

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC  
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670  
Chapter 11

**TRUSTEE'S MOTION FOR PROTECTIVE ORDER WITH RESPECT TO WHEELING  
& LAKE ERIE RAILWAY COMPANY'S NOTICE OF DEPOSITION**

Robert J. Keach, the chapter 11 trustee (the "Trustee") appointed in the above-captioned chapter 11 case of Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor"), by and through his undersigned counsel, hereby moves this Court for a protective order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Rule 7026(c) of the Federal Rules of Bankruptcy Procedure, with respect to the Notice of Deposition served by Wheeling & Lake Erie Railway Company ("Wheeling") on May 27, 2014 (the "Notice of Deposition"). In support of this motion, the Trustee states as follows:

1. After August 7, 2013 (the "Petition Date"), Wheeling, the Debtor, and/or the Trustee agreed on the terms upon which the Debtor and the Trustee would be authorized to use Wheeling's cash collateral. To date, the Court has entered six interim orders (collectively, the "Cash Collateral Orders") authorizing the Debtor and/or the Trustee to use Wheeling's cash collateral. *See* Docket Nos. 51, 98, 173, 255, 374, and 376. Each of the Cash Collateral Orders was entered with Wheeling's consent.

2. Pursuant to the Cash Collateral Orders, the Debtor and/or the Trustee or his professionals have provided extensive financial reporting to Wheeling on a weekly basis. An example of that reporting is attached hereto as **Exhibit A**.

3. Nevertheless, on January 30, 2104, Wheeling filed its Motion to Enforce Cash Collateral Orders (the “Wheeling Enforcement Motion”) [D.E. 603] seeking, *inter alia*, a complete accounting of all collections of accounts receivable received and expended by the Debtor, as well as a complete accounting of all accounts receivable generated by the Debtor after the Petition Date. In response, the Trustee filed his Objection to Wheeling & Lake Erie Railway Company’s Motion to Enforce Cash Collateral Orders (the “Trustee Objection”) [D.E. 707].

4. On May 8, 2014, the Court held a hearing on the Wheeling Motion (the “May 8<sup>th</sup> Hearing”), at which the parties agreed to exchange information related to the Debtor’s and the Trustee’s use of cash collateral (the “Accounting”) on an informal basis. An informal transcript of the relevant portion of the May 8<sup>th</sup> Hearing is attached hereto as **Exhibit B**.

5. As set forth in the Minute Entry dated May 8, 2014 (the “Minute Entry”), the Trustee and Wheeling were instructed to “exchange accountings and responses informally” prior to a hearing scheduled for June 10, 2014. Minute Entry, at 1.<sup>1</sup> Moreover, “[t]o the extent that there is any dispute, an evidentiary hearing will be held to the fullest extent possible. With respect to matters that cannot be resolved beyond arithmetic issues, a preliminary/pretrial will be held.” Id.

6. In addition to the documents and information that has already been provided to Wheeling, the Trustee delivered to Wheeling additional information related to the Accounting in compliance with the Minute Entry. In particular, the Trustee’s professionals met with Wheeling’s lawyers on May 19, 2014. During that meeting, the Trustee’s professionals provided detailed information about the use of cash collateral since the Petition Date, and explained how the information was derived.

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<sup>1</sup> At the direction of the Court, the hearings originally scheduled for June 10 in this case have been moved to June 11, 2014. Because Wheeling’s lead counsel was not available on June 11, the Wheeling matters set for hearing on June 10 were rescheduled for June 23, 2014.

7. Despite the plain language of the Minute Entry, Wheeling served the Notice of Deposition on the Trustee and the Debtor. A copy of the Notice of Deposition is attached as **Exhibit C**. The matters for examination outlined in the Notice of Deposition include, *inter alia*, the “allegations and legal assertions raised by [the Wheeling Enforcement Motion] and Supplemental Brief in Support of [the Wheeling Enforcement Motion],” the “allegations and legal assertions made in the [Trustee’s Objection],” and “[a]ccounting with respect to [the Debtor’s] accounts receivable balances.” Notice of Deposition, at Exh. A.

### **RELIEF REQUESTED**

8. By this Motion, the Trustee requests that the Court enter an order prohibiting Wheeling from taking the deposition of the Trustee or his designated representative in accordance with the Notice of Deposition. Specifically, the Trustee does not believe that the estate should bear the expense of further formal discovery by Wheeling before the conduct of the preliminary hearing that was originally scheduled for June 10, 2014.

### **BASIS FOR RELIEF**

9. Pursuant to Bankruptcy Rule 7026(c), “[a] party or any person from whom discovery is sought may move for a protective order . . . .” Fed. R. Bankr. P. 7026(c)(1).

The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one of more of the following:

- (A) Forbidding the disclosure or discovery;
- (B) Specifying the terms, including time and place, for the disclosure or discovery;
- (C) Prescribing a discovery method other than the one selected by the party seeking discovery; [and]
- (D) Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; . . .

Id.

10. In the current case, there is undoubtedly good cause for the Court to enter a protective order to protect the Trustee and the Debtor's estate from the undue burden and expense of additional discovery before the preliminary hearing set by the Court (which is now scheduled for June 23, 2014). Wheeling's intended deposition serves no practical purpose on the Accounting issue, and is beyond the limited scope of informal cooperation the parties agreed to undertake between the May 8<sup>th</sup> hearing and the next hearing. Simply put, the deposition is premature at this point.

11. As noted above, the Court ordered, among other things, the parties to "exchange accountings and responses informally." Minute Entry, at 1. The Court also ruled that, "[t]o the extent that there is any dispute, an evidentiary hearing will be held to the fullest extent possible. With respect to matters that cannot be resolved beyond arithmetic [sic] issues, a preliminary/pretrial will be held." Id.

12. Upon information and belief, the Court ordered the conduct of a preliminary, pretrial hearing on June 10, because there are multiple disputes in different procedural stages. For example, Wheeling and the Trustee are involved with:

- a. An adversary proceeding brought by Wheeling regarding the nature, extent, validity, and priority of its asserted liens;
- b. An appeal by Wheeling of the Court's order on the Travelers' insurance proceeds;
- c. An appeal by the Trustee from the Court's order on the so-called "Net Funds" derived from the contract with KM Strategic Investments relating to the 45G tax credits;
- d. A motion by the Trustee to surcharge Wheeling or its collateral pursuant to 11 U.S.C. § 506(c) (to which Wheeling has not responded yet); and
- e. The Wheeling Enforcement Motion.

The Trustee believes that other issues may surface as well. For example, there is no agreement regarding the amount of sale proceeds to be allocated to the inventory collateral sold by the Trustee to Central Maine & Quebec Railroad in the section 363 transaction authorized by the Court.

13. There is, undoubtedly, a need for a comprehensive solution to the various disputes that exist in various procedural stages. The Trustee understood that the parties would be discussing that with the Court at the hearing originally set for June 10 (but now set for June 23, 2014). In the interim, the Trustee has fully complied with the Court's orders. Wheeling has received a substantial amount of information regarding the Debtor's and then the Trustee's use of Wheeling's collateral. While Wheeling and the Trustee may have different ideas about the legal consequences of that use, there can be no serious argument that Wheeling has received all of the information it needs in order to assess the nature and extent of its claims. Wheeling has taken at least three depositions of the Debtor's former CFO. Wheeling has received all of the weekly reporting mandated by the Cash Collateral Orders. The Trustee's professionals have had several telephone calls with Wheeling's lawyers and, as noted above, the Trustee's professionals met with Wheeling's lawyers after the May 8<sup>th</sup> Hearing in order to review and discuss the informal accounting provided to Wheeling.

14. At some point—and the Trustee maintains that that point is now—the Court should halt the scatter-shot discovery that Wheeling wants to conduct. As ordered by the Court, the parties should attend the next scheduled hearing and be prepared to discuss a comprehensive and efficient mechanism for resolving the many disputes between Wheeling and the estate. There is no need for Wheeling to have additional discovery right now.

15. In light of the Trustee's continued and thorough disclosure of financial information, the only outstanding issues and/or disputes related to the Accounting, if any, are limited to those beyond the arithmetic issues, which is the subject of the informal exchange of information between the parties. Such issues, pursuant to the Minute Entry, will be the subject of a "preliminary/pretrial" and, eventually, "an evidentiary hearing." Id. Nevertheless,

Wheeling attempts to place the proverbial cart before the horse and seeks information beyond the mere mathematical issues related to the Accounting in direct violation of the Minute Entry.

16. As set forth in the Notice of Deposition, the matters for examination of the contested depositions include, *inter alia*, the Debtor's accounts receivable balance as of the Petition Date, the Debtor's accounts receivable balance as of October 18, 2013, the Debtor's accounts receivable as of May 31, 2014, and the collections of accounts receivable since August 7, 2013. *See* Notice of Deposition, at Exh. A. As such, Wheeling's request to depose the Trustee at this time can only be for the purpose to seek information beyond the limits set by this Court. Accordingly, a protective order is necessary to protect the Trustee and the Debtor from the undue burden and expense of a deposition before the preliminary hearing that the Court set at the conclusion of the May 8<sup>th</sup> Hearing.

17. The Trustee has in good faith conferred with Wheeling in an effort to resolve this dispute without the Court's involvement.

Dated: June 3, 2014

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

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