

**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.

WORLD FUEL SERVICES CORPORATION,
WORLD FUEL SERVICES, INC.,
WESTERN PETROLEUM COMPANY,
WORLD FUEL SERVICES, CANADA, INC.,
PETROLEUM TRANSPORT SOLUTIONS,
LLC, CANADIAN PACIFIC RAILWAY CO.,
IRVING OIL LIMITED, AND SMBC RAIL
SERVICES, INC.

Defendants.

Adversary Proceeding No. 14-1001

JOINT PRETRIAL STATEMENT/PRETRIAL ORDER

Plaintiff Robert J. Keach, solely in his capacity as the chapter 11 trustee (the “Trustee”) of Montreal Maine & Atlantic Railway, Ltd. (the “Debtor” or “MMAR”), and defendant Canadian Pacific Railway Company (“CP” and, together with the Trustee, the “Parties”), by and through their undersigned counsel, submit the following Joint Pretrial Statement/Pretrial Order (“JPS”) and agree that, upon the Court’s endorsement, its terms shall govern pretrial proceedings.

INTRODUCTION

As an initial matter, the Parties have conferred pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rule 7026(f) of the Federal Rules of Bankruptcy Procedure.

This JPS shall apply with respect to (1) the contested matter initiated by CP by filing its *Application of Canadian Pacific Railway Company for Allowance and Payment of Administrative Expense Claim* [D.E. 1295] (the “CP Admin Claim”), (2) the contested matter initiated by the Trustee by filing his *Objection to Proof of Claim Filed by Canadian Pacific Railway Company on the Basis that Such Claim is Unenforceable Against the Debtor* [D.E. 1581] the “Objection to CP Claim”), and (3) the adversary proceeding initiated by the Trustee, and filed in this case, entitled *Keach v. World Fuel Services Corporation, et al.*, Adv. No. 14-1001. Each of these contested matters and adversary proceeding shall henceforth be consolidated for all purposes, and shall proceed henceforth in said adversary proceeding (the “Consolidated Proceeding”).

I. Pleadings:

(a) The pleadings are complete, provided, however, that all parties reserve the right to amend pleadings to conform to the evidence at trial or in the event of new facts emerging from discovery.

II. Statement of Legal Issues:

The Parties anticipate that some or all of the following legal issues will be presented to the Court for determination:

(a) Whether Canadian law and/or regulations and a joint rate agreement between the Debtor and CP required the Debtor to accept CP’s rail cars and cargo and transport it through to its intended destination.

(b) Whether Canadian law and/or regulations and World Fuel's waybill required CP to interchange with MMAR.

(c) Whether CP owed any duties to the Debtor, and the scope of any such duties, including whether, under the Canadian Transportation of Dangerous Goods Act (the "TDGA") in effect as of July 6, 2013, CP owed a continuing duty to not place the crude oil on the Train (the "Crude Oil") and to prevent its shipment until any error in classification was clarified or corrected.

(d) Whether CP had any duty to classify Crude Oil.

(e) Whether CP could rely on the shipper's classification of Crude Oil.

(f) Whether CP had reason to know of any misclassification of Crude Oil.

(g) Whether CP was negligent in its breach of certain duties owed to the Debtor and/or under the TDGA, and, as a direct and proximate result of CP's negligent acts and/or omissions, the Debtor suffered damages.

(h) Whether CP had any duties imposed by the TDGA or otherwise to the Debtor.

(i) Whether any damages suffered by the Debtor were caused by the acts and/or omissions of CP and/or an entity or entities other than CP.

(j) Whether any damages or defense costs suffered or incurred by CP were caused by Debtor.

(k) Whether the Debtor suffered any compensable damages.

(l) Whether CP had any involvement with the Train carrying the Crude Oil in the U.S.

(m) Whether any claims asserted by the Debtor against CP are governed by U.S. law or Canadian law.

(n) Whether any claims asserted by the Debtor are preempted by U.S. federal and/or Canadian law.

(o) Whether the claims described in CP's proof of claim are unenforceable and should be disallowed pursuant to 11 U.S.C. § 502(a)(1).¹

(p) Whether CP conducts any significant operations in the U.S.

The Parties agree that the above legal issues may be amended and additional legal issues may be identified as discovery progresses.

III. Statement of Anticipated Factual Issues:

The Parties anticipate that some or all of the following factual issues will be presented to the Court for determination:

(a) Whether the Crude Oil was incorrectly classified, identified or labeled.

(b) Whether CP had any classification duties.

(c) Whether CP had any packaging duties.

(d) Whether CP knew or should have known that the Crude Oil was incorrectly classified, identified or labeled.

(e) Whether CP properly identified the hazard class of the shipment.

(f) Whether CP had any identification duties.

(g) Whether CP was a "consignor" under the Canadian Transportation of Dangerous Goods Act in effect as of July 6, 2013.

(h) Whether the shipment of the Crude Oil remained subject to the Bill of Lading when the Train was handed off to the Debtor.

¹Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Complaint filed by the Trustee [D.E. 1] as amended by the First Amended Complaint [D.E. 95] and the Second Amended Complaint [D.E. 134].

(i) Whether CP was aware that crude oil produced from the Bakken Formation is often explosive and can self-ignite at low ambient temperatures.

(j) Whether MMAR was aware that crude oil produced from the Bakken Formation is often explosive and can self-ignite at low ambient temperatures.

(k) Whether CP knew or had reasonable grounds to suspect that the testing of Bakken crude oil prior to shipment by rail cars was inadequate and was likely to lead to misclassification.

(l) Whether MMAR knew or had reasonable grounds to suspect that the testing of Bakken crude oil prior to shipment by rail cars was inadequate and was likely to lead to misclassification.

(m) Whether CP was aware that the tank cars carrying the Crude Oil contained a mixture of crude oil from eleven different suppliers.

(n) Whether MMAR was aware that the tank cars carrying the Crude Oil contained a mixture of crude oil from eleven different suppliers.

(o) Whether any acts and/or omissions of CP caused the Derailment.

(p) Whether any acts and/or omissions of MMAR caused the Derailment.

(q) Whether any acts and/or omissions of CP caused the Debtor's injuries.

(r) Whether any acts and/or omissions of MMAR caused CP's injuries.

(s) Whether the Debtor was aware that the Crude Oil was Packing Group I.

(t) Whether any acts and/or omissions of the Debtor were the cause of its damages.

(u) The amount of any such compensable injuries suffered by the Debtor.

(v) Whether any acts and/or omissions of CP were the cause of its damages.

(w) The amount of any such compensable injuries suffered by CP.

The Parties agree that the above factual issues may be amended and additional factual issues may be identified as discovery progresses.

IV. Jurisdiction.

The Trustee believes this is a core matter, in its entirety, on which the Bankruptcy Court can enter final judgment. CP believes this is a non-core matter, in its entirety, and the bankruptcy court does not have CP's consent to enter final judgment.

The United States District Court for the District of Maine (the "District Court") has denied CP's motion to withdraw the reference (the "Order"). See Keach v. World Fuels Services Corp., No. 1:15-mc-22-NT, Docket Number 23 (D. Me. June 8, 2015). The District Court's Order provides that CP "has not established cause to withdraw the reference of the proceeding at this time" and that the case against CP shall proceed in the Bankruptcy Court until the case is trial ready.

V. Jury Trial.

(a) The parties disagree re: jury entitlement. The Trustee believes that CP has waived any right to a jury trial by filing a proof of claim; CP disagrees.

Disagreements re: jury entitlement will be addressed at the final pretrial conference and determined immediately thereafter, unless the parties request an initial pretrial conference and convince the court that the issue should be resolved earlier.

(b) If a jury trial is warranted, the parties do not consent to jury trial in the bankruptcy court.

VI. Disclosures.

The Parties agree to a schedule for expert and non-expert disclosures as follows:

(a) The Trustee shall have twenty eight (28) days from the date of the Court's endorsement to complete non-expert initial disclosures.

(b) CP shall have forty two (42) days from the date of the Court's endorsement to complete non-expert initial disclosures.

(c) Expert disclosures of the Trustee shall be completed within fourteen (14) days of the completion of non-expert discovery. Expert disclosures of CP shall be completed within twenty eight (28) days of the completion of non-expert discovery.

VII. Discovery.

The Parties agree to the following schedule for non-expert discovery:

(a) The Parties shall have ninety (90) days from the date of the Court's endorsement to send Interrogatories and Requests for Production of Documents.

(b) The Parties shall have two hundred and forty (240) days after the deadline to send Interrogatories and Requests for Documents to conduct non-expert depositions.

The Parties agree to the following schedule for expert discovery:

(c) The Debtor shall have sixty (60) days after the deadline to conduct non-expert depositions to provide its expert reports.

(d) CP shall have one hundred and twenty (120) days after the deadline to conduct non-expert depositions to provide its expert reports.

(e) The Parties shall have sixty (60) days after the deadline for CP to provide expert reports to conduct expert depositions.

In no event shall trial start before January 18, 2017. The Parties agree that the above discovery deadline may be amended by order of the Court or by agreement of the Parties without further order of the Court.

VIII. Electronic Discovery.

If needed, the Parties agree to proceed with the discovery of electronic information as follows:

The Parties will confer and cooperate with each other to set reasonable limits on the amount of ESI to be produced, including limits on collection of emails and the possible use of

reasonable search terms on limited numbers of custodians, and will submit for the Court's approval an ESI protocol.

IX. Privilege and Confidentiality

(a) The Parties will negotiate a mutually agreeable time for the exchange of privilege logs that identify information or documents withheld on the basis of the attorney-client privilege, work product immunity, or other privilege or protection. The Parties will meet and confer regarding other issues as to the scope, content, and exchange of privilege logs, including regarding categories of documents and information immune from discovery that the Parties need not log. The Parties anticipate handling inadvertently produced documents under terms specified in a protective order that the Parties will propose for entry by the Court.

(b) The Parties plan to discuss and jointly submit to the Court a proposed protective order regarding the handling of sensitive technical or commercial discovery materials produced by the Parties in this action. Until such time as the Court enters a protective order in this matter, the Parties agree that any documents designated by the producing party as "Confidential" shall be treated by the receiving party as Confidential and shall not be used by the receiving party in any other proceeding.

X. Stipulation.

The Parties, through counsel, shall engage in a good faith effort to stipulate to all facts and legal issues as to which there is no actual dispute. Counsel shall prepare a written stipulation, signed by all counsel, in a form satisfactory to permit the document to be marked as an exhibit and offered in evidence at trial.

The Parties will review any Transportation Safety Board of Canada (TSB) and Federal Railroad Administration (FRA) Crude Oil testing data and/or reports and confer about stipulating to the accuracy of that testing.

All stipulations shall be filed with the Court no later than thirty (30) days after the close of discovery.

XI. Joint Pretrial Memorandum.

The Parties shall file a Joint Pretrial Memorandum outlining legal issues pertinent to the case. To the extent they disagree as to controlling legal authority, the joint pretrial memorandum shall include a statement on each contested legal issue, detailing support for each party's position. To the extent the Parties are not in agreement as to factual issues, the joint pretrial memorandum shall include a statement of each party's pertinent factual contentions and a summary statement of the evidence to be offered in support of each contention. The exhibit list and witness list required below must be incorporated into the Joint Pretrial Memorandum. The Trustee is responsible for circulating a draft of the proposed pretrial memorandum to CP sufficiently in advance of the filing deadline so as to permit CP adequate time to review and respond to the Trustee's proposals. CP is responsible for timely providing pertinent information regarding facts, evidence and legal authority for their defenses and claims. If valuation is at issue, each party shall include its position on value in its recitations regarding contested facts.

After circulation and review, the Parties shall file the joint pretrial memorandum no later than five (5) days prior to the final pretrial conference.

XII. Exhibits/Witnesses/Experts.

(a) Exhibits. During preparation of the Joint Pretrial Memorandum, the Parties are to pre-mark and exchange copies of the exhibits they reasonably anticipate offering at trial. In the absence of objection served and filed within thirty (30) days of service, such exhibits will be received in evidence without further authentication.

Pre-marking shall consist of clearly designating each proposed exhibit in the order of its probable presentation at trial. The Trustee's proposed exhibits shall be designated by number;

starting at 1. CP's proposed exhibits shall be designated by number starting at 500. Copies of proposed exhibits shall be accompanied by a list of the exhibits with a brief identification of each. The exhibit list shall be included in the Joint Pretrial Memorandum.

(b) Witnesses/Experts. In preparing the Joint Pretrial Memorandum, the Parties are to exchange the names of all witnesses they intend to present at trial, together with a brief summary of the area of testimony each witness will address. The filing(s) may incorporate previously-made disclosures. All reasonably anticipated objections to the testimony and all motions to limit testimony of a witness identified by an opposing party shall be filed with the court and served on the opposing parties within fourteen (14) days after service of the witness list required by this paragraph.

NOTE: Designation of a non-party witness on an opponent's list of witnesses does not relieve a party of assuring the presence of that witness at trial if his or her testimony is desired. The Parties anticipate video recording deposition testimony of all witnesses whose attendance cannot be compelled at trial.

XIII. Pretrial Motions.

All pretrial motions and motions, including both dispositive and non-dispositive motions, *Daubert* motions, and for summary judgment shall be filed no later than sixty (60) days after the expiration of both the fact and expert discovery period.

XIV. Compliance.

Failure to comply with the provisions of this order may result in the imposition of sanctions, monetary and non-monetary, including, without limitation, entry of an order denying the admission of exhibits, testimony of witnesses, or other appropriate sanctions where noncompliance has caused undue delay, expense and/or prejudice.

XV. Final Pretrial Conference.

Within fourteen (14) days after the close of all discovery, the Trustee shall schedule and send notice of a final pretrial conference. The Parties shall be prepared to discuss all matters relating to trial at the final conference.

XVI. Alternative Dispute Resolution.

Unless one or more of the Parties requests it do so sooner, and requests an initial pretrial conference in accordance with Part XIII above, the court will consider alternative dispute resolution with the Parties in the course of the final pretrial conference.

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Dated: October 14, 2015

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

By his attorneys:

/s/ Timothy J. McKeon

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Dated: October 14, 2015

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ENDORSED AND ENTERED as an ORDER of the COURT

Date:

Honorable Peter G. Cary
Chief Judge of the U.S. Bankruptcy
Court for the District of Maine