UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

WHEELING & LAKE ERIE RAILWAY COMPANY'S OBJECTION TO (1) CHAPTER 11 TRUSTEE'S MOTION FOR ORDER APPROVING COMPROMISE AND SETTLEMENT WITH TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA; AND (2) MOTION TO EXPEDITE

Now comes the Wheeling & Lake Erie Railway Company ("Wheeling") and objects to the above-referenced motion to compromise (the "Motion") [D.E. 473] and the related motion to expedite hearing on the Motion (the "Motion to Expedite") [D.E. 474], filed by Robert J. Keach, the chapter 11 trustee in this case (the "Trustee"), for the reasons set forth herein.[1]

OBJECTIONS TO MOTION TO EXPEDITE AND MOTION

1. Wheeling claims a valid, perfected first-priority security interest in the Debtor's, and its affiliates', accounts, payment intangibles, rights to payment and inventory, as well as proceeds thereof, pursuant to that certain Security Agreement dated June 15, 2009, by and between, *inter alia*, the Debtor, certain of the Debtor's affiliates, and Wheeling (the "Security Agreement"). The Security Agreement and related UCC-1 financing statements are attached hereto as **Exhibits A** and **B**. The Security Agreement defines Wheeling's collateral (the "Collateral") in § II.[2] The Collateral includes all rights to payment that the Debtor and its affiliates may have with respect to the Policy issued by Travelers, which is the subject of the

[1] Capitalized terms not defined herein shall have the meaning set forth in the Trustee's Motion [D.E. 473].

[2] Terms used in the Security Agreement but not defined therein have the meaning of such terms as defined by the Maine Uniform Commercial Code (the "Maine UCC"), as amended from time to time, and codified in Title 11 of the Maine Revised Statutes Annotated. *See* **Exhibit A**, § I.C. This includes, in relevant part, terms such as "account," "inventory," "payment intangible," and "proceeds."

Motion. Such payment rights are either "accounts" or "payment intangibles" within the meaning of the Security Agreement. As such, Wheeling's Collateral includes the rights to payment of the Debtor and its affiliates under the proposed settlement with Travelers (the "Settlement"), as set forth in the Motion.

2. Wheeling has asserted its claim of a valid, perfected and enforceable first-priority security interest in all rights to payment under the Policy in the adversary proceeding now-pending before this Court under docket number of 13-1033 (the "Adversary Proceeding"). That Policy is the same Policy that is the subject of the Settlement set forth in the Motion.[3] The defendants in the Adversary Proceeding include Travelers, the Trustee, the Debtor, and certain of the Debtor's affiliates, including LMS Acquisition Corp. ("LMS") and Montreal Maine & Atlantic Corp. ("MMA Corp."). Wheeling restates and confirms its claim, as set forth in the Adversary Proceeding, that all rights to payment that arise under the Policy, including the rights to payment that are the subject of the Settlement and the Motion, are Collateral of Wheeling, pursuant to the Security Agreement.

3. After consulting with counsel for the Trustee and Travelers, Wheeling understands that at this time, other than the Motion, there are no documents describing the terms of the proposed Settlement, whether in draft or final form (with the exception of a draft agreement related to the release of claims of non-debtor insureds under the Policy). The Motion states that "[t]he parties shall enter into any documents reasonably necessary to effectuate the terms of the settlement described herein[,]" but does not state what further conditions, if any, will be required, whether they are material, or what effect, if any, they will have on Wheeling or the rights of other creditors of the Debtor.

[3] Wheeling notes that the last two digits of the Policy in the Motion and a similar motion in the related Canadian proceedings are -12, but counsel for Travelers confirmed that the correct policy number ends in -13.

4. Wheeling submits that there is no basis to grant the Motion to Expedite at this time. There is no evidence of any condition, actual or implied, that requires approval of the Motion on an expedited basis. Further, there are substantial unanswered questions as to the prudence of the Settlement amount ($3,800,000), and even more questions as to the allocation of the Settlement among the various insured entities under the Policy. The proper determination of these issues is material and will have a significant impact on Wheeling, as well as estates of the bankrupt entities. Given the importance of the matter, and the lack of any demonstrable need to obtain Court approval on December 18, 2013, or any other named date, the Court should deny the Motion to Expedite and defer decision on the Motion itself pending an adequate opportunity for discovery and evaluation of both the amount of the Settlement and the allocation of Settlement proceeds.

5. Thus, for these reasons, and as set forth below, Wheeling objects to the Motion to Expedite and the Motion.

I. There Is No Basis To Expedite The Motion.

6. The sole purported basis for expedited relief is that "[u]nder the terms of the settlement, the Settlement Payment is required to be made on or before December 31, 2013 (assuming the order approving the settlement is final)." Motion to Expedite, ¶ 9 (parenthesis in original). Wheeling submits that this purported justification for expedited relief is both circular and insufficient to support expedited treatment of the Motion. First, it appears that the Settlement Payment is required to be made on or before December 31, 2013—but only "assuming" that the order approving the Settlement is final. Presumably, if that assumption fails, the Settlement Payment is not required to be made by December 31, 2013. Further, there appears to be no adverse consequence to the Settlement if the Court exercises its sound

discretion to decline to buy into the "assumption" of approval prior to December 31, 2013, and instead permits a reasonable opportunity for parties in interest to review the merits of the Settlement in all respects.

7. Second, based on inquiry made by Wheeling to counsel for the Trustee, there are apparently no written documents or agreements that evidence the Settlement. Not only is there no document that states a condition precedent of approval by December 31, 2013, the Motion acknowledges the absence of complete settlement documentation and contemplates that there will be further documentation entered into with respect to the Settlement. This documentation includes consents to the Settlement by non-debtor entities such as LMS and MMA Corp. Both of these entities are borrowers of and debtors of Wheeling pursuant to the Security Agreement. Their consent to the Settlement is subject to Wheeling's approval. Wheeling has not been consulted regarding the terms upon which such approval will be given. As such, the Settlement is at best incomplete. It should be submitted to the Court and creditors only upon completion and with adequate notice.

8. In light of the foregoing, Wheeling submits that the Motion to Expedite should be denied and that a hearing on the merits of the Motion should be scheduled in the ordinary course, after the Settlement is properly documented, and an appropriate time for discovery has been afforded to the parties.

II. <u>Wheeling Objects To the Settlement Because It is Not Clearly Defined And Insofar As Defined, It Is Not "Fair And Equitable" as to Wheeling.</u>

9. Wheeling objects to the Settlement because the Settlement terms have not been fully defined or articulated. Without limiting the generality of the foregoing, the Settlement requires, as a condition precedent, that non-debtor entities MMA Corp. and LMS consent to the Settlement but the terms and conditions of such consent have not been determined. Further, the

Settlement contemplates the execution of further settlement documentation. No one knows what is going to be included in that documentation and therefore approval of the Settlement is premature at this time.

10. Under the Security Agreement (*see* § VI of Exhibit A), "Secured party (Wheeling), in the name of Debtor, may contest any claims made against Debtor wherein an adverse decision would impair Secured Party's security". As such, if and to the extent that the Settlement is motivated by potential "adverse claims" regarding the security in question—the payment under the Policy— (which, according to the Motion appears to be the case), Wheeling has the right to contest any such claims, and any recognition of such claims by way of Settlement. In contravention of the Security Agreement, Wheeling has not been provided any opportunity to contest any such adverse claims, and the Motion provides no adequate basis for Wheeling to do so.

11. In addition, the Settlement, insofar as it has been described in the Motion, is unclear. The Settlement fails to describe what payment is being made on account of property damage, and what payment is being made on account of loss of business or extraordinary expenses. It also fails to describe what payment rights of MMA Corp. and LMS, both of which are insureds under the Policy, are being compromised and released, and what the consideration for such release might be. The Motion is generally unclear as to these matters, although it does imply that the Settlement Payment, at least that portion payable to the Debtor, is attributable to loss of business and extraordinary expense. In any case, at this stage, in the absence of any settlement documents that define and articulate these issues, the Motion must be denied.

12 Most importantly, the Settlement is not "fair and equitable" as to Wheeling. It is well-settled law that a bankruptcy trustee cannot compromise or impair a lender's security

interest in collateral through a 9019 Motion. "While a trustee technically represents all creditors, secured as well as unsecured, a trustee primarily represents the unsecured creditors, and represents the secured creditors only in his capacity as a custodian of the property upon which they have a lien. As a custodian, the Trustee may not compromise the secured creditor's lien, unless of course the creditor consents." *In re Speir*, 190 B.R. 657, 664 (Bankr. N.D. Ala. 1995) (internal quotation and citations omitted) (denying request for approval of compromise and affirming such order on motion for reconsideration).

13. In order for the Settlement to be deemed "fair and equitable" as to Wheeling, this Court must consider whether the Settlement comports with the well-known "absolute priority" rule, *i.e.* do junior interests (here, the Debtor and its affiliates, including MMAC) receive distributions on account of the Settlement ahead of a senior secured party (Wheeling). *U.S. v. AWECO, Inc. (Matter of AWECO, Inc.)*, 725 F.2d 293, 298-99 (5th Cir. 1984) (adopting a *per se* rule requiring adherence to the absolute priority rule for pre-plan compromises); *Motorola, Inc. v. Official Committee of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 463-466 (2d Cir. 2007) (rejecting *per se* rule but holding that absolute priority rule is most important factor in determining whether a compromise is "fair and equitable"). *See also U.S. ex rel. Rahman v. Oncology Assoc., P.C.*, 269 B.R. 139, 154 (D. Md. 2001) ("In determining whether a settlement should be approved, the Bankruptcy Court has the duty to review and determine the relative priorities of various creditors." Creditor failed to meet its burden to prove its security interest).

As the Second Circuit appropriately observed:

> Thus, whether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is "fair and equitable" under Rule 9019. The court must be certain that parties to a settlement have not

> employed a settlement as a means to avoid the priority strictures of the Bankruptcy Code. In the Chapter 11 context, whether a settlement's distribution plan complies with the Bankruptcy Code's priority scheme will often be the dispositive factor. However, where the remaining factors weigh heavily in favor of approving a settlement, the bankruptcy court, in its discretion, could endorse a settlement that does not comply in some minor respects with the priority rule of the parties to the settlement justify, and the reviewing court clearly articulates the reasons for approving, a settlement that deviates from the priority rule.

Iridium, 478 F.3d at 464-65 (reversing and remanding order approving settlement for failure to explain why residuum of settled funds was not distributed in accordance with the rule of priorities).

14. In another railroad reorganization case, the First Circuit has acknowledged that compromises must be "fair and equitable" within the meaning described above. The First Circuit has cited with approval *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968), wherein the U.S. Supreme Court held that settlements in plans of reorganization must be "fair and equitable". This rule has been extended to pre-plan compromises by decisions such as *AWECO* and *Iridium*, *supra*.

> A court approving a compromise in reorganization proceedings does not play the same role as a court approving a compromise between individual litigants. Bankruptcy proceedings, by definition, coerce the bankrupt's creditors into a compromise of their interests. Therefore, the trustee has a fiduciary obligation to manage the reorganization for their protection, and the supervising court must play a quasi-inquisitorial role, ensuring that all aspects of the reorganization are 'fair and equitable.'" *See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968).

Matter of Boston & Providence R.R. Corp., 673 F.2d 11, 12 (1st Cir. 1982).

15. In sum, whatever deference bankruptcy trustees may get in settlements under Rule 9019, that deference does not apply to, nor warrant, the impairment of the liens of a secured party, nor does it authorize payment of the proceeds of such liens to any party other than the secured party. The Trustee can neither release nor compromise Wheeling's security interest in

the proceeds of the Policy at issue, nor can he unilaterally determine how they are to be allocated.

16. In addition, Travelers has received authenticated notice of Wheeling's security interest and demand for payment of proceeds pursuant to Section 9-1406 of the Maine Uniform Commercial Code. That section provides in relevant part:

> Subject to subsections (2) through (9), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

17. By service of the initial Complaint in the Adversary Proceeding on Travelers [*see* D.E. 1 in the Adversary Proceeding], as well as this Objection, Travelers has received an authenticated notice from Wheeling, as assignee, of its security interest in the proceeds of the Policy and that, subject to the automatic stay in this case and the stay in the Canadian proceedings, Wheeling claims the right to payment of the policy proceeds, undiminished by any purported agreement of the insured debtors. Absent a court order to the contrary, and subject to the stays, as appropriate, Travelers may discharge its payment obligation under the Policy only by paying Wheeling, or obtaining Wheeling's consent to payment of another person. Wheeling declines to provide such consent at this time as to the Debtor, and as to non-debtor entities, LMS and MMA Corp. Absent payment to Wheeling of the Policy proceeds, or its consent, the Settlement cannot be approved or consummated.

REQUIREMENTS OF D. ME. LBR 9013-1(f)

18. In general, Wheeling is without knowledge or information concerning the facts pertaining to the Policy, the Settlement, or the terms of any arrangements between the Trustee,

Travelers, and parties insured under the Policy, and accordingly denies such allegations. Wheeling reserves all of its rights in respect thereof. With a few limited exceptions (¶¶ 12-13 of the Motion), in all other respects the Motion alleges jurisdictional facts that are not in dispute, or makes conclusions of law, and Wheeling makes no response thereto. Paragraphs 12 and 13 of the Motion reference court filings that speak for themselves.

CONCLUSION

For the reasons set forth herein, Wheeling requests entry of an order denying the Motion to Expedite and the Motion. There are substantial rights at issue, and the Settlement should be presented to the Court and creditors once it is documented in a final form, so that the Court and creditors can fully apprise themselves of the issues to be determined thereby. Moreover, no settlement with Travelers can be approved that would impair Wheeling's security interest in the proceeds of the Policy, without consent of Wheeling, and at this time, such consent is withheld.

Thus, at this time, Wheeling requests entry of an order denying the Motion to Expedite and the Motion.

Dated: December 17, 2013

/s/ George J. Marcus

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CERTIFICATE OF SERVICE

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties and at the addresses set forth on the Service List attached hereto either electronically or via first class mail, postage prepaid, on 17th day of December, 2013.

/s/ Holly C. Pelkey
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