UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

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

WHEELING & LAKE ERIE RAILWAY CO.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO ENFORCE PAYMENT OF ALLOWED ADMINISTRATIVE CLAIM PURSUANT TO ORDER CONFIRMING TRUSTEE'S REVISED FIRST AMENDED PLAN OF LIQUIDATION DATED JULY 15, 2015 (AS AMENDED ON OCTOBER 8, 2015)

Wheeling & Lake Erie Railway Co. ("Wheeling") files this reply (the "Reply") in support of its *Motion To Enforce Payment Of Allowed Administrative Claim Pursuant To Order Confirming Trustee's Revised First Amended Plan Of Liquidation Dated July 15, 2015 (As Amended On October 8, 2015)* [D.E. 1938] (the "Motion") and in response to the objection (the "Objection") thereto filed by Robert J. Keach in his capacity as estate representative ("Estate Representative") of Montreal, Maine & Atlantic Railway, Ltd. (the "Debtor").[1]

OVERVIEW

The Estate Representative's Objection contains a dizzying array of arguments that depend on two conflicting, mutually exclusive, and meritless theories:

- Either (A) after a bruising eighteen month fight which ended with Wheeling obtaining final allowance of its Superpriority Claim,[2] Wheeling then decided, for reasons unknown, to waive that claim for the opportunity to prove a larger secured claim (even though the Estate Representative also maintains that he holds no collateral of Wheeling, making any such secured claim illusory);

[1] Capitalized terms not defined herein shall have the meaning set forth in the Motion.

[2] Wheeling filed the motion that led to allowance of the Superpriority Claim on January 30, 2014. The Superpriority Claim was allowed on July 14, 2015.

- Or (B), there is a new provision of the Bankruptcy Code (or a new reading of § 506(c)) that allows surcharge against an *unsecured administrative expense claim* for the expenses allegedly incurred by the estate for preservation of collateral that the Trustee also claims no longer exists.

The Estate Representative's theories are wholly unsupported by the facts and applicable law. They ignore the legal reality that the Estate Representative's Plan could not have been confirmed without providing payment for the cash value of Wheeling's allowed Superpriority Claim on the Effective Date pursuant to § 1129(a)(9) of the Bankruptcy Code;[3] that Wheeling has not agreed to any treatment of its allowed Superpriority Claim other than payment in full; and that there is not one single case—not one—cited in the Objection that supports surcharging an administrative expense claim for the expenses of preserving collateral long since dissipated.

The Motion must be granted, and Wheeling's Superpriority Claim must be paid as required under the Plan, § 1129(a)(9) of the Bankruptcy Code, and Rule 3021 of the Federal Rules of Bankruptcy Procedure, which states that "after a plan is confirmed, distribution shall be made to creditors *whose claims have been allowed*[.]" (Emphasis added).

ARGUMENTS IN REPLY

Contrary to the Estate Representative's assertions, the facts, circumstances, and law make clear that (A) Wheeling holds an allowed administrative expense claim by virtue of a final order of this Court; (B) an administrative expense claim cannot be surcharged under § 506(c); and (C) Wheeling has not agreed to any other treatment of its Superpriority Claim other than payment in cash of the value of that claim as of the Effective Date under the Plan.

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[3] Thus, for the Plan to be confirmed, it had to comply with the following provision, among others:

> Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim[.]

11 U.S.C. § 1129(a)(9).

A. Wheeling Holds An Allowed Superpriority Claim Pursuant To A Final Order Of This Court; No Defense Of Deduction, Offset, Or Surcharge Can Be Raised.

Wheeling holds an allowed superpriority administrative expense claim because of the Estate Representative's failure to do what he was ordered (and had agreed) to do: escrow and pay over to Wheeling proceeds of certain of the Debtor's accounts receivables without deduction of any kind. By refusing to pay Wheeling the cash value of its Superpriority Claim, the Estate Representative is again disregarding the Court's orders as well as the terms of his own Plan. A brief review of certain facts makes this clear.

The Estate Representative's "the-facts-and-law-are-what-I-say-they-are" approach to Wheeling represents a striking about-face from the earliest days of the case when the Estate Representative needed Wheeling's help. As the Estate Representative has told the Court (when he was the Debtor's trustee), the case would have been dead on arrival without Wheeling, which is why he agreed to provide Wheeling with adequate protection for the use of its cash collateral and further agreed to remit to Wheeling the proceeds of some of its collateral once the Debtor obtained post-petition financing from another lender. The Estate Representative's own words (from when he was the Debtor's trustee) say it best:

> At the start of the Application Period [August 21, 2013 through April 30, 2014], the Trustee engaged in negotiations regarding the use of cash collateral, primarily working to provide adequate protection to Wheeling & Lake Erie Railway Company ("Wheeling") as senior lienholder on the Debtor's cash collateral. As a result of these negotiations, the Trustee was allowed to use cash collateral to fund the Debtor's operations during the early part of the chapter 11 case, and Wheeling was granted adequate protection on account of the use of Wheeling's cash collateral. *In the absence of the Trustee's efforts and the agreement with Wheeling, the Debtor's business would have ceased to function, severely degrading its value as a going concern to the detriment of all creditors.*

First Interim Application Of Trustee Robert J. Keach For Allowance And Payment Of Compensation And Reimbursement Of Expenses For The Period August 21, 2013 Through April 30, 2014 [Case No. 13-10670, D.E. 873], ¶ 10 (emphasis added).

Consistent with this, the Court's six orders authorizing the use of Wheeling's cash collateral granted Wheeling a superpriority administrative expense claim, if Wheeling's replacement lien did not adequately protect it. An exemplar is in the sixth such order:

> If, notwithstanding the grant of adequate protection provided in this Order, Wheeling has a claim arising under Section 507(b) of the Bankruptcy Code, from the use of Cash Collateral pursuant to this Order and allowable under Section 507(a)(2) of the Bankruptcy Code, then, *such claim shall have priority over all other claims arising under Section 507(b) and all claims allowable under Section 507(a)(2)*.

Sixth Interim Order Authorizing Debtor To Use Cash Collateral And Granting Adequate Protection [D.E. 376] (the "Sixth CC Order"), ¶ 10 (emphasis added). In other words, the Superpriority Claim has priority over the very type of administrative expense claims that the Estate Representative seeks to surcharge Wheeling for today.

Moreover, with the Estate Representative's agreement, the Sixth CC Order also ordered him to turn over to Wheeling proceeds of certain accounts receivable *without deduction of any kind*. Sixth CC Order, ¶ 5. This provision reflects and embodies in a Court order the Estate Representative's agreement that there would be no deductions (none, including any for surcharge) with respect to receivables to be paid to Wheeling. This provision is critical to understanding why the Superpriority Claim was allowed, and must be paid, without deduction. It states:

> On and after the date of the Closing, and as and for additional adequate protection, the Trustee shall establish a segregated escrow account (the "Wheeling AR Escrow") and shall deposit therein any and all amounts collected by the Trustee, *without deduction*, from the payment of accounts receivable that were created at any time prior to the date of the Closing, including prior to the Petition Date ("Pre-Closing A/R"). *The Trustee shall remit the proceeds of any and all Pre-Closing A/R to Wheeling* on or before the 5th of each month without further Court Order.

Sixth CC Order, ¶ 5 (emphasis added). The Court allowed Wheeling's Superpriority Claim on a final basis precisely because the Estate Representative refused to comply with the foregoing

provision of the Sixth CC Order and dissipated Wheeling's collateral for his own (or the Debtor's) benefit.

When Wheeling filed a motion to enforce the foregoing provision from the Sixth CC Order, first and foremost it requested entry of an order "[r]equiring the Trustee to pay over the proceeds of *all* of the accounts receivable—including Canadian Receivables—collected by the Debtor and/or the Trustee after the Closing[.]" *Wheeling & Lake Erie Railway Company's Motion To Enforce Cash Collateral Orders* [Adv. Pro. 13-1033, D.E. 33] (the "Motion to Enforce"), Prayer for Relief, ¶ A (emphasis in original). In his objection to the Motion to Enforce [Adv. Pro. 13-1033, D.E. 34] (the "Superpriority Objection"), the Estate Representative countered that this type of relief was "unavailable" because "funds that have already been disbursed cannot be channeled retroactively into a segregated account. At best, Wheeling would be entitled to an allowed Superpriority claim under 11 U.S.C. § 507(b), *a claim that could and would be paid in full under a confirmed plan*." Superpriority Objection, ¶ 5 (emphasis added).

In ruling on the Motion to Enforce, the Court held that its prior determination that receivables of the Debtor's Canadian affiliate were really the Debtor's receivables (and, therefore, subject to Wheeling's security interest) was binding in this context too. *Amended Order On Wheeling & Lake Erie Railway Company's Motion To Enforce Cash Collateral Orders* [Adv. Pro. 13-1033, D.E. 76] (the "Superpriority Claim Order"). Thus the Court ruled "*consistent with the stipulations entered into by the parties in the Third Amended JPO*, Wheeling shall be deemed to have an allowed Superpriority, administrative expense claim against the estate in this Chapter 11 case, pursuant to 11 U.S.C. § 507(b) and as provided for by the terms of the applicable cash collateral orders, in the amount of $695,640.03 (the 'Superpriority Claim')." Superpriority Claim Order, ¶ 4 (emphasis added).

The Superpriority Claim Order made no allowances for deductions, offsets, or recoupments of any kind (which could have been, but were not, raised as defenses to the Motion to Enforce), nor could it have. The Superpriority Claim is a form of adequate protection granted to Wheeling because the Estate Representative spent Wheeling's collateral without permission and in direct violation of the terms of the Sixth CC Order. Allowing for deduction or offset in the Superpriority Claim Order, or against it now, would leave Wheeling with something less than the indubitable equivalent of proceeds of the Canadian Receivables that were supposed to be paid to Wheeling "without deduction."

The Superpriority Claim Order is a final order of this Court allowing the Superpriority Claim. The Estate Representative did not appeal from the Superpriority Claim Order, and there are no subsequent orders altering or amending it. The Estate Representative must pay Wheeling the cash value of the Superpriority Claim, as he was required to do under § 1129(a)(9) of the Bankruptcy Code, Rule 3021 of the Federal Rules of Bankruptcy Procedure, and the terms of his own Plan.

B. The Superpriority Claim Is An Unsecured Claim That Cannot Be Surcharged Under § 506(c).

There is absolutely nothing in the Superpriority Claim Order, the Disclosure Statement, or the Plan that magically transformed the Superpriority Claim from an allowed administrative expense claim into a secured claim subject to surcharge. Nor could there be.

Section 506(c) is a limited exception to the general rule that a debtor's estate must bear its expenses of administration and allows a surcharge against *only against collateral, not administrative claims*. Thus:

> The trustee may *recover from property securing an allowed secured claim* the reasonable, necessary costs and expenses of preserving, or disposing of, *such*

> *property* to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

11 U.S.C. § 506(c) (emphasis added). The irony here is that after spending Wheeling's collateral for his own (or the Debtor's own) benefit in derogation of Wheeling's rights, the Estate Representative is now seeking to "surcharge" the Superpriority Claim—but an administrative expense claim cannot be "surcharged" under governing law.

That the Superpriority Claim Order "reserve[d] all rights regarding the Surcharge Motion" for Wheeling and the Estate Representative does nothing to help the Estate Representative because the reservation was just that. It reserved the estate's right to seek to surcharge *collateral* under § 506(c) but did not reserve the right to re-litigate the final, allowed Superpriority Claim. The Estate Representative has nothing but a reservation of rights to surcharge collateral and must meet his burden under § 506(c) to do so. As a result, not only must the expenses to be surcharged be reasonable and necessary, but the Estate Representative also bears the burden to prove that Wheeling benefited from them—and in the First Circuit that requires proving that he "expended the funds *primarily to benefit the secured creditor*, who in fact directly benefited from the expenditure." *In re Parque Forestal, Inc.*, 949 F.2d 504, 512 (1st Cir. 1991) (emphasis added).[4]

Two threshold issues undermine the Estate Representative's surcharge argument, in addition to the Estate Representative's complete inability to meet the benefit requirement of *Parque Forestal*. First, § 506(c) provides that a "trustee may recover from property securing an allowed secured claim" the costs of preserving "such property[.]" It does not provide that a "trustee may recover from an allowed administrative expense claim" the costs of preserving "property securing an allowed secured claim." As one court recently observed:

[4] One aspect of this decision was subsequently overruled, but it dealt with standing and not the criteria necessary to prove the benefit requirement under § 506(c). Wheeling reserves all rights with respect to standing arguments in respect of the Surcharge Motion.

> We note that surcharges and administrative expenses under the Bankruptcy Code are distinct charges against estate property that serve very different purposes. Prorating one with another makes no conceptual sense and violates the Code's priority structure. Compensation for professionals is an administrative expense as defined in 11 U.S.C. § 503 and is an assessment against the estate as a whole because all of the creditors are benefitted. On the other hand, a surcharge under 11 U.S.C. § 506(c) is not an administrative expense. It is an assessment against a secured party's collateral as reimbursement for a particular benefit to such a secured creditor. As set forth in *In re Debbie Reynolds Hotel & Casino, Inc.*:
>
> > [Unlike administrative expenses, a § 506(c) surcharge] does not come out of the debtor's estate, but rather comes directly from the secured party's recovery. Consequently, § 506(c) expenses do not fall within the priority scheme of the Bankruptcy Code at all. These expenses "are paid first out of the proceeds of the sale, before a secured creditor is paid."

In re InteliQuest Media Corp., 326 B.R. 825, 831-32 (B.A.P. 10th Cir. 2005) (edits by the BAP) (*quoting In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1067 (9th Cir. 2001) (*quoting U.S. v. F.D.I.C. Corp.,* 899 F.Supp. 50, 55 (D.R.I. 1995)). Section § 506(c) cannot be used to surcharge the Superpriority Claim. If there was authority to the contrary, then presumably it would be cited in the Estate Representative's Objection but none is.

Moreover, even if surcharge were appropriate here, there is another threshold problem: A surcharge must actually be paid out of proceeds of sale before the secured creditor is paid. *Id.* Once property leaves a debtor's estate, a bankruptcy court has no jurisdiction over it and cannot surcharge such property:

> Although this court has never explicitly addressed the issue, we agree with the Seventh Circuit that when property is transferred out of a bankruptcy estate free and clear of all liens, the bankruptcy court ceases to have jurisdiction over that property. *See, e.g., In re Edwards,* 962 F.2d 641, 643 (7th Cir.1992); *see also In re Xonics, Inc.,* 813 F.2d 127, 131 (7th Cir.1987). Once the assets are sold unencumbered from the estate, they are no longer "property securing an allowed secured claim," are not property of the estate, and therefore may not be surcharged under section 506(c).

In re Skuna River Lumber, LLC, 564 F.3d 353, 355 (5th Cir. 2009). This rule applies even if at the time property leaves an estate there is an adversary proceeding pending to determine rights to property of a debtor's estate. *Id.* at 356 ("[T]he bankruptcy court's jurisdiction over the adversary proceeding could not serve to revive its jurisdiction over property that had already been sold and conveyed from and out of the bankruptcy estate.").

The Estate Representative has all but conceded that his Surcharge Motion is doomed for the very reason that the property to be surcharged has been paid over to Wheeling (or otherwise left the estate, as with proceeds of the Canadian Receivables). In his Objection he said: "Absent the ability to surcharge the Superpriority Claim, there would be nothing for the Estate Representative to surcharge[.]" Objection, ¶ 33. That state of affairs is not Wheeling's fault—and a reservation of rights in the Superpriority Claim Order cannot change it. The reservation merely reflected the Third Amended JPO's having ordered that "[t]he Court shall hold a status conference on the Surcharge Motion . . . on the Oral Argument Date" and that those issues had not yet been determined. Third Amended JPO, ¶ 8.

Lastly, even if one were to consider a surcharge claim on the merits, the Estate Representative cannot prove that any expenses to collect the Canadian Receivables were incurred "*primarily to benefit the secured creditor*, who in fact directly benefited from the expenditure." *In re Parque Forestal, Inc.*, 949 F.2d at 512. Assuming that there were expenses associated with collection of the Canadian Receivables, none of those expenses were incurred "primarily to benefit" Wheeling.[5] To the contrary, they were incurred primarily so that the Estate Representative could use those funds in his operation of the Debtor, which he did in violation of Wheeling's rights under the Sixth CC Order. This brings the issue full circle: The Estate Representative cannot now

[5] And there are no other expenses that could reasonably be related to the Superpriority Claim.

"surcharge" Wheeling's administrative claim for the expenses he incurred collecting the Canadian Receivables in violation of the Court's order requiring turnover of those accounts receivable without deduction of any kind, including surcharge.

C. Wheeling Has Not Waived Its Superpriority Claim And Has Not Agreed To Any Payment Terms Other Than The Cash Value Of That Claim As Of The Effective Date Under the Plan.

In light of the foregoing, the Estate Representative suggests that there is some "agreement" by Wheeling to have its Superpriority Claim treated the way he wants. That is because absent such an agreement, he was required by prior orders, the Plan, the Confirmation Order, and the Bankruptcy Code to pay Wheeling "cash equal to the allowed amount of such claim" as of the Effective Date. 11 U.S.C. § 1129(a)(9). *See also* Fed. R. Bankr. P. 3021 ("after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed").

The fact of the matter is that no such agreement exists, nor could it. It is legally impossible to surcharge the Superpriority Claim for the expenses of preserving collateral for all of the reasons already discussed. Thus, the Estate Representative's few remaining arguments are quickly dismissed.

To begin with, the statement in the Disclosure Statement purporting to permit offset of claims is nothing more than the Estate Representative's vision of how certain events were to unfold. It did not change the fact that all the Superpriority Claim Order's reservation provision did was make explicit that what was not decided was reserved. Superpriority Claim Order, ¶ 7 ("The parties reserve all rights regarding the Surcharge Motion."). The Disclosure Statement was neither an "agreement" under § 1129(a)(9), nor a Court order, and the terms of the Plan govern in the event of any conflict. *See* Disclosure Statement, p. ix. No creditor is bound by a plan proponent's view of the world as set forth in a disclosure statement. Wheeling ultimately chose

not to contest the Disclosure Statement for the very reason that it is legally irrelevant to the treatment of its claims. Wheeling made this clear at the hearing approving the Disclosure Statement. *See* Audio of Hr'g., July 15, 2015 (Bankr. D. Me.), at 7:24-9:02 (containing the Estate Representative's "preview" of Disclosure Statement issues, Wheeling's statement that it reserved all of its rights as to the treatment of its claims, and the Estate Representative's agreement that such was the case).

Moreover, the idea that the Disclosure Statement embodies an "agreement" that Wheeling would subject its allowed Superpriority Claim to surcharge makes no sense at all. The provision in the Disclosure Statement that the Estate Representative quoted contemplated that the Surcharge Motion would actually be heard and decided prior to the time for payment of the Superpriority Claim under the Plan. If hearings had taken place as originally contemplated, then there might have been a rationale for a netting of accounts payable and receivable between Wheeling and the Estate Representative (of course, that presumes the impossible with respect to surcharge issues against the Superpriority Claim). That is because payment of the Superpriority Claim as an Allowed Administrative Expense Claim was not required until there was an Effective Date. But that is simply not what ultimately occurred. While the Court originally set the Surcharge Motion for hearing on September 22, 2015, the Estate Representative subsequently continued that hearing (with Wheeling's consent) to a later date after plan confirmation and then let the Surcharge Motion linger on the docket even after a fourth pre-trial scheduling order entered. [*See* Adv. Pro. 13-1033, D.E. 73 and an unnumbered docket entry dated Sept. 18, 2015]. To put a finer point on things, all of Wheeling's rights were reserved with respect to its claims under the Plan, as the Estate Representative agreed, and the Estate Representative deviated from the schedule he wanted such that the legal requirements of § 1129(a)(9), the Plan, and Rule 3021 must be complied with.

The provisions of the Confirmation Order and Plan are equally unavailing for the Trustee. For example, ¶ 84 of the Confirmation Order granted Wheeling security for payment of any *allowed secured claim* that Wheeling has, but it did not alter or amend the Superpriority Claim Order's allowance of the Superpriority Claim under § 507 of the Bankruptcy Code. In other words, ¶ 84 did not vacate allowance of the Superpriority Claim under § 507 or constitute an agreement for treatment other than payment in cash on the Effective Date. Further, when the Estate Representative pays the Superpriority Claim, Wheeling will of course credit its claims against the Debtor, thereby reducing its remaining claims to the extent necessary. The same would be true if Wheeling receives a distribution under the Plan as a secured or as an unsecured creditor. But that does not mean that Wheeling's preservation of its rights, whether as secured creditor (see ¶ 84 of the Confirmation Order) or even as an unsecured creditor (Wheeling is entitled to a distribution pursuant if it is determined to have an unsecured claim), somehow constitutes a waiver of an Allowed Administrative Expense Claim. Wheeling does not have to give up its allowed Superpriority Claim in order to preserve its rights as a secured or an unsecured creditor.[6]

Similarly, the Estate Representative can take no solace in the setoff and recoupment provision of the Plan. Plan § 7.16. That provision authorized the Estate Representative (as Disbursing Agent) to "setoff or recoup from any *Claim* and from any payments to be made pursuant to the Plan in respect of such *Claim* any claims . . . that the Trustee may have against the Claimant[.]" Plan § 7.16 (terms defined in the Plan emphasized). But the Superpriority Claim is

[6] Wheeling already proved that the Canadian Receivables were its collateral and that the Estate Representative spent them. It does not have to hunt for other property that could also have been its collateral.

If, however, the Estate Representative is suggesting that payment of the Superpriority Claim be made from the escrow required under ¶ 84, then that is certainly something Wheeling would entertain, provided that additional funds are escrowed to protect Wheeling's in case it turns out that Wheeling is oversecured by virtue of proving that payments from the World Fuel Parties (or others) are its collateral. Under those circumstances, then additional costs, such as post-petition interest, could be added to Wheeling's secured claim. *The Prudential Insurance Co. of America v. SW Boston Hotel Venture LLC (In re SW Boston Hotel Venture, LLC)*, 748 F. 3d 393, 403 (1st Cir. 2014).

an "*Allowed* Administrative Expense Claim"—defined as something else entirely. The Plan defined the term "Claim" by reference to § 101(5) of the Bankruptcy Code, Plan § 1.36, whereas an "Allowed Administrative Expense Claim" was defined as:

> [A] request for payment of which was timely filed with the Bankruptcy Court on or before the Administrative Expense Claims Bar Date and which has been allowed pursuant to a Final Order of the Bankruptcy Court, including, without limitation, the Confirmation Order[.]

Plan § 1.11. The term "Allowed Administrative Expense Claim" is more specific than "Claim" and, therefore, is controlling here. As a result, whatever rights the Estate Representative thinks he has to recoup or setoff against a "Claim" do not apply to an "Allowed Administrative Expense Claim." No provision of the Plan permits an offset against an *Allowed* Administrative Expense Claim. Nor could it and still satisfy the Bankruptcy Code. And the Plan, by its own terms, cannot be used to "alter" or "enhance . . . any of the Estate's defenses [or] rights to set-off . . . as to any . . . Claim or Administrative Expense Claim[.]" Plan § 10.4(a). Thus the setoff/recoupment provision cannot grant the Estate Representative rights to surcharge an administrative expense claim that otherwise do not exist.

Lastly, the Plan further provided that an "Administrative Expense Claim shall become an Allowed Administrative Expense Claim only to the extent Allowed by Final Order[.]" Plan § 2.1(a). The Superpriority Claim Order fits neatly into the Plan's definition of a "Final Order" allowing the Superpriority Claim as an Allowed Administrative Expense Claim.[7] As such, the

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[7] The Plan defined "Final Order" as follows:

> ***1.71.*** Final Order means an order or judgment of a court of competent jurisdiction that has been entered on the docket maintained by the clerk of such court and has not been reversed, vacated, amended, modified or stayed and as to which (a) the time to appeal, petition for certiorari or move for a new trial, reargument or rehearing has expired and as to which no appeal, petition for certiorari or other proceedings for a new trial, reargument or rehearing shall then be pending or (b) if an appeal, writ of certiorari, new trial, reargument or rehearing thereof has been sought, (i) such order or judgment shall have been affirmed by the highest court to which such order was appealed, certiorari shall have been denied or a new trial, reargument or rehearing shall have

Superpriority Claim must be paid as provided for under § 1129(a)(9) absent an agreement to the contrary. Plan § 2.1(b).

While it has already been established that neither the Superpriority Claim Order, the Disclosure Statement, nor ¶ 84 of the Confirmation Order constituted such an agreement, it is also true that no such agreement is in the Plan either. There are no express provisions memorializing such an agreement with Wheeling (because there was none), in contrast to express provisions memorializing exactly that type of agreement with other creditors. *E.g.*, Plan § 2.4 ("By agreement with Holders in the affected Class, to the extent that any Derailment Government Claim might be an Allowed Administrative Expense Claim under applicable law, such Derailment Government Claim will not be treated or paid as an Administrative Expense Claim but shall be treated solely as a Class 10 Claim.") The Estate Representative clearly knew how to draft a provision memorializing a § 1129(a)(9) agreement for treatment other than payment in cash on the Effective Date. Notably there is no such agreement by Wheeling anywhere in the Plan. Allowing a deduction against Wheeling's Superpriority Claim cannot now be made consistent with the Plan's treatment of Allowed Administrative Expense Claims.

CONCLUSION

The Estate Representative struggles to find some justification to renege on his obligations to pay Wheeling's Superpriority Claim in full. The irony is that Wheeling's Superpriority Claim arose in the first place because the Estate Representative reneged on an earlier order of the Court—

> been denied or resulted in no modification of such order, and (ii) the time to take any further appeal, petition for certiorari, or move for a new trial, reargument or rehearing shall have expired; provided, however, that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules or the Local Bankruptcy Rules, or any other applicable U.S. or Canadian rule or procedure, may be filed relating to such order shall not prevent such order from being a Final Order.

Plan § 1.71.

the Sixth CC Order, which required him to turn over to Wheeling all proceeds of certain accounts receivable "without deduction." Having allowed the Superpriority Claim as an Allowed Administrative Expense Claim, the Superpriority Claim cannot be "surcharged" and the time has come for the Estate Representative to pay that claim in full.

Date: April 1, 2016

/s/ Andrew C. Helman

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CERTIFICATE OF SERVICE

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties electronically at the addresses set forth on the Service List below on 1st day of April, 2016.

/s/ Holly C. Pelkey
Holly C. Pelkey
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