

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 MACALLISTER MACHINERY CO., INC.**

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 with MacAllister Machinery Co., Inc. (the “Contract”). Attached as **Attachment A** is a copy of the Contract.

4. The Contract with MacAllister Machinery Co., Inc. (“MacAllister”) is for the continued sales of parts and repairs to the extensive inventory of Caterpillar equipment owned and/or leased by the Debtor.

5. The Debtor is in the business of leasing heavy equipment. A substantial amount of its equipment has been manufactured by Caterpillar. Caterpillar has an extensive dealer network throughout the United States. It is often the case that heavy equipment in heavy rotation and use needs repair and parts. There is no “secondary market” for Caterpillar parts other than through the Caterpillar network dealership. Therefore, if one owns a piece of Caterpillar equipment and it breaks one must obtain Caterpillar parts from a Caterpillar dealer. MacAllister is the local dealer for Caterpillar parts and services and there are not others in Indiana. The Debtor in the past has, with great difficulty, expense and delay, obtained parts from dealers outside of Indiana but that is not deemed by the Debtor to be a workable, convenient or ideal way to purchase parts and obtain service for its Caterpillar inventory. The Debtor believes it is in its best interest to maintain its relationship with MacAllister to insure unencumbered continued supply of parts and service from MacAllister.

6. MacAllister has indicated that it will only continue to provide parts and services if its open account sum of \$35,606.25 is brought current notwithstanding provisions under Title 11.

7. The Contract also provides that the Debtor will receive 30 day terms on payment, which is beneficial to the Debtor.

8. In the business judgment of the Debtor entering into the Contract is necessary in order for the Debtor to carry on its normal business operations and without access to Caterpillar parts and services from MacAllister, the Debtor’s continued operations would be hampered if not outright difficult.

9. 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 (7th Cir. 1985).

10. 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").

11. 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,

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