UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

CHAPTER 11 TRUSTEE'S MOTION FOR AUTHORITY TO REJECT EMPLOYEE RETENTION AGREEMENTS

Robert J. Keach, the chapter 11 trustee in the above-captioned case, moves this Court for an order, pursuant to 11 U.S.C. § 365(a) and Rule 6006(a) of the Federal Rules of Bankruptcy Procedure, authorizing Montreal Maine & Atlantic Railway, Ltd. to reject certain employee retention agreements. In support of the motion, the movant states as follows:

JURISDICTION, VENUE AND PREDICATES FOR RELIEF

1. The District Court has original but not exclusive jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 11 case to the Bankruptcy Court.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Bankruptcy Court has constitutional authority to enter final judgment in this proceeding.

3. Venue over this chapter 11 case is proper in this district pursuant to 28 U.S.C. § 1408, and venue over this proceeding is proper in this district pursuant to 28 U.S.C. § 1409.

4. The relief sought in this motion is predicated upon 11 U.S.C. § 365(a) of the United States Bankruptcy Code and Rule 6006(a) of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

5. On August 7, 2013 (the "Petition Date"), Montreal Maine & Atlantic Railway, Ltd. ("MMA") filed a voluntary petition for relief under 11 U.S.C. § 101 *et seq*. MMA's bankruptcy filing was precipitated by the train derailment in Lac-Mégantic, Québec on July 6, 2013 (the "Derailment"). The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. The Derailment also precipitated the filing by Montreal Maine & Atlantic Canada Co., MMA's subsidiary, under Canada's *Companies' Creditors Arrangement Act*.

6. On August 21, 2013, the United States Trustee appointed Robert J. Keach (the "Trustee") as the chapter 11 trustee pursuant to 11 U.S.C. § 1163.

7. Prior to the Petition Date, in August 2011, MMA entered into retention agreements with certain of its employees. Some of the retention agreements are related to inactive employees who no longer work for MMA (the "Inactive Retention Agreements"), while certain of the retention agreements are related to active employees who continue to work for MMA (the "Active Retention Agreements," and collectively with the Inactive Retention Agreements, the "Employee Retention Agreements").

8. The Inactive Retention Agreements concern the inactive employees listed on **Exhibit A** which is attached hereto and incorporated herein by reference

9. The Active Retention Agreements concern the active employees listed on **Exhibit B** which is attached hereto and incorporated herein by reference.

10. Under the Employee Retention Agreements, the respective employee was obligated to provide continued services to MMA to help with operations and management of MMA's business during a potential sale of the company. In exchange for these services, the Employee Retention Agreements provided that MMA would pay the employee half of their

existing annual salary if the employee was offered employment with the purchaser of the company. In the event that the employee was not offered employment with the purchaser, the Employee Retention Agreements provide that the MMA would pay the employee a sum equal to the employee's existing annual salary. The sale of MMA never occurred.

11. The annual salaries for both inactive and active employees range from approximately $48,800 to $171,900. The total potential cost associated with the Employee Retention Agreements is approximately $2.4 million dollars.

12. Given that the sale did not occur, the Employee Retention Agreements are unnecessary and may, in fact, be ineffective or unenforceable. Indeed, the inactive employees no longer provide these services. As to the remainder, if retention or incentive agreements are required, the Trustee must and will propose such agreements in accordance with section 503 of the Bankruptcy Code. Accordingly, to the extent enforceable, the obligations under the Employee Retention Agreements constitute an undue burden to the estate while providing no benefit. Therefore, as a precaution, the Trustee has determined that rejecting the Employee Retention Agreements is in the best interests of MMA and its estate.

RELIEF REQUESTED

13. Pursuant to 11 U.S.C. § 365(a) and Rule 6006(a) of the Federal Rules of Bankruptcy Procedure, the Trustee requests that the Court approve the rejection of the Employee Retention Agreements.

BASIS FOR RELIEF

14. Section 365(a) provides that the trustee, subject to the Court's approval, may reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a).

15. A contract is executory where performance to some extent remains due on both sides. Bezanson v. Metropolitan Ins. and Annuity Co., 952 F.2d 1, 7 (1st Cir. 1991). "Federal

courts have pretty generally settled upon the following definition of an executory contract: 'a contract under which the obligation[s] of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.'" Gallivan v. Springfield Post Road Corp., 110 F.3d 848, 851 (1st Cir. 1997) (quoting In re Columbia Gas System, Inc., 50 F.3d 233, 239 (3d Cir. 1995)). The Employee Retention Agreements, to the extent still effective, are unquestionably executory contracts, given the potential obligations by MMA and each employee-counterparty. *See e.g.* In re Plymouth Rubber Co., 336 B.R. 16, 22 (Bankr. D. Mass. 2005)(agreements providing retention/severance payments were executory); In re Applied Theory Corp., 312 B.R. 225, 235 (Bankr. S.D.N.Y. 2004)(agreements to pay "stay-put bonuses" were executory contracts subject to rejection).

16. A trustee's decision to assume or reject any executory contract or unexpired lease is subject to the business judgment standard. See In re BankVest Capital Corp., 290 B.R. 443, 448 (aff'd In re BankVest Capital Corp., 360 F.3d 291 (1st Cir. 2004)); In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993); In re Blackstone Potato Chip Co., Inc., 109 B.R. 557, 560 (Bankr. D.R.I. 1990). The business judgment standard, as applied in the bankruptcy context, "requires that the decision [to reject] be accepted by courts unless it is shown that the bankrupt's decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion." In re Malden Brooks Farm, LLC, 435 B.R. 81, 83 (Bankr. D. Mass. 2010) (quoting Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1047 (4th Cir. 1985)). It is enough if the trustee determines, in his business judgment, that rejection of the relevant contracts or leases would benefit the estate. Sharon Steel Corp. v. National Fuel Distribution Corp. (In re Sharon

Steel Corp.), 872 F.2d 36, 39-40 (3d Cir. 1989) (citing In re Wheeling Pittsburgh Steel Corp., 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987)).

17. The Trustee has appropriately exercised his business judgment in rejecting the Employee Retention Agreements. The Employee Retention Agreements were originally entered into in order to assist MMA during the potential prepetition sale of the company. The Trustee has determined that the incentives for services provided under the Employee Retention Agreements, to the extent still enforceable or effective, are no longer necessary or beneficial to the estate and at a potential cost of $2.4 million are burdensome. Accordingly, the Trustee has concluded, in his business judgment, that the Employee Retention Agreements should be rejected. To the extent that retention or incentive programs are required by the Trustee, they will be developed by the Trustee and proposed for court approval under section 503.

NOTICE

18. Notice of this motion was served on the following parties on the date and in the manner set forth in the certificate of service: (1) the United States Trustee; (2) MMA's counsel; (3) the non-insider holders of the twenty (20) largest unsecured claims against MMA or, if applicable, the lawyers representing such holders; (4) applicable federal and state taxing authorities; (5) the holders of secured claims against MMA, or if applicable, the lawyers representing such holders; (6) the employees that are party to the Employee Retention Agreements or, if applicable, the lawyers representing such employees; and (7) others who have, as of the date of the motion, entered an appearance and requested service of papers in the chapter 11 case.

WHEREFORE, the Trustee respectfully requests that this Court enter an Order, pursuant to 11 U.S.C. § 365(a) and Rule 6006(a) of the Federal Rules of Bankruptcy Procedure,

approving the rejection of the Employee Retention Agreements, and granting such other and further relief as this Court deems just and equitable.

Dated: October 25, 2013

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

By his attorneys:

/s/ *Michael A. Fagone*

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Exhibit A

The Inactive Retention Agreements relate to the following inactive employees:

1. **Jocelyne Baranek;**
2. **Jean Demaitre;**
3. **Wane Doore, Jr.;**
4. **Michael Horan;**
5. **Lynne Labonte;**
6. **David Monahan;**
7. **Roger Noiseux;**
8. **Gabriel Tessier; and**
9. **Robert Thomas.**

Exhibit B

The Active Retention Agreements concern the following active employees:

1. **Glendon Arnold;**
2. **Daniel Aube;**
3. **Jonathan Beals**
4. **Benjamin Boone;**
5. **Paul Budge;**
6. **Christopher Caldwell;**
7. **Robert Campbell;**
8. **Christopher Carr;**
9. **Robert Cote;**
10. **M.D. Gardner;**
11. **Robert Grindrod;**
12. **David Houghton;**
13. **Jerry Keller;**
14. **Joseph McGonigle;**
15. **Sara Osborne;**
16. **Gaynor Ryan;**
17. **Timothy Scalia;**
18. **James Speed;**
19. **Randall Stahl;**
20. **Kenneth Strout;**
21. **Thomas Tardif;**
22. **Randy White; and**
23. **Fred Williams.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

ORDER GRANTING THE CHAPTER 11 TRUSTEE'S MOTION FOR AUTHORITY TO REJECT EMPLOYEE RETENTION AGREEMENTS

This matter having come before the Court on the Chapter 11 Trustee's Motion for Authority to Reject Employee Retention Agreements, filed by the Trustee,[1] after such notice and opportunity for hearing as was required under the Bankruptcy Code, 11 U.S.C. § 101 et seq. and the Federal Rules of Bankruptcy Procedure, this Court having conducted a hearing on the motion on November 21, 2013, after due deliberation and sufficient cause appearing therefore, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. The motion is granted.

2. The Trustee is hereby authorized to reject the Employee Retention Agreements concerning the employees listed on Exhibits A and B to the motion.

Dated:

____
Honorable Louis H. Kornreich
United States Bankruptcy Judge

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the motion

UNITED STATES BANKRUPTCY COURT
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NOTICE OF HEARING

Robert J. Keach, the chapter 11 trustee in the above-captioned case (the "Trustee"), has filed the *Chapter 11 Trustee's Motion for Authority to Reject Employee Retention Agreements* (the "Motion").

If you do not want the Court to approve the Motion, then on or before **November 14, 2013**, you or your attorney must file with the Court a response or objection explaining your position. If you are not able to access the CM/ECF Filing System, then your response should be served upon the Court at:

Alex Leddy, Clerk
United States Bankruptcy Court for the District of Maine
202 Harlow Street
Bangor, Maine 04401

If you do have to mail your response to the Court for filing, then you must mail it early enough so that the Court will receive it **on or before November 14, 2013**.

You may attend the hearing with respect to the Motion scheduled to be held at the Bankruptcy Court, 202 Harlow Street, Bangor, Maine on **November 21, 2013 at 10:00 a.m.**

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the Motion and may enter an order granting the requested relief without further notice or hearing.

Dated: October 25, 2013

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

By his proposed attorneys:

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