

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
RED TOP RENTALS, INC.) CAUSE NO.: 09-05229-JKC-11
)
DEBTOR.)
)
_____)

**MOTION FOR AUTHORITY TO EMPLOY AUCTIONEER TO SELL
PROPERTY AT FUTURE PUBLIC AUCTION SALES**

The Debtor, in support of the above-described Motion (the “Motion”), states:

1. The Debtor filed its petition for relief under Title 11, Chapter 11 of the United States Code on April 20, 2009 (the “Petition Date”).
2. Since the Petition Date, the Debtor has continued in the possession of its property pursuant to §§ 1107 and 1108 of the Bankruptcy Code, codified at 11 U.S.C. §101, *et seq.* (the “Code”), and is a Debtor-in-possession. A Creditors’ Committee has been appointed, and counsel has appeared on its behalf.
3. This Court has jurisdiction over the Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. §157(b)(2). The statutory bases for the relief sought herein are §§ 102(1), 105, 327, 328 363 and 503 of the Code and Rules 2002, 6005 and 9014 of the Federal Rules of Bankruptcy Procedure.
4. Contemporaneous with the filing hereof the Debtor has filed its Motion for Authority to Conduct Auctions for the Sale and Transfer of Certain Assets of the Debtor Free and Clear of all Liens, Claims, Interests, Charges and Encumbrances (the “Rolling Authority Motion”). The Rolling Authority Motion is hereby incorporated herein by reference. Defined

terms used in the Rolling Authority Motion but not defined herein shall have the same meaning given to such terms in the Rolling Authority Motion.

5. The Debtor has determined that it is in its best interest and its creditors' best interest to conduct regular auctions of some of Debtor's excess machinery and other assets (the "Assets"), primarily consisting of heavy machinery upon which M & I Marshall & Ilsley Bank ("M&I") has the only lien. The terms of this Motion shall only apply to Assets covered by M&I's lien.

6. A previous online auction to sell certain of the Debtor's Assets was held by auctioneer, IronPlanet.com, Inc., headquartered at 4695 Chabot Drive, Suite 102, Pleasanton, California 95488 (the "Auctioneer"). The Debtor is satisfied with the services provided by the Auctioneer, including: (a) the manner in which the previous auction was conducted; (b) the use of auctions to sell the Debtor's excess Assets; and (c) the Auctioneer's specific use of on-line auctions.

7. The Court approved the hiring of the Auctioneer to conduct the previous online auction, as is evidenced by the Court's *Order on Motion for Authority to Employ Auctioneer to Sell Property at a Public Auction Sale* [Docket #223]. A representative of the Auctioneer (the "Representative") appeared at a previous hearing held on July 31, 2009 regarding the previous *Motion for Authority to Employ Auctioneer to Sell Property at a Public Auction Sale* [Docket #186]. At the hearing, the Representative explained for the record the procedural aspects of the Auctioneer's online auctions, including: (a) who attends the Auctioneer's auctions (the "Interested Parties"); (b) how Interested Parties attend the auctions; (c) how Interested Parties bid at auctions; (d) how Interested Parties pay; (e) how the Assets are inspected; (f) the

availability of the Auctioneer's inspection reports to Interested Parties; and (g) other details of the online-only auctions.

8. The Debtor is advised by the Auctioneer that holding auctions is an advisable way to sell the Assets for their highest value. The Debtor is seeking contemporaneously herewith the authority to hold as many auctions as it deems to be in its best interest and the best interest of the estate. The general terms of the online auctions are as follows: (a) the Auctioneer shall be solely responsible for conducting the Auction; (b) the Auction shall be a public, on-line only auction at which the Debtor agrees to sell the Assets to the highest bidder and to convey and transfer title free and clear of all Interests (as defined below); (c) all of the Assets shall be sold "as is" and "where is"; (d) the Debtor shall not warranty or make any representation regarding the Assets; (e) the Debtor is responsible to maintain insurance on the Assets prior to shipment to a successful buyer and provide access to potential buyers prior to the auctions; (f) in exchange for conducting the future auctions, the Debtor has agreed (subject to this Court's approval by separate pleading) to compensate the Auctioneer by paying a straight consignment rate of 7.5% to the final selling price of any Asset sold, a listing fee to be determined at a later date according to the Assets to be sold, a lien search fee of \$2,660 to verify clear ownership and a title processing fee of \$25 on each item possessing a DMV title; and (g) the Debtor shall not place any reserve on the Assets and shall be authorized to sell the Assets for the highest bid.

9. The Debtor wishes to continue to employ the Auctioneer to sell its excess Assets through the Auctioneer's online auction services. The Debtor has determined, in consultation and at the request of M&I, that additional online auctions of the Debtor's Assets by the Auctioneer will be beneficial and will achieve the best results for the Debtor and the estate.

10. The Debtor seeks to be granted authority to have the Auctioneer conduct future auctions of the Assets as often as on a weekly basis. However, the Debtor will have the authority to choose how often such auctions will be conducted, including the option to hold no auctions of its Assets. The Debtor further seeks to be granted authority to choose which of its Assets shall be sold at future auctions (if the Debtor determines holding such auctions is in its best interest and the best interest of the estate), and for authority to choose the number of Assets to be sold at such auctions.

11. Attached hereto as **Attachment A** is an Affidavit of Disinterestedness of the Auctioneer.

12. The compensation for the Auctioneer as set out in the Contract, including auctioneer's fees and sale costs, is fair and reasonable in relation to the standards for such compensation in the industry and the services to be provided in this matter. The Auctioneer shall be entitled to a commission as follows: straight consignment rate of 7.5% to the final selling price of any Asset sold, a listing fee to be determined at a later date according to the Assets to be sold, a lien search fee of \$2,660 to verify clear ownership and a title processing fee of \$25 on each item possession a DMV title.

13. The Auctioneer is aware of the provisions of Code §§ 327 and 328, Fed.R.Bankr.P. 6005 and S.D.Ind. L.R. B-6005-1 and agrees to abide by the same. In accordance with S.D.Ind. L.R. B-6005-1(a), the Auctioneer agrees to post a standing bond in the amount of \$1,000,000.00, which represents the maximum amount of proceeds expected at any one time from an auction of the Assets. The Auctioneer will be responsible for getting the bond, and carrying it until the auctions of the Assets are complete. Further, the Auctioneer agrees that

the terms of an order hiring the Auctioneer shall control where there are conflicting terms in the Contract with said order or any other agreement.

14. The Auctioneer shall file a report of sale within thirty (30) days of any sale and transmit a copy of the report to the Debtor. The report must provide an itemized list of the property sold, the name of each purchaser, and the price received for each item or lot of inventory and/or equipment.

15. If the Court authorizes deduction of the Auctioneer's compensation from the gross sale proceeds of the Auction, the Auctioneer shall file with the report, an affidavit listing the compensation received. If the Court authorizes the deduction of the Auctioneer's compensation from the gross sale proceeds, the net sale proceeds shall be remitted to the Debtor within thirty (30) days of the sale. If the Court does not authorize the deduction of the compensation, the gross sale proceeds shall be remitted to the Debtor within thirty (30) days of the sale.

16. The validity of any checks or bank drafts accepted by the Auctioneer shall be the sole responsibility of the Auctioneer.

17. The Auctioneer has no interest adverse to the Debtor, or the creditors in this matter as set forth in the Affidavit.

18. The Debtor desires that this Court determine that good cause has been shown for the employment by the Debtor of the Auctioneer to conduct a public auction sale of the Assets in accordance with the terms of the Contract and the terms of this Court's Order Approving the Rolling Authority Motion.

Request for Relief

The Debtor respectfully requests that the Court grant the relief requested herein and grant such other and further relief as is just and proper.

Respectfully submitted,

TUCKER | HESTER, LLC

/s/Jeffrey M. Hester

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