

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC  
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**POST-HEARING BRIEF OF NEW BRUNSWICK SOUTHERN RAILWAY  
COMPANY LIMITED AND MAINE NORTHERN RAILWAY COMPANY  
IN SUPPORT OF THE ALLOWANCE OF THEIR PROOFS OF CLAIM**

New Brunswick Southern Railway Company Limited (“NBSR”) and Maine Northern Railway Company (“MNR” and together with NBSR, the “MN/NB Railways”) hereby submit this post-hearing brief in support of the allowance of the proofs of claim they filed in the chapter 11 case of the debtor, Montreal Maine & Atlantic Railway, Ltd. (“MMA” or the “Debtor”).

**INTRODUCTION**

The legal arguments advanced by the Trustee in his Objection to the proofs of claim filed by the MN/NB Railways [D.E. 1826], in his Reply in support of the Objection [D.E. 1878], and in his closing argument at trial are *wrong as a matter of law*, and are completely at odds with the First Circuit’s opinions in the *Boston & Maine* case and the District Court’s opinion, on remand, confirming Boston & Maine’s plan of reorganization. Moreover, the Trustee’s assertions regarding the relevant facts in this matter are *clearly erroneous* and without any evidentiary support.

Based upon controlling law in the First Circuit, and the uncontroverted evidence presented at the hearing on this matter, the Court should enter an order finding that the claims of the MN/NB Railways for freight services provided to the Debtor within six months prior to the commencement of the Debtor’s chapter 11 case qualify as “six-month” claims and are entitled to

priority under section 1171(b) of the Bankruptcy Code because the services were necessary to the operation of the Debtor's railroad and were provided with the expectation that payment would be made from the Debtor's current operating revenue, rather than in reliance upon the Debtor's general creditworthiness.

## DISCUSSION

### **I. The Trustee Has Misstated the Law Governing this Dispute**

#### **A. The Decisions of the Court of Appeals and the District Court in the *Boston & Maine* Case Establish Beyond Doubt that Interline Claims Qualify as Six-Month Claims**

For reasons which we cannot comprehend, the Trustee has continued to advance the argument that in the *Boston & Maine* case, the First Circuit held, as a matter of law, a railroad's claims arising from the provision of interline freight services do not qualify for status as "six-month" priority claims. Nothing could be further from the truth. As we explained in our Response to the Trustee's Objection [D.E. 1855] (the "MN/NB Railways' Response"), the *per diem claims* asserted by the interlining railroads in the *Boston & Maine* case (which the Trustee concedes are functionally equivalent to the interline claims asserted by the MN/NB Railways in this case) were recognized as six-month priority claims and were paid in full, in cash, on the effective date of the debtor's plan of reorganization. See MN/NB Railways' Response at pages 6-8. That should have put the Trustee's argument to rest. Nonetheless, because the Trustee continues to advance his erroneous reading of the *Boston & Maine* decisions, a brief review of those decisions is warranted.

#### **1. Boston & Maine I Dealt Only With the Timing of Payment, Not Priority under a Plan of Reorganization**

The sole basis for the Trustee's assertion that, as a matter of law in this Circuit, interline claims cannot qualify as "six-month" claims, is the First Circuit's decision in *In re Boston &*

*Maine Corp.*, 600 F. 2d 307 (1st Cir. 1979) (“*Boston & Maine I*”). *Boston & Maine I* did not, however, address in any way the question of whether interline freight claims qualify as six-month claims. *Boston & Maine I* dealt *only* with the question of the timing of the payment of such claims - whether pre-petition per diem claims were required to be paid immediately at the outset of the reorganization or whether the reorganization court had discretion, instead, to defer payment to a later point in the proceeding. The First Circuit held that the reorganization court had such discretion, and had not abused its discretion in refusing to order immediate payment of the per diem claims. *Id.* at 311-312.

In reaching its conclusion that *immediate* payment of the per diem claims was not required, the Court noted that the Seventh Circuit had come to the opposite conclusion in *Chicago, Rock Island and Pacific Railroad Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 537 F. 2d 906 (7th Cir. 1976) (“*Rock Island*”) and that in enacting the new Bankruptcy Code pursuant to the Bankruptcy Reform Act of 1978, Pl. No. 95-598, Congress had rejected the Senate version of the bill that would have codified the Seventh Circuit’s holding in *Rock Island*.

As the First Circuit explained in *Boston & Maine I*:

... Congress expressly rejected a draft that would have codified the Rock Island rule. Congress chose instead to place the *timing of payment* of per diem claims exclusively in the discretion of the reorganization court. Thus, the resolution of conflicting policies we find implicit in the old Act is explicit in the new.

*Id.* at 313 (emphasis added and internal citations omitted).<sup>1</sup>

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<sup>1</sup> In his Reply (at page 8), and in his opening statement at the hearing, the Trustee cited a statement from *In re McLean Indust., Inc.*, 103 B.R. 424, 426-27 (Bankr. S.D.N.Y. 1989) referring to Congress’ rejection of the proposal that would have required *immediate* payment of per diem claims, as evidence that the claims of the MN/NB Railways “are *per se* not entitled to 1171(b) priority status.” Similar to his misreading of the First Circuit’s decision in *Boston & Maine I*, the Trustee has confused the issue of *immediate* payment of interline claims with the issue of the priority to which those claims are entitled under section 1171(b) of the Bankruptcy Code. As explained by Judge Coffey of the Seventh Circuit in *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F. 2d 562, 568-69 (7th Cir. 1986), the case relied upon by the bankruptcy court for its statement in *McLean Industries*:

Simply put, the only issue addressed by the First Circuit in *Boston & Maine I* dealt with the timing of the payment of per diem claims. The issue of whether the per diem claims would be entitled to priority status as six-month claims under such plan of reorganization as might eventually be proposed by the Boston & Maine was not addressed, nor even mentioned, in the First Circuit's opinion in *Boston & Maine I*.

2. **Boston & Maine II Established that Interline Claims are Entitled to Priority as Six-Month Claims**

The question of whether per diem, and other interline claims, were entitled to treatment as six-month priority claims under Boston & Maine's plan of reorganization was addressed by the First Circuit in its second decision in the Boston & Maine case, *In re Boston & Maine Corp.*, 634 F. 2d 1359 (1st Cir 1980), *cert denied*, 450 U.S. 982, 101 S. Ct. 1518 (1981) ("*Boston & Maine II*"). The interlining railroads which sought six-month priority status for their per diem claims included Chesapeake and Ohio Railway Company, Baltimore and Ohio Railway Company, Western Maryland Railway and Canadian Pacific Ltd. (the "B & M Interline Carriers"). As noted by the First Circuit:

The claims for which priority is asserted under the "Six Month Rule" do not exceed \$3,000,000 and include per diems for the period commencing September 13, 1969; ...

*Id.* at 1365.

In addressing the per diem claims of the B & M Interline Carriers, the First Circuit specifically identified "*interline claims*" as the type of claim entitled to priority, referring to the possible stoppage of traffic interchange as one of the "*disastrous consequences*" of failing to pay

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Congress rejected our holding that the rules of the ICC, rather than principles of bankruptcy, should govern the question of *whether pre-reorganization per diem charges should be paid immediately*. (emphasis supplied).

The Senate provision rejected by Congress in enacting the Bankruptcy Code dealt only with the issue of whether per diem charges had to be paid *immediately* during the course of the reorganization. It did not address the priority to which such claims were entitled under a plan of reorganization.

such claims. *Id.* at 1377-78. The Court also cited with approval a number of cases which recognized *interline freight claims* as quintessential examples of six-month claims. See *Southern Railway v. Flournoy*, 301 F. 2d 847, 853-54 (4th Cir. 1962); *Finance Co. vs. Charleston*, 62 F. 205 (4th Cir. 1984); *In re Tennessee Central Ry.*, 316 F. Supp. 1103 (M.D. Tenn. 1970), *vacated on other grounds*, 463 F. 2d 73 (6th Cir. 1972).

The Court held that the \$3,000,000 of per diem claims asserted by the B & M Interline Carriers were entitled to six-month priority status, so long as each claim:

- (1) represents a current operating expense necessarily incurred, (2) was incurred within six months before the reorganization petition was filed, and (3) the goods or services were delivered in the expectation that they would be paid for out of current operating revenues of the railroad, and not in reliance on the road's general credit ...

*Id.* at 1378.

There is simply no question that the First Circuit found in *Boston & Maine II* that the per diem claims asserted by the B & M Interline Carriers were entitled to treatment as priority claims as long as they met the characteristics the Court had identified. The Trustee's arguments to the contrary are nonsense.<sup>2</sup>

3. **The Boston & Maine District Court Decision Confirmed the Treatment of the Interline Per Diem Claims as Six-Month Priority Claims**

Despite the First Circuit's clear holding in *Boston & Maine II* that the \$3,000,000 of per diem claims of the B & M Interline Carriers were entitled to be treated as priority claims so long as they satisfied the requirements laid out by the Court, the Trustee contends that such claims

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<sup>2</sup> At the hearing, the Trustee cited *In re Bangor & Aroostook Railroad*, 320 B.R. 226 (Bankr. D. Maine 2005), in support of his argument that interline claims do not qualify for 1171(b) priority status. In that case, the Court held that interline balances owed to participants in the Interline Settlement System were not held in trust and thus payments made within 90 days prior to bankruptcy could be subject to challenge as preferential transfers. The decision did *not* mention nor address in any way whether interline claims might qualify for status as six-month priority claims.

were not recognized as six-month priority claims in the decision of the District Court, on remand, confirming Boston & Maine's plan of reorganization. Once again, the Trustee is wrong.

In its opinion confirming Boston & Maine's amended plan of reorganization, the District Court found that the \$3,000,000 in per diem claims of the B & M Interline Carriers referenced in *Boston & Maine II* were to be treated as six-month claims. *In re Boston & Maine Corp.*, 46 B.R. 930, 941 (D. Mass. 1983). At issue, however, was the additional claim asserted by certain of the B & M Interline Carriers that they were entitled to post-petition interest on their claims. The District Court noted that "in accordance with the principles [of the First Circuit's opinion] in *Boston & Maine*," the principal amount of each allowed six-month claim was to be paid in full, in cash, on the effective date of the Boston & Maine plan. *Id.* at 956. The District Court found no support, however, in the First Circuit's decision in *Boston & Maine II* for the interest claims asserted by the B & M Interline Carriers:

It is clear that neither Order No. 637 [providing for payment in full of the per diem claims] nor the decision of the First Circuit in *Boston & Maine*, *supra*, supports the interest claims. The question of entitlement to interest was not considered by the Court of Appeals, nor was it considered by this court.

*Id.* at 956.

Although the District Court denied the allowance of post-petition interest, the per diem claims asserted by the B & M Interline Carriers were recognized as six-month priority claims and were paid in full as required by the First Circuit's opinion in *Boston & Maine II*. The Trustee once again has simply misread the case.<sup>3</sup>

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<sup>3</sup> In his closing argument at the hearing, the Trustee alluded to the fact that in the District Court's decision, the Court noted that under the debtor's plan, the "six-month" claims were accorded a priority junior to administrative claims and secured tax claims, but senior to all other claims, including those of bondholders. Hearing Tr. at page 124, line 21 – page 125, line 1. Although the placement of six-month claims below other administrative expense claims in the plan was clearly not consistent with the First Circuit's holding in *Boston & Maine II* which required equality of treatment as between six-month claims and administrative expense claims, such placement was irrelevant, and there was no reason for the B & M Interline Carriers to question the placement of their claims, since the Boston & Maine

**B. The Trustee has Misconstrued What Must Be Shown to Establish that the Services Were Necessarily Incurred**

The Trustee's assertions as to what must be shown to establish that the interline freight services provided to the MMA were "necessarily incurred" are equally flawed. The Trustee argues that the services were not necessary because MMA could have chosen alternative routes to carry its shipments to their final destination, and thus the refusal to provide such services would not have resulted in the complete shutdown of the railroad. The Trustee argues further that because the MN/NB Railways were required to accept the interchange of traffic from the MMA, their claims do not qualify, as a matter of law, for priority status as six-month claims under section 1171(b).

The Trustee is wrong on both points. The test is not whether the individual claimant has the power to shut down the operation of the railroad, but whether the claim in question falls within a *class* of claims which are indispensable to operation of the business. The First Circuit's opinion is very clear on this point. In addressing the Supreme Court's holding in *Miltenberger v. Logansport, C. & S.W. Ry.*, 106 U.S. 286, 1 S. Ct. 140, 27 L. Ed. 117 (1882), the First Circuit observed that:

The Court's rationale excludes the inference that only those creditors are entitled to priority of payment who demand immediate payment as a condition of continuing to supply a service or commodity of which they are monopolists. The Court was defining the *classes* of claims payment of which was indispensable to the business of the railroad ...

*Id.* at 1377 (emphasis in original; footnotes omitted).

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plan specifically provided that the six-month claims were to be paid in full, in cash, on the effective date of the plan, as was the case with administrative expense claims. For our purposes, what is significant about the Boston & Maine plan confirmed by the District Court is that, consistent with the First Circuit's holding in *Boston & Maine II*, it recognized the per diem claims of the interlining railroads as six-month claims entitled to priority over the claims of unsecured creditors.

The First Circuit went on to note specifically that interline claims constituted one of the *classes* of claims that qualified for the priority:

The [Miltenberger] Court's depiction of the disastrous consequences of failing to pay labor claims – a work stoppage – or *interline claims* – a stoppage of traffic interchange – is directed to restricting the *class of claims* entitled to priority of payment to claims for those goods and services that are indispensable to the continued performance of the transportation service. ... The test is not whether the claimant has the naked power to exert economic duress, but whether the expenses have the *characteristics of those that the receiver pays from revenue as expenses of administration*....

*Id.* at 1377-78 (emphasis supplied; footnotes omitted).

There is no question, as the Court in *Boston & Maine II* specifically recognized, that the interchanging of freight among railroads is “indispensable to the continued performance of transportation services” and thus interline claims of the type asserted by the MN/NB Railways in this case qualify for status as six-month priority claims. The fact that alternative routes may have been available (albeit less economical and less practicable) is of absolutely no consequence.

The First Circuit's opinion in *Boston & Maine II* also makes short shrift of the Trustee's second argument – that the claims asserted by the MN/NB railways do not qualify for priority status because the MN/NB Railways were required under applicable provisions of federal transportation law to accept the interchange of traffic from the MMA. That has long been the case and was recognized as such with respect to the per diem claims at issue in the *Boston & Maine* case. *See Boston & Maine*, 634 F. 2d at 1362 (“ ... the interlining of freight cars is mandatory under the Interstate Commerce Act, 49 U.S.C. §§ 1 (4), (10), (11), (14), (15), and (17)). Notwithstanding the fact that the interlining railroads were required under the Interstate Commerce Act to loan their railcars to the Boston & Maine, their per diem claims were, nonetheless, recognized as being entitled to priority status as six-month claims. As the First

Circuit noted, “the test is not whether the claimant has the naked power to exert economic duress.” *Id.* at 1378. The Trustee’s contention that the claims of the MN/NB Railways are not entitled to priority status because they were required to accept the interchange of freight traffic is entirely without merit.<sup>4</sup>

**C. The Trustee Has Misconstrued the Standard for Determining Whether Services Were Provided in the Expectation that Payment Would be Made from Current Operating Revenue, Rather Than in Reliance on the Debtor’s General Credit**

The Trustee contends that the extension of payment terms establishes, as a matter of law, that the services furnished by the MN/NB Railways were provided *not* with the expectation that payment would be made from current operating revenue, but rather in reliance upon MMA’s general creditworthiness. As the Trustee put it during closing argument:

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 60-75 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.

Transcript of November 20, 2015 Hearing (“Hearing Tr.”, a copy of which is attached as Exhibit A) at page 128, lines 4-9.

The Trustee’s confusion notwithstanding, the standard is not whether payment terms were extended to the debtor. If that were the standard, there would be no six-month priority rule.

The First Circuit articulated the standard with great specificity in its opinion in *Boston & Maine II*:

... when the time comes to determine membership in the class it will be for the reorganization court to determine ... whether the non-payment reflects an intentional extension of credit to the railroad, or the intervention of the reorganization petition before expiration of the

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<sup>4</sup> Although the MN/NB Railways were required to accept the interchange of freight traffic from the MMA, they had the right to require advance payment as a condition of doing so if MMA failed to pay freight charges when due. *See The National Railroad Passenger Corporation – Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, ICC Docket No. 31250, 1990 ICC Lexis 52 (Feb. 6, 1990) at \* 38-39.

ordinary billing and payment period, or some non-contractual indulgence or inadvertence on the part of the claimant, or deferment of payment on the part of the railroad; and *whether, if the transaction giving rise to the claim had any credit term, it was compatible with a general expectation of payment from current receipts or indicated reliance on the railroad's general credit.*

*Id.* at 1379-80 (emphasis supplied; footnotes omitted).

Clearly, the mere extension of payment terms is not the driving factor in the analysis. The answer must be derived from the evidence of the parties' expectations and understanding regarding the source of payment. Were the payment terms provided to the debtor "*compatible with a general expectation of payment from current receipts?*" In this case, as discussed below, the uncontroverted evidence establishes beyond doubt that the MN/NB Railways provided interline freight services to the MMA in the expectation that payment would be made from MMA's current receipts, as and when collected.

**II. The Evidence Establishes that the Interline Freight Claims of the MN/NB Railways Qualify as Six Month Priority Claims**

**A. The Interline Freight Services Were Necessary for the Operation of MMA's Business**

Although the Trustee attempted to downplay the importance of MMA's interchange connection with the MN/NB Railways, the Disclosure Statement he filed and served upon all creditors in this case, tells the true story. As described in the Disclosure Statement, MMA's rail system:

... was a substantial component of the transportation systems of Northern Maine, Northern New England, Quebec and New Brunswick. The System provided:

- (a) *The shortest rail transportation route between Maine and Montreal and a critical rail artery between Saint John, New Brunswick and Montreal;*
- ...
- (c) Outlets for major producers of paper, lumber, wood and agricultural products in eastern and northern Maine; and

- (d) In-bound transportation for chemicals and other products used by paper producers and consumers in Maine

First Amended Disclosure Statement for the Trustee's Plan of Liquidation Dated July 7, 2015 [D.E. 1497] (the "Disclosure Statement") at page 13 (emphasis supplied).<sup>5</sup>

The importance to MMA's business of the "critical rail artery" terminating at the oil refineries in Saint John, New Brunswick was explained in the Disclosure Statement in the following way:

In the two years leading up to the commencement of the Chapter 11 case, the Debtor had benefitted from the dramatic increased use of trains to move oil from the central and western regions of the United States, specifically, the Bakken oil fields in North Dakota, to refineries in the east .... Prior to the Derailment, the Debtor had been hauling about 500,000 barrels of oil monthly through Quebec and Maine. Due to this business, the Debtor enjoyed a significant increase in gross revenue, and for a short time, positive net operating income, although needed capital expenditures remained deferred and unfunded.

Disclosure Statement at pages 19-20.

Ian Simpson, the MN/NB Railways' General Manager, testified at the hearing regarding the freight services provided to the MMA.<sup>6</sup> Mr. Simpson confirmed the importance to the MMA of the critical rail artery between Montreal and Saint John, New Brunswick, which required the interchange of traffic between the MMA and the MN/NB Railways, characterizing it as the most direct, economical and practical route for the shipment of oil to refineries in Saint John. Hearing Tr. at page 97, line 19 – page 98, line 5, and page 104, line 14 – page 106, line 17.

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<sup>5</sup> The Court may take judicial notice of the Trustee's Disclosure Statement in this case. Fed. R. Evid. 201(c).

<sup>6</sup> Mr. Simpson described the process involved in the interchange of freight traffic between the MMA and the MN/NB Railways. With respect to traffic carried by the MMA to an interchange point with the MN/NB Railways, Mr. Simpson explained that the railcars were decoupled from MMA's locomotive, hooked on to an MN/NB Railway locomotive and carried to the final destination by MN/NB Railway personnel. Hearing Tr. at page 94, lines 5-23. The Trustee's contention in his Reply (at pages 7-8, ¶ 11) that the interchange did not involve the provision of services, but rather merely granted permission for the MMA to pass over the MN/NB Railways tracks for a fee is factually incorrect.

Mr. Simpson testified further that the MMA had made substantial efforts to attract business in Saint John that would be serviced through its interchange with the MN/NB Railways. Sales trips had been made by MMA's President, Bob Grindrod, its Chairman, Ed Burkhardt, and its Vice President of Sales and Marketing, Joseph McGonigle for the purpose of developing business in Saint John. Hearing Tr. at page 94, line 24 – page 97, line 4.

The testimony at the hearing established that the inability of the MMA to interchange traffic with the MN/NB Railways on the “*critical rail artery*” between Saint John, New Brunswick and Montreal, would have had a significant adverse impact on MMA's operations, including, among other things, the loss of business with the various paper companies owned by JD Irving, Limited, which were among the largest customers of the MMA, and a substantial reduction in revenue generated from the shipment of oil to the refineries in Saint John. Hearing Tr. at page 75, lines 2-13; page 94, line 24 – page 97, line 4; page 110, lines 11-20. There was no evidence to the contrary.

The record in this case could not be more clear. The interline freight services provided by the MN/NB Railways to the Debtor were necessary for the operation of the Debtor's business.

**B. The MN/NB Railways Provided the Services With the Expectation that Payment Would be Made from Current Operating Revenue**

**1. The Uncontroverted Evidence Presented at the Hearing Established the Expectation and Understanding of the Parties**

The evidence presented at the hearing established that from the inception of their business relationship with the MMA in 2003, the MN/NB Railways were not willing to rely upon MMA's general creditworthiness in providing freight services to it. Hearing Tr. at page 43, line 24 – page 46, line 22. In order to avoid taking on any credit risk, Karl Hansen, the General Manager of Corporate Credit and Finance for J.D. Irving Limited, the parent of the MN/NB

Railways, created what he referred to as the “swap” arrangement with the MMA, pursuant to which on a weekly basis, MMA would simultaneously exchange with the MN/NB Railways and their affiliated paper companies (the “Irving Paper Companies”), who were among the largest customers of the MMA, wire transfers of the amounts each owed the other. Mr. Hansen’s testimony at the hearing was clear regarding the reasons for entering into this arrangement with the MMA:

- Q. ... [w]hat 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.

Hearing Tr. at page 46, lines 18-22.

The arrangement worked well for a number of years, primarily because the amounts owed to the MMA by the Irving Paper Companies each week exceeded the amounts owed by the MMA to the MN/NB Railways. Hearing Tr. at page 46, lines 5-16. Thus, the Irving Paper Companies were, in effect, providing to the MMA on a weekly basis the cash (i.e. current operating revenue) with which the MMA was able to satisfy its obligations to the MN/NB Railways.

With the increase in volume of oil shipments carried by the MMA, and interchanged with the MN/NB Railways for ultimate delivery to the oil refineries in Saint John, New Brunswick, the situation changed dramatically. Beginning in 2012, the amounts owed by the MMA for interline freight services provided by the MN/NB Railways began to substantially exceed the amounts owed by the Irving Paper Companies to the MMA. Hearing Tr. at page 50, line 17 – page 51, line 2. As a consequence, MMA proposed to modify the payment arrangement with the MN/NB Railways. Pursuant to MMA’s proposal, amounts owed to the MN/NB Railways for

interline freight charges incurred in connection with oil shipments would be carved out of the swap arrangement, and instead, those charges would be paid to the MN/NB Railways upon MMA's receipt of payment from the Interline Settlement System (the "ISS") of the amounts owed to the MMA for such shipments. Hearing Tr. at page 51, line 13 – page 52, line 23; page 54, line 10 – page 57, line 20; Irving Exhibit 5, E-mail from Robert Grindrod to Ian Simpson, dated June 4, 2012.

The MN/NB Railways accepted MMA's proposal. Irving Exhibit 7, E-mail from Joanne Kelter to Donald Gardner, dated July 26, 2012. Karl Hansen explained the reasons for doing so:

... [o]nce I was briefed a bit on what this ISS was I felt comfortable enough that moneys would be coming into MMA without any hiccups, so to speak, and that shortly thereafter within a matter of days I would be paid our share.

Q. And when you refer to our share what are you referring to?

A. The monies owed by MMA for the transportation of oil on our lines.

Hearing Tr. at page 59, line 22 – page 60, line 5.

Testimony from both Karl Hansen and Ian Simpson confirmed that from July 2012, the MN/NB Railways relied upon the agreement they had reached with the MMA in continuing to accept the interchange of oil shipments. Mr. Hansen testified as follows:

Q. Based upon the agreement that is referenced in the emails that you've just identified as well as your understanding of the agreement that was reached between the MMA and the Irving Railroads, what was New Brunswick Southern Railways' expectation regarding payment by MMA for freight services provided in connection with oil shipments?

A. Our expectation was that we would be paid immediately after they were paid from the ISS system.

Hearing Tr. at page 63, lines 18-25.

Mr. Hansen also made it clear that the MN/NB Railways did not, at any time, rely upon MMA's general creditworthiness:

Q. Mr. Hansen, in providing freight services in connection with the interchange of traffic with the MMA did the Irving Railroads rely upon MMA's general creditworthiness?

A. Absolutely not.

Q. What did the Irving Railroads rely upon?

A. We relied upon them being paid out of the ISS system, which I felt was secure, and that meant I would be paid shortly thereafter.

Hearing Tr. at page 67, line 19 – page 68, line 1.

Mr. Simpson corroborated Mr. Hansen's testimony explaining that:

... we expected prompt payment, because when ISS – when they received their money from the ISS, they were receiving their share and our share, and that's all we were looking for. When they got paid, we were to be paid.

Hearing Tr. at page 98, line 23 – page 99, line 2.

The record in this case could not be more clear. The evidence presented by the MN/NB Railways established that:

- From the inception of their business relationship, the MN/NB Railways did not rely upon MMA's general creditworthiness in providing freight services to the MMA
- The weekly swap arrangement between the MMA and the MN/NB Railways on non-oil shipments was put in place by the MN/NB Railways to avoid credit risk and, in effect, provided the MMA with the cash (i.e. current operating revenue) necessary to satisfy its obligations to the MN/NB Railways
- The agreement and expectation of the MN/NB Railways and the MMA with respect to interline freight charges incurred in connection with the interchange of oil shipments was that MMA would pay the MN/NB Railways immediately upon MMA's receipt of payment from the ISS of amounts owed to it for such shipments.

2. **The Trustee's Contention that the MN/NB Railways Relied Upon MMA's General Creditworthiness in Providing Interline Freight Services Is Without Any Factual Support**

In his Objection, the Trustee asserted two grounds in support of his contention that the MN/NB Railways relied upon MMA's general creditworthiness in providing it with interline freight services. First, he argued that the decision of the MN/NB Railways to opt out of participation in the ISS demonstrated their reliance upon MMA's general credit. Objection at pages 10-11. Second, he contended that the MN/NB Railways "could not possibly have been looking to the Debtor's operating revenues for payment" because those revenues were subject to a security interest held by Wheeling & Lake Erie Railway Company ("Wheeling") as collateral for a \$6 million line of credit, and all receivable collections, upon receipt, were remitted to Wheeling to pay down the line of credit. *Id.* at page 11.

There is, however, absolutely no evidence to support either contention. With respect to the decision of the MN/NB Railways not to participate in the ISS, the testimony of Messrs. Hansen and Simpson established that the decision was not influenced in any way by an evaluation of MMA's creditworthiness. Hearing Tr. at page 42, lines 8-11 and page 93, lines 23-25. Participation in the ISS requires expertise and resources that the MN/NB Railways did not possess and would have resulted in a significant duplication of effort with other railroads which were members of the ISS and with which the MN/NB Railways interchanged traffic. *Id.* at page 92, line 1 – page 93, line 22. The creditworthiness of the MMA was not a factor.

The Trustee's second contention, that the MN/NB Railways could not have expected to be paid from MMA's current receipts because all collections of MMA's accounts receivable were immediately remitted to Wheeling to pay down its line of credit, is patently false. Accounts receivable collections were not remitted to Wheeling for payment against the line of credit.

During the period from January 1, 2011 through the date MMA filed its chapter 11 petition, it generated approximately \$85,533,000 in revenue. *See* Montreal Maine & Atlantic Railway Ltd. Statement of Financial Affairs [D.E. 216]. From June 15, 2011 through August 6, 2013, the total principal amount paid to Wheeling in reduction of its loan was \$2,400,000. *See* Trustee's Exhibit B, Wheeling Line of Credit Activity - June 15, 2011 through August 6, 2013. Based upon this evidence, even the Trustee conceded at trial that MMA had “complete dominion over that money.” Hearing Tr. at page 127, lines 20-22.

Given that MMA had complete dominion and control over its accounts receivable collections from the ISS, and putting aside the swap arrangement for payment of non-oil shipments pursuant to which the Irving Paper Companies controlled the cash used by MMA to satisfy its obligations to the MN/NB Railways, the Trustee is left only with the argument that the mere existence of Wheeling's security interest precluded any reasonable expectation on the part of the MN/NB Railways that they would be paid out of current operating revenue. No evidence was offered by the Trustee as to why the existence of Wheeling's security interest, even if it was listed in a Dun & Bradstreet Report obtained by the MN/NB Railways,<sup>7</sup> would have precluded the MN/NB Railways from expecting to receive payment for such freight charges from funds received by MMA from the ISS. The question is not what would have transpired if the MMA had defaulted on its loan agreement and Wheeling had elected to exercise remedies as a secured creditor. The question is whether the MN/NB Railways provided interline freight services with the expectation that payment would be made from current operating revenue. The uncontroverted evidence presented at the hearing established that freight services were provided with that expectation.

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<sup>7</sup> Hearing Tr. at page 84, line 5 – page 85, line 9.

Moreover, consistent with the expectation and understanding of the parties, the MN/NB Railways did, in fact, receive payment for oil shipments from funds MMA collected from the ISS until MMA was forced to file its chapter 11 petition following the derailment at Lac Megantic, Quebec in July 2013. Hearing Tr. at page 64, line 1 – page 66, line 2; Irving Exhibit 11, Montreal Maine & Atlantic (MMA) Swap History. Such payments were typically made within a day or two of MMA's receipt of payment from the ISS, consistent with the agreement and expectation of the parties. See Irving Exhibit 6, E-mail from Donald Gardner to Ryan Ellis, dated July 26, 2012; Irving Exhibit 8, E-mail exchange between Ryan Ellis and Donald Gardner, dated August 30, 2012; Irving Exhibit 9, E-mail exchange between Donald Gardner and Ian Simpson, dated January 3, 2013; Irving Exhibit 10, E-mail from Donald Gardner to Ian Simpson, dated January 7, 2013.

Aside from the complete lack of evidence to support his contention that the MN/NB Railways could not have expected to be paid from MMA's current receipts, the Trustee's argument is totally undermined by the fact that in virtually every case that has addressed six-month claims, dating back to the mid-nineteenth century, there has been a secured creditor with a perfected lien against the debtor's operating revenue. At the hearing, the Trustee attempted to dismiss this fact by arguing that:

The reason that a lot of those old cases actually had secured claims in them was because there was a time ... where the presence of a security interest, indeed the presence of a first security interest in another party was a prerequisite to an award under the six-month rule.

Under one of the doctrines they used to justify the rule, in fact it was the requirement that the court find that the funds were diverted away from the six-month creditors to the payment of a senior lien, and therefore in the absence of a senior lien under that particular subset of the doctrine you had no six-month rule.

So not uncommon of course that the cases would involve security interests in that context.

Hearing Tr. at page 21, line 21 – page 22, line 10.

The Trustee was, of course, referring to the line of cases that evolved from *Fosdick v. Schall*, 99 U.S. 235, 25 L. Ed. 339 (1879), which was based upon the principle of equitable restitution – that a mortgagee must restore to operating creditors revenues diverted to the mortgagee’s advantage. See *Boston & Maine II*, 634 F. 2d at 1377. As the First Circuit held, however, in *Boston & Maine II*, a separate and independent basis for conferring priority under the six-month rule has evolved from the Supreme Court’s decision in *Miltenberger v. Logansport* that does not require a showing that funds were diverted for the benefit of a secured creditor. In those cases, secured creditors held perfected security interests that were a matter of public record. See e.g. *Miltenberger v. Logansport*, 106 U.S. at 288; *Southern Railway Company v. Flournoy*, 301 F. 2d at 849; *In re Boston & Maine Corp.*, 46 B.R. at 935-36. Yet, the existence of those recorded security interests did not prevent the claims of creditors from being accorded status as six-month priority claims.

The fact that Wheeling held a security interest in MMA’s accounts receivable and that security interest appeared on a Dun & Bradstreet report obtained by the MN/NB Railways is entirely irrelevant. The issue is whether the MN/NB Railways expected to be paid from current operating revenue received by the MMA. The evidence established that to be the case. No evidence was presented to suggest otherwise.

### **CONCLUSION**

The Trustee’s objections to the claims of the MN/NB Railways are without merit. Interline freight claims like those asserted by the MN/NB Railways are quintessential examples of the types of claims that qualify as “six-month” claims, and have been recognized as such by

the First Circuit. Moreover, the evidence clearly established that the services provided by the MN/NB Railways were necessary to MMA's operation of what the Trustee characterized in his Disclosure Statement as the "critical rail artery" between Montreal and Saint John, New Brunswick.

With respect to MN/NB Railways' claims for services provided in connection with non-oil shipments, the Irving Paper Companies provided MMA, through the swap arrangement, the cash (i.e. current operating revenue) with which MMA satisfied its obligations to the MN/NB Railways. In that way, the MN/NB Railways avoided taking on any credit risk with the MMA, and instead provided freight services under an arrangement that provided for payment from current operating revenue.

Separate and apart from the non-oil shipments, the evidence established that with respect to oil shipments, the MN/NB Railways provided freight services to the MMA pursuant to the agreement and understanding that payment would be made immediately following MMA's receipt of payment from the ISS. Irrespective of how one might characterize the swap arrangement, it is clear that the MN/NB Railways provided services to the MMA in connection with oil shipments with the expectation that payments would be made from "current receipts." The Trustee presented no evidence to suggest otherwise.

This is a unique case. As articulated by the First Circuit in *Boston & Maine II*, a creditor seeking priority status under the six-month rule, must present evidence to show that the services provided by the creditor were necessary to the operation of the debtor's business, and the services were provided with the expectation that payment would be made from current operating revenue, rather than in reliance on the debtor's general creditworthiness. The MN/NB Railways have made that showing in this case. The Trustee's Objection to the claims of the MN/NB

Railways should be overruled and an order should be entered finding that the claims asserted by the MN/NB Railways are to be treated as six-month claims entitled to priority under section 1171(b) of the Bankruptcy Code.

Dated: December 10, 2015

Respectfully submitted,

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Company Limited and Maine Northern Railway  
Company Limited

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF MAINE

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5 In the Matter of:

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7 MONTREAL MAINE & ATLANTIC Case No. 13-10670-PGC

8 RAILWAY LTD.,

9

10 Debtor.

11

12 - - - - - x

13

14 U.S. Bankruptcy Court

15 537 Congress Street, 2nd Floor

16 Portland, Maine

17

18 November 20, 2015

19 1:33 PM

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21 B E F O R E :

22 HON. PETER G. CARY

23 U.S. BANKRUPTCY JUDGE

24

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1     **Hearing re:    Doc #1826;  Objection to Claim**

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25     **Transcribed by:   Dawn South and Sheila Orms**

1 A P P E A R A N C E S :

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P R O C E E D I N G S

THE CLERK: The United States Bankruptcy Court for the District of Maine is now in session, the Honorable Peter Cary presiding. Please be seated and come to order.

THE COURT: Good afternoon.

(A chorus of good afternoon)

THE COURT: We're here on the Montreal Maine & Atlantic Railway Ltd. case, 13-10670, and we are on a continued hearing of document 1826, trustee's objection to proofs of claim of New Brunswick Southern Railway and Maine Northern Railway. And I understand we have a stipulation that gets rid of the duplicate claims.

But why don't I begin with appearances starting with you, Mr. Keach.

MR. KEACH: Thank you, Your Honor. Robert Keach, the Chapter 11 Trustee for Montreal Maine & Atlantic Railway Ltd. I'm here with Lindsay Zahradka from Bernstein Shur.

MS. ZAHRADKA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KEACH: Mr. Caruso is here as a witness, we'll introduce him later.

THE COURT: Okay. Hello, Mr. Caruso.

MR. LEPENE: Good afternoon, Your Honor, Alan Lepene with Thompson Hine on behalf of the New Brunswick Southern Railway Company and the Maine Northern Railway

1 Company. And with me today, Ryan Ellis, Ian Simpson, and  
2 Karl Hansen with J.D. Irving and the affiliated railroad  
3 companies who will be witnesses today.

4 THE COURT: Wonderful. Good afternoon.

5 Thank you for the stipulations. So we can take  
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

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

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.

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

1 creditworthiness of the railroad?

2 THE COURT: Is that a subjective test at that  
3 point? And if the Irving railroads get up and say, well  
4 that's definitely what we believed, then it's game over and  
5 the trustee --

6 MR. LEPENE: Well we would certainly --

7 THE COURT: -- automatically loses?

8 MR. LEPENE: We would certainly like to believe  
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  
25 other two very briefly.

1 THE COURT: Sure.

2 MR. LEPENE: I don't believe there is any dispute  
3 that the Irving railroad provided the services in question  
4 within six months prior to the reorganization. And we'll  
5 produce evidence, we have the invoices, the invoices  
6 indicate the various dates that services were provided, so,  
7 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

1 asserted by the Irving railroads in this case. And, Your  
2 Honor, that's one of the few points on which we can agree.  
3 I think the interlying claims are essentially similar to the  
4 per diem claim that is were asserted by the Irving -- excuse  
5 me -- by the interlining railroads in the Boston and Maine  
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  
12 dealt with the issue of whether the per diem claims were  
13 required to be paid immediately during the course of the  
14 reorganization. And we've addressed this in our brief and I  
15 know the Court has read our brief, so I'm not going belabor  
16 the point, but that was the issue that was in front of the  
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  
25 required to qualify -- what is required for a claim to

1 qualify as a six-month priority claim.

2 And ironically the very same per diem claims that  
3 were addressed by the First Circuit in the first Boston and  
4 Maine decision were the claims that were addressed in the  
5 second Boston and Maine decision. And the court held in  
6 that case that those claims were the types of claims that  
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  
15 consequences. Those aren't my words, those are the First  
16 Circuit's words. The disastrous consequences that would  
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  
25 claims of that type -- these are the same claims that are

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  
5 services really weren't necessary, because if the Irving  
6 railroads refused to accept traffic -- an interchange of  
7 traffic from the MMA that there were alternate routes that  
8 could have been pursued.

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  
18 terms of being able to successfully obtain the business from  
19 the shippers in North Dakota, and they would have lost that  
20 particular business. There simply was no practical, easable  
21 (sic) way for them to be to deliver product, deliver the oil  
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

1 don't think that the standard is necessarily to show that  
2 they would have been put out of business. Would it have had  
3 a substantial negative impact on their operations? I think  
4 the evidence will show that that absolutely would have been  
5 the case. And the second element I think is clearly  
6 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

1 railroads were unwilling to rely on the general  
2 creditworthiness of the MMA. The evidence will show that  
3 because they were unwilling to rely on the creditworthiness  
4 of the MMA they entered into an arrangement with the MMA  
5 that involved the Irving paper companies, which are  
6 companies that are affiliated with the Irving railroads, and  
7 that which happened to be among the largest customers of the  
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  
12 is driven by the fact that from the beginning Irving  
13 railroads were not satisfied, were not willing to rely on  
14 the creditworthiness of the MMA in terms of doing business  
15 with them.

16 So what happened here, and this is what the  
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  
23 incurred by the MMA in carrying freight for the Irving paper  
24 companies, and the parties would determine how much the MMA  
25 owed the Irving railroad for freight services. And much of

1 the freight services that were owed by the MMA to the Irving  
2 railroads actually involved freight from the Irving paper  
3 companies that was being shipped from their mills in Canada  
4 to other destinations. And so you have this relationship  
5 where on a weekly basis the parties would exchange payments  
6 among each other.

7 Now the arrangement was what it was. The label  
8 that you put on that arrangement -- and I note it in the  
9 reply that was filed this morning in terms of how the  
10 trustee wants to characterize the arrangement -- I think  
11 labels are really irrelevant. The issue is what actually  
12 transpired with respect to this arrangement? And what  
13 transpired was that the Irving paper companies on a weekly  
14 basis would pay in cash, it'd be done by wire transfers,  
15 what they owed to the MMA and the MMA would pay in cash  
16 through a wire transfer what it owed to the Irving railroads  
17 in terms of freight services.

18 The expectation of the parties was that the Irving  
19 railroads would be paid out of the cash that was collected  
20 by the MMA from the Irving paper companies, and in most of  
21 the weeks that this was done, the fact is the Irving paper  
22 companies were paying more to the MMA than the MMA was  
23 turning around and paying concurrently to the Irving  
24 railroads.

25 So was this an arrangement under which the Irving

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  
4 Irving railroads in terms of who was owed by the MMA was  
5 essentially the cash that was being paid to the MMA by the  
6 Irving paper companies.

7 Now this arrangement worked very well for a number  
8 of years until we had this development, all attributable to  
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 freight 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  
18 Canadian Pacific, would get interchanged with the MMA, and  
19 then they would carry it, would interchange with the Irving  
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.

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

1 opportunity, to the extent needed, to respond. But --  
2 because I don't want to cut off your rights -- but I'm in a  
3 similar boat.

4 MR. LEPENE: Okay. I'm pleased to hear that  
5 actually, Your Honor.

6 I'm going to then cut through this, and I would  
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.

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.

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  
4 the Irving railroads and the claims of the Irving railroads  
5 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.

19 Unfortunately I think Mr. Lepene, who's otherwise  
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

1 party was a prerequisite to an award under the six-month  
2 rule.

3 Under one of the doctrines they used to justify  
4 the rule, in fact it was a requirement that the court find  
5 that the funds were diverted away from the six-month  
6 creditors to the payment of a senior lien, and therefore in  
7 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.

11 The Boston and Maine decision that we all adore  
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

1 security interest is per se a problem, we're arguing that  
2 the existence of the known security interest and the nature  
3 of the known security interest in this case prevents the  
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  
16 simply doesn't support his proposition at all. But more  
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 unquestionably interlying balances.

1                   What the Southern Bankruptcy Court for the  
2 Southern District of New York said and looking at both the  
3 Boston and Maine decisions and looking at Congress's intent  
4 under 1171(b) said, quote:

5                   "Congress in enacting the bankruptcy Code  
6 expressly rejected a proposal that debtor railroads be  
7 required to pay interlying balances, stating that to do  
8 so would distort the central bankruptcy principal of a  
9 quality of treatment of unsecured creditors."

10                  And that's really what's at issue here, right?  
11 The issue is whether or not the Irving railroads have a  
12 priority over all of the other unsecured creditors who also  
13 supplied goods and services and they're not paid for them,  
14 many of whom supplied them frankly throughout a longer  
15 period of time.

16                  So the fact of the matter is that interlying  
17 balances aren't 1171(b) payments, precisely for the reason  
18 that under modern railroad law, number one, they couldn't  
19 have refused us if they had wanted to in going over their  
20 tracks, and secondly, because of the interlying payment  
21 system had they been members of the interlying system there  
22 would have been no risk to them in our doing so.

23                  Irving railroads find themselves in the position  
24 they're in because they, for clearly self-interested  
25 reasons, opted out of the interlying payment system and

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  
4 where MMA collected interlying payments from the system for  
5 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  
8 the specifics, because neither Mr. Lepene's argument nor  
9 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. Irving, 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  
23 credit terms, net 21-day terms -- notwithstanding the  
24 agreement to have everything done on net 21-day terms, we  
25 decided to set up a secured credit relationship.

1           And Mr. Lepene just told you it's not the labels  
2           that matter, it's how they handled things. Well the reason  
3           he doesn't want the labels is because the label that his own  
4           client put on this relationship was that it was a secured  
5           creditor/debtor relationship.

6           THE COURT: It sounds like somebody worried about  
7           a general creditworthiness.

8           MR. KEACH: Well, I think it sounds like somebody  
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  
21          because he was relying on the collateral arrangement that he  
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

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 yesterday'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 Irving Paper to MMA. When I asked, what would you  
15 have done if MMA had not paid? He said, I simply would have  
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  
25 under common control. That's what they were relying on.

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.

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

1 to the Irving railroads. Essentially that was an agreement  
2 to credit terms that could be as long as 70 or more days.  
3 Because the way the -- remember as to the oil shipments I  
4 guess as we all know from other activity in this case  
5 Canadian Pacific was the originating carrier of the oil  
6 shipments.

7 The way the ISS works is that the originating  
8 carrier is then responsible for paying all of the receiving  
9 railroads along the line. The originating carrier is  
10 responsible to pay those railroads whether or not the  
11 originating carrier collects from the customer ultimately,  
12 whether that customer is the shipper or the ultimate  
13 destination. But that responsibility for CP to pay doesn't  
14 exist until the weigh bills clear the system, and that can  
15 be from the time that the trains run over people's tracks to  
16 the time that that happens, it can be a period as long as 70  
17 or more days.

18 And so essentially we now had a two-part  
19 arrangement. Reliance on the collateral, and you know, once  
20 you've collected from the ISS system, the money that would  
21 otherwise be payable to us, turn it over to us. And again,  
22 by definition a net 60, 70, 75-day period of time.

23 More importantly, Your Honor, and as this will  
24 come out in testimony and then I'll wrap up, by not being a  
25 member of ISS and by creating this system, but certainly

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

1 MMA could take care of its other obligations of the ISS  
2 ahead of taking care of the Irving railroads.

3 MR. KEACH: Not only whether we could but by  
4 necessity it was going to occur.

5 THE COURT: By financial necessity.

6 MR. KEACH: And by the manner in which the ISS  
7 system worked, right? So in other words --

8 MR. KEACH: Requiring you to take -- to --

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.

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 over unsecured creditors. He  
5 looked at the policy implications of treating it as a trust  
6 system and decided it would be unfair among the trust -- you  
7 know, in and among the trust analysis, which was primary for  
8 unsecured creditors to be subordinated to those claims and  
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.

18           I'll in summary, you know, we have basically three  
19 arguments and they're summarized in our brief and I won't  
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

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

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.

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?

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

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

1 reference to when you say hauling freight?

2 A Well the -- they were -- the Irving railways were going  
3 to do business with MMA in changing -- interchanging  
4 projects that are coming into New Brunswick from their rail  
5 lines.

6 Q So would that involve the interchange of traffic  
7 between the two railroads?

8 A Yes, it would.

9 Q Did the Irving paper companies also have a relationship  
10 with the MMA?

11 A Yes, they did.

12 Q And do you know when that relationship began?

13 A That would have began when MMA, I believe it was 2003  
14 as well, when they became into existence.

15 Q Okay. And MMA came into existence, do you know the  
16 circumstances under which they came into existence?

17 A Yes, they bought the assets of a bankrupt company.

18 Q And what was that company?

19 A Bangor & Aroostook.

20 Q Okay. Now you say that the Irving paper companies have  
21 a business relationship with the MMA?

22 A That's correct.

23 Q And starting in 2003?

24 A That is correct.

25 Q And what was the nature of that relationship?

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

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.

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 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

1 the MMA?

2 A Yes, they did.

3 Q Are you familiar with some of the agreements and  
4 understandings that govern that relationship?

5 A Yes, I am.

6 Q Okay.

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?

14 MR. LEPENE: He does.

15 THE COURT: Okay. Thank you.

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  
25 attention first to the exhibit that is marked as Irving

1 Exhibit 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 Railway 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 Limited?

15 A That is correct.

16 Q Okay. What was the purpose of this particular  
17 agreement?

18 A It was to establish the hauling of freight for MMA.

19 Q Did it address payment terms or freight traffic  
20 interchange 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 companies also had a business relationship with the MMA?

1 A That is correct.

2 Q Okay. And that also began in 2003?

3 A That is correct.

4 Q Okay. And I believe you testified that the Irving  
5 paper companies utilized the MMA to haul freight for the  
6 paper companies?

7 A That's correct.

8 Q Okay. Now at the time these relationships began, and  
9 this would be -- they began in 2003; is that right?

10 A Correct.

11 Q Did you have concerns about these particular  
12 relationships -- business relationships?

13 A Yes, I did.

14 Q And what were the concerns?

15 A Concerns as my job payment. I had major concern that  
16 the company would have a hard time to pay me.

17 Q And did you do something or take certain action to seek  
18 to address those concerns?

19 A Yes, I authorized and entered into an agreement with  
20 MMA whereby, my terminology, we would do swaps on a weekly  
21 basis.

22 So basically Irving Paper and Irving Pulp and Paper's  
23 funds would flow into my department, and once a week we'd  
24 get a hold of MMA and we'd agree that simultaneously I'd  
25 send them their wire transfer, they would the same second

1 send the wire transfer back to me for monies owed to NB  
2 Southern.

3 Q And how frequently were these swaps undertaken?

4 A Weekly.

5 Q Okay. Generally in terms of the amount of cash that  
6 was being sent from or on behalf of the paper companies to  
7 the MMA and the amount of cash that was being sent from MMA  
8 to the railroads, which was the larger amount of cash to be  
9 disbursed, generally speaking?

10 A The Irving Paper and Irving Pulp and Paper's money was  
11 by far more than the --

12 Q Greater than the money that was coming back to the  
13 railroads?

14 A Correct.

15 Q Okay. And this was being done virtually  
16 simultaneously?

17 A Yes.

18 Q Okay. And again, what was the reason for entering into  
19 this particular agreement with the MMA?

20 A Well, I was determined I was not going to take a credit  
21 risk, I was not relying on their credit to insure we got  
22 paid.

23 Q Let me direct your attention to what has been marked as  
24 Irving Exhibit 2. And can you identify that document for  
25 me?

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 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 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 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

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.

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 A Yes.

5 Q And this indicates there was an issue with respect to a  
6 holiday in the United States, President's Day. Do you see  
7 that?

8 A That is correct, yes.

9 Q And so the request was made to delay the swap for one  
10 day so that the Banks would be open on both sides of the  
11 border?

12 A Correct.

13 Q Are these emails representative of the emails that  
14 would have been exchanged between the parties that would  
15 have memorialized the arrangement?

16 A That is correct.

17 Q Okay. Now did there come a time when problems arose  
18 with this swap payment process?

19 A Yes, there was.

20 Q And when was that?

21 A If memory serves me I think it was June or July of  
22 2012.

23 Q And what caused the problem?

24 A The problem was one of the transportation of oil. The  
25 amount became quite excessive, monies owed to NB Southern

1 Railway by MMA that they didn't fall under nor MMA didn't  
2 have the capacity to pay when they were supposed to be paid.

3 Q Now the -- can you describe when you say the shipment  
4 of oil, how did that operate?

5 A Well the shipment of oil would have been coming out of  
6 the Dakotas by CT, they would hit MMA's line, they would  
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  
12 became quite excessive, quite high.

13 Q Okay. Now let me direct your attention to Irving  
14 Exhibit 5. Do you have that?

15 A Yes, I do.

16 Q And at the top of that it's an email from Ian Simpson  
17 to Ellis Ryan dated October 22, 2015, that's just a month  
18 ago. Do you see that?

19 A Yeah.

20 Q All right. So is that just conveying the underlying  
21 email within the Irving organization?

22 A That is correct.

23 Q Okay. So I want to direct your attention to the  
24 underlying email which is from Robert Grindrod (ph) to Ian  
25 Simpson. Do you see that?

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 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 Q All right. Now turning to the attachment, and that's  
17 titled what?

18 A Revision of payment terms of NBSR needed.

19 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?

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 freight 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 Q Is that consistent with your understanding of the  
25 provisions of the commercial agreement?

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" --

1 A Yes.

2 Q -- "for the originated or local traffic not a problem"?

3 A Yes.

4 Q Okay. And the bulk of the payments that are received  
5 in would come from whom?

6 A They'd come from me.

7 Q From you personally or from --

8 A No.

9 Q -- the Irving paper companies?

10 A From the Irving Paper Company.

11 Q Okay. Then the next bullet point on received traffic,  
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 A That is correct.

16 Q Okay. "MMA typically does not receive payment through  
17 the ISS for 45 to 60 days after handling the car on  
18 average." Is that --

19 A That is correct.

20 Q -- consistent with what you understood?

21 A Yes.

22 Q Okay. "As a consequence MMA is expected to make  
23 payment to NBSR on traffic settled to ISS approximately 15  
24 to 30 days before receiving payment." Is that --

25 A That's correct.

1 Q -- consistent with your understanding?

2 A Yes.

3 Q Okay. Then Mr. Grindrod says, "When this system was  
4 established most of the traffic moving was either originated  
5 or local between the two carriers." And that would of  
6 course go back to 2003. Is that consistent with your  
7 understanding?

8 A That is correct.

9 Q "In either case the vast majority of the traffic was  
10 paid for by the shipper at approximately the same time as  
11 MMA made payment to NBSR."

12 A That is correct.

13 Q And that's consistent with the swap arrangement that  
14 was in place?

15 A Yes, it was.

16 Q Okay. And the next paragraph says, "The traffic mix  
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 A That is correct.

21 Q -- as you described previously?

22 A Yes.

23 Q Okay. Now, I'm going to direct your attention then to  
24 the next page, the third paragraph from the bottom, the  
25 paragraph that begins on April 2, 2012. Joe Migonigal (ph)

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 Q Okay. And is there an email that appears right below

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

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 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

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

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 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

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 today 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 January 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 between MMA and the Irving railroads?

25 A Yes, it is.

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 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 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.

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

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?

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

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  
4 because his actual testimony was that he relied not at all  
5 on the general creditworthiness of MMA.

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  
10 to allow the question and I'm going overrule the objection,  
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.

15 MR. KEACH: Thank you, Your Honor.

16 THE COURT: Thank you. Mr. Lepene?

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 A Absolutely not.

23 Q What did the Irving railroads rely upon?

24 A We relied on them being paid out of the ISS system,  
25 which I felt was secure, and that meant I would be paid

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.

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 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?

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

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.

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

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 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 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.

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?

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

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.

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 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 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

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 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

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.

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.

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

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

1 were protected by the -- your secured credit arrangement  
2 with respect to the local traffic, correct?

3 A I was protected on the local traffic by the swap, yes.

4 Q Right. And with respect to the oil shipments you  
5 understood that notwithstanding the fact that your railroad  
6 had handled the traffic that you were going to have to wait  
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?

14 A Well, I felt secure because ISS would have the money  
15 from the originating carrier, that the funds owed to MMA by  
16 the originating carrier would be given to them through the  
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 Q Right.

22 A And that gave me comfort that at least if they had the  
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?

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?

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.

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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REDIRECT EXAMINATION

BY MR. LEPENE:

Q Mr. Hansen, who is responsible for making the decision whether to participate -- whether New Brunswick Southern Railway or Maine Northern Railway would participate in the ISS?

A That would be a decision made between Ian Simpson and probably Jim Irving.

Q Okay. You wouldn't have any role in that decision, would you?

A Absolutely none.

MR. LEPENE: May I have one minute, Your Honor?

THE COURT: Yes.

(Pause)

MR. LEPENE: Nothing further, Your Honor.

THE COURT: Thank you very much. You have no recross?

MR. KEACH: No recross, no.

THE COURT: Thank you. You may step down, thank you for your testimony.

THE WITNESS: Do I leave all of this stuff up here?

THE COURT: Yeah, why don't you leave it right there. Mr. Lepene, any --

MR. LEPENE: Yes. We will call next Ian Simpson

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)

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.

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

1 revenue, administration.

2 Q And what is your title again?

3 A General manager.

4 Q 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.

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,

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.

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 Q What would have been the impact on MMA's operations if  
25 it was unable to interchange traffic with the Irving

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:

1 Q Do you have, Mr. Simpson, an understanding of the  
2 business relationship that existed as between the MMA and  
3 the Irving Paper Companies?

4 A Yes, I know it very well. You know, all the -- again,  
5 we're unique in that we have three railroads that our  
6 railroad interchanges with. And so any business in and out  
7 of Saint John, any business in and out of the Main Northern  
8 Railway, we would handle it, whether it's originating in  
9 Saint John on our railroad or terminating on the railroad.

10 So a shipper like Irving Paper, again might go back and  
11 have three railcars shipping today, we would pick all three  
12 cars up. One could go CN, one could go Pan Am, one could go  
13 the MMA. So we would see that. We would do the interchange  
14 with those three respective railroads.

15 The pricing, the other railroads involved, we would not  
16 see that. And that was a good way to keep things  
17 competitive, and gave the shippers, I mean, in and out of  
18 region many more options.

19 Q Do you know whether the MMA solicited the Irving Paper  
20 Companies for business?

21 A Yes.

22 Q And how do you know that?

23 A In some cases I've been in the same meeting with them,  
24 or they've called in advance, senior people, such as Bob  
25 Grindrod, their President, even their Chairman, Mr. Burkhart

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

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

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

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.

10 THE COURT: Thank you very much. Mr. Keach, any  
11 cross?

12 MR. KEACH: Yeah, briefly, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. KEACH:

15 Q Mr. Simpson, good afternoon.

16 A Good afternoon, Mr. Keach.

17 Q With respect to your knowledge of the ISS system, when  
18 using the -- and you were during Mr. Hansen's testimony,  
19 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.

1 Q All right. In that circumstance, and let's assume CP  
2 is the originating carrier, CP pays money into the ISS  
3 system, correct?

4 A Correct.

5 Q All right. Does CP keep its share out first assuming  
6 -- well, let me back up. Assuming CP has collected from  
7 whoever was liable, right, it doesn't pay the entire amount  
8 into the system, right, it keeps its share and pays the  
9 balance under the system?

10 A That part I don't know.

11 Q But in any event, they pay money into the system, and  
12 the clearinghouse then does what with the money?

13 A They would have the -- all the payables and receivables  
14 from all of the interlying or the ISS carriers, would be put  
15 into the clearinghouse, all the receivables then netted out,  
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 Q And then the consequence of that is that all of the  
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 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

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.

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.

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 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 --

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 with 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 that 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 shipper perspective, it would not make economic sense when  
11 they could go directly with Pan Am or directly with CN, why  
12 would you bring another railroad into the mix, it just adds  
13 cost, complexity and that's the advantage of having multiple  
14 railroads competing for your business.

15 Q So you're saying it might not have been the best  
16 business, 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 relationship between MMA and the Irving Paper entities,  
22 correct?

23 A Yes.

24 Q Do you know what happened to that relationship after  
25 the derailment on July 6th?

1 A Could you be more specific? I'm not sure what you  
2 mean.

3 Q Did you stop doing business with MMA following the  
4 derailment at some point? Did Irving Paper, excuse me, stop  
5 doing business with MMA after the derailment at some point?

6 A No. There would still have been clay coming in from  
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.

10 Q Right. So you -- Irving Paper did not ship product,  
11 outgoing product on MMA, correct?

12 A To my knowledge, no, there was no way to get to market.

13 Q Do you know if the MMA continued to operate  
14 continuously after the derailment until it was sold?

15 A Aspects of it. They were not continuous through the  
16 main line. The main line was severed.

17 Q Well, it was severed in Canada, right? It was severed  
18 at Lac Megantic.

19 A Yes, the main line between --

20 Q It was severed at Lac Megantic, right?

21 A Yes, but that halted traffic between their main line  
22 and the United States, the main line in Quebec.

23 Q You understand that the lines in Canada were owned by  
24 MMA Canada, not by MMA, right?

25 A Yes.

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

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 Q 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?

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?

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.

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.

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

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 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.

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 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.

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

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  
5 collateral with respect to that, that's got nothing to do  
6 with the agreement that dealt with the payment for the oil  
7 shipments, nothing to do with that whatsoever.

8 And with respect to the oil shipments, the parties  
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,  
13 absolutely none.

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  
18 participants in the ISS, they get their share first.

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

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

1 priority under Section 1171(b) of the Bankruptcy Code.

2 To me, Your Honor, it's open and shut, thank you.

3 THE COURT: Thank you for that by the way. So I  
4 think everybody's in agreement that the Boston and Maine  
5 cases, establish the standard, right?

6 MR. LEPENE: Well, that the second Boston and  
7 Maine establishes the standard.

8 THE COURT: And in the second Boston and Maine  
9 case, I know it's unfair to do it this way, but just teeing  
10 it up in case you wish to supplement your closing argument  
11 in writing later --

12 MR. LEPENE: Uh-huh.

13 THE COURT: -- but the Court says on page 1380,  
14 "However, if payment is claimed under the Fosdick principle,  
15 the existence of current debt fund must be demonstrated."  
16 That -- is that an additional element that I need to worry  
17 about?

18 MR. LEPENE: No, no, absolutely not, Your Honor.  
19 The fact is, the First Circuit is unique, okay. The -- and  
20 they were going through -- it's a wonderful opinion, it  
21 takes a long time to parse through it, but -- and it's a  
22 great history lesson in terms of 19th Century receivership  
23 law.

24 The fact of the matter is, in the Second Circuit  
25 and the Third Circuit, and these cases are cited in the

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

1 Maine totally separate principle. It's a principle of  
2 recognizing that claims that arise from services that are  
3 provided within six months prior to reorganization are  
4 entitled to be treated as administrative expense claims  
5 because they enabled the railroad to continue to operate as  
6 long as you meet the three standards; got to be incurred  
7 within six months, got to be necessary for the operation of  
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) excepted 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  
23 don't go through the pains that the Irving Railroads went  
24 through here.

25 There is no evidence with respect to seeking to

1 avoid credit risks. They just go ahead and they provide  
2 their product, and so what are they doing, they are relying  
3 on the general credit of the railroad.

4 If we had done that, Your Honor, we wouldn't be in  
5 front of you, being able to assert that we're entitled to  
6 priority. We didn't rely on the general credit. The  
7 evidence establishes that we didn't rely on the general  
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.

16 MR. KEACH: Thank you, Your Honor, I will be brief  
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

1 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  
4 here, but nothing could be further from the truth, in that  
5 the evidence establishes as meeting any of the requirements  
6 of 1171(b).

7 The only way that the Irving Railroads can even  
8 with a straight face argue that they meet the 1171(b)  
9 standards is by reducing it to no standard at all.

10 As Your Honor just pointed out, under their  
11 articulation of the standard, everybody would qualify.  
12 Every railroad that wasn't paid, every creditor extending  
13 any kind of goods or services within the entire six month  
14 period would qualify. That's not the standard.

15 Like most priorities, and incidentally, the Boston  
16 Maine case definitively does not establish they're entitled  
17 to an administrative claim. You can only get there by  
18 actually ignoring what happened after the remand to the  
19 First Circuit went to the district court, and as was true  
20 back then, the district court confirmed the railroad's plan.

21 If you look at the description of the plan in that  
22 case, and we've cited it in other places and here, the plan  
23 itself lays out the priorities. Number one, the interlying  
24 payments are not there, and number two, the 1171(b) priority  
25 is subordinate to all of the other priority claims, and

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

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  
10 always messy when a creditor sets off, but that doesn't  
11 change the fact that you're relying on your collateral.  
12 It's messy when a secured creditor forecloses its  
13 collateral, but I don't think any of us would say that a  
14 secured creditor is relying on cash flow as opposed to its  
15 collateral, right. They're just a secured creditor with  
16 their foreclosure right, and however messy it might have  
17 been, he made it very clear, he wanted nothing to do with  
18 relying on either the credit of the company or the cash flow  
19 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

1 they entered into. What was that arrangement? Well, first  
2 and foremost as Judge Haynes' decision in (indiscernible)  
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  
16 of ISS collection. They had absolutely no security that it  
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

1 time, he was extending 60 to 75 day credit. To say that the  
2 delay is irrelevant is to reduce the standard to no standard  
3 at all.

4 If the credit terms don't matter, if the objective  
5 indication of an extension of credit and a reliance on  
6 creditworthiness is not that you've extended 60 to 75 day  
7 terms, then there is no standard. I have no idea what the  
8 standard would mean, if it doesn't matter what your credit  
9 terms are.

10 What it would mean is that anybody and everybody  
11 who has a claim in six months would be making the very same  
12 claim that they're making. It would be total floodgates,  
13 and this case would be a very different case. I think it's  
14 pretty telling, we had lots of people render goods and  
15 services. We had lots of people performing interlying  
16 services, we had lots of creditors. None of them are here  
17 claiming 1171(b) priority but the Irving Railroad.

18 That's because it's a hard standard to meet. Most  
19 people, as Mr. Lepene pointed out extend credit. And as Mr.  
20 Hansen admitted, unequivocally, clearly and honestly on  
21 cross-examination, that's exactly what Irving Railroads did.  
22 They extended credit. And that's the be all and end all of  
23 this decision. You don't have to go past one more fact,  
24 they don't meet the test.

25 On top of which, Your Honor, with respect to the

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  
4 its own, I think they're very, very clear with respect to  
5 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  
9 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.

1 THE COURT: -- most of our economy. Which isn't  
2 the case anymore, right?

3 MR. KEACH: Sadly true. But, Your Honor, you have  
4 to remember that most of the existing, most of the non-tax  
5 priorities that are built into the 507 priorities now, under  
6 the original railroad reorganizations were 1171(b) claims,  
7 right.

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  
15 railroad. They couldn't stop us from running over their  
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

1 somebody who sort of knew how to work the system. Mr.

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  
5 services was not a choice. More importantly even if it had  
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

1 not an 1171(b) priority. The hope of the railroads in that  
2 case was that they could establish some kind of actual or  
3 constructive trust. And as Judge Haynes properly ruled,  
4 there is no such trust. This is a system of debtor/creditor  
5 relationships, and when bankruptcy intervenes, those  
6 creditors who are representing of the interlying system, get  
7 treated just like all the other unsecured creditors.  
8 They're in the same place, in the same line as everybody  
9 else.

10 And what's really at issue in this case, which is  
11 always true of priority disputes, right, within the  
12 bankruptcy priority system, is that this isn't a question of  
13 whether, you know, I get to keep money that he wants. It's  
14 a question of whether he takes money away from other  
15 creditors. That's what this is about.

16 And as the fiduciary of this estate, it's my job  
17 not to let that happen. And in this case, there's just no  
18 1171(b) basis. I think the evidence, particularly Mr.  
19 Hansen's, I think unequivocally honest testimony on cross,  
20 means they don't meet any of the tests. Thank you, Your  
21 Honor.

22 THE COURT: Thank you.

23 MR. LEPENE: Your Honor, may I respond just very  
24 briefly?

25 THE COURT: Sure. But it'll be impossible to get

1 significantly before 5.

2 MR. LEPENE: Well, I did go one minute over. I do  
3 think Mr. Keach was a little long-winded, Your Honor, if I  
4 must say.

5 THE COURT: Mr. Lepene, please.

6 MR. LEPENE: Thank you, Your Honor.

7 First of all the Boston and Maine and the district  
8 court opinion following the First Circuit's opinion in that  
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  
18 in cash upon consummation of the plan, based on the Boston -  
19 - based on the First Circuit's opinion in the Boston and  
20 Maine case.

21 With respect to the floodgates, I think I've  
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

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.

1 MR. LEPENE: The notion that Irving could not  
2 refuse to accept the interchange of traffic, and therefore,  
3 the services they provided were not necessary for the  
4 operation of the railroad, the same principles existed in  
5 the Boston Maine, that's a case from the late '70s.

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  
15 traffic has no bearing on the decision that you have to make  
16 in terms of evaluating the evidence.

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  
20 addressed in the case. So that decision doesn't stand at  
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.

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?

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.

5 THE COURT: Fair enough.

6 MR. KEACH: And I'm amenable to any time frame  
7 that meets the Court's needs and that is convenient for  
8 counsel. I appreciate we're getting into holidays and some  
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 post-  
14 trial brief. They don't have to be long, but if there's  
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?

18 MR. LEPENE: We have the holiday coming up, but  
19 perhaps -- certainly no more than two weeks, and I could do  
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.

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

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

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 --

1 MR. KEACH: Other than that, I think it is all or  
2 nothing.

3 THE COURT: Okay. So to that end, I throw it out,  
4 if there's some resolution the parties come to between now  
5 and when they submit their briefs, I'm all interested in a  
6 hearing on any type of emergency or expedited basis. I  
7 don't know whether there will be, I'm anticipating there  
8 won't, but I'll let you work to that end. Seeing as I  
9 brought up the Fosdick point so confidently that you're now  
10 thinking that I don't know what I'm doing, and that you're  
11 really willing to figure out a settlement, but all that  
12 aside, as soon as I get the briefs, I'll treat it with all  
13 seriousness that it deserves.

14 I'd like to thank you for your argument, I'd like  
15 to thank you for your briefing, I know this isn't easy, I  
16 know you've been under pressure timewise, and I'll look for  
17 the briefs or some other word from you and we'll go from  
18 there.

19 MR. LEPENE: Thank you, Your Honor.

20 MR. KEACH: Thank you, Your Honor.

21 THE COURT: Thank you. Court will be adjourned.

22 THE CLERK: All rise.

23 (Whereupon these proceedings were concluded at 5:13 PM)

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20  
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22  
23  
24  
25

I N D E X

T E S T I M O N Y

IRVING'S

WITNESS	EXAM BY	PAGE
Karl Hansen	Mr. Lepene	35
	Mr. Keach	72
	Mr. Lepene	87
Ian Simpson	Mr. Lepene	90
	Mr. Keach	100

E X H I B I T S

PARTY	NO	DESCRIPTION	EVID.
Irving	11	Analysis of MMA Swap History	71
	12	Invoices	71
	13	Invoices	71

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
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19  
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C E R T I F I C A T I O N

We, Dawn South and Sheila Orms, certify that the foregoing transcript is a true and accurate record of the proceedings.

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<b>&amp;</b>	<b>14th</b> 64:22	<b>30th</b> 60:13	<b>7th</b> 62:14
<b>&amp;</b> 1:7 4:7,16 6:7 7:20 10:10 14:18 25:14 26:17 27:18 29:15 32:13 33:12 38:15 39:19 44:8 64:6 84:6,10,22,25 85:3 99:4	<b>15</b> 55:23 <b>150</b> 20:12 21:1,20 22:21 <b>16th</b> 49:24 50:2 64:22 <b>1826</b> 2:1 4:9 <b>18th</b> 139:8 <b>19th</b> 120:22 <b>1:03</b> 47:21 <b>1:15</b> 18:24,25 <b>1:33</b> 1:19	<b>320</b> 29:15 <b>330</b> 143:17 <b>35</b> 142:6 <b>3900</b> 3:14 <b>3:14</b> 72:4 <b>3:20</b> 71:25 <b>3:23</b> 72:4 <b>3rd</b> 58:12 60:25	<b>8</b> <b>8</b> 60:6 <b>87</b> 142:8
<b>0</b>	<b>2</b>	<b>4</b>	<b>9</b>
<b>04104</b> 3:6	<b>2</b> 46:24 56:25 <b>20</b> 1:18 <b>2001</b> 47:21 <b>2003</b> 14:23 38:20 39:13,23 44:4 45:2 45:9 52:22 56:6 84:13 92:9 <b>2011</b> 47:5 49:16 <b>2012</b> 49:24 50:2,22 52:3 56:25 58:3 59:6 64:22 73:18 <b>2013</b> 14:24 60:25 61:19 <b>2015</b> 1:18 51:17 143:12 <b>21</b> 25:23,24 44:23 54:12,25 127:14 <b>22</b> 51:17 <b>226</b> 29:16 <b>242</b> 5:6 <b>243</b> 5:6 <b>257</b> 5:9 <b>259</b> 5:10 <b>26</b> 59:5 <b>26th</b> 58:3,10 <b>27</b> 49:16 <b>28</b> 54:25 143:12 <b>2nd</b> 1:15	<b>4</b> 49:21 <b>408</b> 143:8 <b>44114-1291</b> 3:16 <b>45</b> 55:17 82:11,15 83:7 <b>4:22</b> 115:8 <b>4:30</b> 115:4 <b>4:35</b> 115:8 <b>4th</b> 52:3 58:12 61:19	<b>9</b> 52:22 60:21 85:11 85:11 138:7 <b>90</b> 142:9 <b>9729</b> 3:5 <b>975,128.14</b> 62:4 <b>9th</b> 44:4
<b>1</b>	<b>3</b>	<b>5</b>	<b>a</b>
<b>1</b> 44:1 52:25 53:1,5 <b>1.5</b> 66:8 <b>10</b> 47:21 61:13 <b>100</b> 3:4 142:10 <b>10:05</b> 62:8 <b>10:30</b> 61:25 <b>10:59</b> 18:22 <b>10th</b> 47:5 138:25 139:11,15,22,23,25 <b>11</b> 3:3 4:16 7:19 18:14,21,22 64:2,2 68:25 71:4,19 89:12 90:9,21 116:12 142:16 <b>11501</b> 143:19 <b>1171</b> 7:24 8:10,17 21:7 23:18 24:4,17 33:11,21 34:4 120:1 122:13 124:6,8,24 125:3,8 128:17 129:14,18,20 130:6 131:18,19 132:1,18 135:19 <b>11:25</b> 62:14 <b>11th</b> 138:15,16 <b>12</b> 53:21 68:21,22 69:9 71:4,11,19 89:12 90:19 142:17 <b>127</b> 3:15 <b>13</b> 68:21 69:24 71:4 71:12,19 73:7,10 89:12 142:18 <b>13-10670</b> 1:7 4:8 <b>1380</b> 120:13	<b>3</b> 49:14,15 133:12 <b>30</b> 55:24 57:5 <b>300</b> 143:18	<b>5</b> 51:14 80:25 81:1 114:22,24 133:1 <b>507</b> 130:5 <b>537</b> 1:15 <b>5:13</b> 141:23 <b>5:55</b> 61:19	<b>a.m.</b> 62:8,14 <b>aaert</b> 143:8 <b>ability</b> 21:17 27:23 68:6,15 77:5,7,9 99:20 124:3 <b>able</b> 8:8 13:9,18 18:18 31:2 68:7,16 75:4,5,8,12 99:21 114:17 121:19 123:5 130:20 136:19 139:14 <b>absence</b> 22:7,20 126:3 <b>absolute</b> 119:22 <b>absolutely</b> 14:4 17:2 20:9 42:11 67:6,22 87:11 98:23 115:13 118:13 120:18 122:15,18 125:2 127:16 <b>abundantly</b> 33:22 <b>acadian</b> 90:11 <b>accept</b> 13:6 134:8 134:17 135:2,7,14 136:20 139:4 <b>access</b> 71:10 <b>accident</b> 13:14 14:24 109:15 110:16 <b>accord</b> 136:14 <b>account</b> 26:18 61:24 <b>accounting</b> 77:2 126:8
		<b>6</b>	
		<b>6</b> 20:6,13 57:22 <b>60</b> 30:22 55:17 82:11,15 83:7 103:17 127:10,13 127:15 128:1,6 <b>6th</b> 106:25	
		<b>7</b>	
		<b>7</b> 59:3 112:18 140:23 <b>7,000</b> 140:16,17 <b>70</b> 30:2,16,22 <b>70s</b> 135:5 <b>71</b> 142:16,17,18 <b>72</b> 142:7 <b>75</b> 30:22 127:10,13 127:15 128:1,6	

<p><b>accounts</b> 20:5 37:21                  38:12,13 40:11,11                  40:15,15 104:5,8  <b>accrued</b> 102:25  <b>accurate</b> 143:4  <b>accurately</b> 70:12,15                  70:21  <b>acknowledge</b> 49:4  <b>acknowledged</b>                  62:17  <b>acquainted</b> 38:17                  38:19  <b>acquired</b> 14:19 97:5  <b>act</b> 23:18  <b>action</b> 45:17  <b>activity</b> 29:12 30:4  <b>actual</b> 38:12 48:15                  67:4 132:2 140:14  <b>ad</b> 129:3  <b>addition</b> 19:12                  113:3,19  <b>additional</b> 19:8                  120:16  <b>address</b> 7:11 9:21                  9:24 14:14 42:25                  44:19 45:18 113:9                  116:23  <b>addressed</b> 10:19                  11:10,14,21,22 12:3                  12:4,21 116:18                  133:22 135:20  <b>addressing</b> 23:22  <b>adds</b> 106:12  <b>adjourned</b> 141:21  <b>administrating</b>                  38:13  <b>administration</b>                  37:10 91:1 121:21  <b>administrative</b>                  122:4 124:17 125:1                  125:4 126:8 131:23                  131:25  <b>admire</b> 124:3  <b>admissibility</b> 71:4  <b>admission</b> 71:9  <b>admit</b> 140:12</p>	<p><b>admitted</b> 5:25 6:1                  27:17 71:19 89:4,7                  112:23 125:18                  126:21 128:20                  130:13 131:2  <b>adopted</b> 116:18  <b>adopting</b> 117:10  <b>adore</b> 22:11  <b>advance</b> 96:24                  119:13  <b>advanced</b> 6:14  <b>advantage</b> 106:13  <b>advise</b> 68:5,13                  99:20 136:17  <b>advised</b> 68:18  <b>advising</b> 47:16  <b>affiliate</b> 5:12  <b>affiliated</b> 5:2 7:17                  15:6 36:1 37:25                  44:13  <b>affiliates</b> 15:19                  35:23 36:14 68:14  <b>afford</b> 52:15  <b>afternoon</b> 4:5,6,18                  4:19,23 5:4 6:6                  18:24 21:15 35:8,12                  47:22 72:9,10                  100:15,16 115:12                  115:18  <b>afternoon's</b> 6:9  <b>agent</b> 31:21  <b>ago</b> 8:3 51:18  <b>agree</b> 11:2 19:7                  22:19 29:4,22 45:24                  49:7,9 59:18 81:23                  123:18,21  <b>agreed</b> 19:14 31:4                  58:25 60:13 79:5,17                  81:9 82:7,14 103:1                  103:15 112:7,22                  123:25  <b>agreement</b> 25:21,22                  25:24 26:24 30:1                  44:4,5,7,17 45:19                  46:19 48:21,22                  52:22 53:6,14,25                  54:11,12 60:18</p>	<p>61:10 62:23 63:6,18                  63:20 65:5,7 98:18                  99:3,6 118:6,25                  119:23 120:4                  123:24 127:14,15  <b>agreements</b> 9:18                  42:24 43:3 63:2  <b>ahead</b> 6:23 31:8                  32:2 47:15 86:16                  121:20 123:1  <b>alan</b> 3:18 4:23 7:5  <b>alike</b> 71:23  <b>allegedly</b> 61:25  <b>allow</b> 67:10  <b>allowed</b> 131:18  <b>alternate</b> 13:7  <b>alternative</b> 13:17                  42:21 57:1 97:19                  121:15 123:19                  136:21  <b>amenable</b> 137:6  <b>america</b> 91:23                  93:17,22 94:17  <b>american</b> 61:5  <b>amount</b> 28:16 29:22                  40:18 46:5,7,8                  49:10 50:25 56:17                  66:3 76:4,5 101:7                  102:25 103:1,3                  137:11  <b>amounts</b> 28:10                  29:11,12 70:12                  71:13 76:9,11,21                  79:18 91:20 125:16  <b>analysis</b> 33:7 37:11                  64:6 77:4 137:15                  142:16  <b>anecdotally</b> 100:2  <b>answer</b> 18:20 67:12                  86:10 104:20                  108:20 140:19  <b>answered</b> 98:5  <b>answers</b> 22:13  <b>anticipate</b> 113:20  <b>anticipated</b> 28:9  <b>anticipating</b> 141:7</p>	<p><b>anybody</b> 5:14 6:8                  32:21 68:13 101:24                  128:10  <b>anymore</b> 109:18                  130:2  <b>apologize</b> 69:4  <b>appearance</b> 6:9  <b>appearances</b> 4:13  <b>appears</b> 57:25 61:2                  85:12  <b>applicable</b> 53:22  <b>apportioned</b> 55:12                  82:9  <b>appreciate</b> 102:14                  137:8 139:6  <b>approach</b> 34:23                  43:7,20 57:1 69:5  <b>approached</b> 99:8  <b>approaching</b> 111:6  <b>approved</b> 143:10  <b>approximately</b>                  55:23 56:10 66:4,8  <b>april</b> 56:25 58:12  <b>ar</b> 5:11  <b>argue</b> 22:12 121:19                  124:8  <b>argued</b> 129:3  <b>argues</b> 10:12 13:4  <b>arguing</b> 22:25 23:1                  33:13  <b>argument</b> 10:16,17                  11:7 18:4 25:8                  67:12 116:11                  120:10 134:5,9,18                  140:9 141:14  <b>arguments</b> 8:6                  18:17 33:19 134:13                  136:5,7  <b>aroostook</b> 14:18                  25:14 32:13 33:12                  39:19 129:1 135:17  <b>arose</b> 50:17  <b>arrangement</b> 15:4                  15:10 16:7,8,10,12                  16:25 17:7 19:11,12                  19:12 26:21,24 28:7                  30:19 31:4 34:1,2</p>
---	---	--	---

<p>47:10 49:19 50:15                  56:13 75:25 77:8,13                  77:18 82:19,22,24                  83:1,12 92:9 98:7                  103:13 118:2                  125:25 126:20,25                  127:1,8,23</p> <p><b>arrangements</b>                  78:22 94:9 114:21</p> <p><b>arrive</b> 85:24 131:12</p> <p><b>arrived</b> 78:14,18                  131:13</p> <p><b>arriving</b> 100:24</p> <p><b>arrostook</b> 29:15</p> <p><b>arteries</b> 129:24</p> <p><b>articulated</b> 22:18</p> <p><b>articulation</b> 124:11</p> <p><b>aside</b> 141:12</p> <p><b>asked</b> 27:14 86:1,11                  104:14 110:5                  125:20</p> <p><b>asking</b> 47:17 49:4                  66:15 71:24 102:11                  109:5 110:8</p> <p><b>aspects</b> 90:24                  107:15</p> <p><b>assert</b> 31:24 123:5</p> <p><b>asserted</b> 7:11,23                  10:14 11:1,4 13:1</p> <p><b>asserting</b> 116:6</p> <p><b>assess</b> 117:19,20</p> <p><b>assessed</b> 10:22</p> <p><b>assessing</b> 134:14</p> <p><b>assets</b> 14:19 39:17                  84:23 97:6</p> <p><b>associated</b> 68:14                  98:9</p> <p><b>assume</b> 80:23 86:14                  101:1 104:20 139:6</p> <p><b>assuming</b> 101:5,6</p> <p><b>assumption</b> 66:17</p> <p><b>assure</b> 114:23</p> <p><b>atlantic</b> 1:7 4:8,16                  6:7 7:20 10:11                  38:15 44:8 64:6                  99:4</p>	<p><b>attached</b> 69:19 70:7                  70:18 112:23</p> <p><b>attachment</b> 52:16</p> <p><b>attempt</b> 125:12</p> <p><b>attention</b> 9:24                  43:25 46:23 51:13                  51:23 56:23 57:21                  60:6,21 61:13 73:16</p> <p><b>attorney</b> 3:12</p> <p><b>attract</b> 95:12</p> <p><b>attracting</b> 95:12</p> <p><b>attributable</b> 17:8</p> <p><b>august</b> 47:5,21                  60:13</p> <p><b>authorized</b> 45:19</p> <p><b>automatically</b> 9:7                  84:9,18</p> <p><b>available</b> 47:17</p> <p><b>average</b> 55:18                  82:11</p> <p><b>avoid</b> 14:16 123:1                  139:10</p> <p><b>award</b> 22:1</p> <p><b>awarding</b> 34:5</p> <p><b>aware</b> 38:22 40:5                  40:14,17 41:8 68:10                  73:14 84:22</p> <hr/> <p style="text-align: center;"><b>b</b></p> <hr/> <p><b>b</b> 1:21 7:24 8:10,17                  21:7 23:18 24:4,17                  33:11,21 34:4 120:1                  122:13 124:6,8,24                  125:3,8 128:17                  129:14,18,20 130:6                  131:18,19 132:1,18                  135:19 142:14</p> <p><b>b.r.</b> 29:16</p> <p><b>back</b> 20:12 22:20                  23:10,21 46:1,12                  48:6,17 49:10 56:6                  58:24 62:3 64:13                  71:25 78:25 88:6                  89:15 92:4 96:10                  99:15 101:6 115:4                  121:13 124:20                  133:10 139:9</p>	<p><b>balance</b> 101:9</p> <p><b>balances</b> 23:24,25                  24:7,17</p> <p><b>bangor</b> 14:18 25:14                  29:15 32:13 33:12                  39:19 129:1,1                  135:17</p> <p><b>bank</b> 62:1,17</p> <p><b>bankers</b> 37:12</p> <p><b>bankrupt</b> 39:17</p> <p><b>bankruptcy</b> 1:1,14                  1:23 4:2 7:24 8:10                  14:20 21:7 23:18,20                  24:1,5,8 32:24                  63:16 66:7 69:16,16                  70:5 97:6 116:14                  120:1 129:19 132:5                  132:12</p> <p><b>banks</b> 50:10</p> <p><b>base</b> 110:20</p> <p><b>based</b> 10:17 63:18                  64:20 66:16 121:1                  122:20 133:18,19                  136:5</p> <p><b>bases</b> 121:15</p> <p><b>basic</b> 15:11</p> <p><b>basically</b> 33:18                  45:22 131:11</p> <p><b>basis</b> 10:22 15:18                  16:5,14 22:15 27:2                  45:21 71:15 125:2                  132:18 141:6</p> <p><b>bearing</b> 116:24                  135:15</p> <p><b>began</b> 14:23 33:16                  39:12,13 45:2,8,9                  77:19 84:7</p> <p><b>beginning</b> 15:12</p> <p><b>begins</b> 56:25 81:20</p> <p><b>behalf</b> 4:24 7:6 46:6</p> <p><b>belabor</b> 11:15 33:20                  133:24</p> <p><b>believe</b> 9:8 10:2                  23:12 39:13 45:4                  68:20 88:7</p> <p><b>believed</b> 9:4</p>	<p><b>belongs</b> 32:24</p> <p><b>bench</b> 18:21,23                  34:23</p> <p><b>benefit</b> 25:5 72:11                  114:13</p> <p><b>benefits</b> 130:9</p> <p><b>bernstein</b> 3:2 4:17</p> <p><b>best</b> 29:17 106:15</p> <p><b>better</b> 18:10 124:2</p> <p><b>big</b> 68:21,24</p> <p><b>billing</b> 57:6 91:15                  91:22 92:10,11,15</p> <p><b>bills</b> 30:14</p> <p><b>binders</b> 68:21</p> <p><b>bit</b> 59:22 92:4,5                  138:4</p> <p><b>bnsf</b> 103:22 105:9</p> <p><b>boat</b> 19:3</p> <p><b>boats</b> 35:21</p> <p><b>bob</b> 58:12,25 96:24</p> <p><b>border</b> 50:11</p> <p><b>boston</b> 8:18 10:19                  11:5,8,11,19,22                  12:3,5 22:11 23:22                  24:3 115:21,23                  116:1,20 120:4,6,8                  121:1,6,10,24,25                  124:15 129:2 133:7                  133:18,19 135:5</p> <p><b>bottom</b> 21:3 56:24                  61:20</p> <p><b>bought</b> 39:17</p> <p><b>box</b> 3:5</p> <p><b>bradstreet</b> 26:17                  27:18 84:6,10,23,25                  85:3</p> <p><b>break</b> 71:21,24                  115:3</p> <p><b>brenda</b> 47:2,6,8,20                  49:15,23,25 50:1                  59:7 60:10</p> <p><b>brief</b> 8:12 11:14,15                  18:11 21:14 33:19                  40:5 72:2 110:1                  113:13 115:3,15                  123:16 136:6,7                  137:14</p>
--	--	---	--

<p><b>briefed</b> 59:22  <b>briefing</b> 137:12  139:13 141:15  <b>briefly</b> 8:4 9:25  19:9 90:14 100:12  113:9 132:24  <b>briefs</b> 112:13  136:15 137:3  138:11 141:5,12,17  <b>bring</b> 51:11 94:23  105:8 106:12  <b>bringing</b> 104:15  <b>brother</b> 23:15  <b>brought</b> 73:16  141:9  <b>brownville</b> 94:19  109:12  <b>brunswick</b> 3:12  4:10,24 7:7,12  17:12 35:14 37:8,11  37:23 39:4 44:9  51:10 52:8 63:1,5  63:12,21 66:3 69:11  69:21 75:20 78:19  86:2 87:4 90:5,6  91:5 95:5 97:22  98:17,19 104:16  131:13  <b>built</b> 130:5  <b>bulk</b> 23:13 54:19  55:4  <b>bullet</b> 53:17 54:8,14  54:17,24 55:11  81:14,15  <b>bullets</b> 81:14  <b>burden's</b> 136:2  <b>burkhart</b> 96:25  <b>business</b> 13:18,20  14:2 15:14 25:15  27:1 28:6,12 35:17  35:24 36:2,12,15  37:10 38:24 39:3,21  41:21 44:25 45:12  61:3 65:14,23,24  70:10,19 73:20,21  74:17 75:11 84:7,14  84:19 85:7 90:11,12</p>	<p>92:7 95:4,8,12,15  96:2,6,7,20 97:4,10  97:17 98:4 99:15  104:7 105:14,18,23  105:24 106:14,16  107:3,5 108:3 110:8  110:20 125:15,19</p> <p style="text-align: center;"><b>c</b></p> <p><b>c</b> 3:1 4:1 109:17  143:1,1  <b>call</b> 8:12 28:17  34:13 87:25 111:13  111:23 115:9  <b>called</b> 22:15 73:15  82:21 96:24 111:5  129:20  <b>calls</b> 66:12  <b>canada</b> 16:3 35:14  61:4 107:17,23,24  109:9  <b>canadian</b> 17:18  30:5 37:12 57:11  61:2 78:8 85:22  97:21 131:13  <b>capable</b> 21:20  <b>capacity</b> 37:18,19  42:6 51:2 72:14  73:5,7  <b>car</b> 23:23 55:17  82:11 91:18 93:18  <b>care</b> 32:1,2 85:4  126:4  <b>cared</b> 26:19 31:18  <b>carefully</b> 113:22  <b>cares</b> 19:24  <b>carrier</b> 30:5,8,9,11  79:22 82:21 83:15  83:16 93:20 94:18  101:2 104:5  <b>carriers</b> 56:5 94:10  101:14 103:23  104:3,4,7,9  <b>carry</b> 17:19 110:16  110:17  <b>carrying</b> 15:23  <b>cars</b> 10:23 96:12</p>	<p><b>caruso</b> 4:20,22  111:5,13  <b>cary</b> 1:22 4:4 6:7  <b>cary's</b> 76:2  <b>case</b> 1:7 4:8 6:7  8:19 10:19 11:1,6,9  11:11,17,17,21 12:6  14:5 21:2,21 22:24  23:3,4,5,11,19,20  23:24 29:20 30:4  32:15,15 34:7,18,18  38:15 56:9 92:17  93:1 94:20 105:1  115:24 116:2,10,12  116:20 120:9,10  121:7,10,14,17,24  122:18,20 124:16  124:22 125:12  128:13,13 129:1,2  130:2 131:21 132:2  132:10,17 133:9,20  133:23 135:5,13,18  135:20,25  <b>cases</b> 11:10 20:11  21:22 22:9,20 57:6  96:23 103:23 120:5  120:25 121:4,13  125:3  <b>cash</b> 15:11 16:14,15  16:19 17:5 26:20  27:22 31:19 33:23  46:5,7,8 47:25 48:5  49:1 52:15 119:12  125:22 126:4,14,18  133:15,18  <b>categories</b> 82:25  <b>cause</b> 108:17 110:7  <b>caused</b> 50:23  <b>cawood</b> 6:13  <b>cease</b> 108:6 109:20  <b>cede</b> 98:1  <b>center</b> 3:14  <b>central</b> 24:8 75:14  91:15 97:9 121:4  <b>century</b> 120:22  <b>certain</b> 45:17 49:8  112:14</p>	<p><b>certainly</b> 5:23 9:6,8  30:25 77:7 91:11  95:24 112:8 137:3  137:19  <b>certainty</b> 137:1  <b>certified</b> 143:8  <b>certify</b> 143:3  <b>cet</b> 143:8  <b>chairman</b> 96:25  <b>chance</b> 8:4 113:24  136:6  <b>change</b> 126:11  <b>changed</b> 56:17  <b>changes</b> 84:11  <b>changing</b> 39:3  <b>chapter</b> 3:3 4:16  7:19 18:22 116:12  <b>characteristic</b> 26:20  126:19  <b>characterize</b> 16:10  118:3  <b>characterized</b> 118:3  <b>charges</b> 10:21,24  15:22 17:15 54:19  55:12 82:8 98:20  140:7,13  <b>cheated</b> 138:24  <b>check</b> 71:22 101:16  112:16 140:22  <b>chicago</b> 92:20,21,22  92:23  <b>choice</b> 33:25 131:3  131:5,6  <b>choose</b> 13:16 137:4  137:13  <b>chorus</b> 4:6  <b>chose</b> 103:11  <b>chronology</b> 25:10  <b>cibc</b> 62:20  <b>circuit</b> 10:13,18  11:10 12:3,14,21,24  21:6 22:14,16  115:24 116:7,15,19  117:10,15 119:10  119:17 120:19,24  120:25 121:7,7,11  121:12,12,25</p>
---	---	---	---

<p>123:20 124:19 135:9 <b>circuit's</b> 8:18 12:16 133:8,19 134:7,19 <b>circuits</b> 21:24 <b>circumstance</b> 79:15 101:1 <b>circumstances</b> 29:21 38:21 39:16 64:25 66:14,15 126:24 135:22 <b>cite</b> 115:22 <b>cited</b> 23:21 29:16 120:25 124:22 135:10 <b>cites</b> 11:9 116:10 <b>claim</b> 2:1 4:10 5:9 5:10 6:24 8:19 10:25 11:4,25 12:1 28:3,14 66:4 69:10 113:16 119:25 124:17 128:11,12 <b>claimant</b> 119:20 <b>claimants</b> 33:4 <b>claimed</b> 120:14 <b>claiming</b> 128:17 <b>claims</b> 4:12 7:11,23 7:23 8:9,16,16 10:14,15,20,21,23 10:24,25 11:3,12,18 11:19 12:2,4,6,6,17 12:22,22,23,25,25 13:2 20:13 21:4,18 21:22 22:20 23:13 33:8,11 115:19,23 116:2,4,5,6,8,21 122:2,4,20 124:25 125:1,4 130:6,9 133:9,11,12,13 135:10,11,12 <b>clarify</b> 89:11 <b>class</b> 103:22 <b>classification</b> 71:2 <b>clay</b> 107:6 109:1 <b>clean</b> 23:21 <b>clear</b> 8:19 27:21 30:14 33:22 104:6,8</p>	<p>126:17 129:4 130:22 <b>clearinghouse</b> 40:8 91:15 101:12,15 <b>clearly</b> 8:18 9:16 14:5 24:24 128:20 131:6 <b>clerk</b> 4:2 35:2,4 72:3,5 89:18,20 115:7 141:22 <b>cleveland</b> 3:16 <b>client</b> 26:4 <b>close</b> 108:14 112:12 112:14 <b>closely</b> 18:24 <b>closer</b> 18:23 <b>closing</b> 18:4 120:10 136:7 <b>cm</b> 92:21 <b>cmqr</b> 97:9,10,14 <b>cn</b> 61:4 85:18 92:9 92:10 93:11 96:12 98:2 105:10 106:11 <b>coast</b> 138:6 <b>code</b> 7:25 8:10 21:8 23:20 24:5 120:1 129:19 <b>collateral</b> 26:9,10 26:12,21 30:19 31:20 34:1,2 118:5 125:25 126:11,13 126:15,20,24 <b>collateralization</b> 28:7 <b>collateralized</b> 28:25 78:2 126:25 <b>collect</b> 29:10 80:18 102:2 103:11 113:12 <b>collected</b> 16:19 25:4 29:24,25 30:20 79:16 83:8 101:6 <b>collecting</b> 34:3 <b>collection</b> 31:21 37:21 38:12 103:7 127:16,17</p>	<p><b>collects</b> 30:11 80:10 <b>college</b> 37:5 90:10 <b>come</b> 4:4 6:1 17:17 30:24 34:24 50:17 51:7,8 55:5,6 85:23 141:4 <b>comes</b> 23:18 77:3 <b>comfort</b> 83:22 85:6 <b>comfortable</b> 59:23 77:22 83:18 85:4 92:13 127:24 <b>comforted</b> 77:18 80:8 <b>coming</b> 35:9 39:4 46:12 51:5 57:10 59:23 89:24 97:2 98:2 107:6 122:19 125:17 137:18,23 <b>commencement</b> 8:20 12:9 <b>commercial</b> 44:4 52:21 53:6,14,25 54:11,12 92:25 95:10 <b>commitment</b> 115:1 <b>common</b> 27:6,10,25 94:13 130:11 <b>commonly</b> 25:18 <b>companies</b> 5:3 7:20 15:5,6,18,22,24 16:3,13,20,22 17:6 35:20 36:1,8,24 37:15 38:23 39:9,20 40:9 44:25 45:5,6 46:6 48:18 55:9 64:13 73:11 75:6,7 76:5,12 77:25 95:15 96:3,20 97:11,13 103:21 108:4 125:16 <b>company</b> 3:12,13 4:25 5:1 7:7,8,13,13 36:19 37:3,24,24 39:17,18 41:14 44:9 44:9,12 45:16 48:19 55:10 63:2 65:3 69:11,21 70:4 75:12</p>	<p>75:20 90:19,20 91:5 91:6,6 92:5 97:5 98:17,20 99:23 100:1 116:13 117:19,21 126:18 <b>competing</b> 105:10 106:14 <b>competitive</b> 13:17 96:17 <b>complete</b> 32:20 127:21 <b>completely</b> 67:3 98:5 <b>completeness</b> 113:2 <b>complexity</b> 106:13 <b>component</b> 28:5,12 <b>comprised</b> 5:9,10 95:9 <b>concedes</b> 116:5 <b>concern</b> 18:16 45:15 <b>concerned</b> 27:1 48:11 99:17 135:18 138:2 139:1 <b>concerns</b> 45:11,14 45:15,18 <b>conclude</b> 20:8 66:16 <b>concluded</b> 141:23 <b>conclusion</b> 18:10 66:13,21 67:1,7 119:22 <b>concurrently</b> 16:23 <b>condition</b> 117:19,21 <b>conditions</b> 12:7 81:9 131:11 <b>confer</b> 88:18 <b>confident</b> 62:4 <b>confidently</b> 141:9 <b>confirmed</b> 116:1 124:20 <b>confusion</b> 7:18 <b>congress</b> 1:15 24:5 <b>congress's</b> 24:3 <b>congressional</b> 116:17 <b>conjunction</b> 38:9</p>
---	---	---	--

<p><b>connection</b> 9:19 59:16 63:23 65:24 66:5,9 67:19 99:11 <b>consequence</b> 25:16 29:6 32:10 55:22 67:12 81:8 101:19 <b>consequences</b> 12:15 12:16,18 <b>consider</b> 118:21 119:15 <b>considerations</b> 117:16 <b>consistent</b> 27:9 53:24 54:14 55:14 55:20 56:1,6,13,19 57:18 60:18 61:10 62:23 65:5,7 85:21 92:14 <b>consists</b> 56:17 <b>constructive</b> 132:3 <b>consummation</b> 133:18 <b>contains</b> 29:17 <b>contents</b> 18:19 <b>contested</b> 18:21 <b>context</b> 22:10 113:11 <b>continually</b> 84:10 108:2 <b>continue</b> 82:22 94:17 122:5 131:7,8 <b>continued</b> 4:9 29:9 63:7 107:13 109:2 131:12 <b>continues</b> 129:11 <b>continuing</b> 25:15 75:22 <b>continuous</b> 107:15 <b>continuously</b> 107:14 <b>contradicts</b> 67:8 <b>contrary</b> 118:12 <b>control</b> 27:6,10,23 27:25 72:25 <b>controlled</b> 77:11,13 126:3</p>	<p><b>controlling</b> 116:7 <b>controls</b> 25:17,18 <b>convenience</b> 130:22 <b>convenient</b> 137:7 <b>conversations</b> 29:7 <b>conveying</b> 51:20 <b>copies</b> 6:19 59:6 70:7 112:8 <b>copy</b> 10:11 43:12 61:16 <b>corporate</b> 36:23 37:14 72:13,14,25 <b>correct</b> 5:6,7 20:8 20:18 21:1 36:10 38:1,2 39:22,24 42:13,14 44:15 45:1 45:3,7,10 46:14 47:12 48:1,7,9,12 49:20 50:8,12,16 51:22 52:20,23,25 53:2,4 54:16,22 55:13,15,19,25 56:8 56:12,20 65:12 68:4 72:22,23 73:9,13,22 74:5,6,12,19 75:12 75:13,18 76:6,7,12 76:15,16 77:15,16 77:20,21 78:2,3,6 78:11,14,15,19,20 78:23,24 80:3,6,7 80:14,15,19,20,21 80:22 81:9,10 82:1 82:2,5,17,18,23 83:2,9,25 84:1,7,8 84:11,12,15,20,21 84:24 85:8,9,13,14 85:20,24,25 86:9,13 98:15,16 99:5 100:19,23,24 101:3 101:4,21,22,25 102:1,18,19 103:5,6 103:8,13,18,19 104:10,12,13,24 105:4,7 106:17,22 107:11 108:3,9 109:8,18,19,21,22 110:18 112:19</p>	<p>129:25 <b>corrected</b> 65:10 <b>cost</b> 51:10 106:13 <b>couldn't</b> 86:18 <b>counsel</b> 86:12 88:18 137:8 <b>country</b> 91:18 143:17 <b>couple</b> 131:3 <b>courier</b> 112:5 <b>course</b> 11:13,23 22:9 36:6 48:21 56:6 70:10 116:22 119:14 <b>court</b> 1:1,14 4:2,5,7 4:19,22 5:4,8 6:2,6 6:12,14,19,21 7:2 7:15 8:13 9:2,7 10:1 11:15,17 12:5 15:20 17:21,24 18:1 18:8,15,20 20:7,20 20:22 21:11 22:4 23:5,6 24:1 26:6 27:3 28:13,16,22 31:23 32:5,18,22 34:8,10,15,24 35:8 40:22 41:4 43:9,12 43:15,21 48:14,17 48:23 49:5 52:25 53:3,7,10 65:16,19 66:20 67:9,16 69:1 69:6 71:2,11,17,22 72:2 84:13,16 86:12 86:15,24 87:13,16 87:19,23 88:2,10,12 88:16,20 89:2,5,11 89:16,24 94:5 95:19 95:22 100:5,10 109:24 110:22,24 111:9,15,19,22 112:9,10,15,25 113:3,6,15 114:2,6 114:9,15,20 115:1,6 115:6,9,10,13,25 116:14,16 120:3,8 120:13,13 121:6,24 122:13,16 123:14</p>	<p>123:23 124:19,20 126:7 129:3,23 130:1 132:22,25 133:5,8,10,11,16,16 134:25 136:1,23,25 137:5,10,20,22 138:4,9,13,19,22,24 139:2,12,19,25 140:8,11,16,18,24 141:3,21,21 <b>court's</b> 114:13 137:7 <b>courtcall</b> 6:10 <b>covered</b> 5:17 29:22 <b>covers</b> 5:22,23 <b>cp</b> 30:13 61:4 78:8,8 78:12,17,22 79:5,16 79:17,20,25 80:1,9 82:4 83:24 85:18,22 100:21 101:1,2,5,6 101:17 103:10,22 105:9 <b>create</b> 25:1 31:13 32:16 <b>created</b> 26:23 28:7 29:9 126:23 <b>creating</b> 30:25 <b>credit</b> 14:16 20:6 25:6,23,25 30:2 31:12,15,16 33:24 33:25 36:23 37:11 37:14,19,20,20 38:9 38:11 46:20,21 58:21 62:3 68:7,10 68:16 72:13,15,25 72:25 73:10 74:2 77:18 82:22 83:1 85:6 93:15,24 99:22 99:25 102:6 117:2,7 117:9,12,16,17,22 118:4 119:21 122:10 123:1,3,6,8 125:8,9,11 126:18 127:10,14,15,25 128:1,4,5,8,19,22 134:10,16,22</p>
---	--	--	---

<p><b>creditor</b> 25:3 26:5 31:25 122:14,17 124:12 126:10,12 126:14,15 132:4 <b>creditors</b> 20:14 22:6 24:9,12 33:4,8 122:19,21,21 128:16 132:6,7,15 <b>credits</b> 34:7 <b>creditworthiness</b> 9:1 12:12 14:11 15:2,3,14 17:1 19:21 26:7,11,19 27:22 42:10 66:11 66:23 67:5,21 99:13 128:6 <b>cross</b> 6:25 72:7 88:9 100:11,13 128:21 132:19 <b>crude</b> 17:10 60:23 62:11 109:14,15 110:19 <b>csos</b> 114:21 <b>csxt</b> 103:22 105:9 <b>ct</b> 51:6 <b>cu</b> 92:7 <b>cup</b> 35:1 <b>current</b> 8:24 12:10 14:10 19:20 66:24 117:4,13 119:6,20 119:24 120:15 121:3,5,8,9,18,22 122:11 134:12,21 135:24 <b>customer</b> 25:19 30:11,12 41:14 90:25 92:19 97:13 108:11 <b>customers</b> 15:7 27:24 54:18 74:25 75:3,8 92:12 94:21 97:3 108:19 <b>cut</b> 17:24 19:2,6 140:22</p>	<p><b>d</b></p>	<p><b>debtor's</b> 125:15 <b>december</b> 64:22 138:7,25 139:8,23 <b>decide</b> 139:7 <b>decided</b> 21:2 25:1 25:20,25 31:13 33:6 65:2 80:13,21 139:15 <b>deciding</b> 110:5 118:21 119:11 <b>decision</b> 11:8,23,23 12:4,5 22:11 23:17 31:9,10 33:2,13 42:8 74:1,2,2 87:3,7 87:9 93:6,23 102:5 108:13,14,16,17 110:11 111:12 115:24 116:13 121:1 125:5 127:2 128:23 134:2,2 135:15,20 136:4,21 139:15 <b>decisions</b> 24:3 115:22 <b>decouple</b> 94:21 <b>decoupled</b> 94:14 <b>deduct</b> 65:2 <b>deemed</b> 5:24 <b>definitely</b> 9:4 32:13 <b>definition</b> 30:22 31:14,15 <b>definitively</b> 124:16 <b>degree</b> 37:5,9 90:10 90:11 <b>delay</b> 50:9 82:15 119:8,9,12,14,15,16 128:2 <b>deliver</b> 13:21,21 108:10 <b>delivered</b> 14:8 97:25 <b>delivery</b> 104:25 108:25 109:1 119:13 <b>demonstrate</b> 133:23 <b>demonstrated</b> 120:15</p>	<p><b>depart</b> 114:14 <b>department</b> 45:23 <b>dependent</b> 68:6,15 99:21 <b>depending</b> 111:5 <b>deposition</b> 26:16 27:3,4 <b>depositions</b> 26:15 <b>deposits</b> 130:10 <b>derailment</b> 106:25 107:4,5,14 109:10 110:6 <b>derived</b> 71:14 <b>describe</b> 49:3 51:3 94:5 100:21 <b>described</b> 56:21 76:1 79:16 <b>describes</b> 53:13 <b>description</b> 124:21 142:15 <b>descriptions</b> 5:12 <b>deserves</b> 141:13 <b>designated</b> 127:19 <b>desire</b> 112:12 113:8 137:20 <b>despite</b> 73:7 <b>destination</b> 30:13 42:23 78:14 97:24 <b>destinations</b> 16:4 40:2 <b>destined</b> 94:20 108:25 <b>detail</b> 8:5 136:10,16 <b>determine</b> 15:17,24 135:9 <b>determined</b> 10:13 14:16 46:20 94:15 121:1 135:9 <b>determines</b> 139:18 <b>devastates</b> 74:17 <b>devastating</b> 12:19 13:25 42:18 <b>developed</b> 31:25 <b>development</b> 17:8 <b>developments</b> 138:3 <b>devoid</b> 67:3</p>
<p><b>d</b> 4:1 142:1 143:8 <b>d&amp;b</b> 85:8 <b>daily</b> 10:22 <b>dakota</b> 13:12,19 17:9,17 57:10 78:17 118:17 <b>dakotas</b> 51:6 <b>date</b> 52:2 64:21 69:16,16 70:4 84:13 85:18 139:14,14,20 143:12 <b>dated</b> 44:4 47:4,5 47:21 49:16,23 50:2 51:17 58:3,10 59:5 60:12,24 61:19 62:3 <b>dates</b> 10:6 70:15,15 70:21 <b>dawn</b> 2:25 143:3,7 <b>day</b> 25:23,24 30:22 41:20,21 49:8,11 50:6,10 61:4,4 65:14,23,24 82:15 95:6 104:7 109:15 112:10 127:10,14 127:15 128:1,6 138:4 <b>days</b> 29:24 30:2,17 44:23 53:21 54:12 54:25 55:17,24 57:6 57:15 59:25 65:14 82:11 83:7 103:17 104:1 109:13 112:14 127:13 <b>dead</b> 123:20 <b>deadline</b> 138:10 <b>deal</b> 5:15 112:15 117:15 <b>dealing</b> 10:7 <b>dealt</b> 11:12 19:13 116:19 118:6 <b>debt</b> 120:15 127:10 <b>debtor</b> 1:10 8:25 12:12 14:9,17 24:6 26:5 38:14,18 125:9 127:9 132:4</p>	<p><b>debtor's</b> 125:15 <b>december</b> 64:22 138:7,25 139:8,23 <b>decide</b> 139:7 <b>decided</b> 21:2 25:1 25:20,25 31:13 33:6 65:2 80:13,21 139:15 <b>deciding</b> 110:5 118:21 119:11 <b>decision</b> 11:8,23,23 12:4,5 22:11 23:17 31:9,10 33:2,13 42:8 74:1,2,2 87:3,7 87:9 93:6,23 102:5 108:13,14,16,17 110:11 111:12 115:24 116:13 121:1 125:5 127:2 128:23 134:2,2 135:15,20 136:4,21 139:15 <b>decisions</b> 24:3 115:22 <b>decouple</b> 94:21 <b>decoupled</b> 94:14 <b>deduct</b> 65:2 <b>deemed</b> 5:24 <b>definitely</b> 9:4 32:13 <b>definition</b> 30:22 31:14,15 <b>definitively</b> 124:16 <b>degree</b> 37:5,9 90:10 90:11 <b>delay</b> 50:9 82:15 119:8,9,12,14,15,16 128:2 <b>deliver</b> 13:21,21 108:10 <b>delivered</b> 14:8 97:25 <b>delivery</b> 104:25 108:25 109:1 119:13 <b>demonstrate</b> 133:23 <b>demonstrated</b> 120:15</p>	<p><b>depart</b> 114:14 <b>department</b> 45:23 <b>dependent</b> 68:6,15 99:21 <b>depending</b> 111:5 <b>deposition</b> 26:16 27:3,4 <b>depositions</b> 26:15 <b>deposits</b> 130:10 <b>derailment</b> 106:25 107:4,5,14 109:10 110:6 <b>derived</b> 71:14 <b>describe</b> 49:3 51:3 94:5 100:21 <b>described</b> 56:21 76:1 79:16 <b>describes</b> 53:13 <b>description</b> 124:21 142:15 <b>descriptions</b> 5:12 <b>deserves</b> 141:13 <b>designated</b> 127:19 <b>desire</b> 112:12 113:8 137:20 <b>despite</b> 73:7 <b>destination</b> 30:13 42:23 78:14 97:24 <b>destinations</b> 16:4 40:2 <b>destined</b> 94:20 108:25 <b>detail</b> 8:5 136:10,16 <b>determine</b> 15:17,24 135:9 <b>determined</b> 10:13 14:16 46:20 94:15 121:1 135:9 <b>determines</b> 139:18 <b>devastates</b> 74:17 <b>devastating</b> 12:19 13:25 42:18 <b>developed</b> 31:25 <b>development</b> 17:8 <b>developments</b> 138:3 <b>devoid</b> 67:3</p>	

<p><b>dial</b> 6:11  <b>dictate</b> 131:16  <b>diem</b> 10:20,24 11:4                  11:12,18 12:2,21                  23:23 115:23 116:4                  133:9,11  <b>difference</b> 41:15  <b>different</b> 92:20                  126:23 128:13  <b>direct</b> 6:25 35:10                  43:24 46:23 51:13                  51:23 56:23 57:21                  90:2 98:2,2 104:19  <b>direction</b> 64:8  <b>directly</b> 95:14 105:8                  106:11,11  <b>disagree</b> 25:11  <b>disastrous</b> 12:14,16  <b>disburse</b> 41:16  <b>disbursed</b> 46:9  <b>disbursing</b> 41:18  <b>discontinuance</b>                  110:7  <b>discontinuation</b>                  108:18  <b>discuss</b> 58:23 59:8                  59:11  <b>discussed</b> 58:11                  59:18 78:4 84:22                  92:18  <b>discussion</b> 59:13,14  <b>dispute</b> 10:2 53:4,9                  137:11  <b>disputes</b> 132:11  <b>distinction</b> 134:9,19                  134:24  <b>distort</b> 24:8  <b>distribution</b> 101:23                  138:2,4 139:8  <b>district</b> 1:2 4:3 24:2                  115:25 116:14                  121:6 124:19,20                  133:7,10,16 138:3  <b>diversion</b> 22:15,15  <b>diverted</b> 22:5  <b>doc</b> 2:1</p>	<p><b>dockets</b> 34:17  <b>doctrine</b> 22:8,16                  129:9,13  <b>doctrines</b> 22:3  <b>document</b> 4:9 5:15                  44:3 46:24 57:22                  59:4,5 60:9 64:15  <b>documented</b> 26:23                  127:9  <b>documents</b> 34:18  <b>doing</b> 15:14 24:22                  26:15 38:23 84:14                  84:19 85:7 105:23                  107:3,5 108:3 123:2                  126:21 127:24,25                  141:10  <b>dollars</b> 49:8  <b>dominant</b> 28:5  <b>dominion</b> 32:20                  127:6,21  <b>don</b> 58:2 59:6,9,16                  60:10,13,22 61:15                  62:10  <b>donald</b> 58:5  <b>door</b> 67:13  <b>dots</b> 81:16,17  <b>doubt</b> 77:5 114:25                  119:5  <b>draw</b> 68:7,16 99:22  <b>drew</b> 134:19  <b>drive</b> 88:6 89:16                  111:2  <b>driven</b> 15:12 23:7,7  <b>driving</b> 88:10  <b>drop</b> 31:9  <b>due</b> 27:11,12 28:10                  28:10 29:11,13                  54:19 61:5 76:9,11                  76:21 79:19 85:19                  113:18  <b>dunn</b> 26:17 27:18                  84:6,10,22,25 85:3  <b>duplicate</b> 4:12  <b>duplication</b> 93:12  <b>duties</b> 37:17 90:22  <b>dying</b> 112:12 113:8</p>	<p style="text-align: center;"><b>e</b></p> <p><b>e</b> 1:21,21 3:1,1 4:1,1                  35:7 98:12,15 99:9                  142:1,3,14 143:1  <b>ear</b> 124:3  <b>earlier</b> 42:12 73:3                  92:18 98:1 102:8                  131:19  <b>early</b> 74:13 115:18  <b>earned</b> 118:24  <b>earnings</b> 95:11  <b>easable</b> 13:20  <b>eastern</b> 36:16 44:8                  44:11 90:6 91:6  <b>easy</b> 23:6 141:15  <b>economic</b> 106:10  <b>economically</b>                  105:12  <b>economy</b> 130:1  <b>effect</b> 110:6 134:6                  134:18  <b>efficiently</b> 5:15  <b>effort</b> 95:11  <b>efforts</b> 93:12  <b>either</b> 56:4,9 82:20                  112:5 126:18                  136:14 139:20  <b>electronic</b> 143:8  <b>electronically</b> 112:5  <b>element</b> 14:5                  120:16 129:9  <b>ellis</b> 5:1 51:17 57:23                  58:3,7,8,9,17,23                  59:6,15 60:10,12                  61:16,19 62:13  <b>email</b> 47:1,5,7,16,20                  49:18,23,25 51:16                  51:21,24 52:2,4,11                  57:23,25 58:2,9,12                  58:18 59:8,15 60:10                  60:12,22,24 61:15                  61:18 62:7 81:8                  85:12,15  <b>emailed</b> 62:13  <b>emails</b> 26:23 50:13                  50:13 63:3,6,19                  81:6</p>	<p><b>emergency</b> 141:6  <b>empire</b> 73:21  <b>employ</b> 38:11  <b>employed</b> 35:15                  90:4  <b>employee</b> 25:16                  130:9  <b>employees</b> 129:21                  130:9 131:3  <b>employment</b> 90:14                  90:15  <b>enabled</b> 122:5  <b>enacting</b> 24:5  <b>encouragement</b>                  62:18  <b>engaged</b> 35:18,19                  35:23 36:2,11,14  <b>ensure</b> 102:3  <b>ensured</b> 102:12,17  <b>enter</b> 6:8  <b>entered</b> 15:4 45:19                  126:25 127:1,8                  133:16  <b>entering</b> 15:9 46:18  <b>entire</b> 13:11 27:20                  73:23 84:19 101:7                  109:5 124:13  <b>entities</b> 25:18 27:11                  28:20 72:21 73:5                  84:2 106:21  <b>entitled</b> 7:24 8:9,16                  11:19 21:6 81:3                  116:2,21 119:25                  122:4 123:5,13                  124:16 135:11,24  <b>entitlement</b> 8:9  <b>equitable</b> 121:19,23  <b>equivalent</b> 116:5  <b>erie</b> 20:4 68:8,11,17                  99:23 100:1 121:21  <b>esq</b> 3:8,9,18  <b>essence</b> 78:1  <b>essentially</b> 11:3                  13:11 17:5,17 22:14                  26:22 29:9,21 30:1                  30:18 31:21,24 71:9                  82:25 103:11</p>
--	---	--	--

<p><b>establish</b> 44:18 120:5 124:16 132:2 137:12 <b>established</b> 20:13 21:6 52:21 56:4 <b>establishes</b> 119:5 120:7 122:12 123:7 123:8,12 124:5 134:23 <b>establishing</b> 121:15 <b>estate</b> 32:24 132:16 <b>evaluate</b> 119:11 <b>evaluating</b> 134:3 135:16 <b>evaluation</b> 42:9 <b>event</b> 101:11 <b>eventually</b> 78:18 100:24 <b>everybody</b> 31:7 33:14 104:24 112:10 124:11 128:10 132:8 <b>everybody's</b> 120:4 <b>evid</b> 142:15 <b>evidence</b> 8:7 9:10 9:17,21 10:5 13:9 14:4,15 15:2,17 18:5 19:7,13,18,25 21:3 23:7 34:11 89:4 113:10 117:20 118:11,12 119:4,21 119:22 122:11,21 122:25 123:7,8,12 124:5 132:18 134:3 134:17,23 135:16 136:5 137:15 <b>eviscerated</b> 131:20 <b>exact</b> 26:25 125:21 <b>exactly</b> 28:18 94:6 128:21 <b>exam</b> 142:5 <b>examination</b> 35:10 36:7 72:7 87:1 88:9 90:2 100:13 110:2 128:21 <b>example</b> 78:7 92:19 92:20 100:21</p>	<p>101:17 122:16 <b>excel</b> 71:6 <b>excellent</b> 29:15 <b>exception</b> 23:8 <b>excepted</b> 122:13 <b>excessive</b> 50:25 51:12 52:14 <b>exchange</b> 15:11 16:5 130:14 <b>exchanged</b> 50:14 98:13 <b>exchanges</b> 49:1 <b>excuse</b> 11:4 54:2 58:18 75:3 86:12 97:23 107:4 111:6 129:1 <b>excused</b> 88:13,15 88:24 110:25 111:1 <b>exercise</b> 81:7 <b>exhibit</b> 43:25 44:1 46:24 49:14,15,21 51:14 52:25 53:1,5 57:22 59:3 60:6,21 61:13 64:2,2,5 68:22 69:9,20,24 71:5,19 80:25 81:1 85:11,11 <b>exhibits</b> 5:15,19,20 5:24 6:19 28:13 34:22 43:8,13 68:20 68:21 71:3 89:3 112:3,16,17,21 113:4 117:6 <b>exist</b> 30:14 <b>existed</b> 73:15 96:2 135:4 <b>existence</b> 20:7 23:2 39:14,15,16 120:15 <b>existing</b> 52:20 130:4 <b>exists</b> 22:17 130:18 130:19 135:22 <b>expect</b> 71:4 119:19 <b>expectation</b> 8:23 9:11 12:10 14:9 16:18 19:19 63:22 63:24 66:24 117:3 117:13 118:25</p>	<p>119:5,18,23 122:10 134:11,20 135:23 <b>expected</b> 9:15 55:22 98:23 102:22 123:8 <b>expecting</b> 117:9 <b>expedited</b> 141:6 <b>expense</b> 121:3,5,8,9 121:18,22 122:4 131:23,25 <b>expert</b> 91:10 108:20 <b>expertise</b> 93:10,14 <b>explained</b> 76:25 102:8 <b>explaining</b> 93:6 <b>explanation</b> 29:18 <b>explosion</b> 109:13 <b>expressly</b> 24:6 <b>extend</b> 128:19 <b>extended</b> 128:6,22 <b>extending</b> 33:24 38:10,11 124:12 127:10,25 128:1 <b>extends</b> 125:8 <b>extension</b> 25:6 31:14,16 118:4 128:5 <b>extent</b> 5:25 6:17 19:1 139:10 <b>extra</b> 61:4 85:18</p>	<p><b>failure</b> 12:17 <b>fair</b> 5:19 18:20 29:2 49:5 74:1 86:15 112:25 114:2,20 137:5 <b>fairly</b> 31:15 <b>fall</b> 51:1 <b>familiar</b> 38:14 40:3 43:3 44:5 75:14 91:8,11 97:5 99:24 105:15,16 106:20 <b>far</b> 27:1 46:11 99:17 100:3 107:7 134:3 135:17 136:3 138:25 <b>farming</b> 35:21 <b>fashion</b> 112:14 140:4 <b>favor</b> 20:14 <b>february</b> 49:23 50:2 <b>federal</b> 121:20 <b>felt</b> 59:23 65:3 67:25 77:8 83:10,12 83:14,17 <b>fidelity</b> 31:21 34:3 <b>fiduciary</b> 32:22,23 132:16 <b>fifth</b> 81:19 <b>figure</b> 141:11 <b>file</b> 113:20 <b>filed</b> 8:1,1,2,3,6 10:17 16:9 113:23 <b>final</b> 31:9 42:23 97:24 104:25 105:6 <b>finally</b> 110:25 135:17 <b>finance</b> 37:14 72:13 72:14 <b>financial</b> 26:20 27:19,20 32:5 36:23 37:11 42:6 90:25 117:19,21 126:19 <b>financials</b> 31:19 <b>find</b> 22:4 24:23 34:25 <b>fine</b> 41:6 92:13 115:5 137:22</p>
		<b>f</b>	
		<p><b>f</b> 1:21 143:1 <b>face</b> 124:8 <b>fact</b> 13:1,24 15:12 16:21 22:4 23:6 24:16 25:7 27:17 33:15,21,24 66:22 73:14 75:2 76:8 77:8 80:8,16 83:5 106:2 110:15,16 115:23 118:14 119:8 120:19,24 126:11 128:23 129:5 130:10 134:8 135:8,18 <b>facts</b> 53:10 133:23 <b>factual</b> 66:15</p>	

<p>138:17,25  <b>firm</b> 7:6  <b>first</b> 6:24,25 8:12,18  10:12,18 11:10,10  11:11 12:3,3,14,15  12:21,24 21:6,16,25  22:14,16 25:1 31:7  32:11 38:17,19,21  43:25 52:19 53:17  54:8 60:15 61:20  64:21 69:12,25  73:14 78:12 84:7  101:5,24 104:12  115:16,24 116:7,15  116:19,20 117:10  117:15 118:18  119:10,17 120:19  121:11,25 123:18  123:20 124:19  127:1 133:7,8,19  134:7,18 135:9  <b>fit</b> 34:4 131:17  <b>five</b> 29:24 57:14  62:18 71:21,24  113:12 114:2,19  <b>flat</b> 116:8 133:10  <b>flesh</b> 8:8  <b>flight</b> 111:8  <b>floodgates</b> 122:19  128:12 133:21,22  134:6,24  <b>floor</b> 1:15  <b>flow</b> 6:18 12:17  26:20 27:22 31:20  33:23 45:23 125:22  126:4,14,18  <b>focused</b> 9:23 14:13  <b>follow</b> 60:14 113:15  139:12  <b>following</b> 47:22  48:3,25 65:14 82:7  97:3 107:3 110:6  115:24 118:10  119:3 133:8 139:8  <b>foods</b> 90:18  <b>forced</b> 13:16</p>	<p><b>forceful</b> 20:11  <b>forecloses</b> 126:12  <b>foreclosure</b> 126:16  <b>foregoing</b> 143:3  <b>foremost</b> 25:2 127:2  <b>forgotten</b> 6:3  <b>form</b> 23:13  <b>former</b> 75:17  <b>forming</b> 92:9  <b>forth</b> 99:15  <b>forward</b> 77:24  <b>forwarded</b> 58:18  <b>fosdick</b> 120:14  121:1,17 123:19  141:9  <b>foundation</b> 34:10  67:3,6 95:17  <b>foundational</b> 79:1  <b>four</b> 81:19 138:13  138:18 139:4,4  <b>fourth</b> 54:24  <b>frame</b> 137:6  <b>frankly</b> 18:16 24:14  26:19 85:4  <b>freight</b> 15:22,23,25  16:1,2 17:14 38:24  38:25 39:1 40:1  44:18,19 45:5 54:19  55:12 63:8,10,14,23  66:5,9 67:19 70:21  79:6 82:8,16 92:19  98:8 99:11 103:17  108:24,25 131:8  <b>frequently</b> 46:3  <b>friday</b> 53:21,22  138:16 139:23  <b>fright</b> 16:17 17:15  53:20  <b>front</b> 11:16 44:1  80:24 123:5 136:12  136:13  <b>frustrated</b> 61:23  <b>fuel</b> 129:15,16  <b>full</b> 5:23 64:21  90:24 133:15,17  <b>function</b> 9:17 74:4  118:21,22</p>	<p><b>fund</b> 120:15 121:3,5  121:8,9,18,22  <b>funds</b> 22:5 45:23  61:6,24 62:2 83:15  139:9  <b>furnished</b> 12:9  <b>further</b> 86:23 87:15  109:23 110:23  111:9,17,20,22,25  124:4 136:19</p> <p style="text-align: center;"><b>g</b></p> <p><b>g</b> 1:22 4:1  <b>game</b> 9:4,16  <b>gardner</b> 58:2,5,9  59:6,9,16 60:10,13  60:22,24,25 61:15  61:18,22 62:8,13  85:12,17  <b>gather</b> 114:3  <b>general</b> 8:25 12:11  14:11 15:1 17:1  19:21 20:2 26:7,19  36:23 37:14 38:9  59:21 66:11,23 67:5  67:21 72:13 91:3  95:7 99:13 117:2,7  117:9,12,16,17,22  119:21 122:10  123:3,6,7 134:10,16  134:22  <b>generally</b> 27:6 40:3  41:8 46:5,9 94:8,9  108:18  <b>generated</b> 17:10,14  105:3  <b>gentlemen</b> 62:17  <b>getting</b> 18:12 52:14  119:8 131:9 137:8  <b>gift</b> 140:17  <b>give</b> 18:25 19:23  33:3 43:10 52:11  68:24 83:23 90:14  113:12 115:4 139:4  <b>given</b> 27:17 76:21  83:16  <b>glad</b> 140:21</p>	<p><b>glimpse</b> 18:8  <b>go</b> 7:1 18:9 20:12  28:1 40:25 47:15  54:19 56:6 74:13,23  83:18 86:16 92:4,21  92:22,22 94:17  96:10,12,12,12  104:24 106:11  110:7 122:23 123:1  128:23 133:2,10  141:17  <b>goal</b> 97:4  <b>goals</b> 131:18  <b>goes</b> 114:18 121:13  127:5  <b>going</b> 7:12 9:13,21  9:22,24 10:7 11:15  17:9,21 18:1,9,25  19:6 21:3 22:20  24:19 27:1,2 32:4  32:11 33:14 38:3,10  39:2 43:24 46:20  56:23 57:21 59:6  67:9,9,10,13 68:19  71:20 80:8,23 82:21  83:6 85:10 90:15  92:20 97:3 103:16  111:24 112:20,22  119:14 120:20  122:19 124:2 125:7  126:2,5 127:17  131:8 139:7,7 140:3  <b>good</b> 4:5,6,18,19,23  5:4 6:6 20:17,17,24  35:8,12 47:21 49:2  72:9,10 88:4 95:7  96:16 100:15,16  105:23 123:25  <b>goods</b> 24:13 124:13  128:14  <b>govern</b> 43:4  <b>grand</b> 140:23  <b>granting</b> 37:20  <b>great</b> 5:14 6:1,2  34:10 71:23 99:10  111:7 112:16 113:3  120:22</p>
--	---	---	---

<p><b>greater</b> 46:12 77:19 77:23 136:10 <b>greatest</b> 20:16 <b>grew</b> 126:23 <b>grindrod</b> 51:24 52:11 53:13 56:3 57:19 58:13,25 59:17 61:16 73:17 96:25 99:7,8 <b>grinrod's</b> 54:15 <b>gross</b> 125:4 <b>grossly</b> 34:6 <b>grow</b> 97:18 <b>growing</b> 28:14 29:8 <b>guess</b> 30:4 106:6 <b>guessing</b> 58:24 <b>guidance</b> 11:24</p>	<p>131:2 142:6 <b>hansen's</b> 90:17 100:18 132:19 <b>happen</b> 25:12 132:17 <b>happened</b> 15:7,16 27:5 28:4,19 29:1 29:20 106:24 124:18 131:10 <b>happens</b> 30:16 65:23 <b>happily</b> 40:24 <b>happy</b> 61:1 139:20 <b>hard</b> 45:16 128:18 <b>hate</b> 113:8 <b>haul</b> 45:5 86:18 94:9,10 109:17 <b>haulage</b> 103:1 <b>hauling</b> 38:24,25 39:1 44:18 109:10 <b>haven</b> 121:4 <b>haynes</b> 29:15 33:2 127:2,21 131:20 132:3 <b>header</b> 85:12 <b>hear</b> 19:4 26:22 34:11 113:16 115:12 <b>heard</b> 73:25 94:2 98:6 100:21 113:10 114:6 115:2 117:5 117:20 118:11,19 122:21 136:5 <b>hearing</b> 2:1 4:9 7:11 113:23 141:6 <b>hearings</b> 6:9 <b>held</b> 12:5 20:4 27:11 36:25 37:2 65:4 76:19 90:8 <b>hello</b> 4:22 6:6 <b>help</b> 71:6 99:10 <b>helpful</b> 18:3 <b>helps</b> 111:12 <b>hesitate</b> 139:5 <b>hiccups</b> 59:24 <b>high</b> 51:12 52:14</p>	<p><b>highly</b> 41:1 <b>hine</b> 3:11 4:24 7:6 <b>hire</b> 40:1 <b>hiring</b> 130:25 <b>history</b> 14:20 25:14 64:7 90:15 92:4 120:22 142:16 <b>hit</b> 51:6,8 <b>hold</b> 32:21 45:24 112:9,9 <b>holding</b> 32:14,15 139:9 <b>holiday</b> 50:6 61:2 85:18 137:18 <b>holidays</b> 137:8 <b>hon</b> 1:22 <b>honest</b> 132:19 <b>honestly</b> 128:20 <b>honor</b> 4:15,18,23 5:7,16 6:10 7:4,5,9 8:11,14 9:9,23 10:21 11:2 14:7,12 14:15,25 18:11,13 19:5 20:10 21:10,13 27:5 28:9,18 30:23 33:10 34:12,14,21 40:21 41:6 43:7,16 43:19 49:2 53:1 66:12,18 67:2,15,17 71:1,8,18,20 72:1 86:23,25 87:12,15 88:1,4,19 89:1 95:17 100:4,9,12 106:18 109:23 110:1,21,23 111:4 111:10,13,17,25 112:21 113:7 114:8 114:11,25 115:5,11 117:1 119:9 120:2 120:18 123:4,12,16 124:1,10 125:7 128:25 130:3 132:21,23 133:3,6 133:23 137:2 138:1 138:17,18 139:3 140:7,20,23 141:19 141:20</p>	<p><b>honorable</b> 4:3 <b>hook</b> 94:22 <b>hooks</b> 94:16 <b>hope</b> 132:1 <b>hopefully</b> 111:11 <b>hour</b> 8:2 88:6 112:1 113:23 114:23 <b>hours</b> 8:3 <b>huh</b> 79:7 120:12 <b>hundred</b> 139:16</p>
<p><b>h</b></p>			<p><b>i</b></p>
<p><b>h</b> 35:7 142:14 <b>half</b> 8:3 83:11 113:23 <b>halt</b> 107:9 <b>halted</b> 107:21 <b>hand</b> 35:2 89:18 <b>handed</b> 64:1 <b>handing</b> 64:1 <b>handle</b> 72:14 73:5 96:8 <b>handled</b> 26:2 53:20 73:10,12 77:20 82:16 83:6 103:18 <b>handling</b> 55:17 82:11 <b>hands</b> 85:24 136:4 <b>hansen</b> 5:2 25:13,14 25:16 26:13 27:8 29:4 34:13 35:3,6 35:12,12 36:21 38:14 42:12 43:24 53:12 63:1 67:19 68:5,19 69:9 72:9 84:5 85:10 86:1 87:3 88:5,12,14,21 88:23 89:15,16 94:5 98:6 103:13,15 125:18,20 127:23 128:20 130:13</p>			<p><b>i.e.</b> 127:11 <b>ian</b> 5:1 51:16,24 58:23 59:19,20 60:22 61:15 73:16 73:17 86:11,12,14 87:7,25 89:19,22 142:9 <b>idea</b> 73:23 74:10 75:10 86:7 116:4 128:7 <b>identified</b> 63:19 117:23 125:13,14 <b>identify</b> 36:1 44:3 46:24 49:14,22 57:22 59:4 60:9 61:14 64:15 68:22 69:9 117:8,18 <b>ignoring</b> 124:18 <b>illuminating</b> 12:13 18:2 <b>illustrative</b> 49:19 <b>imbalance</b> 28:24 29:8 <b>immediately</b> 11:13 61:7 63:24 98:9,20 116:21 118:10 119:2 <b>impact</b> 12:19 13:25 14:3 42:15 75:10 94:24 <b>implications</b> 33:5 <b>important</b> 25:9 32:15 97:17 99:14 99:15 103:23 104:11 115:13 137:10</p>

<p><b>importantly</b> 23:17                  23:20 26:13 30:23                  32:12 33:1 67:3                  131:5  <b>impossible</b> 105:25                  106:2 132:25  <b>inception</b> 14:22,25  <b>incidentally</b> 25:21                  28:10 124:15  <b>include</b> 57:9 91:4  <b>including</b> 25:18  <b>incorporates</b> 23:19  <b>incorrectly</b> 21:2  <b>increase</b> 17:13  <b>incurred</b> 8:20 12:8                  15:23 83:7 122:6                  127:11  <b>independent</b> 121:15  <b>indicate</b> 10:6 64:20  <b>indicated</b> 7:22                  37:13 47:18 74:14                  76:2 84:5 91:4                  104:18 119:10                  133:16  <b>indicates</b> 48:10 50:5  <b>indication</b> 125:10                  128:5  <b>indirect</b> 105:4  <b>indiscernible</b> 6:14                  17:9 28:16 31:21                  66:16 127:2  <b>individual</b> 79:22  <b>indulgence</b> 21:10  <b>industries</b> 23:21                  116:10,24  <b>influenced</b> 42:9                  93:24  <b>information</b> 41:3  <b>informed</b> 86:17  <b>initial</b> 27:21  <b>initially</b> 84:14 99:6                  136:3 139:20  <b>inquiry</b> 22:22  <b>insofar</b> 48:11  <b>institute</b> 37:12  <b>instituted</b> 62:19</p>	<p><b>institution</b> 37:7  <b>insufficient</b> 126:24  <b>insure</b> 46:21  <b>insured</b> 31:5  <b>intended</b> 116:22  <b>intending</b> 111:13  <b>intent</b> 24:3  <b>intention</b> 59:9  <b>interchange</b> 13:6,10                  17:19 29:12 39:6                  42:13,16 44:20 51:7                  66:10 67:20 74:15                  74:16 78:21 92:6,7                  94:2,6,12,16,18,25                  96:13 97:22 99:12                  105:17,19 106:3                  135:2,7,14  <b>interchanged</b> 17:17                  17:18 95:6 105:2,6  <b>interchanges</b> 96:6  <b>interchanging</b>                  13:22 39:3 86:4  <b>interconnecting</b>                  63:7 79:23  <b>interest</b> 5:11 20:3,5                  20:8 21:24,25 22:23                  23:1,2,3 129:9,10  <b>interested</b> 24:24                  34:17 141:5  <b>interesting</b> 22:21  <b>interestingly</b>                  121:17  <b>interests</b> 20:13                  22:10  <b>interfaced</b> 51:11  <b>interlining</b> 11:5                  65:25 82:9  <b>interlying</b> 10:13,25                  11:3 12:17,22 19:15                  23:9,12,24,25 24:7                  24:16,20,21,25 25:4                  25:5 33:11 40:4                  55:13 63:9,14 91:9                  91:13,16 101:14                  115:19 124:23                  125:17 127:11                  128:15 129:5 131:4</p>	<p>131:15,18,22 132:6                  135:10  <b>interrail</b> 40:9  <b>interrupt</b> 92:15  <b>intertraffic</b> 40:9  <b>intervenes</b> 32:25                  132:5  <b>introduce</b> 4:21 6:3                  112:4  <b>introduced</b> 6:18,20  <b>introducing</b> 5:20  <b>invoice</b> 44:23 53:21                  54:6,13  <b>invoiced</b> 70:16  <b>invoices</b> 10:5,5                  53:15 54:18,19                  57:24 58:4 69:10,15                  69:19,20 70:2,7,18                  70:21 71:14,15                  142:17,18  <b>invoicing</b> 41:14  <b>involve</b> 22:10 39:6                  40:10  <b>involved</b> 7:19 15:5                  16:2 20:4 94:6                  96:15 118:16  <b>ironically</b> 12:2  <b>irrelevant</b> 16:11                  22:21 119:9 127:4                  128:2 135:19  <b>irving</b> 5:2,12,18                  7:12,14,17,21 9:3                  9:15 10:3,14 11:1,4                  13:1,5,10,22 14:8                  14:16,23,25 15:5,6                  15:12,18,21,23,25                  16:1,2,13,16,18,20                  16:21,23,25 17:4,6                  17:16,19 19:17 21:4                  21:4 24:11,23 25:17                  25:18,19,22 27:5,6                  27:7,11,13,14,16                  28:11,20 29:3,3,13                  29:23 30:1 31:4                  32:2 33:23 34:12                  35:16,17,19,23 36:2                  36:3,3,5,7,8,8,11,14</p>	<p>36:18,19,21,24 37:3                  37:15,25 38:4,6,8                  38:23 39:2,9,20                  40:1 42:1,3,5,12,16                  42:24 43:25 44:13                  44:24 45:4,22,22                  46:10,10,24 47:2,24                  47:24,25 48:8,18,18                  49:13,21 51:13,21                  55:9,10 57:21 59:3                  60:6,19,21 61:10,13                  62:24 63:14,21 64:2                  64:12 65:6 66:10                  67:20,23 68:6,14,15                  68:20,22 69:9,24                  70:10,13,16,19,22                  71:19 72:12,15,19                  72:21,25 73:4,5,8                  73:21 74:3,15 75:5                  75:7,20 76:3,4,5,9                  77:14,25 78:18                  80:12,13,16,24 81:1                  81:8,24 85:11,11                  86:3 87:8 90:16,20                  92:1,18,18,19 93:1                  94:1,25 95:14,21                  96:3,10,19 97:11,13                  97:23 99:12,21                  104:15 106:21                  107:4,8,10 108:8,16                  108:17,22 109:3,6                  110:5,11 111:23                  119:2 122:23 124:7                  125:16 126:2,6                  128:17,21 130:21                  135:1 142:16  <b>irving's</b> 51:10 142:4  <b>irvings</b> 49:8 54:20  <b>isis</b> 66:2  <b>iss</b> 5:11 28:4,11                  29:4,5,8,10,10,14                  29:18,24,25 30:7,20                  30:25 31:1,3,6,6,11                  31:22,24 32:1,6,16                  34:3 40:4,12,18                  41:10,13,15,24 42:1                  42:4,8 55:17,23</p>
--	--	--	--

[iss - leading]

56:18 57:15 58:14 59:10,22 60:14,23 61:24 63:25 66:2 67:24 68:3 73:4,6 73:12,15,24 74:3,8 74:11 78:5 79:13,14 79:15,21,22,24 80:5 80:6,14,17,18 82:10 83:8,12,13,14,17,18 83:24 85:7,23,23 87:6 91:9,15,17,20 91:24 92:1,10,11 93:2,3,4,7,8,10,11 93:19,22,23 98:10 98:22,24,24 99:18 100:17 101:2,14,20 103:23 104:5,6,9,12 118:11,15,18,22,23 118:24 123:9,11 126:22 127:5,5,5,16 127:17,24 130:19 <b>issue</b> 5:12 7:22 8:8 9:23 10:9 11:12,16 11:20,22 16:11 20:1 20:2 22:14 23:9,23 23:24 24:10,11 50:5 62:3 66:22 93:16 113:1 115:13 117:1 117:11 132:10 135:8,19 139:14,17 <b>issued</b> 53:21 54:6 70:3,16 <b>issues</b> 14:14 113:11 136:13 <b>it'd</b> 16:14 18:10 49:2 <b>it'll</b> 5:21 132:25	<b>january</b> 38:20 44:4 52:22 60:25 61:19 62:14 <b>jim</b> 60:11 87:8 <b>joanne</b> 47:1,8,20 49:16,24,24 50:2 57:23 58:18,20,21 59:5,11 <b>job</b> 45:15 132:16 <b>joe</b> 56:25 58:12 <b>john</b> 13:11,22 17:12 17:20 35:14 51:9,11 88:6 89:15 95:13 96:7,9 97:2,22 98:3 104:23 105:9 109:3 118:17 131:12 <b>joined</b> 37:3 <b>judge</b> 1:23 6:6 29:15 33:2 76:1,25 127:2,20 131:20 132:3 <b>judge's</b> 48:25 <b>july</b> 50:21 58:3,10 59:5 73:18,18 106:25 <b>junction</b> 94:19 109:12 <b>june</b> 50:21 52:3 58:12 73:18 <b>jury</b> 67:11 <b>justify</b> 22:3	84:17 86:14,19,23 87:18 88:15,23 89:7 95:17,20 100:10,12 100:14,16 106:18 109:23 110:5,23 111:4,10,23,24 112:20 113:1,5,22 114:15,17,22 116:10 118:3,14 119:7 123:16 124:2 126:9 129:25 130:3 133:3,9 134:13 136:11,25 137:1,6 138:1,10,16 139:5 139:17,21,23 140:6 140:9,12,17,22 141:1,20 142:7,10 <b>keach's</b> 18:17 134:5 134:9,18 136:17 <b>keep</b> 41:15 96:16 101:5 104:5,8 132:13 <b>keeps</b> 101:8 <b>keith</b> 71:22 <b>kelter</b> 47:1 49:16,24 50:2 57:23 58:18,20 58:21 59:5,11 <b>kelter's</b> 47:20 <b>kept</b> 27:16 <b>key</b> 3:14 <b>kind</b> 124:13 132:2 <b>knew</b> 86:1 103:21 131:1 <b>know</b> 8:15 9:9 11:15 13:13 18:15 18:22 19:10 21:15 26:25 28:20 29:18 30:4,19 32:10 33:7 33:18 39:12,15 54:9 59:17 64:25 74:7,9 74:20,23,25 75:3,7 75:11,16,19,21 79:10 95:9,10 96:4 96:4,19,22 97:10,15 99:14,25 101:10 105:14 106:2,24 107:13 109:9	112:10 113:7 118:4 120:9 122:8 125:10 129:2 130:20 131:2 132:13 134:5 136:17 137:10 138:2,5 141:7,10,15 141:16 <b>knowledge</b> 31:2 40:5,7 41:23 42:6 68:13 95:18 100:3 100:17 107:12 <b>knowledgeable</b> 31:1 <b>known</b> 23:2,3 40:4 <b>knows</b> 95:20
<b>j</b>	<b>k</b>	<b>l</b>	
<b>j</b> 3:8 <b>j.b.</b> 35:19 <b>j.d.</b> 5:2 7:17 25:17 27:6 35:16,17,23 36:1,11,13,14,18,21 37:3,15,25 44:13 47:2,24 68:14 72:11 72:15,24 73:8 76:3 90:19	<b>k</b> 35:6 <b>karl</b> 5:2 34:13 35:3 35:6 142:6 <b>keach</b> 3:8 4:14,15 4:15,20 5:7,16 6:5 6:15,16,22 18:14 19:23 20:1,16,17,19 20:25 21:12,13 23:8 26:8 27:4 28:15,18 28:23 32:3,6,8,9,19 32:23 34:8,9 40:21 40:24 43:12,16 49:2 49:6 53:3,5,9 66:12 67:2,13,15 71:4,8 71:13,20 72:1,8	<b>l</b> 35:6 <b>label</b> 16:7 26:3 <b>labels</b> 16:11 26:1,3 <b>lac</b> 98:3 107:9,18,20 109:12 131:10 <b>lack</b> 21:17 <b>laid</b> 8:17 18:17 <b>lake</b> 20:4 36:4 68:8 68:11,17 99:22 100:1 121:21 <b>landlocked</b> 42:22 75:3 <b>large</b> 12:20 56:17 137:11 <b>largely</b> 22:12,21 25:12,13 40:25 82:3 126:21 <b>larger</b> 28:12 46:8 <b>largest</b> 15:7 27:24 <b>late</b> 115:18 135:5 <b>laughter</b> 20:21 <b>law</b> 7:6 10:13 21:2 21:21 23:14,19 24:18 33:16,21 116:7,9 120:23 127:21 <b>lawyer's</b> 115:1 <b>lays</b> 124:23 <b>lead</b> 41:13 <b>leading</b> 40:25 41:1	

<p><b>learned</b> 29:8 93:15  <b>leave</b> 87:21,23                  136:4  <b>leaves</b> 14:7  <b>leery</b> 25:15  <b>legal</b> 66:13,16,21                  67:1,11,12 86:3                  143:16  <b>legally</b> 127:4  <b>lend</b> 137:1  <b>length</b> 88:8  <b>lepepe</b> 3:18 4:23,24                  6:23 7:3,4,5,16 8:14                  9:6,8 10:2 15:21                  17:23,25 18:7,11                  19:4 20:9,23 21:1                  21:19 22:18 23:10                  23:15 25:11 26:1                  34:12,21 35:11 41:4                  41:6,7 43:7,10,14                  43:19,22,23 48:24                  49:12 53:1,11 65:18                  65:21 66:15,18,21                  67:16,17,18 69:4,8                  70:25 71:18 81:7                  86:25 87:2,12,15,24                  87:25 88:4,11,14,17                  88:19,21 89:1,3,6                  89:10,14 90:3 95:22                  95:24,25 100:4,6,8                  109:24 110:1,3,21                  111:1,12,17,20                  112:8,12 113:6,7,21                  114:5,7,11,18,25                  115:5,10,11,14                  116:17 120:6,12,18                  122:15,18 123:15                  123:25 125:12                  128:19 132:23                  133:2,5,6 135:1                  136:9,24 137:18                  138:11,18,20,23,25                  139:3 140:20                  141:19 142:6,8,9  <b>lepepe's</b> 25:8                  104:14 124:3</p>	<p><b>lesson</b> 120:22  <b>letting</b> 40:24  <b>liable</b> 78:25 101:7  <b>lien</b> 22:6,7 121:19                  121:23  <b>liens</b> 84:23  <b>light</b> 29:7 112:1,2  <b>limited</b> 7:17 35:16                  35:17,19 36:11,14                  36:18,22 37:3 40:5                  44:14 47:2  <b>lindsay</b> 3:9 4:17  <b>line</b> 20:6 21:3 30:9                  31:5 51:6,8 68:7,10                  68:16 94:12,21                  99:22,25 102:3                  107:8,16,16,19,21                  107:22 108:9,11                  132:8  <b>lines</b> 39:5 60:5                  79:23 107:23                  118:19 130:16  <b>list</b> 47:23 69:15  <b>listing</b> 70:2  <b>litigated</b> 131:21  <b>little</b> 18:23 29:5                  81:16,16 90:9 92:4                  92:5 133:3 138:4  <b>load</b> 91:18  <b>local</b> 54:18 55:2                  56:5 57:6,9 82:21                  83:2,3 105:21  <b>locomotives</b> 94:11                  94:14,21  <b>logansport</b> 121:14  <b>long</b> 30:2,16 36:25                  90:8 112:10 114:9                  114:15 119:16                  120:21 122:6 133:3                  137:14  <b>longer</b> 24:14 28:19                  77:25  <b>look</b> 8:4 28:13                  49:13,21 52:19                  53:12 59:3 60:7                  64:2 68:20 69:12,24                  80:24 81:13 85:10</p>	<p>121:13 124:21                  125:15,17 130:10                  141:16  <b>looked</b> 19:9 33:5  <b>looking</b> 24:2,3                  34:16,19 49:10                  52:11 60:12 61:18                  99:1 103:7,9  <b>looks</b> 23:21 69:1  <b>lose</b> 23:14  <b>loses</b> 9:7  <b>lost</b> 13:11,19  <b>lot</b> 18:16 21:21 92:7                  93:8,9,14,18 95:11                  99:14 131:11  <b>lots</b> 31:2 128:14,15                  128:16  <b>lumber</b> 35:20</p> <p style="text-align: center;"><b>m</b></p> <p><b>m</b> 89:22 142:3  <b>magic</b> 114:23  <b>mail</b> 99:9  <b>mails</b> 98:12,15  <b>main</b> 90:6,7 91:5                  95:5 96:7 99:4                  107:16,16,19,21,22  <b>maine</b> 1:2,7,16 3:13                  4:3,7,10,16,25 6:7                  7:7,13,19 8:19                  10:10,19 11:5,8,11                  11:23 12:4,5 22:11                  23:22 24:3 36:16,17                  37:24 38:15 44:8,8                  44:11 64:6 70:3                  75:14 86:2 87:5                  90:5 91:6 97:9                  109:2 115:21,24                  116:1,20 120:4,7,8                  121:1,6,10,24 122:1                  124:16 129:2 133:7                  133:20 135:5  <b>maine's</b> 11:20  <b>major</b> 25:19 45:15  <b>majority</b> 56:9  <b>making</b> 26:25 53:10                  78:13 87:3 111:12                  122:20 128:11,12</p>	<p>129:11 138:19                  139:7  <b>manager</b> 36:23                  37:14 38:9 58:21                  59:21 72:13 91:3  <b>manner</b> 32:6 38:10  <b>mark</b> 112:4  <b>marked</b> 43:25                  46:23 64:18  <b>market</b> 13:11                  107:12 131:11  <b>marketing</b> 97:1  <b>massive</b> 17:12                  31:15  <b>masters</b> 90:12  <b>matter</b> 1:5 10:13                  13:24 23:7,14 24:16                  25:7 26:2 33:15,21                  59:25 116:6 117:10                  119:16 120:24                  128:4,8  <b>matters</b> 72:15 73:10                  112:11 118:2  <b>max</b> 114:11  <b>mcclain</b> 116:10,24                  129:2  <b>mckane</b> 90:18  <b>mean</b> 17:22 67:2                  73:6 92:16 93:21                  96:17 102:23,24                  107:2 112:7 113:24                  128:8,10 131:24                  134:22 137:3  <b>meaning</b> 65:16  <b>meaningless</b> 134:19  <b>means</b> 78:12 81:24                  91:10 132:20  <b>meant</b> 28:6 67:25                  103:16 104:20                  129:8 134:10,20  <b>mechanism</b> 40:8,10                  41:8 130:19  <b>meet</b> 122:6 123:11                  124:8 128:18,24                  129:5 132:20  <b>meeting</b> 96:23                  124:5</p>
---	--	---	--

<p><b>meets</b> 137:7  <b>megantic</b> 98:3  107:9,18,20 109:12  131:10  <b>member</b> 29:10  30:25 31:3,8,11  80:14,19 91:17 93:8  103:4,21 104:5,12  127:4,5  <b>members</b> 24:21  28:4 29:4 80:5,17  91:14 101:20  <b>memo</b> 62:3  <b>memorialized</b> 47:11  49:19 50:15  <b>memory</b> 50:21  <b>mentioned</b> 14:12  37:23 83:10 105:6  106:20 116:11  <b>mere</b> 22:25  <b>message</b> 50:1  <b>messy</b> 48:22 76:25  77:1 126:9,10,12,16  <b>middle</b> 3:4  <b>migonigal</b> 56:25  58:12 97:2  <b>mileage</b> 29:5  <b>miles</b> 74:20 75:17  <b>million</b> 20:6 66:8  133:12  <b>mills</b> 16:3  <b>miltenberger</b>  121:14,25  <b>mind</b> 41:4  <b>minds</b> 71:23  <b>mine</b> 25:9  <b>mineola</b> 143:19  <b>minimum</b> 82:15  <b>minute</b> 43:11 71:21  71:24 87:12 100:4  111:10 133:2  <b>minutes</b> 62:18  113:12 114:3,11,18  114:19  <b>misread</b> 11:8  115:21</p>	<p><b>misreading</b> 21:20  125:4  <b>mix</b> 56:16 106:12  <b>mma</b> 13:7,10,15  14:10,17,19,23 15:2  15:4,4,8,14,22,23  15:24 16:1,15,15,20  16:22,22 17:2,4,5  17:15,18 19:14,21  25:4,20,22 26:17,20  27:6,7,12,12,14,15  28:10 29:9,23,25  31:24,25 32:1 38:18  38:19,22,24 39:3,10  39:13,15,21 40:1  41:23 42:10,13 43:1  44:18,20,25 45:5,20  45:24 46:7,7,19  47:3,16,25 48:5  49:9 51:1,1,7 52:5,7  52:9 53:15 54:18  55:16,22 56:11 57:5  57:6,13 58:6,13  59:6,24 60:4,19  61:11 62:24 63:15  63:21,22 64:13 65:2  65:6,8 66:1,10,23  67:5,20 68:6,10,16  69:22 70:4,12,16,22  73:20,21 74:16,16  74:20 75:16,17 76:4  76:8 77:14,14,20,24  77:25 80:21 81:24  82:10 83:8,15,18  84:6,19 91:24 92:8  92:9,22 93:11,24  94:2,19 95:7,10,14  95:21 96:2,13,19  97:6,19,23 98:1,7  98:18 99:12,21  102:2,22 103:11,12  104:4,22 105:10,11  106:3,21 107:3,5,8  107:11,13,24,24  108:1,6,11,14,19,25  109:2,3,9,9,16,17  109:17,20 110:7,13</p>	<p>110:15,18 117:2  118:11,23,23 119:1  125:22,25 127:19  127:20,25 142:16  <b>mma's</b> 13:25 14:11  28:5 33:23 42:15  51:6 59:9 63:16  64:13 66:6,11 67:21  68:5,15 69:16 70:4  74:17 75:11 94:24  98:9,21 99:13,20  103:7 104:18  105:14 108:9  117:22 127:18,18  <b>modern</b> 24:18  130:16  <b>modified</b> 19:11  <b>moment</b> 61:24  88:19 106:18  <b>momentarily</b> 25:13  <b>monday</b> 62:2,4,7  139:9  <b>money</b> 27:7,16  29:24,25,25 30:20  31:9 32:9,19,20,21  32:21,23 41:13,17  46:10,12 68:3 77:11  77:13,14 79:21,24  80:1,9,18 83:14,17  83:18,19,20,23,24  85:23 98:24 101:2  101:11,12 102:22  102:24 103:12  104:2,6 126:2,6  127:6,18,18,18,20  127:22 132:13,14  137:11 139:18  <b>monies</b> 46:1 47:17  47:18 50:25 59:23  60:4 65:2,4 66:1  <b>month</b> 7:23 8:9,16  10:15 11:19 12:1  20:13 21:21 22:1,5  22:8 41:16,20,21  51:17 60:15 63:15  64:22 65:15,23,24  91:19 103:24 104:7</p>	<p>116:2,8,23 119:25  121:2,5,16 124:13  133:13 135:12  <b>monthly</b> 40:16  <b>months</b> 8:20 10:4  12:8 66:6 122:3,7  128:11  <b>montreal</b> 1:7 4:7,16  6:7 7:19 10:10  38:15 44:8 62:1,20  64:6 98:3 99:4  <b>morning</b> 10:17 16:9  18:15 26:14 61:25  115:18  <b>mortgage</b> 22:15  <b>motivators</b> 33:2  <b>move</b> 19:24 89:6  109:3  <b>moved</b> 89:3 108:24  109:14,16  <b>movement</b> 57:24  58:3,13 59:7,10  118:16  <b>movements</b> 63:8  <b>moves</b> 91:18  <b>moving</b> 56:4 92:20  98:4  <b>multiple</b> 73:11,11  91:16 106:13  <b>mutual</b> 32:16</p>
<b>n</b>			
<p><b>n</b> 3:1 4:1 35:7,7  89:23 142:1,3 143:1  <b>name</b> 35:6 89:20,22  97:8  <b>national</b> 85:22  <b>nature</b> 23:2 37:9  39:25 59:13,14  130:16  <b>nauseam</b> 129:3  <b>nb</b> 36:16 44:12 46:1  47:19 50:25 51:8,8  58:8,21 64:11,13  <b>nbsr</b> 66:3  <b>nbsr</b> 52:5,8,18  53:20 55:23 56:11  57:5,14 62:19 81:4</p>			

<p><b>necessarily</b> 14:1 20:8 31:19 105:1 <b>necessary</b> 8:22 10:10 13:2,5 52:13 122:7 129:7 135:3 <b>necessity</b> 22:17 32:4 32:5 129:7 131:20 <b>need</b> 14:14 113:4 120:16 140:14 <b>needed</b> 19:1 52:18 77:10 81:4 93:10,14 <b>needs</b> 9:10 137:7 140:14 <b>negative</b> 14:3 95:4 <b>neither</b> 25:8 29:16 <b>net</b> 25:23,24 30:22 40:18 91:20 101:16 <b>netted</b> 91:20,22 101:15 <b>never</b> 31:18 73:25 <b>new</b> 3:12 4:10,24 7:6,12 17:12 19:11 24:2 35:14 37:8,10 37:23 39:4 44:9 51:9 52:8 61:1 63:1 63:5,12,21 66:3 69:11,21 75:20 78:19 86:2 87:4 90:6 91:4 95:5 97:22 98:17,19 104:15 116:14 121:4 131:12 <b>night</b> 26:15 35:5 76:8 84:5,22 85:2 86:1,11,17 <b>nightmare</b> 42:19 77:2 126:8 <b>nine</b> 73:21,23 74:4 74:11 <b>non</b> 130:4 <b>normal</b> 40:24 <b>normally</b> 122:14 <b>north</b> 13:12,19 17:9 17:17 57:10 61:5 78:17 91:23 93:17 93:22 94:17 118:17</p>	<p><b>northern</b> 3:13 4:11 4:25 7:7,13 36:16 37:24 70:3 86:2 87:5 90:7 91:5 95:5 96:7 <b>nos</b> 71:19 <b>note</b> 10:11 16:8 85:17 <b>noted</b> 7:9 58:11 <b>notified</b> 6:3 <b>notion</b> 135:1,13 <b>notwithstanding</b> 25:21,23 76:17 83:5 85:11 135:8 <b>november</b> 1:18 61:17 64:22 143:12 <b>number</b> 17:7 24:18 49:8 66:13 78:16 97:16 112:14 124:23,24 <b>numerous</b> 35:21 <b>ny</b> 143:19</p>	<p><b>officer</b> 76:3 <b>offset</b> 76:20 126:1 <b>oh</b> 3:16 6:5 20:19 54:7 63:9 77:7 138:22 <b>oil</b> 7:21 13:12,21 17:10,10,13 19:13 28:5,11 30:3,5 36:19 50:24 51:4,5 51:7 57:10,24 58:3 58:13 59:7,10 60:4 60:14 61:17 63:23 64:16,20 66:5 75:19 75:20 76:10 77:19 77:23 78:7,18 82:3 83:4 97:20,21 98:9 98:21 99:17,18 104:15 105:8 109:10,11,11,18 110:16,17 118:1,6,8 118:16 125:24 126:23 131:10 133:25 134:3 <b>okay</b> 4:22 5:8 6:5 6:15,21 7:15 18:7,8 18:11 19:4 34:12 36:6,11 37:5,9,13 37:17 38:6 39:15,20 40:3,7,10 41:12,23 43:6,15 44:16 45:2 45:4,8 46:5,15,18 47:9,10,13,20 48:10 48:10,23 49:13,18 50:17 51:13,23 52:6 52:19,24 53:3,17 54:4,10,14,17,24 55:4,11,16,22 56:3 56:16,23 57:4,13,18 57:21,25 58:5,7,9 58:17,23 59:3,8,13 63:18 64:1,8,15 65:8 66:9 68:19 69:9,12,19,24 70:9 71:17 73:3 74:10,20 75:25 77:8,22 78:16 79:10,14 80:4,23 81:1,13,18,19 82:3</p>	<p>83:10 85:2 86:22 87:9 89:10,14 90:14 90:22 91:12 92:1 95:19 97:10 103:10 103:25 108:1 111:15,22 113:6 120:19 134:25 139:2,12,19 141:3 <b>old</b> 21:22 143:17 <b>once</b> 30:19 45:23 58:13 59:10,22 83:8 91:19 136:15 <b>ones</b> 5:20 64:18 89:8,11 <b>ongoing</b> 8:22 10:10 13:3 <b>ontario</b> 90:13 <b>open</b> 50:10 67:13 120:2 122:19 133:22 134:24 <b>opening</b> 8:12 19:24 21:14 <b>opens</b> 134:6 <b>operate</b> 51:4 75:22 107:13 108:6,22 109:21 122:5 129:11 131:7 <b>operated</b> 108:2 <b>operates</b> 29:19 <b>operating</b> 8:24 12:11 14:10 19:20 20:3,15 35:19 66:25 117:4,14,24 118:24 119:6,20,24 122:11 123:11 134:12,21 135:24 <b>operation</b> 8:22 10:10 13:3 122:7 129:7 131:16 135:4 <b>operational</b> 90:25 <b>operations</b> 12:20 13:25 14:3,19 35:22 42:15,18 94:24 <b>opinion</b> 8:18 10:18 12:13 23:15 29:15 32:13 74:14 79:13 106:16 120:20</p>
	<b>o</b>		
	<p><b>o</b> 1:21 4:1 89:22 142:3 143:1 <b>o'clock</b> 18:14 114:22 <b>objection</b> 2:1 4:9 8:1 10:12,24 40:23 66:12 67:10 71:5,8 71:12,13 89:8,13 95:17 115:17 <b>objective</b> 125:9 128:4 <b>obligation</b> 32:23 83:7 <b>obligations</b> 32:1,22 <b>obtain</b> 13:18 <b>obvious</b> 33:11 <b>obviously</b> 14:20 136:20 <b>occasion</b> 59:11 <b>occur</b> 32:4 65:11 <b>occurred</b> 13:14 119:16 <b>october</b> 49:16 51:17</p>		

[opinion - payment]

<p>127:21 131:21 133:8,8,11,19 134:7 134:19 135:10 <b>opinions</b> 23:22 <b>opportunity</b> 8:5 18:15 19:1,23 71:15 113:9,22 136:10,11 136:15,16,18 <b>opposed</b> 49:3 126:14 <b>opted</b> 24:25 73:4 130:21 <b>opting</b> 102:2,5,12 <b>option</b> 48:20 76:3 76:21 137:3 <b>options</b> 92:21 96:18 <b>oral</b> 114:4 <b>orally</b> 114:10,16 136:6 <b>order</b> 4:4 6:22 23:10 97:20,21 121:2 133:17 <b>ordering</b> 93:18 <b>ordinary</b> 70:10 <b>organization</b> 51:21 <b>origin</b> 105:9 <b>original</b> 25:21 29:2 53:5 129:18 130:6 <b>originally</b> 138:1 <b>originated</b> 54:17 55:2 56:4,18 57:7,9 57:11 109:2 <b>originating</b> 30:5,7,9 30:11 31:12 78:9 79:4 82:1,4,20 83:15,16 96:8 101:2 103:22 <b>orms</b> 2:25 143:3,10 <b>outbound</b> 107:7 <b>outgoing</b> 107:11 <b>outside</b> 101:24 <b>outstanding</b> 69:15 70:3 <b>overall</b> 117:19 <b>overrule</b> 67:10 <b>owe</b> 15:22 47:19</p>	<p><b>owed</b> 15:25 16:1,15 16:16 17:4,15 27:6 27:7 28:20,24 32:9 46:1 50:25 60:4 65:3 66:4 70:12 76:4,5 77:14,14,25 83:15 102:25 103:9 103:10 125:16 <b>owned</b> 72:16,18 74:21 75:17 107:23 <b>owns</b> 74:20</p> <hr/> <p style="text-align: center;"><b>p</b></p> <hr/> <p><b>p</b> 3:1,1 4:1 89:22 <b>p.m.</b> 47:21 61:19 72:4,4 115:8,8 <b>p.o.</b> 3:5 <b>pacific</b> 17:18 30:5 57:11 78:8 97:21 <b>page</b> 56:24 61:20 69:12 71:6 81:2,14 85:15 120:13 142:5 <b>pages</b> 69:25 <b>paid</b> 8:24 11:13 12:10 14:9 16:19 17:5 19:20 24:13 27:15 31:7,8 32:11 32:20 33:14 40:9 41:13 46:22 51:2 54:5 56:10 57:5 59:25 63:24,25 66:24 67:24,25 76:9 76:11,18,19,20 80:6 80:9,18 82:16 83:8 93:1,4 98:19,20 99:1,2 101:20,23,24 103:2,4,17 104:2 116:21 117:3,9,13 118:10 119:2,6,8,13 119:24 122:11 123:9,9 124:12 126:5 127:15,17 133:15,17 134:11 <b>pains</b> 122:23 <b>pan</b> 92:7,11,22 93:11 96:12 98:1 105:7,9,14,17,19 106:4,11 130:23</p>	<p><b>paper</b> 15:5,18,21,23 16:2,13,20,21 17:6 25:19,19 27:5,12,14 27:16 28:20 29:23 35:20,24 36:2,3,4,4 36:7,8,9 39:9,20 40:1 44:24 45:5,6 45:22 46:6,10 47:23 47:24,25 55:9,10 65:3 72:21 73:11 76:4,12 77:14,25 92:19 93:1 95:15,21 96:3,10,19 97:11,13 106:21 107:4,8,10 108:3,8,8,12,16,22 109:1,3,6,7 110:5 110:11 113:25 115:23 125:16 126:2,6 136:16 <b>paper's</b> 45:22 46:10 108:17 <b>papers</b> 8:6 19:10 115:20 136:12 <b>paragraph</b> 52:19 53:13 56:16,24,25 81:20 <b>paragraphs</b> 81:16 <b>parent</b> 25:17 27:10 <b>parse</b> 120:21 <b>part</b> 30:18 91:14,17 101:10 119:1,1 <b>participants</b> 31:7 40:12 118:18 <b>participate</b> 41:23 42:1,3,5,8 74:3,8,11 87:4,5 91:24 92:1 93:7,23 118:15 <b>participating</b> 29:10 31:23 40:18 41:9,17 41:19 80:17 101:20 <b>participation</b> 73:6 73:12 <b>particular</b> 11:21 13:20 14:17 22:7 36:8 40:19 44:16 45:11 46:19 65:1 66:14 70:9 91:17</p>	<p>94:19 112:24 <b>particularly</b> 29:18 132:18 <b>parties</b> 7:18 9:11,18 15:10,17,24 16:5,18 19:14 44:7 50:14 52:21 85:22 101:20 117:3,22 118:8 119:1,18,23 141:4 <b>partner</b> 93:19 <b>party</b> 22:1 57:6 80:21 98:15 125:8 142:15 <b>path</b> 80:5 <b>pause</b> 43:18 69:7 72:6 87:14 88:25 100:7 106:19 111:16 <b>pay</b> 9:24 12:17 16:14,15 19:17 24:7 28:23 30:10,13 45:16 47:18 51:2 52:15 58:13 59:9 61:4 68:6,15 78:25 79:11,17,18,21,21 79:22 80:2 85:18 91:21 99:20 101:7 101:11 103:24 104:3,11 126:1,3,6 127:20 129:21 <b>payable</b> 30:21 40:11,15 <b>payables</b> 91:19 101:13 <b>paying</b> 16:22,23 30:8 64:13 83:24,25 85:22 104:4,6 <b>payment</b> 8:21 17:3 17:3 19:15,16 22:6 24:20,25 25:6 27:11 44:19,22 45:15 48:2 50:18 52:18 54:10 54:25 55:16,23,24 56:11 57:1,14,15 58:14 59:10 61:7,17 63:22 64:12 81:4 82:10 98:10,22,23</p>
--	---	--	--

<p>103:8 117:8,18,23                  118:6,10 119:3,14                  119:15,16,19                  120:14 125:13,15                  127:5,12 134:20                  135:23  <b>payments</b> 15:11                  16:5 19:13 23:9,13                  23:23 24:17 25:4                  27:12,24 29:23                  33:11,20,21 40:17                  41:18 47:23 55:4                  60:14,23 62:11                  64:11,12,13,15,20                  65:1,13,16 77:4                  83:12 98:8 99:19                  102:4,13,18 118:1                  123:10 124:24                  129:5,18 131:16,18                  131:22  <b>pays</b> 101:2,8  <b>penn</b> 121:4  <b>people</b> 6:4 26:10                  37:20 38:12 42:7                  72:24 73:7,10 79:17                  96:24 101:23                  104:11 128:14,15                  128:19 129:14,15                  130:20,23,24 136:5  <b>people's</b> 30:15                  112:2  <b>percent</b> 139:16  <b>percentage</b> 77:19  <b>perfect</b> 71:11  <b>performing</b> 128:15  <b>period</b> 24:15 27:21                  30:16,22 63:15                  73:23 74:4 124:14                  137:20 140:23  <b>person</b> 80:1  <b>personal</b> 95:18  <b>personally</b> 55:7                  74:9  <b>perspective</b> 106:10  <b>peter</b> 1:22 4:3 6:7  <b>petition</b> 69:17</p>	<p><b>petitioning</b> 127:4  <b>pgc</b> 1:7  <b>ph</b> 47:1,2 51:24                  56:25 58:2 60:11                  97:1  <b>phrased</b> 140:2  <b>pick</b> 96:11  <b>picked</b> 97:20  <b>piece</b> 95:9 110:19  <b>place</b> 20:14 25:20                  42:25 56:14 60:15                  99:3,10,16 131:8                  132:8 135:6  <b>places</b> 124:22  <b>plan</b> 11:20 115:25                  124:20,21,22                  133:14,18  <b>planning</b> 38:23  <b>please</b> 4:4 34:24                  35:4 40:22 43:21                  60:7 69:6 86:16                  89:18,20 115:7                  133:5  <b>pleased</b> 19:4  <b>pleasure</b> 136:25                  137:17  <b>plenty</b> 138:21,23  <b>pm</b> 1:19 141:23  <b>point</b> 9:3 11:16                  19:22 20:10 21:16                  21:17,17 27:13                  33:15 53:17 54:8,15                  54:17,24 55:11                  67:14 77:24 78:2,4                  94:11,12 105:6                  107:4,5 111:14,25                  114:4,12 115:16,22                  117:25 118:14                  119:7,7 131:23,24                  133:24 137:15                  141:9  <b>pointed</b> 65:8 124:10                  128:19  <b>points</b> 11:2 19:8                  81:14,15 107:8                  108:25 114:12                  115:14 117:6 127:3</p>	<p><b>policy</b> 33:5 37:20                  38:10 131:17  <b>portion</b> 77:23  <b>portland</b> 1:16 3:6  <b>position</b> 8:14 20:9                  24:23 25:2,3 36:21                  36:25 37:2 114:1  <b>positions</b> 90:8  <b>post</b> 112:13 136:15                  137:3,13  <b>potential</b> 5:24 12:18  <b>potentially</b> 121:21  <b>practical</b> 13:20                  106:3  <b>practice</b> 65:11  <b>pre</b> 94:15  <b>preceding</b> 53:21                  63:15  <b>precisely</b> 24:17  <b>precode</b> 23:19  <b>preexisting</b> 23:17  <b>prefer</b> 136:22                  139:11  <b>preference</b> 136:8,17  <b>preliminary</b> 40:25  <b>premarked</b> 34:22  <b>premise</b> 23:4  <b>prepared</b> 64:8 70:9                  111:6 139:3  <b>prerequisite</b> 22:1  <b>presence</b> 21:24,25                  22:19,25  <b>present</b> 9:21 53:13                  111:24 137:16  <b>presentation</b> 6:23  <b>presented</b> 8:7,8                  23:11  <b>president</b> 96:25                  97:1  <b>president's</b> 50:6  <b>presiding</b> 4:4  <b>pressure</b> 141:16  <b>presume</b> 27:9  <b>presumptuous</b>                  139:6  <b>pretty</b> 10:16 62:3                  105:16 128:14</p>	<p><b>prevent</b> 130:25  <b>prevented</b> 130:25  <b>prevents</b> 23:3  <b>previously</b> 44:24                  56:21 98:6  <b>pricing</b> 96:15  <b>primarily</b> 14:13  <b>primary</b> 32:14 33:7  <b>principal</b> 24:8  <b>principle</b> 120:14                  121:23 122:1,1                  123:19 129:20  <b>principles</b> 135:4,6  <b>print</b> 34:20  <b>prior</b> 8:20 10:4                  13:13 76:10 90:15                  92:9 122:3 125:24  <b>priorities</b> 124:15,23                  129:19 130:5,5  <b>priority</b> 7:24 8:10                  8:16 11:19 12:1,7                  20:12 21:5,7 24:12                  33:4 34:5 116:3,23                  120:1 121:2,5,10,16                  123:6,13 124:24,25                  128:17 129:15,20                  132:1,11,12 133:13                  135:12,12,19,24  <b>probably</b> 5:19 9:23                  18:23 22:12 29:17                  87:8 114:19 139:8  <b>problem</b> 11:7 23:1                  50:23,24 55:2 88:23                  125:18  <b>problems</b> 50:17                  83:19  <b>procedures</b> 37:19  <b>proceeding</b> 7:19  <b>proceedings</b> 141:23                  143:4  <b>process</b> 15:10 50:18                  91:23 93:5,18                  111:13 113:18  <b>produce</b> 10:5  <b>produced</b> 13:12                  18:5</p>
---	--	--	---

<p><b>product</b> 13:21 40:1 42:23 107:10,11 110:5 122:22 123:2 <b>products</b> 108:8 109:7 <b>proffer</b> 20:20,23 <b>program</b> 91:20 <b>progressively</b> 28:8 <b>projects</b> 39:4 <b>promised</b> 123:17 <b>prompt</b> 98:23 <b>proof</b> 28:14 66:4 69:10 <b>proofs</b> 4:10 <b>property</b> 132:3 <b>proposal</b> 24:6 52:7 54:15 57:5 <b>propose</b> 57:1 112:11 113:13 <b>proposed</b> 57:14,19 73:17 127:9 <b>proposition</b> 23:16 135:21,25 <b>protect</b> 129:13,16 130:12 131:15 <b>protected</b> 82:22,24 83:1,3 126:1 131:22 <b>protecting</b> 126:20 <b>protection</b> 131:19 131:25 <b>protective</b> 130:19 <b>provide</b> 8:11 44:22 63:12,14 92:24 114:4 117:11 122:22 123:1 134:15 <b>provided</b> 8:23 10:3 10:6 12:23 63:23 66:5 70:22 108:18 122:3,9,9 133:15,17 135:3 <b>provides</b> 22:13 44:23 135:22 <b>providing</b> 19:19 66:9 67:19 99:11 117:12,17 131:4 134:10,21</p>	<p><b>provision</b> 9:19 23:18 63:9 116:17 <b>provisions</b> 53:14,25 <b>public</b> 3:15 12:20 129:9 <b>pull</b> 43:11 <b>pulled</b> 26:17 84:6 <b>pulp</b> 36:3,4,8 45:22 46:10 47:24 <b>purpose</b> 7:10 44:16 <b>pursued</b> 13:8 <b>push</b> 137:24 <b>pushed</b> 62:10 <b>pushing</b> 139:21 <b>put</b> 9:14 14:2 16:8 18:18 25:2,3,20 26:4 79:24 80:1,9 94:14 95:11 99:8 101:14,16,17 112:20,22 113:1,4 113:11 136:6 138:14 <b>puts</b> 138:14 <b>putting</b> 18:4</p> <p style="text-align: center;"><b>q</b></p> <p><b>qualifies</b> 140:10 <b>qualify</b> 7:23 8:16 10:15 11:18,25 12:1 12:7 33:20 115:19 119:25 124:11,14 140:13 <b>quality</b> 24:9 <b>quebec</b> 75:14 97:9 107:22 <b>question</b> 10:3 11:18 14:7 17:21 18:21 41:1,2,5 48:14,25 49:5 67:10 76:2 79:1 86:5 88:5,5,15 98:5 102:11 104:1 104:14 106:9 108:5 109:5 110:4,9 116:19,23 118:21 119:11,15,17 132:12,14 136:1 <b>questions</b> 22:13 95:23 100:8 118:19</p>	<p><b>quibble</b> 108:13 <b>quick</b> 17:21 18:8 <b>quite</b> 8:19 50:25 51:12,12 52:14 93:20 106:6 111:2 <b>quote</b> 24:4 102:23</p> <p style="text-align: center;"><b>r</b></p> <p><b>r</b> 1:21 3:1,18 4:1 35:6 143:1 <b>rail</b> 12:20 37:24 39:4 41:14 94:10 97:6 <b>railcars</b> 94:16,20 96:11 <b>railroad</b> 5:2 7:12,14 8:22,25 9:1,20 10:3 10:22,23 12:23,24 13:3 14:18,21 15:25 20:4,15 21:20 24:18 25:20 28:2 29:13 31:12 36:12,15 66:25 68:8,11,17 75:2,14 78:9,12 79:2,4 80:17 82:4 83:5 86:4 90:23,25 91:16 92:6,10,11,16 93:10,21,22 94:15 94:23 95:1,8,13 96:6,9,9 97:8,9,25 99:10 106:12 108:1 109:4,6,14,21 111:23 116:11 119:21 121:20 122:5,8 123:3 124:12 125:11 128:17 129:8,9,10 129:11,14,17,21 130:6,12,15 131:7 131:17 135:4 <b>railroad's</b> 5:18 124:20 <b>railroading</b> 130:17 <b>railroads</b> 7:16 9:3 9:15 10:14 11:1,5 13:1,6,10,23 14:8 14:16,23 15:1,6,13 15:19 16:2,16,19,24</p>	<p>17:1,4,16,20 19:17 21:4,4 24:6,11,23 25:22 27:7,13 28:11 29:3 30:1,9,10 31:4 32:2,10 33:23 34:13 37:25 38:4,7,8 39:7 40:18 41:10,19 42:1 42:3,13,17,24 46:8 46:13 48:8,19 60:19 61:5,11 62:24 63:14 63:21 65:6 66:11 67:21,23 68:6,15 70:10,13,16,19,23 72:19 73:4,11 74:15 76:6,9 77:15 78:16 78:22 79:5,6,11,18 80:4,5,12,16 81:9 81:24,25 82:1 90:16 91:4,14,16,17,21,21 92:1,18,24 93:2,4 93:17,18 94:1,8,9 94:10 96:5,14,15 97:23 98:4 99:13,21 103:22 105:2,9,12 106:14 118:15,22 119:2 122:23 124:7 128:21 129:23 130:18 132:1 135:7 <b>railway</b> 1:8 3:12,13 4:8,10,11,16,25,25 6:7 7:7,8,13,13,20 10:11 36:16,16,17 37:23 38:15,23 44:8 44:9,9,11,12 51:1 52:9 58:8,22 59:21 63:2,5,12 69:11,21 70:4 87:5,5 90:6,6,7 90:21 91:5,6,6 92:8 95:6 96:8 98:17,20 99:23 100:1 <b>railway's</b> 63:22 <b>railways</b> 35:21 39:2 41:17 42:5 86:3 90:5 93:19 <b>raise</b> 20:1 35:2 88:4 89:18</p>
---	---	--	--

<p><b>raised</b> 115:16 135:18 <b>raises</b> 20:1 22:12 <b>raising</b> 88:5 <b>rare</b> 122:18,20 <b>rate</b> 92:24 <b>rates</b> 93:17 <b>reached</b> 60:19 62:23 63:20 65:6 98:7,18 109:13 118:25 <b>read</b> 11:15 18:16,24 19:10 32:14 84:25 100:2 115:17 125:3 129:3 133:10 134:7 134:8 <b>ready</b> 34:11 <b>real</b> 14:19 <b>realistic</b> 9:9 <b>really</b> 10:25 11:9 13:5 16:11 24:10 26:17 42:6 74:10 75:10 85:3 93:13 109:5 113:25 127:7 127:8 132:10 141:11 <b>realm</b> 34:4 <b>reason</b> 21:21 22:19 24:17 26:2 28:1,2,9 33:12 34:5 46:18 52:12 77:8,12,22 80:12 129:6 130:20 131:15 139:5 <b>reasonable</b> 140:23 <b>reasons</b> 18:13 22:17 24:25 26:14 73:4 102:14 <b>recall</b> 74:17 86:4 98:10 110:8 <b>receipt</b> 54:12 57:15 62:17 98:8,9,21 119:3 <b>receivable</b> 20:5 37:21 38:13 40:11 40:15 <b>receivables</b> 91:19 91:21 101:13,15</p>	<p><b>receive</b> 55:16 61:6 82:8,10 <b>received</b> 5:18 18:14 19:14 54:25 55:4,11 58:14 59:10,15 61:23 62:1 66:1 79:6 84:9,18 98:24 102:22 118:10 123:10 <b>receivership</b> 120:22 <b>receiving</b> 30:8 55:24 68:2 79:2,5 79:11,18 80:4,5 81:24 98:25 <b>recess</b> 72:2 115:6 <b>recessed</b> 72:4 115:8 <b>recognized</b> 12:22 12:24 115:25 116:7 133:13 135:11 <b>recognizing</b> 122:2 <b>recommend</b> 74:7 <b>recommendation</b> 74:4 <b>recommended</b> 59:17 <b>reconvened</b> 72:4 115:8 <b>record</b> 7:5 35:5 71:3 89:21 118:12 143:4 <b>records</b> 47:18 70:19 71:10 77:3,3 <b>recross</b> 87:17,18 <b>redirect</b> 86:24 87:1 109:25 110:2 <b>reduce</b> 48:18 128:2 <b>reducing</b> 124:9 <b>reduction</b> 110:12 110:18 <b>redundant</b> 93:20 <b>refer</b> 7:12 38:3,17 60:2 75:2 78:8 90:16 <b>reference</b> 39:1 53:7 <b>referenced</b> 63:2,6 63:18</p>	<p><b>referred</b> 10:19 19:15 23:15 72:19 72:22 90:16 91:8 <b>referring</b> 36:7 60:2 81:15 <b>refers</b> 116:13 <b>refineries</b> 17:11,20 <b>refinery</b> 75:20 78:18 97:24 100:24 104:15 <b>reflect</b> 70:12,15,21 77:3 <b>refuse</b> 74:15 86:3 86:18 130:14 135:2 <b>refused</b> 13:6 24:19 74:16 126:1 <b>regard</b> 11:8 95:14 113:14 117:5 136:18,21 <b>regarding</b> 5:9 52:7 58:3 59:7,9 63:22 98:7,8,12 <b>regards</b> 49:16 <b>region</b> 96:18 <b>rejected</b> 24:6 <b>related</b> 7:20 36:18 64:16 65:1 93:16 98:21 <b>relates</b> 102:6 113:8 134:15 <b>relationship</b> 14:22 14:25 16:4 25:25 26:4,5 31:25 39:9 39:12,21,25 42:25 43:4 44:25 92:25 93:16 96:2 97:11 105:14 106:21,24 <b>relationships</b> 32:17 45:8,12,12 132:5 <b>relative</b> 97:16 <b>release</b> 27:13 <b>relevance</b> 116:24 <b>relevant</b> 34:19 123:19 125:5 <b>reliance</b> 8:25 12:11 23:4 30:19 63:6 117:2,11,17 122:9</p>	<p>126:3 128:5 134:10 134:22 <b>relied</b> 33:25 34:2 66:22 67:4,24 <b>relies</b> 117:7 <b>rely</b> 11:24 15:1,3,13 29:6 63:2 66:11 67:21,23 68:2 85:2 98:17 99:13 103:12 119:20 123:6,7 <b>relying</b> 14:11 17:1,2 19:20 20:2 25:5 26:10,11,21 27:18 27:21,23,25 31:18 31:19,20 33:23 46:21 66:14 84:2 85:5,6 99:18 102:21 117:22 123:2 125:10,22,24 126:4 126:11,14,18 134:16 <b>remainder</b> 112:3 <b>remand</b> 124:18 <b>remember</b> 30:3 130:4 <b>remit</b> 29:25 103:12 <b>render</b> 128:14 <b>rendering</b> 134:18 <b>reorganization</b> 8:21 10:4 11:11,14,20 12:9 116:1,12,22 122:3 129:10 133:14 <b>reorganizations</b> 130:6 <b>repair</b> 140:7,13,15 <b>repeat</b> 72:11 81:7 <b>repeated</b> 10:16 <b>repeating</b> 41:5 <b>rephrase</b> 63:13 <b>reply</b> 8:3 10:16 13:4 16:9 18:14 19:10 26:14 113:22 115:17 136:11 <b>report</b> 26:17 27:18 37:21 84:6</p>
--	--	--	--

<p><b>reporting</b> 27:20  <b>reports</b> 84:10,23,25  85:3  <b>represent</b> 13:2 70:2  <b>representative</b>  50:13  <b>represented</b> 52:7  <b>representing</b> 132:6  <b>request</b> 50:9  <b>required</b> 11:13,25  11:25 24:7 116:21  135:7,14  <b>requirement</b> 22:4  <b>requirements</b> 21:5  122:17 124:5 125:8  <b>requiring</b> 32:8  <b>rescue</b> 125:12  <b>reserve</b> 5:21 113:24  <b>reside</b> 35:13,14  <b>residual</b> 109:11  <b>resist</b> 114:17  <b>resolution</b> 141:4  <b>resolved</b> 113:17  135:13  <b>resource</b> 73:7  <b>resources</b> 93:9  <b>respect</b> 5:18 7:18  14:20 16:12 20:16  23:12 31:6 33:2  44:22 50:1,5 65:13  74:2 75:16,25 77:17  78:9 82:19 83:2,4  100:17 102:13,17  102:20,21 108:1  110:4,15 114:1  115:20 118:5,8,9  119:8 122:25  128:25 129:4 133:9  133:21 134:1  <b>respective</b> 96:14  <b>respond</b> 6:24 18:18  19:1 21:16 66:18  132:23  <b>responded</b> 58:17  <b>responding</b> 47:8  49:24</p>	<p><b>response</b> 8:2 47:6  49:15 76:1 104:14  105:5  <b>responsibilities</b>  37:17 90:22  <b>responsibility</b> 30:13  90:24  <b>responsible</b> 30:8,10  78:13 79:10,17,20  79:21,22 87:3  <b>rest</b> 69:20  <b>restitution</b> 121:23  <b>restructure</b> 41:2  <b>result</b> 17:12,14 65:4  105:3 138:2  <b>resulted</b> 110:12,17  <b>return</b> 48:2  <b>revenue</b> 8:24 12:11  13:15 14:10 17:14  19:20 20:3,15 66:25  91:1 110:12,18  117:4,14,24 118:24  119:6,20,24 122:11  123:11 134:12,21  135:24  <b>revert</b> 23:10  <b>review</b> 71:15  113:22 136:10,11  136:16  <b>revision</b> 52:5,7,12  52:18 53:8 81:3  <b>rid</b> 4:12  <b>right</b> 15:20 23:5  24:10 27:7 28:15,18  28:22 32:7,18 34:10  34:18,24 35:1,2  36:18 38:4,18 41:18  43:24 44:13 45:9  51:20 52:16 57:25  60:6 68:19 73:20  75:22 77:5,10,12  78:5,9 79:24 80:10  80:11 82:6,14,25  83:4,21,24 84:23  85:21 86:3,8 87:23  89:18 101:1,5,7,8  102:2,4,10,13,20</p>	<p>103:3,20 104:8,9,21  105:1,22 106:8  107:10,17,20,24  108:7,23 109:7,17  110:25 111:7  113:24 115:2,3  116:16 120:5 121:8  122:14 126:1,15,16  127:3,6 129:14,15  130:2,7,14,17,23  131:7,14 132:11  135:21 136:1  137:10 138:14  140:1,8,11,14  <b>rights</b> 19:2  <b>rise</b> 72:3,5 115:7  141:22  <b>risk</b> 14:17 24:22  31:12,13 46:21  <b>risks</b> 123:1  <b>road</b> 143:17  <b>robert</b> 3:8 4:15  51:24 61:16  <b>role</b> 37:13 38:6,8  87:9  <b>route</b> 98:2 104:18  104:19,21,22  105:11 106:3  131:13  <b>routes</b> 13:7,17  97:19  <b>rude</b> 17:24  <b>rule</b> 21:21 22:2,4,8  22:15,16 116:23  <b>ruled</b> 132:3  <b>run</b> 30:15 129:17  130:18  <b>running</b> 130:15  <b>ryan</b> 5:1 51:17  57:23 58:2,7,8,11  59:6,15 60:10,12  61:15,23</p>	<p><b>safe</b> 89:15,16  <b>safety</b> 90:25  <b>saint</b> 13:11,22  17:11,20 35:14 51:9  51:11 88:6 89:15  95:13 96:7,9 97:2  97:21 98:3 104:23  105:9 109:3 118:17  131:12  <b>sales</b> 95:11 97:1  <b>satisfied</b> 12:8 14:6  15:13  <b>satisfy</b> 21:5 122:17  <b>saved</b> 131:2  <b>saw</b> 5:8 95:4  <b>saying</b> 29:21 47:8  71:23 105:22  106:15 127:7,8  <b>says</b> 47:21 48:2  54:6 56:3,16 57:4  57:13 58:23 60:13  61:1 62:10,16  120:13 121:14,25  125:13  <b>scenario</b> 79:11  81:25  <b>scheduled</b> 6:11  <b>schedules</b> 112:2  137:12  <b>se</b> 23:1  <b>searsport</b> 107:7  109:2  <b>seated</b> 4:4 35:4  89:20  <b>second</b> 11:22 12:5  12:13 14:5 23:15  29:20 40:22 41:16  41:20,21 45:25  53:12,20 54:14 61:3  65:14,23,24 79:1  81:2 83:11 104:7  120:6,8,24 121:7,12  140:1  <b>secondly</b> 24:20 25:3  <b>section</b> 7:24 8:10,17  21:7 120:1</p>
		<b>s</b>	
		<b>s</b> 3:1 4:1 35:7 89:22 89:22 142:3,14 <b>sadly</b> 29:16 130:3	

<p><b>secure</b> 20:5 67:25 68:2 77:9,12 80:13 83:10,13,14 <b>secured</b> 20:14,15 21:18,22 22:20 25:2 25:25 26:4 27:2 77:18 82:22 83:1 85:5 118:4 126:12 126:14,15 <b>security</b> 5:11 20:3,5 20:7,13 21:24,25 22:10,23 23:1,2,3 127:16 <b>see</b> 8:2 18:24 20:25 28:14 34:16 48:3 50:2,6 51:18,25 53:15,17,22 54:17 54:20,24 57:2,7,15 57:17 58:15,17,25 59:14 60:16 61:8,20 62:2,5,8,11,14,21 64:3,23 69:12,25 81:4,14,21 82:12 85:19 96:13,16 97:3 122:16 123:23 140:4 <b>seeing</b> 141:8 <b>seek</b> 45:17 <b>seeking</b> 48:2 122:25 <b>self</b> 24:24 <b>send</b> 41:15 45:25 46:1 47:16 49:8 61:6 62:4 <b>sending</b> 47:22,25 48:5 <b>senior</b> 22:6,7 96:24 <b>sense</b> 79:8 88:2 93:13 105:13 106:10 112:16 125:7 <b>sent</b> 46:6,7 49:25 59:9 61:25 62:7 69:21 <b>sentence</b> 57:4 <b>separate</b> 118:1,2 121:15 122:1 133:25</p>	<p><b>series</b> 78:21 81:6 <b>seriousness</b> 141:13 <b>serves</b> 50:21 <b>service</b> 75:4,5,8,12 108:18 110:7 <b>serviced</b> 74:25 <b>services</b> 8:21,23 9:19 10:3,6,9 12:23 13:2,5 14:8 15:25 16:1,17 19:19 24:13 63:10,15,23 66:5,9 67:19 70:22 98:8,21 99:11 117:11,12,17 122:2,8,22 124:13 127:12 128:15,16 129:13 130:12 131:5 134:11,15,21 135:3,22 140:14 <b>serving</b> 47:23 <b>session</b> 4:3 <b>set</b> 6:15 15:10 25:25 29:3 37:19 38:9,10 77:9 125:3 126:23 129:19 135:21 <b>setoff</b> 26:24 27:8 <b>sets</b> 126:10 <b>setting</b> 31:3 76:4 93:17 <b>settle</b> 140:19 <b>settled</b> 55:23 56:18 61:6 <b>settlement</b> 19:16 40:4,11 52:5,8,12 55:13 57:14 65:25 82:9 91:9,13 93:2,3 141:11 <b>settlements</b> 40:14 40:19 41:9 60:14 <b>severed</b> 107:16,17 107:17,20 <b>share</b> 19:17 41:15 51:10,10 60:1,2 98:25,25 101:5,8,18 102:23,24 103:1,7,9 118:18 127:3,3 <b>sheet</b> 81:3 82:7</p>	<p><b>sheila</b> 2:25 143:3,10 <b>ship</b> 78:12 107:10 108:12,14,14,17 110:5,11 122:22 <b>shipment</b> 32:11 51:3,5 91:18 <b>shipments</b> 17:13,15 28:5,11 30:3,6 57:10 63:23 64:16 66:6 76:10 77:19,20 77:23 78:7,10,14,18 82:3 83:4 98:9,21 99:17,18 100:22 102:25 118:7,8 125:24 131:12 134:1,4 <b>shipped</b> 16:3 17:11 <b>shipper</b> 30:12 56:10 96:10 106:10 <b>shippers</b> 13:19 91:23 92:25 93:5 96:17 97:16 <b>shipping</b> 35:21 63:7 75:19 80:2 96:11 108:8 109:7 <b>short</b> 21:15 86:25 88:7 136:7 <b>shorter</b> 137:20 <b>shortly</b> 59:24 68:1 83:23 <b>show</b> 9:18 13:9 14:1 14:4,15 15:2,17 19:13 21:3 64:10 84:23 <b>showing</b> 34:22 <b>shown</b> 70:15 <b>shows</b> 19:18 64:11 64:12 <b>shur</b> 3:2 4:17 <b>shut</b> 120:2 129:13 129:21 <b>shutdown</b> 109:6 131:14 <b>shuts</b> 130:12 <b>sic</b> 13:21 <b>side</b> 73:1 90:19 94:18 111:23</p>	<p><b>sides</b> 50:10 <b>siding</b> 94:15 <b>signed</b> 52:22 <b>significance</b> 22:23 29:19 65:22 <b>significant</b> 93:12 95:2,4,9 110:12,17 110:19 113:16 <b>significantly</b> 133:1 <b>silk</b> 124:3 <b>similar</b> 11:3 19:3 111:2 <b>similarly</b> 80:13 110:15 <b>simple</b> 9:17 102:11 109:5 129:6 <b>simplified</b> 93:5 <b>simplify</b> 91:22 <b>simply</b> 9:14 11:20 13:20 23:16 27:15 47:16 76:3,11 86:18 115:21 122:22 131:17 <b>simpson</b> 5:1 29:7 31:1 51:16,25 59:19 59:20 60:22,24,25 61:15 62:7,13 73:16 78:5 83:11 85:13,17 86:14 87:7,25 88:7 89:19,22,25 90:4 96:1 100:15 102:9 106:20 110:4 111:6 130:13 142:9 <b>simpson's</b> 130:22 <b>simultaneous</b> 137:2 137:12 138:10 <b>simultaneously</b> 45:24 46:16 <b>sister</b> 44:12 <b>sit</b> 61:23 <b>sits</b> 130:8 <b>situation</b> 25:1 29:3 92:12,12 <b>six</b> 7:23 8:9,16,20 10:4,15 11:19 12:1 12:8 21:21 22:1,5,8 63:15 66:6 88:6</p>
---	---	---	--

<p>90:18 116:2,8,23                  119:25 121:2,5,15                  122:3,7 124:13                  128:11 133:13                  135:12  <b>skip</b> 19:22  <b>slipped</b> 138:4  <b>slowed</b> 131:11  <b>small</b> 140:7  <b>smiling</b> 140:20,21  <b>sold</b> 74:21 107:14  <b>sole</b> 5:12  <b>solicit</b> 95:14  <b>solicited</b> 96:19  <b>solutions</b> 143:16  <b>solved</b> 22:13  <b>somebody</b> 26:6,8                  131:1  <b>somewhat</b> 21:15                  138:3  <b>soon</b> 19:16 141:12  <b>sorry</b> 6:10,15 20:20                  40:22 88:3 92:18                  138:22  <b>sort</b> 18:8 22:19                  32:16 131:1  <b>sought</b> 8:22  <b>sounds</b> 26:6,8                  111:20  <b>source</b> 13:15 17:3,3                  117:8,18,23 127:19  <b>sources</b> 125:13,15  <b>south</b> 2:25 143:3,7  <b>southern</b> 3:12 4:10                  4:25 7:7,13 24:1,2                  36:16 37:23 44:9,12                  46:2 47:19 50:25                  51:9 52:8 58:8,22                  63:1,5,12,22 64:11                  64:14 69:11,21 86:2                  87:4 90:6 91:5 95:5                  98:17,19 116:14  <b>southern's</b> 51:8                  66:4  <b>sow's</b> 124:3  <b>speak</b> 59:24</p>	<p><b>speaking</b> 46:9  <b>specific</b> 97:15 107:1                  117:8,18,23 118:9                  129:8  <b>specifically</b> 23:22                  23:23 61:18 90:5                  92:6 103:21 117:23                  125:25 133:12,14                  135:10  <b>specifics</b> 25:8  <b>speed</b> 60:11  <b>spell</b> 35:4  <b>spelling</b> 59:16  <b>spend</b> 10:7  <b>spent</b> 90:18  <b>spoke</b> 99:8  <b>spread</b> 29:22  <b>spreadsheet</b> 71:7  <b>square</b> 3:15  <b>stage</b> 59:18 139:15                  139:16,17  <b>stand</b> 9:13 34:25                  88:1 111:5 135:20                  135:25  <b>standard</b> 8:15,17                  8:19 14:1 22:17,18                  25:22 117:10,14                  118:20 119:10                  120:5,7 124:9,11,14                  128:2,2,7,8,18  <b>standards</b> 9:22                  122:6 123:12 124:9  <b>standpoint</b> 95:10,11  <b>start</b> 6:24  <b>started</b> 17:11  <b>starting</b> 4:13 39:23  <b>state</b> 89:20  <b>statement</b> 8:12                  10:18 19:24 52:20                  55:13 58:10  <b>statements</b> 27:19                  70:9  <b>states</b> 1:1 4:2 50:6                  107:22 108:11  <b>stating</b> 24:7  <b>status</b> 8:9 21:7</p>	<p><b>steamship</b> 116:12  <b>step</b> 87:19 110:25  <b>stipulated</b> 71:3                  112:3  <b>stipulation</b> 4:11                  5:11,23 6:19 7:10                  71:14,16 89:8                  112:18,21,23 113:2                  140:8  <b>stipulations</b> 5:5,8  <b>stop</b> 33:17 107:3,4                  130:15  <b>stoppage</b> 12:18  <b>stopped</b> 108:2,8                  109:6  <b>story</b> 62:19  <b>straight</b> 124:8  <b>stranded</b> 109:12  <b>street</b> 1:15 3:4  <b>strike</b> 63:13  <b>structured</b> 26:22  <b>study</b> 8:5 113:25  <b>stuff</b> 87:21 127:3                  129:17 130:8,10                  140:15  <b>subject</b> 52:4 57:24                  60:11,23 61:16  <b>subjective</b> 9:2  <b>submit</b> 31:17 33:10                  112:4,13 113:25                  136:7,19 137:13                  141:5  <b>submitted</b> 7:10                  115:20 136:12  <b>subordinate</b> 124:25                  125:1  <b>subordinated</b> 33:8  <b>subsequently</b> 65:10                  99:9  <b>subset</b> 22:7  <b>subsidiaries</b> 72:16                  72:18  <b>substantial</b> 14:3                  97:13  <b>successfully</b> 13:18  <b>successor</b> 14:18                  25:15 75:16</p>	<p><b>suffice</b> 34:2  <b>suggest</b> 9:13 71:20                  112:13 134:8                  136:14 138:7  <b>suggested</b> 57:5  <b>suggestion</b> 5:14                  112:1,4 137:2  <b>suite</b> 143:18  <b>sum</b> 114:10,16  <b>summarized</b> 33:19  <b>summary</b> 33:18                  71:9  <b>summing</b> 18:4                  114:6  <b>sunberry</b> 90:20  <b>supplement</b> 120:10  <b>supplied</b> 24:13,14                  127:11  <b>suppliers</b> 129:15,16  <b>supply</b> 41:3 112:8                  129:16  <b>support</b> 23:16                  69:10 119:22  <b>supported</b> 121:18  <b>supposed</b> 51:2 71:6  <b>sure</b> 5:25 6:18 8:13                  10:1 21:11 31:1                  41:4 43:12 53:10                  71:22 78:13 86:15                  88:8,16,20 98:4                  106:6,9 107:1 108:5                  108:20 113:15,17                  114:18 129:11                  132:25 133:11                  138:19 140:24  <b>surprising</b> 138:3  <b>swap</b> 19:10,12                  49:17 50:9,18 56:13                  60:11 64:7 75:25                  82:23,24 83:3 85:5                  118:1,2 133:25                  134:2 142:16  <b>swaps</b> 45:20 46:3                  99:15  <b>sworn</b> 35:3 89:19  <b>sympathize</b> 111:3</p>
---	--	---	---

<p><b>system</b> 19:16 24:21 24:21,25 25:4,6 28:11 29:18 30:14 30:20,25 31:8,14,22 31:24 32:7,16 33:3 33:6,25 34:3 40:4 40:10 55:13 56:3 57:15 63:25 65:25 66:2 67:24 68:3 79:15,15 80:6 82:9 83:8,17 84:9,18 85:5,6 91:9,13 93:14 100:17 101:3 101:8,9,11,21,24 102:12,20,22,23 103:4,4,11 125:17 127:24 130:17,18 130:21,21 131:1,9 131:13 132:4,6,12</p>	<p><b>telephone</b> 6:8 <b>tell</b> 31:2 34:15 92:16 97:2 108:24 <b>telling</b> 49:4 105:24 128:14 <b>tells</b> 117:15 <b>ten</b> 14:24 114:11,18 <b>term</b> 79:2 81:3 82:6 92:15 113:8 <b>terminating</b> 96:9 107:8 <b>terminology</b> 45:20 <b>terms</b> 6:22 7:9 8:6 8:14,15 9:10 11:10 11:24 13:18 14:14 15:9,14 16:9,17 17:4,13 18:17 25:6 25:23,23,24 30:2 38:25 40:7 44:19,22 46:5 52:5,8,12,18 52:20 53:13,14 54:10 57:1 81:4,9 88:7 94:6 118:15 120:22 125:9 127:10,14,15 128:4 128:7,9 134:13 135:16 <b>terrible</b> 125:5 <b>test</b> 9:2 128:24 129:5,7,8,12 <b>testified</b> 26:13 27:8 42:12 44:24 45:4 66:13 73:3 77:17 95:20 131:6 <b>testimony</b> 6:18 9:14 18:10 23:7 25:9,9 27:9 30:24 67:4,7 74:14,18 87:20 88:8 89:17 90:17 94:1,3 98:6,10,12 100:18 110:24 117:5 130:22 132:19 134:1 <b>tests</b> 132:20 <b>thank</b> 4:15 5:5,16 6:2,12 7:2,4 21:9,9 21:11,13 34:8,9,12</p>	<p>34:20,21 35:8 43:15 43:16,16,19,22 48:13,23 49:6 65:19 67:15,16,17 71:17 71:18 72:1 84:16 86:24 87:16,19,19 88:2,17 89:16,24 100:6,10 109:24 110:22,24 115:11 115:11 120:2,3 123:14,15,16 132:20,22 133:6 136:1,23,24 141:14 141:15,19,20,21 <b>thanks</b> 53:3,10 <b>thanksgiving</b> 138:5 <b>theory</b> 123:20 <b>thereof</b> 21:17 <b>thing</b> 20:10 93:20 99:14 123:18 139:16 140:1,6 <b>things</b> 10:11 26:2 26:16 32:14 34:4 96:16 100:2 134:14 137:9 <b>think</b> 5:17,19,22 8:5 8:15 9:9,22 10:7,15 11:3 14:1,3,5,12,12 14:13 16:10 18:23 19:9,18 20:11 21:19 22:18,22 23:8 26:8 29:4,16 32:13 33:1 33:20,22 34:6 50:21 71:5,23 73:19 76:1 81:19 88:7,14 89:3 89:7 93:6 95:2 101:17 105:23 110:14 112:15 113:21 114:11,12 114:23 115:21 117:1 118:19 120:4 123:20,20 126:13 128:13 129:2,3,4 131:6 132:18,19 133:3,21 137:1 138:8,20 140:12,17 140:18 141:1</p>	<p><b>thinking</b> 83:19 137:23 138:13 141:10 <b>third</b> 54:17 56:24 120:25 121:7,12 <b>thirteen</b> 73:2 <b>thirty</b> 37:1 <b>thompson</b> 3:11 4:24 7:6 <b>thoughts</b> 113:13 114:3,9 <b>three</b> 33:18 81:19 92:24 93:2,3 96:5 96:11,11,14 98:4 122:6,12 138:20,22 <b>throw</b> 18:6 141:3 <b>thursday</b> 139:24,25 <b>time</b> 6:23 10:7 18:22 21:15,23 24:15 27:12 29:2 30:15,16,22 33:22 36:6,6 37:2 38:3,3 45:8,16 49:9,11 50:17 56:10 70:25 73:18 76:9 78:4 82:16,16 83:7 84:19 92:8 100:9 111:7 115:4,12 119:14 120:21 127:12,12 128:1 129:23 137:6 137:17,20 138:21 138:23 140:23 <b>timed</b> 108:16 <b>timely</b> 61:6 <b>times</b> 31:5 111:2 114:23 <b>timewise</b> 141:16 <b>timing</b> 88:3 137:16 <b>tissue</b> 36:5 <b>title</b> 72:11 91:2 <b>titled</b> 52:17 <b>today</b> 5:1,3,13 8:2 22:22 27:9 34:16 61:6 62:3,11 72:19 89:24 96:11 113:10 113:19 114:6 125:6</p>
<p><b>t</b></p>			
<p><b>t</b> 142:3,3,14 143:1,1 <b>take</b> 5:5 26:10,18 31:11 32:1,8 45:17 46:20 49:13 52:19 53:12 60:15 64:2 68:20 69:24 71:21 71:24 78:7 80:24 85:10 104:1 115:3 126:2,6 <b>taken</b> 70:18 <b>takes</b> 120:21 132:14 <b>talk</b> 12:14 93:9 137:16 <b>talked</b> 6:23 79:12 81:25 84:5 <b>talking</b> 76:10 83:11 85:15 92:17 116:15 116:18 121:24 125:6,19 139:21 <b>tarr</b> 47:2,6,8,20 48:10 49:15,23,25 50:1 59:7 60:10 <b>tax</b> 130:4 <b>technically</b> 106:6,8 <b>technology</b> 6:15 <b>teeing</b> 120:9</p>			

<p><b>told</b> 26:1 62:2 76:8 79:4 82:6 85:2 86:7 119:17 <b>tomorrow</b> 61:3 <b>top</b> 33:14 51:16 81:3 85:12,15 128:25 <b>total</b> 48:18 54:18 66:3 77:20 128:12 <b>totally</b> 122:1 <b>track</b> 29:12 74:20 75:17 107:9 <b>tracks</b> 24:20 30:15 74:23,25 78:17 104:19,19 <b>traffic</b> 12:19 13:6,7 13:10 17:16 29:11 39:6 42:13,16 44:19 54:18 55:2,11,23 56:4,9,16,17 57:7,9 57:13 66:10 67:20 77:24 81:8,20,23 82:8,20,20,21 83:2 83:3,6 86:4 94:2,7,9 94:25 97:22 98:1 99:12 104:23 105:11,21 107:21 135:2,8,15 <b>train</b> 51:7 94:14,20 94:22 <b>trains</b> 30:15 60:14 <b>transcontinental</b> 32:11 <b>transcribed</b> 2:25 <b>transcriber</b> 143:8 <b>transcript</b> 125:21 143:4 <b>transcriptionist</b> 143:10 <b>transfer</b> 16:16 45:25 46:1 48:11 49:9,10 62:19 <b>transfers</b> 16:14 47:9 48:15 <b>translate</b> 134:2 <b>transpired</b> 16:12,13</p>	<p><b>transport</b> 51:9 90:20 97:20 <b>transportation</b> 50:24 60:4 90:19 <b>transported</b> 13:13 <b>treat</b> 140:3 141:12 <b>treated</b> 122:4,14 132:7 <b>treating</b> 33:5 <b>treatment</b> 24:9 <b>tremendous</b> 13:15 <b>trepidation</b> 111:7 <b>trial</b> 112:13 136:15 137:3,14 <b>triangular</b> 26:24 27:8 <b>trip</b> 89:15 <b>troubled</b> 14:20 <b>trucking</b> 90:20 <b>true</b> 21:23 28:19 77:24 82:3 124:19 125:14 129:23 130:3 132:11 140:9 143:4 <b>trust</b> 32:16,21 33:5 33:6,7,13 131:20 132:3,4 <b>trustee</b> 3:3 4:16 8:1 8:3 9:5 10:12,23 13:4 16:10 112:17 115:21 116:5 <b>trustee's</b> 4:9 11:7 115:16 <b>trusts</b> 33:9 <b>truth</b> 124:4 <b>try</b> 21:14 97:4 <b>trying</b> 34:19 95:12 97:17 108:13 <b>turn</b> 19:17 30:21 41:16 81:2 85:23 92:25 93:4 105:11 <b>turning</b> 16:23 52:16 60:6,21 61:13 <b>two</b> 5:22 8:3 9:25 11:10 30:18 37:1,24 39:7 48:15 56:5 69:25 71:6 81:19</p>	<p>82:25 84:2 88:10 118:1 121:14 124:24 136:12 137:19,24 139:15 139:19,21 140:13 <b>type</b> 10:14,25 12:25 135:11 141:6 <b>types</b> 12:6 116:20 <b>typically</b> 47:10 54:25 55:16 82:10 <b>typing</b> 34:16</p> <p style="text-align: center;"><b>u</b></p> <p><b>u</b> 112:18 <b>u.s.</b> 1:14,23 108:1 <b>uh</b> 79:7 120:12 <b>ultimate</b> 30:12 78:14 <b>ultimately</b> 28:25 30:11 79:10 93:11 <b>unable</b> 42:16 94:25 <b>uncommon</b> 22:9 <b>uncontroverted</b> 119:4 <b>underlying</b> 51:20 51:24 116:6 <b>undersecured</b> 28:8 <b>understand</b> 4:11 66:25 78:9,25 79:2 79:20 102:7,9 107:23 108:2 115:17 <b>understanding</b> 9:11 11:24 41:12 52:6 53:24 54:4 55:14 56:1,7,19 57:18 63:20 76:2 79:14 85:21 91:12 95:7 96:1 114:22 126:22 <b>understandings</b> 9:18 42:25 43:4 <b>understood</b> 54:11 55:20 82:14 83:5 103:16 127:24 <b>undertaken</b> 46:3 <b>unequivocally</b> 125:20 128:20 132:19</p>	<p><b>unfair</b> 33:6 34:6 120:9 <b>unfortunate</b> 13:14 14:24 <b>unfortunately</b> 21:19 111:4 138:5 <b>unique</b> 92:5 93:21 96:5 120:19 133:23 <b>united</b> 1:1 4:2 50:6 107:22 108:11 <b>universe</b> 5:23,24 130:11 <b>university</b> 37:8,10 90:11,12,18 <b>unpaid</b> 34:6 <b>unquestionably</b> 23:25 <b>unreceived</b> 81:20 81:23 <b>unsecured</b> 24:9,12 28:3 31:25 33:4,8 34:6 132:7 <b>unwilling</b> 15:1,3 <b>use</b> 10:23 92:15 113:8 <b>usual</b> 47:9 48:11 <b>usually</b> 34:19 40:20 94:12,12 <b>utilized</b> 45:5 97:20 <b>utopia</b> 36:4</p> <p style="text-align: center;"><b>v</b></p> <p><b>v</b> 22:15 <b>vacation</b> 58:24 <b>valid</b> 5:11 <b>various</b> 10:6 72:21 78:22 98:12 134:14 <b>vast</b> 56:9 <b>vendors</b> 134:14 <b>verify</b> 112:9 <b>veritext</b> 143:16 <b>versus</b> 121:14 <b>vice</b> 97:1 <b>view</b> 42:22 <b>virtually</b> 31:4 42:21 46:15 102:3 125:14 <b>virtue</b> 38:24</p>
--	--	--	--

<b>volume</b> 52:14 107:7	<b>weigh</b> 30:14	<b>wonderful</b> 5:4 7:2	100:12 102:16,16
<b>w</b>	<b>welcome</b> 6:13	111:19 115:1	138:9,23
<b>wages</b> 129:20	<b>went</b> 28:1 61:16	120:20 140:24	<b>year</b> 61:1 73:23
<b>wait</b> 29:23 83:6	78:17 81:6 103:13	<b>wonderfully</b> 18:2	74:4
112:6	109:1 122:23	<b>wondering</b> 18:3,9	<b>years</b> 13:13 14:24
<b>want</b> 19:2 26:3 29:6	124:19 127:14	<b>word</b> 141:17	17:8 20:12 21:1,20
31:10,11 51:23	<b>west</b> 138:6	<b>words</b> 12:15,16	22:21 37:1 73:21
74:13 81:13,13	<b>western</b> 90:12	26:25 28:21,24 32:7	74:11 90:9,18,19,21
95:22 113:1,17	<b>whatsoever</b> 116:25	32:9,19 117:10	<b>yellow</b> 64:18 65:17
114:3,20 117:25	118:7	125:21	65:18
136:3,4,6 137:15,16	<b>wheeling</b> 20:4 22:23	<b>work</b> 73:7 106:7	<b>yep</b> 90:1
137:24,25	68:7,11,17 99:22	131:1 138:11 141:8	<b>yesterday</b> 61:3
<b>wanted</b> 18:18 24:19	100:1 121:21	<b>worked</b> 17:7 29:5	<b>yesterday's</b> 27:3,4
65:2 86:15 92:12,13	<b>wheelings</b> 5:10	32:7 49:1,3,7 58:6	<b>york</b> 24:2 116:14
126:17 130:16	<b>wholly</b> 72:16,18	78:5 99:6 100:3	
<b>wants</b> 16:10 59:17	<b>wide</b> 67:13	126:22	<b>z</b>
132:13	<b>willing</b> 15:13	<b>working</b> 72:24	<b>zahradka</b> 3:9 4:17
<b>water</b> 35:1	140:12 141:11	107:9	4:18
<b>way</b> 13:21 25:9 28:3	<b>win</b> 139:16	<b>works</b> 29:14 30:7	
29:5,14,19 30:3,7	<b>winded</b> 133:3	31:3,6 47:1,2 49:4	
31:2,6 32:15 33:14	<b>wire</b> 16:14,16 27:14	58:8,22 91:13	
36:19 42:9,23 47:10	45:25 46:1 49:9,10	137:22 138:11	
49:1,9,19 59:22	76:19	<b>worried</b> 26:6	
78:1,5,22 79:6,20	<b>wires</b> 76:14,17	<b>worry</b> 120:16	
86:12 91:22 93:24	<b>wise</b> 42:7	<b>worth</b> 21:20 32:14	
95:4 96:16 104:22	<b>wish</b> 88:3 89:14	<b>worthiness</b> 93:24	
107:12 112:5 120:3	112:13 114:15	<b>worthwhile</b> 123:23	
120:9 124:7 126:22	120:10 137:13	<b>would've</b> 95:2	
134:7 140:2,4	<b>wishes</b> 60:25	103:10 105:3,23	
<b>we've</b> 11:14 23:21	<b>wishing</b> 113:20	110:17 119:12	
34:22 79:5 90:16	<b>withheld</b> 76:14	121:19,20 131:23	
112:7 115:20	<b>withhold</b> 139:18	<b>wrap</b> 30:24 140:19	
124:22 129:2	<b>withholding</b> 76:17	<b>writing</b> 99:9 113:20	
139:15 140:16	129:12	120:11 136:19	
<b>wednesday</b> 53:15	<b>witness</b> 4:20 8:12	<b>wrong</b> 28:1,2 116:8	
138:8	34:13,23,25 35:3,6	121:12 133:10	
<b>week</b> 45:23 47:22	41:2 43:8,20 48:16		
58:24 60:15 64:21	48:20 49:7 65:20	<b>x</b>	
97:3 138:24	67:7 69:3 84:15	<b>x</b> 1:4,12 49:8 142:1	
<b>weekend</b> 114:14	86:17 87:21 89:19	142:14	
<b>weekly</b> 15:11,18	89:22 90:1 95:18		
16:5,13 45:20 46:4	112:24 142:5	<b>y</b>	
<b>weeks</b> 16:21 137:19	<b>witnesses</b> 5:3 6:25	<b>y</b> 142:3	
137:24 138:13,18	9:14 34:15 111:18	<b>yard</b> 94:13,13	
138:20,22 139:4,4	111:21,22,25	<b>yeah</b> 20:23 41:6	
139:21	<b>wo</b> 140:7	49:15 51:19 53:7	
		71:8 79:9 81:5	
		86:17 87:23 92:17	

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC  
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**CERTIFICATE OF SERVICE**

I, Michelle S. Pottle, an employee of Pierce Atwood LLP, being over the age of 18,  
hereby certify that on the date set forth below I caused copies of the Post-Hearing Brief of New  
Brunswick Southern Railway Company and Maine Northern Railway Company in Support of the  
Allowance of Their Proofs of Claim, to be served upon the parties indicated on the service list  
attached hereto in the manner described on said service list.

Dated: Portland, Maine  
December 10, 2015

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