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14 **UNITED STATES BANKRUPTCY COURT**
15 **DISTRICT OF NEVADA**

16 In re:

17 FRONT SIGHT MANAGEMENT, LLC
18 Debtor.

Case No. BK-S-22-11824-ABL
Chapter 11

REPLY IN SUPPORT OF MOTION TO
APPOINT AN EXAMINER

21 LAS VEGAS DEVELOPMENT FUND, LLC (“**LVDF**”), by and through its attorney
22 Brian D. Shapiro, Esq., of the Law Office of Brian D. Shapiro, LLC, hereby submits its reply in
23 support of motion to appoint an examiner. This reply is based upon the attached points and
24 authorities, the pleadings on file and any oral argument that this Court may permit.¹
25

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27
28 ¹ All references to “ECF No.” are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references to “Section” or “§§ 101-1532” are to the provisions of the Bankruptcy Code. All references to “FRCP” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

MEMORANDUM OF POINTS AND AUTHORITES

1
2 The Bankruptcy Code, under Section 1104(2), mandates the appointment of an examiner
3 when the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes,
4 or owing to an insider, exceed \$5,000,000. Here, the Debtor's fixed debts exceed \$5,000,000 and
5 an examiner is required to be appointed. This is a requirement under the Bankruptcy Code.²
6 Moreover, LVDF has provided citations to the record in support of such request and has requested
7 this Court focus the examiner on certain topics. This Court has the ability to expand and/or limit
8 such scope.
9

10
11 This is not a case in which LVDF requested at the last minute for an appointment of an
12 examiner to potentially interfere with a proposed plan and disclosure statement hearing. Rather,
13 LVDF timely moved for such appointment.³

14 As stated herein, there is a need for an independent third party to examine the transactions of
15 this Debtor. Neither the Debtor nor the UCC are independent, and their fiduciary obligation is
16 not to this Court but rather to their own contingency.
17

18 **I. FACTS**

19 Since the filing of the motion for an examiner, the 341 meeting has taken place, the Debtor
20 has filed its disclosure statement and plan of reorganization and the Official Creditor's Committee
21 disclosed the name of their chairperson. These new events accentuate the need for an independent
22 party to investigate this Debtor.
23

24
25
26 ² The Debtor's assertion that seeking to enforce a provision under the bankruptcy code is tantamount to scorched
27 earth litigation tactics is a fallacious argument. The bankruptcy code expressly mandates such appointment and
timely exercising a right provided in the bankruptcy code should never be considered a scorched earth litigation
tactic.

28 ³ Similarly, the UCC argues that this is nothing more than a transparent litigation tactic designed to impede
the Debtor's restructuring efforts. The restructuring efforts just began, and the motion was filed prior to the filing
of a plan and disclosure statement.

1 Members as Creditors

2 Previously, the Debtor submitted a declaration that it had approximately 80,000 creditors but
3 now, the Debtor has taken the position that it “doesn’t believe they actually have true unsecured
4 claims, and that’s why the schedules were prepared the way they were.” The number of creditors
5 were addressed at the meeting of creditors. A copy of pages 33-35 of the 341 transcript is attached
6 hereto as **Exhibit 1**. Such transcript states:

7
8 MR. MCDONALD: Okay. And one question I had was if you look at the schedules, there's a
9 schedule on there for people that have non-priority, unsecured claims. And a lot of them, or maybe
10 actually probably most of them, the nature of their claim or the basis of their claim, it says
11 membership claim. And based on the number each unsecured, non-priority claimant has a number.
12 It looks like there's about 2,904 of these unsecured creditors, most of whom are members -- have
13 membership claims. So why aren't there 250,000 or more claims on here for membership claims?
14 Why is there only about 3,000 or so?

15
16 MR. PIAZZA: Well, that's probably a question that would be best answered by Mr. Gubner.

17
18 MR. MCDONALD: But I guess --

19 MR. GUBNER: I think, Mr. McDonald, that the answer is, is that the debtor doesn't consider
20 them creditors. The issue is whether or not the creditors that we did list, they -- we believe that
21 there is, in fact, a claim. The ones that aren't listed, in the past there were different monikers
22 associated with people that were allowed to use the facility, and moving forward what's become
23 clear to the debtor and its operational advisors is that it has to operate based on a yearly type fee
24 in order to cover its overhead.
25

26 But there's only so many opportunities to provide people access, and at some point, the
27 financial model had to change. So the purpose of giving everybody an alleged claim notice is
28

1 that the debtor doesn't believe that they actually have true unsecured claims, and that's why the
2 schedules were prepared the way they were.

3 MR. MCDONALD: Well -- okay. So, Dr. Piazza, is what Mr. Gubner said, is that something
4 you agree with?
5

6 MR. PIAZZA: Yes.

7 MR. MCDONALD: Okay. And I apologize because I'm not exactly a genius so I -- sometimes
8 I don't get it, I don't understand things. I got to figure out three questions. So if the debtor has
9 250,000 members, do those members pay to be members?
10

11 MR. PIAZZA: 181,000 of those members have not paid us anything

12 **PLAN AND DISCLOSURE STATEMENT**

13 During the argument for DIP Financing, the Debtor stated that “we've been preparing for some
14 time to move at light speed as I'm sure the Court will encourage us to do, and we've prepared to
15 do that. And in fact, as the proposed DIP financing proposes, we have to file a plan and disclosure
16 statement within 30 days or that becomes a default. And I believe we can do that.” See ECF 130
17 (Partial Transcript) p. 47-48, l. 24-4. The DIP Lender and the Debtor thereafter agreed, and this
18 Court ordered that the plan and disclosure statement shall be filed on or before July 15, 2022.
19 See, ECF No. 228 (“Court Order”), p. 16, l. 5-6.
20

21 Despite such promises to move at light speed, the Debtor’s plan and disclosure statement is
22 not close to being completed and states that it “will be filing an amended disclosure statement and
23 plan on or before August 4, 2022 that includes more detailed information and financial projection
24 and reserves the right to make further amendments and modifications. See, ECF No. 270, p. 7, l.
25 1-7.
26
27
28

1 **Chair of Creditor's Committee**

2 Less than 24 hours prior to filing bankruptcy, ALM Investments, LLC became a creditor of
3 the Debtor by directly paying Province, LLC, the Debtor's financial advisor, and was placed on
4 the top 20 creditor's list. See, ECF No. 1 and ECF No. 116. ALM Investments, LLC by and
5 through Mark Eagleton, is the Chairperson of the Official Committee of Unsecured Creditors.
6 See, ECF No. 232, l. 22-25

8 **II. THE APPOINTMENT OF AN EXAMINER IS MANDATORY**

9 When a statute's language is plain, the sole function of the courts — at least where the
10 disposition required by the text is not absurd — is to enforce it according to its terms." *Lamie v.*
11 *United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). On its face, Section
12 1104(c)(2) mandates the appointment of an examiner when a party in interest moves for an
13 examiner and the debtor has \$5,000,000 of qualifying debt.

14 Although the Ninth Circuit has not considered whether the provision is mandatory. There are
15 a number of courts who have held that such provision is mandatory, including the Sixth Circuit.
16 See *In re Revco D.S., Inc.*, 898 F.2d 498, 500-01 (6th Cir. 1990) (holding that appointment of
17 examiner is mandatory in view of the phrase "the court shall order").

18 The Debtor cites to *In re PG&E Corp*, 2020 LW 9211190, at *2 (Bankr. N.D. Cal. July 6,
19 2020), in support of its position that the appointment of an examiner is not mandatory. However,
20 Judge Montali in the PG&E Corp case **was not** analyzing Section 1104(c)(2) as to the
21 applicability of the appointment of an examiner once the \$5 million dollar threshold was met.
22 Rather, Judge Montali focused upon whether the appointment was appropriate and needed due to
23 irregularities in voting on a joint chapter 11 plan. The Court found that an investigation already
24 took place and the appointment of an examiner was not needed.
25
26
27
28

1 LVDF recognizes that by virtue of § 1107(a), a chapter 11 debtor in possession stands in the
2 shoes of a trustee and is a fiduciary for the estate and its creditors. See, e.g., *Thompson v. Margen*
3 (*In re McConville*), 110 F.3d 47, 50 (9th Cir. 1997) (stating that chapter 11 debtors in possession
4 "were fiduciaries of their own estate owing a duty of care and loyalty to the estate's creditors"),
5 cert. denied, 522 U.S. 966 (1997). However, when the debtor is a corporation, the debtor in
6 possession's fiduciary obligations to the corporation, its creditors and shareholders, fall upon the
7 officers and directors. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355
8 (1985) (stating that "the debtor's directors bear essentially the same fiduciary obligation to
9 creditors and shareholders as would the trustee for a debtor out of possession"); *Holta v. Zerbetz*
10 (*In re Anchorage Nautical Tours, Inc.*), 145 B.R. 637, 643 (9th Cir. BAP 1992) ("When the debtor
11 is a corporation, corporate officers and directors are considered to be fiduciaries both to the
12 corporate debtor in possession and to the creditors.").

13
14
15 The question is whether Piazza, and the VNV Trusts are acting as an independent fiduciary.
16 The Debtor recognizes that there are pre-petition allegations of fraudulent transfers and self-
17 dealings, but they have chosen not to pursue them. The Debtor recognizes that the unlisted
18 members may believe that they are creditors but because the Debtor does not believe it to be so,
19 it has not listed them in their schedules.
20

21
22 Similarly, the UCC has a fiduciary obligation to its own contingency not the bankruptcy
23 estate nor this Court. The chair of that committee appears to be a friend of Piazza who loaned
24 funds, by a direct payment to Province, to the Debtor within 24 hours of its filing to pay for its
25 own financial advisor.

26
27 Although one would expect the Committee to be aligned with LVDF on this motion, it attacks
28 it timeliness and its request. It contends that there is no need for an examiner, that the motion is

1 interposed for litigation tactics and there are no funds to pay for an examiner. The Committee's
2 argument, however, makes no sense. An examiner is an independent party who can investigate
3 certain topics that this Court so authorizes and in fact could assist the Debtor and the Creditor's
4 Committee.
5

6 It should come as no surprise that the benefits of an examiner outweigh any detriment in the
7 early stages of a case. First, there is much distrust between the Debtor, Creditors and LVDF. A
8 way to bridge that gap is for a third party to be totally independent. *Matter of Baldwin United*
9 *Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985) ("Examiner's legal status is unlike that of any other
10 court-appointed officer which comes to mind. He is first and foremost disinterested and
11 nonadversarial. The benefits of his investigative efforts flow solely to the debtor and to its creditors
12 and shareholders, but he answers solely to the Court. As was noted in *In re Hamiel Sons, Inc.*, 20 B.R.
13 830, 832 (Bankr.S.D. Ohio 1982), an examiner "constitutes a Court fiduciary and is amenable to no
14 other purpose or interested party."). See also, *In re Congaree Triton Acquisitions, LLC*, 492 B.R.
15 843, 853 (Bankr. D.S.C. 2012) ("The Examiner is "a court fiduciary." *Matter of Hamiel & Sons,*
16 *Inc.*, 20 B.R. 830, 832 (Bankr.S.D. Ohio 1982).
17
18

19 Second, the duties of an examiner are set forth in 11 U.S.C. § 1106(a)(3) (4), plus any other
20 duties of the trustee that the Court orders the debtor-in-possession not to perform. (11 U.S.C. §
21 1106(b)). The examiner's primary duty is to investigate and report on the financial position of the
22 debtor, the operation of the debtor's business, and the desirability of the continuance of the business.
23

24 As the Sixth Circuit in *In re Big Rivers Elec. Corp.*, 355 F.3d 415 (6th Cir. 2004) explained,
25 an examiner has a duty

26 (1) to remain neutral and disinterested. Id. at 428-29.

27 (2) "may not have a "material adverse" interest to any party to the bankruptcy "for any
28 reason," either at the time of appointment or during the course of bankruptcy. Id. at 433.

1 (3) of loyalty to the creditors and shareholders. *Id.* at 435.

2 An examiner answers directly to the court. *Collier Comp., Employment & Appointment of Tr.*
3 *& Prof'l. in Bankr. Cases, P. 1A.09* (2003). Upon appointment of an examiner, this Court can order
4 the examiner to investigate the debtor's conduct, can expand its duties and/or limit its duties. The
5 Court has the flexibility to tailor the examiners' role in this case.
6

7 Despite the arguments made against the appointment of an examiner in this mega case, there
8 are other benefits to all parties and this Court. An examiner can assist in

- 9 • an early determination of whether the debtor's business has a meaningful chance of
10 reorganizing successfully.
- 11 • reduce the time and money that might have been later spent in investigation by
12 multiple parties by providing credible results because an impartial independent third
13 party conducted the investigation.
- 14 • can be concluded more quickly than another party's investigation, since the examiner
15 will not be usually distracted by other aspects of reorganization.
- 16 • using an examiner can avoid disrupting the debtor's business since an examiner does
17 not take control of the business as a trustee would.
- 18 • an examiner may be able to diffuse tensions between the parties in several ways,
19 including mediating plan negotiations or other disputes, assisting the debtor with
20 management or reorganization issues, or performing other tasks that are best
21 performed by a party unconnected with any of the constituencies of the case
22
23

24 By seeking an examiner, LVDF has accelerated an investigation into the Debtor, its
25 transactions and potential failure to list all unsecured creditors (the UCC's unlisted contingency).
26 For instance, the automatic stay stopped the continued prosecution of the fraudulent transfer
27
28

1 actions, and the Debtor appears that it does not want to prosecute such claims. An examiner can
2 focus its energy on analyzing such transactions

3 In addition, the Committee apparently misperceives the object and effect of the
4 appointment of an examiner. Specifically, the Committee's opposition states this is just a litigation
5 tactic. However, the examiner's report may contribute to a determination of who will prosecute
6 the fraudulent transfer claims, where they will be prosecuted and if the principals are the alter ego
7 of the Debtor. The examiner can also assist in resolving disputes as well as assisting in plan
8 formation.
9

10 Unless the Debtor is attempting to avoid detection of bad acts, the benefits of an examiner
11 in this case is outweighed by any detriment. In fact, the utilization of an examiner at this early
12 stage could assist this court and the parties in reaching resolutions of disputes.
13

14 The UCC and Debtor also argue that it will be costly, and they are working on a string
15 shoe budget. However, the budget reflects otherwise, and the bankruptcy schedules reflect that
16 this is a solvent estate. The examiner becomes a Chapter 11 administrative creditor that shares
17 alike with other professionals. To the extent that a third party to whom is selected as an examiner
18 is concerned about payment of its fees, it may decline such position.
19

20 Under these circumstances, and especially in light of the circumstances of the insider
21 transactions, the failure to list all of the members as creditors and the Chairperson of the UCC
22 becoming a creditor within hours prior to the bankruptcy filing, the appointment of an examiner to
23 investigate such matters (and others) is warranted.
24
25
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CERTIFICATE OF SERVICE

On July 18, 2022, this pleading was served upon all registered user in accordance with the Court's CM/ECF service. Such registered users for this case included the parties listed below.

Dated 7-18-2022

/s/ Brian D. Shapiro, Esq.
Brian D. Shapiro, Esq.
Attorney for LVDF

Served Upon the Following Registered Users

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28

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

IN RE: .
. Case No. 22-11824
. Chapter 11
FRONT SIGHT MANAGEMENT, LLC, .
. Debtor. .
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. .
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TRANSCRIPT OF 341 MEETING OF CREDITORS

Las Vegas, Nevada

June 23, 2022

APPEARANCES:

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For the Debtor: BG Law LLP
By: STEVEN T. GUBNER, ESQ.
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transcript produced by transcription service.

1 them -- you let the debtor use them for its classes, right?

2 MR. PIAZZA: Right.

3 MR. MCDONALD: So is there anything -- does the
4 debtor have anything else like a M-60 or, I don't know, sniper
5 rifle?

6 MR. PIAZZA: Well, again, your question regarding
7 exotic is subjective. To somebody like me or our students,
8 they're simply weapons. They're simply guns. But --

9 MR. MCDONALD: Yeah.

10 MR. PIAZZA: -- yes, we have Uzi submachine guns and
11 M-16s.

12 MR. MCDONALD: Okay. That has nothing to do with the
13 bankruptcy. I was just curious. But, fair enough. Let's see
14 here. Okay. This does relate to the business and the
15 bankruptcy, and here's my question, which is like -- so I know
16 that this has I think like 200 and -- about 250,000 members.
17 Is that fair to say?

18 MR. PIAZZA: Correct.

19 MR. MCDONALD: Okay. And one question I had was if
20 you look at the schedules, there's a schedule on there for
21 people that have non-priority, unsecured claims. And a lot of
22 them, or maybe actually probably most of them, the nature of
23 their claim or the basis of their claim, it says membership
24 claim. And based on the number each unsecured, non-priority
25 claimant has a number. It looks like there's about 2,904 of



1 these unsecured creditors, most of whom are members -- have
2 membership claims. So why isn't there 250,000 or more claims
3 on here for membership claims? Why is there only about 3,000
4 or so?

5 MR. PIAZZA: Well, that's probably a question that
6 would be best answered by Mr. Gubner.

7 MR. MCDONALD: But I guess --

8 MR. GUBNER: I think, Mr. McDonald, that the answer
9 is, is that the debtor doesn't consider them creditors. The
10 issue is whether or not the creditors that we did list, they --
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14 and moving forward what's become clear to the debtor and its
15 operational advisors is that it has to operate based on a
16 yearly type fee in order to cover its overhead.

17 But there's only so many opportunities to provide
18 people access, and at some point, the financial model had to
19 change. So the purpose of giving everybody an alleged claim
20 notice is that the debtor doesn't believe that they actually
21 have true unsecured claims, and that's why the schedules were
22 prepared the way they were.

23 MR. MCDONALD: Okay. Fair enough. But --

24 MR. PIAZZA: And Mr. Piazza can confirm that under
25 oath if you so desire.



1 MR. MCDONALD: Well -- okay. So, Dr. Piazza, is what
2 Mr. Gubner said, is that something you agree with?

3 MR. PIAZZA: Yes.

4 MR. MCDONALD: Okay. And I apologize because I'm not
5 exactly a genius so I -- sometimes I don't get it, I don't
6 understand things. I got to figure out three questions. So if
7 the debtor has 250,000 members, do those members pay to be
8 members?

9 MR. PIAZZA: 181,000 of those members have not paid
10 us anything.

11 MR. MCDONALD: Then what makes them members? They
12 just sign up?

13 MR. PIAZZA: They were given a membership by another
14 member, or another member sold them a membership. We never
15 received any income from 181,000 of the members.

16 MR. MCDONALD: So is the -- so where did those other
17 people get the memberships? Did they buy those from the debtor
18 company?

19 MR. PIAZZA: They either purchased them or they were
20 given them as free bonuses that they could sell or transfer to,
21 you know, family members or friends.

22 MR. MCDONALD: So these are things that can be -- let
23 me ask you this. Are these paper documents, these memberships?
24 Or I guess are they -- is the membership interest set forth on
25 a paper document or some type of writing?



1 going off the record.

2 (Proceedings concluded at 1:57 p.m.)

3 * * * * *

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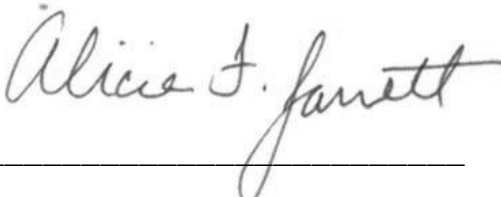
13

14 C E R T I F I C A T I O N

15

16 I, Alicia Jarrett, court-approved transcriber, hereby
17 certify that the foregoing is a correct transcript from the
18 official electronic sound recording of the proceedings in the
19 above-entitled matter.

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24 ALICIA JARRETT, AAERT NO. 428 DATE: July 5, 2022

25 ACCESS TRANSCRIPTS, LLC

