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

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| **In re** | : | |
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| **PANTHERA ENTERPRISES, LLC,** | : | **BK No. 2:19-BK-00787** |
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| **Debtor.** | : | **Chapter 11** |
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| **PANTHERA TRAINING, LLC, and WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,** | : | |
| | : | |
| **Movants,** | : | |
| | : | |
| **v.** | : | |
| | : | |
| **PANTHERA ENTERPRISES, LLC,** | : | |
| | : | |
| **Respondent.** | : | |

**JOINT MOTION TO CONVERT THIS CASE TO A CHAPTER 7 PROCEEDING FOR CAUSE PURSUANT TO 11 U.S.C. § 1112(b)(1)**

Panthera Training, LLC ("Panthera Training") and West Virginia Economic Development Authority ("WVEDA" and with Panthera Training, "Movants"), each by its counsel, moves this Court to convert this Chapter 11 bankruptcy case for cause to a proceeding under Chapter 7, pursuant to 11 U.S.C. § 1112(b)(1). In support of their Motion, Movants state as follows:

## Background Facts

1. Panthera Enterprises, LLC ("Debtor") initiated this bankruptcy case on September 13, 2019, with the filing of a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

2. Panthera Training, LLC is a Virginia limited liability company that is not related to the Debtor or the Debtor's subsidiary, Panthera Training Center, LLC ("Center"). Affidavit of Robert L. Starer attached hereto as Exhibit A, ¶¶ 1, 4.

3. WVEDA is the Debtor's largest creditor, with a claim of $6,477,180.47 based upon two loans made to the Debtor prepetition. Claim # 4. WVEDA's claim is secured by a lien against a 750 acre tract of land, in Hardy County, West Virginia ("Real Property"), scheduled as property of the Debtor. *Id*., Doc 23, p. 2. The Real Property is the site of a military and law enforcement personnel training facility ("Facility"). Ex. A, ¶ 2.

4. On June 1, 2018, when Debtor was on the verge of foreclosure by the WVEDA, Debtor entered into a long term Commercial Lease Agreement with Panthera Training, pursuant to which Panthera Training leased the Real Property. Doc 52-6, p.1 and Ex. A, ¶ 2.

5. In addition, on June 1, 2018, Panthera Training became a subcontractor of the Debtor and its subsidiary, Center, to conduct training at the Facility that Debtor and Center contracted to provide to third parties. Doc 52-7.

6. Currently, Panthera Training conducts training that Debtor contracted to provide to the Drug Enforcement Administration (the "DEA Contract"). This is the Debtor's sole contract. Panthera Training also conducts training for Center under its two contracts, referred to as "SOCOM" and "1st CIG." Ex. A, ¶ 3.

7. The Debtor has no employees. Excerpts from the transcript of the Debtor's 341 meeting conducted October 18, 2019 are attached hereto as Exhibit B,, 11:9.[1] The Debtor is managed by Mr. Punelli and Mr. Jones. Ex. B, 13:7. Mr. Punelli and Mr. Jones also manage Center. Ex. B, 29:7.

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[1] The full transcript is available at Doc 52-5.

8. Mr. Punelli maintains the Debtor's books and records of the Debtor. Doc 23, p.38; Ex. B, 56. The Debtor has not retained an accountant since May 1, 2018. *Id*. Mr. Punelli prepared the Debtor's taxes for 2018. Exhibit B, 56:3-4. Mr. Punelli signed each of the Operating Reports filed in this case under penalty of perjury that the information reported was true and correct.

9. The Debtor's only business is as a landlord under the Commercial Lease with Panthera Training and as the contractor under its sole contract with the DEA. By agreement of the Debtor, the base rent due under the Commercial Lease is paid directly to the WVEDA, to be applied to the indebtedness owed on the loans made to the Debtor prepetition. Doc 52-6, p.10 The full amount of fees paid for the training contracted by the DEA are to be paid directly to Panthera Training. Doc 52-7, p. 26.

## **Argument**

10. Panthera Training and WVEDA request this Court, pursuant to 11 U.S.C. § 1112(b)(1), for cause, to convert this case to a Chapter 7 proceeding with the appointment of a trustee. Cause exists based upon (a) gross mismanagement of the bankruptcy estate; (b) failure to maintain appropriate insurance; and (c) continuing loss and diminution of the estate and the absence of a reasonable likelihood of rehabilitation. 11 U.S.C. § 1112(b)(4)(A) - (C).

11. Determination of whether cause exists to convert a case to a Chapter 7 proceeding involves a fact-specific inquiry of a debtor's postpetition circumstances. *In re Creech*, 538 B.R. 245, 248 (E.D. N.C. 2015). Upon movant's *prima facie* showing that cause exists, the court determines whether unusual circumstances exist to prevent conversion. *Id.*

**A. Debtor's Gross Mismanagement Supports Conversion**

12. Debtor's Operating Reports repeatedly report payments made to Panthera Training to be payments for a training course conducted by Panthera Training under the Debtor's DEA Contract when, in fact, these were payments made to Panthera Training for training conducted by Panthera Training under Center's contracts. In other words, the Operating Reports represent the Debtor is using Debtor's funds to pay Panthera Training for the DEA training conducted in September 2019 under the Debtor's contract when the payments are actually being made to Panthera Training for training conducted under Center's contracts. The filing of materially inaccurate operating reports supports a finding of gross mismanagement as cause for conversion. *In re Creech*, 538 at 251 (citations omitted).

13. Debtor's misrepresentations can only be shown by analyzing each of the Operating Reports sequentially, as follows:

***September, 2019 Operating Report (Doc 37)***

14. Post-petition, in September, 2019, Panthera Training conducted a training course under the Debtor's DEA contract, generating an invoice in the amount of $172,000, which amount was payable by the DEA to the Debtor as the contractor, and then was to be immediately paid to Panthera Training. Debtor's September, 2019 Operating Report correctly shows a Receivable of $177,883.00, due October 23, 2019, for the "Drug Enforcement Administration ("DEA") Training Class." Doc 37, p. 10.

15. However, the September, 2019 Operating Report also reported a payable to Center in the amount of $138,750 for “Training COGS” [Cost of Goods Sold]. Doc 37, p. 9. This is inaccurate. Center does not conduct any training for the Debtor. The only training conducted for the Debtor is by Panthera Training under the DEA Contract.

***October, 2019 Operating Report (Doc 63)***

16. On October 21, 2019, the DEA paid the Debtor $172,000 for the September, 2019 course taught by Panthera Training. Doc 63, p. 7 (showing "Cash Receipts" of $172,000 for "DEA Training Contract") and p. 13 (showing $172,000 deposited in the Debtor's bank account). The receipt of this $172,000 generated a payable to Panthera Training in like amount. Ex. A, ¶ 23. However, the payable to Panthera Training is not reported in the Operating Report. Doc 63, p. 9. The Debtor's $172,000 payable to Panthera Training, to date, has not been paid, and is the subject of a separate adversary proceeding.

17. Also, in the October Operating Report, under "Disbursements," Debtor shows $134,160 being disbursed to Center, falsely labeled as payment to Center on the "DEA Contract." Doc 63, p. 8. The Debtor then added a notation with that disbursement that reads: "Paid in error, will be refunded and shown on the November operating report." Doc 63, p. 16, showing $172,000 received from the DEA and $134,160 paid to Center, with the notation "PTC Payment - Sept DEA Class." "PTC" is a reference to Center. Again, Center did not conduct any DEA training for the Debtor. Ex. A, ¶ 23.

***November, 2019 Operating Report (Doc 80)***

18. The $134,160 Debtor paid to Center "in error" in October was not returned to the Debtor in November. Doc 80, p. 6. The November Operating Report notes: "there was a miscommunication/oversight during the month of November and the October 21, 2019 $134,160 payment to Panthera Training Center was not refunded during the month of November as planned, *but has since been returned in December* and will reflect the same on the next report." Doc 80, p. 6 (emphasis added).[2]

[2] At this juncture, it is worth noting once more that the Debtor has no employees and no accountant. Ex. B, 11:9; , Doc 23, p. 38. Likewise, Center has no employees. Ex. B, 72:4. Mr. Punelli keeps the books of the Debtor and he

***<u>December, 2019 Operating Report (Doc 93)</u>***

19. Despite the representation in the November Operating Report that the October 21, 2019 $134,160 payment has "*since been returned in December*," it was not. The December Operating Report reflects a refund of $50,000 on 12/6/2019 and a refund of $50,000 on 12/18/2019, each characterized as "DEA payment refund from PTC (Sept Class)." Doc 93, p. 15. Of the total $134,160 paid to Center "in error," only $100,000 had been refunded by December 20, 2019 when Debtor filed its November 2019 Operating Report. The December Operating Report reported that "the remaining $34,160.00 that was paid to Panthera Training Center, LLC will be refunded and reflected on the January operating report." Doc 93, p. 7. However, as noted below, the $34,160.00 was not refunded to the Debtor until February 18, 2020. Doc 112, p. 12.

20. The December Operating Report also reports $44,464.80 paid to Panthera Training, labeled "DEA payment to PT (Sept Class)." Doc 93, p. 13. However, this $44,464.80 disbursement was <u>not</u> a payment for the DEA course conducted by Panthera Training in September 2019. Rather, it was payment of a $44,464.80 invoice owed to Panthera Training by Center.

21. As noted above, in addition to its subcontract with Debtor, Panthera Training subcontracted with Center to conduct training courses under Center's two contracts referred to as SOCOM and 1st CIG. Ex. ¶ 3. In September 2019, Training conducted a training class for Center under its SOCOM contract, which generated an invoice payable to Panthera Training in the amount of $44,464.80. Ex. A, ¶¶ 5, 6 (Ex. 1).

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(and Mr. Jones) are the sole managers for Debtor and Center. Further, Mr. Punelli's December 31, 2019 email to Panthera Training confirms that Mr. Punelli is coordinating the subcontract task orders for training for both the Debtor's DEA Contract and Center's SOCOM and 1st CIG contracts. Ex. A, ¶ 15 (Ex. 4).Consequently, one is left to conclude that the "miscommunication/oversight" was between Mr. Punelli and Mr. Punelli.

22. In a January 28, 2020 email, Panthera Training communicated with Mr. Punelli about the status of several delinquent invoices owed by Center to Panthera Training for courses conducted under Center's contracts, including a $30,200 invoice for a course conducted under the 1st CIG contract and the $44,464.80 invoice for the September course conducted under the SOCOM contract. Mr. Punelli replied with notes on Panthera Training's email, stating that Center's $44,464.80 SOCOM invoice was paid December 6, 2019. Ex. A, ¶¶ 7-10 (Ex. 2)

23. Indeed, Panthera Training received $44,464.80 by wire transfer on December 6, 2019. Ex. A, ¶ 11. However, the $44,464.80 payment was paid by the Debtor, from the Debtor's funds, not by Center. Further, Debtor reported the payment in its December Operating Report as "DEA payment to PT (Sept Class)," not payment for Center's 1st CIG class. Doc 93, p. 13. Debtor's December bank statement confirms the $44,464.80 wire on December 6, 2019 paid from the Debtor's account. Doc 93, p. 11.

***Debtor's January, 2020 Operating Report (Doc 98)***

24. Panthera Training conducted another training course for Center in November 2019, under the SOCOM contract, generating and sending an invoice payable by Center in the amount of $30,200. Ex. A, ¶¶ 12, 13 (Ex. 3)

25. By email dated December 31, 2019, Mr. Punelli advised that a wire in payment of this invoice had been sent to Panthera Training. Ex. A, ¶¶ 14, 15 (Ex. 4). Panthera Training received the $30,200 by wire transfer on January 2, 2020. Ex. A. ¶ 16.

26. Debtor's January Operating Report shows the disbursement to Panthera Training for $30,200 on January 2, 2020, which Debtor reported as "Payment for Sept 19, 2019 DEA Train[ing]." Doc 98, pp. 7, 11. Debtor's bank statement confirms a wire in the amount of $30,200 paid from the Debtor's account. Doc 98, p. 10. Again, Debtor paid a payable that

Center owed Panthera Training from the Debtor's account and reported it as payment of the Debtor's payable to Panthera Training for the Debtor's September 2019 DEA contract training.

***<u>Debtor's February, 2020 Operating Report (Doc 110)</u>***

27. Panthera Training conducted another training course for Center in January 2020 under the 1st CIG contract, which generated a second invoice to Center in the amount of $30,200. Ex. A, ¶ 17 (Ex. 5)

28. By email dated February 19, 2020, Mr. Punelli advised that a wire in payment of the "1st CIG January class" had been sent that day. Ex. A, ¶ 19 (Ex. 6).

29. Panthera Training received $30,200 by wire transfer on February 19, 2020. Ex. A, ¶ 21. However, as with the other wire transfers received by Panthera Training to pay the invoices owed by Center, the February Operating Report reports the payment coming from the Debtor's account. Doc 110, p. 8.

30. The February Operating Report shows $30,200 wired to "PT" on February 12, 2020 and again on February 19, 2020. Doc 110, p. 11. Each payment is reported as being a "DEA payment to PT (Sept Class)," (Doc 110, p. 12.) but the wire transfer sent to Panthera Training on February 19, 2020 paid for the 1st CIG contract training Panthera Training performed for Center.

31. Panthera Training did not receive the $30,200 wire reported in the February Operating Report to have been sent February 12, 2020. Ex. A, ¶ 21. The "Reconciled Report" at page 12 suggests that perhaps this payment was sent to Center, not Panthera Training, because there is a subsequent "Repayment" of the same amount, i.e., $30,200, to the Debtor by Center on February 26, 2020 which is labeled "Repayment for DEA mistaken payment to PTC (Sept Class). Doc 110, p. 12.

32. Last, in February, 2020, the remaining $34,160 of the $134,160 payment sent to Center in October 2019 was returned to the Debtor, labeled "DEA payment refund from PTC (Sept Class)." Doc 110, p. 12.

33. There are other entries in the Operating Reports that raise questions. For example, each month, precisely $800 is paid to Mr. Punelli as "Misc Fees - Travel and Expenses", reporting that Mr. Punelli incurred the same $800 in reimbursable miscellaneous fees and expenses each month. Doc 63, p.8; Doc 80, p. 7; Doc 93, p. 8; Doc 98, p. 7; Doc 110, p. 8; Doc 118, p. 8. Mr. Punelli is not an employee of the Debtor, raising the question of whether these are administrative expenses that should be approved by the Bankruptcy Court. On the same pages, each month there is a payment of $450 to "ARB Investments" for "ERP Cloud Fee." There has been no explanation of what or who ARB Investments is or what service it is providing to the Debtor. Further, in the March Operating Report, there is a disbursement of $2,130.50 to the "WV Secretary of State" for "Real estate taxes, 148 acre parcel." Doc 118, p. 8. The Debtor has not scheduled, nor disclosed ownership of, a 148 acre parcel, for which taxes would be paid by the Debtor.

34. Analysis of the Debtor's Operating Reports provides multiple grounds for a finding of cause based on gross mismanagement. In the first instance, Debtor's Operating Reports are simply not reliable.

> The duty to create and maintain records that accurately reflect a debtor's financial activities while under the protection of the Bankruptcy Court is one of the debtor's basic obligations.

*In re V Companies*, 274 B.R. 721, 739 (N.D. Ohio 2002). Characterized as the "life-blood" of the Chapter 11 process, Operating Reports are the means by which creditors can monitor the debtor's post-petition operation. *In re Tucker*, 411 B.R. 530, 535 (S.D. Ga. 2009). Failure to accurately report raises questions about the debtor's ability to effectively reorganize, and incomplete, misleading, and materially false monthly reports are grounds for finding cause to convert this case to a Chapter 7. *Id*.

35. In addition, the discrepancies cited above suggest something more than mere mathematical or clerical errors. In each instance, Center received payment from the contracting party for the training work performed by Panthera Training (Ex. A, ¶ 22), but rather than cause Center to use those funds to pay Center's obligations, the Debtor elected to deplete the Debtor's dwindling cash and report in its Operating Reports that it was properly applying the Debtor's funds in payment of the Debtor's obligations.

36. The Debtor's use of it funds to pay its subsidiary's debts constitutes "cause" as referenced in 11 U.S.C. § 1112(b)(4). *In re 1243 20th Street, Inc.*, 6 B.R. 683 (Bankr. D. D.C. 1980) (transfer of $60,000 to an affiliate by an insolvent debtor warranted appointment of an examiner under section 1104 of the Bankruptcy Code); *In re Sharon Steel Corp.*, 86 B.R. 455 (Bankr. W.D. Pa. 1988) (appointment of chapter 11 trustee was necessary to maintain viability of debtor's business where debtor transferred significant assets to other companies under common control.)

37. Further, the Debtor has misled the Court and its creditors into believing it disbursed $104,864.80 ($44,464.80 + $30,200 + $30,200) to pay the Debtor's obligations, leaving the funds received by Center to pay Center's obligations outside the purview of the Bankruptcy Court and the Debtor's creditors.

**B. <u>Debtor's Failure to Maintain Appropriate Insurance Supports Conversion</u>**

38. Debtor allowed its property casualty insurance to lapse, and as of the filing of this Motion, has failed to secure adequate replacement insurance.

39. Prepetition, the Debtor maintained Commercial Property Insurance and Liability Insurance for the Debtor. Attached as Exhibit C are Certificates of Commercial Property Insurance and Liability Insurance previously provided to the WVEDA, with a term of October 31, 2018 through October 31, 2019.

40. In April of this year, WVEDA requested the Debtor to provide proof of insurance for the post-October 31, 2019 term. It was assumed the insurance had been renewed because the WVEDA had not been notified otherwise and there was no indication in the Debtor's Operating Reports that insurance had lapsed. Attached as Exhibit D is a copy of an email string, in which counsel for WVEDA initially requested proof of insurance.

41. In response, the Debtor indicated it was Panthera Training's obligation under the Commercial Lease Agreement to provide insurance. WVEDA disagreed in its April 7, 2020 response, at least insofar as property casualty insurance was concerned, and again requested proof of insurance. Ex. D. The U.S. Trustee's Office was copied on the email string.

42. On April 7, 2020, the U.S. Trustee's Office filed its Motion to Dismiss or Convert to Chapter 7 for failure to maintain adequate insurance.

43. On April 24, 2020, Debtor responded to the U.S. Trustee's Motion to Dismiss or Convert to Chapter 7, stating that Debtor had procured a policy of casualty insurance as required by the U.S. Trustee. The Certificate attached as Exhibit E was provided with the Debtor's response.

44. The insurance procured by the Debtor is for the term of April 17, 2020 through April 17, 2021 and covers only replacement cost of the buildings on the Real Property ("<u>April 2020 Insurance</u>"). It does not cover the Real Property, which is a 750 acre wooded tract,

integral to the training conducted at the Facility. It does not cover items previously included, such as infrastructure and utilities.

45. The total coverage amount for the April 2020 Insurance, for replacement cost, is $2,149,000. This is less than a third of the $6,224,500 in coverage that was procured for the October 31, 2018 - October 31, 2019 term. Ex. C.

46. The Debtor scheduled its Real Property with a value of $15,050,000. Doc 23, p. 2. It scheduled nearly $9 million in claims secured by the Real Property. *Id.* The $2,149,000 in replacement cost is wholly inadequate to protect the interest of the Debtor's creditors.

47. The Debtor's failure to maintain insurance and to procure insurance in an amount that would sufficiently protect the interests of its creditors is grounds for finding cause to convert this case to a Chapter 7 proceeding under 11 U.S.C. § 1112(b)(1).

**C. Debtor's Continuing Loss and Diminution of the Estate with the Absence of a Reasonable Likelihood of Rehabilitation Supports Conversion**

48. The Debtor's Operating Reports reflect a continuing loss and diminution of the bankruptcy estate. The Debtor has reported a net loss for every month of operations other than December, 2019, with February, 2020 posting its largest single-month loss in the amount of $204,891.94. Doc 63, p. 17 (October, 2019 $17,870.78 loss), Doc 80, p. 11 (November, 2019 $18,749.53 loss) Doc 93, p. 14 (December, 2019 $37,422.30 net income), Doc 98, p. 12, (January, 2020 $48,194.20 loss), Doc 110, p. 13 (February, 2020 $204,891.94 loss), and Doc 118, p, 13 (March, 2020 $17,553.83 loss). Debtor reported net income for December 2019, but only because it reduced its "Subcontractors" direct costs by $55,535.20. Doc 93, p. 14. Yet, the Debtor's December, 2019 Operating Report reveals no receipt or credit that supports the

Debtor's $55,535.20 reduction in its direct costs, again questioning the reliability of the Debtor's Operating Reports.

49. Further, there is nothing whatsoever in any of the Debtor's Operating Reports that supports the notion that the Debtor can rehabilitate its failing financial condition. The Debtor's Operating Reports show no net income. Over the past six months, Debtor's cash receipts consist principally of payments made by the DEA for training conducted by Panthera Training under the Debtor's DEA Contract, of which 100% of the receipts are payable to Panthera Training. Doc 63, p. 13 ($172,000); Doc 98, pp. 6-7 ($168,000), and Doc 110, pp. 7-8 ($168,000). As noted above, the Debtor's Operating Reports also reflect the eventual return of the $134,160 that had been moved to Center at the beginning of the bankruptcy case. But Center's return of improperly transferred funds does not constitute "income" to the Debtor. The Debtor simply has no net income. Without a source of income, it is difficult to conceive of how this Debtor could possibly rehabilitate.

50. The continuing loss to or diminution of the Debtor's estate and the absence of a reasonable likelihood of rehabilitation constitutes cause under 11 U.S.C. §1112(b)(4) for grounds to support conversion of this case to a Chapter 7.

**D. <u>Debtor's Burden to Avoid Conversion</u>**

51. This Motion establishes multiple bases on which to find cause for converting this case to a Chapter 7 proceeding under 11 U.S.C §1112(b). The Debtor's burden to avoid conversion is daunting. Nonetheless, the Debtor may avoid conversion only by establishing all of the following conjunctive conditions:

(a) Unusual conditions such that conversion is not in the best interest of creditors. [11 U.S.C. §1112(b)(2)]; <u>and</u>

(b) A reasonable likelihood that a plan will be confirmed within a reasonable period of time; [11 U.S.C. §1112(b)(2)(A)]; and

(c) Most importantly in the matter at hand, a reasonable justification for the acts and omissions of the Debtor, and that they will be cured within a reasonable time fixed by the Court [11 U.S.C. §1112(b)(2)(B)].

52. There are no unusual circumstances that would prevent conversion of this case, and it is beyond peradventure that the Debtor's acts cannot be reasonably justified.

WHEREFORE, Panthera Training, LLC and the West Virginia Economic Development Authority request that the Court convert this case to one under Chapter 7 with the appointment of a Chapter 7 Trustee, and grant such other and further relief as this cause merits.

PANTHERA TRAINING, LLC

By Counsel

*/s/ Douglas E. Kahle, Esq.*

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-and-

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**WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY**

By Counsel

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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**
**(Martinsburg)**

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| **WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,** | : | |
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| **PANTHERA ENTERPRISES, LLC,** | : | |
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| **Respondent.** | : | |
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**CERTIFICATE OF SERVICE**

I, Zachary J. Rosencrance, hereby certify that on this 7th day of May 2020, the foregoing *Joint Motion to Convert this Case to a Chapter 7 Proceeding for Cause pursuant to 11 U.S.C. ¶ 1112(b)(1)* was served through the Court's ECF system on all parties registered to receive CM/ECF notices, including:

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*/s/ Zachary J. Rosencrance*
Zachary J. Rosencrance (WVSB# 13040)