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

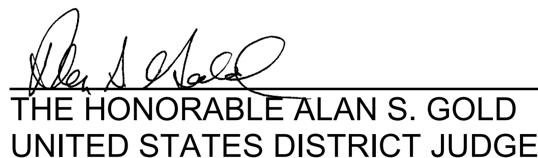
This document applies to:

Case No. 09-CV-23835-ASG.
Case No. 10-CV-20236-ASG.
_________________________________/

MDL ORDER NUMBER 37;
REFERRING MOTIONS TO MAGISTRATE JUDGE JONATHAN GOODMAN

THIS CAUSE is before the Court upon Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s Motion to Withdraw as Counsel **[ECF No. 144]** and Term Lenders' Motion for Sanctions Against Fontainebleau Resorts, LLC for Failure to Comply with Court Order to Produce Documents in Response to Subpoena **[ECF No. 153]**. Pursuant to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules for the Southern District of Florida, the Motions **[ECF Nos. 144, 153]** are hereby REFERRED to United States Magistrate Judge Jonathan Goodman to take all necessary and proper action as required by law.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 13th day of October, 2010.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman
Counsel of record

Dockets.Justia.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
__________________________________/

NOTICE OF CALL-IN INFORMATION FOR TELEPHONIC HEARING ON WALDMAN TRIGOBOFF HILDEBRANDT MARX & CALNAN, P.A.'S MOTION TO WITHDRAW AS COUNSEL AND TERM LENDERS' MOTION FOR SANCTIONS

Come now, Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Holdings, LLC and Fontainebleau Resorts Properties I, LLC (collectively, "Fontainebleau"), by and through their undersigned counsel, hereby give notice to all parties of the following call-in information for the hearing on Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s Motion to Withdraw as Counsel and Term Lenders' Motion for Sanctions, set for Monday, October 18, 2010 at 10:00 a.m.:

Call-in Number: (866) 295-5950

Passcode: 4982319#

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 14, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER CASE NO.: 09-MD- 02106-CIV-GOLD
Magistrate Goodman

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_______________________________/

THIRD-PARTY FONTAINEBLEAU RESORTS, LLC'S MOTION FOR LEAVE TO FILE RESPONSE TO TERM LENDERS' MOTION FOR SANCTIONS

Third Party, Fontainebleau Resorts, LLC ("FBR"), through its undersigned counsel, for the reasons set forth below, respectfully moves for permission to file a Response in Opposition to the Term Lenders' "Motion for Sanctions against Fontainebleau Resorts, LLC for Failure to Comply with Court Order to Produce Documents in Response to Subpoena," [D.E. 153], and states:

1. On October 8, 2010, the Term Lenders filed their Motion for Sanctions against FBR in connection with their previously issued subpoenaed and the Court's Order regarding same.

2. On October 13, 2010, the Court issued its paperless Order setting a telephonic hearing on FBR's counsel's motion to withdraw and on the Term Lender' Motion for Sanctions [D.E. 159]. The Order specifies that neither party shall file any additional written materials in connection with either motion.

3. FBR asks for leave to file a response to the Term Lenders' Motion for Sanctions for the following reasons. First, the Motion seeks relief that FBR submits is unwarranted. The proposed Response explains why and elaborates on additional important information. Second, FBR's

Response was already substantially completed by the time the Court had issued its October 13, 2010 Order. Third, the information provided in FBR's Response would be substantially the same as FBR's counsel would explain to the Court at the time of the telephonic hearing.

4. The proposed Response is attached.

Respectfully submitted,

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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 October 15, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER CASE NO.: 09-MD- 02106-CIV-GOLD
Magistrate Goodman

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
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THIRD-PARTY FONTAINEBLEAU RESORTS, LLC'S
RESPONSE TO TERM LENDERS' MOTION FOR SANCTIONS

Third Party, Fontainebleau Resorts, LLC ("FBR"), through its undersigned counsel and pursuant to Federal Rules of Civil Procedure 37 and 45 and Local Rules 7.1 and 26.1 of the United States District Court for the Southern District of Florida, respectfully submits the following Response in Opposition to the Term Lenders' "Motion for Sanctions against Fontainebleau Resorts, LLC for Failure to Comply with Court Order to Produce Documents in Response to Subpoena," dated October 8, 2010:

Introduction

FBR and its counsel wish to first emphasize that they have endeavored to comply with the Subpoena and this Court's Order of August 30, 2010 to the best of their ability under extraordinary circumstances. The Term Lenders themselves describe the underlying litigation as a "legal storm." FBR, though not a party to this litigation, has nonetheless found itself caught up in the storm. While FBR acknowledges that it has been unable to fully comply to the letter of the Subpoena and the Order, it has made significant developments in meeting its obligations and has also worked

cooperatively with the Term Lenders' counsel to see this matter to its proper conclusion. Although the undersigned law firm has moved for permission withdraw as counsel for FBR and two other entities [D.E. 144] (and continues to request that relief), we provide this response in due respect of the Court and counsel and to demonstrate that sanctions are not warranted. FBR respectfully asks that the Motion be denied.

Background

While much of the background provided in the Term Lenders' Motion is correct, it does not fully describe the efforts undertaken by FBR to produce the subpoenaed materials, the subject of which became very much a moving target in an attempt to narrow the searches within an extremely large amount of information and data. FBR prefers not to file all of the communications among counsel, *S.D. Fla. L.R. 7.7*, but offers this additional information and explanation.

In its initial response to the Term Lenders' Subpoena, FBR explained that, from an electronic document perspective, there are three computer servers containing information believed to be responsive to the Subpoena, at least in part: (1) the *document* server, (2) the *e-mail* server, and (3) the *accounting* server. Each server contains a massive amount of information and data. For example, the document server alone contains approximately 600,000 files of documents (not considering the number of pages of each document / file). The e-mail server, without limiting search terms or specific queries, contains about 400 gigabytes of data. The accounting server is essentially a database, which, in order to be of any use, necessarily requires a list of reports to be run.

In addition to the electronic documents and information, there are approximately eighty (80) boxes of potentially responsive documents (hard copies), which, until recently, were stored and maintained in Las Vegas. As discussed below, arrangements have already been made with the Term

Lenders for those boxes to be produced for review and/or copying. That inspection process is currently underway.

FBR did not receive copies of the computer servers (also maintained in Las Vegas) until August 24, 2010. It immediately researched its options as to how to access the immense amount of information in terms of being able to produce it as electronic discovery in this and other matters.

On August 19, 2010, the Term Lenders filed their Motion to Compel [D.E. 123], which was granted by the Court on August 30, 2010 [D.E. 129]. FBR was ordered to produce all non-privileged documents responsive to the Subpoena by September 13, 2010 and to produce a privilege log by September 20, 2010 [D.E. 129].

Sanctions Are Not Warranted Under the Circumstances

Since August 30, 2010 (and prior), FBR has worked diligently and has expended significant sums of money in an effort to comply with the Subpoena and the Court's Order. The following is illustrative of those efforts and why sanctions should not be imposed and any finding of contempt not warranted.

Prior to entry of the Court's Order on August 30, 2010, FBR's counsel had coordinated the shipment of the eighty boxes (approximate) of documents from Las Vegas to Aventura, Florida. FBR hired a former employee to assist counsel in reviewing the boxes for privilege and responsiveness to the Subpoena as quickly as possible.[1] Even this expedited review process took

[1] Due to the September 13, 2010 deadline, only a cursory privilege review was attempted. Accordingly, FBR and the Term Lenders were in the process of negotiating a "clawback" agreement and/or proposed confidentiality order in the event of the inadvertent production of privileged or confidential materials.

a full week.

In addition, FBR hired an electronic discovery expert with IKON (a document copying / production company) to assist FBR with responding to the subpoenas that have been issued in this and other matters, particularly with respect to the electronically stored data.

FBR (through its counsel) communicated extensively with counsel for the Term Lenders to apprise them of the status of the document production and to work together to resolve the significant hurdles presented as briefly described above. Many of these discussions focused on a narrowing of the search to be conducted of the three computer servers in light of their immense size.

Eventually, the parties agreed that the Term Lenders would provide (and did provide) a list of search terms in order to narrow the search of the e-mail server for responsive documents. FBR, through IKON, has run the search terms provided through the e-mail server. The results of that search are currently contained on a hard-drive prepared with IKON's assistance. In performing this task, FBR expended over $25,000.00. While the costly search has been performed, the review for privilege has not. Presumably, once FBR has had an opportunity to conduct that review, it would be in a position to provide the product to the Term Lenders.

FBR (through its counsel) also attempted to work cooperatively with counsel for the Term Lenders to provide information from the accounting server in a meaningful fashion. The parties agreed that the Term Lenders would provide FBR with a list of reports to run on the accounting server. While the parties were essentially working on a step by step process with regard to these matters, FBR never received from the Term Lenders the list of reports to be run on the accounting server. FBR is not seeking to assign blame on the Term Lenders, but respectfully submits it is not

a failure on its part.

Finally, while the document server was discussed at great length among counsel, the parties had not yet decided upon, or reached an agreement as to the procedure to be used to narrow the search of this immense database. Again, FBR does not ascribe fault to the Term Lenders, but FBR should not be sanctioned or responsible for this fact.

A rather significant event occurred to FBR during the process described above. As noted in the undersigned's motion to withdraw as counsel for FBR, a one billion dollar judgment was entered against FBR in the Supreme Court of the State of New York. This judgment also led to issuance of an Order restraining FBR from transferring *any of its assets for any purpose*, including the payment of attorneys' fees and expenses. While this ruling would obviously have an affect on the undersigned law firm's ability to continue with its representation of FBR (as cited in the motion to withdraw [D.E. 144] and reply memorandum [D.E. 152]), as a practical consequence, it also prohibited any expenditure of money for any purpose, including any future expenditures for the matters detailed above. While the restraining Order has recently been lifted, the one billion dollar judgment has not been vacated such that the undersigned still has uncertainty as to the effect of that judgment and the related out-of-state litigation on any ongoing representation.

Despite the pending motion to withdraw, the undersigned counsel has made arrangements with counsel for Term Lenders to review the boxes of documents located in Aventura as early as October 14, 2010. *That inspection is currently taking place*. Thus, while the Term Lenders ask that the Court order FBR to produce for inspection the hard copy documents located in Aventura, those documents are already being made available.

However, with respect to counsel's presence at the document inspection and, more significantly, continuing the electronic discovery process described above, the undersigned counsel has significant concern over the expenditure of tens of thousands of additional dollars on such efforts under the current circumstances. Thus, while the undersigned firm continues to request permission to withdraw, it is assisting FBR in explaining to the Court the efforts that have been undertaken thus far, and the other intervening events.

The Term Lenders also ask that the Court order FBR to pay for the costs incurred by Term Lenders in extracting responsive documents from the various servers. This relief is not warranted.

As indicated, the e-mail server has been searched for responsive documents after FBR and the Term Lenders worked collaboratively to define the requested searches. The only task that remains with respect to the e-mail server production is the review for privilege and/or entry of a suitable clawback agreement or confidentiality order due to the circumstances.

With respect to the document server and accounting server, and using the already completed work on the e-mail server as a guide, the cost of extracting responsive documents (assuming the Term Lenders provide the requested search parameters) could easily exceed $50,000.00 or more. Imposition of this type of expense, in addition to the amounts FBR has already expended, would clearly be excessive and not indicative of the efforts FBR has already undertaken.

FBR respectfully submits that, under these circumstances, any inability on its part to comply with the Subpoena and Order was by no means willful. Rather, though Federal Rule of Civil Procedure 37 (relied upon by the Term Lenders) does not apply to FBR as a non-party, *American Honda Bailey Industries, Inc. v. CLJP, Inc.*, 2010 WL 3860742, *9 (N.D. Fla. 2010), *and cases cited*

therein; *American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc.*, 2006 WL 1063299, *1 (M.D. Fla. 2006)[2], FBR provides the detailed explanation above to demonstrate that its inability to provide a complete and timely response was substantially justified and that an award of sanctions or expenses would be unjust. *Ibid.*

With regard to the Term Lenders reference to Rule 37(b)(2)(B) as to payment of expenses by the non-compliant party, or "the attorney advising that party . . . ," again, though that provision does not apply here, there is absolutely no basis to suggest that FBR's *counsel* caused any of the delays or events complained of in the Motion. To the contrary, although the undersigned has moved to withdraw as counsel, the foregoing demonstrates a concerted effort by counsel and FBR to cooperate with the Term Lenders and provide the requested information and documents as best as it is able and at its own significant expense.[3]

In addition, FBR's good faith efforts described above are decidedly different that the recalcitrant behavior of the *pro se* litigant in *Phipps v. Blankeney*, 8 F.3d 788 (11th Cir. 1993), cited by the Term Lenders. As the first sentence of that opinion makes clear, the plaintiff in *Phipps* "refused to comply with several court orders about discovery and wrote to the district court that he

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[2] In *American Honda Motor Co., Inc.*, the court declined to find Robert Craig Knievel, a/k/a Evel Knievel, in contempt even though he had offered no explanation for not appearing for deposition. Here, FBR has offered a specific explanation as to why it has not been able to currently comply with the Subpoena and the Order and that its attempts to do so have been done in good faith. *Howard Johnson Company, Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990).

[3] In light of the scope of the Term Lenders' subpoena and the costs FBR has already incurred, FBR respectfully submits that the Term Lenders have it backwards in their attempt to shift the cost of complying to FBR. *See Fed.R.Civ.P. 45(c)(1); Bailey Industries, Inc. v. CLJP, Inc.*, 2010 WL 3860742, *8-10 (N.D. Fla. 2010).

had no intention of complying with future orders." 8 F.3d at 789. It should go without further comment that FBR's attempts to comply with the Subpoena and Court Order bear no relation whatsoever to the comments and behaviors exhibited by the plaintiff in *Phipps*. 8 F.3d at 790, n. 3.

Conclusion

In light of the circumstances described above, FBR respectfully submits that it has acted in good faith in its attempts to comply with the Subpoena and the Court's Order. Any inability of FBR to fully comply was not due to any willful misconduct, but instead, is based on an actual inability to currently comply given the scope of the Subpoena. Even in that regard, FBR has attempted to work cooperatively with the Term Lenders to the scope in order to comply in a fashion that is feasible and fair to all parties. FBR respectfully requests that the Motion be denied.

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Glenn J. Waldman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document applies to:

Case No. 09-CV-23835-ASG.
Case No. 10-CV-20236-ASG.
_________________________________/

MDL ORDER NUMBER 38;
GRANTING MOTIONS TO APPEAR *PRO HAC VICE*,
CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY
RECEIVE NOTICES OF ELECTRONIC FILINGS [ECF Nos. 155, 156, & 157]

THIS CAUSE is before the Court upon three Motions to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronics Filings ("Motions") **[ECF Nos. 155, 156, & 157]**, requesting, pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida, permission for a limited appearance of Rebecca T. Pilch **[ECF No. 155]**, Robert W. Mockler **[ECF No. 156]**, and Caroline M. Walters **[ECF No. 157]** in this matter and to electronically receive notice of electronic filings. Having considered the Motions and being otherwise fully advised, it is hereby

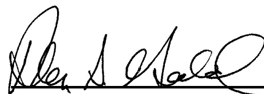
ORDERED and ADJUDGED that:

1. The Motions to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronics Filings **[ECF Nos. 155, 156, & 157]** are GRANTED.

2. Rebecca T. Pilch, Robert W. Mockler, and Caroline M. Walters are permitted to appear and participate in this action for purposes of limited appearances as co-counsel on behalf of the Term Lenders in the above-referenced action.

3. The Clerk shall provide electronic notification of all electronic filings to Rebecca T. Pilch at pilchr@hbdlawyers.com, Robert W. Mockler at mocklerr@hbdlawyers.com, and Caroline M. Walters at waltersc@hbdlawyers.com.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of October, 2010.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Chris M. McAliley
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MAGISTRATE JUDGE JONATHAN GOODMAN
Courtroom No. 4

CIVIL MINUTES

DATE: 10/18/10 TIME: Begin 10:00 a.m. End:11:38 a.m.

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

Case No.: 09-MD-02106-GOLD / GOODMAN

Parties in attendance: (appeared telephonically)

Craig Trigoboff, Esq., Sara Springer, Esq., Kirk Dillman, Esq., Steven Nachtwey, Esq., Daniel Cantor, Esq., Steven Fitzgerald, Esq., Jason Kirschner, Esq., and Russell Blain, Esq.

PROCEEDING:

Telephonic hearing on Motion for Sanctions for Failure to Produce DE [153] and Motion to Withdraw as Counsel DE [144].

RESULT OF HEARING:

Telephonic hearing held on Motion for Sanctions for Failure to Produce DE [153] and Motion to Withdraw as Counsel DE [144]. Counsel addressed the Court on matters regarding status of discovery and production of documents as well as issues surrounding reviewing for privileged information.

Court heard arguments from counsel on Motion to Withdraw.

Matters taken under advisement.

DAR No.: 10:06:54 and 10:21:12 INTERPRETER: None

TAPE No.:10-JG-12 and 13 COURT REPORTER: None

DEPUTY CLERK: **Michael A. Santorufo**

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 WITHDRAW

This matter is before the Court on Waldman Trigoboff Hilderbrandt Marx & Calnan, P.A.'s motion to withdraw as counsel for Fontainebleau Resorts, LCC, Fontainebleau Resorts Holdings, LLC, and Fontainebleau Resorts Properties I, LLC (DE# 152). The Term Lender Plaintiffs, and Defendant Bank of America, N.A., oppose the motion. Having considered the motion and associated briefing, having held a hearing on October 18, 2010 and being otherwise duly advised, it is hereby

ORDERED and ADJUDGED that the motion to withdraw is CONDITIONALLY GRANTED. Waldman Trigoboff shall immediately advise their clients that they must obtain new counsel within 30 days. After new counsel is obtained, Waldman Trigoboff may proceed with its requested withdrawal at any time during the next 30 days by filing a stipulation for substitution of counsel with the Court, which shall be signed by Waldman Trigoboff, the new counsel, and a representative of each Fontainebleau client. Attached to the stipulation, counsel shall include a proposed order ratifying the stipulation and approving the substitution of new counsel. **Waldman Trigoboff may not withdraw until the stipulation for substitution of counsel is approved by the Court.**

Until the Court approves the substitution of counsel, Waldman Trigoboff shall retain responsibility for coordinating appropriate responses to the discovery materials which this Court previously ordered produced and which are the subject of a separate order on a motion for sanctions. Assuming that new counsel is retained within 30 days, Waldman Trigoboff shall also coordinate with new counsel in complying with their clients' discovery obligations.

The Court will not entertain motions to continue the Fontainebleau clients' discovery obligations, which obligations will be outlined in a related order to be filed

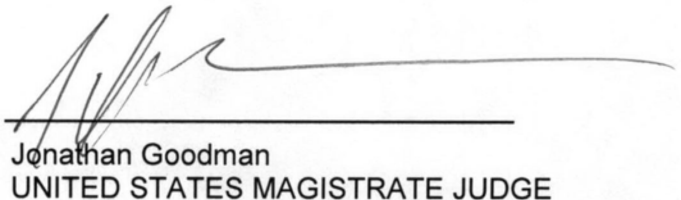
herewith, because of the appearance of new counsel or because of new counsel's need to familiarize itself with the case file.

If, however, the Fontainebleau clients do not obtain new counsel within 30 days, then the Waldman Trigoboff firm shall, after the expiration of the 30 days, file a notice with the Court indicating that its clients have not obtained new counsel.

If this scenario unfolds, then the Court will quickly schedule and hold a hearing to determine whether and when Waldman Trigoboff can withdraw, why its clients did not timely arrange for replacement counsel, and whether other remedies are appropriate to ensure that the Term Lender Plaintiffs and Bank of America are not further prejudiced. The hearing will also address any steps necessary to prevent the District Court's scheduling order from being undermined.

If this hearing becomes necessary, managing members of the Fontainebleau LLC entities will be required to attend and provide testimony and supporting documentation. A shareholder/partner from the Waldman Trigoboff firm will also be required to attend.

DONE AND ORDERED in Chambers, at Miami, Florida, this 18th Day of October, 2010.



Copies furnished to:
All counsel of record

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 FOR SANCTIONS

This matter is before the Court on the Term Lenders' motion for sanctions against Fontainebleau Resorts, LCC (DE# 153, filed October 8, 2010). The Court held a hearing on the motion on October 18, 2010. The motion relates to materials subject to a subpoena issued on April 22, 2010. After Fontainebleau failed to comply with the subpoena, the Term Lenders moved to compel production and (after Judge Gold had already twice extended the discovery deadlines) I ordered that the materials be produced by September 13, 2010, and that a privilege log be produced by September 20, 2010 (DE# 129, filed August 30, 2010).

Fontainebleau has identified three computer servers likely to contain the information sought in the subpoena. All three servers, which were in Fontainebleau's possession, have been copied and are now in the Florida offices of Fontainebleau's counsel. The three servers consist of an email server, a document server, and an account server.

After agreeing with the Term Lenders' counsel on relevant search terms, Fontainebleau's counsel hired IKON, a third-party vendor which conducts e-discovery, to search the email server for relevant documents. Because of concerns regarding its client's ability to pay, Fontainebleau's law firm ordered IKON to stop its work on the email server. At that time, IKON had already completed its work retrieving the relevant documents but had not yet started to search the responsive information on the email server for privileged information.

To date, no relevancy search has been conducted on the documents and accounts servers and no privilege search has been conducted on any of the three servers. During the hearing, Fontainebleau's counsel stated that it would take less than a day to run a search on the email server with agreed-upon search terms for privilege review purposes.

At no time did Fontainebleau request relief from the Court's order granting the Term Lenders' motion to compel. Instead, Fontainebleau's counsel unilaterally decided to stop efforts to comply with this Court's order that its client produce the documents subject to the April 22, 2010 subpoena and a privilege log.[1]

Having carefully considered this matter, and concluding that Fontainebleau is not in compliance with the order requiring it to produce the subpoenaed files and a privilege log, the Term Lenders' motion for sanctions is GRANTED IN PART, DENIED IN PART, and RESERVED IN PART as follows:

Fontainebleau is ordered to produce responsive, non-privileged emails by the end of business on **October 25, 2010.**

Fontainebleau is ordered to provide a privilege log for information obtained from the email server by the end of business on **November 5, 2010.**

Fontainebleau is ordered to produce relevant, non-privileged electronic files from the accounting and documents servers by the end of business on **November 8, 2010.**

Fontainebleau is ordered to provide a privilege log for information on the accounting and document servers by the end of business on **November 17, 2010.**

If Fontainebleau does not fully and timely comply with this order, then the Term Lenders shall forthwith file a "Notice of Non-Compliance," which shall simply state that Fontainebleau has not complied with this order by the deadlines set forth above. The Court will then immediately schedule a show cause hearing (to determine why Fontainebleau should not be sanctioned) and will require a managing member of Fontainebleau Resorts, LCC to personally appear at the hearing.

Finally, the Court RESERVES ruling on the issue of monetary sanctions, the request for fees and costs, and on the Term Lenders' demand that the servers themselves be turned over.

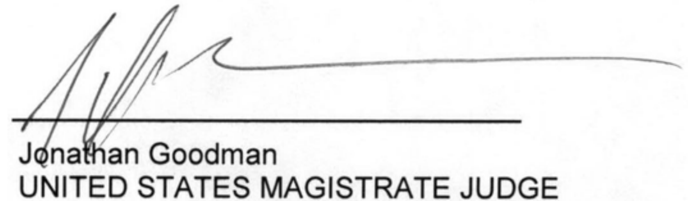
Although the relevant hard-copy documents have already been produced, they were produced beyond the deadline, and without a request for additional time. I will

[1] Fontainebleau has, however, finally made 80 boxes of documents available and at least one of the subpoenaing parties has reviewed those materials and arranged to photocopy those documents that it deemed relevant.

therefore RESERVE ruling on the Term Lender's motion for fees and costs with regard to these finally-produced documents.

In an effort to avoid any confusion or misunderstanding, producing the remainder of the responsive, non-privileged materials and the privilege logs by the new deadlines established in this order will not necessarily immunize Fontainebleau from an order awarding attorney's fees and costs. Fontainebleau may well be sanctioned for its tardy conduct to date, but the Court's evaluation of whether sanctions are appropriate, and, if so, the amount of the sanctions, will likely be affected by Fontainebleau's compliance with the new deadlines established here. At the risk or stating the obvious, Fontainebleau's exposure to sanctions will be aggravated should it fail to fully and timely comply with this Order.

DONE AND ORDERED in Chambers, at Miami, Florida, this 18th Day of October, 2010.



Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-MD-02106-CIV–ASG

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This Document Relates to: No. 09 Civ. 8064 (Southern District of New York)
No. 09 Civ. 1047 (District of Nevada)

**NOTICE OF APPEARANCE OF
RAQUEL A. RODRIGUEZ
OF McDERMOTT WILL & EMERY LLP AS COUNSEL
FOR DEFENDANT CAMULOS MASTER FUND, L.P.**

PLEASE TAKE NOTICE that the undersigned hereby appears in this proceeding as counsel for Camulos Master Fund, L.P., and requests that all papers be served upon the undersigned at the address provided below.

Dated: Miami, Florida
October 21, 2010

Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record identified on the attached list reflecting the Court's Mailing Information for this Case (retrieved from CM/ECF on this date), 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 Notice of Electronic Filing.

/s/Raquel A. Rodriguez
Raquel A. Rodriguez

Mailing Information for a Case 1:09-MD-02106-ASG

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Manual Notice List

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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.
_________________________________/

THIRD PARTIES, FONTAINEBLEAU RESORTS, LLC, FONTAINEBLEAU RESORTS PROPERTIES I, LLC AND FONTAINEBLEAU RESORTS HOLDINGS, LLC'S MOTION FOR ENTRY OF CONFIDENTIALITY ORDER

Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Properties I, LLC and Fontainebleau Resorts Holdings, LLC (collectively, "FBR"), by and through their undersigned counsel, and pursuant to Fed. R. Evid. 502(d), hereby file and serve this Motion for Entry of Confidentiality Order, and state:

1. Over the course of a number of months, FBR was served with subpoenas by (i) Plaintiff Term Lenders[1], (ii) Defendant, Bank of America and (iii) Defendants, JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and The Royal Bank of Scotland PLC.

2. In response to the Plaintiff Term Lenders' Motion to Compel [D.E. 123], and on August 31, 2010, FBR was ordered by Magistrate Goodman to produce all hard copy documents (i.e. non-electronic documents) which were responsive to Plaintiff Term Lenders' subpoena by September 13, 2010. [D.E. 129]

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

3. In response to that Order, FBR made available to all of the requesting parties (not just the Plaintiff Term Lenders) approximately eighty (80) boxes of documents. Given the vast number of documents contained in these boxes, FBR did not have a reasonable opportunity to fully review them prior to production in order to preserve privilege, confidentiality and objections to non-responsiveness.[2]

4. In response to Plaintiff Term Lenders' Motion for Sanctions [D.E. 153] and on October 18, 2010, Magistrate Goodman entered an Order requiring FBR to produce all responsive, non-privileged documents located on FBR's email server by October 25, 2010 [D.E. 167]. In addition, and by November 8, 2010, FBR is required to produce all responsive, non-privileged documents located on its document and accounting servers.

5. Again, and given the voluminous number of electronic documents found on these serves, FBR will likewise not have an opportunity to inspect them all prior to production on October 25, 2010 in conformity with Magistrate Goodman's Order to preserving privilege, confidentiality and objections to non-responsiveness.

6. Accordingly, and pursuant to Fed. R. Evid. 502(d), FBR requests that the Court enter a confidentiality order, ruling that any documents (hard copy or electronic) produced by FBR to the parties here are done so without waiver of the attorney-client privilege, the work product privilege, the accountant-client privilege or any other privilege which might apply, but are yet unknown because the documents have not been reviewed.

7. It is anticipated that counsel for Plaintiff Term Lenders Defendant, Bank of

[2] On October 14, 2010, counsel for Plaintiff Term Lenders reviewed the boxes made available by FBR and made arrangements for copies of certain documents to be made.

America and Defendants, JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and The Royal Bank of Scotland PLC will argue that this Court's Amended MDL Order Number 24 [D.E. 116] ("Order Number 24") should provide sufficient protection for FBR. However, due to the vast number of documents being produced by FBR as well as the October 25, 2010 and November 8, 2010 deadlines, the specific procedures set forth in Order Number 24 are not feasible with respect to FBR's present document production requirements.

8. For example, paragraph four (4) of Order Number 24 states that FBR's designation of a document as ". . . Confidential or Highly Confidential shall constitute a representation that such Confidential Information has been reviewed by an attorney. . ." As reflected, it is simply impossible for an attorney[3] to review the hundreds of thousands of pages of documents FBR has produced prior to the October 25, 2010 and November 8, 2010 deadlines.

9. In addition, paragraph seventeen (17) of Order Number 24 states, "[i]f Privileged Covered Material has been produced. . . the party making the claim of privilege, work product or other ground for withholding may notify the receiving party and state the basis for the claim." Again, due to the enormous amount of documents being produced by FBR, these procedures are simply not feasible unless the receiving party first alerts FBR as to what it has copied and/or printed from the servers and the eighty (80) boxes of documents such that privilege can be identified and asserted.

10. In light of the extraordinary circumstances presented by FBR's financial hardship and the enormity of the document production being made by FBR without any ability to conduct a

---

[3] Due to financial hardship, FBR has no employees. Undersigned counsel has previously handled these matters, at times, with one other lawyer who assisted with document production matters.

privilege review, FBR requests that the Court enter a separate Confidentiality Order which addresses these issues.

11. Pursuant to *S.D. Fla. L.R.* 7.A.2, attached is a proposed Confidentiality Order[4] which addresses the unique issues presented to FBR.

CERTIFICATE OF COUNSEL

In accordance with *S.D. Fla. L.R.* 7.1.A.3, the undersigned certifies that she has conferred with counsel for Plaintiff Term Lenders; Defendant, Bank of America; and, Defendants, JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and The Royal Bank of Scotland PLC with regard to this Motion and the relief sought. Counsel for these parties oppose the relief requested.

/s Sarah J. Springer
Sarah J. Springer, Esq.

WHEREFORE Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Properties I, LLC and Fontainebleau Resorts Holdings, LLC, respectfully request that this Honorable Court enter the attached Confidentiality Order.

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Facsimile: (954) 467-6222

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

[4]The proposed Confidentiality Order has been revised to address certain concerns expressed by the parties prior to submission of this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 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.

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

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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.
_________________________________/

CONFIDENTIALITY ORDER

This cause having come before the Court on Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Properties I, LLC and Fontainebleau Resorts Holdings, LLC's (collectively, "FBR") Motion for entry of Confidentiality Order dated October 22, 2010 [D.E. 171], the Court having considered the Motion and being otherwise advised in the premises, it is hereupon

ORDERED and ADJUDGED as follows:

1. This Order addresses FBR's compliance with certain subpoenas served on it by (i) Plaintiff Term Lenders[1], (ii) Defendant, Bank of America and (iii) Defendants, JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and The Royal Bank of Scotland PLC as well as FBR's compliance with prior Court Orders in respect of same [D.E. 129] [D.E. 167].

2. Consistent with this Court's prior Orders dated August 30, 2010 [D.E. 129] and October 18, 2010 [D.E. 167], FBR will make available for inspection and copying its hard copy and electronic documents no later than October 25, 2010.

---

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

3. For purposes of this Order and in connection with that effort, an "Inadvertently Produced Document" shall be defined as a document produced by FBR to any party in this litigation which may be identified or subject to an attorney-client privilege, work-product privilege, accountant-client privilege or other applicable privilege but for the inability to identify such privilege under the deadlines imposed by prior orders.

4. In the event that any party copies or prints any of the hard copy or electronic documents, such party shall provide FBR within five (5) business days copies of any such documents that were copied or printed. If FBR then identifies an Inadvertently Produced Document within twenty-one (21) days after receiving a copy of same from the party to whom it was produced, FBR may demand the return of the Inadvertently Produced Document (including all copies thereof), which demand shall be made to the receiving party's counsel, in writing, and shall contain information sufficient to identify the Inadvertently Produced Document. Prior to the expiration of this twenty-one (21) day period, no hard copy or electronic document that was copied or printed shall be disclosed, communicated, copied, disseminated or shown to anyone (including the Court) other than the receiving party's counsel.

5. Upon receipt of written demand for return of an Inadvertently Produced Document, the receiving party shall within five (5) business days return the Inadvertently Produced Document (and any copies thereof) to FBR and shall immediately delete all electronic versions of the document.

6. Inclusion of and/or failure of FBR to make a written demand for return of an Inadvertently Produced document shall not result in the waiver of any privilege or protection associated with such document, nor result in a subject matter waiver of any kind and such

Inadvertently Produced Document shall have no evidentiary value in this, or any other, litigation.

7. The receiving party may object to FBR's designation of an Inadvertently Produced Document by providing written notice of such objection within five (5) business days of its receipt of a written demand for the return of an Inadvertently Produced Document. Any such objection shall be resolved by the Court after an *in camera* review of the Inadvertently Produced Document and after FBR and the parties' counsel have an opportunity to submit memoranda on the issue. Pending resolution of the matter by the Court, the parties shall not use any documents that are claimed to be Inadvertently Produced Documents in this, or any other, litigation, for any reason or purpose; nor shall same have any evidentiary value.

8. No copies will be made of an Inadvertently Produced Document or distributed to any person for any purpose.

9. The parties shall take reasonable measures, consistent with this Order, to prevent unauthorized disclosure or use of an Inadvertently Produced Document and are responsible for employing reasonable measures to control the duplication of, access to, and distribution of, an Inadvertently Produced Document.

10. At the conclusion of this action, including, without limitation, dismissal, settlement, trial or any appeals, any party that received an Inadvertently Produced Document shall return or destroy such documents and all copies thereof and, in either case, certify that fact, in writing, to counsel for FBR.

11. After the termination of this action, this Order shall continue to be binding on all parties, or other third parties under applicable law, to whom an Inadvertently Produced Document

was disclosed or communicated, and this Court shall retain jurisdiction over all such parties for enforcement of its provisions.

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

____
UNITED STATES MAGISTRATE JUDGE JONATHAN GOODMAN

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 applies to:

Case No. 09-CV-23835-ASG.
Case No. 10-CV-20236-ASG.
_________________________________/

MDL ORDER NUMBER 39; SETTING ORAL ARGUMENT

THIS CAUSE is before the Court upon Plaintiff Term Lenders' Joint Motion for Partial Final Judgment ("Motion") **[ECF No. 151]**. Having reviewed the Motion and the record, I conclude that oral argument is necessary. Accordingly, it is hereby:

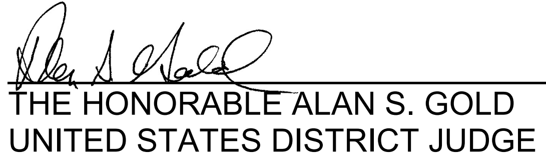
ORDERED AND ADJUDGED that:

1. Oral argument on Plaintiff Term Lenders' Joint Motion for Partial Final Judgment **[ECF No. 151]** is hereby set before the Honorable Alan S. Gold, at the United States District Courthouse, Courtroom 11-1, Eleventh Floor, 400 North Miami Avenue, Miami, Florida, 33128 on **Wednesday, December 17, 2010 at 11:00 a.m.** Please notify the Court immediately at (305) 523-5580 of any disposition or settlement of this case or resolution of the scheduled Motion.

2. To assist the Court, the parties are ORDERED to deliver to the undersigned's Chambers a Joint Binder containing tabbed and indexed courtesy copies of the motion and any responses, replies, exhibits, and memoranda of law related to the motions by **Wednesday, December 1, 2010 at 5:00 p.m.** The courtesy copies shall include a table of contents and shall indicate the docket entry number of each

document contained therein.

DONE and ORDERED in Chambers in Miami, Florida, this 22nd day of October, 2010.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman
Counsel of record

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 FOR ENTRY OF CONFIDENTIALITY ORDER

This matter is before the Court on a Motion for Entry of Confidentiality Order by Fontainebleau Resorts, LCC, Fontainebleau Resorts Holdings, LLC, and Fontainebleau Resorts Properties I, LLC (DE# 171), filed October 22, 2010. The motion indicates that the parties potentially affected by the proposed order oppose the requested relief. Because of the time-sensitive nature of this matter, and the Court's familiarity with the issues, I will decide this motion without argument or additional briefing.[1]

During a lengthy telephone hearing on October 18, 2010, Fontainebleau's counsel stated that it would take "less than a day" to run a search on the email server with agreed-upon search terms for privilege review purposes. Based, in part, on that representation, the Court entered an order on October 18 (DE# 167) requiring that responsive, non-privileged emails be produced by the end of business on Monday, October 25, 2010 (today).

Shortly before 4 p.m. last Friday, four days after the entry of the October 18 order and one business day before Fontainebleau's first production pursuant to the October 18 order was due, Fontainebleau filed its last-minute motion for the entry of a confidentiality order. Fontainebleau now states that it likely will not have the opportunity to inspect all of the relevant documents in conformity with the October 18 order. Fontainebleau states

[1] The procedural history for this motion is recounted in two previous orders. In brief, in August I granted a motion to compel production of materials subject to a subpoena issued on April 22, 2010 (DE# 129, filed August 30, 2010). After Fontainebleau failed to comply with the deadlines I set forth in the order granting the motion to compel, the Term Lenders filed a motion for sanctions. After extensive argument, I enlarged the deadlines for Fontainebleau to comply with the order granting the motion to compel and reserved ruling on sanctions (DE# 167, filed October 18, 2010).

that it is simply impossible for an attorney to review hundreds of thousands of documents prior to the deadlines provided in the October 18 order.

Fontainebleau has not adequately explained why an attorney would need to personally examine "hundreds of thousands of documents." Fontainebleau's motion does not allege that its electronic discovery vendor, Ikon, or another vendor, cannot run the appropriate search for privileged documents. In fact, that is exactly what the parties contemplated during the hearing and, as noted above, Fontainebleau represented that it would take less than a day to run a search for potentially privileged documents on the email server. (In addition, Fontainebleau has not proffered any reason why it could not run a similar privilege search on the documents and accounts servers.) The Court therefore does not understand Fontainebleau's assertion that an attorney would have to review "hundreds of thousands of documents" instead of a more limited number of documents that are returned by the electronic discovery search as both responsive and potentially privileged.

I have also reviewed the terms of the proposed confidentiality order submitted by Fontainebleau. The proposed order would place the burden on the requesting parties to produce back to Fontainebleau all of the documents which they copy off the servers. This process might reveal attorney work product because it would demonstrate which documents the requesting parties deem important enough to copy.[2]

Additionally, the proposed order would impose time constraints on the requesting parties which are unreasonable under the circumstances. For example, the requesting parties might take weeks or longer to determine which documents they want to copy. Fontainebleau's own discovery delays should not result in the imposition of discovery burdens on the requesting parties.

Fontainebleau's motion does not request an extension of the production deadlines set forth in the October 18 order, and none will be granted. Fontainebleau may, however, file a motion at a later date if it determines that it inadvertently produced privileged

[2] The Court understands that the potential for work product disclosure may already have arisen when one of the requesting parties revealed to Fontainebleau which three of the 80 boxes of hard-documents it wanted to copy. But letting Fontainebleau known which boxes were copied is significantly less revealing than pinpointing specific documents.

information. The Court will not set a deadline as to when such motion must be filed, but delay in filing such a motion will be one of several factors the Court will consider in evaluating the motion. Moreover, if Fontainebleau cannot in good faith and with diligent effort produce the privilege logs by the dates established in the October 18 order, it may file a **verified** motion for an enlargement of time to produce the privilege log. The Court is not predicting in advance whether it would grant such a motion, but is merely providing a mechanism for potential relief if Fontainebleau can demonstrate substantial good cause and compelling grounds in its verified motion. It is therefore,

ORDERED AND ADJUDGED that Fontainebleau's Motion for Entry of Confidentiality Order (DE# 171) is **DENIED**.

DONE AND ORDERED in Chambers, at Miami, Florida, this 25th Day of October, 2010.

/s/ Jonathan Goodman
Jonathan Goodman
United States Magistrate Judge

Copies furnished to:
All counsel of record

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.
__________________________________/

THIRD PARTIES, FONTAINEBLEAU RESORTS, LLC, FONTAINEBLEAU RESORTS PROPERTIES I, LLC AND FONTAINEBLEAU RESORTS HOLDINGS, LLC'S NOTICE OF COMPLIANCE

Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Properties I, LLC and Fontainebleau Resorts Holdings, LLC (collectively, "FBR"), by and through their undersigned counsel, respectfully give notice of compliance with Magistrate Goodman's Orders dated August 30, 2010 [D.E. 129] and October 18, 2010 [D.E. 167]. FBR has made available to counsel for Plaintiff Term Lenders, Defendant, Bank of America, and Defendants, JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and The Royal Bank of Scotland PLC all hard copy and electronic documents which are responsive to the various subpoenas served upon FBR.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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

SERVICE LIST

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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.

Case No. 09-CV-23835-ASG
Case No. 10-CV-20236-ASG

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF TERM LENDERS' JOINT MOTION FOR PARTIAL FINAL JUDGMENT

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Defendants Bank of America, N.A. ("BANA"), Merrill Lynch Capital Corporation, Bank of Scotland plc, Barclays Bank PLC, Camulos Master Fund, L.P., Deutsche Bank Trust Company Americas, HSH Nordbank AG, New York Branch, JPMorgan Chase Bank, N.A., MB Financial Bank, N.A., The Royal Bank of Scotland plc, and Sumitomo Mitsui Banking Corporation, by their undersigned attorneys, respectfully submit this memorandum of law in opposition to Plaintiff Term Lenders' Joint Motion for Partial Final Judgment.

INTRODUCTION

The Term Lenders are not entitled to a partial final judgment under Fed. R. Civ. P. 54(b). Instead of focusing on an immediate appeal's effect on the on-going litigation in *this Court*, the Term Lenders claim that they need to accompany the Trustee to the Eleventh Circuit because there is a "substantial identity of issues" between their proposed appeal and the Trustee's appeal, and that Rule 54(b) certification is necessary to avoid duplicative appeals. (Term Lender Br. at 2, 4.) But the Term Lenders' premise is demonstrably false—there are significant differences between the two appeals. Indeed, unlike the Summary Judgment Order being appealed by the Trustee, the principal basis for the May 28 Order dismissing the Term Lenders' Credit Agreement claims was the standing issue—*i.e.*, this Court's holding that the Term Lenders are not intended beneficiaries of Defendants' lending commitment to Fontainebleau. This Court's ruling on the "fully drawn" issue was merely an alternative ground for dismissal. Thus, the Eleventh Circuit would not even need to consider the Term Lenders' arguments on the "fully drawn" issue—the two appeals' sole commonality—except in the unlikely event that it reverses this Court's standing ruling. And even as to the "fully drawn" issue, the Term Lenders concede that their interests are "not entirely" aligned with Fontainebleau's, and that "they have raised

different arguments for their positions." (*Id.* at 5.) Thus, an immediate Term Lender appeal would only serve to multiply the issues before the Eleventh Circuit.

Moreover, the Term Lenders' assertion that the "policy against multiplying appeals . . . weighs in favor" of their motion (*id.* at 5) turns Rule 54(b) on its head by ignoring the multiple appeals that their motion would spawn *in the Term Lender actions*. First, an immediate Term Lender appeal would not address their Disbursement Agreement claims against BANA, necessitating an extra trip to the Eleventh Circuit for those parties. Second, the Term Lenders acknowledge that to succeed on their Disbursement Agreement claims, they must prove, among other things, that in or before March 2009, "Events of Default precluded disbursement" of loan proceeds to Fontainebleau. (*Id.* at 2.) But in so doing, the Term Lenders would establish an independent basis for dismissing the Credit Agreement claims that will not be addressed on their proposed immediate appeal. Such a factual finding would moot the proposed immediate appeal, and could itself become an appellate issue. Thus, there will be more appeals, not fewer, if the Term Lenders' motion is granted.

It is also clear that this is not an "instance[] in which immediate appeal would alleviate some danger of hardship or injustice associated with delay." *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 166 (11th Cir. 1997). The Term Lenders' unsubstantiated fear that absent Rule 54(b) certification, their allegedly "distinct" arguments on the "fully drawn" issue will not be presented for the Eleventh Circuit, fails to explain why they cannot raise these arguments in a separate appeal after a final judgment in this case. And the Term Lenders' claims of "unfairness" do not constitute the type of "hardships or injustice" that Rule 54(b) is intended to prevent.

The Term Lenders offer no reason to depart from the long-standing federal policy against piecemeal appeals. Accordingly, the Term Lenders' motion for Rule 54(b) certification should be denied.

BRIEF PROCEDURAL BACKGROUND

As the Term Lenders correctly point out, their respective complaints each have two sets of claims: (i) the Credit Agreement claims, in which they allege that Defendants breached their Revolving Loan commitment to Fontainebleau Las Vegas LLC ("Fontainebleau") under the June 6, 2007 Credit Agreement ("Credit Agreement") by, among other things, rejecting Fontainebleau's March 3, 2009 Notice of Borrowing, and (ii) the Disbursement Agreement claims, in which they allege that BANA breached its duties as Disbursement Agent under the June 6, 2007 Disbursement Agreement ("Disbursement Agreement") by permitting Fontainebleau to access loan proceeds "despite its actual knowledge that Events of Default precluded disbursement." (Term Lender Br. at 2.) On May 28, 2010, this Court dismissed with prejudice the Credit Agreement claims, holding that "[b]ecause New York law requires that one be an 'intended beneficiary' of a particular promise in order to have a legal right to enforce that promise, and because [Term Lenders] have failed to adequately demonstrate that they were 'intended beneficiaries' of Defendants' promise to fund the Revolving Loans at issue, Counts I and II of the Aurelius Complaint and Count II of the Avenue Complaint must be dismissed." *See In re Fontainebleau Las Vegas Contract Litig.*, No. 09-MD-2106, 2010 U.S. Dist. LEXIS 55894, at *40 (S.D. Fla. May 28, 2010) ("*Fontainebleau II*") (the "May 28 Order"). The Court further held that "[e]ven if [Term Lenders] had standing to enforce Defendants' promises to fund the Revolving Loans at issue, Plaintiffs have not demonstrated that Defendants breached the Credit Agreement by rejecting the March Notices of Borrowing 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." *Id.* at *40–41. But the Court did not dismiss the Disbursement Agreement claims, concluding that the Term Lenders had adequately alleged that BANA had disbursed funds to Fontainebleau in the face of a known Event of Default.

The Term Lenders did not seek reconsideration of the May 28 Order, nor did they seek certification for an interlocutory appeal under 28 U.S.C. § 1292(b). And until earlier this month, the Term Lenders did not seek certification under Fed. R. Civ. P. 54(b). The Term Lenders only sought Rule 54(b) certification after this Court permitted the Fontainebleau Chapter 7 Trustee ("Trustee") to dismiss with prejudice Fontainebleau's Credit Agreement claims against Defendants for the avowed purpose of seeking an immediate appeal of the Court's August 26, 2009 Order denying Fontainebleau's motion for partial summary judgment. MDL Order No. 35; Dismissing Claims With Prejudice To Expedite Appeal Of Claim-Dispositive Ruling (Sept. 20, 2010), ECF No. 139. One of the issues that will be heard on that appeal, of course, is this Court's holding that "the unambiguous meaning of 'fully drawn' in [Credit Agreement] section 2.1(c)(iii) [is] 'fully funded.'" *In re Fontainebleau Las Vegas Contract Litig.*, 417 B.R. 651, 654, 660 (S.D. Fla. 2009) ("*Fontainebleau I*") (the "Summary Judgment Order").

ARGUMENT

Rule 54(b) "provides an exception to the general principle that a final judgment is proper only after the rights and liabilities of all the parties to the action have been adjudicated." *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 165 (11th Cir. 1997) (citation omitted). "The purpose of this rule is to codify the historic practice of prohibit[ing] piecemeal disposition of litigation and permitting appeals only from final judgments except in the

infrequent harsh case where the district court makes the certification contemplated by the rule." *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509–10 (11th Cir. 1990) (emphasis added) (internal quotation marks omitted). Circumstances justifying Rule 54(b) certification "will be encountered only rarely," and thus it is a remedy that "must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Ebrahimi*, 114 F.3d at 166 (internal quotation marks omitted). Accordingly, the Eleventh Circuit has "counseled district courts to exercise the limited discretion afforded by Rule 54(b) conservatively." *Id.*

By its terms, Rule 54(b) requires the district court to "make an express determination that there is no just reason for delay." *In re Yarn Processing Patent Validity Litig.*, 680 F.2d 1338, 1339 (11th Cir. 1982). As the Eleventh Circuit has explained, this requires the district court to "balance judicial administrative interests and relevant equitable concerns." *Ebrahimi*, 114 F.3d at 166. Here, that balance tips decidedly against Rule 54(b) certification because the Term Lenders cannot demonstrate any "pressing need" for an immediate appeal that outweighs the burden that certification will place on the Eleventh Circuit.

I. RULE 54(b) CERTIFICATION WILL BURDEN THE ELEVENTH CIRCUIT WITH ADDITIONAL ISSUES AND ADDITIONAL APPEALS

Contrary to the Term Lenders' assertions, the May 28 Order's immediate appeal would neither have a "positive effect . . . on the Eleventh Circuit's workload" nor would it serve the "policy against multiplying appeals." (Term Lender Br. at 5.) Rather, Rule 54(b) certification would burden the Eleventh Circuit with new issues that will not be raised in the Trustee's appeal and it will increase the number of appeals generated by this litigation.

A. The Term Lenders' Proposed Immediate Appeal Will Multiply the Issues Before the Eleventh Circuit

The Term Lenders' misleadingly simplistic assertion that there is a "substantial identity of issues in the Term Lenders' and [Fontainebleau]'s claims against the Revolving Lenders" (Term Lender Br. at 2) ignores the actual issues that the two appeals will present. The unspoken assumption underlying the Term Lenders' motion is that both appeals will focus on the "fully drawn" issue. But in order to reach that issue in the Term Lenders' appeal, the Eleventh Circuit must first decide the threshold question of whether the Term Lenders have a contractual right to enforce the Revolving Lenders' funding commitment to Fontainebleau. Indeed, the standing ruling was the May 28 Order's principal holding, and the basis on which this Court dismissed all of the Term Lenders' Credit Agreement claims. *See Fontainebleau II*, 2010 U.S. Dist. LEXIS 55894, at *40. In contrast to the Summary Judgment Order, the May 28 Order's holding that, as a matter of law, "fully drawn" in Credit Agreement Section 2.1(c)(iii) means "fully funded" was an *alternative* ground for dismissal. *Id.* at *40–41. If, as this Court concluded, the Term Lenders are not an intended beneficiary of Defendants' Revolving Loan commitment to Fontainebleau, then the Eleventh Circuit need not address the "fully drawn" issue at all.

Moreover, even as to the "fully drawn" issue, the two appeals are far from identical. The Term Lenders readily admit that their interests are "not entirely" aligned with Fontainebleau's, and that "they have raised different arguments for their positions." (Term Lender Br. at 5.) The Term Lenders readily admit that their appeal will raise different issues than the Trustee's appeal, but do not, and cannot, explain how addressing those issues immediately—rather than following a final judgment in this case—will have a "positive effect . . . on the Eleventh Circuit's workload." (*Id.*)

B. The Term Lenders' Proposed Immediate Appeal Will Multiply the Number of Appeals Before the Eleventh Circuit

The Term Lenders' assertion that the "policy against multiplying appeals . . . weighs in favor" of its motion (*id.*) makes no sense. Absent Rule 54(b) certification, there will be just one appeal in this case, after final judgment is entered on the Disbursement Agreement claims. But an immediate appeal of the May 28 Order will result in two appeals in this case: one for the Credit Agreement claims and one for the Disbursement Agreement claims. The Term Lenders ignore this simple math. Indeed, even if the Term Lenders' implicit suggestion that Rule 54(b) certification would create a "single" appeal on the "fully drawn" issue were correct—and for the reasons discussed above, it is not—the total number of appeals arising out of this MDL proceeding (two) would be the same. Thus, Rule 54(b) certification is of no benefit to the Eleventh Circuit in terms of the total number of appeals.

Moreover, the Term Lenders seek to appeal immediately a ruling that could be mooted by this Court's adjudication of their Disbursement Agreement claims. The Disbursement Agreement claims arise from the same factual nucleus as the Credit Agreement claims, and implicate many of the same contractual provisions. In particular, under the Credit Agreement, Fontainebleau could not access Revolving Loan funds unless it satisfied certain conditions set forth in the Disbursement Agreement. The Term Lenders' Disbursement Agreement claims allege that BANA breached its duties as Disbursement Agent under the Disbursement Agreement by (i) funding Fontainebleau loan requests even though Fontainebleau could not satisfy various conditions, and (ii) failing to issue a Stop Funding Notice upon receiving notice of Fontainebleau's defaults. (*See, e.g.*, Aurelius Compl. ¶¶ 127, 150–51; Avenue Compl. ¶ 176). The Term Lenders contend that, among other things, the FDIC's July 2008 closure of First

National Bank of Nevada and Lehman Brothers' September 2008 bankruptcy filing precluded Fontainebleau from satisfying certain funding conditions including:

- The absence of any default or event of default under any of the Financing Agreements. *See* Aurelius Compl. ¶¶ 105–06, 118–21; Avenue Compl. ¶¶ 128, 134.
- The absence of any event which "could reasonably be expected to have a Material Adverse Effect." *See* Aurelius Compl. ¶ 108; Avenue Compl. ¶ 128.
- The absence of any Defaults or Events of Default. The Term Lenders claim that the Lehman and First National Bank of Nevada events were Defaults under the Credit Agreement. *See* Aurelius Compl. ¶¶ 100–05, 118–20; Avenue Compl. ¶¶ 128, 134.
- Required advances by the Retail Lenders following Lehman's September 2008 bankruptcy filing. *See* Aurelius Compl. ¶¶ 98–99; Avenue Compl. ¶ 128.

If Fontainebleau was unable to satisfy the Disbursement Agreement's funding conditions, or was otherwise in default—as the Term Lenders allege—then the Revolving Lenders cannot be held liable for rejecting Fontainebleau's March 3, 2009 Notice of Borrowing. *See Fontainebleau I*, 417 B.R. at 664. Thus, the Term Lenders' Credit Agreement claims would fail as a matter of law.

Rule 54(b) certification will be denied where the proposed immediate appeal could be affected by further district court proceedings. For example, courts routinely deny Rule 54(b) certification where the claims to be appealed are "inherently inseparable" from the unadjudicated claims, and the district court's resolution of those claims "could render an appeal of the dismissed claims moot." *Chamarac Properties, Inc. v. Pike*, No. 86-7919(KMW), 1994 WL 410902, at *1 (S.D.N.Y. Aug. 3, 1994); *see also Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309(JAG), 2007 WL 1134110, at *3 (D.N.J. Apr. 16, 2007) (denying Rule 54(b) certification because "similarities in the factual underpinnings of both claims [were] sufficient to weigh . . . in favor of there being a just reason for delay" and the "possibility that the need for appellate review [would] be mooted . . . also suggest[ed] that there [was] just reason for delay"). And

even if the unadjudicated claims are arguably distinct from the claims to be appealed, courts will deny Rule 54(b) certification where the appeal "may be made academic by the outcome of trial." *Factory Mut. Ins. Co. v. Bobst Grp. USA, Inc.*, 392 F.3d 922, 924 (7th Cir. 2004) (Rule 54(b) certification of contribution claim's dismissal "makes little sense"); *Interstate Power Co. v. Kan. City Power & Light Co.*, 992 F.2d 804, 808 (8th Cir. 1993) (refusing to certify contribution claim appeal because issue may be mooted by district court proceedings). These principles are controlling here. If discovery establishes that Fontainebleau could not satisfy the Disbursement Agreement's funding conditions, the Credit Agreement claims will fail *regardless* of whether the Term Lenders have standing to assert such claims or how the Eleventh Circuit interprets the Credit Agreement's "fully drawn" provision.

This Court's decisions in *Eagletech Communications Inc. v. Citigroup, Inc.* and *Access Now, Inc. v. AMH CGH, Inc.* (Term Lender Br. at 3) are distinguishable from this case. In *Eagletech Communications*, this Court held that there was "no just reason for delay" because (i) the case involved a novel legal issue (the PSLRA bar to civil RICO claims) that the Eleventh Circuit had never addressed; and (ii) the one remaining defendant was "not similarly situated" to the others and, thus, the on-going litigation against him would not affect the immediate appeal's outcome. No. 07-60668, 2008 U.S. Dist. LEXIS 49432, at *52, 59–62 (S.D. Fla. June 25, 2008). By contrast, the Term Lenders' claims involve basic contract interpretation issues and, as demonstrated above, the resolution of the Disbursement Agreement claims could moot the Term Lenders' proposed immediate appeal. *Access Now, Inc.* is even more inapposite because it involved a consent decree that this Court entered as a final judgment after the parties reached a class action settlement. No. 98-3004, 2001 U.S. Dist. LEXIS 12876, at *2 (S.D. Fla. May 8, 2001).

II. THERE IS NO PRESSING NEED FOR AN IMMEDIATE APPEAL

The Eleventh Circuit has held that the "relevant equitable concerns" side of the Rule 54(b) balance limits certification to "instances in which immediate appeal would alleviate some danger of hardship or injustice associated with delay." *Ebrahimi*, 114 F.3d at 166. The Term Lenders, however, merely claim that it would be "unfair" for the Eleventh Circuit to address the "fully drawn" issue "without the benefit of the Term Lenders' distinct arguments." (Term Lender Br. at 5.) Passing the fact that they have not articulated any "distinct arguments" that the Trustee could not (or would not) advance on appeal, the Term Lenders fail to explain how they will be prejudiced by making these "new" arguments in a separate appeal after a final judgment on the Disbursement Agreement claims. Moreover, given this Court's ruling that the Term Lenders are not intended beneficiaries of Defendants' Revolving Loan commitment to Fontainebleau, there is nothing unfair about the Term Lenders' inability to weigh in on a contract provision that they cannot enforce. In any event, the Term Lenders fall well short of establishing actual "hardship or injustice."

The absence of hardship or injustice here is underscored by the Term Lenders' four-month delay in seeking Rule 54(b) certification. The Trustee's recent decision to dismiss its claims with prejudice in order to pursue an immediate appeal cannot justify, and stands in stark contrast to, the Term Lenders' attempt to have their cake and eat it too: pursuing an interlocutory appeal of the Credit Agreement claims while actively litigating the Disbursement Agreement claims. Permitting Rule 54(b) certification after months of delay would have the perverse effect of giving more favorable procedural treatment to the Term Lenders' piecemeal approach than to an ordinary final judgment, which must be appealed within thirty days of entry. *See Schaefer v. First Nat'l Bank*, 465 F.2d 234, 236 (7th Cir. 1972) ("[W]e believe that

validating the district court's Rule 54(b) determination here would derogate from the policy against piecemeal appeals while, at the same time and for no apparent good reason, placing Rule 54(b) appeals on a potentially more favorable procedural footing than obtains in appeals as of right from final judgments where no Rule 54(b) problem inheres."). The Term Lenders' delay belies any claim of hardship or injustice.

CONCLUSION

The Term Lenders cannot establish any basis for departing from the long-standing federal policy against piecemeal appeals. Their proposed immediate appeal of the Credit Agreement claims' dismissal does not serve "judicial administrative interests" because it will burden the Eleventh Circuit with additional issues and additional appeals. Moreover, the Term Lenders' Credit Agreement claim appeal could be mooted by this Court's resolution of the Disbursement Agreement claims. The "relevant equitable concerns" also do not favor Rule 54(b) certification because the Term Lenders cannot demonstrate a "pressing need" for an immediate appeal—offering only baseless assertions that it would be "unfair" for the Trustee to proceed without them. Having been content to allow this case to move forward without an interlocutory appeal for more than four months, the Term Lenders are not entitled to Rule 54(b) certification simply because the Trustee has beaten them to the Eleventh Circuit. That is not what Rule 54(b) is

intended to prevent. Accordingly, Defendants respectfully request that the Court deny the Term Lender Plaintiffs' Joint Motion for Partial Final Judgment.

Dated: October 25, 2010

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Dated: October 25, 2010

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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

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Dated: November 1, 2010.

/s/ Raquel A. Rodriguez

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
_____________________________________/

SUPPLEMENTAL ORDER ON MOTION FOR SANCTIONS

This matter is before the Court *sua sponte* to address follow-up issues arising from the Term Lenders' Motion for Sanctions against Fontainebleau Resorts, LLC (DE# 153) and the Court's initial Order on the Motion for Sanctions (DE# 167).

In that initial Order, the Court required Fontainebleau to produce responsive, non-privileged documents and data by two different deadlines (October 25 and November 8, 2010), depending on the source of the material. In addition, the Court's Order also required Fontainebleau to provide privilege logs (for documents and data withheld on the basis of privilege) by November 5 and 17, 2010.

The Court reserved ruling on the Term Lenders' demand for monetary sanctions.

Fontainebleau has now filed a notice of compliance (DE# 174), advising that it has made all the responsive materials available to the requesting parties. Although the notice does not expressly say that Fontainebleau produced all responsive documents and data and did not conduct a privilege review, the Court's understanding is that Fontainebleau is not withholding responsive documents and data on privilege grounds.

In the initial Order, the Court advised the Term Lenders to file a notice of non-compliance if Fontainebleau did not fully and timely comply with its production obligations arising from the Order. The Term Lenders have not filed any such notice, which indicates that all responsive documents and data have now been produced. In addition, it does not appear as though Fontainebleau will be providing any privilege logs.

Under these circumstances, it is now appropriate to revisit the Term Lenders' request for monetary sanctions.

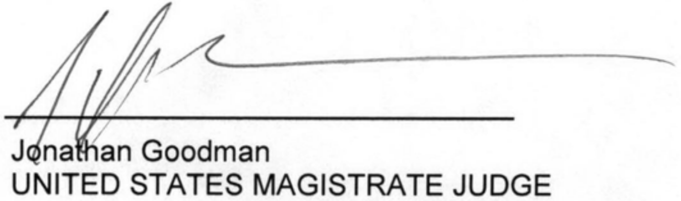
If the Term Lenders (who by now have presumably been provided with all responsive documents and data) intend to move forward on their demand for monetary sanctions, then they shall file a supporting memorandum of **5 pages or less**, outlining the

relevant factual and procedural background and applicable legal authority, by **November 12, 2010**. The Court urges, but is not requiring, the Term Lenders to follow the "less is more" maxim if they decide to pursue the sanctions issue.

If the Term Lenders do not submit the supporting memorandum by the November 12, 2010 deadline, then the Court will treat the monetary sanctions demand as waived and will deny the request for monetary sanctions as moot.

If, on the other hand, the Term Lenders file the supporting memorandum, then Fontainebleau shall have **14 days** in which to submit a response of **5 pages or less**, and the Term Lenders shall have **7 days** to submit a reply (if they choose) of **3 pages or less**.

DONE AND ORDERED in Chambers, at Miami, Florida, this 2nd Day of November, 2010.



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All counsel of record

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' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR JOINT MOTION FOR PARTIAL FINAL JUDGMENT

On September 20, this Court entered final judgment against the Trustee on his claims against the Revolving Lenders for their failure to fund Fontainebleau's Notices of Borrowing dated March 2 and March 3, 2009, in breach of the Fontainebleau Credit Agreement. [DE 141]. The Trustee filed a timely notice of appeal. [DE 168]. He will argue in the Eleventh Circuit that this Court misconstrued the phrase "fully drawn" in the Credit Agreement and that the Defendants should have funded their commitments. In this MDL, the Court decided the identical issue against the Term Lenders when it granted the Revolving Lenders' motion to dismiss. [DE 80]. Both the Trustee's case and the Term Lenders' case thus deal with the same contract interpretation issue, against the same lenders regarding the same two Notices of Borrowing.

The question raised by this motion is one of timing only: whether it makes more sense for the Eleventh Circuit to consider these identical issues once and for all now, or consider them again a second time, perhaps a year or more from now, when the panel will have to reacquaint itself with the dispute.

The answer is straightforward. The same economies that justify MDLs in the district courts, *see In re Managed Care Litig.*, 236 F. Supp. 2d 1336, 1342 (S.D. Fla. 2002), here counsel in favor of partial final judgment and a consolidated appeal. Judicial and party resources are

conserved when a court is able to consider a single issue once, rather than in multiple proceedings conducted months or years apart. This Court should grant partial judgment under Rule 54(b) to permit the Eleventh Circuit to address the Credit Agreement disputes just once.

Hoping to persuade this Court otherwise, the Defendants resurrect an argument they first advanced but then abandoned in their motion-to-dismiss briefing. They argue that if the Term Lenders are successful in their separate claims against Bank of America under the Disbursement Agreement, that very success would preclude a recovery on the Credit Agreement claims. This is so, Defendants say, because the same Defaults that the Term Lenders assert prevented Bank of America from disbursing funds under the Disbursement Agreement also permitted the Revolving Lenders to refuse to fund under the Credit Agreement. *See* Defendants' Memorandum of Law in Opposition to Plaintiff Term Lenders' Joint Motion for Partial Final Judgment ("Def. Mem.") at 7–9. For purposes of this motion, Defendants now describe this as an issue of mootness: "If Fontainebleau was unable to satisfy the Disbursement Agreement's funding conditions, or was otherwise in default … then the Revolving Lenders cannot be held liable for rejecting Fontainebleau's March 3, 2009 Notice of Borrowing." *Id.* at 8.

This argument is still wrong for the same reason it was wrong when the Defendants made it eight months ago in their motion to dismiss. *Compare* Defendants' Joint Motion to Dismiss the Term Lenders Complaints and Supporting Memorandum of Law [DE 36] at 20–22 (arguing that allegations of Events of Default under the Credit Agreement precluded relief). Then, the Term Lenders explained why Defaults (a defined term in the Credit Agreement) do not justify a Revolving Lender's unilateral refusal to fund a Notice of Borrowing. *See* Corrected Joint Opposition to Defendants' Motion to Dismiss [DE 48] at 16–22 (explaining that "[t]he Credit Agreement's provisions require the Revolving Lenders to fund even if there had occurred

Defaults or Events of Default."). The Term Lenders explained that Defendants' argument confused contractually defined conditions—Defaults and Events of Default—for the common-law concept of a material breach. *Id*. This apparently persuaded the Defendants, for they did not answer it in their reply brief. Nor did this Court endorse the argument in its dismissal. The argument is no more persuasive this time around.

Defendants also say this Court's "standing" decision counsels against entering partial judgment. *See* Def. Mem. at 6. Defendants argue that if "the Term Lenders are not an intended beneficiary of Defendants' Revolving Loan commitment to Fontainebleau, then the Eleventh Circuit need not address the 'fully drawn' issue at all." *Id*. But the Eleventh Circuit must consider this Court's standing analysis only if it first concludes that the Defendants should have funded the March 2 and 3 Notices of Borrowing. If that is the Eleventh Circuit's conclusion, it will have to consider standing sooner or later. If, on the other hand, the Eleventh Circuit agrees with this Court on the meaning of "fully drawn," then it never has to reach standing. The Court of Appeals' workload is unaffected.

The same fundamental misconception about the purpose of a Rule 54(b) judgment underlies the Defendants' argument that the Term Lenders would suffer no prejudice from delay. *See* Def. Mem. at 10. Presumably, the Defendants mean that the Term Lenders would not be collaterally estopped from asking the Eleventh Circuit to reconsider any unfavorable decision in the Trustee's appeal. But there is an intangible harm that comes from being second to the table. It is the very reason the Defendants, by opposing this motion, are trying to prevent the Term Lenders' voices from being heard in the Eleventh Circuit now.

Judicial efficiency is at the heart of the decision whether to grant partial final judgment under Rule 54(b). *See Access Now, Inc. v. General Electric Co.*, 2001 U.S. Dist. LEXIS 12876,

*24 (S.D. Fla. May 11, 2001) (Gold, J.) (courts should consider "any judicial administrative advantage" served by speeding appeal). The Eleventh Circuit would benefit from hearing the perspective of all of the interested parties in the MDL litigation now, so that it can make a fully informed decision about the meaning of the Credit Agreement.

DATED: November 4, 2010

Respectfully submitted

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I HEREBY CERTIFY that on November 4, 2010, I served a true and correct copy of the foregoing Plaintiff Term Lenders' Reply Memorandum in Further Support of Their 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

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

NOTICE OF FONTAINEBLEAU RESORTS, LLC'S NON-COMPLIANCE WITH THE OCTOBER 18 ORDER ON MOTION FOR SANCTIONS

On October 18, 2010, this Court issued its Order on Motion for Sanctions, requiring Fontainebleau Resorts, LLC ("FBR") to produce documents and privilege logs by certain specified deadlines (DE# 167). The Court further instructed the Term Lenders to file a Notice of Non-Compliance in the event Fontainebleau did not fully and timely comply with the Order.

On October 20, 2010, FBR filed a Notice of Compliance, stating that it had made all responsive materials available to the Term Lenders. The Term Lenders promptly arranged for a third-party vendor in Miami, IKON, to obtain these materials from FBR and to copy them. The Term Lenders received these materials from IKON on November 2 and 3. Only then were the Term Lenders in a position to evaluate FBR's compliance with the Order. Having now done so, the Term Lenders inform the Court as follows:

A. FBR failed to produce **responsive**, non-privileged emails.

FBR provided a hard-drive containing approximately 126 gigabytes of data, nearly 700,000 emails and attachments. These files appear to include every email on FBR's email server within the 30-month date range to which the parties had previously agreed. They were not

searched using the search terms to which the parties had previously agreed, nor were they otherwise limited to responsive documents. The Term Lenders are determining the additional costs that will be required to narrow this "dump" to a responsive set of emails.

B. FBR failed to provide a privilege log for information obtained from the email server.

FBR's counsel has said that FBR did conduct a privilege review of the emails and intends to produce a privilege log. The Term Lenders have not received one.

C. FBR failed to produce **responsive**, non-privileged electronic files from the document server.

FBR provided a hard-drive containing approximately 800 gigabytes of data, nearly 600,000 documents. Many of the files are compressed. Once decompressed, the size of the data and the number of documents is expected to increase substantially. The files appear to include every document on FBR's document server, going back approximately a decade. FBR's counsel has confirmed that she did nothing to search or otherwise review these documents for responsiveness. The Term Lenders are determining the additional costs that will be required to narrow this "dump" to a responsive set of documents.

Dated: November 5, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing 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: November 5, 2010

By: /s/ Lorenz Michel Prüss
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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.
_________________________________/

THIRD PARTIES, FONTAINEBLEAU RESORTS, LLC, FONTAINEBLEAU RESORTS PROPERTIES I, LLC AND FONTAINEBLEAU RESORTS HOLDINGS, LLC'S RESPONSE TO TERM LENDERS' NOTICE OF NON-COMPLIANCE

Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Properties I, LLC and Fontainebleau Resorts Holdings, LLC (collectively, "FBR"), by and through their undersigned counsel, hereby file and serve this Response to Term Lenders' Notice of Non-Compliance with the October 18, 2010 Order on Motion for Sanctions, dated November 5, 2010, and state:

A. FBR Produced All Responsive, Non-Privileged Emails

FBR provided a copy of the filtered email server to Term Lenders two weeks ago. FBR – a third party to this action with no employees – spent over $25,000.00 to search the email server as requested by the Term Lenders, yet Term Lenders now complain, amazingly, that they have received too much data! However, FBR did not draft the search terms. As such, if they were over-inclusive, the fault does not lie with FBR. Clearly, it cannot be said that FBR simply "dumped" the entire email server on Term Lenders as the original email server contained approximately 400 gigabytes of data and the email server produced to Term Lenders contains approximately 100 gigabytes of data – a seventy-five (75) percent reduction. Nonetheless, and regardless of same, Fed. R. Civ. P. 34(b)(2)(E) provides that a party may produce documents "as they are kept in the ordinary course of business..."

As already stated, FBR did much more than that with respect to the email server.

B. FBR Provided a Partial Privilege Log on November 8, 2010

FBR provided a partial privilege log with respect to the email server on November 8, 2010. Due to a ministerial error, the deadline to provide a privilege log as set forth in the Court's October 18, 2010 Order was mis-calendared on November 8, 2010, instead of November 5, 2010. Undersigned counsel spoke with counsel for Term Lenders regarding this ministerial oversight and is waiting to learn whether the Term Lenders will amend their Notice of Non-Compliance to remove lateness as a basis for same. It certainly cannot be said that Term Lenders were prejudiced in any way by this one (1) day delay in receiving the partial privilege log.

C. FBR Produced All Responsive Files from the Document Server

Again, Fed. R. Civ. P. 34(b)(2)(E) provides that a party may produce documents "as they are kept in the ordinary course of business..." Two weeks ago, FBR gave the Term Lenders access to the document server in its entirety– as it was kept in the ordinary course of business – for purposes of inspection and copying.[1] Term Lenders have in their possession a full copy of the document server. Accordingly, Term Lenders cannot now be heard to complain.

D. FBR is a Third Party and Should Not Be Required to Incur the Expense of Searching any of the Servers on behalf of Term Lenders

FBR paid IKON – a third party vendor– over $25,000.00 to search the email server as requested by the Term Lenders. To suggest that FBR should be required to incur further expense on

[1] The Court will also be reminded that FBR has timely made available over eighty (80) boxes of hard copy documents as well as the accounting server in its entirety – all shipped from Las Vegas, Nevada to South Florida again, at FBR's expense. As such, Term Lenders have been given access to all of FBR's hard copy and electronic data!

behalf of Term Lenders (banks!) is procedurally and substantively unfair. FBR is a Third Party to this action with limited resources and no employees. Nonetheless, it has made available for inspection and copying all documents (electronic and hard copy) which are responsive to the Term Lenders' subpoena. It is clear what the *modus operandi* of Term Lenders is: cause FBR to do all of its work and incur all of its expenses.[2]

Dated: November 9, 2010

Respectfully Submitted,

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

[2] The Court should be reminded that FBR previously offered to do the Term Lenders' work by further searching the various servers for documents responsive to its subpoena but only if Term Lenders paid FBR for same. Term Lenders refused that offer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 9, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

TERM LENDERS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS AGAINST FONTAINEBLEAU RESORTS, LLC

The Term Lenders submit this Supplemental Memorandum in Support of Motion for Sanctions Against Fontainebleau Resorts, LLC ("FBR") pursuant to the Court's November 2, 2010 Supplemental Order on Motion for Sanctions (DE# 178).

I. FACTS

As set forth in the Term Lenders' Notice of Non-Compliance (DE# 180), FBR neither fully nor timely complied with the Court's October 18 Order on Motion for Sanctions ordering FBR to produce certain documents and privilege logs by specified deadlines (DE# 167). FBR's non-compliance continues today:

- FBR still has not produced **responsive**, non-privileged emails: FBR has produced a hard-drive containing approximately 126 gigabytes of data, nearly 700,000 emails and attachments (substantially more than the 16,000 previously represented by FBR's counsel). The Term Lenders were subsequently informed by FBR's vendor, IKON, that these files had not been searched using the search terms to which the parties had previously agreed. IKON further stated that a set of searched emails did exist, consisting of approximately 100 gigabytes of data, still

many hundreds of thousands of emails and attachments. It was IKON's assessment that these searched emails contained a substantial number of "false positives," i.e., documents that contained a search term but were not actually responsive to the subpoena. In the normal course of a production, the producing party works collaboratively (and at its own cost) with the requesting parties to modify and narrow search terms in order to reduce the problem of "false positives". That did not occur here. Instead, the Term Lenders have been left to incur the costs to limit the emails they take into their document management systems to a more responsive set. These costs are anticipated to be several thousands of dollars.

- FBR still has not provided a privilege log for information obtained from the email server: FBR's counsel has said that FBR conducted a privilege review of the emails and that it intends to produce a privilege log. On November 8, 2010, FBR provided the Term Lenders with a "partial" privilege log for the emails. As of the filing of this Supplemental Brief, FBR has not provided the remaining log.

- FBR still has not produced **responsive, non-privileged** electronic files from the document server: FBR provided a hard-drive containing approximately 800 gigabytes of data, nearly 600,000 documents. Many of the files are compressed. Once decompressed, the size of the data and the number of documents is expected to increase substantially. The files appear to include every document on FBR's document server for the last ten years. FBR's counsel has candidly acknowledged that FBR took no steps to review these documents for responsiveness or for privilege. The Term Lenders have been told that the cost of processing this data in a manner that would permit them to identify responsive documents) is between $150,000 and $200,000.

II. ALTHOUGH SANCTIONS ARE JUSTIFIED HERE, THE TERM LENDERS REQUEST ONLY THAT THEY NOT BE PREJUDICED BY FBR'S PRODUCTION FAILINGS

The Term Lenders issued their subpoena to FBR on April 22, 2010. For months, FBR failed to produce a single document, forcing the Term Lenders to bring a Motion to Compel and, subsequently, a Motion for Sanctions. FBR's unjustified failure to produce documents is sufficient by itself to support an award of monetary sanctions to compensate the Term Lenders for the thousands of dollars of attorney's fees they incurred in prosecuting these motions.[1]

FBR's sanctionable conduct did not end there. The manner in which FBR subsequently chose to produce both its emails as well as the documents on its document server has foisted the substantial costs of culling responsive from non-responsive documents onto the Term Lenders. These costs rightfully belong to FBR and constitute an appropriate measure of additional sanctions.[2]

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[1] Fed. R. Civ. P. 37(b)(2) (court shall impose attorneys' fees for violation of discovery order); *DeVaney v. Continental Am. Ins. Co.*, 989 F.2d 1154, 1162 (11th Cir. 1993) (Rule 37 sanctions mandatory absent showing of substantial justification); Fed. R. Civ. P. 45(e) (noncompliance with subpoena subject to contempt); *Folk v. Wallace Business Forms, Inc.*, 394 F.2d 240, 244 (4th Cir. 1968) (contempt sanctions may include attorneys' fees).

[2] A nonparty generally bears the cost of production in response to a subpoena. *Behrend v. Comcast Corp.*, 248 F.R.D. 84, 86 (D. Mass. 2008). It may not simply "dump massive amounts of documents" upon the receiving party and "demand that they try to find what they are looking for." *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 363 (N.D. Ill. 2005); *see also Devon Mobile Communs. Liquidating Trust v. Adelphia Communs. Corp. (In re Adelphia Communs. Corp.)*, 338 B.R. 546, 551 (Bankr. S.D.N.Y. 2005) ("The Court does not endorse a method of document production that merely gives the requesting party *access* to a 'document dump,' with an instruction to the party to 'go fish.'") (citations omitted). Rather, a producing party is obligated "to sort through documents and produce only those responsive to [the] request." *Rothman v. Emory Univ.*, 123 F.3d 446, 455 (7th Cir. 1997) (upholding monetary sanctions that included the amount of the attorney's fees the receiving party "incurred in reviewing the non-responsive documents"); *see e.g., Powell v. Home Depot, U.S.A., Inc.,* No. 07-80435-Civ-Hurley/Hopkins, 2010 U.S. Dist. LEXIS 110301, *89-90 (S.D. Fla. Sept. 14, 2010) (explaining the "mass production of 14,589 pages in response to a discovery request…did not comply with either the Local Rules or the Federal Rules of Civil Procedure because Defendant failed to

Perhaps most insidious, however, is the Trojan Horse within FBR's production. The document server that FBR dumped on the Term Lenders undoubtedly contains documents that would otherwise have been privileged were it not for their production. Despite having access to this server at all times since the Term Lenders' subpoena, FBR acknowledges that it has made no effort to review the data and has taken no other steps to prevent the disclosure of privileged information. Instead, as demonstrated by its recent Motion for Confidentiality Order (which this Court summarily denied), FBR would like to shift to the Term Lenders the burden of dealing with the privilege issue (DE# 171).

There can be little doubt that FBR's failure to conduct any review of its document server constitutes a waiver of all applicable privileges,[3] but the Term Lenders are not asking the Court to reach the waiver issue in the context of this sanctions motion. The Term Lenders merely request clear direction that they may review and use all of the documents FBR has produced, free of any obligation to apprise FBR of those documents that may implicate a privilege or to return such documents to FBR.

---

produce the documents in such a manner so as to allow Plaintiff to locate responsive documents with a reasonable effort.").

[3] "Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." *Pensacola Firefighters' Relief Pension Fund Bd. of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 265 F.R.D. 589, 596 (N.D. Fla. 2010) quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). Even if the disclosure is inadvertent, the production of privileged documents waives the privilege if the producing party failed to "take reasonable steps to prevent the disclosure." Fed. R. Evid. 502(b). Thus, "to preserve a claim of privilege," at the very minimum FBR had to "conduct a privilege review prior to any document production." *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 412 (D.N.J. 1995). Indeed, the sheer volume of FBR's production imposed upon it a heightened obligation to thoroughly review its documents prior to production to protect any claim of privilege. *See New Bank of New England v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991) ("As the number of documents grows, so too must the level of effort increase to avoid an inadvertent disclosure. Failure to meet this level of effort invites the inference of waiver.").

III. CONCLUSION

FBR's continuing conduct warrants an award of substantial monetary sanctions. The Term Lenders are prepared to "eat" the law and motion costs they previously incurred as well as the future cost they will have to incur to narrow FBR's voluminous production—but not while retaining the risk that they will then be pilloried for having obtained and reviewed privileged documents that FBR took no steps to review. FBR cannot have it both ways.

Dated: November 12, 2010

Respectfully submitted,

By: /s/ Lorenz Michel Prüss

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing 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: November 12, 2010

/s/ Lorenz Michel Prüss

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
_________________________________/

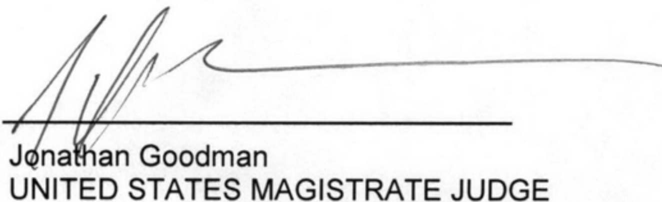
SUPPLEMENTAL ORDER ON MOTION FOR SANCTIONS

This matter is before the Court on the Term Lenders' Notice of Non-Compliance and Supplemental Memorandum in Support of Sanctions (DE## 180, 182). The background of these filings is detailed in three previous orders (DE## 129, 167, 178).

The Term Lenders' Supplemental Memorandum states that the Term Lenders are not seeking a monetary award. Instead, the Term Lenders seek clarification from the Court that they will not have an obligation to conduct, in essence, their own privilege review of the documents produced by Fontainebleau and to return potentially privileged documents back to Fontainebleau.

Before resolving this matter, the Court requires additional information on the contents of the "partial" privilege log furnished by Fontainebleau. In particular, the Court would like to know whether the entries on the "partial" privilege log refer to documents that are being *withheld* as privileged or whether the documents listed on the log refer to documents that Fontainebleau has already produced. **Fontainebleau** shall provide this information to the Court by this Friday, **November 19, 2010**. The Court anticipates that this information can be provided in one page or less.

DONE AND ORDERED in Chambers, at Miami, Florida, this 15th Day of November, 2010.

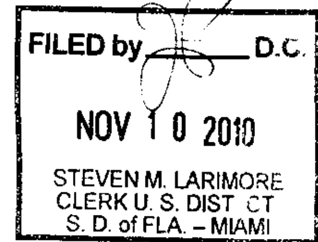


Copies furnished to:
All counsel of record

FILING FEE
PD $75.00
Pro hac 9691
Steven M. Larimore, Clerk

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

______________________________________/

**MOTION TO APPEAR *PRO HAC VICE*,
CONSENT TO DESIGNATION AND REQUEST TO
ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING**

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of STEVEN C. CHIN, ESQ. of the law firm of Kaye Scholer, LLP, 425 Park Avenue, New York, New York 10022-3598 (Telephone: 212-836-8000) for purposes of appearance as co-counsel on behalf of Defendant, HSH Nordbank AG, in the above-styled case only and, pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit STEVEN C. CHIN to receive electronic filings in this case and, in support thereof, states as follows:

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

2. Movant, Arthur Halsey Rice, Esq. of the law firm of Rice Pugatch Robinson & Schiller, P.A., 101 Northeast Third Avenue, Suite 1800, Fort Lauderdale, Florida 33301 (Telephone: 305-379-3121), 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. Movant 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. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the Local Rules of this Court, STEVEN C. CHIN has made payment of this Court's $75.00 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

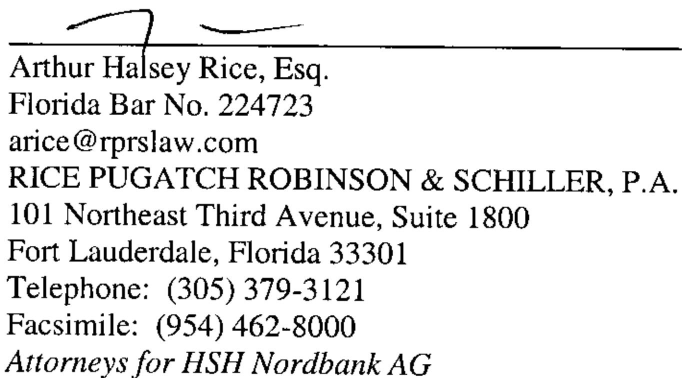
4. STEVEN C. CHIN by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to him at email address: steven.chin@kayescholer.com.

WHEREFORE, Arthur Halsey Rice moves this Court to enter an Order permitting STEVEN C. CHIN to appear before this Court on behalf of Defendant, HSH Nordbank AG, for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to STEVEN C. CHIN.

* * *

Dated this 5 day of November, 2010

Respectfully submitted,



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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
_______________________________________/

CERTIFICATION OF STEVEN C. CHIN

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

STEVEN C. CHIN, ESQ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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
_______________________________________/

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

THIS CAUSE having come before the Court on the *Motion to Appear Pro Hac Vice for STEVEN C. CHIN, Consent to Designation and Request to Electronically Receive Notices of Electronic Filing* (the "*Motion*"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the *Motion* and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The *Motion* is GRANTED. STEVEN C. CHIN may appear and participate in this action on behalf of Defendant, HSH Nordbank AG. The Clerk shall provide electronic notification of all electronic filings to STEVEN C. CHIN at steven.chin@kayescholer.com.

DONE AND ORDERED in Chambers at ______________________________, Florida, this

___________ day of November, 2010.

____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_________________________________/

THIRD PARTIES, FONTAINEBLEAU RESORTS, LLC, FONTAINEBLEAU RESORTS PROPERTIES I, LLC, AND FONTAINEBLEAU RESORT HOLDINGS, LLC'S RESPONSE AND NOTICE REGARDING THE COURT'S ORDER ON MOTION TO WITHDRAW

Third Parties, Fontainebleau Resorts, LLC, Fontainebleau Resorts Properties I, LLC, and Fontainebleau Resorts Holdings, LLC, through their undersigned counsel, respectfully file this response and notice in accordance with the Court's Order on Motion to Withdraw, dated October 18, 2010 [D.E. 166], and state that they are unable, and therefore do not intend, to retain replacement counsel for Waldman Trigoboff Hildebrandt Marx & Calnan, P.A. within the deadline set forth in the Court's Order.

Respectfully submitted,

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By: /s Sarah J. Springer
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 18, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_________________________________/

FONTAINEBLEAU RESORTS, LLC'S RESPONSE TO SUPPLEMENTAL ORDER ON MOTION FOR SANCTIONS

Third Party, Fontainebleau Resorts, LLC ("FBR"), through its undersigned counsel, files its Response to the Court's Supplemental Order on Motion for Sanctions, dated November 15, 2010 [D.E. 183], and respectfully states:

FBR has served three privilege logs in connection with its response to the Term Lenders' Subpoena. Each of the privilege logs pertain to e-mails contained on the e-mail server / hard drive. The e-mails identified on each of those privilege logs have not been produced and have been withheld from production. The only caveat to this response would be any inadvertent production of which counsel is not presently aware.

Respectfully submitted,

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

I HEREBY CERTIFY that on November 19, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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

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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.

CLARIFICATION BY TERM LENDERS REGARDING RESPONSE OF FOUNTAINEBLEAU RESORTS, LLC TO SUPPLEMENTAL ORDER ON MOTION FOR SANCTIONS

In order to clarify any potential ambiguity left by the Response of Fontainebleau Resorts, LLC ("FBR") to Supplemental Order on Motion for Sanctions (DE# 186), Term Lenders state as follows:

FBR's privilege logs relate only to documents contained on the **email server**. FBR has provided no privilege log pertaining to the approximately 800 gigabytes of data, nearly 600,000 documents, contained on the **document server**. FBR's counsel has represented that FBR has not reviewed and does not intend to review any data on the document server, either for responsiveness or for privilege.

Dated: November 19, 2010

Respectfully submitted,

By: /s/ Lorenz Michel Prüss

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing 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: November 19, 2010

/s/ Lorenz Michel Prüss

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 09-md-02106-GOLD

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION,

MDL No. 02106

This document relates to:

Case No. 1:09-cv-21879-GOLD

________________________________/

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE* [ECF No. 184]

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filing **[ECF No. 184]**, requesting permission for a limited appearance of STEVEN C. CHIN in this matter. Having considered the Motion and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

1. The Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filing **[ECF No. 184]** is GRANTED.
2. STEVEN C. CHIN is permitted to appear and participate in this action.
3. The Clerk shall provide electronic notification of all electronic filings to STEVEN C. CHIN at steven.chin@kayesscholer.com.

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

____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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.
_________________________________/

THIRD-PARTY, FONTAINEBLEAU RESORTS, LLC'S RESPONSE TO TERM LENDERS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS

Fontainebleau Resorts, LLC ("FBR"), in accordance with the Court's Order dated November 2, 2010 [D.E. 178], respectfully submits its Response in Opposition to the Term Lenders' Supplemental Memorandum in Support of Motion for Sanctions [D.E. 182][1], and states:

While FBR is respectful of the Term Lender's apparent willingness to waive any claim for monetary sanctions, in doing so, they seek to impale FBR with a proverbial "Morton's Fork" by suggesting that it is required to choose from two alternatives, neither of which is warranted.

I. FBR Should Not Be Required to Incur the Expense of Responding to the Subpoena or Conducting Additional Searches.

The Term Lenders have it backwards to the extent they seek to impose any cost, expense, or sanction against FBR due to its attempts to comply with their subpoena. Federal Rule of Civil

[1] The Term Lenders' initial Motion [D.E. 153] was filed on October 8, 2010. The Court directed that there would, at that time, be no further briefing on the Motion. [D.E. 159]. FBR then requested permission to file a response to the Motion [D.E. 162] given the relief sought and to explain the status of its response to the subpoena. That request was denied without prejudice [D.E. 163]. The Court indicated, however, that if FBR felt it necessary for the Court to review the proposed response, it could renew its motion for leave to file it. FBR does ask that the Court consider the previously submitted proposed response only to the extent that it provides more detail of the pertinent events and further demonstrates FBR's compliance and attempted compliance with the subpoena and the requirements of the Court.

Procedure 45(c), entitled, "***Avoiding Undue Burden or Expense; Sanctions***," provides:

> A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

See also Klay v. All Defendants, 425 F.3d 977, 982-984 (11th Cir. 2005); *Davidson v. Government Employees Insurance Company*, 2010 WL 4342084, *5 (M.D. Fla. Oct. 26, 2010).

The Term Lenders then stand this provision – intended to protect FBR under these circumstances – on its head when they suggest that sanctions or other relief should be entered in their favor. There is no question that FBR has incurred significant expense in its good faith attempts to comply with the subpoena and the Court's requirements. If the Court is to consider any award of expenses or sanctions, it should be in favor of FBR, not against it.

The efforts undertaken by FBR to work cooperatively with the Term Lenders, to respond to the subpoena, to seek appropriate protection, and to comply with the Court's requirements have been extensive. These efforts are documented in FBR's previous filings and numerous telephone conferences and hearings with counsel and the Court. In the interests of brevity, they are not all recounted here. By way of further response, however, FBR notes that it provided the Term Lenders with a copy of the filtered e-mail server (applying the date range and search terms requested by Term Lenders) and a privilege log. FBR also produced full copies of its document and accounting servers as required. Term Lenders now complain they received too much data.[2] Yet, FBR spent over $25,000.00 to reduce the size of the e-mail server by 75%, using the search terms drafted by Term

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[2] The Term Lenders previously demanded that the servers be produced so that *they* could search them for responsive documents.

Lenders.[3] With regard to the document server, Term Lenders acknowledge that the cost to search it for responsive documents could approach $200,000. It cannot be credibly argued that such an undertaking could be done "in the normal course" and that a third party should be required to incur this extraordinary expense.

The cases cited by the Term Lenders in their attempt to shift the cost to FBR are distinguishable and fail to overcome Rule 45(c).[4] Foremost, with one exception, those cases involved parties to the litigation, rather than subpoenas directed to non-parties and application of Rule 45(c). This distinction is important given that FBR has no interest in this case and in view of its extensive efforts to comply with the Term Lenders' subpoena.

The case cited by the Term Lenders involving a non-party, *Behrend v. Comcast Corporation*, 248 F.R.D. 84 (D. Mass. 2008), offers no basis to require FBR to bear the expense of responding to the subpoena. In *Behrend*, the court identified three factors to be considered in deciding cost allocation where a non-party is required to respond to a subpoena, including: (1) whether the non-party actually has an interest in the outcome of the case, (2) whether the non-party can more readily bear the costs than the requesting party, and (3) whether the litigation is of public importance. 248 F.R.D. at 86. None of these factors weigh in favor of the Term Lenders. First, unlike the non-party

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[3] The Term Lenders argue that the search terms were not applied to the e-mail server. However, as they know, IKON (the vendor retained by FBR to assist with the document and data production) acknowledged this was an error on its part, not FBR. The search terms have since been applied by IKON at no extra cost to FBR or the Term Lenders.

[4] Though Fed.R.Civ.P. 37 (cited by the Term Lenders) does not apply to FBR as a non-party, *American Honda Bailey Industries, Inc. v. CLJP, Inc.*, 2010 WL 3860742, *9 (N.D. Fla. 2010); *American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc.*, 2006 WL 1063299, *1 (M.D. Fla. 2006), FBR's response and previous filings demonstrate that any inability to provide a complete and timely response was substantially justified and that an award of sanctions or expenses would be entirely unjust.

in *Behrend*, FBR has no interest in the outcome of the case. Term Lenders suggest none. Next, there is nothing to show that FBR can more readily bear the costs involved versus the Term Lenders. FBR has no employees to further refine the search for responsive documents. FBR's limited resources make it financially impossible to engage a third party vendor to do so. On the other hand, the Term Lenders consist of a group of over *one hundred* lenders or financial institutions who can more readily bear these expenses. The Term Lenders do not and cannot contest this fact. Finally, the issues being litigated by the Term Lenders here are not of public importance. Term Lenders suggest none.

In fact, *Behrend* demonstrates why the extraordinary relief requested by the Term Lenders should be denied. For example, in *Behrend*, the plaintiff had offered to review the third party, Great Media's documents wherever they were stored *before* it incurred the expense of a privilege review. 248 F.R.D. at 85. Here, the Term Lenders are proposing that FBR's privileges be deemed waived. The plaintiff in *Behrend* had also stipulated that its document review would be subject to all of the protections contained in an existing Protective Order in the underlying litigation and offered to enter into an additional stipulation specifically preserving Greater Media's privilege claims, if any. 248 F.R.D. at 85-86, n. 3. The Term Lenders here propose the opposite.

II. The Court Should Not Find a Wholesale Waiver of Privilege and Should Not Endorse the Term Lenders' Request to Use FBR's Records in Any Manner They Wish.

Having obtained full access to FBR's records through the subpoena process, the Term Lenders now seek the Court's imprimatur to allow them to use these confidential and potentially privileged documents for whatever purpose they wish and without any further obligations whatsoever. This request should be denied. This requested relief was not included in the Term Lenders' initial Motion. Nor do they indicate whether they, or their attorneys, intend to use FBR's

most confidential of documents solely in connection with this case, or in relation to other litigation, or whether they propose to freely share FBR's records with others, free of accountability or responsibility for their confidential or privileged nature. The subpoena process was not intended for this purpose.

The Term Lenders contend they "are not asking the Court to reach the waiver issue." But this is precisely the relief they are requesting when they ask the Court that "they may review and use all of the documents FBR has produced," without further obligation. The Term Lenders' request is also inconsistent with this Court's prior Order dated October 25, 2010, in which the Court left open the opportunity for FBR to file a motion at a later date if it determines that privileged information was inadvertently produced [D.E. 173]. The Court's indication in this regard is far more reasonable than the drastic finding of a wholesale waiver as proposed by the Term Lenders.[5]

Nor can it be shown that FBR has not taken steps to preserve the confidentiality of its records to the best it was able under the time and fiscal constraints. Its filing of a Motion for Entry of a Confidentiality Order and its service of privilege logs, while not perfect and all-encompassing, certainly refute any contention that FBR has waived any claim of privilege or other protection.

For these reasons, as well as those set forth in FBR's prior filings, FBR requests that the Term Lenders' Motion be denied. If there is to be any imposition of costs incurred in connection with FBR's response to the subpoena, it should be in FBR's favor. In addition, the Term Lenders' request that the Court relieve the Term Lenders of any obligations with regard to any privileged or

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[5] The Court's Order pertained primarily to FBR's Motion for Entry of a Confidentiality Order. Though the Court denied FBR's request on the grounds that it might reveal the Term Lenders' work product, those concerns would not apply to the relief requested here. It would be difficult for Term Lenders to contend that the mere identification and return of any privileged materials would constitute their attorneys' work product.

confidential information or documents should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 24, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
_________________________________/

ORDER ON MOTION FOR SANCTIONS

This matter is before the Court on the Term Lenders' Motion for Sanctions against Fontainebleau Resorts (DE# 153), filed October 8, 2010. On October 18, 2010, the Court reserved ruling on the motion for sanctions and instructed the Term Lenders to file a notice of non-compliance if Fontainebleau failed to comply with the production and privilege-log deadlines set by the Court (DE# 167). Subsequently, the Term Lenders did file a notice of non-compliance (DE# 181) and a supplemental memorandum of law (DE# 182). Fontainebleau also filed a memorandum of law (DE# 189).

Based on the parties' filings, it appears that Fontainebleau did not review any of the servers for responsive documents (and instead provided the Term Lenders with a "document dump" of more than 926 gigabytes of data) and conducted a privilege review *only* of the email server (See DE# 180, 181, 182, 186, 187). However, the Term Lenders state in their supplemental memorandum that they **no longer seek a monetary sanction** but instead request "direction" from the Court that "they may review and use all of the documents [Fontainebleau] has produced, free of any obligation to apprise [Fontainebleau] of those documents that may implicate a privilege or to return such documents to [Fontainebleau]" (DE# 182). Fontainebleau opposes this relief (DE# 189).

In practical terms, the Term Lenders are seeking protection in case they encounter privileged information in the data produced by Fontainebleau.

At this time, however, the Court is not prepared to summarily grant the alternative relief that the Term Lenders now request. This relief was not originally requested in their motion for sanctions, and the privilege dilemma that the Term Lenders' describe appears to be a consequence of Fontainebleau's defective/non-responsive production, not a sanctions issue flowing from Fontainebleau's failure to timely produce documents and data, which was the cause of the Term Lenders' original motion for sanctions. Additionally, Fontainebleau has not affirmatively asserted that any of the documents or data it produced on the two servers (i.e., the documents and accounting servers) actually contain privileged information. Fontainebleau's lack of a specific privilege objection to particular data on the two servers is, apparently, the result of its failure to even review the two servers for privilege in the first place. (Fontainebleau did, however, advise that it withheld data from the email server and prepared privilege logs for the data that it did not produce.)

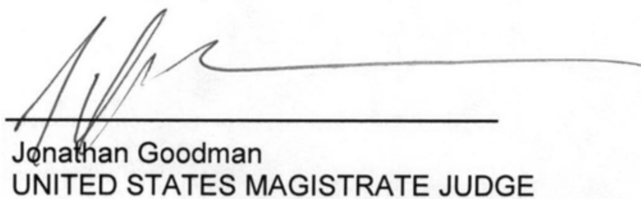
Although the Term Lenders state they are "**not** asking the Court to reach the waiver issue in the context of this **sanctions** motion," the requested relief necessarily contemplates a decision that Fontainebleau waived privileges (emphasis added).

If the Term Lenders wish to pursue the alternate remedy mentioned in their recent submission (DE# 182), they may file a motion (with incorporated memorandum of law) of **no more than seven pages** by next **Monday, December 6, 2010**, which shall specifically explain both the relief sought and why this issue is ripe for adjudication (and thus why the Court would not merely be issuing an advisory opinion). The motion should also provide relevant legal authority supporting the notion that the Court may order the relief (presumably because of a waiver, but other theories may be urged if there

are grounds to support them). Assuming the Term Lenders file such a motion, then Fontainebleau may respond within **seven days from the motion's filing**, and such response shall also be limited to **seven pages**.

If the Term Lenders have a legitimate need to expedite the resolution of a specific motion addressing the waiver-type relief it recently requested as an alternate type of remedy for purported discovery failings by Fontainebleau, then they may file the motion by **Friday, December 3, 2010** (along with an explanation for the expedited treatment) and Fontainebleau will then have four days to submit a response. No reply will be permitted, regardless of when the Term Lenders' motion is filed.

DONE and ORDERED in Chambers, this 29th day of November, 2010



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