UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to Case Nos:

09-CV-23835-ASG

10-CV-20236-ASG.

JOINT OPPOSITION TO DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS THE TERM LENDERS' DISBURSEMENT AGREEMENT CLAIMS

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Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, No. 09-cv-23835-ASG (the "Avenue Complaint") and *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, No. 10-cv-20236-ASG (the "Aurelius Complaint") jointly oppose Bank of America N.A.'s Motion to Dismiss the Term Lenders' Disbursement Agreement Claims as follows:

I. PRELIMINARY STATEMENT

Plaintiffs are Term Lenders under a credit facility for the financing of the construction of the Fontainebleau Resort and Casino in Las Vegas. The facility was governed primarily by two agreements. The Credit Agreement established the circumstances under which the Lenders were required to deposit loan proceeds into a holding account, known as the Bank Proceeds Account. The Disbursement Agreement established the conditions under which the Borrower could access those proceeds. Bank of America, N.A. ("BofA") was the Disbursement Agent under the Disbursement Agreement. This motion involves the Term Lenders' claims against BofA for its wrongful disbursement of loan proceeds to the Borrowers.

As Disbursement Agent, BofA functioned as the gatekeeper on behalf of all Lenders, responsible for ensuring that loan proceeds under the Credit Facility remained safely in the Bank Proceeds Account unless and until all conditions precedent to disbursement were satisfied. BofA was the last line of defense against the Borrower's improper withdrawal of those proceeds.

BofA failed the Term Lenders. As the Project's financial condition deteriorated, BofA disbursed hundreds of millions of dollars of Term Lender Loans to the Borrower at times when BofA knew of material defaults and failed conditions precedent that barred those disbursements. BofA directly benefited from those improper disbursements by reducing its exposure on its own Revolving Loans, and indirectly benefited by fostering its ongoing business relationship with the Borrower and its principal indirect owner, Jeffrey Soffer.

BofA does not dispute that the Term Lenders properly allege existing material defaults at the time of these disbursements. But BofA asserts that it was nothing more than an "administrative" paper-pusher, charged only with determining whether the certificates the Borrower submitted in connection with Advance Requests were genuine and contained representations stating that all conditions precedent to disbursement had been satisfied. If so, says BofA, it blindly could rely upon the certificates to disburse funds. It had no obligation to investigate further.

BofA misses the point. The Term Lenders do not argue that BofA failed to police the Borrower's filings. This is a case about BofA's failure to act in light of known facts. BofA was not privileged under the Disbursement Agreement to disburse funds in cavalier "reliance" on false certificates when it knew of material defaults and failed conditions precedent to disbursement that the Borrower had failed to disclose or acknowledge. This common sense conclusion is supported by the express terms of the Disbursement Agreement or, alternatively, by the implied covenant of good faith and fair dealing. It also is supported by applicable New York law holding that a party may neither "rely" upon facts that it knows are materially incorrect nor seek to contractually insulate itself from its own gross negligence and willful misconduct in doing so.

Contracts must be construed according to their plain meaning and manifest purpose. The purpose of the Disbursement Agreement was to ensure that Loan proceeds were not improperly disbursed. That was BofA's job. BofA was not hired to sit as the Three Wise Monkeys – hearing, speaking and seeing no evil. It was hired to protect the Lenders. It did not.

II. BACKGROUND

Plaintiffs are lenders under a June 6, 2007 Credit Agreement that provided $1.85 billion in bank financing to Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (together, the "Borrower") for the development and construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada (the "Project"). The $1.85 billion bank financing included three types of loan commitments: (a) a $700 million Initial Term Loan Facility; (b) a $350 million Delay Draw Loan Facility (together with the Initial Term Loan, the "Term Loan Facilities"), and (c) an $800 million Revolving Loan Facility. Plaintiffs are each lenders under the Term Loan Facility ("Term Lenders").

BofA served as Administrative Agent to all lenders under the Credit Agreement and as Disbursement Agent for the benefit of all lenders under a related Master Disbursement Agreement. BofA was also a Revolving Lender, an Issuing Lender, and the Swing Line Lender. It was not a Term Lender. The Disbursement Agreement governed the disbursement of funds to the Borrower under the Credit Agreement, the Second Lien Facility and the Retail Facility.

A. The Funding and Disbursement Process

The Credit Agreement and the Disbursement Agreement created a two-step process for the Borrower to obtain loan proceeds under the Delay Draw Loan Facility and the Revolving Facility:

First: In order to obtain loans, the Borrower submitted a Notice of Borrowing to BofA (as Administrative Agent) pursuant to the Credit Agreement. Upon notice from BofA, each lender became obligated to make its pro-rata share of the requested loans available, subject **only** to certain identified conditions precedent in the Credit Agreement. BofA then deposited the proceeds of these loans into the Bank Proceeds Account.

Second: In order to access funds from the Bank Proceeds Account, the Borrower submitted an Advance Request to BofA (as Disbursement Agent) pursuant to the Disbursement Agreement.[1] If and when the conditions precedent to disbursement set forth in Section 3.3 of the Disbursement Agreement were satisfied, BofA (as Disbursement Agent) then issued, together with the Project Entities,[2] an Advance Confirmation Notice, authorizing the advance of funds from the Bank Proceeds Account to the Bank Funding Account.[3] Upon the issuance of an Advance Confirmation Notice, BofA as Disbursement Agent could then disburse funds to the Borrower.[4] If those conditions precedent were not satisfied, then BofA as Disbursement Agent was obligated to issue a "Stop Funding Notice."[5] The issuance of a Stop Funding Notice not only prohibited the disbursement of funds to the Borrower but also relieved the Lenders of any obligation under the Credit Agreement to make Loans until the circumstances giving rise to the Stop Funding Notice were resolved.[6]

It is BofA's breach of its gatekeeper obligations in connection with that second step under the Disbursement Agreement that is at issue in this motion.

B. BofA's Obligations under the Disbursement Agreement

As Disbursement Agent, BofA assumed responsibility to all of the lenders under the Credit Agreement, the Second Lien Facility and the Retail Facility to administer the construction

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[1] Disbursement Agreement ("D.A.") § 2.4, attached as Ex. A to the Second Amended Avenue Complaint.

[2] The Project Entities are the Borrower and certain affiliates. *Id.* at Ex. A.

[3] *Id.* at §§ 2.4.6, 2.6.1(b).

[4] *Id.* at §§ 2.4.6, 2.6.2.

[5] *Id.* at §§ 2.5.1, 2.5.2(a)(ii).

[6] Credit Agreement ("C.A.") § 2.4(e).

loans and the disbursement of the loan proceeds to the Borrower. BofA agreed "to exercise commercially prudent practices in the performance of its duties consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds."[7] BofA was paid for its work.[8]

BofA had a duty to ensure that funds under the Credit Facility were disbursed only if all of the conditions precedent to disbursement set forth in Section 3.3 of the Disbursement Agreement were satisfied as of the date of the Advance.[9] Those conditions included:

- **§ 3.3.2** – each representation and warranty of each Project Entity in Article 4 was true and correct as if made on such date;
- **§ 3.3.3** – there was no Default or Event of Default under any of the Financing Agreements;
- **§ 3.3.8** – the In Balance Test was satisfied;
- **§ 3.3.11** – there had been no development or event since the Closing Date that could reasonably be expected to have a Material Adverse Effect on the Project;
- **§ 3.3.21** – BofA as Bank Agent was not aware of any material and adverse information concerning the Project or the loan transactions; and
- **§ 3.3.23** – the Retail Agent and Retail Lenders under the Retail Facility had made all Advances required of them under the Advance Request.

If any condition precedent were not satisfied, BofA could not approve an Advance Request, could not issue an Advance Confirmation Notice,[10] and therefore could not advance money from the Bank Proceeds Account to the Bank Funding Account. To the contrary, BofA

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[7] D.A. § 9.1.

[8] *Id.* at § 9.5.

[9] *Id.* at §§ 2.4.6, 2.5.1, 2.5.2(a)(ii).

[10] *Id.* at § 2.4.6.

was required to issue a Stop Funding Notice.[11] Moreover, upon notice of a Default, BofA was required to exercise all rights and powers vested in it by any of the loan documents with "the same degree of care and skill . . . as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs."[12] Specifically, upon issuance of a Stop Funding Notice, BofA could not "withdraw, transfer or release any funds on deposit in the Accounts," including the Bank Proceeds Account.[13]

C. BofA's Breaches of the Disbursement Agreement

BofA is liable under Section 9.10 of the Disbursement Agreement for any damages resulting from its "bad faith, fraud, gross negligence or willful misconduct." The Term Lenders have alleged that BofA acted in bad faith, with gross negligence, and in willful disregard of its obligations under the Disbursement Agreement when, beginning in September 2008, it approved Advance Requests, executed Advance Confirmation Notices, failed to issue Stop Funding Notices and disbursed Loan proceeds, all at times when it knew that Defaults had occurred and that conditions precedent to disbursement had not been satisfied.[14]

In particular, the Term Lenders have alleged the following defaults, each of which resulted in the failure of one or more conditions precedent to BofA's disbursement of funds:

- Lehman Brothers Holdings, Inc. ("Lehman"), the Retail Agent and largest Retail Lender (responsible for $215 million, of which $189.6 million was to be advanced after closing), filed for bankruptcy in September 2008 and failed to honor at least four Advances thereafter in breach of the Retail Facility Agreement and thereby defaulted on its lending obligations under the Retail Facility Agreement ("Lehman Default");

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[11] *Id.* at § 2.5.1(i).

[12] *Id.* at § 9.2.3.

[13] *Id.* at § 2.5.2(a)(ii).

[14] Avenue Complaint ¶¶ 173-178; Aurelius Complaint ¶¶ 146-153.

- First National Bank of Nevada, a Term Lender, went into receivership in July 2008 resulting in the repudiation of its commitment by the FDIC, and thereby defaulting under the Credit Agreement ("Bank of Nevada Default");

- The Revolving Lenders failed to fund the March 3, 2009 Notice of Borrowing ("Revolver Defaults"); and

- Certain Delay Draw Term Lenders failed to fund the March 9, 2009 Notice of Borrowing, which BofA was notified of by the Borrower on March 16, 2009 ("Delay Draw Defaults").

Each of these events constituted a Default under the Disbursement Agreement, and each prevented satisfaction of the following conditions precedent:

- **§ 3.3.3** – no Defaults or Events of Defaults;

- **§ 3.3.2** – no incorrect representations and warranties by the Project Entities, including representations regarding the absence of Defaults;

- **§ 3.3.11** – no Material Adverse Effects;

- **§ 3.3.21** – no material adverse information affecting the Project; and

- **§ 3.3.23** – no unpaid advances by any Retail Lender, including Lehman.

Each default, therefore, compelled BofA to issue a Stop Funding Notice and to refrain from any disbursements until the default was cured.

BofA does not dispute those defaults in its Motion. Instead, BofA asserts (although not an apparent basis for its Motion) that the Term Lenders "offer only vague allegations" that BofA "knew" of these defaults and failed conditions precedent. As an initial matter, a party's state of mind, including knowledge, "may be pleaded generally," even under the heightened pleading standards of Rule 9(b) applicable to a fraud case, which this is not.[15] Under recent Supreme Court decisions, a claim raising a defendants' state of mind will not be dismissed unless the state

[15] Fed. R. Civ. P. 9(b).

of mind would not be "plausible" in light of the historical facts alleged.[16] It is hardly "implausible" that BofA knew of the Lehman Bankruptcy (one of the most spectacular bankruptcies in history), that it knew of the FDIC's takeover of the Bank of Nevada, or that it knew of its own defaults and the defaults of its fellow Revolving Lenders.

But the Term Lenders have done more than simply allege BofA's knowledge generally. They specifically have alleged that: (1) BofA knew of the Lehman Defaults beginning in September 2008, and BofA was informed by at least one of the Term Lenders in September and October of 2008 that those defaults meant that conditions precedent had failed;[17] (2) BofA knew of the Bank of Nevada Default beginning in at least January 2009 from the Borrower's own submissions, including the In Balance Reports that reduced the Revolving Loan Availability by the amount of Bank of Nevada's commitment, as evidenced by BofA's own March 23, 2009 letter to all Lenders;[18] (3) depending on BofA's interpretation *de jur*e of the meaning of "fully drawn" under the Disbursement Agreement, it knew from its review of In Balance Reports from the Borrowers (and highlighted in the same March 23, 2009 letter to all Lenders) as early as August 2007 that the Borrowers had failed to meet the In Balance test required for disbursement;[19] (4) BofA knew in March 2009 from the Borrower and from certain of the Term Lenders of the Revolver Defaults;[20] (5) BofA knew in March 2009 from the Borrower and certain of the Term Lenders (as reflected in its own March 23, 2009 letter) of the Delay Draw

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[16] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[17] Avenue Complaint ¶¶ 129-131, 138; Aurelius Complaint ¶¶ 98-99, 109-111.

[18] Avenue Complaint ¶¶ 147, 138; Aurelius Complaint ¶¶ 117-118, 122-126.

[19] Avenue Complaint ¶¶ 138, 147-150, 161, 163-164; Aurelius Complaint ¶¶ 61-63, 88-95.

[20] Avenue Complaint ¶¶ 151, 155; Aurelius Complaint ¶¶ 64-65, 69.

Defaults;[21] and (6) BofA knew, as a result of its own position and that of the other Revolving Lenders in refusing to fund the March 2 and 3 Advance Request, of material adverse changes to the Project.[22] Even if it were the law that the Term Lenders were required to plead BofA's knowledge with specificity, those allegations more than suffice.[23] BofA provides no authority for its contention that something more is required.

III. ARGUMENT

BofA's motion must be denied unless the court finds that the Term Lenders' "factual allegations [do not] raise a right to relief above the speculative level."[24] In making that determination, the court must "accept all the factual allegations in the complaint as true and evaluate all inferences derived from those facts in the light most favorable" to the Plaintiffs.[25] In particular, ambiguity in a contractual provision creates a question of fact, which "must be

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[21] Avenue Complaint ¶ 157; Aurelius Complaint ¶ 90.

[22] Avenue Complaint ¶ 160.

[23] Contrary to BofA's unsupported assertion, the Term Lenders are not required to plead the specific evidence or attach the specific documents detailing BofA's knowledge. BofA Motion 9-10. *See, e.g., Manicini Enters. v. Am. Express Co.*, 236 F.R.D. 695, 698 (S.D. Fla. 2006) (document on which a plaintiff's claim is based is not required to be attached to the complaint); *United States ex rel. Bayer Clothing Group, Inc. v. Tropical Shipping & Constr. Co.*, No. 3:06-cv-42-J-33TEM, 2006 U.S. Dist. LEXIS 70671, at *25-26 (M.D. Fla. Sept. 26, 2006) (same). Further, BofA's argument that any notice it received in its capacity as Administrative Agent did not provide it notice in its capacity as Disbursement Agent due to the "No Imputed Knowledge" provision (§ 9.2.5) is misplaced. Plaintiffs have alleged that BofA, in all of its capacities, had actual knowledge of the defaults and failed conditions precedent. Nothing more is required at this stage.

[24] *Prestige Rests. & Entm't, Inc. v. Bayside Seafood Rest., Inc.*, No. 09-23128-CIV-GOLD/MCALILEY, 2010 U.S. Dist. LEXIS 15535, at *9 (S.D. Fla. Feb. 22, 2010) quoting *Watts v. Fla. Int'l. Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007).

[25] *Id.*

resolved in the plaintiffs' favor" on a motion to dismiss.[26]

A. The Term Lenders Have Stated Claims for Breach of the Disbursement Agreement

1. BofA Breached the Disbursement Agreement When It Failed to Issue Stop Funding Notices and Disbursed Funds under Circumstances Where It Knew that Defaults Had Occurred and Conditions Precedent to Disbursement Had Not Been Met

BofA knew of numerous defaults and failures of conditions precedent that, without the need for any investigation or exercise of discretion, required it to issue Stop Funding Notices and prohibited BofA from approving Advance Requests, from executing Advance Confirmation Notices and from disbursing loan proceeds to the Borrower.[27] Under those circumstances, BofA was required not only to exercise all rights and powers vested in it under the Disbursement Agreement (including issuing a Stop Funding Notice), but also to "use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs."[28] It did not. Instead, it failed to issue Stop Funding Notices and continued to disburse funds in the face of those known defaults and failed conditions precedent, all in breach of its express obligations under the Disbursement Agreement.

2. BofA's Breaches Are Not Excused by Borrower Certificates that BofA Knew To Be Materially Incorrect

BofA asserts that Section 9.3.2 shields it from liability. Section 9.3.2 provides that the Disbursement Agent "may rely" upon certificates provided by the Project Entities and "shall not be required to conduct any independent investigation as to the accuracy, veracity or

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[26] *Coca-Cola Enters. v. Novelis Corp.*, No. 08-12214, 2008 U.S. App. LEXIS 22293, at *4 (11th Cir. 2008), citing *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 178 (2d Cir. 2004).

[27] D.A. §§ 2.4.6, 2.5.1(i), 2.5.2(a)(ii), 3.3.

[28] *Id.* at § 9.2.3.

completeness" of any such certificate.[29] Assuming *arguendo* that BofA was entitled to rely in good faith on certifications by the Project Entities *if it lacked contrary knowledge*, under the express terms of the Disbursement Agreement and as a matter of law, BofA could not rely on certifications it either knew or, but for its own gross negligence, bad faith or willful misconduct, would have known, were materially incorrect.

a) BofA's position is contrary to the express terms of the Disbursement Agreement

When interpreting a contract "the entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency."[30] Where there is an inconsistency between a specific provision and a more general or boilerplate provision, the specific provision governs.[31] As demonstrated below, a reading of the entire Disbursement Agreement reveals that the parties did not intend to bestow upon BofA the all-encompassing protections it now seeks to extract from Section 9.3.2. The parties agreed upon specific mechanisms to ensure that BofA could not disburse loan proceeds if it learned facts contrary to representations made in certificates submitted by the Project Entities. BofA's contention that it was permitted to ignore all known, adverse information in determining whether it was authorized to disburse funds under the Disbursement Agreement would impermissibly read these sections out of the Agreement.[32]

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[29] BofA Motion 8, 12-13.

[30] *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000).

[31] *Rocon Mfg., Inc. v. Ferraro*, 605 N.Y.S.2d 591, 593 (N.Y. App. Div. 1993) citing *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (N.Y. 1956); *see also County of Suffolk v. Long Island Lighting Co.*, 266 F.3d 131,139 (2d Cir. 2001) (under New York law, specific provisions will limit the meaning of general provisions whether or not there is a true conflict between the two provisions).

[32] "[I]t is a cardinal maxim of contract interpretation that an agreement should not be construed in a manner that renders any provision meaningless…." *Baum v. County of Rockland*, 337 F.Supp.2d 454, 467 (S.D.N.Y. 2004), vacated in part on other grounds, 2005 U.S. Dist. LEXIS

The clearest of those provisions is Section 7.1.3(c). It provides that it is an Event of Default under the Disbursement Agreement if any representation, warranty or certification by any of the Project Entities (including any Advance Request or other certificate submitted with respect to this Agreement) is "found to have been incorrect." Section 7.1.3(c) establishes that BofA cannot simply ignore known, material inaccuracies in the Project Entities' certificates. To the contrary, if BofA "found" material inaccuracies in any Borrower certificate, it was placed on notice of an Event of Default, which, as noted above, required it to issue a Stop Funding Notice and prohibited it from further making disbursements.[33] Whether or not BofA was required to look for inaccuracies, it certainly could not simply ignore those that it "found."

Moreover, the parties did not limit the universe of information that prevented BofA from disbursing funds merely to information that contradicted specific representations, warranties or certifications made by the Project Entities. Instead, they expansively conditioned disbursement on BofA's lack of any awareness of any material, adverse information. Section 3.3.21 provides the following Condition Precedent to Advances:

> [T]he Bank Agent [BofA] shall not have become aware after the date hereof of any information or other matter affecting any Loan Party . . . the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole.

Section 3.3.21 establishes a bright-line prohibition on disbursements if BofA became aware of "any information" concerning the Project or any of the Loan Parties (including the Project

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8751 (S.D.N.Y. 2005); *see also Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) ("an interpretation of a contract that has 'the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible.'") quoting *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988).

[33] D.A. §§ 2.5.1, 2.5.2(a)(ii), 3.3.3, 9.2.3.

Entities) that "taken as a whole" was "inconsistent in a material adverse manner" with other information it had been provided, including any information in any certificates.

Finally, BofA agreed in Section 9.1 to "exercise commercially reasonable efforts and utilize commercially prudent practices . . . consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds." To the extent that BofA asserts that it is a "commercially prudent practice[]" to rely on certificates notwithstanding actual knowledge to the contrary, that assertion – if not absurd on its face – is a fact issue that is not appropriate for determination on a motion to dismiss.[34]

b) BofA's position is contrary to settled New York law

BofA's position not only misconstrues the Disbursement Agreement, it is contrary to settled New York law.

First, as a general matter, indeed as a matter of definition, a party may not claim to "rely" upon, *i.e.*, act based upon the assumed truth of, facts that it knows are materially incorrect. Cases uniformly reject a parties' claim of reliance upon purported misrepresentations that it knew (or should have known) to be false. In *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, the Second Circuit reiterated the settled holding that a party "cannot demonstrate justifiable reliance on representations it knew were false" or to which it was "knowingly blind."[35]

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[34] "The issues of whether [BofA's] actions were prudent or whether they met customary standards present questions of fact separate from the legal question of whether the actions were permissible under" the Disbursement Agreement. *LaSalle Bank N.A. v. Citicorp Real Estate*, No. 01 Civ. 4389 (AGS), 2002 U.S. Dist. LEXIS 23323, at *12 (S.D.N.Y. Dec. 4, 2002) (denying seller lender's motion to dismiss breach of contract claims based on the breach of its representation that it used "prudent" practices in servicing the loan and met "customary standards utilized by prudent" similar institutions).

[35] 500 F.3d 171, 182 (2d Cir. 2007) quoting *Banque Franco-Hellinque de Commerce International et Maratime, S.A. v. Orestes Christopides*, 106 F.3d 22 (2d Cir. 1997) (holding Guarantor could not have justifiably relied on false statements he had reason to know were false).

That same general principle has been applied specifically in the context of multi-party loan agreements. In *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*,[36] the borrower under a revolving credit facility filed for bankruptcy, and the lenders brought an action against Chase, the agent bank, alleging that Chase breached the credit agreement by performing its duties with negligence, gross negligence, willful misconduct and fraud.[37] Specifically, the lenders alleged that Chase violated an express condition to funding when it issued a letter of credit in purported reliance on documents from the borrower, including financial statements and a certificate representing that no material adverse change had occurred.[38] The lenders claimed that Chase knew (or had reason to know) that the documents were materially inaccurate. Chase did not dispute that the documents were inaccurate but argued, as BofA does here, that the credit agreement relieved it of responsibility for the accuracy of the information the borrower supplied. The Court rejected that argument.[39] "[I]f Chase knew, or was grossly negligent in not knowing, that the materials . . . were materially inaccurate, it cannot argue that those materials were satisfactory in 'substance.'"[40]

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[36] No. 93 Civ. 5298 (LMM), 1996 U.S. Dist. LEXIS 15631 (S.D.N.Y. Oct. 17, 1996).

[37] *Id.* at *4.

[38] *Id.* at *17-18.

[39] *Id.* at *19-21.

[40] *Id.* at *21. The cases BofA cite do not address whether an agent bank can fulfill its obligations by relying on statements it knows are inaccurate. Instead, they each concern whether or not an agent had a duty to disclose information or a duty to investigate. *See* BofA Motion 13 nn. 45 & 46 citing *Stanfield Offshore Leveraged Assets, Ltd v. Metro Life Ins. Co.*, 883 N.Y.S.2d 486, 489-90 (N.Y. App. Div. 2009) (holding plaintiffs failed to plead aiding and abetting fraud where the crux of the claim was that the agent bank assisted in the borrower's fraud by failing to disclose the borrower's insolvency and the loan agreement provided that the agent had no duty to disclose); *UniCredito Italiano SpA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 497-99, 502-03 (S.D.N.Y. 2003) (granting loan administrators' motion to dismiss fraud and misrepresentation claims as well as claim for breach of implied covenant to the extent it was based on the

The court in *Chase Manhattan Bank v. Motorola, Inc.* reached a similar result.[41] *Motorola* involved a loan guarantee by Motorola in connection with a loan to Iridium, a spin-off from Motorola. Iridium issued a certificate in apparent compliance with the loan agreements, which Motorola argued relieved it of its guarantee obligations. Chase, the agent bank, questioned the certificate and demanded that the guarantee be reinstated. The court found that the certificate was materially false and rejected Motorola's claim that it could rely on the false certificate to terminate its obligation because (1) Iridium's issuance of a false certificate was itself an Event of Default under the loan agreement that triggered the guarantee (as were the Project Entities' false certificates here an Event of Default under Section 7.1.3(c) of the Disbursement Agreement) and (2) Motorola "knew, or was on notice of, the false and misleading nature of Iridium's Certificate."[42]

Like the guarantor in *Motorola* and the bank agent in *Bank Brussels Lambert*, BofA knew or was grossly negligent in not knowing that the certificates submitted by the Project Entities

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defendants' failure to disclose information concerning the borrower where the operative contracts specifically absolved the defendants from any duty to disclose); *Cont'l Cas. Co. v. State of N.Y. Mortgage Agency*, No. 94 Civ. 8408(KMW), 1998 WL 513054 (S.D.N.Y. Aug. 18, 1998) (holding a trustee complied with the terms of a contract where it : "relied in good faith on various documents in carrying out its duties" and was under no duty to investigate the validity of documents it "in good faith reasonably believe[d] to be genuine").

[41] 184 F. Supp. 2d 384 (S.D.N.Y. 2002).

[42] *Id.* at 394-395. In connection with a different issue, the court noted that the Credit Agreement at issue expressly provided that Chase could rely on Iridium's certificates "regardless of any investigation made by [it] or on its behalf and *notwithstanding that [Chase] or any Lender may have had notice or knowledge of any [. . .] incorrect representation or warranty*." *Id.* at 395 (emphasis added). That demonstrates that the banking industry understands how to write language insulating a bank agent from responsibility for known inaccuracies and misrepresentations in certificates submitted by borrowers. Notably, the parties to the Disbursement Agreement provided no such language, and BofA's attempt to read such language into the agreement is impermissible. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475-476 (N.Y. 2004) (explaining that "courts may not by construction add or excise terms" of a contract).

were materially inaccurate, and BofA cannot now escape liability by contending that it relied on those false statements.

Second, under New York law as well as under the express terms of the Disbursement Agreement, BofA is liable for its own gross negligence and willful misconduct.[43] Purporting to rely on representations it knows or has reason to know are false to the detriment of the Term Lenders is, at a minimum, grossly negligent.[44] And BofA's contention that the Disbursement Agreement insulated it from liability for its own gross negligence would read into the agreement protections contrary to the public policy of New York: "It is the public policy of [New York] . . . that a party may not [contractually] insulate itself from damages caused by grossly negligent conduct," and any such clauses are unenforceable.[45] Accordingly, even if the Disbursement Agreement could be read to provide BofA the protections it now puts forth (which, for the reasons set forth above, it cannot), such protections would be invalid and unenforceable under New York law.

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[43] *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554 (N.Y. 1992); D.A. § 9.10.

[44] *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) (Under New York law, gross negligence requires conduct that "evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing."); *Fidata Trust Co. of New York v. Banker's Trust Co.*, No. 87 Civ. 5025 (RO), 1990 U.S. Dist. LEXIS 2228, at *4 (S.D.N.Y. Mar. 2, 1990) (Under New York law, gross negligence requires that a defendant disregarded "the consequences which may ensue from [his] act, and indifference to the rights of others.")

[45] *Sommer*, 79 N.Y.2d at 554; *see also Apache Bohai Corp. LDC v. Texaco China BV*, No. 05-20413, 2007 U.S. App. LEXIS 4403 (5th Cir. Feb. 27, 2007) (stating rule under New York law).

B. The Nevada Term Lenders Have Properly Alleged a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

1. The Nevada Term Lenders' Breach of Contract Claim Is Alternative to, not Duplicative of, Their Breach of Implied Covenant Claim

BofA argues that the plaintiffs in the Avenue Action (the "Nevada Term Lenders") have failed to allege a claim for breach of any express term of the Disbursement Agreement. In the same breath, BofA asserts that the Nevada Term Lenders' claim for breach of the implied covenant of good faith and fair dealing must be dismissed because it is duplicative of the (purportedly deficient) express contract claim. It is not. Among other things, the Nevada Term Lenders allege here, but not in the express breach claim, that BofA failed to communicate information regarding defaults known to BofA.[46] In any event, BofA cannot have it both ways. If the express contract claim fails, there clearly is no duplication of claims. Until that determination is made, the Nevada Term Lenders are entitled to pursue claims in the alternative.[47] BofA has cited no authority to the contrary.

2. The Nevada Term Lenders' Implied Covenant Claim Is Not Inconsistent with the Express Terms of the Disbursement Agreement

In New York, the covenant of good faith and fair dealing is implied in every contract and encompasses a pledge by each party not to "do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[48] The implied covenant is intended to fill gaps in the express terms of a contract to ensure that the "parties' intent and

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[46] Avenue Complaint ¶ 192.

[47] Fed. R. Civ. P. 8(d); *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1273 (11th Cir. 2009) ("Rule 8(d) of the Federal Rules of Civil Procedure expressly permits the pleading of both alternative and inconsistent claims.").

[48] *JPMorgan Chase Bank, N.A. v. IDW Group, LLC*, No. 08 Civ. 9116 (PGG), 2009 U.S. Dist. LEXIS 9207, at *11 (S.D.N.Y. Feb. 9, 2009); *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 22 (N.Y. 2005) (same).

reasonable expectations in entering the contract" are not frustrated.[49] The parties' "reasonable expectations" are shaped by what a "reasonable person in the position of the promisee would be justified in understanding were included"[50] and are informed by principles of sound commercial practice.[51]

Until the funds in the Bank Proceeds Account were distributed, they remained in place for the benefit of the Lenders. BofA was the gatekeeper of the Bank Proceeds Account on behalf of all Lenders, responsible for ensuring that the funds remained in place unless and until all of the agreed conditions precedent to disbursement had been satisfied. The Nevada Term Lenders reasonably understood and expected that if BofA became aware that conditions to funding had not been satisfied, in particular that there were material, existing Defaults, it would not disburse the funds it was charged with overseeing on their behalf. Certainly, the Nevada Term Lenders expected that BofA would not disburse funds as a means of promoting its own interests and the interests of the Revolving Lenders (including BofA) over the interests of the Term Lenders.[52] The Nevada Term Lenders' expectations were reasonable. To the extent BofA contends that the

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[49] *Cross & Cross Properties Ltd. v. Everett Allied Co.*, 886 F.2d 497, 502 (2d Cir. 1989); *see also* Restatement 2d of Contracts, § 205, Comment a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party….")

[50] *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (N.Y. 2002).

[51] *Components Direct, Inc. v. European American Bank & Trust Co.*, 175 A.D.2d 227, 229-230 (N.Y. App. Div. 1991) (finding breach of covenant of good faith and fair dealing because sound commercial practice would require party to give notice prior to terminating contract despite the fact there was no express contract provision requiring such notice; court inferred notice requirement because "any other construction would make the contract unreasonable").

[52] Avenue Complaint ¶ 192; *see, e.g., Smith v. CPC Int'l, Inc.*, 177 F.3d 110 (2d Cir. 1999) (holding claims for breach of contract and breach of implied covenant should have survived summary judgment because there were factual disputes as to whether defendant breached the distribution agreements in bad faith by terminating the contract without good cause in order to enrich itself).

Disbursement Agreement does not expressly prohibit BofA's disbursement of funds under these circumstances, the implied covenant of good faith clearly does.

BofA's sole contention is that a good faith obligation not to disburse under these circumstances would be inconsistent with certain express terms of the Disbursement Agreement.[53] They are not:

- **§ 9.3.2** (right to rely on certifications by Project Entities) – as noted in Section III.A.2., *supra*, assuming *arguendo* that BofA was entitled to rely in good faith on certifications by the Project Entities if it did not have contrary knowledge, it was not permitted under either the express terms of the Disbursement Agreement (§§ 7.1.3(c), 3.3.21and 9.1) or under settled New York law to "rely" on certifications that it knew to be false.

- **§ 9.10** (limitation of liability, no duty to investigate) – the Nevada Term Lenders do not base their claims upon the failure of BofA to investigate and discover facts, but rather that it knew facts that it failed to act upon.

- **§ 2.5.1** (Stop Funding Notice) – Section 2.5.1 required BofA to issue a Stop Funding Notice in the event that "the conditions precedent to an Advance have not been satisfied." This is consistent, not inconsistent, with the Nevada Term Lenders' claim that BofA violated its obligations by failing to do so.

- **§ 9.2.5** (no imputed knowledge) – the Nevada Term Lenders do not allege that BofA had only imputed knowledge of the defaults and failed conditions precedent, rather that it had actual knowledge.

- **§ 11.1** (written notice) – the fact that the Disbursement Agreement required notices to be in writing is hardly inconsistent with BofA's good faith obligation not to disburse funds when it knew of defaults and failed conditions precedent.

Because there is no inconsistency between the Nevada Term Lenders' covenant of good faith claims and the express terms of the Disbursement Agreement, BofA's motion to dismiss the Nevada Term Lenders' claim for breach of the implied covenant of good faith and fair dealing should be denied.

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[53] BofA Motion 17-18.

IV. CONCLUSION

For the foregoing reasons Plaintiffs respectfully request this Court deny BofA's Motion to Dismiss Term Lenders' Disbursement Agreement Claims in its entirety.

DATED: March 22, 2010

Respectfully submitted,

By: /s David A. Rothstein

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing JOINT OPPOSITION TO DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS THE TERM LENDERS' DISBURSEMENT AGREEMENT CLAIMS was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: March 22, 2010.

/s David A. Rothstein
David A. Rothstein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS, LLC,
CONTRACT LITIGATION
MDL NO. 2106
This documents relates to: All Actions
_____/

MOTION FOR LIMITED APPEARANCE, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS

In accordance with Local Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys for the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission of Phillip A. Geraci of the law firm of Kaye Scholer, LLP, 425 Park Avenue, New York, New York 10022-3598 for purposes of limited appearance as co-counsel on behalf of Defendant HSH Nordbank AG in the above-styled case only, and pursuant to Rule 2B, Southern District of Florida, CM/ECF Administrative Procedures, to permit Phillip A. Geraci to receive electronic filings in this case, and in support thereof states as follows:

1. Phillip A. Geraci is not admitted to practice in the Southern District of Florida, is a member in good standing of the bar of the highest Court of the State of New York, and is admitted to practice before the U.S. District Court for the Southern and Eastern Districts of New York.

2. The undersigned, Arthur Halsey Rice, Esq. of the firm of Rice Pugatch Robinson & Schiller, P.A., 101 N.E. Third Avenue, Suite 1800, Fort Lauderdale, Florida 33301, is a member in good standing of The Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this District for the practice of law, and is

authorized to file through the Court's electronic filing system. The undersigned consents to being designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures.

3. In accordance with the Local Rules of this Court, Phillip A. Geraci has made payment of this Court's $75.00 admission fee. A certification in accordance with Rule 4B is attached hereto.

4. Phillip A. Geraci, by and through undersigned counsel and pursuant to Section 2B, Southern District of Florida, CM/ECF Administrative Procedures, hereby requests the Court provide Notice of Electronic Filings to Phillip A. Geraci at email address: pageraci@kayescholer.com.

WHEREFORE, the undersigned respectfully requests entry of the attached proposed Order permitting Phillip A. Geraci to appear before this Court on behalf of HSH Nordbank AG for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Phillip A. Geraci.

Dated: 15 day of March, 2010

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Limited Appearance, Consent to Designation and Request Electronically Receive Electronic Filings was served by First Class U.S. Mail on March 15, 2010 on all counsel or parties of record on the service list.

ARTHUR HALSEY RICE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS, LLC,
CONTRACT LITIGATION
MDL NO. 2106
This documents relates to: All Actions
_____/

CERTIFICATION OF PHILLIP A. GERACI, ESQ.

Phillip A. Geraci, Esq., pursuant to Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the bar of the highest Court of the State of New York.

PHILLIP A. GERACI, ESQ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS, LLC,
CONTRACT LITIGATION
MDL NO. 2106
This documents relates to: All Actions
_____/

ORDER GRANTING MOTION FOR LIMITED APPEARANCE OF PHILLIP A. GERACI, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS

THIS CAUSE having come before the Court upon the Motion for Limited Appearance of Phillip A. Geraci, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings [D.E. #], requesting, pursuant to Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida, permission for a limited appearance of Phillip A. Geraci in this matter and request to electronically receive notice of electronic filings. This Court having considered the Motion and all other relevant factors, it is hereby

ORDERED and ADJUDGED that

The Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notice of Electronic Filings is GRANTED. Phillip A. Geraci may appear and participate in this case on behalf of HSH Nordbank AG. The Clerk shall provide electronic notification of all electronic filings to Phillip A. Geraci at pageraci@kayescholer.com.

DONE and ORDERED in Chambers this _____ day of March, 2010.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

Copies furnished to:
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS, LLC,
CONTRACT LITIGATION
MDL NO. 2106
This documents relates to: All Actions
_____/

MOTION FOR LIMITED APPEARANCE, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS

In accordance with Local Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys for the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission of Steven C. Chin of the law firm of Kaye Scholer, LLP, 425 Park Avenue, New York, New York 10022-3598 for purposes of limited appearance as co-counsel on behalf of Defendant HSH Nordbank AG in the above-styled case only, and pursuant to Rule 2B, Southern District of Florida, CM/ECF Administrative Procedures, to permit Steven C. Chin to receive electronic filings in this case, and in support thereof states as follows:

1. Steven C. Chin is not admitted to practice in the Southern District of Florida and is a member in good standing of the bar of the highest Court of the State of New York.

2. The undersigned, Arthur Halsey Rice, Esq. of the firm of Rice Pugatch Robinson & Schiller, P.A., 101 N.E. Third Avenue, Suite 1800, Fort Lauderdale, Florida 33301, is a member in good standing of The Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this District for the practice of law, and is authorized to file through the Court's electronic filing system. The undersigned consents to being designated as a member of the Bar of this Court with whom the Court and opposing counsel may

readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures.

3. In accordance with the Local Rules of this Court, Steven C. Chin has made payment of this Court's $75.00 admission fee. A certification in accordance with Rule 4B is attached hereto.

4. Steven C. Chin, by and through undersigned counsel and pursuant to Section 2B, Southern District of Florida, CM/ECF Administrative Procedures, hereby requests the Court provide Notice of Electronic Filings to Steven C. Chin at email address: steven.chin@kayescholer.com.

WHEREFORE, the undersigned respectfully requests entry of the attached proposed Order permitting Steven C. Chin to appear before this Court on behalf of HSH Nordbank AG for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Steven C. Chin.

Dated: 15 day of March, 2010

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By: _____
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FBN: 224723

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Limited Appearance, Consent to Designation and Request Electronically Receive Electronic Filings was served by First Class U.S. Mail on March 15, 2010 on all counsel or parties of record on the service list.

ARTHUR HALSEY RICE

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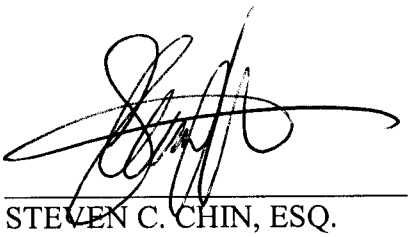
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS, LLC,
CONTRACT LITIGATION
MDL NO. 2106
This documents relates to: All Actions
_____/

CERTIFICATION OF STEVEN C. CHIN

Steven C. Chin, Esq., pursuant to Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the bar of the highest Court of the State of New York.



STEVEN C. CHIN, ESQ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS, LLC,
CONTRACT LITIGATION
MDL NO. 2106
This documents relates to: All Actions
_____/

ORDER GRANTING MOTION FOR LIMITED APPEARANCE OF STEVEN C. CHIN, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS

THIS CAUSE having come before the Court upon the Motion for Limited Appearance of Steven C. Chin, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings [D.E. #], requesting, pursuant to Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida, permission for a limited appearance of Steven C. Chin in this matter and request to electronically receive notice of electronic filings. This Court having considered the Motion and all other relevant factors, it is hereby

ORDERED and ADJUDGED that

The Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notice of Electronic Filings is GRANTED. Steven C. Chin may appear and participate in this case on behalf of HSH Nordbank AG. The Clerk shall provide electronic notification of all electronic filings to Steven C. Chin at steven.chin@kayescholer.com.

DONE and ORDERED in Chambers this _____ day of March, 2010.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

Copies furnished to:
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 09-MD-2106-CIV-GOLD/MCALILEY
This document relates to all actions

In re:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION,

MDL No. 2106
_____/

MDL ORDER NUMBER ELEVEN: GRANTING MOTIONS FOR LIMITED APPEARANCES OF STEVEN CHIN AND PHILLIP GERACI [DE 53]; [DE 54]

THIS CAUSE having come before the Court upon the Motion for Limited Appearance of Steven Chin and Phillip Geraci, Consent to Designation and Request to Electronically Receive Notices of Electronics Filings ("Motion") **[DE 53]**; **[DE 54]**, requesting, pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida, permission for a limited appearance of Steven Chin and Phillip Geraci in this matter and to electronically receive notice of electronic filings. Having considered the Motion and being otherwise fully advised in the Premises, it is hereby

ORDERED and ADJUDGED that:

1. The Motions for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings **[DE 53]**; **[DE 54]** are GRANTED.
2. Steven Chin and Phillip Geraci are permitted to appear and participate in this action for purposes of limited appearances as co-counsel on behalf of Defendant HSH Nordbank AG in the above-referenced actions.
3. The Clerk shall provide electronic notification of all electronic filings to Steven

Chin and Phillip Geraci at steven.chin@kayescholer.com and pageraci@kayescholer.com , respectively.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of March, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
Magistrate Judge Chris McAliley
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE No.: 09-2106-MD-GOLD/BANDSTRA

IN RE :

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to Case Numbers:

09-CV-23835-ASG
10-CV-20236-ASG

DEFENDANT BANK OF AMERICA, N.A.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE TERM LENDERS' DISBURSEMENT AGREEMENT CLAIMS

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ARGUMENT

I. THE TERM LENDERS' COMPLAINTS FAIL TO STATE A CLAIM AGAINST BANA FOR BREACHING THE DISBURSEMENT AGREEMENT

BANA's opening brief demonstrated that the Term Lenders have failed to state a claim that BANA breached the Disbursement Agreement because their complaints do not and cannot allege that BANA (i) approved Fontainebleau Advance Requests that did not include the Disbursement Agreement's required representations, warranties and certifications, or (ii) received specific written notice of an Event of Default that would require BANA to issue a Stop Funding Notice ceasing all disbursements to Fontainebleau.

The Term Lenders' opposition brief implicitly concedes that BANA never received a formal Event of Default notice, arguing that "[t]his is a case about BofA's failure to act in light of known facts." (Opp. at 2.) While the Term Lenders recite a litany of defaults of which BANA allegedly was aware, they cannot escape Disbursement Agreement Section 9.3.2's plain language that BANA "*shall be entitled to rely* on certifications from [Fontainebleau] as to satisfaction of any requirements and/or conditions imposed by this Agreement," and "*shall be protected* in acting or refraining from acting upon any … certificate … believed by it on reasonable grounds to be genuine and to have been signed or presented by the proper party."[1] Section 9.3.2's specific protections also control over more general descriptions of the Disbursement Agent's obligations, applying "[n]otwithstanding anything else in this Agreement to the contrary." Under New York law, this unambiguous provision, which contradicts the complaints' allegations, mandates the contract breach claims' dismissal.[2]

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[1] Disbursement Agreement § 9.3.2 (emphasis added).

[2] *Merit Group, LLC v. Sint Maarten Int'l Telecomms. Servs., NV*, No. 08-cv-3496 (GBD), 2009 WL 3053739, at *2-3 (S.D.N.Y. Sept. 24, 2009) (granting motion to dismiss contract-breach claim).

A. BANA was Entitled to Rely on Fontainebleau's Certifications

The Term Lenders try to tip-toe around Section 9.3.2 by acknowledging only that it provides that BANA "may" rely on Fontainebleau's certifications regarding Section 3.3's conditions precedent—pointedly ignoring the section's conclusive language that BANA "shall be entitled to rely" and "shall be protected" in relying on those certifications "[n]otwithstanding anything else in this Agreement to the contrary." (Opp. at 10.) The Term Lenders then attempt to blunt Section 9.3.2 by arguing that it applies only where BANA "lacked contrary knowledge," and that BANA could not rely on certifications that it knew or should have known were false. (*Id.* at 11.) But Section 9.3.2 contains no such limitation. To the contrary, it absolves BANA from any obligation to look behind the certifications and provides that BANA "shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of" Fontainebleau's certifications. Nor should Section 9.3.2's protections yield to other Disbursement Agreement provisions, as the Term Lenders contend, because these other provisions have no bearing on the Disbursement Agent's responsibilities and are therefore irrelevant.

Contrary to the Term Lenders' assertion, Section 7.1.3(c) does not even mention the Disbursement Agent, much less impose obligations on BANA. Rather, the provision merely identifies one of the numerous Events of Default under the Disbursement Agreement. Nothing in the agreement links this provision to Section 9.3.2 in any way. Indeed, Section 9.3.2 expressly applies "[n]otwithstanding anything else in this Agreement to the contrary," thus rendering unavailing the Term Lenders' reliance on Section 7.1.3(c)'s reference to certifications "found to have been incorrect."

Section 3.3.21 is similarly irrelevant to the Disbursement Agent's Advance Request and Stop Funding Notice duties. Section 3.3.21 speaks only to the *Bank Agent*'s knowledge—and not the Disbursement Agent's. While BANA was both the Bank Agent and the Disbursement Agent, the fact that Section 3.3.21 refers only to the Bank Agent's knowledge is dispositive. This is because Disbursement Agreement Section 9.2.5 provides that "[n]otwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it *in any capacity other than the capacity of Disbursement Agent, or by reason of the fact that the Disbursement Agent is also a Funding Agent or Lender.*"[3] Section 9.2.5 illustrates the Disbursement Agent's purely ministerial role—the only knowledge attributed to the Disbursement Agent is what it learns through formal, written notices.

The Term Lenders' "Lehman Default" allegations are deficient for precisely this reason. While the Term Lenders focus on the Lehman bankruptcy's enormity (Opp. at 7-8), that does not establish that BANA knew of Lehman's alleged failure to fund under the Retail Facility—a separate financing agreement to which BANA was not a party. There is no allegation that BANA ever received a notice of default under the Disbursement Agreement concerning the alleged Lehman Defaults. In the absence of such notice, BANA was permitted to rely on—and, indeed, could not disregard—Fontainebleau's certifications as to the satisfaction of the Disbursement Agreement's conditions precedent to funding.[4]

Section 9.1 also does not trump Section 9.3.2's limitations. (Opp. at 13.) Section 9.1 imposes a general obligation on the Disbursement Agent to "exercise commercially reasonable efforts and utilize commercially prudent practices"; to the extent that this obligation could be

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[3] Disbursement Agreement at § 9.2.5 (emphasis added).

[4] Disbursement Agmt. §§ 2.4.4(a), 2.4.6 ("... the Project Entities and the Disbursement Agent *shall* execute an Advance Confirmation Notice setting forth the amount of the Advances to be made [and] ... the Funding Agents *shall* make the Advances contemplated by that Advance Confirmation Notice ...") (emphasis added).

read (as the Term Lenders do) to conflict with the more specific limitations in Sections 9.3.2 and 9.10, the latter provisions must control.[5] The Term Lenders themselves recognize and rely on this bedrock contract construction principle. (Opp. at 11.) And given Section 9.3.2's terms—"[n]otwithstanding anything else in this Agreement to the contrary, … the Disbursement Agent shall be entitled to rely on certifications from [Fontainebleau] as to satisfaction of any requirements and/or conditions imposed by this Agreement"—Section 9.1's generalized "commercial reasonableness" provision cannot be read to prohibit BANA from relying on Fontainebleau's certifications.[6] Rather, Section 9.1 simply requires BANA to "exercise commercially reasonable efforts and utilize commercially prudent practices" in performing its Disbursement Agent duties as defined by the Disbursement Agreement's other provisions—*e.g.*, in determining that Fontainebleau's Advance Requests are procedurally proper and contain all representations, certifications, and similar documentation necessary to permit BANA to approve the Advance Requests.

B. The Term Lenders' Authorities Are Inapposite

The Term Lenders' argument that BANA was prohibited as a matter of law from relying on Fontainebleau's certifications is legally baseless. (Opp. at 13-15.) None of the cases the Term Lenders cite contained the unequivocal protective language found in Section 9.3.2 of the Disbursement Agreement. For example:

- *Merrill Lynch & Co. v. Allegheny Energy, Inc.* addressed the standard for proving a fraudulent concealment claim's justifiable reliance element, a tort concept that is irrelevant to the contract issue here.[7]

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[5] *Chemical Bank v. Stahl*, 637 N.Y.S.2d 65, 66 (App. Div. 1996) (affirming dismissal because contract's "specific provisions that defendant had no obligation to remove the Atrium were controlling over any inconsistent general provisions regarding compliance with, *e.g.*, zoning regulations").

[6] *See Excess Ins. Co. Ltd. v. Factory Mut. Ins. Co.*, 822 N.E.2d 768, 771-72 (N.Y. 2004) (rejecting contract provision interpretation that "would render [another provision] a nullity").

[7] 500 F.3d 171, 181-82 (2d Cir. 2007) (holding that "sophisticated business entities" asserting fraud claims in connection with a "major transaction[]" failed to meet "its burden in showing justifiable reliance").

- *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, is similarly inapposite. There, a lender syndicate sued their agent bank, Chase, for advancing loan funds in reliance on materially inaccurate borrower documents. While the court observed that Chase "did *not* take responsibility for the accuracy of the information supplied by [borrower]," the loan agreement in that case apparently contained no language comparable to Section 9.3.2's "shall be entitled to rely" and "shall be protected in acting … upon" clauses.[8] To the contrary, Chase was contractually required "to satisfy itself that the materials it received [from the borrower] conformed in form *and in substance*" to what the loan agreement required and the court therefore held that "if Chase knew, or was grossly negligent in not knowing, that the materials it delivered prior to and at closing were materially inaccurate, it cannot argue that those materials were satisfactory in 'substance.'"[9] The Disbursement Agreement imposed no such obligation on BANA, and Section 9.3.2 unambiguously protects BANA here.

- In *Chase Manhattan Bank v. Motorola, Inc.*, the court prohibited a loan *guarantor* from relying on a borrower's certification regarding its financial condition that the guarantor knew or should have known was false. But the case is inapposite because, unlike here, there was no contractual provision permitting the guarantor to rely on the borrower's certification, in contrast to the lenders' agent—whom the agreement explicitly authorized to rely on such a certificate even if the agent knew it to be inaccurate.[10] Because BANA was the lenders' agent—not the guarantor—it is likewise protected from liability by Section 9.3.2's express language.

C. The Term Lenders' Gross Negligence Argument Fails Because Section 9.3.2 is not a Limitation of Liability Provision

The Term Lenders' argument that BANA is impermissibly seeking to insulate itself "from liability for its own gross negligence" (Opp. at 16) mischaracterizes Section 9.3.2. Contrary to the Term Lenders' suggestion, Section 9.3.2 is not a limitation of liability provision. As the Term Lenders' own cases make clear, a limitation of liability clause is one "purporting to exonerate a party from liability [or] limiting damages to a nominal sum."[11] But Section 9.3.2 does not exonerate BANA from liability, it merely defines BANA's contractual duties as

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[8] 93 Civ. 5298 (LMM), 1996 U.S. Dist. LEXIS 15631, at **20-21 (S.D.N.Y. Oct. 23, 1996) (emphasis in original).

[9] *Id.* at **19, 21 (emphasis added).

[10] 184 F. Supp. 2d 384, 394-95 (S.D.N.Y. 2002).

[11] *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1371 (N.Y. 1992).

Disbursement Agent. The distinction can be seen by comparing Section 9.3.2 with Section 9.10, which is entitled "Limitation of Liability." The latter section provides that the Disbursement Agent "shall [not] be in any manner liable or responsible for any loss or damage arising by reason of any act or omission to act by it …, except as a result of [its] bad faith, fraud, gross negligence or willful misconduct …." Section 9.3.2, in contrast, limits the actions that the Disbursement Agent is required to take in performing its duties.

The Term Lenders cannot point to any "legal duty independent of contractual obligations [that is] imposed by law" on the relationship between the Term Lenders and the Disbursement Agent—their relationship is purely contractual.[12] As such, BANA's duties are defined solely by the Disbursement Agreement. Having freely entered into that agreement, the Term Lenders cannot now avoid Section 9.3.2's terms by mischaracterizing it as an unenforceable limitation of liability.

D. The Term Lenders Fail as a Matter of Law to Plead BANA's Gross Negligence

Even if the Term Lenders were correct that Section 9.3.2 is a limitation of liability clause, their conclusory allegations that BANA was grossly negligent fall far short of pleading such conduct. (*See* Opp. at 16.) Used in this context, gross negligence is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing."[13] New York courts "demand[] nothing short of . . . a compelling demonstration of egregious intentional misbehavior evincing extreme culpability: malice, recklessness, deliberate or callous indifference to the rights of others, or an extensive pattern of wanton acts."[14] To state a gross

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12 *Id.* at 1368-69 (describing the difference between tort and contract duties).

13 *Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd.*, 611 N.E.2d 282, 284 (N.Y. 1993); *see also Farash v. Continental Airlines, Inc.*, 574 F. Supp. 2d 356, 368 (S.D.N.Y. 2008) (same).

14 *Net2Globe Int'l, Inc. v. Time Warner Telecom of N.Y.*, 273 F. Supp. 2d 436, 454 (S.D.N.Y. 2003).

negligence claim, New York substantive law requires the Term Lenders to plead "*specific and particular* allegations of *extreme wrongdoing*."[15] The threshold is high because

> parties, especially those of equal bargaining power, should be able to rely on the general New York rule that enforces contracts for the release of claims of liability. If a party needs only to add gross negligence as a theory of liability to force litigation to proceed through discovery and a trial, contracting parties would be stripped of the substantial benefit of their bargain, that is, avoiding the expense of lengthy litigation.[16]

The Term Lenders' complaints do not adequately allege the substantive requirements of a gross negligence claim.

BANA complied with the Disbursement Agreement's terms in performing its duties as the Disbursement Agent. The Term Lenders do not allege that Fontainebleau's Advance Requests lacked the warranties, representations and certifications required by the Disbursement Agreement, or that they were otherwise incomplete. After receiving an Advance Request, BANA was required to "review the Advance Request and attachments thereto to determine whether all required documentation has been provided" and ascertain whether it contained all the representations, warranties, and certifications necessary to satisfy Section 3.3's conditions precedent to an Advance.[17] Indeed, the Disbursement Agreement required BANA and Fontainebleau to direct the Funding Agent to transfer the requested funds to Fontainebleau once those conditions were satisfied.[18] Because BANA complied with the Disbursement Agreement,

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[15] *See Tevdorachvili v. Chase Manhattan Bank*, 103 F. Supp. 2d 632, 644 (E.D.N.Y. 2000) (dismissing gross negligence claim) (emphasis added); *see also SNS Bank, N.V. v. Citibank, N.A.*, 777 N.Y.S.2d 62, 65 (App. Div. 2004) ("Even on a motion to dismiss, a court need not accept as true conclusory allegations that a defendant was grossly negligent or acted willfully, in bad faith or with reckless disregard of its duties."); *Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537(MBM), 2003 WL 23018888, at *12 (S.D.N.Y. Dec. 22, 2003) (enforcing limited liability clause on motion to dismiss where "plaintiff alleges no specific actions by defendant evincing a reckless disregard for the rights of plaintiff or smacking of intentional wrongdoing").

[16] *Indus. Risk Insurers v. Port Auth. of N.Y. & N.J.*, 387 F. Supp. 2d 299, 307 (S.D.N.Y. 2005).

[17] Disbursement Agmt. §§ 2.4.4(a), 2.4.6.

[18] *See* note 4, *supra*.

the conduct that the Term Lenders allege falls well below that required to invalidate the Disbursement Agreement's protections.[19]

II. THE AVENUE PLAINTIFFS FAIL TO STATE AN IMPLIED COVENANT CLAIM AGAINST BANA

BANA's opening brief demonstrated that the Avenue Plaintiffs' implied covenant claim (i) improperly duplicates their deficient breach of contract claim, and (ii) impermissibly seeks to impose obligations on BANA that are contrary to the Disbursement Agreement's provisions.

The Avenue Plaintiffs' argument that their implied covenant claim is merely alternative to, and not duplicative of, their contract breach claim (Opp. at 17) fundamentally misapprehends New York law. There can be no stand-alone implied covenant claim where the two claims arise from the same facts.[20] Moreover, the Avenue Plaintiffs ignore numerous decisions where courts have dismissed a contract breach claim and then also dismissed an implied covenant claim as duplicative.[21] The Avenue Plaintiffs' makeweight assertion that their implied covenant claim includes an additional allegation that "BofA failed to communicate information regarding defaults known to BofA" does not change the fact that the two claims "clearly arise from the

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[19] *See, e.g., Deutsche Lufthansa AG v. Boeing Co.*, No. 06 CV 7667(LBS), 2007 WL 403301, at *4 (S.D.N.Y. Feb. 2, 2007) (granting motion to dismiss based on contractual limitation of liability where "Boeing acted rationally in its endeavor. The conduct alleged by Lufthansa falls well below the levels required by the New York courts to invalidate a mutually agreed upon limitation of liability.").

[20] *See, e.g., Rather v. CBS Corp.*, 886 N.Y.S.2d 121, 124, 128 (N.Y. App. Div. Sept. 29, 2009) (dismissing contract breach claim and implied covenant claim "for being duplicative of his breach of contract claims"); *Long v. Marubeni Am. Corp.*, No. 05 Civ. 0639(GEL), 2006 WL 1716878, at *1 (S.D.N.Y. June 20, 2006) (implied covenant claim fails "despite plaintiffs' effort to assert that the two claims arise from different facts, [where] the claims clearly arise from the same contract and the same breach, and seek essentially the same relief"); *see also Fasolino Foods Co., Inc. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1056 (2d Cir. 1992) ("Under New York law, parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract.") (quotations omitted).

[21] *See, e.g., Broughel v. Battery Conservancy*, No. 07-cv-7755(GBD), 2009 WL 928280, at *7 (S.D.N.Y. Mar. 30, 2009) (implied covenant claim dismissed as redundant of defective contract breach claim); *Computech Int'l, Inc. v. Compaq Computer Corp.*, No. 02 Civ. 2628(RWS), 2002 WL 31398933, at *4 (S.D.N.Y. Oct. 24, 2002) (implied covenant claim "dismissed as a matter of law as redundant" after contract breach claim is dismissed).

same contract and the same breach, and seek … the same relief."[22] Moreover, as BANA's opening brief explained, Disbursement Agreement Section 9.10 specifically provides that the Disbursement Agent has no such disclosure obligation.[23]

The Avenue Plaintiffs' argument that their implied covenant claims do not contradict the Disbursement Agreement's express provisions rests on unsupported *post hac* assertions concerning their alleged understanding that BANA would act as the Bank Proceeds Account's "gatekeeper." (Opp. at 18.) Their alleged unexpressed subjective "expectations" merit no weight because they fly in the face of the plain text of Disbursement Agreement Sections 9.3.2, 2.5.1, 9.2.5 and 11.1:

- Under Section 9.3.2, BANA was entitled to rely on Fontainebleau's certifications as to its compliance with requirements and/or conditions imposed by the Disbursement Agreement.
- Because BANA was entitled to rely on Fontainebleau's certifications, BANA had no obligation to stop funding under Section 2.5.1's first prong.
- Plaintiffs' Sections 9.2.5 and 11.1 arguments are based on a verbal sleight of hand, because their allegations fail to establish that BANA, *as Disbursement Agent*, ever received the contractually required notice of the alleged Fontainebleau defaults.

The conflict between the Disbursement Agreement's terms and the so-called "good faith" obligations the Avenue Plaintiffs would impose on BANA requires that their duplicative implied covenant claim be dismissed.[24]

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[22] *Long*, 2006 WL 1716878, at *1.

[23] Section 9.10 specifies that BANA "shall not have any duty or responsibility . . . to provide any Funding Agent or Lender with any credit or other information with respect" to the "financial condition and affairs of the Project Entities in connection with the making of the extensions of credit contemplated by the Financing Agreements . . . [and] the creditworthiness of the Project Entities."

[24] *See, e.g.*, *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983) ("No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship."); *see also In re Musicland Holding Corp.*, 374 B.R. 113, 121 (Bankr. S.D.N.Y. 2007) (implied covenant claim dismissed where plaintiffs' understanding "is not reflected in the terms of the [Agreement]").

CONCLUSION

The Term Lenders' breach of contract claims against BANA all fail because they contradict the Disbursement Agreement's express terms. Section 9.3.2 specifically permitted BANA to rely on Fontainebleau's Advance Request certifications and unambiguously protects BANA from liability for having done so. The Term Lenders' attempt to impose a "gross negligence" limitation on Section 9.3.2 fails because that provision is not a limitation of liability clause, it simply defines the scope of BANA's contractually based Disbursement Agent duties. And in any event, the Term Lenders' conclusory gross negligence allegations are insufficient to strip BANA of Section 9.3.2's protections. The Avenue Plaintiffs' duplicative implied covenant of good faith and fair dealing claim likewise fails because the "good faith" obligations they seek to impose are inconsistent with BANA's limited obligations under the Disbursement Agreement.

Accordingly, BANA respectfully requests that the Court dismiss the Term Lenders' claims against BANA with prejudice.

Date: Miami, Florida
April 5, 2010

Respectfully submitted,

By: /s/ Craig V. Rasile

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service list either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: April 5, 2010

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to Case Numbers:

09-CV-23835-ASG
10-CV-20236-ASG

_____/

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' JOINT MOTIONS TO DISMISS THE TERM LENDER COMPLAINTS

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PRELIMINARY STATEMENT

Plaintiffs acknowledge that, just like Defendants, they refused to fund Fontainebleau's March 2 and 3 Notices of Borrowing.[1] Plainly, that is because the March 2 and 3 Notices of Borrowing did not satisfy the requirements of the Credit Agreement, which prohibited borrowings of Revolving Loans in excess of $150 million until the Delay Draw Term Loans had been "fully drawn." As this Court held, the Revolving Lenders' interpretation of the Credit Agreement in opposition to Fontainebleau's motion for partial summary judgment—that "fully drawn" means fully funded and not merely requested—is "legally correct."

Plaintiffs' attempt to convince the Court that its prior ruling was incorrect and that the Term Lenders and the Revolving Lenders all breached the Credit Agreement when they declined to fund the March 2 and 3 Notices of Borrowing is completely unavailing—indeed, Plaintiffs mainly rehash the discredited arguments which Fontainebleau made, and the Court rejected, in Fontainebleau's case.[2] Plaintiffs' other responses to this motion are equally lacking. Plaintiffs have utterly failed to rebut Defendants' showing that Plaintiffs lack standing to assert claims for alleged breach of the Revolving Lenders' commitments to Fontainebleau. The factual allegations of the Complaints establish ample basis for the Revolving Lenders' termination of their commitments on April 20, 2009 and for their consequent rejection of Fontainebleau's April 21 Notice of Borrowing. And the Avenue Plaintiffs' attempt to assert an implied covenant of good faith and fair dealing claim is so at odds with established New York law that even the Aurelius Plaintiffs dare not allege otherwise. Plaintiffs' Complaints should be dismissed.

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[1] Certain Plaintiffs are successors in interest to Term Lenders that funded the March 2 and 3 Notices of borrowing. Unless otherwise noted, defined terms herein shall have the meaning ascribed to them in Defendants' Joint Motions to Dismiss the Term Lender Complaints and Supporting Memorandum of Law ("Defendants' Opening Brief").

[2] Plaintiffs additionally purport to incorporate "all the arguments not set forth here that Fontainebleau made" on its summary judgment motion in its litigation against the Revolving Lenders. Corrected Joint Opp'n to Defs' Mot. to Dismiss ("Opp.") at 8 n.2. Defendants likewise incorporate their arguments made in that litigation.

ARGUMENT

I. Plaintiffs Lack Standing

Plaintiffs do not have standing to sue for damages based on the Revolving Lenders' individual contractual promises to Fontainebleau because nothing in the Credit Agreement permits Plaintiffs to enforce those promises and they gave no consideration for them. *Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Mach. Co.*, 46 N.E. 952, 955 (N.Y. 1897). Plaintiffs cannot overcome this fundamental flaw in their claims by arguing that they have standing to enforce "mutual" (*i.e.*, reciprocal) Credit Agreement obligations, *see* Opp. at 5, because Plaintiffs do not, and cannot, identify any Credit Agreement provision creating inter-Lender (*i.e.*, mutual) funding obligations.

Unable to find contractual support for their claims, Plaintiffs attempt to challenge *Berry Harvester*'s long-standing holding. However, none of the cases they cite is more on point or in any way undermines *Berry Harvester*. *Deutsche Bank AG v. JPMorgan Chase Bank* did not involve one bank seeking damages for another bank's failure to fund a loan commitment. 2007 U.S. Dist. LEXIS 71933 (S.D.N.Y. Sept. 27, 2007). Rather, as the court in *Deutsche Bank AG* recognized, the only relief JPMorgan Chase sought was "a declaration that it can distribute the $47.6 million held in escrow to the eight banks that funded the July Advance." *Id.* at *5.[3] Because JPMorgan Chase was not seeking damages for Deutsche Bank's breach of its lending obligation, Deutsche Bank did not raise, and had no reason to raise, any standing issue.

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[3] Plaintiffs' truncated quotations from JPMorgan Chase's Answer and Counterclaims (Opp. at 5) are misleading. The breach that JPMorgan Chase alleged had damaged the Funding Banks was not Deutsche Bank's failure to fund its loan commitment to the borrower, but Deutsche Bank's failure "under Section 2.16 of the Restated Credit Agreement to distribute its recovery in excess of its ratable share of the Revolving Credit Advance by purchasing participations in the Funding Banks' Revolving Credit Advances"—an obligation it owed *directly to the Funding Banks*. *See* Heaton Decl. Ex. B ¶¶ 160-65 and Restated Credit Agreement § 2.16 (pp. 34-35 of the Restated Credit Agreement, which is included in Heaton Decl. Ex. B). In any event, JPMorgan Chase did not seek a damages award for that alleged breach or the failure to fund. *Id.* at 24 (JPMorgan Prayer for Relief).

The other cases Plaintiffs cite are similarly inapposite. In *CARs Receivables Corp. v. Bank One Trust Co., N.A.*, an Ohio court held that because CARs was a direct beneficiary of Bank One's contractual loan servicing promise, it had standing to enforce that promise unless the contract "evince[d] a manifest intention to exclude [CARs] as a party to whom [Bank One's] duties as servicer flowed." 2006 Ohio 6645 ¶¶ 5, 11 (Ohio App. Dec. 14, 2006), *appeal not allowed* 864 N.E.2d 654 (Ohio 2007). *CARs Receivables* is the mirror-image of, and entirely consistent with, *Berry Harvester*, where the plaintiff had no standing because, unlike CARs, it was not the beneficiary of the defendant's promise. *Berry Harvester*, 46 N.E. at 954-55.[4]

Because Plaintiffs cannot establish that the Revolving Lenders had a contractual obligation ***to the Term Lenders*** to lend money to Fontainebleau, they have no standing to sue based on the Revolving Lenders' failure to fund.

II. Fontainebleau's March 2 and 3 Notices of Borrowing Were Properly Rejected

This Court already held that Section 2.1(c)(iii) of the Credit Agreement, which provides that Fontainebleau cannot borrow more than $150 million of Revolving Loans unless the Total Delay Draw Term Loans have been "fully drawn," is unambiguous as a matter of law. *See* August 26 Decision, 417 B.R. 651, 660 (S.D. Fla. 2009). Under the plain language of the Credit Agreement, Fontainebleau cannot simultaneously request in a Notice of Borrowing the entire amount of the Delay Draw Term Loans and all outstanding amounts under the Revolving Loans. *Id.* Fontainebleau must first request and receive the full amount of the Delay Draw Term Loans before borrowing more than $150 million of Revolving Loans under a subsequent Notice of Borrowing. *Id.*

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[4] *Bykowski v. Eskenazi*, which does not even mention *Berry Harvester*, is distinguishable because, unlike here, the defendant indisputably had breached a promise owed to the plaintiff; the only issue was whether a third party's nonpayment of a promissory note to the plaintiff was a "natural and probable consequence" of defendant's own breach such that it should be included in plaintiff's damages. 870 N.Y.S.2d 312 (N.Y. App. Div. 2009).

Plaintiffs erroneously suggest that the Court's holding resulted solely from the application of standards applicable only on a motion for summary judgment. *See* Opp. at 8. But the Court determined "by looking within the four corners of the document, not to outside sources" that Section 2.1(c)(iii) is unambiguous "***as a matter of law***." August 26 Decision, 417 B.R. at 559-60 (citation omitted) (emphasis added). Where a contract is unambiguous as a matter of law, a court may dismiss a complaint—such as the Complaints here—at odds with the contract's plain meaning.[5]

A. Plaintiffs' *Post Hoc* Interpretation is Plainly Wrong

Plaintiffs concede that they refused to fund the March 2 and 3 Notices of Borrowing based on the same interpretation of the Credit Agreement adopted by the Court in its August 26 Decision. *See* Opp. at 15 n.5 (acknowledging refusal to fund but stating that "the Term Lenders cured their own default by funding the March 9, 209 Notice").[6] Now that litigation has commenced, these same Term Lenders want the Court to adopt a different and contradictory interpretation of that agreement. Courts routinely reject such *post hoc* interpretations because the parties' interpretation of a contract "before it comes to be the subject of controversy is deemed of great, if not controlling, influence."[7]

Plaintiffs also argue that the use of the word "draw" in Section 3 of the Credit Agreement, which governs Letters of Credit, supports their contention that "fully drawn" in Section 2.1(c)(iii) means "fully requested" rather than "fully funded." Opp. at 10. Section 3,

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[5] *See, e.g.*, *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1342 (11th Cir. 2005); *Instead, Inc. v. ReProtect, Inc.*, 2009 WL 274154, at *5 (S.D.N.Y. Feb. 5, 2009).

[6] Plaintiffs' argument that the Term Lenders "cured" their failure to fund by funding a Notice of Borrowing on March 9, 2009 is plainly confected for this litigation. It also ignores the fundamental fact that, unlike the March 2 and 3 Notices of Borrowing, the March 9 Notice of Borrowing complied with the Credit Agreement inasmuch as it did not simultaneously request the full amount of the Delay Draw Term Loans and the Revolving Loans.

[7] *Faulkner v. Nat'l Geographic Soc'y*, 452 F. Supp. 2d 369, 381 (S.D.N.Y. 2006) (citation omitted); *Alfin, Inc. v. Pac. Ins. Co.*, 735 F. Supp. 115, 120 (S.D.N.Y. 1990) ("*post hoc* interpretations are legally irrelevant").

however, supports the Revolving Lenders' interpretation. Multiple provisions in Section 3 provide for the ***reimbursement*** of funds "drawn" under Letters of Credit:

- Section 3.1(a) allows Fontainebleau to replace Letters of Credit "that have been drawn upon and reimbursed."
- Section 3.3(d) refers to the Revolving Lenders' obligations "to reimburse the Issuing Lender for any amount drawn under any Letter of Credit."
- Section 3.3(e) refers to the Revolving Lenders' obligations "to reimburse the Issuing Lender for amounts drawn under Letters of Credit."

If "drawn" were synonymous with "requested"—as Plaintiffs now claim—the foregoing provisions would make no sense, since only funded loans, not mere requests, need to be reimbursed.

Unable to find support in the Credit Agreement, Plaintiffs assert that there is an "established definition" of the terms "draw" and "drawn" under New York law. *See* Opp. at 9. This argument fails for multiple reasons. First, the plain language of the Credit Agreement establishes the meaning of "fully drawn" under Section 2.1(c)(iii). Whether the term "drawn" has been used differently in other contexts is irrelevant.[8] Second, there is no "established definition" of "drawn" as meaning "requested" under New York law. Neither the New York UCC nor the UCC cited by Plaintiffs defines "draw" or "drawn." While parties utilizing bills of exchange or drafts are sometimes referred to as "drawers" or "drawees," Plaintiffs have not offered any authority, or even a compelling reason, that suggests this usage should govern the meaning of the term "fully drawn" in Section 2.1(c)(iii) of the Credit Agreement. Indeed, the cases Plaintiffs cite flatly contradict their assertion that courts use the term "draw" in the letter of credit context only to describe funding requests. Each of the cases cited by Plaintiffs uses the

[8] *See Int'l Klafter Co. v. Cont'l Cas. Co.*, 869 F.2d 96, 100 (2d Cir. 1989) ("in the absence of ambiguity, the intent of the parties must be determined from their final writing").

term "draw" to refer to a ***withdrawal of funds*** under a letter of credit—not merely a request or demand for funds.[9]

Plaintiffs similarly misconstrue the pleadings filed in *Deutsche Bank AG v. JPMorgan Chase Bank*, 04 Civ. 7192 (PKL) (S.D.N.Y). These pleadings are inadmissible parole evidence. *See supra* n.8. Moreover, pursuant to the credit agreement at issue in that case, the lenders' obligations to fund their pro rata share of the letter of credit did not arise until the "Issuing Bank" first paid a letter of credit draft. *See* Heaton Decl. Ex. B, Attached Credit Agreement § 2.04. Thus, the pleading excerpts quoted by Plaintiffs from the *Deutsche Bank AG* case used the term "drawn" to describe the fact that the Issuing Bank had paid on a letter of credit, which gave rise to the lenders' obligation to reimburse their pro rata share.

B. Plaintiffs' Interpretation Would Render Section 2.1(b)(iii) Meaningless

As this Court explained in its August 26 Decision, the term "fully drawn" in Section 2.1(c)(iii) cannot be interpreted to mean "fully requested" without rendering meaningless the requirement in Section 2.1(b)(iii) that "the proceeds of each Delayed Draw Term Loan will be applied first to repay in full any then outstanding Revolving Loans." 417 B.R. at 660. Plaintiffs' attempt to dispute this holding is virtually incomprehensible. They appear to contend that "Delay Draw Term Loan" in Section 2.1(b)(iii) means an individual lender's pro rata share of the total amount of "Delay Draw Term Loans" and, thus, that Section 2.1(b)(iii) does not require that proceeds of Delay Draw Term Loans be used to pay in full Revolving Loans then outstanding. Opp. at 12-13. Contrary to the premise of this argument, the Credit Agreement does not define

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[9] *See, e.g.*, *Nassar v. Florida Fleet Sales, Inc.*, 79 F. Supp. 2d 284, 287 (S.D.N.Y. 1999) (letter of credit beneficiary "would be permitted to be paid in the form of a draw on the letter of credit"); *id.* at 291 ("goods to be paid for (in the form of 'draws') under the letter of credit"); *see also Bank of China v. Chan*, 937 F.2d 780, 782 (2d Cir. 1991) (failure "to draw down letters of credit and allowed Chinese customers to receive the goods shipped without paying"); *Self Int'l v. La Salle Nat'l Bank*, 2002 U.S. Dist. LEXIS 5631, at *3 (S.D.N.Y. Mar. 29, 2002) ("rejected . . . attempts to draw on the L/C's"); *id.* at *16 ("presented its documents to [the bank] in its attempt to draw on the L/C's ....").

"Delay Draw Term Loan" as Plaintiffs suggest. Instead, "Delay Draw Term Loans" is the defined term, *see* Credit Agreement § 2.1(b), and the Credit Agreement expressly provides that "[t]he meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms." *Id.* § 1.2(d). Under the plain language of the Credit Agreement, the purported distinction between "Delay Draw Term Loan" and "Delay Draw Term Loans" does not exist. Moreover, the Credit Agreement clearly requires that the proceeds of each such Delay Draw Term Loan be applied to "repay in full" any then outstanding Revolving Loans which "repay[ment] in full" would be impossible under Plaintiffs' interpretation.

Section 2.1(b)(iii) is, thus, not merely a "flow of funds" requirement. Opp. at 13. The fundamental purpose of this provision is to ensure that the Revolving Loans will be the last loans made under the Credit Agreement. Enforcing this sequential funding mechanism is not "commercially unreasonable," as Plaintiffs contend. Opp. at 11 n.3. The Credit Agreement indisputably conditions the Revolving Lenders' obligation to fund upon conditions that may not be met for a variety of reasons, and Lenders who obligated themselves to fund earlier in the construction process, such as the Term Lenders, were always subject to the risk that one or more of the conditions to funding Revolving Loans would not be met.[10]

In sum, the Court's prior decision was and is correct and requires dismissal of Plaintiffs' breach of contract claims based on failure to fund the March 2 and 3 Notices of Borrowing.[11]

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[10] As set forth more fully in Defendants' Opening Brief, Plaintiffs' assertions concerning the In-Balance Test shed no light on the meaning of "drawn." Under Plaintiffs' absurd interpretation of the In-Balance Test, the Project failed to meet that Test on the closing date of the credit facility whether "drawn" means "funded" or "requested." Defs.' Op. Br. at 19. In any event, Plaintiffs concede that evidence relating to the In-Balance Test is extrinsic evidence that is irrelevant to this Court's analysis. Opp. at 10-11.

[11] Similarly, Plaintiffs' claims based on failure to fund the March 2 and 3 Notices of Borrowings must be dismissed because they concede that these notices did not comply with Section 2.4(d) of the Credit Agreement, a condition precedent to lending which requires that the requested Revolver amount be a multiple of $5 million. Opp. at 16 n.6; *see also Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 460 N.E.2d 1077, 1081-82 (N.Y. 1984) ("[A] contracting party's failure to fulfill a condition excuses performance by the other party whose performance is so conditioned"); *AIG Centennial Ins. Co. v. Fraley-Landers*, 450 F.3d 761, 763 (8th Cir. 2006) ("Unlike a

III. Defendants Properly Terminated Their Commitments Under The Credit Agreement

Plaintiffs' allegations of breach based on the Revolving Lenders' refusal to fund Fontainebleau's April 21, 2009 Notice of Borrowing fail to state a claim because the Revolving Lenders exercised their right to terminate their Revolving Loan commitments under the Credit Agreement on April 20. Plaintiffs' Complaints affirmatively allege, and hence concede, that several Events of Default occurred prior to March 2009, *see* Opp. at 15, and the Credit Agreement expressly permitted the Revolving Lenders to terminate their commitments upon the occurrence of such Events of Defaults, *see* Credit Agreement § 8. Thus, the Revolving Lenders had no Revolving Loan commitments and no obligation to lend on April 21.[12]

There is no support in the Credit Agreement or applicable law for Plaintiffs' argument that the April 20 Termination Letter needed to detail each Event of Default on which it was

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mere contract term, the breach of which must be material before it excuses another party from performing, one party's failure to fulfill a condition precedent entirely excuses any remaining obligations of the other party."). The cases cited by the Plaintiffs in their opposition on this point are inapposite because (i) they address contract termination based on breach of contractual terms rather than non-performance for failure of a condition precedent; and (ii) in the cases cited, the court ***allowed*** the parties to assert additional grounds for termination.

[12] Plaintiffs' allegation that these Events of Default existed before March 2009 also provides an alternative basis for dismissing Plaintiffs' claims. That is because, as the Revolving Lenders have established and the Court has already held, a material breach of the Credit Agreement by Fontainebleau would have excused the Revolving Lenders from any obligation to perform as a matter of black letter New York law and the terms of the Credit Agreement. *See* Defs.' Op. Br. at 20–25; August 26 Decision, 417 B.R. at 664 ("Plaintiffs argument that the making of loans to the Bank Proceeds Account is essentially automatic provided a Notice of Borrowing is submitted is contrary to the plain terms of the Credit Agreement."). Plaintiffs' extended argument that the Credit Agreement somehow eliminated the Revolving Lenders' ability to refuse a Notice of Borrowing even in the face of a material breach, Opp. at 14-22, does no more than rehash arguments previously asserted by Fontainebleau, and Defendants respectfully incorporate the prior briefing and oral argument on the point. Plaintiffs' new contention that the Events of Default they concede occurred were not material or breaches, Opp. at 15-19, ignores both the language of the Credit Agreement that established the materiality of these Events of Default as a matter of the parties' agreement by providing the Revolving Lenders with the ability to terminate their obligations on the basis of these defaults 30 days after Fontainebleau became aware of (but failed to cure) the defaults, *see* Credit Agreement § 8(j), and the caselaw establishing that contractually specified defaults are breaches, *see Marley v. United States*, 423 F.2d 324, 335 (Fed. Ct. Cl. 1970) (once contractual default has been established, "the almost inevitable conclusion of law [is] that an unexcused default is a breach"); *Sony Elec. Inc. v. Pinole Point Prop. Inc.*, 2008 WL 3274428, at *11 (Cal. Ct. App. Aug. 11, 2008) ("While every default is a breach, not every breach is a default."); *Bradford Partners II, L.P. v. Fahning*, 231 S.W.3d 513, 520 (Tex. App. 2007) ("'Default' is defined as a failure to do an act . . . The plain meaning of the term includes breach.") (citation omitted).

based.[13] Under New York law, "courts will enforce a termination clause as written" and will not impose conditions to termination that do not appear in the termination clause.[14] Section 8 of the Credit Agreement unambiguously provides that if one or more enumerated Events of Default occur, then, with appropriate Lender consent, "the Administrative Agent shall, by notice to Borrowers, declare the Revolving Commitments ... to be terminated forthwith, whereupon the applicable Commitments shall immediately terminate." Credit Agmt. § 8. Nothing in the Credit Agreement requires that the Revolving Lenders identify specific Event(s) of Default in the termination notice.[15] Plaintiffs offer not a shred of authority for their contrary contention.

IV. The Avenue Plaintiffs' Implied Covenant Claim Falls Short

The Avenue Plaintiffs argue, on the one hand, that their bad faith claim is consistent with the Credit Agreement because "the Revolving Lenders were not contractually permitted to decline to fund" the March 2 and 3 Notices of Borrowing, Opp. at 25, and that, on the other hand, even if "the Credit Agreement did not expressly require [the Revolving Lenders] to fund," the Avenue Plaintiffs "reasonably expected" that each of the Revolving Lenders would do so anyway "in order to ensure that the risks of the transaction were shared ratably," *id.* at 24. If the

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[13] Curiously, Plaintiffs feign ignorance as to the Events of Default that had taken place prior to April 20, even though they allege at least two in their Complaints. Aurelius Compl. ¶¶ 99-106, 118-21; Avenue Compl. ¶¶128, 133-35. Additionally, Defendants identified several additional Events of Default in their opposition to Fontainebleau's motion for partial summary judgment, including a series of material misrepresentations concerning the Project and its prospects. *See, e.g.*, Chart: "February Representations Contradicted by April Disclosures" utilized by Defendants in oral argument before the Bankruptcy Court, a copy of which is annexed hereto as Appendix A. Each of these and other Events of Default that may subsequently be uncovered supports Defendants' termination on April 20. *See Kerns, Inc. v. Wella Corp.*, 114 F.3d 566, 570 (6th Cir. 1997) (under New York law, a party may terminate a contract for cause and use after-acquired evidence to justify its termination).

[14] *Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co.*, 470 F. Supp. 1308, 1314-15 (N.D.N.Y. 1979) (collecting cases); *accord Joseph Victori Wines, Inc. v. Vina Santa Carolina*, 933 F. Supp. 347, 352 (S.D.N.Y. 1996).

[15] Elsewhere in the Credit Agreement where the parties intended that notice of default be provided, the agreement said just that. *See* Credit Agmt. § 8(d)(ii) (certain defaults not otherwise known to the Borrower would not become an Event of Default until 30 days after the Borrowers receipt "of written notice from the Administrative Agent or any Lender *of such default*.") (emphasis added).

former contention is true, then the claim must be dismissed because it is duplicative of Plaintiffs' breach of contract claim; if the latter is true, then the claim fails for inconsistency with the express terms of the Credit Agreement. *See* Defs.' Op. Br. at 26-27.

Under New York law, whether an implied covenant of good faith claim is duplicative of a breach of contract claim does not depend on the success or failure of the contract claim—as the Avenue Plaintiffs incorrectly assert (Opp. at 24)[16]—but rather on whether the implied covenant claim as alleged *is based on the same facts and conduct* as the breach of contract claim.[17] Here, the facts and conduct underlying the two claims are identical and the Avenue Plaintiffs simply may not maintain a separate cause of action for breach of the implied covenant.

The Avenue Plaintiffs' assertion that the Term Lenders reasonably expected that Defendants would fund, even if Defendants were not obligated to do so, fails to state a claim because the Avenue Plaintiffs have not pled any facts that plausibly suggest that they reasonably expected the Defendants to loan money they were not obligated to lend. *See* Defs.' Op. Br. at 8 n. 31. Even if they had so pled, the Avenue Plaintiffs' attempt to employ the good faith covenant to create an obligation to lend where the Credit Agreement does not fails as a matter of law since "no obligation [under the covenant of good faith] can be implied that would be inconsistent with other terms of the contractual relationship."[18]

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[16] *United Technologies Corp. v. Mazer*, 556 F.3d 1260 (11th Cir. 2009), cited for the proposition that Plaintiffs may pursue claims in the alternative, does not even involve a claim of breach of the implied covenant.

[17] *See, e.g., Harris v. Provident Life & Accident Ins. Co.*, 310 F. 3d 73, 81 (2d Cir. 2002) ("New York law ... does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based on the same facts, is also pled."). Moreover, the Avenue Plaintiffs ignore numerous decisions where courts have dismissed a contract breach claim and then also dismissed an implied covenant claim as duplicative. *See, e.g., Broughel v. Battery Conservancy*, 2009 WL 928280, at *7 (S.D.N.Y. Mar. 30, 2009) (implied covenant claim dismissed as redundant of defective contract breach claim).

[18] *Dalton v. Educational Testing Serv.*, 663 N.E.2d 289, 292 (N.Y. 1995).

CONCLUSION

For all of the foregoing reasons and the reasons set forth in Defendants' Opening Brief, the Term Lenders' Complaints should be dismissed with prejudice.

Respectfully Submitted,

Dated: April 5, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Memorandum in Further Support of Defendants' Joint Motion to Dismiss the Term Lender Complaints was furnished via e-mail (where an e-mail address is listed) and First Class U.S. Mail to those on the attached service list on April 5, 2010.

By: /s/ John B. Hutton
John B. Hutton

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Appendix A

February Representations Contradicted by April Disclosures

Fontainebleau's Representations as of Feb. 25, 2009 [1]	Fontainebleau Began to Disclose in April 2009
In-Balance Test is Satisfied by $115.9 Million	The Project had a total shortfall of $383 million [2] ***A Negative Swing of Almost $500 Million***
Remaining Costs Required for Final Completion: $1.117 Billion	Remaining Costs Required for Final Completion: $1.504 Billion [3] ***A $387 Million Difference***
No Material Adverse Effect Has Occurred	Lehman Had Not Funded Under the Retail Facility ***Since December 2008*** [4] Projected EBITDA dramatically reduced; for example 2012 ***EBITDA projection reduced*** from $328.7 million to $162 – $252 million (*i.e.*, ***by as much as 50%)*** [5] Fontainebleau Unable to Deliver Audited Financials ***for Year-End 2008*** [6] Fontainebleau Hired Moelis in ***October 2008*** to Identify Additional Equity Investors – ***four months prior to the February Advance Request*** [7]
Fontainebleau is Solvent	Completed Project Can Only Support $1.4 Billion in Debt, ***Requiring Forgiveness of More than $1 Billion in Debt*** [8]

[1] Yu Decl., Ex. 2 (February Advance Request). [2] Yu Decl. ¶ 38; *see also* Costantino Decl. ¶¶ 58-59. [3] Barone Decl., Ex. 6, p. 7 (May 15, 2009 IVI Cost-to-Complete Review) (based on April 2009 figures). [4] Karawan Decl. ¶¶ 20-23. [5] Costantino Decl. ¶ 62. [6] Opp. Ex. 2 (April 16, 2009 Indenture Trustee Notice). [7] Karawan Decl. ¶ 157; Emergency Application by Debtors For Entry of An Interim Order Authorizing The Employment and Retention of Moelis & Company, 09-21481-AJC, D.E. # 37, p. 5 fn. 6. [8] Yu Decl. ¶ 43.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 09-MD-2106-CIV-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION,

MDL No. 2106

This document relates to all actions.
_____/

MDL ORDER NUMBER TWELVE: SETTING TELEPHONIC STATUS CONFERENCE

THIS CAUSE is before the Court upon the parties' request for a telephonic status conference. While the parties requested that a status conference be held at 5:15 p.m. on Wednesday, April 14, 2010, the Undersigned has a conflict at that particular time. Accordingly, it is hereby ORDERED AND ADJUDGED that

1. A telephonic status conference is hereby set before the Honorable Alan S. Gold, at the United States District Court, Courtroom 11-1, Eleventh Floor, 400 North Miami Avenue, Miami, Florida, on **Friday April 16, 2010 at 1:30 p.m. Participants shall call 1-866-208-0348 and provide the Conference ID #: 68617563. Please be prompt.**
2. The parties are ORDERED to file a Joint Submission of 5 pages or less **no later than Thursday April 15, 2010 at 12:00 p.m.** specifying the issues to be discussed at the status conference and setting forth their respective positions on said issues.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of April, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Bandstra
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

JOINT STATEMENT REQUESTED BY THE COURT IN MDL ORDER NUMBER 12

Plaintiffs in *ACP Master, Ltd v. Bank of America, N.A.*, 09-CV-08064 (S.D.N.Y.) and *Avenue CLO Fund, Ltd. v. Bank of America, N.A.*, 09-CV-1047 (D. Nev.) (collectively the "Term Lender Plaintiffs"), Plaintiff Fontainebleau Las Vegas, LLC ("Fontainebleau") and Defendants, as required by MDL Order Number 12, submit this joint statement summarizing the current discovery dispute and the parties' respective positions relating thereto in advance of the status teleconference scheduled for Friday, April 16, 2010 at 1:30 p.m.

DEFENDANTS' STATEMENT

On January 8, 2010, the Court issued MDL Order Number 3 (the "Scheduling Order") which, *inter alia*, established May 13, 2010 as the date for the completion of document productions in response to initial requests for production. On March 15, the parties held a teleconference to discuss discovery issues, including the use of search terms to collect electronic documents and the identity of individuals whose documents would be searched and collected for production. On March 19, Defendants sent proposed search terms for the collection of electronic documents to both the Term Lender Plaintiffs and Fontainebleau. On March 25, the Term Lender Plaintiffs forwarded to both Defendants and Fontainebleau a search term counter-

proposal. Fontainebleau did not forward any counter proposal. In a letter dated March 25, Fontainebleau suggested that the Scheduling Order's discovery deadlines be extended by sixty days because "we are waiting for instructions from the trustee regarding the timing and manner of document productions in these cases." *See* Exhibit A.

Subsequently, on April 2, Fontainebleau indicated that it was not willing to participate in a teleconference to negotiate search terms because it would be seeking to convert the underlying Chapter 11 bankruptcy cases to cases under Chapter 7 and did not believe discussion of search terms would be appropriate until a Chapter 7 trustee was appointed. In response, Defendants asked Fontainebleau to meet and confer regarding its refusal to negotiate search terms and Fontainebleau's request for a sixty day extension. During an April 7 call, Fontainebleau reiterated its refusal to negotiate search terms with the parties or otherwise participate in discovery, pending conversion of the bankruptcy cases to Chapter 7 and the appointment of a Chapter 7 trustee. Fontainebleau also refused to agree to be bound by any search terms that Defendants negotiated with the Term Lender Plaintiffs and reserved the right to demand that Defendants run additional search terms at a later date. Accordingly, on April 9, Defendants and the Term Lender Plaintiffs requested a conference with the Court. Later that day, Fontainebleau filed a motion in the Bankruptcy Court seeking to convert all of the related Chapter 11 cases to cases under Chapter 7, which conversion would lead automatically to the appointment of a Chapter 7 Trustee. On April 12, the Bankruptcy Court conditionally granted Fontainebleau's motion to convert, subject to a negative notice period which expires on April 19. In so doing, Judge Cristol suggested that "it would be prudent for the United States Trustee to await the expiration of the negative notice period before appointing a trustee." Accordingly, no trustee has yet been appointed.

On two prior occasions, Fontainebleau has asked this Court for a stay of discovery – once in connection with the Scheduling Order's entry and once in connection with its request for certification of an interlocutory appeal. The Court denied both requests. Now, Fontainebleau effectively seeks to grant itself a stay by refusing to negotiate search terms or other aspects of discovery while, at the same time, refusing to be bound by any agreements reached by the other parties to these MDL proceedings. Fontainebleau's position is unjustified and highly prejudicial to the Defendants. The appointment of a Chapter 7 trustee does not excuse Fontainebleau from its obligations under the Scheduling Order. When a trustee is appointed, he or she will be bound by Fontainebleau's conduct and positions to date. Fontainebleau's suggestion that it can stop making decisions or taking necessary actions (*e.g.*, complying with the Scheduling Order) because a trustee may be appointed is completely unfounded.

Fontainebleau sought and obtained accelerated treatment of this case when it suited its purposes and should not now be allowed unilaterally to bring everything to a grinding halt, especially given the Court's previous rejections of Fontainebleau's stay requests. Fontainebleau's position frustrates the MDL proceeding's primary purpose – coordinating pre-trial discovery. Moreover, Defendants should not have to incur the burden and expense of conducting multiple and costly searches for electronic documents, just because Fontainebleau will neither negotiate search terms nor agree to be bound by the terms negotiated by the other parties. Fontainebleau should be directed to participate in discovery, notwithstanding its conversion motion. At a minimum, Fontainebleau should be precluded from asking Defendants to use any search terms that are not part of the search term list negotiated between Defendants and the Term Lender Plaintiffs.

Defendants also seek a sixty-day extension of the deadline for the production of documents. The delay occasioned by Fontainebleau's actions has undermined the ability of all parties to comply with the Court-ordered May 13 deadline. Even if the Term Lenders and Defendants were able to meet that deadline at this point, it seems clear that Fontainebleau, which has the greatest volume of documents to be produced by any party, will not meet the May 13 deadline. Defendants further request the same sixty-day extension of the commencement of fact depositions and identification of expert witnesses Defendants do not request an extension of any other deadlines.

THE TERM LENDER PLAINTIFFS' POSITION

The Term Lender Plaintiffs respectfully ask the court to direct Fontainebleau to participate in discovery, notwithstanding its conversion motion. Given Fontainebleau's refusal to participate in discovery to date, the Term Lenders regrettably concur with Defendants that a sixty-day extension of the deadlines for the production of documents, the commencement of fact depositions and identification of expert witnesses is required. The Term Lenders object to any additional extensions of time with respect to those deadlines and further object to any extension of time with respect to the other deadlines in these coordinated matters.

FONTAINEBLEAU'S POSITION

Fontainebleau agrees, subject to Court approval, to the 60-day extension of deadlines now sought by all parties. Fontainebleau also is agreeable to any search terms that Defendants may agree to with the Term Lender Plaintiffs, albeit without waiver of and expressly preserving the rights of a Chapter 7 Trustee to seek additional discovery. Fontainebleau is not in a position to agree to search terms with respect to its own documents at this time because, as set forth below, those documents will shortly become the property of a Chapter 7 Trustee.

Fontainebleau also responds to several of the points raised above. First, the present application appears to seek an order requiring Fontainebleau to comply with the Scheduling Order. But Fontainebleau has not "refus[ed] to participate in discovery"; it has complied with the Scheduling Order to date, and intends to comply with its obligations going forward. That is why Fontainebleau initially requested, subject to Court approval, a 60-day extension. *See* Exhibit A. Until this filing, Defendants and the Term Lender Plaintiffs had rejected that request.

Second, Fontainebleau on several occasions advised counsel for Defendants and the Term Lender Plaintiffs of its impending Chapter 7 conversion motion. That motion has now been granted, subject to a short negative notice period that expires on April 19. Notably, the only negative notices filed to date seek to have the conversion order require Fontainebleau to preserve its paper and electronic documents. As set forth in Exhibit A hereto, Fontainebleau has already taken extensive measures in this regard.

Third, upon appointment of a trustee, Fontainebleau's documents will become property of the trustee. The conversion order expressly requires the Debtors to "turnover to the chapter 7 trustee all records and property of the estate under its custody and control as required by Bankruptcy Rule 1019(4)." Fontainebleau's counsel cannot bind a trustee to search terms that could cost the estate hundreds of thousands of dollars (if not more) without prior consultation -- and the trustee has not yet been appointed.

Finally, Fontainebleau's election not to negotiate search terms at this time did not "bring everything to a grinding halt." Nothing in the Scheduling Order requires the parties to agree to search terms, and Fontainebleau recognizes fully that in the event those deadlines are not extended, it will be required to complete its document production on May 13. Fontainebleau intends to continue to comply with its obligations.

Dated: April 15, 2010

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EXHIBIT A

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March 25, 2010

By Email

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Re: In re Fontainebleau Las Vegas Contract Litigation,
09-MD-02106-CIV-Gold/Bandstra

Dear Steven:

We write in response to your March 17, 2010 letter.

First, we do not represent any of the affiliates listed in your letter in connection with these lawsuits, the Fontainebleau bankruptcy proceedings or generally. However, we have communicated with the debtors' bankruptcy counsel on the issues raised in your letter. We have been advised that the paper and electronic documents potentially relevant to these litigations have been fully preserved both for plaintiff Fontainebleau Las Vegas, LLC, and for the bankrupt affiliates identified in your letter.[1] *See* Ex. A. Subject to the trustee's instructions (see below), we are agreeable to making the non-privileged, responsive documents from these entities available for inspection and copying.

As for the non-bankrupt affiliates listed in your letter -- Fontainebleau Resorts, LLC; Fontainebleau Resorts Holdings, LLC; and Fontainebleau Resort Properties I, LLC -- we are unaware of what (if any) document preservation measures these entities have taken in connection with these litigations or the Fontainebleau bankruptcy proceedings. It is our understanding, however, that each entity has retained Glen Waldman of the Waldman Law Firm in Weston, Florida in connection with the debtors' bankruptcy proceedings. The debtors' counsel has sent

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[1] Such entities are: Fontainebleau Las Vegas Holdings, LLC; Fontainebleau Las Vegas Capital Corp.; Fontainebleau Las Vegas Retail Parent, LLC; Fontainebleau Las Vegas Retail Mezzanine, LLC; Fontainebleau Las Vegas Retail, LLC; and Fontainebleau Las Vegas II, LLC.

Mr. Waldman a copy of your letter, and will forward to you any relevant response we receive from him.

Second, we do not represent in these lawsuits, the Fontainebleau bankruptcy proceedings or generally the following non-parties identified in your letter: Turnberry Associates, Turnberry West Construction, Inc., Turnberry Residential Limited Partner, LP, Moelis & Company, LLC ("Moelis"), and Citadel Investment Group, LLP ("Citadel").[2] As such, we are unaware of what (if any) document preservation measures these entities have taken in connection with these litigations or the Fontainebleau bankruptcy proceedings. But we have been advised that the Turnberry entities retained David Reimer of Reimer & Rosenthal in Weston, Florida in connection with the debtors' bankruptcy proceedings. The debtors' counsel has sent Mr. Reimer a copy of your letter, and will forward to you any relevant response we receive from him. We do not know who represents either Moelis or Citadel, but a copy of your letter has been forwarded to their principals.

Third, as we have repeatedly informed you, the debtors have very limited resources remaining. As we also informed you, we anticipate that the debtors' bankruptcy proceedings will be converted to a Chapter 7 and a trustee will be appointed early next month. At that time, it is our understanding that, among other things, the debtors' documents will become the property of the trustee. For these reasons, among others, we are waiting for instructions from the trustee regarding the timing and manner of document productions in these cases. Given that the timing of the trustee's appointment may impact Fontainebleau's completion of document production in these lawsuits, we suggest, subject to the Court's approval, that the parties agree to extending the deadline by 60 days. Please let us know whether you and counsel for the other defendants and term lenders are agreeable to that proposal.

Sincerely,

Seth A. Moskowitz

cc: All Counsel of Record

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[2] This firm does represent Turnberry Residential Limited Partner, L.P. ("Turnberry Residential") in an action that is pending in New York Supreme Court, with a jurisdictional appeal pending in the Second Circuit Court of Appeals. Turnberry Residential has been issued a litigation hold in that case, and to the extent non-privileged documents subject to that hold are responsive in these cases, they will be made available for inspection and copying.

Exhibit A

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March 24, 2010

Via E-mail & U.S. Mail

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Re: Fontainebleau Bankruptcy

Dear Mr. Mockler:

We write in response to your letter dated March 16, 2010.

While your requests and inquiries of Ms. Thier are exceedingly broad and generalized, by the following response we have endeavored to provide the information we believe you seek taking into account our prior discussions with Sid Levinson.

First, the Debtors have historically maintained virtually all of their physical records in Las Vegas, Nevada. In contemplation of the impending conversion of the cases to chapter 7, in order to facilitate the transition to the chapter 7 Trustees, those records have been moved into one central location at a warehouse facility in Las Vegas. As you know, certain members of the Board of Managers of Fontainebleau Resorts, LLC ("FBR") were or are based in South Florida. Thus, we have requested those managers, as well as professionals formerly engaged by the Debtors, to deliver to us any of the Debtors' records they may have in their possession. We are in the process of collecting such records and they will likewise be indexed and placed in the storage facility.

Second, the Debtors have historically maintained their electronic records on two servers; one dedicated to department and user files (the "Department File Server") and the other dedicated to electronic mail records (the "Email Server"). The Department File Server is housed in a co-location facility in Las Vegas, Nevada and is a shared server that includes records of FBR and its parents and subsidiaries entirely unrelated to the Debtors. The Email Server is housed in Miami Beach, Florida and includes electronic mail records of FBR and the Fontainebleau Miami Beach, entirely unrelated to the Debtors. As FBR asserts rights of privacy as to records which do not pertain to the Debtors, we have been endeavoring to resolve retrieval issues precipitated by the fact of employment of common servers.

The Debtors and FBR (and its parents and subsidiaries) also utilized the following databases: Timberline; Infinium, Image Logix, HR Logix, and Red Rock. Similar privacy issues pertain to such information and records and we are likewise endeavoring to resolve the same.

In addition, the Debtors continue to maintain the RR Donnelly electronic dataroom that was established and maintained as part of the section 363 sale process. After a conversion of

the cases, the Trustees will need to determine whether to keep that dataroom up and running or to copy all of the data onto portable media.

Third, while your request is exceedingly broad, the following is a non-exclusive list of present or former employees, officers or directors of the Debtors or FBR who may have knowledge of the subjects listed in your third bullet point:

Bill Bewley	Audrey Oswell
James Freeman	Ray Parello
Bernie Glanister	Amie Sabo
Kathy Hernandez	Eric Salzinger
Howard Karawan	Glenn Schaeffer
Devendra Kumar	Jeffrey Soffer
Albert E. Kotite	Whitney Thier
Devendra Kumar	Brian Turpin
Mark Lefever	Dave Walker
Jaclyn Miller	Bruce Weiner
Lauren Oberg	Richard C. White

As for your request to interview Ms. Thier, please be advised that given Ms. Thier's role as general counsel, not only to the Debtors but to FBR as well until after the Debtors' chapter 11 filings, she is unwilling to grant informal interviews at this time. Moreover, Ms. Thier is one of only three remaining officers who are actively handling the preparations for conversion to chapter 7 and we do not wish to distract her in the limited time remaining to accomplish essential pre-conversion tasks.

Sincerely yours,

Scott L. Baena

SLB/rar

cc: Mr. Howard Karawan
Whitney Thier, Esq.
Jay M. Sakalo, Esq.

MIAMI 2108936.1 7650831854

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 09-MD-2106-CIV-GOLD/MCALILEY

In re:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION,

MDL No. 2106

This document relates to all actions.
_____/

MDL ORDER NUMBER THIRTEEN: REQUIRING SUBMISSION

THIS CAUSE is before the Court following a telephonic status conference on the Parties' Joint Statement Regarding Search Terms and Pre-Trial Deadlines **[DE 59]**. For the reasons stated of record, which I incorporate by reference into this Order, it is hereby

ORDERED AND ADJUDGED that:

1. All parties, including Fontainebleau, shall negotiate search terms **no later than Wednesday April 21, 2010 at 10:00 a.m.**, which search terms will be binding on any Chapter 7 Trustee(s) that may be appointed by the Bankruptcy Court.
   a. Should Fontainebleau refuse to negotiate search terms in good faith, such refusal will be construed as a waiver of any objections Fontainebleau may have to the search terms upon which the remaining parties agree.
2. **No later than Thursday April 22, 2010 at 12:00 p.m.**, the parties shall file a Motion for Extension of Pre-Trial Deadlines specifically identifying the pre-trial deadline modifications the parties are requesting.

DONE AND ORDERED in Chambers at Miami, Florida, this 16 day of April, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: Magistrate Judge Bandstra
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

JOINT MOTION FOR EXTENSION OF CERTAIN PRE-TRIAL DEADLINES

Plaintiffs in *ACP Master, Ltd. v. Bank of America, N.A.*, 09-CV-08064 (S.D.N.Y.) and *Avenue CLO Fund, Ltd. v. Bank of America, N.A.*, 09-CV-1047 (D. Nev.) (collectively the "Term Lender Plaintiffs"), Plaintiff Fontainebleau Las Vegas, LLC ("Fontainebleau")[1] and Defendants, as required by MDL Order Number 13, submit this joint motion specifically identifying the pre-trial deadline modifications requested by the parties.

WHEREAS, on January 8, 2010, the Court issued MDL Order Number 3 (the "Scheduling Order") which established certain pre-trial deadlines; and

WHEREAS, on April 15, 2010, the parties filed a Joint Statement in which, *inter alia*, all parties joined in requesting sixty-day extensions of certain deadlines set forth in the Scheduling Order; and

[1] Subject to all applicable orders of the Court, Fontainebleau joins this motion without prejudice to any position that may be taken, or relief that may be sought, by any Chapter 7 Trustee that is appointed in accordance with the April 12, 2010, and April 19, 2010 Orders in *In re Fontainebleau Las Vegas Holdings, LLC, et al*, No. 09-2-21481-BKC-AJC (Bankr. S.D. Fl.), and specifically reserves all applicable rights in that regard.

WHEREAS, on April 19, 2010, the Court issued MDL Order Number 13, which, *inter alia*, required the parties to file a Motion for Extension of Pre-Trial Deadlines specifically identifying the pre-trial deadlines the parties are requesting.

NOW, THEREFORE, the parties hereby respectfully request that this Court approve the following extensions to the pre-trial deadlines set forth in the Scheduling Order:

1. The Scheduling Order currently provides that the deadline for completion of document productions in response to initial Requests for Production is May 13, 2010. The parties request that this date be extended by sixty days, to Monday, July 12, 2010.

2. The Scheduling Order currently provides that the deadline for commencement of fact depositions is July 1, 2010. The parties request that this date be extended by sixty days, to Monday, August 30, 2010.

3. The Scheduling Order currently provides that the deadline for identification of expert witnesses by the Term Lender Plaintiffs and Fontainebleau is September 30, 2010. The parties request that this date be extended by sixty days, to Monday, November 29, 2010.

4. The Scheduling Order currently provides that the deadline for Defendants' identification of expert witnesses is November 1, 2010. The parties request that this date be extended by sixty days, to Friday, December 31, 2010.

Respectfully submitted,

Dated: April 22, 2010

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to 09-CV-01047-KJD-PAL
_____/

VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS ROSEDALE CLO, LTD. AND ROSEDALE CLO II LTD.

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Rosedale CLO, Ltd. and Rosedale CLO II Ltd. hereby voluntarily dismiss this action without prejudice. The Second Amended Complaint was filed on January 15, 2010. At this time, no defendant has answered or filed a summary judgment motion. This voluntary dismissal by Rosedale CLO, Ltd. and Rosedale CLO II Ltd. in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

Dated: April 22, 2010.

Respectfully submitted,

By: /s Lorenz Michel Prüss
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 22, 2010, a copy of the foregoing **VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS ROSEDALE CLO, LTD. AND ROSEDALE CLO II LTD.** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

By: /s Lorenz Michel Prüss
Lorenz Michel Prüss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA
This document relates to Case No.: 09-23835-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

_____/

ORDER DISMISSING PARTIES WITHOUT PREJUDICE UPON NOTICE OF VOLUNTARY DISMISSAL [DE 63]; DIRECTING CLERK TO TAKE ACTION

THIS CAUSE is before the Court upon a Notice of Voluntary Dismissal **[DE 63]** filed by certain Plaintiffs regarding their participation in Case Number 09-CV-23835 ("the Nevada action"). Having considered the Notice, the record, and being otherwise duly advised, it is hereby ORDERED AND ADJUDGED that:

1. The following parties are hereby DISMISSED WITHOUT PREJUDICE from the Nevada Action:

   a. Rosedale CLO II Fund, Ltd.;

   b. Rosedale CLO, Ltd.;

2. The clerk is directed to correct the pertinent dockets so that the above-referenced parties are no longer listed as Plaintiffs in the Nevada Action.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 26th day of April, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Bandstra
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to 09-CV-01047-KJD-PAL

_____ /

VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS ABERDEEN LOAN FUNDING, LTD.; ARMSTRONG LOAN FUNDING, LTD.; BRENTWOOD CLO, LTD.; EASTLAND CLO, LTD.; GLENEAGLES CLO, LTD; GRAYSON CLO, LTD; GREENBRIAR CLO, LTD.; HIGHLAND CREDIT OPPORTUNITIES CDO, LTD.; HIGHLAND LOAN FUNDING V, LTD.; HIGHLAND OFFSHORE PARTNERS, L.P.; JASPER CLO, LTD.; LIBERTY CLO, LTD.; LOAN FUNDING IV LLC; LOAN FUNDING VII LLC; LOAN STAR STATE TRUST; RED RIVER CLO, LTD.; ROCKWALL CDO, LTD.; ROCKWALL CDO II, LTD.; SOUTHFORK LLO, LTD.; STRATFORD CLO, LTD.; AND WESTCHESTER CLO, LTD.

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Aberdeen Loan Funding, Ltd.; Armstrong Loan Funding, Ltd.; Brentwood CLO, Ltd.; Eastland CLO, Ltd.; Gleneagles CLO, Ltd; Grayson CLO, Ltd; Greenbriar CLO, Ltd.; Highland Credit Opportunities CDO, Ltd.; Highland Loan Funding V, Ltd.; Highland Offshore Partners, L.P.; Jasper CLO, Ltd.; Liberty CLO, Ltd.; Loan Funding IV LLC; Loan Funding VII LLC; Loan Star State Trust; Red River CLO, Ltd.; Rockwall CDO, Ltd.; Rockwall CDO II, Ltd.; Southfork LLO, Ltd.; Stratford CLO, Ltd.; and Westchester CLO, Ltd. ("Highland Plaintiffs") hereby voluntarily dismiss this action without prejudice. The Second Amended Complaint was filed on January 15, 2010. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by the Highland Plaintiffs in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

Dated: April 28, 2010.

Respectfully submitted,

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DillmanD@hbdlawyers.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 28, 2010, a copy of the foregoing **VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS ABERDEEN LOAN FUNDING, LTD.; ARMSTRONG LOAN FUNDING, LTD.; BRENTWOOD CLO, LTD.; EASTLAND CLO, LTD.; GLENEAGLES CLO, LTD; GRAYSON CLO, LTD; GREENBRIAR CLO, LTD.; HIGHLAND CREDIT OPPORTUNITIES CDO, LTD.; HIGHLAND LOAN FUNDING V, LTD.; HIGHLAND OFFSHORE PARTNERS, L.P.; JASPER CLO, LTD.; LIBERTY CLO, LTD.; LOAN FUNDING IV LLC; LOAN FUNDING VII LLC; LOAN STAR STATE TRUST; RED RIVER CLO, LTD.; ROCKWALL CDO, LTD.; ROCKWALL CDO II, LTD.; SOUTHFORK LLO, LTD.; STRATFORD CLO, LTD.; AND WESTCHESTER CLO, LTD.** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

By: /s Lorenz Michel Prüss
Lorenz Michel Prüss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA
This document relates to Case No.: 09-23835-CIV-GOLD/McALILEY

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106
_____/

ORDER DISMISSING PARTIES WITHOUT PREJUDICE PURSUANT TO NOTICE OF VOLUNTARY DISMISSAL [DE 65]; DIRECTING CLERK TO TAKE ACTION

THIS CAUSE is before the Court upon a Notice of Voluntary Dismissal **[DE 65]** filed by certain Plaintiffs regarding their participation in Case Number 09-CV-23835 ("the Nevada action"). Having considered the Notice, the record, and being otherwise duly advised, it is hereby ORDERED AND ADJUDGED that:

1. The following parties are hereby DISMISSED WITHOUT PREJUDICE from the Nevada Action:

   a. Aberdeen Loan Funding, Ltd.;

   b. Armstrong Loan Funding, Ltd.;

   c. Brentwood CLO, Ltd.;

   d. Eastland CLO, Ltd.;

   e. Gleneagles CLO, Ltd;

   f. Grayson CLO, Ltd;

   g. Greenbriar CLO, Ltd.;

   h. Highland Credit Opportunities CDO, Ltd.;

   i. Highland Loan Funding V, Ltd.;

   j. Highland Offshore Partners, L.P.;

   k. Jasper CLO, Ltd.;

l. Liberty CLO, Ltd.;

m. Loan Funding IV LLC;

n. Loan Funding VII LLC;

o. Loan Star State Trust;

p. Red River CLO, Ltd.;

q. Rockwall CDO, Ltd.;

r. Rockwall CDO II, Ltd.;

s. Southfork LLO, Ltd.;

t. Stratford CLO, Ltd.; and

u. Westchester CLO, Ltd..

2. The clerk is directed to correct the dockets so that the above-referenced parties are no longer listed as plaintiffs in the Nevada Action.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 30th day of April, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Bandstra
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER CASE NO.: 09-MD- 2106-CIV-GOLD/BANDSTRA

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

FONTAINEBLEAU RESORTS, LLC'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF TERM LENDERS' DOCUMENT REQUESTS DATED APRIL 22, 2010

Comes now, Third Party, Fontainebleau Resorts, LLC ("Fontainebleau"), by and through its undersigned counsel, and pursuant to *S.D. Fla. L.R.* 7.1 hereby files this Unopposed Motion for Extension of Time to Respond to Plaintiff Term Lenders'[1] Document Requests dated April 22, 2010 (the "Request"), and would state:

1. On April 22, 2010, Plaintiff Term Lenders served Fontainebleau with the 41-item Request. Fontainebleau's response to same is due on or before May 13, 2010.

2. Fontainebleau respectfully requests an additional thirty (30) days to respond to the Request.[2]

3. In accordance with *S.D. Fla. L.R.* 7.1.A.3, the undersigned counsel certifies

[1] The Term Lenders include the plaintiffs in the cases captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.,* Case No. 09-cv-1047-KJD-PAL (D. Nev.) And *ACP Master, Ltd., et al v. Bank of America, N.A., et al.,* Case No. 09-cv-8064-LTS/THK (S.D.N.Y.).

[2] Undersigned counsel was retained for the limited purpose of filing this Unopposed Motion for Extension of Time to Respond to Plaintiff Term Lenders' Document Requests dated April 22, 2010. Undersigned counsel has not been retained for any other purposes, including with respect to subsequent discovery requests.

that she has conferred with counsel for Plaintiff Term Lenders with regard to this Motion and the relief sought. Counsel for Plaintiff Term Lenders have expressed that they have no opposition to the relief requested.

5. In addition, pursuant to *S.D. Fla. L.R.* 7.A.2, attached is a proposed Order granting this Motion.

WHEREFORE, Third Party, Fontainebleau Resorts, LLC, respectfully requests that this Honorable Court enter an order granting its Unopposed Motion for Extension of Time to Respond to Term Lender's Document Request dated April 22, 2010.

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By: /s Sarah J. Springer
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Sarah J. Springer
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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MASTER CASE NO.: 09-MD- 2106-CIV-GOLD/BANDSTRA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER CASE NO.: 09-MD- 2106-CIV-GOLD/BANDSTRA

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

ORDER ON FONTAINEBLEAU RESORTS'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF TERM LENDERS' DOCUMENT REQUEST DATED APRIL 22, 2010

THIS CAUSE came before the Court on Fontainebleau Resorts, LLC's Motion for Extension of Time to Respond to Plaintiff Term Lenders' Document Request dated April 22, 2010. The Court, having considered the Motion, being advised of the agreement among counsel for the respective parties, and being otherwise duly advised in the premises, it is hereupon

ORDERED and ADJUDGED that Fontainebleau Resorts, LLC's Motion be and the same is hereby granted. Fontainebleau Resorts, LLC shall serve its Response to Term Lender's Document Request dated April 22, 2010, on or before June 14, 2010.

DONE and ORDERED in Fort Lauderdale, Miami-Dade County, Florida, on this _____ day of May, 2010.

_____
DISTRICT JUDGE ALAN S. GOLD

Copies to:
Craig J. Trigoboff, Esq.
Counsel on the attached Service List

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to 09-23835-CIV-GOLD/BANDSTRA.
_____ /

JOINT MOTION TO ADD PLAINTIFFS TO THE ACTION

Plaintiffs and Defendants submit this Joint Motion to add as plaintiffs to this action Caspian Alpha Long Credit Fund, L.P. ("Caspian"), Monarch Master Funding Ltd. ("Monarch"), and Normandy Hill Master Fund, L.P. ("Normandy"), and in support thereof, state as follows.

WHEREAS, Caspian, Monarch, and Normandy wish to join in the claims asserted by the Plaintiffs in the Second Amended Complaint [D.E. 15] filed on January 15, 2010; and

WHEREAS, Defendants, while not conceding or admitting in any way that the claims of Caspian, Monarch, or Normandy or any of the other Plaintiffs are meritorious, nonetheless agree to the addition of Caspian, Monarch, and Normandy as plaintiffs to this action pursuant to the following terms.

NOW, THEREFORE, the parties hereby respectfully request that this Court approve the following terms agreed to by the parties in this action:

1. Caspian, Monarch, and Normandy will be added to this action without the need of filing a separate complaint.

2. Caspian, Monarch, and Normandy shall be bound by all existing case deadlines.

3. Caspian, Monarch, and Normandy shall be bound by any order issued by this Court on the pending motions to dismiss filed by Defendants.

4. Caspian, Monarch, and Normandy shall file Corporate Disclosure Statements pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Initial Disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, and written responses to all outstanding discovery requests within 14 days of entry of an order adding them to this action.

Respectfully submitted,

Dated: May 14, 2010

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Attorneys for Defendant MB Financial Bank, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 14, 2010, a copy of the foregoing **JOINT MOTION TO ADD PLAINTIFFS TO THE ACTION** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

By: /s/ Lorenz Michel Prüss
Lorenz Michel Prüss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to 09-23835-CIV-GOLD/BANDSTRA.

/

[PROPOSED] ORDER GRANTING JOINT MOTION TO ADD ADDITIONAL PLAINTIFFS TO THE ACTION

THIS CAUSE is before the Court on the Joint Motion to Add Additional Plaintiffs to the Action submitted by Plaintiffs and Defendants. For the reasons set forth in the Motion, it is hereby

ORDERED AND ADJUDGED that

1. The Motion is GRANTED.
2. Caspian Alpha Long Credit Fund, L.P. ("Caspian"), Monarch Master Funding Ltd. ("Monarch"), and Normandy Hill Master Fund, L.P. ("Normandy") are hereby added as plaintiffs to this action and join in the claims asserted by the Plaintiffs in the Second Amended Complaint filed January 15, 2010 without the need of filing a separate complaint.
3. Caspian, Monarch, and Normandy shall be bound by all existing case deadlines.
4. Caspian, Monarch, and Normandy shall be bound by any future order to be issued by this Court on the pending motions to dismiss.

5. Caspian, Monarch, and Normandy shall file Corporate Disclosure Statements pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Initial Disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, and written responses to all outstanding discovery requests within 14 days of entry of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this __ day of May, 2010.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: Magistrate Judge Bandstra
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-2106-MD-GOLD/MCALILEY

IN RE:

FONTAINEBLEAU LAS VEGAS

HOLDINGS, LLC, ET AL.,

DEBTORS.

_____/

FONTAINEBLEAU LAS VEGAS LLC,

PLAINTIFF,

VS.

BANK OF AMERICA, N.A., ET AL.,

DEFENDANTS. _____/

ORDER GRANTING JOINT MOTION TO ADD
ADDITIONAL PLAINTIFFS; DIRECTING CLERK TO TAKE ACTION

THIS CAUSE is before the Court on the Joint Motion to Add Additional Plaintiffs to the Action submitted by Plaintiffs and Defendants **[DE 72]**. For the reasons set forth in the Motion, it is hereby

ORDERED AND ADJUDGED that

1. The Motion **[DE 72]** is GRANTED.
2. Caspian Alpha Long Credit Fund, L.P. ("Caspian"), Monarch Master Funding Ltd. ("Monarch"), and Normandy Hill Master Fund, L.P. ("Normandy") are hereby added as plaintiffs to this action and join in the claims asserted by the Plaintiffs in the Second Amended Complaint filed January 15, 2010 without the need of filing a separate complaint.
3. Caspian, Monarch, and Normandy shall be bound by all existing case deadlines.
4. Caspian, Monarch, and Normandy shall be bound by any future order to be issued by this Court on the pending motions to dismiss.

5. Caspian, Monarch, and Normandy shall file Corporate Disclosure Statements pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Initial Disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, and written responses to all outstanding discovery requests no later than June 4, 2010.

6. The clerk shall update the pertinent docket(s) accordingly.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of May, 2010.

ALAN S. GOLD, US DISTRICT JUDGE

MASTER CASE NO.: 09-MD- 2106-CIV-GOLD/BANDSTRA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER CASE NO.: 09-MD- 2106-CIV-GOLD/BANDSTRA

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

ORDER ON FONTAINEBLEAU RESORTS'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF TERM LENDERS' DOCUMENT REQUEST DATED APRIL 22, 2010

THIS CAUSE came before the Court on Fontainebleau Resorts, LLC's Motion for Extension of Time to Respond to Plaintiff Term Lenders' Document Request dated April 22, 2010. The Court, having considered the Motion, being advised of the agreement among counsel for the respective parties, and being otherwise duly advised in the premises, it is hereupon

ORDERED and ADJUDGED that Fontainebleau Resorts, LLC's Motion be and the same is hereby granted. Fontainebleau Resorts, LLC shall serve its Response to Term Lender's Document Request dated April 22, 2010, on or before June 14, 2010.

DONE and ORDERED in Fort Lauderdale, Miami-Dade County, Florida, on this 18th day of May, 2010.

MAGISTRATE JUDGE TED E. BANDSTRA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-MD-02106-CIV-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

_____/
This Document Relates to: 09-CV-21879

MOTION BY BILZIN SUMBERG BAENA PRICE & AXELROD LLP TO WITHDRAW AS COUNSEL OF RECORD FOR PLAINTIFF FONTAINEBLEAU LAS VEGAS, LLC

Bilzin Sumberg Baena Price & Axelrod LLP ("Bilzin Sumberg"), co-counsel of record to Plaintiff Fontainebleau Las Vegas, LLC ("Fontainebleau"), hereby moves for entry of an Order pursuant to S.D. Fla. L.R. 11.1(d)(3) authorizing Bilzin Sumberg to withdraw as co-counsel of record for Fontainebleau and discharging Bilzin Sumberg from any further responsibilities in respect of these cases and, in support thereof, states as follows:

1. Fontainebleau and certain of its affiliates (the "Fontainebleau Debtors") retained Bilzin Sumberg as their general bankruptcy counsel in connection with their chapter 11 bankruptcy cases filed in the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court").

2. In the engagement letters executed by the Fontainebleau Debtors, the Fontainebleau Debtors acknowledged that Bilzin Sumberg "has not undertaken to represent the [Fontainebleau Debtors] if their bankruptcy cases (i) are converted to cases under chapter 7, (ii) if a chapter 11 trustee is appointed, (iii) the venue of the cases is transferred to a district outside the State of Florida or (iv) if an order is entered directing the disgorgement of any payments

made to [Bilzin Sumberg] in respect of fees, including any retainer payments. Accordingly, [Bilzin Sumberg] reserves the right to seek to withdraw as counsel in any of the foregoing events."

3. On April 12, 2010, pursuant to 11 U.S.C. § 1112(a), the Bankruptcy Court entered an order converting the bankruptcy cases of the Fontainebleau Debtors to cases under chapter 7 of the Bankruptcy Code, effective upon such order becoming final.[1] On April 19, 2010, the Bankruptcy Court entered an order determining the conversion order to be final.[2]

4. On April 20, 2010, pursuant to 11 U.S.C. § 701, the United States Trustee appointed Soneet R. Kapila as interim chapter 7 trustee for the Fontainebleau Debtors' estates.[3] Pursuant to 11 U.S.C. §§ 323 and 704, the chapter 11 trustee is the legal representative of the Fontainebleau Debtors' estates and the chapter 7 trustee, as opposed to Fontainebleau, is charged with the furtherance of the interests of the Fontainebleau's bankruptcy estate in respect of this case, including, without limitation, further prosecution of this case on behalf of Fontainebleau's estate or settlement thereof.

5. On May 3, 2010, the Bankruptcy Court approved the retention of the law firm of Stichter Riedel Blain & Prosser, P.A. and Harley E. Riedel, Russell M. Blain, Becky Ferrell-Anton, and Susan Heath Sharp of that firm as general bankruptcy counsel to the chapter 7 trustee.[4]

6. On May 5, 2010, Bilzin Sumberg was authorized by the Bankruptcy Court to withdraw as counsel of record to the Fontainebleau Debtors and was discharged from providing

[1] Case No. 09-21481-AJC, Dkt. No. 1944 (Bankr. S.D. Fla.).
[2] Case No. 09-21481-AJC, Dkt. No. 1969 (Bankr. S.D. Fla.).
[3] Case No. 09-21481-AJC, Dkt. No. 1973 (Bankr. S.D. Fla.).
[4] Case No. 09-21481-AJC, Dkt. No. 2013 (Bankr. S.D. Fla.).

further services to the Fontainebleau Debtors except for certain limited services not germane to this case.[5]

Relief Requested

7. Bilzin Sumberg requests that it be allowed to withdraw as co-counsel of record to Fontainebleau because, among other things, (a) upon the appointment of the chapter 7 trustee, Fontainebleau was no longer the authorized representative of its bankruptcy estate and therefore has no further role in this case; and (b) Bilzin Sumberg likely will not be compensated for any services it provides in connection with this litigation. *See Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

8. Bilzin Sumberg certifies that, pursuant to S.D. Fla. L.R. 11.1(d)(3), this Motion has been served on Fontainebleau, the chapter 7 trustee, the chapter 7 trustee's counsel, and on opposing counsel by the means and at the addresses shown on the attached certificate of service.

WHEREFORE, Bilzin Sumberg respectfully requests that the Court consider this Motion, and thereupon enter an Order in the form attached hereto: (i) authorizing Bilzin Sumberg to withdraw as co-counsel of record to Fontainebleau and discharging Bilzin Sumberg from providing further services as co-counsel to Fontainebleau pursuant to S.D. Fla. L.R. 11.1(d)(3); and (ii) ordering such other and further relief as the Court may deem just and proper.

Dated: May 20, 2010

Respectfully submitted,

BILZIN SUMBERG BAENA PRICE & AXELROD LLP
Counsel for the Plaintiff Fontainebleau Las Vegas, LLC
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Miami, FL 33131

[5] Case No. 09-21481-AJC, Dkt. No. 2025 (Bankr. S.D. Fla.).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-MD-02106-CIV-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

_____/
This Document Relates to: 09-CV-21879

[PROPOSED] ORDER GRANTING MOTION BY BILZIN SUMBERG BAENA PRICE & AXELROD LLP TO WITHDRAW AS COUNSEL OF RECORD FOR PLAINTIFF FONTAINEBLEAU LAS VEGAS, LLC

THIS MATTER came before the Court for consideration upon the Motion By Bilzin Sumberg Baena Price & Axelrod LLP to Withdraw As Counsel of Record to Plaintiff Fontainebleau Las Vegas, LLC [D.E. ___] (the "Motion") filed by Bilzin Sumberg Baena Price & Axelrod LLP ("Bilzin Sumberg"). The Court, having considered the Motion, the record, and the representations of counsel and being otherwise fully advised in the premises, finds good cause to grant the Motion.

Accordingly, it is hereby ORDERED as follows:

1. The Motion is GRANTED.

2. Bilzin Sumberg is withdrawn as co-counsel of record to Plaintiff Fontainebleau Las Vegas, LLC and is discharged from providing further services in connection with this case.

DONE AND ORDERED in Chambers in Miami, Florida, this ____ day of May 2010.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Motion and proposed order were served (a) via U.S. Mail postage prepaid; or (b) via electronic mail, on May 20, 2010 as set forth on the attached service list. In addition, the foregoing Motion and proposed order were served via the Court's CM/ECF system upon all registered users via the Court's CM/ECF notification.

Dated: May 20, 2010

/s/ Scott L. Baena
Scott L. Baena

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-2106-MD-GOLD/BANDSTRA
CASE NO.: 09-21879-CIV-GOLD/BANDSTRA [Related Case]
CASE NO.: 09-23835-CIV-GOLD/BANDSTRA[Related Case]

IN RE:

FONTAINBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions
_____/

MDL ORDER NUMBER SIXTEEN; SECOND AMENDED ORDER RESETTING CERTAIN PRETRIAL DEADLINES, REFERRING DISCOVERY MOTIONS, DIRECTING PARTIES TO MEDIATION, AND ESTABLISHING PRETRIAL DATES AND PROCEDURES

Based upon the parties' Joint Motion for Extension of Certain Pretrial Deadlines, [DE 62], certain pretrial deadlines are reset. However, dates for the pretrial conference, oral arguments, calendar call, and trial of this case remain as previously scheduled. Counsel shall carefully review and comply with the following requirements concerning the pretrial conference.

Pretrial Conference and Trial Date

1. The parties' Joint Motion for Extension of Certain Pretrial Deadlines, [DE 62] is Granted as follows. The pretrial conference is set pursuant to Fed.R.Civ.P. 16 for **January 13, 2012 at 2:00 p.m**. Unless instructed otherwise by subsequent order, the trial and all other proceedings shall be conducted at **400 North Miami Avenue, Courtroom 11-1, Miami, Florida 33128**. Pursuant to S.D.Fla.L.R. 16.1(C), each party shall be represented at the pretrial conference and at the meeting required by S.D.Fla.L.R. 16.1(D) by the attorney who will conduct the trial, except for good cause shown.

2. Trial is set for the two-week calendar commencing **Monday, February 13, 2012.** Counsel for all parties shall appear at a Calendar Call on **Wednesday, February 8, 2012 at 1:30 p.m.**

Referral

3. Pursuant to 28 U.S.C. § 636 and the Magistrate Judge Rules of the Local Rules of the Southern District of Florida, all discovery pretrial motions in the above-captioned cause, except all motions for extension of time which could affect the dates set forth below, are hereby referred to United States Magistrate Judge Bandstra to take all necessary and proper action as required by law. This referral shall expire on the date of the pretrial conference. Upon expiration, all matters pending before the United States Magistrate Judge shall remain before the Magistrate Judge for resolution, and all new matters shall be filed for consideration by the undersigned.

Mediation

4. The parties shall participate in mediation in accordance with the schedule below. The appearance of counsel and each party or representative of each party with full settlement authority is mandatory. If insurance is involved, an adjuster with full authority up to the policy limits or the most recent demand, whichever is lower, shall attend.

5. All discussions made at the mediation conference shall be confidential and privileged.

6. The mediator shall be compensated in accordance with the standing order of the Court entered pursuant to Rule 16.2(B)(6), or as agreed to in writing by the parties and mediator. The parties shall share equally the cost of mediation unless otherwise ordered by the Court. All payments shall be remitted to the mediator within 30 days of the date of the bill. The parties shall notify the mediator of cancellation two full business days in advance. Failure to do so will result in imposition of a fee for one hour.

7. If a full or partial settlement is reached, counsel shall promptly notify the Court of settlement within ten days of the mediation conference in accordance with Local Rule 16.2(F).

8. **Within five days** following mediation, the mediator shall file a Mediation Report indicating whether the parties were present and recommending sanctions for non-attendance. The Report shall also state whether the case settled (in full or in part), was continued with the parties' consent, or whether the mediator declared an impasse.

9. If mediation is not conducted, the case may be stricken from the trial calendar, and other sanctions may be imposed.

Pretrial Schedule and Pretrial Stipulation

10. All counsel shall comply with S.D.Fla.L.R. 16.1(D) regarding the preparation of the joint Pretrial Statement. **The court will not accept unilateral pretrial stipulations, and will strike *sua sponte*, any such submissions.** Should any of the parties fail to cooperate in the preparation of the joint stipulation, all other parties shall file a certification with the court stating the circumstances. The non-cooperating party may be held in contempt, and sanctions may be imposed, for failure to comply with the court's order.

Filing Procedures

11. For the convenience of the parties and the Court, the Clerk will maintain a master docket with a single docket number and master record under the style: "In re Fontainebleau Las Vegas Contract Litigation" Master Case No. 09-2106-MD-GOLD/MCALILEY. When a document is filed and docketed in the master case, it shall be deemed filed and docketed in each individual case to the extent applicable and will not ordinarily be separately docketed or physically filed in any individual cases. However, the caption may also contain a notation

indicating whether the document relates to all cases or only to specified cases, as described below.

All Orders, papers, motions and other documents served or filed in this Consolidated Action shall bear the same caption as this Order. If the document(s) is generally applicable to all consolidated actions, the caption shall include the notation: "This Document Relates to All Actions," and the Clerk will file and docket the document(s) only in the master record. However, if a document is intended to apply only to a particular case, the caption shall include the notation "This Document Relates to [case number of the case(s) to which it applies]". The original of this Order shall be filed by the Clerk in each of the Fontainebleau actions pending in this Court and a copy thereof shall be filed in each subsequently filed or transferred action, which is related to and consolidated with this action for pretrial purposes. The Clerk of Court will maintain docket and case files under this caption."

Time Schedule and Requirements

12. The following time schedule shall govern unless modified by court order after a showing of compelling circumstances (e.g., delay in transfer of tag-along-action). Absent a court order, a motion to dismiss shall not stay discovery.

	DATE	**ACTION**
By	7-12-2010	Document productions in response to initial Requests for Production to be completed.
By	8-30-2010	Commencement of fact depositions.

By	9-15-2010	All non-dispositive, non-discovery related pretrial motions (including motions pursuant to Fed. R. Civ. P. 14, 15, 18 through 22, and 42 motions) shall be filed. Any motion to amend or supplement the pleadings filed pursuant to Fed. R. Civ. P. 15(a) or 15(d) shall comport with S.D. Fla. L.R. 15.1 and shall be accompanied by the proposed amended or supplemental pleading and a proposed order as required. **When filing non-dispositive motions, the filing party must attach a proposed order to the motion well as emailing the proposed order to gold@flsd.uscourts.gov. Failure to provide the proposed order may result in denial of the motion without prejudice**. Please refer to the docket entry number on the proposed order. The Complete CM/ECF Administrative Procedures are available on the Court's Website at www.flsd.uscourts.gov.
By	11-29-2010	Plaintiff shall furnish opposing counsel with a written list containing the names and addresses of all expert witnesses intended to be called at trial and only those expert witnesses so listed shall be permitted to testify.
By	12-31-2010	Defendant shall furnish opposing counsel with a written list containing the names and addresses of all expert witnesses intended to be called at trial and only those expert witnesses so listed shall be permitted to testify.
By	1-31-2011	Final date to exchange written discovery demands, including Requests for Production, Requests for Admission and Interrogatories.
By	4-14-2011	Conclusion of fact discovery.
By	5-2-2011	The parties shall comply with S.D. Fla. L.R. 16.1(K) concerning the exchange of expert witness summaries and reports. This date shall supersede any other date in Local Rule 16.1(K).
By	6-1-2011	Rebuttal expert reports shall be filed.
By	7-15-2011	All expert discovery, including depositions, shall be completed.
By	7-29-2011	All dispositive pretrial motions, including motions to strike in whole or in part expert testimony, and memoranda of law must be filed. **If any party moves to strike an expert affidavit filed in support of a motion for summary judgment** [for reasons stated in *Daubert v. Merrill Dow Pharmaceuticals, Inc,* 509 U.S.

		579, 125 L.Ed. 2d 469, 113 S.Ct. 2786 (1993) and *Kumho Tire Company, Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)], **the motion to strike shall be filed with that party's responsive memorandum.** Please carefully review the instructions for filing motions for summary judgment.
By	8-30-2011	Opposition to any dispositive motions to be filed.
By	9-15-2011	Replies, if any, to dispositive motions to be filed.
By	12-13-2011	**Pretrial Stipulation and *Motions in Limine.*** The joint pretrial stipulation shall be filed pursuant to S.D. Fla. L.R. 16.1(E). In conjunction with the Joint Pretrial Stipulation, the parties shall file their motions in limine.
ON	**11-18-2011 @ 9:00 a.m.**	**Oral argument will be heard on any motions for summary judgment that may be filed.**

DONE and ORDERED in Chambers in Miami, Florida this 21st day of May, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE