

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 CONDUCT AUCTIONS FOR THE  
SALE AND TRANSFER OF CERTAIN ASSETS OF THE DEBTOR  
FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS,  
CHARGES AND ENCUMBRANCES**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

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 §§ 105 and 363 of the Code and Rules 6004, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure.

## A. BACKGROUND

4. The Debtor is in the business of renting, repairing, and selling heavy machinery, primarily to contractors, and mining overburden and aggregate, on contract, for major aggregate companies. Over the past few years, the Debtor has acquired a large number of heavy machines, too many, in fact. In order for the Debtor to successfully reorganize in its Chapter 11 bankruptcy, the Debtor — in consultation with counsel and financial advisors — has determined that it must sell some of these heavy machines. Accordingly, 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"), consisting of heavy machinery upon which M & I Marshall & Ilsley Bank ("M&I") has the only lien.

5. To effect the sale of excess machinery, the Debtor has already sought, and has already been granted, authority to sell such machinery at arms-length transactions, so long as the Debtor receives an amount of money in exchange for an item sold, greater than or equal to a "threshold amount" (the "Threshold Amount") — a reserve — which has been agreed to by M&I and submitted (under seal) to the Court. The Debtor also sought, and also was granted, authority to hold a test on-line auction of some twenty-five (25) items of the excess machines. That on-line auction has taken place (it occurred on August 6, 2009 and August 16, 2009) and the authority to sell over the Threshold Amount continues. The Debtor (and M&I) believe the test auction was enough of a success that more should be scheduled. With respect to the Threshold Amount sales, the Debtor currently has authority to accept an offer to purchase its Assets so long as such purchase price is higher than the price established by the Debtor and certain lienholders, including M&I, which have valid interests in the items to be purchased, pursuant to the Court's *Order Partially Granting Motion for the Authorization of a Sale and Transfer of Assets Free and*

*Clear of All Liens, Claims, Interests, Charges and Encumbrances and for Approval of the Form and Manner of Notice of the Sale and Sustaining Objections Thereon* [Docket #224]. The Debtor is actively seeking to sell Assets pursuant to this authority.

6. With respect to the previous auction sale, the Debtor filed a *Motion for the Authorization to Conduct an Auction for the Sale and Transfer of Assets Free and Clear of All Liens, Claims, Interests, Charges and Encumbrances and for Approval of the Form and Manner of Notice of the Sale* (the “First Auction Motion”) [Docket #185] on July 9, 2009, in which it sought authorization to conduct an auction (the “First Auction”) for the sale of twenty-five (25) of its Assets, consisting primarily of heavy machinery for using in the construction and mining industries. On July 31, 2009, the Court granted the First Auction Motion and entered an *Order on Motion for the Authorization to Conduct an Auction for the Sale and Transfer of Assets Free and Clear of All Liens, Claims, Interests, Charges and Encumbrances and for Approval of the Form and Manner of Notice of the Sale* [Docket #222]. In order to conduct the First Auction of the Assets, the Debtor selected IronPlanet.com, Inc. (the “Auctioneer”), headquartered at 4695 Chabot Drive, Suite 102, Pleasanton, California 95488. Filed contemporaneously with the First Auction Motion, the Debtor filed its *Motion for Authority to Employ Auctioneer to Sell Property at a Public Auction Sale* (the “Employment Motion”) [Docket #186], seeking authority to hire the Auctioneer.

7. In the First Auction Motion, the Debtor submitted that good cause existed for authorizing the First Auction of certain Assets, and that the Debtor’s plan for exiting this case includes a sell-down of excess equipment. The Debtor further submitted that there is near unanimous consensus that it is a difficult time to sell heavy equipment related to construction

and mining given a slowing demand for such equipment, and that trying to find the optimal method for sales of excess equipment had been a challenge for the Debtor.

8. At the time the First Auction Motion was filed, the Debtor had on staff Jerry Marks (“Marks”), a consultant to assist in evaluating the business and equipment and in downsizing to meet current economic conditions. Marks has considerable past experience with equipment sales, valuation of used equipment, and reduction of inventories for several equipment dealers. Marks had assisted in the ongoing restructuring and downsizing of the Debtor and in evaluating each piece of equipment to determine best use, what fits the business plan, what to keep and what to dispose of and current market values. Marks had advised the Debtor that the Auction is best suited to yield the highest possible auction value of the Assets for the Debtor and the estate. The Debtor discussed an auction with at least one other nationally recognized heavy equipment auction firm. The Debtor, along with M&I chose the Auctioneer as the auctioneer because both parties believed the Auctioneer and the on-line auction service of Auctioneer were best suited to conduct the Auction and achieve the best results for the Debtor and the estate.

9. A representative of the Auctioneer (the “Representative”) was present at the hearing held on July 31, 2009 regarding the First Auction Motion and Employment Motion. At the hearing, the Representative explained on the record the procedural aspects of the Auctioneer’s online auctions, including: (a) who attends the Auctioneer’s auctions (the “Buyers”); (b) how Buyers attend the auctions; (c) how Buyers bid at auctions; (d) how Buyers pay; (e) how the Assets are inspected; (f) the availability of the Auctioneer’s inspection reports to Buyers; and (g) other details of the online-only auctions. Following the hearing, the Court entered an Order authorizing the hiring of the Auctioneer in its *Order on Motion for Authority to Employ Auctioneer to Sell Property at a Public Auction Sale* [Docket #223].

10. The First Auction has occurred on August 6, 2009 and August 16, 2009, the Auctioneer sold nineteen (19) pieces of the Debtor's Assets. The net proceeds from the First Auction totaled \$450,817.50. The Debtor is satisfied with the services provided by the Auctioneer, including the Auctioneer's specific use of on-line auctions to sell the Debtor's excess assets. Furthermore, the Debtor is satisfied with the manner in which the First Auction was conducted, and the outcome of the First Auction.

**B. THE PROPOSED AUCTION**

11. The Debtor submits that it is in its and its creditors' (certainly M&I's) best interest to hold more auctions. For one thing, to the extent M&I acquires funds from the sale of excess equipment, it pays down the equipment line of credit the Debtor acquired from M&I in the maximum principal amount of \$30,000,000.00 (the "Equipment Loan"), upon which the Debtor is required to pay adequate protection payments. Additionally, the Debtor neither needs nor desires to keep excess equipment any longer than it needs to keep it. Such equipment must be protected and insured, all of which costs the Debtor money at a time it sorely needs to reduce expenses. Creditors of the estate all benefit if the Debtor reduces expenses and increases its likelihood of successful reorganization. The Debtor submits that more on-line auctions are desirable because they cost nothing to the Debtor out-of-pocket, are easy for the Debtor to conduct (because the Auctioneer does all the work and the equipment stays at the Debtor's location the entire time) and because there is little to no downside for the Debtor.

12. The Debtor submits that it may like to hold auctions with the auctioneer as frequently as weekly. The Debtor will, in consultation with M&I and the Auctioneer, make the decision of how often to hold auctions. The Debtor seeks the authority to have freedom to decide in which of the Auctioneer's auctions to include which of its items.

13. The Debtor submits that having this authority to conduct “rolling auctions” is key — it allows the Debtor (literally from week-to-week) to decide what makes sense to sell and when, allowing the Debtor to adjust to market forces and maximize the advice it receives on these forces by the Auctioneer.

### **C. THE PROPOSED AUCTION PROCEDURES**

14. The Debtor seeks authority to allow the Auctioneer to sell Assets by on-line auctions to buyers free and clear of any and all liens, claims (including, but not limited to, any statutory or common law successor liability claims), interests, encumbrances and charges (the “Interests”) with any such Interests to attach to the proceeds of the sale. The Debtor has made a diligent, thorough and thoughtful review of all of the Interests in the Assets and has disclosed in the completed schedules (including Schedules B and D) filed in this matter that: M&I likely holds the only valid and properly perfected first-priority security interest in and to substantially all of the Assets. The terms of this Motion and the authority granted to the Debtor herein shall only apply to Assets covered by M&I’s lien. A list of all the Assets to be considered for sale is attached as **Attachment A**. The Debtor submits the Assets have a combined value of approximately \$12,760,000.00 at private market sale value.

15. The Debtor will have the Auctioneer conduct sales of its Assets through auctions only if the Debtor believes it is in its best interest and the estate’s best interest. All Assets will be sold to maximize the return for the Asset sold, and will only be sold in regular consultation with M&I and the Auctioneer.

16. The terms of the proposed auctions are as follows: (a) the Auctioneer is to be solely responsible for conducting the auctions; (b) the auctions are to be a public, on-line only auctions 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; (c) all of the Assets are to be sold “as is” and “where is”; (d) the Debtor is not to warrant or make any representation regarding the Assets; (e) the Debtor is responsible for maintaining insurance on the Assets prior to shipment to a successful buyer and provide access to potential buyers prior to the auction; (f) Interests in the Assets are to attach to proceeds of such Assets for later agreement or Court order concerning determination of rights to such proceeds; (g) in exchange for conducting the auction, the Debtor agrees (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 of per item listed, that varies between \$70.00 and \$750.00 depending on the item sold, a lien search fee of \$35.00 per item to verify clear ownership and a title processing fee of \$25.00 on each item possessing a DMV title; and (h) the Debtor shall be authorized to sell the Assets for the highest bid. Prior to the First Auction, buyers were able to review the Auctioneer’s inspection reports of any machine they were interested in buying. The First Auction was an on-line auction, in which buyers placed bids on-line, on the auction day, with the highest bidder winning the auction for any particular machine. After the First Auction, the winning buyers’ payments were to be confirmed with Auctioneer prior to any release of the Assets. The buyer was to accept delivery of the equipment while the seller was to receive payment.

17. The proposed contract with the Auctioneer is attached as **Attachment B** (the “Contract”). According to the Contract, the Auctioneer alone determines the opening bid. The Debtor agrees to that procedure and is informed that M&I does as well. All proceeds from the sale of Assets shall be wired to the Debtor’s operating account at M&I. The Debtor is informed and therefore understands that M&I is agreeing to the auctions on many conditions (all of which

are contained in this Motion) including that the proceeds of the Assets (its collateral) may be used by M&I to pay down the Debtor's Equipment Loan.

18. 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 seeks the authority to choose how often such auctions will be conducted, including the option to hold no auctions at all. 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. The Debtor requests the blanket authority granted herein continue to and including the date confirming the filing of the Debtor's Chapter 11 Plan.

**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

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