

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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

**JOINT MOTION TO SETTLE & COMPROMISE AND  
TRANSFER OF ASSETS UNDER 11 U.S.C. § 363**

Debtor/Plaintiff, Red Top Rentals, Inc. (the “Debtor” or “Red Top”), Rudd Equipment Company, Inc. (“Rudd”) and M&I Marshall and Ilsley Bank (“M&I”), by counsel, in support of the above entitled Motion (this “Joint Motion”) state as follows:

**A. BACKGROUND**

1. On April 20, 2009, the Debtor filed its Complaint to Determine Validity, Extent, and Priority of Certain Liens (the “Complaint” or “Adversary Proceeding”) against Rudd and M&I (collectively, the “Parties”) [Docket #1]. That adversary proceeding is pending as adversary proceeding no. 09-50253-JKC-11 (the “Adversary Proceeding”).

2. M&I is a creditor of the Debtor and asserts a security interest in virtually all assets of the Debtor. On or about June 28, 2006, M&I perfected its security interest, commonly referred to as a blanket lien, by filing a financing statement with the Secretary of the State of Indiana.

3. Rudd is also a creditor of the Debtor, having loaned the Debtor money to purchase equipment for the Debtor’s business which is currently unpaid, and has, or asserts a first priority security interest on certain of the Debtor’s equipment upon which M&I also claims a lien.

4. This Joint Motion is intended to fully and finally resolve, terminate and settle all claims and disputes as set forth in the Settlement Agreement including but not limited to those related to the Adversary Proceeding and should allow the Adversary Proceeding to be dismissed.

#### **B. FED.R.BANKR.P. 9019 STANDARD**

5. Fed.R.Bankr.P. 9019(a) states:

[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in rule 2002 and to any other entity as the court may direct.

6. Bankruptcy courts may approve litigation settlements that are in the best interests of the estate. The linchpin of the “best interest of the estate” test is a comparison of the value of the settlement with the probable costs and benefits of litigating. Among the factors to be considered are the litigation’s probability of success, complexity, expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets. As part of the test, the value of the settlement must be reasonably equivalent to the value of the claims surrendered. This reasonable equivalent standard is met if the settlement falls within the reasonable range of possible litigation outcomes. *In re: Doctor’s Hospital of Hyde Park, Inc.*, 474 F.3rd 421, 426 (7<sup>th</sup> Cir. 2007).

7. Bankruptcy courts have historically recognized that “[t]o minimize litigation and expedite the administration of a bankruptcy estate ‘[c]ompromises are favored in bankruptcy.’” *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3<sup>rd</sup> Cir. 1996) (citing 9 *Collier on Bankruptcy* ¶ 9019.03[1], 15<sup>th</sup> ed. 1993). When considering settlement under Fed. R. Bankr. P. 9019, a bankruptcy court must determine whether the proposed settlement is in the best interests of the estate. *In re Energy Co-Op, Inc.*, 886 F.2d 921, 927 (7<sup>th</sup> Cir. 1989). Settlement should only be rejected if it “falls below the lowest point in the range of reasonableness.” *In re W.T. Grant Co.*,

699 F.2d 599, 608 (2<sup>nd</sup> Cir. 1982) (citing *Newman v. Stein*, 464 F.2d 689, 693 (2<sup>nd</sup> Cir 1972), cert denied sub nom. *Benson v. Newman*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972)).

### C. SETTLEMENT

8. Pursuant to a settlement agreement dated December 9, 2009 (the “Settlement Agreement”) attached hereto as **Attachment A**, the Debtor and the Parties have agreed, subject to this Court’s approval of the Settlement Agreement and all of the terms thereof, to settle, resolve and terminate all claims and disputes related to the Adversary Proceeding, Rudd’s claim #57 and the Rudd and M&I Units. In particular, the Debtor, M&I and Rudd have agreed that upon delivery of the equipment and related accessories described as the Rudd Units (as defined in the Settlement Agreement) to Rudd in accordance with the terms of Section 1 of the Settlement Agreement, M&I shall release all claims, liens, interests, security interests and encumbrances it has in and to the Rudd Units.

9. Pursuant to the Settlement Agreement, upon the Court’s approval: (a) Red Top agrees to promptly reject or terminate, as applicable, all rental agreements and remove all other claims, liens, encumbrances and other interests in and to each of the Rudd Units, and to promptly take all actions necessary to accomplish such rejections and terminations; and (b) Red Top hereby assigns, transfers, and sets over the Rudd Units and good and marketable title thereto, to Rudd, free and clear of all rental agreements, claims, liens, encumbrances and interests, under the provisions of 11 U.S.C. § 363, including but not limited to those of Red Top and any creditors and customers of Red Top. Red Top shall at its expense promptly cause the Rudd Units to be delivered to Rudd f.o.b. Rudd’s yard at 2655 Kentucky Avenue, Indianapolis, Indiana, in good operating condition and repair. M&I agrees to use its best efforts to cause Red Top to so deliver the Rudd Units to Rudd.

10. Further upon the execution of this Settlement Agreement Red Top has agreed to discontinue the use of all Rudd Units and made other covenants as set forth in Section 4 of the Settlement Agreement, and M&I has agreed to use its best efforts to cause Red Top to comply with its obligations set forth in such Section 4.

11. Furthermore, upon and subject to the terms of the Settlement Agreement, effective upon the Court's approval and delivery of the Rudd Units to Rudd in accordance with the terms of Section 1 of the Settlement Agreement: (a) Rudd releases all claims and security interests it has in the M&I Units (as defined in the Settlement Agreement); (b) Rudd releases all rights and claims under that certain promissory note and security agreement in the original principal amount of \$3,378,994.88 between Rudd and Red Top; and (c) Rudd releases all claims which it has to the hourly usage adequate protection payments which are required to be made weekly by Red Top into an Escrow Account under the terms of the Final Order Authorizing Debtor to Obtain Post-Petition Secured and Super Priority Financing, Authorizing the Debtor to Use Cash Collateral, and Providing Adequate Protection [Docket #15 in original case no. 09-05229-JKC-11] entered by the Court on July 15, 2009 (the "DIP Order").

12. Also, upon and subject to the terms of the Settlement Agreement, Rudd, M&I and the Debtor have agreed to granting the General Mutual Releases as set forth in Section 7 of the Settlement Agreement.

13. The Settlement Agreement, including but not limited to the transfer of the Rudd Units to Rudd under 11 U.S.C. § 363, is in the best interests of the estate. The value of the Settlement Agreement clearly outweighs the probable costs and the benefits of litigating.

14. Litigation of the priority of the security interests between Rudd and M&I is complex. It will involve no less than briefing and argument over the validity, extent and priority of the competing priority liens between Rudd and M&I.

15. Litigating the Adversary Proceeding would be inconvenient and an encumbrance on the Debtor, as the Debtor is currently in need of cash to continue its business operations and to fund its Chapter 11 plan.

16. Given the complexity of the litigation, the cost of litigation and the inconvenience and encumbrance on the Debtor, the Debtor, M&I and Rudd believe approval by the Court of the Settlement Agreement is in the best interests of the estate. The Debtor, M&I and Rudd further believe and therefore assert that the Settlement Agreement falls well within the reasonable range of possible litigation outcomes.

**REQUEST FOR RELIEF**

The Debtor, Rudd and M&I pray that the Court grant this Joint Motion pursuant to Fed.R.Bankr.P. 9019 and for all other just and proper relief.

Respectfully submitted,

TUCKER | HESTER, LLC

/s/ Jeffrey M. Hester  
Jeffrey M. Hester  
*Counsel for Red Top Rentals, Inc.*  
TUCKER | HESTER, LLC  
429 N. Pennsylvania Street, Suite 100  
Indianapolis, Indiana 46204-1816  
317.833.3030 | Fax 317.833.3031  
[jeff@tucker-hester.com](mailto:jeff@tucker-hester.com)

/s/ C.R. Bowles, Jr.  
C.R. Bowles, Jr.  
*Counsel for Rudd Equipment Company, Inc.*  
Greenbaum Doll & McDonald  
101 S. 5<sup>th</sup> St.  
Louisville, KY 40202  
[crb@gdm.com](mailto:crb@gdm.com)

/s/ Jason R. Burke  
Jason R. Burke  
*Counsel for M&I Marshall and Ilsley Bank*  
Hopper Blackwell, P.C.  
111 Monument Circle, Suite 452  
Indianapolis, IN 46204  
[jburke@hopperblackwell.com](mailto:jburke@hopperblackwell.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that on December 11, 2009, a copy of the foregoing *Joint Motion to Settle & Compromise and Transfer of Assets Under 11 U.S.C. § 363* was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

Jeffrey M. Hester  
[jeff@tucker-hester.com](mailto:jeff@tucker-hester.com)

John McDavid  
[john@tucker-hester.com](mailto:john@tucker-hester.com)

Nikki Sadowski  
[nikki@tucker-hester.com](mailto:nikki@tucker-hester.com)

C.R. Bowles, Jr.  
[crb@gdm.com](mailto:crb@gdm.com)

George W. Hopper  
[ghopper@hopperblackwell.com](mailto:ghopper@hopperblackwell.com)

Jason R. Burke  
[jburke@hopperblackwell.com](mailto:jburke@hopperblackwell.com)

/s/ Jeffrey M. Hester  
Jeffrey M. Hester