

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE**

In Re:

Montreal Maine & Atlantic  
Railway Ltd.,

Debtor.

Case No. 13-10670  
Chapter 11

**RESPONSE OF BANGOR SAVINGS BANK TO DEBTOR'S  
OBJECTION TO PROOF OF CLAIM FILED BY BANGOR SAVINGS BANK**

NOW COMES Bangor Savings Bank ("BSB"), by and through its undersigned counsel, and files this response to the *Objection to Proof of Claim filed by Bangor Savings Bank on the Basis that Such Claim Is Unenforceable Against the Debtor* filed by Robert J. Keach (the "Estate Representative") ("Objection") [DE 2041] and in support thereof states the following:

**Preliminary Statement**

Through the Objection, the Estate Representative argues that BSB's contingent deficiency claim filed against the Debtor's estate should be disallowed in its entirety because BSB (a) failed to reduce its asserted claim to account for amounts received in at least partial satisfaction of the Direct Claim<sup>1</sup>, (b) demonstrated no remaining interest in property of the Debtor that would give rise to a secured claim, and (c) failed to satisfy the remaining Direct Claim from the Direct Collateral, which constitute non-debtor assets of the Direct Obligor. BSB will respond to each of those contentions *seriatim*. BSB agrees that the amount of its claim as filed on the claims register needs to be amended to reflect the amount of collateral proceeds received to date. As noted below, BSB will work with the Estate Representative to arrive at a mutually agreeable claim amount and requests 45 days to do so. In any event, the failure to file an amended proof of claim does not provide a basis for denying BSB's claim in its entirety.

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<sup>1</sup> Capitalized terms used herein but not otherwise defined shall have the meaning ascribed to such terms in the Objection.

The Estate Representative's second contention- that BSB no longer has a secured claim against the Debtor's estate- is simply wrong. Although BSB has liquidated 24 of the Debtor's 25 locomotives that secured the Debtor's guaranty of the LMS debt, by agreement of BSB, the Debtor, the Estate Representative and the Quebec Police, the locomotive identified as MMA 5017 (which locomotive was the Lead Locomotive on the train when the derailment occurred) was not previously sold so that the Canadian authorities could have it available for evidentiary purposes in connection with any criminal proceedings brought in Canada stemming from the derailment. The Canadian authorities have only recently released MMA 5017 and given permission for it to be sold and BSB is now in the process of arranging the sale of MMA 5017. Accordingly, as of the date hereof, MMA 5017 still remains property of the Debtor's Estate and BSB still has a valid and perfected security interest in MMA 5017.

Finally, the Objection argues that BSB's claim should be disallowed because BSB has not liquidated all Direct Collateral. The Objection cannot be sustained on this basis either. Although BSB has not liquidated the LMS real property securing the debt, it has been with the full knowledge and consent of the Debtor and the Estate Representative. The Debtor and the Estate Representative are aware of efforts to sell the LMS real property and are aware that inquiries for the LMS real property were far below the amount necessary to satisfy the outstanding debt. It should come as a surprise to no one that a forced liquidation of the LMS real property would produce significantly lower sale proceeds than could be achieved through a commercially reasonable non-foreclosure sale, which would only serve to cement in a large deficiency claim that would be payable by the Debtor's estate. It goes without saying that locking in a large deficiency claim would be to the detriment of not only BSB, but all other creditors of the Debtor's estate, most importantly the victims of the derailment.

Indeed, BSB, the Estate Representative and the Debtor contemplated a deliberate sale process for the Direct Collateral so as to maximize its value and reduce the potential deficiency balance payable by the Debtor's Estate. This fact is evidenced by the agreement contained in the Consent Order granting BSB stay relief to sell the Locomotives wherein it provides that the Locomotives will be sold first, but in the event there are excess proceeds available after all collateral (both direct and indirect) has been liquidated that the excess proceeds will be returned to Rail World and the Debtor's estate *pro rata*.

In the Objection, the Estate Representative does not appear to be waiving the estate's right to have excess sale proceeds returned to the estate if total proceeds available from the disposition of collateral exceed the amount of the BSB debt, but the Estate Representative is, however, seeking to deny BSB the right to seek payment of any deficiency balance from the Debtor's Estate following liquidation of all collateral if total proceeds received prove insufficient to satisfy BSB's claim. As such, it appears that the Estate Representative wants to have its cake and eat it too, which is patently unfair.

Further, all contentions in the Objection that BSB has somehow "sat on its rights" by failing to expeditiously liquidate its collateral, especially where doing so precipitously would have done nothing but lock-in a large deficiency claim payable by the Debtor's Estate, are patently false. BSB has proceeded- with the full knowledge and agreement of the Estate Representative and the Debtor- in a manner intended to maximize the value of all collateral, so as to minimize the amount of the deficiency claim payable by the Debtor's estate, which benefits all constituents involved in this matter. BSB should not be punished for acting in a commercially reasonable manner designed to reduce the loss suffered by all parties, including the Debtor's estate, by having its claim denied in its entirety.

For the foregoing reasons, and for the reasons set forth below, BSB respectfully requests that the Objection be denied in its entirety.

**Response to Objection**

1. Paragraph 1 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 1 of the Objection.

2. Paragraph 2 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 2 of the Objection.

3. Paragraph 3 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 3 of the Objection.

4. Paragraph 4 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 4 of the Objection.

5. BSB admits the allegations contained in paragraph 5 of the Objection.

6. BSB admits the allegations contained in paragraph 6 of the Objection.

7. In response to paragraph 7 of the Objection, BSB admits that there was a derailment, but BSB is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7 of the Objection and, therefore, denies the same.

8. In response to paragraph 8 of the Objection, BSB admits that there were explosions, but BSB is without knowledge or information sufficient to form a belief as to the

truth of the remaining allegations contained in paragraph 8 of the Objection and, therefore, denies the same.

9. In response to paragraph 9 of the Objection, BSB admits that Debtor filed a voluntary petition in the United States Bankruptcy Court for the District of Maine, but BSB is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 9 of the Objection and, therefore, denies the same.

10. In response to paragraph 10 of the Objection, BSB admits that Debtor filed its schedule of assets and liabilities and statement of financial affairs, which documents speak for themselves.

11. BSB admits the allegations contained in paragraph 11 of the Objection.

12. In response to paragraph 12 of the Objection, BSB admits that the Trustee filed a motion for relief from the automatic stay, which motion speaks for itself.

13. BSB admits the allegations contained in paragraph 13 of the Objection.

14. BSB admits the allegations contained in paragraph 14 of the Objection.

15. BSB denies the allegations contained in paragraph 15 of the Objection.

16. BSB admits the allegations contained in paragraph 16 of the Objection.

17. Paragraph 17 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 17 of the Objection.

18. Paragraph 18 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 18 of the Objection.

19. In response to paragraph 19 of the Objection, BSB states that Section 506(a) of the Bankruptcy Code speaks for itself and further answer is not required.

20. BSB denies the allegations contained in paragraph 20 of the Objection.

21. In response to paragraph 21 of the Objection, BSB admits that an amended claim is appropriate, but the amount due BSB has not and cannot be determined at the present time since not all of BSB's collateral has been liquidated.

22. BSB admits the allegations contained in paragraph 22 of the Objection.

23. Paragraph 23 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 23 of the Objection.

24. Paragraph 24 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 24 of the Objection.

25. BSB denies the allegations contained in paragraph 25 of the Objection.

26. Paragraph 26 of the Objection calls for a legal conclusion as to which no answer is required. To the extent an answer is required, BSB denies the allegations of paragraph 26 of the Objection.

27. BSB admits the allegations contained in paragraph 27 of the Objection.

#### **FURTHER RESPONSE TO DEBTOR'S OBJECTION**

The gist of BSB's claim is a complicated commercial transaction. The Debtor's obligations are intertwined with other non-debtor entities. In addition to the Direct Collateral described in the Debtor's Objection, the Debtor entered into other financing agreements involving LMS, Montreal, Maine & Atlantic Corporation, ("MM&A Corp.") and Rail World

Locomotive Leasing, LLC (“Rail World”) and BSB. Those obligations included, among other things, the following:

- a Construction Loan Agreement (the “Loan Agreement”),
- a Promissory Note in the original principal amount of Four Million Dollars (\$4,000,000.00) (referred to in Debtor’s Objection as the BSB Loan);
- an ISDA 2002 Master Swap Agreement (the “Swap Agreement”);
- Assignment of Contracts and Permits;
- a first priority Mortgage, Security Agreement and Financing Statement on the real estate and personal property of LMS located at 77 Logistics Lane, Hermon, Maine (the “Property”), which is recorded in the Penobscot County Registry of Deeds at Book 10369, Page 376 et seq., (the “Mortgage”); and
- a Conditional Assignment of Leases, each dated as of March 31, 2006, pursuant to which BSB made certain loans and financial accommodations to LMS and the Debtor (collectively referred to as the “Obligations”).

The BSB Loan was also guaranteed by: Debtor’s (i) Unconditional Guaranty of Payment and Performance of the Debtor dated as of March 31, 2006 (the “Debtor’s Guaranty”), (ii) Unconditional Guaranty of Payment and Performance of MM&A Corp. dated as of March 31, 2006 (the “MM&A Corp. Guaranty”), and (iii) Continuing Guaranty of Rail World dated as of July 18, 2012 (the “Rail World Guaranty”) (collectively the “Guarantees”). The obligations under the Guarantees are secured by, among other things, liens and security interests in certain locomotives owned by MMA and Rail World, set forth in certain Security Agreements dated as of March 31, 2006 and July 18, 2012, given by MMA and Rail World, respectively, to BSB.

Due to Debtor's bankruptcy filing, the BSB Loan and Guarantees went into default. On August 8, 2013, BSB advised the Debtor and LMS, MMA and Rail World that the commencement of MMA's Bankruptcy Case constituted an Event of Default under (i) section 5(a)(viii)(4)(A) of the Swap Agreement (the "Swap Default") and (ii) the BSB Loan (the "Note Default"). On September 16, 2013, BSB also advised the Debtor and Obligors that BSB was terminating the Swap Agreement and that a swap termination payment in the amount of \$558,500.00 (the "Swap Termination Payment") was immediately due and payable. LMS advised BSB that it did not have the ability to make the Swap Termination Payment (the "Payment Default", together with the Swap Default and the Note Default).

As a result all of the Obligations became immediately due and payable. As of the date hereof, the total principal amount of the Obligations owing by Obligors to BSB under the Loan Documents is \$2,629,841.45, consisting of principal balance in the amount of \$2,063,199.81 (the principal balance is inclusive of the Swap Termination Fee), accrued interest in the amount of \$203,818.90, late charges in the amount of \$150,133.74, fees and expenses in the amount of \$212,615.00 and discharge fees in the amount of \$74.00, plus accrued interest, amounts due for attorneys' fees and costs incurred to date.<sup>2</sup> The Debtor's Objection also claims that the estate paid BSB \$18,500 on account of the Debtor's guaranty. That payment was, in fact, an adequate protection payment, and not a payment under the guaranty. As a result, the Debtor still owes BSB a second \$18,500 adequate protection payment due at confirmation. That second adequate protection payment is in addition to the amounts due under the Obligations.

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<sup>2</sup> BSB also sold three locomotives owned by Rail World. By agreement with Rail World the net proceeds of those sales, currently \$160,099.82, are being held in a collateral account at BSB pending sale of the LMS real property and have not yet been allocated toward the amounts due to BSB.



BSB and LMS's counsel have engaged in many discussions regarding payments, modifications, and a forbearance agreement. In addition, the Obligors have advised BSB that they were actively pursuing various strategic restructuring options for LMS and the Debtor including, without limitation, seeking a sale of some or all of the collateral business, a sale of the Property or a refinancing of the LMS's and Debtor's outstanding indebtedness, in each case in an effort to allow the obligors to fully pay and satisfy the Obligations due and owing to BSB.

Unfortunately LMS has been unable to obtain a reasonable offer for the Property and LMS and the Debtor have been unable to agree to modification terms. The only inquiry that has been made regarding the Property was for substantially less than the amount due BSB. If BSB had accepted such a low offer, the deficiency balance would have been significant. BSB advised Debtor's counsel of these circumstances and as a result BSB has not sought to liquidate the Property or the entertain offers for the Property that would dramatically increase the amount due under the Debtor's Guaranty. If the Debtor is now seeking a final accounting and determination of the amounts due BSB, BSB agrees to work with Debtor's counsel to determine a stipulated amount due under the Guaranty. Otherwise, BSB cannot calculate the exact amount due in light of the fact it has not yet liquidated the last locomotive or the Property. Debtor's Objection that BSB's claim is unenforceable against the Debtor is without basis in fact or law. Clearly, BSB's claim is an obligation of the Debtor. Only the amount and nature of the claim is subject to further calculation and determination.

**WHEREFORE**, BSB respectfully requests that Debtor's Objection be overruled and that it have 45 days to determine if an agreed amount due as a deficiency can be reached or otherwise

file an amended proof of claim setting forth any such agreement, or contingent liability due it, and that the BSB have such other and further relief as may be deemed just and proper.

Dated: March 31, 2016

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In re	*	
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Montreal Maine & Atlantic	*	Chapter 11
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	*	
Debtor	*	

**CERTIFICATE OF SERVICE  
FOR ELECTRONIC CASE FILING**

I, Deborah L.A. Croizier, Administrative Assistant, certify that I caused a true and correct copy of the Response of Bangor Savings Bank to Debtor's Objection to Proof of Claim Filed by Bangor Savings Bank, together with this Certificate of Service to be served on the parties at the addresses set forth on this service list on the 31<sup>st</sup> day of March, 2016.

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