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**
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY, **Movant** **v.** **PANTHERA ENTERPRISES, LLC,** **Respondent**	

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO FORECLOSE AGAINST THE DEBTOR'S REAL PROPERTY, TOGETHER WITH ALL FIXTURES, BUILDINGS AND IMPROVEMENTS THEREON, AT
2506 FISH POND ROAD, OLD FIELDS, HARDY COUNTY, WEST VIRGINIA

West Virginia Economic Development Authority ("WVEDA"), by its counsel, moves this Court, pursuant to 11 U.S.C. § 362(d), for an order terminating the automatic stay in order for WVEDA to foreclose against the Debtor's real property, together with all fixtures, buildings and improvements thereon, located at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia. In support of its Motion, WVEDA states as follows:

Preliminary Statement

1. The Debtor filed its voluntary petition under Chapter 11 of the Bankruptcy Code on September 13, 2019.

2. The bankruptcy proceeding was converted to a Chapter 7 by Order of the Court entered July 21, 2020. Aaron C. Amore was appointed the Chapter 7 Trustee ("Trustee"). ECF 202.

3. The Debtor owns 747.49 acres in Moorefield District, Hardy County, West Virginia ("Real Property"), which is the site of a security operations training facility ("Facility"). ECF 81.

4. Movant WVEDA is a public corporation and government instrumentality under Chapter 31, Article 15 of the West Virginia Code. WVEDA is the Debtor's largest creditor, holding a priority deed of trust lien against the Debtor's Real Property and fixtures and improvement thereon.

5. On March 29, 2021, the Trustee filed a motion, pursuant to 11 U.S.C. § 363, seeking an order approving the sale of the Debtor's Real Property and novation of certain government contracts to Panthera Training LLC ("Training") free and clear of liens, claims, interests, and encumbrances (the "363 Motion"). Hearing on the 363 Motion is set for April 22, 2021 at 9:30 a.m.

6. WVEDA does not oppose the 363 Motion. However, in the event the 363 Motion cannot be granted, the WVEDA requests the Court to grant its Motion for relief from the automatic stay in order to pursue its rights and remedies against the Real Property and the fixtures, buildings and improvements thereon under the pertinent Deeds of Trust and applicable State and Federal law.

Background

7. WVEDA incorporates by reference the background facts stated in the 363 Motion, at pp. 3-16 (ECF 302), but restates below the pertinent facts in support of its Motion.

8. The Debtor acquired the Real Property in 2013 and 2014 with financing provided by the WVEDA.

9. WVEDA made two loans to the Debtor prepetition. ECF 81. The first loan was made August 21, 2013, in the original principal amount of $5,000,000 ("2013 Loan"). It is secured by a Credit Line Deed of Trust and Fixture Filing encumbering the 689.40 acre tract purchased. It is also secured by a Collateral Assignment of Leases and Rents. ECF 81.

10. The second loan was made one year later, on July 2, 2014, in the original principal amount of $1,871,505.00 ("2014 Loan" and with the 2013 Loan, the "WVEDA Loans"). This 2014 Loan financed the acquisition of an additional 58.09 acre tract, adjacent to the 689.40 acre tract. It is secured by a Credit Line Deed of Trust and Fixture Filing, granting WVEDA a subordinate lien on the 689.40 acre tract and a first lien on the 58.09 acre tract. It is also secured by a Collateral Assignment of Leases and Rents. ECF 81.

11. WVEDA filed its secured claim in this bankruptcy case on October 23, 2019 for a total of $6,477,180.47. Claim # 4.

12. Pursuant to the Credit Line Deeds of Trust and Fixture Filings, the Debtor granted WVEDA a priority interest in the Debtor's Real Property, more particularly described in **Exhibit A** attached hereto and incorporated by reference. ECF 52-3, pp. 2-24; 52-4, pp. 7-25. The Real Property is commonly known as 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia.

13. In both Credit Line Deeds of Trust and Fixture Filings, the Debtor granted WVEDA, in addition to the Real Property, its interest in all fixtures, buildings and improvements to the Real Property, specifically:

> [a]ll fixtures, fixed assets and personalty of a permanent nature owned by the [Debtor] now or at any time hereafter annexed, affixed or attached to the Property (as defined herein) hereby conveyed and the buildings, improvements or structures thereon and used or intended to be used in the possession, occupation or enjoyment thereof, and all replacements additions and substitutions thereof or thereto, . . . all of which, . . . shall be a part of the freehold and a portion of the security for the obligation herein described;

ECF 52-3, pp. 2-24; 52-4, pp. 7-25, page 2 of instrument.

14. Among the buildings on the Real Property are thirty-eight (38) modular units ("Modular Units"), which have been the subject of litigation in this bankruptcy case.[1] The Debtor purchased the Modular Units in July 2015. They have been adapted for use in operation of the Facility, serving as, for example, classrooms, specialized training rooms, a cafeteria and offices. As such, they are covered by the WVEDA's lien against all "buildings, improvements or structures . . . used or intended to be used in the possession, occupation or enjoyment . . ." of the Real Property. *Id.*

15. The Debtor first defaulted on the WVEDA Loans in February of 2015, not even a year after the 2014 Loan was made, by failing to make the monthly payments due under the terms of the respective promissory notes. The Loans were brought current in May of 2015, but the Debtor defaulted again in August of 2015, and the Debtor made no payments throughout 2016. ECF 52-10, pp. 2-6, ¶¶ 9-10.

[1] Bill V. Neff, who sold the Modular Units to the Debtor in 2015, filed an adversary proceeding in this bankruptcy case, seeking a determination that he was the owner of the Modular Units. Adv. Proc. No. 2:20-ap-00010, *Neff v. Panthera Enterprises, LLC et al.*, filed February 12, 2020. This Court denied plaintiff's request, holding that the Debtor owned the Modular Units at the time of filing its voluntary petition. 622 B.R. 201, 208 (N.D. W.Va. 2020).

16. In May of 2017, the Debtor and WVEDA entered into a modified payment arrangement whereby the Debtor agreed to pay $20,000 per month for each of the Loans. However, the Debtor defaulted on the modified payment arrangement. ECF 52-10, pp. 2-6, ¶¶ 11-12

17. On February 28, 2108, WVEDA sent a notice of default and demand for payment to the Debtor and its guarantors, giving the obligors a deadline of March 31, 2018 to cure the default. Nothing was paid. ECF 52-10, pp. 2-6, ¶ 13.

18. WVEDA commenced a foreclosure under the two Credit Line Deeds of Trust that secured the Loans in May of 2018. ECF 52-10, pp. 2-6, ¶ 14. Shortly thereafter, the Debtor advised WVEDA it had entered into certain agreements with Training, as of June 1, 2018, to turn over operation of the Facility to Training. ECF 52-10, pp. 2-6, ¶ 15.

19. One of those agreements is a Commercial Lease Agreement, dated June 1, 2018 ("Lease"), pursuant to which Training leased the Debtor's Real and Personal Property for a term of twelve (12) years, together with the option to Training to extend the Lease for three (3) additional ten (10) year periods. ECF 2-6, pp. 10-64. In other words, the Debtor leased the Real Property to Training for an extended term of 42 years.

20. WVEDA, Debtor, Punelli, Jones and Training then entered into a Forbearance Agreement, effective as of July 6, 2018 ("Forbearance Agreement"). Per its terms, WVEDA agreed to forbear from exercising its rights under the WVEDA Loan documents, and the Debtor, among other things, agreed that the monthly rent payments to be paid by Training to the Debtor under the Lease would be paid directly to WVEDA, to be applied to the WVEDA Loans. ECF 52-10, pp. 2-6, ¶¶ 16-17.

21. Training has continued to make its monthly rent payments of $52,000 under the Lease, which are paid directly to WVEDA and applied to the outstanding balances due and owing on the WVEDA Loans. ECF 52-10, pp. 2-6, ¶ 19.

22. The Forbearance Agreement matured January 6, 2019, at which time, the entire balance due and owing on the WVEDA Loans became due and payable. The balance was not paid. ECF 52-10, pp. 2-6, ¶ 18.

23. The payment default on the Forbearance Agreement was not the Debtor's only default. The Debtor failed to pay its West Virginia State sales/use taxes, as well as pass through taxes, which resulted in a tax lien placed against the Real Property.[2] See Claim # 1.

24. In March of 2018 (unknown to WVEDA until months after the Forbearance Agreement was executed), the Debtor granted to SMI, LLC ("SMI") to secure a pre-existing debt of $100,000, the "exclusive rights to all merchantable timber standing or fallen" on the Real Property, in perpetuity. ECF 52-11, pp. 2-8. The value of the timber on the Real Property is, without a doubt, far in excess of the purported consideration, and execution of the Timber Agreement creates yet another default under the WVEDA Loans.

25. The WVEDA commenced another foreclosure, this time with a sale date of Monday, September 16, 2019. ECF 52-10, pp. 2-6, ¶ 20. The Debtor filed its bankruptcy petition under Chapter 11 on Friday, September 13, 2019.

26. Despite two extensions of the exclusivity period, the Debtor did not propose a plan of reorganization. ECF 95, 137. Instead, the Debtor's Operating Reports reflect that monies paid to the Debtor for training conducted by Training were diverted by Punelli to the non-debtor

[2] Prepetition, the Debtor also failed to pay its real property taxes. The 2017 tax liens for the delinquent taxes were auctioned by the Hardy County Sheriff and certified to the West Virginia State Auditor's Office for disposition. Post-petition, the Debtor redeemed the Real Property, in April and May of 2020.

subsidiary PTC. Records obtained by Training showed that the funds diverted to PTC were then paid to Punelli and Jones personally. ECF 162.

27. On May 7, 2020, WVEDA and Training moved to have the bankruptcy case dismissed or otherwise converted to a proceeding under Chapter 7 for cause. ECF 132. On July 21, 2020, the Court entered an Agreed Order converting the bankruptcy case to a proceeding under Chapter 7, and appointing the Chapter 7 Trustee. ECF 202.

Relief Sought

28. WVEDA seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (2).

a. The Debtor consented to relief from the automatic stay for the WVEDA, providing cause to now grant the relief requested under 11 U.S.C. § 365(d)(1).

29. Section 362(d)(1) of Title 11 provides that "[o]n request of a party in interest . . ., the court shall grant relief from the stay . . . (1) for cause . . ." 11 U.S.C. § 365(d)(1).

30. Whether cause exists to warrant relief from the automatic stay is determined on a case-by-case basis, in the sound discretion of the court. *In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992). Movant has the burden initially to show cause for relief. *In re Kaplan Breslaw ASH, LLC*, 264 B.R. 309, 321-2 (S.D. N.Y. 2001). However, the debtor has the burden on all issues other than the debtor's equity in the real property (under § 362(d)(2)). *Id.*; 11 U.S.C. § 362(g).

31. When the Debtor executed the Forbearance Agreement on or about July 6, 2018, it had been in default for nearly three (3) years, it had defaulted on one or more workout plans

agreed to by the WVEDA,[3] the WVEDA had commenced foreclosure, and in response, the Debtor had turned over its Facility to Training.

32. Consequently, in consideration for WVEDA's forbearance, the Debtor consented to relief from the automatic stay in the event it filed for bankruptcy protection or was the subject of an order for relief issued by a bankruptcy court. Specifically,

> The Obligors [Debtor, Global Matrix corporation, Pons Milvius LLC, James V. Punelli and Raymond C. Jones] hereby further agree that in the event that any Obligor shall (i) file for or be the subject of any petition under title 11 of the United States Code (as amended, the "Bankruptcy Code"), (ii) be the subject of an order for relief issued under the Bankruptcy Code, (iii) file or be the subject of any petition seeking any reorganization, composition, readjustment, liquidation, or similar relief under any present or future federal or state law or act relating to bankruptcy insolvency or other relief for debtors, or (iv) be the subject of any order, judgment, or decree entered by any court of competent jurisdiction approving a petition filed against such party for reorganization, composition, readjustment, liquidation, dissolution or similar relief, *WVEDA shall thereupon be entitled to relief from any automatic stay imposed by section 362 of the Bankruptcy Code, or otherwise, on or against the exercise of the rights and remedies otherwise available to WVEDA as provided in the Loan Documents, this Agreement, and/or as otherwise provided by law.* The Obligors further waive any right they may have to move in such proceeding to extend the exclusive period to file a plan or have a plan accepted, unless WVEDA has been granted relief from the stay. This provision shall survive any termination of this Agreement.

ECF 52-4, pp. 37-56, §6(k) (emphasis added).

33. The majority of courts considering a prepetition waiver such as the one above find such waivers enforceable. *In re Shady Grove Tech Center Associates Ltd.*, 227 B.R. 422, 425 (D. Md. 1998) (prepetition waiver is additional ground for granting relief from automatic stay); *In re Cheeks*, 167 B.R. 817, 818-19 (D. S.C. 1994) (enforcing prepetition waiver furthers public policy); *In re Powers*, 170 B.R. 480, 484 (D. Mass. 1994) ("waiver is a 'primary element' to be considered in determining if cause exists for relief from the automatic stay"); *In re Club Tower*

[3] Unknown to the WVEDA at the time, the Debtor had defaulted on many other obligations as well.

L.P., 138 B.R. 307, 312 (N.D. Ga. 1991) (prepetition waiver enforceable and "furthers the legitimate public policy of encouraging out of court restructurings and settlements"); In re Citadel Properties, Inc., 86 B.R. 275, 276 (M.D. Fla. 1988) (prepetition agreement enforceable where court also found debtor filed petition for reorganization in bad faith).

34. In June of 2018, when the terms of the Forbearance Agreement were negotiated, the Debtor had already been afforded the respite that a debtor is accorded in bankruptcy by the automatic stay. The Debtor made no payments in 2016 and had opportunities for a loan workout. Yet, the Debtor's default was not cured, and the Debtor's principals stripped assets of the Debtor to pay antecedent debts of other creditors.

35. We are now nearly two years into a bankruptcy case and nothing has changed. The Debtor did not propose a plan of reorganization. Instead, the Debtor's principals expended resources in a failed attempt to make millions of dollars by selling N95 masks,[4] while at the same time, diverting funds of the Debtor to a non-debtor subsidiary for their own personal use. ECF 159, 162.

36. The prepetition waiver should be enforced to grant WVEDA relief from the automatic stay under 11 U.S.C. § 362(d)(1). *In re Shady Grove*, 227 B.R. at 425 (waiver enforced where there was no "substantial change in circumstances, such as a reasonable prospect of reorganization within a reasonable time").

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[4] According to the news reports, in early 2020, Debtor used its non-debtor subsidiary Panthera Worldwide, LLC, to negotiate a $55 million contract with the Federal Emergency Management Agency for delivery of 10 million masks. No masks were delivered and the contract was cancelled. ECF 159-1

b. The Debtor's Real Property is not necessary to an effective reorganization and the Debtor does not have equity in the Real Property; therefore, relief may be granted pursuant to 11 U.S.C. § 365(d)(2).

37. Under § 362(d)(2), relief from the automatic stay may be granted if the property in issue is not necessary to an effective plan of reorganization and the debtor does not have equity in the property.

38. Debtor never proposed a plan of reorganization, and this bankruptcy case was converted to a Chapter 7 liquidation proceeding on July 21, 2020. ECF 202.

39. The Debtor's Real Property is burdened with a nearly 40 year lease with Training, which greatly reduces its market value. In addition, according to the Trustee and Training, there are significant subsidence issues due to poor engineering that impact the value of the Real Property. ECF 302, ¶ 94.

40. The Trustee informally solicited potential buyers and fielded several inquiries from prospective purchasers of the Real Property. ECF 302, ¶ 93. One party offered that the Real Property would have a value of no more than $4 million. Another party advised the Trustee that he would have no interest in the Real Property with the long-term lease, and that the value free and clear of interests would be between $4.5 million and $5 million. Consequently, the Trustee concluded "there is no financial basis upon which [he] can assert that there exists equity beyond what is owed to WVEDA, let alone owed to the consensual junior lienholders."[5] ECF 302, ¶ 88.

[5] West Virginia Paving, Inc., with a subordinate lien against the 689.40 acres, filed Claim # 8 for $675,318.65; Howard Shockey & Sons, Inc., with a subordinate lien against both parcels, filed Claim # 7 for $2,700,210.58.

41. Accordingly, relief from the automatic stay may be granted under § 365(d)(2) because the Real Property is not necessary to a plan of reorganization and the Debtor has no equity in the Real Property.

WHEREFORE, West Virginia Economic Development Authority respectfully requests this Court to enter an order terminating the automatic stay imposed by 11 U.S.C. § 362 in order for the WVEDA to pursue its rights and remedies under State and Federal law and the pertinent loan documents against the Debtor's real property, together with all fixtures, buildings, and improvements thereon, at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia, and to grant such other and further relief as the Court deems equitable and just.

Dated: April 1, 2021

Respectfully submitted,

/s/ Debra Lee Allen

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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 7**
Debtor.	:	
	:	
	:	
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,	:	
Movant,	:	
	:	
v.	:	
	:	
PANTHERA ENTERPRISES, LLC,	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I, Debra Lee Allen, hereby certify that on this 1st day of April, 2021, the foregoing *West Virginia Economic Development Authority's Motion for Relief from the Automatic Stay to Foreclose Against the Debtor's Real Property, together with all Fixtures, Buildings and Improvements Thereon, at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia* was served through the Court’s ECF system on all parties registered to receive CM/ECF notices, including:

Aaron C. Amore, Chapter 7 Trustee
AMORE LAW, PLLC
206 West Liberty Street
Charles Town, WV 25414
Counsel for Chapter 7 Trustee

Gary O. Kinder
U.S. Trustee's Office
300 Virginia Street East, Rm. 2025
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Office of U.S. Trustee

Mark A. Lindsay
John J. Richardson
Robert S. Bernstein
Bernstein-Burkley, P.C.
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Counsel for the Debtor

and also on this date, a copy of the foregoing pleading was mailed to the Debtor and its members by U.S. Mail, prepaid postage, addressed to the following addresses:

Panthera Enterprises, LLC
215 Depot Court, SE
Leesburg, VA 20175

James V. Punelli, Member
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Reston, Virginia 20190

Raymond C. Jones, Member
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Leesburg, Virginia 20176

/s/ Debra Lee Allen
Debra Lee Allen, WV Bar No. 9838