

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 THE AUTHORIZATION OF A SALE AND
TRANSFER OF ASSETS 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 the debtor-in-possession. A creditors committee has not been appointed in this case.

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, 6006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure.

A. THE PROPOSED SALE

4. The Debtor is in the business of renting, repairing, and selling heavy equipment, primarily to contractors, and mining overburden and aggregate, on contract, for major aggregate companies. The Debtor has determined it is in the best interests of the Debtor and its creditors to conduct a controlled, orderly and ultimately beneficial sale (the “Sale”) of two Caterpillar haul trucks of the Debtor (the “Assets”) to Commercial Choice Investments, Inc. (the “Buyer”). A list of all of the Assets is attached as **Attachment A**. The Debtor does not need the Assets to reorganize, and selling helps reduce debt to M&I Marshall & Ilsley Bank (the “Bank”), which has a blanket lien on most of the Debtor’s assets and is the DIP lender in this case.

5. The Debtor submits the Assets have a combined value of about \$60,000. The Debtor believes this is a fair and reasonable value for the Assets.

6. The Debtor seeks authority to sell the Assets to the Buyer 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 sales.

7. The marketing efforts for the Sale of the Assets have been primarily through advertising conducted by the Debtor on the website <http://www.equipmenttrader.com>. The Buyer contacted the Debtor regarding the Sale of the Assets based on the listings on this website. The Buyer is not an “insider” as defined by Code §101(31). [The Sale is an arms-length transaction, and the Buyer has no other connection to the Debtor or any of its creditors.]

8. The terms of the Sale are set forth in a purchase agreement between the Debtor and Buyer dated June 17, 2009 attached as **Attachment B** and are as follows:

A. All terms are net cash upon receipt of invoice unless otherwise noted;

- B. If not paid on due date, 1 ½% per month service charge will be applied;
- C. Title to Equipment retained by Debtor until full purchase price is paid with good funds;
- D. The Debtor extends no express warranties;
- E. All implied warranties, including those of merchantability and fitness for particular purpose, are disclaimed;
- F. All sales of used equipment are made “as is-where is” unless otherwise endorsed in the purchase agreement;
- G. The total purchase price of the Assets is \$60,000.

B. INTERESTS IN THE ASSETS

9. 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 the Bank holds a valid and properly perfected first-priority security interest in and to substantially all of the Assets of the Debtor.

10. The Debtor seeks authority to issue a bill of sale transferring each sold item free and clear of all Interests upon receipt in full of immediately available funds and authority to execute and file any and all necessary releases of filed financing statements respecting such item, if the buyer so requests.

11. Any proceeds of a sale are cash collateral of the Bank and their use is controlled by cash collateral orders entered in this case.

C. AUTHORITY

12. The Assets are all assets of the estate, pursuant to §541 of the Code.

13. Section 363(b)(1) of the Code provides that a debtor, “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.”

Section 105(a) of the Code provides in relevant part that “[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

14. A sale of the Assets should be authorized pursuant to section 363 of the Code if a sound business reason exists for doing so. See e.g., Meyers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996) (citing Fulton State Bank v. Schipper (In re Schipper), 933 F.2d 513, 515 (7th Cir. 1991)); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986).

15. The Debtor has concluded that a sale of the Assets represents the best manner in which to maximize the value of the Assets and, consequently, the value of the Debtor’s estate and the pecuniary recovery of its creditors. The Debtor believes it is a sound exercise of its business judgment to sell the Assets as described herein because it has no better option, and is informed that an auction of the Assets would result in substantially lower amounts being paid for the Assets.

16. Section 363(f) of the Code provides:

The Debtors may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

- (1) applicable non-bankruptcy 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 a bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

17. Section 363(f) of the Code is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to warrant the Debtor’s sale of the Assets

free and clear of all Interests. See Citicorp Homeowners Services, Inc. v. Elliot, 94 B.R. 343, 345 (E.D. Pa. 1988).

18. The Debtor submits they satisfy at least one of the five conditions of §363(f) of the Code, because the Bank has agreed to release its liens on the Assets so long as it may seek terms it agrees with in the order on this Motion. The Debtor accordingly requests the Assets be transferred to buyers, free and clear of all Interests, with such Interests to attach to the proceeds of the sale of the Assets. Unless Assets can be sold free and clear of the Interests, the Sale cannot be consummated.

19. Pursuant to Bankruptcy Rule 6004(g), an order authorizing the sale, use or lease of property is stayed for ten days after the entry of the order, unless a court orders otherwise. The Debtor requests the Court waive the ten (10) day stay provided for in Bankruptcy Rule 6004(g).

20. The Debtor submits that the sale of the Assets pursuant to the terms of this Motion will provide the estate with fair and reasonable consideration.

21. The Debtor submits that sales will be negotiated at arms-length and in good faith, and thus the Buyers are entitled to the protection of §363(m) of the Code. Accordingly, the Debtor requests the Court make a finding that the Buyers are entitled to the protections of §363(m) of the Code.

22. The Debtor believes a sale of the Assets, on the terms and conditions set forth herein and in the Agreement, is in the best interests of the Debtor's estate.

D. NOTICE OF THE SALE

23. The Debtor will have served this Motion, at least ten (10) days prior to a hearing on its approval on all appearing counsel, the U.S. Trustee, Debtor and counsel for the secured creditors (the "Interested Parties").

24. The Motion sufficiently describes the terms and conditions of the proposed Sale. See Delaware & Hudson Railway, 124 B.R. at 180 (Bankr. D. Del. 1991) (the disclosures necessary in such a sale notice need only include the terms of the sale and the reasons why such a sale is in the best interests of the estate and do not need to include the functional equivalent of a disclosure statement); In re Ionosphere Clubs, Inc., 184 B.R. 648 (S.D.N.Y. 1995).

25. Several sections of the Code dictate the sufficiency of notice and adequacy of service. As discussed below, the content and manner of service of this Motion (and the related pleadings) satisfies all such requirements. Section 363 of the Code provides that a Debtor may sell property “after notice and hearing.” Under §102(1) of the Code, the phrase “after notice and hearing” means “notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances.” As set forth above, Interested Parties will have been provided notice of the salient details regarding the proposed sale of the Assets by receiving a copy of the Motion. Accordingly, the proposed notice in the form of service of this Motion is sufficient under §363 of the Code.

26. As set forth above, service of the Motion on the Interested Parties and service of an order combined with notice setting the Procedures Hearing on all creditors and the Interested Parties satisfies each of the notice requirements of §363 of the Code and Rules 2002 and 6004 and provides adequate notice to those parties interested in the relief requested in the Motion.

27. The service of this Motion is “reasonably calculated” to apprise interested parties of the pendency of the matter and to afford them an opportunity to object. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Interested Parties have been and should be found to have been afforded adequate notice of this Motion.

28. The Debtor requests the Court to enter and not stay the proposed order, notwithstanding Rule 6004(g).

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

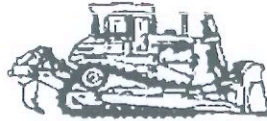
/s/ Jeffrey M. Hester
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Attachment "A"

1 Caterpillar Haul Truck Model D400E, Serial Number 2YR516

1 Caterpillar Haul Truck Model D400E, Serial Number 2YR212



PURCHASE ORDER - SALES AGREEMENT

Subject to the terms and conditions set forth below, Red Top Rentals, Inc. hereby Sells to Buyer and Buyer hereby Purchases from Red Top Rentals, all machinery, equipment and other property described in the Schedule of Equipment, set forth below. All said machinery, component parts of the machinery, equipment and other property described in said Schedule of Equipment is hereinafter collectively called the "Equipment"

Customer Commercial Choice Investments Inc
14518 Millhopper Rd
Jacksonville, Fl. 32258-3146

Customer P.O. No.: Mike Jerrell

Via: _____

F.O.B: Indianapolis, In.

Shipping Date: _____

SCHEDULE OF EQUIPMENT

Quantity	Make	Model	Serial Number	Description	Cash Purchase Price
1	Caterpillar	D400E	2YR516	Haul Truck	\$ 30,000.00
1	Caterpillar	D400E	2YR212	Haul Truck	\$ 30,000.00

	Sub-Total	\$ 60,000.00
2009 Florida Annual Resale Certificate for Sales Tax # 2608013470743-9	Sales Taxes	Exempt
	Freight and	
	Other Charges	
	Grand Total	\$ 60,000.00

Terms: All terms are net cash upon receipt of invoice unless otherwise noted above.
 If not paid on due date, 1 1/2% per month service charge will be applied.
 Title to Equipment retained by Red Top Rentals until full purchase price is paid with good funds.

NOTICE TO BUYER: RED TOP RENTALS EXTENDS NO EXPRESS WARRANTIES; ALL IMPLIED WARRANTIES, INCLUDING THOSE OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE, ARE DISCLAIMED. All sales of used equipment are made "AS IS - WHERE IS" unless otherwise endorsed above. All sales are made subject to the TERMS AND CONDITIONS printed here and on the REVERSE SIDE of this Purchase Order - Sales Agreement.

TERMS AND CONDITIONS OF SALE

1. WARRANTIES.

1.1 MANUFACTURER'S WARRANTY ONLY. Red Top Rentals is not the manufacturer of the Equipment and Red Top Rentals gives no express warranty against patent or latent defects in material, workmanship, capacity, and does not warrant that the Equipment will meet the requirements of any laws, rules, specifications, or contracts which provide for specific machinery or apparatus or special methods. THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE ARE HEREBY EXCLUDED AND DISCLAIMED FOR ALL EQUIPMENT, NEW AND USED. The manufacturer's written warranty is the SOLE warranty given in connection with the sale of new equipment. The manufacturer's warranty on new equipment is incorporated herein by reference and Red Top Rentals has provided the Buyer with a copy of the manufacturer's warranty.

1.2 FAILURE TO RECEIVE COPY OF THE MANUFACTURER'S WARRANTY. If the buyer does not receive a copy of the manufacturer's written

warranty ad provided in Paragraph 1.1 at or before receiving possession of new equipment, it shall be Buyer's obligation to notify Red Top Rentals's Indianapolis office of the fact, and such written warranty will be promptly furnished to Buyer. Failure by Buyer to give such notice shall constitute a waiver of all claims or rights of the Buyer which go beyond the terms of said particular manufacturer's written warranty.

1.3 USED EQUIPMENT. Unless specifically stated to the contrary hereon, all used equipment is sold without warranty on an "AS IS - WHERE IS" basis. Buyer acknowledges that Buyer has fully inspected each piece of used equipment, does not desire further inspection and assumes all risks of defects being present therein.

1.4 EXCLUSIVE REMEDY. THE MANUFACTURER'S WARRANTY IS BUYER'S SOLE AND EXCLUSIVE REMEDY, AND NO OTHER REMEDY, INCLUDING, BUT NOT LIMITED TO, INCIDENTAL OR CONSEQUENTIAL LOSS, SHALL BE AVAILABLE TO BUYER AGAINST RED TOP RENTALS.

2. EXCLUSIVE REMEDY AND MAXIMUM LIABILITY FOR RED TOP RENTALS' BREACH OF PURCHASE ORDER - SALES AGREEMENT. IF RED TOP RENTALS REPUDIATES, FAILS TO DELIVER THE EQUIPMENT, DELIVERS SUBSTANTIALLY NONCONFORMING EQUIPMENT AND BUYER REJECTS THE EQUIPMENT OR JUSTIFIABLY REVOKES ACCEPTANCE OF THE EQUIPMENT, OR IF RED TOP RENTALS COMMITS ANY OTHER SUBSTANTIAL BREACH OF THIS PURCHASE ORDER - SALES AGREEMENT, BUYER'S EXCLUSIVE REMEDY AGAINST RED TOP RENTALS SHALL BE TO RETURN THE EQUIPMENT TO RED TOP RENTALS AT BUYERS EXPENSE. NO OTHER REMEDY, INCLUDING, BUT NOT LIMITED TO, INCIDENTAL OR CONSEQUENTIAL DAMAGES FOR LOST PROFITS, INJURY TO PERSON OR PROPERTY, OR ANY OTHER INCIDENTAL OR CONSEQUENTIAL LOSS, SHALL BE AVAILABLE TO BUYER AGAINST RED TOP RENTALS.

3. INSTRUCTION MANUAL. Buyer acknowledges being furnished with an instruction manual governing safe operation of the Equipment. Buyer warrants that Buyer, and any person who works for Buyer and uses the Equipment, will operate the Equipment in accordance with the instruction manual.

4. SHIPMENT AND RECEIPT OF EQUIPMENT. Should any of the Equipment be received and accepted by Buyer from any carrier in a damaged condition, or with any of the machinery, equipment, parts, or appurtenances missing, it shall be the duty of Buyer to obtain from said carrier a written acknowledgement of the damage or shortage. The failure on the part of Buyer to obtain such statement or acknowledgment upon its receipt and acceptance of the Equipment shall be treated as an acceptance of the Equipment in good, safe, serviceable condition and fit for use. Use of the Equipment shall constitute a full, complete and irrevocable acceptance by Buyer.

5. PRICES. Prices do not include freight unless so noted hereon. All prices are subject to changes in current list prices at the time of shipment.

6. PASSAGE OF RISK OF LOSS. All risks of loss, casualty or other damage to the Equipment shall pass to the Buyer at the time when and place where Red Top Rentals delivers possession, whether such delivery be to the Buyer or to a common carrier or other independent instrument of transportation or to any other bailee.

7. UNFORESEEN CONTINGENCIES. All shipments are subject to unforeseen contingencies or the effect of priorities or other regulations of any governmental authority, or delays occasioned by strikes or any other occurrence beyond Red Top Rentals' control.

8. RENTAL FOR USE OF EQUIPMENT BEFORE REVOCATION OR ACCEPTANCE. If Buyer uses the Equipment and subsequently it is determined by a court that Buyer justifiably revoked its acceptance for any reason, Buyer shall pay a rental fee for each day or part thereof during which the Equipment was used. The rental fee shall be at a rate set by Red Top Rentals under terms of its Lease for equipment similar to that sold to Buyer.

9. PLACE OF MAKING. Indianapolis, Indiana, shall be the place of making of this Purchase Order- Sales Agreement and any and all disputes arising hereunder may be settled, or attempted to be settled, only in Indianapolis, whether such settlement be arrived at, or be attempted, by negotiation, litigation or otherwise.

10. APPLICABLE LAW; SEVERABILITY. The law the State of Indiana shall apply to this Purchase Order - Sales Agreement and its construction. To the extent any provision or clause in this Purchase Order - Sales Agreement is prohibited by any law or is deemed unenforceable, such prohibition or unenforceability shall not invalidate any of the remaining provisions or clauses hereof.

11. ENTIRE UNDERSTANDING. RED TOP RENTALS' SALESMAN AND/OR ANY OTHER EMPLOYEE OF RED TOP RENTALS MAY HAVE MADE ORAL OR WRITTEN STATEMENTS ABOUT EQUIPMENT DESCRIBED IN THIS PURCHASE ORDER - SALES AGREEMENT. SUCH STATEMENTS DO NOT CONSTITUTE WARRANTIES, SHALL NOT BE RELIED UPON BY THE BUYER AND ARE NOT A PART OF THIS AGREEMENT. THE ENTIRE UNDERSTANDING OF THE PARTIES IS EMBODIED IN THIS PURCHASE ORDER - SALES AGREEMENT TOGETHER WITH ANY SECURITY AGREEMENT COVERING THE EQUIPMENT HEREBY SOLD. THIS AGREEMENT SIGNED AND DATED BY BUYER AND RED TOP RENTALS CONSTITUTES A FINAL WRITTEN EXPRESSION OF ALL TERMS OF THIS AGREEMENT AND IS A COMPLETE AND EXCLUSIVE STATEMENT OF THOSE TERMS.

12. MODIFICATION OF AGREEMENT. No modification of this Purchase Order - Sales Agreement shall be binding upon the parties or either of them unless such modification is in writing and duly accepted in writing.

13. WAIVER. No waiver of a breach of any provision of this Purchase Order - Sales Agreement shall constitute a waiver of any other breach of the same or any other provision.

14. SUBJECT TO RED TOP RENTALS' ACCEPTANCE. This order is subject to acceptance by Red Top Rentals and shall not be binding upon Red Top Rentals until signed by Red Top Rentals' authorized representative. This order may be accepted only at Red Top Rentals' home office in Indianapolis, Indiana. Acceptance shall be executed by Red Top Rentals on the Buyer's Acknowledgment Copy which shall be returned to Buyer by United States Mail. WE HAVE READ AND AGREE TO ALL THE ABOVE TERMS AND CONDITIONS, WHICH ARE THOROUGHLY UNDERSTOOD.

Buyer: Commercial Choice

Circle One: Corporation Partnership Individual

By: Mike Jerrell

Title: President, CCI
(Show title of officer if corporation. If Owner or Partner, state which.)

Accepted: Red Top Rentals, Inc.

By: _____

Title: Sales Manager

Date: June 17 2009

Date: 17-Jun-09

Witness: _____
(Salesman sign here as witness)