UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

TRUSTEE'S OBJECTION TO WHEELING & LAKE ERIE RAILWAY COMPANY'S MOTION (1) TO ENFORCE ORDER GRANTING CHAPTER 11 TRUSTEE'S MOTION FOR AN ORDER APPROVING COMPROMISE AND SETTLEMENT WITH TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA OR (2), ALTERNATIVELY, FOR A STAY PENDING APPEAL OF THE DECISION AND ORDER REGARDING THE PROCEEDS OF TRAVELER'S INSURANCE POLICY DATED APRIL 15, 2014

Robert J. Keach, Esq., in his capacity as the chapter 11 trustee (the "Trustee"), objects to the Wheeling & Lake Erie Railway Company's Motion (1) To Enforce Order Granting Chapter 11 Trustee's Motion for an Order Approving Compromise and Settlement with Travelers Property Casualty Company of America or (2), Alternatively, For a Stay Pending Appeal of the Decision and Order Regarding the Proceeds of Traveler's Insurance Policy Dated April 15, 2014 [D.E. 935] (the "Motion") filed by Wheeling & Lake Erie Railway Company ("Wheeling"). In support of this objection, the Trustee states as follows:

A. The Court Should Reject Wheeling's Interpretation of the 9019 Order.

There is no reason for the Court to enforce the 9019 Order, and Wheeling's request for the Court to enforce that order is misplaced.[1] Wheeling correctly points at the relevant language in the 9019 Order:

[1]Capitalized terms used in this objection have the meanings given to such terms in the Motion (unless otherwise expressly defined in this objection).

> The Settlement Payment, and each portion thereof, shall be held in escrow pending further Order of this Court or pending an agreement reached between the Trustee, MMAC, Wheeling and the FRA.

9019 Order, at ¶ 2. Even a cursory review of the 9019 Order reveals that the purpose of this restriction was to ensure that there was an adequate opportunity for the Court to determine the nature and extent of Wheeling's asserted interest in the Settlement Payment. Once that determination was made (and it was made on April 15, 2014), there was no reason for the Settlement Payment, or any portion of it, to remain in escrow pursuant to the 9019 Order. In other words, when this Court determined, on April 15, 2014, that Wheeling did not have an interest in any portion of the Settlement Payment, the Court entered the precise type of order contemplated by the 9019 Order. Nothing further is required. The 9019 Order does not require a Court order with particular language authorizing the distribution of the Settlement Payment. Once the Court determined that Wheeling did not have a security interest in the Settlement, there was no logical reason for the escrow imposed by the 9019 Order to continue.

B. The 9019 Order Should Be Harmonized with the Canadian Court's Order Regarding the Portion of the Settlement Payment Allocated to MMA Canada.

Wheeling argues that the entire Settlement Payment, in the amount of $3.8 million, was placed *in custodia legis*, thereby giving this Court the jurisdiction to enter orders with respect to the entire amount of the Settlement Payment. *See* Motion, at ¶¶ 21-28. Somewhat surprisingly given the subject matter of the Motion, Wheeling does not even mention, let alone address the import of, an order entered by the Canadian Court on December 19, 2013. Given the adoption of a cross-border protocol and given the manner in which this Court and the Canadian Court have attempted to coordinate the two bankruptcy cases, this Court should recognize the Canadian Court's order to the greatest extent possible. Acceptance of Wheeling's argument would be at odds with that goal.

On December 19, 2013, the Canadian Court entered an order on a request by MMA Canada relating to the compromise with Travelers. Wheeling had notice of MMA Canada's request, but did not appear in opposition to the request or otherwise. The Canadian Court's order provides, in pertinent part, that:

> The Settlement Payment shall be made in two payments to account for the allocation described above: (i) one payment in the amount of U.S.$2,470,000.00 shall be paid to [MMA Canada] through the Monitor to the order of Richter Advisory Group, Inc. IN TRUST and shall be kept in trust by the Monitor until further order of this Court; and (ii) one payment in the amount of U.S.$1,330,000.00 shall be paid to [MMA] IN TRUST and shall be kept in trust by [MMA] until further order of the U.S. Bankruptcy Court for the District of Maine.

Order dated December 19, 2013 (a copy of which is attached hereto as **Exhibit A**), at ¶ 3(b) (emphasis added). MMA Canada and the Monitor have asked the Canadian Court for an order authorizing the release of the $2,470,000.[2] There is no reason for this Court to, as Wheeling asks, "exercise jurisdiction" over the $2,470,000 and the $1,330,000, when the Canadian Court is capable of addressing the parties' respective entitlements to the $2,470,000.

C. Wheeling's Request for a Stay Pending Appeal is Untimely and Should be Denied for That Reason.

Perhaps recognizing the weakness in its first argument, Wheeling asks this Court for an alternative remedy: a stay pending its appeal of the Travelers Order. Although Rule 8005 authorizes the Court to grant a stay pending appeal, *see* Fed. R. Bankr. P. 8005, the Court should not grant this relief.

The Travelers Order was entered on April 15, 2014. For over seven weeks, Wheeling took no action to obtain a stay. Meanwhile, the appeal has proceeded in the ordinary course. A briefing schedule has been set by the Bankruptcy Appellate Panel, and Wheeling's brief, as the appellant, is due on June 19, 2014. In addition, the Trustee and other parties (including the

[2] That request is scheduled to be considered by the Canadian Court on June 11, 2014.

Monitor in the CCAA case) have negotiated agreements based on Wheeling's failure to take any action—whether in chapter 11 case or in the CCAA case—to obtain a stay of the Travelers Order. For example, the parties entered into the third amendment to the purchase and sale agreement with Railroad Acquisition Holdings LLC. That amendment, which bifurcated the closing of the sale into U.S. and Canadian components and placed certain sale proceeds in escrow pending an allocation decision was premised, in part, on the assumption that the Travelers' settlement funds subject to the Canadian Court's order would be distributed in the event that court so ruled. Under these circumstances, the request for a stay is untimely and, therefore, should be denied. *See* Lafayette v. Kaplan (In re Kaplan), 373 B.R. 213 (1st Cir. B.A.P. 2007)(holding that appellant's motion for stay pending appeal was untimely, where motion was filed two months after entry of the order). Like the appellant in Kaplan, Wheeling "sat on its hands" for nearly two months. Like the motion in Kaplan, the Motion should be denied as untimely.

D. Wheeling Has Not Met Its Burden of Justifying A Stay Pending Appeal.

Wheeling correctly contends that Rule 8005 does not, by its express terms, articulate the standards by which a court should evaluate a request for a stay pending appeal. Assuming that the standards are those identified by the Bankruptcy Appellate Panel in Country Squire Assocs. of Carle Place, L.P. v. Rochester Community Savs. Bank (In re Country Squire Assocs. of Carle Place, L.P.), 203 B.R. 182 (2nd Cir. B.A.P. 1996), Wheeling has failed to meet them.

As an initial matter, the burden of justifying a stay pending appeal is a heavy one. *See* In re 473 West End Realty Corp., 507 B.R. 496, 501 (Bankr. S.D.N.Y. 2014). As to the first factor, Wheeling must demonstrate a "substantial possibility of success." *See* id. Wheeling has not done this. Instead, it simply labels the issues on appeal as "unsettled." The absence of any

applicable authority at the Circuit Court of Appeals level does not, as Wheeling seems to suggest, translate into a substantial possibility of success on appeal. In fact, Wheeling points to no controlling authority suggesting that this Court erred when it concluded that Wheeling had not perfected its security interest in the Settlement Payment.

Some courts have held that the required level or degree of possibility of success on appeal may vary with the reviewing court's assessment of the other factors. *See* id. (*citing* Mohammed v. Reno, 309 F.3d 101 (2nd Cir. 2002)). Here, the other factors do not support the issuance of a stay. Wheeling will not suffer irreparable harm if the portion of the Settlement Payment attributable to MMA is disbursed. Those funds would be disbursed to the FRA on account of a lien granted to the FRA by the Trustee (with this Court's approval). Wheeling would not suffer irreparable harm if the portion of the Settlement Payment attributable to MMA Canada is disbursed pursuant to an order of the Canadian Court. Those funds would likely be disbursed to professionals in the CCAA case. The money would not, as Wheeling suggests, be transferred to an insolvent debtor or debtors, never to be seen again in the (highly unlikely) event that Wheeling was successful in its appeal of the Travelers Order. In this vein, there are creditors—including administrative creditors in the CCAA case—that would be prejudiced by a stay pending appeal. As noted before, with the exception of some minor tax claims, no pre-petition claim has received any payment in this case, except for the secured claim of Wheeling. The rest of the creditors have had to wait. The Canadian professionals have waited; in fact, they have not received a penny for the services rendered since the CCAA was commenced more than ten months ago. There is no just reason why Wheeling should be permitted to tie up the Settlement Payment while it pursues an ill-fated appeal. Finally, the public interest does not justify a stay pending appeal. This factor is neutral at best.

E. Any Stay Should be Conditioned on Wheeling's Provision of a Bond or Other Surety.

This Court determined the nature, extent, and priority of Wheeling's asserted interest in the Settlement Part as a discrete part of an adversary proceeding brought by Wheeling against the Trustee and others. *See* Wheeling & Lake Erie Railway Co. v. Robert J. Keach, Adv. Proc. 13-0103. Accordingly, Fed. R. Civ. P. 62 applies to Wheeling's request for a stay pending appeal. *See* Fed. R. Bankr. P. 7062. Rule 62 requires the appellant to provide a supersedeas bond approved by the Court. *See* Fed. R. Civ. P. 62(d). If the Court is inclined to grant a stay pending appeal, any such stay should be conditioned on Wheeling's provision of a supersedeas bond approved by the Court.

For the foregoing reasons and for such other reasons as may be identified at the hearing on the Motion, the Court should deny the Motion.

Dated: June 11, 2014

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

By his attorney:

/s/ *Michael A. Fagone*

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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. RED SHIELD ACQUISITION, LLC d/b/a OLD TOWN FUEL & FIBER, Defendant.	Adv. Pro. No. 14-01006

CERTIFICATE OF SERVICE

I, Samantha Swander, being over the age of eighteen and an employee of Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, hereby certify that on this day I filed the Trustee's Objection to Wheeling & Lake Erie Railway Company's Motion (1) to Enforce Order Granting Chapter 11 Trustee's Motion for an Order Approving Compromise and Settlement with Travelers Property Casualty Company of America or (2), Alternatively, for a Stay Pending Appeal of the Decision and Order Regarding the Proceeds of Traveler's Insurance Policy Dated April 15, 2014. via the Court's CM/ECF electronic filing system.

I further certify that a copy of the above was served via CM/ECF on individuals and entities detailed on the attached Service List.

Dated: June 11, 2014

/s/ Samantha Swander
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