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)

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

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TABLE OF CONTENTS

MR. HASBUN: All rise. The Honorable Alan S. Gold presiding. This Court is in session.

THE COURT: Good morning.

MR. HENNIGAN: Good morning, Your Honor.

MR. CANTOR: Good morning, Your Honor.

THE COURT: Please be seated. I need just one moment, please. So, let me begin by welcoming everyone. I wish you and your family a very happy holiday to come.

MR. HENNIGAN: Thank you.

MR. CANTOR: Thank you, Your Honor.

THE COURT: And at this time I will call Case 09-MD-02106, and let me start with appearances, please, on that side.

MR. HENNIGAN: Good morning, Your Honor. Michael Hennigan on behalf of the plaintiffs.

THE COURT: I'm only going to ask everybody, if you don't mind, since I can only hear and Mr. Millikan can only hear, to speak directly in a microphone.

MR. HENNIGAN: I forgot. Good morning.

MR. DILLMAN: Good morning, Your Honor. Kirk Dillman on behalf of the plaintiffs.

THE COURT: All right. Thank you. Would you like to introduce who else is present today?

MR. CANTOR: Good morning, Your Honor. Dan Cantor from O'Melveny & Myers on behalf of Bank of America.

09:02:04 **MR. MURATA:** Ken Murata also from O'Melveny & Myers for
09:02:09 Bank of America.
09:02:10 **THE COURT:** Thank you.
09:02:11 **MS. ISANI:** Jamie Isani of Hunton & Williams on behalf
09:02:16 of Bank of America.
09:02:17 **THE COURT:** All right. What I would like to do -- and
09:02:20 I know you've prepared PowerPoints® and I'll listen to them -- by
09:02:25 the way, I do have others who are listening by telephone. Let
09:02:33 me get the calls transferred in now, although they're muted,
09:02:46 right?
09:02:46 **MR. HASBUN:** They should be, but let me go inside,
09:02:46 Judge.
09:02:46 **THE COURT:** Okay. Let me welcome everybody else who
09:02:48 has now transferred in on the telephone. I've had appearances
09:02:57 from counsel, and I understand that your participation is muted.
09:03:05 It would help me, before I hear your specific arguments
09:03:11 and get into the PowerPoint®, to walk through some of the matters
09:03:18 that I'm trying to figure out and, if you don't mind, have more
09:03:24 of a conversation about these matters where I can engage both
09:03:27 sides, rather than start with the formal presentations, counter,
09:03:35 then, you know, the rest of it.
09:03:39 Often this gives me more clarity on positions and helps
09:03:45 frame the issues. So I'm going to invite you for the moment to
09:03:49 stay seated and you'll have your papers in front of you -- that
09:03:54 will be helpful -- and you may consult with each other as you

need in addressing some of these questions.

Fair enough?

MR. CANTOR: Yes, Your Honor.

THE COURT: All right. So let's go through the matter in the following way: What I would like to try to start with is to focus on the key agreement which is before me in this aspect of the litigation and that's the Master Disbursement Agreement, correct?

MR. CANTOR: Correct, Your Honor.

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

But is it a correct statement of position with regard to, starting with the plaintiffs' summary judgment motions, that the motions are directed against Bank of America solely in its capacity as Disbursement Agent under the Master Disbursement Agreement?

Would you agree to that or not?

MR. HENNIGAN: And as Administrative Agent, Your Honor.

THE COURT: And as what?

MR. HENNIGAN: Administrative agent under the Credit Agreement.

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

that and, yet, I do want further to ask questions about the interrelationships of agreements because there are times when Bank of America refers to the Credit Agreement, such as on notice requirements, and there are no comparable requirements that I saw written in the same way in the Disbursement Agreement.

So let me ask both sides about some of these matters. Do you have the Disbursement Agreement in front of you?

MR. CANTOR: I do, Your Honor.

MR. HENNIGAN: About to.

THE COURT: Yes. If you don't mind, can you turn to Page 80? Take a moment.

MR. DILLMAN: Sorry for the delay, Your Honor.

THE COURT: No. That's all right. Take a moment. Let me know when you get there.

MR. HENNIGAN: We're there.

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

In other words, where there are notice provisions in the Credit Agreement that are referred to in Bank of America's briefs, from the plaintiffs' standpoint, do those notice provisions apply and sort of fill in a gap with regard to how 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 Agreement only.

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

09:11:53 Under the Disbursement Agreement, Bank of America, as the Disbursement Agent, has responsibilities to the Term Lenders --

09:12:02 **MR. CANTOR:** Yes, Your Honor.

09:12:08 **THE COURT:** -- independent, even if they're not signatories to it.

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

09:12:12 We have never contended, Your Honor, that because the Term Lenders are not signatories to the Disbursement Agent that they don't have the right to sue Bank of America for breaching its duties as Disbursement Agent. We've never raised that argument.

09:12:26 **THE COURT:** All right. So let's go back to 9.1 for a minute and just the beginning of that section:

09:12:40 "Each of the funding agents hereby irrevocably appoints an authorized Disbursement Agent to act on its behalf hereunder and under the control agreements."

09:12:52 I've never seen anything called "control agreements" in the record. Did anybody put any control agreements in their summary judgment motions that we've missed here?

09:12:57

09:13:01

09:13:06

09:13:09

09:13:18

09:13:22 **MR. CANTOR:** The control agreements -- that's
09:13:26 interesting. I'm looking at the definitions, and it doesn't
09:13:30 seem to be defined.
09:13:32 I think everyone had always understood that the control
09:13:37 agreements included, among other things, the Credit Agreement,
09:13:41 and this would be one place where there's an interplay.
09:13:45 **THE COURT:** My question is very narrow.
09:13:47 **MR. CANTOR:** Okay.
09:13:48 **THE COURT:** Is there a document called "control
09:13:50 agreement"?
09:13:50 **MR. CANTOR:** I do not believe so, Your Honor. I
09:13:52 believe "control agreement" is a defined term referring to other
09:13:54 agreements.
09:13:59 **THE COURT:** What about from the plaintiffs' standpoint?
09:14:04 Is there something independent that was signed called "control
09:14:09 agreement?" I'll give you something specific in reference to
09:14:15 that in a moment.
09:14:16 What's your understanding of that? Doesn't that have
09:14:23 some significance to that clause which is an issue in this case?
09:14:35 **MR. HENNIGAN:** Your Honor, we've never focused on that
09:14:38 issue.
09:14:38 **THE COURT:** Well, if you turn to your appendix of
09:14:43 definitions on Page 9, it says:
09:14:47 "'Control agreements' means the control agreements of
09:14:51 even date herewith, executed by the project entities, in

respect of the accounts in favor of the Disbursement Agent," et cetera, et cetera.

So I beg to differ. There is, according to the definitions, a document which was executed at the time of the Disbursement Agreement called the control agreement which is referenced in 9.1 and seems to have perhaps some significance and, yet, I can't find it in the materials referenced by either party.

MR. CANTOR: Your Honor, I think this is going to be a slightly imperfect answer but in the definition there, it refers to § 2.2.

If you turn to § 2.2, which is Pages 3, 4, and 5 of the agreement, I think what you will see is that the control agreements seem to refer to agreements that essentially allow the Disbursement Agent to move funds from bank accounts which are in the name of the project entities.

THE COURT: Okay. But let me give you a specific example of one of the problems that I'm having trying to understand the document that is at issue here.

If you turn to Page 10 under § 2.5.1, the stop funding notices, and look at subpart 2, it refers to the controlling person notifying the Disbursement Agent that a default or Event of Default has occurred.

Isn't "controlling person" and all of its responsibilities defined in the control agreement?

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

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

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

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

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

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

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

interpreting this language in 9.1, I don't need to worry about or look at anything called control agreements?

MR. CANTOR: Yes, Your Honor, that would be our position.

MR. HENNIGAN: That's our position as well.

THE COURT: Okay. So I should ignore all that --

MR. CANTOR: Yes, sir.

THE COURT: -- right? That's your mutual position.

Does either party contend that the Disbursement Agreement contains an ambiguity --

MR. CANTOR: Defendants --

THE COURT: -- under New York law?

MR. CANTOR: Defendants do not, Your Honor.

MR. HENNIGAN: There is a potential ambiguity, Your Honor.

THE COURT: Well, how did you argue it in your briefs?

MR. HENNIGAN: We have argued no ambiguity.

THE COURT: Okay. Thank you. That's what I'm trying to find out, everybody's position.

So let me give you a question about that. The second sentence -- let's see -- of 9.1 talks about the Disbursement Agent accepts such appointments and agrees to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder, consistent with those of similar institutions holding collateral,

et cetera, and disbursing control funds.

Doesn't that refer necessarily to extrinsic evidence? How do I know what that standard is? It is not defined in the agreement as a specific definition.

MR. CANTOR: Well, I think, Your Honor, that when it comes time to apply that definition to specific conduct, it's a determination that one, you know, will make.

Obviously, it has to be based on the evidence before you, and the trier of fact is entitled to apply its judgment as to whether something is or is not commercially reasonable, recognizing, Your Honor, our position that § 9.1 is just sort of a general introductory provision.

THE COURT: We will talk about that.

MR. CANTOR: Correct.

THE COURT: I am only talking about 9.1.

MR. CANTOR: Okay.

THE COURT: It references something outside of the four corners of the agreement as a standard, does it not?

MR. CANTOR: It does in the sense that it is not a check-the-box provision. You need to say was something commercially reasonable or was it not commercially reasonable.

THE COURT: Okay. So as to that section, is there an ambiguity under New York law that invites extrinsic evidence as to what that is, to the extent it's material?

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

itself and adds somewhat to the confusion here as to what that actually is and means.

MR. CANTOR: Yeah, I see your point, Your Honor.

I guess my point from a contract interpretation perspective would be that -- and you are right, New York law does not allow the Court to consider extrinsic evidence for the purpose of proving that there is an ambiguity in the first place.

There is no ambiguity as to what the contract says and what the contract sets up as its standard under 9.1, to the extent that 9.1 applies in any given situation.

When the time comes for someone to determine whether a party has complied with that standard, I think, like any other contract determination, that's going to be based on the evidence and that will be within the province of the finder of fact.

But I don't think, if I am understanding your question correctly, Your Honor, I don't believe that that makes the agreement ambiguous or requires a reference to extrinsic evidence in the way that one normally talks about it in the contract interpretation context if I'm understanding you.

THE COURT: Any comments from plaintiffs' side?

MR. HENNIGAN: If I followed Mr. Cantor along, I think I agree with him.

THE COURT: So let's talk -- I know there is a lot of discussion about this in the briefing, but I'd like to talk

about 9.1 and then the other parameters under 9.2 and 9.3. But before getting into that discussion, I'd like to go back into structure again.

So the way the agreement works as I understand it -- and please help me with your own thoughts on this -- is the borrowers make an advance request, along with retail affiliates, in the form specified in Exhibit C-1, and this is in accordance with § 2.4 of the agreement and that's what kicks off the process, correct?

MR. HENNIGAN: Yes.

MR. CANTOR: Yes, Your Honor.

THE COURT: Let me see if I can impose upon my staff to bring in some water. Oh, thank you very much.

C-1 is pretty much a complete document in and of itself drafted by the parties --

MR. CANTOR: Yes, Your Honor.

THE COURT: -- correct?

MR. HENNIGAN: Drafted by the parties to the Disbursement Agreement.

THE COURT: Right.

MR. HENNIGAN: BofA and the borrowers.

THE COURT: Yes. I mean, it is a drafted agreement, excuse me, a drafted document incorporated into the Disbursement Agreement.

MR. HENNIGAN: Correct.

09:29:03 **THE COURT:** It contains all of these affirmative
09:29:07 statements and representations and the like so that the request
09:29:18 is made in accordance with this C-1 document and in the C-1
09:29:26 document on all these representations --
09:29:29 **MR. CANTOR:** Yes, Your Honor.
09:29:31 **THE COURT:** -- there are blanks to be filled in, date,
09:29:35 amount, signatures, things like that.
09:29:37 **MR. CANTOR:** Right.
09:29:38 **THE COURT:** Okay. So after the request, C-1, is
09:29:54 submitted, under 2.4.4, the Disbursement Agent and the
09:30:00 construction consultant have to review and determine whether all
09:30:08 the documentation was provided.
09:30:13 Then here are these words again, "and use commercially
09:30:17 reasonable efforts to notify project entities of any
09:30:21 deficiency."
09:30:23 So that's the next step in this process, correct?
09:30:30 **MR. CANTOR:** Yes, Your Honor.
09:30:36 **THE COURT:** I wanted to note one thing in this process
09:30:40 and ask about it because in regard to Bank of America's role
09:30:52 wearing the hat of Disbursement Agent, of course Bank of America
09:30:57 says, "Look, our job here is ministerial. We are, in effect,
09:31:04 going through the checklist," right?
09:31:07 **MR. CANTOR:** Yes, Your Honor.
09:31:08 **THE COURT:** "We're doing this and, by the way, we're
09:31:13 only paid a relatively small amount of money for this function."

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

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

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

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

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

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

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

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

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

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

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

09:32:35 **THE COURT:** Here is an example of one place in the agreement where there is an affirmative obligation on the Disbursement Agent to do more than just ministerial acts. It has to use reasonable diligence to assure the construction 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 **THE COURT:** Now, you have all your Article 9 things
09:34:20 which you point out and argue. You say, we, Bank of America,
09:34:22 don't have to do anything more than accept representations.
09:34:29 **MR. CANTOR:** Right.
09:34:30 **THE COURT:** I'm pointing out one other part of the
09:34:32 agreement that seemed to me to impose, trying to read these
09:34:38 things together, a higher standard on Bank of America to do
09:34:44 reasonable diligence.
09:34:45 **MR. CANTOR:** I think, Your Honor, it works the other
09:34:47 way. What Bank of America is required to do in this provision
09:34:51 is use reasonable diligence to make sure that the construction
09:34:55 consultant is doing the work and is doing it in a way that will
09:34:59 allow the advance request ultimately to be processed in a timely
09:35:04 fashion.
09:35:04 When it comes to the substance of the review that the
09:35:09 construction consultant performs, that's where § 9.3.2 would
09:35:15 kick in and says that Bank of America is entitled to rely on the
09:35:21 certification that the construction consultant provides in
09:35:26 determining that the things that the construction consultant is
09:35:29 responsible for have been satisfied.
09:35:31 The reasonable diligence to assure that it performs its
09:35:34 reviews as required by § 2.4 is just to make sure that the
09:35:40 process is moving forward and is moving forward in a timely
09:35:43 fashion.
09:35:45 **THE COURT:** All right. Well, let me hold on that for a

second and turn to the plaintiffs' side.

I'd like to have your comments on the question. Is there, by this provision -- and I know this isn't the issue which is on summary judgment. It is not about the construction costs per se.

In terms of the structure of the agreement, what is your position with regard to this aspect? Does the Disbursement Agent have a higher standard with regard to reviewing the construction consultant's performance, et cetera, than it does with regard to other obligations?

MR. HENNIGAN: Let me answer that and I would like to come back and catch something that was part of the colloquy on the other side.

THE COURT: Go ahead.

MR. HENNIGAN: I think their standard remains roughly the same, which is commercially reasonable, and I believe that this articulation of reasonable diligence, I don't read it different from commercially reasonable efforts to make sure the construction consultant is doing his job.

THE COURT: Okay.

MR. HENNIGAN: So I think there are, you know, I would say, plenary obligations throughout the agreement that Bank of America use commercially reasonable diligence, efforts, whatever, to make sure that the conditions are fulfilled.

The part I wanted to bounce back to, Your Honor, was

the point that you referred to, the relatively modest fee that Bank of America was earning for this. Bank of America was the underwriter of these loans, Your Honor. Bank of America earned tens of millions of dollars in putting this package together.

This Disbursement Agreement was an essential part of the comfort assurances that lenders look to in order to put their money into the deal and so, yeah, they may have only made $40,000 on this one, but it was an integral part of the overall financing package. It had to be here and it had to be performed by somebody that people trusted.

THE COURT: All right. I knew I was going to invite some debate on this issue but in terms of the Disbursement Agent hat and function, there is no dispute that Bank of America was being paid a limited amount of money for that job.

MR. HENNIGAN: I would say in terms of funds that were earmarked specifically for that job, it was a very modest amount of money.

THE COURT: Yes. That was my only point.

MR. HENNIGAN: It was part of the overall deal.

THE COURT: I understand that Bank of America has other relations to this deal other than Disbursement Agent, but I don't want to go there yet.

My main point in trying to address this issue is to try to understand the general introductory language in 9.1 on 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

clause for this agreement within an agreement.

It sets forth the general purpose of the agreement for retaining the Disbursement Agent, and it leaves the details for the paragraphs that follow.

So what it says is it is an acknowledgement that Bank of America is going generally to perform its duties in a manner that is consistent with similarly situated institutions like indenture trustees and the like, and it provides a general standard of care for those Disbursement Agent obligations that are not otherwise subject to more specific provisions.

THE COURT: But I have a specific purpose in asking this question, and I want to get back to the plaintiffs' response, what you said in a second, but let me take one step further in our discussion and set up the question and then get back to what we're talking about.

Could you turn your attention to Page 10 of the Disbursement Agreement on 2.5.1? This is, to me, a very important aspect of the flow of obligations under this Disbursement Agreement, so let's go over this together.

"In the event that:

"1. The conditions precedent to an advance have not been satisfied; or,

"2. The controlling person notifies the Disbursement Agent that a default or an Event of Default has occurred and is continuing, then the Disbursement Agent shall notify

the project entities, and each funding agent thereof as soon as reasonably possible, a stop funding notice," et cetera, et cetera.

So let's go back and break that down. Under subpart 2 of that, the controlling person, whoever that is -- and I assume that has to be somebody defined under the control agreement.

No?

MR. CANTOR: No, Your Honor. The controlling person is defined in this agreement as, for purposes of our discussion, the Bank Agent.

THE COURT: Well, the Bank Agent being Bank of America?

MR. CANTOR: Yes, Your Honor.

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

Bank of America, as the controlling person, then writes a formal demand to Bank of America as the Disbursement Agent that there's a notice of default?

MR. CANTOR: That would be the process that the agreement contemplates for purposes of making sure that everything is papered in case there is a later litigation and, by the way, Your Honor, this --

THE COURT: Which portion of Bank of America does this?

MR. CANTOR: Your Honor, the individuals who were performing the agent functions at Bank of America were all part of the same specific group, the credit debt products group in

Dallas, and, yes, Your Honor, it is a formulistic requirement.

THE COURT: Let me narrow this down. The same people who are the controlling person at Bank of America are also the same people who are disbursement agents?

MR. CANTOR: Yes, Your Honor, with the exception of the specific individuals who actually press the button and move the money, but the people who are performing this function and making the decisions are the same group of people.

THE COURT: I'm talking about the decision-makers. Somebody under the definition of controlling person has to make a decision to pull the trigger --

MR. CANTOR: Yes, Your Honor.

THE COURT: -- and then notifies itself, wearing a different hat, that such a decision has been made.

MR. CANTOR: Right, Your Honor.

THE COURT: Okay. So when I started our discussion today about how Bank of America is being sued here, is it sued as only Disbursement Agent, or is it sued as controlling agent or controlling person, and how do you divide up the knowledge that Bank of America has as controlling person from that which it has as Disbursement Agent?

MR. CANTOR: Well, Your Honor, let me answer that somewhat obliquely, but I think you'll see where I'm going.

This actually goes back to one of your original questions about what is the relevance of the Credit Agreement

here because the Credit Agreement which governs the Bank Agent, which is synonymous with Administrative Agent, that is where you get the provision that Your Honor alluded to earlier this morning about knowing whether there has been a default or an Event of Default.

There is a provision in the Credit Agreement that specifically provides that Bank of America is not deemed to have notice of an Event of Default or a default unless it receives an actual notice to that effect.

So until it receives that actual notice, Bank of America as Bank Agent is not required to notify the Disbursement Agent under this provision here and so therefore you --

THE COURT: But my question is: Controlling person, does controlling person, namely Bank of America wearing a different hat, have an independent duty and responsibility to review whether there has been a default and pull the trigger?

MR. CANTOR: I'm not sure what you mean by "review." I think that -- I'm sorry --

THE COURT: Well, here's where I'm having difficulty with the agreement before we get into the facts.

Your position -- and I am not trying to exclude plaintiffs in this discussion -- but let me stick with them for a second because I'd like to hear their response before plaintiffs' response.

Your position is that Bank of America as Disbursement

09:48:34 Agent has certain protections?

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

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

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

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

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

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

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

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

default here, and so therefore this second portion of 2.5.1 which focuses on the controlling person as opposed to the Disbursement Agent is not part of our discussion here this morning, Your Honor.

THE COURT: Well, you are saying a lot of things.

MR. CANTOR: Okay.

THE COURT: So let me go back to what you just said.

One of the issues raised by plaintiffs is, well, they did receive notice from one of the Term Lenders that the Lehman bankruptcy was a triggering Event of Default.

MR. CANTOR: I would say that is a mischaracterization. They received an email from one of the Term Lenders who is not a party here that expressed their views as to whether the Lehman bankruptcy had certain consequences, but what it didn't do was say this is an event of -- we hereby declare an Event of Default.

THE COURT: Let me interrupt for a second and turn to plaintiffs.

Since the Disbursement Agreement does not itself have provisions on notice as to what is formal notice, leaving aside who has to give it for a moment, does the Credit Agreement notice requirements apply here?

Is there a formal process where that notice has to be given in a written, certified way that creates a triggering event, or is it enough that it be electronically transmitted?

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

THE COURT: Control person.

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

Notice to one is notice to the other automatically.

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

MR. HENNIGAN: Gotcha.

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

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

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

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

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

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

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

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

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

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

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

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

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

09:54:48 **THE COURT:** All right. But let's go back to Part 1:

09:54:51 In the event, 1, the conditions precedent to an advance have not

been satisfied.

Now, what I have tried very hard to do is look through this Disbursement Agreement to see who triggers that, who says that. Well, one thing I know is that Fontainebleau can say that. Fontainebleau can give notice and eventually later in the deal did give notice that the conditions precedent were not satisfied.

MR. CANTOR: Right.

THE COURT: So that is one situation.

Another situation seems to me to be if Bank of America as Disbursement Agent is doing its checklist and it determines -- and I'm going to use something which is really not our situation here -- but it determines that the construction consultant has not adequately, reasonably been diligent in the project costs and that condition has not been satisfied, or something of that nature, that would be an event where the Disbursement Agent is required to notify the project entities, right?

MR. CANTOR: Yeah. I think the facts as you actually put them might not work, but let me tie it to something that happened here.

For example, in March 2009, when IVI, the construction consultant, initially reviewed the advance request, it was unwilling to sign off on the advance request.

Ultimately that got resolved, but if it had not, then

09:56:56 Bank of America would not have been allowed --
09:56:59 **THE COURT:** I'm trying to use a simple example.
09:57:01 **MR. CANTOR:** Yeah.
09:57:02 **THE COURT:** I'm trying to use a simple example where
09:57:05 under your ministerial checklist theory, the construction
09:57:08 consultant refuses to sign the document.
09:57:11 **MR. CANTOR:** Yes, Your Honor.
09:57:12 **THE COURT:** Then in the ministerial review of the
09:57:19 paperwork, the Disbursement Agent would determine that a
09:57:26 condition precedent to an advance has not been satisfied.
09:57:30 Would you agree?
09:57:32 **MR. CANTOR:** Yes, Your Honor.
09:57:32 **THE COURT:** Okay. And in that event, under 2.5.1, the
09:57:42 Disbursement Agent has an obligation, "shall" -- mandatory --
09:57:47 notify the project entities, et cetera.
09:57:50 **MR. CANTOR:** Right.
09:57:51 **THE COURT:** Okay. Now, where this does get confusing
09:57:57 to me -- and I want to have more argument from both sides on
09:58:01 this -- and I'm going to have more questions to you as you go
09:58:07 through this -- is another type of situation, and that has to do
09:58:23 where it is not a matter of determining whether C-1 has been
09:58:31 submitted correctly with all certifications.
09:58:35 It's a more subjective determination of whether or not
09:58:40 the other conditions precedent have been met and what I'm trying
09:58:53 to get at is the structure of the agreement as to various

alternative circumstances.

Number 1, since there is no specific language saying Disbursement Agent shall use reasonable diligence to make sure that each condition precedent to an advance has been satisfied, the way it has been with the construction side, is there an affirmative duty in any way on the part -- under the agreement -- on the part of Bank of America to do that?

MR. CANTOR: No, Your Honor.

THE COURT: Okay. I know your position is no, but let me just phrase these things and then we will get back to them.

Okay. In support of your position, you would go through, you know, all the Article 9 limitations that would be consistent with. We don't have the obligation. We are just checklisting. Okay. I understand that.

MR. CANTOR: Yeah, in particular 9.3.2.

THE COURT: And you would also rely on 9.2.5, no imputed knowledge.

MR. CANTOR: Yes, Your Honor.

THE COURT: So now we get to the much harder question which is, I think, the subject of this summary judgment, as to if Bank of America knew or should have known in the course of its dealings with the loan as controlling person or Disbursement Agent that a condition precedent has not been satisfied, okay, and it -- not that it is imputed knowledge.

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 If Bank of America actually knew that a condition precedent had not been satisfied, then it would not be relying on Fontainebleau's certifications at that point, and we would concede that they had an obligation to not allow the funding to go forward but actually knew.

THE COURT: Hold right there.

So for purposes of the summary judgment, your position is if Bank of America had actual knowledge that a condition precedent had not been met -- in this case, I guess that translates to the equivalent of actual knowledge that Lehman was not funding the retail facility, right?

MR. CANTOR: Right.

THE COURT: Okay. If it knew that --

MR. CANTOR: Well, that Fontainebleau Resorts was, because there are other people that could have funded that it would have been permissible.

THE COURT: Let me rephrase that.

MR. CANTOR: Yeah.

THE COURT: If Bank of America had actual knowledge that Lehman did not fund and none of the other lenders within the retail structure funded and that Fontainebleau funded, that is a different situation and then Bank of America did have, notwithstanding Article 9, an affirmative duty to initiate a default notice.

MR. CANTOR: Right. Bank of America in that instance

would know that the conditions precedent have not been satisfied and, thus, it would be required under 2.5.1 to issue a stop funding notice.

THE COURT: So let's hold on that for a second and switch back to the factual issues here.

Is there from the plaintiffs' standpoint -- and I would like more discussion -- is there a material issue of fact about actual knowledge? Let's assume there was actual knowledge, but no action taken.

Wouldn't that be gross negligence under New York law?

MR. CANTOR: It would not, Your Honor, under these circumstances.

THE COURT: Okay. So let's divide the two up. Let's start with Question 1, actual knowledge.

MR. CANTOR: Yes, Your Honor.

THE COURT: Based upon all these emails, and I've now received some new information, other discovery, is there a material issue of fact on actual knowledge?

MR. CANTOR: Let me make sure I phrase it correctly, Your Honor.

Your Honor, we don't believe that there is a material issue of fact that Bank of America had actual knowledge. Plaintiffs have not submitted sufficient evidence in admissible form to establish actual knowledge by Bank of America.

When you add up all of the emails, many of which, I

believe, they have mischaracterized -- a lot of the evidence that they rely on they both mischaracterized and it is inadmissible.

When you add all that up, Your Honor, all that adds up to is, at best, a finding that Bank of America should have been suspicious, that Bank of America should have asked more questions. That's not actual knowledge.

THE COURT: Let me hold up for a second.

Does plaintiff contend that Bank of America had actual knowledge?

MR. HENNIGAN: Yes.

THE COURT: What evidence are you relying on that creates at least a material issue of fact of actual knowledge?

MR. HENNIGAN: The evidence that I am relying on, Your Honor, that I think disposes of the question is

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THE COURT: What was the actual date of the Fontainebleau certification which included that all conditions

were met?

MR. HENNIGAN: They made it with the original advance request. I'll get to that in a second.

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10:14:18 10:14:21 10:14:24 10:14:28 10:14:33 10:14:36

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

So we think it is not that it raises a triable issue of

fact. We think there is no credible evidence on this record that Bank of America did not know that that funding was made by Fontainebleau and not by Lehman Brothers and now let's look at whether or not they have denied it.

The answer is they have mealy-mouthed their way through this thing. They never squarely say.

Instead,

THE COURT: Okay. So, let me ask for responses on that.

MR. CANTOR: Sure, Your Honor. That was a really nice story. It would sound great at closing, but it is an interpretation of the evidence. It is not, in fact, what the evidence will show.

What the evidence does show is that the conversations

10:16:02 that were held between Bank of America and Fontainebleau --
10:16:07 **THE COURT:** Let me ask you to rephrase this in a
10:16:10 different way.
10:16:10 **MR. CANTOR:** Okay.
10:16:11 **THE COURT:** We're not here on closing argument either.
10:16:14 **MR. CANTOR:** Right.
10:16:15 **THE COURT:** The issues have to be addressed in terms of
10:16:18 the standards for summary judgment --
10:16:21 **MR. CANTOR:** Uh-huh.
10:16:22 **THE COURT:** -- and whether or not there is a material
10:16:26 issue of fact on this.
10:16:28 **MR. CANTOR:** Right.
10:16:28 **THE COURT:** So the question is -- at least in response
10:16:33 to your motion, before I get to their motion -- the question is
10:16:37 whether they have generated enough through these emails to
10:16:42 trigger a material issue of fact of actual knowledge.
10:16:45 **MR. CANTOR:** They have not, Your Honor, because the
10:16:47 emails themselves don't show actual knowledge. It is only when
10:16:50 Mr. Hennigan gets a chance to spin them that he even gets close.
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There is no testimony in the record that Fontainebleau told Bank of America, If Lehman doesn't fund, we are going to fund for them. That conversation never happened. There is no --

THE COURT:

I don't understand quite the mechanics of what happened there.

MR. CANTOR: Basically, Bank of America is the largest bank in the United States and among its thousands and thousands of clients is Fontainebleau Las Vegas.

Just as if when Jeff Soffer goes to the ATM machine, there is a record generated somewhere in Bank of America that that happens.

But there is absolutely no evidence in the record that

anyone with any connection to the Fontainebleau Las Vegas project had any knowledge that this wire transfer took place nor would there have been any reason for them to know about that.

THE COURT: Okay. Hold on that.

Your response to that? Is there anything of record plaintiffs are relying on that shows that anyone within the Bank of America controlling person, disbursing agent side, knew of that wire transfer, knew of the wire transfer?

MR. HENNIGAN: Your Honor, I always have these conceptual issues about the different hats that want to be worn here.

THE COURT: My question is very specific. Were you able to determine in any manner, and where is it, that someone within the structure, a controlling person, Administrative Agent, somewhere in that pecking order of who pulls the trigger down to who is working on the account had actual knowledge of that transfer?

MR. HENNIGAN: The answer is yes.

THE COURT: Tell me specifically.

THE COURT: I am not talking about

MR. HENNIGAN: I am talking about what his testimony is.

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

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

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

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

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

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

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

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

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

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

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

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10:22:35 What occurs to us as we are preparing for this argument is that if I were Bank of America and I wanted to know really whether Fontainebleau funded,

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

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

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

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

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

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

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

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

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

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

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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.
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So there is no studied ignorance here and, as you say, that is a criminal concept that I don't think applies when you've got a contract that specifically says you can rely without investigation, but there just was no reason for Bank of America to have to do that.

THE COURT: Let me toss out two more matters and then we'll take a break.

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

THE COURT: Yes

Number 2, they didn't have to know what the exact

10:27:25 amount was. They just needed to ask one question: On the 26th
10:27:29 of September 2008, did Fontainebleau transfer funds to Trimont?
10:27:38 **MR. CANTOR:** Why would they have asked that question,
10:27:40 Your Honor, when they don't have a contractual obligation to do
10:27:42 so?
10:27:43 **THE COURT:** Well, we're going to discuss this more in a
10:27:47 few minutes, but let me pose a couple of questions to you to
10:27:50 consider during our break.
10:27:55 What significance does it have that as a matter of fact
10:28:03 Lehman did fund in October and November? There is no dispute of
10:28:10 fact by and between the parties that that funding occurred from
10:28:14 Lehman. How is that put into this factual equation in terms of
10:28:29 how I should hear the evidence on summary judgment?
10:28:39 The second thing is -- and this is like a bigger
10:28:48 picture issue which is troubling to me so I'll mention it -- the
10:28:55 Term Lenders are wearing different hats, too, it seems to me.
10:29:02 One hat is, Ahhh, look at this, revolvers should have
10:29:13 funded their share of the deal, when is it, in March? They
10:29:17 should have funded it all. Because we funded, you should have
10:29:21 funded, and why is that? Because we wanted this project to
10:29:27 continue in order to protect our investment. Right?
10:29:33 Isn't that a fair way of looking at your first
10:29:36 position?
10:29:37 **MR. HENNIGAN:** Our first position on that subject, Your
10:29:39 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

too closely? Those are a couple of things that are of concern to me on this issue.

You know, if the situation repeated itself in October, November and the like, where Lehman didn't fund and there were continuing questions and whatever, it would be a tougher call here but, I mean, we are dealing with one month which is squirrelly, followed by two months where no one contests that Lehman actually did fund.

So I know I'm looking at this in terms of this record, but I also think that in the real world sense it is necessary to take a look at what was going on in this project at that time in terms of the Term Lenders' argument on commercial reasonableness and gross negligence. I am going to take a break and give you time to all respond to this.

Then, even if you accept as true for purposes of summary judgment that there may have been this funding, they knew or should have known or deliberately ignorant in not knowing that Fontainebleau actually directly or indirectly funded, is that, under the standard of the agreement, gross negligence as a matter of law?

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

MR. CANTOR: Thank you.

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

11:00.

I want to hear your arguments from this point on, as much as you want to make them. I know you have prepared detailed slides and all, but I think we have covered a lot and I'm trying to get as close to the heart of the controversy as I can.

So whatever you want to do in the remaining time, I'm going to be quiet and let you do your thing.

MR. CANTOR: Thank you, Your Honor.

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

Those on the phone, please remain on the phone and we will reconvene because we're not going to call everybody or have people call in again.

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

AFTER RECESS

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

THE COURT: All right. Are we back on the record, Joe?

Just so everybody knows, during the interim there was a problem with the call-in. Someone on the line did something which created a necessity to hang up and require everybody to call in again, so you may hear about that later from those who are interested, but I don't want to delay the proceedings waiting for everybody to come in.

So let me open the argument again to some of the issues. Why don't you start and then I would appreciate if you would argue in point and counterpoint.

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

I think, Your Honor, what I will do as to the more specific factual issues that opposing counsel has raised, I think I'm going to leave them either for the end or for further rebuttal because where the argument has taken us, I have got lots to say about the factual issues and, in particular, the inability of plaintiffs to create a triable issue of fact on actual knowledge.

I think a lot of the factual material that they have discussed has been mischaracterized and is inadmissible, but unless Your Honor wants me to, I think that may be something that I'll come to a little later on.

What I would like to focus on, Your Honor, first is just briefly on the basic issue of breach of contract because we have covered so much of it.

Just to reiterate, Your Honor, our position is this is a very simple case, that the obligations of Bank of America as Disbursement Agent are limited. Your Honor pointed out the two

10:57:37 obligations essentially: determining that the required
10:57:40 documentation has been submitted with each advance request and
10:57:43 confirming that all of the conditions precedent to disbursement
10:57:48 have been met.
10:57:48 From our perspective, in performing the obligation to
10:57:52 ensure that the conditions precedent to disbursement have been
10:57:56 met, the key provision is obviously 9.3.2 which in relevant part
10:58:03 provides, notwithstanding anything else in this agreement to the
10:58:07 contrary, in performing its duties hereunder, including
10:58:11 approving advance requests or making other determinations or
10:58:14 taking other actions hereunder, the Disbursement Agent shall be
10:58:18 entitled to rely on certifications from the project entities as
10:58:23 to the satisfaction of any requirements and/or conditions
10:58:26 imposed by this agreement.
10:58:28 So it's clear, Your Honor, that Bank of America was
10:58:35 entitled to rely without further investigation on the
10:58:38 representations that it received from Fontainebleau.
10:58:42 At the motion to dismiss hearing, Your Honor, you
10:58:44 correctly pointed out that the record at that point was
10:58:46 incomplete because plaintiffs' complaint had not alleged whether
10:58:50 or not Fontainebleau had submitted all of the necessary
10:58:52 certifications. That's no longer an issue here, Your Honor.
10:58:55 It is undisputed that for every single advance request
10:58:59 that's at issue in this case, Bank of America received all of
10:59:02 the required certifications, representations and warranties from

10:59:07 Fontainebleau; and from our perspective, Your Honor, that should
10:59:10 be the end of the case.
10:59:11 Bank of America has done everything that the
10:59:15 Disbursement Agreement expressly required it to do and § 9.10
10:59:19 leaves no doubt that unless the agreement specifically says that
10:59:23 Bank of America has to do something, it does not have any
10:59:27 additional duties.
10:59:28 9.10, as Your Honor probably knows, in relevant part
10:59:32 provides that the Disbursement Agent shall have no duties or
10:59:36 obligations hereunder except as expressly set forth herein,
10:59:40 shall be responsible only for the performance of such duties and
10:59:43 obligations and shall not be required to take any action
10:59:46 otherwise in accordance with the terms hereof.
10:59:49 That is the fundamental flaw with plaintiffs' breach of
10:59:54 contract argument, Your Honor, is that their entire case is
10:59:56 premised on ignoring 9.3.2 and 9.10 and imposing additional
11:00:02 unwritten obligations on Bank of America.
11:00:05 There is a second independent reason why Bank of
11:00:08 America is entitled to summary judgment here, Your Honor, and I
11:00:12 think it ties into some of the issues that you raised just
11:00:16 before the break.
11:00:17 It is undisputed, as Your Honor mentioned, that the
11:00:22 contract limits Bank of America's liability to gross negligence
11:00:26 or worse.
11:00:27 There is no dispute between the parties that such

clauses are fully enforceable under New York law, and plaintiffs have acknowledged in their papers that gross negligence is a very high standard requiring either reckless disregard for the rights of others or conduct that smacks of intentional wrongdoing or, as the one that they cite in their papers, as that case put it, an absence of even slight diligence.

There is nothing even approaching that level of culpable conduct here, especially when Bank of America's actions are considered in context and without hindsight and that is, I think, what Your Honor was alluding to just before the break.

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

MR. CANTOR: In these circumstances, Your Honor, actual knowledge of what we are talking about is the Lehman issue, for example.

THE COURT: Right. Yes, that Fontainebleau actually was doing the funding. If there were actual knowledge --

MR. CANTOR: Yeah.

THE COURT: -- I think you have conceded that would have been a default.

Would it then be gross -- would it necessarily follow

that as -- it is at least a jury question at that point on whether or not Bank of America was grossly negligent in not declaring the default.

MR. CANTOR: I don't think it is, Your Honor, because I think what you have got, as you have alluded to, is a situation where you have got, you know, Bank of America was the Disbursement Agent for all of the different lenders to the Senior Credit Facility, the initial Term Loan Lenders who had money already in the project, the Delay Draw Term Lenders who were going to be the next ones asked to fund and the Revolving Lenders.

So when Bank of America was asked to make a determination as to whether the September funding should go forward in light of the fact that there was no failure of funding here -- as Your Honor pointed out, the money showed up.

This is not a situation where Fontainebleau was supposed to get X dollars and it ended up getting X minus $2.5 million. The money was there.

I don't think, Your Honor, that it even rises to the level of a question of fact to say that Bank of America was recklessly disregarding the rights of all of the lenders if it had actual knowledge, which we say they did not, of Fontainebleau Resorts funding for Lehman, given everything else that was going on with the project, given the amount of money that was involved, given that there were undoubtedly numerous

lenders who would have wanted to see the project go forward especially since the money actually showed up.

THE COURT: Well, in effect, would it have been reckless to pull the plug in terms of all the lenders' investment up to that point --

MR. CANTOR: I would say --

THE COURT: -- when, in fact, the money was there?

MR. CANTOR: Absolutely, Your Honor.

You can imagine what Fontainebleau's reaction would have been. Remember, again, we dispute that Bank of America knew this, but the facts are that an affiliate of the borrower put in money as equity, in other words, it wanted the project to go forward and it was willing to put its money where its mouth is.

You can imagine what the reaction of the borrower would have been if Bank of America had come to it and said that $2.5 million came from the wrong place. I am glad -- it is great that it showed up, but it came from the wrong place and therefore we are pulling the plug on this project and you don't get the $100 some odd million in Term Lender money that you otherwise requested and that you need to pay ongoing construction costs.

Fontainebleau sued Bank of America and the other Revolving Lenders for closing down the Revolver facility after 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 I can get you the exact figures. I don't have them at
11:07:01 the tip of my fingers at the moment, Your Honor.
11:07:06 This all goes back to the point I am making, Your
11:07:08 Honor, that you need to view all of this in context.
11:07:12 Okay. Bank of America, you have to remember, was
11:07:17 working off of the Disbursement Agreement as it was written,
11:07:22 okay, which has, as we have discussed, multiple different
11:07:26 provisions telling it that it can rely on representations and
11:07:32 warranties from Fontainebleau and that it doesn't need to
11:07:36 investigate them further.
11:07:38 We are going here on the assumption, for purposes of
11:07:41 this part of the argument, that as a matter of law that it would
11:07:45 not be sufficient for Bank of America to allow funding if it had
11:07:49 actual knowledge, but that's not what Bank of America's state of
11:07:54 mind was at the time. I think that has to be an important
11:07:57 consideration in determining whether Bank of America was
11:08:00 recklessly disregarding the rights of others.
11:08:04 In addition, as we have just discussed, it wasn't clear
11:08:06 that shutting down the project as soon as possible was going to
11:08:09 be consistent with all of the lenders' rights and interests.
11:08:13 They could have had different views on this and to the
11:08:15 extent that Bank of America is taking all of these different
11:08:19 views into account, I don't think you can say that they were
11:08:23 recklessly disregarding anybody's rights even if at the end of
11:08:27 the day someone's rights were handled in a way that that party

doesn't agree with.

In addition, Your Honor, and, again, you sort of alluded to this prior to the break, in evaluating Bank of America's conduct here, it is important to consider what the Term Lenders were doing or, more importantly, what the Term Lenders were not doing.

With the sole exception of who is not even a party here, not a single Term Lender ever demanded that Bank of America take any kind of action here, much less did any of these Term Lenders actually stick their neck out and put themselves on the line by issuing a Notice of Default which would have left them in the position of potentially being sued by Fontainebleau.

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

So you have to consider whether it is even possible for Bank of America to have recklessly disregarded plaintiffs' rights when they were unwilling to assert those rights themselves.

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.
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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,
11:10:49 17 , 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
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11:11:03 22
11:11:06 23
11:11:09 24 Here
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11:11:16 1
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.
11:11:41 9
11:11:43 10
11:11:45 11
11:11:48 12
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 .
11:12:26 25 So how could it be that Bank of America is recklessly

disregarding these lenders' rights when these lenders aren't even standing up for their rights on their own, as they had the right to do and certainly they had knowledge of what was going on.

If you look at gross negligence in terms of slight diligence, it is clear that Bank of America's actions here were much more than slight diligence.

The record is clear that Bank of America was responsive to questions that were raised by the lenders, attempted to get answers to questions that they raised, that it pressed Fontainebleau for additional information when the lenders had questions, that it facilitated direct communications between the lenders and Fontainebleau.

On an internal basis Bank of America, it is clear, is thinking through these issues, vetting them, discussing them internally, including discussing them with counsel, and that all of their actions here are the result of careful and contemplative deliberation before they take an action.

There can be no legitimate dispute here, Your Honor, that Bank of America was not in any way acting with ill will towards the Term Lenders.

11:13:49 Bank of America wanted to do the right thing here. We
11:13:53 can argue about whether they ultimately did the right thing or
11:13:55 not, but the bottom line is they wanted to try to do the right
11:13:59 thing and that, of course, is the complete antithesis of
11:14:03 recklessly disregarding the lenders' rights.
11:14:06 The plaintiffs here bear the burden of proof on gross
11:14:11 negligence. They have to not only refute the evidence that we
11:14:15 have come forward showing that Bank of America acted properly,
11:14:19 they are going to have to come forward with evidence sufficient
11:14:23 to establish gross negligence, their own evidence, and for the
11:14:26 most part they have not bothered to do that.
11:14:29 Their briefs -- essentially all they do is repeat their
11:14:33 breach of contract argument and argue that Bank of America
11:14:36 ignored facts and ignored warnings but, Your Honor, those are
11:14:41 negligence arguments.
11:14:41 Those are arguments that say that Bank of America
11:14:44 didn't act as a reasonable Disbursement Agent should have acted.
11:14:50 Even if such arguments aren't foreclosed by § 9.3.2, as we say
11:14:55 they are, they are insufficient without more to establish this
11:15:00 added degree of culpability that you have to have here to find
11:15:04 Bank of America liable.
11:15:06 The bottom line is that the Term Lenders have
11:15:10 completely failed to satisfy their burden on summary judgment of
11:15:14 creating a triable issue of fact on the issue of gross
11:15:20 negligence, Your Honor.

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

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

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

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

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

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

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

11:15:56 **MR. CANTOR:** Well, I think it plays a part in the
11:15:58 equation, Your Honor, in a couple of ways. I think for one
11:16:02 thing, to the extent that reasonableness somehow comes into this
11:16:06 on the breach issue -- and again our position is that all you
11:16:09 need to know is 9.3.2 and that 9.1 does not in any way limit our
11:16:16 rights under that agreement -- but to the extent that
11:16:19 reasonableness comes into it,

11:16:23 demonstrates the reasonableness of
11:16:30 what I was discussing earlier this morning, which is that it was
11:16:34 not clear to anybody in September that Lehman was not going to
11:16:39 fund. That was not a forgone conclusion and thus, all of the
11:16:43 discussions that everyone was having was about options if Lehman

didn't fund, but maybe Lehman will fund.

were other loans where it was not going to be stepping up.

THE COURT: Does that play into the gross negligence issue?

MR. CANTOR: I think it absolutely plays into the gross negligence point, Your Honor.

Again, if Bank of America believed that at worst -- and, again, let's start with the assumption that I don't accept, that Bank of America knew that Fontainebleau was going to fund for Lehman in September.

But if Bank of America believed that this was going to be a one-time occurrence because it was still possible that Lehman was going to step back in -- remember, this is all happening within ten days of, you know, one of the most monumental bankruptcy filings in American business history.

IF Bank of America believed that it was still a

possibility that as we go forward and as things calm down that Lehman was going to continue to fund here,

in the face of one of the most monumental bankruptcy filings and uncertain business situations of all time.

It is only with hindsight and knowing where this case ended up that you would say that it is grossly negligent for Bank of America to allow the borrower essentially to put up more of its own money to close that gap if it was going to be a one-time gap.

THE COURT: All right. Thank you. I want to make sure I have plenty of time on the plaintiffs' side.

MR. CANTOR: Sure.

THE COURT: Go ahead, sir.

MR. HENNIGAN: I thought I just heard Mr. Cantor say that they were assured by Lehman Brothers that they were going to continue funding. I do not believe that that is in this record at all.

MR. CANTOR: That is not what I said, actually.

MR. HENNIGAN: That's what you said.

THE COURT: Okay. Well, let's continue.

MR. CANTOR: If it is what I said, I apologize because it is not what I meant.

MR. HENNIGAN: I want to put a point on that.

THE COURT: Go ahead.

MR. HENNIGAN: There is a lot of discussion as though this was a two-and-a-half million dollar issue on a multibillion dollar project.

This was not a two-and-a-half million dollar issue on a multibillion dollar project. Let's put it in context.

I am going to focus on the time period between September 15, 2008 and the middle of October 2008.

Here is what had happened. On September 15, 2008 -- I pick that date because that is the date of the Lehman Brothers bankruptcy filing.

It actually probably happened late with an electronic filing on the 14th, because there were emails that were circling throughout the Bank of America team about the magnitude of that funding early, 1:00 a.m. in the morning on September 15th.

Now, we move toward September 15th. Lehman Brothers files for bankruptcy. We have just heard it was the largest bankruptcy in American history.

The issue wasn't whether they were going to make their $2.5 million payment per se. The issue was whether we could count on them for their substantial portion of the $190 million that was still left to be funded on the retail facility.

Lehman Brothers had over $65 million committed to that. The filing of bankruptcy -- let us make no mistake about it -- put that $190 million piece in question.

Let me read you the operative phrase from the condition precedent, which is that there has been no Material Adverse Effect. The requirement is nothing has happened, nothing has come to Bank of America's attention that could reasonably be expected to have a Material Adverse Effect.

So when Lehman Brothers files on the 15th, everybody 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
11:22:46 7
11:22:50 8
11:22:52 9
11:22:56 10
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.
11:23:22 17
11:23:26 18
11:23:30 19
11:23:38 20
11:23:42 21
11:23:45 22
11:23:50 23
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

so long as there is a reasonable expectation that they are going to be made in the future. So it is okay to put it on that side of the ledger.

He didn't say is it okay with you that we are going to continue to fund this project despite the fact that there are enormous numbers of mounting breaches.

THE COURT: Well, let me ask you to respond to the argument that the Lehman bankruptcy was well known to everybody, including the Term Lenders, and if the Term Lenders believed, or any of them, that there was a default as a result, the Term Lenders could have given formal notification to Bank of America as the Administrative Agent to initiate the proceedings under the stop order.

MR. HENNIGAN: Recalling that we didn't -- we were not signatures to the Disbursement Agreement and most of our clients didn't have access to it. There was a division here between what we call public side and private side where information was made available through an Internet access to people who were willing to receive confidential information, but the public side lenders were not. They only got information that was generally made public.

So what we do have here is we have on September -- right in this time period --

THE COURT: Let me go back because this is what I am trying to clarify. The Term Lenders under the Credit Agreement

made payments.

MR. HENNIGAN: Yes.

THE COURT: And the issue, if I understand it, was whether the payments that were made should have been disbursed.

MR. HENNIGAN: Correct.

THE COURT: Okay. So Bank of America is raising the question that the Term Lenders themselves, if concerned that there was a default, could have sufficiently made a demand on Bank of America as the Administrative Agent under the Disbursement Agreement or Bank Agent under the Credit Agreement not to fund because of the default, but didn't.

MR. HENNIGAN: Again remembering, Your Honor, that most of my clients are not privy to the information that would have demonstrated the magnitude of the problem.

For example, not knowing what the retail lending -- Bank of America claims it didn't know how much Lehman Brothers was committed to on the retail facility, but my clients certainly didn't know how much Lehman Brothers was committed to under the retail facility.

11:27:29 1
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 , 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

were met.

I am not aware of either a protocol or anything in the record that would suggest that anybody was sitting on their rights there. They were relying upon the Disbursement Agent fulfilling its responsibilities.

THE COURT: Go ahead, sir.

MR. HENNIGAN: Okay. So in the earlier session we spent a lot of time, because I do like that issue, about the Fontainebleau funding for Lehman Brothers.

I like that issue because, Number 1, I think it is going to be a fun issue to try, but I also like that issue because I think they can't hide from the fact that they looked squarely at that default and ignored it and then tried to cover it up.

It is also --

THE COURT: Aware of when?

MR. HENNIGAN: In June.

THE COURT: Of when?

BofA, being aware of misinformation coming from the borrower on subjects like budgeting, is itself a default. BofA not receiving information that it has requested is itself a default.

We have talked about this Lehman Brothers funding issue as though it is okay for a retail lender to make the payment for it, and there is indeed an interpretation of one of the conditions precedent that might make it okay for another retail lender to cover for it, but it is still a default as defined in the agreement for any lender, retail or otherwise, to miss payments.

So, we have got, yes, October and November Fontainebleau funds and therefore doesn't default on those payments, but then defaults on every other payment after that, so we've got mounting numbers of defaults.

Now, I am still sort of marching -- I realize I am being a little discursive, but I am marching through the early

11:31:45 1 days of September.
11:31:46 2 On September 18th, 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
11:33:03 19
11:33:08 20
11:33:12 21
11:33:16 22
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 bankruptcy an MAE?

11:33:38 Is the fact that they have been distorting their
11:33:42 budgets itself a default? Isn't the fact that Lehman Brothers
11:33:46 missed a payment strong evidence that our fears are going to
11:33:50 come to fruition, that indeed we can't count on that piece?

11:33:54 Isn't the failure of other banks and their refusal or
11:34:00 inability to make payments itself mounting? By the way, what
11:34:04 about condominium sales?

11:34:07 So it is itself a default if Bank of America has
11:34:11 adverse information that, taken as a whole -- I am kind of
11:34:16 remembering what it says -- taken as a whole, places in doubt
11:34:19 the other information that it has from the lender.

11:34:22 **THE COURT:** Let me stop that part of the argument and
11:34:24 get a response. It is like a cumulative set of circumstances
11:34:31 argument that puts a duty on Bank of America to determine
11:34:38 default.

11:34:39 What's your response?

11:34:40 **MR. CANTOR:** Well, first of all, the Standard & Poor's
11:34:46 downgrade that Mr. Hennigan just talked about is evidence of
11:34:49 what we were talking about earlier, that all this information
11:34:52 was out there in the public.

11:34:54 So to the extent that the Standard & Poor's downgrade
11:34:56 went through all of these points that Mr. Hennigan considers so
11:34:59 significant, they were out there for all the lenders to see.

11:35:04 The idea that Bank of America was the one responsible

for determining whether there was an MAE or not is just not consistent with the --

THE COURT: MAE?

MR. CANTOR: A Material Adverse Event.

THE COURT: I'm sorry. It is not consistent with what?

MR. CANTOR: With the contract, Your Honor.

What you got in the contract is a condition that says that there shall have been no Material Adverse Event. It is Fontainebleau that is required to rep that all of the conditions precedent are met. It is Fontainebleau that is required to rep that all of its other representations and warranties are met.

So Fontainebleau is the one that in the first instance is going to be the one determining whether there has been an MAE or not. Declaring an MAE, okay, under most circumstances, and certainly under these circumstances, is one of the most subjective and speculative determinations that one can make.

If a meteor had hit the project, yes, that would have been an MAE, and I don't think anyone could disagree with that.

But to determine that a set of economic factors has risen to the level of an MAE is always going to be a subjective determination.

You are never going to be able to say that Bank of America had actual knowledge that there was an MAE because there is always going to be some difference of opinion as to whether those facts as they stood at that time constituted an MAE.

11:36:51 Therefore, under the way the contract works, Bank of
11:36:59 America was allowed to rely without further investigation on
11:37:04 Fontainebleau's representation that, in fact, this amalgam of
11:37:08 events was not an MAE.
11:37:11 Bank of America was not required, and it would be
11:37:13 inconsistent with their role under the contract as it is
11:37:17 written, for them to be the one to make that determination and
11:37:21 say, yes, there has been an MAE here as a result of all these
11:37:26 occurrences.
11:37:27 You know who could? The lenders. Again, the lenders
11:37:30 never did that.
11:37:33 **THE COURT:** How could the lenders do that?
11:37:35 **MR. CANTOR:** The lenders, according to Mr. --
11:37:38 **THE COURT:** Let me be more specific. What provisions
11:37:44 under the Credit Agreement or the Disbursement Agreement are you
11:37:49 relying on that would allow the lenders, as compared to the
11:37:54 controlling person, to trigger a default notice?
11:38:00 **MR. CANTOR:** I don't have the specific number for you.
11:38:02 I'll get it for you before we are done here this morning, Your
11:38:05 Honor, but the lenders obviously had the right to declare two --
11:38:08 **THE COURT:** Well, it is not so obvious to me.
11:38:10 **MR. CANTOR:** Well, because what you have got is you
11:38:12 have got the provisions that provide that if Bank of America has
11:38:16 been notified of an Event of Default, it is required to take
11:38:20 certain action.

So, therefore that allows the lenders --

THE COURT: But the only notification provision that I saw, that we discussed, was notification by the controlling person of the Event of Default.

Where does it say that any of the lenders, Revolvers, Term Lenders, could trigger --

MR. CANTOR: In 9.3 of the Credit Agreement, Your Honor, it provides that -- and we have argued the other side of this, but it addresses the same issue -- the agreement provides that the Administrative Agent shall be deemed not to have knowledge of any Default, capital D default, unless and until notice describing such default is given to the Administrative Agent by borrowers, a lender or the Issuing Lender.

So that is the provision that allows the lenders to give notice of an Event of Default to Bank of America as Administrative Agent and then Bank of America, as Administrative Agent, would have knowledge of it and would have to act.

THE COURT: But here's my question. Plaintiffs argue that they are not parties to the Disbursement Agreement.

MR. CANTOR: But they are parties to the Credit Agreement, Your Honor.

THE COURT: They are parties to the Credit Agreement, but they are not parties as such to the Disbursement Agreement.

MR. CANTOR: Right. But the point is the provision I just read to you is from the Credit Agreement.

11:39:51 **THE COURT:** So your point is that where they are
11:39:56 parties --
11:39:58 **MR. CANTOR:** Yeah.
11:39:59 **THE COURT:** -- they have an express right to initiate a
11:40:02 default process.
11:40:03 **MR. CANTOR:** Right, and the contract defines that if
11:40:08 Bank of America knows it, it has to act on it.
11:40:11 **THE COURT:** Let me finish.
11:40:12 **MR. CANTOR:** Sorry.
11:40:13 **THE COURT:** Let me finish. They have an express right
11:40:16 to initiate a default process under the Credit Agreement,
11:40:20 correct?
11:40:20 **MR. CANTOR:** Yes.
11:40:21 **THE COURT:** And give notice.
11:40:22 **MR. CANTOR:** Right.
11:40:23 **THE COURT:** Now, the money is sitting in the account.
11:40:27 **MR. CANTOR:** Right.
11:40:28 **THE COURT:** Then Bank of America has to deal with the
11:40:35 Credit Agreement and Disbursement Agreement.
11:40:36 **MR. CANTOR:** Right.
11:40:37 **THE COURT:** So how does that notice under Credit
11:40:42 Agreement then tie into the responsibilities and the protections
11:40:46 under the Disbursement Agreement?
11:40:46 **MR. CANTOR:** You go to 2.5.1, Your Honor, and you have
11:40:56 the provision that says that if the controlling agent gives

notice of an Event of Default or notice of default, the stop funding notice is going to be issued.

There is also 9.2.3 of the Disbursement Agreement which provides that if the Disbursement Agent is notified of an Event of Default or a Default has occurred, is continuing, that the Disbursement Agent shall promptly, and in any event within five banking days, provide notices to each of the funding agents of the same.

So the bottom line is, Your Honor, one way or another if the lenders, which they clearly had the right to do, gave Bank of America a formal notice of an Event of Default, Bank of America, both in its Disbursement Agent and Bank Agent capacity had obligations to act.

THE COURT: Okay. So let me get back to 9.2.3 for a moment.

MR. CANTOR: Okay.

THE COURT: If the Disbursement Agent is notified that an Event of Default -- which is capitalized, so that means that is a defined term?

MR. CANTOR: Right.

THE COURT: -- or a default has occurred and is continuing. So, how do I read that in terms of the Disbursement Agreement?

Is that notification only by the controlling person?

MR. CANTOR: No, I don't believe so, Your Honor.

11:42:36 **THE COURT:** Or if you read the two agreements together the way we started our discussion, is that notification by lenders, other lenders?

11:42:44 **MR. CANTOR:** I would read that -- I mean, it just says if the Disbursement Agent is notified, Your Honor. I don't see how I can credibly argue to you that that notice has to come from --

11:42:53 **THE COURT:** So let me ask from the plaintiffs' side: In reading that, do I not go back to the Credit Agreement itself where there are provisions for Term Lenders, among others, to give formal notice of default to Bank of America and then that would be sufficient under 9.2.3 to trigger those provisions?

11:43:22 **MR. HENNIGAN:** Your Honor, the Default that was referred to in the Credit Agreement where lenders have the opportunity to give notice is a capital D default under the Credit Agreement.

11:43:31 We are not talking about any of these things being defaults under the Credit Agreement. These are defaults of conditions or failures of conditions under the Disbursement Agreement.

11:43:44 So we don't -- you kind of fall into the capital D default hole in the Credit Agreement and come back over here to the Disbursement Agreement and say, you know, this is a question of knowledge and information that is flowing toward BofA from whatever source.

11:44:04 **THE COURT:** You are saying that once the Term Lenders
11:44:10 put their money up, that there was no right on the part of the
11:44:14 Term Lenders to notify Bank of America that, in the opinion of
11:44:21 the Term Lenders, there was a formal Default and to say to Bank
11:44:28 of America, "Don't disburse"?
11:44:33 **MR. HENNIGAN:** I am going to say two things. There is
11:44:34 a defined term called "Required Lenders." You will recall we
11:44:37 talked about earlier today the fact that BofA considered at one
11:44:41 point going and getting consents from the lenders for the
11:44:47 Fontainebleau disbursement.
11:44:49 If there is -- that protocol does give the required
11:44:54 lenders, if that procedure is invoked by Bank of America, gives
11:44:58 the required -- the quote-unquote Required Lenders authority to
11:45:03 take action. That was never invoked so that sort of issue of
11:45:10 lender democracy never happened.
11:45:12 So, what we're dealing with in September is almost all
11:45:17 of $700 million sitting in a bank proceeds account subject to
11:45:24 the diligence of our Disbursement Agent making sure that at each
11:45:29 level of disbursement the right conditions have been satisfied.
11:45:32 **THE COURT:** Okay. So let me turn back to Bank of
11:45:34 America on this.
11:45:36 The position is that Bank of America can't rely on that
11:45:43 argument because the default at issue would have to be a Default
11:45:49 under the Credit Agreement, which means that the Term Lender
11:45:53 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

papers?

MR. HENNIGAN: Yes, Your Honor. Thank you.

I've got a short list but I want to get to it. I want to read for you -- I realize that there is a lot of information here. It is hard to keep it all straight. I want to read to you the condition for disbursement that is 3.3.21.

THE COURT: Now we are in the Disbursement Agreement.

MR. HENNIGAN: The Disbursement Agreement.

THE COURT: 3.3.21. Let me just catch up with you. Okay. The adverse information?

MR. HENNIGAN: Yes.

THE COURT: Yeah, I've read that.

MR. HENNIGAN: Okay.

Basically, you know, nobody could be certifying to BofA that this condition was complied with because it has to do with BofA subjectively being unaware of information or other matter affecting the project or transactions in an adverse manner inconsistent with the other information. You know what it says.

We've heard BofA now repeatedly say they were entitled to rely upon the representations of the borrower. You don't have any credible information in front of you in which they attempt to say that, in fact, they did rely.

It would have been easy enough to say it. They have never said it. They have never said that they relied upon a representation from the borrower that they didn't have adverse

11:49:11 information, that no Material Adverse Effect had occurred, that
11:49:14 Lehman Brothers had funded.
11:49:18 **THE COURT:** Okay. Quick response on that?
11:49:21 **MR. CANTOR:** Your Honor, the bottom line is that the
11:49:24 contract as written allows us to rely on all of the
11:49:29 representations and warranties that are made.
11:49:33 **THE COURT:** Right. But how do I reconcile the language
11:49:36 in 3.3.21 with Bank Agent with the other language?
11:49:45 **MR. CANTOR:** First of all, again, you are talking there
11:49:47 about the Bank Agent, so again you have got this dichotomy
11:49:52 between the two roles of Bank of America.
11:49:56 But the bottom line is under the contract, this is a
11:50:01 contract set up by sophisticated parties that is specifically
11:50:04 intended to limit the liability of the Disbursement Agent. No
11:50:08 one is hiding behind that fact.
11:50:10 This contract was designed to limit the liability of
11:50:12 the Disbursement Agent.
11:50:14 **THE COURT:** Let me interrupt. This is where it gets
11:50:17 confusing.
11:50:18 **MR. CANTOR:** Yeah.
11:50:20 **THE COURT:** If Bank of America was to be sued as Bank
11:50:24 Agent for violation of 3.3.21, would it have to be sued under
11:50:32 the Credit Agreement where it was the Bank Agent?
11:50:41 **MR. CANTOR:** I --
11:50:42 **THE COURT:** Where was Bank of America a Bank Agent?

Wasn't it under the Credit Agreement?

MR. CANTOR: No. Actually, I believe that technically -- and I realize how complicated and sometimes counterintuitive this seems -- Bank of America was actually the Administrative Agent under the Credit Agreement. It was the Bank Agent under the Disbursement Agreement.

THE COURT: I'm sorry. Bank of America was the Disbursement Agent under the Disbursement Agreement.

MR. CANTOR: Yes.

THE COURT: Was it not the Bank Agent under the Credit Agreement?

MR. CANTOR: "Bank Agent," Your Honor, is a defined term that is used only in the Disbursement Agreement. The term that is used to describe Bank of America in the Credit Agreement is the Administrative Agent.

THE COURT: Okay. This is where we started.

MR. CANTOR: Right.

THE COURT: Is Bank of America being sued as Disbursement Agent or Bank Agent?

MR. CANTOR: Disbursement Agent, Your Honor. So Bank of America, as Disbursement Agent, is relying on all of the certifications by Fontainebleau that all of the conditions precedent are satisfied.

9.2.5, Your Honor, which you talked about a little bit earlier --

11:52:06 **THE COURT:** So where does 3.3.21 come in?

11:52:13 **MR. CANTOR:** I'm not sure I am following your question, Your Honor.

11:52:15 **THE COURT:** Okay. How do I read this paragraph in terms of Article 9?

11:52:25 **MR. CANTOR:** In terms of Article 9, Your Honor, you have got both 9.3.2, which allows us to rely without investigation on the certification from Fontainebleau that every single one of the conditions precedent, regardless of who, if you will, is the action person under that condition precedent, Fontainebleau certifies that every single one of those conditions precedent is satisfied as of the disbursement date and Bank of America, as Disbursement Agent, is entitled to rely on that certification without further investigation.

11:53:00 9.2.5, which is entitled no imputed knowledge, specifically provides that the Disbursement Agent shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent or by reason of the fact that the Disbursement Agent --

11:53:18 **THE COURT:** But --

11:53:18 **MR. CANTOR:** I need to finish this, I apologize.

11:53:21 -- is also a funding agent.

11:53:22 **THE COURT:** Pardon me. Pardon me. Pardon me. Bank Agent is a defined term in the Disbursement Agreement that says the Bank Agent is Bank of America in its capacity as

11:53:34 Administrative Agent under the Credit Agreement.

MR. CANTOR: Yes, Your Honor.

THE COURT: So my question is: If there is a violation of 3.3.21 as to Bank of America as Bank Agent, wouldn't it have to be a suit under the Credit Agreement against Bank of America?

MR. CANTOR: If that is how the claim was going to be phrased, yes, I would say you're right, Your Honor, but to be fair, that is not how the claim is phrased.

The claim is that Bank of America, as Disbursement Agent, shouldn't have allowed the funding to go forward because, among other things, this condition precedent was not satisfied.

The problem is that they can't establish that this condition precedent was not satisfied or that Bank of America was not entitled to rely on the certification by Fontainebleau that it was satisfied.

THE COURT: All right. I know there is so much more that both parties have, but we have been at it for almost three hours, so let me get to one other issue which is important that we discuss and, that is, I had entered back in January 2010, which seems like a long time ago, MDL order number 3 which set dates, among other thing, for a pretrial conference in January 2012. That seemed like a very long time back in 2010.

But let's talk about the posture of the case and my role as an MDL Judge and what my options are here depending on what I do on these motions.

11:55:24 Right now there is before the Eleventh Circuit -- and I think the briefing is done. I don't know if the Eleventh Circuit has set oral argument yet.

MR. CANTOR: There has been no argument date yet, Your Honor.

THE COURT: But the briefing has been done before the Eleventh Circuit on the fully funded questions, right?

MR. CANTOR: Yes.

THE COURT: Okay. The only case that I actually had was the one that Fontainebleau brought --

MR. CANTOR: Right.

THE COURT: -- which deals with the fully funded aspect, although Term Lenders raise this in this suit.

So let's assume for the sake of just a discussion that the Eleventh Circuit affirms on fully funded. My case disappears in terms of what I have in this district. That leaves, if there is a trial on what we are discussing today, the cases in Las Vegas and New York, right?

MR. CANTOR: Well, I think -- and these guys will have to tell you -- I think the New York case no longer exists because -- and you signed some orders to this effect -- but effectively all of the Term Lenders that were plaintiffs in the New York case had sold their interests to Term Lenders who are plaintiffs in the Nevada case and I think -- it has never been actually dismissed, I don't think.

11:56:59 **MR. DILLMAN:** Actually, it has.

11:57:00 **MR. CANTOR:** Has it been dismissed?

11:57:02 **MR. DILLMAN:** I believe so.

11:57:02 **THE COURT:** Well, let's assume it has. That leaves the Las Vegas case --

11:57:06 **MR. CANTOR:** Right.

11:57:07 **THE COURT:** -- right? So, if there is a trial on the issues, it is going to be in Las Vegas because, as an MDL Judge, I have to send this bank to the federal court there.

11:57:29 **MR. CANTOR:** I think as a practical matter -- and I am sure my worthy adversary will chime in momentarily -- that is correct. I believe that it is permissible for Your Honor, if the parties agreed, for Your Honor to keep it here.

11:57:44 But I don't think -- I think that is a moot point.

11:57:47 **THE COURT:** Under the MDL statute and all and interpretation, I, as the MDL Judge, have to stop my work and send it back to the original court once I complete this phase of it.

11:58:06 Now, whether the parties can convince the Court in Las Vegas that I ought to try this thing and transfer it back to me for some reason, whether I accept it, because I don't have a case here, is a whole other issue.

11:58:23 **MR. CANTOR:** Right.

11:58:23 **THE COURT:** But it appears to me that my obligation, if 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

filed. There is still stuff going on in the bankruptcy, Your Honor, litigations relating to lien priority and things like that.

THE COURT: Well, I haven't begun to --

MR. CANTOR: The trustee actually has filed its own fraud claim against Fontainebleau and the Soffer entities in bankruptcy court here.

THE COURT: Okay. So the bottom line is that in terms of the MDL order that I have issued, should I not hold anything in abeyance, at least at the moment, until I determine the issues on this case that are before me and hear further from the Eleventh Circuit because I can't take you to trial in any event?

MR. CANTOR: I would say, Your Honor, that certainly, at a minimum, it makes sense for us to wait until you rule on these motions.

THE COURT: Why should I require everybody to file here a pretrial stipulation which will take you a lot of time when you don't know all the issues that would be going to trial?

MR. HENNIGAN: Your Honor, first of all, I need two more minutes on the substance of this argument.

THE COURT: Let me get my answer first.

MR. HENNIGAN: The answer is I don't know. Certainly I think Your Honor needs to decide these motions. Whether there is a sufficient overlap with the Eleventh Circuit case and this one, I think there's not.

I think once we're done with these motions, this case ought to be liberated to go to Vegas for its trial and I think at that point the case that is pending before Your Honor will probably be a stand-alone version here.

But, honestly, I hadn't really thought it through.

THE COURT: All right.

MR. CANTOR: Your Honor, I don't understand how that could be. Essentially, they filed a complaint with multiple counts. We won on the fully drawn counts. Over our objection, that went up to the Eleventh Circuit. It is still part of this case.

THE COURT: I think I heard --

MR. HENNIGAN: That's right.

THE COURT: You have got two minutes.

MR. HENNIGAN: I forgot. That's true.

THE COURT: Use them wisely.

MR. HENNIGAN: I will talk fast.

First of all, Your Honor before the break suggested that, you know, why would they pull the plug, quote-unquote, for a two-and-a-half million shortfall. Pulling the plug was not one of their options.

What they needed to do was to issue a stop funding order, perhaps call the lenders together to discuss it and have lender clarification on some of these issues, but stop funding doesn't mean stop the project. It means that once the

conditions can be resolved, they can be resolved and move forward largely consensually.

My second point was on the --

THE COURT: Well, what do you mean? In reality, if you are not paying the contractors, the project stops.

MR. HENNIGAN: You stop paying the contractors at that moment and certainly the project in terms of a funding sense stops at that moment until these issues can be resolved and perhaps consensually.

THE COURT: Are you trying to tell me that if a stop order was issued, that this project wouldn't have imploded at that point?

MR. HENNIGAN: I think without any doubt this project was doomed at that moment, Your Honor. Just as a technical matter --

THE COURT: That is not my question.

Are you trying to tell me that if a stop funding order was issued, the project would not have imploded at that point because of the contractors not getting paid and all the rest of this thing given the Lehman bankruptcy and all the other --

MR. HENNIGAN: I am saying not at that moment. I believe that had the democracy protocols taken effect, it would have ultimately -- look, make no mistake about it. I think had the right thing been done in September, this project would have ended on that date. The $700 million would still be in the bank

account and people would have been much better off than they ultimately became.

Now, the last point -- I am trying to speak quickly -- on the cases with respect to gross negligence, it occurred to me reviewing them on the way here that we need to put them into three categories in the group contract cases that have gross negligent provisions.

Category Number 1 are contracts for the provision of goods and services. Those contracts can be intentionally breached as long as there is payment of direct damages. Those are what I call the efficient breach cases. That is, for example, Global Crossing.

In the case of contracts that provide for protection of property, which is banks with conditions on funding and alarm companies that, under certain conditions, are required to take action to protect properties, in those cases where the conditions have occurred that require affirmative action, the courts have routinely held that gross negligence is a triable fact.

In the one case that we cited, which is DRS, when the bank has actively participated in the loss of property, it was held to be gross negligence as a matter of law.

MR. CANTOR: For the most part it is in our papers. Your Honor, at this point I am not going to belabor why DRS is completely factually inapposite here. I think the showing in

our paper on gross negligence is sufficient.

THE COURT: Thank you for your participation this morning. I found it very helpful to discuss these issues with you and hear your input.

MR. HENNIGAN: I always enjoy being here, Your Honor.

MR. CANTOR: Thank you, Your Honor.

[The proceedings conclude at 12:06 p.m., 11/18/11.]

C E R T I F I C A T E

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

12.18.11
DATE

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to 09-CV-23835-ASG.

_____ /

MDL ORDER NO. 61; GRANTING UNOPPOSED MOTION TO SEAL [ECF NO. 332]; GRANTING UNOPPOSED MOTION TO REDACT [ECF NO. 333]

This Cause is before the Court upon the Bank of America's unopposed Motion to Seal [ECF No. 332] and Unopposed Motion to Redact Oral Argument Transcript [ECF No. 333].[1] Having reviewed the Motions and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. The Motion to Seal [ECF No. 332] is **GRANTED.**

2. The Motion to Redact Oral Argument Transcript [ECF No. 333] is **GRANTED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of December, 2011.

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

cc: Magistrate Judge Goodman
All Counsel of Record

[1] This Order shall not be under seal.

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all cases.
_____ /

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

Camulos Master Fund L.P., by and through the undersigned counsel, hereby give notice of this request to the Clerk of Courts that the following person be terminated from the Service List:

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To: Please see attached certificate of service.

CERTIFICATE OF SERVICE

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

Dated: January 30, 2012

/s/ Steven E. Siff_____

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document applies to:

Case No. 09-CV-23835 ASG.

_____/

MDL ORDER NUMBER 62;
OMNIBUS ORDER GRANTING BANK OF AMERICA'S MOTION FOR SUMMARY JUDGMENT [ECF No. 255] AND DENYING TERM LENDERS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ECF No. 258]; CLOSING CASE

This Cause is before the Court upon Bank of America's Motion for Summary Judgment [ECF No. 255] and Plaintiffs' Motion for Partial Summary Judgment [ECF No. 258]. I held oral argument on the Motions on November 18, 2011. While the matters involved in the remainder of this case appear complex because of the parties' cross-motions for summary judgment, in essence, based on the material facts not genuinely in dispute, the legal issues are straightforward. Even assuming all inferences in favor of the non-moving parties, Bank of America, acting as Disbursement Agent and Bank Agent under the Disbursement Agreement, did not breach the Disbursement Agreement, nor did it exercise its duties and responsibilities under the Disbursement Agent and Credit Agreement in a grossly negligent manner under New York law. The Term Lender Plaintiffs have not established otherwise. Accordingly, I grant summary judgment in favor of Defendant Bank of America.

I. Procedural History

This multi-district litigation ("MDL") arises out of alleged breaches of various agreements for loans to construct and develop a casino resort in Las Vegas, Nevada. On December 3, 2009, this MDL was transferred to me by order of the United States Judicial Panel on Multidistrict Litigation [ECF No. 1].[1] Pursuant to the Panel's transfer order (and subsequent related orders, *e.g.* [ECF No. 21]), pending before me are (1) *Fontainebleau Las Vegas, LLC v. Bank of America, N.A.*, *et al.*, Case No. 09-cv-21879 (S.D. Fla.) (the "Fontainebleau Action"), (2) *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-cv-1047 (D. Nev.) (the "Avenue Action"),[2] and (3) *ACP Master, LTD, et al. v. Bank of America, et al*, Case No. 09-cv-8064 (S.D.N.Y) (the "Aurelius Action").[3] I discuss the procedural history of each action in turn.

A. The Fontainebleau Action

On June 9, 2009, Fontainebleau Las Vegas, LLC ("Fontainebleau") filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the Southern District of Florida. That same day, Fontainebleau commenced an adversary proceeding against a group of banks. Fontainebleau is the owner and developer of a casino resort in Las Vegas (the "Project"). On June 6, 2007, Fontainebleau entered into a Credit Agreement and Disbursement Agreement with a syndicate of lenders for the

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[1] All references to the docket refer to Case No. 09-MD-02106, unless otherwise indicated.

[2] Upon transfer to the Southern District of Florida, the Avenue Action was assigned Case No. 09-23835.

[3] Upon transfer to the Southern District of Florida, the Aurelius Action was assigned Case No. 10-20236.

development of the Project. Under the Credit Agreement, the lenders agreed to loan $1.85 billion under three senior secured credit facilities: the Term Loan, the Delay Draw Term Loan, and the Revolver facilities. Defendants in the adversary proceeding and the Fontainebleau Action are the banks that agreed to lend money under the Revolver facility (the "Revolver Banks"). Fontainebleau alleged, *inter alia*, these Revolver Banks breached the Credit Agreement for failing to fund the revolving loans in March 2009. [Bankruptcy Case No. 09-01621-AJC, ECF No. 5, Amended Complaint].

On June 10, 2009, Fontainebleau filed a Motion for Partial Summary Judgment on Liability with Respect to the March 2 Notice of Borrowing in the adversary proceeding. Fontainebleau argued the Revolver Banks breached the Credit Agreement by refusing to process the March 2 notice of borrowing (the "March 2 Notice"), which requested revolving loans in excess of $150 million, on the basis that the Total Delay Draw Commitments were not "fully drawn" as required by the terms of section 2.1(c)(iii) of the Credit Agreement. Fontainebleau argued that the March 2 Notice, which, in addition to revolving loans, requested all funds available under the Delay Draw Term Loan facility, satisfied the "fully drawn" requirement because the Delay Draw Term Loans had been *fully requested* by the time the revolving loans in excess of $150 million were sought. The Revolver Banks moved to withdraw the reference on July 7, 2009 [Case No. 09-21879, ECF No. 1], and I granted the Motion for Withdrawal of Reference on August 5, 2009 [Case No. 09-21879, ECF No. 23].

On August 26, 2009, I denied Fontainebleau's Motion for Partial Summary Judgment [Case No. 09-21879, ECF No. 62], concluding that (1) the Credit Agreement's (Section 2.1(c)(iii)) requirement that the Total Delay Draw Commitments be "fully drawn"

before disbursement means the Commitments must be "fully funded"; (2) even if this legal conclusion is erroneous, Plaintiff's interpretation of "fully drawn" is reasonable but not conclusive, resulting in an ambiguity that precludes summary judgment; and (3) even if Plaintiff's interpretation of the term "fully drawn" is correct, Fontainebleau's default entitled the Revolver Banks to reject the March 2 Notice.

On September 20, 2010, upon uncontested request of the Trustee, I entered a Final Judgment [Case No. 09-21879, ECF No. 138], dismissing the Fontainebleau Action with prejudice for purposes of facilitating an appeal from my August 26, 2009 Order denying Fontainebleau's Motion for Partial Summary Judgment. Accordingly, the August 26, 2009 Order is on appeal, and no other matters are pending before me in the Fontainebleau Action.

B. The Avenue and Aurelius Actions

The Avenue Action was originally filed in the District Court of Nevada, and was transferred to the Southern District of Florida on December 28, 2009. [Case No. 09-23835, ECF No. 77]. On January 15, 2010, the Avenue Plaintiffs, each of which is a term lender under the Credit Agreement, filed a Second Amended Complaint (the "Avenue Complaint") [ECF No. 15] against various revolver lenders pursuant to the Credit Agreement, as well as against Bank of America in its capacities as Administrative Agent under the Credit Agreement and as Disbursement Agent under the Disbursement Agreement. The Avenue Complaint pled the following: Count I - breach of Disbursement Agreement against Bank of America; Count II - breach of the Credit Agreement against all defendants; Count III - breach of the implied duty of good faith and fair dealing against Bank of America; Count IV – breach of the implied duty of good faith and fair dealing against all defendants; Count V – declaratory relief against Bank of

America; and Count VI – declaratory relief against all defendants. With respect to the counts against the revolver lenders, the Avenue Plaintiffs alleged the revolver lenders should have funded the March 2009 Notices of Borrowing.

The Aurelius Action was originally filed in the Southern District of New York and was transferred to the Southern District of Florida on January 26, 2010. [Case No. 10-20236, ECF No. 29]. On January 19, 2010, the Aurelius Plaintiffs (together with the Avenue Plaintiffs, the "Term Lenders" or the "Term Lender Plaintiffs"), each of which is a successor-in-interest to a term lender under the Credit Agreement, filed an Amended Complaint (the "Aurelius Complaint") [Case No. 10-20236, ECF No. 27] against various lenders under the Revolving Loan (together with the defendants in the Avenue Action, the "Revolving Lenders" or the "Revolving Lender Defendants"), including Bank of America, under the Credit Agreement. The Aurelius Complaint pleads the following: Counts I and II - breach of the Credit Agreement against all defendants; and Count III – breach of the Disbursement Agreement against Bank of America. With respect to the claims against the Revolving Lenders, the Aurelius Plaintiffs argued the Revolving Lenders should have funded the March 2, March 3, and April 21 Notices of Borrowing.

On May 28, 2010, reasoning that the Term Lender Plaintiffs lack standing to pursue claims based on the alleged breaches of the Credit Agreement, I dismissed with prejudice the Term Lenders' claims relating to breach of the Credit Agreement (Count II of the Avenue Complaint and Counts I and II of the Aurelius Complaint). I further concluded the Term Lenders' claim against Bank of America for breach of the implied covenant of good faith and fair dealing (Count III of the Avenue Complaint) was precluded by their claims for breach of the Disbursement Agreement because the

damages sought in the implied covenant claim were intrinsically tied to those sought in the breach of contract claim. I dismissed the claim for breach of the implied covenant of good faith and fair dealing accordingly. I also dismissed the claim against all defendants for breach of the implied covenant of good faith and fair dealing in connection with the Credit Agreement (Count VI of the Avenue Complaint) as moot because the claim sought to impose an obligation that was inconsistent with the terms of the Credit Agreement. [Amended MDL Order No. 18]. In short, I dismissed all of the Term Lenders' claims against the Revolving Lender Defendants.

On January 18, 2011, I granted the Term Lenders' Joint Motion for Partial Final Judgment, entering partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) so the Term Lenders could seek an appeal of their claims against the Revolving Lender Defendants at the same time as the Trustee's appeal in the Fontainebleau action. [MDL Order Number 44, ECF No. 201]. Final judgment was therefore entered against the Term Lenders on Counts II, III, and IV of the Avenue Action, and Counts I and II of the Aurelius Action. [ECF No. 202]. The dismissal of the Term Lenders' claims against the Revolving Lender Defendants is on appeal. [ECF No. 203, 208].

On April 19, 2011, upon agreement and stipulation by the Avenue and Aurelius Plaintiffs and Bank of America, I dismissed without prejudice Count III of the Aurelius Action. [MDL Order Number 47, ECF No. 238]. (The Avenue Plaintiffs had purchased the Term Notes previously held by the Aurelius Plaintiffs, and sought to pursue a single action on the Notes they owned. [ECF No. 212].). *See also* 11/18/2011 Oral Argument Transcript ("11/18/2011 Tr.") [ECF No. 335] 97:19–98:3.

Therefore, the only claims outstanding are the Term Lenders' claims against Bank of America for breach of the Disbursement Agreement (Count I of the Avenue Action), and the related request for declaratory relief (Count V of the Avenue Action). The Term Lenders allege Bank of America breached its obligations as Bank Agent and Disbursement Agent under the Disbursement Agreement between September 2008 and March 2009 by improperly approving advance requests that failed to meet one or more of the conditions precedent under Section 3.3 of the Disbursement Agreement, improperly issuing Advance Confirmation Notices, improperly failing to issue Stop Funding Notices, and improperly disbursing funds from the Bank Proceeds Account. [ECF No. 15, Count I]. These claims and Bank of America's breach of the Disbursement Agreement are the subject of the parties' summary judgment motions.

II. Summary Judgment Motions: The Parties' Positions and Relief Sought

On August 5, 2011, the Term Lender Plaintiffs and Bank of America filed cross-motions for summary judgment and accompanying memoranda of law. [ECF Nos. 255 ("BofA Memo."), 258 ("TL Memo.")], and subsequently filed related opposition and reply memoranda [ECF No. 269 ("BofA Opp. Memo."), ECF No. 275 ("TL Opp. Memo."), ECF No. 290 ("BofA Reply Memo."), ECF No. 297 ("TL Reply Memo."). The Term Lenders seek partial summary judgment that Bank of America wrongfully and with gross negligence breached its obligations as Disbursement Agent and Bank Agent under the Disbursement Agreement because Bank of America disbursed funds knowing that Lehman Brothers Holdings, Inc. ("Lehman") had declared bankruptcy, and the bankruptcy and subsequent related events caused multiple conditions precedent to disbursement to fail. Bank of America, on the other hand, argues that it is entitled to summary judgment dismissing the Term Lenders' breach of contract claim because the

undisputed facts demonstrate that Bank of America performed its duties under the Disbursement Agreement by approving and funding Fontainebleau Advance Requests only after receiving the required certifications, had no duty to investigate the representations in these certifications, and was not grossly negligent. Bank of America further argues it did not have actual knowledge of the failure of any conditions precedent to disbursement.

I have considered the parties' positions, and after careful review of the pleadings, the case file, and the relevant law, I grant summary judgment in favor of Bank of America for the reasons discussed below.

III. Undisputed Facts

Pursuant to Southern District of Florida Local Rule 7.5,[4] the parties filed Statements of Undisputed Material Facts [ECF Nos. 256 ("BofA Statement"), 315 ("TL Statement")] and associated exhibits in support of their respective Motions for Summary Judgment. The parties filed responses and replies, including additional material facts ("AMA") and associated exhibits, to the Statements of Undisputed Material Facts [ECF Nos. 324 ("BofA Response"; "BofA Response AMA"), 316 ("TL Response"; "TL Response AMA"), 323 ("BofA Reply"; "BofA Reply AMA"), 317 ("TL Reply"; "TL Reply AMA")]. Upon review of the record, including the exhibits submitted, I conclude that the following material facts are undisputed and supported by evidence in the record.

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[4] In the Southern District of Florida, a party moving for summary judgment must submit a statement of undisputed facts. *See* S.D. Fla. L.R. 7.5. If necessary, the non-moving party may file a concise statement of the material facts as to which it is contended there exists a genuine issue to be tried. *Id.* Each disputed and undisputed fact must be supported by specific evidence in the record, such as depositions, answers to interrogatories, admissions, or affidavits on file with the Court. *Id.* All facts set forth in the movant's statement which are supported by evidence in the record are deemed admitted unless controverted by the non-moving party. *Id.*

A. The Project and the Parties

The Fontainebleau Las Vegas is a partially-completed resort and casino development in Las Vegas (previously defined as the "Project"). (BofA Statement ¶ 8).[5] To finance the Project, Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, the "Borrowers" or "Fontainebleau") entered into various financing agreements, including the Master Disbursement Agreement ("Disbursement Agreement"), Credit Agreement, and Retail Agreement, each of which is discussed in more detail below. (*Id.* ¶¶ 15–16, 22). The Project's developer was the Borrowers' parent, Fontainebleau Resorts, LLC ("Fontainebleau Resorts" or "FBR"). (*Id.* ¶ 9). Jeff Soffer was the Chairman of Fontainebleau Resorts, Glenn Schaeffer was the CEO, and Jim Freeman was Senior Vice President and Chief Financial Officer. (Freeman Dep. 12:10–14; 13:20–24). Turnberry West Construction ("TWC"), a member of the Turnberry group of companies, was the Project's general contractor. (BofA Statement ¶ 12).

Bank of America, a nationally chartered bank, held various roles under the financing agreements. (BofA Response AMA ¶ 1). It acted as Administrative Agent under the Credit Agreement for the Senior Secured Facility Lenders and Disbursement Agent under the Disbursement Agreement, and was also a lender under the Credit Agreement. (BofA Statement ¶¶ 2–4; BofA Response AMA ¶ 1). Bank of America's activities as Administrative and Disbursement Agents for the Project were managed by the same individuals within its Corporate Debt Products Group. (TL Response AMA ¶

[5] Where the fact is not in dispute, I cite only to the statements of material facts, responses, or replies. Where the fact is in dispute, I cite to the underlying record.

9; 11/18/2011 Tr. 26:23-27:1). These activities included approving Advance Requests, disbursing funds to Borrowers, and deciding what information to disseminate to lenders. (BofA Response ¶ 9; TL Reply ¶ 9).

Jeff Susman was the Senior Vice President of Corporate Debt Products and had primary management responsibility for Bank of America's agency activities relating to the Project until his departure from Bank of America in February 2009. (BofA Response ¶ 10; TL Reply ¶ 10; TL Response AMA ¶ 15). Jean Brown reported to the Corporate Debt Products group and was the lead contact with TriMont Real Estate Advisors, the Servicer of the Retail Facility. (TL Response AMA ¶10; Rafeedie Dep. Tr. 33:2–23). David Howard was the Managing Director of Syndications of Bank of America Securities until March 31, 2009, and Brett Yunker was the Vice President of the Global Gaming Team at Bank of America Securities. (TL Response AMA ¶¶ 13–14; BofA Reply AMA ¶¶ 13–14).

Finally, the Term Lender Plaintiffs are a group of sophisticated financial institutions who were lenders—or in many cases, successors-in-interest to lenders—to Fontainebleau under the Credit Agreement.[6] (BofA Statement ¶ 5; Aurelius Compl.; Avenue Compl.).

B. The Project's Financing

The Project's initial budget was $2.9 billion, which included approximately $1.7 billion of hard construction costs. (BofA Statement ¶ 14). The Project was financed through a combination of debt and equity capital. The largest financing component for

[6] The Term Lenders do not dispute this fact; rather, they contend it is immaterial and irrelevant. (TL Response at 1).

the Project's resort component was a $1.85 billion senior secured debt facility ("Senior Credit Facility"), created by the Credit Agreement. (*Id.* ¶¶ 15, 17). The Senior Credit Facility comprised three senior secured loans: (1) a $700 million term loan (the "Initial Term Loan"); (2) a $350 million delay draw term loan (the "Delay Draw Term Loan"); and (3) an $800 million revolving loan (the "Revolver Loan"). (*Id.* ¶ 17). The Term Lender Plaintiffs own Initial Term Loan and Delay Draw Term Loan notes, and Bank of America was a Revolver Loan lender. (*Id.* ¶¶ 4, 18).[7] Additional financing sources for the Project included equity contributions by Fontainebleau and its affiliates, $675 million in Second Mortgage Notes, and a $315 million loan earmarked for the Project's retail space (the "Retail Facility"). (*Id.* ¶ 16).

Pursuant to the agreements governing the various financing sources, Fontainebleau gained access to the financing through a two-step borrowing process. The first step required Fontainebleau to submit to the Administrative Agent a Notice of Borrowing specifying the amount and type of loan to be borrowed and the requested borrowing date. The Administrative Agent would then notify the lenders of the Notice of Borrowing, and the Lenders would remit funds to the Administrative Agent who, upon satisfaction of certain conditions precedent, would transfer the funds into a Bank Proceeds Account. (Dep. Exhs. 808 ¶ 6, 1501). Fontainebleau could not access money in the Bank Proceeds Account; rather, the second step required Fontainebleau to submit an Advance Request to Bank of America as Disbursement Agent under the Disbursement Agreement, a process described in more detail below. (TL Statement ¶¶

[7] The Term Lenders do not dispute this fact; rather, they only contend that it is immaterial and irrelevant. (TL Response at 1).

14–15; Dep. Exh. 808 ¶ 7). The $700 Initial Term Loan was funded into the Bank Proceeds Account upon closing of the Credit Agreement in June 2007, and the majority of the $350 million Delay Draw Term Loan was funded into the Bank Proceeds Account in early March 2009. (Dep. Exh. 644; TL Statement ¶ 13).

C. The Retail Facility, Retail Agreement, and Shared Costs

The Project's retail space was to be developed by Fontainebleau Las Vegas Retail, LLC (the "Retail Affiliate"), an FBR subsidiary. (BofA Statement ¶ 19). Although the Senior Credit Facility and the Retail Facility were separate lending facilities, the resort budget included $83 million in costs that were to be funded through the Retail Facility ("Shared Costs"). (*Id.* ¶ 24). These Shared Costs were used to fund construction of portions of the Project's retail space that were structurally inseparable from the resort. (*Id.* ¶ 25). The Retail Facility was critical to the completion of the Project. (TL Response AMA ¶ 26).

The Retail Facility was subject to a June 6, 2007 agreement (previously referred to as the "Retail Agreement") between the Retail Affiliate and Lehman Brothers Holdings, Inc. ("Lehman"), which signed the agreement as a lender and as the agent for one or more of the co-lenders. (BofA Statement ¶¶ 22, 26). Bank of America was not a Lender under the Retail Agreement or otherwise party to it, but did receive a copy of the Agreement. (Retail Agreement ("Retail Agmt."); TL Response AMA ¶ 8). The Retail Agreement permitted Lehman to syndicate some or all of the Retail Facility to other lenders. (BofA Statement ¶ 27). On September 24, 2007, pursuant to a Retail Co-Lending Agreement, Lehman syndicated select notes under the Retail Facility to National City Bank, Sumitomo Mitsui Banking Corp., and Union Labor Life Insurance Company ("ULLICO") (together with Lehman, "Retail Co-Lenders" or "Retail Lenders").

(BofA Response ¶ 30; Dep. Ex. 9, Retail Co-Lending Agreement ("Retail Co-Lending Agmt."). Post syndication, Lehman was the largest Retail Lender, responsible for $215 million, or 68.25% of the Retail Facility. (TL Response AMA ¶ 25; BofA Response ¶ 30).

The Retail Agreement further permitted Lehman to delegate any portion of its responsibilities under the Agreement to a servicer. (BofA Statement ¶ 31). Lehman designated TriMont Real Estate Advisors, Inc. ("TriMont") as the servicer for the Retail Facility, delegating the responsibility for collecting the Retail Co-Lenders' respective Shared Cost obligations in response to an Advance Request and transferring those funds to Bank of America, as Disbursement Agent under the Disbursement Agreement. (*Id.* ¶¶ 32–33).

Additionally, the Retail Agreement and Retail Co-Lending Agreement permitted the Retail Co-Lenders to "sell … any or any part of their right … Loan …to one or more additional lenders," and to make payments on behalf of a defaulting Co-Lender, subject to certain terms and conditions. (Retail Co-Lending Agmt. § 5.01(d); Retail Agmt. §§ 9.7.2.9(a) and (b)). Bank of America was not party to, and did not receive a copy of, the Retail Co-Lending Agreement. (Retail Co-Lending Agmt.; BofA Response AMA ¶ 25). To that end, Bank of America did not know the identity of the Retail Co-Lenders until late 2008. (BofA Response AMA ¶ 26; TL Reply AMA ¶ 26).

D. The Disbursement Agreement

Fontainebleau's access to the construction financing was governed by the Disbursement Agreement, which contained a New York choice-of-law provision. (BofA Statement ¶ 34; Disbursement Agreement ("Disb. Agmt.") § 11.6). The Disbursement

Agreement contained an integration clause (Section 11.5, entitled "Entire Agreement") that permitted reference to select additional agreements:

> This Agreement and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof, all of which negotiations and writings are deemed void and of no force and effect.

(Disb. Agmt. § 11.5).

As described above, the Credit and Disbursement Agreements established a two-step funding process for the Senior Credit Facility. To access funds from the Delay Draw Term Loan and Revolver Loan facilities, Fontainebleau would submit a Notice of Borrowing that, subject to certain procedures and conditions set forth in the Credit and Disbursement Agreements, would cause Lender funds to be transferred into the designated Bank Proceeds Account. (Credit Agmt. §§ 2.1(b), 2.1(c), 2.4; Disb. Agmt. § 2.1.2). Fontainebleau could not withdraw funds directly from the Bank Proceeds Account; rather, it was required to submit a monthly Advance Request, the form and contents of which were prescribed by the Disbursement Agreement. (BofA Statement ¶ 37).

1. The Advance Request, Conditions Precedent, and the Funding Process

The Disbursement Agreement required that each Advance be requested "pursuant to an Advance Request substantially in the form of Exhibit C-1" and provided "[e]ach Advance Request shall be delivered to the Disbursement Agent … not later than the 11th day of each calendar month." (Disb. Agmt. § 2.4.1). Exhibit C-1, in turn, required Fontainebleau to "represent, warrant and certify" that "the conditions set forth in Section 3.3 … of the Disbursement Agreement are satisfied as of the Requested

Advance Date." (BofA Statement ¶ 37; Disb. Agmt. Exh. C-1 at 1, 8). Exhibit C-1 also outlined certain "General Representations" that overlapped with conditions set forth in Section 3.3. (Disb. Agmt. § 3.3, Exh. C-1 at 5–8).

Section 3.3, entitled "Conditions Precedent to Advances by Trustee and the Bank Agent," contained twenty-four separate conditions precedent. (BofA Statement ¶ 41; Disb. Agmt. § 3.3). These conditions precedent included the following:

- "Representations and Warranties. Each representation and warranty of … [e]ach Project Entity set forth in Article 4 … shall be true and correct in all material respects as if made on such date." (Disb. Agmt. § 3.3.2).

- "Default. No Default or Event of Default shall have occurred and be continuing." (*Id.* § 3.3.3). (Article 7, entitled "Events of Default," provided further information on Events of Default. (*Id.* Art. 7).)

- "Advance Request and Advance Confirmation Notice. … [The] Advance Request shall request an Advance in an amount sufficient to pay all amounts due and payable for work performed on the Project through the last day of the period covered by such Advance Request …." (*Id.* § 3.3.4).

- "Consultant Certificates and Reports. Delivery to each of the applicable Funding Agents and the Disbursement Agent of (a) the Constriction Consultant Advance Certificate approving the corresponding Advance Request, and (b) the Architect's Advance Certificate with respect to the Advance, and (c) the General Contractor's Advance Certificate with respect to the Advance." (*Id.* § 3.3.5).

- "In Balance Requirement. The Project Entitles shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied." (*Id.* § 3.3.8). (The In Balance Test was satisfied when the Available Funds equaled or exceeded the Project's Remaining Costs. (BofA Statement ¶ 41).)

- "Material Adverse Effect. Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material Adverse Effect." (Disb. Agmt. § 3.3.11).

- "Plans and Specifications. In the case of each Advance from the Bank Proceeds Account … , the Construction Consultant shall to the extent set forth in the Construction Consultant Advance Certificate have approved all

Plans and Specifications which, as of the date of the relevant Advance Request, constitute Final Plans and Specifications to the extent not theretofore approved." (*Id.* § 3.3.19).

- "Adverse Information. In the case of each Advance from the Bank Proceeds Account … , the Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole." (*Id.* § 3.3.21).

- "Retail Advances. In the case of each Advance from the Bank Proceeds Account … , the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to the Advance Request." (*Id.* § 3.3.23).

- "Other Documents. In the case of each Advance from the Bank Proceeds Account, the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." (*Id.* § 3.3.24).

Moreover, each Advance Request included certification from TWC, that, among other things, "[t]he Control Estimate … reflects the costs expected to be incurred by [TWC] to complete the remaining 'Work' … on the Project." (BofA Statement ¶ 44; Disb. Agmt. Exh. C-4 ¶ 4). TWC's certification further specified that the representations contained therein were "true and correct" and were "made for the benefit of the Disbursement Agent, the Funding Agents and the Lenders represented thereby, and may be relied upon for the purposes of making advances pursuant to the … Disbursement Agreement …." (Disb. Agmt. Exh. C-4 at 2). Also included with each Advance Request was certification from the Project's Architect that "[t]he construction performed on the Project … is in general accordance with the 'Drawings and Specifications.'" (*Id.* Exh. C-3).

After submission of an Advance Request, the Disbursement Agreement required Bank of America, as Disbursement Agent, and Inspection and Valuation International, Inc. ("IVI"), who was appointed as Construction Consultant under the Disbursement Agreement, to "review the Advance Request and attachments thereto and determine whether all required documentation has been provided, and [to] use commercially reasonable efforts to notify the Project Entities of any deficiency within three Banking Days …." (Disb. Agmt. § 2.4.4(a); BofA Statement ¶ 45).

The Disbursement Agreement further required IVI to deliver to the Disbursement Agent a "Construction Consultant Advance Certificate either approving or disapproving the Advance Request." (Disb. Agmt. § 2.4.4(b); BofA Statement ¶ 47). To fulfill these requirements, IVI performed monthly site visits, reviewed information disclosed by Fontainebleau at the site visits, and summarized its findings in Project Status Reports. (BofA Statement ¶ 46). By signing the Construction Consultant Advance Certificate, IVI certified, based on its on-site observation of construction progress and its review of "the material and data made available" by the Borrowers, Contractor, and others; all relevant invoices, plans and specifications; and all previous Advance Requests, the following:

- "The Project Entities have properly substantiated, in all material respects, the Project Costs for which payment is requested in the Current Advance Request";
- "The Remaining Cost Report attached to the Current Advance Request accurately reflects, in all material aspects, the Remaining Costs required to achieve Final Completion";
- "The Unallocated Contingency Balance set forth in the Remaining Cost Report attached to the Current Advance Request is accurate and equals or exceeds the Required Minimum Contingency";

- "The Opening Date is likely to occur on or before the scheduled Opening Date set forth in the Current Advance Request and the Completion Date if likely to occur within 180 days thereafter";

- "The Advances requested in the Current Advance Request are, in our reasonable judgment, generally appropriate in light of the percentage of construction completed and the amount of Unincorporated Materials"; and

- "The undersigned has not discovered any material error in the matters set forth in the Current Advance Request or Current Supporting Certificates."

(Disb. Agmt. Exh. C-2). The Disbursement Agent was tasked with using "reasonable diligence" to ensure IVI performed its review and delivered its Construction Consultant Advance Certificate "not less than three Banking Days prior to the Scheduled Advance Date." (*Id.* § 2.4.4). In sum, each Advance Request required (and contained) certification from Fontainebleau, TWC, and IVI that the applicable conditions precedent were satisfied.

Further, the Disbursement Agent was permitted to require Fontainebleau to submit a revised Advance Request if it found any "minor or purely mathematical errors." (*Id.*). Independently, Fontainebleau could, with the approval of the Disbursement Agent and IVI, revise and resubmit its Advance Request if it "obtain[ed] additional information or documentation or discover[ed] any errors in or updates required to be made to any Advance Request prior to the Scheduled Advance Date." (*Id.* § 2.4.5). The Disbursement Agent was not obligated to accept any such updates, but was required to "consider their submission in good faith." (*Id.*).

Once an Advance Request's applicable conditions precedent were satisfied, Bank of America (as Disbursement Agent) and Fontainebleau were required to execute an Advance Confirmation Notice. (BofA Statement ¶ 51). By executing the Advance Confirmation Notice, Fontainebleau expressly confirmed "that each of the

representations, warranties and certifications made in the Advance Request … are true and correct as of the Requested Advance Date and Disbursement Agent is entitled to rely on the foregoing in making the Advanced herein requested" and "that the [Advance Request] representations, warranties and certifications are correct as of the Requested Advance Date." (BofA Statement ¶ 52, Disb. Agmt. Exh. E).

The Notice "confirm[ed] the amount of the Advances to be made under the Financing Agreements" and "confirm[ed] the amount to be transferred into each Account." (Disb. Agmt. Exh. E). The Disbursement Agreement correspondingly provided, "each of the Funding Agents shall make the Advances contemplated by [the] Advance Confirmation Notice to the relevant Accounts" and "the Disbursement Agent shall make the resulting transfers amongst the Accounts described in the Advance Confirmation Notice." (*Id.* § 2.4.6). Thus, once an Advance Request's conditions precedent were satisfied and the Advance Confirmation Notice issued, Bank of America transferred the requested funds from the Bank Proceeds Account to select payment accounts for further distribution to Fontainebleau. (*Id.* § 2.4.6, Exh. E).

If, on the other hand, the Advance Request's conditions precedent were not satisfied, or the "Controlling Person notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing," the Disbursement Agreement required the Disbursement Agent to issue a Stop Funding Notice. (BofA Statement ¶ 54, Disb. Agmt. § 2.5.1). (By virtue of its role as Bank Agent, as of September 2008, Bank of America was the Controlling Person under the Disbursement Agreement. (Disb. Agmt. Exh. A at 10; TL Statement ¶ 26; BofA Response ¶ 26).). A Stop Funding Notice relieved the Lenders of their obligation to fund loans under the Credit Agreement until

the circumstances giving rise to the Stop Funding Notice were resolved or the necessary parties waived the unsatisfied conditions precedent. (BofA Statement ¶ 54, Disb. Agmt. § 2.5.2). The Disbursement Agreement specifically provided "[t]he Disbursement Agent shall have no liability … arising from any Stop Funding Notice except to the extent arising out of gross negligence or willful misconduct of the Disbursement Agent." (Disb. Agmt. § 2.5.1).

2. Defaults and Events of Default

As noted above, one of the conditions precedent to an Advance Request was that "No Default or Event of Default shall have occurred and be continuing." (Disb. Agmt. § 3.3.3). "Default" was defined "as any events specific in Article 7" and "the occurrence of any 'Default' under any Facility Agreement," including the Credit Agreement and the Retail Agreement, and "Event of Default" was defined as having "the meaning given in Section 7.1." (*Id.* Exh. A at 10, 12). Per Article 7, entitled "Events of Default," the following constituted an "Event of Default":

- "Other Financing Documents. The occurrence of an 'Event of Default' under and as defined by any one or more of the Facility Agreements …." (*Id.* § 7.1.1).

- "Representations. … Any representation, warranty or certification confirmed or made by any of the Project Entities in this Agreement … (including any Advance Request …) shall be found to have been incorrect when made or deemed to be made in any material respect." (*Id.* § 7.1.3(c)).

The Credit Agreement outlined what constituted an "Event of Default" under the Credit Agreement in Section 8, entitled "Events of Default," and the Retail Agreement outlined what constituted an "Event of Default" under the Retail Agreement in Section 8.1, entitled "Event of Default." (Credit Agreement ("Credit Agmt.") at 11, § 8; Retail Agmt. § 8.1).

Further, the Credit Agreement defined "Lender Default" as "the failure … of a Lender to make available … its portion of any Loan required to be made by such Lender hereunder," and "Defaulting Lender" as "any time … any Lender with respect to which a Lender Default is in effect." (Credit Agmt. 11, 25). However, Section 8 of the Credit Agreement did not include Lender Defaults or Defaulting Lenders as "Events of Default." (Credit Agmt. § 8). The Retail Agreement similarly defined "Lender Default" as "the failure … of a Lender or Co-Lender to make available its portion of any Loan when required to be made by it hereunder," and defined "Defaulting Lender" to include any Lender or Co-Lender that was the subject of bankruptcy, but neither Lender Default nor Defaulting Lender was explicitly included as an Event of Default under Section 8.1 of the Retail Agreement. (Retail Agmt. § 1 at 8, 15, § 8.1).

The Disbursement Agreement imposed on Fontainebleau an obligation "to provide to the Disbursement Agent, the Construction Consultant and the Funding Agents written notice of … [a]ny Default or Event of Default of which the Project Entities have knowledge ….," and explicitly stated the Disbursement Agent had "no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing;" (Disb. Agmt. §§ 5.4.1, 9.10). The Credit Agreement imposed on Fontainebleau and the Lenders the obligation to provide the Administrative Agent with notice of a default under the Credit Agreement. (Credit Agmt. § 9.3(c)). Neither the Disbursement nor the Credit Agreement imposed on the Disbursement Agent or the Bank Agent a duty to inquire as to the occurrence of a Default or an Event of Default. (Disb. Agmt. § 9.10; Credit Agmt. § 9.3(c)).

3. Article 9: The Disbursement Agent

Article 9 of the Disbursement Agreement, entitled "The Disbursement Agent," set forth certain rights and responsibilities of the Disbursement Agent. (Disb. Agmt. Art. 9). Section 9.1, entitled "Appointment and Acceptance," provided as follows: "The Disbursement Agent … agrees to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds." (*Id.* § 9.1).[8] Sections 9.2 ("Duties and Liabilities of the Disbursement Agent Generally) and 9.3 ("Particular Duties and Liabilities of the Disbursement Agent"), as indicated by their titles, set forth the duties and liabilities of the Disbursement Agent.

Section 9.2.3 prescribed the action to be taken by the Disbursement Agent should it be notified of an Event of Default or Default:

> Notice of Events of Default. If the Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing, the Disbursement Agent shall … exercise such of the rights and powers vested in it by this [Disbursement] Agreement … and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs.

(*Id.* § 9.2.3).

In addition, Section 9.2.5, entitled "No Imputed Knowledge," explicitly provided that no knowledge may be imputed to Bank of America, as Disbursement Agent, from Bank of America in its other agency or lender functions:

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[8] Section 9.1 referenced certain "Control Agreements." (Disb. Agmt. § 9.1). The parties agreed during oral argument that I need not consider the Control Agreements in evaluating Section 9.1 and the Disbursement Agreement. (11/18/2011 Tr. 12:24–13:8).

> Notwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent, or by reason of the fact that the Disbursement Agent is also a Funding Agent or Lender.

(*Id.* § 9.2.5). "Funding Agent" included Bank of America's role as Bank Agent under the Disbursement Agreement, and, in turn, Controlling Person under the Disbursement Agreement and Administrative Agent under the Credit Agreement. (*Id.* Exh. A at 3, 10, 14). Accordingly, Bank of America, as Disbursement Agent, had no imputed knowledge from Bank of America as Bank Agent or Administrative Agent.

Regarding the approval of Advance Requests, Section 9.3.2 expressly authorized the Disbursement Agent to rely on certifications from the Project Entities with respect to the conditions precedent of an Advance Request, and disavowed any duty on the part of the Disbursement Agent to investigate independently the veracity of the statements and information contained in the certifications:

> The Disbursement Agent may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval or other paper document believed by it on reasonable grounds to be genuine and to have been signed or presented by the proper party or parties. Notwithstanding anything else in this Agreement to the contrary, in performing its duties hereunder, including approving any Advance Requests, making any other determinations or taking any other actions hereunder, the Disbursement Agent shall be entitled to rely on certifications from the Project Entities (and, where contemplated herein, certifications from third parties, including the Construction Consultant) as to satisfaction of any requirements and/or conditions imposed by this Agreement. The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items or to investigate any other facts or circumstances to verify compliance by the Project Entities with their obligations hereunder.

(*Id.* § 9.3.2).

Section 9.10, entitled "Limitation of Liability," also limited the Disbursement Agent's responsibility and liability. (*Id.* § 9.10). Section 9.10 explicitly limited the duties of the Disbursement Agent as follows: (1) the Disbursement Agent has "no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing"; (2) "the Disbursement Agent is not obligated to supervise, inspect or inform the Project Entities of any aspect of the development, construction or operation of the Project"; (3) the Disbursement Agent has "no duties or obligations hereunder except as expressly set forth herein, shall be responsible only for the performance of such duties and obligations and shall not be required to take any action otherwise than in accordance with the terms hereof"; and (4) "…nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon the Disbursement Agent any obligations in respect of this Agreement except as expressly set forth herein or therein." (BofA Statement ¶ 61; Disb. Agmt. § 9.10). Section 9.10 also stated, "The Disbursement Agent does not represent, warrant or guaranty to the Funding Agents or the Lenders the performance by any Project Entities, the General Contractor, the Constriction Consultant, the Architect, or any other Contractor …." (Disb. Agmt. § 9.10).

Section 9.10, moreover, limited Bank of America's potential liability to bad faith, fraud, gross negligence, or willful misconduct:

- "[T]he Disbursement Agent shall have no responsibility to the Project Entities, the Funding Agents, or the Lenders as a consequence of performance by the Disbursement Agent hereunder except for any bad faith, fraud, gross negligence or willful misconduct of the Disbursement Agent as finally judicially determined by a court of competent jurisdiction;" and

- "Neither the Disbursement Agent nor any of its officers, directors, employees or agents shall be in any manner liable of responsible for any loss or damage arising by reason of any act or omission to act by it or them hereunder or in connection with any of the transactions contemplated hereby, including, but

> not limited to, any loss that may occur by reason of forgery, fraud, gross negligence or willful misconduct as finally judicially determined by a court of competent jurisdiction."

(BofA Statement ¶ 62; Disb. Agmt. § 9.10). (The Term Lenders do not contend Bank of America engaged in fraud.)

E. Bank of America's Role as Bank Agent and the Credit Agreement

Bank of America was not only the Disbursement Agent under the Disbursement Agreement, it was also the Bank Agent. (Disb. Agmt. Exh. A at 3). The Disbursement Agreement defined "Bank Agent" as "Bank of America, N.A. in its capacity as Administrative Agent under the Bank Credit Agreement …." (*Id.*). Like the Disbursement Agreement, the Credit Agreement was governed by New York law. (Credit Agmt § 10.11).

Section 9 of the Credit Agreement set forth certain rights and responsibilities of the Administrative Agent. (Credit Agmt. § 9). Similar to the exculpatory provisions of the Disbursement Agreement, the Credit Agreement, Section 9.3, entitled "Exculpatory Provisions," specifically provided the Administrative Agent could not be held liable in the absence of "its own gross negligence of willful misconduct." (*Id.* § 9.3(c)). Section 9.3 further stated, "The Administrative Agent shall be deemed not to have knowledge of any Default unless and until notice describing such Default is given to the Administrative Agent by Borrowers, a Lender or the Issuing Lender." (*Id.*). In the same vein, Section 9.7 of the Credit Agreement, entitled "Non-Reliance on Administrative Agent and Other Lenders," required the Lenders to make their own decisions "independently and without reliance" upon Bank of America as Administrative Agent. (*Id.* § 9.7).

Section 9 of the Credit Agreement also contained reliance and inquiry provisions similar to those in Article 9 of the Disbursement Agreement. Section 9.3 stated, "The

Administrative Agent shall not be responsible for or have any duty to ascertain or inquire into … any statement, warranty or representation made in or in connection with this Agreement or any other Loan Document ….” (*Id.* § 9.3(c)). Also, Section 9.4 authorized the Administrative Agent to rely on “any notice, request, certificate, consent, statement, instrument, document or other writing … believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person.” (*Id.* § 9.4).

Having set forth the relevant and material provisions of the pertinent Agreements, I turn to the material facts underlying the Term Lenders’ claims.

F. September 2008 through March 2009 Advance Requests

For each Advance Request from September 2008 through March 2009, Bank of America received all required certifications from Fontainebleau, IVI, TWC, and the Architect before disbursing funds to Fontainebleau. (BofA Statement ¶ 57; TL Response ¶ 57; TL Statement ¶ 75). Fontainebleau certified the satisfaction of all conditions precedent and accuracy of all representations and warranties, including the absence of any defaults under the various loan documents. (BofA Statement ¶ 57; TL Response ¶ 57). The Architect certified that the Project’s construction was in accordance with the plans and specifications. (*Id.*). TWC certified the Control Estimate reflected the costs it expected to be incurred to complete the Project. (*Id.*). And IVI certified the Remaining Cost Report accompanying the Advance Request accurately reflected the remaining costs to complete the Project. (*Id.*).[9] It is undisputed that the

[9] The Term Lenders dispute this fact on the basis that IVI rejected the initial March 2009 Advance Request. (TL Response ¶ 57). As discussed below, although IVI rejected the initial Request, IVI ultimately signed off on the March 2009 Advance Request before Bank of America disbursed the requested funds to Fontainebleau.

Controlling Person never formally notified the Disbursement Agent that a Default or Event of Default had occurred and was continuing. (Disb. Agmt. § 2.5.1).

Notwithstanding, the Term Lenders have identified several events underlying their claim that Bank of America breached its obligations under the Disbursement Agreement: the Lehman bankruptcy and the funding of the Retail Facility; Fontainebleau's failure to disclose anticipated Project costs; repudiation by the FDIC of First National Bank of Nevada's commitments; select lenders' failure to fund with respect to the March 2009 Advance; and the "untimely" submission of the March 2009 Advance. I address each event in turn.

G. The Lehman Bankruptcy and Retail Facility Funding

1. September 2008 Advance Request

On September 11, 2008, Fontainebleau submitted its September Advance Request for $103,771.77, including nearly $3.8 million in Retail Facility funds. (Dep. Exhs. 237, 331; BofA Statement ¶ 65). Fontainebleau represented in the Request that all conditions precedent to disbursement had been satisfied. (TL Statement ¶ 75).

Lehman filed for bankruptcy on September 15, 2008. (BofA Statement ¶ 64; TL Statement ¶ 33). In the days following, Bank of America held a series of calls with Fontainebleau to obtain additional information regarding the bankruptcy's implications for the September 2008 Advance Request. (BofA Statement ¶ 68). These calls focused on whether Lehman would fund its portion of the Advance Request and on potential alternative financing arrangements if Lehman did not fund, including funding by other Retail Facility Lenders or Fontainebleau. (BofA Statement ¶ 69; TL Statement ¶ 47). (As noted above, Lehman was a lender and agent under the Retail Facility, and one of the conditions precedent of an Advance Request was the "Retail Agent and the

Retail Lenders … make any Advances required of them pursuant to the Advance Request." (Disb. Agmt. § 3.3.23)). During the calls, Bank of America did not make any recommendations as to the various financing options; however, it later concluded internally that Fontainebleau funding Lehman's share would not satisfy the Advance Request's condition precedent. (BofA Statement ¶¶ 70–71; TL Statement ¶ 48–49). There is no evidence on summary judgment that Bank of America communicated this conclusion to Fontainebleau.[10]

On September 17, 2008, Bank of America issued an Advance Confirmation Notice confirming the amount of the Advances to be made under the various financing agreements, and on September 22, 2008, Bank of America, as Administrative Agent, requested Fontainebleau schedule a telephone conference with the lenders to discuss the implications of Lehman's bankruptcy on the Project. (Dep. Exh. 901). No call was held in the following days. On September 26, 2008, TriMont sent Bank of America the entire amount of the Retail Shared Costs (or the "Retail Advance"). (BofA Statement ¶ 73; TL Response ¶ 73). After receiving the Retail Advance and before disbursing funds to Fontainebleau, Bank of America sought and received reconfirmation from Fontainebleau CFO Jim Freeman that all conditions precedent to funding had been

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[10] The Term Lenders' assert "BofA did not discuss with Fontainebleau BofA's conclusion that Fontainebleau's payment of Lehman's commitment would cause condition precedent in Section 3.3.23 to fail." (TL Statement ¶ 50). Bank of America disputes this fact. (BofA Response ¶ 50). Per the testimony cited by Bank of America, neither Mr. Yunker (of Bank of America) nor Mr. Freeman (of Fontainebleau) recalls whether Bank of America communicated its conclusion to Fontainebleau. (Freeman Dep. Tr. 74:12–24; Yunker Dep. Tr. 96:11–98:14). Bank of America has not, however, cited any evidence on summary judgment stating Bank of America communicated its conclusion to Fontainebleau. *See, e.g.*, *Dickey v. Baptist Mem'l Hosp.*, 146 F.3d 262, 266 n.1 (5th Cir. 1998) ("The mere fact that [the deponent] does not remember the alleged phone conversation, however, is not enough, by itself, to create a genuine issue of material fact [as to whether the conversation occurred.]")

satisfied. (Dep. Exh. 75). Specifically, Bank of America's Jeff Susman requested Jim Freeman reaffirm "pursuant to Section 11.2 of the Disbursement Agreement … the representations and warranties … made pursuant to the [September] Advance Request and Advance Confirmation Notice." (*Id.*). (Section 11.2, entitled "Further Assurances," authorized the Disbursement Agent to seek further assurances in relation to an Advance Request. (Disb. Agmt. § 11.2).). Jim Freeman responded, "I affirm." (Dep. Exh. 75).

As of September 26, 2008, Lehman had not announced that it would reject the Retail Agreement as a result of its bankruptcy, and Bank of America had concluded that the Lehman bankruptcy, in and of itself, did not provide a basis for rejecting Fontainebleau's September 2008 Advance Request. (BofA Statement ¶ 77; BofA Response AMA ¶ 62). Bank of America also believed it was required to honor the September 2080 Advance Request if the requested Retail Shared Costs were received in full and the Advance Request certifications remained in effect. (Howard Dep. Tr. 80:18-81:21). Accordingly, on September 26, 2008, Bank of America disbursed Fontainebleau's September 2008 Advance Request.

2. Highland's Contentions Regarding the Lehman Bankruptcy

Meanwhile, Highland sent several communications to Bank of America asserting Lehman's bankruptcy caused breaches of the Loan Facility. On September 26, 2008, Highland Capital Management, one of the original Term Lenders, sent Jeff Susman of Bank of America an e-mail stating, "[a]s a result of [Lehman's] bankruptcy filing, … the financing agreements are no longer in full force and effect, triggering a number of breaches under the Loan Facility – resulting in the following consequences: (i) No disbursements may be made under the Loan facility; and (ii) The Borrower should be

sent a notice of breach immediately to protect the Lenders' rights and ensure that any cure period commence as soon as possible." (Dep. Exh. 455; BofA Response AMA ¶ 106). That same day, Bank of America's counsel Sheppard Mullin Richter & Hampton LLP ("Sheppard Mullin") responded to Highland, stating the Bankruptcy Code "specifically provides that no executor contract may be terminated or modified solely based on the commencement of a Chapter 11 case" and requesting Highland identify "authority or documents supporting a contrary conclusion." (Dep. Exh. 472; BofA Response AMA ¶ 107). Following communications with Highland and further internal analysis, Bank of America concluded that Lehman's bankruptcy filing did not, on its own, provide a basis for rejecting Fontainebleau's September 2008 Advance Request. (BofA Response AMA ¶ 108).

Bank of America provided additional information and analysis to Highland on September 29, 2008 in a Sheppard Mullin email explaining that it was "monitoring all of the [Lehman] court orders" and was "unaware of a restriction on performance of this agreement." (Dep. Exh. 79). Sheppard Mullin also rejected Highland's suggestion that Lehman's bankruptcy was an "anticipatory repudiation of the contract," and affirmed the earlier conclusion that, "under Section 365(e)(1), an executory contract cannot be terminated or modified solely on the basis of [Lehman's] insolvency … or … the commencement of the Chapter 11 case." (*Id.*).

On September 30, 2008, after disbursement of the September 2008 Advance Request, Highland sent Sheppard Mullin another email, this time claiming, "Re Sec 365 – if this contract can be rejected then, at a minimum, there is [a Material Adverse Effect] under the [Credit Agreement]." (*Id.*). Bank of America analyzed Highland's contention

and the pertinent portions of the relevant financing agreements and concluded that Highland's contention was incorrect, as there was no indication that there would be a shortfall in Retail funds or that the Retail Lenders would fail to honor their obligations under the Retail Facility. (Susman Declaration ("Susman Decl.") ¶ 23). Through these various communications and correspondence, Highland did not submit a formal Notice of Default, or specify, with reference to a specific portion of the relevant agreements, any "Default" or "Event of Default" under the Disbursement Agreement or other financing documents. (Susman Decl. ¶ 25; Dep. Exhs. 79, 455).

3. Fontainebleau Resorts' Funding of Lehman's Portion of the September 2008 Retail Shared Costs

Lehman's portion of the September 2008 Advance Request was funded by Fontainebleau Resorts, which made a $2,526,184.00 "equity contribution" to "prevent an overall project funding delay and resulting disruption of its Las Vegas project" after Lehman failed to fund its required September 2008 Retail Shared Costs portion. (BofA Statement ¶ 78). Although the parties now know that Fontainebleau Resorts funded Lehman's portion of the September 2008 Retail Shared Costs, at the time, Fontainebleau did not disclose (and Bank of America, as Disbursement or Bank Agent, did not know) the source of funding. (Newby Dep. Tr. 63:22–65:3). Indeed, internal December 2008 Bank of America correspondence indicates Bank of America believed Lehman funded its September obligation. (Dep. Exh. 905 (Susman email dated December 30, 2008, "As we understand, each month Lehman has funded its share of the advance.")).

On September 30, 2008, Bank of America, as Administrative Agent, requested a call with Jim Freeman to discuss issues relating to Lehman's bankruptcy, including

whether Lehman funded its portion of the Shared Costs on September 26, 2008, whether its portion was funded by other sources, and the effects of the Lehman bankruptcy on the Project. (Dep. Exh. 76; TL Statement ¶ 51; BofA Response ¶ 51). More specifically, Bank of America asked "Who are the current lenders under the Retail credit facility?" and "Did Lehman fund its portion of the requested $3,789,276.00 of Shared Costs funded last Friday (9/26/08) or was this made up from other sources? If Lehman did not fund its portion, what were the other sources?". (Dep. Exh. 76). Fontainebleau refused to engage in the call requested in the September 30, 2008 letter. (TL Statement ¶ 54). However, in a separate call regarding the September 2008 Advance, Fontainebleau represented to Bank of America that the retail funds for the September 2008 Retail Advance came from the retail lenders. (Susman Dep. Tr. 193:18–195:23).

On October 6, 2008, Highland sent Bank of America an e-mail stating there were "public reports" that "equity sponsors" had funded Lehman's portion of the September 2008 Shared Costs. (TL Statement ¶ 60; BofA Response ¶ 60; Dep. Exh. 81). The e-mail did not identify the source of the public reports. (Dep. Exh. 81). That same day, Jim Freeman told Moody's 2008 that "[r]etail funded its small portion last month." (BofA Response AMA ¶ 74).

The next day, October 7, 2008, Jim Freeman sent Bank of America and the Lenders a memorandum addressing the Retail Facility's status. (BofA Statement ¶ 90). The memorandum assured Lenders the August and September portion of the Shared Costs had been funded in full: "The company has received various inquiries concerning the retail facilities for the Fontainebleau Las Vegas project since the unfortunate

bankruptcy filing by Lehman Brothers Holdings, Inc. … In August and September, the retail portion of such shared costs was $5 mm and $3.8 mm, respectively, all of which was funded." (Dep. Exh. 77). The memorandum further stated Fontainebleau was "continuing active discussions with Lehman Brothers to ensure that, regardless of the Lehman bankruptcy filing and related acquisition by Barclay's, there is no slowdown in funding of the project.", and Fontainebleau was "actively talking with co-lenders under the retail construction facility." (*Id.*). Finally, Fontainebleau stated it "[did] not believe there will be any interruption in the retail funding of the project." (*Id.*).

The memo did not directly answer the question of whether Lehman funded its portion of the September 2008 Shared Costs. (*Id.*). Indeed, Jim Freeman later testified in depositions he did not tell Moody's or the Lenders that FBR had funded for Lehman in September 2008 because counsel had advised him not to disclose the source of funding. (BofA Response AMA ¶ 75).

On October 13, 2008, Highland forwarded to Bank of America's counsel a Merrill Lynch research analyst e-mail stating, "We understand that the FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month ($4 million). As a result, there are no delays in construction so far." (Dep. Exh. 459). Based on this analyst report, Highland stated, "It does not appear that the Retail Lenders made the Sept. payment, but rather equity investors. … This would indicate that the reps the company made for that funding request were false." (*Id.*). Highland conceded, however, the assertion that Fontainebleau equity sponsors had funded for Lehman was "one of a number of speculations that were out there floating around" and was merely a "rumor[] in the market." (Rourke Dep. Tr. 104:11–25).

In its October 13, 2008 e-mail, Highland also requested that because of the cited concerns, Bank of America "request the borrower to provide wiring confirmation from the Retail Lenders or funding certificates from the Retail Lenders to confirm that funding is made by the Retail Lenders (rather than other sources)" and the "borrower's legal counsel should provide an opinion that the Lehman funding agreement is in full force and effect." (BofA Response AMA ¶ 115; Dep. Exh. 459). Highland cited no provision of any agreement requiring such information be provided to the agent or the lenders. (BofA Response AMA ¶ 115). Although Highland asked Bank of America to "confirm" the understanding that Lehman had not made any disbursements while in bankruptcy, there is no evidence that Bank of America did confirm this understanding. (Dep. Exh. 459). Though Highland voiced its concerns in the October 13, 2008 correspondence, it did not submit a formal Notice of Default, nor did it specify any "Default" or "Event of Default" under the Disbursement Agreement or other loan documents. (Susman Decl. ¶ 25; Dep. Exh. 459). In fact, Highland funded its share of the Delay Draw Term Loan in response to the March 2009 Notice of Borrowing. (BofA Response ¶ 130). Highland has since sold all of its Term Loan holdings and is no longer a plaintiff. (BofA Response ¶ 125).[11]

On October 22, 2008, Fontainebleau provided the Lenders with another update stating "Lehman Brother's commitment to the facility has not been rejected in bankruptcy and the facility remains in full force and effect." and "Lehman Brothers has indicated to us that it has sought the necessary approvals to fund its commitment this

[11] The Term Lenders do not dispute this fact; rather, they contend it is immaterial and irrelevant. (TL Reply at 1).

month." (BofA Statement ¶¶ 94, 95). Fontainebleau further stated, should Lehman not be able to perform, Fontainebleau had "received assurances from the co-lenders to the retail facility that they would fund Lehman's portion of the draw." (BofA Statement ¶ 95).

Even through December, Fontainebleau did not disclose that FBR had funded for Lehman in September. On December 5, 2008, FBR issued third quarter (period ending September 30, 2008) financial statements for both Fontainebleau Las Vegas Holdings, LLC and FBR. (BofA Response AMA ¶ 91). Fontainebleau Las Vegas Holdings, LLC's statement included disclosures regarding the Retail Facility's status, and, more specifically, Lehman's funding. (Dep. Exh. 286 at FBR01280966; BofA Response AMA ¶ 91). The statement noted Lehman filed for bankruptcy on September 16, 2008, stated Fontainebleau Las Vegas Holdings "has been working diligently with Lehman Brothers and the co-lenders to ensure that there is no interruption in funding," and disclosed "[t]here can be no assurances that Lehman Brothers will continue to fund all or any portion of its remaining obligation under the Retail Construction Loan, or that the co-lenders will fund any Lehman Brothers shortfall in funding." (Dep. Exh. 286 at FBR01280966). Additionally, in the section entitled "Equity contributions" of FBR's financial statements, FBR disclosed cash contributions to a Florida project, but made no mention of its September 2008 equity contribution on Lehman's behalf. (BofA Response AMA ¶ 93; Dep. Exh. 286 at FBR01281007).

4. The October 2008 Meeting

On October 23, 2008, a meeting ("October Meeting") was held in Las Vegas among executives of Fontainebleau Resorts and Bank of America, and representatives of Retail Co-Lenders ULLICO, Sumitomo Mitsui Bank, and National City Bank in Las Vegas. (Dep. Exh. 18; TL Statement ¶ 62; BofA Response ¶ 62; BofA Response AMA

¶ 88). The meeting agenda included an update on the project and the status of the retail loan, including the effect of the Lehman bankruptcy on the loan. (Dep. Exh. 18; TL Statement ¶ 62; BofA Response ¶ 62). Specifically, it was noted that the Lehman bankruptcy had a material impact on the leasing and development of the Project, as well as the continued funding of the Retail Facility. (Kolben Dep. Tr. 65:7–13).[12] To that end, during the meeting, the participants discussed possible replacements for Lehman's commitment under the Retail Facility. (*Id.* at 175:18–176:15). Although the Retail Co-Lenders did not agree during the meeting to assume Lehman's commitment, ULLICO and Mitsui Sumitomo expressed the possibility of increasing their respective commitments to cover a portion of Lehman's commitment, and additional investment opportunities, including foreign investors, were discussed. (*Id.* at 72:17–75:22; 176:4–9). There is no evidence of record on summary judgment that Lehman's failure to fund the September 2008 Retail Advance was discussed at the October Meeting.[13]

Additionally, the Retail Lenders asked Bank of America, as Bank Agent, to take over Lehman's remaining commitment under the Retail Facility, pursuant to Section 7.1

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[12] The parties dispute the admissibility of Deposition Exhibit 19, the National City Special Assets Committee ("SAC") Report. I need not rule on the parties' hearsay and authentication arguments because Mr. Kolben independently testified to the material facts regarding the retail co-lenders' willingness to fund and discussions at the October Meeting. These facts do not contradict the information in the SAC Report.

[13] During his deposition, Herbert Kolben of ULLICO testified initially that it was discussed openly that Lehman had not made the September 2008 payment. (Kolben Dep. Tr. 16–21). He later corrected his testimony, stating "I said I didn't recall whether it was openly discussed." (Kolben Dep. Tr. 11–18). Upon a direct request for clarification ("Q: Do you … specifically recall any discussion at the October 23rd meeting about whether Lehman had funded its September retail events?"), Mr. Kolben stated, "I don't recall." (Kolben Dep. Tr. 176:22–177:3). The inconsistent testimony of a witness, corrected in the same deposition, is not sufficient to create a genuine issue of material fact. *Horn v. United Parcel Services, Inc.*, 433 F. App'x. 788, 796 (11th Cir. 2011).

of the Intercreditor Agreement, which permitted—but did not require—the Bank Agent to purchase and assume the outstanding obligations of the Retail Agent and Lenders. (TL Statement ¶ 66; BofA Response ¶ 66; Exh. 884 § 7.1; Howard Dep. Tr. 112:13–113:10). Bank of America did not do so. (TL Statement ¶ 67).

5. Communications between TriMont and Bank of America Regarding the September 2008 Retail Advance

TriMont was the Servicer of the Retail Facility, with the responsibility of collecting funds from the Retail Co-Lenders and transferring them to Bank of America, as Disbursement Agent under the Disbursement Agreement. (BofA Statement ¶¶ 32, 33). Each month when Bank of America forwarded to TriMont an Advance Confirmation Notice, TriMont would send a letter to the Retail Co-Lenders requesting their respective portions of the Retail Facility Shared Costs be wired to TriMont's clearing account. (Dep. Exh. 11; Rafeedie Dep. Tr. 37:8–40:21; Brown Dep. Tr. 42:4–8). Upon receipt of the funds, TriMont would send to Bank of America a wire transfer for the full amount of the Retail Advance that was requested, without identifying the amounts funded by each Retail Co-Lender, and Bank of America would transfer the funds into an account that could be accessed by Fontainebleau. (TL Statement ¶ 68; Rafeedie Dep. Tr. 40:22–41:9; Susman Dep. Tr. 204:9–10). Generally, the funding and distribution occurred on the 25th of each month (though, as discussed above, the September request was disbursed on the 26th). (Rafeedie Dep. Tr. 39:23–40:4).

By September 26, 2008, TriMont was made aware that Fontainebleau had paid Lehman's share of the September Retail Advance. (TL Statement ¶ 69; Dep. Exh. 56;

Dep. Exh. 14).[14] McLendon Rafeedie was the primary contact at TriMont with respect to the funding of the Retail Facility, including Lehman's funding of its obligations and transfer of the funds to Bank of America. (Rafeedie Dep. Tr. 21:19–25; 62:3–6). TriMont's lead contact at Bank of America regarding funding of Retail advances was Jean Brown. (*Id.* at 33:2–23). Although it was TriMont's "custom and practice" to inform Bank of America (and Jean Brown, more specifically) of significant events with respect to the Retail Facility, there is no evidence that Mr. Rafeedie (or TriMont) actually informed Ms. Brown (or Bank of America) that Lehman did not fund its portion of the September 2008 Retail Advance, or that Fontainebleau Resorts funded for Lehman.[15]

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[14] The record is not clear as to *when* on September 26 TriMont became aware that FBR was funding Lehman's portion. On September 26, 2008, Albert Kotite, Executive Vice President of Fontainebleau Resorts, sent the Retail Facility Co-Lenders a letter stating, "Because Lehman … has failed to fund its required share under the Retail Facility, in the amount of $2,526,184 …, Fontainebleau Resorts … is making an equity contribution to fund said amount." (Dep. Exh. 14). Mr. Kotite forwarded this letter to Mr. Rafeedie on September 26, 2008 at nearly 6:00 p.m. (*Id.*). Also on September 26, 2008 at 11:39 a.m., Amit Rustgi from TriMont copied Mr. Rafeedie on an email stating "the borrower has decided to fund Lehman's portion." (Dep. Exh. 56). At 1:11 p.m. Yetta Nicholson of TriMont copied Mr. Rafeedie on an email showing the September 26, 2008 wire coming in from Fontainebleau Resorts, LLC. (*Id.*).

Although Mr. Rafeedie acknowledged he was copied on these emails, he testified he did not know when he opened and read the emails. (Rafeedie Dep. Tr. 59:14–62:1). The exact timing of Mr. Rafeedie's knowledge that FBR funded for Lehman is not material, though, as there is no evidence that Mr. Rafeedie communicated to Ms. Brown (or Bank of America) that Lehman did not fund, or that FBR funded for Lehman.

[15] This is a point of much dispute among the parties. After review of Mr. Rafeedie's and Ms. Brown's deposition transcripts, I conclude that there is no evidence to indicate that Mr. Rafeedie told Ms. Brown that Lehman did not fund its portion of the September 2008 Retail Advance.

While Mr. Rafeedie agreed that it is his "custom and practice" to tell Ms. Brown of "significant events with respect to the retail facility," when asked if, "consistent with that practice," he would have told Ms. Brown "about the fact that Lehman did not fund" and that "Fontainebleau Resorts had paid Lehman's share," he testified that he "could have," but he "couldn't recall exactly" and "[did not] remember the exact topics of discussion" and the communication "could have been just that Lehman's dollars were funded, not necessarily who funded what." (Rafeedie Dep. Tr. 57:18–58:19, 63:4–9, 53:17–54:5). Mr. Rafeedie further explained that he could have spoken

6. Lehman's Portion from December 2008 through March 2009

Lehman funded its share of the Retail Advance in October and November 2008, and, as in prior months, Bank of America received from TriMont the full amount of the October and November Retail Advances. (BofA Statement ¶¶ 99, 102; Kolben Dep. Tr. 77:11–19, 78:12–21). As for the December 2008 Advance Request and related Retail Advance, Bank of America became aware in December 2008 that ULLICO, a Retail Co-Lender under the Retail Co-Lending Agreement, would fund Lehman's portion of the December Retail Advance. (BofA Statement ¶¶ 100, 101; Dep. Exhs. 9, 905). Bank of America understood that ULLICO would continue to fund for Lehman for a short time thereafter until a more permanent solution could be found, and that ULLICO had not agreed to permanently assume Lehman's commitment. (BofA Statement ¶¶ 100, 101; Exh. 905). Each month from December 2008 through March 2009, TriMont wired Bank of America the full Retail Advance, and Bank of America knew that ULLICO funded Lehman's portion of the Retail Advances in these months. (BofA Statement ¶ 102; TL Statement ¶ 73; BofA Response AMA ¶ 97).

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with Ms. Brown and told her the Retail Facility had been fully funded, but only later become aware that Fontainebleau Resorts funded for Lehman. (*Id.* at 57:18–58:19).

Ms. Brown testified that she would communicate with Mr. Rafeedie monthly about the status of the "wire" providing the Retail Advance. (Brown Dep. Tr. 41:7–9; 58:23–3). Ms. Brown also testified that, although she was concerned as to whether Lehman would fund its portion of the September 2008 Advance Request, she did not recall Mr. Rafeedie telling her that had not funded. (*Id.* at 57:1–8; 58:2–4). Finally, after stating that she "understood Lehman stopped funding the retail facility in September 2008, Ms. Brown clarified that she did not "know" that Lehman was not funding, but "assumed so" because she "knew they were bankrupt." (*Id*. at 55:6–56:12; 72:9–11).

7. Fontainebleau's Agreement with ULLICO

On December 29, 2008, ULLICO entered into a Guaranty Agreement with FBR, Turnberry Residential Limited Partner, L.P., and Jeffrey Soffer (together, "Guarantors"). (Dep. Exh. 24). As a condition of ULLICO's funding Lehman's portion of the December 2008 Retail Advance, the Guarantors guaranteed the repayment to ULLICO of Lehman's share of the December 2008 Retail Advance. (*Id.*). Subsequently, ULLICO and the Guarantors entered into three monthly Amendments to the Guaranty Agreement, pursuant to which ULLICO would fund Lehman's portion of the January 2009, February 2009, and March 2009 Retail Advances, and the Guarantors would reimburse ULLICO, at least in part. (Dep. Exhs. 30, 36, 42). Pursuant to the Guaranty Agreement and Amendments, ULLICO funded over $11 million on behalf of Lehman, some of which was reimbursed by the Guarantors. (Dep. Exhs. 24, 30, 36, 42). By March 2009, the amount of outstanding "Guaranteed Obligations" under the Guaranty Agreement and Amendments was $5,704,802.32. (Dep. Exh. 42). There is no evidence that Bank of America was aware that ULLICO's payments on behalf of Lehman were effectively made by FBR, Jeff Soffer, and Turnberry Residential Limited Partners.[16]

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[16] The Term Lenders cite to excerpts from Mr. Rafeedie's deposition transcript to dispute this fact. (Rafeedie Dep. Tr. 34:19–35:18; 55:16–24). However, those excerpts speak only to TriMont's general practice of keeping Bank of America informed of issues involving funding, and do not state that Bank of America was aware of the Guaranty Agreement or related Amendments.

Additionally, in response to Bank of America's additional facts (BofA Response ¶ 104), stating "There is no evidence that the guaranties provided by Soffer, FBR and TLRP were ever disclosed to BANA or the Lenders.", the Term Lenders do not cite any evidence rebutting the assertion, but only object that Bank of America did not cite specific evidence, as required by Local Rule 7.5(c)(2). At trial, the Term Lenders would bear the burden of proving Bank of

8. Further Assurances from Fontainebleau Regarding the Retail Facility

On February 20, 2009, Bank of America, as Administrative Agent under the Credit Agreement, sent Jim Freeman a letter regarding the February 2009 Advance Request. (Dep. Exhs. 497, 498; TL Statement ¶ 71). Citing lender concerns that were directed to Bank of America, as Administrative Agent, Bank of America asked Fontainebleau to comment on the status of the Retail Facility and "the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that Lehman Brothers Holdings, Inc. will fund its share of the requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls." (Dep. Exhs. 497, 498; TL Statement ¶ 71). Fontainebleau responded on February 23, 2009 ("Fontainebleau's February 23 Letter"):

> As relates to the Retail Facility, we are continuing active discussions with Lehman Brothers and the co-lenders to ensure that funding for the project will continue on a timely basis. The Retail Facility is in full force and effect, there has not been an interruption in the retail funding of the Project to date.

(Dep. Exh. 811).

America knew Fontainebleau effectively made ULLICO's payments on behalf of Lehman. On summary judgment, then, Bank of America may simply point out that there is an absence of evidence supporting the Term Lenders' case. *See Fitzpatrick v. City of* Atlanta, 2 F.3d 1112, 1115–16 (11th Cir. 1993) (for issues on which the opposing party bears the burden at trial, the party moving for summary judgment "is not required to support its motion with affidavits or other similar material negating the opponent's claim in order to discharge [its] responsibility. Instead, the moving party simply may show—that is, point out to the district court—that there is an absence of evidence to support the non-moving party's case." (internal citations omitted)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.").

H. Project Costs

Also as discussed above, the Disbursement Agreement required IVI to deliver to the Disbursement Agent a Construction Consultant Advance Certificate approving or disapproving each Advance Request. (Disb. Agmt. § 2.4.4(b); BofA Statement ¶ 47). To inform the Construction Consultant Advance Certificate, the Contractor would provide IVI with an Anticipated Cost Report ("ACR"), which was a projection of the Project's anticipated final cost, including all commitments, pending claims, and pending issues. (Barone Dep. Tr. 15:6–20). On January 13, 2009, IVI issued its Construction Consultant Advance Certificate for the January 2009 Advance Request, in which it affirmed, among other things, that it "ha[d] not discovered any material error in the matters set forth in the Current Advance Request or Current Supporting Certificates." (BofA Statement ¶ 132). On January 30, 2009, IVI issued a Project Status Report ("PSR 21") stating it was concerned that Fontainebleau's cost disclosures might not be accurate because it appeared that work on the Project would need to be accelerated to meet the scheduled opening date and the related costs, such as overtime, were not reflected in the latest Anticipated Cost Report: "IVI is concerned that all the subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included." (BofA Statement ¶¶ 133, 134). PSR 21 also addressed Leadership in Energy and Environmental Design ("LEED") credits, which reduce construction costs through Nevada state sales tax credits on building materials for new construction that meets certain sustainability standards: "[I]t appears that the LEED credits are tracking behind projections and the Developer has begun a detailed audit," and noting that it would "continue to discuss this with the Developer." (BofA Statement ¶ 136). Despite the cited concerns, IVI executed

the Construction Consultant Advance Certificate for the February 2009 Advance Request and sent it to Bank of America on February 17, 2009. (BofA Statement ¶ 146; TL Response ¶ 146; Barone Decl. ¶ 20, Exh. 6).

Meanwhile, on February 12, 2009, JPMorgan Chase, a Revolver Lender, sent Bank of America a letter seeking information on issues raised by IVI in PSR 21, and also asked Bank of America to provide additional information on the status of the Retail Facility. (BofA Statement ¶ 138). On February 20, 2009, Bank of America sent Fontainebleau a letter requesting this information. (BofA Statement ¶ 139). Fontainebleau responded in its February 23 Letter, stating IVI's information was outdated, and "at this point, we are not aware of any cost overruns or acceleration costs that are not reflected in the Anticipated Cost Report." (Dep. Exh. 811). Regarding the LEED credits, Fontainebleau stated, "[W]e believe that the full amount of the credits reflected in the Budget will in fact be realized." (*Id.*). That same day, in response to lender requests, Bank of America asked Fontainebleau to schedule a lender call to discuss Fontainebleau's February 23 Letter. (BofA Statement ¶¶ 142–43). But Fontainebleau refused, objecting to having a call on short notice, asserting it was under no contractual obligation to have the call, and raising concerns that sensitive Project-related information may be leaked to the press by lenders. (*Id.*).

On March 3, 2009, IVI sent Bank of America Project Status Report No. 22 ("PSR 22"). (*Id.* ¶ 144). Although PSR 22 repeated IVI's previous concern that there were unreported Project cost increases, it also indicated that the Project remained within budget. (*Id.* ¶ 145).

On March 4, 2009, Bank of America again requested that Fontainebleau arrange a meeting with Lenders and provided Fontainebleau with a list of Lender information requests concerning Project costs. (*Id.* ¶¶ 147–48). The next day, IVI asked Fontainebleau for "a submission of the future potential claims being made by the subcontractors against [the Contractor] and any overruns related to the un-bought work," and for an updated Anticipated Cost Report "to show the potential exposures to [Fontainebleau Las Vegas] and a better indication of the current contingency." (*Id.* ¶ 149). On March 10, 2009, Bank of America sent Fontainebleau another letter and information request. (*Id.* ¶ 150).

On March 11, 2009, Fontainebleau submitted its March 2009 Advance Request. (*Id.* ¶ 151). In the Remaining Cost Report annexed to the March Advance Request, Fontainebleau disclosed that it had increased construction costs by approximately $64.8 million. (*Id.* ¶ 153). The next day, IVI's Robert Barone met with Fontainebleau's Deven Kumar in Las Vegas, and Kumar informed Barone that the Project was $35 million over budget. (*Id.*). On March 19, 2009, IVI issued a Construction Consultant Advance Certificate that declared IVI had discovered material errors in the Advance Request and supporting documentation; believed the Project would require an additional $50 million for Construction Costs; and the Opening date would be November 1, 2009, rather than October 1, 2009 as originally planned. (BofA Statement ¶¶ 154–155; TL Response ¶ 154).

A few days later, IVI informed Bank of America that IVI had been "working with the developer to update their most recent anticipated cost report" and that Fontainebleau had "provided an ACR that they state represents their understanding of

the hard cost exposure to the project." (BofA Statement ¶ 156). IVI advised that it had not yet conducted an audit of the information presented by Fontainebleau (an audit would take weeks), but the information appeared reasonable. (*Id.*). IVI further stated it believed the developer credibly projected the potential costs, but it would be prudent to include additional funds for unexpected or known costs. (*Id.*).

On March 20, 2009, Fontainebleau held a Lender meeting in Las Vegas where it delivered a presentation updating the Lenders on the Project's construction budget and other issues relating to the Project's financial condition, representing, among other things, that it had retained KPMG to conduct a LEED credit audit. (*Id.* ¶¶ 157, 159–60). A few days later, on March 23, 2009, Fontainebleau submitted an unsigned draft revised Advance Request reflecting its earlier discussions with IVI. (*Id.* ¶ 161). IVI signed off on Fontainebleau's revisions and issued a Construction Consultant Advance Certificate approving the March 2009 Advance, after which Fontainebleau submitted an executed revised March Advance Request. (*Id.* ¶¶ 162–63).

Bank of America made the revised March Advance Request available to the Lenders the next morning (March 24) along with, among other things, IVI's Certificate and a chart Fontainebleau prepared at the Lenders' request showing the changes to the Remaining Cost Report and the In Balance Report. (*Id.* ¶ 164). The revised Request represented the Project was In Balance by $13,785,184. (*Id.* ¶ 164). On March 25, 2009, the scheduled Advance Date, Fontainebleau further revised the March Advance Request, increasing the margin by which the Project as In Balance to $14,084,071. (*Id.* ¶ 165). No Term (or other) Lenders submitted a Notice of Default or otherwise formally

objected to the March Advance. Bank of America transferred the Advance to Fontainebleau on March 26, 2009. (BofA Statement ¶ 166; TL Response ¶ 166).

I. First National Bank of Nevada Repudiation

On July 25, 2008, the First National Bank of Nevada (a Delay Draw Term Loam and Revolving Loan Lender) was closed by the Comptroller of the Currency, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver. (BofA Statement ¶¶ 181–82). In late-December 2008, the FDIC formally repudiated First National Bank of Nevada's unfunded Senior Credit Facility commitments, which amounted to $1,666,666 under the Delay Draw Term Loan and $10,000,000 under the Revolver Loan. (*Id.* ¶¶ 183–84). In response to the FDIC's repudiation, Bank of America directed Fontainebleau to remove First National Bank of Nevada's commitments from the In Balance Test's "Available Sources" component. (*Id.* ¶ 185). Even without First National Bank of Nevada's unfunded commitments, though, the Project was "In Balance" by approximately $107.7 million, as reflected in the December 2008 Advance Request. (*Id.* ¶ 186).

J. March 2009 Advance Request and Defaulting Lenders

On March 2, 2009, Fontainebleau submitted a Notice of Borrowing under the Credit Agreement requesting a Delay Draw Term Loan for the entire $350 million facility, and, simultaneously, a $670 million Revolver Loan (which was reduced to $652 million the next day). (*Id.* ¶ 187). Bank of America refused to process the Notice of Borrowing on the grounds that the amounts requested were not permissible under the Credit Agreement, and on March 9, 2009, Fontainebleau submitted a revised Notice of Borrowing seeking only the $350 million Delay Draw Loan. (*Id.* ¶¶ 188–89). Bank of America approved the revised Notice of Borrowing. (*Id.* ¶ 190). All but two of the Delay

Draw Term Lenders—Z Capital and Guggenheim—funded their commitments. (BofA Statement ¶ 191; TL Response ¶ 191). Accordingly, $326.7 million of the $350 million was funded. (*Id.*). Although Z Capital and Guggenheim did not fund, Bank of America continued to include their commitments as "Available Funds" for In Balance Test purposes. (BofA Statement ¶ 192; TL Response ¶ 192). On March 11, 2009, Fontainebleau submitted its March 2009 Advance Request, requesting $137.9 million. (Bolio Decl. ¶ 18 Exh. 16). Accordingly, there were ample funds to cover the requested amount.

On March 23, 2009, Bank of America, as Disbursement Agent and Administrative Agent, sent the Lenders a letter disclosing Z Capital and Guggenheim had not yet funded their respective Delay Draw Term Loan commitments, and excluding those commitments from the Available Funds would result in a failure to satisfy the In Balance test. (Dep. Exh. 104). Bank of America further stated it was willing to include the unfunded commitment in the Available Funds component for the March Advance "pending further information about whether these lenders will fund." (*Id.*). Finally, Bank of America invited "any Lender that does not support these interpretations [to] immediately inform us in writing of their specific position." (*Id.*).

Deutsche Bank and Highland responded to Bank of America's letter, but neither expressed disagreement with Bank of America's position.[17] Rather, Highland merely stated it was under no obligation to state a position about Bank of America's interpretation of the credit documents and reserved all rights and claims against Bank of

[17] Highland conceded that it did not "reach a contrary position" to the March 25th Advance being made available to Fontainebleau. (Rourke Dep. Tr. 172:18–173:3).

America. (Dep. Exh. 471). Deutsche Bank asked Bank of America "[w]hy it [was] appropriate to allow for the inclusion of [the] defaulting lender commitments in the In-Balance Test." (Dep. Exh. 832). Bank of America scheduled a lender call to address this inquiry. (Non-Dep. Exh. 1505). Ultimately, Bank of America disbursed the March 2009 Advance Request to Fontainebleau. (BofA Statement ¶ 197; TL Response ¶ 197).

K. Termination of Funding

On April 13, 2009, Fontainebleau notified Lenders that one or more events "had occurred which reasonably could be expected to cause the In Balance test to fail to be satisfied" and, further, the "Project Entities have learned that (i) the April Advance Request under the Retail Loan may not be fully funded and (ii) as of today, the Remaining Costs exceed Available Funds." (BofA Statement ¶ 167). The next day, April 14, Fontainebleau provided IVI with a schedule of Anticipated Costs dated "as of April 14, 2009" revealing more than $186 million in previously unreported Anticipated Costs. (*Id.* ¶ 169).

On April 17, 2009, Fontainebleau held a Lender meeting and reported that the Project "may be out-of-balance by approximately $180 million," reflecting a deficit of $186 million in committed construction costs. (Dep. Exh. 268). Fontainebleau presented a luxurious "enhanced plan" that would require a further $203 million in spending. (*Id.* 268). Fontainebleau also indicated at the meeting that it could not meet its debt obligations as they came due, disclosing that it planned to extinguish the Second Mortgage Notes and ask the Lenders to convert their debt into equity. (BofA Statement ¶ 172). Based on the information provided by Fontainebleau at the April 17, 2009 Lender meeting, the Revolver Lenders determined that one or more Events of Default had occurred and terminated the Revolver Loan on April 20, 2009. (*Id.* ¶ 173).

On April 20, 2009, Bank of America, as Administrative Agent, sent Jim Freeman a letter stating "the Required Facility Lenders under the Revolving Credit Facility have determined that one or more Events of Default have occurred and are continuing to occur and they have requested that the Administrative Agent notify you that the Total Revolving Commitments have been terminated." (Dep. Exh. 827). On June 9, 2009, the Borrowers and certain affiliates filed a Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida. (TL Statement ¶ 79).

In May 2009, Bank of America commissioned IVI to "perform a cost-complete review" of the Project's construction costs based on the "enhanced plan" presented during the April 2009 Lender meeting. (BofA Statement ¶ 175). As part of its review, IVI received additional information from Fontainebleau and the Contractor regarding the Project budget, including an April 30, 2009 Anticipated Cost Report, which included almost $300 million in pending charges for additional work by subcontractors. (*Id.* ¶ 176). After reviewing the documentation supporting the pending charges, IVI concluded, based on the number and scope of the pending items, that the subcontractors made the claims "some time ago, possibly as far back as a year," but they were never included in the Anticipated Cost Reports Fontainebleau submitted to IVI. (*Id.* ¶ 177). It was later determined that, to conceal the Project's cost overruns, Fontainebleau and TWC used two separate sets of books: one for their own internal use, which allowed them to keep track of the *actual* progress, scope, and cost of the Project, and a second set shown to Bank of America and IVI, which disclosed only a subset of the actual costs. (*Id.* ¶ 178). Fontainebleau and TWC also kept two sets of

Anticipated Cost Reports: an "internal" Report that included actual costs, and a "bank" Report that was disclosed to Bank of America and IVI and that conformed with the construction budget that had been disclosed to the Lenders. (*Id.* ¶¶ 179–80).

IV. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" if it hinges on the substantive law at issue and it might affect the outcome of the nonmoving party's claim. *See id*. ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252; *Bishop v. Birmingham Police Dep't*, 361 F.3d 607, 609 (11th Cir. 2004).

The moving party bears the initial burden under Rule 56(c) of demonstrating the absence of a genuine issue of material fact. *Allen v. Tyson Foods, Inc.,* 121 F.3d 642, 646 (11th Cir. 1997). Once the moving party satisfies this burden, the burden shifts to the party opposing the motion to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A factual dispute is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. *Anderson,* 477 U.S. at 248; *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th

Cir. 2001). Moreover, speculation or conjecture cannot create a genuine issue of material fact. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005)

In assessing whether the movant has met its burden, the court should view the evidence in the light most favorable to the party opposing the motion and should resolve all reasonable doubts about the facts in favor of the non-moving party. *Denney,* 247 F.3d at 1181; *Am. Bankers Ins. Group v. U.S.*, 408 F.3d 1328, 1331 (11th Cir. 2005) (applying same standard to cross-motions for summary judgment). In determining whether to grant summary judgment, the court must remember that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. In determining whether summary judgment is appropriate, the court is required to "draw all *reasonable* inferences in favor of the non-moving party, not all *possible* inferences." *Horn v. United Parcel Services, Inc.*, 433 F. App'x. 788, 796 (11th Cir. 2011) (emphasis added).

V. Discussion of Summary Judgment Motions

Upon review of the parties' cross-motions for summary judgment, I grant Bank of America's Motion for Summary Judgment and, correspondingly, deny the Term Lenders' Motion for Partial Summary Judgment. In reaching this decision, I have carefully examined each cross-motion (and corresponding exhibits) under the proper standard; that is, I have reviewed Bank of America's Motion for Summary Judgment with all inferences in favor of the Term Lenders, and the Term Lenders' Motion for Partial Summary Judgment with all inferences in favor of Bank of America. I conclude the Term Lenders, with all inferences in their favor, have failed to raise a genuine issue of material fact as to whether Bank of America, as Disbursement Agent or Bank Agent,

breached the Disbursement Agreement, or whether Bank of America acted with bad faith, gross negligence, or willful misconduct. Accordingly, I enter judgment as a matter of law in favor of Bank of America on both of these issues.

In addressing the legal issues presented, I turn first to Bank of America's duties and responsibilities under the Disbursement Agreement. Concluding that Bank of America can be held liable under the Disbursement Agreement for only bad faith, gross negligence, or willful misconduct, I explain, with all inferences in favor of the Term Lenders, that the evidence of record on summary judgment does not demonstrate Bank of America acted with bad faith or gross negligence or engaged in willful misconduct in the performance of its duties under the Disbursement Agreement. Finally, I turn to the specific scenarios underlying the Term Lenders' claims, and conclude, based on the facts not materially in dispute, Bank of America did not breach the Disbursement Agreement, and even if it did, it did not act with gross negligence under New York law.

A. Claims at Issue: The Disbursement Agreement

As an initial matter, I reiterate that the only claims outstanding in this case are under the Disbursement Agent, not the Credit Agreement. *See* 11/18/2011 Tr. 6:5–23; ECF No. 328. Therefore, the Disbursement Agreement, and Bank of America's roles and responsibilities as Disbursement Agent and Bank Agent under that Agreement, are the focus of this Order. Pursuant to Section 11.5 of the Disbursement Agreement, however, the Credit Agreement is expressly integrated into the Disbursement Agreement to the extent necessary to define the roles of Bank Agent and Disbursement Agent under the Disbursement Agreement. In fact, the choice of Agreement does not matter, as under either Agreement, Bank of America is held to the same standard, and

Bank of America, in its roles as both Disbursement Agent and Bank Agent, did not act with gross negligence or engage in willful misconduct.

B. Bank of America's Duties Under the Disbursement Agreement

Before addressing the factual circumstances underlying the Term Lenders' breach of contract claims, I turn to Bank of America's duties and responsibilities under the Disbursement Agreement. Under New York law, a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (N.Y. 2002). "Whether an agreement is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (N.Y. 1990). "Ambiguity is resolved by looking within the four corners of the document, not to outside sources." *Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998); *Jet Acceptance Corp. v. Quest Mexicana S.A. de C.V.*, 929 N.Y.S.2d 206, 211 (N.Y. App. Div. 2011) ("Extrinsic evidence may not be introduced to create an ambiguity in an otherwise clear document."). In analyzing whether a term is ambiguous, the court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. *Kass*, 91 N.Y.2d at 566. The court should further construe such terms in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners LP v. Presstek, Inc.*, 912 N.E. 2d 43, 47 (N.Y. 2009); *Int'l. Klafter Co., Inc. v. Continental Cas. Co., Inc.*, 869 F.2d 96, 99 (2d Cir. 1989) (applying New York law; "the court is required to discern the intent of the parties to the extent their intent is evidenced by their written agreement."). Furthermore, "[l]anguage whose meaning is otherwise plain is not ambiguous merely because the parties urge different

interpretations in the litigation." *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d. Cir. 1990) (applying New York law).

Here, the parties agree that the relevant provisions of the Disbursement Agreement are unambiguous. *See, e.g.,* BofA Memo. at 25 ("Here, the relevant Disbursement Agreement … provisions are complete, clear, and ambiguous."); 11/18/2011 Tr. 13:16–17 (Term Lenders counsel stating Term Lenders argued no ambiguity in their briefs). They disagree, however, on the meaning of those provisions and, correspondingly, on the scope of Bank of America's responsibilities under the Disbursement Agreement. I conclude that the Disbursement Agreement limits Bank of America's duties in approving and funding Advance Requests to determining whether Fontainebleau, IVI, the Contractor, and the Architect submitted the required documents, and determining whether the Advance Request conditions precedent were satisfied. In determining whether the conditions precedent were satisfied, Bank of America was entitled to rely on the representations, certifications, and documents it received from Fontainebleau, IVI, the Contractor, and the Architect. Moreover, Bank of America had no duty to investigate the veracity of or facts and circumstances underlying the representations. Nor did Bank of America have any affirmative duty to ensure that the conditions precedent were, in fact, met.

The Disbursement Agreement plainly set forth Bank of America's obligations in approving an Advance Request. Section 2.4.4 required Bank of America to review, in a timely manner, the Advance Request and its attachments to determine whether all required documentation had been provided, and to "use reasonable diligence" to assure that IVI performed its review and delivered its Construction Consultant Advance

Certificate in a timely manner. *See* Disb. Agmt. § 2.4.4. Section 2.4.6 required Bank of America to execute and deliver an Advance Confirmation Notice "[w]hen the applicable conditions precedent set forth in Article 3 have been satisfied." *See id.* § 2.4.6. To the contrary, "[i]n the event … (1) the conditions precedent to an Advance have not been satisfied, or (ii) the Controlling Person notifies the Disbursement Agent that a Default or Event of Default has occurred and is continuing," Bank of America was required to issue a Stop Funding Notice. *See id.* § 2.5.1.

In determining whether the conditions precedent to an Advance Request were satisfied, Bank of America was explicitly authorized to rely on Fontainebleau's certifications and representations as to, among other things, the satisfaction of Article 3's conditions precedent, and was explicitly *not* required to conduct "*any* independent investigation as to the accuracy, veracity, or completeness" of those certifications, or to "investigate *any* other facts or circumstances to verify compliance by [Fontainebleau] with [its] obligations hereunder." *See id.* § 9.3.2 (emphasis added). Furthermore, the Disbursement Agreement was clear that Bank of America had "no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing." *See id.* § 9.10.

Even if Bank of America failed to fulfill its obligations under the Disbursement Agreement, the Disbursement Agreement contained a broad exculpatory provision under which Bank of America's liability was limited to its own bad faith, gross negligence, or willful misconduct. *See id.* § 9.10; *Metropolitan Life Ins. Co. v. Noble Lowndes Intern., Inc.*, 643 N.E.2d 504, 506–7 (N.Y. 1994) (enforcing contract provision "limiting defendant's liability for consequential damages to injuries to plaintiff caused by

intentional misrepresentations, willful acts and gross negligence" because it represented parties' agreement on allocation of risk). Section 9.10 stated the Disbursement Agent shall not be "in any manner liable or responsible" for any loss or damage "except as a result of [its] bad faith, … gross negligence or willful misconduct." *See* Disb. Agmt. § 9.10. In sum, even if Bank of America approved an Advance Request or failed to issue a Stop Funding Notice in violation of the Disbursement Agreement, it could be held liable only if it acted with malice, reckless disregard, or the intent to harm.

C. The Term Lenders' Interpretation of Section 9.3.2

The Term Lenders urge a different interpretation of the Disbursement Agreement, and, in particular, of Bank of America's reliance on and duty to investigate Fontainebleau's representations, as reflected in Section 9.3.2. The Term Lenders argue Bank of America could not rely on Fontainebleau's certificates if Bank of America "had reason to believe that they were false." Term Lenders Opp. at 6. The Term Lenders further argue Bank of America places "unsustainable weight" on Section 9.3.2, which entitles Bank of America to rely on Fontainebleau's certificates, and contend the Disbursement Agreement imposed upon Bank of America an obligation to "determine the satisfaction of conditions precedent not covered by certificates" and a duty to investigate to "resolve[] known inconsistencies." *Id*. While I—and Bank of America—agree that the Disbursement Agreement imposed on Bank of America a duty to issue a Stop Funding Notice when it has *actual knowledge* of the failure of a condition precedent to disbursement or the occurrence of a Default or Event of Default, *see* Nov. 18, 2011 Tr. 37:1–5, I disagree with the Term Lenders that the Disbursement Agreement imposes a duty to investigate *possible* inconsistencies, and address each of the Term Lenders' arguments regarding the interpretation of the Agreement below.

As an initial matter, though, I note the Term Lenders' interpretation of the Disbursement Agreement contradicts the plain language of Section 9.3.2. Imposing upon Bank of America a duty to resolve inconsistencies or investigate the veracity of Fontainebleau's representations directly contradicts Section 9.3.2's provision that Bank of America "shall not be required to conduct *any* independent investigation" as to the accuracy of the representations. *See* Disb. Agmt. § 9.3.2 (emphasis added). Similarly, the Term Lenders' argument that Bank of America could not rely on certificates it had "reason to believe" are false contradicts the plain language of Section 9.3.2, which, without qualification, entitled Bank of America to rely on Fontainebleau's representations as to the satisfaction of the conditions precedent to disbursement. *See id.*

The cases cited by the Term Lenders do not dictate otherwise. *See* TL Opposition at 9–10. In *Bank Brussels Lambert v. Chase Manhattan Bank*, the district court for the Southern District of New York analyzed a revolving credit agreement under which Chase was the agent bank. No. 93 Civ. 5298, 1996 WL 609439 (S.D.N.Y. Oct. 23, 1996). After the borrower filed for bankruptcy, the lender banks sued Chase for breach of the credit agreement, claiming Chase relied on materially inaccurate financial statements and certificates. The revolving credit agreement required Chase to find the documents and documents "satisfactory … in form *and substance*." *Id*. at *6 (emphasis added). The court held, "if Chase knew, or was grossly negligent in not knowing, that the materials it delivered prior to and at closing were materially inaccurate, it cannot argue that those materials were satisfactory in 'substance.'" *Id.* at *7. As the

Disbursement Agreement contains no requirement that Bank of America evaluate the certificates for their *substance*, *Bank Brussels Lambert* is readily distinguishable.

Chase Manhattan Bank v. Motorola, Inc. is similarly distinguishable, as it pertains to a guarantor's right to rely on a borrower's false certificate to terminate its guarantee obligation. 184 F.Supp.2d 384 (S.D.N.Y. 2002). The court held the guarantor could not rely on a false certificate to terminate its obligation. Notably, the guaranty agreement at issue did not contain any provision entitling the guarantor to rely on certificates from the borrower in terminating its obligations. Moreover, in response to Motorola's argument that Chase approved the "form and substance" of the false certificate and therefore cannot challenge its validity, the *Motorola* court cited to language stating Chase had no duty to ascertain or inquire into any statement, warranty or representation, and concluded Chase had the right to rely on the representations in the certificate. Therefore, the case law cited by the Term Lenders does not alter Section 9.3.2's reliance provision. I turn next to the Term Lenders' textual arguments.

1. "Commercially Reasonable" and "Commercially Prudent"

The Term Lenders first argue that Section 9.1's "commercially reasonable" language controls Bank of America's duties under the Disbursement Agreement and cite to parol evidence, including expert reports from Shepherd Pryor and Daniel Lupiani and a treatise, to argue that it would have been commercially unreasonable for Bank of America to disburse funds from September 2008 through March 2009. Section 9.1, the introductory paragraph of Article 9, entitled "Disbursement Agreement," stated that, by accepting appointment as Disbursement Agent, Bank of America agreed to "exercise commercially reasonable efforts and utilize commercially prudent practices" in the performance of its duties hereunder consistent with those of similar institutions holding

collateral, administering construction loans and disbursing control funds." *See* Disb. Agmt. § 9.1. The subsequent sections of Article 9 set forth, *inter alia*, the "Duties and Liabilities of the Disbursement Agent Generally" (§ 9.2); "Particular Duties and Liabilities of the Disbursement Agent" (§ 9.3, including § 9.3.2); and "Limitation of Liability" (§ 9.10). Structurally, then, Section 9.1 contained general standards, and the subsequent sections of Article 9 provided more specificity on Bank of America's duties and liabilities.

The Term Lenders appear to argue that Section 9.1 trumps Sections 9.3.2 and 9.10, and, under Section 9.1, it would be commercially unreasonable for Bank of America to rely on representations that *could be* false, and commercially reasonable for Bank of America to investigate possible inaccuracies. I disagree.

Reading Article 9 and the Disbursement Agreement in their entirety, I conclude Section 9.1 is not inconsistent with the reliance and investigation provisions of Section 9.3.2, or the exculpatory provision of Section 9.10. Section 9.1 required Bank of America to use commercially reasonable efforts and commercially prudent practices in the general performance of its duties, but the Disbursement Agreement still entitled Bank of America to rely on Fontainebleau's certifications without independent investigation (Section 9.3.2) and absolved Bank of America for liability for conduct outside of bad faith, willful misconduct, or gross negligence (Section 9.10). Indeed, to conclude otherwise would render the reliance, investigation, and exculpatory provisions meaningless, in contravention of the basic tenet of contract interpretation that a contract should be read to give all provisions meaning and effect. *See Excess Ins. Co. Ltd. v. Factory Mut. Ins.*, 822 N.E.2d 768, 770–71 (N.Y. 2004) (in interpreting contracts, "the intention of the parties should control. To discern the parties' intentions, the court should

construe the agreements so as to give full meaning and effect to the material provisions."). Even if I were to conclude Section 9.1's "commercially reasonable" and "commercially prudent" standards are inconsistent with Sections 9.3.2 and 9.10, the latter sections would control, as, in the face of an inconsistency between a general provision and specific provisions, the specific provisions prevail. *See Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956); *John B. Stetson Co. v. Joh. A. Benckiser GmbH*, 917 N.Y.S.2d 189 (N.Y. App. Div. 2011) (interpreting contract and concluding more specific articulation of duty controlled over general articulation of duty).

As I have concluded that "commercial reasonableness" and "commercially prudent" do not control or affect Bank of America's entitlement to rely on Fontainebleau's representations or Bank of America's duty to investigate those representations, I need not determine the meaning of these terms. If I were to determine their meaning, though, I would not consider the expert reports and treatise cited by the Term Lenders because, as the Term Lenders and Bank of America agree, "commercial reasonableness" and "commercially prudent" in the Disbursement Agreement are unambiguous terms and, under New York law, parol evidence may not be admitted to interpret unambiguous contract terms. *See R/S Associates v. New York Job Development Authority*, 771 N.E.2d 240, 242 (N.Y. 2002) ("[W]hen interpreting an unambiguous contract term, evidence outside the four corners of the document is generally inadmissible to add to or vary the writing."); TL Memo. Reply at 6 (conceding expert reports and treatise are inadmissible if contract terms are unambiguous, and arguing Disbursement Agreement is unambiguous). Accordingly, Section 9.1 does not

alter the duties, responsibilities, and protections clearly set forth in Sections 9.3.2 and 9.10.

2. The Meaning of "Genuine"

The Term Lenders next argue that Section 9.3.2's provision that Bank of America may rely only on certificates it believes to be "genuine" imposes a duty on Bank of America to determine whether the representations in the certificate are truthful. The Term Lenders reason that a document containing a misrepresentation is not genuine, and Bank of America therefore had a duty to determine if the certificates contained any misrepresentations before relying on them. While the first sentence of Section 9.3.2 does state Bank of America may rely on any document or certificate believed by it on reasonable grounds to be "genuine," the very next sentence of Section 9.3.2 authorizes Bank of America, specifically in conjunction with the approval of an Advance Request, to "*[n]otwithstanding anything else in this Agreement to the contrary*" "rely on Fontainebleau's certifications … as to the satisfaction of any requirements and/or conditions imposed by this Agreement." *See* Disb. Agmt. § 9.3.2. Moreover, the final sentence of Section 9.3.2 specifically rejects any duty of the Disbursement Agent to conduct an independent investigation of the accuracy or veracity of the certificates. *See id.* § 9.3.2 ("The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items or to investigate any other facts or circumstances ….''). Reading Section 9.3.2 in its entirety, I conclude that "genuine" in Section 9.3.2 means authentic or not fake.[18] The

[18] In support of their contention that "genuine" means "truthful", the Term Lenders cite to only one case, *Stanford Seed Co. v. Balfour, Guthrie & Co.*, 27 Misc. 2d 147 (N.Y. Sup. Ct. 1960),

interpretation advanced by the Term Lenders—suggesting Bank of America may only rely on a certificate it deems truthful—renders the reliance and investigation provisions of the rest of Section 9.3.2 meaningless and is therefore not an interpretation supported by New York law.

Lastly, I disagree with the Term Lenders' argument that "[t]he fact that Bank of America could be liable for 'false representations' under Section 9.10 "establishes that it could not blindly rely on false certificates." *See* TL Opposition at 9. Bank of America's liability for Bank of America *itself* making a false representation has no bearing on its reliance on the possibly-false representation of another party. Furthermore, the Term Lenders' reliance on Section 7.1.3(c) is misplaced, as a prohibition on acting on a known, material falsity in a certification does not translate into a duty to investigate any possibly falsity. Therefore, I conclude 9.3.2 did not impose any obligation to investigate the accuracy of a representation.

3. Sections 3.3.21 and 3.3.24

In further support of their contention that Bank of America could rely only on truthful certificates, the Term Lenders cite Sections 3.3.21 and 3.3.24. Section 3.3.21, stated, as a condition precedent to disbursement, "the Bank Agent shall not have become aware … of any information … that taken as a whole is inconsistent in a

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which I find readily distinguishable. In *Stanford Seed*, the trial court addressed what constituted a genuine receipt under the Uniform Warehouses Receipts Act and held that a document was a not a "genuine" receipt because it was not signed by a warehouseman under Oregon law.

Moreover, even if "genuine" means truthful, Bank of America, in approving an Advance Request, was protected by the specific provision of the second sentence of Section 9.3.2 entitling it, *notwithstanding anything in the Agreement to the contrary*, to rely on Fontainebleau's representations. *See John B. Stetson Co. v. Joh. A. Benckiser GmbH*, 917 N.Y.S.2d 189 (N.Y. App. Div.).

material and adverse matter with the information … disclosed to them concerning … the Project," and Section 3.3.24 similarly stated "the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." *See* Disb. Agmt. §§ 3.3.21 and 3.3.24 (emphasis added). Although Bank of America was the Bank Agent (as well as the Disbursement Agent), Bank of America, as Disbursement Agent, cannot be held liable for information it knew as Bank Agent. Indeed, the parties contemplated Bank of America's multiple roles and agreed, "Notwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent." *See id.* § 9.2.5 ("No Imputed Knowledge"). Accordingly, Bank of America, as Disbursement Agent, cannot be held to any duties imposed by the Disbursement Agreement on the Bank Agent, and, in the context of Bank of America's duties as Disbursement Agent, the Term Lenders' emphasis on Sections 3.3.21 and 3.3.24 is misplaced. Having explained the duties and liability of Bank of America under the Disbursement Agreement, I turn to the facts underlying the Term Lenders' claim.

D. Bank of America was Not Grossly Negligent

As explained above, pursuant to the exculpatory provision of the Disbursement Agreement, Bank of America could be held liable for breach of the Disbursement Agreement only if it acted with gross negligence in the performance of its duties under the Disbursement Agreement. Under New York law, gross negligence is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing." *Curley v. AMR Corp.*, 153 F.3d 5, 12–13 (2d Cir. 1998) (applying New

York law); *see also Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd.*, 611 N.E.2d 282, 284 (N.Y. 1993) (gross negligence is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (internal citation omitted)); *Travelers Indem. Co. of Connecticut v. Losco Group, Inc.*, 204 F. Supp. 2d 639, 644–45 (S.D.N.Y. 2002) ("Under New York law, a mistake or series of mistakes alone, without a showing of recklessness, is insufficient for a finding of gross negligence."; gross negligence requires that the defendant "not only acted carelessly in making a mistake, but that it was so extremely careless that it was equivalent to recklessness."); *DRS Optronics, Inc. v. North Fork Bank*, 843 N.Y.S.2d 124, 127–28 (N.Y. App. Div. 2007) (holding defendant exhibited gross negligence where it failed to exercise "slight care" or "slight diligence"); New York Patten Jury Instructions, PJI 2:10A ("Gross negligence means a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others.").

The standard for willful misconduct is similarly high. Under New York law, willful misconduct is "conduct which is tortious in nature, *i.e.*, wrongful conduct in which defendant willfully intends to inflict harm on plaintiff at least in part through the means of breaching the contract between the parties." *Metro. Life*, 643 N.E.2d at 508; *see also In re CCT Communications, Inc.*, --- B.R. ----, 2011 WL 3023501, at *5, 13 (Bankr. S.D.N.Y. July 22, 2011) (interpreting contract under New York law and concluding willful misconduct "does not include the voluntary and intentional failure or refusal to perform a contract for economic reasons," but requires malice or acting with the purpose of inflicting harm).

The Term Lenders argue that Bank of America was grossly negligent because it disbursed funds in the known failure of conditions precedent. *See* TL Motion at 27–28; TL Opposition at 37–39. Putting aside, for the moment, whether Bank of America had actual knowledge of the failures of any conditions precedent, the Term Lenders' argument is fundamentally flawed because it equates breach of the Disbursement Agreement with gross negligence. As discussed above, the exculpatory provision of the Disbursement Agreement requires more than mere breach of the Disbursement Agreement to hold Bank of America liable. *See* Disb. Agmt. § 9.10 (limiting Disbursement Agent's liability to bad faith, gross negligence, or willful misconduct).

Upon review of the facts, I conclude Bank of America, as Disbursement Agent, did not act in bad faith or with gross negligence or willful misconduct in performing its duties under the Disbursement Agreement. *See David Gutter Furs v. Jewelers Protection Services, Ltd.*, 594 N.E.2d 924 (N.Y. 1992) (granting summary judgment in favor of defendant because allegations did not raise an issue of fact whether defendant performed its duties with reckless indifference to plaintiff's rights);[19] *Gold v. Park Ave. Extended Care Center Corp.*, 935 N.Y.S.2d 597, 599 (N.Y. App. Div. 2011) (affirming trial court's granting of summary judgment in favor of hospital and holding hospital was not grossly negligent where evidence showed absence of any conduct that could be

[19] During oral argument, counsel for the Term Lenders argued that in the case of contracts that provide for the protection of property, such as alarm companies, courts have routinely held that gross negligence is a triable fact. (11/18/2011 Tr. 103:13-19). In *David Gutter Furs*, a case involving defendant's design, installation, and monitoring of a burglar alarm system, the New York Court of Appeals reversed the appellate court's denial of summary judgment on the grounds there was no issue of fact whether defendant performed its duties with reckless indifference to plaintiff's rights. 594 N.E.2d 924 (N.Y. 1992). It follows that summary judgment may be granted on the issue of gross negligence in the case of contracts that provide for the protection of property.

viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard for the rights of others); *see also Net2Globe Intern., Inc. v. Time Warner Telecom of New York*, 273 F. Supp. 2d 436 (S.D.N.Y. 2003) ("While issues of malice, willfulness, and gross negligence often present questions of fact, courts have sustained limitation of liability provisions in the context of a summary judgment motion when the surrounding facts compel such a result."). Indeed, there is no evidence of record on summary judgment that Bank of America intended to harm the Term Lenders, or that it recklessly disregarded their rights.

To the contrary, Bank of America gave consideration to the Term Lenders' rights and interests. From September 2008 through April 2009, Bank of America was responsive to Lenders' questions, tried to get information from Fontainebleau, and facilitated communications between the Lenders and Fontainebleau. For example, when Bank of America became aware that there may be an issue with Lehman funding its portion of the Retail Advance, Bank of America consulted internally and with counsel. *See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 474 n.27 (S.D.N.Y. 2010) (concluding bank did not act in bad faith and stating bank's consultation with counsel demonstrated good faith). Bank of America also repeatedly conferred with Fontainebleau, and requested Fontainebleau provide the Lenders with information regarding both Lehman and the Project. Bank of America further responded thoroughly and promptly to Highland's inquiries regarding the Lehman bankruptcy and its implications for the Senior Credit Facility. Finally, before disbursing funds to Fontainebleau, Bank of America sought reaffirmation from Fontainebleau that all conditions precedent to funding had been satisfied.

In addressing First National Bank of Nevada's repudiation, which represented only 0.6% of the Senior Credit Facility, Bank of America proposed a solution that would permit funding to occur. This solution gave consideration to the Lenders' interests, as neither the Lenders nor Fontainebleau would have expected funding to cease based on the repudiation of such a small commitment.

In the same vein, Bank of America consulted with the Lenders regarding Guggenheim and Z Capital's failure to fund the March 2009 Advance Request. Bank of America informed the Lenders that Guggenheim and Z Capital had not funded, and suggested it would still include their commitment in the Available Funds component, so that funding could occur. Bank of America invited any Lender to comment on the intended solution, and no Lender protested. In performing its duties under the Disbursement Agreement, Bank of America consistently communicated with the Lenders, provided them with pertinent information, and invited comment.

Indeed, Bank of America's conduct, even when viewed in the light most favorable to the Term Lenders, is vastly distinct from the conduct of the defendant in *DRS Optronics, Inc. v. North Fork Bank*, the case cited by the Term Lenders in support of their gross negligence argument. *See* 843 N.Y.S.2d 124 (N.Y. App. Div. 2007). In *DRS Optronics*, the defendant entered into a custodial agreement with two parties under which it was required to ensure that no payments were made without joint written instructions of the two parties. *Id*. at 126. The court held the defendant was grossly negligent because it made no effort to implement any procedure to ensure the two-signature requirement would be enforced, and instead established a system that allowed one party to unilaterally transfer funds. *Id*. at 128. Moreover, the court noted

the defendant "failed to submit any evidence … as to whether it exercised even the slightest care in performing its obligations." *Id*. In contrast, Bank of America made significant efforts to comply with the requirements of the Disbursement Agreement, and, as evidenced by meetings, calls, and communications with key parties, exercised well more than the slightest care in performing its obligations.

It bears noting the Term Lenders (or their successors in interest) were aware of the chief "risk"—namely the Lehman bankruptcy—they claim should have prompted Bank of America to investigate Fontainebleau's representations. Yet, not a single Term Lender demanded that Bank of America take any action relating to the allegations presented in this case, nor did any of the Term Lenders file a Notice of Default to compel the issuance of a Stop Funding Notice. It could hardly follow that Bank of America recklessly disregarded the Term Lenders' rights when the Term Lenders themselves did not seek to enforce those rights.[20] Based on these facts, it cannot be said that Bank of America acted with bad faith, gross negligence, or willful misconduct.

E. Bank of America's Knowledge of Failures of Conditions Precedent

Nor can it be said that Bank of America breached the Disbursement Agreement by disbursing funds in the *known* failures of conditions precedent. The Term Lenders argue that Bank of America disbursed funds despite known failures of conditions precedent relating to (1) Lehman's bankruptcy; (2) the Project's cost overruns; (3) the

[20] To the extent the Term Lenders rely on Highland's communications with Bank of America regarding the Lehman bankruptcy as an assertion of the Term Lenders' rights, counsel for the Term Lenders conceded that "[t]here is no protocol for [the Term Lenders] to do that." (11/18/2011 Tr. 79:2-8).

First National Bank of Nevada repudiation; (4) select lenders' failure to fund the March 2009 Advance Request; and (5) the timing of the March 2009 Advance Request. However, as explained below, with respect to each of these situations, there is no evidence on summary judgment that Bank of America actually knew that a condition precedent was not met. Before discussing each scenario, it bears repeating that for all Advance Requests from September 2008 through March 2009, Fontainebleau submitted documentation certifying *all* conditions precedent to disbursement had been met. *See, e.g.* TL Motion at 21 ("In connection with each Advance Request, the Borrowers were required to and did represent and warrant that all conditions precedent to disbursement, including Lehman's funding of its commitments under the Retail Facility had been satisfied.").

1. The Lehman Bankruptcy and Lehman's Failure to Fund

The Term Lenders argue the Lehman bankruptcy, and its aftermath, some of which was known to Bank of America, caused numerous conditions precedent to fail. Specifically, the Term Lenders argue the Lehman bankruptcy was a material adverse effect on the Project; Bank of America knew that Lehman did not fund the September 2008 advance; and ULLICO funding for Lehman was impermissible. Before addressing each of these arguments, I note that, even if the Term Lenders' contentions regarding the Lehman bankruptcy and effects on the Retail Facility were true, it was not grossly negligent for Bank of America to disburse funds when, each month, the Retail Facility was fully funded. Indeed, if commercially reasonable were the applicable standard under the Disbursement Agreement, it would have been commercially *unreasonable* for Bank of America, as Disbursement Agent and Bank Agent, to halt construction of a the multi-billion dollar Fontainebleau Project when Retail funded its September Shared

Costs in full, and when Lehman's portion of the September Shared Costs was a small portion of the total September Advance Request.

a) The Lehman Bankruptcy

The Term Lenders first argue the Lehman bankruptcy alone had a Material Adverse Effect on the Project, and Bank of America therefore should have issued a Stop Funding Notice. *See* TL Opposition at 11. The Term Lenders reason that Lehman was the largest Retail Lender, the Retail Facility was critical to the completion of the Project, and Lehman bankruptcy rendered uncertain the availability of Lehman's committed funds. *See id.* at 11–12.

First, the Disbursement Agreement requires Bank of America as Disbursement Agent to issue a Stop Funding Notice only in the event that (1) the Controlling Person notifies Bank of America, as Disbursement Agent, that a Default or Event of Default has occurred, or (2) conditions precedent to an Advance have not been satisfied. *See* Disb. Agmt. § 2.5.1. There is no evidence on summary judgment that Bank of America, as Disbursement Agent, was notified that the Lehman bankruptcy was a Default or Event of Default, and the Term Lenders have not pointed to any provision of the Disbursement Agreement requiring Bank of America, as Disbursement Agent or Bank Agent, to make that determination on its own. To the extent the Term Lenders suggest Highland's emails to Bank of America regarding the Lehman bankruptcy constituted notice of default, as required by Section 2.5.1, I conclude the emails were not notices of default upon which Bank of America could issue stop funding notices, as they did not state that a Default or Event of Default had taken place or identify the Default or Event of Default.

To the Term Lenders' suggestion that Bank of America should be deemed to have knowledge of defaults irrespective of the role (Controlling Person versus

Disbursement Agent) in which it came across that information, the "no imputed knowledge" provision of the Section 9.2.5 of the Disbursement Agreement expressly defeats the Term Lenders' suggestion. Regardless, there is no evidence of record on summary judgment that Bank of America, as Controlling Person/Bank Agent/Administrative Agent, was notified of a Default or Event of Default, and like the Disbursement Agent, the Credit Agreement, Section 9.3, imposed no duty on Bank of America as Administrative Agent to inquire about defaults.

As for satisfaction of the conditions precedent to disbursement, Fontainebleau expressly certified that the conditions precedent to the September 2008 Advance Request, including there being no Material Adverse Effects on the Project, had been satisfied, a certification upon which Bank of America was entitled to rely in approving an Advance Request and disbursing funds. Accordingly, Bank of America did not breach the Disbursement Agreement by disbursing funds in the face of Lehman's bankruptcy filing.

Even if the Disbursement Agreement imposed on Bank of America as Disbursement Agent or Bank Agent a duty to determine whether the Lehman bankruptcy had a Material Adverse Effect on the Project, under Section 3.3.21 or otherwise, I would conclude that Bank of America did not breach the Disbursement or Credit Agreements by determining there was no Material Adverse Effect. Although Bank of America stated immediately after the Lehman bankruptcy that "Lehman may be the death nail for [the Project]," *see* Dep. Exh. 67, as of the disbursement of the September 2008 Advance Request, there was no indication that there would be a shortfall in Retail Funds or that the Retail Lenders would fail to honor their obligations

under the Retail Facility. Indeed, although it was later discovered that Lehman did not fund its portion of the September 2008 Shared Costs, Lehman did fund its portion in October and November 2008, demonstrating Lehman's bankruptcy filing itself did not make Lehman's funds unavailable or necessarily compromise the Project. Moreover, every month from September 2008 through March 2009, TriMont wired to Bank of America the full amount of the requested Retail Shared Costs, indicating there was no funding gap on the Retail end of the Project. At a minimum, Bank of America did not act with bad faith, gross negligence, or willful misconduct by disbursing funds in the face of the full monthly funding of the Retail Advance.

b) Bank of America's Knowledge that Lehman Failed to Make the September 2008 Retail Advance

The Term Lenders next argue that Bank of America knew that Fontainebleau funded Lehman's share of the September 2008 Retail Advance, but the evidence of record on summary judgment, with all inferences in favor of the Term Lenders, demonstrates otherwise. Bank of America did not have actual knowledge that Fontainebleau funded for Lehman. Nor did it have actual knowledge that Lehman did not fund its share of the September 2008 Retail Advance. Immediately before disbursing the September 2008 Advance Request to Fontainebleau, Bank of America sought and received oral and written confirmation from Jim Freeman that, even though Lehman had filed for bankruptcy, all conditions precedent to funding were satisfied and all prior representation, warranties, and certifications remained correct. McLendon Rafeedie's deposition testimony, the Highland emails, and communications from Fontainebleau did not provide Bank of America with actual knowledge of who funded

the September 2008 Retail Advance such that it could deem Fontainebleau's representations false.

First, contrary to the Term Lenders' assertion, there is no evidence that TriMont told Bank of America that Lehman did not fund its portion of the September 2008 Retail Advance. As explained above, TriMont's McLendon Rafeedie testified that he could not recall the specific communications regarding Lehman's funding with Bank of America's Jean Brown, and stated he "could have" told Ms. Brown that Fontainebleau funded for Lehman, not that he "did" tell Ms. Brown. Similarly, Ms. Brown stated she did not know that Lehman did not fund its portion of the September 2008 Retail Advance. Lack of recollection does not create a genuine issue of material fact. *See, e.g.*, *Brown v. St. Paul Travelers Companies*, 331 F. App'x. 68, 70 (2nd Cir. 2009) ("We agree with the District Court that '[p]laintiff's statement, that she has no recollection or record of receiving the employee handbook and arbitration policy, despite the fact that it was distributed on at least six occasions during her employment, is ... not sufficient to raise a genuine issue of material fact.' "); *Tinder v. Pinkerton Sec'y*, 305 F.3d 728, 735–36 (7th Cir.2002) (plaintiff's testimony that she did not recall seeing or reviewing a brochure did not create a genuine issue of material fact in light of affidavits that the brochure was sent to her); *Dickey v. Baptist Mem'l Hosp.*, 146 F.3d 262, 266 n.1 (5th Cir. 1998) ("The mere fact that [the deponent] does not remember the alleged phone conversation, however, is not enough, by itself, to create a genuine issue of material fact [as to whether the conversation occurred.]"). Moreover, based on the testimony from Mr. Rafeedie and Ms. Brown, a fact finder could only speculate as to whether Bank of America knew Fontainebleau funded for Lehman, and speculation does not create a

genuine issue of material fact. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) (stating speculation does not create a genuine issue of material face); *see also Hughes v. Stryker Corp.*, 423 F. App'x. 878, 882 (11th Cir. 2011) (affirming district court's award of summary judgment in favor of defendant in negligence action because, based on factual record, a jury could only speculate as to causation, and speculation does not create a genuine issue of material fact). The testimony from Mr. Rafeedie and Ms. Brown therefore does not create a genuine issue of material fact as to whether Bank of America knew that Fontainebleau funded Lehman's portion of the September 2008 Advance Request, and there is no other evidence of record on summary judgment that TriMont told Bank of America that Lehman did not fund.

Second, Highland's October 6 and 13 emails (sent after the disbursement date of the September 2008 Advance Request) do not establish that Bank of America had knowledge that Fontainebleau funded for Lehman. The October 6, 2008 email alleged "public reports" that "equity sponsors" had funded for Lehman, but did not identify the source of the public reports. Additionally, the October 13 email, forwarding a Merrill Lynch analyst report, only stated the analyst "underst[ood]" Fontainebleau equity sponsors had funded for Lehman. Most importantly, Highland acknowledged that, at the time of these emails, the assertion that Fontainebleau equity sponsors had funded for Lehman was one of a number of rumors or speculations in the market. Although the Lehman bankruptcy and possible replacements for Lehman were discussed at the October 23, 2008 Retail meeting (at which Bank of America was present), there is no evidence of record that Lehman's failure to fund the September 2008 Retail Advance was discussed at the October Meeting.

Finally, I do not find compelling the Term Lenders' argument that Bank of America's "cryptic" communications, Fontainebleau's refusal to meet with Lenders to discuss the Lehman bankruptcy, Fontainebleau's "shift to the passive voice," Bank of America internal emails, and Mr. Bolio's handwritten notes create a reasonable inference (much less "the only reasonable inference") that Bank of America knew Fontainebleau paid Lehman' share of the September 2008 Retail Advance. *See* TL Opposition at 13, 15–16. First, Bank of America's September 26, 2008 request for confirmation of fulfillment of conditions precedent after Lehman's bankruptcy was reasonable and prudent, as the Lehman bankruptcy caused substantial concern in the market. Second, Fontainebleau's silence and refusal to meet with Lenders in September and October 2008 do not equate to an admission that Fontainebleau funded for Lehman. Third, Fontainebleau's October 7, 2008 Memorandum, in which Fontainebleau craftily avoided answering who funded for Lehman by using the passive voice, did not provide Bank of America with notice that Fontainebleau funded for Lehman, or that Lehman did not fund. Nor did the Memorandum cause Section 3.3.24 to fail, as Section 3.3.24, by its plain language, applies only to "documents and evidence," not information in general, and, moreover, the Memorandum adequately answered the questions asked by Bank of America and fulfilled Section 3.3.24. Notably, the Memorandum was sent to the Lenders, as well as Bank of America. Yet no Term Lender submitted a Notice of Default based on the (now alleged-to-be) insufficient information contained therein.

Next, the internal emails cited by Term Lenders reflect Bank of America's initial understanding from the mid-September 2008 conference calls that Fontainebleau may

fund for Lehman, but not an actual understanding that Lehman did not fund its share of the September 2008 Retail Advance, or that Fontainebleau funded Lehman's share. *See, e.g.*, Dep. Exh. 73 (dated September 19, 2008), Dep. Exh. 204 (dated September 19, 2008). The Term Lenders have presented no evidence to contradict Bank of America's emails showing, as of December 2008, Bank of America thought Lehman funded the September 2008 Retail Advance. Moreover, the January 2009 Bank of America emails cited by the Term Lenders, *see* Dep. Exhs. 1513, 1514, 1515, and 1516, were from the Commercial Real Estate Banking group, a group which had no involvement in Bank of America's roles as Disbursement Agent and Bank Agent and whose knowledge cannot be imputed to Bank of America as Disbursement Agent or Bank Agent.

Finally, the Term Lenders have not pointed to any testimony tying Brandon Bolio's handwritten notes, which state Lehman did not fund, to the September 2008 Advance Request. Indeed, the notes reflect dollar amounts that do not correspond to the September 2008 Advance and ask whether Fontainebleau could permissibly fund for Lehman, a question which Bank of America had answered in the negative by the time Bank of America disbursed the September 2008 Advance Request. *See* Dep. Exh. 475 at BANA_FB00846432–33; Bolio Dep. Tr. 58:7–60:25). In sum, on summary judgment, the Term Lenders have not presented evidence from which it could reasonably be inferred that Bank of America actually knew Fontainebleau funded Lehman's portion of the September 2008 Retail Advance, or Lehman did not fund its portion of the Advance.

c) ULLICO Funding for Lehman

Turning next to the funding of Lehman's portion of the Retail Advance from December 2008 through March 2009, it is undisputed that ULLICO, a Retail Co-Lender, funded Lehman's portion of the Retail Shared Costs, and Fontainebleau (Fontainebleau Resorts, Jeff Soffer, and Turnberry Residential Limited Partners, to be more precise) reimbursed ULLICO for at least a portion of those payments through a Guaranty Agreement and a series of Amendments thereto. It is further undisputed that Bank of America knew that ULLICO was funding Lehman's portion of the Retail Shared Costs from December 2008 through March 2009, and it was impermissible under the Disbursement Agreement for Fontainebleau to reimburse ULLICO and, in effect, make the Retail Advance. The parties disagree, however, on whether it was permissible under Section 3.3.23 of the Disbursement Agreement for ULLICO to fund for Lehman, and whether Bank of America knew of Fontainebleau's guaranty arrangement with ULLICO.

Section 3.3.23 states "the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to the Advance Request." Disb. Agmt. § 3.3.23. The Term Lenders argue the advances made by the Retail Lenders were several, not joint, and therefore Lehman had to fund its respective share of the Retail Advance. Bank of America, on the other hand, argues Section 3.3.23 requires the Retail Agent and Retail Lenders to collectively make their Advances, but does not require each Retail Lender to fund a specific amount.

Reading the Disbursement Agreement in its entirety, I conclude Section 3.3.23 mandates only that the Retail Shared Costs be funded collectively by the Retail

Lenders, not that each Retail Co-Lender funds its respective portion, therefore permitting ULLICO to fund for Lehman. In reaching this conclusion, I rely not only on the plain language of Section 3.3.23, but also Section 2.6.3, which states the Disbursement Agent shall not release Advances until "the Retail Lenders have made any requested Loans under the Retail Facility." *Id*. § 2.6.3. Like Section 3.3.23, Section 2.6.3, by its plain language, does not require *each* Retail Lender to fund its respective portion, but rather requires the "Retail Lenders" to fund their collective "Loans."

To the Term Lenders' reference to Section 9.7.2 of the Retail Agreement, *see* TL Motion at 20, which provides that the liabilities of the Retail Co-Lenders "shall be several not joint," Section 9.7.2 provides that the Retail Co-Lenders are under no *obligation* to fund for each other. However, this provision does not control whether, to satisfy Section 3.3.23 of the Disbursement Agreement, the Retail Co-Lenders *may* fund for each other. Further, Section 9.7.2(a) permits each Retail Co-Lender to assume the obligations of any other Co-Lender, supporting an interpretation of Section 3.3.23 which permits Retail Co-Lenders to fund for each other.

To the extent the parties' intent when drafting Section 3.3.23 can be discerned from the four corners of the relevant agreements, Bank of America was not a party to or provided a copy of the Retail Co-Lending Agreement. Accordingly, the parties could not have intended Bank of America, as Disbursement Agent or Bank Agent, to evaluate whether each Retail Co-Lender made its respective contribution pursuant to the Retail Agreement and Retail Co-Lending Agreement.

Finally, I conclude Bank of America did not have actual knowledge that Fontainebleau reimbursed ULLICO for any portion of the December 2008 through

March 2009 Retail Advances, as the Term Lenders, who would bear the burden at trial, have pointed to no evidence in the record suggesting that Bank of America knew of the guaranty arrangement. *See Fitzpatrick v. City of* Atlanta, 2 F.3d 1112, 1115–16 (11th Cir. 1993) (for issues on which the non-moving party bears the burden at trial, to meet its burden on summary judgment, the moving party may point the district court to the absence of evidence to support the non-moving party's position). Thus, Bank of America, as Disbursement Agent, did not breach the Disbursement Agreement with respect to ULLICO's funding of Lehman's portion of the Retail Shared Costs.

Even if it were determined that ULLICO funding for Lehman was impermissible and therefore caused the condition precedent in Section 3.3.23 to fail, or that ULLICO funding for Lehman constituted a "default" of the Retail Agreement and therefore caused the failure of the condition precedent set forth in Section 3.3.3, Bank of America did not act with bad faith, gross negligence, or willful misconduct in permitting a Retail Co-Lender to fund Lehman's commitment when Fontainebleau certified that all conditions precedent had been met, the Co-Lender funding resulted in full funding of the Retail Shared Costs, and Bank of America believed Section 3.3.23 was satisfied by the Retail Co-Lenders, collectively, funding the Retail Shared Costs.

2. Project Cost Overruns

The Term Lenders next argue that Bank of America knew that Fontainebleau was falsifying (and underreporting) the anticipated cost to complete the Project, this misstatement of Project costs caused numerous conditions precedent to fail, and Bank of America disbursed funds in the face of the failures of these conditions precedent. *See* TL Opposition 23–29. More specifically, the Term Lenders appear to argue that Bank of America knew, as early as May 2008, that Fontainebleau was substantially

underreporting costs, and Bank of America knew this cost underreporting would continue into the future (as, in fact, it did). But the evidence cited by the Term Lenders, with all inference in favor of the Term Lenders, does not support its factual argument or conclusion.

First, the Term Lenders do not dispute that, Fontainebleau and TWC actively concealed the Project's cost overruns from Bank of America and IVI by maintaining two sets of books and Anticipated Cost Reports: an internal set that reflected the actual costs, and an external set disclosed to Bank of America and IVI which contained only a subset of the actual costs. Given this evidence, the Term Lenders' argument that Bank of America was aware of Fontainebleau's inaccurate cost reporting lacks merit.

Notwithstanding, the evidence cited by the Term Lenders does not support the conclusion that Bank of America was actually aware of any cost concealment. The Term Lenders cite documents and testimony demonstrating that, in May 2008, Fontainebleau presented Bank of America with $201 million in change orders. As an initial matter, I concur with Bank of America that the May 23, 2008 Owner Change Order is inadmissible under Federal Rules of Evidence 801, 802, and 901 as an unauthenticated document, the contents of which are hearsay. Even if the Change Order were admissible, though, the information contained therein does not indicate that Fontainebleau was concealing cost overruns. Although the documents accompanying the May 2008 Change Order indicated Fontainebleau knew about select change orders (amounting to about $41.5 million) for some time, the documents also demonstrated that, as of May 2008, these change orders were still being negotiated and had not been finalized. Accordingly, it cannot be said from this evidence that Fontainebleau was

concealing cost overruns, or that Bank of America knew that Fontainebleau was concealing cost overruns.

Second, the evidence on summary judgment does not support the Term Lenders suggestion that Bank of America knew the cost underreporting would continue into the future. The June 10, 2008 email cited by the Term Lenders indicates that, as of that date, IVI believed the $210 million in cost increases was not all inclusive. *See* Dep. Exh. 217. However, the email also indicates that Bank of America and IVI contacted Jim Freeman to express their concerns, and Mr. Freeman would ensure IVI was provided with all necessary information. IVI promptly investigated the additional costs, *see* Dep. Exh. 892, and included its assessment in the June Project Status Report, *see* Dep. Exh. 868. More specifically, the June PSR stated the March 27, 2008 Anticipated Cost Report confirmed additional change orders and potential extra cost exposure, and concluded the March ACR would increase the final budget. *See* Dep. Exh. 868 at 14. Thus, the record indicates Bank of America addressed any concerns about cost overruns with IVI in June 2008, and does not indicate that Bank of America knew that Fontainebleau concealed those pre-June 2008 overruns. Indeed, it is undisputed that, for the April, May, and June 2008 Advance Requests, IVI issued Construction Consultant Advance Certificates, upon which the Disbursement Agreement authorized Bank of America to rely.

Regarding cost overruns in late 2008 and early 2009, IVI's January 30, 2009 Project Status Report, PSR 21, indicated it had concerns that Fontainebleau's cost disclosures were not accurate and the LEED credits, which reduce construction costs through tax credits, were lagging. Despite these concerns, IVI executed the

Construction Consultant Certificate for the February 2009 Advance Request. Similarly, although IVI's March 19, 2009 Construction Consultant Advance Certificate stated it had declared material errors in the Advance Request and supporting documentation, after IVI consulted with Fontainebleau and Fontainebleau revised the March request, IVI issued a Construction Consultant Advance Certificate approving the request. The Disbursement Agreement specifically authorized Bank of America to rely on IVI's Certificate, and Bank of America had no obligation to independently investigate whether the concerns expressed in the Project Status Reports had been adequately resolved. Had the parties wanted to vest Bank of America with such an obligation, they could have included the "reasonable diligence" language employed in Section 2.4.4 with respect to Bank of America's obligation to ensure IVI performed its review and delivered the Certificate in a timely manner. *See* Disb. Agmt. § 2.4.4. As a result, and especially in light of IVI's Certificates, on which Bank of America was expressly authorized to rely, Bank of America did not have actual knowledge of any cost overruns that would have caused a condition precedent to fail or otherwise require the issuance of a Stop Funding Notice.

Moreover, as Bank of America became aware of potential cost overruns, it communicated with, and facilitated communications between, the Lenders and Fontainebleau. For example, in February 2009, when JPMorgan Chase requested from Bank of America information regarding the issues raised in PSR 21, Bank of America promptly requested the information from Fontainebleau. After Fontainebleau responded, Bank of America asked Fontainebleau to schedule a lender call to discuss its response. Fontainebleau initially refused, and in early March, Bank of America again

requested Fontainebleau meet with the Lenders and again requested information regarding Project costs. Upon Bank of America's requests, Fontainebleau finally held a Lender meeting in Las Vegas on March 21, 2009.

Similarly, after Fontainebleau submitted its revised March 2009 Advance Request, and IVI issued the necessary Construction Consultant Advance Certificate, Bank of America promptly made the revised Request and Certificate available to the Lenders. It cannot be said, based on these facts and with all inferences in favor of the Term Lenders, that Bank of America acted in bad faith, with reckless disregard for the Term Lenders' rights, or the intent to harm the Term Lenders, or even knew of the failure of any conditions precedent related to the actively-concealed Project cost overruns.

3. First National Bank of Nevada Repudiation

In July 2008, the Comptroller of Currency closed the First National Bank of Nevada ("FNBN") and appointed the FDIC as receiver. In late December, the FDIC formally repudiated FNBN's unfunded Senior Credit Facility commitments, which amounted to less than 0.6 percent of the $1.85 billion Senior Credit Facility. The Term Lenders argue that, once the FDIC repudiated FNBN's commitment, FNBN was in Lender Default under the Credit Agreement, causing several conditions precedent (Sections 3.3.2, 3.3.3, 3.3.21, and 3.3.11) to fail, and Bank of America disbursed funds in the known failure of condition precedents. Bank of America argues the default was not material, and therefore was not a condition precedent failure.

Although materiality is generally for the finder of fact, "where the evidence concerning the materiality is clear and substantially uncontradicted, the question is a matter of law for the court to decide." *Wiljeff, LLC v. United Realty Mgmt. Corp.*, 920

N.Y.S.2d 495, 497 (N.Y. App. Div. 2011) (granting partial summary judgment on issue of materiality). Here, with all inferences in favor of the Term Lenders, including consideration of the Lehman bankruptcy and other criteria in the market, I conclude the FNBN repudiation was not material, as reasonable lenders and borrowers would not expect a $1.85 billion loan facility to fail due to a repudiation of less than $12 million, especially when the Project remained In Budget by over $100 million. *See Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539, 540–41 (2d Cir. 1996) (affirming district court judgment, in proxy rules context, that misstatements were immaterial as a matter of law). If the sophisticated parties to the Credit and Disbursement Agreements had intended *any* Lender Default to constitute a Default of the Credit Agreement, they would have included it as a specifically-delineated Event of Default in the Credit Agreement, Section 7 or Disbursement Agreement, Section 8.

Even if the FNBN repudiation caused numerous conditions precedent to fail, Bank of America did not act with gross negligence or exhibit willful misconduct in approving Advance Requests in the face of the repudiation. FNBN's commitment was only 0.6 percent of the Senior Credit Facility, and, according to the December 2008 Advance Request, the Project was significantly In Balance. Accordingly, even if the FNBN repudiation caused numerous conditions precedent to fail and Bank of America knew of this failure, viewing the evidence will all inferences in favor of the Term Lenders, no reasonable fact finder could conclude that Bank of America acted in bad faith or with disregard for the Term Lenders' rights in disbursing funds in the face of a repudiation of such a minimal amount and allowing the Project to continue.

4. March 2009 Advance Request and Defaulting Lenders

On March 9, 2009, Fontainebleau submitted a revised Notice of Borrowing, requesting $350 million in Delay Draw funds. Two of the Delay Draw Term Lenders—Z Capital and Guggenheim—did not fund their commitments. Z Capital and Guggenheim's share was less than $23 million of the $350 million draw (roughly 1 percent of the Senior Credit Facility, and 6 percent of the March 2009 draw). Similar to the arguments raised with respect to the First National Bank of Nevada repudiation, the Term Lenders argue these lenders' failure to fund was a default, caused numerous conditions precedent to fail, and Bank of America disbursed funds in the face of the known failure of conditions precedent. Further, the Term Lenders argue that these Lenders' commitments were material, as excluding these commitments caused the In Balance test to fail.

As with the FNBN repudiation, I conclude the Z Capital and Guggenheim's failure to fund was not material, as, even though the failure caused the In Balance Test to fail, the commitment was minimal in the context of the Senior Credit Facility, had no immediate impact on the loan facility because $327 million in Delay Draw Term Loans had been funded, while only $138 million was requested, and no reasonable investor or borrower would expect—or, as discussed below, would request—the loan facility to fail under these circumstances.

Furthermore, even if the failure of Z Capital and Guggenheim caused conditions precedent to fail, Bank of America did not act with gross negligence in disbursing the March 2009 Advance Request. Before disbursing the funds, on March 23, 2009, Bank of America sent the Lenders a letter disclosing Z Capital and Guggenheim's failure to fund. Bank of America advised that excluding Z Capital and Guggenheim's

commitments from the Available Funds would cause the In Balance test to fail, stated it was willing to include the unfunded commitment in the Available Funds component of the March 2009 Advance, and invited any lender who disagreed to inform Bank of America. Although two Lenders replied to the correspondence, no Lender disagreed with Bank of America's position regarding the March 2009 Advance. Accordingly, Bank of America was not grossly negligent or exhibiting willful misconduct—*i.e.*, it was not indifferent to the Term Lenders' rights or intentionally trying to harm them—in disbursing the March 2009 funds.

5. Timing of the March 2009 Advance Request

I turn finally to the timing of the March 2009 Advance Request. On March 11, 2009, Fontainebleau submitted an Advance Request with an Advance Date of March 25, 2009. Approximately one week later, on March 19, 2009, IVI issued a Construction Consultant Advance Certificate declaring it had discovered material errors in the Advance Request and supporting documentation and was concerned about the Project costs. Fontainebleau worked with IVI to address IVI's concerns, and Fontainebleau submitted a revised Advance Request on March 23, 2009, and another revised Request on March 25, 2009. The Term Lenders contend Bank of America should have rejected the revised Requests as untimely under Section 2.4 of the Disbursement Agreement, and Bank of America could not in good faith have approved the Requests.

Regarding the timing of the revised Requests, the Term Lenders argue that, pursuant to Section 2.4.1 of the Disbursement Agreement, Fontainebleau had to submit its March Advance Request by March 11; Section 2.4 allows resubmission of a Request only in the case of minor or purely mathematical errors, not where the Construction Consultant rejected the Request for material misstatements; and Section 2.4.4(b)

requires delivery of the Advance Request no later than four Banking Days prior to the requested Advance Date. Contrary to the Term Lenders' interpretation of the Disbursement Agreement, Section 2.4 does not restrict Fontainebleau's right to supplement its Advance request to correct minor or mathematical errors, it merely permits the Disbursement Agent to require Fontainebleau to resubmit the Advance Request in these circumstances. *See* Disb. Agmt. § 2.4.4 ("In the event … the Disbursement Agent finds any minor or purely mathematical errors or inaccuracies in the Advance Request or supporting materials, the Disbursement Agent may require the Project Entities to revise and resubmit the same.") Indeed, Section 2.4.5, entitled "Supplementation of Advance Requests," specifically permits Fontainebleau to revise an Advance request in the event it discovers any updates required to be made "prior to the Scheduled Advance Date" and is not limited to mathematical errors.

Regarding the timing of Bank of America's approval of an Advance Request, Section 2.4.5's provision that the Disbursement Agent use "reasonable diligence to review and approve such supplemental Advance Request and to cause the Construction Consultant to review and approve the same not less than three Banking Days prior to the Scheduled Advance date," requires only that Bank of America make reasonable efforts under the circumstances. It does not state—or mean—that Bank of America cannot review and approve a supplemental Advance Request less than three Banking Days before the Scheduled Advance Date, especially when that supplemental Request is submitted less than three Days before the Scheduled Advance Date.

Moreover, Section 2.4.4's requirement that IVI submit a Construction Consultant Advance Certificate not later than four Banking Days prior to the requested Advance

Date applies to Fontainebleau's original request. IVI fulfilled this requirement, as it submitted its initial Construction Consultant Advance Certificate on March 19, 2009. The four Banking Days requirement does not apply to IVI's approval of a supplemental request, as Section 2.4.5 controls IVI's approval of a supplemental request.

The Term Lenders next argue that Bank of America could not, in good faith, have approved the revised March 2009 Request in the face of the "funding crunch" (as evidenced, according to the Term Lenders, by the Lehman bankruptcy, FNBN repudiation, and Guggenheim/Z Capital defaults) and cost overruns. In further support of this argument, the Term Lenders cite to Bank of America's internal risk classifications, downgrading the risk rating of the Project. These internal risk ratings are irrelevant to my analysis, as they were conducted by Bank of America, as a Lender, and Section 9.2.5 does not permit the imputation of knowledge from Bank of America as Lender to Bank of America as Disbursement Agent. Moreover, Section 2.4.5 requires Bank of America, as Disbursement Agent to consider the submission of a revised Advance Request "in good faith." Fontainebleau's supplemental March Advance Requests showed the Project In Balance by almost $14 million, and over $14 million. Given this representation and IVI's certifications, Bank of America, as Disbursement Agent, did not act in bad faith in approving the March 2009 Request.

VI. Requests for Judicial Notice

In conjunction with the motions for summary judgment, the Term Lenders filed a Request for Judicial Notice [ECF No. 261 and September 9, 2011 Declaration of Robert Mockler and Request for Judicial Notice], requesting I take judicial notice, pursuant to Federal Rule of Evidence 201, of a Proof of Claim submitted by Fontainebleau Las Vegas Retail, LLC in the Lehman bankruptcy [Non-Dep. Exh. 1504]. The Term Lenders

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." *See* Term Lenders' Reply in Support of Judicial Notice [ECF No. 286] at 1. "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but to establish the fact of such litigation and related filings." *Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) (citing *U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)). Bank of America does not oppose the taking of judicial notice of the Proof of Claim solely for the fact of the document's existence, and not for the truth of the matters contained therein. *See* Bank of America Opposition to Plaintiff's Request for Judicial Notice [ECF Nos. 271 and 292]. Here, however, the fact of Fontainebleau's filing of a Proof of Claim alleging there were defaults under the Retail Agreement is not material to the pending summary judgment motions. Bank of America does not dispute that Lehman did not fund its portion of the September 2008, December 2008, January 2009, and February 2009 Retail Advances. Whether this failure to fund constituted a default under the Retail Agreement and the failure of a condition precedent under the Disbursement Agreement as a matter of law is for the Court, not Fontainebleau, to determine. Accordingly, I deny the Term Lenders' Request for Judicial Notice.

Bank of America filed a Request for Judicial Notice [ECF No. 272], requesting I take judicial notice of (1) an article by Pierre Paulden entitled *Highland Shuts Funds Amid 'Unprecedented' Disruption* [ECF No. 272, Exh. 28] ("Paulden Article") and (2) the

March 25, 2011 Complaint in *Brigade Leveraged Capital Structures Fund, Ltd. v. Fontainebleau Resorts, LLC*, filed in District Court in Clark County, Nevada [ECF No. 272, Exh. 101] ("Brigade Complaint"). Bank of America seeks to use the fact of the Paulden Article, not its contents, to support its proposition that, "[i]n September 2008, numerous credible publications reported that certain Highland finds had suffered losses and faced a liquidity crunch.", and to justify its response to Highland's September 2008 claims regarding the Lehman bankruptcy and its funding of the September 2008 Retail Advance. *See* BofA Response AMA ¶ 118, BofA Opp. Memo. at 16. But the Paulden Article, dated October 16, 2008, does not demonstrate reports of Highland's losses in *September* 2008. Further, Bank of America has cited no evidence to indicate any of the Bank of America individuals who evaluated Highland's claims actually read the Paulden Article, and therefore cannot establish that the Paulden Article was relevant to Bank of America's assessment of Highland's claims. Finally, the communications between Highland and Bank of America regarding the Lehman bankruptcy and Lehman's failure to fund the September 2008 Retail Advance occurred between from late September 2008 through October 13, 2008, before the Paulden Article was published. I conclude, therefore, the fact of the Paulden Article is not relevant to the resolution of the pending summary judgment motions and deny Bank of America's request for judicial notice. *See Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010) ("[A] court may properly decline to take judicial notice of documents that are irrelevant to the resolution of a case."); *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780 (8th Cir. 2009) ("Caution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules."); *see also Shahar v. Bowers*, 120 F.3d 211,

214 (11th Cir. 1997) (noting the taking of judicial notice is, "as a matter of evidence law, a highly limited process" because "the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence ….").

Turning to the Brigade Complaint, Bank of America seeks admission of the Brigade Complaint not only for the fact that it was filed, but also for the content therein, arguing the Complaint's allegations are relevant to the instant action and constitute a party admission and are therefore an exception to the hearsay rule. The *Brigade* plaintiffs, some of whom are Term Lenders, allege, *inter alia*, that Fontainebleau executives and affiliates made material misrepresentations in the Advance Requests, hid cost overruns, and concealed adverse information regarding the Lehman bankruptcy's implications for the Project. Bank of America argues these allegations are relevant to the Term Lenders' claim that Bank of America breached its duties as Disbursement Agent and Bank Agent, and, more specifically, had knowledge of "Fontainebleau's Lehman-related machinations." [ECF No. 301 at 3]. As set forth above, independent of the Brigade Complaint, I have concluded the evidence of record on summary judgment, with all inferences in favor of the Term Lenders, does not demonstrate that Bank of America had knowledge of Fontainebleau's "Lehman-related machinations" or cost overruns. Accordingly, I deny Bank of America's request for judicial notice of the Brigade Complaint as moot.

VII. Conclusion

For reasons discussed, I conclude Bank of America, as Disbursement Agent or Bank Agent, did not breach the Disbursement Agreement, nor did it act with bad faith, gross negligence, or willful misconduct in the performance of its duties under the Disbursement Agreement. The Disbursement Agreement imposed on Bank of America

no duty to inquire or investigate whether Fontainebleau's representations that all conditions precedent had been met were accurate, and, with all inferences in favor of the Term Lenders, the Term Lenders have failed to present a genuine issue of material fact as to whether Bank of America, as Disbursement Agent or Bank Agent, had actual knowledge of the failure of any conditions precedent to disbursement, including, but not limited to, Fontainebleau funding Lehman's portion of the September 2008 Retail Advance, Fontainebleau reimbursing ULLICO for a portion of the December 2008 through March 2009 Retail Advances, and the Project's cost overruns.

Although not germane to my analysis, I would be remiss by not observing that, while the Term Lenders argue on summary judgment that Bank of America should have pulled the plug on the Project as early as September 2008, they argued in their complaints and on motion to dismiss that the Revolving Lenders should have funded the Project as late as March and April 2009. Further, while the Term Lenders argue on summary judgment that Bank of America should have been aware of issues with the Retail Facility and Project costs, they allege in other actions that Fontainebleau perpetrated a fraud against the Lenders and Bank of America in actively concealing cost overruns and misleading interested parties about the status and potential success of the Project. That said, having reviewed the motions for summary judgment and related requested for judicial notice and being otherwise duly advised, it is HEREBY ORDERED and ADJUDGED as follows:

1. Bank of America's Motion for Summary Judgment [ECF No. 255] is **GRANTED**.

2. The Term Lenders' Motion for Partial Summary Judgment [ECF No. 258] is **DENIED**.

3. The parties' Requests for Judicial Notice [ECF No. 261 and 272] are **DENIED**.

4. All pending motions are **DENIED as MOOT** and all hearings are **CANCELLED**.

5. The Clerk of the Court is instructed to **CLOSE** this case.

6. Final judgment will be entered by separate court order pursuant to Federal Rule of Civil Procedure 58.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of March, 2012.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: Clerk of the United States Court of Appeals for the Eleventh Circuit
(related to your Case No. 11-10740)
Clerk of the United States Judicial Panel on Multidistrict Litigation
Magistrate Judge Jonathan Goodman
All Counsel of Record

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document applies to:

Case No. 09-CV-23835 ASG.

_____/

MDL ORDER NUMBER 62;
OMNIBUS ORDER GRANTING BANK OF AMERICA'S MOTION FOR SUMMARY JUDGMENT [ECF No. 255] AND DENYING TERM LENDERS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ECF No. 258]; CLOSING CASE

This Cause is before the Court upon Bank of America's Motion for Summary Judgment [ECF No. 255] and Plaintiffs' Motion for Partial Summary Judgment [ECF No. 258]. I held oral argument on the Motions on November 18, 2011. While the matters involved in the remainder of this case appear complex because of the parties' cross-motions for summary judgment, in essence, based on the material facts not genuinely in dispute, the legal issues are straightforward. Even assuming all inferences in favor of the non-moving parties, Bank of America, acting as Disbursement Agent and Bank Agent under the Disbursement Agreement, did not breach the Disbursement Agreement, nor did it exercise its duties and responsibilities under the Disbursement Agent and Credit Agreement in a grossly negligent manner under New York law. The Term Lender Plaintiffs have not established otherwise. Accordingly, I grant summary judgment in favor of Defendant Bank of America.

I. Procedural History

This multi-district litigation ("MDL") arises out of alleged breaches of various agreements for loans to construct and develop a casino resort in Las Vegas, Nevada. On December 3, 2009, this MDL was transferred to me by order of the United States Judicial Panel on Multidistrict Litigation [ECF No. 1].[1] Pursuant to the Panel's transfer order (and subsequent related orders, *e.g.* [ECF No. 21]), pending before me are (1) *Fontainebleau Las Vegas, LLC v. Bank of America, N.A.*, *et al.*, Case No. 09-cv-21879 (S.D. Fla.) (the "Fontainebleau Action"), (2) *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-cv-1047 (D. Nev.) (the "Avenue Action"),[2] and (3) *ACP Master, LTD, et al. v. Bank of America, et al*, Case No. 09-cv-8064 (S.D.N.Y) (the "Aurelius Action").[3] I discuss the procedural history of each action in turn.

A. The Fontainebleau Action

On June 9, 2009, Fontainebleau Las Vegas, LLC ("Fontainebleau") filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the Southern District of Florida. That same day, Fontainebleau commenced an adversary proceeding against a group of banks. Fontainebleau is the owner and developer of a casino resort in Las Vegas (the "Project"). On June 6, 2007, Fontainebleau entered into a Credit Agreement and Disbursement Agreement with a syndicate of lenders for the

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[1] All references to the docket refer to Case No. 09-MD-02106, unless otherwise indicated.

[2] Upon transfer to the Southern District of Florida, the Avenue Action was assigned Case No. 09-23835.

[3] Upon transfer to the Southern District of Florida, the Aurelius Action was assigned Case No. 10-20236.

development of the Project. Under the Credit Agreement, the lenders agreed to loan $1.85 billion under three senior secured credit facilities: the Term Loan, the Delay Draw Term Loan, and the Revolver facilities. Defendants in the adversary proceeding and the Fontainebleau Action are the banks that agreed to lend money under the Revolver facility (the "Revolver Banks"). Fontainebleau alleged, *inter alia*, these Revolver Banks breached the Credit Agreement for failing to fund the revolving loans in March 2009. [Bankruptcy Case No. 09-01621-AJC, ECF No. 5, Amended Complaint].

On June 10, 2009, Fontainebleau filed a Motion for Partial Summary Judgment on Liability with Respect to the March 2 Notice of Borrowing in the adversary proceeding. Fontainebleau argued the Revolver Banks breached the Credit Agreement by refusing to process the March 2 notice of borrowing (the "March 2 Notice"), which requested revolving loans in excess of $150 million, on the basis that the Total Delay Draw Commitments were not "fully drawn" as required by the terms of section 2.1(c)(iii) of the Credit Agreement. Fontainebleau argued that the March 2 Notice, which, in addition to revolving loans, requested all funds available under the Delay Draw Term Loan facility, satisfied the "fully drawn" requirement because the Delay Draw Term Loans had been *fully requested* by the time the revolving loans in excess of $150 million were sought. The Revolver Banks moved to withdraw the reference on July 7, 2009 [Case No. 09-21879, ECF No. 1], and I granted the Motion for Withdrawal of Reference on August 5, 2009 [Case No. 09-21879, ECF No. 23].

On August 26, 2009, I denied Fontainebleau's Motion for Partial Summary Judgment [Case No. 09-21879, ECF No. 62], concluding that (1) the Credit Agreement's (Section 2.1(c)(iii)) requirement that the Total Delay Draw Commitments be "fully drawn"

before disbursement means the Commitments must be "fully funded"; (2) even if this legal conclusion is erroneous, Plaintiff's interpretation of "fully drawn" is reasonable but not conclusive, resulting in an ambiguity that precludes summary judgment; and (3) even if Plaintiff's interpretation of the term "fully drawn" is correct, Fontainebleau's default entitled the Revolver Banks to reject the March 2 Notice.

On September 20, 2010, upon uncontested request of the Trustee, I entered a Final Judgment [Case No. 09-21879, ECF No. 138], dismissing the Fontainebleau Action with prejudice for purposes of facilitating an appeal from my August 26, 2009 Order denying Fontainebleau's Motion for Partial Summary Judgment. Accordingly, the August 26, 2009 Order is on appeal, and no other matters are pending before me in the Fontainebleau Action.

B. The Avenue and Aurelius Actions

The Avenue Action was originally filed in the District Court of Nevada, and was transferred to the Southern District of Florida on December 28, 2009. [Case No. 09-23835, ECF No. 77]. On January 15, 2010, the Avenue Plaintiffs, each of which is a term lender under the Credit Agreement, filed a Second Amended Complaint (the "Avenue Complaint") [ECF No. 15] against various revolver lenders pursuant to the Credit Agreement, as well as against Bank of America in its capacities as Administrative Agent under the Credit Agreement and as Disbursement Agent under the Disbursement Agreement. The Avenue Complaint pled the following: Count I - breach of Disbursement Agreement against Bank of America; Count II - breach of the Credit Agreement against all defendants; Count III - breach of the implied duty of good faith and fair dealing against Bank of America; Count IV – breach of the implied duty of good faith and fair dealing against all defendants; Count V – declaratory relief against Bank of

America; and Count VI – declaratory relief against all defendants. With respect to the counts against the revolver lenders, the Avenue Plaintiffs alleged the revolver lenders should have funded the March 2009 Notices of Borrowing.

The Aurelius Action was originally filed in the Southern District of New York and was transferred to the Southern District of Florida on January 26, 2010. [Case No. 10-20236, ECF No. 29]. On January 19, 2010, the Aurelius Plaintiffs (together with the Avenue Plaintiffs, the "Term Lenders" or the "Term Lender Plaintiffs"), each of which is a successor-in-interest to a term lender under the Credit Agreement, filed an Amended Complaint (the "Aurelius Complaint") [Case No. 10-20236, ECF No. 27] against various lenders under the Revolving Loan (together with the defendants in the Avenue Action, the "Revolving Lenders" or the "Revolving Lender Defendants"), including Bank of America, under the Credit Agreement. The Aurelius Complaint pleads the following: Counts I and II - breach of the Credit Agreement against all defendants; and Count III – breach of the Disbursement Agreement against Bank of America. With respect to the claims against the Revolving Lenders, the Aurelius Plaintiffs argued the Revolving Lenders should have funded the March 2, March 3, and April 21 Notices of Borrowing.

On May 28, 2010, reasoning that the Term Lender Plaintiffs lack standing to pursue claims based on the alleged breaches of the Credit Agreement, I dismissed with prejudice the Term Lenders' claims relating to breach of the Credit Agreement (Count II of the Avenue Complaint and Counts I and II of the Aurelius Complaint). I further concluded the Term Lenders' claim against Bank of America for breach of the implied covenant of good faith and fair dealing (Count III of the Avenue Complaint) was precluded by their claims for breach of the Disbursement Agreement because the

damages sought in the implied covenant claim were intrinsically tied to those sought in the breach of contract claim. I dismissed the claim for breach of the implied covenant of good faith and fair dealing accordingly. I also dismissed the claim against all defendants for breach of the implied covenant of good faith and fair dealing in connection with the Credit Agreement (Count VI of the Avenue Complaint) as moot because the claim sought to impose an obligation that was inconsistent with the terms of the Credit Agreement. [Amended MDL Order No. 18]. In short, I dismissed all of the Term Lenders' claims against the Revolving Lender Defendants.

On January 18, 2011, I granted the Term Lenders' Joint Motion for Partial Final Judgment, entering partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) so the Term Lenders could seek an appeal of their claims against the Revolving Lender Defendants at the same time as the Trustee's appeal in the Fontainebleau action. [MDL Order Number 44, ECF No. 201]. Final judgment was therefore entered against the Term Lenders on Counts II, III, and IV of the Avenue Action, and Counts I and II of the Aurelius Action. [ECF No. 202]. The dismissal of the Term Lenders' claims against the Revolving Lender Defendants is on appeal. [ECF No. 203, 208].

On April 19, 2011, upon agreement and stipulation by the Avenue and Aurelius Plaintiffs and Bank of America, I dismissed without prejudice Count III of the Aurelius Action. [MDL Order Number 47, ECF No. 238]. (The Avenue Plaintiffs had purchased the Term Notes previously held by the Aurelius Plaintiffs, and sought to pursue a single action on the Notes they owned. [ECF No. 212].). *See also* 11/18/2011 Oral Argument Transcript ("11/18/2011 Tr.") [ECF No. 335] 97:19–98:3.

Therefore, the only claims outstanding are the Term Lenders' claims against Bank of America for breach of the Disbursement Agreement (Count I of the Avenue Action), and the related request for declaratory relief (Count V of the Avenue Action). The Term Lenders allege Bank of America breached its obligations as Bank Agent and Disbursement Agent under the Disbursement Agreement between September 2008 and March 2009 by improperly approving advance requests that failed to meet one or more of the conditions precedent under Section 3.3 of the Disbursement Agreement, improperly issuing Advance Confirmation Notices, improperly failing to issue Stop Funding Notices, and improperly disbursing funds from the Bank Proceeds Account. [ECF No. 15, Count I]. These claims and Bank of America's breach of the Disbursement Agreement are the subject of the parties' summary judgment motions.

II. Summary Judgment Motions: The Parties' Positions and Relief Sought

On August 5, 2011, the Term Lender Plaintiffs and Bank of America filed cross-motions for summary judgment and accompanying memoranda of law. [ECF Nos. 255 ("BofA Memo."), 258 ("TL Memo.")], and subsequently filed related opposition and reply memoranda [ECF No. 269 ("BofA Opp. Memo."), ECF No. 275 ("TL Opp. Memo."), ECF No. 290 ("BofA Reply Memo."), ECF No. 297 ("TL Reply Memo."). The Term Lenders seek partial summary judgment that Bank of America wrongfully and with gross negligence breached its obligations as Disbursement Agent and Bank Agent under the Disbursement Agreement because Bank of America disbursed funds knowing that Lehman Brothers Holdings, Inc. ("Lehman") had declared bankruptcy, and the bankruptcy and subsequent related events caused multiple conditions precedent to disbursement to fail. Bank of America, on the other hand, argues that it is entitled to summary judgment dismissing the Term Lenders' breach of contract claim because the

undisputed facts demonstrate that Bank of America performed its duties under the Disbursement Agreement by approving and funding Fontainebleau Advance Requests only after receiving the required certifications, had no duty to investigate the representations in these certifications, and was not grossly negligent. Bank of America further argues it did not have actual knowledge of the failure of any conditions precedent to disbursement.

I have considered the parties' positions, and after careful review of the pleadings, the case file, and the relevant law, I grant summary judgment in favor of Bank of America for the reasons discussed below.

III. Undisputed Facts

Pursuant to Southern District of Florida Local Rule 7.5,[4] the parties filed Statements of Undisputed Material Facts [ECF Nos. 256 ("BofA Statement"), 315 ("TL Statement")] and associated exhibits in support of their respective Motions for Summary Judgment. The parties filed responses and replies, including additional material facts ("AMA") and associated exhibits, to the Statements of Undisputed Material Facts [ECF Nos. 324 ("BofA Response"; "BofA Response AMA"), 316 ("TL Response"; "TL Response AMA"), 323 ("BofA Reply"; "BofA Reply AMA"), 317 ("TL Reply"; "TL Reply AMA")]. Upon review of the record, including the exhibits submitted, I conclude that the following material facts are undisputed and supported by evidence in the record.

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[4] In the Southern District of Florida, a party moving for summary judgment must submit a statement of undisputed facts. *See* S.D. Fla. L.R. 7.5. If necessary, the non-moving party may file a concise statement of the material facts as to which it is contended there exists a genuine issue to be tried. *Id.* Each disputed and undisputed fact must be supported by specific evidence in the record, such as depositions, answers to interrogatories, admissions, or affidavits on file with the Court. *Id.* All facts set forth in the movant's statement which are supported by evidence in the record are deemed admitted unless controverted by the non-moving party. *Id.*

A. The Project and the Parties

The Fontainebleau Las Vegas is a partially-completed resort and casino development in Las Vegas (previously defined as the "Project"). (BofA Statement ¶ 8).[5] To finance the Project, Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, the "Borrowers" or "Fontainebleau") entered into various financing agreements, including the Master Disbursement Agreement ("Disbursement Agreement"), Credit Agreement, and Retail Agreement, each of which is discussed in more detail below. (*Id.* ¶¶ 15–16, 22). The Project's developer was the Borrowers' parent, Fontainebleau Resorts, LLC ("Fontainebleau Resorts" or "FBR"). (*Id.* ¶ 9). Jeff Soffer was the Chairman of Fontainebleau Resorts, Glenn Schaeffer was the CEO, and Jim Freeman was Senior Vice President and Chief Financial Officer. (Freeman Dep. 12:10–14; 13:20–24). Turnberry West Construction ("TWC"), a member of the Turnberry group of companies, was the Project's general contractor. (BofA Statement ¶ 12).

Bank of America, a nationally chartered bank, held various roles under the financing agreements. (BofA Response AMA ¶ 1). It acted as Administrative Agent under the Credit Agreement for the Senior Secured Facility Lenders and Disbursement Agent under the Disbursement Agreement, and was also a lender under the Credit Agreement. (BofA Statement ¶¶ 2–4; BofA Response AMA ¶ 1). Bank of America's activities as Administrative and Disbursement Agents for the Project were managed by the same individuals within its Corporate Debt Products Group. (TL Response AMA ¶

[5] Where the fact is not in dispute, I cite only to the statements of material facts, responses, or replies. Where the fact is in dispute, I cite to the underlying record.

9; 11/18/2011 Tr. 26:23-27:1). These activities included approving Advance Requests, disbursing funds to Borrowers, and deciding what information to disseminate to lenders. (BofA Response ¶ 9; TL Reply ¶ 9).

Jeff Susman was the Senior Vice President of Corporate Debt Products and had primary management responsibility for Bank of America's agency activities relating to the Project until his departure from Bank of America in February 2009. (BofA Response ¶ 10; TL Reply ¶ 10; TL Response AMA ¶ 15). Jean Brown reported to the Corporate Debt Products group and was the lead contact with TriMont Real Estate Advisors, the Servicer of the Retail Facility. (TL Response AMA ¶10; Rafeedie Dep. Tr. 33:2–23). David Howard was the Managing Director of Syndications of Bank of America Securities until March 31, 2009, and Brett Yunker was the Vice President of the Global Gaming Team at Bank of America Securities. (TL Response AMA ¶¶ 13–14; BofA Reply AMA ¶¶ 13–14).

Finally, the Term Lender Plaintiffs are a group of sophisticated financial institutions who were lenders—or in many cases, successors-in-interest to lenders—to Fontainebleau under the Credit Agreement.[6] (BofA Statement ¶ 5; Aurelius Compl.; Avenue Compl.).

B. The Project's Financing

The Project's initial budget was $2.9 billion, which included approximately $1.7 billion of hard construction costs. (BofA Statement ¶ 14). The Project was financed through a combination of debt and equity capital. The largest financing component for

[6] The Term Lenders do not dispute this fact; rather, they contend it is immaterial and irrelevant. (TL Response at 1).

the Project's resort component was a $1.85 billion senior secured debt facility ("Senior Credit Facility"), created by the Credit Agreement. (*Id.* ¶¶ 15, 17). The Senior Credit Facility comprised three senior secured loans: (1) a $700 million term loan (the "Initial Term Loan"); (2) a $350 million delay draw term loan (the "Delay Draw Term Loan"); and (3) an $800 million revolving loan (the "Revolver Loan"). (*Id.* ¶ 17). The Term Lender Plaintiffs own Initial Term Loan and Delay Draw Term Loan notes, and Bank of America was a Revolver Loan lender. (*Id.* ¶¶ 4, 18).[7] Additional financing sources for the Project included equity contributions by Fontainebleau and its affiliates, $675 million in Second Mortgage Notes, and a $315 million loan earmarked for the Project's retail space (the "Retail Facility"). (*Id.* ¶ 16).

Pursuant to the agreements governing the various financing sources, Fontainebleau gained access to the financing through a two-step borrowing process. The first step required Fontainebleau to submit to the Administrative Agent a Notice of Borrowing specifying the amount and type of loan to be borrowed and the requested borrowing date. The Administrative Agent would then notify the lenders of the Notice of Borrowing, and the Lenders would remit funds to the Administrative Agent who, upon satisfaction of certain conditions precedent, would transfer the funds into a Bank Proceeds Account. (Dep. Exhs. 808 ¶ 6, 1501). Fontainebleau could not access money in the Bank Proceeds Account; rather, the second step required Fontainebleau to submit an Advance Request to Bank of America as Disbursement Agent under the Disbursement Agreement, a process described in more detail below. (TL Statement ¶¶

[7] The Term Lenders do not dispute this fact; rather, they only contend that it is immaterial and irrelevant. (TL Response at 1).

14–15; Dep. Exh. 808 ¶ 7). The $700 Initial Term Loan was funded into the Bank Proceeds Account upon closing of the Credit Agreement in June 2007, and the majority of the $350 million Delay Draw Term Loan was funded into the Bank Proceeds Account in early March 2009. (Dep. Exh. 644; TL Statement ¶ 13).

C. The Retail Facility, Retail Agreement, and Shared Costs

The Project's retail space was to be developed by Fontainebleau Las Vegas Retail, LLC (the "Retail Affiliate"), an FBR subsidiary. (BofA Statement ¶ 19). Although the Senior Credit Facility and the Retail Facility were separate lending facilities, the resort budget included $83 million in costs that were to be funded through the Retail Facility ("Shared Costs"). (*Id.* ¶ 24). These Shared Costs were used to fund construction of portions of the Project's retail space that were structurally inseparable from the resort. (*Id.* ¶ 25). The Retail Facility was critical to the completion of the Project. (TL Response AMA ¶ 26).

The Retail Facility was subject to a June 6, 2007 agreement (previously referred to as the "Retail Agreement") between the Retail Affiliate and Lehman Brothers Holdings, Inc. ("Lehman"), which signed the agreement as a lender and as the agent for one or more of the co-lenders. (BofA Statement ¶¶ 22, 26). Bank of America was not a Lender under the Retail Agreement or otherwise party to it, but did receive a copy of the Agreement. (Retail Agreement ("Retail Agmt."); TL Response AMA ¶ 8). The Retail Agreement permitted Lehman to syndicate some or all of the Retail Facility to other lenders. (BofA Statement ¶ 27). On September 24, 2007, pursuant to a Retail Co-Lending Agreement, Lehman syndicated select notes under the Retail Facility to National City Bank, Sumitomo Mitsui Banking Corp., and Union Labor Life Insurance Company ("ULLICO") (together with Lehman, "Retail Co-Lenders" or "Retail Lenders").

(BofA Response ¶ 30; Dep. Ex. 9, Retail Co-Lending Agreement ("Retail Co-Lending Agmt."). Post syndication, Lehman was the largest Retail Lender, responsible for $215 million, or 68.25% of the Retail Facility. (TL Response AMA ¶ 25; BofA Response ¶ 30).

The Retail Agreement further permitted Lehman to delegate any portion of its responsibilities under the Agreement to a servicer. (BofA Statement ¶ 31). Lehman designated TriMont Real Estate Advisors, Inc. ("TriMont") as the servicer for the Retail Facility, delegating the responsibility for collecting the Retail Co-Lenders' respective Shared Cost obligations in response to an Advance Request and transferring those funds to Bank of America, as Disbursement Agent under the Disbursement Agreement. (*Id.* ¶¶ 32–33).

Additionally, the Retail Agreement and Retail Co-Lending Agreement permitted the Retail Co-Lenders to "sell … any or any part of their right … Loan …to one or more additional lenders," and to make payments on behalf of a defaulting Co-Lender, subject to certain terms and conditions. (Retail Co-Lending Agmt. § 5.01(d); Retail Agmt. §§ 9.7.2.9(a) and (b)). Bank of America was not party to, and did not receive a copy of, the Retail Co-Lending Agreement. (Retail Co-Lending Agmt.; BofA Response AMA ¶ 25). To that end, Bank of America did not know the identity of the Retail Co-Lenders until late 2008. (BofA Response AMA ¶ 26; TL Reply AMA ¶ 26).

D. The Disbursement Agreement

Fontainebleau's access to the construction financing was governed by the Disbursement Agreement, which contained a New York choice-of-law provision. (BofA Statement ¶ 34; Disbursement Agreement ("Disb. Agmt.") § 11.6). The Disbursement

Agreement contained an integration clause (Section 11.5, entitled "Entire Agreement") that permitted reference to select additional agreements:

> This Agreement and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof, all of which negotiations and writings are deemed void and of no force and effect.

(Disb. Agmt. § 11.5).

As described above, the Credit and Disbursement Agreements established a two-step funding process for the Senior Credit Facility. To access funds from the Delay Draw Term Loan and Revolver Loan facilities, Fontainebleau would submit a Notice of Borrowing that, subject to certain procedures and conditions set forth in the Credit and Disbursement Agreements, would cause Lender funds to be transferred into the designated Bank Proceeds Account. (Credit Agmt. §§ 2.1(b), 2.1(c), 2.4; Disb. Agmt. § 2.1.2). Fontainebleau could not withdraw funds directly from the Bank Proceeds Account; rather, it was required to submit a monthly Advance Request, the form and contents of which were prescribed by the Disbursement Agreement. (BofA Statement ¶ 37).

1. The Advance Request, Conditions Precedent, and the Funding Process

The Disbursement Agreement required that each Advance be requested "pursuant to an Advance Request substantially in the form of Exhibit C-1" and provided "[e]ach Advance Request shall be delivered to the Disbursement Agent … not later than the 11th day of each calendar month." (Disb. Agmt. § 2.4.1). Exhibit C-1, in turn, required Fontainebleau to "represent, warrant and certify" that "the conditions set forth in Section 3.3 … of the Disbursement Agreement are satisfied as of the Requested

Advance Date." (BofA Statement ¶ 37; Disb. Agmt. Exh. C-1 at 1, 8). Exhibit C-1 also outlined certain "General Representations" that overlapped with conditions set forth in Section 3.3. (Disb. Agmt. § 3.3, Exh. C-1 at 5–8).

Section 3.3, entitled "Conditions Precedent to Advances by Trustee and the Bank Agent," contained twenty-four separate conditions precedent. (BofA Statement ¶ 41; Disb. Agmt. § 3.3). These conditions precedent included the following:

- "Representations and Warranties. Each representation and warranty of … [e]ach Project Entity set forth in Article 4 … shall be true and correct in all material respects as if made on such date." (Disb. Agmt. § 3.3.2).

- "Default. No Default or Event of Default shall have occurred and be continuing." (*Id.* § 3.3.3). (Article 7, entitled "Events of Default," provided further information on Events of Default. (*Id.* Art. 7).)

- "Advance Request and Advance Confirmation Notice. … [The] Advance Request shall request an Advance in an amount sufficient to pay all amounts due and payable for work performed on the Project through the last day of the period covered by such Advance Request …." (*Id.* § 3.3.4).

- "Consultant Certificates and Reports. Delivery to each of the applicable Funding Agents and the Disbursement Agent of (a) the Constriction Consultant Advance Certificate approving the corresponding Advance Request, and (b) the Architect's Advance Certificate with respect to the Advance, and (c) the General Contractor's Advance Certificate with respect to the Advance." (*Id.* § 3.3.5).

- "In Balance Requirement. The Project Entitles shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied." (*Id.* § 3.3.8). (The In Balance Test was satisfied when the Available Funds equaled or exceeded the Project's Remaining Costs. (BofA Statement ¶ 41).)

- "Material Adverse Effect. Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material Adverse Effect." (Disb. Agmt. § 3.3.11).

- "Plans and Specifications. In the case of each Advance from the Bank Proceeds Account … , the Construction Consultant shall to the extent set forth in the Construction Consultant Advance Certificate have approved all

Plans and Specifications which, as of the date of the relevant Advance Request, constitute Final Plans and Specifications to the extent not theretofore approved." (*Id.* § 3.3.19).

- "Adverse Information. In the case of each Advance from the Bank Proceeds Account … , the Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole." (*Id.* § 3.3.21).

- "Retail Advances. In the case of each Advance from the Bank Proceeds Account … , the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to the Advance Request." (*Id.* § 3.3.23).

- "Other Documents. In the case of each Advance from the Bank Proceeds Account, the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." (*Id.* § 3.3.24).

Moreover, each Advance Request included certification from TWC, that, among other things, "[t]he Control Estimate … reflects the costs expected to be incurred by [TWC] to complete the remaining 'Work' … on the Project." (BofA Statement ¶ 44; Disb. Agmt. Exh. C-4 ¶ 4). TWC's certification further specified that the representations contained therein were "true and correct" and were "made for the benefit of the Disbursement Agent, the Funding Agents and the Lenders represented thereby, and may be relied upon for the purposes of making advances pursuant to the … Disbursement Agreement …." (Disb. Agmt. Exh. C-4 at 2). Also included with each Advance Request was certification from the Project's Architect that "[t]he construction performed on the Project … is in general accordance with the 'Drawings and Specifications.'" (*Id.* Exh. C-3).

After submission of an Advance Request, the Disbursement Agreement required Bank of America, as Disbursement Agent, and Inspection and Valuation International, Inc. ("IVI"), who was appointed as Construction Consultant under the Disbursement Agreement, to "review the Advance Request and attachments thereto and determine whether all required documentation has been provided, and [to] use commercially reasonable efforts to notify the Project Entities of any deficiency within three Banking Days …." (Disb. Agmt. § 2.4.4(a); BofA Statement ¶ 45).

The Disbursement Agreement further required IVI to deliver to the Disbursement Agent a "Construction Consultant Advance Certificate either approving or disapproving the Advance Request." (Disb. Agmt. § 2.4.4(b); BofA Statement ¶ 47). To fulfill these requirements, IVI performed monthly site visits, reviewed information disclosed by Fontainebleau at the site visits, and summarized its findings in Project Status Reports. (BofA Statement ¶ 46). By signing the Construction Consultant Advance Certificate, IVI certified, based on its on-site observation of construction progress and its review of "the material and data made available" by the Borrowers, Contractor, and others; all relevant invoices, plans and specifications; and all previous Advance Requests, the following:

- "The Project Entities have properly substantiated, in all material respects, the Project Costs for which payment is requested in the Current Advance Request";
- "The Remaining Cost Report attached to the Current Advance Request accurately reflects, in all material aspects, the Remaining Costs required to achieve Final Completion";
- "The Unallocated Contingency Balance set forth in the Remaining Cost Report attached to the Current Advance Request is accurate and equals or exceeds the Required Minimum Contingency";

- "The Opening Date is likely to occur on or before the scheduled Opening Date set forth in the Current Advance Request and the Completion Date if likely to occur within 180 days thereafter";

- "The Advances requested in the Current Advance Request are, in our reasonable judgment, generally appropriate in light of the percentage of construction completed and the amount of Unincorporated Materials"; and

- "The undersigned has not discovered any material error in the matters set forth in the Current Advance Request or Current Supporting Certificates."

(Disb. Agmt. Exh. C-2). The Disbursement Agent was tasked with using "reasonable diligence" to ensure IVI performed its review and delivered its Construction Consultant Advance Certificate "not less than three Banking Days prior to the Scheduled Advance Date." (*Id.* § 2.4.4). In sum, each Advance Request required (and contained) certification from Fontainebleau, TWC, and IVI that the applicable conditions precedent were satisfied.

Further, the Disbursement Agent was permitted to require Fontainebleau to submit a revised Advance Request if it found any "minor or purely mathematical errors." (*Id.*). Independently, Fontainebleau could, with the approval of the Disbursement Agent and IVI, revise and resubmit its Advance Request if it "obtain[ed] additional information or documentation or discover[ed] any errors in or updates required to be made to any Advance Request prior to the Scheduled Advance Date." (*Id.* § 2.4.5). The Disbursement Agent was not obligated to accept any such updates, but was required to "consider their submission in good faith." (*Id.*).

Once an Advance Request's applicable conditions precedent were satisfied, Bank of America (as Disbursement Agent) and Fontainebleau were required to execute an Advance Confirmation Notice. (BofA Statement ¶ 51). By executing the Advance Confirmation Notice, Fontainebleau expressly confirmed "that each of the

representations, warranties and certifications made in the Advance Request … are true and correct as of the Requested Advance Date and Disbursement Agent is entitled to rely on the foregoing in making the Advanced herein requested" and "that the [Advance Request] representations, warranties and certifications are correct as of the Requested Advance Date." (BofA Statement ¶ 52, Disb. Agmt. Exh. E).

The Notice "confirm[ed] the amount of the Advances to be made under the Financing Agreements" and "confirm[ed] the amount to be transferred into each Account." (Disb. Agmt. Exh. E). The Disbursement Agreement correspondingly provided, "each of the Funding Agents shall make the Advances contemplated by [the] Advance Confirmation Notice to the relevant Accounts" and "the Disbursement Agent shall make the resulting transfers amongst the Accounts described in the Advance Confirmation Notice." (*Id.* § 2.4.6). Thus, once an Advance Request's conditions precedent were satisfied and the Advance Confirmation Notice issued, Bank of America transferred the requested funds from the Bank Proceeds Account to select payment accounts for further distribution to Fontainebleau. (*Id.* § 2.4.6, Exh. E).

If, on the other hand, the Advance Request's conditions precedent were not satisfied, or the "Controlling Person notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing," the Disbursement Agreement required the Disbursement Agent to issue a Stop Funding Notice. (BofA Statement ¶ 54, Disb. Agmt. § 2.5.1). (By virtue of its role as Bank Agent, as of September 2008, Bank of America was the Controlling Person under the Disbursement Agreement. (Disb. Agmt. Exh. A at 10; TL Statement ¶ 26; BofA Response ¶ 26).). A Stop Funding Notice relieved the Lenders of their obligation to fund loans under the Credit Agreement until

the circumstances giving rise to the Stop Funding Notice were resolved or the necessary parties waived the unsatisfied conditions precedent. (BofA Statement ¶ 54, Disb. Agmt. § 2.5.2). The Disbursement Agreement specifically provided "[t]he Disbursement Agent shall have no liability … arising from any Stop Funding Notice except to the extent arising out of gross negligence or willful misconduct of the Disbursement Agent." (Disb. Agmt. § 2.5.1).

2. Defaults and Events of Default

As noted above, one of the conditions precedent to an Advance Request was that "No Default or Event of Default shall have occurred and be continuing." (Disb. Agmt. § 3.3.3). "Default" was defined "as any events specific in Article 7" and "the occurrence of any 'Default' under any Facility Agreement," including the Credit Agreement and the Retail Agreement, and "Event of Default" was defined as having "the meaning given in Section 7.1." (*Id.* Exh. A at 10, 12). Per Article 7, entitled "Events of Default," the following constituted an "Event of Default":

- "Other Financing Documents. The occurrence of an 'Event of Default' under and as defined by any one or more of the Facility Agreements …." (*Id.* § 7.1.1).

- "Representations. … Any representation, warranty or certification confirmed or made by any of the Project Entities in this Agreement … (including any Advance Request …) shall be found to have been incorrect when made or deemed to be made in any material respect." (*Id.* § 7.1.3(c)).

The Credit Agreement outlined what constituted an "Event of Default" under the Credit Agreement in Section 8, entitled "Events of Default," and the Retail Agreement outlined what constituted an "Event of Default" under the Retail Agreement in Section 8.1, entitled "Event of Default." (Credit Agreement ("Credit Agmt.") at 11, § 8; Retail Agmt. § 8.1).

Further, the Credit Agreement defined "Lender Default" as "the failure … of a Lender to make available … its portion of any Loan required to be made by such Lender hereunder," and "Defaulting Lender" as "any time … any Lender with respect to which a Lender Default is in effect." (Credit Agmt. 11, 25). However, Section 8 of the Credit Agreement did not include Lender Defaults or Defaulting Lenders as "Events of Default." (Credit Agmt. § 8). The Retail Agreement similarly defined "Lender Default" as "the failure … of a Lender or Co-Lender to make available its portion of any Loan when required to be made by it hereunder," and defined "Defaulting Lender" to include any Lender or Co-Lender that was the subject of bankruptcy, but neither Lender Default nor Defaulting Lender was explicitly included as an Event of Default under Section 8.1 of the Retail Agreement. (Retail Agmt. § 1 at 8, 15, § 8.1).

The Disbursement Agreement imposed on Fontainebleau an obligation "to provide to the Disbursement Agent, the Construction Consultant and the Funding Agents written notice of … [a]ny Default or Event of Default of which the Project Entities have knowledge ….," and explicitly stated the Disbursement Agent had "no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing;" (Disb. Agmt. §§ 5.4.1, 9.10). The Credit Agreement imposed on Fontainebleau and the Lenders the obligation to provide the Administrative Agent with notice of a default under the Credit Agreement. (Credit Agmt. § 9.3(c)). Neither the Disbursement nor the Credit Agreement imposed on the Disbursement Agent or the Bank Agent a duty to inquire as to the occurrence of a Default or an Event of Default. (Disb. Agmt. § 9.10; Credit Agmt. § 9.3(c)).

3. Article 9: The Disbursement Agent

Article 9 of the Disbursement Agreement, entitled "The Disbursement Agent," set forth certain rights and responsibilities of the Disbursement Agent. (Disb. Agmt. Art. 9). Section 9.1, entitled "Appointment and Acceptance," provided as follows: "The Disbursement Agent … agrees to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds." (*Id.* § 9.1).[8] Sections 9.2 ("Duties and Liabilities of the Disbursement Agent Generally) and 9.3 ("Particular Duties and Liabilities of the Disbursement Agent"), as indicated by their titles, set forth the duties and liabilities of the Disbursement Agent.

Section 9.2.3 prescribed the action to be taken by the Disbursement Agent should it be notified of an Event of Default or Default:

> Notice of Events of Default. If the Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing, the Disbursement Agent shall … exercise such of the rights and powers vested in it by this [Disbursement] Agreement … and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs.

(*Id.* § 9.2.3).

In addition, Section 9.2.5, entitled "No Imputed Knowledge," explicitly provided that no knowledge may be imputed to Bank of America, as Disbursement Agent, from Bank of America in its other agency or lender functions:

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[8] Section 9.1 referenced certain "Control Agreements." (Disb. Agmt. § 9.1). The parties agreed during oral argument that I need not consider the Control Agreements in evaluating Section 9.1 and the Disbursement Agreement. (11/18/2011 Tr. 12:24–13:8).

> Notwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent, or by reason of the fact that the Disbursement Agent is also a Funding Agent or Lender.

(*Id.* § 9.2.5). "Funding Agent" included Bank of America's role as Bank Agent under the Disbursement Agreement, and, in turn, Controlling Person under the Disbursement Agreement and Administrative Agent under the Credit Agreement. (*Id.* Exh. A at 3, 10, 14). Accordingly, Bank of America, as Disbursement Agent, had no imputed knowledge from Bank of America as Bank Agent or Administrative Agent.

Regarding the approval of Advance Requests, Section 9.3.2 expressly authorized the Disbursement Agent to rely on certifications from the Project Entities with respect to the conditions precedent of an Advance Request, and disavowed any duty on the part of the Disbursement Agent to investigate independently the veracity of the statements and information contained in the certifications:

> The Disbursement Agent may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval or other paper document believed by it on reasonable grounds to be genuine and to have been signed or presented by the proper party or parties. Notwithstanding anything else in this Agreement to the contrary, in performing its duties hereunder, including approving any Advance Requests, making any other determinations or taking any other actions hereunder, the Disbursement Agent shall be entitled to rely on certifications from the Project Entities (and, where contemplated herein, certifications from third parties, including the Construction Consultant) as to satisfaction of any requirements and/or conditions imposed by this Agreement. The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items or to investigate any other facts or circumstances to verify compliance by the Project Entities with their obligations hereunder.

(*Id.* § 9.3.2).

Section 9.10, entitled "Limitation of Liability," also limited the Disbursement Agent's responsibility and liability. (*Id.* § 9.10). Section 9.10 explicitly limited the duties of the Disbursement Agent as follows: (1) the Disbursement Agent has "no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing"; (2) "the Disbursement Agent is not obligated to supervise, inspect or inform the Project Entities of any aspect of the development, construction or operation of the Project"; (3) the Disbursement Agent has "no duties or obligations hereunder except as expressly set forth herein, shall be responsible only for the performance of such duties and obligations and shall not be required to take any action otherwise than in accordance with the terms hereof"; and (4) "…nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon the Disbursement Agent any obligations in respect of this Agreement except as expressly set forth herein or therein." (BofA Statement ¶ 61; Disb. Agmt. § 9.10). Section 9.10 also stated, "The Disbursement Agent does not represent, warrant or guaranty to the Funding Agents or the Lenders the performance by any Project Entities, the General Contractor, the Constriction Consultant, the Architect, or any other Contractor …." (Disb. Agmt. § 9.10).

Section 9.10, moreover, limited Bank of America's potential liability to bad faith, fraud, gross negligence, or willful misconduct:

- "[T]he Disbursement Agent shall have no responsibility to the Project Entities, the Funding Agents, or the Lenders as a consequence of performance by the Disbursement Agent hereunder except for any bad faith, fraud, gross negligence or willful misconduct of the Disbursement Agent as finally judicially determined by a court of competent jurisdiction;" and

- "Neither the Disbursement Agent nor any of its officers, directors, employees or agents shall be in any manner liable of responsible for any loss or damage arising by reason of any act or omission to act by it or them hereunder or in connection with any of the transactions contemplated hereby, including, but

> not limited to, any loss that may occur by reason of forgery, fraud, gross negligence or willful misconduct as finally judicially determined by a court of competent jurisdiction."

(BofA Statement ¶ 62; Disb. Agmt. § 9.10). (The Term Lenders do not contend Bank of America engaged in fraud.)

E. Bank of America's Role as Bank Agent and the Credit Agreement

Bank of America was not only the Disbursement Agent under the Disbursement Agreement, it was also the Bank Agent. (Disb. Agmt. Exh. A at 3). The Disbursement Agreement defined "Bank Agent" as "Bank of America, N.A. in its capacity as Administrative Agent under the Bank Credit Agreement …." (*Id.*). Like the Disbursement Agreement, the Credit Agreement was governed by New York law. (Credit Agmt § 10.11).

Section 9 of the Credit Agreement set forth certain rights and responsibilities of the Administrative Agent. (Credit Agmt. § 9). Similar to the exculpatory provisions of the Disbursement Agreement, the Credit Agreement, Section 9.3, entitled "Exculpatory Provisions," specifically provided the Administrative Agent could not be held liable in the absence of "its own gross negligence of willful misconduct." (*Id.* § 9.3(c)). Section 9.3 further stated, "The Administrative Agent shall be deemed not to have knowledge of any Default unless and until notice describing such Default is given to the Administrative Agent by Borrowers, a Lender or the Issuing Lender." (*Id.*). In the same vein, Section 9.7 of the Credit Agreement, entitled "Non-Reliance on Administrative Agent and Other Lenders," required the Lenders to make their own decisions "independently and without reliance" upon Bank of America as Administrative Agent. (*Id.* § 9.7).

Section 9 of the Credit Agreement also contained reliance and inquiry provisions similar to those in Article 9 of the Disbursement Agreement. Section 9.3 stated, "The

Administrative Agent shall not be responsible for or have any duty to ascertain or inquire into … any statement, warranty or representation made in or in connection with this Agreement or any other Loan Document ….” (*Id.* § 9.3(c)). Also, Section 9.4 authorized the Administrative Agent to rely on “any notice, request, certificate, consent, statement, instrument, document or other writing … believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person.” (*Id.* § 9.4).

Having set forth the relevant and material provisions of the pertinent Agreements, I turn to the material facts underlying the Term Lenders’ claims.

F. September 2008 through March 2009 Advance Requests

For each Advance Request from September 2008 through March 2009, Bank of America received all required certifications from Fontainebleau, IVI, TWC, and the Architect before disbursing funds to Fontainebleau. (BofA Statement ¶ 57; TL Response ¶ 57; TL Statement ¶ 75). Fontainebleau certified the satisfaction of all conditions precedent and accuracy of all representations and warranties, including the absence of any defaults under the various loan documents. (BofA Statement ¶ 57; TL Response ¶ 57). The Architect certified that the Project’s construction was in accordance with the plans and specifications. (*Id.*). TWC certified the Control Estimate reflected the costs it expected to be incurred to complete the Project. (*Id.*). And IVI certified the Remaining Cost Report accompanying the Advance Request accurately reflected the remaining costs to complete the Project. (*Id.*).[9] It is undisputed that the

[9] The Term Lenders dispute this fact on the basis that IVI rejected the initial March 2009 Advance Request. (TL Response ¶ 57). As discussed below, although IVI rejected the initial Request, IVI ultimately signed off on the March 2009 Advance Request before Bank of America disbursed the requested funds to Fontainebleau.

Controlling Person never formally notified the Disbursement Agent that a Default or Event of Default had occurred and was continuing. (Disb. Agmt. § 2.5.1).

Notwithstanding, the Term Lenders have identified several events underlying their claim that Bank of America breached its obligations under the Disbursement Agreement: the Lehman bankruptcy and the funding of the Retail Facility; Fontainebleau's failure to disclose anticipated Project costs; repudiation by the FDIC of First National Bank of Nevada's commitments; select lenders' failure to fund with respect to the March 2009 Advance; and the "untimely" submission of the March 2009 Advance. I address each event in turn.

G. The Lehman Bankruptcy and Retail Facility Funding

1. September 2008 Advance Request

On September 11, 2008, Fontainebleau submitted its September Advance Request for $103,771.77, including nearly $3.8 million in Retail Facility funds. (Dep. Exhs. 237, 331; BofA Statement ¶ 65). Fontainebleau represented in the Request that all conditions precedent to disbursement had been satisfied. (TL Statement ¶ 75).

Lehman filed for bankruptcy on September 15, 2008. (BofA Statement ¶ 64; TL Statement ¶ 33). In the days following, Bank of America held a series of calls with Fontainebleau to obtain additional information regarding the bankruptcy's implications for the September 2008 Advance Request. (BofA Statement ¶ 68). These calls focused on whether Lehman would fund its portion of the Advance Request and on potential alternative financing arrangements if Lehman did not fund, including funding by other Retail Facility Lenders or Fontainebleau. (BofA Statement ¶ 69; TL Statement ¶ 47). (As noted above, Lehman was a lender and agent under the Retail Facility, and one of the conditions precedent of an Advance Request was the "Retail Agent and the

Retail Lenders … make any Advances required of them pursuant to the Advance Request." (Disb. Agmt. § 3.3.23)). During the calls, Bank of America did not make any recommendations as to the various financing options; however, it later concluded internally that Fontainebleau funding Lehman's share would not satisfy the Advance Request's condition precedent. (BofA Statement ¶¶ 70–71; TL Statement ¶ 48–49). There is no evidence on summary judgment that Bank of America communicated this conclusion to Fontainebleau.[10]

On September 17, 2008, Bank of America issued an Advance Confirmation Notice confirming the amount of the Advances to be made under the various financing agreements, and on September 22, 2008, Bank of America, as Administrative Agent, requested Fontainebleau schedule a telephone conference with the lenders to discuss the implications of Lehman's bankruptcy on the Project. (Dep. Exh. 901). No call was held in the following days. On September 26, 2008, TriMont sent Bank of America the entire amount of the Retail Shared Costs (or the "Retail Advance"). (BofA Statement ¶ 73; TL Response ¶ 73). After receiving the Retail Advance and before disbursing funds to Fontainebleau, Bank of America sought and received reconfirmation from Fontainebleau CFO Jim Freeman that all conditions precedent to funding had been

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[10] The Term Lenders' assert "BofA did not discuss with Fontainebleau BofA's conclusion that Fontainebleau's payment of Lehman's commitment would cause condition precedent in Section 3.3.23 to fail." (TL Statement ¶ 50). Bank of America disputes this fact. (BofA Response ¶ 50). Per the testimony cited by Bank of America, neither Mr. Yunker (of Bank of America) nor Mr. Freeman (of Fontainebleau) recalls whether Bank of America communicated its conclusion to Fontainebleau. (Freeman Dep. Tr. 74:12–24; Yunker Dep. Tr. 96:11–98:14). Bank of America has not, however, cited any evidence on summary judgment stating Bank of America communicated its conclusion to Fontainebleau. *See, e.g.*, *Dickey v. Baptist Mem'l Hosp.*, 146 F.3d 262, 266 n.1 (5th Cir. 1998) ("The mere fact that [the deponent] does not remember the alleged phone conversation, however, is not enough, by itself, to create a genuine issue of material fact [as to whether the conversation occurred.]")

satisfied. (Dep. Exh. 75). Specifically, Bank of America's Jeff Susman requested Jim Freeman reaffirm "pursuant to Section 11.2 of the Disbursement Agreement … the representations and warranties … made pursuant to the [September] Advance Request and Advance Confirmation Notice." (*Id.*). (Section 11.2, entitled "Further Assurances," authorized the Disbursement Agent to seek further assurances in relation to an Advance Request. (Disb. Agmt. § 11.2).). Jim Freeman responded, "I affirm." (Dep. Exh. 75).

As of September 26, 2008, Lehman had not announced that it would reject the Retail Agreement as a result of its bankruptcy, and Bank of America had concluded that the Lehman bankruptcy, in and of itself, did not provide a basis for rejecting Fontainebleau's September 2008 Advance Request. (BofA Statement ¶ 77; BofA Response AMA ¶ 62). Bank of America also believed it was required to honor the September 2080 Advance Request if the requested Retail Shared Costs were received in full and the Advance Request certifications remained in effect. (Howard Dep. Tr. 80:18-81:21). Accordingly, on September 26, 2008, Bank of America disbursed Fontainebleau's September 2008 Advance Request.

2. Highland's Contentions Regarding the Lehman Bankruptcy

Meanwhile, Highland sent several communications to Bank of America asserting Lehman's bankruptcy caused breaches of the Loan Facility. On September 26, 2008, Highland Capital Management, one of the original Term Lenders, sent Jeff Susman of Bank of America an e-mail stating, "[a]s a result of [Lehman's] bankruptcy filing, … the financing agreements are no longer in full force and effect, triggering a number of breaches under the Loan Facility – resulting in the following consequences: (i) No disbursements may be made under the Loan facility; and (ii) The Borrower should be

sent a notice of breach immediately to protect the Lenders' rights and ensure that any cure period commence as soon as possible." (Dep. Exh. 455; BofA Response AMA ¶ 106). That same day, Bank of America's counsel Sheppard Mullin Richter & Hampton LLP ("Sheppard Mullin") responded to Highland, stating the Bankruptcy Code "specifically provides that no executor contract may be terminated or modified solely based on the commencement of a Chapter 11 case" and requesting Highland identify "authority or documents supporting a contrary conclusion." (Dep. Exh. 472; BofA Response AMA ¶ 107). Following communications with Highland and further internal analysis, Bank of America concluded that Lehman's bankruptcy filing did not, on its own, provide a basis for rejecting Fontainebleau's September 2008 Advance Request. (BofA Response AMA ¶ 108).

Bank of America provided additional information and analysis to Highland on September 29, 2008 in a Sheppard Mullin email explaining that it was "monitoring all of the [Lehman] court orders" and was "unaware of a restriction on performance of this agreement." (Dep. Exh. 79). Sheppard Mullin also rejected Highland's suggestion that Lehman's bankruptcy was an "anticipatory repudiation of the contract," and affirmed the earlier conclusion that, "under Section 365(e)(1), an executory contract cannot be terminated or modified solely on the basis of [Lehman's] insolvency … or … the commencement of the Chapter 11 case." (*Id.*).

On September 30, 2008, after disbursement of the September 2008 Advance Request, Highland sent Sheppard Mullin another email, this time claiming, "Re Sec 365 – if this contract can be rejected then, at a minimum, there is [a Material Adverse Effect] under the [Credit Agreement]." (*Id.*). Bank of America analyzed Highland's contention

and the pertinent portions of the relevant financing agreements and concluded that Highland's contention was incorrect, as there was no indication that there would be a shortfall in Retail funds or that the Retail Lenders would fail to honor their obligations under the Retail Facility. (Susman Declaration ("Susman Decl.") ¶ 23). Through these various communications and correspondence, Highland did not submit a formal Notice of Default, or specify, with reference to a specific portion of the relevant agreements, any "Default" or "Event of Default" under the Disbursement Agreement or other financing documents. (Susman Decl. ¶ 25; Dep. Exhs. 79, 455).

3. Fontainebleau Resorts' Funding of Lehman's Portion of the September 2008 Retail Shared Costs

Lehman's portion of the September 2008 Advance Request was funded by Fontainebleau Resorts, which made a $2,526,184.00 "equity contribution" to "prevent an overall project funding delay and resulting disruption of its Las Vegas project" after Lehman failed to fund its required September 2008 Retail Shared Costs portion. (BofA Statement ¶ 78). Although the parties now know that Fontainebleau Resorts funded Lehman's portion of the September 2008 Retail Shared Costs, at the time, Fontainebleau did not disclose (and Bank of America, as Disbursement or Bank Agent, did not know) the source of funding. (Newby Dep. Tr. 63:22–65:3). Indeed, internal December 2008 Bank of America correspondence indicates Bank of America believed Lehman funded its September obligation. (Dep. Exh. 905 (Susman email dated December 30, 2008, "As we understand, each month Lehman has funded its share of the advance.")).

On September 30, 2008, Bank of America, as Administrative Agent, requested a call with Jim Freeman to discuss issues relating to Lehman's bankruptcy, including

whether Lehman funded its portion of the Shared Costs on September 26, 2008, whether its portion was funded by other sources, and the effects of the Lehman bankruptcy on the Project. (Dep. Exh. 76; TL Statement ¶ 51; BofA Response ¶ 51). More specifically, Bank of America asked "Who are the current lenders under the Retail credit facility?" and "Did Lehman fund its portion of the requested $3,789,276.00 of Shared Costs funded last Friday (9/26/08) or was this made up from other sources? If Lehman did not fund its portion, what were the other sources?". (Dep. Exh. 76). Fontainebleau refused to engage in the call requested in the September 30, 2008 letter. (TL Statement ¶ 54). However, in a separate call regarding the September 2008 Advance, Fontainebleau represented to Bank of America that the retail funds for the September 2008 Retail Advance came from the retail lenders. (Susman Dep. Tr. 193:18–195:23).

On October 6, 2008, Highland sent Bank of America an e-mail stating there were "public reports" that "equity sponsors" had funded Lehman's portion of the September 2008 Shared Costs. (TL Statement ¶ 60; BofA Response ¶ 60; Dep. Exh. 81). The e-mail did not identify the source of the public reports. (Dep. Exh. 81). That same day, Jim Freeman told Moody's 2008 that "[r]etail funded its small portion last month." (BofA Response AMA ¶ 74).

The next day, October 7, 2008, Jim Freeman sent Bank of America and the Lenders a memorandum addressing the Retail Facility's status. (BofA Statement ¶ 90). The memorandum assured Lenders the August and September portion of the Shared Costs had been funded in full: "The company has received various inquiries concerning the retail facilities for the Fontainebleau Las Vegas project since the unfortunate

bankruptcy filing by Lehman Brothers Holdings, Inc. … In August and September, the retail portion of such shared costs was $5 mm and $3.8 mm, respectively, all of which was funded." (Dep. Exh. 77). The memorandum further stated Fontainebleau was "continuing active discussions with Lehman Brothers to ensure that, regardless of the Lehman bankruptcy filing and related acquisition by Barclay's, there is no slowdown in funding of the project.", and Fontainebleau was "actively talking with co-lenders under the retail construction facility." (*Id.*). Finally, Fontainebleau stated it "[did] not believe there will be any interruption in the retail funding of the project." (*Id.*).

The memo did not directly answer the question of whether Lehman funded its portion of the September 2008 Shared Costs. (*Id.*). Indeed, Jim Freeman later testified in depositions he did not tell Moody's or the Lenders that FBR had funded for Lehman in September 2008 because counsel had advised him not to disclose the source of funding. (BofA Response AMA ¶ 75).

On October 13, 2008, Highland forwarded to Bank of America's counsel a Merrill Lynch research analyst e-mail stating, "We understand that the FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month ($4 million). As a result, there are no delays in construction so far." (Dep. Exh. 459). Based on this analyst report, Highland stated, "It does not appear that the Retail Lenders made the Sept. payment, but rather equity investors. … This would indicate that the reps the company made for that funding request were false." (*Id.*). Highland conceded, however, the assertion that Fontainebleau equity sponsors had funded for Lehman was "one of a number of speculations that were out there floating around" and was merely a "rumor[] in the market." (Rourke Dep. Tr. 104:11–25).

In its October 13, 2008 e-mail, Highland also requested that because of the cited concerns, Bank of America "request the borrower to provide wiring confirmation from the Retail Lenders or funding certificates from the Retail Lenders to confirm that funding is made by the Retail Lenders (rather than other sources)" and the "borrower's legal counsel should provide an opinion that the Lehman funding agreement is in full force and effect." (BofA Response AMA ¶ 115; Dep. Exh. 459). Highland cited no provision of any agreement requiring such information be provided to the agent or the lenders. (BofA Response AMA ¶ 115). Although Highland asked Bank of America to "confirm" the understanding that Lehman had not made any disbursements while in bankruptcy, there is no evidence that Bank of America did confirm this understanding. (Dep. Exh. 459). Though Highland voiced its concerns in the October 13, 2008 correspondence, it did not submit a formal Notice of Default, nor did it specify any "Default" or "Event of Default" under the Disbursement Agreement or other loan documents. (Susman Decl. ¶ 25; Dep. Exh. 459). In fact, Highland funded its share of the Delay Draw Term Loan in response to the March 2009 Notice of Borrowing. (BofA Response ¶ 130). Highland has since sold all of its Term Loan holdings and is no longer a plaintiff. (BofA Response ¶ 125).[11]

On October 22, 2008, Fontainebleau provided the Lenders with another update stating "Lehman Brother's commitment to the facility has not been rejected in bankruptcy and the facility remains in full force and effect." and "Lehman Brothers has indicated to us that it has sought the necessary approvals to fund its commitment this

[11] The Term Lenders do not dispute this fact; rather, they contend it is immaterial and irrelevant. (TL Reply at 1).

month." (BofA Statement ¶¶ 94, 95). Fontainebleau further stated, should Lehman not be able to perform, Fontainebleau had "received assurances from the co-lenders to the retail facility that they would fund Lehman's portion of the draw." (BofA Statement ¶ 95).

Even through December, Fontainebleau did not disclose that FBR had funded for Lehman in September. On December 5, 2008, FBR issued third quarter (period ending September 30, 2008) financial statements for both Fontainebleau Las Vegas Holdings, LLC and FBR. (BofA Response AMA ¶ 91). Fontainebleau Las Vegas Holdings, LLC's statement included disclosures regarding the Retail Facility's status, and, more specifically, Lehman's funding. (Dep. Exh. 286 at FBR01280966; BofA Response AMA ¶ 91). The statement noted Lehman filed for bankruptcy on September 16, 2008, stated Fontainebleau Las Vegas Holdings "has been working diligently with Lehman Brothers and the co-lenders to ensure that there is no interruption in funding," and disclosed "[t]here can be no assurances that Lehman Brothers will continue to fund all or any portion of its remaining obligation under the Retail Construction Loan, or that the co-lenders will fund any Lehman Brothers shortfall in funding." (Dep. Exh. 286 at FBR01280966). Additionally, in the section entitled "Equity contributions" of FBR's financial statements, FBR disclosed cash contributions to a Florida project, but made no mention of its September 2008 equity contribution on Lehman's behalf. (BofA Response AMA ¶ 93; Dep. Exh. 286 at FBR01281007).

4. The October 2008 Meeting

On October 23, 2008, a meeting ("October Meeting") was held in Las Vegas among executives of Fontainebleau Resorts and Bank of America, and representatives of Retail Co-Lenders ULLICO, Sumitomo Mitsui Bank, and National City Bank in Las Vegas. (Dep. Exh. 18; TL Statement ¶ 62; BofA Response ¶ 62; BofA Response AMA

¶ 88). The meeting agenda included an update on the project and the status of the retail loan, including the effect of the Lehman bankruptcy on the loan. (Dep. Exh. 18; TL Statement ¶ 62; BofA Response ¶ 62). Specifically, it was noted that the Lehman bankruptcy had a material impact on the leasing and development of the Project, as well as the continued funding of the Retail Facility. (Kolben Dep. Tr. 65:7–13).[12] To that end, during the meeting, the participants discussed possible replacements for Lehman's commitment under the Retail Facility. (*Id.* at 175:18–176:15). Although the Retail Co-Lenders did not agree during the meeting to assume Lehman's commitment, ULLICO and Mitsui Sumitomo expressed the possibility of increasing their respective commitments to cover a portion of Lehman's commitment, and additional investment opportunities, including foreign investors, were discussed. (*Id.* at 72:17–75:22; 176:4–9). There is no evidence of record on summary judgment that Lehman's failure to fund the September 2008 Retail Advance was discussed at the October Meeting.[13]

Additionally, the Retail Lenders asked Bank of America, as Bank Agent, to take over Lehman's remaining commitment under the Retail Facility, pursuant to Section 7.1

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[12] The parties dispute the admissibility of Deposition Exhibit 19, the National City Special Assets Committee ("SAC") Report. I need not rule on the parties' hearsay and authentication arguments because Mr. Kolben independently testified to the material facts regarding the retail co-lenders' willingness to fund and discussions at the October Meeting. These facts do not contradict the information in the SAC Report.

[13] During his deposition, Herbert Kolben of ULLICO testified initially that it was discussed openly that Lehman had not made the September 2008 payment. (Kolben Dep. Tr. 16–21). He later corrected his testimony, stating "I said I didn't recall whether it was openly discussed." (Kolben Dep. Tr. 11–18). Upon a direct request for clarification ("Q: Do you … specifically recall any discussion at the October 23rd meeting about whether Lehman had funded its September retail events?"), Mr. Kolben stated, "I don't recall." (Kolben Dep. Tr. 176:22–177:3). The inconsistent testimony of a witness, corrected in the same deposition, is not sufficient to create a genuine issue of material fact. *Horn v. United Parcel Services, Inc.*, 433 F. App'x. 788, 796 (11th Cir. 2011).

of the Intercreditor Agreement, which permitted—but did not require—the Bank Agent to purchase and assume the outstanding obligations of the Retail Agent and Lenders. (TL Statement ¶ 66; BofA Response ¶ 66; Exh. 884 § 7.1; Howard Dep. Tr. 112:13–113:10). Bank of America did not do so. (TL Statement ¶ 67).

5. Communications between TriMont and Bank of America Regarding the September 2008 Retail Advance

TriMont was the Servicer of the Retail Facility, with the responsibility of collecting funds from the Retail Co-Lenders and transferring them to Bank of America, as Disbursement Agent under the Disbursement Agreement. (BofA Statement ¶¶ 32, 33). Each month when Bank of America forwarded to TriMont an Advance Confirmation Notice, TriMont would send a letter to the Retail Co-Lenders requesting their respective portions of the Retail Facility Shared Costs be wired to TriMont's clearing account. (Dep. Exh. 11; Rafeedie Dep. Tr. 37:8–40:21; Brown Dep. Tr. 42:4–8). Upon receipt of the funds, TriMont would send to Bank of America a wire transfer for the full amount of the Retail Advance that was requested, without identifying the amounts funded by each Retail Co-Lender, and Bank of America would transfer the funds into an account that could be accessed by Fontainebleau. (TL Statement ¶ 68; Rafeedie Dep. Tr. 40:22–41:9; Susman Dep. Tr. 204:9–10). Generally, the funding and distribution occurred on the 25th of each month (though, as discussed above, the September request was disbursed on the 26th). (Rafeedie Dep. Tr. 39:23–40:4).

By September 26, 2008, TriMont was made aware that Fontainebleau had paid Lehman's share of the September Retail Advance. (TL Statement ¶ 69; Dep. Exh. 56;

Dep. Exh. 14).[14] McLendon Rafeedie was the primary contact at TriMont with respect to the funding of the Retail Facility, including Lehman's funding of its obligations and transfer of the funds to Bank of America. (Rafeedie Dep. Tr. 21:19–25; 62:3–6). TriMont's lead contact at Bank of America regarding funding of Retail advances was Jean Brown. (*Id.* at 33:2–23). Although it was TriMont's "custom and practice" to inform Bank of America (and Jean Brown, more specifically) of significant events with respect to the Retail Facility, there is no evidence that Mr. Rafeedie (or TriMont) actually informed Ms. Brown (or Bank of America) that Lehman did not fund its portion of the September 2008 Retail Advance, or that Fontainebleau Resorts funded for Lehman.[15]

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[14] The record is not clear as to *when* on September 26 TriMont became aware that FBR was funding Lehman's portion. On September 26, 2008, Albert Kotite, Executive Vice President of Fontainebleau Resorts, sent the Retail Facility Co-Lenders a letter stating, "Because Lehman … has failed to fund its required share under the Retail Facility, in the amount of $2,526,184 …, Fontainebleau Resorts … is making an equity contribution to fund said amount." (Dep. Exh. 14). Mr. Kotite forwarded this letter to Mr. Rafeedie on September 26, 2008 at nearly 6:00 p.m. (*Id.*). Also on September 26, 2008 at 11:39 a.m., Amit Rustgi from TriMont copied Mr. Rafeedie on an email stating "the borrower has decided to fund Lehman's portion." (Dep. Exh. 56). At 1:11 p.m. Yetta Nicholson of TriMont copied Mr. Rafeedie on an email showing the September 26, 2008 wire coming in from Fontainebleau Resorts, LLC. (*Id.*).

Although Mr. Rafeedie acknowledged he was copied on these emails, he testified he did not know when he opened and read the emails. (Rafeedie Dep. Tr. 59:14–62:1). The exact timing of Mr. Rafeedie's knowledge that FBR funded for Lehman is not material, though, as there is no evidence that Mr. Rafeedie communicated to Ms. Brown (or Bank of America) that Lehman did not fund, or that FBR funded for Lehman.

[15] This is a point of much dispute among the parties. After review of Mr. Rafeedie's and Ms. Brown's deposition transcripts, I conclude that there is no evidence to indicate that Mr. Rafeedie told Ms. Brown that Lehman did not fund its portion of the September 2008 Retail Advance.

While Mr. Rafeedie agreed that it is his "custom and practice" to tell Ms. Brown of "significant events with respect to the retail facility," when asked if, "consistent with that practice," he would have told Ms. Brown "about the fact that Lehman did not fund" and that "Fontainebleau Resorts had paid Lehman's share," he testified that he "could have," but he "couldn't recall exactly" and "[did not] remember the exact topics of discussion" and the communication "could have been just that Lehman's dollars were funded, not necessarily who funded what." (Rafeedie Dep. Tr. 57:18–58:19, 63:4–9, 53:17–54:5). Mr. Rafeedie further explained that he could have spoken

6. Lehman's Portion from December 2008 through March 2009

Lehman funded its share of the Retail Advance in October and November 2008, and, as in prior months, Bank of America received from TriMont the full amount of the October and November Retail Advances. (BofA Statement ¶¶ 99, 102; Kolben Dep. Tr. 77:11–19, 78:12–21). As for the December 2008 Advance Request and related Retail Advance, Bank of America became aware in December 2008 that ULLICO, a Retail Co-Lender under the Retail Co-Lending Agreement, would fund Lehman's portion of the December Retail Advance. (BofA Statement ¶¶ 100, 101; Dep. Exhs. 9, 905). Bank of America understood that ULLICO would continue to fund for Lehman for a short time thereafter until a more permanent solution could be found, and that ULLICO had not agreed to permanently assume Lehman's commitment. (BofA Statement ¶¶ 100, 101; Exh. 905). Each month from December 2008 through March 2009, TriMont wired Bank of America the full Retail Advance, and Bank of America knew that ULLICO funded Lehman's portion of the Retail Advances in these months. (BofA Statement ¶ 102; TL Statement ¶ 73; BofA Response AMA ¶ 97).

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with Ms. Brown and told her the Retail Facility had been fully funded, but only later become aware that Fontainebleau Resorts funded for Lehman. (*Id.* at 57:18–58:19).

Ms. Brown testified that she would communicate with Mr. Rafeedie monthly about the status of the "wire" providing the Retail Advance. (Brown Dep. Tr. 41:7–9; 58:23–3). Ms. Brown also testified that, although she was concerned as to whether Lehman would fund its portion of the September 2008 Advance Request, she did not recall Mr. Rafeedie telling her that had not funded. (*Id.* at 57:1–8; 58:2–4). Finally, after stating that she "understood Lehman stopped funding the retail facility in September 2008, Ms. Brown clarified that she did not "know" that Lehman was not funding, but "assumed so" because she "knew they were bankrupt." (*Id*. at 55:6–56:12; 72:9–11).

7. Fontainebleau's Agreement with ULLICO

On December 29, 2008, ULLICO entered into a Guaranty Agreement with FBR, Turnberry Residential Limited Partner, L.P., and Jeffrey Soffer (together, "Guarantors"). (Dep. Exh. 24). As a condition of ULLICO's funding Lehman's portion of the December 2008 Retail Advance, the Guarantors guaranteed the repayment to ULLICO of Lehman's share of the December 2008 Retail Advance. (*Id.*). Subsequently, ULLICO and the Guarantors entered into three monthly Amendments to the Guaranty Agreement, pursuant to which ULLICO would fund Lehman's portion of the January 2009, February 2009, and March 2009 Retail Advances, and the Guarantors would reimburse ULLICO, at least in part. (Dep. Exhs. 30, 36, 42). Pursuant to the Guaranty Agreement and Amendments, ULLICO funded over $11 million on behalf of Lehman, some of which was reimbursed by the Guarantors. (Dep. Exhs. 24, 30, 36, 42). By March 2009, the amount of outstanding "Guaranteed Obligations" under the Guaranty Agreement and Amendments was $5,704,802.32. (Dep. Exh. 42). There is no evidence that Bank of America was aware that ULLICO's payments on behalf of Lehman were effectively made by FBR, Jeff Soffer, and Turnberry Residential Limited Partners.[16]

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[16] The Term Lenders cite to excerpts from Mr. Rafeedie's deposition transcript to dispute this fact. (Rafeedie Dep. Tr. 34:19–35:18; 55:16–24). However, those excerpts speak only to TriMont's general practice of keeping Bank of America informed of issues involving funding, and do not state that Bank of America was aware of the Guaranty Agreement or related Amendments.

Additionally, in response to Bank of America's additional facts (BofA Response ¶ 104), stating "There is no evidence that the guaranties provided by Soffer, FBR and TLRP were ever disclosed to BANA or the Lenders.", the Term Lenders do not cite any evidence rebutting the assertion, but only object that Bank of America did not cite specific evidence, as required by Local Rule 7.5(c)(2). At trial, the Term Lenders would bear the burden of proving Bank of

8. Further Assurances from Fontainebleau Regarding the Retail Facility

On February 20, 2009, Bank of America, as Administrative Agent under the Credit Agreement, sent Jim Freeman a letter regarding the February 2009 Advance Request. (Dep. Exhs. 497, 498; TL Statement ¶ 71). Citing lender concerns that were directed to Bank of America, as Administrative Agent, Bank of America asked Fontainebleau to comment on the status of the Retail Facility and "the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that Lehman Brothers Holdings, Inc. will fund its share of the requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls." (Dep. Exhs. 497, 498; TL Statement ¶ 71). Fontainebleau responded on February 23, 2009 ("Fontainebleau's February 23 Letter"):

> As relates to the Retail Facility, we are continuing active discussions with Lehman Brothers and the co-lenders to ensure that funding for the project will continue on a timely basis. The Retail Facility is in full force and effect, there has not been an interruption in the retail funding of the Project to date.

(Dep. Exh. 811).

America knew Fontainebleau effectively made ULLICO's payments on behalf of Lehman. On summary judgment, then, Bank of America may simply point out that there is an absence of evidence supporting the Term Lenders' case. *See Fitzpatrick v. City of* Atlanta, 2 F.3d 1112, 1115–16 (11th Cir. 1993) (for issues on which the opposing party bears the burden at trial, the party moving for summary judgment "is not required to support its motion with affidavits or other similar material negating the opponent's claim in order to discharge [its] responsibility. Instead, the moving party simply may show—that is, point out to the district court—that there is an absence of evidence to support the non-moving party's case." (internal citations omitted)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.").

H. Project Costs

Also as discussed above, the Disbursement Agreement required IVI to deliver to the Disbursement Agent a Construction Consultant Advance Certificate approving or disapproving each Advance Request. (Disb. Agmt. § 2.4.4(b); BofA Statement ¶ 47). To inform the Construction Consultant Advance Certificate, the Contractor would provide IVI with an Anticipated Cost Report ("ACR"), which was a projection of the Project's anticipated final cost, including all commitments, pending claims, and pending issues. (Barone Dep. Tr. 15:6–20). On January 13, 2009, IVI issued its Construction Consultant Advance Certificate for the January 2009 Advance Request, in which it affirmed, among other things, that it "ha[d] not discovered any material error in the matters set forth in the Current Advance Request or Current Supporting Certificates." (BofA Statement ¶ 132). On January 30, 2009, IVI issued a Project Status Report ("PSR 21") stating it was concerned that Fontainebleau's cost disclosures might not be accurate because it appeared that work on the Project would need to be accelerated to meet the scheduled opening date and the related costs, such as overtime, were not reflected in the latest Anticipated Cost Report: "IVI is concerned that all the subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included." (BofA Statement ¶¶ 133, 134). PSR 21 also addressed Leadership in Energy and Environmental Design ("LEED") credits, which reduce construction costs through Nevada state sales tax credits on building materials for new construction that meets certain sustainability standards: "[I]t appears that the LEED credits are tracking behind projections and the Developer has begun a detailed audit," and noting that it would "continue to discuss this with the Developer." (BofA Statement ¶ 136). Despite the cited concerns, IVI executed

the Construction Consultant Advance Certificate for the February 2009 Advance Request and sent it to Bank of America on February 17, 2009. (BofA Statement ¶ 146; TL Response ¶ 146; Barone Decl. ¶ 20, Exh. 6).

Meanwhile, on February 12, 2009, JPMorgan Chase, a Revolver Lender, sent Bank of America a letter seeking information on issues raised by IVI in PSR 21, and also asked Bank of America to provide additional information on the status of the Retail Facility. (BofA Statement ¶ 138). On February 20, 2009, Bank of America sent Fontainebleau a letter requesting this information. (BofA Statement ¶ 139). Fontainebleau responded in its February 23 Letter, stating IVI's information was outdated, and "at this point, we are not aware of any cost overruns or acceleration costs that are not reflected in the Anticipated Cost Report." (Dep. Exh. 811). Regarding the LEED credits, Fontainebleau stated, "[W]e believe that the full amount of the credits reflected in the Budget will in fact be realized." (*Id.*). That same day, in response to lender requests, Bank of America asked Fontainebleau to schedule a lender call to discuss Fontainebleau's February 23 Letter. (BofA Statement ¶¶ 142–43). But Fontainebleau refused, objecting to having a call on short notice, asserting it was under no contractual obligation to have the call, and raising concerns that sensitive Project-related information may be leaked to the press by lenders. (*Id.*).

On March 3, 2009, IVI sent Bank of America Project Status Report No. 22 ("PSR 22"). (*Id.* ¶ 144). Although PSR 22 repeated IVI's previous concern that there were unreported Project cost increases, it also indicated that the Project remained within budget. (*Id.* ¶ 145).

On March 4, 2009, Bank of America again requested that Fontainebleau arrange a meeting with Lenders and provided Fontainebleau with a list of Lender information requests concerning Project costs. (*Id.* ¶¶ 147–48). The next day, IVI asked Fontainebleau for "a submission of the future potential claims being made by the subcontractors against [the Contractor] and any overruns related to the un-bought work," and for an updated Anticipated Cost Report "to show the potential exposures to [Fontainebleau Las Vegas] and a better indication of the current contingency." (*Id.* ¶ 149). On March 10, 2009, Bank of America sent Fontainebleau another letter and information request. (*Id.* ¶ 150).

On March 11, 2009, Fontainebleau submitted its March 2009 Advance Request. (*Id.* ¶ 151). In the Remaining Cost Report annexed to the March Advance Request, Fontainebleau disclosed that it had increased construction costs by approximately $64.8 million. (*Id.* ¶ 153). The next day, IVI's Robert Barone met with Fontainebleau's Deven Kumar in Las Vegas, and Kumar informed Barone that the Project was $35 million over budget. (*Id.*). On March 19, 2009, IVI issued a Construction Consultant Advance Certificate that declared IVI had discovered material errors in the Advance Request and supporting documentation; believed the Project would require an additional $50 million for Construction Costs; and the Opening date would be November 1, 2009, rather than October 1, 2009 as originally planned. (BofA Statement ¶¶ 154–155; TL Response ¶ 154).

A few days later, IVI informed Bank of America that IVI had been "working with the developer to update their most recent anticipated cost report" and that Fontainebleau had "provided an ACR that they state represents their understanding of

the hard cost exposure to the project." (BofA Statement ¶ 156). IVI advised that it had not yet conducted an audit of the information presented by Fontainebleau (an audit would take weeks), but the information appeared reasonable. (*Id.*). IVI further stated it believed the developer credibly projected the potential costs, but it would be prudent to include additional funds for unexpected or known costs. (*Id.*).

On March 20, 2009, Fontainebleau held a Lender meeting in Las Vegas where it delivered a presentation updating the Lenders on the Project's construction budget and other issues relating to the Project's financial condition, representing, among other things, that it had retained KPMG to conduct a LEED credit audit. (*Id.* ¶¶ 157, 159–60). A few days later, on March 23, 2009, Fontainebleau submitted an unsigned draft revised Advance Request reflecting its earlier discussions with IVI. (*Id.* ¶ 161). IVI signed off on Fontainebleau's revisions and issued a Construction Consultant Advance Certificate approving the March 2009 Advance, after which Fontainebleau submitted an executed revised March Advance Request. (*Id.* ¶¶ 162–63).

Bank of America made the revised March Advance Request available to the Lenders the next morning (March 24) along with, among other things, IVI's Certificate and a chart Fontainebleau prepared at the Lenders' request showing the changes to the Remaining Cost Report and the In Balance Report. (*Id.* ¶ 164). The revised Request represented the Project was In Balance by $13,785,184. (*Id.* ¶ 164). On March 25, 2009, the scheduled Advance Date, Fontainebleau further revised the March Advance Request, increasing the margin by which the Project as In Balance to $14,084,071. (*Id.* ¶ 165). No Term (or other) Lenders submitted a Notice of Default or otherwise formally

objected to the March Advance. Bank of America transferred the Advance to Fontainebleau on March 26, 2009. (BofA Statement ¶ 166; TL Response ¶ 166).

I. First National Bank of Nevada Repudiation

On July 25, 2008, the First National Bank of Nevada (a Delay Draw Term Loam and Revolving Loan Lender) was closed by the Comptroller of the Currency, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver. (BofA Statement ¶¶ 181–82). In late-December 2008, the FDIC formally repudiated First National Bank of Nevada's unfunded Senior Credit Facility commitments, which amounted to $1,666,666 under the Delay Draw Term Loan and $10,000,000 under the Revolver Loan. (*Id.* ¶¶ 183–84). In response to the FDIC's repudiation, Bank of America directed Fontainebleau to remove First National Bank of Nevada's commitments from the In Balance Test's "Available Sources" component. (*Id.* ¶ 185). Even without First National Bank of Nevada's unfunded commitments, though, the Project was "In Balance" by approximately $107.7 million, as reflected in the December 2008 Advance Request. (*Id.* ¶ 186).

J. March 2009 Advance Request and Defaulting Lenders

On March 2, 2009, Fontainebleau submitted a Notice of Borrowing under the Credit Agreement requesting a Delay Draw Term Loan for the entire $350 million facility, and, simultaneously, a $670 million Revolver Loan (which was reduced to $652 million the next day). (*Id.* ¶ 187). Bank of America refused to process the Notice of Borrowing on the grounds that the amounts requested were not permissible under the Credit Agreement, and on March 9, 2009, Fontainebleau submitted a revised Notice of Borrowing seeking only the $350 million Delay Draw Loan. (*Id.* ¶¶ 188–89). Bank of America approved the revised Notice of Borrowing. (*Id.* ¶ 190). All but two of the Delay

Draw Term Lenders—Z Capital and Guggenheim—funded their commitments. (BofA Statement ¶ 191; TL Response ¶ 191). Accordingly, $326.7 million of the $350 million was funded. (*Id.*). Although Z Capital and Guggenheim did not fund, Bank of America continued to include their commitments as "Available Funds" for In Balance Test purposes. (BofA Statement ¶ 192; TL Response ¶ 192). On March 11, 2009, Fontainebleau submitted its March 2009 Advance Request, requesting $137.9 million. (Bolio Decl. ¶ 18 Exh. 16). Accordingly, there were ample funds to cover the requested amount.

On March 23, 2009, Bank of America, as Disbursement Agent and Administrative Agent, sent the Lenders a letter disclosing Z Capital and Guggenheim had not yet funded their respective Delay Draw Term Loan commitments, and excluding those commitments from the Available Funds would result in a failure to satisfy the In Balance test. (Dep. Exh. 104). Bank of America further stated it was willing to include the unfunded commitment in the Available Funds component for the March Advance "pending further information about whether these lenders will fund." (*Id.*). Finally, Bank of America invited "any Lender that does not support these interpretations [to] immediately inform us in writing of their specific position." (*Id.*).

Deutsche Bank and Highland responded to Bank of America's letter, but neither expressed disagreement with Bank of America's position.[17] Rather, Highland merely stated it was under no obligation to state a position about Bank of America's interpretation of the credit documents and reserved all rights and claims against Bank of

[17] Highland conceded that it did not "reach a contrary position" to the March 25th Advance being made available to Fontainebleau. (Rourke Dep. Tr. 172:18–173:3).

America. (Dep. Exh. 471). Deutsche Bank asked Bank of America "[w]hy it [was] appropriate to allow for the inclusion of [the] defaulting lender commitments in the In-Balance Test." (Dep. Exh. 832). Bank of America scheduled a lender call to address this inquiry. (Non-Dep. Exh. 1505). Ultimately, Bank of America disbursed the March 2009 Advance Request to Fontainebleau. (BofA Statement ¶ 197; TL Response ¶ 197).

K. Termination of Funding

On April 13, 2009, Fontainebleau notified Lenders that one or more events "had occurred which reasonably could be expected to cause the In Balance test to fail to be satisfied" and, further, the "Project Entities have learned that (i) the April Advance Request under the Retail Loan may not be fully funded and (ii) as of today, the Remaining Costs exceed Available Funds." (BofA Statement ¶ 167). The next day, April 14, Fontainebleau provided IVI with a schedule of Anticipated Costs dated "as of April 14, 2009" revealing more than $186 million in previously unreported Anticipated Costs. (*Id.* ¶ 169).

On April 17, 2009, Fontainebleau held a Lender meeting and reported that the Project "may be out-of-balance by approximately $180 million," reflecting a deficit of $186 million in committed construction costs. (Dep. Exh. 268). Fontainebleau presented a luxurious "enhanced plan" that would require a further $203 million in spending. (*Id.* 268). Fontainebleau also indicated at the meeting that it could not meet its debt obligations as they came due, disclosing that it planned to extinguish the Second Mortgage Notes and ask the Lenders to convert their debt into equity. (BofA Statement ¶ 172). Based on the information provided by Fontainebleau at the April 17, 2009 Lender meeting, the Revolver Lenders determined that one or more Events of Default had occurred and terminated the Revolver Loan on April 20, 2009. (*Id.* ¶ 173).

On April 20, 2009, Bank of America, as Administrative Agent, sent Jim Freeman a letter stating "the Required Facility Lenders under the Revolving Credit Facility have determined that one or more Events of Default have occurred and are continuing to occur and they have requested that the Administrative Agent notify you that the Total Revolving Commitments have been terminated." (Dep. Exh. 827). On June 9, 2009, the Borrowers and certain affiliates filed a Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida. (TL Statement ¶ 79).

In May 2009, Bank of America commissioned IVI to "perform a cost-complete review" of the Project's construction costs based on the "enhanced plan" presented during the April 2009 Lender meeting. (BofA Statement ¶ 175). As part of its review, IVI received additional information from Fontainebleau and the Contractor regarding the Project budget, including an April 30, 2009 Anticipated Cost Report, which included almost $300 million in pending charges for additional work by subcontractors. (*Id.* ¶ 176). After reviewing the documentation supporting the pending charges, IVI concluded, based on the number and scope of the pending items, that the subcontractors made the claims "some time ago, possibly as far back as a year," but they were never included in the Anticipated Cost Reports Fontainebleau submitted to IVI. (*Id.* ¶ 177). It was later determined that, to conceal the Project's cost overruns, Fontainebleau and TWC used two separate sets of books: one for their own internal use, which allowed them to keep track of the *actual* progress, scope, and cost of the Project, and a second set shown to Bank of America and IVI, which disclosed only a subset of the actual costs. (*Id.* ¶ 178). Fontainebleau and TWC also kept two sets of

Anticipated Cost Reports: an "internal" Report that included actual costs, and a "bank" Report that was disclosed to Bank of America and IVI and that conformed with the construction budget that had been disclosed to the Lenders. (*Id.* ¶¶ 179–80).

IV. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" if it hinges on the substantive law at issue and it might affect the outcome of the nonmoving party's claim. *See id*. ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252; *Bishop v. Birmingham Police Dep't*, 361 F.3d 607, 609 (11th Cir. 2004).

The moving party bears the initial burden under Rule 56(c) of demonstrating the absence of a genuine issue of material fact. *Allen v. Tyson Foods, Inc.,* 121 F.3d 642, 646 (11th Cir. 1997). Once the moving party satisfies this burden, the burden shifts to the party opposing the motion to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A factual dispute is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. *Anderson,* 477 U.S. at 248; *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th

Cir. 2001). Moreover, speculation or conjecture cannot create a genuine issue of material fact. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005)

In assessing whether the movant has met its burden, the court should view the evidence in the light most favorable to the party opposing the motion and should resolve all reasonable doubts about the facts in favor of the non-moving party. *Denney,* 247 F.3d at 1181; *Am. Bankers Ins. Group v. U.S.*, 408 F.3d 1328, 1331 (11th Cir. 2005) (applying same standard to cross-motions for summary judgment). In determining whether to grant summary judgment, the court must remember that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. In determining whether summary judgment is appropriate, the court is required to "draw all *reasonable* inferences in favor of the non-moving party, not all *possible* inferences." *Horn v. United Parcel Services, Inc.*, 433 F. App'x. 788, 796 (11th Cir. 2011) (emphasis added).

V. Discussion of Summary Judgment Motions

Upon review of the parties' cross-motions for summary judgment, I grant Bank of America's Motion for Summary Judgment and, correspondingly, deny the Term Lenders' Motion for Partial Summary Judgment. In reaching this decision, I have carefully examined each cross-motion (and corresponding exhibits) under the proper standard; that is, I have reviewed Bank of America's Motion for Summary Judgment with all inferences in favor of the Term Lenders, and the Term Lenders' Motion for Partial Summary Judgment with all inferences in favor of Bank of America. I conclude the Term Lenders, with all inferences in their favor, have failed to raise a genuine issue of material fact as to whether Bank of America, as Disbursement Agent or Bank Agent,

breached the Disbursement Agreement, or whether Bank of America acted with bad faith, gross negligence, or willful misconduct. Accordingly, I enter judgment as a matter of law in favor of Bank of America on both of these issues.

In addressing the legal issues presented, I turn first to Bank of America's duties and responsibilities under the Disbursement Agreement. Concluding that Bank of America can be held liable under the Disbursement Agreement for only bad faith, gross negligence, or willful misconduct, I explain, with all inferences in favor of the Term Lenders, that the evidence of record on summary judgment does not demonstrate Bank of America acted with bad faith or gross negligence or engaged in willful misconduct in the performance of its duties under the Disbursement Agreement. Finally, I turn to the specific scenarios underlying the Term Lenders' claims, and conclude, based on the facts not materially in dispute, Bank of America did not breach the Disbursement Agreement, and even if it did, it did not act with gross negligence under New York law.

A. Claims at Issue: The Disbursement Agreement

As an initial matter, I reiterate that the only claims outstanding in this case are under the Disbursement Agent, not the Credit Agreement. *See* 11/18/2011 Tr. 6:5–23; ECF No. 328. Therefore, the Disbursement Agreement, and Bank of America's roles and responsibilities as Disbursement Agent and Bank Agent under that Agreement, are the focus of this Order. Pursuant to Section 11.5 of the Disbursement Agreement, however, the Credit Agreement is expressly integrated into the Disbursement Agreement to the extent necessary to define the roles of Bank Agent and Disbursement Agent under the Disbursement Agreement. In fact, the choice of Agreement does not matter, as under either Agreement, Bank of America is held to the same standard, and

Bank of America, in its roles as both Disbursement Agent and Bank Agent, did not act with gross negligence or engage in willful misconduct.

B. Bank of America's Duties Under the Disbursement Agreement

Before addressing the factual circumstances underlying the Term Lenders' breach of contract claims, I turn to Bank of America's duties and responsibilities under the Disbursement Agreement. Under New York law, a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (N.Y. 2002). "Whether an agreement is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (N.Y. 1990). "Ambiguity is resolved by looking within the four corners of the document, not to outside sources." *Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998); *Jet Acceptance Corp. v. Quest Mexicana S.A. de C.V.*, 929 N.Y.S.2d 206, 211 (N.Y. App. Div. 2011) ("Extrinsic evidence may not be introduced to create an ambiguity in an otherwise clear document."). In analyzing whether a term is ambiguous, the court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. *Kass*, 91 N.Y.2d at 566. The court should further construe such terms in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners LP v. Presstek, Inc.*, 912 N.E. 2d 43, 47 (N.Y. 2009); *Int'l. Klafter Co., Inc. v. Continental Cas. Co., Inc.*, 869 F.2d 96, 99 (2d Cir. 1989) (applying New York law; "the court is required to discern the intent of the parties to the extent their intent is evidenced by their written agreement."). Furthermore, "[l]anguage whose meaning is otherwise plain is not ambiguous merely because the parties urge different

interpretations in the litigation." *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d. Cir. 1990) (applying New York law).

Here, the parties agree that the relevant provisions of the Disbursement Agreement are unambiguous. *See, e.g.,* BofA Memo. at 25 ("Here, the relevant Disbursement Agreement … provisions are complete, clear, and ambiguous."); 11/18/2011 Tr. 13:16–17 (Term Lenders counsel stating Term Lenders argued no ambiguity in their briefs). They disagree, however, on the meaning of those provisions and, correspondingly, on the scope of Bank of America's responsibilities under the Disbursement Agreement. I conclude that the Disbursement Agreement limits Bank of America's duties in approving and funding Advance Requests to determining whether Fontainebleau, IVI, the Contractor, and the Architect submitted the required documents, and determining whether the Advance Request conditions precedent were satisfied. In determining whether the conditions precedent were satisfied, Bank of America was entitled to rely on the representations, certifications, and documents it received from Fontainebleau, IVI, the Contractor, and the Architect. Moreover, Bank of America had no duty to investigate the veracity of or facts and circumstances underlying the representations. Nor did Bank of America have any affirmative duty to ensure that the conditions precedent were, in fact, met.

The Disbursement Agreement plainly set forth Bank of America's obligations in approving an Advance Request. Section 2.4.4 required Bank of America to review, in a timely manner, the Advance Request and its attachments to determine whether all required documentation had been provided, and to "use reasonable diligence" to assure that IVI performed its review and delivered its Construction Consultant Advance

Certificate in a timely manner. *See* Disb. Agmt. § 2.4.4. Section 2.4.6 required Bank of America to execute and deliver an Advance Confirmation Notice "[w]hen the applicable conditions precedent set forth in Article 3 have been satisfied." *See id.* § 2.4.6. To the contrary, "[i]n the event … (1) the conditions precedent to an Advance have not been satisfied, or (ii) the Controlling Person notifies the Disbursement Agent that a Default or Event of Default has occurred and is continuing," Bank of America was required to issue a Stop Funding Notice. *See id.* § 2.5.1.

In determining whether the conditions precedent to an Advance Request were satisfied, Bank of America was explicitly authorized to rely on Fontainebleau's certifications and representations as to, among other things, the satisfaction of Article 3's conditions precedent, and was explicitly *not* required to conduct "*any* independent investigation as to the accuracy, veracity, or completeness" of those certifications, or to "investigate *any* other facts or circumstances to verify compliance by [Fontainebleau] with [its] obligations hereunder." *See id.* § 9.3.2 (emphasis added). Furthermore, the Disbursement Agreement was clear that Bank of America had "no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing." *See id.* § 9.10.

Even if Bank of America failed to fulfill its obligations under the Disbursement Agreement, the Disbursement Agreement contained a broad exculpatory provision under which Bank of America's liability was limited to its own bad faith, gross negligence, or willful misconduct. *See id.* § 9.10; *Metropolitan Life Ins. Co. v. Noble Lowndes Intern., Inc.*, 643 N.E.2d 504, 506–7 (N.Y. 1994) (enforcing contract provision "limiting defendant's liability for consequential damages to injuries to plaintiff caused by

intentional misrepresentations, willful acts and gross negligence" because it represented parties' agreement on allocation of risk). Section 9.10 stated the Disbursement Agent shall not be "in any manner liable or responsible" for any loss or damage "except as a result of [its] bad faith, … gross negligence or willful misconduct." *See* Disb. Agmt. § 9.10. In sum, even if Bank of America approved an Advance Request or failed to issue a Stop Funding Notice in violation of the Disbursement Agreement, it could be held liable only if it acted with malice, reckless disregard, or the intent to harm.

C. The Term Lenders' Interpretation of Section 9.3.2

The Term Lenders urge a different interpretation of the Disbursement Agreement, and, in particular, of Bank of America's reliance on and duty to investigate Fontainebleau's representations, as reflected in Section 9.3.2. The Term Lenders argue Bank of America could not rely on Fontainebleau's certificates if Bank of America "had reason to believe that they were false." Term Lenders Opp. at 6. The Term Lenders further argue Bank of America places "unsustainable weight" on Section 9.3.2, which entitles Bank of America to rely on Fontainebleau's certificates, and contend the Disbursement Agreement imposed upon Bank of America an obligation to "determine the satisfaction of conditions precedent not covered by certificates" and a duty to investigate to "resolve[] known inconsistencies." *Id*. While I—and Bank of America—agree that the Disbursement Agreement imposed on Bank of America a duty to issue a Stop Funding Notice when it has *actual knowledge* of the failure of a condition precedent to disbursement or the occurrence of a Default or Event of Default, *see* Nov. 18, 2011 Tr. 37:1–5, I disagree with the Term Lenders that the Disbursement Agreement imposes a duty to investigate *possible* inconsistencies, and address each of the Term Lenders' arguments regarding the interpretation of the Agreement below.

As an initial matter, though, I note the Term Lenders' interpretation of the Disbursement Agreement contradicts the plain language of Section 9.3.2. Imposing upon Bank of America a duty to resolve inconsistencies or investigate the veracity of Fontainebleau's representations directly contradicts Section 9.3.2's provision that Bank of America "shall not be required to conduct *any* independent investigation" as to the accuracy of the representations. *See* Disb. Agmt. § 9.3.2 (emphasis added). Similarly, the Term Lenders' argument that Bank of America could not rely on certificates it had "reason to believe" are false contradicts the plain language of Section 9.3.2, which, without qualification, entitled Bank of America to rely on Fontainebleau's representations as to the satisfaction of the conditions precedent to disbursement. *See id.*

The cases cited by the Term Lenders do not dictate otherwise. *See* TL Opposition at 9–10. In *Bank Brussels Lambert v. Chase Manhattan Bank*, the district court for the Southern District of New York analyzed a revolving credit agreement under which Chase was the agent bank. No. 93 Civ. 5298, 1996 WL 609439 (S.D.N.Y. Oct. 23, 1996). After the borrower filed for bankruptcy, the lender banks sued Chase for breach of the credit agreement, claiming Chase relied on materially inaccurate financial statements and certificates. The revolving credit agreement required Chase to find the documents and documents "satisfactory … in form *and substance*." *Id*. at *6 (emphasis added). The court held, "if Chase knew, or was grossly negligent in not knowing, that the materials it delivered prior to and at closing were materially inaccurate, it cannot argue that those materials were satisfactory in 'substance.'" *Id.* at *7. As the

Disbursement Agreement contains no requirement that Bank of America evaluate the certificates for their *substance*, *Bank Brussels Lambert* is readily distinguishable.

Chase Manhattan Bank v. Motorola, Inc. is similarly distinguishable, as it pertains to a guarantor's right to rely on a borrower's false certificate to terminate its guarantee obligation. 184 F.Supp.2d 384 (S.D.N.Y. 2002). The court held the guarantor could not rely on a false certificate to terminate its obligation. Notably, the guaranty agreement at issue did not contain any provision entitling the guarantor to rely on certificates from the borrower in terminating its obligations. Moreover, in response to Motorola's argument that Chase approved the "form and substance" of the false certificate and therefore cannot challenge its validity, the *Motorola* court cited to language stating Chase had no duty to ascertain or inquire into any statement, warranty or representation, and concluded Chase had the right to rely on the representations in the certificate. Therefore, the case law cited by the Term Lenders does not alter Section 9.3.2's reliance provision. I turn next to the Term Lenders' textual arguments.

1. "Commercially Reasonable" and "Commercially Prudent"

The Term Lenders first argue that Section 9.1's "commercially reasonable" language controls Bank of America's duties under the Disbursement Agreement and cite to parol evidence, including expert reports from Shepherd Pryor and Daniel Lupiani and a treatise, to argue that it would have been commercially unreasonable for Bank of America to disburse funds from September 2008 through March 2009. Section 9.1, the introductory paragraph of Article 9, entitled "Disbursement Agreement," stated that, by accepting appointment as Disbursement Agent, Bank of America agreed to "exercise commercially reasonable efforts and utilize commercially prudent practices" in the performance of its duties hereunder consistent with those of similar institutions holding

collateral, administering construction loans and disbursing control funds." *See* Disb. Agmt. § 9.1. The subsequent sections of Article 9 set forth, *inter alia*, the "Duties and Liabilities of the Disbursement Agent Generally" (§ 9.2); "Particular Duties and Liabilities of the Disbursement Agent" (§ 9.3, including § 9.3.2); and "Limitation of Liability" (§ 9.10). Structurally, then, Section 9.1 contained general standards, and the subsequent sections of Article 9 provided more specificity on Bank of America's duties and liabilities.

The Term Lenders appear to argue that Section 9.1 trumps Sections 9.3.2 and 9.10, and, under Section 9.1, it would be commercially unreasonable for Bank of America to rely on representations that *could be* false, and commercially reasonable for Bank of America to investigate possible inaccuracies. I disagree.

Reading Article 9 and the Disbursement Agreement in their entirety, I conclude Section 9.1 is not inconsistent with the reliance and investigation provisions of Section 9.3.2, or the exculpatory provision of Section 9.10. Section 9.1 required Bank of America to use commercially reasonable efforts and commercially prudent practices in the general performance of its duties, but the Disbursement Agreement still entitled Bank of America to rely on Fontainebleau's certifications without independent investigation (Section 9.3.2) and absolved Bank of America for liability for conduct outside of bad faith, willful misconduct, or gross negligence (Section 9.10). Indeed, to conclude otherwise would render the reliance, investigation, and exculpatory provisions meaningless, in contravention of the basic tenet of contract interpretation that a contract should be read to give all provisions meaning and effect. *See Excess Ins. Co. Ltd. v. Factory Mut. Ins.*, 822 N.E.2d 768, 770–71 (N.Y. 2004) (in interpreting contracts, "the intention of the parties should control. To discern the parties' intentions, the court should

construe the agreements so as to give full meaning and effect to the material provisions."). Even if I were to conclude Section 9.1's "commercially reasonable" and "commercially prudent" standards are inconsistent with Sections 9.3.2 and 9.10, the latter sections would control, as, in the face of an inconsistency between a general provision and specific provisions, the specific provisions prevail. *See Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956); *John B. Stetson Co. v. Joh. A. Benckiser GmbH*, 917 N.Y.S.2d 189 (N.Y. App. Div. 2011) (interpreting contract and concluding more specific articulation of duty controlled over general articulation of duty).

As I have concluded that "commercial reasonableness" and "commercially prudent" do not control or affect Bank of America's entitlement to rely on Fontainebleau's representations or Bank of America's duty to investigate those representations, I need not determine the meaning of these terms. If I were to determine their meaning, though, I would not consider the expert reports and treatise cited by the Term Lenders because, as the Term Lenders and Bank of America agree, "commercial reasonableness" and "commercially prudent" in the Disbursement Agreement are unambiguous terms and, under New York law, parol evidence may not be admitted to interpret unambiguous contract terms. *See R/S Associates v. New York Job Development Authority*, 771 N.E.2d 240, 242 (N.Y. 2002) ("[W]hen interpreting an unambiguous contract term, evidence outside the four corners of the document is generally inadmissible to add to or vary the writing."); TL Memo. Reply at 6 (conceding expert reports and treatise are inadmissible if contract terms are unambiguous, and arguing Disbursement Agreement is unambiguous). Accordingly, Section 9.1 does not

alter the duties, responsibilities, and protections clearly set forth in Sections 9.3.2 and 9.10.

2. The Meaning of "Genuine"

The Term Lenders next argue that Section 9.3.2's provision that Bank of America may rely only on certificates it believes to be "genuine" imposes a duty on Bank of America to determine whether the representations in the certificate are truthful. The Term Lenders reason that a document containing a misrepresentation is not genuine, and Bank of America therefore had a duty to determine if the certificates contained any misrepresentations before relying on them. While the first sentence of Section 9.3.2 does state Bank of America may rely on any document or certificate believed by it on reasonable grounds to be "genuine," the very next sentence of Section 9.3.2 authorizes Bank of America, specifically in conjunction with the approval of an Advance Request, to "*[n]otwithstanding anything else in this Agreement to the contrary*" "rely on Fontainebleau's certifications … as to the satisfaction of any requirements and/or conditions imposed by this Agreement." *See* Disb. Agmt. § 9.3.2. Moreover, the final sentence of Section 9.3.2 specifically rejects any duty of the Disbursement Agent to conduct an independent investigation of the accuracy or veracity of the certificates. *See id.* § 9.3.2 ("The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items or to investigate any other facts or circumstances ….''). Reading Section 9.3.2 in its entirety, I conclude that "genuine" in Section 9.3.2 means authentic or not fake.[18] The

[18] In support of their contention that "genuine" means "truthful", the Term Lenders cite to only one case, *Stanford Seed Co. v. Balfour, Guthrie & Co.*, 27 Misc. 2d 147 (N.Y. Sup. Ct. 1960),

interpretation advanced by the Term Lenders—suggesting Bank of America may only rely on a certificate it deems truthful—renders the reliance and investigation provisions of the rest of Section 9.3.2 meaningless and is therefore not an interpretation supported by New York law.

Lastly, I disagree with the Term Lenders' argument that "[t]he fact that Bank of America could be liable for 'false representations' under Section 9.10 "establishes that it could not blindly rely on false certificates." *See* TL Opposition at 9. Bank of America's liability for Bank of America *itself* making a false representation has no bearing on its reliance on the possibly-false representation of another party. Furthermore, the Term Lenders' reliance on Section 7.1.3(c) is misplaced, as a prohibition on acting on a known, material falsity in a certification does not translate into a duty to investigate any possibly falsity. Therefore, I conclude 9.3.2 did not impose any obligation to investigate the accuracy of a representation.

3. Sections 3.3.21 and 3.3.24

In further support of their contention that Bank of America could rely only on truthful certificates, the Term Lenders cite Sections 3.3.21 and 3.3.24. Section 3.3.21, stated, as a condition precedent to disbursement, "the Bank Agent shall not have become aware … of any information … that taken as a whole is inconsistent in a

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which I find readily distinguishable. In *Stanford Seed*, the trial court addressed what constituted a genuine receipt under the Uniform Warehouses Receipts Act and held that a document was a not a "genuine" receipt because it was not signed by a warehouseman under Oregon law.

Moreover, even if "genuine" means truthful, Bank of America, in approving an Advance Request, was protected by the specific provision of the second sentence of Section 9.3.2 entitling it, *notwithstanding anything in the Agreement to the contrary*, to rely on Fontainebleau's representations. *See John B. Stetson Co. v. Joh. A. Benckiser GmbH*, 917 N.Y.S.2d 189 (N.Y. App. Div.).

material and adverse matter with the information … disclosed to them concerning … the Project," and Section 3.3.24 similarly stated "the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." *See* Disb. Agmt. §§ 3.3.21 and 3.3.24 (emphasis added). Although Bank of America was the Bank Agent (as well as the Disbursement Agent), Bank of America, as Disbursement Agent, cannot be held liable for information it knew as Bank Agent. Indeed, the parties contemplated Bank of America's multiple roles and agreed, "Notwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent." *See id.* § 9.2.5 ("No Imputed Knowledge"). Accordingly, Bank of America, as Disbursement Agent, cannot be held to any duties imposed by the Disbursement Agreement on the Bank Agent, and, in the context of Bank of America's duties as Disbursement Agent, the Term Lenders' emphasis on Sections 3.3.21 and 3.3.24 is misplaced. Having explained the duties and liability of Bank of America under the Disbursement Agreement, I turn to the facts underlying the Term Lenders' claim.

D. Bank of America was Not Grossly Negligent

As explained above, pursuant to the exculpatory provision of the Disbursement Agreement, Bank of America could be held liable for breach of the Disbursement Agreement only if it acted with gross negligence in the performance of its duties under the Disbursement Agreement. Under New York law, gross negligence is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing." *Curley v. AMR Corp.*, 153 F.3d 5, 12–13 (2d Cir. 1998) (applying New

York law); *see also Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd.*, 611 N.E.2d 282, 284 (N.Y. 1993) (gross negligence is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (internal citation omitted)); *Travelers Indem. Co. of Connecticut v. Losco Group, Inc.*, 204 F. Supp. 2d 639, 644–45 (S.D.N.Y. 2002) ("Under New York law, a mistake or series of mistakes alone, without a showing of recklessness, is insufficient for a finding of gross negligence."; gross negligence requires that the defendant "not only acted carelessly in making a mistake, but that it was so extremely careless that it was equivalent to recklessness."); *DRS Optronics, Inc. v. North Fork Bank*, 843 N.Y.S.2d 124, 127–28 (N.Y. App. Div. 2007) (holding defendant exhibited gross negligence where it failed to exercise "slight care" or "slight diligence"); New York Patten Jury Instructions, PJI 2:10A ("Gross negligence means a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others.").

The standard for willful misconduct is similarly high. Under New York law, willful misconduct is "conduct which is tortious in nature, *i.e.*, wrongful conduct in which defendant willfully intends to inflict harm on plaintiff at least in part through the means of breaching the contract between the parties." *Metro. Life*, 643 N.E.2d at 508; *see also In re CCT Communications, Inc.*, --- B.R. ----, 2011 WL 3023501, at *5, 13 (Bankr. S.D.N.Y. July 22, 2011) (interpreting contract under New York law and concluding willful misconduct "does not include the voluntary and intentional failure or refusal to perform a contract for economic reasons," but requires malice or acting with the purpose of inflicting harm).

The Term Lenders argue that Bank of America was grossly negligent because it disbursed funds in the known failure of conditions precedent. *See* TL Motion at 27–28; TL Opposition at 37–39. Putting aside, for the moment, whether Bank of America had actual knowledge of the failures of any conditions precedent, the Term Lenders' argument is fundamentally flawed because it equates breach of the Disbursement Agreement with gross negligence. As discussed above, the exculpatory provision of the Disbursement Agreement requires more than mere breach of the Disbursement Agreement to hold Bank of America liable. *See* Disb. Agmt. § 9.10 (limiting Disbursement Agent's liability to bad faith, gross negligence, or willful misconduct).

Upon review of the facts, I conclude Bank of America, as Disbursement Agent, did not act in bad faith or with gross negligence or willful misconduct in performing its duties under the Disbursement Agreement. *See David Gutter Furs v. Jewelers Protection Services, Ltd.*, 594 N.E.2d 924 (N.Y. 1992) (granting summary judgment in favor of defendant because allegations did not raise an issue of fact whether defendant performed its duties with reckless indifference to plaintiff's rights);[19] *Gold v. Park Ave. Extended Care Center Corp.*, 935 N.Y.S.2d 597, 599 (N.Y. App. Div. 2011) (affirming trial court's granting of summary judgment in favor of hospital and holding hospital was not grossly negligent where evidence showed absence of any conduct that could be

[19] During oral argument, counsel for the Term Lenders argued that in the case of contracts that provide for the protection of property, such as alarm companies, courts have routinely held that gross negligence is a triable fact. (11/18/2011 Tr. 103:13-19). In *David Gutter Furs*, a case involving defendant's design, installation, and monitoring of a burglar alarm system, the New York Court of Appeals reversed the appellate court's denial of summary judgment on the grounds there was no issue of fact whether defendant performed its duties with reckless indifference to plaintiff's rights. 594 N.E.2d 924 (N.Y. 1992). It follows that summary judgment may be granted on the issue of gross negligence in the case of contracts that provide for the protection of property.

viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard for the rights of others); *see also Net2Globe Intern., Inc. v. Time Warner Telecom of New York*, 273 F. Supp. 2d 436 (S.D.N.Y. 2003) ("While issues of malice, willfulness, and gross negligence often present questions of fact, courts have sustained limitation of liability provisions in the context of a summary judgment motion when the surrounding facts compel such a result."). Indeed, there is no evidence of record on summary judgment that Bank of America intended to harm the Term Lenders, or that it recklessly disregarded their rights.

To the contrary, Bank of America gave consideration to the Term Lenders' rights and interests. From September 2008 through April 2009, Bank of America was responsive to Lenders' questions, tried to get information from Fontainebleau, and facilitated communications between the Lenders and Fontainebleau. For example, when Bank of America became aware that there may be an issue with Lehman funding its portion of the Retail Advance, Bank of America consulted internally and with counsel. *See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 474 n.27 (S.D.N.Y. 2010) (concluding bank did not act in bad faith and stating bank's consultation with counsel demonstrated good faith). Bank of America also repeatedly conferred with Fontainebleau, and requested Fontainebleau provide the Lenders with information regarding both Lehman and the Project. Bank of America further responded thoroughly and promptly to Highland's inquiries regarding the Lehman bankruptcy and its implications for the Senior Credit Facility. Finally, before disbursing funds to Fontainebleau, Bank of America sought reaffirmation from Fontainebleau that all conditions precedent to funding had been satisfied.

In addressing First National Bank of Nevada's repudiation, which represented only 0.6% of the Senior Credit Facility, Bank of America proposed a solution that would permit funding to occur. This solution gave consideration to the Lenders' interests, as neither the Lenders nor Fontainebleau would have expected funding to cease based on the repudiation of such a small commitment.

In the same vein, Bank of America consulted with the Lenders regarding Guggenheim and Z Capital's failure to fund the March 2009 Advance Request. Bank of America informed the Lenders that Guggenheim and Z Capital had not funded, and suggested it would still include their commitment in the Available Funds component, so that funding could occur. Bank of America invited any Lender to comment on the intended solution, and no Lender protested. In performing its duties under the Disbursement Agreement, Bank of America consistently communicated with the Lenders, provided them with pertinent information, and invited comment.

Indeed, Bank of America's conduct, even when viewed in the light most favorable to the Term Lenders, is vastly distinct from the conduct of the defendant in *DRS Optronics, Inc. v. North Fork Bank*, the case cited by the Term Lenders in support of their gross negligence argument. *See* 843 N.Y.S.2d 124 (N.Y. App. Div. 2007). In *DRS Optronics*, the defendant entered into a custodial agreement with two parties under which it was required to ensure that no payments were made without joint written instructions of the two parties. *Id*. at 126. The court held the defendant was grossly negligent because it made no effort to implement any procedure to ensure the two-signature requirement would be enforced, and instead established a system that allowed one party to unilaterally transfer funds. *Id*. at 128. Moreover, the court noted

the defendant "failed to submit any evidence … as to whether it exercised even the slightest care in performing its obligations." *Id*. In contrast, Bank of America made significant efforts to comply with the requirements of the Disbursement Agreement, and, as evidenced by meetings, calls, and communications with key parties, exercised well more than the slightest care in performing its obligations.

It bears noting the Term Lenders (or their successors in interest) were aware of the chief "risk"—namely the Lehman bankruptcy—they claim should have prompted Bank of America to investigate Fontainebleau's representations. Yet, not a single Term Lender demanded that Bank of America take any action relating to the allegations presented in this case, nor did any of the Term Lenders file a Notice of Default to compel the issuance of a Stop Funding Notice. It could hardly follow that Bank of America recklessly disregarded the Term Lenders' rights when the Term Lenders themselves did not seek to enforce those rights.[20] Based on these facts, it cannot be said that Bank of America acted with bad faith, gross negligence, or willful misconduct.

E. Bank of America's Knowledge of Failures of Conditions Precedent

Nor can it be said that Bank of America breached the Disbursement Agreement by disbursing funds in the *known* failures of conditions precedent. The Term Lenders argue that Bank of America disbursed funds despite known failures of conditions precedent relating to (1) Lehman's bankruptcy; (2) the Project's cost overruns; (3) the

[20] To the extent the Term Lenders rely on Highland's communications with Bank of America regarding the Lehman bankruptcy as an assertion of the Term Lenders' rights, counsel for the Term Lenders conceded that "[t]here is no protocol for [the Term Lenders] to do that." (11/18/2011 Tr. 79:2-8).

First National Bank of Nevada repudiation; (4) select lenders' failure to fund the March 2009 Advance Request; and (5) the timing of the March 2009 Advance Request. However, as explained below, with respect to each of these situations, there is no evidence on summary judgment that Bank of America actually knew that a condition precedent was not met. Before discussing each scenario, it bears repeating that for all Advance Requests from September 2008 through March 2009, Fontainebleau submitted documentation certifying *all* conditions precedent to disbursement had been met. *See, e.g.* TL Motion at 21 ("In connection with each Advance Request, the Borrowers were required to and did represent and warrant that all conditions precedent to disbursement, including Lehman's funding of its commitments under the Retail Facility had been satisfied.").

1. The Lehman Bankruptcy and Lehman's Failure to Fund

The Term Lenders argue the Lehman bankruptcy, and its aftermath, some of which was known to Bank of America, caused numerous conditions precedent to fail. Specifically, the Term Lenders argue the Lehman bankruptcy was a material adverse effect on the Project; Bank of America knew that Lehman did not fund the September 2008 advance; and ULLICO funding for Lehman was impermissible. Before addressing each of these arguments, I note that, even if the Term Lenders' contentions regarding the Lehman bankruptcy and effects on the Retail Facility were true, it was not grossly negligent for Bank of America to disburse funds when, each month, the Retail Facility was fully funded. Indeed, if commercially reasonable were the applicable standard under the Disbursement Agreement, it would have been commercially *unreasonable* for Bank of America, as Disbursement Agent and Bank Agent, to halt construction of a the multi-billion dollar Fontainebleau Project when Retail funded its September Shared

Costs in full, and when Lehman's portion of the September Shared Costs was a small portion of the total September Advance Request.

a) The Lehman Bankruptcy

The Term Lenders first argue the Lehman bankruptcy alone had a Material Adverse Effect on the Project, and Bank of America therefore should have issued a Stop Funding Notice. *See* TL Opposition at 11. The Term Lenders reason that Lehman was the largest Retail Lender, the Retail Facility was critical to the completion of the Project, and Lehman bankruptcy rendered uncertain the availability of Lehman's committed funds. *See id.* at 11–12.

First, the Disbursement Agreement requires Bank of America as Disbursement Agent to issue a Stop Funding Notice only in the event that (1) the Controlling Person notifies Bank of America, as Disbursement Agent, that a Default or Event of Default has occurred, or (2) conditions precedent to an Advance have not been satisfied. *See* Disb. Agmt. § 2.5.1. There is no evidence on summary judgment that Bank of America, as Disbursement Agent, was notified that the Lehman bankruptcy was a Default or Event of Default, and the Term Lenders have not pointed to any provision of the Disbursement Agreement requiring Bank of America, as Disbursement Agent or Bank Agent, to make that determination on its own. To the extent the Term Lenders suggest Highland's emails to Bank of America regarding the Lehman bankruptcy constituted notice of default, as required by Section 2.5.1, I conclude the emails were not notices of default upon which Bank of America could issue stop funding notices, as they did not state that a Default or Event of Default had taken place or identify the Default or Event of Default.

To the Term Lenders' suggestion that Bank of America should be deemed to have knowledge of defaults irrespective of the role (Controlling Person versus

Disbursement Agent) in which it came across that information, the "no imputed knowledge" provision of the Section 9.2.5 of the Disbursement Agreement expressly defeats the Term Lenders' suggestion. Regardless, there is no evidence of record on summary judgment that Bank of America, as Controlling Person/Bank Agent/Administrative Agent, was notified of a Default or Event of Default, and like the Disbursement Agent, the Credit Agreement, Section 9.3, imposed no duty on Bank of America as Administrative Agent to inquire about defaults.

As for satisfaction of the conditions precedent to disbursement, Fontainebleau expressly certified that the conditions precedent to the September 2008 Advance Request, including there being no Material Adverse Effects on the Project, had been satisfied, a certification upon which Bank of America was entitled to rely in approving an Advance Request and disbursing funds. Accordingly, Bank of America did not breach the Disbursement Agreement by disbursing funds in the face of Lehman's bankruptcy filing.

Even if the Disbursement Agreement imposed on Bank of America as Disbursement Agent or Bank Agent a duty to determine whether the Lehman bankruptcy had a Material Adverse Effect on the Project, under Section 3.3.21 or otherwise, I would conclude that Bank of America did not breach the Disbursement or Credit Agreements by determining there was no Material Adverse Effect. Although Bank of America stated immediately after the Lehman bankruptcy that "Lehman may be the death nail for [the Project]," *see* Dep. Exh. 67, as of the disbursement of the September 2008 Advance Request, there was no indication that there would be a shortfall in Retail Funds or that the Retail Lenders would fail to honor their obligations

under the Retail Facility. Indeed, although it was later discovered that Lehman did not fund its portion of the September 2008 Shared Costs, Lehman did fund its portion in October and November 2008, demonstrating Lehman's bankruptcy filing itself did not make Lehman's funds unavailable or necessarily compromise the Project. Moreover, every month from September 2008 through March 2009, TriMont wired to Bank of America the full amount of the requested Retail Shared Costs, indicating there was no funding gap on the Retail end of the Project. At a minimum, Bank of America did not act with bad faith, gross negligence, or willful misconduct by disbursing funds in the face of the full monthly funding of the Retail Advance.

b) Bank of America's Knowledge that Lehman Failed to Make the September 2008 Retail Advance

The Term Lenders next argue that Bank of America knew that Fontainebleau funded Lehman's share of the September 2008 Retail Advance, but the evidence of record on summary judgment, with all inferences in favor of the Term Lenders, demonstrates otherwise. Bank of America did not have actual knowledge that Fontainebleau funded for Lehman. Nor did it have actual knowledge that Lehman did not fund its share of the September 2008 Retail Advance. Immediately before disbursing the September 2008 Advance Request to Fontainebleau, Bank of America sought and received oral and written confirmation from Jim Freeman that, even though Lehman had filed for bankruptcy, all conditions precedent to funding were satisfied and all prior representation, warranties, and certifications remained correct. McLendon Rafeedie's deposition testimony, the Highland emails, and communications from Fontainebleau did not provide Bank of America with actual knowledge of who funded

the September 2008 Retail Advance such that it could deem Fontainebleau's representations false.

First, contrary to the Term Lenders' assertion, there is no evidence that TriMont told Bank of America that Lehman did not fund its portion of the September 2008 Retail Advance. As explained above, TriMont's McLendon Rafeedie testified that he could not recall the specific communications regarding Lehman's funding with Bank of America's Jean Brown, and stated he "could have" told Ms. Brown that Fontainebleau funded for Lehman, not that he "did" tell Ms. Brown. Similarly, Ms. Brown stated she did not know that Lehman did not fund its portion of the September 2008 Retail Advance. Lack of recollection does not create a genuine issue of material fact. *See, e.g.*, *Brown v. St. Paul Travelers Companies*, 331 F. App'x. 68, 70 (2nd Cir. 2009) ("We agree with the District Court that '[p]laintiff's statement, that she has no recollection or record of receiving the employee handbook and arbitration policy, despite the fact that it was distributed on at least six occasions during her employment, is ... not sufficient to raise a genuine issue of material fact.' "); *Tinder v. Pinkerton Sec'y*, 305 F.3d 728, 735–36 (7th Cir.2002) (plaintiff's testimony that she did not recall seeing or reviewing a brochure did not create a genuine issue of material fact in light of affidavits that the brochure was sent to her); *Dickey v. Baptist Mem'l Hosp.*, 146 F.3d 262, 266 n.1 (5th Cir. 1998) ("The mere fact that [the deponent] does not remember the alleged phone conversation, however, is not enough, by itself, to create a genuine issue of material fact [as to whether the conversation occurred.]"). Moreover, based on the testimony from Mr. Rafeedie and Ms. Brown, a fact finder could only speculate as to whether Bank of America knew Fontainebleau funded for Lehman, and speculation does not create a

genuine issue of material fact. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) (stating speculation does not create a genuine issue of material face); *see also Hughes v. Stryker Corp.*, 423 F. App'x. 878, 882 (11th Cir. 2011) (affirming district court's award of summary judgment in favor of defendant in negligence action because, based on factual record, a jury could only speculate as to causation, and speculation does not create a genuine issue of material fact). The testimony from Mr. Rafeedie and Ms. Brown therefore does not create a genuine issue of material fact as to whether Bank of America knew that Fontainebleau funded Lehman's portion of the September 2008 Advance Request, and there is no other evidence of record on summary judgment that TriMont told Bank of America that Lehman did not fund.

Second, Highland's October 6 and 13 emails (sent after the disbursement date of the September 2008 Advance Request) do not establish that Bank of America had knowledge that Fontainebleau funded for Lehman. The October 6, 2008 email alleged "public reports" that "equity sponsors" had funded for Lehman, but did not identify the source of the public reports. Additionally, the October 13 email, forwarding a Merrill Lynch analyst report, only stated the analyst "underst[ood]" Fontainebleau equity sponsors had funded for Lehman. Most importantly, Highland acknowledged that, at the time of these emails, the assertion that Fontainebleau equity sponsors had funded for Lehman was one of a number of rumors or speculations in the market. Although the Lehman bankruptcy and possible replacements for Lehman were discussed at the October 23, 2008 Retail meeting (at which Bank of America was present), there is no evidence of record that Lehman's failure to fund the September 2008 Retail Advance was discussed at the October Meeting.

Finally, I do not find compelling the Term Lenders' argument that Bank of America's "cryptic" communications, Fontainebleau's refusal to meet with Lenders to discuss the Lehman bankruptcy, Fontainebleau's "shift to the passive voice," Bank of America internal emails, and Mr. Bolio's handwritten notes create a reasonable inference (much less "the only reasonable inference") that Bank of America knew Fontainebleau paid Lehman' share of the September 2008 Retail Advance. *See* TL Opposition at 13, 15–16. First, Bank of America's September 26, 2008 request for confirmation of fulfillment of conditions precedent after Lehman's bankruptcy was reasonable and prudent, as the Lehman bankruptcy caused substantial concern in the market. Second, Fontainebleau's silence and refusal to meet with Lenders in September and October 2008 do not equate to an admission that Fontainebleau funded for Lehman. Third, Fontainebleau's October 7, 2008 Memorandum, in which Fontainebleau craftily avoided answering who funded for Lehman by using the passive voice, did not provide Bank of America with notice that Fontainebleau funded for Lehman, or that Lehman did not fund. Nor did the Memorandum cause Section 3.3.24 to fail, as Section 3.3.24, by its plain language, applies only to "documents and evidence," not information in general, and, moreover, the Memorandum adequately answered the questions asked by Bank of America and fulfilled Section 3.3.24. Notably, the Memorandum was sent to the Lenders, as well as Bank of America. Yet no Term Lender submitted a Notice of Default based on the (now alleged-to-be) insufficient information contained therein.

Next, the internal emails cited by Term Lenders reflect Bank of America's initial understanding from the mid-September 2008 conference calls that Fontainebleau may

fund for Lehman, but not an actual understanding that Lehman did not fund its share of the September 2008 Retail Advance, or that Fontainebleau funded Lehman's share. *See, e.g.*, Dep. Exh. 73 (dated September 19, 2008), Dep. Exh. 204 (dated September 19, 2008). The Term Lenders have presented no evidence to contradict Bank of America's emails showing, as of December 2008, Bank of America thought Lehman funded the September 2008 Retail Advance. Moreover, the January 2009 Bank of America emails cited by the Term Lenders, *see* Dep. Exhs. 1513, 1514, 1515, and 1516, were from the Commercial Real Estate Banking group, a group which had no involvement in Bank of America's roles as Disbursement Agent and Bank Agent and whose knowledge cannot be imputed to Bank of America as Disbursement Agent or Bank Agent.

Finally, the Term Lenders have not pointed to any testimony tying Brandon Bolio's handwritten notes, which state Lehman did not fund, to the September 2008 Advance Request. Indeed, the notes reflect dollar amounts that do not correspond to the September 2008 Advance and ask whether Fontainebleau could permissibly fund for Lehman, a question which Bank of America had answered in the negative by the time Bank of America disbursed the September 2008 Advance Request. *See* Dep. Exh. 475 at BANA_FB00846432–33; Bolio Dep. Tr. 58:7–60:25). In sum, on summary judgment, the Term Lenders have not presented evidence from which it could reasonably be inferred that Bank of America actually knew Fontainebleau funded Lehman's portion of the September 2008 Retail Advance, or Lehman did not fund its portion of the Advance.

c) ULLICO Funding for Lehman

Turning next to the funding of Lehman's portion of the Retail Advance from December 2008 through March 2009, it is undisputed that ULLICO, a Retail Co-Lender, funded Lehman's portion of the Retail Shared Costs, and Fontainebleau (Fontainebleau Resorts, Jeff Soffer, and Turnberry Residential Limited Partners, to be more precise) reimbursed ULLICO for at least a portion of those payments through a Guaranty Agreement and a series of Amendments thereto. It is further undisputed that Bank of America knew that ULLICO was funding Lehman's portion of the Retail Shared Costs from December 2008 through March 2009, and it was impermissible under the Disbursement Agreement for Fontainebleau to reimburse ULLICO and, in effect, make the Retail Advance. The parties disagree, however, on whether it was permissible under Section 3.3.23 of the Disbursement Agreement for ULLICO to fund for Lehman, and whether Bank of America knew of Fontainebleau's guaranty arrangement with ULLICO.

Section 3.3.23 states "the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to the Advance Request." Disb. Agmt. § 3.3.23. The Term Lenders argue the advances made by the Retail Lenders were several, not joint, and therefore Lehman had to fund its respective share of the Retail Advance. Bank of America, on the other hand, argues Section 3.3.23 requires the Retail Agent and Retail Lenders to collectively make their Advances, but does not require each Retail Lender to fund a specific amount.

Reading the Disbursement Agreement in its entirety, I conclude Section 3.3.23 mandates only that the Retail Shared Costs be funded collectively by the Retail

Lenders, not that each Retail Co-Lender funds its respective portion, therefore permitting ULLICO to fund for Lehman. In reaching this conclusion, I rely not only on the plain language of Section 3.3.23, but also Section 2.6.3, which states the Disbursement Agent shall not release Advances until "the Retail Lenders have made any requested Loans under the Retail Facility." *Id*. § 2.6.3. Like Section 3.3.23, Section 2.6.3, by its plain language, does not require *each* Retail Lender to fund its respective portion, but rather requires the "Retail Lenders" to fund their collective "Loans."

To the Term Lenders' reference to Section 9.7.2 of the Retail Agreement, *see* TL Motion at 20, which provides that the liabilities of the Retail Co-Lenders "shall be several not joint," Section 9.7.2 provides that the Retail Co-Lenders are under no *obligation* to fund for each other. However, this provision does not control whether, to satisfy Section 3.3.23 of the Disbursement Agreement, the Retail Co-Lenders *may* fund for each other. Further, Section 9.7.2(a) permits each Retail Co-Lender to assume the obligations of any other Co-Lender, supporting an interpretation of Section 3.3.23 which permits Retail Co-Lenders to fund for each other.

To the extent the parties' intent when drafting Section 3.3.23 can be discerned from the four corners of the relevant agreements, Bank of America was not a party to or provided a copy of the Retail Co-Lending Agreement. Accordingly, the parties could not have intended Bank of America, as Disbursement Agent or Bank Agent, to evaluate whether each Retail Co-Lender made its respective contribution pursuant to the Retail Agreement and Retail Co-Lending Agreement.

Finally, I conclude Bank of America did not have actual knowledge that Fontainebleau reimbursed ULLICO for any portion of the December 2008 through

March 2009 Retail Advances, as the Term Lenders, who would bear the burden at trial, have pointed to no evidence in the record suggesting that Bank of America knew of the guaranty arrangement. *See Fitzpatrick v. City of* Atlanta, 2 F.3d 1112, 1115–16 (11th Cir. 1993) (for issues on which the non-moving party bears the burden at trial, to meet its burden on summary judgment, the moving party may point the district court to the absence of evidence to support the non-moving party's position). Thus, Bank of America, as Disbursement Agent, did not breach the Disbursement Agreement with respect to ULLICO's funding of Lehman's portion of the Retail Shared Costs.

Even if it were determined that ULLICO funding for Lehman was impermissible and therefore caused the condition precedent in Section 3.3.23 to fail, or that ULLICO funding for Lehman constituted a "default" of the Retail Agreement and therefore caused the failure of the condition precedent set forth in Section 3.3.3, Bank of America did not act with bad faith, gross negligence, or willful misconduct in permitting a Retail Co-Lender to fund Lehman's commitment when Fontainebleau certified that all conditions precedent had been met, the Co-Lender funding resulted in full funding of the Retail Shared Costs, and Bank of America believed Section 3.3.23 was satisfied by the Retail Co-Lenders, collectively, funding the Retail Shared Costs.

2. Project Cost Overruns

The Term Lenders next argue that Bank of America knew that Fontainebleau was falsifying (and underreporting) the anticipated cost to complete the Project, this misstatement of Project costs caused numerous conditions precedent to fail, and Bank of America disbursed funds in the face of the failures of these conditions precedent. *See* TL Opposition 23–29. More specifically, the Term Lenders appear to argue that Bank of America knew, as early as May 2008, that Fontainebleau was substantially

underreporting costs, and Bank of America knew this cost underreporting would continue into the future (as, in fact, it did). But the evidence cited by the Term Lenders, with all inference in favor of the Term Lenders, does not support its factual argument or conclusion.

First, the Term Lenders do not dispute that, Fontainebleau and TWC actively concealed the Project's cost overruns from Bank of America and IVI by maintaining two sets of books and Anticipated Cost Reports: an internal set that reflected the actual costs, and an external set disclosed to Bank of America and IVI which contained only a subset of the actual costs. Given this evidence, the Term Lenders' argument that Bank of America was aware of Fontainebleau's inaccurate cost reporting lacks merit.

Notwithstanding, the evidence cited by the Term Lenders does not support the conclusion that Bank of America was actually aware of any cost concealment. The Term Lenders cite documents and testimony demonstrating that, in May 2008, Fontainebleau presented Bank of America with $201 million in change orders. As an initial matter, I concur with Bank of America that the May 23, 2008 Owner Change Order is inadmissible under Federal Rules of Evidence 801, 802, and 901 as an unauthenticated document, the contents of which are hearsay. Even if the Change Order were admissible, though, the information contained therein does not indicate that Fontainebleau was concealing cost overruns. Although the documents accompanying the May 2008 Change Order indicated Fontainebleau knew about select change orders (amounting to about $41.5 million) for some time, the documents also demonstrated that, as of May 2008, these change orders were still being negotiated and had not been finalized. Accordingly, it cannot be said from this evidence that Fontainebleau was

concealing cost overruns, or that Bank of America knew that Fontainebleau was concealing cost overruns.

Second, the evidence on summary judgment does not support the Term Lenders suggestion that Bank of America knew the cost underreporting would continue into the future. The June 10, 2008 email cited by the Term Lenders indicates that, as of that date, IVI believed the $210 million in cost increases was not all inclusive. *See* Dep. Exh. 217. However, the email also indicates that Bank of America and IVI contacted Jim Freeman to express their concerns, and Mr. Freeman would ensure IVI was provided with all necessary information. IVI promptly investigated the additional costs, *see* Dep. Exh. 892, and included its assessment in the June Project Status Report, *see* Dep. Exh. 868. More specifically, the June PSR stated the March 27, 2008 Anticipated Cost Report confirmed additional change orders and potential extra cost exposure, and concluded the March ACR would increase the final budget. *See* Dep. Exh. 868 at 14. Thus, the record indicates Bank of America addressed any concerns about cost overruns with IVI in June 2008, and does not indicate that Bank of America knew that Fontainebleau concealed those pre-June 2008 overruns. Indeed, it is undisputed that, for the April, May, and June 2008 Advance Requests, IVI issued Construction Consultant Advance Certificates, upon which the Disbursement Agreement authorized Bank of America to rely.

Regarding cost overruns in late 2008 and early 2009, IVI's January 30, 2009 Project Status Report, PSR 21, indicated it had concerns that Fontainebleau's cost disclosures were not accurate and the LEED credits, which reduce construction costs through tax credits, were lagging. Despite these concerns, IVI executed the

Construction Consultant Certificate for the February 2009 Advance Request. Similarly, although IVI's March 19, 2009 Construction Consultant Advance Certificate stated it had declared material errors in the Advance Request and supporting documentation, after IVI consulted with Fontainebleau and Fontainebleau revised the March request, IVI issued a Construction Consultant Advance Certificate approving the request. The Disbursement Agreement specifically authorized Bank of America to rely on IVI's Certificate, and Bank of America had no obligation to independently investigate whether the concerns expressed in the Project Status Reports had been adequately resolved. Had the parties wanted to vest Bank of America with such an obligation, they could have included the "reasonable diligence" language employed in Section 2.4.4 with respect to Bank of America's obligation to ensure IVI performed its review and delivered the Certificate in a timely manner. *See* Disb. Agmt. § 2.4.4. As a result, and especially in light of IVI's Certificates, on which Bank of America was expressly authorized to rely, Bank of America did not have actual knowledge of any cost overruns that would have caused a condition precedent to fail or otherwise require the issuance of a Stop Funding Notice.

Moreover, as Bank of America became aware of potential cost overruns, it communicated with, and facilitated communications between, the Lenders and Fontainebleau. For example, in February 2009, when JPMorgan Chase requested from Bank of America information regarding the issues raised in PSR 21, Bank of America promptly requested the information from Fontainebleau. After Fontainebleau responded, Bank of America asked Fontainebleau to schedule a lender call to discuss its response. Fontainebleau initially refused, and in early March, Bank of America again

requested Fontainebleau meet with the Lenders and again requested information regarding Project costs. Upon Bank of America's requests, Fontainebleau finally held a Lender meeting in Las Vegas on March 21, 2009.

Similarly, after Fontainebleau submitted its revised March 2009 Advance Request, and IVI issued the necessary Construction Consultant Advance Certificate, Bank of America promptly made the revised Request and Certificate available to the Lenders. It cannot be said, based on these facts and with all inferences in favor of the Term Lenders, that Bank of America acted in bad faith, with reckless disregard for the Term Lenders' rights, or the intent to harm the Term Lenders, or even knew of the failure of any conditions precedent related to the actively-concealed Project cost overruns.

3. First National Bank of Nevada Repudiation

In July 2008, the Comptroller of Currency closed the First National Bank of Nevada ("FNBN") and appointed the FDIC as receiver. In late December, the FDIC formally repudiated FNBN's unfunded Senior Credit Facility commitments, which amounted to less than 0.6 percent of the $1.85 billion Senior Credit Facility. The Term Lenders argue that, once the FDIC repudiated FNBN's commitment, FNBN was in Lender Default under the Credit Agreement, causing several conditions precedent (Sections 3.3.2, 3.3.3, 3.3.21, and 3.3.11) to fail, and Bank of America disbursed funds in the known failure of condition precedents. Bank of America argues the default was not material, and therefore was not a condition precedent failure.

Although materiality is generally for the finder of fact, "where the evidence concerning the materiality is clear and substantially uncontradicted, the question is a matter of law for the court to decide." *Wiljeff, LLC v. United Realty Mgmt. Corp.*, 920

N.Y.S.2d 495, 497 (N.Y. App. Div. 2011) (granting partial summary judgment on issue of materiality). Here, with all inferences in favor of the Term Lenders, including consideration of the Lehman bankruptcy and other criteria in the market, I conclude the FNBN repudiation was not material, as reasonable lenders and borrowers would not expect a $1.85 billion loan facility to fail due to a repudiation of less than $12 million, especially when the Project remained In Budget by over $100 million. *See Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539, 540–41 (2d Cir. 1996) (affirming district court judgment, in proxy rules context, that misstatements were immaterial as a matter of law). If the sophisticated parties to the Credit and Disbursement Agreements had intended *any* Lender Default to constitute a Default of the Credit Agreement, they would have included it as a specifically-delineated Event of Default in the Credit Agreement, Section 7 or Disbursement Agreement, Section 8.

Even if the FNBN repudiation caused numerous conditions precedent to fail, Bank of America did not act with gross negligence or exhibit willful misconduct in approving Advance Requests in the face of the repudiation. FNBN's commitment was only 0.6 percent of the Senior Credit Facility, and, according to the December 2008 Advance Request, the Project was significantly In Balance. Accordingly, even if the FNBN repudiation caused numerous conditions precedent to fail and Bank of America knew of this failure, viewing the evidence will all inferences in favor of the Term Lenders, no reasonable fact finder could conclude that Bank of America acted in bad faith or with disregard for the Term Lenders' rights in disbursing funds in the face of a repudiation of such a minimal amount and allowing the Project to continue.

4. March 2009 Advance Request and Defaulting Lenders

On March 9, 2009, Fontainebleau submitted a revised Notice of Borrowing, requesting $350 million in Delay Draw funds. Two of the Delay Draw Term Lenders—Z Capital and Guggenheim—did not fund their commitments. Z Capital and Guggenheim's share was less than $23 million of the $350 million draw (roughly 1 percent of the Senior Credit Facility, and 6 percent of the March 2009 draw). Similar to the arguments raised with respect to the First National Bank of Nevada repudiation, the Term Lenders argue these lenders' failure to fund was a default, caused numerous conditions precedent to fail, and Bank of America disbursed funds in the face of the known failure of conditions precedent. Further, the Term Lenders argue that these Lenders' commitments were material, as excluding these commitments caused the In Balance test to fail.

As with the FNBN repudiation, I conclude the Z Capital and Guggenheim's failure to fund was not material, as, even though the failure caused the In Balance Test to fail, the commitment was minimal in the context of the Senior Credit Facility, had no immediate impact on the loan facility because $327 million in Delay Draw Term Loans had been funded, while only $138 million was requested, and no reasonable investor or borrower would expect—or, as discussed below, would request—the loan facility to fail under these circumstances.

Furthermore, even if the failure of Z Capital and Guggenheim caused conditions precedent to fail, Bank of America did not act with gross negligence in disbursing the March 2009 Advance Request. Before disbursing the funds, on March 23, 2009, Bank of America sent the Lenders a letter disclosing Z Capital and Guggenheim's failure to fund. Bank of America advised that excluding Z Capital and Guggenheim's

commitments from the Available Funds would cause the In Balance test to fail, stated it was willing to include the unfunded commitment in the Available Funds component of the March 2009 Advance, and invited any lender who disagreed to inform Bank of America. Although two Lenders replied to the correspondence, no Lender disagreed with Bank of America's position regarding the March 2009 Advance. Accordingly, Bank of America was not grossly negligent or exhibiting willful misconduct—*i.e.*, it was not indifferent to the Term Lenders' rights or intentionally trying to harm them—in disbursing the March 2009 funds.

5. Timing of the March 2009 Advance Request

I turn finally to the timing of the March 2009 Advance Request. On March 11, 2009, Fontainebleau submitted an Advance Request with an Advance Date of March 25, 2009. Approximately one week later, on March 19, 2009, IVI issued a Construction Consultant Advance Certificate declaring it had discovered material errors in the Advance Request and supporting documentation and was concerned about the Project costs. Fontainebleau worked with IVI to address IVI's concerns, and Fontainebleau submitted a revised Advance Request on March 23, 2009, and another revised Request on March 25, 2009. The Term Lenders contend Bank of America should have rejected the revised Requests as untimely under Section 2.4 of the Disbursement Agreement, and Bank of America could not in good faith have approved the Requests.

Regarding the timing of the revised Requests, the Term Lenders argue that, pursuant to Section 2.4.1 of the Disbursement Agreement, Fontainebleau had to submit its March Advance Request by March 11; Section 2.4 allows resubmission of a Request only in the case of minor or purely mathematical errors, not where the Construction Consultant rejected the Request for material misstatements; and Section 2.4.4(b)

requires delivery of the Advance Request no later than four Banking Days prior to the requested Advance Date. Contrary to the Term Lenders' interpretation of the Disbursement Agreement, Section 2.4 does not restrict Fontainebleau's right to supplement its Advance request to correct minor or mathematical errors, it merely permits the Disbursement Agent to require Fontainebleau to resubmit the Advance Request in these circumstances. *See* Disb. Agmt. § 2.4.4 ("In the event … the Disbursement Agent finds any minor or purely mathematical errors or inaccuracies in the Advance Request or supporting materials, the Disbursement Agent may require the Project Entities to revise and resubmit the same.") Indeed, Section 2.4.5, entitled "Supplementation of Advance Requests," specifically permits Fontainebleau to revise an Advance request in the event it discovers any updates required to be made "prior to the Scheduled Advance Date" and is not limited to mathematical errors.

Regarding the timing of Bank of America's approval of an Advance Request, Section 2.4.5's provision that the Disbursement Agent use "reasonable diligence to review and approve such supplemental Advance Request and to cause the Construction Consultant to review and approve the same not less than three Banking Days prior to the Scheduled Advance date," requires only that Bank of America make reasonable efforts under the circumstances. It does not state—or mean—that Bank of America cannot review and approve a supplemental Advance Request less than three Banking Days before the Scheduled Advance Date, especially when that supplemental Request is submitted less than three Days before the Scheduled Advance Date.

Moreover, Section 2.4.4's requirement that IVI submit a Construction Consultant Advance Certificate not later than four Banking Days prior to the requested Advance

Date applies to Fontainebleau's original request. IVI fulfilled this requirement, as it submitted its initial Construction Consultant Advance Certificate on March 19, 2009. The four Banking Days requirement does not apply to IVI's approval of a supplemental request, as Section 2.4.5 controls IVI's approval of a supplemental request.

The Term Lenders next argue that Bank of America could not, in good faith, have approved the revised March 2009 Request in the face of the "funding crunch" (as evidenced, according to the Term Lenders, by the Lehman bankruptcy, FNBN repudiation, and Guggenheim/Z Capital defaults) and cost overruns. In further support of this argument, the Term Lenders cite to Bank of America's internal risk classifications, downgrading the risk rating of the Project. These internal risk ratings are irrelevant to my analysis, as they were conducted by Bank of America, as a Lender, and Section 9.2.5 does not permit the imputation of knowledge from Bank of America as Lender to Bank of America as Disbursement Agent. Moreover, Section 2.4.5 requires Bank of America, as Disbursement Agent to consider the submission of a revised Advance Request "in good faith." Fontainebleau's supplemental March Advance Requests showed the Project In Balance by almost $14 million, and over $14 million. Given this representation and IVI's certifications, Bank of America, as Disbursement Agent, did not act in bad faith in approving the March 2009 Request.

VI. Requests for Judicial Notice

In conjunction with the motions for summary judgment, the Term Lenders filed a Request for Judicial Notice [ECF No. 261 and September 9, 2011 Declaration of Robert Mockler and Request for Judicial Notice], requesting I take judicial notice, pursuant to Federal Rule of Evidence 201, of a Proof of Claim submitted by Fontainebleau Las Vegas Retail, LLC in the Lehman bankruptcy [Non-Dep. Exh. 1504]. The Term Lenders

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." *See* Term Lenders' Reply in Support of Judicial Notice [ECF No. 286] at 1. "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but to establish the fact of such litigation and related filings." *Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) (citing *U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)). Bank of America does not oppose the taking of judicial notice of the Proof of Claim solely for the fact of the document's existence, and not for the truth of the matters contained therein. *See* Bank of America Opposition to Plaintiff's Request for Judicial Notice [ECF Nos. 271 and 292]. Here, however, the fact of Fontainebleau's filing of a Proof of Claim alleging there were defaults under the Retail Agreement is not material to the pending summary judgment motions. Bank of America does not dispute that Lehman did not fund its portion of the September 2008, December 2008, January 2009, and February 2009 Retail Advances. Whether this failure to fund constituted a default under the Retail Agreement and the failure of a condition precedent under the Disbursement Agreement as a matter of law is for the Court, not Fontainebleau, to determine. Accordingly, I deny the Term Lenders' Request for Judicial Notice.

Bank of America filed a Request for Judicial Notice [ECF No. 272], requesting I take judicial notice of (1) an article by Pierre Paulden entitled *Highland Shuts Funds Amid 'Unprecedented' Disruption* [ECF No. 272, Exh. 28] ("Paulden Article") and (2) the

March 25, 2011 Complaint in *Brigade Leveraged Capital Structures Fund, Ltd. v. Fontainebleau Resorts, LLC*, filed in District Court in Clark County, Nevada [ECF No. 272, Exh. 101] ("Brigade Complaint"). Bank of America seeks to use the fact of the Paulden Article, not its contents, to support its proposition that, "[i]n September 2008, numerous credible publications reported that certain Highland finds had suffered losses and faced a liquidity crunch.", and to justify its response to Highland's September 2008 claims regarding the Lehman bankruptcy and its funding of the September 2008 Retail Advance. *See* BofA Response AMA ¶ 118, BofA Opp. Memo. at 16. But the Paulden Article, dated October 16, 2008, does not demonstrate reports of Highland's losses in *September* 2008. Further, Bank of America has cited no evidence to indicate any of the Bank of America individuals who evaluated Highland's claims actually read the Paulden Article, and therefore cannot establish that the Paulden Article was relevant to Bank of America's assessment of Highland's claims. Finally, the communications between Highland and Bank of America regarding the Lehman bankruptcy and Lehman's failure to fund the September 2008 Retail Advance occurred between from late September 2008 through October 13, 2008, before the Paulden Article was published. I conclude, therefore, the fact of the Paulden Article is not relevant to the resolution of the pending summary judgment motions and deny Bank of America's request for judicial notice. *See Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010) ("[A] court may properly decline to take judicial notice of documents that are irrelevant to the resolution of a case."); *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780 (8th Cir. 2009) ("Caution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules."); *see also Shahar v. Bowers*, 120 F.3d 211,

214 (11th Cir. 1997) (noting the taking of judicial notice is, "as a matter of evidence law, a highly limited process" because "the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence ….").

Turning to the Brigade Complaint, Bank of America seeks admission of the Brigade Complaint not only for the fact that it was filed, but also for the content therein, arguing the Complaint's allegations are relevant to the instant action and constitute a party admission and are therefore an exception to the hearsay rule. The *Brigade* plaintiffs, some of whom are Term Lenders, allege, *inter alia*, that Fontainebleau executives and affiliates made material misrepresentations in the Advance Requests, hid cost overruns, and concealed adverse information regarding the Lehman bankruptcy's implications for the Project. Bank of America argues these allegations are relevant to the Term Lenders' claim that Bank of America breached its duties as Disbursement Agent and Bank Agent, and, more specifically, had knowledge of "Fontainebleau's Lehman-related machinations." [ECF No. 301 at 3]. As set forth above, independent of the Brigade Complaint, I have concluded the evidence of record on summary judgment, with all inferences in favor of the Term Lenders, does not demonstrate that Bank of America had knowledge of Fontainebleau's "Lehman-related machinations" or cost overruns. Accordingly, I deny Bank of America's request for judicial notice of the Brigade Complaint as moot.

VII. Conclusion

For reasons discussed, I conclude Bank of America, as Disbursement Agent or Bank Agent, did not breach the Disbursement Agreement, nor did it act with bad faith, gross negligence, or willful misconduct in the performance of its duties under the Disbursement Agreement. The Disbursement Agreement imposed on Bank of America

no duty to inquire or investigate whether Fontainebleau's representations that all conditions precedent had been met were accurate, and, with all inferences in favor of the Term Lenders, the Term Lenders have failed to present a genuine issue of material fact as to whether Bank of America, as Disbursement Agent or Bank Agent, had actual knowledge of the failure of any conditions precedent to disbursement, including, but not limited to, Fontainebleau funding Lehman's portion of the September 2008 Retail Advance, Fontainebleau reimbursing ULLICO for a portion of the December 2008 through March 2009 Retail Advances, and the Project's cost overruns.

Although not germane to my analysis, I would be remiss by not observing that, while the Term Lenders argue on summary judgment that Bank of America should have pulled the plug on the Project as early as September 2008, they argued in their complaints and on motion to dismiss that the Revolving Lenders should have funded the Project as late as March and April 2009. Further, while the Term Lenders argue on summary judgment that Bank of America should have been aware of issues with the Retail Facility and Project costs, they allege in other actions that Fontainebleau perpetrated a fraud against the Lenders and Bank of America in actively concealing cost overruns and misleading interested parties about the status and potential success of the Project. That said, having reviewed the motions for summary judgment and related requested for judicial notice and being otherwise duly advised, it is HEREBY ORDERED and ADJUDGED as follows:

1. Bank of America's Motion for Summary Judgment [ECF No. 255] is **GRANTED**.

2. The Term Lenders' Motion for Partial Summary Judgment [ECF No. 258] is **DENIED**.

3. The parties' Requests for Judicial Notice [ECF No. 261 and 272] are **DENIED**.

4. All pending motions are **DENIED as MOOT** and all hearings are **CANCELLED**.

5. The Clerk of the Court is instructed to **CLOSE** this case.

6. Final judgment will be entered by separate court order pursuant to Federal Rule of Civil Procedure 58.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of March, 2012.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: Clerk of the United States Court of Appeals for the Eleventh Circuit
(related to your Case No. 11-10740)
Clerk of the United States Judicial Panel on Multidistrict Litigation
Magistrate Judge Jonathan Goodman
All Counsel of Record

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document applies to:

Case No. 09-cv-23835 ASG.

_____/

FINAL JUDGMENT

Based on MDL Order Number 62, the Omnibus Order Granting Bank of America's Motion for Summary Judgment, final judgment is hereby entered in accordance with Federal Rule of Civil Procedure 58(a). Final Judgment is hereby entered in favor of Defendant Bank of America, N.A., and against Plaintiffs. As to all claims of the Second Amended Complaint, Plaintiffs shall take nothing from the aforementioned Defendant and shall go hence without day.

This case is CLOSED.

BY COURT ORDER at Miami, Florida, this 19 day of March, 2012.

STEVEN LARIMORE
Clerk of Court

By: _____
LYNN SUROWIEC
Deputy Clerk

cc: Clerk of the United States Court of Appeals for the Eleventh Circuit
(related to your Case No. 11-10740)
Clerk of the United States Judicial Panel on Multidistrict Litigation
Magistrate Judge Jonathan Goodman
All Counsel of Record

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

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

/

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al.*, Case No. 09-23835-CIV-GOLD/GOODMAN, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the *Final Judgment* entered on March 19, 2012 and docketed on March 20, 2012 in both the multidistrict litigation [Case No. 09-md-02106- GOLD/GOODMAN, D.E. # 341] and the underlying case [Case No. 09-23835-CIV-GOLD/GOODMAN, D.E. # 128], and the related *MDL Order Number 62: Omnibus Order Granting Bank of America's Motion for Summary Judgment[ECF No. 255] and Denying Term Lenders' Motion for Partial Summary Judgment [ECF No. 258]; Closing Case* entered and docketed on March 19, 2012 in the multidistrict litigation [Case No. 09-md-02106-GOLD/GOODMAN, D.E. # 339 & 340].

This Notice of Appeal has simultaneously been filed and docketed in both the multidistrict litigation case, Case No. 09-md-02106- GOLD/GOODMAN, and the underlying case, Case No. 09-23835-CIV-GOLD/GOODMAN, as the above referenced *Final Judgment* was entered and docketed in both cases.

Dated: March 22, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated: March 22, 2012

s/Lorenz Prüss
Lorenz M. Prüss, Esq.

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Laury M. Macauley **LEWIS & ROCA LLP** 50 W Liberty Street Reno, NV 89501 Tele: (775) 823-2900 Fax: (775) 321-5572	Appellee MB Financial Bank, N.A.
Peter J. Roberts **SHAW GUSSIS FISHMAN FLANTZ WOLFSON & TOWBIN LLC** 321 N Clark Street, Suite 800 Chicago, IL 60654 Tele: (312) 276-1322 Fax: (312) 275-0568	Appellee MB Financial Bank, N.A.
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Attorneys:	Representing:
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Raquel A. Rodriguez **MCDERMOTT WILL & EMERY LLP** 201 S. Biscayne Blvd. Suite 2200 Miami, FL 33131 Tele: (305) 358-3500 Fax: : (305) 347-6500	Appellee Camulos Master Fund, L.P.
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Russell Merrin Blain Micahel J. Hooi Harley E. Reidel Susan Heath Sharp **STICHTER REIDEL BLAIN & PROSSER** 110 East Madison Street Suite 200 Tampa, FL 33602 Tele: (813) 229-0144 Fax: (813) 229-1811	Appellant Chapter 7 Trustee

Attorneys:	Representing:
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Court Name: SOUTHERN DISTRICT OF FLORIDA
Division: 1
Receipt Number: FLS100035775
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NOTICE OF APPEAL/DOCKETING FEE
For: PLAINTIFFS
Case/Party: D-FLS-1-09-MD-002106-001
Amount: $455.00

CREDIT CARD
Amt Tendered: $455.00

Total Due: $455.00
Total Tendered: $455.00
Change Amt: $0.00

1:09-MD-02106 -ASG
DE#342

Returned check fee $53

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ELEVENTH CIRCUIT TRANSCRIPT INFORMATION FORM

PART I. TRANSCRIPT ORDER INFORMATION

Appellant to complete and file with the District Court Clerk within 14 days of the filing of the notice of appeal in all cases, including those in which there was no hearing or for which no transcript is ordered.

Short Case Style: Avenue CLO Fund, Ltd., et al. vs Bank of America, N.A.

District Court No.: 09-cv-23835; 09-md-02106 Date Notice of Appeal Filed: 3/22/12 Court of Appeals No.: _____ (If Available)

CHOOSE ONE: ☐ No hearing ☐ No transcript is required for appeal purposes ☐ All necessary transcript(s) on file
☑ I AM ORDERING A TRANSCRIPT OF THE FOLLOWING PROCEEDINGS:

Check appropriate box(es) and provide all information requested:

	HEARING DATE(S)	JUDGE/MAGISTRATE	COURT REPORTER NAME(S)
☐ Pre-Trial Proceedings	11/18/2011	Hon. Alan S. Gold	Joseph A. Millikan
☐ Trial			
☐ Sentence			
☐ Other			

METHOD OF PAYMENT:

☑ I CERTIFY THAT I HAVE CONTACTED THE COURT REPORTER(S) AND HAVE MADE SATISFACTORY ARRANGEMENTS WITH THE COURT REPORTER(S) FOR PAYING THE COST OF THE TRANSCRIPT.

☐ CRIMINAL JUSTICE ACT. Attached for submission to District Judge/Magistrate is my completed CJA Form 24 requesting authorization for government payment of transcript. [A transcript of the following proceedings will be provided ONLY IF SPECIFICALLY AUTHORIZED in Item 13 on CJA Form 24: Voir Dire; Opening and Closing Statements of Prosecution and Defense; Prosecution Rebuttal; Jury Instructions.]

Ordering Counsel/Party: Lorenz Pruss
Name of Firm: Dimond Kaplan & Rothstein, P.A.
Street Address/P.O. Box: 2665 South Bayshore Drive
City/State/Zip Code: Miami, Florida 33133 Phone No. : (305) 374-1920

I certify that I have completed and filed PART I with the District Court Clerk, sent a copy to the appropriate Court Reporter(s) if ordering a transcript, mailed a filed copy to the Court of Appeals Clerk, and served all parties.

DATE: March 28, 2012 SIGNED: s/Lorenz Pruss Attorney for: Plaintiffs/Appellants

PART II. COURT REPORTER ACKNOWLEDGMENT

Court Reporter to complete and file with the District Court Clerk within 14 days of receipt. The Court Reporter shall send a copy to the Court of Appeals Clerk and to all parties.

Date Transcript Order received: _____
☐ Satisfactory arrangements for paying the cost of the transcript were completed on: _____
☐ Satisfactory arrangements for paying the cost of the transcript have not been made.
No. of hearing days: _____ Estimated no. of transcript pages: _____ Estimated filing date: _____

DATE: _____ SIGNED: _____ Phone No. : _____

NOTE: The transcript is due to be filed within 30 days of the date satisfactory arrangements for paying the cost of the transcript were completed unless the Court Reporter obtains an extension of time to file the transcript.

PART III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN DISTRICT COURT

Court Reporter to complete and file with the District Court Clerk on date of filing transcript in District Court. The Court Reporter shall send a copy to the Court of Appeals Clerk on the same date.

This is to certify that the transcript has been completed and filed with the district court on (date): _____

Actual No. of Volumes and Hearing Dates: _____

Date: _____ Signature of Court Reporter: _____

Rev. 9/11

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **ELEVENTH CIRCUIT TRANSCRIPT INFORMATION FORM** 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: March 28, 2012

s/Lorenz Prüss
Lorenz M. Prüss, Esq.

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Attorneys:	Representing:
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Frederick D. Hyman Jason I. Kirschner Jean-Marie L. Atamian **MAYER BROWN LLP** 1675 Broadway New York, NY 10019-5820 Tele: (212) 506-2500 Fax: (212) 261-1910	Appellee Sumitomo Mitsui Banking Corporation
Stephen Trivett Maher Robert Gerald Fracasso, Jr. **SHUTTS & BOWEN** 201 S Biscayne Boulevard Suite 1500 Miami Center Miami, FL 33131 Tele: (305) 358-6300 Fax: (305) 381-9982	Appellee Sumitomo Mitsui Banking Corporation
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ELEVENTH CIRCUIT TRANSCRIPT INFORMATION FORM

PART I. TRANSCRIPT ORDER INFORMATION

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Short Case Style: Avenue CLO Fund, Ltd., et al. vs Bank of America, N.A.

District Court No.: 09-cv-23835; 09-md-02106 Date Notice of Appeal Filed: 3/22/12 Court of Appeals No.: _____ (If Available)

CHOOSE ONE: ☐ No hearing ☐ No transcript is required for appeal purposes ☐ All necessary transcript(s) on file
☑ I AM ORDERING A TRANSCRIPT OF THE FOLLOWING PROCEEDINGS:

Check appropriate box(es) and provide all information requested:

	HEARING DATE(S)	JUDGE/MAGISTRATE	COURT REPORTER NAME(S)
☐ Pre-Trial Proceedings	11/18/2011	Hon. Alan S. Gold	Joseph A. Millikan
☐ Trial			
☐ Sentence			
☐ Other			

METHOD OF PAYMENT:

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☐ CRIMINAL JUSTICE ACT. Attached for submission to District Judge/Magistrate is my completed CJA Form 24 requesting authorization for government payment of transcript. [A transcript of the following proceedings will be provided ONLY IF SPECIFICALLY AUTHORIZED in Item 13 on CJA Form 24: Voir Dire; Opening and Closing Statements of Prosecution and Defense; Prosecution Rebuttal; Jury Instructions.]

Ordering Counsel/Party: Lorenz Pruss
Name of Firm: Dimond Kaplan & Rothstein, P.A.
Street Address/P.O. Box: 2665 South Bayshore Drive
City/State/Zip Code: Miami, Florida 33133 Phone No. : (305) 374-1920

I certify that I have completed and filed PART I with the District Court Clerk, sent a copy to the appropriate Court Reporter(s) if ordering a transcript, mailed a filed copy to the Court of Appeals Clerk, and served all parties.

DATE: March 28, 2012 SIGNED: s/Lorenz Pruss Attorney for: Plaintiffs/Appellants

PART II. COURT REPORTER ACKNOWLEDGMENT

Court Reporter to complete and file with the District Court Clerk within 14 days of receipt. The Court Reporter shall send a copy to the Court of Appeals Clerk and to all parties.

Date Transcript Order received: 03.29.12
☒ Satisfactory arrangements for paying the cost of the transcript were completed on: 03.29.12
☐ Satisfactory arrangements for paying the cost of the transcript have not been made.
No. of hearing days: One Estimated no. of transcript pages: 80 Estimated filing date: Transcript Already on File, DE 335

DATE: 03.29.12 SIGNED: Joseph A. Millikan Phone No. : 305.523.5588

NOTE: The transcript is due to be filed within 30 days of the date satisfactory arrangements for paying the cost of the transcript were completed unless the Court Reporter obtains an extension of time to file the transcript.

PART III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN DISTRICT COURT

Court Reporter to complete and file with the District Court Clerk on date of filing transcript in District Court. The Court Reporter shall send a copy to the Court of Appeals Clerk on the same date.

This is to certify that the transcript has been completed and filed with the district court on (date): Transcript Already on File, DE 335

Actual No. of Volumes and Hearing Dates: One, November 18, 2011

Date: 03.29.12 Signature of Court Reporter: Joseph A. Millikan

Rev. 9/11

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **ELEVENTH CIRCUIT TRANSCRIPT INFORMATION FORM** 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: March 28, 2012

s/Lorenz Prüss
Lorenz M. Prüss, Esq.

SERVICE LIST

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Bradley J. Butwin Daniel L. Cantor Jonathan Rosenberg William J. Sushon Ken Murata Asher Rivner **O'MELVENY & MYERS LLP** Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Appellees Bank of America, N.A. Merrill Lynch Capital Corporation
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/GOODMAN

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

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

/

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al.*, Case No. 09-23835-CIV-GOLD/GOODMAN, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the *Final Judgment* entered on March 19, 2012 and docketed on March 20, 2012 in both the multidistrict litigation [Case No. 09-md-02106- GOLD/GOODMAN, D.E. # 341] and the underlying case [Case No. 09-23835-CIV-GOLD/GOODMAN, D.E. # 128], and the related *MDL Order Number 62: Omnibus Order Granting Bank of America's Motion for Summary Judgment[ECF No. 255] and Denying Term Lenders' Motion for Partial Summary Judgment [ECF No. 258]; Closing Case* entered and docketed on March 19, 2012 in the multidistrict litigation [Case No. 09-md-02106-GOLD/GOODMAN, D.E. # 339 & 340].

This Notice of Appeal has simultaneously been filed and docketed in both the multidistrict litigation case, Case No. 09-md-02106- GOLD/GOODMAN, and the underlying case, Case No. 09-23835-CIV-GOLD/GOODMAN, as the above referenced *Final Judgment* was entered and docketed in both cases.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

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

JOINT MOTION FOR EXTENSION OF DEADLINE FOR SUBMITTING BILL OF COSTS

Plaintiffs in *Avenue CLO Fund, Ltd. v. Bank of America, N.A.*, Case No. 09-CV-23835-ASG (the "*Avenue* Action"), and defendant Bank of America, N.A. ("BANA") submit this joint motion respectfully requesting that the Court extend BANA's deadline for filing its bill of costs under Federal Rule of Civil Procedure 54(d)(1) and Southern District of Florida Local Rule 7.3(c).

WHEREAS, on March 19, 2012, the Court issued MDL Order Number 62 [ECF No. 340] granting BANA's motion for summary judgment and denying Plaintiffs' motion for partial summary judgment; and

WHEREAS, later that day, the Court entered judgment in favor of BANA and against Plaintiffs [ECF No. 341];

WHEREAS, the parties are continuing to meet and confer as required by Southern District of Florida Local Rule 7.1(a) regarding certain costs BANA is seeking to recover under 19 U.S.C. § 1920; and

WHEREAS, the parties have reached an agreement concerning BANA's time to file its bill of costs.

NOW, THEREFORE, the undersigned parties hereby respectfully request that this Court approve the following extension:

1. The parties respectfully request that BANA's time to file its bill of costs be extended to and including April 30, 2012 to allow the parties to continue meeting and conferring.

Dated: April 18, 2012

Respectfully submitted,

By: /s/ Jamie Zysk Isani

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- *and* -

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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-

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

[Electronically filed by Jamie Zysk Isani with consent of the parties.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS
_____/

[PROPOSED] ORDER EXTENDING BANA'S TIME FOR SUBMITTING BILL OF COSTS

THIS MATTER came before the Court for consideration upon the Joint Motion for Extension of BANA's Time For Submitting Bill of Costs [DE __] (the "Motion") filed by Plaintiffs in *Avenue CLO Fund, Ltd. v. Bank of America, N.A.*, Case No. 09-CV-23835-ASG 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. BANA's time to file its bill of costs be extended to and including April 30, 2012 .

DONE and ORDERED in Chambers in Miami, Florida this ___ day of _____, 2012.

_____
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 relates to 09-CV-23835-ASG.

_____ /

MDL ORDER NO. 62; GRANTING JOINT MOTION FOR EXTENSION OF TIME FOR SUBMITTING BILL OF COSTS [ECF NO. 348]; STAYING MOTION FOR COSTS

This Cause is before the Court upon the parties' Joint Motion for Extension of Deadline for Submitting Bill of Costs [ECF No. 348], in which Bank of America requests until April 30, 2012 to file its Motion for Costs pursuant to Local Rule 7.3 and Federal Rule of Civil Procedure 54(d). I grant the Motion for Extension of Time. However, noting the Final Judgment [ECF No. 341] has been appealed [ECF No. 342] ("Appeal"), and Bank of America's entitlement to costs is predicated on judgment in its favor, I *sua sponte* stay the Motion for Costs pending resolution of the Appeal. Accordingly, it is hereby ORDERED AND ADJUDGED that:

1. The Motion for Extension of Time [ECF No. 348] is **GRANTED** and Bank of America shall have until **April 30, 2012** to file its Motion for Costs.
2. Upon filing of the Motion for Costs, the Motion for Costs and all further related briefing shall be **STAYED** pending resolution of the Appeal.
3. Within **five days** of resolution of the Appeal, the parties shall **FILE** a notice with the Court indicating the same.
4. This case shall remain **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of April, 2012.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: Magistrate Judge Goodman
All Counsel of Record