

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

In re:

MONTREAL, MAINE & ATLANTIC
RAILWAY, LTD.,

Debtor.

Bk. No. 13-10670
Chapter 11

ROBERT J. KEACH, solely in his capacity as the chapter
11 trustee for MONTREAL, MAINE & ATLANTIC
RAILWAY, LTD.,

Plaintiff

v.

WHEELING & LAKE ERIE RAILWAY COMPANY

Defendant.

Adv. Proc. No. 15-____

COMPLAINT

Robert J. Keach, solely in his capacity as the chapter 11 trustee of Montreal, Maine & Atlantic Railway, Ltd. (the "Trustee"), brings this Complaint against Wheeling & Lake Erie Railway Company ("Wheeling") seeking the avoidance of transfers to Wheeling as an insider of the Debtor (as defined below), pursuant to section 544 of the Bankruptcy Code and 14 M.R.S.A § 3576 (the Uniform Fraudulent Transfer Act as adopted by the State of Maine hereinafter "UFTA").¹ In support of his Complaint, the Trustee alleges as follows:

Jurisdiction and Venue

1. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §

¹ While it is the Trustee's contention that Maine law applies in this adversary proceeding, Delaware, the Debtor's state of incorporation, has adopted a substantially identical version of UFTA to the version adopted by the State of Maine.

1334(b).

2. Venue of the above-captioned Debtor's (the "Debtor") chapter 11 case in this District is proper pursuant to 28 U.S.C. § 1409(a). Venue of this adversary proceeding in this District is proper pursuant to 28 U.S.C. § 1409(b).

3. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (E), (F) and (H). This adversary proceeding is a core matter over which the Bankruptcy Court may, consistent with the United States Constitution, exercise the judicial power of the United States of America.

4. The Trustee consents to the entry of final orders by the Bankruptcy Court in this adversary proceeding.

Parties

5. The Trustee was appointed as the Debtor's chapter 11 bankruptcy trustee pursuant to 11 U.S.C. § 1163 on August 21, 2013, and has, since that date, continued to function as the Court-supervised fiduciary of the Debtor's estate.

6. The Debtor is a corporation organized and existing under the laws of the State of Delaware, which historically conducted its business operations from its principal office in Hermon, Maine. At all times relevant hereto, Montreal, Maine & Atlantic Corporation ("MMA Corp.") owned 100% of the Debtor's stock.

7. Upon information and belief, Wheeling is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Brewster, Ohio.

Facts

Background Relevant to the Debtor and Its Financing Structure

8. On July 24, 2002, Montreal, Maine & Atlantic Railway LLC and MMA Canada (as defined below) acquired the assets of several American and Canadian railroad companies in accordance with an Asset Purchase Agreement (the “2002 APA”).

9. Pursuant to the 2002 APA, the following corporate entities became the owners or operators of what was commonly known as the Montreal, Maine & Atlantic Railway, or related businesses:

- a. The Debtor;
- b. MMA Corp.;
- c. LMS Acquisition Corporation (“LMS”);
- d. MM&A Rolling Stock Corporation (“MMA Rolling”); and
- e. Montreal, Maine & Atlantic Canada, Co. (“MMA Canada”)

(collectively, the “MMA Companies”).

10. MMA Canada is a wholly-owned subsidiary of the Debtor.

11. The 2002 APA was amended or modified several times, such that it was part of the same transaction as: (A) a December 23, 2002 Rail Funding Agreement between the Maine Department of Transportation (“MaineDOT”) and the MMA Companies (“Rail Funding Agreement I”); and (B) a January 8, 2003 Note and Warrant Purchase Agreement between the MMA Companies and certain Investors (as defined below) (the “NWPA”).²

12. On January 8, 2003, the MMA Companies entered into the NWPA with a group of corporate and individual investors (the “Investors”), including ABC Railway, Inc. (“ABC Railway”) and Larry R. Parsons (“Mr. Parsons”).

13. Under the NWPA, the Investors invested \$15,000,000 into the MMA Companies,

² In addition to Rail Funding Agreement I, MaineDOT loaned the MMA Companies the following amounts on the following dates: (A) \$3,244,000 on May 13, 2005; (B) \$2,100,073 on June 9, 2006; and (C) \$1,000,000 on June 8, 2009 (collectively with Rail Funding Agreement I, the “Rail Funding Agreements”).

in exchange for certain subordinated notes (the “Investors’ Notes”) and warrants (the “Warrants”).

14. Several years later, on March 24, 2005, the Debtor received a loan from the United States, through the FRA, pursuant to which the FRA loaned the Debtor \$34,000,000 (the “FRA Loan”).

15. The Debtor’s obligation to repay the FRA Loan was secured by, inter alia, a senior lien on the Debtor’s rail lines and related tracks and improvements, all of MMA Canada’s personal property, and all of the Debtor’s shares in MMA Canada (all as more particularly defined by the loan documents relating to the FRA Loan).

16. Several years after the FRA Loan, on or about June 15, 2009, Wheeling provided the Debtor with a line of credit of up to \$6.0 million (the “Wheeling Note”), as evidenced by a line of credit promissory note of even date.

17. To secure its obligations under the Wheeling Note, also on June 15, 2009, the Debtor entered into a security agreement with Wheeling (the “Security Agreement”).

18. The “collateral” for the Wheeling Note did not include all of the Debtor’s assets. For example, the “collateral” did not extend to real property, track, rolling stock, equipment or other operating assets of the Debtor or its affiliates and did not include certain assets pledged to the FRA in relation to the FRA Loan.

**Financial Trouble and The Sale of Rail Lines and Payment of
Certain of the Debtor’s Obligations**

19. After entering into the FRA Loan, the Debtor was unable to meet its obligations to the FRA, MaineDOT, and under the Investors’ Notes, and, accordingly, the Debtor decided to liquidate certain rail lines and others assets in an effort to reduce its debt. In light of the Debtor’s defaults, and to assist in the asset sale, on December 29, 2010, the FRA and the Debtor entered

into a “Loan Workout Agreement and Amendment No. 2 to Financing Agreement, Mortgage, and Security Agreement” (“Second Amendment to FRA Loan”).

20. The Second Amendment to FRA Loan anticipated the MMA Companies’ forthcoming sale of rail assets to the State of Maine, stating that “a condition precedent to a sale of the Lines [to] the State is the release of [FRA’s] interest in the Lines pursuant to the Mortgage and Security Agreement... so that [the Debtor] is able to convey the Lines to the State free and clear of such liens and encumbrances.”

21. On January 4, 2011, the Debtor entered into a Purchase and Sale Agreement with the State of Maine (the “P&S”), under which the Debtor agreed to sell to the State of Maine the following rail lines (with limited exceptions):

- a. The Madawaska Subdivision;
- b. The Presque Isle Subdivision;
- c. The Fort Fairfield Subdivision;
- d. The Limestone Subdivision; and
- e. The Houlton Subdivision

(collectively, the “Lines”).

22. At the time of the P&S, the MMA Companies were in default on their obligations under the NWPA, the FRA Loan, and the Rail Funding Agreements.

23. At the time of the P&S, the Debtor was not able to service its debts or pay its expenses as they became due.

24. At the time of the P&S, the Debtor was insolvent in that the fair value of its assets was less than the amount of its aggregate liabilities.

25. The purchase price of the Lines in the P&S was \$21,100,000.

26. The parties to the P&S applied \$1,000,000 of the purchase price for the Lines as a credit to the State of Maine’s claim against the Debtor under the Rail Funding Agreements,

reducing the cash component of the P&S to \$20,100,000.

27. The remaining \$20,100,000 of the purchase price in the P&S was due and payable at closing.

28. Despite have a first priority interest in the Lines, in exchange for releasing its security interest in the Lines, the FRA agreed to receive only \$2,372,934.96 of the \$21,100,000 from the sale of the Lines to the State of Maine. The payment amount agreed to by the FRA represented only the sum of the overdue principal and accrued interest on the FRA Loan.

29. The FRA agreed to release its security interest in the Lines without receiving the full amount of the proceeds of the sale of the Lines in order to provide the Debtor with much-needed working capital, allowing the Debtor to continue to operate and thereby continuing rail service for parts of the State of Maine, Vermont, and Canada.

30. Upon information and belief, the FRA would have preferred that a greater percentage of the proceeds be used for working capital and to pay its debt, but the Investors demanded full payment as a condition to allowing the transaction to occur.

31. The Second Amendment to FRA Loan provided for the following priority of payments from the proceeds of the sale of the Lines to the State of Maine (other than the payment to the State of Maine in the form of a credit as described above):

- a. First, \$2,372,934.96 to the FRA;
- b. Second, \$13,862,165.29 (plus a per diem of \$4,581.36) to the Investors;
- c. Third, \$1,082,685.79 to the Debtor; and
- d. Fourth, \$2,708,912.20, the balance of the proceeds, to Wheeling.

32. As reflected above, in connection with the sale of the Lines, the Debtor paid Wheeling not less than \$2,708,912.20, even though the FRA, not Wheeling, was entitled to the proceeds of the sale of the Lines, and Wheeling did not have a security interest in the track assets sold to generate the proceeds. Upon payment to Wheeling, the proceeds were unencumbered

proceeds from the sale of the track assets.

33. Several years after the sale of the Lines, on August 7, 2013 (the "Petition Date"), the Debtor filed its bankruptcy petition.

34. On August 8, 2013, MMA Canada commenced ancillary proceedings in the Superior Court of Canada.

Wheeling Was and Is An Insider of the Debtor

35. Upon information and belief, Mr. Parsons is an individual now or formerly residing in the State of Ohio. Mr. Parsons was, at all times material to the allegations in this Complaint, a member of the Board of Directors of the Debtor.

36. In addition to being a board member of the Debtor, Mr. Parsons was, at all times material to the allegations in this Complaint, the Chairman of the Board of Directors and the Chief Executive Officer of Wheeling.

37. Mr. Parsons owns or controls Wheeling.

38. ABC Railway is a wholly-owned subsidiary of Wheeling. ABC Railway, in turn, is a shareholder of MMA Corp., the parent of the Debtor.

39. At all times material to the allegations in this Complaint, ABC Railway owned more than 5% of the equity interests in MMA Corp.

40. ABC Railway was and is the alter ego of Wheeling.

41. Wheeling was a holder of equity securities in MMA Corp. through its subsidiary ABC Railway.

42. From June 15, 2009 to the present, Wheeling was one of the Debtor's largest secured creditors, and the credit facility provided by Wheeling provided the Debtor with proceeds needed to operate. Indeed, Wheeling had the capacity to exercise effective control over

the Debtor's operations through its administration of the credit facility.

43. Similar to Mr. Parsons, Mr. Burkhardt was, at all times material to the allegations in this Complaint, a member of the Board of Directors of the Debtor and was also the Chairman of the Debtor's Board of Directors.

44. In addition to serving in these capacities with the Debtor, Mr. Burkhardt was, at all times material to the allegations in this Complaint, also a member of the Board of Directors of Wheeling.

45. Mr. Parsons is, or was, a director of MMA Corp. and is or was a stockholder of MMA Corp., both directly and through Wheeling subsidiaries.

46. Premised on the above, among other facts, the Debtor did not deal with Wheeling at arm's-length as a typical creditor and Wheeling is an "insider" of the Debtor as that term is defined in the Bankruptcy Code and under UFTA. Indeed, the payment to Wheeling in conjunction with the payments to the Investors makes clear that Wheeling was treated more like an equity holder and insider than like an outside creditor, since the Debtor would have been far better off had it paid the proceeds to the FRA or retained such proceeds as unencumbered working capital. The payment to Wheeling was directly contrary to the Debtor's interests and was made only because of Wheeling's status as an insider, and due to the Debtor's, and Burkhardt's, relationship with Wheeling, Parsons and their alter ego, ABC Railway.

47. The creation of the Wheeling Note and its partial payoff in connection with the sale of the Lines were not arm's-length transactions, because of the closeness of the relationship between Wheeling and the Debtor.

COUNT I

(Avoidance and Recovery of Insider Preferences Pursuant to § 5(b) of the Uniform Fraudulent Transfer Act and § 544(b) of the Bankruptcy Code)

48. The Trustee repeats and realleges, as if set forth at length herein, each and every allegation of paragraphs 1-47 set forth above in this Complaint.

49. The Debtor's payment of \$2,708,912.20 to Wheeling under the circumstances of the sale of the Lines was a transfer made by the Debtor on account of the Wheeling Note.

50. The Lines were encumbered by the FRA through the FRA Loan (and were not encumbered by any interest of Wheeling relating to the Wheeling Note) but the FRA released its interest in the Lines through the Second Amendment to FRA Loan and prior to the payment to Wheeling. The payment to Wheeling in the amount of \$2,708,912.20 consisted entirely of unencumbered assets of the Debtor.

51. The Wheeling Note was an antecedent debt for purposes of UFTA.

52. The Debtor was insolvent at the time of the transfer of the proceeds of the sale of the Lines to Wheeling.

53. Wheeling and its agents knew or had reasonable cause to believe that the Debtor was insolvent at the time of the payment to Wheeling.

54. The Debtor's payment of \$2,708,912.20 to Wheeling was fraudulent as to creditors whose claims arose before the sale of the Lines, and more than one of such creditors remains a creditor to the Debtor as of the date hereof.

55. The Debtor's payment of \$2,708,912.20 to Wheeling should be avoided pursuant to the applicable provisions of UFTA and § 544(b) of the Bankruptcy Code, and Wheeling is liable for the amount of the avoided transfers pursuant to § 550 of the Bankruptcy Code.

Prayer for Relief

WHEREFORE, Robert J. Keach, in his capacity as the trustee of Montreal, Maine & Atlantic Railway, Ltd., respectfully requests that this Court: (a) avoid the \$2,708,912.20 payment to Wheeling in connection with the sale of the Lines as a fraudulent transfer and insider preference pursuant to the UFTA; (b) order Wheeling to pay to the Debtor's estate \$2,708,912.20 plus interest thereon; and (c) grant the Trustee such other and further relief as the Court deems just and appropriate.

Dated: May 26, 2015

ROBERT J. KEACH, solely in his capacity
as the chapter 11 trustee of Montreal, Maine
& Atlantic Railway, Ltd.

/s/ Sam Anderson, Esq.
Sam Anderson, Esq.
Michael A. Siedband, Esq.
BERNSTEIN SHUR
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ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Robert J. Keach, solely in his capacity as the chapter 11 trustee for Montreal, Maine & Atlantic Railway, Ltd.	DEFENDANTS Wheeling & Lake Erie Railway Company
ATTORNEYS (Firm Name, Address, and Telephone No.) Sam Anderson, Esq. and Michael A. Siedband, Esq. Bernstein, Shur, Sawyer & Nelson, P.A. P.O. Box 9729, 100 Middle Street Portland, ME 04104-5029 (207) 774-1200	ATTORNEYS (If Known) George J. Marcus, Esq. Marcus, Clegg & Mistretta, P.A. One Canal Plaza, Suite 600 Portland, ME 04101 (207) 828-8000
PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input checked="" type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Avoidance of transfers to Debtor as an insider of the Debtor, pursuant to section 544 of the Bankruptcy Code and 14 M.R.S.A § 3576	
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)	
FRBP 7001(1) – Recovery of Money/Property <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)	FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et.seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
<input type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$ 2,708,912.20 plus interest thereon
Other Relief Sought	

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Montreal Maine & Atlantic Railway Ltd		BANKRUPTCY CASE NO. 13-10670
DISTRICT IN WHICH CASE IS PENDING Maine	DIVISION OFFICE	NAME OF JUDGE Peter G. Cary
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) /s/ Sam Anderson, Esq.		
DATE May 26, 2015	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Sam Anderson, Esq.	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.