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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re: Front Sight Management, LLC, Debtor.	Case No.: 22-11824-abl Chapter 11 **OPPOSITION TO DEBTOR'S MOTION FOR CONFIRMATION OF DEBTOR'S SECOND AMENDED CHAPTER 11 PLAN OF REORGANIZATION** DATE: November 18, 2022 TIME: 9:30 a.m. PLACE: Foley Courtroom 1, Telephonic JUDGE: Honorable August B. Landis

Michael Meacher, dba Bankgroup Financial Services ("Meacher"), a secured creditor in the above-captioned Chapter 11 proceeding, hereby opposes the *Debtor's Motion for Confirmation of Debtor's Second Amended Chapter 11 Plan of Reorganization* [ECF No. 439] (the "Motion") filed by Front Sight Management LLC, the chapter 11 debtor in possession and

plan proponent (the "Debtor"), pursuant to which the Debtor seeks entry of an order confirming the Debtor's Second Amended Chapter 11 Plan of Reorganization (the "Plan") [ECF No. 405] pursuant to Section 1129 of the Bankruptcy Code. Through this opposition, Meacher objects (the "Objection") to confirmation of the Plan. This Objection is based on the following Memorandum of Points and Authorities, the papers, pleadings, and other documents on this Court's docket, judicial notice of which is respectfully requested pursuant to Federal Rule of Evidence 201, and any evidence and argument presented to the Court at the hearing on confirmation of the Plan.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Court should deny confirmation of the Plan for several reasons. First, the Plan violates the absolute priority rule because, as set forth in the Plan Supplement and Term Sheet (defined below), Dr. Piazza would receive significant payment ahead of senior stakeholders. Second, the Court should deny confirmation of the Plan because the broad third-party releases in favor of Dr. Piazza fail to comply with applicable Ninth Circuit law. Third, the Court should deny confirmation of the Plan because the Plan improperly classified classes of creditors and impairment. Specifically, the Plan artificially impairs the Class 3 and Class 4 mechanics' lien claims and improperly classifies these claims to gerrymander voting on the Plan. Fourth, the Plan fails to provide post-confirmation interest on Meacher's claim. For all these reasons, discussed in further detail below, the Court should deny confirmation of the Plan.

II.

RELEVANT FACTS

The Debtor and Meacher are parties to a Consulting Agreement dated July 1, 2010 (the "Consulting Agreement"), pursuant to which Meacher agreed to serve as a consultant to Debtor. In consideration of the deferment of certain fees due under the Consulting Agreement, and to secure Debtor's obligations under the Consulting Agreement, the Debtor granted Meacher a security interest in, among other things, "all handguns, shotguns, rifles and machine guns owned by [Debtor] and accounted for on the [Debtor's] books under Federal Firearm Licenses No. 9-88-

023-01-4M-01495 and No. 9-88-023-01-00199" (the "Collateral"). To perfect the security interest in the Collateral, on March 22, 2021, Meacher filed a UCC-1 financing statement with the Nevada Secretary of State, filing number 2021162123-4 (the "Financing Statement"). The Financing Statement covers the following collateral: "1. All of the collateral listed on Exhibit A attached hereto, which consists of 37 pages of itemized firearms and firearm equipment; plus 2. All of the collateral listed on Exhibit B attached hereto, which consists of 23 pages of itemized firearms and firearm equipment."

On May 24, 2022, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code commencing this case. [*See* ECF No. 1]. On June 2, 2022, the Court entered an order that establishes certain notice procedures and bar dates (the "Notice/Bar Date Order"). [*See* ECF No. 82]. The "Notice of Bar Date for Filing Proofs of Claim" attached to the Notice/Bar Date Order set August 8, 2022 as the bar date for filing claims. [*See* ECF No. 82].

On August 5, 2020, Meacher timely filed proof of claim number 235 in the amount of $3,300,000.00 (the "Meacher Claim"). Attached to the Meacher Claim is an addendum and exhibits setting forth the basis for the claim.

On October 3, 2022, the Debtor filed its proposed Plan and Disclosure Statement. The Plan designates seven classes of claims, including four classes of secured claims, one class of priority (non-tax) claims, one class of unsecured claims, and one class of equity interests. Specifically, the Plan classifies the following claims and interests as such: (i) Class 1 – LVDF Secured Claim; (ii) Class 2 - Meacher Secured Claim; (iii) Class 3 – M2 EPC Secured Claim; (iv) Class 4 - Top Rank Builders Inc. Secured Claim; (v) Class 5 – Employee Wage Claim; (vi) Class 6 – General Unsecured Claims; and (vii) Class 7 – Equity Interests.

On October 3, 2022, the Court entered the *Order Approving (I) Adequacy of Debtor's Second Amended Disclosure Statement (as May be Further Amended or Modified); (II) Approving Solicitation Procedures, Manner of Notice and Vote Tabulation Procedures; (III) Establishing Voting Record Date and Deadline for Receipt of Ballots; and (IV) Fixing Date, Time, and Place for Confirmation Hearing and (V) Setting Deadline to File Objections to Confirmation* [ECF No. 403] (the "Disclosure Statement Order").

The Plan provides as follows regarding the proposed treatment of the Meacher Claim:

Class No.	**Description**	**Estimated Amount or Value of Claims as of the Effective Date**	**Estimated Projected Payment / Treatment for Allowed Claims**
2	Secured claim of Michael Meacher dba Bankgroup Financial Services ("Meacher") Collateral Description: Certain of the Debtor's firearms Value of Collateral: Approximately $214,569 book value of collateral set forth in the Bankgroup UCC financing statement filed March 22, 2021	Filed Claim: $3.3 million secured claim [Proof of Claim No. 235-1] Former insider.	This claim is Contingent and Disputed. This claim is Contingent and Disputed. The Debtor intends to file a complaint seeking avoidance of this purported lien, which includes an objection to this claim and a fraudulent transfer claim **Treatment:** Pending resolution of the Debtor's complaint against Meacher and prior to the Effective Date, $3.3 million of the Cash Contribution shall be placed into a reserve account maintained by Stretto for purposes of satisfying any allowed claim held by Meacher (again, if any). If any allowed claim is less than the reserve amount of $3.3 million, any surplus shall revert to the Reorganized Debtor. Upon resolution of the aforementioned complaint, if the Class 2 claimant has an allowed secured claim, such claim shall be paid in full. **Lien:** To the same extent and validity of its existing lien against the Debtor's guns, if any, Meacher shall have a first priority lien against the $3.3 million in the reserve

Class No.	Description	Estimated Amount or Value of Claims as of the Effective Date	Estimated Projected Payment / Treatment for Allowed Claims
			account until any allowed claim is paid from the reserve. I.e., Meacher will have a lien in the Cash in the reserve account equal to the fair market value of the Debtor's guns. To the extent that Meacher has a lien against guns owned by Ignatius Piazza, such lien shall not be affected by the Plan. **Collateral:** The $3.3 million in the reserve account but only to the same extent and validity of Meacher's interest in the Debtor's guns (again, if any) **Impaired; Entitled to Vote**

In addition, the Plan states that the mechanics' lien claims held by M2 EPC and Top Rank Builders/Morales Construction are impaired and entitled to vote. Specifically, the Class 3 claim of M2 EPC, in the amount of $110,000, will be paid in monthly installments of $10,000 commencing February 1, 2023 until paid in full; and the Class 4 claim of Top Rank Builders/Morales Construction, in the amount of $15,000, will be paid in three monthly installments of $5,000. The Plan further states that current equity holders will not retain any equity under the Plan.

On October 21, 2022, the Debtor filed the *Supplement to Second Amended Chapter 11 Plan of Reorganization* [ECF No. 445] (the "Plan Supplement"). Attached as **Exhibit 1** to the Plan Supplement is a copy of the term sheet entered into between Dr. Piazza and the New Equity

Investor (on behalf of the Reorganized Debtor) (the "Term Sheet"). According to the Term Sheet, Piazza will receive $7 million in base compensation over ten years. The Term Sheet also provides as follows regarding additional compensation to Piazza for "Litigation Services" and broad releases of claims in favor of Piazza:

Litigation Services to Be Provided regarding LVDF Claims and Meacher Claims:	Dr. Piazza shall have delegated management responsibility to pursue the LVDF Claim and Meacher Claim (as those terms are defined in the *Term Sheet Regarding Joint Plan of Reorganization Between Debtor and PrairieFire* (the **"Plan Term Sheet"**)) on behalf of Reorganized Front Sight. Dr. Piazza shall have litigation decision control to: (1) retain counsel; (2) litigate the claims/objections to completion, including appeal, and/or (3) settle the claims.
Compensation for Services to Be Provided Regarding LVDF Claims and Meacher Claims:	LVDF has asserted a claim in the amount of $[$11,655,701.01] (the "**LVDF Asserted Claim**"). Meacher has asserted a claim in amount of $[3,300,000] (the "**Meacher Asserted Claim**"). In addition to the Base Compensation and Contingent Payout[1] set forth above, as compensation for litigation management, Piazza shall receive a payment from PrairieFire equal to: (1) 75% of the difference between the LVDF Asserted Claim and LVDF Allowed Claim after deduction for attorney's fees incurred by PrairieFire in connection with prosecution of the LVDF Claims; and (2) 75% of the difference between the Meacher Asserted Claim and Meacher Allowed Claim after deduction for attorney's fees incurred by PrairieFire. PrairieFire shall provide no more than $1,000,000 to fund litigation costs (which litigation funding shall have an interest rate of 6%) in connection the claims objections/claim prosecution identified above, provided that such amounts (up to the actual fees spent) will be repaid first out of any recoveries, and which terms shall be set forth in a litigation funding agreement. Dr. Piazza shall be responsible for funding any litigation costs over $1,000,000, and any amount Dr. Piazza funds will be second priority in the litigation recovery waterfall.
Release of Claims	As additional consideration for the services to be provided under the consulting and/or employment agreement, PrairieFire shall enter into broad releases of any and all Chapter 5 claims against the Pizza [sic] Parties, including, but not limited to, claims for

[1] "Contingent Payout" is not defined in the Term Sheet, but appears to suggest additional compensation to be paid to Piazza.

	preference payments, fraudulent transfers, and turnover of property of the Debtor's estate. For the further avoidance of doubt, the parties acknowledge that Dr. Piazza is the owner of certain [insert description of machine guns] which were NOT identified on Debtor's schedule of assets, but are used by Debtor on loan from Dr. Piazza [TBD]. For the further avoidance of doubt, PrairieFire shall not support any plan of reorganization that does not contain such releases.

III.

ARGUMENT

As the plan proponent, the Debtor has the burden of proving, by a preponderance of the evidence, that the Plan complies with all of the statutory requirements for confirmation found in 11 U.S.C. § 1129. A bankruptcy court may confirm a chapter 11 plan only if the plan proponent proves either: (1) that all applicable requirements of Section 1129(a) of the Bankruptcy Code have been met; or (2) if the only condition to confirmation that is not satisfied is Section 1129(a)(8), that the plan satisfies the cramdown standards under Section 1129(b); i.e., that the plan does not discriminate unfairly against, and is fair and equitable with regard to, each impaired class that has not accepted the plan. *See Zachary v. Cal. Bank & Trust (In re Zachary)*, 811 F.3d 1191, 1194 (9th Cir. 2016). The failure of proof on any one of the requirements renders a plan unconfirmable. The Court has an affirmative duty to ensure that a plan satisfies all the confirmation requirements found in Section 1129.

A. The Plan Violates the Absolute Priority Rule[2]

The absolute priority rule, codified in Section 1129(b)(2)(B) of the Code, prohibits junior stakeholders from receiving or retaining property under a reorganization plan unless senior

[2] The Plan contemplates valuing the Collateral and bifurcating the Meacher claim into secured and unsecured portions pursuant to Section 506. On that basis, Meacher holds an unsecured claim and has standing to raise an objection based upon the absolute priority rule. In addition, the Plan and confirmation order should make clear that to the extent Meacher is determined to have any unsecured deficiency claim, such claim is entitled to distribution along with the other general unsecured claims in Class 6.

stakeholders either are paid in full or consent to the distribution to the junior class of claimants. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 137 S. Ct. 973, 984, 197 L. Ed. 2d 398 (2017); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S. Ct. 963, 966, 99 L. Ed. 2d 169 (1988). The Ninth Circuit has held that the absolute priority rule effectively means that a bankruptcy court may not confirm a plan that allows equity holders to receive or retain any interest unless the plan provides for full payment of claims of creditors of a rejecting class because equity holders are always junior to claims of creditors. *In re Perez*, 30 F.3d 1209, 1214 (9th Cir. 1994).

Section 1129(b)(2)(B)(ii) provides in relevant part:

> For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
> (B) with respect to a class of unsecured claims—
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property . . . .

11 U.S.C. 1129(b)(2)(B)(ii).

In *Bank of America Trust and Savings Association v. 203 North LaSalle Street Partnership*, the Supreme Court examined § 1129(b)(2)(B)(ii) and determined that the best reading of the phrase "on account of" indicated that "a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the absolute priority rule." *Bank of Am. Nat'l Trust and Savings Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 451, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999).

For example, in *In re DBSD North America, Inc.*, 634 F.3d 79, 96 (2d Cir. 2011), the Second Circuit held that the Chapter 11 plan could not "gift" shares, warrants, or other property to old equity in exchange for their "cooperation and assistance" in the reorganized debtor, without paying creditors in full. The Second Circuit held that such "gifting" to old equity violated the absolute priority rule:

> The existing shareholder did not contribute additional capital to the reorganized entity, *see, e.g., id.* at 443, 119 S.Ct. 1411 (suggesting uncertainty about whether even new capital may suffice); rather, as the bankruptcy court

> explained, the gift aimed to ensure the existing shareholder's "continued cooperation and assistance" in the reorganization, *DBSD I,* 419 B.R. at 212 n. 140. The "continued cooperation" of the existing shareholder was useful only because of the shareholder's position as equity holder and "the rights emanating from that position," *In re Coltex Loop,* 138 F.3d at 43; an unrelated third party's cooperation would not have been useful. And "assistance" sounds like the sort of "future labor, management, or expertise" that the Supreme Court has held insufficient to avoid falling under the prohibition of the absolute priority rule. *Ahlers*, 485 U.S. at 204, 108 S.Ct. 963. Thus, notwithstanding the various economic reasons that may have contributed to the decision to award property to old equity here, it is clear that the existing shareholder "could not have gained [its] new position but for [its] prior equity position." *In re Coltex Loop,* 138 F.3d at 44.
>
> In sum, we conclude that the existing shareholder received "property," that it did so "under the plan," and that it did so "on account of" its prior, junior interest.

In re DBSD North America, Inc., 634 F.3d 79, 96–97 (2d Cir. 2011).

Here, the Plan similarly violates the absolute priority rule. While the Plan asserts that current equity holders will not retain any equity under the Plan, there is in fact substantial upside for Dr. Piazza. As set forth in the Plan Supplement and Term Sheet, Piazza is guaranteed a minimum of $7 million for a continued consulting role (for his "knowledge, insight, relationships and goodwill"), plus a 75 percent interest in the outcome of litigation against the two main secured creditors in this case. A couple of examples illustrate the significant compensation to Piazza contemplated by the Plan. With respect to the Meacher claim, if it is ultimately proven that the estate's interest in the Collateral securing Meacher's claim is only $300,000 (which Meacher disputes), then Piazza would receive approximately $2.25 million (75 percent of the $3 million difference between Meacher's asserted claim and the value of the Collateral in this hypothetical). Similarly, if LVDF's claim is reduced by, for example, $6 million, then Piazza would receive another $4.5 million.

The Plan, on its face, purports that Piazza will receive nothing for his equity interest under the Plan. In reality, however, the Plan provides that Piazza will receive anywhere from $7 to $13.75 million as a result of the Plan, Plan Supplement, and Term Sheet. This represents an

incredibly lucrative deal for Piazza, while general unsecured creditors will only receive an estimated 10 to 30 percent distribution on their claims. There is insufficient evidence in the record as to why Piazza should provide the Litigation Services or that Piazza is not receiving this interest in the litigation "on account of" his prior equity interest. Rather, it appears that Piazza's opportunity to receive an interest in the litigation arises in a significant way from his prior status as an equity holder. As observed by the Second Circuit, "the 'continued cooperation' of the existing shareholder was useful only because of the shareholder's position as equity holder and 'the rights emanating from that position,' an unrelated third party's cooperation would not have been useful." *DBSD*, 634 F.3d at 96.

The unusual nature of the litigation arrangement with Piazza cannot be overemphasized. According to the Plan, with respect to LVDF's claim, if the allowed claim "is less than the reserve amount, any surplus shall revert to the Reorganized Debtor" and, with respect to Meacher's claim, if the allowed claim "is less than the reserve amount of $3.3 million, any surplus shall revert to the Reorganized Debtor." While any surplus from these reserve accounts is purportedly reverting to the Reorganized Debtor, the vast majority of the surplus from the reserve accounts will go to Piazza and will be unavailable for distribution to general unsecured creditors. Again, Piazza is slated to receive 75 percent of the proceeds of post-confirmation litigation against LVDF and Meacher. In essence, the Plan is creating a litigation trust, with Piazza as trustee, to benefit Piazza rather than unsecured creditors.

In short, the Plan violates the single most important rule of Chapter 11—that senior creditors are paid before junior creditors, who are paid before equity. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 137 S. Ct. 973, 984, 197 L. Ed. 2d 398 (2017). Therefore, confirmation of the Plan must be denied.

B. <u>The Plan Fails to Comply with Applicable Ninth Circuit Law</u>

Ninth Circuit law prohibits plans that expressly provide for non-consensual third-party releases. *See* 11 U.S.C. § 524(e) ("the discharge of a debt of the debtor does not affect the liability of any other third entity on, or the property of any other entity for such debt"); *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995); *In re Am. Hardwoods*, 885 F.2d 621, 626 (9th Cir. 1989). A

chapter 11 plan cannot discharge a non-debtor's obligations to a creditor. The Ninth Circuit has consistently interpreted Section 524(e) to prohibit the permanent release, discharge, or injunction of claims against non-debtors. *See. e.g., Lowenschuss*, 67 F.3d at 1401; *Am. Hardwoods*, 885 F.2d at 626. Section 524(e) is not limited to express attempts to discharge a non-debtor obligation. Rather, courts must look beyond labels and prohibit all forms of discharge or permanent injunction in favor of non-debtors. *See Am. Hardwoods*, 885 F.2d at 625 (examining effect of relief sought and rejecting argument that injunction is distinguishable from discharge). The Debtor cannot make an end-run around the law via subterfuge and a cleverly drafted plan. *See id.*

Here, Section V.B. of the Plan provides: "**The Confirmation Order shall enjoin the prosecution, whether directly, derivatively or otherwise, of any Claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged or terminated pursuant to the Plan.**" In accordance with the Term Sheet, Piazza would receive broad releases of any claims against him, "including, but not limited to, claims for preference payments, fraudulent transfers, and turnover of property of the Debtor's estate."

The following language in the Term Sheet is particularly troubling: "For the further avoidance of doubt, the parties acknowledge that Dr. Piazza is the owner of certain [insert description of machine guns] which were NOT identified on Debtor's schedule of assets, but are used by Debtor on loan from Dr. Piazza [TBD]." Meacher disputes the ownership of the guns, the Debtor's valuation of the Collateral, and the accuracy of the Debtor's schedules. Further investigation is required to determine the extent of the bankruptcy estate's interest in the Collateral and whether additional firearms purportedly owned by Piazza individually are in fact property of the estate. Moreover, there is no information regarding the value of the machine guns that Nevada PF and/or Reorganized Front Sight are conceding belong to Piazza. This appears to be another impermissible gift to Piazza on account of his status as a former equityholder, and the "acknowledgement" that these machine guns belong to Piazza should not be binding on other parties in interest, including Meacher.

In its current form, the Plan waives claims against Piazza, including potential claims for fraud and turnover of any firearms that should have been scheduled as property of the estate. This

is plainly improper. Although the estate may waive its own claims against Piazza, the Plan and Confirmation Order should make clear that any such waiver is without prejudice to the rights of other parties in interest to pursue these claims. The injunction provision of the Plan does not comply with applicable Ninth Circuit law and, therefore, the Court should deny confirmation of the Plan.

C. The Plan Improperly Classifies Classes of Claims and Impairment

The Bankruptcy Code provides two different methods by which a plan proponent can obtain confirmation: (1) under Section 1129(a), the proponent must obtain approval by each class of claims; or (2) under Section 1129(b), the "cramdown" section, the proponent must obtain approval by at least one impaired class of claims. *See* 11 U.S.C. § 1129(a)(10). Each method requires a proper classification scheme and claim impairment designations.

The Court should deny confirmation of the Plan because it improperly classified classes of creditors and impairment, in that the Debtor: (1) improperly classified the Class 3 mechanics' lien claims held by M2 EPC as impaired under the Plan; and (2) improperly classified the mechanics' lien claim held by Top Rank Builders/Morales Construction in its own Class 4. Because the Plan does not comply with Sections 1122 and 1124, the Plan is unconfirmable as presently structured, and confirmation should be denied.

1. The Debtor Improperly Designates the Class 3 claim of M2 EPC as Impaired when the Debtor Has the Resources to Pay M2 EPC in Full on the Effective Date

"In general, a class of claims is impaired under section 1124 if the plan alters the legal, equitable or contractual rights to which the holders of such claims are otherwise entitled, unless the only alteration is the reinstatement of the original maturity and curing defaults with respect to an accelerated debt." 7 Collier on Bankruptcy ¶ 1124.02 (Richard Levin & Henry J. Sommer eds., 16th ed.).

The Debtor has artificially impaired the Class 3 claim by proposing to pay this claim over time instead of on the Effective Date of the Plan. Assuming M2 EPC votes in favor of the Plan, M2 EPC's Class 3 claim cannot constitute an accepting impaired class for purposes of Section 1129(a)(10). Given the enormous financial resources available to the Debtor through Nevada PF,

LLC, which is providing approximately $24 million in Exit Financing, and the various proposed reserve accounts, it is clear that the Debtor (through Nevada PF and an additional reserve account) would be able, if it so chose, to render unimpaired the $110,000 M2 EPC claim. Indeed, the Plan is proposing to place approximately $11.8 million in a reserve account for LVDF's claim, and an additional $3.3 million in a reserve account for Meacher's claim. Thus, with the Exit Financing, the Debtor will hold funds in reserve accounts at the time of the confirmation hearing in an amount that is exponentially larger than the amount of M2 EPC's Class 3 claim and sufficient to enable the Debtor, if it chose to do so, to render M2 EPC's Class 3 claim unimpaired. Notwithstanding the depth of the financial resources apparently available to the Debtor to fund the Plan and pay M2 EPC's Class 3 claim in full, in cash, on the Effective Date of the Plan, the Debtor has chosen to impair the $110,000 claim by proposing to pay it (in full) in installments within eleven months after the Effective Date of the Plan.

The Debtor's impairment of Class 3 constitutes an abuse of § 1129(a)(10) such that the Class 3 must be deemed to be *unimpaired* for purposes of § 1129(a)(10). The apparent reason behind the Debtor's decision to purposely impair a relatively small claim is to manufacture an accepting impaired class of claims to obtain confirmation of the Plan over the opposition of truly impaired creditors. Such a manipulation of the Chapter 11 process, termed "artificial impairment" by the case law, is prohibited. *See In re W.C. Peeler Co., Inc.*, 182 B.R. 435 (Bankr. D.S.C. 1995); *In re Windsor on the River Assoc., Ltd.*, 7 F.3d 127, 132 (8th Cir.1993) ("for purposes of 11 U.S.C. § 1129(a)(10), *a claim is not impaired* if the alteration of rights in question arises solely from the debtor's exercise of discretion.") (emphasis added); *accord Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII)*, 961 F.2d 496 (4th Cir. 1992) ("'If the plan unfairly creates too many or too few classes, if the classifications are designed to manipulate class voting, or if the classification scheme violates basic priority rights, the plan cannot be confirmed.'").

"This contrived and artificial impairment can be viewed either as a violation of the requirement of an accepting impaired class, § 1129(a)(10), or as a violation of the requirement that the plan be proposed in good faith, § 1129(a)(3), or as both. Whichever way it is viewed, it

prevents confirmation of the plan." *In re Orchards Village Investments, LLC*, 2010 WL 143706, at *13 (Bankr.D.Or. 2010) (quoting *In re Daly*, 167 B.R. 734, 737 (Bankr. D. Mass. 1994)).

The Debtor's impairment of the Class 3 claim demonstrates a lack of good faith. Section 1129(a)(10) of the Code "is designed to prevent a plan from being confirmed unless a class of creditors truly impaired by such plan support it. . . . Accordingly, an attempt to manipulate the Chapter 11 process by engineering technical and literal compliance with § 1129(a)(10) by artificially impairing a class of claims in the face of overwhelming opposition by truly impaired creditors constitutes a perversion of Chapter 11." *In re Dunes Hotel Assocs.*, 188 B.R. 174, 185 (Bankr. D.S.C. 1995) (citations omitted).

> The prohibition of artificial impairment of a class of claims in order to obtain technical compliance with § 1129(a)(10) has been overwhelmingly endorsed by the case law. *See In re Investors Fla. Aggressive Growth Fund Ltd.*, 168 B.R. 760, 767 (Bankr. N.D. Fla. 1994) ("there is simply no credible reason to believe that the payment of these claims in full at the Effective Date of the plan will in any way unduly burden the Debtor or threaten the feasibility of the plan. The court therefore finds that the Debtor's plan has artificially impaired the [general unsecured claimants] and that this class must be treated as if no impairment existed."); *In re Daly*, 167 B.R. 734, 737 (Bankr. D. Mass. 1994) ("Thus the impairment of [the] claim has no reasonable basis other than the need to create an accepting impaired class. The cases are clear that this is impermissible. A Debtor may not satisfy § 1129(a)(10) by manufacturing an impaired class for the sole purpose of satisfying § 1129(a)(10) and thereby forcing the plan upon a truly impaired class that has voted to reject the plan."); *In re North Washington Center Ltd. Partnership*, 165 B.R. 805, 810 (Bankr. D. Md. 1994) (same); *In re Dean,* 166 B.R. 949, 954 (Bankr. D. N.M. 1994) (same); *In re North Vermont Assoc., L.P.*, 165 B.R. 340, 343 (Bankr. D. D.C.1994) (same); *In re Boston Post Road Ltd. Partnership*, 145 B.R. 745, 747 (Bankr. D. Conn. 1992), *aff'd*, 154 B.R. 617 (D. Conn. 1993), *aff'd*, 21 F.3d 477 (1994), *cert. denied*, 513 U.S. 1109, 115 S.Ct. 897, 130 L.Ed.2d 782 (1995) (same); *In re River Village Assoc.*, 1993 WL 243897, *4 (E.D. Pa. 1993) (same); *In re Miami Center Assoc., Ltd.*, 144 B.R. 937, 943 (Bankr. S.D. Fla. 1992) (same); *In re Washington Assoc.*, 147 B.R. 827, 831 (E.D.N.Y.1992) ("The $26,800 of the unsecured claims may well be an artificially impaired class. The Debtor . . . assuredly has the funds to pay these claims in full at confirmation and if for some reason such funds are not available, *the Debtor's partners, in all likelihood, have access to funds sufficient to pay these claims at confirmation*.") (emphasis added); *In re Lettick Typografic, Inc.*, 103 B.R. 32, 383-9 (Bankr. D. Conn. 1989) (same).

Dunes Hotel Assocs., 188 B.R. at 186-87.

The Debtor has failed to articulate why the impairment of the Class 3 claim is necessary for economic or other justifiable reasons. It appears that the Debtor improperly designated Class 3 as impaired to obtain a consenting impaired class. As such, M2 EPC's Class 3 claim must be deemed to be unimpaired for purposes of § 1129(a)(10).

2. Debtor's Separate Classification of Top Rank Builders/Morales Construction's Mechanics' Lien Claim in Class 4 Was Improper Classification, Designed to Gerrymander Voting on the Plan

The Debtor's separate classification of the Class 4 claim is even more egregious. Section 1123(a)(1) requires that a Chapter 11 plan shall designate, subject to Section 1122, classes of claims and interests. Each such impaired class then separately votes on whether to accept or reject a plan. *See* 11 U.S.C. § 1129(a)(8). Section 1122 provides that "a plan may place a claim . . . in a particular class only if such claim . . . is substantially similar to the other claims . . . of such class." 11 U.S.C. § 1122.

> The threshold question for the bankruptcy court when applying § 1122(a) is to determine whether the claims are "substantially similar." The Code is silent on how to ascertain whether claims are "substantially similar." The Ninth Circuit has determined that the bankruptcy judge "must evaluate the nature of each claim, i.e., the kind, species, or character of each category of claims." Because § 1122(a) mandates that dissimilar claims may not be placed into the same class, if the bankruptcy court determines that the claims are not substantially similar, the inquiry ends there.
>
> However, if the claims are substantially similar, the plan may place such claims in different classes if the debtor can show a business or economic justification for doing so. . . . Furthermore, a court must not approve a plan placing similar claims differently solely to gerrymander an affirmative vote on the reorganization plan.

In re Loop 76, LLC, 465 B.R. 525, 536-37 (9th Cir. B.A.P. 2012), *aff'd*, 578 Fed. Appx. 644 (9th Cir. 2014) (internal citations omitted).

Here, the Plan classifies the mechanics' lien claims into two separate classes without any justification for the separate classification. Considering the composition of claims in Classes 3 and 4, which claims are substantially similar, and that there is no true business or economic justification for classifying the Top Rank Builders/Morales Construction's Mechanics' Lien

separately in Class 4, confirmation of the Plan should be denied. The Debtor is attempting to impermissibly gerrymander the vote on confirmation of the Plan. *See, e.g.*, *Barakat v. Life Ins. Co. of Va. (In re Barakat)*, 99 F.3d 1520, 1526 (9th Cir. 1996) (separate classification for the sole purpose of obtaining acceptance of a class of creditors under the plan constitutes "gerrymandering" and is not permitted); *In re Bryson Properties, XVIII*, 961 F.2d 496, 502 (4th Cir. 1992) ("Thus, although separate classification of similar claims may not be prohibited, it 'may only be undertaken for reasons independent of the debtor's motivation to secure the vote of an impaired, assenting class of claims.'"). Because the Debtor's claims classification and impairment designations contained in the Plan do not comply with Sections 1122 and 1124, the Plan is unconfirmable.

Moreover, as with the Class 3 claim, the Debtor has failed to articulate why the impairment of the Class 4 claim is necessary for economic or other justifiable reasons. The Debtor clearly has the resources to pay the $15,000 in full, in cash, on the Effective Date of the Plan rather than in three monthly installments of $5,000.

D. <u>The Plan Fails to Provide Post-Confirmation Interest on Meacher's Claim</u>

The Plan's failure to provide post-confirmation interest conflicts with the requirement of 11 U.S.C. § 1129 (b)(2)(A)(i)(II), which requires that the amount the secured creditor will receive at the time of payment is equivalent to the present value of the claim as of the Effective Date. Stated otherwise, Section 1129(b)(2)(A)(i)(II) of the Bankruptcy Code provides that, in a cram down, a secured creditor is to "receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, **as of the effective date of the plan**, of at least the value of such holder's interest in the estate's interest in such property…" If the plan provides for delayed payment, rather than a single lump sum payment on the Effective Date, then "the amount of each installment must be calibrated to ensure that, over time, the creditor receives disbursements whose total present value equals or exceeds that of the allowed claim." *Till v. SCS Credit Corp.*, 541 U.S. 465, 469, 124 S.Ct. 1951 (2004). That is, the Debtor must provide for post-confirmation interest at a market rate, such that the present value of the distributions equals the value of the allowed secured claim as of the Effective Date. *See Rake v. Wade*, 508 U.S. 464,

472 n. 8, 113 S.Ct. 2187, 2192 n. 8, 124 L.Ed.2d 424 (1993) ("When a claim is paid off pursuant to a stream of future payments, a creditor receives the 'present value' of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments."); *In re Airadigm Communications, Inc.*, 547 F.3d 763, 769 (7th Cir.2008) ("Section 1129(b)(2)(A)(i)(II) thus requires interest if the claim is to be paid over time."). Here, the Plan proposes to pay Meacher's allowed secured claim at some undefined point in the future, after the Effective Date of the Plan. In order to provide Meacher with the value of his secured claim as of the Effective Date, the Plan must also provide post-confirmation interest.

E. Retention of Jurisdiction

Meacher objects to the Plan to the extent that it provides for the retention of exclusive jurisdiction. [Plan, Section F]. *See* 28 U.S.C. 1334. While "the bankruptcy court plainly [may retain] jurisdiction to interpret and enforce its own prior orders," *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009), it may not divest other courts of their concurrent jurisdiction to interpret bankruptcy court orders. Rather, if for example, Meacher, post-confirmation, asserts liabilities in a non-bankruptcy court of competent jurisdiction, that court may hear and determine all issues raised in the action, including whether the defendant can rely on the confirmation order as an affirmative defense. Adjudication of such a defense is a proceeding over which the bankruptcy court, as a unit of the district court, has "original but not exclusive jurisdiction." 28 U.S.C. § 1334(b); *see also Stern v. Marshall*, 131 S.Ct. 2594 (2011); *In re Mystic Tank Lines Corp.*, 544 F.3d 524 (3d Cir. 2008) ("No provision of the Bankruptcy Code requires the Bankruptcy Court to hear all 'related to' claims . . . the only aspect of the bankruptcy proceeding over which the district courts and their bankruptcy units have exclusive jurisdiction is 'the bankruptcy petition itself.'") (citing *In re Wood*, 825 F.2d 90, 92 (5th Cir. 1987)); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 224-225 (3d Cir. 2004), as amended (Feb. 23, 2005) ("Section 105(a) permits a bankruptcy court to 'issue any order, process or judgment that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code. But as the statute makes clear, § 105 does not provide an independent source of federal subject matter jurisdiction.").

IV.

RESERVATION OF RIGHTS

Meacher reserves his right to make any and all confirmation objections in connection with the confirmation hearing. Meacher specifically preserves all of his procedural and substantive defenses and rights with respect to the value of the Collateral securing the Meacher Claim, as well as any claim that may be asserted against Meacher by Front Sight Management LLC or any other party in interest in Front Sight Management LLC's bankruptcy case, or any other person or entity whatsoever, including any setoff rights against the Debtor or any challenge or defense to the jurisdiction of this Court over any such claim. Meacher further reserves his right to supplement this Objection in the event that the Debtor modifies or otherwise supplements the Plan or the Motion.

V.

CONCLUSION

For the reasons set forth above, the Plan does not comply with the applicable provisions of Title 11 and therefore cannot be confirmed pursuant to Section 1129(a)(1) of the Bankruptcy Code.

WHEREFORE, Meacher respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems necessary and just.

DATED this 4th day of November 2022.

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