

UNITED STATES BANKRUPTCY COURT
SOUTHER DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

**OBJECTION BY RUDD EQUIPMENT COMPANY, INC. TO THE 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**

Comes now Rudd Equipment Company, Inc. (“Rudd”), by counsel, and hereby files this Objection to the 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 (the “Objection”). In support of the Objection, Rudd provides as follows:

BACKGROUND

1. On July 8, 2009, Red Top Rentals, Inc. (the “Debtor”) filed its 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 (Doc. No. 179) (the “Sale Motion”). In the Sale Motion, the Debtor asks the Court to approve the sale of a portion its assets (the “Sale Assets”) described by the Debtor as “excess machinery.” (Sale Motion ¶ 5.) According to the Debtor, the Sale Assets “generally consist of 196 pieces of heavy machinery and related items such as

attachments and accessions”, which are more particularly identified in Attachment A of the Sale Motion. (Sale Motion ¶ 6.)

2. Rudd is a secured creditor of the Debtor that holds valid and properly perfected purchase money security interests in certain of the Sale Assets (the “Rudd Liens”). A description of the collateral securing the Rudd Liens (the “Rudd Collateral”) is attached hereto as Exhibit A.

3. The Debtor relies on Section 363 of the United States Bankruptcy Code (the “Bankruptcy Code”) as its authority for selling the Sale Assets outside of the ordinary course of its business, free and clear of any interest (the “Proposed Sale”).

4. Section 363(b)(1) provides generally that a debtor-in-possession “may . . . sell . . . other than in the ordinary course of business, property of the estate” during its bankruptcy proceeding. 11 U.S.C. 363(b)(1). Section 363(b)(1) sales, however, must satisfy at least one of five conditions set forth in Section 363(f) of the Bankruptcy Code in order for the assets to be sold free and clear of any interest in such property.

5. Specifically, Section 363(f) provides that a debtor-in-possession may sell property under Section 363(b) of the Bankruptcy Code free and clear of any interest in such property only if –

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

6. The Debtor purports that it satisfies at least one of the conditions set forth in Section 363(f) (*see* Sale Motion ¶ 23), and therefore has authority to sell the Rudd Collateral free and clear of the Rudd Liens under Section 363(b) of the Bankruptcy Code. Rudd, however, strongly disputes this assertion and consequently objects to the Sale Motion and the Proposed Sale.

OBJECTION

7. Rudd objects to the Proposed Sale, which would result in the Debtor selling the Rudd Collateral free and clear of the Rudd Liens, on two grounds. First, the Debtor lacks the legal authority for conducting the Proposed Sale free and clear of any interest as required by Section 363(f) of the Bankruptcy Code. Second, the Debtor has failed to provide adequate information regarding the details of the Proposed Sale.

THE DEBTOR CANNOT CONDUCT THE PROPOSED SALE OF RUDD COLLATERAL FREE AND CLEAR OF THE RUDD LIENS BECAUSE NO LEGAL BASIS FOR CONDUCTING SUCH SALE EXISTS UNDER SECTION 363(F) OF THE BANKRUPTCY CODE

8. In order for the Debtor to sell the Rudd Collateral free and clear of the Rudd Liens, it must satisfy one of five conditions set forth in Section 363(f) of the Bankruptcy Code. As discussed below, the Debtor fails to satisfy any of these five conditions.

The Proposed Sale Fails to Satisfy Section 363(f)(1) of the Bankruptcy Code

9. Section 363(f)(1) of the Bankruptcy Code provides that a debtor-in-possession may sell estate property free and clear of any interest in such property if “applicable nonbankruptcy law permits sale of such property free and clear of such interest.” *See* 11 U.S.C. 363(f)(1).

10. The Debtor has failed to present any nonbankruptcy law such as a Uniform Commercial Code state statute that would permit a free and clear sale of the Rudd Collateral, presumably because no such law exists. Therefore, Section 363(f)(1) does not permit the Proposed Sale of the Rudd Collateral free and clear of the Rudd Liens.

The Proposed Sale Fails to Satisfy Section 363(f)(2) of the Bankruptcy Code

11. Section 363(f)(2) of the Bankruptcy Code provides that a debtor-in-possession may sell estate property free and clear of any interest in such property of an entity other than the estate if “such entity consents.” *See* 11 U.S.C. 363(f)(2).

12. Rudd does not consent to the Proposed Sale. Consequently, Section 363(f)(2) does not permit the Proposed Sale of the Rudd Collateral free and clear of the Rudd Liens.

The Proposed Sale Fails to Satisfy Section 363(f)(3) of the Bankruptcy Code

13. Section 363(f)(3) of the Bankruptcy Code provides that a debtor-in-possession may sell estate property free and clear of any interest in such property if “such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property.” *See* 11 U.S.C. 363(f)(3).

14. In discussing the subsection (f)(3) condition for a free and clear sale, the Seventh Circuit explained that as a general rule, “the bankruptcy court should not order property sold ‘free and clear of’ liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the [debtor’s] estate. *In re Riverside Inv. P’ship*, 674 F.2d 634, 640 (7th Cir. 1982).

15. The Debtor proposes to sell the Rudd Collateral for an amount not less than a "Threshold Price." (Sale Motion ¶ 10.) The Threshold Price is defined by the Debtor as a purchase price that "is higher than the price established by [Rudd and other applicable lienholders] which have valid interests" in the Rudd Collateral. (*See id.*)

16. The Threshold Price for the Rudd Collateral, as defined by the Debtor, is not guaranteed to exceed the aggregate value of the Rudd Liens and any other valid liens on the Rudd Collateral (to the extent such liens exist.) Therefore, Section 363(f)(3) does not permit the Proposed Sale of the Rudd Collateral free and clear of the Rudd Liens.

The Proposed Sale Fails to Satisfy Section 363(f)(4) of the Bankruptcy Code

17. Section 363(f)(4) of the Bankruptcy Code provides that a debtor-in-possession may sell estate property free and clear of any interest in such property if "such interest is in bona fide dispute." *See* 11 U.S.C. 363(f)(4).

18. The Debtor curiously asserts that it satisfies subsection (f)(4) due to the existence of a Complaint by the Debtor against Rudd pending before the Court regarding the priority (but not validity) of the Rudd Liens on the Rudd Collateral. (Sale Motion ¶¶ 23, 25.) This assertion, however, is erroneous because subsection (f)(4) involves disputes over the *validity* of an interest, not disputes over the priority of an interest as the Debtor implies.

19. "To determine in [the Seventh] Circuit what constitutes a bona fide dispute [for purposes of Section 363(f)(4)], 'the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the *validity* of debt.'" *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1990) (quoting *In re Busick*, 831 F.2d 745, 750 (7th Cir.1987) (emphasis added)).

20. No objective basis for a dispute over the validity of the Rudd Lien exists. In fact, the Debtor actually admits and acknowledges the validity of Rudd Liens. (See Debtor's Schedule D (listing Rudd as a secured creditor); *see also* Complaint ¶¶ 8, 12, 13 and 16.)¹

21. As another bankruptcy court in this Circuit observed "It would be nonsensical for a court to allow the trustee to sell property pursuant to 363(f)(4) when the trustee believes the secured party's interest to be valid." *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 829 (N.D. Ill. 1993). Similarly, it would not make sense for this Court to authorize a free and clear sale of the Rudd Collateral when the Debtor has admitted the validity of the Rudd Liens.

22. There is no dispute, and there is no objective basis for a dispute, over the validity of the Rudd Liens. Consequently, Section 363(f)(4) does not permit the Proposed Sale of the Rudd Collateral free and clear of the Rudd Liens.

The Proposed Sale Fails to Satisfy Section 363(f)(5) of the Bankruptcy Code

23. Section 363(f)(5) of the Bankruptcy Code provides that a debtor-in-possession may sell estate property free and clear of any interest in such property of an entity other than the estate if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." *See* 11 U.S.C. 363(f)(5).

24. Similar to its failure to apply subsection (f)(1), the Debtor has not presented any applicable law that would compel Rudd to accept a payment in exchange for its security interests, presumably because no such law exists. Therefore, Section

¹ The Debtor does not dispute the validity of the Rudd Liens as reflected in its Complaint filed against Rudd in the adversary proceeding before this Court styled as *Adv. No. 09-50253, Red Top Rentals, Inc v. Rudd Equipment Company, Inc., et. al.* (See Complaint ¶¶ 8, 12, 13 and 16.)

363(f)(5) does not permit the Proposed Sale of the Rudd Collateral free and clear of the Rudd Liens.

THE COURT SHOULD NOT APPROVE THE PROPOSED SALE BECAUSE THE DEBTOR HAS FAILED TO PROVIDE ADEQUATE INFORMATION REGARDING THE SALE

25. If the Court finds that a legal basis exists for conducting the Proposed Sale free and clear of interests under Section 363(f), it should still overrule the Sale Motion based on the lack of specific information regarding such sale.

26. The Debtor provides some general information about the Proposed Sale and its procedures. The information, however, is not specific enough for the Court or Rudd to make an informed opinion as to whether the sale is, indeed, the best manner for maximizing the value of the Rudd Collateral.

27. Examples of relevant information the Debtor has failed to provide as part of the Sale Motion include (a) how it will identify or target prospective buyers beyond use of a listing on a single website and “word of mouth to people locally” (*see* Sale Motion ¶ 12); (b) the Threshold Price for each piece of Rudd Collateral; (c) how the Threshold Price is or will be determined; and (d) procedures for resolving Threshold Price disputes between Rudd and the Debtor. Without specific information, Rudd, the Court and other parties in interest cannot ascertain whether the Proposed Sale is in the best interest of the estate.

28. The Debtor wants authority for a series of prospective sales of its excess equipment to eliminate additional transaction costs to the estate, to avoid time delays of seeking court approval for a sale, and for general convenience. These well-intended motivations, however, must be weighed against the unfair harms to Rudd that would

result from the Proposed Sale. The Debtor's excessive *carte blanche* authority over any contemplated sale of Rudd Collateral and Rudd's lack of sufficient information or control over such sale significantly outweigh any benefits of the Proposed Sale. For these reasons, the Court should not authorize the Proposed Sale.

CONCLUSION

As part of its Proposed Sale, the Debtor wishes to sell the Rudd Collateral free and clear of the Rudd Liens. The Bankruptcy Code, however, only permits free and clear sales of estate assets if a debtor satisfies one of five statutory conditions for authorizing such sales. As discussed herein, the Debtor has failed to satisfy any of these five conditions. Therefore, this Objection should be sustained by the Court, and the Debtor's Sale Motion and Proposed Sale should be overruled.

Alternatively, if the Court finds that a legal basis exists under Section 363(f) for conducting a sale of the Rudd Collateral free and clear of the Rudd Liens, Rudd objects to such sale on the grounds that the Debtor has not provided Rudd and the Court with sufficient information regarding the pricing and marketing of the proposed sale.

Respectfully submitted,

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COUNSEL FOR RUDD EQUIPMENT
COMPANY, INC.

EXHIBIT A

Volvo EC460BLC Excavator, Serial No. EC460BLC80107
Volvo EC460BLC Excavator, Serial No. EC460BLC80150
Volvo A30D Artic Haul Truck, Serial No. A30DV74058
Volvo A30D Artic Haul Truck, Serial No. A30DV74320
Volvo A30D Artic Haul Truck, Serial No. A30DV74378
Volvo A30D Artic Haul Truck, Serial No. A30DV74376
Volvo A30D Artic Haul Truck, Serial No. A30DV74321
Volvo A30D Artic Haul Truck, Serial No. A30DV74356
Volvo A30D Artic Haul Truck, Serial No. A30DV74358
Volvo A40D Artic Haul Truck, Serial No. A40DV70226
Volvo A40D Artic Haul Truck, Serial No. A40DV70241
Volvo A40D Artic Haul Truck, Serial No. A40DV70264
Volvo A40D Artic Haul Truck, Serial No. A40DV70250
Volvo A40D Artic Haul Truck, Serial No. A40DV70254
Volvo A40D Artic Haul Truck, Serial No. A40DV70249