

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

**MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.,**

Debtor.

Chapter 11

Case No. 13-10670-LHK

**TRUSTEE'S MOTION TO EXTEND THE PERIOD FOR ASSUMPTION OR
REJECTION OF CERTAIN NON-RESIDENTIAL
REAL PROPERTY LEASES**

Robert J. Keach, Esq., the duly appointed trustee in the above-captioned chapter 11 case (the "Trustee"), by and through his undersigned counsel, hereby moves this Court for an order (the "Motion"), pursuant to 11 U.S.C. § 365(d)(4), extending the period for assumption or rejection of non-residential real property leases. In support of this Motion, the Trustee states as follows:

JURISDICTION, VENUE AND PREDICATE FOR RELIEF

1. This Court has jurisdiction to entertain this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The predicate for the relief sought herein is § 365(d)(4)(B)(ii) of the Bankruptcy Code. This is a core proceeding over which the Court has jurisdiction to enter a final order.

BACKGROUND

2. On August 7, 2013 (the "Petition Date"), the above-captioned debtor (the "Debtor") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

3. On August 21, 2013, the United States Trustee appointed the Trustee.

4. Prior to the Petition Date, the Debtor (or its predecessor in interest) entered into certain nonresidential real property leases which can generally be described as follows:¹

- (a) **Larson Easement.** Prior to the Petition Date, the Debtor's predecessor in interest, Bangor and Aroostook Railroad Company ("BAR"), and Arlene L. Larson ("Larson") entered into that certain Release Deed (Easement) dated May 25, 1993 (the "Larson Easement") pursuant to which Larson granted an easement over a parcel of land in Medford, Maine to BAR for purposes of installation of an underground communications transmission system.
- (b) **Medford Easement.** Prior to the Petition Date, BAR and the Town of Medford, Maine ("Medford") entered into that certain Release Deed (Easement) dated May 26, 1993 (the "Medford Easement") pursuant to which Medford granted an easement over a parcel of land in Medford, Maine to BAR for purposes of installation of an underground communications transmission system.
- (c) **Hermon Office Lease.** Prior to the Petition Date, the Debtor and Larry Springer ("Springer") entered into that certain Commercial Lease dated August 1, 2004 (the "Hermon Office Lease") pursuant to which Springer leased a portion of a building in Hermon, Maine to the Debtor.
- (d) **Jackman Ground Lease.** Prior to the Petition Date, the Debtor and the Jackman Utility District ("JUD") entered into that certain Ground Lease dated May 14, 2013 (the "Jackman Ground Lease") pursuant to which JUD leased a parcel of land in Jackman, Maine to the Debtor which parcel of land is used for loading and unloading railcars.
- (e) **Cyr Mountain Lease.** Prior to the Petition Date, the Debtor and Judy L. Dionne ("Dionne") entered into that certain Lease Agreement dated January 24, 2013 (the "Cyr Mountain Lease"), pursuant to which Dionne leased a parcel of land in Madawaska, Maine to the Debtor upon which a radio tower of the Debtor is located.
- (f) **Parkhurst Siding Lease.** Prior to the Petition Date, the Debtor and the Cole Land Company, Inc. ("CLC") entered into that

¹ The descriptions set forth in the Motion of the agreements at issue are in summary form and nothing set forth herein is intended to alter the terms of the actual agreements between the parties. Copies of the leases have previously been filed with the Court in relation to prior motions seeking to extend the deadline to assume or reject the leases.

certain Lease Agreement dated April 1, 2003 (the "Parkhurst Siding Lease") pursuant to which CLC leased a parcel of land in Presque Isle, Maine to the Debtor upon which a radio tower of the Debtor is located.

- (g) **Bailey Hill Lease.** Prior to the Petition Date, the Debtor and Thomas and Eva Young (the "Youngs") entered into that certain Lease Renewal dated July 19, 2012 (the "Bailey Hill Lease"), pursuant to which the Youngs renewed a lease for a parcel of land in Williamsburg, Maine with an area of approximately 2,500 square feet upon which a radio tower of the Debtor is located. The agreements identified in this paragraph 4 hereinafter collectively referred to as the "Leases").

5. Under § 365 of the Bankruptcy Code, the Debtor has certain obligations to parties from whom it has leased nonresidential real property. 11 U.S.C. § 365(d). The obligations under § 365 include the obligation to timely perform certain obligations under any unexpired lease of nonresidential real property, until such lease is assumed or rejected. Id. An unexpired lease of nonresidential real property under which the Debtor is the lessee is deemed rejected if the Trustee does not assume or reject the unexpired lease within 120 days of the order for relief, unless the Court extends the 120-day period for 90 days on the motion of the Trustee for cause. Id.

6. Pursuant to an Order entered by this Court on November 25, 2013 [D.E. 456], this Court extended the 120-day period for the Trustee to assume or reject the Leases for an additional 90 days (the "Extension Period").

7. The Extension Period expires on March 5, 2014.

8. Pursuant to an Order entered on January 24, 2014, the Court entered an Order authorizing the Trustee to sell all or substantially all of the Debtor's assets (the "Sale") to Railroad Acquisition Holdings, LLC (the "Purchaser"). See D.E. 594. The Trustee expects the Sale to close sometime in March of 2014. The Purchaser has indicated its intent to assume certain executory contracts and unexpired leases, including the Leases. See D.E. 585.

9. Prior to March 5, 2014, the Trustee obtained the verbal consent of all but one of the counterparties to the Leases (the “Counterparties”) to extend the period to assume or reject the Leases for the earlier of another 90 days past the Extension Period or the date such Lease expires or terminates by its terms (the “Second Extension Period”). Specifically, the Trustee was unable to reach the Youngs, despite calling them at their last-known telephone number, emailing them at their last-known email address, and sending them a letter at their last-known mailing address. However, the other six Counterparties provided the Trustee with verbal consent to the Second Extension Period.

10. Subsequent to obtaining the verbal consent of six of the Counterparties, the Trustee mailed each Counterparty a consent form to be signed and returned to the Trustee (the “Consent Forms”), memorializing the Counterparty’s consent to the Second Extension Period. On or before March 5, 2014, the Trustee obtained executed Consent Forms from the following Counterparties, which Consent Forms are attached hereto as **Exhibit A**: (a) Dionne; (b) the JUD; (c) Larson; (d) Medford; and (e) CLC.

RELIEF REQUESTED

11. By this Motion, the Trustee seeks entry of an Order authorizing the Second Extension Period.

BASIS FOR RELIEF

12. As explained above, under § 365, non-residential real property leases under which a debtor is the lessee are deemed rejected in the event the debtor does not assume or reject the lease with 120 days of the petition date. The Court may extend the 120-day period for 90 days on motion for cause. Section 365(d)(4)(B) states:

The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

11 U.S.C. § 365(d)(4)(B)(i). Effectively, “Section 365(d)(4) [. . .] requires non-consensual assumption of an unexpired lease of nonresidential real property in a chapter 11 case no later than 210 days after the petition date[.]” In re Eastman Kodak Co., 495 B.R. 618, 621 (Bankr. S.D.N.Y. 2013).

13. After the initial extension of the 120-period under section 365(d)(4)(B)(i), “the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.” 11 U.S.C. § 365(d)(4)(B)(ii). The purpose of the statutory time limits is to curtail the “period during which a lessor may be kept in ‘limbo,’ with a lease that has not been assumed or rejected. . . . During this ‘limbo’ period, which, prior to the 2005 amendments to the Bankruptcy Code, often extended for years, the landlord may be forced to forego opportunities to rent the space to desirable substitute tenants, and the rental market may turn against the lessor.” In re M. Fine Lumber Co., Inc., 383 B.R. 565, 574 (Bankr. E.D.N.Y. 2008).

14. Accordingly, the objective of the limitations provided for in section 365(d)(4)(B) is to protect the interests of landlords who might have to forego opportunities to re-rent property while waiting for the debtor to determine whether to assume or reject its lease.

15. However, in this case, the Trustee is not seeking to indefinitely extend the period to assume or reject. The Trustee has merely requested an additional 90-day extension of the period to assume or reject in order to ensure that it may maintain the status quo pending the closing on the Sale.

16. Additionally, all but one of the counterparties to the Leases have provided the Trustee with their express verbal consent to the Second Extension Period, and five of the Counterparties have memorialized that consent in writing on or before March 5, 2014. The Trustee expects that additional written consents may be submitted subsequent to March 5th. The only Counterparty that has not expressly provided consent is unable to be reached, and the

Trustee has no basis to assume that such Counterparty would not consent to the Second Extension Period.

17. Further, it is essential that the Trustee maintain the Leases pending a closing on the Sale. Given that the Purchaser intends to assume some or all of the Leases, the Trustee submits that the Counterparties will not be prejudiced if the status quo is maintained pending the closing of the Sale. Additionally, certain of the Leases—specifically, the Larson Easement, the Medford Easement, the Cyr Mountain Lease, the Parkhurst Siding Lease, and the Bailey Hill Lease—involve underground easements or the lease of land for placement of a radio tower and would be difficult, if not impossible, to “re-rent” in the marketplace. Accordingly, the Counterparties to these Leases will not be prejudiced by the Second Extension Period because they are unlikely to be able to find an alternate lessor.

18. Given that the Counterparties will not be prejudiced by the Second Extension Period, and given the verbal and/or written consent of all but one of the Counterparties (which remaining Counterparty could not be reached) to the Second Extension Period, the Trustee believes that cause exists to authorize the Second Extension Period.

NOTICE

19. Notice of this Motion was served on the following parties on the date and in the manner set forth in the certificate of service: (a) the U.S. Trustee; (b) Debtor’s counsel; (c) parties receiving notice via CMECF; (d) counterparties to the Leases that are the subject of this Motion; and (e) others who have, as of the date of the Motion, entered an appearance and requested service of papers in the case. The Trustee respectfully requests that the Court find such notice to constitute fair, adequate, and sufficient notice of all matters set forth in this Motion.

WHEREFORE, the Trustee respectfully requests that this Court enter an Order, pursuant to 11 U.S.C. § 365(d)(4)(B), granting this Motion and granting such other and further relief as this Court deems just and equitable.

Dated: March 5, 2014

ROBERT J. KEACH, Trustee for the
Estate of MONTREAL MAINE &
ATLANTIC RAILWAY, LTD.

By his attorneys:

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