

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

In re	)	
PIKE NURSERY HOLDING LLC,	)	
Debtor.	)	CHAPTER 7
	)	CASE NUMBER: 07-79129-mgd
	)	Hearing Date: July 10, 2008
	)	Hearing Time: 10:30 a.m.
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**CALIFORNIA FIRST LEASING CORPORATION'S LIMITED OBJECTION  
TO TRUSTEE'S MOTION TO REJECT LEASE AGREEMENT WITH  
CALIFORNIA FIRST LEASING CORPORATION**

Creditor California First Leasing Corporation ("CalFirst") submits this limited objection to Trustee's Motion to Reject Lease Agreement With CalFirst (the "Motion"), on the grounds that the Motion is premature as CalFirst believes the Trustee is using, and will continue to use, lease property subject to the lease to be rejected, beyond the identified rejection date.

**I. BACKGROUND**

1. On March 31, 2008 Trustee filed Trustee's First Omnibus Motion To Reject Executory Contracts And Leases (Docket #401) (the "Omnibus Motion") that, inter alia, sought permission from this court to reject lease no. CL-02021 between CalFirst and Pike Nursery Holding LLC (the "Lease").

2. On April 10, 2008 after a hearing, this court granted the Omnibus Motion but no order was entered. Subsequently, the Trustee filed an amended Omnibus Motion

(Docket #494) deleting all reference to the Lease. On May 2, 2008 this court entered an order granting the amended Omnibus Motion (Docket #506). The Trustee's stated reason for withdrawing its request to reject the Lease was that it realized it was using and needed to continue to use certain computer hardware and software described in the Lease (the "Lease Property"). The Lease Property is a POS (point of sale) system comprised of computer hardware and Clear Objective Enterprise Software. The original cost of the Lease Property totals \$612,065.31. That amount is comprised of \$62,327.64 of computer hardware with the remaining \$549,737.67 being computer software and its implementation costs.

3. Subsequent to February 29, 2008 neither the Debtor nor the Trustee made any rental payments to CalFirst despite numerous requests to do so, and despite the fact the Trustee admitted it was using the Lease Property. The post-petition rents currently due are as follows:

March Rent	\$20,869.33
April Rent	\$20,196.13
May Rent	\$20,869.33
June Rent	\$20,196.13
July Rent	\$20,869.33
<b>TOTAL:</b>	<b>\$103,000.25<sup>1</sup></b>

An administrative proof of claim was filed seeking rent through May 2008.

4. After the Omnibus Motion was granted, CalFirst was directed by attorneys for the Trustee to contact an employee of the Debtor, Marc Watson, to discuss the condition and location of some of the Lease Property. On May 21, 2008 John

Dilloughery, a portfolio manager at CalFirst, was informed by Marc Watson that the Clear Objective Enterprise Software portion of the Lease Property was residing on one of CalFirst's servers and the IT department was going to move the Clear Objective Enterprise Software from the CalFirst server onto another server that was not part of the Lease Property. After that transfer was completed the Debtor would allow CalFirst to pick-up the computer hardware. Mr. Watson also stated that the Debtor was using the Clear Objective Enterprise Software on a daily basis and would continue to need to use it. See Dilloughery affidavit filed concurrently herewith at para. 4. Given the accounting functions of the Clear Objective Enterprise Software CalFirst believes the Trustee needs to use the software program for some time.

5. Despite the apparent continued usage of the Clear Objective Enterprise Software, on June 18, 2008, the Trustee filed the subject Motion.

## II. CALFIRST'S OBJECTION

6. While CalFirst does not object to this court authorizing a rejection of the Lease when the Trustee is no longer using the Lease Property, CalFirst strenuously objects to the Trustee continuing to use the Lease Property after rejecting the Lease, and not making adequate protection payments to CalFirst for such use.

### **A. The Trustee Should Be Required To Make Adequate Protection Payments To CalFirst Until The Lease Is Rejected Or Assumed**

7. Pending a decision to assume or reject a lease of personal property, "on request of an entity that has an interest in property used, sold, or leased...by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest...". 11 U.S.C. Section

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<sup>1</sup> Monthly rents are based upon a daily rental rate of \$673.20.

363(e). When adequate protection is required pursuant to Section 363, it may be provided by “requiring the trustee to make a cash payment or periodic cash payments to such entity...”. 11 U.S.C. Section 361(1). It is well settled that the rent specified in a lease is presumptively the reasonable value of the debtor’s continued use of the leased property, and absent evidence to the contrary, is accepted as the measure of the lessor’s administrative expense claim based on the debtor’s continued use of the leased property. In re Raymond Cosette Trucking, Inc. (Bankr.D.N.D. 1999) 231 B. R. 80, 85.

8. Accordingly, the actual rent established by the Lease is the presumptive reasonable value of the Trustee’s continued use of the Lease Property, and the court should require CalFirst to be paid adequate protection payments for all past due post petition rent from March, 2008, along with monthly rent on a go forward basis through the date of rejection or assumption of the Lease.

**B. Any Rejection Of The Lease Should Be Conditioned On Return Of The Lease Property To CalFirst**

10. With respect to the equipment subject to a rejected lease, a debtor is required to return to the lessor the equipment upon rejection pursuant to Bankruptcy Code Section 365(a), thereby enabling the lessor to re-let the equipment to a third party. See In re Rigg, 198 B.R. 681, 685 (Bankr. N.D.Tex.1996); In re Blevins, 119 B.R. 814, 817 (Bankr N.D.Okla.1990).

11. Notwithstanding rejection, a debtor-lessee should return the leased equipment in accordance with the return and maintenance provisions contained in the rejected lease. It is well-settled that the rejection of a lease does not rescind the lease or the substantive rights and obligations of the parties contained therein. See Cinicola v. Scharffenberger, 248 F.3d 110,118 at n.8 (3d Cir.2001); In re Hughes, 166 B.R. 103, 105 (Bankr.S.D. Ohio 1994); see also Sir Speedy, Inc. v. Morse, 256 B.R. 657, 659 (D.Mass.2000) (rejection does not cause lease to magically vanish; rather, the post-petition rights and obligations of the debtor and the non-debtor are exactly the same as

they would have been had the debtor first breached the contract and then filed for bankruptcy). Furthermore, a debtor's failure to comply with the return and maintenance provisions of an ultimately rejected lease can give rise to an administrative claim for lessor's damages resulting from such non-compliance. See In re Unlimited Trucking Serv., Inc., 851 F.2d 159, 162 (6<sup>th</sup> Cir.1988); see also In re Atlantic Container Corp., 133 B.R. 980, 991-92 (Bankr.N.D.Ill.1991); In re International Coins & Currency, Inc., 18 B. 335, 338-39 (Bankr.D.Vt. 1982).

12. In this case the Lease contains certain terms governing the return of the Lease Property. In summary, these terms provide that the Debtor is obligated to pay for the deinstallation, packaging, and shipping of the Lease Property to CalFirst upon termination of the Lease.

13. The Trustee has informed CalFirst that the Estate has no intention of shipping any of the Lease Property to CalFirst. Instead, CalFirst is expected to remove all the Lease Property located in the various locations, without assistance. Additionally, the Trustee has indicated he has lost track of a large amount of the hardware portion of the Lease Property and it appears to be missing or stolen. Accordingly, absent an agreement by the parties regarding the return of the Lease Property, CalFirst objects to the Motion unless the order authorizing the rejection provides that upon rejection, the Trustee must immediately surrender and return the Lease Property in accordance with and in compliance with the applicable provisions of the Lease.

### III. CONCLUSION

14. Based upon all the foregoing, CalFirst requests this court to condition rejection of the Lease on the Trustee's discontinued usage of any and all the Lease Property, and return of the Lease Property, including any and all copies of the software portion of the Lease Property, to CalFirst.

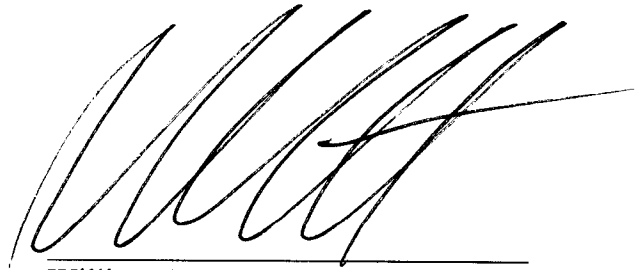
15. Alternatively, in the event the Trustee continues to use the Lease Property (or any portion thereof) the Estate should be required to pay CalFirst adequate protection

payments for such usage. In that regard, the Trustee should be required to pay CalFirst \$103,000.25 for past post-petition usage through July, 2008, and the monthly rental, i.e. \$20,869.33 on a go forward basis beginning in August 2008, until such time as use of the software ceases, and the Trustee returns all copies of the software to CalFirst.

16. Finally, CalFirst has filed an administrative expense claim with respect to the Lease and will seek all post petition amounts due and owing through the effective date of the Lease rejection (if any), as well as a claim for rejection damages. Accordingly, the filing of this objection should not be interpreted to be a waiver or release of CalFirst's rights against any person, entity with respect to the Lease.

WHEREFORE CalFirst requests that the Court condition any rejection of the Lease on the Trustee's discontinued usage of any and all the Lease Property, and return of the Lease Property, including any and all copies of the software portion of the Lease Property, to CalFirst. Additionally, the Estate should be required to pay CalFirst monthly adequate protection payments for usage of the Lease Property in the amount of \$20,869.33 per month retroactively from March, 2008 until such time as the Estate is no longer using the Lease Property.

Dated: July 8, 2008

A handwritten signature in black ink, appearing to read 'W. A. Rountree', written over a horizontal line.

William A. Rountree  
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Attorneys for California First  
Leasing Corporation

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing *California First Leasing Corporation's Limited Objection to Trustee's Motion to Reject Lease Agreement with California First Leasing Corporation* and *Affidavit of John Dilloughery In Support Of California First Leasing Corporation's Limited Objection to Trustee's Motion to Reject Lease Agreement with California First Leasing Corporation* was served upon the following parties via United States Mail, postage prepaid to ensure delivery upon the following parties:

Leroy Culton, Esq. United States Trustee Suite 362 75 Spring Street SW Atlanta, Georgia 30303	Marcus Watson, Interim Chapter 7 Trustee John Christy, Esq. J. Carole Thompson Hord, Esq. Schreeder, Wheeler & Flint, LLP 1100 Peachtree Street NE Suite 800 Atlanta, GA 30309-4516
Pike Nursery Holding LLC Attn: Scott Schnell, CEO 4020 Steve Reynolds Boulevard Norcross, Georgia 30093	J. Robert Williamson Scroggins & Williamson 1500 Candler Building 127 Peachtree Street NE Atlanta, GA 30303

On this 8<sup>th</sup> day of July 2008

*Macey, Wilensky, Kessler & Hennings, LLC*

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