UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

TRUSTEE'S MOTION FOR ORDER AUTHORIZING (A) ENTRY INTO AGREEMENT WITH EARL W. NOYES & SONS PERTAINING TO STORAGE AND DESTRUCTION OF CERTAIN RECORDS AND (B) DESTRUCTION OF CERTAIN ELECTRONIC RECORDS

Robert J. Keach, the chapter 11 trustee (the "Trustee") in the above-captioned chapter 11 case of Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor"), by and through his undersigned counsel, hereby moves this Court for an order pursuant to sections 105, 363 and 554 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004 and 6007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 2002-1(a)(1), 6007-1 and 9013-1(d)(4) of the Local Rules of the Bankruptcy Court for the District of Maine (the "Local Rules") authorizing the Trustee to (a) enter into an agreement (the "Noyes Agreement") with Earl W. Noyes & Sons ("Noyes") pertaining to the storage of certain records for period of four (4) years, the destruction of those records upon expiration of the storage period, and the costs associated therewith, and (b) terminate electronic storage of certain other records after a period of two (2) years. In support hereof, the Trustee respectfully states the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction to entertain this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The predicates for the relief sought herein are Bankruptcy Code sections 105, 363, and 554, Bankruptcy Rules 2002, 6004 and 6007, and Local Rules 2002-1(a)(1), 6007-1 and 9013-1(d)(4).

BACKGROUND

A. The Derailment

3. On July 6, 2013, an unmanned eastbound MMA train with 72 carloads of crude oil, a buffer car, and 5 locomotive units derailed in Lac-Mégantic, Québec (the "Derailment"). The transportation of the crude oil had begun in New Town, North Dakota by the Canadian Pacific Railway ("CP") and the Debtor's wholly owned subsidiary, Montreal Maine & Atlantic Canada Co. ("MMA Canada"), later accepted the rail cars from CP at Saint-Jean, Québec. The crude oil was to be transported via the Saint-Jean-Lac-Mégantic line through Maine to its ultimate destination in Saint John, New Brunswick.

4. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. A large quantity of oil was released into the environment, necessitating an extensive cleanup effort. As a result of the Derailment and the related injuries, deaths, and property damage, lawsuits were filed against the Debtor in both the United States and Canada. After the Derailment, Canadian train activity was temporarily halted between Maine and Québec on the MMA Canada line, resulting in the Debtor losing much of its freight business. These effects of the Derailment caused the Debtor's and MMA Canada's aggregate gross revenues to fall drastically to approximately $1 million per month.

B. Commencement of the Chapter 11 and CCAA Cases

5. On August 7, 2013, the Debtor filed a voluntary petition for relief commencing a case (the "Case") under chapter 11 of the Bankruptcy Code in the United States Bankruptcy

Court for the District of Maine (the "Court"). Simultaneously, the Debtor's wholly owned subsidiary, Montreal Maine & Atlantic Canada Co. ("MMA Canada"), filed for protection under Canada's Companies' Creditors Arrangement Act (Court File No. 450-11-000167-134, the "Canadian Case"). On August 21, 2013, the Office of the United States Trustee (the "U.S. Trustee") appointed the Trustee to serve as trustee in the Debtor's Case pursuant to 11 U.S.C. § 1163 [D.E. No. 64].

C. The Sale of the Debtor's Assets

6. The Trustee, MMA Canada, and the monitor in the Canadian Case (the "Monitor"), in consultation with the Federal Railroad Administration ("FRA"), determined that a sale of the assets of both the Debtor and MMA Canada, on a going concern basis, was in the best interests of creditors of both debtors. The Trustee, with MMA Canada and the Monitor, held discussions and negotiations with potential purchasers to sell substantially all of the Debtor's assets in conjunction with a sale of substantially all of the assets of MMA Canada (the "Sale"). These discussions and negotiations eventually led to the selection of Railroad Acquisition Holdings LLC ("RAH") as a stalking horse bidder in an auction for the Sale.

7. Ultimately, on January 24, 2014, this Court entered an order approving the sale of substantially all of the Debtor's assets to RAH [D.E. 594]. The sale of the Debtor's assets closed on May 15, 2014, and upon final regulatory approval, the sale of the MMA Canada Assets closed on June 30, 2014.

8. In the process of closing the Sale, hard copies of various of the Debtor's records were kept on premises and thus control thereof transferred to RAH. In addition, the Trustee pays Reliable Networks, a Division of OTT Communications ("Reliable"), for the electronic storage of certain general business records, including company emails, employee files, the general ledger, payroll software, legal documents, tax returns, dispatch history, etc. (collectively, the

"General Business Records"). The cost to maintain this information electronically with Reliable (a) in a "suspended state" (conferring no remote access) is approximately $1,300 per month and (b) suitable for remote access is approximately $2,500 per month. The approximate cost of maintaining the General Business Records is thus between $15,600 and $30,000 annually, depending on what kind of access to documents is required.

D. The Plan Process

9. On July 15, 2015, the Trustee filed the *Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015* [D.E. 1534] (as may be amended, the "Plan") and the *Revised First Amended Disclosure Statement with Respect to Trustee's Plan of Liquidation Dated July 15, 2015* [D.E. 1535]. On July 17, 2015, this Court entered the *Order (I) Approving Proposed Disclosure Statement; (II) Establishing Notice, Solicitation and Voting Procedures; (III) Scheduling Confirmation Hearing; and (IV) Establishing Notice and Objection Procedures for Confirmation of the Plan* [D.E. 1544] (the "Disclosure Statement Order"). Confirmation of the Plan is scheduled to be considered on September 24, 2015. Upon confirmation of the Plan, the Trustee will wind down the Debtor's estate in accordance with the Plan.

E. RAH's Relocation and the Terms of the Noyes Agreement

10. In late August, RAH notified the Trustee that it would be relocating its offices and, in connection with the relocation, would return certain of the Debtor's records that had remained on the Debtor's former premises when sold. In particular, RAH had possession of, but will return: (a) records from the office of the Debtor's former President, Robert Grindrod, and other files potentially significant to the operation of the Debtor's business (collectively, the "Grindrod Files"); and (b) accounting documents (i) dating from 2006 through 2013 (collectively, the "Retained Accounting Documents") and (ii) dating prior to 2006 (collectively, the "Stale Accounting Documents"). Subject to entry of an order approving this Motion, the

Trustee proposes to maintain the Grindrod Files and the Retained Accounting Documents (collectively, the "Retained Documents") for a period of four (4) years, subject to automatic discard at the end of such period,[1] and immediately discard the Stale Accounting Documents (unless in the same box as any Retained Accounting Documents, in which case for administrative ease, store with such Retained Accounting Documents).

11. To maintain the Retained Documents, the Trustee contacted several firms that provide record storage services in an effort to obtain the most competitive and advantageous quote, while ensuring the records remain relatively easily accessible. In addition, because the Plan is a plan of liquidation, the Trustee determined that the Retained Records must ultimately be securely destroyed, as RAH has no interest in them and the Trustee will be winding up the Debtor's estate pursuant to the terms of the Plan. The Trustee thus also discussed with the various record retention firms an automatic destruction of the records after a fixed period of time.

12. After consultation with his advisors, the Trustee determined that Noyes's proposal was the most economical and convenient, and that a four-year storage term was prudent, after which Noyes will automatically destroy all the Debtor's records it has stored. A summary of the salient terms of the Noyes Agreement follows:

(a) The Noyes Agreement will cover the period from approximately October 2015 through October 2019, and the date for destruction of the records covered by the agreement is set to be January 31, 2020 (the "Noyes Destruction Date");

(b) Noyes will charge approximately (i) $950 to pick up and place the Retained Documents; (ii) $10,800 to store the Retained Documents for 48 (forty-eight) months; (iii) $2,550 to destroy the Retained Documents on the Noyes Destruction Date; and (iv) $60 per retrieval and delivery of any Retained Document; all in accordance with the Noyes Agreement. The

[1] The four-year period terminates several months after the six-year anniversary of the Derailment (which is July 6, 2013). The Trustee is aware of no statute of limitations that would permit the commencement of a suit related to the Derailment after that six-year anniversary.

approximate expected cost of performance under the Noyes Agreement is thus $15,020.[2]

RELIEF REQUESTED

13. By this Motion, the Trustee respectfully requests that this Court enter an order (a) authorizing the Trustee to enter into the Noyes Agreement and pay the costs thereunder; (b) approving the Noyes Destruction Date and authorizing the abandonment and destruction of the Retained Documents on the Noyes Destruction Date; (c) approving the immediate abandonment and destruction of the Stale Accounting Documents not grouped with Retained Accounting Documents; and (d) approving the abandonment and destruction of the General Business Records on October 31, 2017 (the "Electronic Destruction Date").

14. The Trustee will serve this Motion on counsel to CP, the only Derailment-litigation counterparty with whom the Trustee has not yet settled, and will work in good faith with counsel to CP to resolve any litigation-related concerns counsel to CP may have.

BASIS FOR RELIEF

A. The Legal Standard

15. Section 363(b)(1) of the Bankruptcy Code provides authority for a trustee, "after notice and a hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate."[3] 11 U.S.C. § 363(b)(1). A trustee must demonstrate a sound business justification for a sale or use of assets outside the ordinary course of business. *See*, *e.g.*,

[2] This assumes two document retrievals per year for four years, and is based on the estimated boxes of Retained Documents that will be stored. The actual cost of performance may thus differ slightly.

[3] The Trustee submits that entry into the Noyes Agreement is an action taken in the ordinary course of the Debtor's business, but in an abundance of caution, seeks authority to do so under Bankruptcy Code section 363(b)(1). *See* Braunstein v. McCabe, 571 F.3d 108, 124-25 (1st Cir. 2009) (in determining whether a transaction falls within the ordinary course of business, courts look both to the "horizontal test," or "whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry," and the "vertical test," or "whether it subjects a creditor to economic risks of a nature different from those he accepted when we decided to extend credit."). Indeed, businesses of all types often require the services of storage companies with respect to old records.

Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 387 (2d Cir. 1997); The Inst. Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986) ("[F]or the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business."); *see also* In re Baldwin United Corp., 43 B.R. 888, 906 (Bankr. S. D. Ohio 1984) (trustee "is required to justify the proposed [transaction] with sound business reasons"); Matter of St. Petersburg Hotel Assoc., 37 B.R. 341, 343 (Bankr. M. D. Fla. 1983) (section 363 "impliedly requires the Court to find that it is good business judgment for the Debtor to enter into the transaction."). Further, "[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." Comm. Of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986); In re Filene's Basement, LLC, No. 11-13511, 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) (same).

16. Bankruptcy Rule 6004(a) requires that notice of the proposed use of property of the estate not in the ordinary course of business be made in accordance with Bankruptcy Rule 2002. Fed. R. Bankr. P. 6004(a). Bankruptcy Rule 2002 provides, in pertinent part, that for motions seeking the proposed use of property of the estate other than in the ordinary course of business, the trustee must provide parties in interest with at least twenty-one days' notice. Fed. R. Bankr. P. 2002(a)(2). In turn, Local Rules 2002-1 and 9013-1 provide, in pertinent part, that (a) if the Bankruptcy Rules require twenty-one days' notice for a motion to be heard, the response deadline for such motion shall be no less than twenty-one, and the hearing no less than

twenty-eight, days after the motion is filed, Local Rule 9013-1(d)(4), and (b) that the Court may act on a motion without a hearing in the absence of an objection, Local Rule 9013-1(g)(1).

17. In addition, section 105(a) of the Bankruptcy Code confers upon the Court broad equitable powers to fashion relief in accordance with the policies underlying the Bankruptcy Code. *See* 11 U.S.C. § 105(a); *see also* Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.), 25 F.3d 1132, 1136 (2d Cir. 1994) ("It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process."); Chinichian v. Campolongo (In re Chinichian), 784 F.2d 1440, 1443 (9th Cir. 1986) ("Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code.").

18. Finally, section 554(a) of the Bankruptcy Code provides that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). The decision to abandon property of the estate is evaluated under the business judgment test; accordingly, "[g]ood faith, reasonable basis, and statutory authority" to abandon will be presumed unless an objecting party can "demonstrate some likely benefit to the estate." In re Dilley, 378 B.R. 1, 7 (Bankr. D. Me. 2007). Bankruptcy Rule 6007 provides that the Court shall set a hearing on abandonment only if an objection is made within fourteen (14) days of the mailing of the notice of abandonment. *See* Fed. R. Bankr. P. 6007(a).

B. The Relief Requested Is Warranted

19. In this case, (a) immediate abandonment and destruction of the Stale Accounting Documents, (b) entry into the Noyes Agreement to store the Retained Documents for a period of forty-eight (48) months, (c) abandonment and destruction of the General Business Documents on

the Electronic Destruction Date, and (d) abandonment and destruction of the Retained Documents on the Noyes Destruction Date are all clearly within the Trustee's sound business judgment. No party has expressed interest in accessing these documents, and yet the Debtor's estate continues to incur costs to store the records, which are burdensome to the estate (for the General Business Documents, between $15,600 and $30,000 per year, and for the Retained Documents, almost $3,000 per year). *See* In re Dilley, 378 B.R. at 7 (putting the burden on an objector to "demonstrate some likely benefit to the estate"). In addition, because the Noyes Destruction Date would occur after the sixth anniversary of the Derailment, the Trustee sees no business or other reason to maintain the Retained Records beyond the Noyes Destruction Date. Accordingly, there exists no business reason to continue to pay for the Retained Documents' or the General Business Documents' maintenance beyond the Noyes Destruction Date or the Electronic Destruction Date, respectively. The Trustee thus submits that the relief requested herein is reasonable and in the best interests of the Debtor's estate.

NOTICE

20. 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 Debtor; (b) the Debtor's counsel; (c) the United States Trustee; (d) the Official Committee of Victims appointed in the Case; (e) applicable federal and state taxing authorities; (f) the holders of secured claims against the Debtor, or if applicable, the lawyers representing such holders; (g) counsel to CP; and (h) others who have, as of the date of the Motion, entered an appearance and requested service of papers in the Case.

CONCLUSION

WHEREFORE, the Trustee respectfully requests that this Court enter an order: (i) granting the relief requested herein; and (ii) granting such other and further relief as this Court deems necessary and appropriate.

Dated: September 8, 2015

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

By his attorneys:

/s/ Lindsay K. Zahradka

D. Sam Anderson, Esq.
Lindsay K. Zahradka, Esq. (admitted *pro hac vice*)
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029
Tel: (207) 774-1200
Fax: (207) 774-1127

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

ORDER GRANTING TRUSTEE'S MOTION FOR ORDER AUTHORIZING (A) ENTRY INTO AGREEMENT WITH EARL W. NOYES & SONS PERTAINING TO STORAGE AND DESTRUCTION OF CERTAIN RECORDS AND (B) DESTRUCTION OF CERTAIN ELECTRONIC RECORDS

This matter having come before this Court on the *Trustee's* Motion for Order Authorizing (a) Entry into Agreement with Earl W. Noyes & Sons Pertaining to Storage and Destruction of Certain Records and (B) Destruction of Certain Electronic Records (the "Motion")[1] after such notice and opportunity for hearing as is required under the Bankruptcy Code and the Bankruptcy Rules; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and it appearing that no other notice need be given; and a hearing having been held on the Motion; and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtor, its estate and creditors, and all parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation, and sufficient cause appearing therefore, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:

[1] Capitalized terms used, but not defined in this Order, have the meanings ascribed to such terms in the Motion.

1. The Motion is **GRANTED**.

2. Pursuant to sections 105, 363, and 554 of the Bankruptcy Code, (a) the Trustee is authorized to enter into the Noyes Agreement and pay the costs thereunder; (b) the Noyes Destruction Date is approved and the abandonment and destruction of the Retained Documents on the Noyes Destruction Date is authorized; (c) the immediate abandonment and destruction of the Stale Accounting Documents not grouped with Retained Accounting Documents is approved; and (d) the abandonment and destruction of the General Business Records on the Electronic Destruction Date is approved.

3. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.

Dated: _____, 2015

_____

The Honorable Peter G. Cary
Chief Judge, United States Bankruptcy Court
District of Maine

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

NOTICE OF HEARING

Robert J. Keach, the chapter 11 trustee of Montreal Maine & Atlantic Railway, Ltd. (the "Trustee"), has filed the *Trustee's Motion for Order Authorizing (A) Entry Into Agreement with Earl W. Noyes & Sons Pertaining to Storage and Destruction of Certain Records and (B) Destruction of Certain Electronic Records* (the "Motion").

A hearing to consider the Motion is scheduled for **October 6, 2015 at 9:00 a.m.** (the "Hearing") before the Honorable Judge Peter G. Cary, the United States Bankruptcy Court for the District of Maine (the "Court"), 537 Congress Street, 2nd Floor, Portland, Maine.

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.

You may attend the final hearing with respect to the Motion scheduled to be held at the Bankruptcy Court, 537 Congress Street, 2nd Floor, Portland, Maine on **October 6, 2015 at 9:00 a.m.**

If you do not want the Court to approve the Motion, then **on or before September 29, 2015**, 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:

Alec Leddy, Clerk
United States Bankruptcy Court for the District of Maine
537 Congress Street
2nd Floor
Portland, ME 04101

If you do have to mail your response or objection to the Court for filing, then you must mail it early enough so that the Court will receive it **on or before September 29, 2015**.

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: September 8, 2015

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

By his attorneys:
Lindsay K. Zahradka
D. Sam Anderson, Esq.
Lindsay K. Zahradka, Esq. (admitted *pro hac vice*)
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029
Tel: (207) 774-1200
Fax: (207) 774-1127