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

In re	:	
	:	Bankruptcy Case No. 2:19-bk-00787
Panthera Enterprises, LLC,	:	Chapter 11
Debtor.	:	

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY'S OBJECTION TO DEBTOR'S SECOND MOTION FOR EXTENSION OF EXCLUSIVITY PERIOD

West Virginia Economic Development Authority ("WVEDA"), by its counsel, objects to Panthera Enterprises, LLC's ("Debtor") *Second Motion for Entry of Order Under 11 U.S.C. § 1121(d), Extending the Exclusivity Period for Filing and Confirming a Plan of Reorganization and Disclosure Statement*, filed March 12, 2020 (Dkt 100) ("Second Motion to Extend Exclusivity"), and as grounds for its Objection, WVEDA states as follows:

Factual and Procedural Summary

1. Debtor is a landlord for approximately 750 acres located at 2506 Fishpond Road, Old Fields, West Virginia 26845 ("Real Property"). The Real Property is the site of a security operations training facility ("Facility"). It offers tactical training for personnel involved in military and non-military protective services, including government, military and law enforcement personnel.[1] Dkt 79, ¶¶ 7, 8, 10.

2. Debtor purchased the Real Property in 2013 and 2014 with financing provided by WVEDA. *Id*., ¶¶ 20-26. In November of 2018, the 2017 tax liens for the delinquent taxes assessed on the Real Property were auctioned by the Hardy County Sheriff and certified to the West Virginia State Auditor's Office for disposition. *Id*., ¶ 30-31. Debtor currently holds only a right of redemption to the Real Property.

[1] Nearly all of the facts and documents cited herein are already in the record. Docket # 79 are Stipulated Facts from the hearing on WVEDA's Motion to Convert this case to a Chapter 7 proceeding or dismiss.

3. Debtor conducts no training. *Id.*, ¶ 9. Prior to June 1, 2018, Debtor contracted with its subsidiary Panthera Training Center, LLC ("PTC") to provide training at the Facility. *Id.*, ¶ 11. This is training the Debtor or PTC contracted to provide to third parties.

4. On June 1, 2018, faced with a foreclosure by WVEDA, Debtor entered into a 40+ year lease of the Real Property with Panthera Training, LLC ("Training") pursuant to the terms of a Commercial Lease Agreement ("Commercial Lease"). *Id.*, ¶¶ 14-15; Dkt 52-6, p. 11, ¶¶ 2, 5 (original term through 12/31/2030 with optional three (3) ten (10) year extensions). Training is unaffiliated with either the Debtor or PTC. *Id.*, ¶ 13. Effective June 1, 2018, Debtor also contracted with Training to conduct the training at the Facility that Debtor contractually agreed to provide third parties -- the training that Debtor's subsidiary, PTC, previously provided. *Id.*, ¶12, 14. As evidenced in the transaction documents, Debtor and its subsidiary PTC could no longer operate the Facility economically, and sought out Training "in an effort to generate cash flow that may allow [the Debtor] to avoid imminent foreclosure. . ." Dkt 52-6, p.10; Dkt 52-7, p. 2.

5. Debtor currently holds one contract, which is to provide training to a government agency. Dkt 79, ¶ 16. Payments for the training are made to the Debtor. However, by the terms of its contractual arrangement with Training, such payments are to be paid immediately upon receipt to Training. Dkt 52-7, p. 26, ¶ 1.

6. WVEDA is the Debtor's largest secured creditor, with a claim of $6,477,180.57. Claim # 4. The claim is based upon two loans made to Debtor prepetition, in 2013 and 2014. Dkt 79, ¶¶ 20-26.

7. Effective July 6, 2018, coinciding with the Debtor's long term Commercial Lease with Training and other agreements executed to turn over operation of the Facility to Training,

the Debtor entered into a Forbearance Agreement with WVEDA. Dkt 79, ¶ 28. The terms of the Forbearance Agreement required the lease payments being made by Training under the Commercial Lease, to be paid directly to WVEDA, to be applied to the outstanding indebtedness due and owing WVEDA on Debtor's loans. *Id.*, ¶ 29.

8. WVEDA continued to receive the monthly payments directly from Training. However, Debtor otherwise defaulted under the Forbearance Agreement. Among these defaults, the Forbearance Agreement matured January 6, 2019, without full payment. *Id.*, ¶¶ 29, 33. Debtor failed to pay the 2017 taxes, and the tax liens for the delinquent taxes were auctioned in November of 2018. *Id.*, ¶¶ 30-31.

9. Consequently, WVEDA proceeded to foreclosure and a sale was set for Monday, September 16, 2019. *Id.*, ¶ 33. Debtor filed its voluntary petition for protection under Chapter 11 on Friday, September 13, 2019. *Id.*, ¶ 35.

10. Debtor's first action was to declare the Commercial Lease with Training in default and then file an adversary proceeding against Training, seeking to remove Training from the Real Property and have the Real Property turned over to the Debtor (AP # 19-51, "Training AP"). Dkt 33, Compl. Debtor's request for preliminary injunction to remove Training from the Real Property was denied on December 5, 2019. Training AP Dkt 27. The Training AP is still pending and active.

11. On November 2, 2019, WVEDA filed its *Motion to Convert this Case to a Chapter 7 Proceeding, or, in the Alternative, Dismiss this Bankruptcy Case for Cause*, and *Motion for Relief from the Automatic Stay to Foreclose against the Debtor's Real Property*. Dkt 52,53. Both Motions were based on the assertion that Debtor's bankruptcy filing was not made

in good faith. The *Motion to Convert* was denied by Order entered December 27, 2019. Dkt 81. On January 9, 2020, WVEDA withdrew its Motion for Relief from Stay. Dkt 87.

12. On January 10, 2020, Debtor filed its first *Motion to Extend Exclusivity Period* ("First Motion to Extend Exclusivity"). Dkt 88. Debtor claimed that its "time and resources were occupied by disputes [with Training and WVEDA]" which were resolved or addressed with interim agreements, and "the Debtor now has greater ability to focus on its reorganization efforts." Debtor's request was granted by Order entered February 5, 2020, extending the Exclusivity Period to March 13, 2020. Dkt. 95.

13. On March 12, 2020, Debtor filed its Second Motion to Extend Exclusivity. Dkt. 100. Like its First Motion to Extend, Debtor argues that its time and resources have been occupied by the adversary proceeding it commenced against Training. Debtor contends resolution of the Training AP, as well as resolution of an adversary proceeding recently filed by Bill V. Neff, Sr. (Dkt 97, # 20-AP-0010, "Neff AP") would allow the Debtor to focus on reorganization and put forth a plan of reorganization. Dkt 100.

Argument

14. Section 1121 provides that only the debtor may file a plan for the first 120 days after the date of the order of relief or filing of the voluntary petition, commonly called the Exclusivity Period. The Exclusivity Period can be extended for cause after notice and hearing. 11 U.S.C. § 1121(d)(1). Whether to grant a request for extension is committed to the sound discretion of the bankruptcy court. *In re All Seasons Industries, Inc.*, 121 B.R. 1002, 1004 (N.D. Ind. 1990).

15. A request for extension of the Exclusivity Period is to be guided by the legislative purpose of Section 1121. That purpose is to balance affording the debtor a reasonable time to

obtain confirmation of a plan without the threat of a competing plan, against an unreasonable delay for the creditors. In re *Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993). Although the Code gives the chapter 11 debtor the first attempt to confirm a plan, a debtor should not be allowed to operate indefinitely without attempting to reorganize, thereby holding its creditors hostage. *Mother Hubbard*, at 195, and citing *River Bend-Oxford Assoc.*, 114 B.R. 111, 114 (Bankr. D. Md. 1990).

16. Loss of the Exclusivity Period does not "sound the death knell" for a Chapter 11 debtor. *All Seasons Industries*, 121 B.R. at 1005. It simply means that after that, any party in interest may propose a plan of reorganization. *See Mother Hubbard* at 195 (loss of exclusivity is not prejudicial because the debtor still has the ability to attempt to confirm its own plan of reorganization.)

17. Debtor carries the burden of demonstrating cause exists to grant a request for extension of the Exclusivity Period. *In re Ravenna Industries, Inc.*, 20 B.R. 886, 889 (Bankr. N.D. Ohio 1982); *In re Michigan Produce Haulers, Inc.*, 525 BR. 408, 413 (W.D. Mich. 2015) (Debtor bears burden of showing cause for extension under § 1121(d)(1)).

18. Further, a debtor's allegations of cause must be supported by evidence. "Mere recitations of allegations deemed by a debtor to constitute cause . . . are insufficient." *In re Nicolet, Inc.*, 80 B.R. 733, 742 (Bankr. E.D. Pa. 1987), citations omitted.

19. "Cause" is not defined in the Code. Rather, courts "generally [look] at the diligence of the debtor in proposing a plan, the complexity of the case and the relative negotiating strength of the parties." *Michigan Produce Haulers,* 525 B.R. at 413 (citations omitted). The factors most often cited include:

> (1) the size and complexity of the case; (2) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate

> information; (3) the existence of good faith progress toward reorganization; (4) the fact that the debtor is paying its bills as they become due; (5) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (6) whether the debtor has made progress in negotiations with its creditors; (7) the amount of time which has elapsed in the case; (8) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and (9) whether an unresolved contingency exists.

Michigan Produce Haulers, 525 B.R. at 413, citations omitted.

20. Notably absent from the *Michigan Produce Haulers* list is pending litigation, the only cause Debtor proffers for extending the Exclusivity Period. "Litigation within the bankruptcy court over even a key dispute between the parties is not the type of contingency which justifies extension of exclusivity." *In re Gialamas*, 2019 WL 6215974, *2 (Bankr. W.D. Wisc. 2019), quoting *In re Dow Corning Corp.*, 208 B.R. 661, 667 (Bankr. E.D. Mich. 1997). *See also*, *In re American Federation of Television and Radio Artists*, 30 B.R. 772, 774 (Bankr. S.D. N.Y. 1983) (pendency of appeal did not constitute cause to extend exclusivity period, case was not "unusually large" and debtor made no showing that it could successfully reorganize if exclusivity were extended).

21. The *All Seasons Industries* opinion is instructive. Like the case *sub judice*, the *All Seasons Industries* debtor argued for extension of the Exclusivity Period because (i) successful prosecution of pending litigation would have a substantial impact on the debtor's business and a proper plan could not be formulated without knowing the outcome; and (ii) litigation with its secured creditors had distracted the debtor from formulating and proposing a plan for reorganization. As the *All Seasons Industries* court explained:

> Debtor's post-petition litigation in this court does not weigh heavily in favor of extending the period of exclusivity. Indeed, "[t]he ordinary Chapter 11 debtor is expected to bring with it litigation, or the potential for it." (citation omitted). Litigation with creditors is not unusual. In this particular instance, debtor's post-petition litigation has been nothing "more than predictable creditor litigation,

> symptomatic of any business difficulty in its advanced stages." (citation omitted). It is not the type of litigation which justifies extending the period of exclusivity.

All Seasons Industries, 121 B.R. at 1005.

22. The *All Seasons Industries* Bankruptcy Court denied the extension request, citing also the policy behind § 1121. The Bankruptcy Court also noted the secured creditors had "lost faith in the capability and perhaps the integrity of debtor's management." *Id*. at 1006. The Court declined to make any findings as to whether such loss of faith was justified, but stated that loss of confidence in management "is a factor the court should and must consider in its determination" of a request for extension of the Exclusivity Period. *Id*. at 1006.

23. Like the *All Seasons Industries* debtor, Debtor's only basis for requesting the extension is the pending litigation. Only here, the litigation did not come with the bankruptcy case. Rather, the Debtor initiated the litigation post-petition. The loss of confidence in Debtor's management is evidenced by the WVEDA's early Motion to Convert this case to a Chapter 7. Nothing has changed that.

24. Debtor's case is also similar to the factual situation in *In re Scott*, 37 B.R. 184 (Bankr. W.D. Kentucky 1984). The *Scott* debtor extended a lien to a creditor prepetition to secure a delinquent debt, and then post-petition filed a Complaint to recover the money equivalent of the security interest as a preference, which it intended to use for operating capital. *Id*., 37 B.R. at 186. Here, Debtor entered into a long-term lease and other agreements with Training pre-petition to take over operation of the Facility, at a time when Debtor admitted it could not profitably operate the Facility and was facing imminent foreclosure. Approximately one year later, upon filing for bankruptcy protection, Debtor initiated the Training AP with the intent of taking possession of the Real Property and unraveling its contractual obligations to Training. The similarity does not stop there. The *Scott* debtor then sought an extension of the

Exclusivity Period, characterizing the litigation it instigated as "central to the overall scheme of reorganization." *Id*. Here the Debtor seeks a second extension based upon the pending Training AP it initiated, claiming resolution of the Training AP "will allow the Debtor to focus on reorganization." Dkt 100, ¶ 21. The *Scott* Bankruptcy Court denied the debtor's request. Likewise, Debtor's request for extension of the Exclusivity Period in this case should be denied.

25. Finally, the Debtor cannot claim any of the cause factors listed in the *Michigan Produce Haulers* opinion cited above. This is not a complicated case. The Debtor's assets consist of (i) a right of redemption for Real Property that is leased long-term to Training, (ii) a single contract that is being performed by Training, (iii) a hypothetical receivable that is the subject of the Training AP, and (iv) 83 modular units that are now the subject of the Neff AP and are claimed as collateral by the WVEDA. Debtor scheduled nearly $9 million in secured debt and over $11 million in unsecured debt. Debtor has failed to address the real property taxes due and how it will redeem the Real Property. *See, e.g., Gialamas*, 2019 WL *3 (request for extension denied where court was troubled that debtor had allowed an asset to go to tax sale). The Debtor has no business operation other than its existence as a landlord. To the extent Debtor claims to show potential revenue, it is a revenue stream that perhaps was available to Debtor prior to June 1, 2018. However, after June 1, 2018, Debtor's only sources of revenue are 100% contractually earmarked for other parties. Lease payments for the Real Property are paid directly to WVEDA by Training to satisfy Debtor's obligations to the WVEDA. Payments received for the training Debtor contracted to provide are to be paid 100% to Training. Debtor has made no formal or informal proposal for a plan of reorganization, and there has been no negotiation for a plan.

> In Chapter 11 cases involving debtors with uncomplicated financial structures and . . . no public shareholders, requests for extensions of the exclusivity periods

> should not be granted routinely or as a matter of course without proof as to probable success in formulating a plan of reorganization . . .

In re Grossinger's Assoc., 116 B.R. 34, 36 (Bankr. S.D. N.Y. 1990); *see also, In re Sharon Steel Corp.*, 78 B.R. 762, 765 (Bankr. W.D. Pa.) (extension of exclusivity period denied where debtor offered no evidence of cause or progress toward a plan). Debtor has proffered nothing that would suggest probable success in formulating a plan of reorganization. Like the *Grossinger's Assoc.* debtor, this Debtor appears to be "simply bidding for more time because it does not have any funding in place to support a plan . . ." *Id.*

WHEREFORE, for all of the reasons cited above, West Virginia Economic Development Authority respectfully requests this Court to deny the Debtor's Second Motion to Extend Exclusivity Period, and grant such other and further relief as the Court deems appropriate.

Dated: March 31, 2020

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY
By Spilman Thomas & Battle, PLLC

s/ *Debra Lee Allen*
Debra Lee Allen, WVSB # 9838
48 Donley Street, Suite 800
Morgantown, WV 26507-0615
304.291.7920 | 304.216.5835
Email: dallen@spilmanlaw.com
Counsel for West Virginia Economic Development Authority

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CERTIFICATE OF SERVICE

I, Debra Lee Allen, hereby certify that on this 31st day of March, 2020, the foregoing *West Virginia Economic Development Authority's Objection to Debtor's Second Motion for Extension of Exclusivity Period* was served through the Court's ECF system on all parties registered to receive CM/ECF notices, including:

Mark Lindsey, Esq.
Bernstein Burkley, P.C.
707 Grant St., Suite 2200
Pittsburgh, PA 15219
Counsel for Defendant
Panthera Enterprises, LLC

/s/ Debra Lee Allen
Debra Lee Allen, WV Bar # 9838