

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 41; RESETTING ORAL ARGUMENT

THIS CAUSE is before the Court *sua sponte*. Having determined that a conflict exists with the Court's calendar, it is hereby

ORDERED AND ADJUDGED that:

1. Oral argument on Plaintiff Term Lenders' Joint Motion for Partial Final Judgment ("Motion") [ECF No. 151] previously 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 Friday, December 17, 2010 at 11:00 a.m. is hereby RESET to **Friday, January 7, 2011 at 10:00 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. The Court's prior MDL Order No. 39 (requiring the parties 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.**) remains in effect. 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 30th day of November,
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-MD-02106-CIV-GOLD/GOODMAN

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

**TERM LENDERS' MOTION FOR DETERMINATION OF
FONTAINEBLEAU RESORT'S WAIVER OF PRIVILEGE;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Pursuant to the Court's Order on Motion for Sanctions, Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-CV-23835-ASG (S.D. Fla.) and *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 10-CV-20236-ASG (S.D. Fla.) (the "Term Lenders"), by and through their undersigned counsel, move this Court for an order determining that Fontainebleau Resorts, LLC ("FBR") waived all applicable privileges when it knowingly produced hundreds of thousands of documents to the Term Lenders without conducting any review or taking any other steps to prevent the disclosure of privileged documents.

I. INTRODUCTION

After repeated orders, FBR finally produced electronic documents in response to the Term Lenders' subpoena. FBR made no effort to limit its production to responsive documents. Instead, it produced its entire document server, more than 600,000 documents, including hundreds of thousands of documents having nothing to do with any of the topics set forth in the Term Lenders' subpoena. Nor did FBR take any steps (much less the "reasonable steps" required by Rule 502(b)) to ensure that its document dump did not include privileged documents. Not surprisingly, it does; tens of thousands of them. FBR's voluntary production constitutes a

waiver of all otherwise applicable privileges. The Term Lenders bring this motion for such a determination.

II. BACKGROUND

The Term Lenders' tortured efforts to obtain documents from FBR are set forth in the various orders this Court has issued in connection with the Term Lenders' Motion to Compel and Motion for Sanctions. (DE## 123, 153, 180, 182, 187.)

FBR eventually produced documents, including a copy of its entire document server. The server contains approximately 800 gigabytes of data, nearly 600,000 documents estimated at over 20 million pages. (Declaration of Kirk Dillman, hereinafter "Dillman Decl.", ¶ 2.) FBR's counsel has acknowledged that FBR took no steps to review this data for responsiveness or for privilege. (*Id.* at ¶ 5.)

Not surprisingly, FBR's production includes hundreds of thousands of obviously non-responsive documents. For example, a search of the server's electronic index reveals that more than 80,000 documents relate to Fontainebleau's project in Miami. (*Id.* at ¶ 4.) Thousands more relate to personnel and operations matters unrelated to any of the topics in the Term Lenders subpoena. (*Id.*)

FBR's production also contains tens of thousands of documents that were or may have been privileged but for FBR's production of them. For example, a search of the electronic index reveals that more than 18,000 documents contain the term "*legal*" in either their file location or file name. (*Id.*) More than 5,093 documents are located in the folder of FBR's former general counsel, Whitney Their, which contains, among other things, privileged communications between Ms. Their and others at FBR and/or Ms. Their's attorney work product. (*Id.*) It is virtually certain that there are large numbers of other privileged documents in other files and folders throughout the millions of pages of FBR's production.

It would cost the Term Lenders between \$150,000 and \$200,000 to have the data from the hard drive processed in a manner that would permit them to efficiently locate both responsive and potentially privileged documents. (*Id.* at ¶ 3.) FBR, of course, could have achieved this result without incurring these substantial costs. This is FBR's server. It knows how the server was architected and maintained, and it knows where to look for responsive and/or privileged documents. It elected not to.

FBR's decision to produce its documents without any review places a substantial and unfair burden on the Term Lenders (and the other banks who have received FBR's document server)¹. Absent relief from this Court, FBR may argue that the Term Lenders have an ethical obligation to inform FBR of the existence of any document that may be privileged, and, if FBR determines that it is in fact privileged, remove it from any place it has been stored and retrieve it from anyone to whom it may have been given. Given the enormous universe of potentially privileged documents, this cumbersome process will substantially complicate and slow the Term Lenders' efforts to review FBR's documents. FBR's extended failures to produce documents already has stalled deposition discovery in this action for months. FBR should not be permitted to impose additional delays by failing to review the documents it finally did produce.

III. FBR WAIVED ALL APPLICABLE PRIVILEGES WHEN IT KNOWINGLY PRODUCED MILLIONS OF PAGES OF DOCUMENTS WITHOUT ANY PRIVILEGE REVIEW.

“As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies [and has not been waived] rests not with the party contesting the privilege, but

¹ Bank of America as well as the other Revolving Lenders in these coordinated MDL proceedings also subpoenaed documents from FBR and received the same document server as a part of FBR's production. (*Id.* at ¶ 6.)

with the party asserting it.”² “Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege.”³ In particular, the privilege is waived by a voluntary disclosure of privileged information.⁴

FBR production was voluntary. It elected to dump on the Term Lenders its entire document server, knowing that it contained privileged documents. But even if FBR’s production somehow were deemed to be involuntary, FBR nonetheless waived the privilege by failing to conduct any review. Although FBR had more than six months to take steps to ensure that the documents it produced did not contain privileged materials, it did nothing. Federal Rule of Evidence 502(b) provides that an inadvertent disclosure waives the privilege unless “the holder of the privilege or protection took reasonable steps to prevent disclosure” and “the holder promptly took reasonable steps to rectify the error....” FBR did neither.

FBR conceded that it never conducted any privilege review prior to production.⁵ Given the massive volume of its production, FBR had a heightened obligation to do so.⁶ Nor did FBR

² *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981).

³ *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).

⁴ See *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987) (“[A]t the point where attorney-client communications are no longer confidential, i.e., where there has been a disclosure of a privileged communication, there is no justification for retaining the privilege . . .”); Restat. of the Law, Third, The Law Governing Lawyers, § 79 (“The attorney-client privilege is waived if the client, the client’s lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication.”).

⁵ *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 412 (D.N.J. 1995) (“[T]o preserve a claim of privilege, [parties] must conduct a privilege review prior to any document production”); *SEC v. Cassano*, 189 F.R.D. 83, 86 (S.D.N.Y. 1999) (attorney-client privilege waived where “[a] deliberate decision was made to produce [a document] without looking at it”). See also *United States Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, 630 F. Supp. 2d 1332 (M.D. Fla. 2007)

“promptly take reasonable steps to rectify the error” once it was discovered. In the three weeks since the Term Lenders notified the Court that the hard drive contained privileged materials (DE# 182), FBR has done nothing to seek to identify and/or retrieve privileged materials. (Dillman Decl., ¶ 7.)

IV. CONCLUSION

For the reasons set forth above, the Term Lenders respectfully request an order determining that FBR waived any and all otherwise applicable privileges and protections when it produced its document server without conducting any review.

Respectfully submitted on December 6, 2010,

(privilege waived where attorney who ultimately sent out the production did not review the documents).

⁶ 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.”)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List 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: December 6, 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 actions.

**DECLARATION OF KIRK D. DILLMAN IN SUPPORT OF TERM LENDERS'
MOTION FOR DETERMINATION OF FONTAINEBLEAU RESORT'S
WAIVER OF PRIVILEGE**

I, Kirk D. Dillman, declare as follows:

1. I am a partner with Hennigan, Bennett & Dorman LLP, counsel for the Term Lenders in the case captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-CV-23835-ASG (S.D. Fla.). I make this declaration in support of the Term Lender's Motion Determination of Fontainebleau Resort's Waiver of Privilege. I have personal knowledge of the following and if called as a witness, I would and could competently testify thereto.

2. As part of FBR's production in response the Term Lenders' subpoena, FBR produced a hard-drive containing approximately 800 gigabytes of data. The files on the hard-drive appear to include every document on FBR's document server, going back approximately a decade. The server contains nearly 600,000 documents. Using standard conversion estimates, the number of pages of audio files, emails, image files, database files, excel files, PowerPoint files, Microsoft Word files, text files and video files on the server exceeds 20 million pages.

3. I have been informed by a vendor we use for such purposes that the cost of processing the data from the hard-drive in a manner that would enable the Term Lenders to identify responsive and privileged documents is between \$150,000 and \$200,000.

4. At my instruction, my firm's IT department ran several searches against the file location and the file name of the index of the hard-drive in order to identify the number of files containing particular terms in either the name of the file's location or the file's name. I reviewed the results of these searches, which demonstrate:

A. More than 80,000 documents on the server relate to Fontainebleau's project in Miami, and thousands more relate to personnel and operations matters unrelated to any of the topics in the Term Lenders subpoena;

B. More than 18,000 documents contain the term "*legal*" in either their file location or file name; and

C. More than 5,000 documents are located in the folder of FBR's former general counsel, Whitney Their, which contains, among other things, privileged communications between Ms. Their and others at FBR and/or Ms. Their's attorney work product.

5. On November 3, 2010, FBR's counsel, Sarah Springer, advised me that FBR searched only the email server for privilege prior to production. FBR did not search the document server.

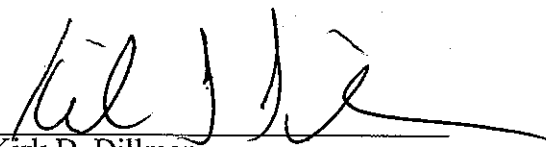
6. Bank of America as well as the other Revolving Lenders in these coordinated MDL proceedings also subpoenaed documents from FBR. I have coordinated with these banks to obtain and copy the various hard copy and electronic documents produced by FBR. I therefore am aware that these banks received the same document server from FBR as a part of its production.

7. On November 12, 2010, the Term Lenders filed their Supplemental Memorandum in Support of Motion for Sanctions against FBR. (DE# 182.) The Term Lenders advised the Court that FBR had taken no steps to cull privileged documents before it produced its document server. The Term Lenders requested that the Court provide the Term Lenders with clear

direction that they could review and use the documents free of any obligation to apprise FBR of those documents that may implicate a privilege or to return such documents to FBR. In the three weeks since the Term Lenders notified the Court (and FBR) that the hard drive likely contained privileged materials, FBR has done nothing to seek to identify and/or retrieve privileged documents that the Term Lenders now have confirmed reside on the server.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 6, 2010 at Los Angeles, California.


Kirk D. Dillman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List 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: December 6, 2010.

/s/ Lorenz Michael Prüss

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS

**BANK OF AMERICA, N.A.'S JOINDER IN THE TERM LENDERS' MOTION FOR
DETERMINATION OF FONTAINEBLEAU RESORTS' WAIVER OF PRIVILEGE**

Defendant Bank of America, N.A. hereby joins in the Term Lenders' Motion for
Determination of Fontainebleau Resorts' Waiver of Privilege, dated December 6, 2010 [DE192].

Dated: December 9, 2010

By: /s/ Craig V. Rasile

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Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Bank of America, N.A.'s Joinder in the Term Lenders' Motion for Determination of Fontainebleau Resort's Waiver of Privilege was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: December 9, 2010

By: /s/ Craig V. Rasile
Craig V. Rasile

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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.

**FONTAINEBLEAU RESORTS, LLC'S RESPONSE IN OPPOSITION TO TERM
LENDERS' MOTION FOR DETERMINATION OF WAIVER OF PRIVILEGE**

Third Party, Fontainebleau Resorts, LLC ("FBR"), through its undersigned counsel and in accordance this Court's Order dated November 29, 2010 [D.E. 190], respectfully submits the following Response in Opposition to the Term Lenders' Motion for Determination of FBR's Waiver of Privilege, dated December 6, 2010 [D.E. 192]:

I. Introduction

The Term Lenders themselves have previously described the underlying litigation as a "legal storm." FBR, though not a party to this litigation, has found itself caught up in that storm. The Court should decline Term Lenders' invitation to find a wholesale waiver on the part of FBR because Term Lenders created this predicament by causing FBR to incur an undue burden and expense in responding to their subpoena and corresponding Court Orders.

Federal Rule of Civil Procedure 45(c), entitled, "*Avoiding Undue Burden or Expense; Sanctions*," is designed to avoid this circumstance visited upon a third party. It 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

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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).

Despite having limited resources, FBR has fully complied with the Term Lenders’ subpoena. It has also taken reasonable efforts under the circumstances to protect its privileges in the process, militating against any finding of waiver. Initially, FBR filed a Motion for Entry of a Confidentiality Order to govern its responses.¹ Although the Court denied FBR’s Motion on the grounds it might reveal the Term Lenders’ work product, it would be difficult for Term Lenders to suggest that the mere identification and return of any privileged materials would constitute their own attorneys’ work product.

In addition, FBR conducted a privilege review of its *e-mail server*. This alone demonstrates FBR’s efforts to protect its privileged materials. The primary reason FBR was unable to identify only responsive documents from its *document server* – and identify privileged materials in the process

¹ *Behrend v. Comcast Corporation*, 248 F.R.D. 84 (D. Mass. 2008), previously relied upon by Term Lenders, confirms that FBR has acted reasonably. The court in that case identified factors to be considered in deciding cost allocation where a non-party is required to respond to a subpoena. Though Term Lenders are no longer seeking monetary relief against FBR, that case nonetheless confirms that any expense associated with the subpoena should be incurred by Term Lenders. Notably, in *Behrend*, the plaintiff had offered to review the third party’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.

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– is because of the incredible expense. Under normal circumstances and as Rule 45 mandates, this expense would have been incurred by the Term Lenders.

When FBR was unable to incur the incredible expense of conducting a privilege review of the document server, and at the same time comply with the Term Lenders' subpoena and the Court's requirements, it provided Term Lenders with the document server. Now, having obtained full access to it, the Term Lenders seek the Court's imprimatur to allow them to use these confidential and privileged documents for whatever purpose they wish and without any further obligations whatsoever. This request should be denied.²

II. Additional Efforts by FBR to Comply with the Subpoena

For several months, FBR worked collaboratively with the Term Lenders to, among other things, apply search terms to the *e-mail server* to identify potentially responsive documents and to reduce the size of potentially responsive documents by seventy-five percent. That process did not occur, however, with respect to the *document server*. As such, FBR had no option but to produce a full copy of it without conducting a privilege review. Under these extraordinary circumstances, and as explained below, this is not tantamount to an intentional waiver.

Term Lenders admit the cost to review the document server for responsive documents would have been approximately \$200,000.00. This is separate and apart from the cost FBR would have

² Term Lenders do not 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 (or if they have already done so), free of accountability or responsibility for their confidential or privileged nature.

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incurred conducting a privilege review after that search process was completed.³ Yet Term Lenders suggest that FBR – a third party – was required to either incur this expense or, if not, be accused of waiving its privileges. Term Lenders do not cite to a case to support such an argument. Indeed, their use of the subpoena process and the relief they seek is violative of Rule 45. FBR has limited resources and no employees to help conduct a privilege review or help locate responsive documents. Thus, Term Lenders’ argument that FBR could have done so without significant expense is without merit.

In addition, the Term Lenders never provided FBR with search terms to apply to the document server in order to limit the scope of responsive documents and associated expense. Term Lenders previously acknowledged in their Supplemental Memorandum in Support of Motion for Sanctions, dated November 12, 2010 [D.E. 182] that “[i]n the normal course of production, the producing party works collaboratively. . . to modify and narrow the search terms in order to reduce the problem of false positives.” Though that process was done with the e-mail server, it was not done with the document server.

III. FBR Did Not Waive Its Privileges with Respect to the Document Server

In determining whether privilege has been waived, the court must consider: (1) the reasonableness of precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to realize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice. *United States Fid. &*

³ This is also separate and apart from the cost FBR already incurred in shipping approximately ninety boxes of documents from Las Vegas to South Florida and processing the email server to the Term Lenders’ specifications.

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Guar. Co. v. Liberty Surplus Ins. Corp., 630 F.Supp.2d 1332, 1336 (M.D.Fla. 2007).

These factors weigh in favor FBR and against the relief sought by the Term Lenders. First, FBR took reasonable precautions to avoid inadvertent disclosure under the circumstances. FBR first filed a Motion for Confidentiality Order prior to the disclosure and the Court-imposed deadline for production.⁴ Due to the size of the production, it would have been financially and logistically impossible to conduct a privilege review of twenty million pages of documents within the production deadline (especially when the Court considers that FBR had no employees to undertake such an effort). Thus, FBR took the only available precaution to protect its privileges before it disclosed the privileged information. It cannot be credibly argued that FBR's production of the entire document server without the protection of a Confidentiality Order was "inconsistent with maintaining the confidential nature of the . . . privilege" such that the holding in *Pensacola Firefighters' Relief Pension Fund Bd. Of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 265 F.R.D. 589 (N.D.Fla. 2010) would apply. In fact, considering that the cost to cull and then review the document server would have been over \$200,000.00, FBR took the only available reasonable effort to protect its privileges when it filed a Motion for Confidentiality Order, while, at the same time, complying with the subpoena and corresponding Court Orders.

Next, the scope of production also weighs in favor of FBR. The document server alone contains twenty million pages. Although Term Lenders focus only on the document server, FBR's

⁴ Certainly, such an effort under these circumstances constitutes a reasonable precaution as contemplated by the court in *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F.Supp. 404, 412 (D.N.J. 1995). This, especially when taking into account, as the court did in *Ciba-Geigy*, the size of FBR's document production – approximately twenty million pages on the document server alone.

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production here was not limited to the document server. In fact, FBR undertook extensive efforts to apply search terms to the email server⁵ and to conduct a privilege review of the documents that were identified in the search.⁶ However, since the Term Lenders never provided search terms for the document server, the same process could not have been undertaken by FBR even if it had been ordered to do so. Clearly, under these circumstances, the overriding interests of fairness and justice also weigh in favor of FBR, a third party to this action who has already incurred significant expense in complying with the Term Lenders' subpoena.

Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981), cited by Term Lenders, is clearly inapplicable under these circumstances. *Weil*, a 1981 case, dealt with inadvertent disclosure of *one letter* during discovery and related testimony during a deposition. The disclosure at issue here, stemming from an electronically maintained document server, is much larger and of an entirely different magnitude. The court in *Weil* also held that the subjective intent of the producing party must be considered in determining whether its privileges were waived. Clearly, it was not FBR's intent to waive all applicable privileges. Rather, FBR was put in the undesirable position of having to spend over \$200,000.00 or turn over the entire document server. Faced with such a decision, FBR's production of the entire server was not voluntary such that the holding in *United States v. Suarez*, 820 F.2d 1158 (11th Cir. 1987) would apply, either.

⁵ FBR paid IKON, a third party copying vendor, approximately \$25,000.00 to apply the Term Lenders' search terms to the e-mail server.

⁶ In addition, FBR paid to ship nearly ninety boxes of documents from Las Vegas to South Florida so that they could be made available to Term Lenders for inspection and copying. Despite having already copied these documents, Term Lenders are now asking to impose further obligations on FBR relating to documents, some of which have already been produced.

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The Term Lenders also cite to *Federal Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 478 (E.D.Va. 1991) in support of their Motion. However, *Federal Deposit* supports FBR's position. In *Federal Deposit*, the court held that "a party may be excused from the waiver consequences of inadvertent disclosure where the number of documents to be screened is large and the time for screening short. See *Transamerica Computer*, 573 F.2d 646 (17 million documents to be screened in three months)." Here, FBR produced twenty million pages of documents on the document server alone. FBR did not obtain a copy of its document server until August, giving it approximately three months to cull and conduct a privilege review of twenty million pages of documents (while at the same time culling and reviewing the email server and approximately ninety boxes of documents at great expense). If the size of FBR's production here does not warrant avoidance of waiver, it is hard to imagine a situation that does.

IV. Conclusion

For these reasons, as well as those set forth in FBR's prior filings, FBR respectfully requests that the Term Lenders' Motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 09-Civ-MD-02106-ASG

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LIGITATION

CASPIAN ALPHA LONG CREDIT FUND, L.P.,
ET AL,

Plaintiffs,

MIAMI, FLORIDA
OCTOBER 18, 2010

TRANSCRIPT OF TELEPHONIC HEARING ON MOTION FOR
SANCTIONS FOR FAILURE TO PRODUCE DE (153) & MOTION TO WITHDRAW
AS COUNSEL
BEFORE THE HONORABLE JONATHAN GOODMAN,
UNITED STATES MAGISTRATE JUDGE

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1 (Call to order of the Court)

2 THE CLERK: The U.S. District Court for the Southern
3 District of Florida is now in session; the Honorable Jonathan
4 Goodman presiding.

5 We are here for Fontainebleau Las Vegas Contract
6 Litigation, case number 09-MD-02106-Gold.

7 THE COURT: Good morning, folks. This is Jonathan
8 Goodman. How are you?

9 MR. TRIGOBOFF: Judge, good morning. This is Craig
10 Trigoboff along with my associate, Sara Springer. How are you
11 this morning?

12 THE COURT: Good. Good. Good. And who do we have
13 here for the other side?

14 MR. TRIGOBOFF: Well, I think that's the problem,
15 Judge Goodman. We sent around, consistent with your order of
16 last week, call in information, and no one participated.

17 We waited for about almost ten minutes on that call in
18 line to then transfer to you. These folks I think are out in
19 California.

20 Sara Springer went and shot an e-mail to these other
21 lawyers to see if they were going to be joining us, and I
22 didn't want Your Honor to be waiting without us checking in
23 with you.

24 THE COURT: All right. So your understanding is that
25 your opposing counsel, or at least the ones that have objected

1 to your motion to withdraw and the ones who have filed the
2 motion for sanctions are based in California?

3 MR. TRIGOBOFF: I believe so.

4 THE COURT: All right. So it is 7:00 clock in the
5 morning there.

6 MR. TRIGOBOFF: Yes.

7 THE COURT: But be that as it may, they haven't
8 responded to your e-mail and haven't asked to reschedule this.

9 All right. Well, we obviously cannot go forward
10 without the other side here. So here is what I am going to
11 suggest:

12 We are going to try to reschedule this for later
13 today. What is your availability or Ms. Springer's
14 availability or both of your availability later on today, maybe
15 like around 2:00 o'clock?

16 MR. TRIGOBOFF: I am available all day today, Judge
17 Goodman. You let us know when it works for you.

18 THE COURT: All right. Well, here is what we are
19 going to do: We are going to temporarily set this for 2:00
20 p.m.

21 MR. TRIGOBOFF: Judge Goodman, I am sorry. I don't
22 mean to interrupt. Apparently these other lawyers are on hold.

23 I am going to try to do the conference call, and I
24 will call you back. I guess there is a delay on that end. Is
25 that acceptable?

1 THE COURT: Sure.

2 MR. TRIGOBOFF: All right. Why don't you give us a
3 moment or two. We are going to disconnect, with your
4 permission.

5 Oh. They are going to call in. Okay. Well,
6 apparently they are going to call in. Will you be able to
7 connect all of us?

8 THE COURT: I don't know. I have two people in the
9 courtroom shaking their heads, no. So I am going to assume,
10 no.

11 I think there has to be some fundamental coordination.
12 I think once the call starts, I don't know if anybody can join
13 separately.

14 MR. TRIGOBOFF: All right. Here is what I am going to
15 do: I am going to start that conference call process anew, and
16 with your permission, I will disconnect and we will all try to
17 get back on the phone with you momentarily. Is that okay?

18 THE COURT: Sure. I will have some coffee in the
19 meantime.

20 MR. TRIGOBOFF: That will be a great idea. Thank you,
21 Judge Goodman. We will be back in touch with you momentarily.

22 THE COURT: All right.

23 MR. TRIGOBOFF: Thank you.

24 THE CLERK: This court is in recess.

25 [There was a short recess].

1 THE CLERK: Good morning. Judge Goodman's chambers.

2 MR. TRIGOBOFF: Good morning. This is Craig

3 Trigoboff. We are all calling in now on that Fontainebleau

4 hearing. We have got all of the lawyers on the line.

5 THE CLERK: Okay. Perfect. I am going to just recall
6 the case again.

7 THE COURT: Michael, is the digital recorder on?

8 THE CLERK: Yes, sir.

9 THE COURT: All right. Okay.

10 THE CLERK: The U.S. District Court for the Southern
11 District of Florida is now in session, the Honorable Jonathan
12 Goodman is presiding.

13 We are here for Fontainebleau Las Vegas Contract
14 Litigation, case number 09-MD-02106-Gold.

15 THE COURT: All right, folks. Good morning. I know
16 we have Craig Trigoboff and Sara Springer on the line. Who do
17 we have for the other side?

18 MR. DILLMAN: Your Honor, this is Kirk Dillman for the
19 Nevada Term Lenders.

20 THE COURT: All right. Anybody else, Mr. Dillman?

21 MR. DILLMAN: Yes, Your Honor. They can make their
22 own appearances.

23 MR. NACHWEY: Steve Nachwey for the Aurlius
24 plaintiffs.

25 MR. CANTOR: Dan Cantor of Almaldy & Meyers for Bank

1 of America.

2 MR. FITZGERALD: Steve Fitzgerald for Barclays
3 Deutsche Bank, J.P. Morgan and RBS.

4 MR. KIRSCHNER: Jason Kirschner of Mayor Brown for
5 defendant Timatomo Mitsui Banking Corporation.

6 THE COURT: All right.

7 MR. BLAIN: Good morning, Your Honor. This is Russ
8 Blain appearing on behalf of Sunik Capela who is the Chapter
9 VII trustee for Fontainebleau Las Vegas and other entities.

10 MR. DILLMAN: Your Honor, this is Kirk Dillman. I
11 think that may be it based upon the roll call that we did
12 earlier.

13 THE COURT: All right. Well, good morning to all of
14 you.

15 Folks, I realize as we first tried to get this hearing
16 started maybe about 15 or 20 minutes ago that when we scheduled
17 this hearing for 10:00 o'clock our time, I didn't really focus
18 on the fact that some of the counsel are West Coast lawyers
19 and, therefore, it is 7:00 a.m. your time, and that is,
20 candidly, a little early to get started for a hearing in the
21 absence of an emergency.

22 So my suggestion is if I make a similar oversight in
23 the future, just give a call to chambers and say, "Did you
24 realize that it is 7:00 a.m. here on the West Coast," and we
25 would say, "No, we didn't realize that you all were

1 participating or we would have scheduled it for a more normal
2 time, but, anyway, thank you for participating this early in
3 the morning for all of you West Coast lawyers.

4 MR. DILLMAN: It is a beautiful sunset, Your Honor, or
5 sunrise. Excuse me.

6 THE COURT: Well, okay. I understand. All right.

7 Before we get into talking about some of the issues, I
8 would like for somebody to bring me up factually.

9 What is the status on the production of, number 1, the
10 80 boxes of documents and, number 2, the electronically stored
11 information?

12 MR. TRIGOBOFF: Your Honor, this is Craig Trigoboff.
13 May I do that?

14 THE COURT: Yes, sir.

15 MR. TRIGOBOFF: All right. And I will defer, if I
16 have to, to my associate Ms. Springer who has been in the
17 trenches, as you may know, and I think these other lawyers know
18 over the last number of months working arduously to get this
19 done, but let me at least give you a snapshot of where we are
20 now, at least in connection with the production.

21 This goes back, I know you know now many months, and
22 it was an order that was entered, I guess it was this past
23 summer. Maybe it was late August or early September where you
24 granted a motion to compel requiring production of these
25 materials, and the production was to take place by September

1 13th, and you gave an extra week until September 20th to
2 produce a privilege log.

3 I must tell you that even before that order was
4 entered, we were working again arduously to get materials
5 copied and brought here to South Florida.

6 Let me start with the hard copy materials because
7 there is two tranches, if you will, of data here. You have got
8 hard copy data, and I know you know this, and we have got
9 electronically stored data.

10 Beginning with the hard copy data, these were 80
11 boxes, 80 boxes, and they were stored out in Las Vegas where
12 this project had been commenced, and we brought them here, and
13 it took some time to get organized and get everything squared
14 away, but we caused those boxes to be brought here to Aventura
15 in North Miami, and we then spent, Ms. Springer did,
16 principally with another employee of Fontainebleau who had to
17 be hired just for this specific project, because I must tell
18 you the Fontainebleau has no employees. None.

19 There is a couple or three provisional directors that
20 sort of oversee what is going on here, but this is not a
21 company that has employees running around that are available to
22 do these types of tasks.

23 So what Ms. Springer did with this other individual
24 that was hired for this specific task, all of these boxes are
25 brought in, and for a full week she and this other individual,

1 and I do not mean to overstate this, but it is the truth.

2 They worked like dogs hour after hour after hour going
3 through these materials to make sure that not only they
4 complied with the court's order, but also to try and redact
5 privileged information, all the while, while this was all going
6 on, and counsel knew all about this, they were also working
7 together, counsel were on, claw back type agreements, such that
8 if we were to start giving this information up quickly, in huge
9 fashion, we would have the ability to at least get back that
10 privileged information if it was erroneously produced, but
11 certainly unintentionally produced.

12 And what happens now, Judge Goodman, just so that you
13 know, is that all of these boxes have been made available, and
14 this is critical -- they have all been made available to
15 counsel.

16 In fact, from what I understand, just last Thursday,
17 last week these lawyers were out there, and they had access to
18 these materials.

19 THE COURT: Sir, by "out there," do you mean Aventura?

20 MS. SPRINGER: Yes, Your Honor.

21 MR. TRIGOBOFF: Yes, Your Honor. These materials were
22 made available to them, all of these boxes in Aventura just
23 this past Thursday.

24 I also believe that an inventory was also produced to
25 these lawyers to assist them in going through these materials.

1 And, from what I understand, arrangements have been made or are
2 being made for copies to now be given to these lawyers.

3 So with respect to the hard copy documents, that
4 tranche of materials, we have complied in good faith in the
5 letter and spirit of your order we worked, it was a herculean
6 effort, but we got it done.

7 And, again, I must tell you we are a non-party with no
8 employees. And, as Your Honor knows, we do have a pending
9 motion to withdraw because there is no money to even fund this
10 effort, in any event.

11 THE COURT: I understand. Let me just ask a brief
12 follow-up question. I don't mean to interrupt you, but I heard
13 you say that these 08 boxes of documents were made available
14 last Thursday in Aventura.

15 So my follow-up question is has anybody taken you up
16 on that these are available offer? In other words, has anybody
17 shown up to review these materials?

18 MR. DILLMAN: Your Honor, this is Kirk Dillman.

19 MS. SPRINGER: Yes.

20 MR. DILLMAN: Your Honor. This s Kirk Dillman. I can
21 answer that.

22 MR. TRIGOBOFF: Excuse me. How about if we answer
23 that, since it was directed to me?

24 THE COURT: Well, folks, it is tough to keep order
25 with so many folks on the phone, especially when there is like

1 a half second delay.

2 So right now I am just speaking to Mr. Trigoboff and
3 Ms. Springer, and then I will give Mr. Dillman and any other
4 lawyer for the lenders or for lender related counsel the
5 opportunity to speak. So, please, continue, sir.

6 MR. TRIGOBOFF: Thank you. May I defer to
7 Ms. Springer? She has the answer to this.

8 MS. SPRINGER: Yes, Your Honor. Kirk Dillman's
9 associate Robert Mokler came down to Miami last week to review
10 the documents. He is the only attorney that has reviewed them.

11 THE COURT: All right. Did you folks have anything
12 further to tell me factually about the status of these 80 boxes
13 of documents before telling me the status of the electronically
14 stored information?

15 MR. TRIGOBOFF: No, sir. I think that sums it up from
16 our standpoint. Thank you.

17 THE COURT: All right. Well, before we shift to the
18 next subject, which is electronically stored information,
19 Mr. Dillman, do you or any of the other lawyers on the line
20 have any factual clarification to provide concerning these 80
21 boxes of documents in Aventura?

22 MR. DILLMAN: Your Honor, this is Kirk Dillman. I
23 apologize for interrupting you just a moment ago. I thought
24 you were directing the question to those who had come out to
25 review them.

1 No. As soon as we were told that they were available,
2 and we were not provided access until last week, despite
3 repeated requests, as soon as we heard that they were available
4 we sent somebody out, and of the 80 boxes that were there, I
5 think somewhere in the neighborhood of 3 or 4 were deemed
6 worthy of copying, and those are being copied now.

7 So with respect to the hard copy documents, why they
8 were not produced, you know, 5, 6 months ago when we asked for
9 them, we don't know, but they have now been produced.

10 And as far as the term lenders go, we have no,
11 assuming that those are all of the hard copy documents, we
12 believe that that has been done or resolved.

13 THE COURT: All right. Let's move to the
14 electronically stored information. Mr. Trigoboff or
15 Ms. Springer, what is happening there?

16 MR. DILLMAN: Your Honor, it sounded like somebody
17 beeped off and that may have been Mr. Trigoboff and
18 Ms. Springer inadvertently.

19 THE COURT: Well, since I haven't heard any response
20 from either Ms. Springer for Mr. Trigoboff, I am going to
21 assume that your prediction is correct.

22 So let me ask my staff here, from a technical
23 perspective, do we need to terminate this call and start again,
24 or are they going to be able to phone in?

25 THE CLERK: No. They will have to terminate and call

1 back in.

2 THE COURT: Are you absolutely certain because I heard
3 that AT&T operator or some operator.

4 MR. TRIGOBOFF: Excuse me. Judge Goodman?

5 THE COURT: Yes.

6 MR. TRIGOBOFF: I am sorry. We were disconnected from
7 our conference call, and I missed counsel's presentation in its
8 entirety. I am terribly sorry.

9 THE COURT: Sure. Well, what Mr. Dillman said, and I
10 am going to give you the Reader's Digest version, it was not
11 particularly long, but other than a brief reference to the
12 historical difficulties in getting these documents available,
13 Mr. Dillman advised me that as soon as he learned that the
14 documents were being made available, they immediately sent
15 somebody there.

16 They did review the documents, and out of the 80
17 boxes, about 3 or 4 of them were deemed worthy of copying, and
18 that is going on. And so as far as the lenders are concerned,
19 setting aside the issue of why it took so long to get these
20 documents produced, his understanding is that they have been
21 produced and the documents that they want copied are, in fact,
22 being copied. So you didn't miss all that much.

23 MR. DILLMAN: Your Honor, if I might, this is Kirk
24 Dillman. I do want to clarify that I was speaking only on
25 behalf of the term lenders.

1 There are the revolvers who are here represented in
2 part by Mr. Fitzgerald and in part by Mr. Cantor. They may
3 have a different perspective.

4 I know they have not yet gone out to review the
5 documents. So I don't want the lenders to be covering them as
6 well as the term lenders who I do represent.

7 THE COURT: Understood. Do the revolving lenders have
8 any factual clarification to provide on this issue concerning
9 the 80 boxes?

10 MR. CANTOR: Your Honor, on behalf of Bank of America,
11 this is Dan Cantor. No. We intend to go out and review the
12 boxes ourselves, but we have not done so yet.

13 We are also technically on a different time frame
14 since our subpoena was served on FBR later than the term
15 lenders was.

16 MR. FITZGERALD: And this is Steve Fitzgerald on
17 behalf of Barclays, Deutsche Bank J.P. Morgan and RBS, and we
18 also intend to coordinate with the other lenders and come up
19 with a way to know what documents are relevant.

20 THE COURT: Does anybody else have a factual
21 clarification concerning other lenders on the 80 boxes of
22 documents?

23 All right. Hearing none, let's move on to the
24 electronically stored information.

25 What is happening there, Mr. Trigoboff?

1 MR. TRIGOBOFF: Thank you, Judge Goodman.

2 The electronic data, as you may know from prior
3 hearings and papers you have seen, this is data that is stored
4 on three discreet and distinct servers.

5 Now, these were also out in Las Vegas, too. These had
6 been copied at our expense and brought here.

7 The three servers are identified for all of our
8 purposes as follows: There is a document server. There is an
9 e-mail server and there is an accounting server.

10 As you probably can imagine, given the size of this
11 project, a one billion dollar project, we are talking about an
12 immense amount of data that is being stored, if you will, in
13 these three buckets of servers.

14 A huge flow of electronic data, but here is what we
15 have done, just so that you know I guess historically what has
16 happened here.

17 Again, we copied these servers, and they have been
18 brought here.

19 Concerning the e-mail server, I will start with that
20 one first, my understanding, and I will defer to Ms. Springer
21 and to counsel, but my understanding, based on my review of
22 this, is that we were working cooperatively with the
23 plaintiff's counsel concerning the e-mail server, and by that I
24 mean we asked them, again, because of the voluminous amount of
25 data, we asked them, "Hey, listen, give us search terms or

1 inquiries that we can plug in. Give us some dates and that
2 would help us narrow the search field."

3 And I must tell you that we can get that done once
4 they worked with us on that, and I thank counsel for doing that
5 is we then have hired an independent IT company, Icon, a local
6 company.

7 We spent about \$25,000 right there trying to and, you
8 know, extracting this specific data. That job is done, and it
9 has been paid for.

10 The issue as is we haven't turned back data over as
11 yet because of again our ongoing efforts to secure privilege.

12 Again, this is really a monumental task of going
13 through page by page hundreds of thousands of pieces of paper,
14 when again, it Ms. Springer or me, and perhaps one separately
15 paid employee that has to do this.

16 Again, I can't put that into words what we are dealing
17 with here, but be that as it may, that effort at least has been
18 done with the e-mail server. Now, let me say --

19 THE COURT: Well, sir, wait, wait, wait. When you
20 say, "that effort has been done," do I take it that the
21 privilege review for the entire e-mail server has been
22 completed?

23 MR. TRIGOFF: No, it has not.

24 THE COURT: Okay. So what did you mean when you say
25 "that effort has been done?"

1 MR. TRIGOBOFF: Well, the effort has been done in that
2 we worked cooperatively with plaintiff's counsel.

3 We agreed on certain search terms, inquiries and
4 things of that nature. We then narrowed down the scope. We
5 worked with Icon, again the IT company.

6 We spent \$25,000, and we have got this dossier, if you
7 will, of information that would be responsive to the
8 plaintiff's request.

9 The concern is, Judge Goodman, again, we simply have
10 not had the time or the resources to now literally go page by
11 page.

12 We tried. We started that process, but to go page by
13 page to try and protect and insure the sanctity of privilege,
14 that's our problem, sir.

15 THE COURT: Okay. Wait. Wait. Wait. If I remember
16 correctly, the privilege issue is not necessarily your client's
17 privilege. It is privilege that you think might be held by
18 other parties?

19 MR. TRIGOBOFF: No, sir. It is our privilege as well.

20 THE COURT: Also what you are saying is every
21 potentially privileged document or information in the e-mail
22 server would also simultaneously be a privilege held by your
23 client?

24 MR. TRIGOBOFF: No. What I am suggesting, Judge
25 Goodman, is that the documents that we are most concerned about

1 and that we are focusing our attention on for purposes of
2 protection of privilege are those documents pertaining to
3 Fontainebleau, my client.

4 THE COURT: Well if I remember correctly from the last
5 hearing, and maybe I should address my question to
6 Ms. Springer, I seem to recall that this particular employee --
7 I don't have his name at the forefront of my memory right now,
8 but it is in my old notes, but we identified this particular
9 person, Ms. Springer, at the hearing, and my understanding was
10 that this employee was going to be reviewing the e-mail on the
11 server for privilege, and basically it didn't sound like it was
12 going to be an overly arduous task because I had asked some
13 specific questions about what was at issue, and it sounded like
14 there was some fairly streamlined methodology which could be
15 used in order to get this process done.

16 Is my memory mistaken?

17 MS. SPRINGER: Your Honor, this is Sara Springer.
18 When we hired Icon, the IT company to do the search terms that
19 we agreed upon, we pulled back a large number of e-mails, and
20 at that point I got the full picture of the e-mails that we
21 would have to search through for privilege purposes, and it is
22 a very large number.

23 Eric Salinger is the former SBR attorney or employee
24 who was helping with the privilege review of the hard copy
25 documents.

1 He was going to be there to assist with the electronic
2 discovery, but we just didn't get there in time before we filed
3 our motion to withdraw.

4 THE COURT: All right. So this fellow whose name you
5 just mentioned to me, that name was mentioned at our last
6 hearing?

7 MS. SPRINGER: Yes, Your Honor.

8 THE COURT: And this was the fellow who was supposed
9 to be reviewing the e-mail on servers for privilege?

10 MS. SPRINGER: He was supposed to be reviewing the
11 hard copy documents as well helping me go through those 80
12 boxes.

13 THE COURT: Yes. Right. Right. Right. I know, but
14 we are beyond the 80 boxes now, and I am focused only on the
15 electronically stored information.

16 So wasn't this fellow supposed to be going through the
17 electronically stored information in order to remove
18 potentially privileged information?

19 Wasn't that one of his tasks that we discussed at the
20 last hearing?

21 MS. SPRINGER: I believe it is better to characterize
22 it that he would be helping Icon, the IT company, figure out
23 what terms he used to pull out privileged documents.

24 You know, I don't recall the exact number of e-mails
25 that came back after we did the search terms, but to have one

1 individual go through page by page, you know, 20, 30, 40,000
2 e-mails, it just wouldn't work in the time line we were working
3 under.

4 So, yes, he was going to assist, but it would not have
5 worked for him to be the only person going page by page.

6 THE COURT: So has he, in fact, provided the
7 anticipated assistance of coming up with search terminology so
8 that Icon could put into effect whatever computer methodology
9 was necessary in order to pinpoint the potentially privileged
10 information?

11 MS. SPRINGER: He started to. However, there was more
12 than a billion dollar judgment entered against Fontainebleau in
13 New York.

14 When that happened, all effort on our part ceased
15 because we knew that Fontainebleau would not be able to pay our
16 bills, or that there was a very good chance the Fontainebleau
17 would not be able to pay our bills, and to fund the kind of
18 money we are talking about to do a privilege search could be
19 you, know, tens and tens of thousands of dollars.

20 MR. TRIGOBOFF: Unfortunately, Judge Goodman, and
21 again this Craig Trigoboff. Unfortunately, that judgment in
22 New York with the concomitant injunction that their procedure
23 provides, in essence, shut Fontainebleau down.

24 As a matter of court order, they couldn't spend any
25 more money. They couldn't do anything with their assets. Not

1 only could they not pay us, but they could not pay third-party
2 vendors such as Icon, either.

3 That is what prompted, in essence, this screech or a
4 halt, if you will, that we would not be in violation or
5 contempt or my client wouldn't be in contempt of court orders
6 in New York, given the one billion dollar judgment that was
7 entered into.

8 Of course, not only, you know, obviously we are
9 concerned about not being compensated for our efforts, but now
10 there are third-party vendors that are out there spending
11 countless hours, tens of thousands dollars of dollars, and they
12 may not get paid.

13 So, unfortunately, that was a wrench that got thrown
14 into this as well, clearly.

15 THE COURT: Well, I think I know the answer to this
16 question because I have access to the court's electronic
17 docket, but in case there was a glitch, let me ask you this
18 question:

19 Did you or Ms. Springer or anybody else on your behalf
20 or your client's behalf file a motion with the court, such as
21 you know, "Motion to be excused from complying with the order,
22 motion for extension of time, a motion to advise the court of
23 the judgment and the restraining order, motion of inability to
24 comply with order?" I think you understand the point that I am
25 getting at here.

1 MR. TRIGOBOFF: We do.

2 THE COURT: So did you all file anything like that?

3 MR. TRIGOBOFF: No. The short and sweet answer is,
4 no, we did not, Judge Goodman, and the reason we didn't, and
5 maybe the better practice, the better practice would have been
6 to file such a motion, but everyone that is on the phone here,
7 although excluding you at the moment, but all of the lawyers
8 certainly were aware of what was going on in New York, and its
9 monumental impact on all of the litigation that Fontainebleau
10 was fighting.

11 So, yes, should a motion have been filed? Perhaps in
12 addition to the motion to withdraw, speaking summarily from the
13 court, putting at least you on notice of what was going on and
14 the trouble that we were facing, the answer is, yes.

15 I don't know why that was not done, but, again, you
16 asked a pointed question, and we did not file such a motion,
17 but, again, everybody, all of the lawyers on this phone call
18 absolutely knew of the impact of that order that came out of
19 New York.

20 THE COURT: All right. Well, we will get to their
21 reaction to what they knew in a minute, but let me just get a
22 better handle on the status.

23 I take it from what you say that concerning the
24 e-mails on the e-mail server, none of that information has been
25 produced yet. Am I correct?

1 MR. TRIGOBOFF: That is correct.

2 THE COURT: Okay. And, secondly, the effort to review
3 the data on the e-mail server with the search terminology in
4 order to pinpoint potentially privileged information, that
5 process as you say has ground to a halt as a result of this
6 judgment and related restraining order?

7 MR. TRIGOBOFF: Yes, sir.

8 THE COURT: And so as we sit here today on Monday,
9 October 18th, nothing is really moving forward on the effort to
10 produce ESI, electronically stored information?

11 MR. TRIGOBOFF: Well, you know, I must try to disabuse
12 you, Judge Goodman, of a concern you may have here that nothing
13 was done because again --

14 THE COURT: No, no, no. No, sir. I am not saying
15 that nothing had been done in the past.

16 I understand that this employee had done certain
17 things. I understand that there were discussions with counsel
18 to try to come up with an acceptable search terminology.

19 I am aware of all of that, sir.

20 My question is as we sit here today what, if anything,
21 is moving forward? If the answer is nothing is happening
22 because everything has been stopped, tell me that.

23 If actually something is happening, like somebody from
24 Icon is implementing a search methodology, tell me that. What
25 is going on today?

1 MR. TRIGOBOFF: Then I will answer your question
2 straight up and straightaway, Judge Goodman.

3 With respect to the effort to produce data or
4 documents off of the servers, there is nothing presently
5 happening on that front.

6 THE COURT: Okay. And although we have been speaking
7 about only one of the three servers, namely the e-mail server,
8 what you are telling me, as a matter of fact, nothing is being
9 don't on the other two servers as well; the document server and
10 the accounting server?

11 MR. TRIGOBOFF: That is true as well, but I must tell
12 you that the plan that we had hoped to implement here with
13 respect to the servers was to be identical with respect to the
14 document server which, by the way, has over a half million
15 files on it.

16 What we were going to do was just as we had worked
17 cooperatively with plaintiff's lawyers to again give us search
18 terms and inquiries, et cetera, we were going to undertake that
19 same effort with respect to the document server, and then with
20 respect to the accounting server.

21 That was our good faith intention and plan.
22 Unfortunately, we just did not get there.

23 THE COURT: All right. And when you say that you were
24 working with counsel in order to generate a list of acceptable
25 search terms, who primarily was your contact point on the other

1 side? Was that Mr. Dillman?

2 MR. TRIGOBOFF: Yes. That would have been my
3 understanding, that Ms. Springer and Mr. Dillman were working
4 on those issues.

5 THE COURT: Okay. And when did you all reach an
6 agreement as to an acceptable search terminology, whether we
7 are talking about only the information on the e-mail server or
8 for all three servers, but either way what date can we pinpoint
9 as to the time when there was an agreement as to acceptable
10 search terminology?

11 MS. SPRINGER: Your Honor, this is Sara Springer. I
12 don't recall the exact date. If I had to guess I would say it
13 was somewhere a week after you entered your order.

14 Mr. Dillman was very, you know, helpful. He had a
15 list that he had used in the past.

16 I got in touch with Bank of America and some of the
17 other parties' counsel to see if they would consent to the
18 search terms so that many of these terms could be used globally
19 from their subpoenas in this matter, and they did agree.

20 I would say it was about a week after your order was
21 entered when you asked for me to clarify, but Your Honor should
22 know that those search terms were to be used only for the
23 e-mails. We had not come up with a plan of attack, if you
24 will, for the document search.

25 THE COURT: All right. And so in addition to finally

1 reaching an agreement concerning the search terms, did Icon
2 actually start the process of using those search terms to
3 search the e-mail server, or has that not yet started?

4 MS. SPRINGER: Yes, Your Honor. The e-mail server as
5 well as the other servers are at Icon to those experts, and
6 they used those search terms to search the entire e-mail server
7 for the \$25,000.

8 We do have a duplicate server that contains only the
9 results of that search. The issue that the other server has
10 not been searched for privilege, but, yes, Icon was retained
11 and was paid \$25,000 and did use the search terms.

12 THE COURT: Ms. Springer, I don't know whether you are
13 on the same phone with your colleague there or whether you are
14 phoning in from a separate phone or whether you are on a
15 separate speaker, but you are, at least from my perspective,
16 kind of cutting in and out, and I am having a great deal of
17 difficulty hearing all of what you are saying.

18 Are you in the same room together?

19 MR. TRIGOBOFF: She is, Your Honor. I am sorry. We
20 are kind of huddled over the same speaker phone.

21 If I may, let me just sum up, if you can hear me
22 better what Ms. Springer just said.

23 To answer your question, yes, Icon was not only
24 engaged to deal with the e-mail server, they were given all of
25 the agreed upon search terms.

1 They were given the server. They were paid \$25,000,
2 and they created a new copy, if you will, of a server that
3 contained the data that plaintiffs are seeking.

4 THE COURT: In other words, so basically
5 non-privileged e-mails on a separate server?

6 MR. TRIGOBOFF: Actually, it is all e-mails. That is
7 the problem. We have not yet had the opportunity to now go
8 through that new disk or that new server, if you will, and pull
9 out what we believe might be privileged.

10 THE COURT: All right. Wait. Wait. Wait. Let me
11 just make sure that I understand this.

12 Icon was paid \$25,000. In exchange for that \$25,000,
13 they have pulled out responsive e-mails and have put them on a
14 separate server. Do I have that right?

15 MR. TRIGOBOFF: Yes, sir.

16 THE COURT: Okay. So we have a separate server, and
17 on that server are, let's just use a technical term, "a bunch
18 of e-mails," but that server with all of those e-mails need to
19 be reviewed for privilege using the search terms, but that
20 process, searching the separate server with e-mails, that has
21 not yet been started; is that correct?

22 MR. TRIGOBOFF: That is correct, sir.

23 THE COURT: All right. And what you are saying to me
24 is, "we were going to do that, but then financial reality hit
25 and those efforts and all efforts have stopped?"

1 MR. TRIGOBOFF: Yes, sir.

2 THE COURT: Okay. Mr. Dillman, do you have anything
3 to add to this factual scenario concerning the e-mail server?

4 MR. DILLMAN: I have two discreet points.

5 One, we were told by Ms. Springer, after Icon did
6 their search, that the universe of responsive e-mails, which
7 would include privileged e-mails, was 16,000.

8 I heard hundreds of thousands of pages a moment ago.
9 That is not the information that we were provided.

10 16,000 e-mails, while nothing is in this courthouse,
11 not even a bunch, that's not a lot of e-mails. It is easily,
12 easily searched through electronic terms by using the names of
13 the attorneys who worked for Fontainebleau and put in search
14 terms like "attorney-client privilege." Those kind of things.

15 They will extract, in very short order, the subset of
16 potentially privileged documents, and it is only that subset
17 that typically people search as opposed to going through every
18 document and looking at every page, but even if one were to
19 look at every page of 16,000 e-mails, that's not a herculean
20 task.

21 Now, let me move to my second clarification or my
22 second point here --

23 THE COURT: Mr. Dillman, just speak up a little
24 louder, if you don't mind, sir.

25 MR. DILLMAN: I am sorry. I have got you on headset

1 to avoid the speaker problem, and apparently my headset is not
2 working right.

3 THE COURT: No, no. It is fine. If you would just a
4 speak a tad louder. I think your last comment was good.

5 MR. DILLMAN: Your Honor, my second point is that
6 while none of us on this phone, from the various lenders
7 perspective, and there are both plaintiffs and defendants, by
8 the way. We have been sort of grouped as plaintiffs, term
9 lenders are plaintiffs here and the revolving lenders are
10 defendants, and we interestingly find ourselves on the same
11 side of this particular issue, but none of us on this phone is
12 interested in having brother and sister counsel do work where
13 they are not getting paid.

14 You know, there but for the grace of God. On the
15 other hand, when I hear the rational or the supporting facts
16 for why counsel is concerned that they are not going to get
17 paid, I must take a little issue here. No. I must take a lot
18 of issue.

19 The T.R.O. that was the source of the original concern
20 by Ms. Springer was addressed shortly after they filed their
21 motion to withdraw, and I advised Ms. Springer, as I pointed
22 out on in my papers, that we had information that that T.R.O.
23 was going to be dissolved.

24 It was, in fact, dissolved a matter of days after they
25 filed their motion, and I asked, "Have we now gotten over this

1 hump?" The answer was, "No. We are going forward with our
2 motion to withdraw."

3 There was no and has not yet been any explanation, any
4 evidence that says what the financial condition of the
5 Fontainebleau is. We have reason to believe that it is not
6 quite as a pauper as it has been represented, but one way or
7 the other, the judgment that we keep hearing about, that case
8 has been settled.

9 So whatever the original reason for bringing this
10 motion, and whatever the reason for opposing the motion for
11 sanctions based upon that, the New York court's judgment, that
12 has dissolved. That has gone away.

13 So with those two points, Your Honor, I don't have any
14 further clarification.

15 THE COURT: All right. Do any of the other lenders
16 counsel have any additional factual background to provide on
17 this specific issue?

18 MR. FITZGERALD: I have one point, Judge.

19 THE COURT: And "I" is who?

20 MR. FITZGERALD: This is Steve Fitzgerald for
21 Barclays, Deutsche Bank, J.P. Morgan and RBS.

22 One minor point. I can fix a date that search terms
23 were agreed to. That was September 14th, but I do want to
24 clarify because I think there is the impression that there has
25 been a long negotiation on that subject.

1 In June I asked counsel for Fontainebleau Resorts to
2 discuss search terms or other means for streamlining production
3 issues, and I was not given that opportunity, and I advised
4 them that there was a list that the parties had agreed to so it
5 would be pretty easy to get to a final list, and I just wanted
6 to flag that issue for you.

7 THE COURT: All right. Fair enough. Well, let's get
8 back to the nuts and bolts of production.

9 First, concerning the information on the e-mail
10 server, Ms. Springer, how long do you anticipate it will take
11 for Icon to implement the search methodology concerning these
12 16,000 e-mails of which I don't mind telling you, as
13 Mr. Dillman noted in the scheme of things is not an
14 unreasonably large amount of e-mails to be searched by a
15 company that specializes in electronic discovery.

16 So how long, assuming that the process resumes and
17 that the monkey wrench is somehow removed, how long is it going
18 to take to complete that privilege review?

19 MR. TRIGOBOFF: May I answer that, Judge Goodman?
20 This is Craig Trigoboff.

21 THE COURT: Sure.

22 MR. TRIGOBOFF: Thank you. The short answer is we
23 don't know because we have not looked into this, but if that is
24 where the court wants to go, then whatever cost and expense
25 going forward associated with that, respectfully, must be borne

1 by the requesting parties.

2 I think that is more than appropriate, given what we
3 are dealing with here.

4 So, to answer your question, we don't know how long.
5 We can inquire and report back to the court promptly, but if
6 there is going to be effort and cost to be borne there, then
7 the requesting parties are going to have to bear that freight.

8 THE COURT: All right. Well, I am going to actually
9 ask my next question to Ms. Springer because I think by your
10 own terms, sir, she was a little bit more in the trenches than
11 you.

12 So I am going to ask somebody who was in the trenches.
13 So do I understand, Ms. Springer, that you have never asked
14 Icon how long it would take to run the search of the 16,000
15 e-mails?

16 MS. SPRINGER: No, Your Honor. When that billion
17 dollar judgment was entered, they were half way through the
18 process of using the various search terms.

19 When that happened, I advised them to stop all work,
20 but by the time I reached them, they had completed that
21 process.

22 So when they heard me say to stop all work, the
23 client's, just having financial issues, they returned the
24 server to me.

25 We didn't inquire or use up anymore of their time to

1 ask about, "Well, how long will this take?"

2 Based on my experience with the search terms, I don't
3 think it will take that long and lengthen necessarily the cost
4 factor here.

5 It is still very expensive, regardless of, you know,
6 the fact that it may only take them a half a day once we decide
7 on the search terms privilege review process.

8 THE COURT: Right. Right. Right. So let me make
9 sure that I understand based on what you have just told me.

10 The server that Icon had been searching for privilege
11 among the e-mails has been returned to your law firm, and Icon
12 no longer has it in its possession in order to finalize the
13 privilege search. Do I have that right?

14 MS. SPRINGER: Your Honor, Icon returned the server to
15 us, yes, but I don't want Your Honor to think that any sort of
16 privileged review process was started.

17 We used the search terms on the entire e-mail server.
18 What we got was kind of a net as if we had cast out with those
19 search terms on the e-mails. Those e-mails which we have on a
20 separate smaller server has not been searched at all for
21 privilege.

22 THE COURT: I have to confess to you I am thoroughly
23 confused based on what you have told me because I thought I
24 just heard you say that Icon was half way through the process
25 of using the search terms.

1 In other words, running a search for privilege at the
2 point that they were told to shut down. Now you are telling me
3 that they didn't even start the process of the search. So
4 which is it?

5 MS. SPRINGER: Your Honor, I am sorry if I was
6 unclear. The only thing Icon did was use the search terms
7 provided by counsel just to get responsive documents.

8 Icon was about half way through the process when the
9 judgment was entered. I told them to stop, but they had
10 already finished.

11 So what I got back and what they did is that they
12 searched the e-mail server for responsive documents. There
13 never was a privilege review started or completed. I am sorry
14 if I was unclear.

15 THE COURT: All right. So we are actually even more
16 behind the 8-ball than I thought, which is even if the process
17 was going to resume today, they could not really do a privilege
18 review with the names of the lawyers and the law firms,
19 et cetera, because they have not yet even completed the process
20 of searching all of the e-mails on the server in order to
21 locate responsive e-mails. Do I have that right?

22 MR. TRIGOBOFF: Judge Goodman, this is Craig
23 Trigoboff. Sir, you don't.

24 THE COURT: I don't have it right?

25 MR. TRIGOBOFF: I am sorry. You have it partially

1 right, and I am sorry that this is confusing, but again, let me
2 see if I can sum this up.

3 THE COURT: Well, sir, I am really asking Ms. Springer
4 to finish up because, as I understand it, she is really in the
5 trenches, or she is the one dealing with Icon.

6 She is the one dealing with opposing counsel. So
7 unless you have some special unique factual information that is
8 unavailable to her, for the time being I am going to have her
9 explain what is going on. So please continue, Ms. Springer.

10 MS. SPRINGER: Your Honor, the bottom line is the
11 search for responsive documents has been finished. The
12 privilege review search has not been started.

13 THE COURT: So what did you say to me a minute ago
14 about it was half through the process? What was half way
15 through?

16 MS. SPRINGER: When the judgment was entered, then I
17 e-mailed Icon to stop all work. I thought they were about half
18 way through. When they got back to me they said, "No. We are
19 done. Here is your \$25,000 bill."

20 So the search for responsive documents is finished. I
21 have a copy of that server with all of the responsive documents
22 on it. However, the privilege review process has not been
23 started.

24 THE COURT: Okay. So I should ignore the term "half
25 way" because that refers to something previously?

1 MS. SPRINGER: Yes, Your Honor. I apologize.

2 THE COURT: Okay. So as we speak here today on the
3 category of the e-mail servers, we have a separate server
4 containing responsive e-mails ready for a privileged search to
5 be conducted whenever that is going to happen, correct?

6 MS. SPRINGER: Yes, Your Honor. Yes.

7 THE COURT: Okay. All right. And you don't know how
8 long that privilege review will take?

9 MS. SPRINGER: No, Your Honor.

10 THE COURT: And how much is it going to cost?

11 MS. SPRINGER: I have no idea because that's based on
12 a number of factors. If it was search terms that was used, you
13 know, the length of your search term is based primarily or
14 determines the cost. So I don't know.

15 THE COURT: Well, is it conceivable in terms of the
16 time factor?

17 In other words, we have two factors here, time and
18 cost. Focusing on the time, is it conceivable that it could
19 take as little as a day to have Icon run the search methodology
20 in order to pinpoint privileged documents?

21 MS. SPRINGER: Yes, Your Honor. Once the list is
22 drafted, when it is decided on and they get the server,
23 certainly I believe, I have to believe that it would take less
24 than a day. However there is a problem.

25 THE COURT: Go ahead.

1 MS. SPRINGER: There is a process involved with coming
2 up with the search terms because we do have to, you know, you
3 can be as thorough as you want and then the cost increases.

4 So the longer your list of search terms is the more it
5 is going to cost you and the more it is going to pull back, but
6 the more thorough you are going to be.

7 THE COURT: But I thought -- please correct me if I am
8 wrong. I thought I heard you say, and counsel agreed that
9 there was an agreement as to search terms as of September 14th.

10 Mr. Fitzgerald gave me the date of September 14th. I
11 didn't hear anybody disagree with him.

12 So hasn't there already been an agreement as to what
13 search terms will be used on this new separate e-mail server?

14 MS. SPRINGER: No, Your Honor. The list that was
15 given to us in September was only to get back responsive
16 documents. There was never a list agreed upon by counsel for
17 any of the other parties regarding privilege review.

18 THE COURT: What about that, Mr. Fitzgerald?

19 MR. FITZGERALD: Yes, Your Honor. I agree with that.

20 THE COURT: Okay. Mr. Dillman?

21 MR. DILLMAN: Yes, Your Honor.

22 THE COURT: Do you have any factual objections or
23 clarification to what Ms. Springer just said, that we are
24 talking about two separate search term lists, one for
25 responsive documents and one for privilege?

1 MR. DILLMAN: I would imagine that would be the case.
2 Certainly we haven't been involved in any way of trying to
3 determine their privilege search.

4 That would be something done, you know, in the normal
5 course. The party producing the documents, you know, they
6 would know who their attorneys were and they would conduct
7 those searches without input from the requesting party.

8 THE COURT: I would think so.

9 Ms. Springer, in terms of coming up with a list of
10 search terms to be used on the separate e-mail server to locate
11 privileged information, do you expect these other lawyers to
12 give you the names of your own client's lawyers, or is this a
13 list that you are going to be coming up with on your own?

14 MS. SPRINGER: No, Your Honor, I would not expect them
15 to come up with a list. However, our work stopped when that
16 judgment was entered.

17 THE COURT: I understand. I understand, but when I
18 hear you use the term "agreement," you said we haven't reached
19 an agreement yet on the search terminology, there really does
20 not need to be an agreement.

21 In fact, counsel may not even know the list or the
22 names of the lawyers or law firms on the list that you decide
23 to run, right?

24 MS. SPRINGER: Your Honor, the idea, the process would
25 have been that I would have come up with the proposed search

1 terms for privilege.

2 However, these other attorneys are much more
3 experienced in this litigation. They know the players. So
4 certainly at some point I would have ran that list by them to
5 see what their input was, but the starting point would have
6 been on my end.

7 THE COURT: Have you started the list yet?

8 MS. SPRINGER: No, Your Honor.

9 THE COURT: How long do you think it will take you to
10 come up with at least a draft list to circulate to these other
11 lawyers?

12 MS. SPRINGER: A day, if that. I mean, I could
13 probably do it before the end of the day.

14 THE COURT: All right. Then as we move onto the other
15 two servers, do we each -- I mean, do we also then need two
16 separate search lists for each server?

17 In other words, one list for locating responsive
18 documents on each of the two servers, and then a separate list
19 to locate privileged documents once the responsive e-mails have
20 been found, or can we use the same two search lists which will
21 be used or have been partially been used for the e-mail server?

22 MS. SPRINGER: I do not believe so, Your Honor.

23 Obviously, I would have to discuss this with the people who
24 issued the subpoenas.

25 Certainly with respect to the accounting server, the

1 same search terms would not work because we need it with the
2 accounting server with the list of reports that they wanted
3 run.

4 It is just not only the books. It doesn't do you any
5 good to just open it up and look at it. We needed counsel for
6 plaintiff and the defendants in this matter to come up with a
7 list of financial reports that they wanted us to run.

8 I know the list would not work for the accounting
9 server. For the document server, I do not think the list would
10 work, either, because if you think of, you know, the files
11 saved on your desk top on your computer searching for names and
12 the that list we came up with on the e-mail server would just
13 not work as well.

14 So I certainly believe we would have had to complete
15 that list or come up with a new plan of attack for the document
16 server.

17 THE COURT: And if things had worked out and your law
18 firm had not filed a motion to withdraw and things had not come
19 to a screeching halt, who was going to assume the
20 responsibility for putting together at least the initial search
21 term lists for the accounting server and the document server?

22 MS. SPRINGER: I had, before this came to a screeching
23 halt, I had asked or informed counsel for term lenders, the
24 defendants, that I needed a list of reports drawn on the
25 accounting server. That list was never produced to me.

1 However, through no fault, it was not their fault that
2 that happened. The way we were kind of all working on this was
3 one server at a time.

4 Once we got to e-mail server done, we were going to
5 move on and figure out a plan of attack for the document
6 server, and then move on to the accounting server.

7 So the accounting server list, that would have come
8 from them because they need to figure out what they wanted from
9 us.

10 The document server, that would have been yet another
11 cooperative effort between myself and the subpoenas issued.

12 THE COURT: All right. Mr. Dillman, Mr. Fitzgerald,
13 any factual clarification to advise the court concerning the
14 notion that this was going to be a server by server process and
15 that you all had not really gotten to the point of dealing with
16 a list for the accounting server and the document server?

17 MR. DILLMAN: Your Honor, Kirk Dillman. With respect
18 to the accounting server, counsel is absolutely correct.

19 The burden was going to be on us either to identify
20 those reports that we wanted to run, but you know, the server
21 is nothing but a big data base that you have to Que it as to
22 what you want it to tell you to spit out, and that was on and
23 is on our plate.

24 We certainly had not gotten there yet because we had
25 not gotten to the e-mail server, but as to the document server,

1 it was my understanding that the ball was in the plaintiffs --
2 excuse me -- in the Resorts court to tell us what that server
3 looked like.

4 If they were having problems applying the terms that
5 we had agreed to, then it was their burden to come back to us
6 and let us know what problems they were having and how we could
7 help solve those. That dialogue never occurred.

8 THE COURT: All right.

9 MR. DILLMAN: Other than that, I think counsel was
10 correct in general.

11 THE COURT: Mr. Trigoboff, what about the second point
12 that Mr. Dillman mentioned?

13 He had a list of two points, and the second point was,
14 well, the temporary restraining order, which was the purported
15 basis for the motion to withdraw has now been dissolved, but,
16 nevertheless, you folks are moving forward on the motion to
17 withdraw. Number 1, has the T.R.O, in fact, been dissolved?

18 MR. TRIGOBOFF: Yes, it has, Your Honor, but what is
19 important and what Mr. Dillman didn't tell you is the one
20 billion dollar judgment entered against my client has not been
21 dissolved or satisfied or discharged.

22 That has crippled, as you can expect, my client's
23 operations, such that they had to, and they have since had to
24 restructure their operations.

25 The intellectual property has been sold. Mr. Sopher,

1 who is I guess the principal owner, now owns only about one
2 percent of the hotel.

3 There has been a totally divestiture of equity and
4 dissipation of equity. So, yes, while the injunction that had
5 been entered is no longer in force and effect, the weight, the
6 crushing weight of a one bill dollar judgment has already taken
7 its toll on my client and clearly its ability to pay its
8 lawyers and other third-parties going forward.

9 You know, I must tell you, and I appreciate what
10 counsel said about brothers and sisters and all of that.

11 THE COURT: Who is speaking, please?

12 MR. TRIGOBOFF: This is Mr. Trigoboff.

13 THE COURT: Okay. Go ahead.

14 MR. TRIGOBOFF: Thank you. With all due respect to
15 counsel, I have not had the pleasure of working with them.

16 These are all sophisticated lawyers, but the truth of
17 the matter is I have been practicing down here in this
18 district, Judge Goodman, for 20 years.

19 I am AD rated. I have practiced in this court and in
20 state and federal courts throughout the State of Florida.

21 I have never opposed any lawyer's motion to withdraw
22 for any reason. And in my 20 years of practice, as AD rated
23 trial lawyer, I have never been the target of opposition.

24 So when we speak of the brothers and sisters and
25 motions to withdraw, I find it a little disingenuous that we

1 would really have to even waste the court's time with this.

2 Now, I understand the court at the end of the day your
3 problem is still different, and perhaps bigger than mine
4 because this case still has to be reached on the merits and
5 discovery has to take place, and these problems have to be
6 solved, and I have a pretty good of where I think you are going
7 here, I think, but at the end of the day, I would still ask,
8 given the totality of the circumstances here, which have been
9 set forth in a well-written motion, in accordance with the
10 rules, that my firm be allowed, be permitted to withdraw from
11 representing this third-party, this non-party to this action.

12 I hope that answers at least Mr. Dillman's point
13 number 2 of his presentation.

14 THE COURT: Well, here is the major dilemma, and I
15 think you have sort of already flagged the issue, which is you
16 were absolutely right, motions to withdraw are routinely
17 granted.

18 They are rarely if ever opposed. Every once in a
19 while a client may oppose a motion to withdraw, but it is very
20 rare. You are absolutely right for the opposing counsel to
21 object to a motion to withdraw, in the absence of extraordinary
22 circumstances and in the absence of a potential prejudice, but
23 here is what I see as a problem from a practical perspective.

24 Let's assume I grant the motion to withdraw, and I
25 say, "Okay, your client has 30 days to get new counsel."

1 So, in the meantime, 30 days go by. There is no
2 forward movement on the production of information on this
3 separate e-mail server, nor on the other two servers.

4 So the discovery is, in effect, frozen.

5 Opposing counsel really, as a practical matter, don't
6 want to take depositions without having this information
7 available, so the rest of the discovery process has been ground
8 to a halt.

9 Then if your client is able to get new counsel, which,
10 by the way, I don't know if they are going to be able to do
11 that because whatever financial difficulties they have,
12 presumably they will have with new counsel as well, but let's
13 assume somehow they make the necessary arrangements and a new
14 law firm appears 30 days from now, what do you think is going
15 to happen?

16 Well, what I think is going to happen is that the new
17 law firm is going to say, "Judge, we are brand new to this
18 case. There is a big learning curve here. We need, gosh,
19 another two months to figure out what is going on. We haven't
20 been dealing with all of these discovery issues.

21 We cannot transplant Ms. Springer's brain and
22 knowledge and familiarity with the case. Give us two months
23 just to figure out where we are."

24 So then discovery will be put on hold for two more
25 months.

1 In the meantime, these folks have been waiting since
2 April for the discovery. So the motion to withdraw, which on
3 its face seems relatively routine, there are some other
4 practical consequences.

5 You know, I note in the motion to withdraw docket
6 entry 144, in Paragraph 3, your firm says, "There will be no
7 prejudice to any of the parties if the firm is allowed to
8 withdraw as counsel for the third-parties."

9 So Mr. Dillman, Mr. Fitzgerald, anybody else, do you
10 agree with Ms. Springer's representation that there will be no
11 prejudice to your parties?

12 MR. DILLMAN: Your Honor, Kirk Dillman. For all of
13 the reasons that Your Honor just articulated, we don't agree.

14 We have been waiting now 6 months. We have been
15 waiting for documents.

16 We have been waiting now a month since the Court
17 ordered that they be produced, and we have very little head way
18 to show for it. We didn't oppose the motion to withdraw.

19 What we opposed was a withdrawal of counsel that would
20 result in further delays. If they have other counsel that can
21 step in and get the job done in the next week or two, so be it.

22 THE COURT: Right.

23 MR. DILLMAN: That would be wonderful. We would like
24 that.

25 THE COURT: Right. Right. Right.

1 MR. DILLMAN: Our concern is exactly what the Court
2 articulated. 90 days from now we are not going to have the
3 documents and we are going to be back in a similar hearing to
4 this with perhaps a new set of, but, you know, eerily
5 reminiscent of claims about why the documents cannot be
6 produced.

7 THE COURT: Right. So, Mr. Trigoboff, let me ask you
8 this, because I am sensitive to your firm's situation, and I am
9 sure it is not comfortable, and so I do feel for you, but as a
10 practical matter, tell me your practical suggestion of how I
11 can grant your motion to withdraw without unduly prejudicing
12 these folks who have been waiting a long time for discovery and
13 who are anxious to move forward with depositions, but who need
14 this material in order to do so.

15 So tell me how you would like me to fashion relief
16 which will simultaneously grant your motion to withdraw, but
17 not unduly prejudice these other folks?

18 MR. TRIGOBOFF: Well, I mean I am struggling with
19 that, Judge Goodman, but I must tell you that if these folks
20 want this done and, you know, I am hearing Mr. Dillman speak
21 about very little head way.

22 I find that to be a little disingenuous, given the 80
23 boxes of documents and the production to date and the server
24 work that has been done, and these folks, by the way, let's not
25 lose sight of the prize here.

1 These are all big banks that are litigating here.
2 They are paying their lawyers to do their work. If they want
3 us in the game because they view us at least, and I think you,
4 Judge Goodman, view us and view Ms. Springer as being involved
5 and knowledgeable and having arms around these documents and
6 these issues and having accountability to this court, then I
7 will tell you what:

8 Be careful, plaintiffs and defendants, what you wish
9 for. If you don't want us out, then keep us in, but you will
10 pay the freight.

11 My recommendation, Judge Goodman, is deny my motion to
12 withdraw, but require these requesting parties to pay my law
13 firm a reasonable hourly rate and all costs associated with
14 this effort.

15 This way everybody is protected, because at the
16 moment, Judge Goodman, I have got to tell you the only party
17 here who is really prejudiced is me.

18 It is my law firm representing a non-party. These
19 guys, I haven't heard one thing about us going to trial or this
20 case is going to trial in 60 days or 90 days. Nothing like
21 that. That's real legal prejudice.

22 The fact that a party may have to wait 45, 60 or 90
23 days for discovery, we deal with that, unfortunately, all of
24 the time. Sometimes that's just a built-in vagary of our
25 system. It is not intentional vagary, but it is a byproduct of

1 complex litigation, but if they want this done and they are
2 driving as they are driving, then do you know something?

3 They can pay the freight. You can deny my motion to
4 withdraw. We will submit our fee schedule in connection with
5 this effort, and we will just move forward until such time as
6 we have to revisit it with the court.

7 THE COURT: Well, that's certainly shall we say a
8 novel suggestion. Do you have any other suggestions besides
9 that?

10 MR. TRIGOFF: I mean, I guess I could say, "Judge,
11 keep us in the case for 30 more days. Obviously the hard
12 copies, we know that issue has already been dealt with. That
13 is sort of resolved.

14 The issue that at least as close to being resolved is,
15 which one is it, Debbie? The e-mail server which you heard
16 Ms. Springer.

17 I think this process can start up today. Again, my
18 feeling is that these folks should pay the freight for whatever
19 fees and costs that are associated with at least finishing that
20 discreet task; that being the e-mail server production and the
21 privilege issue, and then I would submit to the court,
22 respectfully, you should grant our motion to withdraw because
23 then clearly we have worked in good faith to at least get the
24 hard copy documents and at least 33 percent of the electronic
25 data so that these folks really cannot say, "Yeah, we are

1 prejudiced. Yeah, we haven't gotten anything. Yeah, we
2 haven't seen paper one."

3 So that would be my second proposal. Give us 30 days
4 to finish this task. Assuming we do it to the satisfaction of
5 the court, then you grant our motion to withdraw, but again any
6 fees or costs associated with finishing this task I would
7 submit should be borne by the requesting parties.

8 THE COURT: And so when you are using the term,
9 Mr. Trigoboff, "These folks should pay my firm's invoices," who
10 do you mean specifically by "these folks?" Which parties?

11 MR. TRIGOBOFF: The parties that have caused the
12 subpoenas to be issued on my client to do this work.

13 THE COURT: All right. Mr. Dillman, just I would just
14 like to have it on the record. What is your position on
15 Mr. Trigoboff's suggestion that your clients pay his firm's
16 legal fees and costs so that they can stay in the case for 30
17 more days and help this process get completed?

18 MR. DILLMAN: It may surprise the court, but I am not
19 really fully on board with that idea.

20 THE COURT: Okay.

21 MR. CANTOR: Your Honor, this is Dave Cantor on behalf
22 of Bank of America. If I could just add a note here,
23 Fontainebleau's papers on this motion are, in my view, a bit
24 vague on this, you know, now key issue, and I, too, regret that
25 I am forced to debate whether a law firm should be allowed to

1 withdraw for a lack of payment.

2 I would hate to be in their position, but there has
3 been no evidence submitted to the court that, in fact, bills
4 have been submitted and are not paid; that there has been a
5 statement by Fontainebleau to the law firm that they are not
6 going to be paid.

7 All we have heard is that because the judgment is
8 really big that they have got no present ability to pay, and
9 that's a big difference.

10 MR. DILLMAN: If I might, Your Honor, to supplement
11 Mr. Cantor's because the statement was made by Mr. Trigoboff
12 that there was this judgment out there.

13 Let me reiterate. That case has been settled, and so
14 whatever the issues may have been, they no longer are. So I
15 just want to make sure that that is clear.

16 THE COURT: Let me make sure that I am clear. The
17 case which led to the one billion dollar judgment, that case
18 has already been settled?

19 MR. DILLMAN: That was settled at the same time as the
20 T.R.O. was dissolved.

21 THE COURT: All right. So is there still a judgment
22 outstanding or has it been satisfied or has there been some
23 other resolution?

24 MR. DILLMAN: What Fontainebleau Resorts has done with
25 that document or that judgment, Your Honor, I am afraid is a

1 matter of confidential agreement.

2 That was confidential at Fontainebleau Resort's
3 request. I cannot disclose that information to the court.
4 Certainly Mr. Trigoboff could as he represents that counsel,
5 and I invite him to if he want to continue on the road of an
6 extant one billion dollar judgment.

7 THE COURT: All right. Well, I am not going to ask
8 him to do that at this point.

9 All right. And I take it that on the motion for
10 sanctions, the moving parties are standing by their request
11 that the Fontainebleau be required to simply turn over the
12 three servers and then you will do what you need to do?

13 MR. DILLMAN: Your Honor, we have given a number of
14 possibilities in terms of the requested relief, or at least we
15 are prepared to.

16 One would be to have them do their job and do it by
17 week's end and get us the materials. It does not take the kind
18 of time consuming, or they are not left with certain time
19 consuming events that require them to go much past that.

20 THE COURT: All right.

21 MR. DILLMAN: But certainly given the history here, we
22 have no confidence, given Mr. Trigoboff's statements, we have
23 no confidence that that will occur.

24 Then, yes, we are left with give us the server. We
25 will go about it, and, by the way, we would ask that the

1 Fontainebleau Resorts pay the costs of the independent people
2 who will be required to search those servers in the way that
3 they should have.

4 THE COURT: Right. Right. Right. And I was
5 listening to Mr. Trigoboff's statement that really there was no
6 legal prejudice.

7 There is basically just, well, maybe this will put
8 things off 30 days or 45 days, and that is not really legal
9 prejudice, and I think I heard him make a comment about no one
10 talked about a trial date or trial prejudice or that sort of
11 thing, and I seem to recall that Judge Gold has, in fact,
12 entered a trial scheduling order in this case. Am I correct?

13 MR. DILLMAN: Your Honor, I chose not to address those
14 remarks by Mr. Trigoboff because I gave him the benefit of the
15 doubt that he was not at the last hearing when all of these
16 matters were discussed, but, yes, there is a trial date that
17 has been set.

18 There is a discovery cut-off date that has been set.
19 The commencement of depositions has already passed the date for
20 commencing depositions.

21 The parties are at a standstill until they get these
22 documents, and every day that goes by we are butting up further
23 and further to a discovery cut-off that none of the plaintiffs
24 are prepared to move.

25 The judge has indicated he is not prepared to move,

1 and let's step back for a minute. This is a multi-district
2 litigation.

3 This a series of cases, and the Fontainebleau Resorts
4 is the parent of one of the plaintiffs in this multi-district
5 litigation.

6 THE COURT: Right.

7 MR. DILLMAN: So we find it extremely frustrating that
8 our trial date and our discovery cut-off date is being
9 threatened because the parent of a party to this cannot seem to
10 get their act together to get us the documents.

11 THE COURT: Right.

12 MR. TRIGOBOFF: Judge, may I ask a question?

13 THE COURT: Wait. Wait. Wait. Wait one second.
14 What is the trial date?

15 MR. DILLMAN: Your Honor, I believe it is January of
16 2012. I could be off by a week or two.

17 The discovery cut-off is April of 2011, and I think
18 the parties anticipate many, many, many depositions in this
19 case and are just sort of waiting at the starter's gate for the
20 pistol to go off, which is Fontainebleau Resorts and the
21 Fontainebleau Las Vegas documents.

22 The trustee is on the phone. Your Honor may recall
23 that Fontainebleau Las Vegas is also awaiting the outcome of
24 this because their documents are on the server.

25 They have waived the attorney-client privilege. They

1 are prepared to produce the entire servers. They just don't
2 want to be in the position where Fontainebleau Resorts throws
3 rocks at them for having produced documents which Fontainebleau
4 Resorts claims are privileged.

5 So we have a number of parties that the trustee, not
6 the least of whom have very patiently waited for the
7 Fontainebleau Resorts to get its job done.

8 THE COURT: Right. Mr. Trigoboff, I think I cut you
9 off. You wanted to say something?

10 MR. TRIGOBOFF: I did, Your Honor. You actually asked
11 the question that I was going to ask, and I didn't mean to
12 suggest that the case was not set for trial.

13 My comment was that I didn't hear anything about a
14 trial date causing a problem here.

15 THE COURT: I understand. I understand exactly what
16 you said, and that's why I asked when the trial date was, and I
17 think I accurately paraphrased you when I said your point was I
18 didn't hear anybody raise a trial conflict issue or a trial
19 delay issue.

20 MR. TRIGOBOFF: Yes, sir.

21 THE COURT: Yes. So I am aware of what you said and
22 did not say.

23 All right. Ms. Springer, what other point, which is
24 are there any issues, factual or legal, that you wanted to
25 bring to my attention at the hearing today which you had put in

1 whatever response, memo you submitted which, as I indicated I
2 haven't read and my law clerks haven't read for the reasons
3 outlined?

4 So is there anything that you think was in that unread
5 response which we would need to know about in order to get a
6 better handle on either the motion to withdraw or the motion
7 for sanctions?

8 MS. SPRINGER: I would say that the relief, or I would
9 bring the court's attention to the relief that they are
10 requesting. We spoke to these attorneys who are bringing these
11 motions.

12 We paid for the cost of whatever they may be of
13 running the search terms that come up with the document server
14 and whatever reports they come up with for the accounting
15 server.

16 However, that is so open-ended that that could wind up
17 being an enormous sanction; I mean beyond tens of thousands of
18 dollars. If we take a look at the e-mail server example, that
19 is \$25,000. There is extreme prejudice to this one non-party
20 to this litigation. That's all.

21 THE COURT: All right. Well, we have spent a lot more
22 time this morning on this hearing than I anticipated.

23 So before we adjourn, do any of the lawyers have any
24 additional points that they would like to call to our
25 attention?

1 MR. DILLMAN: Your Honor, Kirk Dillman on behalf of
2 the term lenders. I have nothing further. Thank you.

3 MR. TRIGOBOFF: This is Craig Trigoboff. I don't have
4 anything further to add. Thank you, Judge.

5 THE COURT: All right. Well, hearing no additional
6 comments, we will review all of the information we have
7 received this morning, as well as what has been in the properly
8 filed papers, and we will get out a written order in short
9 order.

10 I thank you for your time, and the folks on the West
11 Coast, thanks for waking up early. I will try not to schedule
12 future hearings in this case at a time which will require you
13 to get up at some crazy hour.

14 So thanks for getting up to participate in this
15 hearing. We will be in recess. Thank you.

16 MR. DILLMAN: Thank you.

17 MR. TRIGOBOFF: Thank you, Judge.

18 (Whereupon the proceedings were concluded).
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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

DECEMBER 7, 2010

S/JERALD M. MEYERS

DATE

JERALD M. MEYERS, RPR-CM



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12/17/2010 12:36 PM

To appealtranscripts@flsd.uscourts.gov,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 09-Civ-MD-02106-ASG

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LIGITATION

CASPIAN ALPHA LONG CREDIT FUND, L.P.,
ET AL,

Plaintiffs,

MIAMI, FLORIDA
AUGUST 30, 2010

TRANSCRIPT OF TELEPHONIC HEARING ON MOTION TO COMPEL
PRODUCTION OF DOCUMENTS IN RESPONSE TO SUBPOENA DE# (123)
BEFORE THE HONORABLE JONATHAN GOODMAN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Call to order of the Court)

2 THE CLERK: The U.S. District Court for the Southern
3 District of Florida is now in session; the Honorable Jonathan
4 Goodman presiding.

5 We are here for case number 09-2106
6 Multi-District-Gold, Fontainebleau Las Vegas Contract
7 Litigation.

8 THE COURT: Good afternoon. Can you folks hear me?

9 MR. DILLMAN: Yes, Your Honor, we can.

10 THE COURT: Okay. I understand we have a bunch of
11 lawyers on the phone, but do we have a sense for which of the
12 lawyers are most likely going to be doing most of the talking?

13 MR. DILLMAN: Your Honor, This is Kirk Dillman for the
14 Avenue CLO plaintiffs, one of the parties that brought this
15 motion.

16 Myself and perhaps Mr. Nachtwey on behalf of the
17 Arelius plaintiffs will be presenting for the moving parties.

18 I must admit I may not have listened very carefully to
19 the roll call that was made, but I don't recall hearing a
20 lawyer from a representative of Fontainebleau Resorts who is
21 the responding party.

22 THE COURT: Well, that would certainly make this a
23 rather inefficient hearing.

24 Is there anybody here on behalf of Fontainebleau
25 Resorts, LLC, otherwise known as FBR?

1 MR. DILLMAN: I listened as carefully as I needed to,
2 I guess.

3 THE COURT: Yes. We were looking for somebody. I
4 think I was actually expecting Sarah Springer.

5 MR. DILLMAN: I was, too, Your Honor.

6 THE COURT: All right. Well, why don't we put you all
7 on hold, if we have the ability to.

8 I am going to check with my courtroom Deputy,
9 Santorufo and see if we can't do that.

10 In the meantime, we are going to give Ms. Springer a
11 call and find out what is happening. So if you all will just
12 bear with us. I regret any inconvenience, and we will be back
13 to you just as soon as we figure out what is happening.

14 MR. DILLMAN: Thank you.

15 THE COURT: Thank you.

16 [There was a short recess].

17 THE CLERK: Yes. Okay. Why don't you put me back on
18 the speaker phone. This is Jonathan Goodman. Do we still have
19 the folks on the phone for the hearing?

20 MR. DILLMAN: Yes, Your Honor.

21 THE COURT: All right. Well, thank you for being so
22 patient and waiting. We have found out that apparently
23 Ms. Springer was going to appear here in person, and she
24 apparently is on her way and is expected here as we understand
25 it, "any minute."

1 So what I propose to do is wait about another minute
2 or two and see if she shows up. I will put you on hold for the
3 time being.

4 If not, then I will get back on the phone with you and
5 we will make some other arrangements.

6 I realize that this is not your fault, and I realize
7 we probably have a combined billing rate of thousands of
8 dollars an hour here with all of these lawyers on the phone.

9 So thanks for your patience answer and hopefully you
10 will hear from us soon in just a minute or two.

11 Okay. I am going to call a 15 minute recess. And
12 whenever she shows up, whether or not to keep these lawyers
13 waiting, whenever she shows up, she will show up.

14 All right. Now put me through to the phone
15 conference, please. Hi. It is Jonathan Goodman. Is everybody
16 still here on the line? Hello?

17 MR. DILLMAN: Yes, Your Honor.

18 THE COURT: All right. Great. Well, we have tracked
19 down the confusion. Apparently Ms. Springer was under the
20 impression that the hearing was going to be in front of
21 District Judge Alan Gold, and I don't know if you all are
22 familiar with our courthouse down here, but that's actually in
23 a separate building. It is not far away. It is literally
24 across the street.

25 So what I am going to do is I am going to call a 15

1 minute recess and ask you all to phone back in 15 minutes. I
2 think that you had slotted that much time, anyway, for this
3 hearing under the notice.

4 I don't want to force you all to wait for another 15
5 minutes Ms. Springer to show up. So if you all would be good
6 enough to phone back in at 3:00 clock Eastern Standard Time,
7 which is about 15 minutes from now, hopefully Ms. Springer will
8 arrive by then and we can get the hearing underway. All right?

9 MR. DILLMAN: Yes.

10 THE COURT: All right.

11 MR. DILLMAN: Thank you, Your Honor.

12 THE COURT: All right. Speak to you soon. Speak to
13 you soon. Bye.

14 [There was a short recess].

15 THE CLERK: All rise. This matter is now back in
16 session.

17 THE COURT: Bear with me for just a minute.

18 MS. SPRINGER: Of course.

19 THE COURT: All right. Michael, would you just call
20 the case so we can start off from the beginning, please.

21 THE CLERK: Absolutely. We are here for Fontainebleau
22 Las Vegas Contract Litigation, case number 09-2106
23 Multi-District Gold.

24 THE COURT: All right. And we have one lawyer with us
25 here in person in the courtroom today. Would you state your

1 appearance for the record, please.

2 MS. SPRINGER: My name is Sarah Springer, and I am
3 here on behalf, Fontainebleau Resorts, LLC.

4 THE COURT: All right. And I am guessing that we have
5 the same folks who called in before, but, Michael, have you
6 gone through a roll call on this recall?

7 THE CLERK: I have not, Judge.

8 THE COURT: All right. Let me just tick off the names
9 here. Kirk Dillman?

10 MR. DILLMAN: Yes, Your Honor.

11 THE COURT: All right. Steve Nachtwey?

12 MR. NACHTWEY: Yes, Your Honor.

13 THE COURT: Dan Cantor?

14 MR. CANTOR: Yes, Your Honor.

15 THE COURT: Bonnie, and it looks like Chamil, but I
16 may be mispronouncing it. And, if so, I apologize. Is that
17 right, Bonnie Chamil?

18 MS. CHAMIL: No need. I am here, Your Honor. Thank
19 you.

20 THE COURT: All right. Steven Fitzgerald?

21 MR. FITZGERALD: Here, Your Honor.

22 THE COURT: Okay. Steven Chin?

23 MR. CHIN: Yes, Your Honor.

24 THE COURT: Jason Kirschner?

25 MR. KIRSCHNER: Here, Your Honor.

1 THE COURT: Steve Busey?

2 MR. BUSEY: Yes, Your Honor.

3 THE COURT: Is there anybody on the phone whose name I
4 have yet not called? All right. Good.

5 So, Ms. Springer, I understand that you started off
6 going across the street, and don't be concerned about that.

7 I mean, obviously we would have preferred it if you
8 had shown up here first, but it is not an unknown mistake.

9 It happens from time to time. Fortunately, the
10 building is just right across the street. So we only were
11 delayed maybe about 15 for 20 minutes. So you are here. So
12 that's good.

13 MS. SPRINGER: Well, I appreciate that, Your Honor. I
14 would like to apologize to the court and everyone on the phone
15 for my lateness.

16 THE COURT: Understood. So, Ms. Springer, let me just
17 ask you, I have several questions of you and your party's
18 position.

19 Before I hear from some of these other lawyers, I have
20 read the motion. I read the motion to compel. And,
21 Ms. Springer, did you get a chance to read the order that I
22 entered on August 23rd?

23 MS. SPRINGER: With respect to the three subpoenas
24 issued by the defendants?

25 THE COURT: It was my order, docket entry 126 on

1 August 23rd, saying that we were going to schedule the motion
2 to compel for a telephone hearing and asking the parties not to
3 submit any additional briefing on the motion.

4 MS. SPRINGER: Yes.

5 THE COURT: Okay. So that order went out and was
6 uploaded on the electronic court filing system on August 23rd,
7 and then on August 25th, two days later, I received your
8 response.

9 So I am just a little puzzled about how it is that I
10 asked the parties not to submit a brief, and then two days
11 later you submitted a brief.

12 MS. SPRINGER: I apologize, Your Honor. I probably
13 assumed that meant you didn't want them to file a reply. It
14 was a bad assumption on my part, and I apologize.

15 THE COURT: All right. All right. What I sometimes
16 try to do and what many of the magistrate judges here in this
17 district try to do with these kinds of discovery disputes, when
18 they come in and we try to nip them in the bud which is we try
19 to bring the parties in either in person or on the phone and
20 try to get it resolved with a minimum of fuss and muss and not
21 to waste or spend -- I don't want to use the word waste" -- not
22 to have the parties incur a significant amount of time and cost
23 and energy and attorneys fees because very frequently it is my
24 understanding that these discovery disputes get resolved rather
25 quickly in a telephone hearing.

1 So I was really sending the message to all of the
2 parties not to submit any further paper because we would hash
3 it out in a telephone hearing.

4 So, for next time if you are unclear, my suggestion is
5 that you call up and seek clarification. Maybe other
6 magistrate judges have different policies and procedures in
7 their chambers, and probably it would be best for you to
8 contact their chambers if they issue a similar order, but for
9 me, at least for purposes of this case, if I enter an order
10 saying, "No more briefing," what I mean is anybody no more
11 briefing. Okay?

12 MS. SPRINGER: Understood.

13 THE COURT: All right. Now, the other question that I
14 had for you is I am a little confused on some of the timing,
15 and here is what I mean:

16 In your response you say that you or your firm was
17 retained on May 12th, and then I am reading in the motion that
18 you had a phone call with the counsel for Term Lenders on May
19 4th, which would have been more than a week before you were
20 retained. So that strikes me as a little bit strange. So what
21 is happening there?

22 MS. SPRINGER: I believe what happened, Your Honor, is
23 that our firm got involved with the bankruptcy litigation in
24 representing Fontainebleau Resorts, LLC, and certain people in
25 other matters heard of our being retained to represent them,

1 and they started reaching out to us.

2 I know we were retained for the limited purpose of
3 filing the motion for extension of time, and then we finally
4 got Fontainebleau Resorts to retain us for the full purpose of
5 responding to the subpoena. That would be my best recollection
6 of how that possibly happened.

7 THE COURT: All right.

8 MS. SPRINGER: If I may, I am sorry, Your Honor.
9 Actually, the Term Lenders issued a subpoena in the bankruptcy
10 matter to Fontainebleau Resorts, and we had been retained by
11 Fontainebleau Resorts.

12 In that case they served a subpoena in this matter,
13 and they contacted us similarly, so I wasn't going to shun them
14 simply because we had not been retained in this specific case.

15 THE COURT: All right. So, Ms. Springer, I was going
16 through the motion, and the motion makes certain
17 representations about what you had advised the parties, and I
18 just wanted to confirm if, in fact, these were your
19 representations.

20 It said that you told them on May 4th in a telephone
21 call that the trustee in bankruptcy was in control of the
22 servers on which FBR's documents were stored.

23 Right now I am not asking you if there is another
24 explanation. I am just trying to find out did you, in fact,
25 make that representation on May 4th?

1 MS. SPRINGER: Probably.

2 THE COURT: All right. The moving parties also say
3 that on June 9th you again represented that FBR didn't have
4 access to the electronic documents because the trustee had
5 taken possession of the servers or was not allowing removal of
6 information.

7 So setting aside the issue of whether there is an
8 explanation or not, did you, in fact, make that representation
9 in a June 9th, 2010 letter?

10 MS. SPRINGER: Yes, but I believe I also stated or the
11 trustee would not allow removal. There was some sort of
12 caveat, but, yes, I did say that.

13 THE COURT: Then again on June 17th, according to the
14 moving party, you indicated again that the servers are still in
15 possession of the trustee. So I am guessing that you did make
16 that explanation on June 17th?

17 MS. SPRINGER: Yes, and the servers were in the
18 trustee's possession and still are in the trustee's possession.

19 THE COURT: All right. Well, I can only go by what
20 the folks say in the moving papers. And according to the
21 motion, it says that on July 28th for the very first time you
22 asserted that the documents, the electronic documents were not
23 in the trustee's control, but, instead, were stored on, number
24 1, an accounting server in Las Vegas and, number 2, a document
25 server at that facility and, number 3, an e-mail server in

1 Miami.

2 So I guess my question is did you, in fact, make that
3 assertion or make those assertions?

4 MS. SPRINGER: Yes, I did, and they are also true.

5 What I found out is that the trustee had copies of the
6 servers. If I may, the main servers were laid out just as Your
7 Honor said to an accounting server and a document server in Las
8 Vegas and an e-mail server that was originally in Las Vegas,
9 but what I found out was moved to Miami in January of this
10 year.

11 The trustee took possession of two copies of those
12 servers which were in the debtor's office in Las Vegas. So
13 when we were retained, the trustee asked if he could take
14 possession of the servers for safe keeping.

15 I said, "Yes," and later on I came to find out the
16 full scope, the full realm of servers that are out there, and
17 that is not even the full scope. And part of the reason it
18 took so long to figure out what servers were out there, what
19 server copies were out there, when they were made, who had
20 possession of them is that, one, they were or half of them were
21 in Las Vegas. One was in Miami.

22 The trustee took possession of two copies, and we had
23 a bunch of attorneys talking about servers with different
24 names, different locations, and finally an IT person from the
25 Fontainebleau Florida Hotel, LLC came in and set the record

1 straight for what the server world was.

2 THE COURT: And what is that person's name?

3 MS. SPRINGER: David Chin.

4 THE COURT: Right. You mentioned him in your
5 response.

6 MS. SPRINGER: Yes. He is not an attorney. He works
7 for the hotel down in Miami.

8 THE COURT: And is Mr. Chin an IT person?

9 MS. SPRINGER: Yes.

10 THE COURT: All right. And is the status, in terms of
11 who has the servers, the location of the servers, who has
12 copies of the servers is the latest information available to
13 you what you have outlined in the response that you submitted
14 on August 25th?

15 MS. SPRINGER: Yes, Your Honor.

16 THE COURT: All right. There are no new developments
17 since then as far as you know?

18 MS. SPRINGER: My client, I picked up these servers
19 from David Chin in Miami, and my client Fontainebleau Resorts
20 picked up the copies that I picked up, and they are now or
21 their IT person is now going through them and trying to sort
22 through what belongs to us and what belongs to the debtors.

23 THE COURT: And does the trustee still have copies of
24 all of the servers?

25 MS. SPRINGER: He has copies of 2 of the 3 servers.

1 THE COURT: Which ones?

2 MS. SPRINGER: He has copies of the document server
3 and the e-mail server which were made out in Las Vegas I
4 believe in January of this year.

5 THE COURT: All right. And so which one does the
6 trustee not have a copy of?

7 MS. SPRINGER: I do not think he presently has a copy
8 of the accounting server, but he may have picked up his copy.

9 What happened is this IT person in Miami, David Chin,
10 remotely copied the documents and the accounting server, and he
11 made copies for all of the entities that had the information on
12 those servers, so that the trustee may have picked up his copy
13 of the accounting server by now. I don't know.

14 THE COURT: All right. So regardless of what the
15 trustee has, as we sit here today, what do you and your clients
16 have? And tell me on a server by server basis who has it and
17 where it is.

18 MS. SPRINGER: We have a copy of --

19 THE COURT: By "we," do you mean the law firm or your
20 client?

21 MS. SPRINGER: I am sorry. I apologize. I picked up
22 on Monday a copy of the e-mail server which contains I have
23 been told documents belonging to my client Fontainebleau
24 Resorts, as well as the debtors. I also picked up from Miami a
25 copy of the documents server and the accounting server.

1 THE COURT: And where are those servers now? At your
2 office?

3 MS. SPRINGER: All three servers were transferred to
4 my client on Friday, or Thursday, rather.

5 THE COURT: Last Thursday?

6 MS. SPRINGER: Correct.

7 THE COURT: Okay. So neither a server nor a copy are
8 in your law firm's possession?

9 MS. SPRINGER: Correct, Your Honor.

10 THE COURT: Okay. All right. And as I understand it,
11 it is your position that there are many parties whose documents
12 are on these servers and they need to, A, tell you or your
13 client whether there is information on the servers and, 2,
14 whether it is privileged?

15 MS. SPRINGER: Correct.

16 THE COURT: And how many parties are going to be
17 participating in this process?

18 MS. SPRINGER: The debtors.

19 THE COURT: How many?

20 MS. SPRINGER: I consider them as a whole, the debtors
21 themselves. So the trustee and his counsel will be going
22 through on behalf of the debtors.

23 My client, Fontainebleau Resorts, LLC, Fontainebleau
24 Miami or Fontainebleau Florida Hotel is another entity with
25 documents, and perhaps Turnberry Construction; Turnberry

1 related entities. So there are 4 total.

2 THE COURT: All right. Now, mechanically speaking or
3 practically speaking, how is this going to happen?

4 How are these debtors and the trustee going to review
5 this electronic discovery in order to see, A, whether their
6 materials are on the servers and, B, if so, whether there is
7 anything privileged?

8 MS. SPRINGER: If I may, I will take the servers
9 separately because the e-mail server hopefully will be an
10 easier process because the e-mail server, which is now in my
11 client's possession, has e-mails which belong to the debtors
12 and e-mails which belong to Fontainebleau Resorts.

13 Only two entities. So I am hoping, based on the
14 e-mail addresses we have already retained a former
15 Fontainebleau Resorts employee to look through the list of
16 e-mails addresses and say, "All right, this person worked for
17 Fontainebleau Resorts. This person worked for the debtors,"
18 and just right then and there we will hopefully be able to
19 split up which e-mails belong to which entity.

20 After that, it will be up to the individual entities
21 to do some sort of privilege review.

22 THE COURT: All right. So let's just sort of dig down
23 a little deeper into this.

24 Right now we are talking about the e-mail server. You
25 say that the client has retained a former employee to go

1 through the e-mails?

2 MS. SPRINGER: To look at the list of e-mail
3 addresses.

4 THE COURT: Yes. To look at the list of addresses.
5 What is that employee's name?

6 MS. SPRINGER: Eric Salsinger.

7 THE COURT: And what was his position?

8 MS. SPRINGER: I am not sure.

9 THE COURT: And is he going to be a full time employee
10 devoting, you know 8, 10 hours a day to this process? Is he
11 going to do it whenever he has the spare time? How is this
12 going to happen?

13 MS. SPRINGER: No. My client reached out to Eric with
14 the understanding that we needed to produce things as soon as
15 possible. So my understanding is that Eric may be in a room in
16 Aventura going through some stuff right now.

17 THE COURT: And is he going to be doing this on a full
18 time basis until he completes the task?

19 MS. SPRINGER: That was my understanding, but I don't
20 want to say for sure, but I would hope, based on my
21 representations that time was of the essence, and we needed to
22 move. That would be the case.

23 THE COURT: Any idea how long it is going to take Eric
24 to review the e-mail address list to make this sort of
25 distinction?

1 MS. SPRINGER: It is not a long list. It is maybe 4
2 or 5 pieces of paper with one line each for each e-mail
3 address.

4 I would hope it wouldn't be long. From what I have
5 been told, throughout this case there were a few instances
6 where one party worked for the debtors at one time and they
7 worked for Fontainebleau Resorts at another time.

8 So maybe there are a few that will be worth arguing
9 over, but I would hope he could look at it in one day and tell
10 us.

11 THE COURT: Well, right. In fact, it sounds like it
12 might even be done. I mean, it could take less than 1 or 2
13 hours.

14 MS. SPRINGER: Yes. Based on, I am not sure what his
15 knowledge base is, but he has represented that he will be able
16 to help us with that.

17 THE COURT: Okay. And then what about the next phase
18 of this e-mail server, how is that going to happen?

19 MS. SPRINGER: Once the e-mails are split up, I am not
20 sure how the trustee is going to handle the privilege review.

21 What we had planned on doing, we being Fontainebleau
22 Resorts, had been to retain an IT person or someone to craft
23 search terms based on what documents we believe may be
24 privileged.

25 So including general counsel's name, my name, stuff

1 like that so that we could go through quickly and pull out with
2 an electronic search what we think is privileged. After that,
3 we had planed on producing everything that was non-privileged.

4 THE COURT: And what is your estimate as to how long
5 that process will take?

6 MS. SPRINGER: I really am unsure.

7 THE COURT: Do you understand why I am asking? I
8 mean, the subpoena was served, as I understand it, on April
9 22nd.

10 It is now basically the beginning of September, so it
11 has been almost 4 and a half months since the subpoena has been
12 issued, and it sounds to me like you and your clients are now
13 right about at the preliminary stage where parties first start
14 digging into electronic discovery.

15 So it sounds to me like 4 and a half months down the
16 road you are really just beginning.

17 MS. SPRINGER: It would appear that way, but I can
18 represent that I have been working diligently. It has been
19 complicated by all of the parties involved and the servers
20 being copied, but I understand.

21 I would say a month would be sufficient to pull out
22 everything that is privileged and produce everything that is
23 not.

24 THE COURT: And is this from all of the servers or
25 just from the e-mail server?

1 MS. SPRINGER: The e-mail server certainly. I am
2 going to estimate a month is sufficient.

3 The other two servers, it is my understanding they are
4 not organized as clearly. So figuring out which documents
5 belong to which entity may be a little bit more burdensome, but
6 I would hope that there wouldn't be as many privileged
7 documents and the documents on the server as opposed to the
8 e-mails.

9 THE COURT: All right. Well, let's talk about those
10 other two servers. Is there somebody similar to Eric like an
11 Eric counterpart who is going to be going through those two
12 servers, and explain it to me on a server by server basis,
13 please.

14 MS. SPRINGER: My understanding is that Eric has been
15 retained to help us with all of these various server issues.

16 Now, that my client is in possession of the accounting
17 and the documents server, I have asked them to look at our
18 copy, see out how it is organized and start going through and
19 seeing if we can pull out easily what belongs to us.

20 THE COURT: So Eric is the man?

21 MS. SPRINGER: Yes.

22 THE COURT: Eric is going to be going through the
23 e-mail server and the other two servers as well?

24 MS. SPRINGER: Yes, with the help of myself and the
25 other attorneys at my firm.

1 THE COURT: All right. Mr. Dillman, you have heard
2 the explanation in the background. What do you have to say?

3 MR. DILLMAN: Well, Your Honor, it is consistent with
4 the story line we have been getting for the last 4 and a half
5 months, which is a lack of focus shall I say by the
6 Fontainebleau Resorts on the process of actually reviewing and
7 producing documents.

8 It has been, as you note, a long time and they are
9 only just now beginning that process.

10 It has been my experience that fixed deadlines focus
11 the mind in efforts in a way that a more free-flowing process
12 does not, and what we would ask is that Fontainebleau Resorts
13 be given a fixed time, and I would suggest, Your Honor, and
14 have a proposal to make here, that a month is too much time to
15 produce the documents.

16 I think the court needs to know two facts. One is
17 that Judge Gold has set has issued a scheduling order in this
18 case, not surprisingly, which schedules dates out through
19 trial. Commencement of depositions is today. I think all
20 parties would agree that the Fontainebleau Resorts documents
21 are important, or at least certainly potentially important to
22 the deposition process.

23 Resorts and its principals controlled the financing
24 and the construction of the project. They were at the center
25 of the defaults and the failed conditions precedent that are at

1 the center of our claims.

2 And as I think Ms. Springer has just acknowledged,
3 they have this entire time that the subpoena has been pending
4 owned and controlled these servers.

5 Whether Ms. Springer understood that to be the case or
6 not, I have no qualms about the veracity of her statements as
7 what she knew, but the facts now establish that for some time
8 now they have had these documents.

9 We are under Judge Gold's order, and further delay is
10 simply something that I think the plaintiffs in this case,
11 Mr. Nachtwey's clients and mine, are not agreeable to, nor,
12 frankly, do I think Judge Gold is.

13 The commencement of deposition dates has already been
14 extended I believe twice before. Perhaps just once.
15 Mr. Nachtwey can correct me, because of delays by Fontainebleau
16 Las Vegas in terms of their activities in the case and their
17 production of documents.

18 So that's as an initial position. Further delay is
19 simply not acceptable to us.

20 We understand that the documents cannot be produced
21 tomorrow, but it sounds to me as if let's take them one at a
22 time, the e-mail server should be able to be produced very
23 quickly, and here would be my proposal:

24 I will represent to the court that as recently as
25 several hours ago I spoke to the trustee for the debtors.

1 Excuse me. Trustees' counsel.

2 He confirmed to me what he has told me in the past,
3 which is that the trustee has no intention of asserting any
4 privilege or other basis for withholding production of the
5 Fontainebleau Las Vegas documents.

6 So all of the documents on the e-mail server that are
7 debtor related, as I understood it, there were two categories,
8 can be produced immediately without any review whatsoever.

9 To the extent that that representation by the trustee
10 needs to be more concrete, we can certainly get that, but that
11 has been my information now for some time and was confirmed
12 today.

13 THE COURT: Who is the bankruptcy trustee and who is
14 the trustee's counsel?

15 MR. DILLMAN: The trustee's counsel is Russ Blaine,
16 B-l-a-i-n-e, I believe.

17 THE COURT: And the trustee?

18 MR. DILLMAN: The trustee's name I am going to botch.
19 Steve, can you help me out here?

20 MR. NACHTWEY: His first name is Sanote. His last
21 name is spelled K-a-p-i-l-a.

22 THE COURT: All right.

23 MR. DILLMAN: So it would seem to me that with respect
24 to the e-mail server and, you know, there is a lot of what we
25 want is on the e-mail server.

1 The debtor's documents will not be a problem. And
2 with respect to Fontainebleau Resorts, the only other party as
3 I understand it that has documents on that server, I have heard
4 Ms. Springer say that it should be a fairly process of
5 determining whose documents are whose.

6 And once the FBR documents are segregated or
7 determined, then it seems to me that a quick search to
8 determine a top level privilege, you know, probably broader
9 than actual privileged universe, could be done.

10 We could get everything that does not fall within that
11 broad privilege determination, and they could then go through
12 that on a basis to cull out privileged or non-privileged, but
13 in the meantime we can get the documents for which there is no
14 reasonable basis to believe that they are privileged.

15 THE COURT: All right. Mr. Dillman, bear with me for
16 just one second. Let me just follow-up here.

17 Is this the first time that you have heard the
18 position of the trustee that he does not intend to assert a
19 privilege as to any of the Fontainebleau Las Vegas debtors?

20 MS. SPRINGER: Yes. There have been a lot of e-mails
21 exchanged, but I believe this is the first time I have heard
22 that.

23 THE COURT: All right. Have you heard to the contrary
24 that the trustee was, in fact, going to be asserting some kind
25 of a privilege, or was it merely, you know, an answer of

1 communication or confusing communication?

2 MS. SPRINGER: Absence of communication on that issue.

3 THE COURT: All right. Mr. Dillman, please proceed to
4 the rest of your comments.

5 MR. DILLMAN: Well, taking the servers again one at a
6 time, the accounting server, I would think that the
7 determination of whose accounting records are whose would be
8 fairly easy to make in that.

9 I don't have obviously the access of the server. I
10 can't say that for sure, but based on my experience, accounting
11 servers are segregated in ways that make identification of
12 particular entities financial statements and related materials
13 fairly easy.

14 I don't see a privilege issue that would attach to the
15 accounting server. So, again, that seems to me to be a server
16 that can, in very short order, within, you know, a week or two
17 be produced pursuant to our requests.

18 The document server, I really haven't been given
19 enough information to understand how that is set up and whose
20 documents are on it, how they are organized or categorized, and
21 so on, but I guess I would retreat to the position that I
22 stated earlier which is we have been at this now four and a
23 half months, and it is Fontainebleau Resorts obligation to do
24 whatever it takes to get the documents to us that we have asked
25 for.

1 I would think, under the circumstances, 2 or 3 weeks
2 should, given what I have just heard, be sufficient.

3 If we start delaying longer than that, we are going to
4 be affecting and impacting Judge Gold's discovery schedule and
5 our ability to get this matter ready for trial along his
6 schedule.

7 THE COURT: Is it your position that the trustee needs
8 to be brought into this discovery motion preceding?

9 I ask that because I notice in the response filed by
10 Fontainebleau Resorts, LLC on page 2 in a footnote, there is an
11 explanation that there is some sort of an oral agreement which
12 governs production of documents from the servers, but it is
13 supposed to be reduced to writing, and the person apparently
14 who has been tasked with the preparation of the written
15 agreement is the trustee's counsel, Russell Blain, but the
16 explanation here by Ms. Springer is that despite follow-up
17 e-mails, she has no idea when Mr. Blain is actually going to go
18 ahead and draft this agreement.

19 So when I hear that, I sort of wonder whether or not
20 Mr. Blain or the trustee needs to be part of this discovery
21 dispute. What are your thoughts?

22 MR. DILLMAN: I don't think he does, and for the
23 following reason:

24 The request, the subpoena that we had issued is to
25 Fontainebleau Resorts. The fact that there may be other

1 parties with interest in documents that are on the servers is
2 perhaps important to those parties and they are going to want
3 to work out whatever agreements they have with Fontainebleau
4 Resorts, but from our standpoint, we have a subpoena.

5 It is directed to Fontainebleau Resorts. They are
6 obligated to produce responsive documents in a timely manner.
7 They are obligated to figure out how to do that, and they
8 cannot delay their own production based upon the fact that
9 there isn't an agreement with a third-party that, frankly, is
10 not required in any instance for their production.

11 So I think if Mr. Blain or if the court would like to
12 hear from Mr. Blain to confirm the representations that I have
13 made, he has told me he is happy to do that.

14 I have asked him about this issue with the draft
15 agreement. What he said was that the parties have only talked
16 about the process by which and the timing, which is they
17 haven't decided on anything, by which the various parties would
18 identify what their documents are on these servers, but, again,
19 FBR can identify their own documents.

20 They can produce their own documents. I am not
21 worried at this point about what our trustee documents or what
22 are Fontainebleau Miami documents.

23 I am worried about and want to get copies of
24 Fontainebleau Resort's documents which is fully within their
25 control without recourse to any agreement with the trustee.

1 MS. SPRINGER: If I may, Your Honor, Mr. Blain
2 e-mailed me this morning with a preliminary bullet point
3 agreement which reflects the oral agreement we came to a couple
4 of months ago.

5 So we do have something in writing, but I would
6 disagree with Mr. Dillman that it is not important that we
7 allow parties with information on these servers to figure out
8 if the stuff belongs to them.

9 THE COURT: Right.

10 MS. SPRINGER: We may own the hardware, but we do not
11 own all of the information on the servers. So from the
12 beginning we have recognized that and have been trying to work
13 with all of the entities to try to figure out the best way to
14 make sure my client doesn't produce documents belonging to the
15 debtor or other Fontainebleau related entities.

16 THE COURT: Right. I don't think Mr. Dillman's
17 position is that it is completely irrelevant.

18 I think what he is saying is a subpoena was served on
19 your client. Your client has a responsibility to respond.

20 If for whatever reason your client has decided as a
21 courtesy as part of an agreement or understanding to give other
22 parties the right to review the information before it is
23 disclosed, to see whether or not they have any privilege
24 issues, that is fine, but this process should not unduly
25 prejudice the parties which has served the subpoena, otherwise

1 it would be far too easy for a party who has been served with a
2 subpoena to unduly delay by simply saying, "Well, we need to
3 check with party A or party B or corporation C or D. And,
4 golly, gee, it is not our fault. We are acting as diligently
5 as we can. It is these other folks who haven't gotten back to
6 us timely," and in this last part of the discussion Mr. Dillman
7 didn't exactly say, but it was sort of implied, and I am
8 amplifying his comments, but I suspect that he would not
9 disagree with what I am saying. Correct, sir?

10 MR. DILLMAN: No. Absolutely, Your Honor, and I just
11 heard Ms. Springer say that the agreement that was discussed
12 with the trustee was discussed two months ago, so further
13 indicating that there simply has not been any sense of urgency
14 on behalf of Fontainebleau Resorts to get us the documents we
15 have asked for.

16 THE COURT: Right. All right. Ms. Springer, let me
17 ask you about something that was contained in the final page of
18 your response.

19 It says here that you are asking the court to deny the
20 motion to compel and refer the matter to a general magistrate
21 for an evidentiary hearing.

22 So I guess my question is what do you anticipate
23 happening at an evidentiary hearing?

24 MS. SPRINGER: I anticipate that we would be able to
25 explain more fully at that time the universe of servers, how

1 they are organized, what the process will be, what the
2 deadlines would be for reviewing for privilege, and that type
3 of information. And once that information is laid out, have
4 deadlines that correspond to the reasonable doable rate of
5 production.

6 THE COURT: And what witnesses would you anticipate
7 testifying at this evidentiary hearing that you have asked for?

8 MS. SPRINGER: Well, we could bring in David Chin who
9 did the copying of the servers. We could bring in this Eric
10 Salsinger to set forth whether he can tell easily which
11 documents belong to Fontainebleau Resorts and which ones belong
12 to other entities. That's just two that I can think of. We
13 have former general counsel.

14 THE COURT: All right. I don't want to short-circuit
15 the ability of any of the other counsel on the phone to
16 participate in the hearing.

17 Mr. Dillman you have been carrying the laboring oar
18 there. Do any of the other lawyers participating by phone want
19 to make any argument or say anything at all concerning this
20 motion?

21 MR. NACHTWEY: This is Steve Nachtwey. I represent
22 the Aruilus plaintiffs. I am also one of the moving parties.

23 The one thing I would like to point out, and I think
24 it is referenced in our papers, is that there was a denial of a
25 motion to quash before Judge Bandstra in which FBR or

1 Fontainebleau Resorts has been ordered to complete its
2 production by September 17th.

3 There is already an order requiring Fontainebleau
4 Resorts to produce documents by a certain date. You know, from
5 my perspective, I would like to see on our subpoena that same
6 deadline or something sooner as Mr. Dillman has laid out.

7 MS. SPRINGER: If I may, that order may not or I don't
8 want to say go into effect, but the trustee chose to my
9 understanding is abandon the cause of action that dealt with
10 that order.

11 I have asked the defendants who issued the subpoena to
12 Fontainebleau Resorts, in light of the trustee's recent
13 decision, to dismiss its case, whether they would agree to some
14 sort of a stay until there is a formal order or agreement
15 between the debtors and the trustee is entered, and I have yet
16 to hear back.

17 THE COURT: And that order that you just referenced
18 Mr. Nachtwey, the subpoena was issued to which entity or
19 entities?

20 MR. NACHTWEY: Well, this is part of an MDL. The
21 subpoena was issued by some of the defendants on the phone to
22 Fontainebleau Resorts, the same entity we subpoenaed.

23 MS. SPRINGER: It was actually issued to three
24 Fontainebleau entities, Fontainebleau Resorts, Fontainebleau
25 Resorts Holdings and one other Fontainebleau resort entity.

1 THE COURT: All right. And then those three entities
2 filed a motion to quash, and then there was an order entered
3 denying the motion to quash?

4 MS. SPRINGER: Yes, and requiring that we produce by
5 September 17th.

6 THE COURT: All right. And that was an order entered
7 by Magistrate Judge Bandstra?

8 MS. SPRINGER: Yes, Your Honor.

9 THE COURT: But from what I hear you saying, that
10 order related to subpoenas which were issued in an action which
11 is now, in effect, moot?

12 MS. SPRINGER: Yes, Your Honor.

13 MR. DILLMAN: Well, it may be moot.

14 MR. NACHTWEY: It may be moot. We have a hearing
15 tomorrow. Those actions are still pending.

16 THE COURT: All right. So I have heard from
17 Mr. Dillman. I have heard from Mr. Nachtwey.

18 Are there any other lawyers on the phone who want to
19 call my attention to anything that we haven't discussed
20 already?

21 All right. Well, we are going to be getting an order
22 out fairly quickly on this, probably within the next day or
23 two.

24 So as the saying goes, keep your eyes peeled for the
25 electronic filings. It should be coming across your computers

1 soon.

2 So thank you everybody for participating and thank
3 you, Ms. Springer, for joining us here in person.

4 When I set a telephone hearing, by the way, it doesn't
5 preclude anybody from showing up in person, but as a matter of
6 practice, most of the time for telephone hearings lawyers
7 participate by phone, but I am always happy to see you here in
8 person.

9 MS. SPRINGER: Thank you, Your Honor.

10 THE COURT: All right. We will be in recess. Thank
11 you.

12 MR. DILLMAN: Thank you, Your Honor.

13 (Whereupon the proceedings were concluded).
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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

DECEMBER 7, 2010

S/JERALD M. MEYERS

DATE

JERALD M. MEYERS, RPR-CM



"Jerald M. Meyers"
<crjm@aol.com>

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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.

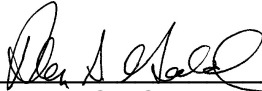
Case No. 10-CV-20236-ASG.

_____/

**MDL ORDER NUMBER 42;
REFERRING MOTION TO MAGISTRATE JUDGE JONATHAN GOODMAN**

THIS CAUSE is before the Court upon Term Lenders' Motion for Determination of Fontainebleau Resort's Waiver of Privilege [ECF No. 192]. Pursuant to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules for the Southern District of Florida, the Motion [ECF No. 192] is hereby REFERRED to United States Magistrate Judge Jonathan Goodman to take all necessary and proper action as required by law.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 17th day of December, 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-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 43; RE ORAL ARGUMENT SET FOR
JANUARY 7, 2011 AT 10:00 AM**

THIS CAUSE is before the Court *sua sponte*. It has come to the Court's attention that there are interested parties who wish to listen and **not participate** at the hearing presently set before the undersigned on Friday, January 7, 2011 at 10:00 a.m. relative to the Plaintiff Term Lenders' Joint Motion for Partial Final Judgment ("Motion") [**ECF No. 151**]. As a courtesy to those interested parties, it is hereby

ORDERED AND ADJUDGED that:

1. Any interested party who wishes to listen and **not participate** at this hearing may dial the following AT&T Toll-Free Number 1.888.684.8852, enter Access Code 8321924 and thereafter Security Code 5050. Please dial in by no later than 9:55 a.m. so that the hearing may start promptly and without interruptions by 10:00 a.m. DONE and ORDERED in Chambers in Miami, Florida, this 30th day of December, 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 DETERMINATION OF WAIVER OF PRIVILEGE

This matter is before the Court on the Term Lenders' Motion for Determination of Fontainebleau Resort, LLC's Waiver of Privilege (DE# 192), filed December 6, 2010. Fontainebleau filed a response in opposition to the motion on December 13, 2010 (DE# 194). I have reviewed the Motion, the response, the pertinent portions of the record, and the applicable law. Having already twice held hearings on the underlying discovery dispute that is the basis for this motion (DE# 132, 165), I will decide the motion without oral argument pursuant to Federal Rule of Civil Procedure 78(b).

As outlined below, I find that Fontainebleau Resorts, LLC ("FBR" or "Fontainebleau") waived the attorney-client privilege and work product protection, and any other applicable privileges, for the materials it produced from two of three computer servers in what can fairly be described as a data dump as part of a significantly tardy response to a subpoena and to court-ordered production deadlines. But this Order will also provide some relief to Fontainebleau: the waiver does not relate to the materials on the email server, and the Term Lenders (who issued the subpoena and who received the massive amount of data belatedly produced by Fontainebleau) shall also timely advise Fontainebleau of any clearly privileged material they may find during their review of the production on the documents and accounting servers. The specific parameters of this notice requirement will be spelled out in more detail in the body of this Order.

DETAILED FACTUAL BACKGROUND

This controversy, which began with a seemingly routine discovery request, dates back to April 22, 2010, when the Term Lenders subpoenaed Fontainebleau for documents, including electronically stored documents, relating to the financing of the construction of the Fontainebleau Resort and Casino in Las Vegas. After waiting four

months without a responsive production from Fontainebleau, the Term Lenders filed a motion to compel (DE# 123). I held a hearing on the motion on August 30, 2010.

Before the hearing, other important events relating to the subpoena unfolded. But before outlining those events, it is helpful to first explain Fontainebleau's place in this litigation.

Although Fontainebleau has identified itself as a "third party" in connection with the Term Lenders' subpoena, this is an over-simplification of its role. Fontainebleau is the *parent* of Fontainebleau Las Vegas, LLC, the borrower who filed a bankruptcy petition in the Southern District of Florida in June 2009 (DE# 123). As I will explain in this chronology, Fontainebleau changed its explanation for continually delaying its production of documents in response to the Term Lenders' subpoena. First, FBR attributed the delay to the bankruptcy trustee's supposed possession of the servers and the trustee's position on whether the data could or should be produced by FBR. Thereafter, Fontainebleau changed its position and resisted both producing documents and conducting privilege review on the grounds that the subpoena (and later Court orders) was too burdensome.

Before the Term Lenders filed their motion to compel in connection with their April 2010 subpoena, FBR and "related" entities filed a motion to quash *other* subpoenas issued by several banks in July 2010 (DE# 93). In this motion to quash, FBR explained that different entities all had information on the three computer servers and that it needed to coordinate the removal of each entity's information. FBR explained in its motion to quash that its counsel had been in contact with the bankruptcy trustee and the trustee's counsel and that the trustee determined "that each entity will receive a full copy of each of the servers." It also explained that "each entity will then have to review all of the documents on the servers to determine which documents belong to them, which documents belong to multiple entities, which documents are privileged and which documents are responsive to any outstanding discovery requests or subpoenas." FBR predicted that "deciding which documents belong to which entities will be a time-

consuming undertaking due to the number of documents as well as anticipated disputes over ownership of the documents” (*Id.*).¹

After noting its position that *other* (albeit potentially related) entities would need to review documents on the “shared” servers, FBR then said: “After this sorting process is complete, *if* any of the entities with information on the servers *wish* to produce documents in response to discovery requests or subpoenas, they will have to provide each entity which received a copy of the servers with *an opportunity to examine* what is being produced in order to confirm that documents belonging to the non-producing entity are not being produced” (*Id.*) (emphasis added). However, Fontainebleau’s motion to quash did not explain why an entity (Corp. A) could prevent another entity (Corp. B) from producing documents (privileged or otherwise) initially belonging to Corp. A but now in Corp. B’s possession (on so-called “shared servers”).

In addition to its comments about the logistics surrounding the shared servers, Fontainebleau also argued that the subpoenas were overbroad. Significantly, however, FBR did **not** specifically contend that it would be too costly to review the servers for responsive documents or to analyze the servers for privileged material before it or the “other” entities produced documents and data. Fontainebleau merely raised a conclusory

¹ Fontainebleau did not explain in its motion to quash why the shared documents on the computer servers would still be privileged (assuming they were privileged in the first place) if they were stored together on servers presumably accessible by other entities. Fontainebleau represented in its motion that the servers “are owned by Fontainebleau Resorts, LLC (one of The FBR Entities) but [] contain documents belonging to various Fontainebleau and Turnberry Construction entities, including the Debtors” (DE# 93, at 2). Likewise, Fontainebleau did not explain in its motion why the entities would not lose privilege protection under a plan where each entity would receive “a full copy of each of the servers” (and presumably have unfettered access to all material, including information and privileged matter belonging to others).

If all of the legally separate entities are sufficiently affiliated, then they likely would be permitted to safely share privileged information without losing privilege, but Fontainebleau did not address the issue in its motion and did not discuss, let alone establish, that all of the entities having material on the servers (and which would obtain full copies of the servers) are **all** in parent-subsidiary relationships or are otherwise sufficiently affiliated. *See, e.g., Roberts v. Carrier Corp.*, 107 F.R.D. 679, 687 (N.D. Ind. 1985) (explaining that privilege can extend to corporate subsidiaries). In addition, Fontainebleau did not state that it had entered into a joint defense, shared information, or common interest agreement with the separate entities.

and boilerplate objection about “an undue burden or expense” but then explained that “the servers have not even been copied yet,” despite “the best efforts of counsel,” and that “it is unknown how many documents are on the servers or how long it will take to complete the above described process” (DE# 93, at 3). Thus, FBR’s initial objection was that logistical and coordination difficulties prevented timely compliance with the subpoena.

Not surprisingly, the banks which served the subpoenas objected to the motion to quash (DE# 114). In their objection, they noted that FBR sent an email on the day it was required to respond to the subpoenas, advising the banks that FBR would move to quash rather than comply. The banks also observed that FBR refused their offer to extend FBR’s response time to respond so that it could properly coordinate its production with the bankruptcy trustee. According to the banks’ objection, FBR declined the offer and filed the motion to quash.

In an Order dated August 3, 2010, Magistrate Judge Ted E. Bandstra denied the motion to quash (DE# 120), finding that the two specific requests flagged by FBR were neither overbroad nor unduly burdensome and finding further that “the FBR Entities failed to satisfy Local Rule 7.1(A)(3) by not making a good faith effort to resolve the subject issues prior to filing the instant motion.”

Two days later, FBR served its formal written response to the Term Lenders’ April 22 subpoena, the discovery tool at issue here. Although FBR’s response described the subpoena as a “document request,” it is clear that FBR was actually referring to the subpoena. Echoing its earlier motion to quash the subpoenas issued by other banks, FBR again raised the “shared server” explanation and explained that “certain information on the servers belongs *solely* to entities other than FBR” (DE# 122, at 1 n.2) (emphasis added). FBR represented that the servers “are in the process of being copied and distributed to all entities with information on them. *Once that is complete, all documents responsive to this request [sic] that belong to FBR will be produced to the Plaintiff Term Lenders*” (*Id.*) (emphasis added).

Again, Fontainebleau did not explain why privilege, assuming it existed, had not been previously waived by virtue of its decision to have its documents and data stored on servers shared by “entities other than FBR.” Fontainebleau apparently assumed that the

other entities, described simply as “related entities,” were all sufficiently affiliated to permit safe sharing of privileged information without risking a waiver, but this point was not raised in any way (DE# 122, at 1 n.2).

Unlike its response to the other subpoenas, FBR did not file a motion to quash the Term Lenders’ subpoena, nor did it assert in its written response that it would be too costly to search the servers for responsive documents and data or that it would be unfairly expensive to review the servers for privilege. Likewise, FBR never filed a motion or pursued any written request to shift to the Term Lenders the cost of searching the servers or conducting a privilege review. In its response, FBR’s repeatedly represented that “all documents responsive to this [April 22, 2010] request [sic] that are the property of FBR will be produced to the Term Lenders,” but FBR’s did not say *when* production would be made (DE# 93, at 1-2).

At the August 30, 2010, hearing on the Term Lenders’ Motion to Compel (DE# 123), Fontainebleau’s counsel conceded that she initially told the Term Lenders that Fontainebleau’s bankruptcy trustee was in control of the electronic servers on which most of the data was stored and that the trustee would not allow removal of the information (DE# 196). As it turned out, this information was not entirely correct. Two of the relevant servers, the accounting server and the documents server, were in Las Vegas, while a third server, for emails, had *moved* to Miami many months earlier, in January 2010.

The Court also learned at this hearing that there were actually two copies of some of the servers. But only in August 2010, one week before the discovery hearing and four months after the initial subpoena, did all three servers finally come into FBR’s possession via its South Florida counsel.

During the four-month period between the subpoena and the hearing on the motion to compel, Fontainebleau did not move to quash the subpoena because it was overly broad or too burdensome, nor did Fontainebleau seek a protective order that might have limited the scope of the subpoena. Instead, Fontainebleau’s position at the hearing was that the delay was due to the logistical difficulty in obtaining the relevant servers. And further, rather than attack the subpoena itself, Fontainebleau requested an evidentiary hearing to determine how long it would take for *it* to properly review this

information for responsive and privileged documents. Fontainebleau's position was that it initially took four months just to gather of all the relevant materials in South Florida, and that substantial, additional time was needed to sort through the large amount of information contained on the servers now in its possession.

But it was only on August 30, 2010, more than four months after the initial subpoena, that Fontainebleau informed the Court, for the first time, and only in opposition to the motion to compel, of the alleged burdens of complying with the April 22 subpoena. Again, FBR never sought to quash the subpoena, nor did it move for a protective order limiting its scope. Instead, Fontainebleau simply discussed the status of the servers and announced the steps it would take to start complying with the subpoena, albeit belatedly.

FBR also did not ask the Court to shift to the Term Lenders the cost of locating responsive documents on the three servers or the cost of reviewing the servers for privileged material. Instead, it advised the Court that it would take less than a day to review the email server to determine which entities had relevant documents on it and an additional month for it and the other entities to complete a privilege review (DE# 196, at 17-20). Fontainebleau's counsel also explained that she hoped that "there wouldn't be as many privileged documents" on the other two servers (*Id.* at 21).

At the hearing, Fontainebleau acted as though it was also moving forward on producing documents and data from the other two servers. It did not then (four months after the subpoena was issued) complain that it lacked financial resources to review the other two servers for privilege, nor did it seek to have the Term Lenders pay all or some of the review costs. FBR simply needed more time.

Because of the lengthy delay of almost four and a half months since the Term Lenders' initial subpoena for documents and data, and in light of the District Court's trial deadlines, I denied Fontainebleau's request for an evidentiary hearing and granted the Term Lenders' motion to compel. I further ordered that Fontainebleau produce non-privileged documents covered by the subpoena by September 13, 2010, and produce a privilege log by September 20, 2010 (DE# 129).

Fontainebleau did not comply with these deadlines and in fact made no production whatsoever within the time given by the Court. In response, the Term

Lenders filed a motion for sanctions (DE# 153), and I held a hearing on the motion on October 18, 2010. During this same time, Fontainebleau's counsel moved to withdraw from the case because of concerns about its client's ability to pay.

I learned at this second hearing that Fontainebleau's counsel had hired IKON, a third-party vendor specializing in e-discovery, to search the email server for relevant documents. IKON had completed its work screening for responsive documents but Fontainebleau's counsel unilaterally ordered IKON not to begin a privilege review because of its payment concerns.² But FBR did not file a motion to be excused from the August 30 discovery Order, nor did it advise the Court of other circumstances which it believed made it financially impossible or difficult to comply with the Order. In fact, as of the October 18 hearing, **FBR had not moved forward on the production front at all**--a state of affairs which I only learned about at the hearing in response to my questioning about the production process (DE# 195, at 21-25). Fontainebleau conceded that "the better practice" might have been to file a motion or advise the Court that all production efforts had stopped even though an order compelling production had been entered (*Id.* at 23).

During the October 18 hearing, the Term Lenders advised that the bankruptcy trustee for Fontainebleau Las Vegas had waived the attorney-client privilege and was "prepared to produce the entire servers" (*Id.* at 55-56). The Term Lenders also advised that the bankruptcy trustee had "very patiently waited for the Fontainebleau Resorts to get its job done" (*Id.*). FBR did not contest these representations in any way. (Fontainebleau Las Vegas is one of the entities which shared the servers with FBR.)

Thus, as of the second hearing on October 18, 2010, approximately six months after the Term Lenders' subpoena was issued, neither Fontainebleau nor its electronic discovery vendor had even started the process of reviewing the email server--or any of the servers--for privilege (*Id.* at 28-29, 36). In fact, the Court learned at the hearing, in response to additional questions, that IKON had *returned* the email server to Fontainebleau's local counsel (*Id.* at 33-34). Fontainebleau also represented that it did

² Although I granted Fontainebleau's counsel's motion to withdraw on the condition that they find substitute counsel within 30 days, counsel has since informed that the Court that Fontainebleau is unable to find new counsel and so current counsel will remain in this case for the time being (DE# 166, 185).

not know how long it would take to review the email server for privilege and for the first time made an informal, *ore tenus* request that the Term Lenders assume the expense of the privilege review (*Id.* at 32-33). But Fontainebleau did not know how much a privilege review of the email server would cost (*Id.* at p. 37).

Fontainebleau then advised the Court that it would take less than a day to review the email server for privilege once it came up with a list of privilege search terms--a list primarily consisting of the names of lawyers and law firms (*Id.* at 37-40). Fontainebleau said it wanted to reach an agreement with the Term Lenders about the names on the list but conceded that *it* was supposed to carry the laboring oar and would therefore be responsible for creating the first draft of the list (*Id.* at 38-40). As of the October 18 hearing, however, Fontainebleau had not begun to prepare the list. It predicted it would take, at most, a day to prepare and circulate the draft of the privilege list (*Id.* at 40).

I found that Fontainebleau was not in compliance with my order compelling production. I therefore extended, once again, FBR's production obligations until October 25 and November 5, and reserved ruling on the issue of monetary sanctions until the expiration of the new deadlines in order to see whether Fontainebleau complied with them (DE# 167). I further instructed the Term Lenders that they could file a "Notice of Non-Compliance" if Fontainebleau did not comply with the new Order.

Fontainebleau again did not comply with the new, Court-ordered discovery deadlines. Instead, similar to its eleventh-hour motion to quash filed in response to subpoenas from other banks, Fontainebleau filed a Friday afternoon motion, one business day before its production was due (under the already-extended Court-imposed deadlines), requesting the entry of a confidentiality order (DE# 173).³ Now, half-a-year after being served with the subpoena, Fontainebleau sought relief because, it contended, it would be too onerous for it to conduct an adequate privilege review within the time period provided by the Court. The proposed order would have required the Term Lenders to produce back to Fontainebleau *all* of the documents which they decided to copy off the servers and to specifically pinpoint the privileged material that they found during their review. This request would have essentially forced the Term Lenders to conduct the

³ This motion was filed on October 22, 2010, exactly six months after the initial subpoena was served.

privilege review on behalf of Fontainebleau and would potentially have revealed attorney work product by demonstrating which documents the Term Lenders' attorneys found important enough to copy. I therefore denied the last-minute motion (DE# 173).

But I did not leave FBR without recourse to protect potentially privileged materials. Instead, I provided that Fontainebleau could file a motion at a later date if it determined that it inadvertently produced privileged documents. I also ruled that Fontainebleau could file a verified motion requesting an enlargement of time to produce a privilege log. **To date, Fontainebleau has not availed itself of either option.**

Instead, Fontainebleau engaged in what the Term Lenders describe (not inaccurately) as a "document dump," *over*producing documents and data in response to the subpoena and court-ordered production. Fontainebleau simply handed over all three servers to the Term Lenders without conducting any meaningful relevancy review. Even though the parties had agreed on search terms for the email server, Fontainebleau ultimately produced a 126 gigabyte disk containing 700,000 emails. Fontainebleau also handed over the documents and accounts servers without conducting any review for responsive data. And Fontainebleau did not produce *any* privilege logs by the deadlines set forth in the October 18 Order. FBR did, however, belatedly produce a privilege log for the data on the email server after the expiration of the court-imposed deadline (though without requesting leave of the Court).

Fontainebleau did not file objections to my order denying its last-minute request, nor did it file a motion for a stay or otherwise seek to challenge my discovery rulings. Instead, it simply turned over the data from the three servers, recognizing that none of the data on the documents and accounting servers had been reviewed for privilege. In effect, Fontainebleau took the two servers, which it never reviewed for privilege or responsiveness, and said to the Term Lenders "here, you go figure it out." And, although FBR reviewed the email server for privilege and withheld materials on it, Fontainebleau turned over the remaining balance of the email server to the Term Lenders with the same implicit message of "here's everything, search away"⁴

⁴ The Term Lenders advised the Court in an affidavit that the documents server contains more than 20 million pages of audio files, emails, image files, database

The Term Lenders filed a notice of Fontainebleau's non-compliance, indicating that Fontainebleau did not search the email server with the agreed-upon terms, did not timely provide a privilege log for the email server and produced a documents server that contained every document in Fontainebleau's servers going back a decade. This document "dump" amounts to approximately 800 gigabytes of data and 600,000 documents (DE# 180). Fontainebleau responded that it spent \$25,000 to search the email server with the terms requested by the Term Lenders and that its production did incorporate the search terms, enabling it to eliminate seventy-five percent of the documents on the email server. But Fontainebleau did not contest the fact that it turned over all the data on the other two servers without either a privilege review or a substantive review for responsiveness.

In response to Fontainebleau's non-compliance, the Term Lenders have now agreed to "eat" (their term) the cost of sorting through this massive amount of data for relevant documents if they have the ability to *use* the data produced. Indeed, the Term Lenders have abandoned their request for monetary sanctions. But the Term Lenders are not prepared to bear the burden of both paying to search for relevant documents and to risk adverse consequences if they encounter (and wish to use in litigation) what would normally be privileged documents and data (DE# 182).

The Term Lenders are understandably concerned that they may well encounter privileged information on Fontainebleau's servers because of the way that they were turned over (i.e., without having been previously reviewed for privileged information). The Term Lenders therefore seek clear direction from the Court that they may review and use all of the documents produced by Fontainebleau, free of any obligation to appraise Fontainebleau of those documents that may implicate a privilege or to return such documents to Fontainebleau. At the Court's suggestion, the Term Lenders filed this motion for determination of Fontainebleau's waiver of privilege (DE# 192).

Fontainebleau opposes the motion. Fontainebleau now argues that the original subpoena from April was unduly burdensome and expensive. Fontainebleau notes that it did not obtain a copy of the documents server until August and therefore argues that it

files, excel files, Power Point files, Microsoft Word files, text files and video files (DE# 192-1, at 2).

could not possibly cull through twenty million pages of documents for privilege review. Citing for the first time to Federal Rule of Civil Procedure 45, which requires that a party issuing a subpoena take reasonable steps to avoid imposing an undue burden or expense of the subpoena's subject, Fontainebleau argues that it has limited resources and no employees to conduct a document review. *See* FED. R. CIV. P. 45(c)(1). FBR claims that the expense "would have been incurred by the Term Lenders" under "normal circumstances and as Rule 45 mandates" (DE# 194, at 2).⁵

Fontainebleau also points to its status as a non-party to the litigation, but, as previously noted, it is the **parent** of the debtor and appears to be affiliated with other related entities. Fontainebleau argues that the Court should not find a waiver and blames the Term Lenders for "creat[ing] this predicament by causing FBR to incur an undue burden and expense in responding to their subpoena and corresponding Court orders." Fontainebleau does not say why it waited six months to first request that the Term Lender pay the costs associated with the privilege review. Likewise, FBR does not explain why it never filed a motion to quash or a motion for a protective order. Nor does FBR indicate why it never asserted the "normal circumstances" of Rule 45 before its December 13, 2010, memorandum, nor why it never filed objections to the discovery orders.

According to the affidavit of Term Lenders' counsel, which Fontainebleau has not challenged, other banks in the coordinated MDL proceedings received the *same document server* from Fontainebleau in response to their separate subpoenas (DE# 192-1).

As outlined above, Fontainebleau's primary objection to the banks' subpoenas and its principal, initial objection to the Term Lenders' subpoena was the shared nature of the servers and the need for "other entities" to review the material. Nevertheless, none of the other entities (which presumably had privileged material on the shared servers) lodged objections to my discovery orders or to Fontainebleau's decision to turn over two

⁵ Fontainebleau first suggested that the Term Lenders assume the cost of the privilege review at the October 18, 2010 hearing, approximately six months after the subpoena was issued. When it did so, it was an informal, oral request, and no specific motion or memorandum urging this "normal circumstances" point had been filed before the hearing.

servers without conducting a privilege review. None of these other entities sought to intervene in the discovery dispute which presumably affected their privileged materials too, and none of them pursued objections to the district court or otherwise joined in Fontainebleau's opposition to the motion to determine waiver.⁶

Having decided to turn over two servers without even a cursory review for privilege, Fontainebleau seeks to avoid the consequences of its review-free production.⁷

THE DILEMMA

Fontainebleau argues that there is no waiver even though the documents and data have already been produced and even though the presumably privileged information from two of the three servers is already in the Term Lenders' possession. The Term Lenders, on the other hand, are reluctant to begin a meaningful review of the documents and data produced to them without obtaining specific permission from the Court that they may do so, because they do not want to confront potential adverse consequences which might flow from their review of Fontainebleau's arguably privileged information.

But Fontainebleau has not provided a workable solution to this dilemma. True, it does not want the Court to find a waiver and does not want the Term Lenders to review privileged information. Yet Fontainebleau still does not pinpoint any particular document or data as privileged and does not suggested how the Term Lenders are supposed to review the information which has been, in effect, dumped in their collective lap, without encountering material which is (or may be) privileged.

Assuming that Fontainebleau's "there-was-no-waiver" theory is correct (which it is not, as explained below), the only conceivable methods available now to prevent the

⁶ Under one recent appellate decision, one or more of these other entities may well have been permitted to immediately appeal, on an interlocutory basis, a district court ruling against privilege (had they chosen to intervene and object in the first place). *See U.S. v. Krane*, 625 F.3d 568, 572 (9th Cir. 2010) (discovery orders adverse to the attorney-client privilege are immediately appealable when the subject materials are sought from a disinterested third party because the third party presumably lacks a sufficient stake and would likely produce the documents rather than submit to a contempt citation). *But cf. Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (privilege determinations adverse to a *litigant* not appealable under collateral order doctrine).

⁷ "Actions have consequences [] first rule of life. And the second rule is this--you are the only one responsible for your own actions." HOLLY LISLE, *FIRE IN THE MIST* 61 (1992).

Term Lenders from encountering privileged information during their review of the two servers is to direct the Term Lenders to *immediately* return the servers without reviewing any of the data on them or to instruct the Term Lenders to *completely refrain* from reviewing the information produced. Neither alternative is workable. Both alternatives unduly prejudice the Term Lenders. And they would both create additional, unacceptable delay.⁸

ANALYSIS

In the Motion For Entry of Confidentiality Order that FBR filed on the Friday afternoon before its Court-ordered production was due the following Monday, Fontainebleau represented that it would “not have an opportunity to inspect them [the three servers] *all* prior to production on October 25, 2010” (DE# 171, at 2) (emphasis added). But it appears as though Fontainebleau never reviewed *anything* on the documents or accounting servers for privilege before producing the servers. Thus, the more accurate statement would have been that Fontainebleau chose to not review *any* documents or data on the accounting and document servers, for privilege or otherwise.

In fact, Fontainebleau has not pinpointed even one document on the servers it belatedly produced which it contends is privileged. And it has not taken advantage of the opportunity to advise the court of any inadvertently produced privileged material. Fontainebleau seems to believe that the two servers must surely contain *some* type of privileged information but it has not provided even *any* specific illustration. It has not designated even one piece of paper as privileged on either the accounting or the documents server. FBR has also not advised the Court whether it engaged in a sampling technique to see whether privileged information could be found on the servers, nor has it demonstrated that the materials on servers available to multiple parties had not *already* lost their privilege by virtue of the access provided to other third parties.

Ironically, it is the *Term Lenders* who have provided the Court with additional information about whether the servers contain privileged information. Specifically, the Term Lenders, in their Motion for Determination of Waiver of Privilege (DE# 192), explain that the electronic index reveals that more than 18,000 documents contain the

⁸ At the October 18 hearing, the Term Lenders advised the Court that April 2011 is the discovery cutoff and that “many” depositions will be taken (DE# 195, at 55).

term *legal* in either their file location or name and that more than 5,000 documents are in the folder of Fontainebleau's former general counsel. But Fontainebleau, the party seeking to protect presumably privileged information and to prevent a finding of waiver, has not proffered any information whatsoever about the specific contents of the servers it produced.

The attorney-client "privilege is not a favored evidentiary concept in the law since it serves to obscure the truth, and it should be construed as narrowly as is consistent with its purpose." *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987). As the party seeking to assert privilege over still-not-designated materials on the two servers, Fontainebleau has the burden of proving the applicability of the attorney-client privilege. *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981). Because the burden is on the proponent of the privilege, a trial court may not properly shift the burden to the opponent. *Hawkins v. Stables*, 148 F.3d 379, 381, 384 (4th Cir. 1998) (trial court incorrectly assumed the privilege applied and shifted the burden of proof to the opponent of the privilege).

In determining whether a waiver has occurred, the Court applies the well-settled principle that *any* disclosure inconsistent with maintaining the confidential nature of the attorney-client privilege, including voluntary disclosure of privileged information, waives the privilege. *Suarez*, 820 F.2d at 1160; *see also In re Keeper of the Records*, 348 F.3d 16, 22 (1st Cir. 2003) ("When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised.") (citing 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE U.S. § 9:79, at 357 (2d ed. 1999)); *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976) ("It is vital to a claim of privilege that the communication have been made *and maintained* in confidence.") (emphasis added). It also well-established that, "once waived, the attorney-client privilege cannot be reasserted." *Id.* (citing *United States v. Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971)).

Although Fontainebleau produced the data and documents in response to a subpoena and court orders compelling production, its production was still "voluntary" because it chose to produce its entire documents and accounting servers without conducting a privilege review. But in order to preserve a privilege claim, a party "must

conduct a privilege review prior to document production.” *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F.Supp. 404, 412 (D.N.J. 1995); *see also United States Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, 630 Supp. 2d 1332 (M.D. Fla. 2007) (privilege waived where attorney who sent out the production never reviewed the documents); *SEC v. Cassano*, 189 F.R.D. 83, 86 (S.D.N.Y. 1999) (attorney-client privilege waived where party makes a deliberate decision to produce without looking at the material produced beforehand).

Fontainebleau concedes that it never reviewed the materials on the document and accounting servers for privilege before turning them over. Fontainebleau’s failure to conduct any meaningful privilege review prior to production accordingly resulted in a complete waiver of applicable privileges. FBR’s production is also inconsistent with the notion that the effort necessary to avoid inadvertent disclosure must increase as the volume of documents increases. *New Bank of New England v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991).

Even now, when contesting the requested finding of waiver, Fontainebleau fails to pinpoint any particular document or file as privileged. It simply asks the Court to *assume* that privileged material will be found on the servers.⁹ This is insufficient to prevent a finder that FBR waived the privilege. *Cf. United Nuclear Corp. v. Gen. Atomic Co.*, 629 P.2d 231, 293 (N.M. 1980) (“The bald assertion that production of the requested information would violate a privilege . . . is not enough. The party resisting discovery has the burden to clarify and explain its objections and to provide support therefore. General objections without specific support may result in waiver of the objections.”) (quotations omitted).

Moreover, “voluntary compliance with a subpoena without fully exhausting attempts to defeat the subpoena or to pursue privilege claims vigorously, will generally be deemed a waiver of any privilege or work-product protection.” THE ATTORNEY-

⁹ Had Fontainebleau wished to withhold certain documents and data on the document and accounting servers on the basis of privilege, Local Rule 26.1(g)(3)(C) requires, subject to an inapplicable exception, “preparation of a privilege log with respect to all documents, electronically stored information, things and oral communications withheld on the basis of a claim of privilege or work product protection.” At risk of stating the obvious, Fontainebleau never distributed a privilege log for the two remaining servers because it never reviewed the information for privilege in the first place.

CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 62 (Edna Selan Epstein ed., 4th ed. supp. 2004); *see, e.g., United States v. Philip Morris, Inc.*, No. 99-2496, 2002 U.S. Dist. LEXIS 9174 (D.D.C. May 17, 2002) (producing documents in response to a House Commerce Committee subpoena without a privilege log and without greater efforts to protect the privilege generated a waiver, and noting that the producing party should have first, at the very least, sought a ruling from the entire committee about the privilege not being recognized).

Some court have also held that to prevent a waiver the party asserting privilege must not only resist any attempt to produce privileged documents, but must generally utilize all available options to the fullest possible extent. *Anaya v. CBS Broad., Inc.*, No. CIV-06-476, 2007 U.S. Dist. LEXIS 55164 (D.N.M. Apr. 30, 2007) (involving waiver based on documents produced to Congress); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 77-78 (N.D.N.Y. 2000) (same).

Here, Fontainebleau hardly exhausted its privilege objections. To the contrary, FBR (1) did not even start reviewing any of its three servers for privilege until six months after the subpoena was issued, (2) belatedly and casually proffered a cost-shifting request, (3) produced two of the three servers without *any privilege review whatsoever* and (4) more than two months after production, has not flagged *even one* document as actually being privileged.

Given the delay in production, the changing explanations for the delay, the failure to timely file a motion for a protective order, the multi-month stalling of depositions caused by FBR's tardy production, the belated and informal suggestion that the Term Lenders should pay for the privilege review, and the continued failure to establish that the servers in fact contain privileged material which was not previously waived through the sharing of servers by different entities, Fontainebleau's argument against waiver is "too little, too late."¹⁰ The privilege has been waived.¹¹

¹⁰ A well-known idiom meaning "inadequate as a remedy and not in time to be effective," as in "the effort to divert the stream into a corn field was too little too late [because] the houses were already flooded" Too little, too late, - Define Too little, too late, <http://dictionary.reference.com/browse/too+little,+too+late> (last visited Jan. 7, 2010).

But notwithstanding FBR's clear waiver of any applicable privileges, the Court will provide some limited relief for Fontainebleau:

First, the Court cannot force the Term Lenders to review the material produced, nor will it direct the Term Lenders on which search protocols to use should they decide to wade into the massive amount of material produced by Fontainebleau.

However, *if* the Term Lenders decide to move forward on a review of the servers, and *if* they encounter ***facially privileged information*** on the documents or accounting servers, they shall timely advise Fontainebleau by identifying, in summary fashion, the privileged information. If the documents and data are Bates-stamped or otherwise similarly designated, then the Term Lenders shall use those identifying criteria. If the materials are not so designated, then the Term Lenders shall, in good faith, provide a description which does not require undue effort, such as simply stating the file location or name. Because the Court has not reviewed the indices, I do not know what type of summary description would be feasible and reasonable under the circumstances (in the absence of a document identification system such as Bates-stamping). Therefore, I am not requiring that any particular type of description be used, and my use of "file location or name" is merely an illustration, not a requirement.

Because I am ruling that the Term Lenders may review all documents and data on the servers produced by Fontainebleau (even if they turn out to contain privileged information), the Term Lenders should not be unduly prejudiced by the requirement that they timely advise Fontainebleau of the clearly privileged materials that they encounter in their review. The Term Lenders may provide notice in a summary fashion and may postpone notice until they determine that a logical group of materials should be listed in a notice. In other words, the Term Lenders are not obligated to provide notice on a continuing, constantly-updating, immediate basis, every time they locate one clearly privileged document.

Thus, to provide one illustration, it might make sense for the Term Lenders to provide notice on a weekly or monthly basis (or some other logical period), rather than on

¹¹ The Term Lenders have advised the Court that FBR's failure to timely produce documents in response to the subpoena has caused a deposition discovery delay lasting "months" (DE# 192, at 3). Fontainebleau has not contested this representation.

an hourly basis. Because Fontainebleau has not explained how many documents it believes are privileged or the files where they might be found, I do not know when or under what circumstances the Term Lenders might locate documents which are facially privileged. Therefore, it is impractical for me to impose a specific schedule for the Term Lenders to provide the notice that I am requiring here.

Likewise, because I cannot predict the content of the servers or the type of search that the Term Lenders may conduct, I do not know for certain what it will take for the Term Lenders to provide the notice. If it turns out that the Term Lenders conclude that it is unduly burdensome to comply with my notice requirement, then they may file an appropriate motion and I will consider rescinding or modifying this requirement. If the Term Lenders file such a motion, then it should be verified or accompanied by an affidavit.

By requiring the Term Lenders to provide a list of privileged information found on the document and accounting servers, I am not restricting the Term Lenders' ability to use those documents. Rather, the Term Lenders are permitted to use the documents during pre-trial preparations in this case, including depositions. Issues of trial admissibility, however, are not encompassed by this Order.

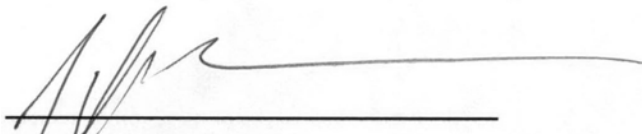
CONCLUSION

I find that Fontainebleau's voluntary disclosure of privileged or potentially privileged information constitutes a waiver of applicable privileges, including any attorney-client privilege, in the documents and data on the documents and accounting servers. Because Fontainebleau prepared a privilege log for the email server, I do not find a privilege waiver for the material on the email server (unless such materials can also be found on one of the other two servers, where there has been a waiver).

The Term Lenders motion for adjudication that the privilege has been waived is therefore GRANTED, subject to the additional procedures for notice outlined in this Order. The Term Lenders, however, are under **no** obligation to screen for privileged documents apart from their ordinary review or conduct any special investigation to determine that a specific document would have been privileged but for FBR's waiver. Moreover, as stated above, the Term Lenders may use all documents and data on the two servers in this case.

In addition, given the magnitude of Fontainebleau's production, it is entirely possible that the Term Lenders might in good faith fail to notice that a document they reviewed was otherwise privileged (i.e., before FBR's waiver). Because the Term Lenders are not to blame for the overproduction of material and because the notice requirement is designed to help *Fontainebleau*, the Term Lenders will not be subject to sanctions or other adverse consequences should they inadvertently omit privileged material from the list or lists they provide to Fontainebleau.

DONE AND ORDERED, in Chambers, at Miami, Florida, January 7, 2011.



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-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 44; GRANTING PLAINTIFF
TERM LENDERS' JOINT MOTION FOR PARTIAL FINAL JUDGMENT [ECF No. 151]**

THIS CAUSE is before the Court upon Plaintiff Term Lenders' ("Plaintiffs" or "Term Lenders"¹) Joint Motion for Partial Final Judgment ("Motion"). [ECF No. 151].² On October 25, 2010, Defendants³ filed an Opposition to Plaintiffs' Motion. [ECF No. 175]. On November 4, 2010, Plaintiffs filed their Reply in support of their Motion. [ECF No. 179]. On January 7, 2011, I held oral argument on Plaintiffs' motion.

Plaintiffs move for entry of partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) ("Rule 54(b)") in order to seek an appeal of their claims against the Revolving Lender Defendants at the same time as the Trustee's appeal. Defendants

¹ The Term Lenders are comprised of all Plaintiffs in the operative complaints in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al*, Case No. 09-cv-23835-ASG (Second Amended "Avenue Complaint") and *ACP Master, Ltd., et al v. Bank of America, N.A., et al*, Case No. 10-cv-20236-ASG (Amended "Aurelius Complaint").

² All references to the docket refer to Case No. 09-MD-02106 unless otherwise indicated.

³ Bank of America, N.A., 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 (collectively "Defendants" or "Revolving Lenders").

oppose Plaintiffs' requested relief on the basis that there are significant differences between the two appeals and an immediate appeal by Plaintiffs would increase the number of issues before the Eleventh Circuit. Specifically, Defendants argue that my prior ruling on the "fully drawn" issue was an alternative ground for dismissing Plaintiffs' claims, secondary to my determination that the Term Lenders lack standing for their Credit Agreement claims because they are not intended beneficiaries of Defendants' lending commitment to Fontainebleau.

Having considered the relevant submissions, the parties' arguments, the applicable law, and being otherwise duly advised in the premises I GRANT Plaintiff Term Lenders' Joint Motion for Partial Final Judgment for the reasons set forth at the hearing and below.

I. Procedural history

On December 9, 2009, the instant multidistrict litigation ("MDL") proceeding was transferred to this district by order of the Judicial Panel on Multidistrict Litigation. [ECF No. 1]. The Term Lenders' respective complaints each contain two sets of claims: (1) Credit Agreement claims, alleging that Defendants breached their Revolving Loan commitment to Fontainebleau under the June 6, 2007 Credit Agreement ("Credit Agreement") by, among other things, rejecting Fontainebleau's March 3, 2009 Notice of Borrowing; and (2) Disbursement Agreement claims, alleging that Bank of America, N.A. breached its duties as Disbursement Agent under the June 6, 2007 Disbursement Agreement ("Disbursement Agreement") by permitting Fontainebleau to access loan proceeds despite actual knowledge that Events of Default precluded disbursement.

A. Trustee's claims

On August 29, 2009, I denied Fontainebleau's Motion for Partial Summary Judgment on Liability With Respect to the March 2 Notice of Borrowing. **[Case No. 09-21879; ECF No. 62]**. The issue in Fontainebleau's Motion for Partial Summary Judgment was whether Defendants breached the Credit Agreement by refusing to process the March 2 Notice, which requested Revolving Loans in excess of \$150 million, on the basis that the Total Delay Draw Commitments, *i.e.*, \$350 million, was not "fully drawn" as required by the terms of Section 2.1(c)(iii).

On September 14, 2010, the Chapter 7 Trustee⁴ for Fontainebleau ("Trustee") filed an Uncontested and Unopposed Motion to Dismiss Claims with Prejudice to Expedite Appeal of Claim-Dispositive Ruling. **[ECF No. 135]**. On September 21, 2010, I granted the Trustee's motion to facilitate an immediate appeal from the judgment in order for the Trustee to appeal my August 26 Order denying Fontainebleau's motion for partial summary judgment. **[ECF No. 139]**. Final judgment pursuant to Federal Rule of Civil Procedure 58 was entered the same day. **[ECF No. 141]**. On October 18, 2010, the Trustee filed a Notice of Appeal, appealing from the final judgment and the order of dismissal with prejudice. **[ECF No. 168]**.⁵

⁴ On April 12, 2010, the Bankruptcy Court entered an order converting the underlying cases from cases under Chapter 11 of Title 11 of the United States Code to cases under Chapter 7 of that title. *In re Fontainebleau Las Vegas Holdings, LLC*, No. 09-21481-AJC (Bankr. S. D. Fla. at **[ECF No. 1944]**).

⁵ At oral argument, the parties represented that the briefing process for the Trustee's appeal before the Eleventh Circuit has been delayed until February 2011 because of an ongoing mediation with the Eleventh Circuit mediator. Plaintiffs argued that granting their Rule 54(b) relief could potentially promote global settlement in this matter, although Defendants disagreed.

B. Term Lenders' claims

On May 28, 2010, I dismissed with prejudice all the Term Lender claims seeking damages from the Revolving Lenders for refusal to finance the construction of the Fontainebleau Casino and Resort. **[ECF No. 80, Amended MDL Order Number 18]**. This resulted in a dismissal of the Term Lenders' Credit Agreement claims. *Id.* However, the Term Lenders' Disbursement Agreement claims were not dismissed because the Term Lenders adequately alleged that Bank of America, N.A. disbursed funds to Fontainebleau in the face of a known Event of Default. *Id.* On September 22, 2010, I denied the Term Lender Plaintiffs and Defendant Bank of America, N.A.'s Motion to Stay on the basis that the Trustee's appeal of the Credit Agreement Claims did not support imposition of a stay of the Term Lenders' Disbursement Agreement Claims in their separate actions. **[ECF No. 142]**.

II. Applicable law

Federal Rule of Civil Procedure 54(b) provides in relevant part, "[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." 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). This determination requires the district court to "balance judicial administrative interests and relevant equitable concerns." *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 166 (11th Cir. 1997). "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. CiticorpSav. of Ill.*, 891 F.2d 1507, 1509110 (11th Cir. 1990) (internal quotation marks omitted).

Appellate jurisdiction over an appeal from an interlocutory decision certified under Rule 54(b) is limited to the rulings or orders certified by the district court. See *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1296-97 (11th Cir. 2001) ("Because no final judgment has been entered disposing of all the claims in this case, our appellate jurisdiction is confined to the issues made appealable under Rule 54(b)."). An appellate court may dismiss an appeal where it determines that entry of partial final judgment under Rule 54(b) was improper. See *Lloyd Noland Found., Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 775 (11th Cir. 2007) (dismissing appeal where district court granted motion for Rule 54(b) certification with a two-sentence order). In *Lloyd Noland*, the Eleventh Circuit addressed the propriety of the district court's entry of final judgment under Rule 54(b) *sua sponte* even though no party on appeal directly questioned the Rule 54(b) certification "because such certifications implicate the scope of our appellate jurisdiction." *Id.* at 777 (citing *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 165 (11th Cir. 1997) (per curiam)). The Eleventh Circuit in *Lloyd Noland* determined that the district court's grant of summary judgment to the defendants did not dispose entirely of a separable claim. *Id.* at 781. Accordingly, the Eleventh Circuit determined that it lacked jurisdiction and dismissed the appeal. *Id.* at 782.

III. Analysis

Although the district court is not required to express its reasons for concluding that there is no just reason for delay in every case, the district court must exercise its own discretion and enter a Rule 54(b) certification determining that there is no just reason for delay and directing entry of judgment before an appeal may be taken. *In re Yarn Processing, supra*, 680 F.2d at 1340 (citing *Rothenberg v. Security Management Co.*, 617 F.2d 1149, 1150 (5th Cir. 1980), *cert. denied*, 449 U.S. 954 (1980)).

A. No just reason for delay

"[I]n deciding whether there are no just reasons to delay the appeal of individual final judgments . . . a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980). "In determining that there is no just reason for delay, courts may consider 'any judicial administrative advantage that might be served by entering the judgment under Rule 54(b).'" *Access Now, Inc. v. AMH CGH, Inc.*, 2001 U.S. Dist. LEXIS 12876, *24 (S.D. Fla. May 11, 2001) (citing *Moore's Federal Practice* § 54.23[1][b]).

As a preliminary matter, it is clear that the issue of whether the Delay Draw Term Loan facility was "fully drawn" was addressed in both orders dismissing the Term Lenders' and Trustee's respective claims. Although the issue of standing was a basis upon which I dismissed the Term Lenders' Credit Agreement claims, Defendants acknowledge that one issue that will be heard on the Trustee's appeal is my determination that "the unambiguous meaning of 'fully drawn' in [Credit Agreement] section 201 (c)(iii) [is] 'fully funded.'" See [ECF No. 175, p. 7]. This same issue

subsequently arose in my order dismissing the Term Lenders' Credit Agreement claims as an additional basis for dismissing those claims. Accordingly, the same interpretation of "fully drawn" was relevant in determining whether to dismiss the Trustee's and Term Lenders' claims. Therefore, both the Trustee and the Term Lenders' appeals will seek review of the same analysis regarding the "fully drawn" issue.

Defendants claim that "an immediate Term Lender appeal would only serve to multiply the issues before the Eleventh Circuit." [ECF No. 175, p. 5]. However, it is clear that there is an overlap of the "fully drawn" issue as it relates to dismissal of both the Trustee's and Term Lenders' Credit Agreement claims. Rule 54(b) certification at this juncture will provide the appellate court with the opportunity to review the "fully drawn" issue regarding both the Trustee and Term Lenders' claims. This will also eliminate the need to revisit this issue pending a forthcoming appeal upon resolution of all of the Term Lenders' claims. As counsel for Defendants acknowledged at oral argument, there will inevitably be an appeal at the completion of the litigation between the Term Lenders and Bank of America, N.A., regardless of the ultimate outcome of that case. Consequently, the Term Lenders' "fully drawn" issue will be appealed, whether it is at the present time through Rule 54(b) certification or following adjudication of the Term Lenders' remaining Disbursement Agreement claims. The ability of the appellate court to consider the Term Lenders' position alongside the Trustee's position will promote efficiency and allow an opportunity to avoid piecemeal and potentially duplicative appeals.

As discussed *supra*, an appellate court may dismiss an appeal where it determines that entry of partial final judgment under Rule 54(b) was improper. See

Lloyd Noland, 483 F.3d at 775. Essentially, the appellate court has the authority to determine whether it is in the interest of all parties to simultaneously resolve both the Trustee and Term Lenders' appeals of the Credit Agreement claims. By granting Rule 54(b) relief to the Term Lenders, there exists—at a minimum—the opportunity for the appellate court to review these matters in the aggregate without needing to wait until final resolution of the Term Lenders' claims to re-examine the "fully drawn" issue.

The practical consequences of granting Plaintiffs' requested relief will result in a situation in which the appellate court may have all the parties' positions on the "fully drawn" issue before it when rendering a decision on this very issue. If the appellate court determines that Rule 54(b) certification was somehow improper, it can decline to entertain the Term Lenders' appeal at the instant stage and revisit the Term Lenders' arguments in the form of an amicus brief or upon the appeal following resolution of the Term Lenders' remaining Disbursement Agreement claims.⁶ This will also allow the Term Lenders to face a final and binding decision, as opposed to circumstances in which the Term Lenders might file an amicus brief pending the appellate court's permission and not be subject to standing to appeal.

In sum, there is no just reason for delaying the Term Lenders' rights to appeal when the order dismissing their claims discusses the "fully drawn" issue as referenced in the order dismissing the Trustee's claims against the same defendants. The possibility of duplicative appeals on the "fully drawn" issue can be foreclosed with a grant of Rule 54(b) certification. Further, there is no just reason for delay especially in

⁶ Assuming the remaining claims are resolved prior to trial by summary judgment or if the parties agree to transfer the cases before this Court prior to final resolution.

light of the nature of the MDL proceeding and the fact that judicial economy can be served by permitting the Term Lenders and the Trustee to simultaneously seek appeals.

B. Multidistrict litigation

The basic purpose underlying 28 U.S.C. § 1407 is to secure, in multidistrict civil litigation as in all other civil litigation, the "just, speedy and inexpensive determination of every action." *In re National Student Marketing Litigation*, 368 F. Supp. 1311, 1316 (J.P.M.L. 1973) (citing Fed. R. Civ. P. 1). As the Judicial Panel on Multidistrict Litigation stated in its Transfer Order, centralization under 28 U.S.C. § 1407 serves the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. **[ECF No. 1]**. In centralizing the proceedings, the Panel noted this would also eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. *Id.* at p. 2.

The unique nature of this matter as a multidistrict litigation proceeding supports entry of Rule 54(b) certification and also underscores why there is no just reason for delay in permitting the Term Lenders to file their appeal alongside the Trustee. Rule 54(b) certification promotes the underlying purposes of multidistrict litigation and will allow conservation of judicial resources because the Trustee and Term Lenders' appeals both concern the "fully drawn" issue. As Plaintiffs noted at oral argument (but admitted that they did not expressly discuss in their moving papers), piecemeal litigation may ensue if these cases are remanded to their original districts. Since the cases fall within this district for coordinated or consolidated pretrial proceedings, the Avenue Plaintiffs would return to the District Court of Nevada and the Aurelius Plaintiffs would return to the Southern District of New York for trial. Accordingly, appeal of these issues

would fall before the Ninth and Second Circuits, respectively. The Term Lenders argue that this will burden two additional circuits with the same issues that could be before the Eleventh Circuit by way of a Rule 54(b) certification. Furthermore, as recognized during oral argument, this has the potential to lead to inconsistent rulings among the circuits—a result contrary to the fundamental purposes of centralizing MDL proceedings.

Appellate courts in other circuits have expressly cautioned against piecemeal appeals requiring appellate review by numerous courts. See e.g., *Royster v. Food Lion (In re Food Lion)*, 73 F.3d 528, 532 (4th Cir. 1996) ("permitting the transferor courts (and, possibly, the Courts of Appeal for the Sixth and Eleventh Circuits) to reconsider the transferee court's summary judgment orders will frustrate the aims of § 1407. The overriding purpose of the multidistrict procedure dictates that these claims be decided in the same appellate forum."). In *In re Food Lion*, a multidistrict litigation proceeding, the Fourth Circuit noted that:

Even accounting for the peculiar facts of each case, it is clearly more efficient to provide for review by one appellate court in one proceeding rather than leaving open the possibility that [the transferee court's] decisions could be reconsidered by each of the transferor courts and reviewed by as many as three courts of appeal.

The better practice in this case would have been for the dismissed parties to have requested, and for [the transferee court] to have directed, the entry of Rule 54(b) final judgments prior to filing the suggestion of remand. A consolidated appeal, heard by the appellate court having jurisdiction over the transferee district court that entered the orders, is the best means of achieving the goals of efficient and uniform adjudication of numerous actions.

73 F.3d at 532-33 (citing *FMC Corp. v. Glouster Engineering Co.*, 830 F.2d 770, 772 (7th Cir. 1987) (explaining why the court of appeals covering the transferee court, rather

than the one covering the transferor court, should hear appeals from orders of the transferee court).

The potential for different points of view among various circuits on matters that the parties will appeal, including the "fully drawn" issue, is inconsistent with the goals of a multidistrict proceeding. With the Term Lenders' partial final judgment, the appellate court will at least have the option of considering the Term Lenders' appeal in conjunction with the Trustee's appeal. The benefit of having an opportunity for the appellate court to review the "fully drawn" issue (and the issue of the Term Lenders' standing, if necessary), in one instance will promote judicial economy. If the appellate court believes that Rule 54(b) certification is improper, it may dismiss the appeal *sua sponte* if necessary. This is not to suggest that district courts should presume that Rule 54(b) certification is appropriate simply because the appellate court can dismiss the appeal. However, in this case, upon evaluating the commonality of the appeals (with respect to the "fully drawn" issue) and given the multidistrict litigation nature of the proceedings, Rule 54(b) certification is proper and will provide the appellate court with the option of considering the Term Lenders' arguments on appeal at this stage.

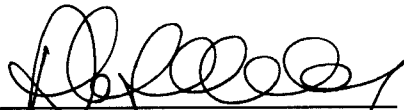
IV. Conclusion

Based on the foregoing, it is hereby ORDERED and ADJUDGED that:

1. Plaintiff Term Lenders' Joint Motion for Partial Final Judgment [ECF No. 151] is GRANTED.
2. The Clerk is directed to enter final judgment in favor of Defendants on Claims II, III, and IV of the Second Amended Complaint in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al.*, Case No. 09-cv-23835-ASG and Claims I and II of

the Amended Complaint in *ACP Master, Ltd., et al v. Bank of America, N.A., et al.*, Case No. 10-cv-20236-ASG.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 13TH day of January, 2011.



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-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

ENTRY OF PARTIAL FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 54(b) and for the reasons set forth more fully in the Order issued in this matter, upon Plaintiff Term Lenders' Joint Motion for Partial Final Judgment [**ECF No. 151**], seeking to enter partial final judgment for the purpose of facilitating an appeal from final judgment that brings up for review this Court's May 28, 2010 order Granting in Part and Denying in Part Motions to Dismiss [**ECF No. 80, Amended MDL Order Number Eighteen**], judgment is hereby entered dismissing with prejudice Claims II, III, and IV of the Second Amended Complaint in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al.*, Case No. 09-cv-23835-ASG and Claims I and II of the Amended Complaint in *ACP Master, Ltd., et al v. Bank of America, N.A., et al.*, Case No. 10-cv-20236-ASG. In accordance with the Court's Order, Plaintiffs shall take nothing from this cause. All parties shall bear their own costs.

BY COURT ORDER at Miami, Florida this 13th day of January, 2011.

STEVEN M. LARIMORE
Clerk of Court



By: JACOB HASBUN
Deputy Clerk

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

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

MDL No. 2106

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

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al.* Case No. 09-23835-CIV-GOLD/GOODMAN, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the *Entry of Partial Final Judgment* entered on January 13, 2011, docketed on January 18, 2011 in both the multidistrict litigation case [Case No. 09-md-02106-ASG, D.E. # 202] and the underlying case [Case No. 09-23835-CIV-GOLD/GOODMAN, D.E. # 110], and the related *Order Granting in Part and Denying in Part Motions to Dismiss* entered in this action on May 28, 2010, to the extent the Motions to Dismiss were granted, [MDL Order No. 18; Case No. 09-md-02106, D.E. # 79; Case No. 09-23835-CIV, D.E. # 107].

This Notice of Appeal has simultaneously been filed and docketed in both the multidistrict litigation case, Case No. 09-md-02106-ASG, and the underlying case, Case No. 09-23835-CIV-GOLD/GOODMAN, as an appeal from the above referenced *Entry of Partial Final Judgment* and the above referenced order entered and docketed in both cases.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF APPEAL** 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: January 19, 2011

s/Lorenz Prüss
Lorenz M. Prüss, Esq.

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Attorneys:	Representing:
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Brett Michael Amron BAST AMRON LLP 150 West Flagler Street Penthouse 2850 Miami, FL 33130 Tele: (305) 379-7905	Plaintiffs ACP Master, Ltd. Aurelius Capital Master, Ltd.

ELEVENTH CIRCUIT TRANSCRIPT ORDER FORM

PART I. TRANSCRIPT ORDER INFORMATION

Appellant to complete and file with the District Court Clerk within ~~30~~ 14 days of the filing of the notice of appeal in all cases, including those in which there was no hearing or for which no transcript is ordered.

Short Case Style: _____ vs _____

District Court No.: _____ Date Notice of Appeal Filed: _____ Court of Appeals No.: _____
(If Available)

CHOOSE ONE: No hearing No transcript is required for appeal purposes All necessary transcript(s) on file
I AM ORDERING A TRANSCRIPT OF THE FOLLOWING PROCEEDINGS:

Check appropriate box(es) and provide all information requested:

HEARING DATE(S)	JUDGE/MAGISTRATE	COURT REPORTER NAME(S)
Pre-Trial Proceedings _____		
Trial _____		
Sentence _____		
Other _____		

METHOD OF PAYMENT:

I CERTIFY THAT I HAVE CONTACTED THE COURT REPORTER(S) AND HAVE MADE SATISFACTORY ARRANGEMENTS WITH THE COURT REPORTER(S) FOR PAYING THE COST OF THE TRANSCRIPT.

CRIMINAL JUSTICE ACT. Attached for submission to District Judge/Magistrate is my completed CJA Form 24 requesting authorization for government payment of transcript. [A transcript of the following proceedings will be provided ONLY IF SPECIFICALLY AUTHORIZED in Item 13 on CJA Form 24: Voir Dire; Opening and Closing Statements of Prosecution and Defense; Prosecution Rebuttal; Jury Instructions]

Ordering Counsel/Party: _____
Name of Firm: _____
Street Address/P.O. Box: _____
City/State/Zip Code: _____ Phone No.: _____

I certify that I have filed the original (Yellow page) with the District Court Clerk, sent the Pink and green pages to the appropriate Court Reporter(s) if ordering a transcript, and sent a photocopy to the Court of Appeals Clerk and to all parties.

DATE: _____ SIGNED: _____ Attorney For: _____

PART II. COURT REPORTER ACKNOWLEDGMENT

Court Reporter to complete and file Pink page with the District Court Clerk within 10 days of receipt. The Court Reporter shall send a photocopy to the Court of Appeals Clerk and to all parties, and retain the Green page to provide notification when transcript filed.

Date Transcript Order received: _____
Satisfactory arrangements for paying the cost of the transcript were completed on: _____
Satisfactory arrangements for paying the cost of the transcript have not been made.

No. of hearing days: _____ Estimated no. of transcript pages: _____ Estimated filing date: _____

DATE: _____ SIGNED: _____ Phone No.: _____

NOTE: The transcript is due to be filed within 30 days of the date satisfactory arrangements for paying the cost of the transcript were completed unless the Court Reporter obtains an extension of time to file the transcript.

PART III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN DISTRICT COURT

Court Reporter to complete and file Green page with the District Court Clerk on date of filing transcript in District Court. The Court Reporter shall send a photocopy of the completed Green page to the Court of Appeals Clerk on the same date.

This is to certify that the transcript has been completed and filed with the district court on (date): _____

Actual No. of Volumes and Hearing Dates: _____

Date: _____ Signature of Court Reporter: _____

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

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

MDL No. 2106

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

**AVENUE TERM LENDER PLAINTIFFS'
DESIGNATION OF RECORD FOR APPEAL**

Pursuant to the Clerk of Court's request dated January 20, 2011, the Avenue Term Lender Plaintiffs¹ hereby designate documents to include in the record transmitted to the Eleventh Circuit Court of Appeals by circling the appropriate docket entry numbers of items to include on a copy of the MDL District Court docket sheet, attached hereto. In addition, the Avenue Term Lender Plaintiffs designate the relevant transcripts that they will order as reflected on the Eleventh Circuit Transcript Order Form that will be filed with the Court separately.

¹ Avenue Term Lender Plaintiffs consist of the plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.* in underlying case number 09-cv-23835-ASG.

Dated: January 24, 2011.

Respectfully submitted,

/s/ Lorenz M. Prüss

David A. Rothstein, Esq.

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APPEAL, CASREF, JG, MDL, REF_DISCOV

**U.S. District Court
 Southern District of Florida (Miami)
 CIVIL DOCKET FOR CASE #: 1:09-md-02106-ASG**

In Re: Fontainebleau Las Vegas Contract Litigation
 Assigned to: Judge Alan S. Gold
 Referred to: Magistrate Judge Jonathan Goodman
 Member case: ([View Member Case](#))
 Cause: 28:1331 Fed. Question: Breach of Contract

Date Filed: 12/02/2009
 Jury Demand: Plaintiff
 Nature of Suit: 190 Contract: Other
 Jurisdiction: Federal Question

Date Filed	#	Docket Text
12/02/2009	<u>1</u>	TRANSFER ORDER (Dated 12/02/2009) from Judicial Panel on Multidistrict Litigation transferring case to the Southern District of Florida re: MDL Case # 09-MD-2106 for consolidated pretrial proceedings pursuant to 28 USC 1407 and assigned to the Honorable Alan S. Gold. (Signed by Robert L. Miller, Jr., Acting Chairman of the Panel). (Attachments: # <u>1</u> JPML Service List) (gp) (Entered: 12/03/2009)
12/02/2009	<u>2</u>	Rules of Procedure of the Judicial Panel on Multidistrict Litigation. (gp) (Entered: 12/03/2009)
12/04/2009	<u>3</u>	MDL Transfer In Case Receipt from Southern District of Florida; Case No. 1:09-cv-21879-ASG. Original file with documents 1-110. re: SDFL MDL Case Number 09-md-2106. This Document relates to: 1:09-md-02106-ASG, 1:09-cv-21879-ASG (gp) (Entered: 12/04/2009)
12/04/2009	<u>4</u>	Rules of Procedure of the Judicial Panel on Multidistrict Litigation [as modified] (gp) (Entered: 12/04/2009)
12/04/2009	<u>5</u>	MDL Transmittal Letter Requesting Case from the District of Nevada, Case Number 2:09-1047 Avenue CLO Fund, Ltd., et al., v. Bank of America, N.A., et al., with enclosed copy of the order of transfer from the Judicial Panel on Multidistrict Litigation. (gp) (Entered: 12/04/2009)
12/08/2009	<u>6</u>	ORDER FOLLOWING TELEPHONIC Status Conference; Requiring Submission; Setting Telephone Status Conference:(Status Conference set for 12/18/2009 02:30 PM in Miami Division before Judge Alan S. Gold.). **Please see Order for further details**. Signed by Judge Alan S. Gold on 12/8/2009. This Document relates to all actions: 1:09-md-02106-ASG, 1:09-cv-21879-ASG (gp) (Entered: 12/08/2009)
12/11/2009	<u>7</u>	NOTICE by Bank of America, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, Fontainebleau Las Vegas LLC, HSH Nordbank AG, New York Branch, JP Morgan Chase Bank, N.A., MB Financial Bank, N.A., Merrill Lynch Capital Corporation, Sumitomo Mitsui Banking Corporation, The Royal Bank of Scotland PLC, Bank of Scotland PLC, Camulos Master Fund [Joint Notice] Associated Cases: 1:09-md-02106-ASG,

		1:09-cv-21879-ASG(Bloom, Mark) (Entered: 12/11/2009)
12/21/2009	<u>8</u>	MDL ORDER NUMBER TWO Following Telephonic Status Conference; Setting Oral Argument; Allowing Submission and Response - Oral Argument as to (98 in 1:09-cv-21879-ASG) MOTION for Leave to Appeal and for Stay Pending Appeal (Oral Argument set for 1/21/2010 05:00 PM in Miami Division before Judge Alan S. Gold.). **Please see Order for further details**. Signed by Judge Alan S. Gold on 12/21/2009. This Document relates to All Actions: 1:09-md-02106-ASG, 1:09-cv-21879-ASG (gp) (Entered: 12/22/2009)
01/06/2010	<u>9</u>	MDL Transfer In Case Receipt from District of Nevada; Case Number 2:09-cv-01047-KJD-PAL. Electronic file consisting of documents numbered 1-76. Assigned Case #1:09-cv-23835-ASG on 12/28/09. re: SDFL MDL Transfer Order at DE # (1 in 1:09-md-02106-ASG). See Docket Sheet at DE # (77 in 1:09-cv-23835-ASG). This Document relates to: 1:09-md-02106-ASG, 1:09-cv-23835-ASG (gp) (Entered: 01/06/2010)
01/08/2010	<u>10</u>	MDL ORDER Number Three - Amended Order Setting Pretrial and Trial Dates, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures. Signed by Judge Alan S. Gold on 1/8/2010. This Document relates to all actions: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG (gp) (Entered: 01/08/2010)
01/08/2010	<u>11</u>	CASE REFERRED to Magistrate Judge Chris M. McAliley for Discovery Motions., Set/Reset Deadlines/Hearings: (Final date to exchange written Discovery demands, including Requests for Production, Requests for Admission and Interrogatories due by 1/31/2011., Conclusion of Fact Discovery due by 4/14/2011., Defendant shall furnish opposing counsel with a written list containing the names and addresses of all Expert Witnesses so Listed permitted to testify due by 11/1/2010., In Limine Motions due by 12/13/2011., All non-dispositive, non-discovery related pretrial Motions due by 9/15/2010., Joint Pretrial Stipulation due by 12/13/2011., Calendar Call set for 2/8/2012 01:30 PM in Miami Division before Judge Alan S. Gold., Trial set for 2/13/2012 before Judge Alan S. Gold., Pretrial Conference set for 1/13/2012 02:00 PM in Miami Division before Judge Alan S. Gold.) **Please see Order at DE # <u>10</u> for further deadlines/instructions** (gp) (Entered: 01/08/2010)
01/13/2010	<u>12</u>	RESPONSE in Opposition re (98 in 1:09-cv-21879-ASG, 98 in 1:09-cv-21879-ASG) MOTION for Leave to Appeal <i>Interlocutory Orders Withdrawing the Reference and Denying Summary Judgment Pursuant to 28 U.S.C. Section 1292(b) and</i> MOTION to Stay re (23) Order., (62) Order., <i>Litigation Pending Disposition of Any Appeal</i> MOTION for Leave to Appeal <i>Interlocutory Orders Withdrawing the Reference and Denying Summary Judgment Pursuant to 28 U.S.C. Section 1292(b) and</i> MOTION to Stay re (23) Order., (62) Order., <i>Litigation Pending Disposition of Any Appeal</i> filed by Term Lenders. Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG(Pruss, Lorenz) (Entered: 01/13/2010)
01/13/2010	<u>13</u>	MDL ORDER NUMBER FOUR: Administratively Closing Member Cases. **Please see Order for further details**. Signed by Judge Alan S. Gold on

		1/13/2010. This Document relates to All actions. Re: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG(gp) -Modified text on 1/14/2010 (gp). (Entered: 01/14/2010)
01/14/2010	<u>14</u>	UNSTIPULATED MOTION for Substitution of Counsel (<i>Proposed Order Attached</i>) by MB Financial Bank, N.A.. Responses due by 2/1/2010 Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG(Grossman, Gregory) (Entered: 01/14/2010)
01/15/2010	<u>15</u>	Second AMENDED COMPLAINT, filed by Term Lenders.Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG(Pruss, Lorenz) (Entered: 01/15/2010)
01/19/2010	<u>16</u>	MDL ORDER Number Five granting (124) Unstipulated Motion for Substitution of Counsel. Attorney Alvin S. Goldstein terminated in case 1:09-cv-21879-ASG; granting (14) Unstipulated Motion for Substitution of Counsel. Attorney Alvin S. Goldstein terminated in case 1:09-md-02106-ASG. Signed by Judge Alan S. Gold on 1/19/2010. Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG(Is) (Entered: 01/19/2010)
01/20/2010	<u>17</u>	NOTICE of Attorney Appearance by Bruce Judson Berman on behalf of Camulos Master Fund, L.P. (Berman, Bruce) (Entered: 01/20/2010)
01/20/2010	<u>18</u>	Corporate Disclosure Statement by Camulos Master Fund, L.P.. (Berman, Bruce) (Entered: 01/20/2010)
01/20/2010	<u>19</u>	REPLY to Response to Motion re (98 in 1:09-cv-21879-ASG, 98 in 1:09-cv-21879-ASG) MOTION for Leave to Appeal <i>Interlocutory Orders Withdrawing the Reference and Denying Summary Judgment Pursuant to 28 U.S.C. Section 1292(b) and</i> MOTION to Stay re (23) Order,, (62) Order,, <i>Litigation Pending Disposition of Any Appeal</i> MOTION for Leave to Appeal <i>Interlocutory Orders Withdrawing the Reference and Denying Summary Judgment Pursuant to 28 U.S.C. Section 1292(b) and</i> MOTION to Stay re (23) Order,, (62) Order,, <i>Litigation Pending Disposition of Any Appeal</i> filed by Fontainebleau Las Vegas LLC. Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG(Snyder, Jeffrey) (Entered: 01/20/2010)
01/21/2010	20	TEXT Minute Entry for proceedings held before Judge Alan S. Gold: Motion Hearing held on 1/21/2010 re Docket Number 98 in 1:09-cv-21879-ASG, MOTION for Leave to Appeal Interlocutory Orders Withdrawing the Reference and Denying Summary Judgment Pursuant to 28 U.S.C. Section 1292(b) and MOTION to Stay re (23) Order, (62) Order, Litigation Pending Disposition of Any Appeal filed by Fontainebleau Las Vegas LLC. Court Reporter: Joseph Millikan, 305-523-5588 Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG (jh) (Entered: 01/22/2010)
01/25/2010	<u>21</u>	CONDITIONAL TRANSFER ORDER (CTO-1) from Judicial Panel on Multidistrict Litigation transferring case, to the Southern District of Florida re: MDL Case # 09-MD-2106 for consolidated pretrial proceedings pursuant to 28 USC 1407 and assigned to the Honorable Alan S. Gold. (Signed by Robert L. Miller, Jr., Acting Chairman of the Panel). (Attachments: # <u>1</u> Panel Service List) (gp) (Entered: 01/25/2010)

01/25/2010	<u>22</u>	MDL Transmittal Letter Requesting Case from the Southern District of New York (via e-mail), Case Number 1:09-8064 Master, Ltd., et al. v. Bank of America, N.A., et al., with enclosed copy of the order of transfer from the Judicial Panel on Multidistrict Litigation. (gp) (Entered: 01/25/2010)
01/25/2010	<u>23</u>	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Andrew B. Kratenstein. Filing Fee \$75.00. Receipt # 1015807. (yc) (Entered: 01/26/2010)
01/25/2010	<u>24</u>	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Michael R. Huttenlocher. Filing Fee \$75.00. Receipt # 1015808. (yc) (Entered: 01/26/2010)
01/27/2010	<u>25</u>	MDL ORDER Number Six: Granting (23) Motion for Limited Appearance of Andrew B. Kratenstein, in case 1:09-md-02106-ASG. Signed by Judge Alan S. Gold on 1/27/2010. This Document relates to : 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG (gp) (Entered: 01/28/2010)
01/27/2010	<u>26</u>	MDL ORDER Number Seven: Granting (24) Motion for Limited Appearance of Michael R. Huttenlocher, in case 1:09-md-02106-ASG. Signed by Judge Alan S. Gold on 1/27/2010. This Document relates to: 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG (gp) (Entered: 01/28/2010)
01/28/2010	<u>27</u>	ORDER OF RECUSAL. Magistrate Judge Chris M. McAliley recused. Case reassigned to Magistrate Judge Edwin G. Torres for all further proceedings. Signed by Magistrate Judge Chris M. McAliley on 1/19/2010. (jc) (Entered: 01/28/2010)
01/28/2010	<u>28</u>	ORDER OF RECUSAL. Magistrate Judge Edwin G. Torres recused. Case reassigned to Magistrate Judge Ted E. Bandstra for all further proceedings. Signed by Magistrate Judge Edwin G. Torres on 1/28/2010. (jc) (Entered: 01/28/2010)
01/29/2010	<u>29</u>	Corporate Disclosure Statement by Term Lenders, Term Lenders. (Attachments: # <u>1</u> Exhibit A - Corporate Disclosure Statement, # <u>2</u> Exhibit B - Corporate Disclosure Statement, # <u>3</u> Exhibit C - Corporate Disclosure Statement, # <u>4</u> Exhibit D - Corporate Disclosure Statement, # <u>5</u> Exhibit E - Corporate Disclosure Statement, # <u>6</u> Exhibit F - Corporate Disclosure Statement, # <u>7</u> Exhibit G - Corporate Disclosure Statement, # <u>8</u> Exhibit H - Corporate Disclosure Statement, # <u>9</u> Exhibit I - Corporate Disclosure Statement, # <u>10</u> Exhibit J - Corporate Disclosure Statement, # <u>11</u> Exhibit K - Corporate Disclosure Statement, # <u>12</u> Exhibit L - Corporate Disclosure Statement, # <u>13</u> Exhibit M - Corporate Disclosure Statement, # <u>14</u> Exhibit N - Corporate Disclosure Statement, # <u>15</u> Exhibit O - Corporate Disclosure Statement, # <u>16</u> Exhibit P - Corporate Disclosure Statement, # <u>17</u> Exhibit Q - Corporate Disclosure Statement)Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Pruss, Lorenz) (Entered: 01/29/2010)
02/08/2010	<u>30</u>	NOTICE by Term Lenders of Request for Termination of Appearance on Service of List of Susan Scann Associated Cases: 1:09-md-02106-ASG, 1:09-

		cv-23835-ASG(Pruss, Lorenz) (Entered: 02/08/2010)
02/09/2010	31	MDL Transfer In Case Receipt from New York Southern; Case Number 1:09-cv-08064. Electronic file consisting of documents numbered 1-28. Assigned Case # 1:10-cv-20236-ASG on 1/26/2010. re: SDFL MDL Conditional Transfer Order (CTO-1) at DE #(21 in 1:09-md-02106-ASG). See Docket Sheet at DE # (29 in 1:10-cv-20236-ASG). This Document relates to: 1:09-md-02106-ASG, 1:10-cv-20236-ASG (gp) (Entered: 02/09/2010)
02/17/2010	32	NOTICE of Voluntary Dismissal <i>Without Prejudice</i> by Carlyle High Yield Partners 2008-1, Ltd., Carlyle High Yield Partners IX, Ltd., Carlyle High Yield Partners VI, Ltd., Carlyle High Yield Partners VII, Ltd., Carlyle High Yield Partners VIII, Ltd., Carlyle High Yield Partners X, Ltd. (Pruss, Lorenz) (Entered: 02/17/2010)
02/17/2010	33	NOTICE of Voluntary Dismissal <i>Without Prejudice</i> by Primus CLO I, Ltd., Primus CLO II, Ltd. (Pruss, Lorenz) (Entered: 02/17/2010)
02/17/2010	34	NOTICE of Inadvertent Inclusion of Certain Plaintiffs by Carlyle Loan Investment, Ltd. re <u>15</u> Second Amended Complaint (Attachments: # <u>1</u> Exhibit Exhibits 1 - 3)(Pruss, Lorenz) Modified on 2/19/2010 (ls). (Entered: 02/17/2010)
02/18/2010	35	Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, by Bank of America, N.A.. Responses due by 3/8/2010 (Attachments: # <u>1</u> Exhibit 1)Associated Cases: 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Rasile, Craig) (Entered: 02/18/2010)
02/18/2010	36	MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> by Bank of America, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, JPMorgan Chase Bank, N.A., Merrill Lynch Capital Corporation, Bank of America, N.A., Bank of Scotland, Barclays Bank PLC, Camulos Master Fund, L.P., Deutsche Bank Trust Company Americas, HSH Nordbank AG, JP Morgan Chase Bank, N.A., MB Financial Bank, N.A., Sumitomo Mitsui Banking Corporation, The Royal Bank of Scotland PLC. Responses due by 3/8/2010 Associated Cases: 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Hutton, John) (Entered: 02/18/2010)
02/18/2010	37	AFFIDAVIT signed by : Thomas C Rice. re (42 in 1:10-cv-20236-ASG, 93 in 1:09-cv-23835-ASG, 36 in 1:09-md-02106-ASG) MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> by Bank of America, N.A., Bank of Scotland, Barclays Bank PLC, Camulos Master Fund, L.P., Deutsche Bank Trust Company Americas, HSH Nordbank AG,

		JPMorgan Chase Bank, N.A., MB Financial Bank, N.A., Merrill Lynch Capital Corporation, Sumitomo Mitsui Banking Corporation, Bank of America, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., The Royal Bank of Scotland PLC (Attachments: # <u>1</u> Exhibit A-1, # <u>2</u> Exhibit A-2, # <u>3</u> Exhibit A-3, # <u>4</u> Exhibit A-4, # <u>5</u> Exhibit B-1, # <u>6</u> Exhibit B-2, # <u>7</u> Exhibit B-3, # <u>8</u> Exhibit B-4, # <u>9</u> Exhibit B-5, # <u>10</u> Exhibit C, # <u>11</u> Exhibit D, # <u>12</u> Exhibit E, # <u>13</u> Exhibit F, # <u>14</u> Exhibit G, # <u>15</u> Exhibit H) Associated Cases: 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Hutton, John) (Entered: 02/18/2010)
02/19/2010	<u>38</u>	NOTICE of Voluntary Dismissal by Copper River CLO Ltd., Green Lane CLO Ltd., Kennecott Funding Ltd., LFC2 Loan Funding LLC, NZC Opportunities (Funding) II Limited, Orpheus Funding LLC, Orpheus Holdings, LLC, Sands Point Funding Ltd. (Pruss, Lorenz) (Entered: 02/19/2010)
02/22/2010	<u>39</u>	ORDER DISMISSING Certain Parties without Prejudice pursuant to (33 in 1:09-md-02106-ASG) Notice of Voluntary Dismissal, (38 in 1:09-md-02106-ASG) Notice of Voluntary Dismissal, (32 in 1:09-md-02106-ASG) Notice of Voluntary Dismissal, (34 in 1:09-md-02106-ASG) Notice (Other). DIRECTING Clerk to Take Action. Signed by Judge Alan S. Gold on 2/22/2010. This Document relates to: 1:09-md-02106-ASG, 1:09-cv-23835-ASG (gp) (Entered: 02/22/2010)
02/23/2010	<u>40</u>	ORDER Setting Hearing on Motion (35 in 1:09-md-02106-ASG, 92 in 1:09-cv-23835-ASG, 41 in 1:10-cv-20236-ASG) Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, (36 in 1:09-md-02106-ASG, 93 in 1:09-cv-23835-ASG, 42 in 1:10-cv-20236-ASG) MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> : Motion Hearing set for 5/7/2010 03:15 PM in Miami Division before Judge Alan S. Gold. See [DE 10, p. 5].. Signed by Judge Alan S. Gold on 2/23/2010. Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG (mbs) (Entered: 02/23/2010)
02/24/2010	<u>41</u>	MDL ORDER Number Nine: Requiring Courtesy Copies. **Please see Order for further details**. Signed by Judge Alan S. Gold on 2/24/2010. This Document relates to All actions (gp) (Entered: 02/24/2010)
02/25/2010	<u>43</u>	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Steven S. Fitzgerald. Filing Fee \$75.00. Receipt # 1018180. (gp) (Entered: 03/04/2010)

02/26/2010	<u>42</u>	NOTICE by Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., Bank of Scotland PLC, Royal Bank of Scotland PLC, The Royal Bank of Scotland PLC, Barclays Bank PLC of <i>Request for Termination of Appearance of Attorney (Justin S. Stern, Esq.)</i> Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Hutton, John) (Entered: 02/26/2010)
03/05/2010	<u>44</u>	NOTICE of Voluntary Dismissal <i>Without Prejudice</i> by Ares Enhanced Loan Investment Strategy III, Ltd., Avenue CLO Fund, Ltd., Avenue CLO II, Ltd., Avenue CLO III, Ltd. (Pruss, Lorenz) (Entered: 03/05/2010)
03/09/2010		Attorney Justin S. Stern terminated. Notice of Termination delivered by US Mail to Justin Stern. Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(mbs) (Entered: 03/09/2010)
03/10/2010	<u>45</u>	MDL ORDER NUMBER TEN Granting <u>43</u> Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Steven S. Fitzgerald. Signed by Judge Alan S. Gold on 3/10/2010. (gp) -Modified text on 3/10/2010 (gp). (Entered: 03/10/2010)
03/10/2010	<u>46</u>	ORDER DISMISSING Parties without prejudice pursuant to (44 in 1:09-md-02106-ASG) Notice of Voluntary Dismissal ; Directing Clerk to Take Action. Avenue CLO Fund, Ltd., Avenue CLO II, Ltd., Avenue CLO III, Ltd., Ares Enhanced Loan Investment Strategy III, Ltd. terminated.. Signed by Judge Alan S. Gold on 3/9/2010. This Document relates to: 1:09-md-02106-ASG, 1:09-cv-23835-ASG (gp) (Entered: 03/10/2010)
03/10/2010	<u>47</u>	ORDER granting <u>43</u> MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Steven S. Fitzgerald. Signed by Magistrate Judge Ted E. Bandstra on 3/9/2010. (gp) (Entered: 03/10/2010)
03/11/2010	48	CLERK'S NOTICE updating Aaron Rubinstein e-mail information. (yc) (Entered: 03/11/2010)
03/18/2010	<u>53</u>	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Phillip A. Geraci. Filing Fee \$75.00. Receipt # 1019191 (ra) Modified Date on 3/24/2010 (ra). (Entered: 03/24/2010)
03/18/2010	<u>54</u>	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Steven C. Chin. Filing Fee \$75.00. Receipt # 1019190 (ra) (Entered: 03/24/2010)
03/22/2010	<u>49</u>	RESPONSE in Opposition re (42 in 1:10-cv-20236-ASG, 36 in 1:09-md-02106-ASG, 93 in 1:09-cv-23835-ASG) MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, <i>and Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, <i>and Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, <i>and Supportion Memorandum of Law</i> filed by

		ACP Master, Ltd., Aurelius Capital Master, Ltd.. (Attachments: # <u>1</u> Exhibit Declaration of James B. Heaton, III Opposing Defendants' Joint Motion to Dismiss the Term Lender Complaints, # <u>2</u> Exhibit Continuation of Declaration)Associated Cases: 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Amron, Brett) (Entered: 03/22/2010)
03/22/2010	<u>50</u>	RESPONSE in Opposition re (42 in 1:10-cv-20236-ASG, 36 in 1:09-md-02106-ASG, 93 in 1:09-cv-23835-ASG) MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law Corrected Joint Opposition to Defendants' Motion to Dismiss the Term Lenders' Claims Against the Revolving Lenders</i> filed by ACP Master, Ltd., Aurelius Capital Master, Ltd.. Associated Cases: 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Amron, Brett) (Entered: 03/22/2010)
03/22/2010	<u>51</u>	AFFIDAVIT in Opposition re (42 in 1:10-cv-20236-ASG, 36 in 1:09-md-02106-ASG, 93 in 1:09-cv-23835-ASG) MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law Declaration of James B. Heaton, III Opposing Defendants' Joint Motion to Dismiss the Term Lender Complaints</i> filed by ACP Master, Ltd., Aurelius Capital Master, Ltd.. (Attachments: # <u>1</u> Affidavit Continuation)Associated Cases: 1:09-md-02106-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG (Amron, Brett) (Entered: 03/22/2010)
03/22/2010	<u>52</u>	RESPONSE in Opposition re (92 in 1:09-cv-23835-ASG, 41 in 1:10-cv-20236-ASG) Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,,Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, filed by 1888 Fund, Ltd., Aberdeen Loan Funding, Ltd., Ares Enhanced Loan Investment Strategy III, Ltd., Armstrong Loan Funding, Ltd., Avenue CLO Fund, Ltd., Avenue CLO II, Ltd., Avenue CLO III, Ltd., Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brentwood CLO, Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Canyon Capital Advisors, LLC, Canyon Special Opportunities Master Fund (Canyon), Ltd., Carlyle High Yield Partners 2008-1, Ltd., Carlyle High Yield Partners IX, Ltd., Carlyle High Yield Partners VI, Ltd., Carlyle High Yield Partners VII, Ltd., Carlyle High Yield Partners VIII, Ltd., Carlyle High Yield Partners X, Ltd., Carlyle Loan Investment, Ltd., Caspian

		<p>Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Copper River CLO Ltd., Duane Street CLO 1, Ltd., Duane Street CLO II, Ltd., Duane Street CLO III, Ltd., Duane Street CLO IV, Ltd., Duane Street CLO V, Ltd., Eastland CLO, Ltd., Encore Fund LP, Fortissimo Fund, Genesis CLO 2007-1 Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Green Lane CLO Ltd., Greenbriar CLO, Ltd., Highland Credit Opportunities CDO, Ltd., Highland Loan Funding V, Ltd., Highland Offshore Partners, L.P., ING International (II) - Senior Bank Loans Euro, ING International (II) - Senior Bank Loans USD, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Jasper CLO, Ltd., Jay Street Market Value CLO I, Ltd., Kennecott Funding Ltd., LFC2 Loan Funding LLC, Liberty CLO, Ltd., Loan Funding IV LLC, Loan Funding VII LLC, Loan Star State Trust, Mariner LDC, Mariner Opportunities Fund, LP, NZC Opportunities (Funding) II Limited, Nuveen Floating Rate Income Fund, Nuveen Floating Rate Income Opportunity Fund, Nuveen Senior Income Fund, Orpheus Funding LLC, Orpheus Holdings, LLC, Primus CLO I, Ltd., Primus CLO II, Ltd., Red River CLO, Ltd., Rockwall CDL II, Ltd., Rockwall CDO Ltd., Sands Point Funding Ltd., Southfork CLO, Ltd., Symphony CLO I, Ltd., Symphony CLO II, Ltd., Symphony CLO III, Ltd., Symphony CLO IV, Ltd., Symphony CLO V, Ltd., Symphony Credit Opportunity Fund, Ltd., Veer Cash Flow CLO, Limited, Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Westchester CLO, Ltd., Aurelius Capital Master, Ltd., Stratford CLO, Ltd., Cantor Fitzgerald Securities, Olympic CLO I Ltd., Shasta CLO I Ltd., Whitney CLO I Ltd., San Gabriel CLO I Ltd., Sierra CLO II Ltd., Rosedale CLO, Ltd., Rosedale CLO II Ltd., SPCP Group, LLC, Stone Lion Portfolio L.P., Venor Capital Master Fund, Ltd. . Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Pruss, Lorenz) -Modified to add missing filer on 3/23/2010 (gp). (Entered: 03/22/2010)</p>
03/30/2010	<u>55</u>	<p>MDL ORDER ELEVEN: Granting <u>53</u> Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings ; Granting <u>54</u> Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings. Signed by Judge Alan S. Gold on 3/30/2010. (gp) (Entered: 03/31/2010)</p>
04/05/2010	<u>56</u>	<p>MEMORANDUM in Support re (35 in 1:09-md-02106-ASG, 92 in 1:09-cv-23835-ASG, 41 in 1:10-cv-20236-ASG) Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,,Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, <i>Defendant Bank of America, N.A.'s Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Term Lenders' Disbursement Agreement Claims by Bank of America, N.A.</i>. Associated Cases: 1:09-md-02106-ASG,</p>

		1:09-cv-23835-ASG, 1:10-cv-20236-ASG(Rasile, Craig) (Entered: 04/05/2010)
04/05/2010	<u>57</u>	RESPONSE in Support re <u>36</u> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law</i> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint,, and <i>Supportion Memorandum of Law [Reply Memorandum in Further Support of Defendants' Joint Motions to Dismiss the Term Lender Complaints]</i> filed by Bank of America, N.A., Bank of Scotland, Barclays Bank PLC, Camulos Master Fund, L.P., Deutsche Bank Trust Company Americas, HSH Nordbank AG, New York Branch, JP Morgan Chase Bank, N.A., MB Financial Bank, N.A., Merrill Lynch Capital Corporation, Sumitomo Mitsui Banking Corporation, The Royal Bank of Scotland PLC. (Hutton, John) (Entered: 04/05/2010)
04/09/2010	<u>58</u>	MDL ORDER NUMBER 12: SETTING HEARING Telephonic Status Conference set for 4/16/2010 01:30 PM in Miami Division before Judge Alan S. Gold. Miscellaneous Deadline: Joint Submission due 04/15/2010. Signed by Judge Alan S. Gold on 4/9/2010. Associated Cases: 1:09-md-02106-ASG, 1:09-cv-21879-ASG, 1:09-cv-23835-ASG, 1:10-cv-20236-ASG (jh) (Entered: 04/09/2010)
04/15/2010	<u>59</u>	Statement of: Joint Statement Requested by the Court in MDL Order Number 12 by ACP Master, Ltd., Avenue CLO Fund, Ltd., Bank of America, N.A., Bank of Scotland PLC, Barclays Bank PLC, Camulos Master Fund, L.P., Deutsche Bank Trust Company Americas, HSH Nordbank AG, New York Branch, JP Morgan Chase Bank, N.A., MB Financial Bank, N.A., Merrill Lynch Capital Corporation, Sumitomo Mitsui Banking Corporation, The Royal Bank of Scotland PLC re <u>58</u> Order, Set/Reset Deadlines/Hearings,, (Hutton, John) (Entered: 04/15/2010)
04/16/2010	60	PAPERLESS Minute Entry for proceedings held before Judge Alan S. Gold: Telephone Status Conference held on 4/16/2010 re <u>59</u> Joint Statement Summarizing Current Discovery Dispute and the Parties' Respective Position. Court Reporter: Joseph Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov (jh) (Entered: 04/16/2010)
04/16/2010	<u>61</u>	MDL ORDER NUMBER THIRTEEN: REQUIRING SUBMISSION - All parties, including Fontainebleau, shall negotiate search terms no later than Wednesday April 21, 2010 at 10:00am; No later than Thursday April 22, 2010 at 12:00pm the parties shall file a Motion for Extension of Pre-Trial Deadlines. Signed by Judge Alan S. Gold on 4/16/2010. (gp) (Entered: 04/19/2010)
04/22/2010	<u>62</u>	Joint MOTION to Continue <i>Certain Pre-Trial Deadlines</i> by Term Lenders. Responses due by 5/10/2010 (Pruss, Lorenz) (Entered: 04/22/2010)
04/22/2010	<u>63</u>	NOTICE of Voluntary Dismissal <i>Without Prejudice</i> by Rosedale CLO II Ltd.,

		Rosedale CLO, Ltd. (Pruss, Lorenz) (Entered: 04/22/2010)
04/27/2010	<u>64</u>	ORDER DISMISSING PARTIES without prejudice Upon (63 in 1:09-md-02106-ASG) Notice of Voluntary Dismissal ; DIRECTING CLERK to Take Action. Rosedale CLO, Ltd., and Rosedale CLO II Ltd. terminated. Signed by Judge Alan S. Gold on 4/26/2010. (gp) (Entered: 04/27/2010)
04/28/2010	<u>65</u>	NOTICE of Voluntary Dismissal <i>Without Prejudice</i> by Aberdeen Loan Funding, Ltd., Armstrong Loan Funding, Ltd., Brentwood CLO, Ltd., Eastland CLO, Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Greenbriar CLO, Ltd., Highland Credit Opportunities CDO, Ltd., Highland Loan Funding V, Ltd., Highland Offshore Partners, L.P., Jasper CLO, Ltd., Liberty CLO, Ltd., Loan Funding IV LLC, Loan Funding VII LLC, Loan Star State Trust, Red River CLO, Ltd., Rockwall CDO II, Ltd., Rockwall CDO Ltd., Southfork CLO, Ltd., Stratford CLO, Ltd., Westchester CLO, Ltd. (Pruss, Lorenz) (Entered: 04/28/2010)
04/29/2010	66	PAPERLESS ORDER providing Call-in information for Oral Argument scheduled for May 4, 2010 at 3:15 p.m. All parties and/or counsel that are not required to appear in person for oral argument may call 1-866-208-0348 on the above date and time. Refer to Conference ID#71566296. Please call 3-4 minutes in advance of the scheduled time. This conference has been designated as lecture mode only. No callers will be able to address the Court. Signed by Judge Alan S. Gold on 4/29/2010. (lms) (Entered: 04/29/2010)
04/29/2010	67	CORRECTED PAPERLESS ORDER. The oral argument which was the subject of the prior paperless order regarding the call-in information is scheduled for May 7, 2010 at 3:15 p.m. Signed by Judge Alan S. Gold on 4/29/2010. (lms) (Entered: 04/29/2010)
04/30/2010	<u>68</u>	ORDER DISMISSING PARTIES WITHOUT PREJUDICE Pursuant to (65 in 1:09-md-02106-ASG) Notice of Voluntary Dismissal. Armstrong Loan Funding, Ltd., Brentwood CLO, Ltd., Eastland CLO, Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Greenbriar CLO, Ltd., Highland Credit Opportunities CDO, Ltd., Highland Loan Funding V, Ltd., Highland Offshore Partners, L.P., Jasper CLO, Ltd., Liberty CLO, Ltd., Loan Funding IV LLC, Loan Funding VII LLC, Loan Star State Trust, Red River CLO, Ltd., Rockwall CDO II, Ltd., Rockwall CDO Ltd., Stratford CLO, Ltd., Westchester CLO, Ltd., and Aberdeen Loan Funding, Ltd. terminated.. Signed by Judge Alan S. Gold on 4/30/2010. This Document relates to: 1:09-md-02106-ASG, 1:09-cv-23835-ASG (gp) (Entered: 05/03/2010)
05/07/2010	69	PAPERLESS Minute Entry for proceedings held before Judge Alan S. Gold: ORAL ARGUMENT presented on 5/7/2010 re <u>35</u> Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint, Defendant's MOTION to Dismiss (84 in 1:09-cv-23835-ASG, 15 in 1:09-md-02106-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint filed by Bank of America, N.A.; <u>36</u> MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint, and Supportion Memorandum of Law MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended

		Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint and Supportion Memorandum of Law MOTION to Dismiss State Court Complaint (84 in 1:09-cv-23835-ASG) Amended Complaint, (27 in 1:10-cv-20236-ASG) Amended Complaint, and Supportion Memorandum of Law filed by HSH Nordbank AG, Sumitomo Mitsui Banking Corporation, The Royal Bank of Scotland PLC, Merrill Lynch Capital Corporation, JPMorgan Chase Bank, N.A., JP Morgan Chase Bank, N.A., Barclays Bank PLC, MB Financial Bank, N.A., Bank of Scotland, Bank of America, N.A., Camulos Master Fund, L.P., Deutsche Bank Trust Company Americas. Court Reporter: Joseph Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov (jh) (Entered: 05/07/2010)
05/13/2010	<u>70</u>	Third Party MOTION for Extension of Time to File Response/Reply to <i>Plaintiff, Term Lenders' Document Requests</i> by Fontainebleau Resorts, LLC. (Trigoboff, Craig) (Entered: 05/13/2010)
05/14/2010	71	MDL ORDER NUMBER FIFTEEN (PAPERLESS) - REFERRING MOTION: <u>70</u> Third Party MOTION for Extension of Time to File Response/Reply to <i>Plaintiff, Term Lenders' Document Requests</i> filed by Fontainebleau Resorts, LLC. Motion referred to Ted E. Bandstra pursuant to 28 U.S.C. 636 to take all necessary and proper action as required by law.. Signed by Judge Alan S. Gold on 5/14/2010. (mbs) (Entered: 05/14/2010)
05/14/2010	<u>72</u>	Joint MOTION Leave to Add Plaintiffs to Action by 1888 Fund, Ltd., Aberdeen Loan Funding, Ltd., Ares Enhanced Loan Investment Strategy III, Ltd., Armstrong Loan Funding, Ltd., Avenue CLO Fund, Ltd., Avenue CLO II, Ltd., Avenue CLO III, Ltd., Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brentwood CLO, Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Capital Advisors, LLC, Canyon Special Opportunities Master Fund (Canyon), Ltd., Carlyle High Yield Partners 2008-1, Ltd., Carlyle High Yield Partners IX, Ltd., Carlyle High Yield Partners VI, Ltd., Carlyle High Yield Partners VII, Ltd., Carlyle High Yield Partners VIII, Ltd., Carlyle High Yield Partners X, Ltd., Carlyle Loan Investment, Ltd., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Copper River CLO Ltd., Duane Street CLO I, Ltd., Duane Street CLO II, Ltd., Duane Street CLO III, Ltd., Duane Street CLO IV, Ltd., Duane Street CLO V, Ltd., Eastland CLO, Ltd., Encore Fund LP, Fortissimo Fund, Genesis CLO 2007-1 Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Green Lane CLO Ltd., Greenbriar CLO, Ltd., Highland Credit Opportunities CDO, Ltd., Highland Loan Funding V, Ltd., Highland Offshore Partners, L.P., ING International (II) - Senior Bank Loans Euro, ING International (II) - Senior Bank Loans USD, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Jasper CLO, Ltd., Jay Street Market Value CLO I, Ltd., Kennecott Funding Ltd., LFC2 Loan Funding LLC, Liberty CLO, Ltd., Loan Funding IV LLC, Loan Funding VII LLC, Loan Star State Trust, Mariner LDC, Mariner Opportunities Fund, LP, NZC Opportunities (Funding) II Limited, Nuveen Floating Rate Income Fund, Nuveen Floating Rate Income

		Opportunity Fund, Nuveen Senior Income Fund, Olympic CLO I Ltd., Orpheus Funding LLC, Orpheus Holdings, LLC, Primus CLO I, Ltd., Primus CLO II, Ltd., Red River CLO, Ltd., Rockwall CDO II, Ltd., Rockwall CDO Ltd., Rosedale CLO II Ltd., Rosedale CLO, Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Sands Point Funding Ltd., Shasta CLO I Ltd., Sierra CLO II Ltd., Southfork CLO, Ltd., Stone Lion Portfolio L.P., Stratford CLO, Ltd., Symphony CLO I, Ltd., Symphony CLO II, Ltd., Symphony CLO III, Ltd., Symphony CLO IV, Ltd., Symphony CLO V, Ltd., Symphony Credit Opportunity Fund, Ltd., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Westchester CLO, Ltd., Whitney CLO I Ltd.. (Attachments: # <u>1</u> Exhibit Proposed Order Granting Motion)(Pruss, Lorenz) (Entered: 05/14/2010)
05/18/2010	<u>73</u>	ORDER Granting <u>72</u> Joint Motion to Add additional Plaintiffs ; DIRECTING Clerk to Take Action. Signed by Judge Alan S. Gold on 5/18/2010. (gp) (Entered: 05/18/2010)
05/18/2010	<u>74</u>	ORDER granting <u>70</u> Motion for Extension of Time to File Response/Reply re <u>70</u> Third Party MOTION for Extension of Time to File Response/Reply to <i>Plaintiff, Term Lenders' Document Requests</i> Responses due by 6/14/2010. Signed by Magistrate Judge Ted E. Bandstra on 5/18/2010. (rg) (Entered: 05/18/2010)
05/20/2010	<u>75</u>	MOTION to Withdraw as Attorney of Record for Plaintiff <i>Fontainebleau Las Vegas, LLC</i> by Bilzin Sumberg Baena Price & Axelrod LLP. by Fontainebleau Las Vegas LLC. Responses due by 6/7/2010 (Baena, Scott) (Entered: 05/20/2010)
05/21/2010	<u>76</u>	MDL ORDER NUMBER SIXTEEN; Second Amended Order Resetting Certain Pretrial deadlines, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial dates and Procedures: re <u>62</u> Joint MOTION to Continue <i>Certain Pre-Trial Deadlines</i> filed by Term Lenders (Pretrial Conference set for 1/13/2012 02:00 PM in Miami Division before Judge Alan S. Gold., Trial set for 2/13/2012 before Judge Alan S. Gold., Calendar Call set for 2/8/2012 01:30 PM in Miami Division before Judge Alan S. Gold., All Expert Discovery due by 7/15/2011., Conclusion of Fact Discovery due by 4/14/2011., In Limine Motions due by 12/13/2011., All Dispositive Pretrial Motions due by 7/29/2011., All non-dispositive, non-discovery related pretrial Motions due by 9/15/2010., Pretrial Stipulation due by 12/13/2011.). Signed by Judge Alan S. Gold on 5/21/2010. **Please see Order for further details** (gp) (Entered: 05/24/2010)
05/24/2010	<u>77</u>	ORDER Granting (75) in case 1:09-cv-21879-ASG Motion by Bilzin Sumberg Baena Price & Axelrod LLP to Withdraw as Counsel of Record. Attorney Scott Louis Baena and Jeffrey Ira Snyder terminated. **Please see Order for further details**. Signed by Judge Alan S. Gold on 5/24/2010. (gp) (Entered: 05/25/2010)
05/25/2010	<u>78</u>	CERTIFICATE OF SERVICE by Fontainebleau Las Vegas LLC (Snyder,

		Jeffrey) (Entered: 05/25/2010)
05/28/2010	<u>79</u>	MDL ORDER NUMBER EIGHTEEN granting in part and denying in part <u>35</u> Motion to Dismiss; granting in part and denying in part <u>36</u> Motion to Dismiss State Court Complaint; REQUIRING ANSWER TO AVENUE COMPLAINT; CLOSING AURELIUS CASE. Signed by Judge Alan S. Gold on 5/28/2010. (bb) (Entered: 05/28/2010)
05/28/2010	<u>80</u>	AMENDED ORDER re <u>79</u> Order on Motion to Dismiss, Order on Motion to Dismiss State Court Complaint. Signed by Judge Alan S. Gold on 5/28/2010. (jh) (Entered: 05/28/2010)
06/04/2010	<u>81</u>	Corporate Disclosure Statement by Caspian Alpha Long Credit Fund, L.P., Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P. (Attachments: # <u>1</u> Exhibit Corporate Disclosure Statements)(Pruss, Lorenz) (Entered: 06/04/2010)
06/04/2010	<u>82</u>	Third Party MOTION for Extension of Time to Complete Discovery <i>re: May 4, 2010 Subpoenas</i> by Fontainebleau Resorts, LLC. (Waldman, Glenn) (Entered: 06/04/2010)
06/07/2010	<u>83</u>	NOTICE of Striking <i>and Notice of Re-Filing Motion for Extension of Time to Respond to Subpoenas dated May 4, 2010</i> by Fontainebleau Resorts, LLC (Waldman, Glenn) (Entered: 06/07/2010)
06/07/2010	<u>84</u>	MOTION for Extension of Time to Complete Discovery <i>and to Respond to Subpoenas dated May 4, 2010</i> by Fontainebleau Resorts, LLC. (Waldman, Glenn) (Entered: 06/07/2010)
06/08/2010	<u>85</u>	PAPERLESS ORDER granting <u>84</u> Unopposed Motion for Extension of Time to Complete Discovery. Movants are hereby GRANTED a 30-day extension to respond to the subpoenas at issue.. Signed by Judge Alan S. Gold (mbs) (Entered: 06/08/2010)
06/18/2010	<u>86</u>	Third Party MOTION for Extension of Time to File Response/Reply to <i>Document Requests</i> by Fontainebleau Resorts, LLC. (Waldman, Glenn) (Entered: 06/18/2010)
06/18/2010	<u>87</u>	NOTICE by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Special Opportunities Master Fund (Canyon), Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans Euro, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Shasta CLO I Ltd., Sierra CLO II Ltd., Stone Lion Portfolio L.P., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III

		CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Whitney CLO I Ltd. re <u>79</u> Order on Motion to Dismiss, Order on Motion to Dismiss State Court Complaint,, (Pruss, Lorenz) (Entered: 06/18/2010)
06/18/2010	<u>88</u>	ANSWER and Affirmative Defenses to Amended Complaint by Bank of America, N.A..(Rasile, Craig) (Entered: 06/18/2010)
06/18/2010	<u>89</u>	ANSWER and Affirmative Defenses to Amended Complaint (" <i>Aurelius Complaint</i> ") by Bank of America, N.A..(Rasile, Craig) (Entered: 06/18/2010)
06/23/2010	<u>90</u>	ORDER REFERRING MOTION: <u>86</u> Third Party MOTION for Extension of Time to File Response/Reply to <i>Document Requests</i> filed by Fontainebleau Resorts, LLC Motions referred to Ted E. Bandstra. Signed by Judge Alan S. Gold on 6/23/2010. (gp) (Entered: 06/23/2010)
06/30/2010	<u>91</u>	ORDER granting <u>86</u> Motion for Extension of Time to File Response/Reply re <u>86</u> Third Party MOTION for Extension of Time to File Response/Reply to <i>Document Requests</i> Responses due by 7/29/2010. Signed by Magistrate Judge Ted E. Bandstra on 6/30/2010. (rg) (Entered: 06/30/2010)
07/02/2010	<u>92</u>	MOTION to Substitute Party <i>Motion to Approve Substitution of Chapter 7 Trustee as Plaintiff Fontainebleau Las Vegas, LLC</i> by Soneet R. Kapila. Responses due by 7/19/2010 (Sharp, Susan) (Entered: 07/02/2010)
07/06/2010	<u>93</u>	MOTION to Quash <i>Subpoenas</i> by Fontainebleau Resorts, LLC. (Waldman, Glenn) (Entered: 07/06/2010)
07/08/2010	<u>94</u>	ORDER REFERRING MOTION: <u>93</u> MOTION to Quash <i>Subpoenas</i> filed by Fontainebleau Resorts, LLC Motions referred to Ted E. Bandstra. Signed by Judge Alan S. Gold (mbs) (Entered: 07/08/2010)
07/10/2010	<u>95</u>	Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Special Opportunities Master Fund (Canyon), Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans Euro, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Shasta CLO I Ltd., Sierra CLO II Ltd., Stone Lion Portfolio L.P., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Whitney CLO I Ltd.. (Attachments: # <u>1</u> Text of Proposed Order Order Granting Joint Motion

		to Join Plaintiffs)(Pruss, Lorenz) (Entered: 07/10/2010)
07/12/2010	<u>96</u>	MOTION for Extension of Time to Complete Discovery <i>Chapter 7 Trustees Motion for Brief Excusal of Compliance with Second Amended Order Resetting Certain Pretrial Deadlines, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures</i> by Soneet R. Kapila. (Sharp, Susan) -Modified text on 8/5/2010 (gp). (Entered: 07/12/2010)
07/12/2010	<u>97</u>	Joint MOTION for Extension of Time to Complete Discovery / <i>Joint Motion for Extension of Certain Pre-Trial Deadlines</i> by Bank of America, N.A., Merrill Lynch Capital Corporation. (Attachments: # <u>1</u> Text of Proposed Order)(Rasile, Craig) (Entered: 07/12/2010)
07/13/2010	<u>98</u>	CERTIFICATE OF SERVICE by Soneet R. Kapila re <u>96</u> MOTION for Extension of Time to Complete Discovery <i>Chapter 7 Trustees Motion for Brief Excusal of Compliance with Second Amended Order Resetting Certain Pretrial Deadlines, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures Amended Certificate of Service</i> (Sharp, Susan) (Entered: 07/13/2010)
07/14/2010	<u>99</u>	Amended MOTION to Adopt/Join <u>95</u> Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> , <u>15</u> Amended Complaint by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Special Opportunities Master Fund (Canyon), Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans Euro, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Shasta CLO I Ltd., Sierra CLO II Ltd., Stone Lion Portfolio L.P., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Whitney CLO I Ltd.. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order Granting Leave to Join Additional Plaintiffs)(Pruss, Lorenz) (Entered: 07/14/2010)
07/15/2010	<u>100</u>	MDL ORDER Number 23 - Granting <u>97</u> Joint Motion for Extension of Time to Complete Discovery ; SETTING TELEPHONE STATUS CONFERENCE on Chapter 7 Trustee's Discovery Motions <u>96</u> , on Tuesday, July 20, 2010 at

		11:00 a.m. Any party opposing the Chapter 7 Trustee's Discovery Motion <u>96</u> shall have until Monday July 19, 2010 at 12:00 noon. Signed by Judge Alan S. Gold on 7/15/2010. (gp) (Entered: 07/15/2010)
07/15/2010		Set/Reset Deadlines as to <u>96</u> MOTION for Extension of Time to Complete Discovery <i>Chapter 7 Trustees Motion for Brief Excusal of Compliance with Second Amended Order Resetting Certain Pretrial Deadlines, Referring Discovery Motions, Directing Parties to Mediation, and Establishing pretrial dates and procedures</i> . Responses due by 7/19/2010 Telephonic Status Conference set for 7/20/2010 11:00 AM in Miami Division before Judge Alan S. Gold. **Per <u>100</u> Order ** (gp) (Entered: 07/15/2010)
07/15/2010	<u>101</u>	Joint MOTION for Extension of Time to Complete Discovery / <i>Joint Motion for Extension of Certain Pre-Trial Deadlines</i> by Bank of America, N.A., Merrill Lynch Capital Corporation. (Attachments: # <u>1</u> Text of Proposed Order)(Rasile, Craig) (Entered: 07/15/2010)
07/15/2010	<u>102</u>	STIPULATION / <i>Confidentiality Stipulation and Proposed Protective Order</i> by Bank of America, N.A., Merrill Lynch Capital Corporation (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(Rasile, Craig) (Entered: 07/15/2010)
07/15/2010	<u>103</u>	ORDER Granting <u>99</u> Unopposed Amended Joint Motion to add Plaintiffs. DIRECTING CLERK to Correct Dockets. Signed by Judge Alan S. Gold on 7/15/2010. **Please see Order for further details** (gp) (Entered: 07/16/2010)
07/15/2010	<u>104</u>	ORDER Granting <u>92</u> Chapter 7 Trustee's Motion to Approve Substitution; DIRECTING CLERK to Modify Docket.. Signed by Judge Alan S. Gold on 7/15/2010. **Please see Order for further details** (gp) (Entered: 07/16/2010)
07/16/2010	<u>105</u>	PAPERLESS ORDER granting <u>101</u> Joint Motion for Extension of Time to Complete Discovery. The date for completing document production in response to Initial Requests for Production is hereby EXTENDED from July 12, 2010 to and including the later of: (a) Monday, August 16, 2010; or (b) the date Plaintiff completes its document production. All other pretrial deadlines contained in MDL Order Number 16 [DE 76] shall remain in full force and effect. THIS DOCUMENT RELATES TO CASE NO.: 09-CV-21879-ASG.. Signed by Judge Alan S. Gold (mbs) (Entered: 07/16/2010)
07/16/2010	<u>108</u>	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Vincent Buccola. Filing Fee \$ 75.00. Receipt # FLS 10000 3865. (gp) (Entered: 07/20/2010)
07/19/2010	<u>106</u>	RESPONSE in Opposition re <u>96</u> MOTION for Extension of Time to Complete Discovery <i>Chapter 7 Trustees Motion for Brief Excusal of Compliance with Second Amended Order Resetting Certain Pretrial Deadlines, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures</i> filed by Bank of Scotland PLC, Barclays Bank PLC, Deutsche Bank Trust Company Americas, HSH Nordbank AG, JP Morgan Chase Bank, N.A., MB Financial Bank, N.A., Royal Bank of Scotland PLC, Sumitomo Mitsui Banking Corporation. (Hutton, John) (Entered: 07/19/2010)

07/19/2010	<u>107</u>	RESPONSE to Motion re <u>96</u> MOTION for Extension of Time to Complete Discovery <i>Chapter 7 Trustees Motion for Brief Excusal of Compliance with Second Amended Order Resetting Certain Pretrial Deadlines, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures</i> filed by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Special Opportunities Master Fund (Canyon), Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans USD, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Shasta CLO I Ltd., Stone Lion Portfolio L.P., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Whitney CLO I Ltd.. Replies due by 7/29/2010. (Pruss, Lorenz) (Entered: 07/19/2010)
07/20/2010	109	PAPERLESS Minute Entry for proceedings held before Judge Alan S. Gold: Telephonic Motion Hearing held on 7/20/2010 re <u>96</u> MOTION for Extension of Time to Complete Discovery <i>Chapter 7 Trustees Motion for Brief Excusal of Compliance with Second Amended Order Resetting Certain Pretrial Deadlines, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures</i> filed by Soneet R. Kapila. Court Reporter: Joseph Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov (jh) (Entered: 07/20/2010)
07/20/2010	<u>110</u>	MDL ORDER Number 24 CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER. Signed by Judge Alan S. Gold on 7/20/2010. (gp) (Entered: 07/21/2010)
07/21/2010	<u>111</u>	MDL ORDER NUMBER 25; Granting in part <u>96</u> Motion for Extension of Time to Complete Discovery. REQUIRING SUBMISSION Setting Telephone Status Conference on August 31, 2010 at 8:45 a.m.. Signed by Judge Alan S. Gold on 7/21/2010. **Please see Order for further details** (gp) -Modified text on 7/22/2010 (gp). (Entered: 07/22/2010)
07/21/2010		Set/Reset Deadlines/Hearings - Telephonic Status Conference set for 8/31/2010 08:45 AM in Miami Division before Judge Alan S. Gold. **Per <u>111</u> MDL Order ** (gp) (Entered: 07/22/2010)
07/21/2010	<u>112</u>	MDL ORDER NUMBER TWENTY SIX: Granting <u>108</u> Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Vincent Buccola. Signed by Judge Alan S. Gold on 7/21/2010. (gp) (Entered: 07/22/2010)

07/22/2010	<u>113</u>	TRANSCRIPT of Telephonic Conference held on 07.20.10 before Judge Alan S. Gold, 1-20 pages, Court Reporter: Joseph A. Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov. The transcript may be viewed at the court public terminal or purchased from Mr. Millikan before the deadline for Release of Transcript Restriction. After that date it may be obtained either from Mr. Millikan or through PACER. Redaction Request due 8/16/2010. Redacted Transcript Deadline set for 8/25/2010. Release of Transcript Restriction set for 10/25/2010. (jm) (Entered: 07/22/2010)
07/23/2010	<u>114</u>	RESPONSE in Opposition re <u>93</u> MOTION to Quash <i>Subpoenas</i> filed by Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., The Royal Bank of Scotland PLC. (Hutton, John) (Entered: 07/23/2010)
07/23/2010	<u>115</u>	AFFIDAVIT signed by : Steven S. Fitzgerald. re <u>114</u> Response in Opposition to Motion by Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., The Royal Bank of Scotland PLC (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K, # <u>12</u> Exhibit L, # <u>13</u> Exhibit M)(Hutton, John) (Entered: 07/23/2010)
07/23/2010	<u>116</u>	AMENDED MDL ORDER NUMBER 24 re <u>110</u> Protective Order to include Exhibits A and B - Confidentiality Stipulation and Protective Order. Signed by Judge Alan S. Gold on 7/22/2010. (jh) (Entered: 07/23/2010)
07/23/2010	<u>117</u>	CERTIFICATE OF SERVICE by Bank of America, N.A., Merrill Lynch Capital Corporation re <u>116</u> Amended Order (Rasile, Craig) (Entered: 07/23/2010)
07/23/2010	<u>118</u>	NOTICE of Change of Attorney after Transfer by Camulos Master Fund, L.P. (gp) (Entered: 07/26/2010)
07/23/2010		Attorney Nicholas J. Santoro terminated. Notice of Termination delivered by US Mail to Nicholas Santoro, Per <u>118</u> Notice of Change of Attorney. (gp) (Entered: 07/26/2010)
07/30/2010	<u>119</u>	Corporate Disclosure Statement by Caspian Solitude Master Fund, L.P., Sola Ltd, Solus Core Opportunities Master Fund Ltd (Attachments: # <u>1</u> Exhibit Exhibit A - Corporate Disclosure - Caspian Solitude Master Fund, # <u>2</u> Exhibit Exhibit B - Corporate Disclosure Statement - Sola Ltd. and Sola Care)(Pruss, Lorenz) (Entered: 07/30/2010)
08/04/2010	<u>120</u>	MDL ORDER No. 27 Denying <u>93</u> Motion to Quash. Signed by Magistrate Judge Ted E. Bandstra on 8/3/2010. (gp)-Modified text on 8/5/2010 (gp). (Entered: 08/05/2010)
08/04/2010	<u>121</u>	CERTIFICATION OF REFERRAL to Magistrate Judge Jonathan Goodman for all discovery pretrial motions, Magistrate Judge Ted E. Bandstra no longer assigned to case. Pursuant to Administrative Order No. 2010-79. Signed by Magistrate Judge Ted E. Bandstra on 8/3/2010. (gp) -Modified text on 8/5/2010 (gp). (Entered: 08/05/2010)

08/05/2010	<u>122</u>	RESPONSE to Plaintiff Term Lenders' Document Request Dated April 22, 2010 by Fontainebleau Resorts, LLC. (gp) (Entered: 08/05/2010)
08/19/2010	<u>123</u>	MOTION to Compel <i>Production of Documents in Response to Subpoena</i> by Term Lenders. Responses due by 9/7/2010 (Attachments: # <u>1</u> Exhibit Mockler Declaration, # <u>2</u> Exhibit Exhibit A to Mockler Declaration.pdf, # <u>3</u> Exhibit Exhibit B to Mockler Declaration.pdf, # <u>4</u> Exhibit Exhibit C to Mockler Declaration.pdf, # <u>5</u> Exhibit Exhibit D to Mockler Declaration.pdf, # <u>6</u> Exhibit Exhibit E to Mockler Declaration.pdf, # <u>7</u> Exhibit Exhibit F to Mockler Declaration.PDF, # <u>8</u> Exhibit Exhibit G to Mockler Declaration.PDF)(Pruss, Lorenz) (Entered: 08/19/2010)
08/20/2010	<u>124</u>	NOTICE by Soneet R. Kapila re <u>111</u> Order on Motion for Extension of Time to Complete Discovery, <i>Chapter 7 Trustee's Notice of Intention with Regard to Case No. 1:09-cv-21879-ASG</i> (Sharp, Susan) (Entered: 08/20/2010)
08/20/2010	<u>125</u>	MDL ORDER NUMBER 28; REFERRING: <u>123</u> MOTION to Compel <i>Production of Documents in Response to Subpoena</i> filed by Term Lenders. Motions referred to Magistrate Judge Jonathan Goodman. Signed by Judge Alan S. Gold on 8/20/2010. (gp) (Entered: 08/23/2010)
08/23/2010	126	PAPERLESS ORDER Setting Hearing on Motion DE # <u>123</u> MOTION to Compel <i>Production of Documents in Response to Subpoena</i> : Motion Hearing set for 8/30/2010 at 02:30 PM in Miami Division before Magistrate Judge Jonathan Goodman. All parties associated with this motion may appear for the hearing telephonically. The filing party shall place the call through a commercial carrier (e.g., AT&T) to Chambers at 305-523-5720 shortly before the above-noted time so that the telephonic hearing may begin promptly. Court requests no additional briefing on this motion. Signed by Magistrate Judge Jonathan Goodman on 8/23/2010. (mso) (Entered: 08/23/2010)
08/25/2010	<u>127</u>	RESPONSE to Motion re <u>123</u> MOTION to Compel <i>Production of Documents in Response to Subpoena</i> filed by Fontainebleau Resorts, LLC. Replies due by 9/7/2010. (Waldman, Glenn) (Entered: 08/25/2010)
08/26/2010	<u>128</u>	NOTICE by Term Lenders re 126 Order Setting Hearing on Motion,, <u>127</u> Response to Motion, <u>123</u> MOTION to Compel <i>Production of Documents in Response to Subpoena</i> , <u>125</u> Order Referring Motion <i>Notice of Call-In Information</i> (Pruss, Lorenz) (Entered: 08/26/2010)
08/30/2010	<u>129</u>	ORDER granting <u>123</u> Motion to Compel. Signed by Magistrate Judge Jonathan Goodman on 8/30/2010. (eg) (Entered: 08/30/2010)
08/30/2010	<u>132</u>	Minute Entry for proceedings held before Magistrate Judge Jonathan Goodman: Motion Hearing held on 8/30/2010 re: DE # <u>123</u> MOTION to Compel <i>Production of Documents in Response to Subpoena</i> filed by Term Lenders. (Digital 14:33:53.) (Tapes #10-JG-3 and 4.) (mso) (Entered: 08/31/2010)
08/31/2010	130	PAPERLESS MDL ORDER NUMBER 31 re <u>124</u> Notice (Other) filed by Soneet R. Kapila. For the reasons stated of record, counsel shall meet and confer and submit proposals and proposed orders setting forth a course of action for all three cases no later than September 14, 2010 at 12:00 p.m. The

		proposals shall include a plan for the preservation of documents by the Trustee and any proposed final judgments the parties would like the Court to enter. The parties shall file a Motion for Status Conference if they are unable to agree regarding how these matters should proceed.. Signed by Judge Alan S. Gold on 8/31/2010. (mbs) (Entered: 08/31/2010)
08/31/2010	131	PAPERLESS Minute Entry for proceedings held before Judge Alan S. Gold: Telephonic Status Conference held on 8/31/2010 regarding prosecution of 09-21879-CV-GOLD. Court Reporter: Joseph Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov (jh) (Entered: 08/31/2010)
09/13/2010	<u>133</u>	Plaintiff's MOTION to Amend/Correct <i>Amended Complaint</i> filed January 15, 2010 in Case No. 10-CV-20236-ASG by ACP Master, Ltd., Aurelius Capital Master, Ltd.. Responses due by 9/30/2010 (Amron, Brett) (Entered: 09/13/2010)
09/14/2010	<u>134</u>	NOTICE by Bank of America, N.A., Term Lenders of <i>Positions Regarding Proposed Adjustment to Certain Pre-Trial Dates in Light of Trustee's Notice of Intention Relating to Case No. 1:09-CV-21879-ASG</i> (Amron, Brett) (Entered: 09/14/2010)
09/14/2010	<u>135</u>	Unopposed MOTION to Dismiss 130 Order., <u>124</u> Notice (Other) <i>Claims With Prejudice to Expedite Appeal of Claim-Dispositive Ruling</i> by Soneet R. Kapila. Responses due by 10/1/2010 (Sharp, Susan) (Entered: 09/14/2010)
09/14/2010	<u>136</u>	REPORT REGARDING Trustee's Plan for Retention and Preservation of Documents by Soneet R. Kapila (Sharp, Susan) (Entered: 09/14/2010)
09/15/2010	<u>137</u>	Joint MOTION to Adopt/Join <u>15</u> Amended Complaint <i>Join Plaintiffs</i> by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Capital Advisors, LLC, Canyon Special Opportunities Master Fund (Canyon), Ltd., Carlyle High Yield Partners 2008-1, Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Caspian Solitude Master Fund, L.P., Duane Street CLO I, Ltd., Duane Street CLO II, Ltd., Duane Street CLO III, Ltd., Duane Street CLO IV, Ltd., Duane Street CLO V, Ltd., Encore Fund LP, Fortissimo Fund, Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans Euro, ING International (II) - Senior Bank Loans USD, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Jay Street Market Value CLO I, Ltd., LFC2 Loan Funding LLC, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Nuveen Floating Rate Income Fund, Nuveen Floating Rate Income Opportunity Fund, Nuveen Senior Income Fund, Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Shasta CLO I Ltd., Sierra CLO II Ltd., Sola Ltd, Solus Core Opportunities Master Fund Ltd, Southfork CLO, Ltd., Stone Lion Portfolio L.P., Symphony CLO I, Ltd., Symphony CLO II, Ltd., Symphony CLO III, Ltd., Symphony CLO IV, Ltd., Symphony CLO V, Ltd., Symphony Credit

		Opportunity Fund, Ltd., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Whitney CLO I Ltd.. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order Granting Motion) (Pruss, Lorenz) (Entered: 09/15/2010)
09/17/2010	<u>138</u>	MDL ORDER NUMBER 32 Granting <u>133</u> Aurelius Plaintiffs' Motion for Leave to Amend their Complaint. Plaintiffs are directed to file their Second Amended Complaint no later than Friday, September 24, 2010. Signed by Judge Alan S. Gold on 9/16/2010. (gp) (Entered: 09/17/2010)
09/20/2010	<u>139</u>	MDL ORDER NUMBER 35; DISMISSING CLAIMS with Prejudice to Expedite Appeal of Claim-Dispositive Ruling <u>135</u> Motion to Dismiss. **Please see Order for further details**. Signed by Judge Alan S. Gold on 9/20/2010. (gp) (Entered: 09/21/2010)
09/20/2010	<u>140</u>	MDL ORDER NUMBER 33; Amending Pre-Trial Deadlines re <u>134</u> Notice filed by Term Lenders, Bank of America, N.A.. Signed by Judge Alan S. Gold on 9/20/2010. (gp) (Entered: 09/21/2010)
09/20/2010	<u>141</u>	FINAL JUDGMENT is hereby entered dismissing action 1:09-cv-21879-ASG, with prejudice, but without prejudice to the Trustee's right to appeal with respect to Counts I and VII of the Amended Complaint. In accordance with the Court's Order, the Plaintiffs shall take nothing from this cause. All parties shall bear their own costs. Signed by DEPUTY CLERK on 9/20/2010. (gp) (Entered: 09/21/2010)
09/22/2010	<u>142</u>	MDL ORDER NUMBER 34; Denying Motion to Stay re <u>134</u> Notice filed by Term Lenders, Bank of America, N.A.. Signed by Judge Alan S. Gold on 9/21/2010. (gp) (Entered: 09/22/2010)
09/22/2010	<u>143</u>	MDL ORDER NUMBER 36; Granting <u>137</u> Motion to Add Additional Plaintiffs to the Action. **Please see Order for further details**. Signed by Judge Alan S. Gold on 9/20/2010. (gp) (Entered: 09/22/2010)
09/22/2010	<u>144</u>	Third Party MOTION to Withdraw as Attorney by Glenn J. Waldman. by Fontainebleau Resorts, LLC. Responses due by 10/12/2010 (Waldman, Glenn) (Entered: 09/22/2010)
09/22/2010	<u>145</u>	NOTICE by Fontainebleau Resorts, LLC re <u>144</u> Third Party MOTION to Withdraw as Attorney by Glenn J. Waldman. (Attachments: # <u>1</u> Exhibit) (Waldman, Glenn) (Entered: 09/22/2010)
09/23/2010	<u>146</u>	Second AMENDED COMPLAINT <i>Relating to Case No. 20236-ASG</i> against Fontainebleau Las Vegas Contract Litigation filed in response to Order Granting Motion for Leave, filed by Aurelius Capital Master, Ltd., ACP Master, Ltd.(Amron, Brett) (Entered: 09/23/2010)
09/29/2010	<u>147</u>	RESPONSE to Motion re <u>144</u> Third Party MOTION to Withdraw as Attorney by Glenn J. Waldman. filed by Bank of America, N.A.. Replies due by 10/12/2010. (Rasile, Craig) (Entered: 09/29/2010)

09/29/2010	<u>148</u>	AFFIDAVIT signed by : Kirk D. Dillman in Support of Joint Response to Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.'s Motion to Withdraw as Counsel. re <u>147</u> Response to Motion by Bank of America, N.A. (Rasile, Craig) (Entered: 09/29/2010)
09/30/2010	<u>149</u>	CERTIFICATE OF SERVICE by Bank of America, N.A. re <u>147</u> Response to Motion, <u>148</u> Affidavit (Rasile, Craig) (Entered: 09/30/2010)
10/04/2010	<u>150</u>	Corporate Disclosure Statement by Scoggin Capital Management II LLC, Scoggin International Fund Ltd, Scoggin Worldwide Fund Ltd (Pruss, Lorenz) (Entered: 10/04/2010)
10/06/2010	<u>151</u>	Joint MOTION for Entry of Judgment under Rule 54(b) (<i>Partial Final</i>) and <i>Memorandum of Law in Support Thereof</i> by Term Lenders. (Amron, Brett) (Entered: 10/06/2010)
10/06/2010	<u>152</u>	REPLY to Response to Motion re <u>144</u> Third Party MOTION to Withdraw as Attorney by Glenn J. Waldman. filed by Fontainebleau Resorts, LLC. (Attachments: # <u>1</u> Exhibit)(Waldman, Glenn) (Entered: 10/06/2010)
10/08/2010	<u>153</u>	MOTION for Sanctions by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Special Opportunities Master Fund (Canyon), Ltd., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Caspian Solitude Master Fund, L.P., Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans Euro, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Shasta CLO I Ltd., Sierra CLO II Ltd., Sola Ltd, Solus Core Opportunities Master Fund Ltd, Stone Lion Portfolio L.P., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Whitney CLO I Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd.. (Attachments: # <u>1</u> Affidavit Declaration of Robert Mockler, Esq.)(Pruss, Lorenz) (Entered: 10/08/2010)
10/08/2010	<u>155</u>	MOTION to Appear Pro Hac Vice and Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Rebecca T. Pilch. Filing Fee \$ 75.00. Receipt # 7834. (ksa) (Entered: 10/12/2010)
10/08/2010	<u>156</u>	MOTION to Appear Pro Hac Vice and Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Robert W. Mockler. Filing Fee \$ 75.00. Receipt # 7835. (ksa) (Entered: 10/12/2010)
10/08/2010	<u>157</u>	MOTION to Appear Pro Hac Vice and Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Caroline M.

		Walters. Filing Fee \$ 75.00. Receipt # 7833. (ksa) (Entered: 10/12/2010)
10/09/2010	<u>154</u>	NOTICE by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd., Canyon Special Opportunities Master Fund (Canyon), Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Solitude Master Fund, L.P., Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans Euro, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Shasta CLO I Ltd., Sierra CLO II Ltd., Sola Ltd, Solus Core Opportunities Master Fund Ltd, Stone Lion Portfolio L.P., Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Whitney CLO I Ltd. <i>OF REQUEST FOR TERMINATION OF APPEARANCE OF ATTORNEY ON SERVICE LIST</i> (Pruss, Lorenz) (Entered: 10/09/2010)
10/12/2010	<u>158</u>	ANSWER and Affirmative Defenses to Amended Complaint / <i>Answer and Affirmative Defenses to Aurelius Plaintiffs' Second Amended Complaint</i> by Bank of America, N.A..(Rasile, Craig) (Entered: 10/12/2010)
10/13/2010	159	PAPERLESS ORDER Setting Telephonic Hearing on <u>144</u> Third Party MOTION to Withdraw as Attorney by Glenn J. Waldman and <u>153</u> MOTION for Sanctions:Hearing set for 10/18/2010 at 10:00 AM in Miami Division before Magistrate Judge Jonathan Goodman. All parties are to appear telephonically. Fontainebleau's counsel shall place the call through a commercial carrier (e.g., AT&T) and shall contact Michael Santorufo at 305-523-5230 for call-in instructions. Neither party shall file any additional written materials in connection with either motion. Signed by Magistrate Judge Jonathan Goodman on 10/13/2010. (eg) (Entered: 10/13/2010)
10/13/2010	<u>160</u>	MDL ORDER NUMBER 37; REFERRING MOTIONS to Magistrate Judge Jonathan Goodman: <u>153</u> MOTION for Sanctions, <u>144</u> Third Party MOTION to Withdraw as Attorney by Glenn J. Waldman. Motions referred to Jonathan Goodman. Signed by Judge Alan S. Gold on 10/13/2010. (gp) (Entered: 10/14/2010)
10/14/2010	<u>161</u>	NOTICE by Fontainebleau Resorts, LLC of <i>Call-In Information for October 18, 2010 Telephonic Hearing</i> (Waldman, Glenn) (Entered: 10/14/2010)
10/15/2010	<u>162</u>	MOTION for Leave to File <i>Response to Motion for Sanctions</i> by Fontainebleau Resorts, LLC. (Attachments: # <u>1</u> Exhibit Response to Motion for Sanctions)(Springer, Sarah) (Entered: 10/15/2010)

10/15/2010	163	ORDER denying, without prejudice, Motion (DE 162) for Leave to File Response to Motion for Sanctions. The motion does not contain the required certificate attesting to a pre-filing conference with opposing counsel. In addition, the Court specifically instructed the parties to not submit any responses before the telephone hearing scheduled for October 18, 2010. Neither the Court nor its law clerks will review the proposed response which was filed along with the motion. Counsel can advise the Court, during the hearing, of the points outlined in the unread response. If, at the end of the hearing, counsel still believes that it is necessary for the Court to review the response, then the motion for leave can be renewed at that time. The Court is optimistic that the disputes will be resolved at the hearing, without further briefing, and that the proposed response will be moot. Signed by Magistrate Judge Jonathan Goodman on 10/15/2010. (JG) (Entered: 10/15/2010)
10/15/2010	164	MDL ORDER NUMBER 38; Granting <u>155</u> Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing ; Granting <u>156</u> Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing ; Granting <u>157</u> Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Signed by Judge Alan S. Gold on 10/15/2010. (gp) (Entered: 10/18/2010)
10/18/2010	165	Minute Entry for proceedings held before Magistrate Judge Jonathan Goodman: Motion Hearing was held on 10/18/2010 regarding DE <u>153</u> MOTION for Sanctions and DE <u>144</u> Third Party MOTION to Withdraw. (Digital 10:06:54 and 10:21:12.) (Tape #10-JG-12 and 13.) (mso) (Entered: 10/18/2010)
10/18/2010	166	ORDER granting in part and denying in part <u>144</u> Motion to Withdraw as Attorney. THE CLERK OF THE COURT IS INSTRUCTED THAT THIS ORDER DOES NOT TERMINATE ANY ATTORNEYS FROM THIS CASE.. Signed by Magistrate Judge Jonathan Goodman on 10/18/2010. (eg) (Entered: 10/18/2010)
10/18/2010	167	ORDER granting in part, denying in part, and reserving in part <u>153</u> Motion for Sanctions. Signed by Magistrate Judge Jonathan Goodman on 10/18/2010. (eg) (Entered: 10/18/2010)
10/18/2010	168	NOTICE OF APPEAL (See case 09CV21879-ASG for appeal details) as to <u>141</u> Judgment, <u>139</u> Order on Motion to Dismiss by Soneet R. Kapila Filing fee \$ 455.00. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. Appeal Record due by 11/1/2010. (Sharp, Susan) -Modified appeal record due date per Attorney on 10/19/2010 (gp)-. Text modified on 10/20/2010 (mc). (Entered: 10/18/2010)
10/19/2010	169	CLERK'S NOTICE re <u>168</u> NOTICE OF APPEAL any documents related to this appeal will be docketed on case 09CV21879-ASG (mc) (Entered: 10/19/2010)

10/21/2010	<u>170</u>	NOTICE of Attorney Appearance by Raquel A. Rodriguez on behalf of Camulos Master Fund, L.P. (Rodriguez, Raquel) (Entered: 10/21/2010)
10/22/2010		Attorney Lauren A. Smith terminated per <u>154</u> Notice of Request for Termination. Notice of Termination delivered by US Mail to Lauren Smith. (gp) (Entered: 10/22/2010)
10/22/2010	<u>171</u>	MOTION for Entry of Confidentiality Order re <u>167</u> Order on Motion for Sanctions, <u>129</u> Order on Motion to Compel by Fontainebleau Resorts, LLC. (Attachments: # <u>1</u> Text of Proposed Order)(Springer, Sarah) (Entered: 10/22/2010)
10/22/2010	<u>172</u>	MDL ORDER NUMBER 39; SETTING ORAL ARGUMENT on: <u>151</u> Joint MOTION for Entry of Judgment under Rule 54(b) (<i>Partial Final</i>) and <i>Memorandum of Law in Support Thereof</i> : Oral Argument set for 12/17/2010 11:00 AM in Miami Division before Judge Alan S. Gold. **Please see Order for further details** Signed by Judge Alan S. Gold on 10/22/2010. (gp) (Entered: 10/25/2010)
10/25/2010	<u>173</u>	ORDER denying <u>171</u> Motion for Entry of Confidentiality Order. Signed by Magistrate Judge Jonathan Goodman on 10/25/2010. (eg) (Entered: 10/25/2010)
10/25/2010	<u>174</u>	NOTICE of Compliance by Fontainebleau Resorts, LLC re <u>167</u> Order on Motion for Sanctions, <u>129</u> Order on Motion to Compel (Springer, Sarah) (Entered: 10/25/2010)
10/25/2010	<u>175</u>	MEMORANDUM in Opposition re <u>151</u> Joint MOTION for Entry of Judgment under Rule 54(b) (<i>Partial Final</i>) and <i>Memorandum of Law in Support Thereof</i> by Bank of America, N.A., Bank of Scotland, Barclays Bank PLC, Camulos Master Fund, L.P., Deutsche Bank Trust Company Americas, HSH Nordbank AG, New York Branch, JP Morgan Chase Bank, N.A., MB Financial Bank, N.A., Merrill Lynch Capital Corporation, Royal Bank of Scotland PLC, Sumitomo Mitsui Banking Corporation. (Rasile, Craig) (Entered: 10/25/2010)
10/27/2010	<u>176</u>	PAPERLESS ORDER Clarifying day of oral argument previously set forth in [DE 172]. Oral argument shall be heard on FRIDAY, December 17, 2010 at 11:00 a.m. Signed by Judge Alan S. Gold on 10/27/2010. (lms) (Entered: 10/27/2010)
11/01/2010	<u>177</u>	NOTICE by Camulos Master Fund, L.P. of Request for Termination of Appearance of Attorney Bruce J. Berman on Service List (Rodriguez, Raquel) (Entered: 11/01/2010)
11/02/2010	<u>178</u>	SUPPLEMENTAL ORDER re <u>167</u> Order on Motion for Sanctions, <u>153</u> MOTION for Sanctions. The Term Lenders' supplemental memorandum is due by 11/12/2010. Signed by Magistrate Judge Jonathan Goodman on 11/2/2010. (eg) (Entered: 11/02/2010)
11/04/2010	<u>179</u>	RESPONSE in Support re <u>151</u> Joint MOTION for Entry of Judgment under Rule 54(b) (<i>Partial Final</i>) and <i>Memorandum of Law in Support Thereof</i> [Term Lenders' Reply Memorandum in Furter Support] filed by ACP Master,

		Ltd., Aurelius Capital Master, Ltd., Avenue CLO Fund, Ltd.. (Amron, Brett) (Entered: 11/04/2010)
11/05/2010	<u>180</u>	NOTICE by Term Lenders re <u>167</u> Order on Motion for Sanctions of <i>Non-Compliance with the October 18, 2010 Order</i> (Pruss, Lorenz) (Entered: 11/05/2010)
11/09/2010	<u>181</u>	NOTICE by Fontainebleau Resorts, LLC re <u>180</u> Notice (Other) of <i>Response to Notice of Non-Compliance</i> (Springer, Sarah) (Entered: 11/09/2010)
11/12/2010	<u>182</u>	SUPPLEMENT to <u>153</u> MOTION for Sanctions <i>Supplemental Memorandum</i> by Term Lenders (Pruss, Lorenz) (Entered: 11/12/2010)
11/15/2010	<u>183</u>	SECOND SUPPLEMENTAL ORDER re <u>167</u> Order on Motion for Sanctions, <u>153</u> MOTION for Sanctions. Signed by Magistrate Judge Jonathan Goodman on 11/15/2010. (eg) (Entered: 11/15/2010)
11/17/2010	<u>184</u>	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Steven C. Chin, Esq.. Filing Fee \$ 75.00. Receipt # 9691. (gp) (Entered: 11/17/2010)
11/18/2010	<u>185</u>	NOTICE by Fontainebleau Resorts, LLC re <u>166</u> Order on Motion to Withdraw as Attorney (Springer, Sarah) (Entered: 11/18/2010)
11/19/2010	<u>186</u>	NOTICE by Fontainebleau Resorts, LLC re <u>183</u> Order <i>Response to Supplemental Order on Motion for Sanctions</i> (Springer, Sarah) (Entered: 11/19/2010)
11/19/2010	<u>187</u>	Statement of: Clarification by Term Lenders Regarding Response of Fountainebleau Resorts, Llc to Supplemental Order on Motion For Sanctions by Term Lenders re <u>186</u> Notice (Other) (Pruss, Lorenz) (Entered: 11/19/2010)
11/22/2010	<u>188</u>	ORDER Granting (<u>184</u>) in case 1:09-md-02106-ASG - Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing of Steven C. Chin. Signed by Judge Alan S. Gold on 11/22/2010. This document relates to: 1:09-md-02106-ASG, 1:09-cv-21879-ASG (gp) (Entered: 11/23/2010)
11/24/2010	<u>189</u>	RESPONSE/REPLY to <u>182</u> Supplement <i>Memorandum in Support of Motion for Sanctions</i> by Fontainebleau Resorts, LLC. (Springer, Sarah) (Entered: 11/24/2010)
11/29/2010	<u>190</u>	SUPPLEMENTAL ORDER re <u>153</u> MOTION for Sanctions. Signed by Magistrate Judge Jonathan Goodman on 11/29/2010. (eg) (Entered: 11/29/2010)
11/30/2010	<u>191</u>	MDL ORDER NUMBER 41; RE-Setting Oral Argument on <u>151</u> Joint MOTION for Entry of Judgment under Rule 54(b) (<i>Partial Final</i>) and <i>Memorandum of Law in Support Thereof</i> : Oral Argument set for 1/7/2011 10:00 AM in Miami Division before Judge Alan S. Gold. Signed by Judge Alan S. Gold on 11/30/2010. **Please see Order for further details** (gp) (Entered: 12/01/2010)
12/06/2010	<u>192</u>	MOTION Motion for Adjudication of FBs Waiver of Privilege by Term

		Lenders. (Attachments: # <u>1</u> Exhibit Declaration of Kirk Dillman)(Pruss, Lorenz) (Entered: 12/06/2010)
12/09/2010	<u>193</u>	Statement of: Joinder by Bank of America, N.A. re <u>192</u> MOTION Motion for Adjudication of FBs Waiver of Privilege (Rasile, Craig) (Entered: 12/09/2010)
12/13/2010	<u>194</u>	RESPONSE in Opposition re <u>192</u> MOTION Motion for Adjudication of FBs Waiver of Privilege filed by Fontainebleau Resorts, LLC. (Springer, Sarah) (Entered: 12/13/2010)
12/17/2010	<u>195</u>	TRANSCRIPT of Telephonic Hearing of Motion for Sanctions held on 10/18/2010 before Magistrate Judge Jonathan Goodman, 1-59 pages, Court Reporter: Jerald M. Meyers, 954-431-4757 / crjm@aol.com. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/10/2011. Redacted Transcript Deadline set for 1/20/2011. Release of Transcript Restriction set for 3/21/2011. (Attachments: # <u>1</u> Designation)(cqs) (Entered: 12/17/2010)
12/17/2010	<u>196</u>	TRANSCRIPT of Telephonic Hearing on Motion to Compel held on 8/30/2010 before Magistrate Judge Jonathan Goodman, 1-35 pages, Court Reporter: Jerald M. Meyers, 954-431-4757 / crjm@aol.com. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/10/2011. Redacted Transcript Deadline set for 1/20/2011. Release of Transcript Restriction set for 3/21/2011. (Attachments: # <u>1</u> Designation)(cqs) (Entered: 12/17/2010)
12/17/2010		Attorney Bruce Judson Berman terminated per <u>177</u> Notice of Request for Termination of Appearance. (gp) (Entered: 12/17/2010)
12/17/2010	<u>197</u>	MDL ORDER NUMBER 42; REFERRING MOTION: <u>192</u> MOTION Motion for Adjudication of FBs Waiver of Privilege filed by Term Lenders. Motions referred to Jonathan Goodman to take all necessary and proper action as required by law. Signed by Judge Alan S. Gold on 12/17/2010. (gp) (Entered: 12/20/2010)
12/30/2010	<u>198</u>	MDL ORDER 43 re <u>191</u> Order Setting Hearing on Motion <u>151</u> Joint MOTION for Entry of Judgment under Rule 54(b)(Partial Final) and Memorandum of Law in Support Thereof. Motion Hearing set for 1/7/2011 10:00 AM in Miami Division before Judge Alan S. Gold. Signed by Judge Alan S. Gold on 12/30/2010. (jh) (Entered: 12/30/2010)
01/07/2011	<u>199</u>	ORDER granting <u>192</u> Motion for Determination of FBR's Waiver of Privilege. Signed by Magistrate Judge Jonathan Goodman on 1/7/2011. (eg) (Entered: 01/07/2011)
01/07/2011	<u>200</u>	PAPERLESS Minute Entry for proceedings held before Judge Alan S. Gold: Motion Hearing held on 1/7/2011 re <u>151</u> Joint MOTION for Entry of Judgment under Rule 54(b)(Partial Final) and Memorandum of Law in

		Support Thereof filed by Term Lenders. Court Reporter: Joseph Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov (jh) (Entered: 01/11/2011)
01/13/2011	<u>201</u>	MDL ORDER NUMBER 44; Granting <u>151</u> Joint Motion for Entry of Partial Final Judgment under Rule 54(b). The Clerk is directed to enter final judgment in favor of Defendants on Claims II, III, and IV of the Second Amended Complaint in Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al., Case No. 09-cv-23835-ASG and Claims I and II of the Amended Complaint in ACP Master, Ltd., et al v. Bank of America, N.A., et al., Case No. 10-cv-20236-ASG **Please see Order for further details**. Signed by Judge Alan S. Gold on 1/13/2010. (gp) (Entered: 01/18/2011)
01/13/2011	<u>202</u>	ENTRY OF PARTIAL FINAL JUDGMENT. Signed by DEPUTY CLERK on 1/13/2011. (gp) (Entered: 01/18/2011)
01/19/2011	<u>203</u>	NOTICE OF APPEAL (see member case 09-23835 for all appeal related documents) as to <u>201</u> Order on Motion for Entry of Judgment under Rule 54 (b), Order on Motion for Entry of Judgment under Rule 54(b), Order on Motion for Entry of Judgment under Rule 54(b), <u>202</u> Judgment by Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Battalion CLO 2007-I Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Canpartners Investments IV, LLC, Cantor Fitzgerald Securities, Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd., Canyon Special Opportunities Master Fund (Canyon), Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Capital Partners, L.P., Caspian Corporate Loan Fund, LLC, Caspian Select Credit Master Fund, Ltd., Caspian Solitude Master Fund, L.P., Genesis CLO 2007-1 Ltd., ING International (II) - Senior Bank Loans Euro, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., ING Prime Rate Trust, ING Senior Income Fund, Mariner LDC, Mariner Opportunities Fund, LP, Monarch Master Funding Ltd., Normandy Hill Master Fund, L.P., Olympic CLO I Ltd., SPCP Group, LLC, San Gabriel CLO I Ltd., Scoggin Capital Management II LLC, Scoggin International Fund Ltd, Scoggin Worldwide Fund Ltd, Shasta CLO I Ltd., Sierra CLO II Ltd., Sola Ltd, Solus Core Opportunities Master Fund Ltd, Stone Lion Portfolio L.P., Veer Cash Flow CLO, Limited, Venor Capital Master Fund, Ltd., Venture II CDO 2002, Limited, Venture III CDO Limited, Venture IV CDO Limited, Venture IX CDO Limited, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Vista Leveraged Income Fund, Whitney CLO I Ltd. Filing fee \$ 455.00. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Pruss, Lorenz)Text Modified on 1/20/2011 (cqs). (Entered: 01/19/2011)

PACER Service Center

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **AVENUE TERM LENDER PLAINTIFFS' DESIGNATION OF RECORD FOR APPEAL** 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: January 24, 2011.

/s/ Lorenz M. Prüss

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

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

MDL No. 2106

This document relates to all actions.

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

The Avenue Term Lenders,¹ by and through the undersigned counsel, hereby give notice of this request to the Clerk of Courts that the following persons be terminated from the Service

List:

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and

Sidney P. Levinson
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and

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¹ The Avenue Term Lenders consist of the plaintiffs in the case captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-CV-23835-GOLD/GOODMAN.

Dated: February 8, 2011

Respectfully submitted,

/s/ Lorenz M. Prüss

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CERTIFICATE OF SERVICE

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

Dated: February 8, 2011.

/s/ Lorenz M. Prüss

Lorenz M. Prüss

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

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

MDL No. 2106

This document relates to all actions.

NOTICE OF NAME CHANGE OF AVENUE TERM LENDERS' COUNSEL

Avenue Term Lenders¹ hereby file this Notice of Name Change of Avenue Term Lenders' Counsel and give notice that effective February 7, 2011, Avenue Term Lenders' counsel, the law firm formerly known as Hennigan, Bennett & Dorman LLP, changed its name to Hennigan Dorman LLP. The firm's address, telephone number and facsimile number have not changed. The email address of J. Michael Hennigan has changed to hennigan@hdlitigation.com, the email address of Kirk Dillman has changed to dillmank@hdlitigation.com, the email address of Peter J. Most has changed to most@hdlitigation.com, the email address of Robert W. Mockler has changed to mocklerr@hdlitigation.com, the email address of Rebecca T. Pilch has changed to pilchr@hdlitigation.com, and the email address of Caroline M. Walters has changed to walteresc@hdlitigation.com.

¹ Avenue Term Lenders consist of the plaintiffs in the case captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-CV-23835-GOLD/GOODMAN.

Dated: February 8, 2011

Respectfully submitted,

/s/ Lorenz M. Prüss

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF NAME CHANGE OF AVENUE TERM LENDERS' COUNSEL** 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: February 8, 2011.

/s/ Lorenz M. Prüss
Lorenz M. Prüss, Esq.

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Attorneys:	Representing:
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Harold Defore Moorefield Jr., Esq. STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON Museum Tower 150 W Flagler Street, Suite 2200 Miami, FL 33130 Tele: (305) 789-3467 Fax: (305) 789-3395	Defendant Bank of Scotland plc
James B. Heaton, Esq. John D. Byars, Esq. Steven James Nachtwey, Esq. Vincent S. J. Buccola, Esq. BARTLIT BECK HERMAN PALENCHAR & SCOTT 54 West Hubbard St. Suite 300 Chicago, IL 60654 Tele: (312) 494-4400	Plaintiffs ACP Master, Ltd. Aurelius Capital Master, Ltd.
Brett Michael Amron BAST AMRON LLP 150 West Flagler Street Penthouse 2850 Miami, FL 33130 Tele: (305) 379-7905	Plaintiffs ACP Master, Ltd. Aurelius Capital Master, Ltd.

**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 10-cv-20236-
GOLD/GOODMAN

NOTICE OF APPEAL

PLEASE TAKE NOTICE THAT all plaintiffs in *ACP Master, Ltd, et al. v. Bank of America, N.A., et al.* Case No. 10-cv-20236-GOODMAN/GOLD, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the *Entry of Partial Final Judgment* entered on January 13, 2011, docketed on January 18, 2011 in both the multidistrict litigation case [Case No. 09-md-02106, D.E. # 202] and the underlying case [Case No. 10-cv-20236, D.E. # 57], and the related *Order Granting in Part and Denying in Part Motions to Dismiss* entered in this action on May 28, 2010, to the extent the Motions to Dismiss were granted, [MDL Order No. 18; Case No. 09-md-02106, D.E. # 79, 80; Case No. 10-CV-20236, D.E. # 54, 55].

This Notice of Appeal has simultaneously been filed and docketed in both the multidistrict litigation case, Case No. 09-md-02106, and the underlying case, Case No. 10-cv-20236, as an appeal from the above referenced *Entry of Partial Final Judgment* and the above referenced order entered and docketed in both cases.

Dated: February 11, 2011

Respectfully submitted,

/s/ Brett M. Amron

Brett M. Amron, Esq.
Florida Bar No. 148342
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*Local Counsel for Plaintiff Term
Lenders*

Of counsel:

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Steven J. Nachtwey

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Telephone: (312) 494-4400

Facsimile: (312) 494-4440

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF APPEAL** 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: February 11, 2011

/s/ Brett M. Amron

Service List

Attorneys:	Representing:
Bradley J. Butwin, Esq. Daniel L. Cantor, Esq. Jonathan Rosenberg, Esq. William J. Sushon, Esq. O'MELVENY & MYERS LLP Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Defendants Bank of America, N.A. Merrill Lynch Capital Corporation
Craig V. Rasile, Esq. Kevin Michael Eckhardt, Esq. HUNTON & WILLIAMS 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.A. Merrill Lynch Capital Corporation JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC HSH Nordbank AG, New York Branch Bank of Scotland plc
David J. Woll, Esq. Justin S. Stern, Esq. Lisa H. Rubin, Esq. Thomas C. Rice, Esq. Steven S. Fitzgerald SIMPSON THACHER & BARTLETT LLP 425 Lexington Avenue New York, NY 10017-3954 Tele: (212) 455-3040 Fax: (212) 455-2502	Defendants JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC Bank of Scotland plc
John Blair Hutton III, Esq, Mark D. Bloom, Esq. GREENBERG TAURIG 1221 Brickell Avenue Miami, FL 33131 Tele: (305) 579-0788 Fax: (305) 579-0717	Defendants JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC

Attorneys:	Representing:
<p>Sarah A. Harmon, Esq. BAILEY KENNEDY 8984 Spanish Ridge Avenue Las Vegas, NV 89148 Tele: (702) 562-8820 Fax: (702) 562-8821</p>	<p>Defendant JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC</p>
<p>Frederick D. Hyman, Esq. Jason I. Kirschner, Esq. Jean-Marie L. Atamian, Esq. MAYER BROWN LLP 1675 Broadway New York, NY 10019-5820 Tele: (212) 506-2500 Fax: (212) 261-1910</p>	<p>Defendant Sumitomo Mitsui Banking Corporation</p>
<p>Robert Gerald Fracasso, Jr. SHUTTS & BOWEN 201 S Biscayne Boulevard Suite 1500 Miami Center Miami, FL 33131 Tele: (305) 358-6300 Fax: (305) 381-9982</p>	<p>Defendant Sumitomo Mitsui Banking Corporation</p>
<p>Phillip A. Geraci, Esq. Steven C. Chin, Esq. Aaron Rubinsten, Esq. W. Stewart Wallace, Esq. KAYE SCHOLER LLP 425 Park Avenue New York, NY 10022-3598 Tele: (212) 836-8000 Fax: (212) 836-8689</p>	<p>Defendant HSH Nordbank AG, New York Branch</p>
<p>Arthur Halsey Rice, Esq. RICE PUGATCH ROBINSON & SCHILLER 101 NE 3 Avenue Suite 1800 Fort Lauderdale, FL 33301 Tele: (305) 379-3121 Fax: (305) 379-4119</p>	<p>Defendant HSH Nordbank AG, New York Branch</p>
<p>Gregory S. Grossman, Esq. ASTIGARRAGA DAVIS MULLINS & GROSSMAN 701 Brickell Avenue, 16th Floor Miami, FL 33131-2847 Tele: (305) 372-8282 Fax: (305) 372-8202</p>	<p>Defendant MB Financial Bank, N.A.</p>

Attorneys:	Representing:
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Raquel A. Rodriguez MCDERMOTT WILL & EMERY LLP 201 S. Biscayne Blvd. Suite 2200 Miami, FL 33131 Tele: (305) 358-3500 Fax: : (305) 347-6500	Defendant Camulos Master Fund, L.P.
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Attorneys:	Representing:
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Harold Defore Moorefield Jr., Esq. STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON Museum Tower 150 W Flagler Street, Suite 2200 Miami, FL 33130 Tele: (305) 789-3467 Fax: (305) 789-3395	Defendant Bank of Scotland plc
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David A. Rothstein Lorenz M. Prüss DIMOND KAPLAN & ROTHSTEIN, P.A. 2665 South Bayshore Drive, PH-2B Miami, FL 33133 Tele: (305) 374-1920 Fax: (305) 374-1961	Plaintiffs Avenue CLO Fund, Ltd., et al.

Court Name: SOUTHERN DISTRICT OF FLORIDA
Division: 1
Receipt Number: FLS100014010
Cashier ID: vthomas
Transaction Date: 02/11/2011
Payer Name: BAST AMRON LLP

NOTICE OF APPEAL/DOCKETING FEE
For: ACP MASTER MASTER, LTD, ET AL
Case/Party: D-FLS-1-09-MD-002106-001
Amount: \$455.00

CHECK
Check/Money Order Num: 1137
Amt Tendered: \$455.00

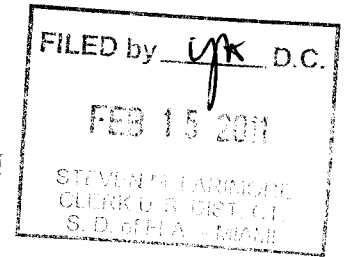
Total Due: \$455.00
Total Tendered: \$455.00
Change Amt: \$0.00

Returned check fee \$45

Checks and drafts are accepted
subject to collection and full
credit will only be given when the
check or draft has been accepted by
the financial institution on which
it was drawn.

FILING FEE	
PAID	\$75.00
Pro hac Vice	14189
Steven M. Larimore, Clerk	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA



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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS

**MOTION FOR APPEARANCE *PRO HAC VICE*, CONSENT TO
DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE
NOTICES OF ELECTRONIC FILINGS**

In accordance with Local Rule 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 (“Local Rule 4(B)”), the undersigned respectfully moves for the admission of Kenneth Murata, Esq. of the law firm of O’Melveny & Myers LLP, Seven Times Square, New York, New York 10036, *pro hac vice* as counsel for Bank of America, N.A. (“BoFA”), in the above-styled case only, and pursuant to Rule 2(B), Southern District of Florida, CM/ECF Administrative Procedures, to permit Kenneth Murata, Esq. to receive electronic filings in this case, and in support thereof states as follows:

1. Kenneth Murata, Esq. is not admitted to practice in the Southern District of Florida but is a member in good standing of the Bar of the State of New York, the United States District Court for the Eastern District of New York, and the United States District Court for the Southern District of New York.

CASE NO. 09-2106

2. Movant, Craig V. Rasile, Esq., of the law firm of Hunton & Williams, LLP, 1111 Brickell Avenue, Suite 2500, Miami, Florida, telephone number (305) 810-2500, 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 2(B) of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Kenneth Murata, Esq. has made payment of this Court's \$75 (seventy-five dollar) admission fee. A certification in accordance with Rule 4(B) is attached hereto.

4. Kenneth Murata, Esq., by and through designated counsel and pursuant to Section 2(B), Southern District of Florida, CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Kenneth Murata at email address: KMurata@OMM.com.

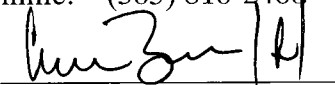
CASE NO. 09-2106

WHEREFORE, Craig V. Rasile moves this Court to enter an Order permitting Kenneth Murata, Esq. to appear before this Court on behalf of Bank of America, N.A. for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Kenneth Murata.

Dated: February 15, 2011

Respectfully submitted,

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Facsimile: (305) 810-2460

By: 
Craig V. Rasile, Esq.
Florida Bar No. 613691

CASE NO. 09-2106

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

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION


MDL NO. 2106

This document relates to:

ALL ACTIONS

CERTIFICATION OF KENNETH MURATA

I, Kenneth Murata, Esquire, 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 State of New York, The United States District Court for the Eastern District of New York and the United States District Court for the Southern District of New York.

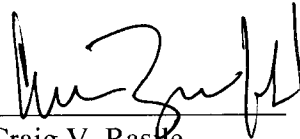


Kenneth Murata, Esq.

CASE NO. 09-2106

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Court's CM-ECF system, where available, on this the 15th day of February, 2011 to the parties on the attached service list.



Craig V. Rashe

SERVICE LIST
09-MD-02106

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Henderson, NV 89014

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

**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 Kenneth Murata, Esq., Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the “Motion”), pursuant to the Special Rules Governing Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2(B) 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. Kenneth Murata, Esq., may appear and participate in this action on behalf of Bank of America, N.A. The Clerk shall provide electronic notification of all electronic filings to Kenneth Murata, Esq., at kmurata@omm.com.

DONE AND ORDERED in Chambers at _____, Florida, this ____
day of _____, 2011.

The Honorable S. Alan Gold
United States District Judge

Copies furnished to:
All Counsel of Record

FILING FEE	
PAID	\$ 75.00
Pro had	14190
Vice	Steven M. Larimore, Clerk

FILED by	MS	D.C.
FEB 15 2011		
STEVEN M. LARIMORE CLERK U.S. DIST. CT. S. D. OF FLA. - MIAMI		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS

**MOTION FOR APPEARANCE *PRO HAC VICE*, CONSENT TO
DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE
NOTICES OF ELECTRONIC FILINGS**

In accordance with Local Rule 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 (“Local Rule 4(B)”), the undersigned respectfully moves for the admission of Asher L. Rivner, Esq. of the law firm of O’Melveny & Myers LLP, Seven Times Square, New York, New York 10036, *pro hac vice* as counsel for Bank of America, N.A. (“BoFA”), in the above-styled case only, and pursuant to Rule 2(B), Southern District of Florida, CM/ECF Administrative Procedures, to permit Asher L. Rivner, Esq. to receive electronic filings in this case, and in support thereof states as follows:

1. Asher L. Rivner, Esq. is not admitted to practice in the Southern District of Florida but is a member in good standing of the Bars of the States of New Jersey and New York, the United States District Court for the Eastern District of New York, and the United States District Court for the Southern District of New York.

CASE NO. 09-2106

2. Movant, Craig V. Rasile, Esq., of the law firm of Hunton & Williams, LLP, 1111 Brickell Avenue, Suite 2500, Miami, Florida, telephone number (305) 810-2500, 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 2(B) of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Asher L. Rivner, Esq. has made payment of this Court's \$75 (seventy-five dollar) admission fee. A certification in accordance with Rule 4(B) is attached hereto.

4. Asher L. Rivner, Esq., by and through designated counsel and pursuant to Section 2(B), Southern District of Florida, CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Asher L. Rivner at email address: arivner@OMM.com.

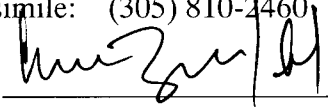
CASE NO. 09-2106

WHEREFORE, Craig V. Rasile moves this Court to enter an Order permitting Asher L. Rivner, Esq. to appear before this Court on behalf of Bank of America, N.A. for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Asher L. Rivner.

Dated: February 15, 2011

Respectfully submitted,

HUNTON & WILLIAMS LLP
Counsel for Bank of America, N.A.
1111 Brickell Avenue, Suite 2500
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Telephone: (305) 810-2500
Facsimile: (305) 810-2460

By: 
Craig V. Rasile, Esq.
Florida Bar No. 613691

CASE NO. 09-2106

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

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

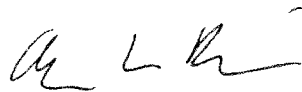
MDL NO. 2106

This document relates to:

ALL ACTIONS

CERTIFICATION OF ASHER L. RIVNER

I, Asher L. Rivner, Esquire, 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 Bars of the States of New Jersey and New York, the United States District Court for the Eastern District of New York, and the United States District Court for the Southern District of New York.

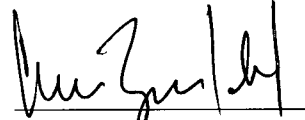


Asher L. Rivner, Esq.

CASE NO. 09-2106

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Court's CM-ECF system, where available, on this the 15th day of February, 2011 to the parties on the attached service list.

A handwritten signature in black ink, appearing to read "Craig V. Rasile", written over a horizontal line.

Craig V. Rasile

SERVICE LIST
09-MD-02106

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

**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 Asher L. Rivner, Esq., Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2(B) 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. Asher L. Rivner, Esq., may appear and participate in this action on behalf of Bank of America, N.A. The Clerk shall provide electronic notification of all electronic filings to Asher L. Rivner, Esq., at arivner@omm.com.

DONE AND ORDERED in Chambers at _____, Florida, this ____ day of _____, 2011.

The Honorable S. Alan Gold
United States District Judge

Copies furnished to:
All Counsel of Record

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

MOTION FOR ORDER DISMISSING AURELIUS ACTION WITHOUT PREJUDICE

The plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-23835-ASG (the “Avenue Action”) have purchased all of the Term Loan Notes previously held by the plaintiffs in *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 10-cv-20236-ASG (the “Aurelius Action”). The Avenue plaintiffs wish to pursue in a single action all claims on all Term Loan Notes they now own. The Avenue and Aurelius plaintiffs have agreed with Bank of America (“BofA”) to the terms of a Stipulation dismissing the Aurelius Action without prejudice so that all claims can be pursued in the Avenue Action. The Revolving Lenders have refused to stipulate. Plaintiffs thus bring this motion for an order approving the terms of that Stipulation.

I. BACKGROUND

The Avenue plaintiffs are (and the Aurelius plaintiffs were) term lenders or successors-in-interest to term lenders under a Credit Agreement dated as of June 6, 2007 for the financing of the development and construction of the Fontainebleau Las Vegas Resort and Casino.

On June 9, 2009, the Avenue plaintiffs filed an action against Bank of America, N.A. and the Revolving Lenders (collectively the “Defendants”) in the United States District Court for the District of Nevada, captioned as *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*,

Case No. 09-cv-1047-KJD-PAL (D. Nev.). The Avenue Action asserts claims for breach of contract and declaratory relief arising out of (1) the Revolving Lenders' wrongful failure to fund under the Credit Agreement and (2) BofA's wrongful disbursement of funds under a related Disbursement Agreement.

On September 21, 2009, the Aurelius plaintiffs filed the Aurelius Action against Defendants in the United States District Court for the Southern District of New York captioned as *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-8064-LTS/THK (S.D.N.Y). The claims asserted in the Aurelius Action are substantially identical to the claims asserted in the Avenue Action. The two cases have been coordinated for pre-trial purposes in this Multidistrict Litigation.

The Avenue plaintiffs recently purchased all of the interest in the Term Loan Notes previously owned by the Aurelius plaintiffs¹ and thus have succeeded to all claims asserted in the Aurelius Action. While the Avenue plaintiffs could continue to pursue those claims in the Aurelius action,² they wish to avoid splitting claims between the two cases, one of which will be returned to Nevada for trial, and the other to New York. All parties currently before this Court (the Aurelius and Avenue plaintiffs and BofA) have negotiated a Stipulation that would dismiss the Aurelius Action without prejudice³ so that the Avenue plaintiffs can pursue the claims related to the Term Loan Notes previously held by the Aurelius plaintiffs in the Avenue Action.⁴

¹ Dillman Decl., ¶ 2.

² Fed. R. Civ. P. 25(c).

³ The Stipulation provides for a dismissal without prejudice as to claims purchased by the Avenue plaintiffs and a dismissal with prejudice in all other regards. This was to address BofA's concern that parties other than the Avenue plaintiffs might purchase Term Loan Notes previously held by Aurelius and then file actions elsewhere in an effort to avoid having their claims coordinated in the Multidistrict Litigation. The Avenue plaintiffs, however, have purchased all

Rule 41 of the Federal Rules of Civil Procedure permits an action to be dismissed without prejudice by a stipulation “signed by all parties who have appeared.” The Stipulation has been signed by all active parties to the Aurelius and Avenue Actions, but the Revolving Lenders, who are no longer before this Court,⁵ have refused. Out of an abundance of caution, the Avenue and Aurelius plaintiffs therefore have brought this motion to approve the Stipulation.

II. PROCEEDING WITH ALL CLAIMS IN A SINGLE ACTION IS EFFICIENT AND WILL NOT PREJUDICE ANY PARTY

In the absence of a stipulation of dismissal by all appearing parties, the Court may order dismissal of an action upon a plaintiff’s request “on terms that the court considers proper.”⁶ A motion to dismiss should be granted unless dismissal will cause the defendants “legal prejudice.”⁷

Dismissing the Aurelius Action in favor of proceeding on all claims in the Avenue Action is a commonsense way to streamline this litigation in light of the fact that all of the Term Loan Notes at issue in the two actions are now owned by the Avenue plaintiffs. Combining the claims from those two actions into one proceeding will be more efficient and less costly for the Court

of the Term Loan Notes previously owned by Aurelius, and thus, as a practical matter, all claims will be dismissed without prejudice pursuant to the Stipulation.

⁴ Dillman Decl., Ex. A. BofA has preserved its ability to challenge the validity of any transfer of Term Loan Notes to or from the Aurelius plaintiffs.

⁵ The Court dismissed the claims against them [MDL Order No. 18; Case No. 09-md-02106, D.E. # 79, 80], and that order is now on appeal [Case No. 09-md-02106, D.E. # 203, 208].

⁶ Fed. R. Civ. P. 41(a)(2).

⁷ 8-41 Moore’s Federal Practice - Civil § 41.40[5][a]. In considering possible prejudice, courts commonly consider: “(1) the extent to which the suit has progressed, including the defendant’s effort and expense in preparing for trial, (2) the plaintiff’s diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff’s explanation for the need to dismiss.” *Id.* at § 41.40[6]. Here, all of these factors support granting plaintiffs’ request.

and the parties and will avoid the possibility of contradictory rulings in the two cases. As one court has stated, where two related actions are simultaneously pending, “the interests of the parties and the Court that the matters at issue . . . be decided in one action, not two parallel ones” is an “excellent reason for voluntary dismissal.”⁸

Dismissing the Aurelius Action *without* prejudice is appropriate. A dismissal with prejudice typically bars the subsequent prosecution of the claims.⁹ But the very purpose of the dismissal here is to permit the Avenue plaintiffs to continue prosecuting the claims associated with the Term Loan Notes previously owned by Aurelius, just in a different action. If put to the choice, the Avenue plaintiffs certainly would elect to split their claims between the two actions rather than dismiss the Aurelius claims with prejudice and risk losing them.

The Revolving Lenders have identified no prejudice from a dismissal without prejudice. Indeed, the primary reason given by the Revolving Lenders for their refusal to agree to the Stipulation was that they were “not getting anything in return.”¹⁰ Efficient case management, however, should not require a quid pro quo. Whether the claims are pursued in one action or two, they will be pursued. All of the procedures governing the coordinated proceedings in this Multidistrict Litigation will continue to apply, and there will be no delays or duplicative work as a result of the dismissal without prejudice.

⁸ *Buller v. Owner Operator Indep. Driver Risk Retention Group, Inc.*, 461 F. Supp. 2d 757, 768 (S.D. Ill. 2006); *see also Grabinger v. Canadian Pac. Ry. Co.*, 2004 U.S. Dist. LEXIS 18209, *4 (D. N.D. Sept. 10, 2004) (holding dismissal without prejudice appropriate where plaintiff filed an identical action in another state).

⁹ *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327 (1955) (“It is of course true that the 1943 judgment dismissing the previous suit ‘with prejudice’ bars a later suit on the same cause of action.”).

¹⁰ Dillman Decl., ¶ 4.

III. CONCLUSION

For the foregoing reasons, plaintiffs request that the Court grant this motion, order the Aurelius Action dismissed without prejudice and enter the attached Stipulation as an order of this Court.

Dated: February 16, 2011

Respectfully submitted,

/s/ Lorenz M. Prüss

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Dated: February 16, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **MOTION FOR ORDER DISMISSING AURELIUS CLAIMS WITHOUT PREJUDICE** 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: February 16, 2011.

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

**DECLARATION OF KIRK D. DILLMAN IN SUPPORT OF MOTION FOR ORDER
DISMISSING AURELIUS ACTION WITHOUT PREJUDICE**

I, Kirk D. Dillman, declare as follows:

1. I am a partner in the firm of Hennigan Dorman, LLP, counsel for Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, No. 09-cv-23835-ASG (the “Avenue Action”). I submit this declaration in support of the Motion for Order Dismissing Aurelius Action Without Prejudice. Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if called as a witness, could and would competently testify thereto.

2. The plaintiffs in the Avenue Action have purchased all of the Term Loan Notes previously held by the plaintiffs in *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 10-cv-20236-ASG (the “Aurelius Action”).

3. The Avenue and Aurelius plaintiffs have agreed with Bank of America to the terms of a Stipulation dismissing the Aurelius Action without prejudice so that all claims can be pursued in the Avenue Action. A true and correct copy of the Stipulation is attached hereto as Exhibit A.

4. On February 7, I spoke with David Woll, counsel for JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas and The Royal Bank of

Scotland PLC, four of the Revolving Lenders. I previously had sent a copy of the Stipulation to Mr. Woll and asked if he would coordinate with the other Revolving Lenders to determine whether they would agree to it. During our conversation, Mr. Woll told me that the Revolving Lenders were not willing to agree to the Stipulation. The primary reason he gave was that the Revolving Lenders felt that they were “not getting anything in return” for the Stipulation.

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

DATED: February 16, 2011

KIRK D. DILLMAN

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EXHIBIT A

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

STIPULATION AND ORDER

WHEREAS, on June 9, 2009 the Nevada Term Lenders filed an action against Bank of America, N.A., Merrill Lynch Capital Corporation, JPMorgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company of Americas, The Royal Bank of Scotland PLC, Sumitomo Mitsui Banking Corporation, Bank of Scotland, HSH Nordbank AG, MB Financial Bank, N.A., and Camulos Master Fund, L.P. (collectively the “Defendants”) in United States District Court for the District of Nevada captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-1047-KJD-PAL (D. Nev.) (the “Avenue Action”)¹;

WHEREAS, on September 21, 2009, the New York Term Lenders filed an action against Defendants in United States District Court for the Southern District of New York captioned *ACP Master, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-8064-LTS/THK (S.D.N.Y) (the “Aurelius Action”)²;

¹ The “Nevada Term Lenders” refers to the plaintiffs in the Avenue Action as of the date of the Order approving this Stipulation.

² The “New York Term Lenders” refers to the plaintiffs in the Aurelius Action.

WHEREAS, the claims asserted in the Aurelius Action are substantially identical to the claims asserted in the Avenue Action;

WHEREAS, the Avenue Action and the Aurelius Action have been consolidated for pre-trial purposes as Multidistrict Litigation (“MDL”) in the Southern District of Florida, MDL Case No. 09-MD-02106-CIV-GOLD/GOODMAN;

WHEREAS, the Nevada Term Lenders and the New York Term Lenders each held notes evidencing term loans made under that certain Credit Agreement dated as of June 6, 2007 among Fontainebleau Las Vegas, LLC, Fontainebleau Las Vegas II, LLC as Borrowers, the Lenders referred to therein, and Bank of America, N.A., as Administrative Agent, Issuing Lender and Swing Line Lender (the “Term Loan Notes”); and

WHEREAS, certain of the Nevada Term Lenders have purchased or will purchase the Term Loan Notes previously owned by the New York Term Lenders (the “Aurelius Notes”),
NOW THEREFORE, IT IS HEREBY STIPULATED THAT:

1. The Aurelius Action shall be dismissed without prejudice as to claims arising out of or related to any Aurelius Notes that are purchased by any of the Nevada Term Lenders, either directly or indirectly from Aurelius, so long as an agreement to purchase such Notes is entered into on or before March 1, 2011, regardless of when such trade finally settles. Such claims shall be pursued only in the Avenue Action and, upon the settlement of the pertinent trade, shall automatically become a part of that action, subject to all prior Orders entered by the Court in the Aurelius Action. The pursuit of such claims in the Avenue Action shall be without prejudice to Defendants’ right to challenge the validity of the assignment of any Aurelius Notes, whether to or from Aurelius. Nothing herein shall limit the right of any Nevada Term Lenders to transfer Term Loan Notes (including, without limitation, Aurelius Notes) between or among themselves, and claims related to any notes so transferred may continue to be pursued in the Avenue Action,

regardless of whether the transfer occurs before or after March 1, 2011. The Nevada Term Lenders shall produce all documents constituting any such transfer between or among themselves within two weeks after it settles.

2. The Aurelius Action shall be dismissed with prejudice in all other regards.

3. For purposes of computing time periods pursuant to any applicable statutes of limitations or repose, the time for filing the claims asserted in the Aurelius Action shall be deemed to have been tolled at all times during the pendency of the Aurelius Action.

4. Within two weeks of the Court's entry of an Order on this Stipulation or the date any pertinent trade settles, whichever is later, any Nevada Term Lender who purchases any Aurelius Notes, either directly or indirectly from Aurelius, will:

- a. amend its Rule 26 disclosures;
- b. amend its interrogatory responses to identify any additional knowledgeable persons; and
- c. produce all documents constituting the transfer or assignment of such Notes.

5. All parties shall bear their own fees and costs with respect to the Aurelius Action and this Stipulation; provided, however, that this provision shall not serve as a waiver of any rights or obligations (including, without limitation, any provisions relating to indemnity or allocation of costs) by any party to the respective purchase and sale agreements by which the Aurelius Notes were sold.

6. BANA's deadline for serving written discovery concerning the Nevada Term Lenders' purchases of any Aurelius Notes, either directly or indirectly from Aurelius, shall be extended until two weeks after the Court's entry of an Order on this Stipulation or the date the final pertinent trade closes, whichever is later.

Dated: February 15, 2011

Respectfully submitted,

By: 

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Kirk D. Dillman (pro hac vice)
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-and-

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

By: _____

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

Dated: February 16, 2011

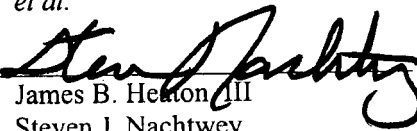
Respectfully submitted,

By: J. Michael Hennigan (pro hac vice)
Kirk D. Dillman (pro hac vice)
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-and-

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

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Aurelius Capital Master, Ltd.*

By: 

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keckhardt@hunton.com

Attorneys for Defendant Bank of America, N.A.

DONE AND ORDERED in Chambers at Miami, Florida at this ____ day of _____, 2011.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **STIPULATION AND ORDER** 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: February 16, 2011

/s/ Lorenz M. Prüss, Esq.
Lorenz M. Prüss, Esq.

SERVICE LIST

Attorneys:	Representing:
Bradley J. Butwin, Esq. Daniel L. Cantor, Esq. Jonathan Rosenberg, Esq. William J. Sushon, Esq. O'MELVENY & MYERS LLP Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Defendants Bank of America, N.A. Merrill Lynch Capital Corporation
Craig V. Rasile, Esq. Kevin Michael Eckhardt, Esq. HUNTON & WILLIAMS 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.A. Merrill Lynch Capital Corporation
David J. Woll, Esq. Lisa H. Rubin, Esq. Thomas C. Rice, Esq. Steven S. Fitzgerald SIMPSON THACHER & BARTLETT LLP 425 Lexington Avenue New York, NY 10017-3954 Tele: (212) 455-3040 Fax: (212) 455-2502	Defendants JP Morgan Chase Bank, N.A. Barclays Bank PLC Deutsche Bank Trust Company Americas The Royal Bank of Scotland PLC
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Frederick D. Hyman, Esq.	Defendant

Attorneys:	Representing:
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Peter J. Roberts, Esq.	Defendant

Attorneys:	Representing:
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<p>Andrew B. Kratenstein, Esq. Michael R. Huttenlocher, Esq. MCDERMOTT WILL & EMERY LLP 340 Madison Avenue New York, NY 10173 Tele: (212) 547-5400</p>	<p>Defendant Camulos Master Fund, L.P.</p>
<p>Raquel A. Rodriguez MCDERMOTT WILL & EMERY LLP 201 S. Biscayne Blvd. Suite 2200 Miami, FL 33131 Tele: (305) 358-3500 Fax: (305) 347-6500</p>	<p>Defendant Camulos Master Fund, L.P.</p>
<p>David M. Friedman, Esq. Jed I. Bergman, Esq. Seth A. Moskowitz KASOWITZ BENSON TORRES & FRIEDMAN 1633 Broadway, 22nd Floor New York, NY 10019-6799 Tele: (212) 506-1700 Fax: (212) 506-1800</p>	<p>Plaintiff Fontainebleau Las Vegas LLC</p>
<p>Jeffrey I. Snyder, Esq. Scott L. Baena, Esq. BILZIN SUMBERG BAENA PRICE & AXELROD 200 S Biscayne Blvd., Suite 2500 Miami, FL 33131-2336 Tele: (305) 375-6148 Fax: (305) 351-2241</p>	<p>Plaintiff Fontainebleau Las Vegas LLC</p>

Attorneys:	Representing:
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James B. Heaton, Esq. John D. Byars, Esq. Steven James Nachtwey, Esq. Vincent S. J. Buccola, Esq. BARTLIT BECK HERMAN PALENCHAR & SCOTT 54 West Hubbard St. Suite 300 Chicago, IL 60654 Tele: (312) 494-4400	Plaintiffs ACP Master, Ltd. Aurelius Capital Master, Ltd.
Brett Michael Amron BAST AMRON LLP 150 West Flagler Street Penthouse 2850 Miami, FL 33130 Tele: (305) 379-7905	Plaintiffs ACP Master, Ltd. Aurelius Capital Master, Ltd.

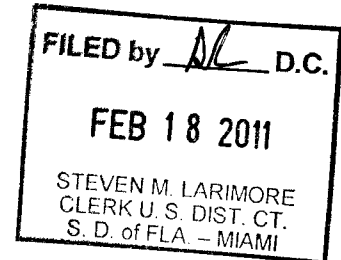
FILING FEE	
PAID	\$75.00
pro hac vice	14355
CASE NO 09-MD-02106-CIV-GOLD/GOODMAN	
Steven M. Larimore, Clerk	

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

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



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

In accordance with S.D. Fla. Rule 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, the undersigned respectfully requests the Court grant the admission of PETER J. MOST, ESQ. ("Mr. Most"), of the law firm of Hennigan Dorman, LLP, 865 South Figueroa Street, Suite 2900, Los Angeles, Los Angeles County, California, 90017, Telephone: (213) 694-1200, for purposes of limited appearance as counsel on behalf of the following entities: Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Battalion CLO 2007-I Ltd., Canpartners Investments IV, LLC, Canyon Special Opportunities Master Fund (Cayman), Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd., Caspian Corporate Loan Fund, LLC, Caspian Capital Partners, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Solitude Master Fund, L.P., Mariner Opportunities Fund, LP, Mariner LDC, ING Prime Rate Trust, ING Senior Income Fund, ING International (II) - Senior Loans, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., Venture II CDO 2002, Limited, Venture III CDO,

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

1. Mr. Most is not admitted to practice in the Southern District of Florida, but he is a member in good standing of the State Bar of California (California State Bar No. 143963), has been generally admitted in the following jurisdictions: the Court Of Chancery of the State Of Delaware, the Supreme Court of New York County for the State of New York, Iowa District Court for the County of Linn, the U.S. District Court for the Central District of California, the Southern District of California, the Northern District of California, the Eastern District of California, the Northern District of Illinois, the Southern District of New York, the Northern District of Iowa, the Southern District of Iowa and the United States Court of Appeals for the Ninth Circuit.

2. Movant Lorenz Michel Prüss, Esq. ("Mr. Prüss"), of the law firm of Dimond Kaplan & Rothstein, P.A., 2665 South Bayshore Drive, PH-2B, Coconut Grove, Florida 33133, Telephone (305) 374-1920, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Mr. Prüss

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

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

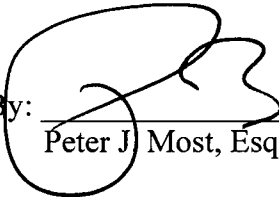
5. Mr. Most hereby requests the Court to provide Notice of Electronic Filings to Mr. Most at email address: most@hdlitigation.com.¹

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

¹ A proposed Order is attached as Exhibit A.

CERTIFICATION OF PETER J. MOST, ESQ.

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

By:  _____
Peter J Most, Esq.

Dated: February 17, 2011.

Respectfully submitted,



David A. Rothstein, Esq.
Fla. Bar No.: 056881
d.Rothstein@dkrpa.com
Lorenz M. Prüss, Esq.
Fla Bar No.: 581305
LPruss@dkrpa.com

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Telephone: (305) 374-1920
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Local Counsel for Plaintiff Term Lenders

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

Email: Hennigan@hdlitigation.com
DillmanK@hdlitigation.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 19th, 2011.



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

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

MDL No. 2106

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

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

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

ORDERED and ADJUDGED that:

1. The Motion is GRANTED.
3. The Clerk shall provide electronic notification of all electronic filings to Mr. Most at most@hdlitigation.com.

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

_____, 2011.

By: _____
District Judge Alan Gold
United States District Judge

FILING FEE	
PAID	\$75. ⁰⁰
pro hac vice	14354
Steven M. Larimore, Clerk	

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

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

MDL No. 2106

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

FILED by <u>AL</u> D.C.
FEB 18 2011
STEVEN M. LARIMORE CLERK U. S. DIST. CT. S. D. of FLA - MIAMI

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

In accordance with S.D. Fla. Rule 4(B) of the Special Rules Governing the Admission and Practice of Attorneys, the undersigned respectfully requests the Court grant the admission of C. DANA HOBART, ESQ. ("Mr. Hobart"), of the law firm of Hennigan Dorman, LLP, 865 South Figueroa Street, Suite 2900, Los Angeles, Los Angeles County, California, 90017, Telephone: (213) 694-1200, for purposes of limited appearance as counsel on behalf of the following entities: Avenue CLO IV, Ltd., Avenue CLO V, Ltd., Avenue CLO VI, Ltd., Brigade Leveraged Capital Structures Fund, Ltd., Battalion CLO 2007-I Ltd., Canpartners Investments IV, LLC , Canyon Special Opportunities Master Fund (Cayman), Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., Canyon Capital CLO 2007 1 Ltd., Caspian Corporate Loan Fund, LLC, Caspian Capital Partners, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Alpha Long Credit Fund, L.P., Caspian Solitude Master Fund, L.P., Mariner Opportunities Fund, LP, Mariner LDC, ING Prime Rate Trust, ING Senior Income Fund, ING International (II) - Senior Loans, ING Investment Management CLO I, Ltd., ING Investment Management CLO II, Ltd., ING Investment Management CLO III, Ltd., ING Investment Management CLO IV, Ltd., ING Investment Management CLO V, Ltd., Venture II CDO 2002,

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

1. Mr. Hobart is not admitted to practice in the Southern District of Florida, but he is a member in good standing of the State Bar of California (California State Bar No. 125139). admitted generally for the practice of law in the State of California (1986), and before the District Courts of the Central and Northern Districts of California, as well as the U.S. Court of Appeals, Ninth Circuit

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

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

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

5. Mr. Hobart hereby requests the Court to provide Notice of Electronic Filings to Mr. Hobart at email address: hobart@hdlitigation.com.¹

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

¹ A proposed Order is attached as Exhibit A.

CERTIFICATION OF C. DANA HOBART, ESQ.

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

By: 

C. Dana Hobart, Esq.

Dated: February 17, 2011.

Respectfully submitted,



David A. Rothstein, Esq.

Fla. Bar No.: 056881

d.Rothstein@dkrpa.com

Lorenz M. Prüss, Esq.

Fla Bar No.: 581305

LPruss@dkrpa.com

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Local Counsel for Plaintiff Term Lenders

Of counsel:

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Kirk D. Dillman

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Email: Hennigan@hdlitigation.com

DillmanK@hdlitigation.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **MOTION TO APPEAR PRO HAC VICE AND CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 18th, 2011.



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

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

MDL No. 2106

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

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

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

ORDERED and ADJUDGED that:

1. The Motion is GRANTED.
3. The Clerk shall provide electronic notification of all electronic filings to

Mr. Hobart at hobart@hdlitigation.com.

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

_____, 2011.

By: _____
District Judge Alan Gold
United States District Judge

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

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS

**BANK OF AMERICA, N.A.'S MOTION FOR A DETERMINATION
OF FONTAINEBLEAU RESORTS' WAIVER OF
PRIVILEGE FOR ITS E-MAIL SERVER DOCUMENTS**

Defendant Bank of America, N.A. ("BANA") moves this Court for an order determining that Fontainebleau Resorts, LLC ("FBR") has waived all applicable privileges by producing thousands of potentially privileged documents on its e-mail server to BANA without taking appropriate steps to prevent disclosing privileged information or to correct the disclosure.

INTRODUCTION

BANA is entitled to a determination that any privilege attaching to e-mails produced by FBR from its e-mail server has been waived due to FBR's careless handling of those materials. Under Federal law, the production of privileged communications waives the privilege unless the producing party can demonstrate that (i) the production was inadvertent, (ii) it took adequate steps to avoid production, and (iii) it promptly sought to rectify the production. *See* Fed. R. Evid. 502(b). FBR cannot establish any—let alone all—of these elements.

While FBR has asserted that it reviewed its e-mail server production for privilege, it has admitted that "due to the time and financial constraints FBR was under, not all privileged e-mails

were withheld from production.” Moreover, whatever review FBR performed (if any) was clearly inadequate: FBR has produced thousands of potentially privileged communications with its in-house and outside counsel. FBR has also failed promptly to address its privileged document disclosure. Despite acknowledging that it failed to withhold all privileged documents, FBR has repeatedly delayed taking affirmative steps to identify and seek the return of any of privileged e-mails it produced to BANA. Instead, FBR first asked BANA to bring to FBR’s attention any privileged documents it might come across—a request that improperly burdens and prejudices BANA. And then, when specifically advised by BANA that it appeared to have produced potentially privileged documents, FBR made no effort to recall any allegedly inadvertently produced documents.

BANA seeks a determination that FBR has waived any privilege for its e-mails by (i) deliberately producing privileged e-mails to BANA, the Term Lenders and others, (ii) failing to take appropriate steps to avoid producing the e-mails, and (iii) failing to act promptly to recall privileged e-mails. BANA seeks this determination now because depositions are beginning, and the uncertainty concerning the parties’ ability to use FBR’s potentially privileged e-mails to prepare for those depositions needs to be resolved.

BACKGROUND

BANA served FBR with a subpoena *duces tecum* on September 2, 2010 seeking documents relating to the Fontainebleau Las Vegas project. Together with the other parties that subpoenaed FBR for documents—*i.e.*, the Term Lenders and defendants Barclays, Deutsche Bank, JP Morgan and Royal Bank of Scotland—BANA negotiated e-mail search terms and a relevant time period with FBR. On September 14, 2010, the parties reached agreement on a search term list and date range that would be used to retrieve e-mails from FBR’s e-mail server.

(*See* Declaration of Kenneth T. Murata in Support of Bank of America, N.A.’s Motion for a Determination of Waiver of Privilege for its Fontainebleau Resorts’ E-mail Server Documents (“Murata Decl.”), at ¶ 2.)

On October 25, 2010, FBR reported that it retrieved “approximately 16,000” documents from the e-mail server based on the mutually-agreed search terms. (Murata Decl. at ¶ 3.) But after BANA and the other parties received the e-mails that were *actually* retrieved by FBR from its e-mail server using the mutually-agreed search terms, they discovered that the search terms and date limitations yielded more than 700,000 e-mails (61.5 gigabytes of data)—substantially more than the 16,000 documents previously reported by FBR. (Murata Decl. at ¶ 4.) When asked if it could explain this discrepancy, FBR simply responded “no.” (*Id.*) Thus, in an effort to reduce the burden of reviewing FBR’s e-mails, defendants applied their own additional search terms to FBR’s production, working with a vendor (IKON), at their own expense, to process and image FBR’s e-mails so that they could be searched, reviewed and printed for discovery purposes. (Murata Decl. at ¶ 5.)

The subsequent review of FBR’s production revealed that it contained thousands of potentially privileged documents. For example, the term “Thier”—Fontainebleau Resorts’ former general counsel—yields nearly 13,000 documents. And the term “Sabo”—Fontainebleau Resorts’ former Associate General Counsel—yields nearly 14,000 documents. In addition, it appears that there are thousands of e-mails to/from FBR’s outside counsel Latham & Watkins LLP and Buchanan Ingersoll & Rooney PC. (*See* Murata Decl. at ¶ 6.)

On December 20, 2010, having discovered that FBR’s production contained numerous potentially privileged e-mails, BANA asked FBR what steps had been taken to review the e-mail server for privileged documents. (Murata Decl. at ¶ 7.) BANA also advised FBR that the “large

number of potentially privileged e-mails” was impairing BANA’s document review. (*Id.*) In response, FBR admitted that it knowingly produced privileged documents: “FBR internally conducted a privilege review of the email server by searching the recipients and senders of each email using a list of its attorneys’ names, . . . [but] [a]dmittedly, due to the time and financial constraints FBR was under, *not all privileged e-mails were withheld from production.*” (Murata Decl. at ¶ 8 (emphasis added).) FBR also asked BANA to continue to bring potentially privileged documents to its attention. (*Id.*)

On January 12, 2011, BANA again advised FBR’s counsel that FBR appeared to have produced a large number of potentially privileged documents. (Murata Decl. at ¶ 9.) But consistent with its previous foot-dragging, FBR failed to take prompt steps to resolve the situation. Despite BANA’s alert, FBR has yet to identify any documents that were inadvertently produced. Instead, FBR has “consulted with an electronic discovery expert (IKON) in order to assess the best way to handle this problem.” (Murata Decl. at ¶ 10.) On February 3, FBR’s counsel reported that it was working with the vendor to conduct a “further privilege review” of the email server. (*Id.*) But FBR has yet to recall any documents, nor has it provided a timetable for recalling documents, producing redacted versions of partially-privileged documents, and providing BANA with a privilege log.

ARGUMENT

Under Federal Rule of Evidence 502, the disclosure of privileged information in a Federal or State proceeding waives the privilege unless: (i) the disclosure is inadvertent; (ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (iii) the holder promptly took reasonable steps to rectify the error. *See* Fed. R. Evid. 502(b). FBR must satisfy all three of these elements—but it cannot satisfy any.

I. FBR'S E-MAIL SERVER PRODUCTION WAIVED ALL APPLICABLE PRIVILEGES THROUGH THE CARELESS HANDLING OF ITS E-MAILS

FBR waived any privilege for its e-mails by failing to take appropriate steps to prevent their disclosure. It is well settled that “[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege.” *United States v. Suarez*, 820 F.2d 1158, 1660 (11th Cir. 1987); *see also In re Keeper of the Records*, 348 F.3d 16, 22 (1st Cir. 2003) (“When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised.”). In particular, privilege is waived by a voluntary or careless disclosure of privileged information to a person outside of the attorney-client relationship. Courts have routinely held that the voluntary or careless production of privileged information waives the privilege. *See, e.g., Conceptus, Inc. v. Hologic, Inc.*, 2010 WL 3911943 (N.D. Cal. Oct. 5, 2010) (“If a party carelessly produced a privileged document, the privilege associated with that document is waived.”); *see also Reino de Espana v. Am. Bureau of Shipping*, 2005 U.S. Dist. LEXIS 33334, at *10 (S.D.N.Y. Dec. 14, 2005) (“The voluntary production of a privileged document removes all confidentiality from the document and clearly effects a waiver of any privilege otherwise applicable.”) (quotation omitted).

Fontainebleau’s admission that “due to the time and financial constraints FBR was under, ***not all privileged e-mails were withheld from production***” establishes that FBR knowingly waived the privilege as to any privileged e-mails that were produced in response to BANA’s subpoena. Furthermore, the large number of potentially privileged e-mails produced by FBR dispels any remaining doubt about FBR’s state of mind in producing the e-mails. This is not the typical inadvertent production situation, where a handful of potentially privileged e-mails slip through an otherwise adequate privilege review. FBR produced more than 30,000 e-mails sent

or received by its in-house attorneys—it must have been aware that its production included a large number of potentially privileged documents. FBR’s admission and the sheer number of potentially privileged documents it produced demonstrate that FBR knowingly—or, at best, carelessly—produced privileged e-mails.

II. FBR DID NOT TAKE REASONABLE CARE IN REVIEWING ITS E-MAILS

FBR did not take reasonable care in reviewing its e-mails before production. FBR’s failure to withhold tens of thousands e-mails to or from its in-house counsel demonstrates that its review process was deficient. If FBR had simply searched for privileged e-mails using its attorneys’ names as keywords—as it claims to have done—it undoubtedly would have come across these e-mails. And FBR cannot reasonably claim that it was impossible to review the e-mails for privilege due to its time and financial constraints. It represented to this Court that a privilege review could be performed in less than a day once it came up with a list of privilege search terms—*i.e.*, a list of lawyers and law firms that counseled FBR.¹ But FBR had over a month to conduct a privilege review. It agreed to search terms on September 14, 2010, and produced the e-mails on October 25, 2010. This was more than enough time to conduct a thorough privilege review before the production deadline—FBR’s failure to do so is inexcusable.

III. FBR HAS FAILED TO TAKE APPROPRIATE STEPS TO RECALL ITS PRODUCTION OF PRIVILEGED DOCUMENTS

FBR’s inaction after admitting that it failed to withhold privileged e-mails also strongly supports the conclusion that FBR has waived the privilege. Having acknowledged that “not all privileged e-mails were withheld from production,” FBR had an affirmative obligation to

¹ See Order on Motion for Determination of Waiver of Privilege, at 8 (Jan. 7, 2011) (DE# 199) (“Fontainebleau then advised the Court that it would take less than a day to review the email server for privilege once it came up with a list of privilege search terms--a list primarily consisting of the names of lawyers and law firms.”).

identify and recall any privileged e-mails from its production. *See* Fed. R. Evid. 502(b) Advisory Committee Notes (stating “[t]he rule does require the producing party to follow up on *any obvious indications* that a protected communication or information has been produced inadvertently”) (emphasis added). But FBR has not taken any independent action to recall allegedly inadvertently produced privileged documents—it has merely recalled those privileged documents brought to its attention *by BANA*. This falls far short of following up on “any obvious indications” that it has inadvertently produced privileged documents.

FBR has not recalled *any* documents since being notified by BANA on January 12, 2011 that it may have produced privileged documents. More than a month has passed since FBR was first notified of this issue. It is well established that a producing party must take immediate steps to recall an inadvertently produced privileged documents to avoid a privilege waiver. *See LaSalle Bank Nat’l Ass’n v. Merrill Lynch Mortgage Lending, Inc.*, 2007 U.S. Dist. LEXIS 59301, at **15-16 (S.D.N.Y. Aug. 13, 2007) (one-month delay in seeking inadvertently produced document’s return waived privilege); *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, 1996 U.S. Dist. LEXIS 17094, at *13 (S.D.N.Y. Nov. 19, 1996) (same). Thus, even if its initial production of privileged e-mails was inadvertent—and FBR’s admission strongly suggests that it was not—FBR’s failure to act after BANA informed FBR that it had produced potentially privileged documents compels a waiver finding.

IV. FAIRNESS ALSO DICTATES A WAIVER RULING

FBR’s failure to comply with its discovery obligations is well documented and has been the subject of several Court orders.² It would be unfair to reward FBR—and penalize the

² *See* Order on Motion for Sanctions, at 2 (Oct. 18, 2010) (DE# 167) (concluding that “Fontainebleau is not in compliance with the order requiring it to produce the subpoenaed files and a privilege log”); *see also* Order on Motion for Determination of Waiver of

receiving parties—by allowing FBR to continue to assert that its e-mails are privileged. Without relief from this Court, FBR may argue that the receiving parties have a duty to bring any potentially privileged documents to FBR's attention. Indeed, FBR has asked BANA to continue to notify it of any privileged e-mails it comes across.³ Given the enormous number of potentially privileged documents, this request is impracticable and unduly burdensome. It will significantly delay and complicate BANA's document review efforts. It also threatens to reveal BANA's attorney work product and litigation strategy by shedding light on the e-mail searches and document reviews it has been performing. As this Court recognized in its ruling on the Term Lenders' Motion with respect to the document and accounting servers, that requirement is prejudicial to the receiving party.⁴

FBR has prejudiced the parties' discovery efforts by delaying its subpoena response. It now further prejudices them by attempting to shift the privilege review burden. FBR's conduct also threatens the parties' discovery schedule. The parties began depositions on February 17 and face an April 15, 2011 discovery cutoff. Without a waiver ruling, the parties' deposition preparation efforts will be hampered by the lingering uncertainty regarding the use of potentially privileged FBR e-mails. This Court should not reward FBR's misconduct by allowing it to preserve the privilege over the e-mails produced in response to BANA's subpoena.

Privilege, at 4-12 (Jan. 7, 2011) (DE# 199) (discussing Fontainebleau's delay in responding to subpoenas).

³ See Murata Decl. at ¶ 8. BANA has brought potentially privileged e-mails to Fontainebleau Resorts' attention, and destroyed copies of the e-mails FBR has claimed are privileged.

⁴ Order on Motion for Determination of Waiver of Privilege, at 12-13.

CONCLUSION

FBR's production of privileged e-mails was not inadvertent, and FBR failed to take reasonable steps to prevent the e-mails' production and to retrieve any potentially privileged e-mails upon learning of their production. Accordingly, BANA respectfully requests an order that FBR has waived any and all otherwise applicable privileges and protections that may have attached to the e-mails it produced from its e-mail server.

LOCAL RULE 7.1(a)(3) CERTIFICATION

Pursuant to Local Rule 7.1.A.3, the movant's counsel certifies that they have, as described above, engaged in a series of calls and e-mails with FBR's counsel in a good faith effort to resolve the issues raised in the motion, and have been unable to do so.

Dated: February 23, 2011

By: /s/ Craig V. Rasile

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Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Bank of America, N.A.'s Motion for a Determination of Fontainebleau Resorts' Waiver of Privilege For Its E-mail Server Documents was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 23, 2011

By: /s/ Craig V. Rasile
Craig V. Rasile

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS

**DECLARATION OF KENNETH T. MURATA IN SUPPORT OF
BANK OF AMERICA, N.A.'S MOTION FOR A DETERMINATION
OF FONTAINEBLEAU RESORTS' WAIVER OF PRIVILEGE
FOR ITS E-MAIL SERVER DOCUMENTS**

I, Kenneth T. Murata, declare as follows:

I am counsel with O'Melveny & Myers LLP, counsel for Bank of America, N.A. ("BANA") in the above-referenced action. I make this declaration in support of BANA's Motion for a Determination of Fontainebleau Resorts' Waiver of Privilege for its E-mail Server Documents. I have personal knowledge of the following, and if called as a witness, I would and could competently testify thereto.

1. BANA served Fontainebleau Resorts, LLC ("FBR") with a subpoena *duces tecum* on September 2, 2010 seeking documents relating to the Fontainebleau Las Vegas project. BANA's document requests mirrored the requests served on FBR by the Term Lenders and certain other revolver bank defendants—Barclays, Deutsche Bank, JPMorgan Chase and Royal Bank of Scotland.

2. Together with the other parties that subpoenaed FBR for documents, BANA negotiated e-mail search terms and a relevant time period with FBR. On September 14, 2010, the parties reached agreement on a search term list and date range that would be used to retrieve e-mails from FBR's e-mail server. A true and correct copy of the September 14, 2010 e-mail chain reflecting the parties' agreement is annexed hereto as Exhibit A.

3. On October 25, 2010, FBR reported in an e-mail that it retrieved "approximately 16,000" documents from the e-mail server based on the mutually-agreed search terms. A true and correct copy of that October 25, 2010 e-mail from Sarah Springer, counsel for FBR to me and other recipients is annexed hereto as Exhibit B.

4. After BANA and the other parties received the e-mails that were *actually* retrieved by FBR from its e-mail server using the mutually-agreed search terms, they discovered that the search terms and date limitations yielded more than 700,000 e-mails (61.5 gigabytes of data)—substantially more than the "approximately 16,000" documents previously reported by FBR. When asked in an e-mail if it could explain this discrepancy, FBR simply responded "no." A true and correct copy of the November 3, 2010 e-mail from Sarah Springer to counsel for the subpoenaing parties is annexed hereto as Exhibit C.

5. In an effort to reduce the burden of reviewing FBR's e-mails, BANA, the Term Lenders and the other bank defendants applied their own additional search terms to FBR's production. They also jointly worked with a vendor (IKON), at their own expense, to process and image FBR's e-mails so that they could be searched, reviewed and printed for discovery purposes.

6. At my direction, O'Melveny's litigation support group ran several word searches against the subset of e-mails identified using BANA, the Term Lenders and the other banks'

additional search terms.

- Nearly 13,000 documents contain the term “Thier”—Fontainebleau Resorts’ former general counsel.
- Nearly 14,000 documents contain the term “Sabo”—Fontainebleau Resorts’ former Associate General Counsel.
- There are thousands of e-mails to/from FBR’s outside counsel Latham & Watkins LLP and Buchanan Ingersoll & Rooney PC.

7. After coming across numerous potentially privileged e-mails in FBR’s production, BANA sent a letter to FBR asking what steps had been taken to review the e-mail server for privileged documents. BANA also advised FBR that the “large number of potentially privileged e-mails” was impairing BANA’s document review. A true and correct copy of my December 20, 2010 letter (without attachments) to Sarah Springer is annexed hereto as Exhibit D.

8. In its December 24, 2010 response, FBR admitted that it knowingly produced privileged documents: “FBR internally conducted a privilege review of the email server by searching the recipients and senders of each email using a list of its attorneys’ names” . . . [but] “[a]dmittedly, due to the time and financial constraints FBR was under, not all privileged e-mails were withheld from production,” and asked BANA to continue bringing potentially privileged documents to its attention. A true and correct of Sarah Springer’s December 24, 2010 response (without attachments) is annexed hereto as Exhibit E.

9. On January 12, 2011, counsel for BANA telephonically advised FBR again that it may have produced a large number of potentially privileged documents.

10. Over the next month, BANA e-mailed FBR on several occasions to determine what steps were being taken by FBR to address its production of potentially privileged

documents. A true and correct copy of an e-mail exchange between January 18, 2011 and February 3, 2011 between me and Sarah Springer is annexed hereto as Exhibit F.

11. FBR has not identified a single document since January 12, 2010 that was inadvertently produced.

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

Executed on February 23, 2011 at New York, New York.



Kenneth T. Murata

EXHIBIT A

Murata, Kenneth

From: Sarah Springer [SSpringer@waldmanlawfirm.com]
Sent: Tuesday, September 14, 2010 5:03 PM
To: Kirk D. Dillman
Cc: Fitzgerald, Steven S; Murata, Kenneth
Subject: RE: Subpoena Search Terms

I will have an ETA for you tomorrow morning.

Sincerely,

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

From: Kirk D. Dillman [mailto:DillmanK@hbdlawyers.com]
Sent: Tuesday, September 14, 2010 12:31 PM
To: Sarah Springer
Cc: Fitzgerald, Steven S; Murata, Kenneth
Subject: RE: Subpoena Search Terms

Sarah

This is fine with us. Can you please give us an eta on when IKON will be finished, what your plans are with respect to potentially privileged documents, and when we can expect to receive the electronic documents.

From: Murata, Kenneth [mailto:KMurata@OMM.com]
Sent: Tuesday, September 14, 2010 8:29 AM
To: Sarah Springer
Cc: 'Fitzgerald, Steven S'; Kirk D. Dillman
Subject: RE: Subpoena Search Terms

Sarah:

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

Thanks.

Ken

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

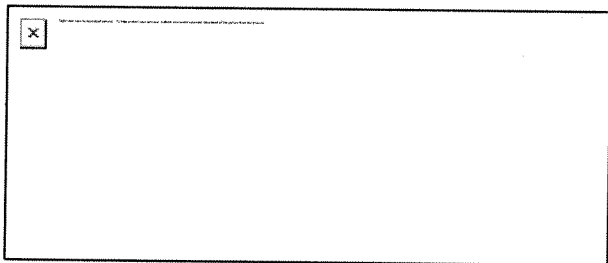
Gentlemen,

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

Sincerely,

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

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



865 South Figueroa Street
Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

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

EXHIBIT B

Murata, Kenneth

From: Sarah Springer [SSpringer@waldmanlawfirm.com]
Sent: Monday, October 25, 2010 4:19 PM
To: Fitzgerald, Steven S; Murata, Kenneth
Cc: Cantor, Daniel L.; drothstein@dkrpa.com; steven.nachtwey@bartlit-beck.com; bamron@bastamron.com; huttonj@gtlaw.com; bloomm@gtlaw.com; dillmank@hbdlawyers.com; Rice, Thomas; Woll, David
Subject: RE: Fontainebleau Resorts. LLC

All electronic and hard copy documents are available for inspection, review and copying.

It is my understanding that there are approximately 16,000 emails on the email server that is being produced. These emails were identified using the search terms and date range provided by the parties a few months ago.

There are approximately 600,000 files on the document/file server.

It is unknown how large the accounting server is. It is my understanding that the accounting server is of no use unless you compile a list of reports you would like to run.

With respect to your other questions, you may want to consult with Kirk Dillman's tech guy. He spoke with the electronic discovery expert FBR retained and they discussed the format and production issues you are now inquiring into.

Sincerely,

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

From: Fitzgerald, Steven S [mailto:SFitzgerald@stblaw.com]
Sent: Monday, October 25, 2010 3:42 PM
To: Sarah Springer; Murata, Kenneth
Cc: Cantor, Daniel L.; drothstein@dkrpa.com; steven.nachtwey@bartlit-beck.com; bamron@bastamron.com; huttonj@gtlaw.com; bloomm@gtlaw.com; dillmank@hbdlawyers.com; Rice, Thomas; Woll, David
Subject: RE: Fontainebleau Resorts. LLC

Can you please describe what form your electronic documents are in so we can evaluate FBR's position? Would like to know what type of media they are currently stored on and the size of the files and whether all meta-data/search capabilities have been kept in-tact. Also, does this relate to the email production only or does this involve the other servers as well?

From: Sarah Springer [mailto:SSpringer@waldmanlawfirm.com]
Sent: Monday, October 25, 2010 3:07 PM
To: Murata, Kenneth
Cc: Cantor, Daniel L.; drothstein@dkrpa.com; steven.nachtwey@bartlit-beck.com; bamron@bastamron.com; huttonj@gtlaw.com; bloomm@gtlaw.com; dillmank@hbdlawyers.com; Rice, Thomas; Woll, David; Fitzgerald, Steven S
Subject: RE: Fontainebleau Resorts. LLC

Gentlemen,

If your clients wish to make a copy of all electronic documents, please make all necessary arrangements with a copy service of your choice. This expense will not be borne by Fontainebleau Resorts, LLC. Let me know when to expect this service, so that I can meet them and ensure that they retrieve what they need.

Sincerely,

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

From: Murata, Kenneth [mailto:KMurata@OMM.com]
Sent: Monday, October 25, 2010 11:09 AM
To: Sarah Springer
Cc: Cantor, Daniel L.; 'drothstein@dkrpa.com'; 'steven.nachtwey@bartlit-beck.com'; 'bamron@bastamron.com'; 'huttonj@gtlaw.com'; 'bloomm@gtlaw.com'; 'dillmank@hbdlawyers.com'; 'trice@stblaw.com'; 'dwooll@stblaw.com'; 'sfitzgerald@stblaw.com'
Subject: Re: Fontainebleau Resorts. LLC

Sarah:

BANA would also like copies of all electronic documents. Please send them to my attention at:

Ken Murata
O'Melveny & Myers LLP
7 Times Square
New York, NY 10036

Please let me know when the copies are sent out.

Regards,

Ken

From: Fitzgerald, Steven S <SFitzgerald@stblaw.com>
To: 'SSpringer@waldmanlawfirm.com' <SSpringer@waldmanlawfirm.com>
Cc: Cantor, Daniel L.; 'drothstein@dkrpa.com' <drothstein@dkrpa.com>; Cantor, Daniel L.; 'steven.nachtwey@bartlit-beck.com' <steven.nachtwey@bartlit-beck.com>; 'bamron@bastamron.com' <bamron@bastamron.com>; 'huttonj@gtlaw.com' <huttonj@gtlaw.com>; 'bloomm@gtlaw.com' <bloomm@gtlaw.com>; 'Dillmank@hbdlawyers.com' <Dillmank@hbdlawyers.com>; Murata, Kenneth; Rice, Thomas <trice@stblaw.com>; Woll, David <dwooll@stblaw.com>
Sent: Mon Oct 25 10:06:03 2010
Subject: FW: Fontainebleau Resorts. LLC

Barclays, Deutsche Bank, JPMorgan and RBS would also like an electronic copy of all electronic documents sent to my attention to the address below. We will get back to you on the hardcopy documents.

Steven Fitzgerald
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, New York 10017

Tel: (212) 455-7993
Fax: (212) 455-2502
sfitzgerald@stblaw.com

From: Kirk D. Dillman [mailto:Dillmank@hbdlawyers.com]
Sent: Saturday, October 23, 2010 12:13 AM
To: Sarah Springer
Cc: dcantor@omm.com; drothstein@dkrpa.com; dcantor@omm.com; steven.nachtwey@bartlit-beck.com;

bamron@bastamron.com; Rice, Thomas; Woll, David; huttonj@gtlaw.com; bloomm@gtlaw.com; Robert Mockler
Subject: Re: Fontainebleau Resorts. LLC

The Term Lenders would like electronic copies of all electronic documents. Please confirm that these will be sent out Monday.

Kirk D. Dillman

On Oct 22, 2010, at 2:15 PM, "Sarah Springer" <[SSpringer@waldmanlawfirm.com](mailto:sspringer@waldmanlawfirm.com)> wrote:

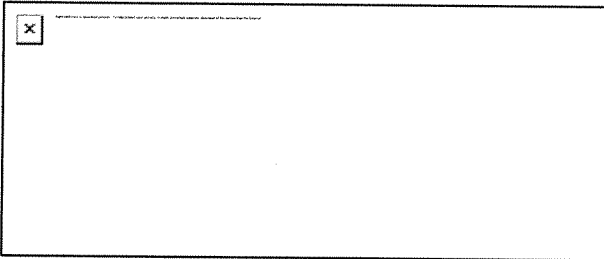
Gentlemen,

On Monday, October 25, 2010, all hard copy and electronic documents which are responsive to your subpoenas will be made available for inspection and copying at the offices located at 19501 Biscayne Blvd., Aventura, Florida 33180. Please email me to coordinate a date and time for you to review same.

Sincerely,

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

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



865 South Figueroa Street
Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

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

EXHIBIT C

Murata, Kenneth

From: Sarah Springer [SSpringer@waldmanlawfirm.com]
Sent: Wednesday, November 03, 2010 3:49 PM
To: Kirk D. Dillman
Cc: steven.nachtwey@bartlit-beck.com; Murata, Kenneth; sfitzgerald@stblaw.com
Subject: RE: FBR Documents

See below in red.

Sincerely,

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

From: Kirk D. Dillman [mailto:DillmanK@hbdlawyers.com]
Sent: Tuesday, November 02, 2010 4:57 PM
To: Sarah Springer
Cc: steven.nachtwey@bartlit-beck.com; Murata, Kenneth; sfitzgerald@stblaw.com
Subject: FBR Documents

Sarah

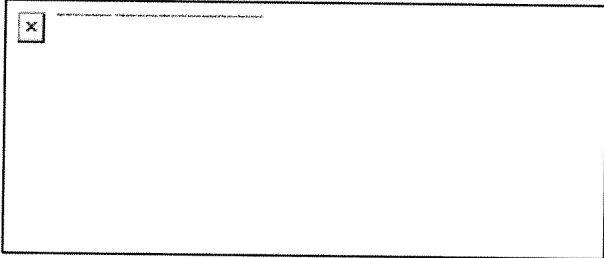
We have now obtained from FBR's offices and had copied the hard drives and hard-copy documents that you provided in response to the Term Lenders' subpoena. In order to be able to report to the Court whether FBR has fully complied with the Court's Order of October 18, 2010, I need the following information:

- Privilege review. In his Supplemental Order issued today, Magistrate Judge Goodman says: "Although [Fontainebleau's Notice of Compliance] does not expressly say that Fontainebleau produced all responsive documents and data and did not conduct a privilege review, it is the Court's understanding that Fontainebleau is not withholding responsive documents and data on privilege grounds." Is it correct that Fontainebleau did not conduct a privilege review, has not withheld privileged documents, and does not intend to produce a privilege log? FBR conducted a privilege review of the filtered email server, only. FBR intends to produce a privilege log but this firm is not handling that task. A 3rd party vendor has been retained to review the emails and create a privilege log.
- E-Mails. The emails FBR produced consists of approximately 126 gigabytes of data. This is substantially more than the 16,000 emails you previously represented were the result of applying the data range and search terms to which we previously agreed. Can you explain the difference? No.
- Documents. I do not have the precise numbers yet, but the amount of data on the hard drive from the document server is extremely large. What efforts, if any, were taken to search these documents to ensure that they were responsive to our subpoena? None. You were given everything.

Thank you for your prompt attention to these issues.

Kirk D. Dillman
Hennigan, Bennett & Dorman LLP
865 S. Figueroa St., Suite 2900

Los Angeles, CA 90017
Direct: 213.694.1101
Main: 213.694.1200
Cell: 213.675.0031
email: dillmank@hbdlawyers.com
Web: www.hbdlawyers.com



865 South Figueroa Street
Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

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Thank you.

EXHIBIT D



O'MELVENY & MYERS LLP

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BRUSSELS
CENTURY CITY
HONG KONG
LONDON
LOS ANGELES
NEWPORT BEACH

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7 Times Square
New York, New York 10036
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FACSIMILE (212) 326-2061
www.omm.com

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SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

December 20, 2010

OUR FILE NUMBER
019,368-1169

BY E-MAIL AND FIRST CLASS MAIL

WRITER'S DIRECT DIAL
(212) 326-2274

Sarah J. Springer, Esq.
Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.
Weston Pointe II, Suite 202
2200 North Commerce Parkway
Weston, Florida 33326-3258

WRITER'S E-MAIL ADDRESS
kmurata@omm.com

**Re: In re Fontainebleau Las Vegas Contract Litigation, No. 09-2106-MD-GOLD/GOODMAN (S.D. Fla.)
Fontainebleau Resorts, LLC ("FBR") Subpoena Response**

Dear Sarah:

This responds to your December 13, 2010 letter. Your letter mischaracterizes the contents of our December 9, 2010 letter. The December 9 letter did not identify e-mails we "believe are privileged but were inadvertently produced by Fontainebleau Resorts, LLC." Our letter stated that the documents "may be privileged," and we wrote to determine whether FBR intentionally or inadvertently produced those e-mails. Now that FBR has asserted a claim of privilege as to each of the nine e-mails identified in the December 9 letter, we will destroy our copies of the nine e-mails while reserving our right to assert that any privilege as to those e-mails have been waived.

Our review has disclosed numerous additional e-mails that may be privileged. These e-mails are annexed as Exhibits 1 through 14. The large number of potentially privileged e-mails in FBR's production is impeding our ability to conduct discovery and prepare for depositions. For each e-mail annexed to this letter, please let me know: (i) whether FBR intends assert a claim of privilege; (ii) whether the privilege, if any, is claimed as to the entire e-mail or a portion of the e-mail, and (iii) the basis for the privilege claim as required by Federal Rule of Civil Procedure 45(d). In addition, please specify the steps taken by FBR to review the e-mail server for privileged documents before FBR made its production in response to BANA's subpoena. Please provide your response to our inquiries by close of business on Thursday, December 23, 2010.

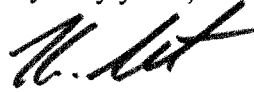
* * *

O'MELVENY & MYERS LLP

Sarah Springer, Esq., December 20, 2010 - Page 2

BANA reserves all of its rights to assert that FBR has waived any claim of privilege over the e-mails annexed to this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read "K. Murata", written in a cursive style.

Ken Murata

Attachments

EXHIBIT E

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

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

December 24, 2010

Via E-Mail and U.S. Mail

Ken Murata, Esq.
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, New York 10036

Re: In re: Fontainebleau Las Vegas Contract Litigation
U.S. District Court: Master Case No.: 09-MD-2106-Civ-Gold

Dear Mr. Murata:

In response to your letter dated December 22, 2010, please find enclosed redacted copies of the partially privileged exhibits you previously identified. In your letter you asked what steps Fontainebleau Resorts, LLC ("FBR") undertook to review the email server for privileged materials. It is my understanding that FBR internally conducted a privilege review of the email server by searching the recipients and senders of each email using a list of its attorneys' names. Admittedly, due to the time and financial constraints FBR was under, not all privileged emails were withheld from production. As such, your continued identification of emails you believe to be privileged is greatly appreciated. FBR will continue to promptly respond to same.

Very truly yours,



Sarah J. Springer

cc: Mario Romine

EXHIBIT F

Murata, Kenneth

From: Sarah Springer [SSpringer@waldmanlawfirm.com]
Sent: Thursday, February 03, 2011 9:41 AM
To: Murata, Kenneth
Subject: RE: Status re IKON

Ken,

As I am sure you are aware, this is not a simple task. As such, FBR has consulted with an electronic discovery expert (IKON) in order to assess the best way to handle this problem. FBR got the proposed work order from IKON late last week and has been considering its other options since then. This morning, I got the go ahead from FBR to hire IKON to conduct a further privilege review of the email hard drive.

If you tell me when the first depositions in this matter are scheduled, I will advise IKON re same. It would certainly quicken the process of determining which search terms to apply if you would provide me with the names of BOA's counsel from 2007 to 2010. Is there any other firm aside from Sheppard Mullin that I should be aware of? If not, are there any attorneys I should look out for?

Sincerely,

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

From: Murata, Kenneth [mailto:KMurata@OMM.com]
Sent: Wednesday, February 02, 2011 11:15 PM
To: Sarah Springer
Subject: RE: Status re IKON

Sarah:

More than three weeks have passed since we first brought the privilege issue to your attention. We are about to start depositions in this litigation, and we need to get this issue resolved. I am surprised at how long it is taking to resolve this issue in view of FBR's earlier representations to the Court that a privilege review had been performed before the e-mails were produced to BANA and the other entities that subpoenaed FBR. We reserve all of our rights, including our ability to seek a privilege waiver determination from the Court.

Ken Murata
O'Melveny & Myers LLP
7 Times Square
New York, New York 10036
(212) 326-2000

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From: Sarah Springer [mailto:SSpringer@waldmanlawfirm.com]
Sent: Thursday, January 27, 2011 4:28 PM
To: Murata, Kenneth
Subject: RE: Status re IKON

Ken,

As previously advised, FBR hired IKON to assess its options with respect to the privilege issue you kindly brought to its attention. FBR paid IKON \$1,500 to assess the production and come up with a proposal that meets your needs and keeps the cost down as much as possible. There have been numerous phone conferences and emails with IKON's experts regarding how the production can be narrowed while both keeping the cost down and not disturbing the document numbering system your firm is presently using. I anticipate receiving IKON's formal proposal tomorrow morning. After that, I will simply need the client's approval to move forward with this project. Your anticipated cooperation is appreciated. Just so you know, the goal would be to simply provide you with a list of doc ID numbers that could be inputted into your system and then the corresponding documents would be deleted without disturbing the document IDs of the other, non-privileged documents.

Sincerely,

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

From: Murata, Kenneth [mailto:KMurata@OMM.com]
Sent: Thursday, January 27, 2011 4:03 PM
To: Sarah Springer
Subject: RE: Status re IKON

Sarah:

It has been more than two weeks since I brought our concerns about FBR's production of potentially privileged documents to your attention. I have not received any information from you regarding the timing and scope of FBR's response, if any, for more than a week. Please let me know at your earliest convenience what FBR proposes doing to resolve this situation.

We reserve our all of our rights in this matter, including our ability to seek a privilege waiver determination from the Court.

Regards,

Ken Murata
O'Melveny & Myers LLP
7 Times Square
New York, New York 10036
(212) 326-2000

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From: Sarah Springer [mailto:SSpringer@waldmanlawfirm.com]
Sent: Wednesday, January 19, 2011 5:00 PM
To: Murata, Kenneth
Subject: FW: Status re IKON

Ken,

FBR decided to incur the additional cost described below and IKON is in the process of applying the search terms I provided to them (along with a few exclusionary terms). I should know more tomorrow regarding what kind of response IKON got from the search. If you have any questions in the mean time, please do not hesitate to contact me.

Sincerely,

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

From: Sarah Springer
Sent: Tuesday, January 18, 2011 2:36 PM
To: 'Murata, Kenneth'
Subject: Status re IKON

Ken,

I wanted to let you know where FBR stands in respect of the email server dilemma. FBR was very recently provided with a cost estimate for searching the email server and is considering its options. If FBR gives the go ahead to incur that additional cost, the search terms will be applied. There is no way of knowing how many documents will come up in the search. If it is a substantial amount, it would be in both of our clients' best interests to apply additional exclusionary terms in order to narrow what must be reviewed for purposes of privilege. I will continue to keep you informed as to any developments in this area.

Sincerely,

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

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