UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

OBJECTION OF WHEELING AND LAKE ERIE RAILWAY COMPANY TO TRUSTEE'S MOTION FOR AN ORDER PURSUANT TO 11 U.S.C. § 506(c) AUTHORIZING RECOVERY OF EXPENSES

NOW COMES Wheeling and Lake Erie Railway Company ("Wheeling") and objects to the Trustee's Motion for An Order Pursuant to 11 U.S.C. § 506(c) Authorizing the Recovery of Expenses from Wheeling and Lake Erie Railway Co. Or It's Collateral (the "Surcharge Motion") [D.E. # 854]. The Surcharge Motion is both procedurally and substantively deficient. As such, it must be denied.

ARGUMENT

I. The Surcharge Motion Is Procedurally Improper For Multiple Reasons

A. Under The Federal Rules of Bankruptcy Procedure, The Claims Set Forth In The Surcharge Motion Must Be Brought As An Adversary Proceeding

As a threshold matter, it must be noted that the Surcharge Motion is procedurally improper. Because the relief requested therein is the recovery of money – the Trustee seeks authority "to recover $384,456 in fees and expenses related to the liquidation of Wheeling's collateral" (Surcharge Motion, p. 10) – Fed.R.Bankr.P 7001 requires that it be sought through an adversary proceeding. *See* 10 Collier on Bankruptcy ¶ 7001.02 ("Proceedings within Rule 7001(1) include actions by trustees or debtors . . . to recover under section 506(c) expenditures made in preserving or disposing of property subject to a lien . . . ."); *see also Rifken v. CapitalSource Finance, LLC (In re Felt Mfg. Co.),* 402, B.R. 502, 508 (Bankr. D.N.H 2009). In

addition, Wheeling has counterclaims against the Trustee for payment of money; specifically, more than one million dollars in adequate protection claims, entitled to superpriority pursuant to six cash collateral orders entered by this Court. These counterclaims more than offset any claimed liability under § 506(c). Further, Wheeling intends to undertake discovery, as permitted by Federal Rule of Bankruptcy Procedure 7026 *et. seq.*, and to present expert testimony, both as to the surcharge claims of the Trustee and Wheeling's counterclaims. All of these circumstances require that the Surcharge Motion be dismissed, and that the relief sought therein, to the extent available to the Trustee, be sought in an adversary proceeding.

B. The Surcharge Motion Should Be Denied With Because The Trustee Failed To File A Mandatory Counterclaim In The Pending Adversary Proceeding

On a related note, and as the Court is aware, Wheeling initiated an adversary proceeding against MMA and the Trustee soon after the inception of this case, and that adversary proceeding is currently pending before the Court at docket no. 13-01033 (the "Wheeling Adversary Proceeding"). In the Wheeling Adversary Proceeding, Wheeling invoked, *inter alia*, § 506, in requesting that the Court determine the extent and validity of its interest in various properties of the MMA estate. *See e.g.,* First Amended Complaint, ¶ 10. [Adv. Proc. D.E. # 18]. On December 9, 2013, the Trustee filed his Answer to the First Amended Complaint. [Adv. Proc. D.E. # 26]. In his Answer, the Trustee did not counterclaim for surcharge or for any relief under § 506(c).

Fed.R.Bankr.P. 7013 makes Fed.R.Civ.P. 13 applicable to adversary proceedings. Here, given that both the Adversary Proceeding and the Surcharge Motion deal expressly and exclusively with Wheeling's collateral, the Trustee's § 506(c) request is clearly a compulsory counterclaim that had to have been asserted in the Adversary Proceeding. *See* Fed.R.Civ.P. 13(a)(1)(A) and (B). Put another way, the § 506(c) claim "arises out of the transaction or

occurrence that is the subject matter of [Wheeling's] claim"; in fact, they both arise from the same statutory wellspring: 11 U.S.C. § 506(c). *See In re Swann v.* 149 B.R. 137, 144 (Bankr. D.S.D. 1993) (noting that § 506 determines the extent of a creditor's secured claim and that § 506(c) "is one of the adjustments to make that determination."). The Trustee's failure to assert his mandatory § 506(c) counterclaim when he filed his Answer results in waiver of the claim with prejudice, pursuant to Fed.R.Bankr.P. 7013; and Fed.R.Civ.P. 13(a)(1)(A) and (B). *See Crown Life Ins. Co. v. American Nat'l. Bank & Trust Co.*, 35 F.3d 296, 300 (7th Cir. 1994); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 360 (7th Cir. 1990). For this reason as well, the Surcharge Motion must be dismissed, and it must be dismissed with prejudice.

II. The Expenses Claimed By The Trustee In the Surcharge Motion Are Not Properly Surchargeable to Wheeling Pursuant to 11 U.S.C. § 506(c).

A. Summary of Argument

Even if the Surcharge Motion were properly before this Court as a contested matter, the relief requested therein cannot be granted. 11 U.S.C. 506(c) provides that a "trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim . . . ." Section 506(c) is an exception to "the general rule that the unsecured creditors must assume the costs of administering the estate." *In re Parque Forestal*, 949 F.2d 504, 511 (1st Cir. 1991) (internal citation omitted); *see* 4-506 Collier on Bankruptcy, ¶ 506.05. "The burden of proving that section 506(c) applies to the costs for which recovery is sought is on the debtor." *In re Korupp Associates, Inc.*, 30 B.R. 659, 661 (Bankr. D. Me. 1983).

A successful surcharge action under Section 506(c) requires the debtor or trustee to demonstrate "(1) the expenditure was necessary, (2) the amounts expended were reasonable, and (3) the [secured] creditor benefitted from the expenses." *Parque Forestal*, 949 F.2d at 512

(quoting *Matter of P.C., Ltd.*, 929 F.2d 203, 205 (5th Cir. 1991)); *In re Maine Pride Salmon*, 180 B.R. 337, 340 (Bankr. D.Me. 1995). The third element – benefit to the secured creditor – is particularly difficult to prove. In the First Circuit, in order to establish a benefit to a secured creditor, the Trustee must show that he "expended the funds primarily for the benefit of the [secured creditor]". *Id.* (quoting *Brookfield Production Credit Ass'n. v. Borron,* 738 F.2d 951, 952 (8th Cir. 1984)) (emphasis added). As the First Court later stated: in order to prevail under § 506(c), a trustee must show that the secured creditor was the "direct and intended" beneficiary of the services at issue; if the "direct and intended" beneficiary was instead the debtor, then there is no basis to surcharge. *Gallivan v. Springfield Post Rd. Corp.*, 110 F.3d 848, 852 (1st Cir. Mass. 1997) (emphasis added). Courts in this Circuit have noted that "this is not an easy burden to meet," *Rifken,* 402 B.R. at 523 (quoting *Debbie Reynolds Hotel & Casino, Inv. v. Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.),* 255 F.3d 1061, 1068 (9th Cir. 2001)), and the 9th Circuit has labelled it "onerous." *Id*

Here, the Trustee seeks to surcharge Wheeling for expenditures related to (a) collection of accounts receivable generally (Surcharge Motion, ¶¶ 7-9); (b) collection of the Irving Receivables; (*id.* at ¶ 10); (c) realization of the TMA proceeds (*id.* at ¶ 11-12); and (d) the sale of the railroad itself (*id.* at ¶¶ 13-14). The Trustee cannot meet his onerous burden and the Surcharge Motion must fail for multiple reasons. First, insofar as the Trustee seeks a surcharge of professional fees expended for the alleged benefit of Wheeling (approximately $136,700 per the Surcharge Motion), it must be remembered that to date, all of the Trustee's professional fees have been (or will be) funded by the Federal Railroad Administration ("FRA") pursuant to a carve-out. In other words, the estate has not paid and will not pay any of the professional fees

sought to be surcharged to Wheeling, and in these circumstances, surcharge is entirely inappropriate and unavailable under § 506(c).

Second, 11 U.S.C. § 506(c) requires the existence of an allowed secured claim before the Trustee can seek to surcharge Wheeling. In the case of the TMA proceeds, the Trustee has appealed the order of this Court allowing Wheeling's security interest therein. Regarding accounts receivable, the Trustee disputes Wheeling's secured claims with respect to so-called Canadian Receivables, as evidenced by the Trustee's statement of issues on appeal with respect to the TMA proceeds. In any event, a necessary condition precedent to a valid § 506(c) claim with respect to the TMA proceeds and the Canadian Receivables is entirely absent – an allowed secured claim.

Third, the expenditures in question were not made primarily for the benefit of Wheeling as required by First Circuit authority; indeed, it can hardly be disputed that Wheeling was not the intended beneficiary of any expenditures by the Trusteee. In point of fact, all of the Trustee's and the Debtor's expenditures were made primarily for the benefit of the estate. The Trustee repeatedly and publicly announced his objective to keep the railroad operational so as to maximize its value in a sale — value that would redound to the estate as a whole, and not to Wheeling. The Trustee incurred operating expenses, such as maintaining its offices and employees and maintaining railroad track, not for the benefit of Wheeling, but in anticipation of a sale, and for the benefit of the general estate.

Finally, and assuming *arguendo* that the expenditures were primarily for the benefit of Wheeling, the Surcharge Motion nevertheless provides no basis on which Wheeling or the Court can determine whether the amounts spent were reasonable. Because the Trustee cannot

meet either a condition precedent to application of § 506(c), nor two of the elements required by that statute, he is not entitled to surcharge Wheeling's collateral.

B. The Trustee Has Challenged Wheeling's Secured Claim As to Much of the Applicable Collateral, Making 11 U.S.C. § 506(c) Inapplicable By Its Plain Language.

Section 506(c) is clear: in order to even attempt to surcharge a secured creditor's collateral, that secured creditor must have an "allowed" secured claim. *See O'Donnell v. Northwest Airlines (In re Northeast Express Reg'l Airlines),* 228 B.R. 53, 92 (Bankr. D.Me. 1998) ("By its explicit terms, Section 506(c) applies to holders of 'allowed secured claims.'") (Emphasis added). In this case, the Trustee has objected to allowance of Wheeling's secured claim in two respects. First, he has appealed the Order of this Court granting Wheeling an allowed secured claim in a portion of the TMA proceeds. *See* Decision and Order Regarding the Proceeds of the Sale of the Debtor's 45G Tax Credit (the "45G Order") [D.E. ## 761] and Notice of Appeal of the 45G Order [D.E. # 884]. Second, in conjunction with that appeal, he has challenged the security interest of Wheeling in and to the so-called Canadian Receivables. *See* Appellant's Statement of Issues to Be Presented on Appeal [D.E. # 921][1].

As a result of these appellate challenges, Wheeling does not, at this time, have an allowed secured claim in either the TMA proceeds (for which the Trustee us seeking to surcharge Wheeling $227,456 in qualified expenditures) or in the Canadian Receivables (for which the Trustee is seeking to surcharge Wheeling $125,500). At this stage of the

[1] Among the issues listed by the Trustee are the following:

1. Whether the Bankruptcy Court's finding that MMA owns all of the accounts receivable was supported by the evidence admitted at the hearing on January 23, 2014.
2. Whether the Bankruptcy Court violated the Cross Border Protocol by determining that MMA owns all of the receivables generated by the operation of MMA's business and by the operation of MMA's subsidiary's business.
3. Whether the Bankruptcy Court erred by concluding that Wheeling's security interest attached to MMA's rights under the Track Maintenance Agreement entered into by and between KM Strategic Investments, LLC, MMA, and Montreal, Maine & Atlantic Corp.

proceedings, Wheeling has, at best, a disputed claim in those funds and the plain language of § 506(c) requiring an "allowed" secured claim therefore bars any attempt by the Trustee to surcharge Wheeling for costs related to the same. *See O'Donnell*, 228 B.R. at 92.

C. The Expenditures Were Neither Made Nor Intended Primarily to Benefit Wheeling; Instead They Were Made to Benefit the Estate.

The Surcharge Motion posits that certain expenses incurred by the Trustee in collecting accounts receivable (including Irving Receivables) and TMA proceeds as well as and orchestrating the sale of the railroad itself "benefitted Wheeling and Wheeling alone." Surcharge Motion, ¶ 21. This statement is utterly divorced from the realities of this case – realities that have existed unchallenged since the Petition Date. Contrary to the Trustee's assertions, the estate – and not Wheeling – was the "direct and intended" beneficiary of those expenditures. *See Gallivan*, 110 F.3d at 852. The Trustee has been clear since his appointment that he believed it to be imperative that the Debtor remain an operating railroad, in order to preserve the business' going concern value pending a sale of its assets. This, in turn, was intended to maximize the ability of the Debtor to generate funds to pay off creditors, first and foremost the personal injury claimants damaged by the derailment.

Indeed, the assets that the Trustee sought to sell consisted primarily of the railroad's real estate (railroad track and rights) and operating equipment. Wheeling claims no security interest in these assets. In fact, the ultimate sale that occurred did not even include sale of Wheeling's primary collateral, the accounts receivable. Wheeling does have a security interest in inventory of the Debtor, but it is telling that as part of the total sale of assets of the Debtor's railroad, only a minor portion of the sale proceeds ($300,000 out of more than $12.5 million) was allocated to Wheeling for the sale of inventory collateral. It is simply not plausible to say that Wheeling was either the "intended" or "primary" beneficiary of the Trustee's expenditures to operate the

Debtor's railroad, when the ultimate goal of that endeavor was to sell the railroad, and Wheeling's stake in the sale was less than three percent (3%) of the proceeds.

Not only did the Trustee's expenditures to operate the railroad result, in fact, in only a *de minimis* benefit to Wheeling, it is clear that the Trustee had no intention even to confer that *de minimis* benefit. Here are just a few of the many statements made by the Trustee which make it clear that this case has been administered for purposes – however appropriate – entirely distinct from any acknowledged or inferred intent to benefit Wheeling:

- "All parties need to acknowledge the prospect that this case will be administered, beyond the need to preserve an operating railroad for the benefit of Maine and regional economies (perhaps via a prompt sale), primarily for the benefit of the wrongful death and personal injury claimants."

  Preliminary Response of Chapter 11 Trustee to Various First Day Motions Filed By Montreal, Maine & Atlantic Railway, Ltd. [D.E. # 68], ¶ 10.

- "Additional financing is required to continue the Debtor's operations at a stable level through a reasonable sale period . . . The Trustee expects that the assets of the Debtor and MMA Canada will be sold either under either section 363 (and relevant similar provisions of the CCAA) or pursuant to a plan including provisions allowed under 11 U.S.C. § 1172(2)(A) and similar applicable provisions of the CCAA . . . ." Chapter 11

  Trustee's First Report Pursuant to Local Rule 3016-3 [D.E. # 270], ¶¶ 3.a and 3.e.

- "After the Petition Date, and subsequent to the appointment of the Trustee, the Trustee began negotiations with the Bank about the Bank providing post-petition financing needed to fund the Debtor's operating costs and working capital needs pending a sale of the Debtor's assets."

  Chapter 11 Trustee's Motion For Order: (A) Authorizing Debtor to Obtain Post-Petition Financing; and (B) Granting to Camden National Bank Post-Petition Security Interests [D.E. # 337], ¶ 12.

- "The Trustee, MMA Canada, and the Monitor, in consultation with FRA, have determined that a sale of the assets of both MMA and MMA Canada, on a going concern basis, is in the best interests of the creditors of both Debtors."

  Motion for Authority to Sell Substantially All of the Debtor's Assets and to Assume and Assign Certain Executory Contracts and Unexpired Leases [D.E. # 490], ¶ 15.

- "After the Petition Date, the Trustee began negotiations with Lender about providing post-petition financing needed to fund the Debtor's operating costs and working capital needs pending a sale of the Debtor's assets."

  Chapter 11 Trustee's Motion for Interim and Final Orders (A) Authorizing Debtor to Obtain Post-Petition Financing And (B) Granting to Camden National Bank Post-Petition Priority Liens (D.E. # 611), ¶ 12.

In other words, all of the expenditures listed in the Surcharge Motion were made by the Trustee (or at the Trustee's direction) to reach a clearly articulated goal — keeping the railroad operational in order to maximize its sale as a going concern. It was clear that none of his efforts were for the primary or direct purpose of disposing of Wheeling's collateral. A more accurate statement would be that the collection and use of Wheeling's accounts receivable collateral was necessary in order for the Trustee to achieve his other objectives; it was a means to an end rather than an end in itself. Far from warranting surcharge, Wheeling is entitled to compensation for the use of its collateral, and that is the subject of other proceedings before this Court. *See In re Westwood Plaza Apts.*, 154 B.R. 916, 922 (Bankr. E.D. Tex. 1993) ("The Court agrees with the Debtor that HUD has received some benefit from the Plan – no matter how much HUD may disagree. HUD is receiving a return on its allowed unsecured claim that it would not have received in liquidation. However, the benefit that HUD has received is only incidental. The services were incurred directly, and primarily, to assist the Debtor to reorganize and maintain ownership of the apartment complex.")

Wheeling may well have received incidental benefits from the Trustee's efforts, but that does not justify any surcharge. As this Court put it in another case, "the services performed during the reorganization proceeding were primarily self-serving and intended to benefit the debtor, not the secured parties." *Korupp Assoc.*, 30 B.R. at 663 (emphasis added). What is clear is that the Trustee chose to continue the Debtor's operations for the benefit of other

creditors of the bankruptcy estate. As a means to that end, he devoted some effort to collecting Wheeling's accounts receivable, but he did so to serve his ultimate goal: keep the railroad running. Wheeling was never the direct or the intended beneficiary of those efforts.

1. Accounts Receivable Generally

Expenses incurred by the Trustee related to the collection of accounts receivable falls squarely into the *Korupp* rubric: they were "primarily self-serving" because Wheeling's security interest in the Debtor's accounts receivable required that the Trustee be attentive to that balance sheet item in order to be able to raise cash, and then utilize it to keep the railroad operating. The Trustee has made this clear in his pleadings:

> In the absence of the Trustee's efforts and the agreement with Wheeling, the Debtor's business would have ceased to function, severely degrading its value as a going concern to the detriment of all creditors.

First Interim Application of Trustee Robert J. Keach for Allowance and Payment of Compensation and Reimbursement of Expenses for the Period August 21, 2013 through April 30, 2014, ¶ 10 [D.E. # 873]. Simply put, no attention to accounts receivable would have meant no revenues, and no operating railroad, no sale (or a far less advantageous sale) and no corresponding benefit to the estate as a whole. The expenses incurred were plainly for the primary and direct benefit of the Debtor.

Even if this were not the case, the Surcharge Motion must also fail because it casts an impermissibly broad net in seeking to charge Wheeling for accounts receivable-related expenses. As Wheeling has explained in its pending Motion to Enforce Cash Collateral Orders [D.E. # 603][2], the Trustee has collected more than $500,000 of "Canadian Receivables" that it has not turned over to Wheeling, in violation of the plain language of the various cash collateral

[2] And Wheeling's subsequently-filed Supplemental Brief In Support of Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Orders [D.E. # 845].

orders and the Debtor's own historic business practices and accounting conventions. It would be patently unfair and entirely inappropriate for Wheeling to be surcharged for the expenses of collecting accounts receivable that were wrongfully withheld from it (a wrong as to which Wheeling is currently expending considerable resources to correct).

Moreover, the Trustee seeks to pay (a) expenses incurred by the Trustee's financial advisor, Development Specialists, Inc. ("DSI") "dealing with accounts receivable in this case"; and (b) a pro-rated share of the salary and benefits paid to a Debtor employee to collect accounts receivable "for the eight month period from August through March . . . ." Surcharge Motion, ¶¶ 8, 9. As the Court knows, the Trustee and the Debtor collected accounts receivable for their own benefit during the period of time between the Petition Date and October 18, 2013. Wheeling did not receive any funds collected during that period of time; instead the Debtor and the Trustee collected those funds and then spent them for operations, *etc.* This provided no benefit whatsoever to Wheeling. In fact, in doing so, the Trustee dissipated Wheeling's collateral by more than $1,000,000, and Wheeling has a substantial adequate protection claim as a result. In these circumstances there is simply no basis upon which to surcharge Wheeling for costs incurred by the Debtor in collection accounts — an activity done for the sole benefit of the Debtor and done with substantial harm to Wheeling in the form of dissipation of its collateral.[3].

2. The Irving Receivables

The issue of the Irving Receivables provides an apt illustration of Wheeling's objections to the Surcharge Motion in general. As the Trustee notes in the Surcharge Motion, he took legal action soon after appointment to compel the turnover of receivables held by certain Irving

[3] As the Court is also aware, there is a "bucket" of accounts receivables, the so-called "Canadian misc." receivables as to which Wheeling has disclaimed any interest and which have been collected and spent by the Debtor since the Petition Date without restriction. If follows of course that they provided no benefit to Wheeling and the costs of collecting the same cannot be charged to Wheeling. The Trustee provides no breakdown of the percentage of the employee's or DSI's time that was spent collecting the Canadian misc. receivables.

account debtors. *See* Motion for Order Pursuant to 11 U.S.C. § 542(b) (the "Turnover Motion") [D.E. # 124], ¶ 15. As was the case with receivables in general, the Trustee undertook this activity not to benefit Wheeling, but to raise money to fund his operation of the Railroad. This was clear from the start, and the Trustee conceded as much:

> Payment of the Debts is important to the operation of the Debtor's railroad in the short term. The Trustee expects current discussions to result in post-petition financing sufficient to allow the proper operation of the railroad for the foreseeable future. However, pending such financing, the Trustee requires payment of the Irving Debt and the GNP Debt.

Turnover Motion, ¶ 15 (emphasis added). Even more telling is the fact that when the Trustee proposed a settlement with Irving, Wheeling objected because it believed that the proposed payment by Irving was inadequate. The Trustee did not acquiesce in Wheeling's objection; he fought for the settlement he wanted. Ultimately, Irving did in fact pay more than the Trustee had proposed, however, the point is that if the Trustee's real motivation and intent in the Irving matter was to benefit Wheeling, then the Trustee would have acquiesced in, not fought, Wheeling's efforts to increase the amount of the settlement. The Trustee did not do so because he desperately wanted the money — and he got it, obtaining over $150,000 with which to fund Railroad operations. Under all of these circumstances, it is beyond plausible dispute but that the Debtor was the direct and intended beneficiary of the expenses incurred by the Trustee in collecting the Irving Receivables[4] and they cannot be surcharged to Wheeling.

[4] A couple of other important issues related to the Irving Receivables must be addressed, both of which arise from the Trustee's statement that he incurred "approximately" $56,400 in connection with collection of the Irving Receivables. Surcharge Motion, ¶ 10. First, and as the Court no doubt recalls, Wheeling requested leave to intervene in the Irving Receivables contested matter. Over the Trustee's objection, the Court permitted Wheeling to participate in the contested matter, which participation included discovery and eventually, a formal objection to the Trustee's attempt to compromise his dispute with Irving without Wheeling's consent. *See* Wheeling & Lake Erie Railway Company's Objection to Chapter 11 Trustee's Motion for Order Approving Compromise and Settlement With Irving Paper Limited, Irving Pulp & Paper, Limited, and J.D. Irving Limited [D.E. # 384]. To the extent that some portion of the $56,400 sought by the Trustee relates to his litigation with Wheeling, that amount cannot be surcharged to Wheeling as it provided Wheeling with no benefit whatsoever. To the contrary, those legal fees were expended challenging Wheeling's entitlement to its collateral. These types of expenditures cannot

3. The TMA Proceeds

The Trustee's attempted application of § 506(c) to the qualified expenditures incurred by the Debtor to generate the TMA proceeds is especially troublesome as it ignores the rulings of this Court in the matter, as well as the sworn testimony of the Debtor's own chief financial officer. More specifically, the Surcharge Motion states that the Debtor incurred $227,456 in qualified railroad track expenditures between the Petition Date and October 17th and that "[t]hese expenditures resulted in payments by KMSI that the Court determined were Wheeling's collateral." Surcharge Motion, ¶ 11. While it is true that the Debtor made qualified track expenditures after the Petition Date[5] and that Wheeling then received a portion of the TMA proceeds thus generated, it does not follow that Wheeling should be surcharged.

In the proceedings before the Court regarding the TMA proceeds and the related 45G Tax Credits, the Trustee argued that the "equitable exception" to Section 552(b)(1) of the Bankruptcy Code warranted a determination that Wheeling should not have a secured claim in the 45G Tax Credits because the track maintenance expenditures were funded, at least in part, with what the Trustee claimed were proceeds of unencumbered assets — the so-called "Canadian Receivables." The Court rejected this argument and held that the Canadian Receivables were collateral for Wheeling, and that in fact, it was proceeds of Wheeling's

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under any circumstances be an appropriate component of a § 506(c) surcharge request as they provided no benefit – direct or otherwise – to Wheeling. *See Korupp,* 30 B.R. at 663 (noting that IRS gained no benefit – surchargeable or otherwise – from the Debtor's attempts to challenge the IRS' attempts to exercise its rights as to its collateral)

Second, 26% of the Irving Receivables settlement ($150,000 of the $581,000 total) was paid to the Debtor and not to Wheeling and therefore provided Wheeling with no benefit. *See e.g.*, Surcharge Motion, ¶ 10. It follows that even if one could overlook the facts (a) that the direct and primary beneficiary of the Irving Receivables settlement was the estate and its cash needs; and (b) that some significant portion of the legal fees was incurred litigating against Wheeling, any surcharge levied on Wheeling for the collection of the Irving Receivables must be reduced by 26% of the total amount requested, $56,400, or $14,664.

[5] The Debtor does not concede that the amount of qualified expenditures supposedly made between the Petition Date and October 17 – $227,456 – is accurate.

collateral that funded the qualified track maintenance expenditures that created the resulting 45G Tax Credit through October 18, 2013.

Plainly, if the $227,456 that the Trustee spent on track maintenance was proceeds of Wheeling collateral, and not unencumbered estate assets, as the Court determined, there is absolutely no basis to surcharge the secured creditor because Wheeling was already "surcharged" when its collateral was spent by the Trustee on the qualified track expenditures. The Trustee has it backward; if anything, rather than a surcharge, Wheeling is entitled to an adequate protection claim for the expenditure of its collateral. The Trustee's surcharge claim for $227,456 must be rejected.

While the fact that the Trustee spent Wheeling's money (not the estate's) should end the § 506(c) discussion, it can also be pointed out that the surcharge claim fails on more conventional grounds. Again, a successful § 506(c) request requires a showing that the secured creditor was the "direct and intended" beneficiary of the expenditures; a secondary or incidental benefit to the secured creditor does not suffice for surcharge purposes. *Gallivan*, 110 F.3d 848, 852; *In re Iberica Mfg.*, 180 B.R. 707, 712-13 (Bankr. D.P.R. 1995) (citations omitted); *Korupp*, 30 B.R. at 663.

During the hearing on the 45G Tax Credits, the Debtor's Chief Financial Officer and Vice President of Administration, testified under oath about the intent and purposes behind the qualified expenditures that the Trustee now argues should be charged to Wheeling (even though it was Wheeling's money in the first place):

> Q: All right. Is it fair to say that the expenditures that the Debtor certified here arose from maintenance and repairs that the Debtor performed on its track?
>
> A: It is true. Yes . . .
>
> Q: <u>What was the Debtor's purpose in making these repairs?</u>

A: It is, truthfully, normal maintenance of the track and rail bed.

Q: Running the railroad during ordinary course of business.

A: It's ordinary course maintenance. It can be snow removal as part of a maintenance program –

Q: And is there a –

A: – track, fixing switches.

Q: Is there a safety component to that work?

A: Certainly.

Q: So [sic] be fair to say that in the ordinary course of business the Debtor determines what work it needs to do to be able to run the track profitably and safely?

A: Yes . . .

Transcript of January 23, 2104 Hearing at 86:4-25[6] (emphasis added). Mr. Gardiner made the self-interested nature of the qualified expenditures even more explicit later in his testimony:

Q: Was this work done in the Debtor's own interests?

A: Yes.

Q: And would it have been performed regardless of the existence of the track maintenance agreement?

A: Yes.

Id. at 88:14-15 and 20-22 (emphasis added).

This testimony is clear and unequivocal: the qualified expenditures were made to enable continued railroad operations and to comply with applicable safety regulations. Mr. Gardner made it clear that they would have been made regardless of whether the TMA contract was in

[6] A copy of this transcript is attached to the Supplemental Brief In Support of Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Orders as ***Exhibit A*** [D.E. # 845-1]. Given the voluminous size of that transcript, Wheeling is not attaching another copy of the same to this Objection.

effect or not. Regardless of what rubric one uses – *Parque Forestal's* "primary" benefit, *Gallivan's* "direct and intended" beneficiary, or *Korupp's* "primarily self-serving" – the result is the same: The Trustee made qualified track expenditures in order to further his goal of operating the railroad. He made them without regard to any incidental benefit to Wheeling. Wheeling cannot be charged for the cost of the qualified expenditures because the primary beneficiary of the same was (as was intended) the Debtor itself.

4. The Railroad Sale

Finally, there can be no real argument that the sale of the Railroad – which did provide Wheeling with an indirect benefit in that the buyer purchased certain inventory that was Wheeling's collateral – primarily benefited the Debtor and the estate as a whole as it was the Trustee's goal from day one of his appointment. *See Parque Forestal*, 949 F.2d at 512. The Trustee concedes as much in the Surcharge Motion: "The Trustee determined that a sale of the integrated rail system operated by the Debtor and its wholly-owned subsidiary, MMA Canada, was in the best interests of the estate." Surcharge Motion, ¶ 13. Further, the ultimate outcome of the sale proves the point: Wheeling's stake, the proceeds of inventory, is not more than two percentage points on the whole transaction, a minor interest. Because the Trustee's actions were "primarily self-serving," there is no basis for Wheeling to be charged for a portion of the professional fees incurred in marketing and selling the railroad.

Additionally, the Trustee provides no realistic apportionment of those professional fees to the sale of Wheeling's physical inventory, instead simply "approximating" that 2% of the professional fees are properly attributable to that inventory because the sale price of the physical inventory equals 2% of the total sale price. Surcharge Motion, ¶ 13. Wheeling has significant doubts about the propriety of this apportionment because its physical inventory was an

extremely minor component of the transaction and it is hard to imagine that the Trustee's professionals spent over $25,000 haggling over easily-valued diesel fuel and other tangible inventory. The Trustee has the burden of showing that it actually spent $25,000 in order to secure the sale of the inventory; it seems highly unlikely that he did.

The Trustee's failure to meet his burden that any of the denominated expenditures directly and intentionally benefits Wheeling requires that the Court deny the relief requested in the Surcharge Motion.

D. The Trustee Cannot Surcharge Wheeling For Professional Fees Paid Through The FRA Carve-out, And Not Paid By The Estate.

The Surcharge Motion claims that Wheeling should reimburse the estate for the $136,700 in professional fees allegedly incurred by the estate for the benefit of Wheeling. Leaving aside the many shortcomings in this claim discussed elsewhere in this Objection, the fact of the matter is that the Trustee's professional fees are to be paid, to the extent allowed, from a carve-out granted by the FRA, and approved by the Court. In other words, not a penny of estate assets are or will be spent to pay the professional fees that the Trustee wants to charge to Wheeling. The FRA is going to pay all of them, to the extent that they are allowed; and the FRA has no surcharge rights as to Wheeling. Simply put, before consideration of the requirements of § 506(c) can be given, there must be some expenditure of unencumbered estate assets. If there is none, there is no basis for the Trustee to seek a surcharge. That is the case here, and the Surcharge Motion must fail in respect of professional fees because the estate has not and will not pay or incur these fees.

E. The Trustee Has Adduced No Evidence that the Expenditures Were Reasonable In Amount.

Finally, and even assuming that the other elements of a successful § 506(c) request were present, the Trustee nevertheless provides us with no information to support his bald assertions that "[t]he Trustee's expenditures were reasonable and, in the absence of a bankruptcy filing by the Debtor, Wheeling would have incurred the same or greater expenses in its own efforts to liquidate the collateral." Surcharge Motion, ¶ 20. Faced with a burden that falls squarely on his shoulders, *e.g., Korupp Associates, Inc.*, 30 B.R. at 661, it is mystifying that the Trustee attaches no billing records, affidavits, or other data whatsoever to the Surcharge Motion. Put another way, there is no evidence of reasonableness. To the extent that the Trustee seeks to surcharge Wheeling with any professional fees, none of them have been finally allowed by the Court, and that is unlikely to occur for some time, regardless of any interim allowance. Further, there is no evidence that if the Trustee had not expended the sums he claims to have expended, that Wheeling would have avoided a similar or greater expense.

This complete lack of evidence makes it impossible for Wheeling or the Court to determine if the fees and expenses at issue were reasonable and if they are, if Wheeling would have incurred commensurate expenses in collecting and liquidating its collateral[7]. *See, e.g., In re Strategic Labor*, 467 B.R. 11, 24 (Bankr. D.Mass. 2012) (discussing the detailed analysis undertaken by the Court of the debtor's counsel's daily billing records "contained in the debtor's § 506(c) motion."); *In re Nat'l. Enterprise Wire Co.*, 103 B.R. 56, 60 (Bankr. N.D.N.Y.

[7] Among other things, absent additional information, Wheeling and the Court cannot determine what portion of the Debtor employee's time was spent collecting accounts receivable during the period between the Petition Date and October 18th (which were indisputably collected for the benefit of the Debtor alone) and what percentage of his or her time was spent collecting so-called "Canadian misc." accounts receivable," which Wheeling does not have an interest in. *See* fn. 3, *supra.* Similarly, there is current no way to calculate what portion of legal fees claimed by the Trustee as to collection of the Irving Receivables are attributable to the Trustee's litigation on that issue with Wheeling, which expenses cannot be surcharged against Wheeling. *See* fn. 4, *supra.*

1989) ("Examining the Fee Application solely in the context of § 506(c), the Court concludes that, absent Trustee time records, it cannot begin to consider an award of $5,000.00, let alone reasonableness."); *In re Baum's Bologna,* 50 B.R. 689, 691 (Bankr. E.D.Pa., 1985) (denying § 506(c) request because, *inter alia,* movant adduced no evidence that the secured creditor would have received in the absence of the relevant legal services).

To the extent that the Trustee sees to surcharge Wheeling for any professional fees, the Surcharge Motion is both deficient and premature. It is deficient because there is no showing that the professional fees are reasonable, or commensurate with what Wheeling would have incurred in the absence of a bankruptcy proceeding. It is premature because professional fees of the Trustee would in any event be finally allowed for some time, and in the absence of final allowance, and payment by the estate, there is no basis for a surcharge. The Trustee's reliance on nothing more than his own *ipse dixit* and as to the final element of the § 506(c) test represents a complete failure on his part to meet the required burden of proof and the Court should deny the relief requested in the Surcharge Motion.

RESPONSES REQUIRED BY D.Me. LBR 9013-1(f)

1. Paragraph 1 of the Surcharge Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling admits the allegations made therein.

2. Wheeling admits that the Trustee is requesting an order authorizing him to recover certain expenses from Wheeling. Wheeling denies that the Trustee is entitled to the relief requested.

3. Wheeling admits the allegations made in ¶ 3 of the Surcharge Motion.

4. Wheeling admits the allegations made in ¶ 4 of the Surcharge Motion.

5. Wheeling admits the allegations made in the first, second and fourth sentences of ¶ 5 of the Surcharge Motion. Wheeling states that the terms of the Security Agreement referenced in the third sentence of ¶ 5 of the Surcharge Motion speaks for itself.

6. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in ¶ 6 of the Surcharge Motion. As such, Wheeling denies the same.

7. Wheeling admits the allegations made in the first sentence of ¶ 7 of the Surcharge Motion. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in the second sentence of ¶ 7 of the Surcharge Motion. As such, Wheeling denies the same. Wheeling admits that, pursuant to various cash collateral orders of this Court, the Trustee has remitted funds to Wheeling representing collected accounts receivable.

8. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in ¶ 8 of the Surcharge Motion. As such, Wheeling denies the same.

9. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in ¶ 9 of the Surcharge Motion. As such, Wheeling denies the same.

10. Wheeling admits all of the allegations made in the first four sentences of ¶ 10 of the Surcharge Motion. Answering further, Wheeling notes that it was also involved in the litigation of the § 542(b) motion and that it also incurred legal expenses related to the settlement referenced in ¶ 10. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in the fifth sentence of ¶ 10 of the Surcharge Motion. As such, Wheeling denies the same.

11. Wheeling states that the terms of the TMA speak for themselves and as such, no response is required to the allegations made in the first two sentences of ¶ 11 of the Surcharge Motion. Wheeling admits the allegations made the third and fourth sentences of ¶11 of the Surcharge Motion.

12. Wheeling admits the allegations made in the first sentence of ¶ 12 of the Surcharge Motion. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in remaining sentences of ¶ 12 of the Surcharge Motion. As such, Wheeling denies the same.

13. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in the first sentence of ¶ 13 of the Surcharge Motion. As such, Wheeling denies the same. Wheeling admits the allegations made in the second and third sentences of ¶ 13 of the Surcharge Motion. Wheeling denies the allegations made in the fourth sentence of ¶ 13 of the Surcharge Motion.

14. Wheeling lack information sufficient to opine on the truth or falsity of the allegations contained in ¶ 14 of the Surcharge Motion. As such, Wheeling denies the same.

15. Wheeling denies the allegations made in ¶ 15 of the Surcharge Motion.

16. Paragraph 16 of the Surcharge Motion contains legal citations to which no response is required. To the extent a response is required, Wheeling states that the statutes and cases cited therein speak for themselves.

17. Paragraph 17 of the Surcharge Motion contains legal citations to which no response is required. To the extent a response is required, Wheeling states that the statutes and cases cited therein speak for themselves.

18. Paragraph 18 of the Surcharge Motion contains legal citations to which no response is required. To the extent a response is required, Wheeling states that the statutes and cases cited therein speak for themselves.

19. Paragraph 20 of the Surcharge Motion contains legal citations to which no response is required. To the extent a response is required, Wheeling states that the statutes and cases cited therein speak for themselves.

20. Wheeling denies the allegations made in ¶ 20 of the Surcharge Motion.

21. Wheeling denies the allegations made in ¶ 21 of the Surcharge Motion.

22. Wheeling admits that the Trustee has the ability, under appropriate circumstances, to supplement the Surcharge Motion but denies that it is entitled to do so or that any such supplements have any merit.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Wheeling respectfully requests that the Court enter an Order:

A. Denying or conditioning the grant of the relief requested in the Trustee's Motion to Amend as is appropriate to provide adequate protection to Wheeling and to preserve its rights under the circumstances; and

B. Granting such other relief as the Court deems just and appropriate.

Dated: June 10, 2014

/s/ David C. Johnson
George J. Marcus
David C. Johnson
Andrew C. Helman

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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 electronically at the addresses set forth on the Service List set forth below on 10th day of June, 2014.

/s/ Holly C. Pelkey
Holly C. Pelkey
Legal Assistant

Mailing Information for Case 13-10670

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

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