



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 08, 2020

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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In re:	)	Case No.: 20-12221-MKN
	)	Chapter 11
ELITE AUTO DEALER, INC.,	)	
	)	Date: June 18, 2020
Debtor.	)	Time: 9:30 a.m.
	)	

**ORDER ON LV.NET’S MOTION TO DISMISS, OR IN THE ALTERNATIVE  
CONVERT TO CHAPTER 7; AND MOTION TO APPOINT A TRUSTEE, OR IN THE  
ALTERNATIVE APPOINT AN EXAMINER <sup>1</sup>**

On June 18, 2020, the court heard the Motion to Dismiss, or in the Alternative Convert to Chapter 7; and Motion to Appoint a Trustee, or in the Alternative Appoint an Examiner (“Motion”), brought by LV.NET, LLC (“LV.Net”). (ECF No. 45). Elite Auto Dealer, Inc. (“Debtor”) filed an opposition to the Motion (“Opposition”). (ECF No. 67). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On November 11, 2019, the Debtor and LV.Net allegedly entered into a contract referred to as the “McNeil Agreement.” See Motion at 4. The agreement was between Andrew McNeil (“McNeil”), a trusted acquaintance of LV.Net, and the “VOSS” entities, which is a collection of

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRE” are to the Federal Rules of Evidence.

1 businesses that include: Debtor, Voss Motors LLC, and Voss Autobody LLC. See McNeil  
2 Agreement, attached as Exhibit “1” to Motion.<sup>2</sup> Under the Agreement, LV.Net apparently  
3 agreed to pay off Debtor’s existing debts and to provide additional funding to keep Elite Auto  
4 afloat. See Motion at 4. In return the Debtor would convey 50% of VOSS to McNeil and give  
5 LV.Net titles to all remaining vehicles as collateral. Id. at 4.

6 The McNeil Agreement allegedly was signed by Voss Autobody, Voss Motors, and  
7 McNeil. Debtor maintains, however, that it never signed the McNeil Agreement and that it is not  
8 valid. See Opposition at 5–6. Even though Debtor asserts that the agreement was not valid, both  
9 parties apparently acted as if there was a valid agreement. LV.Net advanced funds outlined in  
10 the McNeil Agreement and provided credit cards to the Debtor to use for the repair of vehicles.  
11 See Motion at 4–6. Debtor assisted the owner of LV.Net in obtaining a DMV Business  
12 Identification Card, and McNeil was given possession of most titles, given access to all VOSS  
13 software, listed as an owner on all bank accounts, and provided an onsite office. See Motion at  
14 4–5.

15 On November 14, 2019, the owner of LV.Net and McNeil signed a Commercial Auto  
16 Flooring Line/Security Agreement (“Security Agreement”), which allegedly grants LV.Net a  
17 security interest in various vehicles. See Security Agreement, attached as Exhibit “2” to Motion.  
18 The Security Agreement, however, was signed only by McNeil and the owner of LV.Net, not by  
19 Debtor or VOSS entities. Thus, Debtor claims that the McNeil Agreement was not executed by  
20 Debtor and therefore is not binding. See Opposition at 7.

21 On April 10, 2020, LV.Net commenced a civil action against the Debtor and Anderson  
22 Voss in the Eighth Judicial District Court, Clark County, Nevada (“State Court”), denominated  
23 Case No. A-20-813515-W (“State Court Litigation”). A copy of the complaint is attached as  
24 Exhibit “H” to the Omnibus Appendix. On April 22, 2020, the State Court entered a temporary  
25 restraining order (“TRO”) in favor of LV.Net, prohibiting the Debtor and its principal, Anderson  
26 Voss (“Voss”), from transferring or encumbering any assets of the business. A copy of the TRO  
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28 <sup>2</sup> The copy of the McNeil Agreement attached to the Motion is the same as the copy  
attached to an earlier motion for relief from stay filed by LV.Net.

1 is attached as Exhibit “I” to the Omnibus Appendix. The TRO also scheduled a hearing for May  
2 6, 2020, for the State Court to consider whether to issue a writ of possession in favor of LV.Net.

3 On May 5, 2020, Debtor commenced the above-captioned Chapter 11 reorganization  
4 proceeding. (ECF No. 1).<sup>3</sup>

5 On May 12, 2020, creditor, LV.Net filed a motion for relief from stay; motion prohibiting  
6 or conditioning the use, sale, or lease of property; and motion prohibiting use of cash collateral  
7 (“RAS Motion”). (ECF No. 15). Attached to that motion were declarations from Voss’s son  
8 Gabe Voss (“Gabe Voss Declaration”), McNeil (“First McNeil Declaration”), and LV.Net’s  
9 principal, Marty Mizrahi (“Mizrahi”) (“Second Mizrahi Declaration”).

10 On May 14, 2020, Debtor filed its schedule of assets and liabilities (“Schedules”) along  
11 with its Statement of Financial Affairs (“SOFA”) and List of Equity Security Holders (“Equity  
12 Holders List”). (ECF Nos. 20, 21, and 25). On its personal property Schedule “A/B,” Debtor  
13 lists no real property, but lists personal property having a total value of \$319,078.70. The most  
14 valuable property assets are vehicles having a total value of \$210,482.55, as well as notes  
15 receivable valued at \$101,304.74. On its secured creditor Schedule “D,” Debtor lists two  
16 claimants: Fausto Benini having a claim in the amount of \$279,918.38 secured by miscellaneous  
17 office equipment and accounts receivable, and Wolf Larson Loan in the amount of \$143,590.82  
18 (without description of collateral). LV.Net is not listed as a secured creditor. On its unsecured  
19 creditor Schedule “E/F,” Debtor lists priority and nonpriority unsecured claims totaling

20  
21 <sup>3</sup> Attached to the Chapter 11 bankruptcy petition is a list of creditors holding the twenty  
22 largest unsecured claims. Also attached to the petition is a ten-page document that appears to list  
23 creditors and parties in interest, some with incomplete addresses. Along with the bankruptcy  
24 petition, Debtor filed a Verification of Creditor Matrix referencing an attached list of creditors,  
25 but there is no list attached. (ECF No. 6). Nine days after the petition, Debtor filed an amended  
26 list of the twenty largest unsecured creditors. (ECF No. 19). On the same date, Debtor filed an  
27 amended Verification of Creditor Matrix that is unsigned, as well as a separate, amended list of  
28 creditors. (ECF Nos. 23 and 24). Ten days after the petition, Debtor files another amended  
Verification of Creditor Matrix that is signed, but again does not have a list of creditors attached.  
(ECF No. 33). On the same date, Debtor filed another amended list of creditors that appears to  
have twice the number of pages as the prior list. (ECF No. 35). There is no explanation whether  
the later amended list of creditors was intended to be attached to the later amended Verification  
of Creditor Matrix.

1 \$1,230,754.81. LV.Net is listed as a disputed, general unsecured creditor, having a claim in an  
2 unknown amount. Item 1 of the SOFA attests that the Debtor had gross revenues from the sale  
3 of vehicles in the amount of \$1,887,224.37 in 2018, 119,313.50 in 2019, and \$432,507.96 in  
4 2020 through the bankruptcy petition date. Item 3 of the SOFA lists three lawsuits involving the  
5 Debtor pending within the past year. One of those lawsuits is identified as the State Court  
6 Litigation. The Equity Holders List states that there are no equity holders of the Debtor.<sup>4</sup>

7 On May 15, 2020, Debtor filed an application to employ Kung & Brown as Chapter 11  
8 bankruptcy counsel (“Employment Application”), to which is attached the supporting declaration  
9 of Brandy Brown, Esq. (“Brown Declaration”). (ECF No. 26). On that same date, Debtor filed a  
10 motion for order (1) prohibiting utility companies from altering, refusing or discontinuing  
11 service, (2) authorizing payment of prepetition ordinary course claims of utility companies, and  
12 (3) establishing procedures for determining requests for additional adequate assurance (“Utility  
13 Motion”). (ECF No. 27). On the same date, Debtor filed a motion for authorization to pay  
14 wages to key employees (“Wage Motion”). (ECF No. 28). Additionally, on the same date,  
15 Debtor filed a supporting declaration from Voss (“First Voss Declaration”) as the sole  
16 shareholder and owner of the Debtor. (ECF No. 29).

17 On May 15, 2020, an order was entered shortening time regarding for the RAS Motion to  
18 be heard on May 27, 2020. (ECF No. 34).

19 On May 19, 2020, Debtor filed an opposition to the RAS Motion. (ECF No. 40).  
20 Attached to Debtor’s opposition are numerous exhibits, including a copy of an affidavit from  
21 McNeil (“McNeil Affidavit”) that was filed in the State Court Litigation. Also attached is  
22 another declaration from Voss, “individually and as owner of Elite Auto Dealer, Inc.” (“Second  
23 Voss Declaration”).

24  
25  
26  
27 <sup>4</sup> Many of these necessary documents do not bear electronic signatures of the Debtor’s  
28 principal. Amendments were later filed to add the principal’s electronic signature to the SOFA  
(ECF No. 31) and Equity Holders List (ECF No. 38), but not the Schedules.

1 On May 19, 2020, Debtor commenced Adversary Proceeding No. 20-01055 against  
2 LV.Net in this bankruptcy court by filing a complaint seeking to compel turnover of property of  
3 the estate (“Turnover Complaint”). (ECF No. 43).<sup>5</sup>

4 On May 20, 2020, LV.Net filed the instant Motion accompanied by additional  
5 declarations from McNeil (“Second McNeil Declaration”) and from Mizrahi (“Second Mizrahi  
6 Declaration”) in support of the motion. (ECF No. 45).<sup>6</sup> LV.Net alleges that Debtor has  
7 committed bad acts of conversion, embezzlement, breach of contract, fraud/fraudulent  
8 concealment, conspiracy, and negligence. See Motion at 1.

9 On May 22, 2020, LV.Net filed a reply to Debtor’s opposition to the RAS Motion. (ECF  
10 No. 48).

11 On May 27, 2020, LV.Net filed an opposition to the Employment Application. (ECF No.  
12 49).

13 On May 27, 2020, an order was entered shortening time for the instant Motion to be  
14 heard on June 17, 2020. (ECF No. 50).

15 On June 2, 2020, LV.Net filed a limited opposition to the Utility Motion. (ECF No. 58).  
16 On the same day, LV.Net filed an opposition to the Wage Motion that was accompanied by an  
17 “omnibus” declaration from McNeil (“Third McNeil Declaration”). (ECF Nos. 60 and 61).

18 On June 3, 2020, the U.S. Trustee filed an objection to the Employment Application as  
19 well as to the Wage Motion. (ECF Nos. 62 and 63).

20 On June 10, 2020, Debtor filed its Opposition to the instant Motion. (ECF No. 67).  
21 Debtor denies the allegations made by LV.Net. See Opposition at 2. On the same date, Debtor  
22 filed an “Omnibus Appendix” (ECF No. 66) that includes a variety of exhibits pertaining to  
23 unspecified matters scheduled to be heard on June 17, 2020.

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24 <sup>5</sup> An initial scheduling conference in the adversary proceeding is scheduled to be held on  
25 September 24, 2020.

26 <sup>6</sup> A hearing on the Motion under Section 1112(b)(1) was timely commenced within 30  
27 days. See 11 U.S.C. §1112(b)(3). Because the same Motion also requests the appointment of a  
28 Chapter 11 trustee or examiner under Section 1104, the court finds there are compelling  
circumstances warranting additional time to decide the Motion.

1 On June 10, 2020, Debtor filed a reply to the oppositions filed to Wage Motion. (ECF  
2 No. 68). On that same date, Debtor filed an omnibus reply to oppositions to the Employment  
3 Motion. (ECF No. 69). Debtor also filed a reply to LV.Net's opposition to the Utility Motion  
4 (ECF No. 70). Debtor also filed an "omnibus" declaration from Voss ("Third Voss  
5 Declaration"), individually and as the owner of Debtor. (ECF No. 71).<sup>7</sup> Finally, Debtor also filed  
6 a supplement to the Employment Application. (ECF No. 72).

7 On June 11, 2020, the Meeting of Creditors was held and continued to July 16, 2020.  
8 (ECF No. 74).

9 On June 15, 2020, LV.Net filed a reply to Debtor's opposition to the instant Motion.  
10 (ECF No. 76).

### 11 APPLICABLE LEGAL STANDARDS

12 Conversion or dismissal of a Chapter 11 bankruptcy is governed by Section 1112. A  
13 debtor may voluntarily convert its Chapter 11 into a Chapter 7 under Section 1112(a).  
14 Additionally, a creditor may request a case to be convert under Section 11 U.S.C. § 1112(b)  
15 which provides as follows:

16 (1) Except as provided in paragraph (2) and subsection (c), on request  
17 of a party in interest, and after notice and a hearing, the court shall  
18 convert a case under this chapter to a case under chapter 7 or dismiss  
19 a case under this chapter, whichever is in the best interests of creditors  
20 and the estate, for cause unless the court determines that the  
21 appointment under section 1104(a) of a trustee or an examiner is in  
22 the best interests of creditors and the estate.

23 (2) The court may not convert a case under this chapter to a case under  
24 chapter 7 or dismiss a case under this chapter if the court finds and  
25 specifically identifies unusual circumstances establishing that  
26 converting or dismissing the case is not in the best interests of  
27 creditors and the estate, and the debtor or any other party in interest  
28 establishes that--

(A) there is a reasonable likelihood that a plan will be confirmed  
within the timeframes established in sections 1121(e) and 1129(e) of  
this title, or if such sections do not apply, within a reasonable period  
of time; and

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<sup>7</sup> The Third Voss Declaration apparently authenticates the exhibits attached to the Omnibus Appendix pursuant to FRE 901(a).

1 (B) the grounds for converting or dismissing the case include an act  
2 or omission of the debtor other than under paragraph (4)(A)--  
3 (i) for which there exists a reasonable justification for the act or  
4 omission; and  
5 (ii) that will be cured within a reasonable period of time fixed by the  
6 court.

7 11 U.S.C. §1112(b).

8 The court is granted express authority under Section 1112(b)(2) to appoint a Chapter 11  
9 trustee under Section 1104(a), which provides in pertinent part:

10 (a) At any time after the commencement of the case but before  
11 confirmation of a plan, on request of a party in interest or the United  
12 States trustee, and after notice and a hearing, the court shall order  
13 the appointment of a trustee--

14 (1) for cause, including fraud, dishonesty, incompetence, or gross  
15 mismanagement of the affairs of the debtor by current management,  
16 either before or after the commencement of the case, or similar  
17 cause, but not including the number of holders of securities of the  
18 debtor or the amount of assets or liabilities of the debtor; or

19 (2) if such appointment is in the interests of creditors, any equity  
20 security holders, and other interests of the estate, without regard to  
21 the number of holders of securities of the debtor or the amount of  
22 assets or liabilities of the debtor.

23 11 U.S.C. § 1104(a) (Emphasis added). In the alternative, if the court does not appoint a Chapter  
24 11 trustee then an examiner may be appointed under Section 11 U.S.C. § 1104(c). That section  
25 provides:

26 (c) If the court does not order the appointment of a trustee under this  
27 section, then at any time before the confirmation of a plan, on  
28 request of a party in interest or the United States trustee, and after  
notice and a hearing, the court shall order the appointment of an  
examiner to conduct such an investigation of the debtor as is  
appropriate, including an investigation of any allegations of fraud,  
dishonesty, incompetence, misconduct, mismanagement, or  
irregularity in the management of the affairs of the debtor of or by  
current or former management of the debtor, if--

(1) such appointment is in the interests of creditors, any equity  
security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts  
for goods, services, or taxes, or owing to an insider, exceed  
\$5,000,000.

11 U.S.C. §1104(c).

## DISCUSSION

The court has considered the written and oral arguments of the parties, as well as the evidence presented and record before the court. The court concludes that dismissal or conversion is not warranted, and that appointment of a Chapter 11 trustee or an examiner is not required at this stage.

### **1. Dismissal or Conversion.**

There is no dispute that this Chapter 11 proceeding has only been pending for a short period of time. The 120-day plan exclusivity period under Section 1121(b) has not elapsed. The meeting of the creditors has not been completed. Cause must be shown for a Chapter 11 proceeding to be dismissed or converted to Chapter 7. See 11 U.S.C. § 1112(b)(1). The burden of establishing cause rests with the moving party. See Labankoff v. U.S. Trustee (In re Labankoff), 2010 WL 6259969, at \*3 (B.A.P. 9th Cir. June 14, 2010); see generally 7 COLLIER ON BANKRUPTCY, ¶ 1112.04[4] (Richard Levin and Henry J. Sommer, eds., 16th ed. 2019).

LV.Net maintains that various examples of “cause” exist under Section 1112(b)(4). **First**, LV.Net argues that cause for dismissal or conversion exists under Section 1112(b)(4)(C). See Motion at 10. LV.Net alleges that Debtor has failed to maintain required insurance because Debtor’s bond was cancelled prior to commencement of the case. **Second**, LV.Net argues that cause for dismissal or conversion exist under Section 1112(b)(4)(M). See Motion at 11. LV.Net alleges that Debtor will not be able to reorganize because Debtor cannot operate its business without a bond. See Motion at 12. **Third**, LV.Net maintains that Debtor filed the petition in bad faith, and therefore, cause for dismissal or conversion generally exists under Section 1112(b)(4). See Motion at 12. LV.Net alleges that bad faith exists because Debtor fraudulently induced LV.Net to provide financing with the security of an investment, while also using bankruptcy as a sword rather than a shield to avoid a jury trial in State Court. See Motion at 13-14. **Fourth**, LV.Net argues that Voss lacks the authority to commence the bankruptcy proceeding and the case therefore must be dismissed. See Motion at 14. **Finally**, LV.Net maintains that dismissal or conversion is in the best interest of the creditors and the bankruptcy estate because Voss will only act in his own interest compared to what is best for creditors. See Motion at 15.



1 Debtor, of course, disputes all of LV.Net's allegations. See Debtor Opposition at 8.  
2 **First**, Debtor alleges that its automobile dealership bond has been reinstated, and any applicable  
3 business licenses are current. See Opposition at 9; see also Omnibus Appendix Exhibits "E, F,  
4 and G." **Second**, Debtor argues that it was forced to file for bankruptcy protection because  
5 LV.Net repeatedly stole its vehicles and that the COVID shutdowns paralyzed Debtor's business.  
6 For these reasons, Debtor asserts that the Chapter 11 proceeding was commenced in good faith.  
7 See Opposition at 11. **Third**, Debtor maintains that a reorganization is in the best interests of  
8 creditors because liquidation of the business would produce far less for creditors. See  
9 Opposition at 12. Debtor suggests that the instant Motion is premature because it was filed only  
10 fifteen days after the Chapter 11 was commenced, before the meeting of creditors was  
11 completed, and before expiration of the 120-day plan exclusivity period. See Opposition at 13–  
12 14. Of course, Debtor maintains that it has the ability to confirm and consummate a plan of  
13 reorganization. See Opposition at 8–9.

14 Based on the record, the court concludes that LV.Net has not met its burden of proof with  
15 respect to dismissal or conversion under Section 1112(b). The bond apparently has been  
16 reinstated and Debtor's business operations apparently may continue. Additionally, the validity  
17 of the McNeil Agreement is disputed and LV.Net's asserted right to control the business also is  
18 disputed. Gross income from operation of the business apparently was in excess of \$1 million in  
19 both 2018 and 2019, and the liquidation value of the Debtor's inventory is uncertain due to the  
20 ownership dispute between the Debtor and LV.Net.

21 Even if LV.Net did meet its burden of proof, Debtor would be able to prevent the  
22 dismissal or conversion by [1] identifying the unusual circumstances required by Section  
23 1112(b)(2)(A), [2] establishing that there is a reasonable likelihood of confirming a plan in a  
24 reasonable amount of time, [3] establishing that the grounds for relief include an act or omission  
25 of the debtor for which there is a reasonable justification; and [4] establishing that the act or  
26 omission can be cured within a reasonable time. See 11 U.S.C. § 1112(b)(2)(A) and (B). Debtor  
27 has not unreasonably delayed this Chapter 11 proceeding and is still well within the 120-day plan  
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1 exclusivity period. Debtor has reinstated its insurance coverage and bond. Under these  
2 circumstances, dismissal or conversion is unwarranted.

3 **2. Appointment of a Chapter 11 Trustee or an Examiner.**

4 Under Section 1112(b)(1), in lieu of dismissal or conversion, a court may appoint a  
5 Chapter 11 trustee under Section 1104(a) or an examiner under Section 1104(c). Under Section  
6 1104(a) and Section 1104(c), a Chapter 11 trustee or an examiner can be appointed for cause,  
7 including fraud, dishonesty, incompetence or gross mismanagement, or if the court finds it to be  
8 in the interest of creditors. In addition to certain duties under Section 704, see 11 U.S.C.  
9 §1106(a)(1), a Chapter 11 trustee is required to “investigate the acts, conduct, assets, liabilities,  
10 and financial condition of the debtor, the operation of the debtor's business and the desirability of  
11 the continuance of such business.” Id. at §1106(a)(3). Additionally, “as soon as practicable,” a  
12 Chapter 11 trustee must: “(A) file a statement of any investigation conducted under paragraph (3)  
13 of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence,  
14 misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to  
15 a cause of action available to the estate,” and (B) “file a plan under section 1121 of the title, file a  
16 report of why the trustee will not file a plan, or recommend conversion of the case . . . or  
17 dismissal of the case.” Id. at §1106(a)(4)(A) and §1106(a)(5).

18 A Chapter 11 trustee may be appointed upon the request of a party in interest, or, may be  
19 appointed *sua sponte* by the bankruptcy court. See In re CWNevada LLC, 602 B.R. 717, 727  
20 n.23 (Bankr. D. Nev. 2019). “The appointment of a trustee in a Chapter 11 case is an  
21 extraordinary remedy” because it is presumed that current management is in the best position to  
22 reorganize the debtor’s financial affairs. See Keeley and Grabanski Land Partnership v. Keeley  
23 (In re Keeley & Grabanski Land P'ship), 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011). Some factors  
24 that are considered when courts decide whether or not to appoint a trustee are: “(1) the  
25 trustworthiness of the debtor, (2) the past and present performance of the debtor and the  
26 prospects for rehabilitation, (3) the confidence level of creditors and the business community in  
27 the debtor, and (4) whether the benefits of appointing a trustee outweigh the associated costs.”  
28 See United Surety & Indemnity Co. v. Lopez-Munoz (In re Lopez-Munoz), 553 B.R. 179, 195–

1 96 (B.A.P. 1st Cir. 2016), aff'd sub nom. In re Lopez-Munoz, 866 F.3d 487 (1st Cir. 2017).

2 Based on the record, the court concludes that LV.Net has not met its burden, at this point, of  
3 establishing that appointment of a Chapter 11 trustee is in the best interest of the creditors and of  
4 the estate. There are, however, many difficulties that must be considered.

5 First, there is the threshold issue of whether the Debtor or LV.Net validly has title to the  
6 vehicle inventory. Debtor alleges that it owns certain vehicles and that LV.Net stole all or some  
7 of them from the Debtor. See Second Voss Declaration at ¶¶ 20, 21, and 22; Third Voss  
8 Declaration at ¶¶ 28, 29, 30, and 73; Turnover Complaint at ¶¶ 18, 19, and 20. In turn, LV.Net  
9 alleges that it owns certain vehicles or holds certificates of title to certain vehicles, but that  
10 Debtor stole all or some of them from LV.Net. See Gabe Voss Declaration at ¶¶ 17, 19, and 21;  
11 First McNeil Declaration at ¶¶ 29, 30, and 36; McNeil Affidavit at ¶¶ 36, 20; Second McNeil  
12 Declaration at ¶¶ 27, 28, and 35; First Mizrahi Declaration at ¶¶ 29, 30, and 31; Second Mizrahi  
13 Declaration at ¶¶ 18, 28, 29, and 30. Both sides allege that members of law enforcement were  
14 called to the Debtor's premises only to be faced with competing claims to the vehicles, with one  
15 side accusing the other of thievery. See Omnibus Appendix at Exhibit "B"; Gabe Voss  
16 Declaration at ¶¶ 15 and 18; First Mizrahi Declaration at ¶¶ 31, 32, and 33.<sup>8</sup> It is axiomatic that a  
17 party cannot obtain an enforceable legal right in property obtained illegally. See Restatement  
18 (Second) of Torts §229 cmt. d (1965). See, e.g., Kitchen v. Boyd (In re Newpower), 233 F.3d  
19 922 (6th Cir. 2000) (funds embezzled by a Chapter 7 debtor were never property of the  
20 bankruptcy estate)<sup>9</sup>; U.S. S.E.C. v. Universal Exp., Inc., 2008 WL 1944803, at \*3 (S.D. N.Y.  
21 Apr. 30, 2008)("It is a long-established general rule that 'a thief cannot convey good title to  
22 stolen property.'"). Such concerns impact a variety of matters commonly arising in a Chapter 11  
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24 <sup>8</sup> LV.Net also alleges that Voss threatened to shoot both his own son, Gabe Voss, as well  
25 as its principal, Mizrahi. See Gabe Voss Declaration at ¶18; First McNeil Declaration at ¶33;  
26 Second McNeil Declaration at ¶32; First Mizrahi Declaration at ¶33; Second Mizrahi  
27 Declaration at ¶¶32 and 33.

28 <sup>9</sup> "[T]he proposition, long established at common law, [is] that a thief has no title to the  
property that he steals." 233 F.3d at 929.

1 proceeding, including the use of cash collateral<sup>10</sup> and the necessity of adequate protection,<sup>11</sup> the  
2 equitable subordination of claims, the classification of claims, the liquidation value of the estate  
3 at plan confirmation, the feasibility of any proposed plan of reorganization, and the fair and  
4 equitable treatment of dissenting classes, including the requirements of the “absolute priority  
5 rule.”

6 Second, both parties assert that fraudulent and bad faith acts were committed by the other  
7 party. LV.Net contends that Debtor fraudulently induced LV.Net to provide financing and an  
8 investment, while promising to secure the investment through control of Debtor and its affiliates.  
9 See Motion at 13. LV.Net additionally claims that Debtor filed the petition in bad faith to avoid  
10 a jury trial in the State Court Litigation. See Motion at 7–8. Debtor argues that the Security  
11 Agreement was fraudulently signed by someone who did not have authority to bind the Debtor.  
12 See Opposition at 6. Not to be outdone, Debtor also accuses LV.Net of bad faith because it filed  
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14 <sup>10</sup> On May 27, 2020, LV.Net filed Proof of Claim No. 4-1 in the amount of \$546,560.69,  
15 secured as a result of the McNeil Agreement, and a Commercial Auto Flooring Line/Security  
16 Agreement encompassing the Debtor’s vehicle inventory. On the same date, LV.Net filed Proof  
17 of Claim No. 5-1 in the unsecured amount of \$330,376.00 based on improper credit card  
18 expenditures. Unless Section 502(a), a claim for which a proof of claim is filed is deemed  
19 allowed unless a party in interest objects. Under FRBP 3001(f), a proof of claim constitutes  
20 prima facie evidence of the validity and amount of the claim. If LV.Net is a secured creditor of  
21 the Debtor, then its collateral and the proceeds of its collateral may not be used by the Debtor  
22 without consent of LV.Net, or, a court order providing adequate protection of LV.Net’s interest.  
23 See 11 U.S.C. §363(a) (defining “cash collateral”); 11 U.S.C. §363(c)(2) (authorization to use  
24 cash collateral); 11 U.S.C. §363(e) (court shall prohibit or condition use of cash collateral as is  
25 necessary to provide adequate protection to the entity that has an interest in the property).

26 <sup>11</sup> It is a debtor in possession’s responsibility to seek prior authorization to use cash  
27 collateral rather than the claimant’s obligation to demand adequate protection. See, e.g., In re  
28 CHA Hawaii, LLC, 426 B.R. 828, 837 (Bankr. D. Haw. 2010) (ordering liens on unencumbered  
property, superpriority administrative claim, and first priority lien on additional cash due to  
debtor’s unauthorized use of cash collateral). Where a debtor in possession seeks such  
authorization, the burden of proof on the issue of adequate protection of the creditor’s interest  
under Section 363(e) lies with the movant, while the burden of proof on any issue as to the  
validity, priority or extent of the creditor’s interest lies with the creditor. See 11 U.S.C.  
§363(p)(1). Inasmuch as LV.Net asserted an interest in the Debtor’s vehicle inventory in the  
State Court Litigation prior to commencement of the Chapter 11 proceeding, it is puzzling why  
the Debtor did not immediately seek LV.Net’s consent under Section 363(c)(2)(A) or  
immediately seek court authorization to use cash collateral under Section 363(c)(2)(B).

1 the instant Motion only fifteen days after the Chapter 11 proceeding was commenced. See  
2 Opposition at 8–9. These concerns also impact whether the Debtor is able to meet the good faith  
3 requirements of a plan proponent and the ability to provide acceptable management for a  
4 reorganized entity.

5 Third, Debtor and LV.Net do not agree on the amount that is owed by Debtor to LV.Net.  
6 Part of this problem, of course, stems from the disagreement about which party has valid title to  
7 or possession of various vehicles. Both the Debtor and LV.Net have offered into evidence a  
8 copy of the McNeil Agreement that bears signatures on behalf of Voss Motors LLC, Voss  
9 Automotive LLC, and “Andrew McNeil (as an individual or on behalf of his team).” No  
10 signature, however, appears on behalf of Elite Auto Dealers Inc., i.e., the Debtor. McNeil, as  
11 well as LV.Net’s principal, Mizrahi, attest that the agreement was validly signed by Fernanda  
12 Voss on behalf of both Voss Motors LLC and Voss Automotive LLC. See First McNeil  
13 Declaration at ¶ 11; Second McNeil Declaration at ¶ 11; Third McNeil Declaration at ¶5; First  
14 Mizrahi Declaration at ¶ 11; Second Mizrahi Declaration at ¶11. Mizrahi attests that he was  
15 repeatedly assured by Voss that Voss had signed the McNeil Agreement. See First Mizrahi  
16 Declaration at ¶ 12. Both McNeil and Mizrahi attest that the original McNeil Agreement was  
17 maintained at McNeil’s office located at the Debtor’s premises. See First McNeil Declaration at  
18 ¶12; McNeil Affidavit at ¶6; First Mizrahi Declaration at ¶12.<sup>12</sup> Voss attests that the copy of the  
19 McNeil Agreement is not signed by the Debtor because he never signed it. See Second Voss  
20 Declaration at ¶¶ 5 and 14; Third Voss Declaration at ¶¶ 7 and 46.<sup>13</sup> If the McNeil Agreement  
21 was executed or is subject to enforcement on the basis of estoppel principles, then the Debtor’s  
22 ability to effectuate and to even propose a Chapter 11 plan of reorganization may be in doubt. If  
23 the McNeil Agreement is binding on Voss Motors LLC and Voss Automotive LLC, rather than  
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25 <sup>12</sup> Unlike the vehicle title certificates that allegedly were taken from a safe located in  
26 McNeil’s office, see McNeil Affidavit at ¶20, there is no testimony that a fully executed original  
of the McNeil Agreement was removed from the safe or from McNeil’s office.

27 <sup>13</sup> The absence of a signature, of course, is not dispositive of whether Voss, in fact, had  
28 given assurances to Mizrahi that he had signed the McNeil Agreement.

1 the Debtor, then LV.Net's enforcement of its rights, if any, against those entities may well  
2 impact the feasibility of any proposed Chapter 11 plan by the Debtor. Those entities are not in  
3 bankruptcy and the automatic stay in the instant case does not protect either of them, nor does it  
4 protect Voss individually.

5 Fourth, the Debtor has a single shareholder. See Resolution of Sole Shareholder and  
6 Director of Elite Auto Dealer, Inc. (ECF No. 4).<sup>14</sup> This is somewhat curious because Voss also  
7 attests under penalty of perjury that the Debtor has no equity security holders when it obviously  
8 has at least one.<sup>15</sup> Debtor does not dispute that it borrowed funds from LV.Net. See Second  
9 Voss Declaration at ¶¶ 6, 11, and 13; Third Voss Declaration at ¶¶ 5 and 8. Confirmation of a  
10 Chapter 11 plan of reorganization is governed by Section 1129. In the event there is a dissenting  
11 class of unsecured creditors, Debtor will be required by Section 1129(a)(2)(B)(i) and (ii) to pay  
12 the full amount of the claims in the dissenting class, or, otherwise satisfy the absolute priority  
13 rule. See, e.g., In re Green Pharmaceuticals, Inc., 2020 WL 2516537, at \*4 (Bankr. C.D. Cal.  
14 May 15, 2020), quoting Everett v. Perez (In re Perez), 30 F.3d 1209, 1214 (9th Cir. 1994)  
15 (“Because the claims of equity holders are always junior to claims of creditors, this means that a  
16 bankruptcy court may not approve a plan that gives the debtor any interest in the reorganized  
17 estate unless the plan provides for the full payment of claims of creditors in the objecting  
18 class.”). See generally Zachary v. California Bank & Trust (In re Zachary), 811 F.3d 1191, 1194  
19 (9th Cir. 2016). According to the Debtor's schedules, the non-priority unsecured claims that are  
20 not disputed, unliquidated, or contingent exceed \$800,500.00. Under FRBP 3003(b)(1), those  
21 claims have prima facie validity and the claimholders are not required to file proofs of claim. If  
22 LV.Net's Proof of Claim 4-1 in the amount of \$546,560.69, see note 10, supra, is allowed as  
23 unsecured rather than secured, the allowed amount of unsecured claims may exceed \$1.3 million.

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24 <sup>14</sup> Part 13, Item 28 of the SOFA instructs the Debtor to list its officers, directors,  
25 managing members, general partners, members in control, controlling shareholders, or other  
26 people in control of the debtor at the time of the filing of the case. No person or entity is listed.

27 <sup>15</sup> If the Debtor is in fact a sole proprietorship owned entirely by Voss, rather than a  
28 corporation, then it is not eligible to file a bankruptcy petition. See Gilliam v. Speier (In re  
KRSM Properties, LLC), 318 B.R. 712, 717 (B.A.P. 9th Cir. 2004).

1 If LV.Net's Proof of Claim 5-1 in the amount of \$330,376.00 is added, the allowed amount of  
2 unsecured claims may exceed \$1.6 million. Under the absolute priority rule, if all unsecured  
3 claims in the dissenting unsecured class are not paid in full, Voss must contribute "new value" if  
4 he wants to retain his interest as the sole shareholder of the Debtor. See Liberty Nat'l  
5 Enterprises v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship), 115 F.3d 650,  
6 654 (9th Cir. 1997) ("The 'new value' exception to the absolute priority rule 'requires that  
7 former equity holders offer value under the Plan that is (1) new, (2) substantial, (3) in money or  
8 money's worth, (4) necessary for a successful reorganization, and (5) reasonably equivalent to  
9 the value or interest received.'"). Given that the Debtor did not have the funds to provide a  
10 prepetition retainer to its proposed bankruptcy counsel, see Brown Declaration at ¶6, uncertainty  
11 exists whether its operations can generate sufficient funds to pay unsecured claims in full in lieu  
12 of satisfying the absolute priority rule.<sup>16</sup>

13 Finally, it is worth noting that most disputes arising from a debtor-creditor relationship  
14 are resolved informally between the parties, or through civil litigation that is actually civil. Most  
15 debtor-creditor relationships do not involve fiduciary responsibilities. See, e.g., Weingartner v.  
16 Chase Home Finance, LLC, 702 F.Supp.2d 1276, 1288 (D. Nev. 2010)(under Nevada law, a  
17 lender and debtor "are adversaries, not fiduciaries"). Thankfully, most debtor-creditor disputes  
18 also do not involve competing allegations of criminal behavior, including theft or threats of  
19 physical violence. Bankruptcy relief generally is designed to provide a fresh start to honest but  
20 unfortunate debtors. See Grogan v. Garner, 498 U.S. 279, 286-87 (1991). Chapter 11  
21 reorganization is designed to preserve jobs, pay creditors at least as well as a Chapter 7, and to  
22 preserve investments. See U.S. v. Whiting Pools, Inc. (In re Whiting Pools, Inc.), 462 U.S. 198,  
23 203 (1983). Chapter 11 offers the debtor an ability to treat dissenting creditors differently as  
24 long as the treatment is fair and equitable. However, because a Chapter 11 debtor in possession  
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26 <sup>16</sup> Given that the Chapter 11 was commenced on May 5, 2020, Debtor's monthly  
27 operating report for the month of May will be due no later than June 20, 2020. Unexcused  
28 failure to timely file required reports is an example of cause for dismissal or conversion under  
Section 1112(b)(4)(F). More likely, such failures would suggest that the appointment of an  
examiner might be appropriate under Section 1104(c).

1 has a fiduciary duty to protect the interests of all creditors rather than its owners,<sup>17</sup> and owners of  
2 a Chapter 11 entity are subject to the absolute priority rule, Chapter 11 is a balancing process  
3 intended to discourage adversaries from financially destroying each other to the detriment of  
4 other parties in interest.

5 In the event the Debtor and LV.Net desire to participate in a judicially supervised  
6 settlement conference, they should contact the courtroom deputy to obtain the dates at which a  
7 settlement judge is available. Unless and until then, the court concludes that LV.Net has not met  
8 its burden of proving that any of the requested relief is warranted.

9 **IT IS THEREFORE ORDERED** the Motion to Dismiss, or in the Alternative Convert  
10 to Chapter 7; and Motion to Appoint a Trustee, or in the Alternative Appoint an Examiner  
11 (“Motion”), brought by LV.NET, LLC, Docket No. 45, be, and the same hereby is, **DENIED**.

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14 Copies sent via CM/ECF ELECTRONIC FILING

15 Copies sent via BNC to:

16 ELITE AUTO DEALER, INC.  
17 ATTN: OFFICER OR MANAGING AGENT  
18 3115 FREMONT STREET  
19 LAS VEGAS, NV 89104

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28 <sup>17</sup> This fiduciary obligation also is owed by bankruptcy counsel that represents the Chapter 11 debtor in possession. See In re Perez, 30 F.3d at 1219.