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

IN RE:
PANTHERA ENTERPRISES, LLC,
Debtor.

Case No. 19-00787
Chapter 11

PANTHERA ENTERPRISES, LLC,
Plaintiff,

v.

Adv. Pro. No. 2:19-51

PANTHERA TRAINING, LLC,
Defendant.

MOTION TO COMPROMISE/SETTLE ADVERSARY PROCEEDING

Now comes Aaron C. Amore, Trustee for the Estate of Panthera Enterprises, LLC, by and through counsel, Aaron C. Amore of Amore Law, PLLC and moves the Court for approval of a compromise and settlement of certain claims as between these parties pursuant to 11 U.S.C. §§ 105, 541, 704, and Fed. R. Bankr. P. 2002, and 9019. The Trustee desires to resolve the claims asserted in this adversary proceeding by way of mutual dismissal with the Defendant along with its counterclaims.

LEGAL STANDARD

A decision to compromise a claim is also reviewed under the business judgment test. E.g., *In re OptInRealBig.com, LLC*, 345 B.R. 277, 292 (Bankr. D. Colo. 2006) ("Where an application under Rule 9019 is appropriate, the Court's job is to determine whether a given settlement is fair and equitable to the estate. In making its determination, the Court gives some deference to the business judgment of the debtor-in-possession."). A review of that business judgment generally turns on the outcome of four factors: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors. *Fry's Metals, Inc. v. Gibbons* (*In re RFE Industries, Inc*.), 283 F.3d 159, 165 (3rd Cir. 2003). See also *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-25 (1968) (same); *Drexel v. Loomis,* 35 F.2d 800, 806 (8th Cir. 1929) (same). A compromise of claims under Rule 9019 serves the purpose of binding the bankruptcy estate and the creditor to the terms of the bargain struck by the parties. *OptInRealBig.com*, 345 B.R. at 291.

FACTS AND REVIEW OF LEGAL CLAIMS

On September 13, 2019, the Plaintiff filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor filed an adversary proceeding alleging the following facts and claims (paragraph numbers below are as reflected in the Debtor's Complaint Doc. 33):

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 "<u>Property</u>"), 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 (Exhibit omitted).

8. The Plaintiff subcontracted the Training Contracts to Defendant to allow the Defendant to conduct 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, para. 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, para. 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 Plaintiffs 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 Plaintiffs 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.

Based upon the above allegations, the Debtor sought to have this Court determine that Panthera Training had breached its lease obligations. The Debtor sought monetary damages and turn-over of funds (Count I) and injunctive relief in the form of possession of the real property (Count II) that was subject to the Lease.

In response, Panthera Training, LLC (hereafter "PT" or "Defendant") filed an answer specifically denying the claims asserted and advancing counter-claims against the Debtor as follows: Fraud, specifically fraudulent customer and financial information, misrepresentation related to PT's possession and control of the property that were impaired by a timber agreement that could interfere with PT's lease rights; Breach of Contract, specifically that the Debtor diverted and failed to pay over funds due PT pursuant to its trainings performed under the Lease and subcontract for its own use. The damages claimed as of the filing of the answer and counterclaims was $216,464.80. PT moved to amend its answer counterclaims on February 21, 2020. The amended counterclaims sought to add a tortious interference with contract (Claim III).

Counsel for the Trustee has investigated the facts and claims asserted by the Debtor. The primary claim revolves around the claim that PT was not complying with the Lease provisions related to paying over Additional Rents. The specific allegations and Trustee's review and findings are set forth below:

1. Panthera Training breached its lease agreement and/or subcontract by failing to comply with the additional rent/lease payment provisions. [1]

An assessment of the Additional Rents takes into consideration several provisions in the Lease and subcontract. Paragraph 4 of the Lease provides for payment of Additional Rents from PT to the Debtor on a monthly basis equal to fifty

[1] There is no allegation that the Defendant failed to pay the base rent amount of $52,000.00 which was assigned and paid to the West Virginia Economic Development Authority ("WVEDA").

(50%) percent of its taxable income. In addition, PT was to pay $25,000 each month into a Contingency Fund. Both of these amounts were dependent upon PT earning Taxable Income. [2]

The subcontract is between PT, the Debtor, Panthera Training Center, LLC and Panthera Worldwide, LLC and was designed to funnel contracts from these entities to PT. The subcontract references the "Facility Lease" between the Debtor and PT and also incorporates an additional payment provision. Part V, Section 1, unnumbered paragraph 3 provides:

> "In order for Panthera to cover fees and expenses for these contracts, subcontractor will pay Panthera TWENTY THOUSAND DOLLARS AND ZERO CENTS ($20,000.00) per month, on the first of each month. These payments will be deducted from future Additional Lease payments to Panthera made under the terms of the Facility Lease."

The Debtor has claimed that PT has failed to turnover Additional Rent payments to it and that it is owed substantial sums of money. It also asserted that PT failed to provide monthly reports to conceal its earnings so as not to comply with the Additional Rents due under the Lease. The Debtor, through its counsel and principal James Punelli advised that the Debtor lacked funds to conduct a proper audit and that the Debtor did not possess evidence that PT was improperly avoiding its payments to the Debtor under the Lease obligations.

<u>Financial Review and Procedure</u>

[2] Per the lease, " Taxable Income is defined in accordance with applicable federal income tax laws and regulations using the cash basis of accounting , except payroll expense shall be calculated on the accrual basis of accounting."

In order to ascertain if there was merit to the Debtor's allegations, the Trustee employed Kelly T. Smith, CPA, CGMA, MBA, of SEK CPAs & Advisors (hereafter "Smith") to conduct a financial review of PT's accounting and financial records including but not limited to invoices, receipts, bank statements and accounting reports. The Trustee and Smith requested all contracts for which PT performed work pursuant to the Lease and subcontract from June of 2018 to June of 2020. From this list of contracts four (4) were selected to be reviewed. By means of these contracts PT provided trainings pursuant to one (1) government contract that flowed through the Debtor and two (2) subcontracts under Panther Training Center, LLC (an LLC of which the Debtor owns eighty (80)% percent and is the manager). The fourth contract was a non-governmental entity that trains at the Facility on a consistent basis.

The Trustee requested financial reports and records from PT in advance of the financial review which were provided as requested. These documents and reports were also provided to Smith. PT was advised of the four contracts to be reviewed and was asked to provide direct on-site support to Smith who visited the Facility to personally review and inspect the records. Merle Starer assisted Smith with a review of the requested records. Following this review and inspection, Smith requested additional documents related to expenses that did not appear to correlate on the financial records and/or for which documentation was available. Supplemental records were provided by way of explanation for these expenses and are referenced in the summary report attached as **Exhibit A.**

Findings

Trace of expected revenues: On one contract, Smith's review could not trace $44,464.80 to an associated bank statement and this sum was not reported as a cash receipt in PT's general ledger. The absence of these funds is explained by the diversion of funds due to PT by the Debtor. It appears the funds were paid to Panthera Training Center, LLC and were not turned over to PT. These facts were outside the purview of Smith's documents and review but are part of the Court record. Smith found no exceptions related to the other three (3) contracts.

Trace non-payroll cash disbursements individually $5,000 or greater: Smith found two disbursements not supported by invoices or contracts but each was sufficiently explained by a copy of the check with consistent memo line description. Smith found a minor variance on a Worker's Compensation insurance invoice that did not match the payment but the electronic bank record of payment did match the general ledger.

Smith found four disbursements of $10,000 which were traced directly to Punelli Partners, Ltd. (a Virginia limited liability company of which James Punelli is the sole member and manager) and Raymond Jones.[3] One additional disbursement of $7,236.00 per the general ledger, and also a receivable from Punelli Partners, Ltd, was traced to Raymond Jones, though no invoice or contract supported the disbursement.

[3] James Punelli and Raymond Jones are the members of the Debtor LLC and have acted as its managers during all relevant times prior to the conversion of the chapter 11 case.

Smith found one disbursement of $5,000.00 per the general ledger with a corresponding reduction of a loan payable to Bayview Corporation not supported by invoice or contract. Bayview Corporation is a Virginia company that apparently loaned money to PT during the start of phase of its operations pursuant to the lease and this disbursement is a repayment of that obligation.

The remaining thirty-seven (37) transactions totaling $639,817.73 were traced to supporting documentation and bank statements without exception.

<u>Trace payroll disbursements</u>: No exceptions were noted by Smith.

<u>Trustee's Findings related to Additional Rents Due</u>

The Trustee's consideration of the Lease requirements and the financial review conducted by Smith show that PT has not made income, Taxable Income, in order to trigger the Additional Rent provisions contained in the Lease. The lack of Taxable Income also resulted in PT failing to make the Contingency Fund payments. These findings are consistent with the general ledger, profit and loss statements and financial records provided by PT. It does not appear from the review of relevant facts that any funds are due to the Debtor pursuant to the Additional Rent provisions of the Lease.

PT represented that it did make monthly payments of $20,000 pursuant to the subcontract up and until the point the bankruptcy case was filed. These payments were reportedly made, as directed, directly to Jim Punelli through Punelli Partners, Ltd. and to Raymond Jones for "consulting" work. The subcontract anticipates that the monthly payment of $20,000 were to be made to "Panthera" (collectively Panthera Enterprises, Panthera Training, LLC and Panthera Worldwide, LLC) and are to be deducted from future Additional Lease payments to Panthera to be made under the terms of the Facility Lease. This provision appears to assume that Additional Lease (called Additional Rents in the lease agreement) payments would be triggered and the $20,000 deducted. The Trustee is unaware of any fees and expenses that are necessary for the continuation of the contracts that are the subject of the subcontract and certainly nothing that could justify a payment of $20,000. It appears to the Trustee that these payments were diverted by Raymond Jones and James Punelli, through Punelli Partners, Ltd. directly instead of to and through the Debtor or Panthera Training Center, LLC.

Other Claims of Debtor to Substantiate Breach of Lease

Paragraph number 18 of the Complaint provides a laundry list of claims in an effort to establish a breach of the Lease.

a) **failure to pay real estate taxes pursuant to the lease agreement**.

Pursuant to Section 8 of the Lease, PT was obligated to pay all real property taxes payable on the Property pro-rata during the term of the Lease. PT executed the lease agreement and took possession of the property in June of 2018. Its pro rata share of the taxes began in the second half of 2018. At the time it took possession of the real property in June of 2018, TenX Group, LLC (former name of Debtor) owed the Sheriff of Hardy County, West Virginia for tax years 2016 and 2017. The failure to pay these taxes led to the advertisement of a tax sale by the Sheriff of Hardy County. This in turn resulted in the declaration of default by the

WVEDA and its acceleration of the debt and notice of a foreclosure sale which immediately precipitated the filing of the chapter 11 bankruptcy.

West Virginia Code §11A-11-7 states that the sheriff

> "shall decline to receive current taxes on any land where it appears to his or her office that a prior year's real property taxes are unpaid."

The Debtor's failure to pay the past due taxes made it impossible for PT to pay the current obligation due. In addition, it appears that the Debtor accepted certain payments due and owing to PT as a credit for the payment of real property taxes and other expenses. These credits were in excess of $130,000. This uncontradicted testimony was offered at an evidentiary hearing before Judge Flatley on or about November 25 and 26 of 2019.

b) **failure to maintain or provide proof of adequate insurance over the Leased Premises**.

Section 9 of the Lease requires PT to maintain $2 million liability insurance coverage. PT has maintained appropriate insurance as required by the Lease and has provided proof to the Debtor, the Court initially in the chapter 11, and to the Trustee. The Debtor let its insurance coverage lapse (CNA Policy terminated November 7, 2019) due to non-payment. The Debtor argued that the Lease provisions and insurance policy of PT was sufficient such that it did not need to obtain its own insurance. Judge Flatley found that the Debtor was required to have insurance which named the WVEDA as a lien holder. Insurance was obtained by the Debtor during the course of the chapter 11 case.

c) **failure to provide Plaintiff with adequate and sufficient records and/or an accounting as required by the Lease.**

PT has provided financial documents to the Debtor, the Court, the Trustee, and the Trustee's accountants as requested and required by the terms of the Lease. PT offered to open its books and records and continues to do so without delay or limit. PT provided financial documents to the Debtor and only refused when the Debtor published its financial documents and it was advised by counsel for the Debtor that it was about to sue PT, at which time PT advised the Debtor that PT would no longer provide copies of its confidential information but would fully cooperate if the Debtor decided to exercise its audit rights under the Lease.

d) **diversion of certain revenues derived from lodging related services.**

The Trustee was aware of the claims made by the Debtor and other creditors about the lodging income and its structure. Smith was directed to specifically review the lodging income and expenses as part of his financial review related to the four contracts selected. The Trustee found no improper diversion of funds or expenses that were not accounted for in PT's financial records, general ledger, receipts and bank statements.

<u>Conclusion</u>

Review of factors regarding motion to compromise:

(1) Probability of success in litigation: The Trustee is of the opinion that the claims asserted in this adversary proceeding are baseless. The Trustee did not uncover facts that would support the claims asserted in this adversary proceeding. Not only

were facts to support the claims absent, but evidence to directly refute the claims was readily available. The Trustee reviewed the financial statements of the Debtor and its related companies when it operated the Facility. The Debtor and its related companies continually lost money and incurred large amounts of debt. The Debtor defaulted on its mortgage payments (1st and 2nd liens) to WVEDA in 2015 and failed to make a payment in 2016. In May of 2017, the Debtor negotiated an agreement with WVEDA to start making payments but it defaulted on this agreement.

The Debtor provided rosy financial reports to PT at the time the Lease negotiations were undertaken. There appears to have been some urgency to the transfer of operations and infusion of funds due to pending creditor actions. The Trustee understands that utilities were days away from being turned off. Only when PT entered into the Lease and took possession of the Property did payments to WVEDA resume in the form of the base monthly rent payment of $52,000. The Debtor and its related entities accumulated significant amounts of debt and continued to incur debt even after it ceased active operations in June of 2018. Its sole source of income was derived from funds it converted that were due to PT, while payments made pursuant to the subcontract were paid directly to Punelli Partners, Ltd. and Jones.

The Debtor failed to pay its property taxes, both real and personal for several years. It let its insurance lapse. It permitted creditors to secure its assets both through formal and informal legal actions with little regard for the consequences. At the same time the Debtor was negotiating a Lease that included the use of all of the personal property to PT, it was negotiating and executed a bill of sale to a creditor to secure the same personal property. This pledge of collateral appears to have been related to an existing debt and no new consideration was received. The Debtor similarly pledged all of the Property's timber rights in perpetuity to a related creditor to secure a debt of $100,000, again without new consideration. The value of said timber rights is well in excess of this debt. The assignment of the timber rights also appears to be in direct violation of WVEDA's deed of trust and security agreements with the Debtor. The Debtor defaulted on numerous loan agreements, contracts, and debts which resulted in lawsuits and judgments some of which resulted in judgment liens being placed against the property of the Debtor.

It also appears to the Trustee that the Debtor converted funds due to PT well over $260,000 prior to the filing of the bankruptcy case and even diverted funds due to PT after the filing of the bankruptcy case. Said diversion of funds after the filing of the bankruptcy were reflected in the monthly operating reports as a payment from the Debtor to Panthera Training Center, LLC in the amount of $134,160.00. Said funds were ultimately traced to an Atlantic Union bank account in the name of Panthera Training Center, LLC (PT obtained a subpoena for said bank records through an unrelated state court action against Panthera Training Center, LLC) with funds then being diverted to James Punelli and Raymond Jones as well as several personal creditors of these individuals. PT appears to have been owed significant sums of money arising from the work performed pursuant to the Lease and subcontract. This violation of the Court's operating order and diversion of estate funds were a primary factor in the Court's entry of an order converting this case.

(2) Difficulty in collection: The Trustee believes that there are no justiciable claims for which he can recover damages, property and/or other thing of value as against PT. Collection of any award is not a likely impairment or consideration for the Trustee.

(3) Complexity of litigation: The Trustee is of the opinion that to further delve into the day to day and expense minutia of PT's operation would take considerable time and expense. It would interfere with PT's operation and the likelihood of discovering relevant evidence to support the claims asserted in this adversary proceeding are slim. On balance the Trustee does not believe further expenditures are justified beyond what he has already advanced.

(4) Paramount Interest of Creditors: The Trustee has determined that there are no claims for which the state can recover and further, that the Estate may be liable to PT for damages due to the Debtor's breach of the lease agreement and asserted fraud claims. The dismissal of the counterclaims has a significant value to the creditor body as a whole. The Trustee remains free to review and object to any and all claims filed in this case. The Trustee has negotiated a dismissal of the claims against PT in exchange for PT's dismissal of the pending counterclaims against the Debtor. PT has filed proofs of claim and the debts can be adjudicated through the normal claims process.

Wherefore, the Trustee asks this Court for an order granting this Motion to Compromise/Settle the claims raised in this adversary proceeding as set forth hereinabove.

Respectfully Submitted
Aaron C. Amore, Trustee
By Counsel:

/s/ Aaron C. Amore

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Motion to Compromise/Settle Adversary was served via CM/ECF and/or email on this 9th November 2020 to the following:

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Manual Notice List

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

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Successor to SMI, LLC,
a Virginia Limited Liability Company

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Stacie Hardy
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/s/ Aaron C. Amore
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