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

In re: PANTHERA ENTERPRISES, LLC, Debtor,	CASE NUMBER: 2:19-BK-0787- Chapter 11
PANTHERA TRAINING, LLC., and WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY, Movants, V. PANTHERA ENTERPRISES, LLC, Respondent.	Related to Document No. : 132 Document No.: **Hearing Date: June 10, 2020** **Response Deadline: May 22, 2020**

OBJECTION OF DEBTOR PANTHERA ENTERPRISES, LLC
TO JOINT MOTION TO DISMISS OR CONVERT THIS CASE TO A CHAPTER 7
PROCEEDING FOR CAUSE PURSUANT TO 11 U.S.C. § 1112(b)(1)

NOW COMES, Debtor Panthera Enterprises, LLC ("Debtor") by and through its undersigned counsel, BERNSTEIN-BURKLEY, P.C., hereby files this objection ("Objection") to that certain JOINT MOTION TO DISMISS OR CONVERT THIS CASE TO A CHAPTER 7 PROCEEDING FOR CAUSE PURSUANT TO 11 U.S.C. § 1112(b)(1) (the "Motion to Dismiss/Convert") and states the following:

INTRODUCTION

The Motion to Dismiss/Convert is based on alleged inappropriate payments of non-debtor debts, errors in monthly operating reports and alleged insufficient insurance coverage, all of which, if determined to need corrected, can and will be readily remedied. These act or omissions, particularly given their ability to be fixed if necessary, do not present sufficient grounds to satisfy the Movant's burden to establish cause pursuant to Bankruptcy Code § 1112(b) warranting the drastic relief of dismissing or converting the Debtor's Chapter 11 Case.

The Court is witnessing the continued concerted effort of two parties, Panthera Training, LLC ("Training") and the West Virginia Economic Development Authority ("EDA"), to derail and hijack the Debtor's business, assets and opportunity to reorganization under the protection of Title 11 of the Bankruptcy Code. Importantly, Training and the EDA are and have been fully and adequately protected throughout these proceedings and are in no danger of having their interests diminished during the pendency of this case. They simply want to squeeze the Debtor out of the operation of the facility.

It is worth reiterating that the special operations training business that is conducted at the facility was built and orchestrated solely by the Debtor and its principals over the course of many years based on their military background, experience and knowledge of the needs and requirements of the government agencies that are trained at the facility. Training merely took over management of the facility (using substantially all of the Debtor's affiliate's employees) at a time that the Debtor was experiencing certain financial stresses caused by the shutdown of the federal government and the resulting cutbacks in federal spending and prolonged government sequestration. Despite Training's benefit from that situation, Training is clearly unhappy with the fact that as federal spending is reinvigorated and the business grows, Training is required to pay half of the profits generated from operations at the facility to the Debtor. Its motivation to displace the Debtor, in conspiracy with the EDA, is clear and ongoing.

Training now disingenuously asserts its concerns for the estate and all parties in interest based on alleged inappropriate payments that *Training* received, yet Training did nothing to address or remedy the complained of payments when they occurred or even shortly thereafter. Notably, Training failed to ever notify the US Trustee of the complained of payments (until joining in the United States Trustee's Motion to Dismiss). Training also failed to ever notify Debtor's counsel of the complained of payments – despite frequent communications between counsel. Rather, after baiting the Debtor's principal into making the complained of payments, Training accepted the payments (apparently believing that it shouldn't) and then sat on that information for months only to then attempt to use it as ammunition against the Debtor. Astoundingly, Training is the very party that received and benefitted from the payments that it now asserts to have been improper. If Training believes what it alleges, then it should immediately return the payments to the Debtor. If it refuses to do so (despite its complete reliance on this very issue in its Motion to Dismiss), the Debtor can initiate an Adversary Proceeding against Training to recover such payments.

Ultimately, if Training had notified Debtor's counsel or the United States Trustee (the "Trustee") of the issue after the first payment, any further issues could have been avoided. Of course, Training did not do that because it only stood to gain from any perceived mistakes of the Debtor and its principals.

The Debtor is in the process of arranging for the subject funds to be replenished in the Debtor's estate. The Debtor believes that this will take place before the Court even hears this matter and the Debtor will advise the Court and all parties of the same as soon as such replenishment can take place. As noted above, if necessary the Debtor will also seek recovery of the funds from Training by pursuit of an Adversary Proceeding, which by Training's own allegations, it should not have received from the Debtor. Going forward, Debtor's counsel will be able to more closely monitor the Debtor's disbursements and ensure that no payments are made to Training on account of non-debtor contracts.

Regarding the EDA's allegations that the Debtor's casualty insurance policy is inadequate, the Debtor believes that the policy complies with the guidelines of the United States Trustee's Office. Prior to the EDA's allegation, the Trustee had advised Debtor's counsel that his office was satisfied with the insurance. As set forth below, the Debtor believes that the casualty insurance policy complies with Trustee's Office guidelines and, to the extent that the Trustee advises that it does not, the Debtor will endeavor to procure additional insurance.

The Debtor recently sought additional time to propose a Chapter 11 Plan of Reorganization, with the intention of proposing a plan that will benefit all creditors and parties in interest. The EDA and Training self-servingly seek relief that will result in benefitting only them. The requested dismissal or conversion would not be in the best interests of all parties in interest. The Movants' Motion should be denied so that the Debtor can continue its efforts to develop a plan that will be in the best interests of all parties.

BASIS FOR OBJECTION

1. The Movants assert that there is sufficient "cause" to convert or dismiss this case based upon alleged (a) gross mismanagement of the bankruptcy estate for filing materially inaccurate operating reports; (b) failure to maintain appropriate insurance; and (c) continuing loss and diminution of the estate and the absence of a reasonable likelihood of rehabilitation. The Debtor strongly disagrees with these allegations. The Movants cite only to the case of *In re Creech*, 538 B.R. 245 (Bankr. E.D.N.C. 2015) as support for these legal principals and apparently for their arguments. The *Creech* case is of little utility in this matter as that court summarily discussed the debtor's operating reports and found that the debtors had not failed to substantially comply with any reporting requirements. Notably though, the Creech court noted that in order to support conversion or dismissal, failures of a debtor related to reporting requirements should be found to be "egregious" and in "flagrant disregard" of reporting duties. *Id*. at 252. The Debtor submits that any inaccuracies in its operating reports were the result of mistake and/or inadvertence and in no way were intended to mislead and/or misinform any interested parties.

I. Payments to Panthera Training and Monthly Operating Reports

2. First, Movants' rely primarily upon three (3) payments made by the Debtor that Training alleges were applied by Training to satisfy debts of Panthera Training Center, rather than debts of the Debtor. Your undersigned counsel takes this opportunity to point out their belief that

the two $30,200 payments were made as partial payments against Training's outstanding and alleged administrative claim based on trainings conducted for the DEA in September, 2019 (the "September DEA Training"). Training has and had repeatedly threatened to discontinue providing trainings for the DEA based on outstanding payment issues and its concern about future payments. It was the understanding of counsel for the Debtor that these two payments were being made to appease Training and facilitate agreement on the provision of future DEA trainings. The Operating Reports reflect counsel's understanding of how the payments were to be accounted for, both by the Debtor and Training. To the extent that there were communications between the Debtor and Training inconsistent with that understanding, counsel was not aware of any such conversations.

3. In any event, the Debtor advises and Mr. Punelli will testify that the three payments at issue were recorded by the Debtor as payments to Training on the September DEA Training. To the extent that there was not a mutual understanding between the Debtor and Training and/or that the Debtor actually paid non-debtor debts, Mr. Punelli would acknowledge that such is the result of his own misunderstanding of what should have been paid, regardless of the constant pressure applied by Training. Regardless, as noted above, to the extent that the Debtor paid Training on account of non-debtor debts, the Debtor is in the process of providing for the replenishment of such payments and/or the Debtor will seek recovery of such payments from Training.

4. Movants allege that the Debtor filed false operating reports, implying some intent by the Debtor to mislead or otherwise mischaracterize the payments at issue. The Debtor submits that the few alleged inaccuracies on the Monthly Operating Reports were inadvertent and do not give rise to sufficient grounds to convert or dismiss a case. In the case of *In re V. Cos.*, 274 B.R. 721 (Bankr. N.D. Ohio 2002), the court stated that, "Debtors often do make errors in their operating

reports, especially in the first months after filing." *Id*. at 739. The Court refers to this as a kind of "understandable human frailty". *Id*.

5. Here, the Debtor had no intention to defraud or hide any assets of the Debtor or to provide false information. All relevant parties were aware of the business relationships between the Debtor, Panthera Training Center and Training. All parties were aware of which parties were providing services under the DEA contract. If the payments were made on account of a non-DEA contract, then clearly the Debtor's representatives mistakenly described the payments made on the report.

6. In any event, Training **received** the complained of payments and **knew** they were from the Debtor and not Panthera Training Center, but despite Training's alleged concern that the Debtor was paying non-debtor debts, Training did nothing to address or remedy the complained of payments when they occurred or even shortly thereafter. Training did not contact the Trustee with its purported concerns. And despite very frequent communications, neither Training nor Training's counsel made any mention of such concerns to Debtor's counsel. Rather, Training waited months to now attempt to use this as its own ammunition to dismiss or convert this Chapter 11 Case. To the extent that the subject payments were inappropriately made, Training was directly involved with, aware of, and accepting of such payments. Its attempt to now use a situation that it willingly participated in and benefitted from as a sword against the Debtor is questionable at best.

7. Regarding the potential hiring of an accountant, the Debtor is not currently in a financial position to hire any additional professionals. On a going-forward basis, counsel for the Debtor will closely monitor the Debtor's payments to Training as needed.

8. Ultimately, any mistakes made by the Debtor with respect to payments on account of non-debtor debts and/or reporting of any of such payments can and will be remedied and prevented in

the future. As noted above, if payments were made on account of non-debtor debts, those funds can be recovered back to the estate, whether voluntarily or via pursuit of an adversary proceeding. Similarly, any deficiencies in the operating reports can be remedied by amendment.

II. Casualty Insurance

9. The United States Trustee Chapter 11 Operating and Reporting Guidelines for Debtors in Possession in this District provide in pertinent part:

> A Chapter 11 debtor must maintain appropriate insurance to protect the estate and the public. See 11 U.S.C. § 1112(b)(4)(C). The types and amount of coverage must be adequate given the circumstances, and will depend upon the facts of each case.

10. The Debtor's casualty insurance policy is based on replacement cost values of all structures on the real property. Proof of such insurance is attached hereto as EXHIBIT A. The Effective Date of the policy is April 17, 2020 and the Expiration Date is April 17, 2021.

11. The $15M valuation of the property that Movants reference and that has been discussed in other contexts in these proceedings is based on use of the property as a specialized training facility and assumes its operation as such. That valuation is very different from the insurance coverage necessary to replace and restore any integral part of the facility. Particularly, if any of the facilities were to be damaged or destroyed on the property (including but not limited to the Armory, Tower or Live-Fire shoot house), they are fully covered per the replacement cost coverage provided by the current policy. In the event of any damage or destruction to any such structure at the facility, insurance coverage would be adequate to restore such structures in order for the facility to operate.

12. Debtor's counsel has provided the U.S. Trustee with the proof of such insurance and was advised by Mr. Kinder at the time that such insurance was sufficient.

13. Under the circumstances, the Debtor believes that the policy complies with U.S. Trustee guidelines. However, as the Debtor has advised, if the Trustee determines that more or some specific coverage is necessary, the Debtor is willing to update the policy to comply with the Trustee's requests.

III. Continuing Loss and Diminution of the Estate and Absence of Reasonable Likelihood of Rehabilitation.

14. The Movants cannot demonstrate a continuing loss and diminution of the Estate, which consists primarily of the Debtor's DEA contract the facility itself, which is in good condition and upon information and belief is adequately insured.

15. Movants' arguments to the contrary are unsupported and ignore the fact that the Movants themselves have been adequately protected throughout the proceedings.

16. The losses set forth on the operating reports are partially a consequence of Training's own unwillingness to pay over to the Debtor the requisite royalties due and owing arising out of the parties' lease of the facility (50% of the Panthera Training's profit). This issue is subject to the pending adversary proceeding between Training and the Debtor. Moreover, the Lease and subcontract between Training and the Debtor require Training to pay the Debtor an administrative fee of $20,000 per month, which Training has failed and refused to pay during these proceedings.

17. Additionally, the Debtor, along with Training, has experienced the fallout of the Covid-19 crisis. The continuing effects of the pandemic are set forth at length in the Debtor's Third Motion to Extend Exclusivity, so the Debtor will not belabor those points here. Nonetheless, the prolonged shut down of operations and certain vital aspects of the national economy have certainly had an impact on the facility and anticipated revenues and profits to be generated therefrom. Furthermore, with some relief from these obstacles the Debtor can make more productive strides

toward developing a plan of reorganization that will be to the benefit of all creditors, not just the EDA and Training. This Court has on numerous occasions in the past noted the potential viability of the Debtor. The Debtor remains determined to fulfill that viability.

IV. Avoidance of Conversion or Dismissal

18. Even if the Movants could establish "cause" to convert, which the Debtor disputes, the Debtor can avoid conversion or dismissal by establishing the following:

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

(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)].

<u>11 U.S.C. §1112(b)(2).</u>

19. Conversion of this case would not be in the best interest of all creditors. The Movants are **<u>not</u>** the only creditors of the Debtor. A liquidation of this unique facility, particularly during or even in the midst of the lingering effects of a global pandemic, will likely result in a pennies-on-the-dollar recovery for creditors.

20. The Debtor has, in good faith, sought extension of the exclusivity period so as to obtain the additional requisite time to solidify and propose its plan for reorganization within a reasonable period of time.

21. Lastly, the Debtor has provided a reasonable justification for the acts or omissions complained of by Movants. Moreover, Training itself contributed to any inappropriate payments being made by the Debtor and actively withheld that information from the Trustee and Debtor's counsel. And again, if payments were made on account of non-debtor debts, those funds can be

recovered back to the estate, whether voluntarily or via pursuit of an adversary proceeding. Furthermore, in the interim, the Debtor is working to seek replenishment of the funds otherwise. Lastly, any deficiencies in the operating reports can be remedied by amendment.

RESERVATION OF JURISDICTION

22. In the event that the Court determines it appropriate to grant Movants' Motion in any respect, Debtor's counsel hereby requests that any such order expressly retain jurisdiction for the Court to hear and adjudicate any and all fee applications related to these proceedings and to hear and adjudicate any motions or petitions related thereto.

WHEREFORE, based on the foregoing, the Debtor hereby respectfully requests that this Court deny the Joint Motion to Dismiss or Convert this Case to a Chapter 7, and to enter any further relief the Court deems just and appropriate.

Dated: May 22, 2020

Respectfully Submitted,

BERNSTEIN-BURKLEY, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of May, 2020, a copy of the

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was served via the CM/ECF system upon all parties and counsel of record.

Dated: May 22, 2020

Respectfully Submitted,

/s/ Salene Mazur Kraemer