

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE

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 In re :  
 : Chapter 11  
 MONTREAL, MAINE & ATLANTIC :  
 RAILWAY, LTD., : Case No. 13-10670 (LHK)  
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 Debtor. :  
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**OBJECTION OF THE CIT GROUP/EQUIPMENT FINANCING, INC., FLEX LEASING I, LLC, AND FLEX LEASING II, LLC TO THE MOTION FOR AUTHORITY TO SELL SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS AND TO ASSUME AND ASSIGN CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AS IT RELATES TO THE ASSUMPTION AND ASSIGNMENT OF THE CIT LEASES**

The CIT Group/Equipment Financing, Inc., Flex Leasing I, LLC, and Flex Leasing II, LLC (collectively, the “*CIT Lessors*”) hereby file this objection to the Trustee’s<sup>1</sup> *Motion for Authority to Sell Substantially All of the Debtor’s Assets and to Assume and Assign Certain Executory Contracts and Unexpired Leases*, dated December 12, 2013 [Doc. No. 490], as it relates to the assumption and assignment of the CIT Leases (as defined below) (the “*Objection*”).

In support thereof, the CIT Lessors respectfully state as follows:

**PRELIMINARY STATEMENT**

1. On December 20, 2013, the Trustee filed the Contract & Cure Schedule listing the CIT Leases (as defined below) that may be assumed and assigned to the Purchaser.

<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the respective meanings attributed to them in either the *Order (I) Approving Bid Procedures Relating to the Proposed Sale of the Debtor’s Assets, Including Break-Up Fee and Expense Reimbursement, (II) Approving Procedures Relating to the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, Including Form of Notices of Assumption and Assignment, (III) Scheduling a Hearing to Consider the Sale and Approving the Form and Manner of Notice Thereof, and (IV) Granting Related Relief*, dated December 19, 2013, including all exhibits thereto [Doc. No. 535], or the Proposed Sale Order (as defined herein) [Doc. No. 490-2].

The Contract & Cure Schedule lists the proposed Cure Amounts with respect to the CIT Leases as of October 31, 2013.<sup>2</sup>

2. The CIT Lessors do not generally object to the potential assumption and assignment of the CIT Leases to the Purchaser so long as the Purchaser provides adequate assurance of future performance, and defaults under the CIT Leases are cured, as required by the Bankruptcy Code. The CIT Lessors in fact welcome an opportunity to work with potential acquirers of the Debtor's assets in the event that they elect to take any of the CIT Leases. The CIT Lessors also do not object to the listed Cure Amounts as of October 31, 2013. The CIT Lessors file this Objection, however, to protect their rights with respect to the obligations arising under the CIT Leases after October 31, 2013, to object to certain provisions in the proposed sale order that is attached to the Sale Motion (the "***Proposed Sale Order***") that either are inaccurate or are beyond the scope of the Court's authority, and to object to assignment of the CIT Leases to the Stalking Horse until and unless the CIT Lessors receive evidence of adequate assurance of future performance by the Stalking Horse.

**OBJECTION TO THE CURE AMOUNTS BECAUSE THEY  
DO NOT REFLECT ONGOING OBLIGATIONS UNDER THE CIT LEASES**

3. The Contact & Cure Schedule lists the following unexpired leases with the CIT Lessors that may be assumed and assigned to the Purchaser: (i) Schedules 4, 5, 6, and 7 under the Master Railcar Lease, dated December 20, 2007; (ii) Schedules 5, 6, 7, and 8 under the Master Car Lease Agreement, dated May 28, 2004 (together with the leases in clause (i), the "***Railcar Leases***"); and (iii) Schedule 1 (the "***Locomotive Lease Schedule I***") and Schedule 2

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<sup>2</sup> See Attachment 1 to Exhibit B of the Notice of (A) Sale of Substantially All of the Assets of Montreal, Maine & Atlantic Railway, Ltd. and Montreal, Maine & Atlantic Canada, Co.; (B) The Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Procedure for Determining Cure Amounts, dated December 20, 2013 [Doc. No. 538].

(the “*Locomotive Lease Schedule 2*”) under the Master Net Locomotive Lease, dated March 18, 2013 (the “*Locomotive Leases*,” and collectively with the Railcar Leases, each as may have been amended, the “*CIT Leases*”). Pursuant to the CIT Leases, the CIT Lessors lease locomotives and railcars to the Debtor (the “*Leased Equipment*”).

4. Postpetition, the Trustee has continued to use certain of the Leased Equipment. In fact, on September 27, 2013, the Trustee and the CIT Lessors entered into a stipulation agreeing to extend, with respect to the Railcar Leases, the 60-day period set forth in section 1168(a) of the Bankruptcy Code through and including January 31, 2014 (the “*1168 Stipulation*”), which was approved by this Court on October 3, 2013.<sup>3</sup> Pursuant to the 1168 Stipulation, the Trustee agreed to pay all amounts under the Railcar Leases that become payable on and after October 1, 2013. The CIT Lessors and the Trustee also amended the Locomotive Lease Schedule 1, as of November 1, 2013, modifying the rental fee from a daily rental rate to payment on an “as utilized” basis, which had previously only been provided for those locomotives leased pursuant to the Locomotive Lease Schedule 2. This amendment was approved by this Court on October 31, 2013.<sup>4</sup>

5. Certain amounts arising under the CIT Leases are payable in arrears, in certain instances, many months after the Leased Equipment is used. For example, under the Railcar Leases, the Debtor collects, on behalf of the CIT Lessors, certain amounts from other railroads while the railcars leased under the CIT Leases (the “*Leased Railcars*”) are on such other railroads’ lines (the “*Car Hire Revenues*”). Under the Railcar Leases, the CIT Lessors are

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<sup>3</sup> See *Order Granting the Trustee’s Motion for an Order Approving Stipulations to Extend the Time to Comply with Section 1168 and Address Matters Arising Under Section 1168*, dated October 3, 2013 [Doc. No. 332].

<sup>4</sup> *Order on Debtor’s Motion for Entry of an Order Approving the Debtor’s Rejection of Certain Leases*, dated October 31, 2013, ¶ 3 [Doc. No. 421].

entitled to receive, and the Debtor is obligated to remit to the CIT Lessors, 100% of the Car Hire Revenues. The Railroad Clearinghouse, Inc., a trust established by the Association of American Railroads, facilitates the reporting of the Car Hire Revenues. It prepares a report of those Car Hire Revenues earned by the Leased Railcars for each calendar month earning period. The Railroad Clearinghouse report, which is made available to the Debtor and the CIT Lessors for the Leased Railcars, is not produced until three months after the applicable monthly earning period. For example, Car Hire Revenues earned by the Leased Railcars in January 2014 would not be reported until April 2014, and the CIT Lessors would not receive payment for these Car Hire Revenues until late April 2014. Because of the delay in reporting the Car Hire Revenues, it is likely that, even if the Trustee remains timely on all postpetition payments due and payable under the CIT Leases up to the assumption and assignment of the CIT Leases, certain Car Hire Revenues earned prior to assumption and assignment of the CIT Leases will not become due and payable until after assumption and assignment of the CIT Leases. Additionally, the “as utilized” basis rental fee for the locomotives subject to the Locomotive Leases is determined and payable in arrears in the month following the period of usage of such locomotives.

6. Accordingly, the CIT Lessors object to the Cure Amounts to the extent that they do not make any provision for an upward adjustment to reflect amounts owed to the CIT Lessors after October 31, 2013. In particular, there is no provision to amend the Cure Amounts to include any additional defaults that may arise as result of the Trustee’s ongoing use of the Leased Equipment, including defaults after assumption and assignment of the CIT Leases that relate to the Trustee’s use of the Leased Equipment prior to assumption and assignment of the CIT Leases.

**OBJECTION TO CERTAIN PROVISIONS OF THE PROPOSED SALE ORDER**

*Cure of Defaults*

7. Paragraph Q of the Proposed Sale Order contains a finding that “[n]o uncured default exists under the Assigned Contracts and Leases.”<sup>5</sup> As a factual matter, this is simply incorrect. The Trustee has conceded in the Contract & Cure Schedule that Cure Amounts are owed under various executory contracts and unexpired leases. These Cure Amounts would not yet have been paid as of the entry of the Proposed Sale Order. Accordingly, the Proposed Sale Order must be revised to acknowledge the existence of the defaults that must be cured for Assigned Contracts and Leases (as defined in the Sale Motion) to be assumed and assigned to the Purchaser. As noted above, with respect to the CIT Leases, such defaults should include not just the Cure Amounts listed on the Contract & Cure Schedule, but also any additional defaults that may arise after October 31, 2013 relating to the Trustee’s ongoing use of the Leased Equipment.

8. Furthermore, the Proposed Sale Order does not contain clear mechanics for payment of the Cure Amounts, such as when the Cure Amounts will be paid and who will pay them. The Proposed Sale Order should be revised to clearly state who — the Purchaser or the Trustee — will be responsible for paying the Cure Amounts and when such payments will be made.

*Payment for Ongoing Use of Leased Equipment*

9. The Proposed Sale Order fails to contain a procedure for payment of obligations under the CIT Leases that become due and payable after assignment thereof that relate to the Debtor/Trustee’s use of the Leased Equipment prior to the assignment. In fact, the

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<sup>5</sup> See Proposed Sale Order ¶ Q (“No uncured default exists under the Assigned Contracts and Leases, nor is there any existing events or conditions which, with the passage of the time or the giving of notice, or both, would constitute such a default.”).

Proposed Sale Order contains various provisions to the effect that the Purchaser shall not be responsible for obligations of the Debtor under the Assigned Contracts and Leases<sup>6</sup> and that the Trustee shall not be responsible for any defaults under the Assigned Contracts and Leases after the date of assignment.<sup>7</sup> The Proposed Sale Order should be revised to provide that the Proposed Sale Order does not extinguish claims for use of the Leased Equipment prior to assumption and assignment of the CIT Leases that are not payable by the Trustee until after assumption and assignment thereof (*e.g.*, the Car Hire Revenues), and to clarify whether the Purchaser or the Trustee shall be responsible for paying such claims. Accordingly, the CIT Lessors request that the following language be added to the Proposed Sale Order:

Notwithstanding anything to the contrary in this Sale Order, the Sale Motion, or the Agreement, nothing in this Sale Order, the Sale Motion, or the Agreement extinguishes, releases or otherwise eliminates any obligations to counterparties under Assigned Contracts and Leases for use of the Assigned Contracts and Leases by the Debtor/Trustee prior to the date of assignment, but which do not become due and payable until after the date of assignment. Such obligations, if otherwise valid, shall be paid in full by the [Trustee/Purchaser] in accordance with the provisions of the Assigned Contracts and Leases.

*Forced Consent to Assignment by Purchaser*

10. The Proposed Sale Order states, in relevant part, as follows:

This Order shall be fully binding upon all counterparties to the Assigned Contracts and Leases, and such counterparties shall timely and completely perform all of their obligations under the Assigned Contracts and Leases in the absence of a payment default thereunder, including but not limited to consenting to and abiding by: . . . (ii) the assignment, encumbrance or pledge by Purchaser of all its right, title and interest upon Closing in, to and under the Assigned Contracts

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<sup>6</sup> See *e.g.*, Proposed Sale Order ¶ 6 (“Purchaser shall not have any liability or responsibility for any liability or other obligation of the Debtor arising under or related to the Assigned Contracts and Leases.”) and ¶ 8 (“The Purchaser shall not, as a result of such assignment, assume any liability under the Assigned Contracts and Leases for events occurring prior thereto.”).

<sup>7</sup> See *e.g.*, *Id.* ¶ 8 (“Pursuant to section 365(k) of the Bankruptcy Code, the Trustee and the Debtor shall be relieved, from the date of its assignment, from any further liability with respect to the Assigned Contracts and Leases.”).

and Leases as security for any financing or other financial arrangement Purchaser may secure, or to the lenders in such financing or their trustee, designee or assignee obtaining title to the Assigned Contracts and Leases or any of them upon an exercise of remedies or a consensual transfer thereof in lieu of an exercise of remedies. To the extent not timely given, the consent of the counterparties to each of the Assigned Contracts and Leases is hereby deemed granted.<sup>8</sup>

Additionally, the Proposed Sale Order states, in relevant part, as follows:

Because the Purchaser will, as of the Closing, have provided adequate assurance of the Purchaser's future performance under the Assigned Contracts and Leases, the failure (if any) by any counterparty to the Assigned Contracts and Leases to provide their consent to . . . the assignment, encumbrance or pledge by Purchaser of all its right, title and interest upon Closing in, to and under the Assigned Contracts and Leases as security for any financing . . . would be a material breach of the terms of the Assigned Contracts and Leases.<sup>9</sup>

As a general matter, it is not uncommon for a lessor, including the CIT Lessors, to consent to a lessee's assignment, encumbrance, or pledge of its rights under a lease. But requiring the CIT Lessors to provide a blanket consent to all such assignments, encumbrances, and pledges is unreasonable and beyond the scope of a bankruptcy court's authority. Section 365 of the Bankruptcy Code gives a bankruptcy court the power, subject to the satisfaction of the requirements set forth therein, to approve assumption and to order assignment of an executory contract or unexpired lease. To that end, if the requirements of section 365 are satisfied, the Court may order that the non-debtor counterparties to the Assigned Contracts and Leases recognize the Purchaser as the new counterparty to the Assigned Contracts and Leases. Once that assignment has occurred, though, the Court no longer has any jurisdiction over such contracts and leases. Accordingly, while non-debtor counterparties may breach their contracts with the Purchaser following assignment, if they fail to perform, they certainly cannot be held in contempt of court for doing so. Moreover, the Purchaser must take the Assigned Contracts and

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<sup>8</sup> *Id.*

<sup>9</sup> *See Id.* ¶ Q.

Leases as is and will be bound by any restrictions therein on assignment, encumbrance, or pledge. The CIT Leases require lessees to obtain written consent from the CIT Lessors before assigning or pledging their interests in the CIT Leases. The Court does not have the power to override such contractual provisions for the benefit of the Purchaser, and the Court does not have the power to compel counterparties to be deemed to “consent” to actions taken by their new counterparty, the Purchaser. If the Purchaser intends to assign, encumber, or pledge its rights under the CIT Leases, the CIT Lessors are willing to consider such requests in appropriate circumstances. The CIT Lessors must, however, have the ability to withhold consent of such assignment, encumbrance, or pledge without being deemed to have breached the CIT Leases. There are circumstances in which withholding such consent is reasonable and appropriate. Accordingly, the CIT Lessors request that provisions requiring consent to actions of the Purchaser be stricken from the Proposed Sale Order.

**OBJECTION TO ASSIGNMENT ABSENT ADEQUATE ASSURANCE**

11. The CIT Lessors have not yet received evidence of adequate assurance of future performance from the Stalking Horse, even after multiple requests to the Trustee’s counsel for such evidence. Section 365(f)(2) of the Bankruptcy Code provides that the Trustee may only assign the CIT Leases if adequate assurance of future performance by the Purchaser is provided.<sup>10</sup> Accordingly, the CIT Lessors object to assumption and assignment of the CIT Leases to the Stalking Horse until and unless they receive sufficient evidence of adequate assurance of future performance by the Stalking Horse.

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<sup>10</sup> 11 U.S.C. § 365(f)(2)(B).



**RESERVATION OF RIGHTS**

12. The CIT Lessors hereby reserve their right to supplement this Objection and to object to the adequate assurances of future performance with respect to any Successful Bidder.

**CONCLUSION**

For the foregoing reasons, the Proposed Sale Order should be revised as set forth herein.

Dated: January 15, 2014.

Respectfully Submitted,

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