

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 51; GRANTING JOINT MOTION FOR EXTENSION  
OF CERTAIN PRE-TRIAL DEADLINES [ECF No. 247] NUNC PRO TUNC**

THIS CAUSE is before the Court upon Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-23835 and Defendant Bank of America, N.A.'s Joint Motion for Extension of Certain Pre-trial Deadlines ("Motion") [ECF No. 247]. Having reviewed the Motion, the record, and being otherwise duly advised, it is hereby

ORDERED and ADJUDGED that:

1. The Joint Motion for Extension of Certain Pre-trial Deadlines [ECF No. 247] is GRANTED *nunc pro tunc*.
2. Rebuttal expert reports shall be filed **no later than Wednesday, June 29, 2011**.
3. All expert discovery, including depositions, shall be completed **no later than Friday, July 29, 2011**.
4. All dispositive pretrial motions and memoranda of law shall be filed **no later than Friday, August 5, 2011**.

5. Oppositions to any dispositive motions, including motions to strike in whole or in part expert testimony, shall be filed **no later than Friday, September 9, 2011.**
  6. Replies, if any, to dispositive motions shall be filed **no later than Tuesday, September 27, 2011.**
  7. To assist the Court, the parties are ORDERED to deliver to the undersigned's Chambers Joint Binders containing tabbed and indexed courtesy copies of the dispositive pretrial motion(s) and any responses, replies, exhibits, memoranda of law, and case law related to the dispositive pretrial motion(s) by **Friday, October 28, 2011 at 4:00 p.m.** The courtesy copies shall include a table of contents and indicate the docket entry number of each document contained therein.
  8. All motions to strike in whole or in part expert testimony (other than expert affidavits filed in support of a motion for summary judgment) shall be filed **no later than Tuesday, December 13, 2011.**
  9. All other dates and requirements in MDL Order Nos. 16, 33, and 49 [**ECF Nos. 76, 140, 244**] not revised herein, or by court order, shall remain in full force and effect.
- DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of July, 2011.



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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

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**JOINT MOTION FOR EXTENSION OF PAGE LIMITS FOR  
LEGAL MEMORANDA IN SUPPORT OF AND IN OPPOSITION TO  
MOTIONS FOR SUMMARY JUDGMENT AND SUPPORTING DOCUMENTS**

Plaintiffs in *Avenue CLO Fund, Ltd. v. Bank of America, NA.*, 09-CV-1047 (D. Nev.) (the “*Avenue Action*”), and defendant Bank of America, N.A. (“BANA”) submit this joint motion respectfully requesting that the Court grant an extension of page limits for their respective motions for summary judgment and related documents.

WHEREAS, Local Rule 7.1(c)(2) states that legal memoranda are not to exceed twenty (20) pages in length, with the exception of a reply, which is not to exceed ten (10) pages in length.

WHEREAS, Local Rule 7.5(c) states that a statement of material facts submitted either in support of or in opposition to a motion for summary judgment is not to exceed ten (10) pages in length.

WHEREAS, the litigation involves numerous claims arising from a series of events and several contract provisions.

WHEREAS, following the conclusion of a fact and expert discovery process which has seen the production of over 150,000 documents and 32 depositions, the parties intend to file motions for summary judgment.

WHEREAS, the facts and argument cannot be adequately addressed within the page limits set forth by Local Rules 7.1(c)(2) and 7.5(c).

NOW, THEREFORE, the undersigned parties hereby respectfully request that this Court approve the following extensions on page limits referenced in the Local Rules of this Court:

1. Memoranda of law in support of motions for summary judgment shall not exceed forty (40) pages in length.
2. Memoranda of law in opposition to motions for summary judgment shall not exceed forty (40) pages in length.
3. Reply memoranda in further support of motions for summary judgment shall not exceed twenty (20) pages in length.
4. Statements of material fact submitted in support of and in opposition to motions for summary judgment shall not exceed thirty (30) pages in length.
5. Title pages preceding the first page of text in a memorandum, signature pages, and certificates of service shall not be counted as pages for purposes of this joint motion.

Dated: July 28, 2011

Respectfully submitted,

By: /s/ Christopher N. Johnson

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- and -

O'MELVENY & MYERS LLP  
Bradley J. Butwin (*pro hac vice*)  
Jonathan Rosenberg (*pro hac vice*)  
Daniel L. Cantor (*pro hac vice*)  
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*Attorneys for Bank Of America, N.A.*

- and -

DIMOND KAPLAN & ROTHSTEIN, P.A.

By: /s/ David Rothstein

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-and-

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

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

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

In re:

FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS

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**ORDER EXTENDING PAGE LIMITS FOR  
LEGAL MEMORANDA IN SUPPORT OF AND IN OPPOSITION TO  
MOTIONS FOR SUMMARY JUDGMENT AND SUPPORTING DOCUMENTS**

THIS MATTER came before the Court for consideration upon the Joint Motion for the Extension of Page Limits for Legal Memoranda in Support of and in Opposition to Motions for Summary Judgment and Supporting Documents [DE \_\_] (the "Motion") filed by Plaintiffs in *Avenue CLO Fund, Ltd. v. Bank of America, NA.*, 09-CV-1047 (D. Nev.) and Defendant Bank of America, N.A. The Court, having considered the Motion, the record, and the representations of counsel, finds good cause to grant the Motion.

Accordingly, it is hereby ORDERED AND ADJUDGED that:

1. The Motion [DE \_\_] is GRANTED.
2. The page limit for memoranda of law in support of motions for summary judgment is extended from twenty (20) pages to forty (40) pages.
3. The page limit for memoranda of law in opposition to motions for summary judgment is extended from twenty (20) pages to forty (40) pages.
4. The page limit for reply memoranda in further support of motions for summary judgment is extended from ten (10) pages to twenty (20) pages.

5. The page limit for statements of material facts submitted in support of and in opposition to motions for summary judgment is extended from ten (10) pages to thirty (30) pages.

DONE and ORDERED in Chambers in Miami, Florida this \_\_\_\_ day of \_\_\_\_\_, 2011.

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THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

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.*

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**MDL ORDER NUMBER 52;  
GRANTING JOINT MOTION FOR EXTENSION OF PAGE LIMITS [ECF No. 252]**

THIS CAUSE is before the Court upon Plaintiffs in *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-23835 and Defendant Bank of America, N.A.'s Joint Motion for Extension of Page Limits for Legal Memoranda in Support of and in Opposition to Motions for Summary Judgment and Supporting Documents ("Motion") **[ECF No. 252]**. Having reviewed the Motion, the record, and being otherwise duly advised, it is hereby

ORDERED and ADJUDGED that:

1. The Joint Motion for Extension of Page Limits for Legal Memoranda in Support of and in Opposition to Motions for Summary Judgment and Supporting Documents **[ECF No. 252]** is GRANTED.
2. All parties shall comply with the following page limits for memoranda of law and as otherwise indicated:
  - a. Motions for Summary Judgment: 40 pages
  - b. Oppositions to Motions for Summary Judgment: 40 pages



- c. Replies in Support of Motions for Summary Judgment: 20 pages
- d. Statements of material facts submitted in support of and in opposition to Motions for Summary Judgment: 30 pages

\_\_\_\_\_ DONE AND ORDERED in Chambers at Miami, Florida, this 3<sup>rd</sup> day of August, 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 relates to:

ALL ACTIONS  
\_\_\_\_\_ /

**NOTICE OF SUBSTITUTION OF COUNSEL**

PLEASE TAKE NOTICE that attorneys Christopher N. Johnson and Craig Rasile have left the law firm of Hunton & Williams LLP, and Jamie Zysk Isani of the law firm of Hunton & Williams LLP, hereby enters an appearance as additional counsel for Defendant Bank of America, N.A. The undersigned therefore requests that attorneys Johnson and Rasile be removed from the CM/ECF noticing system for this case, and requests that all future pleadings and correspondence be served upon the undersigned.

Respectfully submitted,

Hunton & Williams LLP  
Attorneys for Defendant Bank of America, N.A.

By /s/ Jamie Zysk Isani  
Jamie Zysk Isani & Matthew Mannering  
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(305) 810-2500 fax 2460  
jisani or mmannering@hunton.com

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2011, 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 counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jamie Zysk Isani

Jamie Zysk Isani

**SERVICE LIST**

Holston Investments Inc. B.V.I. and Albert P. Hernandez v. Lanlogistics, Corp.  
Case No. 08-21569-CIV-Moreno/Torres  
United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS

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**AMENDED NOTICE OF SUBSTITUTION OF COUNSEL**

**[To Amend Certificate of Service]**

PLEASE TAKE NOTICE that attorneys Christopher N. Johnson and Craig Rasile have left the law firm of Hunton & Williams LLP, and Jamie Zysk Isani of the law firm of Hunton & Williams LLP, hereby enters an appearance as additional counsel for Defendant Bank of America, N.A. The undersigned therefore requests that attorneys Johnson and Rasile be removed from the CM/ECF noticing system for this case, and requests that all future pleadings and correspondence be served upon the undersigned.

Dated: Miami, Florida  
August 24, 2011

Respectfully submitted,

By: /s/ Jamie Zysk Isani  
Jamie Zysk Isani, Esq.  
Florida Bar No. 728861  
Matthew Mannering, Esq.  
Florida Bar No. 0039300  
**HUNTON & WILLIAMS LLP**  
1111 Brickell Avenue  
Suite 2500  
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Tel: (305) 810-2500  
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*Counsel for Bank of America, N.A.*

**CERTIFICATE OF SERVICE AND COMPLIANCE**

I HEREBY CERTIFY that I am admitted to the Bar of the U.S. District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court as set forth in Local Rule 2090-1(A); and that on August 24, 2011, I electronically filed the *Amended Notice of Substitution of Counsel* with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record who are authorized to receive electronically Notices of Electronic filing via transmission of a Notice of Electronic Filing generated by CM/ECF.

Dated: Miami, FL  
August 24, 2011

/s/ Jamie Zysk Isani  
Jamie Zysk Isani

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 53;**  
**GRANTING UNOPPOSED MOTIONS TO SEAL [ECF Nos. 254; 260]**

This matter is before the Court on Defendant Bank of America, N.A.'s Unopposed Motion to Seal Documents **[ECF No. 254]** and Plaintiffs' Unopposed Motion to File Term Lender Plaintiffs' Motion for Partial Summary Judgment and Supporting Appendices Under Seal **[ECF No. 260]** (collectively "Motions"). Having reviewed the Motions, the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. The Motions **[ECF Nos. 254; 260]** are hereby GRANTED.
2. The Clerk shall permit the parties to file the following documents under seal, as well as any exhibits attached thereto: Defendant Bank of America, N.A.'s Motion for Summary Judgment and Incorporated Memorandum of Law; BANA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment; the Declarations of Daniel L. Cantor, Brandon Bolio, Jeff Susman, and Robert W. Barone; and all exhibits referenced therein; Plaintiffs' motion for partial summary

judgment; appendices; and separate statement submitted in support of Plaintiffs' motion for partial summary judgment.

DONE and ORDERED in Chambers in Miami, Florida, this 26<sup>th</sup> day of August, 2011.



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THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman  
All counsel and parties 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.

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**UNOPPOSED EMERGENCY MOTION TO EXTEND BY ONE DAY THE TIME TO  
FILE APPENDICES IN SUPPORT OF TERM LENDER PLAINTIFFS' OPPOSITION  
TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT**

As a result of Federal Express delays caused by a large power outage in the U.S. Southwest, the Term Lender Plaintiffs will be unable to file the Appendices in support of their Opposition to BofA's Motion for Summary Judgment by today's deadline, September 9, 2011. Plaintiffs will file their Opposition and other supporting documents today, and serve all documents, including the Appendices today. Through this Emergency Motion, Plaintiffs seek leave to file the Appendices on Monday, September 12, 2011. BofA does not oppose the relief requested.

**I. BACKGROUND**

On Thursday, September 8, 2011, Plaintiffs' Los Angeles counsel sent the Appendix of Testimony and Appendix of Evidence in support of Term Lender Plaintiffs' Opposition to BofA's Motion for Summary Judgment to Plaintiffs' counsel in Florida. (Declaration of Robert W. Mockler filed herewith ("Mocker Decl."), ¶ 2.) The Appendices were sent via Federal Express for delivery this morning, so that they could be filed this afternoon, along with the Term Lender Plaintiffs' Opposition and other supporting documents in time for the deadline to file the Opposition. (Mockler Decl., ¶ 2.) Hard copies of the Appendices were transmitted because they

are voluminous and, as they will be filed under seal, they must be manually (and not electronically) filed. (Mockler Decl., ¶ 3.)

Plaintiffs' counsel was informed on the morning of Friday, September 9, 2011 on the West Coast by Federal Express that a power outage on September 8, 2011 affected large portions of the Southwest and as a result the Appendices did not reach Florida this morning as scheduled. (Mockler Decl., ¶ 4.) Specifically, the power outage caused delays at the Phoenix airport, through which the Appendices were routed. (Mockler Decl., ¶ 4.) Federal Express is unable to deliver the Appendices to Florida today in time to be filed with this Court. (Mockler Decl., ¶ 4.) By the time Plaintiffs' counsel was informed of the issue, it was already afternoon in Florida.

Plaintiffs' counsel made a good faith effort to find another way to compile the Appendices to be able to file them by the Court's filing deadline this afternoon. (Mockler Decl., ¶ 5.) Due to the time constraints and the voluminous nature of the Appendices, counsel was unable to do so. (Mockler Decl., ¶ 5.)

## **II. RELIEF REQUESTED**

Plaintiffs request that their time to file the Appendices in support of their Opposition be extended by one day, until Monday, September 12, 2011. Plaintiffs will file their Opposition and supporting documents other than the Appendices today. Plaintiffs will serve the Opposition and all supporting documents, including the Appendices, today, as agreed between the parties. (Mockler Decl., ¶ 6.) Plaintiffs' counsel spoke with counsel for BofA, who indicated that they do not oppose Plaintiffs' request. (Mockler Decl., ¶ 7.)

## **III. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request a one day extension to file the Appendices in support of their Opposition to BofA's Motion for Summary Judgment.

Dated: September 9, 2011

Respectfully submitted,

/s/ Lorenz Michel Prüss

David A. Rothstein, Esq.

Fla. Bar No.: 056881

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Lorenz M. Prüss, Esq.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **UNOPPOSED EMERGENCY MOTION TO EXTEND BY ONE DAY THE TIME TO FILE APPENDICES IN SUPPORT OF TERM LENDER PLAINTIFFS' OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT** was filed with the Clerk of the Court. I also certify that the foregoing document is being electronically served this day on all counsel of record or pro se parties identified on the attached Service List by agreement of all counsel.

Dated: September 9, 2011.

/s/ Lorenz Michel Prüss  
Lorenz M. Prüss, Esq.

**Service List**

<b>Attorneys:</b>	<b>Representing:</b>
Bradley J. Butwin Daniel L. Cantor Jonathan Rosenberg William J. Sushon Ken Murata Asher Rivner <b>O'MELVENY &amp; MYERS LLP</b> Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Defendant Bank of America, N.A.
Kevin Michael Eckhardt <b>HUNTON &amp; WILLIAMS</b> 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendant Bank of America, N.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.

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**DECLARATION OF ROBERT W. MOCKLER IN SUPPORT OF  
UNOPPOSED EMERGENCY MOTION TO EXTEND BY ONE DAY THE TIME TO  
FILE APPENDICES IN SUPPORT OF TERM LENDER PLAINTIFFS' OPPOSITION  
TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT**

I, Robert W. Mockler, declare as follows:

1. I am a partner in the firm of Hennigan Dorman LLP, counsel for Plaintiffs in the above-captioned action. Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if called as a witness, could and would competently testify thereto. I submit this declaration in support of the Unopposed Emergency Motion to Extend by One Day the Time to File Appendices in Support of Term Lender Plaintiffs' Opposition to Bank of America, N.A.'s Motion for Summary Judgment.

2. On Thursday, September 8, 2011, my office sent the Appendix of Testimony and Appendix of Evidence in support of Term Lender Plaintiffs' Opposition to BofA's Motion for Summary Judgment to our Florida counsel, Dimond Kaplan & Rothstein, P.A. We sent the Appendices via Federal Express for delivery this morning, so that they could be filed this afternoon, along with the Term Lender Plaintiffs' Opposition and other supporting documents. The deadline for filing the Opposition and supporting documents is today, September 9, 2011.

3. We had to send hard copies to Florida because the Appendices are voluminous and because they will be filed under seal, they must be manually (and not electronically) filed.

4. Federal Express informed the Office Services staff of my office this morning P.S.T. that, as a result of delays caused by a power outage yesterday that affected large portions of the Southwest, the Appendices did not reach Florida this morning as scheduled, and will not reach Florida in time to be filed with this Court today. Federal Express explained that the Appendices were routed through the Phoenix airport, which has experienced flight cancellations as a result of the power outage.

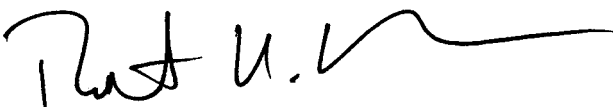
5. My office and Dimond Kaplan & Rothstein, P.A. made a good faith effort to find another way to compile the Appendices to be able to file them by the Court's filing deadline this afternoon, but we were unable to do so due to the time constraints and the size of the Appendices.

6. Plaintiffs' counsel will file Plaintiffs' Opposition and supporting documents other than the Appendices today, and serve the Opposition and all supporting documents, including the Appendices, today, as agreed between the parties. We intend to file the Appendices with the Court on Monday, September 12, 2011.

7. Earlier today, I spoke with Ken Murata of O'Melveny & Myers LLP, counsel for Defendant Bank of America N.A. ("BoFA") in this case, and he indicated that BoFA does not oppose the relief requested in the Emergency Motion.

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

DATED: September 9, 2011

  
\_\_\_\_\_  
ROBERT W. MOCKLER

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **DECLARATION OF ROBERT W. MOCKLER IN SUPPORT OF UNOPPOSED EMERGENCY MOTION TO EXTEND BY ONE DAY THE TIME TO FILE APPENDICES IN SUPPORT OF TERM LENDER PLAINTIFFS' OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT** was filed with the Clerk of the Court. I also certify that the foregoing document is being electronically served this day on all counsel of record or pro se parties identified on the attached Service List by agreement of all counsel.

Dated: September 9, 2011.

\_\_\_\_\_  
/s/  
Lorenz M. Prüss, Esq.



Service List

Attorneys:	Representing:
Bradley J. Butwin Daniel L. Cantor Jonathan Rosenberg William J. Sushon Ken Murata Asher Rivner <b>O'MELVENY &amp; MYERS LLP</b> Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Defendant Bank of America, N.A.
Kevin Michael Eckhardt <b>HUNTON &amp; WILLIAMS</b> 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendant Bank of America, N.A.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

MDL No. 2106

*This document applies to:*

Case No. 09-CV-23835-ASG.

Case No. 10-CV-20236-ASG.

\_\_\_\_\_/

**MDL ORDER NUMBER 54; GRANTING UNOPPOSED  
EMERGENCY MOTION TO EXTEND BY ONE DAY THE TIME TO FILE  
APPENDICES IN SUPPORT OF TERM LENDER PLAINTIFFS' OPPOSITION TO  
BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT [ECF No. 265]**

This matter is before the Court on the Term Lender Plaintiffs' Unopposed Emergency Motion to Extend by One Day the Time to File Appendices in Support of Term Lender Plaintiffs' Opposition to Bank of America, N.A.'s Motion for Summary Judgment **[ECF No. 265]** ("Motion"). Having reviewed the Motion, the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. The Motion **[ECF No. 265]** is hereby GRANTED.
2. The Term Lender Plaintiffs shall file their Opposition to Bank of America N.A.'s Motion for Summary Judgment **no later than Monday, September 12, 2011.**

DONE and ORDERED in Chambers in Miami, Florida, this 9<sup>th</sup> day of September, 2011.



\_\_\_\_\_  
THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman  
All counsel and parties 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.

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**NOTICE OF CHANGED CONTACT INFORMATION FOR  
AVENUE TERM LENDERS' COUNSEL**

Avenue Term Lenders<sup>1</sup> hereby file this Notice of Changed Contact Information for Avenue Term Lenders' Counsel and give notice that effective September 12, 2011, Avenue Term Lenders' counsel have changed their association from Hennigan Dorman LLP to McKool Smith P.C. Counsel's address, telephone number and facsimile number have not changed. The email address of J. Michael Hennigan has changed to hennigan@mckoolsmithhennigan.com, the email address of Kirk Dillman has changed to kdillman@mckoolsmithhennigan.com, the email address of C. Dana Hobart has changed to dhobart@mckoolsmithhennigan.com, the email address of Peter J. Most has changed to pmost@mckoolsmithhennigan.com, the email address of Robert W. Mockler has changed to rmockler@mckoolsmithhennigan.com, the email address of Rebecca T. Pilch has changed to rpilch@mckoolsmithhennigan.com, and the email address of Caroline M. Walters has changed to cwalters@mckoolsmithhennigan.com.

---

<sup>1</sup> 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: September 15, 2011

Respectfully submitted,

/s Lorenz Michel Prüss

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF CHANGED CONTACT INFORMATION FOR 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: September 14, 2011.

/s/ Lorenz M. Prüss  
Lorenz M. Prüss, Esq.

**SERVICE LIST**

<b>Attorneys:</b>	<b>Representing:</b>
<p>Bradley J. Butwin, Esq.                      Daniel L. Cantor, Esq.                      Jonathan Rosenberg, Esq.                      William J. Sushon, Esq.                      Ken Murata, Esq.                      Asher Rivner, Esq.  <b>O'MELVENY &amp; MYERS LLP</b>                      Times Square Tower                      7 Times Square                      New York, NY 10036                      Tele: (212) 326-2000                      Fax: (212) 326-2061</p>	<p>Defendants                      Bank of America, N.A.                      Merrill Lynch Capital Corporation</p>
<p>Kevin Michael Eckhardt, Esq.                      Jamie Zysk Isani, Esq.  <b>HUNTON &amp; WILLIAMS</b>                      1111 Brickell Avenue                      Suite 2500                      Miami, FL 33131                      Tele: (305) 810-2579                      Fax: (305) 810-2460</p>	<p>Defendants                      Bank of America, N.A.                      Merrill Lynch Capital Corporation</p>

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

IN RE: FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

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**TERM LENDER PLAINTIFFS' OPPOSITION TO BANK OF AMERICA'S  
REQUEST FOR JUDICIAL NOTICE**

The Term Lender Plaintiffs hereby object to Bank of America, N.A.'s Request for Judicial Notice of: (1) Exhibit 28 to the Declaration of Daniel L. Cantor in support of Bank of America, N.A.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment and Request for Judicial Notice ("Cantor Decl."), which is a copy of an article by Pierre Paulden titled *Highland Shuts Funds Amid 'Unprecedented' Disruption*, Bloomberg (Oct. 16, 2008) ("Paulden Article"); and (2) Exhibit 101 to the Cantor Decl., which is a copy of the Complaint and Jury Demand for Fraud, Breach of Fiduciary Duty, Negligence and Conspiracy filed in the District Court of Clark County, Nevada on or about March 25, 2011 in *Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al.*, No. A-11-637835-B ("Brigade Complaint").

The Term Lender Plaintiffs object to BofA's Request for Judicial Notice of the Paulden Article on the ground that the Article is not relevant to any issue raised by the Term Lender Plaintiffs' Motion for Partial Summary Judgment or BofA's Opposition thereto. The Term Lender Plaintiffs object to BofA's Request for Judicial Notice of the Brigade Complaint on the grounds that the Complaint is not relevant to any issue in the Motion.

**I. THE PAULDEN ARTICLE IS NOT RELEVANT TO THIS MOTION**

“[A] court may properly decline to take judicial notice of documents that are irrelevant to the resolution of a case.”<sup>1</sup> BofA cites to the Paulden Article in support of its argument that BofA “had good reason to view Highland’s claims skeptically” because “numerous credible publications reported that certain Highland funds had suffered staggering losses and faced a liquidity crunch.”<sup>2</sup> BofA, however, “requests that the Court take judicial [notice] of this article under Fed. R. Evid. 201 not for the truth of the matters set forth therein, but for the fact of its publication.”<sup>3</sup> BofA offers no explanation as to why the fact this article was published is relevant to this Motion. It is not. BofA does not contend that it saw or read the Article at the time it was written and the Article therefore had no bearing on any decision BofA made.

Even if BofA did make such a claim, the article would still be irrelevant to the issue presented: whether BofA breached its obligations under the Disbursement Agreement. Regardless of whether Highland funds “suffered staggering losses,” as BofA claims, BofA was not permitted to ignore notices from Highland of the failure of conditions precedent to disbursement. Thus, judicial notice of the fact that the Paulden Article was published should be denied.

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<sup>1</sup> *Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010).

<sup>2</sup> BofA’s Opposition to Term Lender Plaintiffs’ Motion for Partial Summary Judgment (“BofA Opp.”) at p. 16.

<sup>3</sup> In doing so, BofA cites to a case explaining that articles are inadmissible hearsay if “they are relevant primarily to establish the truth of their contents.” *United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005); *see* Cantor Decl. ¶ 30.



**II. THE BRIGADE COMPLAINT IS NOT RELEVANT TO THIS MOTION AND CAN NOT BE USED FOR THE TRUTH OF THE MATTERS ALLEGED THEREIN**

The fact that the Brigade Complaint was filed is also irrelevant to this Motion. BofA offers no explanation as to why it would be. BofA simply states that “plaintiffs rely on these same facts [regarding ULLICO entering into a Guaranty Agreement with Fontainebleau] to plead a fraud claim against FBR, Soffer, Freeman, and ULLICO.”<sup>4</sup> This is not relevant to whether BofA breached its obligations under the Disbursement Agreement by disbursing the Term Lender Plaintiffs’ funds despite knowing Lehman had filed for bankruptcy and failed to fund its obligations. Thus, BofA’s request for judicial notice of the Brigade Complaint also should be denied.<sup>5</sup> In any event, as BofA appears to recognize,<sup>6</sup> the Court may only take judicial notice of the Brigade Complaint for the fact it was filed.<sup>7</sup>

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<sup>4</sup> BofA Opp. at p. 14.

<sup>5</sup> *Cravens*, 610 F.3d at 1029.

<sup>6</sup> Cantor Decl. ¶ 103.

<sup>7</sup> *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (“[A] court may take notice of another court’s order only for the limited purpose of recognizing the judicial act that the order represents or the subject matter of the litigation.”). See e.g., *Verizon Trademark Services, LLC v. The Producers, Inc.*, 2011 U.S. Dist. LEXIS 11659, \*3 (M.D. Fla. Jan. 27, 2011) (taking judicial notice of a complaint that had been filed in another case “for the limited purpose of recognizing . . . the subject matter of the litigation” (internal quotation marks omitted)).

### III. CONCLUSION

For the foregoing reasons, the Term Lender Plaintiffs respectfully request that the Court deny BofA's Request for Judicial Notice as to both the Paulden Article and the Brigade Complaint.

Dated: September 27, 2011

Respectfully submitted,

/s Lorenz Michel Prüss

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **TERM LENDER PLAINTIFFS' OPPOSITION TO BANK OF AMERICA'S REQUEST FOR JUDICIAL NOTICE** 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: September 27, 2011.

/s Lorenz Michel Prüss  
Lorenz M. Prüss, Esq.

**SERVICE LIST**

<b>Attorneys:</b>	<b>Representing:</b>
Bradley J. Butwin, Esq. Daniel L. Cantor, Esq. Jonathan Rosenberg, Esq. William J. Sushon, Esq. Ken Murata, Esq. Asher Rivner, Esq. <b>O'MELVENY &amp; MYERS LLP</b> Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Defendants Bank of America, N.A.
Kevin Michael Eckhardt, Esq. Jamie Zysk Isani, Esq. <b>HUNTON &amp; WILLIAMS</b> 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.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.

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REPLY IN SUPPORT OF TERM LENDER PLAINTIFFS'  
REQUEST FOR JUDICIAL NOTICE

The Term Lender Plaintiffs requested the Court take judicial notice of Exhibit 1504, a proof of claim submitted by Fontainebleau Las Vegas Retail, LLC, in the Lehman bankruptcy, *In re Lehman Brothers Holdings, Inc., et al.*, United States Bankruptcy Court for the Southern District of New York, Case No. 08-13555. Defendant Bank of America, N.A. (“BofA”) opposes the Request to the extent the Proof of Claim is being introduced “as evidence of the disputed facts contained therein.”<sup>1</sup>

Plaintiffs request judicial notice of the Proof of Claim to evidence that Fontainebleau filed the Proof of Claim and alleged that Lehman’s failure to pay its portion of Advance Requests beginning in September 2008 and on four occasions thereafter were defaults under the Retail Facility, and not for the truth of the matters asserted therein.<sup>2</sup> As BofA acknowledges,

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<sup>1</sup> Bank of America, N.A.’s Opposition to Request for Judicial Notice (“BofA Opp. to RJN”) at p. 2.

<sup>2</sup> See Term Lender Plaintiffs’ Motion for Partial Summary Judgment at p. 9, n.37.

such a request is permissible.<sup>3</sup> Accordingly, Plaintiffs respectfully request the Court take judicial notice of the Proof of Claim for that purpose.

Dated: September 27, 2011

Respectfully submitted,

/Lorenz Michel Prüss

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<sup>3</sup> See BofA Opp. to RJN at p. 1; see also *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (explaining that a “court may take judicial notice of a document filed in another court . . . to establish the fact of such litigation and related filings” (internal quotation marks omitted)).

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **REPLY IN SUPPORT OF TERM LENDER PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE** 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: September 27, 2011.

/s Lorenz Michel Prüss

Lorenz M. Prüss, Esq.

**SERVICE LIST**

<b>Attorneys:</b>	<b>Representing:</b>
<p>Bradley J. Butwin, Esq.                      Daniel L. Cantor, Esq.                      Jonathan Rosenberg, Esq.                      William J. Sushon, Esq.                      Ken Murata, Esq.                      Asher Rivner, Esq.  <b>O'MELVENY &amp; MYERS LLP</b>                      Times Square Tower                      7 Times Square                      New York, NY 10036                      Tele: (212) 326-2000                      Fax: (212) 326-2061</p>	<p>Defendants                      Bank of America, N.A.                      Merrill Lynch Capital Corporation</p>
<p>Kevin Michael Eckhardt, Esq.                      Jamie Zysk Isani, Esq.  <b>HUNTON &amp; WILLIAMS</b>                      1111 Brickell Avenue                      Suite 2500                      Miami, FL 33131                      Tele: (305) 810-2579                      Fax: (305) 810-2460</p>	<p>Defendants                      Bank of America, N.A.                      Merrill Lynch Capital Corporation</p>



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

IN RE: FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

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DECLARATION OF ROBERT W. MOCKLER IN SUPPORT OF REPLY  
RE TERM LENDER PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Robert W. Mockler, declare as follows:

1. I am a principal with the firm McKool Smith, P.C., counsel for Plaintiffs in the above-captioned action. Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if called as a witness, could and would competently testify thereto. I submit this declaration in support of the Reply in Support of Term Lender Plaintiffs' Motion for Partial Summary Judgment.

2. True and correct copies of excerpts of the deposition testimony of the individuals identified therein are attached to the Supplemental Appendix of Testimony and Exhibits in Support of Plaintiffs' Motion for Partial Summary Judgment ("Supplemental Appendix").

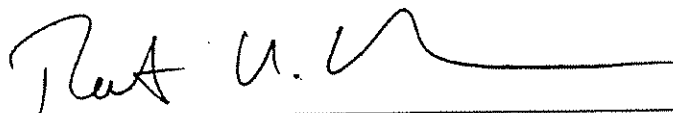
3. A true and correct copy of the identified depositions exhibits (in the range from Exhibit 274 to Exhibit 463) are attached to the Supplemental Appendix.

4. A true and correct copy of the Retail Facility Agreement (BANA\_FB00705886-6238), which was produced by BofA in this action, is attached as Exhibit 1510 to the Supplemental Appendix.

5. A true and correct copy of Defendant Bank of America, N.A.'s Responses and Objections to Plaintiff Term Lenders' Second Set of Rule 26.1.G Interrogatories is attached as Exhibit 1511 to the Supplemental Appendix.

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

DATED: September 27, 2011

A handwritten signature in black ink, appearing to read "Robert W. Mockler", written over a horizontal line.

ROBERT W. MOCKLER

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **DECLARATION OF ROBERT W. MOCKLER IN SUPPORT OF REPLY RE TERM LENDER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** 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: September 27, 2011.



---

Lorenz M. Prüss, Esq.

SERVICE LIST

Attorneys:	Representing:
Bradley J. Butwin, Esq. Daniel L. Cantor, Esq. Jonathan Rosenberg, Esq. William J. Sushon, Esq. Ken Murata, Esq. Asher Rivner, Esq. <b>O'MELVENY &amp; MYERS LLP</b> Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Defendants Bank of America, N.A.
Kevin Michael Eckhardt, Esq. Jamie Zysk Isani, Esq. <b>HUNTON &amp; WILLIAMS</b> 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.A.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

MDL No. 2106

*This document applies to:*

Case No. 09-CV-23835-ASG.

Case No. 10-CV-20236-ASG.

\_\_\_\_\_ /

**MDL ORDER NUMBER 55;**  
**GRANTING UNOPPOSED MOTIONS TO SEAL [ECF Nos. 267; 273; 276; 288; 294]**

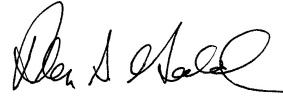
This matter is before the Court on the following unopposed motions to seal: Defendant Bank of America, N.A.'s Unopposed Motion to Seal Documents **[ECF No. 267]**; Term Lender Plaintiffs' Unopposed Motion to File Term Lender Plaintiffs' Opposition to Bank of America, N.A.'s Motion for Summary Judgment and Supporting Documents Under Seal **[ECF No. 273]**; the Term Lender Plaintiffs' Unopposed Motion to File Appendices to Term Lender Plaintiffs' Opposition to Bank of America, N.A.'s Motion for Summary Judgment Under Seal **[ECF No. 276]**; Defendant Bank of America, N.A.'s Unopposed Motion to Seal Documents **[ECF No. 288]**; the Term Lender Plaintiffs' Unopposed Motion to File Reply in Support of Term Lender Plaintiffs' Motion for Partial Summary Judgment and Supporting Documents Under Seal **[ECF No. 294]** (collectively "Motions"). Having reviewed the Motions, the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. The Motions **[ECF Nos. 267; 273; 276; 288; 294]** are hereby GRANTED.
2. The Clerk shall permit the parties to file the following documents identified in the

above-referenced motions **[ECF Nos. 267; 273; 276; 288; 294]** under seal, as well as any exhibits attached thereto.

DONE and ORDERED in Chambers in Miami, Florida, this 3rd day of October, 2011.



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THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman  
All counsel and parties of record

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

IN RE:

FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

---

**DEFENDANT BANK OF AMERICA, N.A.'S REPLY  
TO TERM LENDER PLAINTIFFS' OPPOSITION  
TO ITS REQUEST FOR JUDICIAL NOTICE**

Defendant Bank of America, N.A. ("BANA") respectfully submits this Reply to Term Lender Plaintiffs' Opposition to Bank of America's Request for Judicial Notice ("Pls. Opp."). Both the (1) Complaint and Jury Demand for Fraud, Breach of Fiduciary Duty, Negligence and Conspiracy filed in the District Court of Clark County, Nevada on or about March 25, 2011 in *Brigade Leveraged Capital Structures Fund, Ltd., et al. v. Fontainebleau Resorts, LLC, et al.*, No. A-11-637835-B (the "Brigade Complaint"), and (2) Pierre Paulden article titled *Highland Shuts Funds Amid 'Unprecedented' Disruption*, Bloomberg (Oct. 16, 2008) ("Paulden Article") should be properly admitted into evidence, as the arguments made by the Plaintiffs in their Opposition are inapposite.

**ARGUMENT**

**I. THE BRIGADE COMPLAINT IS RELEVANT AND ADMISSIBLE**

**A. Plaintiffs' Brigade Complaint Allegations Are Relevant to This Action.**

Plaintiffs' claim that the Brigade Complaint "is not relevant to any issue" raised by BANA's Motion for Summary Judgment is frivolous. (Pls. Opp. at 3.) Plaintiffs' allegations in the Brigade Complaint are fundamentally inconsistent with its assertions here on several key issues. That makes the Brigade Complaint's allegations relevant in assessing Plaintiffs' claims based on those same underlying facts in this action. A party's inconsistent pleadings in a different action based on the same facts are clearly relevant and admissible. In *Dugan v. EMS*

*Helicopters, Inc.*, 915 F.2d 1428 (10th Cir. 1990), the Tenth Circuit held that the district court abused its discretion when it refused to admit the plaintiff's complaint in another action, explaining that the other complaint's inconsistent pleadings were relevant for, among other things, impeachment purposes and allocating responsibility for the injury allegedly suffered by plaintiffs. *Id.* at 1434; *see also Burdis v. Texas & Pac. Ry. Co.*, 569 F.2d 320, 323-24 (5th Cir. 1978) (affirming admission of plaintiff's state court complaint).

The *Brigade* action was commenced on March 25, 2011 in Nevada state court by many of the same Plaintiffs that are pursuing this action. That case, in which Plaintiffs assert claims for fraud, negligent misrepresentation, and breach of fiduciary duty against former Fontainebleau executives and affiliates, is clearly based on discovery obtained in this litigation, including hundreds of thousands of pages of documents produced by BANA, Fontainebleau and other non-parties, and depositions of dozens of BANA and non-party witnesses. Yet despite being based on the same source materials, Plaintiffs' fraud allegations in the *Brigade* Complaint are inconsistent with their claim here that BANA breached its agent duties under the Credit and Disbursement Agreements.

For example, the *Brigade* Complaint alleges that Fontainebleau executives and affiliates falsified the Advance Requests sent by Fontainebleau to BANA and the Lenders by concealing massive Project cost overruns and the implications of Lehman's bankruptcy. With respect to construction costs, the *Brigade* Complaint alleges that Fontainebleau and Turnberry West Construction concealed the financial impact of hidden cost overruns and undisclosed change orders:

- "Beginning no later than mid-2007, in connection with the [Advance] Requests, Defendants made material misrepresentations regarding the status of the Project and provided false, misleading and incomplete information about change order logs, cost reports and budgets, which they represented to be true and complete." (*Brigade* Compl. ¶ 126.)
- "Defendants periodically held conference calls with Plaintiffs and other lenders in connection with the Draw Requests. On these calls, and in the written 'Lender Updates' that Defendants distributed to lenders, Defendants ... failed to inform the lenders of ... the fact that, according to Defendants' true cost information, the Project had experienced hundreds of millions of dollars in undisclosed change orders and cost overruns. On these calls, Defendants consistently stated, incorrectly, that the Project was 'on time and on budget.'" (*Id.*)
- "[W]hile Defendants at this point revealed some of the additional costs, they expressly decided not to expose what TWC's Chief Executive Officer, Bob



Ambridge, characterized to [Fontainebleau's Deven] Kumar as the 'big lie,' namely that the Project was massively over budget. Instead, Defendants informed the Lenders of only \$60 million in change orders and additional costs and continued to conceal the remaining undisclosed change orders and additional costs and to submit Draw Requests that they new [sic] to be materially false." (*Id.* ¶ 143.)

- Plaintiffs claim that "[i]f Defendants had incorporated accurate and complete information regarding the budgets and costs to complete the Project into the materials submitted in connection with the Draw Requests ... the In Balance Test would have failed and Borrowers would not have been able to access additional funding under the Credit and Disbursement Agreements." (*Id.* ¶ 127.)

The Brigade Complaint further alleges that Fontainebleau's officers—including CFO Jim Freeman—failed to exercise due care in monitoring and reporting Project costs. The complaint alleges, among other things, that Fontainebleau officers:

- "Failed to ensure that the statements made to [Lenders] in connection with the Draw Requests were accurate and complete"
- "Failed to accurately monitor and report on project budgets and costs"
- "Failed to ensure the timely reporting of changes to the Project and change orders"
- "Failed to exercise reasonable diligence, oversight, monitoring and review of TWC's project administration and management"
- "Failed to monitor subcontractors" (*Id.* ¶ 174.)

With respect to Lehman, the Brigade Complaint alleges that the Brigade defendants concealed adverse information regarding the Lehman bankruptcy's implications:

- "[T]he FBR Defendants, aided by ULLICO, actively concealed the full extent of Lehman's impact on the Project from the Lenders in an effort to increase the likelihood that Loans would continue to be funded and disbursed." (*Id.* ¶ 136.)
- "ULLICO fronted Lehman's draw obligations under the Retail Facility in December 2008, and January, February and March 2009. Defendants did not disclose the 'fronting' arrangement to the Plaintiffs and actively concealed the existence of the Guaranty Agreement from them." (*Id.* ¶ 141.)

The Brigade Complaint also alleges that the Brigade defendants falsified the information disclosed to Lenders to conceal the fact that Fontainebleau could not satisfy the Advance Request conditions precedent. (*Id.* ¶ 153.)

The Brigade Complaint highlights the inadequacy of Plaintiffs' factual response to BANA's Motion for Summary Judgment. As demonstrated in BANA's motion papers, there is no evidence that BANA knew about Fontainebleau's Lehman-related financial machinations. The Brigade Complaint's allegations that Fontainebleau's officers and affiliates were engaged in

fraud demonstrate how implausible are Plaintiffs' allegations that Fontainebleau *told* BANA that Fontainebleau Resorts had funded for Lehman in September 2008, and that Fontainebleau *told* BANA that FBR and its affiliates were guarantying ULLICO's payment of Lehman's Retail Shared Costs portion from December 2008 through March 2009.<sup>1</sup> It is inconceivable that at the same time that it was attempting to defraud Lenders, Fontainebleau would have disclosed the fraud to the Lenders' agent.<sup>2</sup> Thus, the Brigade Complaint is relevant—and admissible—because it contradicts Plaintiffs' claims in this action.

Likewise, the Brigade Complaint's allegation that Fontainebleau officers failed to adequately monitor the Project's costs also belies Plaintiffs' claim that BANA should have known that the Project was facing cost overruns. If Fontainebleau's officers—*i.e.*, BANA and the construction consultants' source of Project cost information—did not know the true state of the Project's finances, they could not have been telling BANA that the Project was facing cost overruns.

The Brigade Complaint's assertion that Fontainebleau provided Lenders with a stream of misinformation through the Advance Requests and other disclosures makes clear that BANA was the victim of the same misrepresentations and omissions underlying Plaintiffs' own Nevada fraud claims. The Brigade Complaint's claims conflict with Plaintiffs' claims against BANA because any damages they seek from BANA were caused by Fontainebleau's fraud, and not BANA's contractually permitted reliance on Fontainebleau's Advance Requests and statements certifying Fontainebleau's satisfaction of all Disbursement Agreement conditions precedent, and the absence of defaults. Thus, these allegations are relevant in this action because they tend to (and, in fact, do) demonstrate that Plaintiffs' claims against BANA are baseless.

**B. The Brigade Complaint Should Be Admitted as an Admission Against Interest.**

Plaintiffs also incorrectly claim that “the Court may only take judicial notice of the Brigade Complaint for the fact it was filed.” (Pls. Opp. at 3.) Plaintiffs' argument fails because the Brigade Complaint and its contents are an admission by Plaintiffs. It is proper to admit a state court complaint filed in one action as evidence against the same party in a pending federal

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<sup>1</sup> See Term Lender Pls. Opp. to BANA's Mot. for Summ. J. at 16-18.

<sup>2</sup> See *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742-43 (11th Cir. 1996) (“A court need not permit a case to go to a jury ... when the inferences that are drawn from the evidence, and upon which the non-movant relies, are implausible.”).

litigation. *See Dugan*, 915 F.2d at 1434 (“The ancillary complaint is factually inconsistent with the position plaintiffs pursued in this case and therefore constitutes an admission against interest pursuant to Fed. R. Evid. 801(d)(2).”); *see also Thyssen Elevator Co. v. Drayton-Bryan Co.*, 106 F. Supp. 2d 1355, 1360-61 (S.D. Ga. 2000) (relying on *Dugan* in allowing prior state court pleadings by the same party to be introduced into evidence as admissions).

Plaintiffs’ authorities are inapposite because they do not involve admissions. In *United States v. Jones*, 29 F.3d 1549 (11th Cir. 1994), the court rejected the government’s effort to introduce a court order from a prior proceeding involving the defendant—not a court filing filed by the defendant. *Id.* at 1552-54. *Verizon Trademark Servs., LLC v. Producers, Inc.*, 2011 U.S. Dist. LEXIS 11659 (M.D. Fla. Jan. 27, 2011), is even further afield, because the plaintiffs there attempted to introduce as evidence against defendants a complaint filed in another case by a completely different party. *Id.* at \*\*2-3. Because the Brigade Complaint contains allegations by the same Plaintiffs as this case, it is a party admission and should be admitted into evidence.

Plaintiffs incorrectly assert that BANA’s Response to Plaintiffs’ Request for Judicial Notice somehow establishes that the Court cannot take judicial notice of the Brigade Complaint’s allegations. BANA opposed Plaintiffs’ request that this Court take judicial notice of assertions in a September 2009 filing by non-party Fontainebleau Las Vegas Retail, LLC in the Lehman bankruptcy on the grounds that its contents were hearsay.<sup>3</sup> This is comparing apples and oranges: the bankruptcy court filing is inadmissible because, unlike the Brigade Complaint, it does not contain party admissions, an exception to the hearsay rule. *See* Fed. R. Evid. 801(d)(2).

## **II. THE FACT OF THE PAULDEN ARTICLE’S PUBLICATION IS RELEVANT**

As stated by BANA and repeated by the Plaintiffs in their Opposition, BANA seeks to introduce the Paulden Article solely for the fact of its publication and not for the truth of its contents. Plaintiffs’ argument against judicial notice consists solely of their claim that the Paulden Article’s publication is not relevant to BANA’s summary judgment arguments. (Pls. Opp. at 2.) But as BANA’s Opposition Brief explained, the fact that credible publications were reporting that Highland funds had suffered staggering losses and faced a liquidity crunch is relevant to evaluating BANA’s response to Highland’s claims.<sup>4</sup>

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<sup>3</sup> *See* Def. BANA’s Opp. to Pls. Req. for Jud. Notice at 1-2.

<sup>4</sup> *See* Def. BANA’s Opp. to Term Lender Pls. Mot. for Partial Summ. J. at 16.

**CONCLUSION**

For the foregoing reasons, BANA's request for judicial notice of the Brigade Complaint and the Paulden Article should be granted.

Dated: October 7, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by electronic means pursuant to an agreement between the parties upon the below-listed counsel of record.

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Jamie Zysk Isani

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 56;**  
**GRANTING UNOPPOSED MOTIONS TO SEAL [ECF Nos. 302, 305, 307]**

This matter is before the Court on the following unopposed motions to seal: Term Lender Plaintiffs' Unopposed Motion to File Under Seal Term Lender Plaintiffs' Response to Bank of America's Evidentiary Objections [**ECF No. 302**]; Defendant Bank of America, N.A.'s Unopposed Motion to Seal Documents [**ECF No. 305**]; and Defendant Bank of America, N.A.'s Unopposed Motion to Seal Documents [**ECF No. 307**] (collectively "Motions"). Having reviewed the Motions, the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. The Motions [**ECF Nos. 302, 305, 307**] are hereby GRANTED.
2. The Clerk shall permit the parties to file the following documents identified in the above-referenced motions [**ECF Nos. 302, 305, 307**] under seal, as well as any exhibits attached thereto.

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

DONE and ORDERED in Chambers in Miami, Florida, this 19th day of October,  
2011.



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THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman  
All counsel and parties 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.*

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**MDL ORDER NUMBER 57; GRANTING UNOPPOSED MOTION TO FILE NOTICE OF  
SUBMISSION UNDER SEAL [ECF No. 311]**


This matter is before the Court on the Term Lender Plaintiffs' Unopposed Motion to File Plaintiffs' Notice of Submission of Recently Produced Documents Under Seal **[ECF No. 311]**. Having reviewed the Motions, the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. The Motion **[ECF No. 311]** is GRANTED.
2. The materials submitted in conjunction with the Notice of Submission **[ECF No. 312]** will be considered on summary judgment with no additional briefing from the parties.
3. During oral argument scheduled for Friday, November 18, 2011, Bank of America shall be prepared to discuss its delayed production of documents, as well as the status of its document production in this case.

DONE and ORDERED in Chambers in Miami, Florida, this 16th day of November, 2011.



  
\_\_\_\_\_  
THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman  
All counsel and parties of record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case 09-MD-02106

IN RE:

**FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC,**  
*et al.,*

Debtors.

**FONTAINEBLEAU LAS VEGAS**  
**HOLDINGS, LLC, et al.,**

Plaintiffs,

vs.

**BANK OF AMERICA, N.A., et al.,**

Defendants.

COURTROOM 11-1

MIAMI, FLORIDA

NOVEMBER 18, 2011

(Pages 1 - 113)

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TRANSCRIPT OF ORAL ARGUMENT  
BEFORE THE HONORABLE ALAN S. GOLD  
SENIOR UNITED STATES DISTRICT JUDGE

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09:00:24 1           **MR. HASBUN:** All rise. The Honorable Alan S. Gold  
09:00:26 2 presiding. This Court is in session.

09:00:28 3           **THE COURT:** Good morning.

09:00:33 4           **MR. HENNIGAN:** Good morning, Your Honor.

09:00:34 5           **MR. CANTOR:** Good morning, Your Honor.

09:00:56 6           **THE COURT:** Please be seated. I need just one moment,  
09:00:58 7 please. So, let me begin by welcoming everyone. I wish you and  
09:01:14 8 your family a very happy holiday to come.

09:01:17 9           **MR. HENNIGAN:** Thank you.

09:01:17 10           **MR. CANTOR:** Thank you, Your Honor.

09:01:18 11           **THE COURT:** And at this time I will call  
09:01:20 12 Case 09-MD-02106, and let me start with appearances, please, on  
09:01:32 13 that side.

09:01:33 14           **MR. HENNIGAN:** Good morning, Your Honor. Michael  
09:01:34 15 Hennigan on behalf of the plaintiffs.

09:01:35 16           **THE COURT:** I'm only going to ask everybody, if you  
09:01:37 17 don't mind, since I can only hear and Mr. Millikan can only  
09:01:43 18 hear, to speak directly in a microphone.

09:01:46 19           **MR. HENNIGAN:** I forgot. Good morning.

09:01:48 20           **MR. DILLMAN:** Good morning, Your Honor. Kirk Dillman  
09:01:50 21 on behalf of the plaintiffs.

09:01:53 22           **THE COURT:** All right. Thank you. Would you like to  
09:01:55 23 introduce who else is present today?

09:01:58 24           **MR. CANTOR:** Good morning, Your Honor. Dan Cantor from  
09:02:00 25 O'Melveny & Myers on behalf of Bank of America.

09:02:04 1           **MR. MURATA:** Ken Murata also from O'Melveny & Myers for  
09:02:09 2 Bank of America.

09:02:10 3           **THE COURT:** Thank you.

09:02:11 4           **MS. ISANI:** Jamie Isani of Hunton & Williams on behalf  
09:02:16 5 of Bank of America.

09:02:17 6           **THE COURT:** All right. What I would like to do -- and  
09:02:20 7 I know you've prepared PowerPoints® and I'll listen to them -- by  
09:02:25 8 the way, I do have others who are listening by telephone. Let  
09:02:33 9 me get the calls transferred in now, although they're muted,  
09:02:46 10 right?

09:02:46 11           **MR. HASBUN:** They should be, but let me go inside,  
09:02:46 12 Judge.

09:02:46 13           **THE COURT:** Okay. Let me welcome everybody else who  
09:02:48 14 has now transferred in on the telephone. I've had appearances  
09:02:57 15 from counsel, and I understand that your participation is muted.  
09:03:05 16           It would help me, before I hear your specific arguments  
09:03:11 17 and get into the PowerPoint®, to walk through some of the matters  
09:03:18 18 that I'm trying to figure out and, if you don't mind, have more  
09:03:24 19 of a conversation about these matters where I can engage both  
09:03:27 20 sides, rather than start with the formal presentations, counter,  
09:03:35 21 then, you know, the rest of it.

09:03:39 22           Often this gives me more clarity on positions and helps  
09:03:45 23 frame the issues. So I'm going to invite you for the moment to  
09:03:49 24 stay seated and you'll have your papers in front of you -- that  
09:03:54 25 will be helpful -- and you may consult with each other as you

09:03:57 1 need in addressing some of these questions.

09:04:00 2 Fair enough?

09:04:01 3 **MR. CANTOR:** Yes, Your Honor.

09:04:03 4 **THE COURT:** All right. So let's go through the matter  
09:04:11 5 in the following way: What I would like to try to start with is  
09:04:17 6 to focus on the key agreement which is before me in this aspect  
09:04:27 7 of the litigation and that's the Master Disbursement Agreement,  
09:04:32 8 correct?

09:04:32 9 **MR. CANTOR:** Correct, Your Honor.

09:04:33 10 **THE COURT:** Okay. And let me preface this: My  
09:04:41 11 questions are not trying to lead one side or another down a  
09:04:46 12 rabbit hole and into admissions or a trap, so please understand  
09:04:53 13 I don't have an agenda for that purpose in starting to ask these  
09:04:57 14 questions. It's really to help me clarify everybody's position.

09:05:01 15 But is it a correct statement of position with regard  
09:05:06 16 to, starting with the plaintiffs' summary judgment motions, that  
09:05:12 17 the motions are directed against Bank of America solely in its  
09:05:19 18 capacity as Disbursement Agent under the Master Disbursement  
09:05:25 19 Agreement?

09:05:26 20 Would you agree to that or not?

09:05:29 21 **MR. HENNIGAN:** And as Administrative Agent, Your Honor.

09:05:32 22 **THE COURT:** And as what?

09:05:33 23 **MR. HENNIGAN:** Administrative agent under the Credit  
09:05:37 24 Agreement.

09:05:43 25 **THE COURT:** Okay. But that's a different phase of the

09:05:45 1 case, isn't it?

09:05:47 2 In terms of what we're here for today, aren't we  
09:05:52 3 focusing on what Bank of America did or did not do as the  
09:06:06 4 administrating agent under the Master Disbursement Agreement?

09:06:09 5 **MR. HENNIGAN:** Your Honor, absolutely what we're  
09:06:11 6 focusing on is the conduct of BofA as Disbursement Agent.

09:06:17 7 Their role as Administrative Agent becomes relevant in  
09:06:20 8 terms of their knowledge of the Credit Agreement and aspects of  
09:06:23 9 the Credit Agreement, but their conduct, actions and inactions  
09:06:28 10 absolutely as Disbursement Agent.

09:06:33 11 **THE COURT:** Any comments?

09:06:34 12 **MR. CANTOR:** My only comment would be that I just  
09:06:37 13 thought it was more simple and straightforward than that; that  
09:06:40 14 this is about whether Bank of America complied with its duties  
09:06:43 15 as Disbursement Agent full stop.

09:06:49 16 **THE COURT:** I really do want to hear your position on  
09:06:53 17 this, so help me understand a little bit more about how their  
09:07:00 18 role as Administrative Agent under the Credit Agreement  
09:07:07 19 interplays here.

09:07:12 20 **MR. HENNIGAN:** Only to the extent, Your Honor, that  
09:07:14 21 there are interlocking agreements, that one agreement refers to  
09:07:17 22 the other agreement; but I agree with counsel that the conduct  
09:07:20 23 at question in these motions is conduct as Disbursement Agent.

09:07:24 24 **THE COURT:** Okay. That's what I'm trying to focus on  
09:07:27 25 and see if my understanding of the matters before me were just

09:07:34 1 that and, yet, I do want further to ask questions about the  
09:07:41 2 interrelationships of agreements because there are times when  
09:07:46 3 Bank of America refers to the Credit Agreement, such as on  
09:07:52 4 notice requirements, and there are no comparable requirements  
09:07:57 5 that I saw written in the same way in the Disbursement  
09:07:59 6 Agreement.

09:08:02 7 So let me ask both sides about some of these matters.  
09:08:11 8 Do you have the Disbursement Agreement in front of you?

09:08:13 9 **MR. CANTOR:** I do, Your Honor.

09:08:15 10 **MR. HENNIGAN:** About to.

09:08:16 11 **THE COURT:** Yes. If you don't mind, can you turn to  
09:08:19 12 Page 80? Take a moment.

09:09:00 13 **MR. DILLMAN:** Sorry for the delay, Your Honor.

09:09:01 14 **THE COURT:** No. That's all right. Take a moment. Let  
09:09:03 15 me know when you get there.

09:09:16 16 **MR. HENNIGAN:** We're there.

09:09:18 17 **THE COURT:** All right. Before I focus on 9.1 for a  
09:09:22 18 moment, let me rephrase that. What is each side's position on  
09:09:32 19 how I am supposed to read the Disbursement Agreement in  
09:09:37 20 relationship to the Credit Agreement?

09:09:40 21 In other words, where there are notice provisions in  
09:09:43 22 the Credit Agreement that are referred to in Bank of America's  
09:09:47 23 briefs, from the plaintiffs' standpoint, do those notice  
09:09:55 24 provisions apply and sort of fill in a gap with regard to how  
09:10:00 25 notice is given in the Disbursement Agreement?



09:10:05 1 Do both sides agree that these agreements are one and  
09:10:09 2 the same and intertwined?

09:10:14 3 **MR. CANTOR:** Your Honor, I don't know that I would say  
09:10:15 4 that they are one and the same. I certainly would agree that  
09:10:18 5 they are intertwined.

09:10:20 6 They were all executed at the same time. At various  
09:10:23 7 points in each of the agreements they are referred to as the  
09:10:29 8 loan agreements or other terms that make it clear that this was  
09:10:34 9 a complete set of documents that was meant to be referred to in  
09:10:38 10 an integrated fashion.

09:10:40 11 That said, Your Honor, you know, I will --

09:10:42 12 **THE COURT:** Well, let me not mislead anybody. I want  
09:10:46 13 to refer to the Disbursement Agreement, § 11.5, which talks  
09:10:52 14 about the entire agreement. It says:

09:10:55 15 "This agreement, and any agreement, document or  
09:10:58 16 instrument attached hereto, or referred to herein,  
09:11:02 17 integrate all the terms and conditions mentioned herein, or  
09:11:07 18 incidental hereto, and supersede all oral negotiations,  
09:11:11 19 prior writings," et cetera.

09:11:16 20 So what am I to make of that?

09:11:21 21 **MR. HENNIGAN:** Your Honor, I believe the agreements in  
09:11:24 22 that regard need to be read, from the disbursement agreement's  
09:11:28 23 perspective, as integrated documents, remembering that the  
09:11:31 24 lenders that we represent are not signatories to the  
09:11:34 25 Disbursement Agreement. They're signatories to the Credit

09:11:38 1 Agreement only.

09:11:41 2 **THE COURT:** Okay. But there's no argument -- well, let  
09:11:53 3 me turn to Bank of America.

09:11:56 4 Under the Disbursement Agreement, Bank of America, as  
09:12:02 5 the Disbursement Agent, has responsibilities to the Term  
09:12:05 6 Lenders --

09:12:08 7 **MR. CANTOR:** Yes, Your Honor.

09:12:09 8 **THE COURT:** -- independent, even if they're not  
09:12:11 9 signatories to it.

09:12:12 10 **MR. CANTOR:** Well, they are appointed as Disbursement  
09:12:14 11 Agent for the process of disbursing funds and in that sense they  
09:12:21 12 have obligation -- let me put a finer point on it.

09:12:26 13 We have never contended, Your Honor, that because the  
09:12:28 14 Term Lenders are not signatories to the Disbursement Agent that  
09:12:31 15 they don't have the right to sue Bank of America for breaching  
09:12:36 16 its duties as Disbursement Agent. We've never raised that  
09:12:40 17 argument.

09:12:40 18 **THE COURT:** All right. So let's go back to 9.1 for a  
09:12:47 19 minute and just the beginning of that section:

09:12:52 20 "Each of the funding agents hereby irrevocably appoints  
09:12:57 21 an authorized Disbursement Agent to act on its behalf  
09:13:01 22 hereunder and under the control agreements."

09:13:06 23 I've never seen anything called "control agreements" in  
09:13:09 24 the record. Did anybody put any control agreements in their  
09:13:18 25 summary judgment motions that we've missed here?

09:13:22 1           **MR. CANTOR:** The control agreements -- that's  
09:13:26 2 interesting. I'm looking at the definitions, and it doesn't  
09:13:30 3 seem to be defined.

09:13:32 4           I think everyone had always understood that the control  
09:13:37 5 agreements included, among other things, the Credit Agreement,  
09:13:41 6 and this would be one place where there's an interplay.

09:13:45 7           **THE COURT:** My question is very narrow.

09:13:47 8           **MR. CANTOR:** Okay.

09:13:48 9           **THE COURT:** Is there a document called "control  
09:13:50 10 agreement"?

09:13:50 11           **MR. CANTOR:** I do not believe so, Your Honor. I  
09:13:52 12 believe "control agreement" is a defined term referring to other  
09:13:54 13 agreements.

09:13:59 14           **THE COURT:** What about from the plaintiffs' standpoint?  
09:14:04 15 Is there something independent that was signed called "control  
09:14:09 16 agreement?" I'll give you something specific in reference to  
09:14:15 17 that in a moment.

09:14:16 18           What's your understanding of that? Doesn't that have  
09:14:23 19 some significance to that clause which is an issue in this case?

09:14:35 20           **MR. HENNIGAN:** Your Honor, we've never focused on that  
09:14:38 21 issue.

09:14:38 22           **THE COURT:** Well, if you turn to your appendix of  
09:14:43 23 definitions on Page 9, it says:

09:14:47 24           "'Control agreements' means the control agreements of  
09:14:51 25 even date herewith, executed by the project entities, in

09:14:56 1 respect of the accounts in favor of the Disbursement  
09:14:59 2 Agent," et cetera, et cetera.

09:15:02 3 So I beg to differ. There is, according to the  
09:15:08 4 definitions, a document which was executed at the time of the  
09:15:13 5 Disbursement Agreement called the control agreement which is  
09:15:18 6 referenced in 9.1 and seems to have perhaps some significance  
09:15:25 7 and, yet, I can't find it in the materials referenced by either  
09:15:32 8 party.

09:15:32 9 **MR. CANTOR:** Your Honor, I think this is going to be a  
09:15:36 10 slightly imperfect answer but in the definition there, it refers  
09:15:40 11 to § 2.2.

09:15:44 12 If you turn to § 2.2, which is Pages 3, 4, and 5 of the  
09:15:50 13 agreement, I think what you will see is that the control  
09:15:53 14 agreements seem to refer to agreements that essentially allow  
09:15:56 15 the Disbursement Agent to move funds from bank accounts which  
09:16:04 16 are in the name of the project entities.

09:16:09 17 **THE COURT:** Okay. But let me give you a specific  
09:16:14 18 example of one of the problems that I'm having trying to  
09:16:20 19 understand the document that is at issue here.

09:16:24 20 If you turn to Page 10 under § 2.5.1, the stop funding  
09:16:34 21 notices, and look at subpart 2, it refers to the controlling  
09:16:47 22 person notifying the Disbursement Agent that a default or Event  
09:16:51 23 of Default has occurred.

09:16:53 24 Isn't "controlling person" and all of its  
09:16:59 25 responsibilities defined in the control agreement?

09:17:01 1           **MR. CANTOR:** No, Your Honor. It is defined in this  
09:17:03 2 agreement as until the exhaustion of the second mortgage  
09:17:09 3 proceeds -- I am looking at Page 10 of the appendix -- as until  
09:17:13 4 the exhaustion of the second mortgage proceeds account, the  
09:17:18 5 trustee and thereafter the Bank Agent.

09:17:25 6           **THE COURT:** So when we're discussing who is being sued  
09:17:30 7 here, Bank of America, I get back to which hat is Bank of  
09:17:35 8 America wearing where it is being sued? Is it only its hat as  
09:17:43 9 the Disbursement Agent?

09:17:46 10           **MR. CANTOR:** That's my understanding, Your Honor, and  
09:17:48 11 that's how we've approached the case.

09:17:50 12           **MR. HENNIGAN:** I think that's the way we look at it as  
09:17:53 13 well, although the Bank Agent is the Bank of America under  
09:17:59 14 2.2 -- 2.5.1, subpart 2.

09:18:05 15           **THE COURT:** Okay. So one of the things we will get  
09:18:12 16 into a discussion about is some of the later language under  
09:18:18 17 Article 9 where Bank of America is wearing one hat other than  
09:18:27 18 Disbursement Agent and gains certain information, and then under  
09:18:36 19 certain language it's not obligated to recognize that  
09:18:41 20 information under the other half as Disbursement Agent.

09:18:46 21           I'm trying to sort all that out as to in which capacity  
09:18:57 22 is Bank of America acting at any particular point in time  
09:19:01 23 factually, but I don't want to get there quite yet.

09:19:04 24           So let's continue our discussion of the structure of  
09:19:09 25 the agreement itself. Now, is it the parties' position that in

09:19:28 1 interpreting this language in 9.1, I don't need to worry about  
09:19:38 2 or look at anything called control agreements?

09:19:42 3 **MR. CANTOR:** Yes, Your Honor, that would be our  
09:19:43 4 position.

09:19:43 5 **MR. HENNIGAN:** That's our position as well.

09:19:45 6 **THE COURT:** Okay. So I should ignore all that --

09:19:47 7 **MR. CANTOR:** Yes, sir.

09:19:48 8 **THE COURT:** -- right? That's your mutual position.

09:19:54 9 Does either party contend that the Disbursement  
09:20:00 10 Agreement contains an ambiguity --

09:20:04 11 **MR. CANTOR:** Defendants --

09:20:04 12 **THE COURT:** -- under New York law?

09:20:06 13 **MR. CANTOR:** Defendants do not, Your Honor.

09:20:16 14 **MR. HENNIGAN:** There is a potential ambiguity, Your  
09:20:19 15 Honor.

09:20:19 16 **THE COURT:** Well, how did you argue it in your briefs?

09:20:21 17 **MR. HENNIGAN:** We have argued no ambiguity.

09:20:24 18 **THE COURT:** Okay. Thank you. That's what I'm trying  
09:20:29 19 to find out, everybody's position.

09:20:32 20 So let me give you a question about that. The second  
09:20:48 21 sentence -- let's see -- of 9.1 talks about the Disbursement  
09:20:55 22 Agent accepts such appointments and agrees to exercise  
09:21:01 23 commercially reasonable efforts and utilize commercially prudent  
09:21:05 24 practices in the performance of its duties hereunder, consistent  
09:21:10 25 with those of similar institutions holding collateral,

09:21:15 1 et cetera, and disbursing control funds.

09:21:22 2 Doesn't that refer necessarily to extrinsic evidence?

09:21:30 3 How do I know what that standard is? It is not defined in the

09:21:36 4 agreement as a specific definition.

09:21:40 5 **MR. CANTOR:** Well, I think, Your Honor, that when it  
09:21:44 6 comes time to apply that definition to specific conduct, it's a  
09:21:53 7 determination that one, you know, will make.

09:21:59 8 Obviously, it has to be based on the evidence before  
09:22:01 9 you, and the trier of fact is entitled to apply its judgment as  
09:22:05 10 to whether something is or is not commercially reasonable,  
09:22:10 11 recognizing, Your Honor, our position that § 9.1 is just sort of  
09:22:16 12 a general introductory provision.

09:22:19 13 **THE COURT:** We will talk about that.

09:22:20 14 **MR. CANTOR:** Correct.

09:22:20 15 **THE COURT:** I am only talking about 9.1.

09:22:22 16 **MR. CANTOR:** Okay.

09:22:23 17 **THE COURT:** It references something outside of the four  
09:22:29 18 corners of the agreement as a standard, does it not?

09:22:34 19 **MR. CANTOR:** It does in the sense that it is not a  
09:22:36 20 check-the-box provision. You need to say was something  
09:22:40 21 commercially reasonable or was it not commercially reasonable.

09:22:43 22 **THE COURT:** Okay. So as to that section, is there an  
09:22:46 23 ambiguity under New York law that invites extrinsic evidence as  
09:22:52 24 to what that is, to the extent it's material?

09:22:58 25 **MR. CANTOR:** To the extent it's material and leaving

09:23:03 1 that question aside, I think I am struggling with how to answer  
09:23:07 2 it because it is an odd provision in the sense that it is  
09:23:10 3 essentially imposing a tort standard into a contract.

09:23:16 4 I don't know that it requires extrinsic evidence in the  
09:23:20 5 sense that it's a contract interpretation point and thus it is  
09:23:25 6 an ambiguous contract provision.

09:23:29 7 The determination as to whether someone is or is not  
09:23:32 8 acting commercially reasonable is necessarily going to be a  
09:23:37 9 judgment that's committed to the trier of fact.

09:23:45 10 **THE COURT:** Well, I have this expert submission which  
09:23:59 11 Bank of America says, well, you know, that shouldn't be  
09:24:02 12 considered, but it raised the question of extrinsic evidence in  
09:24:11 13 terms of this motion for summary judgment.

09:24:20 14 New York law, as best as my independent research  
09:24:24 15 discloses, is different than Florida law in terms of when  
09:24:29 16 extrinsic evidence is permitted and how it determines ambiguity.

09:24:37 17 There's no latent versus patent distinction under New  
09:24:41 18 York law as I understand it.

09:24:42 19 **MR. CANTOR:** Right.

09:24:47 20 **THE COURT:** There seems to be some language in the case  
09:24:51 21 law that in the face of ambiguity, recourse to extrinsic  
09:24:56 22 evidence is permissible insofar as that evidence tends to  
09:25:00 23 clarify the meaning of the language employed by the parties.

09:25:03 24 So here the parties employed language which by its very  
09:25:12 25 nature refers to a standard that is not defined in the agreement



09:25:17 1 | itself and adds somewhat to the confusion here as to what that  
09:25:23 2 | actually is and means.

09:25:26 3 |           **MR. CANTOR:** Yeah, I see your point, Your Honor.

09:25:28 4 |           I guess my point from a contract interpretation  
09:25:31 5 | perspective would be that -- and you are right, New York law  
09:25:36 6 | does not allow the Court to consider extrinsic evidence for the  
09:25:39 7 | purpose of proving that there is an ambiguity in the first  
09:25:42 8 | place.

09:25:45 9 |           There is no ambiguity as to what the contract says and  
09:25:51 10 | what the contract sets up as its standard under 9.1, to the  
09:25:57 11 | extent that 9.1 applies in any given situation.

09:26:03 12 |           When the time comes for someone to determine whether a  
09:26:07 13 | party has complied with that standard, I think, like any other  
09:26:13 14 | contract determination, that's going to be based on the evidence  
09:26:16 15 | and that will be within the province of the finder of fact.

09:26:21 16 |           But I don't think, if I am understanding your question  
09:26:24 17 | correctly, Your Honor, I don't believe that that makes the  
09:26:26 18 | agreement ambiguous or requires a reference to extrinsic  
09:26:34 19 | evidence in the way that one normally talks about it in the  
09:26:38 20 | contract interpretation context if I'm understanding you.

09:26:42 21 |           **THE COURT:** Any comments from plaintiffs' side?

09:26:45 22 |           **MR. HENNIGAN:** If I followed Mr. Cantor along, I think  
09:26:50 23 | I agree with him.

09:26:51 24 |           **THE COURT:** So let's talk -- I know there is a lot of  
09:26:55 25 | discussion about this in the briefing, but I'd like to talk

09:27:01 1 about 9.1 and then the other parameters under 9.2 and 9.3. But  
09:27:11 2 before getting into that discussion, I'd like to go back into  
09:27:16 3 structure again.

09:27:19 4 So the way the agreement works as I understand it --  
09:27:29 5 and please help me with your own thoughts on this -- is the  
09:27:39 6 borrowers make an advance request, along with retail affiliates,  
09:27:52 7 in the form specified in Exhibit C-1, and this is in accordance  
09:27:55 8 with § 2.4 of the agreement and that's what kicks off the  
09:28:02 9 process, correct?

09:28:03 10 **MR. HENNIGAN:** Yes.

09:28:04 11 **MR. CANTOR:** Yes, Your Honor.

09:28:06 12 **THE COURT:** Let me see if I can impose upon my staff to  
09:28:16 13 bring in some water. Oh, thank you very much.

09:28:23 14 C-1 is pretty much a complete document in and of itself  
09:28:33 15 drafted by the parties --

09:28:35 16 **MR. CANTOR:** Yes, Your Honor.

09:28:36 17 **THE COURT:** -- correct?

09:28:42 18 **MR. HENNIGAN:** Drafted by the parties to the  
09:28:44 19 Disbursement Agreement.

09:28:45 20 **THE COURT:** Right.

09:28:46 21 **MR. HENNIGAN:** BofA and the borrowers.

09:28:48 22 **THE COURT:** Yes. I mean, it is a drafted agreement,  
09:28:54 23 excuse me, a drafted document incorporated into the Disbursement  
09:28:57 24 Agreement.

09:28:58 25 **MR. HENNIGAN:** Correct.

09:29:03 1           **THE COURT:** It contains all of these affirmative  
09:29:07 2 statements and representations and the like so that the request  
09:29:18 3 is made in accordance with this C-1 document and in the C-1  
09:29:26 4 document on all these representations --

09:29:29 5           **MR. CANTOR:** Yes, Your Honor.

09:29:31 6           **THE COURT:** -- there are blanks to be filled in, date,  
09:29:35 7 amount, signatures, things like that.

09:29:37 8           **MR. CANTOR:** Right.

09:29:38 9           **THE COURT:** Okay. So after the request, C-1, is  
09:29:54 10 submitted, under 2.4.4, the Disbursement Agent and the  
09:30:00 11 construction consultant have to review and determine whether all  
09:30:08 12 the documentation was provided.

09:30:13 13           Then here are these words again, "and use commercially  
09:30:17 14 reasonable efforts to notify project entities of any  
09:30:21 15 deficiency."

09:30:23 16           So that's the next step in this process, correct?

09:30:30 17           **MR. CANTOR:** Yes, Your Honor.

09:30:36 18           **THE COURT:** I wanted to note one thing in this process  
09:30:40 19 and ask about it because in regard to Bank of America's role  
09:30:52 20 wearing the hat of Disbursement Agent, of course Bank of America  
09:30:57 21 says, "Look, our job here is ministerial. We are, in effect,  
09:31:04 22 going through the checklist," right?

09:31:07 23           **MR. CANTOR:** Yes, Your Honor.

09:31:08 24           **THE COURT:** "We're doing this and, by the way, we're  
09:31:13 25 only paid a relatively small amount of money for this function."

09:31:20 1           **MR. CANTOR:** Yes, Your Honor.

09:31:21 2           **THE COURT:** I didn't see anywhere in the agreements any  
09:31:27 3 obligation or the like for Bank of America to carry some type of  
09:31:35 4 insurance for its function.

09:31:41 5           There wasn't any insurance criteria, right?

09:31:44 6           **MR. CANTOR:** Not that I'm aware of, Your Honor, no.

09:31:47 7           **THE COURT:** In fact, did it have sort of malpractice  
09:31:50 8 insurance?

09:31:50 9           **MR. CANTOR:** Not specifically. I don't know whether  
09:31:53 10 somewhere within the organization there would be a policy that  
09:31:58 11 might cover this, but there was no insurance specifically  
09:32:01 12 obtained for this role.

09:32:03 13           **THE COURT:** It probably wouldn't cover gross negligence  
09:32:07 14 anyway, right?

09:32:08 15           **MR. CANTOR:** Probably not.

09:32:09 16           **THE COURT:** All right.

09:32:10 17           So turn to Page 9 for a moment. In the paragraph below  
09:32:19 18 debt service notifications, do you see that paragraph that  
09:32:24 19 begins with "the Disbursement Agent shall"?

09:32:26 20           **MR. CANTOR:** Uh-huh.

09:32:35 21           **THE COURT:** Here is an example of one place in the  
09:32:38 22 agreement where there is an affirmative obligation on the  
09:32:42 23 Disbursement Agent to do more than just ministerial acts. It  
09:32:47 24 has to use reasonable diligence to assure the construction  
09:32:53 25 consultant performs its review of the materials required,

09:33:02 1 et cetera.

09:33:02 2 I noted this as a higher standard of obligation than  
09:33:10 3 just ministerial checklists.

09:33:12 4 Would you agree from Bank of America's side?

09:33:15 5 **MR. CANTOR:** It certainly is more than just a  
09:33:20 6 checklist.

09:33:22 7 I think, though, that using reasonable diligence -- by  
09:33:25 8 the way, this would be an instance where the commercial  
09:33:27 9 reasonableness requirement would apply.

09:33:29 10 But I think using reasonable diligence to assure that  
09:33:32 11 the construction consultant performs its review of the  
09:33:35 12 materials, I don't think that it is a terribly high standard.

09:33:38 13 It's not checking a box; it's making sure that the  
09:33:42 14 construction consultant is doing its job.

09:33:44 15 **THE COURT:** Let me back up. The construction  
09:33:48 16 consultant files its own piece of paper --

09:33:50 17 **MR. CANTOR:** Right.

09:33:51 18 **THE COURT:** -- Saying, "We looked at everything and the  
09:33:56 19 advance is within the projected budget" --

09:34:00 20 **MR. CANTOR:** Right.

09:34:01 21 **THE COURT:** -- "and the projected construction cost."

09:34:04 22 **MR. CANTOR:** Right.

09:34:05 23 **THE COURT:** So it files its piece of paper and it  
09:34:12 24 certifies that.

09:34:13 25 **MR. CANTOR:** Right.

09:34:14 1           **THE COURT:** Now, you have all your Article 9 things  
09:34:20 2 which you point out and argue. You say, we, Bank of America,  
09:34:22 3 don't have to do anything more than accept representations.

09:34:29 4           **MR. CANTOR:** Right.

09:34:30 5           **THE COURT:** I'm pointing out one other part of the  
09:34:32 6 agreement that seemed to me to impose, trying to read these  
09:34:38 7 things together, a higher standard on Bank of America to do  
09:34:44 8 reasonable diligence.

09:34:45 9           **MR. CANTOR:** I think, Your Honor, it works the other  
09:34:47 10 way. What Bank of America is required to do in this provision  
09:34:51 11 is use reasonable diligence to make sure that the construction  
09:34:55 12 consultant is doing the work and is doing it in a way that will  
09:34:59 13 allow the advance request ultimately to be processed in a timely  
09:35:04 14 fashion.

09:35:04 15           When it comes to the substance of the review that the  
09:35:09 16 construction consultant performs, that's where § 9.3.2 would  
09:35:15 17 kick in and says that Bank of America is entitled to rely on the  
09:35:21 18 certification that the construction consultant provides in  
09:35:26 19 determining that the things that the construction consultant is  
09:35:29 20 responsible for have been satisfied.

09:35:31 21           The reasonable diligence to assure that it performs its  
09:35:34 22 reviews as required by § 2.4 is just to make sure that the  
09:35:40 23 process is moving forward and is moving forward in a timely  
09:35:43 24 fashion.

09:35:45 25           **THE COURT:** All right. Well, let me hold on that for a

09:35:47 1 second and turn to the plaintiffs' side.

09:35:52 2 I'd like to have your comments on the question. Is  
09:36:00 3 there, by this provision -- and I know this isn't the issue  
09:36:04 4 which is on summary judgment. It is not about the construction  
09:36:10 5 costs per se.

09:36:15 6 In terms of the structure of the agreement, what is  
09:36:18 7 your position with regard to this aspect? Does the Disbursement  
09:36:25 8 Agent have a higher standard with regard to reviewing the  
09:36:34 9 construction consultant's performance, et cetera, than it does  
09:36:42 10 with regard to other obligations?

09:36:47 11 **MR. HENNIGAN:** Let me answer that and I would like to  
09:36:48 12 come back and catch something that was part of the colloquy on  
09:36:52 13 the other side.

09:36:52 14 **THE COURT:** Go ahead.

09:36:53 15 **MR. HENNIGAN:** I think their standard remains roughly  
09:36:56 16 the same, which is commercially reasonable, and I believe that  
09:37:00 17 this articulation of reasonable diligence, I don't read it  
09:37:05 18 different from commercially reasonable efforts to make sure the  
09:37:08 19 construction consultant is doing his job.

09:37:10 20 **THE COURT:** Okay.

09:37:10 21 **MR. HENNIGAN:** So I think there are, you know, I would  
09:37:13 22 say, plenary obligations throughout the agreement that Bank of  
09:37:19 23 America use commercially reasonable diligence, efforts,  
09:37:22 24 whatever, to make sure that the conditions are fulfilled.

09:37:27 25 The part I wanted to bounce back to, Your Honor, was

09:37:32 1 the point that you referred to, the relatively modest fee that  
09:37:37 2 Bank of America was earning for this. Bank of America was the  
09:37:41 3 underwriter of these loans, Your Honor. Bank of America earned  
09:37:45 4 tens of millions of dollars in putting this package together.

09:37:50 5 This Disbursement Agreement was an essential part of  
09:37:56 6 the comfort assurances that lenders look to in order to put  
09:38:01 7 their money into the deal and so, yeah, they may have only made  
09:38:04 8 \$40,000 on this one, but it was an integral part of the overall  
09:38:10 9 financing package. It had to be here and it had to be performed  
09:38:13 10 by somebody that people trusted.

09:38:15 11 **THE COURT:** All right. I knew I was going to invite  
09:38:18 12 some debate on this issue but in terms of the Disbursement Agent  
09:38:24 13 hat and function, there is no dispute that Bank of America was  
09:38:31 14 being paid a limited amount of money for that job.

09:38:37 15 **MR. HENNIGAN:** I would say in terms of funds that were  
09:38:40 16 earmarked specifically for that job, it was a very modest amount  
09:38:44 17 of money.

09:38:46 18 **THE COURT:** Yes. That was my only point.

09:38:47 19 **MR. HENNIGAN:** It was part of the overall deal.

09:38:49 20 **THE COURT:** I understand that Bank of America has other  
09:38:54 21 relations to this deal other than Disbursement Agent, but I  
09:39:00 22 don't want to go there yet.

09:39:02 23 My main point in trying to address this issue is to try  
09:39:12 24 to understand the general introductory language in 9.1 on  
09:39:19 25 commercial reasonableness with regard to other aspects of the



09:39:23 1 agreement.

09:39:25 2 I pointed out to you this one matter where reasonable  
09:39:33 3 diligence has to be done with regard to the construction  
09:39:39 4 consultant's obligations.

09:39:42 5 Also, under 2.4.4(A) under general review, here again  
09:39:48 6 the Disbursement Agent and the construction consultant shall  
09:39:52 7 review the advance requests and attachments thereto to determine  
09:39:56 8 whether all required documentation has been provided and shall  
09:39:59 9 use commercially reasonable efforts, et cetera.

09:40:02 10 So when I am looking at the document and trying to  
09:40:08 11 integrate the whole, one of the points that is of concern to me  
09:40:18 12 is how do you apply that introductory language in 9.1 with  
09:40:27 13 regard to the other parts of the agreement where there is  
09:40:29 14 specific reference then to the commercial diligence or  
09:40:32 15 equivalent and then the rest of Article 9 that seems to limit  
09:40:41 16 how that is exercised or the conditions under which it is  
09:40:46 17 exercised.

09:40:47 18 **MR. CANTOR:** Your Honor, I think the best way to think  
09:40:49 19 about this is if you start with Article 9 as a whole. It is  
09:40:56 20 essentially a contract within a contract. You know, for the  
09:41:04 21 most part, the rest of the Disbursement Agreement deals with  
09:41:09 22 mechanics for disbursing funds, but Article 9 is specifically  
09:41:14 23 limited to the retention, the rights, the responsibilities of  
09:41:16 24 the Disbursement Agent.

09:41:19 25 So you can look at 9.1, I think, as like a whereas

09:41:23 1 clause for this agreement within an agreement.

09:41:26 2 It sets forth the general purpose of the agreement for  
09:41:33 3 retaining the Disbursement Agent, and it leaves the details for  
09:41:38 4 the paragraphs that follow.

09:41:40 5 So what it says is it is an acknowledgement that Bank  
09:41:42 6 of America is going generally to perform its duties in a manner  
09:41:47 7 that is consistent with similarly situated institutions like  
09:41:52 8 indenture trustees and the like, and it provides a general  
09:41:56 9 standard of care for those Disbursement Agent obligations that  
09:42:01 10 are not otherwise subject to more specific provisions.

09:42:06 11 **THE COURT:** But I have a specific purpose in asking  
09:42:10 12 this question, and I want to get back to the plaintiffs'  
09:42:13 13 response, what you said in a second, but let me take one step  
09:42:19 14 further in our discussion and set up the question and then get  
09:42:24 15 back to what we're talking about.

09:42:27 16 Could you turn your attention to Page 10 of the  
09:42:29 17 Disbursement Agreement on 2.5.1? This is, to me, a very  
09:42:46 18 important aspect of the flow of obligations under this  
09:42:56 19 Disbursement Agreement, so let's go over this together.

09:43:05 20 "In the event that:

09:43:07 21 "1. The conditions precedent to an advance have not  
22 been satisfied; or,

09:43:11 23 "2. The controlling person notifies the Disbursement  
09:43:13 24 Agent that a default or an Event of Default has occurred  
09:43:18 25 and is continuing, then the Disbursement Agent shall notify

09:43:24 1 the project entities, and each funding agent thereof as  
09:43:29 2 soon as reasonably possible, a stop funding notice,"  
09:43:33 3 et cetera, et cetera.

09:43:34 4 So let's go back and break that down. Under subpart 2  
09:43:41 5 of that, the controlling person, whoever that is -- and I assume  
09:43:47 6 that has to be somebody defined under the control agreement.

7 No?

09:43:53 8 **MR. CANTOR:** No, Your Honor. The controlling person is  
09:43:55 9 defined in this agreement as, for purposes of our discussion,  
09:44:00 10 the Bank Agent.

09:44:02 11 **THE COURT:** Well, the Bank Agent being Bank of America?

09:44:06 12 **MR. CANTOR:** Yes, Your Honor.

09:44:06 13 **THE COURT:** Okay. Okay. So this is what I'm trying to  
09:44:13 14 get to. How does this work? Bank of America notifies itself?

09:44:21 15 Bank of America, as the controlling person, then writes  
09:44:26 16 a formal demand to Bank of America as the Disbursement Agent  
09:44:33 17 that there's a notice of default?

09:44:35 18 **MR. CANTOR:** That would be the process that the  
09:44:36 19 agreement contemplates for purposes of making sure that  
09:44:40 20 everything is papered in case there is a later litigation and,  
09:44:44 21 by the way, Your Honor, this --

09:44:45 22 **THE COURT:** Which portion of Bank of America does this?

09:44:50 23 **MR. CANTOR:** Your Honor, the individuals who were  
09:44:55 24 performing the agent functions at Bank of America were all part  
09:44:59 25 of the same specific group, the credit debt products group in

09:45:09 1 Dallas, and, yes, Your Honor, it is a formulistic requirement.

09:45:16 2 **THE COURT:** Let me narrow this down. The same people  
09:45:19 3 who are the controlling person at Bank of America are also the  
09:45:20 4 same people who are disbursement agents?

09:45:22 5 **MR. CANTOR:** Yes, Your Honor, with the exception of the  
09:45:27 6 specific individuals who actually press the button and move the  
09:45:32 7 money, but the people who are performing this function and  
09:45:34 8 making the decisions are the same group of people.

09:45:36 9 **THE COURT:** I'm talking about the decision-makers.  
09:45:39 10 Somebody under the definition of controlling person has to make  
09:45:44 11 a decision to pull the trigger --

09:45:46 12 **MR. CANTOR:** Yes, Your Honor.

09:45:47 13 **THE COURT:** -- and then notifies itself, wearing a  
09:45:51 14 different hat, that such a decision has been made.

09:45:56 15 **MR. CANTOR:** Right, Your Honor.

09:45:57 16 **THE COURT:** Okay. So when I started our discussion  
09:46:01 17 today about how Bank of America is being sued here, is it sued  
09:46:10 18 as only Disbursement Agent, or is it sued as controlling agent  
09:46:20 19 or controlling person, and how do you divide up the knowledge  
09:46:26 20 that Bank of America has as controlling person from that which  
09:46:30 21 it has as Disbursement Agent?

09:46:33 22 **MR. CANTOR:** Well, Your Honor, let me answer that  
09:46:37 23 somewhat obliquely, but I think you'll see where I'm going.

09:46:40 24 This actually goes back to one of your original  
09:46:43 25 questions about what is the relevance of the Credit Agreement

09:46:46 1 here because the Credit Agreement which governs the Bank Agent,  
09:46:53 2 which is synonymous with Administrative Agent, that is where you  
09:46:57 3 get the provision that Your Honor alluded to earlier this  
09:47:00 4 morning about knowing whether there has been a default or an  
09:47:04 5 Event of Default.

09:47:05 6 There is a provision in the Credit Agreement that  
09:47:08 7 specifically provides that Bank of America is not deemed to have  
09:47:10 8 notice of an Event of Default or a default unless it receives an  
09:47:13 9 actual notice to that effect.

09:47:16 10 So until it receives that actual notice, Bank of  
09:47:21 11 America as Bank Agent is not required to notify the Disbursement  
09:47:26 12 Agent under this provision here and so therefore you --

09:47:31 13 **THE COURT:** But my question is: Controlling person,  
09:47:39 14 does controlling person, namely Bank of America wearing a  
09:47:43 15 different hat, have an independent duty and responsibility to  
09:47:51 16 review whether there has been a default and pull the trigger?

09:47:54 17 **MR. CANTOR:** I'm not sure what you mean by "review." I  
09:47:58 18 think that -- I'm sorry --

09:48:02 19 **THE COURT:** Well, here's where I'm having difficulty  
09:48:07 20 with the agreement before we get into the facts.

09:48:13 21 Your position -- and I am not trying to exclude  
09:48:18 22 plaintiffs in this discussion -- but let me stick with them for  
09:48:21 23 a second because I'd like to hear their response before  
09:48:25 24 plaintiffs' response.

09:48:28 25 Your position is that Bank of America as Disbursement

09:48:34 1 Agent has certain protections?

09:48:39 2 **MR. CANTOR:** Yes.

09:48:41 3 **THE COURT:** All right. But Bank of America as  
09:48:43 4 controlling person, under some authority, seems to me to have  
09:48:55 5 more obligation, if you will, to monitor what's going on in this  
09:49:02 6 deal.

09:49:03 7 **MR. CANTOR:** I would disagree with that, Your Honor.

09:49:05 8 **THE COURT:** Okay. Tell me why you disagree with that.

09:49:09 9 **MR. CANTOR:** Okay. There are provisions in the Credit  
09:49:15 10 Agreement which mirror the provisions in the Disbursement  
09:49:18 11 Agreement about the Bank Agent or the Administrative Agent,  
09:49:23 12 which again is synonymous, being allowed to rely on the same  
09:49:28 13 types of certifications, representations and warranties that the  
09:49:33 14 Disbursement Agent relies upon.

09:49:36 15 That would be § 9.4 of the Credit Agreement, and § 9.3  
09:49:43 16 of the Credit Agreement all deal with that.

09:49:45 17 When you get specific to 2.5.1, Your Honor, and the  
09:49:50 18 issue about controlling person notifying the Disbursement Agent  
09:49:54 19 that there has been a default or an Event of Default, the Credit  
09:49:58 20 Agreement specifically provides that Bank of America doesn't  
09:50:01 21 have knowledge of an Event of Default or a Default, capital D  
09:50:06 22 default, unless it has received notice from someone of that  
09:50:10 23 event.

09:50:10 24 So what you get is, if you focus specifically on 2.5.1,  
09:50:17 25 it is undisputed that Bank of America never received a notice of

09:50:21 1 default here, and so therefore this second portion of 2.5.1  
09:50:28 2 which focuses on the controlling person as opposed to the  
09:50:32 3 Disbursement Agent is not part of our discussion here this  
09:50:34 4 morning, Your Honor.

09:50:35 5 **THE COURT:** Well, you are saying a lot of things.

09:50:38 6 **MR. CANTOR:** Okay.

09:50:39 7 **THE COURT:** So let me go back to what you just said.

09:50:42 8 One of the issues raised by plaintiffs is, well, they  
09:50:46 9 did receive notice from one of the Term Lenders that the Lehman  
09:50:56 10 bankruptcy was a triggering Event of Default.

09:51:00 11 **MR. CANTOR:** I would say that is a mischaracterization.  
09:51:02 12 They received an email from one of the Term Lenders who is not a  
09:51:07 13 party here that expressed their views as to whether the Lehman  
09:51:14 14 bankruptcy had certain consequences, but what it didn't do was  
09:51:17 15 say this is an event of -- we hereby declare an Event of  
09:51:20 16 Default.

09:51:21 17 **THE COURT:** Let me interrupt for a second and turn to  
09:51:23 18 plaintiffs.

09:51:25 19 Since the Disbursement Agreement does not itself have  
09:51:29 20 provisions on notice as to what is formal notice, leaving aside  
09:51:36 21 who has to give it for a moment, does the Credit Agreement  
09:51:43 22 notice requirements apply here?

09:51:46 23 Is there a formal process where that notice has to be  
09:51:53 24 given in a written, certified way that creates a triggering  
09:52:00 25 event, or is it enough that it be electronically transmitted?

09:52:08 1           **MR. HENNIGAN:** If I am tracking it, Your Honor, it  
09:52:09 2 seems to me that the unity of control agent and -- I am using  
09:52:14 3 the right word, right, control agent?

4           **THE COURT:** Control person.

09:52:19 5           **MR. HENNIGAN:** The unity of the controlling person  
09:52:20 6 being the Bank Agent and that same person being the disbursing  
09:52:25 7 agent makes notice under that circumstance self-executing.

09:52:29 8           Notice to one is notice to the other automatically.

09:52:32 9           **THE COURT:** Yes. But let's say one of the Term  
09:52:34 10 Lenders, like in this situation --

11           **MR. HENNIGAN:** Gotcha.

09:52:37 12           **THE COURT:** -- sends an email. Does that qualify as  
09:52:43 13 notice in this formal sense under the Credit Agreement which  
09:52:50 14 then is notice of appropriate communication for purposes of the  
09:52:54 15 Disbursement Agreement?

09:52:55 16           **MR. HENNIGAN:** It is absolutely a notice of default.

09:52:59 17           **MR. CANTOR:** Your Honor, the issue is not the means of  
09:53:01 18 transmission; the issue is the content of the transmission.

09:53:05 19           If what the Term Lender said, which is the case here,  
09:53:09 20 is that, you know, we believe that there are all sorts of  
09:53:13 21 problems here and we want you to check it out, that's not the  
09:53:16 22 same thing as saying we, as Highland, subject to being liable  
09:53:21 23 for doing so, hereby declare an Event of Default under the  
09:53:27 24 relevant agreements.

09:53:28 25           Basically, they tried to have it both ways.



09:53:30 1           **THE COURT:** So let me get back to 2.5.1. We talked  
09:53:37 2 about controlling person notifies, which is a triggering event  
09:53:43 3 if that provision was met, but it wasn't met here.

09:53:47 4           **MR. CANTOR:** Correct.

09:53:48 5           **THE COURT:** So I don't have to pay any attention to  
09:53:51 6 that subpart 2, right?

09:53:52 7           **MR. CANTOR:** That's my position, Your Honor.

09:53:55 8           **THE COURT:** And I don't know. Do you have a position  
09:53:57 9 different? There isn't any formal notice from controlling  
09:54:02 10 person to Disbursement Agent that would meet that requirement,  
09:54:09 11 is there?

09:54:09 12           **MR. HENNIGAN:** As I said, Your Honor, I believe that  
09:54:11 13 since they are the same entity, notice to one is by definition  
09:54:17 14 notice to the other.

09:54:17 15           **THE COURT:** What do you say about that?

09:54:19 16           **MR. CANTOR:** That is not what the contract says.

09:54:21 17           The contract specifically requires -- and, again, it  
09:54:24 18 might seem overly formalistic as you sit here today, but you can  
09:54:29 19 imagine a litigation situation where the failure to have all of  
09:54:34 20 these specified boxes checked could be important.

09:54:37 21           What 2.5.1 talks about is the controlling person  
09:54:41 22 notifying the disbursing agent, and there is no evidence in the  
09:54:45 23 record that that ever happened.

09:54:48 24           **THE COURT:** All right. But let's go back to Part 1:  
09:54:51 25 In the event, 1, the conditions precedent to an advance have not

09:54:56 1 been satisfied.

09:55:06 2 Now, what I have tried very hard to do is look through  
09:55:10 3 this Disbursement Agreement to see who triggers that, who says  
09:55:17 4 that. Well, one thing I know is that Fontainebleau can say  
09:55:24 5 that. Fontainebleau can give notice and eventually later in the  
09:55:28 6 deal did give notice that the conditions precedent were not  
09:55:37 7 satisfied.

09:55:37 8 **MR. CANTOR:** Right.

09:55:38 9 **THE COURT:** So that is one situation.

09:55:40 10 Another situation seems to me to be if Bank of America  
09:55:50 11 as Disbursement Agent is doing its checklist and it  
09:55:56 12 determines -- and I'm going to use something which is really not  
09:55:59 13 our situation here -- but it determines that the construction  
09:56:06 14 consultant has not adequately, reasonably been diligent in the  
09:56:15 15 project costs and that condition has not been satisfied, or  
09:56:18 16 something of that nature, that would be an event where the  
09:56:28 17 Disbursement Agent is required to notify the project entities,  
09:56:34 18 right?

09:56:34 19 **MR. CANTOR:** Yeah. I think the facts as you actually  
09:56:38 20 put them might not work, but let me tie it to something that  
09:56:41 21 happened here.

09:56:42 22 For example, in March 2009, when IVI, the construction  
09:56:48 23 consultant, initially reviewed the advance request, it was  
09:56:50 24 unwilling to sign off on the advance request.

09:56:53 25 Ultimately that got resolved, but if it had not, then

09:56:56 1 Bank of America would not have been allowed --

09:56:59 2 **THE COURT:** I'm trying to use a simple example.

09:57:01 3 **MR. CANTOR:** Yeah.

09:57:02 4 **THE COURT:** I'm trying to use a simple example where  
09:57:05 5 under your ministerial checklist theory, the construction  
09:57:08 6 consultant refuses to sign the document.

09:57:11 7 **MR. CANTOR:** Yes, Your Honor.

09:57:12 8 **THE COURT:** Then in the ministerial review of the  
09:57:19 9 paperwork, the Disbursement Agent would determine that a  
09:57:26 10 condition precedent to an advance has not been satisfied.

09:57:30 11 Would you agree?

09:57:32 12 **MR. CANTOR:** Yes, Your Honor.

09:57:32 13 **THE COURT:** Okay. And in that event, under 2.5.1, the  
09:57:42 14 Disbursement Agent has an obligation, "shall" -- mandatory --  
09:57:47 15 notify the project entities, et cetera.

09:57:50 16 **MR. CANTOR:** Right.

09:57:51 17 **THE COURT:** Okay. Now, where this does get confusing  
09:57:57 18 to me -- and I want to have more argument from both sides on  
09:58:01 19 this -- and I'm going to have more questions to you as you go  
09:58:07 20 through this -- is another type of situation, and that has to do  
09:58:23 21 where it is not a matter of determining whether C-1 has been  
09:58:31 22 submitted correctly with all certifications.

09:58:35 23 It's a more subjective determination of whether or not  
09:58:40 24 the other conditions precedent have been met and what I'm trying  
09:58:53 25 to get at is the structure of the agreement as to various

09:59:01 1 alternative circumstances.

09:59:04 2           Number 1, since there is no specific language saying  
09:59:13 3 Disbursement Agent shall use reasonable diligence to make sure  
09:59:17 4 that each condition precedent to an advance has been satisfied,  
09:59:24 5 the way it has been with the construction side, is there an  
09:59:29 6 affirmative duty in any way on the part -- under the  
09:59:33 7 agreement -- on the part of Bank of America to do that?

09:59:37 8           **MR. CANTOR:** No, Your Honor.

09:59:38 9           **THE COURT:** Okay. I know your position is no, but let  
09:59:42 10 me just phrase these things and then we will get back to them.

09:59:49 11           Okay. In support of your position, you would go  
09:59:55 12 through, you know, all the Article 9 limitations that would be  
10:00:02 13 consistent with. We don't have the obligation. We are just  
10:00:07 14 checklisting. Okay. I understand that.

10:00:09 15           **MR. CANTOR:** Yeah, in particular 9.3.2.

10:00:12 16           **THE COURT:** And you would also rely on 9.2.5, no  
10:00:19 17 imputed knowledge.

10:00:20 18           **MR. CANTOR:** Yes, Your Honor.

10:00:23 19           **THE COURT:** So now we get to the much harder question  
10:00:30 20 which is, I think, the subject of this summary judgment, as to  
10:00:39 21 if Bank of America knew or should have known in the course of  
10:00:47 22 its dealings with the loan as controlling person or Disbursement  
10:00:56 23 Agent that a condition precedent has not been satisfied, okay,  
10:01:08 24 and it -- not that it is imputed knowledge.

10:01:11 25           I mean, under the best of circumstances, let's say it

10:01:13 1 is a clean-cut advance. You are doing your checklist. You  
10:01:17 2 don't know anything. There is nothing at issue. You stamp it  
10:01:21 3 approved. Off it goes. You are covered by everything in this  
10:01:25 4 agreement.

10:01:27 5 But here you have this issue with the retail facility  
10:01:36 6 and Lehman's bankruptcy, and then the question is, well, what  
10:01:43 7 did Bank of America know or what should it have known?

10:01:50 8 If it either should have known or knew, did it have an  
10:01:54 9 affirmative duty at that point, under commercial reasonableness  
10:02:03 10 language, to do more and, in fact, didn't it do more by looking  
10:02:10 11 into the question, having its lawyer look into the question or  
10:02:14 12 other thing?

10:02:15 13 **MR. CANTOR:** Well, let me start by saying to the extent  
10:02:19 14 that Bank of America did more, that's not the way that you  
10:02:25 15 define the standard, the minimum standard of what they were  
10:02:28 16 required to do. The fact that they did more, among other  
10:02:31 17 things, shows that they weren't grossly negligent here.

10:02:35 18 But in determining what it is that they need to do, I  
10:02:37 19 think you need to split "knew or should have known" into two  
10:02:44 20 parts.

10:02:44 21 The premise of our argument here is that, as the clear  
10:02:50 22 and unambiguous language of 9.3.2 says, Bank of America is  
10:02:58 23 entitled to rely without further investigation on  
10:02:59 24 Fontainebleau's certifications that conditions precedent had  
10:03:02 25 been met.

10:03:02 1 If Bank of America actually knew that a condition  
10:03:08 2 precedent had not been satisfied, then it would not be relying  
10:03:12 3 on Fontainebleau's certifications at that point, and we would  
10:03:17 4 concede that they had an obligation to not allow the funding to  
10:03:22 5 go forward but actually knew.

10:03:25 6 **THE COURT:** Hold right there.

10:03:29 7 So for purposes of the summary judgment, your position  
10:03:34 8 is if Bank of America had actual knowledge that a condition  
10:03:38 9 precedent had not been met -- in this case, I guess that  
10:03:44 10 translates to the equivalent of actual knowledge that Lehman was  
10:03:52 11 not funding the retail facility, right?

10:03:54 12 **MR. CANTOR:** Right.

10:03:55 13 **THE COURT:** Okay. If it knew that --

10:03:58 14 **MR. CANTOR:** Well, that Fontainebleau Resorts was,  
10:04:01 15 because there are other people that could have funded that it  
10:04:05 16 would have been permissible.

10:04:05 17 **THE COURT:** Let me rephrase that.

10:04:07 18 **MR. CANTOR:** Yeah.

10:04:08 19 **THE COURT:** If Bank of America had actual knowledge  
10:04:14 20 that Lehman did not fund and none of the other lenders within  
10:04:22 21 the retail structure funded and that Fontainebleau funded, that  
10:04:30 22 is a different situation and then Bank of America did have,  
10:04:35 23 notwithstanding Article 9, an affirmative duty to initiate a  
10:04:43 24 default notice.

10:04:44 25 **MR. CANTOR:** Right. Bank of America in that instance

10:04:46 1 would know that the conditions precedent have not been satisfied  
10:04:49 2 and, thus, it would be required under 2.5.1 to issue a stop  
10:04:53 3 funding notice.

10:04:54 4 **THE COURT:** So let's hold on that for a second and  
10:04:58 5 switch back to the factual issues here.

10:05:07 6 Is there from the plaintiffs' standpoint -- and I would  
10:05:08 7 like more discussion -- is there a material issue of fact about  
10:05:14 8 actual knowledge? Let's assume there was actual knowledge, but  
10:05:28 9 no action taken.

10:05:30 10 Wouldn't that be gross negligence under New York law?

10:05:33 11 **MR. CANTOR:** It would not, Your Honor, under these  
10:05:36 12 circumstances.

10:05:36 13 **THE COURT:** Okay. So let's divide the two up. Let's  
10:05:39 14 start with Question 1, actual knowledge.

10:05:43 15 **MR. CANTOR:** Yes, Your Honor.

10:05:44 16 **THE COURT:** Based upon all these emails, and I've now  
10:05:49 17 received some new information, other discovery, is there a  
10:05:55 18 material issue of fact on actual knowledge?

10:05:57 19 **MR. CANTOR:** Let me make sure I phrase it correctly,  
10:06:00 20 Your Honor.

10:06:00 21 Your Honor, we don't believe that there is a material  
10:06:03 22 issue of fact that Bank of America had actual knowledge.  
10:06:08 23 Plaintiffs have not submitted sufficient evidence in admissible  
10:06:14 24 form to establish actual knowledge by Bank of America.

10:06:17 25 When you add up all of the emails, many of which, I

10:06:21 1 believe, they have mischaracterized -- a lot of the evidence  
10:06:25 2 that they rely on they both mischaracterized and it is  
10:06:30 3 inadmissible.

10:06:32 4 When you add all that up, Your Honor, all that adds up  
10:06:35 5 to is, at best, a finding that Bank of America should have been  
10:06:38 6 suspicious, that Bank of America should have asked more  
10:06:41 7 questions. That's not actual knowledge.

10:06:44 8 **THE COURT:** Let me hold up for a second.

10:06:46 9 Does plaintiff contend that Bank of America had actual  
10:06:52 10 knowledge?

10:06:52 11 **MR. HENNIGAN:** Yes.

10:06:54 12 **THE COURT:** What evidence are you relying on that  
10:06:57 13 creates at least a material issue of fact of actual knowledge?

10:07:03 14 **MR. HENNIGAN:** The evidence that I am relying on, Your  
10:07:04 15 Honor, that I think disposes of the question is a series of  
10:07:09 16 emails that begin on September 19<sup>th</sup>, that make it clear inside  
10:07:18 17 Bank of America that Bank of America is actively discussing with  
10:07:24 18 Fontainebleau that Lehman Brothers will not make the payment and  
10:07:28 19 Fontainebleau will.

10:07:31 20 We have a series of emails. Let me get to them. We  
10:07:48 21 have Exhibit 73, Yunker email to Kotzin. They say, and I am  
10:07:53 22 quoting:

10:07:54 23 "They," meaning Fontainebleau, "only need \$4 million  
10:07:59 24 from Lehman for retail costs this month. Jim" -- Jim  
10:08:03 25 Freeman of Fontainebleau -- "can put money down from up top



10:08:05 1 to solve that gap if/when Lehman fails to fund."

10:08:11 2 The next one, also on the 19<sup>th</sup>, from Jeff Susman,  
10:08:17 3 project manager.

10:08:19 4 "I spoke with Doug last night on this matter. His  
10:08:22 5 initial reaction is that he thinks the Fontainebleau  
10:08:24 6 funding and no adjustment to in balance this month are  
10:08:28 7 reasonable and makes sense."

10:08:30 8 Next, same email:

10:08:33 9 "What times work for you today to wrap up the Lehman  
10:08:35 10 issue with Jim?" Skipping, "If there is no change to in  
10:08:41 11 balance, and unless I am missing something, the company's  
10:08:43 12 advance request is satisfied and we move on."

10:08:47 13 So on the 19<sup>th</sup> we've got clear, I think, unmistakable  
10:08:54 14 evidence. Then there is Exhibit 229, again Susman emails  
10:08:59 15 Yunker.

10:09:00 16 "There is still one issue that still needs to be  
10:09:02 17 resolved; that is, do we as the Bank Agent make the  
10:09:06 18 unilateral call to interpret Fontainebleau funding as  
10:09:10 19 retail agent funding, or do we seek required lender  
10:09:14 20 consent?"

10:09:14 21 So I think absolutely, categorically on the 19<sup>th</sup>, we  
10:09:18 22 have unmistakable evidence that they are actively planning for  
10:09:23 23 the Fontainebleau funding of the Lehman share.

10:09:26 24 **THE COURT:** What was the actual date of the  
10:09:35 25 Fontainebleau certification which included that all conditions

10:09:40 1 were met?

10:09:40 2 **MR. HENNIGAN:** They made it with the original advance  
10:09:44 3 request. I'll get to that in a second. Bank of America asked  
10:09:49 4 that they reissue it on the 26<sup>th</sup>, September 26, the date of the  
10:09:54 5 funding. I think that's a very important moment and I'll get to  
10:09:58 6 that.

10:09:59 7 So as of the 19<sup>th</sup>, we have unmistakable evidence that  
10:10:08 8 they were planning for the Fontainebleau funding. Now, we know  
10:10:13 9 now -- everyone in this courtroom knows -- that, in fact, on the  
10:10:17 10 26<sup>th</sup>, Fontainebleau, not Lehman, made the payment.

10:10:22 11 How do we know that? First of all, Bank of America has  
10:10:24 12 conceded it, but we also have Exhibit 56 which is an email that  
10:10:30 13 reports the wire transfer that came out of Bank of America on  
10:10:36 14 Fontainebleau's behalf in the exact amount of the Lehman  
10:10:39 15 Brothers funding.

10:10:40 16 So Bank of America, on Fontainebleau's behalf, made the  
10:10:46 17 payment on the 26<sup>th</sup>. Now, what do they do? They say -- there  
10:10:54 18 is no doubt on this record -- we have this little gap between  
10:10:56 19 the 19<sup>th</sup> and the 26<sup>th</sup>.

10:10:58 20 There is no doubt what we see is a lot of privileged  
10:11:01 21 communications that happened. It is perfectly plain at this  
10:11:04 22 point that Bank of America has changed its mind; that this will  
10:11:07 23 not satisfy the condition; that if Fontainebleau makes the  
10:11:11 24 payment it will fail the condition and therefore create, you  
10:11:15 25 know, requirements of notices of default and stop funding

10:11:19 1 notices.

10:11:20 2           So what do they do? They send an email to Freeman and  
10:11:35 3 say, please bring current your -- "Please reaffirm the  
10:11:46 4 representations and warranties which the companies made pursuant  
10:11:48 5 to the advance request and advance confirmation notice submitted  
10:11:51 6 to the Disbursement Agent earlier this month." That's Exhibit  
10:11:54 7 75.

10:11:55 8           On the top of Exhibit 75, on the 26<sup>th</sup>, Mr. Freeman says  
10:12:01 9 "I affirm."

10:12:02 10           Now, let's pause for a minute. The context of this is  
10:12:08 11 Freeman and Susman have been reaching an agreement that  
10:12:12 12 Fontainebleau is going to fund and that will satisfy the  
10:12:14 13 condition.

10:12:15 14           Bank of America has now changed its mind and so it goes  
10:12:18 15 now to Mr. Freeman and says, "Please reaffirm all of your  
10:12:25 16 representations and warranties."

10:12:28 17           What does he not say? He doesn't say "Did you fund"  
10:12:32 18 because, of course, he already knows he did fund. So what we  
10:12:36 19 get is Freeman's position in an "I affirm" that it must be okay,  
10:12:42 20 but he doesn't say I didn't fund.

10:12:46 21           We know for a fact that a few days later there is  
10:12:49 22 another series of conversations that happen where a memo comes  
10:12:53 23 out from Bank of America on being pushed by lenders and he sends  
10:12:58 24 a memo out and he says, "Look, I want to have a conversation  
10:13:01 25 with you, Mr. Freeman, on behalf of the lenders. The lenders

10:13:04 1 would like to know did Lehman Brothers make the contribution;  
10:13:11 2 and if not, who made it?"

10:13:14 3           What happens then? Mr. Freeman says, "I don't want to  
10:13:20 4 have a conversation because there are things that I can't say."  
10:13:26 5 You know, there is controversy on whether he said on advice of  
10:13:29 6 counsel, but he clearly told them "I can't have the conversation  
10:13:34 7 with you because there are things I can't say. I'll send you a  
10:13:36 8 memo."

10:13:38 9           And what does the memo say? With respect to the Lehman  
10:13:43 10 portion of it -- remember, what is the question? Did Lehman  
10:13:48 11 Brothers make the payment; and if not, who did? And what does  
10:13:52 12 Freeman say? It was made. It was made. He doesn't answer the  
10:14:01 13 question.

10:14:02 14           In the colloquy in deposition, my partner, Mr. Dillman,  
10:14:08 15 had this exchange with Mr. Freeman and he said -- or whoever it  
10:14:12 16 was -- he said:

10:14:14 17           "Did he answer the question?"

10:14:15 18           He said: "Yeah, I guess he did. Yeah, I guess he  
10:14:18 19 did."

10:14:18 20           In other words, when you answer the question that way,  
10:14:21 21 there is not a jury or a court anywhere in the country that  
10:14:24 22 wouldn't understand in that context that he was saying it was  
10:14:28 23 made in a way that violates the condition. Everyone knew it at  
10:14:33 24 that point. What they were doing was looking for cover.

10:14:36 25           So we think it is not that it raises a triable issue of

10:14:40 1 fact. We think there is no credible evidence on this record  
10:14:44 2 that Bank of America did not know that that funding was made by  
10:14:49 3 Fontainebleau and not by Lehman Brothers and now let's look at  
10:14:53 4 whether or not they have denied it.

10:14:56 5 The answer is they have mealy-mouthed their way through  
10:15:01 6 this thing. They never squarely say. No one on Bank of  
10:15:05 7 America's behalf has said, I believed that Lehman Brothers made  
10:15:09 8 the payment, or I believed that some other retail lender made  
10:15:12 9 the payment, or I believe that Fontainebleau didn't make the  
10:15:15 10 payment.

10:15:16 11 Instead, we got all this sort of squishy language  
10:15:20 12 because things were funded and dah-dah, dah-dah, dah-dah. How  
10:15:25 13 hard was it in the context of this motion to put in a  
10:15:28 14 declaration by Jeff Susman that said I believed that  
10:15:31 15 Fontainebleau did not make the payment, or I believed that some  
10:15:33 16 other retail lender made the payment?

10:15:36 17 How does he get around the fact that the payment was  
10:15:37 18 made on Fontainebleau's behalf by Bank of America?

10:15:41 19 **THE COURT:** Okay. So, let me ask for responses on  
10:15:45 20 that.

10:15:45 21 **MR. CANTOR:** Sure, Your Honor. That was a really nice  
10:15:50 22 story. It would sound great at closing, but it is an  
10:15:53 23 interpretation of the evidence. It is not, in fact, what the  
10:15:56 24 evidence will show.

10:15:58 25 What the evidence does show is that the conversations

10:16:02 1 that were held between Bank of America and Fontainebleau --

10:16:07 2 **THE COURT:** Let me ask you to rephrase this in a  
10:16:10 3 different way.

10:16:10 4 **MR. CANTOR:** Okay.

10:16:11 5 **THE COURT:** We're not here on closing argument either.

10:16:14 6 **MR. CANTOR:** Right.

10:16:15 7 **THE COURT:** The issues have to be addressed in terms of  
10:16:18 8 the standards for summary judgment --

10:16:21 9 **MR. CANTOR:** Uh-huh.

10:16:22 10 **THE COURT:** -- and whether or not there is a material  
10:16:26 11 issue of fact on this.

10:16:28 12 **MR. CANTOR:** Right.

10:16:28 13 **THE COURT:** So the question is -- at least in response  
10:16:33 14 to your motion, before I get to their motion -- the question is  
10:16:37 15 whether they have generated enough through these emails to  
10:16:42 16 trigger a material issue of fact of actual knowledge.

10:16:45 17 **MR. CANTOR:** They have not, Your Honor, because the  
10:16:47 18 emails themselves don't show actual knowledge. It is only when  
10:16:50 19 Mr. Hennigan gets a chance to spin them that he even gets close.

10:16:55 20 The actual testimony and the emails themselves make  
10:16:59 21 clear that what was going on during the first week, during the  
10:17:02 22 first week after Lehman filed for bankruptcy, was that there  
10:17:05 23 were discussions between Bank of America and Fontainebleau in  
10:17:09 24 which Fontainebleau laid out the various options that it had,  
10:17:14 25 was considering if, in fact, Lehman ended up not funding.

10:17:18 1 It was not known at that point whether, in fact, Lehman  
10:17:22 2 was or was not going to fund.

10:17:25 3 There is testimony in the record from the Bank of  
10:17:27 4 America side that they were hearing that Lehman was going to be  
10:17:32 5 funding some of its obligations, and so they did not know  
10:17:36 6 whether Fontainebleau was going to be one of those obligations,  
10:17:39 7 and so there was a discussion with Fontainebleau in which  
10:17:42 8 Fontainebleau laid out its options.

10:17:44 9 There is no testimony in the record that Fontainebleau  
10:17:48 10 told Bank of America, If Lehman doesn't fund, we are going to  
10:17:54 11 fund for them. That conversation never happened. There is  
10:17:57 12 no --

10:17:58 13 **THE COURT:** What about the actual funding made by Bank  
10:18:03 14 of America? I don't understand quite the mechanics of what  
10:18:06 15 happened there.

10:18:07 16 **MR. CANTOR:** Basically, Bank of America is the largest  
10:18:11 17 bank in the United States and among its thousands and thousands  
10:18:14 18 of clients is Fontainebleau Las Vegas.

10:18:18 19 Just as if when Jeff Soffer goes to the ATM machine,  
10:18:23 20 there is a record generated somewhere in Bank of America that  
10:18:25 21 that happens.

10:18:26 22 When Fontainebleau Las Vegas, which was banked by Bank  
10:18:31 23 of America, made a wire transfer of its funds, that money came  
10:18:34 24 out of a Bank of America account.

10:18:35 25 But there is absolutely no evidence in the record that

10:18:37 1 anyone with any connection to the Fontainebleau Las Vegas  
10:18:40 2 project had any knowledge that this wire transfer took place nor  
10:18:45 3 would there have been any reason for them to know about that.

10:18:47 4 **THE COURT:** Okay. Hold on that.

10:18:49 5 Your response to that? Is there anything of record  
10:18:52 6 plaintiffs are relying on that shows that anyone within the Bank  
10:18:59 7 of America controlling person, disbursing agent side, knew of  
10:19:07 8 that wire transfer, knew of the wire transfer?

10:19:13 9 **MR. HENNIGAN:** Your Honor, I always have these  
10:19:18 10 conceptual issues about the different hats that want to be worn  
10:19:23 11 here.

10:19:23 12 **THE COURT:** My question is very specific. Were you  
10:19:26 13 able to determine in any manner, and where is it, that someone  
10:19:32 14 within the structure, a controlling person, Administrative  
10:19:36 15 Agent, somewhere in that pecking order of who pulls the trigger  
10:19:43 16 down to who is working on the account had actual knowledge of  
10:19:48 17 that transfer?

10:19:50 18 **MR. HENNIGAN:** The answer is yes.

10:19:54 19 **THE COURT:** Tell me specifically.

10:19:56 20 **MR. HENNIGAN:** We have McClendon Rafitti, who is the  
10:20:00 21 principal for Trimont, the agent that actually received the  
10:20:05 22 funds and disbursed them as --

10:20:07 23 **THE COURT:** I am not talking about Trimont.

10:20:09 24 **MR. HENNIGAN:** I am talking about what his testimony  
10:20:12 25 is.



10:20:12 1 THE COURT: Okay. Go ahead.

10:20:13 2 MR. HENNIGAN: He testified that it was likely that he  
10:20:15 3 informed the BofA that Fontainebleau had funded.

10:20:19 4 THE COURT: Well, you know, that's not quite going to  
10:20:22 5 cut it. I mean, that sounds like, at best, speculative. If  
10:20:33 6 there was an objection --

10:20:33 7 MR. CANTOR: There was.

10:20:34 8 THE COURT: -- made to that, I would grant it because  
10:20:38 9 it's an assumption unless established as something in terms of  
10:20:46 10 habit and course of practice and all that.

10:20:47 11 MR. HENNIGAN: That is exactly what it is.

10:20:48 12 THE COURT: But I don't think that is what I am asking  
10:20:50 13 you.

10:20:50 14 MR. HENNIGAN: Well, --

10:20:53 15 THE COURT: There is nothing in the record that said  
10:20:55 16 that somebody from Trimont actually remembered directly telling  
10:21:04 17 someone in the structure that that funding occurred, is there?

10:21:11 18 MR. HENNIGAN: We have Jean Brown's testimony from Bank  
10:21:14 19 of America that says that she understood that Lehman had stopped  
10:21:18 20 funding in September. That was her understanding.

10:21:21 21 THE COURT: Okay. That's not the question I asked.

10:21:24 22 MR. HENNIGAN: I am going to get as close as I can. I  
10:21:26 23 have got Mr. Bolio's handwritten notes that says Lehman did not  
10:21:31 24 fund their share, so I think I can circle the whole Lehman  
10:21:35 25 didn't make the payment part. I know what your question is.

10:21:38 1           **THE COURT:** Okay. But that doesn't mean others didn't,  
10:21:41 2 so that's Bank of America's point in terms of other lenders. It  
10:21:46 3 is different than Fontainebleau made it.

10:21:51 4           **MR. HENNIGAN:** That's true.

10:21:52 5           Now let me describe to Your Honor how it is that we  
10:21:57 6 focused on this email that demonstrates conclusively that BofA  
10:22:04 7 actually made the payment, and that is because while we are  
10:22:10 8 thinking about this problem and we are thinking about this  
10:22:13 9 strange phenomenon that after planning for it, after being  
10:22:17 10 notified that Fontainebleau was intending to make the payment,  
10:22:21 11 they go through this silly charade about asking them to reaffirm  
10:22:26 12 affirmations, a silly charade of accepting a passive voice  
10:22:32 13 response to a specific question.

10:22:35 14           What occurs to us as we are preparing for this argument  
10:22:39 15 is that if I were Bank of America and I wanted to know really  
10:22:45 16 whether Fontainebleau funded, I would go and ask the people who  
10:22:50 17 control the Fontainebleau bank accounts because they're all at  
10:22:58 18 the BofA.

10:22:59 19           So, the fact they don't puts them, I think, into the  
10:23:01 20 category of studied ignorance. They didn't want to know at that  
10:23:05 21 point. They wanted to cover their tracks. They did not want  
10:23:11 22 evidence in the record that, in fact, they had induced this  
10:23:16 23 default and therefore were in error for having disbursed the  
10:23:20 24 funds.

10:23:21 25           **THE COURT:** Okay.

10:23:21 1           **MR. HENNIGAN:** I don't think there is another  
10:23:22 2 explanation for it.

10:23:23 3           **THE COURT:** But let's turn back --

10:23:25 4           **MR. CANTOR:** Okay.

10:23:26 5           **THE COURT:** -- and then we will take a break in a  
10:23:28 6 minute.

10:23:29 7           **MR. CANTOR:** There has been so much thrown out that I  
10:23:32 8 am not sure I am going to be able to hit all of it.

10:23:34 9           **THE COURT:** What is being argued, as I understand it,  
10:23:37 10 is equivalent to the criminal concept of deliberate ignorance,  
10:23:45 11 that Bank of America, in analyzing this question which it was  
10:23:51 12 discussing and asking for affirmations or explanations from  
10:23:58 13 Fontainebleau about, deliberately did not verify the answer  
10:24:09 14 within the confines of records it controlled.

10:24:12 15           **MR. CANTOR:** Your Honor, it didn't have any reason to  
10:24:14 16 go and check the records. As I was starting to explain before,  
10:24:17 17 when Mr. Hennigan says that Bank of America induced  
10:24:21 18 Fontainebleau Resorts to fund, that's just false and not based  
10:24:25 19 on any testimony or documents that are in the record.

10:24:29 20           What Bank of America knew is that Fontainebleau was  
10:24:32 21 considering a variety of options in the event that Lehman didn't  
10:24:37 22 fund.

10:24:38 23           The emails that Mr. Hennigan cited to you at the very  
10:24:41 24 beginning of his presentation refer to Bank of America's  
10:24:46 25 internal determination that if Fontainebleau was to choose to

10:24:49 1 have Equity fund for Lehman, that their initial determination  
10:24:53 2 was that that would be okay.

10:24:55 3 There is no evidence that they ever communicated to  
10:24:59 4 Fontainebleau that if Fontainebleau wanted to do that, it would  
10:25:02 5 be okay. That's an assumption that Mr. Hennigan has made.  
10:25:06 6 There is no evidence in the record of that, no testimony by Jim  
10:25:09 7 Freeman, no testimony by anyone from Bank of America that that  
10:25:13 8 happened.

10:25:15 9 Bank of America ultimately changed their position  
10:25:19 10 internally as to whether it would be permissible for  
10:25:22 11 Fontainebleau Resorts to fund on behalf of Lehman.

10:25:25 12 When the money came in, in the context that, again, no  
10:25:29 13 one knew whether, in fact, Lehman was going to fund or not, Bank  
10:25:33 14 of America, even though it was not required to do so, asked  
10:25:37 15 Fontainebleau to confirm that all of its previous  
10:25:40 16 representations and warranties, including the representation and  
10:25:43 17 warranty about the retail lenders making the funding, was true  
10:25:47 18 and Fontainebleau did.

10:25:48 19 There was nothing further that Bank of America was  
10:25:52 20 required or had reason to do at that point. The money had come  
10:25:56 21 in.

10:25:57 22 Remember, we are talking about a very small amount of  
10:25:59 23 money here. Right? We are talking about \$2.5 million out of a  
10:26:03 24 \$4 million retail advance in a project that has \$3 billion in  
10:26:11 25 costs.

10:26:13 1 The money came in. The representations were reaffirmed  
10:26:16 2 by Fontainebleau. The documents specifically say that we can  
10:26:18 3 rely on those representations without further investigation.

10:26:25 4 So there was no reason for Bank of America to go and  
10:26:28 5 look to see whether there was some wire transfer out there. In  
10:26:32 6 fact, it would not have even known the amount of a wire transfer  
10:26:34 7 to look for because at that point it had no knowledge as to how  
10:26:37 8 the retail facility had been whacked up among the different  
10:26:44 9 co-lenders.

10:26:45 10 So there is no studied ignorance here and, as you say,  
10:26:49 11 that is a criminal concept that I don't think applies when  
10:26:52 12 you've got a contract that specifically says you can rely  
10:26:53 13 without investigation, but there just was no reason for Bank of  
10:26:57 14 America to have to do that.

10:26:59 15 **THE COURT:** Let me toss out two more matters and then  
10:27:07 16 we'll take a break.

17 **MR. HENNIGAN:** Could I respond in just a couple of  
18 sentences?

19 **THE COURT:** Yes

10:27:07 20 **MR. HENNIGAN:** Mr. Cantor says they were studying --  
10:27:10 21 presumably he is talking about on the 19<sup>th</sup> of September -- a  
10:27:13 22 variety of ways to solve the problem of Lehman Brothers not  
10:27:16 23 funding. I don't think so. The only thing that was being  
10:27:18 24 discussed on the 19<sup>th</sup> was Fontainebleau making the funding.

10:27:22 25 Number 2, they didn't have to know what the exact

10:27:25 1 amount was. They just needed to ask one question: On the 26<sup>th</sup>  
10:27:29 2 of September 2008, did Fontainebleau transfer funds to Trimont?

10:27:38 3 **MR. CANTOR:** Why would they have asked that question,  
10:27:40 4 Your Honor, when they don't have a contractual obligation to do  
10:27:42 5 so?

10:27:43 6 **THE COURT:** Well, we're going to discuss this more in a  
10:27:47 7 few minutes, but let me pose a couple of questions to you to  
10:27:50 8 consider during our break.

10:27:55 9 What significance does it have that as a matter of fact  
10:28:03 10 Lehman did fund in October and November? There is no dispute of  
10:28:10 11 fact by and between the parties that that funding occurred from  
10:28:14 12 Lehman. How is that put into this factual equation in terms of  
10:28:29 13 how I should hear the evidence on summary judgment?

10:28:39 14 The second thing is -- and this is like a bigger  
10:28:48 15 picture issue which is troubling to me so I'll mention it -- the  
10:28:55 16 Term Lenders are wearing different hats, too, it seems to me.

10:29:02 17 One hat is, Ahhh, look at this, revolvers should have  
10:29:13 18 funded their share of the deal, when is it, in March? They  
10:29:17 19 should have funded it all. Because we funded, you should have  
10:29:21 20 funded, and why is that? Because we wanted this project to  
10:29:27 21 continue in order to protect our investment. Right?

10:29:33 22 Isn't that a fair way of looking at your first  
10:29:36 23 position?

10:29:37 24 **MR. HENNIGAN:** Our first position on that subject, Your  
10:29:39 25 Honor, is we absolutely, categorically wanted their money into

10:29:44 1 the bank proceeds account because we have a lien on it and we're  
10:29:49 2 going to thereby share the pain with them as was contemplated by  
10:29:53 3 the overall funding agreements.

10:29:55 4 We did not want this money, ours and theirs, to go down  
10:30:01 5 this rat hole. We wanted them to fund.

10:30:07 6 **THE COURT:** But if there was a default, it would have  
10:30:10 7 been a default all and there would have been a stoppage, if you  
10:30:16 8 would, of the project for every lender back in September, right,  
10:30:32 9 '08?

10:30:34 10 If your theory is correct, then Bank of America would  
10:30:37 11 have pulled the plug on the whole project because of this retail  
10:30:47 12 issue involving Lehman. What did you say? It was one point  
10:30:51 13 something.

10:30:52 14 **MR. CANTOR:** The amount of the issue for Lehman in that  
10:30:55 15 September advance was \$4 million total, 2.5 from Lehman.

10:30:59 16 **THE COURT:** 2.5 for Lehman and the whole advance was  
10:31:03 17 for?

10:31:03 18 **MR. CANTOR:** The whole retail advance was 4. I don't  
10:31:05 19 remember what the whole requested that month. It was probably  
10:31:08 20 like \$100 million or something.

10:31:16 21 **THE COURT:** Okay. What bothers me is two-fold looking  
10:31:22 22 at this from a broader perspective.

10:31:25 23 One is, notwithstanding your statement to me, it  
10:31:31 24 doesn't really make sense to me for the Term Lenders to take a  
10:31:37 25 position that the Revolvers were obligated to fund in March if,

10:31:45 1 in fact, your position is that none of the lenders should have  
10:31:50 2 been obligated to fund anything and Bank of America shouldn't  
10:31:55 3 have advanced anything, sorry, back in September. That's  
10:32:00 4 Number 1.

10:32:00 5 Number 2, this project was well underway and there was  
10:32:16 6 every effort being made to try to make it work to protect  
10:32:23 7 everybody's money.

10:32:27 8 So what is being done here, it seems to me, is to look  
10:32:33 9 back retroactively to a situation in September where there is no  
10:32:39 10 question that money was coming forward to do the retail part and  
10:32:49 11 that was moving forward and, in fact, Lehman did continue after  
10:32:56 12 that.

10:32:56 13 So the project was being protected and everybody's  
10:33:00 14 money was being protected, at least up to that point in time,  
10:33:07 15 until it was discovered about all these cost overruns which  
10:33:14 16 nobody here claims anybody knew at the time.

10:33:19 17 So here you have an Administrative Agent that really, I  
10:33:28 18 could see, is in a bit of a dilemma. I mean, if it pulled the  
10:33:32 19 plug on the whole project, based upon what you are arguing from  
10:33:36 20 the Term Lenders looking in retrospect, would it have had a  
10:33:44 21 massive lawsuit from Fontainebleau as well as potentially others  
10:33:53 22 who were dependent upon this project going forward?

10:33:57 23 So even if I applied a commercial reasonableness  
10:34:03 24 standard, what was done, was that commercially unreasonable to  
10:34:08 25 allow that project go forward and maybe not look at the question



10:34:12 1 too closely? Those are a couple of things that are of concern  
10:34:21 2 to me on this issue.

10:34:24 3           You know, if the situation repeated itself in October,  
10:34:35 4 November and the like, where Lehman didn't fund and there were  
10:34:42 5 continuing questions and whatever, it would be a tougher call  
10:34:46 6 here but, I mean, we are dealing with one month which is  
10:34:51 7 squirrely, followed by two months where no one contests that  
10:34:56 8 Lehman actually did fund.

10:34:59 9           So I know I'm looking at this in terms of this record,  
10:35:09 10 but I also think that in the real world sense it is necessary to  
10:35:16 11 take a look at what was going on in this project at that time in  
10:35:25 12 terms of the Term Lenders' argument on commercial reasonableness  
10:35:27 13 and gross negligence. I am going to take a break and give you  
10:35:31 14 time to all respond to this.

10:35:34 15           Then, even if you accept as true for purposes of  
10:35:39 16 summary judgment that there may have been this funding, they  
10:35:48 17 knew or should have known or deliberately ignorant in not  
10:35:54 18 knowing that Fontainebleau actually directly or indirectly  
10:35:57 19 funded, is that, under the standard of the agreement, gross  
10:36:11 20 negligence as a matter of law?

10:36:14 21           When we return, can we deal with some of these issues?  
10:36:21 22 I'll give both sides an opportunity to address it.

10:36:25 23           **MR. CANTOR:** Thank you.

10:36:26 24           **THE COURT:** Let's take fifteen minutes. In fact, I  
10:36:31 25 have to break by no later than noon, so let's reconvene at 10 of

10:36:40 1 11:00.

10:36:44 2 I want to hear your arguments from this point on, as  
10:36:48 3 much as you want to make them. I know you have prepared  
10:36:51 4 detailed slides and all, but I think we have covered a lot and  
10:36:54 5 I'm trying to get as close to the heart of the controversy as I  
10:37:00 6 can.

10:37:00 7 So whatever you want to do in the remaining time, I'm  
10:37:03 8 going to be quiet and let you do your thing.

10:37:06 9 **MR. CANTOR:** Thank you, Your Honor.

10:37:08 10 **THE COURT:** But keep in mind some of these questions I  
10:37:11 11 have posed to you. All right. 10 of 11:00 we will be back.  
10:37:15 12 Thank you.

10:37:16 13 Those on the phone, please remain on the phone and we  
10:37:18 14 will reconvene because we're not going to call everybody or have  
10:37:22 15 people call in again.

10:37:24 16 [There was a short recess taken at 10:37 a.m.]

17 AFTER RECESS

10:54:10 18 [The proceedings in this cause resumed at 10:54 a.m.]

10:55:11 19 **THE COURT:** All right. Are we back on the record, Joe?

10:55:15 20 Just so everybody knows, during the interim there was a  
10:55:21 21 problem with the call-in. Someone on the line did something  
10:55:29 22 which created a necessity to hang up and require everybody to  
10:55:35 23 call in again, so you may hear about that later from those who  
10:55:41 24 are interested, but I don't want to delay the proceedings  
10:55:45 25 waiting for everybody to come in.

10:55:47 1 So let me open the argument again to some of the  
10:55:58 2 issues. Why don't you start and then I would appreciate if you  
10:56:05 3 would argue in point and counterpoint.

10:56:08 4 **MR. CANTOR:** Sure, Your Honor. I am not going to do  
10:56:10 5 any kind of a formal presentation because so much of what I  
10:56:14 6 would have done has been covered earlier today, but I do want to  
10:56:21 7 try and address some of the issues that have been raised this  
10:56:25 8 morning as well as the questions that you left us with.

10:56:30 9 I think, Your Honor, what I will do as to the more  
10:56:34 10 specific factual issues that opposing counsel has raised, I  
10:56:39 11 think I'm going to leave them either for the end or for further  
10:56:43 12 rebuttal because where the argument has taken us, I have got  
10:56:48 13 lots to say about the factual issues and, in particular, the  
10:56:53 14 inability of plaintiffs to create a triable issue of fact on  
10:56:57 15 actual knowledge.

10:56:59 16 I think a lot of the factual material that they have  
10:57:01 17 discussed has been mischaracterized and is inadmissible, but  
10:57:07 18 unless Your Honor wants me to, I think that may be something  
10:57:10 19 that I'll come to a little later on.

10:57:14 20 What I would like to focus on, Your Honor, first is  
10:57:17 21 just briefly on the basic issue of breach of contract because we  
10:57:21 22 have covered so much of it.

10:57:23 23 Just to reiterate, Your Honor, our position is this is  
10:57:26 24 a very simple case, that the obligations of Bank of America as  
10:57:33 25 Disbursement Agent are limited. Your Honor pointed out the two

10:57:37 1 obligations essentially: determining that the required  
10:57:40 2 documentation has been submitted with each advance request and  
10:57:43 3 confirming that all of the conditions precedent to disbursement  
10:57:48 4 have been met.

10:57:48 5           From our perspective, in performing the obligation to  
10:57:52 6 ensure that the conditions precedent to disbursement have been  
10:57:56 7 met, the key provision is obviously 9.3.2 which in relevant part  
10:58:03 8 provides, notwithstanding anything else in this agreement to the  
10:58:07 9 contrary, in performing its duties hereunder, including  
10:58:11 10 approving advance requests or making other determinations or  
10:58:14 11 taking other actions hereunder, the Disbursement Agent shall be  
10:58:18 12 entitled to rely on certifications from the project entities as  
10:58:23 13 to the satisfaction of any requirements and/or conditions  
10:58:26 14 imposed by this agreement.

10:58:28 15           So it's clear, Your Honor, that Bank of America was  
10:58:35 16 entitled to rely without further investigation on the  
10:58:38 17 representations that it received from Fontainebleau.

10:58:42 18           At the motion to dismiss hearing, Your Honor, you  
10:58:44 19 correctly pointed out that the record at that point was  
10:58:46 20 incomplete because plaintiffs' complaint had not alleged whether  
10:58:50 21 or not Fontainebleau had submitted all of the necessary  
10:58:52 22 certifications. That's no longer an issue here, Your Honor.

10:58:55 23           It is undisputed that for every single advance request  
10:58:59 24 that's at issue in this case, Bank of America received all of  
10:59:02 25 the required certifications, representations and warranties from

10:59:07 1 Fontainebleau; and from our perspective, Your Honor, that should  
10:59:10 2 be the end of the case.

10:59:11 3 Bank of America has done everything that the  
10:59:15 4 Disbursement Agreement expressly required it to do and § 9.10  
10:59:19 5 leaves no doubt that unless the agreement specifically says that  
10:59:23 6 Bank of America has to do something, it does not have any  
10:59:27 7 additional duties.

10:59:28 8 9.10, as Your Honor probably knows, in relevant part  
10:59:32 9 provides that the Disbursement Agent shall have no duties or  
10:59:36 10 obligations hereunder except as expressly set forth herein,  
10:59:40 11 shall be responsible only for the performance of such duties and  
10:59:43 12 obligations and shall not be required to take any action  
10:59:46 13 otherwise in accordance with the terms hereof.

10:59:49 14 That is the fundamental flaw with plaintiffs' breach of  
10:59:54 15 contract argument, Your Honor, is that their entire case is  
10:59:56 16 premised on ignoring 9.3.2 and 9.10 and imposing additional  
11:00:02 17 unwritten obligations on Bank of America.

11:00:05 18 There is a second independent reason why Bank of  
11:00:08 19 America is entitled to summary judgment here, Your Honor, and I  
11:00:12 20 think it ties into some of the issues that you raised just  
11:00:16 21 before the break.

11:00:17 22 It is undisputed, as Your Honor mentioned, that the  
11:00:22 23 contract limits Bank of America's liability to gross negligence  
11:00:26 24 or worse.

11:00:27 25 There is no dispute between the parties that such

11:00:29 1 clauses are fully enforceable under New York law, and plaintiffs  
11:00:35 2 have acknowledged in their papers that gross negligence is a  
11:00:37 3 very high standard requiring either reckless disregard for the  
11:00:41 4 rights of others or conduct that smacks of intentional  
11:00:44 5 wrongdoing or, as the one that they cite in their papers, as  
11:00:47 6 that case put it, an absence of even slight diligence.

11:00:51 7           There is nothing even approaching that level of  
11:00:55 8 culpable conduct here, especially when Bank of America's actions  
11:00:59 9 are considered in context and without hindsight and that is, I  
11:01:02 10 think, what Your Honor was alluding to just before the break.

11:01:07 11           **THE COURT:** Well, I am violating my own prohibition  
11:01:11 12 against asking too much and giving you a chance, but I asked you  
11:01:17 13 before if it is assumed there is a material issue of fact on  
11:01:41 14 actual knowledge, is there a further question that if there was  
11:01:47 15 actual knowledge, that that would equate to gross negligence and  
11:01:52 16 not following through with the terms of the agreement.

11:01:55 17           **MR. CANTOR:** In these circumstances, Your Honor, actual  
11:02:00 18 knowledge of what we are talking about is the Lehman issue, for  
11:02:04 19 example.

11:02:05 20           **THE COURT:** Right. Yes, that Fontainebleau actually  
11:02:09 21 was doing the funding. If there were actual knowledge --

11:02:13 22           **MR. CANTOR:** Yeah.

11:02:14 23           **THE COURT:** -- I think you have conceded that would  
11:02:15 24 have been a default.

11:02:17 25           Would it then be gross -- would it necessarily follow

11:02:25 1 that as -- it is at least a jury question at that point on  
11:02:29 2 whether or not Bank of America was grossly negligent in not  
11:02:37 3 declaring the default.

11:02:37 4 **MR. CANTOR:** I don't think it is, Your Honor, because I  
11:02:39 5 think what you have got, as you have alluded to, is a situation  
11:02:43 6 where you have got, you know, Bank of America was the  
11:02:44 7 Disbursement Agent for all of the different lenders to the  
11:02:48 8 Senior Credit Facility, the initial Term Loan Lenders who had  
11:02:52 9 money already in the project, the Delay Draw Term Lenders who  
11:02:56 10 were going to be the next ones asked to fund and the Revolving  
11:02:58 11 Lenders.

11:02:59 12 So when Bank of America was asked to make a  
11:03:02 13 determination as to whether the September funding should go  
11:03:08 14 forward in light of the fact that there was no failure of  
11:03:13 15 funding here -- as Your Honor pointed out, the money showed up.

11:03:16 16 This is not a situation where Fontainebleau was  
11:03:19 17 supposed to get X dollars and it ended up getting X minus \$2.5  
11:03:26 18 million. The money was there.

11:03:27 19 I don't think, Your Honor, that it even rises to the  
11:03:31 20 level of a question of fact to say that Bank of America was  
11:03:37 21 recklessly disregarding the rights of all of the lenders if it  
11:03:43 22 had actual knowledge, which we say they did not, of  
11:03:49 23 Fontainebleau Resorts funding for Lehman, given everything else  
11:03:54 24 that was going on with the project, given the amount of money  
11:03:58 25 that was involved, given that there were undoubtedly numerous

11:04:01 1 lenders who would have wanted to see the project go forward  
11:04:05 2 especially since the money actually showed up.

11:04:06 3 **THE COURT:** Well, in effect, would it have been  
11:04:11 4 reckless to pull the plug in terms of all the lenders'  
11:04:17 5 investment up to that point --

11:04:19 6 **MR. CANTOR:** I would say --

11:04:21 7 **THE COURT:** -- when, in fact, the money was there?

11:04:22 8 **MR. CANTOR:** Absolutely, Your Honor.

11:04:23 9 You can imagine what Fontainebleau's reaction would  
11:04:27 10 have been. Remember, again, we dispute that Bank of America  
11:04:31 11 knew this, but the facts are that an affiliate of the borrower  
11:04:35 12 put in money as equity, in other words, it wanted the project to  
11:04:40 13 go forward and it was willing to put its money where its mouth  
11:04:43 14 is.

11:04:43 15 You can imagine what the reaction of the borrower would  
11:04:45 16 have been if Bank of America had come to it and said that \$2.5  
11:04:50 17 million came from the wrong place. I am glad -- it is great  
11:04:55 18 that it showed up, but it came from the wrong place and  
11:04:57 19 therefore we are pulling the plug on this project and you don't  
11:05:01 20 get the \$100 some odd million in Term Lender money that you  
11:05:06 21 otherwise requested and that you need to pay ongoing  
11:05:09 22 construction costs.

11:05:11 23 Fontainebleau sued Bank of America and the other  
11:05:16 24 Revolving Lenders for closing down the Revolver facility after  
11:05:22 25 Fontainebleau admitted publicly that there were hundreds of



11:05:25 1 millions of dollars of undisclosed costs.

11:05:27 2 If they were going to sue someone at that point, you  
11:05:29 3 can being sure that if Bank of America had stopped the funding  
11:05:32 4 to this project in September 2008, because \$4 million didn't  
11:05:37 5 come from the right place, that there would have been a lawsuit.

11:05:40 6 Bank of America would have also been in the middle of a  
11:05:42 7 lawsuit from any lender that decided that they wanted the  
11:05:48 8 project to continue, or any lender that decided, Gee,  
11:05:51 9 Fontainebleau is suing us. One way for us to get out from  
11:05:55 10 Fontainebleau suing us is for us to claim over against Bank of  
11:05:59 11 America.

11:05:59 12 I think that when you are talking about a payment of  
11:06:02 13 this magnitude that it absolutely would have been reckless in  
11:06:10 14 the other direction for Bank of America to simply shut down the  
11:06:15 15 project at that point.

11:06:17 16 **THE COURT:** How much did the Term Lenders have in the  
11:06:19 17 deal by September '08? Do you remember?

11:06:22 18 **MR. CANTOR:** Well, the initial Term Lenders had put up  
11:06:28 19 their -- I want to say -- I can't remember whether it was \$700  
11:06:31 20 or \$800 million at closing, and so it was sitting in the bank  
11:06:38 21 proceeds account and a couple of hundred million of it had  
11:06:41 22 already been disbursed to Fontainebleau for project costs.

11:06:46 23 So the money was out of their pocket. It was sitting  
11:06:51 24 in an account that was under the control of Bank of America.  
11:06:55 25 Some of it had been spent on project costs; some of it had not.

11:06:59 1 I can get you the exact figures. I don't have them at  
11:07:01 2 the tip of my fingers at the moment, Your Honor.

11:07:06 3 This all goes back to the point I am making, Your  
11:07:08 4 Honor, that you need to view all of this in context.

11:07:12 5 Okay. Bank of America, you have to remember, was  
11:07:17 6 working off of the Disbursement Agreement as it was written,  
11:07:22 7 okay, which has, as we have discussed, multiple different  
11:07:26 8 provisions telling it that it can rely on representations and  
11:07:32 9 warranties from Fontainebleau and that it doesn't need to  
11:07:36 10 investigate them further.

11:07:38 11 We are going here on the assumption, for purposes of  
11:07:41 12 this part of the argument, that as a matter of law that it would  
11:07:45 13 not be sufficient for Bank of America to allow funding if it had  
11:07:49 14 actual knowledge, but that's not what Bank of America's state of  
11:07:54 15 mind was at the time. I think that has to be an important  
11:07:57 16 consideration in determining whether Bank of America was  
11:08:00 17 recklessly disregarding the rights of others.

11:08:04 18 In addition, as we have just discussed, it wasn't clear  
11:08:06 19 that shutting down the project as soon as possible was going to  
11:08:09 20 be consistent with all of the lenders' rights and interests.

11:08:13 21 They could have had different views on this and to the  
11:08:15 22 extent that Bank of America is taking all of these different  
11:08:19 23 views into account, I don't think you can say that they were  
11:08:23 24 recklessly disregarding anybody's rights even if at the end of  
11:08:27 25 the day someone's rights were handled in a way that that party

11:08:31 1 doesn't agree with.

11:08:32 2 In addition, Your Honor, and, again, you sort of  
11:08:35 3 alluded to this prior to the break, in evaluating Bank of  
11:08:39 4 America's conduct here, it is important to consider what the  
11:08:42 5 Term Lenders were doing or, more importantly, what the Term  
11:08:45 6 Lenders were not doing.

11:08:47 7 With the sole exception of Highland Capital, who is not  
11:08:50 8 even a party here, not a single Term Lender ever demanded that  
11:08:55 9 Bank of America take any kind of action here, much less did any  
11:09:01 10 of these Term Lenders actually stick their neck out and put  
11:09:05 11 themselves on the line by issuing a Notice of Default which  
11:09:09 12 would have left them in the position of potentially being sued  
11:09:13 13 by Fontainebleau.

11:09:14 14 Obviously, Your Honor, the events that we're all  
11:09:16 15 talking about here that resulted in the failed conditions  
11:09:19 16 precedent, particularly Lehman, but really everything else that  
11:09:23 17 is a part of the parties' papers, these are facts that were  
11:09:26 18 well-known to all of the Term Lenders and yet the Term Lenders,  
11:09:30 19 for whatever reasons, chose not to act. They could have. They  
11:09:33 20 had the right to act, but they chose not to.

11:09:36 21 So you have to consider whether it is even possible for  
11:09:39 22 Bank of America to have recklessly disregarded plaintiffs'  
11:09:43 23 rights when they were unwilling to assert those rights  
11:09:47 24 themselves.

11:09:47 25 I think one of the most telling incidents here, Your

11:09:50 1 Honor, is from March 2009, but it certainly illustrates the  
11:09:57 2 position that Bank of America was in and which you, yourself,  
11:09:59 3 alluded to earlier this morning.

11:10:02 4 In March 2009, as you may recall, there was that issue  
11:10:05 5 with the two small-term lenders who failed to fund their  
11:10:09 6 commitment. It was less than two percent of the total  
11:10:12 7 commitment. It did not in any way jeopardize the amount of  
11:10:18 8 money that was on hand that month to satisfy that month's  
11:10:21 9 advance request, but the bottom line is that Z Capital and  
11:10:25 10 Guggenheim didn't fund that money.

11:10:28 11 Bank of America, after studying the situation and  
11:10:29 12 figuring out what made the most sense, made the decision that  
11:10:32 13 they were going to go ahead and allow funding that month; that  
11:10:36 14 they were going to continue to include those entities' money in  
11:10:42 15 the in balance test because they had had conversations with  
11:10:45 16 these entities and, unlike First National Bank of Nevada which  
11:10:49 17 had repudiated its commitment, it was unclear whether, in fact,  
11:10:52 18 these entities were ultimately going to fund and one of them  
11:10:54 19 ultimately did.

11:10:55 20 So on March 23<sup>rd</sup>, Henry Yu, who is here in the  
11:10:59 21 courtroom today, sent out a letter to all of the Term Lenders,  
11:11:03 22 all of the lenders actually, not just the Term Lenders, all of  
11:11:06 23 them and said, Look, here is the situation. Here is the facts.  
11:11:09 24 Here is the consequences. Here's what we are planning to do  
11:11:12 25 about it. If you disagree with what we are going to do, let us

11:11:16 1 know.

11:11:18 2           Your Honor, not a single one of the Term Lenders put  
11:11:23 3 forward any kind of an objection whatsoever to what Bank of  
11:11:27 4 America --

11:11:28 5           **THE COURT:** I'm sorry. March 23, '08?

11:11:35 6           **MR. CANTOR:** '09. Excuse me.

11:11:37 7           Not a single one of the Term Lenders put forward any  
11:11:39 8 kind of an objection. Highland, again Highland not being a  
11:11:41 9 party here, Highland sends back an email to Bank of America and  
11:11:43 10 says, Look, we are not going to tell you whether what you are  
11:11:45 11 doing is right or wrong, but we reserve the right to sue you  
11:11:48 12 either way.

11:11:49 13           So this is what Bank of America is dealing with not  
11:11:52 14 just in March but throughout. It's got all of these Term  
11:11:56 15 Lenders out there. It's got all of these Delayed Term Lenders  
11:11:59 16 out there. It's got all of these Revolver Term Lenders out  
11:12:02 17 there, and they all conceivably have differing views on what the  
11:12:07 18 right thing to do is.

11:12:08 19           All of these events are public. Lehman couldn't have  
11:12:10 20 been more public, but all of the events that are at issue here  
11:12:13 21 are either public or were available to the lenders through the  
11:12:16 22 interlinks system and none of the lenders ever come forward to  
11:12:20 23 Bank of America and say Do this, don't do that, with the one  
11:12:24 24 exception being Highland.

11:12:26 25           So how could it be that Bank of America is recklessly

11:12:30 1 disregarding these lenders' rights when these lenders aren't  
11:12:33 2 even standing up for their rights on their own, as they had the  
11:12:37 3 right to do and certainly they had knowledge of what was going  
11:12:39 4 on.

11:12:40 5           If you look at gross negligence in terms of slight  
11:12:43 6 diligence, it is clear that Bank of America's actions here were  
11:12:47 7 much more than slight diligence.

11:12:49 8           The record is clear that Bank of America was responsive  
11:12:52 9 to questions that were raised by the lenders, attempted to get  
11:12:55 10 answers to questions that they raised, that it pressed  
11:12:58 11 Fontainebleau for additional information when the lenders had  
11:13:02 12 questions, that it facilitated direct communications between the  
11:13:05 13 lenders and Fontainebleau.

11:13:07 14           There is ample evidence in the record, Your Honor, of  
11:13:11 15 individual Term Lenders having either phone conversations or  
11:13:14 16 face-to-face meetings with Jim Freeman where they asked him  
11:13:17 17 about the Lehman situation, and yet they never take any action.

11:13:22 18           On an internal basis Bank of America, it is clear, is  
11:13:25 19 thinking through these issues, vetting them, discussing them  
11:13:28 20 internally, including discussing them with counsel, and that all  
11:13:32 21 of their actions here are the result of careful and  
11:13:36 22 contemplative deliberation before they take an action.

11:13:40 23           There can be no legitimate dispute here, Your Honor,  
11:13:43 24 that Bank of America was not in any way acting with ill will  
11:13:47 25 towards the Term Lenders.

11:13:49 1 Bank of America wanted to do the right thing here. We  
11:13:53 2 can argue about whether they ultimately did the right thing or  
11:13:55 3 not, but the bottom line is they wanted to try to do the right  
11:13:59 4 thing and that, of course, is the complete antithesis of  
11:14:03 5 recklessly disregarding the lenders' rights.

11:14:06 6 The plaintiffs here bear the burden of proof on gross  
11:14:11 7 negligence. They have to not only refute the evidence that we  
11:14:15 8 have come forward showing that Bank of America acted properly,  
11:14:19 9 they are going to have to come forward with evidence sufficient  
11:14:23 10 to establish gross negligence, their own evidence, and for the  
11:14:26 11 most part they have not bothered to do that.

11:14:29 12 Their briefs -- essentially all they do is repeat their  
11:14:33 13 breach of contract argument and argue that Bank of America  
11:14:36 14 ignored facts and ignored warnings but, Your Honor, those are  
11:14:41 15 negligence arguments.

11:14:41 16 Those are arguments that say that Bank of America  
11:14:44 17 didn't act as a reasonable Disbursement Agent should have acted.  
11:14:50 18 Even if such arguments aren't foreclosed by § 9.3.2, as we say  
11:14:55 19 they are, they are insufficient without more to establish this  
11:15:00 20 added degree of culpability that you have to have here to find  
11:15:04 21 Bank of America liable.

11:15:06 22 The bottom line is that the Term Lenders have  
11:15:10 23 completely failed to satisfy their burden on summary judgment of  
11:15:14 24 creating a triable issue of fact on the issue of gross  
11:15:20 25 negligence, Your Honor.

11:15:21 1           **THE COURT:** All right. Thank you.

11:15:23 2           **MR. HENNIGAN:** Thank you, Your Honor.

11:15:26 3           I think I'm -- I was inclined to start, I think I am  
11:15:30 4 still going to start with Your Honor's questions prior to the  
11:15:35 5 break.

11:15:36 6           **THE COURT:** Nobody mentioned the Lehman funding.

11:15:39 7           **MR. CANTOR:** I don't want to cut Mike off. If you'd  
11:15:42 8 like me to, I could do it in two seconds.

11:15:45 9           **THE COURT:** Let him mention that because I would like  
11:15:46 10 you to respond to that.

11:15:48 11           What is your position? Should I consider that? Is  
11:15:52 12 that something that plays a part in this equation; and, if so,  
11:15:56 13 how?

11:15:56 14           **MR. CANTOR:** Well, I think it plays a part in the  
11:15:58 15 equation, Your Honor, in a couple of ways. I think for one  
11:16:02 16 thing, to the extent that reasonableness somehow comes into this  
11:16:06 17 on the breach issue -- and again our position is that all you  
11:16:09 18 need to know is 9.3.2 and that 9.1 does not in any way limit our  
11:16:16 19 rights under that agreement -- but to the extent that  
11:16:19 20 reasonableness comes into it, the fact that Lehman funded in  
11:16:23 21 October and November 2008 demonstrates the reasonableness of  
11:16:30 22 what I was discussing earlier this morning, which is that it was  
11:16:34 23 not clear to anybody in September that Lehman was not going to  
11:16:39 24 fund. That was not a forgone conclusion and thus, all of the  
11:16:43 25 discussions that everyone was having was about options if Lehman



11:16:49 1 didn't fund, but maybe Lehman will fund.

11:16:52 2 And the testimony, as I mentioned earlier, from the  
11:16:54 3 Bank of America side is that what they were hearing from other  
11:16:58 4 people within the bank was that there were some loans where  
11:17:03 5 Lehman was going to be stepping up in September and there were  
11:17:05 6 other loans where it was not going to be stepping up.

11:17:08 7 So the fact that Lehman eventually funded in October  
11:17:12 8 and November lends credence to the notion that Bank of America  
11:17:17 9 was reasonable in believing that it is possible that Lehman  
11:17:19 10 funded in September. So when the money comes in on September  
11:17:22 11 26 --

11:17:24 12 **THE COURT:** Does that play into the gross negligence  
11:17:25 13 issue?

11:17:25 14 **MR. CANTOR:** I think it absolutely plays into the gross  
11:17:29 15 negligence point, Your Honor.

11:17:30 16 Again, if Bank of America believed that at worst --  
11:17:33 17 and, again, let's start with the assumption that I don't accept,  
11:17:36 18 that Bank of America knew that Fontainebleau was going to fund  
11:17:40 19 for Lehman in September.

11:17:42 20 But if Bank of America believed that this was going to  
11:17:44 21 be a one-time occurrence because it was still possible that  
11:17:48 22 Lehman was going to step back in -- remember, this is all  
11:17:51 23 happening within ten days of, you know, one of the most  
11:17:56 24 monumental bankruptcy filings in American business history.

11:18:00 25 IF Bank of America believed that it was still a

11:18:04 1 possibility that as we go forward and as things calm down that  
11:18:07 2 Lehman was going to continue to fund here, which is what you get  
11:18:11 3 when you find out that Lehman funded in October and November,  
11:18:13 4 what you get when you had Fontainebleau telling Bank of America  
11:18:17 5 and all of the lenders in a memo in mid-November that it had  
11:18:20 6 talked to Lehman and Lehman said that it was going to continue  
11:18:23 7 funding, that it clearly was not grossly negligent for Bank of  
11:18:28 8 America to allow -- assuming it knew and we don't accept that --  
11:18:32 9 for Bank of America to allow a one-time equity contribution to  
11:18:36 10 bridge the gap in the face of one of the most monumental  
11:18:40 11 bankruptcy filings and uncertain business situations of all  
11:18:43 12 time.

11:18:43 13 It is only with hindsight and knowing where this case  
11:18:45 14 ended up that you would say that it is grossly negligent for  
11:18:51 15 Bank of America to allow the borrower essentially to put up more  
11:18:55 16 of its own money to close that gap if it was going to be a  
11:18:59 17 one-time gap.

11:19:00 18 **THE COURT:** All right. Thank you. I want to make sure  
11:19:01 19 I have plenty of time on the plaintiffs' side.

11:19:04 20 **MR. CANTOR:** Sure.

11:19:05 21 **THE COURT:** Go ahead, sir.

11:19:06 22 **MR. HENNIGAN:** I thought I just heard Mr. Cantor say  
11:19:09 23 that they were assured by Lehman Brothers that they were going  
11:19:12 24 to continue funding. I do not believe that that is in this  
11:19:16 25 record at all.

11:19:17 1 MR. CANTOR: That is not what I said, actually.

11:19:19 2 MR. HENNIGAN: That's what you said.

11:19:20 3 THE COURT: Okay. Well, let's continue.

11:19:22 4 MR. CANTOR: If it is what I said, I apologize because  
11:19:25 5 it is not what I meant.

11:19:28 6 MR. HENNIGAN: I want to put a point on that.

11:19:29 7 THE COURT: Go ahead.

11:19:29 8 MR. HENNIGAN: There is a lot of discussion as though  
11:19:32 9 this was a two-and-a-half million dollar issue on a multibillion  
11:19:35 10 dollar project.

11:19:35 11 This was not a two-and-a-half million dollar issue on a  
11:19:39 12 multibillion dollar project. Let's put it in context.

11:19:43 13 I am going to focus on the time period between  
11:19:46 14 September 15, 2008 and the middle of October 2008.

11:19:51 15 Here is what had happened. On September 15, 2008 -- I  
11:19:56 16 pick that date because that is the date of the Lehman Brothers  
11:19:59 17 bankruptcy filing.

11:20:01 18 It actually probably happened late with an electronic  
11:20:03 19 filing on the 14<sup>th</sup>, because there were emails that were circling  
11:20:07 20 throughout the Bank of America team about the magnitude of that  
11:20:14 21 funding early, 1:00 a.m. in the morning on September 15<sup>th</sup>.

11:20:16 22 At that moment, from June 2008, Bank of America was  
11:20:23 23 aware we were not aware that there had been a \$201 million cost  
11:20:27 24 overrun funded by capital that demonstrated the fact that the  
11:20:34 25 earlier budgets on this project, the submissions that had been

11:20:38 1 made to support earlier fundings, were false.

11:20:42 2 In an email from IVI, the consultant, it said it was  
11:20:50 3 apparent to IVI that there are additional known cost increases,  
11:20:54 4 but the amount was not disclosed to them in a meeting that they  
11:20:58 5 had had with the lenders.

11:21:00 6 So we go back to June and say there is massive cost  
11:21:03 7 overruns, \$201 million worth of disclosure of this, with  
11:21:08 8 significant additional cost overruns still to be expected.

11:21:13 9 Now, we move toward September 15<sup>th</sup>. Lehman Brothers  
11:21:18 10 files for bankruptcy. We have just heard it was the largest  
11:21:22 11 bankruptcy in American history.

11:21:24 12 The issue wasn't whether they were going to make their  
11:21:26 13 \$2.5 million payment per se. The issue was whether we could  
11:21:31 14 count on them for their substantial portion of the \$190 million  
11:21:36 15 that was still left to be funded on the retail facility.

11:21:39 16 Lehman Brothers had over \$65 million committed to that.  
11:21:45 17 The filing of bankruptcy -- let us make no mistake about it --  
11:21:49 18 put that \$190 million piece in question.

11:21:53 19 Let me read you the operative phrase from the condition  
11:21:57 20 precedent, which is that there has been no Material Adverse  
11:22:01 21 Effect. The requirement is nothing has happened, nothing has  
11:22:07 22 come to Bank of America's attention that could reasonably be  
11:22:11 23 expected to have a Material Adverse Effect.

11:22:14 24 So when Lehman Brothers files on the 15<sup>th</sup>, everybody  
11:22:20 25 knows that it could reasonably be expected to have a Material

11:22:23 1 Adverse Effect. The issue isn't whether they are going to make  
11:22:27 2 the \$2.5 million payment; it is whether they are going to remain  
11:22:31 3 committed to their share of the retail portion of this lending  
11:22:34 4 facility because without it there is hole that is unlikely to be  
11:22:40 5 filled.

11:22:40 6 So when they missed the \$2.5 million payment, that  
11:22:46 7 sends -- if it had been understood -- would have sent shock  
11:22:50 8 waves through the organizations that were concerned about this  
11:22:52 9 because it demonstrated that Lehman Brothers was not committed  
11:22:56 10 to their share of the \$190 million.

11:23:00 11 Now, Your Honor referenced the fact that in the next  
11:23:02 12 two months they did make the required draws and indeed they did.  
11:23:06 13 They never made up the draw from September and they never made  
11:23:11 14 another payment.

11:23:13 15 So by the time we get to the March draw, they are out  
11:23:17 16 of the picture. They are as dead for practical purposes as was  
11:23:22 17 the Bank of Nevada which had already disavowed their commitments  
11:23:26 18 to this project.

11:23:30 19 For some reason my mind just went to Mr. Yu's letter.  
11:23:38 20 Mr. Yu sent out a letter because two of the lenders had failed  
11:23:42 21 to make a payment and his letter suggested that they were going  
11:23:45 22 to keep those funding commitments in the in balance analysis and  
11:23:50 23 was that okay.

11:23:51 24 Well, we have looked at that. That is perfectly all  
11:23:53 25 right to keep those funding commitments in the in balance test

11:23:58 1 so long as there is a reasonable expectation that they are going  
11:24:01 2 to be made in the future. So it is okay to put it on that side  
11:24:03 3 of the ledger.

11:24:04 4 He didn't say is it okay with you that we are going to  
11:24:08 5 continue to fund this project despite the fact that there are  
11:24:13 6 enormous numbers of mounting breaches.

11:24:15 7 **THE COURT:** Well, let me ask you to respond to the  
11:24:19 8 argument that the Lehman bankruptcy was well known to everybody,  
11:24:25 9 including the Term Lenders, and if the Term Lenders believed, or  
11:24:31 10 any of them, that there was a default as a result, the Term  
11:24:37 11 Lenders could have given formal notification to Bank of America  
11:24:47 12 as the Administrative Agent to initiate the proceedings under  
11:24:54 13 the stop order.

11:24:58 14 **MR. HENNIGAN:** Recalling that we didn't -- we were not  
11:25:01 15 signatures to the Disbursement Agreement and most of our clients  
11:25:05 16 didn't have access to it. There was a division here between  
11:25:09 17 what we call public side and private side where information was  
11:25:14 18 made available through an Internet access to people who were  
11:25:18 19 willing to receive confidential information, but the public side  
11:25:22 20 lenders were not. They only got information that was generally  
11:25:26 21 made public.

11:25:26 22 So what we do have here is we have Highland Capital on  
11:25:32 23 September -- right in this time period --

11:25:34 24 **THE COURT:** Let me go back because this is what I am  
11:25:36 25 trying to clarify. The Term Lenders under the Credit Agreement

11:25:42 1 made payments.

11:25:43 2 **MR. HENNIGAN:** Yes.

11:25:44 3 **THE COURT:** And the issue, if I understand it, was  
11:25:54 4 whether the payments that were made should have been disbursed.

11:25:57 5 **MR. HENNIGAN:** Correct.

11:25:57 6 **THE COURT:** Okay. So Bank of America is raising the  
11:26:04 7 question that the Term Lenders themselves, if concerned that  
11:26:12 8 there was a default, could have sufficiently made a demand on  
11:26:19 9 Bank of America as the Administrative Agent under the  
11:26:28 10 Disbursement Agreement or Bank Agent under the Credit Agreement  
11:26:34 11 not to fund because of the default, but didn't.

11:26:38 12 **MR. HENNIGAN:** Again remembering, Your Honor, that most  
11:26:41 13 of my clients are not privy to the information that would have  
11:26:46 14 demonstrated the magnitude of the problem.

11:26:49 15 For example, not knowing what the retail lending --  
11:26:53 16 Bank of America claims it didn't know how much Lehman Brothers  
11:26:56 17 was committed to on the retail facility, but my clients  
11:26:59 18 certainly didn't know how much Lehman Brothers was committed to  
11:27:04 19 under the retail facility.

11:27:05 20 But Highland Capital did make exactly that demand to  
11:27:09 21 BofA and pointed out that the Lehman Brothers bankruptcy was,  
11:27:13 22 Number 1, their position was it was a default.

11:27:15 23 When Bank of America went back and said the mere filing  
11:27:19 24 of a bankruptcy doesn't create an automatic voiding of the  
11:27:22 25 obligation, Highland Capital said it is at least an MAE.

11:27:29 1 At the very least, it was an MAE.

11:27:31 2 **THE COURT:** Can your clients rely on that when Highland  
11:27:35 3 is not even a party here?

11:27:37 4 **MR. HENNIGAN:** Well --

11:27:38 5 **THE COURT:** And your clients then join in and said we  
11:27:41 6 agree. We demand. Can you do that after the fact?

11:27:47 7 **MR. HENNIGAN:** There is no protocol for us to do that,  
11:27:50 8 Your Honor.

11:27:50 9 **THE COURT:** Well, what about the notice provisions that  
11:27:53 10 we have discussed?

11:27:54 11 **MR. HENNIGAN:** The notice provision, that BofA is  
11:27:57 12 required to give notice to itself to stop funding?

11:28:02 13 **THE COURT:** Under the credit agreements, notice to Bank  
11:28:06 14 of America of default by any of the Term Lenders.

11:28:14 15 **MR. HENNIGAN:** Other than Highland, it would --

11:28:16 16 **THE COURT:** Well, yeah.

11:28:17 17 **MR. HENNIGAN:** I don't think there is actually a  
11:28:19 18 protocol in the Credit Agreement. I could be misremembering it,  
11:28:23 19 but I don't think there is a protocol to do that. The Credit  
11:28:26 20 Agreement contemplated that we would make our funding  
11:28:30 21 commitments.

11:28:31 22 We made \$700 million worth of commitments, or funding,  
11:28:35 23 at the time of closing. That money was sitting in the bank  
11:28:38 24 proceeds account. It could not be disbursed. There was no  
11:28:41 25 authority to disburse it unless all of the conditions precedent



11:28:44 1 were met.

11:28:45 2 I am not aware of either a protocol or anything in the  
11:28:50 3 record that would suggest that anybody was sitting on their  
11:28:54 4 rights there. They were relying upon the Disbursement Agent  
11:28:59 5 fulfilling its responsibilities.

11:29:00 6 **THE COURT:** Go ahead, sir.

11:29:02 7 **MR. HENNIGAN:** Okay. So in the earlier session we  
11:29:06 8 spent a lot of time, because I do like that issue, about the  
11:29:13 9 Fontainebleau funding for Lehman Brothers.

11:29:15 10 I like that issue because, Number 1, I think it is  
11:29:18 11 going to be a fun issue to try, but I also like that issue  
11:29:22 12 because I think they can't hide from the fact that they looked  
11:29:26 13 squarely at that default and ignored it and then tried to cover  
11:29:30 14 it up.

11:29:31 15 But there is also the fact that Bank of Nevada had  
11:29:37 16 defaulted. There is also the fact that there were misstatements  
11:29:41 17 made in the cost to complete reports that it was aware of.

11:29:47 18 It is also --

11:29:49 19 **THE COURT:** Aware of when?

11:29:50 20 **MR. HENNIGAN:** In June.

11:29:52 21 **THE COURT:** Of when?

11:29:53 22 **MR. HENNIGAN:** 2008. Exhibit 217, Susman's email to  
11:30:01 23 Yunker:

11:30:05 24 "IVI reported that Turnberry West was not prepared for  
11:30:09 25 an in-depth discussion of additional costs. The only

11:30:11 1 information brought to the meeting was the same worksheet  
11:30:14 2 that Jim provided us a couple of weeks ago.

11:30:16 3 "The meeting was scheduled for three hours, but it  
11:30:19 4 barely made it 90 minutes. One piece of information that  
11:30:22 5 did come out was that the \$201 million of increases is not  
11:30:28 6 all inclusive. It was apparent to IVI that there are  
11:30:31 7 additional known cost increases, but the amount was not  
11:30:34 8 disclosed to them."

11:30:37 9 BofA, being aware of misinformation coming from the  
11:30:42 10 borrower on subjects like budgeting, is itself a default. BofA  
11:30:47 11 not receiving information that it has requested is itself a  
11:30:52 12 default.

11:30:55 13 We have talked about this Lehman Brothers funding issue  
11:30:59 14 as though it is okay for a retail lender to make the payment for  
11:31:05 15 it, and there is indeed an interpretation of one of the  
11:31:10 16 conditions precedent that might make it okay for another retail  
11:31:14 17 lender to cover for it, but it is still a default as defined in  
11:31:17 18 the agreement for any lender, retail or otherwise, to miss  
11:31:25 19 payments.

11:31:25 20 So, we have got, yes, October and November  
11:31:28 21 Fontainebleau funds and therefore doesn't default on those  
11:31:30 22 payments, but then defaults on every other payment after that,  
11:31:33 23 so we've got mounting numbers of defaults.

11:31:36 24 Now, I am still sort of marching -- I realize I am  
11:31:41 25 being a little discursive, but I am marching through the early

11:31:45 1 days of September.

11:31:46 2           On September 18<sup>th</sup>, I may be off a day, Standard &  
11:31:52 3 Poor's downgrades the Fontainebleau facility to B minus with an  
11:32:00 4 indication that further downgrades are probable.

11:32:04 5           What it points to is what BofA also knew, which is that  
11:32:11 6 the Las Vegas market for gaming was collapsing; that they could  
11:32:16 7 no longer expect repayment to come from cash flow the way they  
11:32:20 8 had originally budgeted, and they were concerned about that  
11:32:22 9 requiring further degradation; that \$700 million of these loans  
11:32:28 10 was going to be repaid from sales of condominiums and that  
11:32:32 11 market was drying up and looked like it was going to be bleak  
11:32:36 12 going into the future; and oh, by the way, Fontainebleau  
11:32:42 13 declared bankruptcy -- I'm sorry -- Lehman Brothers declared  
11:32:46 14 bankruptcy and that piece is substantially in jeopardy.

11:32:50 15           There's nothing in the Standard & Poor's downgrade,  
11:32:53 16 other than the fact that it downgraded it, that BofA didn't  
11:32:58 17 already know.

11:32:59 18           BofA itself, during the period marching toward the  
11:33:03 19 month of March 2009, is itself contemplating a degradation of  
11:33:08 20 the credit rating of the Fontainebleau Las Vegas facility and  
11:33:12 21 ultimately does do that, puts it at a Category 9, high risk of  
11:33:16 22 default, probability of default.

11:33:18 23           So the context in which this occurs is a nightmare of  
11:33:24 24 negative information, all of which is known to the BofA at the  
11:33:28 25 time it is making this decision about is the Fontainebleau

11:33:37 1 bankruptcy an MAE?

11:33:38 2 Is the fact that they have been distorting their  
11:33:42 3 budgets itself a default? Isn't the fact that Lehman Brothers  
11:33:46 4 missed a payment strong evidence that our fears are going to  
11:33:50 5 come to fruition, that indeed we can't count on that piece?

11:33:54 6 Isn't the failure of other banks and their refusal or  
11:34:00 7 inability to make payments itself mounting? By the way, what  
11:34:04 8 about condominium sales?

11:34:07 9 So it is itself a default if Bank of America has  
11:34:11 10 adverse information that, taken as a whole -- I am kind of  
11:34:16 11 remembering what it says -- taken as a whole, places in doubt  
11:34:19 12 the other information that it has from the lender.

11:34:22 13 **THE COURT:** Let me stop that part of the argument and  
11:34:24 14 get a response. It is like a cumulative set of circumstances  
11:34:31 15 argument that puts a duty on Bank of America to determine  
11:34:38 16 default.

11:34:39 17 What's your response?

11:34:40 18 **MR. CANTOR:** Well, first of all, the Standard & Poor's  
11:34:46 19 downgrade that Mr. Hennigan just talked about is evidence of  
11:34:49 20 what we were talking about earlier, that all this information  
11:34:52 21 was out there in the public.

11:34:54 22 So to the extent that the Standard & Poor's downgrade  
11:34:56 23 went through all of these points that Mr. Hennigan considers so  
11:34:59 24 significant, they were out there for all the lenders to see.

11:35:04 25 The idea that Bank of America was the one responsible

11:35:10 1 for determining whether there was an MAE or not is just not  
11:35:15 2 consistent with the --

11:35:16 3 **THE COURT:** MAE?

11:35:17 4 **MR. CANTOR:** A Material Adverse Event.

11:35:23 5 **THE COURT:** I'm sorry. It is not consistent with what?

11:35:25 6 **MR. CANTOR:** With the contract, Your Honor.

11:35:28 7 What you got in the contract is a condition that says  
11:35:32 8 that there shall have been no Material Adverse Event. It is  
11:35:38 9 Fontainebleau that is required to rep that all of the conditions  
11:35:43 10 precedent are met. It is Fontainebleau that is required to rep  
11:35:46 11 that all of its other representations and warranties are met.

11:35:50 12 So Fontainebleau is the one that in the first instance  
11:35:57 13 is going to be the one determining whether there has been an MAE  
11:36:01 14 or not. Declaring an MAE, okay, under most circumstances, and  
11:36:06 15 certainly under these circumstances, is one of the most  
11:36:10 16 subjective and speculative determinations that one can make.

11:36:16 17 If a meteor had hit the project, yes, that would have  
11:36:19 18 been an MAE, and I don't think anyone could disagree with that.

11:36:23 19 But to determine that a set of economic factors has  
11:36:28 20 risen to the level of an MAE is always going to be a subjective  
11:36:33 21 determination.

11:36:34 22 You are never going to be able to say that Bank of  
11:36:38 23 America had actual knowledge that there was an MAE because there  
11:36:42 24 is always going to be some difference of opinion as to whether  
11:36:46 25 those facts as they stood at that time constituted an MAE.

11:36:51 1           Therefore, under the way the contract works, Bank of  
11:36:59 2 America was allowed to rely without further investigation on  
11:37:04 3 Fontainebleau's representation that, in fact, this amalgam of  
11:37:08 4 events was not an MAE.

11:37:11 5           Bank of America was not required, and it would be  
11:37:13 6 inconsistent with their role under the contract as it is  
11:37:17 7 written, for them to be the one to make that determination and  
11:37:21 8 say, yes, there has been an MAE here as a result of all these  
11:37:26 9 occurrences.

11:37:27 10           You know who could? The lenders. Again, the lenders  
11:37:30 11 never did that.

11:37:33 12           **THE COURT:** How could the lenders do that?

11:37:35 13           **MR. CANTOR:** The lenders, according to Mr. --

11:37:38 14           **THE COURT:** Let me be more specific. What provisions  
11:37:44 15 under the Credit Agreement or the Disbursement Agreement are you  
11:37:49 16 relying on that would allow the lenders, as compared to the  
11:37:54 17 controlling person, to trigger a default notice?

11:38:00 18           **MR. CANTOR:** I don't have the specific number for you.  
11:38:02 19 I'll get it for you before we are done here this morning, Your  
11:38:05 20 Honor, but the lenders obviously had the right to declare two --

11:38:08 21           **THE COURT:** Well, it is not so obvious to me.

11:38:10 22           **MR. CANTOR:** Well, because what you have got is you  
11:38:12 23 have got the provisions that provide that if Bank of America has  
11:38:16 24 been notified of an Event of Default, it is required to take  
11:38:20 25 certain action.

11:38:20 1 So, therefore that allows the lenders --

11:38:23 2 **THE COURT:** But the only notification provision that I  
11:38:28 3 saw, that we discussed, was notification by the controlling  
11:38:35 4 person of the Event of Default.

11:38:37 5 Where does it say that any of the lenders, Revolvers,  
11:38:44 6 Term Lenders, could trigger --

11:38:48 7 **MR. CANTOR:** In 9.3 of the Credit Agreement, Your  
11:38:50 8 Honor, it provides that -- and we have argued the other side of  
11:38:56 9 this, but it addresses the same issue -- the agreement provides  
11:39:00 10 that the Administrative Agent shall be deemed not to have  
11:39:02 11 knowledge of any Default, capital D default, unless and until  
11:39:07 12 notice describing such default is given to the Administrative  
11:39:10 13 Agent by borrowers, a lender or the Issuing Lender.

11:39:14 14 So that is the provision that allows the lenders to  
11:39:18 15 give notice of an Event of Default to Bank of America as  
11:39:24 16 Administrative Agent and then Bank of America, as Administrative  
11:39:27 17 Agent, would have knowledge of it and would have to act.

11:39:29 18 **THE COURT:** But here's my question. Plaintiffs argue  
11:39:34 19 that they are not parties to the Disbursement Agreement.

11:39:37 20 **MR. CANTOR:** But they are parties to the Credit  
11:39:40 21 Agreement, Your Honor.

11:39:40 22 **THE COURT:** They are parties to the Credit Agreement,  
11:39:42 23 but they are not parties as such to the Disbursement Agreement.

11:39:45 24 **MR. CANTOR:** Right. But the point is the provision I  
11:39:48 25 just read to you is from the Credit Agreement.

11:39:51 1 THE COURT: So your point is that where they are  
11:39:56 2 parties --

11:39:58 3 MR. CANTOR: Yeah.

11:39:59 4 THE COURT: -- they have an express right to initiate a  
11:40:02 5 default process.

11:40:03 6 MR. CANTOR: Right, and the contract defines that if  
11:40:08 7 Bank of America knows it, it has to act on it.

11:40:11 8 THE COURT: Let me finish.

11:40:12 9 MR. CANTOR: Sorry.

11:40:13 10 THE COURT: Let me finish. They have an express right  
11:40:16 11 to initiate a default process under the Credit Agreement,  
11:40:20 12 correct?

11:40:20 13 MR. CANTOR: Yes.

11:40:21 14 THE COURT: And give notice.

11:40:22 15 MR. CANTOR: Right.

11:40:23 16 THE COURT: Now, the money is sitting in the account.

11:40:27 17 MR. CANTOR: Right.

11:40:28 18 THE COURT: Then Bank of America has to deal with the  
11:40:35 19 Credit Agreement and Disbursement Agreement.

11:40:36 20 MR. CANTOR: Right.

11:40:37 21 THE COURT: So how does that notice under Credit  
11:40:42 22 Agreement then tie into the responsibilities and the protections  
11:40:46 23 under the Disbursement Agreement?

11:40:46 24 MR. CANTOR: You go to 2.5.1, Your Honor, and you have  
11:40:56 25 the provision that says that if the controlling agent gives



11:41:03 1 notice of an Event of Default or notice of default, the stop  
11:41:09 2 funding notice is going to be issued.

11:41:11 3           There is also 9.2.3 of the Disbursement Agreement which  
11:41:19 4 provides that if the Disbursement Agent is notified of an Event  
11:41:21 5 of Default or a Default has occurred, is continuing, that the  
11:41:27 6 Disbursement Agent shall promptly, and in any event within five  
11:41:31 7 banking days, provide notices to each of the funding agents of  
11:41:37 8 the same.

11:41:37 9           So the bottom line is, Your Honor, one way or another  
11:41:39 10 if the lenders, which they clearly had the right to do, gave  
11:41:42 11 Bank of America a formal notice of an Event of Default, Bank of  
11:41:46 12 America, both in its Disbursement Agent and Bank Agent capacity  
11:41:53 13 had obligations to act.

11:41:58 14           **THE COURT:** Okay. So let me get back to 9.2.3 for a  
11:42:04 15 moment.

11:42:06 16           **MR. CANTOR:** Okay.

11:42:07 17           **THE COURT:** If the Disbursement Agent is notified that  
11:42:11 18 an Event of Default -- which is capitalized, so that means that  
11:42:15 19 is a defined term?

11:42:16 20           **MR. CANTOR:** Right.

11:42:17 21           **THE COURT:** -- or a default has occurred and is  
11:42:20 22 continuing. So, how do I read that in terms of the Disbursement  
11:42:27 23 Agreement?

11:42:30 24           Is that notification only by the controlling person?

11:42:34 25           **MR. CANTOR:** No, I don't believe so, Your Honor.

11:42:36 1           **THE COURT:** Or if you read the two agreements together  
11:42:39 2 the way we started our discussion, is that notification by  
11:42:42 3 lenders, other lenders?

11:42:44 4           **MR. CANTOR:** I would read that -- I mean, it just says  
11:42:46 5 if the Disbursement Agent is notified, Your Honor. I don't see  
11:42:49 6 how I can credibly argue to you that that notice has to come  
11:42:52 7 from --

11:42:53 8           **THE COURT:** So let me ask from the plaintiffs' side:  
11:42:58 9 In reading that, do I not go back to the Credit Agreement itself  
11:43:05 10 where there are provisions for Term Lenders, among others, to  
11:43:08 11 give formal notice of default to Bank of America and then that  
11:43:16 12 would be sufficient under 9.2.3 to trigger those provisions?

11:43:22 13           **MR. HENNIGAN:** Your Honor, the Default that was  
11:43:23 14 referred to in the Credit Agreement where lenders have the  
11:43:27 15 opportunity to give notice is a capital D default under the  
11:43:30 16 Credit Agreement.

11:43:31 17           We are not talking about any of these things being  
11:43:33 18 defaults under the Credit Agreement. These are defaults of  
11:43:36 19 conditions or failures of conditions under the Disbursement  
11:43:40 20 Agreement.

11:43:44 21           So we don't -- you kind of fall into the capital D  
11:43:50 22 default hole in the Credit Agreement and come back over here to  
11:43:55 23 the Disbursement Agreement and say, you know, this is a question  
11:43:59 24 of knowledge and information that is flowing toward BofA from  
11:44:03 25 whatever source.

11:44:04 1           **THE COURT:** You are saying that once the Term Lenders  
11:44:10 2 put their money up, that there was no right on the part of the  
11:44:14 3 Term Lenders to notify Bank of America that, in the opinion of  
11:44:21 4 the Term Lenders, there was a formal Default and to say to Bank  
11:44:28 5 of America, "Don't disburse"?

11:44:33 6           **MR. HENNIGAN:** I am going to say two things. There is  
11:44:34 7 a defined term called "Required Lenders." You will recall we  
11:44:37 8 talked about earlier today the fact that BofA considered at one  
11:44:41 9 point going and getting consents from the lenders for the  
11:44:47 10 Fontainebleau disbursement.

11:44:49 11           If there is -- that protocol does give the required  
11:44:54 12 lenders, if that procedure is invoked by Bank of America, gives  
11:44:58 13 the required -- the quote-unquote Required Lenders authority to  
11:45:03 14 take action. That was never invoked so that sort of issue of  
11:45:10 15 lender democracy never happened.

11:45:12 16           So, what we're dealing with in September is almost all  
11:45:17 17 of \$700 million sitting in a bank proceeds account subject to  
11:45:24 18 the diligence of our Disbursement Agent making sure that at each  
11:45:29 19 level of disbursement the right conditions have been satisfied.

11:45:32 20           **THE COURT:** Okay. So let me turn back to Bank of  
11:45:34 21 America on this.

11:45:36 22           The position is that Bank of America can't rely on that  
11:45:43 23 argument because the default at issue would have to be a Default  
11:45:49 24 under the Credit Agreement, which means that the Term Lender  
11:45:53 25 wouldn't have had to fund into the account that was subject to

11:45:58 1 the Disbursement Agreement.

11:46:01 2 **MR. CANTOR:** Everything that they are talking about  
11:46:02 3 here, Your Honor, is an Event of Default, both under the  
11:46:06 4 Disbursement Agreement and under the Credit Agreement.

11:46:09 5 If there are events of default -- nothing in either  
11:46:13 6 9.2.3 or 2.5.1 in any way says that only certain events of  
11:46:25 7 default give rise to a stop funding notice.

11:46:28 8 Indeed, it is completely inconsistent with what their  
11:46:31 9 practical business position has been all along, which is that  
11:46:34 10 they wanted to make sure that the money that they had funded  
11:46:37 11 into the bank proceeds account didn't find its way into the  
11:46:40 12 project.

11:46:40 13 So the idea that it is their position that they didn't  
11:46:43 14 have the right somehow to stop that by issuing a notice of an  
11:46:47 15 Event of Default or a Notice of Default, all of these things  
11:46:51 16 that they are claiming, all of these things that they had equal  
11:46:55 17 knowledge with Bank of America, are all things that are defaults  
11:47:02 18 under all of the loan documents, both the Credit Agreement and  
11:47:07 19 the Disbursement Agreement.

11:47:08 20 **THE COURT:** Let me do this. Let me give you a few more  
11:47:13 21 minutes to complete your argument on the plaintiffs' side  
11:47:16 22 because there is another issue I have to discuss before we  
11:47:19 23 adjourn.

11:47:21 24 Any other points you want me to note that address  
11:47:27 25 issues that were raised here during oral argument or from the

11:47:32 1 papers?

11:47:35 2 **MR. HENNIGAN:** Yes, Your Honor. Thank you.

11:47:39 3 I've got a short list but I want to get to it. I want  
11:47:44 4 to read for you -- I realize that there is a lot of information  
11:47:48 5 here. It is hard to keep it all straight. I want to read to  
11:47:50 6 you the condition for disbursement that is 3.3.21.

11:47:57 7 **THE COURT:** Now we are in the Disbursement Agreement.

11:47:59 8 **MR. HENNIGAN:** The Disbursement Agreement.

11:48:01 9 **THE COURT:** 3.3.21. Let me just catch up with you.

11:48:08 10 Okay. The adverse information?

11:48:10 11 **MR. HENNIGAN:** Yes.

11:48:11 12 **THE COURT:** Yeah, I've read that.

11:48:12 13 **MR. HENNIGAN:** Okay.

11:48:14 14 Basically, you know, nobody could be certifying to BofA  
11:48:22 15 that this condition was complied with because it has to do with  
11:48:27 16 BofA subjectively being unaware of information or other matter  
11:48:32 17 affecting the project or transactions in an adverse manner  
11:48:37 18 inconsistent with the other information. You know what it says.

11:48:41 19 We've heard BofA now repeatedly say they were entitled  
11:48:46 20 to rely upon the representations of the borrower. You don't  
11:48:54 21 have any credible information in front of you in which they  
11:48:57 22 attempt to say that, in fact, they did rely.

11:49:01 23 It would have been easy enough to say it. They have  
11:49:03 24 never said it. They have never said that they relied upon a  
11:49:07 25 representation from the borrower that they didn't have adverse

11:49:11 1 information, that no Material Adverse Effect had occurred, that  
11:49:14 2 Lehman Brothers had funded.

11:49:18 3 **THE COURT:** Okay. Quick response on that?

11:49:21 4 **MR. CANTOR:** Your Honor, the bottom line is that the  
11:49:24 5 contract as written allows us to rely on all of the  
11:49:29 6 representations and warranties that are made.

11:49:33 7 **THE COURT:** Right. But how do I reconcile the language  
11:49:36 8 in 3.3.21 with Bank Agent with the other language?

11:49:45 9 **MR. CANTOR:** First of all, again, you are talking there  
11:49:47 10 about the Bank Agent, so again you have got this dichotomy  
11:49:52 11 between the two roles of Bank of America.

11:49:56 12 But the bottom line is under the contract, this is a  
11:50:01 13 contract set up by sophisticated parties that is specifically  
11:50:04 14 intended to limit the liability of the Disbursement Agent. No  
11:50:08 15 one is hiding behind that fact.

11:50:10 16 This contract was designed to limit the liability of  
11:50:12 17 the Disbursement Agent.

11:50:14 18 **THE COURT:** Let me interrupt. This is where it gets  
11:50:17 19 confusing.

11:50:18 20 **MR. CANTOR:** Yeah.

11:50:20 21 **THE COURT:** If Bank of America was to be sued as Bank  
11:50:24 22 Agent for violation of 3.3.21, would it have to be sued under  
11:50:32 23 the Credit Agreement where it was the Bank Agent?

11:50:41 24 **MR. CANTOR:** I --

11:50:42 25 **THE COURT:** Where was Bank of America a Bank Agent?

11:50:45 1 Wasn't it under the Credit Agreement?

11:50:47 2 **MR. CANTOR:** No. Actually, I believe that  
11:50:49 3 technically -- and I realize how complicated and sometimes  
11:50:53 4 counterintuitive this seems -- Bank of America was actually the  
11:50:55 5 Administrative Agent under the Credit Agreement. It was the  
11:50:59 6 Bank Agent under the Disbursement Agreement.

11:51:03 7 **THE COURT:** I'm sorry. Bank of America was the  
11:51:12 8 Disbursement Agent under the Disbursement Agreement.

11:51:15 9 **MR. CANTOR:** Yes.

11:51:17 10 **THE COURT:** Was it not the Bank Agent under the Credit  
11:51:21 11 Agreement?

11:51:21 12 **MR. CANTOR:** "Bank Agent," Your Honor, is a defined  
11:51:24 13 term that is used only in the Disbursement Agreement. The term  
11:51:28 14 that is used to describe Bank of America in the Credit Agreement  
11:51:32 15 is the Administrative Agent.

11:51:33 16 **THE COURT:** Okay. This is where we started.

11:51:39 17 **MR. CANTOR:** Right.

11:51:39 18 **THE COURT:** Is Bank of America being sued as  
11:51:44 19 Disbursement Agent or Bank Agent?

11:51:47 20 **MR. CANTOR:** Disbursement Agent, Your Honor. So Bank  
11:51:50 21 of America, as Disbursement Agent, is relying on all of the  
11:51:54 22 certifications by Fontainebleau that all of the conditions  
11:51:57 23 precedent are satisfied.

11:52:00 24 9.2.5, Your Honor, which you talked about a little bit  
11:52:05 25 earlier --

11:52:06 1 THE COURT: So where does 3.3.21 come in?

11:52:13 2 MR. CANTOR: I'm not sure I am following your question,  
11:52:15 3 Your Honor.

11:52:15 4 THE COURT: Okay. How do I read this paragraph in  
11:52:22 5 terms of Article 9?

11:52:25 6 MR. CANTOR: In terms of Article 9, Your Honor, you  
11:52:26 7 have got both 9.3.2, which allows us to rely without  
11:52:31 8 investigation on the certification from Fontainebleau that every  
11:52:35 9 single one of the conditions precedent, regardless of who, if  
11:52:39 10 you will, is the action person under that condition precedent,  
11:52:44 11 Fontainebleau certifies that every single one of those  
11:52:46 12 conditions precedent is satisfied as of the disbursement date  
11:52:53 13 and Bank of America, as Disbursement Agent, is entitled to rely  
11:52:57 14 on that certification without further investigation.

11:53:00 15 9.2.5, which is entitled no imputed knowledge,  
11:53:06 16 specifically provides that the Disbursement Agent shall not be  
11:53:09 17 deemed to have knowledge of any fact known to it in any capacity  
11:53:13 18 other than the capacity of Disbursement Agent or by reason of  
11:53:16 19 the fact that the Disbursement Agent --

11:53:18 20 THE COURT: But --

11:53:18 21 MR. CANTOR: I need to finish this, I apologize.  
11:53:21 22 -- is also a funding agent.

11:53:22 23 THE COURT: Pardon me. Pardon me. Pardon me. Bank  
11:53:26 24 Agent is a defined term in the Disbursement Agreement that says  
11:53:31 25 the Bank Agent is Bank of America in its capacity as



11:53:34 1 Administrative Agent under the Credit Agreement.

11:53:36 2 **MR. CANTOR:** Yes, Your Honor.

11:53:37 3 **THE COURT:** So my question is: If there is a violation  
11:53:40 4 of 3.3.21 as to Bank of America as Bank Agent, wouldn't it have  
11:53:50 5 to be a suit under the Credit Agreement against Bank of America?

11:53:54 6 **MR. CANTOR:** If that is how the claim was going to be  
11:53:58 7 phrased, yes, I would say you're right, Your Honor, but to be  
11:54:01 8 fair, that is not how the claim is phrased.

11:54:04 9 The claim is that Bank of America, as Disbursement  
11:54:05 10 Agent, shouldn't have allowed the funding to go forward because,  
11:54:09 11 among other things, this condition precedent was not satisfied.

11:54:12 12 The problem is that they can't establish that this  
11:54:15 13 condition precedent was not satisfied or that Bank of America  
11:54:18 14 was not entitled to rely on the certification by Fontainebleau  
11:54:23 15 that it was satisfied.

11:54:26 16 **THE COURT:** All right. I know there is so much more  
11:54:28 17 that both parties have, but we have been at it for almost three  
11:54:32 18 hours, so let me get to one other issue which is important that  
11:54:38 19 we discuss and, that is, I had entered back in January 2010,  
11:54:49 20 which seems like a long time ago, MDL order number 3 which set  
11:54:56 21 dates, among other thing, for a pretrial conference in January  
11:55:00 22 2012. That seemed like a very long time back in 2010.

11:55:06 23 But let's talk about the posture of the case and my  
11:55:16 24 role as an MDL Judge and what my options are here depending on  
11:55:22 25 what I do on these motions.

11:55:24 1 Right now there is before the Eleventh Circuit -- and I  
11:55:28 2 think the briefing is done. I don't know if the Eleventh  
11:55:31 3 Circuit has set oral argument yet.

11:55:33 4 **MR. CANTOR:** There has been no argument date yet, Your  
11:55:35 5 Honor.

11:55:35 6 **THE COURT:** But the briefing has been done before the  
11:55:38 7 Eleventh Circuit on the fully funded questions, right?

11:55:42 8 **MR. CANTOR:** Yes.

11:55:43 9 **THE COURT:** Okay. The only case that I actually had  
11:55:48 10 was the one that Fontainebleau brought --

11:55:51 11 **MR. CANTOR:** Right.

11:55:52 12 **THE COURT:** -- which deals with the fully funded  
11:55:55 13 aspect, although Term Lenders raise this in this suit.

11:56:00 14 So let's assume for the sake of just a discussion that  
11:56:11 15 the Eleventh Circuit affirms on fully funded. My case  
11:56:18 16 disappears in terms of what I have in this district. That  
11:56:24 17 leaves, if there is a trial on what we are discussing today, the  
11:56:31 18 cases in Las Vegas and New York, right?

11:56:34 19 **MR. CANTOR:** Well, I think -- and these guys will have  
11:56:37 20 to tell you -- I think the New York case no longer exists  
11:56:41 21 because -- and you signed some orders to this effect -- but  
11:56:44 22 effectively all of the Term Lenders that were plaintiffs in the  
11:56:48 23 New York case had sold their interests to Term Lenders who are  
11:56:51 24 plaintiffs in the Nevada case and I think -- it has never been  
11:56:56 25 actually dismissed, I don't think.

11:56:59 1 MR. DILLMAN: Actually, it has.

11:57:00 2 MR. CANTOR: Has it been dismissed?

11:57:02 3 MR. DILLMAN: I believe so.

11:57:02 4 THE COURT: Well, let's assume it has. That leaves the  
11:57:05 5 Las Vegas case --

11:57:06 6 MR. CANTOR: Right.

11:57:07 7 THE COURT: -- right? So, if there is a trial on the  
11:57:15 8 issues, it is going to be in Las Vegas because, as an MDL Judge,  
11:57:22 9 I have to send this bank to the federal court there.

11:57:29 10 MR. CANTOR: I think as a practical matter -- and I am  
11:57:31 11 sure my worthy adversary will chime in momentarily -- that is  
11:57:38 12 correct. I believe that it is permissible for Your Honor, if  
11:57:40 13 the parties agreed, for Your Honor to keep it here.

11:57:44 14 But I don't think -- I think that is a moot point.

11:57:47 15 THE COURT: Under the MDL statute and all and  
11:57:51 16 interpretation, I, as the MDL Judge, have to stop my work and  
11:57:58 17 send it back to the original court once I complete this phase of  
11:58:06 18 it.

11:58:06 19 Now, whether the parties can convince the Court in Las  
11:58:13 20 Vegas that I ought to try this thing and transfer it back to me  
11:58:16 21 for some reason, whether I accept it, because I don't have a  
11:58:19 22 case here, is a whole other issue.

11:58:23 23 MR. CANTOR: Right.

11:58:23 24 THE COURT: But it appears to me that my obligation, if  
11:58:29 25 I determine that there are material issues of fact and a trial

11:58:34 1 is necessary -- and, by the way, it has to be a nonjury trial  
11:58:40 2 according to the papers, right?

11:58:42 3 **MR. HENNIGAN:** Correct, Your Honor.

11:58:43 4 **THE COURT:** That goes back to Las Vegas.

11:58:47 5 So then I have to say, Well, wait a minute. Don't I  
11:58:52 6 have to wait to see what the Eleventh Circuit does on the fully  
11:58:57 7 funded questions to see whether I have a case that goes forward  
11:59:03 8 with Fontainebleau because if I do have that case and all these  
11:59:09 9 other matters are related, then, you know, should I, you know,  
11:59:16 10 integrate everything if the parties want that?

11:59:18 11 **MR. CANTOR:** Well, I think so, Your Honor, because  
11:59:20 12 if -- and obviously, you know, we hope and believe that it won't  
11:59:24 13 happen, but if the fully funded case were to come back as to  
11:59:29 14 both entities, there is going to be further discovery on that  
11:59:32 15 issue.

11:59:33 16 **THE COURT:** Right. The Term Lenders have an issue in  
11:59:38 17 that and Fontainebleau has an issue in that, in the fully funded  
11:59:43 18 side.

11:59:43 19 **MR. CANTOR:** Right.

11:59:44 20 **THE COURT:** Okay. So then I still have a case to which  
11:59:51 21 all of these issues then also relate, plus there are going to be  
11:59:57 22 all kinds of other claims, I assume, against Fontainebleau based  
12:00:01 23 on the discovery that has come out here.

12:00:05 24 **MR. CANTOR:** I will let them speak. There are  
12:00:07 25 litigations pending against Fontainebleau that these folks have

12:00:11 1 filed. There is still stuff going on in the bankruptcy, Your  
12:00:14 2 Honor, litigations relating to lien priority and things like  
12:00:18 3 that.

12:00:19 4 **THE COURT:** Well, I haven't begun to --

12:00:21 5 **MR. CANTOR:** The trustee actually has filed its own  
12:00:24 6 fraud claim against Fontainebleau and the Soffer entities in  
12:00:29 7 bankruptcy court here.

12:00:32 8 **THE COURT:** Okay. So the bottom line is that in terms  
12:00:36 9 of the MDL order that I have issued, should I not hold anything  
12:00:43 10 in abeyance, at least at the moment, until I determine the  
12:00:50 11 issues on this case that are before me and hear further from the  
12:00:55 12 Eleventh Circuit because I can't take you to trial in any event?

12:01:00 13 **MR. CANTOR:** I would say, Your Honor, that certainly,  
12:01:02 14 at a minimum, it makes sense for us to wait until you rule on  
12:01:05 15 these motions.

12:01:07 16 **THE COURT:** Why should I require everybody to file here  
12:01:13 17 a pretrial stipulation which will take you a lot of time when  
12:01:17 18 you don't know all the issues that would be going to trial?

12:01:24 19 **MR. HENNIGAN:** Your Honor, first of all, I need two  
12:01:27 20 more minutes on the substance of this argument.

12:01:31 21 **THE COURT:** Let me get my answer first.

12:01:34 22 **MR. HENNIGAN:** The answer is I don't know. Certainly I  
12:01:38 23 think Your Honor needs to decide these motions. Whether there  
12:01:42 24 is a sufficient overlap with the Eleventh Circuit case and this  
12:01:46 25 one, I think there's not.

12:01:50 1 I think once we're done with these motions, this case  
12:01:52 2 ought to be liberated to go to Vegas for its trial and I think  
12:01:59 3 at that point the case that is pending before Your Honor will  
12:02:03 4 probably be a stand-alone version here.

12:02:07 5 But, honestly, I hadn't really thought it through.

12:02:13 6 **THE COURT:** All right.

12:02:13 7 **MR. CANTOR:** Your Honor, I don't understand how that  
12:02:14 8 could be. Essentially, they filed a complaint with multiple  
12:02:19 9 counts. We won on the fully drawn counts. Over our objection,  
12:02:24 10 that went up to the Eleventh Circuit. It is still part of this  
12:02:27 11 case.

12:02:27 12 **THE COURT:** I think I heard --

12:02:30 13 **MR. HENNIGAN:** That's right.

12:02:30 14 **THE COURT:** You have got two minutes.

12:02:32 15 **MR. HENNIGAN:** I forgot. That's true.

12:02:34 16 **THE COURT:** Use them wisely.

12:02:39 17 **MR. HENNIGAN:** I will talk fast.

12:02:41 18 First of all, Your Honor before the break suggested  
12:02:44 19 that, you know, why would they pull the plug, quote-unquote, for  
12:02:48 20 a two-and-a-half million shortfall. Pulling the plug was not  
12:02:52 21 one of their options.

12:02:54 22 What they needed to do was to issue a stop funding  
12:02:57 23 order, perhaps call the lenders together to discuss it and have  
12:03:02 24 lender clarification on some of these issues, but stop funding  
12:03:06 25 doesn't mean stop the project. It means that once the

12:03:10 1 conditions can be resolved, they can be resolved and move  
12:03:15 2 forward largely consensually.

12:03:17 3 My second point was on the --

12:03:19 4 **THE COURT:** Well, what do you mean? In reality, if you  
12:03:22 5 are not paying the contractors, the project stops.

12:03:24 6 **MR. HENNIGAN:** You stop paying the contractors at that  
12:03:28 7 moment and certainly the project in terms of a funding sense  
12:03:31 8 stops at that moment until these issues can be resolved and  
12:03:34 9 perhaps consensually.

12:03:37 10 **THE COURT:** Are you trying to tell me that if a stop  
12:03:40 11 order was issued, that this project wouldn't have imploded at  
12:03:47 12 that point?

12:03:47 13 **MR. HENNIGAN:** I think without any doubt this project  
12:03:50 14 was doomed at that moment, Your Honor. Just as a technical  
12:03:54 15 matter --

12:03:55 16 **THE COURT:** That is not my question.

12:03:57 17 Are you trying to tell me that if a stop funding order  
12:04:01 18 was issued, the project would not have imploded at that point  
12:04:06 19 because of the contractors not getting paid and all the rest of  
12:04:10 20 this thing given the Lehman bankruptcy and all the other --

12:04:13 21 **MR. HENNIGAN:** I am saying not at that moment. I  
12:04:16 22 believe that had the democracy protocols taken effect, it would  
12:04:21 23 have ultimately -- look, make no mistake about it. I think had  
12:04:25 24 the right thing been done in September, this project would have  
12:04:28 25 ended on that date. The \$700 million would still be in the bank

12:04:33 1 account and people would have been much better off than they  
12:04:39 2 ultimately became.

12:04:41 3 Now, the last point -- I am trying to speak quickly --  
12:04:44 4 on the cases with respect to gross negligence, it occurred to me  
12:04:47 5 reviewing them on the way here that we need to put them into  
12:04:50 6 three categories in the group contract cases that have gross  
12:04:56 7 negligent provisions.

12:04:57 8 Category Number 1 are contracts for the provision of  
12:05:01 9 goods and services. Those contracts can be intentionally  
12:05:06 10 breached as long as there is payment of direct damages. Those  
12:05:09 11 are what I call the efficient breach cases. That is, for  
12:05:14 12 example, Global Crossing.

12:05:20 13 In the case of contracts that provide for protection of  
12:05:23 14 property, which is banks with conditions on funding and alarm  
12:05:28 15 companies that, under certain conditions, are required to take  
12:05:31 16 action to protect properties, in those cases where the  
12:05:35 17 conditions have occurred that require affirmative action, the  
12:05:39 18 courts have routinely held that gross negligence is a triable  
12:05:44 19 fact.

12:05:45 20 In the one case that we cited, which is DRS, when the  
12:05:50 21 bank has actively participated in the loss of property, it was  
12:05:55 22 held to be gross negligence as a matter of law.

12:06:04 23 **MR. CANTOR:** For the most part it is in our papers.  
12:06:07 24 Your Honor, at this point I am not going to belabor why DRS is  
12:06:12 25 completely factually inapposite here. I think the showing in



12:06:16 1 our paper on gross negligence is sufficient.

12:06:18 2 THE COURT: Thank you for your participation this  
12:06:20 3 morning. I found it very helpful to discuss these issues with  
12:06:25 4 you and hear your input.

12:06:27 5 MR. HENNIGAN: I always enjoy being here, Your Honor.

12:06:28 6 MR. CANTOR: Thank you, Your Honor.

12:06:32 7 [The proceedings conclude at 12:06 p.m., 11/18/11.]

8 CERTIFICATE

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

11  
12 11.19.11

DATE



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO.: 09-MD-02106-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 58; HOLDING DATES IN ABEYANCE**

This matter is before the Court *sua sponte*. On January 8, 2010, I entered MDL Order Number Three [**ECF No. 10**], setting pretrial deadlines and a trial date. Subsequently, I entered several orders which are on appeal [**see, e.g., ECF Nos. 168, 203, 208**]. The outcome of the appeals affects whether any matters will go to trial in this district. Accordingly, having reviewed the record and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that all pending deadlines, dates and hearings set forth in MDL Order Number Three [**ECF No. 10**] are **HELD IN ABEYANCE**, subject to further direction of this Court.

DONE and ORDERED in Chambers in Miami, Florida, this 22nd day of November, 2011.

  
\_\_\_\_\_  
THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman  
All counsel and parties of record



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November 23, 2011

**VIA MESSENGER**


Honorable Alan S. Gold  
United States District Courthouse  
(Courtroom 11-1)  
Eleventh Floor  
400 North Miami Avenue  
Miami, Florida 33128

**Re: Fontainebleau Las Vegas, LLC v. Bank of America, N.A., et al.,  
Adv. No. 09-01621-ap-AJC**

Dear Judge Gold:

At the hearing last Friday in connection with the parties' motions for summary judgment, the Court asked whether plaintiffs' wrongful disbursement claim was being pursued against BofA solely in its capacity as Disbursement Agent or also in its capacity as Bank Agent. We were concerned that the record may not have been clear on this point. BofA was a party to the Disbursement Agreement in both capacities, and, as set forth at Paragraph 74 of the Second Amended Complaint, plaintiffs have asserted their claim against BofA in both capacities.

Sincerely,

  
Kirk D. Dillman

cc: Bradley Butwin, Esq. (via email)  
Daniel L. Cantor, Esq. (via email)  
Jonathan Rosenberg, Esq. (via email)  
William Sushon, Esq. (via email)  
Ken Murata, Esq. (via email)  
Asher Rivner, Esq. (via email)  
Jamie Zysk Isani, Esq. (via email)

**McKool Smith  
A Professional Corporation • Attorneys**

**Austin | Dallas | Houston | Los Angeles | Marshall | New York | Washington, DC**

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 59;  
ORDERING REGARDING COMMUNICATIONS WITH THE COURT**

This matter is before the Court *sua sponte*. On November 23, 2011, the Court received via messenger a letter from Kirk D. Dillman regarding the parties' positions on the pending summary judgment motions. The letter has been entered on the docket. See [ECF No. 328].

The parties are EXPRESSLY ADVISED that any communications with the Court regarding the parties' positions on the pending summary judgment motions or any other substantive matter must be in the form of a formal pleading and filed of record.

DONE and ORDERED in Chambers in Miami, Florida, this 29<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman  
All counsel and parties 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 09-CV-23835-ASG.

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**STIPULATION FOR ENTRY OF [PROPOSED] ORDER DISMISSING THE ACTION  
OF PLAINTIFFS STONE LION PORTFOLIO, L.P. AND CANYON SPECIAL  
OPPORTUNITIES MASTER FUND (CAYMAN), LTD. WITHOUT PREJUDICE**

WHEREAS, on June 9, 2009 the Plaintiffs 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 PLC, HSH Nordbank AG, New York Branch, 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.);

WHEREAS, on May 28, 2010, all claims were dismissed against all Defendants except Counts I and V asserted against Bank of America, N.A. (“BofA”);

WHEREAS, on July 7, 2011, Plaintiff Stone Lion Portfolio, L.P. sold the Term Loans that form the basis for the claims at issue in this action to another Term Lender who is already a plaintiff in this action (the “Purchasing Plaintiff”) and who is pursuing such claims in its own name;

WHEREAS, on July 14, 2011, Plaintiff Canyon Special Opportunities Master Fund (Cayman), Ltd. sold the Term Loans that form the basis for the claims at issue in this action to a Purchasing Plaintiff who is pursuing such claims in its own name;

WHEREAS, Plaintiffs Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd. have no remaining interest in this case other than to ensure that the Purchasing Plaintiffs are not precluded from pursuing claims arising out of such Term Loans;

WHEREAS, pursuant to Federal Rule of Civil Procedure Rule 41(a)(1)(A)(ii), Plaintiffs Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd. seek to voluntarily dismiss this action without prejudice to the right of the Purchasing Plaintiffs to pursue such action in their own name;

WHEREAS, Defendant BofA has no objection to the relief sought in this Stipulation;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, counsel of record, that Plaintiffs Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd. can and should be dismissed without prejudice pursuant to the [Proposed] Order Approving Stipulation to Dismiss the Action of Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd. Without Prejudice, attached hereto as Exhibit A.



Respectfully submitted,

Dated: December 14, 2011

By: /s/ Lorenz Michel Prüss

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*Attorneys for Plaintiffs Avenue CLO Fund,  
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*Attorneys for Defendant Bank of America, N.A.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **STIPULATION FOR ENTRY OF [PROPOSED] ORDER DISMISSING THE ACTION OF PLAINTIFFS STONE LION PORTFOLIO, L.P. AND CANYON SPECIAL OPPORTUNITIES MASTER FUND (CAYMAN), LTD. 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: December 14, 2011.

/s/ Lorenz M. Prüss  
Lorenz M. Prüss, Esq.

**SERVICE LIST**

<b>Attorneys:</b>	<b>Representing:</b>
<p>Bradley J. Butwin, Esq.                      Daniel L. Cantor, Esq.                      Jonathan Rosenberg, Esq.                      William J. Sushon, Esq.                      Ken Murata, Esq.                      Asher Rivner, Esq.  <b>O'MELVENY &amp; MYERS LLP</b>                      Times Square Tower                      7 Times Square                      New York, NY 10036                      Tele: (212) 326-2000                      Fax: (212) 326-2061</p>	<p>Defendants                      Bank of America, N.A.                      Merrill Lynch Capital Corporation</p>
<p>Craig V. Rasile, Esq.                      Kevin Michael Eckhardt, Esq.  <b>HUNTON &amp; WILLIAMS</b>                      1111 Brickell Avenue                      Suite 2500                      Miami, FL 33131                      Tele: (305) 810-2579                      Fax: (305) 810-2460</p>	<p>Defendants                      Bank of America, N.A.                      Merrill Lynch Capital Corporation</p>

# 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 09-CV-23835-ASG.

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**[PROPOSED] ORDER APPROVING STIPULATION TO DISMISS THE ACTION OF  
PLAINTIFFS STONE LION PORTFOLIO, L.P. AND CANYON SPECIAL  
OPPORTUNITIES MASTER FUND (CAYMAN), LTD. WITHOUT PREJUDICE**

The Court having considered the parties' Stipulation to dismiss without prejudice the action of Plaintiffs Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd., and good cause appearing,

IT IS HEREBY ORDERED that:

1. Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd. are hereby DISMISSED WITHOUT PREJUDICE from this action against Defendant Bank of America, N.A.. This Order has no effect on claims asserted against any other parties.
2. The clerk is directed to correct the docket so that the above-referenced parties are no longer listed as plaintiffs in this action.

DONE AND ORDERED in Chambers at Miami, Florida, this \_\_\_ day of December, 2011.

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THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT COURT JUDGE

cc: Magistrate Judge Goodman  
All Counsel of Record

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

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

**MDL No. 2106**

This document relates to 09-CV-23835-ASG.

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**MDL ORDER No. 60; APPROVING STIPULATION [ECF No. 330] TO DISMISS THE ACTION OF**  
**PLAINTIFFS STONE LION PORTFOLIO, L.P. AND CANYON SPECIAL OPPORTUNITIES**  
**MASTER FUND (CAYMAN), LTD. WITHOUT PREJUDICE**

This Cause is before the Court upon the parties' Stipulation to dismiss without prejudice the action of Plaintiffs Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd. [ECF No. 330]. Having reviewed the Stipulation and being otherwise duly advised,

IT IS HEREBY ORDERED that:

1. Stone Lion Portfolio, L.P. and Canyon Special Opportunities Master Fund (Cayman), Ltd. are hereby **DISMISSED WITHOUT PREJUDICE** from this action against Defendant Bank of America, N.A.
  
2. This Order has no effect on claims asserted by or against any other parties.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of December, 2011.

  
\_\_\_\_\_  
THE HONORABLE ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Jonathan Goodman  
All Counsel of Record