

**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 objection to declarations filed by the trustee

1. Canadian Pacific Railway Company (CP) objects to all those declarations (ECF Doc. Nos. 1686, 1697-1728) filed by Robert J. Keach, the chapter 11 trustee for Montreal, Maine & Atlantic Railway, Ltd. (MMAR) to the extent they attempt to prove terms of settlement agreements or the reasonableness of any agreement. The basis for this objection is Fed. R. Evid. 1002 (the best evidence rule). The Federal Rules of Evidence are applicable to cases under the Bankruptcy Code. Fed. R. Bankr. P. 9017.

2. Rule 1002 provides as follows: "An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal state provides otherwise."

3. The best evidence rule applies and requires document production "when the proponent is attempting to prove the contents or terms of a writing." *R & R Associates, Inc. v. Visual Scene, Inc.*, 726 F.2d 36, 38 (1st Cir. 1984). "[T]he best-evidence rule requires a party trying to prove the 'content' of a written document to introduce the document itself." *Rodriguez v. Senor Frog's de la Isla, Inc.*, 642 F.3d 28, 34 (1st Cir. 2011). "Think of a will contest where the will is not in evidence and a witness tries to discuss the document's words from memory—that is the sort of situation that the rule was designed to address." *Id.*

4. “The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone’s description and this is no less true as to the extent and circumstances of a contradiction.” *Gordon v. U.S.*, 344 U.S. 414, 421 (1953); *see also U.S. v. Morales-Madera*, 352 F.3d 1, 9 (1st Cir. 2003) (quoting same). Proffered evidence that does not comply with the rule must be excluded. *Gordon*, 344 U.S. at 423 n.15. “[S]econdary evidence of the content of the original is not admissible unless the proponent of the testimony shows that a reasonable and diligent search has been made for the original without success.” *Sylvania Elec. Products, Inc. v. Flanagan*, 352 F.2d 1005, 1007-08 (1st Cir. 1965).

5. In *Assurance Co. of America v. National Fire and Marine Insurance Co.*, defendants sought to exclude secondary evidence of written settlement agreements. No. 2:09-CV-1182 JCM PAL, 2012 WL 1970017, at *6 (D. Nev. June 1, 2012) *aff’d*, 595 F. App’x 670 (9th Cir. 2014). Specifically, defendants requested that the court “enter an order barring plaintiff from admitting secondary evidence to prove the contents and substance of the underlying settlement agreements.” *Id.* The Court issued such an order, stating:

Even with the benefit of a presumption of reasonableness, the court must determine the actual amount that was paid in settlement to determine the amount of damages. Thus plaintiffs must prove the contents of the disputed settlement agreements to identify the sums incurred as a result of the settlement.

Pursuant to the best evidence rule, the settlement agreements themselves must be admitted to prove the contents of said agreements. To the extent plaintiffs wish to prove the contents of the settlement agreements by way of secondary evidence, the motion [in limine] is granted.

Id. at *8 (emphasis added).

6. The trustee’s numerous declarations uniformly attempt to prove agreement terms, specifically settlement reasonableness. For example, take the following stock representation in the declarations: “Under these circumstances and by any measure, the total settlement

contribution to the MMA estate by and on behalf of [the settling party] is ‘substantial.’” What is substantial? Without the unredacted agreements being introduced into the record and provided to CP, such proffer via the declarations cannot be made because the proffer would violate the best evidence rule.

7. CP reserves the right to assert additional objections at the time of the hearing and to supplement this objection.

Dated: September 23, 2015

BRIGGS AND MORGAN, P.A

By: /s Timothy R. Thornton

Timothy R. Thornton
John R. McDonald
Paul J. Hemming
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

And

PEARCE & DOW, LLC

By: /s Aaron P. Burns

Aaron P. Burns
Two Monument Square, Suite 901
PO Box 108
Portland, Maine 04112-0108
(207) 822-9900 (Tel)
(207) 822-9901 (Fax)

**ATTORNEYS FOR CANADIAN PACIFIC
RAILWAY COMPANY**