

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

IN RE:

**FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION**

MDL NO. 2106

This document relates to all actions.

**NOTICE OF FILING ON THE PUBLIC RECORD
DEPOSITION TRANSCRIPT EXCERPTS PREVIOUSLY FILED
UNDER SEAL RELATED TO SUMMARY JUDGMENT FILINGS**

Defendant Bank of America N.A. (“BANA”) and Avenue CLO Fund, et al. (“Plaintiffs”) hereby give notice that they are jointly filing on the public record certain documents, previously filed under seal, related to BANA’s Motion for Summary Judgment and Plaintiffs’ Motion for Partial Summary Judgment in the above-titled case.

On October 4, 2013, this Court issued an Order Upon Mandate [D.E. #368] requiring the parties to specify, by district court docket entry number, which documents previously filed under seal could be unsealed.¹ However, because the parties could not view the sealed entries on the electronic CM/ECF docket in this case—and therefore, could not determine which district court docket entry numbers corresponded to each sealed document—the Court later issued a Sua Sponte Order Regarding Mandate and Documents Filed Under Seal [D.E. #370] requiring the

¹ The parties previously filed with the Eleventh Circuit a letter dated December 14, 2012, identifying documents and testimony that should remain sealed. Since that time, the parties have determined that certain evidence included on that list no longer needs to remain sealed and, upon further review of the record, the parties have identified other evidence that should remain sealed which was inadvertently omitted from the letter.

parties to make a recommendation by November 1, 2013 regarding how they proposed to comply with this Court's October 4, 2013 Order Upon Mandate.

On November 1, 2013, the parties filed a Joint Notice Regarding Proposal for Partially Unsealing Summary Judgment Filings [D.E. #373]. The parties proposed submitting to the Court redacted copies of all memoranda of law and statements of material facts, in addition to one copy of each exhibit and a single compilation of each witness's deposition transcript excerpts cited in all memoranda of law. On November 5, 2013, this Court entered an Order Approving Joint Proposal [D.E. #374], approving the parties' joint proposal and ordering the parties to file via CM/ECF redacted copies of the summary judgment memoranda of law, statements of facts, and exhibits, on or before December 6, 2013.

The parties previously filed under seal the deposition transcript excerpts listed below, which were cited in their respective summary judgment memoranda of law and statements of fact filed on August 5, 2011, September 9, 2011, and September 27, 2011. In compliance with this Court's Order Approving Joint Proposal, the parties now file the following deposition transcript excerpts on the public record with the exception of those that remain under seal either in full or in part (as indicated below):²

DEPOSITION TRANSCRIPT EXCERPTS		
No.	Deponent	Filing Status
1	Ambridge, Robert	Publicly filed (attached)
2	Badala, Peter	Publicly filed (attached)
3	Barone, Robert	Publicly filed (attached)
4	Blauner, Stephen	Filed Under Seal
5	Bolio, Brandon	Publicly filed with redactions (attached)

² Additional documents previously filed under seal related to BANA's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment, including the respective memoranda of law and statements of facts, will be filed under separate cover.

DEPOSITION TRANSCRIPT EXCERPTS		
No.	Deponent	Filing Status
6	Brown, Jeanne	Publicly filed (attached)
7	Christensen, Hans	Publicly filed (attached)
8	Corleto, David	Publicly filed (attached)
9	Esplin, Jason	Publicly filed (attached)
10	Freeman, Jim	Publicly filed with redactions (attached)
11	Fu, Vincent	Publicly filed (attached)
12	Howard, David	Publicly filed with redactions (attached)
13	Kolben, Herbert	Filed Under Seal
14	Kotite, Albert	Publicly filed (attached)
15	Kumar, Deven	Publicly filed (attached)
16	Lupiani, David	Publicly filed (attached)
17	Macklin, Scott	Filed Under Seal
18	Miranowski, Todd	Filed Under Seal
19	Mulé, Philip	Publicly filed with redactions (attached)
20	Naval, Ronaldo	Publicly filed (attached)
21	Newby, William	Publicly filed (attached)
22	Pardon, Douglas	Publicly filed (attached)
23	Pryor, Shepherd	Publicly filed (attached)
24	Rafeedie, McLendon	Publicly filed with redactions (attached)
25	Rourke, Kevin	Filed Under Seal
26	Schmitz, Roger	Filed Under Seal
27	Scott, Michael	Filed Under Seal
28	Sheffield, Chaney	Filed Under Seal
29	Susman, Jeff	Publicly filed with redactions (attached)
30	Sussman, Mitchell	Filed Under Seal
31	Varnell, Jon	Publicly filed (attached)
32	Yu, Henry	Publicly filed with redactions (attached)
33	Yunker, Brett	Publicly filed (attached)

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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 December 3, 2013 on all counsel or parties of record on the Service List below:

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Ambridge, Robert 4/4/2011 5:00:00 PM

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4
5 IN RE:
6 FONTAINEBLEAU LAS VEGAS Civil Action No.
CONTRACT LITIGATION 09-MDL 2106

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12

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14 VIDEOTAPED DEPOSITION OF ROBERT AMBRIDGE
15 Sarnoff Court Reporters
2250 South Rancho Drive, Suite 195
16 Las Vegas, Nevada 89102
17 Monday, April 4, 2011
18 9:06 a.m.

19
20
21 Reported By:
Gale Salerno
22 RMR, CCR No. 542
23 Job No. 157945

24
25

Ambridge, Robert 4/4/2011 5:00:00 PM

1 Q. Mr. McElfresh in his e-mail -- well, the
2 subject is entitled 1/9/09 ACR Review Meeting.

3 What is an ACR review meeting, if you know?

4 A. ACR refers to anticipated cost report.

5 And we regularly met with our key construction
6 executives to review their assessment each in their
7 own area of the cost to complete versus the plans and
8 information that we had at those times.

9 Q. He goes on to say, "The meeting is intended
10 to develop an updated, quote, internal, unquote, ACR
11 that reflects current and projected costs to
12 complete."

13 Was there another ACR, for lack of a better
14 term, an external ACR that you're aware of?

15 A. Each month when we did our construction
16 draws, the bank's inspection service IVI requested
17 anticipated cost reports.

18 And generally those cost reports that were
19 issued to IVI conformed to whatever the approved
20 budget was at the time. Meaning the bank budget plus
21 any approved budget amendments:

22 Q. And what did the internal ACR report
23 conform to?

24 A. It conformed to this group of people who
25 are addressed in this, including myself and

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1 McElfresh. The potential actual cost of completing
2 the project with the scope of work that we understood
3 Fontainebleau to desire and want in the project,
4 some of which was reflected in actual plans and
5 specifications, and some of which you could label
6 nice to have or wish list or not yet documented
7 ideas.

8 Q. It sounds like the -- did the internal ACR
9 have a different name? Was it occasionally referred
10 to as something other than, quote, internal?

11 A. No.

12 Q. I've seen reference to bank ACR. That's
13 the one that would go to IVI?

14 A. Yes.

15 Q. And I've seen reference to on occasion
16 true, t-r-u-e, ACR. Are those terms that you recall
17 having been used?

18 A. The bank ACR, yes. True as a label, I
19 don't specifically recall.

20 Q. I've also seen real ACR. Do you recall
21 that?

22 A. Well, again, not as a label, but I
23 certainly understand the distinction between the bank
24 ACR. And internal is a term that if you had asked me
25 what we called it, I would have called it internal.

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1 True and real, they've got their own meanings.

2 Q. And let's call it bank and internal.

3 A. Yeah.

4 Q. As you described it, the internal ACR had,
5 in addition to the information that would be found on
6 the bank ACR, had you said two components. One, the
7 second was a wish list, or at least items that were
8 not currently embodied in plans and specifications;
9 is that right?

10 A. Yes.

11 Q. And the first category that you gave me was
12 items that were, in fact, embodied in existing plans
13 and specifications?

14 A. Correct.

15 Q. In category number one, typically was that
16 work that was underway?

17 A. January 2009, yes, work underway. At least
18 in its infrastructure, meaning physical structure,
19 mechanical, electrical, plumbing, preparations for
20 implementation of whatever the end result was, be it
21 a restaurant or retail or casino, et cetera.

22 (Exhibit 681 was marked for
23 identification.)

24 BY MR. DILLMAN:

25 Q. Let's mark as Exhibit 681 a series of

Ambridge, Robert 4/4/2011 5:00:00 PM

1 revised ones, or the ones that only show the borrowed
2 account?"

3 Do you know what's being referred to there
4 as -- well, there's three categories. There's the
5 real POC logs. There's the bank-revised POC logs.
6 And then there's apparently a log that only shows the
7 borrowed account.

8 Do you know what those refer to?

9 A. Yes.

10 Q. What do they refer to?

11 A. The real ones would have referred to
12 Turnberry West's, I'll refer to it as a master list
13 of pending change orders. All the ones we were aware
14 of that are similar to the immediate and deferred
15 change orders.

16 The bank revised ones would have been an
17 edit of the real ones, to exclude change orders that
18 may have fallen in either of two categories, real but
19 deferred or pending not resolved.

20 Q. When you say "real but deferred," you mean
21 actual change orders that had gone through the
22 process and were going to be issued, but they were
23 being deferred for one reason or another?

24 A. Yes.

25 Q. And the final category is those that were

Ambridge, Robert 4/4/2011 5:00:00 PM

1 March to keep stalling IVI slash BA."

2 Let me break that out. When you say "dig a

3 little into the 50 million contingency," what does

4 that mean?

5 A. We needed to get them to release from the

6 original 111 million; I take it by the end of the

7 January meeting, we had whittled the 111 million

8 contingency down to 50. And we needed to convince

9 them to release more of the remaining 50 so that we

10 could deal with some of these priority one change

11 orders.

12 Q. And by doing that, or in order to

13 accomplish that, the thought was we release some of

14 the priority one change orders, but only in an amount

15 not to exceed 50 million?

16 A. Yes.

17 Q. You testified earlier about the change

18 orders relating to borrowed accounts. You indicated

19 that there was sort of a cap of how high those would

20 go. Is that sort of the same thing you're referring

21 to here?

22 A. Yes.

23 Q. To keep stalling -- you go on to say, "to

24 keep stalling IVI/B of A."

25 What was the stalling part there?

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1 A. Well, again, in the correct context,
2 Jeff Soffer at this time certainly was aware of
3 whether he knew a specific dollar amount, or in
4 general that we were somewhere between 250 and
5 350 million over the budget. He was actively
6 attempting to raise those sorts of funds to cover the
7 difference.

8 So stalling IVI slash Bank of America was
9 to keep the project and the funding alive until
10 Jeff Soffer could reach an accommodation that allowed
11 us to provide additional equity.

12 Q. And then you say, "better to leak a little
13 than get caught in the big lie."

14 Is that the idea, better to leak out a
15 little bit of the change orders now to keep the thing
16 going until Mr. Soffer can find the equity to fill
17 the gap?

18 A. Yes.

19 Q. And the big lie here was the -- the several
20 hundred million dollars of change orders that were
21 out there at the time that were not being disclosed
22 to the banks?

23 A. That's correct.

24 Q. And did Mr. Kumar ever indicate that he
25 disagreed with any aspect of your assessment here?

1 interested, the ACR is attached as Exhibit B to this
2 report, if you care to look at it.

3 But "The ACR includes 298 million dollars
4 in pending owner changes, which have been detailed in
5 attached summary sheets for each of the components.
6 It is clear from the number and scope of pending
7 items that claims were made by the subcontractors
8 some time ago, possibly as far back as a year, and
9 were never included on prior ACRs submitted to IVI."

10 Do you see that?

11 A. I see it.

12 Q. That's a true statement, isn't it?

13 A. Yes.

14 MR. DILLMAN: I may have a couple of other
15 documents that I've just sort of in the melee of
16 going through things have overlooked, and I'll come
17 back to those if I do. But why don't I turn it over
18 to you, Ken. And I think at this point I'm done,
19 subject to sort of a quick review of materials.

20 MR. MURATA: Can we go off the record?

21 THE VIDEOGRAPHER: We are going off the
22 record at 3:47 p.m.

23 (A recess was taken from 3:47 p.m.
24 to 3:55 p.m.)

25 (Exhibit 691 was marked for

1 identification.)

2 THE VIDEOGRAPHER: We're going back on the
3 record at 3:55 p.m. You may proceed.

4 BY MR. DILLMAN:

5 Q. Mr. McElfresh -- I'm looking at McElfresh,
6 on this document.

7 Mr. Ambridge, just a couple more questions
8 here. I've put in front of you Exhibit 691.

9 My question to you is, is that a copy of a
10 document that you received on or about January 22nd,
11 2009?

12 A. It would appear to be.

13 Q. Just to be clear, the attachment to that is
14 not the internal ACR from Turnberry West, but rather
15 a draft of a proposed bank ACR; is that right?

16 A. Yes.

17 (Exhibit 692 was marked for
18 identification.)

19 BY MR. DILLMAN:

20 Q. 692 is an e-mail from yourself to Mr. Kumar
21 dated March 5th, 2009. An e-mail that you sent?

22 A. Okay, read the e-mail.

23 Q. This is an e-mail from you?

24 A. Yes.

25 Q. It memorializes a meeting that you had

1 with, among others, Mr. Bonvicino of IVI, correct?

2 MR. MURATA: Objection.

3 THE WITNESS: It looks like a phone call
4 from Bonvicino.

5 BY MR. DILLMAN:

6 Q. Okay, thank you. This reflects a phone
7 call that you had?

8 A. Yes.

9 Q. With Mr. Bonvicino, right?

10 A. Yes.

11 Q. You say, "He can see from the current
12 draw," and it goes on.

13 My first is question is who is the "he"
14 here? Are we talking about Mr. Bonvicino, or are we
15 talking about somebody else?

16 A. I'm going to say that it's Bob Barone.

17 Q. And is that because you had a call with
18 Mr. Barone shortly after the call with Mr. Bonvicino?

19 A. Yes.

20 Q. And Mr. Barone told you that he could see
21 from the current draw and the ACR that the
22 contingency is virtually all used up?

23 MR. MURATA: Objection.

24 THE WITNESS: That's what I've written.

25

1 BY MR. DILLMAN:

2 Q. Do you recall that?

3 A. Strictly from memory?

4 Q. Does this document help you to refresh your
5 recollection of --

6 A. Yes. The document, which I wrote, you
7 know, I would say, yes.

8 Q. You go on to say, "And he" -- meaning Bob,
9 right?

10 A. Bob Barone.

11 Q. "Has big concerns that there are more costs
12 slash claims beyond that."

13 Did Mr. Barone express a significant
14 concern on March 5 of 2009 that were -- that there
15 were costs and claims that exceeded the ACR that had
16 been provided to IVI?

17 MR. MURATA: Objection.

18 THE WITNESS: Yes.

19 BY MR. DILLMAN:

20 Q. Okay. Did he tell you on the basis for his
21 concerns?

22 A. Again, I don't recall his specific words in
23 it. But it stems from being familiar enough with the
24 project to see that the remaining available funds
25 were left in the budget, plus the prior equity

1 infusion are not likely sufficient to match the work
2 in place. Yeah, that was the gist of the
3 conversation with him, is whether or not there was
4 more information out there that they haven't seen.

5 Q. And did he tell you that he based his
6 concern in part upon looking at the project and
7 determining that there was going to be more needed to
8 complete it than what was in the budget?

9 MR. MURATA: Objection.

10 THE WITNESS: I don't recall the last time
11 he was in Las Vegas other than the early January
12 meeting. So I don't know if he's speaking from his
13 own personal observation or from Bonvicino's
14 observations, which are reported at the top of the
15 memo.

16 Thursday, March 5th, the date of the
17 e-mail, is about the time that IVI made their monthly
18 visit to review a draw.

19 So my own writing tells me that Paul
20 Bonvicino looked at the property, had been in touch
21 with Barone. Reported his own findings, whatever
22 they may be, that prompted Barone to call me, and
23 wanted Barone directly wanting verification on
24 schedule and ability to complete within the bank
25 budget.

1 BY MR. DILLMAN:

2 Q. And do you recall Mr. Barone telling you
3 that he or others at IVI were concerned that by
4 looking at the project, it was going to cost more in
5 their estimation to complete it than remained in the
6 budget?

7 MR. MURATA: Objection.

8 THE WITNESS: I can't recall the specific
9 conversation in terms of quotes.

10 BY MR. DILLMAN:

11 Q. But he said he was concerned?

12 A. Yes. I've got a general recollection of
13 the conversation because I'm pretty sure that I was
14 in Florida at the time on a personal trip. And I
15 remember a -- I clearly remember an hour-long cell
16 phone conversation with Barone right at this time,
17 coincided with a wedding of a nephew of mine.

18 So the conversation and the gist of it
19 stands out. I don't recall exactly what he said, but
20 certainly the gist of it was we're very concerned as
21 to whether or not you can complete on time and within
22 the budget plus the equity.

23 Q. Did he indicate a concern that the ACR's
24 that were being provided to IVI did not include all
25 of the anticipated costs?

1 A. I actually don't recall that being a
2 question.

3 Q. Did he indicate to you -- well, strike
4 that.

5 You state here that he does not want to be
6 embarrassed in front of the lenders by giving a vote
7 of confidence to the project if it is not there.

8 What did you mean by "if it is not there?"

9 A. What I would have -- what I meant was he
10 was asking me to warn him of pending significant
11 deviations so he wouldn't give the project a vote of
12 confidence to the lenders and then find out something
13 different later.

14 Q. What did you mean by "if it is not there?"
15 If the project isn't there? In other words, if it's
16 going under? Something else?

17 A. What I meant was if the -- if the ability
18 to complete it timely and within the budget is not
19 there.

20 Q. You go on to say, "Bob is skeptical." This
21 you previously testified about his skepticism, right?

22 A. Yes.

23 Q. He says, "I told him that FB expected to
24 meet with lenders soon and discuss how to comply with
25 M1 and M2." Do you see that?

1 A. Yes.

2 Q. Do you know whether any such meeting ever
3 occurred?

4 A. I'm pretty sure that that would have been
5 referring to the pending April meeting where they
6 presented the Exhibit 268.

7 Q. Well, actually just as a frame of
8 reference, this is March 5th, this e-mail. The
9 presentation was April 17 you know, some month and
10 ten days later.

11 A. I understand the gap. But that -- I
12 believe that the -- the necessity of the April 17th
13 presentation, whenever it actually took place,
14 April 17, was something that had been contemplated as
15 far back as this.

16 And that's why I said what I said, FB
17 expected to meet with the lender soon.

18 Q. And you told Mr. Barone that?

19 A. Yes. Because that was my understanding
20 from Fontainebleau sources, including Kumar, that
21 they realized they needed to meet with the lenders
22 and have the discussion that eventually turned out to
23 be this presentation.

24 Q. Did the -- did you discuss with Mr. Barone
25 that the meeting was to discuss how to comply with

1 M1-M2?

2 MR. MURATA: Objection.

3 THE WITNESS: Only by reading my own memo.

4 BY MR. DILLMAN:

5 Q. And do you believe that you accurately
6 reflected your conversation with Mr. Barone when you
7 said, "I told them that FB expected to meet with
8 lenders soon and discuss how to comply with M1-M2?"

9 MR. MURATA: Objection.

10 THE WITNESS: Please repeat that.

11 BY MR. DILLMAN:

12 Q. Do you believe that your e-mail accurately
13 reflects what you told him specifically that FB
14 expected to meet with lenders soon and discuss how to
15 comply with M1 dash M2?

16 MR. MURATA: Objection.

17 THE WITNESS: Yes. I believe what I wrote
18 was my recollection at that time.

19 BY MR. DILLMAN:

20 Q. Do you recall any further discussions on
21 the topic of M1-M2 with Mr. Barone on this call?

22 A. No.

23 Q. You go on to say that, down below, "I said
24 the building itself has no functional or other issues
25 that prevent it from being completed. We would

1 likely need an OT component." That's overtime?

2 A. Yes.

3 Q. "To get done, and ownership was aware of
4 that."

5 Any other conversations regarding overtime
6 that you recall of Mr. Barone at this time?

7 A. No other conversations, no.

8 Q. You go on to say, "some design in deltas
9 were still coming in."

10 What's a delta?

11 A. A new set of plans. A revised set,
12 sometimes called revisions.

13 I think here we called them deltas. Sort
14 of an industry term.

15 Q. You say, "so hard to say what impacts on
16 cost and schedule actually are on any given day, but
17 FB was giving direction to us on what to release or
18 not."

19 Do you see that?

20 A. Yes.

21 Q. What did you mean by FB was giving
22 direction to us on what to release or not?

23 A. What -- which elements of the building,
24 when we received either new or changed design,
25 through the architects, engineers, other consultants,

1 rather than TWC simply deciding on its own to
2 implement or not implement what was in the plans,
3 Fontainebleau was giving us direction on which pieces
4 of work to release or not, again consistent with that
5 February memo where Fontainebleau instructs us not to
6 release or not to incur change orders or new work
7 unless they say so.

8 Q. Did you explain to Mr. Barone that
9 Fontainebleau had given you those instructions?

10 MR. MURATA: Objection.

11 THE WITNESS: No. I -- by writing this,
12 I believe I'm saying to Mr. Barone that we take
13 direction from Fontainebleau on which items to pursue
14 and which to not pursue.

15 BY MR. DILLMAN:

16 Q. Did you tell Mr. Barone that Fontainebleau
17 had told you not to pursue any unless they expressly
18 instructed you to?

19 A. No, I don't recall saying that.

20 Q. You go on towards the end of the next
21 paragraph, "I think IVI will tell the banker's in the
22 private phone conference tomorrow that in IVI's
23 opinion we must be upside down but they don't know
24 how much."

25 Why did you believe that that's what

1 Mr. Barone would tell the bankers?

2 A. I believe that by March 5th, Bob Barone had
3 determined in his own mind, from the information
4 available to him and his employee's observations,
5 that it was likely that there was a shortfall in the
6 cost to complete version the budget.

7 Q. Likely a shortfall in excess of that which
8 had been reported?

9 MR. MURATA: Objection.

10 THE WITNESS: Yes.

11 BY MR. DILLMAN:

12 Q. And did you have any conversations with
13 Mr. Barone on the -- strike that.

14 You came to this conclusion over the course
15 of your conversations with Mr. Barone beginning in
16 early January, and extending through at least the
17 March 5th date of this e-mail?

18 MR. MURATA: Objection.

19 THE WITNESS: Yes.

20 BY MR. DILLMAN:

21 Q. To the best of your knowledge, did
22 Mr. Barone, or anyone else at IVI, request backup for
23 the anticipated cost reports other than that which
24 was provided to them pursuant to the governing
25 documents?

1 MR. MURATA: Objection.

2 THE WITNESS: No. I think their followup
3 was weak during the entire course of the project.

4 BY MR. DILLMAN:

5 Q. Why do you say that?

6 A. Because they didn't pursue opportunities to
7 do enough research to make these determinations
8 earlier.

9 Q. Like what?

10 A. Like ask for -- ask outright to see pending
11 change orders.

12 Q. You believe that as of March 2009
13 Mr. Barone was of the opinion that the project was
14 upside down, right?

15 A. Yes.

16 Q. And is it the case that Mr. Barone never
17 asked you for any pending change orders or other
18 information that Turnberry West Construction was
19 keeping internally that might differ from the ACR
20 reports that were being provided to IVI?

21 A. I would respond by saying I don't recall
22 him asking me to see whether papers existed or didn't
23 exist.

24 Q. Would you have expected that from a
25 consulting firm in IVI's position?

1 MR. MURATA: Objection.

2 THE WITNESS: Yes. I was surprised through
3 the entire life of the project that they didn't delve
4 deeper into whatever questions they had and ask for,
5 you know, hard evidence of whatever they may have
6 been researching.

7 BY MR. DILLMAN:

8 Q. And did you believe that it was
9 particularly questionable that they didn't delve into
10 such information when you believe they actually
11 thought the project was upside down?

12 A. Their performance was surprising to me for
13 the duration of the project.

14 Q. Are there specific examples of things that
15 you looked at at the time and said, you know, in sum
16 or substance, I can't believe IVI is not asking about
17 this?

18 MR. MURATA: Objection.

19 THE WITNESS: There were times that Roger
20 McElfresh and myself would give Paul Bonvicino -- not
21 Barone, but Bonvicino hints that, you know, maybe you
22 ought to look for this or look for that or look into
23 this or look into that.

24 One of the specific recollections was the
25 FF&E purchase, which was a Fontainebleau function,

1 not a Turnberry West function. And so what I recall
2 is Paul at a group meeting, the draw meeting, asked
3 questions about FF&E to Vernon Glanister who was
4 handling that for Fontainebleau. And Mr. Glanister
5 told them no, everything was okay. He had a notebook
6 similar to what you have gentlemen have in front of
7 you and recorded all the purchase orders, and
8 everything was just fine.

9 BY MR. DILLMAN:

10 Q. In your estimation was that the case?

11 A. In my personal estimation, no.

12 Q. Why not?

13 A. It was that the buyout of the FF&E was
14 incomplete and not fully executed within the budget
15 that they had.

16 Q. And did you -- you said that you would give
17 hints on occasion to the IVI personnel. Did you say
18 anything to them about FF&E?

19 A. Well, the one specific that I recall was
20 saying we think you ought to ask about the FF&E
21 purchase orders versus budget and completeness.

22 Q. Why did you suggest that they ask about
23 that?

24 A. Well, because Roger and I had our doubts as
25 to the completeness of what they were being shown.

1 It was one item on the Fontainebleau side that
2 probably, in our opinion, right or wrong, correlated
3 to the ACR reports.

4 Q. Did you ever come to learn that the FF&E
5 was substantial over the budgeted amounts?

6 MR. MURATA: Objection.

7 THE WITNESS: No. Not specifically, no.
8 We didn't pursue it. We didn't pursue -- Roger and I
9 did not pursue our own independent evaluation of that
10 area. We just told Bonvicino that we thought that
11 would be worth looking into.

12 BY MR. DILLMAN:

13 Q. And as far as you were concerned, other
14 than looking at a notebook and seeing that there was
15 a notebook there, you didn't do anything else to get
16 behind that information?

17 MR. MURATA: Objection.

18 THE WITNESS: Not that I'm aware of.

19 (Exhibit 693 was marked for
20 identification.)

21 BY MR. DILLMAN:

22 Q. Exhibit 693 is an e-mail chain. The one in
23 the middle is from Mr. McElfresh to Mr. Kumar, copy
24 to you.

25 And it says, "Attached is information you

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1 borrower. We were kept as far away as possible. I
2 feel from the borrowing relationship because it
3 wasn't germane to Turnberry West's contract to build
4 the building.

5 There were obviously interfaces through the
6 draw process, but we did not, neither McElfresh nor
7 myself, nor others at Turnberry West have interaction
8 with the lending personnel, other than occasionally
9 the draw meeting usually quarterly when either Bank
10 of America and/or other lender's reps would sit in
11 the meeting.

12 Q. Did TWC have any involvement in the
13 decision about what information to release to the
14 lender group or IVI in terms of the ACR's?

15 A. Just state that again if you would.

16 Q. Did Turnberry West have any involvement in
17 the decision about what ACR information to release to
18 the lender group or IVI?

19 A. It's a fine point, but we would produce
20 the ACR that reflected what we believed the actual
21 expected cost of the project, the anticipated cost.
22 We would then meet both at the executive level and
23 also at the administrative level generally with Deven
24 Kumar, and reviewed that, and were aware that there
25 would be edits made to those numbers to conform back

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1 to the bank budget, or as supplemented with the
2 190 million when that came to occur.

3 And our contract administrative office
4 through Cheryl Ross would physically prepare the
5 report form that was ultimately presented, because
6 she had the data and the format on our system. And
7 working often hand in glove with Deven, but with
8 collaboration of our project management team
9 assembled the final ACR that was turned over to IVI.

10 Q. Whose decision was it to leave certain
11 pending order changes off of an ACR, or to include a
12 POC in an ACR?

13 A. Well, at the end of the day, it was
14 Fontainebleau's decision, and, again, normally
15 through Deven as the responsible executive on their
16 side for making the numbers conform.

17 Q. I believe you testified earlier that some
18 of the pending order changes had been pending for
19 more than a year; is that right?

20 A. I don't recall saying that directly. It
21 was said in the IVI report that some of them appeared
22 to be more than a year old.

23 Q. And you agreed with that statement in the
24 IVI report?

25 A. I wouldn't dispute it.

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1 of the fact that Jeff Soffer was chairman of
2 Fontainebleau and the owner, and listed with the
3 state of Nevada as sole owner and president of
4 Turnberry West Construction.

5 And Jeff Soffer's objective was to get the
6 project done, and many people, including Deven Kumar,
7 myself and others followed his lead. We implemented
8 the paperwork to reflect decisions and affirmations
9 that he made to us that he would raise the funds
10 necessary to close the gap.

11 If there was a gap, and that he would -- he
12 was responsible for dealing with the banks and the
13 finances of the project, not us.

14 Q. So in terms of the ACR's that were provided
15 to IVI, it was at Fontainebleau's direction, then,
16 that Turnberry West included or omitted certain
17 information from the ACR's that were provided to
18 IVI?

19 A. I would say yes to that.

20 Q. If IVI had asked Turnberry West
21 Construction for additional information regarding
22 the ACR's, would you have been at liberty to provide
23 that information without checking first with
24 Fontainebleau?

25 MR. SIDHU: Objection.

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1 THE WITNESS: At that point in time, I
2 would not have felt free to voluntarily turn that
3 over without discussing it with Fontainebleau. With
4 somebody in a responsible position, again, primarily
5 Kumar, but potentially all the way up to Soffer.

6 And I think some of the documentation
7 that's available indicates that certainly that the
8 budget overage was discussed openly with Soffer, and
9 he was aware of it. So we would not have taken
10 unilateral action to undermine the lending
11 relationship.

12 BY MR. MURATA:

13 Q. If a request were made to Fontainebleau
14 about ACR-related information, TWC would work with
15 Fontainebleau Las Vegas to help determine what
16 information ought to be provided to IVI or the
17 lending group; isn't that right?

18 A. We would certainly work together to provide
19 the information that they wanted to present.

20 Exhibit 800 was marked for
21 identification.)

22 BY MR. MURATA:

23 Q. Let me show you what I'll mark as 800.

24 MR. DILLMAN: 800?

25 MR. MURATA: Yes.

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

3

4 IN RE: FONTAINEBLEAU LAS VEGAS,
CONTRACT LITIGATION.

5

6 MDL NO. 2106.

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

8

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10

11

12

13 DEPOSITION of PETER V. BADALA, taken
14 pursuant to Notice, held at the law offices of
15 O'MELVENY & MYERS, LLP, Times Square Tower, 7 Times
16 Square, New York, New York, 10036, on Tuesday,
17 August 16, 2011, at 9:00 a.m. before JEANNETTE
18 MCCORMICK, a Certified Shorthand Reporter, License
19 No. XI00920, and a Notary Public.

20

21

22 JOB No. 169494

23

24

1 involving a 300 million dollar or so condominium,
2 luxury condominium project in Wailea, Hawaii. If
3 you have been to the Grand Wailea, the condominium
4 units that are next door to that. So, Dick Pacific
5 was the contractor on that case. They had filed
6 claims and litigation against the developer Lai
7 Honua for delay, disruptions and extra work of
8 around 30 million dollars. The developer had some
9 cross-complaints against Lai Honua. My role was to
10 analyze the accounting records and information in
11 support of the claims that Dick Pacific had
12 presented to Lai Honua and express an opinion.

13 Q. And you were working on behalf of Dick
14 Pacific then?

15 A. No. I was working on behalf of the developer
16 Lai.

17 Q. I keep guessing wrong.

18 A. That's okay. If I underline it, that means
19 that is the --

20 Q. I am just not understanding your shorthand.

21 A. I am glad you asked the question. So in that
22 case I was working for the developer.

23 Q. So, Sierra Blanca Constructors v URS
24 Corporation, and I see you were working for URS
25 Corporation?

1 A. Yes. The third time is the charm. That is
2 correct. I was working for URS in that case.

3 Q. What was the nature of that case?

4 A. That was a dispute between the contractor and
5 its design partner URS on public/private partnership
6 project in New Mexico, La Junta Highway, I think
7 it's called. It was a PPP. And so all of the work
8 and all the issues are as between the contractor and
9 the design team on that. And so there were some
10 issues that or allegations that some portions of the
11 design caused the contractor to lose money over and
12 above what they had budgeted. So, I helped with the
13 quantification, the analysis of the contractor's
14 claims against URS. I didn't get involved in the
15 engineering side of it, those technical issues, just
16 the accounting, quantum and pricing.

17 Q. So, Sierra Blanca was claiming that URS's
18 faulty design caused them to incur overruns?

19 A. That was their assertion, yes.

20 Q. And how did that resolve?

21 A. We did go to arbitration and there was a
22 decision in that matter.

23 Q. Can you tell me what the decision was?

24 A. I can't tell you what it was. I can tell you
25 it was favorable to URS.

1 Q. You divided -- your Exhibit A has trial and
2 arbitration testimony and then deposition testimony.

3 A. Yes.

4 Q. Is there a reason you divided it out like
5 that?

6 A. Just because there are some matters that I
7 guess -- one matter is pending, the Virgin Valley
8 Water District is still an active case. I have
9 given a deposition in that matter. Some of them I
10 just -- I gave testimony, so I thought you would
11 want to know that. But most cases in my line of
12 work settle.

13 Q. In my line of work as well.

14 A. So, I think that's always a good thing if we
15 can help facilitate that. I was just giving you --

16 Q. So let's continue on. It looks like Dick
17 Pacific and Sierra Blanca you also gave deposition
18 testimony in those two?

19 A. Yes.

20 Q. And then at the Virgin Valley Water District,
21 that's the one that's still pending?

22 A. That is a pending piece of litigation in
23 federal court, I believe in the District of Nevada,
24 Las Vegas.

25 Q. What is that case about?

1 A. That is a product liability case really
2 involving the plastic lateral pipe that you may be
3 familiar with. There have been many cases over the
4 years of the failure of that product. And I was
5 involved in I think one of the first cases that
6 actually went to trial. So, it was a successful
7 endeavor, and so I have gotten involved in others
8 through the years, and this is one of those.

9 Q. Why did the pipes fail?

10 A. Well, that's a technical analysis, right, but
11 technically it has to do with the chemical makeup of
12 the polymer, and there's all sorts of issues that
13 come in, which soils conditions you put the pipe in
14 and all these other kinds of things.

15 Q. You are not the technical expert?

16 A. No. I was doing the quantification of the
17 damages to -- in this case of the Virgin Valley
18 Water District.

19 Q. What about Dilbeck & Sons, et al?

20 A. Dilbeck is a case involving defective
21 construction and change order disputes. I was
22 retained by Zurich American who was I think the
23 builder's risk insurer. There were failures, a lot
24 of defective construction issues in that case. And
25 so that's why I was -- that's why the Zurich

1 American was brought into that case.

2 Q. What was being constructed?

3 A. This was a school in Monterey.

4 Q. What were the change order disputes?

5 A. They were a -- there were a number of

6 disputes involving whether something was a change or

7 whether it was contemplated within the contract and

8 the design of the contract. There were other issues

9 as to whether the amounts paid for the change order

10 were sufficient, and then there were delay and

11 disruption claims.

12 Q. What is a delay and disruption claim?

13 A. Delay and disruption is the additional costs

14 for -- cost overruns are associated with if the

15 project extends beyond the original completion date,

16 what kind of damages the contractor would incur as a

17 result of that. Disruption can include a wide

18 variety of issues, some productivity cost related.

19 It's probably the biggest issue.

20 Q. And what kind of losses are generally

21 associated with delay?

22 A. The general delay-type costs could be things

23 like labor escalation. You could have your contract

24 assumes your labor was going to be performed in a

25 certain window of time. If it's delayed and you end

1 up shifting that labor force into a later period,
2 and the wages increased, that could be an element of
3 delay damages. Another -- the same would be true
4 with materials. You could have the same issue with
5 materials. You could have contractor management
6 costs, a portion of the field office overhead as
7 time-driven, time-related costs. So those are the
8 kinds of examples.

9 Q. If you have people working for an extra
10 couple months you have to pay them and you have to
11 keep the project running and all of that?

12 A. Correct.

13 Q. And that is a delay cost?

14 A. That is a component of it.

15 Q. I have also seen in the Fontainebleau stuff a
16 cost for acceleration?

17 A. Schedule-driven, yes. That is a schedule --
18 that typically involves over-time or added people or
19 some of both to make up time and mitigate schedule
20 delays that might be visible.

21 Q. You have to add people and add hours in order
22 to finish faster?

23 A. Yes. You can accelerate in a number of ways.

24 You can work ten-hour days five days a week. You
25 can work ten hours a day seven days a week. You can

1 have double shifts. There is all sorts of
2 opportunities to accelerate. Usually there is a
3 fair amount of care and thought that is put into
4 that, how you want to execute that.

5 Q. But all of those involve extra costs I take
6 it?

7 MR. MURATA: Objection.

8 THE WITNESS: They don't necessarily. I
9 mean, you balance -- balance, you know,
10 extending the project to beyond an original
11 completion date, but there can be some
12 incremental costs, yes.

13 BY MR. MOCKLER:

14 Q. Did I miss one? RCMC versus Westchester
15 Surplus Lines Insurance Company, what was that one?

16 A. This was another -- a builder's risk case
17 where there was damages alleged, actually, by -- on
18 both sides by the contractor against the school
19 district for extra costs and damages they wanted,
20 and the school district was alleging defective work
21 and poor workmanship, and the roof actually did
22 collapse on one of the buildings. So that was not a
23 good thing. So that caused all sorts of additional
24 costs and disruption, and there were different
25 assertions as to why that happened. The school

1 district was alleging that the contractor didn't
2 properly maintain the site and didn't protect its
3 work. And the unexpected event of a big rainstorm
4 came in and ruined a big piece of the construction
5 work that had been done to date. So that was a part
6 of the -- that was not my part because I was doing
7 quantification.

8 Q. What was your -- were you doing work on the
9 quantum?

10 A. Yes, I was working on the quantum.

11 Q. Have you -- presumably, you had deposition
12 and trial and arbitration experience before the
13 cases listed on here, right?

14 A. Yes.

15 Q. Did any of those cases involve change orders?

16 A. Sure. Many of them involved change orders
17 that -- at some level that is always a dispute.
18 Typically it can be a part of a construction
19 dispute.

20 Q. Since I asked -- so what is a change order?

21 A. What is a change order?

22 Q. Yes.

23 A. A change order is a recognition of one of
24 several things. It could be -- first of all, the
25 contract guides when a change order becomes a change

1 A. Yes. Thank you for that.

2 Q. And when you said "credit administrator," you
3 meant the agents under those agreements?

4 A. Yes.

5 Q. In that last sentence in paragraph 28 you
6 say, "The funds in the Bank Proceeds Account could
7 not be used by the Borrowers to pay Project costs"?

8 A. That is my understanding, yes.

9 Q. So until Bank of America approved a
10 disbursement, those funds that were in the bank
11 proceeds account were unavailable to the owner.
12 That is your understanding, right?

13 A. To Fontainebleau, yes.

14 Q. So Fontainebleau you refer to as the
15 developer?

16 A. I was going to call them the developer, yes,
17 but we can use whatever terminology.

18 Q. I am fine with developer. Who is IVI?

19 A. IVI was the third-party consultant retained
20 by BANA and the lenders to oversee the construction
21 process and the paperwork as it relates to the
22 disbursements or the advance, monthly advances.

23 Q. And again for clarity, by IVI we are
24 referring to Inspection Valuation International,
25 right?

1 A. Yes.

2 Q. Do you have prior experience with IVI?

3 A. I do not.

4 Q. Do you have an opinion about them?

5 A. I do not.

6 Q. You are not providing an opinion about their

7 performance in this case, right?

8 A. I wasn't asked to do that.

9 Q. Have you spoken with any people at IVI?

10 A. I have not.

11 Q. Do you know who Robert Barone is?

12 A. Only by depositions, declarations, e-mails.

13 Q. You haven't spoken with him?

14 A. I have not.

15 Q. And you haven't spoken with Paul Bonvicino,

16 B-O-N-V-I-C-I-N-O, about this case?

17 A. I have not.

18 Q. So your understanding is that IVI provided

19 certifications with each advance request, right?

20 A. Yes. They were one of the parties that

21 provided the certification.

22 Q. But you don't have an opinion, you are not

23 expressing an opinion in this case as to whether

24 they should have done so?

25 A. No.

1 Q. If you look at paragraph 35 --

2 A. Yes, I'm there.

3 Q. -- you say, "Without disclosures by the

4 Contractor or Borrowers, information regarding the

5 Project's budget and anticipated changes thereto

6 would not be known to the Construction Consultant

7 and, by extension, BANA." And then you say, "There

8 were several sources of information regarding the

9 Project's budget."

10 Do you see that?

11 A. Yes, I do.

12 Q. So you have advance requests as the first

13 bullet. Do you see that?

14 A. Yes.

15 Q. What are advance requests?

16 A. That is the document that is submitted by the

17 developer to the Bank of America on a monthly basis

18 to request funds to pay for the construction costs

19 of that particular month -- of a particular month.

20 Q. And it includes the certification by IVI and

21 others, right?

22 A. Yes. It's quite a lengthy document.

23 Q. And in the next bullet you have there is

24 anticipated cost reports? What is an anticipated

25 cost report?

1 A. It's -- an anticipated cost report is a -- a
2 document that was developed for this project, I
3 believe, to assist the developer with its ability to
4 evaluate potential changes that may be made to the
5 project and enable them to evaluate those potential
6 changes with the contingency.

7 Q. And also to enable IVI and Bank of America to
8 evaluate the changes in the project, right?

9 MR. MURATA: Objection.

10 THE WITNESS: No. I think it was to
11 provide B of A and IVI with the understanding
12 of what the owner was contemplating as
13 potential changes. It was there to allow
14 them to understand where the bank was -- or
15 where the developer was thinking of potential
16 changes to the project. It wasn't a
17 requirement of the contract, if that was your
18 question.

19 BY MR. MOCKLER:

20 Q. Why do you say it wasn't a requirement of the
21 contract?

22 A. Because it wasn't a requirement of the
23 contract. There is nothing in any documents that
24 requires or lists the ACR.

25 Q. Is it typical for a general contractor or a

1 developer to keep a list similar to an ACR?

2 MR. MURATA: Objection. Vague.

3 THE WITNESS: I would say that this was
4 from my experience unusual.

5 BY MR. MOCKLER:

6 Q. What is the usual practice for -- well, it is
7 typical to keep track of potential changes, right?

8 A. Yes. Of potential changes, yes.

9 Q. And what is the typical method of doing so?

10 A. You will have a change order log.

11 Q. And what is that?

12 A. A change order log is a document that opens
13 up and maintains and tracks the status of potential
14 change orders that are being contemplated on the
15 project.

16 Q. The next bullet on page 11, paragraph 35 of
17 Exhibit 910, says "Site Visits"?

18 A. Yes.

19 Q. So, what are those?

20 A. As I understand it, monthly site visits were
21 made to the project usually towards the beginning of
22 that month, maybe, my observation from review of the
23 reports, monthly reports that were developed by IVI
24 that it would happen within the first week or so of
25 the project. And then there would be quarterly

1 meetings that would occur as well. So those were
2 the site visits.

3 Q. And IVI would actually be there at the
4 construction site in Las Vegas?

5 A. That is my understanding they would visit the
6 site for the day.

7 Q. They would walk around and look at what was
8 going on?

9 A. It's my understanding that they did that,
10 yes.

11 Q. And they would talk to the representatives of
12 the general contractor, representatives of the
13 developer about the project status?

14 A. That is my understanding.

15 Q. So, you've got advance requests, anticipated
16 cost reports and site visits. And there were also
17 e-mail communications between representatives of the
18 developer and IVI?

19 A. I have seen evidence of that, yes.

20 Q. And between representatives of the general
21 contractor and IVI?

22 A. I think I have seen some evidence of that,
23 yes.

24 Q. And there were e-mails between
25 representatives of the developer and/or the general

1 contractor and people working for B of A, right?

2 A. Yes.

3 Q. And representatives of IVI had discussions in
4 person, on the telephone, with representatives of
5 the general contractor and the developer outside of
6 these site visits as well, right?

7 A. I don't know. I don't know.

8 Q. You are not aware of that?

9 A. I think I have seen some references to the
10 discussions. Whether they -- how they happened or
11 how, I don't know. I don't know that fact.

12 Q. Certainly it would have been within IVI's
13 right of the agreement to pick up the phone and call
14 someone at Fontainebleau or Turnberry, right?

15 MR. MURATA: Objection.

16 THE WITNESS: I guess we can look at the
17 agreement. I don't know if it says you can
18 give us a call or -- I don't know.

19 BY MR. MOCKLER:

20 Q. You don't have any reason to think that
21 didn't happen?

22 MR. MURATA: Objection.

23 THE WITNESS: Again, to the extent I
24 might have seen it in e-mail discussions or
25 maybe some correspondence I might have seen

1 that there were some phone calls.

2 BY MR. MOCKLER:

3 Q. The same with Bank of America. Bank of
4 America had telephone conversations with
5 Fontainebleau and with Turnberry?

6 A. I'm sure they probably did.

7 Q. And again for cleanup, by Turnberry, you
8 understand me to be referring to Turnberry West
9 Construction, the general contractor, right?

10 A. Yes.

11 Q. And by Fontainebleau I am referring to the
12 developer, right?

13 A. Yes.

14 Q. If you look on the next page, I am looking at
15 page 12, paragraph 40. You are not expressing an
16 opinion as to whether the documentation that the
17 borrowers provided was sufficient, right?

18 A. Well, I think the record would suggest it was
19 fraudulent in some regards.

20 Q. And this is -- correct me if I'm wrong, but
21 this is your background section, you are just saying
22 what happened was BANA processed these advance
23 requests, right?

24 A. That was -- that BANA received the documents
25 that all the certificates were available and there

1 Q. So essentially 917 summarizes 919 through
2 928?

3 A. 919 is a summary of the detail that makes up
4 the 64 million on line 12 of Exhibit 917.

5 Q. So 919 is the detail of a line item on 917?

6 A. Correct, for IVI's number 12.

7 Q. And 920 is the same thing as 919 but for a
8 different period and different IVI report, correct?

9 A. Right. So you can see the reference in the
10 heading, it will say -- it will give you the
11 Turnberry West Construction ACR. It will give the
12 date of June 11, 2008. That's probably the date of
13 the ACR. And then it will refer to the IVI report
14 that it could be found in.

15 Q. And the same is true of Exhibits -- all of
16 the Exhibits 919 through 928, the same type of
17 summary just for different IVI reports, different
18 period?

19 A. Same mechanics, correct.

20 Q. And how did you use these Exhibits 919
21 through 928 in coming to the conclusions in your
22 report?

23 A. This is the source data that is then used to
24 time phase, if you will, the information for each of
25 the POCs included in the Boyken analysis.

1 Q. So, for example, if you look at the Boyken
2 analysis, and you conclude that a POC isn't included
3 on any of the ACRs, that means you or someone else
4 went through Exhibits 919 through 928 and checked to
5 see whether a POC was listed; is that right?

6 A. I think that is generally correct. And then
7 to -- you then use 918, of course, as well because
8 that is the source for the enhanced budget numbers.

9 Q. Did you do anything else with 917 through
10 928?

11 A. Probably I did with respect to looking at the
12 May 2008 period.

13 Q. I think we can set aside 917 through 928
14 unless you want to reference them later on. I think
15 we can turn back to your expert report. See if I
16 can pick up where we left off.

17 A. Okay.

18 Q. Let's go to paragraph 63. So what is the
19 basis for your conclusion that Mr. Boyken's review
20 of the structural steel change is unsupported by the
21 documents?

22 A. I guess the way I would describe it is the
23 suggestion that these costs, this 40 million
24 dollars, was known to be significant as they want to
25 describe them, costs were known a year in advance.

1 And my point is there's a process that negotiation
2 of planning and even discussion among the limited
3 documents that Mr. Boyken has provided that suggests
4 there was a process of discussion going on during
5 the period.

6 Q. Let's look at Exhibit WW1 to the Boyken
7 report, which is the last exhibit. I know you don't
8 have tabs, but it should start about a dozen pages
9 in. It's the WW steel change order.

10 A. Yes.

11 Q. If you go back a few more pages -- it's
12 actually back the other direction.

13 A. This way?

14 Q. Yes. A couple more pages in. Right there.
15 So this is a document you looked at in assessing
16 Mr. Boyken's report, right?

17 A. It's one of the documents, yes.

18 Q. And what is this?

19 A. This is the owner executed change order for
20 the structural steel drawings POC 19A.

21 Q. So you would agree that IVI and Bank of
22 America knew about this change at least by the time
23 they received this letter change order some time in
24 June 2008?

25 MR. MURATA: Objection.

1 THE WITNESS: It was provided to them
2 around that period of time, yes.

3 BY MR. MOCKLER:

4 Q. So at least by June of 2008 IVI and Bank of
5 America knew there was going to be 41 million
6 dollars more of structural steel pursuant to this
7 OCO, right?

8 MR. MURATA: Objection.

9 THE WITNESS: There was a change order
10 for the structural steel.

11 BY MR. MOCKLER:

12 Q. And it was for 41 million dollars?

13 A. And it was for 41 million dollars.

14 Q. And change. You also agree that Turnberry at
15 least knew that there was going to be a need for
16 more structural steel much earlier than that, right?

17 MR. MURATA: Objection. Speculative.

18 THE WITNESS: There is a document --
19 there is documentation included within
20 Mr. Boyken's Exhibit WW1 that would indicate
21 there was a change order request in June
22 2007.

23 BY MR. MOCKLER:

24 Q. And you can see from that change order
25 request that Turnberry West was notified some time

1 around June 2007 that WW Steel was saying that they
2 wanted another 41 million dollars for structural
3 steel, right?

4 MR. MURATA: Objection.

5 THE WITNESS: There is a pricing
6 proposal.

7 BY MR. MOCKLER:

8 Q. For structural steel from WW Steel, right?

9 A. Yes.

10 Q. Do you understand why it took from June to
11 2007 to May or June 2008 for that to proceed to
12 another change order?

13 A. Well, Mr. Boyken doesn't provide very much
14 documentation on this issue, but there is a letter
15 from the structural engineer dated May 29, 2008
16 which provides some insight.

17 Q. What insight does it provide?

18 A. That the drawings have been evolving due to
19 refinements by the designers and the landscape
20 engineers, clarifications were made to the drawings,
21 other design impacts due to elevators stair
22 refinements, other clarifications. And it goes on
23 to conclude that the structural drawings have been
24 through an evolution process with the architectural
25 designer drawings which is very common for

1 fast-track projects.

2 Q. So your conclusion from this letter is that
3 the delay from June 2007 to May 2008 was the result
4 of design evolution?

5 A. It's --

6 MR. MURATA: Objection.

7 THE WITNESS: It's not a delay. It's an
8 evolution.

9 BY MR. MOCKLER:

10 Q. So how about this, your conclusion that the
11 lapse of time from the June 2007 price quotation to
12 the June 2008 owner change order was the result of
13 evolution in the drawings?

14 MR. MURATA: Objection.

15 THE WITNESS: I'm just reciting or
16 stating to what Mr. Boyken has provided in
17 the documents that explains the period
18 between May 29 of 2008 and June 21 of 2007.

19 BY MR. MOCKLER:

20 Q. Do you see anything else in this
21 documentation to explain that delay?

22 A. Yes. On May 8, 2008, it also discusses the
23 efforts that were made by the parties, the designer,
24 Turnberry West and WW Steel to minimize the costs
25 and the tonnage increases.

1 Q. Anything else?

2 A. I think that exhausts the paper in Boyken's

3 file.

4 Q. Were these owner change orders included with

5 IVI project status reports?

6 A. These what?

7 Q. Owner change orders, executed owner change

8 orders.

9 A. Yes. I believe so.

10 Q. Including this one?

11 A. I believe so.

12 Q. Have you reviewed Mr. Boyken's deposition?

13 A. Yes.

14 Q. Is there anything that you recall disagreeing

15 with in it other than what's in your report?

16 MR. MURATA: Objection.

17 THE WITNESS: I can't say that I was

18 looking at it from that perspective. I was

19 trying to get a read of his deposition to see

20 if it was consistent with his report.

21 BY MR. MOCKLER:

22 Q. And what was your opinion of whether it was

23 consistent with his report?

24 A. It seemed to be.

25 Q. Did you form any other opinions not expressed

1 in your report after reading his deposition?

2 A. I didn't read it with that -- with that
3 objective in mind. I can tell you that it reaffirms
4 my analysis and my opinions with respect to the
5 Boyken report.

6 Q. And you haven't been asked to perform any
7 additional analysis or form any additional opinions
8 based on anything that Mr. Boyken said in his
9 report?

10 A. I haven't talked to the attorneys about that.

11 Q. Let's talk about Mr. Pryor. I will get rid
12 of more of my documents here by marking this one.

13 (Whereupon, Plaintiff's Deposition
14 Exhibit 929 was marked for
15 Identification.)

16 BY MR. MOCKLER:

17 Q. So does Exhibit 929 look like something you
18 recognize?

19 A. Yes.

20 Q. Is it the Pryor report you reviewed in
21 connection with your report?

22 A. The section that I looked at, yes, to be from
23 the Pryor, his prior.

24 Q. What section did you look at?

25 A. Opinion number 2.

1 Q. Did you read the whole thing?

2 MR. MURATA: Objection. Vague.

3 BY MR. MOCKLER:

4 Q. Did you read the entire report?

5 A. No.

6 Q. You didn't?

7 A. For purposes of the opinion?

8 Q. Did you read the entire report at all?

9 A. My focus was on opinion 2.

10 Q. Did you read the rest of the report?

11 A. I think I read the beginning. I didn't -- I

12 believe I read opinion 1. I am not sure that I read

13 opinion 3.

14 Q. Your focus was on opinion 2, pages 31 to 42

15 of the report?

16 A. Yes.

17 Q. It's fair to say you haven't been asked to

18 provide an opinion on anything other than what's in

19 opinion 2 of Pryor's report, right?

20 A. Yes.

21 Q. Was there a particular portion of opinion 2

22 or did you respond to opinion 2 in whole?

23 A. I think that the report, I think specifically

24 identifies my report, which is Exhibit 910,

25 paragraphs 64 through 84 summarize and lay out my

1 opinions and findings and conclusions.

2 Q. Let's look at paragraph 65.

3 MR. MURATA: Paragraph 65 of which?

4 BY MR. MOCKLER:

5 Q. Of Badala's report, of your own report?

6 A. Yes, sir, I'm there.

7 Q. And you say that your review of potential
8 change order log shows that many of the items were
9 previously disclosed by the borrower and contractor
10 on ACR. Do you see that?

11 A. Yes. Sub one.

12 Q. What is the basis for that conclusion?

13 A. The -- on Exhibit 917 you could go back and
14 compare items that are listed on the ACR and IVI's
15 report 12, 13 with items that show up on the ACR for
16 the 217 million and also the 201 million.

17 Q. So, looking at 917 now, so if you look at IVI
18 report 12 under anticipated additional costs you
19 have 64.7 million, right?

20 A. Yes.

21 Q. So you are saying that the borrower and the
22 contractor disclosed 64.7 million of the 201 in that
23 report, and it looks like also in report 13, right?

24 A. No, I wouldn't say. I didn't do a full --
25 you can do the analysis if you want, but not all the

1 64 million, not all of what is in the 201 are the
2 same items as the 64. So some of them -- some of
3 them aren't. So it's, you know, as you would -- so,
4 you could do that comparison, but I just did
5 spot-checking.

6 Q. So, and to do the math the other way, you are
7 saying that 130, 140 million or more of the 201 was
8 not disclosed until it looks like May of 2008 or
9 that report?

10 MR. MURATA: Objection.

11 THE WITNESS: It was a log of potential
12 changes, and at that time that came with the
13 190 million dollars in equity.

14 BY MR. MOCKLER:

15 Q. Now, looking at 917 for reports 1 through 11
16 it says no anticipated cost reports were submitted
17 by Turnberry West?

18 A. Yes.

19 Q. Do you see that?

20 A. Yes.

21 Q. Do you know why that was?

22 A. I don't.

23 Q. So is there, other than the information in
24 917 which I recognize is a summary of information
25 from other documents, but other than this, is there

1 any other document that supports your conclusion
2 that these, some of these 201 million were
3 previously disclosed?

4 A. Not that I recall sitting here right now.

5 Q. The next several paragraphs of your report 67
6 through 70 you talk about the construction contract
7 change orders. Paragraph 68 you say, "The process
8 that defines how a proposed change order is formally
9 recognized as a change to the work and price is
10 defined by the construction contract."

11 You agree with that, right?

12 A. Yes. I wrote it.

13 Q. You would be surprised. Let's show you that
14 construction contract. Not just because it's a
15 large document.

16 (Whereupon, Plaintiff's Deposition
17 Exhibit 930 was marked for
18 Identification.)

19 BY MR. MOCKLER:

20 Q. Is this the construction contract you
21 referred to in this section of your report paragraph
22 68?

23 A. It's one of the two documents. There is
24 actually two documents that make up this
25 construction contract.

1 BY MR. MOCKLER:

2 Q. So you agree that truthful reporting by the
3 borrower and contractor is vital?

4 A. Yes.

5 Q. If you have information that suggests that
6 the borrower and contractor haven't been truthful
7 that is a problem, right?

8 MR. MURATA: Objection.

9 THE WITNESS: If you have information?

10 BY MR. MOCKLER:

11 Q. Right.

12 A. I guess the answer would be yes.

13 Q. You say that "IVI pursued additional
14 information from the Borrowers and Contractor" in
15 paragraph 76?

16 A. Thank you.

17 Q. -- "and focused on the issues that were
18 discernable from the project reporting, project
19 meetings and IVI's regularly occurring site walks."

20 What is your basis for saying that?

21 A. The documentation that existed, depositions,
22 the witnesses.

23 Q. The project status reports?

24 A. Project status reports, yes.

25 Q. Anything else other than the depositions and

1 the project status reports?

2 A. On the issue of what was -- that were

3 discernable -- that was your question on the first

4 sentence of paragraph 76?

5 Q. Or how they pursued additional information?

6 A. Sorry. Where on this paragraph are you

7 talking about?

8 Q. You say IVI -- just the first sentence --

9 A. I see. Okay.

10 Q. What supports the first sentence on the PSRs

11 and the depositions?

12 A. IVI and the bank were in regular dialogue to

13 seek additional information from Fontainebleau.

14 There were meetings, telephone calls. I think there

15 were letters exchanged. There was a fairly regular

16 dialogue that was going on. There may have been

17 phone calls as you were suggesting earlier.

18 Q. You haven't reviewed every e-mail between IVI

19 and Bank of America, right?

20 MR. MURATA: Objection.

21 THE WITNESS: Probably not.

22 BY MR. MOCKLER:

23 Q. You haven't reviewed every e-mail between

24 Turnberry and IVI?

25 MR. MURATA: Objection.

1 THE WITNESS: That's probably true.

2 BY MR. MOCKLER:

3 Q. Other than what is reported in the project
4 status reports and possibly in the e-mails you have
5 reviewed, you don't know what IVI saw or could have
6 seen on project visits, right?

7 MR. MURATA: Objection.

8 THE WITNESS: I am not sure I understand
9 your question.

10 BY MR. MOCKLER:

11 Q. You weren't with IVI on-site visits, right?

12 A. I was not with them, that is correct.

13 Q. So you're learning about what they observed
14 from their project status reports, right?

15 A. In part, yes.

16 Q. And possibly e-mails that refer to those site
17 visits that you reviewed?

18 A. E-mails, declarations, depositions, the
19 report.

20 Q. The Barone declaration?

21 A. The Barone declaration, yes.

22 Q. Have you read the Barone deposition?

23 A. Yes.

24 Q. In 77 -- Mr. Pryor says Bank of America
25 "failed to exercise reasonable efforts and

1 commercially prudent practices to obtain that
2 information from Borrowers," and then -- sorry --
3 down in paragraph 78 you say that IVI and Bank of
4 America "used commercially reasonable efforts to
5 obtain additional data and information to allow IVI
6 to validate the Borrowers' and Contractor's
7 representations."

8 Do you see that?

9 A. Yes, I do.

10 Q. You are not interpreting the agreements,
11 right?

12 A. No.

13 Q. What are you basing your understanding of
14 commercially reasonable efforts on?

15 A. On the exchange of information that occurred
16 between the parties during that period of time.

17 Q. Well, commercially reasonable efforts you are
18 setting a standard, right? What are you basing that
19 standard on?

20 A. Well, I can say in my own work in things that
21 I have done I would do the same sorts of -- go
22 through the same sorts of efforts or exercises with
23 respect to communication to pursue the information.
24 That is my definition.

25 Q. You don't have experience in banking, right?

Barone, Robert 4/11/2011 12:00:00 PM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

3

4 IN RE: FONTAINEBLEAU LAS VEGAS
5 CONTRACT LITIGATION MDL NO. 2106

6 This document relates to all actions.

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14 VIDEOTAPED DEPOSITION OF ROBERT BARONE

15 New York, New York

16 Monday, April 11, 2011

17

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19

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21 Reported by:

AYLETTE GONZALEZ

22 CLR

23 JOB No. 159910

24

25

Barone, Robert 4/11/2011 12:00:00 PM

1 Q. Is there any reason you can't
2 give accurate and complete testimony today?

3 A. No.

4 Q. You understand you're
5 testifying on behalf of the company you
6 work for today?

7 A. Yes.

8 Q. What company is that?

9 A. Inspection and Valuation
10 International.

11 Q. What's your role with
12 Inspection Valuation International?

13 A. I'm a senior vice-president and
14 principal.

15 Q. And that company also goes by
16 IVI?

17 A. Yes, for short.

18 Q. So, I guess let's just start
19 off with how you ended up here. And that
20 is, what was IVI's role on the
21 Fontainebleau project?

22 A. We were the construction
23 consultant for Bank of America.

24 Q. What does it mean to be the
25 construction consultant?

Barone, Robert 4/11/2011 12:00:00 PM

1 project was proceeding.

2 Q. And when did you get involved?

3 When did IVI get involved?

4 A. I don't recall. It would be --

5 a job number would help.

6 Q. We'll get to that.

7 So on a day-to-day basis, what

8 did it mean to oversee the projects?

9 A. There wasn't day-to-day

10 involvement. However, once a month, we

11 visited the project site, walked through

12 the progress, the schedule, the budgets,

13 the payments and came to agreement on

14 amounts to be paid and wrote a report for

15 our client advising of same.

16 Q. And those are the projects

17 status reports --

18 A. Yes.

19 Q. -- you wrote once a month?

20 A. Yes.

21 Q. Who from IVI worked on the

22 Fontainebleau project?

23 A. Paul Bonvicino was my senior

24 project manager and myself.

25 Q. Anyone else?

Barone, Robert 4/11/2011 12:00:00 PM

1 is that your signature?

2 A. Yes, it is.

3 Q. Do you recall signing a

4 Declaration some time in June 2009?

5 A. I recall something back from

6 that time. I suppose this is it.

7 Q. You signed it under penalty of

8 perjury?

9 A. Correct. Yes. It was two

10 years ago.

11 Q. It was true and correct to your

12 knowledge at that time?

13 A. Yeah.

14 Q. Let's look at page 3, paragraph

15 11.

16 Let's start on paragraph 10,

17 the last sentence of paragraph 10 where it

18 says: "One of IVI's responsibilities was

19 to review the advanced requests that

20 Fontainebleau submitted each month."

21 What is an advanced request in

22 the context of this project?

23 A. An advanced request would be a

24 request to the lender from the borrower for

25 funds.

Barone, Robert 4/11/2011 12:00:00 PM

1 Q. And that's something that IVI
2 reviewed as part of their responsibilities?

3 A. Portions of it.

4 Q. Which portions did you review,
5 if you recall?

6 A. Well, the hard cost portions.

7 Q. Then down in paragraph 11, it's
8 talking about project status report number
9 21, and the second sentence says: "In
10 performing the review and analysis to
11 prepare this report, IVI became concern
12 that Fontainebleau was not fully or
13 accurately reporting all of the remaining
14 costs associated with this project."

15 You see that?

16 A. Yes.

17 Q. You recall that was the case?

18 A. Yes.

19 Q. Why was IVI concerned?

20 A. Well, I suppose it was because
21 in the documents did not look clear or may
22 not be accurate.

23 Q. Do you recall which documents
24 you thought weren't clear?

25 A. Not offhand.

Barone, Robert 4/11/2011 12:00:00 PM

1 Q. Two sentences -- the next
2 sentence says -- talks about term variance
3 was supposed to be provided and anticipated
4 cost report. You see that?

5 A. Yes.

6 Q. What's an anticipated cost
7 report?

8 A. An anticipated cost report
9 would be a projection on what would be
10 anticipated as the final cost of the
11 project, including commitments, pending
12 claims, pending issues.

13 Q. So, should it include things
14 that have been committed -- only things
15 that have been committed to or everything?

16 A. Should include everything.

17 Q. Including costs that are
18 projected to be incurred down the line?

19 A. To the extent that they could
20 impact the project.

21 Q. So, a couple of sentences down
22 you say that "IVI was concerned about the
23 completeness and accuracy of the ACR."

24 You see that?

25 A. Yes.

1 Q. Do you recall that there was an
2 update to Project Status Report 22?

3 A. No. What do you mean,
4 "update"?

5 Q. Let me show you the document.
6 This has been previously marked as 601.

7 A. Oh, okay.

8 Q. So, what is Exhibit 602?

9 A. It's Project Status Report No.
10 22 update.

11 Q. So, does that refresh your
12 recollection that you did do one?

13 A. Yes.

14 Q. Do you recall why there was an
15 update to PSR 22?

16 MR. MURATA: Objection; vague.

17 A. Generally an update would be
18 done to produce information prior to the
19 next report or to clarify what was in the
20 prior report.

21 Q. This is dated March 4th, which
22 is just one day after report 22?

23 A. Okay.

24 Q. Do you recall what you needed
25 to clarify or update?

1 MR. MURATA: Objection; vague.

2 A. It has three topics.

3 Q. Okay.

4 A. Tower curtain wall system,

5 podium venue and LEED.

6 Q. Do you recall why you wanted to

7 update these three topics?

8 A. No.

9 Q. Let's look at page 2 on podium
10 venue. What's a venue opening schedule?

11 A. Venue opening schedule is
12 generally -- generally what you would call
13 a list or schedule dates that the retail
14 venues or tenants or uses would be -- would
15 be opening.

16 Q. Do you recall what you learned
17 that caused you to want to update the
18 podium venue information?

19 A. It may have been missing from
20 report 22.

21 Q. And then if you look at LEED,
22 it says: "Detailed audit is currently in
23 process."

24 Do you recall that there was a
25 LEED audit?

1 A. I recall there was supposed to
2 be one.

3 Q. Do you recall how it came about
4 that there was supposed to be one or that
5 was suggested?

6 A. Not exactly.

7 Q. Did you recommend that there be
8 a LEED audit?

9 A. We questioned the achievement
10 of the credits. I believe the developer
11 initiated the audit.

12 Q. What would a LEED audit entail?

13 MR. MURATA: Objection; calls
14 for speculation.

15 A. Well, I don't recall the exact
16 proposal that they were going to use or
17 what scope of work they were going to
18 perform. However, likely, it would have
19 looked at the requirements to achieve the
20 credits and a review of the contracts,
21 subcontracts, purchase orders, for, I
22 believe, the material -- material costs
23 were involved here. And to ensure that
24 they were properly being tracked.

25 Q. Basically to provide more

1 detail on whether they were actually going
2 to get the credits?

3 A. It's actually to provide detail
4 on whether they captured all the credits
5 that they're entitled to. Meaning that if
6 subcontracts or purchase orders were missed
7 or that there were additional ones. You
8 know, basically a record keeping issue.

9 Q. But they'd also look to see
10 that if the project developer was reporting
11 that they anticipated getting a certain
12 credit, that that was actually credit that
13 was going to materialize?

14 MR. MURATA: Objection.

15 Q. Right?

16 A. Not necessarily. The ability
17 to achieve the credit, I believe was an
18 ordinance or law or something. You know,
19 there's more to it than that. I think the
20 audit was just to make sure that the
21 potential amount was captured properly in
22 the vast number of contracts and
23 subcontracts that were.

24 Q. And the developer was reporting
25 to you that it expected to get a certain

1 number of these credits, right?

2 A. Yes.

3 Q. And an audit of the LEED

4 credits could have resulted in a finding

5 that wasn't credible, that they weren't

6 going to get that many LEED credits, right?

7 MR. MURATA: Objection;

8 argumentative.

9 A. That was the purpose of the

10 audit.

11 Q. So, let's go to --

12 (Plaintiff's Exhibit 856,

13 e-mail dated March 5th, marked for

14 identification, as of this date.)

15 Q. Okay, 856 is an e-mail from

16 Robert Embridge to Devin Kumar dated March

17 5th. First of all who are Robert -- who is

18 Robert Embridge?

19 A. He was with Turnberry.

20 Q. He was a CEO of Turnberry; does

21 that sound right?

22 MR. MURATA: Objection.

23 A. I don't recall his title.

24 Q. But he was somebody with

25 management responsibilities that you

1 interfaced with at Turnberry?

2 A. Yes.

3 MR. MURATA: Objection.

4 Q. And who is Devin Kumar?

5 A. Devin was with the developer.

6 Q. The Fontainebleau entities?

7 A. Yes.

8 Q. Did you interface with him as

9 well?

10 A. Yes.

11 Q. Okay. So, this is an e-mail

12 from Mr. Embridge and Mr. Kumar that I

13 believe reports on a call with you. I just

14 want to see if you recall this call.

15 So, he says: "Paul B. called

16 me earlier to give me a heads-up that

17 Barone would be calling extremely nervous

18 about having good information for bankers

19 IVI only phone conference tomorrow."

20 A. Um-hum.

21 Q. Do you recall calling

22 Mr. Embridge about a bankers IVI phone

23 conference in this time period?

24 A. I may have.

25 Q. He then goes on and says: "Bob

1 called shortly thereafter and wanted
2 verification on schedule and ability to
3 complete within bank budget plus prior
4 equity."

5 You see that?

6 A. Um-hum.

7 Q. You recall having that
8 conversation?

9 A. I don't recall the specific
10 conversation.

11 Q. But you may have had it, you
12 just don't recall?

13 A. Yes.

14 Q. What is the bank budget, prior
15 equity?

16 MR. MURATA: Objection; calls
17 for speculation. It's not his
18 e-mail.

19 A. I believe it was the current
20 budget. There were equity amounts that
21 were shown as a source of funding.

22 Q. So, the bank budget would be
23 the budget that was submitted initially?

24 A. And subsequently.

25 Q. And then the equity was the

1 equity that the developer said they were
2 going infuse later to supplement?

3 A. Or did.

4 Q. Or did?

5 A. Yeah.

6 Q. So, the next sentence or two
7 sentences down says: "He can see from the
8 current draw in IVI ACR this contingency is
9 virtually all used down to 11 million and
10 he has big concerns that there is more cost
11 claims beyond that."

12 You see that?

13 A. Yeah.

14 Q. Do you recall you had big
15 concerns about more costs and claims?

16 MR. MURATA: Objection.

17 A. I said that in the reports.

18 Q. You were also concerned the
19 contingency was virtually all used down?

20 A. That's what he thinks, yeah.

21 Q. And --

22 A. I was concerned. That's what's
23 said in the reports, yes.

24 Q. The next sentence says: "Bob
25 is skeptical."

1 A. I guess I was.

2 Q. Next sentence says that "I told
3 him that FB expected to meet with lenders
4 soon and discuss how to comply with M1,
5 M2."

6 You see that?

7 A. Yes.

8 Q. Do you remember discussion
9 about M1, M2?

10 A. Not specific.

11 Q. Does M1, M2 mean something to
12 you?

13 A. I believe they were exhibits to
14 the loan agreement.

15 Q. And do you generally understand
16 what they were referring to when they said
17 what are we going to comply with, M1, M2?

18 A. I believe I understood then. I
19 believe it was the scope of the project of
20 what was expected.

21 Q. What do you mean by what was
22 expected? Can you elaborate on that at
23 all?

24 A. Sometimes a loan agreement will
25 include a minimum requirement relative to

1 the scope of a project. Number of rooms,
2 number of venues, restaurants. And they
3 don't say exactly what has to be done to
4 get there, but it just has a minimum
5 requirement of what's expected to be
6 delivered.

7 Q. Did it give you concern that at
8 this point in the project they're talking
9 about minimum requirements?

10 MR. MURATA: Objection. That's
11 not what he said.

12 A. Minimum requirements were
13 always there.

14 Q. So down towards the last part
15 of this e-mail: "We would likely need an
16 OT component to get done and ownership was
17 aware of that."

18 Do you understand that to be
19 referring to the acceleration concerns and
20 additional costs?

21 MR. MURATA: Objection; calls
22 for speculation.

23 A. I'd have to guess. OT might
24 mean overtime.

25 Q. And if you're going to

1 accelerate, you might need overtime for
2 more people to work on the project and that
3 would increase costs?

4 MR. MURATA: Objection; calls
5 for speculation.

6 A. It could.

7 Q. And you were concerned in the
8 reports that, in fact, it would lead to
9 more costs if you had to accelerate and put
10 more people on the job?

11 MR. MURATA: Objection.

12 A. That's what the report said.

13 Q. Now, it says: "Some design and
14 deltas were still coming in."

15 Do you know what -- do you
16 understand what design and deltas coming in
17 would mean?

18 MR. MURATA: Objection; calls
19 for speculation. It's not his
20 e-mail.

21 A. I can tell you what it means in
22 general.

23 Q. Sure.

24 A. A delta would be a change in a
25 drawing.

1 Q. Okay.

2 A. And design changes. They could
3 be minor, but in a construction project,
4 design changes in delta are very common
5 throughout the process.

6 Q. That's something IVI would have
7 reviewed on a monthly basis?

8 A. No, not in detail.

9 Q. But you've said you reviewed
10 the drawings, right?

11 A. We reviewed the original
12 drawings and not every sheet that comes
13 out. There were thousands.

14 Q. Do you recall -- the next
15 sentence says: "Hard to say what impact
16 and cost in schedule actually are on any
17 given day."

18 Do you recall Mr. Embridge
19 telling you that?

20 A. No.

21 MR. MURATA: Objection.

22 Q. So, do you recall sending a
23 letter to Mr. Kumar on March 5th? And I'll
24 show it to you.

25 MR. MURATA: Objection.

1 Q. This has been previously marked

2 604. Do you recognize this letter?

3 A. I do.

4 Q. Do you recall sending it?

5 A. Yes.

6 Q. Why did you send this letter?

7 A. The letter was sent so that I

8 would receive specific answers.

9 Q. You still had the concerns that

10 we've talked about previously?

11 A. It would seem that way.

12 Q. So, again, you worked in threes

13 with three categories. The first one is

14 podium venues. You again say: "At this

15 point in the project schedule, we would

16 expect to have a better understanding of

17 the designs, budget approval, status for

18 the venues."

19 You see that?

20 A. Um-hum, yes.

21 Q. Is that the same venue schedule

22 that we were talking about or is that

23 something else?

24 A. I believe it's the same.

25 Q. And then looking down in owner

1 change orders and anticipated cost report,
2 you see: "Based upon the review of the
3 temporary request construction requisition
4 for the month of February 2009, received
5 last week, any anticipated costs for
6 Fontainebleau dated January 29 (sic), the
7 ACR, there appears to be a delay in
8 execution of owner change orders which seem
9 to have gotten larger recently."

10 You see that?

11 A. Yes.

12 MR. MURATA: Note my objection.

13 It's January 2009, not January 29.

14 MR. MOCKLER: Thank you.

15 Q. So, what was your concern here?

16 A. Well, the next paragraph I said
17 that I didn't feel they were projecting
18 anymore and just booking what had occurred.

19 Q. And I believe you said before,
20 but correct me if I'm wrong, the
21 anticipated cost report should include
22 projected costs as well as booked costs,
23 correct?

24 A. Correct.

25 Q. Do you recall why you -- your

1 look at these two documents that you
2 referred to led you to believe that they
3 were not including projections?

4 A. Appears from the next paragraph
5 that they had shown costs in the
6 requisition as far as awarded contracts or
7 purchase order change orders that were not
8 yet shown in the anticipated cost report.

9 Q. So, you're basically looking at
10 two documents and finding a discrepancy,
11 right?

12 A. That's what it says, yes.

13 Q. And specifically, you
14 identified 61 million dollars in the
15 requisition for costs incurred or to be
16 incurred that aren't appearing in the
17 anticipated cost report?

18 A. That's correct.

19 Q. And that gave you pause?

20 A. Yes. Although, that was not
21 necessarily an indication that the project
22 was that far over budget. Just a
23 discrepancy.

24 Q. But regardless of the ultimate
25 impact, 61 million dollars is 61 million

1 dollars, right?

2 A. It's a large discrepancy.

3 Q. Gave you concern that you were

4 correct in your scepticism previously,

5 right?

6 MR. MURATA: Objection.

7 A. It seemed that way.

8 Q. Now you essentially caught

9 them, right?

10 MR. MURATA: Objection.

11 A. It wasn't conclusive.

12 Q. You recall that it turned out

13 that the 61 million dollars were booked,

14 right?

15 MR. MURATA: Objection.

16 A. I don't remember.

17 Q. In the next paragraph, you say:

18 "At this point in the project, it is hard

19 to believe there are no additional costs or

20 claims out there."

21 So now you're really skeptical?

22 A. Yeah, that was a stretch.

23 MR. MURATA: Objection.

24 A. That was --

25 Q. It was a stretch to believe

1 that there weren't more costs out there?

2 MR. MURATA: Objection.

3 A. Let's just say that it was hard
4 to believe there were no other costs out
5 there.

6 Q. In addition to the 61 million?

7 MR. MURATA: Objection.

8 A. In addition to those shown on
9 the ACR.

10 Q. So, going up to the previous
11 paragraph, it says: "This gives the
12 indication that project contingency is
13 higher than it actually is."

14 Can you explain why that would
15 be the case?

16 A. Well, because the anticipated
17 cost report or ACR would have a contingency
18 of a certain amount. And if there were
19 claims or additional costs or issues that
20 may impact that, that are not shown prior
21 to, you know, in the trade costs, they
22 would have to be reduced -- the contingency
23 would have to be reduced to maintain
24 budget.

25 Q. And so you would actually have

1 a smaller contingency than had been shown?

2 A. Yes.

3 Q. Why is it important to have
4 contingency?

5 A. Contingency is there to help
6 buffer unknown costs and risks related to
7 the construction project.

8 Q. I think going down to your last
9 category, you still had concerns about
10 LEED, right?

11 A. It seems that way.

12 Q. So, following this letter,
13 Devin Kumar fesses up that there's more
14 costs out there, right?

15 MR. MURATA: Objection;
16 leading.

17 A. I'm not sure.

18 Q. Do you recall that
19 Fontainebleau and/or Turnberry identified
20 additional costs following the March 5th
21 letter?

22 A. I don't recall the exact
23 progression.

24 Q. Let's look at your Declaration,
25 Exhibit 851. I'll direct you to page 26.

1 A. Okay.

2 Q. Do you recall meeting with
3 Devin Kumar on or about March 11th?

4 A. I do.

5 Q. What -- do you recall who was
6 at that meeting?

7 A. I believe it was just the two
8 of us.

9 Q. Do you recall what was said?

10 A. We spoke about the budget.

11 Q. And what did Mr. Kumar tell you
12 about the budget?

13 A. He informed me that it was more
14 than 35 million dollars over budget.

15 Q. Maybe I should ask it this way:
16 Do you recall anything about the meeting
17 other than what's in paragraph 26?

18 A. No.

19 Q. Do you recall where you met?

20 A. I believe we had breakfast.

21 Q. Where?

22 A. I don't remember.

23 Q. What did you say to him?

24 A. At what point?

25 Q. What is the first thing you

1 said to him?

2 A. Hello.

3 Q. Do you recall anything about

4 what you said to him?

5 A. I think I -- I believe we were

6 there to discuss the budget. I had asked

7 for a meeting to go over the skepticism I

8 had and to see what they had to present.

9 Q. And they presented what you say

10 here, 35 million over budget. Increase in

11 construction costs by 15 million to cover

12 additional costs?

13 A. That's --

14 MR. MURATA: Objection.

15 A. That's what it says.

16 Q. And that's correct?

17 A. I believe so, yes.

18 Q. If you look at the next

19 paragraph: "Additional costs Mr. Kumar

20 first told me about on March 11th were not

21 reflected in the March 11th advance

22 request."

23 Did that surprise you?

24 A. I don't remember if I was

25 surprised or I knew that was going to

1 Q. At the bottom of the paragraph
2 about venue schedules, it says: "This time
3 FB is holding back the release of some
4 venue construction pending these
5 decisions."

6 Do you know what you're
7 referring to then?

8 A. Yeah. Yes, the -- it seems
9 because they were considering adjusting the
10 opening date, they were not looking to
11 start certain venue construction because of
12 that. Be done too early.

13 Q. Down in owner change orders in
14 ACR, again, you're reporting that
15 Fontainebleau is acknowledging 60.8 million
16 dollars in pending owner change orders. Do
17 you see that?

18 A. I do.

19 Q. And I think you said earlier
20 that you weren't sure if those were
21 actually committed. Does this refresh your
22 recollection that they were, in fact, at
23 least at this point in time, committed?

24 A. It seems that way.

25 Q. When you say: "At such, this

1 will be shown as being drawn from the
2 contingency," what did you mean by that?

3 A. It means the contingency would
4 be reduced as a result of these -- these
5 commitments -- these changes.

6 Q. Were there other ways to deal
7 with additional commitments or was that the
8 only way?

9 MR. MURATA: Objection; vague.

10 A. Generally, two ways. Take from
11 contingency or increase the budget.

12 Q. And what would you expect to be
13 considered in whether to take it from
14 contingency or increase the budget?

15 A. Well, you would typically take
16 it from contingency until you had to
17 increase the budget.

18 Q. Because the contingency was too
19 low?

20 MR. MURATA: Objection.

21 A. Not necessarily. I'm confused.

22 Q. Sorry; let me ask again.

23 You said you would generally
24 take from contingency unless you had to
25 increase the budget. Why would you have to

1 increase the budget?

2 A. If you ran out of contingency.

3 Q. The next paragraph you say:

4 "We also discussed the fact that the ACR is

5 not showing any increases and the potential

6 exposure to FB for the last month or so,

7 which is clearly not accurate" or it says

8 "with is clearly not accurate."

9 A. Yeah.

10 Q. You would agree with me that's

11 probably "which is clearly not accurate"?

12 A. I do.

13 MR. MURATA: Objection.

14 Q. What do you mean by potential

15 exposure to FB?

16 A. The amounts of pending claims

17 had not gone up.

18 Q. So, this is separate and apart

19 from the 60.8 million that's already been

20 booked?

21 MR. MURATA: Objection.

22 A. I'm not sure if they were the

23 same exclusive. I believe the point being

24 made there that the number had not changed

25 in two months as far as the claims. I had

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1 trouble believing that.

2 Q. And you would expect claims to
3 increase on some, more or less, regular
4 schedule?

5 MR. MURATA: Objection.

6 A. I would expect activity, not
7 necessarily small, large, modest increase,
8 but almost all construction projects have
9 some level of activity with respect to
10 claims.

11 Q. So, you were seeing zero and
12 you would expect to see something other
13 than zero?

14 A. Yes.

15 Q. And that's clearly not right?

16 MR. MURATA: Objection.

17 A. It calls for a question.

18 Q. So, do you recall that IVI
19 initially rejected the March 2009 advance?

20 MR. MURATA: Objection.

21 A. I remember rejecting an
22 advance. If it was March, as you say.

23 Q. Let me show you the document.

24 (Plaintiff's Exhibit 860,
25 Construction Consultant Advance

1 Certificate, marked for
2 identification, as of this date.)

3 Q. Do you recognize Exhibit 860?

4 A. Yes.

5 Q. What is it?

6 A. It is a consultant --

7 Construction Consultant Advance

8 Certificate.

9 Q. And what is that in the context
10 of this project?

11 A. This is a document that was
12 prepared every month in connection with the
13 borrower's advance request. We put this
14 together to approve funding hard costs.

15 Q. And the funding is dependant
16 on, among other things, your certification
17 in this document?

18 MR. MURATA: Objection.

19 A. We're one part of it.

20 Q. If you look on the last page,
21 that's your signature? Excuse me, that's
22 Mr. Bonvicino's signature?

23 A. Yes, it is.

24 Q. Now, if you look on page 2 on
25 the second page --

1 A. Yes.

2 Q. -- there's a number of items in
3 bold. For example, in 3C it says: "The
4 remaining cost report attached to the
5 current advance request does not accurately
6 reflect all materials with respect to
7 remaining costs."

8 You see that?

9 A. Yes.

10 Q. This is you not approving this
11 in advance, right?

12 A. Correct.

13 Q. Do you recall why you didn't do
14 that or why you did not approve it?

15 A. Because we no longer believed
16 it.

17 Q. The advanced request is a
18 request from the borrower for funds, right?

19 A. Yes, it is.

20 MR. MURATA: Objection.

21 Q. And it includes a bunch of
22 attachments?

23 A. Yes, it does.

24 Q. Including a remaining cost
25 report, right?

1 A. I believe it did, yes.

2 Q. And an in balance report,
3 right?

4 A. I believe it did, yes.

5 Q. And you looked at all those
6 things when you were making your
7 certification or deciding whether to make
8 your certification?

9 A. Not all the attachments. Just
10 the attachment that pertained to our hard
11 cost.

12 Q. And that included the remaining
13 cost report?

14 A. Yes. Part of the remaining
15 cost report.

16 Q. Which parts didn't it include?

17 A. Any soft costs related on this.

18 Q. So, you were looking at the
19 hard costs portion of the remaining cost
20 report?

21 A. Yes.

22 Q. So, do you recall what
23 Fontainebleau's response was when you
24 issued this certificate?

25 A. No.

1 Q. They attempted to revise their
2 advance request and get your approval,
3 right?

4 MR. MURATA: Objection.

5 A. I don't remember.

6 Q. Do you recall in mid-March, you
7 had a series of discussions with Mr. Kumar
8 about the budget?

9 MR. MURATA: Objection; asked
10 and answered.

11 A. I don't remember at what point
12 I had what conversations.

13 (Plaintiff's Exhibit 861,
14 forwarded e-mail, marked for
15 identification, as of this date.)

16 Q. Exhibit 861 is a forwarded
17 e-mail, but if you look down one, there's a
18 March 22, 2009 e-mail from you to Bill
19 Scott and others. You see that?

20 A. Yes, I do see that.

21 Q. So, Brandon Bolio, Henry Yu and
22 Brian Corum, those are Bank of America
23 people, right?

24 A. Yes.

25 Q. Bill Scott is Bank of America's

1 lawyer?

2 A. Yes.

3 Q. You recall sending this e-mail?

4 A. I don't recall sending this

5 specific e-mail.

6 Q. If you look at the second

7 paragraph of your e-mail, it says: "Over

8 the last two weeks or so, we have been

9 working with the developer to update their

10 most recent accounts cost report. We did

11 not believe it included all costs or

12 should."

13 Do you see that?

14 A. Yes.

15 Q. Do you recall doing that?

16 A. Not specifically, but it

17 appears we did.

18 Q. If you read the next sentence

19 it says the ACR didn't include adequate

20 projection of costs. I'm paraphrasing.

21 You see that?

22 A. Yes.

23 Q. You recall that was the case?

24 A. Yes.

25 Q. You recall having discussions

1 with Devin Kumar or anyone else about that?

2 A. I know I had discussions.

3 Q. But you don't recall

4 specifically in this time period?

5 A. Not specific discussions, no.

6 Q. If you go to the next page, it

7 says: "While we have not conducted an

8 audit of the information presented, it

9 would take weeks, the information presented

10 appears reasonable at this stage of the

11 project."

12 You see that?

13 A. Yes, I do.

14 Q. You didn't conduct an audit,

15 did you?

16 A. No, we did not.

17 MR. MURATA: Note my objection

18 to the question.

19 Q. If you go two paragraphs down,

20 it says -- looks like you're doing the

21 calculation and you end up with an overrun

22 of 41 and change million dollars is

23 projected for the developer's best guess of

24 their exposure. Do you see that?

25 A. Yes.

1 Q. That was their best guess at
2 the time?

3 MR. MURATA: Objection.

4 A. That's what this says.

5 Q. You don't have any reason to
6 believe you didn't send this e-mail, right?

7 MR. MURATA: Objection.

8 A. No.

9 (Plaintiff's Exhibit 862,
10 e-mail from Robert Barone dated
11 March 23, 2009, marked for
12 identification, as of this date.)

13 Q. Do you recognize this document?

14 Well, for the record, 862 is an
15 e-mail from Robert Barone to Brandon Bolio
16 and others, dated March 23, 2009.

17 Do you recognize it?

18 A. I recognize -- yeah, I mean, I
19 recognize it as a document.

20 Q. Do you recognize it as
21 something you sent around March 23rd, 2009?

22 A. It seems that way.

23 Q. Does this refresh your
24 recollection that you updated the
25 Construction Consultant Advance Certificate

1 after previously rejecting it for March
2 2009?

3 MR. MURATA: Objection.

4 A. It appears that way, yes.

5 Q. And if you look on -- there's
6 no page numbers so I'll direct you to the
7 Bates numbers, which are the numbers on the
8 bottom right of the page.

9 A. Okay.

10 Q. If you look at '80505, which is
11 the last page of the advanced
12 certificate --

13 A. Yes.

14 Q. -- that's Mr. Bonvicino's
15 signature?

16 A. Yes.

17 Q. Dated March 23rd, 2009?

18 A. Yes, it is.

19 Q. In looking back to the cover
20 page, it looks like you or Mr. Bonvicino
21 issued this certificate based on unexecuted
22 advance requests on the assumption that
23 they would be executed; is that fair?

24 A. That's what it says.

25 Q. And do you recall that that was

1 the case?

2 A. I don't remember.

3 Q. Did your certification, signing
4 that document, was based on the information
5 contained in the advance request, right?

6 MR. MURATA: Objection.

7 A. Yes.

8 Q. So, if that information
9 changed, the certification would no longer
10 be valid, it would have to be updated,
11 right?

12 MR. MURATA: Objection.

13 A. Depending on what -- how
14 material it was.

15 Q. Okay. But if it changed
16 materially, it would have to be updated?

17 MR. MURATA: Objection.

18 A. Likely.

19 Q. Let's look at -- again, looking
20 to the Bates numbers '80517, which is the,
21 I believe, the first page of the detailed
22 remaining cost report.

23 So, I'm looking at report costs
24 amount, that square there, those four
25 columns. My understanding is that the

1 closing resort budget is the budget as of
2 the beginning of the project. Is that
3 consistent with your understanding?

4 A. Yes.

5 Q. And then prior resort budget is
6 any previous changes to that closing resort
7 budget; is that right?

8 A. Yes.

9 Q. And then current period budget
10 modifications are the budget modifications
11 that are being implemented through this
12 draw request; is that right?

13 A. Yes.

14 Q. And it looks like, based on
15 this document, construction hard costs are
16 going up by 60.599 million. Does that look
17 like what it is?

18 A. Yeah, that's what it looks
19 like.

20 Q. Is that the same 60, 61 million
21 that Turnberry had booked that we seen
22 e-mails about?

23 MR. MURATA: Objection.

24 A. It may be.

25 Q. It sounds like it would be

1 right?

2 A. It's a very close number.

3 Q. And then if you go down, it
4 looks the subtotal, general conditions
5 requirements, hoisting, there's 28 plus
6 million. You see that?

7 A. Yes.

8 Q. Do you recall how that number
9 was arrived at?

10 A. I believe we looked at the
11 previous expenditures, the additional time
12 that was added to the project. And those
13 are the carrying costs of running a job.

14 Q. Why would there be additional
15 time added to the project?

16 A. I believe that they agreed that
17 the project was not going to be finished in
18 accordance with the original schedule and
19 additional time had to be added to it.
20 That was all part of this adjustment.

21 Q. Do you recall that the opening
22 date had been October 1, 2009 and in this
23 draw process, it was changed to November 1,
24 2009?

25 A. I remember it was changed.

1 Q. Let's just look at that. If
2 you look at IV 80513, which is part of the
3 advance request attached to your e-mail --

4 A. Yes.

5 Q. -- if you look at paragraph 19,
6 you see the opening date is now November 1,
7 2009?

8 A. Yes.

9 Q. And if I can remember where the
10 other one was; if you look at Exhibit 860
11 on the second page on paragraph 3E, you're
12 stating that it should be November 1,
13 right?

14 A. Yes.

15 Q. So, does the change in opening
16 date explain the increase in the general
17 conditions budget? We're on '80517.

18 A. Part of it.

19 Q. Do you know what explains the
20 rest of it?

21 A. I believe they did an analysis
22 of the time required and it would be
23 additional costs for supervision to even
24 meet November 1.

25 Q. Do you recall that they had

1 been running out of general conditions

2 money?

3 A. I don't remember.

4 Q. What are general conditions?

5 A. General conditions would be the

6 costs to fund an on-site presence of the

7 contracting entity.

8 Q. It's usually a fairly

9 consistent cost more or less as time goes

10 on through the project?

11 MR. MURATA: Objection.

12 A. At times, it's consistent.

13 There are periods when it's consistent.

14 Depending on the type of project, tends to

15 grow at the end.

16 Q. Tends to grow at the end?

17 A. On a job like this, it tends to

18 grow.

19 Q. So, if you spent 80 percent of

20 your general conditions budget halfway

21 through the project, that's a red flag?

22 MR. MURATA: Objection.

23 A. It's a red flag.

24 Q. So, looking at the total hard

25 costs under general conditions, looks like

1 the budget is going to increase -- this
2 part of the budget is going to increase by
3 88.8 million dollars. You see that?

4 Again, it's '80517.

5 (Whereupon, the referred to
6 question was read back by the
7 Reporter.)

8 A. The trade cost plus general
9 conditions.

10 Q. Right. So, we've got 60.6 in
11 hard cost and 28.3 in general conditions
12 requirements hoisting, right?

13 A. That's a what it -- yes.

14 Q. So, let's go a few pages down
15 on '80521.

16 So, this is the remaining cost
17 report. You see that?

18 A. Yes.

19 Q. And it looks like we have that
20 88.854 million dollars on the top of the
21 current period budget modifications column.
22 You see that?

23 A. Yes.

24 Q. So, it looks like part of it
25 they're paying with contingency, right?

1 A. Yes.

2 Q. And part of it becomes a 50
3 million dollar budget increase, right?

4 A. Yes.

5 Q. Do you recall discussions about
6 that calculation?

7 A. Which calculation?

8 Q. As to why you would use part of
9 it for contingency and part of it for a
10 budget increase?

11 MR. MURATA: Objection.

12 A. That was presented by the
13 developer.

14 Q. Did you have a view as to
15 whether that was acceptable?

16 MR. MURATA: Objection.

17 A. I believe at the time we felt
18 it was acceptable, based on what we knew.

19 Q. And at the time, were you still
20 concerned that all subcontractor claims had
21 not been fully incorporated in the
22 disclosed costs, right?

23 A. Let's just say I remained
24 skeptical. They lost my trust.

25 Q. Because they had been telling

1 you things that weren't true?

2 MR. MURATA: Objection.

3 A. Effectively.

4 Q. So we get into April.

5 Let's look back at your
6 Declaration, page 10, paragraph 29.

7 A. Yes.

8 Q. Do you recall the project visit
9 on April 1 through 3, 2009 referred to in
10 this paragraph?

11 A. I don't recall it. I suspect
12 it occurred. I don't know that I was
13 there, so I don't recall being there.

14 Q. I understand.
15 Do you recall seeing that some
16 work had fallen behind target as you say in
17 here?

18 A. That's what we -- that's what
19 we observed.

20 Q. Did that give you further
21 concerns about the projects?

22 MR. MURATA: Objection.

23 A. Seems we had concerns about the
24 budget -- the schedule, yes.

25 Q. Well, this is, essentially, two

1 weeks after you're certifying that November
2 1, 2009 is reasonable?

3 A. I'll remember that was based on
4 observations 30 days earlier.

5 Q. So, now behind more?

6 A. Well, if you stop work --

7 Q. Did it appear to you that they
8 had stopped work?

9 A. It appeared that very little
10 had been done in certain areas.

11 Q. Next paragraph refers to a
12 letter, which I'll show you.

13 This is previously marked as
14 495. Do you recognize this letter?

15 A. Yes, I do.

16 Q. Looks like this was sent
17 following your project visit?

18 A. Yes.

19 Q. As it says right here in the
20 first sentence?

21 A. Yes.

22 Q. And in that third bullet, you,
23 again, say: "We still have concerns that
24 not all subcontractor claims are being
25 carried within the submitted ACR."

1 You see that?

2 A. Yes, I do.

3 Q. Still skeptical?

4 A. Yes, I was.

5 Q. So, do you recall at some point
6 that the developer announced that there
7 were substantial additional costs that they
8 needed to spend?

9 A. I remember something like that,
10 yes.

11 MR. MOCKLER: Let's look at it.

12 (Plaintiff's Exhibit 863,
13 e-mail chain, marked for
14 identification, as of this date.)

15 Q. This is 863 and the first
16 e-mail on the chain is from Mr. Bonvicino
17 to you dated April 10, 2009. I want to
18 point you to the second e-mail from you to
19 Mr. Bonvicino on the same day. And you
20 say: "Thanks, Paul" -- the subject line is
21 "Monthly FBR Book."

22 And it says: "Thanks, Paul,
23 I'm very curious what the books will say."

24 Do you recall what you're
25 referring to by "the monthly books"?

1 A. The draw request, I believe.

2 Q. Do you recall why you were
3 curious about what they would say?

4 A. I think -- let me see
5 something. Wait a minute. Wait. Wait.
6 No, no. No, no. This -- this relates to
7 the construction schedule.

8 Q. Okay.

9 A. Raquel worked for Hill
10 International and every month they produced
11 an update on the construction schedule.
12 And every month they were sent to us and
13 my -- I was referring to those books and I
14 was curious about what their new -- what
15 their completion date was going to say.
16 That's what this is about.

17 Q. Mr. Bonvicino is very
18 skeptical, right?

19 A. We both were. Well, they had
20 continued carrying a certain completion
21 date which we were curious if it was going
22 to be the same.

23 Q. And once they've carried the
24 completion date and you found out it's not
25 creditable, Mr. Bonvicino is assuming that

1 they're just going to make something up

2 this time, too?

3 MR. MURATA: Objection.

4 A. I don't know.

5 MR. MURATA: Mischaracterizes

6 prior testimony.

7 A. I don't believe anybody thought

8 they were going to make something up. We

9 were curious what it was going to say.

10 Q. And he's assuming fiction the

11 size of War & Peace?

12 A. No, no, no. Actually, the book

13 is probably -- the schedule book, if I

14 remember right, was several inches thick

15 every month.

16 Q. But he didn't say the

17 encyclopedia of Britannica?

18 MR. MURATA: Objection.

19 A. They don't exist anymore,

20 right?

21 (Plaintiff's Exhibit 864,

22 e-mail dated April 13, 2009, marked

23 for identification, as of this date.)

24 Q. 864 is an e-mail from Henry Yu

25 to you and others dated April 13, 2009.

1 Do you recall this e-mail?

2 A. Not specifically.

3 Q. Do you recall learning that
4 there were an additional 170 million in
5 additional construction costs?

6 A. I remember there being a large
7 amount that they had not disclosed.

8 Q. Do you recall your -- well, let
9 me start over.

10 Does 170 million sound
11 ballpark?

12 MR. MURATA: Objection.

13 A. I -- I -- I don't remember.

14 Q. Did that justify your
15 scepticism, the additional costs?

16 MR. MURATA: Objection; vague.

17 A. I don't remember exactly what
18 made up the money, but it seemed to confirm
19 there were additional costs out there.

20 Q. 170 million in change orders
21 don't just materialize out of nowhere,
22 right?

23 MR. MURATA: Objection.

24 A. I don't remember exactly what
25 they were from, whether they were change

1 orders or contracts or what part of the
2 budget it was part of. I don't remember.

3 Q. Look at your Declaration.

4 A. I'm looking.

5 Q. Paragraph 33.

6 A. There's your answer, I was
7 stunned.

8 Q. Let's look at the next
9 sentence. "It is inconceivable to me that
10 such a significant amount of costs arose
11 suddenly in April 2009."

12 You agree with that, right?

13 A. I did say it.

14 Q. In your experience, that kind
15 of cost overrun doesn't just happen
16 overnight?

17 MR. MURATA: Objection;
18 foundation.

19 A. Generally, no.

20 Q. And the next sentence says: "I
21 suspect at this time that Fontainebleau had
22 to be aware of these costs or most of them
23 much earlier than they report on."

24 You agree with that, right?

25 A. That's what I wrote. That's

1 what I felt.

2 Q. You weren't really surprised
3 that there were unreported cost, right?

4 MR. MURATA: Objection;
5 argumentative. Mischaracterizes
6 prior testimony.

7 A. I don't recall how surprised I
8 was, but I remained skeptical.

9 Q. So, you wouldn't have been
10 surprised with some additional costs?

11 A. No, not some.

12 (Plaintiff's Exhibit 865,
13 e-mail from Mr. Barone to
14 Mr. Bonvicino dated April 13th,
15 marked for identification, as of this
16 date.)

17 Q. 865 is an e-mail from you to
18 Mr. Bonvicino dated April 13th.

19 Do you recall this e-mail?

20 A. No.

21 Q. "Seems they have chosen to come
22 clean"?

23 A. I guess so.

24 Q. Do you have any reason to doubt
25 that you sent this e-mail?

1 A. No.

2 MR. MURATA: Objection.

3 A. No.

4 Q. Mr. Bonvicino wasn't surprised

5 with that many change orders, was he?

6 MR. MURATA: Calls for

7 speculation.

8 A. I don't think neither of us

9 were surprised that there were extra costs.

10 Q. But Mr. Bonvicino wasn't

11 surprised that there were more than a

12 hundred million dollars in extra costs?

13 MR. MURATA: Objection; calls

14 for speculation.

15 A. I don't remember.

16 (Plaintiff's Exhibit 866,

17 e-mail from Mr. Bonvicino to

18 Mr. Barone dated April 13th, marked

19 for identification, as of this date.)

20 Q. 866 is an e-mail from

21 Mr. Bonvicino to you dated April 13th. And

22 he says: "Pretty close to my 150 mil" in

23 response to the e-mail about 170 million in

24 overcosts?

25 A. Um-hum.

1 Q. Do you recall Mr. Bonvicino had
2 predicted or had known that there were 150
3 million dollars in cost overruns?

4 MR. MURATA: Objection.

5 A. I remember him speculating.

6 Q. Speculating fairly correctly,
7 right?

8 MR. MURATA: Objection.

9 A. I guess so.

10 (Plaintiff's Exhibit 867,
11 e-mail from Devin Kumar to Mr. Barone
12 and Mr. Bonvicino, with attached
13 spreadsheet, marked for
14 identification, as of this date.)

15 Q. 867 is an e-mail from Devin
16 Kumar to you and Mr. Bonvicino and it
17 attaches a spreadsheet that I believe shows
18 an additional 187 million dollars in costs
19 over budget. You see this?

20 A. How much?

21 Q. I think if you look in the far
22 right, it says about 187 million?

23 A. Yes.

24 Q. Do you recall seeing this
25 e-mail or spreadsheet around the time?

1 A. I remember something like this,
2 yes.

3 Q. You recall what your response
4 was?

5 A. That I said it in here, I'm
6 sure --

7 Q. Paragraph 32.

8 A. I think we go back to stunned.

9 Q. I'm going to show you what's
10 previously marked as Exhibit 828. This is
11 Project Status Report No. 23. If you
12 would, just confirm that that's what it is.

13 A. Yes, it is.

14 Q. So, this was, essentially, the
15 report from March; is that right?

16 A. I don't know. Let's see.

17 MR. MURATA: Objection.

18 A. It's a report for February
19 through March. We were there on March 2nd.

20 Q. So, it seems like it's prepared
21 a little bit later than on schedule with
22 the other ones.

23 Do you know why that is the
24 case?

25 MR. MURATA: Objection.

1 A. It may have had to do with the
2 advance certificate.

3 Q. Okay. Just to point you to
4 page 7, again, in that paragraph we've seen
5 a similar paragraph in the other reports,
6 the last sentence of the first paragraph:
7 "While the ACR has been submitted by the
8 developer of the true representation of
9 costs, IVI is still concerned all
10 subcontractor claims have not been fully
11 incorporated into the report."

12 A. Correct.

13 Q. Do you recall being asked by
14 Bank of America, and possibly others, to do
15 a cost to complete review for the project?

16 A. Yes.

17 Q. Do you recall what you were
18 asked to do?

19 A. Specifically, no.

20 Q. Generally?

21 A. Generally, look at the costs as
22 they were put forth by the developer.
23 Where they came from. How they put them
24 together and see if their approach was
25 creditable.

1 Q. Do you recall what your general
2 conclusion was?

3 A. No.

4 Q. So, let's --

5 MR. MOCKLER: I'll give you
6 guys copies of these.

7 Q. And you can look at your
8 Declaration as well.

9 A. Okay.

10 Q. This was previously marked as
11 Exhibit 298. Can you just confirm that it
12 is the cost to complete review.

13 A. Yes, it is.

14 Q. And that's your signature there
15 on page 2?

16 A. Yes, it is.

17 Q. Do you recall receiving
18 information about a "enhanced version" of
19 the project submitted by the developer?

20 A. I remember -- I remember
21 something about it, yes.

22 Q. Let's look at your Declaration.
23 So, starting on paragraph 34 --

24 A. Yes.

25 Q. -- why don't I just have you

1 MR. MOCKLER: Finish mine. I
2 don't know how much you guys are
3 gonna have.

4 MR. MURATA: If you want to
5 take a break, sure. Let's go off the
6 record.

7 THE VIDEOGRAPHER: The time is
8 approximately 11:59 a.m.

9 We're off the record.

10 (Whereupon, an off-the-record
11 discussion was held.)

12 THE VIDEOGRAPHER: The time is
13 approximately 12:02.

14 We're back on the record.

15 BY MR. MOCKLER:

16 Q. Hello again.

17 A. Hi there.

18 Q. You recall we spoke about a
19 revised Construction Consultant Advance
20 Certificate that Mr. Bonvicino executed on
21 March 23rd?

22 A. Yes.

23 Q. Do you recall whether there was
24 an additional changes to the advanced
25 request following your execution of that

1 document?

2 A. No, I don't recall.

3 Q. You recall we spoke about
4 changes to the project budget that had been
5 funded with equity early on in the timeline
6 in 2008?

7 A. I don't remember speaking about
8 that.

9 Q. I thought we had. I may be
10 wrong. Let's look at an exhibit.

11 Well, first of all, do you
12 recall that that occurred?

13 A. Yes.

14 Q. And what was your understanding
15 of -- your recollection of what happened?

16 A. My recollection was that there
17 were significant structural steel changes
18 amongst some other minor things, but after
19 the design was finished that had to be
20 rectified.

21 Q. Do you recall how you learned
22 about that?

23 A. It was disclosed by the
24 borrower.

25 Q. The borrower told there's a

1 couple hundred million dollars in increased
2 costs?

3 MR. MURATA: Objection. That's
4 not his testimony.

5 A. I don't remember exactly how it
6 happened.

7 Q. Let's look at a document. I
8 don't think it's been marked yet, so let's
9 mark that as the next one.

10 (Plaintiff's Exhibit 868,
11 Project Status Report No. 14, marked
12 for identification, as of this date.)

13 Q. So, again, first, if you would
14 look and identify the exhibit as -- or
15 confirm that it's Project Status Report No.
16 14.

17 A. Yes, it is.

18 Q. And if you look on page 2, the
19 first sentence says: "Direct cost budget
20 was increased by 190 million."

21 You see that?

22 A. Yes.

23 Q. Do you recall that that
24 happened?

25 A. Yes, I do.

1 Q. You think it was for structural
2 steel? That's your recollection?

3 A. There were some -- yeah, there
4 were revisions -- there were completions of
5 design that occurred right after closing
6 that this was a result of additional costs.

7 Q. And those costs showed up
8 whenever the reporting period was for this
9 June 25th, 2008 report?

10 A. I believe so.

11 Q. Do you recall having concerns
12 about any delay in getting information
13 about those changes to the budget?

14 MR. MURATA: Objection.

15 A. No, I don't remember.

16 Q. Mr. Barone, you received a
17 Subpoena in this case calling for you to
18 join us here today. You recall that?

19 A. Yes.

20 Q. Let's mark it as the next
21 exhibit.

22 (Plaintiff's Exhibit 869,
23 Subpoena, marked for identification,
24 as of this date.)

25 Q. Do you recall receiving -- this

Deposition Transcript Excerpts
of Stephen Blauner
Filed Under Seal

Bolio, Brandon 3/30/2011 12:00:00 PM

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF FLORIDA
3

CASE NO.
4 IN RE: FONTAINEBLEAU LAS 09-MD-02106-CIV-GOLD/
GOODMAN
5 VEGAS CONTRACT LITIGATION
MDL NO. 2106

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12

13 ORAL AND VIDEOTAPED DEPOSITION OF BRANDON BOLIO,
14 produced as a witness at the instance of the Plaintiffs,
15 and duly sworn, was taken in the above-styled and -numbered
16 cause on Wednesday, March 30, 2011, from 9:19 a.m. to 5:28
17 p.m., before Angela L. Mancuso, CSR in and for the State
18 of Texas, reported by machine shorthand, at the law offices
19 of Hunton & Williams, 1445 Ross Avenue, Suite 3700, City of
20 Dallas, County of Dallas, and State of Texas, pursuant to
21 the Rules of Civil Procedure and the provisions stated on
22 the record or attached hereto.

23 JOB No. 159381

24
25

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1 A. That's right.

2 Q. All right. And we'll be looking at documents
3 to try and help you out in that regard throughout the
4 day.

5 By whom are you currently employed?

6 A. Bank of America.

7 Q. Is it the Bank with a "k", the Banc with a "c"
8 or something else?

9 A. Bank with a "k", Bank of America, N.A.

10 Q. And what is your position there?

11 A. I'm currently a vice president.

12 Q. In what group?

13 A. In Corporate Debt Products, covering gaming
14 companies.

15 Q. When did you begin work for Bank of America?

16 A. I started with Bank of America in August
17 of 2004.

18 Q. In what capacity? What was your position?

19 A. I was an analyst in -- at the time it was
20 called Global Portfolio Management. Now it's called
21 Corporate Debt Products.

22 Q. And what is the Corporate Debt Products group?

23 A. Corporate Debt Products is responsible for the
24 bank's balance sheet, for underwriting and monitoring
25 bank loans, and liaising with the other parts of the

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1 bank as needed.

2 Q. What do you mean by "responsible for the
3 bank's balance sheet"?

4 A. When there -- if a client wants to request a
5 bank loan, they come to Bank of America and Corporate
6 Debt Products is responsible for underwriting that bank
7 loan, Bank of America's portion of that bank loan.

8 Q. And when you use the term "underwriting," what
9 does that mean?

10 A. That means conducting financial analysis,
11 market studies, and due diligence in order to make a
12 decision whether or not we lend money and how much we
13 would lend.

14 Q. Is part of that determining the risk that Bank
15 of America faces in entering into the transaction?

16 A. It is.

17 Q. And are there guidelines that help Corporate
18 Debt Products determine whether a particular risk is --
19 is too great to justify the bank's participation?

20 A. There are a lot of guidelines and bank
21 policies that determine a lot of things. We're highly
22 regulated, and there are guidelines that the bank
23 follows to help determine risk and make an ultimate
24 decision.

25 Q. You also said that as part of Corporate Debt

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1 Products that you both underwrite and monitor the loans.

2 In what ways does Corporate Debt Products, in general,
3 monitor the loans the bank entered -- enters into?

4 A. Generally speaking, we will conduct quarterly
5 monitoring of the loans that typically coincides with
6 the reporting requirements of the credit agreement that
7 the borrower is required to do, or monthly if the
8 reporting requirements are monthly.

9 Q. And the review that you do on a quarterly or
10 sometimes more regular basis, does that have a name?

11 A. It does.

12 Q. What's the name?

13 A. The quarterly review is called a PACR,
14 Periodic Analysis and Covenant Review.

15 Q. Okay. That's the periodic review, whether
16 it's monthly or quarterly?

17 A. PACRs are typically required quarterly,
18 although the bank's guidelines are always changing --
19 and those have changed recently -- to account for
20 different profiles of borrowers. But typically PACRs
21 are quarterly.

22 Q. I've seen reference in the documents to CAM,
23 C-A-M, all caps. Are you familiar with that moniker?

24 A. Yes, I am.

25 Q. What does it stands for?

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1 A. CAM stands for Credit Approval Memorandum.

2 Q. How does that relate, if at all, to the PACR?

3 A. The CAM is the document that allows the bank

4 to -- it's essentially the approval document, the

5 underwriting document. And CAMs are conducted at

6 origination in order to seek and document approval, as

7 well as, on an annual basis, CAMs are prepared to assist

8 in the monitoring process.

9 Q. Are there documents that are generated with

10 the more regular PACR?

11 A. There are.

12 Q. What are those called?

13 A. There is a risk-rating score card, typically,

14 that's generated with the PACR.

15 Q. Anything else?

16 A. Not to my knowledge right now.

17 Q. The risk-rating score card is -- is less

18 narrative, shall we say, than the -- than the CAM?

19 A. It's less narrative, although it contains

20 portions of narrative.

21 Q. Is there any other document other than the

22 risk-rating score card that's generated in the PACR

23 process?

24 A. Not that I can think of at this point.

25 Q. Another area that you indicated Corporate Debt

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1 Products got involved in was liaising, over the course
2 of a financing, with other groups in the bank; is that
3 right?

4 A. Yes.

5 Q. Describe that for me.

6 A. Large underwritten or -- or best-effort
7 syndicated bank deals typically require a lot of
8 coordination among the bank, Corporate Debt Products,
9 and if the investment bank is involved or if the
10 structuring group is involved on a syndicated financing,
11 and so we liaise with those groups as needed throughout
12 the deal process.

13 Q. Toward what end?

14 MR. CANTOR: Objection. You can answer.

15 A. Toward -- the goal is to ultimately either do
16 a deal or not do a deal.

17 Q. (BY MR. DILLMAN) For loans that are in
18 existence for which BofA has already signed up, is there
19 a process of liaising with other groups in -- within the
20 bank that's a typical part of the Corporate Debt
21 Products activities?

22 A. If there are things that -- yes. If there are
23 things that require the expertise of those groups, it is
24 typical to liaise with them.

25 Q. You mentioned "best-efforts loan." What did

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1 you mean by that?

2 A. Not underwritten.

3 Q. Typically, on a loan on which BofA is the
4 agent, the bank agent, does the Corporate Debt Products
5 group get involved in some regular course of monitoring
6 or involvement in such -- in such loans?

7 A. Yes.

8 Q. Does -- first of all, why? What's the
9 purpose?

10 A. Purpose of Corporate Debt Products being
11 involved --

12 Q. Yes, sir.

13 A. -- in the agency function on a -- on a
14 monitoring basis, is that the question?

15 Q. Yes. Yes, sir.

16 A. If there are any questions or issues that come
17 up with the monitoring documents that are required to be
18 submitted, typically, Corporate Debt Products will help
19 to coordinate that with the borrower and the agent.

20 Q. And the monitoring documents that you're
21 referring to, describe what you meant by that.

22 A. There are whatever the -- the reporting
23 requirements are under the credit agreement, be it
24 financial statements, compliance certificates,
25 et cetera.

1 Justin Lien.

2 Q. How do you spell Justin's last name?

3 A. L-i-e-n.

4 Q. Did you report to either Mr. Corum or Mr. Lien
5 with respect to the Fontainebleau project at any time
6 prior to Mr. Susman's departure?

7 A. No.

8 Q. Mr. Susman left the firm in -- do you recall?

9 A. I believe he left in February of 2009.

10 Q. [REDACTED]

11 [REDACTED]

12 MR. CANTOR: [REDACTED]

13 [REDACTED]

14 A. [REDACTED]

15 Q. [REDACTED]

16 A. [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED].

21 Q. After Mr. Susman left, to whom did you
22 directly report?

23 A. Brian Corum.

24 Q. Mr. Corum took over some of Mr. Susman's
25 responsibilities with respect to the Fontainebleau

1 project; is that correct?

2 A. He did.

3 Q. Anybody else in the Corporate Debt Products

4 group that became involved in the Fontainebleau

5 Las Vegas project after Mr. Susman's departure who

6 wasn't previously involved?

7 A. No.

8 Q. Okay. Who else other than you, Mr. Susman,

9 and Mr. Corum from the Corporate Debt Products group was

10 involved in the Fontainebleau project at any time?

11 A. Khoa Duong was an analyst who was involved to

12 a certain extent.

13 Q. And is that a man or a woman?

14 A. I'm sorry?

15 Q. Is that a man or a woman?

16 A. It's a man.

17 Q. Can you spell that name?

18 A. Okay. K-h-o-a D-u-o-n-g.

19 Q. And Khoa Duong was involved primarily in the

20 risk-rating activities for the -- for the loan, correct?

21 A. Correct. Khoa was involved in the risk-rating

22 activities as well as helping to write the monitoring

23 and those kind of things.

24 Q. What monitoring and those kinds of things are

25 you referring to?

1 A. Mostly the risk rating, as well as, as I
2 referred before, on an annual basis you have to conduct
3 an annual CAM.

4 Q. Okay. All right. The things that we
5 previously talked about that you -- that Corporate Debt
6 Products did on a periodic basis with respect to loans
7 that had been entered into?

8 A. Correct.

9 Q. Was Mr. Duong involved at all in the liaising
10 functions that you've described with respect to
11 Fontainebleau Las Vegas?

12 A. Not very much.

13 Q. Were you?

14 A. Yes.

15 Q. Describe the involvement of Corporate Debt
16 Products with other groups in the bank as it related to
17 the Fontainebleau Las Vegas facility.

18 MR. CANTOR: Objection to foundation as
19 to people other than himself. But go ahead and answer.

20 A. There was quite a bit of liaising. We --

21 Q. (BY MR. DILLMAN) Can we just say working
22 with?

23 A. Yes. Okay.

24 Q. Okay.

25 A. We --

1 Q. I'm not even sure how you spell "liaising."

2 That's one of the problems.

3 A. We worked with -- are you asking who the
4 specific groups were?

5 Q. I want you to describe for me in general --
6 we'll get into more specifics -- how Corporate Debt
7 Products worked with other members or teams in the bank
8 relating to the Fontainebleau Las Vegas financing.

9 A. Corporate Debt Products worked with the Agency
10 group in coordinating posting of documents to
11 Intralinks. We also worked with the Disbursement Agent
12 group in coordinating the monthly draws. We also worked
13 with the Syndications group if there were times that we
14 needed input on market, bank market. And we also worked
15 with the Investment Banking group if there were times
16 that we needed to discuss -- some of the documents that
17 were -- that were put into place, they helped with some
18 of those documents.

19 Q. Let me take those one at a time. With respect
20 to the Agency department -- department or group? I'm
21 not sure what you said.

22 A. Either one works.

23 Q. Either one works?

24 A. It does.

25 Q. All right. You said you coordinated with them

1 on posting of documents to Intralinks; is that right?

2 A. Correct.

3 Q. That's a fairly routine technical process of

4 posting a document, isn't it?

5 A. It is.

6 Q. Is that typically something that Corporate

7 Debt Products was involved with was the technical

8 aspects of getting a document from Point A to Point B?

9 A. It is.

10 Q. And was that done primarily by IT people?

11 A. No. There are people that work in Agency

12 Management that have access to -- have publishing rights

13 on the workspaces.

14 Q. Publishing rights -- in other words, they can

15 post things to Intralinks that other people can't?

16 A. Correct.

17 Q. Who are those people in the Agency group as it

18 related to Fontainebleau Las Vegas?

19 A. Ron Naval.

20 Q. Otherwise known as Ronaldo?

21 A. Correct.

22 Q. So he was a poster? In other words, he

23 could -- he could actually physically or technically, I

24 suppose, post documents on Intralinks; whereas, you

25 could not?

1 A. Correct.

2 Q. Did Mr. Naval typically -- was he engaged in
3 the process of drafting the documents that he posted?

4 A. He was not, although Agency Management does
5 review, on the front end, documents where there are
6 agency -- where there is agency language. They review
7 that language to make sure it conforms with their
8 requirements.

9 Q. Did he make the call as to what documents were
10 posted on Intralinks and what weren't, or did he simply
11 do the mechanical task of posting of them?

12 A. He did the mechanical task -- task of posting.

13 Q. Who -- who made the call regarding what
14 documents went to Intralinks through Mr. Naval and what
15 documents didn't?

16 A. The credit agreement and disbursement
17 agreement laid out what documents were to be provided to
18 the various groups of investors, and Corporate Debt
19 Products and Agency helped to facilitate that process.

20 Q. It sounds to me as if Corporate Debt Products
21 provided to Mr. Naval the documents that were to be
22 placed on Intralinks. Is that a fair summary?

23 MR. CANTOR: Objection.

24 A. No. The documents were typically provided by
25 the borrower to Corporate Debt Products and/or Agency.

1 Q. (BY MR. DILLMAN) All right. And the
2 documents that were to be -- that were then posted on
3 Intralinks, the decision as to whether or not that's a
4 document that needs to be posted or not, who made that
5 call?

6 A. Typically, Corporate Debt Products in
7 conjunction with Agency.

8 Q. And when you say "typically Corporate Debt
9 Products," who?

10 A. Jeff Susman, myself.

11 Q. Anybody -- and when you say "in conjunction
12 with Agency," who at Agency, other than Mr. Naval, was
13 involved in the process of determining what documents
14 would or wouldn't be put onto Intralinks?

15 A. I believe just Mr. Naval was tasked on
16 Fontainebleau.

17 Q. Did you work with anyone else in the Agency
18 group other than Mr. Naval?

19 A. I may have worked with others when Mr. Naval
20 was out, but primarily it was Mr. Naval.

21 Q. And other than as you've summarized, are you
22 aware of any activities of Mr. Naval with respect to the
23 Fontainebleau Las Vegas project, other than as you've
24 testified?

25 A. No.

1 Q. In what instances would Mr. -- would you work
2 in conjunction with Mr. Naval to determine if this
3 particular document should be placed onto Intralinks?

4 A. Whenever a document came from the borrower, we
5 would typically -- if it was required to be shared with
6 other investors per the documents, those would be posted
7 to Intralinks.

8 Q. And who -- again, I'm trying to figure out
9 who's -- who's making this call as to whether it gets
10 posted or not. You said you worked in conjunction with
11 Mr. Naval.

12 Did you sit down and -- either figuratively or
13 literally sit down and say, what do you think, Ron? Do
14 you think this should be posted to Intralinks? Or was
15 it more, Ron, here is a document that needs to be
16 posted; please do so?

17 A. It was more mechanical. There is not that
18 much judgment whether or not something gets posted.
19 It's really laid out in the documents.

20 Q. Okay. And who made the determination as to
21 whether or not this particular document that you were
22 looking at was a document that, under one or more of
23 the -- of the underlying agreements, should be placed on
24 Intralinks?

25 A. Typically, Corporate Debt Products.

1 Q. You or Mr. Susman, in this case?

2 A. Correct.

3 Q. You said you also worked with Disbursement

4 group in connection with coordinating monthly draws. Do

5 you recall that?

6 A. Yes.

7 Q. And the Disbursement group was who?

8 MR. CANTOR: Objection.

9 A. There was --

10 MR. CANTOR: Go ahead.

11 A. The Disbursement group was a group of people.

12 The main person there was Jeanne Brown, who was tasked

13 on Fontainebleau.

14 Q. (BY MR. DILLMAN) And I meant -- I didn't make

15 my question very clear. But I meant, in connection with

16 Fontainebleau, who was the Disbursement group that you

17 worked with, and it was -- at least included Jeanne

18 Brown?

19 A. Yes.

20 Q. Anyone else that comes to mind?

21 A. I don't recall the name of the people that

22 worked under Jeanne Brown, but she was the -- the team

23 leader.

24 Q. During this time, where were you based?

25 A. In Dallas.

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1 Q. The -- you said that you coordinated with the
2 Disbursement group on monthly draws. What did you mean
3 by that? Describe the process of coordination.

4 A. There is a pretty specific, detailed process
5 that was spelled out in the disbursement agreement that
6 related to monthly draws; and we would, again, work with
7 the Disbursement group to make sure that that was being
8 executed.

9 Q. And when there were -- if there were judgment
10 calls as to whether or not particular requirements had
11 been met, who typically would make those judgment calls?
12 Corporate Debt Products or Disbursement?

13 A. Typically, Corporate Debt Products, although
14 Disbursement did have certain things that they would
15 focus on that was their -- under their purview.

16 Q. What were those things that were, as you
17 understood, under Disbursement's purview as opposed to
18 Corporate Debt Products?

19 A. They would receive a lot of backup to the
20 monthly draws, and they would review a lot of that
21 backup for certain items.

22 Q. What items?

23 A. Lien releases, making sure that, you know,
24 documents that were supposed to be provided were
25 provided.

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1 Q. Anything else?

2 A. That's the majority.

3 Q. Did Disbursement -- did the Disbursement group
4 go through the documents that were provided to make sure
5 that they were -- they fell within the parameters of the
6 underlying loan agreements, or was that left to somebody
7 else?

8 MR. CANTOR: Objection.

9 A. I believe Disbursement would do a certain
10 amount of reviewing as it related to the parts that they
11 were reviewing.

12 Q. (BY MR. DILLMAN) Okay. What parts did
13 Corporate Debt Products review, and what parts did
14 Disbursement review?

15 A. My recollection is that Disbursement reviewed
16 more of the -- you know, making sure that the documents
17 were there, making sure that the -- again, the lien
18 releases were provided, making sure that the general
19 process was intact; and Corporate Debt Products would
20 review more the financial type of documents.

21 Q. What do you mean?

22 A. In balance, those kind of documents.

23 Q. What else other than in balance?

24 A. In balance was one of the major ones, you
25 know, that would -- that would tie to other documents

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1 such as remaining cost report, you know.

2 Q. Budgets?

3 A. I'm sorry?

4 Q. Budgets?

5 A. Correct.

6 Q. What else?

7 A. That was -- I mean, those were some of the
8 major ones.

9 Q. And if there was a question about a particular
10 issue in the documents, typically did Corporate Debt
11 Products take the question to the borrower or did
12 Disbursement?

13 MR. CANTOR: Objection. Go ahead.

14 A. Typically, if it was a more of a financial
15 type question, Corporate Debt Products would take the
16 question to the borrower. If it was a procedural type
17 of question that fell within the purview of what the
18 Disbursement group was doing, they had, you know,
19 certainly, authority to go directly to the borrower and
20 ask questions as well.

21 Q. (BY MR. DILLMAN) And who made the final
22 decision? Who rang the bell when it was appropriate to
23 disburse funds, when BofA determined that it was
24 appropriate to disburse funds under the Fontainebleau
25 Las Vegas facility?

1 A. Typically, Corporate Debt Products.

2 Q. And was that typically Mr. Susman, you, or
3 someone else?

4 A. Mr. Susman.

5 Q. You indicated that with respect to the
6 Fontainebleau loan there was also -- you also worked
7 with Syndications, the Syndications group. How so?

8 A. If there were questions about, you know,
9 general market, the market, or investment groups, we
10 would sometimes, you know, call the Syndications group
11 and ask them what they thought, what their view was,
12 because their expertise is the bank market and working
13 with investors.

14 Q. What did you mean by "questions about the
15 general market, the market, or investment groups"? And
16 I'm just quoting from you.

17 A. Sure. I guess questions about how different
18 institutions or the bank market in general would -- you
19 know, appetite questions. You know, generally, if we
20 wanted to get sort of the pulse of the bank market, we
21 would reach out to Syndications.

22 Q. By "appetite" you're not talking about lunch?

23 A. No.

24 Q. You're talking about the willingness or the --
25 the -- the -- yeah, the willingness of financial markets

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1 to enter into certain transactions at certain times?

2 A. Correct.

3 Q. How did those questions come up during your
4 tenure with the Fontainebleau Las Vegas facility?

5 MR. CANTOR: Objection. Go ahead.

6 A. Syndications was also very involved in the
7 front end, and so I think that Mr. Susman would reach
8 out to Syndications quite a bit to bounce things off of
9 them, you know, if there were ever questions that came
10 up.

11 Q. (BY MR. DILLMAN) Are you talking about
12 pre-closing?

13 A. I'm sure pre-closing, but also post-closing,
14 because Syndications, again, was very involved during
15 the pre-closing, and I think they were -- you know,
16 Mr. Susman and Mr. Howard were partners, and they really
17 worked on the deal together at the beginning. So when
18 questions would come up, they would pick each other's
19 brains and coordinate.

20 Q. Was -- at some point in the history of the
21 Las Vegas facility, as you understood it, was there --
22 were there discussions about restructuring the loan
23 internally at BofA?

24 A. Yes.

25 Q. And those started when?

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1 A. Those started when we started seeing things in
2 the market that we thought would impact the ongoing
3 operations of Fontainebleau once it opened.

4 Q. Those things being what?

5 A. Basically, the recession, how it was impacting
6 the gaming market and the perceived impact of the condo
7 market in Las Vegas.

8 Q. And the perception or the belief by -- by the
9 Corporate Debt Products that by June of 2010
10 Fontainebleau Las Vegas would be in violation of its
11 financial covenants?

12 MR. CANTOR: Objection; foundation.

13 A. Can you repeat the question more specifically?

14 Q. (BY MR. DILLMAN) One of the issues that led
15 to restructuring discussions within BofA was BofA's
16 belief that, based on the factors that you just
17 discussed, Fontainebleau Las Vegas would be out of
18 covenants in June -- by June of 2010?

19 A. Could be. Could have a difficulty meeting its
20 covenants when it opened and as those covenants stepped
21 down.

22 Q. And that was the expectation, actually, at
23 BofA in early 2009, that that would be the case, wasn't
24 it?

25 MR. CANTOR: Objection.

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1 A. Was not the expectation. It was something
2 that could happen, and it was our job to factor that in.

3 Q. (BY MR. DILLMAN) And to protect the bank in
4 the event that that did happen?

5 MR. CANTOR: Objection.

6 A. Could you state the question?

7 Q. (BY MR. DILLMAN) And one of your purposes in
8 doing that analysis that we'll get into a little bit
9 more in detail down the road here was to help protect
10 the bank with respect to its involvement in this loan?

11 A. Yes.

12 Q. Indeed, that's what Corporate Debt Products is
13 all about, isn't it?

14 MR. CANTOR: Objection.

15 A. Correct.

16 Q. (BY MR. DILLMAN) Now, you're aware that in
17 September of 2009, Lehman filed for bankruptcy?

18 A. Yes.

19 Q. And that had a potential impact on the
20 Las Vegas facility because Lehman was the primary lender
21 under the retail facility, right?

22 A. Yes.

23 Q. That caused discussions to occur within the
24 bank?

25 A. Yes.

1 Q. You were involved in those discussions?

2 A. I had some involvement, but not very much, in

3 those discussions.

4 Q. Okay. You interfaced with Trimont -- strike

5 that.

6 Do you know who Trimont is?

7 A. I do.

8 Q. Who is Trimont?

9 A. My understanding is that Trimont is the

10 servicer or was the servicer for the retail facility

11 under the Fontainebleau Las Vegas.

12 Q. What does it mean to be a servicer?

13 MR. CANTOR: Objection. Go ahead.

14 A. Sometimes, if investors don't have as robust a

15 build-out of back office type facilities, they will hire

16 servicers to help execute, service their loans.

17 Q. (BY MR. DILLMAN) You understood that Trimont

18 was the servicer for the retail loan?

19 A. Yes.

20 Q. BofA was the -- held the equivalent position

21 or performed the equivalent functions with respect to

22 the resort loan, correct?

23 MR. CANTOR: Objection.

24 A. There is a lot of nuances and distinctions,

25 probably, between the two.

1 Q. (BY MR. DILLMAN) But the tasks that you
2 understood Trimont did for the retail facility, who did
3 those tasks on the -- on the resort side?

4 MR. CANTOR: Objection.

5 A. I'm not sure how the two tasks directly would
6 correlate, but my understanding was that -- again, that
7 Trimont was the servicer for the retail group lenders.

8 Q. (BY MR. DILLMAN) Who was the servicer for --
9 for the resort side, if there was one?

10 A. Well, Bank of America was the agent under the
11 senior credit facilities, so that was one type of role
12 that was provided.

13 Q. Was there any party other than BofA involved
14 in the disbursement of funds -- the aggregation and
15 disbursement of funds on the resort side?

16 A. I believe there was a trustee under the second
17 mortgage notes.

18 Q. Anybody else?

19 A. Not that I'm aware of.

20 Q. And by September of '09, you -- excuse me --
21 '08, you understood that the second -- second trustee
22 notes were -- had already been exhausted?

23 A. I believe that's the case.

24 MR. CANTOR: Objection.

25 Q. (BY MR. DILLMAN) Okay. So as of that time,

1 BofA was the only party involved in the process of
2 aggregating and disbursing funds on the resort side?

3 A. I believe that's correct.

4 Q. Did you deal with the Trimont folks at all?

5 A. I did not really. I may have spoken or been
6 on a phone call once or twice, but I did not deal with
7 them in a primary capacity.

8 Q. Did you ever -- do you know who the Trimont
9 folks were?

10 A. I believe his name was Mac Rafeedie.

11 Q. Towards the end of September you had an e-mail
12 to Mr. Rafeedie asking him about the -- about the funds
13 from the retail facility, right?

14 MR. CANTOR: And let the record reflect
15 that counsel has shown a document to the witness.

16 (Deposition Exhibit 474 marked.)

17 A. Yes.

18 Q. (BY MR. DILLMAN) And you're looking now at
19 what I've marked as Exhibit 474. That is indeed an
20 e-mail that you sent to Mr. Rafeedie?

21 A. It appears to be so.

22 Q. Was it typical for you to communicate with him
23 by e-mail or otherwise with respect to confirming
24 receipt of funds under the retail facility?

25 A. It was not typically me communicating with

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1 him.

2 Q. Why -- why, at the end of September, were you
3 communicating with Mr. Rafeedie?

4 A. I don't recall.

5 Q. The end of September was a little different
6 than -- than the preceding months that had -- for which
7 disbursements were made, wasn't it?

8 MR. CANTOR: Objection.

9 A. Around that --

10 MR. CANTOR: Go ahead.

11 A. Around that time is when the retail lenders
12 started to fund. So whenever you have a new process, it
13 is a little bit atypical at first.

14 Q. (BY MR. DILLMAN) Retail -- was this the first
15 month that the retail lenders had funded?

16 A. I don't recall.

17 Q. It was also a little different because there
18 was this question about whether Lehman was going to pay?

19 A. Probably, yes.

20 Q. Well, you know that at the end of September,
21 following Lehman's bankruptcy, one of the questions that
22 was being bandied about within BofA was, is Lehman going
23 to pay under the retail facility, right?

24 A. Yes.

25 Q. And if they didn't pay, that -- that was going

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1 to be a bad thing?

2 A. Yes.

3 Q. That would mean that the credit -- the resort

4 payments wouldn't be made, there would be no financing

5 that month for the project?

6 A. Correct.

7 Q. Because the one was dependent on the other?

8 A. Correct.

9 Q. You were attune to the issue?

10 A. Yes.

11 Q. And why were you requesting from Mr. Rafeedie,

12 if you recall, the wire reference number and the wire

13 amount?

14 A. I don't recall. I can -- I can tell you what

15 I think of it, sitting here today, but I don't recall

16 why.

17 Q. Sure. Sure.

18 MR. CANTOR: Don't guess. If you have an

19 understanding, he's entitled to that, but don't guess.

20 Q. (BY MR. DILLMAN) No, I'm not looking for your

21 guess, but I'm -- but I'm guessing that, while you may

22 not recall exactly, you got a pretty good understanding

23 based upon the fact that you were there at the time.

24 MR. CANTOR: If you do, you do.

25 A. Again, typically, I would not communicate with

1 that group. I don't know if -- I don't recall if
2 perhaps the Disbursement folks were out or not. So I
3 just don't recall.

4 Q. (BY MR. DILLMAN) You did know that one of the
5 possibilities was that Fontainebleau would be paying
6 Lehman's share of the September draw?

7 MR. CANTOR: Objection; lacks foundation.

8 A. Can you restate the question?

9 Q. (BY MR. DILLMAN) You did know that one of the
10 possibilities was that Fontainebleau Resorts would pay
11 Lehman's portion of the retail draw, correct?

12 A. I didn't know that that was a possibility. I
13 knew that it was something that was discussed whether it
14 would be a possibility or not.

15 Q. Discussed by whom?

16 A. By Mr. Susman, by, you know, the folks that he
17 got involved in other parts of the bank, and by counsel.

18 Q. And when you say "whether it would be a
19 possibility," what did you mean by that?

20 A. Well, when -- when there was a question of
21 whether or not Lehman would be able to fund, there were,
22 you know, things that were discussed to see if there
23 were alternatives to that.

24 Q. Were there things that were discussed as to
25 whether or not Fontainebleau's payment of the Lehman

1 share would violate any of the conditions to
2 disbursement?

3 A. I believe it was discussed as would it be a
4 possibility for the company to fund.

5 Q. In other words, would they have the ability,
6 under the documents, to fund without busting one of the
7 conditions?

8 A. Correct.

9 Q. Okay. You also -- we'll get into that in a
10 minute.

11 You also mentioned discussions about other
12 possibilities. What were you referring to there?

13 A. Well, just in general, if there is a problem,
14 we typically look at the contract and see if there are
15 any solutions that can be workable.

16 Q. Okay. So let's take those two sides. One was
17 did -- did Fontainebleau have the ability, under the
18 documents, to -- to pay for Lehman without busting
19 conditions, the other being other possibilities. Okay?

20 What discussions did you have with folks
21 within BofA concerning the ability of Fontainebleau to
22 pay, under the documents, without busting conditions?

23 MR. CANTOR: And in answering that
24 question, just be careful about not revealing
25 discussions where you asked for legal advice from

1 counsel.

2 A. Sure. I wasn't primarily involved in those
3 discussions. I was generally sort of told what the
4 progress was, but I was not really involved in those
5 discussions. Really Mr. Susman had those discussions
6 primarily with counsel and other parts of the bank.

7 Q. (BY MR. DILLMAN) And other parts of the bank?

8 A. Yes.

9 Q. Oh. I didn't know if you said "in" other
10 parts of the bank.

11 A. "And" other parts of the bank.

12 Q. What other parts of the bank?

13 A. I don't recall exactly, but probably
14 Syndications, you know, maybe Investment Banking, maybe
15 Risk.

16 Q. Give me names.

17 MR. CANTOR: Well, don't guess. I mean,
18 if you know that Mr. Susman spoke with these people, by
19 all means, tell him.

20 A. I don't recall.

21 Q. (BY MR. DILLMAN) How about -- how about Bret
22 Yunker -- Bret Yunker?

23 A. Perhaps.

24 Q. Okay. You don't -- were you in any
25 conversations with Mr. Yunker and anyone else on the

1 topic of whether or not Fontainebleau had the ability,
2 under the governing documents, to fund for Lehman
3 without busting conditions?

4 A. I don't remember being in any specific
5 discussions with Mr. Yunker about it. I could have
6 been, but I don't remember that.

7 Q. Was there a conclusion that you were informed
8 as to whether or not Fontainebleau could -- could fund
9 for Lehman?

10 A. Generally speaking, the conclusion, as I
11 understood it, was that receiving funds from the retail
12 lenders was a requirement to proceeding with the draw.

13 Q. And receipt of funds from someone else, for
14 example, Fontainebleau Resorts, wouldn't satisfy that
15 condition?

16 MR. CANTOR: Objection.

17 A. I'm not sure.

18 Q. (BY MR. DILLMAN) Okay. You don't recall any
19 conversations that went into that level of detail?

20 A. Again, I believe they were had, but I don't
21 recall the conversations that were in that level of
22 detail, no.

23 Q. You don't recall whether, following Lehman's
24 bankruptcy, it was an important fact for disbursement of
25 funds whether Fontainebleau Resorts paid on behalf of

1 Lehman? Is that --

2 MR. CANTOR: Objection. That's not what
3 he said.

4 Q. (BY MR. DILLMAN) Is that the testimony? I
5 want to make sure I understand.

6 A. No, it's not.

7 Q. Okay. You understood that that was an
8 important issue?

9 A. Yes.

10 Q. And you understood that there was -- there
11 were questions surrounding the appropriateness of
12 payment by Fontainebleau?

13 A. Yes.

14 Q. And you understood that the conclusion at the
15 bank was that if Fontainebleau paid, that that would be
16 a violation of one of the conditions to disbursement,
17 right?

18 MR. CANTOR: Objection.

19 A. That's not what I recall specifically.

20 Q. (BY MR. DILLMAN) What do you recall
21 specifically?

22 MR. CANTOR: Objection; asked and
23 answered.

24 A. As I -- as I already stated before, that it
25 was a requirement for the funds from the retail lenders

1 to be provided in order for the bank to disburse the
2 remainder of the funds.

3 Q. (BY MR. DILLMAN) Okay. But we're talking
4 names here, right, as opposed to categories. You knew
5 that Fontainebleau was certainly considering paying
6 Lehman's portion.

7 A. I did not know that.

8 Q. That was one of the options. I'm putting in
9 front of you Exhibit 204. This is a series of e-mails,
10 Mr. Bolio, that you are copied on. Do you recall them?

11 A. I'm reading. Okay. Your question?

12 Q. The question was, do you recall the document?

13 A. I don't recall this document, but I see it.

14 Q. You have no reason to believe that you didn't
15 receive it, right?

16 A. No.

17 Q. Middle of the second page, and I think I
18 identified this, but for the record this has previously
19 been marked as Exhibit 274 [sic]. Middle of the second
20 page, there is an e-mail from Mr. Susman to Mr. Yunker
21 and Mr. Howard and Mr. Varnell, copied to you. Do you
22 see that?

23 A. Yes.

24 Q. Mr. Susman was your boss?

25 A. Yes.

1 Q. Mr. Yunker was who?

2 A. Mr. Yunker was in the Investment Bank.

3 Q. Mr. Howard?

4 A. Mr. Howard was in Bank of America Securities,
5 in the Syndications group.

6 Q. And Mr. Varnell?

7 A. Mr. Varnell was in the Investment Bank as
8 well.

9 Q. Mr. Susman states that, "In my opinion, there
10 is still one issue that still needs to be resolved.
11 That is, do we as the Bank Agent make the unilateral
12 call to interpret the FB funding as Retail Agent funding
13 (or waive the condition if interpreted differently) or
14 do we seek Required Lender consent." Do you see that?

15 A. Yes.

16 Q. You understood when you -- strike that.

17 You understand that the "FB funding" here
18 refers to funding by Fontainebleau Resorts?

19 MR. CANTOR: Objection.

20 A. I don't know what Mr. Susman was thinking when
21 he wrote this.

22 Q. (BY MR. DILLMAN) Of course not. But when
23 you -- when you received it, you understood that the
24 "FB funding" meant and referred to funding of Lehman's
25 September share of the retail facility by Fontainebleau

1 Q. Does that seem right?

2 A. Yes.

3 Q. All right. You go down -- you say, just below
4 that, "CP for" -- and what was that? "LB"?

5 A. "LB."

6 Q. "To fund prior to bank." What does -- what
7 does "CP" mean there?

8 A. I believe that means condition precedent.

9 Q. Okay. And "LB"?

10 A. Probably Lehman Brothers.

11 Q. "Prior to Bank?" What does "Bank," capital B,
12 refer to there?

13 A. Probably the senior secured credit facilities.

14 Q. Okay. So you're asking here whether it's a
15 condition precedent for Lehman to fund in order for the
16 resort lenders to fund?

17 A. Yes.

18 Q. And ultimately you answered that question yes,
19 it is a condition precedent?

20 MR. CANTOR: Objection; asked and
21 answered. You can answer.

22 A. I believe what I answered is that what I
23 was -- my recollection, what I was told, is that it was
24 a condition precedent for the senior secured lenders to
25 fund for the retail facility lenders' money to have

1 arrived.

2 Q. (BY MR. DILLMAN) Okay. That was -- so far
3 that's what you've said your understanding was, just in
4 general, that you didn't get any more down into the
5 gears on that?

6 A. Correct.

7 Q. Okay. You then go on, "Could FB put this in
8 if LB whiffs?" The "FB" there is Fontainebleau?

9 A. Yes.

10 Q. And "LB" is Lehman Brothers?

11 A. Lehman Brothers, I believe so.

12 Q. And by "whiffs," you meant if Lehman doesn't
13 pay --

14 A. Yes.

15 Q. -- could they put -- could Fontainebleau put
16 this in?

17 A. Yes.

18 Q. You then say, "Approximately 75 million in
19 balance." What's -- was there any connection between
20 the question asked as to whether Fontainebleau could put
21 it in if Lehman whiffed and this "in balance" comment?

22 A. I don't recall this specific conversation.

23 Q. This -- do you believe that these notes
24 reflect a conversation that you had with someone or
25 someones versus just idle musings by -- by Brandon

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1 Bolio?

2 A. I really don't -- I really don't remember a
3 specific conversation.

4 Q. Was it typical for you to write down random
5 thoughts as opposed to simply memorializing events and
6 so on?

7 A. Well, I think, as you'd shown me before,
8 sometimes I would go through and take notes myself to
9 help educate myself on how the deal was supposed to
10 work.

11 Q. Right.

12 A. So this appears to be questions that were
13 being asked. I just don't recall the specific
14 conversation or the context.

15 Q. Okay. On the next page, it says, "25 million,
16 2 million Lehman," and then going off at an angle up
17 above, after "Lehman," it says, "Did not fund their
18 share," and then it continues, "so 23 million others."
19 Do you see that?

20 A. Yes.

21 Q. Do you know what that refers to?

22 A. I don't recall at all.

23 Q. Does it help you to recall that Lehman -- that
24 you understood that Lehman had not funded their share of
25 some portion of the retail loan?

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1 A. No, it does not. That doesn't refresh my
2 memory.

3 Q. Is there anything else that you can think of,
4 any explanation for those words in that conjunction,
5 that would be a reasonable interpretation of that?

6 MR. CANTOR: Objection.

7 A. You know, I recall conversations about -- or
8 being told that Lehman was funding other deals, but I'm
9 not -- I'm not sure if it was referring to something
10 else.

11 Q. (BY MR. DILLMAN) This says, "Did not fund
12 their share." So my question is, is there anything
13 that -- based on your knowledge and recollections, that
14 the words "2 million Lehman" with the notation above,
15 did not share their fund -- "Did not fund their share,"
16 any other reasonable interpretation of that other than
17 that you were aware that Lehman didn't fund their share
18 of the retail facility?

19 MR. CANTOR: Objection. Go ahead.

20 A. I really don't recall.

21 Q. (BY MR. DILLMAN) You don't have any other --
22 can't offer me any other interpretation, sitting here
23 today; is that right?

24 A. No. I already tried, but I really can't
25 recall any other interpretation.

1 A. Sitting here today?

2 Q. Yes, sir.

3 A. Probably.

4 Q. Probably. 11.2, I'll tell you, is the section

5 that deals with further assurances, in the disbursement

6 agreement. Are you familiar with that section?

7 A. Somewhat.

8 Q. It provided the opportunity for Bank of

9 America to seek further assurances from the borrower on

10 certain issues and topics, right?

11 A. I don't recall that specifically, but it

12 could.

13 Q. But you recall that there was such a provision

14 in the disbursement agreement?

15 A. I don't recall.

16 Q. Do you recall that, at the end of September,

17 BofA sent a letter to -- excuse me -- an e-mail to

18 Mr. Freeman seeking further assurances under

19 Section 11.2 of the disbursement agreement?

20 A. I recall that we asked for the company to rep

21 again, and it was likely under 11.2, further assurances.

22 Q. And how did you come to that understanding

23 that you had requested the company to rep again?

24 A. I didn't come to the understanding or the

25 decision, you know. It was -- I understand that it

1 was -- the decision was made based on conversations that
2 were had with -- among Bank of America and counsel.

3 Q. My question was, how did you come to the
4 understanding, not how did the -- how was the decision
5 reached?

6 A. How did I come to the understanding?

7 Q. How did you come to the understanding that
8 there was a request for further assurances by BofA to
9 the borrower?

10 A. I was refreshed on Monday. My memory was
11 refreshed, talking to my counsel.

12 Q. Okay. I don't want to hear what you talked
13 about with your counsel. But did you see documents that
14 helped refresh your recollection that that had occurred,
15 an e-mail?

16 A. I don't think I saw an e-mail, but it was
17 generally discussed.

18 Q. Okay. And does -- do your notes on the bottom
19 of 436 help you to recall that the issues -- at least
20 among the issues of concern for Bank of America with
21 respect to the further assurances were Sections 3.3.1 of
22 the disbursement agreement and 3.3.23 of the
23 disbursement agreement?

24 A. I don't recall that specifically, once again,
25 but it would seem to make sense.

1 Q. And did you -- with this context, the -- the
2 excursion that we took here to discuss what these
3 various sections were -- 3.3.1, 3.3.23 -- further your
4 recollection that there was a further assurances e-mail
5 sent out, does any of that help you to recall a
6 conversation that you participated in with Mr. Sonny
7 BenMoshé, Mr. Freeman, and Ms. Thier on the topic of
8 further assurances?

9 A. It does not.

10 Q. Exhibit 241 is an e-mail from Mr. Susman to a
11 host of people, copied to yourself, and it forwards an
12 e-mail from Ms. Brown to yourself, saying, "The wire for
13 the Lehman portion has arrived. Please advise." Do you
14 see that?

15 A. Yes.

16 Q. You received this e-mail?

17 A. Yes. I don't remember receiving it, but it
18 appears that I did.

19 Q. What advice was Ms. Brown looking for, if you
20 know?

21 A. I believe she was -- looks like she was
22 telling us that the retail funds had arrived and please
23 advise. Again, I don't remember specifically receiving
24 it, but probably means are we okay to, you know,
25 disburse.

1 Q. She was looking for your signoff on
2 disbursement?

3 A. Yes.

4 Q. And did you give her the signoff?

5 A. I don't recall.

6 Q. Do you have any reason to believe you didn't?

7 A. No.

8 Q. Either you or Mr. Susman did, right?

9 A. I believe so.

10 Q. Was this a particularly difficult process in
11 terms of determining whether or not to fund at the end
12 of September?

13 MR. CANTOR: Objection.

14 A. In what way?

15 Q. (BY MR. DILLMAN) Less routine than most.

16 A. Yes.

17 Q. Turbulent?

18 MR. CANTOR: Objection.

19 A. What's the question?

20 Q. (BY MR. DILLMAN) Would you talk -- would
21 you -- would you characterize the events at this time
22 with respect to the Fontainebleau funding as turbulent?

23 A. I wouldn't say turbulent.

24 Q. Actually, you did, which is one of the reasons
25 why I asked you. But you knew that, right?

1 was more the general financial markets being very
2 turbulent.

3 Q. (BY MR. DILLMAN) What did that have to do
4 with Fontainebleau Las Vegas funding other than the
5 Lehman issue?

6 MR. CANTOR: Objection.

7 A. Well, Lehman filed for bankruptcy.

8 Q. (BY MR. DILLMAN) Yeah. Yeah. And so the
9 turbulent times that you're talking about here were
10 the -- were the times related -- at least to this
11 facility, the times related to the Lehman bankruptcy
12 and, you know, the -- the logistical issues, if nothing
13 else, that that caused for the funding of the
14 disbursement; is that right?

15 MR. CANTOR: Objection; asked and
16 answered.

17 A. Yes. Among, as well, the new process being
18 involved, et cetera.

19 Q. (BY MR. DILLMAN) I previously showed you the
20 September 30 letter, Exhibit 76, from Mr. Naval.

21 MR. CANTOR: Do you want him to pull that
22 out?

23 Q. (BY MR. DILLMAN) No, no, no. You don't --
24 you don't need to pull that out. Sorry.

25 You're aware that Fontainebleau did not hold a

1 lender meeting as Mr. Naval requested in his letter?

2 A. I believe that's correct.

3 Q. Instead, they sent a memo that was posted to
4 Intralinks?

5 A. Yes. I believe that's correct.

6 (Deposition Exhibit 477 marked.)

7 Q. And that memo -- well, and -- and this packet
8 of documents, which I'll mark as Exhibit 477, was one
9 that was in your files, correct?

10 A. It appears to be.

11 Q. Is that your received check stamp up top
12 there?

13 A. Yes.

14 Q. So if we go from back to front, the last
15 letter is a September 22nd, 2008, letter from Mr. Naval
16 to Mr. Freeman seeking to schedule a telephone
17 conference, and you've got a sent check up on that,
18 right?

19 A. Yes.

20 Q. The next letter is the letter that we
21 previously looked at, September 30, from Mr. Naval to
22 Mr. Freeman, again seeking a -- among other things,
23 seeking a lender conference call, correct?

24 A. Yes.

25 Q. And down below there is a little star near

1 Item Number 2. Is that your star?

2 A. Yes.

3 Q. You were starring this because this was a
4 particularly important issue within the context of this
5 letter?

6 A. I don't recall why I starred it, but, you
7 know, that would appear that it's highlighted.

8 Q. And the issue is, did Lehman fund its portion
9 of the requested 3.789 million of shared costs funded
10 last Friday or was this made up from other sources? If
11 Lehman did not fund its portion, what were the other
12 sources? Correct?

13 A. Yes.

14 Q. The October 7 memo is then -- is the top
15 document here, which is Fontainebleau's response to
16 Mr. Naval's letter, as you understood it?

17 A. Yes.

18 Q. Did Mr. Freeman, in his memo, answer the
19 question that you had starred down below concerning who
20 funded Lehman's portion of the September retail draw?

21 A. Yes. It appears to have answered that
22 question.

23 Q. And where is that?

24 A. Second paragraph.

25 Q. Yes, sir. Where is that?

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1 A. You want me to read it to you?

2 Q. Yeah, the portion that you're referring to.

3 A. Sure. It says, "In August and September, the
4 retail portion of such shared costs was 5 million and
5 3.8 million, respectively, all of which was funded."

6 Q. Okay. And Mr. Naval's letter to Mr. Freeman
7 doesn't ask whether it was funded, does it? It asks who
8 funded?

9 A. It does ask who funded.

10 Q. And, indeed, Mr. Naval states, in effect, that
11 the amount was funded last Friday. You see that?

12 A. Yes.

13 Q. And you knew that the entire amount was
14 funded, right?

15 A. Yes.

16 Q. The folks at Bank of America, including
17 Mr. Naval, knew that it was funded?

18 A. Yes.

19 Q. So in terms of the question Mr. Naval was
20 asking, who funded it, was that question asked by --
21 answered by Mr. Freeman in his --

22 MR. CANTOR: Objection; asked and
23 answered.

24 Q. -- memo?

25 A. I believe the question was answered, again, in

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1 the -- in the sentence that I read before.

2 Q. That sentence tells you what you need to know
3 about who funded?

4 A. Probably not as much detail as would have
5 been, you know, nice, but I think that, you know,
6 answers the question.

7 Q. Yeah, me, too.

8 The -- did -- did you make any efforts after
9 this to -- to get more detail on that answer?

10 A. I really don't recall.

11 Q. Were you ever advised by anyone at Bank of
12 America -- strike that.

13 Were you ever advised by Mr. Freeman that
14 there were limits to what he could discuss concerning
15 the Lehman September draw, upon the advice of his
16 counsel?

17 A. I don't recall him stating that to me
18 specifically, but he could have.

19 Q. Do you recall that you learned that
20 Mr. Freeman had said that?

21 A. I don't recall that specific concept, no.

22 Q. Okay. Do you recall, in general, the concept
23 that Mr. Freeman was limited in what he was going to
24 tell Bank of America based on advice he had received
25 from his counsel?

1 A. I don't recall it today, sitting here. There
2 might be an e-mail about it, but I don't recall that.

3 Q. Okay.

4 A. I recall that, you know, Mr. Susman,
5 Mr. Freeman were in conversations about the retail
6 funding --

7 Q. Yes.

8 A. -- because we didn't have -- the bank didn't
9 have direct communications with retail lenders other
10 than through, generally, Trimont.

11 Q. But you don't recall hearing from either
12 Mr. Freeman or Mr. Susman or anyone else, for that
13 matter; that Mr. Freeman had informed Bank of America
14 that there were things he couldn't tell them about the
15 Lehman facility based upon the advice of his counsel?

16 A. I don't recall that today, no.

17 (Deposition Exhibit 478 marked.)

18 Q. 478, an e-mail from Ms. Brown to yourself.
19 She passes along an e-mail to you from Kathy Hernandez
20 at Fontainebleau, and she asks, "How do I answer her?
21 Is Jeff OK?"

22 You received this e-mail?

23 A. Yes.

24 Q. You understand from the context that Ms. Brown
25 was asking you whether it was okay to fund the

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1 disbursements?

2 A. That was probably what she was asking, yes.

3 Q. And -- and, again, this is now the second one
4 we've seen. Was it typical for Ms. Brown to check with
5 either you or Mr. Susman to make sure that it was okay
6 to disburse funds?

7 A. Yes.

8 Q. Okay. At some point you became aware that
9 Ullico was funding some or all of Lehman's share of the
10 retail facility, did you not?

11 A. Yes.

12 (Deposition Exhibit 479 marked.)

13 Q. I've put in front of you what we'll mark as
14 Exhibit 479. It's an e-mail that you received?

15 A. Yes.

16 Q. And it says, "Per Trimont this morning, it
17 expects Ullico to fund the Lehman piece."

18 Did you make any inquiries concerning the
19 terms under which Ullico had -- strike that.

20 Did you make any inquiries to confirm that
21 Ullico had, in fact, funded some or all of Lehman's
22 share of the retail advances?

23 A. I didn't make any inquiries directly. I'm not
24 sure if the bank made inquiries that I wasn't aware of.

25 Q. Did you come to understand at some point that

1 indeed Ullico was funding some or all of Lehman's
2 portion of retail advances for some periods?

3 THE REPORTER: I'm sorry.

4 Q. That Lehman was funding some or all -- excuse
5 me -- that Ullico was funding some or all of the Lehman
6 advances for some periods?

7 A. I understood that Ullico -- I came to
8 understand that Ullico was one of the retail lenders and
9 that they were stepping up to fund some deficits under
10 the retail advances.

11 Q. Deficits created by Lehman's failure to fund?

12 A. Yes.

13 Q. Did you ever come to any understanding
14 regarding the -- whether or not Ullico had stepped into
15 Lehman's shoes in terms of its funding commitments?

16 A. When you say "step into their shoes," you mean
17 just fund on their behalf?

18 Q. Taking over their commitment.

19 A. I don't recall that specifically, but, again,
20 I do recall that Ullico had stepped up and was funding
21 more than their original share.

22 Q. Did you at any point come to understand that
23 Ullico had taken over Lehman's obligations under the
24 retail facility, had stepped into Lehman's shoes?

25 MR. CANTOR: Objection. Go ahead.

1 A. That they had legally stepped in, assumed --

2 Q. (BY MR. DILLMAN) As opposed to a

3 month-to-month, one-off, might pay, might not pay, they

4 had assumed Lehman's obligations.

5 A. I don't recall that.

6 Q. You don't recall --

7 A. It's possible.

8 Q. -- ever knowing that, do you?

9 A. Again, I don't recall that specifically, but

10 it's possible that they did.

11 Q. Yes. Indeed, anything's possible. My

12 question really is, is there anything that you recall,

13 sitting here, that would lead you to conclude that that

14 was the case?

15 MR. CANTOR: Objection; asked and

16 answered.

17 A. Once again, I -- you know, I do recall that

18 Ullico had stepped up funding more than their original

19 share.

20 Q. (BY MR. DILLMAN) Beyond that, you weren't

21 aware of what the terms might or might not have been

22 between Ullico and Lehman or Ullico and any other party?

23 A. I don't recall.

24 (Deposition Exhibit 480 marked.)

25 Q. Exhibit 480, an e-mail from Jeanne Brown that

1 is copied to you. Did you receive the e-mail?

2 A. Yes. Looks like I was copied.

3 Q. And you can look through it, but it appears
4 that Ms. Brown is -- has attached an e-mail to herself,
5 which I assume is sort of just -- is a draft of what she
6 would -- she's intending to send if she gets signoff.

7 Does that --

8 MR. CANTOR: Objection.

9 Q. -- seem to be correct to you?

10 A. Yeah, I don't recall what Jeanne was thinking
11 when she wrote this, but it appears that she attached an
12 e-mail that she was asking to hold off on sending until
13 we gave the go-ahead.

14 Q. And the e-mail was forwarding to -- excuse
15 me -- to Trimont the advance confirmation notice from
16 Fontainebleau Las Vegas for January, right?

17 A. Yes.

18 Q. And the advance confirmation notice is
19 attached to her e-mail, right?

20 A. Yes, it appears to be attached. It's attached
21 in this set of papers. So --

22 Q. Well, and this was produced as a single
23 document by -- by Bank of America, so I'm assuming that
24 this is indeed the attachment that went with the e-mail,
25 but I only have the production to go on.

1 The last page is dated January 13, 2009.

2 It's -- it is the IVI Construction's advance
3 certificate. Do you see that?

4 A. Yes.

5 Q. And while Mr. -- strike that.

6 Ms. Brown is writing her e-mail to you on
7 January 14th, the next day. Do you see that? Her
8 e-mail to you which is the --

9 A. Yes.

10 Q. -- the top page -- I guess it's not to you.
11 It is copied to you.

12 With that background, I want you to help me --
13 help me out, work through this. It says, "Brandon has
14 requested that we hold off on sending the request to
15 Trimont/Lehman until either he or Jeff Susman gives us
16 the go ahead."

17 The "Brandon" is you?

18 A. Yes.

19 Q. Do you recall why you were requesting
20 Ms. Brown to hold off sending the January advance
21 certificate to Trimont?

22 A. I don't.

23 MR. CANTOR: By the way, let me just note
24 an objection to the assumption that you put on the
25 record previously, Kirk.

1 MR. DILLMAN: Yes.

2 MR. CANTOR: I don't know whether you're
3 right or you're wrong. I will only note that neither
4 e-mail has the sort of typical attachment reference that
5 one sees in an e-mail when there is something attached
6 to it. So this may or may not have been attached. I
7 just don't know.

8 MR. DILLMAN: I am informed and believe,
9 based upon the fact that it was a single document, that
10 it was. It may not be. It may not be.

11 MR. CANTOR: Yeah, and the fact it's a
12 single document could have been a decision made by a
13 paralegal at O'Melveny who had no -- you know, who was
14 having a good day with the stapler.

15 MR. DILLMAN: Right. Right. And -- and
16 indeed, as I told you, my information about these being
17 part of the same document is simply the manner in which
18 it was produced by BofA.

19 Q. (BY MR. DILLMAN) The content, however, would
20 seem to coincide, doesn't it, whether it was actually
21 attached or not? The e-mail is talking about the
22 January advance and notice to Trimont, and Ms. Brown's
23 follow-up e-mail also addresses that same topic?

24 A. Yes.

25 Q. All right. So whether they were part of the

1 same document or not, does any of these -- do any of
2 these materials help you to refresh your recollection as
3 to the issue, in mid-January of '09, that was causing
4 you to request Ms. Brown to hold off on sending the
5 advance certificate for that month to Trimont?

6 MR. CANTOR: Objection; lacks foundation.

7 A. It doesn't.

8 THE VIDEOGRAPHER: I need to change the
9 tape. We're off record, 11:22 a.m.

10 (Recess from 11:22 a.m. to 11:27 a.m.)

11 THE VIDEOGRAPHER: This is the start of
12 Tape 3. Back on the record at 11:27 a.m.

13 (Deposition Exhibit 481 marked.)

14 Q. (BY MR. DILLMAN) Mr. Bolio, I'm putting in
15 front of you Exhibit 481. 481 is an e-mail from
16 Ms. Brown to yourself. Any reason to believe you didn't
17 receive it?

18 A. No.

19 Q. It's also to Mr. Susman. She is forwarding an
20 e-mail from Ms. -- excuse me -- from Mr. Rafeedie, which
21 reads, "I touched base with Ullico and the wire has been
22 authorized. As soon as it is received, we'll follow up
23 with Sumitomo. Will keep you posted."

24 You understood, in January of 2009, based upon
25 this e-mail, that Ullico was funding -- strike that.

1 Did you understand, in January of 2009, that

2 Ullico was funding on behalf of Lehman?

3 A. Again, I don't recall that specifically, but

4 my understanding was, again, that Ullico had stepped up

5 and was funding more of their share. It was -- you

6 know, at this point I don't remember if it was clear to

7 me exactly who was funding, but I did know that Ullico

8 was stepping up.

9 Q. Let me try and parse that out. You knew that

10 Ullico was paying more than its share?

11 A. Yes.

12 Q. Did you have any reason to believe it was

13 paying -- that that was something other than paying some

14 or all of Lehman's share?

15 A. No.

16 Q. Okay.

17 A. I just don't -- I just don't remember that

18 that was -- they were paying all of it. You asked if

19 they were paying all of it. I don't remember.

20 Q. Okay. If we -- if we change that to some or

21 all?

22 A. That works.

23 Q. Okay. So in December you were aware that

24 Ullico was paying some or all of Lehman's share?

25 A. Yes.

1 Q. In January you were aware that -- aware that
2 Ullico was paying some or all of Lehman's share?

3 A. Wait. I'm sorry. You said, before, in
4 December?

5 Q. December. We already looked at that e-mail.

6 A. Okay. Okay.

7 Q. Right?

8 A. Yes.

9 Q. Okay. So in January you were aware that
10 Lehman was -- that Ullico was paying some or all of
11 Ullico's share?

12 A. Yes.

13 Q. Did -- did you have a different understanding
14 at any point up until the time that BofA terminated the
15 revolver facility, that is, different understanding than
16 that Ullico was paying some or all of Lehman's share?

17 A. I don't recall.

18 Q. At some point in time did you -- do you recall
19 having concluded that Ullico was no longer paying some
20 or all of Lehman's share?

21 A. I don't.

22 (Deposition Exhibit 482 marked.)

23 Q. Exhibit 482, e-mail from Ms. Brown to
24 yourself. This is toward the end of February,
25 specifically February 25th. Ms. Brown forwards to you a

1 series of e-mails, the bottom of which, on the first
2 page, reflects that Ullico funded the Lehman portion
3 with a simultaneous wire as the first one. Do you see
4 that?

5 A. Yes.

6 Q. You understood that -- in February of '09,
7 that Lehman was -- excuse me -- that Ullico was funding
8 the Lehman portion, not just some but all of the Lehman
9 portion, correct?

10 MR. CANTOR: Objection.

11 A. I don't recall reading down this e-mail at the
12 time. I think the punch line was that all the money was
13 in and they were getting the wire out.

14 Q. (BY MR. DILLMAN) You had access to the
15 information?

16 A. I did.

17 Q. Yeah. Did you -- you didn't have an
18 understanding one way or the other, as far as you can
19 recall?

20 A. Again, I recall the important thing being that
21 all the retail money had arrived, and that's what Jeanne
22 was in charge of coordinating with Trimont.

23 Q. And her question to you, "What next?" What
24 did that mean to you?

25 A. Probably meant if -- asking if the draw was

1 going to take place as planned.

2 Q. Again, that was a decision that you and/or
3 Mr. Susman made?

4 A. Yes.

5 Q. And at this time do you know whether
6 Mr. Susman is still at the bank, September 25 -- excuse
7 me -- February 25th?

8 A. I don't recall the exact date that he left the
9 bank. It was probably -- I believe it was in February.
10 I'm not sure if it was before or after this time.

11 Q. All right. The fact that he's not copied on
12 any of these e-mails, does that suggest to you that he
13 was no longer at the bank as of -- at least as of this
14 date?

15 A. It doesn't -- it doesn't, necessarily, because
16 sometimes Jeanne would just send me e-mails intending
17 them for both myself and my boss, whether it was Jeff
18 or -- or Brian.

19 Q. After Mr. Susman left, other than your
20 reporting requirements, did your involvement with the
21 Fontainebleau facility change?

22 A. A little bit.

23 Q. How so?

24 A. Mostly in getting up to speed, Brian Corum and
25 some partners that we had involved at the time as well,

1 Special Assets group.

2 Q. Partners? Do you mean other people in the
3 bank?

4 A. Yes, other people in the bank, in the Special
5 Assets group.

6 Q. Okay. Mr. -- Mr. Yu?

7 A. Correct.

8 Q. Others in Special Assets?

9 A. Mr. Yu was the primary. I believe, when we
10 first got Special Assets involved, we had recommended
11 that it go to Real Estate Special Assets, and I believe
12 there was another gentleman that, you know, looked at a
13 few things. But Mr. Yu, at this time, I believe, was
14 involved.

15 Q. What -- what Special Asset group was he a part
16 of?

17 A. Mr. Yu?

18 Q. Yes.

19 A. Bank of America Special Assets.

20 Q. I'm sorry. I took from your answer that when
21 you originally asked for Special Assets group to get
22 involved, you asked for the Real Estate guy in Special
23 Assets.

24 A. My -- you know, again, I didn't --

25 Q. Was that what you intended to convey?

1 A. Yes. Yes.

2 Q. Okay. Mr. Yu was not a Real Estate Special

3 Assets guy; is that right?

4 A. I don't know if he was or wasn't, but I

5 believe that the head of the Real Estate Special Assets

6 group was named Joe Fuszard, I believe, and he was the

7 first person that we had reached out to.

8 Q. Okay. So whether Mr. Yu was in that group or

9 not, ultimately he transitioned to be your primary

10 contact at Special Assets?

11 A. Correct. It was a staffing issue as we worked

12 through who was being staffed on it from Special Assets.

13 Q. And this was a recommendation from CDP that

14 Special Asset groups get involved?

15 A. Yes.

16 Q. As part of the -- was it part of a CAM review

17 process, or did it precede the CAM process for the year

18 2009?

19 A. Typically, actions are -- coincide with CAM

20 processes because that's when we -- it forces us to take

21 second looks and deep dives into things, but -- so I

22 think it was in conjunction with a CAM process. I don't

23 recall specifically if we had started it prior to that,

24 but it probably would have been documented and evidenced

25 by a CAM.

1 Q. Do you recall whether Mr. -- whether you had
2 concluded -- and by "you" I mean the CDP -- had
3 concluded, prior to Mr. Susman's departure, that Special
4 Assets should get involved?

5 A. I believe that we had recommended Special
6 Assets get involved prior to Mr. Susman's departure,
7 yes.

8 Q. And what -- I take it from documents that I've
9 seen that there are various levels of involvement by
10 Special Assets.

11 A. Correct.

12 Q. What are the levels?

13 A. There's typically three levels: SAG -- stands
14 for Special Assets -- Advisory, SAG Hybrid, and SAG
15 Direct.

16 Q. Describe for me each of those levels.

17 A. SAG Advisory is where CDP and the risk
18 organization that CDP works with has decision-making
19 authority. SAG Hybrid is where SAG has decision-making
20 authority but CDP is still on the account to help with
21 information, background, those kind of things. And SAG
22 Direct is where CDP no longer has involvement and SAG
23 has all of the interactions exclusively.

24 Q. What is the risk organization that you just
25 referred to?

1 A. Yes.

2 Q. Okay. And that it -- the FDIC subsequently
3 repudiated its obligations, "its" being First National
4 Bank of Nevada's obligations under the credit agreement?

5 A. Yes.

6 Q. And this letter memorializes that?

7 A. Yes.

8 Q. What steps, if any, did BofA take with respect
9 to future disbursements as a result of the repudiation
10 of First National Bank's commitments?

11 A. I believe what we did was take out First
12 National Bank's commitments from the in-balance test.

13 Q. Okay. Anything else?

14 A. That's all I'm remembering at this point.

15 Q. Any determination as to whether or not the
16 repudiation of First National Bank's commitment
17 constituted a default or an event of default under any
18 of the pertinent credit agreements?

19 A. I'm sorry. Could you restate that question?

20 Q. I can have it read back. How's that?

21 A. Okay.

22 (Requested text was read.)

23 A. I don't recall if a determination was made
24 that it constituted an event of default.

25 Q. How about a default?

1 A. Or a default.

2 Q. Okay. Were you involved in any conversations
3 on that topic?

4 A. I don't recall the specific conversations, but
5 I remember the issue.

6 Q. What do you remember about it?

7 A. Just that First National Bank of -- I'm
8 sorry -- First National Bank of Nevada had been taken
9 into FDIC receivership and that they were, you know, as
10 a result, no longer able to fulfill their requirements
11 under the loan documents and were being taken out of the
12 in-balance test.

13 Q. Okay. I thought you were suggesting that you
14 recall conversations about whether it constituted a
15 default or event of default.

16 A. I don't remember specific conversations about
17 that, no.

18 Q. Okay. And do you recall whether BofA did
19 anything other than to take the Bank of Nevada funds out
20 of the in-balance test with respect to this repudiation?

21 A. I don't recall anything else.

22 Q. Was that a decision by the CDP group to take
23 the amounts out of the in-balance test?

24 A. I think the decision was made collectively
25 among CDP and -- and counsel.

1 Q. Okay. Other than counsel, were there any
2 other groups involved at the bank in that decision
3 process?

4 A. Agency was probably involved in the process,
5 but I don't recall specifically which groups were or
6 weren't involved.

7 Q. Agency, Mr. Naval?

8 A. Yes.

9 Q. Was involved in the decision to take Bank of
10 Nevada out of the in-balance test?

11 A. He was involved, I believe, in the
12 conversations about it because it impacts, you know,
13 communications with lenders. He's responsible for
14 communicating with lenders, those kind of things.

15 Q. So he would be involved to the extent that
16 there were communications that flowed from the decision?

17 A. I believe that's true.

18 Q. And he wasn't involved in the decision?

19 A. I don't think he made the decision, no.

20 Q. Was not involved in the decision other than
21 to -- as it might have to be communicated to others?

22 A. I don't think so, but I don't recall
23 specifically.

24 Q. Okay. Anybody at Disbursement, in Ms. Brown's
25 group, involved in the decision?

1 A. I just don't remember.

2 Q. You don't recall any involvement at this
3 point, do you?

4 MR. CANTOR: Objection.

5 A. Was the question, do I recall any involvement
6 myself?

7 Q. (BY MR. DILLMAN) No. By her -- by her group.

8 A. I don't recall any involvement by her group.
9 That's correct.

10 (Deposition Exhibit 487 marked.)

11 Q. I'm putting in front of you Exhibit 487, an
12 e-mail from you to Ryan Falconer. We already discussed
13 Mr. Falconer in an earlier e-mail, did we not?

14 A. Yes.

15 Q. He's with Z Capital? Mr. Falconer is with
16 Z Capital?

17 A. Yes.

18 Q. You had a conversation with him?

19 A. Yes.

20 Q. Mr. Naval memorialized that in the letter
21 attached to your e-mail?

22 A. Yes.

23 Q. Mr. Naval -- does the e-mail accurately
24 reflect your conversation -- prior conversation with
25 Mr. Falconer?

1 A. I don't remember this conversation
2 specifically, but I assume that the letter does
3 characterize what our conversation was.

4 Q. You recall that Z Capital was one of a number
5 of term lenders who did not fund their term lender
6 commitments in March of 2009?

7 A. I recall that after having spoken with my
8 counsel on Monday, but I hadn't recalled that prior to
9 that.

10 Q. Okay. As of Monday, when you talked or saw or
11 did whatever you did, you then recalled that that had
12 happened?

13 A. Yes.

14 Q. And that Z Capital was one of several?

15 A. Yes.

16 Q. When did Z Capital -- strike that.

17 Did Z Capital pay their term loan obligation
18 for -- prior to March 25, 2009?

19 A. I don't recall.

20 Q. How about ever? Did they ever?

21 MR. CANTOR: I'm sorry. Are you
22 referring specifically to the March portion or --

23 MR. DILLMAN: Let me make that clear.

24 Thanks.

25 Q. (BY MR. DILLMAN) In your letter -- in

1 Mr. Naval's letter, he is confirming a conversation that
2 you had with Mr. Falconer, during which Mr. Falconer
3 told you that Z Capital was not able to fund their delay
4 draw term loan commitment that month, correct?

5 A. Yes.

6 Q. Do you know whether Z Capital ever paid the
7 delay draw term loan requests referenced in Mr. Naval's
8 letter?

9 A. I don't. I don't recall.

10 Q. Did you have any conversations with
11 Mr. Falconer regarding whether Z Capital intended to pay
12 at some point in the future or whether they were simply
13 refusing to pay altogether?

14 A. I don't recall specific conversations after
15 this conversation, but -- yeah.

16 Q. Yeah, what?

17 A. I just --

18 MR. CANTOR: Objection.

19 A. You know, I don't remember specific
20 conversations after this conversation.

21 Q. (BY MR. DILLMAN) Okay. All right. And you
22 don't know, sitting here, whether Z Capital ever paid?

23 A. I don't.

24 Q. Following your conversation with Mr. Falconer,
25 did you have discussions with others at B -- at BofA on

1 the issue of how does this impact, if at all, our
2 disbursements in March?

3 A. Yes.

4 Q. Who did you have those discussions with?

5 A. Again, I don't remember the specific
6 discussions. I would have, you know -- I would have --
7 well, looks like I copied Brian, Ron, Bill Scott, and
8 Henry Yu. So I think the conversations would have been
9 with those parties. I don't remember the specific
10 conversation, though.

11 Q. Brian -- Brian Corum is the person to whom you
12 reported at the time?

13 A. Correct.

14 Q. Mr. Naval is the author of the letter?

15 A. Correct.

16 Q. Memorialized your conversation?

17 A. Yes.

18 Q. Mr. Yu is SAG?

19 A. Yes.

20 Q. And Mr. Scott was -- was outside counsel for
21 the bank?

22 A. Yes.

23 Q. Okay. Anybody else who you could put in the
24 group of people that you would or may have discussed the
25 impact of Z Capital's failure to fund the disbursement?

1 MR. CANTOR: Objection.

2 A. Again, I don't recall, you know, specific
3 conversations after this.

4 Q. (BY MR. DILLMAN) Okay. But is there anyone
5 that you would put, as I said, in the group of people
6 that you might have had such conversations with --

7 MR. CANTOR: Objection.

8 Q. -- other than the people that were listed on
9 that e-mail?

10 A. It looks like at the time I thought to include
11 the people listed on this e-mail.

12 Q. Yeah. I got that. My question is, is there
13 anybody else that you would put in the group of people
14 that you may have had follow-up discussions with on the
15 topic of whether Z Capital's failure to fund in March
16 had any impact on the obligation of BofA to disburse
17 proceeds in March?

18 MR. CANTOR: Objection.

19 A. I can't think of anyone else.

20 (Deposition Exhibit 488 marked.)

21 Q. (BY MR. DILLMAN) I'm placing in front of you
22 Exhibit 488. This is an e-mail from Mr. Falconer that
23 appears to be in response to your -- excuse me -- to
24 Mr. Ronaldo -- Mr. Naval's letter to him in the previous
25 e-mail; is that correct?

1 MR. CANTOR: Objection.

2 A. Would you repeat the question for me?

3 Q. (BY MR. DILLMAN) Yes. Is it the case that

4 Exhibit 488 is Mr. Falconer's response to you to the

5 letter that Mr. Naval sent him that was attached to

6 Exhibit 487?

7 A. Yes.

8 Q. Mr. Brandon -- excuse me. Mr. Falconer says,

9 "To clarify, Z Capital Finance, LLC, is not funding the

10 requested Delay Draw Term Loan borrowing for

11 Fontainebleau Las Vegas due to an inability to fund the

12 request. We are expressing no opinion at this time on

13 whether conditions to funding were met." Do you see

14 that?

15 A. Yes.

16 Q. Did Mr. -- was it important for your purposes

17 to determine the reason why Z Capital was not -- was not

18 funding?

19 MR. CANTOR: Objection. You can answer.

20 A. I think it's important to determine the

21 reason. Yes, I do.

22 Q. (BY MR. DILLMAN) Why is that?

23 A. Well, for example, if -- with the case of

24 First National Bank of Nevada, if it was in receivership

25 by the FDIC and had been repudiated, then that's, you

1 know, a reason that we would need to know.

2 Q. Okay. So same thing with Z Capital? It
3 was -- you wanted to know the reason why they weren't
4 funding?

5 A. Yeah. It wasn't -- it wasn't the same
6 thing -- the same situation with Z Capital that First --
7 than First National Bank of Nevada, but it was important
8 to understand if they were not funding because they
9 didn't want to fund or because they had an inability to
10 fund at the time.

11 Q. And why was that important?

12 A. Well, I think it, you know, speaks to if they
13 were making the decision not to fund because they didn't
14 want to and they disagree with -- with a failure to
15 satisfy conditions or if they just, you know, couldn't
16 fund the request at the time.

17 Q. Why? Why was that important?

18 A. I think it was important to know what their
19 stance was.

20 Q. Why? We keep getting back to why was it
21 important? Why was that distinction important in
22 your -- in your activities with respect to the
23 Fontainebleau Las Vegas facility?

24 MR. CANTOR: Objection; asked and
25 answered.

1 MR. DILLMAN: It's been asked a couple
2 times.

3 MR. CANTOR: It's been answered a couple
4 times.

5 A. I mean, again, it was important to understand
6 their reasoning. I don't recall exactly why, if there
7 was a legal implication to that.

8 Q. (BY MR. DILLMAN) Okay.

9 A. But we wanted to understand their reasoning,
10 if they just didn't want to fund because they didn't
11 agree that the conditions had been met or if they
12 weren't funding at this time because of an inability to
13 fund.

14 Q. Or simply choosing not to fund?

15 A. Versus simply choosing not to fund, correct.

16 Q. Okay. And if they were -- if they were not
17 funding because of an inability to fund, what
18 consequences did that have, if any, different from their
19 funding because -- their failing to fund because they
20 just didn't want to, they didn't feel like it this
21 morning, or because they felt that the conditions hadn't
22 been met?

23 A. I don't recall today. I'm sure we, you know,
24 talked about it and looked at the documents.

25 Q. Is it your recollection that there was a

1 difference, that it had some difference with respect to
2 how, for instance, disbursements were handled?

3 A. No, not that I recall right now.

4 Q. And with whom were you having these
5 conversations? In all likelihood, the same group that
6 you previously identified --

7 A. Yes.

8 Q. -- or some subset thereof?

9 A. Yes.

10 (Deposition Exhibit 489 marked.)

11 Q. Now, a group of funds under the rubric of
12 Guggenheim didn't fund, either, for March, did they?

13 A. I believe that's correct.

14 Q. You had conversations with representatives of
15 Guggenheim on their failure to fund?

16 A. I don't remember if we had conversations or if
17 it was just e-mail, but we could have had conversations.

18 Q. Did you have any conversations with anyone at
19 Guggenheim?

20 A. I don't recall.

21 Q. Does Holly Lai, L-a-i, ring a bell?

22 A. No.

23 Q. Okay. You did receive this e-mail,
24 Exhibit 490 [sic]?

25 A. Yes.

1 Q. You understood --

2 A. Or -- I'm sorry. 489?

3 MR. CANTOR: 489?

4 Q. (BY MR. DILLMAN) I'm sorry. Yes. Thank you.

5 A. Yes.

6 Q. Did Guggenheim ever pay the amounts that it,

7 as of March 10, 2009, was telling you that it was not

8 funding?

9 MR. CANTOR: Objection.

10 A. I don't -- I don't recall. I believe there

11 was a -- you know, we were trying to figure out. There

12 was a question of these funds, if they were managed by

13 Guggenheim.

14 Q. (BY MR. DILLMAN) Which funds are you

15 referring to?

16 A. LFC2 is one of them.

17 Q. This is the e-mail down below, at the bottom

18 of the first page?

19 A. Correct.

20 Q. Okay.

21 A. I don't recall if they ended up funding or

22 not.

23 Q. Did you recall that at some point in time BofA

24 concluded that some or all of the term lenders were not

25 going to be making their payments of the March funding

1 request at any point?

2 A. Yes. I was reminded on Monday.

3 Q. When did you come to that conclusion?

4 A. I didn't come to the conclusion, but I don't

5 remember when the bank came to the conclusion.

6 Q. Okay. Who at the bank came to the conclusion,

7 as far as you know?

8 A. You know, I think Henry was squarely in the

9 driver seat at the time.

10 Q. Okay. And do you know when the conclusion was

11 reached?

12 MR. CANTOR: Which conclusion is this?

13 MR. DILLMAN: The conclusion we've been

14 talking about, the conclusion that some or all of the

15 term lenders were not going to be making their March

16 funding, ever.

17 MR. CANTOR: Ever? Objection.

18 A. I don't think that that conclusion was ever

19 reached.

20 Q. (BY MR. DILLMAN) Okay. Well, that was my

21 question.

22 A. Okay. I'm sorry. I misunderstood, if that

23 was the question.

24 Q. Okay.

25 A. I'm not aware that that was ever the

1 conclusion that was reached by BofA.

2 Q. Okay. Was -- what efforts did BofA, as far
3 as, you know -- strike that.

4 Did you engage in any efforts to try and track
5 down the issue of whether or not Guggenheim was going to
6 pay?

7 A. Again, I remember trying to help figure out
8 who these various funds were. I think there were
9 certain funds such as this LFC2, Loan Funding Corp.,
10 that were managed by Guggenheim. And so, you know,
11 there was some energy on, you know, figuring out who
12 those funds were managed by, who was the decision-maker,
13 but, you know, I don't remember specific conversations
14 with Guggenheim.

15 Q. How about with Z Capital, other than the one
16 that was reflected in Mr. Naval's letter?

17 A. No, nothing else.

18 Q. Who, as you understood it, was tasked to
19 follow up with those institutions about whether or not
20 they were going to pay?

21 A. Our -- our Credit Services group is typically
22 tasked with following up with investors that haven't
23 funded yet. I'm not sure if they were, you know, the
24 ones that were tasked with it, but that's typically how
25 it works.

1 Q. Do you know whether anyone was tasked, other
2 than how it typically works?

3 A. I don't remember.

4 Q. Typically, it wouldn't be a person in your
5 group?

6 A. No.

7 Q. And, typically, it wouldn't be a person in
8 SAG, if there is a typical situation there?

9 MR. CANTOR: Objection.

10 A. Again, if there is a typical situation, yeah.
11 Typically, it's more back office, but, you know, not to
12 say that it can't be other people.

13 (Deposition Exhibit 490 marked.)

14 Q. I'm putting in front of you Exhibit 490. This
15 is an e-mail from Mr. Naval to yourself and others.
16 Actually, it's to -- excuse me. It's to Kaitlin Trinh
17 at Guggenheim Partners. It is copied to yourself and
18 others.

19 Attached is a letter from Mr. Naval to
20 Guggenheim, which reflects the fact that -- well, it
21 asks them to confirm that the funds stated in the letter
22 do not intend to fund in response to the company's
23 request, that request being the March 2009 request. You
24 received this?

25 A. Yes.

1 Q. Any conversations with Ms. Trinh or anyone
2 else at Guggenheim leading up to this letter that you
3 recall?

4 A. I don't remember.

5 Q. Any conversations after?

6 MR. CANTOR: Objection.

7 A. Again, I don't remember.

8 (Deposition Exhibit 491 marked.)

9 Q. (BY MR. DILLMAN) Exhibit 491, an e-mail from
10 yourself to -- excuse me -- Ms. Trinh, copied to the
11 same group, dated March 24, 2009, asking Ms. Trinh, in
12 effect, to respond to Mr. Naval's letter, right?

13 A. Yes.

14 Q. Did Ms. -- as of this point, March 24, 2009,
15 I'm assuming from your e-mail that Bank of America had
16 not received payment from any of the funds listed in
17 Mr. Naval's letter.

18 A. It appears that's the case.

19 Q. Did BofA at any point receive payment from
20 those funds?

21 A. I don't recall.

22 Q. And does this Exhibit 491 help you to recall
23 any conversations that you had with Ms. Trinh or anyone
24 else at Guggenheim on this topic?

25 A. Again, you know, it helps me to recall that

1 there were these -- you know, I remember thinking there
2 were these sort of strange named funds here, and trying
3 to track down who the fund manager was. So I recall the
4 situation, but I don't recall, you know, the specific
5 conversation.

6 Q. Did you ever come to the conclusion that
7 Guggenheim was not the fund manager for these various
8 funds?

9 A. Not to my recollection.

10 Q. Did you ever come to the conclusion that they
11 were?

12 A. I believe that's what we determined.

13 Q. And as far as you recall, sitting here today,
14 you were never given any contrary information by
15 Ms. Trinh or anyone else; is that right?

16 A. That's -- not that I can recall. Yeah.

17 (Deposition Exhibit 492 marked.)

18 Q. Exhibit 492 is an e-mail from yourself to a
19 number of people, both internal and external to Bank of
20 America. The topic -- the date is March 16, 2009, and
21 the subject is re: Debrief with IVI - Fontainebleau
22 Las Vegas, and you have attached to your e-mail a
23 document entitled "In-Balance Test with 'Revised and
24 Comments' columns added." Actually, that's your
25 description.

1 In mid-March of 2009, you were involved in
2 discussions within Bank of America and with IVI on the
3 in-balance calculations for Fontainebleau Las Vegas; is
4 that right?

5 A. I believe that's correct.

6 Q. You did the calculations that are included on
7 the exhibit, the attachment to this e-mail; is that
8 right?

9 A. I don't remember if I did them or if -- or if
10 they were provided to me.

11 Q. Were there others at the bank who were --
12 strike that.

13 Were there others, as far as you were aware,
14 that were running in-balance test calculations for
15 distribution within this group of people other than
16 yourself?

17 A. No.

18 Q. You, in fact, were running those, correct?

19 A. I believe that's true.

20 Q. And so based on that, you -- based upon the
21 fact that you're the author of the e-mail that attaches
22 this, you believe that these are your calculations,
23 correct?

24 A. Well --

25 MR. CANTOR: Objection.

1 A. -- again, I don't -- I don't recall if I came
2 up with the numbers or if the numbers were -- you know,
3 if they were --

4 Q. (BY MR. DILLMAN) Handed to you?

5 A. -- determined in conjunction with, you know --
6 you know, with input from the company, from the
7 borrower.

8 Q. Fair enough. Fair enough.

9 A. Or -- yeah.

10 Q. But the spreadsheet itself was something that
11 you did, and the contents of it you may have gotten from
12 others?

13 A. That's probably right.

14 Q. All right.

15 A. Or the spreadsheet was provided by the
16 borrower and I, you know, passed it along. I just don't
17 remember.

18 Q. Well, there is a Revised column.

19 A. Okay.

20 Q. Do you see that?

21 A. Yes.

22 Q. And do you know what you were revising from?

23 MR. CANTOR: Objection.

24 A. No.

25 Q. (BY MR. DILLMAN) Was this a revision of an

1 Q. What do you think it means?

2 A. All the lenders in the senior secured
3 facilities.

4 Q. Were the lenders in the senior secureds in a
5 position to do due diligence with respect to
6 Fontainebleau's remaining costs as set forth in the
7 remaining cost report?

8 A. Sure.

9 Q. In the first instance, would you agree with me
10 that that was BofA's job as the agent?

11 MR. CANTOR: Objection.

12 A. I would say it was BofA's job as agent to
13 communicate what we were hearing from IVI; and, you
14 know, to the extent that lenders had questions about
15 what was being provided, they had just as -- as much
16 right to talk to IVI or the company about it.

17 Q. (BY MR. DILLMAN) In the first instance, the
18 due diligence that would be done to determine this was
19 due diligence by IVI and BofA on behalf of the lenders;
20 isn't that right?

21 MR. CANTOR: Objection.

22 A. In which first instance?

23 Q. (BY MR. DILLMAN) Others might be doing other
24 things. They might have -- be able to call the company.
25 They may be able to do a lot of things. But in terms of

1 how this financing was structured, BofA, as the agent
2 for the lenders, and IVI, as the hired construction
3 consultant, were, in the first instance, the people who
4 were -- who were doing the due diligence to determine
5 whether or not the remaining cost report was appropriate
6 or not?

7 MR. CANTOR: Objection.

8 A. Information typically came to the agent and
9 the construction consultant first, but it was up to
10 each, you know, lender to do their own diligence if they
11 had questions about what was being provided on
12 Intralinks.

13 Q. (BY MR. DILLMAN) Okay. I think we're saying
14 the same thing here. But whatever lenders did with
15 the --

16 MR. CANTOR: I actually disagree with
17 that.

18 Q. (BY MR. DILLMAN) Whatever lenders were --
19 were doing with the information that was provided to
20 them on Intralinks, the obligation to assemble and
21 provide that information was BofA's obligation as agent
22 in the first instance, correct?

23 MR. CANTOR: Objection.

24 A. No.

25 Q. (BY MR. DILLMAN) No. Whose obligation was it

1 to assemble and provide that information to the lenders?

2 A. The agent worked in a facilitating type of
3 role to provide information between the borrower and the
4 lenders and, you know -- so information typically came
5 to the agent first.

6 Q. Right.

7 A. But it was each lender's job to analyze the
8 information that was being provided and, if they had
9 questions or concerns about it, to, you know, reach out
10 to the agent, in which case we would try to answer the
11 question, if we knew the answer, and otherwise we would
12 try to get the answer from the company or reach out
13 directly to the company or to the construction
14 consultant.

15 Q. And if BofA, as agent, had questions or
16 concerns about the information that it was being
17 provided, did you understand that BofA had an obligation
18 to get to the bottom of those questions and concerns
19 before it simply passed the information on to the other
20 lenders?

21 MR. CANTOR: Objection; calls for a legal
22 conclusion.

23 A. So is the question if BofA had questions from
24 an agency perspective?

25 Q. (BY MR. DILLMAN) If BofA had questions or

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1 concerns about the information that it was being
2 provided, did you understand that you had an obligation
3 to track that down to get the questions and concerns
4 addressed before you simply forwarded to the other
5 lending banks and institutions the information that you
6 had questions and concerns about?

7 MR. CANTOR: Obligation to whom?

8 A. Not necessarily an obligation as agent.

9 Q. (BY MR. DILLMAN) Obligation as -- in some
10 other capacity?

11 A. No. I mean, Bank of America had its own, you
12 know, commitment as a lender; but the obligation as
13 agent was to ask questions, and, you know, to the extent
14 the questions were being asked by the -- by the
15 investors was to ask the questions and pass the
16 information along.

17 Q. And if BofA was aware of inconsistent
18 information from that that was provided by the
19 borrower -- let me make it easy.

20 If BofA was aware of contrary information to
21 that which was being passed along by the borrower, was
22 it your assessment, as somebody in the CDP unit at BofA,
23 that BofA should just pass that -- the borrower's
24 information along to the lenders without trying to
25 reconcile the contrary information that it had?

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1 MR. CANTOR: Objection; calls for a legal
2 conclusion.

3 A. Again, I think we -- we tried to do what was
4 required of us as agent under the contract, again, the
5 agency role under the contract. I would think that if
6 there is discrepancies, we would ask; but, you know, if
7 there is a specific instance, you know, we can talk
8 about it.

9 Q. (BY MR. DILLMAN) If there were discrepancies,
10 you would ask the borrower or whoever was giving you the
11 information?

12 A. I would think so. I would think so.

13 Q. And based upon your involvement with this
14 facility and your position now as a vice president in
15 the CDP department, you would expect that BofA would do
16 that, would be to ask the borrower if the borrower was
17 providing information that was contrary to or
18 inconsistent with information that BofA had?

19 A. Well, typically, the information that BofA
20 would had -- would have would come from the borrower in
21 the first place, and so I don't see why the borrower
22 would be providing inconsistent information themselves.

23 Q. Based upon your position and experience at
24 BofA, isn't it your understanding that if BofA becomes
25 aware, from any source, of contrary or inconsistent

1 information to that that's being provided to it by the
2 borrower, BofA should and does track that down to
3 determine what the true facts are before they pass the
4 information on to the other lenders?

5 MR. CANTOR: Objection. Any source?

6 A. Again, it would depend on what the contract
7 states BofA, as agent, is required to do.

8 Q. (BY MR. DILLMAN) And as an agent, in terms of
9 general agency principles, bank agent, is it your
10 understanding that BofA would track that information
11 down and determine what the -- what the correct
12 information is before it simply passed on to the lenders
13 information that it believed was inconsistent with or
14 contrary to the true facts?

15 MR. CANTOR: Objection.

16 A. Again, I think that, you know, we would do
17 what was required under the credit agreement and
18 disbursement agreement and ask the questions of the --
19 of the borrower, relay those answers to lenders. You
20 know, that's the process.

21 Q. (BY MR. DILLMAN) Okay. And with the
22 Fontainebleau facility, if Fontainebleau had told you
23 the borrower had provided to you information that you
24 knew was false, would you have simply passed that on to
25 the borrowers -- to the lenders?

1 A. You know, I can't say what I would have done.
2 I don't -- I don't think I would have, if I knew the
3 information was false, but --

4 Q. Really? You think there is even -- is there a
5 doubt in your mind about that?

6 MR. CANTOR: Objection; argumentative.

7 Q. (BY MR. DILLMAN) Are you telling me that as a
8 vice president of Corporate Debt Products at BofA,
9 you're telling me that in an agented facility, agented
10 by BofA, that if you had information that exposed the
11 borrower's information as a lie, that you would pass
12 that information on to the other lenders --

13 MR. CANTOR: Objection.

14 Q. -- without making any effort to determine the
15 true facts?

16 MR. CANTOR: Objection; argumentative,
17 it's hypothetical, calls for speculation. It's
18 fattening. It's un-American.

19 A. Could you restate that question --

20 Q. Sure.

21 A. -- directly and specifically?

22 Q. Sure. If you knew that a borrower was lying,
23 as the agent on the facility, would you simply pass that
24 misinformation along to the other lenders or would you
25 make some effort to make sure that what the lenders got

1 was the correct information?

2 A. Again, we would do what was required by us, as
3 agent, under the credit facility.

4 Q. No more, no less?

5 A. Again, we would do what was required of us, as
6 agent, under the credit facility.

7 Q. I heard that. No more, no less, right?

8 MR. CANTOR: It's an answer. He's
9 answered your question.

10 A. That's what we would do. We would read what's
11 required of us, and that's what we would do.

12 Q. (BY MR. DILLMAN) Thank you. Did you make any
13 other -- I don't want to say -- but did you -- did you
14 do any other in-balance report analyses in the March
15 of '09 period other than as you may have worked on on
16 Exhibit 492?

17 A. I don't recall specifically, but maybe.

18 Q. Was that kind of an ongoing thing over the
19 course of March, that you were looking at and tinkering
20 with in-balance reports, or -- or was that sort of a
21 one-shot deal?

22 A. I don't recall. It was a long time ago.

23 THE VIDEOGRAPHER: Five minutes.

24 Q. (BY MR. DILLMAN) You were aware of concerns
25 expressed by some of the lenders prior to March of '09

1 with respect to whether or not there were cost overruns
2 at the project, were you not?

3 A. I believe so.

4 Q. And who expressed those concerns to you?

5 A. I believe that some lenders, after reading a
6 report that was generated by IVI, asked some questions
7 and expressed some concerns.

8 Q. Which report?

9 A. IVI prepared monthly reports. I believe in
10 January or February the report contained some language
11 about some concerns that they had.

12 Q. Uh-huh.

13 A. And I think we got -- we received questions
14 from some lenders about that.

15 Q. And even before that, Deutsche Bank was
16 suggesting that there were some cost overruns at the
17 project, right?

18 A. I think that's right.

19 (Deposition Exhibit 493 marked.)

20 Q. 493 is -- is one of those suggestions by
21 Deutsche Bank, right?

22 A. Yes.

23 Q. Did you -- you know Mary -- Mary Kay Coyle?

24 A. I don't know her, but I recall this e-mail.

25 Q. Do you recall communicating with her?

1 A. Yes.

2 Q. And she, on the last page of this e-mail,
3 says, "I have heard that there are cost overruns over
4 and above what has been reported since June
5 (approximately 200 million in overruns) and that Moelis
6 has been retained to raise additional equity -- equity
7 to fund these overruns." And then what follows from
8 there -- oh, no, and she goes on to say, "What
9 specifically are the overruns and as a related issue,
10 how is the project in balance if there are."

11 And what follows after that is your response
12 to her e-mail?

13 A. Yes.

14 Q. Okay. The 200 million she's referring to,
15 those are -- those are overruns that were reported in
16 June?

17 A. I believe so.

18 Q. There were -- and you were aware that the
19 company was -- "the company" being Fontainebleau -- was
20 seeking equity raised through Moelis?

21 A. I was not.

22 Q. Were you, before you got this e-mail, aware of
23 that?

24 A. I was not.

25 Q. You -- she made you aware of that, or at least

1 she referenced it, right?

2 A. She did reference it, yes.

3 Q. Did you do anything to determine whether or
4 not the company was indeed seeking to raise equity?

5 A. You know, I believe I asked Jeff, you know, if
6 he had any opinions or suggestions, and, you know, this
7 came as a surprise to us, and, you know, if -- if
8 Deutsche Bank had any knowledge that we didn't have, we
9 were happy to, you know, hear it and discuss it.

10 Q. Did you solicit Deutsche Bank's input in that
11 regard?

12 A. I believe we did, and I believe -- you know, I
13 don't see it written here, but I believe, you know, I
14 said, you know, if you have any details about it, you
15 know, feel free -- you know, please tell us because we
16 haven't heard this. I remember that being my general,
17 you know, thought and sentiment was I haven't heard
18 this. If you have information about it or if you know
19 anything about it, you know, let us know.

20 Q. Now -- and what -- if she had handed you a
21 document that said, you know, here is -- here is a
22 document from Moelis that says they're seeking equity
23 raise for 150 million of cost overruns, what would that
24 have caused you to do, if anything?

25 MR. CANTOR: Objection.

1 A. Well, it's not -- again, it wasn't -- it was
2 surprising to me that she mentioned that Fontainebleau
3 was -- it wasn't surprising, but it was news to me that
4 she mentioned that Moelis was talking to the company. I
5 guess it wouldn't have been necessarily surprising that,
6 you know, a borrower would be talking to a financial
7 advisor --

8 Q. (BY MR. DILLMAN) Sure.

9 A. -- about raising equity. I think it's, you
10 know, probably a prudent thing for them to be doing,
11 especially heading into, you know, an opening in what
12 was believed to be a challenged gaming environment.

13 Q. Sure. But she's talking about raising equity
14 to pay for overruns.

15 MR. CANTOR: Objection.

16 Q. (BY MR. DILLMAN) Right? "Moelis has been
17 retained to raise additional equity to fund these
18 overruns." Right?

19 A. That's what it says.

20 Q. All right. So if -- if she had handed you a
21 document that showed that Moelis was seeking to raise
22 additional equity for Fontainebleau Resort specifically
23 to fund -- let's just grab a number -- 150 million of
24 cost overruns in December 2008, what, if anything, would
25 you have done with that information?

1 A. I would have sent to the -- if it was me
2 making the decisions, I would have sent it to the
3 borrower and said, what is this? This is what we're
4 hearing from the banks. We have no information about
5 it. What's going on? Are there cost overruns? And,
6 you know, what's the situation?

7 Q. And if they simply didn't respond to it, would
8 you have brought that to the attention of the other
9 lenders?

10 A. We would -- well, if they just didn't respond
11 to it, you know, at all, we would probably ask the
12 question again.

13 Q. And if they didn't respond to it?

14 A. You know, I don't know. It's a hypothetical.
15 I don't know.

16 Q. Okay. Was that the kind of information that
17 you would have felt compelled at some point, if the
18 company simply denied it or shied you on, to -- to let
19 the other lenders know about?

20 MR. CANTOR: Objection.

21 A. Again, I don't know. It's hypothetical.

22 Q. (BY MR. DILLMAN) Okay. What did you
23 understand your duties were under the governing
24 agreements in terms of alerting the other -- of tracking
25 down information that was provided to the borrower,

1 where you had inconsistent or contrary information at
2 your -- at your disposal?

3 MR. CANTOR: Objection.

4 A. Again, I think if there is anything that was
5 glaringly wrong, we would have typically asked the
6 question. But, you know, under -- you know, our role as
7 agent was to ask questions, if questions were being
8 asked of us that we didn't know the answer to, and relay
9 those questions back to the, you know, lender that was
10 asking the question. And if that wasn't sufficient for
11 them, then they could follow up with -- with another
12 question.

13 Q. (BY MR. DILLMAN) The lenders, the other
14 lenders?

15 A. Yes. Yes.

16 Q. Okay. So you were simply a conduit between
17 the borrower and the lender; is that your understanding?

18 A. The agency role is -- is a lot like a conduit,
19 yes.

20 Q. And if you had no -- if you had information
21 contrary to the information provided by the borrower, it
22 was your understanding, in this facility, under the
23 documents governing the Fontainebleau Las Vegas project,
24 that you had no obligation to track down the information
25 and no obligation to provide the lenders the contrary

1 information; is that right?

2 A. Is the question if we had definitive evidence
3 of something that was inconsistent that the borrower was
4 telling us or if we had heard, you know, a rumor about
5 something?

6 Q. If you had credible evidence that was contrary
7 to or inconsistent with information that was provided to
8 the borrower, did you understand that under the
9 governing documents for this facility that you had an
10 obligation to track the information down to get to the
11 truth and/or provide the credible information that was
12 inconsistent to the other lenders?

13 A. I don't know if we had an obligation, but, you
14 know, I would think that if we had credible evidence to
15 the contrary than what we were being told, then we would
16 ask -- have asked the question because we would have
17 been just as curious to know the answer as the other
18 lenders.

19 Q. And would --

20 THE VIDEOGRAPHER: I need to change the
21 tape. I'm sorry. We're off record, 2:15 p.m.

22 (Recess from 2:15 p.m. to 2:24 p.m.)

23 THE VIDEOGRAPHER: Start of Tape 5.

24 We're now on record at 2:24 p.m.

25 (Deposition Exhibit 494 marked.)

1 Q. (BY MR. DILLMAN) I've marked and placed in
2 front of you Exhibit 494, which is an e-mail from
3 yourself to Mr. Keyston and Mr. Fuszard. It attaches a
4 letter from J.P. Morgan, which, in turn, attaches the
5 January 30 Project Status Report from IVI. So far so
6 good?

7 A. Yes.

8 Q. You sent this e-mail to Mr. Fuszard and
9 Mr. Keyston?

10 A. Yes.

11 Q. Why were you communicating with them at this
12 point?

13 A. At this point I believe we had recommended
14 that our workout group get involved and so -- Joe
15 Fuszard is with our workout group. I copied Brian
16 Corum. He was -- you know, presumably at this point --
17 I'm not sure, but presumably he had taken over from Jeff
18 Susman, and I was sharing -- as well as I copied -- you
19 know, I sent it to Doug Keyston as our risk officer, and
20 I was sharing the letter that we received from
21 J.P. Morgan to discuss -- discuss the letter and -- and
22 the issue.

23 Q. The -- the issue being what?

24 A. Well, the issue being the comments from IVI
25 that they had seen certain things or, you know, had

1 MR. CANTOR: You said lenders. He meant
2 loan.

3 MR. DILLMAN: I -- I got it.

4 A. I believe I meant loan, DDTL --

5 Q. (BY MR. DILLMAN) DDTL means loan.

6 A. -- delay draw term loan.

7 Q. "Difficulty with the loan and non friends and
8 family banks" -- now I'm even more confused.

9 A. So am I.

10 Q. All right. And in the context when you're
11 talking about friends and family banks, on the one hand
12 those are institutions, right?

13 MR. CANTOR: I'm sorry. Could I hear
14 that again? I missed it, before you answer.

15 Q. (BY MR. DILLMAN) I'll ask it again. The
16 friends and family banks that you're talking about,
17 those are -- you're talking about institutions?

18 A. Banks, yes.

19 Q. You're not talking about agreements?

20 A. No.

21 Q. And I had -- I had read this to mean DDTL,
22 delay draw term lenders, being other institutions and
23 that the difficulties were with these two groups of
24 institutions.

25 You're telling me that, in the context of this

1 sentence, you believe that it means -- DDTL means delay
2 draw term loan and the difficulties here were with the
3 friend and family bank on the one -- banks on the one
4 hand and the loan on the other?

5 MR. CANTOR: Well, again, you're --

6 A. I'm telling --

7 MR. CANTOR: I'm sorry. Again, Kirk,
8 you're misreading it because you're leaving out the word
9 "non."

10 MR. DILLMAN: Okay.

11 MR. CANTOR: Okay.

12 A. I'm telling you that I don't remember what
13 that meant, what -- but typically I think, if I wrote
14 "DDTL," it seems to be that I was thinking delay draw
15 term loan.

16 Q. (BY MR. DILLMAN) Okay. All right. And your
17 counsel is correct. I did read [sic] out, not
18 intentionally, the non friends and family banks.

19 With that, having now gone around and -- and
20 clarified my -- my prior misunderstanding, do you have
21 any idea what that means?

22 MR. CANTOR: Don't guess.

23 A. I just don't remember what that means, sitting
24 here today.

25 (Deposition Exhibit 499 marked.)

1 Q. (BY MR. DILLMAN) 499 has been marked. It's
2 an e-mail from you to a number of internal people at
3 BofA. It attaches IVI's Project Status Report dated
4 February 23, 2009.

5 We previously looked at their report for the
6 prior month in conjunction with Exhibit 494, right?

7 A. Yes.

8 Q. That was for the -- is dated January 30, 2009,
9 and Exhibit 499 is dated February 23, 2009. This is the
10 next monthly Project Status Report by IVI concerning the
11 project?

12 A. That's right.

13 Q. And IVI was still having some of the same
14 concerns that it expressed in its prior report. Do you
15 recall that?

16 A. Let me take a quick look here. Yes.

17 Q. Specifically at -- at page 7 -- that's where
18 you were, right?

19 A. Yes.

20 Q. In the first full paragraph there, the first
21 section entitled "Anticipated Construction Costs Versus
22 Direct Cost Budget," it reads, "While the Anticipated
23 Cost Report indicates the Project is expected to stay
24 within budget, IVI is concerned that all the
25 subcontractor claims have not been fully incorporated

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1 into the report and potential acceleration impact to
2 meet the schedule has not been included." Virtually
3 word for word from the prior report?

4 A. Yeah. I believe that's right.

5 Q. Any discussions with IVI as to what it was
6 doing to try and bring that issue to ground?

7 MR. CANTOR: Objection.

8 A. Yes.

9 Q. (BY MR. DILLMAN) Tell me about those.

10 A. Well, I mean, you know, IVI was having -- it
11 was our understanding that IVI was in communication with
12 the general contractor and/or the borrower about, you
13 know, what was going on, trying to get additional
14 information. You know, that's what they were working
15 on.

16 I mean, they -- they rely to a certain extent
17 on the information that's provided to them by the
18 general contractor and by the borrower. So it looks
19 like what was happening was they were getting some
20 information that they had questions about.

21 We would expect them to ask those -- you know,
22 what was going on, if they had questions, and we were
23 telling them to ask, and figure out what was going on in
24 order to satisfy their -- their questions.

25 Q. And based on this draft report that you sent

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1 around to your group or the group within BofA that is
2 copied on it, you understood that IVI continued to have
3 these same questions and concerns?

4 A. That's probably a fair statement since the
5 comments were still in the report.

6 Q. Page 20 of the report -- do you know what
7 general conditions are?

8 A. Vaguely, general conditions, I think, are, you
9 know, things that don't fall into a specific project
10 such as the tower or, you know, podium or garage.

11 Q. Okay. Do you know why the general condition
12 costs with Change Orders 11, 12, and 13 were
13 transferred, in fact, to the tower, podium, and garage?

14 A. No.

15 Q. Those were not typically what general
16 conditions were to be used for were costs for specific
17 portions of the project, was it?

18 A. I don't know.

19 Q. Turn to page 22 and -- bottom of 22, top of
20 23. Specifically, the top of 23, it says, "The ACR
21 includes 60,599,000 in pending OCOs; however, these have
22 been taken into account within the Anticipated
23 Contingency Summary." And it goes on with language
24 similar to, if not identical, to the prior language that
25 we looked at from the January report. Right?

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1 A. Yes.

2 Q. So you understood that this was still a

3 concern that IVI had?

4 A. Yes.

5 Q. That the OCOs, the owner change orders, were

6 eating into the budget -- excuse me -- eating into

7 contingency?

8 A. That the pending owner change orders could eat

9 into the contingency, yeah, and that IVI was trying to

10 get to the bottom of it.

11 Q. And, apparently, as of the writing of this

12 report, hadn't gotten to the bottom of it?

13 A. I don't know -- yeah, I don't know what

14 information they had received as of the writing of this

15 report and what, you know, phase of understanding they

16 were, but apparently there were still concerns.

17 Q. Okay. And you knew that; BofA knew that?

18 MR. CANTOR: Objection.

19 A. We knew what we read in the report.

20 Q. (BY MR. DILLMAN) And you were actually -- you

21 sent these around to people for their comments, right?

22 You sent this draft around to folks within BofA for

23 their comments?

24 A. Yes.

25 Q. There is a tenant -- I'm sorry. At page 48,

1 there is a section entitled "6.8, Tenant/End-User Status
2 and Approval." Do you see that?

3 A. Yes.

4 Q. There are a number of tenants that are listed
5 on the first portion of this chart, which then follows
6 onto page 49. They include Lobby Bar, Gotham Bar and
7 Grill, FB Steakhouse. Do you see that?

8 A. Yes.

9 Q. Were these tenants that you understand --
10 stood at this time were tenants for the restaurant space
11 that was part of the retail and casino area?

12 MR. CANTOR: Objection; mischaracterizes
13 the document.

14 A. I'm not sure where IVI got this list of
15 proposed tenants. I presume it was from the -- well, I
16 don't know where they got the list. I presume it was
17 from the general contractor or the borrower.

18 Q. (BY MR. DILLMAN) Somebody on the borrower's
19 side, right?

20 A. I would think so.

21 Q. I mean, they're the only ones that are
22 proposing tenants for their project, right?

23 A. Right.

24 Q. Okay. And did you at this time -- in this
25 time frame, late February of '09, understand that the

1 proposed tenants on this list were -- were included
2 within the project as the borrower was then planning it?

3 MR. CANTOR: Objection.

4 A. I wasn't sure, again, not having been involved
5 in the original planning and underwriting, you know,
6 specifically which tenants were believed to be in the
7 original budget, but it looks like this was the list of
8 tenants that they were discussing.

9 Q. (BY MR. DILLMAN) Did you have an
10 understanding in this period of time that the project
11 that was being built was a five-star project?

12 MR. CANTOR: Objection.

13 A. My understanding was that the project that was
14 being built was a very nice, upscale project.

15 Q. (BY MR. DILLMAN) One of the high-end -- to be
16 one of the high-end projects on the strip in Las Vegas?

17 A. Yes.

18 Q. Complete with all the amenities that would go
19 with such a project?

20 A. Yes.

21 Q. Just so we've got a complete record, I'm going
22 to mark as the next exhibit in line, which is 600 --

23 MR. CANTOR: Are we --

24 MR. DILLMAN: I believe we're alternating
25 hundreds.

1 A. Sure. That's correct that the acceleration
2 costs and the owner change order -- owner change orders
3 were not mentioned in the letter from Paul Bonvicino.

4 Q. And specifically, in the letter that was
5 posted on Intralinks, there was no mention that the --
6 there was a delay in execution of owner change orders,
7 which seems to have gotten larger recently, was there?

8 A. The letter that was posted on Intralinks --

9 Q. Yes.

10 A. -- dated March 4th from Paul Bonvicino?

11 Q. Yes.

12 A. The question is, did it talk about the owner
13 change orders?

14 Q. There was no mention of the fact that there
15 were -- there appeared to be a delay in the execution of
16 owner change orders, which seems to have gotten larger
17 recently.

18 A. I don't -- yeah, as I just stated, I don't see
19 a mention to that.

20 Q. And what -- how did you understand -- strike
21 that.

22 What did you understand the impact of delays
23 in owner change orders to be with respect to the
24 remaining cost report?

25 A. My understanding of the way the process would

1 work is the subcontractor would work with the -- I'm
2 sorry -- the general contractor would work with the
3 subcontractors, you know, in building the project, and
4 as the subcontractors would submit, you know, certain
5 invoices or requests for additional funds, that change
6 orders would be generated by the general contractor and
7 those change orders had to be approved by the borrower
8 in order to make their way into the budget.

9 Q. And once approved by the borrower, they would
10 be added to the budget and thus would be -- would
11 increase the remaining costs report number?

12 A. Unless there was an offsetting change to
13 contingency.

14 Q. Of course. But absent any other factors, an
15 owner change order -- a positive owner change order
16 would increase the remaining costs to complete?

17 A. Yes. Absent any other changes, yes.

18 Q. Okay. And if there were delays in the
19 execution of owner change orders, that would delay the
20 increase to the remaining cost report, assuming, again,
21 that those change orders were positive?

22 A. Only if those change orders ended up being
23 approved.

24 Q. Well, owner change orders are, by definition,
25 approved, right?

1 MR. CANTOR: Objection.

2 A. You know, I think the definition of "owner
3 change order," it's sort of semantics, but they
4 weren't -- they weren't approved owner change orders
5 until they were approved. Before they were approved,
6 they were pending. And my understanding is that not
7 necessarily all pending owner change orders were
8 approved.

9 Q. (BY MR. DILLMAN) And there was a category
10 called pending owner changes, right, POC?

11 A. I believe so.

12 Q. And then there was OCO, owner change orders?

13 A. OCO, I think it stands for owner change
14 orders, yes.

15 Q. And the pending were those that hadn't been
16 executed, and the OCO were those that had?

17 A. I believe so.

18 Q. Okay. So when Mr. Bon -- Mr. Barone here
19 says, "There appears to be a delay in the execution of
20 owner change orders," what he's referring to is the
21 signoff by the owner on the pending change orders,
22 right?

23 MR. CANTOR: Objection.

24 A. Again, I don't know what he was thinking when
25 he wrote it, but that's what it appears to have meant to

1 me.

2 Q. (BY MR. DILLMAN) And, in fact, if the owner
3 is delaying in signing change orders, that's going to
4 delay the impact of those change orders on the budget,
5 right?

6 A. Only if those change orders end up being valid
7 and are approved.

8 Q. And are positive?

9 A. And are positive, yes.

10 Q. Okay. And so a delay in the execution of
11 valid, proper owner change orders would, in fact, delay
12 the impact to the budget of those change orders?

13 MR. CANTOR: Objection; asked and
14 answered.

15 A. Yes.

16 Q. (BY MR. DILLMAN) And thereby artificially --
17 and, therefore, the remaining cost to complete that
18 didn't take into account those delayed owner change
19 orders would be artificially low?

20 A. That's my understanding, again, barring any
21 other changes, contingency or otherwise.

22 Q. That's a pretty big deal, right?

23 A. I think all of these things were a big deal,
24 yeah.

25 Q. If you turn the page on Exhibit 604 -- keep

1 the other letter, Mr. Bonvicino's letter out there, too,
2 so you've got access to that. Mr. Barone says, "It
3 appears that the ACRs 'Anticipated Additional Costs',
4 which were supposed to be a worst case projection of the
5 potential owner change orders, are actually a summary of
6 the projected costs to date with no projection of future
7 needs."

8 What did you understand Mr. Barone to be
9 saying in this sentence?

10 MR. CANTOR: Objection.

11 A. Again, I don't know what Mr. Barone was
12 thinking when he wrote this, but to me it sounds like
13 the ACR was not capturing the potential future needs; it
14 was only capturing a summary of the actual projected
15 costs.

16 Q. (BY MR. DILLMAN) As opposed to the
17 anticipated future needs for the project?

18 A. Yes.

19 Q. And he goes on to say, "This is not what the
20 ACR should be representing." Right?

21 A. Right.

22 Q. In other words, it's not supposed to be
23 representing what you've got in the pipeline right now;
24 it's supposed to be representing all of the anticipated
25 costs to complete?

1 MR. CANTOR: Objection.

2 Q. (BY MR. DILLMAN) Right?

3 A. That was my understanding of -- of what IVI
4 was saying.

5 Q. And that was your understanding of what the
6 anticipated cost report were supposed to be disclosing?

7 A. From -- from what we were hearing from IVI,
8 yes. I didn't have an independent, you know,
9 understanding of what the ACR was because that report
10 was not delivered to us, the bank. But we were -- you
11 know, that was what my understanding was based on what
12 IVI was saying.

13 Q. You sure you never saw an anticipated cost
14 report?

15 MR. CANTOR: That's not what he said.

16 A. I didn't say I never saw one. I said I may
17 have seen one.

18 Q. (BY MR. DILLMAN) Okay.

19 A. It was not a common practice that we would
20 be -- that they would be sent to us.

21 Q. I see. I see. You may have received it, for
22 instance, from IVI, but you typically wouldn't have
23 received one in the first instance from the contractor?

24 A. That's right.

25 Q. Got it.

1 A. And it wasn't one of the reports that was part
2 of our loan documentation, so it wasn't something that,
3 you know, we would receive typically from the borrower.

4 Q. Thank you. Mr. Barone goes on to say, "This
5 seems to be the case as just about all of the
6 Anticipated Additional Costs, paren, 60,800,000, have
7 been included in TWC's latest requisition as a credit
8 entry labeled 'TW Construction Commitments - Against
9 POCs.'" Do you see that?

10 A. Yes.

11 Q. What did you understand that to mean?

12 MR. CANTOR: Objection.

13 A. Again, this continues to sound like there were
14 certain owner change orders that were outstanding that
15 had not been, you know, executed yet or approved, or
16 there were -- there were certain costs that were being
17 shown as anticipated costs which were more actual costs.

18 Q. (BY MR. DILLMAN) In fact, which had been
19 committed; is that what you mean by "actual"?

20 MR. CANTOR: Objection.

21 A. Well, he refers to an entry by Turnberry
22 Construction called Commitments Against Potential POCs.
23 I'm not sure what that was intended to mean.

24 Q. (BY MR. DILLMAN) In construction parlance on
25 projects like this, do you understand that there are

1 costs which are committed costs?

2 MR. CANTOR: Objection.

3 A. Generally speaking, yeah, I understand that
4 there are certain costs that would be committed.

5 Q. (BY MR. DILLMAN) As you go along, you commit
6 to certain costs to get the project built?

7 A. Sure.

8 Q. And that Mr. Barone is saying here that the
9 general contractor's requisition showed as a credit
10 entry TW Construction - Commitments Against POCs, right?
11 See that?

12 A. Yes.

13 Q. That would be the contractor is making
14 commitments against pending owner changes, in other
15 words, owner change orders that hadn't yet been
16 approved?

17 A. I don't know what that was meant to -- again,
18 intended to mean by the -- by the GC.

19 Q. But it -- it certainly sounds reasonable to
20 you, doesn't it?

21 MR. CANTOR: Objection.

22 A. Sure. I think we've talked about this. It
23 sounds like there were costs that were be -- being
24 reflected as anticipated costs, which, in fact,
25 according to IVI, were actually costs that had to be

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1 incurred, not anticipated.

2 Q. (BY MR. DILLMAN) Right. Mr. Barone goes on
3 in the next paragraph to say, "This leads us to believe
4 that FBLV and TWC are not on the same page with respect
5 to the Owner Change Orders, which needs to be resolved,
6 and that the entire picture regarding additional pending
7 costs are not being fully shown."

8 You understood this to be a concern by
9 Mr. Barone that he wasn't getting the full picture from
10 the borrower concerning what costs were actually out
11 there?

12 A. I understand this to mean that IVI didn't
13 think that the contractor and the borrower were on the
14 same page with respect to what the approved owner change
15 orders would be.

16 Q. And that IVI wasn't getting the entire picture
17 regarding additional pending costs, right?

18 A. From the prior paragraph, that's what it seems
19 to imply.

20 Q. I'm actually reading from the second paragraph
21 on this page, where he says, "This leads us to
22 believe" -- and it goes on -- "that the entire picture
23 regarding additional pending costs are not being fully
24 shown."

25 A. Okay.

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1 Q. You see that?

2 A. Yes.

3 Q. That's a pretty big deal, isn't it?

4 MR. CANTOR: Objection.

5 A. It is.

6 Q. (BY MR. DILLMAN) If the borrower and/or the
7 general contractor are not providing a full and complete
8 picture of the cost to complete the project, that has
9 repercussions up and down the in-balance report, doesn't
10 it?

11 A. If the -- if the costs that are going to need
12 to be spent to complete the project are not being
13 reflected as costs to complete the project, yes, that
14 absolutely affects the in-balance report.

15 Q. Affects -- affects disbursement?

16 MR. CANTOR: Objection.

17 A. Could affect disbursement.

18 Q. (BY MR. DILLMAN) If the in-balance report
19 isn't correct, it's one of the conditions to
20 disbursement, isn't it?

21 A. Yes.

22 Q. If the -- if the project's out of balance,
23 that's certainly a condition to disbursement, right?

24 MR. CANTOR: Objection.

25 A. I believe the project has to be in balance for

1 there to be disbursement, yes.

2 Q. (BY MR. DILLMAN) If the borrower submits

3 inaccurate or untrue materials with the -- with the

4 disbursement requests, that's a ground for not

5 disbursing, right?

6 MR. CANTOR: Objection.

7 A. I'm not sure what the -- what the remedies are

8 or the implications of receiving information from the

9 borrower that's not accurate or true.

10 Q. (BY MR. DILLMAN) Okay. When you received

11 this letter from Mr. Barone, you understood that these

12 issues were important, had the potential to stop funding

13 or disbursements in its tracks, and that they had to be

14 gotten to the bottom of, right?

15 A. And that they had to be what?

16 Q. Gotten to the bottom of.

17 MR. CANTOR: Objection.

18 A. I understood that the issues were very

19 important and that IVI was continuing to work with the

20 developer and the borrower to get to the bottom of the

21 issues.

22 Q. (BY MR. DILLMAN) Did you understand that you

23 had to get to the bottom of these issues before you

24 could disburse for that month?

25 MR. CANTOR: You, who?

1 MR. DILLMAN: BofA.

2 MR. CANTOR: Objection.

3 A. I'm not sure it was BofA's responsibility to
4 get to the bottom of, you know, all of the issues as
5 agent.

6 Q. (BY MR. DILLMAN) Let me assume that this --
7 that this letter was received on the morning of
8 March 25th, which I will represent to you was the
9 funding date for that -- for the March '09 disbursement.

10 Okay.

11 With the contents that it includes, did you
12 understand that BofA was required to disburse given the
13 information that -- would have been required to disburse
14 given the information that IVI set forth in this letter?

15 MR. CANTOR: Objection; calls for
16 speculation, it's a hypothetical, it calls for a legal
17 conclusion.

18 A. Again, I think that BofA, in conjunction with
19 legal counsel, looked at the contract very hard and
20 within the context of the information that we had and
21 executed what we believed was the, you know, requirement
22 under the contract.

23 Q. (BY MR. DILLMAN) Got it. My question was, if
24 you had received this letter on March 25th, the morning
25 of disbursement, before disbursements had been made,

1 equivalent that Special Assets uses.

2 Q. Okay. And at this point do you understand
3 that Mr. Yu had the ability to make the unilateral
4 decision to downgrade?

5 A. I don't recall specifically, but it seems
6 that, you know, at this point he was certainly, you
7 know, directing the process.

8 Q. Do you know why the decision was made to
9 downgrade in Q1 rather than Q2?

10 A. Just looking at the chain of e-mails, it looks
11 like there is some rationale here.

12 Q. Rationale being what?

13 A. There is some explanation as to why it was
14 decided to be downgraded early.

15 Q. And what is that explanation?

16 A. You want me to read it?

17 Q. I want you to point me to it.

18 A. Okay. It's on page 313.

19 Q. Okay. And the -- specifically where it says,
20 "CDP expects FB LV to draw down the full amount of its
21 \$800 million revolver in April 2009. Given a greater
22 than 50 percent probability that interest coverage will
23 fall below 1.00x in two quarters, CDP is proactively
24 downgrading the company to RR 9 (PSA) with appropriate
25 upgrades and downgrade triggers as follows." Is that

1 right?

2 A. Yes.

3 Q. And what does "PSA" mean?

4 A. Risk rated 9 PSA basically means that there is
5 a higher than 50 percent chance that interest coverage
6 will fall below one turn, one time, you know, coverage
7 of EBITDA over the next six months, two quarters.

8 Q. A downgrade to 9 PSA, does that have any
9 practical implications in terms of the difference
10 between an 8 and a 9 PSA?

11 A. As -- as a loan is downgraded or upgraded,
12 there are implications as to how much capital the bank
13 has to reserve against that loan.

14 Q. Okay. Any other implications that you're
15 aware of that would be relevant to the Fontainebleau
16 loan?

17 A. No.

18 Q. Do you know why there was a conclusion --
19 well, strike that.

20 If you go up to the second page, there is an
21 e-mail from Brian Corum to a bunch of folks, copied to
22 you. It says, "We are trying to downgrade FBLV to RR9
23 at today for quarter end."

24 Do you know why it was important to do that
25 before quarter end as opposed to on April 1st?

1 A. I don't recall why that was important, no.

2 (Deposition Exhibit 617 marked.)

3 Q. Okay. Let me put in front of you what's been
4 marked as Exhibit 617. 617 is an e-mail from Mr. Yu to
5 Mr. Washington, copied to, among others, yourself, and
6 attaches a copy of the March 5th, 2009, letter from
7 Mr. Barone to Mr. Kumar. Do you see that?

8 A. Yes.

9 Q. And Mr. Yu asked Mr. Washington to "Please
10 post this to Intralinks private." You see that?

11 A. Yes.

12 Q. Mr. Washington was with the -- with
13 Mr. Naval's group?

14 A. Agency Management.

15 Q. And he was one of the people who sort of had
16 the -- the secret decoder ring to get things onto
17 Intralinks?

18 A. Yes. He could post things on Intralinks.

19 Q. And -- and I had represented earlier that we
20 had not been able to establish that this was placed on
21 Intralinks. I can represent to you that's -- prior
22 to -- prior to Mr. Murata handing me this exhibit, that
23 was correct. But through his good offices, we can see
24 that apparently it was placed on Intralinks.

25 A. Okay.

1 Q. Correct?

2 A. Yes.

3 Q. I just want to make sure that the record was

4 clear on that before we -- before we ended this

5 deposition. All right?

6 A. Okay. Yes.

7 MR. DILLMAN: And at this point I have no

8 further questions.

9 THE WITNESS: Okay.

10 MR. CANTOR: I have none either. Thank

11 you.

12 THE WITNESS: Okay. Thanks.

13 THE VIDEOGRAPHER: We're off the record

14 at 5:28 p.m.

15 (Proceedings adjourned at 5:28 p.m.)

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Brown, Jeanne 3/20/2011 4:07:00 PM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3
4 IN RE: FONTAINEBLEAU LAS VEGAS
5 CONTRACT LITIGATION MDL NO. 2106

6 This document relates to all actions.

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14 Videotaped Deposition of JEANNE BROWN, taken
15 by Plaintiffs, pursuant to notice, at the offices
16 of O'Melveny & Myers, LLP, 7 Times Square, New York,
17 New York, beginning at 9:29 a.m. on Sunday, March 20,
18 2011, before SUZANNE PASTOR, a Shorthand Reporter and
19 Notary Public within and for the State of New York.

20

21

22

23 JOB No. 158686

24

25

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ALSO PRESENT:

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THOMAS DEL VECCHIO, Videographer

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1 THE VIDEOGRAPHER: Here begins media number
2 1 of the deposition of Ms. Jeanne Brown in the
3 matter of in re Fontainebleau Las Vegas contract
4 litigation. This case is in the United States
5 District Court, Southern District of Florida,
6 and the case number is MDL 2106.

7 Today's date is Sunday, March 20th,
8 2011, the time is approximately 9:29 a.m. This
9 deposition is taking place at the offices of
10 O'Melveny & Myers, 7 Times Square, New York, New
11 York and is being taken on behalf of plaintiffs.

12 My name is Thomas DeVecchio, I am
13 the legal video specialist appearing on behalf
14 of Sarnoff Court Reporters and Legal
15 Technologies, located in Los Angeles.

16 All counsel, parties and the
17 deponent please take notice that as a part of
18 the videotaping of this deposition, very high
19 quality microphones are being used. These
20 microphones are very sensitive. If any party,
21 attorney or the deponent wishes to make a
22 statement or have a conversation off the record,
23 they should state that they are going off the
24 record and gain concurrence from all parties.
25 The videographer will then stop recording.

1 All recorded comments made by any
2 party, attorney or the deponent during this
3 deposition will be assumed to be on the record
4 and will be transcribed.

5 Will counsel please identify
6 yourselves and state whom you represent.

7 MS. WALTERS: Caroline Walters from
8 Hennigan Dorman, LLP, representing the
9 plaintiffs.

10 MR. CANTOR: Daniel Cantor,
11 O'Melveny & Myers, LLP for Bank of America NA
12 and the witness.

13 THE VIDEOGRAPHER: Thank you. Now
14 will the court reporter please swear in or
15 affirm the witness.

16 JEANNE BROWN,
17 having been first duly sworn by the Notary
18 Public (Suzanne Pastor), was examined and
19 testified as follows:

20 EXAMINATION BY

21 MS. WALTERS:

22 Q. Good morning, Ms. Brown.

23 A. Good morning.

24 Q. As we had a moment prior to going
25 on the record, I'm Caroline Walters and I'm here

1 representing the plaintiffs who are a group of
2 term lenders. Have you had a chance to talk to
3 counsel before the deposition?

4 A. Yes.

5 Q. And did he explain the rules of the
6 deposition?

7 A. Yes.

8 Q. Have you been deposed before?

9 A. No.

10 Q. But you understand that you should
11 wait for me to finish my sentence and I'll try
12 and wait for you to finish your answer so that
13 we make the reporter's job easy to make a clean
14 record.

15 A. Yes.

16 Q. Okay. Well, I won't go back
17 over -- take the time to go back over all the
18 rules that I'm sure Dan has previously explained
19 to you. But if at any point an issue comes up,
20 I'll just try and remind you as we go along.

21 Does that make sense?

22 A. Yes.

23 Q. Okay, good.

24 So you understand we're here

25 because I represent a group of term lenders who

1 have sued Bank of America over the disbursement
2 of funds in relation to the Fontainebleau
3 project in Las Vegas?

4 A. Yes.

5 Q. Did you do anything to prepare for
6 your deposition today?

7 A. Yes.

8 Q. What did you do to prepare?

9 A. I met with counsel yesterday.

10 Q. And how long did you meet for?

11 A. About three hours -- no, two and a
12 half, something like that.

13 Q. Did you review any documents?

14 A. Yes.

15 Q. And did the documents refresh your
16 recollection about certain events?

17 A. A little, yes.

18 Q. Can you tell me what those events
19 were?

20 A. Just about the funding process that
21 was gone through during the course of the
22 administration of that particular credit,
23 Fontainebleau.

24 Q. Did you talk to anybody else in
25 preparation?

1 A. No.

2 Q. Did you tell anyone else about your
3 deposition today?

4 A. Yes.

5 Q. Who else did you tell?

6 A. My husband, some of my friends.

7 Q. Did you talk to any colleagues or
8 prior colleagues at Bank of America?

9 A. Yes.

10 Q. Who did you talk to?

11 A. Brandon Bolio.

12 Q. Did you talk to anyone else?

13 MR. CANTOR: Object to the form.
14 You can go ahead and answer.

15 A. Oh. About this, no. No, nobody
16 else from former colleagues, no.

17 Q. What did you discuss with Mr. Bolio
18 about this deposition?

19 A. Just that it was occurring.

20 Q. Did you discuss any of the events
21 in regards to the Fontainebleau credit facility
22 with Mr. Bolio?

23 A. No.

24 Q. Where do you currently work?

25 A. First Franchise Capital

1 Corporation.

2 Q. And what do you do there?

3 A. I'm a senior paralegal.

4 Q. How long have you worked there?

5 A. Since August of 2010.

6 Q. What were you doing before going to

7 First Franchise?

8 A. Immediately before, I was

9 unemployed.

10 Q. Prior to that?

11 A. Bank of America.

12 Q. How long were you working at Bank

13 of America?

14 A. And predecessor organizations,

15 almost 18 years.

16 Q. It's a long time.

17 A. Hmm.

18 Q. When did you leave Bank of America?

19 A. July 2009.

20 Q. Why did you leave?

21 A. My department was let go.

22 Q. What was your department at the

23 time you were let go?

24 A. Credit services and administration

25 for New Jersey.

1 Q. Why was your department let go in
2 July 2009?

3 MR. CANTOR: Objection.

4 A. Downsizing.

5 Q. Was just the bank reorganizing and
6 downsizing and laid off your entire department?

7 A. Yes.

8 Q. When did you start working in the
9 credit services and administration department in
10 New Jersey?

11 A. In New Jersey, over my career, it
12 was back and forth. I was in New Jersey, I was
13 in New York, I covered Philadelphia. I couldn't
14 tell you specifically. I know I gave up New
15 York after 9/11.

16 Q. So let's say beginning in 2007,
17 what department were you in?

18 A. New Jersey.

19 Q. In the credit services and
20 administration?

21 A. Yes.

22 Q. And you remained in that department
23 until you were laid off?

24 A. Yes.

25 Q. What was your title in the

1 department between that time frame, 2011 and
2 2009?

3 A. I was the vice president and the
4 manager.

5 Q. And what were your job
6 responsibilities, just an overview, as a vice
7 president and manager?

8 A. Well, I managed the staff and we
9 managed -- we did the administration for New
10 Jersey customers, New Jersey-based customers,
11 and also we had a legacy term portfolio that we
12 managed. And then we picked up the casino
13 business. So we did the administration for
14 that.

15 Q. When you say you did the
16 administration for casino businesses, what does
17 that entail?

18 A. It was the review of the monthly
19 packages for construction. All the paperwork.

20 Q. And did you review the paperwork
21 and monthly construction packets for several
22 different facilities in that role?

23 A. Yes.

24 Q. And Fontainebleau was one of those
25 facilities?

1 A. Yes.

2 Q. So you were the main disbursement
3 agent on the Fontainebleau Las Vegas project,
4 right?

5 A. Yes.

6 Q. And you understand I'm referring to
7 construction of the hotel and casino --

8 A. Yes.

9 Q. -- in Las Vegas.

10 How were you assigned that role?

11 A. There was -- I had a counterpart in
12 Dallas, and that office, two people resigned so
13 they didn't have the capacity to cover it. And
14 it was given to my location because it was felt
15 we could handle the workload.

16 Q. Who was your counterpart in Dallas?

17 A. I don't remember the name.

18 Q. When you said there was a
19 counterpart in Dallas, are you referring to a
20 credit service and administration department
21 located in Dallas?

22 A. Yes.

23 Q. Was there one person in particular
24 who asked you to be the disbursement agent for
25 the Fontainebleau project?

1 A. Yes.

2 Q. Who was that?

3 A. My boss.

4 Q. Who was your boss?

5 A. Bridgette Casalino.

6 Q. And what is Bridgette's job?

7 A. She's an SVP who manages the

8 northeast.

9 Q. And she was an SPV of the credit

10 services and administration department?

11 A. Yes.

12 Q. Is she still at Bank of America?

13 A. As far as I know.

14 Q. Was Bridget Casalino located in the

15 New Jersey department?

16 A. No.

17 Q. Where is she located?

18 A. Rhode Island.

19 Q. So when your department was let go,

20 you're referring to just the New Jersey office?

21 A. Yes.

22 Q. The New Jersey section of credit

23 services and administration.

24 A. Yes.

25 Q. Do you remember the time -- what

1 Q. Was he part of the counterpart
2 group that you mentioned your credit and
3 services administration had in Dallas?

4 A. No.

5 Q. Do you remember what group he was a
6 part of?

7 A. Gaming and casinos.

8 Q. That was an independent group from
9 administration --

10 A. Yes.

11 Q. The next person in the e-mail is
12 Ron Naval.

13 A. Yes, I see that.

14 Q. What group was Mr. Naval part of?

15 A. Syndications servicing.

16 Q. Where was Mr. Naval located?

17 A. Dallas.

18 Q. When these draw reports were sent
19 let's say for the September 2008 as an example,
20 they would be sent to you as well as additional
21 employees at Bank of America such as Mr. Bolio
22 and Mr. Naval?

23 A. Yes.

24 Q. Once you got the draw report, what
25 would you do? Or draw package, excuse me.

1 A. Would review the invoices that were
2 part of the backup and see that they were
3 reflected in the various reports. And then look
4 to see that the reports brought the numbers
5 forward from the month before to the new month.

6 We would also coordinate with IVI
7 because they had to send their inspection
8 report. And we would have to contact the title
9 insurance company to get title brought up to
10 date so they can issue an endorsement to the
11 title policy. And when everything was in order
12 the funding would be authorized.

13 Q. When you said that you review the
14 reports to ensure they bring the numbers forward
15 from the last month, what did you mean by that?

16 A. The ending balance of the month
17 before should be the beginning balance of the
18 current month.

19 Q. You also mentioned that you
20 coordinated with IVI.

21 A. Yes.

22 Q. Who at IVI did you coordinate with?

23 A. Paul Bonvicino.

24 Q. Did you coordinate with anyone else
25 at IVI?

1 A. Occasionally Bob Barone.

2 Q. Is that it?

3 A. Yes.

4 Q. And did you and IVI have monthly
5 discussions regarding the draw packages?

6 A. Yes.

7 Q. What would be the content of those
8 discussions?

9 A. It would be with myself and also
10 with Brandon Bolio, we would discuss the ongoing
11 construction, if it was on target, budget
12 issues.

13 Q. So would you say in most months it
14 was you and Bolio and Mr. Bonvicino that had
15 these discussions?

16 A. Yes.

17 Q. Was there anybody else that was
18 part of the discussions?

19 A. Bob Barone.

20 Q. And Bob Barone.

21 A. Mm-hmm.

22 Q. And you had these discussions every
23 month.

24 A. Yes.

25 Q. Was this on a conference call?

1 A. Yes.

2 Q. Did you have meetings?

3 A. No.

4 Q. Did you talk to Fontainebleau at

5 all about the draw packages?

6 A. Yes.

7 Q. Did you talk to them in terms of --

8 strike that.

9 When you talked to Fontainebleau,
10 would you have a -- would Mr. Bolio be on those
11 calls as well?

12 A. Sometimes.

13 Q. Would you have a monthly meeting
14 with Fontainebleau about the draw reports?

15 A. A phone call.

16 Q. But you would have monthly phone
17 calls with Fontainebleau about the draw reports?

18 A. Sure, yes.

19 Q. Would IVI be on those phone calls
20 as well?

21 A. Sometimes.

22 Q. And what types of things would you
23 discuss with the company, with Fontainebleau
24 regarding the draw packages?

25 A. If something was not there that

1 Q. And he was also located in Dallas?

2 A. Yes.

3 Q. Who at Turnberry would attend these
4 quarterly meetings?

5 A. Roger McElfresh and Bob Ambridge.

6 Q. Anybody else?

7 A. There probably were but I couldn't
8 tell you who worked for Turnberry.

9 Q. Were people from Fontainebleau at
10 these meetings?

11 A. Yes.

12 Q. Who from Fontainebleau would
13 attend?

14 A. Kathy Hernandez, Deven Kumar,
15 occasionally Jim Freedman.

16 Q. Anybody else that you remember?

17 A. No. I mean -- there were other
18 people, I couldn't tell you who they worked for.

19 Q. Did anyone from IVI attend these
20 meetings?

21 A. Yes.

22 Q. Was that Mr. Bonvicino and
23 Mr. Barone again?

24 A. Yes. Yes.

25 Q. When you received the draw request

1 and any problems arose, you would feel like you
2 would have to track that down with the company?

3 MR. CANTOR: Objection. Go ahead,
4 you can answer. If you can.

5 A. Track it down with the company -- I
6 would call and ask them if something was
7 missing, you know, paper-wise.

8 Q. If there was any other problem
9 other than something missing paper-wise, would
10 you call and ask the company to resolve the
11 issue?

12 MR. CANTOR: Objection.

13 A. No.

14 Q. But you mentioned if any problems
15 had come up in discussions with IVI, someone
16 with Bank of America would call the company to
17 resolve the issue.

18 A. Yes.

19 Q. You just don't know whose job that
20 was to do that.

21 A. Casino's.

22 Q. Someone in Susman, Bolio's --

23 A. Bolio, right.

24 Q. -- team.

25 A. Mm-hmm.

1 Q. Would either Susman or Bolio keep
2 you apprised of conversations with the company
3 that they had regarding any problems that came
4 up?

5 A. I would have conversations with
6 Bolio, taking direction as to what my next steps
7 were.

8 Q. So Mr. Bolio would direct you as to
9 how to respond to the draw packages?

10 A. If there were problems.

11 Q. So once you have reviewed all the
12 paperwork, Mr. Bolio has resolved any problems
13 that he has or hasn't, and at some point
14 Mr. Bolio directs -- strike that question,
15 sorry.

16 Once you have reviewed all the
17 paperwork, at some point you executed an advance
18 confirmation notice, correct?

19 A. I don't remember what that is.

20 Q. Let me show you one and that might
21 help.

22 Just to backtrack one second,
23 Ms. Brown. If you did not receive a piece of
24 paper like you said from the company and that
25 was the time you would call the company, is that

1 something you would report to Mr. Bolio and
2 Mr. Susman?

3 A. Yes.

4 Q. Did you take any steps that you did
5 not report to Mr. Bolio and Mr. Susman?

6 A. No.

7 (Exhibit 237 for identification,
8 Bates BANA-FB 180358 through 180367.)

9 Q. So marked as Exhibit 237 in front
10 of you is an e-mail from you to Mr. Rafeedie and
11 Mr. Freedman and Mr. Rustgi, if I'm pronouncing
12 his name correctly. And it's dated September
13 17, 2008, and it's Bates stamped BANA FB 018358.
14 Do you see that?

15 A. Yes.

16 Q. On the second page there is a
17 document that is entitled "Advance Confirmation
18 Notice."

19 A. Yes.

20 Q. If we go to page 3 of the advance
21 confirmation notice, there's your signature as
22 Bank of America as disbursement agent, correct?

23 A. Yes.

24 Q. Does this help refresh your
25 recollection that you executed advance --

1 documents entitled "advance confirmation
2 notices" after reviewing draw packages?

3 A. Yes.

4 Q. Is this the type of document or
5 form of document you would have executed on a
6 monthly basis?

7 A. Yes.

8 Q. And that is your signature, right?

9 A. Yes.

10 Q. What had to happen before you
11 executed an advance confirmation notice?

12 MR. CANTOR: Object to the form.

13 Go ahead.

14 A. All the steps that I previously
15 noted, all the reviews that we would have done.
16 The bringing together of all the various
17 documents and pieces. And I would have gotten
18 approval from Dallas, casino gaming.

19 Q. When you say casino gaming, you
20 mean either Mr. Bolio or Mr. Susman.

21 A. Right.

22 Q. Is there anyone else in that group
23 who would give you approval to execute advance
24 confirmation notices?

25 A. Brian Corum.

1 Q. Is there a particular time frame
2 that Mr. Corum started giving you approval to
3 execute advance confirmation notices?

4 A. After Jeff Susman was gone.

5 Q. When was Jeff Susman gone?

6 A. Don't remember.

7 Q. At some point prior to your
8 departure from Bank of America, Mr. Susman left,
9 correct?

10 A. Yes.

11 Q. Do you know why Mr. Susman left?

12 A. No.

13 Q. Was Mr. Susman Mr. Bolio's boss?

14 A. I believe so.

15 Q. Mr. Susman was senior to Mr. Bolio?

16 A. Yes.

17 Q. Once Mr. Susman left and Mr. Corum
18 started giving you approval to execute advance
19 confirmation notices, was it your understanding
20 that Mr. Corum took the place of Mr. Susman?

21 A. No.

22 Q. Was he senior to Mr. Bolio?

23 A. Yes.

24 Q. Was he involved in the
25 Fontainebleau Las Vegas credit facility prior to

1 Mr. Susman's termination or --

2 A. I don't know.

3 Q. -- leaving?

4 Did you have any involvement with
5 Mr. Corum prior to Mr. Susman leaving?

6 A. No.

7 Q. So once Mr. Susman left, Mr. Corum
8 would ask you or advise you to sign advance
9 confirmation notices instead of Mr. Susman.

10 MR. CANTOR: Objection.

11 A. It was more likely Brandon Bolio.

12 Q. Did you understand that prior to
13 executing advance confirmation notices certain
14 conditions precedent had to be satisfied under
15 the disbursement agreement?

16 A. Yes.

17 Q. Who determined, and I think you
18 already answered this question by saying
19 Mr. Susman or Mr. Bolio had to approve the
20 advance confirmation notices, but did you -- who
21 determined the conditions precedent were met?

22 A. Brandon Bolio.

23 Q. Brandon Bolio alone?

24 A. Part of the team. I would do my
25 part, we would discuss it together. He would do

1 the parts that he was doing and discussing with
2 Jeff Susman.

3 Q. What were the parts Mr. Bolio was
4 doing?

5 A. I don't remember. There was a lot
6 of parts to this, and I don't remember
7 specifically.

8 Q. But from your understanding, it was
9 on Mr. Bolio and Mr. Susman's plate to ensure
10 the conditions precedent were met.

11 A. Yes.

12 Q. And that was not something that you
13 personally did.

14 A. No. Exactly.

15 Q. So going through the conditions
16 precedent, did you ever look through the
17 document and go through the conditions precedent
18 yourself?

19 A. Yes.

20 Q. On a monthly basis did you ever
21 consider whether the conditions precedent were
22 met? Do you want me to rephrase that?

23 A. Yes, please rephrase that.

24 Q. Okay. Prior to executing an
25 advance confirmation notice on any given month,

1 would you personally consider whether conditions
2 precedent were met?

3 MR. CANTOR: Any, all?

4 Q. Any.

5 A. I don't know how to answer that
6 question.

7 Q. Do you want to explain to me what
8 you're not understanding?

9 MR. CANTOR: If you can.

10 A. If I don't understand it --

11 Q. Okay. On any given month, prior to
12 executing the advance confirmation notice, did
13 you review the disbursement agreement and
14 consider the conditions precedent?

15 A. No. It was --

16 Q. That was not part of your job --
17 I'm sorry, I didn't mean to cut you off. Please
18 finish.

19 A. No. The format was decided up
20 front. I mean, I had read the conditions
21 precedent. Right? And then it was determined
22 what my role was specific to those conditions.
23 And that then became boilerplate on a monthly
24 basis.

25 Q. What do you mean "boilerplate"?

1 A. The same thing. Routine.

2 Q. What became routine?

3 A. What I did.

4 Q. I see.

5 A. What I was responsible for.

6 Q. When you said the format was
7 decided up front, what do you mean by that?

8 A. The discussions with the casino
9 group.

10 Q. Okay. When you say "up front," are
11 we referring to when you first became named
12 disbursement agent?

13 A. Yes.

14 Q. So when the credit facility was
15 originally entered into and you started helping
16 to administer this loan, your responsibilities
17 were determined, correct?

18 A. Right.

19 Q. At that point you reviewed the
20 conditions precedent.

21 A. Yes.

22 Q. At any point after that did you go
23 back to re-review the conditions precedent?

24 MR. CANTOR: You mean in the
25 document?

1 MS. WALTERS: Yes.

2 A. I don't remember.

3 Q. And is it your understanding that
4 it was on Mr. Bolio's and Mr. Susman's and their
5 team's plate to determine whether those
6 conditions precedent were met every month?

7 A. Yes.

8 Q. Beyond doing what you said you did,
9 which was make sure -- I think you went through
10 several steps but one of them was making sure
11 you got all the correct pieces of paper.

12 A. Right.

13 Q. Beyond doing that, did you do
14 anything on a monthly basis to ensure the
15 conditions precedent were met?

16 A. No.

17 Q. How regularly would you talk to
18 Mr. Bolio and Mr. Susman regarding the
19 Fontainebleau project?

20 A. Frequently.

21 Q. Would it be a daily basis?

22 A. Maybe once or -- maybe twice a
23 week, three times a week.

24 Q. And if you learned any information
25 about the project independent of them, would you

1 share it with them?

2 A. Absolutely.

3 Q. Going back to what is Exhibit 237,

4 on the front, the name I mentioned previously,

5 Mr. Rafeedie and Mr. Freedman and Mr. Rustgi,

6 who is Mr. Rafeedie?

7 A. He worked at Trimont.

8 Q. Who was Trimont?

9 A. They were the servicer for Lehman

10 Brothers.

11 Q. When you say the servicer for

12 Lehman Brothers, was that the servicer for

13 Lehman Brothers in connection with the retail

14 facility portion of the construction loan?

15 A. Yes.

16 Q. And then I see Josh Freedman, it

17 says at Lehman. So presumably Mr. Freedman

18 works at Lehman. Did you have any contact with

19 him?

20 A. No.

21 Q. Beyond putting him on e-mails that

22 you also sent to Mr. Rafeedie?

23 A. Right.

24 Q. And what about Mr. Rustgi -- I

25 don't know that I'm pronouncing that correctly,

1 I apologize. Who is he?

2 A. He worked at Trimont.

3 Q. Did you have regular contact with

4 Mr. Rustgi?

5 A. He covered when Mac Rafeedie wasn't

6 around.

7 Q. And did you have regular

8 conversations with Mr. Rafeedie?

9 A. Monthly.

10 Q. Did you like Mr. Rafeedie?

11 A. Indifferent.

12 Q. Did you have any reason to believe

13 Mr. Rafeedie would be dishonest?

14 MR. CANTOR: Objection.

15 A. No idea.

16 Q. Is this Exhibit 237 representative

17 of what you would have sent to Mr. Rafeedie

18 every month?

19 A. I don't really remember.

20 Q. Well, is it -- once you execute the

21 advance confirmation notice, you sent it to

22 Mr. Rafeedie. Why did you do that?

23 A. He needed it to give us the money

24 for his part for the money to come from Lehman

25 Brothers.

1 Q. What money is that that comes from
2 Lehman Brothers?

3 A. The retail facility.

4 Q. So every month, once you would
5 execute the advance confirmation notice, if it
6 called for money for the retail facility you
7 would send it to Mr. Rafeedie?

8 A. Yes.

9 Q. And what would Mr. Rafeedie then
10 do?

11 A. I don't know.

12 Q. Your goal of sending this to
13 Mr. Rafeedie you had mentioned was to get the
14 money from the retail facility.

15 A. Right.

16 Q. Do you know where the money from
17 the retail facility was coming from?

18 A. Lehman Brothers.

19 Q. Do you know that there were other
20 lenders as well as Lehman to the retail
21 facility?

22 A. I didn't know initially. I know it
23 now, but I didn't know it then.

24 Q. When you say you know it now, when
25 did you come to learn that?

1 A. Well, yesterday in our discussions

2 here --

3 Q. I don't want to hear about what was

4 discussed with your counsel.

5 A. Oh.

6 Q. But yesterday you learned that.

7 A. Yesterday. My memory came back

8 yesterday.

9 Q. Did that refresh your recollection

10 that at some point previously you would have

11 known that?

12 A. Yes.

13 Q. And can you now say who the other

14 lenders were to the loan, to that retail

15 facility other than Lehman?

16 A. I just remember Sumitomo and

17 Ullico.

18 Q. So after you would send a monthly

19 advance confirmation notice to Mr. Rafeedie,

20 would you have conversations with Mr. Rafeedie

21 about him collecting the retail funds and

22 delivering them to you?

23 A. Yes. I would ask him where is the

24 wire.

25 Q. We'll get back to that in one

1 moment. I just want to go over the advance
2 confirmation notice, if you would flip to page
3 2. Well, actually, I'm sorry, I meant page 2 of
4 the exhibit, page 16 the advance confirmation
5 notice.

6 It goes through -- it says the
7 amount to be advanced, and it lists almost
8 \$4 million from the retail facility. And that's
9 all money that is coming from Lehman or other
10 lenders under that facility, correct?

11 A. I don't remember. Just from what
12 I'm reading here.

13 Q. But you don't remember --

14 A. No.

15 Q. Do you remember whether resort loss
16 proceeds -- what the resort loss proceeds
17 account was?

18 A. No.

19 Q. And the next line down it says
20 amounts to be advanced from the second mortgage
21 proceeds account. Do you remember what that
22 was?

23 A. No.

24 Q. And the next line down says from
25 the equity funding account. Do you see that?

1 A. Yes, I see that.

2 Q. Do you remember what that funding

3 account was?

4 A. No.

5 Q. Moving on to page 2, it says from

6 the bank proceeds account. Do you remember what

7 that proceeds account was?

8 A. No.

9 Q. And would it be fair to say then

10 you don't remember where the money came from

11 that funded the bank proceeds account?

12 A. No.

13 Q. I think maybe just to be clear for

14 the record, that maybe my question was confusing

15 because you answered "no" and I said would it be

16 fair to say you don't remember.

17 A. Oh.

18 Q. And I think you meant yes.

19 MR. CANTOR: So fix the double

20 negative.

21 Q. Sorry.

22 MR. CANTOR: No, you don't remember

23 where those funds came from?

24 A. No, I don't remember.

25 Q. Thank you. Same is true for the

1 liquidity account exceeds 50,000.

2 A. I don't remember.

3 Q. So then it goes down and it says

4 "Advances pursuant to the retail facility shall

5 be deposited into retail funding account for

6 further credit towards the following accounts."

7 Do you see that?

8 A. Yes.

9 Q. Who disbursed from the retail

10 funding account to these following accounts? It

11 says retail payment account and resort payment

12 account, and it looks like for the September

13 advance, the money is all going to the resort

14 payment account. Do you see that?

15 A. Yes.

16 Q. Who disbursed the money from the

17 one account to the other?

18 A. I don't remember.

19 Q. Do you remember what had to happen

20 in order for the money to be disbursed?

21 A. Everything had to be in place. We

22 had to -- the money had to come from the other

23 places first. Everybody had to come in in

24 accordance with the schedule. All the package

25 had to be reviewed and then the money -- and

1 whoever needed the information got the
2 information, and then the money had to flow in
3 from wherever it was coming. But I only
4 remember generalities, I don't remember
5 specifics.

6 Q. When you said the money had to flow
7 in from wherever it's coming, do you mean --

8 A. Like Lehman.

9 Q. So you had to get the money from
10 Lehman.

11 A. Right.

12 Q. And whoever else. As we went
13 through at the beginning, there was the bank
14 facility and the second mortgage proceeds --

15 A. Right.

16 Q. -- account. So you mean any
17 requests from those facilities the lenders had
18 to fund, is that correct?

19 A. Yes.

20 MR. CANTOR: Object to the form of
21 that last question.

22 Q. Once that happened, was this
23 automatic -- once all the funds came into Bank
24 of America from these various different
25 facilities, did they automatically go from one

1 funding account to -- let's say the retail
2 funding account to the original payment account?

3 MR. CANTOR: Objection.

4 A. No.

5 Q. What happened?

6 A. Somebody would have to instruct
7 somebody to move the money.

8 Q. Do you know who had to instruct who
9 to -- who instructed to move the money?

10 A. I don't remember.

11 Q. Do you remember who was instructed
12 to move the money?

13 A. No.

14 Q. You don't remember that process at
15 all.

16 A. I remember there was a process. I
17 don't recall the particulars.

18 Q. Is that also true if we scroll down
19 to the middle of the page, it says, "Advances
20 funded from the bank proceeds account shall be
21 deposited into the bank funding account for
22 further credits to the following accounts"?

23 A. Right.

24 Q. Do you also not remember the
25 particulars of that?

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1 A. Exactly, I don't remember.

2 Q. Do you know if you -- do you recall

3 if you instructed anyone to move funds from one

4 account to another?

5 A. Yes, I know I did that at some

6 point, but I don't remember from which to what.

7 Q. And if you did instruct someone to

8 move funds from one account to another, would

9 you make that decision yourself?

10 A. No.

11 Q. Who made that decision?

12 A. It would have been in conjunction

13 with casinos, with Brandon Bolio and/or Jeff

14 Susman.

15 Q. When you say "in conjunction with,"

16 what do you mean?

17 A. Together. I mean, I would be

18 taking direction. Everything had to be cleared

19 through casinos.

20 Q. So is it fair to say you recall

21 either Bolio or Susman on occasions directing

22 you to move funds from one account to another?

23 MR. CANTOR: Objection.

24 A. It would have been in conjunction

25 with the protocol.

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1 Q. What was the protocol?

2 A. The flow that had been determined
3 in the loan documents, or the structure of the
4 credit. What money came in first, where it
5 could go, that was all determined.

6 Q. When you say "that was all
7 determined," you mean in the loan documents --
8 that had been determined by the loan documents?

9 A. As I recall, yeah.

10 Q. But even though -- whatever was
11 determined in the loan documents, you would only
12 have directed funds to be moved from one account
13 to another if someone in casinos and gaming
14 asked you to do that.

15 A. Yes.

16 Q. At no point would you have just
17 directed someone to move funds.

18 MR. CANTOR: Objection.

19 A. No.

20 Q. I'm going to mark this as Exhibit
21 238.

22 (Exhibit 238 for identification,
23 Bates BANA-FB 234074.)

24 Q. So Exhibit 238 is an e-mail from
25 you to Jesse Phalen dated September 26, 2008 and

1 it's Bates stamped BANA FB 234074. Can you tell
2 me what this e-mail is?

3 A. Well, I'm reading it. And it's
4 telling me that it's pertaining to Fontainebleau
5 Las Vegas, September 2008. And I'm telling
6 Jesse do not execute until confirmation is
7 received and that we got certain money from
8 Wells Fargo, and it's instructions about moving
9 money, and that we got confirmation on other
10 things.

11 Q. Does this refresh your recollection
12 that you requested Jesse Phalen -- that Jesse
13 Phalen will be someone who you would be
14 requesting to require money from one account to
15 another?

16 A. Okay.

17 Q. I understand that you can see that
18 by looking at this e-mail. What I'm wondering
19 if this refreshes your recollection as to that.

20 A. Not specifically.

21 Q. Do you have any reason to believe
22 you didn't send this e-mail?

23 A. No.

24 Q. But you do not recall sending this
25 e-mail.

1 A. No.

2 Q. Would you assume once you sent an
3 e-mail like this that the funds would have in
4 fact been transferred?

5 MR. CANTOR: Objection.

6 Q. Do you recall once you sent this
7 e-mail that the funds you're requesting
8 Mr. Phalen to transfer were in fact transferred?

9 A. No. It says "do not execute until
10 confirmation is received."

11 Q. Good point, thank you.

12 Assuming Mr. Phalen got
13 confirmation, would you assume the funds were in
14 fact transferred?

15 MR. CANTOR: Objection.

16 A. I would guess so.

17 Q. Who else was in your department
18 that you worked with on this credit?

19 A. Rose Crifo.

20 Q. Is that it?

21 A. Claudia Camejo.

22 Q. What was Rose Crifo's role in
23 relation to this credit?

24 A. Rose reviewed the invoices that
25 came in from Fontainebleau and made sure that

1 they footed to the numbers.

2 Q. And what was Claudia's role?

3 A. The same thing.

4 Q. Did both of them report to you?

5 A. Yes.

6 Q. Is there anyone else you recall
7 that you would have directed to transfer funds
8 other than Jesse Phalen?

9 MR. CANTOR: Objection.

10 A. I don't remember.

11 Q. Prior to sending this e-mail that's
12 now Exhibit 238, Mr. Bolio or Mr. Susman would
13 have directed you to do so, is that correct?

14 A. Yes.

15 Q. And when you say "do not execute
16 until advance confirmation is received" at the
17 top of the e-mail, what confirmation were you
18 waiting for?

19 MR. CANTOR: Objection.

20 A. I don't remember.

21 Q. Would the confirmation have come
22 from you or someone else?

23 A. I don't remember.

24 Q. Would you ever be in the position
25 to be confirming execution of transferring

1 funds?

2 MR. CANTOR: Objection.

3 A. I don't think I understand.

4 Q. Let me try and rephrase. Would

5 you -- from my understanding, you had testified

6 that you would not have asked anyone to transfer

7 any funds without the prior direction of

8 Mr. Bolio or Mr. Susman.

9 A. Right.

10 Q. What I'm wondering then is when you

11 say "do not execute until confirmation

12 received," are you waiting for confirmation from

13 Mr. Bolio or Mr. Susman?

14 A. I don't remember.

15 Q. Is that likely that you were

16 waiting for direction from one of them?

17 MR. CANTOR: Objection.

18 A. I just don't remember.

19 Q. Is there any other person who could

20 confirm to you that funds should be transferred

21 from one account to another under the credit

22 facility other than Mr. Bolio and Mr. Susman?

23 A. No.

24 MR. CANTOR: Objection.

25 Q. Do you remember anything happening

1 in the September 2008 time frame that was a
2 concern of yours or of the casino and gaming
3 folks in Dallas prior to executing the
4 confirmation notice?

5 A. No.

6 Q. Did you find out at some point that
7 Lehman stopped funding the retail facility?

8 A. Yes.

9 Q. When did you find that out?

10 A. When the market crashed and they
11 filed bankruptcy.

12 Q. So you understood in September --
13 do you know -- do you understand that Lehman
14 filed for bankruptcy in September 2008?

15 A. Okay.

16 Q. If I represent to you they filed
17 for bankruptcy in September 2008, would it be
18 fair to say then that you understood Lehman
19 stopped funding the retail facility in September
20 2008?

21 A. Yes.

22 Q. When Lehman stopped funding the
23 retail facility, did you know who was funding
24 their portion of the retail facility for them?

25 A. No.

1 Q. Did you know that at any point who
2 was funding Lehman's portion of the retail
3 facility?

4 A. No.

5 Q. Do you just not recall or you did
6 not know?

7 A. I did not know.

8 Q. But you did know that Lehman was
9 not funding.

10 MR. CANTOR: Objection.

11 A. I assumed so. I knew they were
12 bankrupt.

13 Q. In your conversations with
14 Mr. Rafeedie regarding his ability to collect
15 the funds under the retail facility, did
16 Mr. Rafeedie discuss with you who was -- any
17 problems he was having collecting that money?

18 A. I knew he was having problems
19 getting the money.

20 Q. And is this starting from the time
21 that Lehman filed bankruptcy?

22 A. Yes.

23 Q. And prior to that time had he had
24 any problems, as far as you know?

25 A. No.

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1 Q. And in September 2008, which as I
2 stated was the month Lehman filed bankruptcy, so
3 the month Lehman filed bankruptcy, did
4 Mr. Rafeedie tell you that Lehman was not
5 funding? Would that have been one of your
6 sources of information?

7 A. I don't remember him telling me
8 that.

9 Q. If Mr. Rafeedie had told you that,
10 would you have reported that to Mr. Susman and
11 Mr. Bolio?

12 A. Sure.

13 Q. Do you remember in the month that
14 Lehman filed for bankruptcy whether you were
15 concerned about Lehman funding its portion of
16 the retail facility?

17 A. Yes.

18 Q. Do you remember whether it was
19 funded?

20 MR. CANTOR: I'm sorry?

21 A. I'm confused.

22 Q. Do you remember whether Lehman did
23 in fact fund this portion?

24 A. When?

25 Q. In September 2008.

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1 A. No, I don't remember.

2 Q. But you do remember being concerned

3 as to whether it would be funded.

4 A. Yes.

5 Q. Was this concern about whether

6 Lehman would fund the September 2008 draw a

7 concern you discussed with other people at Bank

8 of America?

9 A. I don't remember.

10 Q. If you had a concern that Lehman

11 would not fund part of its draw, would you have

12 discussed it with Mr. Bolio and Mr. Susman?

13 A. Yes. Yes.

14 Q. If Mr. Bolio and Mr. Susman had

15 concerns about Lehman, would they have discussed

16 it with you?

17 A. Yes.

18 Q. So if Mr. Bolio had been concerned

19 about -- strike that.

20 Did you keep Mr. Rafeedie up to

21 date as to the status of draw packages?

22 A. No.

23 Q. Did Mr. Rafeedie keep you up to

24 date as to the status of him funding the retail

25 facility after you sent him advance confirmation

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1 notices?

2 A. Only as far as whether I was
3 getting my wire or not.

4 Q. I show you a document that was
5 previously marked as Exhibit 58. And this is an
6 e-mail where you're e-mailing Mr. Rafeedie dated
7 December 30, 2008. And you're saying,
8 "Anything?"

9 A. Yes.

10 Q. Does this help refresh your
11 recollection that you would regularly correspond
12 with Mr. Rafeedie about the status of him
13 advancing the funds under the retail facility?

14 MR. CANTOR: Objection.

15 A. Yes. Yes, I'm looking for the
16 wire.

17 Q. Mr. Rafeedie would be responsive
18 when you were asking him questions about the
19 status of the wire?

20 A. I don't -- you know -- I don't
21 know. I'm trying to remember. It seemed like I
22 was chasing him at that point in time to find
23 out what the status was of the wire.

24 MR. CANTOR: And by "at that point
25 in time" you're referring to this document?

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1 THE WITNESS: This document, yes.

2 MR. CANTOR: 58, which is dated

3 December 30, 2008.

4 THE WITNESS: Yes.

5 Q. Should we take a break?

6 THE VIDEOGRAPHER: This marks the

7 end of media number 1 of the deposition of

8 Ms. Jeanne Brown. We are off the record at

9 approximately 10:47 a.m.

10 (Recess taken.)

11 THE VIDEOGRAPHER: We are back on

12 the record at approximately 1054 a.m., and this

13 marks the beginning of media number 2 of the

14 deposition of Ms. Jeanne Brown.

15 BY MS. WALTERS:

16 Q. So before the break, Ms. Brown, I

17 had showed you Exhibit 58, which was an e-mail

18 from you to Mr. Rafeedie, and you stated -- I

19 believe that you remember at this time period

20 you were having to -- and "this time period"

21 being December 2008, had to chase Mr. Rafeedie

22 down in terms of finding out where the wire was

23 from the retail facility, is that correct?

24 A. Yes.

25 Q. Do you remember finding that

1 Mr. Rafeedie ever -- strike that.

2 Do you remember that Mr. Rafeedie
3 would update you when you say you were chasing
4 him down -- strike that again, sorry.

5 What do you mean when you say you
6 were chasing him down?

7 A. Call him, e-mail him asking where's
8 my wire, what's the status of the wire.

9 Q. Would Mr. Rafeedie respond timely
10 to your inquiries?

11 MR. CANTOR: Objection. You can
12 answer if you can.

13 A. I think I was having difficulty in
14 this month with getting him to respond.

15 Q. Did Mr. Rafeedie ever -- strike
16 that. Do you recall ever finding out another
17 retail lender was funding for Lehman?

18 A. Yes.

19 Q. Which other retail lender was that?

20 A. I thought Ullico.

21 Q. When did you learn that
22 information?

23 A. I don't remember.

24 Q. How did you learn that information?

25 A. I don't remember.

1 Q. Do you remember Mr. Rafeedie
2 telling you that Ullico was funding the Lehman
3 piece of the retail facility at any point?

4 A. No, I don't remember.

5 Q. And you didn't refresh anything
6 that refreshed your recollection regarding this?

7 MR. CANTOR: Objection.

8 A. No.

9 MS. WALTERS: Let me mark this as
10 239.

11 (Exhibit 239 for identification,
12 Bates BANA-FB 401060 through 401061.)

13 Q. So what I've marked as Exhibit 239
14 is an e-mail from you to Mr. Susman dated
15 December 30, 2008, and it is Bates stamped BANA
16 FB 401060. Do you need a minute to look at it?

17 A. Okay.

18 Q. Does this refresh your recollection
19 that Mr. Mac at Trimont expects you to fund the
20 Lehman piece. Is "Mac" Mr. Rafeedie?

21 A. Yes.

22 Q. Does this refresh your recollection
23 that Mr. Rafeedie told you Ullico was going to
24 fund the Lehman portion?

25 A. No.

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1 Q. Do you have any reason to believe
2 that this is not an accurate representation of
3 what Mr. Rafeedie told you at the time?

4 A. No.

5 Q. You just don't remember one way or
6 another as you sit here today.

7 A. Right.

8 Q. Would you have sent an e-mail
9 saying Mr. Rafeedie, Trimont expects Ullico to
10 fund the Lehman piece if he had not in fact told
11 you that?

12 MR. CANTOR: Objection.

13 A. Now I'm confused.

14 Q. Would you have sent this e-mail to
15 Mr. Susman saying that Trimont expected Ullico
16 to fund the Lehman piece if Mr. Rafeedie did not
17 tell you that?

18 A. No.

19 Q. But as you sit here today you have
20 no independent recollection of these facts.

21 A. No.

22 Q. Consistent with this e-mail, if you
23 found out from Trimont that someone other than
24 Lehman was funding Lehman's piece, would you
25 have automatically told Mr. Susman?

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1 A. Yes.

2 Q. Would you have automatically told

3 Mr. Bolio?

4 A. Yes.

5 Q. For the next draw in January 2009,

6 do you have any -- do you know who funded

7 Lehman's portion of the retail facility?

8 A. No.

9 Q. But again, if you found out that

10 someone -- if you found out from Trimont that

11 someone other than Lehman was funding that

12 portion, you would have told Mr. Susman.

13 A. Yes.

14 Q. And the same is true for any month

15 that that happened, is that correct?

16 A. Yes.

17 Q. Do you have any recollection of

18 Trimont telling you that Ullico funded the

19 Lehman piece in any month?

20 A. No.

21 Q. I just want to clarify your

22 testimony that as you sit here today, you don't

23 remember Trimont telling you Ullico was funding

24 is not limited to the December 2008 funding.

25 A. Right.

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1 Q. In general, you don't remember that
2 ever happening.

3 A. No.

4 Q. But not to say that it did not
5 happen.

6 A. Right.

7 Q. As you can see, there are e-mails.

8 A. Right.

9 MR. CANTOR: Well, and she
10 testified earlier that at some point she heard
11 that Ullico was funding.

12 MS. WALTERS: But she doesn't
13 remember when. That's true.

14 Q. But you just don't remember if
15 Trimont told you, sitting here today.

16 A. No.

17 Q. Or how you found that out.

18 A. No.

19 Q. Looking at that e-mail, does that
20 refresh your recollection that Mr. Rafeedie
21 would keep you up to date as to what was going
22 on with the -- with who was funding the Lehman
23 portion of the loan?

24 MR. CANTOR: Objection.

25 A. I don't remember.

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1 Q. That December 30th, 2008 e-mail --

2 MR. CANTOR: Which one?

3 Q. Sorry, it's Exhibit -- we're at

4 239, right?

5 MR. CANTOR: Because Rafeedie's was

6 also December 30th. I wasn't sure which one you

7 were referring to.

8 MS. WALTERS: You're right. Thank

9 you.

10 Q. The e-mail from you to Mr. Susman

11 on December 30th, 2009 reflects that Trimont

12 was -- Mr. Rafeedie at Trimont was updating you

13 as to who was funding the Lehman piece, right?

14 A. Yes. As I read it here.

15 Q. Does this refresh your recollection

16 that they were updating you, not necessarily

17 that Ullico specifically, but that they were

18 updating you regularly as to who was funding the

19 Lehman piece?

20 MR. CANTOR: Objection --

21 A. No.

22 Q. Again, not to say that's not true,

23 right?

24 A. I don't remember.

25 Q. You just don't remember one way or

1 the other.

2 A. Right.

3 Q. Given that as this Exhibit 239

4 e-mail reflects that Mr. Rafeedie was updating

5 you as to who was funding the Lehman piece,

6 would it be fair to assume that he had been

7 doing this in the past?

8 MR. CANTOR: Objection.

9 A. I have no idea.

10 Q. Would it be fair to assume if he

11 continued to do so?

12 MR. CANTOR: I'm sorry, what?

13 Q. Would it be fair to assume that

14 Mr. Rafeedie continued to update you?

15 MR. CANTOR: Objection.

16 A. I don't remember.

17 (Exhibit 240 for identification,

18 Bates BANA-FB 235198 through 235200.)

19 Q. Marked as Exhibit 240 is an e-mail

20 from you to Brandon Bolio dated February 25,

21 2009 and it's Bates stamped BANA FB 235198. Do

22 you want to take a minute to flip through it?

23 A. (The witness reads the document.)

24 Okay.

25 Q. You see at the bottom of the e-mail

1 string on the first page is an e-mail from Eric
2 Salzinger to Mr. Rafeedie?

3 A. Yes.

4 Q. That says, "Please check again.

5 Ullico funded the Lehman portion with a
6 simultaneous wire" is the first one.

7 A. I see that.

8 Q. Who is Eric Salzinger?

9 A. I have no idea.

10 Q. Did you ever have any contact with
11 him?

12 A. No.

13 Q. At some point, if we scroll up to
14 the second from the top e-mail in the chain,
15 Mr. Rafeedie has then replied to Mr. Salzinger
16 and copied to you stating, "All the money is in
17 and we're generating a wire to B of A." Do you
18 see that?

19 A. Yes.

20 Q. Does this help refresh your
21 recollection that Mr. Rafeedie would indeed keep
22 you updated as to who was funding the Lehman
23 portion of the draw?

24 MR. CANTOR: Objection.

25 A. No.

1 Q. When you say "no," you mean --

2 A. It doesn't refresh my recollection.

3 Q. You still have no recollection of
4 those facts?

5 A. No.

6 Q. But not to say that that's not
7 accurate.

8 MR. CANTOR: Objection.

9 A. Fine.

10 Q. I'm trying to -- I'm trying to find
11 out, you don't know one way or the other right
12 now, is that accurate?

13 A. Right.

14 Q. And this is not refreshing your
15 recollection.

16 A. No.

17 Q. At the top of the e-mail you then
18 forward this to Mr. Bolio and you said, "What
19 next?" Do you see that?

20 A. Yes.

21 Q. Would this be consistent with your
22 practice of having -- Mr. Bolio directing you
23 what to do in terms of your job
24 responsibilities?

25 A. Yes.

1 Q. Do you have any recollection of
2 what Mr. Bolio told you in response to this
3 e-mail?

4 A. No.

5 Q. And this would be consistent with
6 your practice that if you found out information
7 about who was funding Lehman's portion of the
8 draw, you would also share that information with
9 Mr. Bolio.

10 A. Right.

11 Q. Do you know if Mr. Susman had left
12 by this point, February 25, 2009?

13 A. No, I don't remember.

14 Q. Is there any reason you would have
15 sent this to Mr. Bolio and not Mr. Susman?

16 A. Don't remember.

17 Q. Now, you had previously testified
18 that you thought Lehman stopped funding its
19 portion of the draw when it filed for
20 bankruptcy, which I represented was in September
21 of 2008, right?

22 MR. CANTOR: Objection. I think
23 that mischaracterizes the her testimony that she
24 corrected later saying that she assumed they
25 stopped funding.

1 A. I assume that they stopped funding.

2 Q. Do you know if Trimont told you
3 that they stopped funding in September 2008?

4 MR. CANTOR: Objection.

5 A. I don't remember.

6 Q. In September 2008, prior to the --
7 after Lehman had filed bankruptcy and before
8 executing advance confirmation notice, you
9 talked with the employees of Turnberry. Do you
10 remember that?

11 A. No.

12 Q. If Turnberry called you several
13 times in a day, would you have returned their
14 phone call?

15 MR. CANTOR: Objection.

16 A. I have no idea.

17 Q. Turnberry was affiliated with
18 Fontainebleau, was it not?

19 A. I don't really know the
20 relationship.

21 Q. Did you consider Turnberry to be a
22 client?

23 A. No.

24 Q. But would it be your practice to
25 return phone calls if someone called you in

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1 connection with a loan several times?

2 MR. CANTOR: Objection.

3 A. Yes.

4 Q. We had discussed earlier that you
5 had been concerned in September 2008, the month
6 Lehman filed for bankruptcy, about whether
7 Lehman would fund, correct?

8 A. Yes.

9 Q. But you don't know if Lehman
10 ultimately funded or not, is that right?

11 A. No, I don't know.

12 Q. Do you know whether someone funded,
13 whether it be Lehman or not, Lehman's share of
14 the September 2008 draw?

15 A. I don't remember the details.

16 Q. If Lehman did not fund its share of
17 the September 2008 draw, would the advance have
18 gone forward?

19 MR. CANTOR: Is your question
20 whether the entire amount of the retail portion
21 for September came in or not?

22 MS. WALTERS: Yes.

23 A. I don't remember if it came in or
24 not. You know? But we wouldn't go forward
25 unless we had that part. That was part of the

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1 protocol. Each step had to come in order.

2 Q. And when you say "we wouldn't go
3 forward," that's you personally would not have
4 made that decision not to go forward?

5 A. We the bank.

6 Q. You had said previously your role
7 was to look over the draw package -- we
8 discussed previously that it --

9 (Interruption.)

10 Q. We said previously that the gaming
11 and casinos team in Dallas decided whether
12 conditions precedent were met and directed, is
13 that correct?

14 A. Yes.

15 Q. And they directed you whether or
16 not to advance funds, correct?

17 A. Right, yes.

18 Q. Or to request someone else funds.

19 A. Right.

20 Q. So now you're saying -- when you
21 say now we wouldn't have gone forward if all the
22 pieces didn't come in, would that have been your
23 decision?

24 A. No.

25 Q. Your personally.

1 A. No.

2 Q. Is your understanding that the
3 casino and gaming group would not have gone
4 forward if all the pieces didn't come in?

5 A. Yes.

6 Q. But you don't know -- strike that.
7 Given that -- strike that. If
8 someone else funded Lehman's portion of the draw
9 on any month, you would not -- you were not
10 involved in the process of determining whether
11 the conditions precedent were satisfied, is that
12 correct?

13 MR. CANTOR: Objection.

14 A. Those seem like two separate
15 thoughts to me.

16 Q. Okay, let me go through it with
17 you. If someone else -- okay, we had discussed
18 that the gaming casino folks were in charge of
19 ensuring the conditions precedent were
20 satisfied, correct?

21 A. Yes.

22 Q. And they would direct you whether
23 to fund or not, correct?

24 A. Right.

25 Q. You have no knowledge of whether --

1 if a different lender funded or if someone else
2 funded Lehman's draw, you wouldn't be the person
3 who would know whether the conditions precedent
4 were satisfied, or whether that violated
5 conditions precedent.

6 MR. CANTOR: Are you also assuming
7 in your question that Bank of America knew that
8 somebody else funded Lehman's portion?

9 Q. Assuming that, sure.

10 A. I'm completely confused.

11 Q. Okay, let me start again then.

12 A. It just --

13 MR. CANTOR: Let her ask a
14 question.

15 A. I'm confused.

16 Q. You have told me that you advanced
17 funds or executed advance confirmation notices
18 at the direction of people in Dallas.

19 A. Yes.

20 Q. The gaming casino folks.

21 A. Yes.

22 Q. Given that, if somebody else funded
23 for Lehman, assuming Bank of America knew
24 somebody else funded, it would not be your role
25 to determine whether that would affect advancing

1 funds or not, is that correct?

2 A. Yes.

3 Q. That would be the role of the

4 people in Dallas, the gaming and casino folks.

5 A. Yes.

6 Q. They'd make that determination.

7 A. Well, I wouldn't.

8 Q. You wouldn't.

9 A. I wouldn't.

10 Q. And you do not know whether that

11 determination would have been made by the gaming

12 and casino folks in Dallas or somebody else or

13 at all.

14 A. Right. I don't know.

15 Q. So as we discussed, in September

16 2008 you had said you were concerned as to

17 whether Lehman would fund, correct?

18 A. Yes.

19 Q. And you're not sure whether Lehman

20 funded at all that month.

21 A. I don't remember.

22 Q. Do you remember when -- do you

23 remember sending an e-mail when money for the

24 Lehman portion of the draw had arrived?

25 A. Specifically, no.

1 Q. Let me mark this.

2 (Exhibit 241 for identification,

3 Bates BANA-FB 462092.)

4 Q. Exhibit 241 is an e-mail, at the

5 top of the e-mail is Mr. Susman forwarding an

6 e-mail from you to various people dated

7 September 26, 2008. And the e-mail from you is

8 an e-mail you sent same day to Mr. Bolio and

9 Mr. Susman. And it reads, "The wire for the

10 Lehman portion has arrived. Please advise."

11 Does that refresh your recollection

12 as to whether money -- whether the Lehman

13 portion of the retail draw was in fact funded?

14 MR. CANTOR: Objection.

15 A. No. Just what I'm reading here.

16 Q. But it doesn't refresh your memory.

17 A. No.

18 Q. Now, how you wrote this, "the wire

19 for the Lehman portion has arrived," you didn't

20 write "Lehman has funded," correct?

21 A. No, I didn't write that.

22 Q. If Lehman had funded, wouldn't you

23 expect yourself to write "Lehman funded"?

24 MR. CANTOR: Objection.

25 A. No.

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1 Q. You wouldn't say "Lehman's" --

2 MR. CANTOR: Counsel, I think
3 you're assuming that "Lehman portion" refers to
4 a portion of the retail facility as opposed to
5 Lehman portion being a synonym for the entire
6 retail facility.

7 Q. When you see this, would you have
8 written "Lehman's portion," referring to the
9 entire retail facility?

10 A. Yes.

11 Q. Is this one of the documents you
12 used to refresh your recollection?

13 A. Yes.

14 Q. And you stated that while you see
15 this now, this didn't actually -- and you
16 reviewed it in preparation for the deposition,
17 that this has not actually refreshed your
18 recollection.

19 A. No.

20 Q. What would you mean when you wrote
21 "the Lehman portion"?

22 MR. CANTOR: Objection; asked and
23 answered. Go ahead.

24 A. I would have meant what should have
25 come from Lehman, from the facility -- the

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1 Lehman facility.

2 Q. And you would not have meant what
3 you were -- you would not have meant Lehman's
4 share of the retail facility.

5 A. No.

6 Q. Even though you had been concerned
7 that Lehman may not be funding in this month.

8 MR. CANTOR: Objection. You can
9 answer. It's argumentative, but you can answer.

10 A. Right.

11 Q. Given that you don't remember
12 writing this e-mail --

13 A. Right. I don't remember.

14 Q. -- how are you certain that saying
15 that the Lehman portion referred to the entire
16 facility as opposed to the portion of the
17 facility Lehman was meant to fund?

18 A. I did not know that there were
19 other parts of the Lehman. It wasn't part of my
20 knowledge. I wouldn't have been concerned about
21 it.

22 Q. What wouldn't you have been
23 concerned about?

24 A. I only cared that the money came
25 from Lehman, or what I thought of as Lehman

1 funding the facility piece.

2 Q. You've said you knew at some point

3 that there were other lenders to the retail

4 facility. When did you find that out?

5 A. At some point after the Lehman

6 bankruptcy.

7 Q. When you say "at some point after

8 the Lehman bankruptcy," could it have been a day

9 after the Lehman bankruptcy?

10 A. I don't remember.

11 Q. So it could have been a day, it

12 could have been a month.

13 A. I don't remember.

14 Q. By the e-mails we were looking at

15 in December where it said Ullico was funding,

16 which I understand you don't remember at this

17 point, but would you agree that by the time you

18 were writing e-mails stating Ullico's funding

19 Lehman's portion in December, that at that point

20 you knew that there were more than one lender to

21 the Lehman facility?

22 A. I would assume so.

23 Q. So at most we know is before

24 Lehman's bankruptcy you did not know there were

25 other lenders to the Lehman facility. Sometime

1 even -- sorry.

2 A. No, all right.

3 Q. Is that correct?

4 A. Right.

5 Q. Sometime between the date Lehman

6 filed for bankruptcy and the date of those

7 December e-mails where you were referring to

8 Ullico funding Lehman's share, you found out

9 there were other lenders, is that correct?

10 A. I would assume so.

11 Q. So you could have -- if Lehman's

12 bankruptcy -- Lehman's bankruptcy was before

13 this September 26th, 2008 e-mail.

14 A. Okay.

15 Q. You could have known by the time

16 you wrote this September 26, 2008 e-mail that

17 there were multiple lenders --

18 MR. CANTOR: Objection; asked and

19 answered.

20 Q. -- is that possible?

21 A. I don't remember. I don't think

22 that's what I'm saying here, but I don't

23 remember.

24 Q. So when we look back at the prior

25 exhibit, I think it was 239, the December 30th,

1 2008 e-mail that you sent to Susman.

2 A. Yes.

3 Q. And that's the e-mail that says,

4 "Mac at Trimont expects you to fund the Lehman

5 piece."

6 A. Yes.

7 Q. When you said "Ullico to fund the

8 Lehman piece," what did you mean by the Lehman

9 piece?

10 A. I don't remember.

11 Q. Would it be fair to say that -- to

12 assume that the Lehman piece in the December --

13 that you referred to in the December 30, 2008

14 e-mail was the Lehman piece of the retail

15 facility?

16 MR. CANTOR: Objection. Answer if

17 you can.

18 A. I mean, I don't remember.

19 Q. I understand whether you remember

20 one way or not.

21 A. You just want me to assume?

22 MR. CANTOR: She answered your

23 question. She doesn't remember and she's not

24 willing to say what's fair to assume. She's

25 here to give you her memory of facts.

1 Q. What I'm trying to find out is why
2 you would think -- you said you aren't -- this
3 is why if LiveNote were running I could tell you
4 what you said. But you testified that you think
5 that in the September 26th, 2008 e-mail when you
6 referred to the Lehman portion, that you were
7 referring to the entire facility. However, it
8 appears you used very similar language by
9 December 30th where you refer to "Lehman piece."
10 And it seems that in the December 30th e-mail
11 the Lehman piece must have referred to just the
12 Lehman share of the retail facility.

13 So what I'm trying to understand is
14 why you then think the September 26th, 2008
15 e-mail with very similar language actually
16 referred to the entire portion.

17 MR. CANTOR: Because she told you
18 earlier -- well, whatever. I object to that
19 question. It's not really a question. It's
20 asking for a logical argument that you guys will
21 be free to make whenever you want to make it to
22 the court. But she's given you what her memory
23 of the events is.

24 MS. WALTERS: Are you instructing
25 her not to answer?

1 MR. CANTOR: I'm not instructing
2 her not to answer. I'm explaining why it's a
3 bad question.

4 A. I just look at the e-mail on 2008
5 and that's kind of just the way I write. That
6 phraseology is pretty standard for my style of
7 writing.

8 Q. We're talking about the
9 September 26th e-mail?

10 A. Yes, September -- Exhibit 241. And
11 then when I get to 2008 I'm much more specific
12 because now I'm talking about Ullico and
13 Sumitomo. And I'm not talking about that in
14 September.

15 But as to specific memory of this,
16 no.

17 Q. So is it possible then in Exhibit
18 241 "the Lehman portion" meant the same thing
19 that it meant -- that you meant later on?

20 MR. CANTOR: Objection; asked and
21 answered.

22 A. I don't think so.

23 Q. If you assume -- if you had found
24 out that there were several lenders to the
25 Lehman portion -- to the retail facility prior

1 to writing this e-mail about the Lehman portion,
2 which is Exhibit 241, wouldn't it then make
3 sense for "the Lehman portion" to refer to
4 Lehman's share of the retail facility?

5 MR. CANTOR: Objection. You're
6 arguing with the witness now. That's not a
7 question.

8 A. I don't know.

9 Q. So if you don't know, it could mean
10 one or the other then.

11 MR. CANTOR: Objection; asked and
12 answered multiple times.

13 A. You can assume what you want. I
14 just don't remember.

15 MR. CANTOR: And she's told you she
16 doesn't think that's what it means.

17 Q. Every month after Lehman filed
18 bankruptcy, were you concerned as to whether the
19 Lehman piece -- whether Lehman would fund its
20 obligations?

21 A. Yes.

22 Q. Were the people in Dallas concerned
23 as well, the casino and gaming concerned that
24 Lehman would not fund its obligations after they
25 filed for bankruptcy?

1 A. You would have to ask them.

2 Q. Did you talk to them about your

3 concerns?

4 A. Yes.

5 Q. What was the response when you

6 stated you were concerned that Lehman may not

7 fund?

8 A. Their response? I knew they were

9 working on stuff but I had no -- I don't know

10 what they were doing specifically.

11 Q. When you say "working on stuff,"

12 what do you mean?

13 A. I knew there was other things

14 happening just by virtue of the fact that I work

15 in a bank, I knew that there would be other

16 types of conversations occurring that I was not

17 party to.

18 Q. Did anyone tell you that those

19 types of conversations were occurring?

20 A. No.

21 Q. Just from your experience --

22 A. Right.

23 Q. -- at working at a bank.

24 A. Right.

25 Q. I'm not sure that you answered the

1 question I asked previously when I said what was
2 the response of the people in the credit group
3 to you expressing your concerns about Lehman not
4 funding. You told me that you knew that they
5 were working on things, but what did they tell
6 you?

7 A. They would get back to me.

8 Q. Did they ever get back to you? Did
9 anyone ever get back to you?

10 A. I don't remember specifically. I
11 mean, it was an ongoing process when Lehman
12 filed bankruptcy. The whole world changed at
13 that point in time, not just the Lehman
14 bankruptcy.

15 Q. Right.

16 A. So there was a lot that was
17 happening, if you recall, in the economy.

18 Q. I recall.

19 A. Okay. So there was a lot of
20 concerns in a lot of places.

21 Q. Did you express concern to the
22 credit -- the gaming group in Dallas about
23 Lehman not funding -- Lehman's bankruptcy
24 specifically relating to Fontainebleau?

25 A. Yes.

1 Q. And their response was that they
2 would get back to you --

3 A. Right.

4 Q. -- about that?

5 A. Right. I had to wait for further
6 instructions from them.

7 Q. As to whether to execute advance
8 confirmation notices?

9 A. Yes. Whatever path was going to
10 happen, I would take direction from them.

11 Q. Did you learn at any point during
12 the Fontainebleau -- while you were disbursement
13 agent of the Fontainebleau project that there
14 had been cost overruns?

15 A. Yes.

16 Q. When was that?

17 A. I don't know specifically.

18 Q. Do you have any recollection of the
19 time frame?

20 A. No.

21 Q. In 2007 right when you became
22 disbursement agent?

23 A. I don't remember dates at all in my
24 life. It's very hard, I don't remember. I
25 don't work that way.

1 Q. Is there some sort of event in
2 your -- is there a way in your life that you
3 remember the timing of events?

4 A. Yes.

5 Q. What is that?

6 A. A major thing. The death of my
7 mother. I remember when that was. So something
8 like that, yeah, I remember.

9 Q. Sorry to hear about that.

10 A. That's okay, but I do remember that
11 date.

12 Q. What I meant was whether you had a
13 way that you conceptualize remembering events
14 such as --

15 A. If they're important to me.

16 Q. So when you learned of these cost
17 overruns, it could have been any time while you
18 were acting to administer and disburse funds of
19 the Fontainebleau construction loan.

20 A. Yes.

21 Q. Do you recall whether you learned
22 of cost overruns significantly before the end of
23 the -- before Fontainebleau filed for bankruptcy
24 or whether it was closer in time?

25 MR. CANTOR: Objection.

1 A. I don't know.

2 Q. I'm going to show you what has
3 previously been marked as Exhibit 217. This is
4 an e-mail from Jesse Susman. You're not on this
5 e-mail but he states that -- do you want to make
6 a minute to read the e-mail yourself?

7 MR. CANTOR: Do you want her to
8 read the whole string?

9 Q. Just the top e-mail.

10 A. (The witness reads the document.)

11 Okay.

12 Q. Does this refresh your recollection
13 of a time you learned that there were increases
14 in the budget? Increases over the budget.

15 A. Yes. I mean, I remember that there
16 were budget increases.

17 Q. Do you recall that at one point
18 there were an additional \$201 million of
19 increases?

20 A. I don't remember the dollar amount,
21 but I remember that there were increases.

22 Q. Do you remember whether the
23 increases were significant?

24 MR. CANTOR: Objection.

25 Q. Sorry, you didn't answer that. You

1 made a motion. We need a verbal answer.

2 A. Sorry.

3 Q. For the court reporter.

4 A. Do I remember that number

5 significant? Yeah, I would say it was a

6 significant number.

7 Q. 200 million is a significant

8 number?

9 A. Yes.

10 Q. What I had asked originally was

11 that -- what I had originally asked was whether

12 you remembered whether you recalled there being

13 increases that were significant.

14 A. How would you define "significant"?

15 Q. Well, I agree that this 200 --

16 strike that. Do you recall specifically that

17 there was a \$200 million increase?

18 MR. CANTOR: Objection.

19 A. No.

20 Q. Do you recall that there were

21 significant increases?

22 A. Yes.

23 Q. That would be consistent with a

24 \$200 million increase as reflected here.

25 MR. CANTOR: Objection.

1 A. Yes.

2 Q. You said previously that in your
3 meetings discussing the draw reports with IVI,
4 that you discussed if there were budget
5 problems, is that correct?

6 A. Yes.

7 Q. Is this 200 million increase in
8 costs something you would have discussed in your
9 meetings with IVI?

10 A. Yes.

11 Q. Do you recall actually discussing
12 it?

13 A. No.

14 Q. Do you remember whether you were
15 on -- at the top of this e-mail it says,
16 "Brandon spoke with IVI yesterday after the
17 meeting." Would that have been a meeting that
18 you would have attended that he's referring to?

19 A. I don't remember.

20 Q. Do you remember if you spoke to IVI
21 with Brandon in this time frame?

22 A. Specifically, no.

23 Q. When you found out there were
24 significant increases in costs, what did you do?

25 A. Alerted Brandon and Jeff.

1 Q. What did they tell you at that
2 time?

3 MR. CANTOR: At what time?

4 MS. WALTERS: When she alerted them
5 about significant increases.

6 A. They would have a further
7 conversation with IVI and with the customer.

8 Q. Would you be involved in those
9 conversations that Brandon or Susman was having
10 with IVI?

11 A. Sometimes yes, sometimes no.

12 Q. Were you involved in -- were they
13 having multiple conversations about the cost
14 increases?

15 A. Yes.

16 Q. And on some of those occasions you
17 would be involved on the calls.

18 A. Yes.

19 Q. When you were involved on the
20 calls, what was discussed?

21 MR. CANTOR: Objection. You can
22 answer if you can. It would be helpful if we
23 could nail it down to a specific conversation.

24 A. I'm not going to remember a
25 specific conversation for sure.

1 Generally we'd talk about the
2 concern with whatever the cost overrun was, what
3 it would do to the time frame and meeting the
4 deadlines and where the money was going to come
5 from to pay for it.

6 Q. And in terms of discussions about
7 where the money was going to come from to pay
8 for it, do you remember any details about those
9 discussions?

10 A. No.

11 Q. Were you concerned that additional
12 money was needed to pay for these costs?

13 A. Yes.

14 Q. Do you know if Mr. Bolio or
15 Mr. Susman was concerned about this also?

16 A. I don't know that.

17 Q. Despite the fact you were concerned
18 that there were these costs though and that
19 there was a need for additional money to cover
20 these costs -- strike that.

21 Although you were concerned there
22 was additional money to cover these costs, it
23 wouldn't have been -- you would have still
24 executed advance confirmation notices if you
25 were directed to do so, is that correct?

1 A. Yes.

2 Q. And it wouldn't have been your job
3 to determine that an advance shouldn't be made
4 because of these costs.

5 A. Right.

6 Q. But in your mind, these costs
7 raised a red flag.

8 MR. CANTOR: Objection.

9 A. Yes.

10 Q. Would you have personally talked to
11 the borrower about these additional costs?

12 A. No.

13 Q. Was that Bolio and Susman that
14 would have been in that position to talk to the
15 borrower about the costs?

16 A. Yes.

17 Q. Were you ever concerned that there
18 were additional costs that were not being
19 disclosed to you by the company?

20 A. Yes.

21 Q. What, if anything, did you do to
22 find out whether there were additional costs?

23 A. Personally, I did nothing. Other
24 than raise my concerns to Jeff and to Brandon.

25 Q. Do you know if Jeff and Brandon did

Brown, Jeanne 3/20/2011 4:07:00 PM

1 anything?

2 A. No, I don't.

3 Q. And again, the fact that you were

4 concerned there may have been costs that were

5 not being disclosed to you, was that a red flag

6 to you?

7 A. Yes.

8 Q. Again, even in spite of that red

9 flag, you would have executed advance

10 confirmation notices if you were directed to do

11 so, right?

12 A. Yes.

13 Q. Because it was not your job to

14 determine whether the advance confirmation

15 notices should be executed regardless of whether

16 there may have been -- regardless of your

17 concern that there may be costs that weren't

18 being disclosed.

19 A. Right.

20 Q. I know that we have discussed that

21 you don't recall time frames well and

22 necessarily specifics, but do you recall whether

23 there were several instances where additional

24 costs that in your mind would have been

25 significant were disclosed to you?

1 project? The Fontainebleau project?

2 MR. CANTOR: Objection. Objection

3 to the extent that your question assumes that

4 the mechanics liens caused her concerns about

5 the viability of the project. There's been no

6 testimony on that.

7 Q. When we said red flags, you said

8 that you were concerned that people weren't

9 getting paid.

10 A. Right.

11 Q. Did the fact people weren't getting

12 paid give you any concerns about the project's

13 viability?

14 A. I want to expand a little bit

15 because it's not uncommon on a construction

16 project to have mechanics liens, period. So the

17 fact that there were mechanics liens is

18 something that needs to be looked at and

19 addressed, but in and of itself it's not

20 necessarily something that reflects on the

21 viability of the project. Beyond that, I

22 couldn't tell you.

23 Q. In conjunction with the significant

24 cost overruns, which was also, as you testified,

25 a red flag --

1 A. Right.

2 Q. -- were you concerned about the

3 viability of the project?

4 A. Actually, no.

5 Q. What was your concern about the

6 significant cost overruns?

7 A. Where the money was going to come

8 from.

9 Q. But you anticipated that someone

10 would find -- that the borrower would find the

11 money to pay for the costs.

12 A. Yes.

13 Q. Even though the cost was

14 significant.

15 A. Yes.

16 Q. Were there any other things that

17 caused you concerns about the project?

18 A. The delay in the construction, the

19 timeline, the importing of significant amounts

20 of material from overseas, and the fact that if

21 it didn't get there in time, it was going to

22 further delay the project.

23 Q. Tell me what you remember about the

24 delay in the construction timeline.

25 A. There was -- they needed the

1 curtain wall to come in from China. It was a
2 special order, special project that was being
3 done and needed it to come from China on a ship
4 across to Nevada. And it was a key element of
5 the project, so there was a concern about that.

6 And there was a concern about the
7 fact that they had yet to define where the
8 theater was going to be and what that was going
9 to look like. And you can only go so far in the
10 construction until you know what you're --
11 unless you've refined what you're actually
12 building. So there was a concern about that.

13 Q. How great was the delay in the
14 construction timeline?

15 A. I just remember that it was pretty
16 substantial.

17 Q. When you say "pretty substantial,"
18 are we talking months --

19 A. Yes, months.

20 Q. Six months?

21 A. Just --

22 Q. Just months.

23 A. -- months.

24 Q. Less than a year.

25 A. Yes. You would think so.

1 Q. Was anyone else concerned about the
2 delay in the construction schedule?

3 A. Yes.

4 Q. Who else was concerned?

5 A. IVI and Brandon and Jeff.

6 Q. And did you have discussions with
7 IVI and Brandon and Jeff about these concerns?

8 A. Yes.

9 Q. Do you know if anything -- if
10 anything, what was done about these concerns, to
11 address these concerns?

12 A. It was discussed at the meetings
13 with Turnberry that I attended as well.

14 Q. And did Turnberry alleviate your
15 concerns?

16 A. They at one point were able to
17 accelerate the construction so that it seemed
18 like the deadlines that had been put forth would
19 actually be met pretty closely. It seemed
20 realistic.

21 Q. At what point was that?

22 A. I don't know.

23 Q. Once they accelerated the
24 construction, did the concern about delay arise
25 again?

Brown, Jeanne 3/20/2011 4:07:00 PM

1 A. Yes. It had not been alleviated.
2 They were making good progress but they hadn't
3 closed the gap.

4 Q. Do you know what role First
5 National Bank of Nevada played in this -- in the
6 loan facility?

7 A. No.

8 Q. If I represent to you that they
9 were both a term lender and a revolver under the
10 bank agreement of which Bank of America was
11 administrative agent, does that refresh your
12 memory at all?

13 A. I mean, fine.

14 Q. But you don't independently
15 remember --

16 A. No.

17 Q. -- that.

18 Do you remember at any point any of
19 the term lenders not funding their commitments
20 under the bank facility?

21 A. No.

22 Q. If any of the term lenders had not
23 funded their portion of the draw, of any given
24 draw, would that have prevented you moving
25 forward and disbursing funds?

Brown, Jeanne 3/20/2011 4:07:00 PM

1 MR. CANTOR: Objection.

2 A. I don't even remember anything

3 about the term lenders.

4 Q. Earlier you had said that before

5 taking the next step in disbursing funds, all

6 the different pieces had to come in that you had

7 requested.

8 A. Right.

9 Q. So if any of those pieces did not

10 come in, even if it was a small piece, would you

11 have not disbursed the funds?

12 MR. CANTOR: Objection.

13 A. I would have done as instructed.

14 Q. You would have done whatever

15 Brandon and Susman told you to.

16 A. Right, yeah.

17 Q. Or at some point Corum.

18 A. Right.

19 Q. From your understanding of the

20 protocol that was originally set up, did you

21 understand that if some of the funds didn't come

22 in, you weren't meant to disburse?

23 A. Right. Yes.

24 Q. But regardless, it wasn't up to you

25 to make that decision.

1 A. No.

2 Q. It was up to the credit folks in

3 Dallas.

4 A. Right.

5 Q. I'm sorry, I keep saying credit

6 folks. Gaming and casino folks in Dallas.

7 A. I think they're actually called

8 leisure or something. I don't know.

9 Q. The Susman/Bolio contingency.

10 A. Yes.

11 Q. Should we take a break? I think

12 we're almost out of tape.

13 THE VIDEOGRAPHER: This marks the

14 end of media number 2 of the deposition of

15 Ms. Jeanne Brown. We are off the record at

16 approximately 12:12 p.m.

17 (Recess taken.)

18 THE VIDEOGRAPHER: We are back on

19 the record at approximately 12:19 p.m., and this

20 marks the beginning of media number 3 of the

21 deposition of Ms. Jeanne Brown.

22 BY MS. WALTERS:

23 Q. Ms. Brown, you understand at some

24 point the revolvers terminated their

25 commitment -- the revolving lenders under the

1 bank facility that you were disbursing

2 terminated their commitment, right?

3 A. I don't remember.

4 Q. You understand at some point

5 Fontainebleau filed for bankruptcy.

6 A. Yes.

7 Q. So that was in June 2009. If I

8 represent that to you does that sound about

9 right?

10 A. Okay.

11 Q. You don't have any recollection as

12 to when that was.

13 A. No.

14 Q. Do you remember the events leading

15 up to Fontainebleau filing for bankruptcy?

16 A. In my mind it starts with the

17 Lehman bankruptcy. Beyond that I wouldn't know

18 anything else.

19 Q. What do you mean it starts with the

20 Lehman bankruptcy?

21 A. To me everything -- the point in

22 time at which everything went bad in my mind

23 starts with Lehman filing for bankruptcy and the

24 problems with funding anything at that point.

25 Q. When you say "problems with funding

1 anything at that point," what do you mean?

2 A. The difficulties with getting money

3 from Lehman and the wires and everything that

4 was happening in the economy.

5 Q. Do you remember the last advance

6 that you made to Fontainebleau under the

7 disbursement agreement?

8 A. No.

9 Q. If I represent to you was in March

10 2009, does that sound right to you?

11 A. I don't remember.

12 Q. So it would be fair to say you had

13 no role in making the decision to make that

14 advance, the final advance in March 2009.

15 MR. CANTOR: Objection.

16 A. I'm confused.

17 Q. You looked confused. I was waiting

18 for you to say so for the record. Let me

19 restate.

20 We've already gone over that you

21 really signed advance confirmation notices when

22 directed to by the Susman/Bolio/Corum contingent

23 in Dallas.

24 A. Right.

25 Q. Is it fair to say that the last

1 advance, which I'm representing to you was March
2 2009, you would not have made the decision to
3 make that advance?

4 A. Right. Yes.

5 Q. Someone would have told you --
6 directed you to make that advance.

7 A. Yes.

8 Q. As with every other advance.

9 A. Yes.

10 Q. Do you remember Mr. Henry Yu
11 getting involved with the loan?

12 A. Yes.

13 Q. Do you remember when that was?

14 A. No.

15 Q. What was Mr. Yu's role?

16 A. He was SAG I believe. Special
17 Assets Group.

18 Q. Why did he become involved with the
19 loan?

20 MR. CANTOR: Objection.

21 Q. You can answer.

22 A. I'm just -- just from my knowledge
23 of the role of the SAG person is that if they
24 felt a credit was in jeopardy or in trouble,
25 they would bring SAG in to advise.

1 Q. But you were not involved in the
2 decision to get Mr. Yu involved.

3 A. No, I was not.

4 Q. Were you aware that Mr. Yu signed
5 letters as disbursement agent?

6 A. No.

7 Q. Does it come as a surprise to you
8 that he did?

9 MR. CANTOR: Objection.

10 A. No.

11 Q. Why does it not come as a surprise
12 to you?

13 MR. CANTOR: Objection.

14 A. To me it's the bank.

15 Q. "The bank" being Bank of America.

16 A. "The bank" being Bank of America,
17 yes.

18 Q. And the disbursement agent was the
19 bank, the Bank of America.

20 A. In my mind, yes.

21 Q. And then you had a small --
22 although you were named disbursement agent, you
23 had a role as one of the many people who acted
24 as the disbursement agent, is that correct?

25 A. Yes.

1 MR. CANTOR: Objection.

2 Q. So therefore, Mr. Yu signing
3 letters as disbursement agent is neither
4 shocking nor surprising to you in any way.

5 A. Right.

6 Q. Now, with the last draw, the March
7 2009 draw, do you recall that at that point some
8 of the revolver was outstanding?

9 A. No, I don't recall.

10 Q. Did you understand that under the
11 agreements, if a certain amount of the revolver
12 was outstanding, it would get paid off by term
13 lender loans prior to the borrower being able to
14 draw on the rest of the revolver?

15 A. I don't remember.

16 Q. What would happen if term lenders
17 funded, or anyone funded, including the retail,
18 and then it was decided that you weren't -- I
19 can start that question again, sorry, I lost my
20 train of thought.

21 What would happen if after
22 executing an advance confirmation notice and
23 money came in, prior to you being given the
24 go-ahead to disburse the funds it was determined
25 that the funds shouldn't be disbursed?

1 Bates BANA-FB 336931 through 336932.)

2 Q. Exhibit 251 is an e-mail string,
3 and the top e-mail is an e-mail from you to
4 Mr. Bolio dated February 27, 2009. Can you just
5 tell me what this e-mail is?

6 A. Excuse me?

7 Q. Can you tell me what -- why don't
8 we stop with the bottom. What does the bottom
9 e-mail reflect?

10 A. It's a request from me to Latrelle
11 to move money from one account to another --
12 from several accounts to another.

13 Q. And do you know whether this
14 transfer took place?

15 A. No.

16 Q. Do you have any reason to think it
17 didn't?

18 A. No.

19 Q. And then the next e-mail is an
20 e-mail from Mr. Bolio to you. It says, "Yeah,
21 the drama is over on this one. At least for
22 now," dot dot dot.

23 A. Right.

24 Q. What did he mean by that?

25 A. I don't remember. I guess because

1 we funded. I don't know.

2 Q. And you said --

3 A. I know.

4 Q. -- back, "I don't consider the
5 drama over until FB actually has the funds."

6 And the drama you were referring to was what?

7 A. At this point in time every funding
8 for Fontainebleau was a drama. So it was
9 always -- it was tense with the tight time
10 frames and it was always -- it was a drama.

11 Q. Would you say anything else other
12 than tight time frames that made it a drama?

13 A. You know, after the Lehman and
14 where's the money coming from, are we getting
15 it, all of that created the drama.

16 Q. And when you say "where is the
17 money coming from," what money are you referring
18 to?

19 A. The funding from Trimont.

20 Q. But again, even though there was
21 drama, you issued advance confirmation notices
22 because you were directed to do so, correct?

23 A. Right.

24 (Exhibit 252 for identification,
25 Bates BANA-FB 217018 through 217024.)

1 Q. So Exhibit 252 is an e-mail from
2 Mr. Bolio to looks like various Bank of America
3 employees including you on the cc line. Do you
4 see that?

5 A. Yes.

6 Q. And it's dated March 26, 2009. And
7 it says essentially that the bank funds are
8 being transferred.

9 If we go to the second page,
10 there's another e-mail. What is the e-mail on
11 the second page?

12 A. It's a routine e-mail that I would
13 have sent to Latrelle directing them to move the
14 money from one Fontainebleau account to another.

15 Q. And do you know whether that
16 transfer took place?

17 A. No. I don't.

18 Q. Do you have any reason to believe
19 it didn't?

20 A. No.

21 Q. If you go to the third page of the
22 exhibit it's titled "Advance Confirmation
23 Notice." And if you just review that, was this
24 the advance confirmation notice you signed and
25 issued in connection with the March 25, 2009

1 draw?

2 A. It would appear so.

3 Q. Any reason you think it might not

4 be?

5 A. No.

6 Q. I think I am pretty much done. I

7 need a few minutes just to review my notes.

8 MR. CANTOR: Okay. Should we go

9 off the record?

10 THE VIDEOGRAPHER: The time is

11 approximately 1 p.m. We're off the record.

12 (Recess taken.)

13 THE VIDEOGRAPHER: The time is

14 approximately 1:05 p.m. We're back on the

15 record.

16 BY MS. WALTERS:

17 Q. Ms. Brown, thank you very much for

18 your time today. I have no further questions.

19 MR. CANTOR: I have no questions.

20 Q. The stipulation is that the court

21 reporter will send Mr. Cantor the draft of the

22 transcript and he will then forward it to you

23 and you'll have 30 days to make any corrections.

24 If you make any corrections other than typos, I

25 will be entitled to argue that the original

Christensen, Hans 3/9/2011 1:57:00 PM

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

-----)
IN RE:)
)
FONTAINEBLEAU LAS VEGAS)
CONTRACT LITIGATION)
)
MDL NO. 2106)
)

This document relates to all actions.)
-----)

March 9, 2011
9:30 a.m.

DEPOSITION of HANS CHRISTENSEN,
a 30(b)(6) witness on behalf of MJX Asset
Management, taken by Defendants, pursuant to
notice, held at the offices of O'Melveny & Myers,
7 Times Square, New York, New York, before
Eileen Mulvenna, CSR/RMR, Certified Shorthand
Reporter, Registered Merit Reporter and Notary
Public of the State of New York.

1 HANS CHRISTENSEN

2 Q. So in April of 2009?

3 A. Correct.

4 MR. RIVNER: Could we take a very

5 brief adjournment -- very brief recess.

6 Let's go off the record for like --

7 MR. HOBART: Sure.

8 (Recess from the record.)

9 MR. RIVNER: We're back on the

10 record.

11 BY MR. RIVNER:

12 Q. One follow-up question.

13 A. Okay.

14 Q. Approximately how much -- strike

15 that.

16 Approximately how large are the

17 funds collectively?

18 A. About \$4.4 billion.

19 Q. And were they that size at the time

20 that the investment in the Fontainebleau Las

21 Vegas -- were they approximately the same size in

22 2007?

23 A. Our last transaction closed in 2007,

24 so we -- we -- Venture IX closed in 2008. So

25 that was the difference. So we moved that over

Corleto, David (No Exhibits) 4/8/2011 9:30:00 AM

1 **** C O N F I D E N T I A L ****
2 **UNITED STATES DISTRICT COURT**
 SOUTHERN DISTRICT OF FLORIDA
3 **MIAMI DIVISION**
 CASE NO.: 09-2106-MD-GOLD/GOODMAN

4 -----)
 IN RE:)
5)
 FONTAINEBLEAU LAS VEGAS)
6 CONTRACT LITIGATION)
)
7 MDL NO. 2106)
)

8 This document relates to all actions.)
 -----)

9
10 April 8, 2011
11 9:30 a.m.

12
13
14 **DEPOSITION of DAVID CORLETO,**
15 a witness on behalf of Caspian Capital, LP, taken
16 by Defendants, pursuant to notice, held at the
17 offices of O'Melveny & Myers, 7 Times Square,
18 New York, New York, before Eileen Mulvenna,
19 CSR/RMR, Certified Shorthand Reporter, Registered
20 Merit Reporter and Notary Public of the State of
21 New York.

22
23
24
25

1 CORLETO - HIGHLY CONFIDENTIAL

2 Q. And does this refresh your
3 recollection about your thoughts on the project?

4 A. Somewhat.

5 Q. How so?

6 A. I remember that we were very
7 concerned about the estimates they were making
8 for their ability to sell -- presell, if you
9 will, condos, not only just in general, but at
10 the very high dollars per square foot that they
11 were asking.

12 Q. How did those concerns figure into
13 your analysis?

14 A. Condo sales were a material portion
15 of the funding for the project and for its
16 ongoing feasibility.

17 Q. What do you mean by they "were a
18 material portion of the funding for the project"?

19 A. They needed some of the dollars from
20 those sales to complete the rest of the project.

21 Q. So you thought that there
22 was -- strike that.

23 In 2007, you thought that they would
24 have issues having sufficient funds to complete
25 the project?

1 CORLETO - HIGHLY CONFIDENTIAL

2 A. I would say that I did not agree
3 with the ease with which the management said they
4 would be able to do it.

5 Q. And if you go back to the e-mail
6 here, you wrote at the very end, "i.e., doesn't
7 work."

8 What did you mean by that?

9 A. I don't remember.

10 Q. You wrote here, "The key is that
11 without the condo presales, they don't complete
12 the plan - though they could do something
13 smaller... (despite the fact they say they are on
14 time/budget they don't even have a construction
15 model), but then you end up with a partial
16 concept casino/hotel that is 10x leveraged [sic]
17 and probably doesn't cover interest payments."

18 A. "Is greater than 10 times levered."

19 Q. "Greater then 10 times levered and
20 probably doesn't cover interest payments."

21 Is "doesn't work" referring to that?

22 A. I don't remember exactly why I wrote
23 that.

24 Q. Do you have a general understanding
25 of why you wrote it?

1 CORLETO - HIGHLY CONFIDENTIAL

2 A. Yeah.

3 Q. What is that understanding?

4 A. That more than 10 times levered

5 partial -- partially completed casino/hotel would

6 not be long-term feasible with the capital

7 structure that was in place here.

8 Q. Basically it wouldn't be able to

9 generate enough cash to pay off the interest on

10 its debt?

11 A. Essentially.

12 Q. Then if you and -- do you recognize

13 the document that's attached here?

14 A. Not specifically. It looks like one

15 of our normal models.

16 Q. Would this be -- for Fontainebleau

17 Las Vegas, the model would have been prepared by

18 Mr. Mulé?

19 A. If you're telling me it was, he

20 would have been our guy to do that, so yes.

21 Q. Did you have any discussions with

22 him about the model?

23 A. How do you mean?

24 Q. Did you review it and tell him to

25 tweak various things?

1 CORLETO - HIGHLY CONFIDENTIAL

2 A. I don't remember specifically.

3 Q. If you go to the third page here --

4 A. Third page including the first?

5 Q. It's the third page including the

6 e-mail, so it's the second page of the model.

7 A. Okay. It says, "Investment points,

8 property description" on the top left?

9 Q. Uh-huh.

10 A. Okay.

11 Q. Do you recall any discussions you

12 had regarding -- he lists positives and negatives

13 of the investment.

14 Do you recall any discussions you

15 had with Mr. Mulé regarding those?

16 A. I don't remember.

17 Q. Do you recall any discussions that

18 the investment committee had regarding those?

19 A. I don't remember any specifics.

20 Q. Were your concerns about the ability

21 of the project to support the debt shared by the

22 rest of the investment committee?

23 A. I'm sorry, can you repeat that.

24 Q. Did the rest of the investment

25 committee share your concerns about the project's

Corleto, David (No Exhibits) 4/8/2011 9:30:00 AM

1 CORLETO - HIGHLY CONFIDENTIAL

2 when things were filed or not relative to this

3 e-mail.

4 MR. RIVNER: Off the record for one

5 second.

6 (Discussion off the record.)

7 MR. RIVNER: Back on the record.

8 BY MR. RIVNER:

9 Q. I'm going to actually move on.

10 You initiated -- around June --

11 around June 9, Caspian filed -- commenced a

12 lawsuit against the revolvers and Bank of

13 America. Are you aware of that?

14 A. If you're telling me it was June 9.

15 MR. MOST: We'll say it's in or

16 around that date. Hopefully Mr. Rivner's

17 questions won't be specific to June 9.

18 Q. But you were aware that around that

19 time period, that litigation by a group of term

20 lenders in which your company was involved with

21 had been commenced?

22 A. Around that time, yes.

23 Q. Now, can I also refer you back to

24 Exhibit 372, which is this thing.

25 A. Uh-huh.

Corleto, David (No Exhibits) 4/8/2011 9:30:00 AM

1 CORLETO - HIGHLY CONFIDENTIAL

2 Q. If you go down, it looks like you
3 purchased additional term loans in August of 2009
4 and in September of 2009.

5 A. Yep.

6 Q. Now, what was the basis for those
7 purchases?

8 A. Making money.

9 Q. Now, what information did you
10 consider in connection with those purchases?

11 A. All of our information that we had
12 gathered with regards to Fontainebleau.

13 Q. What information was that?

14 A. I can't tell you specifically. I
15 don't remember. But based off of our models and
16 information that we had collected.

17 Q. Now, how did you think you were
18 going to make money on this investment?

19 MR. MOST: Objection. I think this
20 question's been asked and answered. You're
21 talking about this specific --

22 MR. RIVNER: This specific -- the
23 August and -- the August and September
24 purchases.

25 MR. MOST: Okay.

Corleto, David (No Exhibits) 4/8/2011 9:30:00 AM

1 CORLETO - HIGHLY CONFIDENTIAL

2 A. Yep.

3 Q. -- is that correct?

4 Was he providing you with updates on
5 the litigation at this time?

6 A. I don't specifically recall. I
7 would hope he was if there was something to
8 report on.

9 Q. Now, again, I'm not going to ask you
10 about every single one of these, but you made
11 numerous additional purchases after that date and
12 you also made some purchases in September of
13 2010.

14 A. Uh-huh.

15 Q. You purchased roughly 20 million in
16 face value at that time. Do you recall making
17 those purchases?

18 (Witness peruses the exhibit.)

19 Q. Those are not reflected on the
20 chart.

21 MR. MOST: He's asking you, beyond
22 the chart, just generally speaking, do you
23 have a recollection of making a \$20 million
24 purchase?

25 THE WITNESS: I remember there was

Corleto, David (No Exhibits) 4/8/2011 9:30:00 AM

1 CORLETO - HIGHLY CONFIDENTIAL

2 one or two -- if we consider 20 to be
3 larger in the scope of the capital, yes, I
4 remember those purchases.

5 Q. Do you know why -- what were the
6 events that led to that purchase?

7 A. There were sellers.

8 Q. Do you recall who those sellers
9 were?

10 A. I think one of them -- I may be
11 confusing this, but it was the larger purchases
12 around that time frame, if I'm not mistaken. One
13 of them was Aurelius.

14 Q. You were purchasing Aurelius' share
15 at that time?

16 A. At some point, yeah.

17 Q. When you purchased Aurelius' share,
18 were you simply trying to purchase additional
19 term loans or were you trying to -- or were you
20 trying to purchase Aurelius' share of the term
21 loans -- let me rephrase that.

22 Did you have any discussions with
23 Aurelius about purchasing the term loans they
24 held?

25 A. No.

Esplin, Jason 3/31/2011 11:42:00 AM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI DIVISION
4

IN RE:)
5)
FONTAINEBLEAU LAS VEGAS) Case No.
6 CONTRACT LITIGATION) 09-2106-MD-GOLD/
) GOODMAN
7 MDL NO. 2106)
)

8 This document relates to all)
actions.)
9)

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DEPOSITION OF JASON ESPLIN
Phoenix, Arizona
March 31, 2011
9:45 a.m.

Reported by: Deborah Cleary, RPR/CR
Certified Reporter
Certification No. 50663

1 JASON ESPLIN

2 MR. HOBART: Just so we're clear, you mean once
3 they had acquired the Avenue funds?

4 MR. RIVNER: Yeah. I'm sorry.

5 Q. (By Mr. Rivner) After early 20 -- strike that.
6 After you became responsible for them in early 2010, your
7 monitoring was the same as the funds you were already
8 monitoring?

9 A. That's correct.

10 Q. Okay. Do you know if the Avenue funds had sold
11 any -- sorry. Have you sold any of the investments in the
12 former Avenue funds?

13 A. I believe since we have -- have assumed that
14 contract, we have not sold any investments.

15 Q. And by investments, I meant Fontainebleau Las
16 Vegas investments.

17 A. Understood.

18 Q. Okay.

19 A. Correct.

20 Q. All right. And roughly how much in assets under
21 management does your group work with?

22 A. Currently, somewhere between 9 and 10 billion.

23 Q. And was that -- has that changed in the last few
24 years?

25 A. It has.

Freeman, Jim 3/23/2011 5:02:00 PM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

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In Re: FONTAINEBLEAU LAS VEGAS) Case No.: 1:09-md-02106-ASG

7 CONTRACT LITIGATION)

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13 VIDEOTAPED DEPOSITION OF JIM FREEMAN

14 LAS VEGAS, NEVADA

15 WEDNESDAY, MARCH 23, 2011

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23 REPORTED BY: CARRE LEWIS, CCR NO. 497

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2 Whereupon --

3 JIM FREEMAN

4 having been first duly sworn to testify to the
5 truth, was examined and testified as follows:

6 EXAMINATION

7 BY MR. DILLMAN:

8 Q. Good morning, Mr. Freeman.

9 A. Good morning.

10 Q. As I just stated, I represent a number of
11 plaintiffs in a lawsuit filed against Bank of
12 America relating to the Fontainebleau Las Vegas
13 project.

14 Are you familiar with that lawsuit?

15 A. I am familiar with the lawsuit.

16 Q. Have you ever had your deposition taken
17 before?

18 A. I have never had a deposition taken.

19 Q. You have had an opportunity to discuss the
20 proceedings here with your counsel, Mr. Kitchens?

21 A. I have.

22 Q. Any questions before we go forward?

23 A. No questions.

24 Q. Who are you currently employed by?

25 A. I work for MGM Resorts.

1 Q. In what capacity?

2 A. My title is senior vice president of
3 capital market and strategy.

4 Q. In that regard, what are your general job
5 descriptions and duties?

6 A. I'm in charge of capital raising for all of
7 MGM Resorts. I report to the chief financial
8 officer of MGM Resorts.

9 Q. How long have you held that position?

10 A. Approximately one year.

11 Q. You will have to pardon me because we have
12 this wind tunnel effect behind you so it may be that
13 I don't catch all of your answers. If you could
14 speak up, I suspect the video and the court
15 reporter, as well, would appreciate it.

16 A. Okay.

17 Q. You have been with MGM for approximately
18 one year?

19 A. Approximately one year.

20 Q. Prior to that where were you employed, if
21 at all?

22 A. I was employed at Fontainebleau Resorts.

23 Q. On what date did you leave Fontainebleau
24 Resorts?

25 A. I can't remember the exact date. It would

1 have been, I believe, around June of 2009.

2 Q. If I do my math and go back a year, I'm not

3 at June of 2009.

4 A. Correct.

5 Q. What did you do between the time that you

6 left Fontainebleau and the time that you joined MGM?

7 A. I was not employed.

8 Q. On the beach, as they say?

9 A. (Laughter.)

10 Q. At the time that you left Fontainebleau,

11 what was your title with that company, Fontainebleau

12 Resorts?

13 A. Senior vice president and chief financial

14 officer for Fontainebleau Resorts.

15 Q. Were you a director?

16 A. No.

17 Q. Were you a member of the board of managers?

18 A. No.

19 Q. Did you hold any positions at any other

20 Fontainebleau-related entities?

21 A. I may have been -- there may have been a

22 title at the -- at a Las Vegas entity where I may

23 have been a treasurer or something like that, but

24 the main functional responsibility was at

25 Fontainebleau Resorts.

1 Q. Which Las Vegas entity do you believe you
2 may have been the treasurer for?

3 A. I'm not sure which entity.

4 Q. Was it a retail entity?

5 A. No. I think it would have been the main --
6 you know, probably had to do with the entity that
7 raised the capital.

8 Q. The borrower under the credit agreement?

9 A. The borrower and the issuer of the second
10 mortgage notes.

11 Q. One of the things that I'm going to ask you
12 to try and concentrate on as we go through this
13 deposition is to let me finish my question before
14 you answer. In a conversational setting it's
15 perfectly appropriate; I understand what you are
16 saying; we can communicate. The court reporter has
17 a much more difficult time with that.

18 A. I apologize.

19 Q. Thank you.

20 When did you join Fontainebleau Resorts?

21 A. February of 2006.

22 Q. In what capacity?

23 A. As the senior vice president and chief
24 financial officer of Fontainebleau Resorts.

25 Q. During the period from February of 2006

1 Q. [REDACTED]
2 [REDACTED]
3 [REDACTED]

4 A. [REDACTED]

5 Q. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 A. [REDACTED]

10 Q. [REDACTED]

11 [REDACTED]
12 [REDACTED]

13 A. [REDACTED]

14 Q. [REDACTED]

15 Now, the Lehman bankruptcy occurred on
16 September 15, 2008. Do you recall that?

17 A. I don't recall the exact date but that --
18 my guess would have been September of 2008.

19 Q. [REDACTED]
20 [REDACTED]

21 A. [REDACTED]

22 Q. [REDACTED]

23 [REDACTED]

24 A. [REDACTED]

25 Q. Did you receive in a normal course these

1 draw requests to the retail lenders?

2 A. My recollection is that the disbursement
3 agent sent this to TriMont as a server, but I'm
4 guessing a little bit. I don't -- I don't remember
5 seeing this as part of my monthly package that I
6 saw.

7 Q. You did understand that in September there
8 was a request, a draw request, made to the retail
9 lenders consistent with your advance request that we
10 previously looked at --

11 A. That's correct.

12 Q. -- as Exhibit 253, correct?

13 A. That's correct.

14 Q. And you understand that -- understood at
15 that time that the retail lenders included Lehman.

16 A. That's correct.

17 Q. That in fact Lehman was the largest retail
18 lender.

19 A. That's correct.

20 Q. And that therefore, as a result of your
21 advance request, Lehman would be requested to fund
22 the majority share of the draw request to the retail
23 lenders for that month.

24 A. I can't remember if they were the majority
25 share, but they were certainly a significant

1 contributor and could have been a majority.

2 Q. The Lehman bankruptcy was generally not
3 perceived at Fontainebleau by you in particular as a
4 positive development for the project, correct?

5 A. That's correct.

6 Q. Why was that?

7 A. At the time of the bankruptcy, I can't
8 remember the exact number, but Lehman was still
9 obligated to fund at least \$100 million under the
10 retail facility, I believe.

11 Q. And you perceived that as a problem?

12 A. Yes, with the -- yes.

13 Q. In fact, if the retail facility didn't
14 fund, the credit facility was not obligated to fund
15 either, correct?

16 MR. KITCHENS: Calls for a legal
17 conclusion.

18 But you can answer, if you know.

19 THE WITNESS: It was my understanding that
20 the retail facility funding, even though it was
21 relatively small relative to the large funding, was
22 a triggering event for funding the larger facility.

23 BY MR. DILLMAN:

24 Q. Therefore, if Lehman didn't fund its
25 obligation and no one stepped up to fund it, that

1 could very well shut down all financing for the
2 project.

3 A. Yes, there was that concern.

4 Q. And that's not something that you wanted to
5 have happen.

6 A. I'm sorry?

7 Q. Not something that you wanted to have
8 happen.

9 A. Correct.

10 Q. Did you have any expectation that you could
11 obtain different funding if that occurred?

12 MR. CANTOR: Objection.

13 MR. KITCHENS: Vague as to time.

14 BY MR. DILLMAN:

15 Q. At that time, September of 2008.

16 MR. CANTOR: Objection.

17 THE WITNESS: At the time, there were
18 discussions going on between the company and all of
19 the retail lenders about -- sorry -- about funding
20 for the project.

21 BY MR. DILLMAN:

22 Q. My question was not clear. I apologize.

23 A. I'm sorry.

24 Q. Did you have any expectation that you could
25 replace the existing financing, the credit facility

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1 happened. I still don't recall it.

2 BY MR. DILLMAN:

3 Q. If I represented to you that Mr. Yunker
4 said the conversation did occur, would you have any
5 reason to dispute that?

6 MR. CANTOR: Objection. Mischaracterizes
7 the record.

8 Go ahead.

9 THE WITNESS: I don't have any reason to
10 dispute it.

11 BY MR. DILLMAN:

12 Q. Did anyone at B of A ever indicate to you
13 that payment of the Lehman portion of the
14 September retail draw by anyone other than Lehman
15 created potential issues under the governing
16 financing documents?

17 MR. KITCHENS: And again, excluding from
18 your answer any conversations you had with counsel.

19 MR. DILLMAN: I don't think that that would
20 be appropriate since I said "did anyone from
21 B of A."

22 MR. KITCHENS: I'm sorry. I misheard it.
23 Okay.

24 THE WITNESS: Not that I recall.

25 BY MR. DILLMAN:

1 Q. Anyone from B of A indicate to you in sum
2 or substance that they would prefer not to know how
3 the Lehman share of the retail advance was being
4 made?

5 A. Not -- not that I -- not that I recall.

6 Q. Did you ever indicate to them that that
7 might not be a question that they would want to ask?

8 Excuse me. Let me start over.

9 Did you ever indicate to them that that was
10 a question that they might not want to ask?

11 A. Not that I recall.

12 Q. Do you recall that in that -- well, strike.

13 You know that FBR made the payment for
14 Lehman, right?

15 A. In September?

16 Q. Yes, sir.

17 A. I didn't remember. I know that FBR did --
18 I didn't remember which month it did, but that month
19 it strikes me that we did. But I --

20 Q. Strikes you?

21 A. I believe that to be -- I believe that we
22 made the payment in September for Lehman.

23 Q. You were part of the decision process that
24 led to FBR making that payment for Lehman?

25 A. I believe so.

1 Q. As the CFO, would you typically have signed
2 off on the wiring of those funds to TriMont, the
3 servicer on the retail?

4 A. I believe so.

5 Q. Let me place in front of you what's
6 previously been marked as Exhibit 14. Is this a
7 document you have previously seen?

8 A. I may have. I don't remember the specific
9 document.

10 Q. Did you have an understanding that
11 Mr. Kotite was going to inform the retail lenders
12 that Fontainebleau Resorts had made Lehman's payment
13 for the September draw?

14 A. I believe I would have, yes.

15 Q. Exhibit 56 is a document from TriMont. You
16 understand TriMont was the servicer --

17 A. That's correct.

18 Q. -- for the retail facility?

19 A. That's correct.

20 Q. They were the entity that received the
21 funds from the various retail lenders?

22 A. That's correct.

23 Q. And this reflects a wire from Fontainebleau
24 Las Vegas -- excuse me -- Fontainebleau Resorts,
25 Inc., of \$2,526,184 on September 26, 2008.

1 A. Correct.

2 Q. That was Lehman's share of the retail

3 facility for the month of September, correct?

4 A. I believe that to be correct, yes.

5 Q. And this is a payment you authorized?

6 A. That's correct.

7 Q. So as of certainly no later than

8 September 26, you were aware that Fontainebleau

9 Resorts paid the retail portion for Lehman.

10 A. For September, that's correct.

11 Q. Yes.

12 At that time, September 26, 2008, Bank of

13 America asked you to reaffirm your prior reps and

14 warranties from the advanced certificate, didn't

15 they?

16 A. That -- I believe so.

17 Q. Why?

18 MR. CANTOR: Objection.

19 MR. KITCHENS: Calls for speculation.

20 MR. CANTOR: Yeah.

21 THE WITNESS: I don't remember

22 specifically. I don't -- I assume it's tied into

23 the retail facility and the funding that month, but

24 I guess I considered my reps to be reaffirmed on the

25 draw date, regardless.

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1 A. No.

2 MR. KITCHENS: I was going to say that's a
3 yes-or-no answer, and you selected one of those
4 alternatives so that's fine.

5 BY MR. DILLMAN:

6 Q. The letter that was sent to you was --
7 that's Exhibit 76.

8 Your response to that was Exhibit 77?

9 A. Let me spend a minute looking at the
10 letter.

11 Q. Sure. Sure.

12 A. Yes, I believe my letter was a response to
13 that request.

14 Q. In the second full paragraph of the letter,
15 there is a reference to 3.3.23 of the disbursement
16 agreement. It's the second indented portion.

17 Do you see that?

18 A. Yes.

19 Q. Had you had discussions with anyone at
20 B of A prior to the date of this letter concerning
21 this condition in the master disbursement agreement?

22 MR. KITCHENS: In the context of the Lehman
23 bankruptcy?

24 MR. DILLMAN: Yes. Yes.

25 BY MR. DILLMAN:

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1 Q. Prior to the date of this letter and in the
2 context of the Lehman bankruptcy.

3 A. I don't recall a conversation on this
4 specific provision.

5 Q. Did you --

6 A. Is this provision getting at who is
7 funding? Is that --

8 Q. Let's look at the disbursement agreement
9 and look at 3.2.3 so that you can have it in front
10 of you, but I believe this quote is in that
11 provision.

12 A. I don't remember. I mean we obviously
13 talked generally. I don't remember them citing
14 3.3.23, but obviously there was discussion around
15 what was happening with Lehman Brothers.

16 Q. More particularly, discussion around what
17 was happening with Lehman Brothers and how those
18 events might impact conditions under the master
19 disbursement agreement?

20 A. I think all the discussions around Lehman
21 Brothers were its impact on the overall monthly
22 funding.

23 Q. With -- all of the discussions with B of A?

24 A. And with counsel, yes.

25 Q. I'm just talking now about B of A.

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1 A. Yes.

2 Q. What did you discuss with B of A concerning
3 the Lehman events and how those events might impact
4 conditions under the master disbursement agreement?

5 MR. CANTOR: Objection. Mischaracterizes
6 his testimony.

7 THE WITNESS: Again, I don't remember -- I
8 don't remember the specific discussions that took
9 place. There were obviously -- there were questions
10 about what was going on with Lehman Brothers and
11 what was -- you know, what was their impact going to
12 be on a going-forward basis. And then they
13 formalized those for the bank group, I think, with a
14 request for a call, and we responded with the letter
15 that we sent.

16 BY MR. DILLMAN:

17 Q. And is it your belief that these two
18 provisions that are set forth in the first two
19 paragraphs of Mr. Naval's letter to you were at
20 least two of the conditions that you had previously
21 discussed with B of A?

22 MR. CANTOR: Objection. Mischaracterizes
23 his testimony.

24 THE WITNESS: I believe these are the -- I
25 believe these are the general context of the

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1 conversation that we were having with B of A, yes.

2 BY MR. DILLMAN:

3 Q. Mr. Susman, Mr. Howard, or others?

4 A. I don't remember specifically who the

5 discussion was with.

6 Q. And can you recall anything more

7 specifically about conversations with B of A related

8 to 3.3.23?

9 MR. CANTOR: Objection. Asked and

10 answered.

11 THE WITNESS: Not -- not that I recollect.

12 BY MR. DILLMAN:

13 Q. The letter here, Mr. Naval's letter,

14 itemizes several questions, six questions, to be

15 precise, that they believe the lenders would want

16 answers to. Feel free to read through those. My --

17 I'm going to ask you about Question Number 2 in

18 particular.

19 A. Okay.

20 Q. You understood that at least according to

21 B of A it was important to the lenders to know

22 whether Lehman funded its portion of the

23 September draw requests and if not, who did?

24 A. That's -- that's the Question Number 2.

25 Yes, I agree.

1 Q. And that was one of the issues that you
2 were addressing in your follow-up letter,
3 Exhibit 77?

4 A. We were addressing -- yes, we were
5 addressing the issue in it -- several issues.

6 Q. Several issues --

7 A. Yes.

8 Q. -- that being one of them.

9 A. Uh-huh.

10 Q. And turning to Exhibit 77, where is it that
11 you answered the Question Number 2?

12 A. We responded based on the -- based on the
13 advice of counsel to -- the memo was authored based
14 on the advice of counsel.

15 Q. I wasn't asking how it was authored or who
16 authored it or anything.

17 Where does Exhibit 77 address the question
18 did Lehman fund its portion of the requested
19 September draw request? -- I have shorted that --
20 and if so -- or if not, who did?

21 MR. KITCHENS: Well, there is no foundation
22 for that. There is an assumption that this 77 is
23 response to the six questions in 76, which is not
24 necessarily correct. So to ask him where does it
25 occur I think is without foundation.

1 THE WITNESS: Do I still answer it?

2 MR. KITCHENS: You may.

3 BY MR. DILLMAN:

4 Q. Yes.

5 A. I don't believe it answers the question.

6 Q. It does address payment, doesn't it, in the
7 middle of the second paragraph? It says, "In August
8 and September the retail portion of such shared
9 costs was 5 million and 3.8 million respectively,
10 all of which was funded."

11 Do you see that?

12 A. Yes.

13 Q. And that -- take whatever time you need.

14 That's the only response here in Exhibit 77
15 that addresses in any way the subject matter of
16 Question 2 in Exhibit 76, correct?

17 A. I believe so.

18 Q. But if we look at Question 2, they weren't
19 asking you whether it was funded. Question 2
20 assumes it was funded, doesn't it?

21 A. Yes.

22 Q. So when you say in question -- in
23 section -- paragraph -- or Exhibit 77 that it was
24 funded, you are not really answering that question,
25 are you.

1 A. That's correct.

2 Q. People knew it was funded.

3 A. Correct.

4 Q. And so when Bank of America says to you did

5 Lehman fund and if it didn't, who did? and you said

6 it was funded, you dodged their question, didn't

7 you?

8 MR. KITCHENS: Well, wait a minute. Bank

9 of America didn't ask him anything. Bank of America

10 said --

11 MR. DILLMAN: Is there an objection?

12 MR. KITCHENS: -- what we think others are

13 going to be asking this question. So there's an

14 incorrect premise. It lacks foundation, and it's

15 argumentative in its use of the term "dodged their

16 question."

17 BY MR. DILLMAN:

18 Q. You can answer.

19 A. We authored the memo which was -- which,

20 you know, was broadly a response to questions that

21 arose over Lehman Brothers, based on the advice of

22 counsel.

23 Q. And you answered it in a way that would

24 inform a reader of Exhibit 76 that in fact Lehman

25 hadn't paid, right?

1 MR. KITCHENS: Objection. Vague. Unclear.

2 THE WITNESS: I'm not sure I understand

3 that.

4 BY MR. DILLMAN:

5 Q. If someone asks you who did X -- you know,
6 did Lehman do X and you say X was done, wouldn't a
7 reader naturally come to the conclusion that Lehman
8 did X because you are dodging the question?

9 MR. CANTOR: Objection.

10 MR. KITCHENS: Objection. Argumentative.
11 Lacks foundation.

12 MR. CANTOR: Is he being called as an
13 expert on linguistics? mind reading? any of the
14 above?

15 THE WITNESS: I'm not sure what a reader
16 would conclude from that.

17 BY MR. DILLMAN:

18 Q. Wouldn't be an irrational conclusion, would
19 it?

20 MR. CANTOR: Objection.

21 MR. KITCHENS: Calls for speculation, and
22 incomplete hypothetical.

23 THE WITNESS: I'm not sure what a reader
24 would conclude.

25 BY MR. DILLMAN:

1 Q. At some point, do you recall Mr. --

2 Do you know Mr. Varnell?

3 A. I do.

4 Q. He is a B of A managing director.

5 A. Correct.

6 Q. Was at the time that you worked for B of A?

7 A. Correct.

8 Q. Was at the time that you left B of A?

9 A. Correct.

10 Q. And was at the time of these events in

11 2008?

12 A. Yes.

13 Q. Do you recall any conversations with

14 Mr. Varnell concerning the Lehman issues?

15 A. Not -- not specific conversations. I --

16 the ones that I remember were more with David Howard

17 about setting up this -- with, I believe, David

18 Howard about setting up this call, and maybe Jeff

19 Susman. I may or may not have had a conversation

20 with John on the subject. I'm not sure.

21 Q. Do you recall that you had a meeting in

22 Las Vegas with the retail lenders and, among others,

23 Mr. Varnell?

24 A. I'm not sure. That meeting may have

25 happened, but I don't specifically remember the

1 meeting.

2 Q. Do you remember a meeting with the retail
3 lenders after the Lehman bankruptcy to discuss stuff
4 relating to Lehman?

5 A. I don't remember a specific meeting. There
6 may or may not have been.

7 Q. Mr. Varnell at some point forwarded to you
8 information about analyst reports, stating that
9 Fontainebleau had paid Lehman's portion of the
10 September 2008 draw request on the retail facility.
11 Do you recall that?

12 A. I don't recall it specifically, but it may
13 have happened.

14 Q. Okay. Well, let me place Exhibit 233 in
15 front of you, previously been marked. Exhibit 233
16 is a highly confidential transmittal of an e-mail
17 from somebody else to you from Mr. Freeman.

18 You received this e-mail, I take it?

19 A. From Mr. Varnell.

20 Q. Excuse me. From Mr. Varnell. Yes, sir.
21 The other Mr. Freeman.

22 A. Yes.

23 Q. Do you recall having received it?

24 A. It does -- yes, it does sound familiar,
25 once I see it.

1 Q. And what sounds familiar is the information
2 down below that -- in the e-mail that he was
3 forwarding to you that is in paragraph numbered
4 Item 5?

5 A. That's correct.

6 Q. And it reads, "Fontainebleau update." We
7 understand that the FBLEAU equity sponsors have
8 funded the amount required from Lehman on the retail
9 credit facility due this month, \$4 million. As a
10 result, there are no delays in construction this
11 far."

12 Do you see that?

13 A. Yes, I do.

14 Q. And does this help you to recall
15 conversations with Mr. Varnell on the topic of who
16 funded for Lehman?

17 A. I don't remember specific conversations
18 with Mr. Varnell on who funded.

19 Q. Do you have any recollection of asking
20 Mr. Varnell why he was sending you this?

21 A. Not -- not that I -- not that I recall.

22 Q. Were you curious?

23 MR. CANTOR: Objection. Doesn't recall.

24 THE WITNESS: I mean, yes, I was -- yes, I
25 would be curious upon receiving this.

1 BY MR. DILLMAN:

2 Q. And you recall having received it?

3 A. I do believe so, yes.

4 Q. And you were curious about why it was being
5 sent to you?

6 A. Uh-huh.

7 MR. KITCHENS: You have to say yes.

8 THE WITNESS: Sorry. Yes.

9 BY MR. DILLMAN:

10 Q. I will tell you how to answer. Just read
11 my lips.

12 Did you contact Mr. Varnell and ask him
13 "Why did you send this?"

14 A. I probably did, but I don't remember a
15 conversation.

16 Q. Does this help you to recall conversation
17 or conversations with Mr. Varnell relating to the
18 who-paid-for-Lehman issue?

19 A. Again, I don't -- I don't remember having a
20 specific conversation with Mr. Varnell on who paid
21 for Lehman.

22 Q. And if Mr. Varnell had asked you who paid
23 for Lehman, you wouldn't have lied to him, would
24 you?

25 A. No.

1 Q. You would have told him the Fontainebleau
2 did?

3 MR. KITCHENS: Lacks foundation. I think
4 he said he couldn't remember the discussions.

5 MR. DILLMAN: Strike it.

6 BY MR. DILLMAN:

7 Q. Now, Exhibit 233 attaches an e-mail from
8 Kevin Rourke, Andrei Dorenbaum, and Brad Means.
9 They are from Highland Capital Management, LP,
10 according to the signature line of the contact
11 information.

12 Did you know Mr. Rourke, Mr. Dorenbaum, or
13 Mr. Means prior to receiving this e-mail?

14 A. I knew Kevin Rourke.

15 Q. And you knew him as being someone from
16 Highland?

17 A. From Highland Capital, correct.

18 Q. You knew that Highland was a term lender in
19 the credit facility?

20 A. That's correct.

21 Q. Had you had conversations with Mr. Rourke
22 prior to October 10, 2008?

23 A. Yes.

24 Q. On what topics? Strike that.

25 On any topics having to do with Lehman?

1 A. I think so.

2 Q. What do you recall of your conversations
3 with Mr. Rourke? And let me expand that to be or
4 anyone else from Highland.

5 A. I thought -- I think I remember a meeting
6 where they were in our office and they were asked --
7 it was right around the time of Lehman's bankruptcy
8 filing.

9 Q. Around the time as in that week or sometime
10 in the general, you know, month thereafter?

11 A. It's a little bit of a blur. I thought it
12 was really close to the time, but I could be wrong.

13 Q. All right. Who attended that meeting that
14 you recall?

15 A. Kevin. And I think there were some others,
16 but I remember Kevin. I think Kevin specifically.

17 Q. Others from Highland?

18 A. I think so.

19 Q. Others from Fontainebleau other than you?

20 A. I'm not sure.

21 Q. Anyone else?

22 A. I'm not sure.

23 Q. B of A?

24 A. I don't believe so.

25 Q. Who called the meeting?

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1 BY MR. DILLMAN:

2 Q. And that when you were telling Mr. Howard
3 and Mr. Susman and Mr. Varnell and Bill Scott that
4 you told Highland what you could, you were
5 representing at least in part that you didn't tell
6 them everything. There was things that you couldn't
7 tell them and therefore didn't.

8 A. I think -- I think it was what I could
9 based on -- based on my conversation -- based on the
10 advice I had received from counsel.

11 Q. And did you make it clear to the folks at
12 B of A that your limitations on what you could and
13 couldn't say to Highland were the result of
14 conversations that you had had with counsel?

15 A. Not sure.

16 Q. Do you recall having described the reason
17 why you had limitations on what you could and
18 couldn't say other than conversations you had had
19 with counsel?

20 A. I don't believe so.

21 Q. So whether you told them that it was
22 because you talked to counsel and counsel had given
23 you certain limitations or whether or not, you don't
24 recall having said there was any other reason?

25 A. I believe that to be the case.

1 Q. Okay. What was their reaction when you
2 told them that there were certain things you
3 couldn't tell Highland?

4 MR. CANTOR: Objection. Whose reaction?

5 MR. DILLMAN: B of A's.

6 MR. CANTOR: Objection. That
7 mischaracterizes testimony, but he can answer.

8 THE WITNESS: In what time frame? My
9 recollection is that when we sent the memo out to
10 the lenders there was some conversation about that
11 we had limitations on what we were and weren't
12 allowed to say, based on our discussions with
13 counsel. That's my recollection of when that
14 conversation happened.

15 BY MR. DILLMAN:

16 Q. And the conversation you are talking about
17 now is a conversation with B of A?

18 A. I believe -- I believe it would have been.
19 But this was around -- this was around: Are you
20 going to have a call?

21 No, we don't think we are going to have a
22 call. We will write a memo instead.

23 But again, I don't remember a specific
24 conversation where we went through this, but it
25 seems to me that it would have happened as a natural

1 response to the request.

2 Q. So to be -- take it back to some of the
3 documents we looked at, in connection with the
4 request B of A made in Exhibit 76 and your
5 responsive letter in Exhibit 77, you believe there
6 were discussions with B of A in which you apprised
7 representatives of B of A that there were things
8 that you could say and things that you couldn't say
9 about the Lehman bankruptcy issue?

10 MR. CANTOR: Objection.

11 THE WITNESS: I don't remember a specific
12 conversation, but I think we framed -- we framed the
13 fact that we weren't going to have a call in that
14 context.

15 BY MR. DILLMAN:

16 Q. There were certain things that we would
17 prefer not to --

18 A. Right.

19 Q. -- say on a call?

20 A. There are certain things that we are not
21 allowed to say, and we don't want the call to
22 deteriorate to kind of a least common denominator
23 approach.

24 Q. Did you inform B of A -- strike that.

25 With whom did you have that conversation

1 you just --

2 A. My best guess is it would have been David
3 Howard and Jeff Susman because they were -- they
4 were trying to organize the call at that point in
5 time.

6 Q. Not a guess, right? That's your best
7 recollection?

8 A. That's my best recollection of who at
9 B of A I would have been speaking to about it.

10 Q. What was their reaction?

11 A. I --

12 MR. CANTOR: Objection.

13 THE WITNESS: I don't remember.

14 BY MR. DILLMAN:

15 Q. Anybody ask you what is it that you -- what
16 are the subjects about which you can or can't speak?

17 A. No, not that I remember.

18 Q. Any questions about "How about that
19 question of who paid for Lehman?" Can you talk --
20 can you give answers to that?

21 A. I don't -- I don't remember them. Once I
22 laid out that, I don't remember that they ever asked
23 me specifically.

24 Q. Once you laid out what?

25 A. Well, we were talking about scheduling the

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1 call, not scheduling the call. And we would have
2 said -- my recollection is that at that point in
3 time we said we don't think -- we don't think a call
4 is the right idea; there are limitations upon what
5 we can and can't say. And I don't think they
6 followed up with that statement with specific
7 questions of "Why can't you say this?"

8 Did that answer the question?

9 Q. It did. Thank you.

10 I will place in front of you Exhibit 18.

11 This is a meeting agenda for a meeting that -- the
12 testimony is did occur -- occurred on or about this
13 date of March 23, 2008, in Las Vegas --

14 A. October?

15 Q. Yes, sir. October 23, 2008. Sorry.

16 -- and included at least Mr. Schaeffer,
17 Mr. Varnell, Mr. Yunker, Mr. Howard -- excuse me --
18 yes, Mr. Howard, and I believe that the testimony
19 has been Mr. Freeman as well.

20 A. I believe I attended the meeting.

21 Q. All right. And the purpose of this meeting
22 was what?

23 A. I don't remember specifically. There would
24 have been obviously questions amongst the --
25 questions amongst the retail lenders about what

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1 happens, what happens with Lehman but also I think
2 generally about the project.

3 My recollection is that the retail funders,
4 the retail lenders, went a long time without
5 funding. They didn't start funding until after we
6 were through the equity dollars and the second
7 mortgage notes proceeds, so I think it was -- I
8 think it was a project update is my recollection of
9 the meeting.

10 Q. Was there a discussion about the
11 possibility of the non-Lehman lenders on the retail
12 facility stepping up and taking over Lehman's
13 commitment?

14 A. There may have been. I can't remember
15 specifically.

16 Q. Was there any appetite for that, if you can
17 recall that?

18 MR. CANTOR: Objection.

19 THE WITNESS: As part of this meeting?

20 BY MR. DILLMAN:

21 Q. Yes, sir.

22 A. I can't -- I can't remember as part of this
23 meeting.

24 Q. Did you have an understanding in the
25 September/October time frame that if Lehman didn't

1 come through with its commitments that the other
2 retail lenders were waiting there to make good on
3 Lehman's commitments and take over its portion of
4 that facility?

5 MR. CANTOR: Objection.

6 THE WITNESS: There were discussions
7 underway, but there wasn't a commit from the other
8 lenders to step in for Lehman if Lehman didn't
9 perform going forward.

10 BY MR. DILLMAN:

11 Q. Who paid Lehman's share in November?

12 A. I don't remember specifically.

13 Q. Fontainebleau?

14 A. I don't remember specifically.

15 Q. What -- for what months other than
16 September or in addition to September did
17 Fontainebleau fund Lehman's share of the retail
18 facility?

19 MR. CANTOR: Objection.

20 THE WITNESS: I don't remember
21 specifically. There was -- there was several months
22 where I believe Fontainebleau Resorts funded -- I
23 can't remember if Lehman funded once or twice after
24 them so I don't remember the sequence of the
25 specific months or how many.

1 BY MR. DILLMAN:

2 Q. You remember that at some point
3 Fontainebleau entered into agreements with ULLICO
4 relating to monthly funding of the Lehman's share of
5 the retail facility?

6 A. I do remember -- I do remember that now,
7 but I don't remember the specifics of that -- of
8 that arrangement.

9 Q. When you say you remember that now, is that
10 because you have looked at documents that helped
11 refresh your recollection about that?

12 A. I think in a discussion with -- with
13 counsel.

14 Q. I'm not asking for --

15 A. Sorry.

16 Q. -- discussions with counsel.

17 But is it in preparation for the
18 deposition, looking at documents or otherwise, that
19 you were refreshed about an arrangement between
20 ULLICO and Fontainebleau in connection with payment
21 of Lehman's share?

22 A. In a discussion with counsel, yes.

23 Q. Did you review any documents in that
24 regard?

25 A. No.

1 Q. Now that you recall those events, do you
2 recall that you were involved in the internal
3 discussions concerning that agreement between -- or
4 those arrangements between ULLICO and Fontainebleau?

5 A. I would have been involved in internal
6 discussions, but I wasn't involved in the
7 discussions with ULLICO, that I remember.

8 Q. Do you recall having signed certain
9 documents in that regard?

10 A. I may have.

11 Q. Let me place in front of you what's
12 previously been marked as Exhibit 24.

13 What's 24?

14 MR. CANTOR: Objection. Form.

15 MR. KITCHENS: Objection. Vague.

16 MR. DILLMAN: Come on. I'm trying to cut
17 through things, guys.

18 BY MR. DILLMAN:

19 Q. Do you recognize Exhibit 24?

20 A. I would need to review it.

21 Q. Sure.

22 A. Okay.

23 Q. This is a document that you have seen
24 before?

25 A. I have seen it before, and that's my

1 signature on Page 5.

2 Q. This relates to the retail draw -- Lehman's

3 share of the retail draw for December of 2008,

4 correct?

5 A. I believe that would be correct.

6 Q. This provides a guarantee by the named

7 parties, in the first paragraph, of ULLICO's payment

8 of the Lehman's share, correct?

9 A. I believe that's correct.

10 Q. And it requires that the guarantee --

11 strike that -- that the guarantors repay that money

12 to ULLICO the earlier of May --

13 A. Maybe March?

14 Q. -- March 29, 2009, or the next time that

15 Lehman fails to make an advance.

16 A. I believe that to be correct.

17 MR. CANTOR: Objection.

18 BY MR. DILLMAN:

19 Q. You were involved in the decision process

20 by which this document was entered into by

21 Fontainebleau Resorts, Turnberry Residential, Jeff

22 Soffer?

23 A. I was -- I was informed -- I was informed

24 of it and discussed it internally, but I wasn't -- I

25 wasn't involved in many of the conversations with

1 ULLICO about it.

2 Q. Right. I heard that.

3 And why didn't Fontainebleau Resorts simply
4 pay the Lehman share for December as opposed to
5 going through a payment by ULLICO guaranteed by
6 Fontainebleau, Turnberry, and so forth?

7 MR. KITCHENS: Lacks foundation.

8 THE WITNESS: I don't recall.

9 BY MR. DILLMAN:

10 Q. Did you have any discussions about why
11 these entities were entered into this agreement as
12 opposed to a direct payment from Fontainebleau?

13 A. I'm sure we had discussions about it, but I
14 don't remember the specific discussions.

15 Q. Did Fontainebleau have the financial
16 ability to pay \$3,391,631.83 in December of 2008?

17 MR. CANTOR: Which Fontainebleau?

18 MR. DILLMAN: Fontainebleau Resorts, LLC.

19 THE WITNESS: To the best of my
20 recollection, they would have.

21 BY MR. DILLMAN:

22 Q. Any reason sitting here today why you --
23 that you can think of why Fontainebleau chose to go
24 through a guaranty agreement with ULLICO as opposed
25 to a direct payment?

1 A. Not that I can -- not that I can recollect.
2 My recollection is that Sonny was in the middle
3 of -- Sonny Kotite was in the middle of those
4 discussions. And certainly there was -- there was
5 discussions with Lehman about how much -- how much
6 they would continue to fund, and there were
7 discussions with ULLICO about stepping in for, I
8 believe, a significant portion of those fundings.

9 So this may have been kind of an interim
10 step to that -- to that resolution, but that's
11 the -- that's my best recollection of why we would
12 have gone through these steps.

13 Q. As of December 31, 2008, you understood
14 that Lehman was not funding its share of the
15 December advance?

16 A. I believe that to be -- I believe that to
17 be correct.

18 Q. You actually came to that understanding
19 before that because you signed this guaranty
20 agreement on December 29 -- as of December 29,
21 reflecting the fact that Lehman wasn't going to pay.

22 A. I believe that's what this reflects.

23 Q. How did you come to the understanding that
24 Lehman was not going to pay December?

25 A. I would have heard it from Sonny Kotite, I

1 believe.

2 Q. And he was the main contact with Lehman?

3 A. Correct.

4 Q. And it was your understanding based on your
5 conversations with Mr. Kotite that he had been in
6 communication with Lehman and advised that Lehman
7 was not going to make its December payment?

8 A. That would have been how I got the
9 information, correct.

10 Q. Did you understand in December that Lehman
11 in all likelihood would not be making subsequent
12 payments after that as well?

13 A. No.

14 Q. Did you have any understanding one way or
15 the other as to the likelihood of Lehman making, for
16 instance, the January payment?

17 A. I did not have any understanding of whether
18 they would or wouldn't.

19 Q. You came to understand that they had not?

20 MR. CANTOR: Objection.

21 THE WITNESS: I came to understand that
22 they had not for December.

23 BY MR. DILLMAN:

24 Q. You came to understand that they had not
25 for January as well? They did not for January?

1 A. I believe that -- I believe that to be the
2 case, yes.

3 Q. And you are aware that the guaranty
4 agreement was amended to provide for payment by
5 Fontainebleau Resorts through ULLICO of Lehman's
6 January draw requirements under the retail facility.

7 A. I don't remember what happened in January
8 with regards to ULLICO.

9 Q. [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 MR. KITCHENS: I think he is done looking
13 at it.

14 MR. DILLMAN: I'm sorry. Thanks. Throw
15 something at me next time.

16 BY MR. DILLMAN:

17 Q. [REDACTED]

18 A. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Q. [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 A. [REDACTED]

25 Q. [REDACTED]

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[REDACTED]

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A.

[REDACTED]

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Q.

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[REDACTED]

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A.

[REDACTED]

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[REDACTED]

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Q.

[REDACTED]

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[REDACTED]

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A.

[REDACTED]

14

Q.

[REDACTED]

15

[REDACTED]

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MR. CANTOR: Objection.

18

BY MR. DILLMAN:

19

Q.

[REDACTED]

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22

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MR. CANTOR: Objection.

24

THE WITNESS:

[REDACTED]

25

[REDACTED]

1 BY MR. DILLMAN:

2 Q. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 A. [REDACTED]

6 Q. [REDACTED]

7 A. [REDACTED]

8 Q. [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 A. [REDACTED]

13 Q. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 A. [REDACTED]

18 Q. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 A. [REDACTED]

23 Q. [REDACTED]

24 [REDACTED]

25 A. [REDACTED]

1 Q. Let me put a document in front of you. It

2 may help.

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[REDACTED]

THE WITNESS: [REDACTED]

BY MR. DILLMAN:

Q. [REDACTED]

MR. CANTOR: Objection.

THE WITNESS: [REDACTED]

[REDACTED]

BY MR. DILLMAN:

Q. [REDACTED]

[REDACTED]

A. [REDACTED]

[REDACTED]

Q. [REDACTED]

[REDACTED]

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[REDACTED]
A. [REDACTED]

[REDACTED]

MR. DILLMAN: Why don't we go off the record for a minute. You review. We will go back on. We will get the answer, and we'll go to lunch.

THE WITNESS: That would be helpful.

THE VIDEOGRAPHER: Off the record at 12:01.

(Off the record.)

THE VIDEOGRAPHER: Back on the record at 12:11.

BY MR. DILLMAN:

Q. [REDACTED]
[REDACTED]

A. [REDACTED]

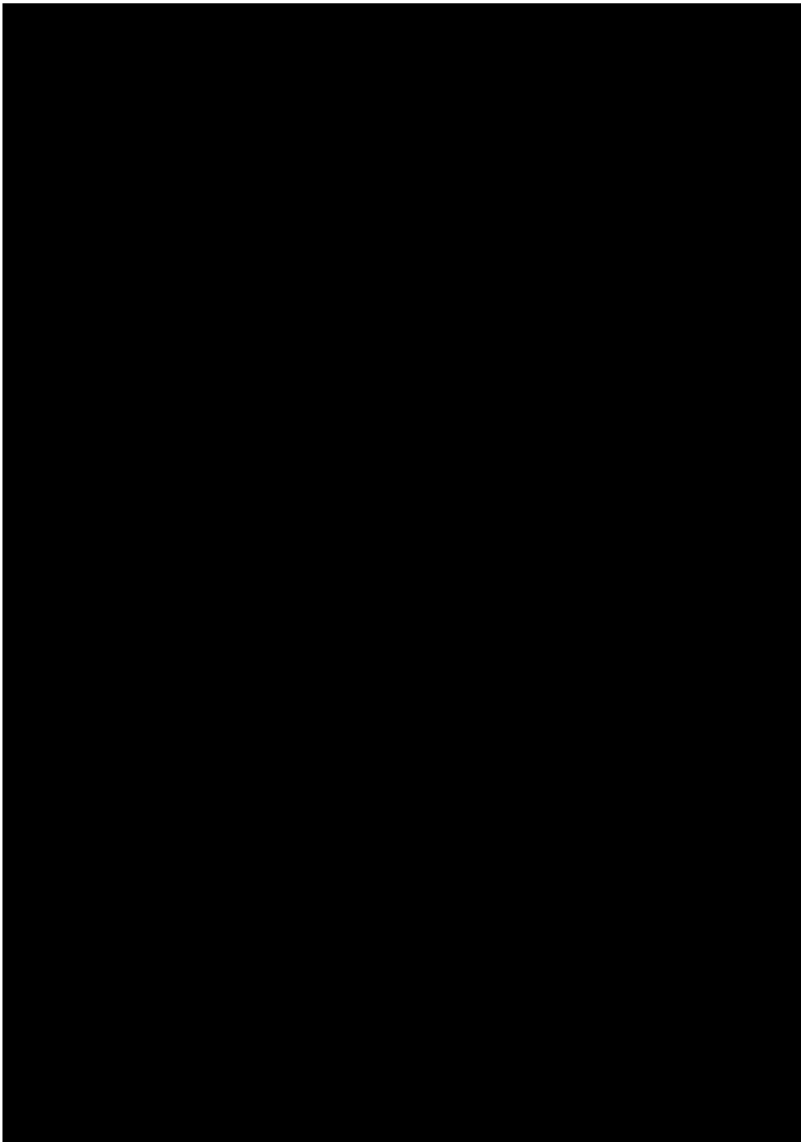
Q. [REDACTED]

[REDACTED]

A. [REDACTED]

[REDACTED]

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17 MR. DILLMAN: Thank you. Let's take a
18 break for lunch.

19 THE VIDEOGRAPHER: Off the record at 12:13.
20 (Off the record for lunch recess.)

21 THE VIDEOGRAPHER: Back on the record at
22 1:12.

23 BY MR. DILLMAN:

24 Q. Mr. Freeman, at some point in 2008, did
25 Fontainebleau Resorts seek to raise equity through

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1 Q. Yeah. Those are additive.

2 A. Correct.

3 Q. So the total cost to complete the project
4 as enhanced would be net of the things that are
5 netted out here, \$374 million?

6 A. That's how I would interpret these, yes.

7 Q. Of which 171 was for the base plan?

8 A. Was what they said we were committed to at
9 that point this time for the base plan.

10 MR. CANTOR: Who is the "they"?

11 THE WITNESS: I'm sorry. "They" being
12 based on the discussion with Jeff and Howard and the
13 team the week immediately prior to this meeting.

14 BY MR. DILLMAN:

15 Q. So let's stick with the 171 is actually net
16 of soft-cost savings and the committed construction
17 costs are 186. We see that on Page 12, right?

18 A. Correct.

19 Q. Based on your conversations within
20 Fontainebleau, when was the 186 million of base plan
21 additional spend committed?

22 MR. CANTOR: Objection. Asked and
23 answered.

24 THE WITNESS: I believe it was -- I believe
25 it was committed at the point in time that the

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1 A. I don't know. Not that I'm aware of.

2 Q. I'm going to ask you to dig back into your
3 pile. If you could, pull out the document that had
4 been previously marked as Exhibit 75. It's the
5 one-pager.

6 A. Okay.

7 MR. DILLMAN: What's the date?

8 MR. CANTOR: September 26.

9 MR. KITCHENS: Here it is. You can use
10 mine, if you want.

11 THE WITNESS: It's going to be at the
12 bottom.

13 BY MR. CANTOR:

14 Q. Of course.

15 A. Okay.

16 Q. Do you have that in front of you now?

17 A. I do.

18 Q. This is the e-mail exchange where Jeff
19 Susman from Bank of America asks you to affirm the
20 representations and warranties, and you respond, "I
21 affirm."

22 A. Yes.

23 Q. And when you responded "I affirm," was that
24 a -- was that a true statement?

25 A. Yes.

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1 Q. Did you believe that that -- that by
2 responding "I affirm" that that statement was
3 misleading in any way?

4 A. No, I didn't.

5 Q. Now, you knew that what you were affirming
6 were the various representations and warranties that
7 are certified to in the advance request, correct?

8 A. Correct.

9 Q. And you knew that one of those
10 representations and warranties had to do with retail
11 funding, correct?

12 A. Correct.

13 Q. And in fact, the specific one that we have
14 been talking about is Section 3.3.23 of the
15 disbursement agreement. You knew that you were
16 affirming your representation that that condition
17 had been met, correct?

18 A. Correct.

19 Q. And you also knew as of this date that
20 Fontainebleau Resorts had funded on behalf of
21 Lehman, correct?

22 A. I believe so. I can't remember the exact
23 date that that funding would have taken place. Was
24 it the 26th or 27th?

25 Q. I will represent to you that it was the

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1 26th. If Mr. Dillman has a fuss with that, I will

2 find a document to prove it to be so.

3 MR. DILLMAN: I have no fuss.

4 BY MR. CANTOR:

5 Q. So when you were affirming this, you knew

6 that Fontainebleau Resorts had funded the Lehman

7 portion of the September retail.

8 A. That is correct.

9 Q. Okay. So can you explain to me, sir, why

10 it was true that the condition precedent in

11 Section 3.3.23 was satisfied?

12 A. Based on my discussion with counsel, I

13 was -- I was -- it was explained to me that we were

14 in compliance.

15 MR. DILLMAN: Just so the record is clear,

16 I am going to go back -- every time he talks about

17 "based on my conversation with counsel," I'm going

18 to go into exactly what he talked about with

19 counsel. If you want to let him waive that as we

20 go -- this is the second time -- you may do so.

21 MR. KITCHENS: I don't intend to waive

22 anything with respect to that, and I have instructed

23 him not to disclose the content of discussions with

24 counsel.

25 So please be careful about that. I think

1 respect to the retail funding in September?

2 A. I said what I believed I was allowed to say
3 at the point in time, based on the advice I received
4 from counsel.

5 Q. I believe you testified earlier that --
6 withdrawn.

7 If you could, pull out -- and hopefully
8 it's right next to the one you are looking at --
9 Exhibit 76.

10 MR. KITCHENS: In my file.

11 BY MR. CANTOR:

12 Q. In Mr. Kitchens' file. Exhibit 76, the
13 September 30 letter. Do you have that in front of
14 you, sir?

15 A. I do.

16 Q. And if you look down to Paragraph 2 at the
17 bottom of the Question Number 2 at the bottom of the
18 first page there, do you recall we discussed that --
19 you discussed that with Mr. Dillman earlier today?

20 A. Yes.

21 Q. And I apologize, but I'm not sure I
22 understood your testimony from earlier so let me
23 just try it again.

24 Is it your testimony, sir, that the
25 October 7 memo that is Exhibit 77 does not, in fact,

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1 answer Question 2 on Exhibit 76?

2 A. I don't know that it answers -- I don't
3 know that it answers any -- any of the questions.

4 It wasn't written as a direct response to
5 these individual questions. It was written as an
6 update to what I believed I could say about the --
7 about the Lehman subject at that point in time.

8 Q. Okay. Is there any reason why in preparing
9 Exhibit 77 you did not specifically address the
10 issue of who funded the Lehman draw in September?

11 A. I wrote the memo saying what I believed I
12 could say based on the subject of funding based on
13 the discussions that I had with counsel, the advice
14 that I received from counsel.

15 Q. And so is it fair to say, then, that you
16 did not include direct information on whether Lehman
17 funded the September retail advance request because
18 that was not within what counsel had permitted you
19 to say?

20 A. That's my belief.

21 (Exhibit 274 marked.)

22 BY MR. CANTOR:

23 Q. Let me show you a document that's been
24 marked as exhibit --

25 MR. CANTOR: What are we up to? 274?

1 MR. DILLMAN: I am unreliable but --

2 MR. KITCHENS: 274 would be next one.

3 BY MR. CANTOR:

4 Q. If you could, just take a look at that
5 document and let me know when you have had a chance
6 to look at it.

7 A. Okay.

8 Q. It's a -- an e-mail from Howard Karawan to
9 Mr. Kotite and Mr. Soffer, CC'd to you and
10 Mr. Schaeffer, forwarding an e-mail from John
11 Maxwell.

12 Let me ask you first, do you know who John
13 Maxwell is?

14 A. I do know Mr. Maxwell. He was a -- he was
15 a high-yield research analyst for Merrill Lynch at
16 that point in time, I believe.

17 Q. Okay. Do you recall having seen this
18 e-mail?

19 A. Yes.

20 Q. Was -- withdrawn.

21 Did part of your job responsibilities as
22 CFO for Fontainebleau Resorts include talking to
23 research analysts?

24 A. From time to time, yes, on the high-yield
25 side. Obviously we were private on the equity side.

1 Q. Right. Prior to September 2008, had you
2 spoken with Mr. Maxwell about the Fontainebleau
3 project?

4 A. I -- I may have. I don't remember if I did
5 or I didn't.

6 Q. As you mentioned earlier, the bottom e-mail
7 here is from Mr. Maxwell. It's essentially him
8 sending around his September 18 report on
9 Fontainebleau. Did you speak with Mr. Maxwell in
10 connection with this report prior to its
11 dissemination?

12 A. I believe I may have.

13 Q. And so for example, if you look in the
14 first paragraph of Mr. Maxwell's e-mail, the second
15 sentence, I believe it is, says, "We spoke with
16 company management."

17 Were you at least one of the people whom
18 Mr. Maxwell spoke?

19 A. Potentially. He may have also spoken with
20 Glenn, but potentially it was me.

21 Q. Okay. Do you have any -- well, withdrawn.
22 Do you have any memory of having spoken
23 with Mr. Maxwell in connection with this?

24 A. I can't remember.

25 Q. Other than you and Glenn, is there anyone

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1 A. Yes.

2 Q. Did you ever respond to Mr. Rourke's
3 question?

4 A. Not -- not that I recollect.

5 Q. Okay. Why didn't you respond to
6 Mr. Rourke's question?

7 A. I think I had been given specific guidance
8 from counsel as to what I could comment on and not
9 comment on with regards to funding, and I was -- I
10 believed I was giving all of the information that I
11 could at that point in time.

12 Q. And so you didn't believe that you could,
13 consistent with the instructions that you had been
14 given with counsel, respond to Mr. Rourke's
15 questions?

16 A. I didn't believe that at that point in
17 time, I don't think.

18 Q. And were those the same instructions from
19 counsel that you had been given back in September?

20 A. I believe so.

21 (Exhibit 277 marked.)

22 BY MR. CANTOR:

23 Q. Let me show you what we have marked as
24 Exhibit 277. It's amazing that I can't remember
25 three seconds later.

Freeman, Jim 3/23/2011 5:02:00 PM

1 Q. In fact, you knew that Fontainebleau
2 Resorts had funded part of the retail draw for that.

3 A. I knew that at that point in time, yes.

4 Q. Did you think that was something that --
5 that was unimportant to Ms. Holloway?

6 A. I'm not -- I'm not sure.

7 Q. Is there any particular reason why you
8 didn't tell Ms. Holloway that Fontainebleau equity
9 had funded part of the September retail advance?

10 A. Based on the discussion that I had, the
11 advice of counsel, I was -- I was not talking to
12 people about the source of funding.

13 Q. Your e-mail also says, "Sitting down with
14 D&T Partners tomorrow."

15 Is that Deloitte & Touche?

16 A. I would guess so.

17 Q. Who was Deloitte & Touche in connection
18 with the Fontainebleau project?

19 A. They were our auditors.

20 Q. Did you -- withdrawn.

21 This also refers to you having a call with
22 Ms. Holloway. I believe it's to be the day after
23 this e-mail chain. Do you recall whether that call
24 took place?

25 A. I'm not sure.

1 record that I disagree with your position on the
2 privilege, but let's -- might as well keep going.

3 MR. KITCHENS: I will state for the record
4 I disagree with your disagreement. You don't need
5 to do that. I won't ever claim you waived it.

6 MR. CANTOR: And ad infinitum.

7 THE WITNESS: I'm sorry. Can you read
8 back?

9 BY MR. CANTOR:

10 Q. Yeah, what was discussed at the board
11 meeting concerning the decision to seek a loan under
12 both the delay-draw facility and the revolver?

13 A. The business rationale that I described, I
14 think, a minute ago with regards to uncertainty in
15 the capital markets, uncertainty in the lending
16 institutions. There was -- about the lending
17 institutions. There was concern about -- about
18 Miami, actually. There were some liens in Miami
19 with regards to construction there that were growing
20 and, although not meaningful to the overall
21 Fontainebleau enterprise, could potentially trip
22 across default, I believe, with the Fontainebleau
23 facility.

24 So there is a lot of -- there was -- there
25 was concern about Lehman, whether or not Lehman

1 would keep funding, stop funding, be in a position
2 to fund anymore, rescind their commitment.

3 And based upon all of those factors, the
4 decision was -- and the advice of counsel, the
5 decision was made to draw to -- to attempt to draw
6 all of the facilities.

7 Q. Lehman was still in the picture at that
8 point? They had not rescinded their commitment?

9 A. To my knowledge, they never rescinded their
10 commitment.

11 Q. You were never --

12 A. Not that I'm aware of.

13 Q. Okay. Were you ever informed by anyone
14 that Fontainebleau could no longer place any
15 reliance on Lehman funding?

16 A. Not -- not to my recollection.

17 Q. And the point that you mentioned about
18 Miami, just to make sure I understand it, the idea
19 would be that you wanted to draw down the funds --
20 as much of the funds in the facility as you could,
21 just in case something would happen in Miami that
22 would trip a default that would preclude funding for
23 Las Vegas?

24 A. Right. Even though -- even though we
25 wouldn't view it as material to the overall project

1 in Las Vegas, the times were such in the capital
2 markets that I think it was people had to be very
3 cautious about how they approached their lending
4 institutions.

5 Q. Do you recall when this board meeting took
6 place?

7 A. I would guess sometime late February, but I
8 don't recall specifically the date.

9 Q. The notice of borrowing that we looked at a
10 couple of minutes ago I believe is dated March 2, if
11 I recall correctly, or March 3, one or the other.

12 Do you recall whether the board meeting was
13 held the same day that the notice of borrowing was
14 sent out or was it in advance?

15 A. I don't believe so. Because my
16 recollection is that the board meeting was in Miami,
17 and I believe I was back in Las Vegas on March 1
18 because it's my anniversary and I was getting yelled
19 at by my wife for not being around.

20 Q. Gotcha.

21 You spoke with Mr. Dillman earlier today
22 about a meeting that involved lenders, and he showed
23 you a document that was dated April 17. Do you
24 recall a prior meeting in March of 2009 involving
25 the lender group and Fontainebleau?

1 A. I believe there was a prior meeting. I

2 wouldn't have guessed it was in March.

3 (Exhibit 290 marked.)

4 BY MR. CANTOR:

5 Q. Let me show you what we have marked as

6 Exhibit 290. Take a look at that document. And the

7 first thing I will ask you is whether it refreshes

8 your recollection as to the fact that there was a

9 meeting in Las Vegas on or about March 20 of 2009

10 with Fontainebleau and its lenders.

11 A. It appears to be in preparation for a March

12 meeting.

13 Q. Do you recall a meeting in Las Vegas in or

14 around this time with Fontainebleau lenders?

15 A. I'm not sure.

16 Q. You said a few minutes ago that you recall

17 that there was another meeting with lenders but you

18 weren't sure when it was.

19 A. If I had to guess, I thought it was earlier

20 in the year, but I could be wrong.

21 Q. Was it in 2009, as far as you know?

22 A. I believe so.

23 Q. And who attended that meeting?

24 A. I think it was all the -- all the lenders

25 and senior management of Fontainebleau.

1 Q. So it included both term lenders and
2 revolver lenders and delay-draw lenders?

3 A. Yes.

4 Q. Generally speaking, what was discussed at
5 that meeting? Was it -- I'm sorry.

6 Was that a meeting in Las Vegas?

7 A. I believe so.

8 Q. What was discussed at that meeting?

9 A. I think project update. I think we spent
10 some time on the -- kind of the in-balance
11 calculation, and it was kind of just an
12 informational update on the overall project.

13 Q. Do you recall -- well, withdrawn.

14 If you take a look at what we have marked
15 as Exhibit 290, the attachment is labeled "LV Bank
16 Talking Points.doc." If you flip over to the second
17 page of the document, one of the talking points
18 there talks about the March advance request.

19 Recognizing that you haven't been able to
20 place this meeting in a time context, do you
21 remember any discussion about the March advance
22 request during that meeting?

23 A. Not specifically at that meeting. Could
24 you be more specific? I'm not sure I --

25 Q. Well, do you recall having any discussions

1 with -- withdrawn.

2 Do you recall that for the March 2008 draw

3 that there were some term lenders who -- delay-draw

4 term lenders who did not fund their commitments in

5 March?

6 A. 2009?

7 Q. 2009. I'm sorry.

8 A. Yes, I believe that there were a couple.

9 Q. And do you recall that you ended up sending

10 default notices to those folks?

11 A. I didn't recall that. I don't recall that

12 specifically, but I may have.

13 (Exhibit 291-B marked.)

14 BY MR. CANTOR:

15 Q. I'm going to show you what's been marked as

16 Exhibit 291. Take a look at this, Mr. Freeman, and

17 just let me know if this refreshes your recollection

18 that default notices were sent out in March of 2009.

19 A. Yes.

20 Q. The first letter went out to Z Capital. Do

21 you see that?

22 A. Yes.

23 Q. And it is a default notice with respect to

24 Z Capital failing to fund an \$11.66 million portion

25 of the March delay-draw term loan request.

1 A. Okay.

2 Q. And if you look at the second notice, do
3 you see that that goes to several funds who in a
4 letter I will refer to as "the Guggenheim lenders"?

5 A. Yes.

6 Q. And do you recall that they failed to fund
7 a \$10 million portion of the delay-draw term loan?

8 A. At that point in time, they did, I believe.

9 Q. Do you recall that Guggenheim subsequently
10 funded its portion of the delay draw?

11 A. That's my recollection.

12 Q. Do you know whether Z Capital funded its
13 portion?

14 A. I don't believe so, but I can't remember
15 for sure.

16 Q. What was -- withdrawn.

17 Did Fontainebleau have a position at this
18 time as to whether the failure of these two lenders
19 to fund their portions of the delay draw for
20 March 2009 should preclude funding of that draw?

21 A. I think our view was that they should --
22 that this should not preclude funding of the draw.

23 Q. Did you have any discussions during March
24 of 2009 with anyone from Highland on the issue of
25 whether the fact that certain term lenders hadn't

1 funded their portion of the delay-draw loan and how
2 that would affect the overall funding?

3 A. I can't remember if I did or didn't.

4 Q. Do you have -- did you have any discussions
5 with anyone from Halcyon?

6 A. I can't remember if I did or not.

7 Q. Do you remember if you had any discussions
8 with anyone from Symphony on that subject?

9 A. I can't remember if I did or didn't.

10 Q. Do you recall having any discussions with
11 any of the term lenders on the issue of whether the
12 failure of these term lenders to fund their portion
13 of the delay-draw loan should affect the
14 availability of the loan for Fontainebleau?

15 A. I don't remember those discussions.

16 Q. You were having discussions with term
17 lenders during March of 2009 about the fact that the
18 revolving lenders had rejected the notice of
19 borrowing that we saw earlier, correct?

20 A. I believe that to be the case.

21 Q. And the general tenor of those discussions
22 with these term lenders was that they thought that
23 the revolving lender should have funded, correct?

24 A. That's my recollection.

25 Q. But you don't recall whether any of these

Fu, Vincent 3/17/2011 5:07:00 PM

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF FLORIDA

3

4 -----)Civil Action No.

5 In re: FONTAINEBLEAU LAS VEGAS)09-MD-02106-CIV-GOLD/

6 CONTRACT LITIGATION)GOODMAN

7 -----)

8

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10

11

12 Deposition of VINCENT FU, at

13 865 South Figueroa Street, Suite 2900,

14 Los Angeles, California, commencing at

15 9:36 a.m., Thursday, March 17, 2011,

16 before Janice Schutzman, CSR No. 9509.

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Fu, Vincent 3/17/2011 5:07:00 PM

1 MR. RIVNER: Sure.

2 BY MR. RIVNER:

3 Q. What is Olympic CLO?

4 A. CLO is short for collateralized loan
5 obligation. It's a package of leveraged loans and
6 high yield bonds.

7 Q. Now, when you say it's a package of
8 leveraged loans and high yield bonds, what do you
9 mean by "a package"?

10 A. Just that there are a number of loans and
11 bonds within the CLO confines.

12 Q. So it purchases and sells CL- -- sorry --
13 it purchases and sells loans and bonds?

14 A. Right.

15 Q. Okay. And does it -- does it make its own
16 purchase and sale decisions?

17 A. Well, the portfolio managers make the
18 decision.

19 Q. And the portfolio managers work at
20 Churchill Pacific?

21 A. Right.

22 Q. Does it focus on a specific industry?

23 A. No, not particularly. I --

24 Q. Sorry?

25 A. Nothing.

Fu, Vincent 3/17/2011 5:07:00 PM

1 Q. And at the time it was considering the
2 Fontainebleau investment, do you know roughly what
3 it was?

4 A. Considering the --

5 Q. At the time Churchill was considering the
6 Fontainebleau investment, do you know how much it
7 was managing, roughly?

8 A. You mean when --

9 Q. In 2000 -- in 2007, roughly how much was
10 the funds managing?

11 A. I would guess --

12 MR. HOBART: He doesn't want you to guess.

13 If you have a --

14 BY MR. RIVNER:

15 Q. Do you have a rough idea? About the same?

16 MR. HOBART: I think it has to be more than
17 a rough idea. I think you need to have an estimate
18 that is based upon fact. If you can provide that to
19 him, that's fine. If you can't, then you can tell
20 him that you can't do that.

21 THE WITNESS: Yeah, I can only approximate,
22 so --

23 BY MR. RIVNER:

24 Q. What would an approximation be?

25 A. At that time, probably 3 billion.

Fu, Vincent 3/17/2011 5:07:00 PM

1 A. Yes.

2 Q. And what do you think about the Nakheel
3 transaction from your perspective as a holder of the
4 Fontainebleau Las Vegas term loans?

5 MR. HOBART: Assumes facts not in evidence.

6 THE WITNESS: What did I think about the
7 transaction?

8 BY MR. RIVNER:

9 Q. Did you consider it a positive development?

10 MR. HOBART: What? What did he consider
11 positive?

12 BY MR. RIVNER:

13 Q. Did you consider -- strike that.

14 You said essentially that they were going
15 to fund the increase by injecting the \$200 million
16 in funds from the Nakheel transaction.

17 Did you consider the injection of
18 additional funds from the parent to be a positive or
19 negative development?

20 MR. HOBART: Objection, vague, ambiguous,
21 assumes facts not in evidence.

22 THE WITNESS: I considered it a positive.

23 BY MR. RIVNER:

24 Q. Why?

25 A. Because they're covering their cost overrun

Fu, Vincent 3/17/2011 5:07:00 PM

1 and injecting additional liquidity on top of that,
2 additional possible funds.

3 Q. Did you do any analysis -- strike that.

4 Does this document refresh your
5 recollection of any additional analysis you did
6 regarding how the Fontainebleau was going to fund
7 the cost increases?

8 MR. HOBART: Of this particular cost
9 increase?

10 BY MR. RIVNER:

11 Q. This cost -- particular cost increase.

12 A. No.

13 Q. Do you know that -- strike that.

14 Do you know if they're permitted to inject
15 additional -- strike that.

16 Do you know if Fontainebleau Las Vegas was
17 permitted to inject additional capital to pay for
18 cost increases?

19 MR. HOBART: Objection, calls for a legal
20 conclusion, calls for an expert opinion, lacks
21 foundation, calls for speculation.

22 BY MR. RIVNER:

23 Q. I'm asking if you know.

24 A. I -- I assumed it was allowed, but I -- I
25 don't specifically know.

1 the role that they -- that they played in the retail
2 facility.

3 BY MR. RIVNER:

4 Q. And what was that role?

5 MR. HOBART: Asked and answered.

6 THE WITNESS: The funding of that holding
7 size.

8 BY MR. RIVNER:

9 Q. Did the analyst reports express a view of
10 whether or not Lehman was going to fund?

11 A. I don't remember that it was -- they
12 weren't sure initially.

13 Q. Anything else you remember about these
14 analysts' reports?

15 A. No, not particularly.

16 (Deposition Exhibit 152 was marked for
17 identification.)

18 BY MR. RIVNER:

19 Q. Let me know when you've had a chance to
20 look at that.

21 A. Okay.

22 Q. Is this one of the analysts' reports that
23 you recall seeing?

24 A. Yes.

25 Q. And it's a September 19, 2008 report from

1 John Maxwell?

2 A. Yes.

3 Q. And who's John Maxwell?

4 A. At that time, he was a gaming analyst

5 whether Merrill Lynch.

6 Q. And was that one of the analysts that you

7 followed?

8 A. Yes.

9 Q. Now, there's some handwritten markings on

10 here.

11 Are those your notes?

12 A. Yes.

13 Q. Now, it says at the top, "Verify as fact

14 actual layout."

15 What does that mean?

16 A. You know, I -- I don't -- I don't know what

17 my notes mean there.

18 Q. Now, okay. It says you require to fund

19 whether bankruptcy.

20 Do you see that note on the top right-hand

21 side of the page?

22 A. Yes.

23 Q. Was that something you looked at was

24 whether or not Lehman would be required to fund in

25 its bankruptcy?

1 A. I think that was a question I had, if they
2 were -- whether or not they were going to fund even
3 though they were bankrupt or filing.

4 Q. What did you do to determine if they would
5 fund?

6 A. Well, I guess I talked -- I remember
7 talking to company management. I probably talked to
8 B of A about the situation.

9 Q. What else?

10 A. I think that was the extent.

11 Q. Did you look at Lehman's bankruptcy
12 filings?

13 A. Lehman's specific bankruptcy filings? No,
14 I did not look at that.

15 Q. Did you consult whether counsel?

16 A. I may have consulted whether our in-house
17 counsel. I don't recall.

18 Q. Did you communicate whether Lehman about
19 whether it was going to fund in bankruptcy?

20 A. I did not talk to anyone specifically from
21 Lehman.

22 Q. You mentioned that you spoke to
23 Fontainebleau management.

24 Do you recall who you spoke whether?

25 A. Usually it would be Jim Freeman.

1 Q. Were these one-on-one conversations?

2 A. I believe so.

3 Q. Did you take notes of these conversation?

4 A. Yes, I usually do.

5 Q. Do you recall what you discussed whether
6 Mr. Freeman about the bankruptcy?

7 A. No. I'm guessing it was just our general
8 take on the situation.

9 Q. Do you recall what he told you the general
10 take was on these calls?

11 A. That this was unfolding as we speak and
12 that they weren't positive what was going to happen.

13 Q. Anything else?

14 A. No.

15 Q. Do you recall -- strike that.

16 Did you ask Jim Freeman -- strike that.

17 Did you ask anyone from Fontainebleau
18 Las Vegas management whether Las -- whether Lehman
19 told them they would fund?

20 A. Repeat the question.

21 Q. Sure.

22 Did you ask anyone from Fontainebleau
23 Las Vegas management whether Lehman was going to
24 fund?

25 A. I did, but they expressed uncertainty.

1 request -- strike that.

2 You don't know which retail advance request

3 Lehman funded and which they did not?

4 A. No. I'm not part of the retail facility.

5 I wasn't an insider within that facility. I -- I

6 couldn't directly monitor it.

7 Q. Did you ask Fontainebleau Las Vegas who

8 funded the September 2009 retail facility -- strike

9 that.

10 Did you ask Fontainebleau Las Vegas who

11 funded the retail facility in September 2009?

12 A. I don't recall doing that.

13 Q. Do you recall asking anyone at

14 Fontainebleau Las Vegas who funded the October 2009

15 retail facility?

16 A. I -- I don't recall.

17 Q. Did you ask Fontainebleau Las Vegas if

18 Lehman funded any of the retail facilities after

19 that date?

20 A. No, I don't recall.

21 Q. Did you ask Bank of America if

22 Fontainebleau -- strike that.

23 Did you ask Bank of America if Lehman

24 funded the retail facility for September 2009?

25 A. I -- I don't remember specifically asking

1 them.

2 Q. Did you ask Bank of America if Lehman

3 funded the retail facility for October 2009?

4 MR. HOBART: Objection, assumes facts not

5 in evidence.

6 THE WITNESS: No, I don't specifically

7 recall asking.

8 BY MR. RIVNER:

9 Q. Did you ask Bank of America if Lehman

10 funded the retail facility -- strike that.

11 Did you ask -- did you ask Bank of America

12 if Lehman funded the retail facility for the

13 November through May advances?

14 MR. HOBART: Objection, assumes facts not

15 in evidence.

16 THE WITNESS: I did not -- I don't think I

17 asked them.

18 BY MR. RIVNER:

19 Q. You don't think you asked them if Lehman

20 funded?

21 A. November through May, no.

22 Q. Did you ask for -- individually, did you

23 ask if they funded individual requests?

24 A. No.

25 Q. You mentioned earlier you may have spoken

1 to analysts.

2 Do you remember any analyst you

3 specifically spoke to?

4 A. I might have spoken to John.

5 Q. Do you recall any other analysts?

6 A. Not off the top of my head.

7 Q. Did John -- strike that.

8 What did John -- strike that.

9 Do you know if John -- strike that.

10 Did you ask John Maxwell if he thought

11 Lehman had funded the September 2009 advance

12 request?

13 MR. HOBART: Objection, calls for

14 speculation.

15 THE WITNESS: I don't think I specifically

16 asked him about Lehman. Well, I might have asked

17 him. I don't recall, though.

18 BY MR. RIVNER:

19 Q. Do you recall what you discussed whether

20 John Maxwell?

21 A. No. I -- I might have sent an email to him

22 asking what he thought or more details on his

23 report, but --

24 Q. Do you have an understanding where the

25 details in Maxwell's report came from?

1 A. I never questioned his sources.

2 Q. And does he have access to inside

3 information about the retail facility?

4 MR. HOBART: Objection, lacks foundation,

5 calls for speculation.

6 THE WITNESS: He's been involved whether

7 the gaming industry a number of years, so he has

8 good access to management. He also has good

9 relations whether the other investment banks too,

10 so -- but I don't know where specifically he gets

11 his information.

12 MR. HOBART: Asher, we've been going about

13 an hour and a half. When you get to a spot to take

14 a break, let's do that.

15 MR. RIVNER: Yeah, another maybe five, ten

16 minutes.

17 BY MR. RIVNER:

18 Q. In your report, you -- you --

19 MR. HOBART: What report are you referring

20 to?

21 MR. RIVNER: I'm sorry. Exhibit 155.

22 BY MR. RIVNER:

23 Q. You've got a section here called "Main

24 Risks."

25 A. Yes.

Howard, David 3/11/2011 12:00:00 PM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

3
4 IN RE: FONTAINEBLEAU LAS VEGAS
5 CONTRACT LITIGATION

6 CASE NO 09-MD-02106-CIV-GOLD/GOODMAN
7 MDL No. 2106

8 This document relates to all actions.

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12

13 CONTAINS CONFIDENTIAL PORTIONS
14 VIDEO DEPOSITION OF DAVID HOWARD
15 Charlotte, North Carolina
16 Friday, March 11, 2011

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21 Reported by:
Andrea Nobrega
22 Court Reporter
Notary Public
23 JOB No. 157413

24
25

Howard, David 3/11/2011 12:00:00 PM

1 Q. Specifically, what time frame are you
2 referring to when you talk about following the
3 documents, making sure that everyone was doing
4 what they were supposed to be doing?

5 MR. CANTOR: Objection. You can answer.

6 THE WITNESS: Well, the -- I mean, I do
7 recall, you know, that it started with the Lehman
8 bankruptcy, and then there was -- you know, it was
9 probably every month after that there was always a
10 discussion around this. So that's the time frame
11 in the beginning.

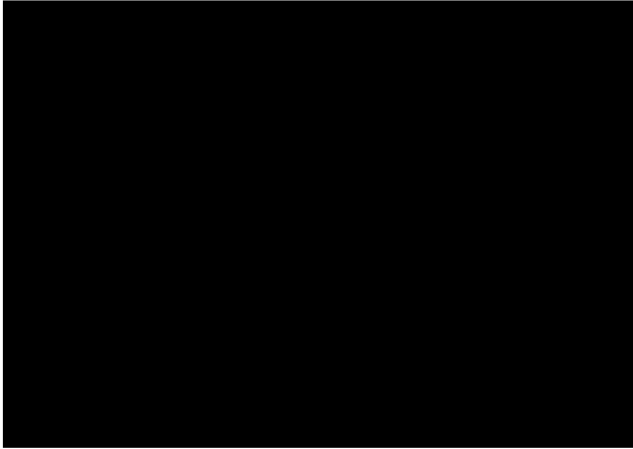
12 BY MR. DILLMAN:

13 Q. That's the time frame it began and it
14 went forward from there?

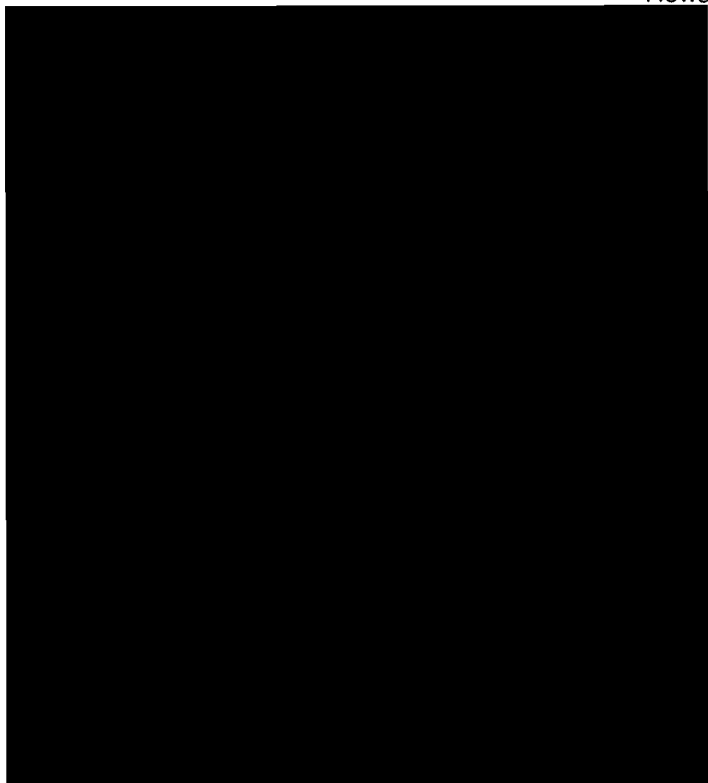
15 A. Right.

16 Q. And when did your involvement with the
17 Fontainebleau project cease?

18 A. 

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12 Q. Your name is on a lot of e-mails up
13 through April, May of 2009. In reviewing or in
14 preparing for your deposition, do you recall
15 seeing e-mails post-February 2009?

16 A. I recall seeing one that was in March.

17 Q. Did that help you to recall that you
18 were indeed involved in some manner with the
19 Fontainebleau facility in March of 2009?

20 MR. CANTOR: Objection. You can answer.

21 THE WITNESS: All I recalled was that,
22 you know, I was probably copied on the e-mail.

23 BY MR. DILLMAN:

24 Q. And fair enough. If you saw your name
25 on an e-mail, it didn't bring back any

1 recollections, oh, yeah, now I remember I was
2 in --

3 A. No, I remember, you know, checking out.
4 I mean, it was, you know, there were plenty of
5 cooks in the kitchen. You know, there was plenty
6 of people handling it the right way in my opinion,
7 and my advice was not really -- it was more a
8 matter of I guess because I had been involved with
9 it for so long, you know, I was just on the
10 distribution list.

11 Q. When you say people were handling it the
12 right way, what were they handling the right way?

13 A. I think there was just enough -- there
14 was a workout team. There was internal legal. I
15 guess not handling it right -- there were the
16 right, appropriate people that were staffed to be
17 working on it. They didn't need my help.

18 Q. Post-February of 2009, fair to say you
19 don't know whether BofA was handling it
20 appropriately or not?

21 MR. CANTOR: Object to the form.

22 THE WITNESS: I guess I would say I know
23 that they were the right people involved. What
24 they were doing, I wasn't involved in, so I don't
25 know. I don't know what the decisions were.

1 BY MR. DILLMAN:

2 Q. Do you today understand that BofA and
3 the other revolvers terminated the revolving
4 facility associated with the Fontainebleau project
5 in late April of 2009?

6 A. Yes.

7 Q. Were you involved in that decision
8 process?

9 A. No.

10 Q. Do you understand that the borrower put
11 forth a borrowing notice in early March of 2009
12 that sought to draw down on both the term loan,
13 un-funded delay draw term loan and the revolver?

14 A. I recall that notice, yes.

15 Q. Were you involved at all in the process
16 by which BofA responded or recommended that banks
17 respond to that?

18 A. I recall that I was on phone calls, and
19 I heard discussion. I don't recall my
20 involvement.

21 Q. Do you understand or do you know that
22 there was a disbursement of proceeds in late March
23 of 2009?

24 A. Can you clarify disbursement of
25 proceeds?

1 MR. CANTOR: It wasn't me --

2 THE WITNESS: It's the nature of the
3 beast.

4 BY MR. DILLMAN:

5 Q. Did you talk to Mr. Yunker before his
6 deposition?

7 A. Yes, I did. I don't know that I talked
8 about -- other than the fact that he was going to
9 be deposed, we were actually working on a
10 transaction at the time.

11 You know, we were working with BofA and
12 Bret on an Indian deal. So I talked to him
13 frequently about a lot of things.

14 Q. Tell me about your conversation with Mr.
15 Yunker after his deposition other than the part
16 that it was tiring?

17 A. That's about all we talked about. I was
18 more concerned how long it lasted.

19 Q. Did you talk about what he and I spoke
20 about during that deposition?

21 A. No.

22 Q. Any of the topics that came up?

23 A. Not really. I mean, I can't recall that
24 we talked any specifics about the deal. I was
25 mostly interested in how long it was, and you

1 know, when would I be able to get out of here.

2 Q. Did he ask you what you recall about
3 various events that he might have testified to at
4 the deposition?

5 A. No.

6 Q. Did he indicate any of the questions
7 that I asked him or the answers that he gave?

8 MR. CANTOR: Objection, asked and
9 answered.

10 THE WITNESS: I don't recall.

11 BY MR. DILLMAN:

12 Q. When did you talk to him?

13 A. A couple weeks ago. I saw him
14 personally a week ago Monday -- let's see, what's
15 today? I saw him Monday night. I saw him Monday
16 night in New York, but we didn't talk about this.

17 Q. So at some point in the last couple of
18 weeks you talked to him about his deposition?

19 A. Yeah.

20 Q. It would make sense because his
21 deposition occurred about a couple weeks ago?

22 A. Yeah.

23 Q. And it's your testimony that you can't
24 recall anything about that conversation that you
25 had with him a couple weeks ago other than the

1 fact that he said the deposition was tiring, is
2 that right?

3 MR. CANTOR: Objection. I think that
4 mischaracterizes what he said.

5 THE WITNESS: I said I don't recall us
6 talking about any specifics, and I was mostly
7 concerned -- you know, my questions to him
8 revolved around the time and his answers were it
9 was tiring and he told me it was about five or six
10 hours.

11 BY MR. DILLMAN:

12 Q. When you left BofA, what was your
13 position -- strike that.

14 Let me go back. I forgot something.
15 You talked to Mr. Newby?

16 A. Yes.

17 Q. 

18 

19 A. 

20

21

22

23

24

25

1 We did not talk anybody about

2 Fontainebleau.

3 Q. When you left BofA, what was your

4 position?

5 A. Managing director.

6 Q. What group?

7 A. I was in the real estate group,

8 syndications, and I handled gaming and lodging and

9 leisure.

10 Q. Who signed your paycheck, what entity?

11 A. Banc of America Securities.

12 Q. How long had you been managing director

13 in the group that you just testified about?

14 A. I don't recall when I was promoted. I

15 had been running that group gaming since '02. I

16 had done hotels before that.

17 I think I was already an MD by then

18 or -- I originally -- it's a long path. What else

19 do you want to know about my --

20 Q. What I want to know is whether your job

21 description in 2007 was essentially the same as

22 your job description at the time that you left?

23 A. Yes.

24 Q. One thing for the court reporter, you

25 are going to have to wait until I finish my

1 question, and I understand that in conversations
2 you anticipate and typically anticipate correctly
3 what the question is going to be and want to get
4 on with it and answer, but it makes her job really
5 hard.

6 A. Understood.

7 Q. What were your job responsibilities at
8 the time that you left in March of 2009?

9 A. They were the same as they had been
10 since 2002.

11 Q. What were your job responsibilities
12 during the time from 2002 through the time that
13 you left on March 31, 2009? Sorry, it wasn't a
14 clear question apparently.

15 A. My job responsibility, I had during
16 those times, I don't know, I managed a small
17 group, three to four individuals.

18 We were primarily tasked with on the
19 syndication side of I guess originating or winning
20 business from clients, structuring syndicated
21 transactions, working with our sales group to then
22 sell them off, work with credits.

23 So I was very much involved in the
24 marketing process. I was very much involved in
25 structuring, documentation, not always, but often,

1 a lot of the modeling and then the syndication,
2 but typically after a transaction was closed, I
3 did not have any involvement.
4 If I had involvement, it was usually if
5 there was an amendment where the lenders were
6 going to be involved, and they needed -- often I
7 was the facilitator between, you know, the client
8 and credit, and the lenders to just communicate as
9 to what's going on and, you know, was often
10 involved in amendments or when something was going
11 differently than the documentation or the
12 transaction was expected to go, and there needed
13 to be communication with lenders.

14 Q. Who were the three or four in your group
15 who you worked with or who worked for you in the
16 2008, 2009 time frame?

17 A. Richard Arendale, Michael Chung, Tom
18 Montgomery, Jordan Harris, Knight Kieffer, but I
19 don't know when Knight left. Knight had gone on.
20 He worked with me on the original Fontainebleau, I
21 believe.

22 Q. Knight Kieffer?

23 A. Knight Kieffer.

24 Q. Cool name.

25 A. I can't -- that's --

1 Q. Did any of the individuals that you just
2 identified work in any way on Fontainebleau
3 post-closing?

4 A. No.

5 Q. You did?

6 A. Yes.

7 Q. What were the circumstances that got you
8 involved in Fontainebleau post-closing?

9 A. Because of potential issues that might
10 need communication with lenders.

11 Q. Specific issues?

12 A. Well, specifically when Lehman, you
13 know, went bankrupt and we got a lot of inquiries
14 from lenders, that's when I got involved.

15 Q. And we'll go into this in more detail,
16 but you got involved when Lehman issues arose for
17 what purpose?

18 A. Well, my job responsibility would have
19 been to if there needed to be an amendment or
20 communication with the lenders, to be involved as
21 to how that was going to be received and act as
22 liaison with sales staff. So we made sure that
23 the lenders received, you know, the appropriate
24 communication. From a practical standpoint, just
25 I have done a lot of transactions, have a lot of

1 construction loan experience.

2 I did a lot of real estate -- started my
3 career in real estate construction back in Texas
4 and moved to California, and I have done a lot of
5 real estate construction.

6 So I think from the credit products
7 group and credit, they valued my opinion. So they
8 would -- I was involved just as an advisor a lot
9 of times to have another -- somebody to bounce
10 ideas off and talk about things.

11 Q. I will try to break that down. Were you
12 brought in to the Fontainebleau Las Vegas issues
13 surrounding Lehman to provide -- in part to
14 provide opinions, assistance, etc., with respect
15 to the construction issues that you just testified
16 you had some background with?

17 A. I think it was with everything. I mean,
18 you work with a group. I had a lot of knowledge
19 about Fontainebleau. The documents, I was very
20 involved in drafting the documents.

21 So I think it was just my experience
22 with Fontainebleau, my experience with the
23 borrowers, my experience with the lenders, my
24 experience with construction, my experience with
25 gaming, my experience with working internally.

1 It was a wide variety of experiences
2 that I have collected over my career that I think
3 people valued and wanted me to be involved since I
4 had knowledge.

5 Q. And since the Lehman issues as you have
6 referred to them created potential problems and
7 concerns for which your grouping of talents was
8 perceived to be valuable by BofA?

9 MR. CANTOR: Objection.

10 THE WITNESS: I don't know -- you have
11 to rephrase that for me.

12 BY MR. DILLMAN:

13 Q. It was an awful question.

14 MR. CANTOR: I'm not even sure it was a
15 question.

16 THE WITNESS: I think it was just saying
17 what I just said.

18 BY MR. DILLMAN:

19 Q. You have these talents. You have this
20 package of experiences and so on that you bring to
21 the table. You bring that to the table at all
22 times that you are at BofA during this time
23 period, yet for most projects your involvement
24 ends at closing. It didn't with Fontainebleau.
25 You were brought back into this facility with

1 respect to the Lehman issues. Why? What was
2 there about the Lehman issues that as you
3 understood it, caused the bank to come to you and
4 say we want you to become re-engaged with the
5 Fontainebleau Las Vegas project?

6 MR. CANTOR: Objection.

7 THE WITNESS: Again, I think you
8 mischaracterized quite a bit in that statement.
9 What I would say is if there had been any other
10 deal that had similar issues, any deal that had
11 issues with the transaction that needed
12 conversation from lenders, I was brought in.

13 It had nothing to do with it being
14 Fontainebleau if I had prior knowledge of the deal
15 or -- I got involved post-closing on lots of
16 transactions, and in fact, people called and asked
17 my advice a lot after closing about what's this,
18 what do you think about that.

19 So it was not unique to Fontainebleau
20 that I got involved post-closing.

21 BY MR. DILLMAN:

22 Q. What were the issues with Fontainebleau?
23 You have said the Lehman issues. What were those
24 issues that caused you to become involved
25 post-closing on that facility?

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1 A. Well, I think the initial was the fact
2 of the Lehman bankruptcy and the retail funding,
3 and how are those funds going to be put into the
4 project as related to an in-balance issue. Was
5 there going to be adequate proceeds to finish the
6 project, and what did that mean to the existing
7 documentation, and what did that mean, you know,
8 to the lender and procedurally how are we going
9 to, you know, review and handle that.

10 Q. You said that one of your roles was
11 communication with lenders. How was it perceived
12 in September of 2008 that there would need to be
13 communication with lenders on this issue of
14 Lehman?

15 MR. CANTOR: Objection.

16 THE WITNESS: How was it perceived?

17 BY MR. DILLMAN:

18 Q. How did you understand -- strike that.

19 What communications with lenders did you
20 understand would need to or might occur as a
21 result of the Lehman issues?

22 A. Well, given that it was very high
23 profile, there was a lot going on at the time.
24 There was a lot of panic in the market. There was
25 just -- it was a really difficult time for the

1 financial services industry across the board.
2 But the high profile nature of it, the
3 fact that everybody knew that Lehman was one of
4 the funders in the retail loan, we actually had
5 inbound calls coming in. We anticipated that
6 people would want to know what was going on with
7 the situation.

8 Best we could, we needed to gather
9 information and communicate to lenders what we
10 know.

11 Q. How did you get brought back into
12 Fontainebleau? Who called you?

13 A. I don't know. I don't recall who called
14 me.

15 Q. Typically in those circumstances, how do
16 you get brought back into a project post-closing?

17 A. How did get brought -- I mean, you know,
18 I usually stay abreast of everything that I work
19 on. So I mean I talked to -- you are talking
20 about a team that works on a lot of deals that
21 talk three or four or five times a day about a lot
22 of things. So I'm always up to speed about
23 everything.

24 Getting brought back in, there is no
25 official demarcation line of you are on, you are

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1 you have any recollection whatsoever of the
2 circumstances that caused you to be reviewing this
3 issue as you stated in your e-mail prior to the
4 actual date of Lehman's bankruptcy in September
5 15, 2008?

6 A. I have no recollection of that.

7 Q. Did you prior to Lehman's bankruptcy
8 filing, talk with anyone at the company, the
9 company being Fontainebleau Resorts or any entity
10 associated with it, about Lehman issues?

11 A. I have no recollection.

12 Q. Who at the company did you typically go
13 to if you needed to discuss issues concerning the
14 Las Vegas financing?

15 MR. CANTOR: Objection. You can answer.

16 THE WITNESS: Jim Freeman.

17 BY MR. DILLMAN:

18 Q. You knew Jim Freeman from his days of
19 Bank of America?

20 A. Yes.

21 Q. Jim Freeman a friend?

22 A. No. I mean, define friend, I guess.

23 Q. I would define friend as being someone
24 that you are closer to than a business colleague.

25 A. No. He was a business colleague.

1 Q. Did you at my time in conjunction with
2 the Lehman issues as we discussed them here, speak
3 to Mr. Freeman?

4 A. Can you repeat that question?

5 Q. Did you at any time in conjunction with
6 the Lehman issues that we have been -- as we
7 discussed them here, the bankruptcy issues, have
8 any discussions with Mr. Freeman?

9 A. I just want to make sure I understand.
10 Are you talking prior to the bankruptcy or
11 post-bankruptcy or just any time in there?

12 Q. Any time is any time.

13 A. I know I had to be on some phone calls
14 with him. I don't recall any specific
15 conversations, but I do recall I had to talk to
16 him about these issues, and primarily I recall the
17 thrust of my wanting to talk to him was for him to
18 speak to the other banks.

19 Q. What time period are you referring to
20 here?

21 A. It would be after the bankruptcy, after
22 the 15th that you stated.

23 Q. But in that general time frame,
24 September of 2008, as opposed to January of 2009?
25 It's that time frame around the Lehman bankruptcy

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1 that you are talking about now?

2 A. Yeah, fall of 2008.

3 Q. By the way, you understand that -- and I
4 didn't go through this at the beginning. You
5 understand that this deposition is being taken
6 under penalty of perjury?

7 A. Yes.

8 Q. And you understand that an answer to a
9 question for which you have a recollection, if the
10 answer is I don't recall, that that is untruthful
11 and that would be perjury?

12 A. Yes.

13 Q. Did you consider the Lehman bankruptcy
14 to be a potential material -- to have a
15 potentially material impact, negative impact on
16 the Fontainebleau Las Vegas facilities?

17 A. Did I consider it?

18 Q. Yes.

19 MR. CANTOR: Objection.

20 THE WITNESS: Yes, I did.

21 BY MR. DILLMAN:

22 Q. Why?

23 A. Well, they were the funding mechanism
24 for the retail portion, and the way the documents
25 were constructed, that if retail funds were not

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1 funded, then the lenders were not required --
2 the -- I guess the casino resort lenders,
3 everybody else, were not required to fund.

4 Q. Without funding, the project doesn't get
5 built?

6 A. Yeah.

7 Q. I have seen reference in e-mails to a
8 risk rating. At BofA, what does that mean, a risk
9 rating?

10 A. Every -- every is a broad word. I would
11 say typically the loan, especially commercial
12 loans at the bank carry a risk rating, which
13 allows in the bank to -- it's helpful in pricing
14 for risk adjusted capital, and I think the scale
15 goes from one to ten.

16 Q. Ten being best or ten being worst?

17 A. Ten is the worst. Ten you are writing
18 it off almost. Nine is typically considered a
19 substandard, which is an OCC term. The fed --
20 there are certain reserves that has to be taken if
21 it's a nine. If it's an eight, it's called -- I
22 forget what the term was, but there are certain
23 reserves if it's an eight.

24 Seven is kind of it's on watch list to
25 go to -- once it starts getting into seven or

1 eight, nine range, it goes to -- typically it gets
2 reviewed to go to the workout group.

3 Most loans in the gaming portfolio were
4 somewhere in the four to six range. Typically
5 when a loan is made, it's in that range. It would
6 be -- it's the bank's own internal system that
7 they use to grade loans.

8 The best analogy would be like a Moody's
9 or S&P type rating, so you can -- a risk rated
10 four loan is less risky than a risk rated six,
11 thereby you could charge less LIBOR spread and
12 that was a way of determining profitability based
13 on the risk that you were taking.

14 Q. And this would be at the outset of the
15 loan in terms of pricing the loan at the
16 beginning?

17 A. It's done at the beginning, and then
18 it's reviewed -- I don't know -- it's reviewed
19 consistently at least annually, or if any material
20 events happen, it's typically looked at when the
21 material events happen. So that's not my
22 department.

23 When involved in risk rating, I needed
24 to know what it was. It helped from a pricing
25 standpoint often you could -- that certainly

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1 BY MR. DILLMAN:

2 Q. Did you ever hear that from any source?

3 A. You know, honestly, I don't recall. I

4 probably read this e-mail, so, you know, I may

5 have seen it in print.

6 Q. Let's step back for a minute. When you

7 got involved or re-involved in this facility in

8 September 2008, you understood that there was a

9 potential problem as a result of the Lehman

10 bankruptcy, and that potential problem was that if

11 the retail funding didn't come through, it would

12 effectively shut down the financing for the

13 project?

14 A. Correct.

15 Q. So one of the issues that BofA was

16 interested in getting to the bottom of, was would

17 the retail funding come through or would it not?

18 A. Yes, definitely.

19 Q. And you talked to the company -- at

20 least in part talked to the company, Mr. Freeman,

21 to find out what they knew about those issues?

22 A. Those issues being whether retail was

23 going to be funded or not?

24 Q. Yes, sir.

25 A. I can't recall -- I very well could have

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1 been on phone conversations. I recall having
2 discussions around this. Specific discussions I
3 do not recall.

4 I do recall having discussions as to --
5 what I recall my main focus, what I thought, what
6 I was interested in, was making sure that, one,
7 all the appropriate people were involved
8 internally; that everybody was aware of the
9 situation; that communication throughout the
10 organization as well as to the extent possible
11 communication to the lenders was being handled in
12 an appropriate manner.

13 I know I was on phone calls with Jim. I
14 do not recall whether they were before, after,
15 when. What I do recall is mostly I wanted him to
16 have phone calls with the lenders to talk about
17 this issue. I wanted people to hear it from him
18 directly, not through BofA, not as BofA being a
19 conduit.

20 I know we talked about how was this
21 going to get solved. This was very realtime and
22 there wasn't a lot of months to kind of go through
23 a process and figure this out, because I think the
24 draw requests were due at the end of the month,
25 24th, 25th, something like that.

1 me to where in your opinion you thought a
2 default --

3 BY MR. DILLMAN:

4 Q. There is lots of provisions. My
5 question is, whether your review of section 3.3,
6 which deals with conditions precedent to advances
7 by the trustee and the bank agent, allows you to
8 recall any discussions in the negotiation of this
9 document relating to the impact of defaults under
10 the retail facility on funding conditions under
11 the master disbursement agreement?

12 A. My recollection would only be to this
13 section that is 3.3.23, retail advances, which as
14 more eloquently stated than I did that the
15 retailers had to refund as a condition for the
16 bank lenders or BofA to fund.

17 Q. Did you have any discussions at any
18 point with anyone at BofA surrounding the Lehman
19 bankruptcy with respect to the applicability or
20 not of this particular condition precedent to any
21 of the events or potential events arising out of
22 the Lehman bankruptcy?

23 A. I recall discussing this provision, the
24 funding of the retail lenders, yes, several times.

25 Q. With whom?

1 A. I don't recall exactly with whom. I
2 know with Jeff Sussman. I'm sure Bret Yunker was
3 on the phone. I'm sure whoever worked with Jeff,
4 Brandon, if Brandon was working on it at that
5 time, Brandon Bolio, potentially credit officer,
6 Doug Keyston.

7 I know I requested that internal counsel
8 be involved, Bill Scott at Sheppard Mullen. So
9 there likely could have been more people but those
10 were the people I would have expected to have
11 those conversations with.

12 Q. Did you, Mr. Howard, come to any
13 conclusions with respect to whether or not payment
14 of Lehman's portion of the September draw request
15 under the retail facility by Fontainebleau Resorts
16 would be payment by the retail agent and/or the
17 retail lenders as set forth in 3.3.23?

18 MR. CANTOR: Mr. Howard, I would just
19 caution you, he is asking if you personally came
20 to that conclusion one way or another. You
21 shouldn't be repeating what counsel told you, if
22 anything.

23 THE WITNESS: I don't recall coming to a
24 conclusion. In this process, as I would let you
25 know, I did not have a vote. I -- it was not my

1 decision to decide whether or not that was, in
2 fact, the case.

3 It was not my decision, nor my
4 responsibility guided by the bank to make that
5 decision whether or not to fund.

6 BY MR. DILLMAN:

7 Q. Whose responsibility was it?

8 A. It would have fallen under Jeff Susman
9 and his group. I was there as advice, and as I
10 have stated, my goal primarily, I was mostly
11 concerned that all the right people were looking
12 at all the facts, considering all sides, whether
13 it be the client side, whether it be the lender
14 side, whether it be Bank of America side, all
15 contingent parties needed to be involved and
16 considered in this decision, and in fact, that
17 counsel needed to be involved to make sure that
18 the documents were being followed.

19 That was really my goal, was to make
20 sure that the people that were making the decision
21 that did have a vote were doing it the right way.
22 What I thought or felt, in fact, I never really
23 advised to my knowledge as to what could or could
24 not be done.

25 My goal per my recollection, was just to

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1 make sure that everybody was discussing it and the
2 facts were to the best of everybody's ability,
3 they were going through the process because I felt
4 a responsibility in my position to make sure that
5 the lenders were -- the existing lenders, you
6 know, were represented I guess.

7 It wasn't just, hey, we have to fund
8 this because the client wants us to, or we don't
9 want -- I felt like everybody needed to look at
10 this. This was a gray area. It was very
11 difficult. It had never been looked at before.
12 There wasn't precedent for this issue.

13 So my goal was really to make sure that
14 everybody considered it and viewed it pursuant to
15 the documents.

16 Q. Did you provide any input, whether you
17 had a vote or not, on the issue of whether or not
18 payment by Fontainebleau Resorts of Lehman's
19 September draw would satisfy the condition of
20 3.3.23?

21 MR. CANTOR: Objection, asked and
22 answered.

23 THE WITNESS: Yeah, I don't recall.

24 BY MR. DILLMAN:

25 Q. You don't recall any input at all?

1 was in October of 2008?

2 A. Well, I remember the meeting. The
3 reason I know it's October is because I was
4 refreshed by the O'Melveny counsel as to when the
5 actual date, but I do remember going to that
6 meeting in the fall.

7 Q. We'll get there in just a minute. I
8 want to direct your attention to the page 33 of
9 the master disbursement agreement. 3.3.2, do you
10 see that representations and warranties?

11 A. Yes.

12 Q. Yes?

13 A. 3.3.2, yes.

14 Q. And specifically paragraph A,
15 subparagraph A, which reads in part each project
16 entity set forth in article four or in any -- or
17 in any material contract shall be true and correct
18 in all material respects as if made on such date,
19 and it goes on from there. Do you see that?

20 A. Yes.

21 Q. And if you look at article four of the
22 master disbursement agreement, specifically 4.9.1,
23 it says there is no default or event of default
24 under any of the financing agreements. Do you see
25 that?

1 A. I see that.

2 Q. And so one of the conditions precedent
3 in the document that you negotiated was that at
4 the time of any funding, there would be no default
5 or event of default under any of the financing
6 agreements, correct?

7 MR. CANTOR: Objection.

8 THE WITNESS: I don't know what the
9 definition of financing agreements.

10 BY MR. DILLMAN:

11 Q. Let's look at it. I think you will find
12 if you turn to the definitions at the back -- I'm
13 sorry, page -- it's the bates stamp number that
14 ends in 67 at the very bottom on the right-hand
15 corner here. Do you see that financing
16 agreements?

17 A. Uh-huh.

18 Q. And it means collectively, and I will go
19 to the facility agreements. Do you see that?

20 A. Uh-huh.

21 Q. Yes?

22 A. I see the facility agreements.

23 Q. And if you turn a couple pages back, you
24 will see that facility agreements is defined to
25 mean collectively and including the retail

1 facility agreement. Do you see that?

2 A. Yes.

3 Q. So the document that you negotiated said
4 as one of the conditions precedent, that there be
5 no default or event of default under the retail
6 facility agreement, correct?

7 A. Correct. Well, I mean based on the
8 reading of this document, I would say that's
9 correct. I'm not an attorney. Based on this
10 cursory review, what you just showed me, I would
11 agree with that.

12 MR. CANTOR: Note an objection.

13 BY MR. DILLMAN:

14 Q. Do you recall any discussions
15 surrounding the drafting of this agreement with
16 respect to these provisions that I just -- that we
17 have just gone over?

18 A. No.

19 Q. In September of 2008 surrounding
20 Lehman's bankruptcy, did you participate in any
21 discussions concerning whether or not Lehman's
22 failure to pay its obligations under the retail
23 facility constituted a default?

24 A. I don't recall having those specific
25 discussions.

1 Q. Did you at any time have any discussions
2 with respect to that issue?

3 A. No, I don't recall.

4 Q. Lehman had an obligation to fund under
5 the retail facility, did it not?

6 MR. CANTOR: Objection.

7 THE WITNESS: Yes.

8 BY MR. DILLMAN:

9 Q. I will represent to you that failure to
10 fund is defined as a capital L, capital D lender
11 default under the retail facility.

12 A. Maybe, but I mean I also have been doing
13 this long enough to know defaults can be cured,
14 waived by lenders. Just because something happens
15 it could be a default, doesn't necessarily
16 constitute it puts an agreement into default.

17 Q. Did BofA, to the best of your knowledge,
18 ever waive any condition for disbursement under
19 the master disbursement agreement with respect to
20 the September disbursements, September '08,
21 specifically those?

22 A. I do not believe that they waived
23 anything.

24 Q. At any time that you are aware of?

25 MR. CANTOR: Objection.

1 THE WITNESS: That I'm aware of, I don't
2 recall anything being waived.

3 BY MR. DILLMAN:

4 Q. Based on your experience, you are aware
5 that any such waiver would have to be in writing,
6 correct?

7 A. You know, it depends on the
8 technicality. I have seen a lot of things over my
9 experience where guys have waived things because
10 they just view it as a gray area, and they decide
11 not to do it, but typically if it is very
12 specific, it will be -- especially in a case of a
13 syndicated loan, it will usually be in writing.

14 Q. In part you want to make sure everybody
15 is aware of what's going on?

16 A. Correct.

17 Q. Are you aware of any written waiver of
18 any condition precedent set forth in the master
19 disbursement agreement by BofA at any time?

20 A. No.

21 Q. So you are not aware that the particular
22 default by Lehman of its obligation to fund the
23 retail facility, you are not aware of that having
24 been waived at any time by BofA, correct?

25 MR. CANTOR: Objection.

1 THE WITNESS: You know, I don't know
2 that there was a default -- who knew there was a
3 default to waive? You are asking a question that
4 has a lot of hindsight to it in my opinion. I
5 don't know that anybody knew.

6 Financing documents, while written, can
7 be modified. You are talking about modification
8 of a document which the bank had nothing to do
9 with, the retail facility documents, correct? You
10 are talking about a default under a document that
11 Bank of America was not party to other than
12 vis-a-vis a inter-creditor agreement.

13 So the only -- I would have to go back
14 and look. Typically in inter-creditor agreements,
15 you would have, if you are in default you need to
16 notify us and the reliance is on the other
17 lenders.

18 I don't know that Bank of America had
19 any knowledge at that time -- I never had any
20 knowledge, I will put it that way, nor did I know
21 that Bank of America -- that that agreement was
22 technically in default.

23 Typically a default has to be declared
24 in my experience because I have lived through lots
25 of defaulted documents.

1 BY MR. DILLMAN:

2 Q. Did you at any time come to the
3 understanding that Lehman had not made its payment
4 obligations under the retail facility?

5 A. I came to that understanding as it
6 relates -- are you talking to the September '08
7 specifically or anyone?

8 Q. At any time. My question was not
9 limited to time.

10 A. I did become aware when I found out that
11 ULLICO was funding their share.

12 Q. To go back, in the September time frame,
13 you don't recall any conversations with respect to
14 whether or not payment by Fontainebleau Resorts of
15 Lehman's obligations under the retail facility,
16 would constitute a violation of condition 3.3.2A
17 of the master disbursement agreement, is that
18 correct?

19 MR. CANTOR: Objection, asked and
20 answered.

21 THE WITNESS: I don't recall.

22 BY MR. DILLMAN:

23 Q. You don't recall ever having been asked
24 by anyone for any input into that determination,
25 is that right?

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1 MR. CANTOR: Objection.

2 THE WITNESS: I don't recall. There was
3 a lot going on then. I just don't remember that
4 specific request coming to me.

5 BY MR. DILLMAN:

6 Q. Do you remember any request that in
7 general related in any way to whether or not
8 defaults by Lehman under the retail credit
9 facility would be a condition -- would violate a
10 condition precedent to funding under the master
11 disbursement agreement?

12 A. I don't recall defaults, discussing
13 defaults.

14 Q. How about --

15 A. Again, I think my recollection goes to
16 if the money came in from the servicer, retail
17 servicer.

18 Q. And that was sort of where it stopped in
19 terms of what you recall about an analysis having
20 been done?

21 A. That's what I recall, yes. Because
22 that's where my -- maybe I was too simplistic at
23 the time thinking that if it came in from the
24 servicer that was coming in, and we heard Lehman
25 funding other situations, the lenders could fund,

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1 and was there -- I do recall that people looked at
2 the documents to say what's our obligation, and it
3 was like if it comes in from -- I think the
4 decision would be if it came in from the servicer,
5 that that was -- and we had a rep from the
6 company, that everything as you pointed out in
7 3.2, which I think that rep also included if there
8 was a default under the other documents.

9 So I think at that time as you are
10 talking September-ish time frame, that funding,
11 Bank of America, to my knowledge, had no knowledge
12 that there was a default under -- they had not
13 been noticed by the retail lenders, and you would
14 have the documents. I wouldn't.

15 I would assume that the inter-creditor
16 would say that you have to notify -- both parties
17 had to be notified if there was default, that you
18 were required to provide notice.

19 I don't recall any notice of default
20 being delivered to Bank of America or it being
21 included in the rep.

22 Q. Based on your years of experience in
23 this industry and your involvement in negotiating
24 at least some of these documents related to the
25 Las Vegas facility, if BofA became aware of a

1 just don't recall. You are starting to like --
2 I'm not saying -- if I can say, seeing these
3 e-mails and stuff, that certainly could have
4 happened.

5 What I'm trying to think of is what did
6 I think of exactly that happened when I was on the
7 phone in any of these meetings, do I remember it,
8 I don't. I don't remember that specific point.

9 Now that I'm seeing all this, yes, that
10 certainly could have happened. That could have
11 been an issue that guys were focused on.

12 BY MR. DILLMAN:

13 Q. You do know that the other lenders were
14 focused on that issue, don't you?

15 A. Oh, yeah, yeah, yeah.

16 Q. They wanted to know who paid the Lehman
17 portion?

18 A. The other lenders were and that was -- I
19 don't know when that was.

20 Q. You tell me.

21 A. I don't know. I don't know that it was
22 at the time frame you are talking about right now.
23 That's what I don't know. It may have been after
24 the fact, but from my recollection, I don't recall
25 in September that that was the issue with other

1 lenders.

2 I recall it being -- the issue being
3 what's going to happen, and is money going to come
4 in and are we going to get the project built.

5 That's what I recall the issue being.

6 Q. You recall other lenders asking
7 certainly after the September funding of the
8 retail facility who paid Lehman's share?

9 A. I saw some documents on that yesterday.
10 So that refreshed my memory that, yeah, the guys
11 were curious about that.

12 Q. The guys being other lenders?

13 A. Other lenders.

14 Q. And so was BofA?

15 A. Yes.

16 Q. And BofA, in fact, sent a letter to the
17 company asking the company to answer several
18 questions, one of which is who paid Lehman's share
19 in September?

20 A. Yes. I saw that letter yesterday.

21 Q. You saw it at the time, correct?

22 A. Very likely I saw it at the time.

23 Q. And based on your review of documents
24 yesterday, you are aware that the company never
25 responded to that question, either with a call to

1 the lenders or with anything in writing?

2 MR. CANTOR: Objection.

3 THE WITNESS: I saw a letter response
4 from Jim Freeman.

5 BY MR. DILLMAN:

6 Q. And Mr. Freeman in that letter response
7 didn't state who paid the Lehman portion of the
8 September retail draw, did he?

9 MR. CANTOR: Objection, argumentative.

10 THE WITNESS: Well, in that letter I did
11 not see that statement. It's a letter, so it
12 didn't have it in there. When I read it
13 yesterday, I didn't see it in there.

14 BY MR. DILLMAN:

15 Q. Do you have any recollection of the
16 company ever having answered the question BofA
17 posed as to who paid Lehman's portion of the
18 September retail facility?

19 A. I have no recollection of that.

20 Q. Do you recall being concerned in the
21 September, October time frame that the company was
22 dodging the issue of who paid the September
23 payment?

24 A. I don't recall being concerned.

25 Q. Do you recall having --

1 A. I mean about that issue. I was
2 concerned about finishing the project and a lot of
3 other things, but about that issue I wasn't
4 concerned.

5 Q. Generally of concern when a borrower
6 fails to answer direct questions, isn't it?

7 MR. CANTOR: Objection.

8 THE WITNESS: I have been doing this a
9 long time. I mean, I think that if you ask
10 someone a direct question, they don't answer it,
11 yes, it could be concerning. I don't recall being
12 concerned at the time.

13 BY MR. DILLMAN:

14 Q. You recall having tried to set up a
15 meeting with the company and with the other
16 lenders, right?

17 A. Yes. That was really where my concern
18 was, was communication.

19 Q. And you recall that the company refused
20 to do that?

21 MR. CANTOR: Objection.

22 THE WITNESS: I don't recall -- I recall
23 I wasn't able to do -- that I wasn't able to get
24 it done. So you know, I don't recall being told
25 no or whatever. I just know that I was not able

1 to accomplish it. I know that they chose to by
2 looking at documents yesterday, they chose to
3 write a letter. This is all based on the review
4 yesterday.

5 I believe and I thought we had a call at
6 one point, and I can't remember. I thought I
7 eventually talked them into having a call either
8 with -- directly with some lenders or having a
9 lender call.

10 But I know the initial one I was not
11 successful in getting them -- I had them agreed
12 and they cancelled it or backed out and decided to
13 write a letter instead.

14 BY MR. DILLMAN:

15 Q. It wasn't from any lack of trying by you
16 that a group lender call didn't go forward in
17 October, November?

18 A. Yeah.

19 Q. You thought that was something the
20 company should do?

21 A. Absolutely.

22 Q. You told Mr. Freeman that?

23 A. Absolutely.

24 Q. You thought it was important from both
25 the company's standpoint and so that the lenders

1 could get information on topics that were
2 important to them?

3 A. From his mouth, yes.

4 Q. Including who paid Lehman in September?

5 A. If that was a question that the lenders
6 wanted to ask, that was their prerogative and he
7 would need to answer it himself.

8 Q. And you were concerned when the company
9 did not agree to hold such a lender call in
10 October, weren't you?

11 A. I don't recall, but I was not -- that
12 was not -- looked bad on me. I felt I couldn't
13 get them to -- I always felt that the borrower
14 should address all the lenders.

15 Q. And as well, the company -- that was an
16 opportunity for the company to provide information
17 to lenders?

18 A. Yes.

19 Q. And the company wasn't doing that?

20 MR. CANTOR: Objection.

21 THE WITNESS: They did not do it. I
22 mean and I can't remember if they actually ever
23 did have a call, but I know initially they didn't.

24 BY MR. DILLMAN:

25 Q. Going back to the mid-September time

1 frame, I'm going to place in front of you an
2 exhibit I marked as Exhibit 201. The top
3 e-mail is from you to Mr. Susman and Mr. Yunker
4 and Mr. Varnell.

5 A. I forgot John should be included. He
6 was on a lot of those calls, too, Mr. Varnell.

7 Q. And Mr. Varnell was with Mr. Susman's
8 group, correct?

9 A. No.

10 Q. Whose group was he?

11 A. With Mr. Yunker's and Mr. Newby's group.

12 Q. What was his role during these
13 discussions concerning the Lehman events in
14 September?

15 A. John's?

16 Q. Yes.

17 A. John was a client, you know, knew the
18 client very well. That was his job. So I think
19 he was on the phone just to, one, just being
20 involved since it was his client, making sure that
21 his client's interests were being represented, as
22 well as the bank's.

23 I don't remember John saying a lot, to
24 be honest with you, but I'm sure he was on a lot
25 of the e-mails and copies.

1 Q. What was Mr. Yunker's role?

2 A. Same, except Bret was much more

3 knowledgeable about the transaction.

4 Q. And Mr. Susman?

5 A. Jeff was on the portfolio management

6 side or credit -- I don't remember what name they

7 had at the time. Maybe it's on here. He kind of

8 handled it. He and Brandon handled it on a

9 day-to-day basis in terms of monitoring the

10 credit.

11 They were primarily responsible as it

12 related to the credit and also to managing Bank of

13 America's share of the loan.

14 Q. What do you mean by managing the credit?

15 A. Oversee, making sure that the in-balance

16 tests were met, all the provisions in the

17 disbursement agreement, credit agreement were

18 being met, review any financial information, keep

19 tabs on the market to watch it in order to provide

20 a risk rating if market conditions changed.

21 I don't think they -- I think they may

22 have actually approved fundings.

23 Q. When you say fundings, you mean

24 disbursements?

25 A. Disbursements.

1 Q. They, in fact, approved the September
2 disbursement, didn't they?

3 MR. CANTOR: Objection.

4 THE WITNESS: I assume -- somebody did.

5 I don't know if it was Jeff or not. He probably
6 took it to somebody to get it -- I don't know.

7 BY MR. DILLMAN:

8 Q. In this e-mail, the second one from Mr.
9 Susman to you and others, in the second paragraph
10 he says I realize there are more questions and
11 answers right now, and that we are formulating a
12 plan to address Lehman and the retail facility.

13 What plan was BofA formulating at this
14 time to address Lehman on the retail facility?

15 A. I don't recall. I think the concern, to
16 the best of my recollection, was a much broader
17 concern than an individual funding.

18 It was the ability to continue to fund,
19 and was there going -- this was a big event. We
20 didn't know how much Lehman had of the retail
21 facility, how much had been sold off.

22 We didn't know who the other people
23 were. We didn't know if they were going to step
24 in and fill the shoes. What was going to happen
25 to -- this was one funding.

1 There were several more needed. I can't
2 remember the amount, but there was \$80,000,000 or
3 \$40,000,000. There was a certain amount left that
4 would, if not funded, would put the project out of
5 balance.

6 So I think my assumption around the plan
7 was much broader than any individual funding. It
8 was more concerned about what's going to happen,
9 and there were other costs, and I can't remember
10 the details, but there were other loan -- there
11 were tenant improvement costs for the retail that
12 were going to be funded by the retail lenders.

13 So there was a thing called shared
14 costs, which is what -- that was the funding
15 mechanism that was most concern to -- which again,
16 was unusual to have two different lending parties
17 building the same building, since this was kind of
18 a condo air rights situation.

19 So there were other costs for the retail
20 to be completed. They weren't party necessarily
21 to the shared costs and inter-creditor agreement.

22 I think the shared costs were like
23 80-some million dollars, and then there was
24 another \$100,000,000 of tenant improvements that
25 weren't part of this disbursement agreement, you

1 know, that didn't have to come in to the -- but
2 still were going to need to be funded to have a
3 viable project because if you had a shell and you
4 had empty retail because these guys couldn't fund.
5 So I think the plan was to address given the
6 bankruptcy, what was going to happen.

7 Q. Mr. Susman says we are formulating a
8 plan. You described the problem or at least some
9 aspects of the problem.

10 What was BofA -- what plan was BofA
11 formulating to address those problems?

12 MR. CANTOR: Objection.

13 THE WITNESS: I don't know. That may
14 have been a poor choice of words. I think it was
15 probably better -- aptly said analyzing the
16 situation.

17 I recall other lenders being -- would
18 somebody step in, could somebody buy Lehman's --
19 what are the options. This was very realtime and
20 this was considered to be something that could be
21 a future problem in terms of, you know, completing
22 the project.

23 So I don't know that, you know, it
24 was -- the plan could have been that he is
25 referring to here could have been related to

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1 communication with the other lenders, you know, I
2 don't know.

3 Those were the conversations that were
4 going on. What are you going to do on a macro
5 basis and, you know, are we making sure that the
6 lenders are getting the information from the
7 company that they need.

8 BY MR. DILLMAN:

9 Q. Any discussions that you are aware of
10 internally at BofA concerning the possibility of
11 taking over Lehman's portion of the retail
12 facility?

13 A. My memory was refreshed yesterday, an
14 e-mail that there was another group in BofA than
15 the real estate group that Mr. Soffer did a lot of
16 condo real estate financing in Florida, where Jeff
17 Soffer had called him to see if they could come in
18 on the retail side to talk to BofA about it.

19 I know when I attended the retail
20 meeting, the other lenders just assumed BofA would
21 step in and fill the gap and make everything okay
22 for them, which that was not the case.

23 So both I think -- I don't know if that
24 was a direct request. It was more of a verbal,
25 hey, can you guys -- this is your problem, too,

1 why don't you pony up I don't know how many
2 millions of dollars, hundreds of millions of
3 dollars it was, which I knew internally that was
4 not something that was going to be entertained.
5 I'm sure there was lots of discussions that I may
6 not have been involved with.

7 Is there other ways to, you know, solve
8 this problem. Is this something that can be fixed
9 to primarily finish the project I think was the
10 overriding concern.

11 Q. You said a number of things there. I
12 want to try and break them down. The one was that
13 Mr. Soffer apparently contacted some BofA
14 representative?

15 A. Yeah, according to e-mail I saw -- I had
16 forgotten about this, but according to an e-mail
17 that I saw, it was Vinny Tria.

18 Q. Mr. Tria is down in Miami Beach?

19 A. In Miami, yes.

20 Q. And the e-mail that you saw reminded you
21 that you had heard at some point that Soffer had
22 contacted Tria asking if BofA would step into the
23 retail facility in some manner?

24 A. I don't know what the request
25 specifically was. I think it was what can BofA

1 do? That may have been the request. I just don't
2 remember. It was a short conversation with Vinny
3 from my standpoint, that they weren't able to help
4 out and do anything.

5 Q. Why not?

6 A. I don't recall the reasons, probably
7 because BofA had a lot of money already invested
8 in Fontainebleau, way more than they probably
9 wanted to have and didn't want to invest anymore.

10 Q. BofA's assessment of the Fontainebleau
11 Las Vegas project had -- strike that.

12 To your knowledge, in September of 2008,
13 BofA assessed the Fontainebleau Las Vegas project
14 as a higher risk than it did in June of 2007 when
15 it -- when the facilities were entered into?

16 MR. CANTOR: Objection.

17 THE WITNESS: I think BofA assessed
18 every gaming deal and probably every loan in their
19 portfolio as a higher risk at that time.

20 BY MR. DILLMAN:

21 Q. Including this one?

22 A. Including this one.

23 Q. And at least because of that in part,
24 BofA was not prepared to put in any more money
25 into this deal, fair statement?

1 MR. CANTOR: Objection.

2 THE WITNESS: I don't know why. I

3 wasn't involved in the conversations as to why or

4 why not. I can only speculate.

5 BY MR. DILLMAN:

6 Q. Would you have recommended they put more

7 money into this deal?

8 A. No.

9 Q. Were you involved in any conversations

10 other than the one that you just -- strike that.

11 Did you have any conversations with Mr.

12 Tria?

13 A. I'm sure I did.

14 Q. About this issue?

15 A. I'm sure I did. I knew Vinny. I didn't

16 remember that I had had a conversation about it

17 because he would call every once in awhile just to

18 check in, see how it was going.

19 He was more concerned about the property

20 in Miami because it was closer to his -- he could

21 see it going up. But that e-mail said -- I think

22 it said probably call him or something. I'm sure

23 I did. I don't recall the conversation.

24 Q. Any other conversations that you recall

25 with anyone internal at BofA with respect to

1 whether or not BofA might be willing to take on
2 some or all of Lehman's commitment under the
3 retail facility?

4 A. I just don't remember them.

5 Q. Any conversations that you are aware of
6 between BofA -- anyone at BofA and anyone at
7 Lehman on issues relating to the Fontainebleau Las
8 Vegas project in or about the bankruptcy time?

9 A. I don't recall. I wasn't involved if
10 they were. I don't recall being involved.

11 Q. Are you aware that BofA reached out in
12 any manner to Lehman to find out what was going
13 on, what their plans were, etc.?

14 A. I don't know that anybody did.

15 Q. Would you expect somebody to do that
16 under these circumstances?

17 MR. CANTOR: Objection.

18 THE WITNESS: I don't know.

19 BY MR. DILLMAN:

20 Q. You would or wouldn't expect? I know
21 you don't know whether it happened. Would you
22 expect as a bank interested in finding out what's
23 going on that one of the calls might be to the
24 source of the potential problem?

25 MR. CANTOR: Objection.

1 THE WITNESS: Yeah, I don't know. They
2 just went bankrupt. There was lots of other
3 Lehman -- there was lots of issues going on. I
4 don't think this was one that in the macro scheme
5 of the bank was taking forefront. I mean, we just
6 merged with Merrill. There was a lot of things
7 going on.

8 I think this was probably the most
9 unusual time in banking I have ever been into, so
10 anything that was usual would be -- there was
11 nothing that was happening that was normal in that
12 time frame.

13 BY MR. DILLMAN:

14 Q. And the credit markets were all but
15 evaporated during this time period?

16 A. Yeah.

17 Q. Did you have any expectation that if
18 Lehman reneged on its obligations under the retail
19 facility, that you would be able to find somebody
20 to replace them?

21 MR. CANTOR: Objection.

22 THE WITNESS: Given the state of the
23 markets, I didn't know if there was anybody that
24 would. That being said, they are in bankruptcy.
25 You don't know price. There were people out

1 buying stuff at deep discounts. There were other
2 retail lenders that had a position to protect.

3 They could have negotiated a deep
4 discount with Lehman. So there is things that
5 could have happened. Crazy things were happening,
6 and a lot of guys got rich taking advantage of
7 that disruption in the marketplace.

8 I didn't know how to fix it, but there
9 might have been somebody else a lot smarter than
10 me that could have figured it out.

11 BY MR. DILLMAN:

12 Q. You also mentioned -- this was back in a
13 question that had much in it or an answer, excuse
14 me. You mentioned that when you met with the
15 other retail lenders in, I'm assuming you mean
16 October?

17 A. Based on what I saw yesterday, that's
18 the time frame. I don't know what day in October.

19 Q. That they seemed to have an attitude
20 that BofA was going to fix this problem. Is that
21 a fair characterization?

22 MR. CANTOR: Objection.

23 THE WITNESS: No.

24 MR. DILLMAN: That BofA was somehow
25 going to --

1 THE WITNESS: They asked -- they asked.
2 I think they rightfully so, anybody is going to
3 try anything.
4 I don't remember if it was myself or
5 someone else, but we were -- I think Bret may have
6 been there. We were clear that that was not going
7 to happen, and I was clear to them per the
8 documents, we weren't going to get -- if they did
9 not fund their share of the retail proceeds, that
10 the rest of it is not going to fund.
11 So they needed to -- it needed to be
12 their problem. They as retail lenders needed to
13 figure out how to continue to fund and get the
14 project built, and as long as the money came in
15 pursuant to you all the documentation, if
16 everything else was fine, that the lenders would
17 fund.
18 However, if they did not fund there was
19 going to be -- that was very clear that was not an
20 obligation to fund any more and that had been
21 expressed to me that wouldn't go back and ask for
22 a waiver from the lenders or anything like that.
23 BY MR. DILLMAN:
24 Q. Did you at some point get some clarity
25 on how much Lehman's obligation was under the

1 retail facility, the remaining un-funded
2 commitment?

3 A. I'm sure I did -- I don't know if I knew
4 how much Lehman's was. I think we knew how much
5 the total was. I'm not sure at that time, and I
6 don't recall me ever really knowing or remembering
7 what their share was.

8 So I don't know what -- I'm sure there
9 is some documentation somewhere somebody may have
10 found out at some point what the -- we knew what
11 the total hole was, because it was the shared cost
12 minus whatever had been funded.

13 Q. Plus the TI costs?

14 A. Yeah, plus that and we knew what that
15 was supposed to be 100,000,000 or something like
16 that.

17 Q. You knew in total that the hole that
18 would be left by the retail facility was in excess
19 of \$200,000,000?

20 MR. CANTOR: Objection.

21 THE WITNESS: I don't remember what the
22 hole was. I mean I just don't remember. I knew I
23 had it at the time. I would have had the exact
24 numbers. I mean I can't remember three years,
25 four years ago what it was.

1 BY MR. DILLMAN:

2 Q. Let me mark as an exhibit here, because
3 I think I misspoke here. The hole was
4 190,000,000, and that's not a question. That's a
5 representation that I would like you to confirm
6 based on Exhibit 203, which I'm putting in
7 front of you.

8 Exhibit 203 is a series of e-mails,
9 the top one of which is from you to Mr.
10 Benningfield. Who is Mr. Benningfield?

11 A. He was my boss at the time. I think --
12 well, I don't know that he was -- bosses moved
13 around a lot. He may not have been my boss at the
14 time, but he was somebody that my boss would have
15 wanted -- you know, may have asked for the
16 information from me. He used to be my boss. He
17 kind of went to a different role.

18 He would have been involved in the
19 troubled situations. He also was involved in --
20 in fact, he wasn't my boss, I remember that at
21 this time. He was for a long time.

22 On Miami he worked with a group and
23 oversaw the \$40,000,000 mezzanine piece that we
24 put on the Miami property.

25 Q. All right, the e-mail that you are

1 possible option and knowing that this was an issue
2 that was being discussed internally at BofA, in
3 connection whether or not it might violate the
4 master disbursement agreement, did you make any
5 effort to find out whether Fontainebleau funded
6 for Lehman in September of 2008?

7 MR. CANTOR: Objection.

8 THE WITNESS: I did not.

9 BY MR. DILLMAN:

10 Q. To the best of your knowledge, did
11 anyone else at BofA, that you are aware of, make
12 any efforts to make that determination other than
13 the letter that was sent out to the company that
14 we previously talked about?

15 A. I'm not aware of any.

16 Q. You knew from discussions with Freeman
17 that that was one of the things that Fontainebleau
18 was contemplating?

19 MR. CANTOR: Objection.

20 THE WITNESS: No. I never -- where did
21 you know -- I don't recall talking to Jim about
22 that. I saw earlier you showed me an e-mail that
23 Bret Yunker did.

24 BY MR. DILLMAN:

25 Q. You knew from conversations that BofA

1 had with Freeman that were relayed to you by
2 others at BofA, that Fontainebleau was considering
3 the option of paying for -- paying Lehman's share
4 of the September draw under the retail facility?

5 A. Based on the e-mail that you showed me,
6 I read it then I guess.

7 Q. You understood that this wasn't some
8 secret that Freeman was keeping under his hat?

9 MR. CANTOR: Objection.

10 THE WITNESS: I never talked to Jim
11 about it.

12 BY MR. DILLMAN:

13 Q. Did you have any reason to believe that
14 the company was keeping secret from BofA
15 information about who was funding the Lehman
16 facility?

17 MR. CANTOR: Objection.

18 BY MR. DILLMAN:

19 Q. Up until the funding actually occurred?

20 MR. CANTOR: Objection.

21 THE WITNESS: I'm only going on
22 hindsight what I read yesterday, that it was asked
23 and based on the response in the letter, it wasn't
24 directly answered.

25 I had no reason -- my recollection is I

1 don't know that anybody was keeping anything from
2 anybody. I think it was -- my whole point was
3 making sure legal looked at it. They were
4 comfortable with the facts set around the
5 disbursement.

6 BY MR. DILLMAN:

7 Q. Your whole point was to try to get the
8 right people involved in looking at it from
9 various points?

10 A. Yeah. Quite frankly, I didn't want to
11 be involved in the decision.

12 Q. Why not?

13 A. I just didn't think it was something --
14 I mean --

15 Q. No good could come of it?

16 MR. CANTOR: Objection.

17 THE WITNESS: No good could come of it.

18 It wasn't my responsibility. I wanted to make
19 sure the guys that were responsible for it were
20 doing it right, and they had accountability for
21 the decision.

22 BY MR. DILLMAN:

23 Q. You wanted to make sure it was stuck in
24 the right lap and it wasn't yours?

25 MR. CANTOR: Objection.

1 THE WITNESS: I just wanted to make sure
2 the right people made the right decision and it
3 wasn't my responsibility to make the decision.

4 BY MR. DILLMAN:

5 Q. The second part of that was important to
6 you, it wasn't your responsibility, it was theirs?

7 A. Exactly. So I was focused on them
8 making the decision, what the outcome of that
9 decision is and making sure that they felt
10 comfortable from a legal point of view that
11 whatever decision they were making we could
12 represent that to the lenders.

13 Q. And back to Mr. Susman's e-mail that's
14 in the middle of Exhibit 204 here, the second
15 page.

16 He says after the provision I just read
17 regarding interpreting the FB funding is retail
18 agent funding, there is a parenthetical that says
19 or waive the condition if interpreted differently.

20 To re-affirm, you are not aware of any
21 waivers of any conditions by BofA of any sorts,
22 much less a waiver of condition relating to FB's
23 funding of the retail facility?

24 MR. CANTOR: Objection.

25 THE WITNESS: Huh-uh. I'm not aware of

1 any waivers.

2 BY MR. DILLMAN:

3 Q. Then he goes on and it says do we seek
4 required lender consent. You recall conversations
5 surrounding the issue of required lender consent
6 at this time period?

7 A. I don't recall them.

8 Q. Were there discussions that you were
9 involved in regarding whether or not to get
10 consent from some or all of the lenders with
11 respect to any anything that was happening in
12 September of 2008?

13 MR. CANTOR: Objection.

14 THE WITNESS: I don't recall. That's
15 probably why I wanted legal involved is to
16 determine if that was, in fact, the case.

17 BY MR. DILLMAN:

18 Q. When did you understand under the
19 documents that you helped put together required
20 lender -- excuse me, lender consent was required?

21 MR. CANTOR: Objection.

22 THE WITNESS: Lender consent would be
23 required for anything that was not in conformance
24 with the documents.

25 BY MR. DILLMAN:

1 Q. Were there discussions at BofA about
2 possible options to address Lehman that would have
3 required some sort of an amendment or some sort of
4 change to the way in which the documents otherwise
5 would have worked?

6 MR. CANTOR: Objection.

7 THE WITNESS: I do not recall -- it may
8 have been broached briefly, but I don't recall any
9 subsequent -- substantive conversations around
10 that.

11 BY MR. DILLMAN:

12 Q. Any efforts that you are aware of by
13 BofA to obtain any consent from any lenders for a
14 modification or other change to the underlying
15 documentation?

16 A. None that I'm aware of.

17 Q. Any requests by BofA that you are aware
18 of to the other lender to approve any acts by BofA
19 within this time frame, September, October of
20 2009?

21 A. None that I'm aware of.

22 Q. On this same issue, Mr. Howard, I
23 previously marked a document that we discussed
24 with Mr. Yunker at his deposition, Exhibit 74.

25 It's an e-mail, the top one of which is

1 from Mr. Yunker to Mr. Varnell dated October 1st.
2 It follows an e-mail from Mr. Varnell to Mr.
3 Yunker on that same date, and he refers to the
4 requisite lenders, quote, as a possible, quote,
5 problem beyond mischief making rogues.

6 Do you know what he is referring to
7 there?

8 MR. CANTOR: Objection.

9 THE WITNESS: No.

10 BY MR. DILLMAN:

11 Q. Mr. Yunker up above says in the top
12 e-mail in the second sentence, the requisite
13 lenders can't unilaterally decide to change a deal
14 in their favor after it's closed. Do you see
15 that?

16 A. I see it.

17 Q. Were there any discussions with any
18 other lenders that you are aware of concerning a
19 changing of the deal?

20 A. No. I don't recall.

21 Q. Do you have any idea what Mr. Yunker is
22 referring to here?

23 A. No.

24 Q. Do you agree with Mr. Yunker that the
25 Fontainebleau loan was underwater at the time?

1 MR. CANTOR: Objection.

2 THE WITNESS: Define underwater.

3 BY MR. DILLMAN:

4 Q. In your business you have heard of loans
5 being underwater, haven't you?

6 A. Uh-huh.

7 Q. When you hear that, what do you
8 understand it to mean?

9 A. It means different things, I guess.
10 Often it means it's -- in this context it would
11 mean the trading value is less than par, the
12 potential marked value. I would agree that the
13 potential marked value of this at the time was
14 less than par.

15 Q. Substantially less than par?

16 MR. CANTOR: Objection.

17 THE WITNESS: I don't know.

18 Construction loans are difficult, but given the
19 state of the markets, everything else was
20 substantially under par. So it would have been
21 correlated to other gaming transactions.

22 BY MR. DILLMAN:

23 Q. And thus substantially under par?

24 MR. CANTOR: Objection.

25 THE WITNESS: Depends on substantially.

1 company to speak to the lenders.

2 Q. In your e-mail you say company is not
3 ready to have the call. I assume that that was
4 information you got from Mr. Freeman?

5 MR. CANTOR: Objection.

6 THE WITNESS: I don't recall where I got
7 that information. It very well could have been,
8 but I don't recall exactly where I got it. It
9 could have been second party, could have been via
10 e-mail. I don't recall. Obviously I felt it was
11 credible information, but I don't know how I
12 received it. I can't remember.

13 BY MR. DILLMAN:

14 Q. Do you recall having known in early
15 October what the issue was with respect to the
16 company's lack of readiness to have the call?

17 MR. CANTOR: Objection.

18 THE WITNESS: I don't recall what their
19 lack of readiness was.

20 BY MR. DILLMAN:

21 Q. What was the conclusion that you are
22 referring here to, that the company is working on
23 a solution?

24 A. I don't recall specifically, however, my
25 thought would be as it related to future fundings

1 of the retail piece.

2 Q. You don't have any specific
3 recollection, but that's what you would surmise
4 from these words?

5 A. That's what I would surmise.

6 Q. It was a solution to the retail facility
7 as opposed to a solution to the call going
8 forward?

9 MR. CANTOR: Objection.

10 THE WITNESS: That's the best I can
11 surmise.

12 BY MR. DILLMAN:

13 Q. Let me place in front of you a document
14 that I think you already testified you saw
15 yesterday.

16 It's the -- it's previously marked as
17 Exhibit 18, and is an agenda, meeting agenda
18 from October 23rd meeting.

19 MR. CANTOR: He didn't testify whether
20 he saw this or not.

21 BY MR. DILLMAN:

22 Q. I think you did. You saw this
23 yesterday, didn't you?

24 A. I didn't see this. I saw something else
25 that reminded me of the meeting. I don't remember

1 what it was.

2 Q. Your counsel was right on that then.

3 MR. CANTOR: Twice a day.

4 BY MR. DILLMAN:

5 Q. As I recall, you recall having attended
6 this meeting?

7 A. Yes, I do recall.

8 Q. Attended it with at least Mr. Yunker, I
9 think you said?

10 A. You know, at the time I didn't recall
11 who went with me. I don't remember anybody else
12 being there, but it doesn't surprise me that Bret
13 and John were there.

14 Q. And prior to getting ready for this
15 deposition, did you even recall this meeting
16 occurred?

17 A. Yeah, I would have remembered this.

18 Q. Did the document you looked at yesterday
19 help to refresh your recollection on the
20 particulars of that meeting?

21 A. A little bit, yes.

22 Q. And what was the document you looked at
23 yesterday?

24 A. I don't recall.

25 Q. It was yesterday for goodness sake.

1 A. Yeah, I don't recall. We looked at a
2 lot of documents. I don't know exactly what it
3 was. It may have been an e-mail or something. I
4 don't know.

5 Q. Was it a summary of what occurred by one
6 of the parties that attended?

7 A. No. I don't know what it was. It was
8 something that just talked about this meeting and
9 that sparked my memory of the meeting and what
10 happened.

11 Q. Tell us what happened?

12 A. To the best of my recollection, there
13 was an update on the status of leasing. Jackie
14 Soffer and Jeff -- yeah, Jeff I think was there.

15 I can't remember, but Jackie Soffer was
16 there. That was the first time I met her. That's
17 Jeff Soffer's sister. I spent a lot of time about
18 what was going on with the leasing of the retail
19 space, who they were talking to to update the
20 retail lenders.

21 Q. Let me stop you. Did you say Jeff
22 Soffer was there?

23 A. I don't -- I don't recall him being
24 there, but I was at a lot of meetings at the
25 Sterling Club and he was in attendance at those.

1 So remembering whether he was there or
2 not -- I do remember Jackie Soffer, because that
3 was the one and only time I recall meeting her.

4 Q. Okay.

5 A. At that same venue a lot of meetings
6 over multiple years with Jeff. So remembering if
7 he was there or not, I don't recall.

8 I do remember that they spent a lot of
9 time going over the leasing, what tenants they
10 were targeting, what was going on in the general
11 leasing market. There was an update with that.

12 Based on this agenda, I don't recall
13 discussion around the construction or overall
14 development. I don't recall the financial review.
15 I know Jim was there. I remember him speaking. I
16 don't remember the substance of what he spoke.

17 I do recall the lenders, the retail
18 lenders discussing the fact that they were in
19 conversations with Lehman to fund, that ULLICO
20 stated that they had funded, I don't know how
21 many, once or twice or that they could do maybe a
22 couple more fundings, them asking the other retail
23 lenders how much they could do or maybe the
24 company was asking them if they could step up and
25 fund Lehman's share.

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1 I recall them asking directly to the
2 representatives of Bank of America -- I remember
3 it directed at me, but it could have been Bret. I
4 don't remember who answered, but I know asking us
5 if Bank of America could come in and stop gap and
6 fill in the hole here, which I don't know the
7 exact words or who responded, but the response was
8 that don't view that as an option.

9 You should pursue other avenues, and I
10 remember making it very clear to them that they
11 would -- if there was no fundings on the retail,
12 that there would not be any continued fundings on
13 the loan side.

14 That's pretty much the gist of my
15 recollection of that meeting.

16 Q. Did BofA, anyone from BofA make any sort
17 of presentation at that meeting?

18 A. I do not recall.

19 Q. Don't recall that it happened or just
20 don't recall one way or the other?

21 A. I don't recall -- no, I don't recall
22 either way. I mean I just don't remember.

23 Q. Mr. Kotite according to this agenda made
24 a presentation, an overview of the retail loan
25 status. Do you recall that having occurred?

1 A. I recall Sonny talking. I don't

2 remember what he said.

3 Q. What was discussed by anyone about the
4 retail loan facility?

5 MR. CANTOR: Objection.

6 THE WITNESS: I have already told you
7 everything I can remember about the meeting. I am
8 not going to be able to -- I'm trying to remember
9 everything I can. It was a meeting several
10 periods ago. I think I -- what I said previously
11 is exactly what I recall.

12 BY MR. DILLMAN:

13 Q. Part of what you recall is that someone
14 said that ULLICO had funded some or all of the
15 Lehman portion of the retail facility?

16 A. I don't know the time frame of this.
17 Either they were going to fund the next one,
18 either they had. I don't remember. I remember
19 Herb, who I met one time a long time ago, Kolben,
20 talking about their ability to -- I was mostly
21 concerned with going forward, but I can't remember
22 if he said given the time frame they had already
23 done it or were going to do it. I don't recall
24 exactly.

25 Q. With respect to going forward, did you

1 understand from the presentation that ULLICO had
2 committed to funding in the future on behalf of
3 Lehman?

4 A. I understood that they committed the
5 next draw one more time. I don't recall
6 remembering any more commitments after that.

7 Q. We had testimony from other people.
8 There are other documents in this case that have a
9 different take on that meeting and that is that
10 ULLICO specifically said it wasn't willing to fund
11 all of the Lehman commitment, and that the group
12 as a whole, retail lenders as a whole were not
13 willing at that time to commit to funding Lehman?

14 A. I'm just telling you exactly what I
15 remember, like one time they said they were going
16 to fund.

17 MR. CANTOR: Note an objection to the
18 last question, please.

19 BY MR. DILLMAN:

20 Q. I want to be fair to you and let you
21 know that's the testimony in the documents?

22 A. I'm just telling you what I remember.

23 Q. My question is this.

24 A. Okay.

25 Q. Could you be confusing this meeting with

1 some other meeting at which you learned that
2 ULLICO had or, in fact, intended to fund Lehman's
3 share of the retail facility?

4 A. To the best of my recollection, this is
5 the only meeting I attended in person with the
6 retail lenders.

7 Q. You knew Mr. Kolben from other deals?

8 A. I knew who he was.

9 Q. Had you met him in conjunction with this
10 deal before?

11 A. No.

12 Q. Did you meet him after this meeting?

13 A. Shook his hand.

14 Q. When?

15 A. Right after when I left.

16 Q. After this meeting occurred, did you
17 have subsequent opportunity to meet Mr. Kolben
18 face to face?

19 A. No.

20 Q. As far as you know, there was just one
21 meeting where you actually face to face were in
22 the same room as Mr. Kolben?

23 A. As far as I can remember, yes.

24 Q. Slow down just a little so I can finish
25 my question.

1 Q. Did you at any point come to learn that
2 ULLICO had, in fact, funded some or all of
3 Lehman's draw under the retail facility?

4 A. I may have. To my recollection, I found
5 out yesterday that they had. That was a
6 confirmation. Whether I knew it in the past or
7 not, I cannot remember.

8 Q. You can't confirm something you didn't
9 previously know. Did you, when you saw whatever
10 you saw yesterday that caused you to conclude that
11 ULLICO had funded, did that bring back a
12 recollection that that was information that you
13 previously knew?

14 A. I was told that they funded. I didn't
15 see anything.

16 Q. This is yesterday?

17 A. This is yesterday, and to the best of my
18 recollection, that was -- I don't recall knowing
19 that before. So that was probably the first time
20 I read confirmation that that was, in fact, the
21 case that I can remember.

22 Q. Were there discussions you had with
23 people at BofA or anyone else prior to your
24 meeting yesterday where the supposition was that
25 ULLICO was funding on behalf of Lehman, whether

1 you actually knew it for a fact or not?

2 A. I believe so, because I in my opinion
3 and I may have been mistaken about what somebody
4 said, I gleaned that from this meeting that --
5 this one here, that they had either funded or were
6 going to fund at least the next draw, and they
7 were seriously looking into the fact that funding
8 in the future, they would not commit to it, nor
9 would any of the other lenders.

10 But I do -- I clearly do remember, and I
11 could be mistaken, but I do remember them saying,
12 yes, we are going to -- the next draw we have got
13 approval to fund.

14 I couldn't -- I can't completely
15 remember if they, given the timing, if they had
16 already funded one. I can't recall that or not,
17 but that's the first time I heard them say that
18 they were going to fund yesterday was the first
19 time I had real confirmation that that had
20 actually happened.

21 I don't recall having specific knowledge
22 other than from this meeting hearing that they
23 were going to take care of it on the next one.
24 That's the best of my recollection.

25 Q. Did you make any efforts at any time

1 or by its consultant, IVI, with respect to the
2 project costs at Las Vegas?

3 A. I don't -- I kind of checked out on some
4 of this stuff by this time. I just don't
5 remember. What I do remember is that people were
6 very -- I remember that they had lots of
7 conversations, and I remember people urging them.

8 That was going to be a point of
9 contention that IVI's reports were correct and
10 true, and that there weren't any overruns because
11 there was lots of rumors in the market that this
12 was overrun here and this was overrun here, and
13 this guy wasn't getting paid, and none of us were
14 experts other than we had hired an expert in IVI.

15 I know there was a lot of focus on IVI,
16 and what they had to say. What they said and what
17 they got out of it, I don't really recall. I kind
18 of left it up to those guys to determine the
19 outcome of that. I was not on any calls that I
20 can remember with IVI.

21 Q. You became aware at some point that
22 there were rumors in the marketplace that people
23 weren't getting paid on the project?

24 MR. CANTOR: Objection.

25 THE WITNESS: Not paid, overruns. I may

1 have said paid. The rumors I'm referring to --
2 and this was secondhand, and we would hear it from
3 other lenders, oh, that there is an overrun at the
4 project.

5 BY MR. DILLMAN:

6 Q. Who did you hear -- from who did you
7 hear that there were overruns at the Las Vegas
8 project?

9 A. I don't recall. I think it was a
10 lender, another lender.

11 Q. Other lenders on the Las Vegas facility?

12 A. Yes.

13 Q. Deutsche Bank?

14 A. I don't know. To be honest, at this
15 point it was very difficult to trust what
16 anybody's motive was in terms of the information
17 that they were giving you.

18 Q. Why is that?

19 A. Different people within the capital
20 stack had a different desired outcome.

21 Q. Explain.

22 A. If someone was already funded, they
23 wanted those not funded to continue to fund. If
24 somebody wasn't funded, they may not want to
25 continue to fund or fund at all.

1 Q. Why?

2 A. I don't know. I felt that any lender
3 that was feeding me information, always I felt had
4 to be taken with a grain of salt because they had
5 a very vested interest in protecting their own
6 interest in creating a situation that would
7 benefit them whatever the situation was.

8 Q. Were you aware that there were lenders
9 who hadn't funded that had an incentive or an
10 interest in not funding in the future?

11 MR. CANTOR: Objection.

12 THE WITNESS: Well, I don't know that
13 there -- no one said that to me, but it was easy
14 to deduce by the materials that you produced here,
15 and that we already testified that people
16 considered the loan underwater.

17 The bonds were trading below par. No
18 one is going to come out and say their motives,
19 but you had to be very careful with what people
20 were going -- so my overriding theme was to make
21 sure that the internal team at Bank of America was
22 doing everything correctly by the book, whether
23 it's with legal, IVI, the resources and doing
24 things that they deemed because they were the ones
25 going to be responsible to make sure that they

1 could answer to the lenders and to everybody else
2 they had done the right thing.

3 There was a lot of rumors about a lot of
4 things going on at that time. So one guy would be
5 I want to fund. One guy was nobody should fund.
6 You didn't know what to believe as to what
7 somebody's motive was.

8 They didn't tell you what their motive
9 was. You just had to be careful as to what it may
10 or may not be, and that was a speculation and
11 that's why we tried to research any rumor that we
12 heard.

13 If we heard that there is overrun, I
14 would pass that on to them and say you should make
15 sure -- I have heard this. Pass this on to IVI.
16 We need to make sure that IVI is on top of the --
17 as our third-party consultant.

18 That's not my job. I don't know how to
19 go and verify whether there is overruns in the
20 construction project. Neither do you. But that's
21 why we hired these guys.

22 So I know there was a lot of not
23 concern, but reliance, dependence on IVI and their
24 ability to assess the project and the cost needed
25 to finish it.

1 BY MR. DILLMAN:

2 Q. Bank of America was looking to reduce
3 its exposure to Fontainebleau in the first quarter
4 of 2009, wasn't it?

5 MR. CANTOR: Objection.

6 THE WITNESS: I don't -- what's that
7 premised on? Is that a fact that you know? I
8 don't know that as a fact.

9 BY MR. DILLMAN:

10 Q. Are you aware from any source that Bank
11 of America was looking to reduce its exposure to
12 Fontainebleau in the first quarter of 2009?

13 A. I don't recall.

14 Q. Would it surprise you to learn that that
15 was the case?

16 MR. CANTOR: Objection.

17 THE WITNESS: At that time nothing would
18 have surprised me. They were looking to reduce
19 exposure in lots of things, but that's not
20 something I have knowledge of.

21 BY MR. DILLMAN:

22 Q. Consistent with being a highly placed
23 executive at the bank, it would not surprise you
24 that BofA was looking to reduce its exposure to
25 Fontainebleau Las Vegas -- excuse me, to

1 Fontainebleau Resorts in 2009?

2 MR. CANTOR: Objection.

3 THE WITNESS: No, I thank you kindly for
4 saying I was a highly placed executive. That's
5 very kind of you. A lot of those decisions were
6 made way over my head. They did things that
7 surprise me on a regular basis.

8 Positions that should not have been sold
9 were sold. Positions that should have been sold
10 were not sold. So, you know, I have no idea, and
11 in fact, was very frustrated by macro decisions
12 made by the bank.

13 One of the reasons I left because I
14 didn't -- places where I would have done something
15 they didn't. So I cannot speculate one bit what
16 they were thinking or what I would do.

17 This was very, very unusual times, but
18 to my knowledge, I had no idea they were trying to
19 reduce exposure.

20 BY MR. DILLMAN:

21 Q. Based on what you knew at the time,
22 would you have terminated the revolver facility in
23 April of 2009?

24 MR. CANTOR: Objection.

25 THE WITNESS: In April of 2009? It

1 wasn't my decision.

2 BY MR. DILLMAN:

3 Q. I know it wasn't.

4 A. I wasn't even there at the bank.

5 Q. Based on what you knew, did you agree
6 with the decision not to fund by BofA on the March
7 draw notice?

8 A. Honestly, I did not think about it. I
9 did not -- didn't have a thought about it as to
10 whether I would agree or disagree.

11 Q. You were involved in those discussions?

12 A. I listened to people talk about it. I
13 did not form an opinion. On one side I was very
14 disappointed that a great project was not going to
15 be built. On the other side I understood the
16 dynamics of those from a financial point of view
17 they wouldn't want to fund.

18 That's why at all times this ended up
19 having, in my opinion, had to be governed by
20 whatever the documents said.

21 Q. Exhibit 209 is an e-mail from
22 yourself to a group begins with Mr. Henry Yu dated
23 February 23, '09. This is your e-mail, right?

24 A. It says it's from me.

25 Q. And you relayed in this e-mail a

1 conversation you had with Mr. Freeman at FBR. Do
2 you see that?

3 A. Yes.

4 Q. Do you recall the conversation?

5 A. Do not.

6 Q. Does this help you to recall that Mr. Hu
7 was involved in this at least as of February 23rd?

8 A. Yes, this would help me to recall that.

9 Q. And I believe you testified that from
10 the time he got involved forward, you were, I
11 think to use your words, checked out?

12 A. Transitioning away from things like
13 this, yes. At this point I may not have disclosed
14 that I was planning on leaving.

15 Q. Mr. Susman was gone by this time we
16 determined from the prior e-mail.

17 A. Right.

18 Q. Who was running the facility at that
19 point? Who had stepped in for Mr. Susman?

20 A. I believe Brandon Bolio had. That's the
21 best of my recollection.

22 Q. From the time that Mr. Hu got involved,
23 what was his role?

24 MR. CANTOR: Objection.

25 THE WITNESS: With SAG, I mean he kind

1 of took over the day-to-day responsibilities and
2 strategy of how to deal with the loan and form --
3 there was a lot of committees being formed. I
4 believe they did form a steering committee with
5 the other lenders. You probably know better than
6 I do. You looked at all the documents, and you
7 know, he kind of took over.

8 When I talk about decisions, they kind
9 of would flow through him and his chain of command
10 as to what to do, what not to do.

11 BY MR. DILLMAN:

12 Q. He was running the ship at that point?

13 MR. CANTOR: Objection, foundation.

14 THE WITNESS: That was my impression. I
15 was leaving the ship.

16 BY MR. DILLMAN:

17 Q. You were getting off at the next port?

18 MR. CANTOR: He was in the dingy.

19 BY MR. DILLMAN:

20 Q. When you say -- to whom did Mr. Hu
21 report in this matter?

22 A. I don't know who his direct report was.
23 I believe at the time Tom Biaggi was the head of
24 special assets group and workout.

25 Q. Anybody else in special assets in that

1 group that you associate with the Fontainebleau
2 issues other than potentially Mr. Biaggi and Mr.
3 Hu?

4 A. I see Joe Fuszard's name on here. He
5 was the real estate SAG. I don't remember Joe
6 ever speaking up. He may have listened on calls.
7 He probably was copied.

8 So I don't -- to my recollection, I
9 don't recall him being involved. He has a lot of
10 construction loan experience, because of his
11 position, so he may have just been a resource for
12 construction loan matters.

13 Q. Anybody else other than Mr. Fuszard?
14 You remember the question was SAG. Was there
15 anybody else that you associated with
16 Fontainebleau Las Vegas other than Mr. Hu,
17 potentially Mr. Biaggi, and then now because you
18 see it in an e-mail, Mr. Fuszard?

19 A. Yes, that's all that I can recall.

20 Q. Why were you talking to Mr. Freeman in
21 this time period about having a meeting with the
22 lenders?

23 MR. CANTOR: Objection.

24 THE WITNESS: Well, as previously
25 stated, that was often my role was to facilitate

1 communication to the lenders. I can only assume,
2 because I do not recall having the conversation
3 with him. I'm supposing by this e-mail I did,
4 that Henry probably asked me to have that
5 conversation with Jim.

6 He probably had met Jim at the time or
7 had a relationship with him, and wanted somebody
8 that didn't have a relationship to impress on Jim
9 that he needed to have a call with the lenders.

10 BY MR. DILLMAN:

11 Q. Do you recall telling Mr. Freeman you
12 thought it would be a good idea for him to comply
13 with that request?

14 MR. CANTOR: Objection.

15 THE WITNESS: I don't recall what I said
16 to him. Thematically in all conversations with
17 him, communication was important to the lenders
18 every time I talked to him.

19 It was never okay not to stand up and
20 face the music. Whatever the music was going to
21 be, he needed to address all the lenders and allow
22 them to ask him questions rather than do it via
23 letters or verbal communication.

24 That was always my advice to him.
25 Whether he followed it or not, he would have --

1 nor, I don't believe in the documentation they
2 were ever required to.

3 BY MR. DILLMAN:

4 Q. Did he follow your advice here?

5 A. I don't remember. I don't know.

6 MR. CANTOR: Objection.

7 BY MR. DILLMAN:

8 Q. Exhibit 210 is an e-mail from Mr.
9 Freeman to Mr. Naval, and copied to others
10 including yourself and attaches a letter.

11 Take whatever time you need to review
12 both the e-mail and the letters, but I will tell
13 you that the letter basically says they are not
14 going forward with the call, and my question after
15 you review this is, do you recall these
16 circumstances?

17 A. I really don't even remember this
18 letter. I remember we had a hard time getting
19 them to step in front of everybody, and I can't
20 remember if he ever did or not.

21 Q. Did you ever attend a meeting in this
22 time period, February, March 2009 before you --
23 just before leaving the company in Las Vegas
24 regarding the Fontainebleau Las Vegas project?

25 MR. CANTOR: Objection, asked and

1 Q. We are kind of past that point, though,
2 at this stage in terms of the disbursement funds
3 that were in the bank --

4 A. Okay, this is past that. After that I
5 am out. I really quit listening. This is a week
6 before I left.

7 Q. Blah, blah, blah, blah, blah, blah?

8 A. I wouldn't even come down on calls at
9 that point.

10 MR. CANTOR: I think I need to note an
11 objection to blah, blah, blah, blah, blah.

12 MR. DILLMAN: What would that be?

13 MR. CANTOR: That I don't speak that
14 language, form.

15 BY MR. DILLMAN:

16 Q. The second point here refers to
17 treatment of un-funded delay draw commitments.

18 Were you aware that there were un-funded
19 delay draw commitments in March of 2009?

20 A. I remember hearing that some people
21 didn't fund. I don't recall if they ever
22 funded -- if they were ever able -- I just
23 remember that there was analysis, are they able to
24 fund and didn't fund or are they unable to fund,
25 and I think that was going to go be researched.

1 I don't know what the outcome of that
2 research was. I don't know if guys ultimately
3 funded or not, but I know at the time that the
4 delay draw was requested to be fund -- I don't
5 know how many it was, one, two, three, ten. I
6 don't have any idea, recollection, but I just
7 remember that, yes, some guys didn't fund, and
8 that the discussion that I listened to was -- I
9 may have even thrown this out there, you need to
10 find out, are they able to fund? Are they under
11 FDIC and can't fund or they choose not to fund,
12 and if they chose not to fund, it would be given
13 the way this loan is documented, that's the
14 borrower's obligation, not the bank's obligation
15 to go sue them to fund.

16 Now, it potentially could be the bank's
17 problem if they didn't fund because they would
18 have a loan out of balance with someone not
19 funding. But the way these loans are crafted, if
20 a lender does not fund, other lenders don't have
21 to fund in their stead.

22 They create a defaulting lender and
23 since the note is directly with the borrower, it's
24 the borrower's -- the borrower has legal recourse
25 to them for not funding.

1 Q. Any discussions on this issue with
2 respect to whether or not the failure to fund by
3 one of the retail lenders presented any issue to
4 disbursement with respect to the conditions
5 precedent?

6 A. You have to repeat that question.

7 Q. Any discussions as to whether the
8 failure to fund by the retail lenders -- excuse
9 me, the resort lenders created any issue of failed
10 conditions precedent under the disbursement
11 agreement?

12 MR. CANTOR: Objection.

13 THE WITNESS: I don't recall hearing
14 those discussions. Mr. Cantor mentioned that
15 yesterday, that they had those discussions. I
16 just don't recall being a part of them. I very
17 well could have sat in on a phone call. I just
18 don't remember.

19 BY MR. DILLMAN:

20 Q. Failure to fund by a lender would be a
21 default under the credit facility, would it not?

22 MR. CANTOR: Objection.

23 THE WITNESS: Under -- I don't know. I
24 have drafted lots of credit agreements. This was
25 a pretty complex one, highly negotiated. I would

1 have to go back and look at the documents to see
2 what it said.

3 I know there is typically provisions
4 what happens if a lender doesn't fund and becomes
5 a defaulting lender, but I have seen lots of cases
6 where people haven't funded and especially we had
7 lots of cases where Lehman was involved, other
8 transactions where it didn't constitute a default
9 under the agreement, it just created a shortfall,
10 i.e., it was all about if a borrower asked for
11 \$100,000 and a defaulting lender didn't fund their
12 \$10,000 share, they only got 90,000.

13 It didn't necessarily create a default
14 under the document. So I don't know how this one
15 was written.

16 My guess is it was much more around the
17 in-balance test as to the overriding premise of
18 all the documentation was to finish the project if
19 at all possible, and make sure that there was
20 adequate funds at every step of the way to finish
21 it.

22 BY MR. DILLMAN:

23 Q. If let's say BofA under the retail
24 facility -- strike that.

25 If a lender under the resort facility

Deposition Transcript Excerpts
of Herbert Kolben
Filed Under Seal

1 ** C O N F I D E N T I A L **
2 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI DIVISION
 CASE NO.: 09-2106-MD-GOLD/GOODMAN

4 -----)
 IN RE:)
5)
 FONTAINEBLEAU LAS VEGAS)
6 CONTRACT LITIGATION)
)
7 MDL NO. 2106)
)

8 This document relates to all actions.)
 -----)

9
10 April 12, 2011
11 9:39 a.m.

12
13
14 VIDEOTAPED DEPOSITION of ALBERT KOTITE,
15 a nonparty witness in the above-captioned matter,
16 held at the offices of O'Melveny & Myers, 7 Times
17 Square, New York, New York, before Eileen
18 Mulvenna, CSR/RMR, Certified Shorthand Reporter,
19 Registered Merit Reporter and Notary Public of
20 the State of New York.

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23
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25

Kotite, Albert 4/12/2011 11:35:00 AM

1 KOTITE - CONFIDENTIAL

2 facility?

3 A. Yes.

4 Q. What would have happened if Lehman
5 hadn't funded its portion of the facility?

6 MR. CANTOR: Objection.

7 A. Can you just rephrase the question
8 or just repeat it.

9 Q. Sure.

10 What effect would Lehman's failure
11 to fund that portion of the facility have had on
12 the financing for the Las Vegas project?

13 A. Well, if Lehman failed to fund and
14 those funds were not replaced, the project would
15 have -- would have had to stop.

16 Q. You understood that Lehman's funding
17 was a condition precedent to the funding for the
18 project continuing?

19 MR. KINGHAM: Object to the form of
20 the question.

21 MR. CANTOR: Join in the objection.

22 THE WITNESS: May I answer?

23 MR. KINGHAM: You may.

24 THE WITNESS: Would you just repeat
25 it again?

1 KOTITE - CONFIDENTIAL

2 MR. MOCKLER: Read it back.

3 (Record read.)

4 A. I understood that the retail funding
5 was a condition precedent to the project
6 continuing of which Lehman was a part.

7 Q. So if Lehman didn't fund, the retail
8 amounts wouldn't have been met possibly; right?

9 A. Potentially.

10 Q. And if the retail amounts hadn't
11 been met, that would have caused the failure of a
12 condition precedent to the rest of the funding?

13 A. Potentially. Unless one of the
14 other lenders or some other party replaced
15 Lehman's shortfall in funding.

16 Q. Is it fair to say that around this
17 time, September 2008, you became more involved in
18 the project concerning the Lehman issue?

19 A. Yes.

20 Q. How did you become involved on the
21 Lehman issue?

22 A. I was asked to see if we could --
23 see if we could either revive Lehman's funding of
24 the retail facility and/or replace Lehman's
25 portion of the retail facility.

Kotite, Albert 4/12/2011 11:35:00 AM

1 KOTITE - CONFIDENTIAL

2 Q. Asked by whom?

3 A. I don't know if it was a specific
4 person or just a general request from the senior
5 management and board of the company.

6 Q. So you viewed there being two
7 operations, either revive Lehman's funding or
8 replace it?

9 A. Yes, or some combination of the two.

10 Q. Did you attempt to revive the Lehman
11 funding?

12 A. Yes.

13 Q. Were you successful?

14 A. Partially.

15 Q. In what way?

16 A. To the best of my recollection,
17 Lehman made a couple of -- a couple of monthly
18 fundings postbankruptcy.

19 Q. But they didn't provide all of the
20 funding?

21 MR. CANTOR: Objection.

22 A. Can you explain to me what you mean
23 by "all of the funding"?

24 Q. Sure.

25 Lehman didn't provide all of the

1 KOTITE - CONFIDENTIAL

2 funding for the retail facility that they were
3 supposed to provide?

4 MR. CANTOR: Objection.

5 A. No, they didn't ultimately provide
6 all the funding that they had committed to
7 provide.

8 Q. So you also needed to look for
9 replacement for that funding that was missing;
10 right?

11 A. That's correct.

12 Q. How did you go about looking for
13 replacement for the funding?

14 A. Well, the first thing I did was
15 contact the other retail lenders to see whether
16 or not they would step up and increase their
17 commitments to cover any shortfall caused by
18 Lehman.

19 Q. I'll show you Exhibit 13 which has
20 been previously marked.

21 (Exhibit 13, Previously marked.)

22 (Witness peruses the exhibit.)

23 BY MR. MOCKLER:

24 Q. It's an e-mail from you to
25 kolben@ullico.com and others.

Kotite, Albert 4/12/2011 11:35:00 AM

1 KOTITE - CONFIDENTIAL

2 You recognize this e-mail?

3 A. Yes, it looks familiar.

4 Q. Were the other retail lenders

5 willing to replace -- let me start again.

6 Do you recall that for

7 September 2008, the other retail lenders were not

8 willing to replace the Lehman funding?

9 A. Can you read that back, please. I

10 was reading the document.

11 Q. Let me ask a different question.

12 A. Sure.

13 Q. Do you recall that ultimately in

14 September 2008, Fontainebleau replaced the Lehman

15 portion with an equity contribution?

16 A. In September of '08, yes.

17 Q. And looking at Exhibit 13, in this

18 e-mail, you're asking the retail lenders -- the

19 other retail lenders to consent to Fontainebleau

20 doing that; right?

21 A. Yes.

22 Q. And the other retail lenders

23 ultimately did not sign this document that you

24 attached in Exhibit 13; right?

25 A. Oh, I'm not sure that they did not.

Kotite, Albert 4/12/2011 11:35:00 AM

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2 The copy you gave me doesn't have their
3 signature.

4 Q. Correct.

5 A. But I was -- my recollection is that
6 they did consent to us making this payment.

7 MR. MOCKLER: Mark this as the next
8 exhibit.

9 (Exhibit 875, Bates Nos.
10 SMBC00078623 through 24, E-mail Chain,
11 marked for identification.)

12 (Discussion off the record.)

13 BY MR. MOCKLER:

14 Q. Exhibit 875 is an e-mail from
15 Herbert Kolben to you and others.

16 Do you recognize Exhibit 75?

17 (Witness peruses the exhibit.)

18 A. Yes.

19 Q. And do you recall that Mr. Kolben
20 declined to sign the agreement that you had sent
21 him in Exhibit 13?

22 A. Now that you show me this, it
23 appears that he did decline.

24 Q. Do you recall or do you know why he
25 declined to sign it?

Kotite, Albert 4/12/2011 11:35:00 AM

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2 MR. KINGHAM: Other than what it
3 says in the e-mail?

4 MR. MOCKLER: Yes.

5 A. Well --

6 MR. KINGHAM: Do you know of any
7 other reason?

8 THE WITNESS: From the e-mail
9 itself, which is consistent with my
10 recollection, he did not object and, in
11 fact, did consent to us making this
12 payment. It's just that his attorney did
13 not want him to actually sign the consent
14 because his attorney was concerned with
15 Ullico's rights vis-a-vis Lehman in its
16 bankruptcy as a colender in the retail
17 facility.

18 BY MR. MOCKLER:

19 Q. How did you learn this?

20 A. From this e-mail.

21 Q. He just says he talked to counsel.

22 How did you learn what counsel's concerns were?

23 A. What I'm saying -- what I'm reading
24 here is "I spoke with our attorney last night and
25 he advised me not to sign it for a variety

Kotite, Albert 4/12/2011 11:35:00 AM

1 KOTITE - CONFIDENTIAL

2 reasons, none of which have to do with Turnberry
3 but rather Lehman."

4 To me, that means the lawyer was
5 concerned about how signing that consent might
6 effect Ullico's rights vis-a-vis Lehman in its
7 bankruptcy, but did not have a problem with us
8 making the payment.

9 Q. And you're getting that just from
10 the e-mail?

11 A. From that sentence.

12 Q. You didn't have other conversations
13 with --

14 A. And actually from some of the other
15 sentences that follow.

16 Q. You didn't have another conversation
17 with Mr. Kolben about the reasons?

18 A. Oh, I am sure we had conversations
19 that are consistent with, you know, my
20 explanation that I'm giving you now.

21 And the second sentence here is
22 similar: "There's nothing to prevent you from
23 funding this as an equity advance."

24 Q. Is it fair to say that you had a lot
25 of conversations in this time period about the

Kumar, Deven 3/24/2011 4:06:00 PM

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

)

)

In Re: FONTAINEBLEAU LAS VEGAS) Case No.: 1:09-md-02106-ASG

CONTRACT LITIGATION)

)

)

_____)

VIDEOTAPED DEPOSITION OF DEVEN KUMAR
LAS VEGAS, NEVADA
THURSDAY, MARCH 24, 2011

REPORTED BY: CARRE LEWIS, CCR NO. 497

Kumar, Deven 3/24/2011 4:06:00 PM

1 Q. There is a line in there that reads, "If
2 all of these anticipated costs materialized and
3 there were no offsetting cost savings, the
4 In-Balance Test would continue to be satisfied."

5 Did you believe that statement to be true
6 at the time when he made it?

7 A. Yes.

8 Q. Did you realize that statement would be
9 relied on by the lenders?

10 A. Yes.

11 Q. The sentence after that reads, "While, as
12 you know, construction of a project of this scale is
13 a fluid and dynamic process, at this point in time
14 we are not aware of any cost overruns or
15 acceleration costs that are not reflected in the
16 anticipated cost report."

17 Do you see that?

18 A. Correct.

19 Q. Again, was that statement true when he made
20 it?

21 A. Yes.

22 Q. Showing you what I will mark as -- before
23 that, do you recall a point in time when IVI
24 expressed concerns about the project cost in
25 March 2009?

Kumar, Deven 3/24/2011 4:06:00 PM

1 A. In March 2009. I assume, yes.

2 Q. What do you recall about that?

3 A. I don't know offhand. I mean, we have had

4 multiple conversations, so I don't know exactly.

5 Concerns would have been related to schedule, LEEDs,

6 if we are going to meet the benefits. Not sure.

7 Q. Do you recall, sir, that Mr. Dillman showed

8 you what was marked as Exhibit 297 earlier today,

9 which refers to a \$50 million increase in

10 construction costs?

11 A. Yes.

12 Q. Does that refresh your recollection at all

13 about any of those discussions?

14 A. Yes.

15 Q. Did you agree with -- what do you recall

16 about the cost increases?

17 A. We went through analysis and we believed --

18 we came up with what we believed, and IVI addressed

19 additional concerns and felt some of the numbers

20 needed to be increased, and that's how we got to the

21 number that we settled on.

22 Q. When you say "we," who are you referring

23 to?

24 A. Paul Bonvicino and Bob Barone.

25 Q. Was anyone else involved in the decision to

Lupiani, Daniel 7/21/2011 5:33:00 PM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

3
4 IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION,

5
6 MDL No. 2106,
CASE NO. 09-MD-02106-CIV-GOLD/GOODMAN

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13
14 DEPOSITION of DANIEL A. LUPIANI, taken
15 pursuant to Notice, held at the law offices of
16 O'MELVENY & MYERS, LLP, Times Square Tower, 7 Times
17 Square, New York, New York, 10036, on Thursday,
18 July 21, 2011, at 10:00 a.m. before JEANNETTE
19 MCCORMICK, a Certified Court Reporter and a Notary
20 Public.

21
22
23 JOB No. 167722
24
25

1 Q. It's a condition to disbursement, isn't it?

2 A. It is a condition.

3 Q. If it's not satisfied you can't disburse,
4 right?

5 A. That's correct.

6 Q. Okay. So --

7 A. Should it occur.

8 Q. I want you to assume that there are -- B of A
9 is aware of facts that taken as a whole -- I am not
10 talking about this particular case. I am not asking
11 to you say -- to sort of admit that the facts in
12 this case fit this bill. But assume in this
13 hypothetical that B of A is aware of facts that
14 taken as a whole are inconsistent in a material and
15 adverse manner with the information disclosed to
16 them regarding the project. Is it your
17 understanding of the agreement that they are as a
18 result of that information prevented from
19 disbursing?

20 A. And the borrower has disagreed with it?

21 Q. The hypothetical has nothing to do with the
22 borrower.

23 A. Well, you see, your hypothetical is
24 incomplete, and it's very hard to give you a
25 reaction to an incomplete hypothetical.

1 Q. It's not incomplete at all, sir. I have
2 asked you to assume exactly what this provision
3 says. Okay? Is it your understanding that if those
4 facts were in existence and B of A was aware of
5 them, that a condition precedent to disbursement
6 would not be satisfied and thus the B of A could not
7 disburse?

8 A. It's possible that B of A could not disburse.

9 Q. You say in your report -- and I refer you to
10 paragraph 42.

11 A. Of my report?

12 Q. Yes, sir.

13 A. Yes.

14 Q. "If BANA" -- and just so that we are clear,
15 BANA and B of A are the same entity?

16 A. Yes.

17 Q. I call it B of A and you call it BANA.

18 A. I write BANA. I say B of A.

19 Q. "If B of A determined that the Advance
20 Request was lacking required documentation or that
21 the Borrowers failed to provide certifications and
22 representations establishing that all conditions
23 precedent to Advance were satisfied, then after
24 taking into consideration the interests of all the
25 Project's lenders, which is consistent with standard

1 industry practice, and (if necessary) seeking the
2 advice of counsel, the Disbursement Agent was
3 required to issue a Stop Funding Notice."

4 My question has to do with your, the clause
5 "after taking into consideration the interest of the
6 project's lenders."

7 A. Um-mm.

8 Q. If B of A determined that the required
9 documentation was not provided, did it have the
10 discretion in your estimation to disburse under any
11 set of circumstances?

12 A. I would say generally not, but there could be
13 situations where the matter involved was immaterial
14 and highly technical in nature, and in those
15 situations I could see it being reasonable to
16 disburse.

17 Q. Can you give me an example where the advance
18 request was lacking the required documentation and
19 it would be nonetheless appropriate for B of A to
20 disburse?

21 MR. CANTOR: And you're focusing just on
22 documentation?

23 MR. DILLMAN: I am focusing on his
24 statement that if required documentation was
25 missing that all conditions would then after

1 taking into consideration so they cannot
2 disburse?

3 A. By documentation, I am including reps and
4 warranties. If that's what you mean by
5 documentation?

6 Q. I don't mean anything. I am reading from
7 your report.

8 A. I am telling you. It's basically it's the
9 reps and warranties as well as all the other
10 submitted information. It's a catch-all for
11 everything that's required.

12 Q. Okay. And if, for instance, the various
13 items that you have previously identified as
14 documentation that would have to be presented in
15 order to satisfy conditions precedent was not, there
16 are circumstances where you would say that failure
17 to provide is in and of itself not a basis for
18 refusing to disburse; is that right?

19 A. As I qualified it.

20 Q. And that you would qualify it in --

21 A. I qualified them as technical and immaterial.

22 Q. You don't say that in your report, but that
23 is what you meant?

24 A. Well, you asked me to explain my report.

25 Q. Sure.

1 A. No. I still would disagree.

2 Q. Okay. What is the basis for your
3 disagreement?

4 A. Well, the first few sentences of the
5 paragraph which imply is that normal credit
6 agreements. I think in normal credit agreements
7 based on practices and customs an agent is allowed
8 to accept as truthful what's presented to them.
9 They have the right to make inquiries should they
10 choose to.

11 MR. CANTOR: Kirk, I think part of the
12 problem is --

13 MR. DILLMAN: No. No. No. I don't
14 need it.

15 MR. CANTOR: I think you are making the
16 record confusing. You're saying things are
17 custom and practice when there is a factual
18 statement at the beginning.

19 BY MR. DILLMAN:

20 Q. In the clause that says if the lenders have
21 reason to believe that the certificate is inaccurate
22 they are not barred from asserting that the
23 condition has not been satisfied. You disagree with
24 that; is that right?

25 A. I don't disagree they have the right to make

1 inquiries.

2 Q. And would commercially reasonable practices
3 dictate that where the lenders have reason to
4 believe that the certificate is inaccurate that they
5 should make inquiries?

6 A. You will have to define belief.

7 Q. Really?

8 MR. CANTOR: Objection.

9 Q. The word belief I believe is commonly
10 understood. If they believe it in their mind, if
11 the lenders have reason to believe that the
12 certificate is inaccurate, would you agree that
13 commercially reasonable practice would require that
14 they make inquiry?

15 A. I don't think that accurately describes a
16 situation to allow for a positive answer to that.

17 Q. Again, I think I understand the words, but I
18 don't understand what you said.

19 A. All right. Then please repeat the first part
20 of the statement you made, the reading. You have
21 reason to believe.

22 Q. If the lenders have reason to believe that
23 the certificate is inaccurate, okay. Stop right
24 there.

25 A. Right.

Lupiani, Daniel 7/21/2011 5:33:00 PM

1 Q. Is it your opinion that if that's the case,
2 the commercially reasonable practices applicable to
3 bank agents would require the agent to make further
4 inquiry in order to determine whether or not the
5 certificates were in fact inaccurate?

6 A. I would have to know the degree of certainty
7 of the reasons.

8 Q. Might or might not?

9 A. Might or might not what?

10 Q. In other words, depending on the reason for
11 the belief, the bank agent might or might not have
12 the responsibility to inquire further to determine
13 whether the certificates were inaccurate?

14 MR. CANTOR: Objection. You changed the
15 question. You started with should. You went
16 to require. Now you've used another
17 formulation. Which one is it?

18 THE WITNESS: There is no requirement.

19 There is the opportunity.

20 BY MR. DILLMAN:

21 Q. And consistent with commercially reasonable
22 practices, should a bank agent if it has reason to
23 believe that a certificate is inaccurate, should a
24 reasonable bank agent make further inquiry to
25 determine whether or not the certificate in fact is

Lupiani, Daniel 7/21/2011 5:33:00 PM

1 inaccurate?

2 A. It depends on the certainty of the reasons.

3 Q. So, depending on the basis for the belief
4 that the certificate may be inaccurate, that would
5 cause the bank agent either to have -- the bank
6 agent either should make further inquiries or
7 shouldn't. Is that fair?

8 A. Could. Should. I wouldn't use should.
9 Could.

10 Q. Of course they could. They could do
11 anything. My question is, consistent with what you
12 in your expert opinion believe to be the
13 commercially reasonable practice here, should a bank
14 agent make further inquiry if it has reason to
15 believe that the certificate is inaccurate?

16 A. As I qualified, based on the certainty of the
17 reasons or the quality of the reasons, then it would
18 be commercially reasonable to inquire in certain
19 cases.

20 Q. You state -- strike that.

21 When we broke for lunch, we were talking
22 about the LSTA materials. You have relied primarily
23 on LSTA materials in your report, correct, for those
24 outside sources that you have cited?

25 A. They're my primary external source.

1 agency roles?

2 A. It was reported to me, as I asked for that
3 information, that in point 89 that the disbursement
4 agent, it was a fee of \$40,000 a year, and the
5 administrative agent was \$125,000.

6 Q. Do you know what B of A was paid?

7 A. These were reported to me as what was due. I
8 did not ask if it had been paid.

9 Q. And do you know -- the credit agreement was
10 on June 7, 2007. Do you know one way or the other
11 whether the \$165,000 that was the annual total fee
12 was paid on June 7, 2007?

13 A. I don't know the manner in which it accrued
14 or was paid.

15 Q. Okay. Do you agree with the LSTA that a
16 typical fee for agency activities under a syndicated
17 loan agreement is \$25,000 per year?

18 A. If typical is meant to be average, yes.

19 Q. Do you recall any loans in which you were
20 involved as a banker in which the agent fee on a
21 syndicated loan was greater than \$25,000?

22 A. It could very well have been.

23 Q. Sure it could. Do you recall?

24 A. I don't have specific recollection at this
25 point in time.

1 Q. Looking back on the loans that you were
2 involved with as a banker, was the typical agent fee
3 in the \$25,000 range?

4 A. The fee was a function of size of
5 transaction.

6 Q. Okay. And \$25,000 was typical or not?

7 A. At some point in time for some average of
8 loans it would be typical.

9 Q. What was the largest loan that you ever were
10 involved in, syndicated loan?

11 A. I would say -- well, there was a period of
12 time when I was involved in syndicated loans in the
13 hundreds of million dollars. And certainly there
14 was a time when there would have been in the
15 billions of dollars. And it depend on the customer
16 base I was dealing with.

17 Q. My question though what was the largest
18 syndicated loan that you were involved with? If you
19 need to give me an approximation, that's fine.

20 A. I would estimate in the billion dollar
21 category.

22 Q. And do you have any recollection of what the
23 agency fee was on that?

24 A. I do not.

25 Q. You spent some time in your report on issues

1 having to do with reliance on certificates, and it
2 is your conclusion, I believe, that B of A was
3 entitled to rely on the certificates that it
4 received from the borrowers in connection with
5 advance requests; is that right?

6 A. As stated in the agreement.

7 Q. If B of A knew the certificates to be false,
8 could it rely upon them in your expert opinion?

9 A. It really would be a fact of how they knew.

10 Q. If they that had information from the
11 borrower that was contrary to the information in the
12 certificates, could they rely upon the certificates?

13 A. If they had direct information from the
14 borrower that contradicted the statement they had
15 submitted, they would have to deal with the borrower
16 before they could rely on what is being claimed now
17 to be false representations.

18 Q. And if they had information from, reliable
19 information from other parties other than the
20 borrower that contradicted the certificates, could
21 they in your expert opinion rely upon the
22 certificates without more?

23 A. I don't know what reliable -- who the
24 reliable party would be or what the information was.
25 And both of those would be very significant in

1 making that determination.

2 Q. Assume that it's information that you would
3 deem reliable. I don't want to get into the
4 specifics and be bandying about. Assume that it's
5 information that you or Judge Gold would deem to be
6 reliable. Is it your expert opinion that B of A
7 could rely upon the certificates and disburse funds
8 pursuant thereto if it had reliable information that
9 contradicted information that was provided in the
10 certificates?

11 A. Again, I think it would be a function of the
12 form in which what we're agreeing is reliable has
13 come to them in.

14 Q. And I've asked you to assume that it is in a
15 form that -- we will get into that in a minute --
16 it's in a form that you would deem to be reliable.
17 Is it your opinion that B of A could rely upon
18 certificates and ignore reliable information that
19 contradicted the information provided in the
20 certificates?

21 A. Again, I think there is a complexity to --
22 this is a hypothetical. And there is a complexity
23 to it that has to be completed in order to answer
24 it. And that is what does the contract that they
25 are working under state relative to the rights of

1 the borrower and what is the degree of provability
2 of the reliable information available to protect
3 against the defense and punitive damage claim from
4 the borrower.

5 Q. Move to strike as nonresponsive.

6 MR. CANTOR: Objection.

7 Q. Let me ask the question again. Is it your
8 expert opinion that B of A could rely upon
9 certificates and disburse funds pursuant to
10 paragraph 3.3 of the master disbursement agreement
11 if it had reliable information that contradicted
12 representations and warranties in the certificates?

13 A. My opinion is there could be circumstances
14 under which they would have to.

15 Q. They would have to what?

16 A. Fund.

17 Q. And there could be circumstances in which
18 they wouldn't have to fund?

19 A. In this hypothetical?

20 Q. The hypothetical where they got reliable
21 information that is contrary to representations and
22 warranties existing in certificates provided by the
23 borrower in connection with an advance.

24 MR. CANTOR: And you are excluding the
25 borrower from this question because that was

1 your last question, right?

2 THE WITNESS: Depending on the nature of
3 the reliable information and the nature of
4 the agreement, there could be situations
5 where they could resist funding.

6 BY MR. DILLMAN:

7 Q. Now, let's talk about what's the nature of
8 the information that you would consider to be
9 reliable enough to provide the disbursement agent
10 with a basis for, in your words, resisting
11 disbursement?

12 A. What would be an example?

13 Q. You could give me examples or you could
14 describe it generically.

15 A. There is no generic description. It's fact
16 based, so it has to be fact specific. So, it could
17 be the borrower. The borrower has given you
18 information.

19 Q. Okay.

20 A. A party in a contractual agreement with the
21 borrower could give you information. It could be a
22 court order could give you information. Those would
23 be examples.

24 Q. And in those instances as examples which you
25 would deem to be reliable information the

1 disbursement agent would be prevented from -- strike
2 that.

3 In those instances that you just provided me
4 of reliable information, what would B of A need to
5 do having received that information in order to
6 properly disburse pursuant to paragraph 3.3 in your
7 estimation?

8 A. Determine the veracity of what they just
9 received.

10 Q. You quote at paragraph 97 of your report
11 Section 9.2.5 of the disbursement agreement.

12 MR. CANTOR: What paragraph? Sorry.

13 MR. DILLMAN: 97 of his report.

14 Confusing, isn't it. And quoting 9.2.5 of
15 the disbursement agreement, having to do with
16 Bank of America's multiple roles in the
17 project.

18 BY MR. DILLMAN:

19 Q. How, if at all, is this provision relevant to
20 the opinions that you have provided?

21 A. It's relevant to the information that I
22 reviewed in reaching my opinion.

23 Q. How so?

24 A. There are certain parties associated with
25 B of A who were deposed who had roles unconnected to

1 this transaction and --

2 Q. Go ahead. Sorry.

3 A. And to the extent that they or their actions
4 are factored into the claims against B of A in this,
5 this statement relates to those claims.

6 Q. Who are the people that you are referring to?

7 A. People in the investment banking group.
8 Varnell comes to mind.

9 Q. And how does the fact that Varnell was in the
10 investment group, how does that bear, if at all --
11 again, it may just be background information -- how
12 does that bear upon your opinions concerning B of
13 A's conduct and whether it met the standards of care
14 applicable?

15 A. Well, in reading the depositions, I had seen
16 arguments being made relative to that individual and
17 actions he might have had or conversations he might
18 have had with the implication that that was the
19 disbursement or the administrative agent, and this
20 was the -- disabused that association.

21 Q. Why is it important at all to disabuse that
22 for purposes of your conclusion that B of A did or
23 did not act consistent with --

24 A. So that the issue wouldn't be clouded with
25 that inappropriate accusations.

1 Q. And you have assumed a standard for gross
2 negligence that was provided to you by counsel for
3 Bank of America; is that right?

4 A. That is correct.

5 Q. It wasn't provided to you by Navigant?

6 A. No.

7 Q. And you have not formed an opinion based on
8 any other standard of gross negligence for gross
9 negligence, have you?

10 A. I have used the information I was given as to
11 standard I have used in my opinion.

12 Q. And that is the only standard that you have
13 applied in the opinions that you have provided us?

14 A. Yes.

15 Q. Paragraph 126?

16 A. Yes.

17 Q. The last sentence states, "Thus, a prudent
18 agent would not invoke an MAE unless it possessed
19 definitive evidence of an MAE, particularly where
20 the borrower has certified that no MAE has
21 occurred."

22 Do you see that?

23 A. Yes.

24 Q. Where a prudent -- would a prudent agent
25 invoke an MAE if it possessed definitive evidence of

1 an MAE to justify non-disbursement even where the
2 borrower has certified that no MAE exists?

3 A. Possibly.

4 Q. Under what circumstances would a prudent
5 agent disburse funds to a borrower where it
6 possessed definitive evidence of a material adverse
7 event where the borrower has certified that no
8 material adverse event has occurred?

9 A. Where that condition exists, I think there
10 would be a negotiation to reconcile facts prior to
11 invocation.

12 Q. That is how it usually works, isn't it?

13 A. I'm sorry?

14 Q. That is how it usually works, isn't it?

15 A. Not necessarily.

16 Q. But you think it would work?

17 A. In this situation. I may have misunderstood
18 your question. I'm sorry. Would you reask it?

19 Q. No. We will just move on here.

20 So if an agent possessed definitive evidence
21 that a material adverse event existed, it would not
22 disburse funds -- it would not be prudent to
23 disburse funds unless some resolution to that issue
24 was achieved with the borrower and all of the
25 lenders to the facility, right?

1 A. As I'm using the term here, I would expect
2 that to be the case.

3 Q. And you would expect that -- indeed, it's
4 your opinion that it would not be prudent for the
5 agent to disburse funds unless there was the kind of
6 resolution that I've just described?

7 MR. CANTOR: Under the circumstances
8 described in this paragraph?

9 Q. Yes.

10 A. In this very specific case I've laid out,
11 yes.

12 Q. And it wouldn't be prudent for the
13 disbursement agent to disburse under those
14 circumstances even if the borrower provided a
15 certification saying there's no material adverse
16 event, right?

17 A. Again, under the words as I've used them as
18 definitive evidence, there would need to be at a
19 minimum a discussion.

20 Q. And the disbursement agent could not simply
21 rely upon the fact that the borrower had given a
22 certificate as some way of justifying a
23 disbursement?

24 A. I would expect not.

25 MR. DILLMAN: Let me take a minute to

1 look through my notes. I might be done.
2 (Discussion off the record.)
3 (Recess from 2:55 to 2:59.)
4 BY MR. DILLMAN:
5 Q. Mr. Lupiani, I appreciate your time here
6 today. I have no further questions.
7 MR. CANTOR: I have no questions.
8 (Whereupon, the deposition was
9 concluded at 3:00 p.m.)
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