IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

In re: **PANTHERA ENTERPRISES, LLC,** **Debtor** **Aaron C. Amore, Chapter 7 Trustee**	**BK No. 2:19-bk-00787** **Chapter 7**

MEMORANDUM OF LAW IN SUPPORT OF CHAPTER 7 TRUSTEE'S MOTION FOR AN ORDER APPROVING THE SALE OF THE DEBTOR'S REAL PROPERTY AND NOVATING CERTAIN GOVERNMENT CONTRACTS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES PURSUANT TO 11 U.S.C. § 363

Now comes Aaron C. Amore, Chapter 7 Trustee for the Estate of Panthera Enterprises, LLC ("Debtor") to submit the following *Memorandum of Law in Support of Chapter 7 Trustee's Motion for An order Approving the Sale of the Debtor's Real Property and Novating Certain Government Contracts Free and Clear of Liens, Claims, Interests, and Encumbrances Pursuant to 11 U.S.C. ¶ 363*.

BACKGROUND

1. Panthera Enterprises, LLC ("Debtor") commenced this bankruptcy case with the filing of a voluntary petition under Chapter 11 of the United States Bankruptcy Code on Friday, September 13, 2019.

2. On July 21, 2020, the Court entered an Agreed Order converting the bankruptcy case to a proceeding under Chapter 7 and appointing Aaron C. Amore as the Chapter 7 Trustee ("Trustee"). ECF 202.

3. On March 29, 2021, the Trustee filed a motion for approval of the sale of substantially all of the Debtor's assets to Panthera Training LLC free and clear of liens, claims, interests, and encumbrances pursuant to 11 U.S.C. § 363 ("363 Motion").

4. The Debtor's assets consist of (1) the Real Property, 747.49 acres in Hardy County, West Virginia ("Real Property"), which is the site of a security operations training facility ("Facility"); (2) modular buildings situated on the Real Property, which the Debtor scheduled as "38 Modular Office Buildings" on its Schedule A/B; and (3) a single contract with a government agency, for which the Debtor remains the prime contractor. ECF 23.

5. The "38 Modular Office Buildings" are actually six buildings (hereinafter the "Modular Buildings") constructed from 38 modular units that are fixtures. In 2009, the 38 modular units were placed on the Real Property, before the Debtor owned the Real Property. *Neff v. Panthera Enterprises, LLC et al.*, 622 B.R. 201, 203 (N.D. W.Va. 2020). They were leased to the Debtor's predecessor and then to the Debtor until July 23, 2015. *Id.* On July 23, 2015, the Modular Buildings were sold to the Debtor. The Trustee incorporates herein by reference the discussion of the Modular Buildings contained in WVEDA's *Memorandum of Law in Support of Motion for Relief from the Automatic Stay* filed May 20, 2021 in which the WVEDA argues the Modular Buildings are fixtures. ECF 346. As fixtures, the Modular Buildings are part of the Real Property and will be sold with the Real Property.

6. The purchaser, Panthera Training, LLC ("Training") currently leases the Debtor's Real Property, together all buildings, structures and other improvements and appurtenances thereon under a long term lease (through 2030 with three additional 10-year extension options). ECF 52-6. Training currently operates and maintains the Facility, conducting training courses for

clients it has developed while also providing training to a government agency pursuant to a subcontract with the Debtor.

7. In addition to acquiring the Real Property, Training will fund payment of certain administrative expenses and a small amount to pay unsecured claims. The latter is paid in partial consideration for the Trustee's agreement to assist and cooperate in novating to Training the Debtor's single government contract.

8. The West Virginia Economic Development Authority ("WVEDA"), the Debtor's largest creditor with a first priority lien against the Real Property, will be paid in full with the proceeds of sale of the Real Property. The two junior lienholders, West Virginia Paving, Inc., and Shockey & Sons Inc., will receive payments in consideration for release of their lien and consent to the sale.

9. The Trustee asserts that the proposed sale can be made free and clear of liens pursuant to 11 U.S.C. § 363(f). The junior lienholders have consented to the proposed sale and all other creditors and parties in interest claiming to have liens or an interest in the property subject to the proposed sale are the subject of *bona fide* disputes or, as discussed herein, lack standing to object to the proposed sale.

10. Three objections were filed in response to the Trustee's 363 Motion: (i) by Renick C. Williams, Betty P. Williams, and Robert R. Williams; (ii) by TR&L, LLC, and (iii) by Azadian Group, LLC. The Trustee's responses to these objections are detailed below.

OBJECTIONS TO THE 363 MOTION

A. Objection of Renick C. Williams, Betty P. Williams, and Robert R. Williams

11. *Objection of Williams*. Renick C. Williams and his wife, Betty P. Williams, are grantors of the 689.40 acre parcel sold to the Debtor in 2013.[1] Robert R. Williams serves as agent for Renick C. Williams and Betty P. Williams. ECF 321, ¶ 1. Together they are referred to as the "Williams."

12. A copy of the deed conveying the 689.40 acres to the Debtor is attached hereto as **Exhibit A** and is incorporated herein by reference (hereinafter referred to as the "Williams Deed"). It is the reservations, covenants and restrictions at paragraphs one through ten that are at issue in the Williams Objection.

13. The Williams filed their Objection to the Trustee's Motion on April 20, 2021, seeking an order of the Court prohibiting the sale or otherwise providing adequate protection for their interest in the Real Property. ECF 321. On May 7, 2021, the Williams filed a Memorandum in Support of their objection to the Trustee's Motion.

14. The Williams's objected to the Trustee's 363 Motion based upon their understanding that the Trustee seeks to strip the covenants numbered one (1) through ten (10) from the Real Property. In fact, the restrictive covenants were not specifically addressed in the Trustee's 363 Motion or Notice of Sale.

15. Further, the Williams assert that if they are not provided the right of first refusal pursuant to paragraph 7 of the Williams Deed, then they are entitled to receive 5% of the greater

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[1] The Debtor purchased a 689.40 acre parcel on or about August 22, 2013 from Renick and Betty Williams. Another 58.09 acre parcel was purchased on or about July 2, 2014 from a third party, not the Williams. Together, the two parcels make up the 747.49 acres that are the Debtor's Real Property.

of gross sales proceeds received or gross value of assets transferred, as provided for in paragraph 8 of the Williams Deed. ECF 342, p. 10.

16. *Response to Williams' Objection*. The covenants in paragraphs one (1) through five (5) of the Williams Deed are reservations that appear to run with the land and as such, would not be affected by the sale of the Real Property. Paragraphs nine (9) and ten (10) are simply representations that the Grantee, i.e., the Debtor, will comply with local, federal and state laws and regulations.

17. However, paragraphs six (6), seven (7), and eight (8) are not restrictive covenants that run with the land for the reasons stated herein. These are personal, contractual agreements that bind the Grantors, i.e., Renick C. Williams and Betty P. Williams and their "then surviving children," and the Grantee, i.e., TenX Group, LLC. Further, the right of first refusal given to Renick and Betty Williams and their "then surviving children" in paragraph seven (7) is an executory contract that is deemed terminated by the Trustee 60 days after the bankruptcy case was converted to a Chapter 7 proceeding.

18. Property interests and their characterization are determined by applicable state law, in this case West Virginia. In *McElroy Coal Co. v. Dobbs*, 853 S.E.2d 620, 626 (W.Va. 2020), the West Virginia Supreme Court of Appeals explained that a right conveyed by a servitude may be either appurtenant, meaning "it runs with land or an interest in land," or gross, meaning it is "not tied to ownership or occupancy of a particular unit or parcel of land." A servitude that is gross, and not transferable, is personal. *Id.*, citing Restatement (Third) of Property (Servitudes) § 1.5(3) (2000).

19. A right of first refusal is presumptively personal, i.e., it "is not transferable and does not run with land." *Id.* at 628, quoting Restatement (Third) of Property (Servitudes) § 1.5(3)(2000)

(emphasis added) ("when a court confronts a right-of-first-refusal servitude, the court begins by assuming that the benefit is personal . . ."). Whether this presumption is overcome is determined "by the . . . . [granting] language employed, considered in the light of surrounding circumstances." *Id*. at 626-7. The right is presumed to be personal "unless either the clause granting the right refers to successors or assigns or the instrument clearly shows the right was intended to be assignable." *Id*. at 628.

20. Under West Virginia law, the right of first refusal given to "Renick C. Williams, Betty P. Williams, or any of their then surviving children" is a servitude in gross, i.e., it does not run with the land. Further, by the words granting the right, it is not transferable. Hence, the right of first refusal is a personal contractual obligation.

21. The Williams highlight the introductory paragraph to the reservations, covenants and restrictions in the Deed, which state that the Grantee takes title to the property, "subject to the following reservations, covenants and restrictions, . . . [which] shall be deemed covenants running with the land." They argue this language indicates the right of first refusal in paragraph 7 runs with the land. ECF 342, p. 9. However, this is not the end of the inquiry. *McElroy*, 853 S.E.2d at 628.

22. The Court must also consider the language granting the right. Paragraph 7 grants the right of first refusal to "Renick C. Williams, Betty P. Williams, or any of their then surviving children." The Grantors are specifically named, and the words "successors and assigns" are not included, indicating a clear intent to limit the right of first refusal to "Renick C. Williams, Betty P. Williams, or any of their then surviving children." In contrast, the "adequate right of way" given in paragraph 3 is to "Grantors and their successors in interest." Similarly, paragraph 4 reserves for the Grantors, "their heirs, successors in interest and assigns," the water flowing from a spring. The

words "successors and assigns" are conspicuously absent from the rights granted in paragraphs 6, 7, and 8. One must conclude the right of first refusal given to the Williams and their surviving children is not transferable, despite the introductory words. *See, also, Park Station Ltd. Partnership, LLP v. Bosse*, 835 A.2d 646 (Md. 2003) (Construing a right of first refusal in a contract with other restrictions, held to be personal where the right was granted to a named person and omitted "successors or assigns" in the granting language.)

23. Moreover, in order for a right to run with the land, it must "[pass] automatically to successive owners or occupiers of the land or the interest in land *with which the right or obligation runs*." *Id*. at 626, quoting Restatement (Third) of Property (Servitudes) § 1.1(1)(a) (2000) (emphasis added). The Williams' right of first refusal does not benefit or burden any land of the Williams.[2] It is simply a personal, contractual right given to the Williams.

24. Applying West Virginia law, the right of first refusal granted to "Renick C. Williams, Betty P. Williams, or any of their then surviving children," is a personal, contractual right and not a restrictive covenant that runs with the land.

25. While property rights are determined by applicable State law, whether the right of first refusal is an executory contract is determined by federal law. *See, e.g., In re Fleischman*, 138 B.R. 641 (D. Mass. 1992).

26. A majority of courts hold that a right of first refusal is an executory contract that can be rejected under 11 U.S.C. § 365. *In re CB Holding Corp.*, 448 B.R. 684, 689 (Bankr. D. De. 2011) (citations omitted). The right of first refusal in the Williams Deed is no different.

27. An executory contract is

[2] For example, in *In re Fleishman*, 138 B.R. 641, 645, the Bankruptcy Court, applying the common law of Massachusetts, noted the right of first refusal "does not confer a direct physical advantages to the occupation of the Premises, nor does it relate to the mode of occupying or enjoying the land or the ability to control development or commercial use. It cannot be interpreted to be inherent or attached to the land."

> A contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

In re Fleishman, 138 B.R. at 646, citing to cases adopting the Countryman definition.

28. In this instance, the obligations of both the Debtor and the Williams are unperformed, and the failure of either to complete performance would constitute a breach. Hence the right of first refusal found in the Williams Deed is an executory contract. In fact, Renick C. Williams and Better P. Williams were scheduled on the Debtor's Schedule G of Executory Contracts. ECF 23.

29. As an executory contract, the right of first refusal is subject to 11 U.S.C. § 365(d)(1), which states that if a Chapter 7 trustee does not assume or reject an executory contract of the debtor within 60 days after the order for relief is entered, then such contract is deemed rejected.

30. The Debtor's bankruptcy case was converted to a Chapter 7 proceeding by Order entered July 21, 2020. ECF 202. The Trustee did not file a motion to assume or reject the executory contract. Hence, the right of first refusal given to the Williams is rejected. Further, because the Williams are not in possession of the Real Property and there was no specific consideration paid for the right of first refusal, the Williams do not have a claim for rejection of the right of first refusal. *See In re Fleischman*, 138 B.R. at 647-648.

31. The Williams' claim to the 5% distribution described in paragraph 8 of the Williams Deed is not triggered because the right of first refusal was rejected by the Trustee as an executory contract. Hence, the Williams are not entitled to the percentage distribution.

32. The Williams' objection to the Trustee's Motion to Sell must be overruled. The Williams' right of first refusal is a personal contractual right and an executory contract that is

deemed rejected by the Trustee. Hence, it cannot be a basis for objecting to the sale of the Real Property. *See, In re Fleischman*, 138 B.R. at 647 (§ 365(f) does not apply because the right of first refusal is not an interest in property). Similarly, the Williams' right to a portion of the sale proceeds is a personal contractual right, not an interest in the Real Property, and therefore, it cannot be a basis for objecting to the sale of the Real Property.

B. Objection of TR&L, LLC and SMI, LLC

33. *Objection of TR&L and SMI*. TR&L, LLC ("TR&L") and SMI, LLC ("SMI") filed their objection to the Trustee's 363 Motion on April 20, 2021. ECF 325. The objection incorporates by reference the factual allegations asserted by TR&L and SMI in their Counterclaim filed in Adversary Proceeding No. 21-ap-0002.[3] TR&L asserts that it is the successor to SMI.[4]

34. TR&L alleges that prepetition, on or about September 23, 2015, the Debtor executed and delivered to SMI a promissory note in the original principal amount of $100,000. ECF 325, ¶ 4. This note was replaced with a note in the principal amount of $400,000 on June 16, 2016, and amended September 5, 2017, to increase the principal balance to $475,000. *Id.* at ¶¶ 6-7. TR&L filed a claim in the Debtor's bankruptcy case for $529,199.00.[5] Claim ## 25, 26.

35. TR&L alleges that on September 23, 2015, the Debtor, PTC, Panthera WorldWide, LLC, and others executed a Security Agreement to secure payment of the 2015 promissory note pursuant to which TR&L was granted a security interest in all of the Debtor's personal property.

[3] On February 12, 2021, the Trustee, WVEDA and Training filed an adversary proceeding Complaint against TR&L, seeking to avoid the Debtor's prepetition conveyances to SMI. Adv. Proc. 21-ap-00002.

[4] TR&L and SMI filed an Assignment of Assets and Assumption of Assets in Adv. Proc. 21-ap-00002, dated as of September 13, 2019.

[5] TR&L filed two claims: # 25 for $529,199 for a "deficiency claim after liquidation of collateral conveyed 6/15/2018," and # 26 for $529,199 for a "loan."

ECF 325, ¶ 5. TR&L did not perfect the security interest, i.e., no UCC Financing Statement was filed.

36. On June 15, 2018, the Debtor, James Punelli, Raymond Jones and PTC ("Seller") executed a Bill of Sale, pursuant to which the Seller purportedly sold all of their rights, title and interest in the

> assets, inventory, vehicles, office equipment, furnishing, other equipment munitions, firearms, and other personal property and equipment owned by the Seller located at Panthera Training Center and located offsite used in the operations of the Panthera Training Center . . . , including but not limited to: All of Seller's equipment, furniture, fixtures, machinery, merchandise, firearms, vehicles, supplies and appliances, including, but not limited to, the specific items listed on the attached Schedule A.

(emphasis in original). ECF ¶ 8.

37. TR&L alleges that 83 modular units, i.e., the Modular Buildings, situated on the Debtor's Real Property were sold to SMI with the Bill of Sale. The Modular Buildings are not specifically itemized in the property sold pursuant to the Bill of Sale, and to date, a copy of the attached Schedule A has not been produced. Nevertheless, TR&L asserts that the Modular Buildings are personal property that were sold to TR&L with the Bill of Sale. ECF 10-11.

38. TR&L also objected to the proposed sale based upon a Timber Agreement described in the 363 Motion, stating that "*[i]f the timbering rights in fact were conveyed to SMI* prepetition, then the Trustee has no power to sell the real property free and clear of TR&L's rights, . . . ECF 325, ¶ 15 (emphasis added); Timber Agreement described at ECF 302, pp. 31-32.

39. TR&L objected to the proposed sale by the Trustee, contending that the bankruptcy estate's interest in the Modular Buildings and the timber rights is in dispute, and therefore, the Trustee cannot sell the Debtor's Real Property free and clear of liens. ECF 325.

40. *Response to TR&L and SMI Objection*.

a. TR&L and/or SMI's purported interest is the subject of a *bona fide dispute*.

41. The claims of TR&L and/or SMI are the subject of a *bona fide* dispute and as such, the Trustee contends the sale of the Debtor's property free and clear of liens may proceed pursuant to 11 U.S.C. § 365(f)(4). On February 12, 2021, the Trustee, WVEDA and Training filed a Complaint against TR&L and SMI, and others, seeking declaratory relief and voidance of prepetition transfers made by the Debtor to SMI. ECF 281, Adv. Proc. 21-ap-00002. Specifically, the plaintiffs seek voidance of the Bill of Sale executed June 15, 2018 and the Timber Agreement executed March 26, 2018 as fraudulent conveyances under West Virginia law and the Bankruptcy Code. *Id.*

b. TR&L and SMI are barred from claiming ownership of the Modular Buildings by the doctrines of *res judicata*, collateral estoppel and waiver.

42. *Res judicata* applies in the bankruptcy context, barring prosecution of a claim when the following three elements are met:

> (1) [T]he prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; (2) the parties are identical, or in privity, in the two actions; and, (3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.

In re Glaspell, 626 B.R. 272, 276 (Bankr. N.D. W.Va. 2021). Not only are claims that were actually adjudicated in the prior proceeding barred, *res judicata* also bars claims that could have been raised. *Id. See also, Baker v. Chemours Co. FC, LLC,* 855 S.E.2d 344, 349(W.Va. 2021) (*res judicata* "prohibits 'splitting' a claim or cause of action") (citations omitted).

43. Collateral estoppel, also known as "issue preclusion," prevents litigation of an issue previously decided when the party against whom the doctrine is asserted had a "full and fair

opportunity to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 94-95, 101 S.Ct. 411 (1980).

44. Collateral estoppel precludes relitigation of an issue when:

> (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

In re Hoak, No. 16-AP-32, 2017 WL 83351, *3 (Bankr. N.D. W.Va. Jan. 9, 2017).

45. "Waiver is the voluntary, intentional abandonment of a known legal right, advantage, or privilege." *In re Buffalo Coal Co., Inc.*, 418 B.R. 878, 890 (Bankr. N.D. W.Va. 2009), aff'd No. 2:10-CV-130, 2011 WL 917717 (N.D. W.Va. Mar. 8, 2011) (citation omitted). In the bankruptcy context,

> [w]here a party has adequate notice of a motion, fails to appeal the entry of an order granting the motion, and fails to avail itself of the process to object to its treatment under the motion and order, a new due process right does not arise and all parties are bound by the order.

In re AMF Bowling Worldwide, Inc., 278 B.R. 96, 102 (Bankr. E.D. Va. 2002).

46. Privity in the context of *res judicata* and collateral estoppel describes a relationship between a party to an action and a person who is not a party, but is bound by the action's outcome. "One relationship long held to fall within the concept of privity is that between a non-party and a party who acts as the nonparty's representative." *Rowe v. Grapevine Corp.*, 527 S.E.2d 814, 826 (W.Va. 1999). *See also, Weinberger v. Tucker*, 510 F.3d 486, 493 (4th Cir. 2007) (attorney-client relationship provided privity for purposes of precluding claim under collateral estoppel). *See, also, Sandlin v. Citimortgage, Inc.*, 2021 U.S. Dist. LEXIS 59552, CA No. 2:19-cv-02368, (W.D. Tenn., Mar. 1, 2021) (an attorney is in privity with its client for *res judicata* purposes) (citations omitted)

47. On Friday, October 18, 2019, Attorney William J. ("Jay") Leon appeared at the Debtor's first meeting of creditors in this bankruptcy case, representing SMI and Bill Neff Enterprises:

> EXAMINATION OF MR. PUNELLI BY MR. LEON:
>
> Q: Mr. Punelli, we met briefly earlier. My name is Jay Leon, and I represent SMI and Bill Neff Enterprises. . . .

Excerpt from Transcript of Meeting of Creditors, October 18, 2019, attached hereto as Exhibit A, 106:16-19.

48. Mr. Leon continues to be shown as counsel of record for SMI, LLC in this bankruptcy case. *See, e.g.*, Notice of Trustee's 363 Motion, listing Mr. Leon on behalf of Creditor SMI LLC and on behalf of Plaintiff Bill V. Neff Sr. ECF 315.

49. On February 12, 2020, Mr. Leon filed an Adversary Proceeding Complaint on behalf of Bill F. Neff, Sr. ("Neff"), initiating Adversary Proceeding 20-ap-00010 ("Neff AP"). ECF 97. In his Complaint, Neff sought an order of the Court declaring that he was the owner of the Modular Buildings. He also sought an order that he had the right to immediate possession of the Modular Buildings and damages for their use by Panthera Training, LLC. ECF 97.

50. The Neff AP was decided on cross-Motions for Summary Judgment. The Court held that the Modular Buildings were owned by the Debtor, not Neff, and as such they were property of the Debtor's estate. *Neff v. Panthera Enterprises, LLC*, 622 B.R. 201, 208 (Bankr. N.D. W.Va. 2020).

51. On April 20, 2021, SMI and its successor TR&L, now using different counsel, filed a Counterclaim in Adversary Proceeding 21-ap-00002, claiming TR&L was the owner of the Modular Buildings as of June 15, 2018. Adv. Proc. 21-ap-00002, ECF 17, Counterclaim, ¶ 18. In

addition, TR&L asserts that it is entitled to immediate possession of the Modular Buildings and compensation for their use by Training since June 15, 2018. *Id.*, Counterclaim, Counts I and II.

52. Mr. Leon was (and still is shown as) counsel of record for SMI at the same Mr. Leon filed the adversary proceeding complaint on behalf of Neff. Consequently, for purposes of both *res judicata* and collateral estoppel, SMI is in privity with Neff.

53. The claims made by Neff and now made by TR&L and SMI in their Counterclaim are identical. Each claimed or now claims that it is the owner of the Modular Units, and that it is entitled to immediate possession of the Modular Buildings and compensation for their use.

54. The elements of *res judicata* are met. The Court's Judgment in the Neff AP was final, the parties, i.e., Neff and SMI, are in privity, and the claims are identical.

55. The elements of collateral estoppel are also met. The issue previously decided, i.e., ownership of the Modular Units, is identical to the claim alleged by SMI and TR&L. There was a final adjudication on the merits in the prior action. The parties are in privity. SMI and TR&L had a full and fair opportunity to litigate the issue in the prior action. They had notice by virtue of their counsel's representation, and they could have intervened in the Neff AP to assert their rights as owner of the Modular Buildings.

56. Finally, at a minimum, SMI (and TR&L as successor) has waived its right to be heard on the issue of ownership of the Modular Buildings. It had adequate notice of the Neff AP and failed to take any action to protect its assertion that it was the owner of the Modular Buildings.

57. Based on the doctrines of *res judicata*, collateral estoppel and waiver, TR&L, as successor to SMI, is barred from claiming ownership of the Modular Buildings. Accordingly, its purported interest in the Modular Buildings does not give it a basis for objecting to the proposed sale. 11 U.S.C. § 363(e).

c. The Modular Buildings were not personal property of the Debtor on June 15, 2018 and therefore, were not included in the personal property sold to SMI by the Debtor on June 15, 2018.

58. TR&L's claim of ownership of the Modular Buildings is based upon an assertion that the Modular Buildings were personal property on June 15, 2018 when the Debtor sold its personal property to SMI. ECF 325, ¶ 11.

59. The Trustee incorporates by reference the portions of the WVEDA's Memorandum in Support of its Motion for Relief from Stay, in which the WVEDA argues that on June 1, 2018, the Modular Buildings were fixtures, and if not fixtures, they were certainly "structures" or "buildings." Consequently, they could not be sold with the personal property of the Debtor on June 15, 2018. Further, it is noted that the Bill of Sale dated June 15, 2018, which TR&L relies on for asserting that the Modular Buildings were sold to SMI, does not itemize the Modular Buildings and the Schedule A, which purportedly does itemize the personal property sold to SMI, has never been produced.

d. TR&L does not have an interest in the timbering rights, and therefore, under 11 U.S.C. § 363(e), it does not have standing to object to the 363 Motion.

60. On May 24, 2018, a Memorandum of Timber Agreement executed by Theresa Morgoglione on April 30, 2018 was recorded with the Office of the Clerk of the County Commission of Hardy County at Book 346, page 278. Attached as **Exhibit C** and incorporated herein by reference is copy of the Memorandum of Timber Agreement. It recites that

> Pursuant to a Timber Agreement dated March 26, 2018, TenX Group, LLC has granted Theresa Morgoglione the right to harvest any and all timber, trees and other forest products growing on the above-referenced property, for a perpetual term, commencing on September 26, 2018.
>
> TenX Group, LLC and Theresa Morgoglione each have a fully-executed copy of the Timber Agreement dated March 26, 2018, the terms of which are incorporated herein.

61. Further, on June 11, 2018, the Debtor executed a First Amendment to the Timber Agreement, a copy of which is attached as **Exhibit D**. The First Amendment recites "by Timber Agreement dated March 26, 2018, . . . TenX granted Morgoglione the right to timber the Property . . ." and then goes on to amend the terms of the Timber Agreement.

62. Despite allegations that the Timber Agreement was given to SMI, the foregoing instruments strongly evidence that the Timber Agreement is with Theresa Morgoglione, not SMI. Consequently, TR&L does not have any interest in the timbering rights to the Property.

63. The Trustee has alleged various claims related to the Timber Agreement as against Morgoglione and SMI as further set forth in adversary proceeding 21-ap-2 ECF 281 ¶¶ 35-39 in his avoidance action for fraudulent transfer of the timber rights. The Clerk entered default against Morgoglione pursuant Federal Rule of Bankruptcy Procedure 7055 on May 6, 2021. See Doc.26.

64. Any dispute over the transfer of the timber rights has been resolved in favor of the Trustee.

65. It is axiomatic that in order for a party to object to a proposed sale of property, the party must have an interest in the property to be sold. 11 U.S.C. § 363(e) (". . . 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 conditions such use, sale, or lease as is necessary . . .").

66. Any objection to the 363 Motion made by TR&L based upon alleged timbering rights must be overruled. For all of the reasons cited above, the objection of TR&L and SMI to the Trustee's 363 Motion should be overruled.

C. Objection of Azadian Group, LLC

67. Objection. Azadian Group, LLC ("Azadian") claims that it provided financing to the Debtor prepetition, which was secured by two Merchant Receivables Purchase and Security

Agreements ("Receivables Agreements"), dated August 18, 2017 and October 24, 2017. ECF 327, ¶ 6. Copies of the Receivables Agreements are attached to Azadian's Objection as Exhibit A and Exhibit B. *Id*.

68. Azadian filed a UCC Financing Statement with the Delaware Department of State on December 12, 2016. ECF 327, ¶ 7. Azadian claims it has a security interest in all of the Debtor's tangible and intangible personal property. ECF 327, ¶ 6. However, its objection focuses on the single government contract of the Debtor and perhaps any receivables that derive from the contract. ECF 327.

69. Azadian asserts that if the proposed sale is consummated then proceeds of the sale of the non-real estate assets should be distributed to Azadian. ECF 327, ¶ 16. Further, Azadian asserts that the balance of the proceeds of sale after payment to the secured creditors who have claims against the real estate, should be paid first to Azadian in satisfaction of its lien. ECF, ¶ 28.

70. Response to the Objection of Azadian

a. Azadian does not have a security interest in any of the Debtor's property because it released its security interest.

71. Azadian's proof of claim for $86,829 states that this amount is due based upon the breach of a Settlement Agreement and Release ("Settlement Agreement"). Claim # 21. A copy of Azadian's Proof of Claim, with the exhibits, including the Settlement Agreement, is attached to this Memorandum for the Court's reference as **Exhibit E** and is incorporated herein by reference.

72. The Settlement Agreement recites the transactions with the Debtor, specifically the Merchant Receivables Purchase and Security Agreement, defined therein as "Agreements." It states the terms for payment of a Settlement Amount of $126,829, which shall be paid by the Debtor and its principals.

73. Further, paragraph 8 of the Settlement Agreement states the terms of "Mutual Releases and Covenants Not to Sue." Specifically, Azadian released the Debtor and its principals

> from any and all claims, defenses, demands, actions, allegations, causes of action, *debts*, dues, accounts, *agreements*, judgments, settlements, *obligations*, damages (whether incidental, consequential, liquidated, ensuring or resulting), losses, costs, attorneys' fees and expenses of every kind and nature whatsoever, known or unknown, fixed or contingent, *alleged to have arisen, or related to occurrences, under the Agreements*.

Ex. E (emphasis added).

74. By the words of the mutual release, Azadian released the underlying debt owed and most importantly, the security interest that was granted in the Agreements to secure payment of the debt. There is nothing in the Settlement Agreement that preserves Azadian's security interest until the full Settlement Amount is paid. There is nothing in the Settlement Agreement that voids the release or "reinstates" the security interest or obligations under the Receivables Agreements in the event the Debtor defaults. [6]

75. The provisions of the Settlement Agreement indicate the parties intended the terms of the Settlement Agreement and the requirement to pay the Settlement Amount to replace any indebtedness, obligations, or agreements of the parties that existed prior to execution of the Settlement Agreement. This is further confirmed by the terms of the summary judgment granted to Azadian in the Superior Court of the State of Delaware, C.A. N19C-04-235, which is also attached to Azadian's proof of claim. Ex. E.

76. The summary judgment states that plaintiff, i.e., Azadian, sued defendants for just one count: breach of the Settlement Agreement. Claim # 21, pg. 15. There is no reference to the underlying transactions that gave rise to the Settlement Agreement or the Debtor's default under

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[6] Paragraph 8 includes a provision that if any portion of the Settlement Amount must be disgorged by Azadian, the release given to the Debtor shall be null and void. However, no amount of the Settlement Amount is being disgorged in this instance, and a requirement to disgorge is not the same as default.

the underlying loan transactions, only the failure of the Debtor and its principals to pay Azadian the amounts due under the Settlement Agreement.

77. Based on the foregoing, Azadian does not have a security interest in any of the Debtor's property and therefore, there is no basis on which it may object to the proposed sale.

b. Azadian's purported interest in the Debtor's property is subject to a *bona fide* dispute, and therefore, the proposed sale may be approved under 11 U.S.C. §363(f).

78. Azadian claims in its objection that because the Trustee has not formally objected to its proof of claim, its interest cannot be the subject of a *bona fide* dispute under § 363(f). ECF 327, § 4, 14, 15. Azadian offers no authority for this position.

79. The filing of an adversary proceeding complaint or contested matter is not a prerequisite to asserting a *bona fide* dispute for purposes of § 363(f). *In re Collins*, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995) (*bona fide* dispute does not require that an adversary proceeding is filed). Rather, there must be "an objective basis for either a factual or legal dispute as to the validity of the debt." *Id.* (citations omitted). In this instance, there are multiple objective bases to dispute the validity of Azadian's debt or interest.

80. Azadian makes the claim that it should receive the proceeds of sale of the non-real estate assets, but no non-real estate assets are being sold. Hence, there is no basis to allocate sale proceeds to Azadian.

81. To the extent Azadian is claiming an interest in receivables arising under the government contract, it has waived such a claim. Azadian did not assert a cash collateral claim, having first raised the issue in response to the Trustee's 363 Motion. Further, any claim that Azadian may make to receivables post-petition is nullified by 11 U.S.C. § 552(a), i.e. "property acquired by the estate or by the debtor after the commencement of the case is not subject to any

lien resulting from any security agreement entered into by the debtor before the commencement of the case."

82. Moreover, there are no post-petition receivables. By contract, the funds paid by the government under its contract with the Debtor are not earned by the Debtor. All work under the contract since June 1, 2018 has been done by Training. Training expends both money and labor in order to provide the services the Debtor has contracted to provide. Each "call" for new work under the contract is an independent request and all training is conducted by Training. The Debtor has no claim or right to the proceeds of this work and neither should Azadian.

83. Finally, any security interest in the Debtor's government contract is unenforceable under UCC § 9-203(b)(2). In order for a security interest to be enforceable, the debtor must have rights in the collateral and the power to transfer rights in the collateral to a secured party. The Debtor is prohibited from assignment of the government contract. Hence, any attempt to purportedly assign it to Azadian fails.

84. Under 41 U.S.C. § 6305(a), titled "General prohibition on transfer of contracts,"

> The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party. A purported transfer in violation of this subsection *annuls the contract* or order as far as the Federal Government is concerned . . .

41 U.S.C. § 6305(a) (emphasis added).

85. Subsequent subsections of this statute set forth limited conditions wherein a contractor may be allowed to assign rights only to "amounts due from the Federal Government" on a contract. However, these subsections do not allow for a transfer of the contract itself.

86. There are limited conditions where the government may, in its discretion, recognize a third party as a successor in interest to a government contractor, which are described in 48 C.F.R. § 42.1204, "Applicability of novation agreement."

87. Specifically, 48 C.F.R. § 42.1204(a) states in pertinent part:

> 41 U.S.C. § 6305 *prohibits* transfer of Government contracts from the contractor to a third party. The Government may, when in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of (1) All of the contractor's assets, or (2) The entire portion of the assets involved in performing the contract.

48 C.F.R. § 42.1204(a) (emphasis added).

88. The cases cited by Azadian in its objection are not helpful:

- *In re Robert E. Derecktor of Rhode Island, Inc.* 142 BR 29 (Bankr. D. R.I. 1992) pertains to perfection, holding that compliance with the Assignment of Claims Act was not necessary to perfect a lien against proceeds of a debtor's contract with the military.

- *In re TopGallant Lines, Inc.*, 125 B.R. 682 (Bank. S.D. Ga. 1991) held that a holder of a UCC security interest in receivables has a security interest in funds when paid by the government to the same extent as it would have in any other receivables and further, that the Assignment of Claims Act was intended to protect the government and was inapplicable in a suit between creditors claiming rights to receivables.

- *In re Medina*, 177 B.R. 335 (Bankr. D. Or. 1994) held that the creditor met statutory conditions of exception to prohibition against assignment of interests in government contracts, and could claim priority over other claims. Notably, the creditor was considered a financing institution, the contracts were in excess of $1.00 and expressly permitted assignment, the contracts were not assigned to more than one party, and *written notice of assignment was properly filed.* No written notice of assignment was filed in this case.

89. Last, and most importantly, Azadian simply does not have standing to object to the proposed sale. It does not have an interest in the property of the Debtor that is being sold. The proposed sale is not selling receivables and it is not selling tangible and intangible personal property as listed in Azadian's security interest.

90. Section 363(e) provides that

> on request of an entity that has an *interest in property used, sold, or leased*, or proposed to be 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. § 363(e).

91. Absent an interest in the property proposed to be sold, Azadian lacks standing to object to the sale.

CONCLUSION

92. Based on the foregoing, and for the reasons cited in the Trustee's 363 Motion, the Trustee respectfully respects this Court to enter an order approving the sale of the Debtor's assets, as outlined in the 363 Motion, free and clear of liens and encumbrances pursuant to 11 U.S.C. § 363.

WHEREFORE, Aaron C. Amore, Chapter 7 Trustee for the estate of Panthera Enterprises, LLC respectfully requests this Court to enter an order (i) overruling the objections and approving the sale of the Debtor's Real Property to Panthera Training LLC and novation of the government Contracts to Panthera Training LLC in accordance with the terms described in the Asset Purchase Agreement, free and clear of liens, claims, interests, and encumbrances, pursuant to 11 U.S.C. § 363; (ii) finding that Panthera Training LLC has acted in good faith within the meaning of § 363(m) of the Bankruptcy Code; (iii) finding that the Asset Purchase Agreement was negotiated, proposed and entered into by the parties without collusion, in good faith and from arm's length bargaining positions; (iv) retaining the Bankruptcy Court's jurisdiction to resolve any controversy or claim arising out of or relating to the Asset Purchase Agreement or breach thereof; (v) finding that the Asset Purchase Agreement and the transaction contemplated thereby may be specifically enforced against and binding upon, and not subject to rejection or avoidance by the Debtor; and (vi) granting such other and further relief as the Court deems appropriate.

Dated: May 21, 2021

Respectfully submitted,

/s/Aaron C. Amore
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Counsel for Chapter 7 Trustee Aaron C. Amore

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
(Martinsburg)

In re	:	
	:	**BK No. 2:19-bk-00787**
PANTHERA ENTERPRISES, LLC,	:	
	:	**Chapter 11**
Debtor.	:	

CERTIFICATE OF SERVICE

I, Aaron C. Amore hereby certify that on this 21st day of May, 2021, the foregoing *Memorandum of Law in Support of Chapter 7 Trustee's Motion for An Order Approving the Sale of the Debtor's Real Property and Novating Certain Government Contracts Free and Clear of Liens, Claims, Interests, and Encumbrances Pursuant to 11 U.S.C. § 363* was served through the Court's ECF system on all parties registered to receive CM/ECF notices, including:

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Mark A. Lindsay mlindsay@bernsteinlaw.com
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Manual Notice List

Notice was not mailed to the parties below as no addresses were provided. To the extent the Trustee has email addresses the below notice parties, they were emailed.

Rob Duncan
Manager/Duncan Development Group, LLC
Rob Duncan
Manager/TR&L, LLC,
a Virginia Limited Liability Company
Successor to SMI, LLC,
a Virginia Limited Liability Company

Bruce Hardy
Stacie Hardy
Anthony McIntyre
Timothy Miller

/s/ Aaron C. Amore
Aaron C. Amore, Esq.