UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

TRUSTEE'S BRIEF REGARDING PROCEEDS OF TRAVELERS INSURANCE POLICY

Robert J. Keach, the chapter 11 trustee (the "Trustee"), submits this brief regarding the extent of the security interests of Wheeling & Lake Erie Railway Company ("Wheeling") in and to payments made under a commercial property insurance policy, No. QT-630-6357L188-TIL-12 (the "Policy"), issued by Travelers Property Casualty Company of America ("Travelers") to Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor"), Montreal Maine & Atlantic Canada, Co. ("MMA Canada"), and other affiliates of the Debtor. Pursuant to an order entered by this Court on December 24, 2013 [D.E. 550] (the "9019 Order"), the parties were required to submit simultaneous briefs on the issues contained herein.

Application of straightforward legal principles to undisputed facts yields one conclusion: Wheeling does not have a security interest in the policy in question, or the amount paid by the insurance company under that policy. Wheeling will try to stretch its agreements to cover this money as a type of collateral, but the law simply does not permit that in this case. Moreover, Wheeling will try to attack the negotiated allocation of the money paid by the insurer to the debtor and to its Canadian subsidiary. That effort should fail because the allocation has already been approved by the Court overseeing the Canadian subsidiary's

insolvency proceeding and because the allocation is reasonable in any event. In further support of his position, the Trustee offers the following memorandum of law.

I. BACKGROUND

A. The Wheeling Line of Credit Note and Wheeling's Security Interests.

1. Pursuant to that certain Line of Credit Note dated as of June 15, 2009 (the "LOC Note"), Wheeling provided a line of credit of up to $6.0 million to MMA, Montreal, Maine & Atlantic Canada Co. ("MMA Canada"), Montreal, Maine & Atlantic Corporation ("MMA Corp."), and LMS Acquisition Corporation ("LMS").

2. To secure their obligations under the Wheeling LOC, MMA, MMA Canada, MMA Corp., and LMS entered into a security agreement with Wheeling dated June 15, 2009 (the "Security Agreement"). MMA, MMA Canada, MMA Corp., and LMS granted security interests in the "Collateral." The Security Agreement defines "Collateral" as:

> A. All Accounts and other rights to payment (including Payment Intangibles), whether or not earned by performance, including but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) that Debtor may have by law or agreement against any account debtor or obligor of Debtor.
>
> B. All Inventory
>
> C. All additions, accessions, substitutions, replacements, products to or for, and all cash or non-cash proceeds of any of the foregoing, including insurance proceeds.

Security Agreement, at § II. The Collateral does not include insurance policies, nor does it include the track, rolling stock, equipment or other operating assets of MMA or MMA Canada.

3. The Security Agreement provides that "all of the rights, remedies and duties of the Secured Party and Debtor shall be governed by the laws of the State of Maine, except to the extent that the Maine Uniform Commercial Code provides for the application of the law of the

state where Debtor is located." MMA is located, for purposes of the UCC, in Delaware. *See* 11 M.R.S.A § 9-1307(5).

4. Wheeling filed a UCC-1 financing statement with the Delaware Department of State on August 25, 2009.

5. Wheeling did not take any steps to perfect a security interest in assets owned by MMA Canada.

6. The unpaid principal balance of the LOC Note was $6.0 million as of July 31, 2013. In other words, the LOC Note was fully drawn as of July 31, 2013.

B. The Terms of the Policy and the Debtor's Claim for Business Interruption and Extra Expense Coverage.

7. On or about April 19, 2013, Travelers issued the Policy, under which the Debtor and MMA Canada are insureds for total coverage in the amount of $7,500,000.00 (the "Policy"). LMS, MMA Corp. and Rail World, Inc. are also named as insureds under the Policy.

8. Although the Policy provides coverage for certain types of property damage, importantly, the Debtor contends that the Policy also provides coverage for loss of business income (the "Business Interruption Coverage") and for "Extra Expense" arising out of a disruption to business (the "Extra Expense Coverage").

9. Specifically, the Policy contains an endorsement entitled "Railroad Rolling Stock 'Business Income' and 'Extra Expense' Coverage" (the "Endorsement"). The Endorsement provides as follows:

> 1. "Business Income" and "Extra Expense"
>
> [Travelers] will pay:
>
> (a) The amount by which your "Business Income" is actually reduced during the "period of restoration" due to loss of or damage to Covered Property from a Covered Cause of Loss; and

> (b) Your necessary "Extra Expense" to continue normal operations following loss of or damage to Covered Property from a Covered Cause of Loss.

Endorsement, § A.

10. The term "Business Income" is defined in the Endorsement as "net income that would have been earned had no loss or damage occurred, plus normal payroll and expenses which are reasonable and necessary for you to operate your business after loss or damage." Endorsement, § B.1. The term "Extra Expense" is defined in the Endorsement as "reasonable and necessary expense you incur in order to continue your business operations after loss or damage that you would not have incurred had there been no loss or damage." Id. at § B.2.

11. On July 6, 2013, a freight train transporting 72 tanker cars loaded with crude oil (the "Train") derailed in Lac-Mégantic, Québec (the "Derailment"). The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and killed 47 people.

12. After the Derailment, the Debtor filed a claim under the Policy for resulting damages to locomotives, railcars, railroad track, and roadbed. Additionally, the Debtor asserted claims under the Business Interruption Coverage and the Extra Expense Coverage premised on the loss of revenue arising out of the Derailment and the extra expenses being incurred by the Debtor as a result of the accident. The Debtor claimed that Travelers should advance the entire Policy limit of $7,500,000.00 premised on the asserted claims.

13. Travelers responded to the Debtor's claims for coverage by denying that coverage exists under the Policy for the type of claims asserted by the Debtor. First, in relation to Business Interruption Coverage and Extra Expense Coverage, Travelers argued that there is simply no coverage because the claimed loss of business income did not arise out of damage to "Covered Property" as such term is defined by the Policy. Second, in relation to the Business

Interruption Coverage specifically, Travelers argued, to the extent coverage exists, it was provided by mistake because the parties intended to include only Extra Expense Coverage and did not intend to include Business Interruption Coverage in the Policy, and the inclusion of such coverage in the Policy occurred in error. Travelers did agree, however, to pay $250,000.00 under the Policy for expenses incurred to repair or replace certain damaged railroad track and roadbed. Travelers asserted that these incurred expenses were covered only under an endorsement, and did not constitute "Covered Property" under the Policy (and therefore did not provide a basis for claiming Business Interruption Coverage or Extra Expense Coverage).

C. The Debtor's Bankruptcy Filing and the Settlement with Travelers.

14. On August 7, 2013 (the "Petition Date"), the Debtor filed a voluntary petition for relief under 11 U.S.C. § 101 et seq. Also on August 7, 2013, MMA Canada filed for relief under Canada's *Companies' Creditors Arrangement Act*; Richter Advisory Group, Inc. was appointed as the monitor to those proceedings (the "Monitor"). On August 21, 2013, the Trustee was appointed by the United States Trustee. *See* Docket No. 64.

15. On August 27, 2013, Travelers filed the *Motion of Travelers Property Casualty Company of America for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1)* [D.E. 105] (the "Motion for Relief") in order to file a declaratory judgment action in the United States District Court for the District of Maine to seek a judicial declaration regarding the rights of the parties under the Policy, including a declaration that any Business Interruption Coverage was included in the Policy by mistake, and a declaration that the Policy as written did not provide Business Interruption Coverage for the claimed loss. The Trustee filed a timely objection to the Motion for Relief.

16. Pursuant to an order entered on October 9, 2013 [D.E. 199], this Court entered an order denying the Motion for Relief. Travelers filed an appeal (the "Appeal") from that order. *See* No. 1:13-cv-00432-NT.

17. The Trustee and MMA Canada actively negotiated with Travelers regarding the issues set forth in the Motion for Relief and the Appeal, including whether Travelers was required to provide Business Interruption Coverage and Extra Expense Coverage under the Policy. As a result of the negotiations, the Trustee, MMA Canada, and Travelers reached a settlement resolving the issue of MMA's and MMA Canada's entitlement to coverage under the Policy. In light of the settlement, the parties to the Appeal filed a joint motion to stay the appeal pending consideration of the Motion, which motion was granted.

18. On December 9, 2013, the Trustee filed the *Chapter 11 Trustee's Motion for Order Approving Compromise and Settlement with Travelers Property Casualty Company of America* [D.E. 473] (the "9019 Motion"), seeking Court approval of the settlement reached by the Trustee, MMA Canada, and Travelers with respect to the Policy.

19. As described in the 9019 Motion, Travelers was to pay a total of $3,800,000 to the Debtor and MMA Canada (the "Settlement Payment") in relation to the Debtor's business interruption and extra expense claims, in addition to the $250,000 already paid to MMA Canada by Travelers. The Settlement Payment would be allocated 35% to the Debtor and 65% to MMA Canada. The Settlement Payment would be in full and final satisfaction of any and all claims arising under the Policy, and Travelers would be released from any and all liability arising under or relating to the Policy.

20. Wheeling objected to the 9019 Motion on the basis that: (i) the Travelers Settlement was "unclear;" and (ii) the Travelers Settlement was not "fair and equitable" to Wheeling, which asserts a security interest in the Settlement Payment. *See* D.E. 514.

21. The Court granted the 9019 Motion pursuant to the 9019 Order with respect to the amount of the Settlement Payment and Travelers' liability under the Policy. The 9019 Order provides for the scheduling of a joint, final hearing to determine the respective rights of the Trustee, MMA Canada, Wheeling, and the Federal Railroad Administration in and to the Settlement Payment in its entirety and/or any portion thereof, including the priority of each party's rights in the same, and the appropriate allocation of the Settlement Payment as between MMA and MMA Canada. 9019 Order, p. 3.

22. Pursuant to the 9019 Order, Travelers has issued the Settlement Payment, and such payment has been escrowed pending resolution of the issues addressed herein.

23. A parallel motion to the 9019 Motion (the "Canadian Motion") was filed in the Canadian Case, seeking approval of the compromise with Travelers, including allocation of the Settlement Payment between MMA and MMA Canada. Wheeling did not object to the Canadian Motion. The Canadian Court entered an order (the "Canadian Order") granting the Canadian Motion, which specifically provides that "[t]he Settlement Payment shall be allocated 65% to [MMA Canada] and 35% to [MMA]." Canadian Order, ¶ 3(a). A true and correct copy of the Canadian Order is attached hereto as **Exhibit A**.

24. The Canadian Order further orders Travelers to make "one payment in the amount of U.S. $2,470,000.00" to MMA Canada, to be "kept in trust by the Monitor until further order" of the Canadian Court. Id. at ¶ 3(b). The Canadian Order also orders Travelers to make "one payment in the amount of U.S. $1,330,000.00" to MMA, to be "kept in trust by [MMA] until

further order of the U.S. Bankruptcy Court for the District of Maine." Id. The Canadian Order was entered without objection by Wheeling, and does not provide that MMA or this Court have any authority or discretion with respect to the allocation of the Settlement Payment, or with respect to the funds allocated to MMA Canada.

II. ARGUMENT

A. Wheeling Bears the Burden of Establishing the Validity, Priority, and Extent of Its Interest, If Any, in and to the Settlement Payment.

Section 363(p)(2) of the Bankruptcy Code provides that "the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest." 11 U.S.C. § 363(p)(2). Where a party's underlying objection to a debtor's use of property is premised on or involves the extent of that party's interest in such property, the burden is on the objecting party to establish its interest. *See* id.; *see also* In re Corse, 486 B.R. 241, 244 (Bankr. D.R.I. 2013). Wheeling's objection to the 9019 Motion is premised on Wheeling's assertion of an interest in the Settlement Payment. Accordingly, Wheeling bears the burden of establishing the validity, priority, and extent of its asserted interests.

B. Wheeling Does Not Have a Security Interest in the Policy.

MMA did not grant a security interest in the Policy to Wheeling. As stated above, the Security Agreement provides only that Wheeling has an interest in accounts, rights to payment, payment intangibles, inventory, and proceeds of the same. The only language in the Security Agreement pertaining to the Debtor's insurance indicates simply that Wheeling was granted an interest in "[a]ll additions, accessions, substitutions, replacements, products to or for, and all cash or non-cash proceeds **of any of the foregoing**, **including insurance proceeds**." Security Agreement, at § II (emphasis added). This relates, quite obviously, to insurance as proceeds of collateral. It does not relate to insurance as original collateral. Thus, the unequivocal language

in the Security Agreement establishes that Wheeling does not have a security interest in the Policy. It follows, inexorably, that Wheeling does not have a security interest in amounts paid by the insurer under the Policy after the Petition Date.

C. Even if Wheeling Could Somehow be Deemed to Have a Security Interest in the Policy, Wheeling's Interest is Not Perfected.

Further, even if Wheeling could somehow be deemed to have a security interest in the Policy (contrary to the plain language of the Security Agreement), Wheeling's interest in the Policy would not be perfected and therefore would be avoidable. *See* 11 U.S.C. § 544(a). Section 9-1109(4)(h) of the Maine Uniform Commercial Code (the "UCC") provides that Article 9 of the UCC "does not apply to . . . [a] transfer of an interest in or assignment of a claim under a policy of insurance . . . ." 11 M.R.S.A. § 9-1109(4)(h). Accordingly, article 9 of the UCC does not apply to the perfection of a security interest in an insurance policy. *See* Thico Plan, Inc. v. Maplewood Poultry Co. (In re Maplewood Poultry Co.), 2 B.R. 550, 554 (Bankr. D. Me. 1980) ("Article 9 of the Uniform Commercial Code does not apply to a secured transaction in which the collateral consists of unearned insurance premiums."); A-1 Credit Corp. v. Big Squaw Mountain Corp. (In re Big Squaw Mountain Corp.), 122 B.R. 831, 836 (Bankr. D. Me. 1990) (claims "in or under a policy of insurance" are excluded from the UCC); *see also* Am. Bank, FSB v. Cornerstone Comm. Bank, 733 F.3d 609 (6th Cir. 2013) (finding that the UCC excludes transfers of an interest in an insurance policy and assignment of a claim under an insurance policy); Am. Bank & Trust Co. v. Jardine Ins. Svcs. Tex., Inc. (In re Barton Indus., Inc.), 104 F.3d 1241, 1246 (10th Cir. 1997) ("Article 9 of the Uniform Commercial Code . . . does not directly apply in this case because the security interests were 'in or under [a] policy of insurance.'"); In re JII Liquidating, Inc., 344 B.R. 875, 882-83 (Bankr. N.D. Ill. 2006) (finding that Article 9 is inapplicable to a security interest in unearned insurance premiums); Miller v.

Norwest Bank Minn., N.A. (In re Inv. & Tax Svcs., Inc.), 148 B.R. 571, 573 (Bankr. D. Minn. 1992) (noting that Article 9 of the UCC does not apply to "any 'interest or claim in or under' an insurance policy."); Peacock Holdings, Inc. v. Mass. Mut. Life Ins. Co., 1996 WL 285435, *6 (E.D.N.Y. May 23, 1996) ("The transfer of a security interest in an insurance policy is governed by the common law of pledge.").

Because the UCC does not apply, the filing of a financing statement does not perfect a security interest in an insurance policy. Instead, "the perfection of security interests or claims in or under policies of insurance should continue to be controlled by the common law." Maplewood Poultry, 2 B.R. at 554 n.5. Under Maine common law, "possession of the collateral" is required to enforce a "pledge of intangibles" against third parties. Id. Accordingly, "[a] pledge of insurance policies requires that the pledgee maintain physical possession of the policies." Id. In this case, Wheeling has taken no steps to perfect an interest in the Policy under Maine common law. Upon information and belief, Wheeling does not have possession of the Policy, nor has it ever attempted to gain possession of the Policy. Upon information and belief, at no point did Wheeling provide notice, or attempt to provide notice, to Travelers of its alleged interest in the Policy prior to the Petition Date. Accordingly, Wheeling does not have a perfected security interest in the Policy, and does not even have a security interest in the Policy at all.

D. Wheeling Does Not Have a Security Interest in the Settlement Payment as Proceeds of the Policy.

A security interest in an "account," or "right to payment," is insufficient to create a security interest in a debtor's claim under an insurance policy, given that the transfer of claims under an insurance policy is expressly excluded from the scope of Article 9. *See* Inv. & Tax

Svcs., 148 B.R. at 575; *see also* Big Squaw Mountain, 122 B.R. at 836.[1] Accordingly, "[t]he [insurance] policy need[s] to be pledged or assigned in order for the debtor's interest therein or claim thereunder to serve as collateral for the debt to [the creditor]." Inv. & Tax Svcs., 148 B.R. at 575 (stating further that "[t]he fact that [the creditor] had a security interest in the debtor's contractual rights to payment and choses in action is insufficient to create an Article 9 security interest in the debtor's claim under the key man life insurance policy because the transfer of such claims is expressly excluded from Article 9 coverage."). In this case, as set forth above, the Policy was not pledged to Wheeling, Wheeling does not have possession of the Policy, and Wheeling cannot assert a valid interest in the Policy under either the UCC or Maine common law.

As explained by the Court in Investment & Tax Services, proceeds of a business loss insurance policy, such as the Policy, are not proceeds of a creditor's collateral unless the creditor has a security interest in the debtor's interest in, or claim under, the business loss insurance policy itself:

> In the case of derivative insurance, the insured property itself is the collateral, and if the collateral is destroyed any insurance proceeds are proceeds of the collateral. Clearly the creditor's security interest should extend to such insurance proceeds since an Article 9 security interest extends to proceeds of the creditor's collateral. **However, in the case of business interruption insurance, the policy does not**

[1] The definition of "account" in section 9-1102 of the Maine UCC includes "a right to payment of a monetary obligation, whether or not earned by performance . . . [f]or a policy of insurance issued or to be issued." This provision refers not to an insured's interest in, or claim under, an insurance policy itself, but instead refers to an insurance agency's right to a commission from an insurance company for insurance policies sold. *See* Jahn v. Cornerstone Cmty. Bank (In re U.S. Ins. Grp., LLC), No. 09-1079, 2009 WL 4723466, *4-5 (Bankr. E.D. Tenn. Dec. 2, 2009) (finding that while "Article 9 generally does not apply to a transfer of an interest in or an assignment of a claim under an insurance policy," insurance agency's right to a commission from insurance company for policies sold fell within Article 9's definition of "account"); Comm. Nat'l Bank of Pa. v. Seubert & Assocs., Inc., 807 A.2d 297, 303-04 (Pa. 2002) (finding that "interests in commissions and expirations of insurance policies" should be analyzed under Article 9, pursuant to definition of "account," because Article 9 insurance exclusion applied only to rights under insurance policies). The inclusion of "a right to payment . . . for a policy of insurance issued or to be issued" is designed to facilitate financing by insurers or insurance agents. This has nothing to do with an insured's right to receive payment under a policy. The insured's rights are excluded from the scope of Article 9.

> **insure any of the creditor's collateral; it simply insures the debtor against interruption of its business. Thus the proceeds of business interruption insurance are not proceeds of the creditor's collateral unless the creditor had a security interest in the debtor's interest in or claim under the insurance policy.**

Inv. & Tax Svcs., 148 B.R. at 574 (emphasis added). The vast majority of courts addressing this issue have held similarly. CPC Acquisitions, Inc. v. Helms, No. 07-C-702, 2007 WL 4365342, *5 (N.D. Ill. Dec. 12, 2007) (finding that "'proceeds' does not include amounts necessary to compensate for the losses to a business due to the loss of use of the collateral. CPCA's security interest does not attach to amounts recovered on account of Certified's business interruption losses from the fire."); Peacock Holdings, 1996 WL 285435 at *5 (holding that blanket security interest did not attach to business interruption insurance policy); *see also* Helms v. Certified Packaging Corp., 551 F.3d 675, 678-79 (7th Cir. 2008) (holding that settlement payment arising from claim against insurance broker for failure to obtain business loss insurance was not proceeds of collateral, because "replacing a business loss is not restoring the value of damaged collateral.").

The Policy in this case constitutes a policy for "business interruption insurance," rather than "derivative insurance." In other words, the Settlement Payment compensates the Debtor for interruption of the Debtor's business, not for loss of **specific collateral**. Case law is clear that a creditor does not have an interest in proceeds of business interruption insurance unless the creditor has a valid, perfected, and enforceable interest in the underlying business interruption insurance policy. Wheeling does not have an interest in the Policy, and therefore does not have an interest in proceeds of the Policy—the Settlement Payment—notwithstanding its assertion of an interest in accounts, rights to payment, and payment intangibles.

As it did with the 45G tax credits, Wheeling will likely argue that the right to receive money is either an account or a payment intangible and, consequently, part of its collateral. However, this Court has previously found that the right to payment under an insurance policy existing as of the petition date "constitute[s] a claim in or under a policy of insurance," and is therefore excluded from the UCC. *See* Big Squaw Mountain, 122 B.R. at 836. In Big Squaw Mountain, this Court addressed whether a creditor had a perfected security interest in the debtor's unearned insurance premiums, which unearned insurance premiums were converted to cash after the petition date. *See* id. The Court determined that, "[a]t the critical point of inquiry" (i.e., the petition date), the creditor's "rights as an assignee of unearned premiums constituted a claim 'in or under [a] policy of insurance' and, therefore, [was] excluded from the U.C.C.'s coverage by § 9-104(g)." Id. In other words, the creditor's interest in the right to unearned premiums was not simply an interest in a right to payment under the UCC. Accordingly, the Court analyzed whether the creditor had perfected its interest in the unearned insurance premiums under the Maine common law, rather than Article 9 of the UCC. *See* id. Other courts have made similar findings. *See, e.g.*, In the Matter of Fount-Wip Distrib. of S. Jersey, Inc., 4 B.R. 424, 425 (Bankr. D.N.J. 1980). As explained in Fount-Wip,

> For the following reasons the Trustee is vested with the proceeds of the policy:
>
> The inclusion by Peoples of the words "contract rights" and "proceeds thereof" in the Security Agreement cannot be construed to extend to and include the proceeds of the life insurance policy in which Fount-Wip was designated as the beneficiary. The Uniform Commercial Code adopted by the State of New Jersey specifically excludes its application as to an interest or claim in or under any policy of insurance. N.J.S.A. 12A:9-104(g), which deals with Secured Transactions, provides as follows: "This Chapter does not apply . . . (g) to a transfer of an interest in or under any policy of insurance; . . ."

Fount-Wip, 4 B.R. at 425.

The same analysis applies here. Wheeling's interest in rights to payment under the UCC does not encompass rights to payment under the Policy. Rather, as explained above, perfection of an interest in a right to payment under the Policy is governed by the Maine common law. Under Maine common law, Wheeling does not have a perfected interest in rights to payment under, or proceeds of, the Policy. In fact, pursuant to the plain language of the Security Agreement, Wheeling does not have **any** interest in rights to payment under, or proceeds of, the Policy. If Wheeling's argument that its security interest extends to any right of payment existing as of the Petition Date, Wheeling would have a lien on any money that ever comes into the estate. In other words, any time the estate has a right to get money, Wheeling would have a lien on it. If the estate settles a cause of action arising under chapter 5 of the Bankruptcy Code, Wheeling would have a lien on it simply because the prospective defendant agrees to pay money to the estate. Under Wheeling's theory, it has a lien on money to be received from Railroad Acquisition Holdings as the acquirer of the railroad. There is no authority in support of this novel position, and Wheeling has not cited any.

E. To the Extent Wheeling Has a Security Interest in the Settlement Payment, It Has, at Best, an Interest in That Portion of the Settlement Payment Allocated to MMA.

As set forth above, the Trustee disputes that Wheeling has a valid, perfected, and enforceable interest in any portion of the Settlement Payment, regardless of the allocation of the Settlement Payment between MMA and MMA Canada. However, to the extent that Wheeling's interest in "accounts" is deemed to give Wheeling an interest in the Settlement Payment, Wheeling could, at best, only have an interest in that portion of the Settlement Payment allocated to MMA. Wheeling took no steps to perfect its interest in Canadian accounts or rights to payment, and cannot be deemed to have a valid, perfected and enforceable interest in Canadian accounts receivable. Accordingly, even if Wheeling were deemed to have an interest in the

Settlement Payment as proceeds of a pre-petition account, Wheeling would only have an interest in the 35% of the Settlement Payment allocated to MMA.

F. Allocation of the Settlement Payment in the Manner Proposed in the 9019 Motion is Well within the Range of Reasonableness.

The 9019 Motion represents a compromise between the Trustee, MMA Canada, the Monitor, and Travelers regarding amounts owed by Travelers under the Policy and the allocation of the Settlement Payment between MMA and MMA Canada. The First Circuit articulated the standard by which compromises under Rule 9019 are to be evaluated in Yacovi v. Rubin & Rudman, LLP (In re Yacovi), 411 Fed. Appx. 342, 2011 WL 924244 (1st Cir. Mar. 18, 2011). In deciding whether to approve a compromise under Rule 9019, the court must consider: (i) the probability of success in the litigation being compromised; (ii) the difficulties in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience, and delay attending it; and (iv) the paramount interest of the creditors and a proper deference to their reasonable views. Yacovi, 411 Fed. Appx. at 346 (*quoting* Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995)). In reviewing a proposed compromise, "deference should also be given to the Trustee's judgment regarding the settlement." In re Fibercore, Inc., 391 B.R. 647, 655 (Bankr. D. Mass. 2008) (internal citations omitted). Thus, the standard for approving a compromise under Rule 9019 is not a high one; rather, the court's charge is to "see whether the settlement falls below the lowest point in the range of reasonableness." Yacovi, 411 Fed. Appx. at 346 (internal quotations omitted); *see also* Hicks, Muse & Co., Inc. v. Brandt (In re Healthco Intern., Inc.), 136 F.3d 45, 51 (1st Cir. 1998) (noting that the responsibility of the bankruptcy judge is to "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness.") (internal quotations omitted); In re Edwards, 228 B.R. 552, 569 (Bankr. E.D. Pa. 1998) ("Only if the Court concludes that the settlement falls below the lowest point in the

range of reasonableness should the compromise be rejected."). The settlement "may not be the most reasonable and it can be, basically, the least reasonable as long as it's within reason." Beacon Inv. LLC v. MainePCS, LLC, 468 B.R. 1, 17 (D. Me. 2012).

Further, in reviewing the terms of a proposed settlement under Rule 9019, the court need not "conduct a trial or mini-trial, or to decide the merits of individual issues." Edwards, 228 B.R. at 569. Instead, the court's duty is to "determine whether the settlement **as a whole** is fair and equitable." Id. (emphasis added). Where a settlement is presented to the court as an "integrated package," the settlement must be approved or rejected as a whole. *See* In re Telesphere Commc'ns, Inc., 179 B.R. 544, 565 (Bankr. N.D. Ill. 1994) (refusing to approve part of a settlement and reject another aspect of settlement where "the proposed settlement is an integrated package, with the agreements of [the parties] mutually dependent" and where the settlement was "presented to the court as a whole.").

As set forth above, the 9019 Motion provides that 35% of the Settlement Payment will be allocated to the Debtor, and the remaining 65% of the Settlement Payment will be allocated to MMA Canada. The allocation is based on a projection of tonnage that would have been carried across Canadian rail lines—owned by MMA Canada—and U.S. rail lines—owned by MMA—but for the Derailment. Specifically, the Debtor's financial advisor, Development Specialists, Inc. ("DSI"), determined the ratio of the net transportation revenue, earned by both MMA and MMA Canada for May and June 2013, to the net ton miles (*i.e.*, the movement of a ton of freight one mile) by MMA and MMA Canada, respectively. DSI determined that MMA and MMA Canada, collectively, earned a total of $5,431,044 net transportation revenue during May and June 2013. During that period, a total of 28,280,664 net ton miles were attributable to MMA, and a total of 44,660,680 net ton miles were attributable to MMA Canada, during May-June

2013. Accordingly, $2,105,713 of net transportation revenue can be allocated to MMA, and $3,325,331 of net transportation revenue can be allocated to MMA Canada. In other words, 61.2% of the net ton miles were attributable to MMA Canada (44,660,680/72,941,344) and 38.8% were attributable to MMA.

After the Derailment, due to disruptions in operations as a result of the Derailment, the net transportation revenue of MMA and MMA Canada decreased substantially. Specifically, net transportation revenue totaled $1,142,463 during August-September 2013. MMA's net ton miles decreased to 4,107,133 in August-September 2013, and MMA Canada's net ton miles decreased to 3,362,607 during this same period. Accordingly, $606,254 of net transportation revenue was allocated to MMA, and another $536,209 of net transportation revenue was allocated to MMA Canada, for the period August-September 2013. Accordingly, assuming that, but for the Derailment, net transportation revenue for August-September 2013 would be substantially similar to net transportation revenue earned in May-June 2013, MMA and MMA Canada lost an aggregate of $4,288,581 during the period August-September 2013. The table below shows how the aggregate loss should be allocated between MMA and MMA Canada:

Debtor	**Revenue Allocation May-June 2013**	**Revenue Allocation August-September 2013**	**Delta [Lost Revenue]**	**Percentage**
MMA (U.S.)	$2,105,713	$606,254	**$1,499,459**	**35.0%**
MMA Canada (Canada)	$3,325,331	$536,209	**$2,789,122**	**65.0%**
TOTAL LOSS:			**$4,288,581**	**100%**

Accordingly, allocation of the proceeds of the business loss insurance should be allocated proportionate to the loss sustained by MMA and MMA Canada, respectively. The Trustee

engaged in protracted negotiations with the Monitor and counsel to MMA Canada to determine the proper allocation of the Settlement Payment, relied on the analysis of DSI regarding the relative extent to which MMA and MMA Canada suffered business losses as a result of the Derailment, and submits that the 65/35 allocation set forth above is well within the range of reasonableness. Wheeling may argue for some other approach. It cannot, however, credibly argue that the Trustee's methodology is unreasonable. That is Wheeling's burden and it cannot be carried.

Additionally, the proposed allocation of the Settlement Payment is an integral part of the settlement between Travelers, the Trustee, MMA Canada, and the Monitor. The proposed settlement with Travelers was presented to this Court as an integrated package, and the proposed allocation of the Settlement Payment is a significant, and key, aspect of the settlement. The settlement must be approved as a whole, notwithstanding Wheeling's attempt to undercut the validity of the proposed allocation of the Settlement Payment. Further, the allocation of the Settlement Payment has already been approved by the Canadian Court pursuant to the Canadian Order, without any opposition of Wheeling. Wheeling cannot revisit the issue of how the Settlement Payment is allocated by obtaining relief from this Court, or at the very least without also seeking relief from the Canadian Court.

Dated: March 5, 2014

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

By his attorneys:

/s/ *Michael A. Fagone, Esq.*

Michael A. Fagone, Esq.
D. Sam Anderson, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle Street
P.O. Box 9729
Portland, ME 04104
Telephone: (207) 774-1200
Facsimile: (207) 774-1127
E-mail: mfagone@bernsteinshur.com