UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: **MONTREAL MAINE & ATLANTIC RAILWAY, LTD.,** **Debtor.**	**Chapter 11** **Case No. 13-10670-PGK**
WHEELING & LAKE ERIE RAILWAY CO., **Plaintiff,** **v.** **ROBERT J. KEACH, in his capacity as Chapter 11 Trustee of Montreal Maine & Atlantic Railway Ltd.; Montreal Maine & Atlantic Railway Ltd.; LMS Acquisition Corp.; Montreal Maine & Atlantic Corp.,** **Defendants.**	**Adv. No. 13-01033**

TRUSTEE'S REPLY TO WHEELING & LAKE ERIE RAILWAY COMPANY'S INITIAL BRIEF REGARDING THE APPLICABILITY AND ENFORCEABILITY OF THE COURT'S 2014 RULINGS DETERMINING THAT THE SO-CALLED CANADIAN RECEIVABLES ARE WHEELING'S COLLATERAL

Robert J. Keach, the chapter 11 trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), by and through his undersigned counsel, hereby files this reply to Wheeling & Lake Erie Railway Company's Initial Brief Regarding the Applicability and Enforceability of the Court's 2014 Rulings Determining that the So-Called Canadian Receivables are Wheeling's Collateral [D.E. 65] ("Wheeling's Brief") filed by Wheeling & Lake

Erie Railway Company ("Wheeling").[1] Because the Trustee's Brief already addresses whether Judge Kornreich ruled on the ownership of the Canadian A/R at the March 13 Hearing or May 8 Hearing, which the Trustee contends he did not, and whether the elements of collateral estoppel have been met, again, the Trustee does not believe those elements have been met, the Trustee will not rehash those arguments here. Instead, this reply will address Wheeling's incorrect contention that any ruling made by Judge Kornreich regarding the ownership of the Canadian A/R is the law of the case and Wheeling's misconstruing the preclusive effect of the dismissal of the appeal of the 45G Order. In further support of this reply, the Trustee states as follows:

I. The Law of the Case Doctrine

Under the law of the case doctrine, "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." United States v. Wallace, 573 F.3d 82, 87-88 (1st Cir. 2009). The First Circuit has applied the law of the case doctrine in two instances. The first instance, known as the "mandate rule," "prevents relitigation in the trial court of matters that were explicitly or implicitly decided by an earlier appellate decision in the same case." United States v. Moran, 393 F.3d 1, 7 (1st Cir. 2004). The second instance, "contemplates that a legal decision made at one stage of a criminal or civil proceeding should remain the law of the case throughout the litigation, unless and until the decision is modified or overruled by a higher court." Id. Neither instance is present here.

First, no appellate decision has been rendered regarding the ownership of the Canadian A/R. Next, as already established in the Trustee's Brief, Judge Kornreich did not render a decision regarding the ownership of the Canadian A/R. To the extent that Judge Kornreich made any ruling on the ownership of receivables, he only determined that, in the context of the 45G

[1] Capitalized terms not defined herein have the meaning ascribed to them in the *Trustee's Brief in Support of Objection to Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Orders* [D.E. 63] (the "Trustee's Brief").

Motion, the track maintenance expenditures were funded with receivables, but there was no separate treatment, between MMA Canada and the Debtor, of the receivables attributable to the track maintenance expenditures. That is, any determination that was made regarding receivables was limited to the receivables directly attributable to the track maintenance expenditures and not to all receivables. This distinction is important, because the issue of the ownership of all receivables is directly at issue in the Enforcement Motion. Moreover, Judge Kornreich could not have possibly made a determination as to the ownership of all receivables because that issue was not in front of him and he did not have that evidence in front of him; he only had evidence regarding the collection of certain receivables in connection with track maintenance expenditures. Accordingly, the law of the case doctrine has no implication in a decision on the Enforcement Motion because Judge Kornreich did not make a legal determination as to the ownership of all receivables.

If the Court determines that Judge Kornreich made a ruling regarding the ownership of the Canadian A/R, the circumstances warrant applying an exception to the law of the case doctrine and reconsidering such a ruling. The law of the case doctrine provides certain exceptions under which a successor judge may reconsider decisions made in a proceeding. *See* Ellis v. U.S., 313 F.3d 636, 646 (1st Cir. 2002) ("[The second] branch of the doctrine frowns upon, but does not altogether prohibit, reconsideration of orders within a single proceeding by a successor judge.") Reconsideration is appropriate where the "initial ruling was made on an inadequate record" or "to avoid manifest injustice." Id. Both of those circumstances are present here.

The record, as it stands, is incomplete regarding the ownership and treatment of all receivables because no evidence has been taken regarding the accounting methods and treatment

of all receivables between the Debtor, MMA Canada, and other affiliated companies. Accordingly, if a ruling was made regarding the ownership of the Canadian A/R, such ruling would have been made on an inadequate record. Further, finding that a ruling was made as to the ownership issue would create manifest injustice. The Canadian A/R is the property of MMA Canada, not this debtor. Any such ruling would divest MMA Canada of its property – which this Court does not have authority to do – without allowing the Canadian Court to weigh in or make its own determination as to property of MMA Canada's estate. Moreover, the Court would be extending a ruling to all receivables when a ruling and the evidence presented may have only been made as to a certain portion of receivables attributable to track maintenance expenditures.

II. Wheeling Misstates the Facts Leading to the Dismissal of the Appeal of the 45G Motion

Wheeling's Brief states that "[the Canadian A/R issue] was finally resolved when the Trustee dismissed his appeal." Wheeling Brief, ¶ 29. This statement is patently incorrect and must be corrected for the record. Following the Trustee's filing of a notice of appeal of the 45G Motion, the parties engaged in discussions to resolve their outstanding disputes. Despite multiple efforts, the parties could not reach an agreement as to the Canadian A/R issue, which is why the issue was specifically left out of the *Chapter 11 Trustee's Motion for Order Approving Compromise and Settlement with Wheeling & Lake Erie Railway Company* [D.E. 1011] (No. 13-10670) (the "Motion to Compromise"). Wheeling held the position that a ruling had already been made on the question of ownership of the Canadian A/R and the Trustee maintains that no such ruling was made. This remaining disagreement resulted in the filing of the JPTO and the current briefing of the issue.

Accordingly, (1) the law of the case doctrine does not apply in the instant proceeding; (2) even if it did, the circumstances warrant applying the exceptions to the doctrine; and (3) the

Motion to Compromise did not foreclose the Trustee from arguing that a ruling was not made on the ownership of the Canadian A/R.

WHEREFORE, for the foregoing reasons, the Trustee requests that this Court find that no binding ruling was made by Judge Kornreich regarding the Canadian A/R, and the issue of whether Wheeling has any perfected security interest in Canadian accounts remains a triable issue.

Dated: June 9, 2015

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

By his attorney:

/s/ Robert J. Keach

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CERTIFICATE OF SERVICE

I, Angela L. Stewart, being over the age of eighteen and an employee of Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that, on June 9, 2015, I filed the *Trustee's Reply to Wheeling & Lake Erie Railway Company's Initial Brief Regarding the Applicability and Enforceability of the Court's 2014 Rulings Determining that the So-Called Canadian Receivables are Wheeling's Collateral* via the Court's CM/ECF electronic filing system which sent notice to all parties receiving notice through the CM/ECF system.

Dated: June 9, 2015

/s/ Angela L. Stewart
Angela L. Stewart, Paralegal

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