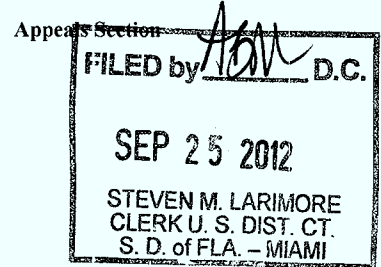




UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

STEVEN M. LARIMORE
Clerk of Court



Date: 9/12/2012

Clerk, United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

COR/ROA

IN RE:

Dist. Court No: 09-02106-MD - ASG 09-23835-CV ASG

U.S.C.A. No: 12-11815-AA

Style: AVENUE CLO IV LTD ET AL V BANK OF AMERICA

CERTIFICATE OF READINESS AND TRANSMITTAL OF RECORD ON APPEAL

Pursuant to Fed. R. App. P. 11(c), the Clerk of the District Court for the Southern District of Florida hereby certifies that, as shown on the enclosed index, the record is complete for purposes of this appeal. The record (including the transcript or parts thereof designated for inclusion and all necessary exhibits) consists of:

- 4 Volume(s) of pleadings
- 5 Volume(s) of Transcripts
- Exhibits: 5 boxes; 4 folders;
- 0 envelopes; 0 PSIs (sealed)
- other: _____
- other: (5)BOXES CONTAINING SEALED DOCUMENTS
- Other: (4)ACC FOLDERS DE# 77,94,99,101,115,250,340,350

Certified to be a true and correct copy of the document on file
 Steven M. Larimore, Clerk,
 U.S. District Court
 Southern District of Florida
 By: [Signature]
 Deputy Clerk
 Date: 9/12/12
 Deputy Clerk

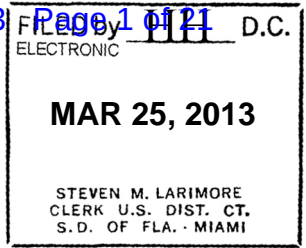
Attachment
c: court file

S/F A-15
Rev. 10/94

400 N. Miami Avenue
Miami, FL 33128-7716
305-523-5080

299 E. Broward Boulevard
Ft. Lauderdale, FL 33301
954-769-5413

701 Clematis Street
West Palm Beach, FL 33401
561-803-3408



**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 25, 2013

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 11-10468-AA ; 11-10740 -AA
Case Style: Avenue CLO Fund, Ltd., et al v. Bank of America, NA, et al
District Court Docket No: 1:09-cv-23835-ASG
Secondary Case Number: 1:09-md-02106-ASG

The enclosed judgment is hereby issued as the mandate of this court.

The record on appeal will be returned to you at a later date.

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being mailed to counsel and pro se parties. A copy of the court's decision was previously mailed to counsel and pro se parties on the date it was issued.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Eleanor Dixon/jsc
Phone #: (404) 335-6172

Enclosure(s)

MDT-1 Letter Issuing Mandate

**UNITED STATES COURT OF APPEALS
For the Eleventh Circuit**

No. 11-10468

District Court Docket Nos.
1:09-cv-23835-ASG,
1:09-md-02106-ASG

AVENUE CLO FUND LTD.,
AVENUE CLO II, LTD.,
AVENUE CLO III, LTD.,
AVENUE CLO IV, LTD.,
AVENUE CLO V, LTD.,
AVENUE CLO VI, LTD.,
BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.,
BATTALION CLO 2007-I LTD.,
CASPIAN CORPORATE LOAN FUND, LLC.,
CASPIAN CAPITAL PARTNERS, L.P.,
CASPIAN SELECT CREDIT MASTER FUND, LTD.,
ING PRIME RATE TRUST,
ING SENIOR INCOME FUND,
ING INTERNATIONAL (II) -SENIOR BANK LOANS EURO,
ING INVESTMENT MANAGEMENT CLO I, LTD.,
ING INVESTMENT MANAGEMENT CLO II, LTD.,
ING INVESTMENT MANAGEMENT CLO III, LTD.,
ING INVESTMENT MANAGEMENT CLO IV, LTD.,
ING INVESTMENT MANAGEMENT CLO V, LTD.,
VENTURE II CDO 2002, LIMITED,
VENTURE III CDO LIMITED,
VENTURE IV CDO LIMITED,
VENTURE V CDO LIMITED,
VENTURE VI CDO LIMITED,
VENTURE VII CDO LIMITED,
VENTURE VIII CDO LIMITED,
VENTURE IX CDO LIMITED,
VISTA LEVERAGED INCOME FUND,
VEER CASH FLOW CLO, LIMITED,
MARINER LDC,
MARINER OPPORTUNITIES FUND,L.P.,
GENESIS CLO 2007-1 LTD.,
CANPARTNERS INVESTMENTS IV, LLC,
CANYON CAPITAL ADVISORS, LLC.,
CANYON SPECIAL OPPORTUNITIES MASHTER FUND (CANYON), LTD.,
SCROGGIN CAPITAL MANAGEMENT II,

SCROGGIN INTERNATIONAL FUND LTD.,
SCROGGIN WORLDWIDE FUND LTD.,
CANTOR FITZGERALD SECURITIES,
OLYMPIC CLO I, LTD.,
SHASTA CLO I, LTD.,
WHITNEY CLO I LTD.,
SAN GABRIEL CLO I LTD.,
SIERRA CLO II LTD.,
SPCP GROUP, LLC,
STONE LION PORTFOLIO L.P.,
VENURE CAPITAL MASTER FUND, LTD.,

Plaintiffs - Appellants,

SANDS POINT FUNDING LTD., et al.,

Plaintiffs,

versus

BANK OF AMERICA,
NA, MERRILL LYNCH CAPITAL CORP.,
JPMORGAN CHASE BANK, N.A.,
BARCLAYS BANK, PLC,
DEUTSCHE BANK TRUST COMPANY AMERICAS,
ROYAL BANK OF SCOTLAND GROUP PLC, et al.,

Defendants - Appellees.

No. 11-10740

District Court Docket Nos.
1:10-cv-20236-ASG,

1:09-md-02106-ASG

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.,
MONARCH MASTER FUNDING, LTD.,
VENOR CAPITAL MASTER FUND, LTD., et al.,

Plaintiffs - Appellants,

versus

BANK OF AMERICA, NA,
MERRILL LYNCH CAPITAL CORP.,
JPMORGAN CHASE BANK, N.A.,
BARCLAYS BANK, PLC,
DEUTSCHE BANK TRUST COMPANY AMERICAS, et al.,

Defendants - Appellees.

Appeals from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: February 20, 2013
For the Court: John Ley, Clerk of Court
By: Djuanna Clark

Issued as Mandate:
March 25, 2013

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-10468

D.C. Docket Nos. 1:09-cv-23835-ASG,

1:09-md-02106-ASG

AVENUE CLO FUND LTD.,
AVENUE CLO II, LTD.,
AVENUE CLO III, LTD.,
AVENUE CLO IV, LTD.,
AVENUE CLO V, LTD.,
AVENUE CLO VI, LTD.,
BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.,
BATTALION CLO 2007-I LTD.,
CASPIAN CORPORATE LOAN FUND, LLC.,
CASPIAN CAPITAL PARTNERS, L.P.,
CASPIAN SELECT CREDIT MASTER FUND, LTD.,
ING PRIME RATE TRUST,
ING SENIOR INCOME FUND,
ING INTERNATIONAL (II) -SENIOR BANK LOANS EURO,
ING INVESTMENT MANAGEMENT CLO I, LTD.,
ING INVESTMENT MANAGEMENT CLO II, LTD.,
ING INVESTMENT MANAGEMENT CLO III, LTD.,
ING INVESTMENT MANAGEMENT CLO IV, LTD.,
ING INVESTMENT MANAGEMENT CLO V, LTD.,
VENTURE II CDO 2002, LIMITED,
VENTURE III CDO LIMITED,
VENTURE IV CDO LIMITED,
VENTURE V CDO LIMITED,
VENTURE VI CDO LIMITED,
VENTURE VII CDO LIMITED,
VENTURE VIII CDO LIMITED,

VENTURE IX CDO LIMITED,
VISTA LEVERAGED INCOME FUND,
VEER CASH FLOW CLO, LIMITED,
MARINER LDC,
MARINER OPPORTUNITIES FUND,L.P.,
GENESIS CLO 2007-1 LTD.,
CANPARTNERS INVESTMENTS IV, LLC,
CANYON CAPITAL ADVISORS, LLC.,
CANYON SPECIAL OPPORTUNITIES MASHTER FUND (CANYON), LTD.,
SCROGGIN CAPITAL MANAGEMENT II,
SCROGGIN INTERNATIONAL FUND LTD.,
SCROGGIN WORLDWIDE FUND LTD.,
CANTOR FITZGERALD SECURITIES,
OLYMPIC CLO I, LTD.,
SHASTA CLO I, LTD.,
WHITNEY CLO I LTD.,
SAN GABRIEL CLO I LTD.,
SIERRA CLO II LTD.,
SPCP GROUP, LLC,
STONE LION PORTFOLIO L.P.,
VENOR CAPITAL MASTER FUND, LTD.,

Plaintiffs - Appellants,

versus

BANK OF AMERICA, NA,
MERRILL LYNCH CAPITAL CORP.,
JPMORGAN CHASE BANK, N.A.,
BARCLAYS BANK, PLC,
DEUTSCHE BANK TRUST COMPANY AMERICAS,
ROYAL BANK OF SCOTLAND GROUP PLC, et al.,

Defendants - Appellees.

No. 11-10740

D.C. Docket Nos. 1:10-cv-20236-ASG,

1:09-md-02106-ASG

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.,
MONARCH MASTER FUNDING, LTD.,
VENOR CAPITAL MASTER FUND, LTD., et al.,

Plaintiffs - Appellants,

versus

BANK OF AMERICA, NA,
MERRILL LYNCH CAPITAL CORP.,
JPMORGAN CHASE BANK, N.A.,
BARCLAYS BANK, PLC,
DEUTSCHE BANK TRUST COMPANY AMERICAS, et al.,

Defendants - Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(February 20, 2013)

Before TJOFLAT, MARTIN and BUCKLEW,* Circuit Judges.

MARTIN, Circuit Judge:

* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

This case presents more fallout from the failure of the ambitious Fontainebleau development in Las Vegas, Nevada. In this appeal, we address a contract dispute and two District Court decisions. The contract was entered into by appellants Avenue CLO Fund, Ltd., and others, who provided term loans (the Term Lenders); the appellee Bank of America, N.A., and others, who provided revolving loans (the Revolving Lenders); and Fontainebleau Las Vegas LLC and Fontainebleau Las Vegas II LLC, who borrowed the money (the Borrowers). The Borrowers are represented here by Soneet R. Kapila, who is the Chapter 7 Bankruptcy Trustee for the Fontainebleau Estate. In separate actions, the Borrowers and the Term Lenders sued the Revolving Lenders for breach of contract. In one case, the District Court dismissed the Term Lenders' claims against the Revolving Lenders, finding that the Term Lenders lacked standing to sue. In the other case, the District Court denied the Borrowers' motion for summary judgment against the Revolving Lenders, rejecting the Borrowers' argument that the Revolving Lenders had breached the contract as a matter of law and alternatively finding there are material issues of fact about whether the Revolving Lenders breached the contract. After careful review, and having had the benefit of oral argument, we affirm both rulings by the District Court.

I. BACKGROUND

A. FACTS

The Borrowers were the owners and developers of a casino-resort to be built in Las Vegas, Nevada (the Project). The Project was funded through a series of agreements, including a Credit Agreement and a Disbursement Agreement. These agreements set the terms by which the Borrowers could borrow the funds needed to complete the Project.

Here, the parties dispute the meaning of section 2 of the Credit Agreement, through which the Revolving Lenders promised to lend the Borrowers money by an agreed-upon process, once the Borrowers satisfied certain conditions. Specifically, under section 2.1(c)(iii) of the Credit Agreement, “each Revolving Lender severally agree[d] to make Revolving Loans . . . to Borrowers . . . provided that . . . unless the Total Delay Draw Commitments [had] been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed \$150,000,000.”

On March 2, 2009, the Borrowers requested \$350 million in Delay Draw Term Loans and \$670 million in Revolving Loans.¹ The next day, Bank of America, as Administrative Agent,² rejected the Borrowers’ request, explaining

¹ The next day, the Borrowers re-submitted their request to correct a “scrivener’s error” by reducing their Revolving Loan request to \$656,522,698. Bank of America rejected the Borrowers’ March 3, 2009 request—which corrected the scrivener’s error—for the same reason it rejected the March 2, 2009 request.

² The Credit and Disbursement Agreements established the Bank of America as both a Revolving Lender and the Administrative Agent. The contract provided that the Borrowers would submit lending requests to Bank of America as Administrative Agent. Then, Bank of America as

that the request did not comply with Section 2.1(c)(iii) of the Credit Agreement, by which the parties agreed that the outstanding principal amount of all Revolving Loans would not exceed \$150 million unless the Total Delay Draw Commitments had been fully drawn. In other words, the Bank of America denied the Borrowers' request because it asked for Delay Draw Term Loans and Revolving Loans at the same time. The Borrowers responded to Bank of America's rejection, stating that their request complied with the Credit Agreement because "fully drawn" meant "fully requested," not "fully funded." Thus, the Borrowers argued then, as they do now, that the simultaneous request for the Delay Draw Term Loans and the remainder of the Revolving Loans was in compliance with the Credit Agreement.³

During March and April 2009, the parties talked about the financial condition of the Project. On April 20, 2009, the Revolving Lenders told the Administrative Agent that the Borrowers had defaulted on the lending conditions. As a result, the Revolving Lenders refused to give more funding to the Borrowers and the Project collapsed.

Administrative Agent would notify each lender of the request so that the lender could make its pro rata share of the funds available to the Administrative Agent. Then, "[u]pon satisfaction or waiver of the applicable conditions precedent specified in Section 2.1," the Administrative Agent was to make the funds available in the Bank Proceeds Account, as consistent with the conditions set forth in the Disbursement Agreement.

³ Specifically, the Borrowers responded: "To be clear, Section 2.1(c)(iii) does not require the Delay Draw Term Loan Commitment to have been funded prior to drawing down the Revolving Loans; instead, this provision restricts the outstanding amount of the Revolving Loans unless the Total Delay Draw Commitments have been fully drawn." (emphasis in original).

B. PROCEDURAL HISTORY

On June 9, 2009, the Borrowers filed for bankruptcy in the Southern District of Florida and sued the Revolving Lenders in that proceeding. The Borrowers alleged that the Revolving Lenders breached their contract by, among other things, refusing to fund the loan payment on March 2, 2009. On June 10, 2009, the Borrowers moved for summary judgment in Bankruptcy Court, seeking a judgment that the Revolving Lenders breached the Credit Agreement by failing to fund the Borrowers' March 2, 2009 request and asking for a Turnover Order pursuant to section 542 of the Bankruptcy Code. Next, the District Court for the Southern District of Florida withdrew the reference to the Bankruptcy Court and took over the case. On August 26, 2009, the District Court denied the Borrowers' motion for partial summary judgment and request for an order directing the turnover of funds.

In separate law suits, various Term Lenders sued the Revolving Lenders. Avenue CLO Fund, Ltd., and others, sued the Revolving Lenders in the District of Nevada. ACP Master, Ltd., and others, sued the Revolving Lenders in the Southern District of New York. On December 2, 2009, these cases were merged into a multi-district litigation action in the Southern District of Florida. The Revolving Lenders then moved to dismiss the Term Lenders' complaints. On May 28, 2010, the District Court dismissed with prejudice the Delay Term Lenders' claims against the Revolving Lenders, finding that the Term Lenders had no

standing to enforce the Revolving Lenders' promise to lend to the Borrowers because the Term Lenders were not the intended beneficiaries of that promise.

The Borrowers filed a notice of appeal on October 18, 2010. The Term Lenders filed a notice of appeal on January 19, 2011. We consolidated the two appeals, and have now had the benefit of the parties' oral arguments.

II. DISCUSSION

We review the District Court's dismissal for lack of standing de novo. Wright v. Dougherty Cnty., Ga., 358 F.3d 1352, 1354 (11th Cir. 2004). We also review the District Court's summary judgment decision de novo, applying the same legal standard as the District Court. See Durruthy v. Pastor, 351 F.3d 1080, 1084 (11th Cir. 2003). "The interpretation of a contract is a question of law that the court reviews de novo." Daewoo Motor Am. v. Gen. Motors Corp., 459 F.3d 1249, 1256 (11th Cir. 2006). The parties agree that New York law governs the interpretation of the contract.

A. DISMISSAL OF THE TERM LENDERS' CLAIMS AGAINST THE REVOLVING LENDERS FOR LACK OF STANDING

To establish standing for Article III purposes, the Term Lenders must show that they held a legally protected interest in the Credit Agreement which was injured by the Revolving Lenders. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992); Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168, 173 (2d Cir. 2005) ("[A] plaintiff

must have standing under both Article III of the Constitution and applicable state law in order to maintain a [breach of contract] cause of action.”). We look to New York law to determine if the Term Lenders had a legally protected interest in the Credit Agreement that allows them to sue the Revolving Lenders. See Mid-Hudson Catskill, 418 F.3d at 173. Under New York law, the Term Lenders may enforce a promise made in the Credit Agreement if either the contract language “clearly evidences an intent to permit enforcement” by the Term Lenders or if no other party may recover for the alleged breach of contract. See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 45 (N.Y. 1985).

The Term Lenders argue that the parties intended for them to enforce section 2.1(c) of the Credit Agreement. Specifically, they assert that the Term Lenders were the intended beneficiaries of the Revolving Lenders’ promise to lend to the Borrowers. Because the intended beneficiary of a promise may enforce that agreement, the Term Lenders argue that they have standing to enforce the section 2.1(c) promise. While they concede that the language of section 2.1(c) “says nothing about whether the parties intended to give the Term Lenders the benefit of that obligation,” the Term Lenders point to a separate provision in the Credit Agreement and provisions in the Disbursement Agreement to argue that they were the intended beneficiaries of the section 2.1(c) promise.

First, the Term Lenders direct us to section 10.6(a) of the Credit Agreement, which provides that “[t]he provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.” From this, the Term Lenders argue that “all parties are intended beneficiaries of all provisions” of the Credit Agreement. However, we are not persuaded by this because the broad-sweeping language in section 10.6(a) does not clearly show the parties’ intent for the Term Lenders to enforce or benefit from the promise of the Revolving Lenders to fund the Borrowers. Stainless, Inc. v. Emp’r Fire Ins. Co., 418 N.Y.S.2d 76, 80 (N.Y. App. Div. 1979) (“The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions.”). Certainly, the Term Lenders’ argument that all parties were intended beneficiaries of section 2.1(c) does not support the conclusion that the Term Lenders are the only party able to recover under that provision. See Fourth Ocean Putnam Corp., 66 N.Y.2d at 45.

Second, the Term Lenders point to sections 2.3(d) and 10.5 of the Disbursement Agreement. Generally, the Disbursement Agreement was structured so that Disbursement Agreement Loans were paid into a Bank Proceeds Account. The Borrowers could not access the funds in this account until they fulfilled several conditions. During this time, the Lenders held a ratable security interest in funds in the Bank Proceeds Account, which provided additional security for the

Lenders “[t]o secure the payment and performance of each Borrower’s obligations.” Based on this, the Term Lenders argue that they were the intended beneficiaries of the loan from the Revolving Lenders to the Borrowers because while the funds were in the Bank Proceeds Account, the Term Lenders gained the benefit of a ratable security interest in that account.

Again, we look to the language of the contract and find no express intention of the parties that the Term Lenders be the beneficiaries of the Revolving Lenders’ promise to fund the Borrowers under section 2.1(c). See Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Mach. Co., 46 N.E. 952, 955 (N.Y. 1897) (“Whether the right or privilege conferred by the promise of one party to a tripartite contract belongs to one or both of the other contracting parties depends upon the intention as gathered from the words used.”); see also Stainless, Inc., 418 N.Y.S.2d at 80 (“The intention to benefit the third party must appear from the four corners of the instrument.”).⁴ That the Term Lenders may have indirectly benefitted from a promise between the Revolving Lenders and Borrowers makes them incidental beneficiaries, not intended beneficiaries. See Salzman v. Holiday Inns, Inc., 369 N.Y.S.2d 238, 261–62 (N.Y. App. Div. 1975) (“An incidental

⁴ The Term Lenders ask us to consider the circumstances surrounding the contract. However, we consider the background circumstances only when the language of the contract is ambiguous. Berry Harvester Co., 46 N.E. at 955. Like the District Court we find no ambiguity in the language of section 2.1(c) about the intended beneficiary, as it provides that “each Revolving Lender severally agrees to make Revolving Loans . . . to Borrowers from time to time during the Revolving Commitment Period.” (emphasis added).

beneficiary is a person who may derive benefit from the performance of a contract though he is neither the promisee nor the one to whom performance is to be rendered”). As incidental beneficiaries, the Term Lenders are not in a position to require the performance of the Revolving Lenders. See id. Beyond that, the Term Lenders are not the only party able to recover for the breach. This consolidated appeal also includes the Borrowers’ suit against the Revolving Lenders for the purported breach of section 2.1(c), suggesting that other parties are able to recover for the alleged breach of contract.⁵ Cf. Fourth Ocean Putnam Corp., 66 N.Y.2d at 45. Thus, we have concluded that the Term Lenders lack standing to enforce the section 2.1(c) promise and affirm the District Court’s dismissal of the breach of contract claims of the Term Lenders’ complaint.

B. DENIAL OF THE BORROWERS’ MOTION FOR SUMMARY JUDGMENT AGAINST THE REVOLVING LENDERS AND MOTION FOR TURNOVER

The Borrowers urge us to find that the Revolving Lenders broke their promise to fund under section 2.1(c)(iii) when they did not lend to the Borrowers

⁵ The Term Lenders argue that they are the only party able to enforce the section 2.1(c)(iii) promise. Specifically, they suggest that the Revolving Lenders breached because they were required to fund the Borrowers, even though the Borrowers also breached by failing to disclose an event of default. Because the Term Lenders are the only non-breaching party in this scenario, the Term Lenders argue that they are the only party that may recover under section 2.1(c)(iii). By way of this argument, the Term Lenders essentially ask us to assume the outcome of an ongoing contract dispute and decide that the Term Lenders have standing on the basis of this assumption. This we will not do. The language of the section 2.1(c)(iii) reveals an “intent to permit enforcement” by the Borrowers. Fourth Ocean Putnam Corp., 66 N.Y.2d at 45.

We therefore conclude that the Term Lenders are not the only party able to enforce the section 2.1(c)(iii) promise.

on March 2, 2009. Specifically, the Borrowers say that the Revolving Lenders were required to fund once the Borrowers simultaneously requested funds from the Delay Draw Term Loans and the Revolving Loans. The Revolving Lenders respond that they were right to reject the Borrowers' request because the Credit Agreement did not allow for this type of simultaneous request. After careful review, we have concluded that the relevant terms of the Credit Agreement are ambiguous. For this reason, we decline to hold, as a matter of law, that the Revolving Lenders breached the Credit Agreement when they did not fund the March 2, 2009 request.

The provision of the Credit Agreement at issue, section 2.1(c)(iii), requires the Revolving Lenders to make Revolving Loans to the Borrowers "unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed \$150,000,000." Section 2.1(c)(iii) is found within section 2, which contains three provisions about the "amount and terms of [the loan] commitments" between the Lenders and Borrowers. Subsection (a) governs the disbursement of the Initial Term Loans, which were given to the Borrowers after the execution of the Credit Agreement. Subsection (b) describes the disbursement process for Delay Draw Term Loans. In relevant part, subsection (b) provides that "the proceeds of each Delay Draw Term Loan will be applied first to repay any then outstanding

Revolving Loans . . . and [any remaining funds will] second be credited to the Bank Proceeds Account.” (emphasis in original). Subsection (c) covers Revolving Loans and explains that the Revolving Lenders will make Revolving Loans to the Borrowers provided that “unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed \$150,000,000.”

The Revolving Lenders argue that subsections (b) and (c) of the Credit Agreement establish a “sequential funding process” by which the Revolving Loans were the last loans to be funded to the Borrowers. The Revolving Lenders urge us to read subsection (b)(i), which requires loans under the Delay Draw Commitments to be \$150 million or greater, together with subsection (c)(iii), which provides that the Revolving Loans must not exceed \$150 million “unless the Total Delay Draw Commitments have been fully drawn.” When read in context, the Revolving Lenders assert that the Delay Draw Term Loan Commitments could not be “fully drawn” under subsection (c)(iii) “until there were no funds left to pay off the \$150 million.”⁶ Thus, a simultaneous request for all of the funds from the Delay Draw Term Loans and all of the funds from the Revolving Loans is not allowed under

⁶ This reasoning was articulated by the District Court in concluding that the term “fully drawn” means “fully funded.” On appeal, the Revolving Lenders adopt this position in urging us to agree with the District Court’s interpretation.

the contract because the Delay Draw Term Loans are used to repay the Revolving Loans.

The Borrowers argue that the funding arrangement established through subsections (b) and (c) created a continuous flow-of-funds structure. The Borrowers appear to agree that the contract established a “sequential funding process,” but say that the sequential process did not allow for the funding to stop when there was a simultaneous request for Revolving and Delay Draw Term Loans. Rather, the Borrowers assert that the Delay Draw Term Loans were only required to cover the Revolving Loans that were outstanding at the time the Borrowers requested the loan. In March 2009, the Borrowers argue that the Delay Draw Term Loans would have satisfied the outstanding Revolving Loan, meaning that the remainder of available funds should have been placed in the Bank Proceed Account to be disbursed to the Borrowers. Because the Revolving Lenders’ interpretation of subsections (b) and (c) stopped the lending, the Borrowers argue it is at odds with the purpose of the agreement, which was to provide a steady flow of funds to the Borrowers.

The Borrowers also present several arguments why the phrase “fully drawn” in section 2.1(c)(iii) unambiguously means “fully requested.” The Borrowers’ primary argument is that the word “outstanding” is used other places in the contract to mean “funded.” Because “outstanding” means “funded,” the Borrowers

argue that the word “drawn” must mean “requested.” The Revolving Lenders respond that “drawn” and “outstanding” have different meanings because they are used to describe loans that have different features.⁷

This seems to us a reasonable basis for disagreement over the interpretation of the Revolving Lenders’ section 2.1(c)(iii) obligation and so we conclude that the meaning of the provision is ambiguous. See Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (N.Y. 2002) (explaining that a contract is unambiguous when it has a “definite and precise meaning”). This is in keeping with New York law which instructs that when there is a “reasonable basis for a difference of opinion” attended by a “danger of misconception,” in a contract, it is to be deemed ambiguous. See Breed v. Ins. Co. of N. Am., 46 N.Y.2d 351, 355 (1978); see e.g., Seiden Assoc., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 430 (2d Cir. 1992) (applying New York law in examining the interrelationship between two provisions in an agreement and finding the contract susceptible to more than one meaning and therefore ambiguous).

⁷ The Borrowers have also argued alternatively that the contract required the Revolving Lenders to lend to them even if the Borrowers had entered into default. Specifically, section 2.1 provides that “[t]he making of Revolving Loans which are Disbursement Agreement Loans to the Bank Proceeds Account shall be subject only to the fulfillment of the applicable conditions set forth in Section 5.2.” Section 5.2(a) provides that funding after the submission of a Notice of Borrowing must comply with Section 2. From this, the Borrowers argue that the Revolving Lenders’ obligation to fund was only conditioned by the term set forth in section 2. Because the Borrowers’ failure to disclose an Event of Default was a condition governed by a different section, the Borrowers argue that the Revolving Lenders were obligated to fund because the Borrowers were in non-compliance with a provision outside of section 2. Again, we agree with the District Court that the clause cannot be read to make irrelevant the duties and obligations of the parties which are carefully outlined in several sections of the Credit Agreement.

Where, as here, “the language used is susceptible to differing interpretations . . . and where there is relevant extrinsic evidence of the parties’ actual intent, the meaning of the words become an issue of fact and summary judgment is inappropriate.” Seiden Assoc., 959 F.2d at 428. “Because of the presence of an ambiguity, an opportunity to present extrinsic evidence must be afforded to establish what the original contracting parties intended.” Id. at 430. Based on this, we cannot conclude, as a matter of law, that the Revolving Lenders broke their promise to fund the Borrowers under section 2 of the Credit Agreement. For the same reasons, we also affirm the District Court’s denial of the Borrowers’ request for turnover of the loan proceeds and specific performance.

III. CONCLUSION

We affirm the District Court’s dismissal of the Term Lenders’ claims for lack of standing. We also affirm the District Court’s denial of the Borrowers’ summary judgment motion.

AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303



John Ley
Clerk of Court

August 28, 2013

For rules and forms visit
www.ca11.uscourts.gov

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 12-11815-AA
Case Style: Avenue CLO IV, Ltd, et al v. Bank of America, NA
District Court Docket No: 1:09-md-02106-ASG
Secondary Case Number: 1:09-cv-23835-ASG

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Regina A. Veals-Gillis
Phone #: (404) 335-6163

Enclosure(s)

MDT-1 Letter Issuing Mandate

**UNITED STATES COURT OF APPEALS
For the Eleventh Circuit**

No. 12-11815

District Court Docket No.
1:09-md-02106-ASG

AVENUE CLO FUND, LTD.,
et. al.,

Plaintiffs,

AVENUE CLO IV, LTD.,
AVENUE CLO V, LTD.,
AVENUE CLO VI, LTD.,
BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.,
BATTALION CLO 2007-I LTD.,
CASPIAN CAPITAL PARTNERS, L.P.,
CASPIAN SELECT CREDIT MASTER FUND, LTD.,
ING PRIME RATE TRUST,
ING SENIOR INCOME FUND,
ING INTERNATIONAL (II) -SENIOR BANK LOANS EURO,
ING INVESTMENT MANAGEMENT CLO I, LTD.,
ING INVESTMENT MANAGEMENT CLO II, LTD.,
ING INVESTMENT MANAGEMENT CLO III, LTD.,
ING INVESTMENT MANAGEMENT CLO IV, LTD.,
ING INVESTMENT MANAGEMENT CLO V, LTD.,
VENTURE II CDO 2002, LIMITED,
VENTURE III CDO LIMITED,
VENTURE IV CDO LIMITED,
VENTURE V CDO LIMITED,
VENTURE VI CDO LIMITED,
VENTURE VII CDO LIMITED,
VENTURE VIII CDO LIMITED,
VENTURE IX CDO LIMITED,
VISTA LEVERAGED INCOME FUND,
VEER CASH FLOW CLO, LIMITED,
MARINER LDC,
GENESIS CLO 2007-1 LTD.,
CANPARTNERS INVESTMENTS IV, LLC,
SCROGGIN CAPITAL MANAGEMENT II,
SCROGGIN INTERNATIONAL FUND LTD.,
SCROGGIN WORLDWIDE FUND LTD.,
CASPIAN ALPHA LONG CREDIT FUND, L.P.,

SOLA LTD,
MONARCH MASTER FUNDING, LTD.,
SOLUS CORE OPPORTUNITIES MASTER FUND LTD.,
CANTOR FITZGERALD SECURITIES,
OLYMPIC CLO I, LTD.,
SHASTA CLO I, LTD.,
WHITNEY CLO I LTD.,
SAN GABRIEL CLO I LTD.,
SIERRA CLO II LTD.,
NORMANDY HILL MASTER FUND, L.P.,

SPCP GROUP, LLC,
VENURE CAPITAL MASTER FUND, LTD.,

Plaintiffs - Appellants,

versus

SUMITOMO MITSUI BANKING CORPORATION,
et al.,

Defendants,

BANK OF AMERICA, NA,

Defendant - Appellee.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: July 26, 2013
For the Court: John Ley, Clerk of Court
By: Jeff R. Patch

Issued as Mandate:
August 28, 2013

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-11815

D.C. Docket Nos. 1:09-md-02106-ASG, 1:09-cv-23835-ASG

AVENUE CLO FUND, LTD.,
et. al.,

Plaintiffs,

AVENUE CLO IV, LTD.,
AVENUE CLO V, LTD.,
AVENUE CLO VI, LTD.,
BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.,
BATTALION CLO 2007-I LTD.,
CASPIAN CAPITAL PARTNERS, L.P.,
CASPIAN SELECT CREDIT MASTER FUND, LTD.,
ING PRIME RATE TRUST,
ING SENIOR INCOME FUND,
ING INTERNATIONAL (II) -SENIOR BANK LOANS EURO,
ING INVESTMENT MANAGEMENT CLO I, LTD.,
ING INVESTMENT MANAGEMENT CLO II, LTD.,
ING INVESTMENT MANAGEMENT CLO III, LTD.,
ING INVESTMENT MANAGEMENT CLO IV, LTD.,
ING INVESTMENT MANAGEMENT CLO V, LTD.,
VENTURE II CDO 2002, LIMITED,
VENTURE III CDO LIMITED,
VENTURE IV CDO LIMITED,
VENTURE V CDO LIMITED,
VENTURE VI CDO LIMITED,
VENTURE VII CDO LIMITED,
VENTURE VIII CDO LIMITED,
VENTURE IX CDO LIMITED,
VISTA LEVERAGED INCOME FUND,

VEER CASH FLOW CLO, LIMITED,
MARINER LDC,
GENESIS CLO 2007-1 LTD.,
CANPARTNERS INVESTMENTS IV, LLC,
SCROGGIN CAPITAL MANAGEMENT II,
SCROGGIN INTERNATIONAL FUND LTD.,
SCROGGIN WORLDWIDE FUND LTD.,
CASPIAN ALPHA LONG CREDIT FUND, L.P.,
SOLA LTD,
MONARCH MASTER FUNDING, LTD.,
SOLUS CORE OPPORTUNITIES MASTER FUND LTD.,
CANTOR FITZGERALD SECURITIES,
OLYMPIC CLO I, LTD.,
SHASTA CLO I, LTD.,
WHITNEY CLO I LTD.,
SAN GABRIEL CLO I LTD.,
SIERRA CLO II LTD.,
NORMANDY HILL MASTER FUND, L.P.,

SPCP GROUP, LLC,
VENURE CAPITAL MASTER FUND, LTD.,

Plaintiffs - Appellants,

versus

SUMITOMO MITSUI BANKING CORPORATION,
et al.,

Defendants,

BANK OF AMERICA, NA,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 26, 2013)

Before TJOFLAT and MARTIN, Circuit Judges, and BUCKLEW, * District Judge.

MARTIN, Circuit Judge:

This case is one of many resulting from the failure of the project to build a Fontainebleau Resort in Las Vegas. The Fontainebleau Las Vegas was a hotel and casino development project on an approximately 24.4 acre parcel at the north end of the Las Vegas Strip. Here, a group of lenders and their successors in interest (Term Lenders) appeal the District Court's grant of summary judgment in favor of Bank of America. See In re Fontainebleau Las Vegas Contract Litigation MDL No. 2106, No. 09-MD-02106-CIV, 2012 WL 930290, *1 (S.D. Fla. March 19, 2012). After careful review, and with the benefit of oral argument, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This case is a contract dispute related to the funding of the development of the Fontainebleau Las Vegas (the Project). See In re Fontainebleau, 2012 WL 930290, at *1–49. On one side of the dispute are the Term Lenders, which loaned money to Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (the Borrowers). The Borrowers' parent company, Fontainebleau Resorts, LLC, was the developer of the Fontainebleau Las Vegas. On the other side of the

* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

dispute is Bank of America, which was the Disbursement Agent responsible under the funding agreements for disbursing the Term Lenders' funds to the Borrowers.

A. THE FUNDING STRUCTURE

At the beginning, the Project's budget was \$2.9 billion, with \$1.85 billion to be funded by a senior secured debt facility (Senior Credit Facility).¹ The Senior Credit Facility was set up by the Credit Agreement and consisted of three components: a \$700 million Initial Term Loan Facility; a \$350 million Delay Draw Term Loan Facility; and an \$800 million Revolving Loan Facility.

The Term Lenders own Initial Term Loan and Delay Draw Term Loan notes. The Initial Term Loans were due on the closing date. The Delay Draw Term Loans and Revolving Loans were disbursed on a periodic basis under the terms of the Disbursement Agreement. Bank of America was the Disbursement Agent responsible for distributing the funds under the terms of the Disbursement Agreement.

B. DISPERSING THE MONEY

The process set up for the Borrowers to get the money had a lot of moving parts. The Credit Agreement required the Borrowers to first submit a Notice of Borrowing to the Administrative Agent (Bank of America). This would prompt

¹ The balance of the Project was funded by a \$675 million Second Mortgage Note offering and a \$400 million Retail Facility. The Retail Facility was the sole source of funding for the retail portion of the Fontainebleau Las Vegas. The resort budget included \$83 million in costs that were to be funded through the Retail Facility.

the Term Lenders and/or Revolving Lenders to give the money to the Administrative Agent. If the Notice of Borrowing included the proper information and the Borrowers submitted no more than one Notice per month, the Administrative Agent would transfer the loan funds into the Bank Proceeds Account. One difference between the Delay Draw Term Loans and Revolving Loans was that “the proceeds of each Delayed Draw Term Loan [was] applied first to repay in full any then outstanding Revolving Loans . . . and second, to the extent of any excess, [was] credited to the Bank Proceeds Account.”

Once funds were in the Bank Proceeds Account, the Borrowers had to submit another request, called the Advance Request, which included a series of general representations and certifications, to the Disbursement Agent (Bank of America). When it received the Advance Request, Bank of America, as Disbursement Agent, as well as the Construction Consultant were required to review the Advance Request and determine whether all the required documentation was provided. The Construction Consultant was also required to deliver a certificate to Bank of America either approving or disapproving the Advance Request.

Under the Disbursement Agreement, the next step turned on whether the conditions precedent set forth in Article 3 of the Disbursement Agreement were

satisfied.² If the conditions precedent were met, Bank of America, in its role as Disbursement Agent, was required to execute an Advance Confirmation Notice and the funds would be disbursed to the Borrowers. If, on the other hand, the conditions precedent were not met then Bank of America was required to issue a Stop Funding Notice. Bank of America's duties as Disbursement Agent, with respect to determining whether the conditions precedent were or were not satisfied, is one of the disputes between the parties that will be the subject of our discussion in Part IV.A of this Order.

C. MONEY DISPERSED DURING THE TIME IN DISPUTE

For each Advance Request from September 2008 through March 2009, Bank of America, as Disbursement Agent, received the required Advance Request certifications from the Borrowers, the Construction Consultant, the contractor, and the architect. Throughout this period Bank of America continued to disburse funds to the Borrowers and never issued a Stop Funding Notice.

However, the Term Lenders have pointed to a number of events, beginning in September 2008, which they say "caused the failures of multiple conditions precedent." They delineate these events as: "the Lehman bankruptcy and the

² The conditions included, for example, that "[n]o Default or Event of Default shall have occurred and be continuing"; "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 Fontainebleau, any of which could reasonably be expected to have a Material Adverse Effect"; and "the Retail Agent and the Retail Lenders shall . . . make any Advances required of them." Other conditions that the parties believe are relevant to this case are set forth in §§ 3.3.2, 3.3.8, 3.3.21, and 3.3.24 of the Disbursement Agreement.

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." See In re Fontainebleau, 2012 WL 930290, at *15. How much Bank of America knew about these events is another source of dispute between the parties. That dispute will be the subject of our discussion in Part IV.B of this Order.

In April 2009, the "Total Revolving Commitments" were ended because the Revolving Lenders determined that there had been Events of Default. In May 2009, Bank of America commissioned a "cost-complete review" of the Project, which revealed that Fontainebleau had been concealing cost overruns. Finally, on June 9, 2009, the Borrowers and some of their affiliates filed for bankruptcy.

II. PROCEDURAL HISTORY

On January 15, 2010, the Term Lenders filed a Second Amended Complaint alleging, as relevant to this appeal, that Bank of America breached the Disbursement Agreement.³ Following discovery, the parties filed cross-motions for summary judgment.

³ The Complaint also alleged breach of the Credit Agreement, breach of the implied covenant of good faith and fair dealing, and requested declaratory relief.

The District Court granted summary judgment in favor of Bank of America because it determined that “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.” In re Fontainebleau, 2012 WL 930290, at *26. In reaching that conclusion, the District Court made several preliminary findings. First, the District Court held that “[i]n determining whether the conditions precedent to an Advance Request were satisfied, Bank of America was explicitly authorized to rely on Fontainebleau’s certifications . . . and was explicitly not required to conduct ‘any independent investigation as to the accuracy, veracity, or completeness’ of those certifications.” Id. at *28. Second, the District Court determined that “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.” Id. at *34. Third, the District Court found that there was no evidence on summary judgment that Bank of America breached the Disbursement Agreement by disbursing funds despite having actual knowledge that a condition precedent was not satisfied. Id. at * 35.

The Term Lenders timely filed a Notice of Appeal on March 22, 2012.

III. STANDARD OF REVIEW

“This Court reviews the granting of summary judgment de novo, applying the same legal standards which bound the district court.” Whatley v. CNA Ins. Companies, 189 F.3d 1310, 1313 (11th Cir. 1999). “Summary judgment is appropriate only when there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Id. (quotation marks omitted). “An issue of fact is material if it ‘might affect the outcome of the suit under governing law’” and it is “genuine ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” Western Grp. Nurseries, Inc. v. Ergas, 167 F.3d 1354, 1360 – 61 (11th Cir. 1999) (quoting Anderson v. Liberty Lobby, Inc., 466 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986)).

All “evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment.” Blackston v. Shook and Fletcher Insulation Co., 764 F.2d 1480, 1482 (11th Cir. 1985). The Court “must avoid weighing conflicting evidence or making credibility determinations.” Stewart v. Booker T. Washington Ins., 232 F.3d 844, 848 (11th Cir. 2000). “All reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable.” Blackston, 764 F.2d at 1482 (internal citation omitted).

IV. DISCUSSION

In its appeal, the Term Lenders argue that the District Court erred in granting summary judgment to Bank of America because: 1) it based its determination on a misunderstanding of Bank of America's duties under the Disbursement Agreement; 2) there remain genuine issues of material fact about whether Bank of America breached the Disbursement Agreement; and 3) there remain genuine issues of material fact about whether Bank of America was grossly negligent. We will discuss each of these issues in turn.

A. BANK OF AMERICA'S DUTIES UNDER THE DISBURSEMENT AGREEMENT

In ruling on the summary judgment motion, the District Court necessarily had to determine what Bank of America's duties were under the relevant portions of the Disbursement Agreement. Both parties agree that if the conditions precedent were satisfied, Bank of America was supposed to deliver an Advance Confirmation Notice so that the Term Lenders' funds could be disbursed to the Borrowers. Both parties also agree that if any of the relevant conditions precedent were not satisfied Bank of America was required to issue a Stop Funding Notice. The parties disagree, however, on whether Bank of America had an affirmative duty to determine that the conditions precedent were satisfied or whether Bank of America was permitted to rely on the Borrowers' certifications that the conditions precedent were satisfied unless it had actual knowledge to the contrary.

The District Court determined that “[t]he Disbursement Agreement imposed on Bank of America no duty to inquire or investigate whether [the Borrower’s] representations that all conditions precedent had been met were accurate.” In re Fontainebleau, 2012 WL 930290, at *48. For the reasons set out here, we agree with this determination.

“Under New York Law, the initial interpretation of a contract is a matter of law for the court to decide.” Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd’s, London, 136 F.3d 82, 86 (2d Cir. 1998) (quotation marks omitted).⁴ A court must enforce a contract provision that is “complete, clear and unambiguous on its face . . . according to the plain meaning of the terms.” Greenfield v. Phillies Records, Inc., 780 N.E.2d 166, 170 (N.Y. 2002). When interpreting a contract, a court should look at the whole agreement and try to give meaning to all of the contract’s provisions. See RLI Ins. Co. v. Smiedala, 947 N.Y.S.2d 850, 853 (App. Div. 2012). But, in the face of any 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).

The specific provision of the Disbursement Agreement that most directly addresses this issue is § 9.3.2. That section explains that:

Notwithstanding anything else in this Agreement to the contrary, in performing its duties hereunder, including approving any Advance

⁴ The Disbursement Agreement says that it is to be governed by New York law. [D.A. § 11.6]

Requests . . . the Disbursement Agent shall be entitled to rely on certifications from the Project Entities . . . as to the satisfaction of any requirements and/or conditions imposed by this Agreement.

The clear language of this provision supports Bank of America's interpretation of its duties under the Disbursement Agreement: Bank of America had to determine that the conditions precedent were satisfied, but in doing so it was permitted to rely on the Borrower's certifications.

Bank of America, as Disbursement Agent, would not have been permitted to rely on the Borrowers' certifications that the conditions precedent were met if it had actual knowledge to the contrary. If Bank of America actually knew that a condition precedent was not satisfied, it would not be commercially reasonable to interpret the Agreement to allow Bank of America to disregard that knowledge by pointing to a certification by the Borrower, which it knows to be false. See In re Lipper Holdings, LLC, 766 N.Y.S.2d 561, 562 (App. Div. 2003) (explaining that a contract "should not be interpreted to produce a result . . . commercially unreasonable, or contrary to the reasonable expectations of the parties" (internal citations omitted)).

However, if Bank of America merely had information that was inconsistent with the Borrowers' certification, it did not have an affirmative duty to determine whether the condition precedent was actually satisfied. Section 9.3.2 does not include any language requiring Bank of America, as Disbursement Agent, to verify

the accuracy of the Borrowers' certifications. Instead, immediately following the language quoted above, § 9.3.2 includes language suggesting that the opposite is true:

The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items

In addition, according to § 9.10 of the Agreement, "nothing in this Agreement . . . shall be so construed as to impose" obligations on Bank of America "except as expressly set forth herein."

Under this interpretation of Bank of America's duties as Disbursement Agent, Bank of America would still have to determine whether each condition precedent was satisfied if it did not have a certification it could rely on. For example, as the Term Lenders point out, there are some conditions for disbursement that the Borrowers could not certify, such as the condition in § 3.3.24, requiring that the Bank Agent "receive[] such other documents and evidence as are customary . . . as the Bank Agent may reasonably request." Also, it is not hard to imagine a circumstance in which the Borrowers chose not to give such a certification or where Bank of America had actual knowledge that the certification was false. In situations like these, § 9.3.2 would play no role because there would be no certification Bank of America, as Disbursement Agent, could rely on when determining whether the condition precedent was satisfied. It is

under these circumstances that other provisions of the Agreement – such a § 9.2.1, giving Bank of America the right to review information supporting the Advance Requests, and § 2.5.1, requiring that Bank of America “specify, in reasonable detail, the conditions precedent which [it] has determined have not been satisfied” – would have had more relevance

B. DID BANK OF AMERICA BREACH THE DISBURSEMENT AGREEMENT?

Bank of America was permitted to rely on the Borrowers’ certifications unless it had actual knowledge that the conditions precedent were not satisfied. During the relevant period, the Borrowers certified that the conditions precedent were met. Therefore, Bank of America could have only been in breach by disbursing funds to the Borrowers if it had actual knowledge that the conditions precedent were not satisfied.

In granting summary judgment to Bank of America, the District Court determined that “with all inferences in favor of the Term Lenders, the Term Lenders . . . 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.” In re Fontainebleau, 2012 WL 930290, at *48. For the reasons we will outline here, we have come to a different conclusion.

As detailed in the District Court's thorough opinion, the Term Lenders contend that Bank of America should have stopped disbursing funds to the Borrowers because, at some point between September 2008 and March 2009, Bank of America became aware of certain events, discussed below, that it knew caused the failure of seven separate conditions precedent listed in § 3.3 of the Disbursement Agreement. Id. at *8–9, 15–24. Under the terms of that agreement, once the Bank of America knew that conditions precedent were not satisfied, it was required to issue a Stop Funding Notice to temporarily halt disbursement of the funds.

1. Lehman Brothers' Bankruptcy and Failure to Fund

Lehman Brothers Holdings, Inc. (Lehman) was the largest lender under the Retail Facility and the Administrative Agent of the Retail Facility. No one disputes that Lehman filed for bankruptcy on September 15, 2008. Neither is it disputed that Fontainebleau funded Lehman's approximately \$2.5 million share of the September 2008 Retail Advance and essentially funded Lehman's portion of the Retail Advances from December 2008 through March 2009 by reimbursing ULLICO, a Co-Lender under the Retail Facility, for funding those amounts.

The failure of Lehman may have caused the failure of several conditions precedent in and of itself. For example, Fontainebleau's funding of Lehman's share of the September Retail Advance was a failure of the condition in § 3.3.23, requiring that the Retail Lenders make all advances required of them. Also, if

Lehman's bankruptcy was a "change in the economics" of the Project "which could reasonably be expected to have a Material Adverse Effect," there would have been a failure of the condition in § 3.3.11, requiring that no such change shall have occurred.⁵

What the parties do dispute is whether Bank of America had actual knowledge of these events and whether the impact of these events on the conditions precedent was such that the disbursing of funds constituted a breach of contract. The Term Lenders argue that Bank of America had actual knowledge that Lehman did not fund its share of the September Retail Advance and that Fontainebleau paid the money for Lehman. In support of this view of the facts, the Term Lenders point to a number of things: 1) a series of letters from Highland Capital Management, one of the original term lenders, alerting Bank of America to the serious impact Lehman's bankruptcy could have on the Project and suggesting that Fontainebleau funded Lehman's share of the September Retail Advance; 2) testimony by McLendon Rafeedie, the primary contact at TriMont Real Estate

⁵ The Term Lenders also argue that Lehman's bankruptcy and its failure to fund could have led to the failure of several other conditions precedent in the Disbursement Agreement: § 3.3.21, requiring that the Bank Agent shall not have become aware of information that is materially inconsistent with the information disclosed to them; § 3.3.3, requiring that no "Default or Event of Default" has occurred and is continuing ; and § 3.3.2, requiring that the Borrowers' representation that there was no "Event of Default" was true in all material respects. Our analysis of Bank of America's actual knowledge applies equally to these conditions precedent even though we do not specifically discuss them. The Term Lenders made other arguments on appeal about why genuine issues of material fact remain with respect to Bank of America's knowledge of the failure of these conditions. However, our analysis in this section makes it unnecessary for us to address them.

Advisors, Inc. about TriMont's role as servicer of the Retail Facility, explaining that he knew Fontainebleau funded for Lehman and suggesting that it was possible that he informed Bank of America about this; 3) an October 2008 meeting among executives of Fontainebleau, Bank of America, and certain Retail Co-Lenders where the implications of Lehman's bankruptcy were discussed; and 4) Fontainebleau's suspicious evasiveness on the topic of Lehman's bankruptcy and its nonresponsive answers to Bank of America's questions about who funded Lehman's share of the September Advance.

As the District Court's opinion details, there are ways to discount each of these categories of evidence as showing, at most, a reason that Bank of America should have been suspicious that Fontainebleau funded Lehman's share of the September Retail Advance. See In re Fontainebleau, 2012 WL 930290, at *37–40. However, taken together and viewed in the light most favorable to the Term Lenders, we conclude that this circumstantial evidence creates a genuine issue of material fact with respect to whether Bank of America had actual knowledge that Fontainebleau paid Lehman's share of the September Retail Advance. Cf. United States v. Santos, 553 U.S. 507, 521, 128 S. Ct. 2020, 2029 (2008) (explaining that the “knowledge element” of the offense “will be provable (as knowledge must almost always be proved) by circumstantial evidence”).

Forwarding a similar argument, the Term Lenders also say that Bank of America had actual knowledge that Lehman's bankruptcy was a "change in the economics . . . which could reasonably be expected to have a Material Adverse Effect." To support this proposition, the Term Lenders highlight: 1) the large share of the Retail Facility that Lehman was responsible for funding; 2) contemporaneous statements made by Bank of America employees about the potential impact Lehman's bankruptcy would have on the Project together with their later explanations of those statements; 3) the letters from Highland Capital Management mentioned above; and 4) discussions at the October 2009 meeting (also mentioned above) about the impact of Lehman's bankruptcy on the Project and the Retail Co-Lenders' unwillingness to pay Lehman's portion if Lehman was unable to pay.

The District Court's opinion accurately details how, despite Lehman's bankruptcy, "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." In re Fontainebleau, 2012 WL 930290, at * 17. However, when taken together and viewed in the light most favorable to the Term Lenders, we conclude that the Term Lenders' evidence raises a genuine question of material fact about whether Bank of America had actual knowledge that Lehman's bankruptcy was a

change in the economics of the Project “which could reasonably be expected to have a Material Adverse Effect.” (emphasis added).

2. First National Bank of Nevada’s Repudiation, Cost Overruns, and the Default of Several Delay Draw Term Lenders

That several other events of consequence happened during the period of September 2008 through 2009 is also undisputed. First, in late December 2008, the Federal Deposit Insurance Corporation, which had been appointed as receiver of First National Bank of Nevada (a Delay Draw Term Loan and Revolving Loan Lender), formally repudiated First National Bank of Nevada’s unfunded Senior Credit Facility commitments. These commitments amounted to \$1,666,666 under the Delay Draw Term Loan and \$10,000,000 under the Revolver Loan.

Second, in January and March 2009, the Construction Consultant issued Project Status Reports expressing concerns that the Borrowers’ Anticipated Cost Report did not accurately reflect increases in the Project budget. In March, the Consultant issued a Construction Consultant Advance Certificate declaring that there were material errors in the Advance Request and that the budget did not accurately reflect costs. By the end of March, the Borrowers increased the Project budget by more than \$114,000,000.⁶

⁶ The Borrowers first increased construction costs by \$64,854,000. Based on the Construction Consultant’s Advance Certificate, the Borrowers increased the budget by another \$50,000,000.

Third, in March 2009, the Borrowers submitted a Notice of Borrowing requesting a Delay Draw Term Loan for the entire \$350 million facility. Guggenheim (which controlled five Delay Draw Term Loan investment funds) and Z Capital Finance, LLC (a Delay Draw Term Lender) failed to give Bank of America funds as they were obligated to under the Credit Agreement. Guggenheim's portion of the Delay Draw Term Loan was \$10,000,000 and Z Capital was responsible for \$11,666,666. Despite their failure to fund, Bank of America included these commitments as "Available Funds" to calculate whether the Project was "In Balance."

No one disputes that these events may be relevant to several conditions precedent. For example, if either First National Bank of Nevada's repudiation or Guggenheim's and Z Capital's failures to fund "could reasonably be expected to result in a Material Adverse Effect," this would have been an Event of Default under the Credit Agreement. Based on this, the condition in § 3.3.3 of the Disbursement Agreement would not have been satisfied.⁷ Also, if these events,

⁷ This condition required that "No Default or Event of Default shall have occurred and be continuing." "Event of Default" was defined as being an "Event of Default under any of the Facility Agreements." One "Event of Default" under the Credit Agreement was any breach or default by any party to the agreements of any term of the agreements provided that it "could reasonably be expected to result in a Material Adverse Effect."

If Bank of America had actual knowledge that the condition in § 3.3.3 was not satisfied because there was an "Event of Default," the condition in § 3.3.2 would also be implicated because Bank of America would have had actual knowledge that Fontainebleau's representation that there was no "Event of Default" was not "true and correct."

considered together with Lehman's bankruptcy, amounted to a "change in the economics" of the Project "which could reasonably be expected to have a Material Adverse Effect," then the condition in § 3.3.23 would not have been satisfied.

However, the parties do dispute whether these events did, in fact, cause failures of the conditions precedent and whether Bank of America had actual knowledge of the failures. The primary basis for the District Court's determination that these events did not constitute failures of conditions precedent, which Bank of America urges us to adopt, was its determination that each of these events was not material, as a matter of law. See In re Fontainebleau, 2012 WL 930290, at *43–44. In arguing to defeat this materiality determination by the District Court, and to support their own view that these events "could reasonably be expected to have a Material Adverse Effect," the Term Lenders: 1) take issue with the District Court's finding that the loan amounts of the Senior Credit Facility that were not available due to First National Bank of Nevada's repudiation and Guggenheim's and Z Capital's failures to fund were immaterial as a matter of law; 2) point out that, as the District Court acknowledged, Guggenheim's and Z Capital's failures to fund caused the Project's budget to be out of balance; 3) highlight Bank of America's recognition of how difficult it would be to secure alternative lenders; and 4) argue that "[t]he intricate, interlocking agreements reflected the reality that no reasonable

lender would fund without assurances that other lenders would also fund to completion.”

Considering all of this together, the Term Lenders have raised genuine issues of material fact about whether there were “Events of Default” to the extent that these events “could reasonably be expected to have a Material Adverse Effect” and whether Bank of America had actual knowledge of this fact. Cf. e.g., Lucas v. Fla. Power & Light Co., 765 F.2d 1039, 1040–41 (11th Cir. 1985) (explaining that “questions of materiality” are “[m]ixed questions of law and fact” that “involve assessments peculiarly within the province of the trier of fact”); Willjeff, LLC v. United Realty Mgmt. Corp., 920 N.Y.S.2d 495, 497 (N.Y. App. Div. 2011) (explaining that materiality is generally a question for the finder of fact unless “the evidence concerning the materiality is clear and substantially uncontradicted”). Even if First National Bank of Nevada’s repudiation, and Guggenheim’s and Z Capital’s failures to fund could not have been expected to result in a Material Adverse Effect when considered one by one, taken together and in conjunction with the large increase in the Project budget and Lehman’s bankruptcy, we have no problem concluding there is a genuine issue of material fact regarding whether Bank of America knew that there was a “change in the economics” of the Project

“which could reasonably be expected to have a Material Adverse Effect,” thereby implicating the condition in § 3.3.11.⁸

C. WAS BANK OF AMERICA GROSSLY NEGLIGENT?

Under § 9.10 of the Disbursement Agreement, Bank of America, as Disbursement Agent, had no responsibility “except for any bad faith, fraud, gross negligence or willful misconduct” and could not be held liable for any loss “except as a result of [its] bad faith, fraud, gross negligence or willful misconduct.” Under New York law, these are high standards. For example, New York law defines gross negligence as “conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing,” Colnaghi, U.S.A., Ltd. v. Jewelers Protection Servs., Ltd., 81 N.Y.2d 821, 823–24 (N.Y. 1993) (quotation marks omitted), or “the failure to exercise even slight care,” Food Pageant, Inc. v. Consolidated Edison Co., Inc., 54 N.Y.2d 167, 172 (N.Y. 1981).

However, “[g]enerally, the particular standard of care which a defendant is judged against in a given case is a factual matter for the jury.” Food Pageant, Inc., 54 N.Y.2d at 172. Thus, “[w]here the inquiry is to the existence or nonexistence of gross negligence . . . the question . . . [is] a matter for jury determination.” Id. at

⁸ The Term Lenders argue that Bank of America was in breach of the Disbursement Agreement because it disbursed funds even though it had actual knowledge that seven conditions precedent had failed. Because we have concluded that there were genuine issues of material fact as to five of these conditions, we decline to address the remaining two conditions precedent. Neither will we address Term Lenders’ arguments about several other purported failures of the conditions precedent we have discussed. We leave it to the District Court to reevaluate these issues, as necessary, in light of this opinion and further proceedings before that court.

173. “While gross negligence may be found as a matter of law in some limited instances,” Trump Int’l Hotel & Tower v. Carrier Corp., 524 F. Supp. 2d 302, 315 (S.D.N.Y. 2007), it cannot be resolved as a matter of law in this case.

Here, there is an issue of fact about whether Bank of America was grossly negligent. For example, under our interpretation of the Disbursement Agreement, Bank of America would have been in breach of the Agreement if it disbursed the Term Lenders’ funds to the Borrowers even though it had actual knowledge that any one of the conditions precedent had failed. We have discussed why we believe there are genuine issues of material fact about whether Bank of America had actual knowledge that a number of conditions precedent had failed. In addition to those things we discussed, the Term Lenders have also established a dispute of material fact on the subject of whether Bank of America had actual knowledge that some of these conditions precedent had failed months before it disbursed funds to the Borrowers or that Bank of America had actual knowledge that some of these conditions precedent had failed for several different reasons. A jury could find that the cumulative effect of Bank of America’s disbursing funds despite having actual knowledge about the failure of many different conditions precedent amounted to gross negligence. A jury could also find that certain conditions precedent were so material to the Agreement that Bank of America’s conduct, including disbursing

funds to the Borrowers, showed a reckless disregard for the Term Lenders' rights to the extent it knew that those conditions were not satisfied.

V. SEALED DOCUMENTS

Many of the documents filed in this case, including the parties' motions for summary judgment and appeal briefs, were filed under seal. An example of the documents filed under seal is the Disbursement Agreement, which is central to this case. This same document was publicly filed in other proceedings, including a case we heard at oral argument on the same day as this one.

At the request of the court, the parties have filed a joint letter agreeing that the underlying Agreements and many of the other documents in the record should be unsealed. The parties also listed certain documents they wish to continue to keep under seal. Upon remand of this case to the District Court, the Clerk is directed to unseal all of the documents in the record, except those delineated in the parties' request to retain them as sealed.

VI. CONCLUSION

Having concluded that under the Disbursement Agreement Bank of America was permitted to rely on the Borrowers' certifications that the conditions precedent were satisfied unless it had actual knowledge to the contrary, and finding that there remain genuine issues of material fact about whether Bank of America had such knowledge and whether its actions amounted to gross negligence, we affirm in part

and reverse in part the District Court's order. Specifically, we affirm the District Court's denial of the Term Lenders' Motion for Partial Summary Judgment and the District Court's interpretation of Bank of America's obligations under the Disbursement Agreement. We reverse the District Court's grant of summary judgment in favor of Bank of America. We also remand the case to the District Court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

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

**ORDER UPON MANDATE; SUGGESTING REMAND BY THE UNITED STATES
PANEL ON MULTIDISTRICT LITIGATION TO THE DISTRICT OF NEVADA**

This Cause is before the Court upon Mandate of the Eleventh Circuit Court of Appeals [ECF 362], in which the Eleventh Circuit affirmed my denial of the Term Lenders' Motion for Partial Summary Judgment and interpretation of Bank of America's obligations under the Disbursement Agreement, reversed the grant of final summary judgment in favor of Bank of America, and remanded the case for proceedings consistent with the opinion. This multi-district litigation ("MDL") arose out of alleged breaches of various agreements for loans to construct and develop a casino resort in Las Vegas, Nevada. On July 7, 2009, *Fontainebleau Las Vegas, LLC v. Bank of America, N.A., et al.*, Case No. 09-cv-21879 (the "Fontainebleau Action"), was filed in the Southern District of Florida and assigned to me. Subsequently, *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-cv-1047 (the "Avenue Action") was filed in the District of Nevada.

On December 2, 2009, the United States Judicial Panel on Multidistrict Litigation ("JPML") [ECF No. 1]¹ consolidated the Fontainebleau and Avenue Actions for

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

coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407, and transferred the MDL to me, reasoning, *inter alia*, that the Fontainebleau Action was the more advanced of the two actions.² The JPML also noted there was a potential tag-along action pending in the Southern District of New York, *ACP Master, LTD, et al. v. Bank of America, et al*, Case No. 09-cv-8064 (the “Aurelius Action”), and, on January 4, 2010 [ECF No. 21], the JPML transferred the Aurelius Action to me.³

In April 2011, upon agreement by the relevant parties, I dismissed the Aurelius Action without prejudice so that the Aurelius plaintiffs, whose interests had been acquired by the Avenue plaintiffs, could pursue their claims against Bank of America in the Avenue Action [ECF No. 238; see also ECF Nos. 212, 212-1].⁴ In August 2012, while various appeals relating to the MDL were pending before the Eleventh Circuit, the parties to the Fontainebleau Action settled their case [ECF No. 353; 09-cv-21879, ECF No. 161]. Therefore, pending before me upon Mandate is the Avenue action only. Additionally, upon review of the case file and the Eleventh Circuit’s Mandates [ECF Nos. 361 and 362], I conclude all common pretrial proceedings in this MDL have been completed.

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

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

⁴ I had previously dismissed Counts I and II of the Aurelius Amended Complaint for lack of standing. The Eleventh Circuit affirmed the dismissal by mandate issued March 25, 2013 [ECF No. 361].

Accordingly, pursuant to 28 U.S.C. § 1407 and the Rules of Procedure of the JPML, and for the just and efficient handling of this matter, I respectfully request that the JPML remand this case to its original forum, the District of Nevada. See 28 U.S.C. § 1407(a) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated”); Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, Rule 10.1(b); MDL No. 2005, *In Re: Air Crash at Tegucigalpa, Honduras*, ECF No. 63, August 6, 2010 Remand Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of August, 2013.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: Clerk of the United States Judicial Panel on Multidistrict Litigation
Magistrate Judge Jonathan Goodman
All Counsel of Record

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

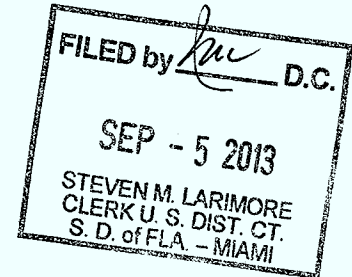
ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 29, 2013

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810



Appeal Number: **12-11815-AA**
Case Style: Avenue CLO IV, Ltd, et al v. Bank of America, NA
District Court Docket No: 1:09-md-02106-ASG
Secondary Case Number: 1:09-cv-23835-ASG

The following record materials in the referenced case are returned herewith:

Nine Volumes Record-on-Appeal, Four Folders of Exhibits and Five Sealed Boxes of Exhibits.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Will Miller
Phone #: (404) 335-6115

(4) Vols. of Pleadings (copies)
(5) Vols of Receipts (copies)
(4) Occasion Folders (copies)
(5) Boxes containing Sealed Documents

REC-3 Ltr Returning Record to DC

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

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

**DEFENDANT’S MOTION FOR RECONSIDERATION OF ORDER UPON
MANDATE; SUGGESTING REMAND BY THE UNITED STATES PANEL
ON MULTIDISTRICT LITIGATION TO THE DISTRICT OF NEVADA**

Defendant Bank of America, N.A. (“BANA”) respectfully requests that the Court reconsider and vacate its August 30, 2013 *sua sponte* Order Upon Mandate; Suggesting Remand by the United States Panel on Multidistrict Litigation to the District of Nevada [D.E.# 363] (the “Order”) because the Order incorrectly assumes that “all common pretrial proceedings in this MDL have been completed.” (Order at 3.) In fact, as demonstrated below, common pretrial proceedings—fact and expert discovery regarding Plaintiffs’ alleged damages—remain. This Court is best equipped to oversee these pretrial proceedings to their conclusion, given the deep familiarity with the complex factual record that the Court has developed during the nearly four years that it has been presiding over these MDL proceedings.

I. PRETRIAL PROCEEDINGS ARE NOT COMPLETE

Although the parties have completed fact discovery concerning the events underlying Plaintiffs’ claims and summary judgment motions have been decided, the parties never completed discovery. This and other pretrial proceedings thus remain. “[P]re-trial, as an adjective, means before trial - [thus,] all judicial proceedings before trial are pretrial

proceedings.” *In re Multidistrict Private Civil Treble Damage Litig. Involving Plumbing Fixtures*, 298 F. Supp. 484, 494 (J.P.M.L. 1968). Pretrial proceedings are not completed until a final pretrial order is entered. *See U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 37 (D.D.C. 2007) (“[P]re-trial proceedings do not conclude until a final pretrial order is entered, and ... all prior proceedings—including rulings on motions for summary judgment—are pretrial proceedings that may properly remain before the transferee court.”); *see also In re Rhone-Poulenc Rorer Pharms., Inc.*, 138 F.3d 695, 697 (7th Cir.1998) (final pretrial order under Fed. R. Civ. P. 16 is “an order that a judge presiding over pretrial proceedings by reference from the Multidistrict Litigation Panel has (or so all the cases we’ve found on the question hold or assume) the power to issue.”). Here, as described below, several additional proceedings must be completed before all pretrial proceedings are complete and this case is trial-ready.

A. Fact Discovery Relating to Plaintiffs’ Alleged Damages is not Complete.

Pretrial fact discovery regarding Plaintiffs’ alleged damages is not complete. Many of the Plaintiffs are hedge funds that have acquired—and continued to acquire—Fontainebleau Las Vegas Term Loans on the secondary market long after the events giving rise to this lawsuit. It is BANA’s understanding based on a review of the Fontainebleau Las Vegas bankruptcy docket that in the two-plus years since serving their damages expert’s report, certain Plaintiffs have purchased tens of millions of dollars of additional Fontainebleau Las Vegas Term Loans on the secondary market, increasing the damages they seek from BANA. (Decl. of Daniel L. Cantor in Support of Defendant’s Motion for Reconsideration of Order Upon Mandate; Suggesting Remand by the United States Panel on Multidistrict Litigation to the District of Nevada (“Cantor Decl.”), at ¶ 4.) Fed. R. Civ. P. 26(e)(1)(A) requires Plaintiffs to update their previous discovery

responses detailing each Plaintiff's current Term Loan holdings and claimed damages. This has not happened yet. Moreover, to the extent that any disputes arise concerning this additional discovery, that would also be a pretrial proceeding requiring this Court's attention.

B. Expert Discovery Relating to Plaintiffs' Alleged Damages is not Complete.

The parties never completed expert discovery regarding Plaintiffs' alleged damages. Although the parties exchanged expert reports in mid-2011, they agreed to defer the damages experts' depositions pending resolution of the summary judgment motions, recognizing that the summary judgment rulings might alter the damages experts' opinions, or moot them entirely. (Cantor Decl. ¶ 8.) Moreover, before expert damages depositions can move forward, the parties need to update their respective expert reports to reflect, among other things, the following:

- Changes in Plaintiffs' Term Loan holdings over the past two years, and the accrual since 2011 of additional prejudgment interest we expect Plaintiffs claim.
- Developments in other litigations arising from the Fontainebleau Las Vegas Project's financial collapse over the past two years, including the settlement that Plaintiffs (and other Term Lenders) have nearly finalized with mechanics lienholders that will resolve their competing claims to the proceeds from the Project's sale to Carl Icahn. (See Cantor Decl. ¶¶ 9-10.)

The damages experts' reports must be updated to reflect these and other developments that could affect Plaintiffs' claimed damages—and this process cannot begin until the discovery discussed in Section I.A above is completed.

II. THE SUGGESTION OF REMAND SHOULD BE RECONSIDERED IN VIEW OF THE REMAINING PRETRIAL PROCEEDINGS

A motion for reconsideration should be granted when the "Court has ... made an error not of reasoning, but of apprehension." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F.

Supp. 2d 1366, 1369 (S.D. Fla. 2002) (citation omitted); *see also Sanzone v. Hartford Life & Accident Ins. Co.*, 519 F. Supp. 2d 1250, 1257-58 (S.D. Fla. 2007) (Gold, J.) (granting motion to reconsider where Court's initial ruling was "based on ... incorrect assumptions"). Grounds justifying reconsideration include "the need to correct clear error or prevent manifest injustice." *Safari Ltd. v. Adonix Transcomm, Inc.*, No. 09-CV-21289, 2011 WL 465334, at *1 (S.D. Fla. Feb. 4, 2011) (citation omitted). We respectfully submit that in entering the remand order, the Court overlooked the additional pretrial proceedings that must be completed before this case is trial-ready.

Although remand prior to the completion of all pretrial proceedings is not prohibited under 28 U.S.C. § 1407, "[t]he transferee court should consider when remand will best serve the expeditious disposition of the litigation." Manual for Complex Litigation (Fourth), § 20.133 (2004). Courts have found that even where "virtually all the actions with which [a] case was consolidated have ... been settled," remand is not required. *In re Integrated Res. Inc.*, No. 92 Civ. 4555 (RWS), 1995 WL 234975, at *4 (S.D.N.Y. Apr. 21, 1995); *see also In re Wilson*, 451 F.3d 161, 170 (3d Cir. 2006) ("[A] proceeding that relates only to a single individual's case or claim can nonetheless be coordinated, as coordination can be found even if common issues are present only in relation to cases that have already been terminated.") (internal quotation marks and citation omitted)). Thus, even if only one case remains in an MDL, that case need not be remanded to the transferor district if discovery has not been completed. *See In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1405 (J.P.M.L. 1972) (denying motion to remand because "we are not convinced ... that an action, in which discovery is not yet completed, should be remanded simply because all other consolidated cases in the transferee court have been dismissed or terminated in some way.").

The parties here would benefit from this Court's supervision of the remaining pretrial proceedings. The Court's handling of this MDL has given it a deep understanding of the legal and factual issues arising from the complex Fontainebleau Las Vegas financing agreements and, in particular, the enormous factual record relating to Plaintiffs' claims. Thus, this Court is best-positioned to address—knowledgably and efficiently—any potential issues relating to the remaining damages expert discovery and other pretrial proceedings.

III. CONCLUSION

Pretrial proceedings in this case, including fact and expert discovery on damages, are not yet complete. Accordingly, BANA respectfully requests that the Court grant its motion for reconsideration, vacate the Order, and schedule a conference with the parties to discuss the remaining pretrial proceedings.

LOCAL RULE 7.1(a)(3) CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), BANA certifies that it conferred with Plaintiffs' counsel on September 4, 2013, in a good faith effort to resolve the need for filing this motion. Plaintiffs disagree that the Order should be reconsidered and intend to oppose this motion.

Dated: September 5, 2013

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: /s/ Jamie Zysk Isani
Jamie Zysk Isani
Florida Bar No. 728861
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: (305) 536-2724
Facsimile: (305) 810-1675
E-mail: jisani@hunton.com

- and -

O'MELVENY & MYERS LLP
Bradley J. Butwin (*pro hac vice*)
Jonathan Rosenberg (*pro hac vice*)
Daniel L. Cantor (*pro hac vice*)
William J. Sushon (*pro hac vice*)
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
E-mails:
bbutwin@omm.com;
jrosenberg@omm.com;
dcantor@omm.com;
wsushon@omm.com

Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by transmission of Notice of Electronic Filing generated by CM/ECF on September 5, 2013 on all counsel or parties of record on the Service List below:

J. Michael Hennigan, Esq.
Kirk Dillman, Esq.
Robert Mockler, Esq.
MCKOOL SMITH, P.C.
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234
E-mail:
hennigan@mckoolsmithhennigan.com
kdillman@mckoolsmithhennigan.com
rmockler@mckoolsmithhennigan.com

David A. Rothstein, Esq.
Lorenz Michel Pruss, Esq.
DIMOND KAPLAN & ROTHSTEIN, P.A.
2665 South Bayshore Drive
Penthouse 2-B
Miami, Florida 33133
Telephone: (305) 600-1393
Facsimile: (305) 374-1961
E-mail:
drothstein@dkrpa.com
lpruss@dkrpa.com

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

By: /s/ Jamie Zysk Isani
 Jamie Zysk Isani, Esq.

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

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

**DECLARATION OF DANIEL L. CANTOR IN SUPPORT OF DEFENDANT'S
MOTION FOR RECONSIDERATION OF ORDER UPON MANDATE;
SUGGESTING REMAND BY THE UNITED STATES PANEL ON
MULTIDISTRICT LITIGATION TO THE DISTRICT OF NEVADA**

I, Daniel L. Cantor, hereby declare as follows:

1. I am a member of the law firm of O'Melveny & Myers LLP, counsel for defendant Bank of America, N.A. ("BANA"), and I am familiar with the facts and circumstances in this action.

2. I make this declaration in support of Defendant's Motion for Reconsideration of Order Upon Mandate; Suggesting Remand by the United States Panel on Multidistrict Litigation to the District of Nevada.

A. Fact Discovery Relating to Plaintiffs' Alleged Damages is not Complete.

3. Since June 2011, there have been a number of developments that are likely to affect the amount of alleged damages Plaintiffs claim to have suffered.

4. The Term Lenders have continued to trade Fontainebleau Las Vegas Term Loans. Certain Plaintiffs have purchased tens of millions of dollars of additional Fontainebleau Las Vegas Term Loans on the secondary market, increasing the damages they seek from BANA.

The docket for the Fontainebleau Las Vegas bankruptcy, which is captioned *In re Fontainebleau Las Vegas Holdings, LLC*, Case No. 09-21481-AJC (Bankr. S.D. Fla.), reflects numerous such transactions by Plaintiffs, including most recently:

- On April 26, 2013, plaintiff Brigade Leveraged Capital Structures Fund, Ltd. filed a notice of Partial Transfer of Claim for the transfer to Brigade of \$40,841,901.44 in Initial Term Loan and \$20,420,950.73 in Delay Draw Term Loan from non-party Citigroup Financial Products Inc. (D.E. # 3950) A true and correct copy of the notice is attached hereto as Exhibit 1.
- On June 25, 2013, plaintiff Sola Ltd. filed a notice of Partial Transfer of Claim for the transfer to Sola of \$1,679,480.54 in Initial Term Loan and \$565,496.40 in Delay Draw Term Loan from non-party Kelts LLC. (D.E. # 4038) A true and correct copy of the notice is attached hereto as Exhibit 2.
- And on June 25, 2013, plaintiff Solus Core Opportunities Master Fund, Ltd. filed a notice of Partial Transfer of Claim for the transfer to Solus of \$616,867.06 in Initial Term Loans from non-plaintiff The Royal Bank of Scotland plc. (D.E. # 4046.) That same day, Solus also filed a notice of Partial Transfer of Claim to Solus of \$8,930.11 in Initial Term Loan and \$210,711.61 of Delay Draw Term Loan from non-party Kelts LLC. (D.E. # 4049) True and correct copies of the notices are attached hereto as Exhibits 3 and 4.
- On July 9, 2013, plaintiff Caspian Select Credit Master Fund, Ltd. filed notices of Partial Transfer of Claim for the transfer of \$923,208.29 in claims from non-plaintiff Morgan Stanley Senior Funding, Inc. (D.E. #s 4056, 4057) True and correct copies of the notices are attached hereto as Exhibits 5 and 6.

B. Expert Discovery Relating to Plaintiffs' Alleged Damages is not Complete.

5. On May 23, 2011, Plaintiffs served three expert reports, including the expert report of Saul Solomon, whom they claimed was a damages expert.

6. In calculating Plaintiffs' alleged damages, Solomon estimated that Plaintiffs accounted for 73.73% of the Delay Draw Term Loans and 82.76% of the Initial Term Loans. Solomon also calculated Plaintiffs' damages based on the assumption that each disbursement to Fontainebleau between September 2008 and March 2009 was improper.

7. On June 29, 2011, BANA served three expert reports, including the expert report of Christopher M. James. James' report analyzed and commented on Solomon's damages analysis.

8. On June 30, 2011, the parties agreed to postpone the Solomon and James depositions until summary judgment motions were resolved. The parties recognized that the ruling on the summary judgment motions could narrow or moot the damages experts' opinions.

9. The Fontainebleau Las Vegas lenders have been engaged in litigation with numerous entities that filed mechanics liens on the Project to determine the validity of the mechanics lienholders' claims, and whether the mechanics lienholders' claims are subordinated or subrogated to the rights and liens of the Project lenders. The proceeding is captioned *Wilmington Trust FSB v. AI Concrete Cutting & Demolition LLC, et al.*, Adv. No. 09-2480-AJC (Bankr. S.D. Fla.). That litigation's outcome will determine those parties' respective rights to the remaining assets in the Fontainebleau Las Vegas bankruptcy estate—namely, the proceeds from the Project's sale to Carl Icahn. Plaintiffs' alleged damages in this case must be reduced by the amount, if any, they recover from the Fontainebleau bankruptcy estate.

10. The parties to the *AI Concrete* lawsuit have filed documents reflecting an imminent settlement. On June 7, 2013, they reported to the bankruptcy court that: "The parties have continued to negotiate and are very close to finalizing a settlement agreement, Rule 9019 Motion, and proposed order approving the settlement agreement." A true and correct copy of the Second Agreed *Ex Parte* Motion to Continue Hearing on Motions to Dismiss and Status Conference (D.E. # 625) is attached hereto as Exhibit 7. The parties' respective damages expert reports will need to be updated to reflect the settlement's impact.

11. I declare under penalty of perjury and 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, information, and belief.

Date: September 5, 2013
New York, New York

/s/ Daniel L. Cantor
DANIEL L. CANTOR

EXHIBIT 1

United States Bankruptcy Court Southern District of Florida

In re: Fontainebleau Las Vegas Holdings, LLC et al. Case No. 09-21481(AJC) (Jointly Administered)

PARTIAL TRANSFER OF CLAIMS OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this evidence and notice.

Brigade Leveraged Capital Structures Fund, LTD.
Name of Transferee

Citigroup Financial Products Inc.
Name of Transferor

Name and Address where notices to transferee should be sent:

Court Claim No. See attached Proof of Claim

Brigade Leveraged Capital Structures Fund, LTD.
399 Park Avenue, 16th Floor
New York, NY 10022
Attention: Joanna Bensimon
Telephone: (212) 745-9766
Fax: 1-469-304-2966
Email: Bankdebt@brigadecapital.com

Amount of Claim Transferred:
(i) \$40,841,901.44 outstanding principal amount of Initial Term Loans, plus interest, fees, expenses and other amounts owed thereon asserted in the Proof of Claim; and
(ii) \$20,420,950.73 outstanding principal amount of Delayed Draw Term Loans, plus interest, fees, expenses and other amounts owed thereon asserted in the Proof of Claim


Date Claim Filed: October 9, 2009

Last Four Digits of Acct #: _____

Phone: 302-324-6660/ 302-894-6175
Last Four Digits of Acct. #: _____

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.
By: Brigade Capital Management, LLC
As Investment Manager

By: 
Transferee/Transferee's Agent

Date: April 23rd, 2013

United States Bankruptcy Court Southern District of Florida

In re: Fontainebleau Las Vegas Holdings, LLC et al. Case No. 09-21481(AJC) (Jointly Administered)

PARTIAL TRANSFER OF CLAIMS OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this evidence and notice.

| | |
|---|--|
| <p><u>Brigade Leveraged Capital Structures Fund, LTD.</u> Name of Transferee</p> <p>Address of Alleged Transferee:</p> <p>Brigade Leveraged Capital Structures Fund, LTD. 399 Park Avenue, 16th Floor New York, NY 10022</p> <p>Attention: Joanna Bensimon Telephone: (212) 745-9766 Fax: 1-469-304-2966 Email: Bankdebt@brigadecapital.com</p> | <p><u>Citigroup Financial Products Inc.</u> Name of Transferor</p> <p>Citigroup Financial Products Inc. c/o Citibank, N.A. 1615 Brett Road Ops III New Castle, DE 19720</p> <p>Tel: 302-324-6660 / 302-894-6175 E-Mail: brian.m.blessing@citi.com /brian.broyles@citi.com Attn: Brian Blessing / Brian Broyles</p> |
|---|--|

~DEADLINE OF OBJECT TO TRANSFER~

The alleged transferor of this claim is hereby notified that objections must be filed with the court within twenty-one (21) days of the mailing of this notice. If no objection is timely received by the court, the transferee will be substituted as the original claimant without further order of the court.

Date: _____

CLERK OF THE COURT

B 10 (Official Form 106 (12/08))

COPY

| | | |
|--|--|--|
| UNITED STATES BANKRUPTCY COURT | | PROOF OF CLAIM |
| Name of Debtor: Fontainebleau Las Vegas Holdings, LLC | | Case Number: 09-21481 (AJC) |
| NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be made pursuant to 11 U.S.C. 303. | | |
| Name of Creditor (the person or other entity to whom the debtor owes money or property): Bank of Scotland plc | | <input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim. Court Claims Number: _____ (if known) Filed on: _____ |
| Name and address where notices should be sent: Kenneth E. Noble Katam Muchin Roomman LLP 575 Madison Avenue New York, NY 10022-2585 Telephone number: (212) 940-6419 | | |
| Name and address where payment should be sent (if different from above): Julia R. Franklin Assistant Vice President - Loan Documentation Bank of Scotland plc 1095 Avenue of the Americas New York, NY 10036 Telephone number: (646) 264-6361 | | <input checked="" type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check this box if you are the debtor or trustee in this case. |
| 1. Amount of Claim as of Date Case Filed: <u>\$ See Addendum</u> If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input checked="" type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges. | | 5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan- 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8). <input checked="" type="checkbox"/> Other- Specify applicable paragraph of 11 U.S.C. §507 (a)(2). Amount entitled to priority: <u>\$ See Addendum</u> |
| 2. Basis for Claim: <u>See Addendum</u> See instruction #2 on reverse side. | | |
| 3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.) | | |
| 4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other Describe: Value of Property: <u>\$ See Addendum</u> Annual Interest Rate: <u>See Addendum</u> Amount of arrearage and other charges as of time case filed included in secured claim, If any: <u>\$ See Addendum</u> Basis for perfection: <u>See Addendum</u> Amount of Secured Claim: <u>\$ See Addendum</u> Amount Unsecured: <u>\$ See Addendum</u> | | |
| 6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim. See Addendum 7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary (See instruction 7 and definition of "redacted" on reverse side) DO NOT SEND ORIGINAL DOCUMENTS ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain: | | *Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment. |
| Date: October 8, 2009 | | FOR CREDITOR USE ONLY RECEIVED OCT 09 2009 NOT FOR CREDITORS USE |
| Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. By: <u>Julia R. Franklin</u> Name: Julia R. Franklin Title: Assistant Vice President - Loan Documentation | | |

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 132 and 3371.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re: Chapter 11
FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC, Case No. 09-21481-BKC-AJC
Debtor.

ADDENDUM TO PROOF OF CLAIM OF BANK OF SCOTLAND PLC AGAINST FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC

1. Lender. The undersigned, Julia R. Franklin, is an Assistant Vice President of Bank of Scotland plc (“Bank of Scotland”), a public limited company registered in Scotland, United Kingdom and doing business at 1095 Avenue of the Americas, New York, New York, 10036. Bank of Scotland is a Term Lender and a Revolving Lender under the Credit Agreement (as defined below) and files this proof of claim in such capacities pursuant to Section 501 of the Bankruptcy Code and Bankruptcy Rule 3003. (Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Credit Agreement and other Loan Documents (as defined in the Credit Agreement).)

2. Bankruptcy Proceedings. Fontainebleau Las Vegas Holdings, LLC (the “Debtor”), Fontainebleau Las Vegas, LLC (the “FBLV”), and Fontainebleau Las Vegas Capital Corp. (“Capital” and, collectively with the Debtor, and FBLV, the “Companies”), filed petitions under Chapter 11 of the Bankruptcy Code on June 9, 2009 (the “Petition Date”). Since the Petition Date, the Companies have managed their businesses and properties as Debtors-in-

possession under Bankruptcy Code §§ 1107 and 1108. The Companies' cases are being jointly administered under case number 09-21481-BKC-AJC.

3. Supporting Documents. FBLV, Fontainebleau Las Vegas II, LLC ("FBLV II")¹, the lenders from time to time party thereto, including Bank of Scotland (collectively, the "Lenders"), and Bank of America, N.A., as Administrative Agent are parties to the Credit Agreement dated as of June 6, 2007 (the "Credit Agreement"). Concurrently with the Credit Agreement, the Companies, FBLV II, Fontainebleau Las Vegas Retail, LLC, Bank of America, N.A., as bank agent, Wells Fargo Bank, N.A., as trustee ("Trustee"), Lehman Brothers Holdings Inc., as retail agent, and Bank of America, N.A., as initial disbursement agent ("Disbursement Agent"), entered into a Master Disbursement Agreement dated as of June 6, 2007 (the "Disbursement Agreement"), pursuant to which the parties thereto agreed, inter alia, as to the manner in which certain loan proceeds were to be disbursed to the Companies.

4. Copies of the Credit Agreement and each Loan Document referenced herein, together with all amendments thereto, are attached to the proof of claim filed in connection with the above-referenced case by the Administrative Agent and are hereby incorporated herein (the "Master Proof of Claim"). In addition, copies of all Loan Documents referenced herein are available (at the expense of the requesting party) upon written request to Kenneth E. Noble, Katten Muchin Rosenman LLP, 575 Madison Avenue, New York, NY 10022.

5. Pursuant to the Guarantee and Collateral Agreement dated as of June 6, 2007 (the "Guarantee and Collateral Agreement"), by FBLV, FBLV II, the Debtor, and Capital in favor of the Administrative Agent, the Debtor guaranteed payment and performance of all of the "Obligations" as defined in the Credit Agreement.

¹ Subsequent to the execution of the Credit Agreement, but prior to the Petition Date, FBLV II was merged into FBLV.

6. Principal, Interest and Commitment Fees. Bank of Scotland asserts a claim on account of the Debtor's guarantee of FBLV's obligations to pay for principal, interest and commitment fees owed under the Credit Agreement. As of the Petition Date, the Debtor was indebted to Bank of Scotland under the Guarantee and Collateral Agreement on account of its guarantee of principal and interest owed under the Credit Agreement, in the aggregate amount of not less than \$72.5 million, including principal due on the Initial Term Loans in the aggregate amount of not less than \$48.33 million, principal due on the Delay Draw Term Loans in the aggregate amount of not less than \$24.2 million, plus its pro rate share of (i) unpaid interest accrued on the Loans and (ii) unpaid commitment fees accrued with respect to the Loans. Interest continues to accrue at the applicable rate set forth in the Credit Agreement to the extent permitted by law. As of September 30, 2009, the interest and commitment fees due to Bank of Scotland in respect of the Loans is in the aggregate amount of not less than \$1,005,933.42.

7. Letter of Credit Reimbursement Obligations. Bank of Scotland asserts a claim for its pro rata share of amounts owed with respect to the Debtor's guarantee of certain letter of credit reimbursement obligations. Pursuant to (a) the Guarantee and Collateral Agreement (b) Section 3.3 of the Credit Agreement and (c) each letter of credit application (each an "LC Application" and collectively, the "LC Applications") entered into in connection with the letters of credit (a "Letter of Credit" and collectively, the "Letters of Credit") issued by the Issuing Lenders pursuant to the Credit Agreement, the Debtor is required to reimburse the Issuing Lenders for any drawings made under any Letters of Credit and is required to pay such other amounts as are more particularly described therein. As of the Petition Date, the aggregate undrawn amount of all issued and outstanding Letters of Credit issued by the Issuing Lenders was not less than \$13,477,302.00. After the Petition Date, the beneficiaries of Letter of Credit

number 3090031 in the amount of \$117,630 and Letter of Credit number 3088823 in the amount of \$11,750,000 drew upon such Letters of Credit.

8. In addition, pursuant to the Guarantee and Collateral Agreement and Section 3.9 of the Credit Agreement, the Debtor is required to pay a Letter of Credit fee (the "Letter of Credit Fee") to the Administrative Agent, for the account of each Revolving Lender, on the daily amount available to be drawn under any Letter of Credit. As of September 30, 2009, the aggregate amount of the Letter of Credit Fees owed by the Debtor to Bank of Scotland was not less than \$145,876.53.

9. Bank of Scotland asserts a claim for not less than \$1,234,258.33 under the Guarantee and Collateral Agreement in respect of its pro rata share of all drawn Letters of Credit, Letter of Credit Fees and interest due thereon as of September 30, 2009, and further asserts a claim for its pro rata share of the amount of all undrawn Letters of Credit, and any and all other amounts owed under the LC Applications and the Credit Agreement.

10. Bank of Scotland reserves its right to supplement or modify this proof of claim with additional information regarding any reimbursement obligations owed to Bank of Scotland.

11. Fees, Expenses and Indemnities. Bank of Scotland asserts a claim for fees, expenses and indemnities under the Credit Agreement, the Disbursement Agreement, the Guarantee and Collateral Agreement and the other Loan Documents. The Debtor is obligated pursuant to the Guarantee and Collateral Agreement in respect of certain covenants and indemnities contained therein and in the Credit Agreement, the Disbursement Agreement and the other Loan Documents, including without limitation the covenants and indemnities set forth in Sections 2.19 and 10.5 of the Credit Agreement, Section 11.15 of the Disbursement Agreement and Section 8.4 of the Guarantee and Collateral Agreement to indemnify the Administrative

Agent and the Lenders and to pay certain fees and expenses as more particularly set forth therein. As of September 30, 2009, the amount of liquidated expenses and indemnities, including, without limitation, those owed by the Debtor to Bank of Scotland for fees and expenses of professionals, includes amounts paid to (i) Katten Muchin Rosenman LLP totaling not less than \$411,096.00, (ii) Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. totaling not less than \$57,369.20, and (iii) amounts paid by Bank of Scotland to the Administrative Agent for reimbursement of the Agent's professional fees and expenses under the Credit Agreement totaling not less than \$47,209.68.

12. All of the above fees and expenses have grown and continue to grow, to the extent permitted by law. Any amounts arising after the Petition Date are entitled to administrative priority to the extent provided in Sections 507(a)(1) and 503(b) of the Bankruptcy Code or applicable court order.

13. Bank of Scotland asserts a claim for indemnification in connection with, among other things, any litigation heretofore or hereafter brought against Bank of Scotland, related to the Fontainebleau Resort and Casino in Las Vegas, Nevada, including in connection with the financing or construction thereof. In particular, Bank of Scotland asserts a claim for indemnification in respect of any claims, fees (including attorney's fees) or costs associated with lawsuits heretofore or hereafter filed by any person, including the Companies, certain Lenders, Turnberry West Construction, or any purported mechanic's lien claimant.]

14. After the Petition Date, Bank of Scotland received certain adequate protection payments which have not been credited against the claim amounts set forth above.

15. Bank of Scotland further reserves all of its rights to supplement this proof of claim with additional information regarding any such claims. Bank of Scotland is entitled to post-petition interest, attorneys' fees and expenses to the extent provided by law.

16. Secured Claim. As more fully described in the Master Proof of Claim, the Debtor granted to the Administrative Agent for the ratable benefit of the Secured Parties, including Bank of Scotland, a security interest in substantially all of the Debtor's property (the "Collateral"). Prior to the Petition Date, the Administrative Agent duly perfected such security interests pursuant to applicable law. The security interests referred to above were granted in favor of Administrative Agent for the ratable benefit of the Secured Parties, including Bank of Scotland, in order to secure, inter alia, the Obligations (as defined in the Guarantee and Collateral Agreement), including, without limitation, each of the claims described above. Accordingly, Bank of Scotland asserts a secured claim to the extent of the value of the Collateral and an unsecured claim for any deficiency (subject to an election, if any, made under 11 U.S.C. § 1111(b)).

17. The Administrative Agent, for the benefit of itself and the Lenders, including Bank of Scotland, has been granted additional perfected security interests in, and liens upon, property of the Debtor and the other Companies pursuant to (i) the Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection To Prepetition Secured Parties Pursuant to Section 361, 362, and 363, of the Bankruptcy Code, and (III) Scheduling Final Hearing, entered on June 11, 2009, (ii) the Second Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection To Prepetition Secured Parties Pursuant to Section 361, 362, and 363, of the Bankruptcy Code, and (III) Scheduling Final Hearing, entered on July

7, 2009, (iii) the Third Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code, and (III) Scheduling Final Hearing, entered on July 31, 2009, (iv) the Amended Third Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code, and (III) Scheduling Final Hearing, entered August 7, 2009, (v) the Fourth Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code, and (III) Scheduling Final Hearing, entered August 19, 2009, and (vi) the First Interim Order (I) Authorizing the Nonconsensual Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code, and (III) Scheduling Final Hearing, entered September 18, 2009, as supplemented by the Bankruptcy Court (the Orders described in clauses (i)-(v) and this clause (vi), collectively, the "Cash Collateral Orders").

18. To the extent that the adequate protection previously provided or approved pursuant to the Cash Collateral Orders or hereinafter provided or approved (including, without limitation, any of the same that the Debtor has agreed will relate back to the Petition Date) proves to be inadequate, Bank of Scotland is entitled to an administrative priority and super-priority claim pursuant to 11 U.S.C. §§ 507(a)(1) and (b).

19. Right of Setoff. The Debtor's indebtedness to Bank of Scotland is also secured, pursuant to §§ 506(a) and 553 of the Bankruptcy Code, by any funds on deposit on the Petition

Date with the Administrative Agent or any of the Lenders, which funds were subject to the Administrative Agent's or Lenders' rights of setoff under applicable law and the Loan Documents.

20. Subordinated Claims. Turnberry West Construction, Inc. (the "General Contractor"), Turnberry Residential Limited Partner, L.P. (the "Completion Guarantor"), Fontainebleau Resorts, LLC ("Parent" and, collectively with the General Contractor and the Completion Guarantor, the "Fontainebleau Affiliates"), the Debtor, FBLV and FBLV II entered into the Affiliate Subordination Agreement dated as of June 6, 2007 (the "Affiliate Subordination Agreement"), in favor of the Administrative Agent and Trustee. Pursuant to the Affiliate Subordination Agreement, the Fontainebleau Affiliates subordinated certain claims against the Debtor to the claims of the Lenders. Section 2.04(b) of the Affiliate Subordination Agreement provides that until all of the debt owed to the Lenders is paid in full, "any payments of the Subordinated Obligations to which any Fontainebleau Affiliate would be entitled but for this Article 2 will be made to [the Administrative Agent]." By this proof of claim, Bank of Scotland asserts its right to any distributions made on account of any Subordinated Obligations (as defined in the Affiliate Subordination Agreement) that would otherwise be made to Fontainebleau Affiliates on account of any such claim they may have made or make against the Debtor.

21. Setoff, Counterclaim. The claims set forth in this proof of claim are not subject to any valid setoff or counterclaim in favor of the Debtor.

22. No Judgment. No judgment has been rendered on the claims set forth in this proof of claim.

23. Right to Amend. Bank of Scotland reserves the right to (i) amend and/or supplement this proof of claim from time to time hereafter as it may deem necessary and proper,

including, but not limited to, for purposes of fixing, increasing or amending in any respect the amounts referred to herein, and adding or amending documents and other information and further describing this proof of claim; (ii) file additional proofs of claim for additional claims which may be based upon the same or additional documents, and/or (iii) file a request for payment of administrative expenses in accordance with 11 U.S.C. §§ 503 and 507 with respect to claims covered by this proof of claim or any other claims.

24. Notices. All notices in respect of this proof of claim should be sent to:

Bank of Scotland plc
1095 Avenue of the Americas, 34th Floor
New York, NY 10036
Tel: (646) 264-6361
Facsimile: (212) 479-2806
Attn: Julia R. Franklin, Assistant Vice
President – Loan Documentation

- and -

Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022-2585
Tel: (212) 940-6419
Facsimile: (212) 894-5653
Attn: Kenneth E. Noble

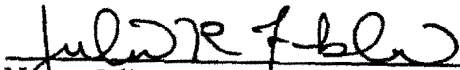
25. Bar Date, Reservation of Rights. This proof of claim is filed under compulsion of the bar date applicable in these cases and pursuant to Bankruptcy Rule 3003, and is filed to protect Bank of Scotland from forfeiture of claims by reason of said bar date. Filing of this proof of claim is not and should not be construed to be, inter alia: (i) a consent by Bank of Scotland to the jurisdiction of this Court with respect to the subject matter of the claims set forth in this proof of claim, any objection or other proceeding commenced with respect thereto or any other proceeding commenced in these cases against or otherwise involving Bank of Scotland; (ii) a

waiver of the right of Bank of Scotland to trial by jury in any proceedings so triable in these cases or any controversy or proceedings related to these cases; (iii) a waiver or release of any of Bank of Scotland's rights against any of the Companies, their non-debtor parents and affiliates, including the Fontainebleau Affiliates, Jeffrey Soffer or any other entity or person liable for all or part of any claim described herein; (iv) a waiver of the right to seek to have the reference withdrawn with respect to the subject matter of these claims, any objection or other proceedings commenced with respect thereto, or any other proceedings commenced in this case against or otherwise involving Bank of Scotland; (v) a waiver of any right of subordination in favor of Bank of Scotland of indebtedness or liens held by creditors of the Companies; (vi) an election of remedies; (vii) a waiver of any rights Bank of Scotland may have pursuant to section 506(b) of the Bankruptcy Code; (viii) a waiver or limitation on the right of Bank of Scotland to vote separately on any plan or plans of reorganization proposed in any of the above-captioned cases; or (ix) a waiver of any additional claims or other rights Bank of Scotland may have against the Companies.

****Remainder of Page Intentionally Left Blank****

Dated: October 8, 2009

BANK OF SCOTLAND PLC

By: 
Name: Julia R. Franklin
Title: Assistant Vice President – Loan
Documentation

This form is intentionally blank.

The notice is scheduled to be processed by the Bankruptcy Noticing Center (BNC).

Refer to the BNC Certificate of Notice entry to view the actual form.

EXHIBIT 2

B 210A (10/06)

**United States Bankruptcy Court
Southern District of Florida**

In re Fontainebleau Las Vegas Holdings, LLC, et al.

Case No. 09-21482 (AJC)
(Jointly Administered)

PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this evidence and notice.

SOLA LTD
Name of Transferee

Kelts LLC
Name of Transferor

Name and Address where notices to transferee should be sent:

Court Claim # (if known): originally filed by Eastland CLO, Ltd.

c/o Solus Alternative Asset Management LP
410 Park Avenue, 11th Floor
New York, NY 10022
Attn: Solus Compliance Officer
Phone: (212) 284-4300
Last Four Digits of Acct #: _____

Amount of Claim Transferred: \$2,244,976.94
(consisting of \$1,679,480.54 Initial Term Loans and \$565,496.40 Delay Draw Term Loans)

Date Claim Filed: October 13, 2009

Name and Address where transferee payments should be sent (if different from above):

Phone: _____
Last Four Digits of Acct #: _____

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: _____
Transferee/Transferee's Agent

Date: 6-24-13

Penalty for making a false statement: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 & 3571.

This form is intentionally blank.

The notice is scheduled to be processed by the Bankruptcy Noticing Center (BNC).

Refer to the BNC Certificate of Notice entry to view the actual form.

EXHIBIT 3

B 210A (10/06)

**United States Bankruptcy Court
Southern District of Florida**

In re Fontainebleau Las Vegas Holdings, LLC, et al.

Case No. 09-21481 (AJC)
(Jointly Administered)

PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this evidence and notice.

Solus Core Opportunities Master Fund Ltd.
Name of Transferee

The Royal Bank of Scotland plc
Name of Transferor

Name and Address where notices to transferee should be sent:

Court Claim # (if known): originally filed by The Royal Bank of Scotland plc

c/o Solus Alternative Asset Management LP
410 Park Avenue, 11th Floor
New York, NY 10022
Attn: Solus Compliance Officer
Phone: (212) 284-4300
Last Four Digits of Acct #: _____

Amount of Claim Transferred: \$616,867.06 Initial Term Loans

Date Claim Filed: October 13, 2009

Name and Address where transferee payments should be sent (if different from above):

Phone: _____
Last Four Digits of Acct #: _____

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: _____
Transferee/Transferee's Agent

Date: 6-24-13

Penalty for making a false statement: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 & 3571.

This form is intentionally blank.

The notice is scheduled to be processed by the Bankruptcy Noticing Center (BNC).

Refer to the BNC Certificate of Notice entry to view the actual form.

EXHIBIT 4

B 210A (10/06)

United States Bankruptcy Court
Southern District of Florida

In re Fontainebleau Las Vegas Holdings, LLC, et al.

Case No. 09-21481 (AJC)
(Jointly Administered)

PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this evidence and notice.

Solus Core Opportunities Master Fund, Ltd.
Name of Transferee

Kelts LLC
Name of Transferor

Name and Address where notices to transferee should be sent:

Court Claim # (if known): originally filed by Eastland CLO, Ltd.

c/o Solus Alternative Asset Management LP
410 Park Avenue, 11th Floor
New York, NY 10022
Attn: Solus Compliance Officer
Phone: (212) 284-4300
Last Four Digits of Acct #: _____

Amount of Claim Transferred: \$219,101.72
(consisting of \$8,930.11 Initial Term Loans and \$210,711.61 Delay Draw Term Loans)

Date Claim Filed: October 13, 2009

Name and Address where transferee payments should be sent (if different from above):

Phone: _____
Last Four Digits of Acct #: _____

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: _____
Transferee/Transferee's Agent

Date: 6-24-13

Penalty for making a false statement: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 & 3571.

This form is intentionally blank.

The notice is scheduled to be processed by the Bankruptcy Noticing Center (BNC).

Refer to the BNC Certificate of Notice entry to view the actual form.

EXHIBIT 5

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

| | | |
|------------------------------|---|-------------------------|
| -----X | | |
| In re: | : | Chapter 7 |
| | : | |
| FONTAINEBLEAU LAS VEGAS | : | Case No. 09-21482 (AJC) |
| HOLDINGS, LLC, <u>et al.</u> | : | |
| | : | |
| Debtors, | : | (Jointly Administered) |
| | : | |
| -----X | | |

PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the partial transfer, other than for security, of the claim referenced in this evidence and notice.

Caspian Select Credit Master Fund, Ltd.
Name of Transferee

Morgan Stanley Senior Funding, Inc.
Name of Transferor

Name and Address where notices to transferee should be sent:

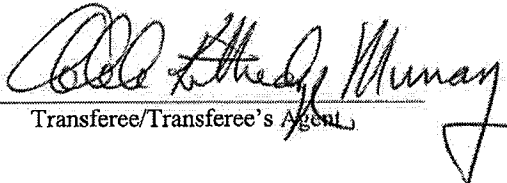
Court Claim # (if known): 97
Amount of Claim: **\$361,500.04**
Date Claim Filed: **August 20, 2010**

Caspian Select Credit Master Fund, Ltd.
767 Fifth Avenue, 45th Floor
New York, New York 10153
Attention: Susan Lancaster
Email: susan@caspiantp.com
Phone: (914) 798-4241
Last Four Digits of Acct #: _____

Phone: (718) 754-7288
Last Four Digits of Acct #: 9776

Name and Address where transferee payments should be sent (if different from above):

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: 
Transferee/Transferee's Agent

Date: 7/2/13

By: _____
Transferor/Transferor's Agent

Date: _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

| | |
|-------------------------|---------------------------|
| -----X | |
| In re: | : Chapter 7 |
| FONTAINEBLEAU LAS VEGAS | : : |
| HOLDINGS, LLC, et al. | : Case No. 09-21482 (AJC) |
| | : : |
| Debtors. | : (Jointly Administered) |
| | : : |
| -----X | |

PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the partial transfer, other than for security, of the claim referenced in this evidence and notice.

Caspian Select Credit Master Fund, Ltd.
Name of Transferee

Morgan Stanley Senior Funding, Inc.
Name of Transferor

Name and Address where notices to transferee should be sent:

Court Claim # (if known): **97**
Amount of Claim: **\$361,500.04**
Date Claim Filed: **August 20, 2010**

Caspian Select Credit Master Fund, Ltd.
767 Fifth Avenue, 45th Floor
New York, New York 10153
Attention: Susan Lancaster
Email: susan@caspiantp.com
Phone: (914) 798-4241
Last Four Digits of Acct #: _____

Phone: (718) 754-7288
Last Four Digits of Acct #: 9776

Name and Address where transferee payments should be sent (if different from above):

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: _____
Transferee/Transferee's Agent

Date: _____

By: John Ragusa
Transferor/Transferor's Agent
John Ragusa
Authorized Signatory

Date: _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

| | |
|------------------------------|---|
| -----X | |
| In re: | : |
| | : |
| FONTAINEBLEAU LAS VEGAS | : |
| HOLDINGS, LLC, <u>et al.</u> | : |
| | : |
| | : |
| Debtors. | : |
| | : |
| -----X | |

Chapter 7
Case No. 09-21482 (AJC)
(Jointly Administered)

NOTICE OF PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

Claim No. 97 was filed or deemed filed under 11 U.S.C. § 1111(a) in this case by the alleged transferor. As evidence of the transfer of that claim, the transferee filed a Transfer of Claim Other than for Security in the clerk's office of this court on _____ (date).

Morgan Stanley Senior Funding, Inc.

Name of Alleged Transferor

Address of Alleged Transferor:

Morgan Stanley Senior Funding, Inc.
1 Pierrepont Plaza, 7th Floor
New York, New York 10022

Caspian Select Credit Master Fund, Ltd.

Name of Transferee

Address of Transferee:

Caspian Select Credit Master Fund, Ltd.
767 Fifth Avenue, 45th Floor
New York, New York 10153

~~DEADLINE TO OBJECT TO TRANSFER~~

The alleged transferor of the claim is hereby notified that objections must be filed with the court within twenty (20) days of the mailing of this notice. If no objection is timely received by the court, the transferee will be substituted as the original claimant without further order of the court.

Date: _____

CLERK OF THE COURT

EXHIBIT 6

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

-----X
In re: :
: Chapter 11
FONTAINEBLEAU LAS VEGAS :
HOLDINGS, LLC, et al. :
: Case No. 09-21481 (AJC)
: :
Debtors. : (Jointly Administered)
: :
-----X

PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the partial transfer, other than for security, of the claim referenced in this evidence and notice.

Caspian Select Credit Master Fund, Ltd.
Name of Transferee

Morgan Stanley Senior Funding, Inc.
Name of Transferor

Name and Address where notices to transferee should be sent:

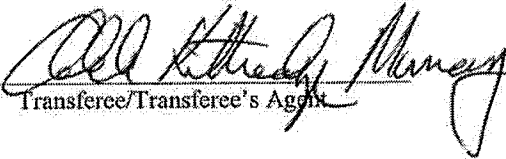
Court Claim # (if known): 608
Amount of Claim: \$561,708.25
Date Claim Filed: April 6, 2010

Caspian Select Credit Master Fund, Ltd.
767 Fifth Avenue, 45th Floor
New York, New York 10153
Attention: Susan Lancaster
Email: susan@caspiantp.com
Phone: (914) 798-4241
Last Four Digits of Acct #: _____

Phone: (718) 754-7288
Last Four Digits of Acct #: 9776

Name and Address where transferee payments should be sent (if different from above):

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: 
Transferee/Transferee's Agent

Date: 7/2/13

By: _____
Transferor/Transferor's Agent

Date: _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

| | |
|------------------------------|---------------------------|
| -----X | |
| In re: | : Chapter 11 |
| FONTAINEBLEAU LAS VEGAS | : : |
| HOLDINGS, LLC, <u>et al.</u> | : Case No. 09-21481 (AJC) |
| | : : |
| Debtors. | : (Jointly Administered) |
| | : : |
| -----X | |

PARTIAL TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the partial transfer, other than for security, of the claim referenced in this evidence and notice.

Caspian Select Credit Master Fund, Ltd.
Name of Transferee

Morgan Stanley Senior Funding, Inc.
Name of Transferor

Name and Address where notices to transferee should be sent:

Court Claim # (if known): **608**
Amount of Claim: **\$561,708.25**
Date Claim Filed: **April 6, 2010**

Caspian Select Credit Master Fund, Ltd.
767 Fifth Avenue, 45th Floor
New York, New York 10153
Attention: Susan Lancaster
Email: susan@caspiantp.com
Phone: (914) 798-4241
Last Four Digits of Acct #: _____

Phone: (718) 754-7288
Last Four Digits of Acct #: 9776

Name and Address where transferee payments should be sent (if different from above):

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: _____
Transferee/Transferee's Agent

Date: _____

By: 
Transferor/Transferor's Agent
John Ragusa
Authorized Signatory

Date: _____

EXHIBIT 7

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re:

FONTAINEBLEAU LAS VEGAS
HOLDINGS, LLC, ET AL,¹

Debtors.

WILMINGTON TRUST N.A., as
Administrative Agent,

Plaintiff,

v.

A1 CONCRETE CUTTING &
DEMOLITION, LLC, et al,

Defendants.

Chapter 7

Case No.: 09-21481-BKC-AJC

(Jointly Administered)

Adversary No. 09-02480-AJC

**SECOND AGREED EX PARTE MOTION TO CONTINUE HEARING ON MOTIONS
TO DISMISS AND STATUS CONFERENCE**

Defendants (exclusive of Turnberry West Construction, Inc. (“TWC”), the “Subcontractors”), by and through co-lead counsel, the law firms of Gordon Silver, Ehrenstein Charbonneau Calderin, and Shraiberg, Ferrara & Landau, P.A.,² move *ex parte* with the consent of the Plaintiff, Wilmington Trust, N.A. (“Wilmington”) and Defendant TWC, and pursuant to Local Rule 9013-1(C)(1) to continue the hearing on the pending Motions to Dismiss and Status

¹ *In re Fontainebleau Las Vegas Holdings, LLC*, Case No. 09-21481-BKC-AJC; *In re Fontainebleau Las Vegas, LLC*, Case No. 09-21482-BKC-AJC; *In re Fontainebleau Las Vegas Capital Corp.*, Case No. 09-21483-BKC-AJC; *In re Fontainebleau Las Vegas Retail Parent, LLC*, Case No. 09-36187-BKC-AJC; *In re Fontainebleau Las Vegas Retail Mezzanine, LLC*, Case No. 09-36191-BKC-AJC; and *In re Fontainebleau Las Vegas Retail, LLC*, Case No. 09-36197-BKC-AJC.

² In compliance with the *Agreed Order Regarding Scheduling and Discovery Management and Coordination Among Defendants* [ECF No. 276], co-lead counsel files this Motion on behalf of all of the Subcontractors named in this adversary proceeding.

Conference scheduled for June 12, 2013 at 3:00 p.m. (the “Agreed Motion”). In support of the Agreed Motion, Subcontractors state as follows:

1. On January 10, 2013, Wilmington filed an Amended Complaint [ECF# 552] against the Subcontractors and Turnberry West Construction, Inc.

2. On January 22, 2013, the Court held a Status Conference regarding the Amended Complaint and various response deadlines related to the Amended Complaint. On the January 30, 2013, the Court issued the *Order (i) Establishing Response Date for the Amended Complaint, (ii) Briefing Schedule and (iii) Scheduling Hearing* (the “Scheduling Order”). [ECF# 562].

3. On March 1, 2013, Subcontractors filed their *Motion to Dismiss and, in the Alternative, for Partial Dismissal and a More Definite Statement* (the “Subcontractor Motion”) [ECF# 577]. On March 15, 2013, TWC filed its *Motion to Dismiss Amended Complaint, or in the Alternative for a More Definite Statement* (the “TWC Motion”). [ECF# 607]. On March 22, 2013, Wilmington filed *Plaintiff’s Response in Opposition to Motion to Dismiss and for a More Definite Statement* (the “Response”). [ECF# 610].

4. The parties then conducted a settlement conference in Miami on April 9 and 10. The settlement conference was substantially successful, and the parties reached an agreement in principal that was memorialized in a nearly final term sheet. After the settlement conference, the parties continued to work toward finalizing the term sheet. In order to facilitate continued negotiations, the parties filed the *Agreed Motion Ex Parte Motion to Continue Hearing on Motions to Dismiss and Status Conference* (the “First Agreed Motion”). The Court set the First Agreed Motion for hearing.

5. On Thursday, April 25, 2013 at 2:30 p.m., the Court held a hearing on the First Agreed Motion at which undersigned counsel announced that the parties were negotiating a settlement, and that they required a 30-day continuance in order to continue negotiating the terms of settlement. The Court granted the First Agreed Motion and continued the hearing on the Motions to Dismiss and Status Conference until June 12, 2013 at 3:00 p.m. (the "Hearing").

6. The parties have continued to negotiate and are very close to finalizing a settlement agreement, Rule 9019 Motion, and proposed order approving the settlement agreement. After finalizing and executing the settlement agreement, the Trustee will file a Rule 9019 Motion, seeking the settlement's approval and the parties will intend to use the continued hearing date as a hearing to approve the settlement.

7. In order to allow the parties to complete that process, the parties respectfully request that the Court grant them a second thirty (30) day continuance of the currently scheduled Hearing and status conference.

8. An agreed order, substantially in the form of Exhibit A attached hereto, will be uploaded via CM/ECF.

WHEREFORE, the Subcontractors respectfully request that the Court grant the Agreed Motion, and enter an order substantially in the form of Exhibit A, continuing the Hearing for thirty (30) days, and grant such other relief as is just.

[Signature page follows]

I certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

Dated: June 7, 2013.

EHRENSTEIN CHARBONNEAU CALDERIN

*Counsel for JMB Capital Partners
Master Fund, L.P.
501 Brickell Key Dr., Suite 300
Miami, FL 33131
T. 305.722.2002 F. 305.722.2001*

GORDON SILVER

*Counsel for the M&M Lienholders
3960 Howard Hughes Parkway, Ninth Floor
Las Vegas, NV 89160
T. 702.396.5555 F. 702.369.2666*

By: /s/ Daniel Gold
DANIEL L. GOLD, ESQ.
Florida Bar No. 761281
dg@ecclegal.com

By: /s/
GREGORY E. GARMAN, ESQ.
Nevada Bar No.: 6654
ggarman@gordonsilver.com
Admitted pro hac vice
GABRIELLE A. HAMM, ESQ.
Nevada Bar No. 11588
ghamm@gordonsilver.com
Admitted pro hac vice

SHRAIBERG, FERRARA & LANDAU, P.A.

*Counsel for the M&M Lienholders
2385 N.W. Executive Center Dr., Suite 300
Boca Raton, FL 33431
T. 561.443.0800 F. 561.998.0047*

By: /s/
PHILIP J. LANDAU, ESQ.
Florida Bar No.: 504017
Plandau@sfl-pa.com

Certificate of Service

I certify that a copy of the foregoing was served this 7th day of June, 2013 on the following:

James H. Post
Stephen D. Busey
Smith Hulsey & Busey
225 Water Street, Suite 1800
Jacksonville, FL 32201

Sidney Levinson
Jones Day
555 South Flower Street
Fiftieth Floor
Los Angeles, California 90071-2300

EXHIBIT "A"

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov**

In re:

FONTAINEBLEAU LAS VEGAS
HOLDINGS, LLC, ET AL,³

Debtors.

WILMINGTON TRUST N.A., as
Administrative Agent,

Plaintiff,

v.

A1 CONCRETE CUTTING &
DEMOLITION, LLC, et al,

Defendants.

Chapter 7

Case No.: 09-21481-BKC-AJC

(Jointly Administered)

Adversary No. 09-02480-AJC

³ *In re Fontainebleau Las Vegas Holdings, LLC*, Case No. 09-21481-BKC-AJC; *In re Fontainebleau Las Vegas, LLC*, Case No. 09-21482-BKC-AJC; *In re Fontainebleau Las Vegas Capital Corp.*, Case No. 09-21483-BKC-AJC; *In re Fontainebleau Las Vegas Retail Parent, LLC*, Case No. 09-36187-BKC-AJC; *In re Fontainebleau Las Vegas Retail Mezzanine, LLC*, Case No. 09-36191-BKC-AJC; and *In re Fontainebleau Las Vegas Retail, LLC*, Case No. 09-36197-BKC-AJC.

**ORDER GRANTING SECOND AGREED EX PARTE MOTION TO CONTINUE
HEARING ON MOTIONS TO DISMISS AND STATUS CONFERENCE**

This Matter came before the Court *ex parte* on the *Second Agreed Ex Parte Motion to Continue Hearing on Motions to Dismiss and Status Conference* (the “Motion”) [ECF# __]. The Court has considered the Motion and the consent to continue the Hearing and Status Conference by Wilmington Trust, N.A. and Turnberry West Construction, Inc. and finds that good cause exists to grant the requested continuance. Accordingly, the Court **ORDERS and ADJUDGES**:

1. The Motion is GRANTED.

2. The Hearing and Status Conference are continued until _____, 2013 in the United States Bankruptcy Court, 51 S.W. 1st Avenue, 14th Floor, Room 1410, Miami, FL 33130.

#

Submitted by:

Daniel L. Gold, Esq.
Florida Bar No. 0761281
Ehrenstein Charbonneau Calderin
Counsel for JMB Capital Partners Master Fund, L.P.
501 Brickell Key Drive, Suite 300
Miami, FL 33131
T: 305.722.2002
dgold@ecclegal.com

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

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

**ORDER DENYING DEFENDANT'S
MOTION FOR RECONSIDERATION [ECF No. 365]**

This Cause is before the Court on Defendant's Motion for Reconsideration [ECF No. 365]. On August 30, 2013, I entered an Order [ECF No. 363] suggesting remand of this multi-district litigation ("MDL") to the District of Nevada. I noted that the only action pending before me upon the Eleventh Circuit Court of Appeals' mandate was *Avenue CLO Fund, Ltd., et al. v. Bank of America, et al.*, Case No. 09-cv-1047, originally filed in the District of Nevada. I noted that *Fontainebleau Las Vegas, LLC v. Bank of America, N.A., et al.*, Case No. 09-cv-21879, the case originally assigned to me, had settled, and the tag-along action, *ACP Master, LTD, et al. v. Bank of America, et al*, Case No. 09-cv-8064, had been dismissed. I also stated that all common pretrial proceedings in the MDL had been completed [see ECF No. 251, MDL Order Number 51, setting pre-trial deadlines]. The Judicial Panel on Multidistrict Litigation ("JPML") issued a Conditional Remand Order on September 4, 2013.

In its Motion for Reconsideration, filed September 5, 2013, Defendant states pretrial proceedings, namely fact and expert witness discovery on damages, are not yet complete. Specifically, Defendant contends certain Plaintiffs must update their damages disclosures because they have purchased additional Fontainebleau Las Vegas Term

Loans on the secondary market, and expert discovery must be revised to reflect these changes in Plaintiffs' holdings as well as settlement recoveries in pending bankruptcy proceedings. Defendant contends the parties would benefit from this Court's supervision of the remaining pretrial proceedings.

Upon review of the case file, I deny Defendant's Motion for Reconsideration. The damages discovery that remains outstanding does not overlap with the Fontainebleau case, the case originally before me. Further, I do not believe I have obtained any particular expertise from supervising the MDL that would render me more capable than the District of Nevada in presiding over damages discovery. To the contrary, I conclude the central purpose of the JPML referral has been achieved through my orders on motions to dismiss and motions for summary judgment, and it will promote the just and efficient conduct of this action to have any remaining damages discovery supervised by the judge trying the case, in conjunction with trial-related issues and pleadings. I therefore recommend the JPML exercise its discretion and remand the case to the District of Nevada. See 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at *or before* the conclusion of such pretrial proceedings (emphasis added)); *In re Evergreen Valley Project Litig.*, 435 F. Supp. 923 (Jud. Pan. Mult. Lit. 1978) ("It is not contemplated that a Section 1407 transferee judge will necessarily complete all pretrial proceedings in all actions transferred and assigned to him by the Panel, but rather that the transferee judge in his discretion will conduct the common pretrial proceedings with respect to the actions and any additional pretrial proceedings as he deems otherwise appropriate."); *In re Air Crash Disaster at Tenerife*, 461 F.Supp., 671 (Jud. Pan. Mult. Lit. 1978) (remanding select plaintiffs' case to

transferor district where remaining discovery concerned damages and remaining pretrial proceedings in plaintiffs' case were unique to those plaintiffs).

Accordingly, it is hereby ORDERED and ADJUDGED that Defendant's Motion for Reconsideration [ECF No. 365] is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of September, 2013.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: 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

**ORDER UPON MANDATE; REQUIRING FILING OF JOINT
NOTICE REGARDING DOCUMENTS FILED UNDER SEAL**

This Cause is before the Court upon Mandate of the Eleventh Circuit Court of Appeals [ECF 362]. While this case was on appeal, the parties filed before the Eleventh Circuit a joint letter agreeing that certain documents should be unsealed, but listing certain documents they wished remain under seal. [Eleventh Circuit Case No. 12-11815, Letter dated December 14, 2012]. In the Mandate, the Eleventh Circuit directed the Clerk, upon remand, to unseal all of the documents in the record, except those delineated in the parties' request to retain them as sealed." [ECF No. 362, 25]. To assist the Court in determining which documents should be unsealed, it is hereby ORDERED and ADJUDGED as follows:

On or before **October 18, 2013**, the parties shall file a Joint Notice specifying, by district court docket entry number, which documents should be unsealed, and which documents the parties wish to remain under seal. The designations in the Joint Notice should correspond to the December 14, 2012 letter submitted to the Eleventh Circuit.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of October, 2013.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: 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

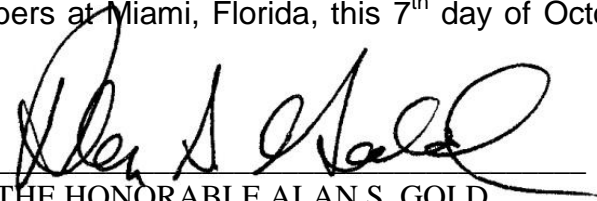
MDL No. 2106

**ORDER DENYING WITHOUT PREJUDICE MOTION TO UNSEAL OR, IN THE
ALTERNATIVE, MOTION TO PARTIALLY LIFT SEAL FOR PURPOSES OF
COPYING PERTINENT DOCUMENTS [ECF No. 367]**

This Cause is before the Court on the Motion of non-parties Glenn Schaeffer, et al., to Unseal or Partially Lift Seal for Purposes of Copying Pertinent Documents [ECF No. 367]. The Motion was filed under seal. The Court has requested the parties to specify, in accordance with the Eleventh Circuit's Mandate, which documents should be unsealed, and which should remain under seal [ECF No. 368]. Accordingly, at this juncture, I find it prudent to deny the Motion without prejudice.

It is hereby ORDERED and ADJUDGED that the Motion to Unseal or Partially Lift Seal for Purposes of Copying Pertinent Documents [ECF No. 367] is **DENIED WITHOUT PREJUDICE.**

DONE AND ORDERED in Chambers at Miami, Florida, this 7th day of October, 2013.


THE HONORABLE ALAN S. GOLD
SENIOR UNITED STATES DISTRICT JUDGE

cc: Clerk of the United States Judicial Panel on Multidistrict Litigation
Magistrate Judge Jonathan Goodman
All Counsel of Record
Freidin Dobrinsky Brown & Rosenbaum, P.A.
One Biscayne Tower, Ste. 3100
2 South Biscayne Blvd., Miami, FL 33131

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

**SUA SPONTE ORDER REGARDING MANDATE AND
DOCUMENTS FILED UNDER SEAL**

This Cause is before the Court *sua sponte*. On October 4, 2013, pursuant to the Mandate of the Eleventh Circuit Court of Appeals [ECF 362] directing the Clerk of Court, upon remand, “to unseal all of the documents in the record, except those delineated in the parties’ request to retain them as sealed.” [ECF No. 362, 25; see *also* Eleventh Circuit Case No. 12-11815, Letter dated December 14, 2012], I issued an Order Upon Mandate; Requiring Filing of Joint Notice Regarding Documents Filed Under Seal [ECF No. 368] directing the parties to file a Joint Notice specifying, by district court docket entry number, which documents should be unsealed, and which documents the parties wish to remain under seal. It has come to the Court’s attention that the parties cannot view the sealed entries on the electronic CM/ECF docket in this case, and, therefore, cannot, by viewing the CM/ECF docket, determine which district court docket entry numbers correspond to each sealed document. The Court cannot grant the parties electronic CM/ECF access to the sealed documents.

The Eleventh Circuit’s mandate is still outstanding, and one option of complying with the mandate is to require the parties to conduct a physical review of the sealed documents in the Clerk’s office. Recognizing that this may be burdensome, I find it

prudent to allow the parties to propose an alternate solution. If no viable alternative is presented, I will instruct the parties to appear in person at the Clerk's office and review the physical sealed files to file a Joint Notice in compliance with my Order [ECF No. 369]. It is hereby ORDERED and ADJUDGED as follows:

1. On or before **November 1, 2013**, the parties shall file a joint recommendation on how they propose to comply with the Eleventh Circuit's mandate that select documents be unsealed and my Order [ECF No. 368] requiring the parties to specify, by district court docket entry number, which documents should be unsealed. If no viable joint recommendation is presented, the parties will be required to comply with the mandate and my Order by conducting a physical review of the sealed files.

2. The October 18, 2013 deadline to file a Joint Notice, as specified in my Order [ECF No. 368] is held in abeyance pending further Court order.

DONE AND ORDERED in Chambers at Miami, Florida, this 17th day of October, 2013.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: All Counsel of Record

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

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

**UNOPPOSED MOTION TO WITHDRAW APPEARANCE OF
ATTORNEY KENNETH T. MURATA**

Pursuant to S.D. Fla. Local Rule 11.1(d), Defendant Bank of America, N.A. (“BANA”) respectfully requests leave to withdraw the appearance of attorney Kenneth T. Murata as its counsel in the above-captioned action. In support of this motion, BANA states as follows:

1. Mr. Murata is no longer associated with O’Melveny & Myers LLP (“OMM”), which is counsel to BANA in this action.
2. Granting this motion will not prejudice BANA because OMM and Hunton & Williams LLP continue to represent BANA in this action. The OMM attorneys currently representing BANA in this matter are Bradley J. Butwin (bbutwin@omm.com), Jonathan Rosenberg (jrosenberg@omm.com), Daniel L. Cantor (dcantor@omm.com), and William J. Sushon (wsushon@omm.com). In addition, Hunton & Williams LLP attorney Jamie Zysk Isani (jisani@hunton.com) continues to represent BANA in this matter.

WHEREFORE, BANA respectfully requests that this Court direct the Clerk to remove Kenneth T. Murata as counsel for BANA for all purposes relating to the proceedings in the above-styled matter and cease delivering notices of electronic filing in this action to Mr. Murata

at kmurata@omm.com. A proposed order is being submitted separately via e-mail, pursuant to this Court's posted CM/ECF procedures.

LOCAL RULE 7.1(a)(3) CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), BANA certifies that it conferred with Plaintiffs' counsel on October 20, 2013, regarding this motion. Plaintiffs have stated that they do not oppose this motion.

Dated: October 22, 2013

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: /s/ Jamie Zysk Isani
Jamie Zysk Isani
Florida Bar No. 728861
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: (305) 536-2724
Facsimile: (305) 810-1675
E-mail: jisani@hunton.com

- and -

O'MELVENY & MYERS LLP
Bradley J. Butwin (*pro hac vice*)
Jonathan Rosenberg (*pro hac vice*)
Daniel L. Cantor (*pro hac vice*)
William J. Sushon (*pro hac vice*)
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
E-mails:
bbutwin@omm.com;
jrosenberg@omm.com;
dcantor@omm.com;
wsushon@omm.com

Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by transmission of Notice of Electronic Filing generated by CM/ECF on October 22, 2013 on all counsel or parties of record on the Service List below:

J. Michael Hennigan, Esq.
Kirk Dillman, Esq.
Robert Mockler, Esq.
MCKOOL SMITH, P.C.
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234
E-mail:
hennigan@mckoolsmithhennigan.com
kdillman@mckoolsmithhennigan.com
rmockler@mckoolsmithhennigan.com

David A. Rothstein, Esq.
Lorenz Michel Pruss, Esq.
DIMOND KAPLAN & ROTHSTEIN, P.A.
2665 South Bayshore Drive
Penthouse 2-B
Miami, Florida 33133
Telephone: (305) 600-1393
Facsimile: (305) 374-1961
E-mail:
drothstein@dkrpa.com
lpruss@dkrpa.com

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

By: /s/ Jamie Zysk Isani
 Jamie Zysk Isani, Esq.

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

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

**ORDER GRANTING UNOPPOSED MOTION TO WITHDRAW
APPEARANCE OF ATTORNEY KENNETH T. MURATA**

THIS CAUSE having come before the Court on Bank of America, N.A.'s ("BANA") Unopposed Motion to Withdraw Appearance of Attorney Kenneth T. Murata, and the Court, having reviewed the file and being otherwise advised, it is hereby:

ORDERED and ADJUDGED that:

1. The Motion is GRANTED.
2. Kenneth T. Murata is withdrawn as counsel for Defendant BANA, for all purposes relating to the proceedings in the above-styled matter.
3. The Clerk shall remove Mr. Murata from the docket and cease delivery of notifications of electronic filings to Mr. Murata. Mr. Murata's e-mail address to be removed is kmurata@omm.com.

DONE and ORDERED in Chambers in Miami-Dade County, Florida this ___ day of
October __, 2013.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
Counsel of Record

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

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106


This document relates to all actions.

**ORDER GRANTING UNOPPOSED MOTION TO WITHDRAW
APPEARANCE OF ATTORNEY KENNETH T. MURATA [ECF NO. 371]**

THIS CAUSE having come before the Court on Bank of America, N.A.'s ("BANA") Unopposed Motion to Withdraw Appearance of Attorney Kenneth T. Murata [ECF No. 371], and the Court, having reviewed the file and being otherwise advised, it is hereby **ORDERED and ADJUDGED** that:

1. The Motion [ECF No. 371] is **GRANTED**.
2. Kenneth T. Murata is withdrawn as counsel for Defendant BANA, for all purposes relating to the proceedings in the above-styled matter.
3. The Clerk shall remove Mr. Murata from the docket and cease delivery of notifications of electronic filings to Mr. Murata. Mr. Murata's e-mail address to be removed is kmurata@omm.com.

DONE and ORDERED in Chambers in Miami-Dade County, Florida this 24th day
of October, 2013.



THE HONORABLE ALAN S. GOLD
SENIOR UNITED STATES DISTRICT JUDGE

cc:
Counsel of Record

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

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

**JOINT NOTICE REGARDING PROPOSAL FOR
PARTIALLY UNSEALING SUMMARY JUDGMENT FILINGS**

This Joint Notice by Defendant Bank of America, N.A. (“BANA”) and the Avenue Term Lender Plaintiffs (“Plaintiffs”) is made in response to the Court’s Sua Sponte Order Regarding Mandate and Documents Filed Under Seal [D.E. #370] (the “Sua Sponte Order”). The Order required the parties to make a recommendation by November 1, 2013 regarding how they propose to comply with this Court’s October 4, 2013 Order Upon Mandate [D.E. #368] requiring the parties to specify, by district court docket entry number, which documents should be unsealed. As this Court noted in its Sua Sponte Order, because the parties cannot view the sealed entries on the electronic CM/ECF docket in this case, they cannot, by viewing the CM/ECF docket, determine which district court docket entry numbers correspond to each sealed document.

Because the summary judgment materials contain commercially sensitive information, good cause remains for keeping under seal certain party documents and information cited therein. In addition, the parties have been instructed by certain third parties that produced documents under this Court’s Amended MDL Order Number 24 Confidentiality Stipulation and

Protective Order [D.E. #116] (the “Protective Order”), that they do not consent to the unsealing of any of their documents or information that were included in the parties’ summary judgment filings.

Accordingly, the parties propose jointly submitting to the Court redacted copies of the joint binders of all summary judgment filings that were previously submitted to this Court on October 28, 2011 in response to MDL Order No. 51 Granting Joint Motion for Extension of Certain Pre-Trial Deadlines *Nunc Pro Tunc* [D.E. #251]. As per the Court’s Order, those binders contained copies of the parties’ summary judgment motions and all responses, replies, exhibits, memoranda of law, and case law cited therein. In preparation for compiling these joint binders, the parties met and conferred. In an effort to reduce the burden on the Court of reviewing such a voluminous record, the parties determined that although certain exhibits were cited in both BANA’s motion for summary judgment and the Plaintiffs’ motion for partial summary judgment—or responses and replies thereto—and thus, were filed multiple times, it would be less burdensome for the Court if the joint binders contained only one copy of each exhibit and a single compilation of each witness’s deposition transcript excerpts cited in all memoranda of law. When compiling the joint binders, the parties conducted a thorough review of the entire record and ensured that a copy of all documents filed with the Court in connection with the parties’ summary judgment motions were contained in those binders. The parties delivered the joint binders to this Court on October 28, 2011, along with a letter attaching an index that detailed all documents included in each binder. The October 28, 2011 letter from Hunton & Williams to the Honorable Alan S. Gold is attached hereto as Exhibit A.

The parties now propose submitting to the Court redacted copies of the memoranda of law, statements of undisputed/disputed material facts, and exhibits contained in these joint

binders, which could be made available to the public because they will omit all party and third party documents and information that should remain under seal.¹ The parties will also include in these joint binders redacted copies of all documents included in their supplemental summary judgment filings dated November 14, 2011 and November 16, 2011. Because these two filings occurred after the parties submitted their joint binders on October 28, 2011, they were not included in the original copy set. The parties will either send hardcopies of the redacted joint binders to the Court by FedEx or will file the documents via ECF, if the Court prefers. The parties request that they are allowed four weeks from the date the Court approves this joint proposal in order to complete the cumbersome redaction process.

This proposal reduces the onus on both the parties and the Clerk because it prevents the need for a manual review of all paper documents and information included in each individual filing to determine which documents the parties and certain third-parties have requested remain under seal. A manual review of the entire record would be particularly burdensome because, as described above, certain exhibits were filed multiple times in connection with the summary judgment motions. This approach significantly reduces the number of documents that would need to be reviewed and redacted and will promote both efficiency and consistency in terms of the material that remains sealed.

Should the Court find that this proposal does not adequately meet its request, the parties recommend in the alternative electronically filing redacted copies of all memoranda of law, statements of undisputed/disputed fact and any other documents that require redactions, along with an updated chart detailing all documents that the parties and certain third parties request

¹ The parties anticipate the need to redact certain memoranda of law and statements of facts to the extent they disclose information contained in documents that will remain under seal. Although the vast majority of exhibits will be refiled publicly, the parties anticipate that a handful of deposition transcripts and exhibits will need to be redacted prior to public filing.

remain under seal in full. A list of such documents was previously provided to the Eleventh Circuit upon request on December 14, 2012. A copy of the December 14, 2012 letter from Bancroft to John Ley, Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit, is attached hereto as Exhibit B. Recently one of the third parties has responded to the parties' inquiry as to the continued confidentiality of its documents and has agreed to un-seal its documents. The updated chart would reflect this change.

In connection with this alternative proposal, the parties could include on the updated chart additional columns indicating—instead of docket numbers, which are unavailable to the parties for the sealed filings—the titles of the documents in which the exhibits listed are cited and the corresponding filing dates. While this alternative proposal would enable the Court to identify which filings in the original record contain the documents that must remain under seal, including duplicate copies, it would likely create more work for the Clerk than the parties' initial proposal described above. The parties could electronically file copies of all documents requiring redactions and the chart described herein four weeks from the date the Court approves this proposal.

The parties respectfully request that the Court inform the parties at its earliest convenience which of their proposals is amenable to the Court.

Date: Miami, Florida
November 1, 2013

By: /s/ Jamie Zysk Isani
Jamie Zysk Isani

HUNTON & WILLIAMS LLP
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: (305) 810-2500
Facsimile: (305) 810-2460
E-mail: jjsani@hunton.com

-and-

Bradley J. Butwin (*pro hac vice*)
Jonathan Rosenberg (*pro hac vice*)
Daniel L. Cantor (*pro hac vice*)
William J. Sushon (*pro hac vice*)
O'MELVENY & MYERS LLP
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
E-mail: bbutwin@omm.com
jrosenberg@omm.com
dcantor@omm.com
wsushon@omm.com

Attorneys for Defendant Bank of America, N.A.

By: /s/ Lorenz Michel Prüss
Lorenz Michel Prüss

DIMOND KAPLAN & ROTHSTEIN, P.A.
2665 South Bayshore Drive, PH-2B
Miami, Florida 33133
Telephone: (305) 374-1920
Facsimile: (305) 374-1961
E-mail: lpruss@dkrpa.com

-and-

J. Michael Hennigan (*pro hac vice*)
Kirk D. Dillman (*pro hac vice*)
MCKOOL SMITH
865 S. Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234
E-mail:
hennigan@mckoolsmithhennigan.com
kdillman@mckoolsmithhennigan.com

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

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on November 1, 2013, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served upon counsel of record.

By: /s Lorenz Michel Prüss
Lorenz Michel Prüss



HUNTON & WILLIAMS LLP
1111 BRICKELL AVENUE
SUITE 2500
MIAMI, FLORIDA 33131-1802

TEL 305 • 810 • 2500
FAX 305 • 810 • 2460

JAMIE ZYSK ISANI
DIRECT DIAL: 305-536-2724
EMAIL: jisani@hunton.com

FILE NO: 46124.00911

October 28, 2011

By Hand Delivery

The Honorable Judge Alan S. Gold
United States District Judge
400 North Miami Avenue
Chambers Suite 11S56
Courtroom 11-1
Miami, Florida 33128

Re: *In re Fontainebleau Las Vegas Contract Litigation*,
Case No. 09-2106-MD-GOLD/GOODMAN (S.D. Fla.)

Dear Judge Gold:

We represent defendant Bank of America, N.A. (“BANA”) in the above-referenced action. Pursuant to MDL Order Number 51 [ECF No. 251], enclosed are four binders containing the following materials pertaining to BANA’s Motion for Summary Judgment, filed under seal on August 5, 2011:¹

Filings related to our Motion for Summary Judgment:

- Binder 1: BANA’s Motion, Plaintiffs’ Response, Related Filings
- Binder 2: Declaration of Robert W. Barone and Exhibits
- Binder 3: Declaration of Brandon Bolio and Exhibits
- Binder 4: Declaration of Jeff Susman and Exhibits

The parties cite to many of the same depositions transcripts and exhibits in their papers related to BANA’s Motion for Summary Judgment and those related to Plaintiffs’ Motion for Partial Summary Judgment, also filed under seal on August 5, 2011. In view of the volume of documents involved, the parties have conferred and agreed that, to avoid duplicity and,

¹ All of the materials referenced herein have been filed under seal and, thus, cannot be referenced by docket entry number. Detailed indices describing the contents of each binder are enclosed.



The Honorable Judge Alan S. Gold
October 28, 2011
Page 2

hopefully, to ease the Court's burden, we are submitting the deposition transcript excerpts and exhibits relating to both parties' motions together in one package.² Accordingly, we also enclose six joint binders containing all of the legal authorities, deposition transcripts excerpts, deposition exhibits, and non-deposition exhibits cited in the papers related to both BANA's Motion for Summary Judgment and the Plaintiffs' Motion for Partial Summary Judgment:

Joint binders of legal and factual citations:

- Binder 1: Authorities
- Binder 2: Deposition Transcript Excerpts
- Binder 3: Deposition Exhibits Cited
- Binder 4: Deposition Exhibits Cited
- Binder 5: Deposition Exhibits Cited
- Binder 6: Non-Deposition Exhibits Cited

We hope that this format is acceptable to the Court. If not, we would be happy to resubmit the materials in any format the Court prefers.

Thank you for your time and attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jamie Zysk Isani', with a long horizontal flourish extending to the right.

Jamie Zysk Isani

Enclosures

² BANA filed a number of deposition transcript excerpts and exhibits in support of its Motion for Summary Judgment and in opposition to Plaintiffs' Partial Motion for Summary Judgment as attachments to declarations of Daniel Cantor. Based on the parties' agreement to submit a single set of deposition exhibits and to avoid duplicity, BANA has submitted the Cantor declarations in support of its Motion for Summary Judgment and Reply Memorandum *without* exhibits.



The Honorable Judge Alan S. Gold
October 28, 2011
Page 3

cc: Kirk D. Dillman, Esq. (*via FedEx*)
McKool Smith Hennigan
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017

INDEX FOR BANK OF AMERICA, N.A.'S ("BANA'S")
MOTION FOR SUMMARY JUDGMENT BINDERS

| BINDER 1: BANA'S MOTION, PLAINTIFFS' RESPONSE, RELATED FILINGS | | |
|---|--|--|
| Tab | Document | Date and Docket No. |
| BANA's Motion for Summary Judgment | | |
| 1 | BANA's Motion for Summary Judgment and Incorporated Memorandum of Law | August 5, 2011 Filed Under Seal |
| 2 | BANA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment | August 5, 2011 Filed Under Seal |
| 3 | Declaration of Daniel L. Cantor (without exhibits) | August 5, 2011 Filed Under Seal |
| Plaintiffs' Opposition to BANA's Motion for Summary Judgment | | |
| 4 | Term Lender Plaintiffs' Opposition to BANA's Motion for Summary Judgment | September 9, 2011 Filed Under Seal |
| 5 | Term Lender Plaintiffs' Response to BANA's Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to BANA's Motion for Summary Judgment | September 9, 2011 Filed Under Seal |
| 6 | Declaration of Robert W. Mockler and Request for Judicial Notice in Support of Term Lender Plaintiffs' Opposition to BANA's Motion for Summary Judgment | September 9, 2011 Filed Under Seal |
| BANA's Reply to Plaintiffs' Opposition to Motion for Summary Judgment | | |
| 7 | BANA's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment | September 27, 2011 Filed Under Seal |
| 8 | BANA's Reply to Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to Defendant's Motion for Summary Judgment | September 27, 2011 Filed Under Seal |
| 9 | Declaration of Daniel L. Cantor in Support of BANA's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment (without exhibits) | September 27, 2011 Filed Under Seal |
| BANA's Opposition to Plaintiffs' Request for Judicial Notice and Plaintiffs' Reply | | |
| 10 | BANA's Opposition to Plaintiffs' Request for Judicial Notice in Support of Term Lender Plaintiffs' Opposition to BANA's Motion for Summary Judgment | September 27, 2011 Filed Under Seal |
| 11 | Reply in Support of Term Lender Plaintiffs' Request for Judicial Notice filed September | September 27, 2011 Docket No. 286 |
| Plaintiffs' Opposition to BANA's Request for Judicial Notice and BANA's Reply | | |
| 12 | Term Lender Plaintiffs' Opposition to BANA's Request for Judicial Notice | September 27, 2011 Docket No. 285 |

DOCUMENTS IN INDEX FILED UNDER SEAL

INDEX FOR BANA'S MOTION FOR SUMMARY JUDGMENT BINDERS

| BINDER 1: BANA'S MOTION, PLAINTIFFS' RESPONSE, RELATED FILINGS | | |
|---|---|--------------------------------------|
| Tab | Document | Date and Docket No. |
| 13 | BANA's Reply to Term Lender Plaintiffs' Opposition to its Request for Judicial Notice | October 7, 2011 Docket No. 301 |
| Plaintiffs' Response to BANA's Evidentiary Objections and BANA's Reply | | |
| 14 | Term Lender Plaintiffs' Response to BANA's Evidentiary Objections Included in its Response to Plaintiffs' Statement of Additional Undisputed Material Facts | October 7, 2011 Filed Under Seal |
| 15 | Declaration of Robert W. Mockler in Support of Term Lender Plaintiffs' Response to BANA's Evidentiary Objections Included in its Response to Plaintiffs' Statement of Additional Undisputed Material Facts (without exhibits) | October 7, 2011 Filed Under Seal |
| 16 | BANA's Reply to Term Lender Plaintiffs' Response to BANA's Evidentiary Objections | October 17, 2011 Filed Under Seal |

| BINDER 2: DECLARATION OF ROBERT W. BARONE AND EXHIBITS | | |
|---|---------------------------------|----------------------------------|
| Tab | Exhibit | BATES or Docket Nos. |
| -- | Declaration of Robert W. Barone | Filed Under Seal, August 5, 2011 |
| 1 | Barone Ex. 1 | BANA_FB00104126-79 |
| 2 | Barone Ex. 2 | IVI 029026-778 |
| 3 | Barone Ex. 3 | IVI 075239-43 |
| 4 | Barone Ex. 4 | IVI 078189-246 |
| 5 | Barone Ex. 5 | IVI 029967-30892 |
| 6 | Barone Ex. 6 | IVI 078285-89 |
| 7 | Barone Ex. 7 | IVI 079130-32 |
| 8 | Barone Ex. 8 | IVI 079987-80041 |
| 9 | Barone Ex. 9 | IVI 080316-20 |
| 10 | Barone Ex. 10 | BANA_FB00864253-55 |
| 11 | Barone Ex. 11 | IVI 038731-39 |
| 12 | Barone Ex. 12 | BANA_FB00216853-79 |
| 13 | Barone Ex. 13 | IVI 080500-21 |
| 14 | Barone Ex. 14 | IVI 038876-933 |

| BINDER 3: DECLARATION OF BRANDON BOLIO AND EXHIBITS | | |
|--|------------------------------|------------------------------------|
| Tab | Exhibit | BATES or Docket Nos. |
| -- | Declaration of Brandon Bolio | Filed Under Seal, August 5, 2011 |
| 1 | Bolio Ex. 1 | BANA_FB00204948-5092 (Dep. Ex. 72) |
| 2 | Bolio Ex. 2 | BANA_FB00342543-82 |

INDEX FOR BANA'S MOTION FOR SUMMARY JUDGMENT BINDERS

| BINDER 3: DECLARATION OF BRANDON BOLIO AND EXHIBITS | | |
|--|----------------|-----------------------------------|
| Tab | Exhibit | BATES or Docket Nos. |
| 3 | Bolio Ex. 3 | BANA_FB00342590-93 |
| 4 | Bolio Ex. 4 | BANA_FB00342587-89 |
| 5 | Bolio Ex. 5 | BANA_FB00342583-86 |
| 6 | Bolio Ex. 6 | BANA_FB00094015-19 |
| 7 | Bolio Ex. 7 | BANA_FB00280278-324 |
| 8 | Bolio Ex. 8 | BANA_FB00331977-79 |
| 9 | Bolio Ex. 9 | BANA_FB00331967-69 |
| 10 | Bolio Ex. 10 | BANA_FB00331970-72 |
| 11 | Bolio Ex. 11 | BANA_FB00103783-838 |
| 12 | Bolio Ex. 12 | BANA_FB00103875-933 |
| 13 | Bolio Ex. 13 | BANA_FB00281969-2022 |
| 14 | Bolio Ex. 14 | BANA_FB00104126-179 |
| 15 | Bolio Ex. 15 | BANA_FB00104216-73 |
| 16 | Bolio Ex. 16 | BANA_FB00104302-56 |
| 17 | Bolio Ex. 17 | BANA_FB00104357-59 |
| 18 | Bolio Ex. 18 | BANA_FB00339288-345 |
| 19 | Bolio Ex. 19 | BANA_FB00285946-50 |
| 20 | Bolio Ex. 20 | BANA_FB00342602-05 |
| 21 | Bolio Ex. 21 | BANA_FB00180358-67 |
| 22 | Bolio Ex. 22 | BANA_FB00234162-72 |
| 23 | Bolio Ex. 23 | BANA_FB00103934-43 |
| 24 | Bolio Ex. 24 | BANA_FB00234904-14 |
| 25 | Bolio Ex. 25 | BANA_FB00235144-54 |
| 26 | Bolio Ex. 26 | BANA_FB00104279-88 |
| 27 | Bolio Ex. 27 | BANA_FB00339350-54 |
| 28 | Bolio Ex. 28 | BANA_FB00235740-45 |
| 29 | Bolio Ex. 29 | BANA_FB00103867-72 |
| 30 | Bolio Ex. 30 | BANA_FB00103944-49 |
| 31 | Bolio Ex. 31 | BANA_FB00104110-15 |
| 32 | Bolio Ex. 32 | BANA_FB00104202-07 |
| 33 | Bolio Ex. 33 | BANA_FB00104296-301 |
| 34 | Bolio Ex. 34 | BANA_FB00377105-11 |
| 35 | Bolio Ex. 35 | BANA_FB00215641-42 |
| 36 | Bolio Ex. 36 | BANA_FB00806878-81 (Dep. Ex. 860) |
| 37 | Bolio Ex. 37 | SMRH00105442-44 (Dep. Ex. 611) |
| 38 | Bolio Ex. 38 | BANA_FB00216853-79 |
| 39 | Bolio Ex. 39 | BANA_FB00216886-907 |
| 40 | Bolio Ex. 40 | No Bates Number |
| 41 | Bolio Ex. 41 | BANA_FB00339608-12 |

INDEX FOR BANA'S MOTION FOR SUMMARY JUDGMENT BINDERS

| BINDER 4: DECLARATION OF JEFF SUSMAN AND EXHIBITS | | |
|--|----------------------------|-----------------------------------|
| Tab | Exhibit | BATES or Docket Nos. |
| -- | Declaration of Jeff Susman | Filed Under Seal, August 5, 2011 |
| 1 | Susman Ex. 1 | BANA_FB00422664-65 (Dep. Ex. 455) |
| 2 | Susman Ex. 2 | BANA_FB00424081-84 |
| 3 | Susman Ex. 3 | BANA_FB00462092 (Dep. Ex. 241) |
| 4 | Susman Ex. 4 | BANA_FB00884060 (Dep. Ex. 75) |
| 5 | Susman Ex. 5 | BANA_FB00869576-78 |
| 6 | Susman Ex. 6 | SMRH00016771-73 (Dep. Ex. 459) |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANK OF AMERICA, N.A. ("BANA") AND TERM LENDER PLAINTIFFS IN
THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDER 1: AUTHORITIES | |
|------------------------------|--|
| Tab | Document |
| Cases | |
| 1 | <i>85th Street Restaurant Corp. v. Sanders</i> , 600 N.Y.S.2d 1 (N.Y. App. Div. 1st Dep't 1993) |
| 2 | <i>Aguirre v. City of New York</i> , 625 N.Y.S.2d 597 (N.Y. App. Div. 2d Dep't 1995) |
| 3 | <i>Alitalia Linee Aeree Italiane v. Airline Tariff Publishing Co.</i> , 580 F. Supp. 2d 285 (S.D.N.Y. 2008) |
| 4 | <i>American Express Bank Ltd. v. Uniroyal, Inc.</i> , 562 N.Y.S.2d 613 (N.Y. App. Div. 1st Dep't 1990) |
| 5 | <i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) |
| 6 | <i>Autonation, Inc. v. O'Brien</i> , 347 F. Supp. 2d 1299 (S.D. Fla. 2004) |
| 7 | <i>Bank Brussels Lambert v. Chase Manhattan Bank, N.A.</i> , 1996 U.S. Dist. LEXIS 15631 (S.D.N.Y. Oct. 23, 1996) |
| 8 | <i>Banque Franco-Hellinque de Commerce International et Maritime, S.A. v. Christopides</i> , 106 F. 3d 22 (2d Cir. 1997) |
| 9 | <i>Bellsouth Advertising & Publishing Corp. v. Donnelley Info. Publishing, Inc.</i> , 999 F.2d 1436 (11th Cir. 1993) |
| 10 | <i>Berger v. Board of Regents of the State of New York</i> , 577 N.Y.S.2d 500 (N.Y. App. Div. 3d Dep't 1991) |
| 11 | <i>BNP Paribas Mortgage Corp. v. Bank of America, N.A.</i> , 2011 U.S. Dist. LEXIS 31362 (S.D.N.Y. Mar. 23, 2011) |
| 12 | <i>Bumpers v. Austal, U.S.A.</i> , No. 08-00155-KD-N, 2011 U.S. Dist. LEXIS 57488 (S.D. Ala. May 26, 2011) |
| 13 | <i>Burdis v. Texas & Pacific Railway Co.</i> , 569 F.2d 320 (5th Cir. 1978) |
| 14 | <i>Camaiore v. Farance</i> , 50 A.D.3d 471 (N.Y. App. Div. 1st Dep't 2008) |
| 15 | <i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) |
| 16 | <i>Century-Maxim Construction Corp. v. One Bryant Park, LLC</i> , 2009 N.Y. Slip. Op. 50858U, 2009 WL 1218895 (N.Y. Sup. Ct. Apr. 7, 2009) |
| 17 | <i>CFIP Master Fund, Ltd. v. Citibank, N.A.</i> , 738 F. Supp. 2d 450 (S.D.N.Y. 2010) |
| 18 | <i>Chase Manhattan Bank v. Motorola, Inc.</i> , 184 F. Supp. 2d 384 (S.D.N.Y. 2002) |
| 19 | <i>Chemical Bank v. Stahl</i> , 637 N.Y.S.2d 65 (N.Y. App. Div. 1st Dep't 1996) |
| 20 | <i>In re Citric Acid Litigation</i> , 191 F.3d 1090 (9th Cir. 1999) |
| 21 | <i>Clanton v. Inter.Net Global, L.L.C.</i> , 435 F.3d 1319 (11th Cir. 2006) |
| 22 | <i>Clemons v. Dougherty County</i> , 684 F.2d 1365 (11th Cir. 1982) |
| 23 | <i>Collins v. Harrison-Bode</i> , 303 F.3d 429 (2d Cir. 2002) |
| 24 | <i>Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services</i> , 611 N.E.2d 282 (N.Y. 1993) |
| 25 | <i>Columbus Park Corp. v. Department of Housing Preservation & Development</i> , 598 N.E.2d 702 (N.Y. 1992) |

DOCUMENTS IN INDEX FILED UNDER SEAL

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDER 1: AUTHORITIES | |
|------------------------------|---|
| Tab | Document |
| 26 | <i>Concepcion v. Dowd</i> , 2011 U.S. Dist. LEXIS 69158 (M.D. Fla. June 28, 2011) |
| 27 | <i>Continental Casualty Co. v. State of N.Y. Mortgage Agency</i> , No. 94 Civ. 8408 (KMW), 1998 WL 513054 (S.D.N.Y. Aug. 18, 1998) |
| 28 | <i>Cordoba v. Dillard's, Inc.</i> , 419 F.3d 1169 (11th Cir. 2005) |
| 29 | <i>Corhill Corp. v. S.D. Plants, Inc.</i> , 176 N.E.2d 37 (N.Y. 1961) |
| 30 | <i>Cortezano v. Salin Bank & Trust Co.</i> , 2011 WL 573755 (S.D. Ind. Feb. 15, 2011) |
| 31 | <i>County of Suffolk v. Long Island Lighting Co.</i> , 266 F.3d 131 (2d Cir. 2001) |
| 32 | <i>Cravens v. Smith</i> , 610 F.3d 1019 (8th Cir. 2010) |
| 33 | <i>Curley v. AMR Corp.</i> , 153 F.3d 5 (2d Cir. 1998) |
| 34 | <i>David Gutter Furs v. Jewelers Protection Services, Ltd.</i> , 594 N.E.2d 924 (N.Y. 1992) |
| 35 | <i>Design X Manufacturing, Inc. v. ABF Freight Systems, Inc.</i> , 584 F. Supp. 2d 464, 468 (D. Conn. 2008) |
| 36 | <i>DRS Optronics, Inc. v. North Fork Bank</i> , 843 N.Y.S.2d 124 (N.Y. App. Div. 2d Dep't 2007) |
| 37 | <i>Dugan v. EMS Helicopters, Inc.</i> , 915 F.2d 1428 (10th Cir. 1990) |
| 38 | <i>ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.</i> , 553 F.3d 187 (2d Cir. 2009) |
| 39 | <i>EJS-Asoc Ticaret Ve Danismanlik Ltd. Sti. v. AT&T Co.</i> , 92 Civ. 3038 (PNL), 1993 U.S. Dist. LEXIS 10344 (S.D.N.Y. July 28, 1993) |
| 40 | <i>Estate of Parsons v. Palestinian Authority</i> , 715 F. Supp. 2d 27 (D.D.C. 2010) |
| 41 | <i>Excess Insurance Co. v. Factory Mutual Insurance Co.</i> , 822 N.E.2d 768 (N.Y. 2004) |
| 42 | <i>Excess Insurance Co. v. Factory Mutual Insurance Co.</i> , 769 N.Y.S.2d 487 (N.Y. App. Div. 1st Dep't 2003) |
| 43 | <i>In re FedEx Ground Package Sys., Inc. Employment Practices Litig.</i> , 2010 WL 1838400 (N.D. Ind. May 4, 2010) |
| 44 | <i>In re Fontainebleau Las Vegas Contract Litigation</i> , 716 F. Supp. 2d. 1237 (S.D. Fla. 2010) |
| 45 | <i>In re Fontainebleau Las Vegas Holdings, LLC</i> , 417 B.R. 651 (S.D. Fla. 2009) |
| 46 | <i>Franconero v. Universal Music Corp.</i> , No. 02 Civ. 1963, 2011 WL 566794 (S.D.N.Y. Feb. 11, 2011) |
| 47 | <i>Ganino v. Citizens Utils. Co.</i> , 228 F.3d 154 (2d Cir. 2000) |
| 48 | <i>Gans v. Mundy</i> , 762 F.2d 338 (3d Cir. 1985) |
| 49 | <i>Garczynski v. Bradshaw</i> , 573 F.3d 1158 (11th Cir. 2009) |
| 50 | <i>Gerard v. Board of Regents of State of Georgia</i> , 324 Fed. Appx. 818 (11th Cir. 2009) |
| 51 | <i>Global Crossing Telecommunications, Inc. v. CCT Communications, Inc.</i> , 2011 WL 3023501 (Bankr. S.D.N.Y. July 22, 2011) |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDER 1: AUTHORITIES | |
|------------------------------|--|
| Tab | Document |
| 52 | <i>God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Associates, LLP</i> , 845 N.E.2d 1265 (N.Y. 2006) |
| 53 | <i>Goldstein v. Carnell Associates</i> , 906 N.Y.S.2d 905 (N.Y. App. Div. 2d Dep't 2010) |
| 54 | <i>Greenfield v. Phillis Records</i> , 780 N.E.2d 166 (N.Y. 2002) |
| 55 | <i>Gutierrez v. State</i> , 871 N.Y.S.2d 729 (N.Y. App. Div. 2d Dep't 2009) |
| 56 | <i>Haves v. City of Miami</i> , 52 F.3d 918 (11th Cir. 1995) |
| 57 | <i>Hellenic Lines Ltd. v. Gulf Oil Corp.</i> , 340 F.2d 398 (2d Cir. 1965) |
| 58 | <i>Hess v. Zoological Society of Buffalo</i> , 521 N.Y.S.2d 903 (N.Y. App. Div. 4th Dep't 1987) |
| 59 | <i>Hoefler & Arnett, Inc. v. Lehigh Press, Inc.</i> , 1988 WL 12505 (E.D. Pa. Feb. 16, 1988) |
| 60 | <i>HSH Nordbank AG New York Branch v. Street</i> , No. 10-1684, 2011 U.S. App. LEXIS 9316 (2d Cir. May 4, 2011) |
| 61 | <i>International Klafier Co. v. Continental Casualty Co.</i> , 869 F.2d 96 (2d Cir. 1989) |
| 62 | <i>International Stamp Art, Inc. v. United States Postal Service</i> , 456 F.3d 1270 (11th Cir. 2006) |
| 63 | <i>JPMorgan Chase Bank v. Winnick</i> , 350 F. Supp. 2d 393 (S.D.N.Y. 2004) |
| 64 | <i>Kass v. Kass</i> , 91 N.Y.2d 554 (N.Y. 1998) |
| 65 | <i>Katel Limited Liability Co. v. AT&T Corp.</i> , 607 F.3d 60 (2d Cir. 2010) |
| 66 | <i>Kovar v. CSX Transportation, Inc.</i> , 327 Fed. App'x 197 (11th Cir. 2009) |
| 67 | <i>In re Lake States Commodities, Inc.</i> , 272 B.R. 233 (Bankr. N.D. Ill. 2002) |
| 68 | <i>LaSalle Bank, N.A. v. Citicorp Real Estate, Inc.</i> , 2002 U.S. Dist. LEXIS 23323 (S.D.N.Y. Dec. 5, 2002) |
| 69 | <i>Law Debenture Trust Co. of New York v. Maverick Tube Corp.</i> , 595 F.3d 458 (2d Cir. 2010) |
| 70 | <i>Lipper Holdings, LLC v. Trident Holdings, LLC</i> , 766 N.Y.S.2d 561 (N.Y. App. Div. 1st Dep't 2003) |
| 71 | <i>Lofton v. Kearney</i> , 157 F. Supp. 2d 1372 (S.D. Fla. 2001) |
| 72 | <i>Macuba v. DeBoer</i> , 193 F.3d 1316 (11th Cir. 1999) |
| 73 | <i>Manhattan Med. Diagnostic & Rehabilitation, P.C. v. Wachovia, Nat'l Bank, N.A.</i> , 2006 WL 3026294 (N.Y. Sup. Ct. 2006) |
| 74 | <i>Manufacturers and Traders Trust Company v. Erie County Industrial Development Agency</i> , 703 N.Y.S.2d 636 (N.Y. 2000) |
| 75 | <i>Marvel Worldwide, Inc. v. Kirby</i> , 777 F. Supp. 2d 720 (S.D.N.Y. 2011) |
| 76 | <i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986) |
| 77 | <i>McNamara v. Tourneau, Inc.</i> , 464 F. Supp. 2d 232 (S.D.N.Y. 2006) |
| 78 | <i>Merrill Lynch & Co. v. Allegheny Energy, Inc.</i> , 500 F.3d 171 (2d Cir. 2007) |
| 79 | <i>Metropolitan Life Insurance Co. v. Noble Lowndes International, Inc.</i> , 643 N.E.2d 504 (N.Y. 1994) |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDER 1: AUTHORITIES | |
|------------------------------|--|
| Tab | Document |
| 80 | <i>Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.</i> , 906 F.2d 884 (2d Cir. 1990) |
| 81 | <i>Mize v. Jefferson City Board of Education</i> , 93 F.3d 739 (11th Cir. 1996) |
| 82 | <i>Montgomery v. Aetna Casualty & Surety Co.</i> , 898 F.2d 1537 (11th Cir. 1990) |
| 83 | <i>Muzak Corp. v. Hotel Taft Corp.</i> , 133 N.E.2d 688 (N.Y. 1956) |
| 84 | <i>Net2Globe International, Inc. v. Time Warner Telecom of New York</i> , 273 F. Supp. 2d 436 (S.D.N.Y. 2003) |
| 85 | <i>Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.</i> , 86 N.Y.2d 685 (1995) |
| 86 | <i>Parnes v. Gateway 2000, Inc.</i> , 122 F.3d 539 (8th Cir. 1997) |
| 87 | <i>Peak Partners, LP v. Republic Bank</i> , 191 Fed. App'x 118 (3d Cir. 2006) |
| 88 | <i>Pharmaceutical Horizons, Inc. v. Sterling Drug, Inc.</i> , 512 N.Y.S.2d 30 (N.Y. App. Div. 1st Dep't 1987) |
| 89 | <i>Progress Rail Services Corp. v. Hillsbrough Regional Transit Authority</i> , No. 8:04-CV-200-T-23EAJ, 2005 U.S. Dist. LEXIS 37729 (M.D. Fla. Apr. 12, 2005) |
| 90 | <i>R/S Associates v. New York Job Development Authority</i> , 771 N.E.2d 240 (N.Y. 2002) |
| 91 | <i>Ransom v. Equifax Inc.</i> , 2010 WL 1258084 (S.D. Fla. Mar. 30, 2010) |
| 92 | <i>Read v. Teton Springs Golf & Casting Club, LLC</i> , 2010 WL 5158882 (D. Idaho Dec. 14, 2010) |
| 93 | <i>Red Ball Interior Demolition Corp. v. Palmadessa</i> , 173 F.3d 481 (2d Cir. 1999) |
| 94 | <i>Reeves v. Sanderson Plumbing Prod. Inc.</i> , 530 U.S. 133 (2000) |
| 95 | <i>Rocon Manufacturing, Inc. v. Ferraro</i> , 605 N.Y.S.2d 591 (N.Y. App. Div. 1993) |
| 96 | <i>Ruttenberg v. Davidge Data System Corp.</i> , 626 N.Y.S.2d 174 (N.Y. App. Div. 1st Dep't 1995) |
| 97 | <i>SEC v. Keith Group of Companies</i> , 95-6702-CIV-Gonzalez, 1998 U.S. Dist. LEXIS 13011 (S.D. Fla. July 7, 1998) |
| 98 | <i>Shannon v. Potter</i> , 2008 WL 4753732 (S.D. Fla. 2008) |
| 99 | <i>Smith v. Continental Casualty Co.</i> , 2008 WL 4462120 (M.D. Pa. Sept, 30, 2008) |
| 100 | <i>South West Georgia Financial Corp. v. Colonial American Casualty and Surety Co.</i> , 397 Fed. App'x 563 (11th Cir. 2010) |
| 101 | <i>Southern Stone Co. v. Singer</i> , 665 F.2d 698 (5th Cir. 1982) |
| 102 | <i>Stanfield Offshore Leveraged Assets, Ltd v. Metro Life Ins. Co.</i> , 883 N.Y.S.2d 486 (N.Y. App. Div. 2009) |
| 103 | <i>Stanford Seed Co. v. Balfour, Guthrie & Co.</i> , 27 Misc. 2d 147 (N.Y. Sup. Ct. 1960) |
| 104 | <i>Stolt-Nielsen S. A. v. AnimalFeeds International Corp.</i> , 130 S. Ct. 1758 (2010) |
| 105 | <i>Stuart Rudnick, Inc. v. Jewelers Protection Services</i> , 598 N.Y.S.2d 235 (N.Y. App. Div. 1st Dep't 1993) |
| 106 | <i>Terwilliger v. Terwilliger</i> , 206 F.3d 240 (2d Cir. 2000) |
| 107 | <i>This Is Me, Inc. v. Taylor</i> , 157 F.3d 139 (2d Cir. 1998) |

INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT

| BINDER 1: AUTHORITIES | |
|------------------------------|---|
| Tab | Document |
| 108 | <i>Thyssen Elevator Co. v. Drayton-Bryan Co.</i> , 106 F. Supp. 2d 1355 (S.D. Ga. 2000) |
| 109 | <i>TLT-Babcock, Inc. v. Emerson Elec. Co.</i> , 33 F.3d 397 (4th Cir. 1994) |
| 110 | <i>Tober v. Graco Children's Prods., Inc.</i> , 431 F.3d 572 (7th Cir. 2005) |
| 111 | <i>Tomasini v. Mount Sinai Medical Center of Florida Inc.</i> , 315 F. Supp. 2d 1252 (S.D. Fla. 2004) |
| 112 | <i>Travelers Indemnity Company of Connecticut v. The Losco Group, Inc.</i> , 204 F. Supp. 2d 639 (S.D.N.Y. 2002) |
| 113 | <i>UniCredito Italiano SpA v. JPMorgan Chase Bank</i> , 288 F. Supp. 2d 485 (S.D.N.Y. 2003) |
| 114 | <i>United States v. Baker</i> , 432 F.3d 1189 (11th Cir. 2005) |
| 115 | <i>United States v. Boffil-Rivera</i> , 607 F.3d 736 (11th Cir. 2010) |
| 116 | <i>United States v. Central Gulf Lines</i> , 974 F.2d 621 (5th Cir. 1992) |
| 117 | <i>United States v. Jones</i> , 29 F.3d 1549 (11th Cir. 1994) |
| 118 | <i>United States v. Mavashev</i> , 2010 WL 234773 (E.D.N.Y. Jan. 14, 2010) |
| 119 | <i>United States v. Nektalov</i> , 461 F.3d 309 (2d Cir. 2006) |
| 120 | <i>Verizon Trademark Services, LLC v. The Producers, Inc.</i> , 2011 U.S. Dist. LEXIS 11659 (M.D. Fla. Jan. 27, 2011) |
| 121 | <i>Vermont Teddy Bear Co. v. 538 Madison Realty Co.</i> , 1 N.Y.3d 470 (2004) |
| 122 | <i>Vickers v. Federal Express Corp.</i> , 132 F. Supp. 2d 1371 (S.D. Fla. 2000) |
| 123 | <i>Waddell v. Holiday Isle, LLC</i> , 2009 U.S. Dist. LEXIS 67669 (S.D. Ala. Aug. 4, 2009) |
| 124 | <i>Walton-Horton v. Hyundai of Alabama</i> , 402 Fed. Appx. 405 (11th Cir. 2010) |
| 125 | <i>In re Westinghouse Securities Litigation</i> , 90 F.3d 696 (3d Cir. 1996) |
| 126 | <i>White v. Continental Casualty Co.</i> , 9 N.Y.3d 264 (N.Y. 2007) |
| 127 | <i>White Industries, Inc. v. Cessna Aircraft Co.</i> , 611 F. Supp. 1049 (W.D. Mo. 1985) |
| 128 | <i>W.W.W. Associates, Inc. v. Giancontieri</i> , 566 N.E.2d 639 (N.Y. 1990) |
| Rules | |
| 129 | FED. R. CIV. P. 56 |
| 130 | FED. R. EVID. 801 |
| 131 | FED. R. EVID. 802 |
| 132 | S.D. FLA. L.R. 7.1(c) |
| 133 | S.D. FLA. L.R. 7.5 |
| Other Authorities | |
| 134 | RESTATEMENT (SECOND) OF CONTRACTS § 203 |
| 135 | MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th Ed. 1998) |
| 136 | Richard Night, Warren Cook, and Richard Gray, THE LSTA'S COMPLETE CREDIT AGREEMENT GUIDE (McGraw-Hill 2009) |

INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT

| BINDER 1: AUTHORITIES | |
|------------------------------|--|
| Tab | Document |
| 137 | Allison Taylor & Alicia Sansone, THE HANDBOOK OF LOAN SYNDICATIONS AND TRADING, (McGraw-Hill 2007) |
| 138 | WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (1993) |

| BINDER 2: DEPOSITION TRANSCRIPT EXCERPTS | |
|---|--------------------|
| Tab | Deponent |
| 1 | Ambridge, Robert |
| 2 | Badala, Peter |
| 3 | Barone, Robert |
| 4 | Blauner, Stephen |
| 5 | Bolio, Brandon |
| 6 | Brown, Jeanne |
| 7 | Christensen, Hans |
| 8 | Corleto, David |
| 9 | Esplin, Jason |
| 10 | Freeman, Jim |
| 11 | Fu, Vincent |
| 12 | Howard, David |
| 13 | Kolben, Herbert |
| 14 | Kotite, Albert |
| 15 | Kumar, Deven |
| 16 | Lupiani, David |
| 17 | Macklin, Scott |
| 18 | Miranowski, Todd |
| 19 | Mulé, Philip |
| 20 | Naval, Ronaldo |
| 21 | Newby, William |
| 22 | Pardon, Douglas |
| 23 | Pryor, Shepherd |
| 24 | Rafeedie, McLendon |
| 25 | Rourke, Kevin |
| 26 | Schmitz, Roger |
| 27 | Scott, Michael |
| 28 | Sheffield, Chaney |
| 29 | Susman, Jeff |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDER 2: DEPOSITION TRANSCRIPT EXCERPTS | |
|---|-------------------|
| Tab | Deponent |
| 30 | Sussman, Mitchell |
| 31 | Varnell, Jon |
| 32 | Yu, Henry |
| 33 | Yunker, Brett |

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|-----------------------------|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| BINDER 3 | | | |
| 1 | Dep. Ex. 1 | | BANA_FB00018949 |
| 3 | Dep. Ex. 3 | | Case 09-01621-AJC Doc. 98-2 |
| 4 | Dep. Ex. 4 | Cantor Decl. Ex. 34, Cantor Opp. Decl. Ex. 41 | BANA_FB00291925-2018 |
| 5 | Dep. Ex. 5 | Cantor Opp. Decl. Ex. 42 | Case 09-01621-AJC Doc. 98-1 |
| 8 | Dep. Ex. 8 | Cantor Decl. Ex. 35, Cantor Opp. Decl. Ex. 43 | ULL-FLVR0002046-207 |
| 9 | Dep. Ex. 9 | Cantor Decl. Ex. 85, Cantor Opp. Decl. Ex. 49 | ULL-FLVR0002674-738 |
| 11 | Dep. Ex. 11 | Cantor Reply Decl. Ex. 20 | ULL-FLVR0007582.002706-18 |
| 14 | Dep. Ex. 14 | Cantor Decl. Ex. 40, Cantor Opp. Decl. Ex. 52 | TRIM 028440-41 |
| 16 | Dep. Ex. 16 | | ULL-FLVR0007582.006644-48 |
| 18 | Dep. Ex. 18 | Cantor Opp. Decl. Ex. 67 | No Bates Number |
| 19 | Dep. Ex. 19 | Cantor Opp. Decl. Ex. 89 | PNC 000369-77 |
| 21 | Dep. Ex. 21 | | ULL-FLVR0004224 |
| 22 | Dep. Ex. 22 | Cantor Opp. Decl. Ex. 73 | ULL-FLVR0004429-30 |
| 23 | Dep. Ex. 23 | Cantor Opp. Decl. Ex. 74 | ULL-FLVR0004221-23 |
| 24 | Dep. Ex. 24 | Cantor Decl. Ex. 55, Cantor Opp. Decl. Ex. 75 | ULL-FLVR0004483-88 |
| 26 | Dep. Ex. 26 | | ULL-FLVR0004214 |
| 28 | Dep. Ex. 28 | Cantor Opp. Decl. Ex. 78 | ULL-FLVR0007582.006807-08 |
| 29 | Dep. Ex. 29 | | ULL-FLVR0004254-56 |
| 30 | Dep. Ex. 30 | Cantor Decl. Ex. 58, Cantor Opp. Decl. Ex. 79 | ULL-FLVR0004249-53 |
| 31 | Dep. Ex. 31 | | ULL-FLVR0004237 |
| 32 | Dep. Ex. 32 | | TRIM 030208-10 |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|-----------------------------|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| 34 | Dep. Ex. 34 | | ULL-FLVR0007582.006877-79 |
| 35 | Dep. Ex. 35 | Cantor Opp. Decl. Ex. 83 | ULL-FLVR0007582.004314-16 |
| 36 | Dep. Ex. 36 | Cantor Decl. Ex. 60, Cantor Opp. Decl. Ex. 80 | ULL-FLVR0007582.002960-63 |
| 37 | Dep. Ex. 37 | | ULL-FLVR0004279 |
| 38 | Dep. Ex. 38 | | ULL-FLVR0007582.002958-59 |
| 40 | Dep. Ex. 40 | | MUS2_001888-89 |
| 41 | Dep. Ex. 41 | Cantor Opp. Decl. Ex. 87 | ULL-FLVR0007582.006934-36 |
| 42 | Dep. Ex. 42 | Cantor Decl. Ex. 78, Cantor Opp. Decl. Ex. 86 | ULL-FLVR0004468-73 |
| 43 | Dep. Ex. 43 | | MUS2_001858 |
| 44 | Dep. Ex. 44 | | TRIM 030253-60 |
| 45 | Dep. Ex. 45 | | ULL-FLVR0004282 |
| 46 | Dep. Ex. 46 | Cantor Opp. Decl. Ex. 69 | ULL-FLVR0007582.000816 |
| 47 | Dep. Ex. 47 | | ULL-FLVR0007582.001622 |
| 48 | Dep. Ex. 48 | | MUS2_002473-76 |
| 50 | Dep. Ex. 50 | | ULL-FLVR0007582.008161-62 |
| 53 | Dep. Ex. 53 | | ULL-FLVR0007582.008448-49 |
| 54 | Dep. Ex. 54 | | ULL-FLVR0006805 |
| 56 | Dep. Ex. 56 | | TRIM 038104-05 |
| 57 | Dep. Ex. 57 | | TRIM 039519 |
| 58 | Dep. Ex. 58 | | TRIM 029187 |
| 59 | Dep. Ex. 59 | | TRIM 038913-14 |
| 61 | Dep. Ex. 61 | | TRIM 031501-02 |
| 62 | Dep. Ex. 62 | | TRIM 040241 |
| 63 | Dep. Ex. 63 | | TRIM 030253-60 |
| 67 | Dep. Ex. 67 | Cantor Opp. Decl. Ex. 44 | BANA_FB00358828 |
| 68 | Dep. Ex. 68 | | BANA_FB00474066-67 |
| 69 | Dep. Ex. 69 | | No Bates Number |
| 72 | Dep. Ex. 72 | Cantor Decl. Ex. 1, Cantor Opp. Decl. Ex. 1 | BANA_FB00204948-5092 |
| 73 | Dep. Ex. 73 | | BANA_FB00448399-402 |
| 75 | Dep. Ex. 75 | Cantor Decl. Ex. 39, Cantor Opp. Decl. Ex. 51 | BANA_FB00884060 |
| 76 | Dep. Ex. 76 | Cantor Decl. Ex. 42, Cantor Opp. Decl. Ex. 54 | BANA_FB00402019-20 |

INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|------------------------------|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| 77 | Dep. Ex. 77 | Cantor Decl. Ex. 47, Cantor Opp. Decl. Ex. 59 | BANA_FB00358870 |
| 78 | Dep. Ex. 78 | | BANA_FB00904984-86 |
| 79 | Dep. Ex. 79 | | BANA_FB00887876-87 |
| 80 | Dep. Ex. 80 | Cantor Opp. Decl. Ex. 62, Cantor Reply Decl. Ex. 22 | BANA_FB00884074-76 |
| 81 | Dep. Ex. 81 | Cantor Opp. Decl. Ex. 58, Cantor Reply Decl. Ex. 21 | BANA_FB00735454-55 |
| 91 | Dep. Ex. 91 | Cantor Opp. Decl. Ex. 93 | BGD 000502-58. |
| 92 | Dep. Ex. 92 | Cantor Opp. Decl. Ex. 48 | BGD 001616 |
| 97 | Dep. Ex. 97 | Cantor Decl. Ex. 74, Cantor Opp. Decl. Ex. 85 | BGD 000331-57 |
| 104 | Dep. Ex. 104 | Cantor Decl. Ex. 76 | Case 09-01621-AJC Doc. 110-4 |
| 115 | Dep. Ex. 115 | | MJX 001177 |
| 126 | Dep. Ex. 126 | Cantor Opp. Decl. Ex. 36 | SLN 000318-20 |
| 127 | Dep. Ex. 127 | Cantor Opp. Decl. Ex. 37 | SLN 000315-17 |
| 128 | Dep. Ex. 128 | Cantor Opp. Decl. Ex. 38 | SLN 000312-14 |
| 129 | Dep. Ex. 129 | Cantor Opp. Decl. Ex. 39 | SLN 000323-25 |
| 137 | Dep. Ex. 137 | Cantor Opp. Decl. Ex. 35 | MON 000044-45 |
| 151 | Dep. Ex. 151 | Cantor Reply Decl. Ex. 37 | CRCH 001031 |
| 154 | Dep. Ex. 154 | Cantor Opp. Decl. Ex. 92 | CRCH 001032 |
| 158 | Dep. Ex. 158 | Cantor Opp. Decl. Ex. 68, Cantor Reply Decl. Ex. 23 | CRCH 000866 |
| 160 | Dep. Ex. 160 | Cantor Opp. Decl. Ex. 71, Cantor Reply Decl. Ex. 28 | CRCH 001013 |
| 175 | Dep. Ex. 175 | Cantor Reply Decl. Ex. 38 | CNY 044601 |
| 182 | Dep. Ex. 182 | Cantor Opp. Decl. Ex. 94 | CNY 004937-40 |
| 204 | Dep. Ex. 204 | | BANA_FB00884194-97 |
| 205 | Dep. Ex. 205 | Cantor Decl. Ex. 43, Cantor Opp. Decl. Ex. 55 | BANA_FB00735299-301 |
| 206 | Dep. Ex. 206 | | BANA_FB00815552-77 |
| 210 | Dep. Ex. 210 | Cantor Decl. Ex. 64 | BANA_FB00283993-96 |
| 212 | Dep. Ex. 212 | | BGD 000194 |
| 216 | Dep. Ex. 216 | | BANA_FB00358830-34 |
| 217 | Dep. Ex. 217 | | BANA_FB00389401-03 |
| BINDER 4 | | | |

INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|-----------------------------|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| 218 | Dep. Ex. 218 | | BANA_FB00358772 |
| 220 | Dep. Ex. 220 | | No Bates Number |
| 222 | Dep. Ex. 222 | | BANA_FB00811199-200 |
| 227 | Dep. Ex. 227 | | BANA_FB00811702-04 |
| 228 | Dep. Ex. 228 | | BANA_FB00838422 |
| 230 | Dep. Ex. 230 | | BANA_FB00358863-65 |
| 231 | Dep. Ex. 231 | | BANA_FB00366849 |
| 232 | Dep. Ex. 232 | | BANA_FB00358914-15 |
| 233 | Dep. Ex. 233 | | BANA_FB00366850-53 |
| 237 | Dep. Ex. 237 | Cantor Opp. Decl. Ex. 45 | BANA_FB00180358-67 |
| 239 | Dep. Ex. 239 | | BANA_FB00401060-61 |
| 240 | Dep. Ex. 240 | | BANA_FB00235198-200 |
| 241 | Dep. Ex. 241 | Cantor Decl. Ex. 38, Cantor Opp. Decl. Ex. 50 | BANA_FB00462092 |
| 243 | Dep. Ex. 243 | | BANA_FB00180419-28 |
| 244 | Dep. Ex. 244 | | BANA_FB00393783-92 |
| 245 | Dep. Ex. 245 | | BANA_FB00817987 |
| 246 | Dep. Ex. 246 | | BANA_FB00104093-102 |
| 247 | Dep. Ex. 247 | | BANA_FB00839712 |
| 248 | Dep. Ex. 248 | | BANA_FB00235088-98 |
| 249 | Dep. Ex. 249 | | BANA_FB00839705 |
| 250 | Dep. Ex. 250 | | BANA_FB00874008-17 |
| 251 | Dep. Ex. 251 | | BANA_FB00336931-32 |
| 252 | Dep. Ex. 252 | | BANA_FB00217018-24 |
| 254 | Dep. Ex. 254 | Cantor Opp. Decl. Ex. 65 | BANA_FB00402511-13 |
| 263 | Dep. Ex. 263 | | BANA_FB00336065-74 |
| 264 | Dep. Ex. 264 | | BANA_FB00338132-41 |
| 265 | Dep. Ex. 265 | | BANA_FB00286470-79 |
| 268 | Dep. Ex. 268 | Cantor Decl. Ex. 81 | JPM_FB 00001711-48 |
| 269 | Dep. Ex. 269 | | BANA_FB00103783-838 |
| 270 | Dep. Ex. 270 | | BANA_FB00103875-933 |
| 271 | Dep. Ex. 271 | | BANA_FB00281969-2022 |
| 274 | Dep. Ex. 274 | | FBR01250389-90 |
| 275 | Dep. Ex. 275 | | FBR01273000 |
| 278 | Dep. Ex. 278 | Cantor Decl. Ex. 36, | FBR00151117-18 |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|-----------------------------|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| | | Cantor Opp. Decl. Ex. 46 | |
| 279 | Dep. Ex. 279 | Cantor Opp. Decl. Ex. 95 | FBR01278532-33 |
| 280 | Dep. Ex. 280 | Cantor Decl. Ex. 48 | FBR01274590-92 |
| 281 | Dep. Ex. 281 | Cantor Decl. Ex. 46 | FBR01284009 |
| 282 | Dep. Ex. 282 | Cantor Decl. Ex. 53 | FBR01282119 |
| 283 | Dep. Ex. 283 | Cantor Decl. Ex. 44, Cantor Opp. Decl. Ex. 56 | FBR01287548 |
| 285 | Dep. Ex. 285 | Cantor Decl. Ex. 51, Cantor Opp. Decl. Ex. 64 | BANA_FB00400510-11 |
| 286 | Dep. Ex. 286 | Cantor Decl. Ex. 54, Cantor Opp. Decl. Ex. 72 | FBR01280952-1008 |
| 288 | Dep. Ex. 288 | Cantor Decl. Ex. 65 | FBR01291242 |
| 291 | Dep. Ex. 291-B | | FBR01227199-203 |
| 298 | Dep. Ex. 298 | Cantor Decl. Ex. 83, Cantor Opp. Decl. Ex. 91 | BANA_FB00808826-955 |
| 331 | Dep. Ex. 331 | | BANA_FB00280280-324 |
| 346 | Dep. Ex. 346 | Cantor Reply Decl. Ex. 29 | ING 014045-71 |
| 348 | Dep. Ex. 348 | Cantor Decl. Ex. 77 | ING 000187-88 |
| 377 | Dep. Ex. 377 | Cantor Opp. Decl. Ex. 98, Cantor Reply Decl. Ex. 24 | CASP 053298-99 |
| 379 | Dep. Ex. 379 | Cantor Opp. Decl. Ex. 99, Cantor Reply Decl. Ex. 26 | CASP 053803-04 |
| 381 | Dep. Ex. 381 | Cantor Opp. Decl. Ex. 70, Cantor Reply Decl. Ex. 27 | CASP 061712 |
| 382 | Dep. Ex. 382 | Cantor Opp. Decl. Ex. 40, Cantor Reply Decl. Ex. 17 | CASP 061714 |
| 399 | Dep. Ex. 399 | | CASP 050764-66 |
| 410 | Dep. Ex. 410 | Cantor Decl. Ex. 79 | FBR00635701-05 |
| 455 | Dep. Ex. 455 | Cantor Decl. Ex. 41, Cantor Opp. Decl. Ex. 53 | BANA_FB00422664-65 |
| 456 | Dep. Ex. 456 | | Highland010411-12 |
| 458 | Dep. Ex. 458 | Cantor Decl. Ex. 45, Cantor Opp. Decl. Ex. 57 | Highland010419-20 |
| 459 | Dep. Ex. 459 | Cantor Decl. Ex. 50, Cantor Opp. Decl. Ex. 61 | SMRH00016771-73 |
| 463 | Dep. Ex. 463 | | AVE 010281-83 |
| 465 | Dep. Ex. 465 | Cantor Decl. Ex. 52, | FBR01266769 |

INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|-----------------------------|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| | | Cantor Opp. Decl. Ex. 66 | |
| 470 | Dep. Ex. 470 | | Highland010416-17 |
| 471 | Dep. Ex. 471 | | BANA_FB00216983 |
| 472 | Dep. Ex. 472 | | BANA_FB00869714-16 |
| 473 | Dep. Ex. 473 | | BANA_FB00884065-67 |
| 475 | Dep. Ex. 475 | | BANA_FB00846377-451 |
| 479 | Dep. Ex. 479 | | BANA_FB00334499 |
| 481 | Dep. Ex. 481 | | BANA_FB00335713 |
| 486 | Dep. Ex. 486 | Cantor Decl. Ex. 57 | FB00334820-24 |
| 487 | Dep. Ex. 487 | | SMRH00105198-99 |
| 488 | Dep. Ex. 488 | | BANA_FB00284478-79 |
| 489 | Dep. Ex. 489 | | BANA_FB00809672-74 |
| 491 | Dep. Ex. 491 | | SMRH00105530-31 |
| 493 | Dep. Ex. 493 | | BANA_FB00402350-52 |
| 495 | Dep. Ex. 495 | | BANA_FB00862413-14 |
| 497 | Dep. Ex. 497 | | BANA_FB00376887-88 |
| 498 | Dep. Ex. 498 | Cantor Decl. Ex. 62, Cantor Opp. Decl. Ex. 81 | FB00376889-91 |
| 600 | Dep. Ex. 600 | Cantor Decl. Ex. 66 | BANA_FB00235206-73 |
| 604 | Dep. Ex. 604 | Cantor Decl. Ex. 69 | BANA_FB00897758-59 |
| 607 | Dep. Ex. 607 | | BANA_FB00846452-552 |
| 608 | Dep. Ex. 608 | Cantor Decl. Ex. 72 | SMRH00134814 |
| 609 | Dep. Ex. 609 | | BANA_FB00358689-91 |
| 610 | Dep. Ex. 610 | Cantor Decl. Ex. 73 | BANA_FB00216536-40 |
| 611 | Dep. Ex. 611 | Cantor Decl. Ex. 75 | SMRH00105442-44 |
| 613 | Dep. Ex. 613 | Cantor Decl. Ex. 80 | SMRH00105581-85 |
| 614 | Dep. Ex. 614 | | BANA_FB00335580-604 |
| 622 | Dep. Ex. 622 | | BANA_FB00336935 |
| 623 | Dep. Ex. 623 | | BANA_FB00336937-42 |
| 624 | Dep. Ex. 624 | | BANA_FB00858648-56 |
| 625 | Dep. Ex. 625 | | BANA_FB00280435-36 |
| 626 | Dep. Ex. 626 | | BANA_FB00333174-75 |
| 627 | Dep. Ex. 627 | | BANA_FB00235052-53 |
| 628 | Dep. Ex. 628 | | BANA_FB00282251-52 |
| 629 | Dep. Ex. 629 | | BANA_FB00335745 |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|---|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| 634 | Dep. Ex. 634 | | BANA_FB00863808 |
| 635 | Dep. Ex. 635 | | BANA_FB00350539-40 |
| 636 | Dep. Ex. 636 | | BANA_FB00284967-68 |
| 637 | Dep. Ex. 637 | | BANA_FB00859358-59 |
| 638 | Dep. Ex. 638 | | BANA_FB00216342-43 |
| 639 | Dep. Ex. 639 | | BANA_FB00809053 |
| 640 | Dep. Ex. 640 | | BANA_FB00902325-28 |
| 641 | Dep. Ex. 641 | | BANA_FB00219474-75 |
| BINDER 5 | | | |
| 642 | Dep. Ex. 642 | | BANA_FB00806884-903 |
| 643 | Dep. Ex. 643 | | BANA_FB00219519-20 |
| 644 | Dep. Ex. 644 | | No Bates Number |
| 653 | Dep. Ex. 653 | | No Bates Number |
| 654 | Dep. Ex. 654 | | No Bates Number |
| 655 | Dep. Ex. 655 | | No Bates Number |
| 658 | Dep. Ex. 658 | Cantor Decl. Ex. 2, Cantor Opp. Decl. Ex. 2 | BANA_FB00342012-385 |
| 660 | Dep. Ex. 660 | | BANA_FB00280405-11 |
| 664 | Dep. Ex. 664 | Cantor Opp. Decl. Ex. 90 | BANA_FB00340734-36 |
| 692 | Dep. Ex. 692 | | No Bates Number |
| 694 | Dep. Ex. 694 | | BANA_FB00104126-79 |
| 696 | Dep. Ex. 696 | | BANA_FB00376889-91 |
| 804 | Dep. Ex. 804 | | BANA_FB00799078-80 |
| 805 | Dep. Ex. 805 | | BANA_FB00904056-62 |
| 808 | Dep. Ex. 808 | Cantor Decl. Ex. 84 | Declaration of Henry Yu Case 09-01621-AJC Doc. 103 |
| 809 | Dep. Ex. 809 | Cantor Decl. Ex. 59 | BANA_FB00215227-73 |
| 810 | Dep. Ex. 810 | Cantor Decl. Ex. 61 | BANA_FB00810764-65 |
| 811 | Dep. Ex. 811 | Cantor Decl. Ex. 63, Cantor Opp. Decl. Ex. 82 | Case 09-01621-AJC Doc. 103-5 |
| 813 | Dep. Ex. 813 | Cantor Decl. Ex. 67 | BANA_FB00810800 |
| 814 | Dep. Ex. 814 | Cantor Decl. Ex. 68, Cantor Opp. Decl. Ex. 84 | BANA_FB00810803-05 |
| 816 | Dep. Ex. 816 | Cantor Decl. Ex. 70 | ORE 004010-13 |
| 819 | Dep. Ex. 819 | Cantor Decl. Ex. 71 | BANA_FB00810815-18 |
| 820 | Dep. Ex. 820 | | BANA_FB00370303-12 |

**INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED
BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT**

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|--|--|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| 825 | Dep. Ex. 825 | | Case 09-01621-AJC Doc. 103-24 |
| 827 | Dep. Ex. 827 | Cantor Decl. Ex. 82 | SMRH00135086-88 |
| 828 | Dep. Ex. 828 | Cantor Reply Decl. Ex. 36 | BANA_FB00104507-579 |
| 829 | Dep. Ex. 829 | | BANA_FB00810164-65 |
| 831 | Dep. Ex. 831 | Cantor Opp. Decl. Ex. 88 | BANA_FB00181092-98 |
| 832 | Dep. Ex. 832 | | BANA_FB00878869-70 |
| 834 | Dep. Ex. 834 | | BANA_FB00846575-76 |
| 835 | Dep. Ex. 835 | | BANA_FB00808649 |
| 851 | Dep. Ex. 851 | Cantor Reply Decl. Ex. 32 | Declaration of Robert W. Barone Case 09-01621-AJC Doc. 97 |
| 860 | Dep. Ex. 860 | | BANA_FB00806878-81 |
| 861 | Dep. Ex. 861 | Cantor Reply Decl. Ex. 30 | BANA_FB00899769-71 |
| 862 | Dep. Ex. 862 | Cantor Reply Decl. Ex. 31 | IVI 080500-21 |
| 864 | Dep. Ex. 864 | | IVI 081391-93 |
| 865 | Dep. Ex. 865 | | IVI 081395 |
| 866 | Dep. Ex. 866 | | IVI 081396-99 |
| 868 | Dep. Ex. 868 | Cantor Reply Decl. Ex. 19 | BANA_FB00329740-811 |
| 884 | Dep. Ex. 884 | | BANA_FB00343247-71 |
| 888 | Dep. Ex. 888 | Cantor Decl. Ex. 87 | BANA_FB00873653-54 |
| 890 | Dep. Ex. 890 | Cantor Opp. Decl. Ex. 63 | BANA_FB00884038-42 |
| 891 | Dep. Ex. 891 | | No Bates Number |
| 892 | Dep. Ex. 892 | Cantor Reply Decl. Ex. 18 | BANA_FB00358727-28 |
| 896 | Dep. Ex. 896 | | BANA_FB00803037-39 |
| 898 | Dep. Ex. 898 | | BANA_FB00884063-64 |
| 899 | Dep. Ex. 899 | | BANA_FB00799758-60 |
| 901 | Dep. Ex. 901 | Cantor Decl. Ex. 37, Cantor Opp. Decl. Ex. 47 | BANA_FB00401793-95 |
| 902 | Dep. Ex. 902 | | BANA_FB00801558-62 |
| 903 | Dep. Ex. 903 | | BANA_FB00400423-25 |
| 904 | Dep. Ex. 904 | Cantor Decl. Ex. 49, Cantor Opp. Decl. Ex. 60 | BANA_FB00869927-30 |
| 905 | Dep. Ex. 905 | Cantor Decl. Ex. 56, Cantor Opp. Decl. Ex. 76 | BANA_FB00798940-41 |
| 906 | Dep. Ex. 906 | | BANA_FB00811823-33 |
| 907 | Dep. Ex. 907 | Cantor Opp. Decl. Ex. 77 | BANA_FB00403515-16 |
| 910 | Dep. Ex. 910 | | Expert Report of Peter V. Badala |

INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT

| BINDERS 3-5: DEPOSITION EXHIBITS CITED | | | |
|---|---------------------------|----------------------------|---------------------------------------|
| Tab | Deposition Exhibit | Cantor Exhibit Nos. | BATES or Docket Nos. |
| 915 | Dep. Ex. 915 | | Expert Report of Donald R. Boyken |
| 917 | Dep. Ex. 917 | | No Bates Number |
| 932 | Dep. Ex. 932 | Cantor Reply Decl. Ex. 33 | Expert Report of Shepherd G. Pryor IV |

| BINDER 6: NON-DEPOSITION EXHIBITS CITED | | |
|--|----------------------|--|
| Tab | Exhibit | BATES or Docket Nos. |
| Plaintiffs' Additional Exhibits | | |
| 1501 | Plaintiffs' Ex. 1501 | BANA_FB00285801-35 |
| 1502 | Plaintiffs' Ex. 1502 | BANA_FB00904981-86 |
| 1503 | Plaintiffs' Ex. 1503 | Expert Report of Shepherd G. Pryor IV |
| 1504 | Plaintiffs' Ex. 1504 | Proof of Claim, <i>In re Lehman Brothers Holdings, Inc., et al.</i> , Case No. 08-13555 |
| 1505 | Plaintiffs' Ex. 1505 | BANA_FB00860198-203 |
| 1506 | Plaintiffs' Ex. 1506 | BANA_FB00358917-19 |
| 1507 | Plaintiffs' Ex. 1507 | BANA_FB00215939-43 |
| 1508 | Plaintiffs' Ex. 1508 | BANA_FB00107325 |
| 1509 | Plaintiffs' Ex. 1509 | BANA_FB00556275-79 |
| 1510 | Plaintiffs' Ex. 1510 | BANA_FB00705886-6238 |
| 1511 | Plaintiffs' Ex. 1511 | Defendant Bank of America, N.A.'s Responses and Objections to Plaintiff Term Lenders' Second Set of Rule 26.1.G Interrogatories |
| Non-Deposition Exhibits to Cantor Declaration | | |
| 24 | Cantor Decl. Ex. 24 | No Bates Number |
| 25 | Cantor Decl. Ex. 25 | Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Declaratory Relief, Case 1:09-md-02106-ASG Doc. 15 |
| 26 | Cantor Decl. Ex. 26 | Amended MDL Order Number Eighteen; Granting in Part and Denying in Part Motions to Dismiss [DE 35]; [DE 36]; Requiring Answer to Complaints; Vacating Final Judgment, Case 1:09-md-02106-ASG Doc. 80 |
| 27 | Cantor Decl. Ex. 27 | Complaint, <i>Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al</i> , No. A-11-637835-B |
| 28 | Cantor Decl. Ex. 28 | Expert Report of Shepherd G. Pryor IV |
| 29 | Cantor Decl. Ex. 29 | Avenue Term Lender Plaintiffs' Amended Responses to |

INDEX FOR JOINT BINDERS OF LEGAL AND FACTUAL SUPPORT CITED BY BANA AND PLAINTIFFS IN THEIR MOTIONS FOR SUMMARY JUDGMENT

| BINDER 6: NON-DEPOSITION EXHIBITS CITED | | |
|---|---------------------------|--|
| Tab | Exhibit | BATES or Docket Nos. |
| | | Second Set of Interrogatories from Defendant Bank of America, N.A. |
| 30 | Cantor Decl. Ex. 30 | MON 000044-45 |
| 31 | Cantor Decl. Ex. 31 | VEN 000803-06 |
| 32 | Cantor Decl. Ex. 32 | SPT 000179-81 |
| 33 | Cantor Decl. Ex. 33 | BGD 004016-18 |
| 88 | Cantor Decl. Ex. 88 | Order Dismissing Parties Without Prejudice Pursuant to Notice of Voluntary Dismissal [DE 65]; Directing Clerk to Take Action, Case 1:09-md-02106-ASG Doc. 68 |
| 89 | Cantor Decl. Ex. 89 | No Bates Number |
| 90 | Cantor Decl. Ex. 90 | Answer of Defendant Bank of America, N.A., Case 1:09-md-02106-ASG Doc. 88 |
| Non-Deposition Exhibits to Cantor Opposition Declaration | | |
| O28 | Cantor Opp. Decl. Ex. 28 | No Bates Number |
| O29 | Cantor Opp. Decl. Ex. 29 | Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Declaratory Relief, Case 1:09-md-02106-ASG Doc. 15 |
| O30 | Cantor Opp. Decl. Ex. 30 | Answer of Defendant Bank of America, N.A., Case 1:09-md-02106-ASG Doc. 88 |
| O31 | Cantor Opp. Decl. Ex. 31 | Expert Report of Saul Solomon |
| O32 | Cantor Opp. Decl. Ex. 32 | VEN 000803-06 |
| O33 | Cantor Opp. Decl. Ex. 33 | SPT 000179-81 |
| O34 | Cantor Opp. Decl. Ex. 34 | BGD 004016-18 |
| O100 | Cantor Opp. Decl. Ex. 100 | BGD 000845-49 |
| O101 | Cantor Opp. Decl. Ex. 101 | Complaint, <i>Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al</i> , No. A-11-637835-B |
| Non-Deposition Exhibits to Cantor Reply Declaration | | |
| R25 | Cantor Reply Decl. Ex. 25 | BGD 000845-49 |



December 14, 2012

By ECF

John Ley
 Clerk of the Court
 United States Court of Appeals for the 11th Circuit
 56 Forsythe Street, N.W.
 Atlanta, GA 30303

Re: *Avenue CLO IV, Ltd., et al. v. Bank of America*, No. 12-11815-AA

Dear Mr. Ley:

During oral argument in the above-captioned case on December 4, 2012, the panel asked counsel for both parties about the sealed nature of the documents in the proceedings and whether the parties might take steps to enable the court to issue an opinion that does not require sealing or redactions. Counsel for both parties advised the panel that they would need to consult with their clients, and the Court subsequently entered an order on December 4 directing counsel to “file in 10 days if the sealed material can be unsealed.”

Having consulted with their respective clients as well as certain third parties, counsel now advise the Court that the panel may consider all documents in the record transmitted to the Court in this case, including the Disbursement Agreement, Credit Agreement, and Retail Agreement, non-confidential and unsealed with the exception of the following documents, which the parties and third parties have requested to keep confidential:

| Deposition Exhibit No. | Declaration Exhibit No. | Bates No. |
|-------------------------------|---|-------------------------|
| Dep. Ex. 11 | Cantor Reply Decl. Ex. 20 | ULL-FLVR 7582.002706-18 |
| Dep. Ex. 14 | Cantor Decl. Ex. 40, Cantor Opp. Decl. Ex. 52 | TRIM 028440-41 |
| Dep. Ex. 16 | | ULL-FLVR 7582.006644-48 |
| Dep. Ex. 21 | | ULL-FLVR 0004224 |
| Dep. Ex. 23 | Cantor Opp. Decl. Ex. 74 | ULL-FLVR 0004221-23 |
| Dep. Ex. 26 | | ULL-FLVR 0004214 |
| Dep. Ex. 28 | Cantor Opp. Decl. Ex. 78 | ULL-FLVR 7582.006807-08 |
| Dep. Ex. 29 | | ULL-FLVR 0004254-56 |
| Dep. Ex. 30 | Cantor Decl. Ex. 58, Cantor Opp. Decl. Ex. 79 | ULL-FLVR 0004249-53 |
| Dep. Ex. 31 | | ULL-FLVR 0004237 |

John Ley
 December 14, 2012
 Page 2 of 4

| | | |
|--------------|---|--------------------------|
| Dep. Ex. 32 | | TRIM 030208-10 |
| Dep. Ex. 34 | | ULL-FLVR 7582.006877-79 |
| Dep. Ex. 35 | Cantor Opp. Decl. Ex. 83 | ULL-FLVR 7582.004314-16 |
| Dep. Ex. 36 | Cantor Decl. Ex. 60, Cantor Opp. Decl. Ex. 80 | ULL-FLVR 7582.002960-63 |
| Dep. Ex. 37 | | ULL-FLVR 0004279 |
| Dep. Ex. 38 | | ULL-FLVR 7582.002958-59 |
| Dep. Ex. 40 | | MUS2_001888-89 |
| Dep. Ex. 41 | Cantor Opp. Decl. Ex. 87 | ULL-FLVR 7582.006934-36 |
| Dep. Ex. 43 | | MUS2_001858 |
| Dep. Ex. 45 | | ULL-FLVR 0004282 |
| Dep. Ex. 46 | Cantor Opp. Decl. Ex. 69 | ULL-FLVR 7582.000816 |
| Dep. Ex. 47 | | ULL-FLVR 7582.001622 |
| Dep. Ex. 48 | | MUS2_002473-76 |
| Dep. Ex. 50 | | ULL-FLVR 7582.0008161-62 |
| Dep. Ex. 53 | | ULL-FLVR 7582.0008448-49 |
| Dep. Ex. 54 | | ULL-FLVR 0006805 |
| Dep. Ex. 56 | | TRIM 038104-05 |
| Dep. Ex. 57 | | TRIM 039519 |
| Dep. Ex. 58 | | TRIM 029187 |
| Dep. Ex. 59 | | TRIM 038913-14 |
| Dep. Ex. 61 | | TRIM 031501-02 |
| Dep. Ex. 62 | | TRIM 040241 |
| Dep. Ex. 63 | | TRIM 030253-60 |
| Dep. Ex. 126 | Cantor Opp. Decl. Ex. 36 | SLN 000318-20 |
| Dep. Ex. 127 | Cantor Opp. Decl. Ex. 37 | SLN 000315-17 |
| Dep. Ex. 128 | Cantor Opp. Decl. Ex. 38 | SLN 000312-14 |
| Dep. Ex. 129 | Cantor Opp. Decl. Ex. 39 | SLN 000323-25 |
| Dep. Ex. 137 | Cantor Decl. Ex. 30, Cantor Opp. Decl. Ex. 35 | MON 00044-45 |
| Dep. Ex. 268 | Cantor Decl. Ex. 81 | JPM_FB 00001711-48 |
| Dep. Ex. 456 | | Highland 010411-12 |
| Dep. Ex. 458 | Cantor Decl. Ex. 45, Cantor | Highland 010419-20 |

John Ley
 December 14, 2012
 Page 3 of 4

| | | |
|--|--|---------------------|
| | Opp. Decl. Ex. 57 | |
| Dep. Ex. 463 | | AVE 010281-83 |
| Dep. Ex. 470 | | Highland 010416-17 |
| Dep. Ex. 642 | | BANA_FB00806884-903 |
| Dep. Ex. 902 | | BANA_FB00801558-62 |
| Ex. 1512 | | BANA_FB00920141-44 |
| Ex. 1513 | | BANA_FB00920133-34 |
| Ex. 1514 | | BANA_FB00916869-83 |
| Ex. 1515 | | BANA_FB00920068-69 |
| Ex. 1516 | | BANA_FB00917843-45 |
| | Cantor Decl Ex. 31, Cantor Opp. Decl. Ex. 32 | VEN 000803-06 |
| | Cantor Decl. Ex. 32, Cantor Opp. Decl. Ex. 33 | SPT 000179-81 |
| | Cantor Decl. Ex. 33, Cantor Opp. Decl. Ex. 34 | BGD 004016-18 |
| Full deposition transcripts of Scott Macklin, Todd Miranowski, Roger Schmitz, Michael Scott, Chaney Sheffield, and Mitchell Sussman. | | |
| The following deposition transcript excerpts: Brandon Bolio at 21:10-20 (testimony regarding personal information); David Howard at 10:18-11:11 and 20:17-25 (testimony regarding personal information and other transactions); Jeff Susman at 16:5-22 and 17:24-18:25 (testimony regarding personal information and other transactions) | | |

Should the panel wish to include information in any of the foregoing documents in a publicly available opinion, counsel respectfully request that the Court employ appropriate measures to maintain the confidentiality of such information. Should the Court desire updated versions of the parties' briefs reflecting the non-confidential nature of all documents except the foregoing, the parties are happy to so provide upon request.

If there are any questions or concerns about this or any other issue, please do not hesitate to contact us. Thank you very much.

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

ORDER APPROVING JOINT PROPOSAL [ECF No. 373]

This Cause is before the Court on the parties' Joint Notice Regarding Proposal for Partially Unsealing Summary Judgment Filings [ECF No. 373], filed in response to my October 17, 2013 Sua Sponte Order [ECF No. 370]. Having reviewed both proposals presented in the Joint Notice, and reiterating the directive of the Eleventh Circuit Court of Appeals in its Mandate [ECF 362] "to unseal all of the documents in the record, except those delineated in the parties' request to retain them as sealed," the Court approves the parties' first proposal [ECF No. 373, at 2-3]. It is hereby ORDERED and ADJUDGED:

On or before **December 6, 2013**, the parties shall **file via CM/ECF** redacted copies of the summary judgment memoranda of law, statements of facts, and exhibits. The parties **need not** submit hard copies of the redacted documents to the Court. I, or my successor judge [see ECF Nos. 363, 366], reserve to review requests presented by third parties as to disclosure of redacted information or sealed filings.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of November, 2013.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT COURT JUDGE

cc: Magistrate Judge Jonathan Goodman
All Counsel of Record