

**IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE**

In re

MONTREAL MAINE & ATLANTIC  
RAILWAY, LTD.

Debtors.

Chapter 11

Case No.13-10670

**LIMITED OBJECTION OF RAIL WORLD, INC.  
TO THE TRUSTEE'S MOTION FOR AUTHORITY TO REJECT  
THE RAIL WORLD, INC. MANAGEMENT CONTRACT**

Rail World, Inc. ("Rail World") hereby files this limited objection to the Trustee's Motion for Authority to Reject the Rail World, Inc. Management Agreement [Dkt. No. 261] (the "Motion"). In support of its limited objection, Rail World states as follows:

**Basis for Limited Objection**

1. Rail World does not object to the rejection of the Management Agreement provided the rejection date is effective as of the date the Court approves the rejection, or, at minimum, as of the date of the Motion. Rail World does object, for the reasons set forth below, to the retroactive rejection of the Management Agreement to the Petition Date.<sup>1</sup> Neither Rail World's conditional consent to the rejection of the Management Contract nor anything contained herein shall be construed as Rail World's admission or adoption of the Trustee's characterization in the Motion of services rendered by Rail World and Rail World's employees or personnel under the Management Agreement.

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<sup>1</sup> Unless otherwise defined, capitalized terms shall have the same meaning set forth in the Motion.

### **Background**

2. On or about January 8, 2003, Rail World, on the one hand, and the Debtor, MMAC, MMARS and LMS (collectively, the "Companies"), on the other, executed the Management Agreement. The Management Agreement memorialized an arrangement between Rail World and the Companies under which Rail World and certain of Rail World's employees had been providing services during an "Interim Period" consisting of "day-to-day management and operation of the business and affairs of the Companies, in each case under the overall direction and oversight of the officers and board of directors of the respective Company." (*See* Management Agreement, attached as Ex. A to the Motion at Section 1(a)). Pursuant to the terms of the Management Agreement, the "Interim Period" ended when the Companies "fully implemented their business plan, appointed appropriate officers, and achieved stable operations." *Id.* The "Interim Period" ended in accordance with the terms of the Management Agreement on or about January 9, 2003.

3. Subsequent to the "Interim Period," the Management Agreement requires that Rail World perform certain "Long Term Services," described as an "active oversight role for the Companies," and providing expert advice and input on: (i) traffic and revenues; (ii) operations; (iii) mechanical matters; (iv) engineering; (v) finance; and (vi) strategic planning. (*See* Management Agreement at Section 1(b)).

4. The Management Agreement requires fees to be paid to Rail World at the "initial rate of \$500,000 per anum" adjusted annually based upon change in the Consumer Price Index. (*See* Management Agreement at Section 2(a)). The fees are payable in arrears, in quarterly installments of \$125,000, subject to the adjustments set forth in Section 2(a) of the Management Agreement. (*See* Management Agreement at Section 2(b)). Upon information and belief, the

Companies were delinquent in payments owed to Rail World under the Management Agreement as of the Petition Date.<sup>2</sup> Such delinquencies have not yet been calculated, but, to the extent they remain unpaid, will be included in Rail World's claim for damages arising from the rejection of the Management Agreement.

5. In addition to fees payable to Rail World, the Management Agreement requires that the Companies "jointly and severally indemnify and hold Manager harmless from and against any loss, liability or damage (including, without limitation, attorneys fees and legal costs) that may result from Manager's performance of its duties under the Agreement . . . ." (*See* Management Agreement at Section 8). Rail World reserves the right to claim amounts arising from the Companies' indemnification obligations.<sup>3</sup>

6. On September 18, 2013, the Trustee filed the Motion, seeking to reject the Management Agreement retroactive to the Petition Date. At no point prior to the filing of the Motion did the Trustee express his intent to reject the Management Agreement or otherwise direct Rail World to discontinue services under the Management Agreement. Moreover, prior to and following the Petition Date, Rail World devoted substantial time and resources assisting the Debtor and the Trustee in, among others, matters concerning financial performance, strategic planning and operations of the Debtor.

### **Argument**

7. As noted above, Rail World Does not object to the Trustee's rejection of the Management Agreement. However, the Trustee's proposed retroactive rejection to the Petition

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<sup>2</sup> No payments have been received from the Debtor since the Petition Date on account of the Management Agreement.

<sup>3</sup> In addition to any claim arising from the rejection of the Management Agreement, Rail World reserves all rights to seek payment from the Companies or compel performance under the Management Agreement for obligations arising after the Petition Date, including, but not limited to, payment of an administrative expense under Section 503(b) of the Bankruptcy Code.

Date is inappropriate. In the First Circuit, the effective date of rejection of a nonresidential lease or executory contract is, ordinarily, the date on which the bankruptcy court enters an order approving of such rejection. *In re Thinking Machines Corp.*, 67 F.3d 1021, 1025 (1st Cir. 1995).<sup>4</sup> In *Thinking Machines*, in considering rejection of a non-residential lease, First Circuit articulated the basis for its finding that court approval of a rejection is ordinarily a condition precedent to an effective rejection as follows:

[T]he date of court approval . . . controls. We are guided to his conclusion by several signposts.

First and foremost, we think that the structure of the Bankruptcy Code and the nature of judicial oversight in the Chapter 11 milieu combine to make it highly likely that Congress intended judicial authorization to be a condition precedent to rejection. . . .

A second reason . . . is rooted in history. . . . The conclusion is irresistible that Congress, by changing the protocol in 1978, intended to involve bankruptcy courts more actively in the decisional process. We believe this policy of increased involvement is better served by viewing judicial approval as a condition precedent to the effectiveness of a rejection instead of as a condition subsequent.

. . .

The third reason for our view is that reading the statute in the manner favored by the district court tends to reduce a bankruptcy court's order of approval to a bagatelle. So interpreted, the provision would trivialize judicial oversight of the rejection process.

*Id.* at 1025-26.

8. Although ruling that the lease rejection was effective only upon court order in *Thinking Machines*, the First Circuit did not foreclose retroactive rejection pursuant to Section 365(a) of the Bankruptcy Code "when the balance of equities preponderates in favor of such remediation." *Id.* at 1028. However, it is important to note that *Thinking Machines* does not support retroactive rejection all the way to back to the date of the bankruptcy petition, as is requested by the Trustee, but only to the date upon which the motion was filed. *Id.*

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<sup>4</sup> Although *In re Thinking Machines* involves rejection of a non-residential lease, its reasoning is equally applicable to rejection of a executory contract, as rejection in either case falls under Section 365 of the Bankruptcy Code.

("Consequently, we rule that a bankruptcy court, when the principles of equity so dictate, may approve a rejection of a nonresidential lease pursuant to section 356(a) retroactive to the motion filing date."). Accordingly, the Trustee's rejection of the Management Agreement should be effective as of the date this Court enters an order granting the Motion, or at the very earliest, the date upon which the Motion was filed.

9. Even if retroactive rejection to a date prior to the filing date of the Motion is possible under *Thinking Machines*, there is no basis to do so in this case. Where courts have permitted executory contracts and leases to be rejected retroactively, the date of notice of intent to reject is typically found to control. See *In re GCP CT School Acquisition, LLC*, 429 B.R. 817 (BAP 1st Cir. 2010) (holding that rejection was effective on the date upon which counter-party had "sufficient and reasonable notice" of the trustee's intent to reject its lease). Despite numerous meetings and communications with Rail World following the Petition Date, neither the Trustee nor the Debtor (prior to the Trustee's appointment) provided Rail World notice of intent to reject the Management Agreement prior to the Motion's filing date.

#### **Reservation of Rights**

10. Although Rail World does not object to the rejection of the Management Agreement, nothing herein should be construed as an adoption of or acquiescence to the Motion's characterization of the services provided by Rail World to the Debtor under the Management Agreement.

11. Further, nothing in this Limited Objection should be construed as a waiver of any of Rail World's rights, and Rail World specifically reserves the right to compel payment of unpaid postpetition obligations or otherwise seek payment of an administrative expense related to the Debtors' unpaid postpetition obligations under the Management Agreement.

**CONCLUSION**

WHEREFORE, Rail World respectfully requests that the Court (i) order that rejection of the Management Agreement shall be effective no earlier than the date upon entry of the Court's order approving rejection, or, in the alternative, no earlier than the date upon which the Motion was filed and (ii) order that rejection of the Management Agreement is without prejudice to Rail World's right to seek allowance and payment of an administrative expense related to Rail World's services under the Management Agreement on and after the Petition Date.

Dated: October 11, 2013

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