

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**SECOND INTERIM APPLICATION OF TRUSTEE, ROBERT J. KEACH, FOR
ALLOWANCE AND PAYMENT OF COMPENSATION AND
REIMBURSEMENT OF EXPENSES FOR THE PERIOD
AUGUST 21, 2013 THROUGH SEPTEMBER 30, 2014**

| | |
|---|---|
| Name of Applicant: | Robert J. Keach |
| Authorized to Provide Professional Services as: | Duly appointed Chapter 11 trustee of the bankruptcy estate of the Debtor |
| Petition Date: | August 7, 2013 |
| Date of Retention: | August 21, 2013 |
| Period for Which Compensation and Reimbursement is Sought: | August 21, 2013 through and including September 30, 2014* |
| Total Amount of Compensation sought as actual, reasonable and necessary: | \$209,165.05 |
| Total Amount of Expenses sought as actual, reasonable and necessary: | \$13,270.87 |
| Total Fees and Expenses Requested: | \$222,435.92 |

This is an Interim Application.

* Pursuant to the Consent Order on Chapter 11 Trustee's Application for Allowance of Interim Compensation (the "Consent Order") [Docket No. 966], the Trustee was allowed, on an interim basis, \$600,000.00 as compensation for services for the period covered by the First Interim Fee Application of Trustee Robert J. Keach for Allowance and Payment of Compensation and Reimbursement of Expenses for the Period August 21, 2013 Through April 30, 2014 [Docket No. 783] (the "First Fee Application"). Under the Consent Order, the Trustee's rights are reserved with respect to any amounts requested in the First Fee Application and not paid pursuant to the Consent Order. Based on the concessions made in relation to the First Fee Application and the rights reserved in relation thereto, this Application covers amounts owed for disbursements made from August 21, 2013 through September 30, 2014, minus the \$600,000.00 payment made in relation to the Consent Order.

Prior Fee Applications:

| | | Requested | | Approved/Received | |
|------------|-------------------------------------|--------------|------------|-------------------|------------|
| Date Filed | Period Covered | Fees | Expenses | Fees | Expenses |
| 5/12/14 | August 21, 2013 – April 30, 2014 | \$780,464.87 | \$8,275.28 | \$600,000.00 | \$8,275.28 |

COMPENSATION BY PROFESSIONAL

| NAME OF PROFESSIONAL PERSON | DEPARTMENT AND YEAR ADMITTED | TOTAL BILLED HOURS | TOTAL COMPENSATION |
|------------------------------------|-------------------------------------|---------------------------|---------------------------|
| SHAREHOLDER | | | |
| Robert J. Keach | BRI - 1980 | 492.7 | \$209,165.05 |
| Total Fees Requested | | 492.7 | \$209,165.05 |

Effective hourly rate: \$424.53

COMPENSATION BY PROJECT CATEGORY

| PROJECT CODE | PROJECT DESCRIPTION | HOURS |
|---------------------|--------------------------------------|--------------------------|
| 2 | Asset Disposition | 49.5 |
| 3 | Business Operations | 19.0 |
| 4 | Case Administration | 114.8 |
| 5 | Claims Administration and Objections | 10.8 |
| 6 | Employee Benefits/Pensions | 0.9 |
| 7 | Fee/Employment Applications | 19.0 |
| 9 | Financing | 3.0 |
| 10 | Litigation | 217.5 |
| 12 | Plan and Disclosure Statement | 31.0 |
| 14 | Other | 25.5 |
| 15 | Accounting/Auditing | 0.3 |
| 21 | Tax Issues | 1.4 |
| TOTAL | | 492.7[†] |

EXPENSE SUMMARY

| Charges & Disbursements | AMOUNT |
|--|--------------------|
| Travel Expenses | \$13,023.67 |
| Meals | \$178.30 |
| Courier/Federal Express | \$38.90 |
| Miscellaneous/Filing Fee | \$30.00 |
| Total Charges & Disbursements | \$13,270.87 |

[†] The hours worked and expenses requested herein pertain only to the period May 1, 2014 through September 30, 2014.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**SECOND INTERIM APPLICATION OF TRUSTEE ROBERT J. KEACH FOR
ALLOWANCE AND PAYMENT OF COMPENSATION AND
REIMBURSEMENT OF EXPENSES FOR THE PERIOD
AUGUST 21, 2013 THROUGH SEPTEMBER 30, 2014¹**

Pursuant to 11 U.S.C. §§ 326(a), 330(a)(1), 330(a)(7) and 331, Rule 2016(a) of the Federal Rules of Bankruptcy Procedure, and District of Maine Local Bankruptcy Rule 2016-1(a), Robert J. Keach, the duly appointed Chapter 11 trustee appointed pursuant to 11 U.S.C. § 1163 (the “Trustee”) of the bankruptcy estate of Montreal Maine & Atlantic Railway, Ltd. (the “Debtor”), by and through his counsel, hereby requests that this Court enter an order allowing and ordering payment of compensation earned and reimbursement of expenses incurred as set forth in detail below (the “Application”). Services were rendered by, and the expenses incurred by, the Trustee during the period from August 21, 2013 through September 30, 2014 (the “Application Period”), and are based, *inter alia*, on disbursements made by the Trustee through September 30, 2014.² In support of this Application, the Trustee states as follows:

¹ The periods for which fees and expenses are sought and the calculations relating thereto are more particularly described in the notes to the summary pages filed with this Application and are further described herein.

² As detailed, *infra*, the calculation of disbursements for purposes of application of sections 326(a) and 330(a)(7) is based on disbursements, including payments to secured creditors, in connection with various transactions as well as, disbursements made in the ordinary course of operating the Debtor’s business through September 30, 2014.

BACKGROUND

1. On August 7, 2013 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"). On August 21, 2013 (the "Appointment Date"), the United States Trustee (the "U.S. Trustee") appointed the Trustee to serve in the Debtor's Chapter 11 case (the "Case") pursuant to 11 U.S.C. § 1163.

2. No payment has been made by the Debtor to the Trustee for services rendered or expenses incurred during the Application Period, other than as detailed below. Other than an agreement between the Trustee and his law firm of Bernstein, Shur, Sawyer & Nelson, P.A. ("BSSN"), for the sharing of the Trustee's compensation as a shareholder of BSSN, no agreement or understanding exists between the Trustee and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the Case. All services for which approval of compensation is requested were performed for and on behalf of the Debtor's estate and not for any other individual, person, or entity.

JURISDICTION AND VENUE

3. This Court has jurisdiction to entertain this Application 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.

REQUESTED RELIEF

4. Pursuant to sections 326(a), 330(a)(1), 330(a)(7) and 331 of the Bankruptcy Code, Rule 2016(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 2016-1(a) of the Local Bankruptcy Rules of the District of Maine (the "Local Rules"), the Trustee seeks approval of compensation in the amount of \$209,165.05 for professional services provided to the Debtor during the Application Period and reimbursement of reasonable and

necessary out-of-pocket expenses in the amount of \$13,270.87 incurred by the Trustee during the Application Period. In accordance with Local Rule 2016-1(a)(4)(iv) and as discussed further herein, the Trustee certifies that the amount of compensation requested is equal to and does not exceed the statutory commission. D. Me. LBR 2016-1(a)(4)(iv).

SUMMARY OF WORK PERFORMED BY THE TRUSTEE

5. During the Application Period, the Trustee provided essential professional services to the estate in connection with a variety of critical and complex issues. The following is a summary of the services rendered by the Trustee during the Application Period.³

Operations

6. Since the Appointment Date, the Trustee has operated the Debtor's railroad, which—given that the Debtor's Canadian affiliates operations were managed post-petition, from an operational and financial perspective, from the Debtor's offices in Hermon, Maine—included overseeing the restoration, and eventual operation, of the Canadian subsidiary as well. Upon appointment, and the obtaining of necessary financing, the Trustee initiated a number of safety measures, including, without limitation, requiring two employees on all trains.

45G Tax Credits

7. As described more fully in the First Fee Application, the Trustee and Wheeling & Lake Erie Railroad Company ("Wheeling") engaged in litigation concerning the rights to the proceeds relating to tax credits assigned by the Debtor (the "45G Tax Credits"). During the Application Period, the litigation continued and was eventually resolved.

³ The narrative summary set forth in paragraphs 6–20 is, of course, a partial statement regarding the Trustee's services; a comprehensive recitation of all time spent by the Trustee during the period of May 1, 2014 through September 30, 2014 is attached as **Exhibit C**. The First Fee Application contains a comprehensive recitation of all time spent by the Trustee from the period of August 21, 2013 through April 30, 2014.

8. On May 16, 2014, the Trustee filed the Notice of Appeal with respect to certain issues involving the 45G Tax Credits. Following negotiations with Wheeling on this and other issues, the matter, and the appeal, was resolved, as set forth below.

Auction and Sale of Debtor's Assets

9. Among the most critical and urgent tasks that the Trustee and his professionals accomplished during the Application Period was the negotiation of a sale of substantially all of the Debtor's assets in conjunction with a sale of substantially all of the assets of Montreal Maine & Atlantic Canada Co. ("MMA Canada") (the "Sale"). The Trustee, with MMA Canada and the Monitor, began discussions and negotiations with potential purchasers early in the Case, eventually leading to the selection of Railroad Acquisition Holdings LLC ("RAH") as a stalking horse bidder in an auction for the Sale assets. The Trustee was actively involved in the identification and evaluation of potential purchasers, coordination with other professionals including Gordian Group LLC and Development Specialists Inc., the establishment of the auction and bidding procedures, the coordination of the approval of similar procedures in the concurrent proceeding under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "Canadian Case"), the execution of the auction, the drafting of the asset purchase agreement and other Sale documents, the approval of the sale in this Case and the Canadian Case, and ongoing work towards an expeditious closing of the Sale.

10. On December 12, 2013, the Trustee filed a motion to establish bidding procedures and an auction to select the successful bidder for the purchase of the Debtor's assets [Docket No. 488], as well as a sale motion and asset purchase agreement with RAH as stalking horse bidder. The bidding procedures motion was approved on December 19, 2013 [Docket No. 535], along with a similar motion in the Canadian Case, and the auction was held on January 21, 2014,

wherein the bid of RAH was declared the successful bid. The Court approved the sale to RAH on January 24, 2014 [Docket No. 594], which was also approved by the Canadian Court. The sale of the Debtor's assets closed on May 15, 2014, and the sale of MMA Canada's assets closed on June 30, 2014.

11. By taking immediate steps to organize and execute the auction and negotiate the terms of the Sale, the Trustee maximized the value of the Debtor's assets, and in turn, the value that will be distributed to creditors. Moreover, the sale insured the continued operation of the railroad in accordance with the public interest. See 11 U.S.C. § 1165.

Trustee's Section 506(c) Surcharge Motion

12. On May 7, 2014, with the assistance of BSSN, the Trustee filed the Motion for an Order Pursuant to 11 U.S.C. Sec. 506(c) Authorizing the Recovery of Expenses From Wheeling and Lake Erie Railway Co. or Its Collateral [Docket No. 854] seeking to surcharge Wheeling and its collateral for certain expenses directly related to the liquidation of Wheeling's collateral pursuant to 11 U.S.C. § 506(c) (the "506(c) Surcharge Motion").

13. On June 10, 2014, Wheeling filed the Objection of Wheeling and Lake Erie Railway Company to Trustee's Motion for an Order Pursuant to 11 U.S.C. § 506(c) Authorizing Recovery of Expenses Filed by Wheeling & Lake Erie Railway Company [Docket No. 949], arguing that the filing of the 506(c) Surcharge Motion was procedurally improper and that the Trustee was not entitled to relief as a matter of law. This matter is now stayed, as set forth below.

Red Shield Acquisition LLC Adversary Proceeding

14. On April 16, 2014, the Trustee filed a Complaint commencing adversary proceeding number 14-01006 against Red Shield Acquisition LLC for breach of a rail services agreement and failure to pay an outstanding debt owed to the Debtor [Docket No. 835].

15. On June 10, 2014, the Court entered an order staying the adversary proceeding pursuant to a settlement between the parties, whereby Red Shield Acquisition LLC agreed to make monthly payments in satisfaction of its debt.

Wheeling Collateral Litigation; Wheeling Compromise

16. On January 30, 2014, Wheeling filed the Motion to Enforce Cash Collateral Orders [Docket No. 603] arguing that the Trustee failed to escrow and turn over to Wheeling the proceeds of collection of all accounts receivable generated by the Debtor prior to the closing of the first of two separate financings with Camden National Bank. On March 5, 2014, the Trustee filed the Trustee's Objection to Wheeling & Lake Erie Railroad Company's Motion to Enforce Cash Collateral Orders [Docket No. 707].

17. On July 10, 2014, the Trustee filed the Trustee's Application to Compromise a Controversy with Wheeling & Lake Erie Railway Company [Docket No. 1011], setting forth an agreement between the Trustee and Wheeling (the "Wheeling Compromise"). Pursuant to the Wheeling Compromise, the parties agreed to:

- (a) Payment by the Trustee to Wheeling in partial satisfaction of its inventory collateral claim with respect to inventory sold in the Sale;
- (b) Payment by the Trustee to Wheeling in full satisfaction of its 45G Tax Claims, followed by the dismissal of the 45G Appeal;
- (c) a six (6) month stay of the Wheeling Adversary Proceeding, as well as all proceedings related to the 506(c) Surcharge Motion and the Motion to Enforce Cash Collateral Orders; and
- (d) A lift of the automatic stay for Wheeling to enforce its rights in the

Debtor's accounts receivable.

18. On July 25, 2014, the Court entered the Order Approving Chapter 11 Trustee's Motion for Order Approving Compromise and Settlement with Wheeling & Lake Erie Railway Company [Docket No. 1075].

Derailment Settlements

19. The Trustee is in the process of attempting to recover funds for the benefit of creditors, including those creditors with claims arising out of the Lac-Mégantic derailment. The Trustee is working with counterparts in Canada to create a nine-figure settlement fund to be implemented in plans filed in this case and the Canadian Case. As part of those efforts, during the Application Period, the Trustee devoted a substantial amount of time to meeting with parties attempting to establish that settlement fund, including various defendants in pending litigation, counsel to victims, the Monitor in the Canadian Case, and other parties. These efforts continue.

Plan and Disclosure Statement

20. During the Application Period, the Trustee, with BSSN, began to prepare the Debtor's plan of reorganization and disclosure statement, both of which the Trustee intends to file by mid-November.

BASIS FOR REQUESTED RELIEF

21. Section 330 of the Bankruptcy Code provides that "the court may award to a trustee . . . (A) reasonable compensation for actual, necessary services rendered . . . and, (B) reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Applications for such relief may be made "not more than once every 120 days . . . or more often if the court permits," and "[a]fter notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement." 11 U.S.C. § 331.

22. Bankruptcy Rule 2016(a) provides that a trustee must file an application for compensation and reimbursement containing “a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.” Fed. R. Bankr. P. 2016(a). Local Rule 2016-1(a)(5) also requires that each application “set forth with specificity all disbursements for which reimbursement is sought.” D. Me. LBR 2016-1(a)(5).

23. “In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.” 11 U.S.C. § 330(a)(7). Section 326 of the Bankruptcy Code states:

In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee’s services, payable after the trustee renders such services, not to exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a). Thus, the trustee’s commission under sections 326(a) and 330(a)(7) is calculated as follows: \$1,250.00 of the first \$5,000.00 disbursed; \$4,500.00 of the following \$45,000.00; \$47,500.00 of the following \$950,000.00; and 3% of any following sums.

24. Consistent with this approach to calculating the commission, Local Rule 2016-1(a)(4)(ii) requires that the Trustee state: (a) “the total funds received in the estate” and (b) “the amount of money disbursed and anticipated to be disbursed by the trustee to parties-in-interest (excluding the debtor) and a calculation of the maximum fee allowable under 11 U.S.C. § 326.” D. Me. LBR 2016-1(a)(4)(ii). In that respect, attached hereto, collectively, as **Exhibit A** are the

monthly operating reports filed by the Trustee with the United States Trustee's office and the Court during the period from May 1, 2014 through September 30, 2014.⁴

25. Notwithstanding the commission calculation methodology mandated above, Section 330 of the Bankruptcy Code provides that:

In determining the amount of reasonable compensation to be awarded to . . . [a] **trustee under chapter 11**. . . [t]he court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors including –

- (a) the time spent on such services;
- (b) the rates charged for such services;
- (c) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (d) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- (e) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- (f) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3) (emphasis supplied).

⁴ “Disbursements” for purposes of section 326(a) include amounts disbursed by the Trustee in the ordinary course of operating the Debtor’s business. See, e.g., In re Orient River Investments, Ltd., 133 B.R. 729, 733 (Bankr. E.D. Pa. 1991) (Section 326(a) allows “disbursement made in actual operation of businesses to be included among the ‘moneys turned over. . . to parties in interest’ in calculating trustee’s fees.”); In re McNar, Inc., 120 B.R. 149, 154 (Bankr. S.D. Cal. 1990) (“ . . . this court concludes that disbursements during the operation of the Chapter 11 to trade creditors and suppliers . . . should be counted in determining the § 326(a) statutory maximum available to a trustee . . . ”); see also In re P.J. Keating Co., 205 B.R. 663, 667 (Bankr. D. Mass. 1997) (defining “disbursements” to include ordinary course operating disbursements in calculating UST fees, and citing Orient River). “Disbursements” includes payments of administrative claims, including, professional fees. See, e.g., Mohsen v. Wu (In re Mohsen), 506 B.R. 96, 105–06 (N.D. Cal. 2013); Kristan v. Turner (In re Kristan), 2008 WL 8664765 at *1, n.4 (1st Cir. B.A.P., Dec. 15, 2008). Under the plain language of section 362(a), payments to secured creditors are also included. 11 U.S.C. § 326(a) (“ . . . but including holders of secured claims”).

26. Section 330(a)(7) was added to the statute by the Bankruptcy Abuse Prevention and Consumer Act of 2005 (“BAPCPA”). Also, as part of BAPCPA, section 330(a)(3) was amended to exclude chapter 7, 12 and 13 trustees, and to apply only to chapter 11 trustees. Since the passage of those amendments, courts have struggled to reconcile those sections, and section 326(a), in determining the proper standard of review for compensation sought by chapter 7 and chapter 11 trustees. In re Rowe, 2014 WL 1663329 at *1–3 (4th Cir., April 28, 2014); Hopkins v. Asset Acceptance LLC (In re Salgado-Nava), 473 B.R. 911, 916 (9th Cir. B.A.P. 2012).

27. However, in a carefully reasoned opinion parsing and interpreting these sections, the Ninth Circuit Bankruptcy Appellate Panel, in Salgado-Nava, provided guidance as to the reconciliation of these sections, both as to chapter 7 and chapter 11 trustees. As to chapter 7 trustees, noting the exclusion of such trustees from section 330(a)(3), the court held that “. . . absent extraordinary circumstances, chapter 7 . . . trustee fees should be presumed reasonable if they are requested at the statutory rate [set forth in section 326(a)].” 473 B.R. at 921. The Fourth Circuit has embraced this holding in Rowe. 2014 WL 1663329 at *4 (4th Cir., April 28, 2014).

28. In the case of a chapter 11 trustee, given the post-BAPCPA formulation of section 330(a)(3), the presumption still applies, but the “extraordinary circumstances” exception is replaced with a different and more flexible test (given that chapter 11 trustees often operate businesses and that mechanical application of the commission percentages could create large, “windfall” commissions based entirely on the size of the business in large, “mega” cases). The court stated that: “if chapter 11 fees are at issue, the bankruptcy court may be called upon . . . to determine whether there exists a rational relationship between the amount of the commission and the type and level of services rendered. In the case of a chapter 11 trustee, this determination

necessarily requires consideration of the § 330(a)(3) factors, and also ordinarily includes a lodestar analysis.” Salgado-Nava, 473 B.R. at 921. However, this does not change the fundamental presumption in favor of commission-based compensation for chapter 11 trustees:

But bankruptcy courts still must keep in mind that tallying trustee time expended in performing services and multiplying that time by a reasonable hourly rate ordinarily is beyond the scope of a reasonableness inquiry involving commissions. Simply put, a bankruptcy court that diminishes a trustee’s compensation from the statutorily-set rate errs if the only basis offered for this diminution is a lodestar analysis.

Id.; see also In re McCombs, 436 B.R. 421, 444 (Bankr. S.D. Tex. 2010) (court should first look for “disproportionality or inequitableness” in judging reasonableness of trustee commission rather than mechanically applying § 330(a)(3) factors); In re McKinney, 383 B.R. 490, 494 (Bankr. N.D. Cal. 2008) (If the statutory maximum determined under section 326(a) is not “substantially disproportionate to the value of the services required from the trustee, the court should award the statutory maximum.”).

29. This Court has wisely adopted the reasoning and holding of Salgado-Nava, at least in the context of chapter 7 trustee commissions. In re Trask, 2013 WL 1397332 (Bankr. D. Me., April 5, 2013); In re Giger, 504 B.R. 286, 289 n.13 (Bankr. D. Me. 2014). Other courts within the First Circuit have also embraced the reasoning and holding of Salgado-Nava. See, e.g., In re Invent Resources, Inc., 2012 WL 5399616 (Bankr. D. Mass., Nov. 5, 2012); In re Wolverine Proctor & Schwartz, LLC, 2012 WL 3930360 (Bankr. D. Mass., Sept. 10, 2012). Indeed, as this Court held in Trask, applying the applicable rules of evidence governing the effect of statutory presumptions to section 330(a)(7): “This presumption of reasonableness of the statutory commission shifts the burden to the objecting party to show extraordinary circumstances warranting a downward departure from the commission amount.” Trask, 2013 WL 1397332 at *1 (Bankr. D. Me., April 5, 2013). The same result pertains in the case of a

commission sought by a chapter 11 trustee (including a railroad trustee), with the “rational relationship” test substituted for the “extraordinary circumstances” exception applicable in chapter 7 cases.

Calculation of the Trustee’s Commission Under 11 U.S.C. §§ 326(a) & 330(a)(7)

30. Accordingly, the starting point with respect to this Application is the calculation of the Trustee’s commission under sections 326(a) and 330(a)(7). The Trustee made ordinary course disbursements in operating the railroad, for the period of August 21, 2013 through September 30, 2014, and disbursements in connection with the closing of the sale of the Debtor’s assets, and the distribution of the proceeds of the sale (as well as U.S. estate’s share of the proceeds of the Traveler’s settlement and the 45G proceeds), of \$26,197,168.33.⁵ This results in a total commission due of \$809,165.05. Pursuant to the Consent Order on Chapter 11 Trustee’s Application for Allowance of Interim Compensation [Docket No 966], the Trustee was allowed, on an interim basis, \$600,000.00 with respect to the First Fee Application; however, all rights with respect to any amounts requested in the First Fee Application were reserved. As such, after applying the payment received in the amount of \$600,000.00, the Trustee requests allowance of the remaining commission due in the amount of \$209,165.05.

31. When computing the statutory commission in the context of an interim fee request, “it is reasonable to assume that the bulk of the funds received . . . will ultimately be disbursed to parties in interest,” and, therefore, an interim fee allowance may be “based upon the sums on hand.” In re Bank of New England Corp., 134 B.R. 450, 466 (Bankr. D. Mass. 1991). See also, McCombs, 436 B.R. at 442, n. 20 (“the trustee may receive interim compensation

⁵ Attached hereto collectively as Exhibit A are the monthly operating reports (“MOR’s”) filed by the Trustee through September 30, 2014. The MOR for September 2014 is a draft, but will be filed prior to the hearing on this Application. If any adjustments are made to total disbursements, the Trustee will adjust the requested commission amount.

based on [sale proceeds] that are to be disbursed to [secured creditors] or the Debtor's unsecured creditors upon resolution of the Adversary Proceeding on appeal.”); In re Monus, 210 B.R. 541, 544 (Bankr. N.D. Ohio 1997) (interim compensation may be based on fees collected by trustee which will surely be disbursed). However, in this Case, all of the proceeds shown on **Exhibit B** were in fact disbursed by the Trustee, with the bulk being distributed on May 15, 2014.

**The Trustee's Requested Fees and Expenses Are Reasonable and Comply with
11 U.S.C. § 326 and D. Me. LBR 2016-1(a)(4)**

32. As summarized above, during the Application Period, the Trustee provided essential services to the estate and the services provided by the Trustee have benefited the estate. Copies of the chronological time entries of the Trustee for the period of May 1, 2014 through September 30, 2014 are attached as **Exhibit C**. These entries contain descriptions of the services rendered by the Trustee to the Debtor, the time it took to render such services, and the date the services were rendered, and are broken down by category of service. If billed at the Trustee's normal hourly rate, the value of such services billed during the Application Period would be \$788,593.00.

33. As noted above, the commission amount of \$809,165.05 is presumptively reasonable. Salgado-Nava, supra; Trask, supra. Using the test articulated in Salgado-Nava, there is also clearly a “rational relationship” between the commission amount and the value and extent of the services rendered by the Trustee, and the commission sought is not “disproportionate” to the value and extent of such services, or the benefit conferred thereby.

34. Indeed, an examination of the factors set forth in section 330(a)(3), apart from merely the lodestar calculation set forth in 330(a)(3)(A), (B), reveals the reasonableness of the commission sought. The section 330(a)(3) factors are often described as shorthand for the so-called “Johnson” factors. In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.

1974), the Fifth Circuit set forth the following factors to be considered in awarding a reasonable fee: (a) time and labor involved; (b) novelty and difficulty of the questions; (c) skill requisite to perform the legal services properly; (d) the preclusion of other employment due to acceptance of the case; (e) customary fees in similar cases in the community; (f) the contingent versus fixed nature of the fee; (g) time limitation imposed by the client or circumstances; (h) the amount involved and results obtained; (i) the experience, reputation and ability of the attorney(s); (j) the undesirability of the case; (k) the nature and length of the professional relationship with the client; and (l) awards in similar cases, within or without the Circuit. *Id.* at 717–19.

35. In this Case, the Trustee has devoted over 1,514.2 hours to the service of the estate since the date of his appointment. The Case has involved novel issues, in some cases unique, unprecedented issues, involving, *inter alia*, the application of section 1171(a) in a mass-accident context and cross-border insolvency. These issues, and others, have required considerable skill and expertise. The Trustee’s fees, at the time of appointment, were highly contingent; had the Carve-Out not been approved, there was no basis for payment.⁶ The entire Case has involved short time limits and a continuous element of crisis-management, as the Trustee, with others, raced to obtain financing and then to sell the assets before operating capital was exhausted. Despite considerable challenges, financing was raised, Canadian service was restored, and the sale was accomplished. In the Trustee’s over thirty years of experience as an

⁶ In September 2013, the Trustee negotiated a carve-out stipulation (the “Carve-Out”) with the Federal Railroad Administration (the “FRA”), which provided a means of administering the Debtor’s case without diminishing the possible return to the victims of the Lac-Mégantic derailment. The Carve-Out was approved by the Court on October 18, 2013 (the “Carve-Out Order”), and will be funded from the proceeds of the FRA’s otherwise unassailable first-priority lien in the Debtor’s assets, resulting in a reduction of the lien and the underlying claim [Docket No. 392]. Without the Trustee’s efforts and the Carve-Out, the Debtor’s case could not have been effectively administered, to the detriment of all creditors, the state and regional economies, and, most of all, the derailment victims. The Carve-Out Order remains on appeal, but such order is not subject to any stay and is fully enforceable. It is anticipated that all compensation and reimbursement of expenses payable to the Trustee and his professionals in connection with the second interim applications will be funded from the Carve-Out.

insolvency professional, few if any cases have presented a more challenging environment, particularly given the regulatory intensity following the Lac-Mégantic accident and the multiple subsequent crude-by-rail derailments and explosions, all of which attracted national and international press and scrutiny.

36. The services performed by the Trustee and summarized herein were necessary and appropriate to the administration of the estate, were in the best interests of the estate, and were provided without unnecessary duplication of effort or expense incurred by other professionals and paraprofessionals employed by the Trustee.⁷ The services were performed with expedition and in an efficient manner. Compensation for these services as requested at the commission amount is commensurate with the complexity, importance, and nature of the problems, issues, or tasks involved, and the amount sought is rationally related to the value of the services.

37. Indeed, while trustee commissions that exceed a pure lodestar calculation based on the trustee's hours times his hourly rate are not to be treated as fee enhancements, and basing trustee commission on the lodestar amount is error, Salgado-Nava, supra, any differential between the commission sought by the Trustee and a pure lodestar calculation could be justified on that basis. In re Public Service Co. of N.H., 160 B.R. 404, 451 (Bankr. D. N.H. 1993); see also In re Bank of New England Corp., 484 B.R. 252, 283 (Bankr. D. Mass 2012) (trustee awarded difference between lodestar amount and section 326(a) amount—an increase of over \$1 million – in light of quality of services, benefit to estate, and lack of interim payments resulting in delay in payment); In re Public Service Co. of New Hampshire, 138 B.R. 660, 663 (Bankr. D. N.H. 1992) (enhancements to compensate for payment delay).

⁷ Although the Trustee has often performed as his own counsel in the case, none of the Trustee's time is included in the fee application of BSSN.

Expenses

38. Local Rule 2016-1(a)(5)(i) establishes a Standard Maine Expense Level List (the “SMELL”), which identifies standard levels of reimbursement for commonly occurring expenses, “subject to an applicant requesting reimbursement at other levels upon proof that the reimbursement levels set by in the SMELL are inadequate in view of the applicant’s actual costs.” D. Me. LBR 2016-1(a)(5)(i). A detailed itemization of all of the out-of-pocket expenses incurred by the Trustee in the course of providing services to the Debtor during the period from May 1, 2014 to September 30, 2014 is set forth in **Exhibit D** attached hereto. These expenses, which total \$13,270.87, are in compliance with the SMELL or are based on the Trustee’s actual costs, as required by Local Rule 2016-1(a)(5).

NOTICE

39. The Trustee has provided the office of the U.S. Trustee with a copy of this Application in accordance with Bankruptcy Rule 2016(a).

CONCLUSION

WHEREFORE, the Trustee requests that this Court enter an order (a) awarding the Trustee the amount of \$209,165.05 as additional commission under section 330(a)(7) and as compensation for reasonable and necessary professional services rendered by the Trustee and \$13,270.87 for actual and necessary expenses incurred by the Trustee on behalf of the estate for a total award of \$222,435.92; (b) authorizing and directing the payment of the sum of \$222,435.92 to the Trustee; (c) finding that the award to the Trustee is reasonable and in compliance with the Bankruptcy Code, Bankruptcy Rules, and Local Rules, and (d) granting the Trustee such other and further relief as this Court deems just and equitable.

Dated: October 24, 2014

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

By his attorneys:

/s/ Sam Anderson

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**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 (the “Trustee”), has filed a Second Interim Application of Trustee, Robert J. Keach, for Allowance and Payment of Compensation and Reimbursement of Expenses for the Period August 21, 2013 Through September 30, 2014 (the “Application”). A hearing on the Application is set to take place at the United States Bankruptcy Court, 202 Harlow Street, 3rd Floor, Bangor, Maine on **November 18, 2014 at 10:00 a.m.** (the “Hearing”).

By the Application, the Trustee seeks a total amount of \$222,435.92, which includes \$209,165.05 for payment of a commission pursuant to 11 U.S.C. § 330(a)(7) and \$13,270.87 for reimbursement of expenses incurred during the period from August 21, 2013 through September 30, 2014 (the “Compensation Period”). The Trustee seeks an order authorizing and approving this compensation for the fees and expenses incurred during the Compensation Period on an interim basis. The Application is the second interim fee application filed by the Trustee.

On May 12, 2014, the Trustee filed the First Interim Fee Application of Trustee, Robert J. Keach, for Allowance and Payment of Compensation and Reimbursement of Expenses for the Period August 21, 2013 Through April 30, 2014 [Docket No. 783] (the “First Fee Application”). With respect to the First Fee Application which covered the period of August 21, 2013 through April 30, 2014, the court awarded the Trustee fees in the amount of \$600,000.00 and expenses in the amount of \$8,275.28.

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

If you do not want the court to approve the Application, or if you want the court to consider your views on the Application, then **on or before November 10, 2014**, you or your attorney must file with the court a written response explaining your position. If you are not able to access the CM/ECF Filing System, your response should be served upon the Court at:

Alec Leddy, Clerk
United States Bankruptcy Court
202 Harlow Street
Bangor, Maine 04401

-and-

Robert J. Keach, Esq.
Bernstein, Shur, Sawyer & Nelson, P.A.
100 Middle St., PO Box 9729
Portland, Maine 04104-5029

If you have to mail your response to the Court for filing, you must mail it early enough so that the Court will receive it on or before the date stated above.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the Application and may enter an order granting that relief.

Dated: October 24, 2014

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

By his attorneys:

/s/ Sam Anderson
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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670
Chapter 11

**ORDER GRANTING SECOND APPLICATION OF TRUSTEE, ROBERT J. KEACH,
FOR ALLOWANCE AND PAYMENT OF COMPENSATION AND REIMBURSEMENT
OF EXPENSES FOR THE PERIOD AUGUST 21, 2013
THROUGH SEPTEMBER 30, 2014**

This matter having come before the Court on the Second Interim Application of Trustee, Robert J. Keach, For Allowance and Payment of Compensation and Reimbursement of Expenses for the Period August 21, 2013 through September 30, 2014 (the "Fee Application"), and after proper notice to all creditors and other parties-in-interest, the Court having independently reviewed the Fee Application, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

1. The Fee Application is granted.
2. In relation to the Application Period and, pursuant to 11 U.S.C. § 331, Robert J. Keach, the chapter 11 trustee, is allowed compensation in the aggregate amount of **\$222,435.92**, including a commission pursuant to 11 U.S.C. § 330(a)(7) in the amount of \$209,165.05 and reimbursement of expenses in the amount of \$13,270.87.¹

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Fee Application.

3. The compensation and expenses for the Compensation Period are hereby awarded on an interim basis in accordance with the applicable sections of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and this Court's local rules.

Dated: _____, 2014

The Honorable Louis H. Kornreich
United States Bankruptcy Court for the District of
Maine