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## UNITED STATES BANKRUPTCY COURT DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC RAILWAY, LTD.

Bk. No. 13-10670 Chapter 11

Debtor.

## TRUSTEE'S POST-TRIAL BRIEF IN SUPPORT OF OBJECTION TO PROOFS OF CLAIM FILED BY NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED 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 chapter 11 trustee (the "<u>Trustee</u>") of Montreal Maine & Atlantic Railway, Ltd. ("<u>MMA</u>" or the "<u>Debtor</u>"), files this post-trial brief (the "<u>Brief</u>") in support of the *Trustee's Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited 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 "<u>Objection</u>")<sup>1</sup>. In submitting this Brief, the Trustee avoids reiterating the legal arguments and reservations of rights made in his Objection and Reply, each of which is incorporated as if fully set forth herein, but rather summarizes the salient facts that came to light at the hearing held on the Objection on November 20, 2015 (the "Hearing")<sup>2</sup> and applies the relevant law thereto.

<sup>&</sup>lt;sup>1</sup> Capitalized terms not defined in this Brief shall have the meanings ascribed to such terms in the Objection or the *Trustee's Reply in Support of Objection to Proofs of Claim Filed by New Brunswick Southern Railway Company Limited 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. 1878] (the "<u>Reply</u>"), as applicable.

<sup>&</sup>lt;sup>2</sup> As access to the official transcript of the Hearing remains restricted until February 29, 2015, *see* D.E. 1888, a compressed version of the transcript is attached hereto as <u>Exhibit A</u> (the "<u>Transcript</u>").

## **PRELIMINARY STATEMENT**

1. The MN/NB Railways have a burden that they have not satisfied, and their Asserted 1171(b) Claims should thus be relegated to (asserted) general unsecured claims. First, numerous circuit courts have made clear that claims of the sort comprising the Asserted 1171(b) Claims do not merit consideration for "six month claim" status. But even were that not the case, to merit priority status under Bankruptcy Code section 1171(b), claims must be shown to have been *absolutely necessary* to the continued operation of the debtor railroad as a going concern. This standard is in keeping with the policy behind section 1171(b), which is the continued operation of the rail network for the public good—not the protection of individual creditors supplying railroads in the ordinary course. Moreover, to merit priority status, a claimant must demonstrate reliance on a debtor railroad's immediate net cash flow. The uncontroverted evidence presented at the Hearing demonstrates that use of the MN/NB Railways' tracks simply was not necessary to MMA's continued operation, and that the MN/NB Railways did not ever rely on MMA's net cash flow. Instead, they relied on special security and payment arrangements that, per se, remove their claims from section 1171(b) status. Each of these factual findings alone is fatal to the MN/NB's Railways' request for priority status, but taken together leave no room for doubt: the MN/NB Railways have failed to meet their burden of proof, and should not inequitably be awarded priority status to the detriment of other equally deserving general unsecured creditors.

### **ARGUMENT**

2. In their Response, the MN/NB Railways failed as a matter of law, and at the Hearing, failed as a matter of fact, to meet their burden of demonstrating entitlement to priority status. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 174 (3d Cir. 1992); *see also In re Trentadue*, 527 B.R. 328, 332 (Bankr. E.D. Wis.) (claimant asserting entitlement to priority

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status bears the burden of showing entitlement thereto), *aff'd sub nom*. <u>Trentadue v. Gay</u>, 538 B.R. 770 (E.D. Wis. 2015); *cf.* <u>In re PMC Mktg. Corp.</u>, 517 B.R. 386, 391 (B.A.P. 1st Cir. 2014) ("An administrative expense claimant bears the burden of establishing that its claim qualifies for priority status.") (internal citations omitted). The Objection should thus be sustained.

## A. Interchange Charges are *Per Se* General Unsecured Claims

3. Post-Bankruptcy Code law makes clear that interline payments are *per se* general unsecured claims. *See, e.g.*, <u>Union Pac. R.R. Co. v. Moritz (In re Iowa R.R. Co.)</u>, 840 F.2d 535, 545 (7th Cir. 1988) ("We therefore conclude that the interline balances are general, unsecured debts of the [debtor].")<sup>3</sup>; *see also* <u>In re Bangor & Aroostook R.R. Co.</u>, 320 B.R. 226, 240 (Bankr. D. Me. 2005) (finding that the relationship between an interline creditor and interline debtor is a simple creditor-debtor relationship), *aff'd* <u>In re Bangor & Aroostook R.R. Co.</u>, No. 01-11565, 2007 WL 607867 (D. Me. Feb. 23, 2007).<sup>4</sup> Indeed, in negotiating the 1978 overhaul of the Bankruptcy Code, the Senate adopted a bill explicitly affording interline claims priority status; the House rejected that portion of the bill, and the Senate capitulated. *See* <u>Iowa R.R.</u> <u>Co.</u>, 840 F.2d at 538. "[I]nterline creditors [who] try to rely on the 1978 Code [for their asserted priority thus] must lose." <u>Id.</u> The Seventh Circuit clearly articulated the reasoning and policy behind withholding priority status to such claims:

Perhaps one could argue that the financial health of the railroad business depends on being able to collect interline balances quickly. This is not a complete view, however. Railroads are on both sides of

<sup>&</sup>lt;sup>3</sup> Indeed, like the Trustee and contrary to the MN/NB Railways, the Seventh Circuit interprets <u>In re Bos. & Me.</u> <u>Corp.</u>, 600 F.2d 307, 313 (1st Cir. 1979), as holding that "interline per diem car balances should be treated as general, unsecured debt." <u>Iowa R.R. Co.</u>, 840 F.2d at 538 (citing 600 F.2d 307).

<sup>&</sup>lt;sup>4</sup> The First Circuit has clarified—to the extent any doubt existed—that the term "general unsecured claims," as used by the Seventh Circuit in <u>Iowa R.R.</u>, necessarily does <u>not include</u> priority claims. *See* <u>In re Plourde</u>, 418 B.R. 495, 498 n.1 (B.A.P. 1st Cir. 2009) ("The term 'general unsecured claim' is nearly universally considered by bankruptcy courts and practitioners to mean an unsecured claim that will receive distribution from the estate via  $\frac{726}{2}(a)(2)$ ....[T]he term does not include unsecured claims that receive more favored treatment under  $\frac{8}{726}(a)(1)$  [i.e. priority claims under section 507]....").

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these transactions. If some railroad is more secure, another is less so. If interline creditors always get  $100\phi$  on the dollar, then other creditors (suppliers of fuel, equipment, and labor first among them) get less. They perceive the risks as greater and must do more to protect themselves—take security interests, charge higher interest, and so on. Shippers must pay these alternative costs, too. In other words, the risk of failure is part of the business. If railroads insulate some of their creditors (interline roads) from the risk, they expose other creditors to more of it; in the end, someone bears the whole risk, and shippers pay the full cost. There is no panacea in making interline creditors better off. We therefore do not agree ... that giving interline creditors priority claims on the funds of bankrupt railroads is essential to the preservation of a national transportation system.

Id. at 542 (emphasis added).

4. In enacting the current version of the Bankruptcy Code, Congress thus addressed and rejected the request that the MN/NB Railways now make of this Court. The Asserted 1171(b) Claims explicitly request priority treatment for "[f]reight services provided to the Debtor in connection with *interline rail shipments*." *See* Claim Nos. 257, 259 (emphasis added). They thus constitute the very kind of "interline" payments that Congress, the courts in this district, and the First and Seventh Circuits have definitively determined are not entitled to any priority under the Bankruptcy Code. *See* Bos. & Me., 600 F.2d at 313; Iowa R.R., 840 F.2d at 545; Bangor & Aroostook R.R., No. 01-11565, 2007 WL 607867. Accordingly, the Asserted 1171(b) Claims are—at best—general unsecured claims as a matter of law.

## B. <u>The MN/NB Railways Have Failed to Establish That the Interchange Charges</u> Were Operating Expenses Necessary to Maintain MMA as a Going Concern

5. Even if the Court were to disregard Congress's drafting and the First and Seventh Circuits' determinations that interline charges are simply not entitled to priority status under Bankruptcy Code section 1171(b), the Asserted 1171(b) Claims are nevertheless not entitled to priority status because the MN/NB Railways have not met their burden of demonstrating that the underlying claims were necessary operating expenses of MMA. Among other things, to merit priority status under Bankruptcy Code section 1171(b), a claim must have

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been for goods or services that were necessary operating expenses. *See* Response, at 1-2 (citing In re Bos. & Me. Corp., 634 F.2d 1359, 1378 (1st Cir. 1980)). A "necessary" operating expense is an expense the non-payment of which would cause the debtor railroad to cease, or clearly risk cessation of, operations. *See* Commonwealth Edison Co. v. Cont'l Nat. Bank & Trust Co. of Chic., 93 F.2d 265, 266 (7th Cir. 1937) (affording priority status to claims incurred for electricity provided to railroad to operate its "cars, lights and equipment" on the basis that the power "was *essential to the operation of [the] road*") (emphasis added); N.Y. Guar. & Indem. Co. v. Tacoma Ry. & Motor Co., 83 F. 365, 367 (9th Cir. 1897) (claims entitled to priority status "when they involve debts incurred which are necessary to keep the road a going concern") (internal quotations omitted); In re Mich. Interstate Ry. Co., 87 B.R. 921, 923 (Bankr. E.D. Mich. 1988) (granting priority status to claims that had been "necessary to keep the railroad running").

6. Indeed, courts have declined to afford "six-month" priority treatment to ordinary operating expenses if not truly necessary to operation of the railroad; the fact that the goods or services increased cash flow or made the road more profitable is thus insufficient as a matter of law. *See* <u>III. Trust & Savs. Bank v. Doud</u>, 105 F. 123, 127-30 (8th Cir. 1900) (finding that claims that were "necessary to the maintenance of the *volume* of [the debtor's] business, but [] not indispensable to [the debtor's] continuance as a going concern," were not entitled to priority status) (emphasis added); *see also* <u>Cent. Trust Co. of N. Y. v. E. Tenn., V. & G.R. Co.</u>, 80 F. 624, 631 (6th Cir. 1897) (declining to afford priority status to advertising services rendered in the ordinary course). In <u>Illinois Trust & Savings Bank</u>, a debtor railroad conducted three branches of business. 105 F. 123 at 125. A creditor that had financed a new building and machinery to support one of the businesses sought "six month" priority status for the amount financed. <u>Id.</u> The building and machinery were admitted to have been necessary for operation

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of the business identified, but the other two businesses would have continued to operate as going concerns without the building or the machinery (or the dependent business). <u>Id.</u> at 127-28. The Court found that because the debtor could have continued to operate at least some of its business as a going concern without the building and machinery giving rise to the claim, the creditor's "proof [fell] far short of establishing the proposition that the [good] was necessary to keep the railway a going concern." <u>Id.</u> at 128.

7. The facts at bar are akin to those of <u>Illinois Trust & Savings Bank</u>, where the creditor seeking priority had financed materials relevant only to one component of the debtor's business, but not one without which the debtor could not operate as a whole. At best, taking the facts in the light most favorable to the MN/NB Railways, the Asserted 1171(b) Claims simply facilitated an economical route for MMA's shipment of one good—oil, to one customer—an affiliate of the MN/NB Railways (the "<u>Affiliate</u>"). *See* Tr. at 106:3-17 (Mr. Simpson acknowledging that, in his opinion, "it would not make economic sense" to have interchanged with another railroad in shipping oil to St. John, but it would have been "possible"). And at worst, the MN/NB Railways failed to demonstrate that interchanging with them provided any business benefit to MMA at all, let alone constituted a necessary service. *See* Tr. at 75:10-13 (Mr. Hansen admitting that he had "no idea what the impact would have been on MMA's business [had it not been able to interchange with the MN/NB Railways, other than] know[ing MMA] wouldn't have been able to service [the Affiliate].").

8. But oil shipments to St. John and paper shipments to the Affiliate were not the only sources of MMA's freight. *See* Tr. at 108:1-7, 109:5-8 (Mr. Simpson acknowledging that even after the Affiliate stopped doing business with MMA, and thus after MMA stopped interchanging with the MN/NB Railways, MMA did not cease operations). The Court can, of course, take judicial notice of the record before it—that MMA and MMA Canada were both

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sold as going concerns despite the fact that, as admitted by both MN/NB Railways witnesses, the MN/NB Railways had ceased almost all, if not all, interchange activities with MMA and MMA Canada. The evidence thus fails to demonstrate any necessity for interchanging with the MN/NB Railways at all, let alone that such service was one without which MMA would have had to have ceased operations; indeed, the facts demonstrate otherwise. *See* Tr. 75:14-24 (Mr. Hansen acknowledging that MMA's successor continues to operate despite not shipping oil to St. John).<sup>5</sup>

9. The MN/NB Railways' interchange claims stand in marked contrast to, for example, actual section 1171(b) expenses such as fuel and labor. These are the claims that fall within the true ambit of Bankruptcy Code section 1171(b). See In re CoServ, L.L.C., 273 B.R. 487, 492 n.7 (Bankr. N.D. Tex. 2002) (describing six-month rule as "originating from the practice of initiating a railroad receivership case with an order appointing a receiver who was authorized to pay certain prepetition debts for labor, supplies or equipment from post-petition funds"); In re Third Ave. Transit Corp., 138 F. Supp. 623, 626 (S.D.N.Y. 1955) (finding that "[t]he cases bear out the limitation in the rules [governing allowance of six month claims] to labor, supplies or materials," "no matter how necessary [other services] may be"). Without truly necessary operating expenditures such as fuel and labor, MMA could not have sent cars over any tracks or hauled any freight-paralyzing its ability to generate revenue and necessitating an immediate cessation of operations. Because of the important public policy of avoiding a shutdown of the rail system overall, these are the kinds of claims Congress intended to protect—the protections extend no further, lest they unjustifiably disadvantage other creditors.

<sup>&</sup>lt;sup>5</sup> Even if MMA did have to use the MN/NB Railways' tracks to operate, the facts demonstrate that the MN/NB Railways did not have the option of ceasing service, so MMA's payment to the MN/NB Railways was not even necessary to MMA's use of the MN/NB Railways' tracks. *See* Tr. at 89:1-22 (Mr. Hansen acknowledging that Mr. Simpson had informed him that the MN/NB Railways did not have the legal right to refuse to haul MMA traffic).

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10. The facts thus demonstrate that the Asserted 1171(b) Claims fail the "necessity" test for meriting priority status under Bankruptcy Code section 1171(b).

## C. <u>The MN/NB Railways Orchestrated a Special Security Arrangement, and</u> Have Otherwise Failed to Establish Reliance on MMA's Cash Flow

11. As an initial matter, creditors with "special security arrangements" do not benefit from the protections afforded "six month creditors." *See* <u>Gregg v. Mercantile Trust Co.</u>, 109 F. 220, 223 (6th Cir 1901) (quarterly payments made by lessee railroad *in advance* for lease of lessor railroad's tracks, together with certain other forms of security, "afforded [lessor railroad] a most stringent remedy," and "indicate[d] that the lessor did not rely upon [lessee railroad's] rentals as constituting an equitable charge upon the current income of the lessee"), *aff'd* <u>Gregg</u> <u>v. Metro. Trust Co.</u>, 197 U.S. 183 (1905); <u>Commonwealth Edison Co.</u>, 93 F.2d at 270 ("six month rule" only protects creditors "if it does not appear that credit was given in reliance on the railroad company's personal credit *or some special security*," and such a reliance is "conclusively established by the evidentiary facts of *other security taken, or other rights reserved or existing*") (emphasis added); <u>Third Ave. Transit</u>, 138 F.Supp. at 625 (similar to Commonwealth Edison).

12. The facts demonstrate that the MN/NB Railways took just the kind of "special security" that excepts creditors from the protections of the six-month rule. Mr. Hansen testified to a special security arrangement that he, as general manager of corporate credit and finance for the parent company to the MN/NB Railways and the Affiliate ("<u>Irving</u>"), had orchestrated to better protect Irving from MMA credit risk: he would withhold payment on behalf of the Affiliate until MMA remitted to the MN/NB Railways amounts due for freight. *See* Tr. at 76:17-19 ("Q: And if notwithstanding your withholding the wires [from the Affiliate to MMA, MMA] had not paid[,] what would you have done? A: I would have held the wire until they paid."). In this way, Irving would, in effect, have had the ability to set off what Mr. Hansen

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considered to be the Affiliate's secured claim against outstanding MMA receivables. *See* Tr. at 76:20-77:16 (Q: [Y]ou have no doubt that you had the ability to [offset against the amounts due]? A: Oh, I certainly had the ability, yes. Q: Okay. And in fact the reason you felt this arrangement was secure was because you had the ability to set off if you needed to, right? A: I controlled the money. Q: Right. And the reason you were secure in this arrangement is because you controlled the money and because Irving Paper almost always owed MMA more money than MMA owed the railroads, correct? A: Correct."). This is precisely the type of "special security" arrangement that the courts in <u>Commonwealth Edison</u> and <u>Third Avenue Transit</u> contemplated when excepting specially secured creditors from the protections of priority status.

13. This is logical from an equitable perspective: as in the case of a preference recipient who takes non-ordinary course action to de-risk its position on the eve of bankruptcy, a creditor that improves its position vis-à-vis its ordinary interactions with the debtor (as by creating a collateralized setoff position or tightening trade terms) should not benefit from priority treatment under Bankruptcy Code section 1171(b) to the detriment of creditors who did not take such aggressive action. *See* Gregg, 109 F. at 223; Commonwealth Edison Co., 93 F.2d at 270; Third Ave. Transit, 138 F.Supp. at 625. Here, the MN/NB Railways improved their position vis-à-vis MMA by entering into the "swap arrangement." The MN/NB Railways thus excepted themselves from the protection of the six-month rule, and should not be rewarded with a protection that will work a corresponding economic harm on similarly situated creditors.

14. More significantly, the facts demonstrate that MMA's cash flow was irrelevant to the MN/NB Railways—their reliance was on the cash flows of third parties and on MMA's remittance of those cash flows (indeed, the MN/NB Railways' "share" of such cash, as if it had been an ISS member) to the MN/NB Railways. Mr. Hansen testified that in doing business with MMA, he was intent on avoiding MMA credit risk. *See* Tr. at 67:19-22. In attempting to

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protect the MN/NB Railways from MMA credit risk, Mr. Hansen admitted that he was not ever relying on MMA's immediate or short-term cash flow—indeed, MMA's cash flow was wholly irrelevant to his credit calculus. *See* Tr. at 85:2-9 ("Q: You also told me last night that you didn't rely on the Dunn & Bradstreet reports, that you didn't really care frankly what was in them because you were comfortable that you were relying on your swap system, your secured credit system, and you were relying on your comfort with ISS, and that's why you were doing business, not anything that was in the D&B, correct? A: That's correct.").

15. What was relevant to the MN/NB Railways was, (a) in respect of "local traffic," the Affiliate's cash flow, which benefited the MN/NB Railways via the swap arrangement, see Tr. at 82:19-24 ("Q: And then the arrangement with respect to ... the so-called local traffic, that was going to continue to be protected by your secured credit arrangement through the swap, correct? A: It was protected by the swap arrangement."), and (b) in respect of oil traffic, the cash flow of Canadian Pacific Railway Company ("CP") and the reliability of the ISS system, see Tr. at 67:23-68:1 ("Q: What did the Irving railroads rely on? A: We relied on [MMA] being paid out of the ISS system, which I felt was secure, and that meant I would be paid shortly thereafter."). There can thus be no doubt that the MN/NB Railways were relying only on the cash flows of CP, ISS and the Affiliate; MMA's cash flow was irrelevant. See Tr. at 83:24-84:4 ("Q: Because CP was paying the money in and ISS was paying it out, correct? A: Correct. Q: And those were the two entities that you were relying on? A: Yes.") (emphasis added). Unable to demonstrate a reliance on MMA's cash flow, the MN/NB Railways are left with the "special security arrangements" they devised, and whatever protection that provided to them. As to the MN/NB Railways' recourse against MMA, they are entitled only to assert a general unsecured claim.

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16. In addition, the equities are entirely against the MN/NB Railways. Those railroads made a knowing and informed choice, for their own convenience, not to participate in the ISS, instead relying on security arrangements of their own creation, and which they insisted be in place as conditions to doing business with MMA—arrangements not insisted upon by any other MMA customer or receiving railroad. To the extent the MN/NB Railways suffered a loss, it is a consequence of their choice, not of any reliance on the cash flow of MMA.

17. The facts thus demonstrate that the Asserted 1171(b) Claims also fail the net cash flow reliance requirement for meriting priority status under section 1171(b). There is no basis to elevate the MN/NB Railways claims over the claim of other deserving creditors, many of whom provided far more support to MMA than did those railroads.

## **CONCLUSION**

WHEREFORE, for the reasons set forth herein and in the Objection, the Trustee requests that the Court enter an order: (i) sustaining the Objection; (ii) disallowing the Asserted 1171(b) Claims and allowing such claims only as general unsecured claims against the Debtor (subject to the rights reserved in the Objection); and (iii) granting such other and further relief as may be just.

Dated: December 10, 2015

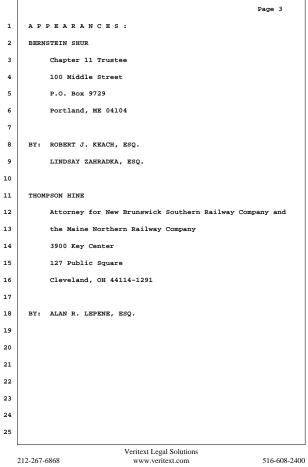
## ROBERT J. KEACH, CHAPTER 11 TRUSTEE OF MONTREAL MAINE & ATLANTIC RAILWAY, LTD.

By his attorneys:

/s/ Lindsay K. Zahradka

Sam Anderson 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

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1	PROCEEDINGS
2	THE CLERK: The United States Bankruptcy Court for
3	the District of Maine is now in session, the Honorable Peter
4	Cary presiding. Please be seated and come to order.
5	THE COURT: Good afternoon.
6	(A chorus of good afternoon)
7	THE COURT: We're here on the Montreal Maine &
8	Atlantic Railway Ltd. case, 13-10670, and we are on a
9	continued hearing of document 1826, trustee's objection to
10	proofs of claim of New Brunswick Southern Railway and Maine
11	Northern Railway. And I understand we have a stipulation
12	that gets rid of the duplicate claims.
13	But why don't I begin with appearances starting
14	with you, Mr. Keach.
15	MR. KEACH: Thank you, Your Honor. Robert Keach,
16	the Chapter 11 Trustee for Montreal Maine & Atlantic Railway
17	Ltd. I'm here with Lindsay Zahradka from Bernstein Shur.
18	MS. ZAHRADKA: Good afternoon, Your Honor.
19	THE COURT: Good afternoon.
20	MR. KEACH: Mr. Caruso is here as a witness, we'll
21	introduce him later.
22	THE COURT: Okay. Hello, Mr. Caruso.
23	MR. LEPENE: Good afternoon, Your Honor, Alan
24	Lepene with Thompson Hine on behalf of the New Brunswick
25	Southern Railway Company and the Maine Northern Railway
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	212-267-6868 www.veritext.com 516-608-2400

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6	away 242 and 243, correct?
7	MR. KEACH: That is correct, Your Honor.
8	THE COURT: Okay. And then I saw the stipulations
9	regarding the what the claim under 257 is comprised of
10	and what the claim under 259 is comprised of. Wheelings
11	valid security interest stipulation in the AR, the ISS
12	descriptions, Irving as affiliate, and the sole issue that
13	we're up to today.
14	Anybody have any great suggestion on how to most
15	efficiently deal with the document the exhibits?
16	MR. KEACH: Thank you, Your Honor.
17	I actually think we covered it, but both with
18	respect to I have received the Irving railroad's
19	exhibits. I think it is fair to say that we probably won't
20	be introducing any other exhibits other than the ones they
21	have, although I'll reserve on that. It'll be at most one
22	or two, if there's anything. But I think that covers the
23	universe. And certainly the stipulation covers the full
24	universe of potential exhibits, all of which are deemed
25	admitted, and we'll make sure to the extent they're not
	Veritext Legal Solutions

Company. And with me today, Ryan Ellis, Ian Simpson, and Karl Hansen with J.D. Irving and the affiliated railroad

THE COURT: Wonderful. Good afternoon.

Thank you for the stipulations. So we can take

companies who will be witnesses today.

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1	we'll go on from there.
2	THE COURT: Wonderful. Thank you.
3	Mr. Lepene?
4	MR. LEPENE: Thank you, Your Honor.
5	Again, Your Honor, for the record, Alan Lepene
6	with the law firm of Thompson Hine on behalf of the New
7	Brunswick Southern Railway Company and the Maine Northern
8	Railway Company.
9	And as Your Honor has noted in terms of the
10	stipulation that we have submitted, the purpose of this
11	hearing is to address whether the claims asserted by the
12	Irving Railroad and I'm going refer to both New Brunswick
13	Southern Railway Company and Maine Northern Railway Company
14	as the Irving railroad.
15	THE COURT: Okay.
16	MR. LEPENE: These are railroads that are
17	affiliated with J.D. Irving, Limited, and so that there is
18	no confusion with respect to other parties that have been
19	involved in the Chapter 11 proceeding of the Montreal Maine
20	& Atlantic Railway, these are companies that are not related
21	to Irving Oil.
22	The as I indicated, the issue here is whether
23	the claims that we have asserted qualify as six-month claims
24	entitled to priority under Section 1171(b) of the Bankruptcy
25	Code.
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1	otherwise admitted that they come in before we great.
2	THE COURT: Great. And thank you. I've just been
3	notified that I have forgotten to introduce we may have
4	people on
5	MR. KEACH: Oh, okay.
6	THE COURT: Hello, good afternoon. This is Judge
7	Peter Cary in the Montreal Maine & Atlantic Railway case.
8	Is there anybody on the telephone that would like to enter
9	their appearance in this afternoon's hearings?
10	COURTCALL: I'm sorry, Your Honor, no one is
11	scheduled to dial in for it.
12	THE COURT: Thank you.
13	MR. CAWOOD: You're welcome.
14	THE COURT: (Indiscernible) all this advanced
15	technology. Got it. Okay. We're set. Sorry, Mr. Keach.
16	MR. KEACH: Not at all.
17	The as I said, to the extent not otherwise
18	introduced in the flow of testimony we'll make sure the
19	Court has copies of any exhibits that are on the stipulation
20	that are not otherwise introduced.
21	THE COURT: Okay.
22	MR. KEACH: The and in terms of order of
23	presentation, Mr. Lepene and I talked ahead of time, and
24	this is their claim, they'll start first and we'll respond.
25	So his direct witnesses will be first, I'll cross, and then
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	Page 8
1	The trustee filed his objection, we filed a
2	response. I did see today filed just about an hour and a
3	half or two hours ago a reply that the trustee has filed.
4	I've had a chance to look at that briefly, I haven't had an
5	opportunity to study that in any detail, but I think in
6	terms of the papers that have been filed and the arguments
7	that will be presented and the evidence that will be
8	presented we'll be able to flesh out this issue of
9	entitlement to status as six-month claims entitled to
10	priority under Section 1171(b) of the Bankruptcy Code.
11	If I might, Your Honor, I'd like to provide just a
12	brief opening statement and then call our first witness.
13	THE COURT: Sure.
14	MR. LEPENE: In terms of our position, Your Honor,
15	I think we know what the standard is in terms of whether
16	claims qualify as six-month claims entitled to priority
17	under Section 1171(b). The standard is laid out very
18	clearly in the First Circuit's opinion in the Boston and
19	Maine case. And the standard is quite clear. Was the claim
20	incurred within six months prior to the commencement of
21	reorganization? Were the services for which payment is
22	sought necessary to the ongoing operation of the railroad?
23	And were the services provided with the expectation that
24	they would be paid for out of current operating revenue of
25	the debtor railroad rather than in reliance on the general
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Exhibit A

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3 point? And if the Irving railroads get up and say, well that's definitely what we believed, then it's game over and the trustee --6 MR. LEPENE: Well we would certainly --THE COURT: -- automatically loses? 7 MR. LEPENE: We would certainly like to believe 8 9 that, Your Honor, but I think we're realistic enough to know 10 that there needs to be evidence in terms of the 11 understanding between the parties as to what the expectation 12 was. 13 So, I'm not going to stand up here and suggest to 14 you that we simply put on the testimony of the witnesses for 15 the Irving railroads and say, well this is what we expected 16 and therefore, as you say, game over. It's clearly not that 17 simple. But it is a function of what the evidence will 18 show, the agreements and understandings of the parties were 19 in connection with the provision of services to the 20 railroad. And that's what we're about, that's what we're 21 going to present evidence to address. 22 Going through the standards, and I think Your 23 Honor has actually focused on the issue that we're probably 24 going to pay the most attention to, but let me address the

THE COURT: Is that a subjective test at that

25 other two very briefly.

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creditworthiness of the railroad?

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Page 11 1 asserted by the Irving railroads in this case. And, Your Honor, that's one of the few points on which we can agree 2 I think the interlying claims are essentially similar to the 3 4 per diem claim that is were asserted by the Irving -- excuse me -- by the interlining railroads in the Boston and Maine 5 6 case. 7 The problem with the trustee's argument is that 8 he's misread the Boston and Maine decision in that regard. 9 In the case that he cites, and this was really the 10 first of two cases that the First Circuit addressed in terms 11 of the Boston and Maine reorganization. The first case dealt with the issue of whether the per diem claims were 12 13 required to be paid immediately during the course of the 14 reorganization. And we've addressed this in our brief and T 15 know the Court has read our brief, so I'm not going belabor the point, but that was the issue that was in front of the 16 17 court in that case. That case had nothing to do with the 18 question of whether the per diem claims would qualify as 19 six-month claims entitled to priority under Boston and 20 Maine's plan of reorganization. It simply was not an issue 21 that was addressed in that particular case. 22 The issue was addressed in the second Boston and 23 Maine decision, and that of course is the decision that we 24 all rely upon for guidance in terms of understanding what is

Page 10 THE COURT: Sure. MR. LEPENE: I don't believe there is any dispute that the Irving railroad provided the services in question 3 within six months prior to the reorganization. And we'll produce evidence, we have the invoices, the invoices 6 indicate the various dates that services were provided, so, I don't think we're going to have to spend much time dealing 8 with that. 9 As to the issue of whether the services were 10 necessary to the ongoing operation of the Montreal Maine & 11 Atlantic Railway, I would note a copy of things. 12 In his objection the trustee argues that the First 13 Circuit has determined as a matter of law that interlying 14 claims of the type that are asserted by the Irving railroads 15 do not qualify as six-month claims. Now -- and he's I think 16 pretty much repeated that argument in the reply that he 17 filed this morning. And this argument is based on a 18 statement that is made in a First Circuit opinion in the 19 Boston and Maine case that addressed what are referred to as 20 per diem claims 21 Those claims, Your Honor, are charges that are 22 assessed on a daily basis by one railroad to another 23 railroad for the use of its cars. And the trustee claims in 24 his objection that the claims for per diem charges are 25 really the same type of claim as the interlying claims Veritext Legal Solutions 212-267-6868 516-608-2400 www.veritext.com

Page 12 1 qualify as a six-month priority claim. 2 And ironically the very same per diem claims that vere addressed by the First Circuit in the first Boston and 3 4 Maine decision were the claims that were addressed in the second Boston and Maine decision. And the court held in 5 that case that those claims were the types of claims that 6 7 would qualify for priority if the other conditions were 8 satisfied. They had to be incurred within six months of the 9 commencement of reorganization and they had to be furnished 10 with the expectation that they would be paid out of current 11 operating revenue rather than a reliance on the general 12 creditworthiness of the debtor. 13 What is most illuminating in the second opinion of 14 the First Circuit is that they talk about the disastrous consequences. Those aren't my words, those are the First 15 Circuit's words. The disastrous consequences that would 16 17 flow from a failure to pay interlying claims. And what 18 would those consequences be? The potential for a stoppage 19 of traffic, which would have a devastating impact not only 20 on rail operations but on the public at large. 21 So again, the First Circuit addressed the per diem 22 claims, recognized that they were interlying claims, if you 23 will, claims for services provided by one railroad to 24 another railroad, and the First Circuit recognized that claims of that type -- these are the same claims that are 25

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required to gualify -- what is required for a claim to

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Page 14 don't think that the standard is necessarily to show that they would have been put out of business. Would it have had a substantial negative impact on their operations? I think the evidence will show that that absolutely would have been the case. And the second element I think is clearly satisfied.

7	So, Your Honor, that leaves us with the question
8	of whether the Irving railroads delivered the services to
9	the debtor with the expectation that they would be paid for
10	out of current operating revenue of the MMA or whether they
11	were relying upon the MMA's general creditworthiness. And
12	as I think and as I mentioned before, I think Your Honor
13	has focused on that, I think that's primarily what we're all
14	about here in terms of the issues that we need to address.
15	Now, Your Honor, what the evidence will show is
16	that the Irving railroads were determined to avoid credit
17	risk with this particular debtor in the MMA with the
18	successor to the Bangor & Aroostook railroad. The
19	operations the real assets of the MMA were acquired out
20	of bankruptcy. Obviously a troubled history with respect to
21	that railroad.
22	From the inception of the relationship between the
23	Irving railroads and the MMA, which began in 2003, so some
24	ten years before the unfortunate accident in 2013, from the
25	inception of that relationship, Your Honor, the Irving
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	Page 16
	the freight services that were owed by the MMA to the Irving
	railroads actually involved freight from the Irving paper
	companies that was being shipped from their mills in Canada
	to other destinations. And so you have this relationship
	where on a weekly basis the parties would exchange payments
	among each other.
	Now the arrangement was what it was. The label
	that you put on that arrangement and I note it in the
	reply that was filed this morning in terms of how the
	trustee wants to characterize the arrangement I think
	labels are really irrelevant. The issue is what actually
	transpired with respect to this arrangement? And what
	transpired was that the Irving paper companies on a weekly
	basis would pay in cash, it'd be done by wire transfers,
	what they owed to the MMA and the MMA would pay in cash
	through a wire transfer what it owed to the Irving railroads
	in terms of fright services.
	The expectation of the parties was that the Irving
	railroads would be paid out of the cash that was collected
	by the MMA from the Irving paper companies, and in most of
	the weeks that this was done, the fact is the Irving paper
	companies were paying more to the MMA than the MMA was
	turning around and paying concurrently to the Irving
	railroads.
	So was this an arrangement under which the Irving
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1 being asserted by the Irving railroads -- do in fact 2 represent claims for services that aren't necessary to the 3 ongoing operation of a railroad. 4 Now the trustee argues in his reply that the services really weren't necessary, because if the Irving 5 6 railroads refused to accept traffic -- an interchange of traffic from the MMA that there were alternate routes that 7 could have been pursued. 8 9 The evidence will show that without being able to 10 interchange traffic with the Irving railroads the MMA would 11 have lost essentially the entire Saint John market, which is 12 where the oil that was being produced in North Dakota was 13 being transported to over several years, you know, prior to 14 the unfortunate accident that had occurred, and there was a 15 source of tremendous revenue for the MMA. 16 If they would have been forced to choose 17 alternative routes they would not have been competitive in terms of being able to successfully obtain the business from 18 19 the shippers in North Dakota, and they would have lost that 20 particular business. There simply was no practical, easable (sic) way for them to be to deliver product, deliver the oil 21 22 to Saint John without interchanging with the Irving 23 railroads. 24 And so the fact of the matter is that this would 25 have had a devastating impact on MMA's operations. And I Veritext Legal Solutions 212-267-6868 516-608-2400 www.veritext.com

Page 15 1 railroads were unwilling to rely on the general creditworthiness of the MMA. The evidence will show that 2 3 because they were unwilling to rely on the creditworthiness 4 of the MMA they entered into an arrangement with the MMA that involved the Irving paper companies, which are 5 companies that are affiliated with the Irving railroads, and 6 that which happened to be among the largest customers of the 7 8 MMA. 9 Now what they did in terms of entering into this 10 arrangement was to set up a process under which the parties 11 would exchange cash payments on a weekly basic. Again, this is driven by the fact that from the beginning Irving 12 13 railroads were not satisfied, were not willing to rely on the creditworthiness of the MMA in terms of doing business 14 with them. 15 So what happened here, and this is what the 16 17 evidence will show, is that the parties would determine on a 18 weekly basis how much the Irving paper companies -- again, 19 these are affiliates of the railroads --20 THE COURT: Right. 21 MR. LEPENE: -- how much the Irving paper 22 companies owe the MMA for freight charges that had been incurred by the MMA in carrying freight for the Irving paper 23 24 companies, and the parties would determine how much the MMA owed the Irving railroad for freight services. And much of 25 Veritext Legal Solutions

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Exhibit A 1 railroads were relying on the general creditworthiness of 2 the MMA? Absolutely not. What they were relying on, the 3 source of their payment, the source of the payment for the Irving railroads in terms of who was owed by the MMA was essentially the cash that was being paid to the MMA by the 5 6 Irving paper companies. 7 Now this arrangement worked very well for a number of years until we had this development, all attributable to 8 9 the (indiscernible) that was going on in North Dakota and 10 the oil that was -- crude oil that was being generated, and 11 then it started to get shipped to the refineries in Saint 12 John, New Brunswick, and as a result of this massive 13 increase in terms of the oil shipments and therefore the 14 freight revenue that was generated as a result of these 15 shipments, the fright charges that were owed by the MMA to 16 the Irving railroads -- because again, this traffic was 17 interchanged, it would come from North Dakota essentially on Canadian Pacific, would get interchanged with the MMA, and 18 then they would carry it, would interchange with the Irving 19 20 railroads and then onto the refineries in Saint John. 21 THE COURT: Just going to ask a quick question, I 22 don't mean --23 MR. LEPENE: Yes. 24 THE COURT: -- to be rude or cut off --25 MR. LEPENE: Yes. Veritext Legal Solutions 212-267-6868 516-608-2400 www.veritext.com

Page 19 1 opportunity, to the extent needed, to respond. But -because I don't want to cut off your rights -- but I'm in a 2 3 similar boat. 4 MR. LEPENE: Okav. I'm pleased to hear that 5 actually, Your Honor. I'm going to then cut through this, and I would 6 7 agree, we can get to the evidence. 8 Just a few additional points that I'll make very 9 briefly, and I think you are, if you've looked at their 10 reply and you've read our papers, you know that that swap 11 arrangement then was modified. Actually it was a new 12 arrangement in addition to the swap arrangement that just 13 dealt with the oil payments, and the evidence will show that 14 what the parties agreed to was that when the MMA received 15 payment through what is referred to as the interlying 16 settlement system, as soon as they got that payment they 17 would turn around and pay the Irving railroads their share. 18 So again, we think the evidence shows that's --19 that we were providing services with the expectation that we 20 would paid out of current operating revenue, not relying on 21 the general creditworthiness of the MMA. 22 Now let me just skip to the last point and then 23 we'll give Mr. Keach an opportunity and we can -- if he 24 cares to make an opening statement and we can then move to 25 the evidence.

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MR.	KEACH:	Well,	we'll	see.
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	Page 18
1	THE COURT: where we're going with this.
2	This is wonderfully illuminating for me and
3	helpful. What I'm wondering is whether or not this is more
4	like summing up closing argument and putting everything
5	together at the end after the evidence is produced. So, I
6	just throw that out.
7	MR. LEPENE: Okay.
8	THE COURT: I'm okay with a quick sort of glimpse
9	of where we're going to go, but I'm wondering as to whether
10	it'd be better off towards the conclusion of testimony.
11	MR. LEPENE: Okay, Your Honor. I will be brief in
12	getting through this.
13	One of the reasons again, Your Honor, I only
14	received the reply from Mr. Keach at about 11 o'clock this
15	morning and don't know whether the Court had an opportunity
16	to read it, but the concern that I had frankly was a lot of
17	this this is laid out in terms of Mr. Keach's arguments,
18	I wanted to be able to respond to this and put everything in
19	contents.
20	THE COURT: That's fair enough. To answer your
21	question I was on the bench in another contested 11
22	Chapter 11 until I don't know what time, but after 10:59 I
23	think I was on the bench probably 'til closer to a little
24	afternoon, I did see this at 1:15 and I read it as closely
25	as I could from 1:15 on, and I was going to give you an
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1	They raise the issue Mr. Keach raises the
2	issue, well you couldn't have been relying upon general
3	operating revenue because there was a security interest
4	involved held by Wheeling and Lake Erie Railroad and they
5	had a security interest in the accounts receivable to secure
6	a \$6 million line of credit.
7	THE COURT: But the existence of a security
8	interest doesn't necessarily conclude that, correct?
9	MR. LEPENE: Absolutely, and that's our position.
10	And the thing that I would point out, Your Honor,
11	which I think is most forceful, in every one of the cases
12	that go back over 150 years in which priority was
13	established for 6-month claims there were security interests
14	that were in place in favor of secured creditors that
15	secured the operating revenue of the railroad.
16	So if Mr. Keach I have the greatest respect for
17	Mr. Keach, he's good, but he's not that good. If he's
18	correct
19	MR. KEACH: Oh, yes, I am. We'll get to that.
20	THE COURT: I'm sorry, was that a proffer?
21	(Laughter)
22	THE COURT: No.
23	MR. LEPENE: Yeah, my proffer is he's not that
24	good.
25	MR. KEACH: Well, we'll see.
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1 MR. LEPENE: If he's correct then 150 years of 2 case law was decided incorrectly. 3 Bottom line, the evidence is going to show that the Irving railroads and the claims of the Irving railroads satisfy all of the requirements for priority that have been 6 established by the First Circuit and that we are entitled to 7 priority status under Section 1171(b) of the Bankruptcy 8 Code. 9 Thank you very much. Thank you for your 10 indulgence, Your Honor. 11 THE COURT: Sure. Thank you. 12 Mr. Keach? 13 MR. KEACH: Thank you, Your Honor, And I will 14 actually try to make this opening brief, since we're well 15 into the afternoon and I know our time is somewhat short. 16 Let me respond to that last point first, not the 17 point about my ability or lack thereof, but the point about 18 the secured claims. Unfortunately I think Mr. Lepene, who's otherwise 19 20 very capable, is also misreading 150 years worth of railroad 21 case law and the six-month rule. The reason that a lot of 22 those old cases actually had secured claims in them was 23 because there was a time, and this is actually still true in 24 some circuits, where the presence of a security interest, 25 indeed the presence of a first security interest in another Veritext Legal Solutions 212-267-6868 516-608-2400

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Page 23 1 security interest is per se a problem, we're arguing that 2 the existence of the known security interest and the nature of the known security interest in this case prevents the 3 4 reliance upon which they premise their case. 5 THE COURT: Right. Because in this case there's 6 nothing easy for the Court. This is got to be a fact 7 driven, testimony -- evidence driven matter. 8 MR. KEACH: I think so with the exception of the 9 issue on the interlying payments, which I'll get to. And 10 also now let me revert back to the order in which Mr. Lepene 11 presented his case. 12 We do believe that with respect to interlying 13 payments, which form the bulk of their claims, that they 14 lose as a matter of law. 15 The second opinion that Brother Lepene referred to simply doesn't support his proposition at all. But more 16 17 importantly that decision was under the preexisting 18 bankruptcy act provision. 1171(b) comes along and 19 incorporates much of the precode case law, but not all of 20 it. And most importantly in a Bankruptcy Code case, which 21 we've cited in the clean industries, looks back at both the 22 Boston and Maine opinions, and addressing specifically not 23 the issue of per diem car payments, but specifically the 24 issue of interlying balances, and what we have in this case 25 are unguestionably interlying balances.

Page 22 party was a prerequisite to an award under the six-month 1 2 rule. Under one of the doctrines they used to justify 3 the rule, in fact it was a requirement that the court find that the funds were diverted away from the six-month 6 creditors to the payment of a senior lien, and therefore in the absence of a senior lien under that particular subset of 8 the doctrine you had no six-month rule. 9 So not uncommon of course that the cases would 10 involve security interests in that context. The Boston and Maine decision that we all adore 11 12 and argue from, largely because it probably raises as many 13 questions as it provides answers, solved at least in the 14 First Circuit that issue. It essentially said, no, the so-15 called diversion or mortgage v. diversion rule isn't a basis 16 for the rule in the First Circuit, nor is the doctrine of 17 necessity, which exists for other reasons. The standard is 18 the standard that Mr. Lepene has articulated and I think 19 which we agree on. And for that reason the sort of presence 20 or absence of secured claims in those cases going back over 21 150 years is while interesting largely irrelevant to our 22 inquiry today, and we'll get to what we think the 23 significance is of the Wheeling security interest in this 24 case. 25 We're not arguing that the mere presence of a

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Veritext Legal Solutions 516-608-2400 www.veritext.com Page 24 What the Southern Bankruptcy Court for the Southern District of New York said and looking at both the Boston and Maine decisions and looking at Congress's intent under 1171(b) said, guote: "Congress in enacting the bankruptcy Code expressly rejected a proposal that debtor railroads be required to pay interlying balances, stating that to do so would distort the central bankruptcy principal of a quality of treatment of unsecured creditors." And that's really what's at issue here, right? The issue is whether or not the Irving railroads have a priority over all of the other unsecured creditors who also supplied goods and services and they're not paid for them, many of whom supplied them frankly throughout a longer period of time. So the fact of the matter is that interlying balances aren't 1171(b) payments, precisely for the reason that under modern railroad law, number one, they couldn't have refused us if they had wanted to in going over their tracks, and secondly, because of the interlying payment system had they been members of the interlying system there would have been no risk to them in our doing so. Irving railroads find themselves in the position they're in because they, for clearly self-interested reasons, opted out of the interlying payment system and Veritext Legal Solutions 212-267-6868 www.veritext.com 516-608-2400

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#### 1 instead decided to create a situation where first and 2 foremost they put themselves in a position of a secured 3 creditor, and secondly, then put themselves in a position where MMA collected interlying payments from the system for their benefit, and they then were relying on the interlying 6 payment system in terms of credit extension. 7 The fact of the matter is that -- and we'll get to the specifics, because neither Mr. Lepene's argument nor 8 mine are testimony, and the testimony is way more important 10 on this -- but what -- the chronology is something that 11 Mr. Lepene and I don't disagree on. 12 But what happen to begin with largely because --13 and you'll here from Mr. Hansen momentarily -- largely 14 because of the history of Bangor & Aroostook, Mr. Hansen was 15 leery about continuing to do business with the successor, 16 and as a consequence and because Mr. Hansen is an employee 17 of J.D. Trying, which is the parent that controls --18 commonly controls all of these entities, including Irving 19 Paper, and since Irving Paper was a major customer of the 20 railroad, of MMA, what he decided to put in place. 21 notwithstanding an agreement incidentally -- the original 22 agreement between MMA and the Irving railroads had standard credit terms, net 21-day terms -- notwithstanding the 23 24 agreement to have everything done on net 21-day terms, we 25 decided to set up a secured credit relationship.

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Page 27 1 far as I'm concerned if we were going to do business it was 2 going to be done on a secured basis 3 THE COURT: This is vesterday's deposition? 4 MR. KEACH: Yesterday's deposition. And what 5 happened, Your Honor, was that Irving Paper, under the 6 common control of J.D. Irving, generally owed to MMA more 7 money than MMA owed to the Irving railroads, right, this was 8 the triangular setoff. And so what Mr. Hansen testified to, 9 and I presume he will be consistent in his testimony today. 10 is that he, through the parent common control of the 11 entities, held onto the payment otherwise due from Irving 12 Paper to MMA until such time as MMA made the payments due to 13 the Irving railroads at which point he would release the 14 wire from Trying Paper to MMA. When I asked, what would you have done if MMA had not paid? He said, I simply would have 15 16 kept the money that was from Irving Paper. 17 Given the fact that he has admitted he wasn't 18 relying on anything in the Dunn & Bradstreet report, that 19 they didn't otherwise get any financial statements from us, 20 they have no financial reporting, through this entire 21 initial period it's clear they weren't relying on our 22 creditworthiness or our cash flow or anything else. What 23 they were relying on was their ability to control the 24 payments from one of our largest customers because they were

1 And Mr. Lepene just told you it's not the labels 2 that matter, it's how they handled things. Well the reason he doesn't want the labels is because the label that his own 3 client put on this relationship was that it was a secured reditor/debtor relationship 6 THE COURT: It sounds like somebody worried about a general creditworthiness. 7 MR. KEACH: Well, I think it sounds like somebody 8 9 who's taking collateral, which they did. And like most 10 people who take collateral, they're not relying on our 11 creditworthiness, they were actually relying on their 12 collateral. 13 Importantly what Mr. Hansen testified to -- and 14 one of the reasons you got our reply this morning was being 15 we're both doing depositions until last night -- but one of 16 the things he said in his deposition was that while he 17 pulled the Dunn & Bradstreet report on MMA, he didn't really 18 take into account anything that was in it. He could have 19 cared less frankly about the general creditworthiness or 20 cash flow of any other financial characteristic of MMA because he was relying on the collateral arrangement that he 21 22 had structured. And what you'll hear about is essentially 23 what he created, which is documented in some emails, was a 24 triangular setoff arrangement by agreement. And I'm not 25 making this up, these are his exact words, so you know as

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	Page 28
1	Why did this go wrong? Well the reason it went
2	wrong for them and the reason they're the only railroad here
3	by the way that has an unsecured claim, is that the they
4	were not members of the ISS. And what happened was as the
5	oil shipments became the dominant component of MMA's
6	business, what that meant was that under the
7	collateralization arrangement that they had created was that
8	they became progressively undersecured, something they
9	hadn't anticipated. And the reason for that, Your Honor,
10	was that the amounts due to MMA and incidentally due to the
11	Irving railroads under the ISS system for the oil shipments,
12	became a much larger component of the business.
13	THE COURT: And as you look at the exhibits to the
14	proof of claim you see the growing
15	MR. KEACH: Right.
16	THE COURT: of the amount of (indiscernible) or
17	whatever you would like to call it.
18	MR. KEACH: Right. Exactly, Your Honor.
19	And so what happened was it was no longer true
20	that the Irving paper entities owed, you know, in other
21	words
22	THE COURT: Right.
23	MR. KEACH: were had more to pay us than was
24	owed by us to them. In other words there was an imbalance
25	that was ultimately under collateralized.
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under common control. That's what they were relying on.

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1	Well what did they do about that? What happened
2	at the time, and it's fair to say that this original
3	situation was set up because Irving the Irving railroads
4	not being members of ISS, I think Mr. Hansen would agree,
5	that he had very little mileage about the way ISS worked and
6	as a consequence didn't want to rely on it.
7	Through conversations with Mr. Simpson in light of
8	this growing imbalance he learned more about ISS, and
9	essentially what was created and continued was that MMA
10	would collect from the ISS as a participating member of ISS
11	not only the amounts that were due to it for traffic over
12	its track or its interchange activity, but also the amounts
13	that would otherwise have been due to the Irving railroad.
14	Now the way the ISS works, and this is all in
15	Judge Haynes' excellent opinion in Bangor & Arrostook at 320
16	B.R. 226, sadly I think neither of us cited it and we
17	probably should have because it contains the best
18	explanation I know of of the ISS system and particularly the
19	way it operates, and we'll get to the significance of that
20	case in a second, but what happened under these
21	circumstances was that by essentially saying that they would
22	agree as to this spread, the amount not covered by the
23	Irving Paper payments, that they would wait until MMA
24	collected money from the ISS and then within five days after
25	MMA collected money from the ISS they would remit that money
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1	being knowledgeable about ISS, I'm sure Mr. Simpson will be
2	able to tell us that he has lots of knowledge about the way
3	ISS works, by not being a member and by setting up this
4	arrangement the Irving railroads agreed and virtually
5	insured that they would be last in line at all times with
6	respect to ISS. Because the way the ISS works is all of the
7	other participants have to get paid first. So everybody
8	else who was a member got paid out of the system ahead of
9	this final drop of money to us, and that's the decision they
10	made. That's the decision they made when they didn't want
11	to be a member of the ISS, because they didn't want to take
12	on the credit risk of being an originating railroad, and
13	that's the risk they took on when they decided to create
14	this system. But it is by any definition an extension of
15	credit, and it is by any definition a fairly massive
16	extension of credit.
17	I would submit to you though that they're not
18	relying because again they never cared about our
19	financials they're not relying necessarily on our cash
20	flow or anything else, they're relying on the collateral
21	(indiscernible) fidelity essentially as a collection agent
22	under the ISS system.
23	THE COURT: And by not being not participating
24	in the ISS system MMA would assert they essentially
25	developed an unsecured creditor relationship with MMA where

to the Irving railroads. Essentially that was an agreement
to credit terms that could be as long as 70 or more days.
Because the way the remember as to the oil shipments I
guess as we all know from other activity in this case
Canadian Pacific was the originating carrier of the oil
shipments.
The way the ISS works is that the originating
carrier is then responsible for paying all of the receiving
railroads along the line. The originating carrier is
responsible to pay those railroads whether or not the
originating carrier collects from the customer ultimately,
whether that customer is the shipper or the ultimate
destination. But that responsibility for CP to pay doesn't
exist until the weigh bills clear the system, and that can
be from the time that the trains run over people's tracks to
the time that that happens, it can be a period as long as 70
or more days.
And so essentially we now had a two-part
arrangement. Reliance on the collateral, and you know, once
you've collected from the ISS system, the money that would
otherwise be payable to us, turn it over to us. And again,
by definition a net 60, 70, 75-day period of time.
More importantly, Your Honor, and as this will
come out in testimony and then I'll wrap up, by not being a

24 25 member of ISS and by creating this system, but certainly

necessity it was going to occur.

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Page 32 MMA could take care of its other obligations of the ISS ahead of taking care of the Irving railroads. MR. KEACH: Not only whether we could but by THE COURT: By financial necessity. MR. KEACH: And by the manner in which the ISS system worked, right? So in other words --MR. KEACH: Requiring you to take -- to --

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9	MR. KEACH: in other words if we owed money to
10	other railroads as a consequence of that, you know,
11	transcontinental shipment they were going to get paid first.
12	And more importantly and again, this is in the
13	Bangor & Aroostook opinion, which I think is definitely
14	worth a read, one of the things that the primary holding
15	in that case by the way, the important holding in that case
16	is that the ISS system does not create sort of mutual trust
17	relationships.
18	THE COURT: Right.
19	MR. KEACH: In other words, when the money was
20	paid to us it was our money, we had complete dominion over
21	the money, we didn't hold the money in trust for anybody.
22	THE COURT: No fiduciary obligations that arise
23	MR. KEACH: No fiduciary obligation, the money
24	belongs to the estate, and you have a bankruptcy that
25	intervenes.

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1 But -- and importantly I think one of the 2 motivators behind Judge Haynes' decision in that respect was 3 that there was nothing about that system that should give 4 those claimants priority other unsecured creditors. He looked at the policy implications of treating it as a trust 5 6 system and decided it would be unfair among the trust -- you know, in and among the trust analysis, which was primary for 7 unsecured creditors to be subordinated to those claims and 8 9 trusts. 10 I would submit to you, Your Honor, that if it were 11 so obvious that interlying payments were 1171(b) claims 12 there would have been no reason for the Bangor & Aroostook 13 decision because they weren't even arguing the trust. If 14 they were going to be paid on top of everybody else any way 15 what would have been the point? The fact is as a matter of 16 law they're not. And so I end where I began. So let me 17 stop there. I'll in summary, you know, we have basically three 18 arguments and they're summarized in our brief and I won't 19 20 belabor them. One, we don't think these payments qualify as 21 a matter of law or fact as 1171(b) payments. 22 We think it is abundantly clear that at no time

23 were the Irving railroads relying on MMA's cash flow or its

24 credit other than the fact that they were extending us

25 credit through the system. They relied by their own choice

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1	water and a cup right up there for you.
2	THE CLERK: Raise your right hand.
3	KARL HANSEN, WITNESS, SWORN
4	THE CLERK: Please be seated. Spell your last
5	night for the record.
6	THE WITNESS: My name is Karl, K-A-R-L, Hansen,
7	H-A-N-S-E-N.
8	THE COURT: Good afternoon and thank you for
9	coming.
10	DIRECT EXAMINATION
11	BY MR. LEPENE:
12	Q Good afternoon, Mr. Hansen. Mr. Hansen, where do you
13	reside?
14	A I reside in Saint John, New Brunswick, Canada.
15	Q And by whom are you employed?
16	A J.D. Irving, Limited.
17	Q And what is the business that J.D. Irving, Limited is
18	engaged in?
19	A J.B. Irving, Limited is engaged in operating of several
20	companies. We're into lumber, we're into paper, we're into
21	shipping boats, we're into railways, farming. Numerous
22	operations.
23	Q Is J.D. Irving, through its affiliates, engaged in the
24	paper business?
25	A Yes, we are.

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	Page 34
1	on their collateral arrangement, and then when that
2	collateral arrangement did not suffice they relied on our
3	fidelity and collecting for them from the ISS system. None
4	of those things make them fit will be 1171(b) realm.
5	And for that reason awarding them a priority would
6	be, we think, grossly unfair to the other unpaid unsecured
7	credits in the case.
8	THE COURT: Thank you very much, Mr. Keach.
9	MR. KEACH: Thank you.
10	THE COURT: All right. I have a great foundation
11	now and I'm ready to hear the evidence.
12	MR. LEPENE: Okay, Your Honor, thank you. Irving
13	railroads will call Karl Hansen as a witness. And, Your
14	Honor
15	THE COURT: And I should tell all the witnesses if
16	you see me today looking over here and typing it's not
17	because I'm not interested, it's all the dockets in this
18	case all the documents in this case are right here, I
19	usually am looking at something that's relevant and trying
20	to print it out. Thank you.
21	MR. LEPENE: Thank you, Your Honor. I have
22	exhibits that we've premarked that I'll be showing the
23	witness. May I approach the bench?
24	THE COURT: Yes, please. Why don't you come right
25	around here and there's the witness stand, and you'll find
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1	Q Can you identify the companies affiliated with J.D.
2	Irving that are engaged in the paper business?
3	A There's Irving Paper Ltd., there's Irving Pulp and
4	Paper, there's Lake Utopia Pulp and Paper, and there's
5	Irving Tissue.
6	Q Okay. And from time to time during the course of this
7	examination I may be referring to the Irving paper
8	companies, and in particular Irving Paper and Irving Pulp
9	and Paper.
10	A Correct.
11	Q Okay. Is J.D. Irving, Limited also engaged in the
12	railroad business?
13	A Yes, J.D yes, we are.
14	Q And what affiliates of J.D. Irving, Limited are engaged
15	in the railroad business?
16	A NB Southern Railway, Maine Northern Railway, Eastern
17	Maine Railway.
18	Q All right. And is J.D. Irving, Limited related in any
19	way to the Irving Oil Company?
20	A We are not.
21	Q Now what is your position, Mr. Hansen, at J.D. Irving,
22	Limited?
23	A I am a general manager corporate credit and financial
24	for all the Irving companies.
25	Q How long have you held that position?
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1	A Thirty-two years.
2	Q And have you held that position from the time that you
3	joined the J.D. Irving, Limited company?
4	A Yes, I have.
5	Q Okay. Do you have a college degree?
6	A Yes, I do.
7	Q From what institution?
8	A University of New Brunswick.
9	Q Okay. And what was your the nature of your degree?
10	A Business administration from the University of New
11	Brunswick and a credit and financial analysis from the
12	Institute of Canadian Bankers.
13	Q Okay. Now you indicated that you have a role as
14	general manager corporate credit and finance for all of the
15	J.D. Irving companies?
16	A Yes.
17	Q Okay. And what are your duties and responsibilities in
18	that capacity?
19	A In that capacity I set all the credit procedures,
20	credit policy, all the people that do the granting of credit
21	and the collection of accounts receivable all report to
22	myself.
23	Q Now you mentioned New Brunswick Southern Railway
24	Company and Maine Northern Rail Company as two of the
25	railroads that are affiliated with J.D. Irving Ltd; is that
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Page 39 1 reference to when you say hauling freight? 2 Well the -- they were -- the Irving railways were going А 3 to do business with MMA in changing -- interchanging projects that are coming into New Brunswick from their rail 4 5 lines. 6 So would that involve the interchange of traffic Q 7 between the two railroads? 8 A Yes, it would. 9  ${\tt Q}$   $\qquad$  Did the Irving paper companies also have a relationship 10 with the MMA? 11 Yes, they did. А 12 And do you know when that relationship began? Q 13 А That would have began when MMA, I believe it was 2003 14 as well, when they became into existence. 15 0 Okav. And MMA came into existence, do you know the circumstances under which they came into existence? 16 17 A Yes, they bought the assets of a bankrupt company. 18 Q And what was that company? 19 А Bangor & Aroostook. 20 Q Okay. Now you say that the Irving paper companies have a business relationship with the MMA? 21 22 That's correct. A 23 And starting in 2003? Q 24 А That is correct. 25 Q And what was the nature of that relationship?

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1	correct?
2	A That is correct.
3	Q And again, I'm going to from time to time refer to
4	those as the Irving railroads, is that all right?
5	A Yes.
6	Q Okay. Now do you have a role with the Irving
7	railroads?
8	A The role I have with the Irving railroads is I would in
9	conjunction with their general manager set the credit
10	policy, set the manner in which we're going to be extending
11	or not extending credit. We would I also employ the
12	people that do the actual collection of the accounts and
13	administrating of all their accounts receivable.
14	Q Mr. Hansen, are you familiar with the debtor in this
15	case, the Montreal Maine & Atlantic Railway Ltd.?
16	A Yes, I am.
17	Q When did you first become acquainted with I'll refer
18	to the debtor as MMA if that's all right when did you
19	first become acquainted with the MMA?
20	A January 2003.
21	Q And what were the circumstances under which you first
22	became aware of the MMA?
23	A The Irving railway companies were planning on doing
24	business with MMA by virtue of hauling freight.
25	Q And the in terms of hauling freight what do you have
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1	A Irving Paper would hire MMA to freight their product to
2	their destinations.
3	Q Okay. Now are you generally familiar with something
4	that is known as the interlying settlement system or ISS?
5	A I'm aware of it and have brief or limited knowledge of
6	it.
7	Q Okay. In terms of your knowledge of it what is it?
8	A It is a clearinghouse and a mechanism in which
9	intertraffic or interrail companies would get paid.
10	Q Okay. Does that mechanism or system involve the
11	settlement of accounts receivable and accounts payable among
12	participants in the ISS?
13	A Yes, it does.
14	Q And are you aware of how often settlements of those
15	accounts receivable and accounts payable are made?
16	A Monthly.
17	Q And are you aware of when payments are made from the
18	ISS to participating railroads of the net amount of those
19	particular settlements?
20	A Usually
21	MR. KEACH: Your Honor
22	THE COURT: I'm sorry, one second, please. Is
23	there an objection?
24	MR. KEACH: I've been happily letting some normal
25	leading go through because it was largely preliminary, but
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1	that question is highly leading. It seems to me he should
2	restructure and ask the question so that the witness will
3	supply the information.
4	THE COURT: Sure. Do you mind, Mr. Lepene,
5	repeating the question?
6	MR. LEPENE: Yeah. Well that's fine, Your Honor.
7	BY MR. LEPENE:
8	Q Are you aware generally of the mechanism for
9	settlements within that are made among participating
10	railroads within the ISS?
11	A Yes, I am.
12	Q Okay. And what's your understanding of that?
13	A That the ISS would have been paid money by the lead
14	rail company, the one that was invoicing the customer, they
15	would keep their share, send the difference into ISS who
16	would in turn on the second of every month disburse the
17	money to participating railways.
18	Q All right. So the payments to disbursing to the
19	participating railroads are made when?
20	A The second day of each month.
21	Q Second business day of each month?
22	A Yes.
23	Q Okay. Now did the MMA to your knowledge participate in
24	the ISS?
25	A Yes.
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Page 43 the MMA? 1 2 A Yes, they did. 3 Q Are you familiar with some of the agreements and understandings that govern that relationship? 4 A Yes, I am. 5 Okay. 6 Q 7 MR. LEPENE: Your Honor, if I might approach the 8 witness with some exhibits? 9 THE COURT: Yes. 10 MR. LEPENE: And if you could give me just a 11 minute here to pull them out. 12 THE COURT: Sure. And does Mr. Keach have a copy 13 of the exhibits? MR. LEPENE: He does. 14 THE COURT: Okay. Thank you. 15 16 MR. KEACH: Thank you. I do, Your Honor. Thank 17 you. 18 (Pause) 19 MR. LEPENE: Thank you, Your Honor. May I 20 approach the witness? 21 THE COURT: Yes, please. 22 MR. LEPENE: Thank you. 23 BY MR. LEPENE: 24 Q All right. Mr. Hansen, I'm going to direct your attention first to the exhibit that is marked as Irving 25

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1	Q Did the Irving railroads participate in the ISS?
2	A No.
3	Q And why did the Irving railroads not participate in the
4	ISS?
5	A The Irving railways didn't participate because we
6	didn't really have the knowledge or the capacity financial
7	wise and otherwise the people to do it.
8	Q Was the decision not to participate in the ISS
9	influenced in any way by an evaluation of the
10	creditworthiness of the MMA?
11	A Absolutely not.
12	Q Now, Mr. Hansen, you testified earlier that the Irving
13	railroads interchange traffic with the MMA; is that correct?
14	A That's correct.
15	$\ensuremath{\mathtt{Q}}$ What would have been the impact on MMA's operations if
16	it was unable to interchange traffic with the Irving
17	railroads?
18	A It would have been devastating. Their operations just
19	would be a nightmare.
20	Q And why is that?
21	A Well they virtually wouldn't have an alternative. My
22	view would be they would be landlocked, there would be no
23	way to get the product to the final destination.
24	Q Did the Irving railroads have agreements and
25	understandings in place to address their relationship with
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		Page 44
1	Exhi	bit 1. Do you have that in front of you?
2	A	Yes, I do.
3	Q	Can you identify that document?
4	A	Commercial agreement dated January the 9th, 2003.
5	Q	And are you familiar with that agreement?
6	A	Yes, I am.
7	Q	Who are the parties to that agreement?
8	A	Montreal Maine & Atlantic Railway Ltd., Eastern Maine
9	Rail	way Company, and New Brunswick Southern Railway Company
10	Ltd.	
11	Q	And who or what is Eastern Maine Railway?
12	A	It's a sister company of the NB Southern Railway.
13	Q	All right. So again affiliated with J.D. Irving,
14	Limi	ted?
15	A	That is correct.
16	Q	Okay. What was the purpose of this particular
17	agre	eement?
18	A	It was to establish the hauling of freight for MMA.
19	Q	Did it address payment terms or freight traffic
20	inte	erchange with the MMA?
21	A	Yes, it did.
22	Q	And what does it provide with respect to payment terms?
23	A	It provides 21 days from invoice.
24	Q	Now you testified previously that the Irving paper
25	com	panies also had a business relationship with the MMA?
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A That is correct.	1
Q Okay. And that also began in 2003?	2
A That is correct.	3
$\ensuremath{\mathtt{Q}}$ Okay. And I believe you testified that the Irving	4
paper companies utilized the MMA to haul freight for the	5
paper companies?	6
A That's correct.	7
Q Okay. Now at the time these relationships began, and	8
this would be they began in 2003; is that right?	9
A Correct.	10
Q Did you have concerns about these particular	11
relationships business relationships?	12
A Yes, I did.	13
Q And what were the concerns?	14
A Concerns as my job payment. I had major concern that	15
the company would have a hard time to pay me.	16
Q And did you do something or take certain action to seek	17
to address those concerns?	18
A Yes, I authorized and entered into an agreement with	19
MMA whereby, my terminology, we would do swaps on a weekly	20
basis.	21
So basically Irving Paper and Irving Pulp and Paper's	22
funds would flow into my department, and once a week we'd	23
get a hold of MMA and we'd agree that simultaneously I'd	24
send them their wire transfer, they would the same second	25
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1	A This is an email from Joanne Kelter (ph) who works for
2	myself at J.D. Irving, Limited to Brenda Tarr (ph) who works
3	for MMA.
4	Q And it's dated when?
5	A This email is dated August the 10th, 2011.
6	$\ensuremath{\mathbb{Q}}$ $% \ensuremath{\mathbb{Q}}$ And then is there a response from Brenda Tarr to that
7	email?
8	A Yes, Brenda Tarr is responding to Joanne saying
9	everything is okay with me for our usual transfers.
10	${\tt Q}$ $% {\tt Q}$ Okay. And so is this typically the way the arrangement
11	was memorialized?
12	A This is correct.
13	Q Okay.
14	A We
15	Q And go ahead.
16	A We simply send an email off to MMA advising them what
17	monies we had available for them along with asking them to
18	pay the monies that they that our records indicated they
19	owe NB Southern.
20	Q Okay. And so in Joanne Kelter's email to Brenda Tarr,
21	dated August 10, 2001 at 1:03 p.m. and it says, "Good
22	afternoon. This week we will be sending the following
23	payments along." Would those then list serving Paper
24	Irving Pulp and Paper and J.D. Irving, would that be the
25	cash that Irving Paper was sending to the MMA?

1 A

2 Q

3 A

4 Q

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7 А

8 Q

9 10 A

11 Q

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13 А

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Page 46 send the wire transfer back to me for monies owed to NB Southern. Q And how frequently were these swaps undertaken? A Weekly. Q Okay. Generally in terms of the amount of cash that
Southern. Q And how frequently were these swaps undertaken? A Weekly.
<ul> <li>Q And how frequently were these swaps undertaken?</li> <li>A Weekly.</li> </ul>
A Weekly.
Q Okay. Generally in terms of the amount of cash that
was being sent from or on behalf of the paper companies to
the MMA and the amount of cash that was being sent from MMA
to the railroads, which was the larger amount of cash to be
disbursed, generally speaking?
A The Irving Paper and Irving Pulp and Paper's money was
by far more than the
Q Greater than the money that was coming back to the
railroads?
A Correct.
Q Okay. And this was being done virtually
simultaneously?
A Yes.
Q Okay. And again, what was the reason for entering into
this particular agreement with the MMA?
A Well, I was determined I was not going to take a credit
risk, I was not relying on their credit to insure we got
paid.
Q Let me direct your attention to what has been marked as
Irving Exhibit 2. And can you identify that document for
me?
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1	A That is correct.
2	Q And then it says, "In return we are seeking payment for
3	the following." Do you see that?
4	A Yes.
5	Q And is that the cash that the MMA would be sending
6	back?
7	A That is correct.
8	Q To the Irving railroads?
9	A Correct.
10	Q Okay. And then Ms. Tarr indicates that that was okay
11	insofar as the usual transfer was concerned?
12	A Correct.
13	Q Thank you.
14	THE COURT: Just one question I have for you. So
15	are there two actual transfers?
16	THE WITNESS: Yes, we would
17	THE COURT: Over and back it wasn't as if you
18	would reduce the Irving companies total by the Irving
19	railroads company?
20	THE WITNESS: No. No. We had that option of
21	course, I could have made that agreement with them but I
22	didn't because that agreement is too messy.
23	THE COURT: Okay. Thank you.
24	BY MR. LEPENE:
25	Q So the following up on the judge's question. The
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1	way it worked was exchanges of cash?
2	MR. KEACH: Your Honor, it'd be actually good if
3	you would let him describe how it worked as opposed to
4	telling him how it works and asking him to acknowledge it.
5	THE COURT: Fair enough question.
6	MR. KEACH: Thank you.
7	THE WITNESS: How it worked is we would agree on a
8	certain day that the Irvings would send X number of dollars
9	by way of wire transfer, at the same time MMA would agree to
10	wire transfer back the amount we were looking for at the
11	same day same time.
12	BY MR. LEPENE:
13	Q Okay. Then if you would take a look at Irving
14	Exhibit 3. Can you identify that?
15	A Yeah. This Exhibit 3 is a response from Brenda Tarr
16	dated October 27, 2011 to Joanne Kelter in regards to the
17	swap.
18	Q Okay. And again, this is another email that is
19	illustrative of the way this arrangement was memorialized?
20	A That is correct.
21	Q And then if you would look at Irving Exhibit 4. Can
22	you identify that?
23	A This is an email from Brenda Tarr dated February the
24	16th, 2012 to Joanne Kelter responding to Joanne from an
25	email that she had sent to Brenda Tarr.
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Page 51 1 Railway by MMA that they didn't fall under nor MMA didn't have the capacity to pay when they were supposed to be paid. 2 3 Now the -- can you describe when you say the shipment Q 4 of oil, how did that operate? Well the shipment of oil would have been coming out of 5 А the Dakotas by CT, they would hit MMA's line, they would 6 7 interchange with MMA, then the oil would come -- the train 8 would come down through until it hit NB Southern's line, NB 9 Southern would transport it from then into Saint John, New 10 Brunswick. And the cost, our share, Irving's share, it 11 would bring it from where we interfaced into Saint John became quite excessive, quite high. 12 13 Q Okay. Now let me direct your attention to Irving 14 Exhibit 5. Do you have that? 15 А Yes, I do. And at the top of that it's an email from Ian Simpson 16 0 17 to Ellis Ryan dated October 22, 2015, that's just a month 18 ago. Do you see that? 19 Yeah. А 20 Q All right. So is that just conveying the underlying 21 email within the Irving organization? 22 That is correct. А 23 Okay. So I want to direct your attention to the Q 24 underlying email which is from Robert Grindrod (ph) to Ian 25 Simpson. Do you see that?

1 Q And with respect to the message from Brenda Tarr to 2 Joanne Kelter that is dated February 16th, 2012, do you see 3 that? 4 А Yes. And this indicates there was an issue with respect to a 5 Q 6 holiday in the United States, President's Day. Do you see that? 7 8 А That is correct, yes. And so the request was made to delay the swap for one 9 Q 10 day so that the Banks would be open on both sides of the 11 border? 12 Correct. А 13 0 Are these emails representative of the emails that 14 would have been exchanged between the parties that would have memorialized the arrangement? 15 16 А That is correct. 17 Okay. Now did there come a time when problems arose 0 18 with this swap payment process? 19 А Yes, there was. 20 And when was that? 0 If memory serves me I think it was June or July of 21 A 22 2012. 23 0 And what caused the problem? The problem was one of the transportation of oil. The 24 А 25 amount became quite excessive, monies owed to NB Southern Veritext Legal Solutions

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1	A I do.		
2	Q And the date of that email is?		
3	A June 4th, 2012.		
4	Q And the subject of the email is?		
5	A Revision of the settlement terms between NBSR and MMA.		
6	$\label{eq:Q}$ Okay. And is it your understanding that this		
7	represented a proposal from the MMA regarding a revision to		
8	settlement terms as between NBSR, the New Brunswick Southern		
9	Railway, and MMA?		
10	A Yes, it is.		
11	Q And looking at the email does Mr. Grindrod give a		
12	reason for why a revision to the settlement terms is		
13	necessary?		
14	A Well the volume was getting excessive, quite high, and		
15	they just couldn't afford to have the cash to pay it.		
16	$\ensuremath{\mathbb{Q}}$ All right. Now turning to the attachment, and that's		
17	titled what?		
18	A Revision of payment terms of NBSR needed.		
19	$\ensuremath{\mathbb{Q}}$ Okay. And if you take a look at the first paragraph is		
20	that a correct statement that the existing terms were		
21	between the parties were established by the commercial		
22	agreement signed on January 9, 2003?		
23	A That is correct.		
24	Q Okay.		
25	THE COURT: Exhibit 1, correct?		
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	EXTIDIL A Page 53	F
1	MR. LEPENE: Yes, it is Exhibit 1, Your Honor,	
2	that is correct.	
3	THE COURT: Okay. Thanks. And Mr. Keach, there's	
4	no dispute about that; is that correct?	
5	MR. KEACH: That Exhibit 1 is the original	
6	commercial agreement?	
7	THE COURT: That yeah, that the reference here	
8	revision	
9	MR. KEACH: No, there's no dispute about that.	
10	THE COURT: Thanks. Just making sure the facts.	
11	BY MR. LEPENE:	
12	Q Now, Mr. Hansen, would you take a look at the second	
13	paragraph where Mr. Grindrod describes the present terms	
14	under the commercial agreement in terms of the provisions of	
15	the invoices each Wednesday to MMA, do you see that?	
16	A Yes.	
17	Q Okay. So the do you see the first bullet point	
18	there?	
19	A Yes.	
20	Q "For all fright handled by NBSR up to the second	
21	preceding Friday, the invoice is issued 12 days after the	
22	applicable Friday." Do you see that?	
23	A Yes.	
24	$\ensuremath{\mathtt{Q}}$ Is that consistent with your understanding of the	
25	provisions of the commercial agreement?	
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Page 55 1 Yes. А 2 -- "for the originated or local traffic not a problem"? Q 3 A Yes. 4 0 Okay. And the bulk of the payments that are received 5 in would come from whom? They'd come from me. 6 А From you personally or from --7 Q 8 A No. 9 Q -- the Irving paper companies? 10 А From the Irving Paper Company. 11 Okay. Then the next bullet point on received traffic, 0 12 "The freight charges must be apportioned through the 13 interlying settlement system." Is that a correct statement, 14 is that consistent with your understanding? 15 А That is correct. 16 Okay. "MMA typically does not receive payment through Q 17 the ISS for 45 to 60 days after handling the car on 18 average." Is that --19 That is correct. А 20 Q -- consistent with what you understood? 21 А Yes. 22 Okay. "As a consequence MMA is expected to make Q 23 payment to NBSR on traffic settled to ISS approximately 15 24 to 30 days before receiving payment." Is that --25 А That's correct.

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1	A No.
2	Q Excuse me?
3	A No.
4	Q Okay. What was your understanding?
5	A That we would be paid
6	Q No, the this says when the invoice is issued.
7	A Oh.
8	Q The first bullet point.
9	A Could be, I have I don't know.
10	Q Okay. What were the terms of payment under the
11	commercial agreement as you understood it?
12	A Under the commercial agreement 21 days from receipt of
13	invoice.
14	Q Okay. And is that consistent with the second bullet
15	point in Mr. Grinrod's proposal?
16	A Correct.
17	Q Okay. Do you see the third bullet point for originated
18	and local traffic MMA invoices the customers for the total
19	freight charges due, the bulk of the invoices go to the
20	Irvings? Do you see that?
21	A Yes.
22	Q Is that correct?
23	A Yes.
24	Q Okay. And do you see the fourth bullet point,
25	"Typically payment is received in from 21 to 28 days"
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Page 56 1 -- consistent with your understanding? 0 2 A Yes 3 Okay. Then Mr. Grindrod says, "When this system was Q 4 established most of the traffic moving was either originated or local between the two carriers." And that would of 5 course go back to 2003. Is that consistent with your 6 understanding? 7 8 That is correct. 9 0 "In either case the vast majority of the traffic was 10 paid for by the shipper at approximately the same time as MMA made payment to NBSR." 11 12 That is correct. A 13 0 And that's consistent with the swap arrangement that 14 was in place? Yes, it was. 15 А Okay. And the next paragraph says, "The traffic mix 16 Q 17 has changed and now consists of a large amount of traffic 18 originated elsewhere and settled through the ISS." Is that 19 consistent with your understanding --20 That is correct. А 21 -- as you described previously? Q 22 Yes. А 23 Okay. Now, I'm going to direct your attention then to Q 24 the next page, the third paragraph from the bottom, the paragraph that begins on April 2, 2012. Joe Migonigal (ph) 25 Veritext Legal Solutions

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1	propose an alternative approach to the payment terms. Do
2	you see that?
3	A Yes, I do.
4	Q Okay. And then the next sentence says, "In this
5	proposal MMA suggested that NBSR would be paid within 30
6	days in all cases where MMA is the billing party, local and
7	originated traffic." Do you see that?
8	A Yes, I do.
9	Q Now would that local and originated traffic include the
10	oil shipments that were coming in from North Dakota that was
11	originated by the Canadian Pacific?
12	A No, it does not.
13	Q Okay. And then it says, "On all other traffic MMA
14	proposed to make a settlement payment to NBSR within five
15	days of receipt of payment from the ISS system." Do you see
16	that?
17	A I see that, yes.
18	Q Okay. Is that consistent with your understanding of
19	what Mr. Grindrod had proposed?
20	A Yes, it is.
21	Q Okay. I'm going direct your attention next to Irving
22	Exhibit 6. Can you identify that document?
23	A Yes, it's an email from Ryan Ellis to Joanne Kelter,
24	subject of oil movement invoices.
25	$\ensuremath{\mathbb{Q}}$ Okay. And is there an email that appears right below
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1	that?
2	A I do.
3	Q Okay. Let me then ask you to look at Irving Exhibit 7.
4	And can you identify this document?
5	A This is a document from Joanne Kelter dated July 26,
6	2012 to Don Gardner of MMA, copies going to Ryan Ellis and
7	Brenda Tarr regarding oil movement.
8	Q Okay. Now did you discuss this email that had been
9	sent by Don Gardner regarding MMA's intention to pay for the
10	oil movement once payment was received through the ISS? Did
11	you have occasion to discuss that with Joanne Kelter?
12	A Yes, I did.
13	$\ensuremath{\mathtt{Q}}$ Okay. And what was the nature of that discussion?
14	A The nature of that discussion is she came in to see me
15	with the email that she had received from Ryan Ellis in
16	connection with the Don Gardner spelling of that
17	Mr. Grindrod had recommended this and that she wants to know
18	if I would agree to it. So at that stage I just discussed
19	it with Ian Simpson, and
20	Q And who is Ian Simpson?
21	A He's is general manager of the railway.
22	And any way, once I was briefed a bit on what this ISS
23	was I felt comfortable enough that monies would be coming
24	into MMA without any hiccups, so to speak, and that shortly
25	thereafter within a matter of days I would be paid our

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• •	Page 58
1	that?
2	A Yes, there's an email from Don Gardner (ph) to Ryan
3	Ellis dated July the 26th, 2012 regarding oil movement
4	invoices.
5	Q Okay. Now who is Donald Gardner?
6	A He worked for MMA.
7	Q Okay. And who is Ryan Ellis?
8	A Ryan Ellis works for NB Southern Railway.
9	Q Okay. And in the email from Mr. Gardner to Mr. Ellis
10	dated July 26th, the statement is made:
11	"Ryan, as we discussed and as was noted in an
12	email April 3rd by Joe Migonigal and on June 4th by Bob
13	Grindrod, MMA will pay for the oil movement once
14	payment is received through ISS."
15	Do you see that?
16	A Yes, I do.
17	Q Okay. Now do you see that Mr. Ellis responded or
18	excuse me forwarded this email to Joanne Kelter?
19	A Yes.
20	Q And who is Joanne Kelter?
21	A Joanne Kelter would be the credit manager for NB
22	Southern Railway, and she works for me.
23	Q Okay. And Mr. Ellis says, "I will discuss with Ian
24	when he is back from vacation next week. I'm guessing he
25	may have agreed to this with Bob Grindrod." Do you see

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1	share.
2	Q And when you refer to our share what are you referring
3	to?
4	A The monies owed by MMA for the transportation of oil on
5	our lines.
6	Q All right. Turning your attention to Irving Exhibit 8.
7	Can you look at that, please.
8	A Yes.
9	Q And can you identify this document?
10	A Email from Ryan Ellis to Don Gardner and Brenda Tarr
11	and Jim Speed (ph), subject is the swap.
12	Q And looking at the email from Ryan Ellis dated
13	August 30th to Don Gardner where it says, "Agreed the
14	payments for the oil trains will follow the ISS settlements
15	which take place during the first week of each month." Do
16	you see that?
17	A Yes, I do.
18	Q And was that consistent with the agreement that had
19	been reached between the Irving railroads and the MMA?
20	A Yes, it is.
21	Q Turning your attention then to Irving Exhibit 9.
22	A That's an email from Don Gardner to Ian Simpson, the
23	subject of which is ISS crude payments.
24	Q And the email from Mr. Gardner to Mr. Simpson dated
25	January 3rd, 2013 where Mr. Gardner wishes Mr. Simpson a
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1	Happy New Year, and then says:
2	"It appears that there was a Canadian holiday
3	yesterday. Tomorrow therefore is the second business
4	day for Canada which gave CN and CP an extra day to pay
5	what is due. All other North American railroads
6	settled today. If we receive funds timely I will send
7	off the payment immediately."
8	Do you see that?
9	A Yes, I do.
10	${\tt Q}$ $$ Is that consistent with the agreement that the Irving
11	railroads had with the MMA?
12	A Yes, it is.
13	Q Turning your attention to Irving Exhibit 10. Can you
14	identify that?
15	A It's an email from Don Gardner to Ian Simpson and Ryan
16	Ellis, a copy of which went to Robert Grindrod, subject of
17	November oil payment.
18	Q And looking specifically at the email from Mr. Gardner
19	to Mr. Ellis dated January 4th, 2013 at 5:55 p.m., do you
20	see that at the bottom of the first page?
21	A I do, yes.
22	Q Mr. Gardner say:
23	"Ryan, I sit frustrated that we have received no
24	funds in our account at this moment from the ISS. They
25	allegedly were sent at 10:30 this morning through the
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1	Q Now, Mr. Hansen, did the New Brunswick and Southern
2	Railway Company rely upon the agreements that is referenced
3	in these emails?
4	A Yes, we did.
5	Q And what did New Brunswick Southern Railway do in
6	reliance upon the agreement referenced in these emails?
7	A We continued shipping and interconnecting with them on
8	the freight movements.
9	$\ensuremath{\mathtt{Q}}$ Oh, that would have been the provision of interlying
10	freight services?
11	A Yes.
12	Q Did the New Brunswick and Southern Railway provide
13	well strike that, let me rephrase it.
14	Did the Irving railroads provide interlying freight
15	services to the MMA during the six-month period preceding
16	MMA's bankruptcy?
17	A Yes, we did.
18	$\ensuremath{\mathbb{Q}}$ Okay. Based upon the agreement that is referenced in
19	the emails that you've just identified as well as your
20	understanding of the agreement that was reached between the
21	MMA and the Irving railroads, what was New Brunswick
22	Southern Railway's expectation regarding payment by MMA for
23	freight services provided in connection with oil shipments?
24	A Our expectation was that we would be paid immediately
25	after they were paid from the ISS system.
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		Page 62
1		Bank of Montreal but we have not received them. I am
2		told that we will likely see funds on Monday and they
3		issue a back dated credit memo to today. I am pretty
4		confident that we will send \$975,128.14 on Monday."
5		Do you see that?
6	A	I do.
7	Q	And then Mr. Simpson sent an email on that Monday to
8	Mr.	Gardner at 10:05 a.m., do you see that?
9	A	I do.
10	Q	And it says, "Don, did everything get pushed through
11	toda	y on the crude payments?" Do you see that?
12	A	I do.
13	Q	And then Mr. Gardner emailed Mr. Simpson and Mr. Ellis
14	on J	anuary 7th at 11:25 a.m. Do you see that?
15	A	I do.
16	Q	And it says:
17		"Gentlemen, bank has acknowledged receipt within
18		the last five minutes, not without some encouragement,
19		another story. We have instituted the transfer to NBSR
20		from CIBC in Montreal."
21		Do you see that?
22	A	Yes, I do.
23	Q	Is that consistent with the agreement that was reached
24	betw	een MMA and the Irving railroads?
25	A	Yes, it is.
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1	Q Okay. Handing you or I already handed to you. If
2	you take a look at Exhibit 11 Irving Exhibit 11. Do you
3	see that?
4	A Yes, I do.
5	Q What is this exhibit?
6	A This is an analysis of the Montreal Maine & Atlantic
7	swap history.
8	Q Okay. And was this prepared at your direction?
9	A Yes, it was.
10	Q And what does it show?
11	A What it shows is payments made between NB Southern and
12	payment what it shows is payments that the Irving
13	companies were paying to MMA and MMA's payments back to NB
14	Southern.
15	Q Okay. And does this document identify the payments
16	related to oil shipments?
17	A Yes, it does.
18	Q Are those the ones that are marked in yellow?
19	A Yes, they are.
20	Q Now each of these payments for oil indicate based on
21	the date having been made during the first full week of the
22	month other than November 16th and December 14th of 2012.
23	Do you see that?
24	A Yes.
25	Q And do you know what the circumstances were that were
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1	related to those particular payments?
2	A Yes. MMA decided that they wanted to deduct monies
3	they felt was owed to them from the paper company and they
4	held up the monies as a result of that.
5	Q And was that in consistent with the agreement that
6	had been reached between the Irving railroads and the MMA?
7	A No, it's not consistent with the agreement.
8	Q Okay. And was that pointed out to the MMA?
9	A Yes, it was.
10	Q And was that subsequently corrected so that that
11	practice did not thereafter occur?
12	A That is correct.
13	Q With respect to all of the other payments, were those
14	made within days following the second business day of each
15	month?
16	THE COURT: All of the other payments meaning
17	those in yellow?
18	MR. LEPENE: In yellow, yes.
19	THE COURT: Thank you.
20	THE WITNESS: Yes, they were.
21	BY MR. LEPENE:
22	Q And again, the what is the significance of the
23	second business day of the month? What happens on the
24	second business day of the month in connection with the
25	interlining settlement system?
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Page 67 1 that becomes a legal conclusion. 2 MR. KEACH: Yet, Your Honor -- I mean more 3 importantly it's also a completely devoid of foundation because his actual testimony was that he relied not at all 4 on the general creditworthiness of MMA. 5 6 So there's no -- absolutely no foundation for the 7 witness to make the conclusion, because his testimony 8 contradicts it. But --9 THE COURT: So what I'm going to do is I'm going to allow the question and I'm going overrule the objection, 10 11 but in -- we don't have a jury, and as we get to the legal 12 argument and the legal consequence of the answer that we're 13 going to get, Mr. Keach, the door is wide open for you at 14 that point. MR. KEACH: Thank you, Your Honor. 15 THE COURT: Thank you. Mr. Lepene? 16 17 MR. LEPENE: Thank you, Your Honor. 18 BY MR. LEPENE: 19 Q Mr. Hansen, in providing freight services in connection 20 with the interchange of traffic with the MMA did the Irving 21 railroads rely upon MMA's general creditworthiness? 22 Absolutely not. А 23 What did the Irving railroads rely upon? Q 24 А We relied on them being paid out of the ISS system, which I felt was secure, and that meant I would be paid 25

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•	Page 66
1	A Well that's when MMA would have received monies under
2	the ISIS or ISS system.
3	Q Now of the total amount of NBRS, New Brunswick
4	Southern's proof of claim, approximately how much is owed
5	for freight services provided in connection with oil
6	shipments that were made within six months of MMA's
7	bankruptcy?
8	A Approximately 1.5 million.
9	Q Okay. In providing freight services in connection with
10	the interchange of traffic with the MMA did the Irving
11	railroads rely upon MMA's general creditworthiness?
12	MR. KEACH: Your Honor, objection. Calls for a
13	legal conclusion. He's already testified on a number of
14	circumstances about what they were relying on in particular
15	factual circumstances, what Mr. Lepene is now asking
16	(indiscernible) to conclude from that based on the legal
17	assumption.
18	MR. LEPENE: Your Honor, if I might respond to
19	that?
20	THE COURT: Yes.
21	MR. LEPENE: That's not a legal conclusion at all,
22	that's an issue of fact as to whether they relied on the
23	general creditworthiness of the MMA or whether the
24	expectation was that they would be paid from current
25	operating revenue of the railroad. I don't understand how
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1	shortly thereafter.
2	Q And were you secure that they could rely upon receiving
3	money from the ISS system?
4	A That is correct.
5	Q Mr. Hansen, did anyone ever advise you that MMA's
6	ability to pay the Irving railroads was dependent upon MMA
7	being able to draw down on a line of credit with Wheeling
8	and Lake Erie Railroad?
9	A No.
10	Q Were you aware that the MMA had a line of credit with
11	the Wheeling and Lake Erie Railroad?
12	A No, I was not.
13	Q To your knowledge did anyone ever advise anybody
14	associated with J.D. Irving or any of its affiliates that
15	MMA's ability to pay the Irving railroads was dependent upon
16	MMA being able to draw down on a line of credit with
17	Wheeling and Lake Erie Railroad?
18	A No, nobody advised us.
19	Q All right. Okay. Mr. Hansen, I'm going and you to
20	take a look at what I believe are exhibits Irving
21	Exhibits 12 and 13, those are the big binders. Can you
22	identify Irving Exhibit 12?
23	A I don't do I have it here?
24	Q Do you not have did I not give you the big
25	A No, I got 11, that's it.
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1	THE COURT: Do you have anything that looks like
2	this?
3	THE WITNESS: No, I don't. My
4	MR. LEPENE: I've got it. I apologize. May I
5	approach?
6	THE COURT: Yes, please.
7	(Pause)
8	BY MR. LEPENE:
9	Q Okay. Mr. Hansen, can you identify Irving Exhibit 12?
10	A Yes, it's invoices in support of the proof of claim of
11	New Brunswick Southern Railway Company Ltd.
12	Q Okay. Would you look at the first page. Do you see
13	that?
14	A Yes.
15	$\ensuremath{\mathtt{Q}}$ Is this a list of invoices that were outstanding as of
16	the date of bankruptcy the date of MMA's bankruptcy
17	petition?
18	A Yes, it is.
19	Q Okay. And then the invoices that are attached that
20	make up the rest of the exhibit, are those the invoices that
21	were sent by the New Brunswick Southern Railway Company to
22	the MMA?
23	A Yes, they are.
24	Q Okay. If you would take a look at Irving Exhibit 13.
25	Do you see the first two pages?
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1	Honor.
2	THE COURT: Why don't we just for classification
3	on the record, all these exhibits were stipulated to for
4	admissibility expect for 12, 13, and 11, and so, Mr. Keach,
5	any objection to the let's do the exhibit I think that's
6	just supposed to help us all, the two-page Excel
7	spreadsheet.
8	MR. KEACH: Yeah, Your Honor, I have no objection
9	to its admission, it's just a summary essentially of other
10	records of which we have had access to.
11	THE COURT: Perfect. And then how about the 12
12	and 13, any objection?
13	MR. KEACH: No objection. The amounts in the
14	stipulation were derived from the invoices. We had a
15	opportunity to review the invoices and that's the basis of
16	the stipulation.
17	THE COURT: Okay. Thank you very much.
18	MR. LEPENE: Thank you, Your Honor.
19	(Irving Exhibit Nos. 11, 12, and 13 were admitted)
20	MR. KEACH: Your Honor, I'm going to suggest, can
21	we take about a five-minute break?
22	THE COURT: Sure. Let me just check, Ms. Keith
23	was saying something. Great minds think alike. She was
24	asking the same. Why don't we take a five-minute break and
25	be back at 3:20.

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1	A Yes.
2	Q Does this represent a listing of the invoices that were
3	outstanding in that had been issued by the Maine Northern
4	Railway Company to the MMA as of the date of MMA's
5	bankruptcy?
6	A Yes, it is.
7	Q And are copies of the invoices attached?
8	A They are.
9	Q Okay. Now were these particular statements prepared in
10	the ordinary course of the business of the Irving railroads?
11	A Yes, they are.
12	Q Do you accurately reflect the amounts owed by MMA to
13	the Irving railroads?
14	A Yes, they do.
15	Q And do the dates shown accurately reflect the dates
16	invoiced were issued by the Irving railroads to MMA?
17	A Yes.
18	Q And the attached invoices, were those taken from the
19	business records of the Irving railroads?
20	A Yes, they were.
21	Q Do the invoices accurately reflect the dates freight
22	and other services were provided to the MMA by the Irving
23	railroads?
24	A Yes, it does.
25	MR. LEPENE: That's all I have at this time, Your
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1	MR. KEACH: Thank you, Your Honor.
2	THE COURT: What'll be in a brief recess.
3	THE CLERK: All rise.
4	(Recessed at 3:14 p.m.; reconvened at 3:23 p.m.)
5	THE CLERK: All rise.
6	(Pause)
7	CROSS-EXAMINATION
8	BY MR. KEACH:
9	Q Mr. Hansen, good afternoon.
10	A Good afternoon.
11	Q Would you for my benefit repeat your title with J.D.
12	Irving?
13	A I am the general manager corporate credit and finance.
14	Q And in that capacity do you handle corporate finance
15	and credit matters not only for J.D. Irving but all of its
16	wholly-owned subsidiaries?
17	A Yes, I do.
18	Q And among those wholly-owned subsidiaries were the
19	Irving railroads that we have referred to today?
20	A Yes, they are.
21	Q As well as the various Irving paper entities that have
22	been referred to, correct?
23	A That is correct.
24	Q How many people do you have working for you at J.D.
25	Irving on the credit and corporate credit and control
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1	side?
2	A Thirteen.
3	Q Okay. And you testified earlier that one of the
4	reasons that the Irving railroads opted out of ISS was that
5	the Irving entities did not have the capacity to handle
6	participation in the ISS. Did you mean that you didn't have
7	the resource capacity despite the 13 people who work for
8	J.D. Irving?
9	A That's correct.
10	Q So the 13 people who otherwise handled credit matters
11	for multiple paper companies and multiple railroads couldn't
12	have handled participation in the ISS?
13	A That is correct.
14	${\tt Q}$ When did you actually first become aware of the fact
15	that something called ISS existed?
16	A When it was brought to my attention from Ian Simpson
17	when it was proposed to Ian by Mr. Grindrod, so that would
18	have been some time in July or June or July of 2012 I
19	think.
20	$\ensuremath{\mathbb{Q}}$ All right. So you did business with MMA or I should
21	say the Irving empire did business with MMA for nine years?
22	A That's correct.
23	Q And during that entire nine-year period you had no idea
24	what the ISS was?
25	A Never heard of it.

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1	A I do not.
2	Q And you refer to do the fact that the railroad might be
3	landlocked excuse me do you know which customers it
4	would not have been able to service?
5	A They would not have been able to service the Irving
6	companies.
7	Q And do you know other than the Irving companies which
8	customers it would not have been able to service?
9	A I do not.
10	Q So you really have no idea what the impact would have
11	been on MMA's business, you just know it wouldn't have been
12	able to service your company, correct?
13	A Correct.
14	Q Are you familiar with Central Maine Quebec Railroad?
15	A Yes, I am.
16	Q Do you know they're the successor to MMA with respect
17	to the former track miles that MMA owned?
18	A Correct.
19	Q And do you know that they're not shipping oil to the
20	Irving Oil Company and refinery in New Brunswick?
21	A I know that, yes.
22	Q All right. And yet they're continuing to operate are
23	they not?
24	A Yes, they are.
25	Q Okay. With respect to the swap arrangement that you

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1	Q And so it's fair to say that any decision you made at
2	least with respect to your credit decision, any decision
3	that was made by Irving not to participate in ISS for that
4	nine-year period was not a function of your recommendation,
5	correct?
6	A That is correct.
7	Q Was it and do you know who did recommend that you
8	not participate in ISS?
9	A I personally don't know, no.
10	Q Okay. So you really have no idea why you didn't
11	participate in ISS for those nine years?
12	A That is correct.
13	Q I want to go to something you said early in your
14	testimony. You indicated that from your in your opinion
15	if the Irving railroads were to refuse to interchange with
16	MMA that or had refused to interchange with MMA that that
17	would have been devastates to MMA's business. Do you recall
18	your testimony?
19	A That's correct.
20	Q Okay. Do you know how many track miles MMA owns or
21	owned before it sold them?
22	A No, I do not.
23	Q Do you know where those tracks go?
24	A No, I do not.
25	Q Do you know which customers those tracks serviced?
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1	have described, and I think actually in response to Judge
2	Cary's question, you indicated that from your understanding,
3	you, as the officer of J.D. Irving, had the option of simply
4	setting off the amount owed to MMA by the Irving paper
5	companies against any amount that was owed to the Irving
6	railroads, correct?
7	A That's correct.
8	Q And in fact as you told me last night if MMA at any
9	time had not paid the amounts due to the Irving railroads,
10	again prior to the oil shipments we're talking now, you
11	simply would have paid yourself from the amounts due from
12	the paper companies, correct?
13	A No, I didn't say that.
14	Q But you said you would have withheld the wires,
15	correct?
16	A That is correct.
17	Q And if notwithstanding your withholding the wires they
18	had not paid what would you have done?
19	A I would have held the wire until they paid.
20	Q And if they hadn't paid at all would you have offset
21	against the amounts due given that you had the option to do
22	so?
23	A No.
24	Q And why not?
25	A Well as I explained to the judge it's too messy.
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1	Q And why is it too messy?
2	A Well because it's an accounting nightmare, because my
3	records may not reflect their records when it comes to
4	analysis of the payments.
5	Q Right. But you have no doubt that you had the ability
6	to do so?
7	A Oh, I certainly had the ability, yes.
8	$\ensuremath{\mathtt{Q}}$ Okay. And in fact the reason you felt this arrangement
9	was secure was because you had the ability to set off if you
10	needed to, right?
11	A I controlled the money.
12	$\ensuremath{\mathtt{Q}}$ Right. And the reason you were secure in this
13	arrangement is because you controlled the money and because
14	Irving Paper almost always owed MMA more money than MMA owed
15	the railroads, correct?
16	A Correct.
17	Q Now you've testified with respect to when you became
18	less comforted by this secured credit arrangement and that
19	was when the oil shipments began to be a greater percentage
20	of the total shipments handled by MMA; is that correct?
21	A That's correct.
22	Q Okay. And the reason you became less comfortable was
23	because as the oil shipments became of greater portion of
24	the MMA traffic it was true from that point forward that the
25	Irving paper companies now no longer owed more to MMA than

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1	up for a second and just ask one foundational question.
2	Do you understand the term receiving railroad?
3	A No, I don't.
4	Q If I told you that there's the originating railroad
5	which we've just agreed was CP, that the receiving railroads
6	were the railroads along the way that received the freight.
7	A Uh-huh.
8	Q Would that make sense to you?
9	A Yeah.
10	Q Okay. Do you know who was ultimately responsible to
11	pay the receiving railroads in the scenario that we just
12	talked about?
13	A In my opinion it's ISS.
14	Q Okay. Do you have an understanding about the ISS
15	system that under the ISS system and the circumstance we
16	just described that even if CP had not collected from the
17	people who had agreed to pay it that CP was responsible to
18	pay all of the receiving railroads the amounts they were
19	due?
20	A No, the way I understand it is that CP were responsible
21	to pay the money into ISS. They are not responsible to pay
22	every individual carrier. ISS are responsible to pay all
23	the interconnecting lines.
24	Q Right. But who has to put the money into ISS?
25	A CP.

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1	the other way around and in essence you were under
2	collateralized at that point, correct?
3	A Correct.
4	Q And it's at that point in time that you discussed with
5	Mr. Simpson the way is ISS worked, right?
6	A Correct.
7	Q And let's just take the oil shipments, for example.
8	CP, Canadian Pacific, which we'll refer to as CP, as you
9	understand was the originating railroad, right, with respect
10	to those shipments?
11	A Correct.
12	Q And that means that CP was the first railroad to ship
13	them and was responsible for making sure that those
14	shipments arrived at their ultimate destination, correct?
15	A Correct.
16	$\ensuremath{\mathbb{Q}}$ Okay. And there might have been a number of railroads'
17	tracks that CP went over from North Dakota until those
18	shipments eventually arrived at the Irving oil refinery in
19	New Brunswick, correct?
20	A Correct.
21	Q So there may have been a series of interchange
22	arrangements between CP and various railroads along the way,
23	correct?
24	A Correct.
25	Q Who did you understand was liable to pay let me back
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1	Q And did CP have to put that money in even if the person
2	it was shipping to didn't pay it?
3	A Correct, yes.
4	Q Okay. And if all of the receiving railroads along the
5	path are members of ISS all of those receiving railroads get
6	paid through the ISS system, correct?
7	A Correct.
8	Q And they're comforted by the fact that they're going to
9	get paid because CP has to put the money in whether it
10	collects or not, right?
11	A Right.
12	Q And the only reason why the Irving railroads were not
13	similarly secure was because Irving had decided not to be a
14	member of ISS, correct?
15	A Correct.
16	Q And in fact because the Irving railroads are not
17	members of ISS you had to have a participating railroad in
18	ISS collect the money that otherwise would have been paid to
19	you had you been a member, correct?
20	A Correct.
21	Q And you decided that that party would be MMA, correct?
22	A Correct.
23	Q Okay. I'm going to and I assume these are all still
24	in front of you ask you to take a look at Irving
25	Exhibit 5.
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1	A Irving Exhibit 5. Okay.
2	Q Now, I'll just ask you to turn to the second page,
3	which is the term sheet entitled at the top revision of
4	payment terms with NBSR needed. Do you see that?
5	A Yeah.
6	Q And you went through a whole series of emails with
7	Mr. Lepene, and I won't repeat that exercise, but the
8	consequence of that email traffic was that the Irving
9	railroads agreed to these terms and conditions, correct?
10	A Correct.
11	Q Yes?
12	A Yes.
13	Q Okay. And I want to I want you to look at the
14	bullets on that page, the bullet points. Do you see them?
15	A What are you referring to as bullet points?
16	Q Well little dots, the paragraphs next to the little
17	dots.
18	A Okay.
19	Q Okay? And I think one, two, three, four, the fifth one
20	down is a paragraph that begins with unreceived traffic.
21	See that?
22	A Yes.
23	Q And would you agree with me that unreceived traffic
24	means when MMA and the Irving railroads are receiving
25	railroads under the scenario that you and I just talked
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Page 83 were protected by the -- your secured credit arrangement 1 2 with respect to the local traffic, correct? 3 A I was protected on the local traffic by the swap, yes. Right. And with respect to the oil shipments you 4 0 5 understood that notwithstanding the fact that your railroad had handled the traffic that you were going to have to wait 6 7 45 to 60 days from the time that obligation was incurred to 8 get paid once MMA collected on the ISS system? 9 A Correct. 10 Q Okay. You mentioned that you were -- you felt secure 11 after talking to Mr. Simpson about the second half of that 12 arrangement, the ISS payments. Why is it that you felt 13 secure about the ISS? Well, I felt secure because ISS would have the money 14 А 15 from the originating carrier, that the funds owed to MMA by the originating carrier would be given to them through the 16 17 ISS system and they would have the money. So, I felt 18 comfortable that the money would go from ISS into MMA and 19 that they would get the money. I have no problems thinking 20 they would not get the money. 21 Right. Q 22 And that gave me comfort that at least if they had the А 23 money then they had to give it to me shortly thereafter. 24 Q Right. Because CP was paying the money in and ISS was 25 paying it out, correct?

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1	about rather than originating railroads, correct?
2	A Correct.
3	Q Okay. And that was largely true of the oil shipments
4	because CP was the originating railroad?
5	A Correct.
6	Q All right. And so what you are being told in this term
7	sheet and what you agreed to is the following.
8	"Receive traffic the freight charges must be
9	apportioned through the interlining settlement system.
10	MMA typically does not receive payment through ISS for
11	45 to 60 days after handling the car on average."
12	Do you see that?
13	A Yes.
14	Q All right. So you understood and agreed that there
15	would be a 45 to 60-day delay, at a minimum, between the
16	time you handled freight and the time you would be paid,
17	correct?
18	A Yes, correct.
19	Q And then the arrangement with respect to the other
20	traffic, traffic on which either of you was an originating
21	carrier, the so-called local traffic, that was going to
22	continue to be protected by your secured credit arrangement
23	through the swap, correct?
24	A It was protected by the swap arrangement.
25	Q Right. So you had essentially two categories. You
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1	A Correct.
2	Q And those were the two entities that you were relying
3	on?
4	A Yes.
5	Q When we talked last night, Mr. Hansen, you indicated
6	that you pulled a Dunn & Bradstreet report on MMA when you
7	first began to do business with them, correct?
8	A That is correct.
9	Q And that under your system you automatically received
10	Dunn & Bradstreet reports on them continually when there
11	were any changes, correct?
12	A Correct.
13	THE COURT: And then that date would be 2003
14	initially doing business with them?
15	THE WITNESS: Correct.
16	THE COURT: Thank you.
17	BY MR. KEACH:
18	Q And you received them automatically under your system
19	through the entire time you were doing business with MMA,
20	correct?
21	A Correct.
22	Q And as we discussed last night you're aware that Dunn &
23	Bradstreet reports show liens on assets, right?
24	A Correct.
25	Q And you read those Dunn & Bradstreet reports?
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1	A Yes.
2	Q Okay. You also told me last night that you didn't rely
3	on the Dunn & Bradstreet reports, that you didn't really
4	care frankly what was in them because you were comfortable
5	that you were relying on your swap system, your secured
6	credit system, and you were relying on your comfort with
7	ISS, and that's why you were doing business, not anything
8	that was in the D&B, correct?
9	A That's correct.
10	Q Mr. Hansen, I'm going to ask you to take a look at
11	Irving Exhibit 9. And Irving Exhibit 9, notwithstanding the
12	header at the top, appears to be an email from Mr. Gardner
13	to Mr. Simpson, correct?
14	A Yes, correct.
15	Q I'm talking about the top email on the page.
16	A Yes.
17	Q And the note by Mr. Gardner to Mr. Simpson is that
18	because of this holiday, CN and CP had an extra date of pay
19	what is due. Do you see that?
20	A That is correct, yes.
21	Q And this is consistent with your understanding, right,
22	that Canadian National and CP were the parties paying into
23	the ISS, in turn the money would then come out of ISS and
24	arrive in your hands, correct?
25	A Correct.
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Page 87 REDIRECT EXAMINATION 1 2 BY MR. LEPENE: 3 Q Mr. Hansen, who is responsible for making the decision whether to participate -- whether New Brunswick Southern 4 5 Railway or Maine Northern Railway would participate in the ISS? 6 7 That would be a decision made between Ian Simpson and А 8 probably Jim Irving. Okay. You wouldn't have any role in that decision, 9 Q 10 would you? 11 Absolutely none. А 12 MR. LEPENE: May I have one minute, Your Honor? 13 THE COURT: Yes. 14 (Pause) MR. LEPENE: Nothing further, Your Honor. 15 THE COURT: Thank you very much. You have no 16 17 recross? 18 MR. KEACH: No recross, no. 19 THE COURT: Thank you. You may step down, thank 20 you for your testimony. 21 THE WITNESS: Do I leave all of this stuff up 22 here? 23 THE COURT: Yeah, why don't you leave it right 24 there. Mr. Lepene, any --MR. LEPENE: Yes. We will call next Ian Simpson 25

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1	Q And, Mr. Hansen, I asked you last night if you knew
2	whether or not Maine Northern or New Brunswick Southern or
3	any of the Irving railways had the legal right to refuse
4	traffic from an interchanging railroad. Do you recall that
5	question?
6	A Yes, I do.
7	Q And you told me you had no idea whether they could or
8	they couldn't, right?
9	A That's correct.
10	Q Is that still your answer?
11	A No, I asked Ian last night, and he said, no, that
12	THE COURT: Excuse me. Ian is in no way counsel,
13	correct?
14	MR. KEACH: No, Ian is I assume, Mr. Simpson.
15	THE COURT: Fair enough, just wanted to make sure.
16	Please go ahead.
17	THE WITNESS: Yeah. And he informed me last night
18	that, no, that we couldn't just simply refuse to haul.
19	BY MR. KEACH:
20	Q That you could not?
21	A Yes.
22	Q Okay.
23	MR. KEACH: Nothing further, Your Honor.
24	THE COURT: Thank you. Any redirect?
25	MR. LEPENE: Very short, Your Honor.
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1	to the stand, Your Honor.
2	THE COURT: Thank you. And any sense, just a
3	timing I'm sorry, you wish to
4	MR. LEPENE: Your Honor, you raise a very good
5	question because Mr. Hansen was raising the same question
6	with me. He has a six hour drive back to Saint John, I
7	believe. I think Mr. Simpson will be very short, in terms
8	of his testimony, I'm not sure about the length of the
9	cross-examination.
10	THE COURT: Are the two of them driving together?
11	MR. LEPENE: No, they are not.
12	THE COURT: Would Mr. Hansen would like to be
13	excused?
14	MR. LEPENE: I think Mr. Hansen would like to be
15	excused, but may I ask a question of Mr. Keach?
16	THE COURT: Sure.
17	MR. LEPENE: Thank you.
18	(Counsel confer)
19	MR. LEPENE: Can I have one moment, Your Honor?
20	THE COURT: Sure.
21	MR. LEPENE: I would like to get Mr. Hansen out of
22	here if we could.
23	MR. KEACH: And I have no problem with Mr. Hansen
24	being excused.
25	(Pause)
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1	MR. LEPENE: Your Honor, if I might?
2	THE COURT: Yes.
3	MR. LEPENE: I think we have moved our exhibits
4	into evidence. They've been admitted, is that?
5	THE COURT: Yes, that's
6	MR. LEPENE: If not, I will move them.
7	MR. KEACH: I think they're all admitted by
8	stipulation, and the ones that weren't, I had no objection
9	to.
10	MR. LEPENE: Okay.
11	THE COURT: So we can clarify the ones that were,
12	11, 12 and 13, everything else was in, all of those are in
13	without objection.
14	MR. LEPENE: Okay. With that, we will wish Mr.
15	Hansen a safe trip back to Saint John.
16	THE COURT: Safe drive, Mr. Hansen, thank you for
17	your testimony.
18	THE CLERK: Please raise your right hand.
19	IAN SIMPSON, WITNESS, SWORN
20	THE CLERK: Please be seated, state your name for
21	the record.
22	THE WITNESS: My name is Ian Simpson, S-i-m-p-s-o-
23	n.
24	THE COURT: Thank you for coming today, Mr.
25	Simpson.
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1	revenue, administration.
2	Q And what is your title again?
3	A General manager.
4	$\ensuremath{\mathtt{Q}}$ $\ensuremath{\mathtt{And}}$ you indicated that those railroads include New
5	Brunswick Southern Railway Company, the Main Northern
6	Railway Company, and the Eastern Maine Railway Company?
7	A Yes.
8	Q Now, are you familiar with the what's been referred
9	to as the ISS or Interlying Settlement System?
10	A Yes, I wouldn't be an expert by any means, but yes, I
11	am certainly familiar with.
12	Q Okay. And can what is your understanding of how the
13	Interlying Settlement System works?
14	A It's for members, for railroads who are part of the
15	ISS, that's a central clearinghouse. There is one billing
16	railroad, there may be multiple interlying railroads, also
17	member of ISS railroads that could be part of a particular
18	shipment, the car load that moves across the country.
19	And once per month, all of the receivables, payables
20	get netted out through the ISS program, and the net amounts,
21	some railroads pay in, some railroads get receivables out,
22	but it's all netted out. It's a way to simplify the billing
23	process for shippers across North America.
24	Q Did the MMA participate in the ISS?
25	A Yes, they did.

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1	THE WITNESS: Yep.
2	DIRECT EXAMINATION
3	BY MR. LEPENE:
4	Q Mr. Simpson, by whom are you employed?
5	A The Brunswick and Maine Railways, specifically it's the
6	New Brunswick Southern Railway, the Eastern Main Railway and
7	the Main Northern Railway.
8	Q And how long have you held those positions?
9	A For a little over 11 years.
10	Q Do you have a college degree?
11	A Yes, I have a business degree from Acadian University,
12	and a masters of business from the University of Western
13	Ontario.
14	Q Okay. And briefly, could you give us your employment
15	history prior to your employment by the, what I'm going to
16	refer to as the Irving Railroads, as we've referred to them
17	in during Mr. Hansen's testimony?
18	A I spent six years out of university with a McKane Foods
19	Company on the transportation side, and 12 years with a J.D.
20	Irving Trucking Company, Sunberry Transport, and then the
21	last 11 years with the railway.
22	Q Okay. And what are your duties and responsibilities
23	with the railroad?
24	A So I have full responsibility of all aspects of the
25	railroad, the financial, operational, safety, customer
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1	Q Okay. Did the Irving Railroads participate in the ISS?
2	A No.
3	Q And why not?
4	A Well, you have to go back a little bit to the history
5	of our company. We're a little bit unique, in that we
6	interchange with more than one railroad, specifically we
7	interchange a lot of our business with CU, with the Pan Am
8	Railway, and with, at the time, the MMA.
9	Prior to the MMA forming in 2003, the CN arrangement
10	that we had with them, the CN were the ISS billing railroad,
11	Pan Am were the ISS billing railroad. That was the
12	situation they wanted, it was a situation our customers
13	wanted, and we were comfortable with that, we were fine with
14	that, it was very consistent.
15	Q And let me just interrupt when you use the term billing
16	railroad, can you tell us what you mean by that?
17	A Yeah. So if in the case when we're talking about as
18	discussed earlier, the Irving Railroads or sorry, the Irving
19	customer, Irving Paper as an example, they may have freight
20	going to Chicago as an example. There are different moving
21	options. They could go through the CM to get to Chicago, it
22	could go Pan Am to get to Chicago, it could go the MMA to
23	get to Chicago.
24	We would provide our rate to those three railroads, who
25	in turn had the commercial relationship with the shippers,

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1	in this case, Irving Paper. And we would get paid through
2	the ISS settlement from those three railroads. We didn't
3	get we weren't in the ISS settlement, but those three
4	railroads were in the ISS, and they in turn paid us, and it
5	simplified the process for the shippers.
6	Q Now, you were I think explaining why the decision was
7	made not to participate in the ISS.
8	A So there's a lot to be a member of the ISS. So you
9	have to have, when we talk about resources, there's a lot of
10	expertise needed. If we were to become an ISS railroad
11	after CN and Pan Am, and then ultimately MMA all were ISS as
12	well, there'd be a significant duplication of efforts that
13	really made no sense.
14	There's a lot of expertise needed in the system itself
15	that could be learned; however, you also have a credit
16	related issue, it's having a relationship with all the other
17	railroads in North America, setting rates with all the other
18	railroads, the car ordering process, so there's a lot to it.
19	Now, when the other partner railways are already an ISS
20	carrier, it's quite redundant for us to do the same thing,
21	and we're not unique in this. I mean, not every railroad in
22	North America is an ISS railroad.
23	Q Was the decision not to participate in the ISS
24	influenced in any way by the credit worthiness of the MMA?
25	A No.
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1	Railroad?				
2	A I think it would've been significant.				
3	Q And how so?				
4	A Significant in a negative way. We saw the business				
5	from the Main Northern and the New Brunswick Southern				
6	Railway that was interchanged each and every day with the				
7	MMA. And we also had a good understanding of the general				
8	business on their railroad.				
9	And, you know, we comprised a significant piece. And				
10	we know the MMA also had from a commercial standpoint, from				
11	a sales and earnings standpoint, put a lot of effort into				
12	attracting and trying to attract more business in and out of				
13	Saint John on our railroad.				
14	Q Did the MMA in that regard directly solicit the Irving				
15	Paper Companies for business?				
16	A Yes.				
17	MR. KEACH: Your Honor, objection, foundation,				
18	personal knowledge of the witness.				
19	THE COURT: Okay.				
20	MR. KEACH: He hasn't testified he knows anything				
21	about Irving Paper or MMA.				
22	THE COURT: Mr. Lepene, do you want to ask a few				
23	questions?				
24	MR. LEPENE: Yes. Yes, certainly.				
25	BY MR. LEPENE:				

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1	Q Now, there's been testimony that the Irving Railroads
2	interchange traffic with the MMA. You heard some of that
3	testimony
4	A Yes.
5	Q from Mr. Hansen. Can you just describe to the Court
6	exactly what was involved in terms of that interchange of
7	traffic?
8	A So railroads generally unless there's other
9	arrangements, but generally the railroads haul the traffic,
10	haul the rail carriers on their railroads, with their
11	locomotives. They get to a point where it's the end of
12	their line, it's usually an interchange point, usually a
13	yard, a common yard.
14	And the locomotives are decoupled, the train is put
15	into a pre-determined siding, and the other railroad that
16	you interchange with hooks on to those railcars and then
17	they continue and that to go through North America.
18	On the other side of it, that same interchange carrier,
19	if it was the MMA and Brownville Junction in this particular
20	case, they would have a train with railcars destined for
21	customers on our line, they would decouple their locomotives
22	from that train, we would hook onto that, and when we would
23	bring it onto our railroad.
24	${\tt Q}$ What would have been the impact on MMA's operations if
25	it was unable to interchange traffic with the Irving
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Page 96 Do you have, Mr. Simpson, an understanding of the Q business relationship that existed as between the MMA and the Irving Paper Companies? А Yes, I know it very well. You know, all the -- again, we're unique in that we have three railroads that our railroad interchanges with. And so any business in and out of Saint John, any business in and out of the Main Northern Railway, we would handle it, whether it's originating in Saint John on our railroad or terminating on the railroad. So a shipper like Irving Paper, again might go back and have three railcars shipping today, we would pick all three cars up. One could go CN, one could go Pan Am, one could go the MMA. So we would see that. We would do the interchange with those three respective railroads. The pricing, the other railroads involved, we would not see that. And that was a good way to keep things competitive, and gave the shippers, I mean, in and out of region many more options. Q Do you know whether the MMA solicited the Irving Paper Companies for business? Yes. А And how do you know that? Q In some cases I've been in the same meeting with them, A or they've called in advance, senior people, such as Bob Grindrod, their President, even their Chairman, Mr. Burkhart Veritext Legal Solutions

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1	(ph), their Vice-President of Sales and Marketing, Mr.			
2	Migonigal, they would tell us, we're coming to Saint John			
3	next week, we're going to see the following customers, and			
4	with the goal to try to get more business.			
5	Q Are you familiar with the company that acquired the			
6	rail assets from the MMA out of bankruptcy?			
7	A Yes.			
8	Q And what is the name of that railroad?			
9	A The Central Maine and Quebec Railroad, the CMQR.			
10	Q Okay. Do you know whether the CMQR has a business			
11	relationship with the Irving Paper Companies?			
12	A Yes, they do.			
13	Q Are the Irving Paper Companies a substantial customer			
14	of the CMQR?			
15	A I would say they are, yes. I don't know the specific			
16	number relative to all their other shippers, but it would be			
17	business that would be important to them that they're trying			
18	to grow.			
19	Q Would there have been alternative routes that MMA could			
20	have utilized in order to transport oil that it had picked			
21	up from Canadian Pacific in order to get that oil to Saint			
22	John, New Brunswick if it did not interchange that traffic			
23	with the MMA excuse me, with the Irving Railroads?			
24	A The final destination at the refinery has to be			
25	delivered by us, we're the only railroad there. But we do			
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1	all we were looking for. When they got paid, we were to be					
2	paid.					
3	Q And that was the agreement that was in place with the					
4	Montreal Main & Atlantic?					
5	A That is correct.					
6	Q That was an agreement that you worked out initially					
7	with Mr. Grindrod?					
8	A Mr. Grindrod approached me, we spoke, and then he put					
9	it subsequently in writing in the e-mail, and it was of					
10	great help to their railroad to have that in place.					
11	Q In providing freight services in connection with the					
12	interchange of traffic with the MMA, did the Irving					
13	Railroads rely upon MMA's general creditworthiness?					
14	A No. You know, the important thing was we did a lot of					
15	business back and forth, and the swaps were very important					
16	to have in place.					
17	Q And as far as the oil shipments were concerned?					
18	A On the oil shipments, we were relying on the ISS					
19	payments.					
20	Q Did anyone ever advise you that MMA's ability to pay					
21	the Irving Railroads was dependent upon MMA being able to					
22	draw down on a line of credit with the Wheeling and Lake					
23	Erie Railway Company?					
24	A No, I wasn't familiar with that.					
25	Q Did you even know there was a line of credit with the					
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1	cede the traffic from, like I said earlier Pan Am, MMA or
2	CN. The direct, the most direct route was coming from
3	Montreal to Saint John by Lac Megantic, so but the
4	business was moving on all three railroads. I'm not sure if
5	I answered the question completely but.
6	Q You heard the testimony previously from Mr. Hansen
7	regarding the arrangement that had been reached with the MMA
8	regarding the receipt of payments for freight services
9	associated with oil shipments immediately upon MMA's receipt
10	of payment from the ISS. Do you recall that testimony?
11	A Yes.
12	Q And there was testimony regarding various e-mails that
13	were exchanged.
14	A Yes.
15	Q You were a party to some of those e-mails, correct?
16	A Correct.
17	Q Did the New Brunswick Southern Railway Company rely
18	upon the agreement that had been reached with the MMA that
19	it would be paid it, being the New Brunswick Southern
20	Railway Company would be paid immediately its charges for
21	services related to oil shipments upon MMA's receipt of
22	payment out of the ISS?
23	A We absolutely did. We expected prompt payment, because
24	when ISS when they received their money from the ISS,
25	they were receiving their share and our share, and that's
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1	Wheeling and Lake Erie Railway Company?
2	A Only if things I would have read, just anecdotally, but
3	I as far as how it worked or I had no knowledge of.
4	MR. LEPENE: Can I have one minute, Your Honor?
5	THE COURT: Yes.
6	MR. LEPENE: Thank you.
7	(Pause)
8	MR. LEPENE: That's all the questions I have at
9	this time, Your Honor.
LO	THE COURT: Thank you very much. Mr. Keach, any
1	cross?
12	MR. KEACH: Yeah, briefly, Your Honor.
L3	CROSS-EXAMINATION
14	BY MR. KEACH:
15	Q Mr. Simpson, good afternoon.
L6	A Good afternoon, Mr. Keach.
L7	Q With respect to your knowledge of the ISS system, when
18	using the and you were during Mr. Hansen's testimony,
9	correct?
20	A Yes.
21	Q So you heard me describe the example of the CP
22	shipments
23	A Correct.
24	Q eventually arriving at the refinery, correct?
25	A Yes.
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Q All right. In that circumstance, and let's assume CP	
is the originating carrier, CP pays money into the ISS	
system, correct?	
A Correct.	
Q All right. Does CP keep its share out first assuming	
well, let me back up. Assuming CP has collected from	
whoever was liable, right, it doesn't pay the entire amount	
into the system, right, it keeps its share and pays the	
balance under the system?	
A That part I don't know.	
Q But in any event, they pay money into the system, and	
the clearinghouse then does what with the money?	
A They would have the all the payables and receivables	

from all of the interlying or the ISS carriers, would be put 14

into the clearinghouse, all the receivables then netted out, 15 16 and then a net check would be put in that.

17	So in that example,	I would	think	CP	would	have	to	put
18	their share in as well.							

19 And then the consequence of that is that all of the Q

20 parties who are participating members of the ISS get paid

21	through	that	system,	correct?

22 A That is correct.

23 Q And all of those people get paid in the distribution

24 first before anybody who's outside the system gets paid,

25 correct?

1 Q

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1	share being the haulage amount that was agreed upon that we
2	would be paid.
3	Q All right. And that's the amount you would have been
4	paid through the system had you been a member of the system,
5	correct?
6	A Correct.
7	Q You weren't looking to MMA's share of that collection
8	or a payment, correct?
9	A We were looking for our share that was owed to us.
10	Q Okay. And it would've been owed by the CP or by the
11	system, but you chose essentially to have MMA collect the
12	money and rely on MMA to remit, in accordance with the
13	arrangement that I went through with Mr. Hansen, correct?
14	A Yes.
15	Q And as I said to Mr. Hansen, and as he agreed, you
16	understood that that meant that you were not going to be
17	paid for 60 or more days after the freight was actually
18	handled, correct?
19	A That is correct.
20	Q All right.
21	A We knew that the member companies specifically the
22	Class I's, BNSF, CP, CSXT would be originating railroads in
23	those cases, and all those ISS carriers, it's very important
24	that they pay in each month.
25	Q Okay.

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1	A That would be correct.
2	Q All right. So by opting out, and having MMA collect
3	for you, you virtually ensure that you would be last in line
4	for those payments, right?
5	A Opting out though is more than the decision as it
6	relates to the credit.
7	Q No, I understand that.
8	A I explained earlier how
9	Q Mr. Simpson, I understand that
10	A Right.
11	Q I'm asking one simple question.
12	By opting out of the system, you ensured you would be
13	last, right, just with respect to the payments? I
14	appreciate you had other reasons, and we'll get to those,
15	but
16	A Yeah, yeah.
17	Q you ensured you would be last with respect to the
18	payments, correct?
19	A Well, we yes, that's correct.
20	Q All right. Now, with respect to the system you said
21	with respect to what you were relying on, is that you
22	expected that when MMA received money from the system, you
23	would get quote, our share of the system, what did you mean
24	our share of the money. What did you mean by that?
25	A The amount owed to us with accrued shipments, and the
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1	A So there was a question of the days that it would take
2	to get paid, but the money would be there.
3	Q Because the other carriers would pay it in?
4	A The other carriers were paying in, and the MMA as a
5	member ISS carrier, they also had to keep their accounts
6	clear and have any money they were paying into the other ISS
7	carriers there by the second business day of each month.
8	Q Right. And they had to keep their accounts clear with
9	all of the other ISS carriers, right?
10	A That's correct.
11	Q It was important for them to pay all of those people
12	first to be a member of ISS, correct?
13	A Correct.
14	Q In response to Mr. Lepene's question, he asked you
15	about the bringing of the oil to the Irving Refinery in New
16	Brunswick.
17	A Yes.
18	Q And you indicated that the route used through MMA's
19	tracks and through your tracks, was the most direct route.
20	I assume by that answer, you meant that it wasn't the only
21	route though, right?
22	A It was the only route from the only way MMA could
23	get traffic into Saint John would be through us.
24	Q Well, everybody had to go through you, correct?
25	A For the final delivery, yes.

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1	Q Right. But it wasn't necessarily the case that they
2	couldn't have just interchanged with other railroads and
3	generated the same result, it just would've been more
4	indirect, correct?
5	A (No response)
6	Q You mentioned that you interchanged at that final point
7	with Pan Am, correct?
8	A We did bring oil directly from some of those same
9	origin railroads, CP, BNSF, CSXT into Saint John via Pan Am,
10	and via CN. But they were competing against the MMA, so
11	they have MMA route the traffic and then turn it over to one
12	of those railroads economically would not have made any
13	sense.
14	Q Well, do you know MMA's business relationship with Pan
15	Am? Are you familiar with it?
16	A Pretty familiar, yes.
17	Q Well, they do interchange with Pan Am, don't they?
18	A Not on business like this they wouldn't.
19	${\tt Q}$ $$ Well, they do interchange with Pan Am, though, don't
20	they?
21	A Local traffic, yes, they do.
22	Q Right. And they could have here, you're just saying
23	you don't think it would've been as good business as doing
24	business with you. But you're not telling me it's
25	impossible
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Page 107 1 Could you be more specific? I'm not sure what you А 2 mean. 3 Q Did you stop doing business with MMA following the derailment at some point? Did Irving Paper, excuse me, stop 4 doing business with MMA after the derailment at some point? 5 No. There would still have been clay coming in from 6 А 7 Searsport, but as far as outbound volume, there was no 8 terminating points for Irving Paper on the MMA line with the 9 halt, with the track not working through Lac Megantic. Q Right. So you -- Irving Paper did not ship product, 10 11 outgoing product on MMA, correct? 12 To my knowledge, no, there was no way to get to market. A 13 Q Do you know if the MMA continued to operate continuously after the derailment until it was sold? 14 Aspects of it. They were not continuous through the 15 А main line. The main line was severed. 16 17 Well, it was severed in Canada, right? It was severed Q 18 at Lac Megantic. 19 А Yes, the main line between --20 Q It was severed at Lac Megantic, right? 21 Yes, but that halted traffic between their main line А 22 and the United States, the main line in Quebec. 23 You understand that the lines in Canada were owned by Q 24 MMA Canada, not by MMA, right? 25 А Yes.

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			Page 106	
1	A		It's	
2	Q		in fact, you know it's not impossible.	
3	A		It's not a practical route for the MMA to interchange	
4	w	ith	Pan Am.	
5	Q		But they could have done it, though, couldn't they?	
6	A		I guess technically they could, I'm not quite sure how	
7	tl	hat	would work.	
8	Q		But technically they could have, right?	
9	A		I'm not sure if that was still a question. From a	
10	sl	hipp	per perspective, it would not make economic sense when	
11	t	hey	could go directly with Pan Am or directly with CN, why	
12	w	ould	l you bring another railroad into the mix, it just adds	
13	c	ost,	complexity and that's the advantage of having multipl	е
14	r	ailr	coads competing for your business.	
15	Q		So you're saying it might not have been the best	
16	b	usin	ess, not that they couldn't get there, in your opinion	?
17	A		Correct.	
18			MR. KEACH: Your Honor, can I have a moment?	
19			(Pause)	
20	Q		Mr. Simpson, you mentioned you were familiar with the	
21	r	elat	ionship between MMA and the Irving Paper entities,	
22	c	orre	ect?	
23	A		Yes.	
24	Q		Do you know what happened to that relationship after	
25	t	he d	lerailment on July 6th?	
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1	Q Okay. So with respect to MMA, the U.S. railroad, you
2	do understand it operated continually even after you stopped
3	doing business with it, correct, through the paper
4	companies?
5	A I'm not sure of your question.
6	Q MMA did not cease to operate
7	A Right.
8	Q when Irving Paper stopped shipping paper products on
9	MMA's line, correct?
10	A There was no where to deliver the there was no
11	customer on the MMA line in the United States for them to
12	ship paper to.
13	Q I'm not trying to quibble with your decision not to
14	ship. But your decision not to ship did not close down MMA,
15	did it?
16	A Your decision timed with Irving Paper?
17	Q Irving Paper's decision not to ship did not cause the
18	discontinuation of service generally that was being provided
19	by MMA to other customers.
20	A I'm not sure I can answer that with any expert
21	Q Do you
22	A I don't operate Irving Paper.
23	Q All right.
24	A I can tell you how the freight moved. There was no
25	freight destined for MMA delivery points, so there's no
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1	paper that went to delivery, but there was clay that
2	originated in Searsport, Maine on the MMA that continued to
3	move to Irving Paper in Saint John via the MMA and our
4	railroad.
5	Q And I'm asking a really simple question. The entire
6	railroad did not shutdown just because Irving Paper stopped
7	shipping paper products, right?
8	A Correct.
9	Q And do you know if MMA was or MMA Canada were
10	hauling any oil after the derailment?
11	A Being oil that if there was any residual oil that
12	was stranded between Lac Megantic and Brownville Junction, I
13	will say days after the explosion, that had not yet reached
14	our railroad, that would be the only crude that had moved
15	after the accident and to this day, that's the only crude
16	that's moved on the MMA.
17	Q Right. Other than that, MMA and MMA-C did not haul
18	anymore oil, correct?
19	A Correct.
20	$\ensuremath{\mathbb{Q}}$ $\ensuremath{}\xspace$ And yet again, as you just said, MMA did not cease to
21	operate as a railroad, correct?
22	A Correct.
23	MR. KEACH: Nothing further, Your Honor.
24	THE COURT: Thank you very much. Mr. Lepene, any
25	redirect?
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1	MR. LEPENE: He may be excused. I've made not	
2	quite that drive, but a similar one many times, and I	
3	sympathize.	
4	MR. KEACH: Actually, Your Honor, unfortunately	
5	depending on whether Mr. Caruso is called to the stand, I'm	
6	not prepared to excuse Mr. Simpson, and he's approaching me	
7	right now, so I say that with great trepidation. What time	
8	is your flight?	
9	THE COURT: Did any further	
10	MR. KEACH: Let me have one minute, Your Honor,	
11	and hopefully we can	
12	MR. LEPENE: If it helps his decision-making	
13	process, Your Honor, I'm not intending to call Mr. Caruso at	
14	this point.	
15	THE COURT: Okay.	
16	(Pause)	
17	MR. LEPENE: Your Honor, I don't have further	
18	witnesses.	
19	THE COURT: Wonderful.	
20	MR. LEPENE: It sounds like we have no further	
21	witnesses.	
22	THE COURT: Okay. So no further witnesses from,	
23	I'll call it Irving Railroad side, Mr. Keach?	
24	MR. KEACH: No, we're not going to present any	
25	further witnesses at this point, Your Honor.	
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1	MR. LEPENE: Yes, I'll be brief, Your Honor.			
2	REDIRECT EXAMINATION			
3	BY MR. LEPENE:			
4	Q Mr. Simpson, with respect to the question that Mr.			
5	Keach asked about Irving Paper deciding not to ship product			
6	following the derailment and the effect of that did not			
7	cause a discontinuance of service by the MMA, they didn't go			
8	out of business. Do you recall him asking you that			
9	question?			
10	A Yes.			
11	Q The decision by Irving Paper, however, not to ship			
12	would have resulted in a significant reduction in revenue			
13	for the MMA, would it not?			
14	A I would think so, yes.			
15	Q And similarly, with respect to the fact that the MMA			
16	did not after the accident carry oil it's the fact that			
17	it didn't carry any oil would've resulted in a significant			
18	reduction in revenue for the MMA; is that correct?			
19	A Yes. The crude was a significant piece of their			
20	business base.			
21	MR. LEPENE: That's all I have, Your Honor.			
22	THE COURT: Thank you.			
23	MR. KEACH: Nothing further, Your Honor.			
24	THE COURT: Thank you for your testimony. You may			
25	step down, and he may be finally excused also, right?			
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1	I have a suggestion in light of the hour and in			
2	light of people's schedules, and that is that we do have the			
3	remainder of the stipulated exhibits that we would			
4	introduce. My suggestion is that we mark those and submit			
5	them either by courier or electronically, and that way we			
6	won't all have to wait around for us to do that.			
7	I mean, we've agreed on what they are. I'll			
8	certainly supply Mr. Lepene with copies, so that he can			
9	verify them. But rather than hold the Court up, and hold			
10	everybody up, I know it's been a long day for the Court, and			
11	some other matters as well, we would propose to do that			
12	unless Mr. Lepene has a dying desire to close, I would			
13	suggest that we submit post-trial briefs, if we wish to			
14	within a certain number of days and close in that fashion.			
15	THE COURT: Let me just deal with I think that			
16	makes great sense. Let me just check on the exhibits.			
17	So the trustee doesn't have any exhibits other			
18	than the A through U under No. 7 of the stipulation,			
19	correct?			
20	MR. KEACH: Well, we're going to put in all the			
21	exhibits that are in the stipulation, Your Honor. We're			
22	just going to put them in because they were agreed to be			
23	admitted by stipulation, they're not attached to any			
24	particular witness.			
25	THE COURT: Fair enough.			
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1	MR. KEACH: I just want to put them in the issue
2	of completeness and the stipulation.
3	THE COURT: Great. Is there anything in addition
4	to those exhibits that you need to put in?
5	MR. KEACH: No.
6	THE COURT: Okay. Mr. Lepene?
7	MR. LEPENE: Well, Your Honor, I don't know about
8	a dying desire, I hate to use that term when it relates to
9	myself, but I would like the opportunity to briefly address
10	the evidence that you've heard today and some of these
11	issues, just to put all of this into context. And what I
12	would ask if you could give us five minutes to collect our
13	thoughts, and then I would propose to be very brief in that
14	regard.
15	THE COURT: Sure. So let me just follow-up now.
16	I'm we're here to hear this, this is a significant claim
17	and we want to make sure it gets resolved, and get the
18	process that's due to you.
19	In addition to what you'd like to say today, do
20	you anticipate wishing to file anything in writing?
21	MR. LEPENE: Well, I think again I have not had an
22	opportunity to carefully review the reply that Mr. Keach
23	filed an hour and a half before the hearing, so I would like
24	to reserve the right, I mean, after I've had a chance to
25	really study the paper to perhaps submit something with
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1	THE COURT: Wonderful. It's a lawyer's commitment
2	I've heard right there.
3	All right. So why don't we take a brief break and
4	be back by 4:30, does that give you time?
5	MR. LEPENE: That would be fine, Your Honor.
6	THE COURT: Court will be in recess.
7	THE CLERK: All rise, please.
8	(Recessed at 4:22 p.m.; reconvened at 4:35 p.m.)
9	(Call to Court)
10	THE COURT: Mr. Lepene.
11	MR. LEPENE: Thank you, Your Honor, and thank you
12	for taking the time this afternoon to hear us.
13	THE COURT: Absolutely, it's an important issue.
14	MR. LEPENE: Just several points that I would like
15	to make and I will be brief.
16	The first point again raised in the trustee's
17	objection and in their reply as I understand it and read it
18	this afternoon or early late morning, I should say, do
19	interlying claims like this qualify.
20	And we've submitted papers with respect to this.
21	We think the trustee has simply misread the Boston and Maine
22	decisions, but we would also point out and we did cite this
23	in our paper, the fact is, the per diem claims in the Boston
24	and Maine case following the decision of the First Circuit
25	were recognized by the district court in the plan of

1		
	respect to our position.	
2	THE COURT: Fair enough. So would you like five	
3	minutes to gather your thoughts, and then you want to also	
4	at that point provide some oral	
5	MR. LEPENE: Yes.	
6	THE COURT: summing of what we heard today?	
7	7 MR. LEPENE: Yes, I would like to do that, Your	
8	Honor.	
9	THE COURT: And what are your thoughts of how long	
10	you'd like to orally sum up?	
11	MR. LEPENE: I think ten minutes max, Your Honor,	
12	I just I have I think at this point just a few points	
13	that I would like to make for the Court's benefit and then	
14	we can all depart for the weekend.	
15	THE COURT: And, Mr. Keach, how long do you wish	
16	to orally sum up, if at all?	
17	MR. KEACH: I well, I won't be able to resist	
18	if Mr. Lepene goes, but I'm sure I can do it in ten minutes	
19	or less, probably five minutes or less.	
20	THE COURT: Fair enough. Just I want to make	
21	arrangements with the CSOs and	
22	MR. KEACH: And understanding that 5 o'clock is a	
23	magic hour at times, I think we can both assure you we'll be	
24	well out of here before 5.	
25	MR. LEPENE: Without a doubt, Your Honor.	
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1	reorganization that was confirmed in the Boston and Maine			
2	case, as being six month claims that were entitled to			
3	priority.			
4	So this idea that per diem claims which the			
5	trustee concedes are equivalent to the claims that we are			
6	asserting here, the underlying claims, as a matter of			
7	controlling law in the First Circuit, are not recognized as			
8	six month claims is just flat out wrong. That's just not			
9	the law.			
10	Mr. Keach cites also the McClain Industries case,			
11	he mentioned it in his argument, it's not a railroad			
12	reorganization case. It's a Chapter 11 of a steamship			
13	company. And he refers and this is a decision of the			
14	Bankruptcy Court, Southern District of New York, so we're			
15	not talking about anyone within the First Circuit			
16	THE COURT: Right.			
17	MR. LEPENE: but the congressional provision			
18	that he is talking about that wasn't adopted, addressed the			
19	same question that the First Circuit had dealt with in the			
20	first Boston and Maine case, which is whether these types of			
21	claims would be entitled or required to be paid immediately			
22	during the course of the reorganization. It wasn't intended			
23	to address the question of the six month priority rule.			
24	So McClain Industries has no relevance, no bearing			
25	whatsoever.			
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1	Your Honor, I think again we're down to the issue
2	of reliance on the general credit of the MMA, or whether the
3	expectation of the parties is or was that we would be paid
4	out of current operating revenue.
5	You heard all of the testimony in that regard.
6	You have the exhibits. I would just make a few points.
7	When you when someone relies on general credit, they
8	don't identify the specific source of the payment from which
9	they are expecting to be paid. General credit and the
10	First Circuit in adopting that standard, words matter. It
11	was an issue of whether you provide the services in reliance
12	on general credit or whether you were providing the services
13	with the expectation that they would be paid out of current
14	operating revenue. That's the standard that you've got to
15	deal with because that's what the First Circuit tells us.
16	General credit considerations, when someone is
17	providing services in reliance on general credit, they don't
18	identify the specific source of payment. What they do is
19	they assess the overall financial condition of the company.
20	You heard the evidence. We didn't assess the
21	financial condition of the company because we weren't
22	relying on the MMA's general credit. Here, the parties
23	specifically identified the specific source of payment, and
24	it was operating revenue.
25	The other point I want to make is you have to
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1	parties, both on the part of the MMA and on the part of the
2	Irving Railroads was that we would be paid immediately
3	following their receipt of payment.
4	That is the evidence. It is uncontroverted. It
5	establishes without a doubt that the expectation was that we
6	would paid out of current operating revenue.
7	Last point. Mr. Keach made a point, well, there
8	was such a delay with respect to our getting paid. The fact
9	that there was a delay again, Your Honor, is irrelevant to
10	the standard that the First Circuit has indicated you have
11	to evaluate in deciding this question.
12	If there wasn't any delay, if cash would've been
13	paid in advance, or on delivery, we wouldn't be here. Of
14	course there's going to be a delay in payment. Any time you
15	consider this question, there will be a delay in payment.
16	It doesn't matter how long the delay in payment occurred,
17	the question is, as the First Circuit has told us, what was
18	the expectation of the parties.
19	Did they expect the payment would be made out of
20	current operating revenue, or did the claimant rely upon the
21	general credit of the railroad? The evidence here is
22	absolute, there is no evidence to support any conclusion at
23	all other than the agreement and expectation of the parties,
24	was that we would be paid out of current operating revenue,
25	and therefore, we qualify as a six month claim entitled to

Page 118 1 separate out the swap and the oil payments, they are two 2 separate matters. Even if the swap arrangement could be 3 characterized as Mr. Keach would like to characterize it as 4 the extension of secured credit, you know, we were taking collateral with respect to that, that's got nothing to do 5 6 with the agreement that dealt with the payment for the oil shipments, nothing to do with that whatsoever. 7 And with respect to the oil shipments, the parties 8 9 were very specific, that with respect to that, we would be 10 paid immediately following the payment that was received by 11 the MMA from the ISS. That's the evidence that you heard. 12 There is no evidence in this record to the contrary, absolutely none. 13 14 Now, the fact and Mr. Keach made a point of this, 15 that the other railroads who participate in the ISS in terms 16 of those that were involved in the movement of oil from 17 North Dakota to Saint John, they would -- because they're participants in the ISS, they get their share first. 18 19 I think you heard questions along those lines. 20 That has nothing to do with the standard that you have to 21 consider in deciding this question. It's not a function of 22 what the other railroads got out of the ISS, the function of 23 what the MMA got out of the ISS. Because what the MMA got 24 out of the ISS is their operating revenue, that they earned, 25 and the agreement that was reached, the expectation of the Veritext Legal Solutions

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priority	under Section 1171(b) of the Bankruptcy Code	
	To me, Your Honor, it's open and shut, than	k you.
	THE COURT: Thank you for that by the way.	So I
think eve	rybody's in agreement that the Boston and Ma	ine
cases, es	tablish the standard, right?	
	MR. LEPENE: Well, that the second Boston a	nd
Maine est	ablishes the standard.	
	THE COURT: And in the second Boston and Ma	ine
case. T k	now it's unfair to do it this way, but just	
	case you wish to supplement your closing arg	
	g later	umenc
in writin	MR. LEPENE: Uh-huh.	
	THE COURT: but the Court says on page 1	
"However,	if payment is claimed under the Fosdick pri	nciple,
the exist	ence of current debt fund must be demonstrat	ed."
That i	s that an additional element that I need to	worry
about?		
	MR. LEPENE: No, no, absolutely not, Your H	onor.
The fact	is, the First Circuit is unique, okay. The	and
they were	going through it's a wonderful opinion,	it
takes a l	ong time to parse through it, but and it'	s a
great his	tory lesson in terms of 19th Century receive	rship
law.		
	The fact of the matter is, in the Second Ci	rcuit
and the T	hird Circuit, and these cases are cited in t	he
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1	Boston Maine decision, they determined based upon Fosdick,		
2	that in order for there to be six month priority, you had to		
3	have a current expense fund. And because in, this was the		
4	Penn Central and the New Haven, in those cases, there was no		
5	current expense fund, therefore, no six month priority.		
6	The district court in this, in the Boston Maine		
7	case said, well, the Second Circuit, and Third Circuit,		
8	they're right, got to have a current expense fund, and if		
9	you don't have a current expense fund and there was none in		
10	the Boston Maine case, you don't get the priority.		
11	And what the First Circuit said is, that the		
12	Second Circuit and Third Circuit got it wrong, that if you		
13	look at all of the cases and it goes back to where the		
14	Miltenberger versus Logansport case, and says there are two		
15	separate alternative independent bases for establishing six		
16	month priority.		
17	Interestingly enough, the Fosdick case would have		
18	supported, if there had been a current expense fund, we		
19	would've been able to argue that we had an equitable lien,		
20	and we would've been ahead of the Federal Railroad		
21	Administration, potentially the Wheeling and Lake Erie, but		
22	if there's no current expense fund you don't get an		
23	equitable lien. That was the principle of restitution that		
24	the Court in the Boston Maine case was talking about.		
25	Miltenberger, the First Circuit says in Boston		
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Page 123 1 avoid credit risks. They just go ahead and they provide their product, and so what are they doing, they are relying 2 3 on the general credit of the railroad. 4 If we had done that, Your Honor, we wouldn't be in front of you, being able to assert that we're entitled to 5 priority. We didn't rely on the general credit. The 6 evidence establishes that we didn't rely on the general 7 8 credit. The evidence establishes that we expected to be 9 paid for when they got paid out of the ISS. 10 So what is the payments that they received out of 11 the ISS, that's their operating revenue. We meet the 12 standards, Your Honor, the evidence establishes it, and 13 we're entitled to priority. 14 THE COURT: Thank you very much. 15 MR. LEPENE: Thank you. MR. KEACH: Thank you, Your Honor, I will be brief 16 17 as promised. 18 First, there is one thing we do agree on, the 19 Fosdick principle is not relevant. That was an alternative 20 theory that I think is dead in the First Circuit, so I think 21 we can agree on that. 22 And I --23 THE COURT: See, this was worthwhile. We got an 24 agreement. 25 MR. LEPENE: I agreed that he was good, Your

Page 122 1 Maine totally separate principle. It's a principle of 2 recognizing that claims that arise from services that are provided within six months prior to reorganization are 3 4 entitled to be treated as administrative expense claims because they enabled the railroad to continue to operate as 5 6 long as you meet the three standards; got to be incurred within six months, got to be necessary for the operation of 7 8 the railroad, and the -- you know, the services that were 9 provided had to have been provided not in reliance on 10 general credit, but with the expectation that they would be 11 paid out of current operating revenue. And the evidence 12 here establishes all three. 13 THE COURT: That 1171(b) exceptioned how a 14 creditor would be normally treated, right? 15 MR. LEPENE: Absolutely. 16 THE COURT: And can you see an example of a 17 creditor that wouldn't satisfy most of those requirements? 18 MR. LEPENE: Absolutely. We have the rare case. 19 This is not going to open the floodgates to creditors coming 20 in and making claims. We are the rare case, based on the 21 evidence that you heard, most creditors, most creditors 22 simply ship their product or provide their services, they don't go through the pains that the Irving Railroads went 23 24 through here. 25 There is no evidence with respect to seeking to

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	Honor.
2	MR. KEACH: And it's just going to get better. I
3	admire Mr. Lepene's ability to make silk from a sow's ear
ł	here, but nothing could be further from the truth, in that
5	the evidence establishes as meeting any of the requirements
5	of 1171(b).
,	The only way that the Irving Railroads can even
3	with a straight face argue that they meet the 1171(b)
,	standards is by reducing it to no standard at all.
)	As Your Honor just pointed out, under their
L	articulation of the standard, everybody would qualify.
2	Every railroad that wasn't paid, every creditor extending
3	any kind of goods or services within the entire six month
ł	period would qualify. That's not the standard.
5	Like most priorities, and incidentally, the Boston
5	Maine case definitively does not establish they're entitled
,	to an administrative claim. You can only get there by
3	actually ignoring what happened after the remand to the
,	First Circuit went to the district court, and as was true
)	back then, the district court confirmed the railroad's plan.
	If you look at the description of the plan in that
2	case, and we've cited it in other places and here, the plan
3	itself lays out the priorities. Number one, the interlying
L	payments are not there, and number two, the 1171(b) priority
5	is subordinate to all of the other priority claims, and
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1	subordinate to the administrative claims.
2	So that there is absolutely no basis upon which
3	you can read that set of cases to make 1171(b)
4	administrative claims. It's just a gross misreading of the
5	decision, but also not terrible relevant to what we're
6	talking about today.
7	Your Honor, if we're going to make any sense out
8	of the requirements of 1171(b), when a party extends credit
9	to the debtor on credit terms, that is an objective
10	indication, the only one I know of, that you are relying on
11	the credit of the railroad.
12	Now, Mr. Lepene in an attempt to rescue this case
13	says, well, they identified the sources of payment. Well,
14	that's true, except they identified virtually all of the
15	debtor's business as sources of payment, because if you look
16	at the amounts owed by the Irving Paper Companies and you
17	look what was coming into the interlying system, as Mr.
18	Hansen admitted, because that was his problem, you're
19	talking about the business.
20	But what Mr. Hansen said unequivocally, I asked
21	him, and he said the exact words that are in the transcript,
22	that he wasn't relying on the cash flow of the MMA at all.
23	Not at all.
24	Prior to the shipments of oil, he was relying on
25	his collateral arrangement. He said specifically if MMA had
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Page 127 1 they entered into. What was that arrangement? Well, first and foremost as Judge Haynes' decision in (indiscernible) 2 3 points out, all right, this their share/our share stuff is 4 legally irrelevant. When you're not a petitioning member of 5 the ISS and the payment goes out to the ISS member from ISS, 6 they have dominion over that money, right. 7 So what were they really saying here? What they 8 were really saying when they entered into this arrangement, 9 as they documented, as proposed by the debtor, they were 10 extending 60 to 75 day credit terms. When the debt was 11 incurred, i.e., when they actually supplied the interlying 12 services from that time, to the time there was payment, was 13 60 to 75 days. 14 They went from 21-day credit terms per agreement 15 to 60 to 75 day credit terms per agreement, to be paid out of ISS collection. They had absolutely no security that it 16 17 was going to be paid out of the ISS collection. That was 18 MMA's money, just like their other money was MMA's money, 19 they weren't designated to that source. MMA didn't even 20 have to pay them from that money. Because MMA, under Judge 21 Haynes' opinion and under the law had complete dominion over 22 that money. 23 All that arrangement did, now that Mr. Hansen 24 understood the ISS system, was make him comfortable doing 25 what he was doing before, extending credit to MMA. And this

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7	Page 126
1	refused to pay, he was protected by his offset right. He
2	was just going to take the Irving Paper money which he
3	controlled and pay himself. That is the absence of reliance
4	on our cash flow. He wasn't relying he didn't care
5	whether we paid him or not, because he was just going to
6	take the Irving Paper money and pay himself.
7	THE COURT: Didn't he say that it would be an
8	administrative an accounting nightmare for him to do so?
9	MR. KEACH: He said it would be messy, and it's
0	always messy when a creditor sets off, but that doesn't
.1	change the fact that you're relying on your collateral.
2	It's messy when a secured creditor forecloses its
.3	collateral, but I don't think any of us would say that a
.4	secured creditor is relying on cash flow as opposed to its
.5	collateral, right. They're just a secured creditor with
.6	their foreclosure right, and however messy it might have
.7	been, he made it very clear, he wanted nothing to do with
.8	relying on either the credit of the company or the cash flow
9	or any other financial characteristic, because he was
20	protecting himself with his collateral arrangement. That
21	was why he was doing it. Largely because, as he admitted,
22	he had no understanding of the way ISS worked.
23	When the oil grew and it created a different set
24	of circumstances, his collateral was now insufficient, he
25	was under collateralized, they entered into the arrangement
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Page 128 time, he was extending 60 to 75 day credit. To say that the delay is irrelevant is to reduce the standard to no standard at all. If the credit terms don't matter, if the objective indication of an extension of credit and a reliance on creditworthiness is not that you've extended 60 to 75 day terms, then there is no standard. I have no idea what the standard would mean, if it doesn't matter what your credit terms are. What it would mean is that anybody and everybody who has a claim in six months would be making the very same claim that they're making. It would be total floodgates, and this case would be a very different case. I think it's pretty telling, we had lots of people render goods and services. We had lots of people performing interlying services, we had lots of creditors. None of them are here claiming 1171(b) priority but the Irving Railroad. That's because it's a hard standard to meet. Most people, as Mr. Lepene pointed out extend credit. And as Mr. Hansen admitted, unequivocally, clearly and honestly on cross-examination, that's exactly what Irving Railroads did. They extended credit. And that's the be all and end all of this decision. You don't have to go past one more fact, they don't meet the test. On top of which, Your Honor, with respect to the Veritext Legal Solutions

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1 Bangor -- excuse me, the Bangor and Aroostook case and the 2 Boston and Maine case, and McClain, you know, I think we've 3 argued those ad nauseam, I think the Court can read them on its own, I think they're very, very clear with respect to the fact that interlying payments don't meet the test. And 6 there's a very simple reason. 7 The necessity test, the necessary to the operation 8 of the railroad test is not meant to be specific to that railroad. It's an element of the public interest doctrine 10 and railroad reorganization. What's at interest there is 11 making sure the railroad continues to operate. 12 The test is, would the withholding of those 13 services, if there were no doctrine to protect them, shut 14 the railroad down, all right. So the people who get 1171(b) 15 priority are people like fuel suppliers. Right, because if 16 you don't protect fuel suppliers, they don't supply the 17 stuff that makes the railroad run. 18 If you -- the original 1171(b) payments before 19 there was a Bankruptcy Code that had a set of priorities in 20 it, the principle 1171(b) priority was called wages 21 Because if you didn't pay the employees, their railroad shut 22 down. 23 THE COURT: At a time when railroads were the true 24 arteries of --25 MR. KEACH: Correct.

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Page 131 1 somebody who sort of knew how to work the system. 2 Hansen admitted he didn't know. And it may be saved them a 3 couple of employees. But that was a choice. 4 The -- but not providing us with interlying services was not a choice. More importantly even if it had 5 6 to be a choice, as was I think clearly testified to, didn't 7 end the railroad, right. We could continue to operate, 8 freight was going to continue to get every place it was 9 getting when we were using their system. 10 What happened to the oil after Lac Megantic until 11 market conditions basically have slowed down on a lot of 12 those shipments, it continued to arrive in Saint John, New 13 Brunswick. It arrived through a Canadian route. The system 14 wasn't shutdown, right. 15 For the reason you don't protect interlying 16 payments is because they don't dictate the operation of the 17 railroad. And they just don't simply fit with the policy 18 goals of 1171(b). If you allowed interlying payments to 19 have 1171(b) protection, you would also as I said earlier, 20 have eviscerated the necessity of Judge Haynes' trust 21 opinion. Who would have litigated that case? If the 22 interlying payments were already protected as an 23 administrative expense, what would've been the point. 24 I mean the point was, they didn't have that 25 protection. They're not an administrative expense. They're

Page 130 1 THE COURT: -- most of our economy. Which isn't 2 the case anymore, right? MR. KEACH: Sadly true. But, Your Honor, you have 3 to remember that most of the existing, most of the non-tax priorities that are built into the 507 priorities now, under 6 the original railroad reorganizations were 1171(b) claims, right. 7 8 So it's not just the stuff that sits out there 9 now, it's all those claims, employees, employee benefits, 10 all that stuff, deposits. The fact is, that if you look at 11 that universe, what's common about them is if you don't 12 protect those services, the railroad shuts down. 13 As Mr. Simpson and Mr. Hansen admitted, they 14 didn't have the right to refuse to exchange with the railroad. They couldn't stop us from running over their 15 16 lines if they wanted to. That's the nature of modern 17 railroading, right, that's the system, because that's the 18 system that actually exists so that the railroads will run. 19 The ISS exists as a protective mechanism that 20 makes people, you know, be able to do that. The reason you 21 have that system. Irving opted out of that system for their 22 own convenience. Mr. Simpson's testimony was clear. They 23 had other people who would do it for them, right, Pan Am did 24 it for them, we did it for them, other people did it for 25 them, what did it prevent? It prevented them from hiring Veritext Legal Solutions 516-608-2400 www.veritext.com

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Page 132 not an 1171(b) priority. The hope of the railroads in that case was that they could establish some kind of actual or constructive trust. And as Judge Havnes property ruled, there is no such trust. This is a system of debtor/creditor relationships, and when bankruptcy intervenes, those creditors who are representing of the interlying system, get treated just like all the other unsecured creditors They're in the same place, in the same line as everybody else. And what's really at issue in this case, which is always true of priority disputes, right, within the bankruptcy priority system, is that this isn't a question of whether, you know, I get to keep money that he wants. It's a question of whether he takes money away from other creditors. That's what this is about. And as the fiduciary of this estate, it's my job not to let that happen. And in this case, there's just no 1171(b) basis. I think the evidence, particularly Mr. Hansen's, I think unequivocally honest testimony on cross, means they don't meet any of the tests. Thank you, Your Honor. THE COURT: Thank you. MR. LEPENE: Your Honor, may I respond just very briefly? THE COURT: Sure. But it'll be impossible to get Veritext Legal Solutions 212-267-6868 www.veritext.com 516-608-2400

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Page 133 1 significantly before 5. 2 MR. LEPENE: Well, I did go one minute over. I do think Mr. Keach was a little long-winded, Your Honor, if I 3 must sav. THE COURT: Mr. Lepene, please. 5 6 MR. LEPENE: Thank you, Your Honor. 7 First of all the Boston and Maine and the district court opinion following the First Circuit's opinion in that 8 9 case with respect to the per diem claims, Mr. Keach again is 10 just flat out wrong. Go back and read the district court 11 opinion, as I'm sure the Court will. The per diem claims, 12 there were \$3 million of claims, they are specifically 13 recognized as being six month priority claims. 14 And the plan of reorganization specifically 15 provided that they would be paid in full and in cash. And 16 the Court, the district court indicated that it had entered 17 an order that provided that they would be paid in full and in cash upon consummation of the plan, based on the Boston -18 - based on the First Circuit's opinion in the Boston and 19 20 Maine case. With respect to the floodgates, I think I've 21 22 addressed that. This does not open the floodgates. This is 23 a unique case. Your Honor, and the facts demonstrate that. 24 I won't belabor that point. 25 Again, the swap is separate from the oil Veritext Legal Solutions 212-267-6868 516-608-2400 www.veritext.com

Page 135 1 MR. LEPENE: The notion that Irving could not refuse to accept the interchange of traffic, and therefore, 2 3 the services they provided were not necessary for the 4 operation of the railroad, the same principles existed in the Boston Maine, that's a case from the late '70s. 5 6 The same principles were in place, that the 7 railroads were required to accept the interchange of 8 traffic, that was no issue. But notwithstanding that fact, 9 what did the First Circuit determine? It determined and it 10 specifically cited the interlying claims in the opinion as 11 being the type of claims that are entitled to be recognized 12 as priority six month priority claims. 13 And so this notion that this case can be resolved 14 because we -- as we're required to accept the interchange of traffic has no bearing on the decision that you have to make 15 in terms of evaluating the evidence. 16 17 And finally, as far as Bangor and Aroostook is 18 concerned, the fact that no one in that case raised the 19 issue of 1171(b) priority again is irrelevant. It's not addressed in the case. So that decision doesn't stand at 20 21 all for the proposition that under the right set of 22 circumstances, as exists here, someone who provides services 23 with the expectation that payment would be made out of 24

current operating revenue is not entitled to priority. That 25

case doesn't stand for that proposition at all.

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1	shipments, so whatever the testimony is with respect to the
2	swap doesn't translate to what the decision, your decision
3	should be in evaluating the evidence as far as the oil
4	shipments.
5	Now, Mr. Keach's argument that there is, you know,
6	in effect, it just again, just opens the floodgates, that
7	the First Circuit's opinion can't be read the way I would
8	suggest that it must be read. The fact is if you accept Mr.
9	Keach's argument, there is no then distinction between what
10	is meant by reliance on general credit and providing
11	services with the expectation that they would be paid out of
12	current operating revenue.
13	All of the arguments that Mr. Keach makes in terms
14	of the various things that vendors do in assessing whether
15	or not to provide services, that all relates to whether or
16	not someone is relying on the general credit. That's not
17	the evidence that is before you here. And if you accept Mr.
18	Keach's argument, in effect, you are rendering the First
19	Circuit's opinion meaningless. They drew the distinction
20	between what is meant by having an expectation of payment
21	out of current operating revenue and providing services in
22	reliance on general credit, it must mean something.
23	This is the evidence that establishes what the
24	distinction is. It doesn't open the floodgates.
25	THE COURT: Okay.
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1	THE COURT: All right. Thank you. A question I
2	have for you, since you're the the burden's on you
3	initially at least, what do you want to do as far as do
4	you want to now leave it in my hands to make the decision
5	based on the evidence I've heard, and the arguments people
6	have made orally, do you want the chance to brief and put in
7	closing arguments in a short brief and submit it to me,
8	what's your preference?
9	MR. LEPENE: Well, again, I would like the
10	opportunity to review in greater detail than I had the
11	opportunity to review, the reply that Mr. Keach has
12	submitted. There are now two papers in front of you on
13	these issues, I only have one in front of you.
14	So I would suggest either that you accord the
15	opportunity for post-trial briefs, or once I've had the
16	opportunity to review his paper in detail, perhaps I can
17	advise you and I don't know what Mr. Keach's preference is
18	in this regard, as to whether I would like the opportunity
19	to be able to submit anything further in writing.
20	But obviously I'm just will accept your
21	decision in that regard as to which alternative you would
22	prefer.
23	THE COURT: Thank you.
24	MR. LEPENE: Thank you.
25	THE COURT: Mr. Keach, what's your pleasure?
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Page 137 1 MR. KEACH: I think just to lend some certainty to 2 it, Your Honor, my suggestion is that we do simultaneous 3 post-trial briefs at our option, I mean, we can certainly 4 choose not to. THE COURT: Fair enough. 5 6 MR. KEACH: And I'm amenable to any time frame that meets the Court's needs and that is convenient for 7 counsel. I appreciate we're getting into holidays and some 8 9 other things, so. 10 THE COURT: Right, but you know, an important 11 dispute, a large amount of money, why don't we do this then. 12 Why don't we establish simultaneous briefing schedules and 13 you can choose whether or not you wish to submit a posttrial brief. They don't have to be long, but if there's 14 15 evidence you want to point to, and if there's an analysis 16 you want to present, let's talk about timing. What's your 17 pleasure time on this? MR. LEPENE: We have the holiday coming up, but 18 perhaps -- certainly no more than two weeks, and I could do 19 20 it in a shorter period of time if the Court were to desire 21 that. 22 THE COURT: No, that works out fine in accordance 23 with what I have coming up. I was even thinking more than 24 two weeks, but I don't want to push it out, if you don't 25 want it out. Veritext Legal Solutions

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1	concerned.
2	THE COURT: Okay.
3	MR. LEPENE: Your Honor, if you were prepared to
4	give us four weeks, I'll accept four weeks.
5	MR. KEACH: The only reason I would hesitate, and
6	I appreciate, I'm not so presumptuous to assume when you're
7	going to decide it after that, we're going to be making a
8	distribution probably on December 18th or the following
9	Monday, and since we're holding back funds for this, to the
10	extent that we can avoid that, I'd like to. So if we can do
11	this on the 10th, I would prefer it.
12	THE COURT: Okay. And let me just follow-through
13	on something. Let's say that I get the briefing in on
14	make up a date, whatever date, and I was able to issue a
15	decision on the 10th, we've only decided stage one of a two
16	stage thing here, that's if you win a hundred percent
17	MR. KEACH: Stage one is the only issue that
18	determines whether I have to withhold money or not.
19	THE COURT: Got it, okay. So I'll let you two
20	I'm happy either date. If we do it on the initially
21	you're talking about two weeks, Mr. Keach is pushing for
22	having it done on the you said the 10th?
23	MR. KEACH: December 10th is the Friday
24	Thursday.
25	THE COURT: Let's do 10th is a Thursday, so
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<i>.</i>	Page 138
1	MR. KEACH: Your Honor, originally I was most
2	concerned, as you know, about the distribution as a result
3	of the somewhat surprising developments in the district
4	court that distribution day has slipped a little bit. And I
5	know there's Thanksgiving, and then unfortunately I have to
6	be on the West Coast.
7	If I could suggest December 9, which is a
8	Wednesday, I think.
9	THE COURT: Yeah.
10	MR. KEACH: As the deadline for simultaneous
11	briefs, if that works for Mr. Lepene, that would work for
12	me.
13	THE COURT: I was actually thinking of four weeks,
14	which puts us right at what does that put us at, the
15	11th?
16	MR. KEACH: The 11th would be that Friday, that
17	would be fine, too, Your Honor.
18	MR. LEPENE: Is that four weeks, Your Honor?
19	THE COURT: I'm just making sure.
20	MR. LEPENE: That's three weeks I think, but
21	that's plenty of time.
22	THE COURT: Oh, I'm sorry, that's three weeks.
23	MR. LEPENE: Yeah, that would be plenty of time.
24	THE COURT: I cheated you out of a week.
25	MR. LEPENE: December 10th is fine, as far as I'm
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1	it's do it then, and the second thing is, right now it's
2	phrased as an all or nothing, and that's the way this is
3	before me, and that's how I'm going to treat it. I don't
4	see any way to do it but in an all or nothing fashion.
5	So
6	MR. KEACH: The only thing I would say to that,
7	Your Honor, and there are wo small repair charges.
8	THE COURT: Right, which are in the stipulation.
9	MR. KEACH: True to my argument as to what
10	actually qualifies and what doesn't
11	THE COURT: Right.
12	MR. KEACH: I think we're willing to admit that
13	those two repair charges would actually qualify, because
14	those are actual services that you one needs, right, need
15	to repair stuff.
16	THE COURT: So we've got about 7,000 that's not
17	MR. KEACH: So I think a \$7,000 gift that
18	THE COURT: Do you think on that, we could just
19	wrap it up and settle it on that? The answer is no?
20	MR. LEPENE: He's smiling, Your Honor, and I'm
21	glad you're smiling.
22	MR. KEACH: We'll even cut him a check within a
23	reasonable period of time on the 7 grand, Your Honor.
24	THE COURT: I'm sure you would. Wonderful, but
25	other than that, do
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IRVING'S WITNESS

Karl Hansen

Ian Simpson

[& - accounting]

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TESTIMONY

EXAM BY

Mr. Lepene

Mr. Keach

Mr. Lepene

Mr. Lepene

Mr. Keach

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11 Analysis of MMA Swap History

NO DESCRIPTION

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13 Invoices

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EVID.

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71

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1	MR. KEACH: Other than that, I think it is all or	1	
2	nothing.	2	
3	THE COURT: Okay. So to that end, I throw it out,	3	
4	if there's some resolution the parties come to between now	4	IRVING'S
5	and when they submit their briefs, I'm all interested in a	5	WITNESS
6	hearing on any type of emergency or expedited basis. I	6	Karl Har
7	don't know whether there will be, I'm anticipating there	7	
8	won't, but I'll let you work to that end. Seeing as I	8	
9	brought up the Fosdick point so confidently that you're now	9	Ian Simp
10	thinking that I don't know what I'm doing, and that you're	10	
11	really willing to figure out a settlement, but all that	11	
12	aside, as soon as I get the briefs, I'll treat it with all	12	
13	seriousness that it deserves.	13	
14	I'd like to thank you for your argument, I'd like	14	
15	to thank you for your briefing, I know this isn't easy, I	15	PARTY
16	know you've been under pressure timewise, and I'll look for	16	Irving
17	the briefs or some other word from you and we'll go from	17	
18	there.	18	
19	MR. LEPENE: Thank you, Your Honor.	19	
20	MR. KEACH: Thank you, Your Honor.	20	
21	THE COURT: Thank you. Court will be adjourned.	21	
22	THE CLERK: All rise.	22	
23	(Whereupon these proceedings were concluded at 5:13 PM)	23	
24	* * * *	24	
25		25	
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1	CERTIFICATION
2	
3	We, Dawn South and Sheila Orms, certify that the foregoing
4	transcript is a true and accurate record of the proceedings.
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