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 11**
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY, **Movant** **v.** **PANTHERA ENTERPRISES, LLC,** **Respondent**	

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY'S MOTION TO CONVERT THIS CASE TO A CHAPTER 7 PROCEEDING, OR, IN THE ALTERNATIVE, DISMISS THIS BANKRUPTCY CASE FOR CAUSE

West Virginia Economic Development Authority ("WVEDA"), by its counsel, moves this Court, pursuant to 11 U.S.C. § 1112(b), to convert this Chapter 11 bankruptcy case to a Chapter 7 proceeding, or in the alternative, dismiss this bankruptcy case for bad faith, and grant WVEDA's Motion for Relief from the Automatic Stay (filed separately). In support of its Motion, WVEDA states as follows:

Jurisdiction and Venue

1. WVEDA, a secured creditor and party in interest, brings this Motion pursuant to 11 U.S.C. § 1112(b), seeking a conversion of this bankruptcy case to a Chapter 7 proceeding, or alternatively, dismissal, for cause.

2. This Court has jurisdiction to hear this Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b).

Procedural Background

3. 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.

4. The Debtor's first meeting of creditors was convened October 18, 2019 ("341 Meeting"), and remains open.

5. On October 17, 2019, the Debtor filed a Complaint against Panthera Training, LLC ("Panthera Training"), commencing Adversary Proceeding 19-ap-0051 ("Adversary Proceeding").

6. On October 18, 2019, Panthera Training filed its *Motion to Compel Panthera Enterprises, LLC to Timely Perform All Obligations Under the Subcontract* with the Debtor. Hearing is scheduled for November 25, 2019.

Factual Background

A. Prepetition Loans Made to the Debtor

7. On August 21, 2013, WVEDA made a fifteen (15) year term loan to the Debtor[1] in the original principal amount of $5,000,000 ("2013 Loan"). The 2013 Loan financed a portion of the Debtor's cost to acquire 689.40 acres in Moorefield District, Hardy County, West Virginia.

8. The 2013 Loan is evidenced by a Promissory Note, pursuant to which the Debtor was to make equal monthly payments of $37,849.50, beginning September 21, 2013, with a final payment of all unpaid principal and accrued and unpaid interest due on August 21, 2028.

[1] The Debtor is a limited liability company formed under the laws of the State of Delaware in 2011. It began its life as TenX Group LLC, and thereafter, changed its name to Panthera Enterprises LLC.

Attached as Exhibit A and incorporated herein by reference is a copy of WVEDA's proof of claim, to which are attached a number of the documents referenced in this Motion as Exhibits A-1 through A-9. Ex. A-2.

9. The 2013 Loan is secured by a Credit Line Deed of Trust and Fixture Filing, granting WVEDA a first lien on the 689.40 acre tract acquired by the Debtor. Ex. A-3. The 2013 Loan is also secured by a Collateral Assignment of Leases and Rents. Ex. A-4.

10. The 2013 Loan is guaranteed by the principals of the Debtor, James V. Punelli ("Punelli") and Raymond C. Jones ("Jones"). It is also guaranteed by Global Matrix Corporation, a corporation solely owned by Jones, and by Pons Milvius LLC, a limited liability company whose sole member is Punelli (together, "Guarantors"). Attached as Exhibit B and incorporated herein by reference is a transcript of the testimony of Mr. James Punelli taken at the 341 Meeting. Ex. B, 79:9-81:4.

11. WVEDA made a second loan to the Debtor on July 2, 2014, in the original principal amount of $1,871,505.00. This loan financed the acquisition of an additional 58.09 acre tract, adjacent to the 689.40 acre tract ("2014 Loan" and with the 2013 Loan, the "Loans"). Together, the 689.40 acre tract and the 58.09 acre tract are referred to herein as the "Real Property." Proceeds of the 2014 Loan were also used to construct improvements and renovations on the Real Property.

12. The 2014 Loan is evidenced by a Promissory Note, pursuant to which the Debtor was to make equal monthly payments of $13,734.66, for a term of fifteen (15) years, with a final installment of all unpaid principal and accrued and unpaid interest due on July 2, 2029. Ex. A-6.

13. The 2014 Loan is secured by a Credit Line Deed of Trust and Fixture Filing, granting WVEDA a subordinate lien on the 689.40 acre tract and a first lien on the 58.09 acre

tract. Ex. A-7. It is also secured by a Collateral Assignment of Leases and Rents, and is guaranteed by the Guarantors. Ex. A-8.

14. WVEDA filed its secured claim in this bankruptcy case on October 23, 2019 for $6,477,180.47. Ex. A, Claim # 4.

B. Operation of the Facility

15. The Real Property is the site of a security operations training facility ("Facility"). It offers tactical training for personnel involved in military and non-military protective services, including government, military and law enforcement personnel. The Facility includes tactical driving tracks, a vehicle obstacle course, shooting ranges, a live fire shoot house, a mobile operations urban training combat town, an FAA approved helicopter landing pad, an armory and explosives vault, multiple classrooms, on-site dining facilities and off-site lodging. Attached as Exhibit C and incorporated herein by reference is the Affidavit of Robert L. Starer, Manager and CEO of Panthera Training, LLC. Ex. C, ¶ 3.

16. The Debtor does not operate the Facility, nor does it provide any of the specialized training that is conducted at the Facility. Ex. B, 7:21-23. The Debtor has no employees. Ex. B, 11:9-10; 72:4-5. Rather, the Debtor subcontracts with another company to operate the Facility and provide training. Ex. B, 7:21-23.

17. Prior to June 2018, Panthera Training Center, LLC ("PTC"), a subsidiary of the Debtor, operated the Facility and provided training at the site. Ex. B, 8:2-4; 14:15-19. PTC is owned 80% by the Debtor. Ex. B, 27:17-19. The remaining 20% is held by David Dolan, who formerly owned the Real Property. Ex. B, 27:21-28:4. Mr. Dolan is not involved in the operation of the Facility. Ex. B, 28:5-8.

18. Punelli and Jones are each 50% owners of the Debtor. They are both officers and managers for both the Debtor and PTC. Ex. B, 10:1-14; 29:7-9.

19. In 2013, the Debtor leased the Real Property to PTC for a fifteen (15) year term, pursuant to the terms of a Commercial Lease ("2013 Commercial Lease"). Not coincidentally, the monthly rent to be paid by PTC was $38,000, the approximate amount of the monthly loan installment the Debtor was obligated to pay WVEDA under the 2013 Promissory Note. Attached as Exhibit D and incorporated herein by reference is a copy of the 2013 Commercial Lease by and between the Debtor and PTC.

20. On June 1, 2018, without prior notice to the WVEDA, the Debtor entered into a subcontract agreement with Panthera Training ("2018 Subcontract"), to operate the Facility and provide training at the site, replacing PTC. Ex. C-3. The 2018 Subcontract has an initial term of June 1, 2018 to May 31, 2023, with two options to extend the 2018 Subcontract through May 31, 2026. Ex. C-3.

21. Panthera Training LLC is not affiliated with the Debtor. It is a wholly owned subsidiary of Historic Arms Corporation, a company owned by Mr. Starer and his wife. Ex. C, ¶ 1. Robert L. Starer is manager and CEO of Panthera Training. Id. Mr. Starer has 50 plus years' experience working with challenged companies that range from "Mom and Pop" shops to a NASDAQ publicly traded company. Among these are several sporting goods stores and firearm training ranges. Mr. Starer also conducts firearms training. Ex. C, ¶ 2.

22. Mr. Starer was first approached about becoming involved with PTC in April, 2018 by Bill White, who was then the Director of Operations for PTC. Ex. C, ¶ 5. According to Mr. White, PTC was experiencing financial and operational challenges. Id. Thereafter, Mr. Starer met with Punelli and Jones on several occasions, who requested that Mr. Starer invest in

the Debtor. Ex. C, ¶ 6. Mr. Starer declined to become an investor. Ex. C, ¶ 7. Instead, Mr. Starer proposed to form a new company, Panthera Training, LLC, which would lease the Real Property and operate the Facility, i.e., provide the training the Debtor and PTC were obligated to perform under their contracts. Ex. C, ¶ 8.

23. Panthera Training entered into three agreements with the Debtor:

(i) a Commercial Lease Agreement, dated June 1, 2018 ("2018 Commercial Lease"), pursuant to which Panthera Training leased the Debtor's Real Property, a copy of which is attached as Exhibit C-1 and incorporated herein by reference;

(ii) an Agreement of assignment, effective as of June 1, 2018 ("2018 Assignment"), with both the Debtor and PTC, pursuant to which all contracts of the Debtor and PTC that involve training and teaching operations at the Facility were assigned to Panthera Training, a copy of which attached as Exhibit C-2 and incorporated herein by reference; and

(iii) a Subcontract, effective June 1, 2018 (the 2018 Subcontract), with the Debtor and its subsidiaries Panthera Worldwide LLC and PTC, pursuant to which Panthera Training agreed to perform the services, i.e., specialized tactical training, that the Debtor and its subsidiaries had contracted to provide at the Facility, a copy of which is attached as Exhibit C-3 and incorporated herein by reference.

24. PTC was no longer involved with operation of or training at the Facility after June 1, 2018. Ex. B, 16:7-10. The Debtor's sole obligation, per the 2018 Subcontract, is to send invoices for the work performed by Panthera Training and immediately forward to Panthera Training all payments received in payment of those invoices. Ex. C, ¶ 10; Ex. C-3.

25. The term of the 2018 Commercial Lease extends through December 31, 2030. It requires monthly base rent payments of $52,000, plus "Additional Rent" equal to one-half the taxable income from operating the Facility after funding a $25,000 monthly set-aside for working capital. Ex. C-1.

26. As of the Petition Date, Panthera Training was providing specialized training as a subcontractor under the 2018 Subcontract to a government agency that contracted with the Debtor and to a branch of the military that has two contracts with PTC. Ex. C, ¶ 11. The Debtor and PTC have no other contracts for training. Ex. B, 76:14-17.

27. The Debtor does not maintain the Real Property. Rather, the 2018 Commercial Lease Agreement provides that "[t]he Tenant [Panthera Training] shall be responsible for maintaining the Property in good operating condition in order to facilitate training and in compliance with all applicable laws, ordinances, and regulations." Ex. C-1, ¶ 10.

C. Prepetition Defaults

28. The Debtor first defaulted on the Loans in February of 2015, not even a year after the 2014 Loan was made, by failing to make the monthly payments due under the terms of the respective promissory notes. The Loans were brought current in May of 2015, but the Debtor defaulted again in August of 2015. Attached as Exhibit E and incorporated herein by reference is the Affidavit of J. Steven Webb, Director of Financial Services for WVEDA, to which is attached a copy of the payment histories for the Debtor's Loans as Exhibit E-1. Ex. E, ¶ 9.

29. The Debtor made no payments on the two Loans in 2016. Ex. E-1.

30. On May 20, 2017, the Debtor and WVEDA entered into a modified payment arrangement whereby the Debtor agreed to pay $20,000 per month for each of the Loans. Ex. E, ¶ 11.

31. The Debtor defaulted on the modified payment arrangement, making just three (3) of the nine (9) payments that were to be paid between May 20, 2017 and February 28, 2018. Ex. E, ¶ 12; Ex. E-1.

32. On February 28, 2018, WVEDA sent a notice of default and demand for payment to the Debtor and Guarantors, giving the obligors a deadline of March 31, 2018 to cure the default. The Debtor paid nothing. Ex. E, ¶ 13; Ex. E-1.

33. In May of 2018, WVEDA commenced a foreclosure under the two Credit Line Deeds of Trust that secured the Loans. Ex. E, ¶ 14.

34. Shortly after commencing foreclosure, the Debtor advised WVEDA that it had entered into the 2018 Subcontract with Panthera Training, as of June 1, 2018, as well as the 2018 2018 Commercial Lease and 2018 Assignment. Ex. E, ¶ 15.

35. Thereafter, WVEDA, the Debtor, PTC, and the Guarantors entered into a Forbearance Agreement, effective as of July 6, 2018. Ex. E, ¶ 16; Ex. A-9. The Debtor indicated, as it had done numerous times before, that it was talking with potential investors, and needed additional time to bring one or more on board. Id.

36. Under the Forbearance Agreement, WVEDA agreed to forbear from exercising its rights under the Loan documents, including the Deeds of Trust, for a period of six (6) months. The monthly rent payments to be paid by Panthera Training to the Debtor under the 2018 Commercial Lease would be paid directly to WVEDA,[2] to be applied to the Loans. Ex. A-9, ¶ 6(a).

37. In October of 2018, WVEDA entered into a Subordination, Non-Disturbance and Attornment Agreement ("<u>SNDA</u>") with Panthera Training, a copy of which is attached hereto as

[2] This is consistent with paragraph 6 of the two Collateral Assignments of Leases and Rents, one effective August 21, 2013 and one effective July 2, 2014. Ex. A-4; Ex. A-8; Ex. C-1.

Exhibit C-5 and incorporated by reference. Panthera Training was faced with making significant capital expenditures for maintenance of the Real Property, including among those soil erosion mitigation measures and deferred maintenance. Panthera Training requested WVEDA to sign the SNDA to protect Panthera Training's possession and use of the Real Property. Ex. C-5. Pursuant to the SNDA, Panthera Training's rent payments would continue to be paid to the WVEDA. Ex. C-5, ¶ 5(f).

38. The Forbearance Agreement expired on January 6, 2019, at which time, the entire balance due and owing on the Loans was immediately due and payable. Ex. E, ¶ 18. No investor had materialized at that time, nor has one materialized to date. Id.

D. <u>Sale of 2017 Tax Liens, Foreclosure, and the Bankruptcy Filing</u>

39. Panthera Training has timely paid the monthly payment of $52,000 to WVEDA. Ex. E, ¶ 19. In fact, the time during which Panthera Training has been forwarding payments to WVEDA is the only time since 2014 that the WVEDA has consistently and timely received payments on the Loans. Ex. E-1.

40. Nevertheless, there have been other defaults by the Debtor. Among these, the Debtor failed to pay the 2017 real property taxes due and owing on the Real Property. Failure to timely pay real property taxes is a breach of the Deeds of Trust, which require the Debtor to promptly pay all taxes, charges and assessments levied against the Real Property. Exs. A-3, A-7.

41. In November of 2018, the 2017 tax liens for the delinquent taxes were auctioned by the Hardy County Sheriff and certified to the West Virginia State Auditor's Office for

disposition. As of the filing of this Motion, the cost to redeem the Real Property was believed to be approximately $55,000.[3] The redemption period expires April 1, 2020.

42. On March 26, 2018, the Debtor granted to SMI, LLC ("SMI"), for consideration of $100,000, the "exclusive rights to all merchantable timber standing or fallen" on the Real Property. Attached as Exhibit F and incorporated herein by reference is a copy of the recorded Memorandum of Timber Agreement and the Timber Agreement executed by the Debtor.

43. The Timber Agreement is perpetual, to be released upon the Debtor's satisfaction in full of all indebtedness the Debtor and its affiliates owe to SMI. Ex. F.

44. WVEDA, by counsel, sent the Debtor a notice of default and demand for payment on August 14, 2019. Ex. E, ¶ 20. A copy of the notice of default and demand for payment is attached hereto as Ex. E-2 and incorporated herein by reference. The Debtor did not respond; WVEDA again commenced foreclosure. A foreclosure sale was scheduled and noticed for September 16, 2019. Id.

45. On September 13, 2019, the Debtor filed its voluntary petition under Chapter 11 of the United States Bankruptcy Code, commencing this proceeding.

Standard

46. A bankruptcy court may dismiss a Chapter 11 case or convert it to a Chapter 7 proceeding, "whichever is in the best interest of creditors and the estate, *for cause* . . ." 11 U.S.C. §1112(b)(1). Courts interpreting §1112(b) have consistently interpreted "for cause" to include the lack of good faith in [a debtor's] filing. *In re Humble Place Joint Venture*, 936 F.2d 814, 816-17 (5th Cir. 1991).

[3] Until November 6, 2019, the 2017 taxes would be paid to the State Auditor's office and the 2018 and 2019 taxes would be paid to the Hardy County Sheriff. After November 6, 2019, the State Auditor's office would collect all of the taxes.

> The right to file a Chapter 11 bankruptcy petition is conditioned upon the debtor's good faith — the absence of which is cause for summary dismissal. Indeed, the ability of a bankruptcy court to conduct a threshold inquiry into the good faith of a petitioner is indispensable to proper accomplishment of the basic purposes of Chapter 11 protection.

In re Premier Auto. Servs., Inc., 492 F.3d 274 (4th Cir. 2007). See also, *Carolin Corp. v. Miller*, 886 F.2d 693, 698 (4th Cir. 1989) ("[A]n implicit prerequisite to the right to file is good faith on the part of the debtor, the absence of which may constitute cause for dismissal....").

47. In *Carolin*, the Fourth Circuit established a two-prong test for determining whether cause exists to dismiss a Chapter 11 case for a bad faith filing. *Carolin Corp.*, 886 F.2d at 700-01. Dismissal is appropriate when the movant shows that (1) the debtor's reorganization effort is objectively futile; and (2) the debtor's filing was motivated by subjective bad faith. *Id.*

48. There is no particular indicia or set of facts for determining whether the requisite prongs for a finding of bad faith exist. Id. Rather, the court must employ a totality of circumstances analysis. Although separate inquiries may be considered, proof of one prong often may offer proof of the other and vice versa. *Id*.

49. Upon making a prima facie showing of the debtor's lack of good faith, the burden shifts to the debtor to prove the petition was filed in good faith. *In re Paolini*, 312 B.R. 295, 305 (E.D. Va. 2004).

50. Upon finding cause exists, the Bankruptcy Court has discretion to decide whether dismissal or conversion is in the best interests of the creditors and the estate. *In re Rain Tree Healthcare of Winston-Salem, LLC*, 585 B.R. 777, 782 (M.D. N.C. 2018).

Argument

The Debtor filed its bankruptcy petition in bad faith, and therefore, there is cause to convert this Chapter 11 case to a Chapter 7 proceeding, or alternatively, dismiss.

A. The Totality of Circumstances Inquiry

51. Case law enumerates a non-exhaustive list of factors that may be considered for determining whether objective futility and subjective bad faith are present for a finding of cause to dismiss or convert a Chapter 11 case. Among these are:

1. The debtor has one asset;
2. Secured creditors' liens encumber the asset;
3. There are generally no employees except for the principals and there is no ongoing business activity.
4. The debtor has little or no cash flow and no available sources of income to sustain a plan of reorganization or make adequate protection payments;
5. There are few, if any, unsecured creditors whose claims are relatively small;
6. There are allegations of wrongdoing by the debtor or its principals;
7. The timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of secured creditors to enforce their rights;
8. The debtor is afflicted with the 'new debtor syndrome' in which a one asset entity is created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors;
9. There is no realistic possibility of reorganization of the debtor's business;
10. The reorganization essentially involves a two-party dispute; and
11. Bankruptcy offers the only possibility of forestalling loss of the property.

In re Dunes Hotel Associates, 188 B.R. 162, 171-2 (D. S.C. 1995) (citation omitted). The Debtor exhibits nearly all of these factors.

52. The Debtor scheduled just three assets: 38 modular office buildings, account receivables of $777,781.11, and the Real Property. Dkt. 23, Schedule A/B. The Debtor filed its petition with just $100 in a bank account. Id. It has no inventory and no personal property, having sold all of the personal property prepetition to a creditor, SMI. Ex. B, 33:13-34:15; 55:10-11.

53. The modular office buildings purportedly are subject to a lease for purchase. Ex. B, 32:1-33:4. The account receivables are primarily a purported receivable from Panthera Training, which Punelli calculated, and which is the subject of the Adversary Proceeding. Ex. B, 24:3-25:22; 89:7-91:13. This leaves the Real Property.

54. However, the Debtor does not currently hold title to the Real Property. Under relevant case law, the Debtor holds only a right of redemption. *In re Isom*, 342 B.R. 743, 745 (N.D. MS 2006) (post sale of property for delinquent taxes, debtor holds only right of redemption and not the real property)(quoting 5 Collier on Bankruptcy 541.05[2]).

55. On information and belief, the Real Property is fully encumbered. The Debtor scheduled $9 million in secured debt.[4] Dkt 23, Schedule D, Form 206Sum.

56. The Debtor claims the Real Property has a value of $15 million, based upon a 2015 appraisal completed for Access National Bank, but this is suspect. Dkt. 23, schedule A/B, Ex. B, 68:4-21. The appraisal included all of the Debtor's trade fixtures and personal property, which are no longer property of the Debtor. It relies on projected revenue of $6.8 - $7.3 million for the Debtor in 2015 and 2016. The Debtor's gross income for 2018 was around $1.8 million. Ex. B, 17:3-9.

57. The Debtor has no ongoing business activity. The Debtor has no employees and no offices. Ex. B, 11:9. The Debtor has just one contract with a government agency, the performance of which is by the Debtor's subcontractor, Panthera Training.[5] The Debtor's

[4] The Debtor did not include a secured claim for Virginia Heritage Bank or its successor. Ex. B, 72:9-73:11. Virginia Heritage Bank holds a Deed of Trust against the Debtor, dated July 30, 2014, which is recorded in Hardy County in Trust Book No. 284, at page 125. The Deed of Trust states it secures a debt of $500,000.

[5] The government contract with the Debtor was intended to be assigned to Panthera Training under the 2018 Assignment. Ex. C-2; Ex. B, 104:13-106:10. The requested assignment is still pending.

obligations under its sole contract are to send invoices for work performed by its Subcontractor, Panthera Training and immediately forward 100% of the payment received for those invoices.[6] Ex. C-3.

58. The Debtor has virtually no cash flow and no available sources of income to sustain a plan of reorganization. At the 341 meeting, Punelli inaccurately responded "Correct" when the U.S. Trustee representative asked if the Debtor earns income both from leasing the Facility and by acquiring contracts and then making a profit from the difference between what the Debtor pays the subcontractor and what is paid for the contract. Ex. B, 46:5-10. There is no profit to the Debtor from its sole contract that is performed by Panthera Training. As explained in footnote 6, 100% of what is received by the Debtor for Task Orders under the contract is paid to Panthera Training. Ex. C-3. The Debtor does earn rental income from leasing the Facility. However, the monthly base rent of $52,000 is paid directly to WVEDA, and applied to the indebtedness owed WVEDA. Ex. C-1; Ex. A-9. Under the 2018 Subcontract, the Debtor and PTC are to be paid a monthly administrative fee of $20,000. Ex. C-3. However, at the direction of Punelli and Jones, the $20,000 payments have been paid directly to Punelli and Jones' bank accounts and not to the Debtor nor PTC. Ex. C-3.

59. Postpetition, the Debtor declared the 2018 Commercial Lease in default based upon alleged prepetition defaults. Adversary Proceeding, Complaint, ¶ 18. Notably, prior to September 13, 2019, neither the Debtor nor its principals expressed any concerns with Panthera Training's performance under the 2018 Commerical Lease or 2018 Subcontract. There was no

[6] The 2018 Subcontract, at Part V - Price Schedule, provides that training services will be provided in total by the Subcontractor, i.e., Panthera Training, and the price delivered to the Subcontractor will be the price given for the Task Order or Call Order. The Debtor is to issue a Purchase Order and payments are to be routed directly to the Subcontractor when possible. If routed to the Debtor, they are to be paid to the Subcontractor "immediately upon receipt." Ex. C-3.

notice, let alone any mention that the Debtor or PTC thought Panthera Training had defaulted under either the 2018 Commercial Lease or 2018 Subcontract. Ex. C, ¶ 12.

60. Nevertheless, the Debtor commenced the Adversary Proceeding October 17, 2019, seeking to remove Panthera Training from the Real Property. Because the Facility is integral to the performance of training services under the 2018 Subcontract, removing Panthera Training from the Real Property would have the resultant effect of terminating Panthera Training's performance under the Debtor's sole contract. Indeed, Debtor's counsel stated at the creditors meeting that the Debtor had the discretion to not assign work to Panthera Training. Ex. B, ¶ 44:10-18

61. This then would obligate the Debtor to immediately perform training under its sole contract, a Debtor with no employees and a dismal track record.

62. Prior to June 1, 2018, the Debtor's subsidiary, PTC, provided the specialized training services at the Facility. Ex. B, 7:21-8:6. Profits from the operation of the Facility were to flow back to the Debtor, and based on the Debtor's projections, the Debtor and PTC would be profitable. However, this did not happen.

63. In 2018, in order to stave off a foreclosure of the Real Property, the Debtor transferred operation of the Facility and its contractual training obligations to Panthera Training. Recitals in the 2018 Commercial Lease state the Debtor asked Panthera Training to lease the Real Property "in an effort to generate cash flow that may allow [the Debtor] to avoid an imminent foreclosure on the Property . . ." Ex. C-1. Recitals in the 2018 Assignment state that PTC "was unable to operate its business activities on the Property in a manner that allowed it to pay [to the Debtor] the rent required;" that "PTC defaulted in its rent obligations [to the Debtor]" and the lease with PTC was therefore terminated. Ex. C-2. The Debtor, in essence, defaulted

on itself. "[N]either [the Debtor] nor PTC [is] able to perform the obligations required under the Contracts [for specialized training] that would result in the generation of revenues from the Contracts . . ." Id. The Debtor terminated its business operations and its contracts with its own subsidiary because it could not run the Facility profitably.

64. The Debtor's principals have been, at best, unrealistically optimistic, and at worse, deceptive, regarding the prospects and profitability of the Facility's operations. In May of 2018, despite the numerous defaults to date, Punelli and Jones represented to Mr. Starer that PTC was successful, but was in a financial bind because they had diverted PTC's cash flow to their efforts in pursuing international opportunities for the Facility through another subsidiary, Panthera WorldWide, LLC. Ex. C, ¶ 6.

65. Punelli and Jones provided documents purporting to list current customers of who contracted for training at the Facility and the income these customers would generate for the balance of 2018 and into 2019. Ex. C, ¶ 17; Ex. C-6. After taking over operation of the Facility, Panthera Training learned that seven of the purported "current customers" listed in Exhibit C-6 did not have current contracts for training to be provided at the Debtor's training facility as of May 2018. Attached as Exhibit G and incorporated herein by reference is the Affidavit of William White. Ex. G, ¶¶ 5-6. In addition, the projected revenues from a number of the customers was significantly overstated. Ex. C, ¶ 19; Ex. G-1.

66. Based upon the expenses and estimated cash flow from customers provided by Punelli and Jones, Panthera Training prepared a pro forma that projected net cash flow/profit from operation of the Facility to be $808,088 by December 2018. Ex. C, ¶ 20. However, the Facility generated a net loss for the period of June through December 2018 in the amount of approximately $295,000. Id.

67. The difference between the expected and actual profit is not in the expenses, which closely track the estimated expenses provided by Punelli and Jones in May 2018. Ex. C, ¶ 21. Rather, the difference is in the actual versus projected revenues from non-existing current customers and exaggerated representations as to the dollar amount of actual existing customer's contracts. Id. Specifically, Panthera Training's total revenue from all business in 2018 was $1,291,097.53, which stands in stark contrast to the representations of Punelli and Jones that revenue from current customers alone would be $4,730,000. Ex. C, ¶ 22; Ex. G-1.

68. At the 341 Meeting, Punelli had the audacity to state that the Debtor was profitable, that its net income was positive and adequate to pay creditors. Ex. B, 17:14-19:5. The Debtor's schedules, showing $20 million in debt, belie any characterization of the Debtor as profitable. The Debtor has not paid SMI. The Timber Agreement has not been released. Another creditor, Iron Horse Consulting, LLC, garnished the Debtor's bank account in June of 2019. Dkt 23, Statement of Financial Affairs, 3.2. Two other creditors, Azadian Group LLC and West Virginia Paving, Inc. have actions against the Debtor for failure to pay. Id. at Part 3. The 2017 taxes were not paid and the Real Property has not been redeemed.

69. The Debtor's bankruptcy filing is the principals' last ditch effort to forestall loss of the Real Property. The petition was filed 3 days before a scheduled foreclosure sale, with the purpose of stopping the sale. Ex. B, 133:10-14.

70. The Debtor did not file for bankruptcy protection with a plan of reorganization in mind. At the initial scheduling conference, in response to the Court's inquiry regarding a prospective plan, the Debtor's response focused on its Commercial Lease with Panthera Training. Dkt. 20. The Debtor claimed it is owed additional money from Panthera Training, and that it had to reconcile or look to rejection of the contracts with Panthera Training. Further, the money to

be obtained from Panthera Training and outside investors would fund a plan. Id. In other words, the Debtor's "plan" is to terminate its contracts with Panthera Training. This was further confirmed at the 341 Meeting. When asked when the Debtor expected to file its plan, the response was it needed to resolve its issues with Panthera Training and may need to seek an extension of the exclusivity period. Ex. B, 62:10-63:3.

71. Finally, there is no dearth of evidence indicating wrongdoing prepetition by the Debtor's principals.

72. Under the 2018 Subcontract, Panthera Training is required to pay an "administrative" fee of $20,000 per month to the Debtor and PTC.[7] At the instruction of Punelli and Jones, each month Panthera Training wired $10,000 to the personal account of Raymond Jones and $10,000 to an account named "Punelli Partners Limited Company," believed to be Punelli's personal account. Ex. C, ¶ 13. Attached as Exhibit C-4 are copies of the wire memos from Panthera Training's files, showing the payments wired to the personal accounts of Punelli and Jones.[8] To date, $248,326 owed to the Debtor and PTC has been diverted to the personal accounts of the principals.[9] Ex. C-4.

73. The $20,000 monthly payments were not disclosed in the Debtor's schedules nor mentioned in the 341 Meeting. Punelli testified he and Jones did not receive a salary from the

[7] This obligation is also to Panthera Worldwide LLC. However, Punelli testified Worldwide was not operational and had no active contracts. Ex. B, 15:1-10; 75:13-17. Consequently, there would be no reason to pay an administrative fee to Worldwide.

[8] Exhibit C-4 refers to the $20,000 as "advances against future profit sharing" because the $20,000 payments are to be deducted from "future Additional Lease payments" paid by Panthera Training to the Debtor under the 2018 Commercial Lease. Ex. C-3. The Additional Lease payment is 50% of Panthera Training's prior month's profit, calculated under the 2018 Commercial Lease. Ex. C-1.

[9] The $20,000 payments were not made in June, July, August, September or October 2019. Jones agreed these should be kept by Panthera Training to reimburse it for $100,000 owed to Panthera Training for training, but not paid in May 2019 because the Debtor's bank account was garnished. Ex. C, ¶ 13.

Debtor, and they had not received a draw from the Debtor in over a year.[10] Ex. B, 11:11-19; 59:15-22.

74. On or about October 29, 2019, in response to the request of the U.S. Trustee, the Debtor provided a list of payments made by PTC to Punelli and Jones, a copy of which is attached as Exhibit H and incorporated by reference. The list shows $10,000 paid to Jones and to Punelli each month. The document indicates the payments were made by PTC. However, the monthly $20,000 did not go to PTC's account. Further, the payments in Exhibit H are characterized as "draws," but Punelli and Jones do not own PTC. The Debtor and a third party, David Dolan own PTC. Ex. B, 27:18-28:8. Consequently, the monthly payments could not be "draws" from PTC, and Punelli testified there were no draws from the Debtor to the principals within the last year. Ex. B, 11:11-19.

75. Failure to fully disclose financial affairs to creditors and to the court is an indicia of bad faith on the part of the Debtor.[11] *In re Marrama*, 430 F.3d 474, 478 (1st Cir. 2005), aff'd 549 U.S. 365 (2007) ("Those who seek the shelter of the bankruptcy court [must] not play fast and loose with their assets or with the reality of their affairs.") (citations omitted). *See also, In re MacInnis*, 235 B.R. at 261 (misrepresentations in bankruptcy filing clearly evidences bad faith).

76. Punelli and Jones breached their fiduciary duty to the Debtor and PTC by diverting the Debtor's income to their personal accounts. The $248,326 taken by Punelli and

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[10] Punelli testified he received income from PTC. Ex. B, 13:20-22; 14:20-24; 29:10-14. He provided vague descriptions of what he did for the Debtor and PTC, finally landing on "Program Management." Ex. B, 67:14-24; 71:16-72:3. Later he testified that Raymond Jones principally worked on contract issues and business development, and he (Punelli) was "overseas" for most 2018. Ex. B, 85:4-21; 95:2-4.

[11] The Debtor also failed to list any of the guarantors and co-obligors of the Debtors and appear to have omitted at least one secured creditor, Virginia Heritage Bank or is successor.

Jones could have paid creditors, and was more than sufficient to pay the real property taxes necessary to redeem the Real Property.[12]

77. On March 26, 2018, the Debtor entered into a Timber Agreement with SMI, granting SMI the "exclusive rights to all merchantable timber" on the Real Property, allowing "total and uninterrupted use of and ingress and egress over and across the Property" and the right to construct new roads over and across the Property as needed for access and removal of the timber. Ex. F. Although the Timber Agreement recites that $100,000 in consideration was given, Punelli testified no cash was received. Rather the Timber Agreement was given to secure payment of an antecedent debt. Ex. B, 126:23-127:2. Purportedly, SMI made loans to the Debtor and PTC to cover their payroll and other operating costs between 2015 and 2017. Indeed, the Timber Agreement states that it may be terminated "upon satisfaction in full of the terms of all loan documents between TenX and its affiliates and SMI." Ex. F.

78. Granting a perpetual right to "timber" the Real Property is a breach of the Deeds of Trust granted to WVEDA and is likely a breach under the security instruments of other creditors whose claims are secured by the Real Property. The Agreement signed by Punelli for the Debtor wrongfully states that the Debtor "is the owner of the unencumbered fee simple title to all of the Property . . . " Ex. F, ¶ 3.

79. Further, timbering on the Real Property is "waste" of the asset, and may give rise to a cause of action against the Debtor. *Keesecker v. Bird*, 490 S.E.2d 754, 769-770, 200 W.Va. 667, 682 (1997) (waste includes "the commission of the deliberate, willful or voluntary destruction or carrying away of something attached to the freehold.")

[12] Under the 2013 Commercial Lease, PTC would have been responsible for paying the 2017 real property taxes, for which the tax lien was certified to the State. Ex. D, p.2.

80. More significantly, granting a perpetual right to timber the Real Property is antithetical to the development and use of the Facility as a specialized tactical training facility. It is the wooded nature of the site that lends itself to the training, in particular, to simulate scenario-based training. Removal of the timber would destroy any ability to conduct training at the Facility. Ex C, ¶ 23. Timbering the Real Property would significantly reduce the value of the Debtor's most significant asset (assuming the Debtor redeems the Real Property) and eliminates the potential for income generated from the specialized training facility established on the Real Property.

81. Attached as Exhibit B to the June 1, 2018 Commercial Lease Agreement with Panthera Training are approximately 40 pages itemizing "tangible personal property" that was leased to Panthera Training along with the Real Property. Ex. C-1. This includes, without limitation, office furniture, equipment, vehicles, firearms, and property relating to use of the firearms. Id.

82. On June 15, 2018, Punelli and Jones, on behalf of the Debtor and PTC, executed a Bill of Sale, selling to SMI all of the Debtor's personal property, including equipment, vehicles, office equipment and furnishings, munitions, firearms and related equipment. Ex. C-7. Punelli testified the sale "goes back to some previous agreements with SMI." Ex. B, 99:18-22.

83. Panthera Training learned of the sale in September of 2018, not from the Debtor, but from a representative of SMI. Ex. C, ¶ 24. The SMI representative advised Panthera Training that it would have to pay rent to SMI for use of the personal property -- for which Panthera Training was already paying rent to the Debtor. Id. The personal property sold was not removed from the Facility; it is integral to the training operation. Id. Panthera Training

continues to use the personal property, but the terms of the Commercial Lease Agreement remain unchanged. Id.; Ex. B, 71:2-4.

84. Recently, WVEDA became aware of a lawsuit filed in December of 2018, by Blue Force Technologies, Inc. ("Blue Force") against a number of defendants, including Punelli and Jones. Attached as Exhibit I and incorporated herein by reference is a copy of the Complaint filed in the United States District Court for the Middle District of North Carolina, Case No. 18-cv-1028, with a copy of the docket for the case.

85. The Complaint alleges that between 2015 and 2017, Punelli and Jones entered into loan agreements with Azadian Group, LLC, Midtown Resources MCA LLC, Change Capital Partners Fund 1, LLC and SMI, LLC "using Blue Force as an unknowing and unauthorized guarantor of loans in excess of $2,606,000."[13] The loans were made for the benefit of the Debtor and were also guaranteed by Punelli and Jones. The Complaint asserts claims against Punelli and Jones for breach of fiduciary duty and fraud. Attached to the Complaint is an Affidavit signed by Punelli admitting to have entered into agreement(s) or contract(s) on behalf of Blue Force without authority. Ex. I.

86. At the time SMI advised Panthera Training that it had acquired the Debtor's personal property, SMI provided Panthera Training a copy of an Amended Promissory Note dated September 5, 2017, a note given to SMI by the Debtor. Ex. C-8. It is guaranteed by Punelli and Jones individually, as well as others. Id. SMI also provided a copy of a Security Agreement dated September 23, 2015, pursuant to which the Debtor, PTC, Blue Force, Panthera Worldwide, LLC, and Punelli and Jones granted to SMI a security interest in certain assets of the Debtor and PTC. Id.

[13] Azadian Group, LLC, Midtown Resources MCA LLC and SMI, LLC are scheduled as unsecured creditors in the Debtor's bankruptcy case. Dkt. 23, Schedule E/F.

87. The Blue Force civil action was dismissed May 1, 2019, by Consent Order entered by the Court. Ex. I. Counsel for Blue Force advised that it reached a settlement with each of the defendants, including Punelli and Jones, and including SMI, although SMI was not a named defendant. However, counsel for Blue Force and counsel for SMI refused to disclose any information regarding additional facts, the underlying debts, or the settlements because each of the settlements is subject to a confidentiality provision.

88. At this time, there is not enough information available to allege, but certainly enough to call into question, whether the settlements negotiated by Punelli and Jones used the Debtor or the Debtor's assets to benefit the principals, as guarantors.

B. There is no realistic possibility of an effective reorganization of the Debtor and therefore, the objective futility prong for a finding of bad faith is met.

89. For a finding of objective futility, the court focuses on whether "there exists the 'realistic possibility of an effective reorganization.'" *In re Premier Automotive Services, Inc.*, 492 F.3d 274, 279 (4th Cir. 2007), citing *Carolin*, 886 F.2d at 698 (further citations omitted).

90. The Debtor has no going concern to preserve. It does not operate a business. It has no employees. It has a single contract, which is performed not by the Debtor but by a subcontractor, Panthera Training. There is no ongoing business to reorganize.

91. The Debtor's purported plan for reorganization is to unravel its business relationship with Panthera Training. Because the Debtor's only source of income is the 2018 Commercial Lease with Panthera Training and its sole contract that is being performed by Panthera Training, the only way it can show income is to terminate the 2018 Commercial Lease and take back the training operations at the Facility. The Debtor started this process with the filing of the Adversary Proceeding.

92. It will be a travesty to the creditors if the Debtor prevails in removing Panthera Training and taking back the Facility operations. It likely will be the demise of what little income and assets this Debtor has left. Further, doing so would jeopardize the ability to attract new government contracts going forward.

93. The track record of the Debtor's principals shows they cannot propose a realistic and reliable plan of reorganization for this Debtor. The Debtor claims its income will come from the operation of the Facility and outside investors. Dkt. 20. Yet, the Debtor and its subsidiary PTC could not profitably operate the Facility prior to June 1, 2018. We now know or have good reason to believe that during this time, between 2015 and 2017, while PTC operated and provided training at the Facility, the Debtor and/or PTC were obtaining loans from third parties to cover payroll and operating costs. The Debtor was in default of its obligations to the WVEDA, its largest secured creditor, and to many other creditors.

94. In addition, prepetition the Debtor's principals, Punelli and Jones, stripped assets from the Debtor. The Debtor failed to pay the 2017 real property taxes and now is in jeopardy of losing its most valuable asset, the Real Property. The Debtor's principals agreed to transfer timber rights on the Real Property to SMI to secure payment of a prior debt. The sale of the Debtor's personal property, necessary for the maintenance and operation of the Facility and training, reduces the value of the Real Property, and impedes the operation of the Facility.

95. Debtor's vague statements about outside investors have been continuous, and ultimately empty, promises. The principals have not been able to secure outside investors for the last three years. There is nothing to indicate they could do so in the next three months. This Debtor could not sustain a reorganization plan -- neither operationally nor financially.

96. Rather than addressing the losses over the last few years, the Debtor is focusing its limited resources on litigating with Panthera Training. This is not a plan of reorganization. Resuscitation of this Debtor would require much more than simply terminating the Debtor's relationship with Panthera Training. Given its pattern of continuous financial ineptitude, the Debtor's hopes of a reorganization based upon its taking charge of the operations of the Facility are simply illusory. The objective futility prong for a finding of bad faith is met.

C. The Evidence Overwhemingly Supports a Finding of the Debtor's Subjective Bad Faith

97. The subjective bad faith inquiry asks whether the Debtor

> actually intends "to use the provisions of Chapter 11 . . . to reorganize or rehabilitate an existing enterprise, or to preserve going concern values of a viable or existing business."

Carolin, 886 F.2d at 702 (citations omitted). The inquiry is often stated as whether the real motivation for the bankruptcy filing is "to abuse the reorganization process" and "to cause hardship or to delay creditors, . . . without an intent or ability to reorganize . . ." *Id*. *See also, In re MacInnis*, 235 B.R. at 261 (debtor must have some intention of rehabilitation when seeking protection of bankruptcy). The facts supporting a finding of objective futility oftentimes support a finding of the Debtor's subjective bad faith. That is the case here.

98. WVEDA worked with the Debtor repeatedly over the past four years in attempts to facilitate a workable solution for the Debtor to repay the Loans. Each time, the Debtor defaulted. Each time, the Debtor would talk of new, outside investors, but no investors materialized.

99. The Debtor filed its petition just three days before the scheduled foreclosure sale in order to invoke the automatic stay and stop the sale. Bankruptcy offered the only possibility of forestalling loss of the Real Property. However,

> protection of the automatic stay is not *per se* a valid justification for a Chapter 11 filing; rather, it is a consequential benefit of an otherwise good faith filing.

In re 15375 Memorial Corp. v. Bepco, L.P., 589 F.3d 605, 620 (3d Cir. 2009) (citations omitted). Further, "the automatic stay, without more, cannot convert a bad faith filing to a good faith one." *Id*. (citations omitted).

100. The Debtor's only source of income is the lease of the Real Property to Panthera Training, and the Debtor's single government contract that is being serviced by Panthera Training. Yet, within weeks of filing its petition, the Debtor declared Panthera Training in default and filed an adversary proceeding in an effort to terminate the 2018 Commercial Lease, remove Panthera Training from the Real Property, and thereby terminate Panthera Training's performance under the 2018 Subcontract. The Debtor's actions are reckless and not in the best interest of the Debtor or its creditors. By terminating the contractual arrangements with Panthera Training, and the ability to continue to perform under the Debtor's sole contract and PTC's two contracts, the Debtor and PTC will breach their contracts with the government.

101. Moreover,

> [w]here a debtor's reorganization effort involves essentially a two-party dispute which can be resolved in state court, and the filing for relief under Chapter 11 is intended to frustrate or delay the legitimate efforts of creditors to enforce their rights against the debtor, dismissal for cause is warranted.

In re Paolini, 312 B.R. 295, 307 (E.D. Va. 2004)

102. Invoking the automatic stay to stop the foreclosure by the WVEDA was certainly intended to frustrate and delay the WVEDA's legitimate efforts to enforce its rights under the

Deeds of Trust.[14] Further, instead of working to preserve operation of the Facility, the Debtor immediately embarked upon a two-party dispute with its subcontractor, Panthera Training, to wrest control of the Facility's operations.

103. The principals of the Debtor have shown no intention to preserve or maximize the value of the Debtor's assets and bankruptcy estate. To the contrary, since June of 2018, the principals have diverted significant funds owed to the Debtor and PTC to their own personal use. They failed to pay the 2017 real property taxes and now are in peril of losing the Real Property. They sold timber rights to the Real Property, and they sold all of the Debtor's personal property, which is integral to the operation of the Facility. These actions are not consistent with an intent to preserve and maximize the value of the Debtor's assets.

104. The purpose of the "twin-pronged inquiry" is "to determine whether the purposes of the Code would be furthered by permitting the Chapter 11 petition to proceed past filing." *In re Rain Tree Healthcare of Winston-Salem, LLC*, 585 B.R. 777, 782 (M.D. N.C. 2018). The purposes of the Bankruptcy Code would not be furthered in this case. The Debtor has neither the intent nor the ability to reorganize. The subjective bad faith prong is met for a finding of bad faith, and cause exists to convert this bankruptcy case to a Chapter 7 proceeding or dismiss.

105. Upon finding cause to dismiss or convert the Debtor's Chapter 11 case, the Court must determine whether dismissal or conversion to a Chapter 7 proceeding with the appointment of a Trustee is in the best interests of the creditors and estate. *In re Kingsway Capital Partners, LLC v. Sosa*, 549 B.R. 897, 906 (N.D. Ca. 2016). Given the number of creditors in this case and the actions of the Debtor's principals, both prepetition and postpetition, this case is likely more

[14] In the Forbearance Agreement negotiated by the Debtor prepetition, it consented to relief from the automatic stay should the Debtor become a debtor in bankruptcy. Ex. A-9, ¶ 6(k). See WVEDA's Motion for Relief from the Automatic Stay filed contemporaneously with this Motion.

suited to a conversion, with the appointment of a Trustee who can marshall the assets and preserve or liquidate the assets for the benefit of creditors.

WHEREFORE, West Virginia Economic Development Authority respectfully requests this Court to convert the Debtor's Chapter 11 case to a Chapter 7 proceeding, or alternatively, dismiss the Debtor's Chapter 11 case for cause, and to grant such other and further relief that this Court deems equitable and just.

Dated: November 2, 2018

Respectfully submitted,

/s/ Debra Lee Allen

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

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

<u>CERTIFICATE OF SERVICE</u>

I, Debra Lee Allen, hereby certify that on this 2nd day of November, 2019, the foregoing *West Virginia Economic Development Authority's Motion to Convert this Case to a Chapter 7 Proceeding, or, in the Alternative, Dismiss this Bankruptcy Case for Cause* was served through the Court’s ECF system on all parties registered to receive CM/ECF notices, including:

Mark A. Lindsay
John J. Richardson
Robert S. Bernstein
Bernstein-Burkley, P.C.
707 Grant Street, Ste. 2200
Pittsburgh, PA 15219
Counsel for the Debtor

Gary O. Kinder
U.S. Trustee's Office
300 Virginia Street East, Rm. 2025
Charleston, WV 25301
U.S. Trustee

and the Debtor and its members will be mailed a copy by U.S. Mail, prepaid postage, addressed to the following addresses, with a separate Certificate of Service to follow:

Panthera Enterprises, LLC
215 Depot Court, SE
Leesburg, VA 20175

James V. Punelli, Member
11654 Plaza America Drive #320
Reston, Virginia 20190

Raymond C. Jones, Member
43787 Bent Creek Terrance
Leesburg, Virginia 20176

/s/ Debra Lee Allen
Debra Lee Allen, WV Bar No. 9838