

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**ESTATE REPRESENTATIVE’S MOTION TO STAY PROCEEDINGS AND
DISCOVERY IN RELATION TO OBJECTION TO PROOFS OF CLAIM FILED BY
NEW BRUNSWICK SOUTHERN RAILWAY COMPANY AND MAINE NORTHERN
RAILWAY COMPANY LIMITED ON THE BASIS THAT CERTAIN OF SUCH
CLAIMS ARE DUPLICATIVE OF OTHERS, AND SUCH OTHERS ARE
IMPROPERLY ASSERTED AS ADMINISTRATIVE AND/OR PRIORITY CLAIMS**

Robert J. Keach, the estate representative (the “Estate Representative”) for the post-effective date estate of Montreal Maine & Atlantic Railway, Ltd. (“MMA” or the “Debtor”), hereby moves (the “Motion”) to stay all proceedings and discovery in relation to the *Objection to Proofs of Claim filed by New Brunswick Southern Railway Company and Maine Northern Railway Company Limited on the basis that Certain of Such Claims are Duplicative of Others, and Such Others are Improperly Asserted As Administrative and/or Priority Claims* [D.E. 1826] (the “Objection”).¹ In support of this Motion, the Estate Representative states as follows:

JURISDICTION, VENUE AND BASES FOR RELIEF

1. The United States District Court for the District of Maine (the “District Court”) has original, but not exclusive, jurisdiction over this chapter 11 case pursuant to 28 U.S.C. § 1334(a) and over this Motion pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a) and Rule 83.6 of the District Court’s local rules, the District Court has authority to refer and has referred this chapter 11 case, and, accordingly, this Motion, to this Court.

¹ Capitalized Terms used but not defined herein shall have the meanings ascribed in the Objection.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has constitutional authority to enter judgment in this action.

3. Venue over this chapter 11 case is proper in this district pursuant to 28 U.S.C. § 1408, and venue over this proceeding is proper in this district pursuant to 28 U.S.C. § 1409.

4. The relief sought in this Motion is predicated upon section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”).

BACKGROUND

A. Procedural Posture of the Contested Matter

5. On October 19, 2015, the Estate Representative (then the chapter 11 trustee) filed the Objection. After completion of briefing, the United States Bankruptcy Court for the District of Maine (the “Bankruptcy Court”) held an evidentiary hearing on the Objection, and the parties filed post-trial briefs.

6. On February 5, 2016, the Bankruptcy Court issued its oral findings of fact and conclusions of law. On February 26, 2016, the Bankruptcy Court entered its order, which provided, in pertinent part:

The Asserted 1171(b) Claims, to the extent allowed, are afforded priority status under § 1171(b). The amount of the Asserted 1171(b) Claims is not determined by this Order, and thus those Asserted 1171(b) Claims are not allowed in any amount at this time. The Appellant’s rights to object to the amount of the Asserted 1171(b) Claims are fully reserved.

D.E. 2034 (the “Bankruptcy Court Order”).

7. On March 29, 2016, the Bankruptcy Appellate Panel for the First Circuit (the “BAP”) granted the Estate Representative leave to appeal the Bankruptcy Court Order. *See* BAP No. EB 16-015, No. 001127138. After the issue was fully briefed, on October 21, 2016, the BAP affirmed the Bankruptcy Court Order. *See* BAP No. EB 16-015, Nos. 001129069, 001129073 (together, the “BAP Order”).

8. Upon the motion of the MN/NB Railways, the Bankruptcy Court held a telephonic status conference on the remaining contested matter—the amount of the MN/NB Railways’ section 1171(b) and general unsecured claims (the “Contested Matter”)—on November 18, 2016, at which a further status conference was scheduled for January 10, 2017.

9. On December 8, 2016, the BAP denied the Estate Representative’s motion for certification of the BAP Order for interlocutory appeal to the United States Court of Appeals for the First Circuit (the “First Circuit”). See BAP No. EB 16-015, No. 001129449 (the “BAP Certification Denial”).

10. In light of the BAP Certification Denial, on December 9, 2016, the MN/NB Railways moved to move the January 10 status conference forward. On December 12, 2016, the Bankruptcy Court rescheduled the status conference for December 20, 2016.

11. At the December 20, 2016 status conference, the parties agreed to work toward a joint pretrial order, which was submitted to the Bankruptcy Court on January 3, 2017 [D.E. 2276] (the “Proposed JPO”). The Bankruptcy Court endorsed the Proposed JPO on January 5, 2017 [D.E. 2277] (the “Endorsed JPO”). Pursuant to the Endorsed JPO, *inter alia*, the parties are to complete discovery by March 6, 2017 (all deadlines contained in the Endorsed JPO, the “JPO Deadlines”).

B. Wheeling’s District Court Litigation Against the MN/NB Railways

12. Prior to the Petition Date, on or about June 15, 2009, MMA executed and delivered to Wheeling & Lake Erie Railway Company (“Wheeling”) (a) that certain Line of Credit Note (the “LOC”) which memorialized the terms of a revolving credit facility provided by Wheeling in the maximum amount of \$6 million and (b) a security agreement to secure MMA’s obligations to Wheeling under the LOC (the “Security Agreement”).

13. After the Petition Date, on July 25, 2014, the Bankruptcy Court entered an order [D.E. 1047] (the “Lift Stay Order”) granting the then-chapter 11 trustee’s motion approving compromise with Wheeling whereby, *inter alia*, the automatic stay was modified such that Wheeling became authorized to enforce its rights with respect to certain accounts receivable of MMA that were its collateral pursuant to the Security Agreement, including accounts payable by the MN/NB Railways (the “MN/NB A/R”). The Lift Stay Order did not effect the outright assignment of the MN/NB A/R to Wheeling. The MN/NB A/R thus remains property of the Debtor’s estate.

14. On August 14, 2014, Wheeling filed a complaint (the “Wheeling Complaint”) against the MN/NB Railways seeking to collect the MN/NB A/R. *See* No. 14-cv-00325-NT (D. Me.) (the “District Court Litigation”). The Wheeling Complaint seeks payment from MNR on invoices originally issued by MMA in the amount of \$328,447.78 and payment from NBSR on invoices originally issued by MMA in the amount of \$12,174.53.

15. On September 23, 2014, the MN/NB Railways answered the Wheeling Complaint [No. 14-cv-00325, D.E. 7 at 4], asserting, *inter alia*:

23. Plaintiff’s claims are barred to the extent there exists a valid right of setoff, recoupment, or otherwise. Without limiting the foregoing, Defendants further state that Plaintiff, as assignee of MMA US, acquired its interest in the accounts receivable subject to the rights of third parties, including the Defendants. As a result of Defendants[’] prior business relationship with MMA US and/or its affiliates, the Defendants have a valid and enforceable right of setoff and/or recoupment. Defendants’ setoff and/or recoupment rights exceed the amounts that Plaintiff claims to be owed by the Defendants in the Complaint; and thus Defendants’ setoff and/or recoupment rights completely extinguish and bar Plaintiff’s claims.

24. Plaintiff’s claims are barred by the provisions of Me. Rev. Stat. Ann. Title 11 § 9-1404(1)(a) (2014) as a result of agreements between the Defendants and the MMA Debtors authorizing the Defendants to setoff or recoup amounts owed by the Defendants and/or their affiliates to the MMA Debtors against amounts owed by the MMA Debtors to the Defendants and/or their affiliates.

25. Plaintiff's claims are barred by the provisions of Me. Rev. Stat. Ann. Title 11 § 9-1404(1)(b) (2014) as a result of Defendants' rights of setoff and/or recoupment that accrued prior to Defendants' receipt of authenticated notification from either Plaintiff or the MMA Debtors of Plaintiff's purported security interest in the MMA Debtors' accounts receivable alleged to be owed by Defendants.

The MN/NB Railways provide no citation for the "agreements" between the MN/NB Railways and MMA, which they claim—as of September 23, 2014—entitle them to set off against claims owed by MMA.²

16. On April 16, 2015, Wheeling moved for partial summary judgment in the District Court Litigation on the issue of whether the MN/NB Railways' "actual notice of Wheeling's claim of a security interest in the MMA Accounts before any right of offset arose" precluded their ability under the Maine Uniform Commercial Code to set off against the amount Wheeling sought to collect. *See* No. 14-cv-00325, D.E. 21.

17. The same day, the MN/NB Railways moved for partial summary judgment on the issue "on the issue of whether certain credit reports obtained by the Defendants from Dun & Bradstreet, Inc. constituted 'authenticated notification' of Wheeling's claimed security interest in accounts receivable of [MMA] within the meaning of 11 M.R.S.A § 9-1404(1)(b)." *See* No. 14-cv-00325, D.E. 20.

18. On September 15, 2015 the District Court denied Wheeling's motion for partial summary judgment and granted the MN/NB Railways' motion for partial summary judgment, holding in pertinent part that "[b]ecause the [Dun & Bradstreet] credit reports did not constitute the required notice under 11 M.R.S. § 9-1404, the Plaintiff's rights as a secured creditor are subject to all claims and defenses of the Defendants that had accrued at the time MMA U.S.

² On January 26, 2015, the then-trustee consented to entry of an order by the Bankruptcy Court permitting the MN/NB Railways to, *inter alia*, "exercise their setoff rights in the event the [District Court] determines in the context of the District Court [Litigation] that [the MN/NB Railways] have valid rights of setoff that are superior to Wheeling's claimed security interest in MMA's accounts receivable." *See* 13-10670, D.E. 1349.

filed its petition for bankruptcy relief in 2013.” *See* No. 14-cv-00325, D.E. 27 9the “Partial SJ Order”).

19. After entry of the Partial SJ Order, the District Court set discovery and further dispositive motion practice deadlines.

20. The parties jointly sought to stay those deadlines pending the result of Wheeling’s litigation against the Estate Representative, which Wheeling stated could provide for Wheeling’s payment in full, which would in turn moot the District Court Litigation. *See* No. 14-cv-00325, D.E. 31 (the “Motion to Stay”). The District Court granted the Motion to Stay on January 26, 2016, but deferred the establishment of new deadlines. *See* No. 14-cv-00325, D.E. 32. The Estate Representative was not on notice of the Motion to Stay or the order granting it.

21. After a subsequent status conference, the District Court extended the stay of the proceedings to November 1, 2016, and required the parties to submit a joint status report by September 30, 2016. The Estate Representative was not on notice of the extended stay of the District Court Litigation.

22. On October 11, 2016, the parties submitted the joint status report, reporting in pertinent part that: (a) the Bankruptcy Court had denied the Estate Representative’s motion for summary judgment in Wheeling’s adversary proceeding against the Estate Representative, and that the parties would be conferring on discovery and pre-trial deadlines; and (b) the MN/NB Railways’ request for payment of the Asserted 1171(b) Claim was on appeal before the BAP, and the BAP decision was (at that time) pending; if the MN/NB Railways received payment in full, their setoff defense would be reduced or eliminated. The status report requested a further extension of the stay to April 1, 2017. *See* No. 14-cv-00325, D.E. 38 (the “October 2016 Status Report”). The Estate Representative was not on notice of the October 2016 Status Report.

23. On October 12, 2016, the District Court further extended the stay of the District Court Litigation to February 1, 2017, and provided that the District Court would schedule a telephonic conference after February 1, 2017 to discuss the stay status and whether a further stay was warranted. *See* No. 14-cv-00325, D.E. 41. The Estate Representative was not on notice of the further extended stay of the District Court Litigation.

24. On January 31, 2017, counsel to Wheeling informed the Estate Representative that the District Court Litigation had been stayed.

25. As of the date hereof, based on the Estate Representative's review of the District Court Litigation docket, no telephonic status conference has yet been scheduled, and the District Court Litigation remains stayed.

C. Relevant Provisions of the Confirmed Plan

26. On March 31, 2015, the then-chapter 11 trustee filed the *Trustee's Plan of Liquidation Dated March 31, 2015* [D.E. 1384] (as subsequently amended, the "Plan").

27. The Plan provided, in pertinent part:

7.16. *Setoff and Recoupment.* The Disbursing Agent may, but shall not be required to, setoff against or recoup from any Claim and from any payments to be made pursuant to the Plan in respect of such Claim any claims of any nature whatsoever that the Trustee may have against the Claimant, but neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by the Trustee or the Disbursing Agent of any such claim it may have against such claimant.

Plan § 7.16 (the "Setoff Provision"). The Plan appointed the Estate Representative as the "Disbursing Agent." *See* Plan § 7.7.

28. On October 9, 2015, the Bankruptcy Court confirmed the Plan [D.E. 1801] (the "Confirmation Order").³

³ A standalone version of the confirmation version of the Plan was filed at D.E. 1822. That version also contained the Setoff Provision.

29. On October 24, 2015, the Confirmation Order became a final, non-appealable order. *See* Fed. R. Bankr. P. 8001.

30. The Effective Date of the Plan occurred on December 22, 2015. *See* D.E. 1927.

RELIEF REQUESTED

31. By this Motion, the Estate Representative requests entry of an order staying the JPO Deadlines pending resolution of the District Court Litigation.

BASIS FOR RELIEF

32. A bankruptcy court, as does any court, has the inherent power to “control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). Incidental to this power is a court’s power to stay proceedings on its own docket. Id.

33. The Contested Matter should be stayed pending final resolution of the District Court Litigation. The purpose of the Contested Matter is to determine the amount of the MN/NB Railways’ claims against the Debtor; as part of that calculation, the Estate Representative is entitled to assert any defenses or rights of setoff held by the Debtor against the MN/NB Railways—indeed, the Plan, confirmed by final order, permits setoff against any claims, *see* Setoff Provision. But at least certain of the Debtor’s setoff rights arise from the MN/NB A/R, which in turn are the subject of Wheeling’s Complaint in the District Court Litigation.⁴ Resolution of the District Court Litigation is therefore a condition precedent to the Estate Representative’s ability to assert at least certain of the Debtor’s rights in the Contested Matter: if Wheeling’s security interest in the MN/NB A/R is determined in the District Court Litigation to be superior to that of the MN/NB Railways, then the MN/NB Railways will have to remit the amount owed to Wheeling, and the Debtor’s setoff claim against the MN/NB

⁴ The Estate Representative reserves all rights to assert other defenses against the MN/NB Railways’ claims regardless of whether addressed specifically in this Motion.

Railways will be reduced accordingly.⁵ If, on the other hand, Wheeling's security interest in the MN/NB A/R is determined in the District Court Litigation to be *inferior* to that of the MN/NB Railways, then the MN/NB Railways will prevail in the District Court Litigation, and the Estate Representative will be entitled to setoff the amount of the MN/NB A/R against the MN/NB Railways' asserted claims in the chapter 11 case.⁶ But no determination can be made as to the amount of the MN/NB Railways' claims against MMA until the District Court Litigation is resolved.⁷

34. This Court has the power to stay proceedings on its own docket. *See Landis*, 299 U.S. at 254-55. It makes sense for the Court to do so in this case because the amount of the MN/NB Railways' claim against the Debtor—the issue to be resolved in the Contested Matter—is dependent upon the outcome of the District Court Litigation. And because the MN/NB A/R is property of the estate (and not Wheeling's property), satisfaction of Wheeling's secured claim against the estate would not moot the setoff issue; it would merely confine its relevance to the Contested Matter. Moreover, the Plan confers upon the Estate Representative the ability to set off any claims of the estate against claims held by the entity against which the estate has a claim before making a distribution to such claim holder. *See Setoff Provision*. Resolution of the setoff issue is thus a prerequisite to a final order on the Contested Matter. It would thus be a waste of judicial resources to proceed with the Contested Matter and the JPO Deadlines until the District Court has issued a final order (or the District Court's order has

⁵ Likewise, Wheeling's secured claim against the Debtor will be reduced accordingly.

⁶ In this outcome, Wheeling's secured claim would not be reduced.

⁷ The Estate Representative was not on notice of the continuing stay of the District Court Litigation and thus was of the understanding that the District Court Litigation was continuing in due course. To the best of the Estate Representative's knowledge, neither Wheeling nor the MN/NB Railways had notified the Bankruptcy Court or the Estate Representative of the stay of the District Court Litigation until the Estate Representative discussed same with Wheeling's counsel this week.

become a final order) determining whether the MN/NB Railways' rights in the MN/NB A/R are superior to those of Wheeling.⁸

RESERVATION OF RIGHTS

35. Nothing contained herein is or should be construed as: (i) an admission as to the validity or extent of any claim against the Debtor, (ii) a waiver of the Estate Representative's right to dispute any claim on any grounds, or (iii) a promise to pay any claim.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Estate Representative requests that the Court enter an order, substantially in the form annexed hereto: (i) staying the Contested Matter pending final resolution of the District Court Litigation; and (ii) granting such other and further relief as may be just.

Dated: February 1, 2017

**ROBERT J. KEACH, ESTATE
REPRESENTATIVE OF THE POST-
EFFECTIVE DATE ESTATE OF MONTREAL
MAINE & ATLANTIC RAILWAY, LTD.**

/s/ Robert J. Keach

Robert J. Keach
Lindsay K. Zahradka (admitted *pro hac vice*)
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle Street, P.O. Box 9729
Portland, ME 04104
Telephone: (207) 774-1200
Facsimile: (207) 774-1127

⁸ Indeed, the Estate Representative sought to appeal the Bankruptcy Court Order and the BAP Order directly to the First Circuit on the issue of the Asserted 1171(b) Claims' priority, which appeal would have permitted the MN/NB Railways and Wheeling time to resolve the District Court Litigation (thus paving the way for the Bankruptcy Court's ultimate determination of the claim amount in the Contested Matter). But the MN/NB Railways opposed the Estate Representative's motion and prevailed, and thus are left with the piecemeal litigation that they have created. It would be inequitable to now permit the MN/NB Railways to put off resolution of a condition precedent to determine the amount of their claims when prompt resolution of the Contested Matter was their justification for opposing the Estate Representative's motion for certification to the First Circuit. In any event, as the parties are likely aware, the Estate Representative does ultimately plan to appeal the issue of priority to the First Circuit when the current proceedings in the District Court and the Bankruptcy Court result in a final order as to the claims of the MN/NB Railways.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**ORDER GRANTING MOTION TO STAY PROCEEDINGS AND DISCOVERY
IN RELATION TO OBJECTION TO PROOFS OF CLAIM FILED BY NEW
BRUNSWICK SOUTHERN RAILWAY COMPANY AND MAINE NORTHERN
RAILWAY COMPANY LIMITED ON THE BASIS THAT CERTAIN OF SUCH
CLAIMS ARE DUPLICATIVE OF OTHERS, AND SUCH OTHERS ARE
IMPROPERLY ASSERTED AS ADMINISTRATIVE AND /OR PRIORITY CLAIMS**

This matter having come before the Court on the *Estate Representative's Motion to Stay Proceedings and Discovery in Relation to Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company and Maine Northern Railway Company Limited on the Basis That Certain of Such Claims Are Duplicative of Others, and Such Others Are Improperly Asserted as Administrative and/or Priority Claims* (the "Motion to Stay") filed by Robert J. Keach, estate representative of the post-effective date estate of Montreal, Maine & Atlantic Railway, Ltd., and upon consideration of all responses to the Motion to Stay (if any), it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Motion to Stay is hereby granted.
2. The Contested Matter, including the JPO Deadlines, shall be stayed pending final resolution of the District Court Litigation.
3. The MN/NB Railways shall notify this Court and the Estate Representative of final resolution of the District Court Litigation, and shall request a telephonic status conference

with this Court at that time to determine next steps in the Contested Matter.

4. The MN/NB Railways are instructed to inform the District Court of entry of this Order.

5. This Court shall retain jurisdiction over the Contested Matter or any other matters arising from this Order.

Dated: _____, 2017

THE HONORABLE PETER G. CARY
UNITED STATES BANKRUPTCY JUDGE