

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE

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

**NOTICE BY THE WHEELING & LAKE ERIE RAILWAY COMPANY OF INTENT TO PARTICIPATE AND BE HEARD IN PROCEEDINGS RELATED TO THE TRUSTEE’S PENDING MOTION FOR ORDER PURSUANT TO 11 U.S.C. § 542(b)**

Now comes the Wheeling & Lake Erie Railway Company (“Wheeling”) and provides notice of its intent, pursuant to 11 U.S.C. § 1109(b), to participate and be heard in connection with the contested proceedings related to the Chapter 11 Trustee’s Motion for Order Pursuant to 11 U.S.C. § 542(b) (the “Turnover Motion”) [D.E. # 124].<sup>1</sup> More specifically, Wheeling states as follows:

1. On August 7, 2013 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”). On August 21, 2013, the United States Trustee appointed Robert J. Keach, Esq. (the “Trustee”) to serve as Chapter 11 Trustee in the Debtor’s Chapter 11 case (the “Case”) pursuant to 11 U.S.C. § 1163.

2. The Debtor is a Delaware corporation that has, since January of 2003, operated in an integrated, shortline freight railroad system with its wholly owned Canadian subsidiary, Montreal Maine & Atlantic Co. (“MMA Canada”). On August 7, 2013, MMA Canada filed for

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<sup>1</sup> The Wheeling has an unconditional right to appear and be heard in this contested matter, including by presenting evidence and making oral argument. 11 U.S.C. § 1109(b). *See Term Loan Holder Comm. v. Ozer Group, LLC (In re The Caldor Corp.)*, 303 F.3d 161, 169-170 (2d Cir. 2002) (“We hold, therefore, that the phrase ‘any issue in a case [under Chapter 11]’ plainly grants a right to raise, appear and be heard on any issue regardless whether it arises in a contested matter or an adversary proceeding.”). To the extent that this Court concludes that the Wheeling does not have such an unconditional right, then this Notice should be construed as a request for permissive intervention pursuant to Rule 2018(a) of the Federal Rules of Bankruptcy Procedure, for cause, for the reasons set forth herein.

protection from creditors in a concurrent proceeding under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended.

3. Prior to the Petition Date, the Wheeling provided the Debtor with a \$6,000,000 secured line of credit (the "LOC") pursuant to the terms of a certain Line of Credit and Security Agreement dated June 9, 2009, as such agreement may have been amended, modified, renewed, or extended thereafter. In order to secure the Debtor's obligations under the LOC, the Debtor granted Wheeling a first priority security interest in and to the Debtor's accounts receivable, inventory, and the proceeds thereof, including insurance proceeds (collectively, the "Collateral"). Wheeling timely and properly perfected its security interest in the Collateral by filing a UCC-1 Financing Statement with the Secretary of State of Delaware.

4. As of the Petition Date, the Debtor had fully drawn down the LOC. As a result, as of the Petition Date, the Debtor was indebted to Wheeling in the principal amount of \$6,000,000, plus interest, fees, costs of collection and other applicable charges.

5. On or about August 7, 2013, the Debtor filed a motion seeking emergency authority to use Wheeling's cash collateral on an interim basis (the "Cash Collateral Motion") [D.E. # 4]. On August 9, 2013, following a hearing and with the consent of Wheeling, the Court issued an order authorizing the Debtor's use of Wheeling's cash collateral on a limited interim basis (the "First Cash Collateral Order") [D.E. # 51]. On August 26, 2013, following a second hearing and again with the consent of Wheeling, the Court issued a second order authorizing the Debtor's use of Wheeling's cash collateral on a limited interim basis (the "Second Cash Collateral Order") [D.E. # 98]. On September 5, 2013, following another hearing and again with the consent of Wheeling, the Court issued a third order authorizing the Debtor's use of Wheeling's cash collateral on a limited interim basis through September 13, 2013 (the "Third Cash Collateral Order") [D.E. # 173].

6. On August 30, 2013, the Trustee filed the Turnover Motion. In that Motion, he sought issuance of an order under 11 U.S.C. § 542(b) (i) compelling Irving Paper Ltd., Irving Pulp & Paper, LTD., and J.D. Irving, Ltd. (collectively “Irving”) to pay a past due balance on an account owed to the Debtor of approximately \$885,733 (the “Irving Debt”) and (ii) compelling Great Northern paper (“GNP”) to pay a past due balance on an account owed to the Debtor of approximately \$422,625 (the “GNP Debt”). According to the Turnover Motion, the Irving Debt and the GNP Debt arose from the ordinary course provision of transport services to Irving and GNP. Turnover Motion, ¶¶ 8, 9. As a result, both the Irving Debt and the GNP Debt constitute accounts receivable of the Debtor and such accounts, and any proceeds thereof, constitute the Debtor’s Collateral and further constitute Cash Collateral within the meaning of the Cash Collateral Orders.

7. The Turnover Motion notes that Irving “has . . . alleged offsets to the Irving Debt on a ‘triangular setoff’ theory based on debts owed by Debtor to an Irving affiliate, but not to Irving.” Setoff Motion, fn. 3. The Trustee noticed the Turnover Motion for an expedited hearing on September 4, 2013.

8. Prior to that hearing, both Irving and GNP filed objections to the Turnover Motion and/or to the Trustee’s request that it be heard on an expedited basis [D.E. ## 149, 151].

9. On September 5, 2013, the Court conducted a hearing on the Turnover Motion. During the hearing, the Trustee announced that he had resolved his dispute with GNP and that GNP would pay the estate the sum of \$225,000 in satisfaction of the GNP Debt. This agreement was memorialized in the Court’s September 5, 2013 Order on the Turnover Motion (the “Turnover Order”) [D.E. # 174].

10. Irving also announced during the hearing its intent to dispute the merits of the Turnover Motion based on, *inter alia*, an offset defense, including the so-called triangular offsets between and among the Debtor, Irving and certain Irving affiliates (*i.e.*, Irving-owned railroads)

alluded to by the Trustee in his pleading. With the agreement of the Trustee and Irving, the Court scheduled a continued evidentiary hearing on the Irving Debt for Monday, September 16, 2013 at 9:00 a.m. (the “Irving Evidentiary Hearing”) [D.E. # 163].

11. Wheeling has standing to participate in the Irving Evidentiary Hearing pursuant to 11 U.S.C. § 1109(b) and for the additional reasons set forth herein.

12. Section 1109(b) provides that “[a] party in interest, including . . . a creditor . . . , may raise and may appear and be heard on any issue in a case under this chapter.” Wheeling is a party-in-interest, and a creditor, and therefore it has a statutory right to appear and be heard on any issue in the case, including issues raised by the Turnover Motion, which are to be heard in the Irving Evidentiary Hearing.

13. More importantly, Wheeling has a direct and substantial interest in the Irving Debt which is the subject of the Turnover Motion, and it claims an interest in the Irving Debt that the Trustee may not be able to adequately protect.

14. The Irving Debt constitutes Collateral for Wheeling. As such, Wheeling claims and has a valid, enforceable and perfected state-law property right in and to the Irving Debt. Moreover, while the Debtor, at the present time, has interim authority to use the proceeds of the Irving Debt as Cash Collateral, such authority expires on September 13, 2013, and no presumption can be made as to its authority to use the Irving Debt or other Cash Collateral of Wheeling after that date. Wheeling reserves the right to object to the Debtor’s use of Cash Collateral after September 13, 2013, and to require payment of the Irving Debt to Wheeling.

15. Wheeling may assert rights to compel turnover and payment of the Irving Debt that the Trustee may not be able to assert. Without limiting the generality of the foregoing:

- a. Wheeling, as a secured creditor who made advances to the Debtor on account of the Irving Debt, is a bona fide purchaser for value of the Irving Debt within the meaning of the Uniform Commercial Code. *See* 11 M.R.S.A. § 1-1201(3).

As a bona fide purchaser for value of the Irving Debt, the so-called “triangular offset” claims of Irving are subject and subordinate to Wheeling’s duly perfected security interests. *See In re Arlco, Inc.*, 239 B.R. 261, 270-71 (Bankr. S.D.N.Y. 1999) (a secured creditor with a security interest in after-acquired property is a good faith purchaser to whose claim that of a reclaiming seller is subject).

- b. Wheeling’s prior, perfected security interest in the Irving Debt is prior in right to any claimed right, title and/or interest in the Irving Debt held by any other party, including a party who is an affiliate of Irving. *See* 11 M.R.S.A. §§ 9-1322 and 9-1404. Affiliates of Irving are and were at all times on notice of the Wheeling’s interest in the Irving Debt by virtue of Wheeling’s properly filed financing statement.
- c. To the extent that any affiliate of Irving claims a right in and to the Irving Debt by virtue of any agreement with the Debtor purporting to permit a “triangular offset”, such agreement is a “security agreement” within the meaning of the Uniform Commercial Code, and the security interest purportedly created thereby is unperfected. As such, it is subordinate to the Wheeling security interest.

### **CONCLUSION**

In view of all of the foregoing, Wheeling claims an interest in the Irving Debt which is superior in right to any interest claimed by the Debtor, the Trustee, and/or any affiliate of Irving. Accordingly, it intends to appear and be heard at the Irving Evidentiary Hearing and to protect its superior right, title and interest in the Irving Debt.

Dated: September 6, 2013

/s/ George J. Marcus

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**CERTIFICATE OF SERVICE**

I, Holly C. Pelkey, hereby certify that I am over eighteen years of age and caused a true and correct copy of the above document to be served on the parties at the addresses set forth on the **SERVICE LIST** below either via electronically or first class U.S. mail, postage prepaid, on the 6<sup>th</sup> day of September, 2013.

/s/ Holly C. Pelkey  
Holly C. Pelkey  
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**Mailing Information for Case 13-10670**

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