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

IN RE: PANTHERA ENTERPRISES, LLC, Debtor.	Bankr. Case No. 19-00787 Chapter 11
PANTHERA ENTERPRISES, LLC, Plaintiff, v. PANTHERA TRAINING, LLC, Defendant.	Adv. Pro. No.____________________

COMPLAINT FOR TURNOVER AND POSSESSION OF REAL AND PERSONAL PROPERTY AND FOR PRELIMINARY INJUNCTION AGAINST POSSESSION OF PROPERTY

Panthera Enterprises, LLC (the "Debtor" or "Plaintiff"), by and through its undersigned counsel, files this complaint (the "Complaint") for turnover and possession of real and personal property pursuant to termination of commercial lease by and between the Debtor and Panthera Training, LLC ("Defendant") and for an injunction against the Defendant's possession of all such real and related personal property. In support of this Complaint, the Plaintiff hereby avers:

JURISDICTION AND VENUE

1. This adversary proceeding is commenced pursuant to section 542(a) of Chapter 5 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the "Bankruptcy Code") for the turnover and possession of real property pursuant to the Lease (as defined herein) and for an injunction against Defendant's possession of the Leased Premises (as defined herein).

2. The United States Bankruptcy Court for the Northern District of West Virginia (the "Court") has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334(b). Venue is proper pursuant to 28 U.S.C. § 1409. This adversary proceeding is a "core" proceeding to be heard and determined by this Court pursuant to 11 U.S.C. § 157(b)(2).

3. The statutory and legal predicates for the relief sought herein are section 542(a) of the Bankruptcy Code and Rule 7001(1) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

4. The Plaintiff consents to the jurisdiction of the bankruptcy court and the entry of final orders or judgment by the bankruptcy court.

BACKGROUND

5. On September 13, 2019, the Plaintiff filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

6. The Plaintiff owns the real property located at 2506 Fishpond Road, Old Fields, West Virginia 26845 , including the improvements, structures and various personal property situated on such real property (collectively, the "Property"), all of which is utilized as a training facility for various of the Plaintiff's clients and customers (the "Facility").

7. On or about June 1, 2018, the Plaintiff and the Defendant entered into a commercial lease (the "Lease") by which the Defendant was to occupy the Property and the Facility (collectively referred to as the "Leased Premises") and conduct certain trainings (the "Trainings") to fulfill contracts held by the Plaintiff (the "Training Contracts"). A true and correct copy of the Lease is attached hereto as **Exhibit A.**

8. The Plaintiff subcontracted the Training Contracts to Defendant to allow the Defendant to facilitate the Trainings while the Defendant was leasing the Property.

9. Pursuant to the Lease, the Defendant was to pay the Plaintiff fifty-two thousand dollars and 00/100 ($52,000.00) per month in "base rent." The Defendant was also required to pay certain monthly "Additional Rent" on the first day of each calendar month in an amount to be determined by and based on the Defendant's profit and loss statement for each such calendar month.

10. The Lease defines "Additional Rent" as "an amount equal to fifty-percent (50%) of the Tenant's prior month's Profit." Lease, ¶ 4. "Profit" is defined in the Lease as the "amount calculated monthly that is equal to the Tenant's Taxable Income derived from the Tenant's operations conducted on the Property in the ordinary course of business, reduced by the amount of $25,000 per month…" Lease, ¶ 4.

11. The Lease provision regarding Additional Rent also provides a detailed illustration of how such Additional Rent is to be calculated on a monthly basis to eliminate any possible confusion in determining how much Additional Rent the Defendant is to pay to Plaintiff on the first of each month.

12. The Additional Rent is owed by the Defendant for the months of October 2018, November 2018, December 2018, April 2019, May 2019, and June 2019 in the total amount of $218,469.00.

13. The Defendant has refused to provide the Plaintiff with its profit and loss statements for July 2019 through September 2019 and Plaintiff has therefore been unable to determine the amount of Additional Rent that it is owed from Defendant for this period of time.

14. The Lease provides that the Defendant's failure to pay the rent as required by the lease is an Event of Default. *See* Lease, ¶ 14.

15. Further, because "the [Defendant's] Event of Default involves nonpayment of rent and Tenant fail[ed] to cure such default within ten (10) days of its due date," the Plaintiff may pursue any of the remedies set forth in the Lease.

16. One such remedy provided by the Lease is the ability of the Plaintiff to terminate the Lease and, "with or without terminating this Lease, [Plaintiff] may re-enter, terminate [Defendant]'s right of possession, and take possession of the Property." Lease, ¶ 15(a).

17. Because the Defendant failed to cure its default involving the nonpayment of Additional Rent within ten days of October 1, 2018 (the first due date of the missed Additional Rent payment), the Plaintiff has had the right to terminate the Lease, re-enter, terminate Defendant's right of possession, and take possession of the Property since October 11, 2018.

18. On October 3, 2019, the Plaintiff sent a letter to the Defendant notifying it of the Plaintiff's termination of the Lease pursuant to the remedies contained in the lease (the "Letter"). This correspondence to the Defendant demanded that the Defendant relinquish possession of the Property in accordance with Plaintiff's termination of the Lease.

19. The Letter also identified additional Events of Defaults under the Lease, including the Defendant's failure to pay certain taxes, failure to maintain or provide proof of adequate insurance over the Leased Premises, failure to provide Plaintiff with adequate and sufficient records and/or an accounting as required by the Lease, and diversion of certain revenues derived from lodging related services. Such additional Events of Defaults provide further bases for the termination of the Lease

20. As of the date of filing this Complaint, the Defendant has refused to turnover possession of the Property.

COUNT I: CLAIM FOR TURNOVER OF THE DEBTOR'S PROPERTY

21. The Plaintiff hereby incorporates by reference all of the statements and allegations made and contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

22. Pursuant to section 542(a) of the Bankruptcy Code:

> an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title … shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a).

23. As set forth above, the Plaintiff has terminated the Lease as a result of the Defendant's aforementioned Event of Default caused by Defendant's failure to pay the Additional Rent.

24. The Defendant is therefore required to turn over the Plaintiff's Property as the Property is property of the estate.

WHEREFORE, the Plaintiff, Panthera Enterprises Inc., respectfully requests that this Honorable Court require the Defendant to immediately vacate the Property pursuant to the termination of the Lease.

COUNT II: PRELIMINARY INJUNCTION

25. The Plaintiff hereby incorporates by reference all of the statements and allegations made and contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

26. Based upon the foregoing facts, the Plaintiff fears and believes that the Defendant will continue to wrongfully prevent Plaintiff from obtaining possession of the Property which is property of the estate. Plaintiff accordingly requests that the Court enjoin the Defendant from occupying the Property and from blocking Plaintiff's access to and possession of the Property.

27. The Plaintiff is in need of immediate relief in that unless the Plaintiff is granted immediate access and possession, the Plaintiff will suffer immediate and irreparable harm that will be detrimental to the estate.

28. In order for a court to issue a preliminary injunction in West Virginia,

> [A] party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: '(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.'"

State by & Through McGraw v. Imperial Mktg., 472 S.E.2d 792, 798 n.8 888 (W. Va. 2017) (quoting *Jefferson City Bd. Of Educ. V. Jefferson Cty. Educ. Ass'n*, 393 S.E.2d 653, 662 (1990)).

29. Additionally, the Fourth Circuit Court of Appeals has explained that the balancing of the irreparable harm to the Plaintiff without an injunction with the harm to the defendant if such injunction is granted is the most important consideration and should be considered by the court first. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812-13 (4th Cir. 1991).

30. Further, where the plaintiff can show that it is more likely to experience irreparable harm in the absence of such injunctive relief, "the plaintiff need not show as robust a likelihood of success on the merits." *Id.* at 813 (quoting *Benda v. Grand Lodge*, 584 F.2d 308, 315 (9th Cir. 1978), *cert denied*, 441 U.S. 937 (1980)).

31. All relevant factors noted above support the granting of an injunction in favor of the Plaintiff.

32. In this case, preliminary injunctive relief is necessary to prevent immediate and irreparable harm to the Plaintiff, the bankruptcy estate and all creditors of the bankruptcy estate.

33. The Defendant's possession of the Plaintiff's Property is actively occurring even though the Lease has been terminated and the Defendant no longer has a right to possess the Property.

34. Without a preliminary injunction, the Plaintiff will be unable to obtain possession of the Property and will therefore be unable to conduct the necessary Training as required by the Training Contracts. This failure to complete its obligations under the Training Contracts will result in immediate and irreparable harm to Plaintiff and its business relationships under the Training Contracts, will be detrimental to the Plaintiff's ability to obtain such contracts in the future and will severely and negatively impact the Plaintiff's ability to reorganize.

35. More harm will result to the Plaintiff if the requested injunction is not granted than would result to the Defendant if the injunction is granted.

36. Plaintiff is the named party to the Training Contracts and is therefore primarily obligated to fulfill the obligations under those contracts. Any failure to perform the duties under the Training Contracts will severely harm the Plaintiff's ability to obtain such contracts in the future and will not harm the Defendant.

37. The only potential harm to the Defendant is the loss of revenue remaining under the current term of the Subcontract, which is greatly outweighed by Plaintiff's potential loss of future contracts. Furthermore, the Subcontract expressly provides that Plaintiff may cease assigning work to Defendant under the Subcontract at any time and at Plaintiff's sole discretion. Accordingly, Plaintiff has the ability to essentially terminate Defendant's work under the Subcontract in any event. Moreover, the Subcontract is an executory contract subject to Section 365 of the Bankruptcy Code, pursuant to which Plaintiff intends to reject the Subcontract if necessary.

38. The Defendant's breaches and refusal to turn over the Property endanger Plaintiff's ability to ever reorganize and continue operating as a going concern.

39. The Plaintiff is also likely to prevail on the merits. The Defendant's failure to pay the Additional Rent is clearly an Event of Default and the language in the Lease unambiguously gives the Plaintiff the right to terminate the lease and to possess the Property under such an Event of Default.

40. Plaintiff avers that the requested relief is not contrary to, and will have no effect on, any public interest.

41. Absent the entry of an order preliminarily enjoining the Defendant from its continuing violations, the wrongful activity will continue to the irreparable detriment of the Plaintiff.

WHEREFORE, the Plaintiff respectfully requests that this Court enjoin the Defendant from continuing to possess the Property.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Panthera Enterprises LLC, prays that this Honorable Court grant the following relief against Panthera Training LLC:

A. Judgment in favor of Plaintiff and against Defendant enjoining the Defendant from possessing, occupying, or controlling the Property and interfering in any way with the Plaintiff's right to possess, occupy, or control the Property;

B. Judgment in favor of Plaintiff and against Defendant for the immediate turnover of Plaintiff's Property;

C. Ordering that the Plaintiff reserves and preserves any and all rights it may have regarding the Lease and various Events of Default under the Lease; and

D. Granting Plaintiff such other relief and further relief as this Court deems just and proper.

Date: October 17, 2019

BERNSTEIN-BURKLEY, P.C.

By:*/s/ Robert S. Bernstein*
John J. Richardson, Esq.
WV ID: 13140
jrichardson@bernsteinlaw.com
Robert S. Bernstein, Esq.
WV ID: 4708
rbernstein@bernsteinlaw.com
707 Grant Street, Ste. 2200
Pittsburgh, PA 15219
Phone: (412) 456-8101
Fax: (412) 456-8135

Counsel for Plaintiff