

In re:	)	
	)	
ACR MANAGEMENT, L.L.C., <u>et al.</u> , <sup>1</sup>	)	Case No. 04-0_____(____)
	)	
	)	Chapter 11
	)	
Debtors.	)	(Jointly Administered)
	)	
_____	)	Docket No. ____
ACR MANAGEMENT, L.L.C., et al.,	)	
	)	Hearing Date and Time: _____
Movants,	)	
	)	Objection Deadline: _____
v.	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
GROUP	)	
	)	

The above-captioned debtors and debtors-in-possession (the “Debtors”) file this motion (the “Motion”) seeking entry of an order authorizing the Debtors to maintain the existing surety bond program as a valid and binding postpetition obligation of the Debtors and to enter into an arrangement for the issuance of new surety bonds from Travelers Casualty & Surety Company of America and its

<sup>1</sup> The Debtors are the following entities: ACR Management, L.L.C., Anthony Crane Rental Holdings, L.P., ACR/Dunn Acquisition, Inc., Anthony Crane Capital Corporation, Anthony Crane Holdings Capital Corporation, Anthony Crane International, L.P., Anthony Crane Sales & Leasing, L.P., Anthony International Equipment Services Corporation, Anthony Sales & Leasing Corporation, Carlisle Equipment Group, L.P., Carlisle GP, L.L.C., Husky Crane, Inc., Anthony Crane Rental, L.P., d/b/a Maxim Crane Works, Maxim Crane Works, LLC, Sacramento Valley Crane Service, Inc., The Crane & Rigging Company, LLC, Thompson & Rich Crane Service, Inc.

affiliates and subsidiaries (“Travelers,” together with the Debtors, the “Parties”) on the terms contained herein. In support of this Motion, the Debtors respectfully state as follows:<sup>2</sup>

### **Jurisdiction**

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicate for the relief requested herein is section 363(b) of title 11 of the United States Code (the “Bankruptcy Code”).

### **Background**

3. On this date (the “Petition Date”), the Debtors filed petitions for relief under the Bankruptcy Code (the “Chapter 11 Cases”). As more fully described in the First Day Affidavit, Debtors have submitted various First Day Motions that seek to stabilize the Debtors’ business operations and allow the Debtors to commence these Chapter 11 Cases in the best position possible to emerge expeditiously.<sup>3</sup> Consistent with the relief requested in the First Day Motions, Debtors have conducted extensive negotiations and preparations with their Prepetition Senior Lenders regarding their financial obligations and future business operations and have secured a debtor-in-possession financing facility with certain of the Prepetition Senior Lenders to provide for financing of the Debtors’ operations following the Petition Date. Moreover, the Company, certain of the Prepetition Senior Lenders and Prepetition Term B Facility Lenders, and the Term C Lender have entered into a lock up and voting agreement in support of a plan of reorganization that embodies the terms of their agreement concerning the Company’s restructuring, which terms have been set forth in the term sheet

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<sup>2</sup> The facts and circumstances supporting this Motion are set forth in the Affidavit of Ronald M. Marmo, Vice President, Administration, in support of certain first day motions, filed contemporaneously herewith (“the First Day Affidavit”).

<sup>3</sup> Any capitalized terms used in this Motion that are not otherwise defined shall have the meaning ascribed to them in the First Day Affidavit.

attached to the lock up and voting agreement. The Debtors have also requested the Court designate the Chapter 11 Cases as a complex case pursuant to Local Rule 1002-3, and to jointly administer them pursuant to Bankruptcy Rule 1015(b).

#### **Relief Requested**

4. Collectively, the Debtors are the largest provider of comprehensive crane and lifting equipment rentals and services in North America. The Debtors have a network of thirty-two crane rental yards that provide service to over 12,700 customers in forty-seven states and the Caribbean. The Debtors own approximately 7,000 pieces of equipment, of which approximately 2,479 are cranes and other lifting equipment, ranging from 1,000-ton mobile cranes to two-person aerial work platforms. In order to conduct their businesses, the Debtors are required to obtain and hold various licenses to do business in a particular State, operate at particular work sites and to transport equipment on roadways (collectively, the “Licenses”). Various state regulatory agencies, such as state departments of motor vehicles, occupational safety and health administration boards and state corporate oversight entities (the “State Agencies”), issue the Licenses.

5. The Debtors generally must obtain and post surety bonds (the “Business Surety Bonds”) to obtain and subsequently maintain the Licenses. The purpose of the Business Surety Bonds is to ensure that funds are available if customer-related and other claims are made against the Debtors as a result of their doing business in the State for which a particular Business Surety Bond is posted.

6. The Debtors obtain the Business Surety Bonds from Travelers. As of May 31, 2004, there are approximately eight (8) Business Surety Bonds outstanding, with a single letter of credit collateralizing all of them.

7. Most Licenses are of a short-term duration. Where Licenses are longer term, particularly when issued to do business in a particular State, the Debtors must submit the original Business Surety Bonds with their initial License applications. Subsequent applications to add additional licensed locations, increase and decrease bond amounts and change licensed office

addresses generally are submitted with Business Surety Bond riders. When State Agencies renew Licenses, the Debtors will, in some instances, also provide a Business Surety Bond continuation certificate to the relevant State Agency. The various Business Surety Bond amounts vary by License and issuing jurisdiction.

8. Without the Business Surety Bonds in place, the various State Agencies would have the legal authority to revoke or suspend some or all of the Debtors' Licenses. If this were to happen, the Debtors would effectively be unable to operate their businesses, which would severely damage their going-concern value.

9. Moreover, the Debtors obtain additional bonds (the "Additional Surety Bonds," and together with the Business Surety Bonds, the "Surety Bonds") from Travelers from time to time for employee benefit and union obligations, and as required by various courts.

10. On information and belief, no claim has ever been made against the Surety Bonds for any reason.

11. In order to facilitate their operations, the Debtors, by this Motion, seek to maintain the existing surety bond program and assume and treat the bond program documents, including the Indemnity Agreement dated as of May 30, 2003, the existing bond and any related documents, as valid and binding postpetition obligations. Furthermore, the Debtors seek to enter into an agreement for the issuance of Additional Surety Bonds from Travelers, consistent with the DIP Budgets, the DIP Loan Amendment and the DIP Orders (as each term is defined in the First Day Affidavit), according to the following terms:<sup>4</sup>

- (i) The Parties intend to maintain a bonding relationship. Travelers shall issue bonds of a type historically written for the account, however, Travelers is not making a commitment to issue, extend, review or increase any bond and any agreement to issue, extend, renew or increase any bond shall be at Travelers' discretion pursuant to its underwriting business practices. Accordingly,

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<sup>4</sup> Travelers has reviewed this Motion and the terms of the arrangement contained herein, and has determined that the terms set forth herein are acceptable.

Travelers reserves the right to apply its ordinary underwriting business practices to accept or reject a request for any postpetition bond;

- (ii) The collateral requirement for bonds outstanding as of the Petition Date will remain the same as it was prepetition. For any bonds written for the account postpetition, Travelers will require 107% collateral in the form of a standby letter of credit. The standby letter of credit shall be in the form and content customarily used by the parties, and shall be from one of the DIP Lenders (as that term is defined in the Affidavit);
- (iii) Prior to the Petition Date, the Parties executed a letter agreement establishing the pricing for the account and the premium to be charged;
- (iv) The Parties have executed the indemnity agreement attached hereto as Exhibit A, which ratifies any and all existing indemnity agreements. The Debtors agree to execute a new indemnity agreement, in form and substance acceptable to Travelers, after filing for chapter 11 relief, that will ratify any and all existing indemnity agreements. The terms of the new indemnity agreement to include existing indemnity agreements listed therein. Upon emergence from these Chapter 11 Cases, Reorganized Maxim Crane intends to execute a new indemnity agreement with Travelers;
- (v) Subject to the terms of the DIP Orders, the DIP Budget and the DIP Loan Amendment (as defined in the First Day Affidavit), to secure their postpetition obligations under their postpetition agreement with Travelers, the Debtors shall cause to be issued a standby letter of credit (but not cash) in favor of Travelers. Travelers shall have the right to draw upon that standby letter of credit for claims arising from any postpetition bond or postpetition indemnity obligation without the need of any further approval by this Court;
- (vi) The standby letter of credit provided by the Debtors to Travelers shall be held by Travelers until it is presented with competent written evidence, satisfactory to Travelers in its sole discretion, of discharge of all bonds and there exists no outstanding loss, cost, expense, unpaid premium or other unreimbursed amounts due to Travelers. As letters of credit are not part of the bankruptcy estate, Travelers' rights remain the same with respect to letters of credit and Travelers will use the standby letter of credit if any loss occurs in connection with the postpetition bonds or postpetition indemnity agreements;
- (vii) Any claims in excess of the standby letter of credit held at the time of the claim, shall be accorded administrative expense priority, subject to the terms and conditions of the DIP Orders, the DIP Budget and the DIP Loan Amendment (as defined in the First Day Affidavit);
- (viii) The Debtors will continue to make payments as authorized by the Bankruptcy Court of any obligations which are covered by any Travelers bonds;
- (ix) The Debtors shall pay commercially reasonable fees for legal work in connection with preparing, obtaining and enforcing any order granting the relief requested in this Motion, with payments to be made thirty (30) days after a

statement setting forth the basis for such fees in commercially reasonable detail, has been presented to the Debtors. If the parties cannot reach agreement on the payment of any such fees, then Travelers may file with the Court an application for administrative expense in satisfaction of any such fees, the Debtors shall have the right to object thereto, and the Court shall determine the amount payable;

- (x) Debtors will continue to timely supply periodic financial information to Travelers in the ordinary course of business, and cooperate with any claim investigation;
- (xi) The Debtors' subsidiaries may participate in this agreement if they agree to terms as set forth herein; and
- (xii) Travelers agrees not to cancel any bonds for the duration of the Chapter 11 Cases, except for the following limited circumstances under which it may cancel the bonds upon ten (10) days notice without further court authorization:
  - The Debtors fail to perform any material obligations under any one or more of the bond or surety program documents or pay any premium owed with respect to one or more of the bonds as it becomes due;
  - The Debtors shall have ceased the operation of their businesses generally or ceased to engage in the operation or activity covered by such bond;
  - Conversion of these Chapter 11 Cases to liquidation of the Debtors' estates under chapter 7 of the Bankruptcy Code;
  - The Debtors shall have disposed of substantially all of their assets through a sale, reorganization plan or otherwise; or
  - The Debtors shall have become unable to pay all of their administrative expenses and claims.
- (xiii) The automatic stay shall be modified to permit Travelers to cancel any bonds only on ten (10) days written notice to the Debtor solely for the limited circumstances as provided for in paragraph 11(xii) hereof and the enforcement of its remedies against any standby letter of credit held at the time of any such cancellation.

### **Basis for Relief**

12. Section 363(b) of the Bankruptcy Code provides that a debtor in possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). Courts determining whether to approve a debtor's decision to use property of the estate outside the ordinary course of business apply a "business justification" standard. See In re Delaware & Hudson Ry. Co., 124 B.R. 169, 175-76 (D.Del. 1991) (section 363 of the

Bankruptcy Code requires that the debtor's decision be supported by a "sound business purpose"); In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (Bankr. D.Del. 1999).<sup>5</sup>

13. The Debtors cannot continue to operate their businesses unless the Surety Bonds remain in place and they can readily obtain Additional Surety Bonds. Indeed, it is highly likely that many States in which the Debtors are doing business would revoke the Licenses to do business, and to operate at job sites and move equipment on roadways. See e.g., Edwards Mobile Homes Sales, Inc. v. Ohio Casualty Ins. Co. (In re Edwards Mobile Homes Sales, Inc.), 119 B.R. 857 (Bankr. M.D. Fla. 1990) (State was permitted under the section 362(b) to revoke mobile home dealer's license to do business if there is no surety bond in place). Furthermore, the Surety Bonds are also required to secure employee benefit obligations pursuant to certain union requirements and required by various court authorities in pending cases. Allowing the Debtors to maintain the existing surety bond program and enter into the agreement with Travelers on the terms set forth above will preserve the Debtors as a going concerns, which will clearly redound to the benefit of the Debtors' estates. Accordingly, the Debtors believe they have articulated a valid business justification for maintain the current program and entering into the agreement, as set forth above, with Travelers.

14. Furthermore, it is in the best interests of the Debtors, their estates and their creditors to accord administrative expense treatment for any claim in excess of the standby letter of credit held at

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<sup>5</sup> See also, Fulton State Bank v. Schipper, 933 F.2d 513, 515 (7th Cir. 1991) (debtor's decision must be supported by "some articulated business justification"); Stephens Ind., Inc. v. McClung, 789 F.2d 386, 389-90 (6th Cir. 1986); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 147 (3d Cir. 1986) (enunciating the good faith requirement); In re Continental Airlines, Inc., 780 F.2d 1223 (5th Cir. 1986); In re Telesphere Communications, Inc., 179 B.R. 544, 552 (Bankr. N.D. Ill. 1999); In re United Healthcare System, Inc., 1997 WL 176574 (D.N.J. 1997) (courts typically must examine whether there was: (1) adequate notice to interested parties, (2) adequate price paid for the asset, (3) good faith by the parties, and (4) a sound business reason for the sale); Titusville Country Club, 128 B.R. 396, 399 (Bankr. W.D.Pa. 1991) (the "sound business judgment test requires (i) that a sound business purpose justifies the sale outside the ordinary course of business, (ii) that adequate and reasonable notice has been provided to all of the interested parties, (iii) that the debtor has obtained a fair and reasonable price, and (iv) good faith); and In re Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (listing the elements necessary for approval of a section 363 sale in a chapter 11 case).

the time of the claim. As discussed above, the Debtors and Travelers have agreed that the Surety Bonds will remain in place for the duration of these Chapter 11 Cases in exchange for the Debtors agreeing to pay any claims in excess of the standby letters of credit held by Travelers at the time of the claim. Furthermore, having the Surety Bonds remain in place clearly will benefit the Debtors' estates by permitting the Debtors to remain operating entities, thereby preserving their going concern value. See In re O'Brien Environmental Energy, Inc., 181 F.3d 527, 532-33 (3d Cir. 1999) citing In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976). Indeed, such benefits of the Surety Bonds remaining in place are clearly concrete and discernible, thus being necessary to preserve the Debtors' estates.

15. The Debtors also request that the Court find that, notwithstanding the possible applicability of Bankruptcy Rules 6004(g), 7062, 9014 or otherwise, the terms and conditions of an Order shall be immediately effective and enforceable upon its entry, and that any debt incurred hereunder be valid pursuant to section 364(e) of the Bankruptcy Code.

#### **Notice**

16. No trustee, examiner or creditors' committee has been appointed in the Chapter 11 Cases. Notice of this Motion has been provided to: (a) the United States Trustee; (b) those parties listed on the Consolidated List of Creditors Holding Largest Twenty Unsecured Claims Against The Debtors, as identified in their chapter 11 petitions; (c) counsel to the Agent for the DIP Lenders; (d) counsel to the Agent for the Prepetition Senior Lenders; (e) counsel to the Term B Lenders; (f) counsel to the Term C Lender; (g) the Indenture Trustee for the New Senior Notes; (h) the Indenture Trustee for the New Debentures; and (i) Travelers Casualty & Surety Company of America. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

#### **No Prior Request**

17. No prior Motion for the relief requested herein has been made to this or any other court.



WHEREFORE, the Debtors respectfully request that the Court enter an order (i) authorizing the Debtors to maintain the existing surety bond program as a valid and binding postpetition obligation of the Debtors and enter into an agreement with Travelers on the terms as set forth in the Motion for the issuance of Additional Surety Bonds and (ii) granting such other and further relief as the Court deems appropriate.

Dated: Pittsburgh, Pennsylvania

June 14, 2004

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