

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

In re:)	Chapter 11
)	
DAN RIVER INC., <i>et al.</i>)	Case Nos. 04-10990 through 04-10993
)	Jointly Administered
)	
Debtors.)	Judge Drake
<hr/>)	

**DEBTOR’S MOTION TO ASSUME EXECUTORY CONTRACT AND FOR
AUTHORITY TO CONSUMMATE SALE OF EQUIPMENT (Picanol Loom Sale)**

Dan River Inc. (“Dan River” or the “Debtor”) files this Motion to assume an executory contract for the sale of spare loom equipment pursuant to Bankruptcy Code sections 365 and 363, respectfully showing the Court as follows:

Jurisdiction

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Background to the Case

2. On March 31, 2004 (the “Petition Date”), the Debtor filed a voluntary petition for relief under the Bankruptcy Code. The Debtor is authorized to operate its business as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. No official committee of unsecured creditors has been formed as of the date of this motion.

The Loom Equipment

3. Dan River owns certain “Picanol” brand loom equipment (the “Loom Equipment”), which is more particularly described in the Used Machinery Purchase Agreement

attached as Exhibit “A” to this Motion (the “Sale Agreement”). The Loom Equipment is not currently being used by Dan River, and is sitting idle at the Debtor’s closed Whitehorse Plant in Greenville, South Carolina. The Loom Equipment is encumbered by the first-priority perfected security interests in favor of Deutsche Bank Trust Company Americas, as Agent, Fleet Capital Corporation, as Syndication Agent, Wachovia Bank, National Association, as Documentation Agent, and several lenders from time to time party to a senior secured credit agreement dated April 15, 2003.

4. Between September and December 2003, the Debtor marketed the Loom Equipment to approximately a dozen third-party dealers of used industrial textile equipment. These dealers comprise most of the well-established dealers in this type of textile equipment across the country.

5. During the marketing period, the Debtor received nine offers to purchase the Loom Equipment from competing buyers. The most attractive bid was submitted by John W. Peden Company, Inc., a South Carolina broker (the “Purchaser”). The Sale Agreement was entered into on February 25, 2004 by and between Dan River and the Purchaser, and provides for the sale of the Loom Equipment to the Purchaser for an amount equal to \$1,827,000.00. Deposits in the amount of \$200,000 have been received from the Purchaser. At this time, none of the Loom Equipment has been picked up.

6. The Sale Agreement provides for final payment by April 30, 2004, the date the Purchaser was scheduled to take possession of the last of three contemplated parcels of Loom Equipment. Because the filing of the Debtor’s chapter 11 case interrupted the shipment of the Loom Equipment, the Debtor and the Purchaser have agreed that the April 30 deadline will be

extended so that final payment is due at the time the final parcel of Loom Equipment is picked up, but in no event later than June 30, 2004.

Basis for Relief

A. The Proposed Sale is in the Best Interests of the Estate, and Should be Approved under Bankruptcy Code section 365.

7. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor-in-possession “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Courts have uniformly deferred to the business judgment of the debtor to determine whether the debtor’s decision to assume or reject contracts is appropriate under section 365(a) of the Code. *See, e.g., In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir. 1993), *cert. dismissed*, 511 U.S. 1026 (1994); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *In re Gucci*, 193 B.R. 411, 414-15 (S.D.N.Y. 1996); *In re III Enterprises, Inc. V*, 163 B.R. 453, 468-69 (Bankr. E.D. Pa.), *aff’d*, 169 B.R. 551 (E.D. Pa. 1994). Thus, to the extent that sound business reasons justify the assumption of a particular unexpired executory contract, assumption should be approved by the Court.

8. In the instant matter, this standard is met with respect to the assumption of the Sale Agreement, as amended. There is no cure amount or compensation that must be paid by the Debtor to the Purchaser in connection with the assumption of the Sale Agreement, and the sale of the Loom Equipment will generate positive cash proceeds for the Debtor’s estate. The sale is on terms considerably higher than the next best offer.

B. The Proposed Sale Should Be Approved Under Bankruptcy Code Section 363.

9. Although Section 363 of the Bankruptcy Code does not set forth a standard for determining when it is appropriate for a court to authorize a debtor to use, sell, or lease property other than in the ordinary course of business, in applying this section, courts have required that it be based upon the sound business judgment of the debtor. *See In re Chateaugay Corp.*, 973 F.2d 141 (2d Cir. 1992) (holding that a judge determining a § 363(b) application must find from the evidence presented before him a good business reason to grant such application); *Big Shanty Land Corp. v. Comer Properties, Inc.*, 61 B.R. 272, 277-78 (N.D. Ga. 1985) (same).

10. Here, there is a sound business justification for consummating the Sale Agreement -- no buyer is willing to pay more for the Loom Equipment, for which the Debtor has no further use. Accordingly, the Debtor respectfully requests that the Court authorize the Debtor to consummate the Sale Agreement and perform its obligations thereunder pursuant to the Court's powers under Section 363 of the Bankruptcy Code.

11. Because the Sale Agreement is an arm's-length transaction between the Debtor and a non-insider, and resulted from a competitive bidding process, there is a basis for finding that the Purchaser entered into the Sale Agreement in good faith. Accordingly, the Debtor requests that the Court make a specific finding of good faith under Bankruptcy Code section 363(m), so that the transaction can be consummated prior to the expiration of the Letter of Credit on June 30, 2004 without the risk of a lengthy appeal process.

Notice

12. Notice of this Motion has been provided to the Office of the United States Trustee, counsel for the Debtor's pre-petition secured lenders, the indenture trustee for the

Debtor's senior note holders, counsel to the Agent for the Debtor's debtor-in-possession lenders, the Debtor's thirty largest unsecured creditors, the Purchaser, and the parties listed on the Master Service List. In light of the nature of the relief requested, the Debtor submits that no further notice is necessary.

Conclusion

For the foregoing reasons, the Debtor respectfully requests that this Court enter an order under Bankruptcy Code Sections 365 and 363 authorizing the Debtor to assume the Sale Agreement, with an amendment to paragraph 2 of that agreement to provide that the full purchase price must be paid by no later than the time the Loom Equipment is removed from the Debtor's premises, and in no event later than June 30, 2004.

This 7th day of April, 2004.

Respectfully submitted,

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ATTORNEYS FOR THE DEBTOR

Exhibit A

USED MACHINERY PURCHASE AGREEMENT

**IN THE UNITED STATES BANKRUPTCY COURT
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DAN RIVER INC., <i>et al.</i>)	Case Nos. 04-10990 through 04-10993
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Debtors.)	Judge Drake
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**ORDER GRANTING DEBTORS' MOTION TO ASSUME EXECUTORY CONTRACT
AND FOR AUTHORITY TO CONSUMMATE SALE OF EQUIPMENT
(Picanol Loom Sale)**

This matter is before the Court on the motion of Dan River Inc. (the "Debtor") dated April 7, 2004 for authority under Bankruptcy Code Sections 365 and 363 to assume the Used Machinery Purchase Agreement between Dan River Inc. and John W. Penden Company, Inc. dated February 25, 2004 (the "Sale Agreement"), and consummate the sale contemplated by the Sale Agreement (the "Motion"). (Capitalized terms not otherwise defined in this order have the meanings ascribed to them in the Motion.)

The Court has considered the Motion and the matters reflected in the record of the hearing held on the Motion. It appears that the Court has jurisdiction over this proceeding; that this is a core proceeding; that notice of the Motion has been given to all parties on the Master Service List and to the Purchaser; that no further notice is necessary; that the relief sought in the motion is in the best interests of the Debtor, its estate, and its creditors; and that good and sufficient cause exists for such relief. The Court also finds that the Purchaser has purchased the Loom Equipment in good faith, as that term is used in Bankruptcy Code section 363(m).

Accordingly, it is hereby ORDERED as follows:

1. The Motion (document no. ____) is GRANTED.

2. Effective immediately, the Debtor is authorized to assume the Sale Agreement, amended as follows: the last two sentences of section 2 of the Sale Agreement are amended to read: "The full purchase price must be paid at or prior to the time the last parcel of Loom Equipment is released from the Seller's possession, but in no event later than June 30, 2004. Time is of the essence of this Agreement, and in the event the Purchase Price is not paid in full by June 30, 2004, Seller may cancel this Agreement and retain the non-refundable deposits theretofore received (subject to paragraphs 3 and 8(c) below)."

3. The Court finds and concludes that (a) no cure or compensation to the Purchaser is required under Section 365(b)(1)(A) or (B) of the Bankruptcy Code; and (b) the Purchaser is adequately assured of future performance by the Debtor under the Sale Agreement for purposes of Section 365(b)(1)(C) of the Bankruptcy Code.

4. Notwithstanding Federal Rule of Bankruptcy Procedure 6006(d), this Order shall be effective immediately upon its entry.

5. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

SO ORDERED.

At Newnan, Georgia this ____ day of _____, 2004.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

Prepared and presented by:

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