Except as prohibited by applicable law and regulation, the Railroad shall keep KMSI informed concerning any audit by any tax authority, any assessment for additional taxes, any notice of tax deficiency or other adjustment of taxes arising from or relating to the Tax Credits and their related federal income tax issues. The parties shall cooperate in good faith to assist each other in resolving matters raised by any tax authority relating to the Tax Credits.

4.07 Further Assurances. The Railroad shall execute and deliver, and will cause each of its affiliates to execute and deliver, such further instruments or documentation as may be

reasonably requested by KMSI to carry out the provisions and purposes of this Agreement and the other agreements and documents contemplated hereby.

ARTICLE V

COVENANTS OF KMSI

5.01 Maintenance of Existence. KMSI shall maintain and preserve its corporate existence in good standing under all applicable law and shall maintain all qualifications or registrations which may be necessary under applicable law for the business and operations conducted by KMSI.

5.02 Maintenance of Tax Representations; Tax Credits. KMSI shall cause all of its tax representations in Section 7.03 to continue to be true from the date hereof through December 31, 2013 (provided that KMSI shall not be in breach of this covenant by reason of the sale or other disposition of any of the entities described in Section 7.03(a) so long as some KMSI affiliates are Class II or Class III railroads or shippers on or suppliers to the Railroad).

5.03 Books and Records. KMSI shall keep books and records reflecting all of its business affairs and transactions in accordance with generally accepted accounting principles.

5.04 Cooperation on Tax Matters. KMSI agrees to furnish or cause to be furnished to the Railroad, upon request, as promptly as practicable, such information (including access to the relevant portions of any books and records) and assistance as is reasonably necessary for the filing of any tax return, for the preparation for any audit, and for the prosecution or defense of any claim, suit or proceeding relating to any proposed tax adjustment, or for any other reasonable business purpose, including access to and the cooperation of KMSI's auditors and other tax advisors. Except as prohibited by applicable law and regulation, KMSI shall keep the Railroad informed concerning any audit by any tax authority, any assessment for additional taxes, any notice of tax deficiency or other adjustment of taxes arising from or relating to the Tax Credits and related federal income tax issues for calendar year 2013. The parties shall cooperate in good faith to assist each other in resolving matters raised by any tax authority relating to the Tax Credits.

5.05 Further Assurances. KMSI shall execute and deliver, and will cause each of its affiliates to execute and deliver, such further instruments or documentation as may be reasonably requested by the Railroad to carry out the provisions and purposes of this Agreement and the other agreements and documents contemplated hereby.

ARTICLE VI

DEFAULTS AND REMEDIES

6.01 Default. Any one of the following shall be considered a Default under this Agreement:

- (a) Any party shall fail to perform its obligations hereunder, and such failure is not cured within ten (10) days after written notice thereof.

- (b) Any party shall: (i) admit in writing its inability to pay its debts as such debts become due; (ii) be generally unable to pay its debts as such debts become due; (iii) make an assignment for benefit of its creditors or seek the appointment of a custodian, receiver, or trustee; (iv) commence any proceedings as the debtor under any bankruptcy, receivership, or similar proceeding for the readjustment of debts; (v) have any petition or application filed against it under any bankruptcy, reorganization, receivership, or similar proceedings for the readjustment of debts, or have any state or federal regulatory authority seek to reorganize or take over the assets of the party or have itself appointed as a receiver, trustee, or liquidator of the assets of the party; or (vi) institute any proceeding or take any corporate action to authorize the dissolution, liquidation, winding up of the affairs of, or reorganization of the party.

6.02 Remedies; Injunctive Relief and Specific Performance. If any Default shall occur and be continuing, the non-defaulting party may exercise any and all rights and remedies available to it at law, in equity and under this Agreement. The parties agree that the remedy of damages at law for the breach of any of the covenants contained in this Agreement may be an inadequate remedy. In recognition of the irreparable harm that a violation of any of the covenants, agreements or obligations arising under this Agreement would cause, the parties agree that in addition to any other relief afforded by law, the parties shall be entitled to seek specific performance and/or an injunction against such violation or violations, it being the understanding of the parties that damages, specific performance and an injunction shall be proper modes of relief and are not to be considered alternative remedies.

ARTICLE VII

TAX INDEMNIFICATION

7.01 Tax Assumptions. For purposes of this Article, the parties assume that Section 45G Tax Credits will be timely claimed on the federal consolidated income tax return in which KMSI joins in an amount that represents 50 percent of the KMSI Qualified Expenditures for 2013, not to exceed the statutory aggregate limitation of \$3,500 per mile per year.

7.02 Additional Railroad Representations and Warranties. The Railroad hereby makes the following additional representations and warranties to KMSI:

- (a) Railroad is a Class II or Class III railroad within the meaning of Section 45G.
- (b) The Railroad will make expenditures for each year that qualify as “qualified railroad track maintenance expenditures” within the meaning of Section 45G in an amount at least equal to the KMSI Qualified Expenditures.
- (c) Unless otherwise noted on Schedule A or permitted under Section 1.02: (i) Railroad (or another Class II or Class III railroad) owned or leased the assigned miles of Track on January 1, 2005; and (ii) Railroad will own or lease the assigned miles of Track on December 31, 2013. In the case of any of the Track which is leased by the Railroad as of the end of the appropriate year, such track

miles will be treated as having been assigned solely to KMSI within the meaning of Section 45G, and the Railroad will be responsible for obtaining any materials necessary to document such treatment under Section 45G or regulations thereunder.

- (d) The Railroad is an accrual basis taxpayer and has the calendar year as its taxable year.
- (e) Any miles of Track that are listed on Schedule A as leased by Railroad are leased from owners of such track that are not themselves Class II or Class III railroads.

7.03 Additional KMSI Representations and Warranties. KMSI hereby makes the following additional representations and warranties to the Railroad:

- (a) Koch Industries, Inc. (“**KII**”) is a Kansas corporation which is the common parent of an affiliated group of corporations that join in the filing of a consolidated federal income tax return (the “**KII Group**”). KMSI is a single member limited liability company that has not elected to be treated as a corporation for federal income tax purposes (a “**Disregarded Entity**”), and accordingly for federal income tax purposes its existence is disregarded and not treated as separate from that of its owner (which is KII, through one or more other Disregarded Entities). Georgia-Pacific (a Georgia corporation), Koch Nitrogen Company (a Nebraska corporation), INVISTA S.a.r.l. (a Luxembourg S.a.r.l) and Flint Hills Resources, LP (a Delaware limited partnership) are all 100% indirectly owned by KII.
- (b) KMSI and any KMSI affiliate that pays or incurs KMSI Qualified Expenditures pursuant to this Agreement will be an entity all of the federal taxable income, gain, loss, expense and credits of which are included in the consolidated federal income tax return filed by KII.
- (c) KMSI and any KMSI affiliate that pays or incurs KMSI Qualified Expenditures pursuant to this Agreement with respect to the assigned miles of Track is an accrual basis taxpayer and has the calendar year as its taxable year.

7.04 Tax Indemnity.

- (a) If KMSI or the KII Group suffers a disallowance or other loss of all or any portion of the Tax Credits arising from this Agreement claimed by KMSI or the KII Group for 2013 or a disallowance or other loss of all or part of the expected benefit of a full ordinary deduction for 2013 for the excess of KMSI Qualified Expenditures for such year over the Shipping Credits for such year with respect to such expenditures, but only to the extent such disallowance or loss of credits or other benefits (a “**Loss**”) is caused by any Specified Tax Breach (as defined below), the Railroad shall pay to KMSI as an indemnity an amount (the “**Special Tax Indemnity Amount**”) sufficient to cause KMSI to be in the same position on an after-tax basis as if such Loss had not occurred, taking into account any interest and any penalties assessed against KMSI or the KII Group and reasonable costs of contest as a result of such Loss. The amount to which KMSI is entitled

under this Section 7.04(a) (the “**Tax Indemnity Obligation**”) shall be due and payable upon the issuance of a Revenue Agent’s Report or similar written adjustment concluding an audit (and asserting facts or legal conclusions that if true would result in a Specified Tax Breach), notwithstanding any right of KMSI or any of its affiliates to appeal or contest such adjustment; provided, however, that (x) upon any successful appeal or litigation or settlement thereof which is no longer appealable by the IRS, KMSI shall refund to the Railroad any portion of the Tax Indemnity Obligation related to Tax Credits or other indemnified benefits which were ultimately allowed, together with the amount of any reductions in the interest and penalties which were included in the Tax Indemnity Obligation, and (y) the Railroad will not be required to make any payment hereunder until KMSI or the KII Group is obligated to make payment to the IRS if the Railroad’s payment obligation hereunder is secured by a letter of credit or other collateral acceptable to KMSI in its sole discretion.

- (b) The Tax Indemnity Obligation shall terminate on the expiration of KMSI and the KII Group’s statute of limitations for the relevant taxable years, subject to any extension of such limitation period agreed to by KMSI or the KII Group and the IRS or otherwise required by law. KMSI shall provide written notice of any extensions of such statutes of limitations, provided that any delays in providing copies of such extensions shall not affect the Railroad’s obligations hereunder.
- (c) Notwithstanding the foregoing and any other provision of this Agreement, the Railroad shall not have any liability to KMSI or KMSI affiliates for indemnification under this Article VII for any loss or disallowance to the extent such loss or disallowance results from one or more of the following: (i) the tax classification of KMSI or its affiliates; (ii) the fraud, willful misconduct or gross negligence of KMSI or its affiliates; (iii) any Loss attributable to issues or transactions unrelated to the transactions contemplated by this Agreement; (iv) the failure of KMSI, its affiliates or the KII Group to have sufficient federal tax liability to benefit from the tax credit; (v) a failure by KMSI, an affiliate or the KII Group to timely and effectively claim the Tax Credits on its tax returns; (vi) the application to KMSI, any KMSI affiliate or the KII Group of any basis, at risk, passive activity or similar limitation under the Code, or any successor provision or any Treasury Regulations thereunder; (vii) any breach by KMSI of any of its tax representations or warranties under Section 7.03; or (viii) any failure by KMSI to fulfill its obligations under Section 5.02.
- (d) The foregoing indemnity assumes that KMSI will claim Tax Credits on its return in an amount consistent with the representations made by Railroad. In the event KMSI concludes in its reasonable business judgment, after consultation in good faith with Railroad (and, if Railroad so requests, Railroad’s tax advisors), and promptly provides notice to Railroad of such determination prior to the filing date for KII’s consolidated federal income tax return for the applicable year, that it cannot (consistently with legal and ethical standards governing tax return preparation and with KII’s corporate policies) claim on the consolidated federal income tax return of the KII Group any part of the anticipated amounts of Tax

Credits because of a Specified Tax Breach (as defined below), Railroad shall promptly pay KMSI an amount sufficient to cause KMSI to be in the same position on an after-tax basis as if it had successfully claimed such Tax Credits; provided, however, that if the Specified Tax Breach relates to a representation made in good faith by Railroad and Railroad brings such inaccuracy to the attention of KMSI within a reasonable time after its discovery, such payment shall be reduced to the amount sufficient to cause KMSI to be in the same position on an after-tax basis as if it had never made the portion of the KMSI Qualified Expenditures corresponding to such unclaimed Tax Credits.

- (e) For purposes hereof, "Specified Tax Breach" means (i) inaccuracy of any representation in Article II or Section 7.02; (ii) the inaccuracy of any information on Schedule A; (iii) the inaccuracy of any information in a certification of expenditures under Section 1.03; or (iv) the breach of any covenant of the Railroad under Article IV. This definition shall not affect the requirement of proper proof of causation of damages, and the parties acknowledge that some Specified Tax Breaches (such as a failure to comply with Section 4.03) will not cause a loss of Tax Credits or other benefits. Similarly, if Railroad erroneously certifies some expenditures as Qualified Expenditures, but the total expenditures that qualify under Section 45G still exceed the KMSI Qualified Expenditures, such inaccuracy will not cause a loss of Tax Credits or other benefits.

7.05 Tax Contests. If an adjustment shall be proposed by the IRS in a written notice that, if sustained, would result in a Loss for which the Railroad could be required to indemnify KMSI under this Tax Indemnity Obligation, KMSI (i) shall promptly notify the Railroad in writing of such proposed adjustment; (ii) shall keep the Railroad reasonably informed of the progress of such proposed adjustment and any contest thereof; (iii) shall, to the extent practicable, consult with the Railroad with respect to its strategy for contesting such proposed adjustment and consider in good faith any suggestions made by Railroad or its tax advisors in connection therewith; (iv) shall permit the Railroad (upon request) reasonable opportunity to review and comment upon the pertinent portions of any correspondence or pleadings related to such proposed adjustment and any contest thereof and consider in good faith any suggestions made by Railroad or its tax advisors in connection therewith; and (v) shall provide the Railroad with copies of all pleadings and correspondence with the IRS with respect to such proposed adjustment (redacted to remove references to any other matters). KMSI agrees to use commercially reasonable efforts to contest through the audit process any IRS proposed disallowance or claim which (if successful) would result in a Tax Indemnity Obligation. Notwithstanding the foregoing, KMSI shall have sole control of the conduct of any dispute or controversy and will make all decisions regarding whether and how to dispute any adjustment or contest or settle any controversy. In the event of an IRS appeal or other contest concerning an adjustment that gives rise to a Tax Indemnity Obligation, KMSI shall keep the Railroad informed as to the progress of any such appeal or contest and, if requested by the Railroad, shall consult with the Railroad's counsel and consider in good faith any recommendations by the Railroad's counsel concerning the conduct of such proceedings, and shall permit the Railroad to review and comment in advance on the portions of all significant submissions relating to such contest which are pertinent to such adjustment. KMSI agrees to exercise good faith in exercising its foregoing

rights of control, and agrees to contest any proceeding hereunder no less vigorously than similar proceedings involving similar agreements with other railroads and similar facts.

7.06 Whipsaw. In the event the Railroad pays an Indemnity Amount to KMSI under Section 7.04, then to the degree necessary to prevent the Railroad from losing any benefit that might partially offset the effect of such disallowance, the parties agree that Railroad may make a protective claim that it is entitled to the Tax Credits disallowed notwithstanding Section 1.02, and the parties will consult in good faith regarding any other steps that may be necessary to make such a protective claim.

7.07 Effect of Change of Law. Based upon currently available information, the parties believe that the Tax Credits should be available to KMSI with respect to this transaction. However, the parties understand that at any time prior to KMSI's fulfilling its 2013 Expenditure Commitment, the IRS may issue new guidance or the United States Congress may enact further legislation concerning Section 45G (either, a "**Change of Tax Law**"), either of which could have a material adverse effect on the availability of the Tax Credits to the KII Group. If KMSI becomes aware of such a change of law, it will promptly give notice to Railroad. In the event KMSI concludes in its reasonable business judgment, after consultation in good faith with Railroad (and, if Railroad requests, Railroad's tax advisors), that there is reason to believe that there has been or will be a Change of Tax Law, then upon written notice to Railroad KMSI may discontinue payments hereunder to the extent affected by such Change of Tax Law, in which case (i) KMSI will be released from any further obligation with respect to any unfunded portion of its 2013 Expenditure Commitments affected by such Change of Tax Law; and (ii) Railroad will be free to assign miles of Track corresponding to such unfunded portion to third parties or to claim credits with respect to those miles itself.

ARTICLE VIII

GENERAL

8.01 Notices. All notices or other communications provided for under the Agreement shall be in writing and shall be sent by certified or registered mail, return receipt requested, by personal delivery against receipt, by overnight courier or by facsimile and, unless otherwise expressly provided herein, shall be deemed to have been validly served, given or delivered immediately when delivered against receipt, one business day after deposit in the mail, postage prepaid, or with an overnight courier or, in the case of facsimile notice, when sent, addressed as follows:

KMSI: KM Strategic Investments, LLC
4111 East 37th Street North
Wichita, KS 67220
Fax: 316-828-5752
Attn: Daniel J. Murray

Railroad: Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Road
Bangor, Maine 04401
Fax: 207-949-4292
Attn: Chief Financial Officer

or to such other address as a party may designate for itself by notice given in accordance with this Section.

8.02 Waiver; Amendment. No delay or omission by a party in the exercise of any right or remedy available to it shall impair such right or be construed to be a waiver of such right or a waiver of any default. Any single or partial exercise of any right or remedy available to a party shall not preclude other or further exercise of the same right or remedy or any other right or remedy. No waiver, modification, amendment, or termination of any provision of this Agreement shall be effective unless the same is in writing and signed by the Railroad and KMSI, and in which case such waiver, amendment, modification, or termination shall be effective only in the specific instance and for the specific purpose for which it is given.

8.03 Binding Effect. The Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. A party may not, however, assign or transfer any of its rights under the Agreement without the prior written consent of the other parties.

8.04 Expenses. Except as otherwise set forth herein, each party shall be responsible for all costs and expenses (including legal fees) incurred by such party in connection with the transactions contemplated hereunder.

8.05 Governing Law. The Agreement and all matters arising hereunder or in connection herewith shall be governed by and construed in accordance with the laws of the state of Kansas without regard to conflicts of law.

8.06 Construction. The Railroad and KMSI acknowledge that each of them has had the benefit of legal counsel of its own choice and has been afforded an opportunity to review this Agreement with its legal counsel and that this Agreement shall be construed as if jointly drafted by the Railroad and KMSI.

8.07 Counterparts; Facsimile. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement. The parties agree that they may rely upon fax signatures hereto and to any amendments, agreements or documents delivered hereunder.

8.08 Severability. If any provision of this Agreement shall be held by a court of competent jurisdiction to be invalid or unenforceable, such provision shall be deemed to be reformed to the minimum extent necessary to render it enforceable, and such provision shall not impair or invalidate the remainder of this Agreement.

8.09 Headings. The headings, titles, captions, and arrangements used in this Agreement are for convenience only and shall not affect the interpretation of this Agreement in any way whatsoever.

8.10 Consequential or Punitive Damages. EXCEPT AS PROVIDED IN ARTICLE VII OR ARISING IN CONNECTION WITH ANY CLAIMS INDEMNIFIED UNDER SECTION 1.05(d) AND NOTWITHSTANDING ANY OTHER PROVISION IN THIS AGREEMENT, NO PARTY SHALL BE LIABLE TO THE OTHER PARTIES FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS, OR BUSINESS INTERRUPTION DAMAGES ARISING IN CONNECTION WITH OR IN ANY WAY RELATED TO THIS AGREEMENT OR ANY QUALIFIED EXPENDITURES, WHETHER BY STATUTE, IN TORT OR IN CONTRACT, UNDER THIS AGREEMENT OR OTHERWISE.

8.11 Railroad Operations. The Parties acknowledge and agree that this Agreement and the liabilities and obligations hereunder do not and will not be used to in any way impair the ability of the Railroad to operate on its lines or fulfill its common carrier obligations.

8.12 No Joint Venture or Partnership. In no event shall the relationship among the Parties (or their respective affiliates) or the transactions contemplated hereunder constitute a partnership or joint venture between KMSI and Railroad with respect to the subject matter hereof, and neither party shall owe the other party any fiduciary duty or obligation hereunder.

8.13 No Announcements/Confidentiality. Except as required by applicable legal requirements, neither the Railroad nor KMSI shall make any public release, announcement or statement regarding this Agreement or the transactions contemplated hereunder without the prior written consent of the other party.

8.14 MM&A Parent. MM&A Parent joins as a signatory to these documents for the sole purpose of providing its guaranty of Railroad's performance under this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day set forth above.

KMSI:

KM STRATEGIC INVESTMENTS, LLC

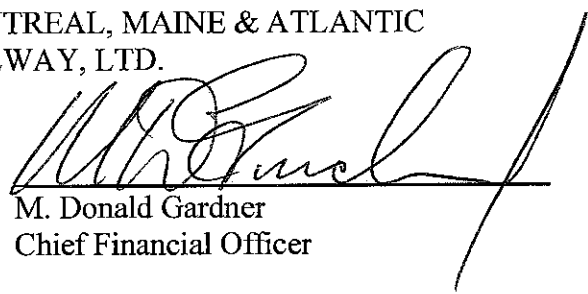
By:


Daniel J. Murray, President

RAILROAD:

MONTREAL, MAINE & ATLANTIC
RAILWAY, LTD.

By:

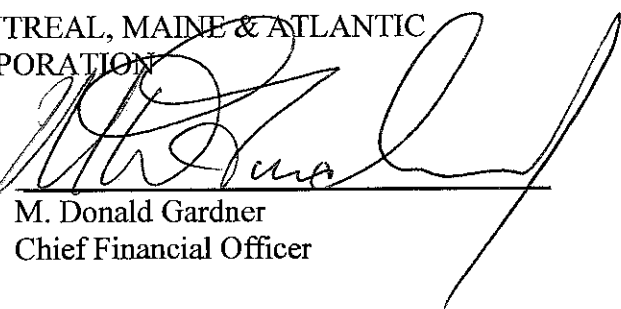


M. Donald Gardner
Chief Financial Officer

MM&A PARENT:

MONTREAL, MAINE & ATLANTIC
CORPORATION

By:



M. Donald Gardner
Chief Financial Officer

LIST OF SCHEDULES AND EXHIBITS

SCHEDULE A 2013 Track

EXHIBIT A Form of Shipping Credit

EXHIBIT B Form of Certification of Expenditures for 2013

SCHEDULE A

2013 TRACK

	Taxpayer ID No.	Owned Miles	Leased Miles	Total Miles
Montreal, Maine & Atlantic Railway, Inc.	11-3660861	412	—	412
Total		412		<u>412</u>

EXHIBIT A

SHIPPING CREDIT

Original Amount: \$ _____ Date: _____, 200_

Shipping Credit Number: _____

FOR VALUE RECEIVED, Montreal, Maine & Atlantic Railway, Inc., a Delaware corporation ("Railroad"), hereby issues this Shipping Credit to KM Strategic Investments, LLC ("KMSI"), and its permitted assigns, in the original amount of \$ _____. This Shipping Credit may only be applied to (a) amounts owed to the Railroad by KMSI or its affiliates for transportation services provided on the Railroad's rail facilities from time to time from the date hereof through and including December 31, 2014, and (b) amounts owed to the Railroad by KMSI or its affiliates for transportation services on other railroads during such time period to the extent the Railroad is obligated to collect payment for such services.

This Shipping Credit shall be used first for the account of KMSI and its affiliates, but if the forecasted shipping business of KMSI and its affiliates with the Railroad is not adequate to fully utilize this Shipping Credit, this Shipping Credit may be assigned (with the consent of the Railroad, such consent not to be unreasonably withheld) to any other shipper using the Railroad's track facilities for application against the types of transportation service charges described above incurred in 2013. Any portion of this Shipping Credit that has not been used as of December 31, 2013, may be negotiated by KMSI (with the consent of the Railroad, such consent not to be unreasonably withheld) with any third party shippers using the Railroad's rail facilities. In addition, upon written request by KMSI, Railroad will redeem for cash any Shipping Credits that have not been utilized 30 days after issuance.

After each use of this Shipping Credit to satisfy amounts owed to the Railroad for transportation services, the value of this Shipping Credit shall be automatically reduced by the dollar amount of the services provided by the Railroad. The Railroad shall maintain records of the original amount of this Shipping Credit and all services paid herewith, which records shall be prima facie evidence of the outstanding unused amount of this Shipping Credit.

This Shipping Credit shall terminate on December 31, 2014, and any outstanding portion of this Shipping Credit shall then terminate without any further liability or obligation of the Railroad.

This Shipping Credit and all matters arising hereunder or in connection herewith shall be governed by and construed in accordance with the laws of the State of Kansas.

MONTREAL, MAINE & ATLANTIC
RAILWAY, INC.

By: _____
Its: _____

EXHIBIT B

CERTIFICATION OF EXPENDITURES FOR 2013

_____, 2013

KM STRATEGIC INVESTMENTS, LLC
4111 East 37th Street North
Wichita, KS 67220
Attn: President

Gentlemen:

The undersigned (the "Railroad") makes and delivers this certificate to request KM STRATEGIC INVESTMENTS, LLC ("KMSI") make payments for the assignment of track miles (solely for purposes of Section 45G) under the terms of that certain Track Maintenance Agreement dated as of April 26, 2013, among KMSI and the Railroad (the "Track Maintenance Agreement"). All terms defined in the Track Maintenance Agreement shall have the same meanings herein.

The undersigned hereby requests KMSI to make payments in the aggregate amount of \$ _____ under the Track Maintenance Agreement to Railroad in the amount identified on Schedule 1, and certifies that Railroad has made expenditures during 2013 that are Qualified Expenditures in the amounts specified thereon. Schedule 1 attached hereto sets forth in reasonable detail each of the Qualified Expenditures. Invoices and other documentation supporting such Qualified Expenditures are also attached to this form.

In connection with the foregoing, the undersigned hereby represents, warrants and certifies that the following statements are true and correct:

1. The expenditures certified are qualified railroad track maintenance expenditures within the meaning of Section 45G and relate to the Track identified in the Track Maintenance Agreement.
2. The requested payments by KMSI will not cause the aggregate payments by KMSI under the Track Maintenance Agreement to exceed the 2013 Expenditure Commitment.
3. The Qualified Expenditures described herein, and the documentation delivered in connection herewith, satisfy the requirements set forth in the Track Maintenance Agreement, and in particular do not include any expenditures excluded from the definition of such under Section 1.01(b).
4. The representations and warranties of Railroad contained in Article II and Section 7.02 of the Track Maintenance Agreement are true and correct on and as of the date hereof, and the Railroad is not in default of any covenant in Article IV or obligation under the Track Maintenance Agreement.

MONTREAL, MAINE & ATLANTIC
RAILWAY, INC.

By: _____
Its: _____



EXHIBIT B

CERTIFICATION OF EXPENDITURES FOR 2013

December 13, 2013

KM STRATEGIC INVESTMENTS, LLC
4111 East 37th Street North
Wichita, KS 67220
Attn: President

Gentlemen:

The undersigned (the "Railroad") makes and delivers this certificate to request KM STRATEGIC INVESTMENTS, LLC ("KMSI") make payments for the assignment of track miles (solely for purposes of Section 45G) under the terms of that certain Track Maintenance Agreement dated as of April 26, 2013, among KMSI and the Railroad (the "Track Maintenance Agreement"). All terms defined in the Track Maintenance Agreement shall have the same meanings herein.

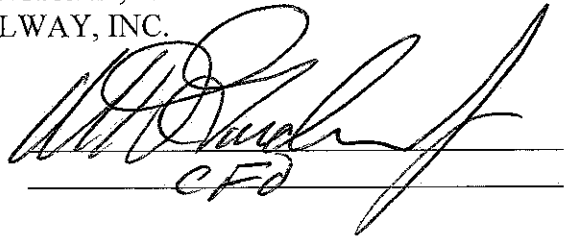
The undersigned hereby requests KMSI to make payments in the aggregate amount of \$274,937 under the Track Maintenance Agreement to Railroad in the amount identified on Schedule 1, and certifies that Railroad has made expenditures during 2013 that are Qualified Expenditures in the amounts specified thereon. Schedule 1 attached hereto sets forth in reasonable detail each of the Qualified Expenditures. Invoices and other documentation supporting such Qualified Expenditures are also attached to this form.

In connection with the foregoing, the undersigned hereby represents, warrants and certifies that the following statements are true and correct:

1. The expenditures certified are qualified railroad track maintenance expenditures within the meaning of Section 45G and relate to the Track identified in the Track Maintenance Agreement.
2. The requested payments by KMSI will not cause the aggregate payments by KMSI under the Track Maintenance Agreement to exceed the 2013 Expenditure Commitment.
3. The Qualified Expenditures described herein, and the documentation delivered in connection herewith, satisfy the requirements set forth in the Track Maintenance Agreement, and in particular do not include any expenditures excluded from the definition of such under Section 1.01(b).
4. The representations and warranties of Railroad contained in Article II and Section 7.02 of the Track Maintenance Agreement are true and correct on and as of the date hereof, and the Railroad is not in default of any covenant in Article IV or obligation under the Track Maintenance Agreement.

MONTREAL, MAINE & ATLANTIC
RAILWAY, INC.

By:
Its:



W. P. D'Amico
CFD

Schedule 1
 Montreal, Maine & Atlantic Railway, Ltd.
 2013 Qualified Expenditures and Payment Schedule

Description	2013					Total Funded
	Budgeted Expenditures	KMSI Funding #1	KMSI Funding #2	KMSI Funding #3	KMSI Funding #4	
MM&A						
Maintenance of Way	\$ 3,200,483	\$ 600,706	\$ 337,269	\$ 842,418	\$ 274,937	
Total	\$ 3,200,483	\$ 600,706	\$ 337,269	\$ 842,418	\$ 274,937	\$ 2,055,329
2013 Expenditure Commitment	\$ 2,688,000	\$ 2,087,294	\$ 1,750,026	\$ 907,608	\$ 632,671	

INVOICE

By : Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Horse Road
Hermon, Maine 04401-9621

Date : 12/13/13

Invoice Number: 2013-04

To : KMSI, LLC
4111 East 37th Street North
Wichita, KS 67220

DESCRIPTION	AMOUNT
Maintenance of Way and Signals - November-December 2013	\$ 274,937
QRTME to be applied first against eligible operating expenditures and then against eligible capital projects as needed.	
Wiring Instructions: Bank Name: TD Bank, N.A. ABA# 211274450 Account Name: Montreal, Maine & Atlantic Railway Ltd. Account #: 2427325764	
TOTAL	\$ 274,937

PLEASE REMIT TO:
Montreal, Maine & Atlantic Railway, Ltd.
15 Iron Horse Road
Hermon, Maine 04401-9621

Please reference Invoice No. on correspondence and payments.

Contact: Don Gardner
Phone number: 207-848-4200

EXHIBIT B

CERTIFICATION OF EXPENDITURES FOR 2013

December 11, 2013

KM STRATEGIC INVESTMENTS, LLC
4111 East 37th Street North
Wichita, KS 67220
Attn: President

Gentlemen:

The undersigned (the "Railroad") makes and delivers this certificate to request KM STRATEGIC INVESTMENTS, LLC ("KMSI") make payments for the assignment of track miles (solely for purposes of Section 45G) under the terms of that certain Track Maintenance Agreement dated as of April 26, 2013, among KMSI and the Railroad (the "Track Maintenance Agreement"). All terms defined in the Track Maintenance Agreement shall have the same meanings herein.

The undersigned hereby requests KMSI to make payments in the aggregate amount of \$842,418 under the Track Maintenance Agreement to Railroad in the amount identified on Schedule 1, and certifies that Railroad has made expenditures during 2013 that are Qualified Expenditures in the amounts specified thereon. Schedule 1 attached hereto sets forth in reasonable detail each of the Qualified Expenditures. Invoices and other documentation supporting such Qualified Expenditures are also attached to this form.

In connection with the foregoing, the undersigned hereby represents, warrants and certifies that the following statements are true and correct:

1. The expenditures certified are qualified railroad track maintenance expenditures within the meaning of Section 45G and relate to the Track identified in the Track Maintenance Agreement.
2. The requested payments by KMSI will not cause the aggregate payments by KMSI under the Track Maintenance Agreement to exceed the 2013 Expenditure Commitment.
3. The Qualified Expenditures described herein, and the documentation delivered in connection herewith, satisfy the requirements set forth in the Track Maintenance Agreement, and in particular do not include any expenditures excluded from the definition of such under Section 1.01(b).
4. The representations and warranties of Railroad contained in Article II and Section 7.02 of the Track Maintenance Agreement are true and correct on and as of the date hereof, and the Railroad is not in default of any covenant in Article IV or obligation under the Track Maintenance Agreement.

Schedule 1
Montreal, Maine & Atlantic Railway, Ltd.
2013 Qualified Expenditures and Payment Schedule

Description	2013				Total Funded
	Budgeted Expenditures	KMSI Funding #1	KMSI Funding #2	KMSI Funding #3	
<u>MM&A</u>					
Maintenance of Way	\$ 3,200,483	\$ 600,706	\$ 337,269	\$ 842,418	
Total	\$ 3,200,483	\$ 600,706	\$ 337,269	\$ 842,418	\$ 1,780,392
2013 Expenditure Commitment	\$ 2,688,000	\$ 2,087,294	\$ 1,750,026	\$ 907,608	

INVOICE

By : Montreal, Maine & Atlantic Railway, Ltd.
 15 Iron Horse Road
 Hermon, Maine 04401-9621

Date : 12/11/13

Invoice Number: 2013-03

To : KMSI, LLC
 4111 East 37th Street North
 Wichita, KS 67220

DESCRIPTION	AMOUNT
Maintenance of Way and Signals - June-October 2013 QRTME to be applied first against eligible operating expenditures and then against eligible capital projects as needed. Wiring Instructions: Bank Name: TD Bank, N.A. ABA# 211274450 Account Name: Montreal, Maine & Atlantic Railway Ltd. Account #: 2427325764	\$ 842,418
TOTAL	\$ 842,418

PLEASE REMIT TO:
 Montreal, Maine & Atlantic Railway, Ltd.
 15 Iron Horse Road
 Hermon, Maine 04401-9621

Please reference Invoice No. on correspondence and payments.
 Contact: Don Gardner
 Phone number: 207-848-4200

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

CERTIFICATE OF SERVICE

I, Kara Mercier, being over the age of eighteen and an employee at Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that, on January 21, 2014, I filed the *Trustee's Brief Regarding 45G Tax Credits* via the Court's CM/ECF electronic filing system and served upon all parties receiving notice through the CM/ECF system.

Dated: January 21, 2014

/s/ Kara Mercier

Kara Mercier
Legal Assistant

BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029
(207) 774-1200

SERVICE LIST

Served via CM/ECF:

D. Sam Anderson, Esq. on behalf of Attorney Bernstein, Shur, Sawyer & Nelson
sanderson@bernsteinshur.com,
acummings@bernsteinshur.com; sspizuoco@bernsteinshur.com; astewart@bernsteinshur.com

D. Sam Anderson, Esq. on behalf of Trustee Robert J. Keach
sanderson@bernsteinshur.com,
acummings@bernsteinshur.com; sspizuoco@bernsteinshur.com; astewart@bernsteinshur.com

Richard Paul Campbell on behalf of Creditor Progress Rail Services Corporation
rpcampbell@campbell-trial-lawyers.com, mmichitson@campbell-trial-lawyers.com

Roger A. Clement, Jr., Esq. on behalf of Attorney Verrill Dana LLP
rclement@verrilldana.com, nhull@verrilldana.com; bankr@verrilldana.com

Roger A. Clement, Jr., Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.
rclement@verrilldana.com, nhull@verrilldana.com; bankr@verrilldana.com

Roger A. Clement, Jr., Esq. on behalf of Trustee Robert J. Keach
rclement@verrilldana.com, nhull@verrilldana.com; bankr@verrilldana.com

Daniel C. Cohn, Esq. on behalf of Creditor Estates of Marie Alliance, et al
dcohn@murthalaw.com, njoyce@murthalaw.com

Maire Bridin Corcoran Ragozzine, Esq. on behalf of Trustee Robert J. Keach
mcorcoran@bernsteinshur.com,
sspizuoco@bernsteinshur.com; astewart@bernsteinshur.com; acummings@bernsteinshur.com; kfox@bernsteinshur.com

Keith J. Cunningham, Esq. on behalf of Creditor Eastern Maine Railway Company
kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Keith J. Cunningham, Esq. on behalf of Creditor Maine Northern Railway Company
kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Keith J. Cunningham, Esq. on behalf of Creditor New Brunswick Southern Railway Company
kcunningham@pierceatwood.com, mpottle@pierceatwood.com; rkelly@pierceatwood.com

Debra A. Dandeneau on behalf of Creditor CIT Group, Inc.
, arvin.maskin@weil.com

Joshua R. Dow, Esq. on behalf of Creditor Canadian Pacific Railway
jdow@pearcedow.com, rpearce@pearcedow.com; lsmith@pearcedow.com

Joshua R. Dow, Esq. on behalf of Creditor Canadian Pacific Railway Co.
jdow@pearcedow.com, rpearce@pearcedow.com; lsmith@pearcedow.com

Michael A. Fagone, Esq. on behalf of Attorney Bernstein, Shur, Sawyer & Nelson
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Defendant Robert J. Keach, in his capacity as Chapter 11
Trustee of Maine Montreal and Atlantic Railway, Ltd.
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Michael A. Fagone, Esq. on behalf of Trustee Robert J. Keach
mfagone@bernsteinshur.com,
acummings@bernsteinshur.com; astewart@bernsteinshur.com; sspizuoco@bernsteinshur.com; kquirk@bernsteinshur.com; kfox@bernsteinshur.com

Daniel R. Felkel, Esq. on behalf of Creditor Dakota Plains Transloading, LLC, Dakota Petroleum
Transport Solutions LLC, Dakota Plains Marketing LLC
dfelkel@troubhheisler.com

Jeremy R. Fischer on behalf of Interested Party Indian Harbor Insurance Company
jfischer@dwmlaw.com, aprincedwmlaw.com

Jeremy R. Fischer on behalf of Interested Party XL Insurance Company, Ltd.
jfischer@dwmlaw.com, aprincedwmlaw.com

Isaiah A. Fishman on behalf of Creditor C. K. Industries, Inc.

ifishman@krasnowsaunders.com, ryant@krasnowsaunders.com; cvalente@krasnowsaunders.com

Peter J. Flowers on behalf of Creditor Estates of Stephanie Bolduc
pjf@meyers-flowers.com

Christopher Fong, Esq. on behalf of Creditor Informal Committee of Quebec Claimants
christopherfong@paulhastings.com

Taruna Garg, Esq. on behalf of Creditor Estates of Marie Alliance, et al
tgarg@murthalaw.com, cball@murthalaw.com; kpatten@murthalaw.com

Jay S. Geller on behalf of Creditor Western Petroleum Corporation
jgeller@maine.rr.com

Craig Goldblatt on behalf of Interested Party XL Insurance Company, Ltd.
craig.goldblatt@wilmerhale.com

Frank J. Guadagnino on behalf of Creditor Maine Department of Transportation
fguadagnino@clarkhillthorpreed.com

Michael F. Hahn, Esq. on behalf of Creditor Bangor Savings Bank
mhahn@eatonpeabody.com,
clavertu@eatonpeabody.com; dgerry@eatonpeabody.com; dcroizier@eatonpeabody.com; jmiller@eatonpeabody.com

Andrew Helman, Esq. on behalf of Creditor Wheeling & Lake Erie Railway Company
ahelman@mcm-law.com, bankruptcy@mcm-law.com

Andrew Helman, Esq. on behalf of Plaintiff Wheeling & Lake Erie Railway Company
ahelman@mcm-law.com, bankruptcy@mcm-law.com

Paul Joseph Hemming on behalf of Creditor Canadian Pacific Railway Co.
phehming@briggs.com, pkringen@briggs.com

Seth S. Holbrook on behalf of Creditor Atlantic Specialty Insurance Company
holbrook_murphy@msn.com

Nathaniel R. Hull, Esq. on behalf of Debtor Montreal Maine & Atlantic Railway Ltd.
nhull@verrilldana.com, bankr@verrilldana.com

David C. Johnson on behalf of Creditor Wheeling & Lake Erie Railway Company

bankruptcy@mcm-law.com, djohnson@mcm-law.com

David C. Johnson on behalf of Plaintiff Wheeling & Lake Erie Railway Company

bankruptcy@mcm-law.com, djohnson@mcm-law.com

Jordan M. Kaplan, Esq. on behalf of Creditor Brotherhood of Locomotive Engineers and Trainmen

jkaplan@zwerdling.com, mwolly@zwerdling.com

Robert J. Keach, Esq. on behalf of Trustee Robert J. Keach

rkeach@bernsteinshur.com,

acummings@bernsteinshur.com; jlewis@bernsteinshur.com; astewart@bernsteinshur.com; kquirk@bernsteinshur.com

Curtis E. Kimball, Esq. on behalf of Creditor Center Beam Flat Car Company, Inc.

ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Curtis E. Kimball, Esq. on behalf of Creditor First Union Rail

ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Curtis E. Kimball, Esq. on behalf of Creditor J. M. Huber Corporation

ckimball@rudman-winchell.com, jphair@rudman-winchell.com; cderrah@rudmanwinchell.com

Andrew J. Kull, Esq. on behalf of Creditor Estate of Jefferson Troester

akull@mittelasen.com, ktrogner@mittelasen.com

George W. Kurr, Jr. on behalf of Creditor Estates of David Lacroix Beaudoin

gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Estates of Marie Alliance, et al

gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Estates of Stephanie Bolduc

gwkurr@grossminsky.com, tmseymour@grossminsky.com

George W. Kurr, Jr. on behalf of Creditor Real Custeau Claimants et al

gwkurr@grossminsky.com, tmseymour@grossminsky.com

Alan R. Lepene, Esq. on behalf of Creditor Eastern Maine Railway Company

Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Creditor Maine Northern Railway Company

Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Creditor New Brunswick Southern Railway Company

Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party Irving Paper Limited

Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party Irving Pulp & Paper, Limited

Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Alan R. Lepene, Esq. on behalf of Interested Party J.D. Irving, Limited

Alan.Lepene@ThompsonHine.com, Cathy.Heldt@ThompsonHine.com

Edward MacColl, Esq. on behalf of Creditor CIT Group, Inc.

emaccoll@thomport.com, bbowman@thomport.com; jhuot@thomport.com; eakers@thomport.com

Benjamin E. Marcus, Esq. on behalf of Interested Party XL Insurance Company, Ltd.

bmarcus@dwmlaw.com, hwhite@dwmlaw.com; dsoucy@dwmlaw.com

George J. Marcus, Esq. on behalf of Creditor Wheeling & Lake Erie Railway Company

bankruptcy@mcm-law.com

George J. Marcus, Esq. on behalf of Plaintiff Wheeling & Lake Erie Railway Company

bankruptcy@mcm-law.com

Patrick C. Maxcy, Esq. on behalf of Creditor Rail World, Inc.

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Defendant LMS Acquisition Corp.

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Defendant Montreal Maine & Atlantic Corporation

patrick.maxcy@dentons.com

Patrick C. Maxcy, Esq. on behalf of Other Prof. Edward A. Burkhardt, Robert Grindrod, Gaynor Ryan, Joseph McGonigle, Donald M. Gardner, Jr., Cathy Aldana, Rail World, Inc, Rail World Holdings, LLC, Rail World Locomotive Leasing, LLC and Earlston As

patrick.maxcy@dentons.com

John R McDonald, Esq. on behalf of Creditor Canadian Pacific Railway Co.

jmcdonald@briggs.com, mjacobson@briggs.com

Kelly McDonald, Esq. on behalf of Creditor Camden National Bank

kmcdonald@mpmlaw.com, kwillette@mpmlaw.com

Kelly McDonald, Esq. on behalf of Creditor GNP Maine Holdings, LLC

kmcdonald@mpmlaw.com, kwillette@mpmlaw.com

James F. Molleur, Esq. on behalf of Creditor Brotherhood of Locomotive Engineers and Trainmen

jim@molleurlaw.com,

all@molleurlaw.com;tanya@molleurlaw.com;jen@molleurlaw.com;barry@molleurlaw.com;kati@molleurlaw.com;martine@molleurlaw.com;julie@molleurlaw.com

Ronald Stephen Louis Molteni, Esq. on behalf of Interested Party Surface Transportation Board

moltenir@stb.dot.gov

Victoria Morales on behalf of Creditor Maine Department of Transportation

Victoria.Morales@maine.gov,

rhotaling@clarkhillthorpreed.com,Toni.Kemmerle@maine.gov,ehocky@clarkhill.com,Nathan.Molton@maine.gov,Robert.Elder@maine.gov

Stephen G. Morrell, Esq. on behalf of U.S. Trustee Office of U.S. Trustee

stephen.g.morrell@usdoj.gov

Office of U.S. Trustee

ustpreion01.po.ecf@usdoj.gov

Richard P. Olson, Esq. on behalf of Creditor Informal Committee of Quebec Claimants

rolson@perkinsolson.com, jmoran@perkinsolson.com; lkubiak@perkinsolson.com

Jeffrey T. Piampiano, Esq. on behalf of Interested Party XL Insurance Company, Ltd.

jpiampiano@dwmlaw.com, aprince@dwmlaw.com; hwhite@dwmlaw.com

Jennifer H. Pincus, Esq. on behalf of U.S. Trustee Office of U.S. Trustee

Jennifer.H.Pincus@usdoj.gov

William C. Price on behalf of Creditor Maine Department of Transportation

wprice@clarkhill.com, rhotaling@clarkhillthorpreed.com

Joshua Aaron Randlett on behalf of Defendant Travelers Property Casualty Company of America
a/k/a) Travelers Insurance Company

jrandlett@rwlb.com, kmorris@rwlb.com

Joshua Aaron Randlett on behalf of Interested Party Travelers Property Casualty Company of America

jrandlett@rwlb.com, kmorris@rwlb.com

Elizabeth L. Slaby on behalf of Creditor Maine Department of Transportation

bslaby@clarkhillthorpreed.com

John Thomas Stemplewicz on behalf of Creditor United States of America

john.stemplewicz@usdoj.gov

Deborah L. Thorne, Esq. on behalf of Creditor GATX Corporation

deborah.thorne@btlaw.com

Timothy R. Thornton on behalf of Creditor Canadian Pacific Railway Co.

pvolk@briggs.com

Mitchell A. Toups on behalf of Interested Party Wrongful Death, Personal Injury, Business, Property and Environmental Clients as of September 1, 2013

matoups@wgttlaw.com, jgordon@wgttlaw.com

Pamela W. Waite, Esq. on behalf of Creditor Maine Revenue Services

pam.waite@maine.gov

Jason C. Webster, Esq. on behalf of Creditor Estates of David Lacroix Beaudoin

jwebster@thewebsterlawfirm.com,

dgarcia@thewebsterlawfirm.com; hvicknair@thewebsterlawfirm.com

William H. Welte, Esq. on behalf of Creditor Atlantic Specialty Insurance Company

wwelte@weltelaw.com

Elizabeth J. Wyman, Esq. on behalf of Creditor Maine Department of Transportation

liz.wyman@maine.gov, liz.wyman@maine.gov