

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: )  
 ) CHAPTER 7  
PIKE NURSERY HOLDING LLC, )  
 ) CASE NO. 07-79129-mgd  
Debtor )

**GAS SOUTH, LLC'S OBJECTION TO PROPOSED COMPROMISE AND SETTLEMENT  
OF CERTAIN CLAIMS BETWEEN MARCUS A. WATSON, CHAPTER 7 TRUSTEE OF  
PIKE NURSERY HOLDING, LLC AND PNC BANK, NATIONAL ASSOCIATION**

Gas South, LLC ("Gas South"), a creditor and party-in-interest, files this formal objection to the proposed compromise and settlement agreement between Marcus A. Watson, Chapter 7 Trustee of Pike Nursery Holding LLC, and PNC Bank, National Association, respectfully showing the Court as follows:

1.

On May 28, 2008, Marcus A. Watson, Chapter 7 Trustee for Pike Nursery Holding LLC ("Trustee"), filed an Emergency Motion for Approval of Compromise and Settlement Between Trustee and PNC Bank, National Association ("PNC") ("Motion") [Docket Entry Nos. 536 and 538<sup>1</sup>]. The following day, the Court commenced a hearing on the Motion. Gas South appeared at the hearing,

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<sup>1</sup> The Trustee filed an amended motion to correct an exhibit.

opposed the Motion and objected to the proposed settlement agreement.

2.

On May 30, 2008, the Court entered an Order authorizing an interim payment to PNC, continuing the hearing on the Motion until June 13, 2008, and directing creditors and parties-in-interest opposing the Motion to file written objections by June 11, 2008 [Docket Entry No. 558].

3.

Gas South files this objection in compliance with the Court's May 30, 2008 Order.

4.

Gas South markets and provides natural gas and related services in Georgia. On September 20, 2007, Gas South and Debtor entered into a Natural Gas Supply Agreement (the "Agreement") requiring Gas South to provide and Debtor to purchase natural gas for approximately 22 of Debtor's facilities during the winter heating season from October 1, 2007 through March 31, 2008. Gas South began providing Debtor natural gas, pursuant to the Agreement, on or about October 1, 2007.

5.

Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on November 14, 2007 ("Petition Date").

6.

On December 7, 2007, the Court entered an Order (A) Establishing Procedures for Utilities To Request Adequate Assurance of Payment, and (B) Establishing Procedures for Resolving Disputes Relating to Adequate Assurance Requests (the "Utility Order") [Docket Entry No. 129]. In the Utility Order, the Court prohibited Gas South and other utility providers from altering, refusing, terminating or discontinuing services to, and from discriminating against, Debtor on the basis of commencement of this case or because of unpaid charges for services provided by Gas South to Debtor prior to the Petition Date (Utility Order, ¶ 1). Additionally, the Court authorized Debtor to pay, on a timely basis, for post-petition utility services (Utility Order, p. 2).

7.

On December 20, 2007, after the Court entered the Utility Order, the Court entered the 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 ("Final PNC Financing Order") [Docket Entry No. 166]. PNC consented to the Court's entry of the Final PNC Financing Order, thereby agreeing to provide certain post-petition financing for Debtor.

8.

When PNC agreed to provide post-petition financing for Debtor, PNC had actual and constructive knowledge of the Utility Order and that Gas South and other utility companies would be providing post-petition utility services to Debtor to preserve Debtor's property, inventory and equipment and to allow Debtor to continue its operations. PNC also should have known that Debtor would pay or become obligated to pay for post-petition utility services, because such payments were contemplated expressly in the Utility Order.

9.

In the Final PNC Financing Order, the Court expressly preserves rights under Section 506(c) to surcharge expenses against PNC's collateral. See, Final PNC Financing Order, ¶ 14 at pp. 14-15.

10.

As required by the Utility Order, Gas South provided, and Debtor accepted, natural gas from the Petition Date until

approximately March 14, 2008, when Debtor ceased operations at the last of the facilities covered by the Agreement.

11.

In compliance with the Order Setting Deadline for Filing Proofs of Claim for Chapter 11 Administrative Expenses [Docket Entry No. 415], on May 21, 2008, Gas South timely submitted a claim for administrative expenses seeking payment of \$108,586.30 for post-petition natural gas provided to Debtor.<sup>2</sup>

12.

Gas South's natural gas delivered to Debtor after the Petition Date was necessary to preserve PNC's collateral and therefore directly benefitted PNC. Gas South repeatedly has asked the Trustee to surcharge Gas South's post-petition utility expenses against PNC's collateral under Section 506(c) of the Bankruptcy Code. See, e.g., Gas South's Motion for Allowance and Payment of Chapter 11 Administrative Expenses, ¶ 30 at p. 13 [Docket Entry No. 526].

13.

The Trustee asserts, in the Motion, that "he is entitled to surcharge PNC's collateral for, among other things, unpaid

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<sup>2</sup> Gas South has filed two other claims: (1) a second administrative expense claim for \$11,392.00 for natural gas provided to Debtor in the 20 days before the Petition and (2) a prepetition claim for \$18,570.35. Gas South's claims total \$138,548.65.

administrative expenses from the chapter 11.” See, Motion, ¶ 7 at p. 3, and Motion for Order Fixing Bar Date for Filing Proofs of Claim for Chapter 11 Administrative Expense, ¶ 7 at p. 3 [Docket Entry No. 396].

14.

The Court has established a procedure and timeline for the Trustee to evaluate and assert surcharge claims under Section 506(c) of the Bankruptcy Code. See Order Setting Deadline for Filing Proofs of Claim for Chapter 11 Administrative Expenses (setting May 30, 2008 as deadline to file Chapter 11 administrative proofs of claim) and Order denying PNC’s Motion for Order Directing Payment in Accordance with DIP Facility (setting June 30, 2008 as Trustee’s deadline to assert Section 506(c) surcharges) [Docket Entry No. 446].

15.

On May 28, 2008, before the expiration of the deadline to file administrative claims, the Trustee filed the Motion. When he filed the Motion, the Trustee could not have evaluated the administrative claims and whether surcharges could be made against PNC’s Collateral.

16.

In the proposed settlement agreement, the Trustee releases and forever waives surcharge rights under Section 506(c) and

precludes any creditor or party-in-interest from seeking to surcharge and from seeking to compel the Trustee to surcharge PNC's collateral under Section 506(c). See, Motion, Ex. A. at ¶¶ 2 and 8.

17.

As more particularly described herein, Gas South, a creditor with surchargeable expenses under Section 506(c), objects to the proposed settlement agreement because the proposed settlement is not fair or equitable. See Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988) (bankruptcy courts may approve a compromise only if it is fair and equitable).

18.

The Final PNC Financing Order (at paragraphs 13 and 14) and the Order denying PNC's Motion for Order Directing Payment in Accordance with DIP Facility expressly preserve the Trustee's rights to surcharge appropriate administrative expenses against PNC's collateral. Further, at the request of the Trustee and PNC, the Court established procedures and deadlines contemplating the Trustee's assertion of surcharges against PNC's collateral under Section 506(c).

19.

Notwithstanding those previous Court orders, the Trustee and PNC now seek approval of their agreement to preclude surcharges against PNC's collateral under Section 506(c). The proposed settlement agreement fails to deliver any recovery to the specific creditors who provided the post-petition goods giving rise to the surcharge rights sought to be compromised. The proposed settlement agreement improperly elevates and favors the interests of PNC over the rights and interests of Gas South.

20.

Although the Trustee asserts that he is entitled to surcharge PNC's collateral for certain unpaid administrative expenses, the Trustee proposes to waive, release and relinquish his rights to surcharge PNC's collateral. See, proposed settlement agreement, ¶ 2. Further, the Trustee and PNC have proposed that all creditors and parties-in-interest will be barred from asserting surcharge rights under Section 506(c).<sup>3</sup> See, proposed settlement agreement, ¶ 8. The complete elimination of surcharge rights under Section 506(c) is unfair

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<sup>3</sup> Although the trustee is cloaked with standing to assert surcharge rights under Section 506(c) of the Bankruptcy Code, a creditor apparently may obtain derivative standing or compel the trustee to exercise surcharge rights under Section 506(c). Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A., 530 U.S. 1, 13, n. 5 (2000).



to creditors holding surchargeable administrative expense claims.

21.

PNC argues that a Section 506(c) surcharge cannot be asserted against PNC's collateral because PNC alleges that it is oversecured. Whether PNC is oversecured has not been established, and Gas South disagrees with PNC's argument in any event.

22.

Section 506(c) of the Bankruptcy Code does not distinguish the collateral of undersecured creditors from the collateral of oversecured creditors. The Code Section does not state that the collateral of oversecured creditors is not subject to surcharge. See, e.g., In re Trim-X, Inc., 695 F.2d 296, 298 (7th Cir. 1982).

23.

The Trustee should seek to surcharge Gas South's utility expenses against PNC's collateral. In re McKeesport Steel Castings Company, 799 F.2d 91 (3d Cir. 1986); United States v. Boatmen's First National Bank of Kansas City, 5 F.3d 1157, 1160 (8th Cir. 1993); see In re Lunan Family Restaurants Ltd. Partnership, 192 B.R. 173, 179 (Bankr. D. Ill. 1996) (utility

and wage-related expenses should be surcharged against secured collateral).

24.

In the Final PNC Financing Order, the Court preserved the right to assert Section 506(c) surcharges at a time when, under the Utility Order, Gas South and other utility companies were providing post-petition utility services to preserve PNC's collateral. PNC knew that the Court, in the Utility Order, already had authorized Debtor to purchase and to pay for post-petition utilities as they accrued. PNC's loan funds were contemplated to be used, in part, to pay for post-petition utilities. Otherwise, without utilities such as gas and electric, PNC's collateral would have been exposed to the elements. At a minimum, the Trustee should seek to surcharge PNC's collateral to pay for the post-petition utilities required by the Utility Order. See 4-506 Collier on Bankruptcy (15th Ed. Rev.), ¶ 506.05 (when a secured creditor consents to an administrative expense, some courts allow greater latitude in surcharging the collateral).

25.

Upon information and belief, all of Debtor's assets are subject to security agreements. See, Final PNC Financing Order, ¶L at p. 5. Therefore, if Gas South's Section 506(c) expenses

are not surcharged against PNC's collateral (and PNC benefitted directly from those expenses), then those administrative expenses may not be paid. For example, Chapter 7 administrative expenses likely have priority over Chapter 11 expenses and will be paid first from the remaining estate assets.

26.

PNC contends that it holds a superpriority claim superior to any Section 506(c) surcharge against its collateral. This contention misses the point of Gas South's objection. If the Trustee (as he should) surcharges Section 506(c) expenses against PNC's collateral, then the amount surcharged would be payable directly to the provider of the Section 506(c) goods and services. PNC does not have a superpriority claim to amounts surcharged against its collateral under Section 506(c). In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1069 (9th Cir. 2001) (holding that section 506(c) "authorizes the payment of proceeds from a surcharge directly to the party who provided the quantifiable benefit to the secured collateral"); cf. In re JKJ Chevrolet, Inc., 26 F.3d 481 (4th Cir. 1994).

27.

Furthermore, the Trustee owes a fiduciary duty to the creditors of the estate to pursue surcharges under Section 506(c) that would benefit the estate, and the Trustee's failure

to pursue a proper surcharge may constitute a breach of that duty. In re JKJ Chevrolet, Inc., 26 F.3d at 485; In re Suntastic USA, Inc., 269 B.R. 846, 849 (2001). The Trustee should not be permitted simply to release and waive all rights to assert surcharges under Section 506(c) without providing a corresponding benefit to the affected creditors.

28.

The proposed settlement agreement would unfairly strip creditors with qualifying expenses under Section 506(c) of their rights to have those expenses surcharged against PNC's collateral without providing those creditors any recovery for their expenses or any assurance that their expenses will be paid. This disregard of the rights of the Section 506(c) providers is particularly unfair, and could serve to benefit other creditors at the expense of the administrative expense claimants.

29.

The proposed settlement agreement violates the equitable purpose of Section 506(c) of the Bankruptcy Code. Section 506(c) allows a trustee to recover costs and expenses from the collateral of a secured creditor to the extent that the expenditures benefit the secured creditor "to prevent a windfall to a secured creditor at the expense of the estate." Ford Motor

Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet), 26 F.3d 481, 483 (4th Cir. 1994). See also In re Nuclear Imaging Systems, Inc., 270 B.R. 365, 378-79 (Bankr. E.D.Pa. 2001) (Section 506(c) designed to prevent a secured creditor's "unjust enrichment").

30.

If the proposed settlement agreement is approved, PNC will recover all but \$150,000 of its secured claim, and none of the valid Section 506(c) expenses incurred to preserve PNC's collateral during the Chapter 11 case will be surcharged against PNC's collateral. Such a windfall to PNC (at the expense of the Section 506(c) providers) is not fair or equitable and conflicts with the purpose of Section 506(c) of the Bankruptcy Code.

#### **CONCLUSION**

The Court should not approve the proposed settlement agreement as currently drafted. If approved, PNC and its collateral will escape the legitimate claims of the Chapter 11 administrative claimants holding surchargeable claims, and Gas South and other post-petition utility providers will be left with unpaid claims arising from the Utility Order. Any settlement with PNC should compensate those creditors, like Gas South, whose goods and services preserved PNC's collateral, benefitted PNC and benefitted the bankruptcy estate.

This 11th day of June, 2008.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing Gas South's Objection to Emergency Motion for Approval of Compromise and Settlement Between Marcus A. Watson, Chapter 7 Trustee of Pike Nursery Holding LLC and PNC Bank, National Association via the ECF System (as indicated) or by causing true and correct copies of same to be deposited in the United States Mail, first-class postage prepaid, addressed to the parties listed on the Service List attached hereto as Exhibit "A."

This 11th day of June, 2008.

**/s/ Melissa J. Perignat**

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**EXHIBIT "A"**

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