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

IN RE:

PANTHERA ENTERPRISES, LLC, Debtor.

BANKRUPTCY CASE NO.: 2:19-bk-00787
CHAPTER 7

MEMORANDUM IN SUPPORT OF CLAIMANTS' OBJECTION TO THE DEBTOR'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. SECTION 363

COMES NOW the Claimants, Renick C. Williams, Betty P. Williams, his wife, and Robert R. Williams, by and through their attorney, James E. Smith, II, Esq, and would offer this Memorandum in Support of the Claimants' Motion Objecting to the Chapter 7 Trustee's Motion to Sell Real Property and Novating Certain Government Contracts Free and Clear of Claims, Interests, and Encumbrances Pursuant to 11 U. S. C. Section 363 (hereinafter "Motion").

STATEMENT OF FACTS

On August 21, 2013, the Claimants, Renick C. Williams and Betty P. Williams, his wife, conveyed real estate located in the Moorefield District of Hardy County, West Virginia, containing 689.40 acres, +/-, to TENX Group, LLC. That conveyance was recorded among the Land Records of Hardy County, West Virginia in Deed Book 328, Page 506. A copy of that Deed has previously been filed with the Clerk of this Court.

James V. Panelli and Raymond C. Jones each hold fifty percent (50%) of TenX Group, LLC. Notwithstanding the existence of TENX Group, LLC, the Chapter 7 Trustee ; the Debtor; Panthera Training, LLC, (hereinafter "Buyer"); West Virginia Economic Development Authority (hereinafter WVEDA); and the Office of the United States Trustee admit that in 2016, for reasons unknown, the Debtor changed its name to Panthera Enterprises, LLC, yet it continued to use the name of TenX Group LLC.... "

Panthera Training Center, LLC is a subsidiary of the Debtor and is owned eighty percent (80%) by Debtor and twenty percent (20%) by a David Dolan. Notwithstanding assertions that David Dolan had owned the subject real estate, that is not true. The Claimants vehemently contest that David Dolan ever owned the subject real estate and aver that TENX Group, LLC is the only owner of record within the chain of title.

The Buyer is evidently not legally or formally affiliated with the Debtor, Panelli or Jones, but the Claimants would state that they must be well known to each other through their related business enterprises.

The above reference Deed of Conveyance from the Claimants to the Debtor contains the following terms:

> The real estate herein conveyed is also subject to any rights or easements which may affect same and which are of record in the aforesaid Clerk's Office, **and it is expressly understood that the parties hereto do mutually agree and the Grantee takes title subject to the following reservations, covenants and restrictions, notice of which is acknowledged by the Grantee upon the delivery and recordation of this deed, and shall be deemed covenants running with the land:**
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> 1. The Grantors hereby expressly reserve all minerals, including oil and gas, mineral rights and the rights to the extractions of same, underlying and appurtenant to the subject 689.40 acre tract. The parties acknowledge that there is a current oil and gas lease with Chesapeake Allegheny and conveyance of this real estate is made subject to same. Surface disruption for the purpose of extracting minerals shall be made without the agreement of the surface owner and the title holder of mineral rights.
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> 2. In the event the Grantors herein should purchase adjoining real estate to the subject 689.40 acre tract, they do hereby reserve the necessary easements across the subject 689.40 acres to provide sewer, water, gas telephone and electric service and such additional easements, as my be required to provide for septic, waste disposal, and storm water drainage to meet local and State government requirements, relating to any structures or construction upon such adjoining tract. Said rights of way shall not exceed 20 feet in width, unless required by the service provider. Said rights of way will be 20 feet on either side of Fish Pond Road and 20 feet along property boundaries. The location of the reserved areas shall be made after giving reasonable notice to the Grantee, its successors or assigns, with placement in the least obstructive location as is possible and the Grantee, its successor and assigns shall not unreasonable withhold access to such services by the Sellers.
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> 3. There is an adjoining 18 acres, more or less, parcel, lying along the bounds of "Corridor H", which is the subject of a pending condemnation proceeding by the State of West Virginia, Department of Transportation, and upon completion of the condemnation proceedings, should this 18 acre tract become available for purchase, the Grantee may also purchase such additional acreage for the price of $4,500 per acre. Should said 18 acres become available and the Grantee elects not to purchase same, then the Grantors and their successors in interest, will be given an adequate right of way by the Grantee, or its successors in interest, which right of way area will allow for the construction of a road which satisfies Hardy County subdivision road standards and provides access from Fish Pond Road.

4. The Grantors hereby expressly reserve, for themselves, their heirs, successors in interest and assigns, one half (½) of the unobstructed water flow from the spring situate upon said property, to supply potable water for the use of their adjoining real estate. The Grantee agrees that it shall not restrict the natural flow, nor cause or allow to be caused, any contamination of the tributaries to Anderson Run, by any operations upon the subject property and shall take all proper precautions to protest the water source in compliance with federal, state and local laws, statues, ordinance, rules and regulations relating to liability for, or cost of other actual or threatened danger to human health or the environment, including, without limitations, laws relating to emissions, discharges, disposal practices, or release of regulated materials into the environment, including, without limitation, ambient air, indoor air, surface water, ground water, land surface of sub-surface strata, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of regulated materials.

In addition thereto, either party, that being the Grantor, Grantee, or their successors in interest, may develop the spring to service acreage owned by the respective parties hereto. Then, and in such event, the party or parties desiring to so develop the spring, shall share on a pro rata basis, the cost of such development and maintenance of the facility based upon their respective usage. In either event, the Grantee, its successors and assigns, agrees it shall grant easements for the spring development including land for collection, treatment and holding facilities. Easements of 20 feet in width will also be granted for utility lines necessary to operate the facilities and utility lines used to disseminate water to Fish Pond Road along existing road or by following the edge of the stream bed. Location of these facilities and utility easements must be granted in such locations as to prevent incurring unreasonable expense in developing the spring.

5. The Grantors shall have a period of one (1) year from date of conveyance to remove the 40 foot culvert, the cabin, barn and stone foundation and structure of an old dwelling house, and grainery, situate upon the subject 689.40 acre tract.

6. It is understanding of the parties hereto that the Grantee shall operate a facility upon the subject real estate to provide training for security personnel from the State Department, Department of Homeland Security, Department of Defense, Law Enforcement and Defense contractors, and any substantial change in use of the property following the execution of this sales agreement and thereafter, must first be authorized by the Grantors and/or their then surviving children.

7. Should the Grantee, or its successor in interest, desire to sell or otherwise transfer all or any portion of the subject real estate to a disinterested third party (which term shall not include any parent or subsidiary corporation or entity associated with TenX Group, LLC) as evidenced by a bona fide written offer received from such third party, which offer shall be kept strictly confidential between the parties hereto, then prior to so doing, they shall offer to the said Renick C. Williams, Betty P. Williams, or any of their then surviving children, the real estate at such price and upon such terms and conditions no less favorable than

those which it was willing to accept from the disinterested third party. Such offer by the Grantee to sell or transfer shall be in writing and shall contain a copy of the written offer by such third party, and shall be sent to the Grantors or their surviving children, by certified mail to their designated agent, Robert Williams at P.O. Box 122, Moorefield, West Virginia 26836. The Grantors, their children or any business entity in which those parties are an owner or member, shall have fifteen (15) days from the date of mailing of such notice within which to give notice of any intent to exercise this right of first refusal and thirty (30) days within which to provide verification of their financial ability to exercise this option. Should any person/party exercise this right of first refusal, he/she/it shall be under a duty to comply with and assume each of the terms and conditions of the written offer to sell which the Grantee, or its successor in interest, has received from the third party. This right of first refusal shall be subordinate to the right of the Grantee to obtain financing, using the subject property as security, for said loan, and the signatures of those persons having the right of first refusal shall not be necessary upon any instrument required by a lender in order to obtain such loan.

8. In the event the sale of the subject 689.40 acre tract is completed, thereafter, should the said TenX Group, LLC, after having given the Grantors or their children opportunity to exercise their right of first refusal set forth above, sell any interest in the assets (including real and personal property) and operation of that business and property (real and personal) known as Panthera Training Center, LLC, the Grantors, their heirs or assigns, shall receive five percent (5%) of the greater of, gross sales proceeds received or gross value of assets transferred, as a part of said transaction(s), not to exceed One Million Dollars ($1,000,000.00) in total.

9. The Grantee shall adhere to all terms and conditions as approved by the Hardy County Planner's Office, as testified to and documented by the Hardy County Board of Appeals at its May 29, 2009 meeting, regarding to operation of their facilities upon this real estate. Any variance from the application which was previously approved by the County authorities must be properly applied for through the Hardy County Planner's Office, with notice thereof to the Grantors. This condition shall include all limitations and representations (both written and oral) made to the Hardy County Planner's Office regarding night driving, shooting, caliber of guns and size of explosives.

10. The Grantee agrees that it shall comply with all applicable Federal, State and local laws, ordinances, rule and regulations having jurisdiction over the subject property, including applicable environmental hazardous water or substances, and underground storage laws and for any Department of Environmental Protection work not completed at time the sale is complete.

Conveyance of the afore described real estate is make subject to any and all restrictive covenants or provisions which are duly recorded in the Office of the Clerk of County Commission of Hardy County, West Virginia.

(Emphasis added).

These restrictive covenants were also enumerated in the Contract for Sale of the subject realty, as is evidenced in the attached Exhibit "A".

On September 13, 2019, Panthera Enterprises, LLC filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Substantial litigation ensued thereafter beginning with an adversary proceeding filed by the Debtor against the Buyer for the recovery of money and property on October 17, 2019 Thereafter, on October 18, 2019, the Buyer filed a Motion to Compel the Debtor to timely preform obligations under its subcontract with the Buyer. Thereafter, on November 2, 2019, WVEDA filed a Motion to convert the case from a Chapter 11 to a Chapter 7. Also on November 2, 2019, WVEDA filed a Motion for Relief from Stay. Thereafter, on December 27, 2019, WVEDA'S Motion to Convert or Dismiss was denied.

On January 9, 2020, WVEDA withdrew its Motion for Relief of Stay. Apparently the Debtor conducted business as a debtor in possession. Thereafter, on April 23, 2020. a Motion to Dismiss or Convert the case to Chapter 7 was filed by the Office of the United States Trustee for failure to maintain adequate insurance, which was joined with by the Buyer. WVEDA joined with the United States Trustee and the Buyer on May 7, 2020. Thereafter, on May 22, 2020, the Debtor filed an objection to the joint Motion to Dismiss or Convert. Finally on July 21, 2020, an agreed Order granting the Motion to Convert case from a Chapter 11 to Chapter 7 was entered.

Thereafter on March 29 2021, the interim Chapter 7 Trustee filed a Motion for an Order for approving the sale of the Debtor's real property (the subject real estate referred to above) and novating certain government contracts free and clear of liens, claims and interest. On April 20, 2021, the Claimants filed an Objection to the Chapter 7 Trustee's Motion for Sale.

ARGUMENT

THE CHAPTER 7 TRUSTEE'S MOTION TO SELL THE REAL ESTATE FREE AND CLEAR OF ALL LIENS, CLAIMS, AND INTERESTS SHOULD BE DENIED AS IT PERTAINS TO THE CLAIMANTS' INTERESTS, SINCE THE RESTRICTIVE COVENANTS WERE INTENDED BY THE PARTIES TO RUN WITH THE LAND, BECOMING SERVITUDES AND RIGHTS APPURTENANT TO THE LAND, EQUALLY BURDENING THE GRANTOR, THE GRANTEE, AND THEIR SUCCESSORS IN INTEREST.

A. None of the Restrictive Covenants qualify for free and clear sales treatment under 11 U. S. C. 363(f).

11 U. S. C. 363 (f) provides in pertinent part:

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -
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> > (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> >
> > (2) such entity consents;
> >
> > (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
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> > (4) such interest is in bona fide dispute; or
> >
> > (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

The baseline bankruptcy principle is that real property may not be sold free and clear of recorded restrictive covenants, easements and other such equitable servitudes that run with the land. This principle is premised upon the rule that these types of property interests must be specifically enforced and that those who benefit from such property interests cannot be compelled to forego equitable relief. See Gouveia v. Tazbir, 37 F. 3d 295 (7th Cir. 1994). See also In re Southcreek Dev., LLC, 2011 Bankr. LEXIS 36 (2011).

The Trustee's Motion violates 11 U. S. C. 363(f)(1), inasmuch as West Virginia law recognizes the above referenced restrictive covenants as property rights, running with the land. Covenants run with the land when they inure to the benefit of the land. Allemong v. Frendzel, 363 S. E. 2d 487 (W. Va. 1987). Restrictive covenants constitute limitations upon an interest in real estate. The elements of a valid restrictive covenant are: they must be in writing to be enforceable; an apparent intent for the covenant to run with the land; that the covenant touch and concern the land, meaning more than a mere personal obligation or promise; horizontal privity as an obligation between the parties originally covenanting parties; and vertical privity relationship between the original covenanting party and a successor. [1]

The West Virginia Supreme Court of Appeals has held that the intent of the parties fundamentally control in construing and recognizing the existence of restrictive covenants. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish. See Foster v. Orchard Dev. Co., LLC, 227 W. Va 119, 705 S.E.2d 816 (2010). In McElroy Coal Co. v. Dobbs, 853 S. E. 2d 620 (2020), in quoting the Restatement (Third) of Property (Servitudes) Section 1.5 (1-3) further delineated the cause and effect of servitudes:

> A right conveyed by a servitude can exist in several forms. A right is "appurtenant" if it is tied to ownership or occupancy of a particular unit or parcel of land. It is "in gross" when the opposite is true– when the exercise of the right "is not tied to ownership and occupancy of a particular unit or parcel of land" A right that does not run with the land is considered "personal" ... Whether an easement is appurtenant or in gross is to be determined by the intent of the parties.

[1] See The Evolution of Restrictive Covenants in West Virginia, Fisher, II, 100 W. Va. L. Rev. (1997).

The language of the subject Deed of Conveyance is clear and unambiguous: "The real estate herein conveyed is also subject to any rights or easements that may effect the same in which are of record in the aforesaid Clerk's office, **and it is expressly understood that the parties hereto due mutually agree and the Grantee takes title subject to the following reservations, covenants and restrictions, notice of which is acknowledged by the Grantee upon the delivery and recordation of this Deed, an shall be deemed covenants running with the land.**" (Emphasis added). The ten restrictive covenants specifically delineated within the Deed were clearly intended by the parties to run with the land since the Deed actually states that they are to run with the land. [2]

B. Restrictive Covenants Number Seven and Eight, are indeed servitudes running appurtenant to the land, notwithstanding the Chapter 7 Trustee's contention that they are only personal contractual obligations.

Upon information and belief, the Chapter 7 Trustee only objects to Restrictive Covenants Number Seven and Number Eight servitudes running with the subject real estate. The Trustee contends that they should be construed as personal obligations only, not meriting recognition as an right appurtenant to the land. That interpretation is clearly wrong, based upon the plain language of the Deed.

The McElroy Court also held that a right to purchase is a servitude that runs with the land or interest in land. A right or obligation which runs with the land passes automatically successor owners or occupiers of the land or the interest in land which the right or obligation runs. The West Virginia Supreme Court of Appeals specifically found that repurchase options run with the

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[2]See Mancuso v. Meadowbrook Mall Co. Ltd. P'ship, 2007 WL 951849, held use covenants were restrictions that ran with the land, and the debtor could not sell the property free and clear of those covenants under Section 363(f), even though the purchaser attempted to show that the covenants could be avoided under the law of eminent domain.

land. See First Huntington Nat. Bank v. Gideon-Broh Realty Co., 79 S. E. 2d 675 (W. Va. 1953). "A right of first refusal is more accurately characterized as a pre-emptive right." See John D. Stump & Associates, Inc. And John Stump v. Cunningham Memorial Park, Inc., *et. al.* , 419 S. E. 2d 699 (W. Va. 1992).

Restrictive Covenants Numbers Seven and Eight likewise are servitudes appurtenant to and running with the land. The Trustee was bound to offer the Claimants herein the opportunity to purchase the realty on no less favorable terms as offered by a disinterested purchaser. Since by the sworn stipulations of facts previous filed in this matter, it must be considered as fact that the Buyer, Panthera Training Center, LLC, is indeed a disinterested third party and not a "parent or subsidiary corporation or entity associated with TenX Group. LLC." ; the pre-emptive right of first refusal should be followed. Likewise, it does not appear the right of first refusal should be considered subordinate, since the Debtor is not attempting to claim to obtain financing using the subject property as security, but is actually intending to sell the subject realty.

If the Claimants refuse their pre-emptive right of first refusal, they are entitled to their percentage fee as outlined in Restrictive Covenant 8. Such a fee should be calculated as a cost of the sale between the Buyer and the Debtor.

CONCLUSION

The Claimant and the Debtor fully intended that the Restrictive Covenants enumerated within the Deed of Conveyance would constitute restrictive covenants touching and concerning the land. All the Restrictive Covenants were placed within the Deed of Conveyance as a purposeful intended act, inasmuch as the acreage was a part of a larger tract from which the Claimants own neighboring parcels. The use by the Debtor was envisioned to unduly hamper and create a nuisance as it would pertain to the neighboring tracts owned by the family, thus resulting in the creation of the restrictive covenants. Without this Court honoring the Restrictive Covenants, the use and enjoyment and value of the remaining parcels of the Claimants will be damaged. West Virginia law clearly recognizes these restrictive covenants as those running with and touching and concerning the subject realty and any sale must be made subject to these Restrictive Covenants.

WHEREFORE, the Claimants pray for the following:

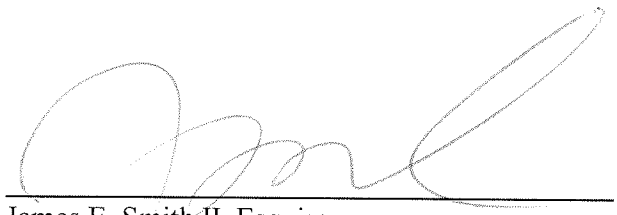
1) That this Honorable Court accept this Memorandum as being timely filed;

2) That this Honorable Court deny this Chapter 7 Trustee's Motion to Sell the subject real estate free and clear of all liens, claims and encumbrances of the Claimants;

3) That is Honorable Court would declare that the Restrictive Covenants itemized within parties' Deed of Conveyance are Restrictive Covenants that run with the land, touch and concern the land and act as a servitude running pertinent to the land; and

4) For such other relief as this Honorable Court deems equitable and just.

RENICK C. WILLIAM and BETTY P. WILLIAMS, husband and wife ROBERT R. WILLIAMS, PLAINTIFF, BY COUNSEL



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CERTIFICATE OF SERVICE

I, James E. Smith, II, Esquire, a practicing attorney, do hereby certify that on the 7th day of May, 2021 a copy of the foregoing Memorandum in Support of Motion Opposing Trustee, was filed via CM/ECF with the Clerk of Court, which will send notification of such filing to all interested parties and creditors having entered their appearance herein, as well as by Electronic Mail transmission and by United States Mail, first class, postage pre-paid to:

1. Aaron C. Amore, Esq., Chapter 7 Trustee, 206 West Liberty Street, P. O. Box 386, Charles Town, West Virginia 25414;

2. Robert S. Bernstein, Esq., Bernstein-Burkley, PC, 707 Grant Street, 220 Gulf Tower, Pittsburgh, PA 15219;

3. Gary O. Kinder, Esq., Office of the United States Trustee, 300 Virginia Street East, Room 2025, Charleston, West Virginia 25301;

4. Debra Lee Allen, Esq., Spilman, Thomas & Battle, PLLC, Counsel for West Virginia Economic Development Authority, 48 Donley Street, Suite 800, Morgantown, West Virginia 26507-0615.

James E. Smith, II, Esq.
Counsel for the Claimants