UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

Canadian Pacific Railway Company's motion to compel the production of settlement agreements and memorandum in support of motion

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Canadian Pacific Railway Company (CP) moves this Court for an order compelling Robert J. Keach, the chapter 11 trustee for Montreal, Maine & Atlantic Railway, Ltd. (MMAR), to produce all settlement agreements associated with the Lac Megantic derailment, without any redactions, entered into between Montreal, Maine & Atlantic Railway, Ltd. or Montreal, Maine and Atlantic Canada, Co. and any other person or entity. CP bases this motion on Rules 26, 34 and 37 of the Federal Rules of Civil Procedure.[1] The following memorandum of law supports CP's motion.

[1] Applicable to this proceeding pursuant to Fed. R. Bankr. P. 7026, 7034, 7037 and 9014(c).

Introduction

1. Canadian Pacific Railway Company (CP) seeks to compel the production of settlement agreements that the trustee wants to keep shrouded in darkness. Previously, in a motion to file under seal, the trustee contended that the third parties could be prejudiced if various Lac Mégantic claimants learned how much the settlors had committed to pay. But 11 U.S.C. § 107(b)(1) prevents the disclosure of data that could be harmful to the debtor and does not protect alleged tort-feasor bargaining leverage. Rather than pressing to file under seal, the trustee withdrew the motion. The trustee had no basis before and none now to secret the settlements. The Court should order the trustee to turn over unredacted agreements to CP.

Background

2. Invoking Rule 34, on July 27, 2015, CP served the following document requests:

> 1. All settlement agreements associated with the Lac Megantic derailment, without any redactions, entered into between Montreal, Maine & Atlantic Railway, Ltd. or Montreal, Maine and Atlantic Canada, Co. and any other person or entity.
>
> 2. All Documents that support the Trustee's request for bankruptcy court approval of any settlement agreement requested in Request No. 1, whether such approval is sought under Bankruptcy Rule 9019, as part of the confirmation of the Plan, or otherwise.

Declaration of Paul J. Hemming, Ex. A. During a telephonic meet and confer the trustee unequivocally refused to produce the requested documents. *Id.* at ¶ 3. In a subsequent written response to CP's discovery, the trustee objected to producing the agreements. *Id.*, Ex. A.

3. Earlier in these proceedings the trustee had sought to file the settlements under seal, arguing that 11 U.S.C. § 107(b) somehow justified subterfuge. *See* ECF Doc. No. 1397. Both CP and the U.S. Trustee objected. *See* ECF Doc. Nos. 1459, 1461. Just before oral argument, the trustee withdrew the motion, effectively conceding that secrecy could not be justified. Now, to dodge CP's document requests, the trustee hides behind a Canadian order that

cannot dictate how this Court decides U.S. Rule 37 motions. The Canadian order granted CP's lawyers restricted access to the settlement agreements and, according to the trustee, prevents disclosure of the unredacted agreements. But nothing about that order defines the scope of discovery south of the border.

Argument

I. The settlement agreements are relevant; their production should be ordered

4. The rules of discovery must be afforded broad and liberal construction. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" Fed. R. Civ. P. 26(b)(1). "The key phrase in this definition – 'relevant to [any party's claim or defense]' – has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). "Discovery requests may be deemed relevant if there is any possibility that the information may be relevant to the general subject matter of the action." *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 124 (M.D.N.C.1989). A party may seek to compel discovery when faced with objections or other failures to appropriately respond. Fed. R. Civ. P. 37(a)(3)(B), 34(b).

5. In the U.S., settlement negotiations and agreements are discoverable. *Cadmus Communications Corp. v. Goldman*, No. 3:05-cv-257, 2006 WL 3359491, at *4 (W.D.N.C. Nov. 17, 2006) (ordering production of confidential settlement agreement "due to the possibility it contains information relevant to the case"); *see also In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir. 1979) (when fairness is at issue, "the trial court's refusal to permit discovery or examination of the [settlement] negotiations constituted an abuse of discretion").

6. Settlement confidentiality provisions cannot prevent production of otherwise discoverable agreements:

> a general concern for protecting confidentiality does not equate to privilege ... information and documents are not shielded from discovery merely because they are confidential. Moreover, this Court has held that in the context of settlement agreements the mere fact that the settling parties agree to maintain the confidentiality of their agreement does not serve to shield the agreement from discovery. Simply put, litigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality.

DirecTV, Inc. v. Puccinelli, 224 F.R.D. 677, 684-85 (D. Kan. 2004).

7. Several factors make the settlement agreements relevant, and their unredacted production is important. First, how can any party, the court, or the public evaluate whether each settlement is fair and reasonable and in the best interest of the estate without knowing financial terms? "Irrespective of whether a claim is settled as part of a plan pursuant to section 1123(b)(3)(A) of the Bankruptcy Code or pursuant to separate motion under Bankruptcy Rule 9019, the standards applied for approval are the same. The settlement must be fair and equitable and in the best interest of the estate." *In re Best Products Co., Inc.*, 177 B.R. 791, 794 n. 4 (S.D.N.Y. 1995), *aff'd*, 68 F.3d 26 (2d Cir. 1995); *see also In re Ashford Hotels, Ltd.*, 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998) ("The 'range of reasonableness' must encompass several benchmark principles. Foremost, the settlement must be supported by adequate consideration, be fair and equitable, and be in the best interest of the estate."); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 758-59 (Bankr. S.D.N.Y. 1992) (Bankruptcy Rule 9019 standards govern).

8. Settlement equity turns upon: (1) the probability of litigation success; (2) collection difficulties; (3) complexity and expense, as well as associated inconvenience and delay; and (4) the interests of creditors and a proper deference to their views. *See In re Lion*

Capital Grp., 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985); *In re Eagle Bus Mfg., Inc.*, 134 B.R. 584, 598 (Bankr. S.D. Tex. 1991), *aff'd* 158 B.R. 421 (S.D. Tex. 1993). "The settling parties must set forth the facts in sufficient detail that a reviewing court could distinguish it from mere boilerplate approval of the trustee's suggestion." *In re Lion Capital Grp.*, 49 B.R. at 176 (citing *In re Boston & Providence RR Corp.*, 673 F.2d 11, 12 (1st Cir. 1982) and *In re Black Watch Farms, Inc.*, 373 F. Supp. 711, 716 (S.D.N.Y. 1974)).

9. By covering up the agreements, the trustee flouts bankruptcy-openness principles. All parties and the Court need to assess settlement terms, including amounts paid, to determine fairness and the estate's best interest. By not providing the agreements, the trustee forces the Court and the parties to blindly guess regarding applicable criteria sufficiency.

10. Second, both the disclosure statement and the plan emphasize settlement agreement importance. In fact, the agreements are "incorporated into the Plan, as if the same were fully set forth herein." *See, e.g.*, *Disclosure Statement* at 54. And the undisclosed deals "will apply with respect to the particular parties thereto" so as to overcome "any inconsistency between the Plan or the Confirmation Order and the Settlement Agreement(s)." *Id.* at 73. Despite this paramountcy mandate, the documented arrangements remain cloaked in mystery. CP, like any other party, is entitled to review the agreements to know how the plan affects the railroad and to assess plan fairness. The assertion that the agreements are not relevant to plan confirmation is frivolous: secret settlements control regardless of disclosed plan terms.

11. None of the trustee's twenty-two boilerplate "general objections" are sustainable. The specific objections are equally fatuous: how the request for 22 distinct settlement agreements could be "vague, ambiguous, overbroad, unduly burdensome, [or] designed to harass and annoy" defies comprehension. Hemming Decl., Ex. A, (trustee's response to Document

Request No. 1). Likewise, how agreements between opposing parties could be subject to any "attorney-client privilege" or "work-product doctrine" is perplexing to say the least. *Id.*

12. And contrary to the trustee's contention that request seeks documents already within CP's "possession, custody or control," CP never received or even saw the agreements. The Canadian court permitted lawyer (but not CP) review of the agreements but with all "financial details of the settlement agreement redacted," which numerous settling parties interpreted to allow for the liberal exclusion of contractual terms. *See* ECF Doc. No. 1491-1, Ex. A at ¶ 15 (Canadian Order dated June 17, 2015). Unfortunately, the non-filing of settlement agreements prevents this Court from evaluating settlor redaction zeal.

13. Finally, the trustee's claim that he is "barred from producing" the agreements by the Canadian Order is unavailing. The Canadian Order provides as follows:

> **ALLOWS** the third parties to transmit information as it wishes and not in the manner Canadian Pacific wishes to receive it. The redacted settlement agreements and their content will be inadmissible as evidence with the exception of being used for the purposes of the Canadian approval order and the U.S. approval order. The settlement agreements must be filed in court under seal and must be the object of a sealing order prohibiting the disclosure, publication and communication of the redacted settlement agreements and is not to be interpreted as a renunciation by any of the third parties as to the confidentiality of the settlement agreements and to the privileges attaching thereto.

Id. This ruling merely means that if CP uses the redacted agreements to contest the Chapter 11 Plan, those documents must be filed under seal.

14. The Order never addresses this Court's disposition of a motion to compel discovery, governed by U.S. law and expansive production axioms. The trustee previously urged this Court to follow the Canadian Order (now relied upon to shield the settlement agreements) according to the Cross Border Insolvency Protocol. *See* ECF Doc. Nos. 168 and 126-1, Ex. A (the Protocol). But the Protocol states:

> In accordance with the principles of comity and independence recognized herein, nothing contained herein shall be construed to: …
>
> > b. require the U.S. Court to take any action that is inconsistent with its obligations under the laws of the United States; …
> >
> > e. … preclude the Debtors, the U.S. Trustee, any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States

Protocol at ¶ 8(b) & (e).

And importantly, the Protocol specifies that U.S., not Canadian, law controls:

> The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings.

Id. at ¶ 7. Liberal discovery is the hallmark of U.S. litigation.

15. Allowing settlement agreements to never see the light of day in a U.S. proceeding contravenes United States law. Nothing in the Canadian proceedings circumscribes this Court's consideration of CP's motion to compel.

II. Nondisclosure is contrary to U.S. law

16. "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). "Only the most compelling reasons can justify non-disclosure of judicial records." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). "Under the common law, there is a long-standing presumption of public access to judicial records." *Gitto v. Worcester Telegram & Gazette Corp.*, 422 F.3d 1, 6 (1st Cir. 2005). By withdrawing the filing under seal motion, the trustee precluded the settlement agreements from becoming part of the record. Nonetheless, as critical elements of the plan, these documents should have been filed. Mollification of the U.S. trustee motivated the trustee to withdraw the

motion to file under seal. But regardless of the government's complacency, CP's need to see those documents persists.

17. The "strong presumption of public access to court records . . . is rooted in the public's first amendment right to know about the administration of justice." *Orion Pictures Corp. v. Video Software Dealers Assoc.*, 21 F.3d 24, 26 (2d 1994). "This presumption of access 'helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies.'" *Gitto*, 422 F.3d at 6 (quoting *In re Orion Pictures Corp.*, 21 F.3d at 26). "Public access to judicial records and documents allows the citizenry to 'monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.'" *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (quotation omitted). Not only has the trustee kept important aspects of a public proceeding – bankruptcy plan approval – out of party litigant view, he has even deprived this Court of influence over these seminal documents.

18. "Outside of the bankruptcy context, the right of public access to judicial records is entrenched in this country's judicial system [] and the sealing or redaction of documents on the record is considered with a keen eye toward the presumption that papers filed in the course of judicial proceedings should be open to the public." *In re Blake*, 452 B.R. 1, 7 (Bankr. D. Mass. 2011) (citing *Nixon*, 435 U.S. at 597) and *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410. "In *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.),* [422 F.3d 1 (1st Cir. 2005)], the First Circuit Court of Appeals recognized that this right of public access vis-à-vis bankruptcy proceedings is specifically codified in the Bankruptcy Code at § 107(a)[.]" *Id.* With limited exceptions, section 107(a) mandates that "a paper filed [] under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times

without charge." The trustee cannot avoid statutory obligations by not filing agreements that purportedly support plan approval.

19. "'[S]ection 107(a) is rooted in the right of public access to judicial proceedings, a principle long-recognized in the common law and buttressed by the First Amendment. This governmental interest is of special importance in the bankruptcy arena[.]'" *In re Blake*, 452 B.R. at 7 (quoting *In re Crawford*, 194 F.3d 954, 960 (9th Cir. 1999)); *see also Orion Pictures Corp.*, 21 F.3d at 26. "During a chapter 11 reorganization, a debtor's affairs are an open book and the debtor operates in a fish bowl." *In re Alterra Healthcare Corp.*, 353 B.R. 66, 73 (Bankr. D. Del. 2006). The trustee wants the affairs of the MMA bankruptcy – *i.e.,* the third party releases – to be anything but an open book.

20. Section 107(b) specifies the only exceptions to section 107(a)'s public access requirement. A court can seal documents to "(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title." 11 U.S.C. § 107(b).

The First Circuit explained bankruptcy transparency as follows:

> Together, the two components of § 107—the broad right of access created in § 107(a) and the exceptions set forth in § 107(b)—create a framework for determining whether a paper filed in a bankruptcy case is available to the public or subject to protection. Absent § 107, this question would be addressed by reference to the common law. Because § 107 speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access to papers filed in a bankruptcy case. …
>
> Once the presumption of public access attaches under § 107(a), the next step in the inquiry is ... to determine whether the material at issue falls within a specific exception to the presumption—namely, into one of the § 107(b) categories.

In re Gitto Global Corp., 422 F.3d at 7–8, 10. "If the § 107(b) exceptions do not apply, the inquiry is complete and the Court's decision will favor public access." *In re FiberMark, Inc.*,

330 B.R. 480, 506 (Bankr. D. Vt. 2005). The moving party must demonstrate that the information to be withheld is both commercial and confidential. *In re Oldco M Corp.*, 466 B.R. 234, 237 (Bankr. S.D.N.Y. 2012).

A. Only competitively harmful data constitutes confidential, commercial information

21. "§ 107(b)(1) is meant to prevent business competitors from seeing confidential business-related information and using that information to the detriment of the movant." *In re Anthracite Capital, Inc.*, 492 B.R. 162, 179 (Bankr. S.D.N.Y. 2013). The Bankruptcy Code does not define "confidential commercial information," but the courts have clarified the meaning. "Confidential commercial information" is "information which would result in an unfair advantage to competitors by providing them information as to the commercial operations of the [entity]." *In re Alterra*, 353 B.R. at 75 (quoting *Orion Pictures*, 21 F.3d at 27-28); *In re Anthracite Capital*, 492 B.R. at 178 (same).

22. To justify confidentiality, publication must "reasonably be expected to cause the entity commercial injury." *In re Alterra*, 353 B.R. at 75. "Moreover, the Court must find that information contained in the . . . [documents] . . . 'is so critical to the operations of the entity seeking the protective order that its disclosure will unfairly benefit that entity's competitors.'" *Id.* at 75-76 (quotation omitted). In simple terms, "[t]he test is whether competitors will gain an unfair advantage." *Id.* at 76. By not filing and not producing the settlement agreements, the trustee is not protecting information that could by any stretch of the imagination be deemed to be competitive.

23. While "[c]ommercial information need not rise to the level of a trade secret to qualify for protection under section 107(b)" "[i]nformation is not considered 'commercial' merely because it relates to business affairs." *In re Borders Grp., Inc.*, 462 B.R. 42, 47 (Bankr.

S.D.N.Y. 2011); *In re Anthracite Capital*, 492 B.R. at 178. "The 'commercial information' exception is not intended to offer a safe harbor for those who crave privacy or secrecy for its own sake. Instead, it protects parties from the release of information that could cause them harm or give competitors an unfair advantage." *In re Anthracite Capital*, 492 B.R. at 178 (quoting *Gowan v. Westford Asset Mgmt. LLC (In re Dreier, LLP)*, 485 B.R. 821, 822–23 (Bankr. S.D.N.Y. 2013)). Just like CP, the U.S. Trustee does not regard the settlement agreements to be commercial information. *See* ECF Doc. No. 1459. And the non-filing of the settlement agreements does not relieve the trustee of bankruptcy-disclosure obligations.

B. The settlement agreements do not qualify for section 107(b)(1) protection

1. *Settlement "leverage" does not justify a cover-up*

24. The trustee previously asserted the preservation of tortfeasor bargaining positions warranted secrecy. *See* ECF Doc. No. 1397 at ¶ 13. The *Alterra* Court refused to allow settlement-agreement nondisclosure because a revelation would not unfairly advantage reorganized debtor competitors. 353 B.R. at 76. The court rejected the notion that settlement "leverage" qualified for section 107(b)(1) treatment:

> The Reorganized Debtor argues that if the unsettled claimants are privy to the settlement amounts, the claimants will use this information as leverage to force higher settlements in their respective cases. An unfair advantage to a tort claimant (creditor) of a debtor, however, does not create an unfair advantage to its market competitors.

Id. at 76.

25. Similarly, the *Geltzer v. Andersen Worldwide, S.C.* trustee urged that a settlement agreement and the amounts paid deserved "commercial information" protection. No. 05 Civ. 3339 (GEL), 2007 WL 273526, at *3 (S.D.N.Y. Jan. 30, 2007). Exposure of the settlement agreement would supposedly harm the debtor by undermining "negotiating leverage" for other claims. *Id.* at *4.

26. The court deemed that argument to be "a rather remarkable and untenable redefinition of 'commerce.'" The court went on to find "no discernable public interest, or interest of the bankruptcy estates, in preserving [the debtor's] 'leverage' as against other parties[.]" *Id.* at *3, 4. Accordingly, concealment could not be condoned. *Id.* at *5. *See also In re Analytical Systems, Inc.*, 83 B.R. 833, 835-36 (Bankr. N.D. Ga. 1987) (vacating protective order because the settlement agreement could not pass section 107(b) muster).

2. *"No seal, no deal" clauses not enough*

27. The trustee previously asserted that a "no seal, no deal" provision excused stealth. *See* ECF Doc. No. 1397 at p. 1-2. But "[p]reserving a settlement agreement is not a reason to restrict from public viewing." *In re Anthracite Capital*, 492 B.R. at 171. The *In re Anthracite Capital,* trustee and settling defendants wanted to cloak settlement agreements, contending that they contained confidential commercial information. The movants "insist[ed]" the compromises contained a "non-negotiable 'no seal, no deal' condition," which was "reason enough for sealing a document under §107[.]" *Id.* at 172.

The court rejected that argument as follows:

> The Movants argument … is not only wrong under the law, it is also illogical. If that were the standard for sealing, every settlement in a bankruptcy case would be sealed whenever a party insisted that a document be sealed. Such a test would remove the need for analysis under § 107 and would directly conflict with the statute, the common law, and the legislative history of § 107.
>
> … "[s]ettlements are entitled to no greater protection than any other requests for relief from bankruptcy courts." …. The presumption of open access, as codified in § 107(a), "is based on the need for federal courts ... to have a measure of accountability and for the public to have confidence in the administration of justice.... [P]ublic monitoring is an essential feature of democratic control." …
>
> The "no seal, no deal" argument that is proffered by the Movants amounts to little more than each side leveraging the threat of disclosure and the costs of trial over the other. On the one hand, the Trustee can hold publicity and trial costs over the heads of the Defendants to force a settlement. On the other hand, the Defendants can force the Trustee to seal the complaint by holding over his head a lengthy and

> costly trial process. In *Geltzer*, the court held that preserving a position of leverage in negotiations with third party claimants did not justify sealing court records. … Leverage between opposing parties is an equally inappropriate justification for sealing a complaint, under § 107. Such leverage could be fabricated in almost every adversary proceeding—which would render § 107's test meaningless.

Id. at 173-74 (quotations omitted). *See also In re Lawlor*, No. 01–11402, 2003 WL 21288634, at *1 (Bankr. D. Vt. May 30, 2003) (despite a *quid pro quo* settlement confidentiality clause, section 107(b) could not be satisfied).

28. In any event, based on CP's counsel's review of Canadian proceeding confidentiality provisions, no agreement presents a "no seal, no deal" term. The provision in question states that the trustee will file the agreements under seal "*unless* [the] court refuses to allow filing under seal." If a court fails to countenance evasiveness, the contracts neither obviate nor nullify the settlements.

III. The trustee could never carry a section 107(b) burden.

29. Because the corporation will no longer exist, MMA cannot satisfy the competitive harm standard. The debtor no longer competes. Yet, the trustee apparently wants to invoke section 107(b)(1) to exculpate clandestine behavior. ECF Doc. No. 1397 at ¶ 9 (trustee motion to seal). The trustee asserted that "the Settlement Agreements contain confidential information (specifically, the dollar amount of each settlement) that must be protected from public disclosure." *Id.* at Pg. 1.

30. The trustee rationalizes nondisclosure with the very settlement "leverage" mumbo jumbo that other courts have soundly and uniformly rejected. The trustee asserted that "in the event the Plan does not become effective, the rights of third parties to sue the Released Parties will be restored" and discovery "would [] severely prejudice[] [the Released Parties] if the amount each was willing to pay in settlement was generally known to future plaintiffs and their

counsel." *Id.* at ¶ 13. The courts in *Alterra*, *Geltzer* and *In re Anthracite Capital* had no time for such nonsense. And nothing about a Canadian court order controls the conduct of U.S. discovery or trumps this Court's interpretation and application of U.S. discovery rules.

31. If that were not enough, the trustee sought to hide other supposedly "minor provisions unique to particular Settlement Agreements (such as certain claims preserved by Released Parties against non-settling parties or insurer)." Id. at ¶ 14. This is exactly the sort of information CP, as a non-settling party, must have. CP knows of one such "minor" provision because the settling party – Irving Oil –announced a $75 million (CDN) settlement and reserved rights to recover while assigning other rights to the trustee. ECF Doc. 1461-1, Ex. A (Hemming Decl.).

32. Another party – World Fuel Services Corporation – proclaimed in press releases that in addition to paying $110 million (USD), the settlor "assign[ed] to the Trustee and MMAC certain claims it has against third parties arising out of the derailment." *Id.*, Ex. B. That assignment undoubtedly encompassed Carmack claims against CP.

33. The Bankruptcy Code entitles CP to completely understand all settlement agreements ramifications, particularly regarding claims against CP that were supposedly and secretly reserved or assigned. To make an informed assessment and to mount an appropriate defense, CP must know what is being resolved and what is not.

Conclusion

34. No U.S. law condones the covertness with which the trustee seeks to conduct this bankruptcy. The Constitution and the Bankruptcy Code mandate that such proceedings take place in a fish bowl, and Rule 34 endorses broad discovery rights. The settlement agreements are unquestionably relevant and no privilege prevents production, which should be determinative of trustee discovery obligations. Besides that, the trustee cannot justify keeping the agreements

from CP on the basis of a "confidential commercial" information exception. Nothing about the third party release involves competition. Simply put, the trustee cannot withhold the unredacted settlement agreements. The Court should grant CP's motion to compel.

Dated: August 28, 2015

BRIGGS AND MORGAN, P.A

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ATTORNEYS FOR CANADIAN PACIFIC RAILWAY COMPANY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: Bk. No. 13-10670

MONTREAL MAINE & ATLANTIC RAILWAY, LTD., Chapter 11

Debtor.

NOTICE OF HEARING

Canadian Pacific Railway Company (CP) has filed a motion to compel the production of settlement agreements in the above-captioned case. The motion will be brought for hearing before the United States Bankruptcy Court for the District Court of Maine in Portland on **September 24, 2015 at 9:00 a.m, E.T.**

If you do not want the Court to approve the motion, then **on or before September 11, 2015**, you or your attorney must file with the Court a response or objection explaining your position. If you are not able to access the CM/ECF Filing System, then your response should be served upon the Court at:

Alec Leddy
Clerk United States Bankruptcy Court for the District of Maine
537 Congress Street
Portland, Maine 04101

And

Timothy R. Thornton
John R. McDonald
Paul J. Hemming
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402

If you do have to mail your response to the Court for filing, then you must mail it early enough so that the Court will receive it **on or before September 11, 2015**.

You may attend the final hearing with respect to the motion scheduled to be held at the **Bankruptcy Court, 537 Congress Street, 2nd Fl. Portland, ME 04101 on September 24, 2015 at 9:00 a.m., E.T.** You may attend the hearing with respect to the motion via court call.

If no objections are timely filed and served, then the Court may enter a final order approving the motion without any further hearing.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the motion, and may enter an order granting the requested relief without further notice or hearing.

Dated: August 28, 2015

BRIGGS AND MORGAN, P.A

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ATTORNEYS FOR CANADIAN PACIFIC RAILWAY COMPANY

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re:

MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.,

Debtor.

Bk. No. 13-10670

DECLARATION OF PAUL J. HEMMING

1. I am a shareholder with the law firm of Briggs and Morgan, P.A., and am one of the counsel for Canadian Pacific Railway Company ("CP"). I submit this Declaration in connection with CP's motion to compel the production of settlement agreements.

2. CP served interrogatories and document requests upon the trustee on July 27, 2015. CP's discovery, among other things, sought "all settlement agreements associated with the Lac Megantic derailment, without any redactions, entered into between Montreal, Maine & Atlantic Railway, Ltd. or Montreal, Maine and Atlantic Canada, Co. and any other person or entity" and "[a]ll Documents that support the Trustee's request for bankruptcy court approval of any settlement agreement requested in Request No. 1, whether such approval is sought under Bankruptcy Rule 9019, as part of the confirmation of the Plan, or otherwise."

3. After service of the discovery, the trustee sought to meet and confer with CP concerning objections the trustee intended to file in response to the discovery requests. Timothy Thornton and myself on behalf of CP met and conferred with Robert

Keach concerning the discovery requests on August 7, 2015 via telephone. During that meet and confer the trustee indicated he would not be producing any unredacted settlement agreements.

4. On August 26, 2015 the trustee served written responses to the discovery on CP. A true and correct copy of CP's document requests and the trustee's responses thereto is attached as **Exhibit A**.

I declare under the penalty of perjury that the forgoing is true and correct.

Executed on August 28, 2015

s/ Paul J. Hemming
PAUL J. HEMMING

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

THE TRUSTEE'S OBJECTIONS AND RESPONSES TO CP'S FIRST SET OF DOCUMENT REQUESTS TO THE CHAPTER 11 TRUSTEE

Robert J. Keach, the chapter 11 trustee (the "Trustee") for Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), by and through his undersigned counsel, and pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rules 7026 and 7034 of the Federal Rules of Bankruptcy Procedure, hereby objects and responds (the "Response") to CP's First Set of Document Requests to the Chapter 11 Trustee, Ltd, dated July 27, 2015 (the "Requests"), served on behalf of Canadian Pacific Railway Company ("CP"), as follows:

GENERAL OBJECTIONS

1. The Trustee objects generally to the Requests for the reasons set forth below (the "General Objections"). The General Objections apply to, and are incorporated by reference into, each of the Trustee's specific Responses to the Requests without the need to specifically refer to or restate the General Objections.

2. The Trustee's assertions of the same, similar, or additional objections in this Response to the individual Requests, or the Trustee's failure to assert any additional objection to any of the individual Requests, does not waive any of the Trustee's objections as set forth in these General Objections, or in the objections to the individual Requests. The Trustee may

reiterate certain General Objections to any of the Requests below without waiver of any General Objection not specifically stated.

3. The Trustee objects to each and every definition and Request to the extent that it purports to impose any requirement or discovery obligation on the Trustee that is greater than or different from those imposed by Rules 26-37 of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure 7026-7037, the Local Rules of the United States District Court for Maine and the Local Rules of the United States Bankruptcy Court for Maine.

4. The Trustee objects to each and every Request because, and to the extent that, it seeks documents or other information that is neither relevant to any issues in the above-captioned bankruptcy case nor reasonably calculated to lead to the discovery of admissible evidence.

5. The Trustee objects to each and every Request because, and to the extent that, it implies, assumes or states legal conclusions and facts or circumstances that do not or did not exist.

6. The Trustee objects to each and every Request because, and to the extent that, it fails to describe the requested documents and/or information with reasonable particularity.

7. In providing this Response to the Requests, the Trustee does not waive or intend to waive:

a. Any objections as to competency, relevancy, materiality or admissibility;

b. Any rights to object on any ground to the use of any of the Responses herein, or documents produced in connection herewith, in any subsequent proceedings, including at a trial arising in, arising under or related to this bankruptcy case or any other action; or

c. Any rights to object on any ground to any further document requests or other discovery requests involving or related to the Requests.

8. The Trustee objects to each and every Request because, and to the extent that, it seeks documents or information not within his possession, custody or control, or not known to the Trustee, or that cannot be found in the course of a reasonable and diligent search of those repositories where the documents are reasonably expected to be located. The Trustee will produce documents only to the extent such documents exist within his possession, custody or control. Unless expressly stated otherwise herein, nothing in this Response shall be construed to suggest that documents in response to any Request in fact exist.

9. The Trustee objects to each and every Request because, and to the extent that, it seeks documents that: (a) would require the production of documents either generated by, or are already in CP's or CP's attorneys' possession, custody and/or control; or (b) are publicly available documents that are equally accessible to CP and the Trustee and that CP may obtain as easily as the Trustee.

10. The Trustee objects to each and every Request because, and to the extent that, it seeks documents and/or information of which only a part is properly discoverable and, to the extent that any such documents and/or information exist, the Trustee reserves the right to produce such documents and/or information in a redacted form.

11. The Trustee objects to each and every Request because, and to the extent that, it seeks all documents concerning a particular subject, or is not reasonably calculated to lead to the discovery of admissible evidence.

12. The Trustee objects to each and every Request because, and to the extent that, it is not specifically limited to the time period relevant to this matter and seeks discovery of

documents outside the scope and time frame of the events related to the above-captioned bankruptcy case on the grounds that such discovery is overbroad and unduly onerous and burdensome, and thereby seeks information that is neither relevant to the subject matter of this bankruptcy case nor reasonably calculated to lead to the discovery of admissible evidence.

13. The Trustee objects to each and every Request because, and to the extent that, it seeks documents subject to the attorney-client privilege, the work-product doctrine, the joint defense privilege, the common interest privilege, or any other applicable privilege, protection or immunity from discovery. Inadvertent or mistaken disclosure of such privileged information or production of any such privileged document is not intended to be, and shall not operate as, a general, implicit, subject matter, separate, independent or any other waiver of the applicable privilege, protection or immunity, in whole or in part, and shall not put in issue or constitute the affirmative use of the advice of counsel or any privileged communications. Upon receiving written notice from the Trustee that information or any document subject to any privilege, protection or immunity has been inadvertently disclosed, CP shall return to the Trustee the information or document designated as privileged, along with any copies thereof, and shall not use such document or information for any purpose or in any proceeding in this bankruptcy case or in any other and/or related proceeding.

14. The Trustee has made reasonable efforts to locate documents or other information responsive to the Requests but reserves his right to supplement these Responses if appropriate.

15. The Trustee's willingness to produce documents pursuant to a particular Request is not, and shall not be construed as, an admission that the purported factual premise for any Request is valid and/or accurate.

16. The Trustee objects to each and every Request because, and to the extent that, it is unduly burdensome and oppressive, in that the assembly and preparation of documents in response to a Request would require a taxing search for information that is of little or no relevance to the issues or controversies in this matter or whose purported value to CP would be far outweighed by the unreasonable burden and expenditure of time and resources needed to search for such information.

17. The Trustee objects to each and every Request because, and to the extent that, it is vague, ambiguous, overbroad, unintelligible, duplicative, and/or cumulative and thereby renders the Trustee incapable of determining what documents or information CP actually seeks, and as posed, is likely to lead to confusing, misleading, inaccurate or incomplete responses.

18. To the extent that the Trustee produces documents or information originating from a third party in response to any Request, such production is not intended to be, and should not be construed as, a representation by the Trustee concerning the accuracy of such document or information.

19. The Trustee objects to each and every Request because, and to the extent that, it seeks documents that contain private, proprietary, confidential or sensitive business or personal information of the Debtor or the Trustee, or constitute trade secrets, and to the extent it calls for other confidential research, development, commercial, financial or proprietary information (including both business and personal information), or the production of which would violate the rights of privacy, secrecy and/or confidentiality that belong to the Debtor, the Trustee or to others. The Trustee will produce such documents, if any, only if ordered to do so and/or subsequent to entry of an appropriate confidentiality order or with the confidential or sensitive information redacted.

20. The Trustee's failure to object to an individual Request is not an acknowledgment that any responsive documents exist or may be located among the Debtor's or the Trustee's books and records.

21. The Trustee's searches for responsive documents are ongoing and the Trustee reserves the right to amend or supplement this Response. Accordingly, this Response is without waiver and with reservation of the right to amend or supplement the Trustee's document production, and information and documents will be provided without prejudice to the Trustee's right to make further objections and present additional information and documents hereafter discovered or that further discovery and investigation may indicate is relevant to this matter and called for by the Requests. The Trustee reserves the right to supplement or amend his objections and this Response to these Requests.

22. The Trustee reserves the right to make use of, or to introduce at any hearing or trial, documents or information responsive to the Requests but discovered subsequent to the date of this Response, including but not limited to, any such documents or information obtained in discovery in this bankruptcy case.

SPECIFIC RESPONSES AND OBJECTIONS TO THE REQUESTS

REQUEST NO. 1:

All settlement agreements associated with the Lac Megantic derailment, without any redactions, entered into between Montreal, Maine & Atlantic Railway, Ltd. or Montreal, Maine and Atlantic Canada, Co. and any other person or entity.

OBJECTIONS TO DOCUMENT REQUEST NO. 1

The Trustee incorporates by reference each and every General Objection noted above. The Trustee specifically objects to this Request on the grounds that it is vague, ambiguous,

overbroad, unduly burdensome, and is designed to harass and annoy. The Trustee specifically objects to this Request to the extent that it calls for information and/or documents that are subject to the attorney-client privilege and the work-product doctrine. The Trustee specifically objects to this Request because, and to the extent that, it seeks documents already within CP's possession, custody or control. The Trustee specifically objects to this Request because, and to the extent that, it seeks information and documents that the Trustee is barred from producing pursuant to an order of the Superior Court of Canada (the "Canadian Order"). A copy of the Canadian Order is attached hereto as **Exhibit A**.

REQUEST NO. 2:

All Documents that support the Trustee's request for bankruptcy court approval or any settlement agreement requested in Request No. 1, whether such approval is sought under Bankruptcy Rule 9019, as part of the confirmation of the Plan, or otherwise.

OBJECTIONS AND RESPONSE TO DOCUMENT REQUEST NO. 2

The Trustee incorporates by reference each and every General Objection noted above. The Trustee specifically objects to this Request on the grounds that it is vague, ambiguous, overbroad, unduly burdensome, and is designed to harass and annoy. The Trustee specifically objects to this Request to the extent that it calls for information and documents that are subject to the attorney-client privilege and the work-product doctrine. The Trustee specifically objects to this Request because, and to the extent that, it seeks documents already within CP's possession, custody or control. Subject to and notwithstanding the foregoing objections, the Trustee directs CP to the publicly available documents on the United States Bankruptcy Court for the District of Maine's document filing system as https://ecf.meb.uscourts.gov/ and filed under Case No. 13-10670, specifically the *Trustee's Revised First Amended Plan of Liquidation dated July 15, 2015*

[D.E. 1534] and the *Revised First Amended Disclosure Statement for the Trustee's Plan of Liquidation dated July 15, 2015* [D.E. 1535].

Dated: August 26, 2015

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

By his attorneys:

/s/ Timothy J. McKeon

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: Bk. No. 13-10670

MONTREAL MAINE & ATLANTIC RAILWAY, LTD., Chapter 11

Debtor.

ORDER

Upon consideration of Canadian Pacific Railway Company's motion to compel the production of settlement agreements, this Court GRANTS the motion. The trustee is hereby ordered to produce to CP without delay all settlement agreements associated with the Lac Megantic derailment, without any redactions, entered into between Montreal, Maine & Atlantic Railway, Ltd. or Montreal, Maine and Atlantic Canada, Co. and any other person or entity.

Dated: _______________, 2015 ______________________________________

Hon. Peter G. Cary
United States Bankruptcy Court Judge