UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	)	
	)	**Chapter 11**
Montreal Maine & Atlantic Railway Ltd.,	)	**Case No. 13-10670**
	)	
Debtor.	)	
	)	
Wheeling & Lake Erie Railway 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.; Travelers Property Casualty Company of America a/k/a Travelers Insurance Company,	)	**Adv. No. 13-01033**
	)	
Defendants.	)	

WHEELING & LAKE ERIE RAILWAY COMPANY'S INITIAL BRIEF REGARDING THE APPLICABILITY AND ENFORCEABILITY OF THE COURT'S 2014 RULINGS DETERMINING THAT THE SO-CALLED CANADIAN RECEIVABLES ARE WHEELING'S COLLATERAL

Now comes Wheeling & Lake Erie Railway Company ("Wheeling") and pursuant to the Third Amended Joint Pretrial Order and Stipulations (the "Third Amended JPO") [Adv. Proc. D.E. # 61] files this Initial Brief Regarding the Applicability and Enforceability of the Court's 2014 Rulings Determining That the So-Called Canadian Receivables Are Wheeling's Collateral. *See* Third Amended JPO, ¶¶ C, 2, 4. Wheeling and the Trustee have stipulated that if the Canadian Receivables constitute Wheeling Collateral, then Wheeling has a valid and enforceable, superpriority administrative claim in this case in the amount of $695,640.93. *Id.*, ¶

3.A. Wheeling contends that this Court has already determined, twice, that Wheeling has a valid, perfected and enforceable security interest in the Canadian Receivables, and that these determinations are fully binding on the Trustee. Thus, as set forth in the Third Amended JPO, this Initial Brief addresses the following question:

> Whether the Bankruptcy Court, Judge Kornreich presiding, ruled at the conclusion of the March 13, 2014 hearing and/or the May 8, 2014 hearing that the so-called Canadian Receivables constituted Wheeling's collateral (the "Ruling") and, if so, whether any such ruling is binding upon the Trustee and Wheeling for the purposes of the Cash Collateral Motion and the Surcharge Motion.

Id., ¶ 2. The answer to both of those questions is an unequivocal "yes". As this Court has already held, the Ruling[1] did in fact determine that the Canadian Receivables[2] are Wheeling's collateral and, when the Trustee challenged the Ruling, ***the Court reaffirmed the Ruling***, and to remove all doubt, it held that Ruling is ***binding on the parties for all purposes***, including the pending Cash Collateral Motion and the Surcharge Motion (as those terms are defined in the Third Amended JPO). Given that these issues have already been briefed and decided by this Court multiple times in multiple final orders, there is absolutely no procedural or substantive basis that would permit this Court to revisit the Ruling.

Procedural History

1. On August 7, 2013, Montreal, Maine & Atlantic Railway, Ltd. (the "Debtor" or "MMA") filed a petition for relief under 11 U.S.C. § 101, *et seq.* Fourteen days later, the Trustee was appointed to oversee the Debtor's estate.

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[1] The Ruling is actually comprised of four separate transcripts and/or orders: (a) The March 13 Findings; (b) the Net Funds Order; (c) the May 8 Findings; and (d) the Rule 52 Order (as those terms are defined *infra*).

[2] During the pendency of this Chapter 11 case, the Trustee has taken the position that accounts receivable generated in conjunction with rail services provided to Canadian customers – accounts described as "Canadian Receivables" – are property of the Montreal, Maine & Atlantic Canada ("MMA Canada") estate (and not property of the Debtor's estate) and therefore are not subject to Wheeling's perfected security interest. *See e.g.*, Cash Collateral Motion, ¶ 13. Wheeling disputes this, and the Court has twice rejected the Trustee's contentions.

2. Soon thereafter, Wheeling initiated the above-captioned Adversary Proceeding by filing a complaint seeking a determination of the extent and priority of its security interests in property of the Debtor's estate (the "Complaint") [Adv. Proc. D.E. # 1]. More specifically, Wheeling sought a judicial determination that certain of the estate's assets served as collateral for a $6,000,000 line of credit (the "LOC") because the Debtor had granted Wheeling a pre-petition security interest in, *inter alia*, the Debtor's accounts and other rights to payments. *See* Complaint, generally.

3. On December 2, 2013, Robert J. Keach, the chapter 11 trustee (the "Trustee") for the Debtor's estate filed a Motion for Order (I) Authorizing Assignment of Tax Credits and (II) Granting Related Relief (the "45G Motion") [D.E. # 463]. In the 45G Motion, the Trustee sought authority to continue performing pursuant to a certain Track Management Agreement (the "TMA") entered into between the Debtor and KM Strategic Investment ("KMSI"). Under the TMA, the Debtor agreed to assign certain railroad track miles to KMSI, solely for the purpose of allowing KMSI to claim a federal income tax credit in relation to those track miles under section 46G of the Internal Revenue Code. In exchange for said assignment, KMSI agreed to pay the estate $400,000 for the tax credits it received, after deduction for a broker's fee and an escrow (the "Net Funds").

4. Wheeling filed an objection to the 45G Motion (the "45G Objection") on December 9, 2013 [D.E. # 470]. In its objection, Wheeling endorsed the agreement with KMSI, but claimed entitlement to the Net Funds because it claimed that these funds constituted "accounts" or "payment intangibles" within the meaning of the Maine UCC, in which it held a pre-petition security interest.

5. On December 17, 2013, the Court issued an order granting the relief requested in the 45G Motion but it reserved the respective rights of Wheeling and the Trustee with respect to the Net Funds (the "45G Order") [D.E. # 511].

6. By consent order issued on January 17, 2014 (the "Stay Order"), most activity in the Adversary Proceeding was stayed until the earlier of March 13, 2014, of the entry of an order terminating the stay [Adv. Proc. D.E. # 28]. Discovery and litigation related to the 45G Motion was expressly excluded from that stay[3]. Stay Motion, ¶¶ 5, 8-9.

7. Wheeling and the Trustee subsequently conducted discovery related to 45G issues and Wheeling's entitlement to the Net Funds. Among other things, Wheeling deposed the Debtor's VP of Finance & Administration and CFO, M. Donald Gardner. In addition, and the parties also filed simultaneous briefs on the foregoing issues [D.E. ## 576, 578].

8. The Court then held an evidentiary hearing on January 23, 2014 (the "January 23 Hearing") to determine the validity, priority, and extent of Wheeling's interest in the Net Funds [*see* D.E. #590]. During the January 23 Hearing, Mr. Gardner testified under oath about various issues (including the nature and source of the Canadian Receivables), the parties argued their positions, and the Court took the matter under advisement[4].

9. On March 13, 2014 the Court convened another hearing during which it rendered its decision on the parties' entitlement to the Net Funds (the "March 13 Hearing" and the "March 13 Findings"). In holding that Wheeling was entitled to most of the Net Funds, the

[3] The parties agreed that the nature of the Net Funds disagreement between the Trustee and Wheeling technically brought that dispute under the ambit of the Adversary Proceeding, but since the Trustee initiated the matter as a motion in the main Chapter 11 case, the parties agreed to continue to litigate the Net Funds dispute, and have the Court decide the matter, in the context of the 45G Motion as a contested matter in the main case. As evidenced by the Stay Order, the Court agreed to this course of action.

[4] A true and accurate copy of the January 23 Hearing Transcript is docketed at D.E. # 697.

Court found in the March 13 Findings that the Canadian Receivables were in fact property of the Debtor (and not MMA Canada):

> The Canadian accounts. I stated earlier in the day today that the evidence from the Debtor's witness [Mr. Gardner] 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 [MMA Canada] and the American entity [MMA], 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 any other distinction or separation between accounts receivable attributed 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*** [the alleged failure of Wheeling to perfect its security interest with respect to assets of the Canadian subsidiary] ***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.***

March 13 Findings Transcript[5], pp. 76:7-77:9 (emphasis added).

10. The Court, having thus determined that the Canadian Receivables were assets of the Debtor, also held that they were, as a result, subject to Wheeling's duly perfected and enforceable Article 9 security interest in the Debtor's accounts. The Court went on to determine that the proceeds of Wheeling's collateral, including the Canadian Receivables, were used to fund the track maintenance expenditures that in turn generated the Net Funds.

> The evidence indicates that clearly and unambiguously, the Debtor['s] source of funding through accounts receivable, the accounts receivable were subject to pre-

[5] A true and accurate copy of the March 13 Findings Transcript is docketed at D.E. # 1008.

> 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 to the Debtor under the [TMA] was recovery by the Debtor 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.***

March 13 Findings Transcript, p., 78:5-14 (emphasis added).

11. This was a critical issue in the 45G Motion because the Trustee contended that Wheeling should not have an interest in the Net Funds to the extent they were created by expenditures of funds that were not Wheeling collateral or proceeds of its collateral. The Court rejected this contention as to the Canadian Receivables, holding that they were Wheeling collateral and their proceeds were used in part to generate the Net Funds. *Id.* On March 17, 2014, the Court issued the Net Funds Order which quantified Wheeling's entitlement to $342,121.81 of the Net Proceeds "[f]or the reasons set forth on the record of herein on March 13, 2014."

12. On March 31, 2014, the Trustee filed his Motion for an Order Amending or Striking Findings of Fact Pursuant to Fed.R.Bankr.P. 7052 (the "Rule 52 Motion") [D.E. # 807]. In the Rule 52 Motion, the Trustee asked the Court to amend or strike the portion of the March 13 Findings regarding the Canadian Receivables, supposedly because (a) they were not supported by the evidence introduced at the January 23 Hearing; (b) they were unnecessary to the Court's adjudication of Wheeling's interest in the Net Funds; (c) they violated the Cross-Border Insolvency Protocol (the "Protocol") [D.E. # 168] entered into by the this Court and the Quebec Superior Court overseeing the MMA Canada insolvency proceeding; and (d) they could prejudice his defense of the Cash Collateral Motion. On the last point the Trustee argued:

> In unnecessarily making the March 13 Findings, the Court has potentially prejudiced the Trustee with respect to other related matters before this Court, including the [Cash Collateral Motion]. The issue of the ownership of the

> Canadian receivables is directly involved in the [Cash Collateral Motion], and this Court's findings and conclusions as to this issue were made well before the record was fully developed on the point.

Rule 52 Motion, ¶ 24.

13. On April 30, 2014, Wheeling filed its Objection to the Rule 52 Motion (the "Rule 52 Objection") [D.E. # 842]. The Rule 52 Objection squarely responded to each of the asserted bases for the Rule 52 Motion and demonstrated why they lacked all merit. In a nutshell, Wheeling made the following points in its Rule 52 Objection:

- The Court's determination regarding the Canadian Receivables was fully supported by the evidence, to wit, the testimony of Mr. Gardner, the Chief Financial Officer of the Debtor.

- The Court's determination was fully necessary to the adjudication of Wheeling's entitlement to the Net Funds because the Trustee claimed that Wheeling was not entitled to all of the Net Funds because a portion of them were generated by the expenditure of the proceeds of the Canadian Receivables, which the Trustee asserted were not Wheeling Collateral.

- The Court's adjudication did not violate the Cross Border Insolvency Protocol because that Protocol expressly preserves the right of the Court to adjudicate the rights of parties in and to property of the Estate. The Bankruptcy Court needs no permission from any Canadian Court to exercise its jurisdiction pursuant to 28 U.S.C § 1334.

- The Court's adjudication might well "prejudice" the Trustee in other matters, because the Court entered its final order ruling against the Trustee; nevertheless, this presents no injustice. The Trustee is the party that raised the issue regarding the Canadian Receivables and he had every opportunity to present evidence and make legal argument to sustain his position. He did, and he was overruled.

Wheeling incorporates herein its Rule 52 Objection in its entirety, by reference.

14. On May 8, 2014, the Court held a hearing on the Rule 52 Motion [D.E. # 860]. After hearing oral argument from the parties, the Court issued oral findings of fact and rulings of law (the "May 8 Findings") and denied the Rule 52 Motion in its entirety; largely for the reasons articulated by Wheeling. May 8 Findings Transcript, pp. 11:25-44:16 (oral argument);

pp. 44:18-49:15 (findings of fact and rulings of law). The May 8 Findings are summarized and discussed below (a true and accurate copy of the May 8 Findings Transcript is attached hereto as ***Exhibit A***). ***In doing so, the Court explicitly addressed – and explicitly rejected – each of the bases for the Trustee's Rule 52 Motion.***

15. First, the Court held that the Canadian Receivables ruling did not run afoul of the Protocol or the Canadian Court's jurisdiction over MMA Canada and its assets "for reasons which I have fully elaborated during my colloquy with counsel." May 8 Findings Transcript, p. 45:10-11. Wheeling directs the Court to pages 13-19 and 33-36 of the May 8 Findings Transcript for that colloquy. The Court nevertheless then went on to summarize its ruling on this issue:

> I will just summarize it this way that this court may exercise its jurisdiction with respect to property of debtor and property of the estate [under 28 U.S.C. § 1334]. The evidence presented at the hearing suggested to me that all of the receivables were property of this debtor. The Trustee has conceded this morning that with respect to the finds [sic] as made they correspond to the evidence presented and to the evidence 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 [e]state based on the evidence of that 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 choose to ignore it or challenge it. Those questions are now [sic] before me now.
>
> So with respect to the first argument on jurisdiction and the [P]rotocol, the Trustee's Motion is denied.

Id., p. 45:12-15:9.

16. The Court also found that, contrary to any assertions by the Trustee, the evidence presented at the January 23 Hearing fully supported the Court's findings as to the Canadian Receivables:

> 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[6]. 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.

Id., p. 46:10-17.

17. Third, the Court held that the Canadian Receivables findings were necessary to the Net Funds Order, and not mere *dicta*:

> 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.***[7] 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 [§ 552(b)]. 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***

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[6] *See* May 8 Findings Transcript, pp. 19:2-20:2.

[7] During oral argument, the Court was similarly blunt: "The Trustee clearly and unambiguously raised the issue by asserting that some portion of the so-called receivables were Canadian receivables . . . ***It was the trustee that put the issue of receivables four square before the court.***" May 8 Hearing Transcript, p. 13:19-25 (emphasis added).

> ***the Trustee was that even if Wheeling had a perfected security interest in the 45G proceeds, the equities exception should be appl[ied].***
>
> ***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 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 [sic] 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 ample opportunity to join other parties, which he now deems to be necessary. He failed to do all of that.

Id., p. 46:20-49:6 (emphasis added).

18. Finally, the Court made short shrift of the Trustee's argument that the Ruling should be overturned because it would be prejudicial to the Trustee in other matters, including resolution of the Cash Collateral Motion:

> ***As I caution[ed] 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 maybe prejudicial to the debtor in other matters, specifically the motion

> that we are going to here now [the Cash Collateral Motion]. ***My answer to that is so be it***[8]. The Trustee's motion to reconsider on 52B is denied in all respects.

Id., p. 49:6-14 (emphasis added).

19. On the same day, the Court issued a brief order denying the relief requested in the Rule 52 Motion "in its entirety for the reasons set forth on the record at the Hearing" (the "Rule 52 Order") [D.E. # 864].

20. On May 16, 2014, the Trustee filed a notice of appeal (the "Notice of Appeal") to the First Circuit Bankruptcy Appellate Panel (the "BAP") appealing the March 13 Findings [D.E. # 844].

21. Following the filing of the Notice of Appeal, the Trustee and Wheeling agreed to resolve certain disputes between them, including those arising from this Court's rulings on the Net Funds. As such, on July 10, 2014, the Trustee filed a Motion for Order Approving Compromise and Settlement Agreement with Wheeling & Lake Erie Railway (the "Compromise Motion") [D.E. # 1011].

22. In the Compromise Motion, the Trustee stated as follows:

> Following additional briefing by the parties, the Court entered an order determining that Wheeling was entitled to 69.74% of the 45G Tax Credit Proceeds, *i.e.*, $342,128.81 [the Net Funds Order]. *See* D.E. 761. Based on the Court's determination, the Trustee would receive $148,384.31.

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[8] It should be noted that the Court made this ruling after the Trustee's counsel admitted during oral argument that he had not asked for any sort of instruction that would limit the effect of the Net Funds Order to only the 45G Motion (had such a request been made, Wheeling would have opposed it):

> THE COURT: Excuse me one moment, Mr. Fagone may I ask you, did you at any time during the evidentiary hearing [the January 23 Hearing] say your Honor it is our understanding that this evidence today is limited and spoken [sic] 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 it was necessary.
> THE COURT: I understand that and I respect that. But there was no such express . . .
> MR. FAGONE: ***The transcript is clear that there was no such reservation***.

May 8 Findings Transcript, p. 33:4-14 (emphasis added).

> The trustee has appealed this Court's determination of the extent of Wheeling's interest in the 45G Tax Credit Proceeds (the "45G Appeal"). *See* D.E. 884. The 45G Appeal is currently pending in the Bankruptcy Appellate Panel for the First Circuit.

Compromise Motion, ¶¶ 27, 28.

23. The proposed compromise as to the Net Funds Order was as follows:

> In full and final satisfaction of any and all claims asserted by Wheeling with respect to the Debtor's 45G Tax Credits, following the Final Order Date[9], the Trustee shall, within five (5) business days of the Final Order Date, pay Three Hundred and Twenty-Three Thousand ($323,000) from the 45G Tax Credit Proceeds to Wheeling (the "45G Tax Settlement Payment," and together with the Inventory Settlement Payment, the "Settlement Payments"). The remainder of the 45G Tax Credit Proceeds shall be payable to the Administrator of the Federal Railroad Administration on account of its lien on such proceeds. The Trustee, with Wheeling's consent, shall promptly cause any and all litigation related to the 45G Tax Credit Proceeds, including the 45G Appeal, to be dismissed, with prejudice.

Id., ¶ 32(b).

24. On July 25, 2104, the Court entered an order approving the Compromise Motion (the "Compromise Order") [D.E. # 1047].

25. The Trustee subsequently made the Settlement Payments -- including the 45G Tax Settlement Payment -- to Wheeling and dismissed the 45G Appeal.

Argument

26. There can be little doubt that this Court has ruled, in the form of ***final*** findings of fact and conclusions of law, that the Canadian Receivables were property of the Debtor and subject to Wheeling's perfected and enforceable security interest. The Court then reaffirmed these findings and conclusions when the Trustee challenged them in the Rule 52 Motion. Finally, the Court held in no uncertain terms that the Ruling is binding upon the Trustee for

[9] Defined as the date when the order approving the Compromise Motion became final and non-appealable. Compromise Motion, ¶ 32(a).

every aspect of this case, including the pending Cash Collateral and Surcharge Motions. While it would hardly seem necessary, a review of the applicable legal principles is in order.

A. The Trustee Is Collaterally Estopped From Relitigating the Ruling, Which Is Binding For All Purposes on the Trustee and Wheeling.

27. The collateral estoppel doctrine bars the Trustee from re-litigating the merits of the Ruling. It is well settled that collateral estoppel doctrine applies generally in bankruptcy cases. *Grogan v. Garner,* 498 U.S. 279, 285, n. 11 (1991). Moreover, collateral estoppel/issue preclusion has been regularly applied by bankruptcy courts in the context of both contested matters and adversary proceedings arising in the same bankruptcy case. *See e.g., In re Mortgages Ltd.*, 2:08-BK-07465-RJH, 2013 WL 1336830, at *4 (Bankr. D. Ariz. Mar. 29, 2013) (noting that plaintiffs "fail to provide any argument or authority demonstrating that the context of a contested matter somehow deprived them of a full and fair opportunity to litigate, or deprived them of a final judgment on the merits so as to render issue preclusion inapplicable" in a subsequent adversary proceeding arising from the same bankruptcy case); *In re Chase*, 392 B.R. 72, 83 (Bankr. S.D.N.Y. 2008) (holding bankruptcy court's determination that certain debt was non-dischargeable in the context of a contempt motion in a debtor's Chapter 7 case had preclusive effect in subsequent dischargeability adversary proceeding in same case); *In re Chase & Sanborn Corp.*, 138 B.R. 116, 119 (Bankr. S.D. Fla. 1992); *Matter of Cruz Martinez,* 123 B.R. 158, 159 (Bankr. D.P.R. 1991); *see also L.J. Hooker Int'l. Florida, Inc. v. Gelina (In re Hooker Inv. Inc.),* 131 B.R. 922, 931 (Bankr. S.D.N.Y. 1991); Principles of Preclusion and Estoppel in Bankruptcy Case, 79 Am. Bankr.L.J. 839, 840 (2005)

28. Under federal common law[10], a party will be precluded from re-litigating an issue that was the subject of a prior adjudication if there is "(1) an identity of issues (that is, that the issue sought to be precluded is the same as that which was involved in the prior proceeding), (2) actuality of litigation (that is, that the point was actually litigated in the earlier proceeding), (3) finality of the earlier resolution (that is, that the issue was determined by a valid and binding final judgment or order), and (4) the centrality of the adjudication (that is, that the determination of the issue in the prior proceeding was essential to the final judgment or order). *González–Piña v. Rodríguez*, 407 F.3d 425, 430 (1st Cir. 2005).

29. As is demonstrated by the procedural history set forth above, ***all*** of the elements of collateral estoppel and issue preclusion are present here. First, the Canadian Receivables issue – *i.e.* the nature and extent of Wheeling's security interest in the same – is identical for purposes of the 45G action and, *inter alia*, the Cash Collateral Motion. Second, the issue was litigated, re-litigated pursuant to Rule 52, and then appealed. Third, the issue was finally resolved when the Trustee dismissed his appeal. Fourth, the Ruling was central to the Net Funds Order, as the Court reiterated in the May 8 Findings. In short, the issue at hand — Wheeling's security interest in the Canadian Receivables — has been finally and conclusively decided. As a result, under principles of collateral estoppel and issue preclusion, the Trustee is estopped from trying to re-litigate the issue (this would be his third attempt) in the context of the current proceeding.

B. Alternatively, The Ruling Is Law of the Case For All Purposes And Is Binding on the Parties.

30. The Ruling is binding on the Trustee by application of well-defined principles of claim preclusion, as noted above. In addition, the Ruling is fully binding on the Trustee under a

[10] Because the Ruling is a judgment issued by a federal court, federal common law principles of issue preclusion apply. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

related principle, "law of the case." The First Circuit Court of Appeals has stated the rule: "[A] legal decision made at one stage of a civil or criminal case, unchallenged in a subsequent appeal despite the existence of ample opportunity to do so, becomes law of the case for future stages of the same litigation." *United States v. Bell,* 988 F.2d 247, 250 (1st Cir. 1993). *See also United States v. Leahy,* 668 F.3d 18, 21 (1st Cir. 2012) (quoting *United States v. Matthews,* 643 F.3d 9, 12–13 (1st Cir. 201). This Court has -- as it must – adhered to First Circuit ruling on the law of the case. In *In re N.E. Exp. Regl. Airlines, Inc.,* 228 B.R. 53, 61 (Bankr. D. Me. 1998), the Bankruptcy Court for the district of Maine noted that the law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."

31. The First Circuit has noted that there "two branches" to the doctrine. *See, e.g.*, *United States v. Moran*, 393 F.3d 1, 7 (1st Cir.2004); *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002). The first branch, called the "mandate rule," "prevents relitigation in the trial court of matters that were explicitly or implicitly decided by an earlier appellate decision in the same case." *Moran,* 393 F.3d at 7. The second branch "contemplates that a legal decision made at one stage of a criminal or civil proceeding should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court." *Id.* In this case, the law of the case clearly requires that the Ruling be followed by the Court because it became final when the Trustee voluntary dismissed his BAP appeal of the same.

32. In the bankruptcy sphere, the law of the case doctrine is applicable in adversary proceedings and contested matters arising under the ambit of a single bankruptcy case. *See e.g.*, *In re Provenza*, 316 B.R. 177, 220 (Bankr. E.D. La. 2003) ("The fact that the court's prior order was in a contested matter separate from the contested matter and adversary presently before the

court is of no moment. The parties and the legal issues are identical."); *N.E. Exp. Reg'l. Airlines*, 228 B.R. at 61 ("The memorandum of decision is clear in its findings and need not be restated again herein. Those findings without question are final and binding as law of the case."); *Artra Group, Inc. v. Salomon Brothers Holding Company*, 1996 WL 637595 (N.D.Ill. 1996) (*citing Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir.1990)).

33. Here, the Ruling was issued by Judge Kornreich in the context of a contested matter between the Trustee and Wheeling. *See* fn. 3, *supra*. The parties and the issues pertaining to Wheeling's interest in the Canadian Receivables are the same in the 45G matter on the one hand, and in the Cash Collateral and Surcharge Motions on the other. *See Provenza*, 316 B.R. at 220. The Trustee has already had "ample opportunity" to challenge the Ruling in a subsequent appeal. *See Bell*, 988 F.2d at 250. In fact he did so by appealing to the BAP; that appeal was then dismissed. *See id.*

34. As such, the Ruling falls squarely within the *Bell* rubric: It was a "legal decision made at one stage of a civil or criminal case," – i.e., the 45G contested matter. *Id.* It then went ultimately unchallenged "in a subsequent appeal despite the existence of ample opportunity to do so" and became a final order. *Id.* This means that the Ruling "becomes law of the case for future stages of the same litigation." *Id.*

35. Any claim by the Trustee that application of the law of the case doctrine to the Ruling would be unfair is simply unwarranted. The parties litigated the 45G matter knowing full well that the outcome would have preclusive effect on future disputes. The Court noted as much at the May 8 Hearing: "The issues that were determined were determined with full notice to the parties that they would have preclusive effect in all respects." May 8 Findings Transcript, p. 17:9-11. The Trustee may not like the result of the application of that doctrine to, *inter alia*,

the Cash Collateral Motion, but, as Judge Kornreich said, "so be it."[11] *Id.*, p. 49:12. Nor is this an unjust result: the Trustee was given at least two opportunities to make his legal and factual arguments to the Court[12]. Fairness requires nothing more.

36. In sum, under controlling First Circuit jurisprudence, the Ruling – that the Canadian Receivables are property of the MMA estate and therefore Wheeling collateral -- is as applicable to the pending Cash Collateral Motion and Surcharge Motion as it was to the 45 action[13].

CONCLUSION

As the parties have stipulated, if the Court determines that its prior rulings on the Canadian Receivables (*i.e.*, the Ruling) is binding on the Trustee, then Wheeling will have an allowed superpriority administrative claim in the amount of $695,640.93. There would seem to be no plausible reason for the Court to rule in any other manner. Principles of collateral estoppel and "law of the case" all point in the same direction: the Trustee is bound by prior orders of the Court in all respects. And there can be no doubt that two prior orders of the Court regarding the Canadian Receivables are clear and unequivocal in their outcomes, were entered

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[12] Not counting the current round of briefing, which constitutes a third bite at the apple for the Trustee.

[13] There are limited exceptions to the law of the case doctrine. It may not apply on a showing of "exceptional circumstances":

> At a minimum, reopening would require a showing of exceptional circumstances-a threshold which, in turn, demands that the proponent accomplish one of three things: show that controlling legal authority has changed dramatically; proffer significant new evidence, not earlier obtainable in the exercise of due diligence; or convince the court that a blatant error in the prior decision will, if uncorrected, result in a serious injustice.

Bell, 988 F.2d at 251. Obviously, no "exceptional circumstances" are present here. There has been no change in controlling legal authority. There has been no showing of significant new evidence "not earlier obtained in the exercise if due diligence" (to the contrary, the Court took the Trustee to task at the May 8 Hearing when the Trustee tried to suggest that additional evidence beyond that presented at the January 23 Hearing could alter the Ruling: "the time for evidence has passed." (May 8 Findings Transcript, p. 20:6)). Finally, there was -- of course -- no blatant error in the Ruling. This is evidenced by the Court's explicit rejection of the relief requested in the Rule 52 Motion and the Trustee's subsequent abandonment of the BAP appeal.

after full opportunity to present evidence and make legal arguments, were entirely necessary (indeed they were triggered by the Trustee's own arguments), and final. The Court can and should end this proceeding now by determining that the Canadian Receivables are and were Wheeling collateral and that therefore Wheeling has an allowed superpriority administrative claim in the stipulated amount.

WHEREFORE, Wheeling respectfully requests that the Court enter an Order:

A. Rejecting the request of the Trustee to relitigate (for the third time) the issue of whether the Canadian Receivables are collateral for Wheeling;

B. Ordering, pursuant to the Third Amended JPO, that Wheeling holds a valid and enforceable superpriority administrative claim, in the amount of $695,640.93, and that such claim has priority over all other administrative claims in this Chapter 11 case; and

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

Dated: May 26, 2015

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

Counsel for Wheeling & Lake Erie Railway Company

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CERTIFICATE OF SERVICE

I, Karen A. Stone, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties electronically at the addresses set forth on the Service List set forth below on 26th day of May, 2015.

/s/ Karen A. Stone
Karen A. Stone
Legal Assistant

Mailing Information for Case 13-01033

Electronic Mail Notice List

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

- D. Sam Anderson sanderson@bernsteinshur.com, acummings@bernsteinshur.com; astewart@bernsteinshur.com; kquirk@bernsteinshur.com; kbigelow@bernsteinshur.com
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Manual Notice List

The following is the list of **parties** who are **not** on the list to receive email notice/service for this case (who therefore require manual noticing/service). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Montreal Maine & Atlantic Railway Ltd.
15 Iron Road
Hermon, ME 04401

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

EXHIBIT A

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IN RE: *

*

MONTREAL, MAINE & ATLANTIC RAILWAY, LTD. * **Chapter 11**

* **No. 13-10670**

Debtor. *

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*

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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.

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.

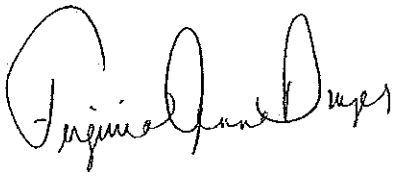
THE COURT: I will see you all in the visiting Judge's chambers okay? The court is adjourned, thank you all very much. Gentlemen I meant what I said before, I count your work on today's matters to be excellent. Thank you.

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