IN THE SUPREME COURT OF THE STATE OF NEVADA

FRONT SIGHT MANAGEMENT LLC, a Nevada Limited Liability Company,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE,

Respondents,

and

LAS VEGAS DEVELOPMENT FUND LLC, a Nevada Limited Liability Company; EB5 IMPACT CAPITAL REGIONAL CENTER LLC, a Nevada Limited Liability Company; EB5 IMPACT ADVISORS LLC, a Nevada Limited Liability Company; ROBERT W. DZIUBLA, individually and as President and CEO of LAS VEGAS DEVELOPMENT FUND LLC and EB5 IMPACT ADVISORS LLC; JON FLEMING, individually and as an agent of LAS VEGAS DEVELOPMENT FUND LLC and EB5 IMPACT ADVISORS LLC; LINDA STANWOOD, individually and as Senior Vice President of LAS VEGAS DEVELOPMENT FUND LLC and EB5 IMPACT ADVISORS LLC,

Real Parties in Interest.

No.: _____

Dist. Ct. Case No.: A-18-781084-B

Electronically Filed
Dec 18 2019 10:16 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Docket 80242 Document 2019-51134

PETITION FOR EXTRAORDINARY WRIT RELIEF

Petitioner FRONT SIGHT MANAGEMENT, LLC ("Petitioner" or "Front Sight"), by and through counsel, John P. Aldrich, Esq., and Matthew B. Beckstead, Esq., of the Aldrich Law Firm, Ltd., respectfully petitions this Honorable Court for an extraordinary writ of mandamus and/or prohibition, as appropriate, vacating two (2) Orders of Respondent Eighth Judicial District Court (the Honorable Timothy C. Williams). In one Order, the district court denied Front Sight's motion to quash the subpoenas issued by Real Parties in Interest/Defendants[1] (collectively "Defendants") to Front Sight's bank and accountant. In the other Order, the district court granted all Defendants' motions to quash various subpoenas sought to be issued by Front Sight to Defendants' banks. The Court should intervene now; otherwise, Front Sight stands to suffer irreparable harm (1) by Defendants' obtaining Front Sight's financial information through fraud and to further their efforts to take over Front Sight's property and business, and (2) by Defendants' refusal to provide or allow discovery that Front Sight believes will

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[1] Real Parties in Interest/Defendants collectively refers to Entity Defendants Las Vegas Development Fund LLC ("LVDF," the lender), EB5 Impact Advisors LLC ("EB5IA," the purported marketing entity), and EB5 Impact Capital Advisors LLC ("EB5IC" or the "Regional Center," the USCIS-approved regional center), as well as Individual Defendants Robert Dziubla ("Dziubla"), Jon Fleming ("Fleming"), and Linda Stanwood ("Stanwood").

conclusively prove Defendants' fraudulent representations, conversion, breaches of contract, and misuse of Front Sight's funds.

DATED this 17th day of December, 2019.

ALDRICH LAW FIRM, LTD.

John P. Aldrich, Esq.
Nevada Bar No. 6877
Matthew B. Beckstead, Esq.
Nevada Bar No. 14168
7866 West Sahara Avenue
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702-853-5490
Attorneys for Petitioner

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that Petitioner Front Sight has no parent corporations and there are no publicly-held companies who own 10% or more of Petitioner's shares.

Law firms whose partners or associates have appeared for the party in the underlying case or are expected to appear for the party in this court include:

John P. Aldrich, Catherine Hernandez, and Matthew B. Beckstead of Aldrich Law Firm, Ltd. for Petitioner Front Sight Management, LLC.

Kathryn Holbert, of Farmer Case & Fedor, and C. Keith Greer, for Real Parties in Interest/Defendants Las Vegas Development Fund LLC, EB5 Impact Advisors LLC, EB5 Impact Capital Advisors LLC, Robert Dziubla, Jon Fleming, and Linda Stanwood.

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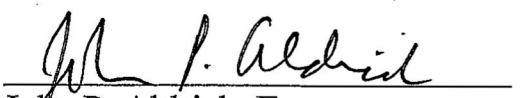
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These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

DATED this 17th day of December, 2019.

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II.

ROUTING STATEMENT PURSUANT TO RULE 21(a)(3)(A)

This case is retained by the Supreme Court under NRAP 17(a)(9) because it originated in the Eighth Judicial District Court's business court.

III.

INTRODUCTION

Defendants duped Front Sight out of hundreds of thousands of dollars by representing that they had substantial experience raising funds under the United States Customs and Immigration Service's EB-5 Program ("EB-5 funds") (they had never raised any money for a completed project) and promising to raise tens

of millions of dollars in a short amount of time. The federal EB-5 program allows an immigrant investor who meets certain criteria to invest in an American company, and if the targeted number of jobs is created, the immigrant investor may apply for a green card two years after being admitted to the United States as a conditional permanent resident.

Additionally, after making many additional fraudulent representations, Defendants fraudulently induced Front Sight into signing a Construction Loan Agreement, before providing a mere fraction of the amount of money they promised to raise. Now, Defendants are, without exaggeration, attempting to unlawfully and fraudulently steal Front Sight's real and personal property with the intent, stated on the record, to take over Front Sight's business and operate it themselves. (PA V, 00890.) While discovery disputes are, admittedly, not ordinarily subject to extraordinary writ relief, this Honorable Court has sometimes allowed it. *See, e.g., Valley Health Sys. LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 170-71, 252 P.3d 676, 678-79 (Nev. 2011), citing *Wardleigh v. District Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183 (1995). Petitioner now believes the stakes and the circumstances involved in the underlying action warrant writ relief from this Court to intervene in the underlying action and correct an abuse of discretion by the district court related to subpoenas sought to be issued by the parties.

First, the district court denied Front Sight's motion to quash subpoenas to Front Sight's bank, Bank of America, N.A. ("Bank of America"), and Front Sight's accountant, Lucas, Horsfall, Murphy & Pindroh, LLP ("Lucas Horsfall"). (PA XVIII, 03681-03686.) Those subpoenas seek sensitive financial information of Front Sight, and that discovery serves no purpose in this litigation – but Defendants want to obtain it to further their nefarious purpose to take over Front Sight's project and business, allegedly pursuant to a Construction Loan Agreement that Defendants fraudulently induced Front Sight into signing.

Second, the district court also granted a motion to quash subpoenas filed by Defendants. (PA XVIII, 03658-03664.) Those subpoenas were to be served by Front Sight on banks where the various Defendants have or had bank accounts. (PA VIII, 01414-01418.) The documents Front Sight seeks are vital to its claims because they comprise key elements of Petitioner's case against Defendants. There are five reasons why the district court abused its discretion in granting Defendants' motion to quash Front Sight's subpoenas to Defendants' banks. The first reason is procedural; the other four reasons demonstrate that these records are both relevant and proportional to the needs of the case. Those reasons include: (1) Defendants filed their motion to quash at least two days late; (2) Defendants took hundreds of thousands of dollars from Front Sight, allegedly in furtherance of Front Sight's project, but Defendant Dziubla intentionally destroyed Defendant

EB5IA's financial records and the scant accounting Defendant EB5IA provided pursuant to the district court's two orders showed payments to Defendants Dziubla and Fleming and/or entities controlled by them; (3) Front Sight's claims include alter ego claims and Defendants did not distinguish between the various entities; (4) Defendants induced Front Sight into entering into the Construction Loan Agreement by making repeated misrepresentations about their ability to raise funds and/or the number of investors who had already invested. These bank records will allow Front Sight to show these statements were false; and (5) Section 1.3 of the Construction Loan Agreement allows Front Sight to prepay the loan if no immigrant investor's I-829 petition is still pending and Defendants have taken the position that there are immigrant investors whose petitions have not been fully adjudicated. The bank records would allow Front Sight to determine if the immigrant investors exist.

This Honorable Court should intervene now and (1) issue a writ of prohibition that bars Defendant LVDF (and the other Defendants) from obtaining Front Sight's bank statements and tax returns and accompanying documentation (all of which are irrelevant to the merits of, and not proportional to the needs of, the case, and which Front Sight believes Defendants intend to use for nefarious purposes outside this litigation), and (2) issue a writ of mandamus that vacates the district court's order granting Defendants' motion to quash subpoenas to certain

banks, thus permitting Front Sight to obtain financial and bank account information from Defendants' banks; this information is relevant and proportional to show Defendants' fraudulent use of Front Sight's funds as part of Defendants' fraudulent scheme, and to establish that Defendants had not actually secured investors as they claimed they had prior to and after Front Sight entered into the Construction Loan Agreement.

The district court's discovery orders have hamstrung Petitioner's ability to legitimately use its subpoena power to obtain relevant documents for which there appear to be no substitute, in part because Defendants Dziubla and EB5IA destroyed the documents, while simultaneously allowing Defendants to proceed with their subpoenas for documents that are undiscoverable, irrelevant, which Defendants seek to use for their own nefarious purposes (including further stifling of the project), and which Defendants have shown they will not keep confidential. (PA III, 00529-00534.)

As for Defendants' discovery of Front Sight's taxes and bank records, despite the fact that only Defendant LVDF has even a remote argument that it is entitled to Front Sight's records, the district court granted a motion brought by all Defendants, without limitation. But more importantly, Defendants cannot be trusted to protect this information, having already disclosed publicly some of Front Sight's tax records that they had previously obtained from Front Sight

during execution of their fraudulent scheme. (PA III, 00529-00534.) Defendants have no right to the information requested in the subpoenas to Front Sight's bank and accountant; Defendants stopped lending money on the project approximately two years ago and they seek to take over Front Sight's project and business. There is no adequate, speedy remedy at law for Petitioner to otherwise pursue, warranting writ relief from this Court.

Similarly, Petitioner must be able to prove its case in the evidentiary hearing on Petitioner's motion for preliminary injunction to restrain Defendant LVDF's (also referred to in the underlying action as "LVD Fund") nonjudicial foreclosure sale of Petitioner's commercial property, part of which has already been consolidated under Rule 65(a)(2) with the trial. The district court's granting of Defendants' motion to quash jeopardizes Front Sight's ability to do so. The value of Front Sight's real property alone is agreed to be at least $25 million, and the land on which it is situated is agreed to be another $50 million, and Front Sight's business is tied to its property. (PA IV, 00663.) Petitioner must be permitted to conduct proper discovery to prove Defendants' blatant fraudulent misrepresentations and theft of Front Sight's funds.

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IV.

ISSUES PRESENTED

1. Taking into consideration the potential for irreparable harm to Petitioner, the magnitude of the potential harm, the lack of adequate remedy at law, and other considerations such as judicial economy, efficiency, urgency, and necessity, **do the circumstances of this case justify this Court exercising its discretion to consider this writ petition and grant writs of mandamus and prohibition related to two orders of the district court related to discovery subpoenas?**

2. Did the district court abuse its discretion when it denied Front Sight's motion to quash the subpoenas issued by Defendants to Front Sight's bank and accountant, despite the fact that Front Sight has proven beyond dispute that it properly spent the money loaned by Defendant LVDF, and where the subject subpoenas seek to obtain information that is irrelevant, sensitive, not proportional to the needs of the case, and, in particular with respect to Front Sight's tax returns, generally undiscoverable as a matter of Nevada law? ***And accordingly,*** **should this Court grant a writ of <u>prohibition</u> that precludes disclosure of records retained by Front Sight's bank and accountant to Defendants, and which effectively overturns the district court's denial of Front Sight's motion to**

quash the subpoenas issued by Defendants to Front Sight's bank and accountant?

3. Did the district court abuse its discretion when it granted all Defendants' motions to quash various subpoenas sought to be issued by Front Sight to Defendants' banks, despite the fact that Defendants' motions to quash were procedurally defective and certain Defendants have admitted, among other things, to destroying critical financial documents and misusing Front Sight's money that was intended for marketing of Front Sight's project, including making payments to Defendants Dziubla and Fleming individually, as well as entities controlled by Defendants Dziubla and Fleming? ***And accordingly*, should this Court issue a writ of <u>mandamus</u> that directs the district court to allow the issuance of subpoenas by Front Sight to Defendants' banks, including Open Bank, Signature Bank, Bank of Hope, and Wells Fargo Bank, and effectively overturning the order granting all Defendants' motions to quash various subpoenas sought to be issued by Front Sight to Defendants' banks, including Open Bank, Signature Bank, Bank of Hope, and Wells Fargo Bank?**

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V.

RELIEF REQUESTED

Front Sight seeks a writ of prohibition and a writ of mandamus, as follows:

1. Despite the fact that Front Sight has proven beyond dispute that it properly spent the money loaned by Defendant LVDF, the district court denied Front Sight's motion to quash the subpoenas issued by Defendants to Front Sight's bank and accountant, which subpoenas seek to obtain information that is irrelevant, sensitive, not proportional to the needs of the case, and, in particular with respect to Front Sight's tax returns, generally undiscoverable as a matter of Nevada law. (PA XVIII, 03681-03686.) **Front Sight seeks a writ of prohibition that precludes disclosure of records retained by Front Sight's bank and accountant to Defendants, and which effectively overturns the district court's denial of Front Sight's motion to quash the subpoenas issued by Defendants to Front Sight's bank and accountant.**

2. The district court granted all Defendants' motions to quash various subpoenas sought to be issued by Front Sight to Defendants' banks, including Open Bank, Signature Bank, Bank of Hope, and Wells Fargo Bank, despite the fact that certain Defendants have admitted to destroying critical financial documents and misusing Front Sight's money that was intended for marketing of Front Sight's project, including making payments to Defendants Dziubla and

Fleming individually, as well as entities controlled by Defendants Dziubla and Fleming. (PA XVIII, 03658-03664.) **Front Sight seeks a writ of mandamus that directs the district court to allow the issuance of subpoenas by Front Sight to Defendants' banks, including Open Bank, Signature Bank, Bank of Hope, and Wells Fargo Bank, and effectively overturning the order granting all Defendants' motions to quash various subpoenas sought to be issued by Front Sight to Defendants' banks, including Open Bank, Signature Bank, Bank of Hope, and Wells Fargo Bank.**

VI.

RELEVANT FACTS AND PROCEDURAL HISTORY

A. General Allegations

Front Sight sought to expand its business and needed financing to do so. Defendants Dziubla and Fleming, individually and through their entities, Defendants EB5IA, EB5IC, and LVDF, misrepresented their knowledge, experience and ability to raise funds on Plaintiff's behalf, particularly with regard to the federal government's EB-5 immigrant investor program. (See generally PA II, 00179-0394; PA XI, 02476-02511.) Later, Defendant Stanwood apparently joined the fray. (PA II, 00225; PA VI, 01185-01190.) As evidenced by the existence of this litigation, Defendants' many claims were false and they have taken hundreds of thousands of dollars of Front Sight's money and used them for

purposes for which they were not intended (PA XIV 02862-02892) – and Defendant Dziubla has even admitted he intentionally destroyed financial documents. (PA V 00790-00794.)

On January 4, 2019, Front Sight filed its Second Amended Complaint ("SAC"), in the underlying action. The SAC leveled claims for fraud (against all Defendants), breach of fiduciary duty (against all Defendants), conversion (against all Defendants), civil conspiracy (against all Defendants), breach of contract (against Defendants EB5IA and LVDF), both contractual and tortious breach of the implied covenant of good faith and fair dealing (against Defendants EB5IA, LVDF, and EB5IC), intentional interference with prospective economic advantage (against Defendants EB5IA, LVDF, EB5IC and Dziubla), unjust enrichment (against all Defendants), negligent misrepresentation (against all Defendants), and negligence (against all Defendants). (PA II, 00179-00394.)

Petitioner's SAC makes certain allegations regarding Defendants' conduct over the years. "[A]s early as August of 2012, Defendant Dziubla, on behalf of what eventually became L[V]DF, EB5IC, and EB5IA, made representations to Front Sight that Defendant Dziubla and his associates had the ability, experience and networking breadth" to raise "some, or perhaps all, of the $150 million you [Front Sight] were seeking to raise." (PA II, 00183-00184 at ¶11).

"These material representations [set forth in ¶¶11-15] were made to induce Front Sight into trusting its project to Defendants," and in Defendant Dziubla's September 13, 2012, letter, sent in his capacity as Kenworth Capital, Inc.'s President and CEO to Front Sight, he "represented to Front Sight that 'EB-5 funding initiatives typically take 5-8 months before first funds are placed into escrow with the balance of the funds being deposited during the next 6-8 months.'" (PA II, 00186 at ¶16.) "These material representations were relied upon by Plaintiff but were false." (PA II, 00186 at ¶16.)

"Based on Mr. Dziubla and Mr. Fleming's representations, Dr. Ignatius Piazza, Front Sight's principal, and Plaintiff Front Sight believed that an EB5 Regional Center was the best way to raise the required capital to complete the Front Sight project within the time frames represented by Defendants." (PA II, 00188 at ¶21.) "The estimated timeline...showing that $75 million in EB-5 financing would be raised between 4 months from the earliest expected approval of the regional center and 6 months from the latest expected approval of the regional center wildly misrepresented the normal time necessary to raise $75 million in EB-5 financing." (PA II, 00189 at ¶23.) Petitioner has since learned, however, that "[m]ost new regional centers either failed to raise any financing at all or would start with very small offerings ($5 million to $10 million) and gradually raise larger EB-5 financings as they become known in the EB-5

financing market." (PA II, 00189 at ¶23.) "These material misrepresentations...were intended to induce Plaintiff to enter into and/or continue with the [engagement letter] agreement [dated February 14, 2013] and were false." (PA II, 00189 at ¶23.)

"Defendants Dziubla and Fleming represented to Plaintiff that the approval process for the new regional center could be as short as 3-4 months." (PA II, 00190 at ¶26.) "Unbeknownst to Front Sight, the process for filing a regional center application with the U.S. Citizenship and Immigration Services ('USCIS') and a request for exemplar approval of an actual EB-5 project in 2013 was approximately 12 to 24 months from the date of filing." (PA II, 00190 at ¶27.) "This was a very important disadvantage...that Defendants Dziubla, Fleming, and EB5IA concealed from Front Sight." (PA II, 00190 at ¶27.) "Plaintiff's project could not be marketed for 15 months after the regional center application was filed, thus demonstrating the substantial disadvantage of this method of raising EB-5 financing," something that "Defendants Dziubla, Fleming, Stanwood, and EB5IA did not disclose...to Front Sight." (PA II, 00190 at ¶27.)

Defendant Dziubla, on behalf of Defendants EB5IA and/or EB5IC, made "more promises and representations...with respect to the rapidity of the EB-5 raise," including his promise to "have the first tranche of $25m into escrow and ready for disbursement to the [Front Sight] project (at the 75% level, i.e. $18.75m

[pursuant to a 25% holdback clause], as discussed) within 4-5 months [of beginning the international road shows]." (PA II, 00191 at ¶29.)

Shortly after USCIS approved the Regional Center on July 27, 2015, "marketing efforts allegedly began by Defendants Dziubla, Fleming, and EB5IA (and allegedly Stanwood 'informally'), and others engaged by Defendant Dziubla, with Front Sight continuing to pay for all related costs and expenses [pertaining to Defendants' marketing efforts.]" (PA II, 00192 at ¶30.)

> The results of those alleged efforts have fallen dramatically short, both of the $75 million raise that Front Sight had been induced to expect, and of the reduced maximum $50 million raise that subsequently Defendant Dziubla asked Front Sight to accept, long after Front Sight had been induced into incurring, and had in fact incurred, approximately $300,000 in costs and expenses in connection with such raise.

(PA II, 00192 at ¶31.)

"A pattern was established of asking Front Sight to advance funds for travel and marketing expenses by Defendant Dziubla and other members of Defendant Dziubla's team, including Jon Fleming, and then not delivering even a modest amount of EB-5 investor funds as promised." (PA II, 00192 at ¶32.) In fact, "Defendants Dziubla, Fleming, and EB5IA repeatedly failed and refused to provide any documentation or receipts to Plaintiff Front Sight that demonstrated how Front Sight's money – which had been provided to Defendants and earmarked for marketing – had been used, if it was used for marketing at all."

(PA II, 00192 at ¶32.) "[B]ut in the end, more than three years after the USCIS approval, and after Front Sight had paid at least $512,500 in fees and expenses, Front Sight has only received $6,375,000 in Construction Loan disbursements." (PA II, 00197 at ¶40.) "Instead of providing the promised $75,000,000 in funding, Defendants Dziubla, Fleming, Stanwood, EB5IA, and LVDF have provided just over $6,000,000 – less than 5% of the originally promised $150,000,000 and less than 10% of the $75,000,000 Defendants later promised to raise." (PA II, 00199 at ¶48.)

Over the course of the underlying action, the district court ordered an accounting from Defendant EB5IA, an entity owned and run by Defendants Dziubla and Fleming. The district court ordered that "[s]aid accounting must include all money received from Plaintiff [Front Sight] by EB5 Impact Advisors LLC, how all funds were spent, identification of who received any portion of the funds, and any and all documentation to support payments made or funds spent" (quoting district court's Order on Plaintiff's Petition for Appointment of Receiver and for an Accounting, filed November 26, 2018). (PA II, 00203 at ¶61.) Although some documents were provided, EB5IA's accounting "is grossly deficient," and "the documents EB5IA provided clearly show that, from 2013 to 2018, Defendants have misappropriated and converted the funds Front Sight provided to Defendants Dziubla and Fleming, as representatives of Defendant

EB5IA, for the specific purpose of marketing Front Sight's project around the world." (PA II, 00203-00204 at ¶62.) Defendants did not provide a single invoice or receipt in support of the court-ordered accounting. (PA II, 00204 at ¶63.)

Moreover, "Plaintiff has recently learned that Defendants Dziubla, Stanwood, and Fleming dissolved Defendant EB5IA without notifying Plaintiff, and upon information and belief, without notifying USCIS." (PA II, 00204 at ¶65.) Upon doing so, they "have not returned any unused marketing funds to Plaintiff, and appear to have drained the bank account." (PA II, 00204-00205 at ¶65.) Defendant EB5IA's accounting documents also show that in the months preceding EB5IA's dissolution, "Defendant EB5IA, by either Dziubla's, Stanwood's, or Fleming's instruction and/or action, transferred nearly all the remaining funds in EB5IA's bank account to the account of an entity controlled by Defendant Dziubla." (PA II, 00205 at ¶66.)

On July 31, 2018, "Defendant LVDF, through Defendant Dziubla, delivered a document to Front Sight entitled 'Notice of Multiple Defaults / Notice of Inspection / Monthly Proof of Project Costs,' ('the Notice') which document was signed by Defendant Dziubla." (PA II, 00199 at ¶49.) "Said notice alleges breach by Front Sight of that certain Construction Loan Agreement dated October 6, 2016..., that certain First Amendment to Loan Agreement dated July 1, 2017...,

and that certain Second Amendment to Loan Agreement dated February 28, 2018." (PA II, 00199 at ¶49.)

On January 14, 2019, Defendants' counsel, Kathryn Holbert, Esq., recorded a document entitled Substitution of Trustee, recorded as Document 905318 in the Nye County Official Records. (PA III, 00457.) On January 18, 2019, Defendants' counsel Ms. Holbert recorded a second Notice of Default and Election to Sell in the Nye County Official Records, as Document 905512 in the Nye County Official Records. (PA III, 00458-00462.)

B. Key Testimony Obtained at Evidentiary Hearings

Because Defendant LVDF seeks to foreclose on Front Sight's real property and business, Front Sight sought a temporary restraining order ("TRO") from the district court. That TRO was granted. Subsequently, the district court has taken several days of testimony as part of the evidentiary hearing and notified the parties of its intent to consolidate the evidentiary hearing with the trial on the merits in this action under Rule 65(a)(2).

Defendants have made numerous key admissions, which are now undisputed. Those admissions, many of which establish earlier statements to be misrepresentations include:

1. Between the end of 2017 and when it was dissolved on August 6, 2018, Defendant EB5IA was NOT raising money. (PA V, 00774.)

2. Defendant Dziubla initially said that prior to taking on the Front Sight project, he had no experience in EB-5 funding, but later claimed to have done at least one other – the San Diego Hyatt project that never came to fruition. (PA V, 00780-00781, 00810-00812.) The only other experience with EB-5 was one small transaction that he supervised as a partner at Baker McKenzie in around 1992. (PA V, 00780-00781.)

3. Defendant Dziubla admitted that Front Sight paid $20,000 specifically for an economic study, that a professor named Sean Flynn received a 20% interest in the regional center for producing the report, and that Dziubla spent the $20,000 on "operating expenses" instead of paying it to Sean Flynn. (PA V, 00777-00780.) Defendant Dziubla justified his conduct by claiming that Front Sight agreed to pay $20,000 for an economic study and got a study for that payment. (PA V, 00780.)

4. Regarding the EB5IA financial documents (which the district court has twice ordered Defendant EB5IA to produce), Defendant Dziubla said he has provided Plaintiff everything he has. (PA V, 00879-00880.) Defendant Dziubla "tossed" the rest of the documents because he claims has QuickBooks records and did not need the underlying documentation. (PA V, 00790.)

5. Although Defendant Dziubla said he filed a report with the USCIS in December 2018, that report did not include notice that this project was in litigation

because, he said, there was not a "field" that addressed that issue on the government form. (PA V, 00851.)

6. Defendant Dziubla admitted that he receives compensation from LVDF. (PA V, 00874.) He admitted that the source of his compensation was the interest payments made by Front Sight each month. (PA V, 00874.) He claimed he receives no compensation from EB5IA or EB5IC. (PA V, 00874-00875.)

7. Defendant Dziubla admitted that he pays the attorneys' fees for the instant litigation out of the interest payments that are made by Front Sight. (PA V, 00902.)

8. Defendant Dziubla admitted there is no "Plan B;" he has not spoken to an investment banker about this project in the past 2 years. (PA V, 00857.) If he is allowed to take over the project through his nonjudicial foreclosure, he claims he will raise the money himself (the same money he was supposed to have already raised) and finish the project himself. (PA V, 00890.)

9. Defendant Dziubla stated he has not released $1 million to $1.5 million of investor money, as he should have under the Construction Loan Agreement he claims applies to this transaction. (PA V, 00898.) That money was received before Dziubla declared a default, but because he claims Front Sight was not providing information, he did not notify Plaintiff the money was available. (PA V, 00898-00899.) He also claimed he did not release the funds because Front

Sight had not filled out a draw request; he then admitted that he had not required a draw request before. (PA V, 00899.)

10. Defendant Dziubla stated that he was unsure whether he even filed taxes for EB5IA. (PA V, 00791.)

11. Defendant Dziubla stated that he did not think he was required to keep records of expenditures of the Regional Center and although there is "very little activity" in the Regional Center, Defendant Dziubla stated he was unable to say whether or not he had discarded any records of the Regional Center. (PA V, 00794.)

12. Defendant Dziubla admitted that he paid funds from the Regional Center to fund EB5IA. (PA V, 00874.)

13. Defendant Dziubla stated that the amount of money he pays to his brokers is a trade secret. (PA V, 00783.) Front Sight's expert witness, who has not yet testified but has provided a report, indicates that this is false. (PA III, 00468-00476.)

14. Defendant Dziubla denied having knowledge of USCIS's regulations on how brokers are to be paid. (PA V, 00891.) Front Sight's expert witness, who has not yet testified but has provided a report, indicates that such regulations do, in fact, exist. (PA III, 00468-00476.)

15. During questioning, when Defendant Dziubla was asked whether federal law has any requirements for broker-dealers in the EB-5 funding context, to which he responded, "You'd have to ask a securities attorney." (PA V, 00893.)

16. Defendant LVDF does not have a lending license. (PA V, 00900.)

17. Defendant Dziubla admitted that Front Sight spent the money using its "best business judgment," in accordance with Section 3.7 of the Construction Loan Agreement. (PA IV, 00684; PA V, 00912-00913.)

C. Report of Douglas S. Winters, CPA

Front Sight's accounting expert, Mr. Douglas S. Winters, CPA, of the accounting firm RubinBrown LLP, generated an expert report dated October 18, 2019. (PA XIV, 02862-02892.) Mr. Winters' report found that EB5IA's accounting in response to the district court's orders was "not reasonable." (PA XIV, 02865.) He noted that EB5IA has not produced the following:

- "An electronic copy of its Quick Books accounting records"
- "Balance Sheet"
- "General ledger reports"
- "Cash receipts or disbursement journals"
- "All cancelled checks"
- "Deposit slips"
- "Expense reports or expense reimbursement requests with supporting documentation"
- "Invoices, receipts, statements, or other documents customarily maintained as support for cash receipts and disbursements"

(PA XIV, 02864-02865.)

Mr. Winters' report notes that of the $359,826.95 in expenses billed by EB5IA to Front Sight, he was only able to find "supporting invoices" for "37 payments totaling $113,650.73," and was "unable to find invoices or other documents as support for the other entries" in Defendant EB5IA's accounting documents. (PA XIV, 02866.) Of the $359,826.95 of expenses billed by Defendant EB5IA to Front Sight, $246,176.22 is entirely unaccounted for by EB5IA's documents provided in response to the district court's two orders compelling a proper accounting. (PA XIV, 02866.) Defendant EB5IA's failure to keep receipts directly contravenes the "well-established business practice and custom to maintain and provide support for all reimbursable expenses." (PA XIV, 02866.) Mr. Winters' report plainly notes Defendant Dziubla's testimony that he failed to keep receipts for the expenses reflected in the banking statements that EB5IA provided in response to the accounting. (PA XIV, 02867.)

Moreover, "[t]he total deposits and disbursements from the WF accounts total $482,932.25," but this literally does not add up because "[t]he EB5IA accounting of its disbursements differs from the WF bank activity by $86,408.71." (PA XIV, 02869.) Similarly, "[t]he EB5IA accounting of deposits differs from the WF bank deposits by $130,934.30." (PA XIV, 02869.) The inaccuracy and incompleteness of Defendant EB5IA's accounting in response to the district court's two orders is readily apparent.

D. Fraud Discovered During the Course of Litigation

In support of the underlying action, Petitioner has prepared a chart summarizing and tracking Defendants' history of falsehoods. Included in this summary are cites to Defendant Dziubla's testimony from the evidentiary hearing pertaining to Petitioner's motion for preliminary injunction, which has since been consolidated with the trial on the merits, pursuant to NRCP 65(a)(2).

The Court cannot ignore the monumental amount of facts supporting Front Sight's fraud claims. Defendant Dziubla, who is the CEO of each entity Defendant, has admitted to numerous fraudulent misrepresentations. Front Sight's counsel has compiled a chart of undisputed lies and misrepresentations made by Defendants – and Defendant Dziubla in particular – in furtherance of their criminal scheme. (PA XII, 02535-02575.)

Defendant Fleming, a 50-50 partner with Defendant Dziubla in the Entity Defendants, testified as part of the evidentiary hearing on November 20, 2019.[2] The "highlights" of his testimony are summarized here. Contrary to Dziubla's testimony that Defendant EB5IA destroyed documents pursuant to some unwritten

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[2] The transcript of the November 20, 2019 hearing is not yet available. Because time is of the essence, Petitioner is proceeding with filing this Petition. This summary is provided upon Petitioner's counsel's notes and memory. Petitioner will provide the transcript once it is received, along with references to this summary or corrections if necessary.

"company policy," Defendant Fleming testified that Defendant EB5IA kept excellent records on all of its expenditures, that Fleming was unaware of a policy to destroy documents, and that before Fleming left the company, no documents had been destroyed.

Defendant Fleming also contradicted Dziubla's earlier testimony that Defendant LVDF took over marketing the project from Defendant EB5IA – Defendant Fleming's testimony was that the Regional Center, Defendant EB5IC, handled marketing from the time it was formed.

Defendant Fleming also testified about his business called Legacy Receiver. Consistent with the untrue representations made by Defendants at issue in this case, the July 19, 2019 version of Legacy Receiver's website was brazen and unashamed in its bogus representations. Defendant Fleming used the term "EB5 Specialization" across several pages and expressly stated, "I [Fleming] specialize in receivership work for the USCIS EB-5 Program" and "I function as a receiver on troubled EB-5 projects." Despite what Legacy Receiver's website said up until recently, Defendant Fleming ultimately admitted he has never been a court-appointed "EB-5 receiver." Defendant Fleming testified that these statements were, in reality, false.

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E. Brief Procedural History

The motion practice in this case has been extensive and every motion has been hotly contested. The district court has considered and decided the following motions:

- On November 27, 2018, the district court granted in part Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. (PA I, 00128-00133.)
- On November 27, 2018, the district court granted Plaintiff's Motion for Protective Order. (PA I, 00104-00108.)
- On November 27, 2018, the district court granted in part and denied in part Plaintiff's Petition for Appointment of Receiver and for an Accounting; the district court ordered an accounting from Defendant EB5 Impact Advisors LLC. (PA I, 00098-00103.)
- On January 17, 2019, the district court denied Defendants' Las Vegas Development Fund LLC, EB5 Impact Capital Regional Center LLC, EB5 Impact Advisors LLC, Robert W. Dziubla, Jon Fleming and Linda Stanwood's Motion to Dismiss Plaintiff's First Amended Complaint. (PA II, 00405-00409.)
- On January 17, 2019, the district court denied Plaintiff's Renewed Motion for an Accounting Related to Defendants Las Vegas Development

Fund LLC and Robert Dziubla and for Release of Funds. (PA II, 00400-00404.)

- On March 19, 2019, the district court granted in part and denied in part Plaintiff's Motion to Seal and or Redact Pleadings and Exhibits to Protect Confidential Information and Motion to Amend Paragraph 2.3 of Protective Order. (PA III, 00529-00534.)
- On April 10, 2019, the district court denied Defendant Las Vegas Development Fund LLC's Motion for Appointment of a Receiver. (PA III, 00546-00550.)
- On April 10, 2019, the district court granted in part and denied in part Plaintiff's Second Motion for Temporary Restraining Order and Setting Preliminary Injunction Hearing. (PA III, 00551-00556.)
- On April 10, 2019, the district court granted in part and denied in part Plaintiff's Motion to Compel and for Sanctions. (PA III, 00557-00562.)
- On April 10, 2019, the district court granted in part and denied in part Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint and Motion to Strike Portions of Second Amended Complaint. (PA III, 00563-00569.)
- On July 10, 2019, the district court denied Defendant Las Vegas Development Fund LLC's Motion for Appointment of a Special Master to

Report to The Court Regarding Default Under the Construction Loan Agreement and Deed of Trust.

- On September 13, 2019, the district court granted in part and denied in part Counterdefendants Front Sight Management LLC, Ignatius Piazza, Jennifer Piazza, VNV Dynasty Trust I and VNV Dynasty Trust II's Motion to Dismiss Las Vegas Development Fund LLC's Counterclaim. (PA VIII, 01605-01611.)

- On September 13, 2019, the district court denied Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction related to Investor Funds and Interest Payments. (PA VIII, 01612-01618.)

- On October 9, 2019, the district court denied Defendant Las Vegas Development Fund LLC's Motion to Bifurcate Pursuant to NRCP 42(b). (PA XIII, 02790-02792.)

- On November 21, 2019, the district court denied Plaintiff's Motion for Sanctions. (PA XVII, 03641-03642.)

- On November 27, 2019, the district court denied Defendant Las Vegas Development Fund LLC's Motion to Dissolve Temporary Restraining Order and to Appoint a Receiver. (PA XVII, 03645-03646.)

- On November 27, 2019, the district court denied Plaintiff s Motion to Quash Subpoenas to Third Parties Top Rank Builders, Morales Construction, and All American Concrete and Masonry. (PA XVII, 03647.)
- On December 6, 2019, the district court granted in part and denied in part Defendants' Motions to Quash Plaintiff's Subpoenas to Non-Parties Empyrean West, Jay Carter and David Keller. (PA XVIII, 03650-03657.)
- On December 6, 2019, the district court granted Defendants' Motions to Quash Plaintiff's Subpoenas to Wells Fargo Bank, Open Bank, Bank of Hope, and Signature Bank. (PA XVIII, 03658-03664.)
- On December 6, 2019, the district court denied Plaintiff's Motion to Quash Subpoenas to Plaintiff's Motion to Quash Subpoenas to Bank of America, NA and Lucas Horsfall, Murphy Pindroh, LLP. (PA III, 03681-03686.)

The district court also still has the following motions under advisement:

- Plaintiff's Motion to Compel and for Sanctions regarding Defendants' deficient discovery responses. (PA IX, 01671-01876; PA X 01877-02084; PA XVI, 03269-03402; PA XVII, 03403-03549, 03566-03640.)
- Plaintiff's Motion to Extinguish LVDF's Deed of Trust, or Alternatively to Grant Senior Debt Lender Romspen a First Lien Position,

and Motion to Deposit Funds Pursuant to NRCP 67. (PA XII, 02509-02601.)

On April 10, 2019, the district court entered its omnibus order as to Defendants' five respective motions to dismiss Front Sight's SAC. After that order, the remaining claims brought by Front Sight against the respective Defendants are (1) Fraud/Intentional Misrepresentation/Concealment (against LVDF, EB5IC, EB5IA, Dziubla, Fleming, and Stanwood); (2) Conversion (against LVDF, EB5IC, EB5IA, Dziubla, Fleming, and Stanwood); (3) Civil Conspiracy (against LVDF, EB5IC, EB5IA, Dziubla, Fleming, and Stanwood); (4) Breach of Contract (against EB5IA and LVDF); (5) Contractual Breach of Implied Covenant of Good Faith and Fair Dealing (against EB5IA and LVDF); (6) Intentional Interference with Prospective Economic Advantage (against Dziubla and LVDF); and (7) Negligent Misrepresentation (against EB5IA and Dziubla). (PA III, 00563-00569.)

On April 23, 2019, Defendants filed their answer to Plaintiff's SAC, and, in the same document, LVDF filed its Counterclaim against Petitioner and others who were not original parties to this action. On September 13, 2019, the district court entered its omnibus order as to Counterdefendants' respective motions to dismiss LVDF's Counterclaim. After that order, the remaining counterclaims brought by LVDF against the respective Counterdefendants are for (1) Intentional

Interference with Contractual Relations (against Dr. Piazza, Jennifer Piazza, and the VNV Trust Defendants - this asserted, so-called "counterclaim" has never included Petitioner at any point during the underlying proceedings); (2) Conversion (against Front Sight, Dr. Piazza, and Jennifer Piazza); (3) Civil Conspiracy (against Front Sight, Dr. Piazza, Jennifer Piazza, and the VNV Trust Defendants); (4) Judicial Foreclosure (against Front Sight); and (5) Waste (against Front Sight, Dr. Piazza, and the VNV Trust Defendants). (PA VIII, 01605-01611.)

F. <u>Defendants' Subpoenas to Bank of America and accounting firm Lucas Horsfall</u>

On October 22, 2019, Defendants e-served to Petitioner two Notices of Intent to Issue Subpoena. (PA XV, 02981-03061, 03063-03143.) One of those Notices pertained to Bank of America, and the other one pertained to Lucas Horsfall. Each of these subpoenas had a return date of November 22, 2019, directing the responsive documents to be returned to Defendants' counsel's office by that date.

On October 29, 2019, Petitioner filed and served Plaintiff's Motion to Quash Subpoenas ("Petitioner's Motion to Quash"). (PA XIV, 02952-02970.) Petitioner's Motion to Quash sought an order quashing the Bank of America subpoena under NRCP 26(c)(1) because the subpoena's requests are overly broad

on their face and because they seek irrelevant documents and are, therefore, unduly burdensome. Petitioner's Motion to Quash also sought an order quashing the Lucas Horsfall subpoena under NRCP 26(c)(1) and 45(c)(3), and this Court's decision in *McNair v. Eighth Judicial Dist. Court*, 110 Nev. 1285, 885 P.2d 576 (Nev. 1994).

On November 6, 2019, Defendants filed an Opposition to Petitioner's Motion to Quash. (PA XV, 02971-03147.) Defendants' Opposition argued, *inter alia*, that Petitioner lacked standing to file Petitioner's Motion to Quash and that Petitioner had contractually waived the undiscoverable nature of its tax returns by executing a lending agreement between Petitioner and Defendant LVDF.

On November 15, 2019, Petitioner filed its Reply in support of Petitioner's Motion to Quash. (PA XVI, 03153-03268.)

On November 26, 2019, the Court heard Petitioner's Motion to Quash and verbally denied the motion and verbally granted Defendants' request that Bank of America and Lucas Horsfall respond to the respective subpoenas within ten days. On December 6, 2019, the Court entered its Order Denying Plaintiff's Motion to Quash Subpoenas to Plaintiff's Bank and Accountant. (PA XVIII, 03681-03686.) **This is the Order related to Front Sight's petition for a writ of prohibition.**

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G. Petitioner's Four Bank Subpoenas

On August 6, 2019, Petitioner e-served seven notices of intent to issue subpoena, including four to different banks with whom at least one Defendant is known to have an account ("Bank Subpoenas"). (PA VII, 01226-01289.) Three of the Bank Subpoenas were issued, and served shortly thereafter. (PA VII, 01407; PA VIII, 01592-01593.) The fourth Bank Subpoena, to Signature Bank in New York, remains unissued and unserved, partly because on September 13, 2019, the district court entered its order entitled Order Staying All Subpoenas for Documents and Depositions Which Were Served on Non-Parties By Plaintiff, pertaining to, *inter alia*, the Bank Subpoenas and, on its face, prohibiting the Bank Subpoenas' respective recipients from producing any documents in response to the Bank Subpoenas. (PA VIII, 01619-01626.)

On August 15, 2019, – nine days after the Notices of Intent were served and two days *after* the deadline by which to object to the subpoenas – Defendants filed four separate motions as to each of the four individual Bank Subpoenas ("Defendants' Motions to Quash"). (PA VII, 01290-01401.) The hearing on these motions was originally scheduled for September 3, 2019, it was continued once to September 5, 2019, a second continuance to September 20, 2019, and then was continued a third time to October 9, 2019. During the October 9, 2019, hearing, the district court issued verbal orders granting Defendants' motions to

quash the four Bank Subpoenas. On December 6, 2019, the district court entered its Notice of Entry of Order Granting Defendant's Motions to Quash Plaintiff's Subpoenas to Non-Party Banks. (PA XVIII, 03658-03664.) **This is the Order related to Front Sight's petition for writ of mandamus.**

VII.

REASONS WHY WRITS SHOULD ISSUE

A. Writ Relief is Warranted

Front Sight acknowledges that, "[g]enerally, extraordinary writs are not available to review discovery orders." *Clark County Liquor & Gambling Lic. Bd. v. Clark*, 102 Nev. 654, 730 P.2d 443 (1986) (citing *Franklin v. District Court*, 85 Nev. 401, 455 P.2d 919 (1969), *abrogated on other grounds as stated in State v. Loyle,* 101 Nev. 65, 692 P.2d 516 (1985); *Mears v. State*, 83 Nev. 3, 422 P.2d 230 (1967); *Pinana v. District Court*, 75 Nev. 74, 334 P.2d 843 (1959)). *But see Valley Health Sys. LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 170-71, 252 P.3d 676, 678-79 (Nev. 2011) (citing *Wardleigh v. District Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183 (1995) (acknowledging that some circumstances warrant an exception to this general rule). However, this Court has previously issued writs of mandamus compelling a district court to vacate a discovery order under certain circumstances. *See Clark v. District Court*, 101 Nev. 58, 64-65, 692 P.2d 512, 516 (1985) (writ of mandamus issued upon finding that district court

had exceeded its jurisdiction in ordering production and disclosure of privileged information); *see also Schlatter v. District Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977) (writ issued upon finding that district court had exceeded its jurisdiction in ordering discovery of irrelevant matter). Indeed, "there are occasions where, in the absence of writ relief, the resulting prejudice would not only be irreparable, but of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions." *Wardleigh v. Second Judicial Court*, 111 Nev. 345, 351, 891 P.2d 1180, 1184 (1995). And sometimes, even when an adequate remedy at law is available, this Court nevertheless exercises its discretion to entertain a petition for extraordinary relief in the interest of judicial economy and efficiency, *see, e.g., In re Citycenter Constr. Litig.*, 2011 Nev. Unpub. LEXIS 1307, 2011 WL 5847207 (Nev. 2011), or where urgency or necessity warrant the granting of extraordinary relief, *see Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 856 P.2d 244 (1993) (citing Nev. Const. Art. 6, §4; *Jeep Corp v. District Court,* 98 Nev. 440, 443, 652 P.2s 1183, 1185 (1982)) (showing that despite the availability of an adequate legal remedy, the Supreme Court may "exercise its constitutional prerogative to entertain" a writ petition where circumstances reveal urgency and necessity).

Mandamus will lie to control discretionary action where the district court manifestly abuses its discretion. *See Round Hill Gen. Imp. Dist. v. Newman*, 97

Nev. 601, 603-04, 637 P.2d 534, 536 (1981). When the relief sought is the prevention of improper discovery, the appropriate remedy is a writ of prohibition, rather than a writ of mandamus. *Wardleigh*, 111 Nev. at 350.

Front Sight acknowledges that whether to entertain a petition for extraordinary writ relief lies within this Court's discretion. *See Clark County Liquor and Gambling Lic. Bd.,* 102 Nev. 654, 730 P.2d 443 (1986); *supra.*

This case requires the issuance of two extraordinary writs. Defendants are trying to foreclose on Front Sight's real property and business, which the parties agree is worth approximately $75 million; Front Sight faces irreparable harm if it is not granted relief. Regarding the writ of prohibition to stop the disclosure of Front Sight's bank and tax records, a writ of prohibition should issue because the district court exceeded its jurisdiction in ordering production and disclosure of privileged information (tax returns) and irrelevant materials. *See Clark v. District Court*, 101 Nev. 58, 692 P.2d 512 (1985); *Schlatter v. District Court*, 93 Nev. 189, 561 P.2d 1342 (1977). Moreover, Defendants already have a significant amount of financial information, which they obtained by fraudulently inducing Front Sight into entering into the Construction Loan Agreement. Defendants have filed portions of Front Sight's tax returns – which contain ostensibly private information – in publicly available pleadings. (PA III, 00529-00534.) Defendants have stated publicly that their intended purpose is to take over Front Sight's

property and its project. (PA V, 00890.) The information the district court is allowing Defendants to subpoena is not relevant to any issue in the case – the district court has already found that Front Sight proved it spent the money it borrowed appropriately, and that Front Sight spent more on the project than it borrowed from Defendants. (PA XVII, 03645-03646.) Defendants must be stopped from obtaining even more of Front Sight's financial information.

Additionally, as for the writ of mandamus, several of the elements listed above apply – judicial economy, efficiency, urgency, and necessity, the potential for irreparable harm, and the possibility that Front Sight could suffer the imposition of such drastic remedies as dismissal with prejudice of one or more of its claims (or other similar sanctions) if it cannot obtain this discovery to establish its claims – not to mention the inability to fully set forth the evidence at the ongoing evidentiary hearing related to the TRO.

There are five reasons why the district court abused its discretion in granting Defendants' motion to quash Front Sight's subpoenas to Defendants' banks. The first reason is procedural; the other four reasons demonstrate that these records are both relevant and proportional to the needs of the case. Those reasons include: (1) Defendants filed their motion to quash at least two days late; (2) Defendants took hundreds of thousands of dollars from Front Sight, allegedly in furtherance of Front Sight's project, but Defendant Dziubla intentionally

destroyed Defendant EB5IA's financial records and the scant accounting Defendant EB5IA provided pursuant to the district court's two orders showed payments to Defendants Dziubla and Fleming and/or entities controlled by them; (3) Front Sight's claims include alter ego claims and Defendants did not distinguish between the various entities; (4) Defendants induced Front Sight into entering into the Construction Loan Agreement by making repeated misrepresentations about their ability to raise funds and/or the number of investors who had already invested. These bank records will allow Front Sight to show these statements were false; and (5) Section 1.3 of the Construction Loan Agreement allows Front Sight to prepay the loan if no immigrant investor's I-829 petition is still pending and Defendants have taken the position that there are immigrant investors whose petitions have not been fully adjudicated. The bank records would allow Front Sight to determine if the immigrant investors exist.

Consequently, Front Sight seeks the issuance of the following: (1) a writ of prohibition that precludes disclosure of records retained by Front Sight's bank and accountant, and effectively overturns the district court's denial if Front Sight's motion to quash the subpoenas issued by Defendants to Front Sight's bank and accountant; and (2) a writ of mandamus that directs the district court to allow the issuance of subpoenas by Front Sight to Defendants' banks, including Open Bank, Signature Bank, Bank of Hope, and Wells Fargo Bank, and effectively

overturning the order granting all Defendants' motions to quash various subpoenas sought to be issued by Front Sight to Defendants' banks, including Open Bank, Signature Bank, Bank of Hope, and Wells Fargo Bank.

B. Petitioner faces the looming specter of impending, irreparable harm in the form of nonjudicial foreclosure proceedings pertaining to its commercial property on which it conducts its business

This Honorable Court has found the existence of irreparable harm to a business where a person's actions have "'interfere[ed] with the operation of a legitimate business by creating public confusion, infringing on goodwill, and damaging reputation in the eyes of creditors.'" *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 270 P.3d 1259 (2012) (quoting *Sobol v. Capital Mgmt.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986)). In this case, the parties agree Front Sight's property and business are worth approximately $75 million. (PA IV, 00663.)

Additionally, this Court has "determined that a threat of foreclosure constitutes a danger of irreparable harm because land is unique." *McKnight Family, LLC v. Adept Mgmt. Svcs., Inc.*, 129 Nev. 610, 615, 310 P.3d 555, 558 (2013). Front Sight faces the very real possibility of irreparable harm if its bank records and tax returns are disclosed to Defendants. Moreover, Defendants cannot be trusted to keep such information confidential, having already filed Front Sight's tax records in the public domain. (PA III, 00529-00534.) Moreover, if Front Sight is not allowed to obtain Defendants' bank account information, it will

be hampered in its efforts to prove Defendants' fraud and Defendants will be rewarded for their destruction of relevant evidence. (PA V, 00790-00794.) Defendant Dziubla, CEO of Defendant EB5IA, has confirmed that he intentionally destroyed critical financial documents. (PA V, 00790-00794.) Defendants have refused to provide any financial information in discovery either.[3] (PA IX, 01671-01876; PA X 01877-02084; PA XVI, 03269-03402; PA XVII, 03403-03549, 03566-03640.)

C. This Court Should Issue a Writ of Prohibition Compelling the District Court to Vacate Its Order Denying Petitioner's Motion to Quash Defendants' Subpoenas to Front Sight's Bank and Accountant

1. NRCP 26 and 45 prevent enforcement of Defendants' subpoenas to Front Sight's bank and accountant

Defendants have no need for the documents they seek, given that their requests seek information that is either irrelevant to Defendants' claims and defenses or are protected from disclosure under Nevada law. Their claims for breach of contract and breach of the implied covenant of good faith and fair dealing have been dismissed under the One Action Rule. Their nonjudicial foreclosure and judicial foreclosure proceedings arise out of defaults that allegedly

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[3] To be clear, Defendant EB5IA provided some financial information, albeit an inadequate accounting in response to a court order for an accounting. No Defendant has provided any of its financial documents in response to Requests for Production of Documents sent by Front Sight.

preceded their July 2019 letter to Front Sight. Defendants stopped even trying to raise EB-5 funds for Front Sight's project almost two years ago. (PA V 00774, 00769-00770.) Defendant LVDF has not sought nor provided any loan proceeds for at least two years. (PA V, 00774.) Defendants issued these subpoenas solely to harass Front Sight and obtain information to which they are not entitled, but which they intend to use in their efforts to usurp Front Sight's corporate opportunity.

A party who seeks to challenge a subpoena that is issued to a third party has options, including objecting under Rule 45(a)(4)(B) and seeking a Rule 26(c) motion for protective order, or a motion to quash under Rule 45(c)(3) (for subpoenas that seek disclosure of protected matters) and/or under Rule 26(c) (for subpoenas that seek irrelevant information and are, therefore, unduly burdensome because they are overly broad).

A party has standing under the new version of NRCP 45 to object to a subpoena that is issued to a third party. *See* NRCP 45(a)(4)(B)(i)-(ii) & (iv) (entitled "Party Objections"). Specifically, this rule states:

> (i) A party who receives notice under Rule 45(a)(4)(A) that another party intends to serve a subpoena duces tecum on a third party that will require disclosure of privileged, confidential[,] or other protected matter, to which no exception or waiver applies, may object to the subpoena by filing and serving written objections to the subpoena and a motion for a protective order.

> (ii) To invoke the protections of this rule, the objecting party must file and serve written objections to the subpoena and a motion for a protective order under Rule 26(c) within 7 days after being served with notice and a copy of the subpoena under Rule 45(a)(4)(A).
> ...
> (iv) If the party objects based upon privilege, confidentiality, or other protection and timely files and serves objections and a motion for a protective order, the subpoena may not be served, unless revised to eliminate the objected-to commands, until the court that issued the subpoena has ruled on the objections and motion.

Id.

A party may, either separately or coupled with Rule 45(a)(4)(B) objections, bring a motion for protective order under Rule 26(c), which states, in part, "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." NRCP 26(c)(1). Like its federal counterpart, upon which Nevada's newly-minted version is based, Nevada's Rule 26 limits the scope of discovery to "any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case"; it also lists a number of factors for consideration when analyzing what constitutes "proportional to the needs of the case." *See* NRCP 26(b)(1).

A subpoena that seeks information that is irrelevant to the case qualifies as unduly burdensome and is necessarily subject to a court order quashing it pursuant

to NRCP 26(c)(1). The case law quoted below demonstrates this very point, using published case law from two different jurisdictions.

Nevada case law has repeatedly held that federal case law is strongly persuasive authority when analyzing Nevada's version of the same rule. *See, e.g., Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1253 (Nev. 2005) ("We have previously recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules." (citing *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 877 (Nev. 2002) ("Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" (citation omitted)))).

The federal district court for the Eastern District of Virginia conducted a detailed analysis regarding motions to quash, examining the distinct bases for quashing subpoenas under, and the interplay between, Rules 26(c) and 45(c)(3)(A), in *Singletary v. Sterling Transport Co., Inc.* 289 F.R.D. 237, 240 (E.D. Va. 2012). *See also Blotzer v. L-3 Comm'ns Corp.*, 287 F.R.D. 507, 509 (D. Ariz. 2012).

The *Singletary* decision's analysis regarding overly broad subpoenas duces tecum for employment records is thorough and instructive:

> Rule 45 does not list irrelevance or overbreadth as reasons for quashing a subpoena. However, the scope of discovery allowed under a subpoena is the same as the scope of discovery allowed under Rule

26. Cook v. Howard, No. 11-1601, 484 Fed. Appx. 805, 2012 U.S. App. LEXIS 18053, 2012 WL 3634451, at *6 (4th Cir. Aug. 24, 2012) (per curiam) ("Although Rule 45(c) sets forth additional grounds on which a subpoena against a third party may be quashed ... those factors are co-extensive with the general rules governing all discovery that are set forth in Rule 26."); see also Barrington, 2007 U.S. Dist. LEXIS 90555, 2007 WL 4370647, at *3 (collecting cases). **Thus, regardless of whether the Court considers Plaintiffs Motion under Rule 45 or Rule 26, the Court must review Defendant's subpoenas under the relevancy standards set forth in Rule 26(b).**

Rule 26(b) limits the scope of discovery to those materials that are "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). . . . Notably, the Court "must limit the frequency or extent of discovery" if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Id. at 26(b)(2)(C). **As such, the Court may quash a subpoena duces tecum as overbroad if it "does not limit the [documents] requested to those containing subject matter relevant to the underlying action."** In re Subpoena Duces Tecum to AOL. LLC, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008); see also Sirpal, 2012 U.S. Dist. LEXIS 97145, 2012 WL 2880565, at *5.

Further, the Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by forbidding the disclosure or discovery of the material at issue. Fed. R. Civ. P. 26(c)(1). Likewise, Rule 45(c)(3) requires the Court to quash a subpoena that "subjects a person to an undue burden." Fed. R. Civ. P. 45(c)(3); see also Cook, 2012 U.S. App. LEXIS 18053, 2012 WL 3634451, at *6 n.7. This undue burden category "encompasses situations where the subpoena seeks information irrelevant to the case." Cook, 2012 U.S. App. LEXIS 18053, 2012 WL 3634451, at *6 n.7. Moreover, "[a] subpoena imposes an undue burden on a party when [it] is overbroad." In re Subpoena Duces Tecum, 550 F. Supp. 2d at 612.

Singletary, 289 F.R.D. at 240-41 (emphases added).

Similarly, a federal district court in Arizona analyzed the same exact issue in a similar manner:

> **Under Rule 45(c)(3)(A),** Fed.R.Civ.P., a party may move to quash or modify a subpoena if it requires the disclosure of "privileged or other protected matter, if no exception or waiver applies." **A party has standing to challenge a subpoena served on another entity** only if the party can show it has a personal right or privilege regarding the subject matter of the subpoena. *See Delta Mechanical, Inc. v. Garden City Group, Inc.,* 2010 U.S. Dist. LEXIS 75551, 2010 WL 2609057, *2 (D. Ariz. 2010). **Pursuant to Rule 26(c)(1)(B),** Fed.R.Civ.P., a party may move for an order to protect itself from "annoyance, embarrassment, oppression, or undue burden or expense."

Blotzer v. L-3 Comm'ns Corp., 287 F.R.D. 507, 509 (D. Ariz. 2012) (emphases added).

Under Nevada law, "tax returns must be relevant to be discoverable, and may not be discoverable in the absence of a showing that the information is otherwise unobtainable." *McNair v. Eighth Judicial Dist. Court*, 110 Nev. 1285, 1290, 885 P.2d 576, 579 (Nev. 1994). *Accord Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977). The burden of establishing relevance and the lack of obtainability is on the requesting party. *Id.*

2. The Subpoena for Front Sight's Banking Records should also be quashed pursuant to NRCP 26(c)(1)

Defendants' subpoena to Bank of America contains four requests that are all overly broad because they seek irrelevant documents, and their overly broad

nature subjects them to an order quashing the Bank of America subpoena under Rule 26(c)(1) for being unduly burdensome.

The first three requests seek "all of FRONT SIGHT's bank statements" for the fiscal years 2016, 2017, and 2018. But Front Sight's bank statements are only relevant (thus only discoverable) to the extent they reflect "expenditures on the project," (PA IV, 00695 at §5.10), and not for any other purpose. *See* NRCP 26(b). Front Sight has already provided Defendants with more than sufficient documents to support their expenditures on Front Sight's project. Indeed, Front Sight has hired an expert, whose reports remain unrefuted by Defendants, who explained that Front Sight has established it created more than the required number of jobs necessary under the USCIS EB-5 program. (PA XI, 02593-02598; PA XVI, 03193-03247, 03249-03251, 03253-03258.) All of that information has been provided to Defendants. Yet Defendants seek an astonishingly broad array of documents from Bank of America that will contain information that is neither relevant nor proportional to the needs of this case. Only an order quashing the subpoena will correct this procedural defect to the requests, because there is no way to modify the subpoena in a way that Bank of America could reasonably interpret it yet still be responsive.

The fourth request seeks "all of FRONT SIGHT's bank statements for the time period of January 1, 2019 to October 31, 2019." In addition to the rationale

and relief sought for the first three requests, which also apply here, the fourth request should be quashed because seeks documents pertaining to the time period long *after* LVDF initially declared Front Sight to be in default under the CLA and other Loan Documents. Again, Defendants stopped attempting to raise money approximately two years ago, and Defendant LVDF has not loaned any additional money in approximately two years either. Defendant LVDF's counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing have been dismissed, as LVDF is pursuing nonjudicial foreclosure based on the alleged defaults set forth in its July 2018 letter to Front Sight.

Defendants' assertion that the documents sought to be subpoenaed are relevant because "Front Sight claims that 'many of the original documents were destroyed when the facility at which they were stored burned to the ground,'" and they are "highly relevant" to whether Front Sight breached the CLA (PA XV, 02973-02976) is disingenuous and has been addressed herein – Defendants have acknowledged receipt of the 23-lb. box of documents from Front Sight's accountant. (PA IX, 01701.) Defendants also recently provided the contents of that 23-lb. box of documents in response to a discovery request from Front Sight.

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3. The Subpoena for Front Sight's Tax Returns and Related Accounting Records should be quashed pursuant to NRCP 45(c)(3)(A)(iii) and 26(c)(1)

Defendants' subpoena to Front Sight's accounting firm, namely Lucas Horsfall, should be quashed entirely pursuant to NRCP 26(c)(1) and 45(c)(3). With little exception, tax returns are protected against disclosure under Nevada law. Moreover, the supporting documents Defendants seek in Request No. 4 are neither relevant nor proportional to the needs of this case. Additionally, as set forth above, Defendants stopped even trying to raise EB-5 funds for Front Sight's project almost two years ago. (PA V, 00774, 00769-00770.) Defendant LVDF has not sought nor provided any loan proceeds for at least two years. (PA V, 00774.) Defendants issued these subpoenas solely to harass Front Sight and obtain information to which they are not entitled, but which Front Sight fears they intend to use in their efforts to usurp Front Sight's corporate opportunity. Defendants have filed portions of Front Sight's tax returns – which contain ostensibly private information – in publicly available pleadings. (PA III, 00529-00534.) Defendants have stated publicly that their intended purpose is to take over Front Sight and its project. (PA V, 00890.) This Court should not allow this to happen.

Requests 1-3 ask Front Sight's accounting firm to "produce FRONT SIGHT's complete tax return" for the years 2016, 2017, and 2018. It bears repeating that under Nevada law, "tax returns must be relevant to be discoverable,

and **may not be discoverable in the absence of a *showing* that the information is otherwise unobtainable.**" *McNair v. Eighth Judicial Dist. Court*, 110 Nev. 1285, 1290, 885 P.2d 576, 579 (Nev. 1994) (emphases added). *Accord Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977). The documents used by an accounting firm in preparing and completing a tax return are subject to the same legal protection against general discoverability. *Cf. id.* Nonetheless, the record in this matter also shows that Defendants already have the financial information they need, and their duplicative requests should be quashed as unnecessary and overbroad.

There is zero language from the CLA that might tether Request No. 4 to the needs of this case. The language of the CLA does not permit disclosure of all underlying documents relied upon to prepare the tax returns. Request No. 4 is clearly a fishing expedition, even more so than the other requests, seeking "ALL DOCUMENTS used by YOU [Lucas Horsfall] that RELATE to the preparation and completion of FRONT SIGHT's tax returns for the years 2016, 2017, and 2018." Request No. 4 should be quashed for being overly broad because it seeks irrelevant information that does not pertain to any party's claims or information that LVDF already possesses under the CLA's reporting requirements in the CLA § 5.10. (PA IV, 00695 at §5.10.)

The argument put forth by Defendants that the documents are "otherwise unobtainable" is disingenuous. Defendants quote the cover letter from Ms. Sobol, which was attached to Plaintiff's Motion, and claim the records are "otherwise unobtainable." But this is untrue. In fact, Defendant LVDF already has an abundance of records from Ms. Sobol; it apparently just chooses to ignore that fact now.

As part of the "meet and confer" requirement of EDCR 2.34, which must occur before a party brings a Motion to Compel, counsel for Plaintiff, Mr. Aldrich, spoke with counsel for Defendants, Mr. Greer, specifically about the approximately 23-lb. box of documents that was delivered by Ms. Sobol to Defendant LVDF. During that "meet and confer," Mr. Greer not only acknowledged that Defendant LVDF had received the documents, he promised to supplement his client's non-responsive responses to requests for production of documents and provide the contents of the entire 23-lb. box of documents. That promise was memorialized in an e-mail. (PA IX, 01701.) Defendants finally produced those documents just recently.

Additionally, Front Sight has provided an abundance of financial documentation related to the jobs creation, along with an uncontroverted expert report by one of the top EB-5 jobs creation experts in the country that explains that Front Sight has created more than enough jobs to allow the immigrant

investors to submit their I-829 applications. (PA XI, 02593-02598; PA XVI, 03193-03247, 03249-03251, 03253-03258.) Indeed, the district court has already found that Front Sight proved it spent the money it borrowed appropriately, and that Front Sight spent more on the project than it borrowed from Defendants. (PA XVII, 03645-03646.)

The subpoena to Lucas Horsfall is unnecessary because Defendant LVDF already has that information. That information is also not relevant to any issue in this case.

Defendants have issued these subpoenas only to harass Front Sight and attempt to bolster their attempts to take over Front Sight's business and project. The requested writ of prohibition should issue.

4. The financial information is not necessary for Dziubla's reporting to the USCIS

Finally, although not stated in Defendants' Opposition, the argument set forth by Defendants at recent hearings to substantiate their request for Front Sight's tax and financial information has been the assertion that such information is needed for Defendant Dziubla to complete his reports to the USCIS. Front Sight will address this argument briefly as well.

As noted above, Front Sight has already provided Defendants with an abundance of documentation related to jobs creation, as well as an uncontroverted

report from a renowned expert. (PA XI, 02593-02598; PA XVI, 03193-03247, 03249-03251, 03253-03258.) As explained to the district court, it is Front Sight's understanding that the report Defendant Dziubla must submit to the USCIS is a USCIS Form I-924. (PA XVI, 03260-03268.) Front Sight believes this is the same form that Mr. Dziubla claimed (during evidentiary hearing testimony) that he filled out last year – the one that did not have a "field" for him to report that this case was in litigation. Defendants have not contested that the attached I-924 Form is the correct form.

As the Court can see, the form asks for information about the following:

1. The regional center, its owners and structure (Parts 1-4) (PA XVI, 03260-03262);

2. The regional center's operations, including the aggregate investment and job creation (Part 5) (PA XVI, 03263);

3. The new commercial enterprise (Part 6) (PA XVI, 03263-03264);

4. Petitions filed by EB-5 investors (I-526 and I-829) (Part 7) – the Court will note that this very information that goes to the USCIS is the very information that Defendants claim is proprietary, confidential, and privileged (PA XVI, 06264-03265);

5. Information about the declarant/person filling out the report (Parts 8-10) (PA XVI, 03265-03267).

Nowhere in that report is there information about Front Sight, its financial condition, its ability to perform under the CLA, or anything else. Defendants are simply on a fishing expedition for non-relevant information.

5. LVDF cannot enforce the CLA or other Loan Documents because it was the first party to breach the agreement

Defendants assert that they are entitled to Front Sight's bank and tax information because Front Sight and Defendant LVDF are parties to the Construction Loan Agreement. However, as explained above and in the SAC, LVDF and the other Defendants fraudulently induced Front Sight into entering into the Construction Loan Agreement, and Defendants should not be able to utilize their own fraud to continue to pursue their nefarious purposes. Moreover, LVDF abandoned the contract at the end of 2017 (capped off with EB5IA's dissolution in August 2018), prior to any alleged breach from Front Sight described in LVDF's July 2018 letter to Front Sight. This means Front Sight is no longer even subject to the CLA's reporting requirements which serve as a purported basis for the Bank of America and Lucas Horsfall subpoenas. These alleged breaches serve as the basis for LVDF's nonjudicial and judicial foreclosure. LVDF has no need, therefore, for further performance from Front Sight under the CLA and other Loan Documents. Its claims for breach of contract and breach of the implied covenant of good faith and fair dealing are gone already.

Front Sight has no further contractual duty under the CLA anyway, because Defendant Dziubla has admitted to blatant breaches of the CLA. Those include, among others, the following:

1. Long before Front Sight's alleged default under the CLA, Defendants stopped marketing the Front Sight Project.

a. Between the end of 2017 and when Dziubla dissolved Defendant EB5IA, Defendants Dziubla, Fleming, EB5IA, and LVDF were not marketing the Front Sight project. (PA V, 00774 at ls. 11-15.)

b. Dziubla testified that Defendant LVDF took over the marketing of the Front Sight project when the CLA was signed. (PA V, 00877 at ls. 21-25.) But again, Defendants were not marketing after 2017, even though they were receiving money from Front Sight specifically for marketing purposes.

c. Dziubla claimed that the engagement letter with EB5IA was extended on a "gentlemen's basis" before Defendant LVDF took over. (PA V, 00878.)

2. LVDF failed to comply with its contractual obligation to give 5-days' notice as to the $1 million to $1.5 million it is currently holding in escrow. The CLA requires LVDF to "advise Borrower [Front Sight] within five (5)

business days every time Lender [LVDF] has received a new EB-5 Investor's funds into the Escrow Account," clearing the way for Front Sight to request an Advance from LVDF. (PA IV, 00681 at §3.1.)

a. Dziubla testified he held back $1 million to $1.5 million a month or longer before he even alleged Front Sight was in default. (PA V, 00898-00899.)

b. Dziubla claimed he did not provide the money because of lack of information, and because Front Sight had not provided a draw request. Dziubla and LVDF had never required a draw request before. (PA V, 00899.)

c. This failure to notify constituted a material breach of LVDF's obligations under the CLA that resulted in $1 million to $1.5 million less being loaned to Front Sight more than a year before the Completion Date pertaining to the Project as set forth in the CLA.

3. Dziubla has not facilitated the filing of the I-829 petitions by the immigrant investors. If Dziubla had truly been trying to help the immigrant investors and/or to protect their money, he would have honestly evaluated the Front Sight project, hired an economist who knew what he was doing, and advised the immigrant investors almost immediately that they should submit their I-829 petitions to the USCIS for approval. Front Sight had

already created plenty of jobs when the first money came in between October 2016 and June 30, 2017. Each of those investors could have submitted their I-829 petitions long ago, had Dziubla so advised them. If Dziubla had done so, as each I-829 petition was approved, Front Sight would have been able to repay that immigrant investor's money, reducing the amount of monthly interest payments it was required to make. Instead, Defendants – and particularly Dziubla – failed to do so. They failed to do so in order to allow Defendant LVDF – run by Dziubla – to collect $36,000 per month in interest payments. And all of this while Dziubla and Defendant EB5IA were accepting marketing payments from Front Sight even though they had stopped marketing the project.

"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. O. R. Railway.*, 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, LLC*, 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).

The writ of prohibition sought by Front Sight should be granted, and this Court should order the district court to prohibit enforcement if the subpoenas to Bank of America and Front Sight's accountant.

D. Petitioner seeks a writ of mandamus compelling the district court to clear the way for Petitioner to serve the Bank Subpoenas, without delay

Front Sight seeks to subpoena the bank records of all Defendants; more particularly, the records of the Defendants from Bank of Hope, Signature Bank, Open Bank, and Wells Fargo Bank. Bank of Hope has multiple accounts that were designed by Defendant Dziubla for Front Sight to use to pay interest under the CLA and for use as an escrow account for EB-5 investor funds. Signature Bank was designated by Defendants Dziubla and Fleming, and Front Sight, as the place for the deposit of EB-5 investors' funds. Defendant LVDF has an account at Open Bank that Defendant Dziubla designated for Front Sight to use in order to deposit fees related to marketing the Project to potential EB-5 investors. Wells Fargo Bank was the bank designated for deposits to Defendants EB5IA and EB5IC for marketing fees paid by Front Sight. (PA VIII, 01414-01418.) There are several reasons why the district court abused its discretion in granting the

motion to quash Front Sight's subpoenas to Defendants' banks. The first reason is procedural: Defendants filed their motion to quash at least two days late. The other reasons demonstrate that these records are both relevant and proportional to the needs of the case. All five are summarized as follows:

1. By filing their motion at least two days after the deadline, Defendants waived their right to object and the district court was without subject matter jurisdiction to consider and/or grant the motion.
2. Despite the fact that Front Sight paid hundreds of thousands of dollars for Defendants to create the Regional Center and market the Front Sight project, Defendants failed abysmally. After the district court ordered Defendant EB5IA to provide an accounting, Defendant Dziubla admitted to "tossing" critical financial documents that were related to Defendant EB5IA's alleged expenses. Defendant Dziubla claimed that was related to a company policy to destroy documents; Defendant Fleming, Dziubla's 50-50 partner, testified that Defendant EB5IA kept meticulous records and had not destroyed any records before Defendant EB5IA was dissolved. Front Sight's expert, Doug Winters, discovered payments of money that was sourced from Front Sight to individual Defendants Dziubla and Fleming. (PA XIV, 02869.) Front Sight is entitled to

attempt to determine if any of its money was funneled to any of the identified banks.

3. Front Sight has alleged alter ego claims (PA II, 00219-00221), and the testimony elicited by Defendants Dziubla and Fleming so far indicate that Defendants did not distinguish between the entity Defendants except when beneficial to their position. For example, Defendant Dziubla alleged that after Front Sight entered into the CLA, Defendant LVDF was responsible for marketing. Contrary to that testimony, Defendant Fleming testified that the Regional Center (Defendant EB5IC) was responsible for marketing after the CLA was entered into.

4. In order to induce Front Sight into entering into the CLA, Defendants made repeated misrepresentations about their ability to raise funds and/or the number of investors who had already invested. These bank records will allow Front Sight to show these statements were false. The records may also be relevant to whether Defendants breached the CLA (assuming it is valid) and whether Defendants fulfilled their duties and responsibilities *vis-à-vis* Front Sight.

5. Under Section 1.3 of the CLA, Front Sight may prepay the loan at any time, unless the I-829 petition of any EB-5 immigrant investor has not been fully adjudicated. Defendants have taken the position that this

condition prohibiting Front Sight from pre-paying the loan exists (PA XIII, 02795), but they have refused to provide any information about the EB-5 immigrant investors. Indeed, they have not shown that any such immigrant investors even exist. Defendants' bank records would allow Front Sight to determine if any such investors exist, and then hopefully, if any I-829 petitions remain pending, or alternatively, whether Defendants LVDF and Dziubla have fulfilled their duties to move the I-829 petitions forward.

1. Defendants' Motion to Quash Was Untimely and Procedurally Defective

Procedurally, the district court should not have granted Defendants' motions to quash the Bank Subpoenas. As Front Sight argued in district court, Defendants failed to comply with NRCP 45(a)(4)(B)'s procedural requirements for making objections. (PA VIII, 01428-01429.) Front Sight e-served the notices of intent to issue subpoena on August 6, 2019, but Defendants did not file their motions to quash the Bank Subpoenas until August 15, 2019. Rule 45 plainly states, "To invoke the protections of this rule, the objecting party must file and serve written objections to the subpoena and a motion for a protective order under Rule 26(c) within 7 days after being served with notice and a copy of the subpoena." NRCP 45(a)(4)(B)(ii).

In response to Front Sight pointing this out, Defendants replied that excusable neglect existed, arguing that the district court could go ahead and quash the Bank Subpoenas. (PA VIII, 01595.) This rationale is procedurally invalid for a couple of reasons. First, Rule 45 lacks any basis for the district court to excuse a party from missing the 7-day deadline for objecting and filing a motion for a Rule 26(c) protective order. *See* NRCP 45(a)(4)(B). Second, the rule cited in Defendants' Omnibus Reply, Rule 6(b)(1), only allows the district court to, "for good cause, extend the time . . . (ii) on motion made after the time has expired if the party failed to act because of excusable neglect." NRCP 6(b)(1)(B)(ii). But Defendants never made a motion asking for more time or trying to establish excusable neglect, nor did they provide any evidence of excusable neglect. Certainly Nevada Rule of Civil Procedure 6 requires such a motion. *See* NRCP 6(c).

The district court lacked subject-matter jurisdiction to grant Defendants' motions to quash the Bank Subpoenas and, therefore, abused its discretion in failing to deny Defendants' motions to quash with prejudice.

Additionally, Front Sight described for the district court how "each and every one of Defendants' Motions to Quash is nearly identical" and how "Defendants do not even come close to meeting their burden." (PA VII, 01421.) Rule 45(a) required Defendants to "specifically state" their objections and to do so

as to "each command to produce documents." NRCP 45(a)(4)(b)(iii). Moreover, Rule 45 requires a party who is asserting privilege or other protection must demonstrate the existence of such protection, prove there is no exception or waiver to the protection, and show that the party "is entitled to assert the claim of privilege or other protection against disclosure." *See id.*

Even a cursory review of Defendants' objections should reveal their non-compliance with these procedural requirements for making Rule 45 objections. For example, Front Sight's subpoena to Signature Bank contained eight different commands to produce documents. Instead of complying with Rule 45 and specifically stating their objections to each of these eight categories, Defendants effectively used the same language they did in the other seven motions to quash – tantamount to boilerplate objections that in no way comply with Rule 45. (PA VII, 01290-01401.) Still, the district court went ahead and quashed the Bank Subpoenas seeking crucial records that Front Sight must have to have any chance of prosecuting the underlying action in a speedy, efficient manner.

2. EB5IA Accounting and Self-Dealing

In seeking the banking records enumerated in the Bank Subpoenas, Petitioner seeks information about how its money might have been spent – by taking money from Front Sight which was supposed to be used for marketing and diverting it to Defendants individually – or to establish Defendants' fraudulent

misrepresentations as it sought to obtain more money from Front Sight and a signature on the Construction Loan Agreement.

The Winters Report demonstrates why Front Sight needs the banking records it seeks in the Bank Subpoenas. The Report plainly states that EB5IA "has failed 1) to provide a complete or accurate accounting, 2) to provide documentation for the expenses that it charged Front Sight, and 3) to maintain adequate receipts and other records to support its expenses." (PA XIV, 02869.) The Winters report also clearly outlines payments made by Defendant EB5IA (whose principals were Defendants Dziubla and Fleming) to Defendants Dziubla and Fleming personally or entities controlled by them personally. (PA XIV, 02868-02869.) All of the money to start the Regional Center came from Front Sight as well. (PA V, 00828.) Front Sight should be permitted to track where its funds went.

Additionally, Front Sight is entitled to know what, if anything, Defendants were doing to further Front Sight's interests, or whether Defendants were just using Front Sight's money as their own personal piggy bank.

3. Alter Ego Claims and Conversion

Front Sight is prosecuting its case using the alter-ego theory of liability, and it needs to see the banking records for each party's bank accounts to adequately demonstrate for the district court that Defendants co-mingled funds and were

funneling funds to themselves. (PA II, 00212; PA VIII, 01428-01429.) The banking records sought in the Bank Subpoenas will contain information that is relevant to this theory of liability or, possibly, to Defendants' defenses against such liability.

While Front Sight already possesses some evidence showing payments of money sourced from Front Sight to Defendants Dziubla and Fleming and entities controlled by them, Front Sight believes that obtaining the bank statements for accounts that Defendants themselves identified to Front Sight in emails will demonstrate that additional Defendants are also guilty of either commingling funds or otherwise receiving funds inappropriately and using them for their own personal gain and purposes. Front Sight argued this point before the district court, to no avail, and therefore seeks writ relief here.

Front Sight's expert has shown the insufficient nature of EB5IA's accounting records, Front Sight seeks relief on an alter-ego theory, and Front Sight believes that the funds deposited with the banks named in the Bank Subpoenas went to inappropriate recipients for inappropriate purposes. (PA VIII, 01428-01429; PA XIV, 02869.)

4. Fraud and Breach of Contract

Defendants worked in concert to dupe Front Sight out of hundreds of thousands of dollars by representing that they had substantial experience raising

EB-5 funds (they had never raised any money for a completed project) and promising to raise tens of millions of dollars in a short amount of time. Additionally, after making many additional fraudulent representations, Defendants fraudulently induced Front Sight into signing a Construction Loan Agreement, before providing a mere fraction of the amount of money they promised to raise. All along the way, Defendants made representations about the number of investors they had lined up. They made these representations to induce Front Sight into providing money that was allegedly for marketing the project. Of course, as set forth above, much of that money has gone unaccounted for. (PA XIV, 02862-02892.) And rather than provide documentation where some of that money went, Defendant Dziubla, as CEO of Defendant EB5IA, intentionally destroyed financial documents that would purportedly substantiate the expenditure of Front Sight's money. (PA V 00790-00794.)

Now, Defendants are, without exaggeration, attempting to unlawfully and fraudulently steal Petitioner's real and personal property with the intent, stated in writing and on the record, to takeover Petitioner's property and operate Petitioner's business themselves. (PA V, 00890.)

Defendants continue to refuse to provide discovery responses and documents. The district court has not yet ruled on Front Sight's motion to compel, despite holding multiple hearings to address the motion – and despite Defendants'

repeated promises to supplement its responses and provide the requested documentation. (PA IX, 01671-01876; PA X 01877-02084; PA XVI, 03269-03402; PA XVII, 03403-03549, 03566-03640.) Defendants continue to refuse to provide documents, and repeatedly continue to ask the court to dissolve the TRO before they are forced to provide information.

Petitioner is working to prove that as part of the Defendants' years-long fraudulent scheme, Defendants acted in concert to disburse funds to Petitioner in an amount that equals a paltry 8.5% or less (depending on which promise of millions in loan proceeds is used as a reference point) of what they initially and repeatedly promised to raise in the years leading up to the formation of the CLA. They claim to have made these disbursements from, or using, various "escrow" accounts that actually, or ostensibly, housed EB-5-investor funds that were actually, or ostensibly, received from foreign immigrant investors under the federal EB-5 visa program.

When opposing Defendants' motions to quash the Bank Subpoenas, Front Sight specifically argued that the subpoenaed records were "relevant to Plaintiff's claims for fraud and breach of contract." (PA VIII, 01428-01429.) Front Sight has consistently argued that Defendants have a long history of fraudulent misrepresentations, and the documents sought in the Bank Subpoenas will demonstrate the truth once and for all. There, of course, remains the possibility

that they could demonstrate that Defendants have acted appropriately, but it appears that will not be the case, given Defendants' position. Specifically, given the many fraudulent misrepresentations admitted by Defendants thus far during the litigation, Front Sight now has reason to question whether any EB-5 investors do or ever did exist, and whether Defendants sourced the funds elsewhere – not from EB-5 investors – in support of their long-running scheme to usurp Front Sight's corporate opportunity and steal Front Sight's personal and real property, which has an agreed-upon value of tens of millions of dollars. (PA IV, 00663.)

Additionally, pursuant to Section 3.1 of the CLA, Defendant LVDF was required to notify Front Sight within 5 days of receiving new EB-5 investor funds into escrow. (PA IV, 00681.) Defendant Dziubla has admitted that he held back investor funds even though Front Sight was not in default. (PA V, 00898-00899.) This is a clear breach of the contract, and this information will provide additional evidence to establish this.

5. Prepayment of the Loan Under Section 1.3 of the Construction Loan Agreement

Front Sight has expressed its willingness to prepay the Loan proceeds it received, which CLA § 1.3 permits. (PA IV, 00676.) Some or all of the accounts for which Front Sight seeks records by way of the Bank Subpoenas very likely contain records that confirm or refute the existence of EB-5 investors. If no EB-5

investors exist, Front Sight has an immediate right to prepay the loan proceeds disbursed from LVDF according to the CLA. Indeed, as Defendants have refused to provide any discovery that shows any such immigrant investors even exist, Defendants' bank records would allow Front Sight to determine if any such investors exist, and then hopefully, if any I-829 petitions remain pending, or alternatively, whether Defendants LVDF and Dziubla have fulfilled their duties to move the I-829 petitions forward.

For the purpose of prepaying the loan, stopping monthly interest payments, and extinguishing LVDF's deed of trust, Petitioner has repeatedly attempted to obtain information regarding the immigrant investors, because the information sought is directly material to whether Petitioner has a contractual right to prepay the loan under the CLA. Defendants have repeatedly thwarted Petitioner's attempts to discern this and other key information, and the district court has declined to compel disclosures from Defendants thus far. (PA V 00780-00782; PA VII, 01375-01401; PA IX, 01671-01876; PA X 01877-02084; PA XVI, 03269-03402; PA XVII, 03403-03549, 03566-03640.)

Through the subpoenas to Defendants' banks, Front Sight is attempting to discover information and obtain documents showing that it has a contractual right to prepay the loan balance to LVDF. Petitioner needs those banking records because the CLA contains language that, purportedly, prevents Petitioner from

prepaying the principal loan balance – something Petitioner is eager to do – during the time when any immigrant investor's petition for a green card is still pending with USCIS (United States Citizenship and Immigration Services). (PA IV, 00676 at §1.3; PA XII, 02509-02601 (analyzing the contractual basis for Petitioner being able to prepay the loan balance to Defendant LVDF).)

In the meantime, Petitioner is struggling to obtain reasonable alternative financing for the resort project because Defendant LVDF has recorded a frivolous Notice of Default that is currently clouding Petitioner's title to its real and personal property. (PA III, 00458-00462.) Defendants' co-counsel of record in the underlying action, Ms. Holbert, has attempted to act as trustee of record for the Amended Deed of Trust (she is not actually the trustee of record under that instrument, despite her attempt to act as such she was substituted as Trustee of the original Deed of Trust, not the Amended Deed of Trust) and recorded a notice of default and election to sell in January 2019 with the Nye County Recorder's Office, rendering it difficult, to say the least, for Petitioner to seek alternative financing to expand its business. (PA III, 00458-00462.)

For all of these reasons, Petitioner seeks a writ of mandamus directing the district court to vacate any and all such orders and enter an order denying Defendants' Motions to Quash.

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VIII.

TIMING OF WRIT PETITION

Extraordinary writ relief must be timely sought. *Moseley v. Eighth Jud. Dist. Ct.,* 124 Nev. 654, 188 P.3d. 1136 (2008). Notices of entry of the orders at issue in this matter were filed on Friday, December 6, 2019. This petition is timely.

DATED this 17th day of December, 2019.

ALDRICH LAW FIRM, LTD.



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VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

John P. Aldrich, being first duly sworn, deposes and says:

1. I am over the age of 18 years and am personally familiar with the facts stated in this Verification. Pursuant to NRAP 21(a)(5), NRS 15.010 and NRS 34.170, I am counsel of record for Petitioner Front Sight Management, LLC. I know the contents of this writ petition.

2. The facts stated in this writ petition are true and correct to the best of my knowledge or based on information and belief. The relevant facts are drawn from the proceedings before the district court and therefore are within my knowledge as counsel for Petitioner Front Sight Management, LLC.

DATED this 17th day of December, 2019.

John P. Aldrich, Esq.

Subscribed and sworn to before me
this 17th day of December, 2019.

Notary Public

TRACI A BIXENMANN
Notary Public, State of Nevada
Appointment No. 05-94569-1
My Appt. Expires Dec 22, 2020

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 15,218 words.

I further certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of December, 2019.

ALDRICH LAW FIRM, LTD.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Aldrich Law Firm, Ltd., and that on this 18th day of December, 2019, a copy of the foregoing Petition for Extraordinary Writ Relief was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex) and served via electronic mail or via U.S. Mail, postage prepaid, on the following individuals:

Kathryn Holbert, Esq.
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In addition, in compliance with NRAP 21(a)(1), a copy of this Petition for Extraordinary Writ Relief will be hand-delivered to the chambers of the Honorable Timothy Williams, District Judge on December 18, 2019.

An employee of Aldrich Law Firm, Ltd.