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

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

LIMITED OBJECTION TO CHAPTER 7 TRUSTEE'S MOTION FOR AN ORDER APPROVING THE SALE OFTHE DEBTOR'S REAL PROPERTY AND NOVATING CERTAIN GOVERNMENTCONTRACTS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES PURSUANT TO 11 U.S.C. § 363

Now comes Azadian Group, LLC ("Azadian") and requests a limited objection to the Motion of Aaron C. Amore, Chapter 7 Trustee for the Estate of Panthera Enterprises, LLC (the "Debtor") for 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 pursuant to 11 U.S.C. § 363 (the "Motion"). As for its limited objection, Azadian states as follows:

1. As discussed below, the proceeds of the sale after distribution to the three (3) real property secured creditors (the "Remaining Proceeds"), West Virginia Economic Development Authority, West Virginia Paving, Inc. and Howard Shockey & Sons, Inc, should be paid to Azadian or held in escrow pending an appropriate proceeding to determine Azadian's security interest in the Remaining Proceeds.

INTRODUCTION AND BACKGROUND

2. By its Motion, the Debtor, in exchange for the purchase price of $6,563,252.35, seeks authority to, *inter alia*: (i) sell the Debtor's real property consisting of 747.49 acres in

Moorefield District, Hardy County, West Virginia ("Real Property"), which is the site of a security operations training facility ("Facility") and includes, a number of fixtures and improvements to the Real Property, including 38 Modular Office Buildings, ("Modular Units"); and, (ii) convey various government contracts (the "Contracts" and together with the Real Property the "Purchased Assets") pursuant to an Asset Purchase Agreement dated March 29, 2021, between Training and the Debtor (the "Agreement") (ECF Doc. 302-1, Exhibit "A", pp. 4-5).

3. The Debtor argues that Azadian does not have a valid security interest in any of the Purchased Assets and therefore is not entitled to the proceeds thereof (ECF 34, pp. 32-33, ¶¶104, 105). Specifically, the Debtor asserts that Azadian's security interest in the proceeds of the Contracts is prohibited by 41 U.S.C. § 6305. *Id*. Further, the Debtor argues that Azadian does not have a perfected security interest in the Module Units as Azadian failed to properly perfect its security interest by filing a UCC-1 Financing Statement in Delaware and not in West Virginia. The Debtor alleges that Azadian's lien, claim or interest is subject to a bona fide dispute under 11 U.S.C. § 363(f)(4) (ECF 34, pp. 32-33, ¶¶105).

4. At the outset, the Debtor cannot contest by virtue of the Motion Azadian's Security Interest in the Remaining Proceeds because Azadian properly filed its secured proof of claim ("Claim #21"), and any objection to same would be considered a "contested matter", which must be brought by motion pursuant to Bankruptcy Rule 9014.

5. Contrary to the Debtor's claims, Azadian has a valid, enforceable and perfected lien on all pre-petition assets of the Debtor, including, but not limited to, the Contracts and proceeds thereof, which liens secure payment of the Debtor's obligations to Azadian pursuant to the Security Agreements (as defined below). Further, Azadian qualifies as a financial institution within the exception to the Anti-Assignment Acts (as described below) since its primary business is to supply

financing or capital to its customers. Alternatively, non-compliance with the Anti-Assignment Acts does not affect perfection and validity of Azadian's Security Interest (as defined below). Therefore, Azadian respectfully requests that this Court direct the Trustee to pay Azadian the full amount of its claim from the Remaining Proceeds, or alternatively, to deposit the Remaining Proceeds in to an escrow account pending the determination of Azadian's Security Interest (as defined below).

6. On or about August 18, 2017 and October 24, 2017, Azadian provided financing to the Debtor in the amounts of $337,500.00 and $150,000.00 (the "Purchase Price") As security for the Purchase Price, the Debtor executed and delivered to Azadian certain Merchant Receivables Purchase and Security Agreements, dated August 18, 2017 and October 24, 2017, respectively (collectively, the "Security Agreements"), whereby the Debtor granted a security interest to Azadian in, *inter alia*, all assets that Debtor now owns or shall acquire or create immediately upon the acquisition or creation thereof: all other tangible and intangible personal property, including but not limited to: (a) inventory, (b) equipment, (c) investment property, including certificated uncertified securities, securities accounts, security entitlements, commodity contracts, and commodity accounts, (d) instruments, including promissory notes, (e) chattel paper, including tangible chattel paper and electronic chattel paper, (f) documents, (g) letter of credit rights … (i) deposit accounts, (j) commercial tort claims, (k) general intangibles, including payment intangibles and software ….("the Collateral"). Annexed hereto as **Exhibit "A"** and **Exhibit "B"** are copies of the Security Agreements.

7. As acknowledged by the Debtor (ECF 32, ¶104), Azadian duly perfected its security interest in the Collateral by filing a UCC-1 Financing Statement with the Office of the Secretary of the State of Delaware on December 12, 2016, bearing Filing No. "20167697194", as

amended, on August 18, 2017, bearing Filing No. "20175518086" ("Security Interest") (Claim #21). The Security Interest is a first priority blanket security interest in all of the Debtor's Remaining Assets.

8. The Debtor defaulted on its obligations to Azadian on or about September 27, 2018 (the "Event of Default"). On December 20, 2018, Azadian and the Debtor entered into a Settlement Agreement (the "Settlement Agreement"), wherein the Debtor acknowledged its Event of Default under the Security Agreements, and agreed to pay the sum of $126,829.00 to Azadian (Claim #21 pp.4-11).

9. On or about January 30, 2019, the Debtor default under the Settlement Agreement, by failing to remit the required payments due and owing to Azadian. Azadian then commenced an action against the Debtor in the Superior Court of the State of Delaware, Case No. C.A. No. N19C-04-235 CLS (the "State Court Action"), for *inter alia*, breach of the Settlement Agreement. By Decision and Order, the Hon. Clavin L. Scott, Jr. granted Azadian's Motion for Summary Judgment on the grounds that no genuine disputes of material fact exist (Claim #21 pp. 12-20).

10. The Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of West Virginia (the "Bankruptcy Court") on September 13, 2019, resulting in a stay of the State Court Action.

11. The Debtor's bankruptcy was thereafter converted to a Chapter 7 proceeding on July 21, 2020, with the appointment of Aaron C. Amore as the Chapter 7 Trustee, and is being administered as Case No. 2:19-bk-00787 (the "Bankruptcy Case").

12. Azadian timely filed its proof of claim in the Bankruptcy Case on October 19, 2020 (Claim #21).

13. As of the petition date, the Debtor was indebted to Azadian in the principal sum of $86,829.000, plus interest on Azadian's fully secured claim.

ARGUMENT

OBJECTIONS TO A PROOF OF CLAIM CREATE A DISPUTE WHICH IS A CONTESTED MATTER GOVERNED BY BANKRUPTCY RULE 9014

14. A proof of claim that is executed and filed in accordance with the Bankruptcy Rules constitutes "prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). The prima facie evidentiary effect of a properly filed proof of claim applies to claims filed by creditors under Bankruptcy Rule 3001. A proof of claim is properly filed for a secured claim in a debtor's personal property where the creditor has attached evidence that its security interest therein has been perfected. It is well-established law that Bankruptcy Rule 3001(f) places the burden on the objecting party to come forward with evidence—an objection without sufficient supporting evidence is overcome by the presumption in favor of validity. Here, Azadian properly filed its secured proof of claim in the Bankruptcy Case on October 19, 2020 (Claim #21) by attaching evidence of its UCC-1 Financing Statement. Thus, Azadian's proof of claim is prima facie evidence of its Security Interest in the Remaining Proceeds.

15. The filing of an objection to a proof of claim creates a dispute which is a contested matter governed by Rule 9014. See Fed. R. Bankr. P. 9014 (Advisory Committee Notes). Pursuant to Rule 9014, relief sought through contested matters must be prosecuted upon a duly filed motion and cannot be contested by a motion brought pursuant to 11 U.S.C. § 363. Thus, the Debtor cannot dispute Azadian's Security Interest in the Remaining Assets in its Motion since it is procedurally defective.

AZADIAN GROUP, LLC HAS A VALID PERFECTED SECURITY INTEREST

16. Under the Uniform Commercial Code § 46-9-307 which is applicable with respect to Azadian's liens against all of the Debtor's non-real estate assets, a secured creditor perfects its lien in personalty by filing a financing statement with the Secretary of State. Azadian perfected its lien upon the Contracts by filing a UCC-1 Finance Statement with the Secretary of State of Delaware. Therefore, if the sale were to be consummated then proceeds of the sale of the non-real estate assets should be distributed to Azadian to satisfy the full amount of its claim.

17. In fact, the Debtor does not question the propriety of Azadian's UCC filing, but incongruously appears to contest the notion that Azadian's lien attaches to the proceeds of the sale of the collateral (here, the Contracts) subject to Azadian's properly perfected security interest.

AZADIAN GROUP, LLC IS A FINANCIAL INSTITUTION FOR PURPOSES OF THE ANTI-ASSIGNMENT ACTS

18. The Anti–Assignment Acts limit assignments of government contracts to third parties. 31 U.S.C. § 3727(b); *see also* 41 U.S.C. § 15(a); *Fireman's Fund Ins. Co. v England*, 313 F3d 1344 (Fed Cir 2002) ("These two provisions together broadly prohibit ... transfers of contracts involving the United States or interests therein, and assignment of claims against the United States."). Statutory exceptions, however, may allow assignments, but only if certain requirements are fulfilled. 31 U.S.C. § 3727(c); *see also* 41 U.S.C. § 15(b).7.

19. A well-known statutory exception from the strictures of the Anti–Assignment Acts occurs when a Government contract is assigned to a bank, trust company, or other "financing institution." 31 U.S.C. § 3727(c); *see* 41 U.S.C. § 15(b); *see also* 41 U.S.C. §6305.

20. The United States Court of Appeals for the Federal Circuit has held that "financing institution" should be accorded a common-sense definition:

> [The term "financing institution"] is not ambiguous. A "financing institution" supplies financing. That is its business. It lends money or provides capital. As the provision in 41 U.S.C. § 15(b) indicates, the term includes banks and trust companies, as well as 'other' institutions whose business is providing financing. *Fireman's Fund*, 313 F.3d at 1350 (emphasis added).

21. Azadian, is a duly registered Delaware company, which is in the business of providing financing to small businesses to assist them with day-to-day functions. Here, Azadian provided needed working capital to the Debtor to fund its ongoing business operations. *See Ham Investments, LLC v United States*, 89 Fed Cl 537 (Fed Cl 2009). Thus, Azadian is a qualified financial institution and it's financing of the Debtor is clearly an exception to the Anti-Assignment Acts.

PROCEDURAL REQUIREMENTS OF THE ANTI ASSIGNMENT ACTS ARE NOT APPLICABLE TO DISPUTES BETWEEN PRIVATE PARTIES AND DO NOT PROHIBIT SECURITY INTERESTS IN PROCEEDS OFGOVERNMENT CONTRACTS

22. Rather than prohibit perfection of liens and security interests, the Anti-Assignment Acts are meant to establish procedural requirements for assignees planning to assert claims against government. *In re Coastal Bus & Equip. Sales, Inc*., 330 B.R. 328 (Bankr. D. Mass. 2005) ; 45 BCD 103; 96 AFTR 2d 6263; *In re Robert E. Derecktor, Inc*., 142 B.R. 29, 30 (1992, BC DC Rhode Island).

23. Azadian's security interest in the Debtor's general intangibles, including the Contracts, continues to attach to the proceeds of the sale or assignment of the Contracts. Azadian had, and still has, a valid and perfected security interest in the general intangibles and present and future proceeds thereof. Thus, there is no dispute between the Debtor, Azadian and the United States Government.

24. In *Matter of Topgallant Lines, Inc*, the Bankruptcy Court for the Southern District of Georgia granted appellants motion for summary judgment, holding, in relevant part, that "non-compliance with the Anti Assignment Acts by any holder of an otherwise valid [UCC] security interest in freights will be deemed irrelevant and such interests will be afforded priority among themselves and in relation to unsecured claims as provided by the UCC." *Matter of Matter of Topgallant Lines, Inc*., 125 BR 682 (Bankr. S.D. Ga 1991). *In re Robert E. Derecktor of Rhode Is., Inc.,* 142 BR 29 (Bankr. DRI 1992) (the court upheld the creditor's security interest on the basis that the 31 U.S.C. § 3727 did not apply where it was a financial institution that had a valid, perfected and enforceable lien on all pre-petition asserts).

25. Similarly, in *McKenzie v. Irving Trust Co*., 323 U.S. 365, 65 S.Ct. 405, 89 L.Ed. 305 (1945), the Supreme Court dismissed a complaint brought by a trustee in a bankruptcy proceeding to recover money paid by the debtor to its creditor pursuant to an assignment, which did not adhere to the notice provisions of the Anti Assignment Acts. The Court noted that 31 U.S.C.A. § 3727, is for the protection of the government and not the regulation of the equities of the claimants as between themselves. *McKenzie v. Irving Trust Co*., 323 U.S., 65 S.Ct., 89 L.Ed. 305 (1945).

26. Furthermore, it is well established law that the Anti Assignment Acts address one's right to direct payment from the federal government, not the perfection or validity of security interests. *In re Robert E. Derecktor, Inc*., 142 B.R. 29, 30 (1992, BC DC Rhode Island); *In re Topgallant Lines, Inc.*, 125 B.R. 682, 689–90 (Bankr.S.D.Ga.1991) (citing *King v. Gilbert*, 569 F.2d 398 (5th Cir.1978) (recognizing that as between private parties, non-compliance with the Act does not affect assignment); *Matter of Palmetto Pump & Irrigation, Inc*., 81 B.R. 109, 112 (Bankr.M.D.Fla.1987) (the Act was designed to protect the government and hence has no bearing

upon the contractual rights of non-governmental entities, in the absence of governmental intervention). Its focus is not on the perfection of liens and security interests, but rather the establishment of procedural requirements of assignees planning to assert claims against the government. *In re Robert E. Derecktor, Inc*., 142 B.R. 29, 30 (1992, BC DC Rhode Island).

27. The Asset Purchase Agreement that is the subject of the proposed sale, defines "Purchased Assets to include the Contracts. The Contracts are defined in the Asset Purchase Agreement as "any agreement by and between the Seller or its subsidiaries Panthera Training Center, LLC and Panthera Worldwide, LLC on the one hand and the federal government, and any agency or department thereof, on the other hand regarding the provision of training services at the Facility" Clearly by admission of the Trustee and the Buyer, the purchase price under the Asset Purchase Agreement include value for the contract rights which constitute Azadian's Collateral.

28. According to the Asset Purchase Agreement the purchase price of 6,563,232.24 is to be paid first to the secured creditors who have claims against the real estate being sold in the amount of $6,068,060,53. The balance of the proceeds sale should first be to Azadian for the satisfaction of its lien and the balance to the Trustee's estate.

CONCLUSION

29. Accordingly, for the reasons stated hereinabove, the Debtor's Motion must be denied in its entirety.

Dated:
April 20, 2021

BAILES, CRAIG, YON & SELLARDS, PLLC

_/s/ Robert M. Sellards_____________

Robert M. Sellards, Esq., (WV 9104)
401 10TH Street, Suite 500
Huntington, WV 25701
Phone (304) 697-4700
Fax (304) 697-4714
Email: rms@bcysfirm.com