UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

REPLY TO OBJECTIONS OF WHEELING & LAKE ERIE RAILWAY COMPANY AND FLOWERS CLAIMANTS TO MOTION TO APPROVE, AND AUTHORIZE THE TRUSTEE TO ENTER INTO, STIPULATION CONCERNING CARVE-OUT FROM COLLATERAL OF THE FEDERAL RAILROAD ADMINISTRATION

Robert J. Keach, the chapter 11 trustee (the "Trustee") appointed in the above-captioned case (the "Case") of Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor"), by and through his undersigned counsel, hereby replies (the "Reply") to the *Wheeling & Lake Erie Railway Company's Objection to the Trustee's Motion to Approve, and Authorize the Trustee to Enter Into, Stipulation Concerning Carve-Out from Collateral of the Federal Railroad Administration Pursuant to 11 U.S.C. §§ 105(a), 363(b), 506(c), 1163, and 1165* [Docket No. 288], filed by the Wheeling & Lake Erie Railway Company ("Wheeling"), and the *Wrongful Death Claimants' Objection to Trustee's Motion for Approval of Stipulation with Federal Railroad Administration and Request for Evidentiary Hearing* [Docket No. 292], purportedly filed by the representatives of the estates of 42 out of the 47 victims (the "Flowers Claimants") of the July 6, 2013 train derailment in Lac-Mégantic, Québec (the "Derailment"), with respect to the *Motion to Approve, and Authorize the Trustee to Enter Into, Stipulation Concerning Carve-Out from Collateral of the Federal Railroad Administration Pursuant to 11 U.S.C. §§ 105(a), 363(b), 506(c), 1163 and 1165* [Docket No. 257] (the "Carve-Out Motion"). While most of the

arguments made by Wheeling and the Flowers Claimants are addressed in detail in the Carve-Out Motion, and will not be repeated here, the Trustee files this Reply to specifically address both parties' lack of standing in connection with the Carve-Out Motion. In support of this Reply, the Trustee states as follows:

1. The Carve-Out Motion seeks approval of, and authority for the Trustee to enter into, a stipulation (the "Stipulation") with the Federal Railroad Administration (the "FRA"), pursuant to which the FRA will provide a carve-out (the "Carve-Out") in the amount of $5 million from the proceeds of a sale of FRA's collateral securing certain obligations of the Debtor owed to the FRA. The Carve-Out will be paid solely to the Trustee and his professionals to compensate them for the fees and expenses incurred in administering this Case, and to pay the quarterly fees of the United States Trustee (the "UST fees"). As evidenced by the Carve-Out Motion, and by the terms of the Stipulation itself, the Carve-Out is a "true" carve-out. Specifically, "[a] 'carve-out agreement' is generally understood to be an agreement by a party secured by some or all of the assets of the estate to allow some portion of its lien proceeds to be paid to others, i.e., to carve out of its lien proceeds." *See* Besset v. Stadtmueller (In re Besset), 2012 WL 6554706 at *4 n. 5 (9th Cir. BAP Dec. 14, 2012) (internal quotations omitted). The Carve-Out is precisely that: an agreement, by the FRA, in its sole discretion, to allow a portion of its lien proceeds to be paid to the Trustee and his professionals as compensation for their allowed fees and expenses incurred in administering this Case, and to pay the UST fees.

2. Upon a sale of the Debtor's assets, the only party with an interest in the proceeds of FRA's collateral is the FRA itself; the proceeds do not constitute property of the Debtor's estate. *See* Debbie Reynolds Resorts, Inc. v. Calstar Corp., Inc. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061, 1067 (9th Cir. 2001) (stating that "an assessment against a secured

party's collateral . . . does not come out of the debtor's estate, but rather comes directly from the secured party's recovery."). The other creditors of the Debtor, including Wheeling and the Flowers Claimants, simply have no economic stake in the matter of how FRA chooses to allocate the proceeds of its collateral, and FRA is under no obligation to allocate its proceeds to another party at all. "With no economic stake in the matter," Wheeling and the Flowers Claimants are "not directly and adversely affected pecuniarily" by the Carve-Out, and thus do not have standing to object to the Carve-Out. *See* Besset, 2012 WL 6554706 at *4 (finding that appellant lacked standing to appeal court's order awarding fees to chapter 7 trustee, which fees were paid through a carve out of the proceeds of attorney lien creditors' collateral, and noting that appellant was merely "unhappy that the carve out from the attorney lien creditors' share of the sale proceeds was paid to the trustee and his professionals rather than to her even though there was no equity in the property."); In re Miller, 485 B.R. 478 (6th Cir. BAP 2012) (finding that neither debtor nor heir to debtor had standing to appeal order authorizing sale of property, from which sale a portion of the proceeds would be used to pay the fees of the chapter 7 trustee; sale of property would have no pecuniary impact because there was no equity in the property); *see also* Austin Assocs. v. Howison (In re Murphy), 288 B.R. 1, 4 (D. Me. 2002) (finding that the pecuniary interests of a party are affected if the party's property is diminished, its burdens increased, or its rights detrimentally affected).

3. Further, this Court lacks authority to direct the FRA to fund the administrative claims of other parties, such as Wheeling and the Flowers Claimants, from the proceeds of its collateral, and Wheeling and the Flowers Claimants lack standing to request a surcharge of the proceeds of FRA's collateral. *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 14 (2000) (holding that administrative claimant does not have independent right

under the Bankruptcy Code to seek payment of its claim from secured party's collateral); In re Computer Sys., 446 B.R. 837, 843-44 (Bankr. N.D. Ohio 2011) (holding that financial advisor lacked standing to seek surcharge of proceeds of secured party's collateral to pay its administrative claim).

4. Here, FRA has voluntarily elected to allocate a portion of the proceeds of its collateral to the Trustee, the Trustee's professionals, and the UST, for the purpose of ensuring that this Case is efficiently and effectively administered. As noted above, a carve-out from FRA's recovery on the sale of its collateral is unequivocally not property of the Debtor's estate. Absent FRA's agreement to enter into the Stipulation, FRA would, to the extent of its liens, be the sole beneficiary of the proceeds from the sale of its collateral. Instead, FRA has, consistent with its mission statement, elected to allocate a portion of its recovery to fund the administration of this Case for the benefit of all creditors. Wheeling and the Flowers Claimants have no entitlement, absent FRA's consent, to surcharge the proceeds of FRA's collateral, and therefore absolutely no basis to object to the Stipulation, including any limitation on a future surcharge attempt with respect to the FRA's collateral under section 506(c).

5. The Flowers Claimants have a further standing problem. None of the Flowers Claimants have yet filed a proof of claim. They have withdrawn their attempt to have an official committee appointed, not wanting to share committee status with other victims of the Derailment, and are apparently electing to proceed as an ad hoc committee. However, neither the ad hoc committee nor its purported representatives have complied with Rule 2019 by filing the required verified statement or the required additional disclosures and documents, which would include a full disclosure of the details under which the representatives acquired agency or representative status, and a full disclosure of the engagement letters and other relevant

documents establishing such status. Fed. R. Bankr. P. 2019(c). Failure to comply with Rule 2019 may, and should in this instance, result in the Flowers Claimants not being granted the right to be heard or to intervene unless and until their representatives have fully complied with Rule 2019, such that there is no doubt regarding the legitimacy and scope of that representation. Fed. R. Bankr. P. 2019(e). *See also* In re N. Bay Gen. Hosp., Inc., 404 B.R. 443,455 (Bankr. S.D. Tex. 2009); In re Ionosphere Clubs, Inc., 101 B.R. 744, 851-53 (Bankr. S.D.N.Y. 1989).

Dated: September 30, 2013

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

By his attorneys:

/s/ *Michael A. Fagone, Esq.*

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