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Attorneys for Chapter 11 Debtor and Plaintiff

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re Front Sight Management LLC,	Case No. 22-11824-abl Chapter 11 Adv. No. 22-01116-abl
Front Sight Management LLC, a Nevada Limited Liability Company, Plaintiff, v. Las Vegas Development Fund LLC, a Nevada limited liability company, et al., Defendants.	**Hearing Date**: September 1, 2022 **Hearing Time:** 9:30 a.m.
And all related counterclaims.	

DECLARATION OF STEVEN T. GUBNER IN SUPPORT OF THE DEBTOR'S REPLY TO SHAPIRO'S OPPOSITION TO AMENDED MOTION FOR ENTRY OF AN ORDER CONFIRMING TERMINATING SANCTIONS ORDER IS VOID AS A VIOLATION OF THE AUTOMATIC STAY OR, IN THE ALTERNATIVE, MOTION FOR RELIEF FROM ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

I, Steven T. Gubner, declare as follows:

1. I am the managing partner and founder of the law firm of BG Law LLP, bankruptcy counsel for Front Sight Management LLC (the "Debtor"). I am an attorney duly licensed in and am a member in good standing of the bar for the State of Nevada and am admitted to practice before all courts of the State of Nevada, including the United States Bankruptcy Court for the District of Nevada.

2. I have personal knowledge of the facts stated in this declaration, except as to those stated on information and belief. If called as a witness, I could and would competently testify to the facts stated herein under oath.

3. This declaration is submitted in support of the *Debtor's Reply to Shapiro's Opposition to Amended Motion for Entry of an Order Confirming Terminating Sanctions Order is Void as a Violation of the Automatic Stay or, in the Alternative, Motion for Relief from Order Pursuant to Federal Rule of Civil Procedure 60(b)* (the "Shapiro Reply") filed concurrently herewith. Any capitalized term that is not defined in this declaration has the same meaning ascribed to it in the Shapiro Reply.

4. Two days after the initial bankruptcy filing, I had a call with Andrea Champion of Jones Lovelock and Brian Shapiro of the Law Office of Brian D. Shapiro, LLC, regarding the case and ongoing issues. During that call, Mr. Shapiro represented to me that he was closely involved in the case and had been working with Jones Lovelock for approximately three weeks. I do not have a copy of his or his firm's engagement, but it was clear from the call that Mr. Shapiro was well versed in the case issues, including the stay violations. As such I assumed he had been retained approximately three weeks prior to bankruptcy filing.

5. On August 7, 2022, Mr. Shapiro served BG via facsimile with a *Motion for Bankruptcy Rule 9011 Sanctions* (the "Rule 11 Motion").

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1 6. In response to the Rule 11 Motion, I caused a letter to be sent to Mr. Shapiro
2 providing him with case law supporting the Debtor's contentions that Mr. Shapiro violated the
3 automatic stay. A true and correct copy of this letter is attached hereto as **Exhibit 1**.
4 I declare under penalty of perjury under the laws of the United States of America that the
5 foregoing is true and correct.
6 Executed on this 25th day of August, 2022, at Coeur d' Alene, Idaho.
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Steven T. Gubner
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EXHIBIT “1”

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August 10, 2022

VIA EMAIL

Brian D. Shapiro
Law Office of Brian D. Shapiro, LLC
510 S. 8th Street
Las Vegas, NV 89101
brian@brianshapirolaw.com

Re: Motion for Bankruptcy Rule 9011 Sanctions
Front Sight Management Ch. 11 BK 22-11824
Our File No. 5890.002

Dear Brian:

I am in receipt of your *Motion for Bankruptcy Rule 9011 Sanctions* (the "Rule 11 Motion"), which was served via facsimile on August 7, 2022. In the Rule 11 Motion, you state that BG Law LLP ("BG") filed a motion for sanctions against you for violating the automatic stay. This statement is simply not accurate. The motion [22-01116-able, ECF No. 51 (as amended)] (the "Motion"), which you define in your letter as the Motion for Sanctions, requests that the bankruptcy court enter an order confirming the Terminating Sanctions Order entered in the underlying state court action, almost a month after the Debtor commenced its chapter 11 case, is void as a violation of the automatic stay. While it is true that BG reserved the right to file a motion and/or adversary proceeding seeking compensatory damages, BG has not yet done so.

In the Rule 11 Motion, you state that BG's request for the bankruptcy court to find you violated the automatic stay is frivolous as that term is defined in Rule 9011(b) of the Federal Rules of Bankruptcy Procedure because you did not personally appear in the underlying state court action. While I understand an order confirming a stay violation may affect your reputation in the bankruptcy community and I am sympathetic to your situation, BG will not be amending the Motion as the request to find that you violated the automatic stay is not frivolous. There is ample case law supporting BG's position.

For example, in *In re Harrison*, 599 B.R. 173 (Bankr. N.D. Fla. 2019), the debtor had previously filed two bankruptcy cases which were dismissed. *Id.* at 177-78. On the eve of foreclosure of her residence, the debtor filed a third bankruptcy petition. *Id.* The debtor advised the creditor and its state court counsel of her filing and advised them of the automatic stay. *Id.* at 178, which matches the facts and circumstances in our case. However, the state court counsel

mistakenly believed that the automatic stay was not in place because of the debtor's two prior bankruptcy cases and convinced the clerk of court to proceed with the foreclosure sale notwithstanding the bankruptcy filing. *Id.* at 179.

Within four days of the foreclosure, the debtor contacted the creditor's *bankruptcy counsel* and advised them of the violation of the automatic stay. *Id.* at 181. Bankruptcy counsel made its first appearance in debtor's case eleven days after the case was filed. *Id.* at 184. Bankruptcy counsel, although they were advised of the stay violation, took no action to vacate the foreclosure sale. *Id.* at 185. The *Harrison* court found that *bankruptcy counsel* (not state court counsel) violated the automatic stay, reasoning:

> **Violations of the automatic stay become willful when counsel, upon learning of the bankruptcy filing, fails to act to undo the stay violation**. In *In re Taylor,* a creditor's attorney caused a default final judgment to be entered against the debtor post-petition in violation of the automatic stay. The debtor's bankruptcy lawyer wrote and called the creditor's lawyer to request that he move to vacate the default judgment; he refused. In awarding attorneys' fees as a sanction against the creditor's lawyer, the bankruptcy court stated: "**If one is enjoined from continuing an action then a person is required to take steps to discontinue such action**."
>
> Like the attorney in *Taylor,* Deltona's **bankruptcy counsel had an affirmative duty to restore the pre-petition status quo by taking immediate action to undo the foreclosure sale**. Rather than do so, Deltona's bankruptcy counsel facilitated Deltona's continuing stay violations with false and misleading representations. Even after Debtor brought the numerous stay violations to the Court's attention, neither Deltona nor its bankruptcy counsel showed remorse or made any real attempt to rectify the situation. This Court has ample evidence on which to find that Deltona's bankruptcy counsel's stay violations were willful, and that under the provisions of 11 U.S.C. § 362(k), Debtor is entitled to an award of damages against them.

Id. (emphasis added).

As explained in *Harrison*, a willful stay violation occurs when counsel learns of the bankruptcy filing and fails to act to undo the stay violation. Like the bankruptcy counsel in *Harrison*, you have failed to act to undo the stay violation and to restore the pre-petition status quo. In light of the multiple written and verbal requests to do the same, the Motion as presented not only follows recognized case law, but your failure to cure the violations post-petition has required this action. You represented to me that you were retained by LVDF *three weeks prior* to the Debtor filing its chapter 11 petition. While representing LVDF in this case, you allowed

LVDF to proceed with the hearing on the terminating sanctions motion and to obtain entry of the Terminating Sanctions Order. BG, on behalf of the Debtor, advised you of the stay violation within days of the Debtor's bankruptcy filing and requested that you act to undo the stay violation. *See* Letters dated May 31, 2022 and June 7, 2022. Rather than acting to undo the stay violation, you facilitated LVDF's continuing stay violations by allowing LVDF to obtain entry of the Terminating Sanctions Order. As LVDF's bankruptcy counsel, you had an affirmative obligation to advise LVDF and its state court counsel not to proceed with the hearing on the terminating sanctions motion and with entry of the Terminating Sanctions Order. If your client chose to ignore your advice, you should have withdrawn as counsel in the bankruptcy case. This affirmative obligation is also mandated by Rule 1.13(b) of the Nevada Rules of Professional Conduct.

Instead, you have taken no action to vacate the Terminating Sanctions Order despite the Debtor's repeated requests that you do so. You have even defended LVDF's actions and facilitated LVDF's continuing stay violations by filing misleading pleadings in the bankruptcy court attempting to re-cast the claims to make them seem as though they were not property of the Debtor's bankruptcy estate and to make it appear as though LVDF did not violate the automatic stay. As explained to you in my letters dated May 31, 2022 and June 7, 2022, and in numerous pleadings filed in the bankruptcy case, the claims are property of the estate. Even if you and your client sincerely believe that the claims are not property of the estate, your obligation was to bring a motion in the bankruptcy court confirming such belief prior to proceeding. You did not do so, and thus, you acted at your own peril. "Not even a good faith mistake of law or a legitimate dispute as to legal rights relieve a willful violator of the consequences of his act." *Ramirez v. Fuselier (In re Ramirez),* 183 B.R. 583, 589 (9th Cir. BAP 1995) (quotation omitted).

As explained in *Harrison*, you have an affirmative duty to restore the prepetition status quo by taking immediate action to undo the Terminating Sanctions Order. Yet, you have failed to do so. Like the bankruptcy counsel in *Harrison*, you are not insulated from liability because you didn't personally appear in the state court action or personally seek entry of the Terminating Sanctions Order. It is irrelevant that you did not personally submit the Terminating Sanctions Order to the state court. Prior to entry of the Terminating Sanctions Order, you appeared in the Debtor's bankruptcy case as counsel for LVDF, you were aware of the automatic stay, and you were aware of the Debtor's contention that the Terminating Sanctions Order violated the automatic stay, yet you have done nothing to remedy the stay violation and even allowed your client to obtain entry of the order a month after the Debtor commenced its chapter 11 case. Your failure to act to undo the stay violation is a willful violation of the automatic stay and your failure to act has facilitated LVDF's continuing violations of the stay and caused the estate harm and cost.

While we have been unable to find any authority supporting your position, there are numerous authorities in the Ninth Circuit supporting the position that a creditor and its counsel

must "take affirmative action to terminate or undo any action that violates the automatic stay." *In re Johnston*, 321 B.R. 262, 283 (D. Ariz. 2005) (finding creditor and its counsel willfully violated the automatic stay by taking no affirmative action to vacate or stay a state court order entered in violation of the stay). *See also e.g.*, *In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003) (holding that when a creditor has knowledge of a violation of the automatic stay, that creditor has an affirmative duty to undo the violation); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002) (same); *In re H Granados Commc'ns, Inc.*, 503 B.R. 726, 737 (9th Cir. BAP 2013) (explaining that once a creditor and its counsel are aware of a debtor's bankruptcy, the onus is on the creditor to cease all efforts related to the debtor in its pending state-court action without further order from the bankruptcy court and to remedy the impact of existing stay violations); *In re Achterberg*, 573 B.R. 819, 831 (Bankr. E.D. Cal. 2017) ("A party who takes an action in violation of the stay not only has an obligation to cease the continuing violation, but also has an affirmative duty to remedy the violation."); *In re Gray*, 567 B.R. 841, 846 (Bankr. W.D. Wash. 2017) ("Failure to take affirmative action to stay or vacate a state court order, entered without knowledge of the stay or even without the request of the creditor, can be a willful violation of the stay."); *In re Copeland*, 441 B.R. 352, 360 (Bankr. W.D. Wash. 2010) (failing to take reasonable steps to remedy an action that violates the stay is a continuing stay violation).

Further, the well-established Ninth Circuit precedent is consistent with other jurisdictions. *See e.g.*, *Patton v. Shade,* 263 B.R. 861, 865 (C.D. Ill. 2001) ("A creditor who violates automatic stay has an affirmative duty to undo the offending acts, even if he had no actual notice of the bankruptcy at the time the acts were performed."); *In re Skinner*, 90 B.R. 470, 480 (D. Utah 1988) ("Once a creditor has been informed of a violation of the stay, the creditor has an obligation to restore the status quo and undo his post-petition collection actions."); *In re McCall–Pruitt,* 281 B.R. 910, 911–912 (Bankr. E.D. Mich. 2002) (stating that creditors have an affirmative duty under § 362 to reverse any action taken in violation of the stay); *Matter of Clemmons*, 107 B.R. 488, 490 (Bankr. D. Del. 1989) ("Failure to act constitutes a willful violation of § 362(a).").

As explained in this letter, the Motion is not baseless and is supported by case law. BG will not be amending the Motion as it is not frivolous. However, if you provide BG with a declaration signed under penalty of perjury stating that you advised LVDF not to proceed with the hearing and with entry of the Terminating Sanctions Order and LVDF chose to ignore your advice, BG may re-consider its current position. Such disclosure is permissible under Rule 1.13(c)(2) of the Nevada Rules of Professional Conduct. Again, I am sympathetic to your situation and how such an order may affect your reputation as a panel trustee, however, it is your own actions and inactions that lead to the Motion.

As stated above, we have performed research and cannot find any case law to support your position. If any exists, please provide the same so we may consider it and our position with respect to you and the motion.

Sincerely,

STEVEN T. GUBNER
Managing Partner

STG:JSW:jlw

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CERTIFICATE OF SERVICE

On **August 25, 2022**, I, Jessica Studley, served the following document(s) on the below referenced persons and/or entities via the Courts CM/ECF List.

- DECLARATION OF STEVEN T. GUBNER IN SUPPORT OF THE DEBTOR'S REPLY TO SHAPIRO'S OPPOSITION TO AMENDED MOTION FOR ENTRY OF AN ORDER CONFIRMING TERMINATING SANCTIONS ORDER IS VOID AS A VIOLATION OF THE AUTOMATIC STAY OR, IN THE ALTERNATIVE, MOTION FOR RELIEF FROM ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

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The Court's CM/ECF List:

- **DAWN M. CICA** dcica@carlyoncica.com, nrodriguez@carlyoncica.com;crobertson@carlyoncica.com;dmcica@gmail.com;dcica@carlyoncica.com;tosteen@carlyoncica.com;3342887420@filings.docketbird.com
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Under penalty of perjury, I declare that the foregoing is true and correct.

DATED: August 25, 2022 BG LAW LLP

By: /s/ Jessica Studley
JESSICA STUDLEY