

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

In re: )  
 ) Chapter 11  
PIKE NURSERY HOLDING LLC, )  
 )  
Debtor ) Case No. 07-79129-mgd  
 )  
 )

**PNC BANK, NATIONAL ASSOCIATION'S OBJECTION TO THE DEBTOR'S MOTION (A) FOR AUTHORITY TO SELL ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES PURSUANT TO 11 U.S.C. SECTIONS 105(a) AND 363(b), (f) and (m), AND TO ASSUME AND ASSIGN CERTAIN EXECUTORY CONTRACTS, LEASES AND LICENSES IN CONNECTION THEREWITH PURSUANT TO 11 U.S.C. SECTIONS 363 AND 365, (B) TO ESTABLISH PROCEDURES WITH RESPECT TO SUCH SALE, INCLUDING BIDDING PROCEDURES, (C) TO CONSIDER APPROVAL OF TOPPING FEE, AND (D) TO SHORTEN NOTICE**

**NOW COMES** PNC Bank, National Association ("PNC"), a secured creditor and party-in-interest with respect to this proceeding, who, by and through its counsel, objects to the *Debtor's Motion (A) for Authority to Sell Assets Free and Clear of Liens, Claims and Encumbrances Pursuant to 11 U.S.C. Sections 105(A) and 363(B), (F) and (M), and to Assume and Assign Certain Executory Contracts, Leases and Licenses in Connection Therewith Pursuant to 11 U.S.C. Sections 363 and 365, (B) to Establish Procedures with Respect to Such Sale, Including Bidding Procedures, (C) to Consider Approval of Topping Fee, and (D) to Shorten Notice* (the "Sale Motion"). In support of its objection to the Sale Motion, PNC respectfully states:

**BACKGROUND**

1. On November 14, 2007 (the "Filing Date"), Pike Nursery Holding LLC (the "Debtor") filed for protection under the Chapter 11 of the Bankruptcy Code.
2. The Debtor has continued in the management and operation of its business and properties as debtor-in-possession pursuant to Bankruptcy Code Sections 1107 and 1108. No trustee or examiner has

been appointed in this case, however, on November 20, 2007 the U.S. Trustee appointed an official committee of unsecured creditors (the "Committee") in this case.

3. On December 20, 2007, the Court entered *Final Order (A) Authorizing Debtor in Possession to Obtain Secured Postpetition Financing from PNC with Priority Set Forth Herein, (B) Approving Agreements Relating to the Foregoing; and (C) Granting Related Relief* (the "Final DIP Order"), pursuant to which the Court established a debtor-in-possession credit facility (the "DIP Facility") between the Debtor and PNC.

4. Pursuant to the Final DIP Order, PNC holds first priority liens in, *inter alia*, substantially all of the Debtor's personal property assets. Pursuant to the Final DIP Order, the Debtor owes PNC an amount which is anticipated to be approximately \$4,600,000 as of the date that the Auction Sales (defined below) are consummated, if approved. All of PNC's obligations are secured by first priority liens on substantially all of the Debtor's personal property.

5. On February 1, 2008, the Debtor filed the Sale Motion seeking authority to auction off its assets.

6. On February 26, 2008, the Debtor conducted an auction of its assets at which certain bids for certain of the Debtor's assets were accepted by the Debtor.

7. The Debtor extended the deadline for filing objections to the sale to February 27, 2008.

#### **The Results of the Sale**

8. Upon information and belief, the results of the Auction are as follows:

(a) The Debtor accepted a bid for its "retail" assets by Armstrong Garden Centers, Inc. ("Armstrong") for a sale price of approximately \$5,184,000 (the "Armstrong Sale"). The purported allocation of that price is \$2,000,000 for real property in Charlotte, \$800,000 for the "Pike Nursery" name and other personal property non-inventory assets at the retail locations and \$2,384,000 for inventory assets at the retail locations. Of the assets sold, PNC has a first priority lien \$3,184,000 of the assets. Upon

information and belief, the anticipated book value of the inventory at the retail locations is \$2,860,000 and the value of the "Pike Nursery" name and non-inventory assets is substantially in excess of \$800,000.

(b) The Debtor accepted a bid by Geo. Schofield Co., Inc. ("Schofield") for all of the assets at Store 28 and the "hardscape inventory" at Stores 52 and 55 for a purchase price of \$1,200,000 (the "Schofield Sale"). PNC has a first lien on all assets being sold in the Schofield Sale. Upon information and belief, the value of the inventory alone subject to the Schofield Sale is \$1,535,684.

(c) The Debtor accepted a bid by Skinner Nurseries, Inc. ("Skinner") for all of the assets at Stores 44 and 46 for a purchase price of \$1,000,000, which price is subject to certain holdbacks pending resolution of cure claims and lease issues (the "Skinner Sale"). PNC has a first lien on all assets being sold in the Skinner Sale. Upon information and belief, the value of the inventory alone subject to the Skinner sale is \$1,358,323.

(d) The Debtor accepted a bid from Gary Pike ("Gary Pike") to purchase certain of the assets of Store 52 and 55, which are not subject to the Schofield Sale, for a purchase price of \$490,000 (the "Gary Pike Sale"). PNC has a first lien on all of the assets being sold in the Gary Pike Sale. Upon information and belief, the value of the inventory alone subject to the Gary Pike Sale is \$863,221.

9. The gross proceeds of the Armstrong Sale, Schofield Sale, Skinner Sale and Gary Pike Sale (collectively the "Auction Sales"), appear to be approximately \$5,874,000, an amount more than \$1,000,000 in excess of PNC's anticipated debt on such assets at closing. After consummation of the Auction Sales, if they were to occur, the Debtor will have accounts receivable with a book value in excess of \$2,000,000 and will have assets at its Birmingham facility with a book value in excess of \$700,000. Despite these facts, PNC has not yet been able to obtain any assurance that PNC will be paid from the proceeds of the Auction Sales.

10. Unless PNC is paid in full at closing of the Auction Sales, PNC objects to the Auction Sales and asks that the Sale Motion be denied.

**The Debtor Has Not Met Its Burden Under 11 U.S.C. § 363 To Allow A Sale Of PNC's**

**Collateral**

11. A debtor ordinarily must obtain confirmation of a plan of reorganization before selling substantially all of its assets. See 11 U.S.C. §§ 1121-29 et seq. Section 363 of the Bankruptcy Code, however, provides an exception to this general rule. Under Section 363(b)(1) of the Bankruptcy Code, 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." Pursuant to Section 363(f) of the Bankruptcy Code, a sale can only be made "free and clear of any interest" of an entity other than the estate, only if:

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

(emphasis added).

12. PNC does not consent to the sale of its collateral free and clear of its liens. There are no applicable non-bankruptcy laws that would permit the Sale Motion to be approved with respect to PNC's collateral over PNC's objection.

13. Therefore, the Debtor's must demonstrate that such a sale is justified under Section 363(f)(3) of the Bankruptcy Code. Section 363(f)(3) of the Bankruptcy Code provides that sales free and clear of liens and interests are only justified if the sale price will exceed the aggregate value of all liens on the property. At the time that the Auction Sales are closed, PNC's lien on the property is anticipated to be approximately \$4,600,000. In order to approve the Auction Sales under Section 363(f)(3), the Debtor will have to show that the net proceeds of the sale of PNC's collateral exceed of \$4,600,000. If the Debtor is

able to establish this fact, then the Debtor will necessarily have enough to pay PNC at closing. If not, then the Debtor cannot meet the Section 363(f)(3) test. Without proof that PNC will realize at least the amount of its debt from the Auction Sales, the Debtor cannot use Section 363(f)(3) to approve the Auction Sales.

**The Price Received for the Auction Sales is Inadequate.**

14. If PNC is not going to be paid in full at closing of the Auction Sales, then PNC objects to the Auction Sales because the consideration paid is inadequate. As stated, PNC's obligations at the time of the closing of the Auction Sales is anticipated to be approximately \$4,600,000. While the gross proceeds of the Auction Sales far exceed that amount, if the net proceeds to PNC are below that amount, then the Auction Sales are inadequate.

15. In each instance, the sales are nearly going concern sales. Each purchaser is stepping into leasehold interests and operating businesses. However, in each case, the purchasers are buying assets for far less than the value of the assets. For example, in the Armstrong Sale, Armstrong is paying \$2,384,000 for inventory worth \$2,860,000 at cost. Armstrong is also paying \$800,000 for all of the non-inventory personal property assets at the retail locations, which includes the Pike Nursery name, for \$800,000 when the book value of leasehold improvements, equipment, vehicles, furniture and other assets at the retail locations exceeds \$2,600,000. Likewise, the gross purchase price paid by each of the purchasers at the wholesale locations is paying between 56% and 78% of cost of inventory, before accounting for any deductions which will make the recovery on such assets well below 56% to 78% of cost. In each instance, the Auction Sales have yielded a purchase price that falls well below the 65% advance rate the Borrower used to justify borrowing money from PNC under the DIP Facility.

16. The Court should not approve the Debtor's proposal to sell assets below liquidation value when the purchasers are buying the assets as a going concern, and in the case of Armstrong, are buying the name Pike Nursery and the goodwill associated with such name.

17. Upon information and belief, one item that the Debtor intends to pay at closing of the Auction Sales, prior to paying PNC in full, is a fee to its financial advisor, Alvarez & Marsal Securities, LLC, in the approximate amount of \$675,000. PNC does not consent to the Auction Sales and does not consent to these amounts being paid from PNC's collateral. Given the fact that, if the Debtor does not pay PNC in full at the close of the Auction Sales, the Auction Sales would not have yielded enough to satisfy PNC, the fee is inappropriate in light of the recovery on the assets being sold.

**Failing to Pay PNC in Full at the Closing of the Auction Sales is Harmful to the Debtor's Estate.**

18. As mentioned, sufficient proceeds exist to pay PNC in full from the Auction Sale proceeds. If the PNC lien is not satisfied at closing of the Auction Sales, then PNC will need to be actively involved in policing the liquidation of the remaining collateral (which consists of more than \$2,000,000 of accounts receivable and \$700,000 of inventory at the Debtor's Birmingham location). In addition, conducting these sales without paying PNC in full will be a default under the DIP Facility. Leaving PNC obligations in place after the Auction Sales, only adds to the already burdensome administration of this case. The Debtor is in the best position to liquidate the remaining personal property assets without the oversight of a lender and its counsel. No cash collateral or financing arrangements would be necessary if PNC is paid in full at the closing of the Auction Sales. In short, it makes no sense to leave a defaulted DIP facility in place after the Auction Sales have occurred when there are enough proceeds to pay the DIP Facility in full at the closing of the Auction Sales.

19. Finally, it bears noting that this sale process was not done at the request or insistence of PNC. PNC was not consulted before the Sale Motion was filed but only learned of the Debtor's motion when it was served by counsel to the Debtor. Likewise, PNC did not force this Debtor into bankruptcy. PNC gladly assisted when the request was made for postpetition financing to assist the Debtor in its reorganization efforts, but PNC did not choose this process. Furthermore, neither a bankruptcy case nor a

sale process such as this was necessary to liquidate PNC's collateral. In or out of bankruptcy, this Debtor could have easily operated going out of business sales and easily paid PNC's in full. This process was designed by the Debtors, the Committee and their advisors to get proceeds in excess of the PNC obligations in order to pay unsecured creditors and administrative claimants other than PNC.

20. PNC's objection to the Auction Sale is based wholly on the Debtor's apparent refusal to pay PNC off from the proceeds of the Auction Sales as is mandated by the DIP Facility and the Bankruptcy Code. If PNC will be paid in full from the closing of the Auctions, then PNC has no objection to the sales being consummated.

21. Unless the Debtor agrees to pay PNC in full at the closing of the Auction Sales, the Sale Motion should be denied with respect to the sale of PNC's collateral.

Dated: Charlotte, North Carolina  
February 27, 2008

MOORE & VAN ALLEN PLLC

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