**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF MAINE**

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

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

Now comes Wheeling and Lake Erie Railway Company ("Wheeling") and objects to the Trustee's Motion for An Order Amending or Striking Findings of Fact Pursuant to Fed.R.Bankr.P. 7052 (the "Rule 52 Motion") [D.E. # 807]. Contrary to the Trustee's assertions, there is no reason to amend or strike the findings of fact made by the Court at the March 13, 2014 hearing on the Trustee's Motion for Order (I) Authorizing Assignment of Tax Credits and (II) Granting Related Relief (the "45G Motion") [D.E. # 463] because the challenged findings of fact were (a) accurate; (b) directly relevant to the issues in controversy; and (c) do not violate any of the provisions of the Cross-Border Insolvency Protocol (the "Protocol"). As such, there is no basis for this Court to utilize Fed.R.Civ.P. 52 and Fed.R.Bankr.P. 7052 to amend or strike the same.

**ARGUMENT**

The Rule 52 Motion is premised on three arguments, all of which relate to certain findings of fact made by the Court and announced on the record at a March 13, 2014 hearing on the 45G Motion (the "March 13 Findings"). These findings related to the ownership of accounts receivable generated by Montreal, Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor") and the interest of the Debtor's subsidiary, Montreal Maine & Atlantic Canada Co.

("MMA Canada") in and to those accounts. The Court's findings are reproduced in their entirety below:

> The Canadian accounts. I stated earlier in the day today that the evidence from the Debtor's witness indicated that separate treatment of accounts receivable did not exist, that all funds came into the Hermon, Maine, operations center attributable to the Canadian entity [MMA Canada] and the American entity [MMA], they were comingled and that the funds were used for operations generally in the uniform operation of those entities.
>
> There was testimony to the effect that the receivables were distinguished or delineated for tax purposes at year end but there was no clear indication of the record as to how that was done or if it was simply paper attribution for the purposes of tax returns. It was clear to me from the testimony at the time that there was no separate account or any other distinction or separation between accounts receivable attributed to track in Canada or track in the United States.
>
> And the testimony indicated further that all the receivables were treated as receivables of the American entity which had general supervisory operational responsibility for both entities out of one office and that no distinction was made.
>
> I therefore find and conclude, with respect to the Trustee's question concerning Canadian receivables, that the perfection issue simply doesn't apply under this instance but for the purposes of the 45G motion the evidence is clear and unambiguous that all of the receivables were comingled and they were all treated as receivables for the American entity.

March 13 Findings Transcript, pp. 12:6-13:6 (a true and accurate copy of the March 13 Findings Transcript is attached hereto as ***Exhibit A***).

For a number of reasons – none of them convincing – the Trustee argues in the Rule 52 Motion that the foregoing portion of the March 13 Findings should be amended or stricken[1].

**A. RULE 52(b) GENERALLY.**

Rule 52(b) "permit[s] the correction of ***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) (emphasis added); *see* Rule

[1] Although the Trustee asks that the Court either amend or strike the findings (Rule 52 Motion, ¶ 23), he never explains what amendments he thinks should be made. As such, the only relief actually and fully requested in the Rule 52 Motion is that the findings be stricken.

52 Motion, ¶ 21. The primary purpose of Rule 52(b) "is to correct, clarify or amplify the findings so that the appellate court will be able to arrive at a thorough understanding of the factual basis of the trial court's decision." 9-52 Moore's Federal Practice – Civil § 52.60 [3]. "The Rule is not meant to provide an avenue for relitigating issues on which the moving party did not prevail at trial." *Id.* Where a party is asserting manifest error, as the Trustee is here, it "must demonstrate some reason why the Court should alter its decision and also must set forth facts or law of a strongly convincing nature." *Id.* at § 52.60[4][a]. This is a burden the Trustee cannot meet.

**B. RULE 52(b) PROVIDES THE TRUSTEE WITH NO GROUNDS FOR RELIEF BECAUSE THE EVIDENCE UPON WHICH THE COURT'S FINDING WAS BASED – MR. GARDINER'S TESTIMONY AT THE JANUARY 23 HEARING – WAS COMPLETELY CONSISTENT WITH THE CHALLENGED MARCH 13 FINDINGS. THE TRUSTEE HAS SUGGESTED NO NEW OR DIFFERENT EVIDENCE.**

The Trustee first argues that the March 13 Findings related to the Canadian accounts receivable – *i.e.*, accounts receivable generated by the provision of rail services to Canadian customers[2] – are not supported by the evidence in the record, namely the testimony provided to the Court at the January 23, 2014 hearing on the Rule 45G Motion by M. Donald Gardner, the VP of Finance & Administration and the Chief Financial Officer of both MMA and MMA Canada. More specifically, the Rule 52 Motion states baldly that: "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." Rule 52 Motion, ¶ 22. The transcript of the January 23 Hearing shows otherwise.

[2] *See* January 23 Hearing Transcript at p. 131:17-20: "Q. Just to make sure we're clear, when we talk about Canadian receivables we're talking about services provided to Canadian customers but billed by the Debtor. Correct? A: Yes." A true and accurate copy of the January 23 Hearing Transcript is attached hereto as ***Exhibit B***.

As the Trustee notes, Mr. Gardner testified that MMA Canada maintains its own currency accounts, maintains its own books, and is a legal entity separate and distinct from MMA. Rule 52 Motion, ¶ 22. All of that may be true, but it has no bearing on the accounts receivable issue; that is, which entity issues invoices and records accounts receivable. However, Mr. Gardiner's other testimony does, and he also testified as follows:

- MMA and MMA Canada operate on an integrated basis out of their Hermon, Maine headquarters. January 23 Hearing Transcript, pp. 84:11-13; 119.

- Canadian customers were billed for freight services (*i.e.*, services that would generate so-called "Canadian accounts receivable") via MMA invoices by MMA personnel; MMA Canada does not send out separate invoices for these services. *Id.*, pp. 119:16-120:20.

- Invoices sent by MMA to Canadian customers for freight services create accounts receivable for MMA and are booked as such on MMA's books, not MMA Canada's books. *Id.*, pp. 120:21-121:1.

- The same is true for interline settlement system ("ISS") invoices related to Canadian customers. *Id.*, pp. 121:2-122:21.

- Only MMA owns any rolling stock; MMA Canada does not own any rolling stock. *Id.*, p. 123:3-5.

- All of the cash generated by freight services, whether it be for U.S. or Canadian customers "all goes into one pot" at MMA. *Id.*, p. 124:3.

- On a periodic basis, MMA allocates a certain portion of accounts receivable proceeds to MMA Canada for tax purposes pursuant to an historical formula. *Id.*, pp. 123:11-124:2.

- That allocation of funds to MMA Canada is not tied to the amount of accounts receivable revenue generated by Canadian customers. *Id.*, pp. 123:25-124:3.

Taken as a whole, Mr. Gardner's undisputed testimony was that ***all*** accounts receivable of the "integrated" system, including those generated by freight services rendered to Canadian customers, are invoiced by the Debtor, MMA, and create accounts receivable on the books of the Debtor. MMA Canada does not invoice any customer for

freight services, and records no accounts receivable for the same. Further, MMA Canada would have no way of creating an account receivable for freight services because it owns no rolling stock, and without rolling stock, it cannot deliver freight. Finally, it is equally clear that after the fact, for tax or other reasons, and in accordance with historical practices, MMA allocates freight revenue to its Canadian subsidiary, but this allocation has no relationship at all to the accounts generated by Canadian customers. It is unsurprising then that the Court held in its subsequent March 13 Findings that "the evidence is clear and unambiguous that all of the receivables were comingled and they were all treated as receivables for the American entity." March 13 Findings Transcript, p. 13:4-6.

Oddly, and in complete contravention of the plain import of Mr. Gardner's testimony, the Trustee argues the Court's March 13 Findings "are plainly not supported by the evidence provided by Mr. Gardner's testimony . . . ." (Rule 52 Motion, ¶ 23). Wheeling is unable to discern any inconsistency between the Court's March 13 Findings and Mr. Gardner's testimony.

The March 13 Findings are also completely compatible with Mr. Gardner's testimony about the facts that MMA Canada is a separate legal entity from MMA and that MMA Canada maintains its own currency and books. There is nothing in this testimony that leads to any inconsistent inference regarding the ownership of accounts receivable generated by MMA. In fact, the only viable conclusion to be drawn from the evidence is that MMA and its wholly owned subsidiary, MMA Canada, do business like many corporate groups where different members of the group may own different operating assets (*e.g.*, track in Canada). Typically, in such situations, invoices are rendered by the parent corporation, creating accounts receivable of

the parent, and then costs and/or revenues are allocated to the subsidiaries upon whatever formula, and for whatever reason (e.g. tax allocation, as in this case), suits the corporate group. The evidence showed that MMA and its subsidiary, MMA Canada, operate in this entirely perfunctory and commonplace manner. There is nothing in the Court's findings of fact that can or should be viewed as unusual, or a stretch of the evidence. In other words, the testimony at the January 23 Hearing establishes complete consistency between MMA's pre-petition business practices and Mr. Gardner's testimony in this case. This is yet a further reason to reject the notion advanced by the Trustee that somehow the Court's findings are unsupported by the record in this case.

The Trustee provides no basis for his argument that the March 13 Findings are unsupported by Mr. Gardner's testimony other than his own *ipse dixit*. Nor does the Trustee point to any new or different evidence that may have been overlooked at the hearing. In reality, the evidence adduced at the January 23 Hearing, and the Court's ruling are completely consistent with one another, and there was no error, never mind a "manifest error," in the March 13 Findings that would justify utilizing Rule 52(b) to amend or strike the same. *See Nat'l. Metal Finishing*, 899 F.2d at 123.

**C. THE CHALLENGED MARCH 13 FINDINGS WERE CENTRAL TO THE COURT'S DECISION. THEY AROSE AS A RESULT OF ISSUES RAISED BY THE TRUSTEE AND WERE LITIGATED BY THE PARTIES DURING THE COURSE OF THE RULE 45G PROCEEDINGS.**

The Trustee next argues that "the Court did not need to determine the ownership of the Canadian receivables in deciding Wheeling's rights in the "Net Funds.[3]" This argument should be seen for what it is: a transparent *ex post facto* attempt to re-characterize a central component of the 45G litigation as nothing more than "a peripheral issue raised by the Trustee, who did not

[3] Defined terms shall have the same meanings as ascribed to them in the Rule 52 Motion unless otherwise noted herein.

bear any evidentiary burdens in this matter" (*see* March 13 Findings, ¶ 24) in order to avoid the consequences of the March 13 Findings. In point of fact, the question of who owned the Canadian accounts receivable was not a "peripheral issue". It was placed squarely in the center of the litigation by the Trustee himself, in an effort to defeat Wheeling's interest in the 45G tax credits (*i.e*. the KMSI Payments). The Trustee argued that Wheeling could not prove that these credits or payments constituted identifiable proceeds of its collateral and, further, that under the "equities of the case" provision of 11 U.S.C. § 552(b)(1), Wheeling was barred from claiming an interest in the KMSI payments because they were not entirely proceeds of Wheeling's collateral.

These arguments were explicit, albeit misguided. In the Trustee's Brief Regarding 45G Tax Credits (the "Trustee's 45G Brief") [D.E. # 578], he argued that:

> The Qualified Expenditures were funded from a variety of sources, including sources in which Wheeling did not have a perfected security interest. ***For example, more than half of the Debtor's cash receipts from June 1, 2013 through December 31, 2103 were received from Canadian account debtors.***

Trustee's 45G Brief, ¶ 22 (emphasis added).

He goes on to argue that "Wheeling cannot meet its burden of establishing that the payments under the KMSI Agreement constitute its identifiable proceeds" because they were the result of Qualified Expenditures made with funds that included "Canadian accounts receivable." *Id.,* at p. 18. The Trustee made the same argument in the context of his § 552(b) "equities of the case" discussion:

> 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***).

*Id.,* 20 (emphasis added).

The Trustee also addressed this point multiple times during the January 23 Hearing. He engaged in an extended colloquy with Mr. Gardner about the sources of the funds (including cash received from Canadian freight customers) used to pay the Qualified Expenditures (expenditures that generated the tax credits) (January 13 Hearing Transcript, pp. 103:22-106:7) and introduced an exhibit – Trustee's Exhibit 9[4] – which showed the at 52% of the cash received by MMA between June 1 and December 31, 2013 was remitted by Canadian customers. During oral argument, he then discussed that evidence in detail and its purported effect on the 45G dispute, including whether Wheeling had a perfected security interest in the proceeds of the Canadian A/R:

> Here's what I think is outcome determinative. Expenditures giving rise to these payments were made from a variety of sources. More than half of them came -- more than half of the prepetition ones came from prepetition Canadian receivables, that's Trustee's Exhibit 9. I understand that Mr. Marcus may quarrel with whether it's a U.S. receivable, a Canadian receivable. This exhibit demonstrates that they're Canadian receivables. . . ***All you need to understand today is that about 50% of the revenue came from Canadian accounts in which Wheeling isn't perfected and I don't think there's any serious dispute about the lack of perfection.***

January 23 Hearing Transcript, pp. 168:16-169:6 (emphasis added).

Wheeling also argued the issue of ownership of the Canadian accounts receivable both in its pre-January 23 Hearing Briefing (*see* Wheeling and Lake Erie Railway Company's Memorandum of Law In Support of Enforcement of Its Security Interest In All Proceeds of the Track Maintenance Agreement, Filed Pursuant to the Court's Order Dated December 17, 2013 ("Wheeling's 45G Brief" [D.E. # 576], ¶¶ 19, 22, 41)) and at the Hearing itself. In fact, Wheeling's counsel and the Court engaged in a lengthy discussion of whether Wheeling had a perfected security interest in the Canadian A/R and its proceeds (including the KMSI Payments). January 23 Hearing Transcript, pp. 149:16-160:17 (emphasis added). During that

[4] A true and accurate Copy of this Exhibit is attached hereto as ***Exhibit C***.

colloquy, counsel made it very clear that Wheeling had a perfected security interest in the so-called Canadian A/R, which the evidence showed were, in any case, actually MMA accounts receivable[5]. *Id.*, p. 150:4-17.

In short, the Trustee explicitly placed at issue the question of whether Wheeling collateral was expended in generating the KMSI Payments. In particular, the Trustee argued strenuously that so-called Canadian Receivables were not Wheeling collateral and therefore, because the KMSI Payments were generated, at least in part, by expenditure of these assets, Wheeling could assert no claim to the KMSI Payments. Wheeling attacked the Trustee's position in oral and written argument and in testimony elicited at the hearing. To suggest now that this issue, which was heavily litigated, both in written presentations of the parties, in testimony, and in oral argument, was "peripheral" is as divorced from reality as the Trustee's contention that the Court's findings are not supported by Mr. Gardner's testimony.

**D. THE MARCH 13 FINDINGS DO NOT VIOLATE THE PROTOCOL.**

Finally, the Trustee argues that the March 13 Findings violate the terms of the Protocol because they "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." Rule 52 Motion, p 25. This argument also misses the mark.

The issue at stake in the 45G Motion was whether, and to what extent, Wheeling has a valid, perfected and enforceable security interest in the KMSI Payments. These were payments generated entirely ***by the Debtor***, and they arose entirely from the transfer

[5] This, of course, followed Wheeling's questioning of Mr. Gardner on the mechanics of billing and accounting for amounts owed by Canadian account debtors (discussed above).

of tax credits made available under the U.S. Internal Revenue Code for maintenance of railroad track located exclusively in the United States. Neither MMA Canada nor any of its creditors had any property right in these credits, nor could MMA Canada ever generate American tax credits for maintenance of Canadian track. There is nothing about the resolution of this dispute over the KMSI Payments that involves any interest of MMA Canada or any of its creditors.

Additionally, because the Debtor placed in issue the existence and extent of so-called Canadian receivables in play in the 45G proceeding, the Court was required to adjudicate the question. The Debtor had every opportunity to invoke the Protocol if it wished to do so, and to invite MMA Canada to participate in the proceedings. Having failed to invoke the Protocol, it is now absurd to suggest that the Trustee gets the opportunity to re-litigate the issues.

Moreover, there is also no basis to argue that that the Protocol – which the Trustee chose to ignore – somehow undermines the exclusive jurisdiction of this Court to determine the nature and extent of MMA's interest in property, *i.e.*, accounts receivable. *See* 28 U.S.C. 1334(a). *See* Protocol, §§ C.6 ("The approval and implementation of this Protocol shall not divest nor diminish the U.S. Court's . . . independent jurisdiction over the subject matter of the U.S. Proceeding . . . ."), C.7 ("The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings."), C.8(a), C.8(b), C.12 There is nothing therein that can or even attempts to limit or regulate this Court's statutory jurisdiction and authority over property of the Debtor's estate. *Id.* If the Trustee wanted to invoke the Protocol, he could have and should have done so at the

beginning of this contested matter, not at the end[6]. *See* Protocol, § 11. The Protocol offers no basis for the Court to enter any order under Rule 52(b), other than an order denying the Rule 52 Motion.

**RESPONSES REQUIRED BY D.Me. LBR 9013-1(f)**

1. Paragraph 1 of the Rule 52 Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling admits the same.

2. Paragraph 2 of the Rule 52 Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling admits the same.

3. Paragraph 3 of the Rule 52 Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling admits the same.

4. Paragraph 4 of the Rule 52 Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling admits the same.

5. Wheeling admits the allegations made in ¶ 5 of the Rule 52 Motion.

6. Wheeling admits the allegations made in ¶ 6 of the Rule 52 Motion.

7. Wheeling admits the allegations made in ¶ 7 of the Rule 52 Motion.

8. Wheeling admits the allegations made in the first two sentences of ¶ 8 of the Rule 52 Motion. Wheeling states that the terms of the Protocol (as that term is defined in the Rule 52 Motion) speak for themselves; ; as such, no response is required to the allegations made in ¶ 8 of the Rule 52 Brief.

9. Wheeling admits the allegations made in the first sentence of ¶ 9 of the Rule 52 Motion. Wheeling states that the terms of the 45G Motion and the TMA (as that term is defined in the Rule 52 Motion) speak for themselves; as such, no response is required to the allegations made in ¶ 9 of the Rule 52 Brief.

10. Wheeling admits the allegations made in ¶ 10 of the Rule 52 Motion.

11. Wheeling states that the terms of the 45G Order (as that term is defined in the Rule 52 Motion) speak for themselves; as such, no response is required to the allegations made in ¶ 11 of the Rule 52 Brief.

[6] The same holds true for MMA Canada Monitor. Upon information and belief, the Monitor stays abreast of proceedings in this Court and could have likewise invoked the Protocol if he felt that the MMA Canada estate's interests were somehow threatened.

12. Wheeling states that the arguments made by the Trustee in the Trustee's Brief speak for themselves; as such, no response is required to the allegations made in the first sentence of ¶ 12 of the Rule 52 Brief. Wheeling denies that "ownership of the Canadian receivables was not at issue in the Trustee's arguments" and admits that the Trustee did not "bear the burden of establishing that MMA did not own the Canadian receivables."

13. Wheeling admits the allegations made in ¶ 13 of the Rule 52 Motion.

14. Wheeling states that Mr. Gardener's testimony at the January 23 Hearing speaks for itself and that a transcript of that testimony is attached hereto; as such, as such, no response is required to the allegations made in ¶ 14 of the Rule 52 Brief. Wheeling admits that MMA is a separate entity from MMA Canada.

15. Wheeling admits the allegations made in ¶ 15 of the Rule 52 Motion.

16. Wheeling states that the March 13 Findings speaks for itself and that a transcript of the same is attached hereto; as such, no response is required to the allegations made in ¶ 16 of the Rule 52 Brief. To the extent a response is required, Wheeling states that the Court's listing of the three arguments made by the Trustee can be found at pp. 11:19-12:5 of the March 13 Findings Transcript.

17. Wheeling states that the March 13 Findings speak for themselves and that a transcript of the same is attached hereto; as such, no response is required to the allegations made in ¶ 17 of the Rule 52 Brief. To the extent a response is required, Wheeling states that the Court's ruling with respect to the MMA and MMA Canada accounts receivable can be found at pp. 12:6-13:6 of the March 13 Findings Transcript.

18. Wheeling states that the terms of the Decision and Order speak for themselves; as such, no response is required to the allegations made in ¶ 18 of the Rule 52 Brief.

19. Wheeling admits that ¶ 19 of the Rule 52 Brief requests that the March 13 Findings be amended or stricken. Wheeling denies that this relief is warranted or justified.

20. Paragraph 20 of the Rule 52 Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling admits the same.

21. Paragraph 21 of the Rule 52 Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling admits the same.

22. Wheeling denies the allegations made in the first sentence of ¶ 22 of the Rule 52 Motion. Wheeling states that the March 13 Findings speak for themselves and that a transcript of the same is attached hereto; as such, no response is required to the allegations made in the second sentence of ¶ 22 of the Rule 52 Brief.

23. Wheeling states that the March 13 Findings speak for themselves and that a transcript of the same is attached hereto; as such, no response is required to the allegations

made in the first sentence of ¶ 23 of the Rule 52 Brief. Wheeling denies the allegation made in the second sentence of ¶ 23 of the Rule 52 Brief.

24. Wheeling denies the allegations made in ¶ 24 of the Rule 52 Motion.

25. Wheeling denies the allegations made in ¶ 25 of the Rule 52 Motion.

## CONCLUSION

WHEREFORE, Wheeling respectfully requests that the Court enter an Order:

A. Denying the relief requested in the Rule 52 Motion; and

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

Dated: April 30, 2014

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

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties electronically at the addresses set forth on the Service List set forth below on 30th day of April, 2014.

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

# Mailing Information for Case 13-10670

## Electronic Mail Notice List

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