UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

SUPPLEMENTAL BRIEF IN SUPPORT OF WHEELING AND LAKE ERIE RAILWAY COMPANY'S MOTION TO ENFORCE CASH COLLATERAL ORDERS

Now comes Wheeling and Lake Erie Railway Company ("Wheeling") and, pursuant to ¶2.F of the Court's March 27, 2014 Scheduling Order (the "Enforcement Scheduling Order") [D.E. # 794], submits this Supplemental Brief in Support of its Motion to Enforce Cash Collateral Orders (the "Enforcement Motion") [D.E. # 603]. Since filing the Enforcement Motion, the parties have engaged in briefing on the issues raised therein (*see e.g.,* Trustee's Objection to Wheeling & Lake Erie Railway Company's Motion to Enforce Cash collateral Orders (the "Objection") [D.E. # 707]) and have conducted additional discovery pursuant to the Enforcement Scheduling Order. Furthermore, in a related matter, this Court issued a final ruling on the Trustee's Motion for Order (I) Authorizing Assignment of Tax Credits and (II) Granting Related Relief (the "45G Motion") [D.E. # 463] that bears directly on the merits of the Enforcement Motion, and has preclusive effect. The upshot of these events is clear: Wheeling is inarguably entitled to the relief in the Enforcement Motion, including (a) a comprehensive accounting of accounts receivable, collected and uncollected, including so-called Canadian Receivables[1] and the proceeds thereof; (b) turnover of all proceeds of accounts receivable

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[1] Unless otherwise noted, defined terms herein shall have the same meanings as ascribed to them in the Enforcement Motion.

(including Canadian Receivables[2]) that constitute Wheeling's collateral; and (c) provision of additional adequate protection as may be needed to account for the Debtor's expenditure of Wheeling collateral.

Relevant Procedural History

1. On October 7, 2013, Wheeling initiated an adversary proceeding seeking a declaratory judgment as to the extent and priority of its security interest in property of the Montreal, Maine & Atlantic Railway Company's ("MMA's" or the "Debtor's") estate (the "Adversary Proceeding"). The Adversary Proceeding was assigned adversary case no.13-1033.

2. On December 2, 2013, the Trustee filed the 45G Motion.

3. On December 9, 2013, Wheeling filed an opposition to the 45G Motion, limited in effect to the issues related to the disposition of the payments for tax credits which were at stake in that Motion [D.E. # 470].

4. On December 17, 2013, the Court entered an order granting, in part, the 45G Motion but reserving the rights of the Trustee and Wheeling as to the proceeds (the "Net Funds") of that certain Track Maintenance Agreement, which was the subject of the 45G Motion (the "12/17 Order") [D.E. # 511]. The 12/17 Order scheduled an evidentiary hearing for January 23, 2014 "to determine the validity, priority, and extent of Wheeling's security interest in and to the Net Funds . . . ." 12/17 Order, ¶ 7.

5. Following issuance of the 12/17 Order, the parties conducted discovery regarding the issues related to the 45G Motion, including the validity, priority and extent of Wheeling's security interest in and to the Net Funds.

6. On January 20, 2014, the Trustee filed a Consent Motion for Order Staying Adversary Proceeding (the "Stay Motion") [Adversary Proceeding D.E. # 27]. In the Stay

[2] With one minor exception discussed *infra* at § B.

Motion, the Trustee requested that the Adversary Proceeding be stayed so that, *inter alia,* the 45G Motion could be resolved on the theory that "resolution of the [45G Motion] . . . may resolve many of the issues in the [Adversary Proceeding]." Stay Motion, ¶ 8. As an accommodation to the Trustee, Wheeling consented to the relief requested in the Stay Motion.

7. On January 21, 2014, the Court issued an order staying the Adversary Proceeding until the earlier of March 31, 2014 or entry of an order terminating the stay [Adversary Proceeding D.E. # 28].

8. On January 21, 2014, the parties provided the Court with additional briefing on the 45G issues, including arguments by the Trustee that Wheeling was not entitled to some or all of the Net Funds because, *inter alia*, such funds were the proceeds of accounts receivable of its Canadian affiliate, Montreal, Maine & Atlantic Canada Co. ("MMA Canada"), in which Wheeling had no perfected interest. D.E. ## 576, 578]. For example, in the Trustee's Brief Regarding 45G Tax Credits [D.E. # 578], the Trustee alleged:

> 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.
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> 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.

See D.E. 578, ¶¶ 5, 22.

9. Based on these allegations, among other things, the Trustee argued that Wheeling could claim no right to the Net Funds because, *inter alia*:

> 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 prepetition 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 prepetition 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.

See D.E. 578, p. 18.

10. Consistent with the 12/17 Order, the Court conducted an evidentiary hearing on the 45G Motion on January 23, 2014 (the "January 23 Hearing"). A transcript of the January 23 Hearing (the "January 23 Hearing Transcript") is attached hereto as ***Exhibit A***.

11. During the January 23 Hearing, the Court heard testimony from M. Donald Gardner, Vice President of Finance & Administration and Chief Financial Officer of MMA and MMA Canada, and the parties argued their positions orally before the Court.

12. During the January 23 Hearing, the parties agreed that the Court's decision on the 45G Motion would constitute a final judgment as to the Net Funds both for purposes of the general MMA bankruptcy and the Adversary Proceeding. *See* January 23 Hearing Transcript, pp. 52:19-25.

13. On January 30, 2014, Wheeling filed the Enforcement Motion.

14. On February 24, 2014, Wheeling took the deposition of Mr. Gardner as to issues involving, *inter alia,* the Enforcement Motion.

15. On March 5, 2014, the Trustee filed his Objection to the Enforcement Motion (the "Enforcement Objection") [D.E. # 707].

16. On March 13, 2014, the Court issued findings of fact and rulings of law as to the 45G Motion and the scope of Wheeling's security interest in the Net Funds (the "March Findings").

17. In the March Findings, the Court noted that "the parties agreed that the determination of the validity and extent of Wheeling's security interest in the [Net Funds] would have the same preclusive effect as a judgment on this issue in the [Adversary Proceeding]." March 13 Findings Transcript, p. 10:16-20 (a true and accurate copy of the March 13 Findings Transcript is attached hereto as ***Exhibit B***).

18. Among other things, in the March Findings, the Court then made following factual determination as to the so-called Canadian Receivables:

> The Canadian accounts. I stated earlier in the day today that the evidence from the Debtor's witness indicted 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.
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> 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.
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> 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.
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> 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.

19. On March 17, 2014, the Court entered a Decision and Order Regarding the Proceeds of the Sale of the Debtor's 45G Tax Credit (the "45G Order") [D.E. # 761], which adopted the March 13 Findings and held that a certain percentage of the Net Funds were subject to Wheeling's Security Interest.

20. On March 27, 2014, after conducting a preliminary hearing on the Enforcement Motion, the Court entered the Enforcement Scheduling Order. That Order provided deadlines for Wheeling and the Trustee to conduct discovery and scheduled a final evidentiary hearing on the Enforcement Motion for May. Enforcement Scheduling Order, ¶¶ 1, 2. It also provided that if MMA Canada or MMA Canada's court appointed Monitor "desire to intervene in this contested matter, then they shall be permitted to do so . . . ." *Id.*, ¶ 3.

21. On April 15, 2014, Wheeling took the deposition of Mr. Gardner consistent with the terms of the Enforcement Scheduling Order. A true and accurate copy of the transcript of that deposition (together with the exhibits introduced at the deposition) (the "Gardner Transcript"), is attached hereto as ***Exhibit C***.

22. To date, neither MMAC nor the Monitor have moved to intervene in this contested matter.

ARGUMENT

A. INTRODUCTION: WHAT IS AT STAKE IN THE ENFORCEMENT MOTION

By the Enforcement Motion, Wheeling seeks an order of this Court compelling the Debtor and the Trustee to comply with the Court's prior orders entered with respect to cash collateral. To date, the Court has issued six (6) Orders authorizing the Trustee, upon the terms and conditions stated therein, to utilize cash collateral of Wheeling (collectively, the "Cash Collateral Orders") [D.E. ## 51, 98, 173, 255, 274 and 376]. Wheeling's cash collateral consists

of accounts receivable and inventory of the Debtor. The effect and import of these Cash Collateral Orders, insofar as relevant to the Enforcement Motion, can be easily summarized, as follows: (1) for the period between August 7, 2013, the Petition Date, and October 18, 2013 (the "First Cash Collateral Period"), the Trustee was granted authority to utilize Wheeling's cash collateral in the ordinary course of business, and, in exchange, the Trustee was required to provide Wheeling with adequate protection in the form of a "replacement lien" in accounts receivable and inventory generated or acquired by the Debtor after the Petition Date, and a first priority "superpriority" administrative claim, pursuant to 11 U.S.C. § 507(b), which would cover any shortfall in the replacement lien granted to Wheeling.

For the period between October 19, 2013 and through the current date (the "Second Cash Collateral Period"), the Trustee ceased to have authority to use Wheeling cash collateral, and instead, he was required to (i) turn over to Wheeling collections made by the Trustee of all pre-petition accounts receivable that constituted Wheeling collateral; and (ii) to pay Wheeling the cost of inventory used by the Trustee during the Second Cash Collateral Period. *See* Sixth CC Order, generally.

Wheeling believes that the Trustee has failed to comply with the Cash Collateral Orders in both the First Cash Collateral Period and the Second Cash Collateral Period. Specifically, in the First Cash Collateral Period, the Trustee has failed to properly account for and provide adequate protection for use of Wheeling's cash collateral; and in the Second Cash Collateral Period, he has failed, in derogation of the provisions of the Sixth CC Order, to pay over to Wheeling proceeds of accounts receivable collected by the Trustee and that constitute Wheeling's collateral. All parties acknowledge that Wheeling has a valid, perfected, and enforceable first priority security interest in accounts receivable of the Debtor. At the same time,

the parties acknowledge that Wheeling's security interest in accounts receivable of MMA Canada, a wholly owned subsidiary of the Debtor, is not perfected by a public filing in Canada. This difference in perfection status makes it critical to determine what accounts receivable are accounts receivable of the Debtor, as to which Wheeling has a valid, and perfected security interest, and what accounts receivable are accounts receivable of entities other than the Debtor, as to which Wheeling's security interest is not perfected. The former category of accounts are subject to the terms of the Cash Collateral Orders; the latter are not. The issue presented by the Enforcement Motion is that in both the First and Second Cash Collateral Periods, the Trustee has incorrectly and impermissibly treated a substantial amount of the Debtor's accounts receivable as not being subject to Wheeling's security interest, to the detriment of Wheeling.

While it is undisputed that all invoices for rail freight services for the Debtor's entire integrated rail system are issued by the Debtor, and are recorded on the Debtor's books and records as accounts receivable of the Debtor, the Trustee has nevertheless taken the position that some of these invoices are accounts receivable of MMA Canada, or "Canadian Receivables." Thus, to the extent that such invoices are for freight services that were rendered to Canadian customers or other railroads over Canadian track, the Trustee has ignored the Debtor's accounting system and treated those accounts receivables as property of MMA Canada, not subject to Wheeling's security interest, and not subject to the protections provided in the Cash Collateral Orders.

This is impermissible conduct by the Trustee. As will be addressed in more detail below, this Court has already ruled, in the context of the 45G Motion, that the Trustee's contentions are unsustainable, and that ***all*** accounts receivable generated by the rendition of freight services by the Debtor's integrated rail system, whether in the U.S. or Canada, are accounts receivable ***of the***

Debtor, whether the account debtors are or are not Canadian entities and whether the freight movements occur or do not occur entirely within Canada.

Even apart from any prior ruling of this Court, the evidence has (and will) confirmed this reality. As a result, the Trustee was required by the Cash Collateral Orders to treat what he has come to call "Canadian Receivables" as accounts receivable of the Debtor and thus Wheeling cash collateral. As such, all accounts receivable, including those denominated by the Trustee as "Canadian Receivables" are Wheeling collateral and the Trustee was under a duty to treat them as such and to comply with the Cash Collateral Orders. He has failed to do so, and this failure requires the following remedial orders to be entered by the Court:

1. As to the First Cash Collateral Period, Wheeling is entitled to (a) a full accounting of the collection and use of all accounts receivables, Canadian Receivables or otherwise, and the use of the proceeds thereof; (b) adequate protection in the form of a replacement lien in post-petition accounts, including so called Canadian Receivables, to the full extent of the Trustee's post-petition collection and use of so-called Canadian Receivables; and (c) a superpriority claim, pursuant to 11 U.S.C. § 507(b) to the extent of any shortfall in the replacement lien; and

2. As to the Second Cash Collateral Period and going forward, Wheeling is entitled to (a) payment of the amount of all accounts receivable collected by the Trustee during this period, including collections of so-called Canadian Receivables, and (b) to the extent that Canadian Receivables have heretofore been collected and spent by the Trustee, Wheeling is entitled to adequate protection for the use of such accounts, in the form of a replacement lien and a superpriority claim under § 507(b) of the Bankruptcy Code.

In providing the necessary relief, the Court should be aware of the dollars involved, for both cash collateral periods. We begin with the Second Cash Collateral Period, which is ongoing. According to reports issued by the Trustee, as recently as April 29, 2014, it appears that the Trustee has collected, during the Second Cash Collateral Period, and through April 25, 2014, a total of not less than $541,856 in so-called Canadian Receivables which the Trustee has failed to

remit to Wheeling[3]. In addition, the MMA Canada A/R aging included as part of the Trustee's April 25, 2014 reporting, show a total of $515,140.39 in outstanding, uncollected Canadian Receivables, the collection of which must be turned over to Wheeling. Thus, for the Second Cash Collateral Period, Wheeling is entitled to turnover and/or adequate protection of more than one million dollars.

As for the First Cash Collateral Period, Wheeling is entitled to a full accounting as to all so-called Canadian Receivables collected by the Trustee and used in the operation of the Debtor. Once that accounting is made, Wheeling is entitled to a replacement lien on post-petition accounts receivable of the Debtor, as well as a superpriority claim pursuant to § 507(b) of the Bankruptcy Code.

B. THE COURT'S RULING ON THE CANADIAN ACCOUNTS IN THE MARCH 13 FINDINGS ENTERED WITH RESPECT TO THE 45G MOTION IS BINDING ON THE TRUSTEE FOR ALL PURPOSES, INCLUDING RESOLUTION OF THE ENFORCEMENT MOTION.

As a threshold matter, it must be pointed out that given the March 13 Findings, there is no need for an evidentiary hearing on the Enforcement Motion. The portions of those Findings related to the Canadian Receivables (see ¶ 18, *supra*) are binding on the Trustee and they conclusively establish that ***all*** accounts receivable generated by the rendition of freight services over and upon the Debtor's integrated American and Canadian rail system are accounts receivable of the Debtor. These include the so-called Canadian Receivables. They are all part of Wheeling's valid, enforceable and duly perfected collateral[4] and, therefore, are subject to the terms of the Cash Collateral Orders, including the Sixth CC Order. Because the March 13

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[3] These amounts for collections that the Trustee has failed to remit, and for outstanding Canadian Receivables, are taken from the Trustee's own financial reports. Attached hereto as ***Appendix 1*** is an explanation of how it was calculated, utilizing the Trustee's most recent set of reports, which are current as of April 25, 2014. If necessary, Wheeling will present testimony from Mr. Gardner at next week's hearing confirming the information contained in Appendix 1.

[4] With one minor exception, as discussed below in § B.

Findings and the 45G Order together constitute a final judgment in the 45G contested matter that the parties agreed "would have the same preclusive effect as a judgment . . . in the [Adversary Proceeding,]" (*see* ¶ 17, *supra*), principles of *collateral estoppel* and/or law of the case bar the Trustee from relitigating the issue of whether the Canadian Receivables are MMA's property and Wheeling's collateral[5]. It has already been determined by this Court that they are both.

Collateral estoppel (or issue preclusion) bars re-litigation of issues actually adjudicated in a proceeding, such as the ownership of so-called Canadian Receivables, if (1) the issue in the pending case is the same as that decided in a prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was determined by a valid and binding final judgment or order; and (4) the determination of the issue was essential to the judgment. *E.g., Keystone Shipping Co. v. New England Power Co.,* 109 F.3d 46, 51 (1st Cir. 1997); *Grella v. Salem Five Cent Sav. Bank,* 42 F.3d 26, 30 (1st Cir. 1994). All of these elements are present here:

1. The issue in the this contested matter is the same as that determined in the 45G litigation (and by extension and agreement, the Adversary Proceeding): in both proceedings, the Court has been asked to determine whether the so-called Canadian Receivables are, in fact, property and accounts receivable of MMA and therefore subject to Wheeling's security interest[6]. The Trustee concedes the prior litigation and determination of this very issue in his Motion for an Order Amending or Striking Findings of Fact Pursuant to Fed.R.Bankr.P. 7052, filed in the 45G proceedings (the "Rule 52 Motion") [D.E. # 807].

2. The Canadian Receivables issue was actually litigated in the context of the 45G litigation, as described in detail in Wheeling's Objection to the Trustee's Motion for an Order Amending or Striking Findings of Facts Pursuant to Fed.R.Bankr.P. 7052 (the "Rule 52 Objection"), which is incorporated herein by reference[7].

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5 The application of estoppel principals to the March 13 Findings in general, and the Canadian Receivables in particular, was eminently foreseeable based on a back-and-forth between the Court and Wheeling's counsel during the January 23 Hearing. January 23 Hearing Transcript, pp. 151:9-152:18. Moreover, the Trustee himself anticipated such a result, as evidenced by his Motion for an Order Amending or Striking Findings of Fact Pursuant to Fed.R.Bankr.P. 7052, which warns that the March 13 Findings could "potentially prejudice[]" the Trustee in pending matters, including the Enforcement Motion.

6 The doctrine of collateral estoppel can be invoked as to different matters arising in the same bankruptcy case. *E.g., In re All American Semiconductor, Inc.* 427 B.R. 559, 570-71 (Bankr. S.D.Fla. 2010)

7 The Rule 52 Objection was filed substantially contemporaneously with this Supplemental Brief.

3. The Canadian Receivables issue was decided in the context of a valid and final binding judgment. *See,* ¶ 17 and 19, *supra*; 45G Order.

4. The determination of the issue of ownership of the Canadian Receivables was essential to the judgment because it formed the linchpin of many of the Trustee's defenses to Wheeling's claims in and to the so-called Net Funds at issue in the 45G proceeding. Wheeling directs the Court's attention to its Rule 52 Objection for a more complete discussion of the centrality of this issue to the 45G litigation and the March 13 Findings.

Because all of the elements of issue preclusion are present, the Trustee is estopped from arguing in the context of the Enforcement Motion litigation that the Canadian Receivables are not property of and accounts receivable of MMA and therefore subject to Wheeling's security interest.

Even apart from doctrines regarding issue preclusion, the Court may also apply the doctrine of the law of the case and hold that the Trustee is bound by the March 13 Findings. "The law of the case doctrine is a judicial doctrine that promotes finality and efficiency in the judicial process by encouraging courts to follow their own decisions in any given case." *In re Pilgrim's Pride Corp.,* 442 B.R. 522, 529 (Bankr.N.D. Tex. 2010) (internal quotations and citations omitted). "As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-816 (1988) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983)); *see Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996) ("The law of the case doctrine precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided."); 18-134 <u>Moore's Federal Practice – Civil</u> § 134.20[1] ("The doctrine of the law of the case is similar [to issue preclusion] in that it limits relitigation of an issue once it has been decided, but the law of the case doctrine is concerned with the extent to which the law

applied in decisions at various stages of the same litigation becomes the governing principle in later stages.")

Importantly, the law of the case doctrine is not limited solely to legal conclusions; it also applies to factual findings and necessary inferences therefrom. *See e.g., Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1096-97 (9th Cir. 1994)("A decision on a factual or legal issue must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.") (Internal quotation marks and citations omitted.) In the bankruptcy context, the law of the case doctrine is applied not only to subsequent orders or rulings in a single adversary proceeding, but also to contested matters and among and between both types of proceedings in a single bankruptcy case. *Pilgrim's Pride,* 442 B.R. at 530.

Here, the 45G litigation and the pending Enforcement Motion are contested matters in the same Chapter 11 case, and they both implicate a common question: the scope of Wheeling's security interest in the Debtor's accounts receivable. The law of the case doctrine bars relitigation of Wheeling's perfected security interest in the Debtor's accounts receivable and the ownership of and Wheeling's interest in so-called Canadian Receivables. This is because this Court has already entered findings and conclusions of law pursuant to which it determined that there is no distinct category of so-called Canadian Receivables; all accounts receivable are accounts of the Debtor, MMA: "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. Regardless of whether the Court applies the doctrine of *collateral*

estoppel or "law of the case", the result is the same. The important goals of finality and efficiency are served only by honoring and preserving factual and legal determinations already made in this case as a result of litigation between the same parties: All accounts receivable for freight services generated by the Debtor's integrated rail system are accounts receivable of the Debtor, notwithstanding any later designation or allocation of so called Canadian Receivables.

C. EVEN IF THE MARCH 13 FINDINGS DO NOT HAVE PRECLUSIVE EFFECT, THE EVIDENCE WILL SHOW THAT ALL FREIGHT-RELATED ACCOUNTS RECEIVABLE, INCLUDING THE SO-CALLED CANADIAN RECEIVABLES, ARE IN FACT MMA RECEIVABLES SUBJECT TO WHEELING'S VALID AND PERFECTED SECURITY INTEREST.

If necessary, the evidence to be presented at the hearing on the Enforcement Motion will demonstrate — even without consideration of the preclusive effect of this Court's prior rulings — that ***all*** accounts receivable generated by the movement of freight throughout the integrated rail system of the Debtor and its affiliates are accounts receivable of the Debtor. The evidence will show (as it has already shown in prior proceedings) that the Debtor does ***all*** invoicing for freight movements throughout the integrated rail system, and records ***all*** invoices as its own accounts receivable on the MMA balance sheet, including (a) those arising under the Interline Settlement System for Canada-only rail services; and (b) accounts receivable arising for movement of freight solely in Canada on behalf of Canadian customers. The fact of the matter is that neither MMA Canada, nor any other affiliate of the Debtor, issues invoices for freight shipments. All of these invoices are issued by the Debtor and they all are recorded as the Debtor's accounts receivable. At a later point in time, revenues are allocated to MMA Canada so that it will have cash to meet its expenses and to satisfy Canadian taxing obligations. But even this allocation process has no relation to the movement of freight in Canada or elsewhere; it is motivated by entirely unrelated concerns, namely revenue allocation for tax purposes. This

entire receivable allocation process is neither unusual nor improper. The Debtor is the parent corporation and the only entity in the affiliated group that actually owns assets sufficient to operate a railroad: rolling stock, track, maintenance facilities, etc. In contrast, MMA Canada, owns no rolling stock (although it owns track), and therefore could not deliver any freight without the use of the Debtor's rolling stock. The evidence will show that the Debtor utilizes the Canadian track of its subsidiary to effectuate freight shipments when the demand arises, and then it allocates to MMA Canada a portion of its revenues, so as to cover MMA Canada expenses and tax obligations. Many corporate groups work this way. But this operational convention in no way undercuts the legal and factual conclusion that this Court has already made and would no doubt make again based on the evidence, and that is that all freight accounts receivable are accounts of the Debtor, to which Wheeling's security interest attaches in full force.

The Trustee makes the odd argument that if Wheeling prevails in enforcing its security interest as to so-called Canadian Receivables, it will have accomplished by "substantive consolidation" what it did not accomplish by compliance with the rules of perfection as to such receivables. This garbled argument is entirely circular. It presumes (a) that there is a distinct category of receivables consisting of Canadian Receivables, (b) that Wheeling is unperfected as to these receivables; and (c) that Wheeling therefore can only achieve perfection as to the same by passage through the back door — *i.e.*, "consolidation" with the Debtor's own accounts.

Unfortunately for the Trustee, the argument collapses under its own weight because its fundamental premise is incorrect: there is no distinct category of Canadian Receivables that come outside of the Debtor's accounts receivable and Wheeling's collateral. This Court has already ruled (and if necessary, the evidence will show again) that there is, in reality, no separate category of Canadian Receivables. It is nothing more than an artificial distinction created by the

Trustee after the filing of this case (it is a distinction that the Debtor never employed prior to the filing of this case) to improperly free assets from the ambit of Wheeling's security interest and the duties and obligations imposed by the Cash Collateral Orders[8]. ***All*** accounts receivable of the integrated rail system operated by the Debtor with the assistance of its affiliates are accounts receivable of the Debtor. The premise of the Trustee's substantive consolidation argument is wrong, and that makes its conclusion wrong as well.

As is demonstrated by both the law of this case, as well as the relevant evidence, ***all*** accounts receivable generated by the Debtor's integrated rail system are in fact accounts receivable of the Debtor, that Wheeling has a valid, perfected and enforceable security interest in the same, and that it is entitled to the protections afforded by the Cash Collateral Orders as to the same.

D. THE DOCTRINES OF WAIVER, EQUITABLE ESTOPPEL, AND LACHES DO NOT DIMINISH WHEELING'S RIGHT TO BRING THE ENFORCEMENT MOTION

The Cash Collateral Orders establish a duty of the Debtor and the Trustee to provide adequate protection to Wheeling as a condition for the use, collection and disposition of Wheeling's collateral. It is telling that the Trustee first attempts to evade that duty by adopting an arbitrary and artificial definition of accounts receivable (one that was apparently created just for this case, and following the Petition Date; *see* fn. 7, *supra*) and then claims that Wheeling has been lax by not discovering his artifice in time.

As to the First Cash Collateral Period, which ended on October 18, 2013, there was simply no reason for Wheeling to investigate the Trustee's cash collateral reporting. The Cash Collateral Orders covering this period are entirely self-executing: as to any accounts that were

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[8] Mr. Gardner testified at his deposition that he created the separate Canadian Receivables categories at the instruction of the Trustee. Gardner Transcript, pp. 19:25-20:9.

collected and used by the Trustee, the Trustee is and was obligated to provide a replacement lien or a superpriority claim. If the Trustee adopts an artifice to categorize accounts, he does so at his peril, and must account when the time comes to assess the adequacy of the replacement lien ordered by the Cash Collateral Orders. There is nothing in the Cash Collateral Orders or in the Bankruptcy Code that now bars a full and complete accounting for the use of cash collateral, which necessarily requires determination of what accounts of Wheeling were actually used. That is ***precisely*** what is at issue in the Enforcement Motion, and it is clear that each of the Cash Collateral Orders covering the Cash Collateral Period expressly reserve for a later accounting and determination the exact nature and extent of Wheeling's interest in cash collateral. Typically, that accounting and determination occurs later in a Chapter 11 case after the secured creditor has liquidated its collateral and its position has been determined. Wheeling asks that it occur now. There is no place for application of any doctrines of waiver, estoppel or laches — all rights have been expressly reserved, and the Trustee should gain no traction by having invented a clever artifice.

As to the issues arising from the Trustee's use of cash collateral during the Second Cash Collateral Period, it must first be noted that that period is ongoing as of the current date; it has not ended. As such, it is odd to suggest that there has been any undue delay or waiver of any rights. Surely, Wheeling did not, as the Trustee suggests, "excessively delay" prosecuting its rights. *See* Enforcement Objection, ¶¶ 14-20. To the contrary, as soon as Wheeling learned that the Canadian Receivables may have in fact been MMA's property and therefore subject to Wheeling's security interest, Wheeling took immediate action by confirming that that was the case and filing the Enforcement Motion, on January 30th.

Indeed, Wheeling first raised the issue in the Adversary Proceeding commenced in October of last year, wherein Wheeling sought a determination of the full extent of its security interests — including its security interests in all accounts receivable, including Canadian Receivables. *See* ¶ 1, *supra.* As the Court is aware, at the request of the Trustee, and in deference to the Trustee's pre-occupation with the sale of the railroad and other pressing matters, Wheeling consented to a general stay of the adversary proceeding, including discovery therein, so the parties could focus on discrete issues that required immediate resolution, such as the 45G proceedings. *See* ¶¶ 6, 7 *supra,* Stay Motion generally. That stay — requested by the Trustee and agreed to as a courtesy by Wheeling, encompassed discovery that Wheeling would have taken on various financial issues, including the mechanics of the MMA/MMA Canada receivables process. Perhaps if Wheeling had not given the Trustee the courtesy of the stay, it would have discovered the artificial receivables reclassification through discovery in the Adversary Proceeding.

As stated, the Stay Motion and the order approving the same expressly contemplated that certain matters would proceed notwithstanding the stay. Thus, while preparing for the January 23 Hearing on the 45G Motion, Wheeling learned for the first time (during an interview with Mr. Gardner) that MMA Canada did not send out its own invoices for Canadian freight movements, did not book the resulting accounts receivable on MMA Canada's balance sheet, and did not receive payments for the same from customers. Wheeling then elicited testimony from Mr. Gardner under oath at the January 23 Hearing[9] that confirmed the fact that the Canadian Receivables are in fact Wheeling's collateral. Wheeling's counsel went on to note that this new

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[9] *See* Rule 52 Objection at Argument § B for a detailed description of Mr. Gardner's testimony from the January 23 Hearing.

development was a concern and that Wheeling would shortly take action; the Court in turn acknowledged that Wheeling was not waiving any rights vis-à-vis this issue:

> The Court: Let me ask you a question.
> Mr. Marcus: Yeah.
> The Court: We have been collecting and liquidating receivables. Has there been a deduction on the MMA side or the Wheeling side with respect to Canadian receivables?
> Mr. Marcus: The MMA side has withheld payment of what is describes as Canadian receivables. We don't acquiesce in that. This court --
> The Court: ***That's not an issue that's before me today but it is nonetheless an issue.***
> Mr. Marcus: It's an issue and the Court will be hearing more about it later.
> ***The Court: All right. So you haven't acquiesced to that deduction but you -- as far as you know today you haven't received the benefit of any Canadian receivables. That's –***
> Mr. Marcus: Well, I -- I -- I --
> The Court: ***-- something you might chase after another time.***

January 23 Hearing Transcript, pp. 151:9-152:1 (emphasis added). This Enforcement Motion was filed a week after the January 23 Hearing[10].

In a nutshell, Wheeling placed in issue the full extent of its security interests, including its interests in accounts receivable, by filing its Adversary Proceeding on October 7, 2013. It then agreed to defer and stay discovery in and prosecution of this Adversary Proceeding as an accommodation to the Trustee. Notwithstanding this stay, Wheeling learned of the Trustee's artifice as to Canadian Receivables in January of this year and Wheeling's counsel made an express reservation of rights on the record of this Court at the January 23 Hearing pertaining to the accounts receivable issue.

This timeline demonstrates that Wheeling was in no way "idle" or dilatory in protecting its interests. It did not waive a "known right"; to the contrary, it slowed down its discovery and prosecution of the Adversary Proceeding to accommodate the Trustee, and moved immediately

[10] It should be noted that the Adversary Proceeding was still stayed at this point.

to protect its interests after learning that what MMA was calling "Canadian receivables" were nothing of the sort. *See e.g., OfficeMax Inc. v. Sousa*, 773 F. Supp. 2d 190, 235 (D. Me. 2011) (quoting *Blue Star Corp. v. CFK Props., LLC,* 2009 ME 101, ¶ 26); *DiVittorio v. HSBC Bank, USA, N.A. (In re DiVittorio)*, 430 B.R. 26, 52 (Bankr. D. Mass. 2010) ("Regardless of the context, courts unanimously define waiver as the intentional relinquishment of a known right.")

While further argument would hardly seem necessary, the equitable estoppel doctrine is completely inapplicable in this case because that doctrine is only applicable where a party ***knows*** he has a given right and does not exercise it, to the detriment of the counter-party. *E.g., Ramirez-Carlo v. United States*, 496 F.3d 41, 48 (1st Cir. P.R. 2007); *Vistamar, Inc.* v. *Fagundo-Fagundo*, 430 F.3d 66, 73 (1st Cir. 2005). Again, Wheeling was unaware that the Canadian receivables were its collateral until earlier this year. When it learned this was the case, it took immediate action to remedy the situation. This is ***not*** a situation where Wheeling sat on its knowledge to the detriment of the Trustee; in reality, the Trustee sat on knowledge to the detriment of Wheeling.

Finally, laches is also inapplicable for the same reasons: Wheeling did not delay (unreasonably or otherwise) in bringing the Enforcement Motion. *See e.g., Iglesias v. Mutual Life Ins. Co.,* 156 F.3d 237, 243 (1st Cir. 1998) (the equitable doctrine of laches requires, *inter alia,* a showing that a party's delay in bringing an action was "unreasonable"). If there was any "delay" it arose out of Wheeling's agreement to defer prosecution of its own adversary proceeding — a deferral agreed upon at the request of, and as an accommodation to, the Trustee. If there is anything that is unreasonable, it is the Trustee's post-petition adoption of an account receivable artifice in an effort to deprive Wheeling of the value of its collateral. This is simply not a case where Wheeling can be held accountable under doctrines of laches or *estoppel.*

CONCLUSION

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

A. Granting it the specific relief requested in the Enforcement Motion; and

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

Dated: April 30, 2014

/s/ George J. Marcus
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David C. Johnson
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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

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