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

IN RE: PANTHERA ENTERPRISES, LLC, Debtor.	Bankr. Case No. 19-00787 Chapter 7
PANTHERA TRAINING, LLC, Movant, v. BERNSTEIN BURKLEY, P.C., Respondent.	

OBJECTION TO MOTION FOR APPROVAL OF ATTORNEYS FEES AND COSTS

Bernstein-Burkley, P.C. ("Respondent") files this Objection (the "Objection") to the Motion of Panthera Training, LLC for Approval of Attorneys Fees and Costs Pursuant to Bankruptcy Rule 9011 (the "Motion"), and in support thereof state as follows:

INTRODUCTION

1. Movant waited to file its Motion until approximately fourteen (14) months after the commencement of the subject adversary proceeding and nearly six (6) months after conversion to Chapter 7 and Respondent's involvement in the case. For a myriad of reasons, Movant's Motion must be denied in its entirety. First, pursuant to Bankruptcy Rule 9011(c)(1), Movant's Motion cannot be considered by the Court because Movant failed to comply with the express provisions of 9011(c)(1). Bankruptcy Rule 9011(c)(1) expressly provides that a party must give notice to an opposing party of its intent to seek Rule 9011 sanctions and provide the other party with an opportunity to address and remedy the allegedly offending pleading(s) or allegation(s). Rule 9011(c)(1) prohibits even the *filing* of a motion for sanctions

without compliance with this prerequisite. Second, even if the Court could consider the Motion, the standards of Rule 9011 clearly are not and cannot be satisfied. As set forth below, the Debtor and Respondent had ample bases on which to file the Complaint and a good faith belief that a judicial determination was necessary to resolve the parties' fundamental disagreements regarding the application and operation of the parties' key contracts. Third, no judicial determination on the merits of the parties' claims was ever made; but rather, the Trustee's ultimate opinion of the parties' respective claims against one another and decision to compromise said claims was based on the relatively low standards of Bankruptcy Rule 9019. And lastly, the Motion amounts to an attempt by the Movant to shift payment of all of its fees to the Respondent, which under the circumstances is contrary to and prohibited by the principles of the long-standing "American Rule."

PROCEDURAL BACKGROUND

2. On September 13, 2019, Panthera Enterprises, LLC (the "Debtor") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

3. Respondent was approved as counsel to the Debtor by Order of the Court on October 10, 2019.

4. The Debtor 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 "Property"), all of which is utilized as a training facility for various of the Debtor's clients and customers (the "Facility").

5. 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 trainings (the "Trainings") to fulfill certain government contracts held by the Debtor and an affiliated entity (the "Training Contracts").

6. The Debtor and Movant also entered into that certain Subcontract Agreement dated June 1, 2018 (the "Subcontract", together with the Lease, the "Contracts") pursuant to which the Debtor subcontracted the Training Contracts to Defendant to allow the Defendant to facilitate the Trainings while the Defendant was leasing the Property.

7. On or about October 3, 2019, the Debtor gave written notice to the Movant of various alleged defaults under the Lease. As discussed more fully below, said defaults included Movant's failure to pay Additional Rents and Movant's failure to pay current real and personal property taxes.

8. On or about October 4, 2019, the Debtor gave written notice to the Movant of various alleged defaults under the Subcontract, which defaults included Movant's failure to pay monthly administrative fees to the Debtor.

9. The Movant responded to each of the Default Notices in writing on or about October 4, 2019 and October 8, 2019, respectively (collectively, the "Default Responses").

10. The Default Responses indicated a clear disagreement regarding, *inter alia*, the Movant's calculation of Additional Rent under the Lease, Movant's purported rights to offset alleged amounts owed to the Movant against amounts owed to the Debtor, Movant's obligation to comply with the Contracts while disputing the Debtor's obligations, Movants' failure to pay monthly administrative fees (each in the amount of $20,000), Movant's direct contact with Debtor's prime contracting parties in violation of the Contracts and to the detriment of the Debtor, and Movant's use of confidential information (as defined in the Contracts) to the detriment of the Debtor.

11. The Default Responses denied the existence of any defaults under the Contracts based on Movant's own interpretation of the Contracts and alleged various fact-specific defenses.

12. On October 17, 2019, resulting not only from the financial aspects of the parties' relationship but also on the improper and unauthorized actions of Movant with respect to Debtor's prime contract

counterparties, the Debtor filed a Complaint against Movant at Adversary Proceeding No 19-00051, seeking damages and injunctive relief (the “Adversary Proceeding”).

13. In response to the Complaint, the Movant did not file a Motion to Dismiss under either Rule 11 or even Rule 12, but rather Movant filed an Answer, Affirmative Defenses and Counterclaims to the Complaint (the “Answer”).

14. Additionally, Movant filed a Motion which purported to seek money damages as injunctive relief, requesting payment of certain amounts Movant claimed to be owed for post-Petition Date services. The amounts sought by Movant were for services purportedly provided in September, 2019, prior to the filing of the Complaint, which brought the amounts owed by the parties under the Contracts into further dispute.

15. The Court scheduled a hearing on the Debtor’s request for injunctive relief for December 2, 2019. On December 5, 2019, the Court entered an Order denying the Debtor’s request for injunctive relief.

16. Also on December 5, 2019, the Court scheduled a telephonic hearing on Movant’s Motion for Injunctive Relief for December 5, 20109 at 3:30 p.m. The Court thereafter set an evidentiary hearing on Movant’s Motion for Injunctive Relief for December 10, 2019.

17. On December 10, 2019, the Court entered an Order denying Movant’s Motion for Injunctive Relief and also scheduled a status conference for December 16, 2019.

18. On January 6, 2020 the Court entered an Order scheduling a pre-trial conference for January 21, 2020 and thereafter scheduled a further telephonic status conference for February 25, 2020.

19. At the February 25, 2020 status conference, the Judge suggested and the parties agreed to participate in a mediation in an effort to resolve the litigation amicably[1].

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[1] Due primarily to statewide COVID restrictions, the mediation was postponed several times prior to conversion of the case to Chapter 7.

20. On July 21, 2020, the Court entered an agreed Order converting the case to a Chapter 7 case and appointing Aaron C. Amore, Esq. as the Chapter 7 Trustee (the "Trustee").

21. On November 11, 2020, the Trustee filed his Motion to Compromise Claims pursuant to Bankruptcy Rule 9019 regarding the respective claims asserted in the Adversary (the "9019 Motion").

22. On December 15, 2020, prior to the scheduled hearing thereon, the Court approved the 9019 Motion and on January 4, 2021 closed the Adversary Case.

23. Throughout the entirety of the extensive foregoing procedural history and the countless communications between Respondent and Movant's counsel, and between the Debtor and Movant directly, Movant at no time gave notice to Respondent or Debtor of any intention to seek dismissal and/or fees pursuant to Rule 9011 and, as is evidenced by the record, Movant took no such action during the fourteen (14) months that the Adversary was open and pending.

OBJECTION

24. The Application is inappropriate and must be denied for the following reasons: First, as to any request for this Honorable Court to award attorneys' fees as sanctions under Rule 9011, Debtor did not comply with the Federal Rules of Bankruptcy Procedure safe harbor provisions required by Rule 9011(c)(1). Second, even if Movant had complied and the Court could consider the Motion, sanctions are not appropriate because the requirements of Rule 9011 cannot be met. Third, there has been no determination of the merits of the parties' respective claims. Rather, the Trustee's ultimate decision to compromise said claims was merely based on the relatively low standards of Bankruptcy Rule 9019. Lastly, the Motion amounts to an attempt by the Movant to fee shift, which under the circumstances is prohibited by the principles of the "American Rule."

A. Movant Failed to Comply with Requirements of Rule 9011(c)(1)

25. Rule 9011 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") is substantially identical to Rule 11 of the Federal Rules of Civil Procedure (the "Federal Rules"). A party seeking sanctions must adhere to the requirements set forth by the Federal Rules and Bankruptcy Rules. Bankruptcy Rule 9011(b) provides as follows:

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

26. Rule 9011(c)(1) specifically instructs that: "A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. **The motion for sanctions may not be filed with or presented to the court, unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.** If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." (Emphasis added).

27. Here, Movant did not file a motion for sanctions after receipt of any of the pleadings in the Adversary Proceeding, nor at any time until over a year after the bulk of the litigation in the case was already complete and months after disposition of the Adversary Proceeding. Even if the Movant's concerns were

asserted in a timely manner, Movant did not comply with the express requirements of Rule 9011(c)(1) which would have allowed for those concerns to be addressed and potentially remedied pursuant to the express requirements and procedures of Rule 9011(c)(1).

28. Bankruptcy Rule 9011 authorizes a court to award sanctions for any violation of this certification, but the party seeking sanctions must follow certain procedural requirements. A party seeking sanctions must seek relief by filing (a) a motion for sanctions separately from any other motion; (b) serving a copy of the motion on opposing party prior to filing the motion; and (c) allowing 21 days after service for the offending document to be withdrawn or properly corrected before filing the motion seeking sanctions with the court. These requirements are mandatory and relief under Rule 11 cannot be granted unless the requirements are satisfied.

29. In particular, Bankruptcy Rule 9011 contains a "safe harbor" provision that prohibits the filing or presentation of a motion for sanctions if the offending party withdraws or corrects the challenged paper within twenty-one days after service of the motion on the offending party. *Spa Chakra Fifth Avenue, LLC v. Cornelia Fifth Ave., LLC (In re Spa Chakra, Inc.),* 2013 Bankr.LEXIS 2602, at 16-17 (Bankr.S.D. NY 2013).

30. It is well established that without providing Plaintiffs with notice of any Motion for Sanctions, Movant's counsel is prohibited from presenting any such motion to the Court. *See e.g.*, K*rommenhoek v. Covino (In re Covino),* 241 B.R. 673 (Bankr. D. Idaho 1999)(Motion for sanctions pursuant to FRBP Rule 9011 is denied since motion is coupled with motion to strike and because "safe harbor" provisions of Rule 9011(c)(1)(A) were not followed.); *In re Slack*, 280 B.R. 604, Bankr. L. Rep. (CCH) P78699, 48 Collier Bankr. Cas. 2d (MB) 957 (Bankr. D.N.J. 2002)(Pursuant to Fed. R. Bankr. P. 9011(c), motion for sanctions must be brought separately from other motions or requests and not simply included as additional prayer for relief contained in another motion). *See also, In re Falwell*, 434 B.R. 779

(Bankr. W.D. Va. 2009)(Creditor's request for award of attorney's fees for defending debtors' unsuccessful objections to its proofs of claim was denied because creditor had not served separate motion on debtors demanding withdrawal of objections, nor had creditor filed such separate motion with clerk.); *Greer v. Healthcare Fin. Servs. LLC (In re Greer)*, 498 B.R. 98 (Bankr. S.D. Miss. 2013)(Creditor's request for sanctions was denied where its request was not filed in separate motion and it did not follow safe harbor provision but rather included its request in its motion for summary judgment on debtor's adversary complaint.)

31. Movant's counsel never sent the Debtor or Respondent a notice, or otherwise advised Debtor or Respondent, of its intent to file a motion for sanctions. Movant never gave notice of any such allegations to Debtor or Respondent that would have, if necessary, permitted the Debtor or Respondent to utilize the required safe harbor provision of Rule 9011(c)(1).

32. Movant's failure to comply with the procedural prerequisite is an absolute bar to seeking relief under Bankruptcy Rule 9011 and Federal Rule 11.

33. The Adversary Proceeding has been closed and the bulk of the proceedings and litigation therein occurred over a year ago. Not only did the Movant never comply with the express requirements of Rule 9011(c)(1), but in fact while the Adversary Proceeding was pending, the Movant never filed any motion or otherwise asserted to the Court or Movant that the Debtor's claims should be dismissed pursuant to Rule 11, or even Rule 12 for that matter, or that Movant would seek sanctions. Rather than asserting any such arguments at the appropriate time, if that was Movant's contention, Movant answered the Complaint, asserted defenses, brought counterclaims and propounded written discovery upon the Defendant. Movant also separately filed a Motion for a Preliminary Injunction against the Debtor, creating yet another avenue for the parties to litigate. In other words, the Movant proceeded full steam ahead at every opportunity.

34. Movant had ample opportunity to proceed under Rule 9011 during the Adversary when the appropriate procedures under Rule 9011 could have been adhered to and Respondent could have responded to Movant's allegations. Per the express requirements of Rule 9011(c)(1), Movant's Motion cannot proceed or be considered by the Court. In fact, Rule 9011(c)(1) prohibited Movant from even filing its Motion without complying with the requirement of Rule 9011(c)(1), but Movant did so anyway.

35. Because Movant failed to timely act under Rule 9011 and properly comply with the express requirements of Rule 9011(c)(1), the Motion must be denied in its entirety.

B. Movant is Not Entitled to Relief Because the Elements of Rule 9011 Cannot be Satisfied

36. Even if consideration of Movant's Motion at this time was appropriate, which it is not, Movant is not entitled to any relief under Rule 9011 because the particular requirements of said Rule are not and cannot be met.

37. A review of the record in the Adversary Proceeding and communications between the parties prior to the Complaint shows a clear dispute between the parties regarding the effectiveness, application, and interpretation of the Contracts, the methods by which to determine financial obligations thereunder and the extent to which either party was in default of any such obligations. The Complaint was brought in good faith by counsel based upon the information available, review of the Debtor's Contracts and internal accounting records, review of Movant's financial reporting and its asserted defensive positions regarding its obligations under the Contracts, the representations of the Debtor as to the allegations in the Complaint and a good faith belief that a judicial determination was necessary as to the application of various provisions of the Contracts based on state contract law.

38. Much emphasis has been placed on the fact that Debtor did not engage an accountant to perform a formal audit of the Movant's financial records and transactions prior to filing its Complaint. However, this emphasis is wholly misplaced and completely overlooks the fact that regardless of the results

of any audit, even if it confirmed the accuracy of the Movant's profit and loss statements, that would not resolve the issue of how Additional Rents or other monetary amounts are to be calculated and paid under the Contracts. There was a clear fundamental dispute as to how to properly interpret and apply various provisions of the Contracts and it was apparent that a judicial determination would be necessary to resolve those key issues. Therefore, the filing of the Complaint was necessary in order to obtain a judicial determination as to whether any amounts were due the Debtor under the Contracts.

39. The following examples illustrate the legitimate legal disputes that existed between the parties under the Contracts.

i. Dispute regarding Additional Rents

40. With regard to the Debtor's claim for Additional Rents, Movant relied upon an interpretation of the Contracts in its purported defense of owing Additional Rents for months in which there was no question that Movant reported net profits that were subject to splitting 50/50 with the Debtor. The Lease provided a clear example of how Additional Rent was to be calculated, stating in pertinent part:

> "Tenant shall pay additional rent ("Additional Rent") in an amount equal to 50% of the Tenant's prior month's Profit. For purposes hereof, the term "Profit" shall be that amount calculated monthly that is equal to the Tenant's Taxable Income derived from Tenant's operations on the Property in the ordinary course of business, reduced by the amount of $25,000 per month ("Contingency Fund"). By means of illustration, if the Tenant's operations conducted on the Property in the ordinary course of business during the month of July generates Taxable Income in the amount of $225,000, then Additional Rent payable on August 1 shall be $100,000 ($225,000-$25,000=$200,000. $200,000 x 50% = $100,000)."

41. There were multiple months in which the Movant's records showed Taxable Income that would have resulted in the obligation to pay Additional Rent pursuant to the above-referenced formula and those are the payments that the Debtor asserted were owed. Movant's response to owing these amounts was that it did not owe such amounts because it was entitled to offset, in the aggregate, all of certain monthly administrative fee payments it was required to make under the Subcontract. The Subcontract required that a monthly payment of $20,000.00 be made to Debtor to cover fees and expenses for administration of the

government contracts subject to the Subcontract. The Subcontract provided for a credit for any such monthly administrative payment made against Additional Rent due. It was the Debtor's understanding and contention that such offset was to be calculated on a monthly basis, so that for example, if $50,000 in Additional Rent was due the Debtor in any given month based on the formula provided in the Lease, the Additional Rent payment for that month would only be $30,000 ($50,000 less the $20,000 administrative fee payment). However, Movant contended that it was entitled to offset any and all prior monthly administrative fee payments against all Additional Rent, rather than the monthly Additional Rent being determined based on that month's administrative fee payment alone. To be sure, Movant's only alleged defense to Debtor's claim for Additional Rents was based on its argument regarding application of credits provided under the Subcontract. This dispute required a determination by the Court as to how the language of the Contracts should be applied in determining amounts owed.

42. Perhaps even more important and glaring is that Movant also took the position and alleged that <u>the Subcontract is invalid and unenforceable</u>. Movant eventually formally asserted this position when it filed its Motion for Leave to Amend its Counterclaims on February 21, 2020 ("Motion to Amend"). In its Motion to Amend, Movant sought to add a Count for Declaratory Relief stating that the Subcontract is invalid and unenforceable and seeking a declaratory judgment that: a) "under the laws of the Commonwealth of Virginia, the Subcontract is an unenforceable 'agreement to agree'"; and b) "the Subcontract is not a valid contract between Panthera Training and Debtor."

43. Pursuant to Movant's own counterclaim that the Subcontract is/was invalid and unenforceable, its argument that it is/was entitled to a credit for the administrative fees paid, expressly and solely pursuant to the terms of the Subcontract, is wholly without merit, invalid and unenforceable as well. Accordingly, then Movant is not entitled to any credit against Additional Rent and there is no question that

Movant owes the Debtor substantial Additional Rent. Based on this set of facts alone, the concept that the Debtor's claims for Additional Rent "are baseless" is somewhat absurd.

ii. Dispute regarding Real and Personal Property Taxes

44. As set forth in its Motion, Movant's ultimate defense to owing any real or personal property taxes rested on certain West Virginia law that purportedly precludes current taxes from being paid until prior year taxes are paid in full. So despite being required to pay property taxes under the Contracts, Movant claimed it was unable to pay them directly until prior year taxes were paid. Movant raised this "defense" at or around the time of the December, 2019 hearing on Debtor's request for preliminary injunction. Until the time of said hearing, despite having multiple opportunities to do so in writing (including in its Answer), Movant never raised or brought this alleged "defense" to Respondent's attention or otherwise asserted it as the reason why it had not complied with the Contracts.

45. Instead, in Movant's Default Responses, Movant's response to Debtor's request for payment of personal property taxes was its assertion that "there is no personal property covered by the Lease that would generate any property tax obligation on the part of Training," but offered that "if Enterprises (the Debtor) and the purchaser under the Bill of Sale will provide notarized statements that the Bill of Sale was a fraud….then Training will entertain paying the associated property taxes." So Movant made no mention of the West Virginia law upon which it eventually relied and even offered to entertain payment of the taxes under certain circumstances.

46. With regard to the real property taxes, Movant's response in its Default Response was that it had paid other obligations of the Debtor and that it was entitled to "credit" those amounts against its real estate tax obligations to the Debtor. Again, the Movant failed to ever raise the defense that it ultimately used at the hearing, which is that certain West Virginia law precludes payments of current taxes before prior year taxes are paid in full. Clearly, Movant was unaware of this law when it responded to Debtor's requests

for payment of property taxes. Nonetheless, Movant incredulously now asserts that Respondent should have been aware of that and, accordingly, should not have sought a claim for payment of the property taxes.

47. As set forth above, as a result of the allegations and the counter-allegations regarding the obligations of the parties and the application and operation of the Contracts, it was absolutely necessary to obtain a judicial determination as to the parties' respective rights under the Contracts.

48. No such judicial determination was ever made and so no legal determination on the merits of the Debtor's claims was ever even made. Respondent understands that the Trustee eventually reached his own conclusion as to how the Contracts should operate and how to determine Additional Rents and other obligations thereunder. However, the Trustee's conclusion in his business judgment is not a legal determination and is not determinative of the merits of the Debtor's legal positions and claims. The Trustee's compromise of the Debtor's claims and the counterclaims of Movant was subject to the relatively low standards of Rule 9019.

C. *Standards of Bankruptcy Rule 9019*

49. Rule 9019 of the Bankruptcy Rules provides that:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.
>
> Fed. R. Bankr. 9019(a).

50. A settlement must be "fair and equitable" and fall above the "lowest point in the range of reasonableness." *In re Capmark Financial Group, Inc.,* 438 B.R. 471, 515 (D. Del. 2010) (citing *In re: W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir. 1983)).

51. In considering whether a settlement is fair and reasonable, the court should consider: (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. *See id.* (citing *In re: Neshaminy Office Bldg. Assocs.,* 62 B.R. 798, 803 (E.D. Pa. 1986)). The court must ultimately consider whether the proposed settlement is fair, reasonable and in the interest of the bankruptcy estate. *In re: Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998)

52. The Trustee exercised his judgment in deciding to compromise the Debtor's claims (and Movant's counterclaims) pursuant to the standards of Rule 9019. Importantly though, alleging and meeting the low bar of those standards does not result in a determination of the merits, but is only the Trustee's opinion of the probability of success thereon, while also taking into consideration the potential difficulties in collection and the complexity of the litigation (taking into consideration the cost of prosecuting).

53. Accordingly, there has been no legal determination that the Debtor would not ultimately have been successful on any of its claims. However, the Trustee's and Movant's position that the Debtor's claims were baseless ignores the legitimate disputes surrounding the language of the Contracts and the resulting obligations of the parties. As set forth above, there were legitimate bases on which to pursue the Debtor's claims, particularly as to the Movant's obligations for Additional Rent. Despite this, Movant purports to rely heavily on the Trustee's opinion of the case and his resulting decision to compromise.

54. Lastly, Movant asserts that the Complaint was brought for an improper purpose because it was purportedly brought as "a tactic to breach the lease to regain possession of the training facility without any real lawful basis." As set forth above, there was ample basis on which to bring the Complaint. To the extent it is suggested that it was improper to seek to regain possession of the training facility based on a breach of the Lease, such suggestion is without support as seeking repossession is a legitimate remedy in the face of a default. Additionally, Movant alleges that the Complaint was brought in order to avoid payment of Movant's claim for alleged post-Petition services provided during September, 2019. As was made clear to Movant on numerous occasions, Movant could have at any time filed a Motion for Payment of Administrative Expenses and affirmatively sought payment for any post-Petition services performed.

Movant could have availed itself of any such rights regardless of the pending Adversary Proceeding. Movant failed to do so. Nevertheless, the Complaint was not filed in order to avoid any post-Petition payments due Movant and, in fact, the Debtor made multiple post-Petition payments to Movant for services performed throughout the case proceedings.

55. Accordingly, even if the Movant had complied with Rule 9011(c)(1) and the Motion could be considered by the Court, there is no basis for sanctions pursuant to Rule 9011 and the Motion must be denied in its entirety.

D. *The Motion Should be Denied Because the "American Rule" Prohibits Fee-Shifting under the Circumstances*

56. The ability to recover attorney's fees is mostly governed by the "American Rule". In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S. Ct. 1612, 1616, 44 L.Ed.2d 141, 147 (1975). Before a court can shift a party's legal fees to another party, it must find a reason to depart from this bedrock rule. *Garza v. Citigroup Inc.*, 881 F.3d 277, 281 (3d Cir. 2018).

57. The Supreme Court has determined that attorney fees may be granted when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See, e.g. F. D. Rich Co. v. United States ex rel Indus. Lumber Co.*, 417 U.S. 116, 129, 94 S. Ct. 2157, 2165, 40 L.Ed.2d 703, 714 (1974); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 1407, 18 L.Ed.2d 475, 479 (1967).

58. Here, Movant is clearly attempting to fee-shift and have Respondent pay for its attorney's fees incurred in the bankruptcy and Adversary case. The American Rule prohibits any such fee-shifting under the circumstances.

59. First, the Debtor was not the "losing" party in the Adversary Proceeding or in any other context based on its claims asserted against the Movant. As set forth above, there has been no judicial

determination on the merits of the Debtor's claims, but rather the Trustee merely determined in his opinion to compromise said claims pursuant to Bankruptcy Rule 9019.

60. Significantly, Movant's counsel continued to incur attorneys' fees, when in fact, if Movant believed the Debtor had no valid claim for relief in the Adversary Proceeding, Movant should have filed an appropriate dispositive motion. Movant failed to do so despite ample opportunity.

61. Movant did nothing to mitigate its own alleged damages, but rather, only after conclusion of the proceedings, is trying to fee-shift its entire fees and costs.

62. While Bankruptcy courts possess power to sanction attorneys for egregious behavior that exceeds scope of Fed. R. Bankr. P. 9011 as evidenced by 11 USCS § 105(a), sanctions based upon this inherent power must be underpinned by "explicit finding that counsel's conduct constituted or was tantamount to bad faith". *In re Sanford*, 403 B.R. 831, 61 Collier Bankr. Cas. 2d (MB) 1248 (Bankr. D. Nev. 2009)(emphasis added).

63. The Complaint set forth colorable causes of action and Respondent believed and acted in good faith throughout this Adversary Proceeding and the bankruptcy case.

64. If the Movant believed that the Debtor's claims had no merit, then Debtor could have (and should have) filed an appropriate motion when it had the opportunity to do so. Again, Movant failed to avail itself of any such opportunities.

65. Accordingly, Movant's attempt to fee-shift is wholly inappropriate and contrary to the long-standing and well-established principles of the "American Rule."

WHEREFORE, Respondent Bernstein-Burkley, P.C., respectfully requests that this Honorable Court enter an Order denying the Motion for Attorney Fees Pursuant to Rule 9011 in its entirety and ordering such further relief as is just and appropriate.

Dated: February 1, 2021

BERNSTEIN-BURKLEY, PC

By: */s/ John J. Richardson*

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the within *Objection to Panthera Training, LLC's Motion for Payment of Attorney's Fees Pursuant to Rule 9011* was served via the CM/ECF system upon all parties and counsel of record in this case on this 1st day of February, 2021.

Date: February 1, 2021

Respectfully submitted:
BERNSTEIN-BURKLEY, P.C.

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