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9 **UNITED STATES BANKRUPTCY COURT**
 10 **DISTRICT OF NEVADA**

11 In re
 12 Front Sight Management LLC,
 13 Debtor.

Case No. 22-11824-abl
 Chapter 11

Hearing Date: July 25, 2022
Hearing Time: 9:30 a.m.

19 **DEBTOR’S REPLY TO THE UNITED STATES TRUSTEE’S OBJECTION TO**
 20 **APPLICATION TO EMPLOY LUCAS HORSFALL AS ACCOUNTANT**

21 Front Sight Management LLC, the chapter 11 debtor in possession herein (the “Debtor”),
 22 hereby submits its reply (“Reply”) to the objection and reservation of rights [ECF No. 263] (the
 23 “Objection”) filed by the United States Trustee (the “US Trustee”) to the Debtor’s *Application to*
 24 *Employ Lucas Horsfall as Accountant Pursuant to 11 U.S.C. §§ 327(a), 328(a) and 330 Effective as*
 25 *of the Petition Date* [ECF No. 200] (the “Application”).¹ In support of the Reply and in further
 26 support of the Application, the Debtor respectfully represents as follows:
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¹ Any capitalized term not defined herein has the same meaning ascribed to it in the Application.

INTRODUCTION

1
2 While the Debtor's bankruptcy case is considered a "mega" case due to the number of
3 members and interested parties, the Debtor has a flat organizational structure and a small
4 administrative office. In preparing to file the Debtor's bankruptcy case and in preparing the
5 Debtor's schedules, statement of financial affairs and other compliance due to the US Trustee and
6 this Court, Lucas Horsfall was and is an indispensable party for the Debtor, its financial advisor,
7 Province, LLC ("Province"), and its bankruptcy counsel. In fact, Lucas Horsfall's prepetition claim
8 arises solely out of work performed by Lucas Horsfall in preparation for the Debtor's bankruptcy
9 filing and attempts to obtain debtor in possession financing. While it is Province who prepares the
10 Debtor's monthly operating reports, financial projections, etc., often times it is only Lucas Horsfall
11 who can direct Province to the correct data and information. The Debtor recognizes that its
12 relationship with its accountant may be somewhat unusual but cannot emphasize enough how critical
13 it is to have Lucas Horsfall's ongoing services. Because the Debtor has recently experienced
14 turnover with respect to its bookkeeper, Lucas Horsfall's ongoing services are critical to the
15 Debtor's ability to reorganize quickly and efficiently.

I. THE COURT CAN APPROVE THE APPLICATION IN SPITE OF LUCAS HORSFALL'S PREPETITION CLAIM

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18 The US Trustee argues that the Court should deny the Application because Lucas Horsfall
19 holds a prepetition claim against the Debtor. The US Trustee cites to *In re CIC Inv. Corp.*, 175 B.R.
20 52, 56 (B.A.P. 9th Cir. 1994) and *In re Triple Star Welding, Inc.*, 324 B.R. 778, 790 (B.A.P. 9th Cir.
21 2005). However, BAP decisions are not binding upon this Court. Rather, BAP decisions are treated
22 "as persuasive authority given its special expertise in bankruptcy issues and to promote uniformity
23 of bankruptcy law throughout the Ninth Circuit." *In re Silverman*, 616 F.3d 1001, 1005 n.1 (9th Cir.
24 2010).

25 Although the US Trustee contends that the case law is clear that Section 1107(b) does not
26 permit the debtor in possession to employ a professional who is also a prepetition creditor, the case
27 law construing Sections 1107(b) and 327(a) is unsettled and not uniform. *See generally* 7 COLLIER
28

1 ON BANKRUPTCY P 1107.04 (16th 2022). As the court in *In re Talsma*, 436 B.R. 908, 911–12
2 (Bankr. N.D. Tex. 2010) explained:

3 Case law offers two interpretations of section 1107(b). A minority of
4 courts read sections 1107(b) and 327(a) to allow a debtor in possession
5 to employ a creditor professional so long as the professional's
6 prepetition claim arose from prior professional work for the
7 debtor. *See, e.g., In re Microwave Prods. of Am., Inc.*, 94 B.R. 971,
8 974 (Bankr.W.D.Tenn.1989) (a professional is not disqualified under
9 section 327(a) when its creditor status arose as a result of prepetition
10 employment); *In re Viking Ranches, Inc.*, 89 B.R. at 115 (same); *In re*
11 *Best W. Heritage Inn P'ship*, 79 B.R. 736, 740–41
12 (Bankr.E.D.Tenn.1987) (a professional should not be automatically
13 disqualified from postpetition employment solely because that
14 professional is owed a fee for prepetition, non-bankruptcy work); *In re*
15 *Heatron*, 5 B.R. 703, 705 (Bankr.W.D.Mo.1980) (attorney's status as
16 creditor “has less significance when his service to the estate will be
17 only a continuation” of prior service to the debtor).

18 On the other hand, more courts hold that section 1107(b) bars a debtor
19 in possession from employing a professional holding a prepetition
20 claim arising from prior employment by the debtor. These courts
21 read section 1107(b) to unambiguously exempt professionals from
22 disqualification based on prior employment alone, but not where the
23 debtor owes the professional fees for prepetition work. *See, e.g., E.*
24 *Charter Tours*, 167 B.R. 995, 996 (Bankr.M.D.Ga.1994) (Congress
25 has not exempted prepetition fee claims as a basis for disqualification
26 of professionals); *In re Pierce*, 809 F.2d 1356, 1362–63 (8th Cir.1987)
27 (Congress did not intend section 1107(b) to prevent disqualification of
28 any professional who is a prepetition creditor). Courts following the
majority approach allow a debtor in possession to employ a
professional who is a prepetition creditor only if the professional
waives the prepetition claim. *See, e.g., E. Charter Tours*, 167 B.R. at
998.

22 *Id.* However, even courts that adhere to the *per se* rule have held that professionals holding claims
23 for services rendered prior to the commencement of the chapter 11 case are not thereby barred from
24 representing the debtor in possession if the services were rendered in preparation for the bankruptcy
25 filing. *See e.g., In re Martin*, 817 F.2d 175, 180 n.5 (1st Cir. 1987) (“The performance of standard
26 prepetition services, *i.e.*, preliminary work routinely undertaken to facilitate an upcoming chapter 11
27 filing, will not serve to disqualify an otherwise eligible attorney.”); *In re Hall*, 520 B.R. 116, 120–21
28 (Bankr. D. Kan. 2014) (“The evidence, including the testimony and the Court's examination of Mr.

1 Eron's time entries for the prepetition time period, convince the Court that the services were rendered
2 in preparation of the bankruptcy filing and Eron Law should be considered disinterested for purposes
3 of appointment under § 327.”); *In re K & R Mining, Inc.*, 105 B.R. 394, 396–97 (Bankr. N.D. Ohio
4 1989) (“The court finds the reasoning of *Martin* to be persuasive and accordingly, does not view the
5 applicant as disqualified to be counsel for the debtor if, indeed, it possesses a security interest
6 property of the debtor.”); *In re Watson*, 94 B.R. 111, 114–15 (Bankr. S.D. Ohio 1988) (“Thus, the
7 Court believes that an attorney holding a prepetition claim for bankruptcy services is not barred *per*
8 *se* by 11 U.S.C. § 327(a) from appointment as counsel to the trustee or debtor in possession.
9 Likewise, the retention of a prepetition security interest in the debtor in possession's assets, to secure
10 payment of fees generated for bankruptcy services, is not, *per se*, a disqualifying factor under §
11 327(a.”); *In re Automend, Inc.*, 85 B.R. 173, 176 (Bankr. N.D. Ga. 1988) (“This Court agrees that
12 use of a *per se* rule excluding attorneys who are creditors of the debtor would be an overbroad
13 interpretation of § 327(a) and § 101(13).”); *In re Heatron, Inc.*, 5 B.R. 703, 705 (Bankr. W.D. Mo.
14 1980) (“The fact that the attorney is interested, in the sense of being a creditor because of prior
15 service to the debtor, has less significance when his service to the estate will be only a continuation
16 of that prior function. The interest does not offset the value afforded by the attorney's experience and
17 familiarity with the affairs of the debtor.”).

18 Indeed, some courts have taken a more flexible approach and have attempted to balance the
19 potential risks associated with employing a professional that holds a prepetition claim with the costs
20 of retaining a substitute professional. For example, in *In re Howard Smith Inc.*, 207 B.R. 236, 237–
21 38 (Bankr. W.D. Okla. 1997), the bankruptcy court approved the debtor in possession’s application
22 to employ a certified public accounting firm notwithstanding that the accounting firm held a
23 prepetition claim against the debtor in possession. The *Howard Smith* court reasoned as follows:

24 Gillispie is not a law firm, but is a qualified certified public accounting
25 firm specializing in automobile dealerships, is familiar with Debtor's
26 operation, and is here performing ministerial accounting services. To
27 require Debtor to hire another accounting firm to become familiar with
28 Debtor's operation would place an unnecessary expense on the estate,
benefiting no one other than the new firm. It is significant to the Court
that the opportunity for Gillispie to benefit unfairly from its
appointment is indeed small and is outweighed by the expense to the

1 estate if Debtor is required to hire another accounting firm. Also, the
 2 only objection to the retention of Gillispie was filed by the UST who
 3 has no financial interest in the outcome of this bankruptcy. If the
 4 parties with a direct financial interest do not object to the retention of
 5 Gillispie, the Court fails to see how the integrity of the bankruptcy
 6 process is in any way placed at risk by the approval of this application.
 7 Moreover, it is also noteworthy to the Court that Gillispie's interest is
 8 not materially “adverse” to the debtor's estate because the obligation
 9 owed by Debtor to Gillispie is “*de minimus*” in relation to the total
 10 debts of Debtor. *Viking Ranches*, 89 B.R. at 115. Accordingly, the
 11 adoption of a *per se* disapproval rule which benefits no party in
 12 interest, when the language of § 1107(b) appears to permit a more
 13 pragmatic approach, serves no useful purpose and renders the
 14 Bankruptcy Code subject to ridicule.

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 16 *Howard Smith*, 207 B.R. at 237–38. In a footnote, the *Howard Smith* court noted:

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 18 Here, Gillispie's claim is in the amount of \$8,998.00, which is less
 19 than 0.2% of the total claims in this case of \$5,369,736.10. Cases in
 20 which the accounting firm's claim was not *de minimus* include *United*
 21 *States Trustee v. Price Waterhouse* 19 F.3d 138 (3d Cir.1994) (Price
 22 Waterhouse held one of the twenty largest claims); and *Siliconix*, 135
 23 B.R. 378 (the accounting firm held the eighth largest claim). In those
 24 cases, the Court's refusal to approve employment of the accounting
 25 firms might well have been justified.

26 *Id.* at n.7.

27
 28 Here, Lucas Horsfall’s prepetition claim arises out of services rendered in preparation for the
 Debtor’s chapter 11 bankruptcy filing and its attempt to obtain DIP financing. The amount of Lucas
 Horsfall’s prepetition claim is *de minimus* in relation to the total debts of the Debtor. As of the date
 of filing this Reply, over \$87 million in claims have been filed in the Debtor’s case, while Lucas
 Horsfall’s prepetition claim is a mere \$22,380.72. As explained in the Application, Lucas Horsfall
 has been the Debtor’s accountant for over ten years, and therefore, has significant irreplaceable
 institutional knowledge of the Debtor’s financial affairs. If the Debtor was required to employ
 another accounting firm, it would place an unnecessary expense on the estate because it would take a
 new firm significant time (at significant cost) to become familiar with the Debtor’s financial affairs.
 As in *Howard Smith*, the only party objecting to Lucas Horsfall’s retention is the US Trustee, who
 does not have a financial interest in the outcome of this case. The parties with a financial interest
 have not objected to Lucas Horsfall’s continued employment.

1 The Debtor respectfully requests that the Court adhere to the reasoning employed by the
2 court in *Howard Smith* and take a more pragmatic approach to the Debtor's request to employ Lucas
3 Horsfall and overrule the Objection as: (i) Lucas Horsfall's prepetition claim arose primarily out of
4 services rendered in preparation for the Debtor's chapter 11 filing; (ii) it would place an unnecessary
5 expense on the estate to employ a new accounting firm; and (iii) Lucas Horsfall does not hold an
6 interest materially adverse to the estate because its claim is *de minimus* in relation to the Debtor's
7 debts.

8 **II. THE DEBTOR IS NOT SEEKING TO EMPLOY LUCAS HORSFALL UNDER THE**
9 **TERMS OF AN ENGAGEMENT AGREEMENT**

10 The US Trustee argues that the Application does not contain an engagement agreement
11 between the Debtor and Lucas Horsfall and that until an engagement agreement has been filed with
12 the Court, the Application should not be approved. Attached hereto as **Exhibit A** is a copy of the
13 engagement agreement between the Debtor and Lucas Horsfall, which has previously been provided
14 to the US Trustee. The Debtor notes that it is not seeking to employ Lucas Horsfall under the terms
15 and conditions of the engagement agreement. The Debtor is seeking to employ Lucas Horsfall under
16 the terms and conditions set forth in the Application, which terms and conditions do not violate
17 *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158 (2015).

18 **III. THE DEBTOR AGREES TO REPORT THE ORDINARY COURSE SERVICES**
19 **PAYMENTS ON THE DEBTOR'S MONTHLY OPERATING REPORTS**

20 The US Trustee requests that the Debtor be required to report the monthly flat fee of \$5,000
21 for Ordinary Course Services on its monthly operating reports. At the request of the US Trustee, on
22 July 13, 2022, the Debtor filed a Declaration of Sameh Attia in support of the Application [ECF No.
23 259] (the "Attia Declaration"). In the Attia Declaration, Mr. Attia sets forth the Ordinary Course
24 Services Lucas Horsfall provides to the Debtor. The Debtor respectfully submits that these services
25 qualify as Ordinary Course Services, and the Debtor agrees to report the \$5,000 flat fee to Lucas
26 Horsfall on its monthly operating reports.

27 **IV. CONCLUSION**

28 Based on the foregoing, and for the reasons set forth in the Application, the Sobol

1 Declaration [ECF No. 201], and the Attia Declaration [ECF No. 259], the Debtor respectfully
2 requests that the Court enter an order overruling the Objection and approving the Application, and
3 granting to the Debtor such other and further relief as the Court deems just and proper under the
4 circumstances.

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6 DATED: July 18, 2022

BG LAW LLP

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8 By: /s/ Susan K. Seflin

Steven T. Gubner

Susan K. Seflin

Jessica S. Wellington

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10 Attorneys for Chapter 11 Debtor
and Debtor in Possession
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EXHIBIT A

Lucas, Horsfall, Murphy & Pindroh LLP
299 N Euclid Ave., 2nd Floor
Pasadena, CA 91101
626-744-5100

Front Sight Management, Inc
1380 River Bend Drive Ste 136
Dallas, 75247

Front Sight Management, Inc,

We appreciate the opportunity to work with you and for your trust in us to serve as your income tax advisors. The Internal Revenue Service imposes penalties upon taxpayers, and upon us as return preparers, for failure to observe due care in reporting for income tax returns. In order to ensure an understanding of our mutual responsibilities, we ask all clients for whom returns are prepared to confirm the following arrangements.

Engagement Objective and Scope

We will prepare your 2021 federal and state S-Corporation returns from information which you will furnish to us. We will render such accounting and bookkeeping assistance as determined to be necessary for preparation of the entity's returns. However, we will not audit or otherwise verify the data you submit, although it may be necessary to ask you for clarification of some of the information. Our work in connection with the preparation of your returns does not include any procedures designed to discover defalcations and/or irregularities, should any exist. Our work is not intended to benefit or influence any third party, either to obtain credit or for any other purpose.

We will rely upon the completeness and accuracy of the information and representations you provide to us to prepare your tax returns. You should retain all the documents, cancelled checks and other data that form the basis of these returns. These may be necessary to prove the accuracy and completeness of the returns to a taxing authority. You have the final responsibility for the entity's returns and, therefore, you should review them carefully before you sign them.

We will use professional judgment in resolving questions where the tax law is unclear or where there may be conflicts between the existing tax authorities' interpretations of the law and other supportable positions. Unless otherwise instructed by you, we will resolve such questions in your favor whenever possible. The client understands that we as tax preparers are not responsible for the disallowance of doubtful deductions or deductions unsupported by adequate documentation and resulting taxes, penalties, and interest by the applicable taxing authorities.

The IRS and many states impose penalties for substantial understatement of tax and on taxpayers and tax advisors for failure to disclose listed and other reportable transactions on Form 8886, Reportable Transaction Disclosure Statement. You agree to advise us of any tax shelters and/or reportable transactions.

Management is responsible for the proper recording of transactions in the books of accounts, for the safeguarding of assets, and for the substantial accuracy of the financial records. You have the final responsibility for the income tax returns and, therefore, you should review them carefully before you sign and file them. You are responsible for ensuring that personal expenses, if any, are segregated from

business expenses, and are supported by contemporaneous records to support all deductions, including those for “listed property” (including passenger automobiles and computers), gifts, charitable contributions, travel expenses (including local travel), meals and entertainment expenses and that transactions with related parties are conducted in an arm’s length manner.

Timing of the Engagement

We may need to extend the filing date of the entity’s returns if all necessary information is not received in adequate time for our Firm to complete the preparation of the returns by the original date. Although the time for the filing of the tax returns can be extended, payment of taxes owed must be paid by the original due date, interest and penalties may be assessed on any unpaid tax after the original due date of the returns. Thus, the estimate of the entity’s tax liabilities for extension purposes (and estimated taxes, if applicable) should err on the side of conservatism. As a result, extensions involve additional professional time. Management should be aware that our fees will reflect any additional work required in completing your extensions.

Foreign Activity

By signing this letter, you acknowledge that you will inform us if the entity has financial assets in foreign countries, income from foreign sources, or if any employee has signatory authority over any foreign account. You are responsible for informing us of all foreign assets owned directly or indirectly, including but not limited to financial institutions, other foreign non-account investments, and ownership of any foreign entities, regardless of amount.

The entity’s returns may be selected for review by the taxing authorities. Any proposed adjustments by the examining agent are subject to certain rights of appeal. In the event of such government tax examination, we will be available upon request to represent you and will render additional invoices for the time and expenses incurred.

Fees and Termination

Our fee for these services will be based upon the amount of time required at standard billing rates plus out-of-pocket expenses, such as FedEx delivery. All invoices are due and payable upon presentation.

Front Sight Management, Inc may terminate the engagement of our service at any time. Should you do so, however, you remain liable for all unpaid fees as discussed above. We reserve the right to suspend work or withdraw from this engagement at any time because of unpaid fees, the guidance of our Professional Standards, or for any other reason. Firm credit policy is for work to be suspended when outstanding fees remain unpaid after 90 days, unless prior arrangements have been made. We will notify you in advance prior to withdrawal. Subject to your making satisfactory arrangements for the payment of your outstanding invoices, we will cooperate with your new accountants in addressing these and other matters.

Front Sight Management, Inc and Lucas, Horsfall, Murphy & Pindroh LLP both agree that any dispute over fees charged will be submitted first to mediation, and if mediation is not successful, then to binding arbitration. The parties will engage in the mediation process in good faith once a written request to mediate has been given by any party to the engagement. Any mediation initiated as a result of this engagement shall be administered within the County of Los Angeles, California in accordance with the Dispute Resolution Rules of Judicate West and any ensuing arbitration shall be conducted within said County, according to California law. The results of any such mediation shall be binding only upon agreement of each party to be bound. The costs of any mediation proceeding shall be shared equally by

the participating parties.

If the parties are unable to resolve any dispute through mediation outlined above, the dispute shall be resolved by binding arbitration. The arbitration will be conducted in accordance with the procedures in this document and the rules of the American Arbitration Association as in effect on the date of the engagement letter. Such arbitration shall be binding and final. In agreeing to arbitration, we both acknowledge that in the event of a dispute over fees, each of us is giving up the right to have the dispute decided in a court of law before a judge or jury and instead we are accepting the use of arbitration for resolution.

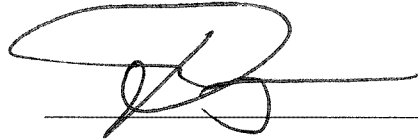
If the foregoing fairly sets forth your understanding for tax return preparation services, please sign this letter below in the space indicated and return it to our office. In the event you provide us with information necessary to prepare tax returns, the commencement of our services constitutes your acceptance of the terms of this letter, even if this agreement was not signed. If, however, this office receives no response from you to this letter, then this office will not proceed to provide you with any professional services, and will not prepare your 2021 income tax returns. If there are other returns you expect us to prepare, please inform us by noting so at the end of the return copy of this letter.

We want to express our appreciation for this opportunity to be of service to you.
Very truly yours,


Lucas, Horsfall, Murphy & Pindroh LLP

ACCEPTED BY:

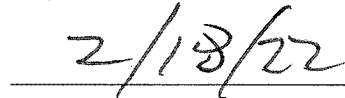
Representative Signature:



Title:



Date:



Front Sight Management, Inc
Client No. 28797

PLEASE
F

CERTIFICATE OF SERVICE

I declare that I am over the age of 18 years and not a party to the within action. I am employed in the County of Los Angeles and my business address is 21650 Oxnard Street, Suite 500, Woodland Hills, California 91367.

On July 18, 2022, I served the following document:

DEBTOR’S REPLY TO THE UNITED STATES TRUSTEE’S OBJECTION TO APPLICATION TO EMPLOY LUCAS HORSFALL AS ACCOUNTANT

BY ELECTRONIC MAIL

Those designated "[NEF]" on the Court docket were served with the Notice by the Court via Electronic Mail, as follows:

- JASON BLUMBERG Jason.blumberg@usdoj.gov
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- JESSICA S. WELLINGTON jwellington@bg.law

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed July 18, 2022, at Woodland Hills, California.

/s/ Jessica Studley
JESSICA STUDLEY