UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

In re:

PANTHERA ENTERPRISES, LLC,

Debtor-in-possession.

Case No. 2:19-787
Chapter 11

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,

Movant,

v.

PANTHERA ENTERPRISES, LLC,

Respondent.

DEBTOR'S OBJECTION AND RESPONSE IN OPPOSITION TO WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO FORECLOSE AGAINST THE DEBTOR'S REAL PROPERTY AT 2506 FISH POND ROAD, OLD FIELDS, HARDY COUNTY, WEST VIRGINIA

AND NOW, comes Panthera Enterprises, LLC ("Debtor"), by and through its undersigned counsel, and files this objection and response in opposition (the "Response in Opposition") to *West Virginia Economic Development Authority's Motion for Relief from the Automatic Stay to Foreclose against the Debtor's Real Property at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia* (the "Motion"). In support of its Response in Opposition, Debtor states as follows:

JURISDICTION AND VENUE

1. This Court (hereinafter defined) has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b).

2. Venue of this Motion is proper in this district under 28 U.S.C. §§ 1408 and 1409(a).

INTRODUCTION

3. West Virginia Economic Development Authority's ("EDA") Motion for Relief from Stay (the "Motion"), if granted, would short-circuit Debtor's opportunity for and efforts at reorganization and would serve to benefit only the EDA to the detriment to all other creditors and parties in interest. The EDA ironically claims to be concerned with the estate while at the same time seeking to foreclose on the Debtor's primary asset for the EDA's sole benefit. As the Court has perceived and noted on the record on multiple occasions, the Debtor has available business that can and should function in any way to benefit all parties in interest if certain issues and disputes can be resolved amongst certain key parties. The Debtor is in the midst of the very process of attempting to resolve such issues so that it can maximize value for ALL creditors and parties in interest and achieve a successful reorganization. Besides not being supported by relevant facts or applicable law, the EDA's Motion is premature and contrary to the Chapter 11 goals of providing the debtor with an opportunity to remedy past financial difficulties and challenges and successfully rehabilitate itself. The EDA's request is particularly egregious given that it is overwhelmingly adequately protected by both the value of the Property serving as its collateral and the fact that it receives loan payments in the amount of $52,000 every month.

4. The Debtor has significant equity in the Property and the Property is necessary for a successful reorganization. The EDA's interest is adequately protected and the Debtor is entitled to an opportunity to develop and propose a Chapter 11 plan that will benefit all creditors and parties in interest. The EDA's Motion, if granted, would benefit only the EDA and would have the unfortunate effect of drastically diminishing the value of the estate to the detriment of all

other parties in interest. As discussed more fully below, the EDA's Motion should accordingly be denied.

BACKGROUND

5. On September 13, 2019 (the "Petition Date"), the Plaintiff filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the "Bankruptcy Code") of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of West Virginia (the "Court") at case number 19-00787 (the "Case").

6. The Plaintiff owns the real property located at 2506 Fishpond Road, Old Fields, West Virginia 26845 (the "Real Property"), including the improvements, structures and various personal property situated on such real property (collectively, the "Property"), all of which is utilized as a training facility for various of the Plaintiff's clients and customers (the "Facility").

7. Beginning in or October, 2015, the Debtor's business of fulfilling government training contracts began experiencing financial difficulty due to uncontrollable issues with the government's defense business and sequestration. Prior to that time, the Debtor had operated successfully and continued to grow its business.

8. Due to the financial difficulties it was experiencing, on or about June 1, 2018, the Debtor and Panthera Training, LLC ("Training") entered into a commercial lease (the "Lease") by which Training was to occupy the Property and the Facility and conduct certain trainings (the "Trainings") to fulfill certain contracts held by the Plaintiff (the "Training Contracts"). A true and correct copy of the Lease is attached hereto as **Exhibit A.**

9. The Debtor subcontracted the Training Contracts to Training to allow Training to facilitate the Trainings while it was leasing the Property (the "Subcontract"). A true and correct copy of the Subcontract is attached hereto as **Exhibit B.**

10. Prior to the Lease and the Subcontract, the Debtor performed all obligations under the Training Contracts through an affiliated subcontractor.

11. In a related proceeding well known to the Court, the Debtor and Training traded requests for preliminary injunctive relief, all of which has been denied by the Court. In the process of that dispute, Debtor and Training have entered into an agreement to ensure that certain crucial December Trainings are conducted as scheduled, including the very important DEA Trainings.

12. Even after the Debtor entered into the Lease and Subcontract, the Debtor has remained involved in various aspects of the business operations conducted at the facility.

13. In particular, the Debtor's involvement in the Facility was and is crucial to Training's preparation of a proposal to obtain new government Training Contracts since Training did not and does not have the experience, track record or resources necessary to prepare such proposals and be awarded such contracts. By way of example, as recently as June of 2019, the Debtor's principals, particularly Raymond Jones, prepared an RFI to be submitted to the DEA for a proposed Disaster Readiness Course.

14. The EDA is a secured creditor of the Debtor as a result of two prepetition loans made to the Debtor (the "Loans"). The Loans are secured by Deeds of Trust on the Debtor's Property and the EDA has alleged first priority liens on the Property.

15. As of the Petition Date, the total amount due under the loans to the EDA was $6,433,609.38.

16. As a result of the Debtor's Lease with Training, Training pays $52,000.00 a month to the EDA as payment on the Loans. The $52,000.00 would otherwise be due to the Debtor as monthly rent, but Debtor forgoes such rent in order to ensure monthly payments to the EDA.

17. Since July of 2018, EDA has been timely paid all monthly payments due to it from Debtor.

18. The Debtor and various other parties entered into a forbearance agreement on July 6, 2018 (the "Forbearance Agreement"). Under the Forbearance Agreement, the EDA agreed to forbear from exercising its rights under the Loans for a period of six months and in exchange, the monthly rental payments in the amount of $52,000.00 that Training owed to the Debtor under the Lease were to be made directly to the EDA.

19. The Debtor did not default on the Forbearance Agreement during the six-month period and the EDA timely received its monthly payments as required.

20. The Forbearance Period expired on January 6, 2019.

21. EDA waited until August 14, 2019 – more than eight months from the expiration of the Forbearance Period – to send letter a notice of default under the Loans and Deeds of Trust.

22. On November 2, 2019, the EDA filed the Motion seeking relief from stay to foreclose on the Property. Simultaneously, the EDA filed a motion to convert this Case to a chapter 7 proceeding, or in the alternative, dismiss this Case (the "Motion to Convert") [Doc. No. 55].

23. Simultaneous with the Debtor's filing of this Objection and Response in Opposition, the Debtor has also filed an Objection and Response in opposition to the Motion to Convert (the "Objection to the Motion to Convert"). **Debtor's Objection to the Motion to Convert, including all Exhibits thereto, is fully incorporated herein by reference and asserted in opposition to the instant Motion for Relief from Stay**.

ARGUMENT AND LEGAL AUTHORITY

24. Section 362(d) of the Bankruptcy Code provides, in pertinent part, that:

> "On request of a party in interest and after notice and a hearing, the court shall grant relief from the say provided under subsection (a) of this section, such as be terminating, annulling, modifying, or condition such stay –
>
> (1) For cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) With respect to a stay of an act against property under subsection (a) of this section, if -
>
> (A) The debtor does not have an equity in such property; and
> (B) Such property is not necessary to an effective reorganization.

11 U.S.C. §362(d).

25. When a creditor moves for relief from the automatic stay, the moving creditor bears the initial burden of showing cause for relief from stay. *See In re Toomer*, No. 10-07273-JW, 2011 Bankr. LEXIS 3744, *6 (Bankr. D. S.C. Oct. 5, 2011).

26. Only after the movant shows that cause exists for relief from the automatic stay does the burden shift to the debtor to demonstrate the lack of cause and the existence of adequate protection. *See id.*

27. The EDA has failed to meet its burden of showing that cause exists to grant relief from the stay. Further, the EDA is adequately protected by the value of the Property as demonstrated by the most recent appraisal and EDA's of monthly loan payments.

28. Notably, the EDA does not argue for relief from stay under §362(d)(2), even though the relief it seeks relates to an act against property, because it is readily apparent that the Debtor has equity in the Property and that the Property is necessary for a successful reorganization. These factors weigh heavily in favor of denial of the EDA's Motion.

I. The existence of prepetition consent to relief from stay is not determinative of cause.

29. The existence of a prepetition consent to relief from stay in a forbearance agreement is not determinative of finding the cause necessary to lift the relief from stay. *See In re Drawdy*, No. 01-04844-W, 2001 Bankr. Lexis 2395, *14-15 (Bankr. D. S.C. Sept. 20, 2011).

30. The existence of such a provision consenting to relief from stay is only one element that may support a finding of cause, but courts consider a variety of factors and employ a totality of the circumstances analysis when determining whether to grant the relief from stay where the debtor had made a prepetition agreement to allow a creditor to obtain relief from stay. *Id.*

31. In determining whether to grant a creditor's motion for relief from stay where a prepetition agreement consented to such relief, the court in *In re Drawdy* set forth eight factors that a court may consider in determining whether such a provision should be enforced:

> (1) whether the affected party understood the terms and consequences of the waiver of stay, (2) the benefit the debtor received from the workout agreement, (3) the kiss of consideration or potential prejudice to the creditor if the waiver is not enforced, (4) the effect of enforcement on other creditors, (5) the likelihood of a successful reorganization, (6) public policy that favors pre-petition workouts outside of bankruptcy, (7) objections by other parties to the relief from stay, and (8) the waiver as a means of inducing the creditor to surrender enforcement rights.

In re Drawdy, No. 01-04844-W, 2001 Bankr. LEXIS 2395, *13 (Bankr. D. S.C. Sept. 20, 2001 (relying on *In re Riley.*, 188 B.R. 191, 192-92 (Bankr. D.S.C. 1995) and *In re Darrell Creek Assocs.*, L.P., 187 B.R. 908, 913-15 (Bankr. D. S.C. 1995).

32. The effects of the motion on other creditors is a crucial consideration in the court's determination of whether to enforce such prepetition provisions because, regardless of the debtor's willingness to enter into agreements affecting its rights, the other creditors of the estate who would be affected by the relief from stay did not agree to have their rights altered. The Debtor has multiple general unsecured creditors and they have significant claims. Protection of

their interests by preserving the Real Property and allowing the Debtor to seek to reorganize is wholly against the EDA's self-interest of attempting to foreclose on the Real Property for only its benefit. Substantial emphasis and weight should be allocated to this factor in order to preserve value in the estate and seek to accomplish what is in the best interests of **all** creditors.

33. Further, the six month period under the Forbearance Agreement expired nearly a year ago while the Debtor only filed its petition for relief less than three months ago.

34. The creditor had nine months to proceed with its rights under the Loans and should not be permitted to obtain relief from the stay now where doing so would detrimentally affect the rights of other creditors of the estate.

35. Also, the EDA will not be prejudiced if relief from stay is not granted because the EDA is adequately protected by both the value of the Property and its receipt of monthly loan payments.

36. As stated at length in its Response to the Motion to Convert or Dismiss, the Debtor has both the intent and the ability to reorganize under Chapter 11.

37. Lastly, it is not clear that the Debtor fully understood the potential consequences of the waiver provision.

38. Accordingly, considering the totality of the circumstances, particularly the detrimental effect a waiver would have on third party creditors, enforcement of the prepetition waiver provision is not supported and would not be in the best interests of the estate and other creditors.

II. The Debtor did not File this Case in Bad Faith.

39. In the Fourth Circuit, courts employ a totality of the circumstances analysis to determine whether a debtor has filed a bankruptcy petition in bad faith. In order to for a court to make such a determination of bad faith, the movant must establish that (1) the debtor's reorganization effort is objectively futile and (2) the debtor's filing was motivated by subjective bad faith. *See Carolin*

Corp. v. Miller, 886 F.2d 693, 700-01 (4th Cir 1989). Both prongs must be met in order for a court to find bad faith.

40. The Debtor's Objection to the Motion to Convert or Dismiss and the entirety of the arguments set forth therein regarding the EDA's failure to show that Debtor filed the Case in bad faith are fully incorporated herein by reference.

41. As set forth at length in the Debtor's Objection to the Motion to Convert or Dismiss, the filing of this Case was not motivated by subjective bad faith and the Debtor's reorganization efforts are not objectively futile.

42. Because there can be no finding of bad faith on the part of the Debtor, EDA's allegations in that regard provide no support to its request for relief from the automatic stay.

III. The EDA is Adequately Protected.

43. The EDA's concern surrounding the "lack of adequate protection" is without merit as it has continued to receive monthly adequate protection payments in the monthly amount of $52,000 and, despite the bald claims made by the EDA that the Property is fully encumbered, the Property has a generous equity cushion.

44. Courts have found that an equity cushion standing alone can provide adequate protection to a creditor. *See Bank Rhode Island v. Paxtuxet Valley Prescription & Surgical Ctr.*, 368 B.R. 1, 5 (D. R.I. 2008).

45. The Debtor's most recent appraisal, conducted less than five years ago, valued the Property at $15,050,000.00 (the "Appraised Value"). A true and correct copy of the Appraisal is attached hereto as **Exhibit C**. In particular, the Appraised Value includes the land ($6,727,410), various structures on the land ($3,042,345), and various site improvements ($5,277,161).

46. Based upon the Appraised Value of the Property, the EDA would have an equity cushion on its secured claim of more than twice the value of its claim.

47. As noted above, the EDA also receives it monthly loan payments in the amount of $52,000 directly from Training as a result of the Lease agreement between the Debtor and Training.

48. The EDA also feigns concern over how the monthly adequate protection payments will be made to it if the Lease is terminated. The EDA's "concern" in this regard is illusory. Although the Debtor gave notice to Training of termination of the Lease, Training advised that it did not recognize such termination and so the Lease obligations continue to be met, subject to the eventual resolution of the adversary proceeding between the Debtor and Training (Adv. Proc. No. 19-0051).

49. In any event, the only difference with regard to adequate protection payments to the EDA if the Lease is terminated will be that the Debtor will be paying the EDA directly rather than through Training.

50. As previously stated by the Debtor, it will redeem the Property by April 1, 2020. The Debtor recognizes the importance of redeeming the Property and will obtain the funds required to redeem the Property by whatever means become necessary. Again, the Debtor has substantial time within which to determine the best and most feasible manner in which to accomplish the redemption.

51. The EDA's concern regarding the SMI Agreement is irrelevant to the issue of adequate protection and does not affect the fact that the EDA is adequately protected by both the equity cushion as well as monthly adequate protection payments. In any event, the Debtor intends to

satisfy the SMI debt and obtain the release of the security interest created by the Timber Agreement through its Plan of Reorganization.

WHEREFORE, the Debtor, Panthera Enterprises, LLC, respectfully requests that the Court deny West Virginia Economic Development Authority's Motion for Relief from the Automatic Stay to Foreclose against the Debtor's Real Property at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia.

Date: December 11, 2019

BERNSTEIN-BURKLEY, P.C.

By: *<u>/s/ John J. Richardson</u>*

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the within Objection and Response to Motion for Relief from Stay was served via the CM/ECF system upon all parties and counsel of record on this 11th day of December, 2019.

Date: December 11, 2019

Respectfully submitted:
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