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.

_____/

AMENDED **MDL ORDER NUMBER 24** TO INCLUDE EXHIBITS A + B

CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER

WHEREAS, the parties to *Fontainebleau Las Vegas, LLC v. Bank of America, N.A.*, et al., Case No. 1:09-cv-21879-ASG (S.D. Fla.); and the parties and former parties to *Avenue CLO Fund, Ltd.*, et al. *v. Bank of America, N.A.*, et al., Case No. 1:09-cv-23835-ASG (S.D. Fla.); and *ACP Master, Ltd.*, et ano. *v. Bank of America, N.A.*, et al., Case No. 1:10-cv-20236-ASG (S.D. Fla.), all of which have been consolidated for pre-trial purposes under the caption *In re Fontainebleau Las Vegas Contract Litigation*, MDL No. 2106 (together, the "Parties," or individually, a "Party"), seek to enter into a confidentiality stipulation and protective order to govern discovery and the use of discoverable materials or information in the above-captioned cases and in any other related proceeding hereafter transferred to and consolidated therewith (collectively, the "MDL Actions");

WHEREAS, the Parties have conferred and agree that the MDL Actions may require the discovery, production, disclosure, and use of certain documents, information and other materials that contain information that is confidential, proprietary or otherwise inappropriate for public disclosure, and, in certain instances, disclosure directly to the Parties; and

WHEREAS, the Parties desire to be protected against potential disadvantage, financial loss, hardship and/or substantial prejudice that may result from the unauthorized or inappropriate disclosure of confidential proprietary documents, or other information, or materials;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the Parties through their undersigned counsel, and;

IT IS HEREBY ORDERED that this Confidentiality Stipulation and Protective Order (the "Order") shall govern the use and handling of documents, including deposition testimony and transcripts, deposition notices and exhibits, interrogatories and interrogatory responses, requests for admissions and responses, and any other information or material provided, disclosed, produced, given, or exchanged by, between, and among the parties and any non-parties in connection with proceedings in the MDL Actions (such information or material hereinafter referred to as "Covered Material") and any briefs, affidavits or other court documents containing or otherwise disclosing such Covered Material:

1. Any Party or non-party to the MDL Actions disclosing, producing, giving or exchanging any documents, information or material in connection with proceedings in the MDL Actions, or whose documents, information, or material is being disclosed, produced, given, or exchanged by another Party or non-party in connection with the MDL Actions (the "Disclosing Party"), may designate any Covered Material as "Confidential" under the terms of this Order if such party in good faith reasonably believes that such Covered Material contains confidential,

proprietary or commercially or personally sensitive information that requires the protections provided in this Order ("Confidential Information").

2. Any Disclosing Party may designate any Covered Material as "Highly Confidential" under the terms of this Order if such party in good faith reasonably believes that such Covered Material consists of highly sensitive information, the disclosure of which to the adverse party, even subject to the terms governing Confidential Information under this Order, is substantially likely to cause competitive business injury ("Highly Confidential Information"); provided, however, that only that portion of Covered Material that contains Highly Confidential Information shall be designated Highly Confidential.

3. Nothing herein precludes any Party from challenging a designation of Covered Material as Confidential or Highly Confidential, or constitutes an acknowledgement that any Covered Material or category of Covered Material (including those set forth above) are discoverable or appropriate for designation as Confidential or Highly Confidential. If any Party objects to or disagrees with a Disclosing Party's designation of Covered Material as Confidential or Highly Confidential, they shall confer with the Disclosing Party and the parties shall attempt to resolve the objection or disagreement. To the extent the parties are not able to resolve any objection or disagreement, the provisions of paragraph 23 of this Order will apply; provided, however, that it is contemplated that every effort shall be made to resolve a dispute of a designation as Confidential or Highly Confidential within two (2) business days.

4. The designation by any Disclosing Party of Covered Material as Confidential or Highly Confidential shall constitute a representation that such Confidential Information has been reviewed by an attorney (which, for purposes of this paragraph, includes contract attorneys reviewing documents under the supervision of outside counsel) for the Disclosing Party and that

there is a reasonable good-faith basis for such designation.

5. For the purposes of this Order, any Disclosing Party may apply, upon notice, for an order to supplement the foregoing categories of Confidential or Highly Confidential information.

6. Covered Material, or information contained therein or derived therefrom, shall be used solely for prosecution and/or defense of the MDL Actions or any appeals therefrom, and shall not be used for any other purpose, including, without limitation, any business or commercial purposes or any other litigation or proceeding.

7. The designation of Covered Material as Confidential or Highly Confidential for purposes of this Order shall be made in the following manner by any Disclosing Party:

(a) For documents or other materials (apart from depositions or other pretrial testimony), by affixing the legend "Confidential" or "Highly Confidential" to each page containing any Confidential or Highly Confidential information; provided that the failure to designate a document (or a portion of a document) as Confidential or Highly Confidential shall not constitute a waiver of such claim, and a Disclosing Party may so designate a document thereafter by providing written notice to all other parties together with properly designated copies of said document within five (5) business days of becoming aware of such failure to designate, with the effect that such document is thereafter (including previously produced copies) subject to the protections of this Order. In the case of Confidential or Highly Confidential documents or materials that are inadvertently produced without the appropriate designation, but that were otherwise intended to be produced, the Disclosing Party shall deliver to each party to whom the Confidential or Highly Confidential documents or materials were inadvertently produced copies of the Confidential or Highly Confidential documents or material

containing the appropriate designation and each such party shall return or destroy the Confidential or Highly Confidential documents or materials that were produced without the appropriate designation;

(b) For depositions or other pretrial testimony, (i) by a statement on the record, by counsel, at the time of such disclosure; or (ii) by written notice, sent to all parties within ten (10) business days after receiving a copy of the final certified transcript thereof, and in both of the foregoing instances, by directing the court reporter that the appropriate confidentiality legend be affixed to all pages of the original and all copies of the transcript containing any Confidential or Highly Confidential information. Until expiration of the ten (10) business day period, all deposition testimony shall be deemed Confidential and treated as if so designated. The Parties may modify this procedure for any particular deposition, through agreement on the record at such deposition, without further order of the Court; and

(c) For Covered Material that is disclosed or produced in a non-paper medium (*e.g.*, videotape, DVD, CD, audiotape, computer disks, etc.), by affixing the legend "Confidential" or "Highly Confidential" on the medium, if possible, and its container, if any, so as to clearly give notice that the medium contains Confidential and/or Highly Confidential information. Documents produced in PDF or TIFF image format on a CD-ROM or other non-paper medium shall be marked in the manner provided for in paragraph 7(a) above.

8. Except as specifically provided for in this Order or subsequent Court orders or stipulations among the Parties (and the relevant non-party if the Confidential information in question was produced by a non-party), Covered Material produced in the MDL Actions and designated Confidential may be disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part only to the following persons:

(a) Outside counsel for the Parties in the MDL Actions, and regular and temporary employees, including clerical, paralegal and secretarial staff, and service vendors of such counsel (including outside copying and litigation support services including, without limitation, contract attorneys) assisting in the conduct of the MDL Actions for use in accordance with this Order;

(b) The parties to the MDL Actions, which for any Party that is an entity means any of its current directors, officers, in-house counsel, employees and general or limited partners who are actively participating in or assisting those parties in the MDL Actions;

(c) Experts, advisors, or consultants (together with their staff) assisting the Parties or their counsel in the MDL Actions; provided that any report created by such expert, advisor or consultant relying on or incorporating Confidential Information, in whole or in part, shall be designated Confidential;

(d) Any person indicated on the face of a document to be the author, addressee, or a copy recipient of the document, or as to whom there has been deposition or trial testimony that the person was the author or a recipient of the document;

(e) Subject to and in accordance with paragraph 9, witnesses or deponents and their counsel, during the course of and, to the extent necessary, in preparation for depositions or testimony in the MDL Actions; provided, however, that no copies or notes relating to the Confidential Information shall be made by such person;

(f) The Court and its employees; and

(g) Court reporters employed in connection with the MDL Actions.

9. Except as specifically provided for in this Order or subsequent Court orders or stipulations among the Parties (and the relevant non-party if the Highly Confidential information in question was produced by a non-party), Covered Material produced in the MDL Actions and designated Highly Confidential may be disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part only to the following persons:

(a) Outside counsel for the Parties in the MDL Actions, and regular and temporary employees, including clerical, paralegal and secretarial staff, and service vendors of such counsel (including outside copying and litigation support services including, without limitation, contract attorneys) assisting in the conduct of the MDL Actions for use in accordance with this Order;

(b) Experts, advisors, or consultants (together with their staff) assisting the Parties or their counsel in the MDL Actions; provided that any report created by such expert, advisors or consultant relying on or incorporating Highly Confidential Information, in whole or in part, shall be designated Highly Confidential;

(c) Any person indicated on the face of a document to be the author, addressee, or a copy recipient of the document, or as to whom there has been deposition or trial testimony that the person was the author or a recipient of the document;

(d) The Court and its employees; and

(e) Court reporters employed in connection with the MDL Actions;

10. Persons identified in paragraphs 8(c), 8(e), and 9(b) above who do not fall within the descriptions in paragraph 8(b) and to whom Confidential and/or Highly Confidential Information is disclosed shall prior to such disclosure be required to sign an undertaking (a "Confidentiality Undertaking") in the form attached as Exhibit A hereto, agreeing in writing to

be bound by the terms and conditions of this Order, consenting to the jurisdiction of the Court for purposes of the enforcement of this Order, and agreeing not to disclose or use any Confidential and/or Highly Confidential information in a manner or for purposes other than those permitted hereunder; provided, however, that a non-party witness to whom Confidential and/or Highly Confidential information is first disclosed at deposition need not be required to sign a copy of the Confidentiality Undertaking in order to be bound by the terms hereof. Showing a Confidential or Highly Confidential document to a deponent does not waive the confidentiality protections otherwise afforded that document. The attorneys of record making Confidential and/or Highly Confidential information available to any person required to execute a copy of the Confidentiality Undertaking pursuant to this paragraph shall be responsible for obtaining such signed undertaking and for maintaining all original, executed copies of such Confidentiality Undertakings. Copies of any executed Confidentiality Undertaking shall be disclosed to counsel for the Disclosing Party upon agreement of the parties, which agreement shall not be unreasonably withheld, or upon further Court order. The requirements of this provision are not applicable to non-testifying, consulting experts.

11. To the extent non-parties are authorized by Court order or consent of all Parties hereto to attend a deposition or otherwise participate in discovery in this Action that may involve Confidential and/or Highly Confidential Information, such non-party must sign a Confidentiality Undertaking in the form attached as Exhibit A hereto, agreeing in writing to be bound by the terms and conditions of this Order, consenting to the jurisdiction of the Court for purposes of the enforcement of this Order, and agreeing not to disclose or use any Confidential and/or Highly Confidential Information in a manner or for purposes other than those permitted hereunder.

12. Every person given access to Confidential or Highly Confidential Information shall be advised that the information is being disclosed pursuant and subject to the terms of this Order and may not be disclosed other than pursuant to the terms hereof.

13. Any Party seeking discovery from a non-party shall provide a copy of this Order to the non-party and notify the non-party that the protections of this Order are available to such non-party. Any non-party from whom discovery is sought in the MDL Actions may obtain the protection of this Order by signing and providing to outside counsel for the party seeking the discovery a certification and agreement, substantially in the form attached hereto as Exhibit B, stating that the non-party has read the Order, understands the terms of the Order, agrees to be fully bound by the Order, submits to the jurisdiction of this Court for purposes of enforcement of the Order, and understands that any violation of the terms of the Order shall be punishable by relief deemed appropriate by the Court.

14. Counsel for any Disclosing Party shall have the right to exclude from depositions any person who is not authorized by this Order to receive documents or information designated Confidential or Highly Confidential. Such right of exclusion shall be applicable only during periods of examination or testimony directed to or comprising information which is Confidential or Highly Confidential.

15. Counsel for any party wishing to file documents of any nature, including briefs, which have been designated as Confidential or Highly Confidential, or that would disclose information from a document that has either been designated as Confidential or Highly Confidential, or would otherwise be required to be filed under seal, shall move to file such documents with the Court under seal and, providing that the Court approves the motion to file under seal, a statement shall be endorsed on the cover:

"CONFIDENTIAL – SUBJECT TO COURT ORDER"

It is understood that all such materials so filed shall be maintained by the Clerk separate from public records and shall be released only upon further Order of this Court in accordance with Local Rule 5.4. Upon the conclusion of any of the MDL Actions, any party may seek the return or destruction of documents it has filed under seal pursuant to this paragraph. Any such documents shall remain subject to the provisions of this Order.

16. Entering into, agreeing to and/or producing or receiving Confidential or Highly Confidential Information pursuant to or otherwise complying with the terms of this Order shall not:

(a) Operate as an admission that any discovery is appropriate or warranted in the MDL Actions, or an admission or waiver as to the proper scope of discovery in the MDL Actions;

(b) Operate as an admission that any document designated Confidential or Highly Confidential contains or reflects trade secrets or any other type of Confidential Information;

(c) Prejudice in any way the rights of any Party or non-party to object to the production of documents they consider not subject to discovery, or operate as an admission by any Party or non-party that the restrictions and procedures set forth herein constitute adequate protection for any particular information deemed by any Party to be Confidential or Highly Confidential Information;

(d) Prevent the Parties to this Order from agreeing to alter or waive the provisions or protections provided herein with respect to any particular Covered Material;

(e) Prejudice in any way the rights of any Party to object to the authenticity or admissibility into evidence of any document, testimony or other evidence subject to this Order;

(f) Prejudice in any way the right of any Party or non-party to seek a determination by the Court whether any Confidential or Highly Confidential Information should be subject to the terms of this Order;

(g) Prejudice in any way the right of any Party or non-party to petition the Court for a further protective order relating to any purportedly confidential information;

(h) Waive, supersede, or amend the provisions of any prior confidentiality agreement between and/or among defendants, any of the Parties or non-parties, and/or any other person; and

(i) Be construed or operate as a waiver of any claim of privilege or immunity with respect to the production of any document.

(j) This Order has no effect upon, and shall not apply to, the Parties' or non-parties' use of their own Confidential or Highly Confidential Information for any purpose. Nothing herein shall prevent or in any way limit disclosure, use or dissemination of any information or documents that are in the public domain through no violation of this Order. The following shall not constitute Confidential documents or material for purposes of this Order: (i) information that is or becomes generally available to the public other than as a result of a violation of this Order; (ii) information that was already in the files of a Party, other than the Disclosing Party, on a non-confidential basis prior to be being produced to such Party; (iii) information that becomes available to any Party on a non-confidential basis if the source was not, to the best of the receiving Party's knowledge, subject to any prohibition against transmitting the information to it; or (iv) information independently developed by any Party, other than the Disclosing Party, without use of Confidential documents or material. Nothing herein shall impose any restriction on the use or disclosure by a party of documents, materials or information

designated as "Confidential" or "Highly Confidential" that have been obtained lawfully by such party independently of the discovery proceedings in the MDL Actions.

17. The production, transmission, or disclosure of any material that is arguably or actually subject to a claim of privilege or of protection as trial preparation material ("Privileged Covered Material") shall not prejudice, or constitute a waiver (either as to the specific document disclosed or as to other documents or communications concerning the same subject matter) of, or estop a party from asserting, any claim of privilege, work product or other ground for withholding production of that material. This "non-waiver" provision shall be construed in a manner consistent with Federal Rule of Evidence 502(b). If Privileged Covered Material has been produced, transmitted, or disclosed, the party making the claim of privilege, work product or other ground for withholding may notify the receiving party and state the basis for the claim. After being notified, the receiving Party (i) must promptly return or destroy the Privileged Covered Material and any copies (paper or electronic) the receiving Party has of it and (ii) may not make any disclosure of the Privileged Covered Material or use the Privileged Covered Material, or information gleaned from Privileged Covered Material, in connection with the MDL Actions or for any other purpose until the claim is resolved (even if such a disclosure were otherwise permissible hereunder); provided, however, that a receiving Party may retain one copy of the Privileged Covered Material solely for purposes of submitting the Privileged Covered Material to the Court under seal for a determination of the claim of privilege. If a receiving Party disclosed the Privileged Covered Material before being notified, the receiving Party must make reasonable steps to retrieve it. This provision is intended to facilitate the production of electronic or paper records. No Party or non-party, by virtue of agreeing to this paragraph, is assuming any obligation, or in any way undertaking, to produce privileged matter, and no Party

or non-party is agreeing to waive any applicable privilege.

18. In the event additional Parties join or intervene in any of the MDL Actions, including proceedings consolidated with the existing MDL Actions after the entry of this Order, such Parties shall not have access to Confidential or Highly Confidential Information until counsel for each newly joined or intervening party has executed a Confidentiality Undertaking evidencing the newly joined or intervening party's intent to be bound by this Order, which shall be filed with the Court promptly.

19. The Parties agree to be bound by the terms of this Order pending the entry by the Court of this Order and any violation of its terms shall be subject to the same sanctions and penalties, as if this Order had been entered by the Court.

20. The attorneys of record shall take reasonable measures, consistent with this Order, to prevent the unauthorized disclosure or use of Confidential or Highly Confidential information and are responsible for employing reasonable measures to control the duplication of, access to, and distribution of, Confidential and Highly Confidential information.

21. The provisions of this Order shall, absent written permission of the Disclosing Party or further order of the Court, continue to be binding throughout and after the conclusion of any and all of the MDL Actions, including, without limitation, any appeals therefrom. Within ninety (90) days after receiving notice of the entry of an order, judgment or decree finally disposing of any of the MDL Actions, including the exhaustion of all possible appeals, all persons having received Confidential or Highly Confidential Information shall either return such material and all copies thereof (including summaries and excerpts) to counsel for the Disclosing Party or destroy all such Confidential or Highly Confidential Information, and, in either case, certify that fact to counsel for the Producing Party. Outside counsel for the Parties shall be

entitled to retain court papers, depositions and trial transcripts and attorney work product (including discovery material containing Confidential or Highly Confidential Information); provided, that such outside counsel, and employees of such outside counsel, shall maintain the confidentiality thereof and shall not disclose such court papers or attorney work product to any person except pursuant to court order or agreement by the Disclosing Party.

22. After the termination of any or all of the MDL Actions, this Order shall continue to be binding upon the Parties hereto, and upon all persons to whom Confidential or Highly Confidential Information has been disclosed or communicated, and this Court shall retain jurisdiction over all such Parties and persons for enforcement of its provisions.

23. During the pendency of the MDL Actions, any party objecting to the designation of any Covered Material or testimony as Confidential or Highly Confidential or the application of any provision of this Order may, after making a good-faith effort to resolve any such objection with opposing counsel, move promptly for an order vacating the designation or the application of said provision. While such an application is pending, the Covered Material or testimony in question shall continue to be treated as Confidential or Highly Confidential pursuant to this Order. Nothing in this Order is intended to shift the burden of establishing confidentiality which, at all times, remains upon the Disclosing Party.

24. Counsel shall confer on such procedures that are necessary to protect the confidentiality of any documents, information and transcripts used in the course of any court proceedings. In the event that any Confidential or Highly Confidential information is used in any court proceeding in the MDL Actions or any appeal therefrom, such Confidential or Highly Confidential information shall not lose its status as Confidential or Highly Confidential information through such use.

25. If any person receiving documents covered by this Order (the "Receiver") is subpoenaed or receives other compulsory process in another action or proceeding or is served with a document demand, and such subpoena, process or document demand seeks Covered Material which was produced or designated as Confidential or Highly Confidential by someone other than the Receiver, the Receiver shall (i) give written notice by e-mail, hand or facsimile transmission within five (5) business days of receipt of such subpoena, process or document demand to those who produced or designated the information Confidential or Highly Confidential, and which notice shall include or attach a complete copy of the subpoena or other discovery request, unless prohibited by law, and (ii) refrain from producing any Covered Material that has been designated Confidential or Highly Confidential in response to such a subpoena or document demand until the earlier of (a) receipt of written notice from the Disclosing Party that such party does not object to production of the designated Covered Material, or (b) resolution of any objection asserted by the Disclosing Party either by agreement or by final order of the Court with jurisdiction over the objection of the Disclosing Party, unless prohibited by law; provided, however, that the burden of opposing the enforcement of the subpoena or document demand shall fall solely upon the party who produced or designated the Confidential or Highly Confidential information, and unless the party who produced or designated the Confidential or Highly Confidential Information submits a timely objection seeking an order that the subpoena or document demand not be complied with, and serves such objection upon the Receiver by e-mail, hand or facsimile prior to production pursuant to the subpoena or document demand, the Receiver shall be permitted without violating this Order to produce documents responsive to the subpoena or document demand on the response date. Compliance by the Receiver with any order directing production pursuant to the subpoena or

document demand of any Confidential or Highly Confidential Information shall not constitute a violation of this Order. Nothing herein shall be construed as requiring the Receiver or anyone else covered by this Order to challenge or appeal any order directing production of Confidential or Highly Confidential Information covered by this Order, or to subject himself or itself to any penalties for non-compliance with a legal process or order, or to seek any relief from this Court.

26. Nothing in this Order shall preclude any Party from seeking judicial relief, upon notice to the other Parties, with regard to any provision hereof.

27. This agreement may be executed in counterparts each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

DONE AND ORDERED in Chambers at Miami, Florida at this 22 day of July, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
Counsel of record
Magistrate Judge Ted E. Badnstra

EXHIBIT A

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.
_____/

CERTIFICATION RE: CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION

I, _____, hereby certify (i) my understanding that Covered Material and/or Confidential or Highly Confidential Information is being provided to me pursuant to the terms and restrictions of the Confidentiality Stipulation and Protective Order (the "Order") entered by the United States District Court, Southern District of Florida, Miami Division in the above-captioned actions, and (ii) that I have read the Order.

I understand the terms of the Order, I agree to be fully bound by the Order, and I hereby submit to the jurisdiction of the United States District Court, Southern District of Florida, Miami Division for purposes of enforcement of the Order. I understand that any violation of the terms of the Order shall be punishable by relief deemed appropriate by the Court.

Signature: _____

Please Print or Type the Following

Name: _____

Title and Affiliation: _____

Company: _____

Address: _____

_____

Telephone: _____

Date: _____

EXHIBIT B

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.
_____/

CERTIFICATION RE: CONFIDENTIAL
AND HIGHLY CONFIDENTIAL INFORMATION

I, _____, hereby certify, on behalf of _____, that (i) _____ is producing Covered Material and/or Confidential or Highly Confidential Information in the above-captioned actions, that (ii) _____ seeks to obtain the protections provided by the Confidentiality Stipulation and Protective Order (the "Order") entered by the United States District Court, Southern District of Florida, Miami Division in the above-captioned action, and (iii) I am authorized to execute this certification on _____'s behalf.

I hereby further certify that (i) I have read the Order, understand the terms of the Order, and agree to be fully bound by the Order, and (ii) _____ hereby submit to the jurisdiction of the United States District Court, Southern District of Florida, Miami Division for purposes of enforcement of the Order. On behalf of _____, I further certify my

understanding that any violation of the terms of the Order shall be punishable by relief deemed appropriate by the Court.

Signature: _____

Please Print or Type the Following

Name: _____

Title and Affiliation: _____

Company: _____

Address: _____

_____

Telephone: _____

Date: _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

_____/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **July 23, 2010**, a true and correct copy of the following was served this day via transmission of Notices of Electronic Filing generated by CM/ECF and by first class U.S. Mail on all counsel of record or pro se parties identified on the attached Service list:

AMENDED MDL ORDER NUMBER 24 TO INCLUDE EXHIBITS A AND B CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER
[DE 116]

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court as set forth in Local Rule 2090-1(a).

Dated: July 23, 2010

Respectfully submitted,

HUNTON & WILLIAMS LLP
Attorneys for Bank of America, N.A. and Merrill Lynch Capital Corporation
1111 Brickell Avenue - Suite 2500
Miami, FL 33131
Telephone: (305) 810-2500
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By:/s/ Craig V. Rasile _____
Craig V. Rasile (FBN 613691)

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Nevada Bar No. 0532
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FOUNTAINBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document specifically relates to 1:09-cv-23835-ASG and all related actions.

NOTICE OF CHANGE OF ATTORNEY AFTER TRANSFER

PLEASE TAKE NOTICE that Nicholas J. Santoro, Esq., of the law firm of Santoro, Driggs, Walch, Kearney, Holley & Thompson, counsel of record for Camulos Master Fund, L.P. prior to transfer of this case to the Southern District of Florida, is not an attorney of record in the above-captioned matter and may be removed from the Court's service list. Nicholas J. Santoro, Esq. is not admitted to practice in the Southern District of Florida, and the law firm of Santoro, Driggs, Walch, Kearney, Holley & Thompson has not made an appearance in the instant case. Camulos Master Fund, L.P. continues to be represented in this matter by Andrew Kratenstein of the law firm of McDermott, Will & Emery, 340 Madison Avenue, New York, New York 10173 (212) 547-5400.

Dated this 19 day of July, 2010.

SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON

NICHOLAS J. SANTORO, ESQ.
Nevada Bar No. 0532
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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 Case No. 09-CV-23835.

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PLAINTIFFS CASPIAN SOLITUDE MASTER FUND, L.P., SOLA LTD, AND SOLUS CORE OPPORTUNITIES MASTER FUND LTD'S DISCLOSURE STATEMENTS PURSUANT TO F.R.C.P. RULE 7.1

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Plaintiffs, by their counsel, attach the following Disclosure Statements:

1. Exhibit A: Disclosure Statement for Plaintiff Caspian Solitude Master Fund, L.P.

2. Exhibit B: Disclosure Statement for Plaintiffs Sola Ltd and Solus Core Opportunities Master Fund Ltd

Dated: July 30, 2010

By: /s/ Lorenz Michel Prüss

DIMOND KAPLAN & ROTHSTEIN, P.A.
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Attorneys for Plaintiffs Avenue CLO Fund, Ltd., et. al.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 30, 2010, a copy of the foregoing **PLAINTIFFS CASPIAN SOLITUDE MASTER FUND, L.P., SOLA LTD, AND SOLUS CORE OPPORTUNITIES MASTER FUND LTD'S DISCLOSURE STATEMENTS PURSUANT TO F.R.C.P. RULE 7.1** 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

SERVICE LIST

Attorneys:	**Representing:**
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Craig V. Rasile, Esq. Kevin Michael Eckhardt, Esq. **HUNTON & WILLIAMS** 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.A. Merrill Lynch Capital Corporation JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC HSH Nordbank AG, New York Branch Bank of Scotland plc
David J. Woll, Esq. Justin S. Stern, Esq. Lisa H. Rubin, Esq. Thomas C. Rice, Esq. Steven S. Fitzgerald **SIMPSON THACHER & BARTLETT LLP** 425 Lexington Avenue New York, NY 10017-3954 Tele: (212) 455-3040 Fax: (212) 455-2502	Defendants JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC Bank of Scotland plc
John Blair Hutton III, Esq, Mark D. Bloom, Esq. **GREENBERG TAURIG** 1221 Brickell Avenue Miami, FL 33131 Tele: (305) 579-0788 Fax: (305) 579-0717	Defendants JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC

Attorneys:	Representing:
Sarah A. Harmon, Esq. **BAILEY KENNEDY** 8984 Spanish Ridge Avenue Las Vegas, NV 89148 Tele: (702) 562-8820 Fax: (702) 562-8821	Defendant JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC
Frederick D. Hyman, Esq. Jason I. Kirschner, Esq. Jean-Marie L. Atamian, Esq. **MAYER BROWN LLP** 1675 Broadway New York, NY 10019-5820 Tele: (212) 506-2500 Fax: (212) 261-1910	Defendant Sumitomo Mitsui Banking Corporation
Robert Gerald Fracasso, Jr. **SHUTTS & BOWEN** 201 S Biscayne Boulevard Suite 1500 Miami Center Miami, FL 33131 Tele: (305) 358-6300 Fax: (305) 381-9982	Defendant Sumitomo Mitsui Banking Corporation
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Arthur Halsey Rice, Esq. **RICE PUGATCH ROBINSON & SCHILLER** 101 NE 3 Avenue Suite 1800 Fort Lauderdale, FL 33301 Tele: (305) 379-3121 Fax: (305) 379-4119	Defendant HSH Nordbank AG, New York Branch
Gregory S. Grossman, Esq. **ASTIGARRAGA DAVIS MULLINS & GROSSMAN** 701 Brickell Avenue, 16th Floor Miami, FL 33131-2847 Tele: (305) 372-8282 Fax: (305) 372-8202	Defendant MB Financial Bank, N.A.

Attorneys:	Representing:
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Peter J. Roberts, Esq. **SHAW GUSSIS FISHMAN FLANTZ WOLFSON & TOWBIN LLC** 321 N Clark Street, Suite 800 Chicago, IL 60654 Tele: (312) 276-1322 Fax: (312) 275-0568	Defendant MB Financial Bank, N.A.
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Andrew B. Kratenstein, Esq. Michael R. Huttenlocher, Esq. **MCDERMOTT WILL & EMERY LLP** 340 Madison Avenue New York, NY 10173 Tele: (212) 547-5400	Defendant Camulos Master Fund, L.P.
Bruce Judson Berman **MCDERMOTT WILL & EMERY LLP** 201 S. Biscayne Blvd. Suite 2200 Miami, FL 33131 Tele: (305) 358-3500 Fax: : (305) 347-6500	Defendant Camulos Master Fund, L.P.
David M. Friedman, Esq. Jed I. Bergman, Esq. Seth A. Moskowitz **KASOWITZ BENSON TORRES & FRIEDMAN** 1633 Broadway, 22nd Floor New York, NY 10019-6799 Tele: (212) 506-1700 Fax: (212) 506-1800	Plaintiff Fontainebleau Las Vegas LLC

Attorneys:	**Representing:**
Jeffrey I. Snyder, Esq. Scott L. Baena, Esq. **BILZIN SUMBERG BAENA PRICE & AXELROD** 200 S Biscayne Blvd., Suite 2500 Miami, FL 33131-2336 Tele: (305) 375-6148 Fax: (305) 351-2241	Plaintiff Fontainebleau Las Vegas LLC
Harold Defore Moorefield Jr., Esq. **STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON** Museum Tower 150 W Flagler Street, Suite 2200 Miami, FL 33130 Tele: (305) 789-3467 Fax: (305) 789-3395	Defendant Bank of Scotland plc
James B. Heaton, Esq. John D. Byars, Esq. Steven James Nachtwey, Esq. Vincent S. J. Buccola, Esq. **BARTLIT BECK HERMAN PALENCHAR & SCOTT** 54 West Hubbard St. Suite 300 Chicago, IL 60654 Tele: (312) 494-4400	Plaintiffs ACP Master, Ltd. Aurelius Capital Master, Ltd.
Brett Michael Amron **BAST AMRON LLP** 150 West Flagler Street Penthouse 2850 Miami, FL 33130 Tele: (305) 379-7905	Plaintiffs ACP Master, Ltd. Aurelius Capital Master, Ltd.

Exhibit A

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-CV-23835.

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CORPORATE DISCLOSURE STATEMENT OF PLAINTIFF CASPIAN SOLITUDE MASTER FUND, L.P.

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Plaintiff Caspian Solitude Master Fund, L.P. discloses the following:

1. Plaintiff is a limited partnership formed under the laws of Delaware and its sole general partner is Caspian Credit Advisors, LLC. The Investment Manager for Plaintiff is Mariner Investment Group, LLC.

2. The Investment Manager is unaware of any publicly-held company that owns more than 10% of the limited partnership interests of this Plaintiff or Caspian Credit Advisors, LLC.

Exhibit B

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 No. 09-CV-23835.

_____ /

CORPORATE DISCLOSURE STATEMENT OF PLAINTIFFS SOLA LTD AND SOLUS CORE OPPORTUNITIES MASTER FUND LTD

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Plaintiffs Sola Ltd and Solus Core Opportunities Master Fund Ltd disclose the following:

1. Plaintiffs are each exempted companies with limited liability incorporated under the laws of the Cayman Islands, whose Investment Advisor is Solus Alternative Asset Management LP.

2. Plaintiffs have no parent company and no publicly-held company owns more than 10% of these Plaintiffs' shares.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-MD-GOLD/BANDSTRA

In Re: FOUNTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION,

MDL No. 2106

This document relates to all actions.
_____/

MDL ORDER NO. 27 DENYING MOTION TO QUASH

THIS CAUSE came before the Court on Fountainebleau Resorts, LLC, Fountainebleau Resorts Holdings, LLC and Fountainebleau Resorts Properties I, LLC's Motion to Quash Defendants' Subpoenas Dated May 4, 2010 (D.E. 93) filed on July 6, 2010. On July 8. 2010, this motion was referred to the undersigned by the Honorable Alan S. Gold for appropriate resolution pursuant to 28 U.S.C. § 636(b). Upon review of this motion, the response and reply thereto, the court file and applicable law, it is hereby

ORDERED AND ADJUDGED that Fountainebleau Resorts, LLC, Fountainebleau Resorts Holdings, LLC and Fountainebleau Resorts Properties I, LLC's (the "FBR Entities") Motion to Quash Defendants' Subpoenas Dated May 4, 2010 is DENIED, the Court finding that the FBR Entities have failed to meet its burden of demonstrating that compliance with the subject subpoenas would be unreasonable and oppressive. Specifically, the Court finds that Request Nos. 9 & 26 are neither overbroad nor unduly burdensome. As a further basis for denial of this motion, the Court finds that the FBR Entities failed to satisfy Local Rule 7.1 (A)(3) by not making a good faith effort to resolve the subject issues prior to filing the instant motion.

Accordingly, the FBR Entities shall comply with the subject subpoenas and complete

its document production on or before September 17, 2010.

DONE AND ORDERED in Chambers at Miami, Florida this 3rd day of August, 2010.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:
Honorable Alan S. Gold
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-MD-GOLD/BANDSTRA

In Re: FOUNTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION,

MDL No. 2106

This document relates to all actions.
_____/

CERTIFICATION OF REFERRAL

THIS CAUSE, currently assigned to the Honorable Alan S. Gold and the undersigned Magistrate Judge, came before the Court pursuant to *Administrative Order No. 2010-79, In re Assignments for Magistrate Judge Jonathan Goodman,* issued by Chief United States District Judge Federico A. Moreno. As required by the Administrative Order, the undersigned has reviewed the case file and hereby refers all discovery pretrial motions in the above-captioned cause, except all motions for extension of time which could affect the dates provided in the District Court's Scheduling Order to United States Magistrate Judge Jonathan Goodman.

DONE AND ORDERED in Chambers at Miami, Florida this 3rd day of August, 2010.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:
Honorable Alan S. Gold
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 RESPONSE TO PLAINTIFF TERM LENDERS' DOCUMENT REQUEST DATED APRIL 22, 2010

Third Party, Fontainebleau Resorts, LLC ("FBR"), by and through its undersigned counsel, hereby serves its Response to Plaintiff, Term Lenders', Document Request dated April 22, 2010, and responds seriatim, as follows:

1. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there is a copy of the Credit Agreement in the FBR "Storage Room."[1] In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers.[2] All documents responsive to this request that are the property of FBR will be produced to the

[1] The FBR Storage Room is located at 2727 S Decatur Blvd, Unit B039, Las Vegas, Nevada at a Public Storage facility.

[2] There are three computer servers which contain documents responsive to this request. While FBR owns the severs, the servers were historically used and shared by related entities. As such, the information on the servers does not belong exclusively to FBR. In fact, certain information on the servers belongs solely to entities other than FBR. The servers are in the process of being copied and distributed to all entities with information on them. Once that is complete, all documents responsive to this request that belong to FBR will be produced to the Plaintiff Term Lenders.

Plaintiff Term Lenders.

2. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there is a copy of the Disbursement Agreement in the FBR Storage Room. In addition, upon information and belief there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

3. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there is a copy of the Retail Facility Agreement in the FBR Storage Room. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

4. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are copies of offering memoranda provided to lenders in connection with the Project in the FBR Storage Room. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

5. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are copies of offering memoranda provided to lenders in connection with the Project in the FBR Storage

Room. In addition, upon information and belief there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

6. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents relating to the Financing Structure of the Project in the FBR Storage Room. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

7. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

8. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. There are loan binders in the Storage Room which contain documents responsive to this request. These binders will be produced to the Plaintiff Term Lenders.

9. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

10. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

11. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

12. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

13. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

14. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

15. FBR objects to this request on the grounds that it seeks production of

documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

16. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

17. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

18. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

19. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are

the property of FBR will be produced to the Plaintiff Term Lenders.

20. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

21. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

22. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

23. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

24. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

25. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

26. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

27. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

28. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

29. FBR objects to this request on the grounds that it seeks production of

documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

30. There are no documents responsive to this request in the care, custody or control of FBR.

31. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

32. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

33. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

34. FBR objects to this request on the grounds that it seeks production of

documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

35. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

36. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request in the Storage Room. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

37. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

38. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property

of FBR will be produced to the Plaintiff Term Lenders.

39. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

40. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

41. A Fontainebleau Branch System Map dated March 2010 will be produced in response to this request.

WALDMAN TRIGOBOFF HILDEBRANDT
MARX & CALNAN, P.A.
2200 North Commerce Parkway, Suite 200
Weston, Florida 33326
Telephone: (954) 467-8600
Facsimile: (954) 467-6222

By: _____
Glenn J. Waldman
Florida Bar No. 370113
Sarah J. Springer
Florida Bar No. 0070747

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail this 3rd day of August, 2010 upon: Sidney P. Levinson, Esq., Robert Mockler, Esq. & Kirk D. Dillman, Esq., HENNIGAN, BENNET & DORMAN, LLP, 865 S. Figueroa Avenue, Suite 2900, Los Angeles, CA 90017; Lorenza M. Pruss, Esq., DIMOND KAPLAN & ROTHERSTEIN PA, 2665 S. Bayshore Dr., PH-2B, Coconut Grove, FL 33133; James B. Heaton, Esq., BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP, 54 West Hubbard Street, Suite 300, Chicago, IL 60654; and, Brett Amron, Esq., BAST AMRON, One Southeast 3rd Ave, Suite 1440, Miami, FL 33131.

WALDMAN TRIGOBOFF HILDEBRANDT
MARX & CALNAN, P.A.
2200 North Commerce Parkway, Suite 200
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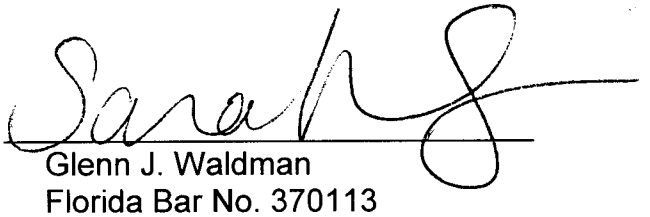
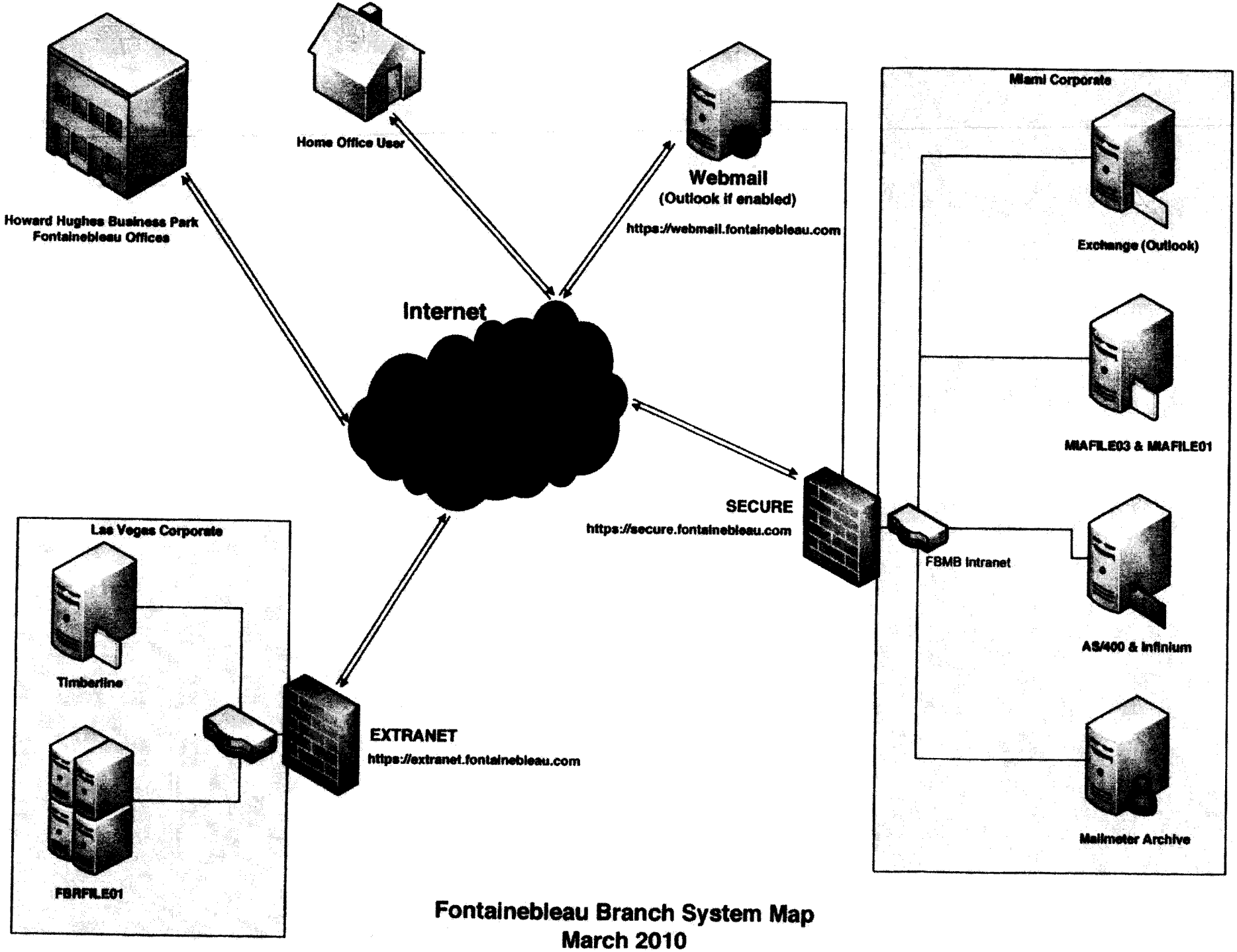
By: 

Glenn J. Waldman
Florida Bar No. 370113
Sarah J. Springer
Florida Bar No. 0070747



Fontainebleau Branch System Map
March 2010

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

TERM LENDERS' MOTION TO COMPEL FONTAINEBLEAU RESORTS, LLC TO PRODUCE ELECTRONICALLY STORED INFORMATION IN RESPONSE TO SUBPOENA

Pursuant to Federal Rule of Civil Procedure 45 and Southern District of Florida Local Rules 7.1 and 26.1, Plaintiffs in the cases captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-CV-23835-ASG (S.D. Fla.) and *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 10-CV-20236-ASG (S.D. Fla.) (the "Term Lenders"), by and through their undersigned counsel, hereby move this Court for an order compelling Fontainebleau Resorts, LLC ("FBR") to produce all documents, including electronically stored information, in response to a subpoena issued to FBR on April 22, 2010.

I. INTRODUCTION

The Term Lenders are lenders under a credit facility (the "Credit Agreement") for the financing of the construction of the Fontainebleau Resort and Casino in Las Vegas (the "Project"). On June 9, 2009, the borrower under the Credit Agreement, Fontainebleau Las Vegas, LLC (the "Borrower"), commenced a bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of Florida. Thereafter, the Term Lenders filed this action against Bank of America N.A. ("BofA") and a number of Revolving Lenders (collectively, the "Bank Defendants"), to recover for losses resulting from BofA's breaches of the Credit Agreement and related Master Disbursement Agreement.

On April 22, 2010, the Term Lenders served a subpoena (the "Subpoena") on FBR, the parent of the Borrower, seeking information regarding the Project. FBR has yet to produce any electronic documents in response to the Subpoena. Instead, FBR has raised the same objections it advanced in seeking to quash subpoenas served by the Bank Defendants in this case—namely, that its electronic documents are stored on servers that also house documents belonging to the Debtors and other FBR affiliates. FBR asserts that it cannot produce its documents without the consent of its affiliates, but it refuses to provide a timetable for when that might occur. The Court rejected similar arguments raised by FBR in denying FBR's motion to quash the Bank Defendants' subpoena and ordered FBR to produce documents by September 17, 2010. The Court should similarly overrule FBR's objections to the Term Lenders' Subpoena and direct it to produce, on a similar timetable, all responsive documents.

II. BACKGROUND

A. The Project

The Term Lenders 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")[1] for the development and construction of the Fontainebleau Las Vegas Resort and Casino in Las Vegas, Nevada. (*See* Declaration of Robert W. Mockler In Support Of Term Lenders' Motion to Compel Fontainebleau Resorts, LLC to Produce Electronically Stored Information in Response to Subpoena, attached as Exhibit 1 ("Mockler Decl."), at ¶ 2). On June 9, 2009, the Borrower and certain of its affiliates (together with Borrower, the "Debtors") filed for bankruptcy. (*Id.*).

B. The Subpoena

FBR is the parent of the Debtors. On April 22, 2010, the Term Lenders served the Subpoena on FBR. (Mockler Decl., Ex. A). The Subpoena seeks documents regarding the Project, including communications between FBR and the Debtors, construction documents and documents regarding the Project's finances. (*Id.*). These documents are relevant to understanding the course of the construction on the Project, the use of funds disbursed under the Credit Agreement, as well as the defaults and failed conditions precedent under the Credit Agreement and the Disbursement Agreement that form the basis for the Term Lenders' claims against BofA. (Mockler Decl., at ¶ 3).

C. FBR's Failure to Produce Electronic Materials

In response to the Subpoena, FBR stated that its electronic documents were stored on servers shared with other entities and that those servers would need to be reviewed for responsiveness and privilege. On a phone call with the Term Lenders' counsel on May 4, 2010, FBR's counsel Sarah Springer stated that the Trustee in the bankruptcy case was in control of the servers on which FBR documents were stored. (Mockler Decl., at ¶ 4 & Ex. B). Ms. Springer said that FBR would be discussing with the Trustee a process for review and production of the

[1] Those entities merged in 2009; the surviving entity, the Debtor, is Fontainebleau Las Vegas, LLC.

documents on the servers. She asserted that the servers were being maintained and preserved and that no documents on them would be destroyed. (*Id.*).

In a June 9, 2010 letter to the Term Lenders' counsel, Ms. Springer stated that FBR did not have access to its electronic documents because the Trustee had taken possession of the servers or was not allowing removal of any information. (Mockler Decl., Ex. C). On June 17, Ms. Springer indicated that the "servers are still in possession of the Trustee. There is nothing my client can do, at present, to remove its documents from those servers." (Mockler Decl., Ex. D).

On July 28, 2010, counsel for the Term Lenders again spoke with Ms. Springer, who, contrary to all previous claims, asserted for the first time that FBR's electronic documents were not in the Trustee's control but instead were stored on: (i) an accounting server in a Las Vegas co-location facility; (ii) a document server at that facility; and (iii) an e-mail server in Miami. (Mockler Decl., at ¶ 6). Ms. Springer did not know who had control of the accounting and document servers at the co-location facility in Las Vegas. (*Id.*). She asserted that the e-mail server was in the possession of one of FBR's subsidiaries, Fontainebleau Miami. (*Id.*).

When asked what steps had been taken to protect the data on the servers, counsel had no clear answer. (Mockler Decl., at ¶ 7). She stated that the Trustee, FBR, FBR's Florida affiliates and the Turnberry entities had spoken and were making sure that the data was protected. (*Id.*). When pressed, however, Ms. Springer could not provide any details about what steps had been taken. (*Id.*). She further stated that the accounting and document servers were being copied by David Chin, an IT employee of FBR's Florida affiliates. (*Id.*). But she conceded that there was no current plan in place to copy the e-mail server. (*Id.*).

Ms. Springer indicated that copying the servers was only the first step in the process. (Mockler Decl., at ¶ 8). She said that, following copying, all affected parties would be provided

with a copy of the servers, and those parties would then have the opportunity to review them and assert objections to production. (*Id.*). Ms. Springer could not provide any estimate of when copying would be done or when the process of review and objection would begin or conclude. (*Id.*). She said that an agreement between the affected parties was being drafted but could not say when that agreement would be completed or even what the status was. (*Id.*). She promised to talk to Mr. Chin and to other affected parties and get back to the Term Lenders. (*Id.*).

On a call on August 2, 2010, counsel for FBR had little additional information. (Mockler Decl., at ¶ 9). She stated that the agreement between the affected parties still had not been drafted. (*Id.*). She further stated that she was unwilling to agree to any schedule for production of electronic documents. (*Id.*).

After obtaining multiple extensions of the time to respond, FBR served objections to the Subpoena on August 3, 2010. (Mockler Decl., Ex. E). The only objection FBR raised is that the Subpoena "seeks production of documents in Los Angeles and Chicago." As to electronic documents, FBR stated:

> There are three computer servers which contain documents responsive to this request. While FBR owns the servers, the servers were historically used and shared by related entities. As such, the information on the servers does not belong exclusively to FBR. In fact, certain information on the servers belongs solely to entities other than FBR. The servers are in the process of being copied and distributed to all entities with information on them. Once that is complete, all documents responsive to this request that belong to FBR will be produced to the Plaintiff Term Lenders.

(*Id.*, at ¶ 1 n.2).[2] FBR provided no timetable for its production of documents from the servers.

[2] FBR has indicated that it has no documents that are responsive to seven of the 41 requests in the Subpoena (Nos. 7, 9, 11, 12, 18, 21 and 30). Accordingly, the Term Lenders seek an order compelling FBR to produce documents in response to the remaining 34 requests.

D. This Court Rejects FBR's Motion to Quash the Bank Defendants' Subpoenas

On July 6, 2010, FBR filed a motion to quash (D.E. 93) subpoenas served on it in this multi-district litigation by four of the Bank Defendants—JP Morgan Chase, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and the Royal Bank of Scotland PLC. Among other things, FBR argued that the "time-consuming undertaking" of "sorting" documents on servers and dividing them among the interested parties justified quashing the Bank Defendants' subpoena. (Mockler Decl., Ex. F, p. 3). This Court rejected FBR's arguments. On August 5, 2010, the Court denied the motion to quash (D.E. 120), finding that FBR "failed to meet its burden of demonstrating that compliance with the subject subpoenas would be unreasonable and oppressive." (Mockler Decl., Ex. G.) The Court ordered FBR to complete its production in response to the subpoenas by September 17, 2010. (*Id.*).

III. FBR SHOULD BE COMPELLED TO PRODUCE DOCUMENTS IN RESPONSE TO THE SUBPOENA

Pursuant to Federal Rule of Civil Procedure 45 and Southern District of Florida Local Rules 7.1 and 26.1, the Term Lenders respectfully request that this Court enter an Order compelling FBR to produce, by September 17, 2010, all documents, including electronic documents, responsive to the Subpoena.

This Court has already rejected FBR's objection to the Subpoena. FBR's motion to quash the Bank Defendants' subpoena raised the same issues regarding shared servers that FBR has offered up in its objection to the Subpoena. This Court properly rejected those arguments and directed FBR to produce documents. The result should be no different here.

The Subpoena seeks relevant information regarding the management of the construction Project, the use of funds disbursed by the lenders and the events leading up to and reasons for the bankruptcy filing. (Mockler Decl., at ¶ 3 & Ex. A). As FBR has conceded, they have documents, including electronic documents, that are responsive to the subpoena. *See also* Fed.

R. Civ. P. 45(d)(1) (setting out rules for production of electronic materials). And FBR raises no valid objection to production.

The documents are in the possession, custody and control of FBR. So "long as the party has the legal right or ability to obtain the documents from another source upon demand, that party is deemed to have control." *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. Pa. 2004) (applying Fed. R. Civ. P. 34). In its objections, FBR concedes that "FBR owns the servers." (Mockler Decl., Ex. E). Moreover, FBR has indicated that it has asked for a copy of the servers and that such a copy will be provided to them, further confirming that it has control of them.

FBR takes the position that it needs more time. This is disingenuous. The Subpoena was served four months ago. Since then, FBR has done nothing to review or produce its electronic information. FBR has had more than enough time to respond to discovery, and will be responding to discovery from the Bank Defendants, pursuant to the Court's Order, by September 17, 2010. FBR should be compelled to respond to the Term Lenders' Subpoena on the same schedule.

IV. CONCLUSION

For the foregoing reasons, the Term Lenders request that this Court enter an Order compelling FBR to produce, by September 17, 2010, all documents, including electronic documents, responsive to the Subpoena.

V. LOCAL RULE 7.1(a)(3) CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), counsel for the Term Lenders certifies that the Term Lenders have, as described above, engaged in a series of telephone calls and e-mails with Ms. Springer, counsel for FBR, in a good faith effort to resolve the issues raised in the motion and have been unable to do so.

Wherefore, the Term Lenders respectfully request that the Court enter an Order compelling FBR to produce, by September 17, 2010, all documents, including electronic documents, responsive to the Subpoena, and any other relief that is just proper.

Respectfully submitted,

By: /s/ Lorenz Michel Prüss

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing TERM LENDERS' MOTION TO COMPEL FONTAINEBLEAU RESORTS, LLC TO PRODUCE ELECTRONICALLY STORED INFORMATION IN RESPONSE TO SUBPOENA 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: August 19, 2010

By: /s/ Lorenz Michel Prüss
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/GOODMAN

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

DECLARATION OF ROBERT W. MOCKLER IN SUPPORT OF TERM LENDERS' MOTION TO COMPEL FONTAINEBLEAU RESORTS, LLC TO PRODUCE ELECTRONICALLY STORED INFORMATION IN RESPONSE TO SUBPOENA

I, Robert W. Mockler, declare as follows:

1. I am a partner in the firm of Hennigan, Bennett & Dorman, L.L.P., counsel for the Term Lenders that are plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-CV-23835-ASG (S.D. Fla.). Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if called as a witness, could and would competently testify thereto. I submit this declaration in support of the Term Lenders' Motion to Compel Fontainebleau Resorts, LLC to Produce Electronically Stored Information in Response to Subpoena.

2. The Term Lenders 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 Las Vegas Resort and Casino in Las Vegas, Nevada (the "Project"). On June 9, 2009, the Borrower and certain of its affiliates filed for bankruptcy. The bankruptcy case is

pending in the United States Bankruptcy Court for the Southern District of Florida, styled as *In re Fontainebleau Las Vegas Holdings, LLC et al.*, Case No. 09-21481-AJC.

The Subpoena

3. Fontainebleau Resorts, LLC ("FBR") is the parent of the Debtors. On April 22, 2010, the Term Lenders served a subpoena for the production of documents ("Subpoena") on FBR. A true and correct copy of the Subpoena is attached hereto as **Exhibit A**. The documents requested are relevant to understanding the course of the construction on the Project, the use of funds disbursed under the Credit Agreement, as well as the defaults and failed conditions precedent under the Credit Agreement and the Disbursement Agreement that form the basis for the Term Lenders' claims against Bank of America in this action.

FBR's Responses to the Subpoena

4. On a phone call on May 4, 2010, FBR counsel, Sarah Springer, indicated that the Trustee in the bankruptcy case was in control of the servers on which FBR's electronic documents were stored. Ms. Springer said that FBR would be discussing with the Trustee a process for review and production of the documents on the servers. Ms. Springer affirmed that the servers were being maintained and preserved and that no documents on them would be destroyed. A true and correct copy of my letter to Ms. Springer dated May 5, 2010, confirming our May 4, 2010 conversation, is attached hereto as **Exhibit B**.

5. In a June 9, 2010 letter to me, Ms. Springer stated that FBR did not have access to its electronic documents because the Trustee had taken possession of the servers or was not allowing removal of any information. A true and correct copy of the June 9, 2010 letter is attached hereto as **Exhibit C**. On June 17, Ms. Springer indicated that the "servers are still in possession of the Trustee. There is nothing my client can do, at present, to remove its documents

from those servers." A true and correct copy of Ms. Springer's June 17, 2010 e-mail is attached hereto as **Exhibit D**.

The Failure By FBR to Produce or Preserve Their Electronic Documents

6. On July 28, 2010, I and other counsel for the Term Lenders spoke with Ms. Springer, who, contrary to all previous claims, asserted for the first time that FBR's electronic documents were not in the Trustee's control but instead were stored on: (i) an accounting server in a Las Vegas co-location facility; (ii) a document server at that facility; and (iii) an e-mail server in Miami. Counsel did not know who had control of the accounting and document servers at the co-location facility in Las Vegas. She asserted that the e-mail server was in the possession of one of FBR's subsidiaries, Fontainebleau Miami.

7. When my colleague asked what steps had been taken to protect the data on the servers, counsel for FBR had no clear answer. Ms. Springer stated that the Trustee, FBR and FBR's affiliates had spoken and were making sure that the data was protected. When pressed, however, counsel could not provide any details about what steps had been taken. She said that the accounting and document servers were being copied by David Chin, an IT employee of FBR's Florida affiliates. But she conceded that there was not a current plan to copy the e-mail server.

8. Ms. Springer indicated that copying the servers was only the first step in the process. She said that, following copying, all affected parties would be provided with a copy of the servers, and those parties would then have the opportunity to review them and assert objections to production. Ms. Springer could not provide any estimate of when copying would be done or when the process of review and objection would begin or conclude. She said that an agreement between the affected parties was being drafted but could not say when that agreement

would be completed or even what the status was. She promised to talk to Mr. Chin and to other affected parties and get back to the Term Lenders.

9. On a call on August 2, 2010, Ms. Springer had little additional information. She stated that the agreement between the affected parties still had not been drafted. She further stated that she was unwilling to agree to any schedule for production of electronic documents.

10. After obtaining multiple extensions of the time to respond, FBR served objections to the Subpoena on August 3, 2010, a true and correct copy of which is attached hereto as **Exhibit E**.

The Rejection of FBR's Motion to Quash

11. On July 6, 2010, FBR filed a motion to quash a subpoenas served on it in this multi-district litigation by JP Morgan Chase, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and the Royal Bank of Scotland PLC ("Bank Defendants") on May 4, 2010. A true and correct copy of FBR's motion to quash (D.E. 93) is attached hereto as **Exhibit F.** The court rejected FBR's arguments. A true and correct copy of the August 5, 2010 order denying FBR's motion to quash (D.E. 120) is attached hereto as **Exhibit G.** FBR provided no timetable for its production of documents from the servers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: August 18, 2010

ROBERT W. MOCKLER

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

SOUTHERN DISTRICT OF FLORIDA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

Civil Action No. 09-MD-02106-CIV-GOLD/BANDSTRA

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: FONTAINEBLEAU RESORTS, LLC
Attention: Whitney Thier, General Counsel
19950 West Country Club Drive, Aventura, Florida 33180

☒ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

See attached Exhibit A.

Place:	Date and Time:
Hennigan, Bennett & Dorman LLP 865 S. Figueroa Street, Suite 2900 Los Angeles, CA 90017 (or such other location as the parties may agree)	May 13, 2010

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: April 22, 2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Attorneys for Plaintiffs, who issues or requests this subpoena, are:

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(305) 379-7904 (Attorney for ACP Master, Ltd. and Aurelius Capital Master, Ltd.)

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

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 all actions.

_____ /

PLAINTIFF TERM LENDERS' DOCUMENT REQUESTS TO FONTAINEBLEAU RESORTS

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, the Term Lenders[1] hereby request that Fontainebleau Resorts, LLC produce the documents described below for inspection and copying at the offices of Hennigan, Bennett & Dorman LLP, 865 S. Figueroa Street, Suite 2900, Los Angeles, CA 90017 and Bartlit Beck Herman Palenchar & Scott LLP, 54 W. Hubbard Street, Suite 300, Chicago, Illinois 60654, or such other location as the parties may agree, by May 13, 2010.

DEFINITIONS

1. "Administrative Agent" has the meaning set forth in the Credit Agreement.

2. "Advance Request" has the meaning set forth in Exhibit A to the Disbursement Agreement.

3. "Term Lenders" or "Plaintiffs" refers to the plaintiffs in the cases captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-1047-KJD-PAL

[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).

(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) and any of its present or former officers, directors, employees, agents, attorneys, subsidiaries, persons, or predecessors-in-interest acting on behalf of them.

4. "Bank of Nevada" means First National Bank of Nevada and any of its present officers, directors, employees, agents, attorneys, subsidiaries or persons acting on its behalf.

5. "Bank Proceeds Account" has the meaning set forth in Exhibit A to the Disbursement Agreement.

6. "BofA" means Defendant Bank of America, N.A., and any of its present officers, directors, employees, agents, attorneys, subsidiaries or persons acting on its behalf.

7. "Borrowers" means Fontainebleau Las Vegas, LLC, a Nevada limited liability company, and Fontainebleau Las Vegas II, LLC, a Florida limited liability company, and any of their present or former officers, directors, employees, agents, attorneys, subsidiaries, persons, or predecessors-in-interest acting on behalf of them.

8. "Commitment" and "Commitments" have the meaning set forth in the Credit Agreement.

9. "Complaint" means the Amended Complaints by Plaintiffs against Defendants filed on January 15, 2010 in the United States District Court for the Southern District of New York, Case No. 09 CIV 8064 and in the United States District Court for the Southern District of Florida, Case No. 09-1047-CIV-KJD.

10. "Credit Agreement" means the Credit Agreement entered into as of June 6, 2007 among Borrowers, each Lender from time to time a party thereto and BofA, as Administrative Agent (as defined therein), Issuing Lender (as defined therein) and Swing Line Lender (as defined therein).

11. "Default" has the meanings set forth in the Credit Agreement, Disbursement Agreement, and Retail Facility Agreement.

12. "Defendants" refers collectively to Defendants BofA, Merrill Lynch Capital Corporation, JPMorgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, The Royal Bank of Scotland PLC, Sumitomo Mitsui Banking Corporation, Bank of Scotland, HSH Nordbank AG, MB Financial Bank, N.A. and Camulos Master Fund, L.P., and any of their present officers, directors, employees, agents, attorneys, subsidiaries or persons acting on behalf of them.

13. "Disbursement Agent" has the meaning set forth in the Disbursement Agreement.

14. "Disbursement Agreement" means the Master Disbursement Agreement, dated as of June 6, 2007, among Fontainebleau Las Vegas Holdings, LLC, a Delaware limited liability company; Fontainebleau Las Vegas Capital Corp., a Delaware corporation; Fontainebleau Las Vegas Retail, LLC, a Delaware limited liability company; Borrowers; BofA, as the initial Bank Agent (as defined therein); Wells Fargo Bank, N.A., as the initial Trustee (as defined therein), and BofA, as the initial Disbursement Agent (as defined therein).

15. "Event of Default" has the meanings set forth in the Credit Agreement, Disbursement Agreement, and Retail Facility Agreement.

16. "Financing Structure" means the financing arranged for the Project as set forth in the Credit Agreement, the Disbursement Agreement, the Retail Facility Agreement, and the 10.25% Second Mortgage Notes Due 2015 in the aggregate principal amount of $675,000,000.

17. "In Balance Test" has the meaning set forth in Exhibit A to the Disbursement Agreement.

18. "IVI" means Inspection & Valuation International, Inc.

19. "Lehman Brothers" means Lehman Brothers Holdings Inc., a Delaware corporation and any of their present officers, directors, employees, agents, attorneys, subsidiaries or persons acting on its behalf.

20. "Lender" and "Lenders" have the meaning set forth in the Credit Agreement, Disbursement Agreement, and/or Retail Facility Agreement.

21. "Loan" and "Loans" have the meaning set forth in the Credit Agreement, Disbursement Agreement, and/or Retail Facility Agreement.

22. "March 23 Letter" means the letter BofA provided to certain Lenders by posting on Intralinks on or about March 23, 2008.

23. "Material Adverse Effect" has the meaning set forth in the Credit Agreement.

24. "Notice of Borrowing" has the meaning set forth in the Credit Agreement and includes the Notice of Borrowing, dated March 2, 2009, from Borrowers to BofA; the Notice of Borrowing, dated March 3, 2009, from Borrowers to BofA; the Notice of Borrowing, dated March 9, 2009, from Borrowers to BofA; and the Notice of Borrowing, dated April 21, 2009, from Borrowers to BofA.

25. "Project" has the meaning set forth in the Complaint.

26. "Retail Facility Agreement" means the Loan Agreement, dated as of June 6, 2007, between Lehman Brothers and Fontainebleau Las Vegas Retail, LLC, a Delaware limited liability company.

27. "Steering Committee" means the ad hoc steering committee relating to the Project BofA formed in March 2009 with other Lenders.

28. "Stop Funding Notice" has the meaning set forth in the Disbursement Agreement.

29. The term "document" is defined to be given the maximum scope of that term contemplated by Federal Rule of Civil Procedure 34 and thus includes, without limitation, all

tangible things and all documents, books, pamphlets, memoranda, notes, correspondence, emails, computer programs and files, photographs, drawings, depictions, presentations, and any other data compilation or recorded matter of any sort, whether stored in paper format, electronically, magnetically or in any other format or medium, and including all non-identical copies of any document and any copy of a document bearing any marks or notes not a part of the original document.

30. The term "communications" means all inquiries, discussions, conversations, negotiations, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, faxes, emails, advertisements, or other forms of verbal, written, or electronic intercourse, regardless of form or format. It is understood that all categories of documents described above shall include with respect thereto all communications as defined, whether or not expressly stated.

31. The term "date" means the month, day and year, if known, or, if not, Fontainebleau Resorts, LLC's best approximation thereof.

32. The terms "person(s)" or "individual(s)" mean any natural person, partnership, corporation, joint venture, company, law firm, consultant, independent contractor, or other business entity of any kind and all present officers, directors, partners, agents, employees, attorneys and others acting or purporting to act for or on behalf of such person.

33. The term "relating to" means concerning, referring to, describing, evidencing, or constituting.

34. The term "things" means any tangible object other than a document and includes objects of every kind and nature, such as, but not limited to, prototypes, models and specimens.

35. Whenever appropriate in these requests, the singular form of a word shall be interpreted as plural and the plural form of the word shall be interpreted as singular as necessary

to bring within the scope of these requests any information which might otherwise be construed to be outside their scope. The terms "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these requests any information which might otherwise be construed to be outside their scope.

INSTRUCTIONS

1. These requests for production shall be deemed continuing and Fontainebleau Resorts, LLC shall supplement and amend its responses as required under the Federal Rules of Civil Procedure and relevant orders of the Court.

2. In the event Fontainebleau Resorts, LLC withholds any document or information requested on the grounds of privilege, attorney work product or otherwise, state the date of the document, the date that Fontainebleau Resorts, LLC obtained such document or information if applicable, the number of pages in the document if applicable, whether any non-legal or non-privileged information is contained in the document if applicable, a description of the subject matter of the document if applicable, the author(s) and recipient(s) of the document as well as any persons copied on the document if applicable, to whom such document or information was communicated if applicable, and a brief summary explaining the basis for the assertion of privilege, attorney work product or other justification for withholding the document or information.

3. If Fontainebleau Resorts, LLC contends that it would be unreasonably burdensome to obtain and provide all the documents or information called for in response to any of these requests, then for each such request:

(a) Produce all documents and information which are available to Fontainebleau Resorts, LLC without undertaking what is contended to be an unreasonable burden;

(b) Describe with particularity the efforts made by Fontainebleau Resorts, LLC or on Fontainebleau Resorts, LLC's behalf to secure such documents and information; and

(c) State with particularity the grounds on which Fontainebleau Resorts, LLC contends that additional efforts to obtain such documents or information would be unreasonably burdensome.

4. Pursuant to Rule 34(b) of the Federal Rules of Civil Procedure, Fontainebleau Resorts, LLC shall produce documents as they are kept in the usual course of business and organization. To the extent that responsive documents are located in file folders, binders or other containers, labels and covers of such file folders, binders or other containers are requested to be produced with the documents.

5. All English translations, versions or summaries of responsive documents shall be produced.

6. If any of the documents requested herein have been destroyed, describe the contents of such documents as completely as possible, the date of such destruction, and the name of the person who ordered or authorized such destruction.

7. Plaintiffs request that electronically stored information be produced in the form set forth in Exhibit A.

DOCUMENTS REQUESTED

1. All documents relating to the Credit Agreement or any actual or proposed amendment of the Credit Agreement, including but not limited to documents relating to the negotiating and drafting of the Credit Agreement, any term sheets or other documents reflecting

the discussions of the parties to the Credit Agreement, and documents relating to the intent of the parties to the Credit Agreement.

2. All documents relating to the Disbursement Agreement or any actual or proposed amendment of the Disbursement Agreement, including but not limited to documents relating to the negotiating and drafting of the Disbursement Agreement and any term sheets or other documents reflecting discussions of the parties to the Disbursement Agreement.

3. All documents relating to the Retail Facility Agreement or any actual or proposed amendment of the Retail Facility Agreement, including but not limited to documents relating to the negotiating and drafting of the Retail Facility Agreement and any term sheets or other documents reflecting discussions of the parties to the Retail Facility Agreement.

4. All documents relating to offering memoranda and presentations provided to potential and actual Lenders in connection with the Project, including but not limited to any drafts of such offering memoranda and presentations.

5. All documents or communications that relate in any way to the solicitation of any person or entity to lend the Borrowers money in connection with the Project.

6. All documents relating to the Financing Structure of the Project, including but not limited to any proposals by any party to the Credit Agreement or Disbursement Agreement to change, amend, or otherwise modify the Financing Structure for the Project.

7. All documents relating to any business relationship (other than such a relationship relating to the Project) between you and any Defendants or any of their officers, directors, employees, agents, attorneys, parents, subsidiaries or persons acting on behalf of them.

8. All documents relating to BofA's guidelines, procedures and policies for processing Notices of Borrowing and Advance Requests.

9. All documents relating to any Notice of Borrowing, including but not limited to all documents relating to any decision by BofA not to process a Notice of Borrowing and all documents relating to any communications among BofA and any Lender in which any Notice of Borrowing was discussed.

10. All documents relating to any Advance Request, including but not limited to all documents relating to any decision by BofA to process or not to process an Advance Request and/or to release any funds from the Bank Proceeds Account.

11. All documents relating to the use of funds advanced pursuant to any Advance Request.

12. All documents relating to the In Balance Test, including all documents relating to any In Balance Test or any portion of any In Balance Test conducted or reviewed by any party to the Credit Agreement or the Disbursement Agreement.

13. All documents relating to the determination at any point in time whether the In Balance Test had been satisfied or not, including but not limited to all documents relating to the determination that the In Balance Test had been satisfied at the time of the March 25, 2009 Advance Request.

14. All documents relating to any Event of Default, Default, or breach of the Credit Agreement and/or the Disbursement Agreement and/or the Retail Facility Agreement.

15. All documents relating to any actual or potential Material Adverse Effect to the business, properties, condition (financial or otherwise) or prospects of the Project.

16. All documents relating to any actual or proposed agreements pursuant to which BofA would forbear from declaring a Default or an Event of Default under the Credit Agreement or the Retail Facility Agreement, from terminating any Commitments or from exercising any of its default rights and remedies, including but not limited to all documents relating to any

communications between BofA and Borrowers and/or Lenders concerning any such actual or proposed agreements.

17. All documents relating to BofA's purported termination of the Credit Agreement on April 20, 2009.

18. All documents relating to the financial condition of the Borrowers, including but not limited to documents relating to the solvency of the Borrowers and documents relating to any financial disclosures or representations or warranties by the Borrowers.

19. All documents relating to the Project, including but not limited to documents relating to the financial status of the Project, documents relating to the construction status of the Project, and documents relating to the management of the Project.

20. All documents relating to CCCS International and the Project and/or the Borrowers.

21. All documents relating to IVI and the Project and/or the Borrowers.

22. All documents relating to Borrowers' reasons for attempting to borrow approximately $1 billion on March 2, 2009.

23. All documents relating to Borrowers' internal forecasts for the Project's construction costs and timetable.

24. All documents relating to Borrowers' April 2009 notice that Borrowers may have failed the In Balance Test.

25. All documents relating to Borrowers' attempts to secure alternative and/or additional financing for the Project, including their reasons for seeking such financing.

26. All documents relating to Borrowers' financial projections for the Project's post-construction performance.

27. All documents relating to Borrowers' financial disclosures and representations to Defendants, including any back up for any such documents.

28. All documents relating to the decision by any Lender including Defendants to make or fund, or the refusal or failure by any Lender to make or fund, Loans under the Credit Agreement or the Retail Facility Agreement or otherwise meet any of its obligations or Commitments under the Credit Agreement or the Retail Facility Agreement.

29. All documents relating to Lehman Brothers' failure to comply with its funding obligations under the Retail Facility Agreement following its bankruptcy filing in September 2008.

30. All documents relating to Bank of Nevada's failure to comply with its funding obligations under the Credit Agreement following its closure by the Office of the Comptroller of the Currency in July 2008.

31. All documents relating to any decision by BofA to issue or not to issue a Stop Funding Notice and all documents relating to any communications between or among BofA and Borrowers in which a possible Stop Funding Notice was discussed.

32. All documents relating to communications sent to or received from any of the Defendants relating to the Project.

33. All documents relating to communications sent to or received from the Administrative Agent relating to the Project.

34. All documents relating to communications sent to or received from the Disbursement Agent relating to the Project.

35. All documents relating to communications sent to or received from any of the Lenders relating to the Project.

36. All documents relating to any valuation of any Collateral, Cash Collateral, or collateral subject to the Guarantee and Collateral Agreement as defined in the Credit Agreement.

37. All documents relating to fees paid to BofA relating to the Project, including but not limited to its work or Commitments as Administrative Agent, Issuing Lender, Swing Line Lender and/or Disbursement Agent.

38. All documents relating to fees paid to the Joint Lead Arrangers, Joint Book Managers, Syndication Agent and Documentation Agents, as each of those terms is defined in the Credit Agreement, relating to the Project.

39. Any other documents produced by Borrowers and/or you to any of the Defendants and not otherwise requested by any of the foregoing document requests.

40. All documents relating to the preservation, retention or destruction of paper or electronic records during this litigation.

41. Documents sufficient to show the organization of your e-mail communication systems including your policies for the organization, retention, storage, destruction and overwriting of e-mail communications, any network maps, and the location of your archives, individual PST files (or the equivalent) and exchange servers (or the equivalent).

DATED: April 22, 2010

Respectfully submitted,

By: _____

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EXHIBIT A

EXHIBIT A: FORM(S) IN WHICH ELECTRONICALLY STORED INFORMATION IS TO BE PRODUCED

1. Production Elements		
Text	**Production Format** Multi-Page Text Files	**File Naming** Based on Bates No
Images	**Production Format** Single-Page Image Files	**File Naming** Based on Bates No
Images - Details	**General Instructions** • **Image Resolution:** 300 dpi • **File Format:** Group IV TIF Images • **B&W/Color:** Black & White	**Special File Type Instructions:** • Do not TIF MS Excel file types • Do not TIF Text file types • Do not TIF MS Project file types • Do not TIF MS Access file types • Insert Placeholder image for files produced in Native form
Natives	**File Naming** Based on Bates No	
Natives - Details	**General Instructions** • Produce Native files for only select file types	**Special File Type Instructions:** • Produce MS Excel file types in Native form • Produce Text file types in Native form • Produce MS Project file types in Native form • Produce MS Access file types in Native form • Produce Exception files in Native form
Metadata	**Fields** Produce fields identified in Section 7	

2. General Processing Instructions	
OCR the following image types:	• JPEG File Interchange Files (JPG, JPEG) • Graphics Interchange Format (GIF) • MS Windows Bitmap (BMP) • PC Paintbrush Bitmap (PCX) • Portable Network Graphics Bitmap (PNG) • Tagged Image File Format (TIF, TIFF)
Time Zone Settings:	• GMT (Greenwich Mean Time)
Handling of Protected Files:	• Treat as Exception Files

3. De-Duplication Instructions by Data Set		4. De-Duplication Hashing	
E-Mail Content	De-Duplicate Globally	**E-Files**	MD5 Binary Hash of File
Custodian Files	De-Duplicate Globally	**E-Mail**	MD5 Hash based on the E-mail fields listed below
Network Shares	De-Duplicate Globally	**E-Mail Fields**	• From • To • CC • BCC • Sent Date and Time • Subject • Message Body
Custodian Identification	Concatenate Custodian values across duplicates to generate a single value that indicates all custodians that had access to the document.		

5. Specific File Handling Instructions		
MS Outlook Mail	**Outlook Items to Process** • Messages • Calendar Items • Contacts • Notes • Journal • Tasks	**Folders to Include** All Folders
Lotus Notes Mail	**Lotus Notes Items to Process** • Messages • Calendar Items • Addresses • ToDo	**Folders to Include** All Folders
MS Word	**TIF Conversion Instructions** **Tracked Changes/Comments** • Display Comments • Display Tracked Changes (If available)	**Date Macro Options** Display Original Date
MS Power Point	**TIF Conversion Instructions** **Slide Info/Comments** • Display Comments • Display Slide Notes • Display Hidden Slides	**Date Macro Options** Display Original Date
Exception Handling	**Delivery Instructions** • Reference file in Exception Report • Produce exception file in Native form • Produce any available text or metadata captured for the exception • Insert a placeholder image for the file	**Exception Report Format** Deliver report in as a MS Excel file **Fields to Include in Exception Report** Include fields identified in Section 8

6. Load File Specifications			
Load File for Images Opticon OPT File	**Native Files** Reference in Metadata	**Text Files** LST Text Reference File	**Metadata** Concordance DAT File with field header information added as the first line of the file. Export using Concordance default delimiters.

7. Production Metadata Fields

Field Name	Description
BegBates	Beginning bates number
EndBates	Ending bates number
BegAttach	Beginning bates number of the first document in an attachment range
EndAttach	Ending bates number of the last document in an attachment range
Custodian	Name of the Custodian the file was sourced from
FileName	Filename of the original file name of the file
OrigFilePath	Original path and filename of the file as it was found during the collection process
NativeLink	Path and filename to produced Native file
File_Size	Size of the file in bytes
DocExt	Native file extension
EmailSubject	Subject line extracted from an email message
Title	Title field extracted from the metadata of a non-email document
Author	Author field extracted from the metadata of a non-email document
From	From field extracted from an email message
To	To field extracted from an email message
CC	CC field extracted from an email message
BCC	BCC field extracted from an email message
DocSubject	Subject field extracted from the metadata of a non-email document
Sensitivity	Sensitivity field extracted from an email (e.g., Normal)
Keywords	Keywords field extracted from MS Office documents and email messages
Category	Category field extracted from MS Office documents and email messages
Comments	Comments field extracted from MS Office documents and email messages
DateRcvd	Received date of an email message
TimeRcvd	Received time of an email message
DateSent	Sent date of an email message
TimeSent	Sent time of an email message
DateLastPrnt	Date that a file was last printed
TimeLastPrnt	Time that a file was last printed
DateCreated	Date that a file was created
TimeCreated	Time that a file was created
DateLastMod	Date that a file was last modified
TimeLastMod	Time that a file was last modified
Importance	Importance field extracted from an email (e.g., High)
IntMsgID	Message ID assigned to an email message by the outgoing mail server
MD5Hash	MD5 hash value generated by creating a binary stream of the file
FileDescrip	File type description of the file
Mailstore	Contains the name of the mail store and path that a message originated from, if the message was processed as a part of a mail archive, such as a .pst
Emailclient	Description of the mail archive a file was found in, such as MS Outlook, Lotus Notes, or Outlook Express
Conversation	Normalized subject of emails
Entryid	Unique identifier of emails as they were found within a mail store
Unread	Email has been read (Y/N) flag
Readreceipt	Read receipt request notification (Y/N) flag
Headers	Contents of the header field of an email message
Attach	List of the file name(s) of each attachment to an email message, separated by semi-colons

8. Exception Report Fields	
Field Name	Description
BegBates	Beginning bates number
BegAttach	Beginning bates number of the first document in an attachment range
FileName	Filename of the original file name of the file
OrigFilePath	Original path and filename of the file as it was found during the collection process
FileDescrip	File type description of the file
Error	Error message that describes the issue encountered with the exception file

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* FONTAINEBLEAU RESORTS, LLC was received by me on *(date)* April 22, 2010

☒ I served the subpoena by delivering a copy to the named person as follows: First Class U.S. Mail to Fontainebleau Resorts, LLC's General Counsel and to the interested parties on the attached service list.

on *(date)* April 22, 2010; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00

I declare under penalty of perjury that this information is true.

Date: April 22, 2010

Olivette C. Sasser
Server's signature

Olivette C. Sasser, Secretary
Printed name and title

Hennigan, Bennett & Dorman LLP, 865 S. Figueroa Street, Suite 2900, Los Angeles, CA 90017
Server's address

Additional information regarding attempted service, etc:

SERVICE LIST

Attorneys:	Representing:
Whitney Thier, General Counsel Fontainebleau Resorts, LLC 19950 West Country Club Drive Aventura, FL 33180	Fontainebleau Resorts, LLC
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May 5, 2010

VIA E-MAIL AND U.S. MAIL

Sarah J. Springer, Esq.
Waldman Trigoboff Hildebrandt
Marx & Calnan, P.A.
Weston Pointe II Suite 202
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Weston, FL 33326 - 3258

Re: Document Requests to Fontainebleau Resorts, LLC

Dear Sarah:

This letter summarizes our conversation of yesterday regarding the response of Fontainebleau Resorts, LLC ("FBR") to Rule 2004 document requests served by the Term Lender Steering Group in the Fontainebleau bankruptcy case.

In response to the requests, FBR produced several hundred pages of hard copy documents and also referred to additional responsive documents contained in:

> a Las Vegas, Nevada storage room ("the Storage Room"), on a server in a Las Vegas, Nevada collocation center ("the Las Vegas Server") or on an email server which is currently in possession of Fontainebleau Florida Hotel, LLC and Fontainebleau Florida Tower 2, LLC in Miami Beach ("the Miami Server").

FBR Response, pp. 1-2. FBR stated that it would make these additional documents available, but that they had not been reviewed for responsiveness or privilege. I called to ask when these documents would be made available for our review.

You said that you were not sure when the documents would be made available. You said that you have learned additional information about FBR's documents, including the Servers, since you submitted FBR's response to the Rule 2004 requests, and that you continued to get additional information on a daily basis.

With regard to the Storage Room, you said your understanding was that the Storage Room included boxes of hard copy documents but not electronic files or communications. You also mentioned that Whitney Thier, the former general counsel of FBR, told you that there were FBR documents in a storage room in Las Vegas and that David Reimer, Turnberry's counsel, was going to look at these FBR documents. I told you that last week I reviewed documents made available by Mr. Reimer on behalf of Turnberry West Construction, Inc. and Turnberry Residential Limited Partnership, L.P. ("Turnberry") at a storage room in Las Vegas. I asked whether this was the Storage Room referenced in your responses. You said you were not sure but agreed to find out. Please let me know if the Turnberry room I went to last week, the Storage Room referred to in your responses and the room Ms. Thier referred to are the same room. If not, let me know when you can make the Storage Room, and/or any other documents that may be contained in any of these rooms, available for inspection.

With respect to the Las Vegas Server and the Miami Server, you stated that you would be speaking to the bankruptcy Trustee in the next week regarding how these documents would be produced to the various parties that have asked for them. Please get back to me following your discussion with the Trustee.

You explained that the Las Vegas server is in a co-location facility in Las Vegas, in the possession of FBR. You said that it was your understanding that the Miami Server includes back up copies of all of the documents on the Las Vegas server. Please confirm that this is the case. You also said that the Las Vegas Server and the Miami Server are being maintained and preserved and no documents on them will be destroyed.

You also said that Ms. Thier was in possession of an additional server when she was at FBR and that this server is now in FBR's possession. You said that you understand that this server is not an "active" server but rather contains backups of documents on the Las Vegas Server. Please confirm that this is the case and that the documents on this additional server are also being preserved.

Please let me know if any of the foregoing is not correct.

Sincerely yours,

Robert W. Mockler

RWM/as

WALDMAN TRIGOBOFF
HILDEBRANDT MARX & CALNAN, P.A.
ATTORNEYS AT LAW

2200 NORTH COMMERCE PARKWAY • SUITE 202 • WESTON, FLORIDA 33326
TELEPHONE (954) 467-8600 • FACSIMILE (954) 467-6222

June 9, 2010

VIA U.S. MAIL & FACSIMILE

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Re: *In re: Fontainebleau Las Vegas Contract Litigation,* Master Case No. 09-2106-MD-Gold/Bandstra

Dear Robert, Lorenz, James and Brett:

As you know, this firm represents Fontainebleau Resorts, LLC ("FB Resorts") in some matters pending in the Southern District of Florida. While we have not yet been retained by FB Resorts in the above referenced matter, I am writing this letter on behalf of FB Resorts. In order to respond to the subpoenas served upon it, including yours, FB Resorts needs access to its computer servers which house both e-mails and documents. However, the Trustee has either taken possession these servers or is aware of the servers and will not allow the removal of any information at this time.

I have spoken with the Trustee regarding the outstanding discovery which is owed to you and others. The Trustee and I (as well as all other Fontainebleau entities with

information on these servers) are in the process of coordinating the removal of information from the servers. However, due to the number of parties and interests involved, this could take some time.

As a result of the foregoing, I would ask that you continue to be patient as there is nothing that can be done at this time to respond to your subpoenas. As soon as FB Resorts regains access to its servers, it will continue its good faith efforts to respond to all outstanding discovery.

Very truly yours,

Sarah J. Springer

cc: Fontainebleau Resorts, LLC Board of Managers

Robert Mockler

From: Sarah Springer [SSpringer@waldmanlawfirm.com]
Sent: Thursday, June 17, 2010 10:57 AM
To: steven.nachtwey@bartlit-beck.com; Robert Mockler
Subject: Fontainebleau Resorts, LLC: Extension of Time

Steven and Robert,

I am writing regarding the April 22, 2010 subpoena served on my client, Fontainebleau Resorts, LLC, by Plaintiff Term Lenders' Steering Group in the Contract Litigation matter before Judge Gold.

I trust you received the letter I sent last week regarding the predicament my client is in due to the conversion of the bankruptcy action. The servers are still in the possession of the Trustee. There is nothing my client can do, at present, to remove its documents from those servers. There is, however, a storage room in Las Vegas which contains an unknown number of documents belonging to my client and perhaps other Fontainebleau entities.

The plan is for the documents in the Storage Room to be inventoried and scanned onto discs in early July, finally giving my firm access to these documents. As neither I nor my client knows how many documents are in this storage room, it is difficult to say how long it will take to do this and then to also review the documents for purposes of privilege and responsiveness.

As such, my client does not have any documents that it can produce in response to your subpoena right now. Please advise if you would be willing to grant my client a 45 day extension (i.e. up to and through July 29, 2010) to respond to your subpoena.

Sincerely,

Sarah J. Springer, Attorney at Law
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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 RESPONSE TO PLAINTIFF TERM LENDERS' DOCUMENT REQUEST DATED APRIL 22, 2010

Third Party, Fontainebleau Resorts, LLC ("FBR"), by and through its undersigned counsel, hereby serves its Response to Plaintiff, Term Lenders', Document Request dated April 22, 2010, and responds seriatim, as follows:

1. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there is a copy of the Credit Agreement in the FBR "Storage Room."[1] In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers.[2] All documents responsive to this request that are the property of FBR will be produced to the

[1] The FBR Storage Room is located at 2727 S Decatur Blvd, Unit B039, Las Vegas, Nevada at a Public Storage facility.

[2] There are three computer servers which contain documents responsive to this request. While FBR owns the severs, the servers were historically used and shared by related entities. As such, the information on the servers does not belong exclusively to FBR. In fact, certain information on the servers belongs solely to entities other than FBR. The servers are in the process of being copied and distributed to all entities with information on them. Once that is complete, all documents responsive to this request that belong to FBR will be produced to the Plaintiff Term Lenders.

Plaintiff Term Lenders.

2. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there is a copy of the Disbursement Agreement in the FBR Storage Room. In addition, upon information and belief there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

3. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there is a copy of the Retail Facility Agreement in the FBR Storage Room. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

4. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are copies of offering memoranda provided to lenders in connection with the Project in the FBR Storage Room. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

5. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are copies of offering memoranda provided to lenders in connection with the Project in the FBR Storage

Room. In addition, upon information and belief there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

6. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents relating to the Financing Structure of the Project in the FBR Storage Room. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

7. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

8. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. There are loan binders in the Storage Room which contain documents responsive to this request. These binders will be produced to the Plaintiff Term Lenders.

9. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

10. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

11. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

12. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

13. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

14. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

15. FBR objects to this request on the grounds that it seeks production of

documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

16. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

17. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

18. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

19. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are

the property of FBR will be produced to the Plaintiff Term Lenders.

20. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

21. There are no documents responsive to this request in the care, custody or control of FBR. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.

22. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

23. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

24. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

25. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

26. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

27. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

28. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy.In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

29. FBR objects to this request on the grounds that it seeks production of

documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

30. There are no documents responsive to this request in the care, custody or control of FBR.

31. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

32. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

33. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

34. FBR objects to this request on the grounds that it seeks production of

documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

35. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

36. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, there are documents responsive to this request in the Storage Room. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

37. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

38. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. Upon information and belief, documents responsive to this request are in the care, custody or control of the debtors in bankruptcy. In addition, upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property

of FBR will be produced to the Plaintiff Term Lenders.

39. FBR objects to this request on the grounds that it seeks production of documents in Los Angeles and Chicago. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

40. Upon information and belief, there are documents responsive to this request on FBR's computer servers. All documents responsive to this request that are the property of FBR will be produced to the Plaintiff Term Lenders.

41. A Fontainebleau Branch System Map dated March 2010 will be produced in response to this request.

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Facsimile: (954) 467-6222

By: _____
Glenn J. Waldman
Florida Bar No. 370113
Sarah J. Springer
Florida Bar No. 0070747

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail this 3rd day of August, 2010 upon: Sidney P. Levinson, Esq., Robert Mockler, Esq. & Kirk D. Dillman, Esq., HENNIGAN, BENNET & DORMAN, LLP, 865 S. Figueroa Avenue, Suite 2900, Los Angeles, CA 90017; Lorenza M. Pruss, Esq., DIMOND KAPLAN & ROTHERSTEIN PA, 2665 S. Bayshore Dr., PH-2B, Coconut Grove, FL 33133; James B. Heaton, Esq., BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP, 54 West Hubbard Street, Suite 300, Chicago, IL 60654; and, Brett Amron, Esq., BAST AMRON, One Southeast 3rd Ave, Suite 1440, Miami, FL 33131.

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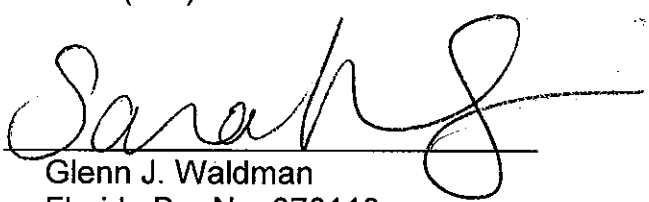
By: 

Glenn J. Waldman
Florida Bar No. 370113
Sarah J. Springer
Florida Bar No. 0070747

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, FONTAINEBLEAU RESORTS HOLDINGS, LLC AND FONTAINEBLEAU RESORTS PROPERTIES I, LLC'S MOTION TO QUASH DEFENDANTS' SUBPOENAS DATED MAY 4, 2010

Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC (collectively, "The FBR Entities"), by and through their undersigned counsel, and pursuant to *Fed. R. Civ. P.* 45, hereby serve their Motion to Quash Defendants, JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and The Royal Bank of Scotland PLC's Subpoenas, dated May 4, 2010 (the "Subpoenas"), and would state:

1. On May 4, 2010, Defendants served each of The FBR Entities with the Subpoenas. The Subpoenas each contain fifty-one categories of documents which the Defendants seek to obtain from The FBR Entities. These extremely broad Subpoenas generally seek the production of a wide variety of documents which relate to the Fontainebleau project in Las Vegas. For example, request no. 9 seeks "[a]ll [d]ocuments [c]oncerning [c]ommunications between Fontainebleau Resorts and Fontainebleau, its shareholders, management, members, financial advisors, board of directors, auditors or

accounts [c]oncerning the Project."

2. Responding to just this one, overbroad request would cause an undue burden or expense to The FBR Entities as it asks for every communication between The FBR Entities and Fontainebleau Las Vegas, LLC, Fontainebleau Las Vegas II, LLC, Fontainebleau Las Vegas Holdings, LLC, Fontainebleau Las Vegas Retail, LLC and/or Fontainebleau Las Vegas Capital Corporation (the "Debtors") and each of their predecessors, successors, affiliates, divisions, subsidiaries, parents, members, officers, representatives, agents and/or employees, including without limitation, their attorneys, investment bankers and advisers acting or purporting to act on its or their behalf regarding a multibillion dollar development which was years in the making – literally and figuratively.

3. Responding to the Subpoenas would further cause an undue burden on The FBR Entities because of the recent conversion of the Fontainebleau Las Vegas Bankruptcy action from Chapter 11 to Chapter 7[1]. The Trustee has recently taken possession of the computer servers which are owned by Fontainebleau Resorts, LLC (one of The FBR Entities) but which contain documents belonging to various Fontainebleau and Turnberry Construction entities, including the Debtors. As such, The FBR Entities do not have possession of or control over those computer servers which, upon in formation and belief, contain the vast majority of the documents sought in the Subpoenas.

4. Undersigned counsel and counsel for the other Fontainebleau-related

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[1] Undersigned counsel is referring to the matter titled In re: Fontainebleau Las Vegas Holdings, LLC, et al. presently pending before Judge Cristol in the United States Bankruptcy Court of the Southern District of Florida (Case No. 09-21481-AJC).

entities have been in contact with the Trustee and the Trustee's counsel, Russel Blain, in attempts to coordinate the removal of each entity's information from the servers. In connection therewith, the Trustee has decided that each entity will receive a full copy of each of the servers. Each entity will then have to review all of the documents on the servers to determine which documents belong to them, which documents belong to multiple entities, which documents are privileged and which documents are responsive to any outstanding discovery requests or subpoenas, as here. Deciding which documents belong to which entities will be a time-consuming undertaking due to the number of documents as well as anticipated disputes over ownership of the documents.

5. After this sorting process is complete, if any of the entities with information on the servers wish to produce documents in response to discovery requests or subpoenas, they will have to provide each entity which received a copy of the servers with an opportunity to examine what is being produced in order to confirm that documents belonging to the non-producing entity are not being produced.

6. Due to the number of parties involved and despite the best efforts of undersigned counsel, the servers have not even been copied yet. Thus, it is unknown how many documents are on the servers or how long it will take to complete the above described process.

7. In addition to the overbreadth of the documents requested and the production problems raised by the recent conversion to Chapter 7 of the bankruptcy action, the subpoenas are also objectionable in that Defendants ask The FBR Entities produce the documents for inspection and copying at the offices of Simpson Thacher & Bartlett LLP in

New York, New York. The FBR Entities are based in South Florida where this action is pending. Due to the number of documents sought, it would be overly burdensome to produce the documents in New York. The FBR Entities have not been requested, and no not agree, to produce documents in New York or in any other foreign location purely for the convenience of Defendants' attorney.

8. With respect to non-party discovery, Florida law states that the court must

> "weigh factors such as relevance, the need of the party for the documents, the brea[d]th of the document request, the time period covered by the document requests and the particularity with which the documents are described against the burden imposed on a person ordered to produce the desired information. Courts must also consider the status of a witness as a non-party when determining the degree of the burden; the status of a person as a non-party is a factor often weighing against disclosure."

United Technologies Corp. v. Mazer, WL788877, S.D. Fla. Mach 14, 2007. The FBR Entities are not parties to this litigation. The breadth of the subpoenas themselves – at fifty-one items, each– and the breadth of each of the items requested[2] also weighs against disclosure. These factors, combined with the Trustee's plan for the servers which, upon information and belief, contain the vast majority of the documents requested, demonstrate that The FBR Entities would be subjected to an enormous burden should the subpoenas not be quashed.

9. In accordance with *S.D. Fla. L.R.* 7.1A.3(a), counsel for FBR has conferred

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[2] For example, item no. 26 asks for "[a]ll [d]ocuments [c]oncerning [y]our [c]ommunications with Fontainebleau relating to this [a]ction" and "[a]ll [d]ocuments [c]oncerning [c]ommunications with, to or from Turnberry West, or any general contractor concerning the Project."

with counsel for Defendants in an effort to resolve by agreement the issues raised in this Motion prior to filing same but counsel were unable to resolve same.

WHEREFORE, Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, respectfully request this Honorable Court enter an Order quashing the Subpoena dated May 4, 2010 consistent herewith.

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By: /s Sarah J. Springer
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 6, 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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-MD-GOLD/BANDSTRA

In Re: FOUNTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION,

MDL No. 2106

This document relates to all actions.
_____/

MDL ORDER NO. 27 DENYING MOTION TO QUASH

THIS CAUSE came before the Court on Fountainebleau Resorts, LLC, Fountainebleau Resorts Holdings, LLC and Fountainebleau Resorts Properties I, LLC's Motion to Quash Defendants' Subpoenas Dated May 4, 2010 (D.E. 93) filed on July 6, 2010. On July 8. 2010, this motion was referred to the undersigned by the Honorable Alan S. Gold for appropriate resolution pursuant to 28 U.S.C. § 636(b). Upon review of this motion, the response and reply thereto, the court file and applicable law, it is hereby

ORDERED AND ADJUDGED that Fountainebleau Resorts, LLC, Fountainebleau Resorts Holdings, LLC and Fountainebleau Resorts Properties I, LLC's (the "FBR Entities") Motion to Quash Defendants' Subpoenas Dated May 4, 2010 is DENIED, the Court finding that the FBR Entities have failed to meet its burden of demonstrating that compliance with the subject subpoenas would be unreasonable and oppressive. Specifically, the Court finds that Request Nos. 9 & 26 are neither overbroad nor unduly burdensome. As a further basis for denial of this motion, the Court finds that the FBR Entities failed to satisfy Local Rule 7.1 (A)(3) by not making a good faith effort to resolve the subject issues prior to filing the instant motion.

Accordingly, the FBR Entities shall comply with the subject subpoenas and complete

its document production on or before September 17, 2010.

DONE AND ORDERED in Chambers at Miami, Florida this 3rd day of August, 2010.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:
Honorable Alan S. Gold
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:09-md-02106-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 02106

This document relates to:

Case No. 1:09-cv-21879-ASG
_____/

CHAPTER 7 TRUSTEE'S NOTICE OF INTENTION WITH REGARD TO CASE NO. 1:09-cv-21879-ASG

Soneet R. Kapila, as Chapter 7 Trustee (the "Trustee") for Fontainebleau Las Vegas Holdings, LLC, *et al.*,[1] in compliance with the Court's directive given during the July 20, 2010 telephonic status conference conducted in this matter and the Court's *MDL Order Number 25; Granting Chapter Seven Trustee's Motion for Extension of Time [DE 96] in Part; Requiring Submission; Setting Telephone Status Conference* [D.E. # 111], hereby gives notice of his position with regard to the prosecution of Case No. 1:09-cv-21879-ASG, as follows:

1. Fontainebleau Las Vegas, LLC, individually and as successor by merger to Fontainebleau Las Vegas II, LLC ("Fontainebleau"), commenced an action against

[1] By Order entered in this action on July 15, 2010 (D.E. # 104), Soneet R. Kapila, the Chapter 7 Trustee for Fontainebleau Las Vegas Holdings, LLC, *et al.*, was substituted for Fontainebleau Las Vegas Holdings, LLC, *et al.*, the former Debtors in Possession under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

certain lenders (the "Revolver Banks") in the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court") by filing a complaint on June 9, 2009, and an amended complaint on June 10, 2009 (Adv. Proc. No. 09-ap-01621-AJC, Bankr. S.D. Fla.).

2. Fontainebleau's amended complaint asserts seven claims for relief, all of which arise out of the Revolver Banks' improper failure to fund, and subsequent purported termination of, their commitments under a June 6, 2007 credit agreement (the "Credit Agreement") relating to the development of the Fontainebleau Las Vegas resort and casino. Fontainebleau's amended complaint seeks relief against the Revolver Banks upon the following grounds:

(a) breach of contract based on the Revolver Banks' failure to fund a March 2, 2009 Notice of Borrowing (the "March 2 Notice") (Count I);

(b) breach of contract based on the Revolver Banks' improper April 20, 2009 termination of their revolving loan commitments under the Credit Agreement (Count II);

(c) breach of contract based on the Revolver Banks' failure to fund a subsequent April 21, 2009 Notice of Borrowing (the "April 21 Notice") (Count III);

(d) equitable estoppel (Count IV);

(e) breach of the implied covenant of good faith and fair dealing (Count V);

(f) intentional interference with contractual relations (Count VI); and

(g) turnover, pursuant to 11 U.S.C. § 542, of the funds that were subject to the March 2 Notice (Count VII).

3. On the same day that it filed its amended complaint, Fontainebleau moved for partial summary judgment as to Counts I and VII—*i.e*, its claim based on the March 2

Notice and its turnover claim. The substance of Fontainebleau's position in its summary judgment motion is that the Revolver Banks were obligated to honor the March 2 Notice because all explicit contractual conditions had been satisfied—including, in particular, the contractual requirement that certain term loans be "fully drawn," a requirement that was satisfied when Fontainebleau *requested* those loan proceeds, rather than later, when those proceeds were actually *funded*—and because the Credit Agreement required the Revolver Banks to honor the March 2 Notice regardless of the existence of any alleged defaults by Fontainebleau. Fontainebleau did not move for summary judgment on any of the other counts of the amended complaint.

4. On August 5, 2009, after Fontainebleau's summary judgment motion had been fully briefed and argued before the Bankruptcy Court, the District Court granted the Revolver Banks' motion to withdraw the reference from the Bankruptcy Court, commencing Case No. 1:09-cv-21879-ASG. The District Court then held additional oral argument on Fontainebleau's pending summary judgment motion. Thereafter, on August 26, 2009, the District Court issued an order (the "August 26 Order") denying the motion [Case No. 1:09-cv-21879-ASG, D.E. # 62], in which the Court ruled that—

(a) the "unambiguous meaning of the term 'fully drawn' is fully funded" as a matter of law;

(b) in the alternative, "[t]he term 'fully drawn' can reasonably be interpreted to mean 'fully funded,'" thus creating an issue of fact;

(c) regardless of the meaning of "fully drawn," there existed a genuine issue of material fact as to whether Fontainebleau was in default as of the date it submitted the March 2 Notice, which issue of fact the Court found precluded summary judgment; and

(d) Fontainebleau as a matter of law could not obtain a turnover of

property that is "in dispute."

5. Following the Court's ruling, Fontainebleau requested that the Court certify the August 26 Order for appeal pursuant to 28 U.S.C. § 1292(b) [Case No. 1:09-cv-21879-ASG, D.E. # 98]. The Court denied Fontainebleau's request on February 4, 2010 [Case No. 1:09-cv-21879-ASG, D.E. # 128].

6. There are presently pending two related actions filed by certain lenders (the "Term Lenders")—*ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 1:10-cv-20236-ASG (S.D. Fla.), and *Avenue CLO Fund, Ltd., et al. v. Sumitomo Mitsui Banking Corporation, et al.*, Case No. 1:09-cv-23835-ASG (S.D. Fla.)—in which the plaintiffs allege claims against the Revolver Banks nearly identical to the claims raised by Fontainebleau and arising from the same breaches of the Credit Agreement. The Term Lenders' actions and Fontainebleau's action were centralized in this Court as this instant multidistrict case for pretrial proceedings pursuant to an order issued by the United States Judicial Panel on Multidistrict Litigation. *In Re Fontainebleau Las Vegas Contract Litigation*, Case No. 1:09-md-02106-ASG (S.D. Fla.) [D.E. # 1].

7. Following centralization, the Revolver Banks moved to dismiss the complaints filed by the Term Lenders, relying heavily on the August 26 Order. On May 28, 2010, the Court granted the Revolver Banks' motions almost in their entirety, on grounds similar to those set forth in the August 26 Order [Amended MDL Order Number Eighteen] [D.E. # 80] (the "May 28 Order"). The Court found, first, that the Term Lenders did not have standing to enforce the Revolver Banks' obligations. The Court held in the alternative that the Revolver Banks had not breached the Credit Agreement by

rejecting the March 2 Notice—and that the Term Lenders had failed as a matter of law to state a claim for such breach—because "(1) 'fully drawn,' as used in Section 2.1(c)(iii) of the Credit Agreement, unambiguously means 'fully funded'; and (2) the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing."

8. The Trustee respectfully submits that the Court's August 26 Order, particularly in light of the Court's May 28 Order granting in part the Revolver Banks' motion to dismiss the related Term Lenders' actions, is claim- and case-dispositive with respect to Fontainebleau's claims arising out of the March 2 Notice (to which the Trustee succeeded upon the conversion of the Fontainebleau bankruptcy cases from cases under Chapter 11 to cases under Chapter 7 of the Bankruptcy Code). By finding as a matter of law that the "unambiguous meaning of the term 'fully drawn' is fully funded," the Court foreclosed recovery upon any of Fontainebleau's claims based on the Revolver Banks' failure to fund their obligations under the Credit Agreement arising out of the March 2 Notice. The Trustee therefore submits that further proceedings in this Court with respect to those causes of action would be futile and that litigating those claims to final judgment would constitute a wasteful and unproductive utilization of the Court's and the parties' time and resources.

9. The Trustee has not been able to settle Case No. 09-cv-21879-ASG.

10. The Trustee reports that he does not intend to pursue the claims (Counts I and VII) that have been fully decided by the Court's claim-dispositive August 26 Order

and that he will request that the Court enter judgment as to those claims.[2]

11. The Trustee also reports that, prior to seeking the entry of judgment on Counts I and VII, he intends to seek consent from all parties and/or leave of Court pursuant to Fed. R. Civ. P. 15(a) to withdraw Counts II through IV of the Amended Complaint. *See, e.g., Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189, 191 (2d Cir. 1984) (*per curiam*) ("[W]e see no reason why [plaintiff] should not be allowed to amend his complaint in order to delete all of his claims not already tried below as long as it is done with prejudice. . . . It is inconceivable that the district court would hold [plaintiff] to claims that he no longer wishes to press. After the amendment was granted, we would have jurisdiction of the appeal under 28 U.S.C. § 1291. . . ."). Counts V and VI having been previously withdrawn, without prejudice, by stipulation of the parties [D.E ## 65, 70], no further report is appropriate with respect to those counts.

12. Following the withdrawal of Counts II through IV, the Trustee will request that the Court, consistent with the case-dispositive nature of the August 26 Order, dismiss Fontainebleau's first and seventh claims (Counts I and VII)—the claim based on the March 2 Notice and the turnover claim—with prejudice. Following from the dismissal, the Trustee will request that the Court cause a final judgment to be entered against the Trustee in accordance with its dismissal order, from which the Trustee may appeal.

WHEREFORE, the Trustee respectfully submits the foregoing as his report and

[2] The United States Court of Appeals for the Eleventh Circuit has held that where, as here, an otherwise interlocutory order is case-dispositive, the Court may dismiss the case with prejudice and enter an appealable judgment against the plaintiff. *See, e.g., OFS Fitel, LLC v. Epstein*, 549 F.3d 1344, 1357-58 (11th Cir. 2008) ("[B]y basing its dismissal on that case-dispositive event, the district court effectively made that contested interlocutory expert exclusion order [an appealable] final order," as plaintiff "stands adverse to the resulting final judgment that was expressly based on the undisputed case-dispositive nature of the contested interlocutory ruling.").

notice of intention in compliance with the Court's directive given during the July 20, 2010 telephonic status conference conducted in this matter and the Court's MDL Order Number 25.

DATED: August 20, 2010.

Respectfully submitted,

/s/ Susan Heath Sharp

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 20th day of August, 2010, the foregoing ***Chapter 7 Trustee's Notice of Intention with Regard to Case No. 1:09-cv-21879-ASG*** was electronically filed with the Clerk of the Court using the Court's CM/ECF system, and true and correct copies of the Notice were served upon counsel of record or *pro se* parties identified on the attached Service List either via CM/ECF or, with respect to counsel and parties not authorized to receive electronic notices by CM/ECF, via United States Mail.

/s/ Susan Heath Sharp
Susan Heath Sharp (Florida Bar No. 716421)

11625-001.133.14

SERVICE LIST

In re Fontainebleau Las Vegas Holdings, LLC, *et al.*
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:09-md-02106-ASG

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.
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MDL ORDER NUMBER 28; REFERRING MOTION TO MAGISTRATE JUDGE

THIS CAUSE is before the Court upon the Term Lenders' Motion to Compel **[ECF No. 123]**. Pursuant to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules for the Southern District of Florida, this Motion **[ECF No. 123]** is hereby **REFERRED** to United States Magistrate Judge Jonathan Goodman to take all necessary and proper action as required by law.

DONE AND ORDERED in chambers at Miami, Florida, this 20th day of August, 2010.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
Magistrate Judge Chris M. McAliley
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

FONTAINEBLEAU RESORTS, LLC'S RESPONSE TO TERM LENDERS' MOTION TO COMPEL DATED AUGUST 19, 2010

Third Party, Fontainebleau Resorts, LLC ("FBR")[1], by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 45 and S.D.Fla. L.R. 7.1, hereby files and serves its response to Term Lenders'[2] Motion to Compel FBR to Produce Electronically Stored Information in Response to Subpoena, and states:

A. Background

1. FBR was served with the Term Lenders' subpoena on April 22, 2010 (the "Subpoena"). On May 12, 2010 undersigned counsel's firm was retained for the limited purpose of filing the Unopposed Motion for Extension of Time dated May 13, 2010. The Motion was granted.

2. Thereafter, undersigned's firm was retained to substantively respond to the Subpoena. FBR timely filed its Response to the Subpoena on August 3, 2010.

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[1] FBR is the parent company of the Debtors in the action titled *In re: Fontainebleau Las Vegas Holdings, LLC, et al.,* Case No. 09-21481-AJC (Bankr. S.D.Fla.).

[2] Term Lenders are 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.).

3. FBR explained in its Response to the Subpoena and to counsel for Term Lenders that there are three computer servers which are likely to contain information responsive to the Subpoena: (1) the document server, (2) the email server, and (3) the accounting server. All three servers were historically housed in Las Vegas and were used by multiple Fontainebleau-related entities. While FBR owns the servers (i.e. the hardware), FBR does not own all of the information on the servers (i.e. the stored, commingled data).

4. As a result of the commingled information on the servers – some of which is privileged – FBR entered into an oral agreement with each entity that has information on the servers and which oral agreement would be reduced to writing.[3] The oral agreement requires that each entity will thereafter be given a copy of the document server and the accounting server. Each entity will be given a certain amount of time to determine what information on the servers (i) belongs to them and (ii) is privileged. Thereafter, once any ownership disputes are resolved, each entity will undertake to produce all documents which belong to them.[4]

5. Despite the best efforts of all parties involved, the servers were not fully copied until August 20, 2010 and FBR did not receive its copy of the document server and the accounting server until August 24, 2010.

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[3] The oral agreement which governs production of documents from the servers is, upon information and belief, presently being drafted by the Trustee's counsel, Russell Blain. Undersigned counsel spoke with Trustee's counsel and was assured he would draft the agreement. However, three subsequent emails regarding when the agreement would be finished have gone unanswered.

[4] Undersigned counsel cannot give a time line for the proposed production of documents because the agreement had not yet been drafted.

6. In addition to the document and accounting servers, FBR now has a copy of the email server.[5] As the email server contains emails belonging to FBR and the debtor in the Fontainebleau Las Vegas bankruptcy action, the same oral agreement will govern document production therefrom.

B. Term Lenders' Motion to Compel

7. The Term Lenders filed a Motion to Compel against FBR on August 19, 2010. The Term Lenders set forth their version of what has occurred since FBR was served with the Subpoena. FBR will respond to each statement, in turn, below.

8. On May 4, 2010, undersigned advised that the Trustee was in physical control of the servers on which FBR documents were stored. At that point in time, because it was unclear which entity owned the servers, the Trustee had taken possession of copies of the document and accounting servers which were housed in the debtors' offices in Las Vegas. In addition, because undersigned counsel was not yet aware of how many servers existed and to which entity/entities the servers belonged, it was believed and understood that the Trustee had taken control of the servers.

9. On June 9, 2010, and then again on June 17, 2010, in a continuous effort to keep the Term Lenders informed of the various server "issues," undersigned wrote the Term Lenders explaining the servers' ownership and stating there was nothing FBR could presently do to produce documents from the servers because FBR did not own all of the commingled data.

10. On July 28, 2010, undersigned communicated with counsel for the Term Lenders and

[5] The email server that was once used by all three entities and which was historically housed in Las Vegas is now in the possession of Fontainebleau Florida Hotel, LLC. Fontainebleau Florida Hotel, LLC made a copy of the email server in May or June, 2010. That server is now in the possession of FBR.

explained that there were three servers which housed documents responsive to the Subpoena: an accounting server in the Las Vegas colocation facility; a document server in the Las Vegas colocation facility; and, an email server (formerly in the colocation facility but relocated to Miami in January, 2010). Undersigned explained, again, that while FBR owned the servers themselves, multiple entities owned the information on the servers. Undersigned counsel also explained that the accounting and document servers currently housed in the colocation facility were being remotely copied as part of the above-described oral agreement.

11. What has made these document production matters more complicated, and perhaps explains some of the mischaracterizations made by counsel for the Term Lenders in its Motion to Compel, is that copies of these servers were made at different times and by different entities. For example, in or around January, 2010, the Debtors made copies of the document and accounting servers. The Trustee took possession of these copies in May 2010.[6] In addition, Fontainebleau Florida Hotel, LLC made a copy of the email server in May or June 2010.

12. The Term Lenders claim that undersigned could not provide details on what steps have been taken to protect the data on the servers. However, undersigned explained to counsel for Term Lenders that information on the servers had not been and was not presently being deleted, destroyed or overwritten at any time.

C. Conclusion

13. Term Lenders have asked that the Court order FBR to produce all documents responsive to the Subpoena by September 17, 2010. While this would ordinarily be more than

[6] The Trustee is still in possession of these copies.

sufficient time to respond to a subpoena, due to the complexities caused by dealing with multiple parties (one of which is in bankruptcy) who have a stake in the document production at issue, FBR asks that the Court deny the Term Lenders' Motion to Compel and refer this matter to a General Magistrate to conduct an evidentiary hearing and to set reasonable time frames for FBR to produce documents responsive to the Subpoena.

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

I HEREBY CERTIFY that on August 25, 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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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/GOODMAN

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

NOTICE OF CALL-IN INFORMATION FOR TELEPHONIC HEARING ON TERM LENDERS' MOTION TO COMPEL FONTAINEBLEAU RESORTS, LLC TO PRODUCE ELECTRONICALLY STORED INFORMATION IN RESPONSE TO SUBPOENA

Plaintiffs in the cases captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-CV-23835-ASG (S.D. Fla.) and *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 10-CV-20236-ASG (S.D. Fla.) (the "Term Lenders"), hereby give notice to all parties of the following call-in information for the hearing on the Term Lenders' Motion To Compel Fontainebleau Resorts, LLC to Produce Electronically Stored Information in Response to Subpoena, set for August 30, 2010 at 2:30 p.m.:

Call-in Number: (800) 326-6981

Passcode: 669349

Respectfully submitted,

By: /s/ Lorenz Michel Prüss

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing NOTICE OF CALL-IN INFORMATION FOR TELEPHONIC HEARING ON TERM LENDERS' MOTION TO COMPEL FONTAINEBLEAU RESORTS, LLC TO PRODUCE ELECTRONICALLY STORED INFORMATION IN RESPONSE TO SUBPOENA 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: August 26, 2010

By: /s/ Lorenz Michel Prüss
Lorenz Michel Prüss

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-02106-MD-GOLD/GOODMAN

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
_____/

ORDER ON MOTION TO COMPEL

This matter is before the Court on the Term Lenders' motion to compel (DE# 123), filed August 19, 2010. The motion seeks an order compelling Fontainebleau Resorts, LCC to produce all documents, including those electronically stored, in response to a subpoena issued on April 22, 2010.

Fontainebleau has identified three computer servers likely to contain the information sought in the subpoena. All three servers are now in Fontainebleau's possession. Fontainebleau requests at least a month to screen the servers for responsive, non-privileged documents. This is because the documents of parties other than Fontainebleau, most notably those of the debtors in bankruptcy, are also found on the servers. During the hearing, Fontainebleau's counsel represented that just this day the bankruptcy trustee sent Fontainebleau's counsel an outline of an agreement on procedures to review the documents on these servers.

The Term Lenders argue that after four and a half months the Court should impose an expeditious and firm deadline so as not to interfere with the scheduling order entered by the Honorable Alan S. Gold. Judge Gold has twice extended discovery deadlines (See DE# 100, 111) and trial in this case is currently scheduled for February 13, 2010 (DE# 76). The Term Lenders seek an order requiring Fontainebleau to produce the relevant documents by September 17, 2010, if not earlier.

The Court has reviewed the motion and response thereto, held a hearing on the motion on August 30, 2010, and is otherwise duly advised. In light of the extended pendency of this subpoena and in order to accommodate Judge Gold's trial setting order, it is hereby ordered that:

1. The Term Lenders' motion to compel (DE# 123) is GRANTED.

2. Fontainebleau shall produce all non-privileged documents subject to the subpoena on or before **September 13, 2010.**

3. Fontainebleau shall provide the Term Lenders with a privilege log on or before **September 20, 2010.**

DONE AND ORDERED in Chambers, at Miami, Florida, this 30th Day of August, 2010.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MAGISTRATE JUDGE JONATHAN GOODMAN
Courtroom No. 4

CIVIL MINUTES

DATE: 8/30/10 TIME: Begin 2:30 p.m. End: 3:40 p.m.

Case Style: ***Fontainbleau Las Vegas Contract Litigation***

Case No.: 09-2106-MD-Gold

Counsel:

Appeared in person : Sarah Springer, Esq.

Appeared telephonically:

Kirk Dillman, Esq. and Steven J. Nachtwey, Esq., Daniel L. Cantor, Esq., Bonnie Chamil, Esq., Steven S. Fitzgerald, Esq., Steven C. Chin, Esq., Jason I. Kirschner, Esq., and Steve Busey, Esq.

PROCEEDING:

Telephonic hearing on Motion to Compel Production of Documents in Response to Subpoena DE # [123]

RESULT OF HEARING:

Telephonic hearing held on Defendant's Motion to Compel Production of Documents. Counsel for Fontainbleau Las Vegas, Sarah Springer, addressed the Court and discussed various issues on matters regarding production of documents and time needed to review electronic discovery for privileged material obtained from three separate servers. Counsel also advised the Court that discovery review for the email server could take approximately 30 days and review of the document and account server take longer. Attorney Kirk Dillman addressed the Court and made rebuttal argument in support of their position and requested discovery responses with regard to the account server within 1 week and requested responses from the document server in 2 to 3 weeks in an effort not to interfere with the scheduling order in this matter. Attorney Steven J. Nachtwey addressed the Court and argued his position.

The Court took matter under advisement.

TAPE No: 10-JG-3 and 4 INTERPRETER: None

DAR No.: 14:33:53 and 14:58:41 COURT REPORTER: None

DEPUTY CLERK: **Michael A. Santorufo**

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to Case No:

10-CV-20236-ASG.

AURELIUS PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT

Plaintiffs ACP Master, Ltd., and Aurelius Capital Master, Ltd. (together, "Plaintiffs") filed the Amended Complaint in this case on January 15, 2010. Since then, Plaintiffs have acquired additional debt of Fontainebleau Las Vegas, LLC and have identified additional predecessors-in-interest. Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiffs seek leave to file a Second Amended Complaint (attached hereto as Exhibit A) that identifies Plaintiffs' additional predecessors.

Plaintiffs have conferred with Bank of America, N.A., the lone remaining defendant, regarding this proposed amendment.[1] By letter of August 25, 2010, counsel for Bank of America, N.A., consented to Plaintiffs' proposed amendment. (Bank of America's consent is attached hereto as Exhibit B.)

In light of Bank of America's consent, Plaintiffs seek leave to file their Second Amended Complaint, attached hereto as Exhibit A.

---

[1] This Court dismissed Plaintiffs' claims against all other Defendants by its Order dated May 28, 2010.

DATED: September 13, 2010

Respectfully submitted,

By: _/s/ Brett M. Amron_____
Brett M. Amron, Esq.
Florida Bar No. 148342

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Attorneys for Plaintiffs ACP Master, Ltd. and Aurelius Capital Master, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Court's CM/ECF, where available, U.S. Mail and Email on this the 13th day of September, 2010 to:

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/s/ *Brett M. Amron*
Brett M. Amron

Exhibit A

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to Case No:

10-CV-20236-ASG.

SECOND AMENDED COMPLAINT

1. This action seeks to redress wrongs done by Defendants to predecessors-in-interest of ACP Master, Ltd. and Aurelius Capital Master, Ltd. ("Aurelius" or "Plaintiffs").

2. In March 2007, a group of investment bankers, including affiliates of Defendants (defined below), contacted Plaintiffs' predecessors-in-interest to participate in financing the development and construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada ("the Project"). The Project was to consist of a sixty-three story glass skyscraper featuring over 3,800 guest rooms, suites and condominium units; a 100-foot-high, three-level podium complex housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater and rooftop pools; a 353,000 square-foot convention center; a high-end retail space including shops and restaurants; and a nightclub.

3. In June 2007, Plaintiffs' predecessors-in-interest and Defendants entered into the Credit Agreement ("Credit Agreement") to provide funds for the Project.

4. The borrowers under the Credit Agreement were Fontainebleau Las Vegas LLC and Fontainebleau Las Vegas II, LLC (the "Borrowers").

5. The Credit Agreement covered three kinds of loans to build the Project:[1] (a) a $700 million initial term loan facility (the "Initial Term Loan"); (b) a $350 million delay draw term facility (the "Delay Draw Loan"); and (c) an $800 million revolving loan facility (the "Revolving Loan"). The lenders are referred to below at times as "Initial Term Loan Lenders," "Delay Draw Loan Lenders," and "Revolving Loan Lenders," respectively.

6. Plaintiffs bring this action against Defendants because, to the detriment of Plaintiffs' predecessors-in-interest, Defendants refused to fund the Revolving Loan when the Credit Agreement required them to do so.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this civil action pursuant to 12 U.S.C. § 632 because Defendants Bank of America, N.A., JPMorgan Chase Bank, N.A., and MB Financial Bank, N.A. are national banking associations organized under the laws of the United States and the action arises out of transactions involving international or foreign banking or other international or foreign financial operations, within the meaning of 12 U.S.C. § 632.

8. Venue is proper in the United States District Court for the Southern District of New York because a substantial number of the Defendants reside in New York and transactions at issue occurred in this District.

THE PARTIES

The Plaintiffs

9. Plaintiff ACP Master, Ltd. is a Cayman Islands exempt company with no place of business in the United States and with its principal place of business in the Cayman Islands.

[1] Certain other loans were available only after the casino and hotel opened for business.

Plaintiff Aurelius Capital Master, Ltd. is a Cayman Islands exempt company with no place of business in the United States and with its principal place of business in the Cayman Islands.

10. Plaintiffs ACP Master, Ltd. and/or Aurelius Capital Master, Ltd. is the successor-in-interest to the following Initial Term Loan Lenders and/or Delay Draw Loan Lenders: Aberdeen Loan Funding, Ltd.; Airlie CLO 2006-Ltd.; Airlie CLO 2006-II Ltd.; American Express Company Retirement Plan by RiverSource Investments, LLC; Ameriprise Financial Retirement Plan by RiverSource Investments, LLC; Armstrong Loan Funding, LTD.; Artus Loan Fund 2007-I, Ltd.; Babson CLO Ltd. 2004-I; Babson CLO Ltd. 2004-II; Babson CLO Ltd. 2005-I; Babson CLO Ltd. 2005-II; Babson CLO Ltd. 2005-III; Babson CLO Ltd. 2006-I; Babson CLO Ltd. 2006-II; Babson CLO Ltd. 2007-I; Babson Loan Opportunity CLO, Ltd. (f/k/a Babson-Jefferies Loan Opportunity CLO, Ltd.); Carlyle High Yield Partners 2008-1, Ltd.; Carlyle Loan Investment Ltd.; Carlyle High Yield Partners VI, Ltd.; Carlyle High Yield Partners VII, Ltd.; Carlyle High Yield Partners VIII, Ltd; Carlyle High Yield Partners IX, Ltd.; Carlyle High Yield Partners X, Ltd.; Caspian Capital Partners, L.P.; Caspian Select Credit Master Fund, Ltd.; C.M. Life Insurance Company; Duane Street CLO I, Ltd.; Duane Street CLO II, Ltd.; Duane Street CLO IV, Ltd.; Emerald Orchard Limited; Encore Fund, L.P.; (FCT) First Trust/Four Corners Senior Floating Rate Income Fund II; Fidelity Central Investment Portfolios LLC: Fidelity Floating Rate Central Investment Portfolio; Flariton Funding; Fortissimo Fund; Four Corners CLO 2005-1, Ltd.; Four Corners CLO II, Ltd.; Gleneagles CLO, Ltd.; Grand Central Asset Trust Cameron I Series; Grayson CLO, Ltd.; Greenbriar CLO, Ltd.; Halcyon Loan Investors CLO I, Ltd.; Halcyon Loan Investors CLO II, Ltd.; Halcyon Structured Asset Management CLO I Ltd.; Halcyon Structured Asset Management Long Secured/Short Unsecured CLO 2006-1 Ltd.; Halcyon Structured Asset Management Long Secured Short Unsecured 2007-1 Ltd. (f/k/a

Halcyon Structured Asset Management Long Secured/Short Unsecured CLO II Ltd.); Halcyon Structured Asset Management Long Secured/Short Unsecured 2007-2 Ltd.; Halcyon Structured Asset Management Long Secured/Short Unsecured 2007-3 Ltd. (f/k/a Halcyon Structured Asset Management Long Secured/Short Unsecured CLO III Ltd.); Halcyon Structured Asset Management CLO 2008-II B.V.; Highland Credit Opportunities CDO, Ltd.; Illinois Lake Clark Spiret Loan Trust; Jay Street Market Value CLO I, Ltd.; Jasper CLO, Ltd.; Jefferies Finance CP Funding LLC; JFIN CLO 2007 Ltd.; LFSIGXG LLC; LL Victory Funding LLC; Loan Funding IV LLC; Loan Star State Trust; Longhorn Credit Funding, LLC; Mariner LDC; Mariner Opportunities Fund, LP; Marlborough Street CLO, Ltd.; Massachusetts Mutual Life Insurance Company; Pequot Credit Opportunities Fund, L.P.; Primus CLO II, Ltd; Pyramis Floating Rate High Income Commingled Pool; Red River CLO, Ltd.; RiverSource High Yield Bond Fund, a series of RiverSource High Yield Income Series, Inc.; RiverSource Income Opportunities Fund, a series of RiverSource Bond Series, Inc.; RiverSource Variable Portfolio – High Yield Bond Fund, a series of RiverSource Variable Portfolio Income Series, Inc., now known as RiverSource Variable Portfolio – High Yield Bond Fund, a series of RiverSource Variable Series Trust; RiverSource Variable Portfolio – Income Opportunities Fund, a series of RiverSource variable Series Trust; Rockwall CDO II, Ltd.; Sapphire Valley CDO I, Ltd.; SF-3 Segregated Portfolio, a segregated portfolio of Shiprock Finance, SPC, for which Shiprock Finance, SPC is acting on behalf of and for the account of SF-3 Segregated Portfolio; Stratford CLO, Ltd.; Southfork CLO, Ltd.; Symphony CLO I, LTD. Symphony CLO II, LTD.; Symphony CLO III, LTD.; Symphony CLO IV, LTD.; Symphony CLO V, LTD; and The Bank of Nova Scotia.

The Defendants

11. Defendant Bank of America, N.A. ("BofA") is a nationally chartered bank with its main office in Charlotte, North Carolina. Under the Credit Agreement and other Loan Documents, BofA acted in several capacities, including as a Revolving Loan Lender, Administrative Agent and Disbursement Agent. BofA committed to fund $100 million under the Revolving Loan.

12. Defendant Merrill Lynch Capital Corporation is a Delaware corporation with its principal place of business in New York. Merrill Lynch Capital Corporation committed to fund $100 million under the Revolving Loan.

13. Defendant JPMorgan Chase Bank, N.A. is a nationally chartered bank with its main office in Columbus, Ohio. JPMorgan Chase Bank, N.A. committed to fund $90 million under the Revolving Loan.

14. Defendant Barclays Bank PLC is a public limited company in the United Kingdom with its principal place of business in London, England. Barclays Bank PLC committed to fund $100 million under the Revolving Loan.

15. Defendant Deutsche Bank Trust Company Americas is a New York State-chartered bank with its principal office in New York, New York. Deutsche Bank Trust Company Americas committed to fund $80 million under the Revolving Loan.

16. Defendant The Royal Bank of Scotland PLC is a banking association organized under the laws of the United Kingdom with a branch in New York, New York. The Royal Bank of Scotland PLC committed to fund $90 million under the Revolving Loan.

17. Defendant Sumitomo Mitsui Banking Corporation is a Japanese corporation with offices in New York, New York. Sumitomo Mitsui Banking Corporation committed to fund $90 million under the Revolving Loan.

18. Defendant Bank of Scotland is chartered under the laws of Scotland, with its principal place of business in Edinburgh, Scotland. Bank of Scotland committed to fund $72.5 million under the Revolving Loan.

19. Defendant HSH Nordbank AG is a German banking corporation with a branch in New York, New York. HSH Nordbank AG committed to fund $40 million under the Revolving Loan.

20. Defendant MB Financial Bank, N.A. is a nationally chartered bank with its main office in Chicago, Illinois. MB Financial Bank, N.A. committed to fund $7.5 million under the Revolving Loan.

21. Defendant Camulos Master Fund, L.P. is a Delaware corporation with its principal place of business in Stamford, Connecticut. Camulos Master Fund L.P. committed to fund $20 million under the Revolving Loan.

22. All of the above Defendants are referred to below collectively as the "Defendants."

NATURE OF THE ACTION

The Structure of the Credit Agreement

23. The Credit Agreement among the Borrowers, Defendants, Plaintiffs' predecessors-in-interest, and others was entered into on June 6, 2007.

24. The Credit Agreement provided for Initial Term Loans of $700 million (all of which was funded in June 2007), Delay Draw Loans of $350 million, and Revolving Loans of $800 million.

25. Plaintiffs' predecessors-in-interest are each lenders under either the Initial Term Loan, the Delay Draw Loan, or both.

26. Defendants all are lenders under the Revolving Loan.

27. In addition to being a lender under the Revolving Loan, Defendant BofA acted as Administrative Agent to all of the lenders under the Credit Agreement and as Disbursement Agent to all of the lenders under the Master Disbursement Agreement ("Disbursement Agreement"), which was signed simultaneously and in connection with the Credit Agreement to control how loan proceeds were spent on the Project.

28. The purpose of the Credit Agreement was to make funds available for the construction of the Project.

29. The loans available under the Credit Agreement were the principal source of construction financing for the Project and were intended to be virtually the only source of construction financing remaining after junior sources of construction financing (equity and second mortgage bonds) were utilized, as was the case before March 2009.

30. The purpose of the Credit Agreement was to provide for the constant availability of funds so long as the terms and conditions of the Credit Agreement were met, because all Lenders would suffer if Project construction came to a halt and, as a result, their collateral value was destroyed.

31. Any amounts outstanding under the Initial Term Loan, the Delay Draw Loan and the Revolving Loan benefit from equal and ratable collateralization by mortgages on the real property comprising the Project and by security interests on all personal property of the Borrowers, including all loan proceeds not yet spent.

32. The Credit Agreement sets forth two kinds of Revolving Loan: (1) "Direct Loans" and (2) "Disbursement Agreement Loans." Disbursement Agreement loans are loans made prior to the "Opening Date," which effectively is the date when the hotel and casino are open for business. The Revolving Loans at issue here are Disbursement Agreement loans, so references below to Revolving Loans are to those that are also Disbursement Agreement loans.

33. Disbursement Agreement borrowings under the Credit Agreement occur in two steps. First, the Borrowers must submit to the Administrative Agent (*i.e.*, BofA) a Notice of Borrowing specifying the amount of committed but unfunded loans it wishes to receive and the designated borrowing date. Such a Notice of Borrowing could be submitted only once per calendar month. The Credit Agreement contemplates a Notice of Borrowing drawing both the Delay Draw Loan and the Revolving Loan at the same date. For example, section 2.4(b) contemplates the Administrative Agent receiving a single Notice of Borrowing that obligates it to "promptly notify each Delay Draw Lender **and/or** Revolving Lender, as appropriate" (emphasis added).

34. Section 2.1(c) states: "The making of Revolving Loans which are Disbursement Agreement Loans to the Bank Proceeds Account shall be subject **only** to the fulfillment of the applicable conditions set forth in Section 5.2, and shall thereafter be disbursed from the Bank Proceeds Account subject only to the conditions set forth in Section 3.3 of the Disbursement Agreement" (emphasis in original).

35. Section 5.2 of the Credit Agreement states:

> Conditions to Extensions of Credit controlled by Disbursement Agreement.
>
> > The agreement of each Lender to make Disbursement Agreement Loans and to issue Letters of Credit for the payment of Project Costs pursuant to Section 3.4 of the Disbursement Agreement, is subject only to the satisfaction of the following conditions precedent:
> >
> > (a) Notice of Borrowing. Borrowers shall have submitted a Notice of Borrowing specifying the amount and Type of the Loans requested, and the making thereof shall be in compliance with the applicable provisions of Section 2 of this Agreement.
> >
> > (b) Letters of Credit. In the case of Letters of Credit, the procedures set forth in Section 3.4 of the Disbursement Agreement shall have been complied with.
> >
> > (c) Drawdown Frequency. Except for Loans made pursuant to Section 3 with respect to Reimbursement Obligations, Loans made pursuant to this Section

> shall be made no more frequently than once every calendar month unless the Administrative Agent otherwise consents in its sole discretion.

36. The Administrative Agent must promptly notify the lenders of the Notice of Borrowing. Once notified, each lender must make its pro-rata share of the requested loans available to the Administrative Agent prior to 10:00 a.m. on the designated borrowing date. The Administrative Agent, "[u]pon satisfaction or waiver of the applicable conditions precedent," transfers the funds (except Delay Draw Loan proceeds used to pay off outstanding balances under the Revolving Loan pursuant to section 2.1(b)(iii) of the Credit Agreement) into a "Bank Proceeds Account," which is essentially a holding account for the loaned funds. As Section 5.2 makes clear, the funding of this first step is not conditioned on representations and warranties or absence of Events of Default.

37. Second, the Borrowers must submit an advance request (the "Advance Request") to secure disbursements from the Bank Proceeds Account under the Disbursement Agreement. It is at this second step that Section 3.3 of the Disbursement Agreement – referred to above by Section 2.1(c)'s requirements for Disbursement Agreement Loans – conditions the disbursement on the protections afforded by the representations and warranties and absence of default. Article 3.3 of the Disbursement Agreement sets forth the conditions precedent to Advances by the Disbursement Agent, BofA, including no misrepresentations under the Credit Agreement, no continuing Events of Default or Defaults, and that the Bank Agent was not aware of any adverse information that may affect the Project. Pursuant to Article 2.5.1, BofA was required to stop funding Advance Requests and issue a Stop Funding Notice (*i.e.*, requests by the Borrower to disburse amounts from the Bank Proceeds Account) if "conditions precedent to an Advance ha[d] not been satisfied…." Once a Stop-Fund Notice was issued, no disbursements could be made from the accounts subject to the Disbursement Agreement

38. Each requested round of Delay Draw Loan was required to be in a minimum amount of $150 million. This meant that either all $350 million of Delay Draw Loans could be

requested at once, or the Delay Draw Loans would be requested in two rounds, the first between $150 million and $200 million and the second for the balance. Once Delay Draw Loans were repaid, they could not be re-borrowed.

39. In contrast, each round of Revolving Loans could be requested in a minimum amount of $5,000,000. This afforded the Borrowers the flexibility to make monthly borrowings of less than the $150 million minimum denomination applicable to Delay Draw Loans. When Delay Draw Loans were made, the Borrowers were required to use the proceeds first to pay down any outstanding Revolving Loans before using them to meet other needs, such as the costs of the Project. Revolving Loans could be repaid and re-borrowed.

40. Consistent with this, Section 2.1(c)(iii) of the Credit Agreement states that "unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000."

41. The Credit Agreement allows the Borrowers simultaneously to request the remaining Delay Draw Loans and new Revolving Loans.

42. Absent this right, there could be months where the Borrowers would have no funds available to meet current expenditures on the Project, which could be disastrous for the Borrowers, the Lenders and the construction companies working on the Project.

43. To illustrate, suppose that the Borrowers received $200 million in the first round of Delay Draw Loan borrowing, then received two rounds of Revolving Loans totaling $150 million, and used that money in project construction. Suppose the Borrowers thereafter need an additional $170 million to meet the current month's construction expenses. If the Borrowers only receive the remaining $150 million of Delay Draw Loans, all of those funds would be used to repay the $150 million of Revolving Loans. Thus, the Borrowers would be left without funds to pay their construction vendors unless the Borrowers could also request $170 million of new Revolving Loans at the same time they request $150 million of new Delay Draw Loans. If the

Borrowers could not request both the Delay Draw Loans and the Revolving Loans at the same time, the Borrowers would be without funds to meet their expenses for another month, when they could request the next round of Revolving Loans.

The Defendants' Wrongful Refusal to Fund

44. On March 2, 2009, the Borrowers issued a Notice of Borrowing drawing the entire amount available under the Delay Draw Loan and the remaining amount available under the Revolving Loan (the "March 2 Notice").

NOTICE OF BORROWING

March 2, 2009

Bank of America, N.A.,
as Administrative Agent
Mail Code: TX1-492-14-11
Bank of America Plaza
901 Main St.
Dallas, TX 75202-3714
Attention: Donna F. Kimbrough

Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC

Ladies and Gentlemen:

Pursuant to Section 2.4 of that certain Credit Agreement, dated as of June 6, 2007 (as amended, supplemented, replaced or otherwise modified from time to time, the "Credit Agreement"; capitalized terms used but not defined herein shall have the meanings given to them in the Credit Agreement or if not set forth therein the meanings given to them in the Disbursement Agreement, or, to the extent the Disbursement Agreement is then not in effect, the Disbursement Agreement as of the last day of its effectiveness), among Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, the "Borrowers"), each lender from time to time party thereto and Bank of America, N.A., as administrative agent (the "Administrative Agent"), the Borrowers hereby give the Administrative Agent irrevocable notice that the Borrowers hereby request a Loan under the Credit Agreement, and in that connection set forth below the information relating to such Loan:

1. The Banking Day of the proposed Loan is March 3, 2009 (the "Borrowing Date").

2. The proposed Loan is a Disbursement Agreement Loan.

3. The proposed Loan is a Delay Draw Loan and a Revolving Loan.The Type of the proposed Loan is a Base Rate Loan.

4. The aggregate amount of the proposed Delay Draw Loan is $350,000,000, and the aggregate amount of the proposed Revolving Loan is $670,000,000.

The Borrowers agree that, if prior to the Borrowing Date any of the foregoing certifications shall cease to be true and correct, the Borrowers shall forthwith notify the Administrative Agent thereof in writing (any such notice, a "Non-Compliance Notice"). Except to the extent, if any, that prior to the Borrowing Date, the Borrowers shall deliver a Non-Compliance Notice to the Administrative Agent, each of the foregoing certifications shall be deemed to be made additionally on the Borrowing Date as if made on such date.

The undersigned is executing this Notice of Borrowing not in an individual capacity, but in the undersigned's capacity as a Responsible Officer of the Borrowers.

1

45. Approximately $68 million of Revolving Loans had previously been funded pursuant to prior Notices of Borrowing and remained outstanding on March 2, 2009.

46. If the March 2 Notice (as corrected by the March 3 Notice described below) had been honored by the Lenders, (a) the $68 million of previously outstanding Revolving Loans would have been fully repaid out of the proceeds of the Delay Draw Loan, (b) a new and much larger Revolving Loan would have been made concurrently with the Delay Draw Loan, and (c) the amounts funded by the Delay Draw Loan (less the portion used to repay previously outstanding Revolving Loans) and by the new Revolving Loan would have been placed in the Bank Proceeds Account, where they would have been subject to the liens of all Lenders under the Credit Agreement unless and until released to pay the costs of constructing the Project (which was also subject to the liens of all Lenders).

47. BofA submitted the March 2 Notice to Revolving Loan Lenders and the Delay Draw Lenders, and several of the Delay Draw Loan Lenders began to fund.

48. At 5:30 p.m. Eastern Time on March 2, 2009, BofA led a conference call among certain lenders to discuss the Notice of Borrowing.

49. BofA hosted a follow-up conference call at 8:00 a.m. Eastern Time the next morning, March 3, 2009.

50. On March 3, 2009, BofA, as the Administrative Agent, sent a letter (the "March 3 Agent Letter") to the Borrowers stating that it would not process the March 2 Notice.

51. The Administrative Agent claimed that the March 2 Notice did not comply with the provisions of Section 2.1(c)(iii) of the Credit Agreement, the provision discussed above which states that "unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000."

Bank of America

March 3, 2009

Via Electronic Mail

Jim Freeman, Senior Vice President and Chief Financial Officer
Fontainebleau Resorts LLC
Fontainebleau Las Vegas, LLC
2827 Paradise Road
Las Vegas, NV 89109
jfreeman@fontainebleau.com

Re: Credit Agreement dated as of June 6, 2007 among Fontainebleau Las Vegas, LLC (the "Company"), Fontainebleau Las Vegas II, LLC, the Lenders, and Bank of America, N.A., as Administrative Agent

Dear Jim:

We are in receipt of the Loan Notice which the Company submitted yesterday under the Credit Agreement described above, which requests a Delay Draw Term Loan in the amount of $350,000,000 and a Revolving Loan of $670,000,000.

The Loan Notice which you submitted does not comply with the provisions of Section 2.1(c) of the Credit Agreement, which states that:

"(iii) unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000."

Accordingly, we have notified the Lenders that we will not be processing this Loan Notice. Please contact Brian Corum or me if you have any questions regarding this letter.

Very truly yours,

BANK OF AMERICA, N.A, as Administrative Agent

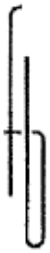
By: Ronaldo Naval
Ronaldo Naval, Vice President

52. The Administrative Agent unilaterally returned funds to those Lenders that had funded the March 2 Notice.

53. Other Delay Draw Loan Lenders relied on BofA's incorrect advice in refusing to fund pursuant to the March 2 Notice and March 3 Notice.

54. On March 3, 2009, the Borrowers replied to the Administrative Agent by letter (the "March 3 Borrower Letter") advising that the March 3 Agent Letter was in error and urging the Administrative Agent to reconsider.

55. The March 3 Borrower Letter explained that the Credit Agreement does not prevent the Borrowers from requesting the full amount of the Delay Draw Loan and Revolving Loan pursuant to one Notice of Borrowing.



FONTAINEBLEAU RESORTS, LLC

702 495 8100
2827 PARADISE ROAD
LAS VEGAS NV 89109

FONTAINEBLEAU.COM

March 3, 2009

VIA ELECTRONIC MAIL

Bank of America, N.A.,
as Administrative Agent
Agency Management
901 Main Street
Mail Code TX1-492-14-11
Dallas, TX 75202
Attn: Ronaldo Naval, Vice President

RE: CREDIT AGREEMENT DATED AS OF JUNE 6, 2007 AMONG FONTAINEBLEAU LAS VEGAS, LLC, FONTAINEBLEAU LAS VEGAS II, LLC, THE LENDERS PARTY THERETO AND BANK OF AMERICA, N.A., AS ADMINISTRATIVE AGENT

Dear Ron:

We are in receipt of your letter of March 3, 2009, in which Bank of America incorrectly declined to process the Notice of Borrowing we submitted yesterday[1]. We are legally entitled to have these monies deposited into the Bank Proceeds Account, in which we have a beneficial interest.

Your letter states that you will not process the Notice of Borrowing based upon an erroneous position that the Notice of Borrowing does not comply with Section 2.1(c)(iii) of the Credit Agreement. We believe that your reading of that section is contrary to the plain language of the Credit Agreement and related Loan Documents. For that reason, we urge you to reconsider your position.

The Notice of Borrowing, by its own terms, satisfies the requirements of Section 2.1(c)(iii). Specifically, at the time that Revolving Loans in excess of $150 million will be outstanding, the Delay Draw Commitments will have been fully drawn in compliance with this provision.

To be clear, Section 2.1(c)(iii) does not require the Delay Draw Term Loan Commitment to have been ***funded prior*** to drawing down the Revolving Loans; instead, this provision restricts the ***outstanding*** amount of the Revolving Loans ***unless*** the Total Delay Draw Commitments have

been ***fully drawn***. By fully drawing on the Delay Draw Commitments at the same time as we requested the borrowing under the Revolving Commitments, we met this requirement.

Accordingly, the Notice of Borrowing we submitted yesterday satisfied the requirements of the Credit Agreement and should have been processed and funded today. Your failure to have done so constitutes a breach of the Credit Agreement, resulting in substantial harm to the Loan Parties. We expect the Lenders to honor their obligations and fund their loans pursuant to the corrected Notice of Borrowing without further delay.

Nothing herein is intended to waive any of our rights and/or remedies, both at law or in equity, all of which we expressly reserve.

Very truly yours,

Fontainebleau Las Vegas, LLC

Name: Jim Freeman
Title: Sr. Vice President and Chief Financial Officer

cc: Brian Corum

56. The Borrowers also submitted an amended Notice of Borrowing ("March 3 Notice") to correct a calculation error specifying that the amount sought was actually $656.52 million.

[1] The Notice of Borrowing submitted on March 2, 2009, contained a scriveners' error such that the amount of Borrowing sought under the Revolving Commitments was represented to be $670 million. The actual amount intended to be drawn upon is $656,522,698, in respect of $13,477,302 of Letters of Credit outstanding. We attach hereto a corrected Notice of Borrowing reflecting the appropriate amount.

57. On March 4, 2009, BofA posted on Intralinks (an on-line platform for the auditable exchange of information among syndicated loan participants) a message available to the lenders noting that BofA had not changed its position and that, in its view, the Notice of Borrowing did not comply with the terms of the Credit Agreement.

58. In fact, the March 2 Notice and the March 3 Notice were effective in fully drawing both the Delay Draw Loan and the Revolving Loan. Contrary to BofA's position and advice to the Delay Draw Loan Lenders, the March 2 Notice and the substituted March 3 Notice were valid and enforceable draws on both the Delay Draw Loan and the Revolving Loan. The Borrowers had satisfied Section 2.1(c)(iii) by submitting the March 2 Notice since, by virtue of the March 2 Notice the Borrowers had fully drawn the Delay Draw Loan, and, as a consequence of that full draw, Revolving Loans in excess of $150 million could be outstanding. Within the meaning of the Credit Agreement and generally, a commitment is "drawn" when a request for payment is presented (here, a Notice of Borrowing).

59. In correspondence dated March 23, 2009, BofA, contradicted its own interpretation of Section 2.1(c)(iii), agreeing with the interpretation stated immediately above—namely, that the Delay Draw facility was "fully drawn" when the entire amount was requested, but before it was fully *funded*. Despite the fact that the Delay Draw Term Loans were never fully funded, BofA, acting as Disbursement Agent, wrote to the lenders that the Borrowers could request Revolving Loans in excess of $150 million:

> There's a divergence in opinions as to the reading of 2.1(c)(iii) of the Credit Agreement. Bank of America's position is that *since the borrower has requested all of the Delay Draw Term Loans*, and almost all of the loans have funded (whether or not the outstanding $21,666,667 is ultimately received), Section 2.1(c)(iii) now permits the Borrower to request Revolving Loans which result in the aggregate amount outstanding under the Revolving Commitments being in excess of $150,000,000 (emphasis added).

60. In its letter dated March 23, 2009, BofA also stated it was working to clarify the so-called "In Balance Test." The In Balance Test, satisfaction of which is a prerequisite to the Disbursement Agent's remitting funds from the Bank Proceeds Account, is defined in the Disbursement Agreement (and thereby in the Credit Agreement) to mean that, "at the time of calculation and after giving effect to any requested Advance, Available Funds equal or exceed the Remaining Costs." (Disbursement Agreement, Ex. A at 15). The In Balance Test is

"satisfied," according to this definition, "when Available Funds equal or exceed Remaining Costs." (*Id.*) "Available Funds" is defined, in turn, to include "as of each date of determination, the sum of: . . . (viii) the Bank Revolving Availability *minus* $40,000,000 . . . ." (*See id.* at 3) The Disbursement Agreement defines "Bank Revolving Availability" to mean "as of each date of determination, the aggregate principal amount *available to be drawn on that date* under the Bank Revolving Facility." (*See id.* at 4) (emphasis added).

61. In calculating the In Balance Test on March 23, 2009, BofA concluded that Revolver Availability could now exceed $150 million and that that amount could be reflected in Available Funds because the Delay Draw Term Loans had been fully requested and almost all of the loans had funded. Following BofA's logic, before March 23, 2009, the Revolver Availability for purposes of calculating the In Balance Test should not have exceeded $150 million.

62. In fact, however, and contrary to BofA's position on March 3, 2009, BofA consistently had determined in every month prior to March 2009 that the Revolver Availability for purposes of calculating the In Balance Test was between $682 million and $760 million, not $150 million. In other words, BofA consistently had determined that the available amount of Revolver Loans to be "drawn on that date" was between $682 and $760 million. Had BofA not calculated the Bank Revolver Availability to be between $682 million and $760 million, Fontainebleau would not have satisfied the In Balance Test for most months for which a disbursement was requested. BofA's position that on March 3, 2009 there was no "Revolver Availability" in excess of $150 million was flatly inconsistent with its acceptance of the Borrower's understanding of the In Balance Test in every month up to that date.

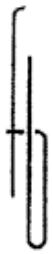
63. BofA's refusals to process the March 2 Notice and March 3 Notice because, as BofA claimed, the notices were inconsistent with Section 2.1(c)(iii) of the Credit Agreement did not reflect BofA's true interpretation of Section 2.1(c)(iii) of the Credit Agreement. BofA's true interpretation of Section 2.1(c)(iii) of the Credit Agreement was evidenced by BofA's

calculation of the In Balance Test and BofA's own admissions in its March 23, 2009 correspondence with Borrowers. BofA's refusals to process the March 2 Notice and March 3 Notice were willful misconduct, grossly negligent, and in bad faith.

The Delay Draw Loan Lenders Cure Their Breach, But The Revolving Loan Lenders Do Not

64. On March 6, 2009, the Borrowers sent a letter to the Administrative Agent again noting that the Administrative Agent had improperly failed and refused to process the Notice of Borrowing based on a contrived construction of Section 2.1 of the Credit Agreement. The letter also noted that other lender parties to the Credit Agreement had informed the Borrowers that they disagreed with the Administrative Agent's interpretation.

65. On March 9, 2009, the Borrowers, while reserving their position that the March 2 Notice and the March 3 Notice were valid, and stating their belief that BofA "may be acting in its own self-interest" by failing to process the notices, issued a revised Notice of Borrowing (the "March 9 Notice") directed solely to the Delay Draw Loan Lenders.



FONTAINEBLEAU RESORTS, LLC

702 495 8100
2827 PARADISE ROAD
LAS VEGAS NV 89109

FONTAINEBLEAU.COM

March 9, 2009

VIA ELECTRONIC MAIL

Henry Yu
Senior Vice President
Bank of America, N.A.
901 Main Street
Mail Code TX1-492-14-11
Dallas, Texas 75202

RE: CREDIT AGREEMENT DATED AS OF JUNE 6, 2007 AMONG FONTAINEBLEAU LAS VEGAS, LLC, FONTAINEBLEAU LAS VEGAS II, LLC (CUMULATIVELY, THE "COMPANY"), THE LENDERS PARTY THERETO AND BANK OF AMERICA, N.A., AS ADMINISTRATIVE AGENT

Dear Mr. Yu:

On March 2, 2009 and again on March 3, 2009 we issued a Notice of Borrowing to the Administrative Agent pursuant to Sections 2.1(b) and 2.4 of the Credit Agreement, in which we sought a Delay Draw Loan in the amount of $350,000,000 and a Revolving Loan in the amount of $656,522,698. The response to both Notices of Borrowing was that the Administrative Agent had declined to process our request on the basis that the Loan Notice did not "conform to the requirements of the credit agreement." It appears to be your belief – albeit an incorrect one – that the credit agreement does not permit a simultaneous draw on the Delay Draw Term Loan and Revolving Loan. We have explained in clear terms why your refusal to process our Loan Notice was in error. We reiterate our prior statements that the Lenders were, by their actions or inactions, in default of the Loan Documents and that, as a consequence of said conduct, we have incurred – and will continue to incur – substantial damages. We also reiterate our very real concern that Bank of America may be acting in its own self-interest in derogation of the Loan Agreement, and against the interests of the Company and several of the other Lenders.

However, given the substantial risks to the Company and the Project associated with any further delay in the processing of our Notice of Borrowing, you have left us no choice but to now submit a Notice of Borrowing for the $350 million Delay Draw Term Loan, without simultaneously seeking to draw upon the Revolving Credit Facility. Accordingly, attached hereto please find our Notice of Borrowing with respect to a $350,000,000 Delay Draw Term Loan to the Company.

66. BofA sent the March 9 Notice to the Delay Draw Loan Lenders, and Plaintiffs' predecessors-in-interest funded their commitments under the Delay Draw Loan. In all, the Delay Draw Loan Lenders funded approximately $337 million of the $350 million Delay Draw Loan. Plaintiffs' predecessors-in-interest entirely funded their own commitments under the Credit Agreement and have fully performed all of their obligations thereunder.

67. As required by Section 2(b)(iii) of the Credit Agreement, BofA applied approximately $68 million of the amounts so lent by the Delay Draw Loan Lenders to repay the Revolving Loans that predated the March 2 notice. As a Revolving Lender, BofA stood to benefit by failing to issue a Stop Funding Notice as Disbursement Agent prior to March 9, 2009, that would have suspended any Delay Draw Term Loans otherwise to be used to repay BofA's 25% share of the then outstanding Revolving Loans.

68. By funding the March 9 Notice, Plaintiffs' predecessors-in-interest cured their breach of the Credit Agreement in failing to fund the March 2 Notice and March 3 Notice.

69. On March 19, 2009, over sixty Delay Draw Term Loan lenders wrote to BofA as Administrative Agent to demand that the Revolving Lenders, including BofA, honor the March 2, 2009 and corrected March 3, 2009 Notices of Borrowing. These Delay Draw Term Loan lenders explained why the interpretation of "fully drawn" BofA was now announcing was erroneous. These lenders stated that BofA's conduct as Administrative Agent indicated "a conflict of interest relating to its $100,000,000 Revolving Commitment exposure," and that BofA should either correct its conduct or resign as agent. (After Merrill Lynch's merger with Bank of America Corp., BofA became exposed to the $100 million funding commitment of defendant Merrill Lynch.)

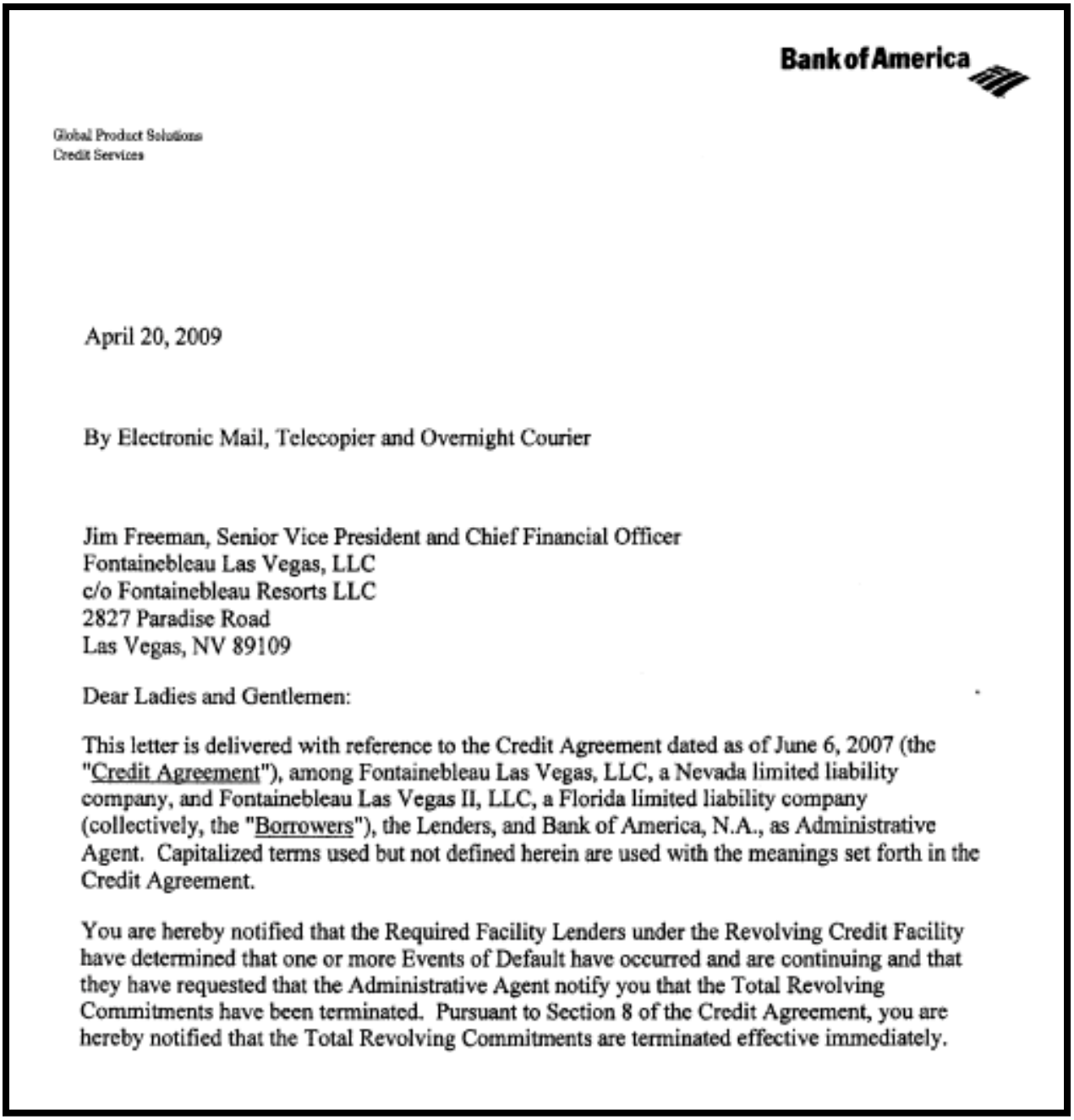
70. The Defendants failed to cure their own breach of the March 2 Notice and March 3 Notice. The Defendants never funded the remaining commitment of the Revolving Loan that the Borrowers validly drew in the March 2 Notice and March 3 Notice.

The Revolving Lenders Again Fail to Fund A Notice of Borrowing on April 21, 2009

71. On April 21, 2009, the Borrowers sent a Notice of Borrowing (the "April 21 Notice") to the Revolving Loan Lenders to borrow $710,000,000 under the Revolving Loan.

72. The Revolving Loan Lenders refused to honor the April 21 Notice.

73. On April 20, 2009, Defendants told the Borrower they were terminating their Revolving Loan commitments. Defendants did not identify or set forth the Events of Default upon which they were relying to terminate their commitment. As such, Defendants' purported termination of their Revolving Loan commitments was not a valid notice to the Borrower.



Bank of America

Global Product Solutions
Credit Services

April 20, 2009

By Electronic Mail, Telecopier and Overnight Courier

Jim Freeman, Senior Vice President and Chief Financial Officer
Fontainebleau Las Vegas, LLC
c/o Fontainebleau Resorts LLC
2827 Paradise Road
Las Vegas, NV 89109

Dear Ladies and Gentlemen:

This letter is delivered with reference to the Credit Agreement dated as of June 6, 2007 (the "Credit Agreement"), among Fontainebleau Las Vegas, LLC, a Nevada limited liability company, and Fontainebleau Las Vegas II, LLC, a Florida limited liability company (collectively, the "Borrowers"), the Lenders, and Bank of America, N.A., as Administrative Agent. Capitalized terms used but not defined herein are used with the meanings set forth in the Credit Agreement.

You are hereby notified that the Required Facility Lenders under the Revolving Credit Facility have determined that one or more Events of Default have occurred and are continuing and that they have requested that the Administrative Agent notify you that the Total Revolving Commitments have been terminated. Pursuant to Section 8 of the Credit Agreement, you are hereby notified that the Total Revolving Commitments are terminated effective immediately.

74. Because Plaintiffs' predecessors-in-interest met their commitments under the Delay Draw Loan and Initial Term Loan while Defendants failed to meet their commitments under the Revolving Loan in response to the March 2 Notice, the March 3 Notice, and the April 21 Notice, Plaintiffs' predecessors-in-interest were injured.

Plaintiffs' Interest in Enforcing the Credit Agreement Against the Defendants

75. The Credit Agreement is a multi-party agreement. The parties to the Agreement are the Borrowers, the Initial Term Loan Lenders, the Delay Draw Loan Lenders, and the Revolving Loan Lenders, as well as all successors-in-interest of any of those parties.

76. Under the Agreement, the Initial Term Loan Lenders and the Delay Draw Loan Lenders had an interest in and relied upon their ability to enforce loan commitments made by the Revolving Lenders, since those commitments were critical to financing the construction of the Project, and any cash provided by the Revolving Lenders would be collateral security for the Initial Term Loans and the Delay Draw Term Loans.

77. Upon entering the Agreement, each lender understood that a wrongful refusal to fund loan commitments would jeopardize the completion of the Project, diminishing the amount and value of the other lenders' collateral. As such, all lenders agreed to share the risks of the lending transaction ratably in proportion to each of the lenders' commitments. The structure of the entire contract evidences the understanding and contractual intent that each lender would be bound to the Borrowers and to one another for its lending commitments.

78. Because any significant refusal to fund by any lender had the potential to destroy the economic viability of the Project and to impair the collateral of those that had funded, the lenders all agreed that any refusal to fund the Revolving Loan could be based only upon certain specified breaches, and then only after a default had been formally declared.

79. "Upon receipt of each Notice of Borrowing…," the Agreement provides that each lender "will make the amount of its pro rata share of each borrowing..." (Credit Agreement Section 2.4(b)). The Agreement further provides that "[t]he failure of any Lender to make any Loan… shall not relieve any other Lender of its corresponding obligation to do so…" (Credit Agreement Section 2.23(g)).

80. The Revolving Loan Lenders had an obligation, not just to the Borrowers, but also to their co-lenders, to fund in response to the Notices of Borrowing. Indeed, as the Borrowers acknowledged in their March 9 Notice, BofA was "acting in its own self-interest in derogation of the [Credit] Agreement, and against the interests of the [Borrowers] and several of the other Lenders."

81. Plaintiffs' predecessors-in-interest fulfilled their funding obligations as Initial Term Lenders and Delay Draw Lenders under the Credit Agreement. However, the Revolving Loan Lenders failed to cure their breach in which they refused to fund after the Notices of Borrowing on March 2 and 3, 2009.

82. The Revolving Loan Lenders' failure to perform their contractual obligations reduced the amount and value of the collateral securing the loans of Plaintiffs' predecessors-in-interest, contrary to their bargained-for rights and benefits under the Credit Agreement and Disbursement Agreement.

83. The Revolving Loan Lenders' failure to follow the terms of the Credit Agreement, and to cure their breach, created the exact scenario the parties contracted to avoid, where the Initial Term Lenders and Delay Draw Loan Lenders were left bearing all of the losses while the Revolving Loan Lenders breached their obligations.

BofA's Improper Funding of Advance Requests

84. In addition to being a large Revolving Loan Lender and the Administrative Agent under the Credit Agreement, BofA served as the Disbursement Agent under the related Disbursement Agreement. As Disbursement Agent, it was BofA's responsibility to ensure that cash lent to the Borrower under the Credit Agreement was initially held in a Bank Proceeds Account as collateral for the Loans and would only be released from that account and spent by the Borrower as needed for the project and subject to important conditions.

As Disbursement Agent, BofA agreed to "exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties [under the Disbursement Agreement] consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds." (Disbursement Agreement 9.1). BofA agreed to exhibit the standard of care exercised by similarly situated disbursement agents.

85. This standard of care requires the Disbursement Agent, among other things, to determine if the conditions precedent to disbursing funds have been met including: that no Default or Event of Default has occurred and is continuing; that each "representation and warranty of (a) [e]ach Project Entity set forth in Article 4 [of the Disbursement Agreement] shall be true and correct in all material respects as if made on such date…."; that the In Balance Test is satisfied; that "[i]n the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request."; and that prior to any disbursement, there have been no change in the economics or feasibility of constructing and/or operating the Project, or in the financing condition, business or property of the Borrowers, any of which could reasonably be expected to have a Material Adverse Effect. (*See id.* at 3.3.3, 3.3.2, 3.3.8, 3.3.11, 3.3.23)

86. Pursuant to the Disbursement Agreement, "if Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing, the Disbursement Agent shall promptly and in any event within five Banking Days provide notice to each of the Funding Agents of the same and otherwise shall exercise such of the rights and powers vested in it by this Agreement and the documents constituting or executed in connection with this Agreement, and 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." As noted above,

among the powers and duties vested in BofA under the Disbursement Agreement upon learning of a Default or Event of Default was the power and duty to issue a Stop Funding Notice.

Under BofA's current interpretation of Section 2.1(c)(iii) of the Credit Agreement, all disbursements by BofA were improper because the Borrowers did not satisfy the In Balance Test

87. Among the prerequisites to disbursement was that the Borrowers satisfy the In Balance Test. This test, which was used to ensure that the project was on track, weighed the Borrowers' available financing against expected costs necessary to complete construction. Among the funding to be considered available was the so-called Revolving Availability—the amount the Borrowers could request from the Revolving facility *on the day determined*, minus $40 million.

88. Beginning in August 2007, BofA consistently used a Revolving Availability figure between $682 million and $760 million when calculating the In Balance Test. In other words, BofA concluded that in excess of $680 million was always available to be drawn from the Revolving facility *on the day of determination*. Using this range, BofA concluded that the Borrowers satisfied the In Balance Test and disbursed funds out of the Bank Proceeds Account.

89. On March 23, 2009, BofA concluded as a result of the Delay Draw Term Loans being fully requested and almost all funded that an amount in excess of $150 million of Revolver Availability could be used to calculate the In Balance Test. BofA acknowledged that under its March 3 interpretation of the Credit Agreement, the Revolver Availability before March 23, 2009, was $150 million and was not between $682 million and $760 million. According to BofA's March 3 interpretation—which is also the interpretation BofA has advanced in the related Fontainebleau litigation (currently pending before the Southern District of Florida and captioned as *Fontainebleau Las Vegas LLC v. Bank of America, N.A., et al*, No. 09-cv-21879-ASG),—the In Balance Test was not satisfied for any monthly Advance Request. BofA knew

the In Balance Test was not satisfied under its current interpretation of the Credit Agreement, yet it did not issue a Stop Funding Notice or prevent the disbursement of funds.

90. On March 23, 2009, the Borrowers advised BofA that they would be submitting a calculation of the In Balance Test reflecting a cushion of $13.8 million. That cushion included Available Funds with two components that are, as explained below, incompatible: (a) $750 million in "Bank Revolving Availability"; and (b) $21,666,666 under "Delay Draw Term Loan Availability," which represented the unfunded portion of the Delay Draw Loans (excluding First National Bank of Nevada's portion).

91. The In Balance Test submitted with the March 25, 2009 Advance Request could include either $750 million in "Bank Revolving Availability" or $21,666,666 under "Delay Draw Term Loan Availability," but not both.

92. If "fully drawn" meant "fully funded," the interpretation advanced by BofA when rejecting the March 2 and March 3 Notices of Borrowing, then Bank Revolving Availability could not include $750 million. Under BofA's interpretation the "Bank Revolving Availability" could not exceed $150 million unless and until the Delay Draw facility was in fact fully funded. The Delay Draw facility was not fully funded. As such, the Borrower did not meet the In Balance Test for the March 25, 2009 Advance Request.

93. If "fully drawn" meant "fully requested," then the $21,666,666 in Delay Draw Term Loan that was requested but not funded would be excluded from the In Balance Test because those funds were fully requested on March 3, 2009 and March 9, 2009. This is because "Delay Draw Term Loan Availability" is defined to mean, "as of each date of determination, the ***then undrawn*** portion of the Delay Draw Term Loans" (emphasis added). (Disbursement Agreement, Ex. A). On March 25, 2009, there was no "undrawn portion of the Delay Draw Term Loans."

94. Under either interpretation of "fully drawn," the Borrower could not satisfy the In Balance Test submitted with the March 25, 2009 Advance Request, a condition to disbursement under Section 3.3.8 of the Disbursement Agreement.

95. BofA disbursement of funds out of the Bank Proceeds Account was willful misconduct, grossly negligent, and in bad faith because the Borrowers did not meet the In Balance Test according to BofA's own interpretation and understanding of the Credit and Disbursement Agreements.

Disbursements after September 15, 2008 by BofA were improper because there was a Default and/or Event of Default related to the bankruptcy of Lehman Brothers and Lehman Brothers breach of the Retail Facility Agreement

96. Lehman Brothers Holdings Inc. ("Lehman Brothers") served as the Retail Agent, arranger and largest lender under the Retail Facility Agreement dated June 6, 2007. Lehman Brothers was responsible for $215 million of the Retail Facility. These funds were to be used to complete the Shared Costs of the Project including the Podium and Retail Component. To successfully complete the Project, the parties relied heavily on Lehman Brothers funding its commitment under the Retail Facility Agreement.

97. On September 15, 2008, Lehman Brothers filed for bankruptcy.

98. Upon information and belief, BofA was aware that Lehman Brothers, the arranger and a lender under the Fontainebleau retail loan facility, declared bankruptcy on September 15, 2008. On October 7, 2008, and October 22, 2008, BofA was made aware that Lehman Brothers was in bankruptcy proceedings. BofA also knew that Lehman Brothers failed to fund its required portion of the retail loan facility as required under Retail Facility Agreement dated June 6, 2007.

99. Since September 2008, Lehman Brothers has failed and refused to make any required advances under the Retail Facility Agreement for which it agreed to lend $215 million.

Lehman Brothers breached the Retail Facility Agreement by declaring bankruptcy and failing to honor advance requests made by the Borrower in September 2008, December 2008, January 2009, February 2009 and March 2009. In total, Lehman Brothers failed to honor its obligations under the Retail Facility Agreement in the amount of $14,259,409.47.

100. The Retail Facility Agreement is a Financing Agreement listed in Schedule 4.24 of the Credit Agreement and is, therefore, a Material Agreement for purposes of Section 8(j) of the Credit Agreement. The Retail Facility Agreement is also defined as a Facility Agreement under the Disbursement Agreement.

101. Under Section 8(j) of the Credit Agreement, a Default and/or Event of Default occurs when "any other Person shall breach or default under any term, condition, provision, covenant, representation or warranty contained in any Material Agreement…."

102. Under the Credit Agreement, a Default occurs when "any of the events specified in Section 8 [of the Credit Agreement], whether or not any requirements for the giving of notice, lapse of time, or both, has been satisfied." A Default under the Credit Agreement is also a Default under Section 7.1 of the Disbursement Agreement.

103. Under the Disbursement Agreement, one representation and warranty made by the Project Entities is that "[t]here is no default or event of default under any of the Financing Agreement." (*See id.* at 4.9) The Retail Facility Agreement is a Financing Agreement.

104. The bankruptcy and failure to fund by Lehman Brothers is one of the events leading up to Fontainebleau filing bankruptcy.

105. The failure of Lehman Brothers to fund pursuant to the Retail Facility Agreement was a breach of a Material Agreement, Financing Agreement and Facility Agreement, and therefore a Default and/or Event of Default under the Disbursement Agreement.

106. This Default and Event of Default is also a violation of the representation and warranty in Section 4.9 that there is no default or event of default, and therefore a Default or Event of Default pursuant to section 3.3.2 of the Disbursement Agreement.

107. Lehman's breach of the Retail Facility Agreement and failure to fund is the failure of a condition precedent pursuant to Section 3.3.23 under the Disbursement Agreement for at lease the five Advance Requests prior to March 2009.

108. Lehman's breach of the Retail Facility Agreement and failure to fund is the failure of a condition precedent under Section 3.3.11 because Lehman's bankruptcy filing, and the uncertainty that any other lender would assume Lehman's commitment under the Retail Facility, posed a grave threat to the successful completion of the Project and thus could reasonably be expected to have a Material Adverse Effect.

109. Upon information and belief, BofA received notice of the Lehman's breach of the Retail Facility Agreement and Defaults from one or more of the Term Lenders. In September and October 2008, at least one of the Term Lenders wrote to BofA and expressed the position that Lehman's failure to comply with its funding obligations under the Retail Facility meant that certain of the conditions precedent to disbursement of funds under Section 3.3.3 of the Disbursement Agreement were not satisfied. BofA willfully took no action in response to that notice, instead asserting that its function as Disbursement Agreement was purely administrative in nature.

110. In February 20, 2009, BofA wrote a detailed letter to the Borrower. In this letter BofA requested that the Borrower "comment on the status of the Retail Facility, and the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that Lehman Brothers Holdings, Inc. will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls."

111. BofA knew of Lehman Brother's breach of the agreement and its failure to fund. BofA knew that Lehman's breach and failure were Defaults and Event of Defaults. BofA's disbursement of funds from the Bank Proceeds Account was willful misconduct, grossly negligent, and in bad faith.

Disbursements by BofA were improper because BofA knew of other Defaults and failures of condition precedent to the disbursement of funds.

112. On March 10, 2009, BofA via Mr. Henry Yu wrote to the Borrowers and requested a meeting "in our capacities as both Administrative Agent and Distribution Agent." Mr. Yu further noted that Borrowers had not returned BofA's telephone calls and had refused to schedule a meeting with BofA.

113. On March 11, 2009, Borrowers sent Mr. Yu a "prenegotiations agreement" that included a standstill period during which BofA would temporarily forbear exercising its default rights and remedies.

114. On March 16, 2009, Borrowers sent Mr. Yu a letter stating that the "Company continues to believe strongly that the Lenders are currently in default of their funding obligations."

115. Also on March 16, 2009, Mr. Yu sent a letter to the Borrowers acknowledging that a meeting with the Borrowers was scheduled for March 20, 2009, and confirming receipt of an Advance Request. Mr. Yu noted that the requested Advance Date was March 25, 2009, and stated that the lenders had raised legitimate questions concerning the Project. Mr. Yu signed the letter on behalf of "Bank of America, N.A., as Administrative Agent and Disbursement Agent."

116. On March 20, 2009, BofA met with the Borrowers to discuss the Project's status. During the meeting Fontainebleau refused to answer questions about the future operating prospects of the Project. The information exchanged and discussions which occurred during this meeting preceded the drafting by the Borrowers of an Interim Agreement dated April 1, 2009,

which provided in part that the lenders signing the agreement would not terminate the Revolving Commitments or declare a Default or an Event of Default.

117. On March 23, 2009, Mr Yu sent a letter to Fontainebleau's lenders stating that BofA knew that several Delay Draw Term Loan lenders, including First National Bank of Nevada, had not funded their Delay Draw Term Loan. Mr. Yu wrote that over $20 million of Delay Draw Term Loan had not funded by March 23, 2009.

118. One of those lenders was First National Bank of Nevada, which had made a commitment of $1,666,666 under the Term Loan Facility and a commitment of $10,000,000 under the Revolving Facility. On July 25, 2008, First National Bank of Nevada, which had made a commitment of $1,666,666 under the Term Loan Facility and a commitment of $10,000,000 under the Revolving Facility, was closed by the Office of the Controller of the Currency, and the Federal Deposit Insurance Company ("FDIC") was subsequently appointed as receiver. According to the Borrower, FDIC subsequently repudiated its commitments under the Credit Agreement. Beginning in January 2009, the calculation of Available Funds under the In Balance Test was reduced by the amount of the total commitment by First National Bank of Nevada ($11,666,666). Upon information and belief, BofA knew about this receivership and repudiation of commitment.

119. The Credit Agreement is a Financing Agreement listed in Schedule 4.24 and is, therefore, a Material Agreement for purposes of Section 8(j).

120. The failure of several lenders, including First National Bank, to fund their Delay Draw Term Loan was a breach of a Material Agreement and therefore a Default under the Disbursement Agreement.

121. This Default is also a violation of the representation and warranty in Section 4.9 that there is no default or event of default, and therefore a Default pursuant to section 3.3.2 of the Disbursement Agreement.

122. On March 23, 2009, BofA stated it knew of these Default by these lenders and therefore the breach of the representation and warranty in Sections 4.9 and 3.3.2 .

123. Despite BofA's knowledge of the Default by First National Bank, BofA willfully and in a grossly negligent manner disbursed funds from Bank Proceeds Account pursuant to Advance Requests made in January and February 2009.

124. Despite BofA's knowledge of these Defaults and the other information in BofA's possession, as both Administrative and Disbursement Agent, on March 25 BofA willfully and in a grossly negligent manner disbursed $133 million from the Bank Proceeds Account.

125. From at least March 2, 2009, through March 25, 2009, Mr. Yu represented BofA in its various capacities as the Administrative Agent, the Bank Agent and the Disbursement Agent. As such, Mr. Yu's knowledge and actions are imputed to BofA in all of these capacities and BofA had identical knowledge in all its capacities.

126. BofA was aware the Borrowers were alleging that the Revolving Loan lenders were in default of their obligations under the Credit Agreement and had reserved all of their rights in connection with that default. BofA was also aware that the Borrowers had requested a pre-negotiated standstill to the lenders' rights due to problems with project. This information was materially adverse and impacted the economics and feasibility of constructing the Project. As such, on or before March 25, 2009, BofA was aware that the Advance Request should be denied because of existing Defaults, misrepresentations regarding the status of Defaults, and that these events could reasonably be expected have a Material Adverse Effect. As such, BofA was aware numerous conditions precedents to disbursement were not satisfied.

127. Instead of fulfilling its duties to act in good faith and to deny an Advance Request and issue a Stop Funding Notice if the conditions precedent to an Advance were satisfied, BofA favored its own interests over those of the Initial Term and Delay Draw lenders and disregarded

evidence in its possession that the March Advance Request should be denied because the conditions precedent in Article 3.3 of the Disbursement Agreement were not satisfied.

128. For each monthly Advance Request, including the request on March 25, 2009, BofA authorized the release funds from the Bank Proceeds Account, notwithstanding the information that it had in its possession regarding Defaults or Events of Default, misrepresentations and adverse information. BofA's release of the funds notwithstanding the information it had in its possession regarding Defaults or Events of Default, misrepresentations and adverse information was willful misconduct, grossly negligent, in bad faith and in reckless disregard for the Plaintiffs' predecessors-in-interests' rights.

129. BofA has conceded its wrongdoing in this respect. BofA has taken the position in related litigation that "long before [Fontainebleau] issued the March [2] Notice of Borrowing … [the Borrowers] had materially and repeatedly breached the Credit Agreement.…" (Defendants' Opposition to Fontainebleau's Motion for Partial Summary Judgment and an Order Pursuant to 11 U.S.C. § 542 Directing the Turnover of Funds; and Defendants' Cross Motions (A) to Dismiss Fontainebleau's Seventh Claim for Relief and (B) to Deny or Continue Fontainebleau's Motion so that Discovery May Be Had, *Fontainebleau Las Vegas LLC v. Bank of America, N.A., et al.*, Adv. Pro. No. 09-01621-ap-AJC (Bankr. S.D. Fla.), at 2.). BofA has asserted that Fontainebleau "…had been in default of the Credit Agreement and the Disbursement Agreement prior to the March Notice of Borrowing." (*Id.* at 50). Moreover, BofA has contended, "Fontainebleau failed to report promptly these and other Events of Default under the Credit Agreement. Thus, while Lenders denied the March Borrowing Notice based on its failure to comply with the requirements of Section 2.1(c), there is mounting evidence that Fontainebleau had no right even to make the request for the additional reason that it was not in compliance with the Credit Agreement and the closely related Disbursement Agreement." *Id.* at 50–51.

130. Because BofA, as Disbursement Agent, knew that the Borrowers were in default on March 25, 2009, BofA is liable for wrongfully disbursing funds from the Bank Proceeds Account.

131. Plaintiffs' and plaintiffs' predecessors-in-interests' collateral has been and continues to be diminished as a result of BofA's actions.

FIRST CLAIM FOR RELIEF
Breach of the Credit Agreement Against All Defendants
For Failure to Fund the March 2 Notice/March 3 Notice

132. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 131 hereof.

133. The Credit Agreement is a valid and binding contract, pursuant to which the Defendants agreed to fund $790 million under the Revolving Loan.

134. The March 2 Notice and the March 3 Notice complied with all applicable conditions under the Credit Agreement. Plaintiffs and their predecessors-in-interest have performed all obligations required of them under the Credit Agreement.

135. Defendants did not elect to cancel their obligations under the Credit Agreement in response to Plaintiffs' predecessors-in-interests' breach of the Credit Agreement but instead permitted the Credit Agreement to continue and took benefits from the cure of breach by Plaintiffs' predecessors-in-interest.

136. Pursuant to the terms of the Credit Agreement, the Defendants were, and continue to be, obligated to honor the March 2 Notice and the March 3 Notice.

137. The Defendants' failure to honor the March 2 Notice and March 3 Notice constitutes a material breach of their obligations under the Credit Agreement.

138. Plaintiffs and/or their predecessors-in-interest have suffered injury as a result of the breach because, as a result of the Defendants' refusal to honor their obligation to fund the

Revolving Loan, the amount and value of Plaintiffs' collateral has been and continues to be diminished.

SECOND CLAIM FOR RELIEF
Breach of the Credit Agreement Against All Defendants
For Failure to Fund the April 21 Notice

139. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 138 hereof.

140. The Credit Agreement is a valid and binding contract, pursuant to which the Defendants agreed to fund $790 million under the Revolving Loan.

141. The April 21 Notice complied with all applicable conditions under the Credit Agreement. Plaintiffs and their predecessors-in-interest have performed all obligations required of them under the Credit Agreement.

142. Defendants did not elect to cancel their obligations under the Credit Agreement in response to Plaintiffs' predecessors-in-interests' breach of the Credit Agreement but instead permitted the Credit Agreement to continue and took benefits from the cure of breach by Plaintiffs' predecessors-in-interest.

143. Pursuant to the terms of the Credit Agreement, the Defendants were, and continue to be, obligated to honor the April 21 Notice.

144. The Defendants' failure to honor the April 21 Notice constitutes a material breach of their obligations under the Credit Agreement.

145. Plaintiffs and/or their predecessors-in-interest have suffered injury as a result of the breach because, as a result of the Defendants' refusal to honor their obligation to fund the Revolving Loan, the amount and value of Plaintiffs' collateral have been and continue to be diminished.

THIRD CLAIM FOR RELIEF
Breach of the Disbursement Agreement Against BofA

146. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 145 hereof.

147. The Disbursement Agreement is a valid and binding contract, pursuant to which BofA agreed to act as Bank Agent (which is defined in the Disbursement Agreement as the Administrative Agent under the Credit Agreement), and/or Disbursement Agent.

148. The Disbursement Agreement was intended to directly benefit Plaintiffs. Pursuant to the Disbursement Agreement, BofA held the security interests for the benefit of Plaintiffs. The conditions and restrictions of disbursement set forth in the Disbursement Agreement were also for the benefit of Plaintiffs. The Disbursement Agreement also sets forth the duties of BofA and states those duties are for the benefit of Plaintiffs

149. BofA had a duty to the lenders, including Plaintiffs' predecessors-in-interest, to carry out its capacities as the Bank Agent (Administrative Agent) and the Disbursement Agent in good faith and to follow the provisions of the Disbursement Agreement.

150. Pursuant to the Disbursement Agreement, BofA was obligated to deny, issue a stop-funding notice, or not fund the Advance Requests due to BofA's knowledge that one or more conditions precedent had not been met.

151. As opposed to fulfilling its duties, BofA acted in bad faith and with gross negligence and reckless disregard or willfulness in favoring its own interests over those of the Delay Draw lenders when BofA authorized the release of funds from the Bank Proceeds Account despite knowing numerous conditions precedent were not satisfied including that under its own interpretation of the Credit Agreement the In Balance Test was not satisfied, that Defaults and/or Events of Default had occurred and were continuing and that the Borrowers were claiming that BofA and other Revolving Loan Lenders defaulted under the Credit Agreement. Moreover, BofA was in possession of information showing other misrepresentations and adverse

information. Despite this knowledge, BofA acted with bad faith, gross negligence and reckless disregard or willfulness in approving Advance Requests.

152. BofA's failure to fulfill its obligations as Bank Agent (Administrative Agent) and/or Disbursement Agent by approving Advance Requests constitutes a material breach of its obligations under the Disbursement Agreement.

153. Plaintiffs have suffered injury as a result of the breach because, as a result of BofA's approval of the Advance Requests, the amount and value of Plaintiffs' and/or their predecessors-in-interests' collateral have been and continue to be diminished.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment and relief as follows:

A. for judgment in Plaintiffs' favor on the counts recited above;

B. for compensatory damages in an amount to be proved at trial;

C. for an award of costs including attorneys' fees and the costs and disbursements of this action;

D. for pre-judgment and post-judgment interest and court costs; and

E. for such other relief as the Court may deem proper and just.

DATED: September 13, 2010

Respectfully submitted,

By: /s/ Steven J. Nachtwey

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Exhibit B

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OUR FILE NUMBER
019,368-1169

August 25, 2010

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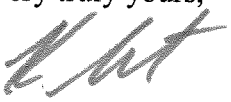
Re: ***In re Fontainebleau Las Vegas Contract Litigation*, MDL No. 2106 (S.D. Fla.)**
***ACP Master, Ltd. v. Bank of America, N.A.*, 10-CV-20236-ASG**

Dear Steve:

This responds to your July 9, 2010 letter. Defendant Bank of America, N.A. consents to the Aurelius plaintiffs' amendment of paragraph 10 of their complaint to add as additional predecessors-in-interest to Initial Term Loans and/or Delay Draw Loans the following entities: American Express Company Retirement Plan by RiverSource Investments, LLC, Ameriprise Financial Retirement Plan by Riversource Investments, LLC, Caspian Capital Partners, L.P., Caspian Select Credit Master Fund, Ltd., Highland Credit Opportunities CDO, Ltd., Illinois Lake Clark Spiret Loan Trust, Jay Street Market Value CLO I, Ltd., Loan Funding IV LLC, Mariner LDC, Mariner Opportunities Fund, LP, Marlborough Street CLO, Ltd., Primus CLO II, Ltd., RiverSource Income Opportunities Fund, a series of RiverSource Bond Series, Inc., RiverSource Variable Portfolio - High Yield Bond Fund, a series of RiverSource Variable Portfolio Income Series, Inc., now known as RiverSource Variable Portfolio - High Yield Bond Fund, a series of RiverSource Variable Series Trust, RiverSource Variable Portfolio - Income Opportunities Fund, a series of RiverSource Variable Series Trust, Southfork CLO, Ltd., Symphony CLO I, Ltd., and The Bank of Nova Scotia.

Very truly yours,



Ken Murata

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to 09-23835-cv-ASG and 10-cv-20236-ASG.

/

NOTICE OF POSITIONS REGARDING PROPOSED ADJUSTMENT TO CERTAIN PRE-TRIAL DATES IN LIGHT OF TRUSTEE'S NOTICE OF INTENTION

In response to the Court's directive during the August 31, 2010 Status Conference, Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, No. 09-cv-23835-ASG and *ACP Master, LTD., et al. v. Bank of America, N.A.*, et al., No. 10-cv-20236-ASG (collectively, the "Term Lender Plaintiffs") and Defendant Bank of America, N.A. ("BANA") submit this notice of their respective positions regarding proposed adjustments to certain pre-trial dates in these two matters as a result of the Chapter 7 Trustee's August 20, 2010 Notice of Intention With Regard to Case No. 1:09-cv-21879-ASG.

I. PROPOSED TIMETABLE MODIFICATIONS

In light of the Trustee's Notice, and subject to the dispute referenced in Point II below, the parties jointly request that the following dates be extended to give them sufficient time to review documents that have yet to be produced by certain Fontainebleau-related entities, including the Trustee on behalf of Fontainebleau Las Vegas Holdings, LLC ("FBLV"):[1]

[1] The Trustee has stated that he will produce all FBLV documents in his possession, custody and control, without regard to privilege. The Trustee's counsel further has stated that such documents reside primarily on three servers that may also contain documents of other

CURRENT DATE	PROPOSED DATE	EVENT
9-15-2010	10-15-2010	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.
11-29-2010	1-15-2010	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.
12-31-2010	2-15-2010	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.

Fontainebleau-related entities, including Fontainebleau Resorts, LLC ("FBR") and Turnberry West Construction and Turnberry Residential Limited Partner, LP (collectively "TWC"). In order to avoid the inadvertent production of privileged documents of these other Fontainebleau-related entities, the Trustee has declined to produce the servers without permission from these other entities, which was not immediately forthcoming. That procedural logjam, however, was broken by two recent orders. On August 30, 2010, Magistrate Goodman granted the Term Lenders' motion to compel FBR to produce documents in response to a comprehensive subpoena issued on April 22, 2010 (including those on the three servers) by September 13, 2010. [DE# 129.] And on September 1, 2010, Judge King of the United States Bankruptcy Court for the District of Hawaii, sitting by designation in a special proceeding brought by the Nevada Term Lenders in the United District Court for the District of Nevada to enforce a March 3, 2010 subpoena against TWC issued in the FBLV Chapter 7 proceeding, granted the Nevada Term Lenders' motion to compel and ordered TWC to produce all of its responsive documents (including those on the three servers) by September 24, 2010. Accordingly, all impediments to the review and production of the documents on these servers appear to have been removed, and the Trustee thus should be in a position to produce FBLV's documents by no later than the end of this month.

II. THE PARTIES DISAGREE ON THE PROPRIETY OF A STAY PENDING THE TRUSTEE'S APPEAL

A. BANA's Position

The Trustee and the Term Lenders have both indicated that they will seek the entry of final judgment under Fed. R. Civ. P. 54(b) on their respective claims that BANA and the other Revolver Banks breached the Credit Agreement by failing to honor FBLV's March 2009 Notice of Borrowing (the "Credit Agreement Claims"). BANA respectfully submits that if either Rule 54(b) motion is granted (and particularly if the Term Lenders' motion is granted), deposition discovery should be stayed until the appeals are resolved because (i) the appeals' outcome will have a direct impact on the Term Lenders' remaining claim that BANA breached its duties as Disbursement Agent (the "Disbursement Agreement Claim"), and (ii) because numerous party and non-party witnesses will need to be deposed a second time if the appeals are successful. If the Term Lenders believe their appeal will succeed—recognizing that they must also overcome the Court's standing ruling to benefit from a successful appeal on the Credit Agreement Claims—they should agree to hold off on deposition discovery for now so as to avoid unnecessarily complicating the case or burdening party and non-party witnesses. Allowing the Term Lenders to proceed with their appeal *and* deposition discovery while the Disbursement Agreement Claim's scope is undefined is fundamentally unfair to BANA.

1. BANA disagrees with the Term Lenders' assertion that the Disbursement Agreement Claim is unrelated the Credit Agreement Claims that would be addressed on appeal. The Credit Agreement Claims are inextricably connected to the Term Lenders' Disbursement Agreement Claim. The Term Lenders allege that BANA breached the Disbursement Agreement by, among other things, permitting FBLV's Advance Requests and Notices of Borrowing to be funded after the Revolver Banks "wrongfully" refused to honor FBLV's March 2009 Notice of Borrowing. Their complaints allege that:

- BANA should have rejected all FBLV Advance Requests because, under BANA's interpretation of the Credit Agreement's "fully drawn" provision, "the In Balance Test was not satisfied for any monthly Advance Request". (*See* Aurelius Compl. ¶¶ 89, 92; *see also* Avenue Compl. ¶ 150 ("Under BofA's new, after-the-fact position that 'drawn' means 'funded,' however, the Borrower had never satisfied the In Balance Test and all prior disbursements were improper."), ¶ 161.)
- The Revolver Banks' refusal to honor the Notice of Borrowing constituted a default under the Credit Agreement, "mean[ing] at least one of the conditions precedent for disbursement of funds, Section 3.3.3 of the Disbursement Agreement, clearly had not been satisfied." (Avenue Compl. ¶ 158.)
- BANA should have rejected FBLV's March 2009 Advance Request because the Revolving Banks' failure to honor FBLV's Notice of Borrowing "was materially adverse and impacted the economics and feasibility of constructing the Project." (*See* Aurelius Compl. ¶ 126; *see also* Avenue Compl. ¶ 160.)

But BANA will not need to address these allegations in defending the Disbursement Agreement Claim *unless* the Term Lenders prevail on appeal because they are predicated on the Credit Agreement breach claims that this Court has twice rejected. If the Revolver Banks' "fully drawn" interpretation was correct, the Term Lenders' argument that FBLV "never" satisfied the In Balance Test must be rejected—it is patently unreasonable to read the Credit Agreement in a way that the In Balance Test would *always* fail. Likewise, if the Revolver Banks permissibly refused to honor the March 2009 Notice of Borrowing, the Term Lenders' claim that Section 3.3.3 was not satisfied fails. And the Revolver Banks' proper interpretation of the Credit Agreement could not adversely affect "the economics and feasibility of constructing the Project" since it is the outcome that was always contemplated by the loan document parties.

The Term Lenders assert "that coordinated appeals of all issues related to the Credit Agreement Claims make sense and thus intend to seek certification under Rule 54(b)," but they recognize the complications that arise if the appeals succeed. While stating that they will not press the March 2009 allegations at this time, they acknowledge that "[i]f the Eleventh Circuit causes that to change in the future, the parties and the Court can determine at that time what impact, if any, such a change has on the cases as they are then positioned." This is precisely the inefficiency, waste of judicial resources and injustice to BANA that could be avoided by BANA's proposed deposition stay. If the Trustee or the Term Lenders are permitted to appeal the Credit Agreement Claims, deposition discovery should be stayed until the appeal is resolved so that BANA knows what allegations it needs to defend against.

2. The Term Lenders offer no reason why the deposition stay should not be granted. They will suffer no prejudice if depositions take place after the Eleventh Circuit's ruling. By contrast, if the Credit Agreement Claims are revived on appeal, the scope of discovery in this MDL action will be significantly broadened. Discovery will be needed regarding the Credit Agreement's negotiation to determine what the parties' intended Credit Agreement Section 2.1(c)(iii) to mean. In addition, discovery will be needed to determine whether FBLV was in default under the Credit Agreement at the time it submitted the March 2009 Notice of Borrowing. As a defense to the Credit Agreement Claims, the Revolver Banks have asserted that FBLV's then-existing defaults relieved them of any obligation to accept the March 2009 Notice of Borrowing, even if they were not aware of the defaults at the time. *See Fontainebleau Las Vegas, LLC v. Bank of Am., N.A.*, 417 B.R. 651, 665-66 (S.D. Fla. 2009). There are numerous party and non-party witnesses who would have knowledge relevant to these issues as well as Disbursement Agreement Claim issues. For example, FBLV's former CFO James Freeman has knowledge regarding both FBLV's financial condition in March 2009 and the Lehman

bankruptcy implications for the Project's financing (a key issue for the Disbursement Agreement Claim). Other non-party witnesses who are likely to possess relevant information regarding both the Credit Agreement Claims and the Disbursement Agreement Claim include:

- Former FBLV officers and employees;
- Former FBLV advisors such as its accountants;
- Former officers and employees of the general contractor on the Project; and
- Attorneys involved in negotiating the Credit Agreement and other loan documents.

Depositions should be stayed pending the appeals' resolution to avoid deposing party and non-party witnesses more than once or, alternatively, burdening them with potentially unnecessary questions concerning the Credit Agreement Claims that the Court has (correctly) dismissed. Moreover, if discovery is not stayed pending appeal, there is a risk that non-party witnesses (especially those residing outside this district) will move to quash subpoenas seeking a second deposition. This will both increase the cost of this litigation (for the parties and the witnesses) and could result in key witnesses being unavailable to testify on Credit Agreement Claims issues. That is not in any party's interest.

3. BANA is not suggesting that all discovery be stayed pending appeal. The parties (including the Trustee) would still be required to complete their document productions. And third-party document production could also proceed. But depositions should be stayed until the Eleventh Circuit rules on the Credit Agreement Claims so that the parties have clarity regarding the appropriate scope of discovery.

B. The Term Lenders' Position

The Trustee's appeal of the Credit Agreement Claims in the FBLV action does not support the imposition of a stay of the Term Lenders' Disbursement Agreement Claims in their

separate actions. The two sets of claims seek different relief, in different actions, against different parties, under different agreements: the Disbursement Agreement Claims seek damages against BANA in its capacity as agent for its improper disbursal of funds to Fontainebleau on numerous occasions in breach of the Disbursement Agreement; while the Credit Agreement Claims seek different damages against the Revolving Lenders (including but not limited to BANA as revolving lender) for their failure to fund the March and April 2009 Notices of Borrowing in breach of the Credit Agreement. In sum, the discovery related to the Disbursement Agreement Claims will deal with BANA's knowledge and actions as bank and disbursement agent while the discovery related to the Credit Agreement Claims will deal with BANA's failure to fund as a lender.

These claims have been on different tracks ever since the Court dismissed the Credit Agreement Claims in the Term Lender actions. The dismissal of the Credit Agreement Claims provided no basis for staying discovery on the Disbursement Agreement Claims then, and the Trustee's appeal of Credit Agreement issues in a separate action certainly does not provide a basis for a stay now. And while the Term Lenders believe that coordinated appeals of all issues related to the Credit Agreement Claims make sense and thus intend to seek certification under Rule 54(b) to appeal those issues in parallel with the Trustee, if put to the choice between an immediate appeal of the Credit Agreement Claims and continued prosecution of their Disbursement Agreement Claims, the Term Lenders would elect not to seek Rule 54(b) relief at this time and would opt instead to appeal the Credit Agreement Claims in the normal course, following a final judgment. One way or the other, to the extent that the Court is inclined even to consider a stay, any such determination should be made upon regularly noticed motion so that the issues and legal standards may be fully briefed and argued.

1. BANA asserts that the Credit Agreement Claims are "inextricably connected" to the Disbursement Agreement Claims because the Term Lenders allege that the failure to fund the March 2009 Notices of Borrowing was one of the many defaults that prevented BANA from disbursing funds on March 25, one of the many dates on which the Term Lenders assert that BANA made improper disbursement. BANA complains that it will not know "what allegations it needs to defend against" until after the Trustee's appeal. Of course it will. It needs to defend against all allegations that have not otherwise been dismissed. As matters stand, claims based upon the Revolving Lenders' failure to fund have been dismissed; and the Term Lenders certainly do not intend to take positions on their remaining claims that are inconsistent with the Court's dismissal. If the Eleventh Circuit causes that to change in the future, the parties and the Court can determine at that time what impact, if any, such a change has on the cases as they are then positioned. In the meantime, there are numerous conditions precedent to disbursement of funds by BANA that are wholly unrelated to the refusal of the Revolving Lenders to fund, such as those related to the failure of Lehman Brothers to providing financing.

2. BANA argues that a successful appeal of the Credit Agreement Claims (which assumes that that the 11th Circuit will find that the Court's ruling was erroneous) may require some third-party witnesses to be re-deposed. This was always the case once the Court granted the Revolving Lenders' motion to dismiss over three months ago. BANA never considered it a problem until the Trustee indicated it was going to dismiss its Credit Agreement Claims. The theoretical possibility the some individuals may be deposed a second time on different subject matter, contingent of course on a successful appeal, cannot wag the tail of the Disbursement Agreement Claims that have not been dismissed and that remain on track for trial.

In any event, the risk of multiple depositions is not particularly great.[2] BANA's claim that the resurrection of the Credit Agreement Claims would "significantly broaden discovery" overstates the matter. The primary issue BANA cites, FBLV's defaults prior to March 2009, will be discovered in connection with the Disbursement Agreement Claims, which are premised on BANA's disbursement of loan proceeds in the face of these defaults. People with knowledge of those issues should be deposed once. And while discovery on the negotiations and interpretation of the Credit Agreement may involve limited overlapping discovery, it certainly is not significant enough to cause the Disbursement Agreement Claims to come to a grinding halt. The vast majority of discovery related to those claims will focus on the knowledge and actions of BANA's improper disbursement of funds. This discovery will only need to be taken once by the Term Lenders, and now is the time to proceed with that discovery.

3. BANA asserts that it is only seeking a stay of deposition discovery, as if that mattered. Document discovery, for the most part, has or shortly will be completed, so there is little discovery left other than depositions.

BANA also asserts that the Term Lenders have not proven how they are prejudiced by staying depositions. BANA is wrong on two points. First, it is BANA's burden to prove that it is prejudiced by depositions going forward on the Disbursement Agreement Claims, not the Term Lenders' burden to establish a lack of prejudice. BANA has not and cannot make such a showing. Even if the Term Lenders were required to prove prejudice, they can. A stay of depositions would stop these actions in their tracks while the appeal is briefed, argued and the 11th Circuit issues a decision, all while the memories of witnesses continue to fade. And during

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[2] Even more makeweight is BANA's suggestion that non-party witnesses may move to quash subpoenas seeking a second deposition. There would be no merit to any such motion if the issues were new; and if they were not new, there would be no need for the deposition.

this indeterminate delay, the Term Lenders will be unable to recover the money that BANA improperly disbursed to Fontainebleau. The Term Lenders therefore will suffer prejudice—a diminished ability to prove their case and a delay in recovering damages—regardless of how the 11th Circuit rules.

Rather than impose this certain delay based upon an uncertain outcome (and impact) of the Trustee's appeal, the Term Lenders submit that it will be substantially more efficient and cost-effective to permit both tracks to go forward simultaneously and address any issues that may arise in the future in light of the actual facts and developments at that time.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 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.

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