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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
FRONT SIGHT MANAGEMENT LLC,

Debtor.

Case No. 22-11824-abl
Chapter 11
Hearing Date: July 25, 2022
Hearing Time: 9:30 a.m.

**OBJECTION OF THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS TO THE MOTION OF
LAS VEGAS DEVELOPMENT FUND, LLC TO APPOINT AN EXAMINER**

The Official Committee of Unsecured Creditors (the “Committee”) of the above-captioned debtor and debtor-in-possession (the “Debtor”), by and through its proposed undersigned counsel, hereby files this objection (the “Objection”) to the *Motion to Appoint an Examiner* (the “Motion”) filed by Las Vegas Development Fund, LLC (“LVDF”).¹ In support of its Objection, the Committee respectfully states as follows:

¹ Docket No. 211. Pursuant to Local Rules 7008 and 7012, the Committee consents to the entry of a final judgment or order with respect to the Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

PRELIMINARY STATEMENT

1
2 1. The appointment of an examiner is neither mandated by the Bankruptcy
3 Code nor appropriate based on the circumstances of this case. Instead, LVDF’s request for the
4 appointment of an examiner is a poorly veiled litigation tactic intended to impede the Debtor’s
5 restructuring efforts. The Motion should, therefore, be denied.
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7 2. Notwithstanding LVDF’s argument to the contrary, existing case law is far
8 from conclusive regarding whether the appointment of an examiner is mandatory simply because
9 a debtor’s unsecured liabilities exceed \$5 million. To the contrary, there is extensive case law
10 supported by the legislative history of section 1104(c)(2) of the Bankruptcy Code, that provides
11 this Court discretion over whether to appoint an examiner. These better reasoned cases,
12 implement Congressional intent and give full effect to the express language of section 1104,
13 which provides for examiner appointment “as is appropriate” based on the facts and
14 circumstances of the case.
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16 3. Here, appointment of an examiner is not warranted because (i) it is
17 unnecessary in light of the presence of the Committee as an effective fiduciary of the estate; and
18 (ii) LVDF’s request is a transparent attempt to derail the chapter 11 process and provide LVDF a
19 litigation advantage over the Debtor, Dr. Piazza and certain related parties and entities. LVDF
20 clearly has no need for the appointment of an examiner, having spent 4 years litigating with the
21 Debtor and conducting its own thorough investigation. As evidenced by the slew of pleadings
22 filed simultaneously by LVDF, the Motion is just one piece of LVDF’s scorched earth litigation
23 strategy designed to divert the Debtor’s limited resources from the issues at hand—formulation
24 of a chapter 11 plan—while casting the Debtor in a negative light. Moreover, the Motion is
25 completely unsupported by admissible evidence. Mere allegations, without more, do not support
26 the appointment of an examiner in this, or any other, case.
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1 **II. LVDF Loan**

2 7. Formed in 1996 by Ignatius Piazza (“Piazza”), the Debtor operates one of
3 the largest private firearms training facilities in the world, located on 550 acres of owned real
4 property in Pahrump, Nevada (the “Property”).³

5
6 8. LVDF asserts that, as of the Petition Date, the Debtor is indebted to LVDF
7 in the amount of approximately \$11 million, secured by a deed of trust on the Property, including
8 all water rights (the “Prepetition Debt”).⁴ The Debtor disputes this allegation.

9 9. The Prepetition Debt emanates from a relationship dating back to 2012,
10 pursuant to which LVDF purportedly agreed to secure \$150 million via an EB-5 immigration
11 investment plan to finance the development of improvements on the Property, but ultimately
12 delivered only \$6.3 million of financing to the Debtor.⁵

13
14 10. In August 2018, the Debtor commenced litigation against LVDF in Clark
15 County, Nevada, asserting claims for, among other things, fraud in the inducement, intentional
16 misrepresentation, breach of fiduciary duty and conversion (the “State Court Action”).⁶

17 11. In response, LVDF filed a foreclosure action against the Debtor, as well as
18 various counterclaims (the “LVDF Counterclaims”). The LVDF Counterclaims include, among
19 others: (i) fraudulent transfer claims based on distributions from the Debtor to or for the benefit
20 of Piazza; (ii) claims for conversion based on Piazza allegedly misappropriating the LVDF loan
21 proceeds; and (iii) claims for corporate waste based on Piazza allegedly inducing the Debtor to
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25 ³ See *Omnibus Declaration of Ignatius Piazza in Support of First Day Motions* (the “First
26 Day Declaration”), ¶ 4. Docket No. 21.

27 ⁴ *Id.* ¶ 26. The Prepetition Debt allegedly consists of: (a) \$6.375 million of principal, (b)
\$2.9 million of interest, late fees and costs, and (c) \$1.74 million of attorneys’ fees.

28 ⁵ *Id.* ¶¶ 12, 15.

⁶ *Id.* ¶¶ 17, 18.

1 improperly utilize the loan proceeds from LVDF.⁷ The LVDF Counterclaims also include an
2 assertion that Piazza is an alter ego of the Debtor, and therefore, seek to hold the Debtor liable for
3 the assertions made against Piazza in the LVDF Counterclaims.⁸
4

5 12. Following four years of contentious litigation, the Debtor no longer had
6 the resources to stave of LVDF's foreclosure efforts. Accordingly, the Debtor commenced this
7 case on the eve of a foreclosure action by LVDF after failing to post a \$9.7 million bond to secure
8 a temporary restraining order.⁹
9

10 **III. The Bankruptcy Case**

11 13. The Debtor filed this case seeking to consummate a plan of reorganization
12 that will restructure its operations and allow it to exit chapter 11 as a viable business entity. If a
13 restructuring cannot be accomplished, the Debtor has a purchase agreement in place that will
14 allow it to pivot towards a sale process.¹⁰
15

16 14. To maintain operations and finance this process, the Debtor secured
17 \$5 million of senior, post-petition financing from FS DIP, LLC (the "DIP Facility").¹¹
18

19 15. On July 1, 2022, the Court entered an order approving the DIP Facility (the
20 "DIP Order"), over the objection of LVDF.¹² Among other terms, the DIP Order requires the
21 Debtor to adhere to certain plan milestones, including the filing of a plan by July 15, 2022 (less
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23 ⁷ See *Plaintiffs Notice of Removal to United States Bankruptcy Court of Litigation*
24 *Pending in the District Court of Clark County, Nevada*, ¶¶ 3-6. Adv. Proc. No. 22-0111-
abl, Docket No. 1.

25 ⁸ *Id.*

26 ⁹ First Day Declaration, ¶ 20.

27 ¹⁰ On June 15, 2022, the Debtor and FS DIP, LLC entered into a *Purchase and Sale*
Agreement & Escrow Instructions (the "APA"), providing for the sale of substantially all
of the Debtor's assets for \$19 million. See Docket No. 150.

28 ¹¹ First Day Declaration, ¶ 40.

¹² See Docket No. 228.

1 than one week away) and confirmation of a plan by November 29, 2022.¹³

2 **IV. LVDF's Bankruptcy Litigation**

3 16. On June 23, 2022, the Debtor filed a notice removing the State Court
4 Action to this Court (the "Removal Notice").¹⁴ The Removal Notice highlights each of the LVDF
5 Counterclaims and asserts they are either (a) fraudulent conveyance claims or alter ego claims,
6 each of which belong to the Debtor's estate, or (b) tort claims that resulted in injury to the Debtor,
7 and therefore, are property of the Debtor's estate.¹⁵

8
9 17. On June 27, 2022, in response to the Debtor's removal notice, LVDF filed
10 a motion seeking to remand the State Court Action to the Eighth Judicial District Court of
11 Nevada.¹⁶ LVDF also filed a motion seeking to modify the automatic stay to allow the State
12 Court Action to proceed assuming the Court grants the remand motion.¹⁷

13
14 18. On June 27, 2022, LVDF also filed the Motion, arguing that appointment
15 of an "independent third party" is necessary to investigate: (i) the transactions between the Debtor
16 and Piazza (or any of his affiliated entities) for the past 6 years; (ii) the alleged discrepancy
17 between the unsecured creditors listed on the Debtor's schedules as compared to the 80,000
18 creditors referenced in the First Day Declaration; and (iii) the reason why the Debtor did not join

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22 ¹³ DIP Order, ¶ 16.

23 ¹⁴ *See Front Sight Management, LLC v. Las Vegas Development Fund, LLC, et al.*, Adv. Proc. Case No. 22-01116-abl.

24 ¹⁵ *See Removal Notice*, ¶¶ 3-6.

25 ¹⁶ *See Adv. Proc. No. 22-01116*, Docket No. 4.

26 ¹⁷ Docket No. 206. Simultaneously with the filing of this Objection, the Committee will be
27 filing an opposition to LVDF's remand motion and its request to modify the automatic
28 stay.

1 the request for terminating sanctions against Piazza as to the fraudulent transfer action in the State
2 Court Action.”¹⁸

3
4 19. The proposed topics also include “the circumstances surrounding” a
5 prepetition note with Committee member ALM Investments, LLC (“ALM”), reflecting a \$55,000
6 loan paid directly to the Debtor’s financial advisor as a retainer.¹⁹

7
8 **OBJECTION**

9 **I. Section 1104(c) Does not Mandate Examiner Appointment In All Circumstances**

10 20. Section 1104(c)(2) of the Bankruptcy Code provides in relevant part that
11 “on request of a party in interest ... the court *shall* order the appointment of an examiner to
12 conduct such an investigation of the debtor *as is appropriate*, ... if - the debtor's fixed, liquidated,
13 unsecured debtors, other than debts for goods, services, or taxes, or owing to an insider, exceed
14 \$5,000,000.”²⁰ LVDF focuses on the word “shall” in the statute, asserting that the appointment
15 of an examiner is mandatory because the Debtor’s fixed, liquidated, unsecured debts exceed
16 \$5 million. Although some courts have relied on the word “shall” in determining that 1104(c)(2)
17 imposes an mandatory requirement, numerous courts have rejected this reasoning as overly
18 limited given the “as is appropriate” language of the statute that supports a more discretionary
19 standard that is consistent with the legislative intent behind section 1104(c)(2) of the Bankruptcy
20 Code.
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22 21. These better reasoned decisions incorporate a complete reading of section
23 1104(c), as well as a review of the legislative history in determining that the bankruptcy court has
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26 ¹⁸ Motion, at 4, 6-7.

27 ¹⁹ *Id.* at 6. With absolutely no evidentiary support, LVDF requests an examination
28 regarding a topic already subject to the ongoing oversight of the Office of the United
States Trustee.

²⁰ 11 U.S.C. §1104(c)(2) (emphasis added).

1 discretion to determine whether the appointment of an examiner is appropriate under the facts and
2 circumstances of the case. The current facts of this case do not support the appointment of an
3 examiner.

4 22. When faced with the question of whether the appointment of an examiner
5 is mandatory, the court in *In re Residential Capital, LLC* conducted a thorough review of the
6 competing case law, including the Sixth Circuit’s 1990 decision in *Morgenstern v. Revco D.S.,*
7 *Inc. (In re Revco D.S., Inc.)* (the only circuit court to have decided the issue).²¹ While *Revco*
8 determined the appointment of an examiner was mandatory based on the plain text of the statute,
9 it also expressly acknowledged that the “as is appropriate” language provides “broad discretion”
10 to direct the investigation of an examiner once appointed.²²

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12
13 23. Following the *Revco* court’s logic, several courts have mandated the
14 appointment of an examiner, only to strip such examiner of any duties or topics for
15 investigation.²³ Similarly, some courts have determined such requirement to be facially
16 mandatory, but nevertheless treated the requirement permissively by declining to appoint an

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22 ²¹ See generally *In re Residential Capital, LLC*, 474 B.R. 112 (Bankr. S.D.N.Y. 2012)
23 (“ResCap”).

24 ²² See *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 501 (6th Cir.
25 1990) (“Revco”); see also *In re Erickson Retirement Communities, LLC*, 425 B.R. 309,
26 312 (Bankr. N.D. Tex. 2010) (agreeing that the court only has discretion to define the
27 scope of the duties of an examiner if the requirements of section 1104(c)(2) are met).

28 ²³ See *In re ACandS, Inc.*, No. 02-12687, Tr. at 130-32 (Bankr. D. Del. Nov. 18, 2002) (while
appointment was mandatory, the examiner would be “a stand-by examiner” on whom
there would be “not going to one penny of fees ... spent”); *In re Asarco, LLC*, Case No.
05-21207, *Order Directing Appointment of Examiner Under 11 U.S.C. §§ 1104(c) and*
1106, Docket No. 7081 (Bankr. S.D. Tex. March 4, 2008) (approving the appointment of
an examiner, but denying the scope of the investigation and providing that the examiner
shall not have any current duties).

1 examiner on other bases.²⁴ In *ResCap*, Judge Glenn took issue with this notion, questioning why
 2 such discretion would not also extend to the decision to not appoint an examiner if the facts and
 3 circumstances of the case do not warrant one.²⁵ Judge Glenn, therefore, appropriately turned to
 4 the legislative history to determine whether such appointment was, in fact, mandated.
 5

6 24. In analyzing the seemingly conflicting “shall” and “as is appropriate”
 7 language of section 1104(c)(2), Judge Glenn noted that the “court must apply the plain words of
 8 a statute when the language is clear, [but] must look beyond the simple words when a single
 9 answer is not apparent.”²⁶ In discussing the protection afforded by the appointment of an
 10 examiner, the House Report for section 1104(c) provides that “the protection must be needed, and
 11 the cost and expense must not be disproportionately high.”²⁷ Judge Glenn ultimately found that
 12 the “legislative purpose is met when an examiner motion is denied in cases with fixed debts in
 13 excess of \$5 million where the evidence establishes that the protection of an examiner is not
 14 needed under the facts and circumstances of the case.”²⁸ Indeed, “it would be an absurd result to
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 22 ²⁴ See *Erickson*, 425 B.R. at 312 (finding the appointment mandatory, but determining the
 23 movant did not have standing under the applicable subordination agreement); *In re*
 24 *Bradlee Stores, Inc.*, 209 B.R. 36, 39 (Bankr. S.D.N.Y. 1997) (declining to decide whether
 section 1104(c)(2) mandates the appointment of an examiner, but denying the request as
 it would be “duplicative, needless and wasteful.”).

25 ²⁵ *ResCap*, 474 B.R. at 118.

26 ²⁶ *Id.* at 120.

27 ²⁷ See H.R. Rep. No. 95–595, 95th Cong., 1st Sess. 402 (1977).

28 ²⁸ *ResCap*, 474 B.R. at 121 (“While the section expresses a congressional preference for the
 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.”).

1 find that in every case where the financial criteria is met and a party-in-interest asks, the Court
2 must appoint an examiner.”²⁹

3 25. Accordingly, Judge Glenn found the appointment of an examiner
4 mandatory only when (1) no plan has been confirmed; (2) no trustee has been appointed; (3) the
5 debtor has in excess of \$5 million in fixed debts; and, critically, (4) the facts and circumstances
6 of a case do not render the appointment of an examiner inappropriate.³⁰ Following Judge Glenn’s
7 2021 *ResCap* decision, numerous courts, including within the 9th Circuit, have followed this
8 reasoning.³¹

11 **II. Appointment of an Examiner is Not Appropriate in This Case**

12 26. The appointment of an examiner is not mandatory simply because a
13 \$5 million threshold has been met. Instead, this Court need only appoint an examiner if it
14 determines such appointment is “appropriate” and not otherwise being sought for an improper
15 purpose. While the Bankruptcy Code does not define or set forth the parameters of the “as is
16 appropriate” language, courts have outlined the following criteria:

- 17 (1) whether the investigation has already been conducted by other parties;

19
20 ²⁹ *In re Dewey & LeBoeuf*, 478 B.R. 627, 639 (Bankr. S.D.N.Y. 2012); *see also Winston*
21 *Indus., Inc. v. Lancer Homes, Inc. (In re Shelter Resources Corp.)*, 35 B.R. 304, 305
22 (Bankr. N.D. Ohio 1983) (“It is the opinion of this Court, therefore, that confronted with
the facts and circumstances that presently exist in this particular case, to slavishly and
blindly follow the so-called mandatory dictates of [section 1104(c)(2)] is needless, costly
and nonproductive and would impose a grave injustice on all parties herein.”).

23 ³⁰ *Id.* Judge Glenn ultimately determined the appointment of an examiner was warranted
24 based on the facts and circumstances of that case.

25 ³¹ *See In re PG&E Corp.*, No. 19-30088, 2020 WL 9211190 (Bankr. N.D. Cal. July 6, 2020)
26 (citing *ResCap* with approval before concluding that the protection of an examiner is not
needed and is not appropriate under the circumstances); *U.S. Bank Nat’l Ass’n v.*
27 *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
28 examiner pursuant to section 1104(c)(2) because the “as is appropriate” language affords
courts discretion to deny appointment that would result in waste and delay); *Dewey &*
LeBoeuf, 478 B.R. at 639 (finding the appointment of an examiner neither mandatory nor
in the best interests of the estate).

- 1 (2) whether the appointment of an examiner would increase costs and cause a
2 delay with no corresponding benefit; and
- 3 (3) the timing and underlying motives of the motion, *i.e.*, whether it is a
4 litigation tactic or an attempt to gain an advocate or whether the motion
comes after an undue delay.³²

5 27. As a preliminary matter, LVDF has the burden of demonstrating that
6 examiner appointment is warranted. The party requesting the appointment must demonstrate by
7 probative evidence that the facts of the case justify the appointment of an examiner.³³ Mere
8 allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the
9 management of the affairs of the debtor of or by current or former management, is insufficient to
10 satisfy section 1104(c).³⁴

12 28. LVDF has provided no evidence in support of the appointment of an
13 examiner. In fact, contrary to the voluminous pleadings LVDF has typically filed in these cases
14 with supporting documentation, the Motion is incredibly bare bones, with little factual support
15 for the broad allegations asserted by LVDF. As discussed further below, such skeletal accusations
16 without support are surprising given the more than 4-year investigation already conducted by
17 LVDF into the affairs of the Debtor, Piazza and his related entities.

19 29. It is, of course, unremarkable that the Debtor made payments to insiders in
20 the one-year (or six years) prior to the Petition Date. The Debtor has not made any attempt to
21 hide this information. The existence of transfers alone does not substantiate the need for the
22 appointment of an examiner under section 1104(c)(2). If it did, an examiner would be necessary
23 in every complex chapter 11 case filed.

26 ³² *ResCap*, 474 B.R. at 120.

27 ³³ *In re Bel Air Assocs.*, 4 B.R. 168 (Bankr. W.D. Okla. 1980) (“[T]his Court is of the opinion
28 that mere naked allegations are not enough to warrant the necessary expense and delay
involved with such an appointment and investigation.”).

³⁴ *In re Gilman Servs., Inc.*, 46 B.R. 322 (Bankr. D. Mass. 1985).

1 30. LVDF similarly fails to provide any factual support regarding an
2 investigation of the Debtor’s decision not to join in terminating sanctions against Piazza and the
3 other co-defendants. LVDF’s questions regarding this can hardly be considered evidence of
4 impropriety warranting an examination.
5

6 31. LVDF has similarly failed to provide any evidence that the ALM note was
7 obtained by the Debtor (or provided by ALM) for an improper purpose. Merely stating it does
8 not make it true. Nor is there any discrepancy between the 2,900 creditors identified in the
9 schedules and the First Day Declaration. Upon information and belief, the Debtor was referencing
10 80,000 members who could be creditors were the Debtor’s operations to cease.
11

12 32. Taken together, LVDF has failed to submit any compelling reason
13 sufficient evidence warranting investigation of any of these topics by an examiner. On this basis
14 alone, the Motion should be denied. For the reasons set forth below, the above-enumerated factors
15 clearly weight against the appointment of an examiner in this case.

16 A. The Status of Investigation

17 33. Courts have denied a request to appointment an examiner where another
18 party is already in place to conduct the investigation being sought. In *PG&E*, the Bankruptcy
19 Court for the Northern District of California was deciding whether to approve the appointment of
20 an examiner to investigate alleged voting irregularities.³⁵ As the official tort claimants committee
21 agreed to conduct such investigation, the court denied the appointment as being “unnecessarily
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³⁵ See generally *PG&E Corp.*, 2020 WL 9211190.

1 duplicative and costly.”³⁶ Other courts have found similarly, particularly where such party is
2 adequately represented in the case.³⁷
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4 34. Here, the Committee has been appointed as an independent fiduciary of the
5 estate. One of the primary directives for any unsecured creditors committee is to investigate the
6 Debtor’s conduct and financial affairs.³⁸ This includes the right to evaluate the Debtor’s assets
7 and liabilities, investigate or pursue potentially valuable claims (including claims against
8 insiders), and evaluate alternate sources of recovery.³⁹ As set forth in its objection to the DIP
9 Facility, the Committee takes LVDF’s allegations seriously and intends to conduct a fullsome
10 investigation. There is no basis, therefore, for the duplication of these efforts by an examiner.
11

12 35. While LVDF may point to the fact that the Committee has not yet
13 conducted an investigation, the Committee was only appointed one month ago and immediately
14 consumed with a contested DIP financing priming fight. With the Debtor’s plan filing deadline
15 less than one week away, the Committee has had insufficient time to conduct its investigation.
16

17 36. The Committee understands that LVDF has already conducted an
18 investigation into the core issues it now requests an examiner to investigate and previously
19 retained a forensic accountant that issued an expert opinion in the State Court Action “detailing
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21 ³⁶ *Id.* at *3

22 ³⁷ *See also Spansion*, 426 B.R. at 128 (denying the appointment of an examiner and noting,
23 in part, that that the creditors’ committee and various ad hoc committees have vigorously
24 represented the interests of unsecured creditors in the case); *In re GHR Cos., Inc.*, 43 B.R.
25 165, 158 (Bankr. D. Mass. 1984) (denying appointment of an examiner where, in part, the
26 court approved the employment of various professionals by fiduciaries of the estate,
including the creditors’ committee, to conduct investigatory functions); *In re Shelter
Resources Corp.*, 35 B.R. 304 (Bankr. N.D. Ohio 1983) (finding that a committee with
investigatory powers was already in place, thereby making the appointment of an
examiner duplicative).

27 ³⁸ *See generally* 11 U.S.C. § 1103(c) (The duties of a committee include the “investigat[ion]
28 of the acts, conduct ... financial condition of the debtor, the operation of the debtor’s
business ... and any other matter relevant to the case or to the formulation of a plan.”).

³⁹ *Id.*

1 the evidence of Front Sight’s insolvency and the millions of dollars the Piazzas took out of Front
2 Sight’s bank accounts from 2016-2019.”⁴⁰ To the extent such analysis has already been done,
3 LVDF should share the results of such investigation with the Committee. Such cooperation would
4 accelerate the Committee’s investigation and likely limit the potential administrative costs to this
5 estate. Regardless, the existence and extent of LVDF’s prepetition investigation dictates against
6 appointment of an examiner.
7

8 B. The Cost of an Examiner Outweighs any Possible Benefit

9 37. The Court is well aware of the extremely tight budget in this case. The
10 duplicative nature of the requested investigation would place additional and unnecessary strain
11 on the limited resources available in this case. Although the Debtor secured \$5 million of
12 financing, the budget is very tight and there are no additional fund available to finance an
13 examiner investigation, particularly when an investigation is already being conducted by the
14 Committee. Rather than serve the estate as a whole, the appointment of an examiner on these
15 facts would cause undue hardship.⁴¹
16

17 C. The Examiner Request is a Transparent Litigation Tactic

18 38. Given the extensive prepetition investigation conducted by LVDF, and the
19 nearly \$2 million in attendant fees incurred by LVDF in connection with the investigation and its
20 litigation against the Debtor, LVDF’s motives in requesting the appointment of an examiner are
21 clear. The Motion is nothing more than a transparent litigation tactic designed to impede the
22 Debtor’s restructuring efforts. Section 1104(c), however, “was not intended and should not be
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25 ⁴⁰ Motion, at 4.

26 ⁴¹ See *PG&E*, 2020 WL 9211190, at *3 (“Based on the third-party’s investigation results,
27 ... the appointment of an examiner would be unnecessarily duplicative and costly and thus
28 inappropriate under section 1104(c.)”); *Spansion*, 426 B.R. at 30 (finding the appointment
of an examiner would cause undue cost to the estate, which would be harmful to the
Debtors and delay the administration of the case); *In re Rutenberg*, 158 B.R. 230, 233
(Bankr. M.D. Fla. 1993) (same).

1 relied on to permit blatant interference with the chapter 11 case or the plan confirmation
2 process.”⁴² The appointment of an examiner for such purpose is improper and should not be
3 countenanced.

4 39. Having failed to overcome this Court’s approval of the DIP Facility, LVDF
5 now seeks to divert the Debtor’s limited resources (including limited time) towards addressing its
6 series of distracting pleadings, rather than formulating an exit strategy and chapter 11 plan.
7 Consistent with the litany of pleadings filed in this case, LVDF seeks the appointment of an
8 examiner to bring the scorched-earth litigation tactic from the State Court Action to this Court.
9 These claims, however, are not LVDF’s to bring and no longer subject to the jurisdiction of the
10 State Court Action. They are estate causes of action subject to investigation by the Committee
11 and pursuit by an estate representative.

12 40. Even if such claims were not estate causes of action, appointment of an
13 examiner to investigate LVDF’s proposed topics is an obvious attempt to buttress its own
14 arguments. The request for an investigation of transfers made by the Debtor to or for the benefit
15 of Piazza goes directly to LVDF’s claims of conversion and fraudulent conveyance in the State
16 Court Action. Similarly, LVDF’s musings regarding the ALM note and the alleged discrepancy
17 in the First Day Declaration are a blatant attempt to cast doubt on the honesty of the Debtor and
18 integrity of this process. Appointment of an examiner for this purpose would benefit only one
19 party—LVDF to the detriment of the remaining parties in interest in this case.

20 41. The timing of the request also weighs against the appointment of an
21 examiner. These cases have been pending for less than 2 months, with the Committee appointed
22 only 4 weeks ago. Rather than the appointment of an examiner to investigate a series of topics
23 that are either entirely unfounded or otherwise within the purview of the Committee, this estate
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⁴² See 7-1104 Collier on Bankruptcy P 1104.03[2] (2009).

1 would benefit from allowing the Committee to complete its investigation and the plan process to
2 proceed without interference from a disgruntled litigant seeking to serve its own interests to the
3 detriment of the remaining estate.

4 **III. If An Examiner Is Appointed, The Scope of Examination Should Be Limited**

5 42. If the Court ultimately appoints an examiner wither as mandatory or
6 appropriate, the scope of examination should be limited to an oversight role with a limited budget
7 to ensure the Committee’s investigation is thorough. The Court “retains discretion to direct the
8 nature, extent and duration of the examiner’s investigation.”⁴³ Courts that find the appointment
9 of an examiner mandatory under section 1104(c)(2), have exercised their discretion to not only
10 limit the scope, but deny outright any duties or areas of investigation.⁴⁴ The scope of
11 appointment, therefore, should be limited until such time as the Committee completes its
12 investigation and the Court can assess whether further examination is warranted and is necessary
13 given the facts and circumstances of these cases.
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25 ⁴³ *Revco*, 898 F.2d at 501.

26 ⁴⁴ *See In re ACandS, Inc.*, No. 02-12687, Tr. at 130-32 (Bankr. D. Del. Nov. 18, 2002) (while
27 appointment was mandatory, the examiner would be “a stand-by examiner” on whom
28 there would was “not going to one penny of fees ... spent”); *In re Asarco, LLC*, Case No.
05-21207, *Order Directing Appointment of Examiner Under 11 U.S.C. §§ 1104(c) and 1106*, Docket No. 7081 (Bankr. S.D. Tex. March 4, 2008) (approving the appointment of
an examiner, but denying the scope of the investigation and providing that the examiner
shall not have any current duties).

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CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court deny the Motion and provide such further relief as is just and proper.

Respectfully submitted this 11th day of July 2022

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