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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re:	Case No.: 22-11824-ABL
FRONT SIGHT MANAGEMENT LLC,	Chapter 11
Reorganized Debtor.	Date: June 1, 2, 5, 4, and 6 Time: 9:00 a.m.

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 this amended and restated objection (the "Objection") to proof of claim no. 284, filed by Las Vegas Development Fund, LLC ("LVDF") on August 8, 2022 and amended on December 23, 2022 (collectively, the "POC"), which amends the *Objection to Claim of Las Vegas Development Fund, LLC* filed on September 29, 2022 as ECF No. 393 (the "Debtor Objection") and the *Objection to Claim of Las Vegas Development Fund and Joinder in Debtor's Objection to Claim of Las Vegas Development Fund, LLC* (the "Joinder").[1] This Objection is made and based on the declaration of Ignatius Piazza (the "Piazza Decl."), filed concurrently herewith, the papers and pleadings on file with this Court, judicial notice of which is respectfully requested, and any evidence and argument this Court chooses to hear.

[1] This Objection is intended to supplement, and clarify the Debtor Objection and Joinder, but does not waive any arguments made therein. The arguments raised and addressed in the are incorporated herein.

TABLE OF CONTENTS

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

TABLE OF AUTHORITIES

Page(s)

Cases

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

Statutes

Rules

Other Authorities

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

I. INTRODUCTION

Front Sight and LVDF are parties to a Construction Loan Agreement (as amended, the "CLA") in which LVDF was contractually obligated to fund a $75,000,000, later reduced to $50,000,000, loan to Front Sight for the construction of a timeshare project. Upon certain conditions being met (each of which was), LVDF was required to fund requested advances to Front Sight. The CLA is not conditioned upon LVDF having raised the funds through EB-5 investors or other sources. LVDF breached the CLA when it acknowledged that it could not and would not fund the promised commitment, advancing only $6,375,000, less than 13% of the amount promised. LVDF's failures and breach caused substantial harm to Front Sight. Period.

Trying to evade this simple and straight-forward analysis, LVDF contends that it actually had no obligation to provide any funding under the CLA. Instead, LVDF contends that the CLA required only that LVDF use its best efforts to raise EB-5 investments and that, if EB-5 investments were raised, they would be advanced and, if they were not, that not only did LVDF have no further obligations, but that Front Sight was obligated to make up the short fall to complete the project. That is not what the CLA says. But even if it did, and LVDF was not obligated to fund any amounts despite executing a contract saying otherwise, the CLA was illusory and is unenforceable.

Nonetheless, LVDF now seeks to recover more than $12.5 million on a $6,375,000 principal balance – with the difference being attributed almost entirely to default interest, late fees, and legal fees. LVDF is not entitled to recover anything as a result of its own wrongdoing, much less to collect default interest, foreclosure fees, attorney's fees, and late charges when it was in material breach of the CLA.

LVDF's actions ultimately caused the complete loss of the project, the collapse of Front Sight, its subsequent chapter 11 case (the "Chapter 11 Case"), and a resulting approximately $11 million in total claims asserted against Front Sight. Front Sight has its own additional claims for damages against LVDF, both as set forth in adversary proceeding no. 22-01116-ABL (the "Adversary Proceeding") and as a result of LVDF's violation of the stay in the State Court Action.[2] Thus, even

[2] The "State Court Action" is defined as *Front Sight Management LLC v. Las Vegas Development Fund, LLC, et al.*, filed in the Eighth Judicial District Court, Case No. A-18-781084-B.

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

if LVDF was entitled to any recovery (it is not because it breached the CLA), Front Sight's claims against LVDF far outweigh any damages that LVDF may assert against Front Sight and LVDF should take nothing by way of its POC.

II. JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this Chapter 11 Case and this Objection in this district is property pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief sought herein are Sections 105 and 502 and Bankruptcy Rule 3007.

3. Pursuant to Local Bankruptcy Rules 7008 and 7012, Front Sight consents to the entry of final orders or judgments by this Court if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

III. STATEMENT OF FACTS

A. Background of Front Sight

1. Front Sight was founded in 1996 by Dr. Ignatius Piazza. *See* Piazza Decl. ¶ 3.

2. In 1998, Front Sight purchased 550 acres of raw land 45 minutes from Las Vegas, acquired water rights, and began building what is now considered the finest and largest private firearms training facility in the world (the "Front Sight Property"). *See id.*, ¶ 4.

3. As a result of Dr. Piazza's twenty-five years of tireless devotion to Front Sight, the business grew immensely. The Front Sight Property is currently comprised of 50 outdoor firearms training ranges, live fire tactical training simulators, an 8,000 square foot classroom and pro shop, and assorted accessory buildings, bathrooms, three water wells, and thousands of square yards of completed grading for future development (the "Front Sight Firearms Facility"). *See id.*, ¶ 5.

4. Front Sight historically provided firearms training courses which promoted the defensive use of various firearms. Courses were offered to the general public, members of law enforcement, and military members. Indeed, the Front Sight Firearms Facility was the most successful firearms training facility of its type in the United States. Front Sight provided classes

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

and instruction annually to upward of 40,000 gun and weapons enthusiasts. Front Sight was considered the leader in its field, and provided additional training and instruction for numerous city and state agencies seeking to improve performance of their respective law enforcement departments. Front Sight's long term goal was to develop a vacation club and resort (the "Vacation Club & Resort") to expand the Front Sight Firearms Facility to also be a word class destination for travel. *See id*., ¶ 6.

B. LVDF's Principals' Solicitation of Front Sight and the LVDF Loan.

5. Front Sight began researching its financing options to complete the Vacation Club & Resort in the early 2010s. In 2012, Front Sight was approached by Robert W. Dziubla ("Dziubla") and John Fleming ("Fleming"), who represented themselves as "like-minded, pro-gun patriots" who told Dr. Piazza they would be able to obtain a financing package to fund Front Sight's construction of the proposed Vacation Club & Resort. *See id*., ¶ 7.

6. Dr. Piazza and Front Sight initially declined Dzibula and Fleming's advances twice. Dzibula and Fleming persisted and promised that they had vast experience raising foreign investments, personal connections in China, a desire to help Front Sight complete its development, and that they could raise the necessary funds within a year. Ultimately, based on their representations regarding their experience and ability to raise funds through EB-5[3] investments, Front Sight entered into a letter agreement (the "EB5IA Agreement") with EB5 Impact Advisors, LLC ("EB5IA"), a company owned by Dzibula and Fleming. *See id*., ¶ 8.

7. EB5IA required, as an initial payment, Front Sight to pay $300,000 in fees needed to secure approval from the United States Customs and Immigration Service ("USCIS") for a regional center, the EB5 Impact Capital Regional Center, LLC ("EB5IC" and together with EB51A, the "EB5 Entities"), and initial approvals, plus $100,000 in marketing costs to solicit foreign investors to participate in an EB-5 immigration investment plan. *See id*., ¶ 9.

8. Instead of taking a year to secure the USCIS approval, as Dzibula and Fleming had

[3] The EB-5 program is a federal foreign direct investment, immigration and regional economic development program that provides access to capital to U.S. businesses from overseas investors, which investors are looking to apply for permanent residency in return for investments that create full-time for qualified U.S. workers.

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

promised, approval was not forthcoming for more than two years. Dzibula and Fleming demanded, and Front Sight paid, an additional $220,000, allegedly for "marketing fees." Despite Dzibula's and Fleming's representations and Front Sight's payments of $520,000, the promised funding did not materialize in 2012. *See id*., ¶ 10.

9. Four years after signing the EB5IA Agreement, in 2016, Dziubla and Fleming stated that LVDF had secured the first $2.5 million in investor funding, and that LVDF had "hundreds" of investors in the pipeline, each to invest no less than $500,000, to fund the proposed Vacation Club & Resort. *See id*., ¶ 11.

C. LVDF Enters into the CLA, and then Fails to Fund the Loan as Agreed.

10. In October of 2016, Front Sight signed the CLA which provided, unequivocally, that LVDF would provide up to $75 million in funding. *See id*., ¶ 12, **Exh. "1"**

11. LVDF, the counter-party to the CLA, is the sole entity related to Dzibula and Fleming that has filed a claim against Front Sight, and the sole basis for the Initial Claim is the CLA and its associated promissory notes and deeds of trust. *See generally*, Initial Claim.

12. Section 1.1 of the CLA provides, "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 purposes 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." *See* CLA, § 1.1 (emphasis in original).

13. The CLA defines as the "Commitment," "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 Loan Documents." *See* CLA, p.3.

14. Aside from the limitation that Lender shall not be obligated to fund an Advance if doing so would exceed the Commitment, the only other conditions of borrowing[4] as set forth in

[4] The CLA does also recognize that Advances would be made "provided no Default or Event of Default had occurred and is continuing." *See* CLA, Art. III.

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

the CLA, are limited to the following:

CONDITIONS OF BORROWING

Lender shall not be required to make any Advance hereunder until the pre-closing requirements, conditions and other requirements set forth below have been completed and fulfilled to the satisfaction of Lender, at Borrower's sole cost and expense.

Section 2.1 **Pre-Closing Requirements.** On or prior to the Closing Date (except as otherwise provided in this Section), Borrower shall provide to Lender, except as otherwise instructed, each of the following, in form and substance acceptable to Lender:

(a) A copy of the Title Commitment.

(b) A schedule listing all primary contracts relating to the Project having a contract sum in excess of $250,000.

(c) One (1) copy of the recent, certified ALTA/ACSM Survey of the Land, which has already been delivered to, and approved by, Lender. Soil reports on the Land, as already delivered to, and approved by, Lender.

(d) The Environmental Impact Study already delivered to, and approved by, Lender. Certificates of insurance, together with paid receipts, indicating that an insurance currently required under the terms of Section 5.6 hereof

(e) That certain Development Agreement adopted pursuant to Nye County Ordinance No. 378, recorded on August 3, 2009, as Document Number 731349 in the Official Records of the Nye County, Nevada, evidencing the applicable zoning with respect to the Property.

(f) A copy of Borrower's Organizational Documents, certified as true, correct and complete by a manager of Borrower authorized to do so, together with (i) a current certificate of existence/good standing from the jurisdiction in which Borrower was organized (and from the jurisdiction in which the Land is located, if different from the jurisdiction in which Borrower was organized), and (ii) resolutions and/or consents of those parties necessary to authorize the transaction contemplated hereby.

(g) A flood-zone certification indicating that the Project is not located in a flood plain or any other flood-prone area as designated by any governmental agency; provided, however, that if the Project is so located, Borrower shall provide proof of flood insurance to Lender as required by Lender.

(h) A proposed Operating Budget for the Project for its first Fiscal Year of operation in the form previously submitted to the Nevada Real Estate Division in connection with the registration of the Front Sight Resort and Vacation Club.

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

(i) Letters from suppliers confirming the availability of water, storm and sanitary sewer, has, electric and telephone utilities for the Project.

(j) A copy of each non-cancellable agreement relating to the management, operation or maintenance of the property and of each such agreement which cannot be cancelled upon notice of thirty (30) days or less.

See CLA, § 2.1

15. Front Sight satisfied each of these conditions and, upon request for an Advance, LVDF was obligated to fund it. Indeed, LVDF did commence funding Advances under the CLA because the conditions had been met. *See* Piazza Decl. ¶ 13.

16. On July 1, 2017, Front Sight and LVDF executed a First Amendment to the Loan Agreement which reduced the maximum loan amount from $75,000,000 to $50,000,000 (a change that makes no sense if, as LVDF asserts, it had no obligation to raise any amount in the first instance) and still nowhere did LVDF indicate that it was not obligated to fund the Commitment consistent with the terms of the CLA. *See id*. ¶ 14, **Ex. "2."**

17. On February 28, 2018, Front Sight and LVDF executed a Second Amendment to the Loan Agreement which extended the deadline for LVDF to obtain Senior Debt, and which still nowhere indicated that LVDF was not obligated to fund the Commitment consistent with the terms of the CLA. *See id*. ¶ 14, **Ex. "3."**

18. Ultimately, LVDF provided only $6.375 million in funding, ***less than 10% the original amount contractually promised and less than 13% of the revised amount contractually promised***, over the next two years, all of which was used by Front Sight in accordance with the parameters of the CLA. This amount, however, was far short of the amounts necessary to fund the Vacation Club & Resort. *See id*. ¶ 16.

D. <u>Front Sight Becomes Suspicious that It Has Been Defrauded by LVDF and Its Affiliates.</u>

19. Despite LVDF's utter failure to perform, Front Sight continued to pay the interest payments on the drawn funds every month on time and in full. *See id*. ¶ 17.

20. However, by 2018 – two years after executing the CLA – Front Sight became suspicious that the funds advanced (the $300,000 in fees and $220,000 for marketing) had not

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

actually been used to secure USCIS approval and for marketing the project to foreign investors. *See id*. ¶ 18.

21. Front Sight requested that Dziubla and Fleming produce evidence to support their representations to Front Sight in this regard. Dziubla and Fleming refused to show proof of where the funds Front Sight paid had been spent, and apparently ***in retaliation for Front Sight's demands***, Dziubla and Fleming claimed falsely and intentionally that Front Sight was in default on a number of non-monetary terms (the "Manufactured Defaults") of the CLA (notwithstanding that Front Sight was not in default). *See id*. ¶ 19.

22. To be clear, Front Sight performed all of its material obligations, and made demands and qualified for provision of funding, under the CLA; however, LVDF never advanced more than $6,375,000. LVDF never provided the additional funding to which Front Sight was entitled and for which it qualified under the CLA because LVDF simply never had or obtained the financial wherewithal to provide such funding. By failing to provide the funding on which Front Sight reasonably relied, LVDF breached its contractual obligations. *See id*. ¶ 20.

E. The Chapter 11 Case.

23. On May 24, 2022, Front Sight filed a voluntary petition thereby commencing the Chapter 11 Case. *See* ECF No. 1.

24. The Court set a claims bar date of August 8, 2022 (the "Bar Date"), with an extended deadline of January 3, 2023 for parties asserting claims as a result of the rejection of their membership interests. *See* ECF Nos. 82 and 584. To date, approximately $11 million in claims have been filed against Debtor. *See* ECF No. 519 (Debtor's estimation of claims based on objections filed and to be filed).

25. On November 29, 2022, the Bankruptcy Court issued an order confirming Front Sight's *Second Amended Plan of Reorganization* (the "Plan"). *See* ECF No. 556.

F. The LVDF Claim.

26. On August 8, 2022 LVDF filed a claim (the "Initial Claim") asserting $11,655,706.01 due under the CLA as of August 1, 2022 consisting of the following:

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Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

Principal	$6,375,000
Late Fees	$1,126,573.55
Past Due Foreclosure Fees	$155,341.71
Current Foreclosure Costs	$3,813.85
Past Due Attorney's Fees	$1,858,863.24
Current Attorney's Fees	$82,959.69
Past Due Interest	$1,979,472.80
Current Interest	$83,680.09
	$11,655,706.01

See Claim No. 284.

27. On December 23, 2022, while the Debtor Objection and Joinder were pending, LVDF filed an amended claim (the "Amended Claim") increasing those amounts as follows:

Principal	$6,375,000
Late Fees	$1,461,089.03
Past Due Foreclosure Fees	$159,155.55
Current Foreclosure Costs	$0.00
Past Due Attorney's Fees	$2,118,134.62
Current Attorney's Fees	$85,313.85
Past Due Interest	$2,396,931.95
Current Interest	$86,383.85
	$12,682,008.55

See Claim No. 284.

28. Notably, while previously only attaching a deed of trust and amendment thereto and an *Amended and Restated Promissory Note* to the Initial Claim, the Amended Claim now adds and entirely new claim, attaches a declaration of Robert Dzibula (the "Dzibula Decl."), and attaches 881 pages of attachments. *Id.*

29. LVDF also attempts, through the Dzibula Decl., to assert breaches by Front Sight in an effort to support its severely inflated claim:

1. General Alleged Breaches

30. ***After*** Front Sight accused LVDF of breach and fraud in the inducement, and after LVDF concedes that it could not fund the entire Commitment as required by the CLA, LVDF asserted the Manufactured Defaults against Front Sight, which it now repeats in paragraph 29 of the Dzibula Declaration. LVDF has no evidence of these alleged Manufactured Defaults, as

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

evidenced by the lack of any attachments supporting these breaches to its 885 page claim, and, instead, asserted them solely as a means to ignore its own obligations.

31. Moreover, LVDF previously dismissed these alleged breaches of the CLA in the State Court Action.

2. Alleged Breach with Respect to the Morales Line of Credit.

32. Front Sight also asserts a breach the CLA by Front Sight failing to secure "Senior Debt" or, alternately, for misrepresenting that it had.

33. However, the CLA only requires that Front Sight use its best efforts to obtain such Senior Debt and, to the extent obtained, it be funded *after* the loan from LVDF is fully funded. Specifically, the CLA defines "Senior Debt" as "the additional loan that will be sought by Borrower, and which Borrower will use its *best efforts* to obtain, from a traditional financial institution specializing in financing projects such as the Project. Although the Senior Debt will be funded *subsequent* to this Loan,[5] Lender agrees to subordinate its Deed of Trust to the new Senior Debt…" CLA, p. 11, § 5.27 (emphasis added).

34. Thus, Front Sight was never obligated to, in fact, secure Senior Debt, and especially not before LVDF had met its obligation to fund the loan. *See* Piazza Decl. ¶ 21.

35. In any event, on October 31, 2017, Front Sight did obtain a revolving line of credit in the maximum principal amount of thirty-six million dollars from TOP Rank Builders, Inc., Morales Construction, Inc., and All American Concrete and Masonry. Fully executed copies of the loan documents were provided to LVDF. *See id*. ¶ 22.

36. In turn, LVDF advised its investors of this positive development, as follows:

> Senior Construction Lender- Front Sight has negotiated a $36 million construction line of credit with the construction companies contracted to build the resort. This will be a 5- year term credit facility that accrues interest at 7% for the difference between any work done by the construction companies and the payments made by Front Sight to those companies. The terms of this agreement and note are completed and this line of credit will be signed by the end

[5] "Loan" is defined as "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." *See* CLA, p.9.

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

> of October. There will be no Deed of Trust encumbering the property associated with this credit facility.

See id. ¶ 23.

37. LVDF now claims that the senior loan was a sham and that the lenders were never obligated to provide monies to Front Sight. While Front Sight denies this allegation as categorically untrue, the argument misses the point. *See id*. ¶ 24. Even assuming the correctness of LVDF's bald claim, LVDF cannot demonstrate any injury arising therefrom. LVDF's failure to fund the loan as required under the CLA had nothing to do with the senior debt. It is an after-the-fact argument created by LVDF.

G. LVDF Owes Damages to Front Sight for Its Wrongful Conduct and Failure to Fund the Loan.

1. LVDF is Liable to Front Sight for its Breach of Contract.

38. As set forth herein, LVDF agreed to fund a loan of $75,000,000, later reduced to $50,000,000, and ultimately, failed to fund even 13% of the reduced amount.

2. LVDF is Liable to Front Sight for Its Fraud.

39. In the Adversary Proceeding,[6] Front Sight asserts claims for, among other things, fraud in the inducement, intentional misrepresentation, breach of fiduciary duty, and conversion against LVDF, Dzibula, Fleming, the EB5 Entities, among others (collectively, the "LVDF Parties.") These claims are largely based on Dzibula's and Fleming's fraudulent misrepresentations and statements regarding the amounts they could loan and the investors they had lined up on behalf of LVDF, and the $520,000 in advances that the EB5 Entities and LVDF took from Front Sight that they cannot account for.

40. In short, Front Sight's claim for fraud includes the following false statements made by Dzibula and Fleming in inducing Front Sight to enter into the EB5 Agreement and CLA with LVDF:

a. LVDF and its principals lied about their experience with EB-5 fundraising and fundraising

[6] Front Sight's factual and legal arguments set forth in the Adversary Proceeding are incorporated herein by this reference.

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

in general;

b. LVDF and its principals lied about the amount of money they could raise;

c. LVDF and its principals lied about not getting paid until or unless they were successful;

d. LVDF and its principals lied about the amount of time it would take to raise the money;

e. LVDF and its principals lied about their relationship with Empyrean West, LLC and Empyrean West, LLC's connections, which was represented to be a regional center with which LVDF would work;

f. LVDF and its principals lied about the expenses being minimal and "reimbursable" such that they would keep accurate records to justify the expenses; and

g. LVDF and its principals consistently concealed the true status of the EB-5 fundraise they were attempting (unsuccessfully).

41. Front Sight has also claimed conversion insofar as it looks like some of the monies provided by Front Sight to the EB5 Entities and LVDF were not used as intended. LVDF admitted that LVDF did not maintain financial records to substantiate the use of Front Sight's monies.

3. LVDF is Liable to Front Sight for Its Stay Violation.

42. As set forth in the *Stipulation Resolving Debtor's Motion for Entry of an Order Confirming Termination Sanctions Order is Void as a Violation of the Automatic Stay or, in the Alternative, Motion for Relief from Order Pursuant to Federal Rule of Civil Procedure 60(b)* and order thereon [Case No 22-001116-abl, ECF Nos. 104, 106], LVDF tried to advance the State Court Action notwithstanding the filing of the Chapter 11 Case and the automatic stay.

43. Front Sight initially filed a motion to determine such actions to be a stay violation and, after the Bankruptcy Court denied LVDF's motion to remand the Adversary Proceeding based on the fact that the claims asserted by LVDF were estate claims, LVDF stipulated that the LVDF counterclaims were estate claims and that LVDF's actions were void *ab initio* as a violation of the automatic stay. *Id.*

44. Front Sight agreed not to seek monetary sanctions against LVDF and its counsel, but preserved its right to object to any fees incurred by LVDF post-petition and the right to an offset for any fees incurred by Front Sight. *Id.*

. . .

IV. LEGAL ARGUMENT AND ANALYSIS

A. LVDF Breached the CLA, the Agreement on Which Its Claim Is Based.

To state a claim for breach of contract, a party must demonstrate four elements: (1) formation of a valid contract; (2) performance or excuse of performance by plaintiff; (3) material breach by the defendant; and (4) damages. *Laguerre v. Nev. Sys. Of Higher Educ*., 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011); *see also Padilla Construction Company of Nevada v. Big-D Construction Corp*., 132 Nev. 1014, 386 P.3d 880 (2016) (unpublished) (citing *Laguerre* affirmatively).

At all material times, Front Sight performed under the CLA. Not only did it pay contractual interest when due through the maturity date specified in the CLA (as acknowledged by LVDF in the Dzibula Decl. ¶ 43), but in the State Court Action and Adversary Proceeding, Front Sight has presented undisputed evidence that it used the CLA proceeds it received as required under the CLA. Indeed, Front Sight presented evidence demonstrating that it spent more on the Project than it received from LVDF under the CLA. *See* Piazza Decl., ¶ 25, **Ex. "4."**

Conversely, LVDF materially breached the CLA. Front Sight met all conditions precedent to requesting loan advances under the CLA. *See* CLA, § 2.1, Art. III. However, despite the fact that Front Sight was current on the CLA, had met benchmarks thereunder and was entitled to additional funds under the CLA, LVDF refused and failed to fund under the CLA such that the Front Sight could not complete the Project and, in fact, could do very little with respect to the Project.

LVDF now advances the self-serving argument that it was only required to loan as much as it could raise. LVDF's position is contrary to the clear language of the CLA. Nowhere in the CLA is LVDF's requirement to make an advance limited by the total amounts that EB5IA could raise. Tellingly, the Parties understood how to make it clear that LVDF was only required to use its best efforts to secure funds to fund the loan if that was the intent. The term "best efforts" is used twice in the CLA, and its use is limited to define that Front Sight was only required to use "best efforts" to obtain Senior Debt. Thus, Dziubla, a lawyer himself, and LVDF, as the party who drafted the CLA, could have imposed limits on their $75,000,000, and then $50,000,000,

Garman Turner Gordon
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
(725) 777-3000

Commitment to the fund the CLA, and they did not. Instead, the CLA makes clear that LVDF was contractually obligated to advance $50,000,000 upon demand and failed to do so.

As LVDF has breached the CLA, it cannot now seek to enforce its terms and demand payment through the POC, and LVDF's claim should be disallowed.

B. <u>If the CLA Is to Be Read the Way LVDF Argues, the Contract Is Illusory and Unenforceable.</u>

"A contract or promise is illusory if there is 'a promise merely in form, [that] in actuality [does] not promis[e] anything.'" 3 WILLISTON ON CONTRACTS § 7:7 (4th ed.). In other words, a contract is illusory if the promised consideration is optional to the promisor. *See Shoen v. Amerco, Inc.*, 111 Nev. 735, 742, 896 P.2d 469, 473-74 (1995). If a promise is illusory because one side is not obligated to perform, then the contract is unenforceable because there is no mutuality of obligation. *Sala & Ruthe Realty, Inc. v. Campbell*, 89 Nev. 483, 515 P.2d 394, 396 (Nev. 1973) ("[m]utuality of obligation requires that unless both parties to a contract are bound, neither is bound").

LVDF made clear in the CLA that its relationship under the Agreement was that of a lender. *See* CLA, ¶ 8.14. ("The relationship between Borrower and Lender created hereby and by the other Loan Documents shall be that of a borrower and a lender only, and in no event shall Lender be deemed a partner of, or a joint venturer with, Borrower"). However, LVDF now argues that it was free to not loan Front Sight even a single dollar if its affiliates didn't raise it. LVDF thus contends that, even if Front Sight paid all contractual interest, origination fees, and other fees, and even if Front Sight met all of its benchmarks the CLA specified, if EB5IA could not raise any funds, LVDF had no obligations under the CLA. LVDF's purported reading of the CLA renders it illusory. An illusory contract is not enforceable.

As LVDF's interpretation renders the CLA unenforceable, it cannot now seek to enforce its terms and demand payment through the POC, and LVDF's claim should be disallowed.

C. <u>LVDF's Fraud in the Inducement Serves as a Basis to Disallow any Claim.</u>

To prevail on a claim for fraud, also known as intentional misrepresentation, a plaintiff must prove the following elements by clear and convincing evidence: (a) that the defendant made

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a false representation; (b) with knowledge or belief that the representation was false or without a sufficient basis for making the representation; (c) that the defendant intended to induce the plaintiff to act or refrain from acting on the representation; (d) the plaintiff justifiably relied on the representation; and (e) the plaintiff was damaged as a result of his reliance. *Barmettler v. Reno Air, Inc*., 114 Nev. 441, 956 P.2d 1382 (1998); *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc*., 120 Nev. 277, 290-91, 89 P.3d 1009 (2004); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260, 969 P.2d 949 (1998) (plaintiff has burden of proving each element of fraud claim by clear and convincing evidence). The suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist. *Betsinger v. D.R. Horton, Inc*., 232 P.3d 433 (Nev. 2010); *see also Nevada Power Co. v. Monsanto* Co., 891 F. Supp. 1406 (D. Nev. 1995) (a defendant may be liable for misrepresentation when he makes a representation that is misleading because it partially suppresses or conceals information).

At all material times, LVDF and its principals represented that they were experts in EB-5 financing that could raise enormous amounts of money ($75,000,000) very quickly. However, as has been shown, and will further be shown in the Adversary Action, LVDF and its principals had no experience raising money in connection with any EB-5 program. Their contrary statements of fact to Front Sight were made without any reasonable basis, and they knew they were false. Every one of these false statements related to their experience, skill, training, and expertise made to induce Front Sight and did induce Front Sight to enter into the CLA. But for these representations, Front Sight would not have entered into the CLA as a $6 million loan did not assist Front Sight in accomplishing its goal of building the Project.

LVDF and its principals made material, false statements, with knowledge of their falsity, Front Sight relied on those statements, and Front Sight suffered damages when LVDF did not perform, including LVDF's failure to provide the promised loan funding. Critically, the entirety of the Project was based upon LVDF's ability to provide the requisite funds ($75,000,000 , later reduced to $50,000,000).

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D. The Purported Attorney's Fees and Additional Interest and Foreclosure Fees, All Incurred after LVDF Materially Breached the CLA, Are Not Recoverable

Nevada law recognizes that a party may not enforce contractual provision where that party is already in material breach of contract. "If there is anything well settled, it is that the party who commits the first breach of the contract cannot maintain an action against the other for a subsequent failure to perform." *Bradley v. Nevada C. 0. R. Ry.*, 42 Nev. 411, 421 178 P. 906, 908 (1919)(citation omitted); *accord Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 440 F. Supp. 2d 1184 (D. Nev. 2006) (a material breach by one party to a contract may excuse further performance by another party to the contract. The party who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform); *Las Vegas Sands Corp. v. ACE Gaming, LL*C, 713 F. Supp. 2d 427 (D. Nev. 2010) (same); *Young Elec. Sign Co. v. Fohrman*, 86 Nev. 185, 188, 466 P.2d 846 (1970) (stating that one party's material breach excuses the other party's further performance under the contract). Indeed, an essential element of a breach of contract claim is evidence that the party seeking breach damages demonstrate that it was performing under the contract at the time it claims the other party breached. "When parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform. *Cain v. Price*, 134 Nev. 193, 196 (Nev. 2018).

Here, LVDF was in material breach of the CLA by failing to make Advances. Dzibula now admits in the Dzibula Decl. that LVDF could not have advanced the amounts it promised. LVDF's allegations of non-material defaults, the Manufactured Breaches, by Front Sight was a mere pretext to deflect from its own material breaches. Moreover, because LVDF was already in material breach, it does not matter whether there were any non-material defaults under the CLA.

LVDF's antecedent breaches discharged Front Sight from compliance under the CLA—assuming, *arguendo*, Front Sight was not in compliance. LVDF's antecedent breaches, likewise, foreclose its attempt to recover attorneys' fees, default interest, foreclosure fees, or any of the other fees or penalties LVDF seeks.

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E. Even if LVDF Is Entitled To any Recovery, It is Drastically Less than the Amount Asserted in its Proof of Claim Because LVDF Cannot Recover Duplicative Amounts and Amounts that Do Not Represent Actual Damages.

LVDF seeks to double its recovery on amounts actually advanced by seeking $12,682,008.55 on its $6,375,000 principal loan balance. LVDF seeks to do so by improperly charging $1,461,089.03 in late fees, when no monthly payments were late; charging $2,203,448.47 in attorney fees, even though fees were incurred as a result of LVDF's improper actions and breach; charging $159,155.55 in foreclosure costs, despite that the attempts to foreclose were wrongful; and substantial default interest, despite that there was no default.[7] Nonetheless, even if LVDF were right on those points (it is not), LVDF *still* is not entitled to collect these amounts under the Bankruptcy Code as they constitute unreasonable and duplicative fees.

First, a secured creditor is limited under 11 U.S.C. § 506(b) to recovering "reasonable" fees provided for in the agreement. *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989). "Reasonable" charges under § 506(b) are only charges that compensate the Lender for actual harm; in other words, the actual damages suffered by the Lender. *In re Imperial Coronado Partners, Ltd.,* 96 B.R. 997, 1000-01 (BAP 9th Cir. 1989)*; see also In re Outdoor Sports*, 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993) LVDF declared a default where none existed and has been over-secured since before the beginning of this Chapter 11 Case based on its own appraisals. Pre-Petition Date, LVDF attempted to wrongfully foreclose in order to distract and deflect from its own breaches of the CLA. Post-Petition Date, LVDF has disregarded the fact that its interest in Front Sight's property was fully protected, and that Front Sight's proposed Plan sought to pay LVDF's allowed claim in full. LVDF, nonetheless, proceeded to incur unnecessary attorneys' fees vis-à-vis its unnecessary litigation, motion practice, and discovery demands, including by violating the automatic stay, for which actions LVDF cannot be compensated.

Moreover, LVDF, for the first time, attached invoices for its attorneys' fees to the Amended

[7] Front Sight does acknowledge that the LVDF Loan did mature in 2021 and that Front Sight did not pay the total advanced or make interest payment after that date. However, the completion of the Vacation Resort & Club was critical in providing Front Sight a source to repay the construction loan from LVDF insofar as Front Sight had received overwhelming support for the project from its members.

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Claim The information provided makes clear that the fees are not reasonable as, among other things, (1) they are for litigation against parties other than the Debtor that LVDF pursued and were not covered by the CLA, (2) the fees that purportedly are within the CLA resulted from LVDF's bad faith scheme of using litigation without just cause as a sword to hide its own inability to perform the CLA for its lack of financing and as a means of depleting the Debtor's resources to diminish its ability to pursue LVDF for its breaches, (3) there is not a breakdown of which fees are due and owing by LVDF, as opposed to Dzibula, Fleming, or the EB5 Entities, none of which have filed claims against Front Sight, and (4) they include fees incurred for LVDF's violation of the automatic stay.

Second, while late fees provided for in the underlying agreement may be allowed, they must be reasonable so as to comply with section 506(b) of the Bankruptcy Code. *In re Dalessio*, 74 B.R. at 724. Late charges are unreasonable liquidated damages if they are "disproportionate to the actual damages sustained by the injured party." *In re Bryant*, 39 B.R. 313, 323 (Bankr. D. Nev. 1984) (quoting *Haromy v. Sawyer*, 654 P.2d 1022, 1023 (Nev.1982)). Further, an unreasonable assessment of liquidated damages is void as a penalty. *In re Bryant*, 39 B.R. at 323. Here, LVDF seeks recovery of $1,461,089.03 in late fees, but has not, and cannot, articulate what collection costs it is incurring (other than perhaps attorney's fees which it is also separately seeking) that would necessitate in excess of $1,460,000, or nearly 23% of the total principal balance, in late fees. Therefore, the late fees should not be allowed.

Third, default interest may only be awarded if enforceable under non-bankruptcy law. *See Gen. Elec. Capital Corp. v. Future Media Prods., Inc.*, 547 F.3d 956, 961 (9th Cir. 2008); In re *Beltway One Development Group, LLC*, 547 B.R. 819, 830 (BAP 9th Cir. 2016). If, and only if, default interest is enforceable under non-bankruptcy law, the Court must then consider whether the presumptive rule allowing default interest is subject to rebuttal based on equitable considerations. *See id.* (*citing In re Laymon*, 958 F.2d 72, 75 (5th Cir. 1992) (allowing default interest depending on "the equities involved in the bankruptcy proceeding") and *In re Terry, Ltd., P'ship*, 27 F.3d 241, 243 (7th Cir.), *cert. denied*, 513 U.S. 948 (1994) (presumption in favor of contractual default rate is "subject to rebuttal based on equitable considerations."). LVDF seeks to

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recover approximately $1,200,000[8] in purported default interest, including for times when there were unquestionably no defaults, and certainly not material defaults, under the CLA. However, LVDF has not shown, nor can it show, that it is permitted to collect default interest as such interest does not compensate LVDF for any loss, but instead serves only to penalize Front Sight. To be sure, LVDF is also seeking recovery of attorney's fees, late fees, and foreclosure costs. There cannot be any uncompensated harm to which the default interest would apply. Furthermore, for all the other reasons set forth in herein, including LVDF's fraud and misrepresentation, its wrongful declaration of a default, and its wrongful foreclosure attempts, the equities weigh against permitting LVDF to recover default interest (after all, Front Sight was not even in default) and therefore, this Court should not allow a claim for default interest.

Fourth, at most, LVDF may recover reasonable late fees or default interest, but not both. "The decisional law is uniform that over-secured creditors may receive payment of either default interest or late charges, but not both." *In re 785 Partners LLC*, 470 B.R. 126, 137 (Bankr. S.D.N.Y. 2012)(citing *In re Vest Assocs.,* 217 B.R. 696, 701 (Bankr. S.D.N.Y. 1998); *accord In re Dixon,* 228 B.R. 166, 177 (W.D.Va.1998); *In re Market Center East Retail Property, Inc.,* 433 B.R. 335, 365 (Bankr.D.N.M.2010); *In re Cliftondale Oaks, LLC,* 357 B.R. 883, 887 (Bankr. N.D.Ga. 2006); *In re Route One West Windsor Ltd. P'ship,* 225 B.R. 76, 92 (Bankr.D.N.J.1998); *In re 1095 Commonwealth Ave. Corp.,* 204 B.R. 284, 305 (Bankr.D.Mass.1997); *In re Kalian,* 178 B.R. 308, 312 n. 9 (Bankr.D.R.I.1995)). "The reason is that the late fee and default interest are designed to compensate the lender for the same injury, and awarding both amounts to double recovery." *Id.* As set forth in the Amended Claim, LVDF is seeking to charge $1,461,089.03 in late fees and at least $1,200,000 in default interest. These amounts are in addition to $2,203,448.47 in attorney's fees and $159,155.55 in foreclosure costs being sought. In other words, ***on a $6,375,000 principal loan***, LVDF is seeking to collect more than $6,305,000 for its collection of the principal. These amounts are unreasonable, unjustified, and should not be allowed. However,

[8] LVDF does not break down its non-default and default interest amounts in its claim and instead, identifies a total amount of interest due of $2,483,315.5. However, the based on the amounts claim, it appears that the purported default portion of the interest included in the calculation is at least $1,200,000.

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even if LVDF is entitled to collect any amounts asserted in the LVDF Claim (which it is not for the reasons set forth herein), LVDF certainly cannot double its principal amount through charging attorney's fees, ***and*** foreclosure fees, ***and*** late fees, ***and*** default interest and, *at a minimum,* some of them must be disallowed.

F. Front Sight May Offset Its Damages Against Any Allowed Claim.

As set forth in Section III(G) and the Adversary Proceeding, LVDF's actions caused significant damage to Front Sight and LVDF is liable to Front Sight for significant amounts.

First, Front Sight's pre-petition legal fees related to the State Court Action and wrongful foreclosure exceeded one million dollars. These attorneys' fees would not have been incurred but for the LVDF Parties' breaches and wrongful conduct.

Second, LVDF's failure to fund and attempts to wrongfully foreclose caused: (a) the loss of momentum Front Sight suffered in completing the development of the Vacation Resort & Club, (b) the loss of member confidence Front Sight suffered due to all the delays in the Project, (c) the resulting reduction in membership sales, (d) the increased difficulty for Front Sight to obtain additional financing to complete the Project, and (e) Front Sight's payment of marketing expenses and interest. Pre-Petition Date, Front Sight's lost profits / damages expert estimated Front Sight's damages and lost opportunity costs due to LVDF's breach of the CLA at over $20 million. Front Sight is entitled to its estimated pre-petition damages and lost opportunity costs.

Third, Front Sight has actual damages and costs relating to Front Sight's Chapter 11 Case – which filing would not have been necessary but for LVDF's failure to fund under the CLA and LVDF's wrongful foreclosure action.

Fourth, as a result of LVDF's fraud and breaches, and the path they sent Front Sight on, Front Sight has been sold through the Plan and claims asserted against Front Sight.

Moreover, as set forth in the Stay Violation Stipulation, Front Sight may seek to offset its fees incurred as a result of LVDF's stay violations. Damages for a stay violation include recovery of actual damages incurred, including attorneys' fees. *See In re Dyer*, 322 F.3d 1178, 1190 (9th Cir. 2003) (awarding civil contempt sanctions for violation of the stay under Section 105). Here, Front Sight, and other professionals which have been or will be paid through Front Sight's estate,

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have incurred no less than $75,000 in fees as a result of LVDF's stay violations, which amounts are a proper offset against the claim. *See* ECF Nos. 387, 590, 596, 600.

In sum, any claim of LVDF is dwarfed by the damages owed by LVDF to Front Sight resulting in a $0.00 distribution to LVDF even if portions of its POC are allowed at all.

G. Objection to Late-File Amendment to LVDF Claim.

Fed. R. Civ. P. 15, made applicable pursuant to Fed. R. Bank. P. 7015, gives a bankruptcy court discretion to grant or deny leave to amend claims. *See In re Enron*, 419 F. 3d 115 (2nd Cir. 2005). Consistent with Fed. R. Civ. P. 15, an amended claim "cannot relate back to the date of the original proofs [if the] original claims did not give fair notice of the conduct, transaction, or occurrence that forms the basis of the claim asserted in the amendment." *In re Solari*, 63 B.R. 115, 117 (B.A.P. 9th Cir. 1986). Thus, if new claims are added, the amended claim is an untimely proof of claim that must be disallowed.

The Bar Date in this case was August 8, 2022, on which date LVDF filed its Initial Claim. The Initial Claim asserted only a secured claim based on "money loaned" and, as its sole support, attached the deed of trust and amendment thereto related to the CLA, as well as the *Amended and Restated Promissory Note*. Based on the Initial Claim, Front Sight understood the sole claim LVDF was asserting against it was a secured claim based on funds advanced under the CLA.

On December 23, 2022, without seeking leave of court to file an amendment and while the Debtor Objection and Joinder were pending, LVDF filed the Amended Claim. LVDF adds, as a new claim, "fraud claim as asserted in Adv. Case No. 22-01116-ABL (filed on June 23, 2022), which is incorporated as if fully stated herein." *See* Amended Claim. This new basis for a claim, an unsecured claim, fundamentally changes the nature of the Initial Claim.[9] As such, it does not relate back to the Original Claim and is a late-filed claim, having been filed almost five months after the Bar Date and after objections were pending, that must be disallowed.

[9] LVDF cannot now claim that the adversary complaint was an informal claim. An informal claim exists when there is a demand showing the nature and the amount of the claim and evidences an intent to hold the debtor liable. *In re Edwards Theatres Circuit Inc.*, 70 Fed. Appx. 950, 952 (9th Cir. 2003) Here, LVDF filed a formal claim and excluded as basis thereof any of the claims that were asserted in the Adversary Action (all of which have been deemed to be property of the estate, in any event), which evidenced an intent not to pursue those claims against Front Sight.

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V. CONCLUSION

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

DATED this 30th day of December, 2022.

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