UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:

PANTHERA ENTERPRISES, LLC	**Case No. 19-00787**
Debtor.	**Chapter 7**

OBJECTION OF TRUSTEE TO APPLICATION FOR FINAL COMPENSATION AND REIMBURSEMENT OF EXPENSES BY BERNSTEIN-BURKLEY, P.C, COUNSEL FOR THE CHAPTER 11 DEBTOR, PANTHERA ENTERPRISES, LLC

Now comes, Aaron C. Amore, Chapter 7 Trustee, for the Estate of Panthera Enterprises, LLC ("Debtor") and files his Objection to Final Compensation And Reimbursement of Expenses By Bernstein-Burkley, P.C, (hereafter "Applicant") counsel for the Chapter 11 Debtor, Panthera Enterprises, LLC.

LEGAL STANDARD

A bankruptcy court "may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." 11 U.S.C. § 330(a)(4)(B). The "other factors" include those set forth in § 330(a)(3):

(A) the time spent on such services;

(B) the rates charged for such services;

> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of [the case];
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> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
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> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
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> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title. 11 U.S.C. § 330(a)(3).

In addition to these considerations, the Fourth Circuit has instructed bankruptcy courts to evaluate fee applications in light of the following twelve factors (the "Johnson factors"): (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Harman v. Levin*, 772 F.2d 1150, 1152 n.1 (4th Cir. 1985) (citing Barber, 577 F.2d at 226 n.28, and *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

Facts Relevant to Inquiry

1. Panthera Enterprises, LLC ("Debtor" or "Panthera") filed a Chapter 11 Voluntary Bankruptcy Petition on September 13, 2019.
2. On September 23, 2019, Bernstein-Burkley filed an Application for Employment as Counsel to the Debtor with this Honorable Court, and was employed pursuant to the entry of the Order of Court dated October 10, 2019.
3. On July 21, 2020, by Order of Court, this matter was converted from Chapter 11 to Chapter 7 and Aaron C. Amore was appointed as the panel trustee assigned to the case.
4. On October 19, 2020 Applicant filed Final Application for Compensation and Reimbursement of Expenses.

The Trustee has reviewed the Final Application for Compensation and Reimbursement of Expenses and interposes the following objections:

.02 Petition. Trustee objects to the time and claimed fees to review, prepare and draft the petition and schedules in this matter. 46.75 hours are claimed in this category. The majority of the information listed in the schedules appears to be data entry of creditors. Many of the debts asserted to be owed by the Debtor are really debts owed by other entities and several claims filed in the case were omitted on the schedules. For example, James Michael Dowty is listed as a creditor on schedule F (3.15) in the amount of $122,036.11 but most of his claim (no. 17) appears to be from salary owed to him for his work for Panthera Worldwide, LLC ($108,732) as confirmed by James Punelli, along with $10,000 in monies loaned to Panthera (which entity is unclear) and another loan to Raymond Jones in the amount of $18,000. Bruce Hardy is not listed on schedule F but appears to have loaned the Debtor $100,000 and $350,000 according to his proof of claim (no 19.). The Trustee continues to find errors in the schedules and statement of financial affairs as he receives and reviews information in this case.

.07 Monthly Operating Reports The Trustee objects to the requested legal fees charged for the review, finalization and filing of monthly operating reports ("MOR"). The reports filed in this case were replete with errors that went unaddressed and unexplained. The initial operating report (Doc 26) represented that the Debtor would have minimal cash available aside from billings to contract customers.

The first MOR for the period of September 2019 indicates that the Debtor listed an account payable to Panthera Training Center in the amount of $138,750.00. No such debt to Panthera Training Center was scheduled and no account payable or other obligation listed anywhere on the Debtor's schedules, statement of financial affairs or other filed documents. Panthera Training Center, LLC was listed as having received $217,464.00 in the 90 days prior to the filing of the petition. The September MOR showed no cash receipts not on the attached Exhibit C to the MOR.

The October 2019 MOR showed the income received from the DEA contract which was, per its lease with Panthera Training ("hereafter "PT"), due to PT by way of wire transfer. The funds were diverted by the Debtor. The MOR does note the funds were paid in error and would be refunded and reflected in the November

MOR. The transfer of funds is a red flag to counsel. The funds should have been immediately reimbursed to the DIP account. The MOR for November of 2019 is mostly devoid of information but notes on Exhibit C the following;

> "Please note that there was a miscommunication/oversight during the month of November and the October 21, 2019 $134,160.00 payment to Panthera Training Center was not refunded during the month of November as planned, but has since been returned in December and will reflect the same on the next report."

The MOR for November 2019 shows cash receipts of $100,016.43, but this appears to be the repayment of diverted funds to the Debtor in the form of two transfers of $50,000.00. A sentence on Exhibit C of the MOR indicated that "[p]lease note that the remaining $34,160.00 that was paid to Panthera Training Center, LLC will be refunded and reflected on the January operating report." There did not appear to be any accounting of where the funds went, if and how they were spent, or any real verifiable information from the Debtor or its counsel.

The January 2020 MOR, Exhibit C reflects that $30,200.00 was paid to PT for its work performed pursuant to the Lease and for which payment was made in September of 2019. However, the funds were really transferred in February of 2020. PT initiated a legal action in Loudon County Virginia, which enabled it to subpoena the Panthera Training Center, LLC's bank for statements that might establish what happened to the diverted funds and why they were not immediately repaid.

The MORs also included what appear to be account receivables but provided no real explanation. These appear to represent funds the Debtor thought were due from PT related to "Liability ins Due under the Lease" which was not an obligation owed by PT. PT was required to maintain its own liability insurance as part of the lease. Proof of said insurance was provided to the Court. Further, the Court directed the Debtor to obtain insurance which was required pursuant to its deed of trust and agreement with its secured creditor, West Virginia Economic Development Authority.

Counsel's failure to monitor, investigate and take corrective actions caused irreparable harm both to PT as well as the Debtor's credibility and compliance with the Court's operating order as well as the provisions of 11 U.S.C § 308, 18 U.S.C. §§152, 153 & 157. The Trustee objects to the requested fee pursuant to the work done on the monthly operating reports.

.**12 Plan and Disclosure Statement.** The Trustee is unable to assess the claimed time expended as no plan or disclosure statement was filed in this case. Applicant requests fees of $17,449.50 this category. The Trustee is aware of two motions to extend the exclusivity period but these motions would certainly take less than a few hours of legal work. The Trustee objects to the requested fee for this category.

.13 Insurance. The Trustee does not object to the requested fees for time expended regarding insurance.

.14 Taxes. More time should have been expended related to the review of tax claims. The Debtor continued to be taxed on property it no longer owned (Personal property was conveyed in June of 2018). The Applicants failure to review and assess the personal property taxes is a major error. The failure of the Applicant to review the tax returns of the Debtor has resulted in significant issues. The 2019 Panthera Enterprises, LLC beginning retained earnings was 9,275,213, but the ending tax return balance for 2018 was 8,016,577. The 2019 Panthera Training Center, LLC beginning retained earnings was 275,555, but the ending tax return balance for 2018 was 11,226,436. There is a $10 million dollar retained earnings reporting that simply disappeared.

West Virginia State Tax Department filed a proof of claim (No.1-2) which lists a propriety estimated pass through taxes for the year ending 12/31/17 and 12/31/18 in the amount of $50,000.00 each year with interest of $13,000.00 per year. These figures are estimated since no returns were filed for those years. There is also an estimated withholding amount of $1,000 for the period ending 3/31/18. Unsecured claims are also asserted in the amount of $16,000.00 for 2017 and 2017 for each year. There does not appear to have been any effort made to get the returns filed or correct the estimated claim amounts. The West Virginia Tax claims were filed shortly after the filing of the case on September 27, 2019.

.16 Claims. The Trustee believes that little if any real review was made related to the claims in this case. More diligent and through work would have reviewed defects and glaring legal issues with the taxing authorities. The Trustee objects to this request.

.**17 Miscellaneous Motions.** The Trustee is aware of several contested motions at the outset of this case including motions to dismiss and or convert the case as well as a motion for relief from stay. The Applicant would have to defend these actions simply to preserve the case. However, several contested hearings were the result of the Debtor's actions as well as Counsel's failure to monitor and review monthly operating reports. The diversion of funds and failure to truthfully prepare and file monthly operating reports lead to the renewed motion to convert this case. The Trustee is also aware of several evidentiary hearings conducted by the Court. The Trustee does not oppose the time expended defending motions to convert or dismiss, the motion for relief from stay nor its participation in the Neff v. Panthera Enterprises, LLC et al (2:20-ap-00010) adversary proceeding. The Trustee requests specific time entries related to these motions/actions such that he can determine if they are appropriately billed. He reserves the right to object further depending on the records provided.

.18 Adversary Proceedings. The Trustee is unable to ascertain the exact amounts attributable to the Neff adversary proceeding as opposed to the Panthera Enterprises, LLC v. Panthera Training (No. 2:19-51) ("Panthera AP") adversary proceeding. The Trustee does not object to fees billed by the Applicant related to the Neff AP.

The Trustee objects to any time and/or expense billed related to the Panthera AP. The Trustee incorporates by reference his Motion to Compromise the Panthera AP to this objection. The Trustee will not go into specific detail in this objection other than to state that the Panthera AP appears to have been a tactic to breach the lease with PT to regain possession of the training facility without any real lawful basis. It appears that the bulk of billable time and expenditures was made related to the Panthera AP. Doc 283-3 beginning at page 44 through and including page 55 all appear to be related to the Panthera AP totaling 331.80 hours and fees of $97,526.00. Further, the Trustee, in order to disprove the claims of the Debtor, engaged an auditor at the expense of the estate to confirm the accuracy of PT's records and its compliance with the lease provision.

.20 Professional Retentions. .21 Fee Applications. The Trustee has no objection to the work done in these two areas.

Conclusion:

(**A) the time spent on such services**; The Applicant spent much of its time defending against actions related to the Debtor's initial tactics, its failure to pay due real estate taxes, its failure to keep and maintain property insurance and its initial attempt to retake possession, custody and control of the real property despite the existing lease to PT. Much of the litigation was self-inflicted. It appears the initial assessment was a termination of the lease agreement and take-over of the training which was being done by PT. Such an action, absent substantial cause, would result in damages against the Debtor. The failure to investigate, assess and consider the claims asserted by the principals, lead to a protracted litigation whose was result was almost assuredly going to be a defeat with damages and costs flowing from such an action.

(B) the rates charged for such services; The Trustee does not believe the rates charged by the Applicant are excessive. However, the Trustee notes on the time sheets that there are two rates for attorneys and paralegals and he is unsure as to why two billable rates are applied. No explanation as to the basis of the rate change was provided, although the application field with the Court permits such increases due to several factors. Those are not enumerated in the Application.

(**C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of [the case];** The Trustee is of the opinion that the Applicant substantially failed to provide services that were necessary to the administration or beneficial at the time rendered toward a successful completion of the case.

> **(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed**; The Trustee believes the actions of the Debtor, furthered by the Applicant lead to many of the contested issues that should have been resolved or avoided at the initiation of the case.
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> **(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field;** Trustee is unaware of board certification of any of the attorneys as the application fails to note. The Trustee is aware that the Applicant firm has filed several chapter 11 cases
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> **(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title. 11 U.S.C. § 330(a)(3).** The Trustee believes the compensation is well in excess of the work done and required in such cases given the relative simplicity of the Debtor's contracts and scaled down operations. It owned no personal property, had no employees and the sole asset was subject to a long-term lease. The enormity of work done is not consistent with the lack of complexity in this case. The hourly rates are consistent with chapter 11 practitioners, but the hours expended are not.

The Trustee also objects to any fees charged by the Applicant for services rendered after the conversion of the case to a chapter 7 on July 21, 2020. Once a case is converted from a chapter 11 to a chapter 7, counsel for the debtor is not permitted to continue to charge fees to the estate, absent employment by the Chapter 7 Trustee. No such employment has occurred as between the Applicant and the Trustee. In *Lamie V. United States Trustee* (02-693) 540 U.S. 526 (2004) 290 F.3d 739, affirmed, the United States Supreme Court found held that

> "in a chapter 7 proceeding §330(a)(1) does not authorize payment of attorney's fees unless the attorney has been appointed under §327 of the Code. See 11 U.S.C. § 327 and 701 et seq. Petitioner was not so appointed, and his fee request was denied. Id.

Although there is not a large volume of billable entries after the date of conversion, the time sheets attached as an exhibit reference multiple entries after the July 21, 2020 conversion date. These need to be removed from the Application and request for fees and expenses.

Wherefore, the Trustee prays this Court deny the Application for Final Compensation And Reimbursement of Expenses By Bernstein-Burkley, P.C, and grant further relief as this Court deems just and necessary.

Aaron C. Amore, Trustee
Panthera Enterprises, LLC
By counsel

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Objection to Final Compensation And Reimbursement of Expenses By Bernstein-Burkley, P.C**, was served upon the following individuals at the addresses listed below, via CM/ECF and/or email on this 11th 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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a Virginia Limited Liability Company
Successor to SMI, LLC,
a Virginia Limited Liability Company

Bruce Hardy
Stacie Hardy
Anthony McIntyre
Timothy Miller

/s/ Aaron C. Amore
Aaron C. Amore, Esq.