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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 **Hearing Date and Time** Date: July 10, 12, 14, 18, 20, 2023 Time: 9:30 a.m.

REPLY TO RESPONSE TO AMENDED OBJECTION TO CLAIM NO. 284 FILED BY LAS VEGAS DEVELOPMENT FUND, LLC

Reorganized Debtor Front Sight Management LLC ("Front Sight"), by and through its special counsel, the law firm of Garman Turner Gordon LLP, hereby submits its reply ("Reply") to the *Response to Amended Objection to Claim No. 284 Filed by Las Vegas Development Fund, LLC* [ECF No. 667] (the "Opposition") filed by Las Vegas Development Fund, LLC ("LVDF") on January 23, 2023.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

At its core, the Opposition misunderstands and misstates Front Sight's Objection[1] to

[1] "Objection" as used herein shall refer to the *Amended Objection to Claim No. 284 Filed by Las Vegas Development Fund, LLC* [ECF No. 628]. All capitalized undefined terms used herein shall be ascribed the definitions set forth in the Objection unless otherwise indicated.

LVDF's POC. Front Sight has not changed its position at all. Front Sight is responding to the claims asserted against it by LVDF, which are based solely on the Construction Loan Agreement, the Construction Deed of Trust Security Agreement, Assignment of Leases and Rents, and Fixture Filing (the "Deed of Trust"), and the Promissory Note (collectively, as amended, the "LVDF Loan Documents") between the parties.[2] The LVDF Loan Documents are the only agreements between LVDF and Front Sight and, as fully integrated contracts, stand on their own.

The LVDF Loan Documents provide a commitment to loan $75,000,000, later reduced to $50,000,000.[3] LVDF did not fund the loan, admits now that it never could fund the loan – not even a fraction of it – and Front Sight suffered significant damages as a result because the project that relied on the funding could not be built. LVDF is not entitled to *any* recovery due to its breaches of the LVDF Loan Documents, as any money advanced did not provide any benefit to Front Sight, which was left with incomplete construction and ultimately a loss of all equity.

LVDF now seeks to insert a new term in the LVDF Loan Documents that is indisputably not there: that LVDF had no actual obligation to lend any funds, and to the extent it did, its loan commitment was limited to the funds it actually raised from EB-5 investors. Notably, this argument is at direct odds with LVDF's requested amendment lowering its Loan Commitment from $75,000,000 to $50,000,000, as no such amendment would be needed if LVDF had no obligation to provide any funding in the first place. This argument is also inconsistent with LVDF's own admission in the Opposition:

> LVDF is only the lender. LVDF did not make any representations to Front Sight about a different entity's (EB5IA's) ability to raise EB-5 funds.

See Opposition, p. 16, ll. 13-13 (emphasis in original). As the lender, LVDF was obligated to fund the loan and any failure of LVDF to obtain sufficient funds to do so is LVDF's problem.

Front Sight has also pursued the individuals associated with LVDF (Robert Dzibula, Jon

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[2] LVDF has now sought to add a new claim for fraud which, as discussed below, is not timely, is not a secured claim, cannot be recovered from the reserve, and therefore is not only improper, it is irrelevant to these proceedings.

[3] LVDF originally agreed to fund $75,000,000 and later reduced that to $50,000,000. All references to the loan amount herein will reflect the lower amount of $50,000,000 despite that each of the original LVDF Loan Documents stated the higher amount.

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Fleming, and Linda Stanwood, and their related entities, EB5 Impact Advisors, LLC ("EB5IA") and EB5 Impact Capital Regional Center, LLV ("EB5RC")), as well as LVDF, for other actions related to the inducement by the parties to engage Front Sight it is entire fraudulent scheme. That fraud is relevant to Front Sight's affirmative claims against the remaining parties in the Adversary Proceeding to assert and recover its full range of damages for the harm that they have collectively caused and those claims, to the extent made against LVDF, can also offset the amounts sought through the LVDF Claim.

However, for purposes of the Claim Objection, the sole question before this Court is whether LVDF, pursuant to the LVDF Loan Documents, is entitled to collect more than $12,000,000 from a reserve account for the $6,375,000 it advanced on a promised loan of $50,000,000, ***a $43,625,000 or 87.255% shortfall***, when such shortfall was a breach of the promise to loan and resulted in no benefit and instead caused great harm to Front Sight. The answer to that question is a resounding "No."

II.
LEGAL ARGUMENT AND ANALYSIS

A. LVDF's Recitation of the Facts Seeks to Introduce Parole Evidence When None Is Admissible.

The claim asserted in the LVDF POC is the sole affirmative claim by LVDF against the estate. It is a claim for payment under the LVDF Loan Documents. The LVDF Loan Documents are fully integrated agreements and, for purposes of determining whether LVDF is owed anything at all (it is not), this Court need not, and cannot, go beyond the four corners of the LVDF Loan Documents.

1. Relevant Parol Evidence Law.

Parol, or extrinsic, evidence "is not admissible to add to, subtract from, vary, or contradict ... written instruments which ... are contractual in nature and which are valid, complete, unambiguous, and unaffected by accident or mistake." *Ringle v. Bruton,* 120 Nev. 82, 86 P.3d 1032, 1037–38 (2004). Thus, parol evidence is not admissible to vary or contradict the written agreement's terms. *Tallman v. First Nat'l Bank of Nev.,* 66 Nev. 248, 208 P.2d 302, 306 (1949).

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The parol evidence rule is both an evidentiary and substantive rule that applies in equity as well as at law. *State ex rel. List v. Courtesy Motors,* 95 Nev. 103, 590 P.2d 163, 165 (1979)(citing *Wheeler, Kelly & Hagny Inv. Co. v. Curts*, 147 P.2d 737, 740 (Kan. 1944)).

Here, LVDF seeks to use parol evidence, specifically prior communications and agreements between *different* parties, to add a term to the CLA that is indisputably not there. Specifically, LVDF asks this Court to read in a requirement that LVDF is not obligated to fully fund its $50,000,000 commitment until and unless it first raises those funds from EB5 investors which requirement is unequivocally not stated in the CLA. Or in other words, to render the $50,000,000 commitment superfluous.

2. The LVDF Loan Documents are Integrated Contracts.

An integrated contract is a written contract which contains all the terms and conditions of the agreement. 17 Am. J. 2d Contracts, §260. If a contract is integrated then it may neither be supplemented nor contradicted by any additional evidence of any kind. *Kuchta v. Sheltie Opco, LLC*, 466 P.3d 543 (Nev. App. 2020).

LVDF and Front Sight are parties to three agreements which constitute the LVDF Loan Documents. The LVDF Loan Documents are integrated agreements:

> 11.11 ENTIRE AGREEMENT. THE NOTE, THIS DEED OF TRUST AND THE OTHER LOAN DOCUMENTS[4] CONTAIN THE FINAL, ENTIRE AGREEMENT BETWEEN THE PARTIES HERETO RELATING TO THE SUBJECT MATTER HEREOF AND THEREOF AND ALL PRIOR AGREEMENTS, WHETHER WRITTEN OR ORAL, RELATIVE HERETO AND THERETO WHICH ARE NOT CONTAINED HEREIN OR THEREIN ARE SUPERSEDED AND TERMINATED HEREBY. THE NOTE, THIS DEED OF TRUST AND THE LOAN DOCUMENTS MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OF THE PARTIES HERETO. EXCEPT AS INCORPORATED IN WRITING INTO THE LOAN DOCUMENTS, THERE ARE NO REPRESENTATIONS, UNDERSTANDINGS, STIPULATIONS, AGREEMENTS OR PROMISES, ORAL OR WRITTEN,

[4] The Other Loan Documents is defined as "the other agreements, documents and instruments (the "Other Documents") now or hereafter governing, securing, or guaranteeing the Loan evidenced by the Note (the Note, this Deed of Trust and the Other Documents being sometimes hereinafter collectively referred to as the "Loan Documents")" Deed of Trust, p. 1.

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WITH RESPECT TO THE MATTERS ADDRESSED IN THE LOAN DOCUMENTS.

See Deed of Trust, § 11.11.

3. The LVDF Loan Documents Are Clear on Their Face, and Must Be Interpreted Based on Their Plain Language.

The goal of contract interpretation is to give effect to the parties' mutual intentions. *Pioneer Title Ins. & Trust Co. v. Cantrell,* 71 Nev. 243, 286 P.2d 261, 263 (1955) (quoting *Caruso v. John Hancock Mut. Life Ins. Co.,* 136 N.J.L. 597, 57 A.2d 359, 360 (1948) ("The law will not make a better contract for the parties than they themselves have seen fit to enter into....")). A document that is "clear on its face [ ] will be construed from the written language and enforced as written." *Sandy Valley Assocs. v. Sky Ranch Estate Owners Ass'n,* 117 Nev. 948, 35 P.3d 964, 967 (2001) (citing *Ellison v. C.S.A.A.,* 106 Nev. 601, 797 P.2d 975, 977 (1990)).

Here, the LVDF Loan Documents are clear on their face, with respect to the amount that LVDF was obligated to fund:

- "Borrower has requested that the Lender provide the Loan (as hereinafter defined" to Borrower in the principal sum of up to SEVENTY-FIVE MILLION DOLLARS ("75,000,000") for the purpose of paying off Existing Liens (as hereinafter defined) and financing the construction of the Improvements (as hereinafter defined in accordance with the Budget"). CLA, § A.

- "'**Commitment**' means an amount not to exceed seventy five million dollars ($75,000,000). Such Commitment shall be reduced by any principal payments made by or on behalf of Borrower or any principal reductions otherwise required under and pursuant to the Laon Documents." CLA, definitions.

- "'**Loan**' means collectively, the loan of the proceeds of the Note by Lender to Borrower in Advances to be made pursuant to the terms of this Agreement in the maximum aggregate principal amount not to exceed the Commitment." CLA, definitions.

- "**Senior Debt**" to be "funded subsequent to this 'Loan'." CLA, definitions.

- "Subject to the terms and conditions of the agreement, Lender agrees to lend to Borrower and Borrower agrees to borrow from Lender, the proceeds of the Loan from time to time in accordance with the terms hereof until the Maturity Date, for the purpose of refinancing, developing and constructing the Project; provided, however, Lender shall not be obligated to make any Advance if, after giving effect to such Advance, the sum of Lender's aggregate Advances then outstanding would exceed the Commitment" CLA, § 1.1.

- Conditions of Borrowing set forth in Article II do not include as a condition that LVDF has raised funds. CLA, Art. II.

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- Promissory Note executed in amount of $50,000,000.
- Deed of Trust executed and filed against Front Sight's property in the amount of $50,000,000.

Thus, despite LVDF inexplicably now stating that "Front Sight 'wholly fails to cite to a single provision in the loan documents to support [ ] a claim [that LVDF was contractually obligated to fund the maximum loan amount],"[5] the LVDF Loan Documents say just that. Moreover, contrary to LVDF's assertion, there is no provision "clearly provid[ing] that LVDF ***may*** lend 'up to' the maximum loan amount."[6] Nowhere in the LVDF Loan Documents does it state that LVDF's performance is optional, contingent on an ability to raise the $50,000,000, or that the $50,000,000 commitment could or would be largely unavailable.

4. There is No Ambiguity But, Even If There Were, It is Construed Against the Drafter, Which is LVDF.

LVDF seems to potentially argue that there is some ambiguity in what the commitment was and therefore, parol evidence can be introduced. *See* Objection at p. 11, ll. 20-22. However, a contract is only ambiguous when it is "reasonably susceptible to different constructions or interpretations." *Agric. Aviation Eng'g Co. v. Bd. of Clark County Comm'rs,* 106 Nev. 396, 794 P.2d 710, 712 (1990). An ambiguity must be inherent within the contractual term itself, and "does not arise simply because the parties disagree on how to interpret their contract." *Kuchta v. Sheltie Opco, LLC*, 466 P.3d 543 (Nev. App. 2020).

Here there is no ambiguity. The CLA contains a commitment to loan up to $50,000,000. Black's Law Dictionary defines a "Loan Commitment" as "A lender's binding promise to a borrower to lend a specified amount of money at a certain interest rate, usu. within a specified period and for a specified purpose (such as buying real estate)." Black's Law Dictionary (11th ed. 2019). Thus, LVDF obligated itself to fund up to $50,000,000. LVDF wants to read that provision to say any amount it chose up to $50,000,00 based on what funds it has to loan, but such interpretation would render the use of the word "Commitment" meaningless. Such interpretation

[5] *See* Opposition, p. 11, ll.18-20.

[6] *See* Opposition, p. 11, 20-21.

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would also be contrary to LVDF's subsequent acts related to the LVDF Loan Documents in which it amended the CLA to reduce the commitment to $50,000,000 from $75,000,000. If there was no requirement to loan $75,000,000 at Front Sight's request, then there was absolutely no reason to later amend the loan to reduce the commitment to $50,000,000. Likewise, it would have been nonsensical to burden the real property with a $50,000,000 lien if LVDF had no obligation, or ability, to fund anywhere close to that amount. LVDF's attempts to create an ambiguity to avoid its liability must fail.

Likewise, there is no ambiguity based on the CLA stating that the loan will be comprised of EB5 investments and comply with the EB-5 provisions. *See* Objection at p. 6, ll. 9-16. Certainly, Front Sight was aware that the CLA would be comprised of EB-5 Investments. But the source of the funding does not relieve a lender from having or obtaining the funds to fund the loan it committed to. Furthermore, the LVDF Loan Documents could have stated that LVDF was only obligated to fund the amounts it could have raised. They did not. Front Sight would not have entered into the LVDF Loan Documents if it believed that it would only receive $6,375,000 to complete a project with a budget nearly 10x that.

Nonetheless, even if there is an ambiguity (there is not), any ambiguous term or language in a document will be construed against the drafter of the document. Under the rule of *contra proferentem*, a latently ambiguous contract is construed against its drafter if the interpretation advanced by the non-drafter is reasonable. *See Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed.Cir.1999); *Community Heating*, 987 F.2d at 1579. *Contra proferentem,* is followed frequently in the Ninth Circuit and Nevada. See *In re Escoto*, 20176 Bankr. LEXIS 759 [*10] (BAP 9th Cir. 2017) [applying Nevada law]; *F Q Men's Club v. Doe*, ___Nev. ___, 471 P. 3rd 753 (2020) (Contract); *American First Fed. Credit Union v. Soro*, 131 Nev. 737, 359 P. 3rd 105 (2015) (Loan); *Anvui, LLC v. G. L. Dragon, LLC*, 123 Nev. 213, 215-6, 163 P. 3rd 405 (2007) (Lease); *Glenbrook Homeowners Assn. v. Glenbrook Co.*, 111 Nev. 909, 901 P. 2nd 132 (1995) (Master Development Plan); *In re Escoto*, BAP No. NV-16-1211-LJuKu, 20176 Bankr. LEXIS 759, *10 (BAP 9th Cir. March 21, 2017)(Loan).

The LVDF Loan Documents were drafted by Michael Brand, LVDF's counsel, and Mr.

Dzibula, LVDF's principal and a licensed attorney. Thus, to the extent LVDF contends there is an ambiguity as to the meaning of the commitment (there is not), it must be construed against LVDF which, again, renders the CLA clear on its face that the commitment to loan $50,000,000 was a commitment to loan as much up to $50,000,000 as Front Sight requested subject to the other requirements of the CLA. Certainly, LVDF, as the drafter of the contract, could have stated that the "commitment" was not actually a commitment and that it only had to use "best efforts" to raise funds and only loan up to the amount that it raised without any guarantee. It did not.

B. LVDF Admits That It Never Intended to Honor its Obligations.

LVDF is now seeking to turn this matter into a dispute over which party breached first. However, LVDF cannot escape the fact that it has now removed all doubt of its inability to raise the funds promised in the LVDF Loan Documents, an actual and anticipatory breach, making clear that the purported non-monetary breachers were mere distractions to try to protect against its own wrongdoing.

1. LVDF Concedes that It Never Could, and Never Intended to, Honor Its Contractual Obligations.

A breach of contract requires a valid contract, a breach by defendant, and damages as a result of a breach. *Med. Providers Fin. Corp. II v. New Life Centers, L.L.C.*, 818 F.Supp.2d 1271, 1274 (D. Nev. 2011). An anticipatory breach, which may be express or implied, is a breach of a contract that occurs when one party to the contract, without justification and prior to a breach by the other party, makes a statement or engages in conduct indicating that it will not or cannot substantially perform its duties under the contract *Shaw v. CitiMortgage, Inc.,* 201 F. Supp. 3d 1222, 1250 (D. Nev. 2016), amended in part, 3:13-CV-0445-LRH-VPC, 2016 WL 11722898 (D. Nev. Nov. 1, 2016)(citing *Nev. Power Co.*, 2006 WL 1582101, at *10, 2006 U.S. Dist. LEXIS 36135, at *28). If one party anticipatorily breaches the contract, a repudiation of the contract has occurred, and the non-breaching party is excused from performing its obligations under the contract. *Kahle v. Jostiner,* 455 P.2d 42, 44 (Nev. 1969)

LVDF was in breach of the CLA almost from the moment it signed it, especially given its current assertion that it never intended to fund the full amount promised. Specifically, in his

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declaration supporting the LVDF POC, Mr. Dzibula repeatedly seeks to disclaim his obligations by asserting the speculative nature of his ability to raise funds and admission that it became clear to him *prior to executing the CLA* that he would be unable to reach Front Sight's financing goals. *See* Dzibula Decl. ¶¶ 7, 20, 23, 28. By July 2018, LVDF, which had loaned approximately only 10% of the commitment in the nearly twenty months since executing the CLA, instead went on the offensive to try to avoid liability for its own wrongdoing. Mr. Dzibula has now made clear that that was because LVDF never had any ability to actually honor the commitment and loan the funds as promised. Because LVDF contends that it never intended to fund the commitment, despite its promise to do so, it was in breach, an anticipatory breach, of the CLA almost from the moment it was executed.

2. Alternatively, LVDF Did Not Enter Into the LVDF Loan Documents in Good Faith.

Under Nevada law, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and execution." *A.C. Shaw Constr. v. Washoe Cty.*, 105 Nev. 913, 784 P.2d 9, 9 (1989) (quoting Restatement (Second) of Contracts § 205); *see also Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420, 427 (2007) ("It is well established that all contracts impose upon the parties an implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair actions by one party that work to the disadvantage of the other."). The implied covenant "encompass[es] any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *511 W. 232nd Owners Corp. v. Jennifer Realty Co*, 773 N.E.2d 496, 501 (N.Y. 2002). If, as LVDF now conceded, it could not have loaned even a fraction of the amount it contractually agreed to, it did not enter into the LVDF Loan Documents in good faith, which is a breach of the CLA from the outset.

3. In Any Event, LVDF Breached First Because Front Sight Did Not Breach the CLA.

LVDF contends that Front Sight breached the following sections of the CLA: Sections 3.2 ("never provided monthly project costs'); Section 5.1 ("appeared to be running behind on construction"); Section 5.27 ("failed to obtain Senior Debt"); and Section 5.10(e) ("failed to

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provide the requisite EB-5 prove-up documents that included bank statements"). *See* Objection, p. 7, ll. 4-8. There were no such breaches:

- Section 3.2 – Front Sight tendered evidence of project costs by means of spreadsheets and summaries prepared by its accountants and recreated monthly reports after originals were destroyed in a fire.
- Section 5.1 – Front Sight continually kept LVDF apprised of its construction progress, and such timely progress reports were provided to the EB5 investors by LVDF.
- Section 5.27 – Borrower was required to use its best efforts to obtain senior debt pursuant to the express terms of the CLA, which it did, included by obtaining the Morales Line of Credit.
- Section 5.10(e) - Front Sight tendered that documents necessary and even recreated monthly reports after originals were destroyed in a fire.

See ECF No. 384, Ex. "20" to Exhibit "1." (August 20, 2018 Response to Notice of Default).

C. LVDF's Attempts to Avoid the Failures in its Claim By Adding New Claims Related to the Morales Line of Credit is Improper.

LVDF originally asserted a claim based on a purported breach of, and for repayment under, the LVDF Loan Documents. That claim was filed as a secured claim and, as a result, LVDF was separately classified in the Debtor's Plan, a reserve in the amount of the purported claim was established, and LVDF submitted a single ballot on account of its secured claim. LVDF now, however, seeks to add a new claim – an unsecured claim that it indisputably acknowledged was property of the bankruptcy estate – and prosecute that claim as part of its original claim. LVDF's attempts are untimely, improper, contrary to the record, and must be denied.

1. LVDF Misrepresents the Record In This Case.

In order to argue to this Court that its Amended Proof of Claim is proper, LVDF grossly skews the record. LVDF suggests that "the parties are litigating the claim in the Adversary Proceeding." *See* Objection, p. 11, ll. 1-2. That is incorrect. Front Sight is litigating its affirmative claims against the LVDF Parties. The remaining claims in the Adversary Proceeding, including the fraud claim, were already determined to be property of the estate, acquired by Nevada PF, and released pursuant to the Plan and related agreements. Specifically:

- On June 23, 2022, Front Sight removed the State Court Case to the Bankruptcy Court, thereby commencing adversary proceeding no. AP-22-01116-ABL (the "Adversary Proceeding").

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- On June 27, 2022, LVDF filed a *Motion to Remand* [AP-22-01116-ABL, ECF No. 4] in the Adversary Proceeding, which *Motion to Remand* was joined [AP-22-01116-ABL, ECF No. 55] by the remaining LVDF Parties.

- On June 27, 2022, the LVDF Parties also filed a *Motion to Terminate Stay* (the "Stay Relief Motion") in the Chapter 11 Case to pursue the Counterclaims. *See*, ECF No. 206.

- Pursuant to an oral ruling on September 9, 2022 and orders entered on September 15, 2022 (the "Orders"), the Bankruptcy Court denied the Remand Motion and Stay Relief Motion, for the reasons set forth on the Court's record, and found that "[a]fter careful analysis of the claims that have been advanced by LVDF that were pending in the state court lawsuit at the time of removal, the Court concludes that those claims are property the estate, such that only Front Sight, as debtor-in-possession, has standing to pursue them." *See* Sept. 9, 2022 Hrg. Tran. P. 17, ll. 16-20 (available at ECF No. 113); ECF No. 107; Case No. 22-11824-abl, ECF No. 346.

- On September 15, 2022, it its *Order Approving Stipulation Resolving Debtor's Motion for an Order Confirming Terminating Sanction 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)*, pursuant to the **agreement of the LVDF Parties** and Front Sight, the Bankruptcy Court ordered that "the LVDF counterclaims are property of the bankruptcy estate." *See* ECF No. 106.

- On October 4, 2022, Debtor filed its *Debtor's Second Amended Chapter 11 Plan of Reorganization* (the "Plan") [ECF No. 205] which was confirmed by *Findings of Fact, Conclusions of Law, and Order Confirming the Debtor's Second Amended Chapter 11 Plan of Reorganization* (the "Confirmation Order") [ECF No. 556] entered on November 29, 2022.

- No party appealed the Confirmation Order, and the Confirmation Order is now a final order. *See generally*, docket.[7]

- Pursuant to the Plan, Nevada PF acquired the equity interest in Front Sight and all claims owned by the estate. *Id.*

2. LVDF's Amended Claim Is an Untimely New Claim for the Morales Line of Credit Claim.

LVDF filed its original claim on August 11, 2022. That claim was a single secured claim based on the money it contended it was owed under the LVDF Loan Documents. LVDF now seeks – over four months after the proof of claim deadline and two months after the plan in the case has been confirmed – to assert a new unsecured claim based on fraud.

Neither the Bankruptcy Code nor the rules specifically address allowance of amended

[7] LVDF has now filed an untimely and improper collateral attack on this Court's Orders, including the Confirmation Order, through a *Motion for Clarification and/or Motion for Reconsideration* [ECF No. 141]. Front Sight will address the arguments raised therein to the extent necessary.

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1 proofs of claim. *In re Shotwell Landfill, Inc.*, No. 13-02590-8-SWH, at *7-8 (Bankr. E.D.N.C.
2 June 20, 2014) (citing *Clamp-All Corp. v. Foresta (In re Clamp-All Corp.*), 235 B.R. 137, 140 (1st
3 Cir. BAP 1999)). However, Fed. Bank. P. 7015, which incorporates Fed. R. Civ. P. 15, allows
4 relation back when "the amendment asserts a claim or defense that arose out of the conduct,
5 transaction, or occurrence set out - or attempted to be set out - in the original pleading." *In re*
6 *Shotwell Landfill*, at *7-8 (citing Fed. R. Bankr. P. 7015(c)(1)(B). Based thereon, courts typically
7 allow relation back of an amendment to a timely filed proof of claim "where the purpose is to cure
8 a defect in the claim as originally filed, to describe the claim with greater particularity or to plead
9 a new theory of recovery on the facts set forth in the original claim." *In re International Horizons,*
10 *Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985); *see also In re Sambo's Restaurants, Inc.*, 754 F.2d
11 811, 816-17 (9th Cir. 1985); *In re Commonwealth Corporation*, 617 F,2d 415, 420 (5th Cir.1980).
12 When faced with post bar date amendments to proofs of claim, the court must subject the amended
13 claim "to ***careful scrutiny*** to prevent an attempt to file a new claim under the guise of an
14 amendment." *In re Mitchell*, 116 B.R. 63, 64 (Bankr. W.D. Va. 1990) (citing *In re Newcomb*, 60
15 B.R. 520, 522 (Bankr. W.D. Va. 1986))(emphasis added). Whether to allow an amendment to a
16 timely filed proof of claim is an equitable determination that lies within the sound discretion of the
17 court. *See In re Hemingway Transport, Inc.,* 954 F.2d 1, 10 (1st Cir. 1992).

18 The Bankruptcy Court's decision in *In re Shotwell* is particularly instructive in this matter:

19 These three documents, the Explanation of Claim, the Addendum and the 2012
20 draft K-1 are the only documents attached to the original claim that describe the
basis for the claim. Although the original claim and its attachments provide a
21 minimum of information regarding the Phantom Income and stock reimbursement
components (i.e., the Memorandum Agreement was not attached), those
22 components of the claim are at least identified. However, nowhere in the original
proof of claim or its attachments is there any indication that Cook was owed unpaid
23 compensation from the debtor or that Cook would later seek to amend to set forth
such a claim. In fact, the addendum to the original proof of claim specifically stated
24 that the "total amount of claim as of Petition Date" amounted to $1,392,995.30. . .
25 Accordingly, the amended claim is not an attempt to cure a defect that was present
in the original claim or to describe the original claim with greater particularity. . . .

26

27 ***None of the factors necessary for relation back of an amended proof of claim are present here. The amended claim does not cure a defect in the original claim or***
28 ***describe the original claim with more particularity. Instead, Cook asserts an***

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> ***entirely new claim arising from alleged unpaid wages and compensation during Cook's employment with the debtor from 2008 through 2012. This compensation component is wholly unrelated to and does not arise from the same set of facts pled in the original proof of claim. Accordingly, relation back of the amended claim to the time of the original proof of claim shall not be allowed.***

In re Shotwell Landfill, Inc., No. 13-02590-8-SWH, at *11-12 (Bankr. E.D.N.C. June 20, 2014) (emphasis added).

Further, a bankruptcy court may disallow an amendment to a proof of claim if allowing that amendment would result in prejudice to other parties. *In re Sambo's Rest., Inc.,* 754 F.2d at 816-17. The factors a court may consider to determine prejudice include whether there has been "bad faith or unreasonable delay in filing the amendment, impact on other claimants, reliance by the debtor or other creditors, and change of the debtor's position." *Wall Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.),* 344 B.R. 94, 102 (9th Cir. BAP 2006) (quoting *Roberts Farms, Inc. v. Bultman (In re Roberts Farms, Inc.*)*,* 980 F.2d 1248, 1251-52 (9th Cir.1992)). The burden of showing prejudice is on the objecting party. *In re Sambo's Rest., Inc.,* 754 F.2d at 817.

Here, LVDF previously stipulated that the Morales line of credit claim was an estate claim. Moreover, LVDF did not assert any claims based on the State Court Action in its Initial Proof of Claim. Instead, LVDF asserted only a secured claim based on the LVDF Loan Documents. The "Morales line of credit" claim is one based on fraud, a tort, which is an unsecured claim. The amount of any purported unsecured claim by Front Sight was never factored into a liquidation analysis, was not voted by LVDF, and not disclosed in connection with the Debtor's disclosure statement or plan. Any recovery on account of the Morales line of credit claim would be limited to a *pro rata* distribution from the reserve account for the general unsecured claims (as defined in the Plan) which is separate from the reserve established in this case. Amendment at this late date not only seeks to add an entirely new claim, it is prejudicial to the entire unsecured creditor class who relied on the claims existing at the time of Plan confirmation to determine their proposed distributions under the Plan, which did not take into account an LVDF unsecured claim.

3. The Fraud Claim Against Front Sight, Which LVDF Stipulated Was Property of the Bankruptcy Estate, Cannot Serve as an Informal Proof of Claim.

Under Ninth Circuit law, "an informal proof of claim must "[1] state an explicit demand

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showing the nature and amount of the claim against the estate, and [2] evidence an intent to hold the debtor liable." *In re Harrington*, Bankr. No. 02-43878-PBS, USDC Case No. C06-5100BHS, at *11 (W.D. Wash. Aug. 10, 2007) (citing *In re Anderson-Walker Indus. Inc.*, 798 F.2d 1285, 1287 (9th Cir. 1986)); *Sambo's Rest., Inc v. Wheeler (In re Sambo's Rest., Inc.),* 754 F.2d 811, 815 (9th Cir.1985) (citing *Cnty. of Napa v. Franciscan Vineyards (In re Franciscan Vineyards),* 597 F.2d 181, 182-83 (9th Cir.1979) (per curiam), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 598 (1980)). In applying this doctrine, the Ninth Circuit BAP has instructed that, to establish an effective informal claim, the creditor must show, at a minimum: "(1) presentment of a writing; (2) within the time for the filing of claims; (3) by or on behalf of the creditor; (4) bringing to the attention of the court; (5) the nature and amount of a claim asserted against the estate." *Pac. Res. Credit Union v. Fish (In re Fish),* 456 B.R. 413, 417 (9th Cir. BAP 2011).

Here, while the claims asserted by LVDF were on file in the Adversary Proceeding, those claims were determined to be property of the estate ***including through stipulation by LVDF***. All parties relied on the Court's findings and the stipulation for, among other things, voting on a plan that limited LVDF's claim to a secured claim based on the claim it filed and Nevada PF acquiring, and releasing, the estate claims against the Piazza Parties. LVDF cannot now contend that it actually intended to pursue certain claims against Front Sight when they were not only included in the original proof of claim, but more so because they were recognized to be estate property and addressed through a plan that was confirmed over four months ago without objection by LVDF.

4. Front Sight Has Repeatedly Objected to the Purported Fraud Claim Related to the Morales line of Credit.

LVDF contends that Front Sight's only objection to the Amended Proof of Claim regarding the inclusion of LVDF's fraud claim related to the Morales Line of Credit is that it was late filed. *See* Opposition, p. 8, ll. 18-20. This is incorrect. Certainly, the failure to timely file and/or pursue a claim related to the Morales Line of Credit, and instead taking actions indicating a clear intent not to pursue the claim against LVDF, should resolve the issue entirely. But if it does not, as Front Sight argued in the Objection, the claim is without merit *See* Objection, p. 9, l.5 – p. 10.

D. The CLA is Illusory If LVDF Pursues Its Argument that It Had No Obligation to Fund the Commitment.

LVDF attempts to reframe Front Sight's argument regarding the illusory nature of the contract (if LVDF's position that it had no obligation to fund any amounts if it could not raise them is accepted) to an argument that condition precedents render the LVDF Loan Documents illusory. *See* Opposition, p. 14, ll 7-18. This attempt to reframe the argument actually helps clarify Front Sight's point. Front Sight is not arguing that conditions precedent render contracts illusory because notably, ***there is no condition precedent in the CLA that LVDF first raise funds before it is required to honor its loan commitment.*** Instead, the conditions precedent are set forth in detail in Article II of the CLA and each was either satisfied or waived. Rather, Front Sight is arguing that because there was no unsatisfied conditions precedent, LVDF cannot claim to have no obligation to honor its contractual commitments because, if LVDF so claims, then it is claiming to have no obligation under the contract which renders it illusory.

In other words, LVDF's argument is attempting to write in a condition precedent to the contract that does not exist, *i.e.*, EB5IA and/or LVDF's ability to raise EB-5 funds. However, LVDF already conceded that "LVDF is only the lender. LVDF did not make any representations to Front Sight about a different entity's (EB51A's) ability to raise EB-5 funds." LVDF cannot hinge its contractual obligation on its agreement with other parties and default on its contractual obligations for reasons not controlled by the borrower and face no fault. Either LVDF was obligated to fund the commitment, and it breached the CLA, or LVDF did not have any obligations under the CLA, and it is illusory.

E. LVDF Failed to Set Forth the Reasonableness of Its Fees, that They Are Not Duplicative, or Assert the Damages for Which They are Needed to Compensate and Therefore, Such Fees Must Be Disallowed.

As set forth at length in the Objection, in order to recover the fees sought, they must be reasonable and compensatory. *See* Objection, pp. 16-19. In its Opposition, LVDF cites to general law regarding allowance of reasonable fees but makes not argument that its fees were actually reasonable. *See* Opposition, p. 19, l. 5 – p. 21, l. 21. Moreover, while acknowledging that there is caselaw that states that a party is not entitled to duplicative fees, LVDF does nothing, other to the

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1 claim it cannot find a case in the Ninth Circuit, to suggest that the amounts it seeks are not
2 duplicative. *See id.* Finally, while the Objection sets forth in detail that, in order to be permitted,
3 default fees and costs must actually compensate for some damage of the lender in order to not be
4 punitive, LVDF offers no evidence, or even argument, that the more the $6,307,000.00 it seeks in
5 additional to the amount advanced are tied to any actual damage. *See id.* As such, the default
6 interest, attorneys fees, foreclosure fees, and late fees must be disallowed.

7 **III.**
8 **CONCLUSION**

Based on the foregoing, Front Sight respectfully requests that the POC be disallowed for
9 the reasons set forth herein and/or offsets be permitted for the claims as set forth in the Adversary
10 Proceeding. Front Sight requests such other relief as this Court deems just and proper.
11 DATED this 6 day of February, 2023.

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