

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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

**MOTION TO ASSUME EXECUTORY CONTRACT WITH MONERIS  
SOLUTIONS AND HARRIS TRUST & SAVINGS BANK**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Red Top Rentals, Inc., the debtor and debtor-in-possession (the “Debtor”), by counsel, in support of the above-entitled motion (this “Motion”), and respectfully states:

1. Since the Petition Date, the Debtor has continued in the possession of their 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 not been appointed in this case.

2. The Court has jurisdiction over this application pursuant to 28 U.S.C. §157 and 1334. Venue is proper pursuant to 28 U.S.C. §1408 and 1409. This application is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The statutory predicates for the relief requested herein are 11 U.S.C. §365 and Fed. R. Bankr. P. 6006.

3. Prior to the Petition Date, the Debtor, in its normal course of business, entered into an executory contract (the “Contract”) with Moneris Solutions and Harris Trust & Savings Bank (collectively, the “Bank”). Attached as **Attachment A** is a copy of the Contract.

4. The Contract is for the processing of client credit and debit card transactions in the normal course of Debtor's business. The Contract was entered in to on August 24, 2006 and terminates after three (3) years on August 24, 2009.

5. The Contract states Debtor's gross annual bankcard volume to be at \$35,000.00 with an average ticket size of \$630.00.

6. The Contract provides for standard MasterCard and Visa rates. The MasterCard discount rate is 2.50% with a \$0.00 transaction fee. The Visa discount rate is also 2.50% with a \$0.00 transaction fee.

7. The Contract also provides for several standard fees including a 0.00% billback fee, a \$40.00 application fee, and a \$20.00 chargeback fee. Also included in the Contract are a \$20.00 monthly minimum fee, a \$1.25 voice call authorization fee, and a \$10.00 monthly maintenance fee.

8. The Contract also provides for the processing of Discover Card transactions with a \$0.10 transaction fee, a 0.00% discount rate, and a \$25.00 membership fee.

9. The Contract is necessary in order for Debtor to carry on its normal business operations. The Debtor is primarily in the business of renting, repairing, and selling heavy equipment and therefore the ability of the Debtor to process credit and debit card transactions is imperative to Debtor's daily operations. Failure to assume this contract would result in irreparable harm to the Debtor's continued viability.

10. Section 365(a) of the Bankruptcy Code provides that a debtor-in-possession, "subject to the court's approval, [may] assume or reject any executory contract or unexpired lease." See In re FBI Distribution Corp., 330 F.3d 36, 42 (1<sup>st</sup> Cir. 2003); University Medical Center v. Sullivan (In re University Medical Center), 973 F.2d 1065, 1075 (3d Cir. 1992). The assumption or

rejection of an executory contract by a debtor is subject to review under the business judgment standard. In the Matter of Federated Dept. Stores, Inc., 131 B.R. 808, 811 (S.D. Ohio 1991) (“Courts traditionally have applied the business judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases.”); In re Parrot Packing Co., Inc., 42 B.R. 323, 331 (N.D. Ind. 1983). This standard is satisfied when the debtor determines that assumption will benefit the estate. In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y 1997) (“debtor must demonstrate whether assumption or rejection confers a net benefit on the estate”); In re Crystalin, LLC, 293 B.R. 455, 464 (8<sup>th</sup> Cir. BAP 2003) (citation omitted).

11. If the debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease. See, e.g., NLRB v. Bildisco and Bildisco, 465 U.S. 513, 523 (1984); Group of Institutional Investors v. Chicago, M., St. P. & P.R. Co., 318 U.S. 523, 550 (1943); Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 39-40 (3d Cir. 1989); In the Matter of Goldblatt Bros., Inc., 766 F.2d 1136, 1139 (7<sup>th</sup> Cir. 1985).

12. In applying the “business judgment” standard, courts show great deference to the debtor’s decision to assume an unexpired lease or executory contract. See Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”).

13. The Debtor clearly satisfies the “business judgment” standard in assuming the Contract. As explained above, the Contract is necessary in order for Debtor to carry on its normal business operations. Accordingly, the Debtor has determined that, in the sound exercise of their

business judgment, the Contract should be assumed and such assumption will benefit the Debtor's estate.

**Request for Relief**

The Debtor respectfully requests that the Court grant this Motion 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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