

1 Terri H. Didion, Assistant United States Trustee

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2 State Bar No. CA 133491

3 Edward M. McDonald Jr., Trial Attorney

4 State Bar No. NY 4126009

5 *edward.m.mcdonald@usdoj.gov*

6 **UNITED STATES DEPARTMENT OF JUSTICE**

7 Office of the United States Trustee

8 300 Las Vegas Boulevard, So., Ste. 4300, Las Vegas, NV 89101

9 Cell: (202) 603-5222

10 Tel.: (702) 388-6600, Ext. 234

11 Fax: (702) 388-6658

12 Attorneys for the U.S. Trustee for Region 17

13 TRACY HOPE DAVIS

14 **UNITED STATES BANKRUPTCY COURT**

15 **DISTRICT OF NEVADA**

16 In re

17 **FRONT SIGHT MANAGEMENT LLC,**

18 Debtor.

19 Case No: BK-S-22-11824-ABL

20 Chapter 11

21 Date: September 30, 2022

22 Time: 9:30 a.m.

23 Location: Foley Courtroom 1, Telephonic

24 **OBJECTION AND RESERVATION OF RIGHTS OF THE U.S. TRUSTEE
25 TO THE DEBTOR’S APPLICATION TO EMPLOY GREENBERG TRAURIG, LLP AS
26 SPECIAL COUNSEL PURSUANT TO 11 U.S.C. §§ 327(e), 328 AND 330
27 EFFECTIVE AS OF AUGUST 5, 2022**

28 To the Honorable AUGUST B. LANDIS, Chief United States Bankruptcy Judge:

Tracy Hope Davis, United States Trustee for Region 17 (the "U.S. Trustee"), by and through her undersigned counsel, hereby objects (the "Objection") to the *Debtor’s Application to Employ Greenberg Traurig, LLP as Special Counsel Pursuant to 11 U.S.C. §§ 327(e), 328 and 330 Effective as of August 5, 2022* [ECF No. 329] (the “Application”) filed by captioned debtor Front Sight Management LLC (“Debtor”).¹

¹ Hereafter, all references to “Section” in the Motion are to provisions of the Bankruptcy Code, title 11 of the United States Code, 11 U.S.C. § 101-1532 as amended, unless otherwise indicated. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure and to “FRE” are to the Federal Rules of Evidence.

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2 **I. INTRODUCTION**

3 The retention of Greenberg Traurig LLP (“GT”) should be denied because GT does not
4 meet the definition of counsel who can be employed as special counsel under Section 327(e) and
5 should therefore seek employment under the more stringent standard set forth in Section 327(a).
6 The Application lacks evidence, as opposed to conclusory statements, required to satisfy the
7 burden concerning Section 328. For these reasons, the Court should sustain the U.S. Trustee’s
8 objection and deny the Application.
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10 In support the U.S. Trustee states the following:
11

12 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

13 **FACTS**

- 14
- 15 1. On May 24, 2022, the Debtor filed a voluntary petition under Chapter 11
16 commencing this case. [See ECF No. 1].
 - 17 2. The Section 341 meeting of creditors is set for June 23, 2022. [See ECF No. 3].
 - 18 3. On June 9, 2022, the U.S. Trustee filed a Notice of Appointment of an Official
19 Committee of Unsecured Creditors (“OCUC”). [See ECF No. 116].
 - 20 4. Neither the Debtor’s counsel or financial advisor (“FA”), nor the OCUC’s counsel
21 or FA had the terms of their employment or compensation approved under Section 328. [See
22 ECF Nos. 224 (BG Law LLP as Debtor’s counsel), 225 (Province, LLC as Debtor’s FA), 299
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25 _____
26 The United States Trustee requests that the Court take judicial notice of the pleadings and
27 documents filed in this case pursuant to FRBP 9017 and FRE 201. To the extent that this
28 Objection contains factual assertions predicated upon statements made or documents filed by the
Debtor, Greenberg Traurig LLP, or their agents or representatives, the U.S. Trustee submits that
such factual assertions are supported by admissible evidence in the form of admissions of a party
opponent under FRBP 9017 and FRE 801(d) (2).

1 (Carlyon Cica, Chtd. as OCUC's local counsel), 302 (Kelley Drye & Warren LLP as OCUC's
2 lead counsel) & 303 (Dundon Advisers LLP as OCUC's FA)].²

3 5. The Application was filed on August 29, 2022 and seeks to employ GT as special
4 counsel pursuant to Sections 327(e), 328, 330, 1107 and 1108 to provide legal advice and
5 assistance related to developing a membership plan and drafting membership agreement
6 templates, and related documentation. [See ECF No. 329, pp. 2 (¶3) & 4 (¶12) of 19].

7 6. The Application is supported by the declaration of Jim Mace ("Mace
8 Declaration"). [See ECF No. 330]. Attached to the Mace Declaration is an Engagement
9 Agreement dated August 5, 2022. [See ECF No. 330, pp. 13-21 of 21].

10 7. The Application asserts that GT has no adverse interest with respect to the matter
11 on which it is to be employed and therefore can be employed as special counsel under Section
12 327(e). [See ECF No. 329, pp. 6-7 of 19; ¶¶27-32].

13 8. Through the Application, GT seeks approval of its hourly rates, which range from
14 \$250 to \$835,³ and to be employed pursuant to the terms of the Engagement Agreement. [See
15 ECF No. 329, p. 5 of 19; ¶¶20-21].

16 9. The Application and the Engagement Agreement provide for the possibility of
17 modifying GT's scope of engagement or for additional representations by GT of the Debtor or its
18 affiliates. [See ECF No. 329, p. 5 of 19; ¶19; ECF No. 330, p. 14 of 21]. For the purposes of
19 determining adversity, the Engagement Agreement limits its focus only to the Debtor and not to
20 any of its affiliates, insiders or other persons connected to the Debtor. [See ECF No. 330, p. 14 of
21 21; ¶2b]. The Engagement Agreement provides for a waiver of conflicts and/or potential
22 conflicts arising from GT's representation of other clients, except for representing clients adverse
23 to the Debtor within the scope of GT's employment. [See ECF No. 330, p. 15 of 21; §3].

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25 ² Lucas Horsfall was granted Section 328 relief as Debtor's accountant. [See ECF No. 326].

26 ³ The Application and Mace Declaration provide that GT shareholders generally bill between
27 \$510 and \$775 per hour, but it should be noted that Mr. Mace seeks approval to bill at \$850 per
28 hour. [See ECF 329 p. 5 of 19; ¶¶20-21; ECF No. 330, p. 3 of 21; ¶¶9-10]. The Engagement
Agreement provides that GT senior attorneys bill at hourly rates up to \$1,800. [See ECF No.
330, 16 of 21; ¶5b].

1 13. GT does not meet the requirements of Section 327(e).

2 14. Accordingly, the Application to employ GT as Section 327(e) special counsel
3 should be denied or amended to seek GT's employment under Section 327(a).
4

5 **B. *The Proponent of the Application Fails to Carry the Burden of Establishing the***
6 ***Reasonableness of the Terms and Conditions for Retention and Compensation***
7 ***included in the Application, Supporting Declaration and Engagement***
8 ***Agreement.***

9 15. While Section 327 addresses employment of professionals, 11 U.S.C. §§ 328 and
10 330 address compensation of those professionals after they have been employed under Section
11 327. Section 330 authorizes the bankruptcy court to award the retained professional reasonable
12 compensation "based on an after-the-fact consideration of 'the nature, the extent, and the value
13 of such services, taking into account all relevant factors.'" *In re Smart World Technologies, LLC*,
14 552 F.3d 228, 232 (2d Cir. 2009) (quoting Section 330(a)).

15 16. Section 328 operates differently and "permits a professional to have the terms and
16 conditions of its employment pre-approved by the bankruptcy court, such that the bankruptcy
17 court may alter the agreed-upon compensation only 'if such terms and conditions prove to have
18 been improvident in light of developments not capable of being anticipated at the time of the
19 fixing of such terms and conditions.'" *In re Circle K Corp.*, 279 F.3d 669, 671 (9th Cir. 2002); *In*
20 *re Smart World Technologies, LLC*, 552 F.3d at 232 (noting that "section 328(a) permits a
21 bankruptcy court to forgo a full post-hoc reasonableness inquiry if it pre-approves the
22 "employment of a professional person under section 327 ... on any reasonable terms and
23 conditions of employment" (quoting Section 328(a)). Thus, pre-approval of compensation
24 pursuant to Section 328 is not lightly permitted. *Owens v. United States Trustee (In re Owens)*,
25 2014 Bankr. LEXIS 3346, at *7 (B.A.P. 9th Cir. August 6, 2014).

26 17. Section 328 only provides the possible basis for approval of terms of

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28 1994) (attorney must have previously represented debtor); *In re French*, 139 B.R. 485, 489
(Bankr. D.S.D. 1992) (counsel with no prior connection to debtor could not be retained under §
327(e)); *In re Ginco Inc.*, 105 B.R. 620, 621 (D. Colo. 1988) (§ 327(a) applies, rather than §
327(e), where attorney did not represent the debtor pre-petition).

1 compensation. *See generally In re Circle K Corp.*, 279 F.3d 669, 671 (9th Cir. 2002).

2 18. “The differences between §§ 328 and 330 affect the timing and process of the
3 court’s review of fees.” *In re Citation Corp.*, 493 F.3d 1313, 1318 (11th Cir. 2007). Under
4 Section 328, “the bankruptcy court reviews the fee at the time of the agreement and departs from
5 the agreed fee only if some unanticipated circumstance makes the terms of that agreement unfair.
6 Under Section 330, the court reviews the fees after the work has been completed and looks
7 specifically at what was earned, not necessarily at what was bargained for at the time of the
8 agreement.” *Id.*

9 19. The burden of proof to establish the terms and conditions of employment –
10 including the imposition of Section 328(a) – is on the applicant. *Nischwitz v. Miskovic (In re*
11 *Airspect Air, Inc.)*, 385 F.3d 915, 921 (6th Cir. 2004) (quoting *Zolfo, Cooper & Co. v. Sunbeam-*
12 *Oster Co.*, 50 F.3d 253, 262 (3d Cir. 1995)). To meet its burden, the firm must provide specific
13 evidence to establish that “the terms and conditions are in the best interest of the estate.” *In re*
14 *Gillett Holdings, Inc.*, 137 B.R. 452, 455 (Bankr. D. Colo. 1991); *In re Thermadyne Holdings*
15 *Corp.*, 283 B.R. 749, 756 (B.A.P. 8th Cir. 2002); *In re Potter*, 377 B.R. 305, 307-08 (Bankr. D.
16 N.M. 2007) (“The trustee seeking to employ a professional under 11 U.S.C. § 328 bears the
17 burden of showing that the provisions of the proposed employment are reasonable.”).

18 20. Here, Debtor seeks to have GT’s hourly rates and terms of employment approved
19 through the Application and Engagement Agreement. [*See* ECF Nos. 329 & 330].

20 21. Although the Application and the Mace Declaration make general statements
21 about the reasonableness of the terms, they fail to establish the reasonableness of these terms
22 given the specific facts of this case.

23 22. Pre-approval of a professional’s terms of compensation as reasonable should not
24 be granted lightly given that the Court may not revisit the issue at the compensation stage unless
25 such terms prove to have been improvident in light of developments not capable of being
26 anticipated at the time the terms or rates were fixed. *See* 11 U.S.C. § 328(a); *see also Friedman*
27 *Enters. v. B.U.M. Int’l, Inc. (In re B.U.M. Int’l, Inc.)*, 229 F.3d 824, 829 (9th Cir. 2000) (“There
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1 is no question that a bankruptcy court may not conduct a § 330 inquiry into the reasonableness of
2 the fees and their benefit to the estate if the court already has approved the professional's
3 employment under [] § 328.”).

4 23. Approving an arrangement under Section 328 removes the standard of reasonable
5 compensation based on an after-the-fact consideration of “the nature, the extent, and the value of
6 such services, taking into account all of the relevant factors” under Section 330, and instead
7 replaces it with a standard that severely constrains the Court’s authority to only disallow
8 compensation that is “improvident in light of developments not capable of being anticipated at
9 that time.” 11 U.S.C. §328(a). The Court should not allow GT to bypass a full post-hoc
10 reasonableness inquiry if employment is approved under 11 U.S.C. §327.

11 24. Debtor has not met its burden of proof to demonstrate why or how the terms,
12 conditions, and structure of GT’s compensation are reasonable under 11 U.S.C. §328(a) and
13 should be approved at the outset of GT’s employment by the Debtor instead of being subject to
14 review once GT seeks compensation, including at the end of the case once the Court and parties-
15 in-interest can better assess GT’s performance. A professional’s requested invocation of Section
16 328(a) is neither mandatory nor automatic, regardless of the proposed compensation scheme. A
17 professional should not automatically expect approval of its retention under Section 328 just
18 because it asks for it. Accordingly, the Court should deny the request to pre-approve the terms
19 of GT’s employment and compensation under Section 328 or under some other Code provision.

20 25. Under the Engagement Agreement, the Debtor waives conflicts or potential
21 conflicts outside of the Debtor and the specified scope of GT’s employment. [See ECF No. 330,
22 p. 15 of 21; §3]. However, the disinterestedness provision of Section 327(a) is mandatory. It is
23 stricter than the conflict of interest provisions in the Model Rules of Professional Conduct
24 because § 327(a) does not allow for the waiver of conflicts of interest. *See S.S. Retail Stores*
25 *Corp.*, 211 B.R. 699, 703 (B.A.P. 9th Cir. 1997); compare Nevada Rules of Professional
26 Conduct, Rule 1.7(b)(4). Because GT should be employed under Section 327(a), if at all, GT
27 must meet the higher requirements for Section 327(a), which includes disinterestedness under
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1 Section 101(14) including the catchall provision within Section 101(14)(C).

2 26. The arbitration provision may also be unreasonable, at least to the extent it
3 interferes with the Court's consideration of disputes under the Bankruptcy Code. *See In re Home*
4 *Express, Inc.*, 226 B.R. 657, 658-59 (Bankr. N.D. Cal. 1998) (While arbitration enjoys a
5 "favored status," disputes relating to 11 U.S.C. §§ 327 through 331 "fall within the extremely
6 narrow category of disputes which Congress probably never envisioned being delegated to
7 nonjudicial entities for resolution.").

8 27. The Court should decline to approve any Section 328 provisions requested in the
9 Application and Engagement Agreement and subject GT's fee application to a review
10 unconstrained by pre-approval of any compensation terms at the beginning of this case.

11 **WHEREFORE**, the United States Trustee requests that the Court enter an order denying
12 the Application and granting such other and additional relief as is just and equitable.

13 Dated: September 16, 2022

14 Respectfully submitted,

15 **TRACY HOPE DAVIS**
16 **UNITED STATES TRUSTEE, REGION 17**

17 By: /s/ Edward M. McDonald Jr.
18 Edward M. McDonald Jr., Esq.,
19 Trial Attorney
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