UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: **MONTREAL MAINE & ATLANTIC RAILWAY, LTD.,** **Debtor.**	**Chapter 11** **Case No. 13-10670-PGK**
WHEELING & LAKE ERIE RAILWAY CO., **Plaintiff,** **v.** **ROBERT J. KEACH, in his capacity as Chapter 11 Trustee of Montreal Maine & Atlantic Railway Ltd.; Montreal Maine & Atlantic Railway Ltd.; LMS Acquisition Corp.; Montreal Maine & Atlantic Corp.,** **Defendants.**	**Adv. No. 13-01033**

TRUSTEE'S BRIEF IN SUPPORT OF OBJECTION TO WHEELING & LAKE ERIE RAILWAY COMPANY'S MOTION TO ENFORCE CASH COLLATERAL ORDERS

Robert J. Keach, the chapter 11 trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), by and through his undersigned counsel, hereby files this brief in support of the *Trustee's Objection to Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Order* [D.E. 34] (the "Objection") filed in opposition to *Wheeling & Lake Erie Railway Company's Motion to Enforce Cash Collateral Orders* [D.E. 33] (the "Enforcement Motion"), filed by Wheeling & Lake Erie Railway Company ("Wheeling").[1]

[1] Capitalized terms not defined herein have the meaning ascribed to them in the Objection.

The parties agree that the legal issues for determination in connection with the Enforcement Motion are (a) whether Bankruptcy Judge Kornreich ruled on ownership of the Canadian A/R at the March 13, 2014 and/ or May 8, 2014 hearing, and (b) if Judge Kornreich so ruled, whether such ruling is binding and effective absent a ruling of the Canadian Court (as defined below). The Trustee contends that Judge Kornreich made no such ruling. The issue of ownership was not in front of the Court during either hearing, and the issue could not have been in front of the Court alone under the Cross-Border Insolvency Protocol [D.E. 168] (No. 13-10670) (the "Protocol"). Moreover, the ownership issue was not fully litigated, and the determination of ownership of receivables was unnecessary to the judgment on the Trustee's *Motion for Order (I) Authorizing Assignment of Tax Credits and (II) Granting Related Relief* [D.E. 463] (No. 13-10670) (the "45G Motion").

Even if this Court determines that a ruling was made on the ownership of receivables, such ruling is not binding because the Québec Superior Court in Canada (the "Canadian Court") has jurisdiction over the question of whether property is or is not part of the Canadian debtor's estate, especially given that such a ruling would divest the Canadian debtor of property. In further support of this brief, the Trustee states as follows:

RELEVANT BACKGROUND

1. The Debtor filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code") on August 7, 2013 (the "Petition Date"). Contemporaneously therewith, Montreal Maine & Atlantic Canada Co., a wholly-owned subsidiary of the Debtor ("MMA Canada") filed a case under Canada's *Companies' Creditors Arrangement Act* (the "Canadian Case") in the Canadian Court.

2. On August 21, 2013, the United States Trustee appointed the Trustee in the Debtor's chapter 11 case.

3. On September 4, 2013, the Court entered an order adopting the Protocol, which governs the conduct of all parties in interest in the Debtor's case and the Canadian Case. The Canadian Court also adopted the Protocol.

4. The Protocol provides, in part, that:

> Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts.

Protocol, ¶ B(5).

5. The Protocol further provides that:

> To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Court and the Canadian Court each may coordinate activities and consider whether it is appropriate to defer to the judgment of the other Court. In furtherance of the foregoing: . . .
>
> b. Where the issue of the proper jurisdiction or Court to determine an issue is raised by an interested party in either of the Insolvency Proceedings with respect to a motion or application filed in either Court, the Court before which such motion or application was initially filed may contact the other Court to determine an appropriate process by which the issue of jurisdiction will be determined . . . .

Id. at ¶ D(11)(b).

6. On December 2, 2013, the Trustee filed the 45G Motion under which the Trustee sought authority to continue performance under a certain Track Maintenance Agreement (the "TMA") that was entered into between the Debtor and KM Strategic Investments, LLC ("KMSI"). Pursuant to the TMA, the Debtor would assign certain railroad track miles to KMSI for the purpose of KMSI claiming a tax credit in relation to those track miles under section 45G of the Internal Revenue Code. In exchange, KMSI would pay certain monies to the Debtor for the assignment.

7. Wheeling filed an objection to the 45G Motion claiming a security interest in the proceeds of the TMA.

8. On December 17, 2013, the Court entered an order granting the 45G Motion, but reserving the rights of the Trustee and Wheeling with respect to distribution of the proceeds of the TMA (the "Initial 45G Order"). *See* D.E. 511 (No. 13-10670). Pursuant to the Initial 45G Order, an evidentiary hearing was set for January 23, 2014 "to determine the validity, priority, and extent of Wheeling's security interest in and to the Net Funds" received by the Trustee and/or Debtor under the TMA. Id. at ¶ 7.[2]

9. The Court held a hearing on the 45G Motion on January 23, 2014 (the "January 23 Hearing"). As Judge Kornreich noted, the "nub of the . . . dispute is Wheeling's claim to a security interest in whatever value the Debtor may be entitled to receive from KMSI under the TMA." March 13, 2014 Hr'g Tr. at 73, In re Montreal Maine & Atlantic Railway, Ltd. [D.E. 1008] (No. 13-10670) (July 8, 2014). A true and correct copy of the March 13, 2014 Hearing Transcript is attached hereto as **Exhibit A** and incorporated herein by reference.

10. At the January 23 Hearing, Wheeling, which bore the burden of proof, called one witness, M. Donald Gardner, Jr., the V.P. of Finance and Administration and the Chief Financial Officer of the Debtor. Mr. Gardner testified as to how the Debtor's accounts receivable served as a basis for advances under Wheeling's line of credit, how track expenditures were made, how accounts receivable are generated and processed by the Debtor and MMA Canada, and about how the Debtor acts as a receivables management agent for MMA Canada.

11. The arguments of the parties concerned the following three points: first, whether the TMA is an account and thus the proceeds thereof constitute proceeds of accounts (collateral

[2] "Net Funds" are the proceeds of the TMA after deduction for certain amounts agreed to by the parties and are the specified funds at issue in the 45G Motion. "Net Funds" have the meaning ascribed to them in the order on the 45G Motion.

subject to Wheeling's security interest) or whether the TMA relates to real estate (collateral not subject to Wheeling's security interest); second, if the TMA is an account subject to Wheeling's security interest, whether the post-petition proceeds of the TMA are excluded from Wheeling's security interest under section 552(a) of the Bankruptcy Code because the proceeds were acquired after the Petition Date; and third, if Wheeling does have a security interest in the TMA, whether the equities of the case, under section 552(b) of the Bankruptcy Code, tilt toward precluding Wheeling's security interest from attaching to the proceeds of the TMA.

12. On January 30, 2014, Wheeling filed the Enforcement Motion requesting the Court to order the Trustee to, *inter alia*, pay Wheeling the proceeds of certain receivables the Trustee segregated as Canadian A/R pursuant to the Sixth Order. The Trustee filed the Objection to the Enforcement Motion on March 5, 2014.

13. On March 13, 2014, the Court held a hearing (the "March 13 Hearing") and Judge Kornreich presented an oral ruling on the 45G Motion. Judge Kornreich determined that the TMA was an account, as that term is used in the Uniform Commercial Code (the "U.C.C."), and therefore subject to Wheeling's security interest. Judge Kornreich based this determination on the following finding:

> The funds due the Debtor under the security agreement fall within the definition of right to payment, including payment intangibles. Under the UCC, an account is defined as a right to payment of a monetary obligation and the payment intangible is a general intangible under which account debtors' principal obligation is a monetary obligation.
>
> The Debtor's rights to payments under the TMA [are] a right to payment of a monetary obligation from KMSI.

March 13, 2014 Hr'g Tr. at 75.

14. Judge Kornreich next addressed whether the equities of the case under section 552(b) should preclude extension of Wheeling's security interest to the proceeds of the TMA. Judge Kornreich determined that there was "no unfair advantage" under the equities of the case,

because the accounts receivable were used to fund the track maintenance expenditures (collateral that was subject to Wheeling's security interest), and KMSI's payment under the TMA for those track maintenance expenditures simply replaced Wheeling's collateral instead of enhancing the collateral. *See* March 13, 2014 Hr'g Tr. at 78. Finally, Judge Kornreich determined that the exception under section 552(a) did not apply to disqualify Wheeling's security interest in the post-petition portion of the Net Funds, except to the Net Funds attributable to October 18, 2013 onward.

15. Judge Kornreich also made certain statements with respect to the Debtor's receivables, solely as related to the 45G issues, including the following statements:

> [S]eparate *treatment* of accounts receivable did not exist. . . .
>
> [T]here was no separate account or separate treatment or any other distinction or separation between accounts receivable attributable to track in Canada or track in the United States. . . . [A]ll the receivables were *treated* as receivables of the American entity . . . .

March 13, 2014 Hr'g Tr. at 76 (emphasis supplied). To state the obvious, Judge Kornreich was simply noting that, in making the 45G calculation, the Debtor had used both Canadian and U.S. revenue and expenditures.

16. Ultimately, by order dated March 17, 2014 [D.E. 761] (No. 13-10670) (the "45G Order"), the Court awarded Wheeling $342,128.81 of the Net Funds; the Net Funds awarded to Wheeling are attributable to the period of June 1, 2013 through October 17, 2013.

17. On March 31, 2014, the Trustee filed the *Motion for an Order Amending or Striking Findings of Fact Pursuant to Fed. R. Bankr. P. 7052* [D.E. 807] (No. 13-10670) (the "Motion to Strike"). In the Motion to Strike, the Trustee requested that the Court amend or strike Judge Kornreich's statements regarding the Debtor's receivables, because those statements were not supported by the evidence, may unfairly prejudice the Trustee's Objection to the Enforcement Motion, and could be in violation of the Protocol.

18. The Court held a hearing on May 8, 2014 (the "May 8 Hearing") and, in denying the Motion to Strike, Judge Kornreich made the following findings, *inter alia*, on the Motion to Strike:

> The Trustee has conceded this morning that with respect to the find[ings] as made they correspond to the evidence presented, [not] to the evidence that he may wish to present[. In] addition, *that the findings and conclusions made at that time reflect the evidence at that time*.
>
> So there was no error with respect to the evidence that in my determination that the so-called Canadian receivables were, in fact, not such and were all receivables of the American [Debtor] *based on the evidence of that time*.

May 8, 2014 Hr'g Tr. at 45, In re Montreal Maine & Atlantic Railway, Ltd. [D.E. 1004] (No. 13-10670) (June 27, 2014) (emphasis supplied). A true and correct copy of the May 8, 2014 Hearing Transcript is attached hereto as **Exhibit B** and incorporated herein by reference. Thus, the Court specifically allowed for the presentation of additional and different evidence, and a different outcome, at such time as the issue was squarely before the Court.

19. On May 1, 2015, the Court entered the *Third Amended Joint Pretrial Order and Stipulations* [D.E. 61] (the "JPTO") that provided certain stipulations that govern the Enforcement Motion. Pursuant to the JTPO, the parties agreed that the sole remaining legal issues were whether Judge Kornreich ruled at the March 13 Hearing and/or May 8 Hearing that the Canadian A/R constitutes Wheeling's collateral and, if so, whether such a ruling is binding on the parties for purposes of the Enforcement Motion and other motions that are pending. JTPO, ¶ 2.

20. On May 26, 2015, the Trustee filed a complaint against Wheeling seeking the avoidance and recovery, under 11 U.S.C. § 544 and the Maine Uniform Fraudulent Transfer Act, of over $2.7 million in preferential payments made to Wheeling, as an insider of the Debtor and its affiliates, [D.E. 1] (Adv. Proc. No. 15-1011) (the "Preference Action").

ARGUMENT

I. Collateral Estoppel is Inapplicable Regarding the Ownership of the Canadian Receivables.

21. To determine whether a ruling was made regarding the ownership of Canadian A/R, the Court must consider the question under the contours of collateral estoppel, or issue preclusion. To bar re-litigation of a legal issue in a subsequent action, the party seeking application of collateral estoppel must establish the following elements:

> (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) the determination of the issue must have been essential to the judgment.

Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1994). Wheeling cannot establish any of these elements.

A. The March 13 and May 8 Hearings Involved Different Issues than the Issue in the Enforcement Motion.

22. The issue sought to be precluded, ownership of the Canadian A/R, is not the issue that that was in front of the Court at the March 13 Hearing or May 8 Hearing on the 45G Motion. The ownership issue only arose after the parties had oral argument on the 45G Motion and on January 30, 2014 when the Enforcement Motion was filed.

23. The issue at both the March 13 Hearing and the May 8 Hearing concerned the validity, priority, and extent of Wheeling's security interest in specific funds, namely, the Net Funds. The Net Funds are proceeds of a contract, the TMA, which was entered into between the Debtor and KMSI. Although Judge Kornreich made certain statements at the May 8 Hearing with respect to the Debtor's receivables, the question of ownership of receivables was not before the Court. The Net Funds were due to this Debtor and the Court only had to determine whether the Net Funds – not the Canadian A/R – are collateral subject to Wheeling's security interest.

24. Conversely, in the Enforcement Motion, the ownership of the Canadian A/R is squarely before the Court. The funds at issue in the Enforcement Motion are due partially to this Debtor and partially to MMA Canada whereas the Net Funds at issue in the 45G Motion were due to this Debtor alone.

B. The Ownership of Receivables Was Not Actually Litigated.

25. The parties did not actually litigate the ownership of receivables. Again, the issue in the 45G Motion centered on whether Wheeling had a security interest in the Net Funds, an issue not dependent on the contested ownership of the accounts. One of many arguments that the Trustee made in conjunction with the third point at issue in the 45G Motion (the equities argument), was that, assuming Wheeling has a security interest in the TMA and consequently the Net Funds, then the equities should preclude extending Wheeling's security interest in a portion of the Net Funds, because a portion of the expenditures giving rise to the Net Funds were paid with Canadian A/R-receivables in which Wheeling did not have a perfected security interest. Awarding Wheeling that portion of the Net Funds, the Trustee argued, would result in inequity, because the Canadian A/R enhanced the value of the Net Funds in providing Wheeling with more proceeds than Wheeling would have received if Canadian A/R were not used to fund certain expenditures. This argument was not made in the initial 45G Motion, but rather, was raised in subsequent briefing the parties were required to file pursuant to the Initial 45G Order.

26. In connection with this argument, the parties questioned Mr. Gardner on (a) the tracking of accounts receivables between the Debtor and several related entities and (b) the collection and use of cash between affiliated, but separate companies. No evidence was taken regarding the separate accounting and treatment of receivables between companies because that issue was not before the Court; as noted below, both counsel to Wheeling and Bankruptcy Judge Kornreich conceded that the issue was not before the Court, but was, rather, an issue for "another

day". At the January 23 Hearing, Judge Kornreich even noted the lack of evidence on the treatment of receivables and Wheeling conceded that the record on the ownership of receivables was not complete:

> **The Court:** The state of the evidence before this Court is skimpy and the state of the evidence is that [receivables are] collected and it is redistributed in some fashion but we don't have detail on the record today as to what fashion that may be.
>
> **Mr. Marcus:** *We don't have detail as to distribution* but it's more than just collected by [the] U.S. Debtor, it is invoiced and billed by the U.S. Debtor. Now when the U.S. Debtor sends out an invoice that creates an account receivable. That's Accounting 101. That's how you get accounts receivable. You send out an invoice. All U.S. Debtor, all collateral for Wheeling. *Now, if some day in some different proceeding somebody wants to say, well, okay, I know you have a lien in that account receivable because it was billed by the U.S. Debtor but there's some reason that you shouldn't have the money, okay,* ***that's a fight for another day. But in terms of the record before the Court - -***
>
> **The Court:** Let me ask you a question.
>
> **Mr. Marcus:** Yeah.
>
> **The Court:** We have been collecting and liquidating receivables. Has there been a deduction on the MMA side or the Wheeling side with respect to Canadian receivables?
>
> **Mr. Marcus:** The MMA side has withheld payment of what it describes as Canadian receivables. We don't acquiesce in that. This Court - -
>
> **The Court:** ***That's not an issue that's before me today but it is nonetheless an issue.***

January 23, 2014 Oral Argument Tr. at 150-51, In re Montreal Maine & Atlantic Railway, Ltd. [D.E. 697] (No. 13-10670) (March 3, 2014) (emphasis supplied). A true and correct copy of the January 23, 2014 Oral Argument Transcript is attached hereto as **Exhibit C** and incorporated herein by reference.

27. Further, because Wheeling bore the burden of establishing its security interest, the ownership issue was not in front of the Court and there was no reason for the Trustee to believe that that he should litigate the issue at the January 23 Hearing. *See* Kremer v. Chemical Const.

Corp., 456 U.S. 461, 480-81 (1982) ("We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue[.]"). Judge Kornreich acknowledged at the May 8 Hearing on the Motion to Strike that "the findings and conclusions made *at that time* reflect the evidence *at that time*." May 8, 2014 Hr'g Tr. at 45 (emphasis added). However, those findings and conclusions were based, as Judge Kornreich acknowledged, on a record that was not fully developed with respect to the issue of ownership of receivables, and were in no sense final.

C. Determination of the Ownership of Receivables Was Not Essential to the Ruling on the 45G Motion.

28. In ruling on the 45G Motion, the Court did not have to determine the ownership of receivables. The 45G Motion concerned the Net Proceeds that were due and payable to this Debtor and whether the Net Proceeds constitute Wheeling's collateral under its security agreement. The Court determined that Wheeling's security interest attached to the Net Funds by finding that (a) the TMA is an account, because the U.C.C. defines account as a right to payment of a monetary obligation and the Debtor's right to payment under the TMA is a right to payment of a monetary obligation from KMSI; and (b) Wheeling's security agreement covers rights to payment. *See* March 13, 2014 Hr'g Tr. at 75. No part of this determination required the Court to rule on the ownership of receivables; the Court's determination was limited to whether the TMA was an account under the definition of the U.C.C.

29. Next, the Court determined that the equities of the case did not apply to the 45G Motion because accounts receivable – collateral subject to Wheeling's security interest – were used to fund track expenditures and the Net Funds evenly replaced those accounts receivables. In other words, the Net Funds do not give Wheeling a windfall; they replace, on a one to one

basis (or less), Wheeling's collateral. Again, to make this ruling, the Court did not need to determine, and the Trustee believes the Court did not determine, the ownership of receivables.

30. MMA Canada is a party to Wheeling's security agreement. Wheeling had previously argued that it had a security interest in all receivables, which includes Canadian and U.S. receivables. Thus, the Court could have determined that the equities did not weigh in favor of the Trustee, because Wheeling had a security interest in all receivables–regardless of which debtor owned them–and those receivables funded the track maintenance expenditures. Accordingly, a determination regarding ownership of receivables is unnecessary to a ruling on the 45G Motion and all statements Judge Kornreich made in connection with the ownership of receivables are, at best, dicta, since, as Judge Kornreich readily acknowledged, the ownership issue was not before the Court. *See* Arcam Pharmaceutical Corp. v. Faria, 513 F.3d 1, 3 (1st Cir. 2007) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent; rather, it comprises observations in a judicial opinion or order that are not essential to the determination of the legal questions then before the court.") (internal quotations and citations omitted).

D. Any Ruling Judge Kornreich Might Have Made Regarding Ownership of the Canadian Receivables is not a Valid and Binding Judgment.

31. Even if this Court were to decide that a ruling was made on the ownership of receivables, despite Judge Kornreich's qualifying statements to the contrary, such a ruling could not be and is not a valid and binding judgment. The Canadian Court, not Judge Kornreich or this Court, has jurisdiction over MMA Canada and its assets. Therefore, any determination regarding the property of MMA Canada must necessarily be made by the Canadian Court or at least in conjunction with the Canadian Court. Indeed, the Protocol provides for a mechanism for both courts to determine, in tandem, each debtor's rights in property.

32. Specifically, the Protocol states that:

> Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Court.

Protocol, ¶ B(5). Wheeling—if it wanted a ruling on ownership of accounts as between the Debtor and MMA Canada—should have followed the Protocol, and requested appropriate relief in the Canadian Court or by joint hearing. Judge Kornreich, who always respected the Protocol, would have and should have followed that course of action. That is, if Judge Kornreich anticipated rendering a decision regarding ownership of receivables, Judge Kornreich would have and should have consulted with the Canadian Court and either deferred judgment to the Canadian Court regarding determination of ownership of the Canadian A/R or held a joint hearing so that both courts could determine each debtor's property rights in the receivables.

33. For example, the Court implemented the Protocol in a similar dispute over assets when Travelers Property Casualty Company of America ("Travelers") sought relief from the automatic stay to file a declaratory judgment action in the District Court (the "Travelers Action").

34. The Travelers Action concerned the Debtor's and MMA Canada's commercial property insurance policy and coverage thereunder for certain losses to railcars and railroad track and roadbed, and losses of business income or extra expense resulting therefrom, arising out of the July 6, 2013 derailment. Like the receivables here, both debtors had rights in the proceeds of the Travelers policy and, also like here, Wheeling claimed an interest in the rights of the Debtor and MMA Canada to those proceeds.

35. On August 27, 2013, Travelers filed the *Motion of Travelers Property Casualty Company of America for Relief from the Automatic Stay Pursuant to 11 U.S.C. Sec. 362(d)(1)*

[D.E. 105] (No. 13-10670) and filed the *Motion to Lift the Stay of Proceedings* in the Canadian Case. Pursuant to the Protocol, joint hearings were held in the Debtor's case and the Canadian Case regarding the motions on October 1, 2013. On October 9, 2013, the Court entered the *Order Denying Motion for Relief from Stay filed by Travelers Property Casualty Company of America* [D.E. 364] (No. 13-10670), noting that Travelers could commence its declaratory action in the Canadian Court. Similarly, the Canadian Court entered the *Judgment re Motion by Travelers Property Casualty Company of America to Lift the Stay of Proceedings*. Ultimately, the Trustee and Travelers reached a settlement which was memorialized by orders entered by this Court and the Canadian Court.

36. If it was ruling on ownership of accounts as between MMA Canada and the Trustee, Judge Kornreich would have and should have proceeded in the same manner here. Judge Kornreich should have reserved making any determination on the ownership of receivables until the Enforcement Motion was fully briefed after which both courts should have held a joint hearing under the Protocol. To do otherwise, puts the Trustee in an impossible position. Judge Kornreich's unilateral ruling, if it was a ruling, would compel the Trustee to violate orders and stays in effect in the Canadian Case, absent a companion ruling by the Canadian Court relieving the Trustee of the effects of such orders and stays. Judge Kornreich could not have intended such a result, but the result underscores that the Protocol would be offended if that was the case.

37. In addition to the violation of the Protocol, if Judge Kornreich made a determination regarding the Canadian A/R, such a ruling could not extend to the Enforcement Motion because the evidence presented only concerned the portion of receivables attributable to the Net Funds and not the receivables that are the subject of the Enforcement Motion. The entirety of the ownership issue was never before the Court or the Canadian Court.

38. Accordingly, any ruling on the ownership of Canadian A/R cannot be binding, because such a ruling affects the rights of MMA Canada, a party that was not the subject of the 45G Motion and is not subject to this Court's jurisdiction, and such ruling is limited in applicability to the 45G Motion.

II. If the Court Determines that Judge Kornreich made a Binding Ruling Regarding the Canadian A/R, Section 502(d) Bars payments on Wheeling's Claims under the Enforcement Motion.[3]

39. Pursuant to the JTPO, the parties stipulated, among other things, that:

> If the Court determines as a matter of law and fact that the Ruling is binding on the Trustee for purposes of the [Enforcement Motion], then Wheeling shall be deemed to have a superpriority, administrative expense claim in this case, as provided by the terms of the applicable cash collateral orders, in the amount of $695,640.93.

JTPO, ¶ 3(A). However, section 502(d) of the Bankruptcy Code provides that the Trustee cannot be required to pay Wheeling's administrative claim unless and until the Trustee's preference claims against Wheeling have been fully and finally resolved, and such claim is, therefore, allowed. The Trustee's recovery in the Preference Action against Wheeling may affect the allowance and/or amount of Wheeling's claim.

40. Section 502(d) provides that:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of an entity from which property is recoverable under section . . . 550 . . . of this title or that is a transferee of a transfer avoidable under section . . . 544, . . . 547, 548 [or] 549 . . . of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section . . . 550 . . . of this title.

11 U.S.C. § 502(d).

41. Courts have held that section 502(d) is applicable to administrative expense claims. "This plain meaning" view holds that section 502(d) applies to administrative expense

[3] Of course, the issue of whether Wheeling's collateral should be surcharged under section 506(c) of the Bankruptcy Code, pursuant to the Trustee's motion to that effect, is also reserved for future hearing.

claims, because the definition of "claim" in section 101(5) is expansive and, on its face, covers administrative expense claims, and section 502 governs allowance of all types of claims, secured, administrative, priority and unsecured. MicroAge, Inc. v. Viewsonic Corp. (In re MicroAge, Inc.), 291 B.R. 503 (B.A.P. 9th Cir. 2002); In re Circuit City Stores, Inc., 426 B.R. 560, 570 (Bankr. E.D. Va. 2010) (section 503(b)(9) administrative claims are subject to section 502(d)). Indeed, this view of section 502, and section 502(d), is consistent with the Supreme Court's view that all claim allowance or disallowance runs through section 502. Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co., 549 U.S. 443 (2007); *see also* SNTL Corp. v. Centre Ins. Co. (In re SNTL Corp.), 571 F.3d 826, 843 (9th Cir. 2009)(section 502, not section 506, governs allowance of secured claims); UPS Capital Business Credit v. Gencarelli (In re Gencarelli), 501 F.3d 1, 5 (1st Cir. 2007) (section 506 does not govern allowance of secured claims; "Rather, the general rules that govern the allowance or disallowance of claims are set out in section 502").[4]

42. Accordingly, even if Wheeling has a superpriority administrative claim, it cannot be allowed and paid until the Preference Action is resolved, and the section 506(c) issues are fully adjudicated.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Trustee requests that this Court find that no binding ruling was made by Judge Kornreich regarding the Canadian A/R, and the issue of

[4] A second view, following ASM Capital, LP v. Ames Department Stores, Inc. (In re Ames Department Stores, Inc.), 582 F.3d 422 (2d Cir. 2009), finds, on policy grounds, that section 502(d) is not applicable to administrative expenses under section 503(b). The Second Circuit reasoned that the language of section 502(d) suggests that the section only applies in the context of prepetition claims allowable under section 502 and not to expenses under section 503. *See* id. at 430. Additionally, the opinion places heavy emphasis on the policies underlying post-petition allowance of administrative expenses. Under this reasoning, "[a]dministrative expenses arise post-petition, and generally cannot be set off against prepetition claims." Id. at 431. ASM Capital appears to be at odds with Travelers, as well as the First Circuit's decision in Gencarelli.

whether Wheeling has any perfected security interest in Canadian accounts remains a triable issue.

Dated: May 26, 2015

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

By his attorney:

/s/ Robert J. Keach

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EXHIBIT A

STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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IN RE:

MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.

Debtor.

Chapter 11

No. 13-10670

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Before the Hon. Louis H. Kornreich

Bangor, Maine

March 13, 2014

APPEARANCES:

For Robert Keach, Trustee	Michael Fagone, Esq. Maire Raggozine, Esq.
Wheeling Lake Erie Railway Company	George Marcus, Esq. Andrew Helman, Esq.
Official Victims Committee	Luc Despins, Esq. Paul Hastings, Esq.
Impact Insurance	Elizabeth Boydston, Esq.
CIT Group	Victoria Vron, Esq. Alex Bozeman, Esq.

PROCEEDINGS COMMENCED (March 13, 2014, 9:07 a.m.)

THE COURT OFFICER: The U.S. Bankruptcy Court for the District of Maine is now in joint session. The Honorable Judge Louis Kornreich presiding. Please be seated and come to order.

THE COURT: Good morning, everyone. Mr. Helman, who is that sitting on your right? Oh, it's Mr. Marcus. I have a vague memory.

Good morning, everyone. This is Montreal, Maine & Atlantic Railway Chapter 11, 2013-10670. We are here this morning at the request of the Trustee and Wheeling for a special setting of the motion to enforce cash collateral orders and the Trustee's motion for an order of proving compromise in settlement with Travelers.

I will take appearances, beginning with the Trustee, please.

MR. FAGONE: Good morning, Your Honor. Michael Fagone on behalf of the Chapter 11 Trustee.

THE COURT: Good morning.

MS. RAGGOZINE: Maire Raggozine on behalf of the Chapter 11 Trustee.

THE COURT: Good morning to you.

MR. MARCUS: Good morning, Your Honor. George Marcus and Andrew Helman on behalf of Wheeling.

THE COURT: Nice to see both of you and as I told your associates earlier, Mr. Marcus and Mr. Fagone, it's nice

to have the real lawyers in the courtroom this morning.

MR. MARCUS: Who are you referring to?

THE COURT: What? Who would that be? Your associates. Other appearances in the back? None. Okay. Thank you.

Welcome everyone. Telephonic appearances? Telephonic appearances?

MR. DESPINS: Yes, your Honor. Good morning. Luc Despins with Paul Hastings on behalf of the Official Committee.

THE COURT: Good morning, Mr. Despins. Other appearances?

OPERATOR: And Your Honor, we do have Elizabeth Boydston on the line. Alex Bozeman and Victoria Vron.

THE COURT: You'll forgive me but you'll have to do that much slower and spell your last name and state clearly your client, please. Please repeat. Yes.

MS. BOYDSTON: Yes, Elizabeth Boydston.

THE COURT: And you are representing?

MS. BOYDSTON: Fulbright & Jaworski.

THE COURT: That's your firm.

OPERATOR: This is the court call operator. I'm just letting you know we do have Elizabeth Boydston on the line.

THE COURT: Oh. I'm sorry. Okay. Elizabeth Boydston are you present?

MS. BOYDSTON: Yes, I am, Your Honor. It was

supposed to be a listen-only line. We do represent Impact Insurance.

THE COURT: Impact Insurance.

MS. BOYDSTON: Yes, sir.

THE COURT: Are you making an appearance or are you just observing?

MS. BOYDSTON: No, I'm not. It is listen-only.

THE COURT: Okay. Thank you very much. Any other parties on the line? All right. We're ready to proceed.

Also on today's schedule is a status conference at which time, if the parties are amenable and I'm prepared, I will render an order on the 45G matter. We discussed doing that today, this morning, as well, rather than waiting for a written opinion.

And as a preliminary matter, as I've cautioned the parties, I would like to discuss, before we hit the merits, where these three proceedings fit into the pending adversary proceeding and if we dispose of one or more or all of these motions today will there be anything left of the adversary proceeding?

In the 45G matter we had this chat before we took evidence and decided that the determination of that matter would, in effect, be a determination within the context of the adversary proceeding and that the order would be a partial judgment in that proceeding. I am not dealing now with whether

or not that gives right to appeal or anything else. But I think it would just dispose of that matter. On that basis, we assigned the burden of proof to the plaintiff Wheeling.

What are we doing with these other two matters, where do they fit in? Mr. Fagone you go first.

MR. FAGONE: Thank you your Honor. It seems to me that they fit in exactly the same way. At least we are prepared to proceed on that basis. In order words, well leave it at that. It seems to me that there is no reason to treatment them differently and we are prepared to do that. Maybe let me back track.

On Travelers is seems like the right way to do that is the way we did the 45G. The motion to enforce may raise other issues relating to the Canadian case that aren't implicated in the adversaries. So that may bear some different discussion.

THE COURT: All right, Mr. Marcus.

MR. MARCUS: Your Honor, I agree with Mr. Fagone in the sense that I think the Travelers matter can be treated the same way as the 45G. The motion to force cash collateral order is a little different in that apart from the adversary proceeding, there are separate obligations and duties of the debtor regarding the use of cash collateral in which that motion raises and seeks to enforce. So I think the motion was properly filed outside of the adversary proceeding even though

you could have some overlap. It is conceivable to think that the adversary proceeding might also adjudicate disputed receivables. Certainly, the adversary proceedings were broad enough to cover that territory.

THE COURT: Let me ask you this question and then I will ask Mr. Fagone as well. I don't want to be retrying the matter. So it would be my view and I will hear from you. But it will be my view that to the extent we determined issues, discrete issues raised in the adversary proceeding, those issues will be the law of the case in that adversary proceeding. That may dispose of the entire adversary proceeding and there may be other ancillary issues that are resolved from the context of the present motion would you agree to that?

MR. MARCUS: I would agree that any finding of fact or ruling of law arises in these set proceedings would become law of the case and would be binding in the adversary proceeding. Now I just mention that the adversary proceeding probably covers more than just 45G proceedings, business insurance proceeds and cash collateral. So I don't know that we can say, I could agree.

THE COURT: I am not asking, it is not my intention to dispose of it today. It is my intention to make inquiry and you are telling me that you are really not prepared to make that determination today. But that we would take another look

at it. I think we need to schedule that sometime soon after we determine these issues and decide what, if anything, is left. I gave the parties a number of options off the record. Last time with respect to this piecemeal approach because it may well be that somebody is aggrieved and wants to take an appeal and will find out that it is not appealable because it is an account in the adversary proceeding which has get to be finally determined. But you are all at your peril that is all I can do. Yes Mr. Fagone.

MR. FAGONE: Thank you your Honor. Like Wheeling, the Trustee has no interest in re-litigating in the context of the adversary in anything that is determined by the court on these contested matters. We are willing to make the same agreement that Wheeling is on that score.

I think it just bears noting that the adversary proceeding was stayed by agreement of the parties, I believe because we recognized that the travel of these, travel no pun intended of these contested matters may affect what was left in the adversary. So it can remain stayed. I suppose Wheeling could decide to dismiss it without prejudice and then refile it later once we have more clarity. That was something that…

THE COURT: My only concern is not we are not doing double duty and everybody is in agreement that we are not going to do that. We will figure out what form it all takes later on. You all know the consequence of the pending adversary

proceeding may affect your rights to an immediate appeal. I just want to make that clear, I don't want there to be any mystery about that. Again that is not a determination that this court would make. But I don't want anybody to come into this with blinders. Okay.

It makes no difference to me in which order we take this in. We can do the motion to enforce the cash collateral orders first and then do the travelers motion or vice versa. You can go first on this Mr. Marcus, like the 45G motion, because the pending adversary proceeding and the structure of thing, I think you hopefully have the burden of going forward on these issues.

MR. MARCUS: Yes, your Honor. I would suggest that we talk about these.

THE COURT: Do you agree to that premise?

MR. MARCUS: Yes.

THE COURT: And the burden of proof.

MR. MARCUS: Certainly the burden of going forward, so I will go forward.

THE COURT: That is a gimme, but what about the burden of proof?

MR. MARCUS: Well maybe some defenses or allegations that the trustee has made, which the trustee would have the burden.

THE COURT: Clearly, certainly on defenses, but we

are trying to determine the rest of your security interest. It seems, even though it might be on his motion that is the problem that I am faced with procedurally because you filed.

MR. MARCUS: Right, so we accept the burden of proof to make a prima fascia case of our **INAUDIBLE**.

THE COURT: And you acknowledge that Mr. Fagone.

MR. FAGONE: I do your Honor.

THE COURT: Thank you. Now you may go forward.

MR. MARCUS: I was going to suggest that we deal first with the motion to enforce cash collateral because I think that is by and large procedural rather than substantive. Then we can address Travelers motion and the 45G after that.

On the motion to enforce cash collateral, I think the parties agreed that today would be considered a preliminary hearing. There has been some discovery in that case. Wheeling believes that additional discovery is required. There has been cooperation with the trustee on the initial discovery and with respect to the additional discovery Wheeling would like to reserve it rights to take at least another deposition of Mr. Gardner because there as apparently some confusion in his testimony and document production that they are working on clearing up. But we think we need to…

THE COURT: In what regard?

MR. MARCUS: Well um and I want to be careful to say that I don't describe any kind of miss wrongdoing on behalf of

Mr. Gardner, but it appeared to us that he testified in the 45G hearing that all billings of the so-called integrated rail line were issued…

THE COURT: Here before you go beyond this, I want everybody to consider this because now you are getting into my concerns about the law of the case and so forth because we spent a half a day trying a 45G and we had testimony from Mr. Gardner on receivables…

MR. MARCUS: That's right.

THE COURT: …and you are about to recite what he said.

MR. MARCUS: Right.

THE COURT: Quite frankly, I took that evidence at that time and have applied it to the 45G matter. I would be concerned that if all of the sudden we are now going to do discovery and reintroduce evidence on the question of receivables.

MR. MARCUS: Frankly, I have the same concern because our issue was that at his subsequent deposition it appeared that he was modifying or changing his testimony. Then there are been further discussions and it appears that the degree of modification is less than might have originally appeared.

THE COURT: But isn't that what cross-examination was for once upon on January 23.

MR. MARCUS: That's right and Wheeling was perfectly

happy to take the position that whatever he said at the hearing was binding. You know, we are satisfied with that testimony, we think it was correct. We are a little confused because there seems to be some backpedaling and then some re-pedaling and again I don't attribute any bad faith on anybody's part. But we don't want to get to the bottom of it one way or the other. Now it may well be that the bottom has already been reached and what they testified to…

THE COURT: I tell you with respect to 45G the bottom has been reached.

MR. MARCUS: Okay and that may resolve the matter. Because we are happy to rest on his testimony at that hearing, that may resolve it. If it does, then maybe we don't need to take any more depositions that is the issue.

THE COURT: Okay. Let's hear from Mr. Fagone on that.

MR. FAGONE: Thank you, your Honor. I am not sure what that is, but I will tell you what our…

THE COURT: I will tell you what that is so we are all on the same page. One of the issues on the 45G motion was the distinction if any between the Canadian accounts receivable and the American accounts receivable. That evidence was given, argument was given and I have reached a decision based on that evidence and that argument. Are we, is there some effort on the part of the trustee to reopen the account's issue?

MR. FAGONE: No, your Honor none.

THE COURT: What is the concern?

MR. FAGONE: I think I know the specific testimony that Mr. Marcus is referring to. But I am reluctant to go into it in any more details for the very reason that you just mentioned, which is we have reached the bottom of the 45G okay. If we get to the point where there is an evidentiary hearing on the motion to enforce, evidence will be put forward. But I don't think that…

THE COURT: I know that may be and I don't know how I will rule on that. But and this is the danger that I have allowed us all to incur. So we may have attempt on another motion on which you are the moving party to bring in more evidence on receivables, which might be different or the same or the same I don't know. We might have an objection from Mr. Marcus. No, no we have already heard all there is to here and that is the law of the case. Is that what where we are heading Mr. Fagone?

MR. FAGONE: I don't think so your Honor. Where I think we might be headed is a point where when we get to an evidentiary hearing on the motion to enforce okay, Mr. Marcus will contend that the testimony in the 45G had a particular import or particular consequence. I think we will say that's not what the witness meant, but clearly, the transcript of what he said is what he said. There is no way I change what he said

in a hearing that took place in January.

THE COURT: All right, we will reserve what we do on those issues if those issues are raised at another time.

MR. FAGONE: That is my suggestion. We are perfectly happy to proceed then.

THE COURT: I, I want everybody to know that we have already had testimony on accounts receivable.

MR. FAGONE: Understood your Honor. With respect to the motion, Mr. Marcus is right. The parties did agree that this morning's hearing would be preliminary in nature, non-evidentiary obviously.

THE COURT: With respect to the cash collateral orders.

MR. FAGONE: Yes your Honor specifically. Both but yes I am talking now about that one. I think…

THE COURT: So both motion, we are not going to have final hearings on either motion today.

MR. FAGONE: That depends. The way we envisioned it and perhaps we went astray somewhere. But the way that we envisioned it is that we would have a preliminary non-evidentiary hearing on the motion to enforce so that we could get some guidance from the court about the best way to move it forward in light of all of the procedural interconnectedness.

THE COURT: And on Travelers.

MR. FAGONE: And on Travelers, what we thought we

would do was have legal argument before the court on the question of whether Wheeling has a lien on the money. I don't think there are material facts in dispute that bear on the answer to that question. If we are right, I suspect that ends the Travelers matter. If we are wrong and the court determines that Wheeling has met its burden of establishing an interest, then I think at a later date we would come back with the evidence on the allocation question. In other words…

THE COURT: Wait you get two bites at the apple or three or four bites of the apple. How many bites of the same apple do you get?

MR. FAGONE: They are bites of different apples, I think. The first apple is there is nothing for him to eat. The second apple is…

THE COURT: Wait a minute. So what you would like to do is you would like to demonstrate as a matter of law that he has no security interest in the proceeds of the insurance yes?

MR. FAGONE: Yes.

THE COURT: Then if you don't establish that then you want to say well I have got some evidence I want to show you.

MR. FAGONE: On a different question.

THE COURT: On a different question.

MR. FAGONE: On the question of the allocation of the money between the two estates. Think of it as…

THE COURT: You want to bifurcate, you want a legal

determination today for all time and depending on that legal determination you would like to sort of parcel out in a parallel fashion as the parties argue under the 45G motion.

MR. FAGONE: Yes, it is exactly. Exactly. Now all to this bifurcating and then moving for summary judgment on liability.

THE COURT: Moving for summary judgment in a contested matter that is also an adversary proceeding.

MR. FAGONE: It is not also an adversary proceeding. You touch, is an adversary proceeding.

THE COURT: The touches.

MR. FAGONE: Mr. Marcus created that particular difficulty. There is a little difficulty I am reluctant to say and that is this, in our papers we asserted and we believe that the Trustee has complied with the terms of this court's order on cash collateral. You take that position because some of the receivables belong to Canada. There is a Canadian debtor and there is a Canadian court. So at some point we need to figure out how the Canadian debtor's rights and the travel of the Canadian court are going to be connected to this procedural conundrum that we have got. I think today we ought to try to work that out so we know how we are going to move forward on the motion to enforce after today.

THE COURT: I will give you a preview of coming attractions and maybe we, I was frankly stunned by being

underwhelmed by the testimony of Mr. Gardner with respect to the delineation of receivables. I was waiting to hear that there was a separate file cabinet or something that was permanently labeled to Canada and that is not the impression that I derived from the evidence. The impression that I derived was that at year-end for tax purposes and in each jurisdiction, they sort of figured out what they figured. But that we needed the money to run the operation so we used the money to run the operation. That was his testimony.

MR. FAGONE: That may have been the testimony but that is not all of the events your Honor.

THE COURT: I know, but that is all of the evidence that we had with respect to the receivables on that day.

MR. FAGONE: I understand that. But that was Wheeling's burden and was what it put on. I guess what I am saying judge there may be other pieces of evidence that bear on this subject…

THE COURT: Maybe the thing to do gentlemen and I want you know that I am full prepared today to give you an answer of 45G and I thought until a moment ago I was fully prepared today to give you an answer on the **INAUDIBLE** and you folks would rather have a preliminary hearing on the cash collateral motion. Maybe the thing to do is to put the adversary proceeding on a fast track. Put all of this on hold. Then instead of doing this in the context of the motions, do it

all in the form of the adversary proceeding and render a judgment on the various elements of the adversary proceeding. If there is anything that is less **INAUDIBLE**, I will hear that separately. But see what we are doing is we got this lawsuit pending that raises all of these issues and then we have three or four motions covering the same material and you want judgments on some and not judgments on others. You want to go through with the adversary proceeding at another time. Quite frankly, it is confusing.

MR. FAGONE: I agree your Honor. But I am not suggesting that we…

THE COURT: Well but it is within my authority to, you know, make it happen in a more efficient manner. What is your response to doing that?

MR. FAGONE: My response to doing that is that we agree that efficiency is the right goal. I question whether delaying a ruling on the Travelers question is efficient. Because the way I would see it going forward in the manner your Honor suggested, we would have some sort of hearing…

THE COURT: Here is my problem. I am going to render findings and conclusions on Travelers, which will have implications on the other pending motions and the adversary proceedings. Then we are going to have a battle on what is or isn't the law of the case. Who had the burden of proof and who gets to go forward again to demonstrate other issues with

respect to receivables, etc., etc.

MR. FAGONE: I see that your Honor with respect to the motion to enforce and I see it with respect to the allocation question on Travelers, if we ever get there. Where I don't see it is on the legal question of whether Wheeling has a lien at all. That I don't see implicates questions of evidence on bookkeeping or cash management or whatever you want to call it.

THE COURT: You want a legal answer today, which will be, the law of the case, okay. In the adversary proceeding and on all motions and for all time on whether or not Travelers has a security interest, I mean Wheeling has a security interest in the insurance proceeds.

MR. FAGONE: Yes and that is how the parties agreed to proceed.

THE COURT: Mr. Marcus do you agree?

MR. MARCUS: Yes.

THE COURT: All right, that is what we are going to do and let's do it. So with respect to the order of the day, let's get the cash collateral one out of the way, because that is a preliminary hearing and then we will have the argument on the Travelers. What is it you want to do on the cash collateral?

MR. MARCUS: This is what I would suggest your Honor. That we set a hearing date for final hearing on it. That

Wheeling would be permitted to complete discovery. Recognizing that it is possible that a ruling that the court may make in the 45G may establish law of the base on all or part of the issues that are involved. But to the extent that Mr. Fagone says well there are things about the testimony that he would like to explain, elaborate on, whatever, okay, we would like to take Mr. Gardner's deposition to get that explanation, elaboration and the like. So my suggestion is that we set a hearing date and finish our discovery and we come back to a motion to enforce cash collateral, which is a different kind of animal then an adversary proceeding in general.

THE COURT: Yes, it is indeed, but it does overlap in some respects. All right, April 8 looks like it is going to be a busy day, May 8.

MR. MARCUS: That would be fine with me your Honor.

MR. FAGONE: That is fine with the trustee your Honor.

THE COURT: How long do you anticipate that hearing to be?

MR. MARCUS: I would expect that it would be a half a day testimonial.

THE COURT: What do we have on either the 7th or the 9th?

COURT CLERK: In the morning?

THE COURT: May. Okay and the 9th is that a Friday.

Here is the concern that I have. We are going to need a half a day. I have no idea at this point what else is going to be on the regular hearing list. If that is longer than a half a day, we may not finish on the afternoon of the 8th. Okay, yes.

MR. FAGONE: Your Honor that seems like a prudent course of action to us. May 7th is fine and the risk of making this more rather than less complicated, perhaps depending on the outcome of the legal question on the Travelers…

THE COURT: We can readjust it and maybe put it on. Let's schedule this for 10:00 a.m., Bangor, Maine, May 7th, evidentiary hearing. I will set aside the remainder of the day and hopefully you won't use all of that. But that is what we will have available. Then if whittles down to something else, we can put it on the general list on the 8th and then you don't have to come in on the 7th? Okay does that work?

MR. MARCUS: Yes your Honor it works. I would like to request just for some clarification and I don't know if there is any objection to this. But it is our intention to take Mr. Gardner's deposition again and if there is an objection to that by Mr. Fagone, then maybe, we ought to talk about it now.

MR. FAGONE: In general, your Honor there is no objection. But what one..

THE COURT: That is a lawyer's answer.

MR. FAGONE: It is your Honor and here is why. I would like before we conclude this preliminary hearing for us

to deal with two things. One the need for some sort of concrete scheduling order so that we can do our preparations between now and the 7th. We didn't do that last time.

THE COURT: I will tell you what I am going to do. I am not going to stand here and negotiate a scheduling order between two grownups. I will give you time to do that a little later this morning and you will come back in and you will read it into the record. We will go forward on the 7th.

MR. FAGONE: Perfect.

THE COURT: If there is going to be argument on the deposition or other discovery, you can seek whatever protection you need to seek in the normal course and the court will be as available as it can be.

MR. FAGONE: Perfect your Honor that is fine that makes good sense.

THE COURT: Mr. Marcus.

MR. MARCUS: That is fine thank you.

MR. FAGONE: The other thing I would like to make sure that we deal with your Honor is how we are going to deal with the issue of the Canadian debtor and the Trustee's position that what Wheeling seeks is in essence a declaration that property belongs to the Canadian debtor. I am not sure we do that and we ought to have some idea how that is going to play between now and the 7th.

THE COURT: Maybe we don't have all of the necessary

parties. Maybe that is where we begin to start. But you see it is really not that. The issue is does Wheeling's security interest extend to that property and before you get there you have to figure out if that property exists, vis a vis the American debtor.

MR. FAGONE: Agreed. But if it doesn't exist vis a vis the American debtor, it has to exist in the Canadian debtor. It can only go one of two places. So if there is a determination that it exists in the U.S. debtor that necessarily means it doesn't belong to the Canadian debtor. There are only one of two places that it can be owned. I agree that we may not have a necessary party and I would like to figure out how we get the necessary parties so we have a final determination that is useful to everyone on the 7th.

THE COURT: Mr. Marcus.

MR. MARCUS: Yeah let me suggest this. On cash collateral, we are simply seeking to enforce the obligation of this debtor to comply with cash collateral requirements. So the issue is, okay what are the receivables of this debtor? That is all we care about. Now if Canada wants to be heard on that question, then they can file a motion to intervene and whatnot. But this debtor has to…

THE COURT: Well they haven't had notice of this. I mean this is a discrete contested matter between these parties and you can't fault them for not intervening in something they

are not aware of.

MR. MARCUS: I don't fault them for anything, they are not needed. All I am asking this court to do is to identify what other receivables of this debtor, because the code imposes obligations as well as orders of this court. It imposes obligations on this debtor regarding its receivables. Now this debtor can't come into this court and say oh we don't really know what our receivables are until we ask him. Well that doesn't really work under the code.

THE COURT: Well I am going to tell both of you as far as the 45G is concerned it is too late because I am already ruling on that as it stands now on the record and come what May we will see what happens in the next round.

MR. MARCUS: As I said, your ruling may resolve these kinds of issues. So I am happy to wait for the ruling.

THE COURT: So we will take a break for a little while and then you can then propose a scheduling order for discovery briefing or what have you in anticipation of further hearing on the motion to enforce the cash collateral, which is now set for set for 10:00 a.m., May 7th in Bangor, Maine.

MR. MARCUS: Thanks.

THE COURT: Okay, all right. That brings us to Travelers. Mr. Marcus.

MR. MARCUS: Yes, your Honor, thank you.

THE COURT: One moment. Mr. Despins.

MR. DESPINS: Yes your Honor.

THE COURT: I have not invited you to be heard at this point. Perhaps on the mistake that you are observing, I will invite you now, you have heard all of the **INAUDIBLE.** We do have, any input, do you intend to participate or are you here just to see how things are going?

MR. DESPINS: Well very limited input your Honor. The Committee supports the Trustee's position on Travelers. But other than that, we don't intend to…

THE COURT: You don't intend to actively participate.

MR. DESPINS: Correct.

THE COURT: Then the record will indicate the committee's position. Go ahead Mr. Marcus.

MR. MARCUS: Thank you, your Honor. On behalf of Wheeling and Lake Erie Railroad Company, I am pleased to accept the burden to establish the prima fascia rights of Wheeling in and to what we have been calling the settlement payment. The settlement payment is a fund of 3.8 million. A portion of it is held by the debtor and a portion of it held by MMA Canada in all orders of both Canadian court and this court the funds are held in escrow pending further order of the court and the issue…

THE COURT: Further order of this court or both courts?

MR. MARCUS: Well both courts to the extent that the

Canadian subject to further order of the Canadian court. The court may recall that the 3.8 million dollars were split. Part was dispersed to the Canadian company, part was dispersed Maine, the U.S. debtor and the agreement of all parties is that the money is being held pending adjudications of the issues that are now before the court and establishment of the rights of Wheeling. So we are here today to talk about…

THE COURT: Is there a pending proceeding in the Canadian court?

MR. MARCUS: I guess I wouldn't say there is a pending proceeding, other than the order of the Canadian court that says two things: one is the money is held in trust and two is this order is conditioned upon entry of a similar order by the U.S. Bankruptcy Court. So there is at least coordination, if not, simultaneous proceedings. In addition, the order that court signed yesterday, establishing this process says basically, as Mr. Fagone reported, that the initial determination will be whether Wheeling has a security interest in at least the debtor's share of the funds. If the answer is, no we are done. If the answer is yes, Wheeling has a security interest in at least the debtor's share of the funds, whatever that share might be, whether it is a dollar or three million dollars then we go forward. The going forward would include a joint hearing with Justice…

THE COURT: So I am not being asked today to

determine assets of the American state or assets of the Canadian state, I am just being asked to determine the extent of your security interest in 3.8 million dollars.

MR. MARCUS: Wheeling's security interest in the debtor's interest in that fund.

THE COURT: Whatever the debtor's interest may be, to be determined at a later time.

MR. MARCUS: That's right. The debtor has claimed its interest is about 1.3 million dollars. Wheeling doesn't acquiesce in that. Bur for the purpose of this hearing, we can say all right, the debtor claims an interest of 1.3 million dollars in funds. Wheeling claims that the amount or such other amount as may be established is subject to its security interest.

So the facts will allow the court to adjudicate the matter as Mr. Fagone and I agree are not indiscriminate they could be stipulated. The first fact is that Wheeling, the debtor, the Canadian entity and all of the other MMA affiliates or parties to a security agreement as dated June 15, 2009. The security agreement secures a line of credit with a maximum amount of six million dollars and on the date of the filing in the debtor's case…

THE COURT: And this debtor and the Canadian debtor are debtors under the secured…

MR. MARCUS: They are co-obligors under that

agreement. On the date of the filing, the full amount of six million dollars was outstanding. Since the date of filing, there has been some repayments. But a substantial portion of the six million dollars remains outstanding.

THE COURT: Would I be correct in using a round number of one million satisfied and five million outstanding.

MR. MARCUS: I think it may have been more than a million has been satisfied.

THE COURT: That was where we were a month ago, so there have been some changes?

MR. MARCUS: There have been some disbursements since then and there is a $200,000 escrow account. But I don't think it is more than a million and a half dollars your Honor. So it is clearly a significant amount outstanding and that doesn't count any accrued interest.

THE COURT: Would the parties agree for the purposes of this hearing that I can take this in fact that the outstanding balance is five million plus or minus. Is that round enough, close enough?

MR. MARCUS: I think that is satisfactory for purpose of this hearing, yes Judge.

THE COURT: Thank you.

MR. MARCUS: The security unit was perfected by the timing filing of the UCC1 financing statement with the Delaware Secretary of State and that is the proper place for filing as

to the debtor because the debtor is a Delaware corporation. Now the security agreement grants Wheeling a security interest in among other things all accounts, all payment intangibles and all other rights to payment of the debtor and its affiliates. The security agreement incorporates Maine law including the definitions under the UCC, to the extent that the UCC is applicable.

Now among other assets of the debtor as of the date of filing was an insurance policy issued by Travelers Insurance. That insurance policy provided a variety of coverages, one of which was called business interruption coverage. Basically as the court I am sure understands that coverage provides protection for a company if its business is interrupted because of a casualty of some sort. Under the business interruption coverage, the insurance company will pay the formula is to pay net profits plus expenses incurred plus extraordinary expenses for what is called the restoration period.

So the way it works under the policy is there is an accident, operations are disrupted for a period of time and just for discussion sake, let's say it is disrupted for six months. What the policy says is during that six month period the insurer will pay you one the net profits you would have earned during that period, if any, plus we will pay you the expenses that you have during that period so that doesn't

impinge on your net profits. Thirdly, we will pay you what is called extraordinary expenses. These would be things that you would have to incur that you wouldn't have had to incur but for the accident.

So there was such a policy on the date of filing and indeed prior to the date of filing, about a month prior as the court knows, there was a terrible accident in Canada. And that accident at that time then gave rise to the business interruption plan because the business was severely interrupted, as I am sure the court is aware. The debtor and Travelers undertook a negotiation about what amount should be paid on account of the business interruption loss. Travelers has its defenses to payment, debtor has its arguments and there was a final agreement with Travelers that said we will pay 3.8 million dollars. The debtor will accept a total of 3.8 million dollars for the business interruption loss.

Now Travelers didn't have any stake in how that was allocated between Maine and Canada. But the Maine company and the Canadian affiliate agreed upon an allocation, not before the court, but just the court will have a picture. Those facts bring us here today because the 3.8 million dollars is in the bank. There is no question that it is payment under the business interruption coverage, under a policy of insurance that was issued prepetition as to a casualty event that occurred prepetition. Those facts are not disputed.

So the question now before the court is whether or not Wheeling has a security interest in that fund of money or the interest of the debtor in the so-called settlement payment.

THE COURT: It is not or, it is specifically whether it has a security interest in the debtor's interest.

MR. MARCUS: Yes, correct. In the settlement, payment and I believe the answer is yes. This is a situation, a fairly unusual in this court where we have to look at both common law and the Maine UCC to assess **INAUDIBLE** for security interest. It is unusual because the Maine UCC covers most, if not all types of property, personal property as collateral and there are only a few exceptions. However, insurance policies are one of the exceptions of coverage under the UCC. So the question becomes well is this lien covered under the UCC or, if not, if not..

THE COURT: What is the exception? Is it coverage, is it assignment of policy, is it proceeds, what is the exception?

MR. MARCUS: That is the big question.

THE COURT: It is isn't it.

MR. MARCUS: The way it is articulated by statute and the UCC the exception for an insurance policy or a claim under insurance policy those are excluded under the UCC.

THE COURT: Okay.

MR. MARCUS: Expressly. Now what makes the case an

interesting case here is that…

THE COURT: Is that you have 1102, which also suggests that some component of insurance may fall within the definition of accounts.

MR. MARCUS: That's correct and this is what makes it interesting because there is a third component of this insurance situation that we believe does come under the UCC and that is a payment. So you have a policy, you have a loss. You make your claim. So far, the secured creditor has nothing to say. But ah ha the claim gets resolved and now a check is written. We say it is at that stage where UCC now comes into effect with respect to the payment process. That money that the insurance company becomes obligated to pay the insured.

Now what I would like to do with the court's permission is to talk about common law security interest first and circle back to the UCC.

THE COURT: I just want you to review for my benefit your understanding of the law, of the specificity of the UCC exception under Maine UCC.

MR. MARCUS: Well let me, let's talk about the UCC. So we start with the proposition that the UCC excludes from its coverage…

THE COURT: Policies.

MR. MARCUS: A lien and a policy, a lien and a claim under a policy. Now I maintain that there was a third category,

it is not just me maintaining it. There are supports for this. There is a third category.

THE COURT: Maybe a fourth and a fifth. But there are only two that are excluded.

MR. MARCUS: Correct and the category that is relevant here that is not excluded is payment. So you have a policy, you have a loss, you have claim, no security implication. But once the check is written then the UCC applies. Now I think that is mandated by two provisions of the current version of the UCC one or the other. First is the definition of account. In 2000, the year 2000 the UCC was amended. Among the amendments was an amendment to the definition of account.

Now but for the exclusion this would be an account, because account is simply a right to payment whether or not earned by performance. The definition of account is very broad. It is only the insurance exclusion that is giving us any pause. But then that was changed in 2000 to say that an account includes a payment for an insurance policy, which we believe means that payments that arise under insurance policies are also now considered accounts.

THE COURT: How is that at odds with the excluded?

MR. MARCUS: Well I maintain that it is not at odds.

THE COURT: But you were eluding that some might think but that is not your position.

MR. MARCUS: I don't think that any.

THE COURT: I see that it is quite possible that I understand Mr. Fagone's position but I also understand your position that there is really no ambiguity or contradiction in the law.

MR. MARCUS: I don't believe there is. Prior to the 2000 amendments, there was some ambiguity because some cases said well even the payment under the policy is not covered. But a number of cases and we cited these in our memorandum well actually they are covered.

THE COURT: Then you have the amendment, which may have addressed that ambiguity as a consequence of those cases. Do you have any information from the reporters on that issue?

MR. MARCUS: I wish I could say that we did. But we have this. This is what we have on that point and let me just cover a subsidiary point and then I will answer directly the question. There is another change that was made in the code in 2000 and that was for establish a category called payment intangible, the category of collateral. A payment intangible is any payment on a contract and the definition doesn't distinguish between what kinds of contracts. It is any payment that arises under a contract. It doesn't say except insurance contracts or except this contract or except that contract. It just says a payment under contract.

Now get back to your question, how do I know that

this meant to be pickup insurance proceeds? Well I don't have a case on it since the amendments, but what I do have cases and scholarly commentary that relate to a related area, an analogous area. That is real estate contracts. Now we all know that the UCC does not cover transfer of interest in real estate. It doesn't cover mortgage, it doesn't cover an easement or any kind of transfer in real estate. But what the cases have shown since the 2000 amendment and what the commentary, the scholarly commentary has shown is that if there is a contract that involves real estate and results in an obligation to obtain money, the obligation to pay money is under the code. So for example…

THE COURT: A purchase and sales agreement.

MR. MARCUS: A purchase and sale agreement; I agreed to buy your house for $200,000. The seller's accepts. The seller's right to receive that $200,000 is a payment intangible for an account that is covered by the UCC. Again, we cited the details on the basis and scholarly authorities so have said. Now it is difficult to make any distinction between that and the insurance contracts because like real estate insurance policies are an excluded asset, okay we accept that. But if you have a contract that says, you pay money on accounts…

THE COURT: I see the analogy. Whether or not it is complete, I have some difficulty, but I see the analogy. In the real estate exclusion, the UCC was never intended to

incorporate real property interests, it will dirt. Similarly, insurance has been excluded because both real property interest and insurance have a body of law as old as time. The UCC was meant to deal with commercial matters beyond those two areas and other excluded areas. The difference is that insurance proceeds are closer to contract law and closer to commercial law tan perhaps real estate. That may even help you.

MR. MARCUS: I think it helps in the sense, your Honor. It would make sense for the court to rule that payment under a policy is part of a UCC collateral package. Why does that make sense? Because the common law treatment is murky, varies by state and what you would do is you would bring under coverage of the code what is considered universally to be a commercial asset, which is a right to payment of money. Debtors, lenders are constantly trading and dealing with rights to payment of money. That is kind of the essence of collateral. It is shown by this agreement. It makes all of the sense in the world to bring that under the coverage of the UCC, which is exactly what I think they were doing with the 2000 amendments, when they set up the term payment intangible. So look, you got a right to payment, where don't care where it comes, it comes from real estate, it comes from the moon, it comes from insurance. Once it is a right to payment of money, then we are going to bring it into the code, because it makes sense to do that.

THE COURT: It can be done without ever capturing the policy itself or the claim itself.

MR. MARCUS: That's correct, that's correct. So on the UCC side we maintain that by virtue of the amendments in 2000, of course, one might say that even without the amendments we would be covered because there were certain cases that said covers the payment in the policy anyway. But whatever one views about the pre-2000 cases, whatever ones views are about that, clearly at this time, at this stage, the payment rights that arise under insurance contracts are governed by the UCC. Once you have determined that they are governed by the UCC, there is no question that Wheeling has a perfected security interest in that payment right.

We have gone over the agreement according filing text, it has got all, it has got everything that you would have to do under the UCC to perfect an interest in that payment right and we maintain that it is covered under the UCC and should be so perfected. Now…

THE COURT: Including a provision in the UCC that describes it as an account **INAUDIBLE**.

MR. MARCUS: Correct, correct. Once you cross that bridge, which I think you must cross because there is no commercial sense believing this category of assets, the right to payment of money and outside and the hindrance, when that is so at odds with commercial practice.

Now if, nevertheless you are of the view, one of the views that it is governed by common law, we believe you come to the same outcome. We have gone at length and hope the court found it helpful to review common law on assignments of payment rights for securities. Again, we are not talking about assigning a policy, we are not talking about assigning claims. We are talking about assignment of a payment right under a contract.

It was interesting for us to learn because we so rarely deal in this that Maine has a long history of recognizing these assumptions. We cited cases that go back to the 1800's wherein Maine courts recognized that there can be an assignment for payment right for security. Then, of course, the more modern embodiment of that is in the restatement. We may let practitioners know that the Maine Law Court has on many, many occasions endorsed the restatement of the contracts, has adopted it. It is a statement of the law that we know finds favor in our Law Court.

So when you look at the Maine cases, albeit some of them are old and you look at the way Maine treats the restatement and look what the restatement says, it is pretty clear that under the common law A could assign to B as collateral security the right to payment. There is no filing requirement. There is no publication requirement. It is a valid contract and indeed cases in the restatement go so far as to

say…

THE COURT: Do any of those cases say that it is valid beyond A and B?

MR. MARCUS: Yes.

THE COURT: With respect to an intervening Trustee or a lienholder or some such party in interest.

MR. MARCUS: Yes your Honor that was really the next statement that I was going to make. Both restatement and the cases we cited said that the lien, that common law lien is ahead of the rights of a lien creditor, judgment creditor.

THE COURT: Including a BFP or trustee under 544.

MR. MARCUS: I don't have a case that articulates the words including a Trustee.

THE COURT: Do you have the words including any status that the trustee achieves upon his appointment in the filing of the case under 544.

MR. MARCUS: I think I do because under 544 there are two statuses that the Trustee gets. One is that he gets the rights of a lien creditor. We cited the language that makes it explicit that the common law assignment rights are senior to a lien creditor. So check that box off. Now the other status that a Trustee gets is that of a bona fide purchaser of real estate. That status do them on any good on this particular problem. So I don't think that status is relevant to our consideration.

THE COURT: Which points to the distinction that I made earlier between, as real estate means something else.

MR. MARCUS: So where it counts of lien creditor status, the Trustee does not to be the judgment lien creditor, and under Maine law the common law assignment does take priority over a lien creditor. So we believe that Wheeling is perfected even as a matter of common law by virtue of the fact that it has a clear contract granting these rights and that is really the only requirement that there be a contractual grant and there is little doubt that Wheeling satisfies the contractual requirements. In our view, there is little doubt that old Maine case law as well as the more modern articulation in the statement fully supports validity of Wheeling's security assignment. So on that front we believe that Wheeling prevails as well.

So in summary, to the extent that the debtor has an interest in the insurance proceeds and the debtor claims an interest as an estate, Wheeling believes has an effective…

THE COURT: I think the only doubt is that it is not between the debtor and other related entities as to the extent of the debtor's interest. It is not that the debtor doesn't lack, it lacks an interest for any, everybody would concede that the debtor has an interest to the extent that it has **INAUDIBLE**. We are only talking about extent.

MR. MARCUS: And extent is beyond the intent today.

So given that the debtor has an interest, our intention is and we believe that this well supported that both under common law and under the UCC Wheeling has a valid effective and enforceable lien in settlement payment to the extent to the debtor's interest.

THE COURT: Thank you.

MR. MARCUS: Thank you.

THE COURT: Mr. Fagone. Yes, go ahead please, sorry for the interruption.

MR. FAGONE: Not at all. Thank you, your Honor on behalf of the Trustee. We see things differently and I will try to go through as logically as I can because some of these issues kind of turn around on themselves and it is a bit circular. I will do my best to be methodical and logical.

I start at the beginning your Honor, the security agreement does not provide Wheeling with a security interest in insurance policies in general or this policy in particular. Those words just are not there. They do not exist in the security agreement.

THE COURT: I, I forgive the interruption. But I don't think that Wheeling's argument rests in any way on the idea that the insurance policies were covered?

MR. FAGONE: It doesn't because it couldn't make that argument. Right, okay, I guess

THE COURT: So you win on that one.

MR. FAGONE: I do and the point that I want to make there is that it would have been very easy for Wheeling to obtain a security interest in this policy. It didn't do that. Instead, it resorts to those arguments that Mr. Marcus has made here this morning, which I will talk about as I progress. But I think it is important to note at the beginning that this isn't some unique commercial beast, it is an insurance policy. There was a way to get a lien on it and Wheeling didn't do that. Okay that is point one.

Only if you find that there is a security interest in the policy do you then need to move onto the next part.

THE COURT: That is where you and Mr. Marcus part. Mr. Marcus' entire argument, we are not talking about policy and policy, we are talking about what exists when there is a right to payment. It may be that right must be established either by contract, or other agreement or judgment. But the right is distinct from the policy or the claim. His position is that if he has a security interest at all, it is simply on the basis of a right **INAUDIBLE** unrelated to the insurance.

MR. FAGONE: Your Honor, let me see if I can try to crystalize what I think you just said by citing something from Wheeling's brief and something Mr. Marcus said in his remarks that bears emphasis. He said that there are three categories: policy, right to payment and some third category.

THE COURT: He as paraphrasing the statute. He says

saying that there is a specific statutory exclusion. I think it is under 1109 somebody check that for me.

MR. FAGONE: It is I am going to get there.

THE COURT: Okay and that statutory exclusion is with two aspects of insurance. One the policy itself and two a claim underneath that policy. Those are the specific exclusions mentioned by Mr. Marcus. Is that correct Mr. Marcus?

MR. FAGONE: Yes it is.

THE COURT: What Mr. Marcus was saying is that there is a third feature that he wanted to talk about and at which point I interrupted him and said or many, more features, but you want to talk about this one. He is not suggesting that there is some third aspect. But all I am telling you that based on the 1109 there are two aspects, which are facially excluded.

MR. FAGONE: I agree Judge, I am with you, and I am with you.

THE COURT: All right.

MR. FAGONE: Okay, so he is paraphrasing and I think precision is important here.

THE COURT: So why don't you tell us precisely what 1102 says, I gave him an opportunity, I will give you an opportunity.

MR. FAGONE: I am going to read right from it judge.

THE COURT: I going to read…

MR. FAGONE: From the uniform version of Article 9, I don't believe that there are non-uniform changes to Maine's statute. I am reading from 1109(D)8, which I suspect is 4H under Maine's statute because of the way…

THE COURT: That is correct.

MR. FAGONE: So "a transfer of an interest in or an assignment of a claim under a policy of insurance" and then there is some other language. But that bears emphasis. Let me break it into two. A transfer of an interest in a policy that is excluded. A transfer of an, I am sorry, an assignment of a claim under a policy is excluded. Now let's look at Mr. Marcus' brief.

THE COURT: Hold on.

MR. FAGONE: Okay.

THE COURT: Okay, I just wanted to reread the exclusions from the exclusions okay, which do not apply and you would agree to that and you would agree to that. Okay go ahead.

MR. FAGONE: I don't think that they apply directly, but I will get to proceeds later.

THE COURT: The health insurer?

MR. FAGONE: Proceeds under 9315 and 9322. Mr. Marcus' brief at page 4 okay. He says, I am going to read this quote because it is important Wheeling believes this exclusion, referring to that does not prevent the grant of an Article 9 security interest in a right to payment that arises under

insurance policy because such rights to payment are legally distinct from the policy itself. Okay, maybe. And legal and I am interjecting some words here. And legally distinct from claims that can be made under the policy. How is a right to payment under a policy meaningful different than a claim under a policy. That is what a claim under a policy is. A right to payment.

THE COURT: No, it is not. I am going to give you my impression as to why that is not so. Then I will hear from you. A claim remains to be determined. A right is determined.

MR. FAGONE: Then I win.

THE COURT: A claim may become a right, but a claim is not a right, it is a claim.

MR. FAGONE: In bankruptcy **INAUDIBLE** yes. But even if that were the case here, I win because there was no right to payment. Mr. Marcus conceded this. There was no right to payment on the, there was no claim rather. His third bucket is claim. There was no claim on the petition date. What he said was Travelers wrote the check. When they wrote the check…

THE COURT: Hold on, because now we are really getting where there is a meaningful divergence and this has to do with the calendar and the clock more than anything else. If theoretically, Mr. Marcus is correct and a right to payment is distinct from a claim and a claim is excluded. A right of payment is distinct from the policy and the policy is excluded.

When did the right to payment arise? Did it arise at such a time where it would be part of the pre or post filing collateral of Wheeling under its security agreement.

MR. FAGONE: I agree your Honor with that construct and I think if you buy it and I am not entirely sure that the law admits, but if you buy it then the entitlement to money occurred post-petition when Travelers wrote the check. Mr. Marcus said in his recitation of the facts that there was an accident prepetition that importantly Travelers had defenses to coverage that it raised and a check was written post-petition. Those are important facts that I don't think are dispute. If you buy that one bucket, two bucket, three bucket construct, we are in bucket three.

THE COURT: Well…

MR. FAGONE: Post petition we are in bucket three.

THE COURT: Okay, which one do I kick.

MR. FAGONE: Pardon.

THE COURT: Which one do I kick.

MR. FAGONE: Which one do you kick, none I hope Judge. So let me come back because I think perhaps ahead of myself. So…

THE COURT: So you are saying you have two large categories of **INAUDIBLE** here. One is exclusion and the second large category is even if exclusion doesn't work for you, even if there is a possibility of collateral interest under the UCC

and/or the common law for a right that the right arose after bankruptcy and that gives you superior rights to the right.

MR. FAGONE: Essentially.

THE COURT: Essentially.

MR. FAGONE: Okay let me come back. So Mr. Marcus' client contends that its security interest in accounts gives it a security interest in this settlement. That is the core contention. We say the proceeds of an insurance policy, the money that comes from the insurer, forget about the timing question for a minute. It is important, but just move it aside. We say that is proceeds of a creditor's collateral if only one of two things is true. One the creditor has a security agreement in the insurance policy. We don't think that happens.

THE COURT: I understand. You are repeating yourself. We are already there. I understand what you are saying is that he doesn't have insurance coverage, he doesn't have claim to have insurance covered and, therefore, even the right to payment under a common law or under the UCC is excluded from coverage. That is a coverage question under the security agreement. I understand your argument.

MR. FAGONE: It is more than that judge.

THE COURT: What is it?

MR. FAGONE: Because there is a proceeds window that we have glossed over in 109G right.

THE COURT: Yes.

MR. FAGONE: I don't think Wheeling gets within that window because business interruption coverage is not proceeds of its account.

THE COURT: He is not arguing that it is.

MR. FAGONE: I think that he has.

THE COURT: Well maybe he has, but the argument that he rested on this morning had nothing to do with proceeds.

MR. FAGONE: Okay to the extent that Wheeling is making that argument, we cited cases in our brief that stated to the idea that insurance is proceeds of collateral only when it is driven, in other words the insurance…

THE COURT: I understand that, which means that if you have property coverage and the computer of which you are standing is destroyed or stolen and you might have a security interest in the proceeds if you had a security interest in the proceeding.

MR. FAGONE: Exactly judge, exactly.

THE COURT: You are saying that this is the same or analogous.

MR. FAGONE: I am saying that the case, I am saying that it is not the same, okay it is very, very different and the case that Mr. Marcus cited in his brief the MNC…

THE COURT: You are saying to be covered it would have to the same.

MR. FAGONE: Correct. And the case they that they

rely on the MNC case, is distinguishable in that the secured creditor there had a blanket lien on everything. Wheeling does by its admission does not have blanket.

THE COURT: But this insurance was not to replace the computer.

MR. FAGONE: It was not the accounts receivable either.

THE COURT: That's correct. Mr. Marcus would stipulate that wouldn't you Mr. Marcus?

MR. MARCUS: No, I wouldn't say that it replaces accounts receivable. I would not say that.

THE COURT: You would not say that it was to replace accounts receivable.

MR. MARCUS: Correct.

THE COURT: You would stipulate that it is not.

MR. MARCUS: Yes.

THE COURT: Thank you. So his approach is very, very narrow, very surgical Mr. Fagone. Yours is a lot broader. He is saying that rights to payment of insurance are collateral under the UCC and the common law. You are saying no because there was no primary interest in the policy itself.

MR. FAGONE: I am not aware of any case law at all that suggests that rights to payment under insurance policy are collateral within the UCC. It doesn't exist.

THE COURT: We may not need a case because if you take

a look at…

MR. FAGONE: 1102.

THE COURT: 91102(2) and I "account except as used in an account into right payment of a monetary obligation, whether or not earned or performed, earned by performance, I go down to C for a policy of insurance issued or to be issued."

MR. FAGONE: Agreed that doesn't apply here.

THE COURT: Okay tell me how it doesn't?

MR. FAGONE: Because, and we cited this discussion in footnote one in page 11 of our brief. 1102 is the inclusion of those rights, which are limited to four a policy of insurance issued or to be issued. It is on the other side of the coin. It is on the insurance company or the broker side. So if a broker sells a policy and has a right to collect a premium because the policy was issued, the broker can then use that revenue stream to go finance its business. We cited case law that Jan v. Cornerstone case the Seaburg and Associates case. That is why that is there. It is not there to affect a wholesale undoing of the exclusion in 109. It just doesn't do that.

Okay, so I understand 1102 is there, but I don't think it operates the way Mr. Marcus claims it does. It is a different side of the coin.

Now he talked a lot of about the amendments and he talked about real estate being covered by Article 9. I think

in your colloquy with him…

THE COURT: Not real estate being provided by Article 9, but rights to payment arising in the real estate…

MR. FAGONE: Let me tell you what that involves and the revisions to Article 9 in 2000 made this very clear because there was some uncertainty before. Comment 7, the official comment 7 to revise 109 talks about this. What happened, there was some uncertainty before 2000 before the following set of facts. I loaned some money to Mara, she gives me a promissory note. She grants a mortgage on her real estate. She grants me a mortgage on her real estate to secure her obligations evidence by the note. Now I am the holder of the note and I hold the mortgage. I go and I borrow money from George and I give him a lien on my interest in the note. There was some question about whether the lien I granted to George captured my rights as a mortgagee.

THE COURT: This is the securitization issue.

MR. FAGONE: Yes, your Honor it is exactly right. That is the extent to which real estate applies. It does not mean that modification does not in any way, shape or form mean that exclusions to **INAUDIBLE** somehow are washed away by the expansion of the definition account. That is a lot…

THE COURT: What would you say to this? That you sell a piece of real estate tomorrow. She gives you $100 and is that $100 covered by the UCC?

MR. FAGONE: Where do I put it? Do I put it in the bank account? If I put it in the bank account, the answer is yes, likely because now I have a deposit account. Deposit accounts are covered.

THE COURT: If you put it in your mattress?

MR. FAGONE: If I put it, in my mattress, it is now money and I don't believe, I am not sure about that judge that is a good question.

THE COURT: What if she doesn't pay you?

MR. FAGONE: Now.

THE COURT: She is just not going to pay you. You get a judgment against her and now you have a right to a payment of $100.

MR. FAGONE: A judgment I believe now becomes covered by Article 9, although I am not sure about that.

THE COURT: If you threaten to take her to court and she doesn't want to pay lawyers and she said I will, I won't give you the $100 but I will give the right to payment of $50 is that covered by the UCC?

MR. FAGONE: If we settle in essence and I have a right to payment?

THE COURT: Yup.

MR. FAGONE: In other words, the question is the fundamental character…

THE COURT: The question is the same as the facts that

we have here.

MR. FAGONE: Okay, maybe I don't think so, but again, I am not sure you need to get though because of the timing issues.

THE COURT: We are getting warm.

MR. FAGONE: Now Mr. Marcus on the timing issue. I guess on the real estate issue. He cites the Notollo case. It is a case from the Southern District of New York, a bankruptcy case. That was an unusual case and in that case, what happened was there was some real estate. The real estate, the parties believed the real estate was owned by some individuals. Those individuals filed for Chapter 7 bankruptcy and their Trustee sold the real estate. He entered into a contract, he closed on the contract. He got the money. The money was sitting in an account and then the Chapter 7 Trustee for the individuals said I am going to make a distribution. The secured creditor of those individual's entity, the company they owned, showed up and said wait a minute that real estate was owned by my borrower, which gave me a blanket lien, blanket UCC lien and, therefore, I have the right to that money. I have a right to that money, because I have a right to payment.

So what did the Chapter 7 Trustee do in response to that, he filed the entity into its own bankruptcy and brought an adversary challenging the secured party's lien. What the court said that it was, yup the secured party wins. The

secured party wins because everything happened prepetition. The real estate was sold, the closing occurred, the money was in the account and in the unusual facts of this case, given the way 552 works, the secured party won. That is in total that is the holding of the case. Obviously not binding on this court. The dicta in the case says it would be a very different result under 552 if the right to payment were created post petition. That is exactly what happened here. The right to payment is created post petition when Travelers agreed…

THE COURT: Let me put it another way. There was no policy unless the security agreement and a claim, which may have existed prefiling would be excluded from the UCC.

MR. FAGONE: Exactly Judge.

THE COURT: The right to payment was established by consent on the Trustee's watch.

MR. FAGONE: Exactly your Honor. Now we are getting closer to case law that I think does apply here and I like to point the court's attention to the Big Squaw Mountain case that is cited in Wheeling's memorandum and it is cited in our memorandum. That was a case again I don't want you to bore you with details, but I think they are important. Big Squaw Mountain was a case where an involuntary petition was filed against the debtor. After the involuntary was filed and before the entry of an order for relief, an insurance policy was cancelled. So commencement of case, insurance policy cancelled,

refund paid and an order for relief entered. The issue in the case was, does the premium finance company have a lien on unearned premiums that were refunded. That was the issue in Big Squaw Mountain. What the court said there was, if as of the commencement of the case and that case it was the filing of the involuntary. In our case, it was the filing of the voluntary petition. If as of the commencement of the case, the estate nearly has a right to payment under insurance policy that right is excluded from Article 9 of the UCC. That was Big Squaw Mountain that was the holding of the Big Squaw. Nothing has changed in the UCC…

THE COURT: Well I don't know about that. That was before 2000.

MR. FAGONE: Yes but the exclusion is the same.

THE COURT: Okay, I will take another look at the case. As you pose it here, I am not getting your point.

MR. FAGONE: Sure well take a look judge when you do at age 836 of Squaw Mountain, I think it was Judge Haines.

THE COURT: It wasn't me.

MR. FAGONE: The Honorable James B. Haines, Jr. writing for the court said "at the critical point of inquiry, A1 that was the premium finance company, the secured creditors rights as an assignee of unearned premiums constituted a claim in or under a policy of insurance and, therefore, excluded under the UCC's coverage by 9104G. So I think the in or under

a policy of insurance language has been the same. I don't think that changed.

THE COURT: I am still not catching how that is applicable in this instance.

MR. FAGONE: But just like the premium, just like the debtor right to an unearned premium, to a refund of unearned premium on the petition date in Big Squaw was contingent, this debtor's right to a payment under the Traveler's policy was contingent on the petition date. It is excluded, it was excluded from…

THE COURT: The decision was based on the UCC exclusion.

MR. FAGONE: Yes.

THE COURT: So how does that, okay all right, I will take a look at it. I am not certain that it is applicable Mr. Fagone, but go ahead.

MR. FAGONE: Okay, well we think it is.

THE COURT: I will take another look.

MR. FAGONE: Well now, I want to talk a little bit about the common law. Mr. Marcus in his arguments to the court talked about the common law. If you were to find that the UCC exclusion applied, you still have to deal with the common law argument. Mr. Marcus argued a couple of times that Wheeling had a valid security interest and later we talked about perfection when you asked about a 544 and the trustee. In Big

Squaw the court, as I understand Wheeling's argument, Mr. Marcus seems to be saying, look I have got an assignment of the policy, I win period, end of story. Then he cites a bunch of Maine cases and I don't think those apply and I will tell you why in a minute. But Big Squaw undermines that argument. In Big Squaw the court said it was excluded from Article 9 and I understand you have your doubts about that, we think it works. But after the court file that it was excluded from Article 9, it went onto analyze whether the common law security interest was perfected. It didn't stop and say oh gee oh okay I had a common law security interest, end of story. It went on and did an analysis and it cited through Maine case law that said you have got to either have possession of the policy or notice to the insurer. You have to take some perfection step. That is pretty consistent with the basic idea that secret liens don't work in bankruptcy. Wheeling did nothing to perfect a common laws security interest.

THE COURT: Let's just reduce this to the curl, your position is that, that um, under the common law there may have been a lien, but as to the Trustee under 544, it was **INAUDIBLE.**

MR. FAGONE: Yes exactly. I will tell you that I don't think there is any dispute that Wheeling took no common law perfection step before the filing. They filed the UCC, Mr. Marcus said that in his remarks and he is right. They did nothing else that I am aware of to take, to perfect a security

interest. In fact, if you recall your Honor…

THE COURT: Oh no, no you are conflating everything. If we are talking to UCC, it has perfected that is stipulated. If it is covered under the UCC and not excluded, I understand your argument that it is not covered, it get it. But there is no perfection. There is no perfection issue under the UCC.

MR. FAGONE: I didn't say under the UCC, I said under the common law. No common law perfection status.

THE COURT: Maybe I misheard you.

MR. FAGONE: Yeah I am sorry.

THE COURT: We are only talking about now the common law position as it is unperfected by you.

MR. FAGONE: But I want to emphasize, I want to hammer that point for a second at the risk of being tiresome. When Wheeling objected to the Traveler's motion, one of the things that it said in its objection was hey we commenced an adversary proceeding against Travelers and we are filing this objection. Travelers now has notice of our security interest. Had Wheeling done something prefiling to perfect the common law security interest, we wouldn't have needed to do that. The fact that it did that post-petition is an admission that there was no prebankruptcy common law…

THE COURT: Mr. Marcus is prepared to do better than that. He will probably tell you that there was nothing. Mr. Marcus.

MR. MARCUS: There is no prefiling notice and none was required.

MR. FAGONE: I think some was required and I think Big Squaw establishes that pretty clearly that some…

THE COURT: It may have been required, I will make that determination. But he is not asserting that it occurred and he is not admitting that he filed that lawsuit to admit that nothing was filed because he already admits nothing was filed, perfected.

MR. FAGONE: But I think at the end of the day judge, the UCC exclusion applies. Okay, I think it is, I will give Mr. Marcus credit, and it is an interesting argument. I think that it is fancy footwork at the end of the day. The UCC argument exclusion applies leaving Wheeling with its remedies at common law and there was no common law perfection step and one was required. At the end of the day, none of the Maine cases that Wheeling cites are applicable. You know, on this question of whether there needs to be a common law perfection step.

DiPietro v. Boynton for example, that is a case they relied on. That was a case where Boynton entered into an option contract with something called post. Post assigned its rights to Lumber. Lumber then says geez I would like to exercise the option and it sent notice to Boynton and it sent a check to Boynton. Boynton cashed the check and then he related when

Lumber sued him to enforce the option contract. He said oh geez there was no assignment of that so I don't have to perform. It is pretty easy for the court in those circumstances to say look you got a letter, you got a check, you cashed it. The assignment from Post to Lumber was valid, game over. That has nothing to do with the rights of the third-party lien creditor who is like the Trustee under 544. Boynton has nothing to do with it.

Studevant v. Town of Winthrop, Filmtech, White, and Herzog none of those cases all cited by Wheeling deal with the existence of a hypothetical lien creditor with the rights that the Trustee has on the petition date. I just don't go there. So I would urge the court to look at those cases carefully. I don't think they go as far as Wheeling tries to stretch them. At the end of the day Wheeling has to make that stretch because it doesn't have a lien on the policy and the UCC exclusion means that its filing was ineffective. That is what we have judge.

THE COURT: Thank you very much Mr. Fagone. Mr. Marcus.

MR. MARCUS: I would just like to address two points. First is under the UCC. Let's suppose the situation is governed by the UCC. The contention is made that the right to payment didn't arise until post filing when Travelers wrote the check. That is plainly wrong. The right to payment arose when

the catastrophe occurred. It may have arisen earlier when the policy was issued. But under UCC powers, if one of the UCC's is quite clear that whether it is a payment intangible or an account, it doesn't have to be liquidated, undisputed or **INAUDIBLE**. Under either of those definitions of what it is, it is clear and, in fact, explicit that it is in account, whether or not they are in by performance. It is a payment intangible even if the amount is unliquidated, even if the amount is undisputed. When the accident occurred there was a contractual right to payment for loss. Now the amount wasn't determined and it might even have been disputed, but there was there still the right to the payment. When the check was cut, that became then liquidated and undisputed.

Now we are talking about the UCC. It is entirely unavailable to argue about the difference between liquidated and unliquidated rights…

THE COURT: What is the distinction between a claim and a right.

MR. MARCUS: At some point there are two sides to the same coin. But that doesn't mean there are always two sides to the same coin.

THE COURT: It depends on when you flip them.

MR. MARCUS: It depends on when you look at it. If you have a casualty policy and you have a casualty policy, now you have both a claim and there is a right to payment. But

before the casualty you might have a claim, you have a contractual claim, you might have claims under policy. But the fact that they coincide at some point in time, it doesn't exclude the applicability of the right to payment. Once that casualty occurred, actually once the policy was signed, there was at least a condition of right to payment. If there is a loss I get paid. Once the loss has occurred, that condition was set aside. Then once they agreed upon the amount it was liquidated. If we are talking the UCC, the UCC covers once the right attaches, even if it is disputed, unliquidated. That is solid UCC jurisprudence. It is true of accounts receivable, it is true of accounts, and it is true of anything. The UCC doesn't deny the secured creditor of the right, just because someone says well I dispute it or I am not sure whether it is $100 or $120. So we think the right to payment arose.

THE COURT: What is the distinction between a claim and a right to payment?

MR. MARCUS: Well a claim…

THE COURT: I want to narrow that under 4H.

MR. MARCUS: Well for example, suppose I have a life insurance policy and I have a creditor and I say, you know, creditor I am probably going to die one day and I am going to assign to you…,

THE COURT: So this is limited to life insurance?

MR. MARCUS: Well no, it could be any kind of

insurance. I am using life insurance as an example.

THE COURT: Well life insurance is not a good example because there is no right to pay as long as somebody is standing.

MR. MARCUS: Well I know, but there is a claim under the policy, so I have a right, I could but for the UCC I could say to my creditor, look, relax, you know I am going to die and I have a big insurance policy. So I am going to assign you the right to make a claim under that policy when I die.

THE COURT: That is done every day outside of the UCC.

MR. MARCUS: Correct that's right because that claim right, that right to make a claim that is excluded. Now you could go to a casualty policy…

THE COURT: The right to make a claim means that the right to payment has not yet matured.

MR. MARCUS: That's right that is right. So you can look at any kind of policy and in theory you could say, a business could say I have got all kinds of insurance. I have got casualty insurance, I have business interruption, I have got accounts receivable and I have got all kinds of insurance. I am going to assign to you all my rights to make claims under those policies. So if anything ever happens you are the first one on the table. Well that doesn't come with the UCC. But once something, some even occurs and now ah ha there is a contractual obligation with that insurance company to pay me

some money, albeit undetermined, that is the right to payment to which the code attaches. That is how it ought to be your Honor because it makes no sense to leave this commercial asset to the vagaries of the common law, which I will address in the moment. But we all have to acknowledge that there are vagaries. I mean I am citing cases from 1840.

THE COURT: I remember those cases.

MR. MARCUS: I find a great deal of comfort in knowing that as early as 1840 people were talking this way. But one might say it is a lot better commercially to say look the code clearly covers rights to payment earned by performance, not earned by performance, but a right, a real right to payment and that is a commercial asset and we have got to treat it under the code.

Now the second point I want to make Judge is Big Squaw. Now careful reading of Big Squaw says that ah, shows that Judge Haines did not say that it is a necessary condition of a common law assignment that there be possession of the policy or notice to the insurer. What the judge said well common law articulation law says you don't require any notice, you don't require possession, but I know that in this case the secured creditor did give notice. I find that sufficient. So you have to make the law of distinction between that which is sufficient and that which is necessary.

So if you gave notice to the insurer that might well

be sufficient and that is all Judge Haines was saying. Given the fact that there was premium assignment agreement, i.e. a security agreement, given the fact that the creditor had given notice to the insurer that was sufficient. That is not to say it was necessary. Clearly the assignment agreement, the contract was necessary, but the law, even the law cited by Judge Haines is very clear that giving of the notice is not a necessary condition even if it is sufficient. We are in that circumstance here, if we are in common law.

THE COURT: Why would we need something if it wasn't necessary?

MR. MARCUS: Well the judge, I think what the judge said if I understand the court's question, is that I don't have to worry about the niceties that we are worried about here today because if notice is required to the insurer it was given. So I find that sufficient. Now is a different case the judge…

THE COURT: So if notice was required, so there was no decision in that case for you or for Mr. Fagone.

MR. MARCUS: Well I submit that is true because all the court ruled was that notice had been given that sufficient. I don't think that Judge Haines made a rule that said notice is a yes certainty. That is the next case that is this case.

THE COURT: What he said and I am paraphrasing is if notice was required we got. So if notice wasn't required even

though we have it we don't have to worry about it. If notice is required we got it anyway. But there was no determination yeah or nay.

MR. MARCUS: I think that is true. I think he did vote with approval…

THE COURT: Do you agree with that Mr. Fagone?

MR. FAGONE: No I don't.

THE COURT: All right, I will take another look at the case thank you and spending more time talking about it is not going to be…

MR. MARCUS: Then I can conclude, thank you very much.

THE COURT: All right, do you want to respond, please.

MR. FAGONE: Less than 30 seconds. I think if I heard him right, Mr. Marcus said that the right to payment arose prepetition. I think that is what he said.

THE COURT: Yes.

MR. FAGONE: If he is going to maintain the distinction that he was advocating before, it doesn't work. The claim may have arisen when the tragedy occurred.

THE COURT: He is saying that in this instance, the claim and the right to payment are identical and he is also saying that is not always true, but that is true.

MR. FAGONE: Fair enough there is no case law.

THE COURT: That is what he is saying.

MR. FAGONE: Fair enough, but there is not case law for that. If the dichotomy he urges holds the right to payment arose later, and when did it arise, when it was converted to cash. That is the important date and time. That is Big Squaw when it was converted to cash. That is Notollo when it was converted to cash. If the distinction exists it is meaningful when it is converted to cash. Here and I understand you might say well are looking at the clock, we are looking at the calendar. You know, there is some arbitrariness associated with that, I get it. But the petition and the filing and the entry of an order for relief has significance. In this case the right to payment, the conversion to cash occurred post-petition. So that it is it your Honor.

THE COURT: Hold on, I have a question and I am addressing the same question to Mr. Marcus. Are you satisfied to rest on your oral and written arguments today or do you wish to have a very brief opportunity to by further limited argument on the question of the distinction, if any, between a claim and right.

MR. FAGONE: I am satisfied to rest. I would, in fact, I don't want that opportunity.

MR. MARCUS: Your Honor, my inclination is to brief the matter because I think that we are covered relatively unchartered territory and it might be helpful to the court…

THE COURT: I will tell you why it would be helpful to

the court. Because and you can wave participation Mr. Fagone if you want to. Number one, I am not going to make a pop decision from this right now. I commend both sides primarily your hard working associates for having you as well prepared to today as you are. You have given me, even though I have read the papers, I read the statute, I read the cases, you have given me food for thought. But I at this moment, whether or not this is a distinction became claim and right and effects the applicability of the UCC perhaps and affects the timing question. I don't know that I have adequate briefing on that. I want to give the parties an opportunity to participate because I think for me at this moment that may be the crux of the matter.

MR. FAGONE: Your Honor if it would aid the court's process we are happy to participate. We are not going to waive.

THE COURT: Mr. Marcus has already said yes. Now can we do this on simultaneous briefs and how much time would the parties like, Mr. Marcus?

MR. MARCUS: Um, the first number that comes to my head is ten days.

THE COURT: We don't count to ten anymore. It is a count of seven or 14.

MR. MARCUS: I take 14 then.

THE COURT: You can do it in ten, I am just kidding

you.

MR. FAGONE: Your Honor I suggest that 14 is probably more comfortable given everything that is going on in the case and given that these are somewhat arcane issues. So if we are going to do it, I think we might as well take a little bit more time.

THE COURT: Neither one of your looked at your associate and said when are you going to be able to fit this in.

MR. FAGONE: She said 28 Judge.

MR. MARCUS: Mine went on strike your Honor.

THE COURT: Okay, simultaneous briefs, 14 days on that limited question or those limited questions. I want you to button or unbutton the right to payments of the claim and then discuss the timely question. Are there any other issues that the parties can think of since you are going to take time to do this that you would like to discuss further. I don't want to hear repetition more than I already have. Anything else that you feel needs further definition Mr. Marcus?

MR. MARCUS: No your Honor, thank you.

THE COURT: Mr. Fagone.

MR. FAGONE: No, you Honor.

THE COURT: All right 14 days it is. We are going to take a very brief break. Then I will come back in and to the 45G. If you want to make it a more extensive break and trying

to work on that scheduling agreement, how much time do you think you will need?

MR. MARCUS: Maybe until 11:30, a half an hour.

THE COURT: I am happy to do that. We have to be out of here by probably like b 1:30, the hearing is at 2:00, so we have plenty of time.

MR. MARCUS: 11:15.

THE COURT: 11:15 because it will take me probably 15 minutes to do the 45G, okay. All right, so I will see it back here at 11:15. Thank you all very much.

THE COURT OFFICER: All rise.

(45G PROCEEDINGS RECESSED (March 13, 2014, 10:49 a.m.)

(45G PROCEEDINGS RESUMED (March 13, 2014, 11:17 a.m.)

THE COURT OFFICER: United States Bankruptcy Court is again in session. Please be seated and come to order.

THE COURT: Good morning, again. This is Montreal, Maine & Atlantic Railway Limited, Case 2013-10670. We have the Trustee represented and Wheeling represented.

Mr. Despins, are you still on the line for the Committee? Operator, is there anyone on the phone? Okay. Was it something I said? All right.

May I have a report, please, from the Trustee on what's going to happen next on the pending motion?

MR. FAGONE: Thank you, Your Honor. On behalf of the

Trustee, during the break I spoke with Mr. Marcus and Mr. Johnson about deadlines, various additional pretrial activity that would need to take place between now and May 7th. We have -- what we would like is the opportunity to go back to our offices after this hearing, memorialize it in writing and hand up a proposed scheduling order to the Court. We think we can have that by early next week. We've got 85 percent of it --

THE COURT: That's fine. As I told you, the scheduling is up to you. It's to get us from here to May 8th, or May 7th. Right?

MR. FAGONE: Yeah, and we've got 85 percent of the work done. I'm sure we can do the other 15 percent in a couple days.

The only significant thing to report is that Wheeling has agreed that if the Canadian Debtor seeks to intervene in the contested matter it won't oppose that. It'll just need to be bound by the Trustee's discovery schedule and that's okay with us. So I think we'll have a fairly routine scheduling order to hand to the Court in a couple of days if that's acceptable.

THE COURT: Thank you, Mr. Marcus? Thank you very much, gentlemen.

Now, I'm prepared to render my decision on 45G. This will be far more extensive than the average bench ruling but less extensive than if I had completed a written opinion for

publication. The reason I'm going to be doing it in this fashion is so that we can move the case along, both get an answer with respect to the 45G proceeds and have aspects of the case that may help solve other aspects of the case. So here we go.

This is the decision and order regarding the proceeds of sale of the Debtor's 45G tax credit pursuant to the tax -- to the track maintenance agreement.

Montreal, Maine & Atlantic Railway Limited, the Debtor commences railroad reorganization case under Chapter 11 on
August 7, 2013. Robert Keach is the duly appointed Chapter 11 Trustee.

Pending before the Court is an adversary proceeding brought on October 7, 2013 by Wheeling & Lake Erie Railway Company against the Trustee, the Debtor and several other parties. Through it, Wheeling seeks a determination that it holds a valid, perfected and/or enforceable security interest in certain property of the Debtor and the bankruptcy Estate.

Wheeling's assertion stems from a line of credit note and security agreement dated June 15, 2009. Upon the commencement of the bankruptcy case, Wheeling was owed a fully extended line in the amount of $6 million dollars. By agreement in six sequential court orders, Wheeling was permitted -- Wheeling has permitted the Debtor to use its cash

collateral. Even so, Wheeling's balance has been reduced by approximately $1 million dollars.

By order dated October 11, 2013, the Debtor's use of cash collateral came to a halt when Camden National Bank was authorized to become the Debtor's post-bankruptcy lender.

By consent order on January 17, 2014, most activity in the adversary proceeding was stayed until the earlier of March 13, 2014 or the entry of an order terminating the stay.

The activities excluded from the stay included, "conducting discovery or filing any other pleadings in connection with the 45G motion and certain other matters."

The 45G motion refers to the Trustee's "Motion for an order authorizing assignment of tax credits and, two, granting related relief filed on December 2, 2013."

Through this motion the Trustee sought retroactive approval of a pre-bankruptcy agreement between the Debtor and KM Strategic Investments, LLC, dated April 26, 2013 known as the Track Maintenance Agreement.

The Trustee also asked for authority to pay a commission to the broker who arranged the TMA. The TMA provided for the assignment of the Debtor's track to KMSI and the payment by KMSI for the Debtor's track maintenance expenses thereby enabling KMSI to claim the track maintenance credit on the Debtor's track for the year 2013.

Through the TMA, the Debtor was able to recover value for the track maintenance tax credits that otherwise would have been lost due to its substantial net operating loss carry-forward.

The nub of the present dispute is Wheeling's claim to a security interest in whatever value the Debtor may be entitled to receive from KMSI under the TMA.

By order dated December 17, 2013, this Court granted the Trustee's 45G motion with the proviso that Wheeling's security interest shall "attach" (to any funds received by the Debtor from KMSI) to the same extent that Wheeling has a security interest in the 45G credits as determined by agreement of Wheeling and the Trustee or, failing that, by order the Court in connection with a hearing and that hearing was conducted on January 23, 2014.

The December order also authorized the Trustee to pay the broker's commission and approximately $20,000 was paid to the broker, Mickelson and Company.

The respective rights of the Trustee and Wheeling were reserved in paragraph six of the December 17 order. I'm not going to read that to the parties now but you can refer to that if you wish. And that paragraph six refers to net funds as a defined term and the net funds, as defined in paragraph six of the December order, are the focus of this dispute less the broker's commission of roughly $20,000 and the $19,000 also

referred to in the December order, which was an amount to be paid over by agreement.

The amount in dispute presently being held by Court order and agreement is $490,513.62. This is the net amount recovered by the Debtor under the TMA. The actual track maintenance expenditures amounted to $1,117,335. We reached the $490,000 figure by -- according to the formula under the TMA which provided, among other things, that KMSI would receive 52.5 percent of the value of the expenditures in shipping credits or in lieu of shipping credits by a set-off so that the net only of 47.5 percent of the actual expenditures would be due and payable to the Debtor. And that $490,513 figure excludes the $39,000, which is the $19,000 and the $20,000 commission.

An evidentiary hearing was held on January 23, 2014, however, contrary to language in the order quoted above, that's paragraph six of the December order, the parties agreed that the determination of the validity and extent of Wheeling's security interest in the proceeds of the TMA would have the same preclusive effect as a judgment on this issue in the adversary proceeding.

For this reason Wheeling is assigned the burden of going forward and the burden of proof. This decision contains my findings and conclusions under Rule of Bankruptcy Procedure 7052 and this order shall be final with respect to Wheeling's

interest in the proceeds of the TMA.

Wheeling claims the proceeds are subject to its security interest as "accounts and other rights to payment including payment intangibles." The financing statement reflecting Wheeling's security interest was recorded in Delaware. The financing agreement provides "the security agreement shall be governed by the laws of the State of Maine except to the extent that the Maine Uniform Commercial Code provides for the application of the law of the state that the Debtor is located in." In this instance that's a distinction without a difference. I applied Maine law.

The funds due the Debtor under the security agreement fall within the definition of right to payment, including payment intangibles. Under the UCC, an account is defined as a right to payment of a monetary obligation and the payment intangible is a general intangible under which account debtors' principal obligation is a monetary obligation.

The Debtor's right to payments under the TMA have a right to payment of a monetary obligation from KMSI.

The Trustee raises three arguments why Wheeling's security interest does not apply to the entirety of the net funds, first, that some of the net funds are attributable to accounts generated in Canada and are not subject to the security agreement by reason of the fact that the security agreement is not really affected under Canadian law. Second,

that the Trustee is entitled to all of the net proceeds under the equities of the case provision of 552(b)(1) and, third, that the tax credit amounts were not certified to KMSI until December of 2013 and that as a consequence 552(a) (precludes) Wheeling's security interest because these are actually post-petition payments or acquisitions or assets.

Take these in sequence. The Canadian accounts. I stated earlier in the day today that the evidence from the Debtor's witness indicated that separate treatment of accounts receivable did not exist, that all funds came into the Hermon, Maine operations center attributable to the Canadian entity and the American entity, they were comingled and that the funds were used for operations generally in the uniform operation of those entities.

There was testimony to the effect that the receivables were distinguished or delineated for tax purposes at year end but there was no clear indication of the record as to how that was done or if it was simply paper attribution for the purposes of tax returns. It was clear to me from the testimony at the time that there was no separate account or separate treatment or any other distinction or separation between accounts receivable attributable to track in Canada or track in the United States.

And the testimony indicated further that all the receivables were treated as receivables of the American entity

which had general supervisory operational responsibility for both entities out of one office and that no distinction was made.

I therefore find and conclude, with respect to the Trustee's question concerning Canadian receivables, that the perfection issue simply doesn't apply under this instance but for the purposes of the 45G motion the evidence is clear and unambiguous that all of the receivables were comingled and they were all treated as receivables for the American entity.

Equities of the case. The Trustee argues that he should be entitled to the entire tax credit pursuant to 552(d)(1). Specifically, he asserts that the expenditures were made from sources in which Wheeling does not have a security interest including accounts receivable attributable to operations conducted by the Debtor's Canadian subsidiary and that Wheeling had no involvement in the Debtor's post-petition operations and that the recovery of accounts receivable for Wheeling's benefit was largely attributable to the fact that the Debtor has continued operating.

The Debtor referred to authority from the 1st Circuit, the New Hampshire business development case at 818 F.2d 1027, 1987, and I'll quote from that case. Equities of the case is defined narrowly, "We can only conclude from our reading of these reports that the equities of the case proviso was a legislative attempt to address those instances where

expenditures of the Estate enhance the value of the proceeds which, if not adjusted, would lead to an unjust improvement of the secured party's position."

I think that's correct and that's not what occurred in this case. The evidence indicates that clearly, unambiguously, the Debtor source of funding through accounts receivable, the accounts receivable were subject to pre- and post-filing -- the pre- and post-filing security interest of Wheeling. Those accounts receivable were applied to the track maintenance expenditures made by the Debtor. The reimbursement made under the Track Maintenance Agreement was recovery by the Debtor of essentially a half of those expenditures, in other words, replacing the receivables that were expended by the Debtor to pay for the track maintenance in the first instance. So there's no unfair advantage here under the equity case equities of the case provision of 552(b).

Argument number three, 552(a). The Trustee asserts that 552(a) cuts off any claim of Wheeling to a security interest in the tax credit proceeds because they are post-petition assets. Section 552(a) provides, with an exception not applicable here, that property acquired by the Estate after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the Debtor before the commencement of the case. Thus, according to the Trustee when the tax credit arose becomes important. The

Trustee says that the tax credits could not be transferred until the track maintenance expenditures were certified by KMSI, which did not happen until December of 2013.

Under the terms of the TMA the order for the tax credit to be sold --in order for the tax credit to be sold the Debtor was required to, one, assign the track miles, two, KMSI to make qualified track maintenance expenditures and, three, certify those expenditures to KMSI.

The track miles were assigned by KMSI under the TMA. The total qualified track expenditures for 2013, as I said before $1,117,355.

I want to depart from my notes here for a minute to explain something. No tax credits were ever assigned. The Debtor had no tax credits. The TMA is the Track Maintenance Agreement. It allows, under the IRS Code, the assignment of track so that the assignee of the track can take advantage of the credit by reimbursing the assignor of the track to the actual maintenance expenditures. There's no distinction under 45G between a credit to an assignor and an assignee. The assignee is acting on its own behalf. So to say that the tax credits were assigned is really not so. What was assigned was the track and the responsibility for maintenance and out of the payment of that maintenance the assignee was eligible for the credit. The arrangement of the 52.5 versus 47.5 is, theoretically and in the industry, the assignee gets the

benefit of the 50 percent and pays 100 percent of the maintenance expenditures. The benefit derived from the sum of all these transactions is the 2.5 percent, which reduces the actual amount that the assignor is reimbursed for the expenses, which enable the assignee to take advantage of the credit. So the assignee is made whole plus 2.5 percent and the assignor is benefitted by getting 47.5 percent of its expenses reimbursed.

The total expenditures occurred during three specific periods of time as defined by the Trustee and adopted by both parties. These periods are as follows. June 1, 2013 to August 7, 2013, August 7 being the commencement date. The expenditures incurred during this period were $551,889. The next period was from August 8, 2013 to October 17, 2013. The expenditures for that period were $227,456. The third period ran from October 18, 2013 to December 31, 2013 and during this period there were $338,010 of expenditures.

The two post-petition periods are relevant because they would fall within the purview of 552. The period before the commencement of the case is clearly and unambiguously pre-filing. The second post-filing period, however, occurred at a time when Wheeling was no longer the post-petition lender. October 18 was when Camden took over.

If we look at the total expenditures and take the percentage for the first period, which is pre-petition, and apply that to the $490 and add the percentage of the fraction,

which would be for the second period, the $227,456 over the $1,117,355, we get the amount of the $490 that's attributable for those two periods. And then if we take the same percentage of the third period we arrive at $145,384.81. That amount and that amount alone will be property of the Estate.

The balance of the $490 will be subject to Wheeling's security interest. Excuse me, I misspoke. I said $145. It's $148,384.81. That's what the Debtor gets. The balance goes to Wheeling.

So ordered. I will enter a very simple order referring to the transcript of the record today.

Any further business to come before the Court?

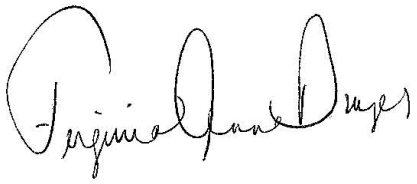
Thank you, all.

THE COURT OFFICER: All rise.

PROCEEDINGS ADJOURNED (March 13, 2014, 11:46 a.m.)

C E R T I F I C A T E

I hereby certify that this is a true and accurate transcript of the proceedings, which took place on March 13, 2014, which have been electronically recorded in this matter.



Virginia Anne Dwyer

Transcriber

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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IN RE:

MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.

Debtor.

Chapter 11

No. 13-10670

****

Before the Hon. Louis H. Kornreich

Bangor, Maine

May 8, 2014

APPEARANCES:

Chapter 11 Trustee	Robert Keach, Esq. Sam Anderson, Esq. Mike Fagone, Esq.
Central Maine and Quebec Railway US, Inc.	Jeremy Fischer, Esq. Jeffrey Stein, Esq. Terry Hynes, Esq.
U.S. Trustee	Steven Morrell, Esq.
United States Trustee	Stephen G. Morrell, Esq.
Wheeling and Lake Erie Railway Company	George Marcus, Esq. David Johnson, Esq. Andrew Helman, Esq.
World Fuel Entities	Jay Geller, Esq.

Maine Department of Transportation	Toni Kemmerle, Esq.
Rail World, Inc., Rail World Holdings, LLC, Rail World Locomotive Leasing, et al.	Patrick Maxcy, Esq.
Federal Railroad Administration	Matthew Troy, Esq. John Stemplewicz, Esq.
CITI Group, Inc.	Debra Dandeneau, Esq. Victoria Vron, Esq.
Department of Justice Federal Railroad Administration	Matthew Troy, Esq.
Official Victims Committee	Luc Despins, Esq.

PROCEEDINGS COMMENCED (May 8, 2014, 9:14 a.m.)

THE COURT OFFICER: All rise. The United Bankruptcy Court is now in session. The Hon. Louis H. Kornreich presiding. Please be seated.

THE COURT: Good morning everyone. We apologize for the delay, but there was some technical issue with the court protocols. Appearances please, beginning with Mr. Keach.

MR. KEACH: Thank you your Honor. Robert Keach Chapter 11 Trustee. Here from my office today also is Sam Anderson and Mike Fagone.

THE COURT: Thank you. Good morning gentlemen.

MR. FISCHER: Good morning your Honor, Jeremy Fischer from Drummond Woodsom on behalf of Central Maine and Quebec Railway US, Inc. purchaser. With me today is Jeffrey Stein of Sipley, Austin from Chicago; Kyle Johnston who is the vice president of the purchaser and on the phone Terry Hynes from Sibley, Austin.

THE COURT: Say the last name please.

MR. FISCHER: Johnston.

THE COURT: No Kines or Hines.

MR. FISCHER: Hynes H-Y-N-E-S, Terry Hynes from Sipley, Austin.

THE COURT: Good morning to both of you.

MR. HYNES: Good morning your Honor.

MR. MARCUS: Your Honor, good morning, George Marcus

for the Wheeling and Lake Erie Railway Company. With me are my colleagues are David Johnson and Helman.

THE COURT: Good morning gentlemen. Others in the courtroom. Others in the courtroom please move forward to a microphone please. Thank you.

MR. MORRELL: Steve Morrell for the U.S. Trustee.

THE COURT: Good morning Mr. Morrell. Anyone else?

MR. GELLER: Good morning your Honor, Jay Geller on behalf of the World Fuel Entities.

THE COURT: Good morning.

MS. KEMMERLE: Good morning your Honor, Toni Kemmerle for the Maine Department of Transportation.

THE COURT: Good morning. Others in the courtroom, on the phone.

MS. DANDENEAU: Good morning your Honor, Debra Dandeneau and Victoria Vron from Wyle, Gotchell and Mangee, appearing on behalf of CIT Group and its affiliates.

THE COURT: Thank you, good morning, next.

MR. MAXCY: Good morning your Honor, Patrick Maxcy on behalf of Railworld Holdings, Railworld, Inc. and certain directors and officers of the debtor.

THE COURT: Good morning.

MR. MAXCY: Good morning.

MR. TROY: Good morning your Honor, Matthew Troy for the United States Department of Justice, Civil Division on

behalf of the Federal Railroad Administration.

THE COURT: Good morning, next, anyone else on the line.

MR. DESPINS: Good morning your Honor, Luc Despins with Paul Hastings on behalf of the Official Committee Victims of derailment.

THE COURT: Thank you all. Welcome to Portland. We will proceed first with the motion to expedite hearing on the Trustee's motion for a third amendment to the asset purchase agreement. Let me ask parties in the courtroom first and then we will hear from parties on the line if there is any objection to an expedited hearing on the Trustee's motion. Any objection in the courtroom? Any objection on the line? The motion to expedite is granted. We will now proceed on the merits of the hearing. The only objection in writing that I have was filed by Wheeling yesterday or today. Are there any other objections in the courtroom, on the line? Okay Mr. Keach proceed with your motion.

MR. KEACH: Thank you your Honor, Robert Keach the Chapter 11 Trustee. I am also happy to report that Mr. Marcus, counsel for Wheeling and I have had a chance to talk so also resolve Wheeling's objection.

THE COURT: I see no black eyes or blood.

MR. KEACH: No actually was actually quite cordial, we can carry that forward. We will maybe shorten everybody's

time. There were a series of other informal comments that we received from parties with respect to the allocation issue, and we have added language to the order to preserve rights and I will speak to that in a second.

With respect to Wheeling's particular objection, there were two points. One related to the provision in the third amendment that deals with Fortress' future purchase of certain Canadian receivables.

THE COURT: Paragraph 2.8.

MR. KEACH: Exactly what I explained to Mr. Marcus and I explained that I would put this of record is that provision works in relevant part as follows. It works in a way in which the American debtor certain never has any rights in the receivables purchased and, in fact, all likelihood the Canadian debtor does not either, does not assert any rights either. The way it will actually work is if there is a bifurcated closing, so that we have completed the U.S. closing and the MMA U.S. operations have been conveyed to Central Maine Quebec Railroad. But MMA Canada is still operating the Canadian operations pending the receipt of Canadian regulatory approval; Fortress will purchase future receivables of the Canadian only operation in the following way. Fortress would advance money that was necessary for the operations and which was necessary to create the very receivables they would be purchasing. Then when that receivable came into being as a

result of those operations it would be acquired.

In other words, the moment, the second the Canadian debtor acquires rights and that receivable becomes Fortresses. As a consequence, we don't think it implicates anybody's rights in the U.S., any lienholders' rights in the U.S. or in Canada for that matter. I think based on that representation I understanding that Wheeling agrees and withdraws that segment of its objection.

THE COURT: Mr. Marcus.

MR. MARCUS: Yes your Honor. Based on the facts represented by Mr. Keach, we will not have an objection on account of…

THE COURT: Is there any need to tinker with the order or are you both satisfied with the record that you have made this morning Mr. Marcus.

MR. MARCUS: I am satisfied with the record.

MR. FAGONE: Same your Honor.

THE COURT: All right then.

MR. KEACH: With respect to the other aspect of Wheeling's objection and this actually ties into informal objections that we received from the Canadian government and comments from the FOA; we inserted a paragraph 10 into the order and will submit a new form of order. But Wheeling has seen this language and agreed to it. But just let me read it into the record. The point here, your Honor, is to preserve

two sets of rights that are in the original sale order and were not intended to be affected by the third amendment. Those rights are the ability of U.S. lienholders to talk about how much value goes to what assets within on the U.S. side. There will be money escrowed from the closing to preserve those battles for a later a day and they may, in fact, go away.

The other is to preserve within a limited framework the ability of the two estates, Canadian and American to talk about the allocation of value as between them. So we have added paragraph 10, which simply says as follows: Not withstanding anything to the contrary in the amendment with this order, the rights of any party who has a lien upon any of the MMA assets, those are the U.S. assets. To contest the allocation of the purchase price as among certain MMA, assets are hereby expressly preserved and the rights, if any, of any party to contest the allocation of value as between the debtor and MMA Canada are hereby expressly preserved. Those rights were preserved in the sale order; they weren't intended to be extinguished by this amendment. This just clarifies that.

The other thing just for the record you Honor that we agreed to with the Canadian government and the Monitor, in we had always planned to do this in any event. After the payment of closing offsets and necessary payments at closing, the payment of the Camden loan and the satisfied of the carve out, there is just under three million dollars left from the U.S.

side of the transcription under the Fortress allocation. That money will be escrowed until we have worked out the allocation issues or until there are further orders of the court. That is consistent with what is being represented in the Canadian pleadings that were being filed and that will be preserved in the Canadian order in that preceding that is going to be held Friday, tomorrow.

THE COURT: And I assume those orders will be identical.

MR. KEACH: They will be your Honor and the orders will be actually filed in each of the jurisdictions.

THE COURT: Now when you say, just for clarification of the record we when you say the Canadian government, are you talking federal, provincial…

MR. KEACH: I should be more precise, the provincial government.

THE COURT: When you are talking about the U.S., you are talking about the Federal Railroad Administration, which is also the secured lender.

MR. KEACH: Correct and we talked about this last night with the FRA. I think Mr. Troy is on the line. But their rights are preserved on both of these issues as well.

THE COURT: Mr. Troy do you concur?

MR. TROY: Yes, your Honor.

THE COURT: Is there a representative of the

provincial government here today? I didn't hear any appearance. Sometimes they just observe. Okay, then does any party wish to be heard with respect to the changes, the order, which is as I understand it is a reservation of rights with respect to inter-company allocation and with respect to lienholder allocations.

MR. KEACH: And cross border allocations.

THE COURT: Well that is for inter-country.

MR. KEACH: Sure.

THE COURT: Same thing in this instance at least. He is objecting.

MR. KEACH: Just trying to make sure that I am taken care of, your Honor.

THE COURT: All right, then there being no objection, the revised form of order will enter once I receive it. I appreciate everyone's cooperation and participation. Minutes will indicate that the order as amended is granted immediately. But I would like to see the revised form of order before the end of the week.

MR. KEACH: Your Honor we intend to with your permission, Mr. Anderson, I would be excused, and I think the Sibley folks as well. We are going to go back and work on the closing. But you will have the order within a half hour.

THE COURT: That's fine. I will be down here for the rest of the week.

MR. KEACH: Thank you, your Honor. Just because I am sure that, there are people curious about this. The U.S. closing at least will happen next week. It is scheduled to happen on Thursday and that is hard date I think as far as everybody in the courtroom is concerned. With prompt action by the Canadian government, we may be able to do this…

THE COURT: Again which government?

MR. KEACH: Actually in this case the federal government, your Honor.

THE COURT: What are the issues there if you can…?

MR. KEACH: The only issue, your Honor, is that an application with the Canadian Transportation Authority for a certificate of fitness was filed by the CMQR Canada and we are simply awaiting the issuance of that certificate of fitness. The agency is within its statutory time-period. We are not suggesting that they have been dilatory; we are just awaiting the issuance of that certificate, because CMQR Canada can't run in Canada until the stipulation.

THE COURT: I understand. Thank you all very much. You and the others you mentioned are excused.

MR. KEACH: Thank you your Honor.

THE COURT: Good morning to all. The room is going to start to lift. Are we all ready?

MR. FAGONE: Yes, your Honor.

THE COURT: We will proceed now with the trustee's

motion for an order amending or striking findings of fact. Mr. Fagone.

MR. FAGONE: Good morning your Honor. On behalf of the Chapter 11 Trustee, by this motion the Trustee seeks an order amending or striking certain findings of fact issued by the court. The relief is sought pursuant to Rule 52B, which is made applicable to this matter by Rule 70052. These findings were made in connection with a hearing to determine the extent of Wheeling's security interest and specified funds paid to the U.S. debtor by an entity called KM Strategic Investments. I am sure your Honor recalls.

The two specific findings of the court that we challenge are first that there was no separate account or treatment or other distinction or separation between the debtor's receivables and the receivables of MMA Canada. Second that all of the receivables were treated as receivables of the American entity.

The Trustee has four arguments why those findings should be stricken. Now identify the four arguments and then come back and expand on each of them if I might.

First, your Honor, we believe that the court did not have jurisdiction to determine the extent of the property interests of the Canadian debtor or to make a finding that prejudices the estate of the Canadian debtor without a combined hearing. Second, your Honor, we believe those specific

findings were not supported by the evidence that was admitted at the January 23 hearing. Third, your Honor, those specific findings were unnecessary to the resolution of the dispute over Wheeling's security interest in so-called net funds by KM Strategic Investments. Finally, your Honor, those findings have the potential to unfairly prejudice the debtor's estate. So those are the four reasons why we think the court should strike those specific findings of fact.

So let me start with the first argument, which is relating to the cross border protocol. In light of the cross border protocol, which seeks to promote and efficient and coordinated administration of both estates, we don't think that this court should have determined the extent of the Canadian debtor's rights and the receivables without a hearing involving the Canadian court.

THE COURT: Who raised the issue?

MR. FAGONE: I am not sure the issue was raised your Honor.

THE COURT: The Trustee clearly unambiguously raised the issue by asserting that some portion of the so-called receivables were Canadian receivables. At no time in my memory and I hope to be corrected if I am in error here, was the issue of jurisdiction raised in the papers submitted by the trustee or the argument of the Trustee. Yet it was the Trustee who put the issue of receivables four square before the court.

MR. FAGONE: Your recollection is correct.

THE COURT: Thank you.

MR. FAGONE: The issue of jurisdiction was not raised. But I think it is worth looking at exactly at what we said. The issue of Canadian funds came up in the context of our fourth argument. It only came up in the context of the equities of the case exception 552B. What we said was Wheeling's, I am sorry what we said was the funds paid by KMSI were generated by the expenditure of funds some of which Wheeling didn't have a perfected lien on, including the Canadian receivables. So it wasn't the ownership question it was the fact that Wheeling's lien in Canada was in doubt.

THE COURT: I don't know how the court could have ruled on the issue, the narrow issue that you suggest without ruling on the underlying issue. Secondly in this regard, if the Trustee and the Monitor and the Canadian debtor are in constant communication, the, one would presume, I don't know, and it is not necessary for my determination today, nor was it necessary at the original hearing. But one would presume that the Monitor and/or the Canadian entity would have seen fit to intervene.

MR. FAGONE: Well perhaps your Honor, but I am not sure that they had fair notice that on January 23 that the issue of ownership was going to be determined.

THE COURT: When was the motion filed?

MR. FAGONE: That I don't know, your Honor, I would have to go back and look.

THE COURT: But it wasn't the day before the 23rd.

MR. FAGONE: No it wasn't. But I guess the point I am trying to make is I don't think the court needed to determine ownership and as I understood the court's ruling, it didn't. To dispose of the equities of the case argument, I understood the court to say look, all of these expenditures were paid from Wheeling's accounts receivable. Therefore, I am not going to exercise my discretion to apply the equities of the case provision except as to expenditures made after the cutover to the Camden financing. That doesn't require a determination of ownership. It simply requires a determination that Wheeling had a security interest. It claims a security interest in the Canadian receivables. I guess that I would also add your Honor that he MMA was a contract between the US debtor and COKE, the Canadian debtor was not a party to it.

THE COURT: Not COKE, KMSI.

MR. FAGONE: KMSI that's right. The Canadian debtor wasn't a party; it didn't involve maintenance for track owned by the Canadian debtor in Canada. It simply was restricted to U.S. track and U.S. income tax constructs.

THE COURT: Well surely, that is true, however, and I made no finding that the Canadian entity or Canadian tracks were implicated in any way. But at issue before the court was

the reduction of balance due for Wheeling and Wheeling's assertion of a security interest in the proceeds. The security interest was not in dispute. What was in dispute was the extent of it and according to your likes Mr. Fagone, the lack of perfection of the interest in the Canadian proceedings. So I understand your concern. Even today, I have no appearance by anyone representing a Canadian entity. And uh I guess you are here sort of altruistically to protect the entity's interest.

MR. FAGONE: No, your Honor, I am here on behalf of the Trustee, the U.S. estate and the concern that we have with these findings and I think it is a real one in light of what Wheeling has argued on another motion is that those findings…

THE COURT: Which is your last argument that this potentially harmful because it may be becoming in law in a case or a matter of issue for inclusion?

MR. FAGONE: Which I will address.

THE COURT: I understand. We had multiple preliminary hearings, at least two maybe more before we actually had the evidentiary hearing and indeed, before the evidentiary hearing we had another chambers conference. My recollection is that both on and off the record on these several occasions, I caution the Trustee and Wheeling that by allowing this matter and other relief matters to go forward on separation motions, it is in the Chapter 11 case, they were eroding an omnibus adversary proceeding that contained

identical issues. I informed the parties that if we were to go forward on a piecemeal basis by motions in the Maine case, that any and all determinations would be determinations and partial judgments in the adversary proceeding. I had the Trustee's consent to that did I not Mr. Fagone?

MR. FAGONE: You did, your Honor.

THE COURT: Did I have Wheeling's consent to that?

MR. MARCUS: Yes, your honor.

THE COURT: The issues that were determined were determined with full notice to the parties that they would have a preclusive effect in all respects. So that should not have come as a surprise Mr. Fagone.

MR. FAGONE: It does not, your Honor. Your recollection is correct. The discussion we had was about litigating contested matters in a serial basis, when those contested matters were covered by an adversary proceeding that had been brought by Wheeling. Your Honor was very clear to the parties about your concerns regarding finality of any order that might get entered in those contested matters and a preclusive effect of those orders in the adversary proceeding. I was very clear. What we are saying now by this motion is that some of the findings that were made in one those contested matters as a subsidiary part of the adversary, went further than they needed to and shouldn't that…

THE COURT: I understand that, I understand it, you

already said.

MR. FAGONE: But I just want to add one point specifically.

THE COURT: Go ahead.

MR. FAGONE: The specific end to that and shouldn't now have preclusive effect on a motion that was brought after that was not part of the adversary proceeding, which is the motion to enforce.

THE COURT: Well indeed that is what finality and preclusive effect implied Mr. Fagone is that in a subsequent proceeding rulings in a prior proceeding would have actual impact. Now the reason I raise the adversary proceeding in this context is because as I recall, the Canadian entity and the Canadian monitor were not named as parties by you and or Mr. Marcus in the adversary proceeding.

MR. FAGONE: I believe that is right your Honor.

THE COURT: So I think everybody went into this eyes wide open. Anything else on this issue?

MR. FAGONE: Well I would like to move onto the next argument if I could.

THE COURT: That is what I meant. I meant this argument, excuse me.

MR. FAGONE: So the next argument…

THE COURT: So you are finished with…

MR. FAGONE: I am finished with the cross border

case.

THE COURT: So let's go with next one.

MR. FAGONE: The next one, your Honor, just make sure I have the right sequence here. Is that we don't think those two findings were supported by evidence that the court heard on January 23 and here is why. The court found that the receivables were treated as receivables of the American entity, the debtor. The court also said or found that there was no separate account or separate treatment or other distinction between the receivables of the U.S. debtor and the Canadian debtor. In fact, there was no evidence that there was no separate account.

The only witness at that hearing was Mr. Gardner, the chief financial officer and vice president of finance of the debtor, who is in the courtroom today. He testified that there were separate books and records of each company. That was the only testimony on that point that there were, in fact, separate books and records…

THE COURT: His testimony and I think the transcript will bear me out on this, is that the funds were billed only by the American entity on the letterhead of the American entity. The receipts came in to the American entity and at some point in time as necessary allocation of revenue and expenses were made for tax and regulatory purposes. I am paraphrasing, but I think that is pretty close to what he said.

MR. FAGONE: Yes, that testimony was admitted your Honor, but that is not all of it. Right. In fact, if the court were to hear evidence on this question, it would learn that there is separate accounting treatment that is quite complicated.

THE COURT: The time for evidence has passed.

MR. FAGONE: That sort of alludes to the next issue, which is…

THE COURT: We are finished with this issue.

MR. FAGONE: Let me sort of Segway there your Honor. I understand that you may not be persuaded, but I need to make the argument.

THE COURT: No, please do. I want you to do that.

MR. FAGONE: So the testimony that you would hear if you were to take it on the ownership question and we think that you should is that there is one accounting group that attracts the receivables for four related entities. That MMA and MMA Canada have separate general ledgers. They each have their own balance sheet, there are separate bank accounts.

THE COURT: That is what I would hear today or some other time, but I didn't hear it then.

MR. FAGONE: You didn't.

THE COURT: Thank you.

MR. FAGONE: There are separate employees. Like you heard evidence on cash, management practices of affiliated

debtors.

THE COURT: So I heard evidence on collection of accounts receivable and the procedure that was utilized.

MR. FAGONE: Which is different than ownership, your Honor that is cash management in our view.

THE COURT: Oh okay, but you would concede that I am allowed to draw reasonable inferences from the evidence before me.

MR. FAGONE: You most certainly are your Honor.

THE COURT: And if the evidence is performing, which you have already conceded was billing was done. As far as the world is concerned, the receivable is owed to MMA USA and that internally after the fact, allocations are made. That is not an unusual corporate arrangement. But as to the collection, the responsibility was on the American entity.

Now your argument may be and correct me if I am wrong, your argument may be that really the American entity was acting as a servicer and was just facilitating the collection of receivables with the ownership always being the property of the Canadian entity. Is that your argument?

MR. FAGONE: Boiled to its essence, yes your Honor.

THE COURT: Usually you like my to do's. I understand that. But I will wait to hear the remainder of your argument and I will wait for Mr. Marcus, but I want you to know in advance of my decision, what my orientation is. That is I

was convinced at that time that this was not a servicing arrangement because of the testimony from that allocation of revenue and expenses was made at a late date. In other words, it wasn't the receivable that came in was earmarked and identified for a ledger entry. Receivables were collected in one bucket.

Hold on I am telling you what I determined and that subsequently for whatever reason allocation was made of monies received. I don't know, either because I don't recall or because I wasn't told, whether that was based on mileage or employee utilization or any other factors because we didn't get into any of that. I don't know whether it was based simply on expenses and having enough revenue to cover Canadian expenses for the purpose of taxation or regulation, I have no idea.

But I am fairly certainly that the testimony was subsequent allocation based on revenue and expenses for taxation and I am throwing in regulations because I have a weaker memory of that. But I think it was taxation and regulation. But surely some taxation. Maybe it wasn't, no mention was made of ownership. No mention was made of servicing. So much so that I had to reserve my own questions in this regard, because I was troubled by it. Then we had multiple direct and redirect and multiple cross and the testimony of the witness didn't change and does was not in large in the ways that you now suggest.

MR. FAGONE: That is all correct your Honor for one reason. You didn't have a fully developed record on the ownership question because it wasn't necessary to resolution of the matter that was before the court at the time.

THE COURT: Your necessity is that it was an afterthought high-density equities of the case argument.

MR. FAGONE: Yes your Honor.

THE COURT: All right.

MR. FAGONE: And your ruling as I understand it was that the equities of the case did not militate toward the Trustee with respect to expenditures made from the petition date to the cutover because those expenditures were paid with Wheeling's collateral. And as you remember, the evidence as that there was a security agreement, which the debtor and MMA Canada are parties to.

THE COURT: So in effect you are saying my findings and conclusions with respect to receivables are **INAUDIBLE.**

MR. FAGONE: Unnecessary, yes your Honor, which, of course as Wheeling argued in its papers is one necessary, is one of the elements that you need to find for preclusive effect and subsequent proceedings like the motion to enforce the cash collateral.

THE COURT: Sure, sure let me ask you a question. Let's assume that you are correct in this regard and not Mr. Marcus. Would it not be within the discretion of the court to

manage this case and to preclude the parties from introducing new and further evidence on the state subject based on the record previously made? Do I, are you suggesting that if the filings and conclusions were unnecessary for that order, that entitles you to a fresh start on the next question or can I say no, we have already heard that question, I have ruled on it. The ruling may not have been necessary to the prior order of judgment, but it is not going to be admissible.

MR. FAGONE: I think what the court should do in that circumstance is allow us…

THE COURT: Not what I should do, but that is the second question. The first question is could I do that would it not be within my discretion.

MR. FAGONE: I am not sure I understand your question judge.

THE COURT: The question is if I were to agree with you that was a unnecessary ruling, could I still use the testimony on a subsequent proceeding without reopening the question.

MR. FAGONE: I think you could use the testimony, but I think it would be error to preclude the admission of further testimony on the subject. In other words to say the question has been answered definitively and conclusively.

THE COURT: So it would be within my discretion, but that in your mind the evidence was incomplete and it would need

to be supplemented and that would be how you would argue the point, even if I were to concede that it was unnecessary.

MR. FAGONE: I don't think it is a matter of discretion, your Honor, I think…

THE COURT: You have already conceded that it would be within my discretion to use the evidence that I had already heard. What you are saying is that you had asked me to provide additional evidence.

MR. FAGONE: To allow the provision of additional evidence. Failing to do that I think would let me see if I can be clear about this. The Trustee has some concerns about the 45G ruling overall. I am sure Wheeling has concerns about the Travelers ruling. The court can expect appeals on both of those things. That is not before you.

THE COURT: It never will be.

MR. FAGONE: Unless it is remanded.

THE COURT: Unless they are remanded.

MR. FAGONE: Short of that, your honor, we think that the findings weren't supported in the 45G context okay. We think that if the court were to adopt those findings for another context, say the motion to enforce without an opportunity to fully develop the factual record, that will be an error that would made any subsequent ruling subject to an appeal. So we think the thing to do, the thing that is required is to allow development on the record on the specific

ownership question in connection with the motion to enforce.

THE COURT: Of course, I understand.

MR. FAGONE: That is what we have, your Honor, unless there are questions.

THE COURT: What pardon me?

MR. FAGONE: I said that's…

THE COURT: Did you get to number four?

MR. FAGONE: I mean I think we sort of talked about it through this colloquy. I am happy to go into more in more detail if you want.

THE COURT: Sure, I want you to do that. The full record, because I don't want to be accused later on cutting you off.

MR. FAGONE: Understood, your Honor, I appreciate that. So I think the last one that I haven't, the last argument that I haven't talked about explicitly is the potential for unfair prejudice, okay. Scheduled for hearing this morning is Wheeling's motion to enforce cash collateral orders of this court. Okay. Wheeling's says the Trustee has not escrowed and remitted all of the proceeds collected after October 18 of Wheeling's collateral that its motion says.

Now when the court hears that matter, you will hear evidence that the Trustee has not remitted proceeds of four distinct buckets of Canadian receivables. Okay. The Trustee believes that those, the proceeds that fall within those

buckets are not property of the debtor's estate. They are instead property of the Canadian debtor's estate. Wheeling has taken extensive discovery on this dispute and now it concedes that one of those buckets was, in fact, properly not remitted. Wheeling concedes that in its papers. But the dispute on the other three buckets remains and it is for this court to determine.

THE COURT: How much is that bucket?

MR. FAGONE: We think in the aggregate it is approximately $545,000 somewhere around there, your Honor. When we get to the evidentiary portion of the hearing, we will have specific information for you. But it is in the half million.

THE COURT: If we get to those.

MR. FAGONE: If we get there, yes. But the remaining dispute on the three buckets will turn on the ownership question. That is the core question for the court to decide and to resolve that motion. We think that you should be allowed to present evidence on it. If we are not, because of an incomplete factual record developed at a hearing in January on a different matter there is potential for unfair prejudice. I think that is a theme that kind of resonates through my arguments this morning. But that is the core position, your Honor. So that is what I have.

THE COURT: Thank you. I also want to thank you for

the competency of the written and oral argument.

MR. FAGONE: I appreciate your compliment.

THE COURT: You made your cogent arguments and put your best food forward.

MR. FAGONE: Thank you, your Honor.

THE COURT: Go ahead Mr. Marcus.

MR. MARCUS: Your Honor, Mr. Johnson will address it.

THE COURT: Mr. Johnson.

MR. JOHNSON: Good morning your Honor, David Johnson on behalf of Wheeling.

THE COURT: Good morning Mr. Johnson.

MR. JOHNSON: Excuse me.

THE COURT: I said good morning.

MR. JOHNSON: Good morning.

THE COURT: You can test that.

MR. JOHNSON: It remains to be seen your Honor, it is morning, I will stipulate to that. Your Honor I will cut to the chance here. I think that you put your finger exactly on the critical point here is that 52B(1) equities of the case, whether you call it argument or defense or whoever board the burden on that, regardless that was put squarely into play by the Trustee here. He argued it in his brief; he used significant testimony from Mr. Gardner from the January 23 hearing. He introduce an exhibit, Trustee's Exhibit 9 purporting to show a percentage of so called Canadian

receivables as a fraction of the total cash receipts of the integrated equity. He made extensive argument in his opening and his closing. I will just read to you a couple of things quickly that were taken from the transcript. Trustee's counsel said here is what I think is outcome determined expenditures giving rise to these payments were made from a variety of sources. More than half of them came from; more than half of the pre-petitioned ones came from pre-petitioned Canadian receivables. That is Trustee's Exhibit 9.

I understand Mr. Marcus may quarrel whether it is your receivable or Canadian receivable. This Exhibit demonstrates in our view that they are Canadian receivables. All we need to understand today is that 50 percent of the revenue came from Canadian accounts in which Wheeling isn't perfected. I think that is really the nut of the issue here. Mr. Fagone can try to draw a distinction between ownership and perfection, but I think there are two sides to the same coin.

THE COURT: I don't know that they are necessarily. I mean you have perfection without ownership that doesn't have to something to attach.

MR. JOHNSON: There has to be something to attach, which means that the debtor has to have some ownership interest in those accounts receivable. So once it became, once they were generated and our position I think the testimony is…

THE COURT: Your position is that they were owned and,

therefore, attached and, therefore, perfected in the United States.

MR. JOHNSON: Correct. Yeah our position, I think, your honor is, and you can't get to perfection until you look at the ownership issue before. The ownership issue…

THE COURT: I look out and I see perfectionables.

MR. JOHNSON: That goes without saying, your Honor. But speaking of secured perfection, I think that is a distinction without a difference. So I think that issue is put in play by Mr. Fagone and litigated and argued by both sides, as discussed back and forth with you. I don't see that there is any way that you couldn't have decided that. In fact, Mr. Fagone said it at the January 23 hearing. We think the court can and should consider the fact that the expenditures giving rise to the payments that produced at $490,000 and paid from a variety of sources and can and consider and that is what you did. You did consider that. And you rejected the Trustee's position that they were owned by MMA Canada. Hence we have this motion here in the findings of fact that have the Trustee so exercise. So we don't see those…

THE COURT: Let me ask you a question. Mr. Fagone makes a note of this because I want to hear from you, if your answer is different than Mr. Johnson's. When cash advances were, this is an asset-based line of credit is it not?

MR. JOHNSON: Yes.

THE COURT: When cash advances were made, were they based on any exclusion of so-called Canadian receivables or were they based on the gross amount of receivables.

MR. JOHNSON: I am not certain, your Honor. I believe they are based on the gross amount of receivables, but I am not 100 percent certain as I stand here today, your Honor.

THE COURT: Mr. Fagone do you have other information.

MR. FAGONE: If you could bear with me one second, your Honor, I will get the answer definitively. Your Honor, thank you. The answer is that the cash advances were made based on the total amount of receivables of the operation.

THE COURT: Which was my understanding then. But I just wanted to be sure that I didn't miss something. Okay, so when advances were made, they were based on total receivables inclusive of the so-called Canadian receivables. Go ahead Mr. Fagone.

MR. JOHNSON: Your Honor, I think that is on that point again. We don't see that there was any manifesto, we don't even see that there was any error in your making those findings of fact about the accounts receivable.

On the actual testimony of Mr. Gardner, again, I don't, we said this is our brief and it is reiterated again now. We weren't able to really draw, see any distinction or any discrepancy between what Mr. Gardner testified about on January 23 and your relevant findings of fact on March 13. We

think that they are completely consistent. You know, to Mr. Fagone's claim that there is an incomplete record, I would suggest that if he had concerns about that, the time to raise that was on January 23, when the evidence was open, the witness was there and was available for additional questioning. Again, I think you…

THE COURT: What about the argument made by the Trustee of lack of necessity that this was surpluses or predicted.

MR. JOHNSON: Again, your Honor, I don't see how it can be surpluses when he put equities of the case in play. He said the Canadian receivables are not something that you have to perfection…

THE COURT: We had a data compilation excluding some certain as allocated the Canadian…

MR. JOHNSON: We did your Honor, it is Trustee's Exhibit 9 and we had, you know, significant evidence about, significant argument about that. There is no way that you could avoided, from my perspective, there is no way that you could avoided making that ruling once Mr. Fagone made the claim that some of the funds that were used to make the qualified expenditures came from collateral that Wheeling arguably did not have a security interest in it. The dye was cast at that point.

THE COURT: Was there any, to your memory reservation

of rights in this regard or limitation of focus with respect to receivables.

MR. JOHNSON: Not that I am aware of, your Honor.

THE COURT: Excuse me one moment, Mr. Fagone may I ask you, did you at any time during the evidentiary hearing say your Honor it is our understanding that this evidence today is limited and spoken and should not have any preclusive effect in any other proceeding before the court.

MR. FAGONE: I don't know. There is no such reservation. I don't think that it was necessary.

THE COURT: I understand that and I respect that. But there was no such express…

MR. FAGONE: The transcript is clear there was no such reservation.

THE COURT: Thank you. Go ahead Mr. Johnson.

MR. JOHNSON: Your Honor, I think that is all that I have at this point. Just briefly on the cross border protocols we have expressed the same concerns that you have about that. I think to the extent that there really was a concern here on the Trustee's part trying to raise that issue in cross border protocol was months ago.

THE COURT: Let me ask you a question on that. If I issue an order, which is within my jurisdiction, I don't know that it necessarily has any preclusive effect on the affected party. Jurisdiction in federal jurisprudence and I expect in

Canadian jurisprudence and I suspect our jurisprudence will govern. They will always be challenged. So that if the Monitor were to appear and say it is all well and good your Honor, but take a hike. That property is mine and we are going to have duke it out. But I don't see anybody here today, do you Mr. Johnson?

MR. JOHNSON: Ah, I don't your Honor. I think that is exactly right your Honor. Jurisdictionally it goes as far as it goes, but our whole point is…

THE COURT: So if my order was beyond the jurisdiction is to be challenged by somebody, there is no way I can conclude that challenge. That is not before me today.

MR. JOHNSON: I don't believe so your Honor.

THE COURT: So what we do have and this was my remark before Mr. Fagone about altruism. As far as the American debtor is concerned, it affects the American debtor and to the extent that it does not affect the Canadian debtor, it doesn't affect the Canadian debtor. But…

MR. JOHNSON: That is exactly right your Honor and that has been proved consistently with the protocol which, of course, says that this court has exclusive jurisdiction over this debtor and this debtor's property and your findings…

THE COURT: 281334E gives me exclusive jurisdiction.

MR. JOHNSON: Yes your Honor.

THE COURT: Gives me exclusive jurisdiction and if I

determine according to the evidence that this is the property of the debtor then so be it. If there somebody else that claims another interest, so be it.

MR. JOHNSON: Thank you, your Honor.

THE COURT: All right, Mr. Fagone.

MR. FAGONE: Just thank you your Honor, on behalf of the Trustee, just two follow up points. One on the cross border protocol, even if the court had jurisdiction to make a finding of ownership of the Canadian receivables, we believe that in light of the cross border protocol and its terms, the court should not have done that. So even if you conclude that you had jurisdiction to make that finding, we think that making the finding is inconsistent with the purposes of the protocol. I agree with the idea that the cross border protocol doesn't diminish the court's jurisdiction. It is what it is. The jurisdiction is what it is; it can't be shrunken by agreement or court order.

THE COURT: The protocol states that expressly with respect to both jurisdictions.

MR. FAGONE: It does, it does. But that doesn't change the fact that the court in our view even if it had jurisdiction over a determination that implicated both estates, shouldn't be doing that in a single hearing that is point one.

THE COURT: But, but again I mean this respectfully and not as a personal criticism in any way, but there was no

suggestion of that in your papers in the initial go around, nor was there any suggestion of that at the time of the entry.

MR. FAGONE: And here is why, which takes me to my second point.

THE COURT: Which is I am inviting you to do.

MR. FAGONE: Because the court didn't need to decide the ownership question and, in fact, if I understand the court's ruling correctly, it didn't. It simply said on the equities of the case, the expenditures were paid from Wheeling's collateral, which includes the Canadian debtor's receivables that was their argument. So there was no need to distinguish between U.S. old receivables and Canadian old receivables in the context of the equities the case exception because you said they look it is all Wheeling's collateral. So that is what I understood the ruling to mean. That is why we think it was unnecessary.

THE COURT: Let me see if I can clarify this in my mind. With respect to that judgment and I refer to it as a judgment because as I previously stated it is to have the effect of partial judgment in the adversary proceeding with respect to that judgment. You are saying that the proceeds of the 45G could have been allocated and were allocated indeed or would be allocated once we straighten this motion out without regard to the Canadian receivables is that what you are saying?

MR. FAGONE: Without regard to ownership of them.

But so…

THE COURT: How would we do that and how would work. I am not sure that I fully understand. Use your chart, use Exhibit 9.

MR. FAGONE: I don't have a copy of Exhibit 9 with me your Honor.

THE COURT: Mr. Johnson will give it to you.

MR. FAGONE: I think that it may be beneficial your Honor to look at exactly what the Trustee argued on the 45G.

THE COURT: First answer my questions.

MR. FAGONE: Yeah Exhibit 9 shows total cash receipts for US MMA from July 1 to December 31 of last year. It shows receipts for June 1 to December 31, 2013, for MMA Canada and then it has a column that totals to roughly 16.3 million. Then there is a column that shows Canadian customer cash receipts on the same periods which totals to 8.5 million and there is a percentage which is computed mathematically as 8.5 as a percentage of 16.2.

THE COURT: Including the so-called Canadian receivables within the definition of American receivables did or will Wheeling receive more than it would be entitled to according to your **INAUDIBLE.**

MR. FAGONE: I am not sure that I understand the question, but let me see if I can answer it.

THE COURT: Does the determination affect

distribution under the 45G motion?

MR. FAGONE: Does the determination, no.

THE COURT: How so?

MR. FAGONE: If I understood the court's order correctly, the court's judgment correctly, the distribution of the net funds was made on the basis of expenditures incurred and paid for up to the cutover. Those went to Wheeling. Expenditures made and paid for after the cutover, which were reserved to the estate under the equities of the case exception. That is what I understood the court to have decided. Our argument on the equities of the case, wasn't a legal argument about who owned or didn't own, did not own the receivables. What we said was judge when you are exercising your discretion under this particular provision of the bankruptcy code.

You can look at a whole host of factors, one of them is that some of the money that was used to pay for those expenditures, came from a variety of sources including things which Wheeling perfected security interest. We said for example, some of the money came from Canadian crossing licenses, real estate type collateral. Wheeling doesn't claim an interest in that. We said that some of the money came from Canadian customers. Wheeling admitted at the time it didn't admit but it has now admitted that it doesn't have a perfected security interest in those receivables. So what we weren't

saying judge please decide who owns these things. We were simply saying when you look at factors and exercise your discretion; you can and should consider that Wheeling's entitlement to some of the money that was used to create the net funds is in doubt, at best or not there at worst.

THE COURT: Even though those receivables were used…

MR. FAGONE: That…

THE COURT: …to draw down Wheeling's loan.

MR. FAGONE: Now you are going to the merits and your discretion is your discretion under 552B equities of the case. I get that. I understand that. But that is a different question than whether ownership needed to be decided in order to resolve Wheeling's entitlement to a lien on net funds that were payable to the U.S. debtor only under our contract with the U.S. debtor only. It is a different question.

THE COURT: Thank you Mr. Fagone.

MR. FAGONE: Thank you, your Honor.

THE COURT: Mr. Johnson.

MR. JOHNSON: From my perspective, when the Trustee says that he was asking you to decide whether Wheeling or did not have a perfected security interest and giving collateral, I see that as run that through the translator. I see assets which MMA does not have an ownership interest such that security interest would attach. Again both two sides are the same, two sides of the same coin from our perspective, your Honor. Again,

Exhibit 9, which you were just discussing with Mr. Fagone. I mean this is evidence introduced by the Trustee about who owns certain cash. It doesn't say ownership, but it says this percentage is Canadian customer cash receipts. It is very clear from the testimony that what that means is from the Trustee's perspectives that are cash receipts that are property of Canada and not property of the debtor here. So again,…

THE COURT: If I had determined on that point in favor of the trustee, what difference would it have made for Wheeling.

MR. JOHNSON: If you had determined, I think it was raised in the issue of, in the context of the equities of the case, so it was presumably we have had changed it. Presumably it would have changed your calculus about the equities of the case and whether it tilts towards Wheeling or whether it tilts toward the Trustee. I don't know what you would have done with that but that is where the change would have been.

THE COURT: So your suggestion is that the fact that it was raised in the context of equities in the case could have changed the outcome of the ruling.

MR. JOHNSON: I think I have to concede that your Honor. Your expression on equities of the case and there are certain evidence that we provided to you on that issue. You put it into the paths and you decided what you decided.

THE COURT: Okay thank you, anything else?

MR. JOHNSON: Thank you, no your Honor. Thanks.

MR. DESPINS: I have…

THE COURT: Hold on, hold on, hold on please. Mr. Fagone do you have a retort to Mr. Johnson?

MR. FAGONE: I don't your Honor, I have said what I have needed to say on this motion.

THE COURT: Thank you, very good. Now on the line someone was about to say something.

MR. DESPINS: Yes, your Honor, it is Luc Despins with Paul Hastings on behalf of the Official Committee. This will not surprise you, the Committee supports the Trustee on all points.

THE COURT: Hold on, hold on one second. Mr. Despins, what is the Committee standing in all of this at this moment in time?

MR. DESPINS: I am not sure. We are surely a party in interest on all matters before the court. I am not sure the standing, you mean whether we are going to recover money out of this or not or…

THE COURT: Yes and I understand you are a party in interest in the Maine case with a right to be heard. That may be sufficient and I may let you be heard simply because of that. But this was a discrete matter, actually these were discrete matters raised in an adversary proceeding and a contested matter in which the Committee was not named a

participating party. But I will allow you to be heard Mr. Despins, go ahead.

MR. DESPINS: I will be very brief. I know, your Honor, there is an aspect of it and I am going to address only point number one which is the cross border issue. I know there is an aspect of this, which can be maddening, which is if you adopt this or you view this as the Trustee having a second kick at the can, that doesn't look appropriate. But if, in fact, we are dealing with jurisdictional issues, which is does the court have jurisdiction to determine the scope and extent of another debtor's assets are subject to another court jurisdiction. You know, the conduct of the Trustee or the waiver, the lack of appearance by someone.

As you know, I think you stated that, it is not really relevant. I think the danger of relying on the fact that well I am just determining that these are U.S. assets, of course, I have jurisdiction over that. That logic could apply to, I am exaggerating a lot here, but it would apply to the railroad track in Canada. In theory, you could decide that they are actually owed by the U.S. debtor and, of course, that wouldn't work. So what I am concerned about is if the court is going to rely on the fact that yes the cross border protocol gives you exclusive jurisdiction of U.S. in determining U.S. assets, I think that can become a circular argument. The Committee is just concerned about that. That is all.

THE COURT: I think it is a circular argument, Mr. Despins, but not raised by me, it is raised by you and Mr. Fagone with all due respects. Surely, surely I can assert jurisdiction over Mars and say that it is under 1334 and that wouldn't be the case. But that is not what we are dealing with here. We are dealing with a discrete contested matter in the American Chapter 11. A discrete adversary proceeding in the American Chapter 11 with opportunity for motions to intervene by adversely affected parties, namely the Monitor and the Canadian entity or on the motion of existing parties or by the court sua sponte.

Now I can only speak for myself. I didn't raise the question, but I am going to tell everybody why because nobody else seemed that it was important. So and I understand the Trustee's position. He didn't seem it was important, because to him it was self-evident and to you Mr. Despins on behalf of the Committee, I take it that Canadian ownership and jurisdiction is self-evident and I respect your positions. But the fact that you are now raising the question is sort of an oh my gosh okay. If this were a real issue at the time I would have expected more activity at the time. The record, the testimony of Mr. Gardner in my mind is clear and unambiguous and I have every indication today from the Trustee that my recollection of what he said and my recollection of the documents admitted into evidence is correct. The primary argument that is being made is

that it was not the full presentation on ownership the Trustee would have made had he believed at the time such a determination would have gone in the other direction. I understand the Trustee's point of view and I respect your joint. Is there anything else Mr. Despins?

MR. DESPINS: No, your Honor, thank you.

THE COURT: Thank you. Does anyone else wish to be heard? I am being generous withstanding this morning. Okay. I am going to take a brief recess before I issue my ruling because the ruling that I make one way the other, it will have impact on the next motion. Forgive me I am going to try not to take a lot of time. I think I have a grasp of the facts and the legal questions. But I would like an opportunity for some private deliberation. The court is adjourned. (Adjourned 10:19 a.m.)

THE COURT OFFICER: All rise.

(PROCEEDINGS RECOMMENCED May 8, 2014 10:43 a.m.)

THE COURT OFFICER: All rise. The court is in session, be seated and come forth.

THE COURT: Thank you all for your patience, people in the courtroom and on the line. I want to explain to you why I left. Most of you appeared before me in this and other matters, fully appreciate how seriously I take these things, particularly motions for reconsideration of various types including this one. When I have competent counsel on both

sides making cogent arguments, I want to give them the time and consideration that it deserves rather than making snap judgments.

The present motion by the Trustee under Federal Rule of Civil Procedure 52B is based on four components. I will address each one of them. First is the jurisdictional component, which involves according to the Trustee's likes my violation of the protocol executed or entered by order of this court and of the Canadian court. I am going to rule against the Trustee on this provision for reasons at which I have fully elaborated during my colloquy with counsel.

I will just summarize it this way that this court may exercise its jurisdiction with respect to property of the debtor and property of the estate of 281334E. The evidence presented at the hearing suggested to me clearly and unambiguously that all of the receivables were property of this debtor. The Trustee has conceded this morning that with respect to the finds as made they correspond to the evidence presented, to the evidence that he may wish to present. In addition that the findings and conclusions made at that time reflect the evidence at that time.

So there was no error with respect to the evidence that in my determination that the so-called Canadian receivables were, in fact, not such and were all receivables of the American state based on the evidence of that time.

Additionally, despite all of the concerns expressed on behalf of the Monitor or the Canadian entity, there has been no appearance by the Monitor or the Canadian entity. And with respect to the effect of my judgment on those entities, that will depend on whether they acknowledge the judgment or they choose to ignore it or challenge it. Those questions are now before me now.

So with respect to the first argument on jurisdiction and the protocol, the Trustee's motion is denied.

Now the second argument is that the conclusions made were not supported by the evidence. It is my understanding this morning that the Trustee has agreed with my recollection of the evidence. My recollection of the evidence has been stated by me, has been stated by Mr. Johnson and it is reflected in the papers of the parties and surely it is reflected in the transcript and documentary evidence. As I just stated, there is no error.

Now with respect to Rule 52B, there has to be some error in the finding. This argument of the Trustee also fails.

Third the Trustee has argued that the findings and conclusions were unnecessary. This is the most troubling for me of the arguments because as I understand the Trustee he is saying that the question of Wheeling's, the extent of Wheeling's interest in the 45G proceeds could have been determined without the findings with respect to receivables.

I disagree for the following reasons. First, I agree with Wheeling that it was the Trustee that put the question into play. The Trustee's argument that the issue is put in play as a subtopic of his equities in the case argument doesn't carry the day. The 45G proceeding emanates or emanated from the Title 11 USC 552B. With respect to a continuing security interest and the rights of the secured party in collateral after the filing of Chapter 11.

The equities argument arises when it appears that there is a security interest, which would be ongoing and which would entitle a secured party to rights and collateral after the filing of the case. The equities argument as expressed in the cases which were addressed by the parties at an earlier time is that there ought to be when the circumstances warrant, exceptions to this rule so that the estate for the benefit of other creditors may enjoy rights in what would otherwise be collateral of the pre-filing secured party. In this instance, the argument made by the Trustee was that even if Wheeling had a perfected security interest in the 45G proceeds, the equities exception should be apply.

One the reasons given were that some portion of the revenue employed by the debtor and the Trustee was attributable to the so-called Canadian proceeds. What the Trustee was looking for at the time was a reduction in the amount paid to Wheeling under the equities exception because some of the money

was generated in Canada or by the Canadian entity.

I find and conclude today that there was no error on my part in determining ownership of those receivables, because it was the Trustee that had hoped to reduce the payout to Wheeling by an amount attributable to Canadian ownership of certain receivables. In effect, the Trustee was saying, you have to give credit under the equities test, the two to the debtor with respect to the monies that were generated by someone other than the debtor. Yeah it was conceded here today that those monies were used in the gross amount and was employed to draw down the line of credit on the asset-based loan.

It appeared to me back in January and it appears to me today that a) based on the facts there were and are no Canadian receivables, and b) the debtor and the Trustee at various points in time utilized the so-called Canadian receivables to draw down on the line of credit. I hate to say this; it is an aphorism that is lost most of its meaning that equity requires clean hands. You can't invite equity if you are not doing equity in the first instance. Use so called Canadian receivables as the basis of a loan and then say payback should not consider Canadian receivables seems to me to trouble. I am not suggesting any bad faith here at all. It is just troubling.

So with respect to the necessity argument, I deem

that it was necessity. The necessity was brought into question by the Trustee. The Trustee had ample opportunity to present whatever evidence he choose to present or could have presented or would have presented. He had sample opportunity to join other parties, which he now deems to be necessary. He failed to do all of that. As I caution the parties repeatedly, the findings and conclusions on that motion could have and would have a binding effect in other aspects of the case.

Which brings me to the fourth argument and the fact that the ruling on the 45G motion may be prejudicial to the debtor in other matters, specifically the motion that we are going to here now. My answer to that is so be it. The Trustee's motion to reconsider on 52B is denied in all respects. Wheeling will present a very terse formal order referring back to the record.

The next matter before the court is motion to enforce cash collateral orders. Wheeling who will be presenting.

MR. MARCUS: Your Honor, I will present the motion and I am ready to talk if the court is ready to hear.

THE COURT: Proceed.

MR. MARCUS: I think in view of the ruling that the court has made, I am going to request that the court just entertain some discussion amongst the court counsel regarding how to proceed this morning because I think that significant portions of the motion, if not all of the motion has been

resolved. As I interpret the status of affairs, we have now an adjudication by this court that all of the so-called Canadian receivables are, in fact, receivables of MMA.

Now I want to mention that there is a caveat, there is a small class that we are going to explain to, but it is not really material. So we can come back to that. But our motion asks the court to require the debtor to treat all of the receivables as U.S. receivables and to comply with the cash collateral orders accordingly. In that respect it is useful to consider two different cash collateral periods that we have because there are different rules that apply.

The first cash collateral period goes from August 7 to October 18, and that was when Wheeling receivables were being collected and used to fund operations. Now there is nothing that the debtor really has to do at this stage, because at some point it could be now, but it could be next month, it simply has to be accounting. How much of our receivables did you use and what do you owe Wheeling in terms of adequate protection. With the determination by the court that Canadian receivables are in the Wheeling bucket, that simply changes how you do that calculation. So our motion requested in accounting and I still want the debtor to account for it.

Now I can present evidence today as to what I think the number ought to be in the accounting. The debtor may contest that number, but I am not sure that it is wise to have

the dispute today as to the accounting, if the court has made a ruling that yes the Canadian receivables are in the Wheeling bucket. Then I would request that the court schedule a later hearing to hear an accounting of this matter.

Now the second buck is the period post October 18…

THE COURT: I think, unless I am reading too much into your comments that may not even be need for further hearing if the debtor provides the accounting.

MR. MARCUS: That's right. As part of what I entered into production today, I have documents that suggested an accounting, but they will probably contest it. I am not adverse as having them consider it, think about it and come back. Maybe it will work out.

THE COURT: At the least there maybe arithmetic disputes.

MR. MARCUS: Sure.

THE COURT: At worst there maybe still, be some legal concerns that the Trustee has which would affect the outcome. And if you were to give me a presentation today and Mr. Fagone would give me a competing presentation today, from what I am hearing from you is that you would not be asking for findings and conclusions today because you are proceeding that there may be greater benefit in allowing the parties to discuss the matter.

MR. MARCUS: Yes because I asked for accounting and

while I was going to make my own accounting, it purports that okay **INAUDIBLE** fuels are your bucket fueling, now debtor account. I would consider that would be objected motion. We could go further and argue about what that accounting looks like. But I think as hard as you focus on benefit from..

THE COURT: It would be, but I think I have to hear from Mr. Fagone on this, but I think you might want to set the benchmark and you are telling me that Mr. Fagone mentioned this in his earlier remark. That there is a revised benchmark, that there is an exception.

MR. MARCUS: Well let me get to the second cash collateral period because it is there, I am not sure that any of us. That could be settled. The second cash collateral period October 18 to the present, there the rule is different. There the debtor is not spending and the Wheeling's fuel holds instead and they can cover them in terms of mobile realty.

Now the parties agree that there is approximately $525,000 in the bucket of Canadian receivables that had we had the court's ruling on October 18, would have been turned over to Wheeling, but they haven't. I don't think there is a dispute among those dollar amounts. As such I think Wheeling is entitled to adequate protection because I believe what is happening is the Trustee's collecting and spending on the impression they were the Trustee's extent. I think the amount. As a result I think we are under adequate protection on that

front. If the Trustee agrees to that accounting, then I am not sure what more the court has to do, let's see, we need to develop adequate protection. That would raise issues of replacement need, what receivables are to replacement lien, super priority claim and those kind of accounting issues that I **INAUDIBLE** and you fax suggestions that we defer because we have now have a lot of clarity that we didn't have before. That seems like an kind of an accounting question. So that is my suggestion your Honor and I invite the court.

THE COURT: First I will hear from Mr. Fagone. I have an idea, but I want to hear from counsel.

MR. FAGONE: On behalf of the Trustee your Honor. I have an idea as well. We understand the court's ruling on the motion to amend. We respect it. Obviously we disagree with it, but we respect it and we understand that it may have implications for this motion. I think what makes sense frankly is to continue the hearing on the motion to enforce the cash collateral orders to a later date. Here is why because I think there is a lot of complexity that may exist if we try to go forward even in part today in light of your Honor's ruling. Let me see if I can explain what I mean by that.

One of the Trustee's responses to the motion to enforce was that it wasn't the right procedural vehicle with which to raise this issue. I understand in light of the court's ruling just a few minutes ago that argument is not

likely to get traction, but that is an argument that we would have made on the motion to enforce.

We also argued that Wheeling had acquiesced in you, the Trustee and the Canadian's debtor's use of the money that was collected after October 18 on account of the Canadian receivables. We raised arguments concerning waiver, latches, estoppel all of which are not addressed by the court's determination on the ownership, if it were given preclusive effect on the motion to enforce. That still leaves unresolved the acquiescence arguments. Okay. As think Wheeling concedes, the $545,000 isn't sitting around anywhere to be paid to Wheeling, it has been spent to support the operation of the railroad.

So I understand the court's ruling that those were Canadian receivables. I get that if the court finds that Wheeling hasn't waived its rights, and then Wheeling is going to have some entitlement based on that $545,000. But it can't be paid over today. At best that could be part of Wheeling's evidentiary presentation on diminution and the value of its collateral since the petition date. That is something that I don't hear Mr. Marcus saying that he wants today. I don't think his papers raised it. I think it would be premature today for the court to make any sort of ruling on diminution for a whole host of reasons.

THE COURT: Including the new 506C motion.

MR. FAGONE: Including the new 506C motion, including appeals that have been taken or will be taken, including the fact that Wheeling's remaining collateral hasn't been liquidated. Wheeling hasn't sought or asked or obtained relief from stay to collect out the remaining receivables that are the on the books. There are a whole bunch of things that would need to go into it and frankly I don't think it is right today and I don't think…

THE COURT: Mr. Marcus may take issue with most of what you said.

MR. FAGONE: I wouldn't be surprised.

THE COURT: But the effective, the effect on me what you have said is very similar to the effect on me when Mr. Marcus suggested that the parties be given an opportunity to have more time to work this out. At least on what Mr. Marcus has referred to as the first issue is the second issue according to your likes. It is also still largely unresolved. That may be a reason to continue the entire, Mr. Marcus.

MR. MARCUS: I think that is essentially right your Honor. I mean I don't necessary compare it without Mr. Fagone…

THE COURT: I am not asking to agree with any of his reasoning, but you said give me a little bit more time and Mr. Fagone has said give me a little bit more time. But why doesn't make any difference.

MR. MARCUS: I agree with that. I guess the only

caveat of qualification is there should be more time, we should compare numbers on the accounting, we should try to come up with what numbers look like, but then I want to have a hearing to resolve all of these issues.

THE COURT: Fine, I think Mr. Fagone said two things in that regard. He said we should continue the hearing and then, of course, he is reserving appeals, stays and dah, dah, dah and I understand all of that. But quite frankly Mr. Marcus we don't have any control over what Mr. Fagone has not yet done and it may well be that he takes action, which could delay the outcome. So everybody's rights are preserved there and it all makes sense. So how much time do you seek Mr. Marcus?

MR. MARCUS: The answer is it depends in a way. What I have, I am sorry.

THE COURT: Mr. Fagone I am sorry to interrupt your argument, I assume you were finished for the most part.

MR. FAGONE: I would like to hear the results of this colloquy.

THE COURT: No, no, no of course you will. But what I am saying you had nothing more to add. You asked for more time and I asked Mr. Marcus to be heard now and I done that and I was more or less interrupting you.

MR. FAGONE: You can proceed in the same direction.

THE COURT: Go ahead.

MR. MARCUS: I think the Trustee and Wheeling have

had a history in cooperating in discovery matters. As a matter of fact in doing financial discovery informally, by conversations over the phone, which has been very, very effective. I believe these kind of accounting issues to a large extent can be hashed out, resolved by informal discussions, exchange of documents and papers. As I indicated, I have tried to on my end to do that and submitted so that Mr. Fagone he may say, well you got it all wrong, you missed this and you missed that okay good.

Now if we had that kind of cooperative attitude, then I would suggest that we wouldn't need much more than a couple of weeks to reconvene.

THE COURT: I have no control over your ability to work.

MR. MARCUS: So what I would like to have the ability to take a deposition that you are feel is necessary in the hope that…

THE COURT: Let's bring this back to my question. How much time would you like taking into account your needs for discovery and Mr. Fagone's potential needs of discovery, the possibility that Mr. Fagone may press for appeals or press for stays, 506C's or goodness knows what else will give rise. When you would like your motion to be heard?

MR. MARCUS: Four weeks.

THE COURT: Thank you, you may now sit down. Mr.

Fagone does four weeks work for you?

MR. FAGONE: On behalf of the Trustee the answer sadly is, it depends. It depends.

THE COURT: At least we are in agreement on that.

MR. FAGONE: I wish I had the ability to control his cooperation Judge but I don't.

THE COURT: He was not as expressive as you are, but that is the simple answer.

MR. FAGONE: I am sure he feels the same way.

THE COURT: That's right and that is why I am going to drag both of you into chambers with permission of other parties in a few minutes. But that remain for the time being.

MR. FAGONE: Here is why I say it depends. It depends on what we are…

THE COURT: By the time this case is over we are all going to wearing a bit.

MR. FAGONE: I am not going to go there Judge. Not going to go there.

THE COURT: That was very good Mr. Fagone.

MR. FAGONE: So, your Honor, if our view of what the motion seeks it right, I don't think we need a long time for the next hearing. Four weeks would be fine. Because we perceived the motion to be asking essentially for two forms of relief. First an order directing the Trustee to turnover that $545,000 of proceeds, which, of course, we all agree, can't

happen right now because it has been spent, it doesn't exist. Second…

THE COURT: I am shocked.

MR. FAGONE: The motion asks for an accounting and as Mr. Marcus said we have been cooperating, we have provided all of the periodic reporting that has been ordered by the court. I don't think that there has been any dispute about that. So I don't think that there is any need for further accounting. That said we are happy to cooperate with some discovery if, however, as I think Wheeling believes the motion seeks allowance of some sort of claim under 503B or 507A2. Then we have lots of discovery to do. That is a much broader question than I think was raised by the motion.

THE COURT: Let me make a suggestion, let's set this for further hearing and we will let the parties file whatever motions for cause Rule 506C they wish to file in the event that either side believes it is not going **INAUDIBLE.**

MR. FAGONE: We can do that your Honor, but what I fear from that approach that we will leave this hearing today and run around and spend time and money on discovery and motion practice, when I think we are here and we can decide what is going to be heard four weeks from now. If what is going to be heard four weeks from now is limited to the question of a 545 and Wheeling's entitlement to some accounting, then four weeks is fine. But what I don't think is appropriate is to set a

hearing down for four weeks out and then expect the parties to come back at that hearing and put on an evidentiary presentation about the extent of Wheeling's diminution since the petition date. I don't think that is before the court.

THE COURT: Well I think if you want to concede to the 545 we don't have worry…

MR. FAGONE: Oh no, no, no that is where there is a disconnect Judge. Wheeling's evidentiary presentation had we gotten there today, was not going to be limited to the 545. Wheeling was going to put on evidence that there had been diminution from 8/7 to 10/18. That is a different bucket than the 545.

THE COURT: Let me ask you a question.

MR. FAGONE: Sure.

THE COURT: I also want to, I am giving you first bite because you are standing up. Then I will ask Mr. Marcus. Since I now have before a 506C, which tells me where the Trustee is at. Would it not make sense to wrap all of these issues together so that when the parties come in, we don't have limited findings and conclusions and the kinds of problem that we just resolved and then have to march onto 506C, which implies and sets up all sorts of other things and stays and goodness knows what. Really I think what Mr. Marcus is trying to achieve for Wheeling is to get paid off at the earliest possible time. In order to do that, you need some accounting to

agree or not agree upon and the right to evidence, to the extent he doesn't agree upon it. Eventually an order that says pay up.

On the other hand, you have been saying no, no a thousand times no. Despite the court's rulings, you still have certain points. I would expect you to exercise them to the extent that the Trustee's business judgment requires. Now that said, we are a long ways off on a resolution. The likelihood of something being accomplished short of an agreement in four weeks is slim and none is that what I hear you telling me?

MR. FAGONE: To a certain extent yes your Honor. What I am trying to say is I agree with the idea that getting things resolved on a serial or an isolated basis presents incredible complexity as the hearing this morning shows. What I also think is that, we can't wrap everything up until all of Wheeling's collateral has been liquidated because Wheeling's contention is that there has been diminution and you can't calculate diminution unless you know two things. One the value of Wheeling's interest and property of the estate as of the petition date and two what Wheeling ultimately recovered through the case. We are not going to be able to determine those things in four weeks.

THE COURT: Some of it is in your power.

MR. FAGONE: Perhaps. Now one thing that I want to make clear is that throughout all of this, throughout the

litigation that we had, various pieces of litigation with Wheeling, we have talked about a global resolution. We are not there yet. We intend to continue talking about that.

THE COURT: We are going to continue talking about that in five minutes.

MR. FAGONE: But just…

THE COURT: What I want to do is this. I simply want because I have got courtroom deputy who is anxious to do her job and I have all sorts of parties on the line and in the courtroom that would like to know when we are going to revisit this question.

MR. FAGONE: We should do it June 10, your Honor because that is when the surcharge motion is set, that is the next MMA hearing date I believe. Perhaps…

THE COURT: Stop. Mr. Marcus do you have a problem with June 10, which is roughly four weeks.

MR. MARCUS: I suggest it implicitly anyways.

THE COURT: Does it depend?

MR. MARCUS: No actually I am going to..

THE COURT: So can we agree without further ado on June 10 is the date for further hearing on the diminution motion. Do you agree?

MR. FAGONE: We may your Honor, but I am not agreeing that June 10 is the right day to determine the extent of Wheeling's diminution claim, which I think is what Wheeling

perceives. I think it would be a mistake to leave here today without some clarity on that.

MR. MARCUS: I think I can provide some clarity. I am not looking for an allowance of Wheeling's claim either as to a replacement lien or as to the super priority claim.

THE COURT: I didn't hear the last phrase or as to the…

MR. MARCUS: Super priority claim.

THE COURT: Thank you.

MR. MARCUS: Not seeking allowance of claim, not seeking payment. What I am seeking and what I think should be resolved on the 10th on the underlying accounting because in my view, my view a lot stems from it…

THE COURT: And that accounting when you say a lot stems from it, it could be used if there is agreement as a starting place for all of the other disputes.

MR. MARCUS: Oh exactly.

THE COURT: Hold on, stop.

MR. FAGONE: That is fine with us, your Honor.

THE COURT: That's good. So if we can let me make a suggestion. That is we continue the motion until June 10 for two purposes. Final hearing on an accounting, which is to be exchanged by the parties prior to that date and will arrive at mechanics for that and preliminary hearing and pretrial on all remaining issues beyond the account. Does that work for

Wheeling?

MR. MARCUS: I think it is perfect your Honor.

THE COURT: Does that work for Mr. Fagone?

MR. FAGONE: I think so your Honor, but I want to tread carefully. I am not sure what a hearing on an accounting is.

THE COURT: Well a hearing on an accounting is that if I haven't yet ordered the accounting, but I would be very interested to know if you think that you are not required to give an accounting and I may choose that for the hearing on that day if that is in contest. But what I would like to do is if the Trustee is so inclined and I am not here to pressure anybody into anything. If the Trustee is so inclined, to agree to an accounting, to agree to provide it to Mr. Marcus by a date certain, which we will agree upon in a moment and then have Mr. Marcus reserve any objections to that accounting for a hearing on the 10th.

MR. FAGONE: You know, your Honor, I guess the problem I have…

THE COURT: So the record is clear, Mr. Marcus is shaking his head in approval.

MR. MARCUS: That is precisely for the record.

THE COURT: Your point Mr. Fagone.

MR. FAGONE: The difficulty I have with that your Honor it sounds eminently reasonable. The difficulty is that

we have already provided the accounting. We have been providing accountings on a weekly basis since last fall. So I am at a bit of a loss to understand what further accounting to I need to provide.

THE COURT: Is there a question Mr. Marcus.

MR. MARCUS: Well here is the issue. As I said in the second cash collateral period from October 18, I agree, I think we have all of the data. The first cash collateral period what we don't know for certain is what portion of the receivables that were collected and spent by the debtor were actually Wheeling receivables. Now that the court has ruled that what the debtor has considered Canadian actually to be U.S. Now I believe and I figured it out, all right, but I am not necessarily looking to hold Mr. Fagone. I showed him my calculations and he may say you don't know the first thing about arithmetic. Okay fine. But I think it is appropriate for the court to say look, pursuant to the terms of the initial cash collateral orders, here is what we can determine. That the Trustee collected "X" dollars' worth of Wheeling receivables. Now they are the so-called Canadian receivables and disburse those sums and, therefore, some article of protection has to be given to looking because those receivables were spent and here are the dollar amounts involved. I said I am open to an allowance of that as a claim. I know there are offsets, but we at least ought to have this accounting to what

extent did the debtor use Wheeling's **INAUDIBLE.**

THE COURT: Mr. Fagone you say.

MR. FAGONE: What I say is let's see it as your Honor suggested a few minutes ago, set the matter for June 10. We will cooperate with Wheeling informally between now and then. If at that point Mr. Marcus says that there are data points that are missing, we will come before you your Honor and have that issue resolved. Everything else is preliminary.

THE COURT: Mr. Marcus.

MR. MARCUS: It's fine.

THE COURT: Done.

MR. FAGONE: Thank you your Honor.

THE COURT: So ordered in the minute entry there will be no written order. In the minute entry will be Trustee's motion, I am sorry Wheeling's motion is continued until June 10 that the party shall exchange accountings and responses informally between now and then. To the extent that there is any dispute for either period, either before or after, the court will have an evidentiary hearing on June 10 to resolve those disputes to the fullest extent possible. Everybody being mindful that there are other matters pending. With respect to matters that cannot be resolved beyond arithmetic, we will have further pretrial status conference and determine when and how those questions will be resolved. Does that work for you Wheeling?

MR. MARCUS: Yes.

THE COURT: Does that work for you Mr. Trustee?

MR. FAGONE: Yes, your Honor.

THE COURT: Is there any other party in the courtroom wish to be heard? Any party on the line wish to be heard? Okay, thank you all very much. Now I have another question for everybody, parties on the line and parties in the courtroom. I would like to have a chambers conference with Mr. Fagone on behalf of the Trustee and with Mr. Marcus on behalf of Wheeling. Is there anyone else that would like to participate in the first question? Second question, is there anyone that would object to having such a conference without participation of other parties in interest? Anyone in the courtroom wish to be heard.

MR. MORRELL: Your Honor, no objection U.S. Trustee.

THE COURT: Thank you Mr. Morrell. Anyone on the line wish to be heard. Is there anyone on the line? All right. Then hearing no objection, Mr. Marcus and Mr. Fagone I will see you in chambers and if you wish to bring all associates that is fine. Yes Mr. Fagone.

MR. FAGONE: In the courtroom this morning is Ted Caruso who is the financial advisor to the Trustee and Don Gardner. Would it be useful to have Mr. Caruso…

THE COURT: I have no problem with that if Mr. Marcus has no objection.

MR. MARCUS: I think it is better.

MR. FAGONE: He knows the numbers.

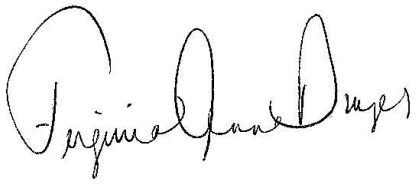
THE COURT: I will see you all in the visiting Judge's chambers okay? The court is adjourned, thank you all very much. Gentlemen I meant what I said before, I count your work on today's matters to be excellent. Thank you.

THE COURT OFFICER: All rise.

(PROCEEDINGS ADJOURNED May 8, 2014 11:25 a.m.)

C E R T I F I C A T E

I hereby certify that this is a true and accurate transcript of the proceedings, which took place on May 8, 2014, which have been electronically recorded in this matter.



Virginia Anne Dwyer

Transcriber

transbk(09/08)

UNITED STATES BANKRUPTCY COURT

District of Maine

Case No.: 13−10670
Chapter: 11

In Re: Montreal Maine & Atlantic Railway Ltd.

NOTICE OF FILING OF TRANSCRIPT

AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION

A transcript of the proceeding held on May 8, 2014 was filed on 6/27/14 .

If a request for redaction is filed, the redacted transcript is due 7/28/14.

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 9/25/14 unless extended by court order.

To review the transcript for redaction purposes, you may view the document at the clerk's office public terminal or request a copy of the transcript. Please contact the clerk's office where the hearing was held to purchase a copy of the transcript.

Dated: 6/27/14

Alec Leddy
Clerk of Court

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TOTAL: 3

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

before the Hon. Louis H. Kornreich
Bangor, Maine
January 23, 2014

Motion to Sell

Motion to Reconsider

Motion Concerning Uses of Tax Credits (45G)

APPEARANCES

Trustee	Robert L. Keach, Esq.
For the Trustee	Michael Fagone, Esq. Sam Anderson, Esq.
United States Trustee	Stephen G. Morrell, Esq.
Wheeling & Lake Erie Railway	George Marcus, Esq. Daniel Rosenthal, Esq.
Railroad Acquisition Holdings, LLC	Jeremy Fischer, Esq. Jeffrey Steen, Esq.
47 Wrongful Death Plaintiffs	George Kurr, Esq. Daniel Cohn, Esq.
CIT Group	Debra Dandeneau, Esq. Victoria Vron, Esq.
Rail World, Inc., Rail World Locomotive Leasing, Rail World Holdings, LMS Acquisition Corporation, Certain Directors and Officers	Patrick Maxcy, Esq.
Maine Dept. of Transportation	William Price, Esq.
Department of Justice, Civil Div. Federal Railroad Administration	Matthew Troy, Esq. John Stemplewicz, Esq.
Official Victims Committee	Luc Despins, Esq. Paul Hastings, Esq.
Eastern Maine Railway	Alan Lepene, Esq.
New England Independent Transmission Company, LLC Canadian Pacific Railway Company	Joshua Dow, Esq.

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WITNESSES

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DONALD GARDNER					
(Mr. Rosenthal)		83		119	
(Mr. Fagone)			93		131

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PROCEEDINGS COMMENCED (January 23, 2014, 10:06 a.m.)

THE COURT OFFICER: United States Bankruptcy Court is now in session. The Honorable Louis Kornreich presiding. Please be seated and come to order.

THE COURT: Good morning, everyone. Welcome. If it gets too warm in here we can always take the hearings outside.

This is the matter of Montreal, Maine & Atlantic Railway, Ltd., Chapter 11, 2013, 10670. There were several matters on for today. I'm about to take appearances. Before I do that I want you to consider something, please.

There is a bit of ambiguity over whether or not this is to be an international hearing. Yesterday, pursuant to the protocols, Justice Dumais and I had a telephone conference and decided that there was no need for an international hearing and we decided to proceed instead with two simultaneous independent hearings.

The reason for this decision is that there are discrete issues on each side of the border. Indeed, there may be no objections on the Canadian side of the border in the Canadian case and it appears that there may be objections of various sorts in this proceeding.

So while I'm taking appearances, I'd like you to consider, on behalf of each of your parties, whether or not you believe otherwise. If any party insists on an international hearing and can demonstrate cause, Justice Dumais and I have

made arrangements to stop what we're doing and reconvene internationally, so to speak.

So with that said, give that due consideration while I call the roll. Let's begin with the Trustee.

MR. KEACH: Thank you, Your Honor. Robert Keach, the Chapter 11 Trustee. Let me start by saying we certainly don't object to it being parallel but not joint proceedings. I'm happy to say that the objections on the U.S. side are all moot or, in the case of the reservation of rights, we'll be able to address it satisfactorily so I don't think that's the distinguishing factor, but I think it's perfectly appropriate to have simultaneous but not joint hearings --

THE COURT: Well that's fine.

MR. KEACH: -- and we consent.

THE COURT: Just so that you're aware, that was not the distinguishing factor yesterday but my call was early in the morning and many things were filed later on in the day. All right.

MR. KEACH: Understood.

THE COURT: Okay.

MR. KEACH: But I -- we certainly consent and not a problem.

THE COURT: Thank you very much, sir.

MR. MORRELL: Stephen Morrell for the United States Trustee and, Your Honor, we consent to the proceedings going

forward as you've outlined.

THE COURT: All right. Thank you, Mr. Morrell.

MR. FAGONE: Good morning, Your Honor. Michael Fagone, Bernstein Shur, counsel for the Chapter 11 Trustee.

THE COURT: Good morning.

MR. ANDERSON: Good morning, Your Honor. Sam Anderson, Bernstein Shur, counsel also for the Trustee.

THE COURT: Good morning.

MR. ANDERSON: Good morning.

MR. FISCHER: Good morning, Your Honor. Jeremy Fischer from Drummond Woodsum on behalf of the purchaser, Railroad Acquisition Holdings, LLC. With me I have my co-counsel, Jeffrey Steen, from Sidley Austen, Terrence Hynes, from Sidley Austen and Matthew Linder, from Sidley Austen and with us in the courtroom today we also have Ken Nicholson who is the Vice President of the purchaser and we also consent to simultaneous hearings.

THE COURT: All right. Thank you and good morning to all of you and welcome.

MR. FISCHER: Good morning.

THE COURT: Others who wish to enter appearances? Please come forward to the podium so that you're picked up on the recording device.

MR. MARCUS: Good morning, Your Honor. George Marcus for the Wheeling & Lake Erie Railway Company and we have no

objection to the simultaneous hearings.

THE COURT: Thank you. Good morning, Mr. Marcus.

MR. DOW: Good morning, Your Honor. Josh Dow from Pearce & Dow, in Portland, appearing on behalf of New England Independent Transmission Company, LLC and also separately appearing for Canadian Pacific Railway Company and affiliates and we have -- neither client has any objection to proceeding in the manner that the Court outlined.

THE COURT: Thank you, Mr. Dow and good morning.

MR. TROY: Good morning, Your Honor. Matthew Troy, United States Department of Justice, Civil Division, on behalf of the Federal Railroad Administration. The FRA has no objection to proceeding as outlined, Your Honor.

THE COURT: Good morning to you and welcome. Thank you. Mr. Cohn, come forward simultaneously, same party. Thank you.

MR. KURR: Thank you, Your Honor. George Kurr and Dan Cohn on behalf of 47 of the 47 wrongful death victims in this case.

THE COURT: Good morning to both of you and welcome. Thank you.

MR. COHN: Thank you, Your Honor. And we, by the way, have no objection to proceeding in the way that you proposed.

THE COURT: Thank you, Mr. Cohn. Great.

MR. MAXCY: Good morning, Your Honor. Patrick Maxcy, Dentons US LLP on behalf of Rail World Locomotive Leasing, Rail World, Inc., LMS Acquisition Corporation and certain directors and officers of MMA. We also have no objection to the manner proposed.

THE COURT: Thank you, Mr. Maxcy. Any other appearances? All right, then.

MR. HAHN: Good morning, Your Honor. Michael Hahn for Bangor Savings Bank. We have no objection for proceeding as Your Honor has proposed.

THE COURT: Thank you Mr. Hahn. Good morning. Next on the line?

MR. PRICE: Good morning, Your Honor. William Price, ClarkHill, on behalf of the Maine Department of Transportation and no objection to the procedures discussed.

THE COURT: Thank you. Good morning.

MS. DANDENEAU: Good morning, Your Honor, Debra Dandeneau. I'm here with my colleague Victoria Vron. We're from Weil, Gotchal & Manges on behalf of the CIT Group. We also have no objection to proceeding.

THE COURT: Thank you. Would you please spell your names, please?

Of course. Debra, D E B R A, Dandeneau, D, as in David, A N D E N E A U and Victoria Vron, V R O N.

THE COURT: Thank you. Good morning. Next?

MS. DANDENEAU: Good morning.

THE COURT: Other telephonic appearances?

MR. DESPINS: Yes, Your Honor. Luc Despins with Paul Hastings on behalf of the Official Committee and we have no objections.

THE COURT: Thank you. Good morning.

MR. DESPINS: Good morning.

THE COURT: Next?

MR. LEPENE: Good morning, Your Honor. Alan Lepene, Thompson Hine, on behalf of Eastern Maine Railway and affiliates and, likewise, we have no objection to the manner proposed.

THE COURT: Thank you. Good morning, Mr. Lepene. Next?

MR. STEMPLEWICZ: Good morning, Your Honor. John Stemplewicz with the U.S. Department of Justice also appearing on behalf of the Federal Railroad Administration.

THE COURT: Good morning, sir. Next? Other appearances on the line? That completes the appearances. We're going to take a brief recess for as long as it takes for me to communicate with the court in Québec just to make sure that we're all on the same page. Thank you all.

THE COURT OFFICER: All rise.

PROCEEDINGS RECESSED (January 23, 2012, 10:14 a.m.)

PROCEEDINGS RESUMED (January 23, 2012, 10:16 a.m.)

THE COURT OFFICER: All rise. United States Bankruptcy Court is back in session. Please be seated and come to order.

THE COURT: Thank you all for your patience and I remind you when you speak, whether you are in the courtroom or online but particularly if you are on the phone line, please announce yourself by name and party each time you speak.

Mr. Keach, either you or Mr. Fagone, I would like to have an outline of proceedings this morning. No argument, just simply procedural outline and we'll see if anybody has an objection to the order of proceedings you suggest.

MR. KEACH: Thank you, Your Honor. We have three matters on, the motion to sell and related matters, the motion for reconsideration of the carve-out, which was filed by Mr. Cohn some time ago and was continued today at 2:00 today and then the 45G dispute. My suggestion is that we take the matters in exactly that order. I think the first two matters, I hope, will be reasonably prompt. The 45G matter, as Your Honor knows, may involve the introduction of some testimony and probably will take a bit longer. So that would be my suggestion.

THE COURT: Thank you. There's no need for anyone to speak unless you object to the order of proceedings recommended by the Trustee. Does anyone object? I will proceed in that order. Let's begin with the sale motion and additional related

material.

MR. KEACH: Thank you, Your Honor. As Your Honor knows, some time ago we filed a motion to sell to Railroad Acquisition Holdings, LLC and along with that filed a motion for approval of bid procedures which Your Honor granted. We conducted -- had been, at that point, conducting and continued to conduct a detailed sale process contacting, we believe, every conceivable, possible acquirer of these assets. That process was both motivated by the fact that we felt that a sale was in the best interest of the public and of the Estates and also by the necessities of the case.

I'm happy to report that we conducted an auction as described, and I'll get to the tender of the declarations in a second, that as a consequence of that auction Railroad Acquisition Holdings emerged as the successful bidder pursuant to a bid that was enhanced by changes prior to the auction and announced at the auction. We believe that bid has a value to the Estates of $16,850,000 at a minimum and we, as I said, also strongly believe that it's the highest and best bid and also best in terms of the public interest, given the commitment of RAH to operate the entirety of the system both in the U.S. and Canada.

With respect to specific support for the motion, Your Honor, that's three declarations to offer as direct testimony. First is my declaration concerning the auction. I'm obviously

present. If I were called to testify I would testify as set forth in the declaration. That declaration, as Your Honor, knows, provides simply a summary of the auction and its outcome and the recommendation I just stated.

We would also proffer the affidavit of Thomas McCarthy from Gordian Group. Mr. McCarthy is present in the courtroom and if called to testify would testify consistently with his affidavit which describes, in great detail, the contacts that were made by Gordian and by others on behalf of the Estate to reach out to prospective purchasers, the creation of the virtual data room, the extensive and intensive sales effort to bring the sale home, and Gordian's belief, as the investment banker to the Estate, that the sale to RAH under the circumstances of a particularly challenging environment that got more challenging by the day and with every day's newspaper, that this sale is the best that could be done under the circumstances and it's in the best interest of the Estate.

We would also tender the declaration of Mr. Ken Nicholson of Railroad Acquisition Holdings, Inc. That declaration establishes a number of things relevant to 363(m) and (n) but also other aspects of the sale process including 365. What that establishes, I think beyond contest, is that this was an arm's length negotiation, I can tell you at times, a difficult negotiation between the Estate and RAH, that RAH is not affiliated with any of the Debtors or any of the insiders

of the Debtors but as a complete stranger and third party to these transactions and, therefore, these were completely arm's length negotiations, that they have proceeded in good faith at all times, that they have not, at any point in time, talked with or colluded with any other prospective or actual bidder in connection with the sale and that we, therefore, believe they are entitled to both the protections of 363(m), as well as a positive finding that they are not in violation of 363(n).

I would hasten to add that, as part of my standard procedure in conducting the auction, I inquired of each of the bidders at the time as to whether there had been any conversations among the bidders themselves or with other prospective bidders. Each of them, with one exception I'll note, said there had been no such communications.

There was one joint bid at the auction which is described in detail in my declaration. Those parties had been permitted to speak after disclosing to me, in advance, that they wished to speak and my having concluded they would not have been independently bidders but for the joint venture. Therefore, we allowed them to proceed jointly.

Other than that it was clear that nobody had talked, nobody had colluded and that we had an open, fair process that generated the necessary results. So let me stop there and proffer those three declarations as the direct testimony of those three individuals, Your Honor.

THE COURT: Is there any objection -- I'm going to break this into two parts -- is there any objection to my accepting proffers as direct evidence in the Trustee's case? All right.

Second question. Does anyone wish to cross-examine any of the three witnesses? All right, then.

They are admitted without objection and form the foundation, uncontested, of your case. Go ahead.

MR. KEACH: Thank you, Your Honor. Let me just speak now to the 363(f) issue in terms of sale free and clear.

First, we have one objection I think is probably best characterized as a reservation of rights by Wheeling. I talked to Mr. Marcus before coming here. That objection goes to Wheeling not wanting to be bound by the for tax purposes allocation between realty and personalty in the asset purchase agreement. We don't intend to bind Wheeling to that. Wheeling and any other secured creditor is not bound to that allocation.

THE COURT: Should there be some modification of the order to provide for Wheeling's concern or will today's record suffice?

MR. KEACH: I'll leave that to Mr. Marcus. I think the record suffices but --

THE COURT: We'll --

MR. KEACH: -- I'm happy to put that in the order if people need it in the order.

THE COURT: We'll reserve that question for a moment. Mr. Marcus, you'll make a note of that and proceed, please.

MR. KEACH: But in any event is not bound and not only are Wheeling's rights reserved in that respect but also other secured parties. All of their interests will, as normal, attach to the proceeds with rights reserved.

THE COURT: As I understand this, the allocation is -- the concern about the allocation is limited for -- to internal tax purposes of the parties and has nothing to do with the --

MR. KEACH: Correct.

THE COURT: Okay.

MR. KEACH: With respect, Your Honor, to the other liens against the assets, against the U.S. assets, there are three liens of note.

Bangor Savings Bank has a first interest in certain locomotives. Those locomotives were excluded from the sale so that there's no issue with respect to selling free and clear of that interest.

With respect to the FRA and the MDOT which have liens -- FRA first and MDOT second -- FRA and MDOT, it's my understanding, consent to the sale but certainly those parties will speak for themselves. But if, as I expect, they are consenting to the sale then we have satisfied 363(f) with respect to a sale free and clear.

Let me now, Your Honor, speak just briefly with respect to the other objections which we believe have become moot.

We filed, and this is Docket 585, a supplemental notice pursuant to the assumption in assignment procedures of removing a number of contracts from the contract and cure schedule. That list includes but is not limited to all of the contracts or what we believe to be all of the contracts of the objecting parties, therefore, mooting their objections.

Let me hasten to add that CP has brought to our attention that there are a couple of additional ancillary contracts that we did not list although they were intended to be listed. We will provide an amendment to this notice to remove those contracts, as well, thus mooting all of the objections.

The -- we'll also add some language, Your Honor, in the order. There's language in the current version of the order that indicates that the objections were overruled with prejudice or withdrawn. We'll add language to note that the objections -- these counterparty objections were rendered moot by the withdrawal but are certainly not with prejudice. To the extent that RAH were to change its mind and want to assume these contracts later they have the right to do that and there are procedures for us to give appropriate notice to the counterparties and they'll have -- their rights are reserved.

And we'll make that clear in the revised form of order, Your Honor.

I believe, Your Honor, with that presentation and with that evidence, that it's appropriate to grant the motion to sell.

THE COURT: Thank you, Mr. Keach. RAH, who's proceeding for RAH? Lawyer, who's going to --

MR. STEEN: Your Honor, I am. Jeffrey Steen on behalf of the purchaser.

THE COURT: Okay. Good morning, Mr. Steen. You've heard Mr. Keach specifically with respect to the contracts which have been taken off the sale. Do you have any concerns or do you concur in every respect with his remarks?

MR. STEEN: We concur, Your Honor, with one clarification.

THE COURT: Yes.

MR. STEEN: It's our understanding that with respect to Canadian Pacific's limited objection to the cure claims. We have already, on the schedule, the contract schedules to the asset purchase agreement, deleted -- I believe there were two contracts that were brought to our attention by Canadian Pacific. We have deleted them, as of this morning, from the schedule of assumed contracts in the asset purchase agreement and we have shown evidence of that both to the Canadian counsel of Canadian Pacific, as well as the U.S. counsel here in court.

So from our perspective that opening issue with respect to Canadian Pacific's cure claim objection has been resolved and our understanding is that their objection is or will be withdrawn.

THE COURT: Thank you.

MR. KEACH: I concur with that, Your Honor. I think --

THE COURT: Hold on. Hold on. Hold -- hold --

MR. KEACH: -- we just haven't filed it yet.

THE COURT: Yeah. Hold on one second. Do you have anything else to add? Just with the limited --

MR. STEEN: I do not.

THE COURT: Okay. Thank you, sir. Now, Canadian Pacific, come forward, please.

MR. DOW: Good morning, again, Your Honor.

THE COURT: Good morning, Mr. Dow. Are you satisfied?

MR. DOW: I think so, Your Honor. I -- I --

THE COURT: Well, I can't enter an order on I think so.

MR. DOW: I realize that, Your Honor, I'm just -- I'm trying to reach out to my Canadian counterpart to confirm and counsel has confirmed this morning that the remaining technical issue was that the contracts that have been deleted by the redlines are still referenced in the original notice of

deletion that was transmitted to CP. My understanding, from purchaser's counsel this morning, is that their view is that by communicating the additional deletion to CP by email this morning, that constitutes a supplemental --

THE COURT: I'm going to give you my view. My view is that it's now a paperwork problem, all right. And do you have a different view, Mr. Dow?

MR. DOW: No, Your Honor, with the representations that the Trustee has made this morning and conferring with counsel for the buyer, I believe CP is satisfied.

THE COURT: All right. Thank you.

MR. DOW: You're welcome.

THE COURT: Does any other party have concerns about the list of contracts or objections that have not been addressed by Mr. Keach?

MR. MARCUS: Your Honor?

THE COURT: Yes, come forward, Mr. Marcus.

MR. MARCUS: Mr. Keach has accurately stated the understanding that we have pertaining to the --

THE COURT: One moment, please. Gentlemen? Go ahead, please.

MR. MARCUS: Mr. Keach has accurately stated the understanding we have insofar as the -- Wheeling's objection is concerned. However, I would like it to be reflect in the form of order because the draft order circulated last night has

statements to the effect that the terms of the APA and the schedules are binding on parties and that --

THE COURT: We will accommodate you. Okay.

MR. MARCUS: -- needs to be overruled. Thank you.

THE COURT: All right. Thank you, Mr. Marcus. Mr. Hahn, on behalf of Bangor Savings are you satisfied that your (inaudible) are not involved?

MR. HAHN: Yes, Your Honor, we are.

THE COURT: Thank you. Does anyone else wish to be heard? Yes, sir. United States, Mr. Troy.

MR. TROY: Yes, Your Honor. Thank you. We've also had the same concern about reservation of rights with respect to the allocation of the purchase price but given that language is going to be included in the order I think our concern will be addressed. Thank you.

THE COURT: Thank you very much. And Maine Department of Transportation, do you concur?

MR. PRICE: Your Honor, William Price on the behalf of eh Maine Department of Transportation. No objection.

THE COURT: Thank you. Does any other party wish to be heard? Mr. Keach, when can we see a revised form of order?

MR. KEACH: I think we can do that by close of business today. Close of business today, Your Honor.

THE COURT: All right.

MR. KEACH: And I should say no later than tomorrow

because I don't know how long the afternoon proceedings will go, but certainly no later than tomorrow morning.

THE COURT: Very good. I have a question concerning the simultaneous Canadian proceeding. Will there be a need to coordinate the two orders, as well as taking care of the details that we discussed this morning?

MR. KEACH: Yeah, we have actually been sharing orders with Canadian counsel. The vesting order that is being presented looks remarkably like this order and the -- both of the orders will contain language that makes them dependent on each other. So --

THE COURT: Thank you very much and I -- so that the parties are aware -- I will be available tomorrow to review the orders. I will not be in the courtroom so the sooner the better --

MR. KEACH: I think we can get them to you today, Your Honor.

THE COURT: All right. Thank you.

The matter of the Trustee's motion to sell, having been heard, there being no objection to the Trustee's evidence and other objections having been resolved as set forth, I hereby approve the sale to RHA.

Thank you, all.

MR. KEACH: Thank you, Your Honor.

THE COURT: The next matter.

MR. KEACH: The next matter is Mr. Cohn's motion so I think he has the podium.

MR. FISCHER: Excuse me, Your Honor, before you start we have travel issues and we were wondering if we could be excused at this time.

THE COURT: And if I were to say no?

MR. FISCHER: We would stay, then.

THE COURT: All right. I want to thank you all very much. I want to thank you for traveling up here, apparently yesterday, in difficult travel circumstances. Thank you, all.

THE COURT: And have a pleasant day.

MR. FISCHER: Thank you, Your Honor.

THE COURT: Mr. Cohn, you and Mr. Kurr now have a place to sit at counsel table.

MR. COHN: That would be helpful. Thank you, Your Honor.

THE COURT: Gentlemen, we'll be ready as soon as you're ready. Thank you. Good morning, Mr. Cohn.

MR. COHN: Good morning, Your Honor. We're here this morning on the motion for reconsideration of your order granting the carve-out and I will be very brief.

The order that was entered provided for approval of a carve-out that would similarly provide for payment of the Trustee and his professionals without regard to other claims of equal priority, mainly, as expenses of administration. The

carve-out deal includes --

THE COURT: Let's be clear. You are asserting, on behalf of what I'm going to refer to as the group of 47, administrative claim status under Section 1171 and that's what we're talking about.

MR. COHN: That is correct.

THE COURT: And as a consequence, you are suggesting that you are on the same rung as professionals with respect to distribution.

MR. COHN: Yes, Your Honor.

THE COURT: Okay. Thank you.

MR. COHN: So the carve-out did include, as one of its features, a waiver of the Estate's rights under Section 506(c) of the Bankruptcy Code. The wrongful death claimants objected on just the basis that you described, Your Honor, which is that they are claimants of equal priority pursuant to Section 1171 of the Bankruptcy Code. The case law is consistent in stating that if an asset of the Estate -- strike that for a moment.

The case law is consistent, Your Honor, that proceeds of Section 506(c) are an asset of the Estate and case law is also consistent that when an asset of the Estate is given up, then the Estate must receive the consideration therefore. So, however, you ruled, Your Honor, that it was okay under these circumstances for the carve-out to provide only for the

expenses that it did on the basis that the relinquishment of Section 506(c) rights had no value and that was based upon a statement of the Trustee at the hearing. Because I found nothing else on the record, Your Honor, other than the one statement that we quote in our motion for reconsideration, namely in answer to a question of yours, he says, "No, Your Honor, what we are saying is that it is not untoward, given what they are doing for us…" they being the FRA -- "…given what the FRA is doing for us to give up the right to surcharge because we don't think the right to surcharge has any value and in order to get them to do what they needed to do," and then the transcript trails off. So -- and that's the only statement that we have.

So, Your Honor, the reason that we're here today is because we want to essentially present the Court with the opportunity, if you choose to utilize it, to schedule a full evidentiary hearing on that critical issue. It's really outcome determinative of what the value --

THE COURT: On what critical issue?

MR. COHN: The issue of whether the carve-out has value -- has any value determines whether the Estate has given up something.

THE COURT: Hold on. Hold on. Hold on.

MR. COHN: Sure.

THE COURT: Because I'm honestly confused.

MR. COHN: Sure.

THE COURT: When you refer to the carve-out has value or the 506(c) has value you're conflating these two things and they are very different.

MR. COHN: If I said the carve-out has value I apologize. I did not mean that.

THE COURT: Okay. So that what -- if I understand you correctly we're really not here about the carve-out as such. We're here because your concern is that the carve-out was given for consideration, the consideration being the waiver of the 506(c) claim.

MR. COHN: That is correct, Your Honor.

THE COURT: And -- and you would like to have an opportunity to present evidence that such a claim has value to the Estate.

MR. COHN: Correct.

THE COURT: Separate and apart from the so-called carve-out which was approved.

MR. COHN: Correct, Your Honor.

THE COURT: Okay.

MR. COHN: Or rather -- I mean, when you say separate and apart that because you have a deal in which the Estate gave up certain things and got certain things, one of the give ups was rights under Section 506(c) --

THE COURT: I don't know. Just so that the record is

clear, I never determined, in the original motion, that the Estate gave up and got anything. What I determined was that FRA carved out funds for such fees as may be allowed by this Court from its property. That's what I determined. Okay. So and what you are suggesting is that that carve-out was given for consideration, the consideration being a waiver of a 506(c) claim.

MR. COHN: Correct, Your Honor.

THE COURT: Okay.

MR. COHN: That's precisely the contention and so the purpose of the motion, as I said, is to offer you the opportunity, if you think it appropriate, to either --

THE COURT: I understand but I -- let's pursue this a bit because at the hearing I didn't hear from you what that evidence might be. There was no proffer on your part as to value other than the fact that you'd like to have a hearing on the question and that's what I'm hearing today.

MR. COHN: Yes, Your Honor.

THE COURT: What evidence would be presented?

MR. COHN: The evidence would be that the Estate has expended or obligated itself to expend substantial funds which, under Section 506(c), would be recoverable from the FRA.

THE COURT: All right. But that's a legal contention. I don't know that that's an evidentiary contention. I -- we might agree, and Mr. Keach and Mr. Fagone

all of your rights are reserved, but we might agree that the professionals have provided services to the Estate which may directly or indirectly have benefitted FRA bringing us to this very day.

MR. COHN: Yes, Your Honor, and if we stipulate it -- if we stipulated that then, of course, there would be no need for an evidentiary hearing.

THE COURT: And I don't know that the Trustee is prepared to stipulate to that fact or not and I don't even know if such a stipulation is appropriate under the circumstances that we're here under, being Rule 59(e) as I understand it. But the point is you're suggesting that there is value in the form of a services provided. The Trustee spoke personally, not through counsel, spoke personally, as did Mr. Stemplewicz on behalf of FRA at the last hearing. And if I recall the Trustee's position it was that there was no value, in his business judgment, to any claim and what I'm asking you to help me out with today is what value do you see?

MR. COHN: The value is the hundreds of thousands of dollars or the -- or more in sale related costs that could be recovered from the FRA if the Estate had its rights under Section 506(c).

THE COURT: If the Trustee, in his business judgment, chose to pursue that. Right?

MR.COHN: Well, yes, Your Honor, but it would be --

THE COURT: All right. And you would quibble that he should or he shouldn't but --

MR. COHN: Well, it's not -- it's more than a -- it's more than a quibble, Your Honor, I think that --

THE COURT: I don't know that it is more than a quibble, counsel, because I haven't heard anything from you that would suggest that it's more than a quibble. Who has -- who has the duty to proceed or the right to proceed under 506(c)?

MR. COHN: The Trustee or other Estate representative.

THE COURT: All right. And so therefore if the Trustee makes -- I don't know about other Estate representative, I don't know what you mean by that. You mean, like a debtor in possession. In this case --

MR. COHN: Well --

THE COURT: -- who would have that prerogative?

MR. COHN: It is whoever -- whoever represents the Estate. Right now it's the Trustee. That isn't -- that doesn't necessarily continue forever but right now it's the Trustee.

THE COURT: Who was it when I entered the order the last time around?

MR. COHN: The Trustee.

THE COURT: Thank you. Now, so the Trustee would

have a right to determine whether or not there was some basis upon which to go forward. Right?

MR. COHN: Correct.

THE COURT: And he told us that there was no basis to go forward and you have a different view of that. Right?

MR. COHN: He did not say there was no basis to go forward.

THE COURT: Oh, he said I've decided, in my business judgment, that there is no value to a 506(c) claim. I'm paraphrasing but that's in the transcript.

MR. COHN: Well, but that's -- but that is ---

THE COURT: It's conclusory. Yes? But your --

MR. COHN: Well --

THE COURT: -- argument is also conclusory. You're saying but there is. What is it, Mr. Cohn? What evidence would you show at a hearing? Would you want to have a deposition of Mr. Keach to have him say the same thing? What would you be doing before a hearing and at an evidentiary hearing in order to present evidence which would show me your view?

MR. COHN: What we would be eliciting, either his testimony or his stipulation, concerning the estimated amount of the sale costs that have been incurred by the Estate.

THE COURT: Let's assume for the sake of discussion that all of the costs of the Trustee's professionals and Mr.

Keach's commission are attributable to bringing us to this day, this day meaning the sale with proceeds of the sale going substantially to FRA. Isn't that what we're talking about?

MR. COHN: Well --

THE COURT: And your suggestion is that either all or something less than all of that, whatever that may be, let's call it X, would be recoverable. Right? Is that what you're saying?

MR. COHN: Yes, Your Honor.

THE COURT: That's really legal, isn't it? I mean, we can assume that whether it's a dollar or five million dollars, it's -- your argument is that it's recoverable. What evidence do we need?

MR. COHN: Well, the evidentiary basis of that is simply that there are -- that there is value to the sale cost. It seemed to me that when you determined that there is no value, I interpreted that, at least, as a finding that there was no value to the Estate's rights under Section 506(c).

THE COURT: What does 506(c) say?

MR. COHN: It says that the Estate can recover costs, and I'm paraphrasing here, Your Honor, but it --

THE COURT: I don't want to paraphrase. I'm going to read it to you. Okay. Will you accept my version of it? I'm reading from Section 506(c), "The 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 including the payment of all ad valorem property taxes with respect to the property." Right?

MR. COHN: Yes.

THE COURT: All right. And what evidence would you show that would satisfy the Court that some assessment should be made against FRA? What evidence would you show?

MR. COHN: Well, Your Honor, FRA has a lien on substantially all of the assets that were sold as part of the sale. I should say all or substantially all of the assets that were sold as part of the sale. The FRA will realize proceeds on account of that. I would add, Your Honor, that the FRA also has a public interest in having the railroad be sold so that, too, represents a benefit to the FRA.

THE COURT: Sure. And the FRA also has a duty in the public interest to make sure that the railroad runs. Right?

MR. COHN: Yes, Your Honor.

THE COURT: Okay. And your suggestion is that the FRA, by permitting this Chapter 11 to proceed without a request for abandonment or a request for relief from stay or a dismissal of the case, as a matter of law would require an assessment under 506(c).

MR. COHN: Well, I think you're leaving out some elements of it but, yes, essentially when a secured creditor --

when assets are sold and proceeds are turned over to the secured creditor and the estate incurs expenses in order to effectuate that, those expenses are chargeable to the secured creditor under Section 506(c).

THE COURT: Yeah, but you're leaving out the word benefit. Okay. You're presumption is that everything that has been done by the Trustee and his professionals in this case is done for the benefit of FRA.

MR. COHN: Well, I'm sorry, Your Honor. Benefit in this context does not require me to prove that. Benefit is simply that the FRA received a benefit from the sale which the turnover of proceeds to the FRA certainly evidences and, also, the discharge of the FRA's public duty to -- that in itself also is consideration.

THE COURT: What evidence is unknown on those issues? It appears to me that those are all legal questions.

MR. COHN: That may be, Your Honor, and if you would like to re-characterize the motion or interpret it as a suggestion that there's a manifest error of law rather than a manifest error of fact --

THE COURT: It's your motion. You can characterize it any way you want. You've already characterized it as such. You've said that I've failed to take evidence and I made a manifest error of law. Are you waiving the failure to take evidence, Mr. Cohn?

MR. COHN: No, Your Honor. Your -- I interpreted and continue to interpret your -- your finding about no value as being a finding of fact. If it was not a finding of fact, if it was a ruling of law and the order is clarified to that extent then -- then we are suggesting that that would be a manifest error of law rather than a fact.

THE COURT: So it's really --

MR. COHN: That's all.

THE COURT: -- it's just a characterization of --

MR. COHN: Yes, Your Honor.

THE COURT: Okay.

MR. COHN: Yes, Your Honor, and really I'm not trying to play games here. What I'm really saying is I have no choice, in this situation, but to take this up on appeal and before doing so I want to --

THE COURT: I -- I want you to know, Mr. Cohn, that first of all I respect you immensely. I respect the duty that you have to your clients and I have no issue with your taking it up on appeal were I to deny your motion. That's not a point and I appreciate the courtesy that you want to give me a second chance.

MR. COHN: That's -- that's --

THE COURT: Okay. That's wonderful.

MR. COHN: -- that's exactly --

THE COURT: All right. That's very kind and

generous.

MR. COHN: -- that's all that I want is --

THE COURT: But I have a question for you and it has to do with this public interest that we bandy about, okay. Do you have a Code handy?

MR. COHN: I can get it

THE COURT: Why don't you -- Mr. Kurr can do that. He's billing for his time today.

THE COURT: Take a look at 1165 for me, please.

MR. COHN: Yes, Your Honor.

THE COURT: All right. Have you read it?

MR. COHN: Yes, Your Honor.

THE COURT: Okay. It deals with protection of the public interest in connection with this case and it says in applying section, and it lists many of them, but including 1171, the Court and the Trustee shall consider the public interest in addition to the interest of the Debtor, creditors and equity security holders.

You're here because of 1171. You wouldn't be here if you didn't have that standing. Is that fair?

MR. COHN: Not -- not necessarily, Your Honor, but probably. I haven't, frankly, done the analysis of whether we might have an economic interest anyway, even if we didn't have rights under Section 1171.

THE COURT: All right. And I gather that, you know,

the Trustee has to take many things into account when he does what he does and this tells me he has to take 1171 into account, as well. I was just wondering if you had looked at this if that had had any impact on your thinking.

MR. COHN: Well, first of all, I had looked at it or I had looked at it certainly before today, considering the whole issue, but I do not think it would be fair to read that section as meaning that you can simply ignore the provisions of one the sections that's referenced in Section 1165 in order to satisfy the public interest.

THE COURT: I take your position and I wasn't suggesting that but I understand your point. Is there anything else that you would like me to hear today?

MR. COHN: No, Your Honor, other than I did want to -- I did want to express the thought that as with -- as with all matters in a bankruptcy case, but especially matters relating to the financing of the case, the -- it's certainly appropriate for the parties to talk with each other and have a -- and have suitable regard for each other's positions and try to reach reasonable agreements and I did just want to express the thought that if -- that we are willing to negotiate with the FRA on the premise that the costs of the case need to be -- need to be covered. So we're not -- so we -- we would -- we -- we -- and that offer has been out there from day one but I wanted to state it on the record and, indeed, Mr. Troy is here

in person which I'm very glad of and I want to speak with him about that right after the hearing.

THE COURT: Well, right after the hearing may, you know, months ago might have been an appropriate time. I don't know about right after the hearing but I'll leave that to your judgment, what you do extra-judicially is fine with me.

But I'm concerned -- I'm very concerned that this case has gone forward for many reasons and the Trustee has made an arrangement with FRA for the paying of professionals. Absent that arrangement, the way the statute is interpreted -- I won't say as it's written because I have some questions with as it's written but as it's been interpreted might have left your group with an overwhelming share of any 506(c) recovery the net effect being that the professionals in the case and other administrative claims might be left out in the cold. And what you are now suggesting is that you, too, recognize that and you'd be gracious and slip them a little something along the way. But I understand your position.

MR. COHN: Well, I'm saying more than that, Your Honor. What I'm saying is that the statute -- the way that the statute is set up is that it creates this collision of interests, as do so many parts of the Bankruptcy Code, and it works only if there is -- on facts of this case anyway -- it worked only if there is a negotiation amongst the parties. And so I'm simply reiterating for the record that that's the way

that I think it ought to turn out and we are willing to engage in that process.

I realize that from a legal perspective, Your Honor, that doesn't change, one way or another, the merits of the motion that's before you. I'm simply saying that this -- it's not as though the Bankruptcy Code doesn't offer us a way out of the problem. It does. It's the same way out -- it's the same way out that we have with so many other issues which is that the parties should see it in their mutual best interest to reach reasonable accommodations and if they don't, cases fail.

THE COURT: And just one last question.

MR. COHN: Sure.

THE COURT: Manifest error of law, what is it? What's the manifest error of law?

MR. COHN: Well, the outcome determinative issue, as I said, is whether the Estate was giving up value when it said we're giving you a waiver of our rights under Section 506(c) in exchange for the carve-out and so the manifest error of law would be the conclusion that, based on the fact that there is -- there is value to the Section 506(c) rights, it was proper for the Estate to give those up adding as consideration only the payment of the Trustee's expenses and not those of creditors of equal priority.

THE COURT: Thank you, Mr. Cohn.

MR. COHN: Thank you, Your Honor.

THE COURT: And Mr. Cohn, just so that you and Mr. Kurr and your clients are aware, I've given this a great deal of thought. Okay.

MR. COHN: Yes. Thank you, Your Honor.

THE COURT: Thank you very much.

MR. COHN: Thank you.

MR. KEACH: Thank you, Your Honor. I'll be very brief. Robert Keach, the Trustee. First, I think it's really important and I think Your Honor has focused on this, as well, to remember that we're here on a motion for reconsideration. Not surprisingly Mr. Cohn wants to talk about lots of other things but not the fact that he has an extremely high mountain to climb with a motion for reconsideration and that there's an extremely high standard which he's reluctant to address but first and foremost, let me say a few things.

Number one, his entire motion is premised on the concept that the 506(c) waiver issue is somehow outcome determinative. It's not and never was. The case law we presented to Your Honor in support of the carve-out made it abundantly clear that, to the extent the FRA wished to give up its collateral to support the Estate given that there was no other way to do it, it was certainly free to do that. SBM has established that for a long time in this circuit and it's no different now.

The 506(c) issue was never a factor with respect to

whether or not the FRA had that right.

THE COURT: What he's saying, though, is that it was -- that it was an asset that was waived by you.

MR. KEACH: In fact, it wasn't, Your Honor, because there was no asset and let me get precisely to that point. His motion, which he argued well beyond, has one basis for reconsideration and that is that there was a factual finding based on my statement in proffer that there was no value to the FRA or to the Estate, I should say, in preserving surcharge rights against the FRA. Let's start with his opportunities at that time.

First and foremost, Mr. Cohn, at that time, had already objected on the basis that he thought an evidentiary hearing was required. Notwithstanding that statement, Mr. Cohn made no request to cross-examine me at that time. As Your Honor knows, other parties have done so. We just went through that recently in connection with the bid procedures. He made no request to cross-examine me or to put me under oath or to challenge that statement. He made no proffer of contrary evidence. He made no additional request, at that time, for an evidentiary hearing. Under any possible view of the law he waived his right to present evidence.

THE COURT: Were those points stated in this Court's original order?

MR. KEACH: Your Honor made it very clear, I think,

in the original order that that opportunity had been provided and had been passed upon by Mr. Cohn and his clients. But more importantly, Your Honor, there's considerable support independently for that statement which I made.

As Your Honor is aware and as Your Honor has probably characterized this, this isn't really an issue of whether or not there's any value to the 506(c) waiver or whether there's any value to the right to surcharge at the time of the waiver. The issue is whether or not that was a reasonable exercise of the Trustee's business judgment at the time.

But whether or not you look at real value or you look at whether or not there's a reasonable exercise of business judgment it unquestionably was at the time. Mr. Cohn's characterization of the law under 506(c) in this circuit is completely mistaken and ignores precedent in this district.

I always remember the cases I lost one of which was a case called KORUPP Associates, a case that took place a long time ago in which case Judge Goodman ruled precisely on the issue of when a 506(c) surcharge might be available for general costs of administration and what he ruled at that time and which is the ruling which has been affirmed many, many times in many circuits is that you have to establish a direct and quantifiable benefit to the secured party arising from the expenditure of unencumbered assets or the provision of otherwise unencumbered services on behalf of that creditor.

That hasn't and can't happen here. The only money we've been able to spend post-petition has been the money of secured parties, either Wheeling's by use of cash collateral or proceeds of the Camden loan with respect to which the FRA subordinated.

Anybody looking at the landscape of this case at the time would have concluded what I concluded which is there was no legal ability to surcharge the FRA and there was no factual ability, under any foreseeable set of circumstances, to surcharge the FRA and, therefore, it had no value.

I made that statement as a statement of fact at the time. It was unchallenged at the time and he can't challenge it now.

There's also clearly, Your Honor, no manifest error of law and let me start -- let me -- before I finish with the factual point -- the standards under 59(e) are noticeably high. On the evidentiary front he has to establish newly discovered evidence he would bring to the Court's attention to cause you to reconsider. He hasn't, at any point despite your offering him the opportunity many times over argument, mentioned a single scrap of new evidence that he would bring to the Court, only the evidence he would have provided and should have provided at the last hearing.

Incidentally, given that he essentially tendered that as evidence he would have offered or the character of the

evidence he would have offered you can consider it because, frankly, even if he had offered it, it still would have been appropriate to bless the carve-out so the proffer is irrelevant.

On the issue of manifest error of law, Your Honor, it is, as it sounds, a mountain to climb. This court's ruling was entirely consistent with SBM and with all of the case law we presented which does not require a trustee to provide for a carve-out for all of the administrative expenses of the estate but which expressly permits a trustee to create a carve-out solely for the trustee and his professionals when necessary for the administration of the estate.

That -- this ruling was consistent with that case law. There's no reason to reconsider that ruling and it certainly is no where near the universe of a manifest error of law.

So under the standards that are applicable, this motion utterly fails. More importantly, Your Honor, as you've mentioned, a considerable amount of time has passed. I, frankly, I never think it appropriate to talk about appeals you're going to take to the judge that's rendered the ruling but, frankly, I don't think Mr. Cohn and his clients have standing to appeal but we'll get to that later. And most of that comes, Your Honor, because I'm not even sure we should be listening to Mr. Cohn's clients now. They have no standing to

create a 506(c) surcharge. They have no ability to exercise that surcharge on their behalf or anybody else's behalf. They didn't lose any rights here because they never had any.

THE COURT: Except maybe a writ of mandamus. I don't know.

MR. KEACH: For all of those reasons, Your Honor, I think this motion fails. It's unfortunate it's taken the Court's time. Thank you.

THE COURT: Thank you. Mr. Cohn, about two minutes of rebuttal if you choose to use it.

MR. COHN: Yes, Your Honor. The reason why this does not pass muster under SBM is that the case law under SBM is that it's fine for a creditor to do with its own assets -- a secured creditor -- to do with its own assets what it wishes but that it is not okay to do with the Estate's assets what it wishes. And our whole point here has been that what was dealt away here when the 506(c) waiver was given was an asset of the Estate and I don't think there are any cases under SBM which contravene that and which contravene the case law that says that a 506(c) recovery is an asset of the estate which is distributed in accordance with the priorities of the Bankruptcy Code as opposed to designated for --

THE COURT: Let me --

MR. COHN: -- some specific subset.

THE COURT: Let me say as a matter of law I agree

with you. Okay. As a matter of law that's fine. I think Mr. Keach agrees with you. But his statement at the time, which I indicated in my order I took as evidence, was that that asset had no value. That was his judgment at the time. There was no attempt to challenge, cross-examine or whatever, at that moment. Now, you may have taken it as argument, I don't know. But I ruled -- I ruled that it was evidence.

MR. COHN: Well, Your Honor, after the fact you ruled as evidence. I don't think that I was under any fair notice, in the context of that hearing, that what Mr. Keach was doing was testifying rather than -- rather than arguing. It simply was not clear from the context. And if there is some, you know, doubt about that, Your Honor, then it would certainly seem to me that a fair review of the record would lead you to conclude the same thing and offer the opportunity for --

THE COURT: A fair review --

MR. COHN: -- that hearing.

THE COURT: -- of the record would lead me to conclude that we would have him testify and he'd testify the same thing and you've offered no new evidence today that would show otherwise.

MR. COHN: Well, Your Honor, let me just at least explain what the evidence, I think, indicates which is -- which would be that there had been some hundreds of thousands of dollars, if not more, of services rendered that can be -- that

are chargeable --

THE COURT: Do you explain that in your original argument.

MR. COHN: -- I did, Your Honor, so I don't understand -- I don't understand how a conclusion that there's --

THE COURT: Because --

MR. COHN: -- no value to it.

THE COURT: Because -- because 506(c) has very specific requirements in the letter of the law and also in the established precedent in this -- in this district which Mr. Keach just reviewed. And it was his view under the Code provision and under the case law that it had no value and it remains his view today and you would like me to believe that it has value. Okay. I -- I hear your point.

MR. COHN: Well, I'm sorry then if the contention is that the Trustee can exercise his business judgment to conclude that that which is black is white and that that's reasonable then --

THE COURT: I won't --

MR. COHN: -- then --

THE COURT: I won't take it that far but when pressed with the issues in this case and when pressed with determining how people are going to get paid to do their duty and when pressed with the notion that if the case were to fail there'd

be no benefit to your clients or any other creditors in this case, then business judgment does very clearly come into play. Bringing a proceeding against a secured party under 506(c) is a matter of discretion. All right. Okay. Thank you very much.

MR. COHN: Yes. If I -- I'm sorry, Your Honor, I just need to add one thing just to avoid any lack of clarity in this record which is that -- which is that the -- even if there were a valid business -- valid exercise of business judgment to accept, say, less than face amount, for example, to the 506(c) rights the -- whatever consideration there was for those rights had to be given to the Estate and what happened here was that the Trustee got consideration viewed -- by the way in light of his argument that the Section 506(c) waiver had no value, he got a tremendous deal because he got payment not only of sale related expenses but, also, of other expenses of the -- other expenses of administration. So in that sense he got a very good economic deal but as a matter of law the benefit of that economic deal belonged to the Estate for distribution to creditors in accordance with the priorities of the Bankruptcy Code.

THE COURT: Thank you very much, Mr. Cohn.

MR. COHN: Thank you, Your Honor.

THE COURT: Thank you all for your patience. I'm prepared to rule on this. There will be no written order so this bench order will be the ruling on the motion for

reconsideration. It will be final and the parties can act accordingly.

I hereby deny the request for reconsideration under Rule 56(e), specifically because of the failure of the group of 47 to demonstrate evidence and failure to demonstrate a manifest error of law.

In the First Circuit, a manifest error or law is an error that is plain and indisputable and that amounts to a complete disregard of the controlling law. That's from the case of Venegas-Hernandez v. Sonolux, 370 F.3d 183, 2004. I don't see that but then again here I am reviewing myself so if you'd like a second opinion, Mr. Cohn, that's your prerogative.

I just don't see it and the reasons for the underlying order are set forth succinctly in the order approving the carve-out dated October 18, 2013. But as I told Mr. Cohn during his argument, I have given this a great deal of thought.

The Trustee has made an arrangement with FRA for a carve-out for fees, as may be allowed by this Court in amounts as may be allowed by this Court. The carve-out is not property of the Estate under established First Circuit case law. The real question is whether or not something of value was bargained away in order to accomplish that. The group of 47 insists that something of value was bargained away, mainly a 506(c) claim. The Trustee gave evidence at the original

hearing that he saw that claim as having no value and acted accordingly. I've received nothing today which would cause me to disturb that determination. So ordered.

Thank you, all. Next matter.

MR. COHN: Thank you, Your Honor.

THE COURT: Thank you, Mr. Cohn.

MR. MARCUS: Excuse me, Your Honor. On this matter may I have a moment to retrieve my colleague who is assisting me?

THE COURT: Well, I don't know. Is he going to be helpful or not?

MR. MARCUS: He will be helpful to me.

THE COURT: Oh, all right. Okay. We'll take a five-minute recess.

THE COURT OFFICER: All rise.

PROCEEDINGS RECESSED (January 23, 2012, 11:15 a.m.)

PROCEEDINGS RESUMED (January 23, 2012, 11:24 a.m.)

THE COURT OFFICER: All rise. United States Bankruptcy Court is back in session. Please be seated and come to order.

THE COURT: Good morning, again. We are approaching the third, and what I believe to be, the last contested matter of the day and that's a motion concerning tax credits. I have a few preliminary questions. First, who will be representing the Trustee?

MR. FAGONE: That would be me, Your Honor, Michael Fagone.

THE COURT: All right. Good morning, Mr. Fagone and you'll be representing Wheeling?

MR. MARCUS: Yes, Your Honor, George Marcus. I'd like to introduce my partner, Daniel Rosenthal.

THE COURT: Rosenthal or Rosenfeld?

MR. MARCUS: Rosenthal.

THE COURT: Thal. Good morning, Mr. Rosenthal. Thank you.

MR. ROSENTHAL: Good morning, Your Honor.

THE COURT: Now, is this a discrete matter or does this involve all parties in the case? It's a contested matter but I think this is really just a challenge between -- made by Wheeling against the Estate. Is that correct?

MR. FAGONE: Your Honor, Michael Fagone for the Trustee. I believe that's correct as a matter of law and certainly as a matter of practicality.

THE COURT: All right. And does any other party in interest assert standing to participate actively in this proceeding today? I'm not going to deny anybody the right to be here or the right to be heard at an appropriate time but no one else is going to actively participate in the contest. Anybody on the line? Okay.

That said, does anyone object to my speaking with Mr.

Marcus and Mr. Rosenthal on one hand and Mr. Fagone and his associates on the other in chambers off the record before we get started? Any problem with that?

MR. MARCUS: No, Your Honor.

THE COURT: All right. If you see no benefit to that tell me now because I'm not going to waste your time or mine.

MR. MARCUS: It's always beneficial to talk to the Court.

THE COURT: Oh, you're so kind. Do you want to say something nice to me, Mr. Fagone?

MR. FAGONE: No, Your Honor.

THE COURT: All right. Before we depart, I would like to know, and this is probably one of the things I want to talk to you about off the record, but there's an adversary proceeding pending and this is -- the proceeding before me today could be characterized as a request to determine the extent and validity and priority of Wheeling's lien and specific assets, namely the 45G tax credits which is the subject matter of the adversary proceeding. And it appears to me, and maybe I'm wrong, that the parties are seeking some sort of final determination of judgment on that question in the context of this contested matter. Indeed, you've filed a consent motion to postpone the adversary proceeding because you're hopeful that to a greater, if not complete, extent it's going to be resolved in this contested matter. Am I correct,

gentlemen?

MR. FAGONE: Your Honor, on behalf of the Trustee, I think you're largely correct. The -- I would characterized the adversary proceeding as sort of a big, broad umbrella with respect to Wheeling's asserted interest in collateral.

THE COURT: It's just a little rain hat.

MR. FAGONE: This is -- yeah. We've got this contested matter which deals with specific identified funds. We've got another contested matter that I believe is set for hearing in front of the Court in February. Those will be, I think, determinative on the issues that are involved and then the adversary proceeding will deal with whatever is left, I think, Your Honor.

THE COURT: All right. Okay. So there'll be something left in the adversary proceeding but one side or the other is looking for a judgment pretty soon on the question raised today. Right?

MR. FAGONE: Absolutely, Your Honor.

THE COURT: All right. And does the Trustee consent to adjudication of this piece of the adversary proceeding in the context that we're here to determine today as a final binding remedy?

MR. FAGONE: We do, Your Honor, I think --

THE COURT: Thank you. Mr. Wheeling?

MR. MARCUS: Yes, we do.

THE COURT: All right. Very good. What context should I be proceeding under? Is this a motion for use of cash collateral under 363? Who has the burden of proof? Is it 363(p)? We have some preliminary things that we have to figure out, yes, Mr. --

MR. MARCUS: I --

THE COURT: -- Marcus.

MR. MARCUS: I perceive this to be a request by Wheeling to turn over the funds. The Courts will reference, maybe you want to look at the order you'd entered when the 45G motion was filed.

THE COURT: Yeah.

MR. MARCUS: And the order invited an agreement among the parties that the money should be collected from the payor then set aside pending determination of the rights to parties.

THE COURT: Right.

MR. MARCUS: So here we are today to determine who gets the --

THE COURT: Okay. I -- yeah, but it doesn't say anything about future proceedings on a turn over request --

MR. MARCUS: I believe --

THE COURT: -- does it?

MR. MARCUS: -- the order says that the purpose of today's hearing is to determine Wheeling's entitlement to the funds.

THE COURT: Yeah, I don't know that that's a turn over, necessarily, under part five of the Code. It seems to me that this may or may not be cash collateral that the Debtor wants to use and you may not want to give it up. Is --

MR. MARCUS: Well, the Debtor conceivably could make a request that it be permitted to use this money even though it's not the Debtor's. I don't perceive that that --

THE COURT: Now, is the Debtor --

MR. MARCUS: -- (inaudible) --

THE COURT: -- it's implicit that the Debtor is making that request and you're saying, no, no, a thousand times no.

MR. MARCUS: Well, I think the Debtor is saying --

THE COURT: But I'm trying to figure out who the moving party is. It's a moving target.

MR. MARCUS: Well, I think the Debtor is saying more than we'd like to use it. The Debtor is saying that Wheeling -- it's not cash collateral. Wheeling has no entitlement and, therefore, does not need to ask permission to use it.

THE COURT: Which brings us back into the lawsuit, doesn't it? Then it's a --

MR. MARCUS: Well --

THE COURT: -- then it's a complaint to determine either brought by the Trustee or by you and I -- let's go into chambers --

MR. MARCUS: Sure.

THE COURT: -- and figure it out because it has to do with who has the burden of going forward today.

MR. MARCUS: Sure.

THE COURT: All right. Excuse us, please. We'll be back just as soon as we can.

THE COURT OFFICER: All rise.

PROCEEDINGS RECESSED (January 23, 2012, 11:30 a.m.)

PROCEEDINGS RESUMED (January 23, 2012, 12:00 p.m.)

THE COURT OFFICER: All rise. United States Bankruptcy Court is back in session. Please be seated.

THE COURT: Thank you, all, for your patience. That was time well spent. We were able to determine, in a less formal way, what the order of proceeding will be and we will resume for trial at 1:00. The parties tell me that it should take between one and two hours to put on evidence. Those of you who wish to stay and be entertained here you're all welcome.

We also explored settlement and it's quite possible that the parties could come back at 1:00 and have the matter resolved or close to resolved. So now you know everything that I know. I'll see you all at 1:00. Thank you.

THE COURT OFFICER: All rise.

PROCEEDINGS RECESSED (January 23, 2012, 12:01 p.m.)

PROCEEDINGS RESUMED (January 23, 2012, 1:06 p.m.)

THE COURT OFFICER: All rise. United States Bankruptcy Court is now in session with Honorable Louis Kornreich presiding. Please be seated and come to order.

THE COURT: Good afternoon, everyone. This is the Chapter 11 case of Montreal, Maine & Atlantic Railroad Ltd., Case No. 2013-10617. We are here on the motion concerning use of tax credits. Give me a moment, please.

This motion is also a subject of a complaint in Adversary Proceeding 2013-1033 brought by Wheeling & Lake Erie Railway against the Trustee and other related parties including the Debtor. That lawsuit has been continued. Nonetheless, the parties agreed, at our chambers conference, that what is to transpire now will be deemed to be an aspect of that litigation and any disposition of the proceeds being held attributable to the so-called 45G tax credit will be adjudicated on the motion but, also, within the adversary proceedings. Is that correct, Mr. Fagone?

MR. FAGONE: Yes, Your Honor, on behalf of the Trustee I'm not sure what the Court meant when you said within the adversary --

THE COURT: I'll explain that. I can see the consternation on your face. Is that generally correct, Mr. Marcus?

MR. MARCUS: Yes, it is, Your Honor.

THE COURT: All right. What I mean by within is that

this -- what is about to transpire is a piece of that adversary proceeding, Mr. Fagone, but a discrete piece and all other matters in that adversary proceeding are reserved. However, whatever we determine today with respect to the so-called 45G credits will be a final disposition, will not be reopened in the context of any further hearings in that matter unless otherwise agreed during the course of the day. Okay? All right.

That said, the burden of going forward will be on the Plaintiff, Wheeling, and in a moment I'll ask Mr. Marcus to proceed with evidence. And I assume the fact that we are here and not in chambers is that we are proceeding to litigate this and that there are no prospects of settlement this afternoon.

MR. MARCUS: Well, I wouldn't say no prospects, Your Honor, but we did have discussions, we did talk about offers and were not able to come to agreement by 1:00.

THE COURT: All right. Is it that you need a bit more time or have the parties decided that they'd be better off using their time here in court.

MR. MARCUS: I think the best use of the time now is to proceed and we'll obviously keep an open mind as things develop but it's not a situation where I believe that another 10, 15, 20 minutes, a half an hour is going to make a difference.

THE COURT: Good. Okay. And you would agree, Mr.

Fagone?

MR. FAGONE: I do, Your Honor.

THE COURT: Well, thank you and you both said that so nicely. All right. Then we'll allow Mr. Marcus to proceed.

I do want to compliment the parties, particularly the authors of the competing briefs which I received timely the day before yesterday, and I think they were very well done and very helpful to the Court. Proceed, Mr. Marcus.

MR. MARCUS: Yes. Thank you, Your Honor.

THE COURT: One moment. Mr. Fagone, you have something to say?

MR. FAGONE: Just a housekeeping matter before the -- before Mr. Marcus proceeds.

THE COURT: Why are you looking at your associate when you say the word housekeeping?

MR. FAGONE: I was looking at a pile of documents, Your Honor. Before we commenced the hearing we had a chance to confer with Mr. Marcus and Mr. Rosenthal about a set of exhibits that we would like to move the admission of. I believe that can be done --

THE COURT: Well, I'm going to -- I'm letting Mr. Marcus --

MR. FAGONE: But I --

THE COURT: -- lead off.

MR. FAGONE: -- have them. That's all.

THE COURT: Oh, you have. I see. Okay. You've been preempted, George. Okay. Go ahead.

MR. FAGONE: So Your Honor, if I might just very briefly in an effort to streamline I have what we have marked as Exhibits -- Trustee's Exhibits 1 through 13 have been pre-marked. We also have Wheeling Exhibits 1, 2 and 3. Those have also been pre-marked. I would move the admission of all of them (inaudible) for purposes of today's hearing and I believe there's no objection to that.

MR. MARCUS: That's correct.

THE COURT: And Exhibits just described by Mr. Fagone will be admitted (inaudible).

MR. FAGONE: Mr. Rosenthal has corrected me. The Trustee's Exhibits are numbered 1 through 11, not 1 through 13. I have a set for the Court. I have a set for the witness. Can I approach?

THE COURT: All right. Yes, you may hand them to the clerk.

MR. FAGONE: Thank you.

THE COURT: Now, 1 through 11, are they clearly marked Trustee or Defendant? How are they --

MR. FAGONE: Trustee's 1 through 11.

THE COURT: Okay.

MR. FAGONE: And Wheeling 1, 2 and 3, Your Honor.

THE COURT: Thank you. Am I to determine the outcome

based on the weight of the evidence, Mr. Fagone?

MR. FAGONE: Among other factors, Your Honor, yes. Perhaps --

THE COURT: Now can we start? Okay.

MR. MARCUS: I'd like to offer Mr. Fagone the opportunity to make my opening statement, too.

THE COURT: Mr. Fagone?

MR. FAGONE: I reserve, Your Honor.

MR. MARCUS: Your Honor, if I may just, briefly, give a roadmap as to what the Plaintiff perceives what it would like to do today. I think that will help matters -- help streamline matters and allow us to get to the central point a little faster.

So as the Court knows what we're talking about today is a fund of money, $490,000, that is currently sitting in escrow with the Trustee that represents payments made to the Trustee under an agreement of a track maintenance agreement, payments made to the Trustee by KMSI in exchange for allowing KMSI to claim federal tax credits based upon railroad track maintenance owned by the Debtor.

Now, it's important to understand that, and the evidence will show this, that these are not tax credits that the Debtor has or has sold. What the Debtor has done is acted pursuant to IRS regulations. It has designated a certain quantity of -- certain miles of track as to which another party

may claim maintenance expenses for the purpose of claiming a credit on their tax returns.

So the way it works under the IRS regulations, and this is articulated in Exhibit 7, the Trustee's exhibit -- I'm sorry, the Trustee's Exhibit 6 so the Court can follow the bouncing ball in Exhibit 6 pretty clearly --

THE COURT: Well, I'm going to let you continue with your recitation because I'm sure it will be helpful but I want you and Mr. Fagone to know that I've been following this ball for some time --

MR. MARCUS: Sure.

THE COURT: -- so I do understand the general scope of the Code and the regulations and I understand the general scope of the TMA. I understand that mileage was, indeed, assigned in this case, broker's fees involved, and I have a grasp of the mechanics but I'd like you to proceed and make a record of it. I may have some questions for you but I just -- I want you to know that we're, hopefully, on the same page. Okay?

MR. MARCUS: Thank you, Your Honor. And that'll -- I'll be brief. So the Court is aware of the fact that under the regs and under the TMA, MMA says to KMSI, here, we're going to designate --

THE COURT: Well, let's identify KMSI as the assignee of the affected track.

MR. MARCUS: Right.

THE COURT: And the counterparty to the TMA.

MR. MARCUS: That's correct. Says to KMSI, okay, we designate 412 miles. You can claim tax credits based on maintenance expenditures made on these miles and the reason that's important is that the IRS has a limit. The limit to tax credits is $3,500 times the number of miles that you have the right to claim the credit for. So KMSI says to the TMA, well, we're going to do this, you've got to give us some miles so that we can claim the credit and get an increase in the cap.

So they did and so the cap was increased, expenses were made in the ordinary course of business, the TMA claimed the tax credits and paid money under -- I'm sorry, KMSI --

THE COURT: Well, let me see if I can help you. Expenditures were made by the Debtor's last Trustee overlapping the filing in the ordinary course of business and reimbursed by KMSI according to the TMA so that KMSI could take the credits.

MR. MARCUS: That's correct. That's correct. So the MMA winds up with 47.5 percent of the expenditures that it made, that it certified as to these miles that were --

THE COURT: A reimbursement so in effect it recovers 47.5 percent, less commission, of its maintenance expense which is roughly equivalent to the 50 percent credit that KMSI is getting on the other side.

MR. MARCUS: I actually think the 47.5 percent is net

of the commission.

THE COURT: Well, we'll have to --

MR. MARCUS: Maybe I'm wrong.

THE COURT: -- maybe you'll have to put some evidence on. I'm looking at the chart in Mr. Fagone's brief on page seven and I'm not sure that that's the way it's reflected.

MR. MARCUS: Actually I think that's right. I think it's net of the commission.

THE COURT: It -- my understanding, and I'd like you and Mr. Fagone to -- or your witnesses tell me otherwise, is that the commission under the arrangement is paid by the Debtor/Trustee.

MR. MARCUS: That's correct, Your Honor.

THE COURT: Is that -- Mr. Fagone is that true?

MR. FAGONE: Yes, Your Honor.

MR. MARCUS: I stand corrected.

MR. FAGONE: Yes, Your Honor.

THE COURT: All right. So it's 52.5 to KMSI. Is that KMSI or KMSI.

MR. MARCUS: KMSI.

THE COURT: KMSI and 47.5 less commission by the Debtor. Is the commission a flat rate or a sliding scale?

MR. MARCUS: I believe it's a percentage.

THE COURT: I know it's a percentage. Is it a fixed percentage?

MR. MARCUS: I believe it is.

MR. FAGONE: We're prepared to address this in the evidentiary part, but I believe it's a specified percentage that's fixed and graduated as to certain levels --

THE COURT: That -- that --

MR. FAGONE: -- in this case it's fixed.

THE COURT: -- and that's why it's hard to follow in your chart numerically because you have to know what that trip point is. Okay. Thank you. Go ahead.

MR. MARCUS: What's important is it all --

THE COURT: Anything else you want to know about your case?

MR. MARCUS: Yeah. Yeah, well, here's what I know about the case. It's $490,000. That's the -- that's the -- that's the number we're arguing about.

THE COURT: And the 490 is the money paid by KMSI to the Trustee which Wheeling has put a hold on because Wheeling claims it has its collateral under its line of credit.

MR. MARCUS: Correct.

THE COURT: Okay.

MR. MARCUS: That's right. Okay. So now on the collateral point, the stipulated exhibits, and now I'm referring to Trustee's 1, which was the note, Trustee's 2, the security agreement, Trustee's 4, which is the UCC-1, Wheeling Exhibit 3, which is a complete UCC-11 on this Debtor. Those

are the documents that establish Wheeling's security interest in collateral which includes accounts, payment intangibles and other rights to payment. And to cut to the chase quickly we contend, and the evidence will show, that the TMA constitutes an account or it might be a payment intangible, clearly creates a right to payment.

The evidence will show, and this is stipulated Exhibit -- Trustee's Exhibit 7, that the money received by the Trustee are proceeds from that contract in which Wheeling has a lien.

THE COURT: Let me ask you a question, and this will come out in the evidence, but proceeds of that contract, I want to be clear, they are proceeds of the contract or they're proceeds of something else pursuant to the contract? What is the understanding that you want me to have and if it is something else I want to know what something else is?

MR. MARCUS: Well, the understanding I'd like the Court to have is that they are payments made by KMSI pursuant to and within the meaning and the terms of the contract.

THE COURT: Thank you.

MR. MARCUS: And as such, we contend that they are proceeds because they're proceeds the lien survives under Section 552(b)(1), notwithstanding the fact that these proceeds were received post-filing.

Moreover we believe that established First Circuit

law makes it clear that even proceeds that are -- that arise and that are earned by a Debtor after a bankruptcy filing, nevertheless are proceeds and are to be treated as such pursuant to a pre-petition contract (inaudible) of a secured lender's collateral. That's the Schlichtmann case that we quoted in our materials. Schlichtmann made it clear that post-filing performance by a Debtor that create proceeds nevertheless were proceeds of a pre-petition contract, prepetition security interest in the contract and (inaudible) the secured creditor (inaudible) --

THE COURT: That was the case of a contingent fee recovered by a lawyer who used to be a member of a firm that had a contingent fee --

MR. MARCUS: Correct.

THE COURT: -- agreement and he got it three years later and the bank said it's mine and the court agreed.

MR. MARCUS: That's correct.

THE COURT: Yes.

MR. MARCUS: And as the Court knows from reading our memorandum that's true in the Seventh Circuit, the Eighth Circuit, the Fourth Circuit and a whole bunch of other ones. So our prima facie case is very simply that the TMA is an account, the payments made, $490,000, are proceeds. They are payments made under that contract, under that account. Wheeling had a valid effective first priority security interest

in that account. It was first. The UCC-11 shows it's first and it is entitled to the proceeds and I do -- that's our prima facie case, which I'm going to address in my presentation.

Now, I understand that the Trustee may assert equitable defense and we'd like to reserve the right for rebuttal --

THE COURT: Well, when you say equitable defense let's be clear, it's statutory defense which raises the equities in the bottom of 552(b)(1).

MR. MARCUS: Yes. We understand that the Trustee will argue that --

THE COURT: He's not looking for equity. He's looking for the application of equity pursuant to the statute.

MR. MARCUS: That's a better way of saying it. So we will -- that will not be our prima facie case, but I'd like to reserve the right to rebut that case to the extent that it's made.

THE COURT: Reserved.

MR. MARCUS: All right. Now, with that being said, I'd like to turn the podium over to Mr. Rosenthal who will examine the witness.

THE COURT: Thank you, Mr. Marcus.

MR. MARCUS: Thank you.

THE COURT: Mr. Fagone, your right to opening is reserved. If you want to give it now I'll hear it or you can

reserve it for when you deliver your testimony.

MR. FAGONE: I'd like to give it now, if Your Honor would hear it now.

THE COURT: That's fine.

MR. FAGONE: Thank you, Your Honor. On behalf of the Trustee, like Mr. Marcus I'll try to be brief. His client's position --

THE COURT: He was brief. Okay.

MR. FAGONE: I'll be as brief as he was. His client's position in this case is elegantly simple, has some surface appeal to it. This matter is more complicated than he makes it out to be. We don't relish the complexity but this is what we have to deal with.

We believe it's Mr. Marcus' client's burden to prove not on an interest in the $490,000 that's in escrow, but the extent of that interest. We don't think he can do that. We think the money is -- was obtained by the Trustee from a fictional assignment of real estate for purposes of the tax code. There was -- there is no dispute that Wheeling does not have a lien on real estate. Wheeling's filing of a financing statement was insufficient as a matter of law --

THE COURT: Hold on. Hold on. Hold on. Let me see if I can make it even quicker. What you are saying is that this is, in effect, proceeds of the Trustee's real estate.

MR. FAGONE: Of a fictional assignment of real estate

for tax purposes, yes.

THE COURT: Okay. What --

MR. FAGONE: Obviously no legal or equitable --

THE COURT: Well, hold on. Hold on. You see, that's -- I'm not mincing words with you. If it's proceeds of a fictional assignment, that fictional assignment is Mr. Marcus' TMA. If it's proceeds of the tracks then you're saying there's no mortgage on the tracks. Which is it that you're saying?

MR. FAGONE: I'm saying the former but I don't agree that Mr. Marcus' claim doesn't have a lien on the proceeds of a fictional assignment. When we get -- I just want to preview the argument for you, Your Honor, and then we'll have evidence that supports all of this. Okay?

THE COURT: But I want to make sure that I understand it and I want to make sure you understand it.

MR. FAGONE: I do.

THE COURT: Okay.

MR. FAGONE: So we don't think that the money that's sitting here is proceeds of collateral in which Mr. Marcus' client had a perfected security interest on the petition date.

THE COURT: Okay. Stop there. What -- is proceeds of what collateral or it's not proceeds of any collateral? What is it?

MR. FAGONE: I think it's proceeds of --

THE COURT: I should -- let me rephrase that --

property rather than collateral because you're saying it's -- the property is not collateral. What is it proceeds of?

MR. FAGONE: It is proceeds of the post-petition assignment of real estate for tax purposes.

THE COURT: Okay.

MR. FAGONE: Alternatively, if it is proceeds of the contract, as Wheeling argues, that's not enough. Wheeling -- let me just --

THE COURT: What's the distinction between the two? How do you -- I accept, for the sake of discussion, it's a fictional arrangement for tax purposes, but that's embodied in a contract, is it not? It wouldn't exist outside of the TMA, would it?

MR. FAGONE: That's true. It wouldn't -- it wouldn't -- it would not exist outside the TMA and we've cited case law for the idea that you can't convert a lien that you don't have into a lien that you do have by simply stuffing an agreement between the collateral and the money.

THE COURT: I think that that's probably true. Even Mr. Marcus wouldn't quibble on that. But what you're saying, then, is that this is -- somehow this is proceeds of tracks?

MR. FAGONE: Proceeds of a hypothetical assignment of tracks for tax purposes, yes. But I don't want to get bogged down in this detail right here, Your Honor. Let me see if I can --

THE COURT: Well, I -- it's worthy of getting bogged down because I see it as the crux of the case.

MR. FAGONE: It is the crux of -- it is the crux of part of the case but let me see if I can move on to a different part.

Even if, as Mr. Marcus suggests, this money is the proceeds of a contract, that's not enough for him to carry his burden. He needs to prove that he had a perfected security interest in the money. The only way he can do that is to establish, first, that he Debtor had rights in the contract on August 7th --

THE COURT: Now we're getting to that -- we're getting to the vesting of the credits.

MR. FAGONE: Yes.

THE COURT: So get to the vesting of the credits.

MR. FAGONE: The evidence will show, Your Honor, that on August 7th MMA did not have the right to demand payment of the $490,000 from KMSI under the contract. It had not met its contractual preconditions. It had not made the expenditures. It had not made the certifications. In fact, KMSI wasn't willing to undertake these transactions until it knew that MMA would own the track as of December 31, 2013. That's important for tax purposes. Okay.

THE COURT: Otherwise the whole thing evaporates.

MR. FAGONE: Otherwise the whole thing is off. So

KMSI would not have given any money to the Debtor and wouldn't have been contractually obligated to give any money to the MMA on August 7th. That's a key fact. That --

THE COURT: Well, stop for a second.

MR. FAGONE: Yeah.

THE COURT: When was the contract entered?

MR. FAGONE: April of 2013, Your Honor.

THE COURT: Okay. Are we not talking about a condition subsequent or are we not talking about a contract that was entered into subject to condition? If the conditions are met certain things happen. If the conditions aren't met other things happen, but the contract predates the conditions, does it not, Mr. Fagone?

MR. FAGONE: The contract was executed in April of 2013. The fact that MMA may have had an expectation or even a hope that it could have gotten the money, doesn't mean that MMA had rights in the contract on August 7th.

THE COURT: Well it may have -- it may have had rights in a contract that wasn't worth very much.

MR. FAGONE: That would be important in determining the extent of Mr. Marcus' client's security interest then.

THE COURT: Not necessarily but I understand your point. My point is this. I have uncertainty, and you're going to improve on this through your evidence or I'm going to read the documents that you've submitted or whatever, and I'm going

to determine, one way or the other, either there was a contract that became increasingly valuable or there was no contract until value attached. I don't know. You're saying that there really was nothing of value to attach until there was something of value.

MR. FAGONE: Yeah, I'm making a very specific technical argument under UCC, Your Honor. What I'm saying is on August 7th it's our view that MMA didn't have sufficient rights in the contact such that Wheeling's interest could attach at that time. That's our argument.

THE COURT: I understand what all of that means and your reason is?

MR. FAGONE: My reason is that on that date it hadn't made the expenditures. It hadn't made the certifications and the assignments had not occurred. So it's not as if we could have, on August 7th, turned to KMSI and said pay us $490,000 and we would have been legally entitled to that. We weren't.

THE COURT: What about, you know, just a simple line of credit between a bank and a manufacturing plant and, you know, monies advanced or not advanced and the production hasn't started and the goods haven't been sold? There's no security agreement in the meantime? Is there a value there? What --

MR. FAGONE: No.

THE COURT: No?

MR. FAGONE: I understand Your Honor's question. I

don't think that's right. The difference is that in order for a security interest to be enforceable three conditions have to be met. Value has to be given.

THE COURT: Uh-huh.

MR. FAGONE: The security agreement needs to be authenticated.

THE COURT: Uh-huh.

MR. FAGONE: The debtor must have rights in the collateral. In Your Honor's example, if the manufacturing company obtains a line of credit, grants a security interest, authenticates a security agreement, the lender extends credit or, you know, makes other financial accommodations, value's been given, security agreement has been authenticated and the stuff that the debtor owns at the time it has rights in the security interest attaches.

THE COURT: And why wouldn't the stuff include the TMA?

MR. FAGONE: Because, and we've cited a bunch of cases in our brief, if it's an account, as Mr. Marcus says it is, there's a whole line of cases that say you don't have rights in an account until you're legally entitled to get the money and we weren't legally entitled to get the money on August 7th. In other words, we hadn't -- to keep with the manufacturing analogy, we hadn't shipped the goods on August 7th. We weren't entitled to turn to KMSI and say pay us on

August 7th.

In our view that means that there was no perfected security interest.

THE COURT: I hear you.

MR. FAGONE: All of that aside, Your Honor, if the Court views the -- what I've come to think of as the base collateral, if you view the base collateral as real estate or a hypothetical assignment of real estate or the contract, either way Wheeling's argument depends on a finding that the money that's sitting in escrow constitutes proceeds. We don't --- I'm not so sure that's right. We're willing to indulge that assumption because once you get --

THE COURT: I understand. You're not waiving the argument.

MR. FAGONE: Yup.

THE COURT: But what you're saying is that with respect to the track, there was no lien on the track but there may have been, giving them the benefit of the doubt without admitting anything, a contract but these were not proceeds of that contract.

MR. FAGONE: No security interest in the contract because it wasn't perfected and these aren't proceeds of the contract. Assume I lose those arguments. Assume the Court's not persuaded. What that means is we are left in a situation where the Court has the ability to consider, under the equities

provision of Section 552(b) --

THE COURT: You came to that too quickly, Mr. Fagone. I'm beginning to doubt your earlier arguments. Go ahead.

MR. FAGONE: Well, this is my opening, Your Honor. I'm -- I hope I get a chance at a closing once you hear the evidence. Okay.

We think, notwithstanding all of the simple arguments that Wheeling has made here, that the Court can and should consider the fact that the expenditures giving rise to the payments that produced the $490,000 were made from a variety of sources. The evidence will show that over half of those cash receipts came from a source that we don't think Wheeling has a valid security interest in.

THE COURT: Pre-filing or post-filing?

MR. FAGONE: Pre-filing. Post-filing up until October 18th when the Trustee began using the Camden line of credit, expenditures were made. Those expenditures, from the petition date to October 18th, were also made from a variety of sources, some of which Wheeling doesn't have a perfected security interest in.

After October 18 the evidence will show that MMA has not used Wheeling's accounts receivable. All we've been using is its inventory and we've been paying for it in the ordinary course.

The evidence -- we believe reasonable inferences from

the evidence the Court will hear today that --

THE COURT: Excuse me. When you say using you're talking about for maintenance.

MR. FAGONE: For any purpose.

THE COURT: For any purpose. Okay.

MR. FAGONE: After, I believe October 18, Your Honor, we've been operating --

THE COURT: On the Camden line.

MR. FAGONE: -- yeah, pursuant to a stipulated cash collateral order where we remit proceeds to Wheeling -- yeah. Yeah.

I think the reasonable inferences will show that if there had been no bankruptcy, if MMA had simply shut its doors on August 7th, Wheeling would have been worse off than it is here today. Wheeling -- there would have been no post-petition certifications. There would have been no $490,000. There would have been no collateral. All of this against what we believe will be evidence that shows that Wheeling never really counted on this as collateral in the first instance.

Wheeling was making loans to MMA based on an ordinary asset-based facility with trade accounts receivable and inventory. So at the end of -- and this money came about through no effort of Wheeling. It came about entirely because MMA and its management team and the Trustee and his professionals were able to persuade KMSI to perform. Okay.

We think what all of that means, Your Honor, is that the Court should weight the equities and determine that the Trustee can use the money that limit -- to limit Wheeling's security interest in the money as proceeds so that the Trustee can operate the business between now and the closing of a sale that this Court authorized this morning. That's what we think the evidence will show.

THE COURT: Okay. I think what you're telling me is, first, they have no interest but if they do have an interest, 552(b)(1) will permit the Estate to keep all or a portion of it. Okay. I get that.

But where you left me hanging was whether or not Wheeling keeps an interest in it or it's -- you're saying that under any scenario, even if Wheeling has a perfected security agreement, the equities would prevent it from receiving any portion of the 490.

MR. FAGONE: Let me see if I can answer that with precision.

THE COURT: You didn't the first time.

MR. FAGONE: No.

THE COURT: That's why I'm asking the question.

MR. FAGONE: I understand and I appreciate that.

We view the 552(b)(1) equities provision as operating to prevent a security interest from attaching to proceeds. So in other words, we think the legal operation of the statute is

to preclude a pre-petition security interest from attaching to proceeds that are obtained post-petition. So I -- now, we will argue that the Court should weigh the equities such that the security interest attaches to none of the $490,000.

THE COURT: How do I do that if 552(b)(1) relates to post-petition conduct and some of the proceeds are attributable to pre-petition?

MR. FAGONE: I -- we don't see 552(b) as so limited, Your Honor.

THE COURT: Okay.

MR. FAGONE: I think -- well, the -- Mr. Marcus referred to First Circuit authority. You -- there's a -- we have a different view of the Schlichtmann case and I'll talk with you about that when you're ready. There's also a case called Cross Baking where the First Circuit held that if something is
post-petition property, the equities provision cannot apply to it as a matter of law. It simply can't.

THE COURT: It's not a question of equities. It just doesn't attach. It's just not there.

MR. FAGONE: It's -- it is a question of applying the plain language of the statute which says the Court can, based on the equities, adjust a security interest in proceeds.

THE COURT: All right.

MR. FAGONE: So if it's not proceeds, if on the other

hand it's post-petition property --

THE COURT: But you're conflating all of this together so I want to -- so if it's not proceeds we don't have to worry about anything. You win. Okay. If it's -- if it is proceeds it seems to me that 552(b)(1) equities provision is talking about the Court using the equities of the case to limit the recovery of proceeds that it might otherwise have a full legal interest in.

MR. FAGONE: Absolutely, Your Honor.

THE COURT: Okay.

MR. FAGONE: Correct.

THE COURT: And what I'm asking based -- your remark, the reason -- what prompted this question was your remark suggested to me that the equities would wipe out any claim that Wheeling had to any of it and that's where you lost me.

MR. FAGONE: No, but I -- that's what I think is right. I don't think that --

THE COURT: And any of the 490 or any of the post-October 18 or any of the post-filing, I don't know any of it, any of it.

MR. FAGONE: We're not aware of any case law that suggests that the Court's ability to --

THE COURT: I'm not limited to the case law, am I?

MR. FAGONE: No.

THE COURT: Okay.

MR. FAGONE: Well, okay. Let's start with the plain language of the statute --

THE COURT: All right.

MR. FAGONE: -- which I think is where you should start. The statute does not say that in evaluating the equities the Court can only consider post-petition activity. It doesn't say that and there's no case law that says that.

THE COURT: Okay. I'm listening to you. Go ahead.

MR. FAGONE: Okay. So in our view, Your Honor, the evidence will show that the equities tilt toward precluding Wheeling's security interest from attaching to any of the $490,000. To any of it.

THE COURT: Well, I beg to differ with you. The whole purpose of 552(b)(1), Mr. Fagone, is to extend pre-filing arrangements post-filing and they are so extended. And then there's a proviso that says except to any extent that the Court, after notice and hearing and based on the equity of the case, orders otherwise.

MR. FAGONE: That's right.

THE COURT: All right.

MR. FAGONE: What we're talking about, Your Honor, is $490,000 that was not MMA's possession on August 7th. MMA wasn't entitled to $490,000 on August 7th. Under Wheeling's theory of the case, 100 percent of that $490,000 is proceeds and once it's proceeds, under Cross Baking, the Court is

entitled to limit the security interest based on the Court's evaluation of the equities and we think there's a compelling case to deny the attachment of the security interest.

THE COURT: Okay.

MR. FAGONE: Thank you.

THE COURT: Thank you very much, Mr. Fagone, and I'm sorry I gave you such a hard time.

MR. FAGONE: I didn't perceive it that way, Your Honor.

THE COURT: Mr. Marcus or Mr. Rosenthal or Mr. Someone?

MR. ROSENTHAL: Thank you, Your Honor. Wheeling calls Don Gardner.

THE CLERK: Hi. Please raise your right hand. Do you solemnly swear that the testimony you are about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated and state your name for the record.

THE WITNESS: It's Donald Gardner.

THE COURT: Good afternoon, Mr. Gardner.

THE WITNESS: How do you do?

TESTIMONY OF DONALD GARDNER, WHO WAS CALLED AS A WITNESS, HAVING FIRST BEEN DULY SWORN,

WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION OF DONALD GARDNER

BY MR. ROSENTHAL:

Q: Good afternoon, Mr. Gardner.

A: How are you?

Q: I'm fine thanks. How are you?

A: Fine, thanks.

Q: Can you tell us, sir, by whom are you employed?

A: Montreal, Maine & Atlantic Railroad.

Q: Okay. Are you employed by the entity known as the Maine -- Montreal, Maine & Atlantic Railway, Limited?

A: Yes.

Q: Okay. And that is a Delaware Corporation?

A: Yes.

Q: What position do you hold?

A: I am the financial officer or vice president. Vice President of Administration and CFO.

Q: Okay. Do you also hold that position, and I'm going to refer to that entity that we talked about as the Debtor. I'm going to try to do that today.

A: Fair enough.

Q: Okay. I forgot to ask you, how long have you held that position, sir?

A: A little over five years.

Q: Okay.

A: July of 2008, I joined.
Q: And do you also hold that position for an entity called Montreal, Maine & Atlantic Canada Company?
A: Yes.
Q: And is that an entity that provides services to customers in Canada?
A: Correct.
Q: Do you also hold the positions you described for a company called MMA Corporation?
A: Yes.
Q: And of those entities all operated on an integrated basis in Hermon, Maine?
A: Essentially, yes.
Q: Okay. And so the services that you provide, do you provide those same services for all of those entities?
A: Yes.
Q: And you provide them in the same place.
A: Yes.
Q: Which is in Hermon.
A: Correct.
Q: And is that true for all of the accounting services that are provided to those entities?
A: Yes.
Q: I'm going to move along and I'm going to try to save a little bit of time by asking you, are you familiar with

the payment of $490,000 by KMSI to the Debtor that we're here talking about today?

A: Yes.

Q: And you're familiar, are you, with the certification by MMA, the Debtor, of expenditures that led to those payments?

A: I am.

Q: And are you familiar with the expenditures that underlie the certification?

A: I am.

Q: Okay. I'd ask you to flip -- there's a manila folder in front of you and it's got a number of exhibits in it and just so that we can see it would you turn to Exhibit -- it's marked Trustee's No. 7?

A: Yes.

Q: And that, because it's been admitted I'm going to save a couple questions here, but is that the certification and let me ask you a better question, actually, is that two certifications of expenditures to KMSI by the Debtor?

A: Yes.

Q: And so these are -- the first four pages are one certification and the last four pages are another. Is that correct?

A: That's correct.

Q: And are these the two certifications that when you apply

the 52½ percent math and back out a commission that lead us to the $490,000 that we're here on today?

A: That is right.

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: And that's U.S. track.

A: Yes. In the United States.

Q: Yes. What was the Debtor's purpose in making these repairs?

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

Q: Running the railroad during the ordinary course of business.

A: It's ordinary course maintenance. It can be snow removal as part of the maintenance program. Replacing --

Q: And is there a --

A: -- track, fixing switches.

Q: Is there a safety component to that work?

A: Certainly.

Q: So 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 on the track profitably and safely.

A: Yes.

Q: Okay. How did the Debtor determine how much to spend on those items?

A: It's a process that is formed at the beginning of the year, essentially, where we build a budget, an annual budget of expenditures, headcount, people who are actually on the ground making the repairs and doing the maintenance as well as other out-of-pocket expenses for rail or switches or whatever other products, including some rail testing that was done as to measurements and things of that nature.

Q: Is that an historical process that the Debtor undertakes?

A: It's generally an annual process where we plan a budget and plan our operation for a 12-month period.

Q: Okay. What consequences, if any, might MMA have faced if it didn't incur these expenditures?

A: Well, track failure of some type and derailments, inability to provide the service that the company intends to provide.

Q: Is there a regulatory component? Is someone watching the condition of the track?

A: Yes. FRA makes inspections and in Canada they make inspections and make recommendations.

Q: So -- and the FRA is the Federal Railroad Administration.

A: Yes.

Q: And if they find something that's not up to snuff are they

able to pose some consequences as a result of that?

A: They will issue orders to -- for us to repair or slow us down or do things of that nature.

Q: And if you're ordered to slow down, can that have business consequences?

A: Certainly.

Q: Like, you're ordered to stop altogether. I take it that would have business consequences.

A: That's a very serious consequence.

Q: In undertaking the expenditures or incurring the expenditures that are at issue here, did the Debtor have any motivation to help KMSI in any way?

A: No.

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

A: Yes.

Q: Was it performed -- let me ask you this. Would it have been performed regardless of the availability of tax credits?

A: Part of the -- yes, it would have been.

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

A: Yes.

Q: Now, have there been expenditures that the debtor incurred and certified and received payment for earlier in 2013 beyond these two certifications?

A: Yes. There was two others.
Q: And is the process of determining what work to be done and why it would be done that we talked about, that's the same process followed with respect to those earlier certifications?
A: Yes.
Q: And in fact, in Exhibit 7 there is a reflection of the earlier certifications, I believe, on page three.
A: Correct.
Q: So that spreadsheet, and actually if you turn to the second to last page, is that a spreadsheet that you prepared?
A: Yes.
Q: And under KMSI funding number 1, does that show the first certification and payment by KMSI of expenditures?
A: Excuse me. Yes.
Q: KMSI-2 would be the second.
A: Uh-huh.
Q: And those two were both before August 7th.
A: Yes.
Q: Okay. And then the next two are the two that give rise to the 490 that we're here on today.
A: Correct.
Q: Is that right?
A: Those were the actual payments received by MMA from KMSI.

Q: Okay. Now, backing up a step, the process of either claiming tax credits or assigning the right to someone else to do that in exchange for cash, is that something that the Debtor had done in years prior to 2013?

A: Yes.

Q: And was that done in the ordinary course of business?

A: Yes.

Q: In fact, would looking for and trying to claim any tax credits that are out there, that's something that you would do in the ordinary course of business.

A: Ordinarily, yes.

Q: Okay. Let me ask you, Mr. Gardner, would it be fair to say that you considered that the certification of expenditures to KMSI that we've been talking about here, is that something that you consider to be done pursuant to the track maintenance agreement?

A; Yes.

Q: Okay. I mean, the track maintenance agreement is why you would be certifying expenditures.

A: Uh-huh.

Q: Okay. And would the same be true of KMSI paying the money based on the certification that you provided to them?

A: Yes.

Q: And let me ask you to point in the pile of exhibits, ask you to look at Trustee's Exhibit 10. And on the first

page this is an email exchange between you and Mr. Nicholson at KMSI. Is that correct?

A: Uh-huh.

Q: I'm sorry. He's the broker. Is that right?

A: Correct.

Q: Yup. And in the bottom portion it's an email from you to Mr. Nicholson on August 27th of 2013. Right?

A: Yes.

Q: And say to him, Mark, now that we are operating under the protection of Bankruptcy Court I would like to have Koch consider continuing the funding of our current year agreement." Is Koch KMSI?

A: Yes.

Q: And so on August 27th when you are talking to Mr. Nicholson here about proceeding under the agreement, is that the TMA?

A: Correct.

Q: Okay. So as far as you were concerned after August 7th your dealings with KMSI in terms of certifying and getting paid for expenditures are pursuant to the track maintenance agreement.

A: Yes.

Q: Okay.

MR. ROSENTHAL: If I could just have a brief moment, Your Honor.

THE COURT: Sure.

MR. ROSENTHAL: Right now we have nothing further. Thank you.

THE COURT: Thank you, Mr. Rosenthal. Cross-examination?

MR. FAGONE: Yes, Your Honor.

CROSS-EXAMINATION OF DONALD GARDNER

BY MR. FAGONE:

Q: Good afternoon --

MR. MARCUS: I'm sorry to interrupt but should I interpret this as being the presentation of the Trustee's main case or is that reserved and it simply goes to whether we'll be rebutting next or what we'll be doing?

MR. FAGONE: I was going to do my part all at once, if that's okay.

MR. MARCUS: (Inaudible) I just want to know what the program was.

THE COURT: All right. Well, I think he's told you that your limited in your scope if you do this under cross but I suspect that it's broad enough and we'll hear from Mr. Marcus if you overstep your bounds and I'll rule if it's necessary. But then Mr. Marcus will have an opportunity to -- we can either call it redirect or cross, but he's going to have an opportunity. Correct?

MR. FAGONE: Sure.

THE COURT: Okay?

MR. FAGONE: How ever --

THE COURT: That work for you?

MR. FAGONE: Yes.

THE COURT: All right.

MR. FAGONE: Whatever we want to call it. I just --

THE COURT: We can call it whatever we want to call it. All right.

MR. FAGONE: I just want to elicit some testimony.

THE COURT: All right. Thank you. And I will explain for the transcript just in case this is reviewed at a later time. The concern here is how the lawyers may expedite the submission of evidence and we could limit Mr. Fagone to cross and allow him to call Mr. Gardner on his direct case in a few minutes or we can let him do it all now. We're going to let him do it all now and if there are issues along the way of a technical sort, Mr. Marcus, you'll raise them and you'll respond, Mr. Fagone. Go ahead, Mr. Fagone.

MR. FAGONE: Thank you, Your Honor.

CROSS-EXAMINATION BY MR. FAGONE:

Q: Good afternoon, Mr. Gardner.

A: Good afternoon.

Q: Do you know a person named Larry Parsons?

A: Yes.

Q: Who is he?

A: He's the President and CEO of the Wheeling & Lake Erie Railroad.

Q: Okay. Does he have any other roles that you're aware of?

A: The other role is he was a -- on the board of directors of the Montreal, Maine & Atlantic Railroad.

Q: To your knowledge, is he still on the board of the MMA?

A: He is, as far as I know.

Q: Okay. Do you also -- the CEO of Wheeling & Lake Erie Railroad is also on the Debtor's Board of Directors.

A: Yes.

Q: Okay. Now are you also familiar with a person named Ed Burkhardt?

A: Yes.

Q: And who is he?

A: He is the Chairman of the Board of the Montreal, Maine & Atlantic Railroad.

Q: Okay. And is Mr. Burkhardt still on the board of directors of the railroad?

A: As far as I know, yes.

Q: Okay. Is Mr. Burkhardt on the board of the Wheeling & Lake Erie Railroad?

A: Yes, sir.

Q: Okay. So Mr. Parsons is on the MMA board and Mr. Burkhardt is on the Wheeling board.

A: Yes.

Q: Okay. Is Wheeling a bank?

A: No. They're a railroad.

Q: Okay. I think you testified on examination by Mr. Rosenthal that you're the Chief Financial Officer of the Debtor. Is that correct?

A: Yes.

Q: Could you just, very briefly, describe for the Court what that entails?

A: Depending -- over a period of time it has been, (a), keeping the books and records for the Debtor, obtaining and maintaining financial resources or financing, doing planning, forecasting, budgeting, general operations and purchasing.

Q: Before you came to work at Montreal, Maine & Atlantic a little over five years ago --

A: Uh-huh.

Q: -- were you involved in other similar financial management positions?

A: Yes. I have been for 20 plus years, 25, 30.

Q: Would you describe, in excruciating detail, all 25 of the -- no I withdraw that question. Is it part of your regular responsibility, as the senior financial officer of the railroad, to communicate with the Board of Directors periodically?

A: Yes. They were routine, quarterly board meetings for

which I prepared a summary of the most recent quarter results, as well as a -- what I called a rolling forecast of the next four quarters.

Q: Did Mr. Burkhardt routinely attend those meetings?

A: Certainly.

Q: Did Mr. Parsons?

A: He did.

Q: Mr. Gardner, take a look, if you would, at the document in the folder there that's been marked as Trustee's Exhibit 1. This is a line of credit note.

A: Yes.

Q: Are you familiar with this note?

A: I am.

Q: Okay. Can you briefly describe how this line of credit note works?

A: It was a note set up as a revolver or a traditional a asset-based type of line of credit whereby we borrowed up to a maximum of the six million dollars limited by receivables -- a formula of receivables and a formula of inventory.

Q: So when Wheeling -- I'm going to refer to it as Wheeling for convenience -- when Wheeling accepted this note from MMA, it established a revolving credit facility --

A: Yes.

Q: -- whereby money could be borrowed.

A: Correct.

Q: Okay. Take a look at Trustee's Exhibit 2, please. That's the --

THE COURT: Excuse me. Mr. Fagone, would you ask him to just clarify, it's a formula according to accounts receivables and what else?

MR. FAGONE: I believe he said inventory, Your Honor, but I'm going to get to that in some more detail --

THE COURT: Okay. Thank you.

MR. FAGONE: -- if I just ask you to hang with me.

CROSS-EXAMINATION BY MR. FAGONE:

Q: Mr. Gardner, Trustee's Exhibit 2 is a security agreement --

A: Yes.

Q: -- that's been admitted into evidence. Do you recognize this as the document whereby the Debtor and some other entities granted security interest --

A: Yes.

Q: -- to Wheeling?

A: Yes.

Q: Okay. Look, if you would, at page two of Trustee's Exhibit 2.

A: Uh-huh.

Q: Do you see the section entitled Collateral, section number 2?

A: Yes.
Q: Okay. And is it your understanding, Mr. Gardner, that Wheeling and Wheeling's collateral is limited to that which is described in this Section 2?
A: Yes.
Q: Are there any other security agreements or mortgages or other documents that the Debtor signed in connection with this line of credit?
A: I do not believe so, no.
Q: If there were any would you be aware of them?
A: I would think so, yes.
Q: Okay.
A: I signed both of these.
Q: Okay. So how is the amount of money that would be made available to MMA under this line of credit note determined?
A: Simplistically, it was 80 percent of our accounts receivable and 50 percent of our inventory which is, in my career, has been a traditional banking approach although inventory has been a varied number, let's put it that way. The rate at which a bank would advance funds against inventory is a varied number.
Q: Sometimes called an advance rate.
A: Advance rate. Yes.
Q: And the amount of the advance rate will vary based on the

category of asset that is involved.

A: That's right.

Q: Okay. Did MMA ever report the amount of available collateral to Wheeling?

A: We reported each month at the end of the month what was available. We did the computation as to what was available in terms of receivables, eligible or ineligible, less ineligible receivables and then made the application or the advance rate which in this case was 80 percent of eligible, computed the formula, deducted the loan and either had an excess or -- we always had excess availability.

Q: Okay. So is it fair to say that the amount of money that Wheeling was willing to make available to MMA depended on the amount and type of collateral that was available.

A: Yes.

Q: Okay. Look at Trustee's Exhibit 3, please.

A: Yes.

Q: Do you recognize this as an email that you sent to Mike Mokodean --

A: Yes.

Q: -- on July 31st of this -- of last year?

A: Yes. He was the financial officer for Wheeling.

Q: Okay. And you say to him, "Here is June for now." What are you referring to.

A: I think further down you see he requested June and July.
Q: I'm sorry, June and July what?
A: Borrowing base -- excuse me -- borrowing base as computed as of the end of June and as of the end of July.
Q: I see. So if I flip to the second page of the exhibit do I see the borrowing base certificate that you intended to transmit to Mr. Mokodean on July 31 of 2013?
A: Yes.
Q: 2013?
A: That is what I conveyed to him.
Q: All right. So let's focus on that second page for a minute. Do you see letter (a), Total Receivables?
A: Correct.
Q: In the amount of approximately $9.584 million.
A: Correct.
Q: You see that number?
A: Yes.
Q: How was that number computed?
A: That was an amalgamation of our various accounts, trade -- trade accounts receivable either from that which we build, meaning traffic that we had originated, or that which we were going to receive through the Interline Settlement Agreement which had been billed by a -- another railroad but was owed to the MMA.
Q: Okay. For a commercial and bankruptcy lawyer is it -- is

my understanding that that $9.5 million represented trade receivables?

A: Yes.

Q: Sort of receivables from the operation of the railroad.

A: Correct.

Q: Okay. Is any of the money that MMA eventually received from KMSI included in that amount?

A: No.

Q: Okay. Is it included anywhere else on this borrowing base certificate?

A: No.

Q: Is it included on any borrowing base certificate that MMA ever submitted to Wheeling?

A: No.

Q: And if I keep going in the exhibit, the same exhibit, Trustee's Exhibit 3, I'll see another email from you to Mr. Mokodean on May 17 is that right?

A: Yes.

Q: Okay. And is -- at the risk of belaboring things, is this just you transmitting another borrowing base certificate?

A: I believe so.

Q: Okay.

A: Included -- but I also -- I guess in this point I also sent them a financial statement.

Q: Okay. The last page of Trustee's 3 is the borrowing base

--

A: Correct.

Q: -- as of April 30th.

A: That's right.

Q: Computed, again, consistently with the manner you just testified about for the other one.

A: Yes.

Q: Let's talk, for a minute, about the trade accounts receivable. Is it common for MMA to owe money to parties that owe money to MAA for shipping goods?

A: Not as a rule. We may owe to other railroads.

Q: That's what I mean.

A: Okay.

Q: Can you just describe for the Court the circumstances under which MMA might owe to other railroads?

A: In the general course any -- most traffic that we originate we will bill the customer, someone here in Maine, for the entire movement which may be from Millinocket, Maine to Huntington Beach, California. Our portion is a relatively minor part, but we will bill the customer for the full amount of the move and it may be $8,000 to go across country. Our portion may be $500. We will bill the customer $8,000, our portion's $500, therefore, we owe all the other railroads in the route $7,500, as an example.

Q: So it's common, then, that MMA may owe another railroad for a shipment that went over its line --

A: Correct.

A: And that other railroad may owe MMA for a shipment that went over MMA's line that the other railroad billed to its customer.

A: Correct.

Q: Is that right?

A: Yes.

Q: Did MMA draw on the Wheeling line of credit after August 7th?

A: No.

Q: Why not?

A: We had, I believe at the end of July, maximized the line. We had drawn the full six million dollars.

Q: So there was no more availability after August 7th.

A: There may have been more availability but the line maxes six million regardless of our availability.

Q: Understood, so the availability is capped at six million even if there was greater collateral value.

A: Correct.

Q: Okay. Look please, if you would, at Trustee's Exhibit 9.

A: Okay.

Q: Do you recognize this document?

A: Yes.

Q: Did you create this document?
A: I did.
Q: Okay. And it's entitled Cash Receipts from Canadian Customers as a percentage of total cash receipts. Is that right?
A: That's right.
Q: And there's a date range right below that, June 1 to December 31. Do you see that date range?
A: Yes.
Q: Why did you pick that date range when you created this document?
A: That is the period of time over which the 45G certifications were provided. Same period of time.
Q: So that I'm clear, you testified on examination by Mr. Rosenthal about, I think, Trustee's Exhibit 7 which were a couple of certifications.
A: Yes.

THE COURT: Excuse me, please.

MR. FAGONE: Yes.

THE COURT: You're looking at Exhibit 9.

MR. FAGONE: I am, Your Honor. Do you not have one?

THE COURT: I don't have that.

THE WITNESS: Two pieces of paper seemed to stick together right there.

MR. FAGONE: Your Honor, I have one if --

THE COURT: Ah. I do and thank you, Mr. Gardner. That is what happened. Electrostatically (inaudible). Okay. Shocking.

CROSS-EXAMINATION BY MR. FAGONE:

Q: Mr. Gardner, so the certifications that are contained within Trustee's Exhibit 7 --

A: Yes.

Q: -- cover expenditures made between June 1 and December 31 of 2013. Correct?

A: Correct.

Q: So, therefore, when you created Trustee's Exhibit 9 you used that period.

A: I did, yes.

Q: Okay. What are the total cash receipts during that period?

A: There's -- here there are $16,377,000.

Q: And what is -- if you look over at the bottom right-hand corner of the exhibit you see 52.14 percent.

A: Yes.

Q: What is that?

A: That is the percentage of our total cash receipts that were received from Canadian customers.

Q: And some -- so approximately $8.5 million.

A: Yes.

Q: And was some of that $8.5 million used to pay for the

expenditures that are described in Trustee's Exhibit 7?

A: Yes.

Q: A substantial portion of that $8.5 million was used for that, wasn't it?

A: Yes.

Q: Mr. Gardner, since October 18 of last year --

A: Yes.

Q: -- how has the Debtor financed the operation of his business?

A: Primarily from our normal collections but from the line of credit that the Camden National Bank has offered -- provided.

Q: I want to trail down here a bit. After October 18 of last year --

A: Yes.

Q: -- has MMA been using, in the ordinary course of this business, any of the receivables that were created before October 18?

A: No. We've been -- those funds that we've collected we've paid on to the Wheeling.

Q: Okay. So after the 18th, MMA has been remitting proceeds of Wheeling's receivables collateral to Wheeling on a periodic basis.

A: Yes.

Q: How frequently?

A: Weekly. There is -- there is $200,000, though, that one, I'm not sure where that came from, specifically. That was from the proceeds but that was early on.

Q: Okay.

A: And that remains in an escrow account.

Q: So there's $200,000 of Wheeling's pre-October 18 receivables that has been escrowed --

A: Correct.

Q: -- pursuant to an order of the Court.

A: Yes.

Q: And the less of the pre-October 18 receivables in which Wheeling has a perfected security interest have been paid to it.

A: Yes.

Q: And do you have any understanding of how much has been paid to Wheeling?

A: It's about a million dollars.

Q: And since the October 18th, has MMA been using Wheeling's inventory collateral?

A: Yes.

Q: Has it been paying Wheeling for that as --

A: Yes, we have. As it's declined we have paid them for whatever we've used.

Q: And you pay that weekly.

A: We pay that weekly.

Q: Is it fair to say that as of October 18, 2013, MMA stopped using Wheeling's collateral?

A: Yes.

Q: So essentially the company has been living on draws under the Camden National Bank line of credit --

A: Yes.

Q: -- since the 18th.

A: Yes. Or -- or new receivables or new billings that we've created or cash receipts that we've --

Q: But in the short term after the 18th, the company is making draws --

A: Yes.

Q: -- and running the business --

A: Yes.

Q: -- and at some point new receivables started turning over into cash --

A: Yes.

Q: -- and the company's been using those and the Camden line.

A: Correct.

Q: Okay. What's the current principal balance of the Camden Line of Credit?

A: Two million -- almost -- two million five.

Q: So it's $2.5 million and I think you testified the maximum on the Camden line right now is three million.

A: Is three million, yes.

Q: Okay. Based on your experience with the company, will it be able to continue operating in the ordinary course of business between today and the end of March if it only uses the remaining availability on the Camden line and the cash receipts from post-10/18 receivables?

A: No.

Q: Do you think the company will need additional sources of liquidity between now --

A: Yes.

Q: -- and then?

A: Yes.

Q: We talked earlier in this examination where you testified earlier of the trade accounts receivables.

A: Yes.

Q: What would have happened to those receivables if the company simply ceased operating on August 7th instead of filing for bankruptcy?

A: That's difficult to say with any certainty, but I would -- from my experience they would have just disappeared. I mean, the customers would have pretty much ignored it or made claims or just certainly would not have volunteered checks, I'm sure.

Q: Is it sometimes hard to get customers to pay money that's owed to the railroad?

A: Even calling weekly, daily or not daily but weekly and

monthly routines. There is a collection effort.

Q: Sometimes even commencing legal action against customers.

A: In fact, that has been necessary. As long as you're providing a service you have far more leverage than if you stop providing a service because then you -- although lawyers are certainly effective, providing services is --

THE COURT: That's very nice to hear in this Court, Mr. Gardner.

THE WITNESS: Providing a service offers more leveraging in collection matters, it's been my experience.

CROSS-EXAMINATION BY MR. FAGONE:

Q: Okay.

A: If you're needed it's easy.

Q: Are you familiar with Section 45G of the Internal Revenue Code?

A: I am.

Q: Okay. And since you arrived at MMA about five years ago --

A: Yes.

Q: -- has the company been able to utilize the tax credits created by that section?

A: No.

Q: Okay. So if I looked at MMA's tax return, returns plural --

A: Uh-huh.

Q: -- for the period of your tenure, I wouldn't see any tax credits under that section. Correct?
A: You would not.
Q: Okay. Did MMA assign track miles in 2009?
A: Yes.
Q: 2010?
A: Yes.
Q: 2011?
A: Yes.
Q: 2012?
A: Yes. But it was the first week of 2013, but yes.
Q: Why was it in the first week?
A: Because the Senate actually -- it was -- 45G apparently has been part of a tax extender's program in Congress every two years and that was not passed for 2012 and 2013, I don't believe -- sometime early January of 2013.
Q: So from 2009 to 2012 the company assigned its track miles for tax purposes.
A: Yes.
Q: In any of those years did Wheeling demand that the company turn over the money that it received from the assignments?
A: No.
Q: Was Wheeling aware that the company was doing that?
A: I believe so.
Q: Okay. Mr. Parsons was on the board during that time.

Correct?

A: It was always a topic of discussion on the board as it was a -- as it was always an unknown depending on the Senate so --

MR. FAGONE: Just a couple more minutes, Your Honor, I think we can finish with the witness.

CROSS-EXAMINATION BY MR. FAGONE:

Q: Take a look, Mr. Gardner please, at Trustee's Exhibit 6. This is what the parties and the Court have referred to as the TMA.

A: Yes. Okay.

Q: You're familiar with KM Strategic Investments, LLC.

A: Excuse me, yes.

Q: Okay. And you're aware that the Trustee sought authority from the Court to assign track miles to KMSI.

A: I am.

Q: Okay. And are you also aware that the Court entered an order in December of last year authorizing that assignment?

A: I am.

Q: Okay. What did you do after that?

A: Right after the order I prepared the submissions for certification. Well, I compiled the expense, number one, and then, number two, forwarded that with the submissions to Koch or to KMSI.

Q: If you had not sent those certifications to KMSI would MMA have been entitled to money under the TMA?

A: No.

Q: Okay. Did KMSI, in fact, pay the Debtor in accordance with the certifications?

A: Yes, they did.

Q: Okay. And did MMA issue shipping credits to KMSI?

A: We did. Upon receipt of the funds I issued the shipping credits.

Q: And just for the Court's edification, what's a shipping credit?

A: It is a credit, if you will, for they -- for this company, KMSI, to ship product on our rail.

THE COURT: Dollar for dollar.

THE WITNESS: Dollar for dollar.

THE COURT: It's a chit so you don't pay them in cash you pay them for service.

THE WITNESS: In services.

THE COURT: In service. Yes.

THE WITNESS: That's right. In service, yes.

CROSS-EXAMINATION BY MR. FAGONE:

Q: In December of 2013, did KMSI utilize those shipping credits to acquire services from MMA?

A: No, they didn't.

Q: What did MMA do with respect to the shipping credits?

A: We liquidated them or we paid them.

Q: Okay. Look, please, at Trustee's Exhibit --

THE COURT: Do you mind, Mr. Marcus, if I ask Mr. Fagone to --

MR. FAGONE: Move it along?

THE COURT: No.

MR. FAGONE: Oh.

THE COURT: I don't understand what liquidate means. It has many different connotations.

MR. FAGONE: I think the next exhibit I was going to examine the witness so that may help with that, Your Honor. That would be Trustee's Exhibit 8.

THE COURT: Okay. Because I -- you left me hanging with disposition of credits so I just want you to know that. Okay.

MR. FAGONE: Yes. Understood.

THE COURT: Okay. Thank you.

CROSS-EXAMINATION BY MR. FAGONE:

Q: So Mr. Gardner, would you look at Trustee's Exhibit 8, please.

A: Yes.

Q: Did you prepare this?

A: I did.

Q: Okay. Let's just take a minute to look at this together, please. Well, first, what is this?

A: This is a summary of the -- at the very bottom it's a summary of the two -- two expenditures. Basically the $1,117,355 is the total that was paid by KMSI to MMA for the two funding -- for funding three and four.

Q: I see. When you say funding three and four you're referring to Trustee's Exhibit 7, just the certification.

A: Yes.

Q: And the next to last page of that has a table, I believe.

A: Correct. And funding three and four compiled to $1,117,355.

Q: So $1,117,355 is the sum of the eligible expenditures that were certified to Koch in December of last year.

A: Correct.

Q: And did Koch pay that same amount of --

THE COURT: Let's either stick with Koch or --

MR. FAGONE: I'm sorry.

THE COURT: KMSI. Okay.

CROSS-EXAMINATION BY MR. FAGONE:

Q: I'll go with KMSI.

A: KMSI paid the $1,117,355 to MMA.

Q: So if I looked at MMA's books and records I would see incoming payments from KMSI in December that totaled $1.17 --

A: Yes.

Q: -- million.

A: That amount.
Q: Okay.
A: The next column is labeled shipping credit. We issued $586,611 in shipping credits initially and within ten days I wired cash, funds of $586,611.38 which --
Q: Wired it back to KMSI.
A: Back to KMSI paying them for their shipping credits or liquidating. That was my -- that was what my intent or what I meant by it. We paid them cash.
Q: Understood. So moving from left to right on Trustee's Exhibit 8, the column entitled Benefit, is the net benefit or $1.17 minus the $586,000?
A: That's right. That is the benefit to the corporation of selling the tax credits which we retained then we paid, the next column, the $21,230 in commission to Mark Nicholson, leaving the $509 and then the deduction for $19,000 related to the settlement that had been done in December, I believe it was, or anyway that was paid to Wheeling on another matter leaving the $490,000 of which we're speaking.
Q: And where is that $490,000 today?
A: It is in an escrow account at TD Bank.
Q: Are there any other funds in that account?
A: There's the $200,000 that we made reference to earlier.
Q: So the balance of that account is roughly $690,000 today.

A: Yes.
Q: There are no other funds other than those two components?
A: There's nothing else in there.
Q: Okay. So again, just sticking with the far right-hand column that says -- I guess it does say Net Benefit. The first number is $251,661.27. Do you see that?
A: Yes.
Q: And that is the net benefit for the period from June 1 to August 7th, 2013.
A: Yes.
Q: And some of the expenditures that led to that net benefit were paid for by MMA with Canadian receipts. Correct?
A: Correct.
Q: Okay. And then the next number, the $103,719.80, what does that represent?
A: That represents a portion of the track expenditures or track maintenance expenditures that occurred from the 8th of August through to the 17th of October.
Q: Okay. So from the day after the filing until the day before the Camden cutover --
A: Yes.
Q: -- the net benefit is $103,719.80.
A: Correct.
Q: And again, were some of the expenditures that led to the creation of that net benefit funded from Canadian

receivables?

A: Yes, they were.

Q: Okay. And then just to speed things along the last, the $154,132.55, that's the net benefit that the company obtained after -- for the expenditures after October 18. Correct?

A: Correct.

Q: And none of that was created using Wheeling's receivables.

A: Correct.

MR. FAGONE: Just bear with me one second, Your Honor. I don't have anything further with this witness at this moment, Your Honor. I'd like to reserve a few minutes for rebuttal, depending on Mr. Marcus' examination.

THE COURT: Thank you. Yes, Mr. Marcus?

MR. MARCUS: May we take a brief recess?

THE COURT: How brief?

MR. MARCUS: Ten minutes?

THE COURT: Certainly.

MR. MARCUS: Thank you, Your Honor.

PROCEEDINGS RECESSED (January 23, 2012, 2:27 p.m.)

PROCEEDINGS RESUMED (January 23, 2012, 2:43 p.m.)

THE COURT OFFICER: United States Bankruptcy Court is back in session. Please be seated and come to order.

THE COURT: Thank you.

MR. MARCUS: Thank you.

THE COURT: Mr. Marcus?

MR. MARCUS: Yes, Mr. Rosenthal will proceed.

MR. ROSENTHAL: Your Honor, I do have some questions for Mr. Gardner if I may.

THE COURT: You may.

MR. ROSENTHAL: Thank you.

THE COURT: Thank you for your patience, Mr. Gardner. Proceed, Mr. Rosenthal.

REDIRECT EXAMINATION OF DONALD GARDNER

REDIRECT EXAMINATION BY MR. ROSENTHAL:

Q: Mr. Gardner, we talked earlier at the beginning of your testimony about how the operations of the various MMA entities are integrated and run out of Hermon, Maine. Do you recall that.

A: Yes.

Q: When an invoice is sent to a customer in Canada for services provided by MMA --

A: Uh-huh.

Q: -- that invoice is on the letterhead of the Debtor. Isn't that right?

A: Generally.

Q: Okay. The -- and the Debtor is the American entity, right, and not the Canadian entity.

A: Yes.

Q: The Canadian entity doesn't send out separate invoices.

A: I don't believe so, no.
Q: All right. As the CFO, that's something you would know. Right?
A: I should.
Q: And the invoices on the Debtor's letterhead are sent from Hermon.
A: Yes.
Q: To, and again to be clear, these are customers in Canada --
A: Yes.
Q: -- that we're talking about.
A: Uh-huh.
Q: So to the extent that there is something called a Canadian receivable that's being talked about here, that's describing money that would be owed for services provided in Canada.
A: Correct.
Q: And to the extent that an invoice is sent, that's on the American company, the Debtor's letterhead.
A: Correct.
Q: Okay. And those invoices create receivables for the Debtor.
A: Correct.
Q: And they're booked by the Debtor as receivables on the Debtor's books.

A: Yes.
Q: Now, there are services that are provided for which invoices aren't sent. Right?
A: Correct.
Q? There's something called the ISS that was referred to earlier.
A: Yes.
Q: It's the Interline Settlement System.
A: Uh-huh.
Q: And that's the thing you were describing in which there's a movement of freight or whatever and it's multiple railroads --
A: All the railroads settling amongst themselves what they owe each other.
Q: Right. Okay. So for the Debtor's piece of that the Debtor keeps an AR on its books for what it's owed for those services that are tracked by the ISS. Correct?
A: Uh-huh. Yes.
Q: And to the extent that those services are provided in Canada it is the Debtor that tracks that receivable. Correct?
A: It is -- well, the Debtor, as you put it, is the only accounting group of all the companies. There's only one accounting group. We do it for every corporation.
Q: Gotcha. So the Canadian entity is not keeping its own

books.

A: No, there's no one there to do it.

Q: Okay. And so if a movement is done in Canada --

A: Yes.

Q: -- and the ISS is keeping track of who owes what to whom --

A: Yes.

Q: -- the Debtor is keeping track of that AR on its books.

A: Yes.

Q: -- and there's no separate set of Canadian books.

A: There is a separate set of Canadian books.

Q: Okay. But it doesn't track that AR on it.

A: Not necessarily that.

Q: Okay. And is there something called Car Hire (inaudible)?

A: Yes.

Q: Car hire, be fair to say, is a situation in which another railroad is using the MMA's cars.

A: Correct.

Q: And is the payment for a Car Hire handled in a manner similarly to the ISS?

A: Yes.

Q: In other words, there's kind of a clearinghouse online.

A: There's a clearinghouse that handles the Car Hire.

Q: So the discussion we were just having about the ISS and the tracking of AR on the Debtor's books, is that also

true of Car Hire?

A: Yes.

Q: Do you understand my question?

A: Yes. Well, the Debtor is the -- of all the entities, is the only entity that owns any rolling stock.

Q: Okay. So to the extent that money is owed for Car Hire that takes place in Canada, that's going to show up on the Debtor's books as an AR and not on some separate set of Canadian books. Is that Correct?

A: That is correct.

Q: Okay. And to the extent -- well, let me withdraw that. When the Debtor collects money on these AR, it's not transferred to the Canadian entity, is it?

A: I don't know how to answer -- I would -- the Debtor, MMA, transfers funds to Canada routinely.

Q: Okay. There is an allocation done by the Debtor to the Canadian entity for tax purposes.

A: Correct.

Q: Correct?

A: Uh-huh.

Q: But when money comes in to Hermon for services provided in Canada it's not the case, is it, that it's then immediately transferred over to the Canadian entity.

A: No.

Q: And in fact, the allocation that's done to the Canadian

entity isn't necessarily a dollar for dollar for money collected for Canadian services.

A: The cash all goes into one pot.

Q: Okay. All right. Now, if you would turn to the Trustee's Exhibit 3, please, and this is the email with the attachment --

A: For the borrowing base?

Q: Exactly. So on page two under the letter (a) total receivables is a number of about 9½ million.

A: Yes.

Q: Do you see that?

A: Yes.

Q: So that includes service -- receivables for services provided to Canadian customers.

A: Yes, it does.

Q: Okay. And the things that we just talked about, Car Hire and ISS and --

A: Yes.

Q: -- all of -- whatever those things are for which there's a receivable generated that's in there for Canada just as much as the U.S.

A: Yes.

Q: Okay. Now I would ask you to turn to Trustee's Exhibit 9. This is one of the one-pagers that got stuck to the other one-pager. Hopefully, has now been statically discharged

sufficiently. This is a spreadsheet that you prepared.

A: I did.

Q: And Mr. Fagone asked you a number of questions about it and I'm not going to make you go through it all again. I guess my -- what Mr. Fagone asked you was whether some of these Canadian customers cash receipts were spent on the expenditures that give rise to the credits that we're here on today.

A: Uh-huh.

Q: Is that right?

A: Yes.

Q: You can't say, can you, how much?

A: No.

Q: In fact, there's no tracking of a dollar in and a dollar out, is there?

A: No.

Q: No Canadian dollar came in and then a Canadian dollar got spent on expenditures.

A: No.

Q: And when I say Canadian dollar I don't mean actual Canadian currency, I mean a dollar from a Canadian customer.

A: Uh-huh.

Q: Okay. There's no document --

A: We have a Canadian currency accounts if that's what --

that are --

Q: No. I started down a bad road and I'm going to stop there.

A: Very well.

Q: We are not asking you about the currency difference. There's no document in evidence here today that's going to tell us as to any particular expenditure that gave rise to a credit, where the dollar for that expenditure came from.

A: No.

Q: Okay. Canadian service --

A: Dollar you mean cash.

Q: -- versus American. Correct.

A: No.

Q: It just wasn't tracked that way.

A: No. Cash isn't, no.

Q: Now, the total cash receipts for the time period in this document are $16,377,767. Right?

A: Yes.

Q: Now the total expenditures that we're here talking about today are shown in Exhibit Trustee's 7 and you summarized them earlier as being about $1.1 million.

A: Yes.

Q: Do you recall that?

A: Yes.

Q: So of the 16 -- approximately $16,300,000 if we subtract

out the Canadian portion, the $8,538,948 --

A: Uh-huh.

Q: -- there's more than enough left over to pay the roughly $1.1 million of expenditures.

A: Yes.

Q: Right? So even -- well, I'll withdraw that. So it certainly would have been possible to pay all of those expenditures without even having any of what are listed here as Canadian Customer Cash Receipts.

THE COURT: Excuse me. For the record, and feel free to objection Mr. Fagone, we say expenditures we're talking about TMA-related track maintenance expenditures.

MR. ROSENTHAL: That's correct, Your Honor.

THE COURT: I just want the record to be able to read that way. Okay.

MR. ROSENTHAL: And to be that much more precise I would say the expenditures that give rise to the credits that we're here on today.

THE COURT: Thank you. We may understand that but somebody reading it cold wouldn't understand. Thank you.

MR. ROSENTHAL: Understood.

REDIRECT EXAMINATION BY MR. ROSENTHAL:

Q: So all of those expenditures could have been covered without any of this -- what's designated as Canadian customer cash receipts.

A: Yes.

Q: Mr. Fagone --

A: Can I --

Q: -- asked you --

A: Can I take that back?

Q: No.

A: It's -- okay.

THE COURT: All right but we'll get it back anyhow when Fagone stands up so --

REDIRECT EXAMINATION BY MR. ROSENTHAL:

Q: If you want to clarify.

A: If you're saying if you take out all the cash receipts from Canada would we be in a position to pay any of -- no, if we had none of the cash receipts from Canada we would have long ago been out of business. So I mean -- I --

Q: And we don't know --

A: I use the analogy of cash going into like, you know, a --

THE COURT: A blender.

THE WITNESS: Or a bucket of water and you take water from this cup and this cup and you put it into a bucket and then you say, well, if I take out half the water can you pay all your bills. Well, no.

REDIRECT EXAMINATION BY MR. ROSENTHAL:

Q: Fair enough. So mathematically it would be possible, practically it wouldn't be.

A: Yes. So --
Q: And practically we have no idea which drops of water are which once they get poured out of the cup.
A: Once they're in the bucket it's a bucket of water.
Q: It's a bucket of water or a blender full of something --
A: Right.
Q: -- that's been blended.
A: And if you remove half --
THE COURT: Don't go down that road.
REDIRECT EXAMINATION BY MR. ROSENTHAL:
Q: Okay.
A: And if you remove half the water, you know, there is, theoretically, enough to pay what you just described but we would not have paid --
Q: Understood.
A: -- a lot of other expenses which would have precluded us from ever getting to the point where we --
Q: Sure. I understand your point.
A: Okay. Thank you.
Q: Mr. -- you're welcome. Mr. Fagone asked you about trade receivables and about what would have happened had the bankruptcy filing not taken place. Do you recall that?
A: Yes.
Q: You don't know what would have happened. Right?
A: I think that's what I said to start with.

Q: Okay. So you're kind of speculating on --
A: Yes.
Q: -- the possibilities.
A: Yes.
Q: And that was what was happening when Mr. Fagone was asking you about that earlier.
A: Yes.
Q: Okay. Mr. Fagone also asked you about Wheeling and whether or not demanded to be paid money from the Debtor that KMSI had paid for the assignment of tax credits. Do you recall that?
A: Uh-huh.
Q: And in years 2009, '10, '11, '12 you reported that Wheeling had not said to you, hey, we want to be paid that money.
A: Correct.
Q: Right. For those years there was no default on the line. Right?
A: Correct.
Q: The Wheeling line, to be clear.
A: The Wheeling line there was no default.
Q: And there was no bankruptcy filing of MMA. Right?
A: No.
Q: So there'd be no reason for Wheeling to come to you and say, hand that money over, would there?

A: I would have to ask them.

Q: Okay. You're not aware of any -- well, and just to be clear as of the date of the filing in this case, the bankruptcy filing on August 7th --

A: Yes.

Q: -- the line had been fully drawn to six million.

A: Yes.

Q: And there's since been some payment that Mr. Fagone asked you about?

A: Yes.

Q: Most of the base of the line, six million is still outstanding. Correct?

A: There's about five million outstanding.

Q: Okay. All right.

MR. ROSENTHAL: If I could have -- just very briefly.

REDIRECT EXAMINATION BY MR. ROSENTHAL:

Q: Just to make sure we're clear, when we talk about Canadian receivables we're talking about services provided to Canadian customers but billed by the Debtor. Correct?

A: Yes.

MR. ROSENTHAL: Okay. With that I have nothing further right now subject to what happens next. Thank you, Your Honor.

THE COURT: Thank you very much. Mr. Fagone?

RECROSS-EXAMINATION BY MR. FAGONE:

Q: Mr. Gardner, just a few questions, Your Honor, Mr. Gardner, is Montreal, Maine & Atlantic Canada a separate legal entity?

A: Yes.

Q: Do you know the -- which jurisdiction's laws govern its creation?

A: I believe Canada

Q: You believe it's a Canadian entity.

A: Yes.

Q: Okay. And was Montreal, Maine & Atlantic Canada a party to the security agreement that's entered into evidence here today?

A: Yes.

Q: Okay. Do the Debtor and MMA Canada owe any money to the Federal Rail Administration?

A: Yes.

Q: Approximately how much?

A: $27 million, I believe.

Q: Are you familiar with the collateral that was granted -- strike that -- was any collateral granted by either of those two --

A: Yes.

Q: -- entities to the FRA?

A: Yes, it was.

Q: Are you familiar with that collateral?

A: Yes.
Q: What was the collateral that was granted to the FRA?
A: Is the track and right-of-way and everything related to that for the entire system in the U.S. and Canada.
Q: Is there any additional collateral granted to the FRA by the Canadian entity?
A: I'm not -- I don't recall.
Q: Take a look at Trustee's Exhibit 5, please, and look specifically at the bottom of page two of (page)*(sic)* five and then let me know if this refreshes your recollection about what collateral was granted to the Federal Rail Administration.
A: Personal property, so there's a lot of (inaudible) any equipment or personal property.
Q: Okay. So you're -- so the record's clear you're looking at the portion of this exhibit entitled General Collateral.
A: Yes.
Q: A security interest has been taken in all of the Debtor's present and after acquired personal property.
A: I am.
Q: And are you aware that the FRA took steps to register that security interest in the personal property registry in Nova Scotia?
A: Yes.

Q: Okay. Do you know if Wheeling took any similar steps?

A: I'm unaware of any steps they would have taken.

MR. ROSENTHAL: Objection. I'm not sure what the foundation would be for that and the document says what it says.

THE COURT: Yeah and the question had nothing to do with the document. He was just asking if he knew whether or not you guys had registered in Nova Scotia and if he knows he knows and if he doesn't he doesn't. Overruled.

MR. FAGONE: Your Honor, I don't have any further questions from this witness.

THE COURT: Thank you.

MR. FAGONE: Thank you. One ministerial note, if I might. I know Mr. McCarthy has a flight. Mr. McCarthy from Gordian Group is here. He has a flight at 4:00 and we were wondering if momentarily he might be excused from the proceeding.

THE COURT: We could have excused him a long time ago.

MR. FAGONE: The difficulty is he needs a ride to the airport.

THE COURT: Would you like to be excused?

MR. FAGONE: Either Mr. Gardner or Ms. Ragozzine will, so I'm not sure how much longer we have with the witness but depending on that we may ask that Ms. Ragozzine be excused.

THE COURT: Yes. You're surely excused unless anyone is going to call you as a witness. He's excused?

MR. MARCUS: Yes.

THE COURT: Very good. Thank you. Thank you very much, sir, you are excused. All right. Yes?

MR. ROSENTHAL: We have nothing else.

THE COURT: Okay.

MR. ROSENTHAL: For Mr. Gardner.

THE COURT: Mr. Gardner, you may step down and I want to thank you very much for your patience --

THE WITNESS: Thank you.

THE COURT: -- and your testimony and putting up with these gentlemen.

MR. FAGONE: He may be excused from further participation.

THE COURT: You are excused and you may take your colleague to the airport.

MR. FAGONE: Thank you, Your Honor.

THE COURT: You're very welcome. Thank you, gentlemen. Have a pleasant day. Mr. Marcus?

MR. MARCUS: Yes, Your Honor, for I guess I'd say the balance of our case so I guess we're now into the rebuttal case. I'd like to call the Court's attention to Wheeling Exhibits 1 and -- I'm sorry, 2 and 3. And let me just explain to the Court what they are. Exhibit 2 -- Wheeling Exhibit 2

are two mortgages, a Maine mortgage and a Vermont mortgage.

THE COURT: One moment, please.

MR. MARCUS: Yes.

THE COURT: I'm going to get into your stack. Okay. I'm looking at Wheeling 2?

MR. MARCUS: Yes. I'm going to speak briefly about 2 and 3 to conclude our case.

THE COURT: Okay. Thank you.

MR. MARCUS: So just to talk about 2, 2 consists of two mortgages granted by the Debtor to the FRA, one for Maine, one for Vermont, and they come from a pleading filed in this Court in connection with the Debtor's request to approve the financing by Camden National Bank. In that request the Court will recall the Debtor obtaining the agreement of FRA to subordinate its mortgages and I'm sorry -- I apologize.

May I go back and say that Exhibits 1 and 2 I'm talking about, Exhibit 1 is Vermont and Exhibit 2 is Maine. It's the same speech but I misidentified the exhibits.

These exhibits come from the Debtor's pleading in which it appended all of the mortgages that have been granted to the FRA. We picked out two examples because they're all the same and the purpose of them is, by way of an explanation of why they're exhibits, is that in point of fact if there's anything to this fiction about the TMA being any kind of assigner of track or real estate, and I know Mr. Fagone

described it as fiction and I think there's a legal construct to the fiction, the FRA mortgages did not extend to it in any case.

So the argument made in the pleadings followed by Mr. Fagone that somehow this tax credit is covered by the FRA mortgages --

THE COURT: Are we in argument now?

MR. MARCUS: We are. But I'm pointing out why -- what the relevance of the exhibits are.

THE COURT: Okay. So you're telling me that 1 and 2 shows that the tracks are or are not part of FRA's collateral?

MR. MARCUS: No, not -- not the tracks but the agreement to convey tax credit rights.

THE COURT: Okay. Hold on. Hold on. Hold on. Okay. Stop. You are telling me that the FRA has no security interest in the TMA.

MR. MARCUS: That's correct.

THE COURT: Thank you.

MR. MARCUS: That's correct.

THE COURT: Is that what you -- that's all you want to tell me.

MR. MARCUS: That's what these exhibits will demonstrate, yes.

THE COURT: Good. Now I don't have to read them. Right?

MR. MARCUS: Wheeling Exhibit 3 --

THE COURT: Okay.

MR. MARCUS: -- is a UCC-11, again admitted by stipulation, that shows all the filings against the Debtor and what it shows is that Wheeling is prior in right to the UCC filing by FRA. So to the extent that FRA may say, well, okay so that TMA is not covered by our mortgage but it's covered by a personal property security interest that personal property --

THE COURT: FRA is not a participant.

MR. MARCUS: I understand.

THE COURT: Okay.

MR. MARCUS: I'm --

THE COURT: So -- so you're point, I think, is that even though -- even though the TMA is not identified as such you construe the language in Wheeling's security agreement in UCC filing statement to encompass the TMA and the proceeds of the TMA under the general language of the --

MR. MARCUS: Right.

THE COURT: -- of the security documentation. And your point with Exhibits 1, 2 and 3 is that the FRA has not done likewise with respect to these documents.

MR. MARCUS: My point is that 1 and 2 being mortgages don't cover it and to the extent FRA by claim it comes under a personal property security interest is (inaudible).

THE COURT: All right. And but that's not an issue

in the case.

MR. MARCUS: Well, I believe it might have been put in issue by a pleading filed --

THE COURT: Well, let me just -- Mr. Fagone, is than issue in the case, that FRA has a prior interest here?

MR. FAGONE: No, Your Honor.

THE COURT: Okay. Good you win on that one. All right.

MR. FAGONE: Well, let me be clear. What I understand to be the legal issues in this case are the nature, extent and validity of Wheeling's security interest.

THE COURT: Correct.

MR. FAGONE: Not FRA's.

THE COURT: Not FRA's.

MR. FAGONE: So --

THE COURT: And we're not adjudicating FRA's interest vis-à-vis your interest but you want to show me that apparently they don't claim any interest anyhow so if anybody has or doesn't have an interest, we do or don't.

MR. MARCUS: I'm on top of the heap, just as the heap may be.

THE COURT: What's that?

MR. MARCUS: I am on top of the heap such as the --

THE COURT: Such as it may be.

MR. MARCUS: -- heap may be. Right.

THE COURT: Yes. And very good. Thank you.

MR. MARCUS: Thank you. With that the Wheeling can rest.

THE COURT: Okay. Wheeling rests. Mr. Fagone?

MR. FAGONE: We have nothing further from an evidentiary perspective, Your Honor.

THE COURT: The Trustee rests which brings us to the high point of my afternoon. Argument. Okay. Mr. Marcus? You're up.

MR. MARCUS: Thank you. I'm going to divide my presentation to Wheeling's prima facie case and then in the second part I'll talk about the defenses and the so-called equitable assertion.

The prima facie case is very straightforward. The Wheeling has a security agreement, that dated April of 2009. It describes among the collateral accounts, payment intangibles, other rights to payment. The security agreement secures monies loaned. As of the date of filing there was six million dollars outstanding and as of today there's approximately five million dollars outstanding. The security agreement was perfected by a properly filed UCC-1 in Delaware. The UCC-11 for all filings shows that the Wheeling security interest is senior.

While the security agreement was in effect the Debtor entered into the track maintenance agreement and under that

track maintenance agreement -- excuse me just one second -- under that track maintenance agreement essentially what happened, and we'll drill down a little bit into the detail, but essentially what happened is the Debtor says to KMSI, we'll permit you to take tax credits with respect to our maintenance expenditures. You just have to pay us for it. And you have to pay us roughly 47½ percent of those expenditures and KMSI said fine. We have taxable income. It's worth it to us.

That track maintenance agreement, Your Honor, created an account or you may call it a payment intangible or other right to payment but under the definition --

THE COURT: You're -- well, I want to be clear on this. You are using alternate provisions of your security agreement. It is either an account or a payment intangible or possibly both but it's -- ringing the bell once is sufficient.

MR. MARCUS: That's right. That's right.

THE COURT: Okay.

MR. MARCUS: So it's just to say that there's no doubt but that this is a category of collateral that the UCC recognizes. An account, by definition, is an agreement that creates a right to payment, whether or not earned by performance. A payment intangible is personal property in which --

THE COURT: But you would concede that it was never intended to be part of the advance formula.

MR. MARCUS: Yes. Yes. And I wanted to address that. Now, advances were made from time to time, and this is fairly typical in a revolving lending arrangement typically done by a bank. A bank will take a security interest in everything under the sun but the advance formula will be teed to receivables and inventory. That's how much money you can draw. But that's not a limitation of the collateral. The collateral is the collateral and lenders take collateral beyond that which they advance against for the very reasons that we're here today. Things happen. Businesses fail and when they fail collateral, inventory and receivables can come up short.

So the fact that Wheeling did not advance on these accounts is of no moment. It's part of the --

THE COURT: And if it --

MR. MARCUS: -- security --

THE COURT: -- dawned on Wheeling the day after the filing no harm as far as you're concerned.

MR. MARCUS: That's right. After the filing Wheeling takes a look at its agreements and says, okay, we have accounts we have inventory but lucky --

THE COURT: Sort of like looking in the couch for nickels.

MR. MARCUS: That's right. Lucky for us we have other collateral. But that's just -- that's the agreement. That's the contract. This court, I believe, is required to

recognize the contract.

Now, that -- and then the last piece of the prima facie case is that the payments that are at issue now, the so-called net funds that are sitting in the bank account, those were all paid -- it's undisputed -- those were paid pursuant to the track maintenance agreement. Those are proceeds of Wheeling's collateral.

Now, the fact that the proceeds were not earned on the date of filing is irrelevant because the definition of account, under the UCC and as set forth in the security agreement, says an account is an agreement to pay money whether or not the money is earned. The fact that neither Wheeling nor MMA could go to KMSI and say, hey, write us a check today, August 7th, that's immaterial.

THE COURT: Okay. But what may be material, and Mr. Fagone (inaudible) this point earlier so I'm going to challenge you on it now is that there may have been nothing of value here because certain triggers had not occurred. Would you address that?

MR. MARCUS: Well, you can't say there's nothing of value because there was a contractual --

THE COURT: I'm not saying it.

MR. MARCUS: Okay.

THE COURT: I'm asking you to address it.

MR. MARCUS: No, well, okay. All right. Well, I --

one cannot fairly say that because there's great value. What was the value? A contract that said if you do X we will pay you Y. That's value. Why? Because they were going to do X anyway.

In other words, on August 6th they had a contract and the contract said, well, if you certify to us that you've maintained your track we'll pay you 47 percent of that.

THE COURT: And the fact that the certification came after the provision of services --

MR. MARCUS: Is --

THE COURT: -- is of no consequence in your mind.

MR. MARCUS: No moment at all. Right. So the contract was not valueless. It had a lot of value and the value was all I had to do was fill out a couple papers and I get a lot of money. That's value.

And the law of this circuit is very clear. It's a proceed of an account and whether the proceed is paid before the filing or after the filing is preserved by Section 552. This is all our collateral.

THE COURT: All right. There's a vesting issue that maybe Mr. Fagone will develop again this afternoon but he attempted to do that in the brief and (inaudible) case law would the tax refund analogy would you address that, please?

MR. MARCUS: Well, I'll start by saying this isn't about tax refunds because the Debtor didn't take any tax

refunds. The Debtor doesn't have any credits. The Debtor has no --

THE COURT: I -- I -- I --

MR. MARCUS: -- tax credits --

THE COURT: -- by analogy --

MR. MARCUS: -- no tax refunds.

THE COURT: -- is what I'm saying. So your view is that under this, what we may call a construct or fiction, but the tracks were assigned a point up to the TMA puts the word assigned in quotes which I find interesting but they were assigned and once they were assigned essentially it's now KMSI that's doing the maintenance on its own tracks, so to speak, and getting the credit for the maintenance that it has performed on its tracks.

MR. MARCUS: You can look at it that way, Your Honor. The point is --

THE COURT: How else would one look at it?

MR. MARCUS: Well, you could look at it all kinds of ways but the point is this is a tax construct and --

THE COURT: And what Mr. Fagone is saying is that there can be no tax consequence until the end of the year.

MR. MARCUS: Well, that's not true. A condition subsequent might have been and I'm not even sure this is a regulatory requirement that the Debtor own the track at the end of the year. Okay. That might have been cause for the Debtor

not to get any money. Well, they owned it and they got the money so we're not saying that --

THE COURT: The Debtor -- the Debtor has to own it in order so that the assignee --

MR. MARCUS: Sure.

THE COURT: -- has an assignment of something.

MR. MARCUS: Right. So we're not saying that Wheeling has rights to collect money under the TMA that exceed the rights of the Debtor. The water doesn't rise high in the dam. But if a Debtor collects money it's ours. That's the point. And if it satisfies the conditions of the contract it's our money. It's an account and it has then been earned.

THE COURT: And the contract has value from its inception subject to the terms of the contract.

MR. MARCUS: Sure. Because it has easy conditions to meet. These conditions are easy. The Debtor's going to do maintenance anyway. They have to. That's what Mr. Gardner testified. They have to assure the safe reliable operation of the railroad so we know they're going to do maintenance. So this is a pretty easy -- this is a slam-dunk to get a lot of money. That's a valuable contract and, as I said, it's ours.

Now, that's the prima facie case and I think that under First Circuit precedent and many other circuits all of the money is proceeds, pre-petition, post-petition it all belongs to the Wheeling.

Now, let me just address some of the matters stated in defense. There was talk about this fiction about assignment of track and maybe this has something to do with real estate and Wheeling doesn't have a lien on real estate. Well, fiction is the best word for it. Mr. Fagone said it better than I ever could.

This is a tax construct and the TMA allows you to walk through it and why do we have this silly little tax construct? Because the Internal Revenue Service says, well, you can take a credit equal to $3,500 times the number of miles you're claiming. So KMSI says, hey, I need more miles so I can up the cap. So MMA said, okay, we'll let you use our miles to up the cap.

THE COURT: Which is not prohibited. It's encouraged in the regulation.

MR. MARCUS: Sure. The regulation says that's how you do it.

THE COURT: In effect, ultimately -- ultimately gentlemen and (inaudible), we have a policy of the Congress which permits subsidizing the maintenance of railroads.

MR. MARCUS: That's right.

THE COURT: And if you don't qualify for the credit you can take advantage of it in a lawful manner.

MR. MARCUS: That's right. And the way you get your cap lifted is you go get miles and you multiply the miles that

you can put in your corral by $3,500. Nothing to do with the transferring of real estate. In effect the TMA disclaims any effort to say you have an estate and land or I'm transferring real estate.

THE COURT: The TMA says specifically that this assignment, if it's an assignment at all, in quotes, is for the limited purpose of taking advantage of the tax credit.

THE COURT: That's right. So what I say, Your Honor, is the willing suspension of disbelief is appropriate in a theatre. In a court of law it's just a fiction. It has no meaning in terms of any kind of real estate connection. It is simply a contract and there's a right under the tax law and the Debtor was smart enough to take advantage of this right under the tax law, sell it --

THE COURT: So you have all sorts of contracts that deal with real estate that are -- give rise to personal property rights and not real estate rights. The primary one being the purchase and sale agreement.

MR. MARCUS: That's true and, of course, I would also add that even a purchase and sale agreement, the money that comes out of it is an account which is subject to the lien. Now, in terms of, for example, the real estate sale that the Court approved this morning we might have a priority fight with the FRA but we have a lien on those proceeds that may be junior to the FRA.

THE COURT: Good luck to you.

MR. MARCUS: -- but that's a different -- that's a whole -- that's an aside.

THE COURT: Good luck to you.

MR. MARCUS: Good luck to me. Right? That's an aside.

The point is whatever talk about real estate really has no place here and then I also -- we have the exhibits of the mortgages and even if it had any relevance, the FRA doesn't have a lien on anyway.

Now, the other contention here is the equitable contention and the first contention is that the Court ought to use the equitable authority granted under 552(b)(1) to reduce or limit or eliminate the claim of Wheeling because money was used to fund these maintenance expenditures that was not Wheeling's collateral. So why should they get the benefit of it?

Now, let's look at the period prior to October 18. The contention is that there's something called --

THE COURT: Hold on.

MR. MARCUS: Yeah.

THE COURT: Including in that pre-filing so we're talking about pre- and post-filing --

MR. MARCUS: Yes.

THE COURT: -- pre-Camden.

MR. MARCUS: Yes. I'm talking about the period June 1 to October 18.

THE COURT: Okay.

MR. MARCUS: All right. The contention is, oh, half the money the Debtor got was from Canadian companies, so-called Canadian receivables. That's not Wheeling's money so they shouldn't get any benefit from it. Well, that's wrong. Those are Wheeling receivables because, as Mr. Garner testified, all of the billing of this company is billed by the Debtor.

Now, how they do allocations corporate-wise after they get the money is of no moment. When this company renders a service, whether it's in the United States or to a Canadian customer or to anybody else, that customer gets a bill from this Debtor. That creates this Debtor's account receivable. That is our collateral and that is the state of the evidence before the Court. Now, what they do with that money, how they allocate it amongst the various entities --

THE COURT: The state of the evidence before this Court is skimpy and the state of the evidence is that it is collected and it is redistributed in some fashion but we don't have detail on the record today as to what fashion that may be.

MR. MARCUS: We don't have detail as to distribution but it's more than just collected by U.S. Debtor, it is invoiced and billed by the U.S. Debtor. Now, when the U.S. Debtor sends out an invoice that creates an account receivable.

That's Accounting 101. That's how you get accounts receivable. You send out an invoice. All U.S. Debtor, all collateral for Wheeling. Now if some day in some different proceeding somebody wants to say, well, okay, I know you have a lien in that account receivable because it was billed by the U.S. Debtor but there's some reason that you shouldn't have the money, okay, that's a fight for another day. But in terms of the record before the Court --

THE COURT: Let me ask you a question.

MR. MARCUS: Yeah.

THE COURT: We have been collecting and liquidating receivables. Has there been a deduction on the MMA side or the Wheeling side with respect to Canadian receivables?

MR. MARCUS: The MMA side has withheld payment of what it describes as Canadian receivables. We don't acquiesce in that. This court --

THE COURT: That's not an issue that's before me today but it is nonetheless an issue.

MR. MARCUS: It's an issue and the Court will be hearing more about it later.

THE COURT: All right. So you haven't acquiesced to that deduction but you -- as far as you know today you haven't received the benefit of any Canadian receivables. That's --

MR. MARCUS: Well, I -- I -- I --

THE COURT: -- something you might chase after

another time.

MR. MARCUS: I know that for sure because I know that when the Debtor reports they set aside Canadian receivables. Now, we've had more --

THE COURT: So we may have another day like this.

MR. MARCUS: We're going to have another day like this. We have more than enough fish to fry up to now and there'll be more fish to fry.

THE COURT: Right. Right. And I don't know, frankly, and I may have to decide it. I may not have to decide it. I understand your point. The receivable is created. It's a receivable of the United States company, therefore, it's a receivable. It may be subject to setoff. It may be subject to accounting. It may be subject to this, that or the other thing and it may or may not be yours but you're saying it's a receivable and I'm telling you I'm not so sure. You may be right. You may not. It's not necessarily Accounting 101. There is an issue there. Okay.

MR. MARCUS: Okay. But --

THE COURT: And it may fall within. It may fall within the equitable concerns addressed in the statute.

MR. MARCUS: And this is the bottom line that I want to articulate. To the extent that the claim of the Debtor is that there's an equity because receivables that don't belong to Wheeling were spent for track, there's no evidence of that. In

fact, all of the evidence points the other way, that these are receivables of Wheeling. The Debtor has not made any case under which a bill sent by the Debtor on the U.S. Debtor's billhead booked as a receivable, the Debtor has made no case today that for some reason --

THE COURT: I -- I --

MR. MARCUS: -- that shouldn't be considered our receivable-

THE COURT: You may be right. You may not be right. I think it's Trustee 9, I'm not sure. There is allocation of percentages between Canadian and American receivables or revenue and they are all, with one exception, a hundred percent where everyone else was in the neighborhood of 50 percent allocation --

MR. MARCUS: Right. But --

THE COURT: -- between the two entities.

MR. MARCUS: -- what I'm saying is that on trust --

THE COURT: Don't say there's no case. There's an argument that can be made for attribution based on that exhibit alone.

MR. MARCUS: Well, but my point for today is that all of the money shown on that exhibit is billed by the U.S. Debtor.

THE COURT: Oh, I understand that and your argument is that because it's billed it's your receivable and you may be

right. I can't rule on that from the bench. I understand your argument --

MR. MARCUS: Right.

THE COURT: -- and I anticipate Mr. Fagone's going to say no, no, no, no, no, no, no, and I'll have to figure something out.

MR. MARCUS: Okay.

THE COURT: Okay?

MR. MARCUS: Well --

THE COURT: Thank you.

MR. MARCUS: I'll conclude by simply submitting respectively --

THE COURT: I just don't want when you say, oh, it's Accounting 101 I don't want to sit here like a student in Accounting 101 and say, oh, okay. Good. Now I can get an A. All right. I don't know that I can get an A or a B or a C.

MR. MARCUS: All right. All right. Well, when I took Accounting 101 the professor gave A's to everybody who agreed or swore that they didn't smoke during a semester. That's how I got my A in Accounting 101. Anyway --

THE COURT: You can get an A from Mr. Fagone by agreeing with him.

MR. MARCUS: All right. So but my first point on the equitable contention is that there's no evidence today that would --

THE COURT: Well --

MR. MARCUS: -- show --

THE COURT: Okay. No evidence and I'm telling you, you may be right. There may be skimpy evidence. There may be implications that I may reasonably draw as a (inaudible) fact, there may be all sorts of ways that we can get there but, you know, one of the things that I noted is what you're trying to tell me and that is I don't have a precise allocation. Okay.

MR. MARCUS: That's right.

THE COURT: And I accept that much. Okay.

MR. MARCUS: Right. Now, the next point is on the equitable defense is the law, I believe, is clear both in the First Circuit and elsewhere that the predicate of the so-called equitable carve-out in 552(b)(1) is that unencumbered funds that would otherwise be available for distribution are used to enhance a secure creditors collateral. All right. And there's been no evidence or proof that such is the case here. That's the sine *qua* non of that exception.

It's kind of like the 506(c) argument that we heard this morning. There is no evidence at all that any unencumbered funds or any money that would otherwise be distributable to creditors was, in fact, used. How do we know this? We know this for two reasons. Number one is all of the money spent on maintenance was spent to operate the railroad, not to feed credits, tax credits. Mr. Gardner testified, well,

they had to do maintenance otherwise they're subject to regulatory sanction, they couldn't run the railroad, it wouldn't be safe. So that was our money.

Once the Trustee made the decision that it's in the interest of this Estate to run a railroad to maximize the sale value the fruits of which were this morning, he was bound and committed to spend that money on maintenance. There is nothing about that money that could have been available for unsecured creditors. They got the benefit of it and the form that they got was in the sale this morning -- the sale of the going concern.

THE COURT: I hear you and I'll have to read Cross Bakers *(sic)* and I'll have to read Schlichtmann again and --

MR. MARCUS: Sure.

THE COURT: -- whatever else but there's also another concern and that is the windfall concern. Now, it may be, as you argued before, to get to the windfall there has to be -- it has to be funds that were unencumbered and would have inured to the benefit of the general creditors. I'm not so sure. You may be right. What about the windfall aspect?

MR. MARCUS: Well, the windfall comes from the, I believe, the windfall is the other --

THE COURT: You're saying the windfall falls from your definition.

MR. MARCUS: That's right. The windfall is the other

side of the coin.

THE COURT: Uh-huh.

MR. MARCUS: In other words, spending unencumbered funds for the purpose of enhancing my collateral, that might be a windfall.

THE COURT: Yes, but the unencumbered may be funds that are unencumbered by your security agreement.

MR. MARCUS: Well --

THE COURT: Not funds that are unencumbered by somebody else's security agreement.

MR. MARCUS: Possibly. But -- but --

THE COURT: That's the best that you can give me?

MR. MARCUS: But remember --

THE COURT: Okay.

MR. MARCUS: -- on the equitable defense if the fund is created it goes to the unsecured creditors. It goes to the estate. Now, that would be a windfall for them. The point is that if you look at the period after October 18 --

THE COURT: What the cases say, you know, when we get into the realm of equity we're getting into subjective notions and it's troubling to me that all of a sudden these notions take on the character of (inaudible). But I hear you.

The concern is that the -- if your collateral went into the production of the widgets, logically the widgets are yours. If something other than your collateral went into the

widget production we'll give you the benefit of your collateral with respect to the widget production, but under the equitable doctrine there may be some slice carved off for that portion of the value-added that was added by somebody else's value. That's all.

MR. MARCUS: Yeah, well, and --

THE COURT: And -- and that may be the so-called rule. I don't know.

MR. MARCUS: Well, I can see how one can articulate it that way and it's there in the statute. But my contention --

THE COURT: Well, it's not in the -- there's nothing in the statute. It's in the cases.

MR. MARCUS: Well, the -- the license to think that way is in the statute.

THE COURT: That's dangerous.

MR. MARCUS: That's right but I think it's pretty clear that -- well, first of all, if you look at the pre-October 18 time period, as far as I can tell from the record in this case, all of the receivables, all of the money is Wheeling collateral. If you look at post-18 --

THE COURT: If you use your definition of account receivable vis-à-vis Canada.

MR. MARCUS: That's right. If you look at post-October 18 I believe it's fairly well acknowledged that

most of the money came from Camden National Bank but, of course, even that isn't money that could have been distributed to unsecured creditors. That's money that was loaned for this express purpose, not -- they didn't make the loan to create a fund for unsecured creditors.

THE COURT: They didn't make a loan to give it to you.

MR. MARCUS: Well, maybe they didn't but to the extent that it created receivables, the extent that creates our collateral --

THE COURT: And that's what the cases say, Mr. Marcus. To the extent that it does that maybe that's a windfall. I'm not so sure. Neither one of us is sure and we're just chasing our tails at this point.

MR. MARCUS: Yeah. All right.

THE COURT: Anything else?

MR. MARCUS: No, except to say that I believe that what the equitable exception permits you to do is to protect, not Camden National Bank --

THE COURT: Justice, Mr. Marcus. Justice.

MR. MARCUS: Well, protect the Estate and the Estate -- the Estate has not been harmed. In fact, it's been benefitted by all this that's gone on.

THE COURT: Well, no. The Estate -- the Estate may not be benefitted because if the Estate has to get from here to

March 31, and it may be that to the extent that other monies went into the production of this account, it may be that the equities require some disposition other than to Wheeling. I don't know that's the case. I have to decide.

MR. MARCUS: Well, I will contend that the Estate's need for money is not justification to say I'm going to take what's Wheeling's collateral and let the Estate have it.

MR. MARCUS: Well, that's -- that's -- and there's the rub. Is it really Wheeling's collateral and it may well be because before you get to the equity you have to have Wheeling's collateral and then it's the equity that may allow you to do something else. I don't know.

MR. MARCUS: All right. Well, there's no --

THE COURT: But thank you very much. It's been entertaining.

MR. MARCUS: Well, thank you for hearing me. All right. Thank you.

THE COURT: Mr. Fagone?

MR. FAGONE: Thank you, Your Honor. Your Honor, it's Wheeling's burden of proof, in our view, under 363 to establish the extent of its interest in this money. Not the TMA but the money. That's what we're talking about, this fund of money $490,000. We think it's Wheeling's burden. We don't think it met it.

THE COURT: Well, hold on. Hold on. I don't

understand that statement. It's their burden to show that they have a security interest which would entitle them to the proceeds. Right? Right. And so we don't go straight to the money. We have to have something upon which it's -- it's based upon their theory as a very I think you said so yourself, you know, it's a very clear, precise thing. Okay.

MR. FAGONE: Yeah, and fundamentally flawed.

THE COURT: Right and so now you're going to tell me why it's fundamentally flawed.

MR. FAGONE: I am. Your Honor, I'm going to speak for less than 30 seconds about Wheeling's argument that the money from the assignment is a payment intangible. Under that view, anything is a payment intangible. The right to get money from a real estate transaction is a payment intangible. That's not the law. We cited two cases in our brief that show that that's not the law. It's rather elementary. I'm going to move off that, Your Honor. Even if --

THE COURT: Well, you still have four seconds.

MR. FAGONE: Trying to be economical here. Even if Wheeling could persuade the Court that the collateral here in question was a contract made in April, even if Wheeling could persuade you of that, it still doesn't win.

There was no right to payment on August 7th. The evidence is very clear. Now, Mr. Marcus conflates the definition of an account under the UCC, which I concede he has

accurately recited in his papers, with the requirement that the Debtor have rights in the collateral. They're different. They're not the same thing. He would like to have the Court believe that they're the same thing and say if I can jam this thing into the definition I win. End of story. That's not how the UCC works, Your Honor.

The Debtor needs to have rights in the collateral on the petition date or if it doesn't --

THE COURT: If I open up a law practice and it takes me six months to generate an account receivable, not collected, but just create an account receivable and it takes me six more months to actually collet it if I'm lucky and I have a line of credit from the bank, they have -- does their line of credit attach to those accounts when they are -- come into being?

MR. FAGONE: Yes.

THE COURT: Okay.

MR. FAGONE: Your Honor. Yes. Because you have rights in the collateral on the day you rendered the services. You have an entitlement at that time to receive something in the future based --

THE COURT: All right. Now, let's stick with this.

MR. FAGONE: Okay.

THE COURT: Distinguish.

MR. FAGONE: Easily, I think. On the petition date MMA needed to make expenditures in order to be entitled to this

money. It needed to make certifications. If you look at the contract, Your Honor, Trustee's Exhibit 6, at Section 2.07, that document says the railroad has owned or leased all of the track since January 1, 2005.

THE COURT: In my hypothetical I don't even have a client yet, okay. I get a line of credit so that I can open up my law practice. I don't even have a client.

MR. FAGONE: I misunderstood the hypothetical, Your Honor.

THE COURT: And I -- and then I go find a client.

MR. FAGONE: Yes, and you do work for the client.

THE COURT: And I do work for the client.

MR. FAGONE: The bank has a security interest.

THE COURT: Okay.

MR. FAGONE: I -- I'm trying to, by pointing out that in your hypothetical once you've done the work for the client you're entitled to be paid, maybe not that day. Maybe you've agreed the client has a certain amount of time to pay in the future. But you're entitled to be paid. If the client terminated your services the next day --

THE COURT: When does the bank get the security interest?

MR. FAGONE: The day you have rights in the collateral.

THE COURT: The bank doesn't get the security

interest the day I walk into the bank and I sign a --

MR. FAGONE: No.

THE COURT: -- security interest.

MR. FAGONE: It does not, Your Honor.

THE COURT: It doesn't. Okay.

MR. FAGONE: It does not. As a matter of UCC, it does not. Under Section 9203 of UCC it does not.

THE COURT: Your point is that it didn't attach until after the bankruptcy.

MR. FAGONE: Yes, Your Honor.

THE COURT: Okay.

MR. FAGONE: And the reason I say that is because of this amalgamation of facts, needed to make expenditures, needed to make certifications, needed, importantly, to own the track on December 31st of 2013. That's in Section 2 point --

THE COURT: Okay. So your argument is as exquisitely simple as Mr. Marcus' it just simply didn't attach.

MR. FAGONE: Correct. Okay, Your Honor, just -- and I -- we think, in our view, the cases on contracts and on tax refunds are more analogous here. Those are cases where the Debtor didn't have a right to get the money on the petition date. Slab Cole, which Wheeling relies on, good case. The difference is that Slab Cole had a contract prepetition. It was obligated to provide coal to the buyer and it had a right to get payment when it provided the coal. There was a

contractual right. In this case the Debtor had an option. It was nice. It was a nice piece of paper, but if the Debtor didn't make the expenditures, it didn't make the certifications and it didn't own the track on December 1, they had nothing.

THE COURT: Let me put it another way. There was no right of enforcement by KMSI.

MR. FAGONE: There was no right of enforcement against KMSI. No right to payment.

THE COURT: And KMSI had no right of enforcement against the Debtor.

MR. FAGONE: Of course not. There's nothing in this contract that that KMSI could have showed up and said, you must assign these track miles to us under this agreement. There's no legal right to it and I don't think Wheeling can argue that there's one. Okay.

So step one is the security interest didn't attach. Okay. Let's suppose Wheeling can get over those hurdles. All right.

THE COURT: Okay.

MR. FAGONE: That brings us, then, to the inevitable conclusion that the money that's sitting there that Wheeling is asserting an interest in, is proceeds of a contract. That's what they argue. They say it's proceeds. We don't think the security interest attached but let's assume it did.

If it's proceeds it's subject to adjustment under the

equities proviso. Now, I want to talk very briefly about two First Circuit cases, okay. Mr. Marcus cited both of them. The Schlichtmann case. I think that case is distinguishable because there was a lawyer who had been in the law firm, had done some work based on a contingency fee agreement with a client and before the bankruptcy filing the money existed, the fund was created and the Debtor's entitlement to it was fixed. It was fixed. The money sat there in June of 1991 and Mr. Schlichtmann filed in October of 1991. Pre-bankruptcy, all events done. He was entitled to the money. Okay.

That's really not important when we're talking about the equities case. Schlichtmann didn't even address the equities case. So that has -- the First Circuit's ruling in Schlichtmann doesn't give this Court any guidance about how to weigh equities. Just not dealt with. Okay. Cross Baking --

THE COURT: Because he was a lawyer.

MR. FAGONE: Perhaps. A rather famous one too, I think. The Cross Baking case also -- the holding of the case is that the equities provision didn't apply, again as I said earlier today, because there wasn't proceeds. It was after acquired property. Proceeds after acquired property, if you're over here no equities adjustment, if you're over here the Court can exercise its equity.

Now, I will say, and let me read --

THE COURT: Well, hold -- hold on. Hold on.

MR. FAGONE: Yeah.

THE COURT: I want to make sure that I understand.

MR. FAGONE: Yeah.

THE COURT: I think you're the one that's conflating now because if it attached I don't know that -- you're already conceding, for the sake of discussion, that it attached.

MR. FAGONE: Yeah. Yes. Yes. I kind of moved --

THE COURT: So then how do we get into the after acquired --

MR. FAGONE: I moved analytically on you and I shouldn't have. I apologize. Okay.

THE COURT: Well, thank you. Okay.

MR. FAGONE: But let me read from Mr. Marcus' brief.

THE COURT: So I can ignore that distinction.

MR. FAGONE: Yes.

THE COURT: Thank you.

MR. FAGONE: Except to the extent that Mr. Marcus is arguing that Cross Baking is somehow controlling on the equities piece. It's not. Cross Baking -- the holding was the equities piece cannot apply so the holding has nothing to do with when the equities provision should be applicable which you had a colloquy with Mr. Marcus about. Okay.

I'm going to read from his brief the excerpt from Cross Banking. It says nothing about unsecured creditors. It says, "We can only conclude from our reading of these reports

that the equities of the case proviso is a legislative attempt to address those instances…" -- there's the key language -- "…where expenditures of the estate…" -- expenditures of the estate -- "…enhance the value of proceeds which, if not adjusted, would lead to an --

THE COURT: To a windfall to the secured party.

MR. FAGONE: Correct, Your Honor.

THE COURT: Which is what I said to him before. Okay.

MR. FAGONE: Okay. So I don't think Schlichtmann or Cross Banking are outcome determinative. Okay. Here's what I do think is outcome determinative.

THE COURT: I'm telling you both that I'm not certain on that right now but I appreciate your argument. It's helpful. Yes?

MR. FAGONE: Here's what I do think is outcome determinative. Expenditures giving rise to these payments were made from a variety of sources. More than half of them came -- more than half of the prepetition ones came from prepetition Canadian receivables, that's Trustee's Exhibit 9. I understand Mr. Marcus may quarrel with whether it's a U.S. receivable, a Canadian receivable. This exhibit demonstrates, in our view, that they're Canadian receivables.

One view of the evidence is that the U.S. company simply acts as a receivables management agent for the

affiliated Debtor. That's not uncommon. There's nothing in Accounting 101 that says you can't do that. Okay. But you don't need to decide that today. All you need to understand today is that about 50 percent of the revenue came from Canadian accounts in which Wheeling isn't perfected and I don't think there's any serious dispute about the lack of perfection. Okay.

Number two --

THE COURT: But pre-filing we couldn't call that property of the Estate, could we?

MR. FAGONE: No, but the money, which is proceeds, is property of the Estate. Okay.

Number two, Wheeling has benefitted from the operation of this company after August 7th. Without it, and this is where I think the Court isn't permitted to draw reasonable inferences, okay, without it there likely would not have been certification to KMSI. And even if there had been a certification to KMSI, KMSI very well may not have paid me money because it had no way to know whether the railroad would still be owned on December 31, 2013 which is a factual predicate to its liability under the contract.

So Wheeling has benefitted by the fact that the railroad continued to operate and make the expenditures and now make the certifications. Wheeling has benefitted from the collection of its receivables. The Trustee's been running the

business, collecting the receivables and handing them over. Now, we may have a dispute about whether all of them are handed over. That's not before you -- the Court this afternoon.

But the reality is, and I think we all know this from years of experience, when a company ceases doing business, collecting receivables gets harder. We've been collecting them and Wheeling hasn't been paying for it. It's been getting a free ride.

THE COURT: Don't tell Mr. Cohn. All right.

MR. FAGONE: Yeah, Mr. Cohn has a different view, I get. Okay. The cost of the Chapter 11 have been borne by other creditors, by FRA. Okay.

The other thing that I think is important, it's up to you to decide how to weigh the equities, but Wheeling's reasonable contractual expectations are not frustrated or would not be frustrated by a limitation of its security interest on these proceeds. It wasn't lending money based on these proceeds.

Now, Mr. Marcus will say, sure, you know, it took the collateral, it took everything it could find and it loaned against a certain amount and that doesn't mean that it doesn't have a lien on it and I agree with that. If we're at this point in the analysis it has an lien on it and they're proceeds. I'm just saying in terms of weighing equities it is fair, in our view, to consider that this isn't really what

Wheeling thought it had for collateral. This is found money that the Trustee created by running the business and doing what it had the ability, but not the right, to do under that -- under TMA.

THE COURT: It really goes back into your prior argument that this is -- there's benefit from the Estate. So the fact that he found nickels in the couch, he'd like to have one of those nickels because the couch wouldn't have been there without you.

MR. FAGONE: Correct. I also think, Your Honor, it's entirely appropriate, under the statute and under any case law, for the Court to consider the fact that the Estate needs the money to continue operating for the benefit of all creditor constituencies. The Court approved the sale. The (outer) date for the sale is the end of March. You heard evidence that the company doesn't have sufficient liquidity under its current financing arrangement with Camden National Bank to get there and, again, I don't think that's determinative. I think it's one of the facts the Court puts in the caldron and mixes up and weighs the equities. I think that's what 552(b) is designed for the Court to do and in this case --

THE COURT: Maybe that's what creates the urgency to weigh the equities but I don't know that it's -- beyond that how much it contributes because for that matter we could even assess the professionals (inaudible).

MR. FAGONE: Understood, Your Honor. I don't disagree with that. I just -- I think that there is -- there's a place for that fact in the analysis here. And that's all I have, Your Honor.

THE COURT: I want to thank you and I want to thank everybody. Mr. Marcus, you have something else you want to add?

MR. MARCUS: Just a brief rejoinder. The contention that Wheeling's security interest in the TMA hadn't attached on the date of filing because there was no right to demand payment and, therefore, it hadn't attached and that's not valid security is just false and the Schlichtmann case demonstrated it was not false. And I believe that Mr. Fagone erroneously stated in Schlichtmann that the contingent fee had been earned at the time of the bankruptcy filing. It hadn't. The First Circuit was explicit. It was earned --

THE COURT: It was still contingent and, as a matter of fact, he was an assignee.

MR. MARCUS: That's right. And so if Mr. Fagone's rule were that if the contract party can't demand payment there's nothing to attach, is false --

THE COURT: Well, I --

MR. MARCUS: -- negated by Schlichtmann.

THE COURT: Well, I read -- let's not get too personal.

MR. MARCUS: No. Not personal at all.

THE COURT: I understand your argument. I understand --

MR. MARCUS: All right.

THE COURT: -- his argument. You were both very forceful in your assertions and I'll have to decide how the definition of attachment applies to this unique set of circumstances. What else?

MR. MARCUS: My second point is that a lot of assertions have been made concerning the equities that are simply not supported by any record in this Court, other than just talk which is not part of the record.

For example, the so-called Canadian receivables being not part of Wheeling's collateral. We talked about that a lot. Now, in argument a moment ago Mr. Fagone says, oh and by the way, Wheeling didn't file anything in Canada. That has no significance because the contract, which is Exhibit 1 and Exhibit 2, the two contracts are signed by MMA --

THE COURT: By those entities.

MR. MARCUS: That's right and they create a security interest that under U.S. law is valid and enforceable. Now, if Canada --

THE COURT: But if it's not perfected, it may have implications once we have an intervening bankruptcy.

MR. MARCUS: Well, we don't know because if --

THE COURT: Well, we do know that that's -- that that may have implications but we don't now what the facts are is what you're telling me.

MR. MARCUS: Well, we don't know what the implications are either because we -- we're all used to thinking in the terms in the vernacular of U.S. debtors under U.S. bankruptcy laws. The lack of a filing is a problem under U.S. laws but there has been no avoidance proceeding in Canada and I'm not sure there's any grounds for avoidance in Canada.

My point is -- my point is you don't have to decide that today but you do have to recognize that there's absolutely nothing in this record that would permit you to say that these so-called Canadian receivables are not Wheeling's receivables. In fact, everything that's in the record points exactly the opposite direction. Signed agreements, the issue of the invoices, they all point in favor of Wheeling.

THE COURT: Okay. The burden of establishing a security interest is on whom?

MR. MARCUS: The burden of a prima facie case security interest is on Wheeling and, of course, we've established that.

THE COURT: Right and so if there's an absence of perfection you're saying that that fact doesn't necessarily establish anything.

MR. MARCUS: It establishes nothing for the Canadian

company and the burden on the equitable defenses --

THE COURT: I take your point. I don't know that it does or it doesn't but the burden of what you have a security interest in is yours.

MR. MARCUS: That's right. However, on the equitable defense on the argument that, okay, even if there's a security interest equities say do something different, that's the Debtor's burden. And there's no evidence in this Court that would fulfill the equitable arguments they're making.

Now, it's not just that issue. It's also the issue concerning the expenditures on the railroad tracks. You know, whatever the source was, we don't know what money was spent. Nobody kept of it. Nobody can tell. All right.

Secondly, in terms of frustrating Wheeling's expectations there's no evidence as to what their expectations were. The assumption is that Wheeling just forgot about its payment intangibles and its accounts. Well, there's no record to that. As far as I know, everybody at Wheeling stayed up late all night before the filing and worried about it. There's just no record to permit the conclusion that this was immaterial collateral to Wheeling. In fact --

THE COURT: I going to disabuse everybody of that notion. I've referred to it three times as nickels in the couch and I think that's why you have that type of collateral in the hope that you never have to go looking for it and when

you do, you do. Okay.

His point is however, not that that's dispositive of anything but let's, at least, think about it judge because maybe that's worthy of some thought. That's all he's telling me. Okay.

MR. MARCUS: Okay. All right.

THE COURT: All right.

MR. MARCUS: Last point and I appreciate the course (inaudible). The last point is that, well, the Debtor's -- the Trustee's operation has been a benefit to Wheeling. I don't know if that's true. There's no record to say that it is. Wheeling's collateral was used to the tune of roughly a million dollars on the promise of a replacement lien. I have no idea whether that promise is going to be fulfilled. For all we know, for all the record today shows, it's impossible to say whether Wheeling has benefitted from operations or not. The Court will recall that through October 18, Wheeling collateral was used on the promise of replacement collateral. We don't know yet whether that promise has been fulfilled and if it's been fulfilled the Court will also remember that the promise is kept by the extent of use. All right. So there's no -- there's no windfall from operations. The worst outcome is Wheeling has suffered from the operation. The best possible outcome is it's been left on a par. That's the best possible outcome. So there's no record under which the Court can draw

upon today to say that, well, spending money on track maintenance and running this railroad has benefitted Wheeling. No record whatsoever --

THE COURT: I think the point that he was making is --

MR. MARCUS: We don't know it's true.

THE COURT: -- that if the railroad had stopped running you may not have recovered as much of the million dollars as you've recovered.

MR. MARCUS: Well, and one would have to say, okay, let's say it's true. We wouldn't have recovered our receivables the same degree as we would have. Well, and what is -- and what is the cost of running -- we don't know the other piece of the equation. Okay. So, yes, we might have suffered a diminution of the value of receivables but we don't know how much we suffered by operating. So there's no way to draw a conclusion. Thank you.

THE COURT: Thank you. Do you want to say anything at all?

MR. FAGONE: Nothing further, Your Honor.

THE COURT: All right. Thank you again. It's not compulsory but if you have a few moments before you depart I'll see counsel in chambers, otherwise, have a nice evening. I'll only see everybody, not pieces.

MR. MARCUS: We'd love to. We'll be there.

THE COURT: Thank you.

THE COURT OFFICER: All rise.

(PROCEEDINGS ADJOURNED (January 23, 2014, 3:54 p.m.)

C E R T I F I C A T E

I hereby certify that this is a true and accurate transcript of the proceedings which took place on January 23, 2014 which have been electronically recorded in this matter.

Beverly A. Lano
Transcriber