

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**MOTION FOR AN ORDER AMENDING OR STRIKING FINDINGS OF FACT
PURSUANT TO FED. R. BANKR. P. 7052**

Robert J. Keach, the chapter 11 trustee (the “Trustee”), by and through his undersigned counsel, submits this motion (the “Motion”) pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) seeking entry of an order amending or striking certain factual findings made by this Court on the record at the March 13, 2014 hearing (the “March 13 Hearing”) in relation to its order the *Motion for Order (I) Authorizing Assignment of Tax Credits and (II) Granting Related Relief* [D.E. 463] (the “45G Motion”). In support of this Motion, the Trustee states as follows:

I. JURISDICTION, VENUE AND STATUTORY BASIS FOR RELIEF

1. The United States District Court for the District of Maine (the “District Court”) has original but not exclusive jurisdiction over this chapter 11 case pursuant to 28 U.S.C. § 1334(a) and over this Motion pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a) and Rule 83.6 of the District Court’s local rules, the District Court has authority to refer and has referred this chapter 11 case and this Motion to this Court.

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

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

4. The relief sought in this Motion is predicated upon Bankruptcy Rules 7052(b) and 9014(c).

II. BACKGROUND

A. General Background

5. On August 7, 2013 (the "Petition Date"), Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor") filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* The Debtor's bankruptcy filing was precipitated by the train derailment in Lac-Mégantic, Québec on July 6, 2013 (the "Derailment") and the business interruption and litigation that subsequently ensued. The Derailment set off several massive fires and explosions, which destroyed part of downtown Lac-Mégantic and killed 47 people.

6. The same factors precipitated the filing by Montreal Maine & Atlantic Canada Co. ("MMA Canada" and, together with MMA, the "Debtors"), under Canada's *Companies' Creditors Arrangement Act* (the "Canadian Case") in Québec Superior Court in Canada (the "Canadian Court").

7. On August 21, 2013, the U.S. Trustee appointed the Trustee in this chapter 11 case.

8. On September 4, 2013, the Court entered an order adopting the *Cross-Border Insolvency Protocol* [D.E. 168] (the "Protocol"), which governs the conduct of all parties in interest in this case and the Canadian Case. The Canadian Court also adopted the Protocol. The purpose of the Protocol is to, among other things, (a) harmonize and coordinate the activities before this Court and the Canadian Court, (b) promote the orderly and efficient administration of

the chapter 11 case and the Canadian Case to, among other things, maximize the efficiency of both proceedings, reduce the costs associated therewith and avoid duplication of effort, and (c) facilitate the fair, open and efficient administration of the proceedings for the benefit of all of the Debtors' creditors and other interested parties, wherever located. *See* Protocol, ¶ 5.

B. The 45G Proceedings

9. The Trustee filed the 45G Motion on December 2, 2013. By the 45G Motion, the Trustee sought, *inter alia*, authority to continue performing under a certain Track Maintenance Agreement (the "TMA") entered into between MMA and KM Strategic Investments, LLC ("KMSI") prior to the Petition Date. Under the TMA, MMA agreed to assign certain railroad track miles to KMSI, solely for the purpose of KMSI claiming a tax credit in relation to those track miles under section 45G of the Internal Revenue Code.

10. Wheeling & Lake Erie Railway Company ("Wheeling") filed an objection to the 45G Motion, asserting, among other things, an interest in the proceeds of the TMA. *See* D.E. 470.

11. Pursuant to an order entered on December 17, 2013 (the "45G Order"), the Court granted the 45G Motion, but reserved the respective rights of the Trustee and Wheeling regarding distribution of the proceeds of the TMA. *See* D.E. 511. The 45G Order also indicated that an evidentiary hearing would be held on January 23, 2014 (the "January 23 Hearing") "to determine the validity, priority, and extent of Wheeling's security interest in and to the Net Funds" received by the Trustee and/or MMA under the TMA. *Id.* at ¶ 7.¹ To assist the Court in ruling on the extent of Wheeling's interest in the Net Funds, the parties were also required to simultaneously file briefs on the subject. *Id.*

¹ "Net Funds" shall hereinafter refer to those proceeds of the TMA at issue in the 45G Motion.

12. The Trustee made the following arguments in his brief: (i) Wheeling does not have a lien on the Debtor's real estate or track miles, and therefore does not have an interest in proceeds of the assignment of those track miles; (ii) the Net Funds were generated post-petition, and are not proceeds of Wheeling's collateral, so section 552(a) cuts off any interest Wheeling might assert in the Net Funds; and (iii) the equities of the case preclude Wheeling from enforcing an interest in the Net Funds because the Net Funds were generated, at least in part, by non-Wheeling collateral, such as Canadian accounts receivable (in which Wheeling did not have a perfected security interest) and proceeds of non-Wheeling financing. *See Trustee's Brief Regarding 45G Tax Credits*, D.E. 578. The ownership of the Canadian receivables was not at issue in the Trustee's arguments, nor did the Trustee bear the burden of establishing that MMA did not own the Canadian receivables.

13. At the January 23 Hearing, Wheeling called a single witness, M. Donald Gardner, Jr., the VP of Finance & Administration and the Chief Financial Officer of MMA. Among the topics on which Mr. Gardner testified was how accounts receivable are generated and processed by MMA and MMA Canada. In connection with Mr. Gardner's testimony, several exhibits were offered by both the Trustee and Wheeling.

14. Specifically, Mr. Gardner testified that the operations of MMA and MMA Canada are conducted as an integrated business in Hermon, Maine. January 23 Hearing at 1:50, 2:35:20.² Mr. Gardner also testified that there is a separate set of Canadian books maintained in relation to MMA Canada. Id. at 2:38:15. Additionally, MMA Canada maintains Canadian currency accounts. Id. at 2:42:50. MMA Canada is also a separate legal entity from MMA. Id. at 2:49:40.

² Citations to the record of the January 23 Hearing are to the audio of the January 23 Hearing. *See* D.E. 591.

15. At the March 13 Hearing, the Court indicated that it intended to rule on the issue of Wheeling's interest in and to the proceeds of the TMA, and would state its findings and conclusions in relation to that ruling on the record, as opposed to issuing a detailed written decision. The Court acknowledged that Wheeling had been assigned the burden of proof and the burden of going forward with respect to the extent and validity of its interest in and to the Net Funds. March 13 Hearing, 1:51:35-1:52:01.³

16. In ruling on the extent of Wheeling's interest in the proceeds of the TMA, the Court identified the Trustee's arguments as follows: (i) a portion of the Net Funds are attributable to accounts generated in Canada and are not subject to Wheeling's security agreement because Wheeling does not have a security interest in Canadian receivables; (ii) the Trustee is entitled to all of the Net Funds under the equities of the case doctrine; and (iii) the 45G tax credit amounts were not certified to KMSI pursuant to the TMA until after the Petition Date, and 11 U.S.C. § 552(a) thus cuts off Wheeling's security interest in the Net Funds. *See* March 13 Hearing, 1:53:49-1:55:18.

17. The Court then made certain findings and conclusions with respect to the Debtors' receivables, including the following:

[S]eparate treatment of accounts receivable did not exist. . . .

[T]here was no separate account or separate treatment or any other distinction or separation between accounts receivable attributable to track in Canada or track in the United States. . . . [A]ll of the receivables were treated as receivables of the American entity

. . . [A]ll of the receivables were commingled and they were all treated as receivables of the American entity.

March 13 Hearing, 1:55:17-1:57:46 (the "March 13 Findings").

³ Citations to the record of the March 13 Hearing are to the audio of the March 13 Hearing. *See* D.E. 749.

18. The Court entered the *Decision and Order Regarding the Proceeds of the Sale of the Debtor's 45G Tax Credit* [D.E. 761] (the "Decision and Order") on March 17, 2014. The Decision and Order provides that "[f]or the reasons set forth on the record of hearing on March 13, 2014, I conclude that of the \$1,117,355.00 qualifying track maintenance expenditures made during 2013, 69.74% . . . were made either prepetition, or during the postpetition period when Wheeling's collateral was funding operations, and therefore are subject to Wheeling's security interest." Decision and Order, p. 1. Because the Court found that the remaining 30.26% of the proceeds were generated after the cut-over to financing from Camden National Bank, that portion was not subject to Wheeling's security interest. Id.

III. RELIEF REQUESTED

19. By this Motion, the Trustee seeks entry of an order amending or striking the March 13 Findings on the basis that such findings were unnecessary for the relief granted in the Decision and Order and are not supported by the evidence presented.

IV. ARGUMENT

20. Bankruptcy Rule 7052, which incorporates Rule 52 of the Federal Rules of Civil Procedure, provides that "[o]n a party's motion . . . , the court may amend its findings—or make additional findings—and may amend the judgment accordingly." Fed. R. Bankr. P. 7052(b). Bankruptcy Rule 7052 applies in contested matters pursuant to Bankruptcy Rule 9014(c). *See* Fed R. Bankr. P. 9014(c).

21. A motion to alter or amend findings and conclusions pursuant to Rule 52(b) is generally reviewed under the same standard as a motion to reconsider filed pursuant to Rule 59(e). *See Feliciano-Hernandez v. Pereira-Castillo*, 663 F.3d 527, 536-37 (1st Cir. 2011). The purpose of Rule 52(b) "is to permit the correction of any manifest errors of law or fact that are

discovered, upon reconsideration, by the trial court.” Nat’l Metal Finishing Co., Inc. v. BarclaysAmerican/Comm., Inc., 899 F.2d 119, 123 (1st Cir. 1990). A party will prevail on a motion to alter or amend under Rule 52(b) if the party “show[s] that the Court’s findings of fact or conclusions of law are not supported by evidence in the record.” Keller v. U.S., No. V-02-62, 2010 WL 3700841, *1 (S.D. Tex. Sept. 14, 2010).

22. The evidence on the record in this case—specifically, the testimony of Mr. Gardner at the January 23 Hearing—does not support the March 13 Findings. Mr. Gardner’s testimony established that, while accounting and operational services for both of the Debtors are consolidated in the Hermon, Maine office, and the Debtors commingled cash which was used to support both MMA and MMA Canada’s respective businesses, MMA Canada: (i) maintains its own Canadian currency accounts; (ii) maintains its own books; and (iii) is a legal entity separate and distinct from MMA. *See* January Hearing at 2:35:20, 2:38:15, 2:42:50, and 2:49:40.

23. The March 13 Findings, however, provide that “there was no separate account or separate treatment or any other distinction or separation between” the MMA receivables and the MMA Canada receivables, and that “all of the receivables . . . were all treated as receivables of the American entity.” March 13 Findings. These findings are plainly not supported by the evidence supplied by Mr. Gardner’s testimony, and should be amended, or stricken, accordingly.

24. Additionally, the Court did not need to determine the ownership of the Canadian receivables in deciding Wheeling’s rights in and to the Net Funds. The perfection of Wheeling’s security interest in Canadian receivables was a peripheral issue raised by the Trustee, who did not bear any evidentiary burdens in this matter. *See* March 13 Hearing at 1:51:35--1:52:01. In unnecessarily making the March 13 Findings, the Court has potentially prejudiced the Trustee with respect to other related matters before this Court, including *Wheeling & Lake Erie Railway*

Company's Motion to Enforce Cash Collateral Orders [D.E. 603] (the "Motion to Enforce").

The issue of the ownership of the Canadian receivables is directly involved in the Motion to Enforce, and this Court's findings and conclusions as to this issue were made well before the record was fully developed on this point.

25. The March 13 Findings should also be amended or stricken because they were made in violation of the Protocol. Specifically, the March 13 Findings have the potential to affect the rights of MMA Canada, and were made without providing MMA Canada the right to be heard regarding its entitlement to or ownership of the Canadian receivables. Accordingly, the March 13 Findings could deprive MMA Canada of its rights in and to the Canadian receivables, a result at odds with the spirit of the Protocol.

V. NOTICE

26. Notice of this Motion was served on the following parties on the date and in the manner set forth in the certificate of service: (1) the United States Trustee; (2) the Debtor's counsel; (3) counsel to Wheeling; (4) counsel to MMA Canada; (5) the Monitor; and (6) others who have, as of the date of the Motion, entered an appearance and requested service of papers in the chapter 11 case. In light of the nature of the relief requested in the Motion, the Trustee requests that the Court approve service of the Motion on the parties set forth above.

WHEREFORE, the Trustee respectfully requests entry of an order granting the relief requested in the Motion and such other and further relief as may be just.

Dated: March 31, 2014

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

By his attorneys:

/s/ Michael Fagone

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**ORDER GRANTING MOTION FOR AN ORDER AMENDING OR STRIKING
FINDINGS OF FACT PURSUANT TO FED. R. BANKR. P. 7052**

This matter having come before the Court on the *Motion for an Order Amending or Striking Findings of Fact Pursuant to Fed. R. Bankr. P. 7052* (the “Motion”), filed by Robert J. Keach, the chapter 11 trustee, seeking entry of an order amending or striking certain factual findings made by this Court on the record at the hearing held before me on March 13, 2014 (the “March 13 Hearing”), pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure; and due and appropriate notice of the Motion having been given; and the Court having reviewed the Motion, and considered any objections or responses to the Motion; and the Court having determined that the relief requested in the Motion is due and appropriate; the Court hereby **ORDERS, ADJUDGES, and DECREES** that:

1. The Motion is granted.
2. The March 13 Findings, as such term is defined in the Motion, shall be stricken from the record of the March 13 Hearing.

Dated:

The Honorable Louis H. Kornreich
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
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In re:

MONTREAL MAINE & ATLANTIC
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Debtor.

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NOTICE OF HEARING

Robert J. Keach, the chapter 11 trustee in the above-captioned case (the “Trustee”), has filed the *Motion for an Order Amending or Striking Findings of Fact Pursuant to Fed. R. Bank. P. 7052* (the “Motion”).

If you do not want the Court to approve the Motion, then on or before **April 30, 2014**, you or your attorney must file with the Court a response or objection explaining your position. If you are not able to access the CM/ECF Filing System, then your response should be served upon the Court at:

Alec Leddy, Clerk
United States Bankruptcy Court for the District of Maine
202 Harlow Street
Bangor, Maine 04401

If you do have to mail your response to the Court for filing, then you must mail it early enough so that the Court will receive it **on or before April 30, 2014**.

You may attend the hearing with respect to the Motion scheduled to be held at the Bankruptcy Court, 202 Harlow Street, Bangor, Maine on **May 8, 2014 at 10:00 a.m.**

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the Motion, and may enter an order granting the requested relief without further notice or hearing.

Dated: March 31, 2014

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

By his attorneys:

/s/ Michael Fagone

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