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4 **UNITED STATES DEPARTMENT OF JUSTICE**
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11 **UNITED STATES BANKRUPTCY COURT**
12 **DISTRICT OF NEVADA**

13 In re
14 **FRONT SIGHT MANAGEMENT LLC,**
15
16 Debtor.

Case No: BK-S-22-11824-ABL
Chapter 11
Date: July 25, 2022
Time: 9:30 a.m.
Location: Foley Courtroom 1, Remote

17 **THE UNITED STATES TRUSTEE’S OBJECTION AND RESERVATION OF RIGHTS**
18 **TO DEBTOR’S APPLICATION TO EMPLOY LUCAS HORSFALL AS**
19 **ACCOUNTANT PURSUANT TO 11 U.S.C. §§ 327(a), 328(a) AND 330**
20 **EFFECTIVE AS OF THE PETITION DATE [ECF No. 200]**

21 To the Honorable AUGUST B. LANDIS, Chief United States Bankruptcy Judge:
22 Tracy Hope Davis, United States Trustee for Region 17 (the “U.S. Trustee”),
23 by and through her undersigned counsel, hereby files this objection and reservation of rights to the
24 *Debtor’s Application to Employ Lucas Horsfall as Accountant Pursuant to 11 U.S.C. §§ 327(a),*
25 *328(a) and 330 Effective as of the Petition Date (“Application”)* [ECF No. 200].¹

26 In support of her Objection, the U.S. Trustee represents the following:

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28 ¹ Unless otherwise noted: “Section” refers to a section of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”); “ECF No.” refers to the bankruptcy docket for case number 22-11824-ABL; “FRBP” refers to the Federal Rules of Bankruptcy Procedure; “FRE” refers to the Federal Rules of Evidence.

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I. INTRODUCTION

1. The Court should deny the retention of the Proposed Accountant Lucas Horsfall (“Accountant”) because Debtor has failed to satisfy its burden to show that the Application meets the requirements of the Bankruptcy Code and Rules. Specifically, Accountant holds a pre-petition claim of \$22,380.72, which it will not waive.

2. The Application does not include any engagement agreement between Debtor and Accountant. The U.S. Trustee is not able to ascertain if there any objectionable terms such as an overly broad indemnification provision or seeking fees in defense of any compensation application filed under §330 in violation of *Baker Botts LLP v. ASARCO LLC*, 135 S.Ct. 2158, 2170-73 (2015).

3. The Application also seeks to designate Accountant as an ordinary course professional for the purpose of performing controller and bookkeeping services. To the extent that the Court finds the request appropriate, the flat fee of \$5,000 per month should be itemized on the Debtor’s Monthly Operating Reports (“MORs”).

4. Accordingly, the Application should be denied. Consistent with her independent and statutory duties, the U.S. Trustee reserves all rights with respect to this matter, including, but not limited to (i) her right to object to the Application if it is amended, and (ii) her right to take any appropriate action under title 11 of the United States Code, the Federal Rules of Bankruptcy Procedure, and the local bankruptcy rules of the United States Bankruptcy Court.

II. FACTUAL BACKGROUND

5. On May 24, 2022, the Debtor filed a voluntary petition under Chapter 11 commencing this case. [See ECF No. 1].

6. The Section 341 meeting of creditors was held and concluded on June 23, 2022. [See ECF No. 188].

7. On June 9, 2022, the U.S. Trustee filed a Notice of Appointment of an Official Committee of Unsecured Creditors. [See ECF No. 116].

1 8. On June 27, 2022, Debtor filed an application to employ Lucas Horsfall as its
2 accountant and set it for hearing on July 25, 2022. [ECF No. 200] ²

3 9. The deadline for opposition to be filed to the Application was July 11, 2022. [ECF
4 No. 205]. The U.S. Trustee timely filed a response and reservation of rights. [ECF No. 249]. ³

5 10. The Application seeks pursuant to Section 327(a) to employ Accountant for tax
6 related services. [ECF No. 200 at p. 3 at ¶12].

7 11. At the time of filing chapter 11, Accountant holds a pre-petition claim of
8 \$22,380.72 that it is not waiving. [*Id.* at ¶7].

9 12. Accountant also provides CFO and bookkeeping services to the Debtor which it
10 seeks approval pursuant to Section 328 to continue at a flat rate of \$5,000 per month. [*Id.* at ¶12; p.
11 4 at ¶¶ 13- 15.

12 **III. OBJECTION**

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14 **A. The Application Should be Denied Because Accountant is a Pre-Petition Creditor and
15 is not Disinterested.**

16 13. The requirements for employment of a professional person seeking authorization to
17 represent the bankruptcy estate under Section 327 are:

18 [e]xcept as otherwise provided in this section, the trustee, with the court’s
19 approval, may employ one or more attorneys, accountants, appraisers,
20 auctioneers, or other professional persons, that do not hold or represent an
21 interest adverse to the estate, and that are disinterested persons, to represent or
22 assist the trustee in carrying out the trustee’s duties under this title.

23 ² The U.S. Trustee requests that the Court take judicial notice of the pleadings and documents
24 filed in this case, pursuant to Federal Rule of Bankruptcy Procedure (“FRBP”) 9017 and Federal
25 Rule of Evidence (“FRE”) 201. To the extent that the U.S. Trustee’s objection contains factual
26 assertions predicated upon statements made by Debtor, any of its current or former affiliates,
27 agents, attorneys, professionals, officers, directors or employees, the U.S. Trustee submits that
28 such factual assertions are supported by admissible evidence in the form of admissions of a party
opponent under FRBP 9017 and FRE 801(d)(2).

³ U.S. Trustee’s Counsel and Debtor’s Counsel were engaged in a dialogue concerning issues the
U.S. Trustee had raised informally prior to and after the objection deadline had passed.

1 11 U.S.C. § 327(a).

2 14. At a minimum, a professional desiring to serve in a bankruptcy case must meet
3 three criteria.

4 15. First, the professional must “not hold or represent an interest adverse to the estate.”
5 11 U.S.C. § 327(a). A generally accepted definition of “adverse interest” is the (1) possession or
6 assertion of an economic interest that would tend to lessen the value of the bankruptcy estate; or
7 (2) possession or assertion of an economic interest that would create either an actual or potential
8 dispute in which the estate is a rival claimant; or (3) possession of a predisposition under
9 circumstances that create a bias against the estate. *In re AFI Holding, Inc.*, 355 B.R. 139, 148-49
10 (B.A.P. 9th Cir. 2006), *aff’d* 530 F.3d 832 (9th Cir. 2008) (citation omitted).

11 16. “An actual conflict exists if there is ‘an active competition between two interests, in
12 which one interest can only be served at the expense of the other.’” *In re Git-N-Go, Inc.*, 321 B.R.
13 54, 58 (Bankr. N.D. Okla. 2004) (citing *In re BH&P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J.
14 1989), *aff’d in pertinent part*. 119 B.R. 35 (D.N.J. 1990)).

15 17. Second, the applicant seeking to serve as a professional in a bankruptcy case must
16 be “disinterested.” The Code defines “disinterested person” as one who “is not a creditor, an
17 equity security holder, or an insider” and who “does not have an interest materially adverse to the
18 interest of the estate . . . [because of] any direct or indirect relationship to, connection with, or
19 interest in the debtor . . . or for any other reason.” 11 U.S.C. §§ 101 (14) (A) & (C).

20 18. While there is substantial overlap between the two prongs of the test set forth in
21 Section 327(a), both prongs must be satisfied. *In re Tevis*, 347 B.R. 679, 687-88 (B.A.P. 9th Cir.
22 2006)(citing *In re Mehdipour*, 202 B.R. 474, 478 (B.A.P. 9th Cir. 1996). The disinterestedness
23 provision of § 327(a) is mandatory. *See S.S. Retail Stores Corp.*, 211 B.R. 699, 703 (B.A.P. 9th
24 Cir. 1997).

25 19. “Together, the statutory requirements of disinterestedness and no adverse interest to
26 the estate ‘serve the important policy of ensuring that all professionals appointed pursuant to
27 section 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance
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1 of their fiduciary responsibilities.” *In re Crivello*, 134 F.3d 831, 836 (7th Cir.1998), (quoting in
2 part *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir.1994)).

3 20. Third, the statute provides that a trustee, with the “approval” of the bankruptcy
4 court “may” appoint professional persons who are disinterested and have no adverse interest,
5 creating a third criterion, namely that a bankruptcy judge approves the person seeking
6 appointment.

7 21. The permissive language in the statute makes clear that courts can deny
8 appointment on additional grounds. The Code’s language is broad enough that a bankruptcy court
9 may exclude a professional with any connection that “would even faintly color the independence
10 and impartial attitude required by the Code.” *See In re AFI Holding*, 530 F.3d 832, 838 (9th Cir.
11 2008) (citation omitted).

12 22. Section 327(a) establishes a comprehensive scheme under which debtors in
13 possession must ask court permission to retain professional persons. Creditors, parties in interest,
14 and the United States Trustee may object, and after determining that a professional can comply
15 with the statutory requirements, the Court may approve or deny the application if the court
16 determines that employment is in the best interests of the estate. 11 U.S.C. §327(a). The purpose
17 of Section 327(a) is to ensure impartiality in bankruptcy representation. *In re Prince*, 40 F.3d 356,
18 360 (11th Cir. 1994).

19 24. Here, it is uncontested that Accountant holds an unsecured claim of \$22,380.72
20 which it will not waive. Accountant is admittedly a creditor by virtue of 11 U.S.C. § 101(14) and
21 is therefore not disinterested.⁴ The Debtor relies on a misapplication of the reading of §1107(b) as
22 an end run to the strict requirements that have been upheld in this Circuit. *See In re CIC Inv.*
23 *Corp.*, 175 B.R. 52 (B.A.P. 9th Cir. 1994) (Bankruptcy Appellate Panel decision rejecting the
24 position of a “minority of courts” that a professional firm with a prepetition claim may represent
25 the debtor).

26
27 ⁴ The Code defines the term “creditor” as meaning any “entity that has a claim against the debtor
28 that arose at the time of or before the order for relief concerning the debtor.” 11 U.S.C. §
101(10)(A).

1 25. The Bankruptcy Appellate Panel for the Ninth Circuit undertook an analysis of the
2 *Viking Ranches* decision relied upon Debtor in the Application. It flatly rejected any argument that
3 §1107(b) permits retention of a professional who holds a pre-petition claim against a debtor. “Code
4 Sections 327(a) and 101(14) explicitly provide that a professional with a prepetition claim against
5 the debtor cannot qualify as disinterested. Section 1107(b) makes no mention of professionals with
6 claims against the debtor. It states only that employment by or representation of a debtor
7 prepetition may not be the sole basis for disqualification. To apply Section 1107(b) to permit the
8 appointment of counsel with claims against the debtor is to ignore the unambiguous language of
9 this statute and of Sections 327(a) and 101(14).” *In re CIC Inv. Corp.*, 175 B.R. 52, 56 (B.A.P. 9th
10 Cir. 1994). *See also In re Triple Star Welding, Inc.*, 324 B.R. 778, 790; FN 18 (B.A.P. 9th Cir.
11 2005). (The United States Bankruptcy Appellate Panel for the Ninth Circuit has previously
12 acknowledged that the courts do not agree on whether counsel with a pre-petition claim against the
13 debtor is absolutely barred from representing the trustee or debtor in possession as general counsel,
14 but it has come down firmly on the side of the courts barring such representation). *See also In re*
15 *Siliconix*, 135 B.R. 378 (N.D. Cal. 1991) (adopting per se rule that creditors are barred from
16 employment by estate, rejecting minority view). *See United States Trustee v. Price Waterhouse*,
17 19 F. 3d 138 (3rd Cir. 1994) (Bankruptcy Code §§ 327(a), 101(14) and 101(10)(A) when taken
18 together, unambiguously forbid a debtor in possession from retaining a prepetition creditor to
19 assist it in the execution of its Title 11 duties.) *See also In re Andover Togs, Inc.* 2001 U.S. Dist.
20 LEXIS 2690 at *16-17, 2001 WL 262605 at *2, *11 (S.D.N.Y Mar. 15, 2001) (retention of
21 accounting firm who holds a prepetition claim is not permitted under §1107(b) and is prohibited by
22 the plain language of § 327(a)).

23 26. The request of Debtor seeking authority to approve the retention of Accountant
24 should be denied because Accountant holds a prepetition claim and is therefore not disinterested.

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1 **B. The Application Does not Provide the Engagement Agreement and Should be Denied**
2 **Until Such Agreement is Produced.**

3 27. Under Section 328(a), the applicant bears the burden of proof “to establish that
4 proposed terms and conditions of the employment are reasonable,” and the court must be
5 “persuaded that the terms and conditions are in the interest of the estate.” *See In re C&P Auto*
6 *Transport, Inc.*, 94 B.R. 682, 686 (Bankr. E.D. Cal. 1988). *See also Nischwitz v. Miskovic (In re*
7 *Airspect Air, Inc.)*, 385 F.3d 915, 921 (6th Cir. 2004) (quoting *Zolfo*, 50 F.3d at 262).

8 28. The Application did not include an engagement agreement (“Agreement”) between
9 Debtor and Accountant. Without reviewing the Agreement, parties and the Court are not able to
10 determine whether there are any objectionable terms. For instance, does the Agreement contain an
11 indemnification clause? If so, what does this provision provide? Is there an express carve out for
12 the Accountant’s own negligence? Does the Agreement provide for the payment of fees by Debtor
13 in defense of the Accountant’s fee applications in violation of *Baker Botts L.L.P. v. ASARCO*
14 *LLC*? *See Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158, 2170-73 (2015).

15 29. Until the Agreement has been filed with the Court, and subject to any further
16 objection that may be raised upon review, the Application should not be approved.

17 **C. The Application Does Not Specify the Ordinary Course Services Payments be**
18 **Reported on the Debtor’s MORs.**

19 30. Ordinary Course Professionals are typically professionals necessary to a debtor but
20 whose services and compensation are limited and not integral to the bankruptcy process.
21 Typically, a motion is unnecessary in accordance with § 363(c). The U.S. Trustee does not oppose
22 setting up efficient procedures for professionals who truly fall under the “ordinary course”
23 category to save unnecessary expenses.

24 31. The Application indicates that Accountant will perform Ordinary Course Services
25 described as “ordinary bookkeeping and other financial services.” [ECF No. 200 at p. 4, ¶13].
26 The Application further states that Sameh Attia, who is employed by Accountant, will provide
27 “controller related services” and “assist the Debtor’s accounting staff as needed.” *Id.* A
28 declaration of Mr. Attia was filed with the Court at the request of the U.S. Trustee so that the

1 exact nature of the Ordinary Course Services could be evaluated by all parties and the Court.
2 [ECF No. 249].

3 32. Should the Court approve the request to treat certain services performed by
4 Accountant at Ordinary Course Services and to promote transparency, the U.S. Trustee requests
5 the Debtor be required to report the monthly flat fee of \$5,000 on its MORs.

6 **IV. CONCLUSION**

7 33. The U.S. Trustee reserves all her rights under the Bankruptcy Code and FRBP,
8 including to object to the Application and any amendments or supplements to the Application,
9 prior to or at the hearing.

10 34. The U.S. Trustee requests that the Court sustain her Objection, deny the
11 Application, and grant such other relief as the Court deems appropriate.

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13 Dated: July 14, 2022

Respectfully Submitted,

14 TRACY HOPE DAVIS
15 UNITED STATES TRUSTEE

16 By: /s/ Terri H. Didion
17 Terri H. Didion, Asst. U.S. Trustee