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

In re:

PANTHERA ENTERPRISES, LLC

Debtor in Possession.

Case No. 2:19-BK-787
Chapter 7

PANTHERA ENTERPRISES, LLC

Plaintiff,

v.

A.P. No. 2:19-ap-51

PANTHERA TRAINING, LLC

Defendant.

PANTHERA TRAINING, LLC'S OBJECTION
TO BERNSTEIN-BURKLEY, P.C.'S FEES AND COSTS APPLICATION

Now comes Panthera Training, LLC ("Training"), by counsel, and in support of its Objection to the Fees and Costs Application filed by the law firm of Bernstein-Burkley, P.C. ("the Firm") states as follows.

1. **The Firm's application for fees and costs generated in connection with Adversary Proceeding # 2:19-AP-00051 ("the Adversary Proceeding") should be denied in full.**

The Firm's application for fees and costs (Doc 238) generated in connection with the Adversary Proceeding should be denied in full. Its attorneys signed and filed the Complaint in violation of FRCP Rule 11 which provides that presentation of a pleading to the court constitutes a certification that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, the factual contentions have evidentiary support. The evidence establishes that the Firm signed and filed the Complaint, and subsequently pursued the Adversary Proceeding, without conducting a reasonable inquiry into the existence of evidentiary support, or the lack thereof, for the factual allegations asserted.

The Trustee's Motion.

Following conversion of this matter to Chapter 7 Liquidation, Aaron C. Amore, Esq., as Trustee ("the Trustee") for the Estate of Panthera Enterprises, LLC ("the Debtor"), investigated the merits of the Adversary Proceeding. To assist his investigation, the Trustee engaged Mr. Kelly T. Smith, CPA to conduct a financial review of Training's accounting and financial records including but not limited to invoices, receipts, bank statements and accounting reports. Upon receipt of the CPA's report of his findings and after conducting his separate investigation, on November 9, 2020, the Trustee filed a Motion to Compromise/Settle Adversary Proceeding ("the Motion"). Doc 245.

In his Motion, the Trustee provided a detailed review of the CPA's report and of the Trustee's findings with respect to the claims asserted in the Adversary Proceeding. The Trustee concluded "that the claims asserted in this adversary proceeding are <u>baseless</u>. 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." (emphasis added). Doc 245, p. 13-14. Training concurs with the Trustee's conclusion and for the reasons set forth below contends that the Firm would not have filed the Adversary Proceeding if it had complied with FRCP 11 by conducting a reasonable inquiry into the factual allegations it made.

By way of brief background, pursuant to a Commercial Lease dated June 1, 2018 ("the Lease" – Doc 1, Exhibit A), Training leased a 750 acre tactical training facility located in Hardy County, West Virginia ("the Property") from the Debtor. Contrary to the contentions made in the Adversary Proceeding, and consistent with the Trustee's findings, Training performed all of its obligations under the Lease unless performance was prevented by the Debtor. A detailed review of the Firm's false factual allegations asserted in the Adversary Proceeding is as follows.

<u>Real estate taxes</u>

Pursuant to Section 8 of the Lease, Training was obligated to pay all real property taxes payable on the Property pro-rata during the term of the Lease. In the Adversary Proceeding the Firm falsely alleged that Training breached this obligation to pay these real estate taxes. A reasonable inquiry by the Firm would have revealed that the Debtor was delinquent in its payment of real estate taxes on the Property for years prior to the commencement of the Lease. Reasonable research by the Firm would have led the Firm to West Virginia Code §11A-11-7 which states that the Debtor's outstanding delinquent taxes from prior periods prevented Training from paying real estate taxes for the periods following commencement of the Lease. Specifically, 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." Accordingly, the Debtor's failure to pay taxes for prior periods prevented Training from paying subsequent period's real estate taxes.

In addition, a hearing was conducted on November 25th and 26th, 2019, before the Honorable United States Bankruptcy Judge Patrick M. Flatly, on the Debtor's request for injunctive relief, seeking possession of the Property due to Training's purported breach of the

Lease. ("the Hearing"). In the Hearing the unchallenged evidence testimony from Robert Starer, manager of Training, was that current real estate taxes payable on the Property were paid by Training by means of allowing the Debtor to retain certain amounts that the Debtor owed Training for services rendered. Nevertheless, the Firm falsely stated that Training violated its obligation to pay the real estate taxes.

Personal property taxes

Also pursuant to Section 8 of the Lease, Training was obligated to pay all personal property taxes payable on the tangible personal property identified in the Lease's Exhibit B, pro-rata during the term of the Lease. In the Adversary Proceeding the Firm falsely alleged that Training breached its obligation under the Lease to pay personal property taxes payable during the term of the Lease. Again, a reasonable inquiry by the Firm would have revealed the Debtor was delinquent in payment of the personal property taxes on its personal property for periods prior to the commencement of the Lease. A reasonable inquiry would have led the Firm to West Virginia Code §11A-11-7a which states that the Debtor's delinquent personal property taxes from prior periods prevented Training prevented Training from paying property taxes on the Debtor's personal property following commencement of the Lease. West Virginia Code §11A-11-7a states that the sheriff "shall decline to receive current taxes on any personal property where it appears to his or her office that a prior year's personal property taxes are unpaid."

In addition, shortly after the Lease was executed, the Debtor advised Training that the personal property identified in the Lease's Exhibit B was not in fact owned by the Debtor, and was not subject to the Lease because it had sold the personal property to a company called SMI, LLC. SMI, LLC ("SMI") subsequently demanded Training execute a separate lease for this personal property and pay separate rent to SMI for the use of this property. Clearly the Firm did not undertake a reasonable inquiry regarding ownership of the personal property or the Debtor's failure to pay prior period taxes, prior to filing the Adversary Proceeding, or at any time during its prosecution.

Liability Insurance.

Section 9 of the Lease requires Training to maintain $2 million dollars of liability insurance coverage. Prior to the filing of the Adversary Proceeding, Training's counsel provided the Firm with a copy of Training's Certificate of Insurance evidencing its satisfaction of the Lease's requirement. In addition, as noted by the Trustee, Training subsequently provided proof of insurance to the Court and to the Trustee. Doc 245, p. 12. Nevertheless, the Firm falsely claimed that Training breached its obligation to maintain liability insurance coverage as required by the Lease and never amended its Complaint after receiving evidence of Training's insurance coverage.

<u>Training's offer to provide financial information</u>.

Section 4 of the Lease provides that Training was to cooperate with a request by the Debtor to audit its books and records. The Firm falsely alleged that Training refused to provide "adequate and sufficient records and/or an accounting as required by the Lease". (Complaint ¶ 19) However, a reasonable inquiry would have revealed that Training provided copies of its financial records to the Debtor prior to the Debtor filing bankruptcy. When the Debtor's counsel announced his intention to file a lawsuit against Training immediately following filing the bankruptcy petition, and following the Debtor's authorization publication of Training's confidential financial information, Training stopped providing its confidential financial information to the Debtor and instead reaffirmed its willingness to cooperate with an audit as specified in the Lease, if requested. The Debtor never requested an audit of Training's books and records until its Chapter 11 Plan was converted to a Chapter 7 Liquidation when the trustee in liquidation, in his effort to determine whether there was any merit to the Debtor's claims presented in the Adversary Proceeding with respect to Training's alleged defaults in the Lease , initiated an audit. As the Trustee observed, when the CPA visited Training's offices to review its books and records, Training "offered to open its books and records and continues to do so without delay or limit." Doc 245, p. 13.

<u>Lodging revenues</u>

In addition to its lease of the Property, Training separately leased a group of townhouses located in nearby Moorefield, West Virginia from a third party. Periodically Training provided lodging in these townhouses for clients receiving training at the Facility. Although Training's lodging revenues generated from off-site are not subject to the terms of the Lease according to paragraph 4 of the Lease, Training included all lodging revenues in its financial books and records. The Trustee and the CPA specifically investigated Training's contracts that included off-site lodging and confirmed that there was no unreported lodging revenue. Doc 245, p. 13. The Firm could have, and should have, requested an audit of Training's books and records prior to filing its baseless Complaint. If the Firm had done so then it would have learned, as set forth in the Trustee's Motion and the CPA's report, that there was no evidence of any unreported lodging revenue. Instead of conducting an audit or other form of reasonable inquiry, the Firm made false allegations about unreported income, wasting the Court's resources, and causing Training to incur significant legal fees and expenses defending another frivolous claim.

<u>Additional Rent</u>

Paragraph 4 of the Lease contains a formula for profit-sharing in the form of "Additional Rent" payments to the Debtor based on Training's Taxable Income, as adjusted. Training's financial statements that were provided to the Debtor revealed that Training had not realized any Taxable Income. If the Debtor had untaken an audit as encouraged by Training, or conducted a reasonable inquiry similar to the Trustee's investigation, then it would have learned that there was no Additional Rent payable. The Trustee and the CPA concluded that there was no evidence to support the contentions that Training owed the Debtor any Additional Rent. Doc 245, p. 10. Nevertheless, the Firm falsely alleged that Training defaulted on its Lease obligations because it owed but did not pay Additional Rent to the Debtor. (See Complaint ¶12).

2. **<u>The balance of the Firm's application for fees and costs should be denied in full because the Firm filed materially false Monthly Operating Reports facilitating the Debtor's principals' apparent fraud and embezzlement.</u>**[1]

The Firm filed materially false Monthly Operating Reports that facilitated the Debtor's principals', James Punelli and Raymond Jones, ability to make false oaths and claims (18 U.S.C § 152), and to apparently commit bankruptcy embezzlement (18 U.S.C. § 153) and bankruptcy fraud (18 U.S.C. § 157).

Together with other information relevant to this objection to the Firms' fee application, by the time the Debtor's first Report, for September, 2019, was filed on October 12, 2019, the Firm knew, or should have known, that; (1) the Debtor had an 80% subsidiary company, Panthera Training Center ("Center"), (2) the Debtor's 750 training facility located in Hardy County, WV ("the Facility") had been leased to Training pursuant to a long-term lease since June 1, 2018, (3) Training was performing services for the DEA pursuant tom a subcontract with the Debtor, (4) Center had stopped conducting any training at the Facility not later by June 1, 2018, and (5) the Debtor's two principals, James Punelli ("Punelli") and Ray Jones ("Jones"), were the only individuals managing the Debtor's affairs once it filed its bankruptcy petition.

Despite the fact that Center had not conducted any training at the Facility for more than seventeen (17) months, the Firm filed the Debtor's September, 2019 Report falsely reporting that a payable was owed to Center in the amount of $138,750 for "training COGS [cost of goods sold]". Doc 37, p.9. Based on the knowledge the Firm should have had at the time, as noted above, even a cursory review of a draft of the Report before filing would have revealed the improbability of such a payable being correct and demanded an inquiry.

The October 2019 Report reflected a $134,160 payment to Center purportedly in partial satisfaction of the payable refenced in the September Report. Doc 63, p. 8. Two statements should have caught the Firm's eye; (1) the Report's notation that the payment to Center was for the "DEA Contract" and (2) <u>the asterisked red ink statement</u> that the payment to Center was "Paid in error, will be refunded and shown on the November operating report." Doc 63, p. 8. By that time the Firm knew that Training, not Center, was the subcontractor on the Debtor's DEA contract. Further, the highlighted disclosure that the Debtor made a $134,160 payment to its affiliate "in error" demanded an inquiry as to how such an error could have been made. If the Firm had investigated this "error", the Firm would have learned that James Punelli transferred the $134,160 from the

[1] Panthera Training, LLC does not suggest that the Firm intentionally or knowingly facilitated the actions taken by James Punelli and Raymond Jones.

Debtor's bank account that was subject to review by the Court and the Debtor's creditors, to Center's separate bank account, beyond the scrutiny of the Court and the Debtor's creditors.

When Center breached certain contractual obligations owed to Training, Training filed suit in Loudon County Circuit Court, Virginia and subpoenaed Center's bank records. Center's bank records revealed that immediately after receiving the $134,160 from the Debtor, Punelli began distributing the Debtor's transferred funds from Center's account to himself and to Jones. (See Center's bank records in Doc 162.) A reasonably prompt inquiry by the Firm into the acknowledged erroneous transfer of the Debtor's funds could have frustrated Punelli's fraudulent scheme to transfer the Debtor's funds to himself and Jones and would have preserved the Debtor's funds for the payment of its creditors.

If the Firm had performed even a cursory review of the Debtor's Reports filed for November, December, January, or February, it would have discovered that, contrary to Punelli's representation that the purported erroneous transfer of funds to Center would be refunded in November, those funds were not fully returned until February, 2020. During these interim months Punelli continued helping himself and Jones to the Debtor's money. (See Docs 80, 93, 98, 110, and 162).

Particularly troublesome is the Firm's failure to take steps when it filed the Debtor's November, 2019 Report which stated that the $134,160 had not been returned to the Debtor in November in part due to a "miscommunication". Doc 80, p. 6. Any standard of reasonableness would have called for the Firm to investigate Punelli's failure to refund the Debtor's money due to a purported miscommunication since the evidence is that Punelli was the person handling the Debtor's bank account and Center's bank account..

Lastly, the Firm must not have given any attention to the December Report or the November Report's representation the $134,160 had finally "been returned in December". The December Report discloses that only a portion of the funds had been returned by December. As stated above, the Firm's lack of any reasonable inquiry before filing these materially false monthly Reports allowed Punelli's transfer of the Debtor's funds to himself and Jones to continue unabated.

3. <u>The Firm's lack of reasonable inquiry into the facts is reflected in additional false statements made in the Debtor's Reports.</u>

In addition to the Firm's inattention to Punelli's mishandling of the Debtor's cash, the Firm filed numerous Reports that falsely inflated the Debtor's Receivables. These Reports reflect the Firm's apparent failure to have read the Lease. For example, the Lease requires Training to maintain $2,000,000 general liability insurance, not to reimburse or pay the Debtor's insurance premium. (Doc 1, Exhibit A, p. 3). However, the Firm filed false Reports repeatedly stating that Training owed the Debtor more than $230,000 for "Liability ins. Due under the Lease". Doc 80, p. 8, Doc 93, p. 10, Doc 98, p. 9, and Doc 110, p. 10.

Conclusion

In conclusion, Training contends that justice should not condone the Firm being rewarded by compensating it for filing and prosecuting a "baseless" Adversary Proceeding in clear violation of FRCP 11. With respect to the false monthly Reports filed by the Firm, a debtor's operating reports are the means by which creditors can monitor the debtor's post-petition operation A debtor's operating reports have been characterized as the "life-blood" of the Chapter 11 process. *In re Tucker*, 411 B.R. 530, 535 (S.D. Ga. 2009). Avoiding the invitation to graphically extend the *Tucker* Court's analogy, Training instead simply contends that the significance of the requirement that accurate operating reports be filed cannot be overstated.

WHEREFORE, for the reasons set forth above Panthera Training, LLC requests that the Court; (1) DENY the Firm's fees and costs application in full, and (2) GRANT such further relief as this cause merits.

PANTHERA TRAINING, LLC

By: /s/ Douglas E. Kahle

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CERTIFICATE OF SERVICE

I, Douglas E. Kahle, Esq., Admitted *Pro Hac Vice*, do hereby certify that a true and accurate copy of **PANTHERA TRAINING, LLC'S OBJECTION TO BERNSTEIN-BURKLEY, P.C.'S FEES AND COSTS APPLICATION** has been served via CM/ECF and/or email on this 11th day of November, 2020, to the following:

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By: /s/ Douglas E. Kahle