

**RELIEF REQUESTED  
WITHOUT A HEARING**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MAINE**

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
<b>MONTREAL MAINE &amp; ATLANTIC RAILWAY, LTD.</b>	)	<b>Case No. 13-10670</b>
	)	
	)	
<b>Debtor.</b>	)	

**MOTION OF MAINE NORTHERN RAILWAY COMPANY AND NEW BRUNSWICK  
SOUTHERN RAILWAY COMPANY LIMITED FOR RELIEF FROM THE  
AUTOMATIC STAY**

Maine Northern Railway Company (“Maine Northern”) and New Brunswick Southern Railway Company Limited (“New Brunswick” and collectively with Maine Northern the “Movants”) hereby submit this motion (the “Motion”) pursuant to Fed. R. Bankr. P. 4001 and Local Bankruptcy Rules 4001-1 and 9013-1 for relief from the automatic stay and, in support of their Motion, Movants respectfully state the following.

**PROCEDURAL BACKGROUND**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicate for the relief requested herein is 11 U.S.C. § 362(d).

**BACKGROUND AND FACTS**

3. On or about August 7, 2013 (the “Petition Date”), Montreal, Maine & Atlantic Railway, Ltd. (“MMA”) filed the above captioned voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

4. Prior to the Petition Date, and thereafter until MMA sold its rail operations, MMA and the Movants had a long and multifaceted business relationship in which both sides supplied

services to the other. As a result, at the time MMA filed for bankruptcy Maine Northern and New Brunswick were both owed money by MMA and owed money to MMA.

5. Upon information and belief, prior to the Petition Date, Wheeling and Lake Erie Railway Company (“Wheeling”) provided MMA with a revolving credit facility under which it made loans to MMA, in the maximum amount of \$6,000,000.00 (the “Revolving Loans”), and was granted a security interest in, among other things, MMA’s accounts receivable to secure MMA’s obligations to repay the Revolving Loans.

6. On July 25, 2014 this Court entered an order, that among other things, modified the automatic stay under section 362 of the Bankruptcy Code in order to permit Wheeling to seek to enforce its rights, if any, with respect to MMA’s outstanding accounts receivable.

7. On August 14, 2014, Wheeling filed an action against the Movants in the United States District Court for the District of Maine [Case No. 14-325] (the “District Court Case”) seeking to collect on the outstanding accounts receivable that the Movants allegedly owed to MMA.

8. In the District Court Case, Movants have, among other things, asserted that Wheeling’s claims are barred as a result of Movants’ right of setoff that accrued prior to the Movants’ receipt of authenticated notification from either Wheeling or MMA of Wheeling’s purported security interest in MMA’s accounts receivable.

9. Movants’ records indicate that as of the Petition Date, MMA owed Maine Northern \$355,101.19 and MMA owed New Brunswick \$2,164,471.30. Movants’ records also indicate that as of the Petition Date Maine Northern owed MMA \$265,367.66 and New Brunswick owed MMA \$734.90. There is some dispute between Wheeling and the Movants as to the pre-petition amounts owed by each side.

10. Movants hereby request relief from stay to enable Movants to (a) exercise their valid right of setoff<sup>1</sup> to the extent the District Court determines, in a final order in the District Court Case that is no longer subject to appeal, that Movants' rights of setoff are superior to Wheeling's claimed security interest in MMA's accounts receivable, and (b) serve discovery upon MMA regarding the amounts due and owing from MMA to Movants and from Movants to MMA as of the Petition Date, in the unlikely event the automatic stay is determined to apply to such discovery.

### **GROUND FOR STAY RELIEF**

11. A creditor's right of setoff is preserved in bankruptcy under section 553 of the Bankruptcy Code, although the right to exercise a setoff is subject to the automatic stay pursuant to section 362(a)(7). Bankruptcy courts routinely determine that the existence of a right of setoff in and of itself constitutes grounds for relief or modification of the stay to enable a party to exercise its right to setoff. See *In re Ealy*, 392 B.R. 408, 414 (Bankr. E.D. Ark. 2008); *In re Garden Ridge Corp.*, 338 B.R. 627, 631-32 (Bankr. D. Del. 2006); *In re Cullen*, 329 B.R. 52, 57 (Bankr. D. Iowa 2005); *In re Nuclear Imaging Sys. Inc.*, 260 B.R. 724, 730 (Bankr. E.D. Pa. 2000); *In re Flanagan Bros., Inc.*, 47 B.R. 299, 303 (Bankr. D. N.J. 1985); *Leicht v. Fifth Third Bank (In re Zaring)*, 2012 Bankr. LEXIS 2777 at n. 1 (Bankr. S.D. Ohio May 18, 2012) ("a right to setoff is 'cause' for relief from stay under 11 U.S.C. § 362(d)(1)").

12. The right of setoff enables parties that owe each other money to apply those debts against each other. *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995) (setoff avoids "the absurdity of making A pay B when B owes A."). Courts have referred to setoff as "a right grounded in concepts of fairness and equity." *In re WL Homes LLC*, 471 B.R. 349, 351 (Bankr.

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<sup>1</sup> Movants have also asserted a right to recoupment in the District Court Case, and nothing in this Motion is or should be construed as a waiver of such rights.

D. Del. 2012). While the Bankruptcy Code does not create a right to setoff, 11 U.S.C. § 553(a) provides that, with certain exceptions, “whatever right of setoff otherwise exists is preserved in bankruptcy.” *Id.* Additionally under § 553(a), in order for setoff to apply the debt must be mutual and the offsetting debts must both be pre-petition.

13. Here, while there is some dispute regarding the exact amount, which dispute will be resolved in the District Court Case, it is clear that there are outstanding pre-petition amounts owed by MMA to the Movants, and by the Movants to MMA. As a result, to the extent it is determined in the District Court Case that Movants have a valid right of setoff that is superior to Wheeling’s claimed security interest in MMA’s accounts receivable, cause exists to modify the automatic stay to permit the Movants to exercise their setoff rights.

14. The lifting of the automatic stay for the purpose of allowing the Movants to exercise their right of setoff, to the extent the District Court determines that Movants’ right of setoff is superior to Wheeling’s claimed security interest in MMA’s accounts receivable, will not hinder, burden, delay, or otherwise be inconsistent with the prompt and orderly administration of MMA’s bankruptcy estate.

15. Finally, because MMA may have in its possession certain records that are relevant to the disposition of the District Court Case, it may be necessary to serve limited discovery upon MMA. Most courts have held that serving discovery upon a debtor in a proceeding outside of the bankruptcy case, does not violate the automatic stay so long as the purpose is not to continue or further the prosecution of claims against the debtor. *See In re Miller*, 262 B.R. 499, 505 (B.A.P. 9th Cir. 2001); *In re Hillsborough Holdings Corp.*, 130 B.R. 603, 605 (Bankr. M.D. Fla. 1991); *In re Kenoyer*, 489 B.R. 103, 121 (Bankr. N.D. Cal. 2013); *Peter Rosenbaum Photography Corp. v. Otto Doosan Mail Order Ltd.* 2004 U.S. Dist. LEXIS 24292 at \*8-9 (D. N.D. Ill. November 29, 2004). In this case, the discovery would be sought solely for the purpose

of establishing in the District Court Case the Movants' defense to claims asserted against them by Wheeling. Under these circumstances, the automatic stay does not apply. To the extent, however, that it should be determined that the automatic stay does apply, Movants request relief from stay to permit them to conduct such limited discovery.

16. Pursuant to Local Rule 9013-1, the Movants have consulted with counsel for (i) MMA's Trustee, (ii) the Official Committee of Derailment Victims, and (iii) Wheeling in an effort to obtain agreement to the relief requested in this Motion. All such parties have agreed to the Motion. Accordingly, Movants respectfully request that this Court grant the requested relief without a hearing.

**WHEREFORE**, based on the foregoing, Movants respectfully request that the Court enter an Order (i) granting Movants relief from the automatic stay to permit Movants to exercise their setoff rights in the event the District Court determines that Movants' right of setoff is superior to Wheeling's claimed security interest in MMA's accounts receivable; (ii) granting Movants relief from the stay to serve limited discovery upon MMA regarding amounts owed to

and from MMA and the Movants, in the event it is determined that the automatic stay applies to the Movants' right to obtain discovery from MMA for the purpose of establishing Movants' defenses to Wheeling's claims in the District Court Case., and (iii) granting to Movants such other and further relief as the Court deems just and appropriate.

Dated: January 23, 2015

Respectfully submitted,

/s/ Alan R. Lepene

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MAINE**

**In re:** ) **Chapter 11**  
)  
**MONTREAL MAINE & ATLANTIC** ) **Case No. 13-10670**  
**RAILWAY, LTD.** )  
)  
**Debtor.** )

**ORDER GRANTING RELIEF FROM AUTOMATIC STAY**

Upon the Motion of Maine Northern Railway Company and New Brunswick Southern Railway Company Limited for Relief from Automatic Stay (the “Motion”); Robert J. Keach, as chapter 11 trustee in the above-captioned case of Montreal, Maine & Atlantic Railway, Ltd. (“MMA”), the Official Committee of Derailment Victims and Wheeling and Lake Erie Railway Company (“Wheeling”) having consented to the entry of this Order; and good cause appearing herefor; it is hereby

ORDERED, that the Motion is hereby GRANTED on the terms set forth in this Order. The automatic stay is lifted to permit Maine Northern Railway Company and New Brunswick Southern Railway Company Limited (together, “Movants”) (i) to exercise their setoff rights in the event the United States District Court for the District of Maine determines in the context of the District Court Case<sup>1</sup> that Movants have valid rights of setoff that are superior to Wheeling’s claimed security interest in MMA’s accounts receivable and (ii) to serve limited discovery upon MMA regarding amounts owed to and from MMA and the Movants, in the event it is determined that the automatic stay applies to the Movants’ right to obtain discovery from MMA for the purpose of establishing Movants’ defenses to Wheeling’s claims in the District Court Case; and further

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning given to them in the Motion.

ORDERED, that the consent of Wheeling to entry of this Order shall not constitute an admission by Wheeling that Movants or either of them have or has any valid setoff rights, or if they do, the amount thereof; and all rights and claims of Wheeling in the District Court case shall be unaffected by entry of this Order; and further

ORDERED, that this Order shall become final in fourteen (14) days unless a party in interest sooner objects, in which case the matter shall be set for hearing and considered by the Court as if this Order had not been entered.

Dated:

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United States Bankruptcy Judge

Seen and consented to:

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

**OFFICIAL COMMITTEE OF  
DERAILMENT VICTIMS**

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FOR THE DISTRICT OF MAINE**

**In re:** ) **Chapter 11**  
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**MONTREAL MAINE & ATLANTIC** ) **Case No. 13-10670**  
**RAILWAY, LTD.** )  
 )  
**Debtor.** )

**CERTIFICATE OF SERVICE**

I, Michelle S. Pottle, an employee of Pierce Atwood LLP, being over the age of 18, hereby certify that on the date set forth below I caused copies of (i) Motion of Maine Northern Railway Company and New Brunswick Southern Railway Company Limited for Relief from the Automatic stay and (ii) Proposed Order, to be served upon the parties indicated on the service list attached hereto in the manner described on said service list.

Dated: Portland, Maine  
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