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

CLAIMANTS' RESPONSE TO TRUSTEE'S MEMORANDUM IN SUPPORT OF TRUSTEE'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 the following as a Response to the Trustee's Memorandum in Support of the 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.

COUNTER-STATEMENT OF FACTS AND COUNTER- ARGUMENTS

The Claimants reassert and reiterate their Statement of Facts and Argument sections of their Memorandum as if fully set forth below. Where there are inconsistencies between the Claimants' and Trustee's Statement of Facts and Argument sections, the Claimants specifically object and challenge such inconsistencies. Lastly, the Claimants accept the Trustee's concession that the Covenants within the parties' Deed of Conveyance numbered One (1) through (5), Nine (9) and Ten (10) indeed run with the land and shall not be stripped from the Deed of Conveyance to the detriment of the Claimants.

ARGUMENT

THE PERSISTENCE OF THE CHAPTER 7 TRUSTEE IN IGNORING THE INTENT OF THE PARTIES AND THE PLAIN LANGUAGE OF THE RESTRICTIVE COVENANTS WITHIN THE DEED OF CONVEYANCE IS CLEARLY ERRONEOUS, PLAINLY WRONG, AND A MISAPPLICATION OF BANKRUPTCY LAW RESULTING IN THE TAKING OF THE CLAIMANTS' PROPERTY INTEREST WITHOUT COMPENSATION AND A PERVERSION OF 11 U.S.C. 363(f) and 365(a).

A. Restrictive Covenants 6, 7, and 8 are not executory personal obligations that qualify for rejection under 11 U. S. C. 365(a).

The Trustee's refusal to acknowledge and give any credence to the intent of the parties which culminated in all of the restrictive covenants contained within the Deed of Conveyance running with and being appurtenant to the land, flies in the face of well established Bankruptcy and State Law. Notwithstanding the Trustee's failure to invoke 11 U.S. C. 365(a) in his initial 11 U. S. C. 363(f) Motion to Sell Free and Clear, he is now attempting to label the restrictive covenants in question as executory contracts, capable not only of rejection, but branding them as personal, contractual, in gross servitudes not running with the land.

Although the interpretation of restrictive covenants must be governed by state law (See Butler v. United States, 440 U. S. 48, 99 S. Ct. 914, 59 L. Ed. 136 [1979]), the finding of whether a contract is executory is a question of federal law. (See Benevides v. Alexander (In Re: Alexander), 670 F. 2d 885 [9th Cir 1982]). The Bankruptcy Code does not specifically define the term "executory contract", courts have applied the general definition as a contract on which performance is due to some extent on both sides. (See NLRB v. Bildisco & Bildisco, 465 U. S. 513 [1984]). Many courts (including the Fourth Circuit) have deferred to Harvard Professor Vern Countryman's definition of executory contract "if the obligations of both parties are so far

unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." (See Vern Countryman Executory Contracts in Bankruptcy, 57 Minn. L. Re.439 [1973]; Gloria Mfg. Corp. V. Int'l Ladies' Garment Workers' Union, 734 F. 2d 1020 [4th Cir. 1984]).

Numerous courts across the country have rejected arguments that restrictive covenants are executory in nature, notwithstanding that restrictive covenants may have similarities to a contractual obligation. The Seventh Circuit in Gouveia v. Tazhir, 37 F. 3d 295 (7th Cir. 1994) held that the restrictive covenant was not an executory contract because neither the debtor nor the other parties were obligated to do some affirmative act and, as a consequence the restrictive deed covenant was in fact a fully executory contract. The Court reasoned that although the restrictive covenants contain the characteristics of both a contract and an interest in land, the primary nature of such covenants is preservation of a land interest, not future duties in contract. The Court further noted that there will almost always be some incidental continuing obligations under a restrictive covenant, those duties were not the kind of obligations Congress intended to impact in enacting Section 365, resulting in the Court deciding that restrictive covenants on real estate are not executory contracts subject to termination or assumption under Section 365. See also Sabine Oil and Gas v. Nordheim Eagle Ford Gathering LLC, 73 Fed. Appx. 64 (2d Cir. 2018) and Mancuso v. Meadowbrook Mall Co. Ltd. P'ship, 2007 WL 951849.

Restrictive Covenant Number 6 squarely falls under the Gouveia, Sabine, and Mancuso in that it specifically compels and burdens the Grantee and its successors to only operate a facility as a training facility for certain governmental agencies 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."

A few courts have permitted the rejection of restrictive covenants when they were in the nature of a right of first refusal. (See In Re: Coordinated Financial Planning Corp., 65 B. R. 711 [B. A. P. 9th Cir 1986]; In Re: Fleishman, 138 B. R. 641 (Bankr. D. Mass 1992]; and In Re: Hardie, 100 B. R. 284 [Bankr. E. D. N. C. 1989]). Those opinions embrace the *Countryman* definition of executory contract. In this case however, restrictive covenant numbers 7 and 8 can not be considered executory and personal in nature. At the time of the filing of the Debtor's Petition, neither Claimant nor Debtor had any unperformed obligations. Only upon the Trustee crafting the terms and conditions supporting his Motion trigger the effect of these restrictive covenants. The Fourth Circuit in RCI Technology Corporation v. Sunterra Corporation (In Re: Sunterra Corporation), 361 F. 3d 254 [4th Cir 2004]) held that "applying the *Countryman* Test, the Agreement was not executory unless it was executory as to both...." In addition, in BNY, Capital Funding LLC v. US Airways, Inc., 345 B. R. 549 (E. D. Va. 2006), the court held that a letter of intent to purchase was not an executory contract (failing *Countryman* definition) since there were no unperformed obligations under the letter of intent at the time of the filing of the Petition. "Unperformed obligations become due if, and only if, the optionee exercises the option.... If the option is not exercised, the unperformed obligations never become due and neither party commits a breach." (*Id* at 551).

As is present here, there is no mutuality of obligations, thus Restrictive Covenants Nos. 7 and 8 are not executory. This analysis was followed in In Re: Bergt, 241 B. R. 17 (Bankr. D. Alaska, 1999), as well as Creditors' Committee v. Southmar Corp (In Re: Robert L. Helms Constr. & Dev. Co., Inc., 139 F. 3d 702 (9th Cir. 1998). The Ninth Circuit went on to consider noteworthy the fact that its ruling was important for the preservation of a valuable asset, whereas if the court would allow rejection, the optioner (Panthera Training in this case) would receive an undeserved windfall. The court went further and discussed that debtors fail to recognize the value of such options and "fail to expressly assume them. This lead to a trap, as unassumed

executory contracts may be deemed rejected...when the trustee has no intention of abandoning the asset." (Id at 705-06).

In Hayes v. Water Ski Mania Estates Homeowners Ass'n (In Re: Hayes), 2077 Bankr. Lexis 3397 [Bankr. D. Mont.,]) 2007, the debtors purchased lakeside property which was subject to a series of restrictive covenants limiting the use of the property, providing for assessments, and for providing ongoing maintenance. The debtors argued that such restrictions were executory while the homeowner association argued that they were property rights and covenants running appurtenant to the land. While the court the homeowner association's actions unreasonable, the court rejected the debtor's argument that the covenants could be "extinguished" by deeming them executory.

The Trustee's arguments regarding Restrictive Covenant Numbers 6, 7 and 8 chant like a litany; however no matter how many times the Trustee brands these covenants personal, executory and capable of rejection, the nature and substance that was intended by the parties does not change. All of the covenants were intended to run with and be appurtenant to the land, thus establishing a valuable property right that must be protected.

B. Restrictive Covenants 6, 7 and 8 do not qualify for free and clear sales treatment under 11 U. S. C. 363(f).

The majority of courts have refused to allow a trustee or debtor in possession to use 11 U. S. C. 363(f) to strip covenants and other rights that run with the land, unless a party can demonstrate a specific state of federal law that provides tor the covenants to be found invalid or otherwise "disconnected" from the property. In Mancuso v. Meadowbrook Mall Co. Ltd. P'ship, 2007 WL 951849, the Court 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.

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.

The McElroy Court elaborated upon the essence of a right of first refusal:

> It is true that we have held that '[a]n easement will not be presumed t be in gross when it can fairly be construed to be appurtenant' (Post, 110 W. Va. at 504, 159 S. E. at 524), syl. Pt. 3. However, a different presumption arises when the servitude in question involves a right of first refusal. 'Rights of first refusal are presumed to be personal, and are thus not assignable unless either the clause granting the right refers to successor or assigns or the instrument clearly shows that the right was intended to be assignable.' 6A C. J. S. Assignments Section 36; see also Mulberry v. Burns Concrete, Inc., 164 Idaho 729, 732, 435 P. 3d 509, 512 (2019) (noting that 'the majority of case law...holds that [rights of first refusal] are presumptively personal to the parties when the [right of first refusal] does not contain language such as 'assigns' or 'heirs').

The West Virginia Supreme Court of Appeals specifically found that repurchase options run with the 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 Covenant Nos. Seven and Eight 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 at the time of closing or as a deferred payment.

CONCLUSION

The tone-deaf condition of the Trustee can not trample the fact that the Claimant and the Debtor fully intended that the Restrictive Covenants enumerated within the Deed of Conveyance would constitute restrictive covenants running with the land, touching and concerning the land, and being appurtenant to the land. The covenants are not executory since the obligations were not triggered until the Trustee's Motion was filed. 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 and the Claimants' property rights will be put asunder. 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 Response 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 14th day of June, 2021, I served the foregoing Response to the Trustee's Memorandum in Support of the 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 by electronic filing 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 to the following:

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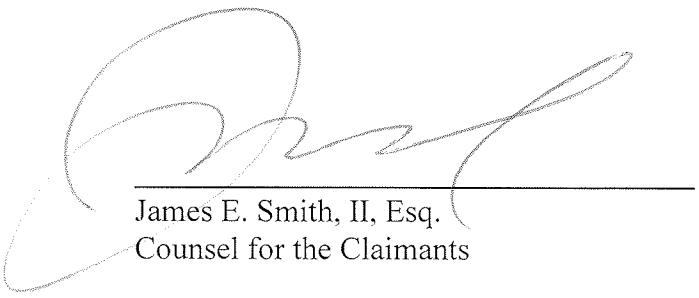
Manual Notice List

Notice was not mailed to be parties below as no addresses were provided. To the extend the Trustee has email addresses the below notice parties, they were emailed.

Rob Duncan
Manager/Duncan Development Group, LLC

Rob Duncan
Manager/TR&L, LLC,
a Virginia Limited Liability Company
Successor to SMI, LLC,
A Virginia Limited Liability Company

Bruce Hardy; Stacie Hardy; Anthony McLntyre; Timothy Miller



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