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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re Front Sight Management LLC,	Case No. 22-11824-abl Chapter 11 **Hearing Date**: July 25, 2022 **Hearing Time:** 9:30 a.m.

DEBTOR'S OPPOSITION TO LAS VEGAS DEVELOPMENT FUND, LLC'S MOTION FOR THE APPOINTMENT OF AN EXAMINER

Front Sight Management LLC, the chapter 11 debtor in possession herein (the "Debtor"), hereby files its opposition ("Opposition") to the *Motion for Appointment of Examiner* [ECF No. 211] (the "Motion") filed by Las Vegas Development Fund, LLC's ("LVDF"). In support of its Opposition, the Debtor respectfully represents as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Many courts, including in this circuit, have concluded that an examiner under 11 U.S.C. § 1104(c) is not mandatory where the appointment of an examiner would be an unnecessary expense and not appropriate under all circumstances. *See In re PG&E Corporation "PG&E")*, 2020 LW 9211190, at *2 (Bankr. N.D. Cal. July 6, 2020); *see also In re Residential Capital,*

LLC ("Residential Capital"), 474 B.R 112, 121 (Bankr. S.D.N.Y 2012); *In re Spansion, Inc. ("Spansion")*, 426 B.R. 114, 127 (Bankr. D. Del. 2010).

Here, it is clear that the creditor requesting the appointment of an examiner, LVDF, is not doing so in the best interests of the estate, but to promote its own litigation agenda. The Court need look no further than the fact that the topics identified by LVDF focus primarily on its theories advanced in litigation against the Debtor and others. Among other things, LVDF wants an examiner to "examine the reason why the Debtor chose not to seek to join in the request for terminating sanctions against Piazza as to the fraudulent transfer action in the State Court Litigation." Motion, at 6:27-7:1. Setting aside that such decision would be protected by the attorney client privilege and the attorney work product doctrine, it highlights LVDF's improper motive for the appointment of an examiner. Notably, LVDF does not suggest that the examiner should review LVDF's loan to the Debtor—an agreed to $75 million loan—that saw LVDF advance a mere $6,375,000, less than 10% of the maximum loan amount, and now seeks a balance due of $11,233,878.47 (almost $5 million more than LVDF funded).

LVDF is no white knight seeking to protect creditors' interests generally; rather, LVDF seeks to promote its own interests at the expense of the Debtor's estate and creditors. It is undisputed that LVDF is fully secured by the Debtor's assets and the stalking horse agreement, and is an oversecured secured creditor. Nevertheless, LVDF is continuing its prepetition scorched earth strategy against the Debtor and the instant Motion is nothing more than an attempt by LVDF to waste estate assets that might otherwise be available for the unsecured creditors in order to advance claims LVDF made in prepetition litigation—which, as explained in the Debtor's opposition [Adv. ECF No. 57] to LVDF's remand motion filed in the adversary proceeding [Adv. No. 22-01116-abl], are not even LVDF's claims to pursue.

There is no evidence before the Court that any of the Debtor's other creditors support the appointment of an examiner or that it is necessary. The Debtor has employed a reputable financial advisor, Province, LLC ("Province"), as its financial advisor, and the Official Committee of Unsecured Creditors (the "Committee") is seeking Court approval of its retention of another reputable financial advisor, Dundon Advisers LLC ("Dundon"), as its financial

advisor. Province has promptly responded to all requests made by Dundon for documents and information and will continue to do so. If for some reason the Committee at some point believes that the Debtor is not providing fulsome responses to its inquiries, then the Court can revisit the appointment of an examiner. However, at this point there is no legitimate need for such an examiner and LVDF provides none. Appointment of an examiner will only impose an additional layer of administrative expense on this estate (which is not allocated for in the Debtor's budget), and yet will not yield any additional information to the Court as the Debtor is already providing Dundon with any of the Debtor's books and records that it seeks to review.

II. COURTS, INCLUDING IN THIS JURISDICTION, HAVE CONCLUDED THAT THE APPOINTMENT OF AN EXAMINER, EVEN WHERE THERE IS OVER $5,000,000 IN QUALIFYING UNSECURED DEBT, IS DISCRETIONARY

Section 1104(c) of the Bankruptcy Code provides, as follows:

> (c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor ***as is appropriate***, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
>
> (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
>
> (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

See 11 U.S.C. § 1104(c) (emphasis added) (emphasis added).

Courts attempting to divine the legislative intent of the "as is appropriate" language have reviewed the legislative history, which provides the following guidance:

> Subsection [(c)] permits the court, at any time after the commencement of the case and on request of a party in interest, to order the appointment of an examiner, if the court has not ordered the appointment of a trustee. The examiner would be appointed to conduct such an investigation of the debtor as is appropriate under the particular circumstances of the case, including an investigation of any allegations of fraud, dishonesty, or gross mismanagement of the debtor of or by current or former management of the debtor. The standards for the appointment of an examiner are the same as those for the appointment of a trustee; ***the protection must be needed, and the cost and expense must not be disproportionately high***.

H.R. Rep. No. 95–595, 95th Cong., 1st Sess. 402 (1977) (emphasis added).

In reviewing the "as is appropriate" language in the statute coupled with the "protection must be needed" language in the legislative history, a Northern District of California Bankruptcy Court concluded that it had discretion to deny the appointment of an examiner. *See PG&E*, 2020 WL 921190, at *2. In doing so, the *PG&E* court noted the fact that there was an Official Committee of Tort Claimants (the "TCC") and the examiner would simply be duplicating their effort at the expense of the estate. *Id.*, at *3 ("Based on the TCC's investigation results, the appointment of an examiner would be unnecessarily duplicative and costly and thus inappropriate under section 1104(c).").

The *PG&E* court cited affirmatively the holding in *Residential Capital, supra*. Like the analysis in *PG&E*, the *Residential Capital* court first examined whether the appointment of an examiner was mandatory or discretionary. Recognizing a split of authority on the issue (even where, as here, there is over $5,000,000 in unsecured debt), the *Residential Capital* court analyzed whether the "as is appropriate" language "confers any discretion to deny an examiner motion when a debtor's fixed debts exceed $5 million." *Residential Capital*, 474 B.R. at 116.

In *Residential Capital*, the debtor and creditors' committee argued that the statutory language, legislative history, and recent case law establish that the court has discretion under the statutory scheme. *Id.* Further, they "assert[ed] that because the Creditors Committee has already begun its investigation and is a more suitable party to conduct the investigation in this case, the motion to appoint an examiner should be denied." *Id.*

After conducting a deep dive into the relevant case authorities, some of which found the language mandatory while others found it discretionary,[1] as well as the legislative history, the *Residential Capital* court concluded as follows:

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[1] The *Residential Capital* court cited the following cases for the proposition that the appointment of an examiner was discretionary: *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 128 (Bankr.D.Del.2010) (rejecting mandatory interpretation of section 1104(c)(2) and denying a motion to appoint examiner pursuant to section 1104(c)(2) because the "as is appropriate" language afforded court discretion to deny appointment that would result in waste and delay); *In re Visteon Corp.*, No. 09–11786(CSS) (Bankr.D.Del. May 12, 2010), Hr'g Tr. at 170:16–20 (ECF Doc. # 3145) (denying appointment of examiner and finding "it would be an absurd result to find that in every case where the financial criteria is met

> The Court concludes that appointment of an examiner is not mandatory in all cases satisfying subsection (c)(2) because the phrase "such an investigation of the debtor as is appropriate" provides a limitation on the requirement for appointment of an examiner under either subsections (1) or (2).

Id., at 117.

Specifically, the *Residential Capital* court, like the *PG&E* court, looked at the legislative history and concluded that it supported the conclusion that the appointment of a receiver is in the sound discretion of the court:

> The legislative history points to the purpose of section 1104(c). An examiner shall be appointed to conduct an investigation "as appropriate under the particular circumstances of the case," but "the protection must be needed...." *Id.* This legislative purpose is met when an examiner motion is denied in cases with fixed debts in excess of $5 million where the evidence establishes that the protection of an examiner is not needed under the facts and circumstances of the case. The appointment of an examiner would be inappropriate if the motion was filed for an improper purpose such as a litigation tactic to delay a case, or if there is no factual basis to conclude that an investigation needs to be conducted, or if an appropriate and thorough investigation has already been conducted (or is nearly complete) by a creditors committee or a governmental agency. *See, e.g., Wash. Mut. Inc.*, No. 08–12229(MFW), Hr'g Tr. at 98:12–100:21 (examiner motion denied where the debtor had been "investigated to death," and where the cost would be high with little ascertainable benefit to parties in the case). While section 1104(c) expresses a Congressional preference for appointment of an independent examiner to conduct a necessary investigation, the facts and circumstances of the case may permit a bankruptcy court to deny the request for appointment of an examiner even in cases with more than $5 million in fixed debts. Accordingly, section 1104(c)(2) requires that a court order the appointment of an examiner when (1) no plan has been confirmed; (2) no trustee has been appointed; (3) the debtor has in excess of $5 million in fixed debts; and (4) the facts and circumstances of a case do not render the appointment of an examiner inappropriate.

Id., at 120-121.

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and a party-in-interest asks, the Court must appoint an examiner. There has to be an appropriate investigation that needs to be done."); *In re Am. Home Mortg. Holdings, Inc.*, No. 07–11047(CSS) (Bankr.D.Del. Oct. 31, 2007), Hr'g Tr. at 76:09–12 (ECF Doc. # 1997) (rejecting mandatory interpretation of section 1104(c)(2) because financial threshold was only one part of inquiry and "the other piece of the puzzle is that there has to be an investigation to perform that's appropriate," and denying a motion to appoint an examiner). *See also, e.g., In re Innkeepers USA Trust*, No. 10–13800(SCC) (Bankr.S.D.N.Y. Sept. 30, 2012), Hr'g Tr. at 167:11–170:22 (ECF Doc. # 546) (finding it unnecessary to decide whether appointment was mandatory, but observing that a growing number of courts reject construction of section 1104(c)(2) that mandates appointment of examiner simply because $5 million threshold was exceeded if other facts do not make such appointment "appropriate," or have appointed examiners with limited or no authority); *In re Calpine Corp.*, No. 05–60200(BRL) (Bankr.S.D.N.Y. Oct. 24, 2007), Hr'g Tr. at 72:23–73:19 (ECF Doc. # 6467).7

Ultimately, the *Residential Capital* court, in its discretion, ordered the appointment of an examiner after finding that the request was not made for an improper purpose. As explained below, it is clear that LVDF's request is made for an improper purpose and should be denied.

Delaware bankruptcy courts are in accord. In *Spansion*, *supra,* a Delaware bankruptcy court recognized the discretionary nature of the appointment of an examiner after reviewing relevant case law and legislative history. The *Spansion* court recognized that it had discretion as to the scope of any examination. 426 B.R. at 126 ("it is well established that the bankruptcy court has considerable discretion in designing an examiner's role") quoting *Loral Stockholders Protective Comm. V. Loral Space and Commc'ns, Ltd.*, 2004 WL 2979785, *5 (S.D.N.Y. Dec. 23, 2004). Building off this point, the *Spansion* court held as follows:

> I find no sound purpose in appointing an examiner, only to significantly limit the examiner's role when there exists insufficient basis for an investigation. To appoint an examiner with no meaningful duties strikes me as a wasteful exercise, a result that could not have been intended by Congress.

Id., at 127.

Notably, courts that have looked at this statutory scheme, as the *Spansion* court did, have recognized that "the entire legislative history for mandatory appointment of an examiner without exception involved publicly held companies." *In re Rutenberg*, 158 B.R. 230, 233 (Bankr. M.D. FL 1993); *Loral*, 2004 WL 2979785, at *4 (provision was designed "to provide extra protection to stockholders of public companies through the mechanism of an independent fiduciary"); *Spansion*, 426 B.R. at 2010 (quoting Colliers for proposition that Section 1104(c)(2) "is the only remnant of the 'public company' exception contained in the original senate bill"). This concern is not implicated here.

Thus, the Court should determine first whether there is a sufficient basis for the appointment of an examiner or whether, as Debtor submits, the examiner is sought by LVDF for

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an improper purpose (and, in light of the Debtor's bankruptcy filing that divested LVDF of standing to pursue its prepetition claims against the Debtor, an unnecessary purpose).[2]

III. THE COURT SHOULD EXERCISE ITS DISCRETION TO DECLINE TO APPOINT AN EXAMINER AT THIS POINT AS THE FACTS AND CIRCUMSTANCES RENDER THE APPOINTMENT OF AN EXAMINER INAPPROPRIATE.

LVDF does not even pretend to hide its own agenda of advancing its litigation claims against the Debtor and certain insiders—claims which it no longer has standing to prosecute and which were brought, in large measure, to deflect from LVDF's own improper conduct (and which claims are irrelevant to the extent and validity of LVDF's secured claim against the estate). As it identifies in its motion, LVDF seeks to have an examiner to:

> (1) examine the transactions between the Debtor and the Piazza and any of his affiliated Entities for the past six years which includes the allegation of millions of dollars being disbursed to such parties to purchase personal items as stated in the State Court Restraining Order, (2) the formation of the creditor list in which only 2603 unsecured creditors were listed when the Debtor indicated there were at least 80,000 creditors; (3) examine the circumstances surrounding the unsecured loan with ALM Investments, LLC and whether it was obtained primarily to have ALM Investments, LLC as a friendly creditor so to be strategically placed on the top 20 creditor list with the anticipation that it will be appointed to the unsecured creditors committee; (4) examine the reason why the Debtor chose not to seek to join in the request for terminating sanctions against Piazza as to the fraudulent transfer action in the State Court Litigation; and any other reason that the court may deem to be just and proper.

Motion, at 6:16-7:2.

In other words, LVDF would like an examiner to investigate LVDF's allegations (not the allegations made against LVDF with respect to fraudulently inducing the Debtor into a $75 million loan of which the Debtor received less than 10%), as if LVDF's allegations should be treated as true. Topic one is under the purview of the Committee (not LVDF) and the Debtor is cooperating with the Committee and its financial advisor's requests. Topic one is also irrelevant

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[2] LVDF supports its request for an examiner based upon its opposition to DIP financing (which arguments were rejected by the Court) and its motion for remand and lifting of the stay. LVDF's objections to the Debtor's DIP financing motion were overruled. Moreover, as detailed in the Debtor's oppositions to LVDF's motion to remand and stay motion, the claims sought to be remanded by LVDF do not belong to LVDF and, accordingly, neither its remand or stay motions are well taken. Thus, the three briefs that LVDF believes support its position here do not support the relief sought therein.

to the extent and validity of LVDF's secured claim given that LVDF is oversecured. Topic two is an indication that LVDF does not understand what counsel for the Debtor represented in the Debtor's first day motions – which is that "there are approximately 263,000 parties in interest in this case, of which the Debtor believes that approximately 80,000 **may be creditors** …". Debtor's first day limit notice motion [ECF No. 6], p.2, ll 4-5 (emphasis added). The Debtor actually has the amount of creditors that are listed on its schedules [ECF No. 137]. Counsel for the Debtor believes that the estate could potentially have 80,000 creditors if the company ceased operating based on the termination of all memberships. Topic three is ridiculous as the Debtor had nothing to do with the formation of the Committee. Topic four would be difficult for an examiner to investigate as any examination is clearly barred by both the attorney-client privilege and the attorney work product doctrine, notwithstanding the fact that the terminating sanctions motion (which directly affects estate claims) should not have gone forward as a result of the automatic stay.

The fact that a single creditor (LVDF) can hijack an examination to pursue its own agenda (*ala* the adage that the best defense is a good offense) clearly evidences the improper purpose that animates this Court's discretion. The Motion and allegations therein are clearly designed to deflect from the extent and validity of LVDF's secured claim, which is central to the Debtor's bankruptcy. That loan, which was supposed to be for as much as $75,000,000, was only provided in a fraction of that amount while LVDF was paid hundreds of thousands of dollars in fees. LVDF now seeks to garner a further windfall via alleged defaults that LVDF claims ballooned its mere $6,375,000 loan into a balance due today of $11,233,878.47.

Indeed, and undermining LVDF's claims of fraudulent transfers, the Nevada state court previously found that ***all*** of the monies loaned by LVDF for construction were used for construction. *See,* p. 7:14-17 of the *Findings of Fact, Conclusions of Law, and Order Denying Defendant Las Vegas Development Fund LLC's Motion to Dissolve Temporary Restraining Order and to Appoint a Receiver* entered on January 23, 2020 in the State Court LVDF litigation, a copy of which is attached hereto as **Exhibit 1**. The State Court has already found that none of

LVDF's funds were fraudulently transferred, and the Debtor respectfully submits that an examination will not change this fact with respect to the monies funded by LVDF.

Moreover, LVDF is fully protected in light of the value of the Debtor's assets and the stalking horse agreement. These findings made in connection with the Debtor's DIP financing motion, made after LVDF filed this Motion, serve to render moot LVDF's concerns. Rather, and to the extent that there were any fraudulent transfers, the Committee is charged with investigating such alleged transfers, which investigation the Debtor is cooperating with. In other words, an oversecured disputed secured creditor should not be put in the position of wasting estate assets on an examination that will not benefit it where, as here, the Committee is also against such appointment and only unsecured creditors (and not LVDF) will be adversely affected by the expenditure of estate assets for any such examination.

LVDF's request is especially troubling given that LVDF admits that it already retained an expert who has conducted such an investigation. See Motion, at 4:7-9 (Jeffrey Porter, a forensic accountant with JDP, issued an expert opinion on May 21, 2021, summarizing and detailing the evidence of Front Sight's alleged insolvency and the alleged millions of dollars the Piazzas took out of Front Sight's bank accounts from 2016-2019…). What value would an examiner add given LVDF's representation that it conducted a thorough examination? Indeed, the examiner's report is not subject to any evidentiary presumptions or admissibility that would make it of any greater probative value. *See Ionosphere Clubs, Inc.*, 156 B.R. 414, 433 (S.D.N.Y. 1993) ("Examiner's findings are no more binding on the court than those of any other attorney's").

The Court should see LVDF's request for what it is: an attempt to allow LVDF to foist its litigation allegations as both a basis for the appointment of an examiner at the estate's expense, as well as a mechanism to dictate the examiner's scope, notwithstanding LVDF's admission that it already has conducted a fulsome examination, LVDF's lack of standing to pursue its litigation claims, LVDF's status as an oversecured secured creditor, LVDF's own egregious conduct, and the fact that the Committee has its own financial advisor conducting its own investigation with the full cooperation of the Debtor. The facts and circumstances render the appointment of an examiner under these circumstances inappropriate.

IV. TO THE EXTENT THAT THE COURT IS INCLINED TO APPOINT AN EXAMINER, IT SHOULD SET THE PARAMETERS OF SUCH EXAMINATION THAT DOES NOT SERVE THE LITIGATION PURPOSES OF LVDF

An examiner's investigation "usually focuses on alleged fraud, dishonesty, incompetence, misconduct, mismanagement, or other irregularities." *In re Gliatech, Inc.*, 305 B.R. 832, 835 (Bankr. N.D. OH 2004). To the extent that notwithstanding the authorities cited above the Court concludes that the appointment of an examiner is required, this Court nevertheless "retains broad discretion to direct the examiner's investigation, including its nature, extent and duration." *Morgenstern v. Revco, D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 501 (6th Cir. 1990).

Rather than focusing merely on LVDF's allegations, the Court if it is inclined to appoint an examiner should focus on how a promised $75 million loan from LVDF morphed into a mere $6,375,000 loan, and how the impact of LVDF's bait and switch precipitated the Debtor's bankruptcy filing. In other words, unlike other creditors (who have not asked for and do not seek the appointment of an examiner) who might seek such an appointment with clean hands, LVDF's unclean hands should be accounted for in the context of the scope of any examination—should the Court be so inclined to order such examination.

V. CONCLUSION

The Debtor respectfully submits that there is authority for the proposition that the Court in its discretion can deny the request for the appointment of an examiner, and under the circumstances the Debtor respectfully requests that the Court deny LVDF's request at this time. To the extent that the Court is inclined to appoint an examiner, the Debtor respectfully requests that the Court exercise its discretion with respect to the scope of any examination such that it focus on the LVDF loan and its contribution to the Debtor's financial difficulties, including LVDF's claim today of approximately $5 million in fees and interest.

Dated: July 11, 2022

Respectfully Submitted,

BG Law LLP

/s/ Susan K. Seflin
Susan K. Seflin
Admitted Pro Hac Vice
Attorneys for Chapter 11
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EXHIBIT 1

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FRONT SIGHT MANAGEMENT LLC, a Nevada Limited Liability Company,

Plaintiff,

vs.

LAS VEGAS DEVELOPMENT FUND LLC, a Nevada Limited Liability Company; et al.,

Defendants.

AND ALL RELATED COUNTERCLAIMS.

CASE NO.: A-18-781084-B
DEPT NO.: 16

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT LAS VEGAS DEVELOPMENT FUND LLC'S MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO APPOINT A RECEIVER

This matter having come before the Court on September 20, 2019 and November 26, 2019 on Defendant Las Vegas Development Fund LLC's Motion to Dissolve Temporary Restraining Order and to Appoint Receiver, John P. Aldrich, Esq. appearing on behalf of Plaintiff and Kathryn Holbert, Esq. and C. Keith Greer, Esq., appearing on behalf of Defendants, the Court having reviewed the pleadings on file herein, having heard oral argument of the parties through their respective counsel, this Court makes the following Findings of Fact and Conclusions of Law.

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Insofar as any conclusion of law is deemed to have been or include a finding of fact, such a finding of fact is hereby included as a factual finding. Insofar as any finding of fact is deemed to have been or to include a conclusion of law such is included as a conclusion of law herein.

FINDINGS OF FACT

The Court makes the following Findings of Fact based on the evidence presented:

1. In Section IIB of Defendant/Counterclaimant Las Vegas Development Fund, LLC's ("LVDF") Motion to Dissolve Temporary Restraining Order and Appoint a Receiver, Defendant LVDF asserts thirteen breaches of the Construction Loan Agreement ("CLA"):
    a. Alleged Breach #1: Improper Use of Loan Proceeds – CLA §1.7(e) (Motion, p. 10);
    b. Alleged Breach #2: Failure to Provide Government Approved Plans – CLA §3.2(b) (Motion, p. 10);
    c. Alleged Breach #3: Failure to Timely Complete Construction – CLA §5.1 (Motion, p. 10);
    d. Alleged Breach #4: Material Change of Costs, Scope or Timing of Work – CLA §5.2 (Motion, p. 11);
    e. Alleged Breach #5: Refusal to Comply Regarding Senior Debt – CLA §5.27 (Motion, p. 11);
    f. Alleged Breach #6: Failure to Provide Monthly Project Costs – CLA §3.2(a) (Motion, p. 11);

g. Alleged Breach #7: Failure to Notify of Event of Default – CLA §5.10 (Motion, p. 11);

h. Alleged Breach #8: Refusal to Allow Inspection of Records – CLA §5.4 (Motion, p. 12);

i. Alleged Breach #9: Refusal to Allow Inspection of the Project – CLA §3.3 (Motion, p. 12);

j. Alleged Breach #10: Failure to Provide EB-5 Information – CLA §1.7(f) (Motion, p. 12);

k. Alleged Breach #11: Non Payment of Default Interest – CLA §1.2 (Motion, p. 12);

l. Alleged Breach #12: Non Payment of Legal Fees – CLA §8.2 (Motion, p. 12); and

m. Alleged Breach #13: Failure to Comply with Applicable Laws (CLA §5.13) and Failure to Give Written Notice of Criminal Complaint (CLA §5.14) (Motion, p. 13).

2. The first allegation of breach focuses on the alleged misuse of loan proceeds by Plaintiff/Counter-Defendant, Front Sight Management, LLC (Front Sight). However, in its Opposition to Defendant/Counter-Claimant LVDF's Motion to Dissolve the TRO and Appoint a Receiver, Front Sight supplied evidence to establish project cost and expenditures which exceed the loan amounts advanced by LVDF.

3. There are four (4) paragraphs of the Construction Loan Agreement that relate to loan proceeds. They are as follows:

Section 1.7 EB-5 Program Requirements.

....

(e) Borrower shall use the proceeds of the Loan solely for the purpose of funding directly, or advancing to Affiliates to pay, the costs of the Project, **in accordance with the terms and conditions of this Agreement**, as set forth in the Budge and the Project documents submitted to, and approved by, USCIS.

....

Section 3.7 Use of Loan Proceeds. Borrower shall use and apply the Loan proceeds **solely to all or any number of the individual Project components in accordance with the Budge and also to pay some or all of any or all existing indebtedness encumbering the Project pursuant to a Permitted Encumbrance. Borrower shall use its best business judgment based upon then-current real estate market and availability of other financing resources to allocate the proceeds of the Loan in such a manner as to assure the full expenditure of the Loan proceeds advanced to Borrower.** Borrower will comply with the requirements of the EB-5 Program and the other EB-5 Program covenants and requirements contained in this Agreement.

Section 4.29 Use of Loan Proceeds. The proceeds of the Loan shall be used to pay and obtain release of the existing liens on the Land, to pay for or reimburse Borrower for soft and hard costs related to the pre-construction, development, promotion, construction, development and operation of the Project in connection with the FSFTI Facility and the construction, development, operation, leasing and sale of the timeshare portion of the Project, all as more particularly described on Exhibit F, attached hereto. The Loan is made exclusively for business purposes in connection with holding, **developing and financially managing real estate for profit**, and none of the proceeds of the Loan will be used for the personal, family or agricultural purposes of the Borrower.

Section 5.3 Using Loan Proceeds. Subject to Section 3.2, **Borrower shall use the Loan proceeds in its sole discretion to pay, or to reimburse Borrower for paying, costs and expenses incurred by Borrower in connection with the pre-construction, promotion, construction, development, operating and leasing of the Project on the Land and the equipping of the Improvements, together with the payoff and release of any existing liens and encumbrances on the Land.** Borrower shall take all steps necessary to assure that Loan proceeds are used by its contractors and subcontractors to pay such costs and expenses which could otherwise constitute a mechanic's lien claim against the Project. Within thirty (30) days after the Completion Date, Borrower shall provide the documentation and supporting accounting records and contract documents necessary, in Lender's discretion, to demonstrate that between the Closing Date and the date of delivery of such documentation not less than the total amount of the Advances has been spent directly or indirectly on the Project substantially in a form acceptable to Lender for compliance with the EB-5 Program.

(Emphases added.)

4. Exhibit 47 to the Evidentiary Hearing Exhibits, Front Sight's "Response to Notice of Default dated July 30, 2018," shows project costs and expenditures well in excess of $6.3 million LVDF advanced. In Exhibit C to that document, Front Sight provided

copies of QuickBooks monthly reports that showed the following Project costs and expenditures:

TIME PERIOD	TOTAL
October 2015 – December 2015	$3,387,591.35
January 2016 – December 2016	$7,466,570.24
January 2017 – December 2017	$12,454,018.84
	$23,308,180.43

5. Exhibit 48 to the Evidentiary Hearing Exhibits is Front Sight's "Additional Response to Notices of Default dated July 31, 2018, and August 24, 2018 and Initial Response to Notice of Default dated August 28, 2018." In that exhibit, Front Sight provided to Defendant Dziubla a multitude of documents showing the following expenses which were paid by Front Sight between the closing of the loan in October 2016 and June 30, 2017:

EXPENSE CATEGORY	TOTAL
Reimbursable construction costs prior to the closing date of the Construction Loan Agreement	$994,336.56
Construction costs from the closing date of the Construction Loan Agreement to June 30, 2017	$1,031,728.10
Class Action lien payoff as of the time of closing of the Construction Loan Agreement	$551,871.50
Class action lien pay-down prior to the closing date of the Construction Loan Agreement	$1,860,000.00
Holecek note paydown prior to the closing date of the Construction Loan Agreement	$6,004,000.00
Holecek note paydown from the closing date of the Construction Loan Agreement to June 30, 2017	$1,422,000.00
Project legal fees	$81,551.25
Fees Paid to Chicago Title in connection with original closing	$9,217.01
EB5 Impact Advisor fees	$244,730.00
Fees paid to US Capital Partners evidencing efforts to secure "Senior Debt" prior to securing construction line of credit from Morales Construction	$62,500.00
Project consulting fees	$82,550.00
	$12,344,484.42

6. Adding construction costs prior to closing with construction costs **from closing to June 30, 2017**, plus the class action lien payoff as of the closing date of the CLA, Front Sight's expenses far exceed the US$2.625M in EB5 funds delivered on or before June 30, 2017.

7. Exhibit 49 to the Evidentiary Hearing Exhibits is Front Sight's "EB-5 Documentation and Additional Information for the Period **July 1, 2017, through October 31, 2018** Delivered Pursuant to Section 5.10(e) of the Construction Loan Agreement." In that exhibit, Front Sight provided to Defendant Dziubla several hundred additional pages of documents showing the following expenses which were paid by Front Sight:

EXPENSE CATEGORY	TOTAL
Construction costs from June 30, 2017, through and including July 1, 2018	$2,088,490.00
Holecek note paydown from June 30, 2017, through and including July 1, 2018	$1,896,000.00
Project legal fees from June 30, 2017, through and including July 1, 2018	$14,116.00
Construction costs from July 1, 2018, through and including October 30, 2018	$402,621.00
Holecek note paydown from July 1, 2018, through and including October 30, 2018	$632,000.00
Project legal fees from July 1, 2018, through and including October 30, 2018	$6,984.00
Construction costs from September 6, 2016, through and including August 24, 2018 (commercial revolving charge account of Front Sight established with Home Depot)	$66,173.67
Construction costs from October 11, 2016, through and including July 13, 2018 (charged to the Visa credit card account of Front Sight established with City National Bank)	$43,212.07
Construction costs from August 30, 2016, through and including February 20, 2018 (charged to the Premier Rewards Gold charge and credit card account of Front Sight established with American Express)	$92,868.00
	$5,242,464.74

8. Based on this uncontroverted evidence, the Court finds Front Sight's expenses on the Project far exceed the amount of the loan from Defendant LVDF.

9. As to the fourth breach alleged by Defendant/Counterclaimant LVDF, the alleged material change in size, scope, and timing of the project, it appears that the size of the classroom was reduced but not the overall size of the facility, and therefore, the Court finds that there is an issue of fact as to this alleged breach of the CLA.

10. Regarding the second, third, and fifth through thirteenth alleged breaches, as asserted by Defendant/Counterclaimant LVDF, the parties asserted multiple competing factual positions and made conflicting factual assertions regarding Defendant LVDF's allegations of breach of the CLA. Based on the state of the evidence as of the date of the hearing on the instant Motion, the Court finds that genuine issues of fact remain as to the second, third, and fifth through thirteenth alleged breaches, as asserted by Defendant/Counterclaimant LVDF.

CONCLUSIONS OF LAW AND ORDER

The Court makes the following Conclusions of Law:

1. Regarding alleged Breach #1, the Court concludes that Front Sight's expenses on the Project far exceed the amount of the loan from Defendant LVDF has Defendant LVDF's assertion that Front Sight improperly used loan proceeds is without merit, and consequently, LVDF has failed to establish this alleged breach.

2. As to the second, third, and fifth through thirteenth alleged breaches, as asserted by Defendant/Counterclaimant LVDF, the Court concludes that LVDF has not established that Plaintiff is in breach of the Construction Loan Agreement, and consequently, LVDF is not entitled to the relief it seeks by this Motion.

4. Regarding the fourth alleged breach, pertaining to the reduction in the size of the Patriot Pavilion, because it appears that the size of the classroom was reduced but not the overall

size of the facility, creating an issue of fact as to this alleged breach, the Court concludes that LVDF has not established that Plaintiff is in breach of the construction Loan Agreement, and consequently, LVDF is not entitled to the relief it seeks by this Motion.

ORDER

IT IS HEREBY ORDERED that Defendant Las Vegas Development Fund LLC's Motion to Dissolve Temporary Restraining Order and to Appoint Receiver is DENIED.

IT IS SO ORDERED.

DATED this 22nd day of January, 2020.

DISTRICT COURT JUDGE

Respectfully submitted by:

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