UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 02106

*This document relates to:*

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

**TRUSTEE'S PLAN FOR RETENTION AND PRESERVATION OF DOCUMENTS**

Soneet R. Kapila, as Chapter 7 Trustee (the "Trustee") for Fontainebleau Las Vegas Holdings, LLC, *et al.*,[1] in connection with his request that the Court, pursuant to Fed. R. Civ. P. 41(a)(2), dismiss with prejudice Counts II through VI (collectively, the "April Claims") of the amended complaint (the "Amended Complaint") filed in this action by Fontainebleau Las Vegas, LLC, individually and as successor by merger to Fontainebleau Las Vegas II, LLC ("Fontainebleau"), and dismiss with prejudice, but without prejudice to the right to appeal, Counts I and VII (the "March 2 Claims") of the Amended Complaint, provides, in accordance with MDL Order Number 31 [D.E. # 130],

[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.

this plan for the retention and preservation of documents (the "Preservation Plan"), as follows:

## BACKGROUND

1. Fontainebleau commenced this action against certain of its lenders (the "Revolver Banks") in the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court") by filing an initial complaint on June 9, 2009, and the Amended Complaint on June 10, 2009.

2. Fontainebleau's Amended Complaint asserts seven claims for relief, all of which arise out of the Revolver Banks' refusal 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.

3. On the same day that it filed the Amended Complaint, Fontainebleau moved for partial summary judgment as to its Count I claim based on the Revolver Banks' refusal to fund a March 2 Notice of Borrowing (the "March 2 Notice") and its Count VII claim for turnover pursuant to 11 U.S.C. § 542 of the funds that were subject to the March 2 Notice. 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 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 fully requested those loan proceeds, rather than (as the

Revolver Banks contend) 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.

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, held additional oral argument on Fontainebleau's pending summary judgment motion, and subsequently, on August 26, 2009, 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 (August 26 Order, Exhibit "A," at 11);

(b) in the alternative, "[t]he term 'fully drawn' can reasonably be interpreted to mean 'fully funded,'" thus creating an issue of fact (*id.* at 14);

(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 (*id.* at 18-19); and

(d) Fontainebleau as a matter of law could not obtain a turnover of property that is "in dispute" (*id.* at 23).

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 similar to the claims raised by Fontainebleau and arising from the same alleged 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 Court granted the Revolver Banks' motion to dismiss the Term Lenders' complaints against the Revolver Banks, determining that the Term Lenders did not have standing to enforce the Revolver Banks' obligations and 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."[2]

[2] The Court denied Bank of America's motion to dismiss claims that it had breached its duties as agent under a separate disbursement agreement.

8. On April 12, 2010, the Bankruptcy Court converted the Fontainebleau cases to Chapter 11, and the United States Trustee appointed the Trustee [Bankr. Ct. Doc. No. 1973]. The Trustee was substituted as plaintiff by Order entered in this action on July 15, 2010 [D.E. # 104].

9. The Trustee has filed his motion seeking to expedite the entry of a final judgment dismissing the Trustee's claims with prejudice, in order to facilitate an immediate appeal from that judgment so as to obtain appellate review of this Court's August 26 Order denying the plaintiffs' motion for partial summary judgment. The Court's August 26 Order is claim- and case-dispositive with respect to Fontainebleau's March 2 Claims. By finding as a matter of law that the "unambiguous meaning of the term 'fully drawn' is fully funded" (August 26 Order, Exhibit "A," at 11)—a finding that this Court reiterated explicitly, as a matter of law, in the May 28 Order—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. Although the Trustee continues to dispute the conclusions reached in the August 26 Order, he recognizes that the order was dispositive of those claims, and accordingly has sought the entry of final judgment, based on the August 26 Order, to expedite an appeal therefrom.[3]

[3] 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 at the plaintiff's request and enter an appealable final judgment. *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.").

10. The Trustee has submitted that further proceedings in this Court regarding the March 2 Claims would be futile and that litigating the March 2 Claims to final judgment would constitute a wasteful and unproductive utilization of the Court's and the parties' time and resources. The Trustee therefore has requested that, pursuant to Fed. R. Civ. P. 41(a)(2),[4] the Court enter an order dismissing the March 2 Claims with prejudice to the Trustee's right to renew such claims, but without prejudice to the Trustee's right to take an appeal from the final judgment and obtain review of the August 26 Order. To facilitate the immediate appeal of the August 26 Order, the Trustee has also requested that the Court dismiss the April Claims—Counts II through VI of the Amended Complaint.[5] Such dismissal is to be with prejudice to both Fontainebleau's right to renew such claims and to Fontainebleau's right to take an appeal from any order of this Court as to such claims. Thus, following the dismissal of both the March Claims (Claims I and VII) and the April Claims (Claims II through VI), the entirety of the Amended Complaint will have been dismissed and the entry of an appealable final judgment will be appropriate.

11. During a status conference conducted telephonically on August 31, 2010, the Court directed the Trustee, pending resolution of the anticipated appeal, to propose a plan for the preservation of Fontainebleau documents [Paperless MDL Order Number 31]

[4] Rule 41(a)(2) permits the Court to dismiss an action "on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

[5] Although Counts V and VI were previously withdrawn by stipulation of the parties [D.E ## 65, 70], they were withdrawn without prejudice. To ensure the appealability of the August 26 Order, the Trustee seeks dismissal of these claims, with prejudice, as well.

[D.E. # 130]. The Trustee proposes this Preservation Plan in response to the Court's directive and order.

**PLAN FOR RETENTION AND PRESERVATION OF DOCUMENTS**

12. As a Chapter 7 trustee, the Trustee has succeeded to the right and interest of Fontainebleau. Consistent with his duties under 11 U.S.C. § 704, the Trustee has in his possession or will obtain possession of various documents, data, and tangible things that are pertinent to the administration of the Chapter 7 cases and that may be subject to discovery in Case No. 1:09-cv-21879-ASG, if remanded, and in the other cases that are part of this multidistrict litigation.

13. For purposes of his Preservation Plan, the Trustee intends that the terms "documents, data, and tangible things" be given broad interpretation to include writings, records, files, correspondence, reports, memoranda, minutes, electronic messages, telephonic messages or logs, computer and network activity logs, hard drives, backup drives, removable computer storage media (including tapes, disks, and cards), printouts, document image files, Web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, checks, statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films, charts, digital or chemical process photographs, recordings (video, phonographic, tape, or digital) or transcripts of such recordings, drafts, jottings, and notes and shall also include information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata.

14. The Trustee intends that "preservation" also be interpreted broadly to accomplish the goal of maintaining the integrity of all documents, data, and tangible things reasonably anticipated to be subject to discovery under Fed. R. Civ. P. 26, 45, and 56(e). In that regard, the Trustee intends that preservation include taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible.

15. The Trustee has made demand upon the officers and employees of Fontainebleau, as the custodians of Fontainebleau's property and business records, for turnover of documents, data, and tangible things. The Trustee has received and is safeguarding substantial amounts of material turned over to him.

16. The Trustee has also made demand upon the related Fontainebleau entities, including Fontainebleau Resorts, LLC, Fontainebleau Resort Holdings, LLC, and Fontainebleau Resort Properties I, LLC, for turnover of documents, data, and tangible things relating to the Fontainebleau Las Vegas. The Trustee asserts a continuing demand upon those entities for turnover.

17. The Trustee and his employees, independent contractors, attorneys, and other professionals will preserve all Fontainebleau documents, data, and tangible things currently in their possession or that subsequently come into their possession, so as to enable the preservation of evidence that may be subject to discovery in these actions.

18. The Trustee will treat Fontainebleau documents, data, and tangible things with the same high degree of care that is required of him as a fiduciary and that is

consistent with the manner of treatment accorded items that come into his possession in other cases in which the Trustee serves as a trustee or examiner. The Trustee will maintain physical documents and tangible things in a secure, safe, protected storage facility and will maintain electronic documents and data in a secure, safe, protected environment, in each instance to assure the preservation of evidence that may be the subject of discovery.

19. Prior to filing this Preservation Plan, the Trustee has circulated it to counsel for the Revolver Banks and counsel for the Term Lenders. In response, the Trustee has received requests for additional specific information regarding the demands made and the documents received, as referenced in the preceding paragraphs 15, 16, and 18. The Trustee will amend this Preservation Plan to provide, using his best efforts, the requested additional information.

20. In addition, the Trustee will honor and respect the reasonable request of any party to these cases with respect to measures necessary to preserve and protect documents, data, and tangible things, and, if a dispute arises, will seek a determination from the Court as to his responsibilities with respect to any category or item of document, data, or tangible thing.

*[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]*

DATED: September 14, 2010.

Respectfully submitted,

*/s/ Susan Heath Sharp*

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**—AND—**

*/s/ Jed I. Bergman*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 14th day of September, 2010, the foregoing *Trustee's Plan for Retention and Preservation of Documents* was electronically filed with the Clerk of the Court using the Court's CM/ECF system, and true and correct copies of that motion 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)

## 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 09-23835-CIV-GOLD/GOODMAN.
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**JOINT MOTION TO ADD PLAINTIFFS TO THE ACTION**

Plaintiffs and Defendant submit this Joint Motion to add as plaintiffs to this action Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd, and in support thereof, state as follows.

WHEREAS, Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd wish to join in the claims asserted by the Plaintiffs in the Second Amended Complaint [D.E. 15] filed on January 15, 2010; and

WHEREAS, Defendant, while not conceding or admitting in any way that the claims of Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd or any of the other Plaintiffs are meritorious, nonetheless agrees to the addition of Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd as plaintiffs to this action pursuant to the following terms.

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

1. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd will be added to this action without the need of filing a separate complaint.

2. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall be bound by all existing case deadlines.

3. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall be bound by Amended MDL Order Number Eighteen Granting in Part and Denying in Part Motions to Dismiss [D.E. 108].

4. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall file Corporate Disclosure Statements pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Initial Disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, and written responses to all outstanding discovery requests within 14 days of entry of an order adding them to this action.

Respectfully submitted,

By: /s/ Lorenz Michel Prüss

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 15, 2010, a copy of the foregoing **JOINT MOTION TO ADD PLAINTIFFS TO THE ACTION** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

By: /s/ Lorenz Michel Prüss
Lorenz Michel Prüss

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| Attorneys: | Representing: |
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| Frederick D. Hyman, Esq.<br>Jason I. Kirschner, Esq.<br>Jean-Marie L. Atamian, Esq.<br>**MAYER BROWN LLP**<br>1675 Broadway<br>New York, NY 10019-5820<br>Tele: (212) 506-2500<br>Fax: (212) 261-1910 | Defendant<br>Sumitomo Mitsui Banking Corporation |
| Robert Gerald Fracasso, Jr.<br>**SHUTTS & BOWEN**<br>201 S Biscayne Boulevard<br>Suite 1500 Miami Center<br>Miami, FL 33131<br>Tele: (305) 358-6300<br>Fax: (305) 381-9982 | Defendant<br>Sumitomo Mitsui Banking Corporation |
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| Gregory S. Grossman, Esq.<br>**ASTIGARRAGA DAVIS MULLINS & GROSSMAN**<br>701 Brickell Avenue, 16th Floor<br>Miami, FL 33131-2847<br>Tele: (305) 372-8282<br>Fax: (305) 372-8202 | Defendant<br>MB Financial Bank, N.A. |

| **Attorneys:** | **Representing:** |
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| Peter J. Roberts, Esq.<br>**SHAW GUSSIS FISHMAN FLANTZ WOLFSON & TOWBIN LLC**<br>321 N Clark Street, Suite 800<br>Chicago, IL 60654<br>Tele: (312) 276-1322<br>Fax: (312) 275-0568 | Defendant<br>MB Financial Bank, N.A. |
| Anthony L. Paccione, Esq.<br>Arthur S. Linker, Esq.<br>Kenneth E. Noble<br>**KATTEN MUCHIN ROSENMAN LLP**<br>575 Madison Avenue<br>New York, NY 10022-2585<br>Tele: (212) 940-8800<br>Fax: (212) 940-8776 | Defendants<br>Bank of Scotland plc |
| Andrew B. Kratenstein, Esq.<br>Michael R. Huttenlocher, Esq.<br>**MCDERMOTT WILL & EMERY LLP**<br>340 Madison Avenue<br>New York, NY 10173<br>Tele: (212) 547-5400 | Defendant<br>Camulos Master Fund, L.P. |
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| **Attorneys:** | **Representing:** |
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| Jeffrey I. Snyder, Esq.<br>Scott L. Baena, Esq.<br>**BILZIN SUMBERG BAENA PRICE & AXELROD**<br>200 S Biscayne Blvd., Suite 2500<br>Miami, FL 33131-2336<br>Tele: (305) 375-6148<br>Fax: (305) 351-2241 | Plaintiff<br>Fontainebleau Las Vegas LLC |
| Harold Defore Moorefield Jr., Esq.<br>**STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON**<br>Museum Tower<br>150 W Flagler Street, Suite 2200<br>Miami, FL 33130<br>Tele: (305) 789-3467<br>Fax: (305) 789-3395 | Defendant<br>Bank of Scotland plc |
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| Brett Michael Amron<br>**BAST AMRON LLP**<br>150 West Flagler Street<br>Penthouse 2850<br>Miami, FL 33130<br>Tele: (305) 379-7905 | Plaintiffs<br>ACP Master, Ltd.<br>Aurelius Capital Master, Ltd. |

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

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

**IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION**

**MDL No. 2106**

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

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

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

ORDERED AND ADJUDGED that

1. The Motion is GRANTED.
2. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd are hereby added as plaintiffs to this action and join in the claims asserted by the Plaintiffs in the Second Amended Complaint [D.E. 15] filed January 15, 2010 without the need of filing a separate complaint.
3. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall be bound by all existing case deadlines.
4. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall be bound by Amended MDL Order Number Eighteen Granting in Part and Denying in Part Motions to Dismiss [D.E. 108].

5. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall file Corporate Disclosure Statements pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Initial Disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, and written responses to all outstanding discovery requests within 14 days of entry of this Order.

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

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

cc: Magistrate Judge Goodman
All Counsel of Record

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 applies to:*

*Case No. 10-CV-20236-ASG.*
_____/

**MDL ORDER NUMBER 32; GRANTING AURELIUS PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT [ECF No. 133]**

THIS CAUSE is before the Court upon Plaintiffs ACP Master, Ltd., and Aurelius Capital Master, Ltd.'s ("Plaintiffs") Unopposed Motion for Leave to Amend Their Complaint **[ECF No. 133]**. After reviewing the Motion, it is hereby

ORDERED AND ADJUDGED that

1. Plaintiffs' Motion for Leave to Amend Their Complaint **[ECF No. 133]** is GRANTED.

2. Plaintiffs are directed to file their Second Amended Complaint no later than **Friday, September 24, 2010**.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 16 day of September, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Goodman
Counsel of record

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 applies to:*

*Case No. 09-CV-21879-ASG.*
_____/

**MDL ORDER NUMBER 35; DISMISSING CLAIMS WITH PREJUDICE TO EXPEDITE APPEAL OF CLAIM-DISPOSITIVE RULING [ECF No. 135]**

THIS CAUSE came before the Court for consideration of the Unopposed and Uncontested Motion to Dismiss Claims with Prejudice to Expedite Appeal of Claim-Dispositive Ruling filed by Soneet R. Kapila, as Chapter 7 Trustee (the "Trustee") for Fontainebleau Las Vegas Holdings, LLC, *et al.*,[1] **[ECF No. 135]** (the "Dismissal Motion"), in Case No. 1:09-cv-21879-ASG. By way of the Dismissal Motion, the Trustee seeks entry of a final judgment to facilitate, expedite, and obtain an immediate appeal from this Court's August 26, 2009, order denying the motion of plaintiffs Fontainebleau Las Vegas, LLC, *et al.* ("Fontainebleau"), for partial summary judgment (the "August 26 Order").

The Court having considered the Dismissal Motion and the record, being fully advised in the premises, and having determined that the other parties to the proceeding have no objection to the Trustee's proposal, finds and determines that the Trustee has set

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[1] By Order entered in this action on July 15, 2010 **[ECF No. 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.

forth appropriate grounds for dismissal of its action pursuant to Fed. R. Civ. P. 41(a)(2) to allow for an immediate appeal, including with respect to the August 26 Order.

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. Counts II through VI of the Amended Complaint are hereby DISMISSED WITH PREJUDICE, without preserving any right to appeal.
2. Counts I and VII of the Amended Complaint are hereby DISMISSED WITH PREJUDICE, preserving the Trustee's right to take an appeal from the final judgment that will be entered in this action and thus to obtain appellate review.
3. The Clerk of the Court is directed to enter a judgment in favor of Defendants on all claims in the Amended Complaint, substantially in the form of the Final Judgment attached hereto.
4. Pending any decision on the Trustee's appeal to the United States Court of Appeals for the Eleventh Circuit, the Trustee shall retain and preserve documents, data, and tangible things that are or may be potentially relevant to Case No. 1:09-cv-21879-ASG, in accordance with the plan of retention and reservation filed with the Court **[ECF No. 136]** (the "Preservation Plan"), which Preservation Plan is approved. The Court shall retain jurisdiction with respect to the Preservation Plan.
5. All parties shall bear their own costs.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 20 day of September, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Jonathan Goodman
Counsel of record

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 applies to:*

*Case No. 09-CV-23835-ASG.*
*Case No. 10-CV-20236-ASG.*
_____/

**MDL ORDER NUMBER 33; AMENDING PRE-TRIAL DEADLINES [ECF No. 134]**

THIS CAUSE is before the Court upon the Notice submitted by 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") **[ECF No. 134]**. After reviewing the Notice, the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that the following time schedule shall govern:

| | |
|---|---|
| By 10-15-2010 | All non-dispositive pretrial motions (including motions pursuant to Fed.R.Civ.P. 14, 15, 18 through 22, and 42 motions) shall be filed. Any motion to amend or supplement the pleadings filed pursuant to Fed.R.Civ.P. 15(a) or 15(d) shall comport with S.D.Fla.L.R. 15.1 and shall be accompanied by the proposed amended or supplemental pleading and a proposed order as required. Prior to filing any non-dispositive motion, counsel for the moving party shall confer, or make reasonable effort to confer, with counsel for the opposing party in a good faith effort to resolve the matter, and shall include in the motion a statement certifying that this has been done. When filing non-dispositive motions, the moving party shall submit a proposed order in WORDPERFECT (or Word) format to gold@flsd.uscourts.gov. |

| | |
|---|---|
| By 1-15-2011 | 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 listed shall be permitted to testify. |
| By 2-15-2011 | 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 listed shall be permitted to testify. |

DONE and ORDERED IN CHAMBERS at Miami, Florida this 20th day of September, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Jonathan Goodman
Counsel of record

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 applies to:*

*Case No. 09-CV-23835-ASG.*
*Case No. 10-CV-20236-ASG.*
_____/

**MDL ORDER NUMBER 34; DENYING MOTION[1] TO STAY [ECF No. 134]**

THIS CAUSE is before the Court upon the Notice submitted by 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") **[ECF No. 134]**.

Having reviewed the parties' respective positions, I conclude that 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. It is substantially more efficient and cost-effective to permit the Disbursement Agreement Claims to simultaneously proceed. Accordingly, it is hereby ORDERED AND ADJUDGED that the motion to stay **[ECF No. 134]** is DENIED.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 21 day of September, 2010.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Jonathan Goodman
Counsel of record

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[1] Although BANA makes no formal motion to stay, I construe and treat BANA's request for a stay in the Notice as such. *See* **[ECF No. 134, § II.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 applies to:*

*Case No. 09-CV-23835-ASG.*
_____/

**MDL ORDER NUMBER 36; GRANTING JOINT MOTION TO ADD ADDITIONAL PLAINTIFFS TO THE ACTION [ECF No. 137]**

THIS CAUSE is before the Court upon the Joint Motion to Add Additional Plaintiffs to the Action submitted by Plaintiffs Avenue CLO Fund, Ltd., *et al.* ("Plaintiffs") and Defendant Bank of America, N.A. ("BANA") **[ECF No. 137]**. After reviewing the Motion, it is hereby

ORDERED AND ADJUDGED that

1. The Motion is GRANTED.
2. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd are hereby added as plaintiffs to this action and join in the claims asserted by the Plaintiffs in the Second Amended Complaint **[ECF No. 15]**, filed on January 15, 2010, without the need of filing a separate complaint.
3. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall be bound by all existing case deadlines.
4. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall be bound by Amended MDL Order Number Eighteen Granting in Part and Denying in Part Motions to Dismiss **[ECF No. 80]**.

5. Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd shall file Corporate Disclosure Statements pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Initial Disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, and written responses to all outstanding discovery requests by **October 4, 2010**.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 9 day of September, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Jonathan Goodman
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

**MOTION TO WITHDRAW AS COUNSEL**

Waldman Trigoboff Hildebrandt Marx & Calnan, P.A. (the "Firm"), as counsel for Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, respectfully moves to withdraw as counsel and states as follows:

1. The Firm and Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, have developed irreconcilable differences between them concerning this litigation necessitating this request.

2. In particular, separate litigation in the Supreme Court of the State of New York entitled: *Wilmington Trust FSB, etc. et al., v. Fontainebleau Resorts, LLC, etc., et al.* (Case No. 650435/2009) has resulted in the issuance of an Order (Lowe, J.) dated September 15, 2010, restraining the ability of Fontainebleau Resorts, LLC to transfer any of its assets for any purpose, including the payment of attorneys' fees and expenses. Accordingly, undersigned counsel has no present ability to be compensated for its legal services and/or to be reimbursed for expenses it may advanced on its clients' behalves.

3. There will be no prejudice to any of the parties if the Firm is allowed to withdraw as counsel for the Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC.

4. Pursuant to *S.D. Fla. L.R.* 7.1(a)(1)(F), a proposed Order granting this Motion is attached hereto.

5. I hereby certify that pursuant to *S.D. Fla. L.R.* 7.1, undersigned counsel has conferred or attempted to confer with counsel for the parties that may be affected by the relief sought in this Motion. The affected parties have either not responded or have refused to take a position with respect to the Motion.

WHEREFORE, Waldman Trigoboff Hildebrandt Marx & Calnan, P.A., including attorneys' within the Firm, respectfully request this Honorable Court enter an order allowing the withdrawal and relieving the Firm of further obligations as of the date of the Order.

WALDMAN TRIGOBOFF HILDEBRANDT
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2200 North Commerce Parkway, Suite 202
Weston, Florida 33326
Telephone: (954) 467-8600
Facsimile: (954) 467-6222

By: /s Sarah J. Springer
Glenn J. Waldman
Florida Bar No. 374113
Sarah J. Springer
Florida Bar No. 0070747

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 22, 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.

I further certify that a true and correct coy of this Motion has been served by U.S. Mail upon Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, c/o Mario Romine, 19501 Biscayne Blvd., Suite 400, Aventura, FL 33180 on this 22nd day of September 2010.

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By: /s Sarah J. Springer
Glenn J. Waldman
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**SERVICE LIST**

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| David J. Woll, Esq.<br>Justin S. Stern, Esq.<br>Lisa H. Rubin, Esq.<br>Thomas C. Rice, Esq.<br>**SIMPSON THACHER & BARTLETT LLP**<br>425 Lexington Avenue<br>New York, NY 10017-3954<br>Tel: 212.455.3040/Fax: 212.455.2502 | JP Morgan Chase Bank, N.A.<br>Barclays Bank PLC<br>Deutsche Bank Trust Company Americas |
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| Robert Gerald Fracasso, Jr.<br>**SHUTTS & BOWEN**<br>201 S Biscayne Blvd.<br>Suite 1500 Miami Center<br>Miami, FL 33131<br>Tel: 305.358.6300/Fax: 305.381.9982 | Sumitomo Mitsui Banking Corporation |
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| Arthur S. Linker, Esq.<br>**KATTEN MUCHIN ROSEMAN LLP**<br>575 Madison Avenue<br>New York, NY 10022-2585<br>Tel: 212.940.8800/Fax: 212.940.8776 | Bank of Scotland PLC |
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| David M. Friedman, Esq.<br>Jed I. Bergman, Esq.<br>Seth A. Moskowitz, Esq.<br>**KASOWITZ BENSON TORRES & FRIEDMAN**<br>1633 Broadway, 22nd Floor<br>New York, NY 10019-6799<br>Tel: 212.506.1700/Fax: 212.506.1800 | Fontainebleau Las Vegas, LLC |
| Jeffrey I. Snyder, Esq.<br>Scott L. Baena, Esq.<br>**BILZIN SUMBERG BAENA PRICE & AXELROD**<br>200 S. Biscayne Blvd., Suite 2500<br>Miami, FL 33131-2336<br>Tel: 305.375.6148/Fax: 305.351.2241 | Fontainebleau Las Vegas, LLC |
| Harold Defore Moorefield, Jr., Esq.<br>**STERNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON**<br>Museum Tower, Suite 2200<br>150 West Flagler Street<br>Miami, FL 33130 | Bank of Scotland PLC |
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

**NOTICE OF FILING PROPOSED ORDER**

Waldman Trigoboff Hildebrandt Marx & Calnan, P.A. (the "Firm"), as counsel for Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, hereby files its proposed Order with respect to its Motion to Withdraw as counsel.

WALDMAN TRIGOBOFF HILDEBRANDT
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Telephone: (954) 467-8600
Facsimile: (954) 467-6222

By: /s Sarah J. Springer
Glenn J. Waldman
Florida Bar No. 374113
Sarah J. Springer
Florida Bar No. 0070747

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 22, 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.

I further certify that a true and correct coy of this Notice has been served by U.S. Mail upon Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, c/o Mario Romine, 19501 Biscayne Blvd., Suite 400, Aventura, FL 33180 on this 22nd day of September 2010.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

**ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL**

_____This came before the Court on Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s Motion to Withdraw as Counsel for Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, dated September 22, 2010. The Court having considered the Motion and being otherwise advised in the premises, it is hereupon

ORDERED and ADJUDGED that said Motion be and the same is hereby Granted. Waldman Trigoboff Hildebrandt Marx & Calnan, P.A. is hereby relieved of all responsibilities attendant to the representation of Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC in this action. All future papers may be served upon Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC as follows: c/o Mario Romine, 19501 Biscayne Blvd., Suite 400, Aventura, FL 33180 .

DONE and ORDERED in chambers at Miami, Miami-Dade County, Florida this ___ day of September, 2010.

_____
HONORABLE JUDGE GOLD

cc: Counsel of Record

**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.

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**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

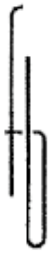
By: Ronaldo Naval
Ronaldo Naval, Vice President

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.

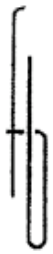
63. BofA's refusals to process the March 2 Notice and March 3 Notice because, as BofA claimed, the notices were inconsistent with Section 2.1(c)(iii) of the Credit Agreement did not reflect BofA's true interpretation of Section 2.1(c)(iii) of the Credit Agreement. BofA's true interpretation of Section 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 23, 2010

Respectfully submitted,

By: /s/ Brett M. Amron

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**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 23th day of September, 2010 to:

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/s/ *Brett M. Amron*
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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Miami Division**
**CASE No.: 09-2106-MD-GOLD/GOODMAN**

IN RE :

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

**JOINT RESPONSE TO WALDMAN TRIGOBOFF HILDEBRANDT MARX & CALNAN, P.A.'S MOTION TO WITHDRAW AS COUNSEL**

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"), by their undersigned attorneys, jointly respond to Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s ("Waldman") Motion To Withdraw As Counsel for Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC (together, "FBR") as follows:

## I. WALDMAN'S PRINCIPAL BASIS FOR WITHDRAWING AS COUNSEL HAS BEEN ELIMINATED

Waldman's principal basis for seeking to withdraw as FBR's counsel are alleged "irreconcilable differences" with FBR that have developed as a result of the New York State Supreme Court's September 15, 2010 Order in *Wilmington Trust FSB v. Fontainebleau Resorts, LLC* "restraining the ability of Fontainebleau Resorts, LLC to transfer any of its assets for any purpose, including the payment of attorneys' fees and expenses." Motion to Withdraw as Counsel, ¶ 2. But recent developments in the *Wilmington Trust* action have eliminated this basis for Waldman's withdrawal motion. On September 27, 2010, the parties to the *Wilmington Trust*

action entered a stipulation to dissolve the temporary restraining order. *See* K. Dillman Aff. Ex. 1. Nonetheless, Waldman has confirmed that it intends to proceed with its withdrawal motion even though there is no longer any legal impediment to it being paid and no indication that FBR is refusing to pay Waldman. *See* K. Dillman Aff. Exs. 2, 3. Thus, Waldman's motion is baseless.

## II. WALDMAN'S WITHDRAWAL SHOULD NOT BE PERMITTED TO FURTHER DELAY FBR'S COMPLIANCE WITH THE SUBPOENAS ISSUED IN THIS CASE

BANA and the Term Lender Plaintiffs are concerned that if Waldman is permitted to withdraw as FBR's counsel there will be a further delay of FBR's production of documents responsive to the subpoenas issued in this case. The Term Lender Plaintiffs and BANA have each served a subpoena on FBR seeking documents related to the Fontainebleau Las Vegas project. This Court's August 30, 2010 order on the Term Lender Plaintiffs' Motion To Compel required FBR to produce all non-privileged documents responsive to the Term Lenders' April 22, 2010 subpoena by no later than *September 13, 2010*. *See* DE #129. In addition, FBR was required to produce documents in response to BANA's September 2, 2010 subpoena by no later than *September 17, 2010*. **FBR has yet to comply with these subpoenas**. To date, FBR has produced no electronic documents, and has only made available for inspection approximately 80 boxes of non-privileged documents in Aventura, Florida.

BANA and the Term Lender Plaintiffs respectfully submit that Waldman should only be permitted to withdraw as FBR's counsel to the extent that such withdrawal will not further delay FBR's compliance with the outstanding subpoenas.

Dated: September 29, 2010

Respectfully submitted,

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*Attorneys for Bank of America, N.A.*

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Miami Division**
**CASE NO.: 09-2106-MD-GOLD/GOODMAN**

IN RE :

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

**DECLARATION OF KIRK D. DILLMAN IN SUPPORT OF JOINT RESPONSE TO WALDMAN TRIGOBOFF HILDEBRANDT MARX & CALNAN, P.A.'S MOTION TO WITHDRAW AS COUNSEL**

I, Kirk D. Dillman, declare as follows:

1. I am a partner in the firm of Hennigan, Bennett & Dorman, L.L.P., counsel for Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, No. 09-cv-23835-ASG. I submit this declaration in support of the joint response of the Term Lender Plaintiffs and Defendant Bank of America, N.A. ("BANA") to Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s ("Waldman") Motion To Withdraw As Counsel for Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC (together, "FBR"). 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.

2. Waldman contends that it has "irreconcilable differences" with FBR as a result of a September 15, 2010 Order issued by the New York State Supreme Court in *Wilmington Trust FSB v. Fontainebleau Resorts, LLC* restraining FBR from transferring assets for any purpose, including the payment of attorneys' fees and expenses (the "TRO").

3. My firm originally filed the Wilmington Trust action on behalf of certain Term Lenders. Wilmington Trust, as administrative agent on behalf of all Term Lenders, was subsequently substituted in as the plaintiff in that action. We have remained involved, however, in assisting Wilmington in those proceedings, and, in particular, in the recent developments regarding the TRO and the settlement that has now resulted in the dissolution of the TRO.

4. On Thursday, September 23, 2010, I spoke with Sarah Springer, counsel for FBR, concerning the Motion to Withdraw. I informed Ms. Springer that I had been informed that discussions between the parties to the Wilmington Trust action and others had reached a point where it appeared that the TRO might be dissolved by agreement of the parties on Monday, September 27. Because it appeared that the TRO was the sole basis for her firm's request to withdraw as counsel, I asked Ms. Springer if she would be willing to request the Court to refrain from deciding the Motion for the few days it would take to determine if the TRO in fact would be dissolved. Ms. Springer stated that she would need to speak with others and get back to me, which she did by email later that day, stating simply: "We will be going forward with our Motion to Withdraw."

5. On Monday, September 27, the parties to the *Wilmington Trust* action entered a stipulation providing that the TRO would automatically expire upon the parties' execution of Definitive Settlement Documentation and Wilmington's receipt of the required payment under the Definitive Settlement Documentation. Ex. 2. I am informed through Wilmington's counsel that those conditions have now occurred and that the TRO accordingly has expired.

6. On September 27, I sent Ms. Springer an email telling her that it appeared the TRO would dissolve that day and asking if she still intended to proceed with the Motion to Withdraw. She confirmed that she was. Ex. 3.

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

DATED: September 28, 2010

KIRK D. DILLMAN

**EXHIBIT 1**

**Murata, Kenneth**

**From:** Sarah Springer [SSpringer@waldmanlawfirm.com]
**Sent:** Thursday, September 23, 2010 3:12 PM
**To:** Kirk D. Dillman
**Subject:** RE: Motion to Withdraw

Kirk,

Thank you for your call earlier today. We will be going forward with our Motion to Withdraw.

Sincerely,

Sarah J. Springer, Attorney at Law
Waldman Trigoboff Hildebrandt Marx & Calnan, P. A.

---

**From:** Kirk D. Dillman [mailto:DillmanK@hbdlawyers.com]
**Sent:** Thursday, September 23, 2010 12:45 PM
**To:** Sarah Springer
**Subject:** Motion to Withdraw

Sarah

I just left you a voicemail. Please give me a call at your earliest convenience regarding your motion to withdraw.

**Kirk D. Dillman**
**Hennigan, Bennett & Dorman LLP**
**865 S. Figueroa St., Suite 2900**
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**Main: 213.694.1200**
**Cell: 213.675.0031**
**email: dillmank@hbdlawyers.com**
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---

is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.
Thank you.

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**EXHIBIT 2**

FILED: NEW YORK COUNTY CLERK 09/27/2010 INDEX NO. 650435/2009
NYSCEF DOC. NO. 130 RECEIVED NYSCEF: 09/27/2010

# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 56
*Justice*

Wilmington

- v -

Fontainebleau

INDEX NO. 650435-09
MOTION DATE _____
MOTION SEQ. NO. 008
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is resolved as per the attached stipulation

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9-24-10

RICHARD B. LOWE III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

WILMINGTON TRUST FSB,
a federally chartered savings bank,

Plaintiff,

vs.

FONTAINEBLEAU RESORTS, LLC,
a Delaware limited liability company, and
FONTAINEBLEAU RESORTS PROPERTIES I, LLC, a
Delaware limited liability company,

Defendants.

Index No: 650435/2009

Part 56 (Lowe, J.)

**STIPULATION PERMITTING RESTRUCTURING PREPARATION ACTIVITIES PENDING POTENTIAL SETTLEMENT**

WHEREAS, by Order and Decision entered September 10, 2010, the Court granted Plaintiff Wilmington Trust FSB summary judgment in the amount of $1.036 billion, as well as interest, costs and disbursements;

WHEREAS, judgment has not yet been entered;

WHEREAS, Plaintiff moved the Court on September 15, 2010 by Order to Show Cause for a Restraining Order and Temporary Restraining Order pursuant to CPLR 5229 (the "CPLR 5229 motion");

WHEREAS, on September 15, 2010 the Court entered a Temporary Restraining Order (the "TRO") ordering that pending a hearing and determination of Plaintiff's CPLR 5229 motion, Defendants and their subsidiaries, affiliates, officers, members and agents are (i) restrained from making or suffering any sale, assignment, transfer or interfering with any property in which Defendants have a legal or beneficial interest, (ii) directed to undertake any action necessary to prevent the making or suffering of any sale, assignment, transfer or interfering with any property in which Defendants have a legal or beneficial interest and (iii) enjoined from closing the Restructuring of the debt and other financial obligations of the Fontainebleau Miami Beach Resort (the "Restructuring");

WHEREAS, the Court held a hearing on Plaintiff's CPLR 5229 motion on

September 21, 2010;

WHEREAS, at the close of the hearing, the Court continued the TRO pending its decision on Plaintiff's CPLR 5229 motion;

WHEREAS, the parties are currently engaged in negotiations to resolve the claims in this action; and

WHEREAS, the parties now desire to modify the TRO to allow preparation for the Restructuring to proceed in anticipation of possible execution of definitive documentation that would result in the resolution of this action; and

WHEREAS, the parties also desire to modify the TRO to allow Defendants to pay legal fees and services incurred in the ordinary course in an unrelated lawsuit pending in Florida state court in an amount not to exceed $100,000.

IT IS HEREBY STIPULATED AND AGREED among the undersigned parties:

1. Notwithstanding the TRO, Defendants, Fontainebleau Nakheel Miami JV, LLC (the "Miami JV") and their respective subsidiaries, affiliates, officers, members, directors, managers and agents, and any non-parties, regardless of having notice of the TRO, are permitted to take steps to prepare the Restructuring for closing;

2. The TRO otherwise remains in full force and effect,

3. In the event the parties and the Miami JV and its subsidiaries execute definitive documentation resolving the claims in this Action ("Definitive Settlement Documentation") and all payments required under such Definitive Settlement Documentation are received by wire by counsel for Wilmington Trust or any other recipient designated in the Definitive Settlement Documentation to receive payment on behalf of Plaintiff, the Restructuring may close without further Order of the Court and without any obligation to provide the final, non-executed definitive restructuring documents to the Plaintiffs two days prior to closing pursuant to paragraph 4(c) of the stipulation so-ordered by this Court on August 11, 2010, and upon the said closing:

(a) the TRO shall expire automatically;

(b) all pending motions in this Action shall be deemed to be withdrawn; and

(c) this Action shall be resolved in accordance with the terms of the Definitive Settlement Documentation.

4. In the event the parties do not execute Definitive Settlement Documentation resolving the claims in this Action or the payments required under such Definitive Settlement Documentation are not received as specified above, the TRO shall remain in full force and effect pending further Order from the Court, this Action shall not be dismissed, and all pending motions shall remain pending.

September 24, 2010

SEWARD & KISSEL LLP

By: _____
Mark J. Hyland

One Battery Park Plaza
New York, New York 10004
Tel.: (212) 574-1200
hyland@sewkis.com

*Attorneys for Plaintiff Wilmington Trust FSB, as Administrative Agent*

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

By: _____
Seth A. Moskowitz

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smoskowitz@kasowitz.com

*Attorneys for Defendants Fontainebleau Resorts, LLC and Fontainebleau Resort Properties I, LLC*

SO ORDERED
September 24, 2010

RICHARD B. LOWE III
J.S.C.

SK 02463 0032 1133395

**EXHIBIT 3**

**Murata, Kenneth**

**From:** Sarah Springer [SSpringer@waldmanlawfirm.com]
**Sent:** Monday, September 27, 2010 3:22 PM
**To:** Kirk D. Dillman
**Subject:** RE: Motion to Withdraw

Yes.

Sincerely,

Sarah J. Springer, Attorney at Law
Waldman Trigoboff Hildebrandt Marx & Calnan, P. A.

---

**From:** Kirk D. Dillman [mailto:DillmanK@hbdlawyers.com]
**Sent:** Monday, September 27, 2010 11:43 AM
**To:** Sarah Springer
**Subject:** RE: Motion to Withdraw

I am told that the TRO will be dissolved today. Are you still going forward?

---

**From:** Sarah Springer [mailto:SSpringer@waldmanlawfirm.com]
**Sent:** Thursday, September 23, 2010 12:12 PM
**To:** Kirk D. Dillman
**Subject:** RE: Motion to Withdraw

Kirk,

Thank you for your call earlier today. We will be going forward with our Motion to Withdraw.

Sincerely,

Sarah J. Springer, Attorney at Law
Waldman Trigoboff Hildebrandt Marx & Calnan, P. A.

---

**From:** Kirk D. Dillman [mailto:DillmanK@hbdlawyers.com]
**Sent:** Thursday, September 23, 2010 12:45 PM
**To:** Sarah Springer
**Subject:** Motion to Withdraw

Sarah

I just left you a voicemail. Please give me a call at your earliest convenience regarding your motion to withdraw.

**Kirk D. Dillman**
**Hennigan, Bennett & Dorman LLP**
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This e-mail was sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately. Thank you.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Miami Division**
**Case No. 09 - 2106-MD-GOLD/GOODMAN**

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on September 29, 2010, I electronically filed the following:

*Bank of America, N.A.'s Joint Response to Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s Motion to Withdraw of Counsel [DE 147]*

and

*Declaration of Kirk D. Dillman In Support of Joint Response to Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s Motion to Withdraw as Counsel [DE 148]*

with the Clerk of Court using CM/ECF. I also certify that the foregoing documents were served on all parties identified on the attached Service List either via transmission of Notice of Electronic Filing generated by CM/ECF.

Respectfully submitted,

**HUNTON & WILLIAMS LLP**

By: */s/ Craig V. Rasile*
Craig V. Rasile, Esq.
Florida Bar No. 613691
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Miami, FL 33131
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Fax: (305) 810-2460

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| Thomas C. Rice, Esq.<br>**SIMPSON THACHER & BARTLETT LLP**<br>425 Lexington Avenue<br>New York, NY 10017-3954<br>Tel: 212.455.3040/Fax: 212.455.2502 | Royal Bank of Scotland PLC |
| Anthony L. Paccione, Esq.<br>**KATTEN MUCHIN ROSEMAN LLP**<br>575 Madison Avenue<br>New York, NY 10022-2585<br>Tel: 212.940.8800/Fax: 212.940.8776 | Bank of Scotland<br>Bank of Scotland PLC |
| Arthur S. Linker, Esq.<br>**KATTEN MUCHIN ROSEMAN LLP**<br>575 Madison Avenue<br>New York, NY 10022-2585<br>Tel: 212.940.8800/Fax: 212.940.8776 | Bank of Scotland PLC |
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| Nicholas J. Santoro, Esq.<br>**SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON**<br>400 S. Fourth Street, 3rd Floor<br>Las Vegas, NV 89101<br>Tel: 702.791.0908/Fax: 702.791.1912 | Camulos Master Fund, L.P. |
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| Jeffrey I. Snyder, Esq.<br>Scott L. Baena, Esq.<br>**BILZIN SUMBERG BAENA PRICE & AXELROD**<br>200 S. Biscayne Blvd., Suite 2500<br>Miami, FL 33131-2336<br>Tel: 305.375.6148/Fax: 305.351.2241 | Fontainebleau Las Vegas, LLC |
| Harold Defore Moorefield, Jr., Esq.<br>**STERNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON**<br>Museum Tower, Suite 2200<br>150 West Flagler Street<br>Miami, FL 33130 | Bank of Scotland PLC |
| Kenneth E. Noble, Esq.<br>**KATTEN MUCHIN ROSEMAN LLP**<br>575 Madison Avenue<br>New York, NY 10022-2585<br>Tel: 212.940.8800/Fax: 212.940.8776 | Bank of Scotland PLC |

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| Thomas C. Rice, Esq.<br>**SIMPSON THACHER & BARTLETT LLP**<br>425 Lexington Avenue<br>New York, NY 10017-3954<br>Tel: 212.455.3040/Fax: 212.455.2502 | Bank of Scotland PLC |

**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. 09-CV-23835 GOLD/GOODMAN.
/

**CORPORATE DISCLOSURE STATEMENT OF PLAINTIFFS SCOGGIN CAPITAL MANAGEMENT II LLC, SCOGGIN INTERNATIONAL FUND LTD, AND SCOGGIN WORLDWIDE FUND LTD PURSUANT TO F.R.C.P. RULE 7.1**

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Plaintiffs Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd disclose the following:

1. Plaintiff Scoggin Capital Management II LLC is a limited liability company formed under the laws of Delaware, whose Investment Advisor is Scoggin LLC.

2. Plaintiff Scoggin International Fund Ltd is a limited liability company formed under the laws of the Cayman Islands, whose Investment Advisor is Scoggin LLC.

3. Plaintiff Scoggin Worldwide Fund Ltd is a limited liability company formed under the laws of the Cayman Islands, whose Investment Manager is Old Bellows Partners LP.

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

Dated: October 4, 2010

By: /s/ Lorenz Michel Prüss

DIMOND KAPLAN & ROTHSTEIN, P.A.
David A. Rothstein
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Facsimile: (213) 694-1200

*Attorneys for Plaintiffs Avenue CLO Fund, Ltd., et. al.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 4, 2010, a copy of the foregoing **CORPORATE DISCLOSURE STATEMENT OF PLAINTIFFS SCOGGIN CAPITAL MANAGEMENT II LLC, SCOGGIN INTERNATIONAL FUND LTD, AND SCOGGIN WORLDWIDE FUND LTD 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:** |
|---|---|
| Bradley J. Butwin, Esq.<br>Daniel L. Cantor, Esq.<br>Jonathan Rosenberg, Esq.<br>William J. Sushon, Esq.<br>**O'MELVENY & MYERS LLP**<br>Times Square Tower<br>7 Times Square<br>New York, NY 10036<br>Tele: (212) 326-2000<br>Fax: (212) 326-2061 | Defendants<br>Bank of America, N.A.<br>Merrill Lynch Capital Corporation |
| Craig V. Rasile, Esq.<br>Kevin Michael Eckhardt, Esq.<br>**HUNTON & WILLIAMS**<br>1111 Brickell Avenue<br>Suite 2500<br>Miami, FL 33131<br>Tele: (305) 810-2579<br>Fax: (305) 810-2460 | Defendants<br>Bank of America, N.A.<br>Merrill Lynch Capital Corporation<br>JP Morgan Chase Bank, N.A.<br>Barclays Bank PLC<br>Deutsche Bank Trust Company Americas<br>The Royal Bank of Scotland PLC<br>HSH Nordbank AG, New York Branch<br>Bank of Scotland plc |
| David J. Woll, Esq.<br>Justin S. Stern, Esq.<br>Lisa H. Rubin, Esq.<br>Thomas C. Rice, Esq.<br>Steven S. Fitzgerald<br>**SIMPSON THACHER & BARTLETT LLP**<br>425 Lexington Avenue<br>New York, NY 10017-3954<br>Tele: (212) 455-3040<br>Fax: (212) 455-2502 | Defendants<br>JP Morgan Chase Bank, N.A.<br>Barclays Bank PLC<br>Deutsche Bank Trust Company Americas<br>The Royal Bank of Scotland PLC<br>Bank of Scotland plc |
| John Blair Hutton III, Esq,<br>Mark D. Bloom, Esq.<br>**GREENBERG TAURIG**<br>1221 Brickell Avenue<br>Miami, FL 33131<br>Tele: (305) 579-0788<br>Fax: (305) 579-0717 | Defendants<br>JP Morgan Chase Bank, N.A.<br>Barclays Bank PLC<br>Deutsche Bank Trust Company Americas<br>The Royal Bank of Scotland PLC |

| Attorneys: | Representing: |
|---|---|
| Sarah A. Harmon, Esq.<br>**BAILEY KENNEDY**<br>8984 Spanish Ridge Avenue<br>Las Vegas, NV 89148<br>Tele: (702) 562-8820<br>Fax: (702) 562-8821 | Defendant<br>JP Morgan Chase Bank, N.A.<br>Barclays Bank PLC<br>Deutsche Bank Trust Company Americas<br>The Royal Bank of Scotland PLC |
| Frederick D. Hyman, Esq.<br>Jason I. Kirschner, Esq.<br>Jean-Marie L. Atamian, Esq.<br>**MAYER BROWN LLP**<br>1675 Broadway<br>New York, NY 10019-5820<br>Tele: (212) 506-2500<br>Fax: (212) 261-1910 | Defendant<br>Sumitomo Mitsui Banking Corporation |
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 09-MD-2106-CIV–GOLD/GOODMAN

In re:
Fontainebleau Las Vegas Contract Litigation
_____/
This Document Relates to cases:
09-CV-23835-ASG
10-CV-20236-ASG
_____/

**PLAINTIFF TERM LENDERS' JOINT MOTION FOR PARTIAL FINAL JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF[1]**

On May 28, 2010, this Court dismissed with prejudice all of the Term Lender[2] claims seeking damages from the Revolving Lenders for their refusals to fund their commitments under a Credit Agreement to finance the construction of the Fontainebleau Casino and Resort. *See* Amended MDL Order Number 18 (the "May 28 Order") at 30–31. The May 28 Order fully resolved the merits of the Term Lender claims against the Revolving Lenders for their refusals to fund their commitments under the Credit Agreement, leaving only claims against Bank of America ("BofA") in its role as Bank Agent and Disbursement Agent for the Lenders. Thereafter, on September 20, 2010, the Court dismissed all of the claims brought by the Trustee in the related adversary proceeding, No. 09-cv-21879-ASG, including the Trustee's own claim against the Revolving Lenders for their refusals to provide funds. *See* MDL Order Number 35.

[1] Counsel for the Term Lenders have conferred with all parties or non-parties who may be affected by the relief sought by this motion in a good faith effort to resolve the issues raised in the motion and have been unable to do so.

[2] The Term Lenders include all of the Plaintiffs captioned in the Second Amended Complaint in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al*, No. 09-cv-23835-ASG (the "Avenue Complaint"), and the Amended Complaint in *ACP Master, Ltd., et al v. Bank of America, N.A., et al*, No. 10-cv-20236-ASG (the "Aurelius Complaint").

The Court entered judgment, so the Trustee may appeal dismissal of that claim as of right. The Trustee has indicated that he will appeal. Because of the substantial identity of issues in the Term Lenders' and the Trustee's claims against the Revolving Lenders, the Eleventh Circuit should consider the Term Lenders' claims against the Revolving Lenders at the same time. Therefore, the Term Lenders jointly move that the Court enter partial final judgment under Federal Rule of Civil Procedure 54(b) so that the Term Lenders may take an appeal, at the same time as the Trustee, of their claims seeking damages from the Revolving Lenders for their refusals to fund their commitments under a Credit Agreement.

## ARGUMENT

The Avenue Complaint and the Aurelius Complaint each allege two distinct theories of liability, against two classes of defendants, arising from breach of two agreements. One theory of liability alleges that all eleven defendants—as Revolving Lenders—breached their obligations under the Credit Agreement when they refused to fund a series of Notices of Borrowing. Claims arising from this theory are alleged in Counts II, III, and IV of the Avenue Complaint and in Counts I and II of the Aurelius Complaint. This Court dismissed all of those claims with prejudice. May 28 Order at 30–31.

The second theory of liability relates to BofA only, in its capacities as Bank Agent and Disbursement Agent for all of the Term Lenders. Count I of the Avenue Complaint and Count III of the Aurelius Complaint allege that BofA breached its obligations under the Disbursement Agreement when it disbursed funds from an account it managed on behalf of the lenders—despite its actual knowledge that Events of Default precluded disbursement. The Court denied BofA's motion to dismiss those claims. May 28 Order at 30–31.

In a multi-claim, multi-party case where there is "no just reason for delay," district courts may grant final judgment after resolving one or more, but fewer than all, of the claims presented.

Fed. R. Civ. P. 54(b). The Eleventh Circuit applies a two-step analysis for deciding the propriety of partial final judgment under Rule 54(b): a judgment should be certified under Rule 54(b) if (1) the decision "is in fact both 'final' and a 'judgment'" and (2) there is "no just reason for delay." *Eagletech Communications Inc. v. Citigroup, Inc.*, 2008 U.S. Dist. LEXIS 49432, *60 (S.D. Fla. June 27, 2008) (Gold, J.).

The May 28 Order is a final decision as to all of the claims arising from the Revolving Lenders' failure to fund, and there is no just reason to delay the Court of Appeals' consideration of the legal basis for these claims.

## I. The May 28 Order Is a Final Decision as to All of the Claims Arising from the Revolving Lenders' Failure to Fund.

The authority to certify under Rule 54(b) applies to "final decisions." "A decision is 'final' if it is 'an ultimate disposition of an individual claim [or individual party] entered in the course of a multiple claims action." *Eagletech*, 2008 U.S. Dist. LEXIS 49432, *60 (citing *Lloyd Noland Foundation, Inc. v. Tenet Health Care Corp.*, 483 F.3d 773 (11th Cir. 2007)).

Standing alone, the fact that the Order dismissed with prejudice all of the claims against ten out of eleven Defendants is sufficient to make it a final decision within the meaning of Rule 54(b). *See In re Southeast Banking Corp.*, 69 F.3d 1539, 1547 (11th Cir. 1995) (explaining that a judgment is final if it "disposes entirely of a separable claim or dismisses a party entirely"). As this Court has said, "the most common application of the rule to multi-party actions is the dismissal, summary judgment, or other adjudication of all of the claims asserted against one or more of multiple Defendants." *Access Now, Inc. v. AMH CGH, Inc.*, 2001 U.S. Dist. LEXIS 12876, *23 (S.D. Fla. May 11, 2001) (Gold, J.) (quoting *Moore's Federal Practice* § 54.22[2][c]).

## II. There Is No Just Reason for Delaying the Eleventh Circuit's Consideration of the Dismissed Claims

"[I]n deciding whether there are no just reasons to delay the appeal of individual final judgments ... a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980). "In determining that there is no just reason for delay, courts may consider 'any judicial administrative advantage that might be served by entering the judgment under Rule 54(b).'" *Access Now*, 2001 U.S. Dist. LEXIS 12876, *24.

Judicial administrative interests weigh in favor of a judgment under Rule 54(b) because the denial of a Rule 54(b) judgment will result in duplicative appeals to the Eleventh Circuit, first by the Trustee and later by the Term Lenders. On September 20, the Court dismissed with prejudice all of the Trustee's claims. The Trustee intends to appeal the May 28th Order. *See* Chapter 7 Trustee's Notice of Intention with Regard to Case No. 1:09-cv-21879-ASG, at 6 (asking for a judgment from which the Trustee may appeal). The Trustee must bring his intended appeal by October 20, which is 30 days after the Court entered judgment. *See* Fed. R. App. P. 4(a)(1)(A). Absent a Rule 54(b) judgment in the Term Lenders' cases, the Term Lenders cannot bring an appeal at the same time, because the May 28 Order is not a final judgment unless certified as such under Rule 54(b). Without an immediate appeal, neither the Revolving Lenders nor the Term Lenders can finally resolve their legal relationship until a final decision issues on the Disbursement Agreement claims. That could be more than a year from now. Under the current scheduling order, discovery on the remaining Disbursement Agreement claims is set to last until July 2011, and trial is scheduled for 2012. MDL Order Number 3 at 6, 1. The Term Lenders intend to appeal this Court's dismissal with prejudice of their claims seeking damages from the Revolving Lenders for their refusals to fund their commitments under a Credit

Agreement. Therefore, the Eleventh Circuit will be forced to consider two separate appeals. Such "piecemeal appeals" are one of the problems Rule 54(b) was meant to remedy. *See Curtiss-Wright Corp.*, 446 U.S. at 8. The policy against multiplying appeals supported the Court's decision to deny Fontainebleau's request for interlocutory review in January, just as it now weighs in favor of entering judgment on the Term Lender claims under Rule 54(b). In light of the positive effect an immediate appeal would have on the Eleventh Circuit's workload, the benefit of early resolution and finality weigh heavily in favor of a Rule 54(b) judgment.

The equities weigh in favor of a judgment under Rule 54(b) because the denial of a Rule 54(b) judgment will prejudice the Term Lenders' right to appeal. The interests of the Term Lenders and the Trustee are significantly aligned, but not entirely, and they have raised different arguments for their positions. It would be unfair to the Term Lenders if the Eleventh Circuit were to decide the common issues without the benefit of the Term Lenders' distinct arguments. This would prejudice the Term Lenders while favoring the Defendants who may persuade the Eleventh Circuit of their position on an incomplete view that they could not advance successfully if the Term Lenders were allowed to be a part of that appeal in the first instance.

## CONCLUSION

Because there is no just reason for delay, the Term Lenders respectfully request that the Court grant judgment under Rule 54(b) with respect to Claims II, III, and IV of the Avenue Complaint and Claims I and II of the Aurelius Complaint.

DATED: October 6, 2010

Respectfully submitted

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 6, 2010, I served a true and correct copy of the Term Lenders' Joint Motion for Partial Final Judgment by first-class mail upon the following:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

**FONTAINEBLEAU RESORTS, LLC'S REPLY TO THE JOINT RESPONSE TO ITS MOTION TO WITHDRAW AS COUNSEL**

Waldman Trigoboff Hildebrandt Marx & Calnan, P.A. (the "Firm"), as counsel for Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC (the "Clients"), respectfully files and serves its Reply to the Joint Response to its Motion to Withdraw as Counsel dated September 29, 2010, and states as follows:

1. In response to the Firm's Motion to Withdraw as Counsel dated September 22, 2010 (the "Motion"), the Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.* and *ACP Master, Ltd., et al v. Bank of America, N.A., et al.* (the "Term Lender Plaintiffs") and Defendant, Bank of America, assert that the basis for the Firm's Motion has been entirely eliminated simply because the New York State Court temporary restraining order entered against Fontainebleau Resorts, LLC by the Court in *Wilmington Trust FSB v. Fontainebleau Resorts, LLC* was dissolved.

2. What the Term Lender Plaintiffs and Defendant fail to mention is that the $1.036 billion judgment entered against Fontainebleau Resorts, LLC on September 8, 2010 and which prompted the temporary restraining order has not been dissolved, vacated

or otherwise nullified. The $1.036 billion judgment is attached hereto as Exhibit "A."

3. Under the circumstances of that judgment, the Clients have no present ability to compensate the Firm for its on-going services in this, or any other, legal proceeding. As such, irreconcilable differences still exist between the Firm and its Clients and the basis for the Firm's Motion has not been eliminated as Term Lender Plaintiffs and Defendant speculatively assert.

4. The Firm should be permitted to withdraw. R. Regulating Fla. Bar 4-1.16(b)(5) ("...a lawyer may withdraw from representing a client if... the representation will result in an unreasonable financial burden on the lawyer...").

WHEREFORE, Waldman Trigoboff Hildebrandt Marx & Calnan, P.A., including attorneys' within the Firm, respectfully request this Honorable Court enter an order allowing the withdrawal and relieving the Firm of further obligations as of the date of the Order.

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 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.

I further certify that a true and correct coy of this Motion has been served by U.S. Mail upon Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC, c/o Mario Romine, 19501 Biscayne Blvd., Suite 400, Aventura, FL 33180 on this 6th day of October 2010.

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

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III. PART 56

Index Number : 650435/2009

WILMINGTON TRUST FSB,

vs

FONTAINEBLEAU RESORTS, LLC.

Sequence Number : 006

SUMMARY JUDGEMENT

INDEX NO.

MOTION DATE 8/7/10

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM OPINION.

Dated: SEP 08 2010

HON. RICHARD B. LOWE, III.
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

----------x

WILMINGTON TRUST FSB,
a federally chartered savings bank,

Plaintiff,

Index No. 650435/09

- against -

FONTAINEBLEAU RESORTS, LLC,
a Delaware limited liability company, and
FONTAINEBLEAU RESORT PROPERTIES I, LLC,
a Delaware limited liability company,

Defendants.

----------x

**HON. RICHARD B. LOWE III:**

Plaintiff, Wilmington Trust FSB ("Wilmington Trust"), moves, pursuant to CPLR 3212, for summary judgment on the Complaint in this action for breach of two Guarantees.

Defendants Fontainebleau Resorts, LLC ("FB Resorts"), and Fontainebleau Resort Properties I, LLC ("FB Resort Properties"), cross-move, pursuant to CPLR 3212(f), for an order denying summary judgment and permitting discovery.

**BACKGROUND**

This action arises out of a Credit Agreement and two Guarantees, all dated June 6, 2007, to fund the construction of a casino-resort in Las Vegas, Nevada. The following facts are gleaned from the submission of the parties.

Fontainebleau Las Vegas, LLC, a Nevada limited liability company, and Fontainebleau Las Vegas II, LLC, a Florida limited liability company, planned to construct the Fontainebleau Resort and Casino (the "Project"), a high-end casino-resort on approximately 24 acres at the north end of the Las Vegas Strip. The Project was designed to include more than 3,800 guest

rooms, as well as entertainment and retail space. The completion and opening of the resort were planned for October 2009.

Fontainebleau La Vegas, LLC and Fontainebleau Las Vegas II, LLC, as Borrowers, entered into a Credit Agreement with certain Lenders, and Bank of America, N.A. ("BofA"), as Administrative Agent, Issuing Lender, and Swing Line Lender, to secure financing of up to $1.85 billion for the Project. The Credit Agreement provided for a Term Loan Facility of $700 million, a Delay Draw Term Loan Facility of $350 million, and a Revolving Loan Facility of $800 million.

Contemporaneously with the execution of the Credit Agreement, in consideration of, and as an inducement for the extension of credit thereunder, defendants, as owners of 100% of the equity interests in the Borrowers, executed separate Guarantees in favor of BofA, as Administrative Agent for the Lenders. Under the Guarantees, defendants "unconditionally and irrevocably guarantee[d] to the Administrative Agent for the ratable benefit of the Guaranteed Parties ... the prompt and complete payment and performance by the Borrowers when due ... of the Borrower Obligations" (Not of Mot, Exhs 1A, 1B).

Upon the closing of the Credit Agreement in June 2007, the Lenders advanced to the Borrowers the sum of $700 million, the principal amount under the Initial Term Loan Facility.

Construction on the Project commenced in 2007. On March 2, 2009, and again on March 3, 2009, the Borrowers submitted a Notice of Borrowing to BofA, seeking $350 million from the Delay Draw Term Loan Facility and more than $650 million from the Revolving Loan Facility (Affirm in Opp, Exh 6). By letter, dated March 3, 2009, BofA informed the Borrowers and Lenders that it would not process the Notice of Borrowing since the notice did not comply with the provisions of §2.1(c) of the Credit Agreement. Section 2.1(c) states, in part, 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" (Affirm in Opp, Exh 7).

On March 9, 2009, the Borrowers submitted another Notice of Borrowing seeking $350 million from the Delay Draw Term Loan Facility. The Lenders agreed to fund $350 million.

Thereafter, by letter, dated April 20, 2009, BofA notified the Borrowers that the Revolving Loan Facility had been terminated because of the occurrence of one or more Events of Default. As a result, the Borrowers terminated the Project.

On June 9, 2009, the Borrowers filed a voluntary petition in the United States Bankruptcy Court for the Southern District of Florida, Miami Division, Case No. 09-21481-BKC-AJC ("Florida Bankruptcy Proceeding"), seeking relief under Chapter 11 of the United States Bankruptcy Code. Under §8(f)(i) of the Credit Agreement, the bankruptcy filing constituted an automatic Event of Default. Specifically, §8 states, in part:

> If any of the following events shall occur and be continuing:
> (f) (i) Any if the Loan Parties ... shall commence any case, proceeding or other action (A) under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts ...
>
> then ... automatically the Commitments shall immediately terminate and the Loans hereunder (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents ... shall immediately become due and payable ... .

(Not of Mot, Exh 1C). Furthermore, under §4 of the FB Resorts Guarantee, defendant covenanted not to permit the Borrowers to file a voluntary petition in bankruptcy. Section §4 of the FB Resorts Guarantee states, in part:

> Parent shall not permit the Borrowers of any of the Subsidiaries to commence any proceeding or other action (a) under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts ... .

(Not of Mot, Exh

Defendants state that the Borrowers ultimately sold the incomplete Project at a loss to a third-party. The Borrowers also commenced an action (*Fontainebleau Las Vegas LLC v Bank of America, N.A.*, No. 09-21879-CIV-ASG [SD Fla]) against BofA and the other Lenders under the Revolving Loan Facility seeking damages for breach of the Credit Agreement. Some of the Lenders under the Term Loan Facilities also commenced contract actions against BofA and the other Lenders under the Revolving Loan Facility.

By Successor Administrative Agent Agreement, dated December 1, 2009, plaintiff succeeded BofA as Administrative Agent under the Credit Agreement.

Plaintiff commenced this action based on the bankruptcy filing and defendants' failure to pay under the Guarantees. The Complaint alleges that Term Loans in the principal amount of $1.0365 billion have been advanced to the Borrowers and remain outstanding. The first cause of action alleges breach of the FB Resorts Guaranty, and the second cause of action alleges breach of the FB Resort Properties Guaranty. Plaintiff seeks to recover the outstanding principal amount, plus any unpaid accrued interest, and expenses.

Defendants answered, generally denying the allegations in the pleadings and asserting numerous affirmative defenses.

Plaintiff now moves for summary judgment on the Complaint, seeking $1.0365 billion, the outstanding principal balances under the loan facilities, plus any unpaid accrued interest, costs, and expenses.

Defendants cross-move for an order denying summary judgment and permitting discovery.

**DISCUSSION**

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the Complaint alleges claims for recovery under the Guarantees. In order to demonstrating entitlement to judgment as a matter of law, plaintiff must submit proof of the existence of the Credit Agreement, the Guarantees, and defendants' failure to make payments in accordance with their terms (*see E.D.S. Sec. Sys., Inc. v Allyn*, 262 AD2d 351 [2d Dept 1999]). Thereafter, it is incumbent upon defendants to demonstrate, by admissible evidence, the existence of triable issues with respect to a bona fide defense (*id.*).

Here, the submissions include copies of the Credit Agreement (*see* Not of Mot, Exh 1C) and the unconditional, irrevocable Guarantees (*see* Not of Mot, Exhs 1A, 1B). Furthermore, defendants do not dispute that the Term Lenders funded $1.0365 billion for the Project. Thus, it appears that plaintiff has sustained its initial burden.

In opposition, however, defendants argue that the failure of the Lenders under the Revolving Loan Facility and BofA to honor the March 2009 Notices of Borrowing and fund their revolving obligations excused the Borrowers' payment obligations under the Credit Agreement and defendants' obligations under the Guarantees. Defendants also argue that the various facilities in the Credit Agreement and the Guarantees are interdependent contracts, and that the breach of one undoes the obligations under the other. Defendants further argue that, at the very least, triable issues of fact exist as to the proper interpretation of the terms of the Credit Agreement and Guarantees.

Guaranty agreements are to be construed under ordinary principals of contract law (*see HSH Nordbank AG New York Branch v Swerdlow*, 672 FSupp2d 409, 417 [SD NY 2009]). "In interpreting a contract, the intent of the parties governs" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990] [internal citation omitted]). "A contract should be construed so as to give full meaning and effect to all of its provisions" (*id.*). Furthermore, where the intent of the parties can be determined from the face of the agreement, without resort to extrinsic materials outside the four corners of the document, the agreement is unambiguous, and its interpretation is a matter of law for the courts and the case is ripe for summary judgment (*Goldman v White Plains Ctr. For Nursing Care*, 11 NY3d 173, 176 [2008][internal citations omitted]). "On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact,

and summary judgment should be denied" (*American Express Bank, Ltd. v Uniroyal, Inc.*, *supra*).

Contrary to defendants' arguments, the conclusion that the parties intended that the obligations of the Lenders under various loan facilities be independent of one another is unavoidable based on the express terms of the Credit Agreement. In particular, §2.23(g) of the Credit Agreement states, in part:

> The obligations of the Lenders hereunder to make Term Loans and Revolving Loans, to fund participations in Letters of Credit and Swing Line Loans and to make payments pursuant to Section 10.5(c) are several not joint. The failure of any Lender to make any Loan, to fund any such participation or to make any payment under Section 10.5(c) on any date required hereunder shall not relieve any other Lender of its corresponding obligation to do so on such date ... .

(Affirm in Opp, Exh 2). Furthermore, §9.1(a) states, in part:

> Each of the lenders and the issuing Lender hereby irrevocably appoints Bank of America to act on its behalf as the Administrative Agent hereunder and under the other Loan Documents and authorizes the Administrative Agent to take such actions on its behalf and to exercise such powers as are delegated to the Administrative Agent by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto

(*id.*).

The independent obligations of the various Lenders under the express terms of the Credit Agreement also undermines defendants' argument that the breaching Lender's conduct violated the implied duty of good faith and fair dealing by denying the Borrowers a material portion of the Project's financing, thereby excusing defendants' obligations under the Guarantees.

Defendants also argue that since BofA served as Administrative Agent for all of the Lenders, including the Term Lenders, when it declined to process the March 2, 2009 Notice of

Borrowing, BofA's actions must be imputed to the Term Lenders, thereby barring plaintiff's claims under the Guarantees as a matter of law. However, here too, the independent contractual obligations of Lenders, as well as separate appointment of the Administrative Agent by each Lender, refutes defendants' assertion. It is well established that an agent may be one party's agent for one purpose and another party's agent for another (*Koreska v United Cargo Corp.*, 23 AD2d 37, 40 [1st Dept 1965]). The agent's powers are limited to the particular purpose for which the agency is, or appears to be, created (*id.*).

Defendants further urges that the doctrine of frustration of purpose excuses their performance under the Guarantees. In particular, defendants argue that it was unforeseen that certain Lenders would collectively refuse to finance the Project, thus destroying the purpose of both the Credit Agreement and Guarantees, and excusing defendants' performance.

However, the defense of frustration of purpose is unavailing given the express language that "the guarantee contained in this Section 2 shall be construed as a continuing, absolute and unconditional guarantee of payment and performance without regard to ... the validity or enforceability of the Credit Agreement" (Affirm in Opp, Exh 3, §2.4).

Defendants fail to demonstrate the existence of triable issues with respect to a bona fide defense under the Guanantees. Furthermore, defendants' failure to put forth any evidentiary basis to suggest that discovery might lead to relevant evidence (*see Trombetta v Cathone*, 59 AD3d 526, 527 [2d Dept 2009]).

**CONCLUSION**

Accordingly, it is

ORDERED that the motion for summary judgment on the complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the amount of

$1.036 billion, together with interest at the rate of _____% per annum from the date of _____ until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion is denied.

**Dated:** SEP 08 2010

**ENTER:**

**J. S. C.**

HON. RICHARD B. LOWE, III

**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 FOR SANCTIONS AGAINST FONTAINEBLEAU RESORTS, LLC FOR FAILURE TO COMPLY WITH COURT ORDER TO PRODUCE DOCUMENTS IN RESPONSE TO SUBPOENA**

Pursuant to Federal Rule of Civil Procedure 37 and 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 imposing appropriate sanctions against Fontainebleau Resorts, LLC ("FBR") for failing to comply with this Court's August 30, 2010 Order compelling FBR to produce documents.

## I. INTRODUCTION

On April 22, 2010, the Term Lenders issued a subpoena to FBR. FBR failed to produce more than a handful of documents in response. On August 30, 2010, the Court granted the Term Lenders' Motion to Compel and ordered FBR to produce all non-privileged documents, in particular electronic documents located on its servers, by September 13, 2010 and to provide a

privilege log by September 20, 2010 (DE #129). FBR has done neither. Instead, on September 22, 2010, FBR's counsel moved to withdraw (DE #144).

Having exhausted all other remedies to enforce their subpoena, the Term Lenders now request that the Court hold FBR in contempt, order FBR immediately to produce for inspection all documents, including the entirety of the three servers it contends house responsive electronic documents, order FBR to pay the Term Lenders' fees and costs incurred in extracting responsive documents from the servers pursuant to the search terms and parameters the parties have already agreed upon, and order FBR to pay the Term Lenders' fees and costs incurred in bringing this Motion and the Motion to Compel.

## II. BACKGROUND

Fontainebleau Las Vegas, LLC ("FBLV") is the borrower at the center of this legal storm. (Declaration of Robert W. Mockler in Support of Motion for Sanctions against Fontainebleau Resorts, LLC for Failure to Comply with Court Order to Produce Documents in Response to Subpoena ("Mockler Decl."), ¶ 2.) FBR is FBLV's parent. (*Id.*) On April 22, 2010, the Term Lenders served FBR with a subpoena seeking documents regarding the project at issue in this action. FBR produced a few hundred pages of hard copy documents. (*Id.* at ¶ 3.) It failed to produce the vast bulk of its hard copy documents (which it now contends consists of approximately 80 boxes) and failed altogether to produce a single electronic document. (*Id.*)

Instead, FBR raised the same objections it had unsuccessfully advanced in seeking to quash subpoenas served by other parties in this case. Namely, that its electronic documents are stored on three servers that also contain documents belonging to FBLV and other FBR affiliates. FBR asserted that it could not produce its documents without the consent of its affiliates, but it refused to provide any timetable for when that might occur.

On August 19, 2010, the Term Lenders filed their Motion to Compel, seeking an order requiring FBR to produce by September 17, 2010 all non-privileged, responsive documents, including all such documents on the three servers (DE #123). United States Magistrate Judge Jonathan Goodman heard the Motion. On August 30, "[i]n light of the extended pendency of this subpoena and in order to accommodate Judge Gold's trial setting order," Judge Goodman granted the Motion and ordered FBR to produce all responsive, non-privileged documents by September 13 and a privilege log by September 20 (DE #129). (Mockler Decl., Ex. A.)

In a September 7 email, FBR's counsel sought assistance in crafting search terms and date ranges to help reduce the time and expense of FBR's production of electronic documents. (*Id*., Ex. B.) Term Lenders' counsel immediately provided a draft set of terms. (*Id*. at ¶ 8.) By September 14, all parties, including Bank of America, N.A. ("BofA") and the Revolving Lenders, had agreed to a set of approved search terms and date restrictions. (*Id*., Ex. C.) FBR, however, has failed to produce a single electronic document. (*Id.*, ¶¶ 6 & 11.)

In that same September 7 email, FBR stated that approximately 80 boxes of documents "will be ready for your review in South Florida." (*Id.*, Ex. B.) For the next month, however, FBR ignored repeated attempts by the Term Lenders to arrange for review of the hard copy documents. (*Id.*, ¶ 9 & Ex. D.)

On September 22, more than a week after the production deadline set forth in the Order, FBR's counsel filed a Motion to Withdraw (DE #144), citing FBR's purported inability to pay counsel's fees and costs as a result of a TRO issued in another action. The Term Lenders and BofA filed a Joint Response noting that the TRO had been dissolved and requesting that FBR's counsel be permitted to withdraw only to the extent that such withdrawal would not further delay FBR's compliance with the outstanding subpoenas (DE #147).

On October 7, having received no electronic documents from FBR and no response to multiple inquiries regarding the 80 boxes of documents, the Term Lenders sent an email to FBR indicating their intention to file a motion for sanctions for FBR's failure to comply with the Court's August 30, 2010 Order. (*Id.*, Ex. E.) Faced with a sanctions motion, FBR indicated that it would make the boxes available for review. (*Id.*) However, while FBR indicated it had begun to review electronic documents, it still refused to provide any timetable for production of electronic documents. (*Id.*).

## III. FBR SHOULD BE SANCTIONED FOR FAILURE TO COMPLY WITH THE AUGUST 30 ORDER

"The district court has broad discretion to control discovery. This power includes the ability to impose sanctions on uncooperative litigants." *Phipps v. Blakeney*, 8 F.3d 788, 790 (11th Cir. 1993) (affirming district court's imposition of sanction of dismissal). Where a party "fails to obey an order to provide or permit discovery," the court "may issue further just orders." Fed. R. Civ. P. 37(b)(2)(A). As the Local Rules of this Court make abundantly clear:

> Federal Rule of Civil Procedure 37 is enforced in this District. Further, if a Court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the Court with the gravity it deserves; willful violation of a Court order is always serious and may be treated as contempt.[1]

S.D. Fla. Local Rules, Appendix A (Discovery Practices Handbook), at Section I.D(4). In addition to any other sanction, Rule 37 specifically directs that the court "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses,

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[1] Rule 45 also specifically allows a Court to "hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena." Fed. R. Civ. P. 45(e).

including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

FBR refused to comply with the subpoena in the first instance and now refuses to comply with the Court's August 30 Order. FBR has offered no explanation or excuse, let alone provided the "substantial justification" required to avoid Rule 37 sanctions. Fed. R. Civ. P. 37(b)(2)(C); *see also DeVaney v. Continental Am. Ins. Co.*, 989 F.2d 1154, 1162 (11th Cir. 1993) (Rule 37 sanctions require no finding of bad faith and are mandatory absent showing of substantial justification).

FBR's delays have and will continue to present a significant risk to the administration of these coordinated MDL actions. FBR and its managers were heavily involved in the project, including the financing of the project. The Term Lenders are reluctant to engage in substantial deposition practice without the benefit of FBR's documents. Accordingly, continued delay in the production of those documents, including in particular FBR's electronic documents, imperils the schedule this Court has put in place.

The Eleventh Circuit has noted that "[s]anctions allowed under Rule 37 are intended to 1) compensate the court and other parties for the added expense caused by discovery abuses, 2) compel discovery, 3) deter others from engaging in similar conduct, and 4) penalize the offending party or attorney." *Wouters v. Martin County*, 9 F.3d 924, 933-934 (11th Cir. 1993) (citations omitted). Holding FBR in contempt and imposing monetary sanctions will punish FBR and compensate the Term Lenders for the direct costs they have incurred in forcing FBR's compliance with its discovery obligations.

Those sanctions alone, however, will not ensure that FBR produces its documents immediately so that these actions can proceed as scheduled. Indeed, FBR's conduct to date strongly suggests that its production of electronic documents will, at best, hit additional snags

and delays and, at worst, simply be abandoned at some point in the future for purported lack of funds or otherwise. The Term Lenders accordingly request that the Court order FBR to produce for inspection not only all hard-copy documents but also the three servers that house responsive electronic documents. The Term Lenders will then search these servers using the search terms and time parameters previously agreed to by the parties. In order not to reward FBR for its violation of this Court's Order, the Term Lenders further request that FBR be ordered to pay for the fees and costs incurred by the Term Lenders in extracting responsive documents from these servers.

## IV. 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.

## V. CONCLUSION

For the foregoing reasons, the Term Lenders request that this Court enter an Order holding FBR in contempt, order FBR immediately to produce for inspection all hard-copy documents as well as the entirety of the three servers it contends house responsive electronic documents, order FBR to pay the Term Lenders' fees and costs incurred in extracting responsive documents from the servers pursuant to the search terms and parameters the parties have already agreed upon, and order FBR to pay the Term Lenders' fees and costs incurred in bringing this Motion and the Motion to Compel.

Respectfully submitted,

By: /s/ Lorenz Michel Prüss

Lorenz Michel Prüss, Esq.
Fla. Bar No.: 581305
David A. Rothstein, Esq.
Fla. Bar No.: 056881
DIMOND KAPLAN & ROTHERSTEIN PA
2665 S. Bayshore Dr., PH-2B
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-and-

J. Michael Hennigan, Esq. (admitted *pro hac vice*)
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*Attorneys for Plaintiffs Avenue CLO Fund, LTD., et al.*

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing TERM LENDERS' MOTION FOR SANCTIONS AGAINST FONTAINEBLEAU RESORTS, LLC FOR FAILURE TO COMPLY WITH COURT ORDER TO PRODUCE DOCUMENTS 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: October 8, 2010

/s/ Lorenz Michel Prüss

**SERVICE LIST**

| **Attorneys:** | **Representing:** |
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| Sarah J. Springer, Esq.<br>**WALDMAN TRIGOBOFF HILDEBRANDT MARX & CALNAN, P.A.**<br>Weston Pointe II, Suite 202<br>2200 N. Commerce Parkway<br>Weston, FL 33326-3258<br>Tele: (954) 467-8600<br>Fax: (954) 467-6222 | Fontainebleau Resorts, LLC |
| Bradley J. Butwin, Esq.<br>Daniel L. Canton, Esq.<br>Jonathan Rosenberg, Esq.<br>William J. Sushon, Esq.<br>**O'MELVENY & MYERS LLP**<br>Times Square Tower<br>7 Times Square<br>New York, NY 10036<br>Tele: (212) 326-2000<br>Fax: (212) 326-2061 | Bank of America, N.A.<br>Merrill Lynch Capital Corporation |
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|---|---|
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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 FOR SANCTIONS AGAINST FONTAINEBLEAU RESORTS, LLC FOR FAILURE TO COMPLY WITH COURT ORDER TO PRODUCE DOCUMENTS 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. 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 Motion for Sanctions against Fontainebleau Resorts, LLC for Failure to Comply with Court Order to Produce Documents in Response to Subpoena, filed by the Term Lenders.

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 ("FBLV") for the development and construction of the Fontainebleau Las Vegas Resort and Casino in Las Vegas, Nevada. FBR is the parent of FBLV. On June 9, 2009, FBLV 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.

3. On April 22, 2010, the Term Lenders served FBR with a subpoena seeking documents regarding the project at issue in this action. FBR produced a few hundred pages of hard copy documents. It failed to produce the vast bulk of its hard copy documents and failed altogether to produce a single electronic document.

4. Instead, FBR objected that its electronic documents are stored on three servers that also contain documents belonging to FBLV and other FBR affiliates, and that it could not produce its documents without the consent of its affiliates. FBR refused to provide any timetable for when that might occur.

5. On August 19, 2010, the Term Lenders filed their Motion to Compel (DE #123). On August 30, Judge Goodman granted the Motion to Compel and ordered FBR to produce all responsive, non-privileged documents by September 13 and to produce a privilege log by September 20, 2010 (DE #129). A true and correct copy of the Order granting the Term Lenders' Motion to Compel is attached hereto as **Exhibit A**.

6. FBR did not produce any documents by September 13, 2010 and did not provide a privilege log by September 20, 2010.

7. In a September 7, 2010 email, FBR's counsel, Sarah Springer, sought assistance in crafting search terms and date ranges to help reduce the time and expense of FBR's production of electronic documents. A true and correct copy of the September 7, 2010 email is attached hereto as **Exhibit B**.

8. Kirk Dillman of my office immediately provided a draft set of terms. By September 14, all parties, including Bank of America, N.A. ("BofA") and the Revolving Lenders, had agreed to a set of approved search terms and date restrictions. A true and correct

copy of the September 14, 2010 email chain showing the approvals by counsel for FBR, BofA and the Revolving Lenders is attached hereto as **Exhibit C**.

9. In the September 7, 2010 email, Ms. Springer, also stated that approximately 80 boxes of documents "will be ready for your review in South Florida." The following week, I left a voicemail message for Ms. Springer regarding making arrangements to gain access to the 80 boxes of documents. Ms. Springer did not respond to my voicemail and did not respond to two follow-up email messages I sent on September 20 and September 27, 2010. A true and correct copy of the email chain with my September 20 and September 27, 2010 emails to Ms. Springer is attached hereto as **Exhibit D**.

10. On September 22, more than a week after the production deadline set forth in the Order, FBR's counsel filed a Motion to Withdraw (DE #144), citing FBR's purported inability to pay counsel's fees and costs as a result of a TRO issued in another action. The Term Lenders and BofA filed a Joint Response (DE #147) noting that the TRO had been dissolved and requesting that FBR's counsel be permitted to withdraw only to the extent that such withdrawal would not further delay FBR's compliance with the outstanding subpoenas.

11. On October 7, 2010, having received no electronic documents from FBR and no response to multiple inquiries regarding the 80 boxes of documents, Mr. Dillman sent an email to Ms. Springer indicating the Term Lenders' intention to file a motion for sanctions for FBR's failure to comply with the Court's August 30, 2010 Order. Ms. Springer responded the next day, stating that FBR would make the 80 boxes of hard copy documents available for review. FBR indicated that it had begun review of its electronic documents, but would not provide a timetable for production of the electronic documents. A true and correct copy of the October 7-8, 2010 email chain is attached hereto as **Exhibit E**.

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

DATED: October 8, 2010

ROBERT W. MOCKLER

# EXHIBIT A

**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

# EXHIBIT B

**Kirk D. Dillman**

**From:** Sarah Springer [SSpringer@waldmanlawfirm.com]
**Sent:** Tuesday, September 07, 2010 5:46 PM
**To:** Robert Mockler; Kirk D. Dillman
**Subject:** Fontainebleau Resorts Document Production

Gentlemen,

In the next couple days, I will finish reviewing the contents of the FBR Storage Room. The documents will be ready for your review in South Florida. There are about 80 boxes of documents.

With respect to the servers, would you be willing to work with an electronic discovery expert from IKON to craft search terms and dates which would find documents responsive to your subpoena? There is well more than a terabyte of information on just one of the servers. The cost to produce all non-privileged documents in the format you request (imaging) is astronomical. In an effort to not produce the haystack when all you need is the needle, perhaps search terms is the best way to go for your client and mine.

Sincerely,

Sarah J. Springer, Attorney at Law
Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.
Weston Pointe II Suite 202
2200 N. Commerce Parkway
Weston, FL 33326 - 3258

Telephone: 954-467-8600 ext. 106
Facsimile: 954-467-6222
E-Mail: sspringer@waldmanlawfirm.com

# EXHIBIT C

**Kirk D. Dillman**

**From:** Fitzgerald, Steven S [SFitzgerald@stblaw.com]
**Sent:** Tuesday, September 14, 2010 8:30 AM
**To:** 'Murata, Kenneth'; Sarah Springer
**Cc:** Kirk D. Dillman
**Subject:** RE: Subpoena Search Terms

Barclays, Deutsche Bank, JPMorgan and RBS are okay with it too

---

**From:** Murata, Kenneth [mailto:KMurata@OMM.com]
**Sent:** Tuesday, September 14, 2010 11:29 AM
**To:** Sarah Springer
**Cc:** Fitzgerald, Steven S; Kirk D. Dillman
**Subject:** RE: Subpoena Search Terms

Sarah:

We propose adding the terms Chapter 11, bankrupt* and Highland to the list. With the addition of those 3 terms, we are fine with the list proposed by Mr. Dillman.

Thanks.

Ken

---

**From:** Sarah Springer [mailto:SSpringer@waldmanlawfirm.com]
**Sent:** Tuesday, September 14, 2010 11:25 AM
**To:** Fitzgerald, Steven S; Murata, Kenneth
**Cc:** Kirk D. Dillman
**Subject:** Subpoena Search Terms

Gentlemen,

My client has agreed to use search terms to produce only what is responsive to your subpoenas. I need your final approval on the search terms proposed by Kirk (attached). If I get your final list today, IKON can begin the process.

Sincerely,

Sarah J. Springer, Attorney at Law
Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.
Weston Pointe II Suite 202
2200 N. Commerce Parkway
Weston, FL 33326 - 3258

Telephone: 954-467-8600 ext. 106
Facsimile: 954-467-6222
E-Mail: sspringer@waldmanlawfirm.com

# EXHIBIT D

**Robert Mockler**

**From:** Robert Mockler
**Sent:** Monday, September 27, 2010 11:59 AM
**To:** 'Sarah J. Springer (sspringer@waldmanlawfirm.com)'
**Subject:** RE: FBR document production

Sarah,

I have not received any response to my inquiries about review of FBR's hard copy documents. Your September 8, 2010 e-mail indicated that there were 80 boxes that would be ready for review by September 13, 2010. Please let me know when we can review these documents.

Regards,

Robby Mockler

-----Original Message-----
From: Robert Mockler
Sent: Monday, September 20, 2010 3:02 PM
To: Sarah J. Springer (sspringer@waldmanlawfirm.com)
Subject: FBR document production

Sarah,

I left you a message last week. Let me know when you are available to discuss the hard copy documents you have identified.

Thanks,

Robby Mockler

# EXHIBIT E

**From:** Sarah Springer [mailto:SSpringer@waldmanlawfirm.com]
**Sent:** Friday, October 08, 2010 5:42 AM
**To:** Kirk D. Dillman
**Cc:** steven.nachtwey@bartlit-beck.com
**Subject:** RE:

Dear Kirk,

As you are aware, this firm is in the process of withdrawing from representation of FBR in this matter. Nonetheless, nearly 80 boxes of documents are available for your review in Aventura. In addition, FBR spent over $25,000.00 culling through over a terabyte of information on its email server using the search terms you suggested. However, the privilege review process for that server was stopped when the $1,000,000,000.00 judgment was entered against FBR and the corresponding restraining order was entered. The restraining order was just lifted. As such, FBR or FBR's new attorney will be able to advise you with respect to completion of this process.

Sincerely,

Sarah J. Springer, Attorney at Law
Waldman Trigoboff Hildebrandt Marx & Calnan, P. A.

---

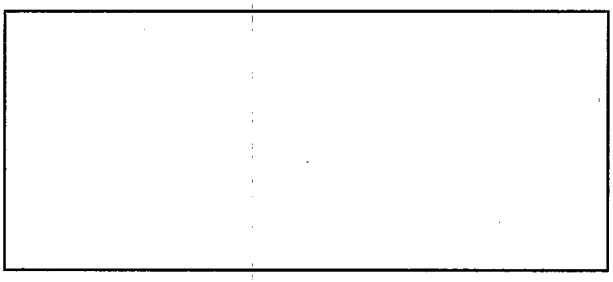
**From:** Kirk D. Dillman [mailto:DillmanK@hbdlawyers.com]
**Sent:** Thursday, October 07, 2010 2:20 PM
**To:** Sarah Springer
**Cc:** steven.nachtwey@bartlit-beck.com
**Subject:**

Sarah

In light of your client's failure to comply with the Court's August 30 order requiring production of documents, we intend to file a motion for sanctions. Please let me know if you intend to oppose.

**Kirk D. Dillman**
**Hennigan, Bennett & Dorman LLP**
**865 S. Figueroa St., Suite 2900**
**Los Angeles, CA 90017**
**Direct: 213.694.1101**
**Main: 213.694.1200**

**Cell:** 213.675.0031
**email:** dillmank@hbdlawyers.com
**Web:** www.hbdlawyers.com



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**Telephone: (213) 694-1200**
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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 cases.
_____ /

**NOTICE OF REQUEST FOR TERMINATION OF APPEARANCE OF ATTORNEY ON SERVICE LIST**

The Term Lenders,[1] by and through the undersigned counsel, hereby give notice of this request to the Clerk of Courts that the following person be terminated from the Service List:

Lauren Smith
Hennigan, Bennett & Dorman LLP
865 South Figueroa Street, Suite 2900
Los Angeles, CA 90017

Dated: October 9, 2010

Respectfully submitted,

By: /s Lorenz Michel Prüss
David A. Rothstein, Esq.
Fla. Bar No.: 056881
d.Rothstein@dkrpa.com
Lorenz M. Prüss, Esq.
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*Local Counsel for Plaintiff Term Lenders*

[1] The Term Lenders include the plaintiffs in the case captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-1047-KJD-PAL (D. Nev.).

Of counsel:
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Kirk D. Dillman
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DillmanD@hbdlawyers.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF REQUEST FOR TERMINATION OF APPEARANCE OF ATTORNEY ON SERVICE LIST** 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: October 9, 2010.

/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 09-23835-CIV-GOLD/GOODMAN.

/

**MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONICS FILINGS**

In accordance with S.D. Fla. 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, the undersigned respectfully requests the Court grant the admission of REBECCA T. PILCH, ESQ. ("Ms. Pilch"), of the law firm of Hennigan, Bennett & Dorman, LLP, 865 South Figueroa Street, Suite 2900, Los Angeles, Los Angeles County, California, 90017, Telephone: (213) 694-1200, for purposes of limited appearance as counsel on behalf of the following entities: Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Battalion CLO 2007-I Ltd., Canpartners Investments IV, LLC, Canyon Special Opportunities Master Fund (Cayman), Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd., Caspian Corporate Loan Fund, LLC, Caspian Capital Partners, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Solitude Master Fund, L.P., Mariner Opportunities Fund, LP, Mariner LDC, ING Prime Rate Trust, ING Senior Income Fund, ING International (II) - Senior Loans, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., Venture II

CDO 2002, Limited, Venture III CDO, Venture IV CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Venture IX CDO Limited, Vista Leveraged Income Fund, Veer Cash Flow, CLO, Limited, Genesis CLO 2007-1 Ltd., Cantor Fitzgerald Securities, Olympic CLO I Ltd., Shasta CLO I Ltd., Whitney CLO I Ltd., San Gabriel CLO I Ltd., Sierra CLO II Ltd., SPCP Group, LLC, Stone Lion Portfolio L.P., Venor Capital Master Fund, Ltd., Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Sola Ltd , Solus Core Opportunities Master Fund Ltd., Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd. (collectively "Term Lenders") in the above-styled case only, and pursuant to S.D. Fla. Rule 2(B) of CM/ECF Administrative Procedures, to permit Ms. Pilch to receive electronic filings in this case, and in support thereof states as follows.

1. Ms. Pilch is not admitted to practice in the Southern District of Florida, but she is a member in good standing of the Bar of California (California State Bar No. 237332) and New York (New York State Bar No. 4211009).

2. Movant Lorenz Michel Prüss, Esq. ("Mr. Prüss"), of the law firm of Dimond Kaplan & Rothstein, P.A., 2665 South Bayshore Drive, PH-2B, Coconut Grove, Florida 33133, Telephone (305) 374-1920, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Mr. Prüss consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Ms. Pilch contemporaneously made payment of this Court's $75 admission fee in compliance with the local rules.

4. Ms. Pilch hereby requests the Court to provide Notice of Electronic Filings to Ms. Pilch at email address: pilchr@hbdlawyers.com.[1]

WHEREFORE, Lorenz Michel Prüss, Esq., requests that this Court enter an Order permitting Ms. Pilch, Esq., to appear before this Court on behalf of the Term Lenders for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Ms. Pilch.

---

[1] A proposed Order is attached as Exhibit A.

**CERTIFICATION OF REBECCA T. PILCH, ESQ.**

Pursuant to Rule 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, I hereby certify: (1) to have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) that I am a member in good standing of the Bar of California.

By: _____
Rebecca T. Pilch, Esq.

Dated: October 5, 2010.

Respectfully submitted,

_____

David A. Rothstein, Esq.
Fla. Bar No.: 056881
d.Rothstein@dkrpa.com
Lorenz M. Prüss, Esq.
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*Local Counsel for Plaintiff Term Lenders*

Of counsel:
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Kirk D. Dillman
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Email: Hennigan@hbdlawyers.com
DillmanD@hbdlawyers.com

**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-CIV-GOLD/GOODMAN

_____ /

**ORDER GRANTING MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS**

THIS CAUSE having come before the Court upon the Motion to Appear Pro Hac Vice and Consent to Designation and Request to Electronically Receive Notices of Electronics Filings (the "Motion") filed on behalf of Rebecca T. Pilch, Esq. ("Ms. Pilch"), requesting, pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States Court for the Southern District of Florida, permission for a limited appearance of Ms. Pilch in this matter and to electronically receive notice of electronic filings. Having considered the Motion and all other relevant factors, it is hereby:

ORDERED and ADJUDGED that:

1. The Motion is GRANTED.

3. The Clerk shall provide electronic notification of all electronic filings to Ms. Pilch at pilchr@hbdlawyers.com.

DONE AND ORDERED IN CHAMBERS at Miami, Florida, this ____ day of _____, 2010.

By:_____
District Judge Alan Gold
United States District Judge

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS** 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: October ___, 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 09-23835-CIV-GOLD/GOODMAN

/

**MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONICS FILINGS**

In accordance with S.D. Fla. Rule 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, the undersigned respectfully requests the Court grant the admission of ROBERT W. MOCKLER, ESQ. ("Mr. Mockler"), of the law firm of Hennigan, Bennett & Dorman, LLP, 865 South Figueroa Street, Suite 2900, Los Angeles, Los Angeles County, California, 90017, Telephone: (213) 694-1200, for purposes of limited appearance as counsel on behalf of the following entities: Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Battalion CLO 2007-I Ltd., Canpartners Investments IV, LLC , Canyon Special Opportunities Master Fund (Cayman), Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd., Caspian Corporate Loan Fund, LLC, Caspian Capital Partners, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Solitude Master Fund, L.P., Mariner Opportunities Fund, LP, Mariner LDC, ING Prime Rate Trust, ING Senior Income Fund, ING International (II) - Senior Loans, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., Venture II

CDO 2002, Limited, Venture III CDO, Venture IV CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Venture IX CDO Limited, Vista Leveraged Income Fund, Veer Cash Flow, CLO, Limited, Genesis CLO 2007-1 Ltd., Cantor Fitzgerald Securities, Olympic CLO I Ltd., Shasta CLO I Ltd., Whitney CLO I Ltd., San Gabriel CLO I Ltd., Sierra CLO II Ltd., SPCP Group, LLC , Stone Lion Portfolio L.P., Venor Capital Master Fund, Ltd., Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Sola Ltd, Solus Core Opportunities Master Fund Ltd., Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd. (collectively "Term Lenders") in the above-styled case only, and pursuant to S.D. Fla. Rule 2(B) of CM/ECF Administrative Procedures, to permit Mr. Mockler to receive electronic filings in this case, and in support thereof states as follows.

1. Mr. Mockler is not admitted to practice in the Southern District of Florida, but he is a member in good standing of the State Bar of California (California State Bar No. 200200), the District of Columbia Bar (District of Columbia Bar No. 984910) and the State Bar of New York (New York State Bar No. 4848701).

2. Movant Lorenz Michel Prüss, Esq. ("Mr. Prüss"), of the law firm of Dimond Kaplan & Rothstein, P.A., 2665 South Bayshore Drive, PH-2B, Coconut Grove, Florida 33133, Telephone (305) 374-1920, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Mr. Prüss consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that

may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures.

4. In accordance with the local rules of this Court, Mr. Mockler contemporaneously made payment of this Court's $75 admission fee in compliance with the local rules.

5. Mr. Mockler hereby requests the Court to provide Notice of Electronic Filings to Mr. Mockler at email address: mocklerr@hbdlawyers.com.[1]

WHEREFORE, Lorenz Michel Prüss, Esq., requests that this Court enter an Order permitting Mr. Mockler, Esq., to appear before this Court on behalf of the Term Lenders for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Mr. Mockler.

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[1] A proposed Order is attached as Exhibit A.

**CERTIFICATION OF ROBERT M. MOCKLER, ESQ.**

Pursuant to Rule 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, I hereby certify: (1) to have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) that I am a member in good standing of the State Bar of California, the District of Columbia Bar and the State Bar of New York.

By: _____
Robert W. Mockler, Esq.

Dated: October 5, 2010.

Respectfully submitted,

_____
David A. Rothstein, Esq.
Fla. Bar No.: 056881
d.Rothstein@dkrpa.com
Lorenz M. Prüss, Esq.
Fla Bar No.: 581305
LPruss@dkrpa.com
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Miami, FL 33133
Telephone: (305) 374-1920
Facsimile: (305) 374-1961

*Local Counsel for Plaintiff Term Lenders*

Of counsel:
J. Michael Hennigan
Kirk D. Dillman
HENNIGAN, BENNETT & DORMAN LLP
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

Email: Hennigan@hbdlawyers.com
DillmanK@hbdlawyers.com

**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-CIV-GOLD/GOODMAN

_____ /

**ORDER GRANTING MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS**

THIS CAUSE having come before the Court upon the Motion to Appear Pro Hac Vice and Consent to Designation and Request to Electronically Receive Notices of Electronics Filings (the "Motion") filed on behalf of Robert M. Mocker, Esq. ("Mr. Mockler"), requesting, pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States Court for the Southern District of Florida, permission for a limited appearance of Mr. Mockler in this matter and to electronically receive notice of electronic filings. Having considered the Motion and all other relevant factors, it is hereby:

ORDERED and ADJUDGED that:

1. The Motion is GRANTED.

3. The Clerk shall provide electronic notification of all electronic filings to Mr. Mockler at mocklerr@hbdlawyers.com.

DONE AND ORDERED IN CHAMBERS at Miami, Florida, this ____ day of _____, 2010.

By:_____
District Judge Alan Gold
United States District Judge

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS** 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: October ___, 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 09-23835-CIV-GOLD/GOODMAN

_____ /

**MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONICS FILINGS**

In accordance with S.D. Fla. 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, the undersigned respectfully requests the Court grant the admission of CAROLINE M. WALTERS, ESQ. ("Ms. Walters"), of the law firm of Hennigan, Bennett & Dorman, LLP, 865 South Figueroa Street, Suite 2900, Los Angeles, Los Angeles County, California, 90017, Telephone: (213) 694-1200, for purposes of limited appearance as counsel on behalf of the following entities: Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Battalion CLO 2007-I Ltd., Canpartners Investments IV, LLC , Canyon Special Opportunities Master Fund (Cayman), Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd., Caspian Corporate Loan Fund, LLC , Caspian Capital Partners, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Alpha Long Credit Fund, L.P. , Caspian Solitude Master Fund, L.P., Mariner Opportunities Fund, LP , Mariner LDC , ING Prime Rate Trust, ING Senior Income Fund, ING International (II) - Senior Loans, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., Venture II

CDO 2002, Limited, Venture III CDO, Venture IV CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Venture IX CDO Limited, Vista Leveraged Income Fund, Veer Cash Flow, CLO, Limited, Genesis CLO 2007-1 Ltd., Cantor Fitzgerald Securities, Olympic CLO I Ltd., Shasta CLO I Ltd., Whitney CLO I Ltd., San Gabriel CLO I Ltd., Sierra CLO II Ltd., SPCP Group, LLC, Stone Lion Portfolio L.P., Venor Capital Master Fund, Ltd., Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Sola Ltd, Solus Core Opportunities Master Fund Ltd., Scoggin Capital Management II LLC, Scoggin International Fund Ltd, and Scoggin Worldwide Fund Ltd. (collectively "Term Lenders") in the above-styled case only, and pursuant to S.D. Fla. Rule 2(B) of CM/ECF Administrative Procedures, to permit Ms. Walters to receive electronic filings in this case, and in support thereof states as follows.

1. Ms. Walters is not admitted to practice in the Southern District of Florida, but she is a member in good standing of the Bar of California (California State Bar No. 239054).

2. Movant Lorenz Michel Prüss, Esq. ("Mr. Prüss"), of the law firm of Dimond Kaplan & Rothstein, P.A., 2665 South Bayshore Drive, PH-2B, Coconut Grove, Florida 33133, Telephone (305) 374-1920, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Mr. Prüss consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Ms. Walters contemporaneously made payment of this Court's $75 admission fee in compliance with the local rules.

4. Ms. Walters hereby requests the Court to provide Notice of Electronic Filings to Ms. Walters at email address: waltersc@hbdlawyers.com.[1]

WHEREFORE, Lorenz Michel Prüss, Esq., requests that this Court enter an Order permitting Ms. Walters, Esq., to appear before this Court on behalf of the Term Lenders for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Ms. Walters.

---

[1] A proposed Order is attached as Exhibit A.

**CERTIFICATION OF CAROLINE M. WALTERS, ESQ.**

Pursuant to Rule 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, I hereby certify: (1) to have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) that I am a member in good standing of the Bar of California.

By: _____
Caroline M. Walters, Esq.

Dated: October ___, 2010.

Respectfully submitted,

_____

David A. Rothstein, Esq.
Fla. Bar No.: 056881
d.Rothstein@dkrpa.com
Lorenz M. Prüss, Esq.
Fla Bar No.: 581305
LPruss@dkrpa.com
DIMOND KAPLAN & ROTHSTEIN, P.A.
2665 South Bayshore Drive, PH-2B
Miami, FL 33133
Telephone: (305) 374-1920
Facsimile: (305) 374-1961

*Local Counsel for Plaintiff Term Lenders*

Of counsel:
J. Michael Hennigan
Kirk D. Dillman
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Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

Email: Hennigan@hbdlawyers.com
DillmanD@hbdlawyers.com

**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-CIV-GOLD/GOODMAN

_____ /

**ORDER GRANTING MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS**

THIS CAUSE having come before the Court upon the Motion to Appear Pro Hac Vice and Consent to Designation and Request to Electronically Receive Notices of Electronics Filings (the "Motion") filed on behalf of Caroline M. Walters, Esq. ("Ms. Walters"), requesting, pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States Court for the Southern District of Florida, permission for a limited appearance of Ms. Walters in this matter and to electronically receive notice of electronic filings. Having considered the Motion and all other relevant factors, it is hereby:

ORDERED and ADJUDGED that:

1. The Motion is GRANTED.

3. The Clerk shall provide electronic notification of all electronic filings to Ms. Walters at waltersc@hbdlawyers.com.

DONE AND ORDERED IN CHAMBERS at Miami, Florida, this ____ day of _____, 2010.

By:_____
District Judge Alan Gold
United States District Judge

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS** 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: October ___, 2010.

_____

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Miami Division**
**CASE No.: 09-02106-MD-GOLD/GOODMAN**

| | |
|---|---|
| IN RE : | : |
| FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION | : |
| MDL NO. 2106 | : |
| This document relates to Case Number: | : |
| 10-CV-20236-ASG | : |

**ANSWER OF DEFENDANT BANK OF AMERICA, N.A.**

Defendant Bank of America, N.A. ("BANA"), by its undersigned attorneys, hereby answers the Second Amended Complaint (the "Aurelius Complaint") and responds, with knowledge as to its own acts and upon information and belief as to the acts of others, as follows:

1. BANA denies paragraph 1's allegations.

2. BANA denies paragraph 2's allegations, except admits that the Project is being constructed on the north end of the Las Vegas Strip on approximately 24.4 acres and includes a 63-story skyscraper, a 100-foot high three-level podium and a 353,000 square-foot convention center.[1]

3. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 3's allegations, except admits that on June 6, 2007, Defendants and other lenders entered into the Credit Agreement and respectfully refers the Court to the Credit Agreement for its true and correct contents.

[1] Capitalized terms not otherwise defined herein have the meaning used in the Credit Agreement or, if applicable, the Disbursement Agreement.

4. Admitted.

5. BANA denies the allegations in paragraph 5's first sentence and respectfully refers the Court to the governing loan agreements for their true and correct contents. BANA states that no response is necessary as to paragraph 5's second sentence.

6. BANA denies paragraph 6's allegations and avers that the Court has already determined, in its May 28, 2010 Amended MDL Order Number Eighteen; Granting in Part and Denying in Part Motions to Dismiss [DE 35]; [DE 36]; Requiring Answer to Complaints; Vacating Final Judgment ("Amended MDL Order Number Eighteen"), that BANA was not obligated to fund the Revolving Loan because "'fully drawn . . . unambiguously means 'fully funded'; and . . . the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing."

7. BANA admits that the United States District Court for the Southern District of Florida has jurisdiction over this matter under 12 U.S.C. § 632, and that BANA is a national banking association organized under the laws of the United States. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 7's remaining allegations.

8. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 8's allegations, except admits that the United States District Court for the Southern District of New York is a proper venue for this action.

9. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 9's allegations.

10. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 10's allegations.

11. BANA denies paragraph 11's allegations, except admits that (i) BANA is a national banking association with its main office in Charlotte, North Carolina, (ii) BANA is a Revolving Loan Lender, (iii) BANA served as Administrative Agent under the Credit Agreement and as Disbursement Agent under the Disbursement Agreement, and (iv) BANA agreed to fund $100 million under the Revolving Facility. BANA respectfully refers the Court to the governing loan agreements for their true and correct contents.

12. BANA denies paragraph 12's allegations, except admits that (i) Merrill Lynch Capital Corporation is a Delaware Corporation with a principal place of business in New York and is indirectly owned by Bank of America Corporation, and (ii) that Merrill Lynch Capital Corporation agreed to fund $100 million under the Revolving Facility. BANA respectfully refers the Court to the governing loan agreements for their true and correct contents.

13. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 13's allegations, except admits that J.P. Morgan Chase Bank, N.A. agreed to fund $90 million under the Revolving Facility.

14. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 14's allegations, except admits that Barclays Bank PLC agreed to fund $100 million under the Revolving Facility.

15. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 15's allegations, except states that Deutsche Bank Trust Company Americas agreed to fund $100 million under the Revolving Facility.

16. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 16's allegations, except admits that The Royal Bank of Scotland PLC agreed to fund $90 million under the Revolving Facility.

17. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 17's allegations, except admits that Sumitomo Mitsui Banking Corporation agreed to fund $90 million under the Revolving Facility.

18. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 18's allegations, except admits that Bank of Scotland agreed to fund $72.5 million under the Revolving Facility.

19. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 19's allegations, except admits that HSH Nordbank AG agreed to fund $40 million under the Revolving Facility.

20. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 20's allegations, except admits that MB Financial Bank, N.A. agreed to fund $7.5 million under the Revolving Facility.

21. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 21's allegations, except admits that Camulos Master Fund, L.P. agreed to fund $20 million under the Revolving Facility.

22. BANA states that the allegations in paragraph 22 require no response.

23. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 23's allegations, except admits that the Credit Agreement was entered into on June 6, 2007, and respectfully refers the Court to the Credit Agreement for its true and correct contents.

24. BANA denies paragraph 24's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

25. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 25's allegations.

26. Admitted.

27. BANA denies paragraph 27's allegations, except admits that (i) BANA served as Administrative Agent under the Credit Agreement and as Disbursement Agent under the Disbursement Agreement and (ii) the Disbursement Agreement was entered into on June 6, 2007, and respectfully refers the Court to the governing loan agreements for their true and correct contents.

28. BANA denies paragraph 28's allegations and respectfully refers the Court to the Credit Agreement for its true and correct contents.

29. BANA denies paragraph 29's allegations and respectfully refers the Court to the Credit Agreement for its true and correct contents.

30. BANA denies paragraph 30's allegations and respectfully refers the Court to the Credit Agreement for its true and correct contents.

31. BANA denies paragraph 31's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

32. BANA denies the allegations in paragraph 32's first and second sentences, and respectfully refers the Court to the governing loan agreements for their true and correct contents. BANA states that no response is necessary as to paragraph 32's third sentence.

33. BANA denies paragraph 33's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

34. BANA denies paragraph 34's allegations and respectfully refers the Court to the Credit Agreement for its true and correct contents.

35. Admitted.

36. BANA denies paragraph 36's allegations and respectfully refers the Court to the Credit Agreement for its true and correct contents.

37. BANA denies paragraph 37's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

38. BANA denies paragraph 38's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

39. BANA denies paragraph 39's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

40. BANA denies paragraph 40's allegations and respectfully refers the Court to the Credit Agreement for its true and correct contents.

41. BANA denies paragraph 41's allegations, respectfully refers the Court to the Credit Agreement for its true and correct contents and BANA further avers that the Court has already determined in Amended MDL Order Number Eighteen that "'fully drawn' . . . unambiguously means 'fully funded'; and . . . the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing."

42. BANA denies paragraph 42's allegations.

43. BANA states that paragraph 43's allegations require no response because they concern a hypothetical situation. To the extent a response is required, BANA denies paragraph 43's allegations.

44. BANA denies paragraph 44's allegations, except admits that the Borrowers issued a Notice of Borrowing on March 2, 2009, and respectfully refers the Court to the March 2 Notice for its true and correct contents.

45. BANA denies paragraph 45's allegations, except admits that $68,000,000.00 of Revolving Loans was advanced to the Borrowers in February 2009, and respectfully refers to the Court to the Notices of Borrowing for their true and correct contents.

46. BANA states that paragraph 46's allegations require no response because it is a hypothetical and speculative. To the extent a response is required, BANA denies paragraph 46's allegations.

47. Admitted.

48. BANA denies paragraph 48's allegations, except admits that at 5:30 p.m. Eastern Time on March 2, 2009, BANA participated in a conference call with certain lenders.

49. BANA denies paragraph 49's allegations, except admits that at 8:00 a.m. Eastern Time on March 3, 2009, BANA participated in a conference call with certain lenders.

50. BANA denies paragraph 50's allegations, except admits that BANA, as Administrative Agent, sent the Borrowers a letter on March 3, 2009, and respectfully refers the Court to the March 3, 2009 letter for its true and correct contents.

51. BANA denies paragraph 51's allegations and respectfully refers the Court to BANA's March 3, 2009 letter for its true and correct contents.

52. BANA denies paragraph 52's allegations, except admits that funds were returned to certain lenders who funded in March 2009.

53. BANA denies paragraph 53's allegations and avers that the Court has already determined in Amended MDL Order Number Eighteen that "'fully drawn' . . . unambiguously means 'fully funded'; and . . . the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing."

54. BANA denies paragraph 54's allegations, except admits that on March 3, 2009, the Borrower sent a letter to BANA, as Administrative Agent, and respectfully refers the Court to that letter for its true and correct contents.

55. BANA denies paragraph 55's allegations and respectfully refers the Court to the Borrowers' March 3, 2009 letter for its true and correct contents.

56. BANA denies paragraph 56's allegations, except admits that the Borrowers issued a Notice of Borrowing on March 3, 2009, and respectfully refers the Court to the Notice for its true and correct contents.

57. BANA denies paragraph 57's allegations, except admits that on March 4, 2009, BANA, as Administrative Agent, posted a Borrowing Notice & Agency Communication on Intralinks and respectfully refers the Court to that posting for its true and correct contents.

58. BANA denies paragraph 58's allegations and avers that the Court has already determined in Amended MDL Order Number Eighteen that "'fully drawn' . . . unambiguously means 'fully funded'; and . . . the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing."

59. BANA denies paragraph 59's allegations, except admits that BANA, as Administrative Agent, sent a March 23, 2009 letter, and respectfully refers the Court to that letter for its true and correct contents.

60. BANA denies paragraph 60's allegations, except admits that on March 23, 2009, BANA, as Administrative Agent and Disbursement Agent, sent a letter to Fontainebleau's lenders and respectfully refers the Court to that letter and the Disbursement Agreement for their true and correct contents.

61. BANA denies paragraph 61's allegations.

62. BANA denies paragraph 62's allegations.

63. BANA denies paragraph 63's allegations and avers that the Court has already determined in Amended MDL Order Number Eighteen that "'fully drawn' . . . unambiguously means 'fully funded'; and . . . the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing."

64. BANA denies paragraph 64's allegations, except admits that on March 6, 2009, the Borrowers sent a letter to BANA, as Administrative Agent, and respectfully refers the Court to that letter for its true and correct contents.

65. BANA denies paragraph 65's allegations, except admits that on March 9, 2009, the Borrower submitted a Notice of Borrowing and respectfully refers the Court to the Notice and the attached letter for its true and correct contents.

66. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 66's allegations, except admits that BANA, as Administrative Agent, posted the March 9 Notice of Borrowing on Intralinks for the Delay Draw Lenders and that the Delay Draw Loan Lenders funded approximately $337 million.

67. BANA denies the allegations in paragraph 67's first sentence, except admits that the Revolving Lenders were repaid $68 million outstanding under the Revolver Facility and respectfully refers the Court to the Credit Agreement for its true and correct contents. BANA denies paragraph 67's remaining allegations.

68. BANA states that paragraph 68's allegations contain legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 68's allegations.

69. BANA denies paragraph 69's allegations, except admits that certain Term Lenders sent BANA a letter on March 19, 2009, and respectfully refers the Court to that letter for its true and correct contents.

70. BANA denies paragraph 70's allegations.

71. BANA denies paragraph 71's allegations, except admits that the Borrower submitted Notice of Borrowing on April 21, 2009, and respectfully refers the Court to that letter for its true and correct contents.

72. Admitted.

73. BANA denies paragraph 73's allegations, except admits that BANA, as Administrative Agent, sent a letter to the Borrower on April 20, 2009, and respectfully refers the Court to that letter for its true and correct contents.

74. BANA denies paragraph 74's allegations.

75. BANA denies paragraph 75's allegations, except BANA admits that numerous parties, including the Borrowers, the Initial Term Loan Lenders, the Delay Draw Loan Lenders and the Revolving Lenders are parties to the Credit Agreement and respectfully refers the Court to the Credit Agreement for its true and correct contents.

76. BANA denies paragraph 76's allegations, except states that whether the Initial Term Loan Lenders and Delay Draw Loan Lenders had an interest in enforcing the Revolving Lenders' loan commitments is a legal conclusion as to which no response is necessary, denies knowledge or information sufficient to form a belief as to what the Initial Term Loan Lenders and Delay Draw Loan Lenders relied on and respectfully refers the Court to the Credit Agreement for its true and correct contents.

77. BANA denies paragraph 77's allegations, except denies knowledge or information sufficient to form a belief as to the other lenders' understanding or intent in entering into the Credit Agreement and other loan documents and respectfully refers the Court to the governing loan documents for their true and correct contents.

78. BANA denies paragraph 78's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

79. BANA denies paragraph 79's allegations and respectfully refers the Court to the Credit Agreement for its true and correct contents.

80. BANA denies paragraph 80's allegations, avers that the Court has already determined in Amended MDL Order Number Eighteen that "[t]his promise . . . does not establish a duty to Plaintiffs here or clearly evidence an intent to permit enforcement by Plaintiffs," (citation and internal quotation marks omitted) and respectfully refers the Court to the March 9 Notice for its true and correct contents.

81. BANA denies paragraph 81's allegations.

82. BANA denies paragraph 82's allegations.

83. BANA denies paragraph 83's allegations.

84. BANA denies paragraph 84's allegations, except admits that BANA was a Revolving Lender and Administrative Agent under the Credit Agreement and Disbursement Agent under the Disbursement Agreement, and respectfully refers the Court to the governing loan agreements for their true and correct contents.

85. BANA denies paragraph 85's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

86. BANA denies the allegations in paragraph 86's first and second sentences and respectfully refers the Court to the governing loan agreements for their true and correct contents. BANA denies paragraph 86's remaining allegations.

87. BANA denies paragraph 87's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

88. BANA denies paragraph 88's allegations, except avers that each Advance Request submitted by the Borrower certified that the In Balance Test was satisfied and respectfully refers the Court to the Advance Requests for their true and correct contents.

89. BANA denies paragraph 89's allegations, except admits that as of March 23, 2009, BANA did not issue a Stop Funding Notice and that BANA, as Administrative Agent and Disbursement Agent, on March 23, 2009 sent a letter to Fontainebleau's lenders and respectfully refers the Court to that letter and BANA's filings in *Fontainebleau Las Vegas LLC v. Bank of America, N.A., et al*, No. 09-cv-21879-ASG for their true and correct contents.

90. BANA denies paragraph 90's allegations, except admits that on March 23, 2009, the Borrowers submitted the March 25, 2009 Advance Request showing the In Balance Test to be positive $13,785,184, and respectfully refers the Court to that Advance Request for its true and correct contents.

91. BANA denies paragraph 91's allegations.

92. BANA denies paragraph 92's allegations and avers that the Court has already determined in Amended MDL Order Number Eighteen that "'fully drawn' . . . unambiguously means 'fully funded'; and . . . the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing."

93. BANA denies paragraph 93's allegations, avers that the Court has already determined in Amended MDL Order Number Eighteen that "'fully drawn' . . . unambiguously means 'fully funded'; and . . . the Delay Draw Term Loans had not been 'fully drawn' at the time Fontainebleau submitted the March Notices of Borrowing" and respectfully refers the Court to the Disbursement Agreement for its true and correct content.

94. BANA denies paragraph 94's allegations, except admits that on March 23, 2009, the Borrowers submitted the March 25, 2009 Advance Request and respectfully refers the Court to that Advance Request and the Disbursement Agreement for their true and correct contents.

95. BANA denies paragraph 95's allegations.

96. BANA denies the allegations in paragraph 96's first and second sentence, except admits that Lehman Brothers Holdings, Inc. was a Retail Lender and Retail Agent and respectfully refers the Court to the governing loan agreements for their true and correct contents. BANA denies paragraph 96's remaining allegations.

97. BANA admits that Lehman Brothers Holdings, Inc. filed for bankruptcy protection on September 15, 2008.

98. BANA denies the allegations in paragraph 98's first sentence, except admits that Lehman Brothers Holdings, Inc. was the arranger and a lender under the retail loan facility, and filed for bankruptcy protection on September 15, 2008. BANA denies the allegations in paragraph 98's second sentence but avers that BANA was aware Lehman Brothers Holdings, Inc. was in bankruptcy. BANA denies paragraph 98's remaining allegations.

99. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 99's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

100. BANA denies paragraph 100's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

101. BANA denies paragraph 101's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

102. BANA denies paragraph 102's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

103. BANA denies paragraph 103's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

104. BANA denies knowledge or information sufficient to form a belief as to the truth of paragraph 104's allegations.

105. BANA states that paragraph 105's allegations contain legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 105's allegations.

106. BANA states that paragraph 106's allegations contain legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 106's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

107. BANA states that paragraph 107's allegations contain legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 107's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

108. BANA states that paragraph 108's allegations contain legal conclusions as to which no response is required. To the extent that a response is required, BANA denies

paragraph 108's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

109. BANA denies paragraph 109's allegations.

110. BANA denies paragraph 110's allegations, except admits that BANA, as Administrative Agent, sent a February 20, 2009 letter to the Borrower and respectfully refers the Court to that letter for its true and correct contents.

111. BANA denies paragraph 111's allegations.

112. BANA denies paragraph 112's allegations, except admits that BANA, as Administrative Agent and Disbursement Agent, sent the Borrower a letter on March 10, 2009, and respectfully refers the Court to that letter for its true and correct contents.

113. BANA denies paragraph 113's allegations, except admits that on March 11, 2009, Borrowers sent BANA a "Pre-Negotiation Agreement" and respectfully refers the Court to the agreement for its true and correct contents.

114. BANA denies paragraph 114's allegations, except admits that the Borrower sent BANA a letter on March 16, 2009, and respectfully refers the Court to that letter for its true and correct contents.

115. BANA denies paragraph 115's allegations, except admits that BANA, as Administrative Agent and Disbursement Agent, sent the Borrower a letter on March 16, 2009, and respectfully refers the Court to that letter for its true and correct contents.

116. BANA admits that on March 20, 2009, BANA, and others, met with the Borrowers to discuss the Project and that Fontainebleau refused to answer questions about the Project's future operating prospects. BANA denies paragraph 116's remaining allegations,

except admits that the Borrowers drafted an Interim Agreement and respectfully refers the Court to the Interim Agreement for its true and correct content.

117. BANA denies paragraph 117's allegations, except admits that on March 23, 2009, BANA, as Administrative Agent and Disbursement Agent, sent a letter to Fontainebleau's lenders and respectfully refers the Court to that letter for its true and correct contents.

118. BANA denies the allegations in paragraph 118's first sentence, except admits that First National Bank of Nevada had made a commitment of $1,666,666.67 under the Delay Draw and states that First National Bank of Nevada had made a commitment of $3,333,333.33 under the Initial Term Loan. BANA denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 118's second sentence, except admits that First National Bank of Nevada was closed on or around July 25, 2008. BANA denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 118's third sentence. BANA denies paragraph 118's remaining allegations.

119. BANA denies paragraph 119's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

120. BANA states that paragraph 120 contains legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 120's allegations.

121. BANA states that paragraph 121 contains legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 121's allegations and respectfully refers the Court to the governing loan agreements for their true and correct contents.

122. BANA denies paragraph 122's allegations and respectfully refers the Court to the March 23, 2009 letter for its true and correct contents.

123. BANA denies paragraph 123's allegations.

124. BANA denies paragraph 124's allegations.

125. BANA states that paragraph 125 calls for legal conclusions as to which no response is required. To the extent a response is required, BANA denies paragraph 125's allegations, except admits that Mr. Yu was employed by BANA.

126. BANA denies paragraph 126's allegations.

127. BANA denies paragraph 127's allegations.

128. BANA denies paragraph 128's allegations.

129. BANA denies paragraph 129's allegations and respectfully refers the Court to Defendants' Opposition to Fontainebleau's Motion for Partial Summary Judgment and an Order Pursuant to 11 U.S.C. § 542 Directing 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 for its true and correct contents.

130. BANA denies paragraph 130's allegations.

131. BANA denies paragraph 131's allegations.

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

132-138. BANA states that no response is required to the allegations in paragraphs 132 through 138 because the Court has dismissed Count I by Amended MDL Order Number Eighteen.

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

139-145. BANA states that no response is required to the allegations in paragraphs 139 through 145 because the Court has dismissed Count II by Amended MDL Order Number Eighteen.

**THIRD CLAIM FOR RELIEF**
**Breach of the Disbursement Agreement Against BofA**

146. BANA repeats and incorporates by reference all the answers set forth in paragraphs 1 through 145 as if fully set forth herein.

147. BANA states that paragraph 147 contains legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 147's allegations, except admits that BANA acted as Bank Agent and Disbursement Agent under the Disbursement Agreement and respectfully refers the Court to the Disbursement Agreement for its true and correct contents.

148. BANA states that paragraph 148 contains legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 148's allegations.

149. BANA states that paragraph 149 contains legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 149's allegations and respectfully refers the Court to the Credit Agreement and Disbursement Agreement for their true and correct contents.

150. BANA states that paragraph 150 contains legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 150's

allegations and respectfully refers the Court to the Disbursement Agreement for its true and correct contents.

151. BANA denies paragraph 151's allegations.

152. BANA states that paragraph 152 contains legal conclusions as to which no response is required. To the extent that a response is required, BANA denies paragraph 152's allegations.

153. BANA denies paragraph 153's allegations.

**DEFENSES**

**First Defense**

The Aurelius Complaint fails to state a claim upon which relief can be granted.

**Second Defense**

The Aurelius Plaintiffs' claims against BANA are barred, in whole or in part, by the doctrines of laches, waiver, and/or acquiescence.

**Third Defense**

The Aurelius Plaintiffs' claims against BANA are barred or limited, in whole or in part, by their failure to mitigate, minimize, or avoid their alleged damages.

**Fourth Defense**

The Aurelius Plaintiffs' claims against BANA are barred, in whole or in part, by the doctrine of equitable estoppel.

**Fifth Defense**

The Aurelius Plaintiffs' claims against BANA are barred by the doctrine of unclean hands.

**Sixth Defense**

The Aurelius Plaintiffs' claims against BANA are barred or limited, in whole or in part, because their own acts and/or omissions caused or, in the alternative, contributed to their alleged damages.

**Seventh Defense**

The Aurelius Plaintiffs' claims may be barred or limited, in whole or in part, by the doctrine of frustration of purpose.

**Eighth Defense**

To the extent that the Aurelius Plaintiffs failed to mitigate, minimize or avoid any loss or damage referred to in the Aurelius Complaint, any recovery against BANA must be reduced by that amount.

**Ninth Defense**

The Aurelius Complaint does not describe the claims made against BANA with sufficient particularity to enable BANA to determine all defenses (including defenses based upon the terms of the Credit Agreement and/or Disbursement Agreement and related documents) it has to this suit. BANA reserves the right to assert other defenses as discovery proceeds.

WHEREFORE, BANA respectfully requests that the Court enter an order:

1. dismissing the Aurelius Plaintiffs' claims with prejudice and entering judgment in BANA's favor;

2. awarding BANA its reasonable attorney's fees and costs of suit; and

3. awarding such other, different, or further relief as the Court may deem just and proper.

Date: Miami, Florida
October 12, 2010

Respectfully submitted,

By: /s/ Craig V. Rasile

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**CERTIFICATE OF SERVICE**

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

Dated: October 12, 2010

By: */s/ Craig V. Rasile*
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