

Deposition Transcript Excerpts  
of Scott Macklin  
Filed Under Seal

Deposition Transcript Excerpts  
of Todd Miranowski  
Filed Under Seal

Mule, Philip 4/5/2011 5:47:00 PM

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 5, 2011  
11                   9:30 a.m.

12  
13  
14       DEPOSITION of PHILIP MULÉ,  
15       a witness on behalf of Caspian in the  
16       above-captioned matter, taken by Defendants, held  
17       at the offices of O'Melveny & Myers, 7 Times  
18       Square, New York, New York, before Eileen  
19       Mulvenna, CSR/RMR, Certified Shorthand Reporter,  
20       Registered Merit Reporter and Notary Public of  
21       the State of New York.

22  
23  
24  
25

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1 MULÉ - CONFIDENTIAL

2 A. Yes, I report to the three partners.

3 Q. Adam Cohen --

4 A. Mark Weissman.

5 Q. And David --

6 A. David Corleto, correct.

7 Q. Have you held any other positions

8 while you've been at Caspian?

9 A. Any other position --

10 Q. Other than an analyst.

11 A. Oh, no.

12 Q. And what does Caspian do?

13 A. [REDACTED]

14 [REDACTED] We

15 invest in high-yield and distressed corporate

16 credit and equity.

17 Q. What do you consider high-yield?

18 A. Non-investment-grade corporate

19 credit.

20 Q. And then what do you consider

21 distressed?

22 A. Companies that are perhaps nearing

23 bankruptcy or reorganizing or coming out of

24 bankruptcy.

25 Q. When you invested in Fontainebleau,

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1 MULÉ - CONFIDENTIAL

2 lodging.

3 Q. And by "equity research analyst,"

4 you mean he's buy side?

5 A. He would have been sell side at the

6 time.

7 Q. And sell side are the ones who

8 publish the --

9 A. Correct.

10 Q. Did you speak to any other sell-side

11 analysts about the Fontainebleau Las Vegas

12 project?

13 A. Yes, I did.

14 Q. Who did you speak with?

15 A. I would have spoken with James

16 Kayler, Greg Roselli, Chris Schroeder. I believe

17 John Maxwell. There may be others, but those are

18 the four I can recall.

19 Q. You spoke to them prior to

20 making -- strike that.

21 You spoke to them as part of the

22 initial due diligence you did?

23 A. I don't recall if it was part of the

24 initial due diligence, but I have spoken to them

25 about the project.

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1 MULE - CONFIDENTIAL

2 Q. Do you recall speaking to any of  
3 them about the initial due diligence?

4 A. Like I said, I don't remember the  
5 time frame in which I spoke to the four of them.

6 Q. Do you recall what you discussed  
7 with any of them -- strike that.

8 Let's take Mr. Kayler first. Who is  
9 Mr. Kayler with?

10 A. He is -- I believe he was with Bank  
11 of America at the time.

12 Q. Do you recall what you discussed  
13 with him?

14 A. No, I don't.

15 Q. What about Mr. Roselli?

16 A. I believe he was an associate  
17 working under Mr. Kayler.

18 Q. Do you recall what you discussed  
19 with him?

20 A. No, I don't.

21 Q. What about Chris Schroeder?

22 A. I believe he was an associate  
23 working with John Maxwell.

24 Q. Do you recall what you discussed  
25 with him?

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1 MULÉ - CONFIDENTIAL

2 A. I do not.

3 Q. And Mr. Maxwell?

4 A. He was an analyst working for  
5 Merrill Lynch at the time. I believe he also  
6 specialized in gaming and lodging.

7 Q. Do you recall what you discussed  
8 with him?

9 A. No, I do not.

10 Q. I'm asking generally the topics that  
11 you would have discussed beyond just  
12 Fontainebleau.

13 A. I would be speculating if I -- if I  
14 pointed to anything in particular.

15 Q. Okay. And again, I said "spoke."  
16 If I said e-mail or communicate, would the list  
17 get any broader, or is this your general analysts  
18 that you communicated with?

19 A. It may have, but those are the four  
20 I can remember having conversations, whether it  
21 was by phone or by e-mail.

22 MR. MOST: Do you need a break?

23 THE WITNESS: I'm okay for now.

24 BY MR. RIVNER:

25 Q. Other than Mr. Kayler and

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1 MULÉ - CONFIDENTIAL

2 Mr. Roselli, did you discuss the investment with  
3 anyone from Bank of America as part of your  
4 initial due diligence?

5 A. I don't believe so, no.

6 Q. What about Fontainebleau?

7 A. Pardon me?

8 Q. Did you discuss the project as part  
9 of your initial -- strike that.

10 As part of your initial due  
11 diligence, did you discuss -- strike that.

12 Did you speak to anyone from  
13 Fontainebleau as part of your initial due  
14 diligence into the project?

15 MR. MOST: Other than what's already  
16 been described?

17 MR. RIVNER: That was after he  
18 purchased, he said.

19 MR. MOST: Excuse me.

20 A. I don't believe so. I think what I  
21 described was my first communication with them.

22 Q. Did you dial in to any management  
23 conference calls as part of your due diligence?

24 A. I have dialed in to management -- I  
25 believe there were earnings calls at the time. I



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2 A. I'll take your word for it.

3 MR. MOST: The question -- what's  
4 important is does the witness recall the  
5 date of this document. And the answer  
6 is --

7 THE WITNESS: My answer is no.

8 MR. MOST: -- the answer is he does  
9 not.

10 BY MR. RIVNER:

11 Q. If you go down here to where it says  
12 "Lehman Brothers" --

13 A. Yes.

14 Q. -- it says your colenders are  
15 picking up slack until another group steps in?

16 A. Yes.

17 Q. What was your understanding of that  
18 when you wrote that?

19 A. My understanding based on the  
20 information that was conveyed on the call was  
21 that other lenders under the facility were  
22 funding on their behalf.

23 Q. Now, did you think -- strike that.

24 Do you think other lenders funding  
25 constituted an event of default?

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2 were trading at during this time period?

3 A. I don't know.

4 Q. Your initial strategy was a

5 defensive long/short. Was there any discussion

6 about whether Caspian should sell its term loan

7 holdings when it closed out its bond short?

8 A. No, to the contrary, all we did was

9 increase our term loan.

10 Q. Why increase the term loans?

11 A. Because we were buying them at more

12 and more favorable levels, creating the

13 enterprise at a much cheaper valuation and a

14 valuation that we were very comfortable that when

15 the project opened, that the cash was at the

16 project supported -- the cash that the project

17 would be able to generate would support the value

18 of the enterprise through that level where we

19 were purchasing the term loan and delay draw.

20 Q. So Caspian continued purchasing term

21 loans after Lehman's bankruptcy?

22 A. Correct. This says we owned

23 18 million and we own 119 million today, so . . .

24 Q. Do you recall any purchases in 2008

25 following the Lehman bankruptcy?

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1 MULÉ - HIGHLY CONFIDENTIAL

2 A. Specifically, I don't. We have the  
3 sheet here we can refer to.

4 MR. MOST: Do you want to look back  
5 at the earlier exhibit?

6 Q. Actually, I want to show you a  
7 different document.

8 MR. RIVNER: Can we mark this as an  
9 exhibit, please.

10 (Exhibit 378, Bates Nos. CASP 061302  
11 through 311, LSTA dated 9/24/08, marked for  
12 identification.)

13 MR. RIVNER: That document actually  
14 has it marked so --

15 MR. MOST: Eileen, we'd like to  
16 designate this portion of the transcript  
17 highly confidential.

18 The witness is looking at  
19 Exhibit 378, which bears CASP Bates  
20 Nos. 61302 to 61311, which is a highly  
21 confidential document.

22 BY MR. RIVNER:

23 Q. If I could refer you to the first  
24 page, if that's okay. I'm just going to talk  
25 about the first two pages.

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1 MULÉ - HIGHLY CONFIDENTIAL

2 A. Okay.

3 Q. Now, this is a trade confirmation

4 for a November 24, 2008, purchase by --

5 A. September.

6 MR. RIVNER: What did I --

7 MR. MOST: You said November.

8 Q. This is a September 24, 2008,

9 purchase from Grand Central Asset Trust MAR

10 series. And the purchase was made by Mariner

11 LDC?

12 A. Yes.

13 Q. And Mariner is one of the Caspian

14 funds?

15 A. Correct, yes.

16 Q. It looks like you purchased

17 approximately \$1.7 million in term loans?

18 A. Yes, that's what it says. Yep.

19 Q. And you made this purchase after the

20 Lehman bankruptcy?

21 A. Remind me of the date of the

22 Lehman --

23 Q. September 15.

24 A. This would have been after the

25 Lehman bankruptcy, yes.

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2 everybody else on this at the time. And, you  
3 know, we didn't want open ourselves up to  
4 liabilities with the company, with other lenders,  
5 by not funding our draws or allowing -- or  
6 requesting that advances not be approved. We  
7 didn't think that was our -- our responsibility.

8 Q. What type of liability do you think  
9 you would have opened yourself up to if you had  
10 requested that the advance not go forward?

11 A. For withholding -- potentially  
12 withholding sources of liquidity for the project,  
13 I'm not sure.

14 Q. Who do you think would have sued  
15 you?

16 A. Potentially the company, the other  
17 lenders. If our decision impacted the value of  
18 the project, it would seem that we would  
19 potentially be liable to any or a number of -- a  
20 number of parties.

21 Q. Did you consider -- strike that.  
22 Did you look at what effect the  
23 release of these funds would have on your  
24 Fontainebleau Las Vegas investment?

25 A. Can you clarify?

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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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14 ORAL AND VIDEOTAPED DEPOSITION OF RONALDO NAVAL,

15 produced as a witness at the instance of the Plaintiffs,

16 and duly sworn, was taken in the above-styled and -numbered

17 cause on Friday, April 1, 2011, from 9:28 a.m. to 12:18 p.m.,

18 before Angela L. Mancuso, CSR in and for the State of Texas,

19 reported by machine shorthand, at the law offices of Hunton

20 & Williams, 1445 Ross Avenue, Suite 3700, City of Dallas,

21 County of Dallas, and State of Texas, pursuant to the Rules

22 of Civil Procedure and the provisions stated on the record

23 or attached hereto.

24 JOB No. 159382

25

26

1 want to remind is if we can each wait for the other  
2 person to finish the question and answer, so then the  
3 court reporter can get a clear record.

4 A. Okay.

5 Q. When you met with Mr. Murata yesterday, did  
6 you look at any documents?

7 A. Yes.

8 Q. And did those documents refresh any  
9 recollection?

10 A. I saw them, but not in great detail, no.

11 Q. No. And did you tell anyone that you were  
12 being deposed today?

13 A. My wife.

14 Q. Did you speak to any colleagues at Bank of  
15 America?

16 A. My manager.

17 Q. Who is your manager?

18 A. Molly Oxford.

19 Q. And what is her title?

20 A. She's vice president, Agency Management, team  
21 leader.

22 Q. And has she been your manager -- how long has  
23 she been your manager?

24 A. Since '07.

25 Q. Did you speak to any former BofA colleagues

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1 regarding your deposition?

2 A. No.

3 Q. Have you read the complaint in this case?

4 A. No.

5 Q. And, today, what is your current position at  
6 Bank of America?

7 A. Agency Management officer, vice president.

8 Q. Is this the same title that you held in 2007?

9 A. Yes.

10 Q. And who is in your current group?

11 A. All the names?

12 Q. How many people are in your group?

13 A. There is a total of 11.

14 Q. Eleven?

15 A. Uh-huh.

16 Q. And is it the same group that was in BofA in  
17 the same department in 2007?

18 A. No. People have left and people have come in  
19 to join the group.

20 Q. In 2007, who did you work with in the Agency  
21 Management department?

22 A. I worked with Donna Kimbrough, Kristine -- or  
23 I'm sorry -- Chris. There is another gentleman, who has  
24 since left; I can't remember his last name. And then  
25 there is another woman who also has left since then.



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1 Q. And what is the general responsibilities of  
2 the Agency Management department?

3 A. We -- we post financial statements to  
4 Intralinks. We help coordinate amendments with the  
5 Syndications group and the Credit Products group and  
6 generally answer questions, if we receive any, from  
7 lenders.

8 Q. You mentioned the Syndications group and the  
9 Credit Products group. Are those the two departments at  
10 Bank of America that you work closely with --

11 MR. MURATA: Objection.

12 Q. -- outside of your department?

13 MR. MURATA: Objection. You can answer  
14 the question, if you can.

15 Q. (BY MS. PILCH) You can answer.

16 A. We work closely with the Credit Debt Products  
17 group, yes, and Syndications, when there is transactions  
18 going on.

19 Q. And what are your general responsibilities?

20 A. On a day-to-day basis?

21 Q. Yes.

22 A. We post financial statements; we coordinate  
23 processing of transactions with our Operations group, if  
24 there is any questions that come up; and we coordinate  
25 amendments, if there are any.

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1 Q. And so -- you said "we," meaning your team?

2 A. Our group does.

3 Q. Are those your specific responsibilities as  
4 well?

5 A. Yes.

6 Q. When you said "process transactions," what did  
7 you mean by that?

8 A. Well, we -- we talk a lot with our Operations  
9 group, so if they have any questions pertaining to  
10 interest rates, wire -- wiring instructions and things  
11 like that.

12 Q. So when you say your Operations group, is that  
13 what people refer to as the back office team?

14 A. Yes, product services.

15 Q. Okay. And in regard to the general  
16 responsibilities you just mentioned, were those the same  
17 responsibilities that you had in relation to the  
18 Fontainebleau Las Vegas project?

19 A. Yes.

20 Q. Are you familiar with the credit agreement and  
21 disbursement agreement related to the Fontainebleau  
22 Las Vegas project?

23 A. Mainly the credit agreement.

24 Q. And under the credit agreement, Bank of  
25 America was administrative agent, correct?

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1 A. Yes.

2 Q. And in the disbursement agreement, Bank of

3 America was the, among other duties, bank agent?

4 A. Yes --

5 Q. And those --

6 A. -- I believe so.

7 Q. Sorry. And those are the same role, correct,

8 bank agent and administrative agent?

9 A. Is it the same role? What do you mean?

10 Q. In the disbursement agreement, are you  
11 familiar that it's defined as bank agent, administrative  
12 agent, defined as the same role?

13 A. I'm not very familiar with the disbursement  
14 agreement, no.

15 Q. Okay. The only reason why I was saying that  
16 is I wanted to know if we can use those terms  
17 interchangeably today.

18 A. No.

19 Q. So you don't find the bank agent to be the  
20 disbursement -- to equal the disbursement -- I'm  
21 sorry -- administrative agent?

22 MR. MURATA: Objection.

23 A. I do not -- again, I'm not familiar with the  
24 disbursement agreement.

25 Q. (BY MS. PILCH) Okay. Have you seen the

Naval, Ronaldo 4/1/2011 12:00:00 PM

1 disbursement agreement before?

2 A. I don't remember.

3 Q. I'm going to show you what's previously been  
4 marked as Exhibit 72 in a prior deposition. Just to  
5 show you, at the very back section are definitions. If  
6 you flip to the page at the bottom that is Bates-stamped  
7 BANA\_FB 00205056.

8 A. Yes.

9 Q. Towards the bottom -- or, actually, in the  
10 middle, it says, "'Bank Agent' means Bank of America,  
11 N.A., in its capacity as Administrative Agent under the  
12 Bank Credit Agreement" --

13 A. Okay.

14 Q. -- "and its successors in such capacity."

15 I just wanted to be able to use the terms  
16 interchangeably today.

17 In both the credit agreement and disbursement  
18 agreement, I see that Donna Kimbrough signed on behalf  
19 of Bank of America as administrative agent and bank  
20 agent.

21 A. Okay.

22 Q. And at some point did the role switch to you?

23 A. Donna left the bank, I believe, after the deal  
24 closed, around that time frame, and I -- yes, I got the  
25 deal because of that.

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1 Q. And were -- were correspondence addressed to  
2 Donna Kimbrough and e-mails forwarded to you?

3 MR. MURATA: Objection; foundation.

4 A. To the extent that I got them, yeah. I mean,  
5 I don't know if all of them were forwarded to me.

6 Q. (BY MS. PILCH) Okay. And who assigned the  
7 role to you once Donna left?

8 A. My manager.

9 Q. And that's Molly Oxford?

10 A. Molly Oxford, yeah.

11 Q. Do you know why she assigned the role to you?

12 A. I do not know.

13 Q. And what are your responsibilities as the bank  
14 agent, under the credit agreement?

15 MR. MURATA: Objection.

16 A. Posted financials, work closely with the  
17 Credit Debt Products group in making sure that things  
18 are done.

19 Q. (BY MS. PILCH) And -- and the Credit  
20 Products group --

21 A. Corporate Products.

22 Q. Excuse me. Who did you work with there?

23 A. Brandon Bolio, Chip Wenmohs, and Jeff Susman.

24 Q. And did those three individuals give you  
25 direction?

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1 A. Yes.

2 Q. With respect to which task?

3 MR. MURATA: Objection; vague.

4 A. Any questions that pertained to the -- to the  
5 credit that I was not able to answer, I -- I bumped it  
6 up to them.

7 Q. (BY MS. PILCH) And was that department also  
8 in Dallas?

9 A. Yes.

10 Q. And you work in Dallas, as well?

11 A. Yes, I do.

12 Q. Did you have direct contact with the borrower?

13 A. Not very much.

14 Q. Did you have direct contact with the lenders  
15 to the credit agreement?

16 A. Only by e-mail, as I received e-mails from  
17 them.

18 Q. When you received e-mails, did you respond to  
19 the lenders directly?

20 A. I would consult with the Credit Debt Products  
21 group whenever I received any inquiries that I was -- I  
22 could not answer.

23 Q. As bank agent under the credit facility, did  
24 Bank of America receive a fee?

25 A. An agency fee?

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1 Q. Correct.

2 A. Yes.

3 Q. And did Bank of America receive a separate fee  
4 as disbursement agent?

5 A. I do not remember.

6 Q. Do you know what that fee was for the agency  
7 fee?

8 A. I don't remember the exact amount.

9 Q. Would -- maybe I can help you.

10 (Exhibit 618 marked.)

11 Q. I'm going to introduce --

12 MS. PILCH: Do you know the next exhibit  
13 number?

14 THE REPORTER: Uh-huh.

15 Q. -- as 618 an e-mail correspondence between you  
16 and Mr. Yu. And if you look halfway down the page,  
17 there is an e-mail correspondence between you and  
18 Kristine Kelleher that discusses a 125,000 agency fee.

19 A. Yes.

20 Q. Is that the fee that Bank of America received  
21 as -- as administrative agent under the credit  
22 agreement?

23 A. It would appear -- sorry.

24 MR. MURATA: Objection. Go ahead.

25 A. It would appear to be.

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1 Q. (BY MS. PILCH) And this e-mail references --  
2 it's dated June 2, 2009, and references that the agency  
3 fee -- the annual agency fee would be due on June 5th,  
4 '09.

5 Do you know if Bank of America collected that  
6 fee?

7 A. I do not remember.

8 Q. I want to take you through the monthly process  
9 for how funds went from the lenders to the borrower on  
10 this project and use February 2009 as a sample month, if  
11 that's all right.

12 Starting with -- actually, if you can tell me,  
13 how did the process start?

14 A. Well, if I remember correctly, I believe there  
15 is a draw package that was submitted, which was  
16 reviewed.

17 Q. Prior to the draw package, would Bank of  
18 America receive a Notice of Borrowing?

19 A. I don't recall if they received that  
20 separately now or together with the package.

21 (Exhibit 619 marked.)

22 Q. I'm going to mark, just to help, perhaps,  
23 refresh your recollection, an e-mail dated February 13,  
24 2009, and it's going to be marked as Exhibit 619. It's  
25 an e-mail from Brandon Bolio, and you are one of the



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1 individuals cc'd on the e-mail. And attached to this  
2 e-mail is a February 13, 2009, Notice of Borrowing --

3 A. Okay.

4 Q. -- if you flip to the third page. You're  
5 welcome to read the e-mail, as well, if you'd like.

6 The Notice of Borrowing is addressed to your  
7 attention. Do you recall receiving this?

8 MR. MURATA: Objection.

9 A. Not specifically, no.

10 Q. (BY MS. PILCH) Do you have any reason to  
11 believe you didn't receive it, since you're on the  
12 e-mail?

13 A. I probably did receive it, yes.

14 Q. Okay. Do you know if this was the first month  
15 that Bank of America received a Notice of Borrowing from  
16 Fontainebleau?

17 A. Ever?

18 Q. In the course of this project.

19 A. I don't believe so.

20 Q. I'll represent to you that this is the first  
21 month I found in the documents that were produced.

22 A. A borrowing notice?

23 Q. Yes. Is there -- and my question was, is --  
24 do you know why February 2009 would have been the first  
25 month that Fontainebleau would serve a Notice of

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1 Borrowing?

2 A. Oh, I'm sorry. I'm sorry. Hang on. What is

3 this -- is this under the revolver or under the --

4 Q. This is a Notice of Borrowing where

5 Fontainebleau, on February 13th, was requesting the loan

6 of -- as a revolving loan.

7 A. It's a revolving loan. I thought you were

8 talking about the disbursement. Actually, if it's under

9 the revolver, I do not recall if they have borrowed

10 under the revolver before.

11 Q. I'll represent that this was the first time --

12 A. Okay.

13 Q. -- that they were borrowing under the

14 revolver.

15 A. Okay.

16 Q. Do you recall if any other documents were

17 attached to this Notice of Borrowing?

18 MR. MURATA: Objection.

19 A. I do not recall if there was anything else

20 attached to this.

21 Q. (BY MS. PILCH) After receiving this Notice of

22 Borrowing that was addressed to your attention, what

23 steps, if any, did you take?

24 MR. MURATA: Objection.

25 A. I really do not remember. I probably would

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1 have notified Brandon Bolio that we received the  
2 borrowing notice.

3 Q. (BY MS. PILCH) Would you review the borrowing  
4 notice?

5 A. I would look at it.

6 Q. Is there anything that you would look at it  
7 for?

8 A. Just the dates and the amounts.

9 Q. Did you have -- other than forwarding it to  
10 Brandon Bolio, what else would you do, if anything?

11 A. I would wait to hear back from him on what  
12 directions to take.

13 Q. So would Mr. Bolio decide the next direction  
14 to take?

15 A. I don't know. I mean, he would probably  
16 consult with other people.

17 Q. Were you involved in deciding what the next  
18 direction would be after receiving the Notice of  
19 Borrowing?

20 A. No.

21 Q. Did you determine at all if this was -- if  
22 this Notice of Borrowing would be sufficient to trigger  
23 revolving lending?

24 MR. MURATA: Objection; calls for a  
25 legal -- legal conclusion.

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1 A. Would you repeat the question again?

2 Q. (BY MS. PILCH) Sure. After receiving this

3 Notice of Borrowing, would you examine it to determine

4 if it was sufficient to trigger lender funding?

5 A. I would not -- I would forward this and let

6 them tell me what action to take.

7 Q. So you would do no substantive review?

8 A. No. No.

9 Q. In March 2009, in response to a Notice of

10 Borrowing, I believe that you posted a letter dated

11 March 3, 2009, to Intralinks regarding the Notice of

12 Borrowing.

13 A. Okay.

14 Q. Do you recall that letter?

15 A. Not specifically.

16 Q. Let me show it to you. Marked as Exhibit 620

17 is an e-mail from you to Mr. Freeman, attaching a letter

18 dated March 3, 2009, as well.

19 MR. MURATA: I don't believe it's marked.

20 Take a moment and look at it.

21 THE WITNESS: Okay.

22 (Exhibit 620 marked.)

23 Q. (BY MS. PILCH) The letter is on the second

24 page. Is that your signature on the bottom?

25 A. Yes, it is.

1 Q. And in this letter, you address the Notice of  
2 Borrowing that was submitted the day prior, March 2,  
3 2009, and state at the bottom, "Accordingly, we have  
4 notified the Lenders that we will not be processing this  
5 Loan Notice."

6 A. Uh-huh.

7 Q. Did you make that determination to not process  
8 that loan notice?

9 A. I did not make that determination.

10 Q. Did you draft this letter?

11 A. I did not draft this letter.

12 Q. Who drafted this letter?

13 A. It appears to be a counsel-drafted letter.

14 Q. Do you know who was involved in the substance  
15 of drafting this letter, other than counsel, if anyone?

16 A. Do I know specifically? No, I do not. I  
17 mean, most likely, probably -- or most likely, the Debt  
18 Products group also.

19 Q. But they had you sign this letter?

20 A. Yes.

21 Q. And was that the protocol for posting letters  
22 as administrative agent?

23 MR. MURATA: Objection; vague.

24 A. What do you mean by that?

25 Q. (BY MS. PILCH) In terms of -- would,

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1 typically, Corporate Debt Products draft a letter and  
2 then you sign it as administrative agent?

3 A. I would sign letters as directed, yes.

4 Q. Going back to just the monthly schedule, after  
5 receiving the Notice of Borrowing -- and we're back to  
6 February 2009 --

7 A. Okay.

8 Q. -- if you can recall -- and you said that you  
9 forwarded on to Brandon Bolio and waited for direction,  
10 correct?

11 MR. MURATA: Objection. I think that --  
12 if we look at the e-mail, I think -- and I'm not trying  
13 to interrupt your examination.

14 MS. PILCH: Which document are you  
15 referring to?

16 MR. MURATA: Exhibit 619. It looks like  
17 the e-mail was addressed from Bill Bewley to Brandon  
18 Bolio.

19 MS. PILCH: That's correct.

20 Q. (BY MS. PILCH) On the second page of  
21 Exhibit 619, it was originally transferred from  
22 Fontainebleau to Bank of America through Brandon Bolio,  
23 but it was addressed to your attention.

24 A. Correct.

25 Q. Do you know why it was addressed to your

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1 attention?

2 A. Probably because I was the admin agent.

3 Q. Okay. Going back to the schedule that occurs

4 after the Notice of Borrowing is received at Bank of

5 America, you had mentioned that typically there would be

6 a draw package. Do you recall receiving draw packages?

7 A. For funding a request; is that what you're

8 talking about?

9 Q. Yes.

10 A. Specifically for the revolving borrowing?

11 Q. For any borrowings.

12 A. I do not remember that, no.

13 Q. When you said "draw package," what did you

14 mean by "draw package"?

15 A. Those were for funds that are disbursed under

16 the -- the -- the other facilities.

17 Q. Okay. Were you typically involved in those

18 disbursements under other facilities?

19 A. I did not do the review of the documents for

20 those, but I posted the draw documents to Intralinks

21 after it's been reviewed.

22 (Exhibit 621 marked.)

23 Q. I'm going to mark as Exhibit 621 a

24 February 13, 2009, e-mail from Jaclyn Miller, who

25 appears to work at Fontainebleau Resorts, addressed to a

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1 number of people, one of them being you. Attached -- it  
2 says, "Attached is the January draw for Las Vegas." I  
3 believe that she had meant the February draw because all  
4 the documents attached are dated for a February draw, so  
5 that might be an error.

6 Do you recall receiving this draw package?

7 A. I do not specifically remember.

8 Q. Do you know why it was addressed to you as  
9 well as a number of other people?

10 A. I do not know why it was -- why it was sent to  
11 me.

12 Q. Did -- in receiving this e-mail, would you  
13 review the documents?

14 A. No, I would not review the documents. I  
15 would -- specifically this draw document, right?

16 Q. Correct.

17 A. I don't recall reviewing this document, but  
18 typically the draw documents, when they come in to be  
19 posted to Intralinks, I would coordinate that through  
20 Brandon Bolio.

21 Q. When you say "coordinate," what do you mean?

22 A. I would wait to get the approval or the okay  
23 that it was all right to post.

24 Q. And would -- would the entire draw package  
25 sent by Fontainebleau be posted to Intralinks?



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1 A. There were draw document files that were  
2 posted, and I don't know if those are all the documents  
3 in there.

4 Q. And when you say that you would wait for  
5 Mr. Bolio to give you the okay, do you know what steps  
6 happened before he gave you the okay?

7 A. I believe it was reviewed.

8 Q. When you say "reviewed," who reviewed it?

9 A. I think he reviewed it, as well as Jeanne  
10 Brown.

11 Q. Do you know what they reviewed it for?

12 A. I do not.

13 Q. Were you involved in any meetings related to  
14 the review of the draw package?

15 A. No, no, because Jeanne Brown was reviewing the  
16 draw packages, not me.

17 Q. And which department was Jeanne Brown in?

18 A. Jeanne Brown was with the -- what group was  
19 that with? Construction, I think, if I'm not mistaken,  
20 group.

21 Q. Okay. And other than Jeanne Brown and Brandon  
22 Bolio, do you know if anyone else reviewed the draw  
23 package?

24 A. I do not.

25 Q. Did either Jeanne Brown or Brandon Bolio ask

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1 you for input related to the review of the draw package?

2 A. Not that I remember, no.

3 Q. Did they request if you or anyone else on your  
4 team had information related to the draw package?

5 A. Within Agency Management?

6 Q. Yes.

7 A. No.

8 Q. Were you involved in issuing an Advance  
9 Confirmation Notice?

10 MR. MURATA: Objection; foundation.

11 A. What is an Advance Confirmation Notice?

12 Q. (BY MS. PILCH) That was going to be my  
13 question, if you're familiar with that.

14 Attached in the draw package are a number of  
15 exhibits.

16 A. Okay.

17 Q. You're -- you're welcome to look through them,  
18 but you don't -- I'm not going to ask you anything  
19 substantive about it.

20 A. Okay.

21 Q. It's one of the exhibits attached to the draw  
22 package, where Bank of America and Fontainebleau both  
23 execute the document.

24 A. And your question, again, was?

25 Q. If you were involved in issuing an Advance

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1 Confirmation Notice.

2 MR. MURATA: Objection; vague.

3 A. No.

4 Q. (BY MS. PILCH) So you said you would wait for  
5 Mr. Bolio to give you the okay to post to Intralinks.

6 A. Yes.

7 Q. What -- once he gave you the okay and you  
8 posted the documents to Intralinks, would you include  
9 any letter or message in the Intralinks posting or  
10 simply attach the draw package?

11 A. You mean a letter that I would compose myself?

12 Q. Either a letter you composed or a letter that  
13 someone else composed.

14 A. I would just post the documents that I  
15 receive.

16 Q. And what was the point of posting the  
17 documents?

18 A. Information for the lenders.

19 Q. Was that an indication to the lenders to fund?

20 MR. MURATA: Objection; calls for  
21 speculation, vague.

22 A. It's information that's required.

23 Q. (BY MS. PILCH) Required under the credit  
24 agreement?

25 A. Right.

1 Q. After you posted the draw package to  
2 Intralinks, what, if anything, did you do in relation to  
3 the draw package?

4 A. That was it.

5 Q. Did you notify the lenders when to fund, if  
6 they were expected to fund?

7 MR. MURATA: Objection; vague.

8 A. I did not notify the lenders to fund.

9 Q. (BY MS. PILCH) Were -- do you know if lenders  
10 were notified to fund?

11 MR. MURATA: Objection.

12 A. The notices for fundings went out of the --  
13 the Operations group. I did not send them out.

14 Q. (BY MS. PILCH) Do you know who within the  
15 Operations group would send out a notice to lenders?

16 A. It would be the credit services representative  
17 or the CSR.

18 Q. What does CSR stand for?

19 A. Credit services representative.

20 Q. Oh. And who would that be?

21 A. At that time -- you know, when was this? '09?

22 Q. The course of the project spanned from  
23 June '07 through June '09, basically.

24 A. It switched to several names. It was probably  
25 Anna Marie Finn.

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1 Q. She was a credit services representative?

2 A. Uh-huh. Yes.

3 Q. Do you know if there was anyone else that was  
4 a credit services representative on the -- during the  
5 course of this project?

6 A. Kristine Kelleher was another one that I -- I  
7 remember.

8 Q. Was Jesse Phalen, as well?

9 A. Jesse Phalen is, yeah, another name, yeah.

10 Q. And was there -- are you -- do you know if  
11 there was any distinction between the credit services  
12 representatives that you just mentioned --

13 MR. MURATA: Objection; vague.

14 Q. -- in terms of their responsibilities on this  
15 project?

16 A. I don't believe so. I think they all do the  
17 same thing.

18 Q. And what is it that they do, to your  
19 knowledge?

20 A. They would send out Notices of Borrowing  
21 requests, if they receive any, to the lenders.

22 Q. Are you familiar with any other  
23 responsibilities that they had other than sending out  
24 notices to lenders?

25 MR. MURATA: Objection.

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1 A. They would -- everything that pertained to  
2 borrowings and payments they would handle.

3 Q. (BY MS. PILCH) And when you said that the  
4 credit services representative would send out a notice  
5 to lenders, would that be posted on Intralinks?

6 A. No. They send that out by fax, if I'm not  
7 mistaken.

8 Q. In response -- do you know what the lenders  
9 would do in response to the fax notifying them to fund?

10 MR. MURATA: Objection; calls for  
11 speculation.

12 A. I -- they would have to make a determination  
13 if they are funding.

14 Q. (BY MS. PILCH) And if the lenders made the  
15 determination to fund, are you familiar with which bank  
16 account the lenders would fund into?

17 A. We typically have a standard wiring  
18 instructions that -- that lenders send money into and  
19 just the standard wiring instructions that we use.

20 Q. Would it help if I suggested that the bank  
21 account would be called Bank Proceeds Account? Does  
22 that sound familiar to you?

23 A. No.

24 Q. Were you involved at all with the wiring of  
25 funds into the Bank Proceeds Account?

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1 A. I was not.

2 Q. That would be -- would that be the  
3 responsibility of the credit services representative to  
4 oversee?

5 A. I'm not sure. I don't -- I don't remember  
6 if -- if they wired money directly into that account.

7 Q. Do you know who would know if the -- who would  
8 be able to confirm that the wires into the Bank Proceeds  
9 Account occurred?

10 A. Probably the CSR and Brandon Bolio. I just --  
11 I don't remember.

12 Q. Are you familiar -- strike that.  
13 Do you know if the borrower had access to the  
14 account that the lenders funded into?

15 MR. MURATA: Objection.

16 A. I do not know.

17 Q. (BY MS. PILCH) Do you know, once the lenders  
18 funded, how the borrower would obtain that money?

19 A. Are we talking specifically as it relates to  
20 this revolving borrowing?

21 Q. In regards to any borrowing.

22 A. Just generally, you mean?

23 Q. Correct.

24 A. And your question again -- I'm sorry -- is  
25 what?

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1 Q. Once lenders funded into an account which I  
2 represented to you is called the Bank Proceeds Account,  
3 do you know how the borrower would access those funds?

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

6 A. I do not know.

7 Q. (BY MS. PILCH) Are you familiar with whose  
8 obligation it would be at Bank of America to cause  
9 advances to be made from the funds that the lenders  
10 funded to the borrower?

11 MR. MURATA: Objection; foundation, calls  
12 for a legal conclusion.

13 A. Repeat the question, please.

14 Q. Are you familiar --

15 MS. PILCH: Or, actually, can you read it  
16 back, please.

17 (Requested text was read.)

18 A. Am I familiar? I believe it would be the CSR,  
19 if everything was okay. They would actually -- you mean  
20 the transferring of the money out of there?

21 Q. (BY MS. PILCH) Correct.

22 A. I believe it would be the CSR.

23 Q. Are you familiar with -- well, strike that.

24 Would the CSR approve the transfer, or would  
25 they simply execute the transfer of the funds?



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1 MR. MURATA: Objection.

2 A. Could you -- what do you mean by that?

3 Q. (BY MS. PILCH) Did the CSR make the decision

4 to transfer funds from an account that the -- that the

5 lenders funded into, into an account that the borrower

6 had access to?

7 MR. MURATA: Objection; vague.

8 A. If I understand your question correctly, they

9 would execute it if everything was okay.

10 Q. (BY MS. PILCH) Who -- are you familiar with

11 who would tell them if everything was okay?

12 A. In this specific one here?

13 Q. Not necessarily in regards to February 2009 --

14 A. Right.

15 Q. -- but specific to Fontainebleau project.

16 A. I guess I'm not understanding the -- the

17 question. If --

18 Q. You had said that the CSR would execute the

19 trans -- the transfer if everything was okay.

20 A. Uh-huh.

21 Q. How would the CSR know if everything was okay?

22 A. Well, unless there is any issue, they -- that

23 they're aware of, they would execute the wires, yes.

24 Q. Do you know who would tell them if there was

25 an issue?

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1 A. Most likely, the Credit Debt Products group.

2 Q. And that would be, as you mentioned, Brandon

3 Bolio, Jeff Susman, and Chip Wenmohs?

4 A. Yes.

5 Q. Was there anyone else in that department that

6 you recall?

7 A. No. I mean, the other person at the end who

8 was involved with that was Henry Yu, also.

9 Q. And he was in that Credit Debt Services?

10 A. He's considered Credit Debt Products, yes.

11 Q. So as bank agent on this loan, you were not

12 involved with approving transfers of funds from lenders

13 to, ultimately, borrower?

14 A. No, I was not.

15 Q. Were you consulted in the approval?

16 A. By whom?

17 Q. By anyone at Bank of America.

18 MR. MURATA: Objection.

19 A. If I was consulted by the CSR, I would direct

20 that to the Credit Debt Products group.

21 Q. (BY MS. PILCH) I'm a bit confused, and maybe

22 you can help me. But it was my understanding that the

23 bank agent, which is defined as the administrative

24 agent, would cause the advances from lenders to fund

25 into the -- into an account at Bank of America that then

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1 A. No.

2 Q. Okay. We're done with the month of  
3 February 2009. I just want to turn to March 2009. I'm  
4 going to mark as Exhibit 630 an e-mail from Jim Freeman  
5 to Anna Finn, Brandon Bolio, and yourself.

6 (Exhibit 630 marked.)

7 Q. And Mr. Freeman states, "Please find attached  
8 the Las Vegas Notice of Borrowing that was faxed in this  
9 morning." The attached Notice of Borrowing was to the  
10 attention of Donna Kimbrough.

11 When -- you had stated Ms. Kimbrough no longer  
12 worked in the Agency Management office?

13 A. Right.

14 Q. So when documents came in to her attention,  
15 were they referred to you?

16 MR. MURATA: Objection; vague.

17 A. If I got them and they were addressed to  
18 Donna, yes, I got them. Yes.

19 Q. (BY MS. PILCH) And do you recall receiving  
20 this Notice of Borrowing?

21 A. Not specifically, but it appears I did receive  
22 it, yes.

23 Q. And I believe earlier today we had marked a  
24 March 3, 2009, letter that you had sent to Mr. Freeman  
25 in response to this Notice of Borrowing, and you had

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1 stated that you had no substantive role in drafting the  
2 letter.

3 A. Right.

4 Q. Do you recall that testimony?

5 A. The response letter, right?

6 Q. Correct. You had stated that counsel had  
7 drafted it.

8 (Exhibit 631 marked.)

9 Q. I'm going to mark as Exhibit 631 an e-mail  
10 from you to a number of individuals at BofA and other  
11 entities, forwarding a letter from Mr. Freeman. The  
12 letter is dated March 3, 2009. This letter is addressed  
13 to -- from Mr. Freeman.

14 Do you recall receiving it?

15 A. Not specifically, but, yes, I do see I did  
16 receive it, yes.

17 Q. And Mr. Freeman states this is in response to  
18 your letter of March 3, 2009.

19 Did you have any responsibility in replying to  
20 Mr. Freeman's letter addressed to you?

21 A. I forwarded the letter to the appropriate  
22 people in here, and -- and I did not draft any response  
23 thereafter.

24 Q. So your only responsibility was to forward on  
25 the letter?

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1 A. Yeah.

2 Q. And then --

3 A. Yes.

4 Q. Do you recall if you received any further  
5 direction after you forwarded on the letter?

6 A. No, I do not recall.

7 (Exhibit 632 marked.)

8 Q. I'm going to mark as Exhibit 634 -- I'm  
9 sorry -- 632, an e-mail from Henry Yu, and you're one of  
10 the recipients of this e-mail. Mr. Yu states that  
11 attached is a letter from Fontainebleau with a Notice of  
12 Borrowing attached. If you flip to the last two pages,  
13 it's a Notice of Borrowing dated March 9, 2009.

14 Do you recall receiving this Notice of  
15 Borrowing?

16 A. I do not recall.

17 Q. And this Notice of Borrowing requests  
18 350 million of delay draw loans. Does that refresh your  
19 recollection, the amount?

20 A. No.

21 Q. No. Do you recall if you had any role in  
22 reviewing this Notice of Borrowing?

23 A. I don't recall receiving it, and I -- so I do  
24 not recall that.

25 (Exhibit 633 marked.)

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1 Q. I'm going to mark as Exhibit 633 an Intralinks  
2 posting dated March 9, 2009. This Intralinks alert  
3 states at the top, "Note from Ronaldo Naval, "and at the  
4 bottom it lists the primary contact as yourself.

5 What was your role, in relation to Intralinks,  
6 as the primary contact?

7 A. It meant that I was the primary person that --  
8 that was responsible for doing postings, and it gave the  
9 lenders a name to contact if they have any questions.

10 Q. In this posting, it appears you are posting  
11 the borrowing notice dated March 3 -- I'm sorry --  
12 March 9, 2009, as well as discussing the posting. It  
13 states here, "The Administrative Agent and the Steering  
14 Committee had determined that the Notices of Borrowing  
15 submitted last week did not comply with the requirements  
16 of Section 2.1(c)(iii) of the Credit Agreement. In the  
17 view of the Administrative Agent, this Notice of  
18 Borrowing complies with Section 2.1(c)(iii), and we are  
19 therefore submitting it to the Lenders."

20 Did you draft this posting?

21 A. I did not.

22 Q. Do you know -- or do you recall who did?

23 A. I don't recall specifically, no.

24 Q. Were you involved in forming this -- this  
25 posting and the substance of it?

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1 A. I was not.

2 Q. So -- and it states, "In the view of the  
3 Administrative Agent." Do you know whose view that is  
4 referring to? Is there a particular individual at Bank  
5 of America that made that determination?

6 A. Probably -- at this time, I think it was  
7 probably Henry Yu or Brandon Bolio, along with counsel.

8 Q. Okay. And you stated Henry Yu. What was his  
9 title?

10 A. I believe he was senior vice president,  
11 Special Assets group, I think, if I'm not mistaken.

12 Q. And when did he first become involved with the  
13 Fontainebleau project?

14 A. I don't recall the specific date.

15 Q. Did your role change at all from the  
16 responsibilities you had first mentioned once Henry Yu  
17 became involved in the project?

18 A. Not really, no.

19 Q. Did you take direction from Mr. Yu?

20 A. Yes.

21 Q. There are various documents that I've seen  
22 that Mr. Yu signs as administrative agent; there are  
23 letters you've signed as administrative agent; and then  
24 there are a number of other individuals I've seen, for  
25 instance, Brian Corum or Maurice Washington, signing as

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1 administrative agent.

2 Do you know how it was determined who signed  
3 as administrative agent?

4 A. They -- well, Maurice Washington worked with  
5 me. He's in Agency Management. Brian and Henry were  
6 with the Credit Debt Products group, and they had the  
7 authority to sign on behalf of Bank of America, N.A., as  
8 administrative agent.

9 Q. Do you know, though, what would determine  
10 whether Mr. Corum versus Mr. Yu signed as administrative  
11 agent?

12 A. Probably just whoever was involved at the --  
13 at the time with whatever particular item it was.

14 (Exhibit 634 marked.)

15 Q. Okay. I'm going to mark as the next exhibit,  
16 Number 634, an e-mail from Mr. Bolio to a number of  
17 individuals, including yourself, dated March 10, 2009.

18 And Mr. Bolio states, "A few updates on FB.  
19 The \$194,745,074.27 has been transferred to the Bank  
20 Proceeds Account. Brian and I" -- do you believe Brian  
21 is Mr. Corum?

22 A. I believe that is Mr. Corum, yes.

23 Q. -- "spoke with Jim Freeman. We communicated  
24 that 261 million had been funded by the delay draw  
25 lenders so far, that approximately 67 million of the



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1 proceeds were used to repay the revolver outstandings  
2 plus 28K to pay interest."

3 Were you involved at all in -- I'm sorry.

4 Strike that.

5 Are you familiar with the amounts that were  
6 transferred to the Bank Proceeds Account, the  
7 194 million?

8 MR. MURATA: Objection; vague.

9 A. I do not recall, no.

10 Q. (BY MS. PILCH) We had just looked at the  
11 March 9 notice -- March 9 Notice of Borrowing that  
12 requested \$350 million from the delay draw term lenders,  
13 and it states -- Mr. Bolio states here, "We communicated  
14 that 261 million had been funded by the delay draw term  
15 lender so far."

16 Are you familiar with -- during this time,  
17 with delay draw term lenders funding?

18 A. Am I familiar with it?

19 Q. Yes.

20 A. In what regards?

21 Q. Do you know whether the delay draw term  
22 lenders funded the full amount requested, 350 million?

23 A. It doesn't appear, based on this, but I don't  
24 recall the specific details.

25 Q. So you don't recall anything -- any events

1 related to delay draw term lenders funding and the  
2 amounts that they funded?

3 A. Based on this, it appears that there are some  
4 lenders that did not fund, basically.

5 Q. Mr. Bolio states in here that approximately  
6 67 million was used to repay the revolver outstanding.

7 Are you familiar with the process where  
8 revolver -- where amounts funded by delay draw lenders  
9 were used to repay revolver outstandings?

10 MR. MURATA: Objection; foundation.

11 A. Am I familiar with -- you mean as it pertains  
12 to this specifically or just typically?

13 Q. (BY MS. PILCH) First, let's do typically.

14 A. Borrowing from one facility to repay another  
15 facility is what you're saying?

16 Q. Yes.

17 A. I don't recall if -- I'm trying to remember if  
18 I've seen borrowers come in to borrow from one facility  
19 to pay another facility.

20 Q. Do you recall specifically on this project?

21 A. On this one, no. I don't recall on this one  
22 specifically.

23 (Exhibit 635 marked.)

24 Q. I'm going to mark as Exhibit 635 a March 10,  
25 2009, e-mail from Jesse Phalen to Brandon Bolio and

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1 see the columns and sheets here. The document is  
2 Bates-stamped BANA\_FB 00284519 through 284906.

3 MS. PILCH: Ken, if you'd like to first  
4 look, this is an Excel spreadsheet that references the  
5 Bates number.

6 MR. MURATA: Looks like a spreadsheet,  
7 yeah.

8 MS. PILCH: Right. And I'll hold it up  
9 to the computer -- to the camera. Excel spreadsheet, so  
10 we can see it represents the same document you're  
11 looking at.

12 Q. (BY MS. PILCH) Can you tell me what this  
13 document is that you had e-mailed to Jesse Phalen?

14 A. It appears to be the register as of those  
15 certain dates.

16 Q. And if you look at the sheets --

17 A. Uh-huh.

18 Q. -- can you tell me which time period this  
19 covers?

20 A. February 3, 2009; January 13, 2009; and there  
21 are some Florida ones in here also mixed in.

22 Q. Right. Just for the Las Vegas is all I'm  
23 concerned with.

24 A. November 20, 2008; and October 15, looks like,  
25 2008. And then there are some various other ones in

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1 here, too. September 15, 2008; August 7, 2008; and that  
2 appears to be it. Oh, no, there's more. There is a  
3 June 30, 2008; June 24, 2008; May 29, 2008; May 21,  
4 2008; May -- sorry -- April 3, 2008; and March 31, 2008.

5 Q. Thank you. And each sheet that you looked at,  
6 did that -- does that appear to be the register as of  
7 the date indicated?

8 A. Yes.

9 MS. PILCH: Ken, I can e-mail you that  
10 document at the conclusion, if you'd like.

11 MR. MURATA: I've got the Bates numbers.

12 MS. PILCH: Okay.

13 Q. (BY MS. PILCH) And the cover e-mail says to  
14 Jesse Phalen, "Per our conversation."

15 Do you recall your conversation with Jesse  
16 Phalen?

17 A. I do not. Why I sent this to him?

18 Q. Correct.

19 A. I do not recall that specifically, no.

20 (Exhibit 663 marked.)

21 Q. I'll mark as Exhibit 663, April 16, 2009,  
22 e-mail from you to Brandon Bolio.

23 Can you tell me what the spreadsheet is that  
24 is attached to the e-mail?

25 A. It's the lenders list as of April 16, 2009.

Naval, Ronaldo 4/1/2011 12:00:00 PM

1 Q. Is there any difference between this lender  
2 list and the prior ones we've seen, not in terms of the  
3 date, but this e-mail you -- the subject line is "Raw  
4 Numbers." Is that used to indicate the lender list?

5 MR. MURATA: Objection.

6 A. I don't know why I said raw numbers. There is  
7 probably -- there are probably -- I don't know. But  
8 this is the register. It's the lenders list as of that  
9 date.

10 Q. (BY MS. PILCH) Do you recall if Brandon Bolio  
11 requested that you send it to him as of that date?

12 A. I do not recall, but probably that's why I  
13 sent it to him.

14 Q. Do you recall any reason why Mr. Bolio asked  
15 you to send it to him on April 16th?

16 A. I do not recall.

17 Q. Are you familiar with the company called IVI?

18 A. IVI, I believe, was the project consultant.

19 Q. Did you have any interaction with IVI?

20 A. No. Not directly, no.

21 Q. When you say "not directly," then did you have  
22 indirect contact?

23 A. I received -- I received the project -- the  
24 CDs from them to post to Intralinks.

25 Q. Did you review the CDs prior to posting to

1 Intralinks?

2 A. Brandon Bolio did.

3 Q. I saw, starting with Project Report Number 6,  
4 you were cc'd on the reports.

5 A. Uh-huh.

6 Q. Did you review the reports?

7 A. I did not review the reports.

8 Q. Did you have any conversations with Mr. Bolio  
9 regarding the IVI reports, other than to post onto  
10 Intralinks?

11 A. If I recall, I believe my conversations would  
12 have said, is it okay to post to Intralinks, and he  
13 would say yes or no.

14 (Exhibit 664 marked.)

15 Q. I'm going to mark as Exhibit 664 an e-mail  
16 dated April 20, 2009, from Bill Scott to a number of  
17 individuals, cc'ing yourself.

18 A. Okay.

19 Q. Attached to this e-mail is a letter from Bank  
20 of America addressed to Jim Freeman that indicates the  
21 revolving facility lenders are terminating the revolving  
22 credit facility, and the document appears to be signed  
23 by you.

24 Is that your signature?

25 A. That is my signature, yes.

Naval, Ronaldo 4/1/2011 12:00:00 PM

1 Q. Did you draft this letter?

2 A. I did not draft the letter.

3 Q. Do you recall who drafted the letter?

4 A. Probably Mr. Scott.

5 Q. Is that Bill Scott from Sheppard Mullin?

6 A. Bill Scott.

7 Q. Did you provide input for this letter?

8 A. No.

9 Q. You were handed this letter and asked to sign?

10 A. I was -- I was probably on the sideline or I  
11 listened in or something, if there was a discussion, and  
12 that was it.

13 Q. Are you knowledgeable regarding the substance  
14 of the letter?

15 MR. MURATA: Objection; vague.

16 A. That we are terminating the revolver.

17 (Exhibit 665 marked.)

18 Q. (BY MS. PILCH) Mark as Exhibit 665 an e-mail  
19 dated 4/21/2009 from you to Henry Yu, Brandon Bolio,  
20 Brian Corum, Alan Martin, Eric Sieke --

21 A. Sieke.

22 Q. -- Sieke, as well as Bill Scott, and you're  
23 forwarding on a letter from Seward & Kissel that is  
24 addressed to you. It says, attention, Ron -- Ronaldo  
25 Naval. It appears that this letter is in response to

1 the letter we just looked at, Exhibit 664.

2 Were you involved at all in responding to this  
3 letter from Seward & Kissel?

4 MR. MURATA: Objection; vague.

5 A. Involved in what way?

6 Q. (BY MS. PILCH) What, if anything, did you do  
7 other than forwarding this letter?

8 A. I don't recall. I don't recall if I did  
9 anything. And if I was asked to sign a response, I  
10 probably would have done that at that time.

11 (Exhibit 666 marked.)

12 Q. I'm going to mark as Exhibit 666 a May 7,  
13 2009, letter signed by you. Is that your signature?

14 A. That is my signature.

15 Q. Are you familiar with this letter of May 7,  
16 2009, that the subject line is "Notice of Resignation by  
17 Administrative Agent and Disbursement Agent"?

18 A. Okay.

19 Q. Are you familiar with it?

20 A. I've seen it before, yes.

21 Q. Did you draft the substance of this letter?

22 A. I did not draft the substance of this letter.

23 Q. Were you involved in the decision to resign as  
24 administrative agent?

25 A. I was not.



Naval, Ronaldo 4/1/2011 12:00:00 PM

1 Q. Do you know who made that determination at  
2 Bank of America?

3 A. Probably the Credit Products group, which  
4 would be, at that point, I think, Henry Yu.

5 MS. PILCH: Okay. I think we're nearing  
6 the end. I just want to take two minutes to review.

7 THE VIDEOGRAPHER: The time is 12:15 p.m.  
8 We are off the record.

9 (Recess from 12:15 p.m. to 12:17 p.m.)

10 THE VIDEOGRAPHER: The time is 2:17 p.m.  
11 We are on the record.

12 MR. MURATA: I don't think it's 2:17 p.m.

13 THE VIDEOGRAPHER: 12:17 p.m. We are on  
14 the record.

15 MS. PILCH: Mr. Naval, thank you very  
16 much. I have no further questions for today.

17 The court reporter will create a transcript  
18 and attach exhibits and send that on to Mr. Murata.  
19 After that, he'll forward on to you. If you have any  
20 changes that you deem necessary, you're free to make  
21 those. Mr. Murata will then forward on your edits to --  
22 to me with your signature.

23 You should sign within 30 days. If you do not  
24 sign that, then the original copy without your signature  
25 will be deemed the executed copy. And I will hold on to

Naval, Ronaldo 4/1/2011 12:00:00 PM

1 the original transcript and then make it available at  
2 trial.

3 Do you have any questions?

4 MR. MURATA: Ms. Pilch, I think it's 30  
5 days from receipt of the transcript, to be clear.

6 MS. PILCH: Yes. Thank you for  
7 correcting that.

8 MR. MURATA: Thirty days from the day,  
9 not 30 days from the date of the deposition.

10 MS. PILCH: Exactly.

11 THE WITNESS: I do not have any  
12 questions. Thank you very much.

13 MS. PILCH: Great. Thank you.

14 THE VIDEOGRAPHER: The time is 12:18 p.m.

15 This is the end of Tape Number 2. We are off the  
16 record.

17 (Proceedings adjourned at 12:18 p.m.)

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Newby, Williams 2/17/2011 12:00:00 PM

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF FLORIDA

3  
4 IN RE: FONTAINEBLEAU LAS VEGAS  
CONTRACT LITIGATION

5  
MDL No. 2106

6  
No. 09-MD-02106-CIV-GOLD/GOODMAN

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15 DEPOSITION OF WILLIAM S. NEWBY

16 Los Angeles, California

17 Thursday, February 17, 2011

18

19

20

21 Reported by:

LORI SCINTA, RPR

22 CSR No. 4811

23 Job No. 155972

24

25

Newby, Williams 2/17/2011 12:00:00 PM

1 retail space?

2 And there was some notion -- I guess Lehman,  
3 from what I recall -- somebody in the organization that  
4 was Lehman or assumed Lehman was making payments for a  
5 while.

6 But that was to me an obvious question, and  
7 there was nobody I could ask it of. But what do you do  
8 about Lehman?

9 The other stuff, you know, construction  
10 projects costs go up and they go down. It happens all  
11 the time. As long as it stays in balance. That's why  
12 you have the in-balance test. You can decide you need  
13 one or two less restrooms over here and take the money  
14 and add a hot dog stand over there, and you're in  
15 balance.

16 And as long as the scope of it generally stays  
17 the same, we're okay. And that's why lenders have a  
18 construction process where some entity is hired to  
19 monitor construction to kind of make sure all these  
20 components are, you know, still working the way they're  
21 supposed to generally so that at the end of the day we  
22 end up with an asset that resembles what it is that we  
23 started out believing we were financing.

24 MR. DILLMAN: I'm going to have to take a break  
25 here. I've got a call that I have to take. I don't

Newby, Williams 2/17/2011 12:00:00 PM

1 know how long. Probably about 15 minutes, if that's

2 okay.

3 MR. CANTOR: Sure.

4 MR. DILLMAN: Good. Let's resume then.

5 (Recess taken.)

6 MR. DILLMAN: Back on the record.

7 Q Before we broke, Mr. Newby, we were talking

8 about scuttlebutt on the Fontainebleau budget. You said

9 you had spoken to some people -- might have been Susman,

10 might have been Varnell, but whatever, B of A ex-pats,

11 after the time that you left.

12 Correct?

13 A Correct.

14 Q And that in the course of those discussions you

15 came to understand or believe that there were budget

16 overruns on the Fontainebleau project.

17 MR. CANTOR: Objection.

18 BY MR. DILLMAN:

19 Q Correct?

20 A Yes.

21 Q Other than a general sense that the project was

22 over budget, did you come away with any sense as to

23 the -- any specific reason why or any specific area that

24 caused these budget overruns?

25 A No. No.

Newby, Williams 2/17/2011 12:00:00 PM

1 Q Did you ever come to learn there was any issue  
2 with Fontainebleau's initial budget for the project?

3 A No. And, again, the two -- two areas of  
4 context were I was -- would have been -- where I was  
5 concerned without anything -- any specificity was the  
6 fact that Lehman was gone, and they were source of the  
7 loan for the funding for the retail, and that the  
8 general condo market had collapsed and that it was  
9 unlikely in my view that they could sell the condos,  
10 which were a component of the budget.

11 But, as I recall, there was an alternative  
12 scenario: If they can't sell them for this, then this  
13 happens. So there was a mechanism for dealing with  
14 that, as I recall, in the loan agreement. And I just  
15 remember thinking, well, obviously, it's pretty clear  
16 they're not going to sell the condos. So that other  
17 mechanism kicks in, and that's how it stays in balance.

18 And that was, again, without being specific to  
19 the mechanism or the details. I remember thinking that  
20 that must be happening. Because this is happening;  
21 ergo, that must be happening, too.

22 Q Did you have any conversations with anyone  
23 concerning the impact of Lehman's bankruptcy on the  
24 Fontainebleau financing, specifically whether that would  
25 be an event of default under any of the financing

Newby, Williams 2/17/2011 12:00:00 PM

1 documents?

2 A I don't recall that. I do recall talking to  
3 Glenn Schaeffer about Lehman and him saying a couple  
4 times, "Gee, they're funding -- somebody keeps  
5 funding" -- without being specific, I don't recall who  
6 it was, but somebody in the Lehman context was funding  
7 their obligations on a as-they-go basis -- "so we're  
8 kind of holding" -- he was holding his breath. I guess  
9 I was holding my breath, too, that it would have a happy  
10 ending.

11 Q When did Mr. Schaeffer inform you that someone  
12 was funding Lehman's obligations?

13 A It would have been right after Lehman -- you  
14 know, the whole Lehman implosion. So what was that?  
15 Like fall of '08?

16 Q Mr. Schaeffer tell you that Lehman -- excuse  
17 me -- that Fontainebleau had funded the first draw,  
18 Lehman's draw under the retail following Lehman's  
19 bankruptcy?

20 A Yeah, that there was -- somebody, somebody was  
21 continuing to fund -- some entity within Lehman, some  
22 assignee or -- was continuing to fund the Lehman piece.

23 And, as I recall, it was not funded up-front,  
24 but it was funded on a -- as the project developed, they  
25 would fund their piece of it, I believe.

Newby, Williams 2/17/2011 12:00:00 PM

1 And he was saying, "Yes, for some reason they  
2 keep -- they are funding, so we're holding our breath."  
3 That was essentially what he was saying.

4 Q Did Mr. Schaeffer tell you that the first  
5 payment following Lehman's bankruptcy was made by  
6 Fontainebleau, not by Lehman?

7 A No. I don't recall that at all.

8 Q Did you learn that from anybody?

9 A No.

10 Q Did you learn from anybody that at some point  
11 in time Lehman stopped making draw payments under the  
12 retail facility?

13 A I seem to recall hearing that, yeah, and I  
14 can't remember when or who said that. And I'm not  
15 surprised -- I remember thinking I'm not surprised. I  
16 mean, I was surprised they were making them in the first  
17 place.

18 Q Did you come to understand whether those  
19 payments were being made by anyone else after Lehman  
20 stopped making them or whether they were just not being  
21 made at all?

22 A My recollection is that they weren't being made  
23 at all. And now we have a -- now we have an obvious  
24 gap, and they have to address it.

25 But I don't recall any of the details. Again,



Pardon, Douglas 3/3/2011 5:20:00 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.)  
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March 3, 2011  
9:57 a.m.

VIDEOTAPED DEPOSITION of DOUGLAS PARDON,  
a witness on behalf of the Plaintiffs, 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.

Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 Q. Did you know any information -- let  
3 me rephrase.

4 Did you know any information in  
5 September of 2008 -- let me strike that.

6 Did Fontainebleau tell you at any  
7 point between September of 2008 and December 2008  
8 that Lehman would not be funding the retail  
9 facility advance?

10 A. I believe that one of the quarterly  
11 earnings reports, that Fontainebleau reported  
12 that -- they stated that at least one advance had  
13 been made by another retail lender. I believe  
14 that that was in a report that Fontainebleau  
15 produced for investors.

16 Q. And did you have any reason to  
17 believe that that statement was not true?

18 A. It was a document produced by the  
19 company and signed by the CFO, so I believed it  
20 to be true.

21 Q. Did you ever ask Fontainebleau who  
22 that lender was?

23 MR. HOBART: Objection. Vague.

24 A. I don't recall asking that specific  
25 question.

Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 didn't know who all of the retail lenders were, I  
3 probably assumed it was possible that he might  
4 have had a commitment on the retail loan.

5 Q. And you knew who Soffer was at the  
6 time?

7 A. Yes.

8 Q. Who was he?

9 A. His exact title, I'm not sure; but I  
10 believe he was chairman or chairman/CEO of the  
11 Fontainebleau parent companies. And he was the  
12 largest equity owner of the company.

13 Q. In October of 2008, did you think  
14 that Soffer would have been permitted to fund for  
15 Lehman?

16 A. I did not know the answer to that.

17 Q. Did you discuss with Bank of America  
18 your concern that the colenders could include  
19 Soffer?

20 A. I don't recall that.

21 Q. Did you speak with Jim Freeman on  
22 September 23, 2008, or around September 23, 2008?

23 A. As I said, I don't know if I  
24 specifically spoke with him on a specific date;  
25 but I said I believe I spoke with the company a

Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 few times between Lehman's bankruptcy and the end  
3 of 2008.

4 Q. Did Jim Freeman ever tell you that  
5 Fontainebleau was considering funding with  
6 equity?

7 MR. HOBART: Objection. Vague.

8 A. I don't recall him saying that.

9 MR. RIVNER: I'd like to mark this  
10 as an exhibit.

11 (Exhibit 92, Bates No. BGD 001616,  
12 E-mail dated 9/23/08 from Pardon to Pardon,  
13 marked for identification.)

14 BY MR. RIVNER:

15 Q. Let me know when you've had a chance  
16 to look at the document.

17 A. Sure.

18 (Witness peruses the exhibit.)

19 A. Okay.

20 Q. Does this refresh your memory of a  
21 September 23, 2008, call with Freeman?

22 A. Yes, according to this, I had a call  
23 with Freeman on the 23rd.

24 Q. Was Don Morgan on that call as well?

25 A. Yes.

Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 Q. And Jim told you that they were  
3 working on contingencies with Lehman with their  
4 credit facilities and with equity? It's the  
5 second bullet there.

6 (Witness peruses the exhibit.)

7 Q. Did you ask Jim Freeman what  
8 contingencies?

9 A. I didn't have a chance to answer the  
10 question.

11 Q. Okay.

12 MR. HOBART: Can we have the  
13 question read back, please.

14 (Record read.)

15 A. It's a fair characterization.

16 Q. Did he tell you what those  
17 contingencies were?

18 A. I believe he just said  
19 contingencies.

20 Q. Did you ask him what those  
21 contingencies were?

22 A. I don't recall.

23 Q. Did you discuss with him what the --  
24 any contingencies with equity?

25 A. I believe, based on my notes, that

Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 he said they were working on contingencies. That  
3 included contingencies with the credit facilities  
4 and contingencies with equity.

5 Q. And based on these notes, what did  
6 you mean by "equity"?

7 A. New cash coming in from a parent  
8 company, from a new investment of cash by a  
9 shareholder.

10 Q. Did you have an understanding of why  
11 that would be necessary?

12 A. Could you clarify?

13 Q. Sure.

14 Why would they need additional  
15 equity for the project?

16 MR. HOBART: I'm going to object.

17 Calls for speculation.

18 You're asking for his opinion or  
19 whether they expressed --

20 MR. RIVNER: For your -- both.

21 Q. Did they express an opinion for why  
22 they needed additional equity?

23 A. I believe that Lehman -- there was  
24 \$120 million of capital that needed to come in to  
25 complete this project, and so they needed -- they

Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 needed -- they believed they needed \$120 million.

3 Q. So they believed -- they told you

4 that they believed that the Lehman funding was

5 not going to be available?

6 A. I think they were working on

7 contingencies to the extent that it wasn't. That

8 is what I read here.

9 Q. It wasn't -- so it wasn't definite

10 one way or the other?

11 MR. HOBART: Again, the question's

12 vague.

13 As to them or as to him?

14 Q. Did Fontainebleau tell you that

15 Lehman was not going to fund?

16 A. On September 23, 2008?

17 Q. Yes.

18 A. Did they tell me that Lehman was not

19 going to fund; is that the question?

20 Q. Yes.

21 A. I don't recall them specifically

22 telling me that.

23 Q. But they did tell you they were

24 working on contingencies in case they did not?

25 A. That is what my notes say, yes. So

Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 I believe that to be the case.

3 Q. And then if you go to the third

4 bullet from the bottom there, it says, "Lehman is

5 a servicer and is telling them they will fund on

6 the facility."

7 Do you see that?

8 A. Yes, I see that.

9 Q. Does that refresh your memory that

10 Jim told you that Lehman was planning on funding

11 a facility?

12 A. No. By "them," I don't read that to

13 necessarily be Lehman. I read that to be that

14 the advances would be made.

15 Q. By someone?

16 A. Correct.

17 Q. What exact -- strike that.

18 So what did Jim Freeman tell you

19 about those contingencies?

20 A. He didn't provide any other details

21 other than contingencies.

22 Q. What else?

23 A. To the best of my recollection,

24 there were contingencies and it was left at that.

25 Q. What else did Jim Freeman tell you



Pardon, Douglas 3/3/2011 5:20:00 PM

1 DOUGLAS PARDON

2 about at this meeting?

3 MR. HOBART: I'm just going to

4 object on the ground the witness' testimony

5 is he didn't recall what was said. His

6 memo is the only document that reflects

7 what he may have heard in that conference.

8 So the question lacks foundation.

9 Q. Does this memo refresh your memory

10 of any additional statements that Jim Freeman

11 would have made -- Jim Freeman made to you at

12 this meeting?

13 A. No.

14 Q. If you look at the fourth bullet, it

15 says, "Soffer is leading the process for managing

16 the multiple equity sponsors."

17 What does that bullet mean?

18 A. I take that to mean that he is

19 leading the process of the contingencies.

20 Q. Did you view the insertion of equity

21 as a -- scratch that. Strike that.

22 In September of 2008, did you view

23 the possibility of additional equity coming in to

24 the project as a good thing for the project?

25 MR. HOBART: Objection. Vague and

Pryor, Shepherd 8/17/2011 9:00:00 AM

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF FLORIDA

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6 IN RE: FONTAINBLEAU LAS VEGAS )

7 CONTRACT LITIGATION ) Case No. 09-MD-02106

8 MDL No. 2106 ) CIV-GOLD/GOLDMAN

9 This document relates to all )

10 actions. )

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14 Deposition of SHEPHERD G. PRYOR IV,

15 taken at 865 South Figueroa Street,

16 Los Angeles, California, commencing at

17 9:00 a.m. Wednesday, August 17, 2011, before

18 Gail E. Kennamer, CSR 4583, CCRR.

19

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Pryor, Shepherd 8/17/2011 9:00:00 AM

1 APPEARANCES OF COUNSEL:

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13 and JOHN D. ESTERHAY, ESQ.

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15 New York, New York 10036

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17 dcantor@omm.com

18 jesterhay@omm.com

19

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22

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1 Wednesday, August 17, 2011; Los Angeles, California

2 9:00 a.m.

3 -- o0o --

4

5 SHEPHERD G. PRYOR IV,

6 a witness herein, having been administered the oath,

7 testifies as follows:

8

9 -EXAMINATION-

10

11 BY MR. CANTOR:

12 Q. Could you state your full name for the record,

13 please.

14 A. Shepherd G. Pryor IV.

15 Q. And could you give me your business address,

16 please.

17 A. 975 North Avenue, Highland Park, Illinois

18 60035.

19 Q. And, Mr. Pryor, until a minute or so ago, you

20 and I never met before, have we?

21 A. We have not.

22 Q. Am I correct, sir, you have been retained as

23 an expert witness on behalf of the plaintiffs in this

24 litigation?

25 A. Yes.

Pryor, Shepherd 8/17/2011 9:00:00 AM

1 Q. I will show you a document that we have had  
2 marked as Exhibit 932.

3 MR. DILLMAN: Okay.

4 (Whereupon the document referred to is marked by  
5 the reporter as Exhibit 932 for identification.)

6 BY MR. CANTOR:

7 Q. I don't know whether you have seen it before.

8 MR. DILLMAN: I'm impressed you have an  
9 exhibit number that wasn't a 1.

10 BY MR. CANTOR:

11 Q. Mr. Pryor, have you ever seen this document  
12 before?

13 A. Yes.

14 Q. And if you'd take a look at page 57 of the  
15 document.

16 Is that your signature?

17 A. Yes.

18 Q. And could you tell me what this document is,  
19 sir?

20 A. This is my expert report dated May 23rd, 2011.

21 Q. Okay. If you could turn to Exhibit A to your  
22 report and in particular, pages 4 through 6 of Exhibit

23 A.

24 A. (Indicating.)

25 Yes.

Pryor, Shepherd 8/17/2011 9:00:00 AM

1 Q. Is that your current resume and curriculum  
2 vitae, however you prefer to term it?

3 A. Yes. With one update.

4 Q. Okay. What would that be?

5 A. On page 6.

6 Q. Okay.

7 A. There is a listing of directorships in the  
8 company. The second company listed, Ulteig Engineers,  
9 I'm now currently chairman of the board of that  
10 company.

11 Q. Okay. Not executive chairman?

12 A. Correct.

13 Q. If you'd turn back to page 5, I will walk  
14 through your resume a little bit and try to do it in  
15 chronological order.

16 MR. DILLMAN: Sorry. Page 5 of Exhibit A?

17 MR. CANTOR: Of Exhibit A. I'm sorry if that  
18 was unclear.

19 Q. Am I correct, sir, that First National Bank of  
20 Chicago was the first job in the banking industry you  
21 had?

22 A. Yes, it was.

23 Q. Okay. And you started there -- What is the  
24 First Scholar Program, please?

25 A. The First Scholar Program was a management

1 training program that took a selected group of  
2 employees, brought them in as a selected group of  
3 employees. And I involved them in full-time day-to-day  
4 work in various rotational assignments, and at the same  
5 time those people also attended business school at  
6 night.

7 Q. I see.

8 And during that period, the assignments you got  
9 were various areas of the bank just to learn those  
10 areas; is that right?

11 A. They were various areas. It was sometimes  
12 independently negotiated areas. So, for example, I  
13 worked in the holding company, I worked in the trust  
14 department, and I worked in a corporate banking area as  
15 well.

16 Q. Okay. And then you became a loan officer in  
17 corporate lending?

18 A. Yes.

19 Q. And describe for me your responsibilities as a  
20 loan officer in corporate lending?

21 A. As a loan officer, I would be marketing  
22 services of the bank to potential customers. I would  
23 be negotiating loan commitments, analyzing the credit  
24 worthiness of customers, documenting the loans,  
25 monitoring the loans, and maintaining the customer

1 relationship.

2 Q. Okay. Now in your resume here you state that  
3 you made construction finance loans to vessel operating  
4 companies.

5 These are loans to build ships?

6 A. Yes.

7 Q. Okay. Anything other than that -- Withdrawn.

8 Let me ask a better question.

9 Is anything else encompassed within construction  
10 finance loans to vessel operating companies as it  
11 relates specifically to your experience at First  
12 National?

13 A. Well, I had a number of different experiences  
14 at First National, one of which was providing  
15 construction finance for vessels.

16 When I was in a unit that specialized in ship  
17 financing, that was the name of the unit.

18 Q. Okay.

19 A. Also, at First Chicago, I was in other  
20 assignments, so I was in other parts of the corporate  
21 banking group.

22 Q. Okay. And that's while you were a loan  
23 officer corporate lending or was that later on in your  
24 career at First National?

25 A. Well, I was -- Some of these things are -- Can



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1 get mixed. I was a loan officer or an assistant vice  
2 president over the course of time when I was with First  
3 National Bank of Chicago. I was in the corporate  
4 banking group for most of that time.

5 Q. I see.

6 A. And I was in more than one unit of the  
7 corporate banking group. So that I focused at one  
8 point on vessel owning and operating companies --

9 Q. Right.

10 A. -- and at another time on capital goods  
11 manufacturers.

12 Q. Okay. The vessel operating companies, what  
13 kind of ships are we talking about?

14 A. Could be ocean-going vessels, such as LNG  
15 carriers or it could be river boats, which could be  
16 stern wheel steamers, barge, tow boats, those types of  
17 vessels.

18 Q. Did it include things like large passenger  
19 ships, ocean liners?

20 A. We looked occasionally at ocean liners. Those  
21 would fall within the category. I don't recall having  
22 a loan of that nature at that time.

23 Q. And were these single-lender loans?

24 A. Both single lender and multi lender.

25 Q. When they were multi lender, generally

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1 speaking, how many co-lenders would you have?

2 A. Well, in the case of the LNG carriers, which  
3 were several hundred million dollars, there were a  
4 fairly large number of co-lenders.

5 Q. Did you have any agent responsibilities with  
6 respect to these multi-lender loans in connection with  
7 vessel -- for vessel operating companies?

8 A. Trying to recall. I believe in one -- in one  
9 or two, yes.

10 Q. Okay. You specifically recall instances in  
11 which -- Well, withdrawn.

12 And what, if any, agent responsibility did you  
13 personally have in those instances?

14 A. Well, the ones I'm recalling, I would have  
15 been the -- the loan officer who was in charge as the  
16 agent.

17 Q. Okay. And what were their agent  
18 responsibilities?

19 A. Well, in any of those cases where I was an  
20 agent on a multi-bank credit, whether it was that  
21 particular loan, I was sort of thinking about others.  
22 An agent would be responsible for collecting money,  
23 coordinating with the -- the various lenders,  
24 syndicate -- syndicate lenders or participants,  
25 coordinating with the borrower, determining whether

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1 funding was appropriate, for example, the conditions  
2 precedent, and handling a variety of informational  
3 transfers between borrower and the various lenders.

4 Q. For these loans to the vessel-operating  
5 companies that we have been talking about where you  
6 were acting as agent, were the funds, the loan funds,  
7 disbursed all at one time or were they disbursed over  
8 time?

9 A. In the particular one I'm thinking about, I  
10 believe there were some funding over a period of time.

11 Q. Okay. Do you remember how long a period of  
12 time that was?

13 A. Construction process took about two years, I  
14 think, in that one.

15 Q. Okay. Was the funding at regular intervals?

16 A. I don't recall enough of the detail.

17 Q. Okay. Then at some point you became a VP in  
18 the corporate lending area. And if I understood you  
19 correctly, the industry focus shifted; is that correct?

20 A. I was in a different unit, a unit that did not  
21 do vessels, but financed capital goods manufacturers.

22 Q. Okay. And when you say financed capital goods  
23 manufacturers, was it one particular part of their  
24 operations or would it be different types of loans  
25 depending on what they needed?

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1 A. It would be the latter. Capital goods  
2 manufacturers would be automotive, construction, farm  
3 equipment, machine tool. A variety of companies that  
4 might find their way into that particular customer  
5 group. But we would provide anything that was a --  
6 that was provided by a bank at that time: Term loans,  
7 revolving credits, short term --

8 Q. Right.

9 A. -- current lines, letters of credit. So the  
10 whole -- the whole array.

11 Revolving credits are the ones that have the  
12 characteristics that are most similar to the  
13 construction loans where there is borrowing. Sometimes  
14 in revolving credit, there is borrowing, repayment and  
15 reborrowing, or sometimes there is just a series of  
16 borrowings as the loan more or less fills up over time.

17 Q. The revolving credits that you were dealing  
18 with for these borrowers, were they generally in the  
19 nature of working capital-type loans, loans for current  
20 operations, as opposed to for capital projects?

21 A. They could be for any different reason. They  
22 could be working capital. They could be capital  
23 projects. They might be mergers and acquisitions.  
24 Variety of uses.

25 Q. Okay. Were any of the loans that you were

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1 involved in, in this area for construction, a plant or  
2 something similar?

3 A. There could have been, but I don't recall the  
4 particular instance.

5 Q. Would these loans have been single loans --  
6 single-lender loans or multi-lender loans?

7 A. They were both. I recall instances where I  
8 was -- played the agent, the direct agent role, and  
9 credits with 15 or 20 participating lenders.

10 I recall others where it was a single-bank loan.

11 Q. Okay. And do you have any sense of how many  
12 of the loans in this part of your career you were  
13 involved in as an agent?

14 A. I can't recount exactly.

15 Q. Can you give me an estimate? Fewer than five?  
16 More than ten?

17 A. Probably over five. Probably less than ten.

18 Q. Okay. And then in 1977, you moved to Wells  
19 Fargo; correct?

20 A. Correct.

21 Q. Why did you leave First National Bank of  
22 Chicago?

23 A. I was recruited by Wells Fargo to open their  
24 first office for corporate banking outside of  
25 California.

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1 Q. Okay. And you started there as an assistant  
2 vice president and worked your way up to senior VP and  
3 regional manager; right?

4 A. I actually left as senior VP and deputy group  
5 head --

6 Q. Okay. I'm sorry.

7 A. -- for corporate.

8 Q. While you were in Chicago, it was -- the most  
9 senior position you obtained was senior VP and regional  
10 manager; is that correct?

11 A. More or less correct. In my transition or my  
12 effort to make a transition, I was taking the role of  
13 deputy group head, but I ultimately made a decision not  
14 to move to California.

15 Q. Okay. In the bullet points under the entry  
16 for Wells Fargo in Chicago, the second bullet point  
17 down, you state that, among other things, you were  
18 personally active in lending to companies.

19 Which period during your time at Wells Fargo in  
20 Chicago are you referring to as being personally active  
21 in lending to companies?

22 A. The entire period.

23 Q. Okay. And so that includes when you were  
24 regional manager?

25 A. Yes.

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1 Q. Okay. And when you say "personally active in  
2 lending to companies," can you explain to me what you  
3 mean by that?

4 A. Sure. The market that we participated in, in  
5 the time period in which I was playing that role in  
6 particular, the late '80s, mid to late 1980s, our loans  
7 that we became involved in were more and more  
8 concentrated in the highly leveraged transactions.  
9 Tended to be larger, more leveraged. They were a group  
10 of leveraged buyouts, merger and acquisition  
11 financings, leverage recapitalizations, and other  
12 transactions that were fundamental sort of  
13 transformative character to the borrower.

14 Most of the participations or the size of the --  
15 our portion of the loan would be in the 30- to  
16 100 million-dollar area.

17 Anything that approached \$100 million would  
18 require that I get on a plane, fly to California, and  
19 personally deal with the internal approvals, which  
20 meant that in order to accomplish that, I would be very  
21 deeply involved in the detail during the origination of  
22 those loans.

23 So I would visit customers along with people who  
24 worked for me. I would help in the analysis and -- as  
25 well as review analyses that were done by those

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1 players.

2 I would read and participate in the negotiation of  
3 documents, the actual loan documents, whether it was  
4 our documents or whether it was documents in a loan  
5 where we were participating.

6 So I played a very direct role, very similar to  
7 the role that I would have played as an account  
8 officer.

9 Q. Was there a threshold below which you didn't  
10 get involved --

11 A. It would --

12 Q. -- generally speaking?

13 A. Generally, I was extremely involved as I went  
14 through that entire period. There may have been some  
15 loans in the 1- to 5-million sort of category where I  
16 was less involved.

17 Q. Okay. And what were -- to the extent that it  
18 differs from what you were just explaining to me, what  
19 were your primary responsibilities as a senior vice  
20 president and regional manager?

21 A. I was -- I was charged with the marketing and  
22 origination and customer maintenance in the Midwest.  
23 Everything from Ohio, to Nebraska, to Missouri, let's  
24 say --

25 Q. Right.



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1 A. -- slice of the map.

2 And then at the point where I was transferring to  
3 California, just added everything in the Northern  
4 California, Pacific Northwest; so it just changed that  
5 geography.

6 But the -- but I had P&L responsibility basically  
7 for the all of the business, the business of the  
8 corporate banking group in the Midwest.

9 Q. What percentage of your time when you were  
10 senior vice president was spent on the -- the active  
11 lending-type activities that we have been discussing as  
12 opposed to your other duties as senior vice president?

13 A. Well, the lending was our major business. So  
14 it would have been, I don't know, maybe 90, 95 percent,  
15 and the other smaller component is in pursuing the  
16 managerial, coordination of various things that had to  
17 be done to -- to just oversee the activities of all of  
18 the employers.

19 Q. In the third bullet point down there under the  
20 Wells Fargo Chicago entry, you reference that you  
21 agented three major loans.

22 Do you recall the details of those loans?

23 A. To some degree.

24 Q. Who were -- Who were the company -- the  
25 borrowers? Excuse me.

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1 A. One borrower was Reliance Electric. It's a  
2 leverage buyout.

3 Q. Do you recall -- I'm sorry.

4 A. Let me think about. The --  
5 (Indicating.)

6 I want to set that loan aside.

7 Q. Okay.

8 A. I'm questioning whether that was exactly what  
9 role we were playing.

10 One -- one was the Revco DS.

11 Q. Okay. And --

12 A. One was Farrell Gas.

13 Q. F-a-r-r-e-l?

14 A. F-a-r-r-e-l-l. Gas.

15 Q. Okay.

16 A. One was West Point Pepperell, which was really  
17 a Farley Industries, F-a-r-l-e-y, Industries/West Point  
18 Pepperell.

19 Q. I remember that actually.

20 So in your resume you mentioned three major loans.

21 You have given me three, plus Reliance Electric.

22 Do you -- As you sit here now, do you recall  
23 whether Reliance Electric was one that you guys agented  
24 it or not?

25 A. We played a significant role. We may not have

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1     agented that particular one.

2           Q. Okay. When was the Revco DS loan?

3           A. Late 1980s.

4           Q. And what kind of financing was that?

5           A. It was a leverage buyout.

6           Q. And what sorts of loan facilities did Wells

7      Fargo provide or participate in, in connection with the

8     leverage buyout?

9           A. We provided a senior lending facilities. That

10    would be senior-secured revolving credits. There could

11    have been a term loan. It would be a mixture of --

12    revolvers and term loans would be our portion. And

13    there was a whole structure of other debt, subordinated

14    debt and various mezzanine instruments that were

15    provided by nonbanks.

16           Q. Now, when you provide -- Let's talk

17    specifically about Revco, but you can generalize, if

18    appropriate.

19           When you provide financing in an LBO context, are

20    you simply providing transaction financing or are you

21    also providing financing for the company's operations

22    post closing of the LBO?

23           A. Well, you raise a good point because post

24    closing, if you haven't provided for operations, you

25    probably created a big problem for yourself and the

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1 borrower.

2 Q. Right.

3 A. Generally, the leverage buyout financing  
4 generally has those two components. You got a certain  
5 component that -- that is necessary to affect the  
6 initial transaction. So, for example, if it's a -- if  
7 it's a go-private transaction, the money is being paid  
8 to stockholders, it's not retrievable thereafter, and  
9 it's also not residing within the company. So that --  
10 that's the first component of the transaction.

11 And thereafter, there is a need for working  
12 capital and operational financing.

13 Q. So the -- the loans that we're talking about  
14 here involved both aspects of that?

15 A. Yes.

16 Q. And the agenting responsibilities would apply  
17 to which aspect of that?

18 A. Both.

19 Q. Both. And how big was the lender group in  
20 connection with the Revco transaction?

21 A. I remember speaking to a pretty sizable  
22 roomful of bankers on more than one occasion on that;  
23 so just trying to remember from that. There had to  
24 between 25, 30 lenders, maybe more.

25 Q. Okay. And were these lenders -- I'm going to

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1 say this poorly, but let me -- I will give it my best  
2 shot -- Were these lenders a part of the lending group  
3 pre-closing or did they sign on -- was the loan  
4 syndicated or participation sold post-closing or both?

5 A. It was not a real either/or. They were --  
6 They were -- These -- These lenders were not typically  
7 loaning money or having corporate banking relationships  
8 with the company prior to the transaction.

9 Q. Okay.

10 A. So for the most part, they were brought into  
11 the transaction. They were brought in pre-closing in  
12 order to be a part of the closing. And then, of  
13 course, post-closing this group of lenders would then  
14 become the bank lenders for the company.

15 So we had to seek participants in the loan and --  
16 and talk to those people as they agreed or didn't agree  
17 to come into the financing.

18 Q. Okay. And what was your role personally with  
19 respect to the agenting responsibilities on this loan?

20 A. Well, I was the manager of the unit in which  
21 the loan was being negotiated and initiated.

22 Because of the size of the loan, again, I  
23 participated in the analysis, the negotiations. I met  
24 multiple times with the buyout group prior to the  
25 transaction, personally involved in the negotiation of

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1 terms and conditions, and in the approval process.

2 In the syndication process, at the time we handled

3 all within our office. We did not have sub units of

4 the bank that were -- that were providing the

5 syndication's efforts. We made contacts.

6 I occasionally had discussions with other banks

7 that we had meetings with, banks and the potential bank

8 group; so I would meet occasionally with some of those

9 people and attended the closing and thereafter the

10 movement of money is not handled and was not handled in

11 the Chicago office so the transfers of funds and those

12 issues were handled by a group that reported to me, and

13 that was housed in California.

14 Q. Okay. And would that group have been the ones

15 who would have been responsible for determining whether

16 any conditions precedent to the borrower obtaining

17 funds had been met?

18 A. That kind of responsibility would have been

19 resident with the loan officers, not the operational

20 people.

21 Q. Okay. And the loan officers were people who

22 reported to you?

23 A. Yes.

24 Q. But you personally were not responsible for

25 reviewing a -- a given request for funds and

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1 determining whether conditions precedent or other  
2 prerequisites to funding had been met; correct?

3 A. I would not necessarily participate in all of  
4 those, but I recall participating in some.

5 So if a question arose, for example, that might  
6 come into my office for discussion.

7 Q. Do you remember any questions that arose --  
8 arose on the Revco DS financing?

9 A. Yes.

10 Q. Can you tell me anything?

11 A. This company had a new chief financial  
12 officer, and he decided that it would be a good idea to  
13 make a prepayment under the agreement, and came into  
14 the bank, probably made a notification that he was  
15 planning to do prepayment.

16 And I recall having discussions about whether that  
17 was a good idea on the part of the company or not.

18 Whether -- Whether, if they made such a  
19 prepayment, they would have the ability to -- to  
20 reborrow.

21 Q. Okay. Were those discussions with him or  
22 internally at Wells Fargo?

23 A. I do -- I recall some internal discussions.

24 There were certainly discussions between him and  
25 various people. I don't recall whether I was involved

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1 in the direct conversation with him or not.

2 Q. With respect to that issue, were there any  
3 conversations with other lenders?

4 A. I don't recall.

5 Q. Any other issues that you can recall that got  
6 elevated to you in connection with the Revco DS  
7 financing?

8 A. I recall a conversation with the CEO about  
9 a -- I guess a threat that was issued to him from one  
10 of the subordinated lenders, and it was -- I don't  
11 know -- maybe threat is not the right word. Pressure  
12 from the subordinated lender for him to come and ask  
13 for some dispensations on the part of the -- of the  
14 senior lenders.

15 Q. Dispensations for the company or for the  
16 subordinated lender?

17 A. Well, dispensations for the company that would  
18 have accrued to the benefit of the subordinated lender  
19 in which -- which it was -- it was a -- more of an  
20 advisory conversation. I just gave my opinions on what  
21 I thought.

22 Q. Were there any discussions with the other  
23 lenders concerning this request?

24 A. I think it materialized into discussions with  
25 the other lenders over time.



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1 Q. Okay. Why over time as opposed to when it  
2 occurred?

3 A. There were some increasing pressures that this  
4 new CEO was trying to deal with.

5 Q. Okay. What were the nature of the discussions  
6 with the other lenders?

7 A. Requests that the company was making for  
8 waivers and amendments.

9 Q. And were those waivers -- requests for waivers  
10 and amendments granted?

11 A. Yes.

12 Q. And how was it determined that those would  
13 be -- would be granted? Withdrawn.

14 How did this -- the bank group determine whether  
15 those requests would be granted?

16 A. Typical waivers and amendments have a  
17 requisite number of banks or proportionate number of  
18 banks who would vote. Submitted to the banks as a --  
19 as a question or as a recommended action, and then the  
20 companies recommended or requested the action. The  
21 banks vote. And if the requisite number of banks  
22 approve it, then it's an approved waiver or an approved  
23 amendment.

24 Q. Okay. The Farrell Gas transaction, when was  
25 that?

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1 A. Again, in the late 1980s.

2 Q. Okay. And what kind of financing was that?

3 A. That was a major acquisition financing.

4 And followed by financing of a company with

5 provisions for continued series of acquisitions.

6 Q. All the funds were to be used for acquisitions

7 as opposed -- as opposed to operations?

8 A. Well, it would be hard to distinguish those in

9 a way. The company was a propane distribution company.

10 It purchased operating entities.

11 Q. Right.

12 A. And those became immediately part of its

13 operation.

14 The use -- I'm trying to recall whether the use of

15 proceeds was somehow specifically restricted to

16 acquisitions. I don't believe it was. I think it was

17 a broad scope of uses of proceeds within which were

18 acquisition financings, and they were conditioned by

19 certain rules that we negotiated.

20 Q. For example, if they wanted to acquire another

21 gas company and in so doing they recognized this

22 company had substandard equipment, could the funds be

23 used to purchase equipment or were they only to be used

24 for purchasing the ownership interest in this company?

25 A. That's what I'm saying. More than likely,

1 they would have purchased assets as opposed to some  
2 ownership interest, and -- and those assets would be  
3 blended with their total pool of assets over time.

4 Q. I see.

5 A. So I believe that the use of proceeds was not  
6 limited to making those small acquisitions on the  
7 go-forward basis, but also encompassed other operating  
8 entities.

9 Q. Okay. And what responsibilities did you  
10 personally have with respect to the agenting of these  
11 facilities?

12 A. Similar to the other loan I was involved in:  
13 In the meeting with the principals, meeting with the  
14 company over time, helping to conduct analysis,  
15 overseeing and reviewing analysis, participating in the  
16 negotiations, participating in the approvals.

17 Q. Were these loans where the bank group had  
18 committed financing in advance -- long in advance of  
19 the borrower actually -- actually accessing the  
20 financing or was it a situation for example with the  
21 follow-on acquisitions where each time the company  
22 would come back and say, "Okay, I'm going to do this.  
23 I need another million and a half" or whatever?

24 A. In the relationship that we had with the  
25 company, there was the initial loan. There may have

1     been some amending and increasing that went on  
2     thereafter in the facilities. There could have been  
3     possibly a new facility.

4         Q. In the initial loan, was that fully funded at  
5     closing?

6         A. Well, the acquisition portion was fully funded  
7     at closing.

8         Q. Okay.

9         A. The initial acquisition was as large as the  
10    company, existing company. So that was an ownership  
11    transfer whether by assets or stock, and it was -- so  
12    it was necessary to provide all that funding upfront.

13        Q. I guess what I'm getting at -- and I apologize  
14    if my question is ill formed -- were the banks as a  
15    part of that initial financing, were they committing to  
16    provide financing for other transactions down the road  
17    or were they putting in all of their money at that  
18    time, and it was being used for this initial  
19    transaction?

20        A. As I recall, there was a -- there was deeper  
21    commitment. That is, sufficient money to finance the  
22    initial acquisition and then ongoing funds that would  
23    be available both for the corporate operations and the  
24    other smaller acquisitions that might occur.

25        Q. Was this a similar situation in terms of your

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1 involvement to Revco, where at some point in time only  
2 certain issues would get elevated to you and the rest  
3 was left to the lending officers?

4 A. Most of the day to day was left to the lending  
5 officers, yes.

6 Q. Do you recall whether there were any issues  
7 that were -- were elevated to you with respect the  
8 Farrell Gas financing?

9 A. Yes.

10 Q. Can you tell me about those issues?

11 A. From time to time, I think we did process  
12 either additional loans or additional changes,  
13 amendments to the fundamental financing to provide them  
14 with additional funds to make those acquisitions, small  
15 acquisitions, that we were discussing.

16 Q. Okay. West Point Pepperell, when was that?

17 A. Similar timeframe, late 1980s.

18 Q. So for all of West Point Pepperell, Farrell  
19 Gas, and Revco, these were all while you were senior  
20 vice president and regional manager?

21 A. Yes.

22 Q. And what kind of -- What kind of financing was  
23 West Point Pepperell?

24 A. It was a loan to Farley Industries to acquire  
25 West Point Pepperell.

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1 Q. And similar to what we talked about with  
2 Revco, did it involve providing financing for  
3 operations post closing?

4 A. I would say yes.

5 Q. And what were your responsibilities as agent  
6 with respect to the West Point Pepperell financing?

7 A. Very similar to the -- my description in the  
8 other two cases.

9 Q. Do you recall any instances with respect to  
10 West Point Pepperell where issues that might otherwise  
11 have been handled by the lending officers were elevated  
12 to your attention?

13 A. Yes.

14 Q. Please tell me what you recall.

15 A. We had a co-agent bankers trust and we had  
16 numerous waivers and amendments that were requested by  
17 the company; and as a result, I was involved in  
18 numerous conversations about the waivers and  
19 amendments.

20 Q. With the co-agent?

21 A. With my account officers, with approval  
22 authorities with the co-agent. From time to time,  
23 definitely with the company, and could be conversations  
24 with the banks. I don't recall.

25 Q. Okay. Now, other than these three that we

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1 have been talking about and that are referenced in  
2 your -- in your resume, while you were at Wells Fargo  
3 in Chicago, did you have any other experience agenting  
4 major loans?

5 A. The qualification and the bullet point we're  
6 talking about was that these were billion-dollar size  
7 financing in the '80s. A billion-plus financing was  
8 probably comparable to some greater multiple,  
9 mini-billion-dollar financing.

10 So yes, there were other situations where we might  
11 have agented loans that were smaller dollar amount than  
12 a billion dollars. Again, leverage buyouts, leverage  
13 recaps, or acquisition financings.

14 Q. Were there any instances in which you were the  
15 lending officer with sort of front-line responsibility,  
16 if you will, for the agenting responsibilities?

17 MR. DILLMAN: Other than as he's already  
18 testified?

19 MR. CANTOR: Yes. I'm excluding these three  
20 now.

21 MR. DILLMAN: Well, and First National Bank  
22 of Chicago.

23 MR. CANTOR: All right. Let me start over.  
24 It was clearly not that great of a question.

25 Q. During your time at Wells Fargo in Chicago,

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1 other than the three loans we have been talking about,  
2 were there other instances in which you were the  
3 front-line representative for Wells Fargo in terms of  
4 its agenting responsibilities?

5 A. As I had done at first Chicago, occasionally  
6 served as the direct agent as an account officer, when  
7 I came over to Wells Fargo, I played a very similar  
8 role in banking. I was a direct account officer. I  
9 was calling on customers to seek direct business. And  
10 for several years, that was the total of my -- my  
11 responsibilities before I took over the management  
12 responsibilities in that office.

13 And in that time period, I served from time to  
14 time as an agent or I might have served as a direct  
15 lender with a single-lender transaction.

16 Q. Okay. Now, 1991, you moved out to San  
17 Francisco and became or may have -- shortly before you  
18 moved became senior vice president, deputy group head;  
19 correct?

20 A. I made a temporary move to San Francisco  
21 during that time period.

22 Q. Am I correct this was a promotion?

23 A. Yes.

24 Q. And in this position, senior vice president  
25 deputy group head, did you continue to be personally



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1 active in lending to companies?

2 A. I was certainly personally active in the  
3 approval process; but now the distance between me and  
4 the approval authorities was much different.

5 Q. You were on the other side of the table from  
6 what you had been doing in Chicago?

7 A. I wasn't just the approving authority at that  
8 point, but the approval authorities, the people that I  
9 had to go and seek a final approval from.

10 Q. Right.

11 A. I happened to be co-located with. So it was  
12 more a geographic change and the addition of the  
13 Pacific Northwest to my responsibilities along with  
14 those that I had in the Midwest.

15 Q. Okay. Did you have any agenting  
16 responsibilities while you were senior vice president  
17 deputy group head?

18 A. Well, as a continuation of those things that I  
19 had done when I was located in Chicago, those would  
20 have continued.

21 Q. By that you mean, the specific loans that you  
22 had worked on when you were in Chicago?

23 A. Right. Any of those things that were still in  
24 the portfolio.

25 I basically would have everything that was in the

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1 Chicago portfolio, now the addition of things that were  
2 in the portfolio from the San Francisco office that I  
3 took over. That -- that was basically all the Pacific  
4 Northwest.

5 So from time to time, during that period, I might  
6 have become involved. I recall enough conversations to  
7 know that I was involved in and out of various loans,  
8 various agented loans.

9 Q. Okay. Now, you left that job after a year;  
10 correct?

11 A. I left that job in, I think, about mid-1991.

12 Q. Okay. Why was that?

13 A. May of 1991.

14 Q. Why was that?

15 A. Family reasons. I had elected after -- after  
16 trying to make the move, decided that I would leave so  
17 that my family would not be dissatisfied with moving,  
18 which it was becoming a very strong preference.

19 Q. Okay.

20 A. So it was a family decision.

21 Q. When you made that decision, you needed to  
22 leave the bank as well?

23 A. Yes. Because we had closed our offices at  
24 Southern California generally.

25 Q. Okay. I want to jump ahead to the next item

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1 up, if you will on your resume. I'm going to mangle  
2 this name. Lobue Associates.

3 A. Lobue.

4 Q. Am I close?

5 A. Lobue.

6 Q. Lobue.

7 What kind of business is that?

8 A. Lobue Associates is an international bank  
9 consulting firm.

10 Q. And how did you get involved with them?

11 A. Actually from an ad that they placed.

12 Q. Where was the ad?

13 A. In some financial press.

14 And I was interested in putting together a product  
15 for a consulting company at the time. They were one  
16 that I talked to, about 1994, 1995. I was looking to  
17 put together a product to work on the credit process  
18 for banks, and they did not have a credit process, so I  
19 was bringing that capability to them.

20 Q. And explain to me what you mean by "credit  
21 process"?

22 A. The efficiency and the efficacy of the credit  
23 process, that is, the decision-making process,  
24 authority for credit approvals, monitoring of credits,  
25 the rating and grading of credits. Those things that

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1 are done according to regulatory mandates by every  
2 bank, but that sometimes are either costly, slow down  
3 the process, or maybe ineffective and create risk.

4 Q. And what you did was to try and streamline  
5 that process or make it more efficient?

6 A. Yes. Well, to rationalize that process. To  
7 make it more efficient on the one hand and to make it  
8 more effective on the other.

9 Q. In the first bullet under that entry, you  
10 refer to, "Redesigned the credit process and credit  
11 policy for a major Saudi Arabian bank." Can you tell  
12 me what you mean by credit policy?

13 A. Credit policies are generally documents and  
14 policies that govern the credit process of a bank.

15 In this particular situation, I drafted and  
16 designed the credit policy for that bank's approval.  
17 But every bank has a -- a policy framework within which  
18 its authority structure, its monitoring structure, all  
19 of the various things that the banks do in order to  
20 maintain their -- their control over, and the value  
21 that they get from the credit relationships that they  
22 have with their customers.

23 Q. Okay. The next bullet down talks about  
24 Rationalized Credit Group.

25 Is that similar to what you've just been talking

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1 about previously or is that a different sort of  
2 function?

3 A. That's similar to what I'm talking about.

4 Q. Okay. And then "Rationalized underwriting  
5 process for high growth mortgage finance company," what  
6 does that involve?

7 A. There was a mortgage finance company that  
8 issued first mortgages and home equity loans and their  
9 process took them 30 to 45 days to accomplish, and the  
10 project was to reduce the time necessary to accomplish  
11 that.

12 Q. Okay. Let's talk about Shepherd G. Pryor IV  
13 Management Consulting.

14 I can figure out where you got the name from. How  
15 many other employees are there in this company?

16 A. I am the employee.

17 Q. You are the employee.

18 Looking at some of the bullets under that entry,  
19 the third one down, says "Evaluate, design, develop,  
20 and reengineer critical business processes for  
21 financial institutions."

22 Can you explain to me what that means?

23 A. Well, there is a colon, and then a series of  
24 examples thereafter: Credit processes, credit training  
25 systems, portfolio analysis, product development, those

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1 types of things.

2 Q. I see.

3 A. So I was involved in a number of different  
4 projects to assist financial institutions with those --  
5 those areas.

6 Q. Okay. And then the next bullet down talks  
7 about conducting on-site acquisition due diligence  
8 (financial service).

9 What kind of due diligence would you be doing?

10 A. Credit, operational, legal, and accounting.

11 Q. And when you say "financial services  
12 industry," would you be doing due diligence for  
13 financial services companies that were making  
14 acquisitions or part of the lending process? What  
15 would your role be?

16 A. The acquirer is a financial institution, and  
17 they had a number of financial institutions of various  
18 types that they were interested in acquiring, and they  
19 needed on-site due diligence to verify all of the  
20 assumptions that they were making about the value.

21 And so I would go and either run a project team,  
22 for instance, say legal due diligence -- I'm not an  
23 attorney -- but I would have a series of a group of  
24 lawyers in the country doing legal due diligence and  
25 then coming back to me for further direction or inquiry

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1 opposing witnesses, rebuttal witnesses. In some cases,  
2 their depositions.

3 Q. Okay. But as you sit here today, you're not  
4 aware of any documents that you believe you need in  
5 order to render an opinion that you have not received.

6 Am I correct about that?

7 A. With -- With the caveats I gave before,  
8 correct.

9 Q. Right. That is what I'm trying to carve out.  
10 You may get stuff in the future; but as you sit here  
11 today, you are not aware of anything that you don't  
12 have that you would need?

13 A. If I were testifying in court today, I would  
14 be satisfied to render my opinion today.

15 If I testify six months from now, then my caveat  
16 would come into play.

17 Q. Okay. Other than the terms that are listed on  
18 Exhibit B, did you rely on anything in rendering the  
19 opinions that appear in your report?

20 A. Forty years of banking experience.

21 Q. I didn't say that wasn't relevant.

22 A. All of those background issues we talked  
23 about, obviously I rely on.

24 Q. Okay. Other than your experience and the hard  
25 copy materials that appear in Exhibit B, anything else

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1 that you relied on in reaching the opinions referred to  
2 in your report?

3 A. Not that I can think of at this moment.

4 Q. And is your report as of today full and  
5 complete?

6 A. Yes. As of today.

7 Q. If you would turn to page 10 of your report,  
8 the front of your report.

9 A. (Indicating.)

10 Q. Beginning on that page and continuing for the  
11 next several pages, is a section that appears to  
12 reflect your views on the role of an agent in a  
13 syndicated loan facility.

14 Is that a correct characterization?

15 THE WITNESS: Please read that back.

16 (The record is read by the reporter.)

17 THE WITNESS: Subject -- That's -- That's  
18 reasonably correct, subject to the fact that the role  
19 is specified within the particular set of documents  
20 that -- that govern an individual transaction.

21 BY MR. DILLMAN:

22 Q. Okay. If you'd look at Paragraph 20 on  
23 page 10, the first sentence there says that, "The  
24 provisions of the Credit Agreement and Disbursement  
25 Agreement must be viewed in the context of the



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1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF FLORIDA

3

4 -----x

5 )

6 In Re: FONTAINEBLEAU LAS ) Civil Action No.

7 VEGAS CONTRACT LITIGATION ) 09-MD-02106-CIV-GOLD/

8 ) Goodman

9 -----x

10

11 DEPOSITION OF

12 MCLENDON P. RAFEEDIE

13 February 24, 2011

14 9:21 a.m.

15

16 Kilpatrick Townsend & Stockton, LLP

17 1100 Peachtree Street, NE

18 Suite 2800

19 Atlanta, Georgia

20

21

22

23

24

25 Marsi Koehl, CCR, CCR-B-2424

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1 which we haven't yet been provided which is why I  
2 don't have the document to mark as an exhibit, to ask  
3 you questions about it. And we may or may not be able  
4 to obtain a copy of that before your deposition  
5 concludes today.

6 So let me ask you: What services or  
7 responsibilities were delegated to TriMont by Lehman  
8 with respect to the retail facility?

9 A. Well, there's certain services -- it's a  
10 servicing and asset management agreement. And under  
11 any -- the servicing category I would say that we  
12 provide customary services that other servicers --  
13 industry standard type loan servicing things. And  
14 examples would be cash management. As I mentioned to  
15 you previously, that would be like a lock box where we  
16 would sweep it monthly, whatever, pay operating  
17 expenses to the borrower or fill up buckets for  
18 reserves for various things.

19 Q. Let me interrupt you for a second. You  
20 didn't do that here?

21 A. It's not an operating property.

22 Q. My question though is: What responsibilities  
23 and obligations that Lehman had under the retail  
24 facility were delegated to TriMont?

25 A. Okay. Well, in this particular instance we

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1 did all the accounting. We calculated interest  
2 monthly. When there was a funding request on this  
3 particular loan, we would review the draw. We would  
4 sign off on it. We would ensure compliance. We would  
5 go to the co-lenders under this facility; request that  
6 they fund a certain balance by a certain day into a  
7 certain account. Then we would consolidate those  
8 funds; wire them to Bank of America.

9 We would also monitor whether the borrower  
10 had insurance like they were required to under the  
11 loan agreement; whether they paid their taxes like  
12 they are required to under the loan agreement. We  
13 would, you know, monitor their reporting; make sure  
14 that they were reporting like they were required to.

15 Q. Reporting? What reporting?

16 A. Well, for instance, once the thing --  
17 property was open and operating, they are required to  
18 provide financial statements. And then once a year  
19 they are supposed to provide financials and things of  
20 that nature. They are spelled out in this agreement.

21 Q. Financial reporting?

22 A. Yes. On the asset management side, I would  
23 do inspections of the property. I would meet with the  
24 borrower; maintain a relationship there. I would stay  
25 on top of things that were happening in the

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1 marketplace; would do status reports for the lender

2 monthly.

3 We would do, you know, valuation updates for

4 the vendor -- for Lehman's benefit. We would -- you

5 know, occasionally they would want to come down to our

6 offices and we would present, you know, a status

7 meeting.

8 Q. Who's the "they"?

9 A. Lehman.

10 Let's see. I'm sure I'm leaving something

11 out here.

12 Q. If you think -- as we go along, if you think

13 of additional activities and duties that TriMont had

14 under the retail facility, would you let me know?

15 A. Sure.

16 Q. I want to focus on a couple of things that

17 you indicated. You said you dealt with B of A?

18 A. Mm-hmm.

19 Q. Yes?

20 A. Yes.

21 Q. You were dealing with Bank of America as a

22 disbursement agent; were you not?

23 A. Yes.

24 Q. Were you the primary contact with B of A with

25 respect to the obligations and responsibilities that

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1 Lehman otherwise had under the retail facility?

2 A. Otherwise had? You mean --

3 Q. I think it was a confusing way to put it.

4 Lehman as the agent of the retail facility

5 had certain obligations in connection with interfacing

6 with B of A as the disbursement agent in terms of

7 funds and so forth; correct?

8 A. Correct.

9 Q. You took over all of those responsibilities

10 as part of your servicing agreement; did you not?

11 MR. KAEDING: Object to the form. You can

12 answer.

13 A. Well, in terms of coordination of funds and

14 the reporting that they were required to provide, yes.

15 I don't know if Lehman was having conversations with

16 Bank of America or not, so I don't want to say that I

17 was the only person talking to them.

18 BY MR. DILLMAN:

19 Q. I'm not suggesting that you were.

20 In terms of, however, the obligations that

21 Lehman had under the retail facility --

22 A. On a monthly basis funding, yes, I was.

23 Q. You were the primary --

24 A. Yes.

25 Q. -- contact with Lehman?

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1 A. No. I did not.

2 Q. In general, what sorts of interactions did  
3 TriMont have with B of A in the normal course of its  
4 servicing?

5 A. Well --

6 MR. KAEDING: Object to the form. You can  
7 answer.

8 THE WITNESS: I dealt primarily with one  
9 individual and that was Jean Brown.

10 BY MR. DILLMAN:

11 Q. Who is Jean Brown?

12 A. Jean Brown, yeah.

13 Q. Who was she as far as you understood?

14 A. She was my lead contact as a disbursement  
15 agent of Bank of America. She would -- a lot of phone  
16 calls and E-mails about -- in other words, funding is  
17 due on a certain date, meaning, Here's wiring  
18 introduction instructions; here's our affidavit that  
19 we've signed. You know, all the conditions that it  
20 was okay to fund, she would coordinate. And I would  
21 communicate with her and she was, you know, my primary  
22 contact at B of A. So it was generally in regard to  
23 the funding of advances.

24 Q. Do you know the name Brandon Bolio?

25 A. No. I don't.

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1 Q. At any time did TriMont intentionally keep  
2 information from B of A in its capacity as  
3 disbursement agent regarding potential problems --

4 MR. KAEDING: I'm going to object to --

5 MR. CANTOR: Object to the form.

6 MR. DILLMAN: How about I finish my  
7 question --

8 (Discussion ensued off the record.)

9 BY MR. DILLMAN:

10 Q. At any time, did TriMont intentionally keep  
11 information from B of A as disbursement agent  
12 regarding potential problems regarding funding of  
13 retail advances?

14 MR. CANTOR: Objection.

15 MR. KAEDING: Object to the form. You can  
16 answer.

17 A. No.

18 BY MR. DILLMAN:

19 Q. As part of TriMont's duties as a servicer  
20 under the retail facility, as the servicer, did  
21 TriMont understand that it was obligated to keep B of  
22 A as the disbursement agent apprised of potential  
23 problems regarding the funding of retail advances?

24 MR. KAEDING: Object to the form. You can  
25 answer.

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1 MR. CANTOR: Join.

2 A. We didn't keep anything from them. We were  
3 open in communicating about the status of our funding.  
4 Sometimes it was delayed. And I think you have copies  
5 of the E-mails that show the interaction where they --  
6 everybody in the world understood the situation with  
7 Lehman when they filed and their difficulties. So  
8 there was -- almost every month people were wondering  
9 if the funds came in, who paid them; things of that  
10 nature.

11 BY MR. DILLMAN:

12 Q. And you shared with B of A as part of your  
13 servicing obligations all of that information in a  
14 realtime basis; isn't that right?

15 MR. CANTOR: Objection.


16 MR. KAEDING: Object to the form. You can  
17 answer.

18 A. Yes.

19 BY MR. DILLMAN:

20 Q. I want to run through sort of the procedures,  
21 the mechanics by which TriMont requested, received and  
22 then forwarded funds under the retail facility.

23 A. Sure.

24 MR. DILLMAN: I think it might be helpful to  
25 do that with this document here -- 



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1

2

3

4

(Deposition Exhibit-11 was previously marked

5

for identification.)

6

BY MR. DILLMAN:

7

Q. Mr. Rafeedie, you've seen this document

8

before; have you not?

9

A. Yes.

10

Q.

11

A.

12

Q.

13

14

15

A.

16

Q.

17

18

19

A.

20

MR. DILLMAN: Sorry. Go ahead.

21

MR. KAEDING: So we're clear, I know you've

22

seen these documents over and over again and you lived

23

through this. But -- like the agreement, do look

24

through the whole thing and make certain it appears

25

everything is there before you say what it is or

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1 isn't.

2 THE WITNESS: To the best of my knowledge,  
3 this is the full package. You know, I would have to  
4 go through my file to make sure that all the  
5 attachments would be included. I believe that they  
6 are.

7 BY MR. DILLMAN:

8 Q. Yeah. And let's sort of go through this.

9 There was a standard package of information or  
10 materials that were sent out to co-lenders for each  
11 advance request; correct?

12 A. Yes.

13 Q. It included, first off, TriMont's letter  
14 outlining how much of a principal advance had been  
15 requested by the borrower?

16 A. There was other reporting, too, on the  
17 interest advances that was done separately at the  
18 beginning of the month. This was for the shared cost  
19 draw.

20 Q. Thank you. Let's focus just on those draws  
21 then because that's what we will be focusing on today.

22 A. Okay.

23 Q. There was TriMont's letter?

24 A. Right.

25 Q. 

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1

2

3

4

A.

5

Q.

6

7

A.

8

Q.

9

10

11

A.

12

Q.

13

14

A.

15

Q.

16

17

18

MR. KAEDING: Object to the form. You can

19

answer.

20

A.

21

22

23

BY MR. DILLMAN:

24

Q.

25

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1 [REDACTED]  
2 A. [REDACTED]  
3 Q. [REDACTED]  
4 A. [REDACTED]  
5 Q. [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 A. [REDACTED]  
9 [REDACTED]  
10 Q. [REDACTED]  
11 A. [REDACTED]  
12 Q. [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 A. [REDACTED]  
16 Q. [REDACTED]  
17 A. [REDACTED]  
18 Q. [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 A. [REDACTED]  
23 Q. Is that the -- was there a typical -- strike  
24 that.  
25 Were funds due the same date of the month

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1 under the various documents that governed your

2 servicing?

3 A. I believe so, unless it fell on a weekend or

4 holiday.

5 Q. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 A. [REDACTED]

9 Q. [REDACTED]

10 [REDACTED]

11 A. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Q. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 A. [REDACTED]

18 Q. [REDACTED]

19 [REDACTED]

20 A. [REDACTED]

21 [REDACTED]

22 Q. Now, assuming that all the funds came in as

23 requested by 10:00 a.m. on the 25th, what did TriMont

24 then do with them?

25 MR. KAEDING: Object to the form. You can

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1 answer.

2 A. We would -- assuming that there were no  
3 issues, we would process the wire to Bank of America.

4 BY MR. DILLMAN:

5 Q. And you would --

6 A. Or the --

7 Q. I'm sorry.

8 A. For the full amount of the advance that was  
9 requested.

10 Q. 

11 

12 

13 

14 MR. KAEDING: Object to the form. You can

15 answer.

16 A. 

17 BY MR. DILLMAN:

18 Q. 

19 

20 

21 MR. KAEDING: Same objection. You can

22 answer.

23 A. 

24 

25 

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]

5 BY MR. DILLMAN:

6 Q. [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11 A. [REDACTED]  
12 Q. [REDACTED]

13 [REDACTED]

14 A. [REDACTED]  
15 Q. [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 A. [REDACTED]

20 Q. [REDACTED]

21 [REDACTED]  
22 [REDACTED]

23 A. [REDACTED]

24 Q. [REDACTED]

25 [REDACTED]

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1

2

3

4

What was the retail funding account?

5

A. That was Bank of America's account.

6

Q. That's where you sent the funds?

7

A. Yes.

8

Q. Were those funds assessable by the borrower

9

at that point in that fund -- in that account?

10

MR. CANTOR: Objection.

11

A. I don't know.

12

BY MR. DILLMAN:

13

Q. In reviewing the disbursement agreement, did

14

you ever have an understanding as to whether or not

15

the funds that you wired to B of A were directly

16

assessable to the borrower or whether the borrower --

17

or excuse me -- whether B of A would then transfer

18

those funds to a further account that would be

19

assessable directly by the borrower?

20

MR. KAEDING: Object to the form. You can

21

answer.

22

A. The latter of what you described is my

23

understanding.

24

BY MR. DILLMAN:

25

Q. That there would be a two-step process?



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1 A. Yes.

2 Q. And that you would wire funds to the retail

3 funding accounts and then as it says here, that I just

4 read, it would be further credited to the resort

5 payment account. And it has a specific number there?

6 A. Correct.

7 Q. It was that account that the borrower had

8 access to, to your understanding?

9 A. I believe so. I'm not positive.

10 Q. Are you familiar with the bank proceeds

11 account?

12 A. No.

13 Q. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 A. [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 Q. Did you have an understanding as to when B of

23 A would credit to an account that the borrower could

24 access the funds that were provided by TriMont as

25 servicer under the retail facility?

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1 A. No.

2 Q. Did you understand that that would occur

3 simultaneously or at least on the same date,

4 September 25th, or some other date?

5 A. With the other proceeds is my understanding.

6 Q. Did you understand that B of A would disburse

7 all proceeds including the retail facility, assuming

8 that they were received on September 25th on that

9 date, that date being September 25th?

10 MR. KAEDING: Object to the form. You can

11 answer.

12 MR. CANTOR: Objection.

13 A. I was not aware when those funds -- I

14 believed it to be all at once, but I don't know that.

15 BY MR. DILLMAN:

16 Q. You believed it to be a transfer of -- excuse

17 me -- a wiring of funds from TriMont under the retail

18 facility on the 25th assuming that B of A received all

19 the other funds that it was required to receive under

20 the advance confirmation notice. All of those funds

21 as appropriate would be wired to the borrower for

22 access on the 25th; was that your understanding?

23 A. That was my understanding, but that was not

24 my role or I had no backup or anything to support that

25 one way or the other.

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1 it?

2 MR. KAEDING: Object to form.

3 A. I don't recall when the timing of the funds  
4 coming in...

5 BY MR. DILLMAN:

6 Q. [REDACTED]

7 [REDACTED]

8 A. [REDACTED]

9 Q. [REDACTED]

10 [REDACTED]

11 MR. CANTOR: Objection.

12 A. I have no reason to --

13 BY MR. DILLMAN:

14 Q. Let me ask --

15 MR. CANTOR: Let him finish his answer. He  
16 has no reason to what?

17 BY MR. DILLMAN:

18 Q. I'm sorry. I thought you were done.

19 A. I have no reason to dispute Mr. Kotite.  
20 However, I'm fairly certain the funds came in from  
21 Lehman. And we weren't -- to my knowledge, there was  
22 no communication with Lehman that this is money from  
23 the borrower to cover our advance or anything of that  
24 nature. The funds came in on that date. We did get  
25 this.

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1 Q. The funds came in on the 25th; is that what  
2 you meant by this date or the 26th?

3 A. It would have been one of those two dates.

4 Q. What causes you to believe that they -- the  
5 funds -- strike that.

6 The funds came in on the 25th and they came  
7 in from Lehman; is that your recollection?

8 A. As per the wire, as I recall.

9 Q. Is that a recollection that you have based  
10 upon your involvement at the time or one that you have  
11 gained at least in part and refreshed by recent review  
12 of documents?

13 MR. CANTOR: Objection.

14 MR. KAEDING: Object to the form. You can  
15 answer.

16 A. It was always my understanding.

17 MR. DILLMAN: Let's mark as 56...

18 BY MR. DILLMAN:

19 Q. Let me just get on the record, a  
20 September 26th, 2008 E-mail from Yetta Nicholson to  
21 Amit Rustgi, a copy to yourself. Before I have this  
22 marked, sir, who is Yetta Nicholson?

23 A. I believe she was in our treasury department;  
24 processed the movement of funds.

25 (Deposition Exhibit-56 was marked for

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1 identification.)

2 BY MR. DILLMAN:

3 Q. Mr. Rafeedie, Exhibit 56 reflects the payment  
4 by Fontainebleau Resorts, LLC on September 26, 2008,  
5 of \$2,526,184 in connection with the September draw  
6 under the retail facility; does it not?

7 A. It does.

8 Q. Does this help to refresh your recollection  
9 that, in fact, it was Fontainebleau Resorts, LLC and  
10 not Lehman that funded that portion of the September  
11 draw?

12 A. Yeah. Yeah, you are correct.

13 Q. With that in mind, Mr. Kotite's  
14 representations in the E-mail that we just looked at  
15 that was Exhibit 14 are indeed correct?

16 A. Correct.

17 MR. CANTOR: Objection.

18 BY MR. DILLMAN:

19 Q. The bottom of this E-mail -- excuse me -- the  
20 first E-mail in the chain in Exhibit 56, which occurs  
21 at the bottom, is from Mr. Rustgi to ATL Treasury Cash  
22 Management with a copy to yourself. And it states,  
23 With Lehman not funding their portion of the draw, the  
24 borrower has decided to fund Lehman's portion.

25 Do you see that?

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1 A. Yes.

2 Q. And then up above is the confirmation of that

3 wire; yes?

4 A. Correct.

5 Q. Now, consistent with your practice of keeping

6 B of A up to date on issues with respect to the retail

7 facility and payments thereunder, did you have any

8 conversations with B of A on September 25th, or

9 thereafter, concerning the late payment of the retail

10 facility?

11 MR. KAEDING: Object to the form. You may

12 answer.

13 MR. CANTOR: Object to the form.

14 A. I don't recall specifically, but I'm certain

15 there were.

16 BY MR. DILLMAN:

17 Q. And consistent with your practices, did you

18 tell B of A, specifically Ms. Brown, that Lehman had

19 not paid its portion of the September advance notice?

20 MR. KAEDING: Object to the form. You can

21 answer.

22 A. I don't remember the exact topics of

23 discussion --

24 BY MR. DILLMAN:

25 Q. But consistent with your practice --

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1 MR. CANTOR: Objection. Let him finish.

2 BY MR. DILLMAN:

3 Q. Were you not done?

4 A. We probably did discuss who would fund it and  
5 who didn't, but I don't recall exactly.

6 Q. The funds were due the 25th?

7 A. Mm-hmm. Yes.

8 Q. They were not paid on the 25th?

9 A. Correct.

10 Q. Because you hadn't received Lehman's portion  
11 on the 25th, you wouldn't have sent --

12 A. Partial.

13 Q. -- partial payment; right?

14 A. Correct.

15 Q. So on the 25th, Lehman -- B of A hadn't  
16 received any monies that were due under the retail  
17 facility in a disbursement --

18 MR. KAEDING: Object to form. You can  
19 answer.

20 A. It doesn't appear that they did. No.

21 BY MR. DILLMAN:

22 Q. As we talked about this, this would have been  
23 a cause for some concern with B of A?

24 MR. KAEDING: Object to the form. You can  
25 answer.

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1 MR. CANTOR: Objection.

2 A. Yes.

3 BY MR. DILLMAN:

4 Q. Would it have precipitated conversations

5 between you and Ms. Brown?

6 MR. CANTOR: Objection.

7 MR. KAEDING: Object to the form. You can

8 answer.

9 A. Yes. Yes.

10 BY MR. DILLMAN:

11 Q. You believe those conversations occurred?

12 MR. KAEDING: Object to the form. You can

13 answer.

14 A. Yes.

15 BY MR. DILLMAN:

16 Q. You had a practice of keeping B of A apprised

17 of any issues with respect to payment under the retail

18 facility; did you not?

19 MR. CANTOR: Objection.

20 MR. KAEDING: Object to the form. You can

21 answer.

22 A. Well, I wouldn't -- we wouldn't discuss

23 everything involved in the funding. But if there was

24 an issue of significance, yes.

25 BY MR. DILLMAN:



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1 Q. And Lehman's failure to fund was an issue of  
2 big significance; wasn't it?

3 MR. KAEDING: Object to form.

4 MR. CANTOR: Objection.

5 A. Yes. But they could have initiated the call.

6 I didn't necessarily call them in a panic or anything,  
7 yeah.

8 BY MR. DILLMAN:

9 Q. Understood. But it is the case that Lehman's  
10 failure to fund in September following its bankruptcy  
11 was an issue in your estimation major significance for  
12 this facility?

13 A. Yes.

14 Q. It was an issue of major significance to B of  
15 A?

16 MR. CANTOR: Objection. Calls for  
17 speculation.

18 MR. KAEDING: Object to form. You can  
19 answer.

20 A. I assume so, but I don't know.

21 BY MR. DILLMAN:

22 Q. You had conversations with B of A concerning  
23 Lehman's failure to pay in which you were apprised  
24 that it was a major -- an issue of major  
25 significance to do that; didn't you?

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1 MR. CANTOR: Objection.

2 A. Well, the primary concern was whether the  
3 full funding would take place and the timing of it.

4 BY MR. DILLMAN:

5 Q. During your conversations with B of A in the  
6 September 25/September 26th time frame, consistent  
7 with your practice, you would have informed Ms. Brown  
8 that Lehman didn't make its payment; correct?

9 MR. CANTOR: Objection.

10 MR. KAEDING: Object to form. It's been  
11 asked and answered. You can answer again.

12 A. Again, I feel like it was covered in our  
13 conversation. I don't recall the exact things that  
14 were discussed in that call. If the call -- as I  
15 recall, there was a conversation, but I don't --  
16 beyond that, I can't remember the specific details.

17 BY MR. DILLMAN:

18 Q. I understand sitting here today, what, three  
19 years later, something like that, you can't recall the  
20 specific words that were used and the details of the  
21 conversation. So I'm referring now to your general  
22 practice and custom of keeping B of A apprised of  
23 significant events with respect to the retail  
24 facility.

25 A. Correct.

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1 Q. And consistent with that practice, you would  
2 have told Ms. Brown about the fact that Lehman did not  
3 fund; isn't that correct?

4 MR. CANTOR: Objection. Calls for  
5 speculation. Asked and answered.

6 MR. KAEDING: Object to form.

7 A. That's correct. Or it could have been just  
8 that Lehman's dollars were funded, not necessarily who  
9 funded what.

10 BY MR. DILLMAN:

11 Q. Well, consistent with your practice of  
12 keeping B of A informed about material events -- and I  
13 believe you previously testified including who was  
14 paying -- you would have told her that Fontainebleau  
15 Resorts had paid Lehman's share not Lehman?

16 MR. CANTOR: Objection. Mischaracterizes his  
17 prior testimony. Calls for speculation.

18 MR. KAEDING: Object to form. Join.

19 A. Yeah. I could have.

20 BY MR. DILLMAN:

21 Q. As the servicer with the relationship you  
22 described with B of A in terms of full disclosure, you  
23 said you wouldn't have held anything back. It's your  
24 belief sitting here today that in or about the  
25 September 25/September 26 time frame you informed

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1 Ms. Brown at B of A that Lehman Brothers had not  
2 funded its share and that that share had been funded  
3 by Fontainebleau Resorts; isn't that correct?

4 MR. CANTOR: Objection. He said he could  
5 have told her. He didn't say he did.

6 MR. KAEDING: Object to form. Join. You can  
7 answer.

8 A. You say that, but I could have had -- let's  
9 see. What time did this E-mail come in? It's almost  
10 like six o'clock in the afternoon. I could have  
11 gotten funds in before that thinking they were from  
12 Lehman and talked to her and then got this afterwards.

13 BY MR. DILLMAN:

14 Q. Let's go back for a minute. Okay? Because  
15 you're holding Exhibit -- what -- 14? Okay.

16 Exhibit 56, you knew no later than 11:39 in  
17 the morning on September 26th that Fontainebleau  
18 Resorts was paying Lehman's share; didn't you?

19 MR. KAEDING: I'm going to object to the  
20 form. I mean, you have an E-mail, whether it was  
21 instantaneously read is a whole other question. I  
22 think he's gone over this. Go ahead. You can answer.

23 A. Right. I don't recall what time I opened the  
24 E-mail and saw that.

25 BY MR. DILLMAN:

1 Q. But certainly by 11:39 in the morning you had  
2 access to that information; didn't you?

3 MR. KAEDING: Object to form.

4 MR. CANTOR: Objection.

5 A. I would have to check my calendar. If I was  
6 out of the office or something, I may not have been  
7 able to open an attachment on my Blackberry.

8 BY MR. DILLMAN:

9 Q. You were keeping up monitoring this  
10 particular facility at this particular time with some  
11 interest; weren't you?

12 MR. CANTOR: Objection.

13 MR. KAEDING: Object to form. You can  
14 answer.

15 A. Yes. I'm just -- you're asking me to  
16 definitively answer something. And I'm just saying  
17 that there would be a set of circumstances where your  
18 previous comment --

19 BY MR. DILLMAN:

20 Q. There could be. And I understand that you  
21 don't recall exactly the conversations and events of  
22 that date.

23 But you were indeed -- you do recall being  
24 very acutely attuned to what was going on with this  
25 particular facility in light of Lehman's bankruptcy

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1 and in light of the fact that you didn't have funding  
2 on the designated date of September 25th to forward to  
3 B of A; isn't that correct?

4 MR. KAEDING: Object to the form. You can  
5 answer.

6 A. Well, again, I didn't recall that they had  
7 sent these funds in. So I'm telling you. It's three  
8 years ago, so my memory isn't ironclad. But,  
9 generally speaking, I would have been monitoring this  
10 closely. It was right about the bankruptcy time. And  
11 as I recall, I was in the office. But I can't  
12 remember every phone conversation, the timing of the  
13 phone conversation, what I said to Bank of America,  
14 when I said it.

15 BY MR. DILLMAN:

16 Q. I understand the exact details may be a bit  
17 cloudy. But the significance of this event at that  
18 time, that is the nonpayment of these funds by Lehman,  
19 that's not -- that's something you recall that it was  
20 significant and you were monitoring it?

21 MR. CANTOR: Objection.

22 MR. KAEDING: Object to form. You can  
23 answer.

24 A. Well, at some point during that day or the  
25 following day I would have seen this and known that it

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1 was Fontainebleau's money.

2 BY MR. DILLMAN:

3 Q. You were the primary contact with B of A on  
4 this?

5 A. Yes. Although, Amit would occasionally talk  
6 to Jean Brown, too, in my absence.

7 Q. But you weren't absent and you were the  
8 primary contact?

9 MR. CANTOR: Objection.

10 A. Again, I don't recall that particular day  
11 what my itinerary was. But if she would call me and  
12 couldn't get me, then she would go to Amit.

13 BY MR. DILLMAN:

14 Q. You do recall having conversations with B of  
15 A about the September payment issues?

16 MR. CANTOR: Objection.

17 A. As I recall, we did.

18 BY MR. DILLMAN:

19 Q. Having this information before you, that it  
20 was -- that Lehman had not funded and that  
21 Fontainebleau Resorts had paid Lehman's portion, that  
22 would have been information that you would not have  
23 hidden from B of A; would you?

24 MR. CANTOR: Objection.

25 MR. KAEDING: Object to form. You can

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1 answer.

2 A. No.

3 BY MR. DILLMAN:

4 Q. And that consistent with your practice of  
5 full disclosure to B of A, you would have expected  
6 that you would have informed B of A about that?

7 MR. CANTOR: Objection. Asked and answered.

8 MR. KAEDING: Objection. You can answer.

9 A. Yes.

10 MR. DILLMAN: Let's take a break.

11 (Recess from 10:34 a.m. to 10:44 a.m.)

12 BY MR. DILLMAN:

13 Q. Mr. Rafeedie -- back on the record. Do you  
14 have a recollection as to whether or not Lehman paid  
15 its share of the retail advances before October?

16 A. As I mentioned to you, I was incorrect  
17 initially on this draw. It was my understanding that  
18 they funded up until like December. So I don't recall  
19 them -- it seems like ULLICO started paying, based on  
20 my memory, effective like December, January, February,  
21 March advances.

22 Q. We'll get to those in a minute and I will  
23 represent to you that you are correct; that ULLICO  
24 and -- pursuant to some guaranty --

25 A. So to answer your question, I believe they



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1 funded the October one. But, again, you just showed  
2 me --

3 Q. I believe they funded, too, or at least I  
4 don't have any information to suggest at this point  
5 that they didn't.

6 My question is: Did you have conversations  
7 with Lehman during the -- let's start in September and  
8 just go through November -- whether or not they were  
9 going to pay, what's going on, that sort of --

10 A. Yeah. I had some, an occasional E-mail.  
11 You've got to understand what was going on at Lehman  
12 during this time. People were leaving. The  
13 bankruptcy court was getting involved. The trustee  
14 was getting involved. So, I mean, a lot of stuff was  
15 verbal. And it was chaotic time.

16 Q. I do -- can appreciate that that must have  
17 been the case knowing how Lehman has affected the  
18 entire world.

19 Do you recall that during that time period  
20 you were, in fact, talking with people at Lehman  
21 about -- on the topic of: Are you going to pay and  
22 when?

23 A. I'm sure I did.

24 Q. Who was your primary contact at Lehman?

25 A. At that time it was Al Picallo,

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1 P-I-C-A-L-L-O. And you should have his name on some  
2 of those E-mails.

3 Q. Yeah, I do.

4 Who else, if anyone, at Lehman?

5 A. The guy Masato Inagaki that worked with Al.

6 M-A-S-A-T-O I-N-A-G-A-K-I, I believe.

7 And then, let's see, I'm trying to think who  
8 Al reported to at that time, whether they were still  
9 there or they were gone. It might have been Anthony  
10 Barsanti.

11 Q. Josh Freeman?

12 A. Josh -- he was there and left, I think,  
13 fairly early on. I don't know if he was there at that  
14 time or not.

15 Q. Al Battle?

16 A. Al worked with me. He was my boss at the  
17 time.

18 Q. What was Josh's role when he was there?

19 A. Josh was more on the origination side and  
20 selling the notes to the co-lenders. I'm not familiar  
21 enough with Lehman's structure to give you his job  
22 description. But, in general, that's what he did.

23 Q. But on a day-in-day-out basis from the time  
24 that you took over as servicer, as servicer on the  
25 retail facility, Mr. Picallo would have been your

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1 primary contact?

2 A. Yes.

3 Q. And during this time period

4 September/October/November of 2008, you recall that

5 you had conversations with Mr. Picallo concerning

6 whether or not Lehman would be funding?

7 A. Yes.

8 Q. You recall that the funding in October and

9 the funding in November were sort of touch and go up

10 to the very last minute?

11 A. Correct.

12 MR. CANTOR: Objection.

13 BY MR. DILLMAN:

14 Q. And, in fact, you, TriMont, didn't know until

15 the day of, the day funds were due, whether or not

16 they would be coming in from Lehman?

17 MR. KAEDING: Object to the form. You can

18 answer.

19 A. I believe that's correct.

20 BY MR. DILLMAN:

21 Q. And then in December, Lehman stopped paying?

22 MR. CANTOR: Objection.

23 A. To my recollection, yes.

24 BY MR. DILLMAN:

25 Q. Did you have any conversations with

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1 Mr. Picallo or anyone else at Lehman concerning their  
2 decision to stop paying?

3 A. I don't recall. It's very understandable  
4 given their situation.

5 Q. Here's what I haven't been able to figure  
6 out. How did they pay during October and November if  
7 they were in bankruptcy? Did you ever have any  
8 conversations with anybody on that topic?

9 A. You know, we -- communication was difficult,  
10 as I mentioned earlier. And, you know, I would get  
11 E-mails sometimes like just -- they didn't want things  
12 in an E-mail to call or whatever or they'd be out of  
13 the office. And I don't know who they had to get  
14 things approved by and I don't know the mechanics of  
15 how they were operating.

16 They were in New York. I was in Atlanta. It  
17 was interesting to me. And I believe that's why I  
18 thought -- the first draw that you brought up was paid  
19 by them because I just remember ULLICO -- the  
20 documentation really flowing in heavily when they  
21 started making the advances on Lehman's behalf.

22 Q. In December?

23 A. Yes.

24 Q. But sitting here today, you don't recall any  
25 conversations -- let me broaden it -- with anyone on

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1 the topic of: How is it that Lehman is paying when  
2 it's in bankruptcy?

3 A. I don't recall that specific line of  
4 discussion.

5 Q. Generally on that topic?

6 A. Well, yeah. I mean, it's interesting and  
7 curiosity -- but, again, we serviced a lot of loans  
8 for them and we never knew which ones or if or yes or  
9 no. There was no rhyme or reason to us. I'm sure  
10 there was to them, but that wasn't shared to us.

11 Q. Did Lehman continue to make its payments on  
12 other loans that you were servicing?

13 A. Certain ones.

14 Q. Certain ones it stopped paying on?

15 A. Yes.

16 Q. Or at least earlier than -- it wasn't making  
17 payments on other loans in the October/November time  
18 frame?

19 MR. KAEDING: Object to the form. You may  
20 answer.

21 A. As I recall.

22 BY MR. DILLMAN:

23 Q. But you never got any explanation of why some  
24 and not others?

25 MR. KAEDING: Object to the form. You can

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1 answer.

2 A. No. I didn't.

3 (Deposition Exhibit-20 was previously marked  
4 for identification.)

5 BY MR. DILLMAN:

6 Q. Mr. Rafeedie, I've placed in front of you  
7 what's previously been marked as Exhibit 20. Can you  
8 identify this for the record?

9 A. That's correct.

10 Q. I know it's correct --

11 MR. KAEDING: He asked you to tell him what  
12 it is.

13 THE WITNESS: It is the draw request that  
14 went to the co-lenders for the December shared cost  
15 funding.

16 MR. DILLMAN: Let me put in front of you --  
17 strike that.

18 This was the December --

19 MR. KAEDING: Can we go off the record?

20 (Discussion ensued off the record.)

21 BY MR. DILLMAN:

22 Q. Exhibit 20 that I placed in front of you is  
23 the December advance request that TriMont sent to each  
24 of the lenders; is it not?

25 A. Co-lenders right. Retail, yes.

1 Q. This was a request that was not honored by  
2 Lehman?

3 A. To my -- yeah, as I recall.

4 MR. DILLMAN: Let me put in front of you  
5 Exhibit -- mark as the next in order -- 57.

6 (Deposition Exhibit-57 was marked for  
7 identification.)

8 BY MR. DILLMAN:

9 Q. Mr. Rafeedie, I place in front of you  
10 Exhibit 57. It's an E-mail from yourself to  
11 Mr. Picallo copied to others, including Mr. Battle.  
12 You say, FYI, I got voicemail from Jean Brown of Bank  
13 of America. The shared cost draw is on its way and  
14 they want to fund on 12/29. We are working on  
15 updating the IRR per your instructions.

16 In this context, do you know what you meant  
17 by "IRR"?

18 A. Internal rate of return model.

19 Q. And in this context, what were you working on  
20 with respect to the retail facility to provide to  
21 Lehman?

22 A. Well, as I mentioned to you, one of the  
23 things that we did under our services agreement was  
24 valuations and things of that nature. An IRR model is  
25 part of that valuation process. And it looks at, I

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1 believe, under the co-lending agreement, if another  
2 lender made an advance on behalf of another, that they  
3 received a higher interest rate. So I think it was to  
4 update and incorporate that, as I recall. I don't --  
5 it could have been for that reason or just showing if  
6 they resumed payments or if they didn't make any more.  
7 I can't recall the purpose of the exercise. But it  
8 was not uncommon for us to be tweaking our models  
9 constantly on different loan positions.

10 Q. Did Mr. Picallo tell you why he wanted an  
11 updated IRR?

12 A. I can't recall. That's what I just said.

13 Q. Did you understand that the valuation issues  
14 that you were analyzing for Lehman were important to  
15 Mr. Picallo in determining whether or not to continue  
16 paying under the retail facility?

17 A. I think it was -- he may have been asked by  
18 somebody about him. I don't know. I don't want to  
19 speculate why he wanted that. And I don't recall  
20 exactly what we were doing to the model to lead you  
21 one way or the other.

22 MR. KAEDING: My understanding of the model,  
23 it's a valuation model. And TriMont does consider --  
24 in that they've kind of spent a lot of time and  
25 invested a lot of effort into developing this



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1 valuation model. So the actual way it's done is -- we  
2 always treat as highly confidential. So to the extent  
3 you're going to ask him about that, I mean, I'll allow  
4 him to answer. But anything he says, I would want  
5 this designated, this part of the transcript, as  
6 highly confidential.

7 MR. DILLMAN: I'm not going to ask him about  
8 any process and procedures that would be in any way  
9 remotely confidential --

10 THE WITNESS: The IRR -- Lehman's IRR is  
11 different than other clients' IRRs.

12 BY MR. DILLMAN:

13 Q. My question was: Was it your understanding  
14 that the update that Mr. Picallo had asked you for,  
15 however that was done and whatever it yielded, was in  
16 conjunction with Lehman's ongoing decision whether or  
17 not to fund its portion of retail facility?

18 A. I assume so.

19 Q. In the first E-mail on this chain, the one  
20 below, Mr. Rustgi refers to conversations in Atlanta.  
21 He says, By the sound of our conversation in Atlanta,  
22 it does not sound like Lehman will be funding.

23 Do you recall meeting with Lehman in Atlanta  
24 in early December on the topic of whether or not they  
25 would be funding?

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1 A. Well, as I mentioned to you previously, one  
2 of the things we routinely did with all of our clients  
3 is have status meetings. And right after the  
4 bankruptcy, I'm sure Lehman, as I recall, was trying  
5 to get their arms around all their obligations and  
6 loan positions and trying to understand current  
7 status, so they could report back to people that were  
8 handling the bankruptcy and to prioritize things,  
9 things of that nature.

10 So, as I recall, we did have a big meeting in  
11 our conference room and details of the loan and the  
12 status were discussed. So I think that's what he's  
13 referring to.

14 Q. A big meeting here in Atlanta?

15 A. At our offices, yes.

16 Q. Attended, among others, Mr. Picallo --

17 A. Yes.

18 Q. -- who was out in New York?

19 A. Correct.

20 Q. At that meeting among potentially other  
21 topics was discussed whether or not Lehman would be  
22 funding its December advances under the retail  
23 facility?

24 A. I don't think we specifically discussed  
25 whether they would or wouldn't.

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1 Lehman's position in its entirety?

2 A. No.

3 Q. Did you ever learn from any source that  
4 anyone or any group of people had taken over Lehman's  
5 position in its entirety?

6 A. No.

7 Q. At all times prior to Fontainebleau's  
8 bankruptcy, you understood that there was no  
9 commitment for Lehman's portion of the retail facility  
10 in place; isn't that correct?

11 MR. KAEDING: Object to the form. You may  
12 answer.

13 A. It was a month-to-month thing.

14 BY MR. DILLMAN:

15 Q. And that there was no commitment by anyone to  
16 take over Lehman's entire position other than on a  
17 potential month-to-month --

18 A. Not to my knowledge.

19 Q. The funds -- sorry -- with reference to  
20 Exhibit 20, the funds for the December advance were  
21 due on the 29th of December; correct?

22 A. Correct.

23 Q. They were not received in total as of that  
24 date; were they?

25 A. I don't recall. But I assume you've got

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1 something that shows when they were received.

2 MR. DILLMAN: Well, let me just show you

3 Exhibit 58. This might help us out -- mark this as

4 Exhibit 58.

5 (Deposition Exhibit-58 was marked for

6 identification.)

7 BY MR. DILLMAN:

8 Q. This is an E-mail from -- the top one is from

9 Ms. Brown to yourself. The entire content is,

10 "Anything?" It's dated December 30, 2008. It is in

11 response to your E-mail below dated the same date that

12 says, We did get the ULLICO funding. Waiting on SMBC.

13 We'll send immediately thereafter.

14 This helps to refresh your recollection that

15 the monies were not paid to B of A as of December 29;

16 correct?

17 A. Correct.

18 MR. KAEDING: Object to the form.

19 BY MR. DILLMAN:

20 Q. As of December 30, you have gotten ULLICO's

21 payment both on behalf of its -- both for its share of

22 the December advance as well as for Lehman's share of

23 the December advance?

24 A. It appears so.

25 Q. You informed Ms. Brown that ULLICO was paying

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1 Lehman's share for December?

2 A. I believe I did.

3 Q. ULLICO paid Lehman's share as part of an  
4 arrangement with the borrower?

5 A. Correct.

6 Q. And that arrangement involved a guaranty?

7 A. Correct.

8 Q. Were you aware in the December time period  
9 that that arrangement was in place?

10 A. After the fact.

11 Q. You became aware of it later?

12 A. Correct.

13 Q. When did you first become aware of the fact  
14 that this arrangement between ULLICO and the borrower  
15 was in place?

16 A. When they provided that documentation.

17 Q. Do you remember when that was?

18 A. No.

19 Q. In connection with the January advance?

20 A. I'm sure you've got -- I do not recall the  
21 exact -- I can't -- that's three years ago.

22 Q. You know, I do appreciate that. I'm the last  
23 one to pick on somebody's memory.

24 A. Also, I had a lot more loans than just this  
25 one.

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1 Q. To be fair to you -- let me ask it in a more  
2 general way.

3 December -- there's an arrangement between  
4 borrower and ULLICO that you're not aware of in  
5 December; correct?

6 A. I don't think so.

7 Q. You think you became aware of that sometime  
8 later?

9 A. In January probably.

10 Q. I'm just trying to figure out whether it was  
11 a day, a week, a month, a year --

12 A. We're talking about a matter of days here.

13 MR. DILLMAN: The agreement between borrower  
14 and ULLICO is what I will -- what's previously marked  
15 as Exhibit 24.

16 (Deposition Exhibit-24 was previously marked  
17 for identification.)

18 BY MR. DILLMAN:

19 Q. Take whatever time you need to review that,  
20 sir. My question to you is: At some point you became  
21 aware of the existence of and received a copy of that  
22 agreement; isn't that correct?

23 A. Yes.

24 Q. When you became aware of that agreement, did  
25 you apprise Ms. Brown of its existence?

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1 A. I don't know if I told her about every piece  
2 of documentation we received. I told her that ULLICO  
3 was covering Lehman. But in regards to a guaranty or  
4 things of that nature, I don't remember if I did or I  
5 didn't.

6 Q. Did you tell Ms. Brown that the borrower  
7 was -- strike that.

8 Let's go to January. I think it'll make it a  
9 little clearer.

10 A. There was also a letter from ULLICO's counsel  
11 that preceded us getting this. It basically just  
12 notified all the co-lenders and Lehman that they were  
13 going to make that advance.

14 Q. Yes. Right. Right.

15 A. So, actually, I knew about it from that, as I  
16 recall, before I saw this.

17 Q. Knew about what?

18 A. I didn't know what the nature of their  
19 understanding was between ULLICO and the borrower  
20 until I received this.

21 MR. DILLMAN: Right. Let's move to January  
22 because at that point I think if you had more  
23 information in front of you, it might make it a little  
24 clearer. Let me put in front of you what's previously  
25 been marked as Exhibit 25.

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1 (Deposition Exhibit-25 was previously marked  
2 for identification.)

3 BY MR. DILLMAN:

4 Q. 25, sir, is the --

5 MR. KAEDING: Do you have any extra 25s?

6 MR. DILLMAN: Oh, yeah.

7 MR. KAEDING: Thanks.

8 MR. DILLMAN: Yeah.

9 BY MR. DILLMAN:

10 Q. 25 is the advance request for --

11 A. January.

12 Q. -- January of 2009; correct?

13 A. Correct.

14 Q. This is a document that TriMont sent out?

15 A. Yes.

16 Q. And Lehman did not fund its obligations under  
17 this January advance request; did it?

18 A. No.

19 Q. ULLICO did?

20 A. I believe so, yes. I believe they funded

21 December, January, February and March.

22 Q. And ULLICO's funding of this obligation in an  
23 amount equal to Lehman's share was reimbursed to it in

24 January by the borrower; correct?

25 A. I believe so. I know they partially



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1 reimbursed certain ones. They fully reimbursed  
2 others. I don't have the accounting fully memorized.

3 MR. DILLMAN: Yes, sir. Fair enough.

4 Let's mark as Exhibit 59 an E-mail from  
5 yourself to Mr. Picallo copied to Mr. Rustgi dated  
6 January 27, 2009.

7 (Deposition Exhibit-59 was marked for  
8 identification.)

9 BY MR. DILLMAN:

10 Q. Mr. Rafeedie, Exhibit 59 is an E-mail that  
11 you sent to Mr. Picallo?

12 A. Yes.

13 Q. Mr. Picallo asks you, Who funded our short  
14 fall? And you respond, ULLICO is, partly because  
15 ULLICO hadn't yet done it; right? It hadn't been  
16 funded yet?

17 A. Correct.

18 Q. You go on to say, Per paragraph two per doc I  
19 just sent you, it appears that Fontainebleau is going  
20 to reimburse ULLICO for this advance.

21 Do you see that?

22 A. Yes.

23 Q. So you knew at the end of January that  
24 ULLICO -- excuse me -- that Fontainebleau would be  
25 reimbursing ULLICO for the monies that ULLICO tendered

1 for Lehman's share of the January advance?

2 MR. KAEDING: Object to the form. You can  
3 answer.

4 A. I guess I did. Yeah.

5 (Deposition Exhibit-30 was previously marked  
6 for identification.)

7 BY MR. DILLMAN:

8 Q. [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 A. [REDACTED]

13 Q. [REDACTED]

14 [REDACTED]

15 A. [REDACTED]

16 Q. [REDACTED]

17 MR. KAEDING: [REDACTED]

18 [REDACTED]

19 MR. DILLMAN: [REDACTED]

20 [REDACTED]

21 A. [REDACTED]

22 BY MR. DILLMAN:

23 Q. [REDACTED]

24 [REDACTED]

25 [REDACTED]

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MR. KAEDING: Object to form. You can

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answer.

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A.

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BY MR. DILLMAN:

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Q.

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A.

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Q.

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MR. CANTOR: Objection.

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MR. KAEDING: Object to the form. You can

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answer.

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A.

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BY MR. DILLMAN:

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Q.

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1 MR. CANTOR: Objection.

2 MR. KAEDING: Object to the form. You can

3 answer.

4 A. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 BY MR. DILLMAN:

14 Q. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 MR. CANTOR: Objection.

18 MR. KAEDING: Object to the form.

19 A. [REDACTED]

20 MR. KAEDING: Give us a second. Object to

21 the form.

22 THE REPORTER: [REDACTED]

23 THE WITNESS: [REDACTED]

24 THE REPORTER: [REDACTED]

25 MR. CANTOR: [REDACTED]

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A.

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BY MR. DILLMAN:

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Q.

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MR. KAEDING: Object to the form. Sorry.

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BY MR. DILLMAN:

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Q.

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MR. CANTOR: Objection. Asked and answered.

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MR. KAEDING: Object to form. Asked and

18

answered and continuing -- mischaracterizes his prior

19

testimony. Go ahead. You can answer.

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A.

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[REDACTED]

BY MR. DILLMAN:

Q. [REDACTED]

[REDACTED]

A. [REDACTED]

Q. [REDACTED]

A. [REDACTED]

[REDACTED]

BY MR. DILLMAN:

Q. [REDACTED]

[REDACTED]

1 Q. My question was, I think, pretty simple.

2 You knew in January of 2009, as you informed

3 Mr. Picallo in Exhibit 59, that Fontainebleau was

4 going to be reimbursing ULLICO for the amount of the

5 January draw that ULLICO was going to be fronting for

6 the Lehman portion of that draw; correct?

7 MR. KAEDING: Object to the form.

8 MR. CANTOR: Object to the form.

9 A. Well, what I said in the E-mail was that

10 Fontainebleau is going to reimburse ULLICO, but I

11 didn't say in full, in part or -- I mean --

12 BY MR. DILLMAN:

13 Q. You said per paragraph two of the document

14 below, which is the first amendment to guaranty which

15 you have in front of you which says, "In full."

16 Doesn't it?

17 MR. KAEDING: Object to form.

18 MR. CANTOR: Argumentative.

19 MR. KAEDING: It's argumentative. It's been

20 asked and answered.

21 A. It says in here -- you can read it for

22 yourself. There's an outstanding balance here. I

23 didn't mean to represent anything other than he needs

24 to read that to understand the situation.

25 BY MR. DILLMAN:

1 Q. And you read that?

2 A. Yeah.

3 Q. You understood it when you read it?

4 A. Obviously, if I pointed it out to him, I read  
5 it.

6 Q. You understood it when you read it?

7 MR. KAEDING: Objection. Go ahead you can  
8 answer.

9 A. You're just --

10 MR. DILLMAN: Strike the question.

11 MR. KAEDING: I don't know where you're  
12 going. I think the only issue he's having is with  
13 whether ultimately that written promise was fulfilled.  
14 Maybe I'm missing something. I think that's the  
15 disconnect --

16 MR. DILLMAN: No. It's not, but that's okay.

17 THE WITNESS: My interpretation, the way he's  
18 asking the question, is whether they are going to  
19 immediately turn around and pay that. And, I mean, as  
20 I mentioned to you, it's my understanding that there  
21 are still sums -- because of all of these agreements,  
22 there's still -- that Fontainebleau never reimbursed  
23 ULLICO. They still have an IOU out there.

24 BY MR. DILLMAN:

25 Q. For some amount?



1 A. Yeah.

2 Q. So you don't know what exactly happened?

3 A. No. I didn't see the wires.

4 Q. Fair enough.

5 You had the first amendment agreement; right?

6 A. Yes.

7 Q. You read it at the time?

8 A. Yes.

9 Q. You --

10 A. Shared it and forwarded it on.

11 Q. You understood at least what its terms said.

12 Whether it was fulfilled or not, you understood it

13 terms?

14 A. Mm-hmm.

15 Q. Yes?

16 A. Yes. I just thought you were asking

17 something different than that.

18 Q. That's all I was asking. That's all I was

19 asking.

20 A. Okay.

21 (Deposition Exhibit-36 was previously marked

22 for identification.)

23 BY MR. DILLMAN:

24 Q. [REDACTED]

25 [REDACTED]

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A.

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Q.

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A.

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Q.

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A.

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Q.

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Q.

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A.

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Q.

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MR. CANTOR:

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MR. DILLMAN:

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A.

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BY MR. DILLMAN:

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Q.

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MR. KAEDING: Object to form.

24

A.

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1 BY MR. DILLMAN:

2 Q. 

3 A. 

4 

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6 (Deposition Exhibit-60 was marked for  
7 identification.)

8 BY MR. DILLMAN:

9 Q. Exhibit 60 is an E-mail with a document  
10 attached -- a series of E-mails. The first one is  
11 from Donita Johnson to yourself, dated February 25,  
12 2009. Ms. Johnson was with ULLICO; correct?

13 A. Correct.

14 Q. She attaches to this E-mail a copy of the  
15 second amendment to guaranty. Do you see that?

16 A. Yes.

17 Q. That's --

18 A. So I -- yeah, I did have it.

19 Q. She explains that ULLICO funded \$2,759,598.04  
20 today to cover the Lehman portion of the funding  
21 request you sent to us. In addition to date, ULLICO  
22 has received \$2,759,598.04 from the borrower to repay  
23 the principal advance made by ULLICO.

24 Do you see that?

25 A. Yes.

1 Q. So you knew that that had occurred?

2 A. Yes.

3 Q. And you did have -- strike that.

4 Did you inform B of A, in or about the late  
5 February time period, that ULLICO had funded the  
6 \$2.75 million amount to cover Lehman's portion of the  
7 February draw request?

8 MR. CANTOR: Objection.

9 A. I probably did, I mean, seeing how we were  
10 having conversations. I could have just said, We got  
11 the money in. You know, I don't know if I went into  
12 detail as ULLICO -- I assume I did.

13 BY MR. DILLMAN:

14 Q. Consistent with your practice of telling --

15 A. I may have. Yeah.

16 MR. KAEDING: Object to form.

17 Give us a split second to be able to answer.

18 (Discussion ensued off the record.)

19 BY MR. DILLMAN:

20 Q. Consistent with your practice of informing B  
21 of A of who was paying what on the retail facility,  
22 you expect that you would have told her that ULLICO,  
23 not Lehman, had made the Lehman portion of the  
24 February draw?

25 A. I believe I did.

1 MR. CANTOR: Objection.

2 MR. KAEDING: Object to the form. Just give

3 us a split second. Object to form. You can answer.

4 MR. CANTOR: Objection.

5 THE WITNESS: I believe I did.

6 BY MR. DILLMAN:

7 Q. And consistent with your practice to keep B  
8 of A informed about events with respect to the funding  
9 of the retail facility, did you also apprise Ms. Brown  
10 of the information that Ms. Johnson had given to you  
11 in Exhibit 60, specifically that ULLICO had received  
12 \$2,759,598.04 from the borrower to pay the principal  
13 advance made by ULLICO?

14 MR. CANTOR: Objection.

15 MR. KAEDING: Object to the form. You can  
16 answer.

17 A. I don't know whether I told her that the  
18 borrower was paying it back, ULLICO or not or just  
19 ULLICO. But as I mentioned to you, the borrower --  
20 you know, was calling everybody at this time period.  
21 I don't know what was being communicated.

22 BY MR. DILLMAN:

23 Q. I'm not interested in what anybody else other  
24 than what TriMont and you were communicating. So let  
25 me -- I think you answered question, but you let on a

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1 bit, so let me just make sure.

2 Consistent with your practice of keeping B of

3 A informed of issues and events related to the payment

4 under the retail facility, did you apprise Ms. Brown

5 that the borrower had repaid to ULLICO the amount that

6 ULLICO had paid as Lehman's portion of the February

7 retail advance?

8 MR. CANTOR: Objection.

9 MR. KAEDING: Object to form, including it's

10 been asked and answered.

11 THE REPORTER: I just want to point out that

12 you said Ms. Brown this time and the first time you

13 said Ms. Johnson.

14 (Discussion ensued off the record.)

15 BY MR. DILLMAN:

16 Q. Did you, consistent with your practice of

17 keeping B of A informed of relevant events concerning

18 funding of the retail facility inform Ms. Brown of the

19 fact as explained to you by Ms. Johnson that the

20 borrower had repaid to ULLICO the \$2,759,598.04 that

21 ULLICO had advanced as Lehman's portion of the

22 February retail advance request?

23 MR. CANTOR: Objection.

24 MR. KAEDING: Same objection. You can

25 answer.

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1 A. I don't recall whether she -- whether we  
2 discussed whether it was reimbursed to ULLICO or not.

3 BY MR. DILLMAN:

4 Q. Do you recall at any time specifically having  
5 any conversations with Ms. Brown concerning borrower  
6 reimbursement of ULLICO payments?

7 A. I don't recall any specific conversation to  
8 that effect, but it could have been like in one of  
9 these funding conversations every month that we had,  
10 it could have been mentioned during those. I don't  
11 recall any, you know, specific conversation dedicated  
12 to whether the borrower was kicking in money or not.

13 Q. Do you recall that coming up in any  
14 conversation whether it was dedicated to that or  
15 otherwise?

16 A. I don't recall.

17 MR. KAEDING: Can we go off the record for a  
18 second?

19 (Deposition Exhibit-39 was previously marked  
20 for identification.)

21 BY MR. DILLMAN:

22 Q. Mr. Rafeedie, I placed in front of you  
23 previously marked as Exhibit 39. Can you just confirm  
24 for us that that is the March draw request on the  
25 retail facility that you, being TriMont, provided to

1 the co-lenders?

2 A. Feels a little thinner than the other one. I

3 don't know if everything's in it.

4 Q. Take a look.

5 A. I don't see the construction consultant

6 certificate in there. It appears to be missing, the

7 construction consultant certificate.

8 Q. Other than that?

9 A. It appears to be there.

10 Q. That is your signature on the second page; is

11 it not?

12 A. Correct.

13 Q. With respect to the body of the letter, that

14 is the draw request that was sent out --

15 A. Yes.

16 Q. -- for the March?

17 A. I believe so, yes.

18 Q. Lehman did not make its --

19 A. No.

20 Q. -- advances under that; correct?

21 A. Correct.

22 Q. ULLICO did?

23 A. Yes. My recollection, same as the others.

24 Q. Consistent with your prior testimony, is it

25 the case that you informed Ms. Brown of the fact that



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1 ULLICO, not Lehman, had made the advance for the  
2 Lehman portion of the March draw?

3 MR. KAEDING: Object to form. You can  
4 answer.

5 A. Yeah. I believe that I did inform her that  
6 ULLICO was covering it.

7 MR. CANTOR: Join.

8 (Deposition Exhibit-61 was marked for  
9 identification.)

10 BY MR. DILLMAN:

11 Q. Mr. Rafeedie, Exhibit 61 is a series of  
12 E-mails. The first one is from Beth Leshner,  
13 L-E-S-H-E-R, at National City to Mr. Rustgi in your  
14 office, dated March 3, 2009.

15 I want to point you to the E-mail just below  
16 that from Mr. Rustgi to Ms. Leshner. And it says, I  
17 already sent this information to Elissa on Friday, but  
18 here it is again. ULLICO funded Lehman's share on  
19 12/30/08 in the amount of \$3,391,631.84. The borrower  
20 funded Lehman's share on 9/26/08, 1/26/09 and 2/25/09  
21 in the amount of -- I've got to say. There's a hole  
22 punched right through, but -- can you read that number  
23 in for me?

24 A. \$7,554,607.43.

25 Q. I thought that was seven. I just -- there's

1 a hole punched right through it.

2 Giving a total between the two of

3 \$10,946,239.27. And it goes on.

4 Does this statement by Mr. Rustgi that the

5 borrower had funded 7.5 million of Lehman's share of

6 the identified draw request comport with your

7 understanding as of this date in early March 2009?

8 A. I didn't compile this accounting. But it

9 appears correct based on our discussions we've just

10 had. And when I get copied on an E-mail like that, I

11 wouldn't question a sum to the penny if it looked

12 reasonable, you know.

13 Q. Mr. Rustgi was the person at TriMont who

14 would have been compiling that information --

15 A. He would have been one of the people, yes.

16 MR. DILLMAN: Just to round out this

17 particular circle in terms of your conversations with

18 Ms. Brown, Exhibit 61 -- 62, excuse me, is an E-mail

19 between yourself and Ms. Brown, dated March 25th,

20 2009, which reads, ULLICO will be funding Lehman's

21 share plus their own in the morning. We should have

22 Sumitomo's share shortly thereafter and will get the

23 wire out.

24 (Deposition Exhibit-62 was marked for

25 identification.)

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1 BY MR. DILLMAN:

2 Q. That's an E-mail you sent?

3 A. Yes.

4 Q. Does this help you refresh your recollection  
5 that you did, in fact, keep Ms. Brown apprised of the  
6 fact that ULLICO was funding Lehman's share --

7 MR. KAEDING: Object to the form.

8 BY MR. DILLMAN:

9 Q. -- in addition to their own?

10 A. Yeah. Like I said a lot of times, ULLICO --  
11 that was not ever hidden from them that they were  
12 covering it. I think, I was open about that. And,  
13 you know, in terms of the borrower paying back X  
14 amount of whatever, I'm not sure we ever got into all  
15 that. I knew she knew that ULLICO was advancing  
16 Lehman's share.

17 Q. It was the fact that the information about  
18 the borrower paying those amounts in terms of  
19 reimbursing ULLICO was never hidden from B of A --

20 MR. KAEDING: Object to the form. You can  
21 answer.

22 A. No. No.

23 BY MR. DILLMAN:

24 Q. It's correct that you did not do that?

25 MR. KAEDING: Object to the form.

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1 A. Correct.

2 MR. DILLMAN: I just want to make sure that

3 we didn't have a double negative there.

4 One more document, I've seen reference in

5 your records to -- strike that.

6 (Deposition Exhibit-63 was marked for

7 identification.)

8 BY MR. DILLMAN:

9 Q. Exhibit 63, Mr. Rafeedie, is an E-mail from

10 Donita Johnson to Mr. Rustgi copied to yourself and

11 attaches the third amendment to guaranty between

12 various parties and ULLICO. This is an E-mail that

13 you received?

14 A. Yes.

15 Q. TriMont did have in its possession the third

16 amendment to guaranty?

17 A. Yes.

18 Q. You understood from Ms. Johnson's E-mail

19 that, in fact, the borrower or the guarantors had

20 repaid one million dollars to ULLICO of the amount

21 that it had funded for Lehman's share of the March

22 draw?

23 MR. KAEDING: Object to the form. You can

24 answer.

25 A. Yes.

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1 BY MR. DILLMAN:

2 Q. Did B of A at some point tell you that it was  
3 resigning as agent from everything having to do with  
4 Fontainebleau?

5 MR. CANTOR: Object to the form.

6 A. Yes. They did tell me that.

7 BY MR. DILLMAN:

8 Q. Who in particular told you that?

9 A. Jean Brown.

10 Q. Did she tell you why?

11 A. They were -- well, it was consistent with --  
12 the nonfunding of the revolver facility coincided with  
13 that date, I believe, as I recall. And they were  
14 resigning and Wilmington was going to take over.  
15 Well, that wasn't known immediately, but it was known  
16 later that they would be the agent on the loan, the  
17 resort piece.

18 Q. Wilmington became a trustee?

19 MR. CANTOR: Objection.

20 A. It was my understanding they were the agent.

21 BY MR. DILLMAN:

22 Q. It was your understanding that Wilmington  
23 became the disbursement agent?

24 A. They were taking over Bank of America's role.  
25 I don't want to get into exact role and -- you know,

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1 that was later. But, yeah, Bank of America pulled out  
2 and nobody knew who would be manning the ship. But  
3 all fundings -- IVI, I think, quit publishing reports  
4 and the whole thing shut down.

5 I think, as I understand, the borrower funded  
6 a couple of draws to keep construction going, partial  
7 draws or minimum amount. They cut down on the scope  
8 of the project. They just wanted to protect it until  
9 they could acquire additional financing, or whatever,  
10 and there were lawsuits going back and forth.

11 BY MR. DILLMAN:

12 Q. Based on your conversation with Ms. Brown,  
13 you understood that B of A's resignation as agent had  
14 something to do with the termination of the revolver  
15 facility?

16 MR. KAEDING: Object to the form. Go ahead.

17 MR. CANTOR: Objection. Mischaracterizes his  
18 testimony.

19 A. There was a default notice that went to the  
20 borrower. Basically, I believe, the loan was out of  
21 balance. There was some budget issues and they -- I  
22 believe because they -- that was the whole reason they  
23 weren't going to fund the revolver. And at that point  
24 they quit sending out draw requests and that's when  
25 those other events occurred.

1 MR. DILLMAN: No further questions.

2 (Recess from 11:54 a.m. to 12:33 p.m.)

3 EXAMINATION

4 BY MR. CANTOR:

5 Q. Thank you, Mr. Rafeedie. I just want to  
6 thank you for your time today. I know it isn't a lot  
7 of fun trying to recall events from several years ago  
8 and I appreciate your efforts. I assume you're just  
9 trying to be helpful here today; isn't that right?

10 A. Well, I think I'd get in trouble if I didn't  
11 show; right?

12 Q. Yeah, right. But you have no ax to grind  
13 here one way or the other?

14 A. No.

15 Q. As we get started, I just want to remind you  
16 that you're still under oath; do you understand that?

17 A. Yes.

18 Q. Do you understand that this is the same oath  
19 that you would take if you were actually in a  
20 courtroom?

21 A. Yes.

22 Q. You understand that, in fact, the testimony  
23 that you're giving here today can be read in court at  
24 the trial of this action; right?

25 A. Yes.

1 Q. So you understand the importance of telling  
2 the truth in your testimony here today; correct?

3 A. Yes.

4 Q. Now, Mr. Dillman asked you a lot of questions  
5 about what you might have done based on what he  
6 referred to as your practices. But I want to ask you,  
7 sir, is can you say under oath that, in fact, you told  
8 Jean Brown that the borrower had provided the funds  
9 for Lehman's September '08 retail advance  
10 contribution?

11 A. Say that again, the last part.

12 Q. Let me start from the beginning. Can you  
13 tell us --

14 A. Under oath.

15 Q. -- under oath that you told Jean Brown that  
16 the borrower had provided the funds for Lehman's  
17 September 2008 retail advance contribution obligation?

18 MR. KAEDING: Object to the form. You can  
19 answer.

20 A. I feel like I most likely did, but I can't  
21 say with a hundred percent certainly that I did.

22 BY MR. CANTOR:

23 Q. I take it you don't remember when that  
24 conversation happened?

25 A. There were several defaults over several



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1 months, defaulted payments, and a lot of conversations  
2 had taken place. I can't recall which month what  
3 exactly was said. It's been an awful long time and I  
4 just can say with a hundred percent certainty that I  
5 did.

6 Q. And, similarly, you can't say with a hundred  
7 percent certainty that you told anyone else at Bank of  
8 America that the borrower had provided funds for  
9 Lehman's 2008 retail advance contribution?

10 A. I don't believe I ever spoke with anyone at  
11 Bank of America other than Jane Brown and maybe one  
12 other person. I don't even recall that person's name  
13 that worked within her department when she was on  
14 vacation or something.

15 Q. But I take it, therefore, you don't remember  
16 having a conversation with that person, whomever that  
17 might have been, where you told that person that the  
18 borrower had funded Lehman's September '08  
19 contribution?

20 A. No. I can't say a hundred percent.

21 Q. I apologize if this repeats a little bit what  
22 you already said. You also can't say under oath that  
23 you told Jean Brown or anyone else at Bank of America  
24 that the borrower was reimbursing ULLICO for the  
25 payments that ULLICO was making on behalf of Lehman in

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11 Bank of America other than Jane Brown and maybe one  
12 other person. I don't even recall that person's name  
13 that worked within her department when she was on  
14 vacation or something.

15 Q. But I take it, therefore, you don't remember  
16 having a conversation with that person, whomever that  
17 might have been, where you told that person that the  
18 borrower had funded Lehman's September '08  
19 contribution?

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21 Q. I apologize if this repeats a little bit what  
22 you already said. You also can't say under oath that  
23 you told Jean Brown or anyone else at Bank of America  
24 that the borrower was reimbursing ULLICO for the  
25 payments that ULLICO was making on behalf of Lehman in

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1 the December '08 through March '09 time frame; isn't

2 that right?

3 A. That's correct.

4 MR. CANTOR: Can I have these marked together

5 as 64 and 65?

6 (Deposition Exhibit-64 and Exhibit-65 were

7 marked for identification.)

8 BY MR. CANTOR:

9 Q. Mr. Rafeedie, I've had marked as Exhibits 64

10 and 65 two letters that bear the date September 25th,

11 2008. Exhibit 64 is a three-page letter that bears

12 production numbers TRIM 014944 through 46 and

13 Exhibit 65 is a three-page document which bears

14 production numbers TRIM 014911 through 13.

15 Let's start with Exhibit 64 for the moment.

16 Have you ever seen this document before, sir?

17 A. One of them appears to be a draft. One is

18 signed. Obviously, I've seen the one that's signed.

19 Q. Right.

20 A. The other one --

21 MR. KAEDING: Just so everything is clear,

22 when you say the one --

23 THE WITNESS: 65 I've signed. 64 -- I don't

24 know if this was just the Word version. I'm trying

25 to -- it's got different parties to it --

Deposition Transcript Excerpts  
of Kevin Rourke  
Filed Under Seal

Deposition Transcript Excerpts  
of Roger Schmitz  
Filed Under Seal

Deposition Transcript Excerpts  
of Michael Scott  
Filed Under Seal

Deposition Transcript Excerpts  
of Chaney Sheffield  
Filed Under Seal

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

3  
4 IN RE: FONTAINEBLEAU LAS CASE NO.  
09-MD-02106-CIV-GOLD/  
5 VEGAS CONTRACT LITIGATION GOODMAN  
MDL NO. 2106

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13 ORAL AND VIDEOTAPED DEPOSITION OF JEFF SUSMAN,  
14 produced as a witness at the instance of the Plaintiffs,  
15 and duly sworn, was taken in the above-styled and  
16 -numbered cause on Thursday, April 28, 2011, from 9:23  
17 a.m. to 4:56 p.m., before Angela L. Mancuso, CSR in and  
18 for the State of Texas, reported by machine shorthand,  
19 at the law offices of Hunton & Williams, 1445 Ross Avenue,  
20 Suite 3700, City of Dallas, County of Dallas, and State  
21 of Texas, pursuant to the Rules of Civil Procedure and  
22 the provisions stated on the record or attached hereto.  
23 JOB No. 161730

24  
25



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1 A. There were a few that -- that I had -- you  
2 know, that I hadn't seen in a while, mostly e-mails,  
3 that refreshed some memories.

4 Q. Who was your employer when you were at BofA,  
5 the entity that signed your check, so to speak?

6 A. Bank of America, N.A.

7 Q. The bank?

8 A. The bank, yes.

9 Q. With a "k"? With a "k"?

10 A. With a "k", yes, not the "c."

11 Q. And when did you join Bank of America?

12 A. I joined one of the predecessors in August  
13 of 1988.

14 Q. What was that predecessor?

15 A. It was NCNB Texas.

16 Q. Oh, yeah, I can't read that.

17 What -- what was -- I was looking over the  
18 court reporter's shoulder and I couldn't -- give me  
19 those initials again.

20 A. NCNB Texas.

21 Q. And what was NCNB Texas?

22 A. It was -- it was the former First Republic  
23 Bank, which NCNB, out of Charlotte, North Carolina,  
24 acquired in the summer of 1988.

25 Q. What was your job at NCNB?

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1 A. I was a analyst and junior banker in the  
2 Corporate Lending group.

3 Q. And after the acquisition? Same?

4 A. It was -- NCNB was the entity that I worked  
5 for. It -- it had already been acquired. First  
6 Republic had already been acquired when I joined.

7 Q. I see. I see. When -- I take it that NCNB at  
8 some point was acquired by Bank of America?

9 A. NCNB subsequently changed its name to  
10 NationBank -- NationsBank.

11 Q. Got it.

12 A. And then NationsBank acquired Bank of America  
13 and changed the name.

14 Q. Thank you. Had that backwards, didn't I?

15 A. Yeah, I guess.

16 Q. All right. And when did that occur?

17 A. The acquisition?

18 Q. Yes.

19 A. Name change to Bank of America was in 1998.

20 Q. Between 1988 when you joined NCNB Texas and  
21 1998 when NationsBank acquired BofA and changed the  
22 name, did your job duties change at all from the junior  
23 analyst position that you previously identified?

24 A. Yes. I was --

25 Q. How so?

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1 A. -- promoted to a position where I had direct  
2 client responsibility and then --

3 Q. What was that position?

4 A. It was assistant vice president and vice  
5 president, still in the Corporate Lending group.

6 Q. Okay.

7 A. And then in 1997, I moved from that group to  
8 Loan Syndications.

9 Q. That was it?

10 A. And then the acquisition of Bank of America  
11 occurred.

12 Q. Okay. After the acquisition, what were your  
13 positions?

14 A. In 2000, I left Syndications to go to our  
15 Middle Market group as a client manager. I was there  
16 for two years. And after that, I joined Corporate Debt  
17 Products, in Large Corporate.

18 Q. In Large what?

19 A. Large Corporate or Global Corporate Investment  
20 Banking, essentially back to the large corporate lending  
21 function that I had started in.

22 Q. What was -- and you were in Corporate Debt  
23 Products, in the Large Corporate group, for --

24 A. From 2002 to when I departed in February  
25 of 2009.

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1 Q. Do you remember the day on which you departed?

2 A. My last day in the office, I believe, was

3 February 13th. I think my official last day was the

4 next Monday, but that was a bank holiday.

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23 Q. You indicated that you worked in Corporate

24 Debt Products from 2002 through 2009. What was

25 Corporate Debt Products?

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1 A. It is the function that manages the credit  
2 relationships with large corporate clients.

3 Q. What do you mean by "manages the credit  
4 relationship"?

5 A. Responsible for everything from underwriting  
6 to monitoring credit exposures, loans, letters of  
7 credit, any extensions of credit, derivatives, anytime  
8 there is treasury management, credit exposure. So all  
9 credit-related matters for the large corporate clients.

10 Q. And when you say "monitor exposures," what do  
11 you mean?

12 A. On -- one of our responsibilities is to  
13 monitor the financial condition of borrowers, including  
14 review of financial statements, monitoring compliance  
15 with covenants and loan agreements, risk ratings.

16 Q. Anything else?

17 A. That's the majority of the responsibilities.

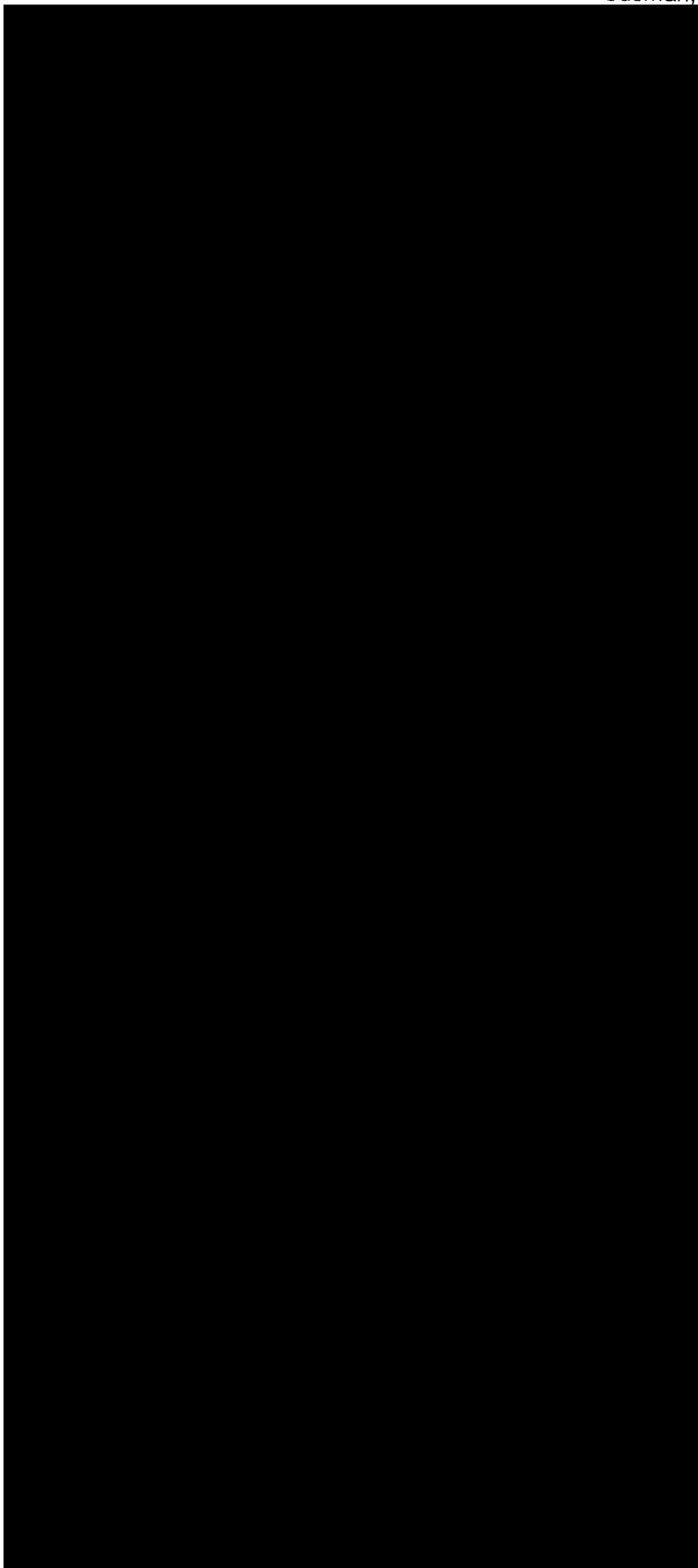
18 Q. With respect to the monitoring exposures,  
19 monitoring financial condition of the borrowers,  
20 compliance with covenants and risk ratings?

21 A. Manage and monitoring risk ratings, making  
22 sure they're appropriate, changing them when necessary  
23 and appropriate.

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1 Q. What was the involvement that you had with  
2 respect to the Miami project?

3 A. I don't recall the specifics. It was -- in  
4 general, it is complying with the terms and conditions  
5 under the disbursement agreement, making sure all the  
6 requisite steps occur before draws are permitted.

7 Q. Anything else?

8 A. And then once those steps -- steps have been  
9 taken, then permitting the advance.

10 Q. In general, those were activities that  
11 Corporate Debt Products undertook with respect to the  
12 Fontainebleau Miami loan?

13 A. Yes.

14 Q. And, in general, those are steps the Corporate  
15 Debt Products undertook with respect to the  
16 Fontainebleau Las Vegas loan?

17 A. Yes. It was -- Corporate Debt Products was  
18 one of the groups involved in the process.

19 Q. With respect to the Miami loan, what was your  
20 role?

21 A. I was the senior Corporate Debt Products  
22 officer on that relationship.

23 Q. And Las Vegas, the same?

24 A. Same.

25 Q. When did the Miami loan commence as far as --

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1 strike that.

2 When did your involvement in the Miami loan  
3 begin?

4 A. It goes back to the first loan that Bank of  
5 America made on the combined projects. At one time, it  
6 was -- it was one loan, subsequently refinanced into two  
7 separate loans, and that goes back to -- I can't recall  
8 if it was '04 or '05.

9 Q. From that time that you first became involved,  
10 until you left the bank, were you the senior person in  
11 Corporate Debt Products responsible for the  
12 Fontainebleau Miami loan?

13 A. Yes.

14 Q. When did you become involved in the  
15 Fontainebleau Las Vegas loan?

16 A. Again, both started about the same time, and  
17 they evolved together; and then we knew at some point  
18 they would be two separate financings, and so I was  
19 involved with both of them from the beginning.

20 Q. And the senior person on both of them from the  
21 beginning in Corporate Debt --

22 A. Yes.

23 Q. -- in Corporate Debt Products?

24 A. Yes.

25 Q. You need to make sure that you wait for my



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1 that?

2 A. Reviewing of available financial information,  
3 market information, and providing periodic analysis to  
4 document the status of the credit and the credit quality  
5 of the borrower.

6 Q. All of which, at some point, makes its way  
7 into risk ratings?

8 A. Those are some of the aspects, yes, that help  
9 determine the risk ratings.

10 Q. Did you have a particular title or position  
11 with respect to risk ratings? I've seen -- I've seen it  
12 referred to at some point that -- Chairman of the Risk  
13 Rating Score Card Issues Committee.

14 A. There -- Bank of America instituted a number  
15 of risk-rating tools, fact-based, objective-based  
16 risk-rating tools for various industries. Those were  
17 developed internally. And once they were rolled out for  
18 use in Corporate Debt Products, issues arose on how to  
19 use it. Applying tools developed for a portfolio on an  
20 individual name basis, there were questions that arose  
21 on how to do certain things.

22 It was determined that there was a group  
23 needed to be formed to take in the questions and  
24 basically to discuss the issues that arose, to discuss  
25 them, to work with the developers to come up with

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1      workaround solutions, and then to disseminate guidance.

2      And I was on that group for -- I don't recall how many  
3      years, but at one point I was the leader of the group.

4           Q. All right.

5           A. It was independent of -- it was part of my  
6      responsibilities that I volunteered for, but it was not  
7      anything directly related to managing, you know, any of  
8      the loans.

9           Q. In connection with BofA's status as a  
10     lender --

11          A. Uh-huh.

12          Q. -- for the Las Vegas facility, did Corporate  
13      Debt Products get involved in monitoring the  
14      construction of the project?

15           MR. CANTOR: Objection. You can answer.

16          A. Yes.

17          Q. (BY MR. DILLMAN) Get involved in monitoring  
18      the -- whether or not the project was on budget?

19          A. Yes.

20          Q. Whether the project was on schedule?

21          A. Yes.

22          Q. And who was primarily responsible, in  
23      Corporate Debt Products, for monitoring those aspects of  
24      the credit?

25          A. It was me and Brandon Bolio together.

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1 Q. How would you go about that?

2 A. We would review the information that was  
3 provided to us by our construction consultants,  
4 reviewing their reports that would come out monthly, and  
5 we would also review information we received from the  
6 construction monitoring group internally.

7 Q. What was the construction monitoring group?

8 A. It was Jeanne Brown, her group. I don't  
9 recall what her group's name was. The information that  
10 she was provided, we would -- we would see some of her  
11 information.

12 Q. When you say "the information that she was  
13 provided," you're talking about information provided by  
14 others to that group you would see?

15 A. Correct.

16 Q. Correct?

17 A. Yes. Correct.

18 Q. Did that group generate information of their  
19 own that they provided to you?

20 A. I don't recall if they were generating  
21 anything themselves or just reviewing information they  
22 had been provided.

23 Q. But they acted, in part, as a passthrough of  
24 information to you and Mr. Bolio?

25 MR. CANTOR: Objection. Go ahead.

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1 A. We received information from them. I don't  
2 know if they were -- again, what information, what we  
3 were seeing that they had generated. I just don't  
4 recall. If they generated anything, it was purely a  
5 passthrough. I just don't recall.

6 Q. (BY MR. DILLMAN) All right. Well, let's  
7 break it down. What information do you recall having  
8 received from Ms. Brown and her group?

9 A. It was budget-related information, where the  
10 project was with respect to the budget.

11 Q. What does that mean, exactly, budget-related  
12 information?

13 A. They would be provided information on purchase  
14 orders, invoices. They would review them, compare them  
15 to the budget, and then we would see some of that  
16 information. Specifically, I don't recall.

17 Q. It was your understanding that Ms. Brown's  
18 group was receiving purchase orders and invoices?

19 A. They were receiving information from  
20 Fontainebleau and the general contractor. I don't  
21 recall specifically what information they were  
22 receiving, but that was -- the purchase orders and  
23 contracts were the root documents that -- that -- and  
24 the invoices were driving the draw requests, and that's  
25 the type of information they would receive and review.

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1 certain reporting by the borrower to the banks. And  
2 rather than the borrower sending separate information to  
3 each participant lender, it's provided to the  
4 administrative agent one time, and the administrative  
5 agent then serves the function of distributing  
6 information to the participant banks.

7 Q. As you've just described the role as you  
8 understood it of the administrative agent -- strike  
9 that.

10 As you've just described BofA's role as the  
11 administrative agent with respect to the Fontainebleau  
12 Las Vegas facility, what was the involvement of  
13 Corporate Debt Products in those functions?

14 A. There is not much role. That's the Agency  
15 Management group's role. They are the primary contacts  
16 for the funds and for the information. Corporate Debt  
17 Products is a recipient of that information as one of  
18 the participant banks.

19 Q. Corporate Debt Products received that  
20 information as a lender?

21 A. Yes.

22 Q. Okay. Did Corporate Debt Products,  
23 specifically you, approve, on a monthly basis, draw  
24 requests?

25 A. Under the resort credit agreement?

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1 Q. In any capacity, did you approve draw requests  
2 from the borrowers?

3 A. Yes.

4 Q. Did the other lenders approve draw requests  
5 from the borrowers before those draws would be approved?

6 A. No.

7 Q. So in doing that -- in approving draw  
8 requests, you weren't doing that as a lender. You were  
9 doing that in some other capacity, correct?

10 A. Yes.

11 Q. What other capacity were you doing that in?

12 A. As the disbursement agent.

13 Q. Okay. So Corporate Debt Products acted as the  
14 disbursement agent, at least in that regard?

15 A. Yes.

16 Q. One of the functions that you described was --  
17 for the administrative agent was receiving and  
18 disseminating information to the lender group, correct?

19 A. Yes.

20 Q. And that information went out on Intralinks?

21 A. I believe so, yes.

22 Q. Mr. Naval was at least the nominal head of the  
23 Agency group, correct, for this -- for this loan?

24 A. He was the Agency Management officer on this  
25 loan, yes.

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1 Q. Mr. Naval was the person that had the key to  
2 Intralinks that would allow him to actually load  
3 documents onto this particular facility site?

4 A. Yes.

5 Q. You didn't have that key?

6 A. I did not.

7 Q. But Mr. Naval only loaded information to the  
8 extent that Corporate Debt Products approved it?

9 A. No.

10 Q. If I were to tell you that that's been  
11 Mr. Naval's testimony, would you disagree with that?

12 A. It is not necessarily Corporate Debt Products'  
13 role to approve all documents that get posted. We  
14 typically say all the information is here; go ahead and  
15 post it.

16 Q. If Mr. Naval testified that he did not place  
17 documents on Intralinks without first obtaining the  
18 approval of Corporate Debt Products, would you disagree  
19 with that?

20 A. No.

21 Q. Was there anyone other than Corporate Debt  
22 Products that was -- that was required to approve  
23 information that was posted on Intralinks?

24 A. I don't know that there is anybody that was  
25 required to give approval, so I don't know who else

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1 would have told Agency Management to post information.

2 Q. Okay. So as far as you're aware, Corporate  
3 Debt Products was the only group within BofA that  
4 approved the dissemination of information to the lenders  
5 through Intralinks?

6 A. With respect to the resort facility, in this  
7 particular case, perhaps, yes.

8 Q. When you say "with respect to the resort  
9 facility," what distinction are you seeking to draw  
10 there?

11 A. We didn't have any relationship with the  
12 retail lenders.

13 Q. Fair enough. Okay. All right.

14 A. Yeah.

15 Q. But that was the only distinction you were  
16 seeking?

17 A. Yeah.

18 Q. When -- was part of the administrative agent's  
19 role, as you understood it, to help obtain -- strike  
20 that.

21 Was part of the administrative agent's role to  
22 field questions from lenders and to seek to obtain  
23 answers to those questions from, among others, the  
24 borrowers?

25 A. If lenders chose to pose the questions to the



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1 administrative agent, yes.

2 Q. And, typically, with respect to the Las Vegas  
3 facility, were the questions from lenders posed to  
4 Corporate Debt Products or to Mr. Naval?

5 A. I don't know if he received any -- if  
6 Mr. Naval received any inquiries directly. I know  
7 Corporate Debt Products received some directly, but I  
8 don't know what he received, if he received any  
9 directly.

10 Q. Given your role in the Las Vegas facility,  
11 would it -- was it your expectation that if Mr. Naval  
12 received inquiries from lenders, that he would forward  
13 those inquiries to you in Corporate Debt Products?

14 A. I would have expected for him to do that, yes.

15 Q. And was it Corporate Debt Products that was  
16 the group at BofA who would then seek to obtain answers  
17 to questions posed by the lenders, or was that some  
18 other group?

19 A. No. It would typically be Corporate Debt  
20 Products.

21 Q. Again, to put names on it, you and Mr. Bolio?

22 A. Yes.

23 Q. Depending on the timing?

24 A. Correct.

25 Q. One of the roles of the administrative agent,

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1 as well, was to keep a register --

2 A. Uh-huh.

3 Q. -- right?

4 A. Yes. Sorry.

5 MR. CANTOR: You need to answer verbally.

6 You can't give uh-huhs and shakes and nods.

7 Q. (BY MR. DILLMAN) I'm not going to inquire,  
8 but I'm going to assume that you went over some of this  
9 with Mr. -- with Mr. Cantor yesterday, so I did not go  
10 over sort of the ground rules of what makes this process  
11 easier on court reporters and so on. But when we do run  
12 across those things, I'll point them out.

13 A. I understand.

14 Q. What's a register?

15 A. It is the official list of the participant  
16 lenders.

17 Q. What involvement, if any -- strike that.

18 Do you know how BofA keeps registers?

19 A. No.

20 Q. Did you have any involvement in the register  
21 for this facility?

22 A. Not that I recall.

23 Q. You understand what information is contained  
24 on the register?

25 A. I don't know specifically.

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1 Q. Do you understand that -- did you understand  
2 that, with respect to the Las Vegas facility, the  
3 register was open and available to all lenders?

4 A. I don't recall.

5 Q. Do you recall lenders having asked to see  
6 copies of the register at various times?

7 A. I don't recall specifically.

8 Q. Do you recall having required lenders to come  
9 to Dallas to look at the register?

10 A. I don't remember.

11 Q. Do you recall having refused to give paper  
12 copies of the register to lenders?

13 A. I don't remember that.

14 Q. Is there any reason you can think of why --  
15 why BofA would refuse to give lenders paper copies of --  
16 or electronic copies of registers?

17 MR. CANTOR: Objection.

18 A. I don't know.

19 Q. (BY MR. DILLMAN) Let me hand you what's  
20 previously been marked as 661. 661, a document from  
21 Mr. Naval. He was in the Agency group. Yes?

22 A. Yes.

23 Q. To Mr. Pinzon, P-i-n-z-o-n. Do you know who  
24 that is?

25 A. No.

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1 Q. With a copy to yourself. And it is entitled  
2 or the subject is SigabaSecure, S-i-g-a-b-a, Secure. Do  
3 you know what that means?

4 A. I don't.

5 Q. Is that a particular security provision that  
6 goes -- or protocol that you could have attached to  
7 e-mails at Bank of America?

8 A. I don't remember or I don't -- I don't know  
9 what that is.

10 Q. Okay. And then it goes on to say  
11 RE: Fontaine Las Vegas -- Fontainebleau Las Vegas -  
12 Register Review.

13 A. Yes.

14 Q. Does this help you to recall that in late 2008  
15 Guggenheim had asked to look at the register?

16 A. I don't recall this event, but, you know,  
17 there's e-mails that I sent, so apparently there was  
18 somebody that wanted to view the register.

19 Q. And you recall that Highland had asked to look  
20 at the register in approximately September of 2008?

21 A. I don't remember.

22 Q. The e-mail from Mr. Naval says, "Don, attached  
23 is the register for Fontainebleau Las Vegas. Same  
24 drill, no paper copies." Do you see that?

25 A. Yes.

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1 Q. Helps you to recall that, in fact, BofA would  
2 not permit the lenders to have paper copies of the  
3 register?

4 A. I don't recall that, again, but that's --  
5 that's what this says.

6 Q. And does this help you to recall one way or  
7 the other whether there was a policy at BofA to preclude  
8 lenders on facilities that it agented from obtaining  
9 paper copies of the register of all lenders?

10 A. Again, I don't know what Agency Management  
11 policies were. I just -- I don't know. I don't recall.

12 Q. Do you know Chip Wenmohs?

13 A. Wenmohs.

14 Q. Wenmohs?

15 A. Yes.

16 Q. Who was he?

17 A. He was the associate that worked on the  
18 Fontainebleau relationship prior to Brandon Bolio. He's  
19 the one that took an assignment in Australia.

20 Q. All right. So he was with the Corporate Debt  
21 Products group?

22 A. For a time, yes.

23 Q. He was the Bolio before Bolio came around?

24 A. Correct.

25 Q. When did he leave? Do you know?

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1 A. Pardon me?

2 Q. When did he leave?

3 A. I don't recall specifically.

4 (Deposition Exhibit 885 marked.)

5 Q. I've marked as Exhibit 885 a document that was

6 produced by BofA in this litigation and indicates in the

7 electronic data that identifies the document as one that

8 was created by and in Mr. Wenmohs's file.

9 A. Uh-huh.

10 Q. Do you recognize this?

11 A. No, I don't.

12 Q. Let me just draw your attention to the Bates

13 stamp number at the lower right-hand corner that ends in

14 179.

15 A. Okay.

16 Q. About halfway down the page, on the -- there

17 is a section that says "Bank of America." Do you see

18 that?

19 A. Yes.

20 Q. And the first line item is "Bank

21 Agent/Administrative Agent." Do you see that?

22 A. Yes.

23 Q. And it has Mr. Susman, Mr. Wenmohs, and

24 Mr. Naval. Do you see that?

25 A. Yes.

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1 Q. Would you agree that that group -- Susman,  
2 Wenmohs, and Naval -- at some point in time constituted  
3 the administrative agents for Bank of America on this  
4 facility?

5 A. Mr. Naval was the administrative agent. As  
6 the senior Corporate Debt Products and the primary  
7 Corporate -- Corporate Debt Products team working on the  
8 agency -- agented relationship, that would have involved  
9 me and Mr. Wenmohs.

10 Q. In terms of a functional group that worked on  
11 the matters that were within the ambit of the  
12 administrative agent, this would be -- this would  
13 accurately reflect --

14 A. Yes.

15 Q. -- that functional group?

16 A. Yes.

17 Q. And would it also accurately reflect the  
18 functional group responsible for the role of BofA as  
19 bank agent?

20 A. Well, what do you mean by "bank agent"? Bank  
21 agent/administrative agent, in my mind, are  
22 interchangeable.

23 Q. Okay. So your answer would be yes?

24 A. This -- functionally, yes, the three of us  
25 would -- would work as the administrative function.

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1 Q. At any point did you come to understand that  
2 actually there was a designated -- capital B,  
3 capital A -- Bank Agent and a designated -- capital A,  
4 capital A -- Administrative Agent with respect to the  
5 Fontainebleau financing?

6 A. I don't think I understand what your question  
7 is.

8 Q. You said in your way of thinking bank agent  
9 and administrative agent are the same thing.

10 A. The -- if the reference is administrative  
11 agent on the resort facilities, that's -- that's what  
12 I -- is that what you're speaking of? That's what I  
13 understand it to be.

14 Q. Yes. That's what I understand administrative  
15 agent to be here.

16 A. Uh-huh.

17 Q. Did you have any understanding as to whether  
18 or not there was a bank agent on the -- in connection  
19 with the Las Vegas financing with respect to the resort  
20 loan?

21 MR. CANTOR: Let me just -- so I  
22 understand, are you asking was there a defined term or  
23 was there a human?

24 Q. (BY MR. DILLMAN) You can answer.

25 A. I don't recall a distinction.



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1 Q. Okay. I will represent to you that in the  
2 disbursement agreement there is a defined term, "bank  
3 agent."

4 A. Okay.

5 Q. That bank agent has certain responsibilities  
6 under the -- the -- the disbursement agreement. Let me  
7 point you to 2.4.6 of the disbursement agreement, which  
8 I think you have in front of you there. I'm sorry; I've  
9 confused matters. That is the -- that's the funding  
10 agent.

11 Let me ask you to turn to 3.3.2.1. Let's just  
12 start at 3.3 -- 3.3 on page 33, and this is Exhibit 72,  
13 which is the Master Disbursement Agreement. Are you  
14 there?

15 A. Yes, I'm there.

16 Q. These are the Conditions Precedent to Advances  
17 by the Trustee and the Bank Agent. Do you see that?

18 A. Yes.

19 Q. You understood that these conditions precedent  
20 were with respect to disbursements of proceeds to the  
21 borrower?

22 A. Yes.

23 Q. Under both the resort loan and underneath the  
24 retail facility?

25 A. Yes.

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1 Q. And it says here, "The obligations" -- and I'm  
2 going to skip down to (b) -- "of the Bank Agent to make  
3 Advances from the Bank Proceeds Account are each subject  
4 to the prior satisfaction of each of the conditions  
5 precedent set forth in this Section 3.3."

6 A. Uh-huh.

7 Q. Who was the bank agent --

8 A. The administrative agent.

9 Q. -- that made advances from the Bank Proceeds  
10 Account?

11 A. It's the administrative agent for the resort  
12 loan is the bank -- that's the reference here, is the  
13 bank agent.

14 Q. Okay. So with respect to the functions set  
15 forth in 3.3, the functional group that was responsible  
16 for that was yourself, Mr. Wenmohs or Mr. Bolio,  
17 depending on the point in time, and Mr. Naval?

18 A. Yes.

19 Q. All right. And if you turn to 3.3.21 of this  
20 same Exhibit 72, it's entitled "Adverse Information."  
21 And it says, "In the case of each Advance from the Bank  
22 Proceeds Account made concurrently with or after  
23 Exhaustion of the Second Mortgage Proceeds Account, the  
24 Bank Agent shall not have become aware after the date  
25 hereof of any information or other matter affecting any

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1 Loan Party, Turnberry Residential, the Project or the  
2 transactions contemplated hereby that taken as a whole  
3 is inconsistent in a material and adverse manner with  
4 the information or other matter disclosed to them  
5 concerning such Persons and the Project, taken as a  
6 whole."

7 You understood, when you were involved with  
8 this facility, the resort facility, that 3.3.21 was a  
9 condition precedent to advancing or disbursing funds to  
10 the borrower, did you not?

11 A. Yes.

12 Q. And 3.3.21 refers to a lack of awareness by  
13 the bank agent of the things that are described in  
14 there. Do you see that?

15 A. Yes.

16 Q. And this would refer, then, to the awareness  
17 that you, Mr. Wenmohs or Mr. Bolio, depending on the  
18 time period, and Mr. Naval had at any given time of  
19 disbursements, correct?

20 MR. CANTOR: Objection; calls for a legal  
21 conclusion. You can answer to the best of your  
22 understanding.

23 A. Would you repeat the question, please.

24 Q. (BY MR. DILLMAN) Sure. The awareness of the  
25 bank agent referred to herein is the awareness that you,

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1 Mr. Wenmohs and Mr. Bolio, depending on the time, and  
2 Mr. Naval had at any particular point in time, correct?

3 MR. CANTOR: Same objection.

4 A. Those were the -- yes. Those were the folks  
5 serving as the administrative function.

6 Q. (BY MR. DILLMAN) And what procedures were in  
7 place at Bank of America to determine whether the bank  
8 agent was aware of any of the information specified in  
9 3.3.21 prior to the time the disbursements were made?

10 A. The information that we knew was what we knew  
11 as part of, you know, ongoing monitoring and diligence  
12 as part of our responsibilities.

13 Q. Okay. And your knowledge at any particular  
14 time in connection with any particular disbursement was  
15 part of the conditions precedent, as you understood it,  
16 that was -- that governed the disbursement of proceeds  
17 under the Master Disbursement Agreement, correct?

18 MR. CANTOR: Objection; calls for a legal  
19 conclusion.

20 A. I mean, if there were -- it's information that  
21 I had, it was information I knew, I guess. I'm not  
22 exactly sure what your question is.

23 Q. (BY MR. DILLMAN) If you had any information,  
24 any awareness of information specified in 3.3.21, you  
25 understood that that was part of the analysis as to

1 whether or not the conditions precedent had been met --

2 A. Yes.

3 Q. -- for any particular disbursement?

4 A. Yes.

5 MR. CANTOR: Objection.

6 Q. (BY MR. DILLMAN) What -- and was there any  
7 particular procedure or protocol in place to make sure  
8 that for each disbursement the bank agent, as we've just  
9 discussed it, was not aware of any of the information  
10 set forth in 3.3.21?

11 A. I don't recall specifically any specific  
12 protocols other than, again, our normal diligence and  
13 monitoring of the situation and of the borrower.

14 Q. Okay. And all that information would have  
15 been reviewed in terms of your awareness of these facts  
16 before anything was disbursed?

17 A. Yes.

18 Q. Other than as it relates to disbursements and  
19 the conditions precedent under 3.3 of the disbursement  
20 agreement, did Corporate Debt Products have -- undertake  
21 any activities in its capacity as bank agent for the  
22 Las Vegas facility other than those that you previously  
23 testified to about the roles it took with respect to the  
24 administrative agent functions?

25 A. I don't recall anything significantly

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1 different, no.

2 Q. BofA was also the -- a funding agent under the  
3 resort loan, was it not?

4 A. I don't recall specifically.

5 Q. Okay. Let's turn to 2.4.6 --

6 A. Okay.

7 Q. -- of the disbursement agreement, which I  
8 erroneously directed you to previously.

9 A. 2.4.2?

10 Q. 4.6, which is on page 10 of Exhibit 72.

11 A. Okay.

12 Q. Take a minute to read that.

13 A. Uh-huh. Okay.

14 Q. The last sentence -- strike that.

15 Does this help you to recall that there was --  
16 there were one or more funding agents?

17 A. Yes.

18 Q. Was BofA a funding agent?

19 A. I don't recall specifically.

20 Q. What was the role of the -- of funding agents  
21 in connection with this facility?

22 A. To fund proceeds from their respective sources  
23 of capital.

24 Q. When you say "respective sources of capital,"  
25 I didn't follow you.

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1 A. If there were -- if -- if there was bank  
2 proceeds being advanced, then BofA would have acted to  
3 sort -- to fund the bank proceeds.

4 Q. All right. So you do recall that BofA acted  
5 as a funding agent with respect to the proceeds from the  
6 credit resort --

7 A. From the resort credit, yes.

8 Q. -- resort loan?

9 A. Yes.

10 Q. Let me make a complete sentence and if you  
11 could -- or complete question. Wait until I'm done.

12 A. Okay.

13 Q. It is your recollection that BofA functioned  
14 as the funding agent with respect to disbursements from  
15 the resort loan; is that right?

16 A. Yes.

17 Q. And who at BofA performed the functions of the  
18 funding agent on BofA's behalf?

19 A. Is your question specifically who funded the  
20 proceeds?

21 Q. There is a defined term, "funding agent." Who  
22 were the people at BofA who were involved in the  
23 activities of BofA as funding agent?

24 A. I would have been involved.

25 Q. Okay. And how were you involved?

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1 A. In determining if the conditions had been met.

2 Q. The conditions precedent to disbursement --

3 A. Correct.

4 Q. -- under 3.3?

5 A. Yes.

6 Q. Were you involved in any other way?

7 A. I don't recall specifically.

8 Q. To the best of your knowledge, was anyone else

9 at BofA, other than yourself, involved in the functions

10 of the funding agent?

11 A. Mr. Bolio, in conjunction with me, not

12 independently.

13 Q. Okay. Under your supervision?

14 A. Yes.

15 Q. If you look at 2.6.1(b) of the Master

16 Disbursement Agreement, Exhibit 72, it says, "The Bank

17 Agent shall cause the Bank Lenders to remit any required

18 Loans under the Bank Credit Agreement to the Bank

19 Proceeds Account." Let's stop there.

20 Did you have an understand -- do you have an

21 understanding of what the Bank Proceeds Account was?

22 A. Yes.

23 Q. What was it?

24 A. An account where advances under the bank

25 facility would be put prior to disbursement to the



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1 borrower.

2 Q. All right. It was a holding account of sorts?

3 A. Yes.

4 Q. The borrower did not have access to that

5 account?

6 A. Correct.

7 Q. The lenders did not have access to that

8 account?

9 A. I don't recall.

10 Q. They did have a security interest in that

11 account?

12 A. I don't recall specifically.

13 Q. Okay. Do you recall that that account earned

14 interest?

15 A. I don't recall.

16 Q. 2.6.1(b) goes on, "The Bank Agent shall

17 thereafter remit any required Advances under the Bank

18 Credit Agreement from the Bank Proceeds Account to the

19 Bank Funding Account." Do you see that?

20 A. Yes.

21 Q. And what was the -- do you know what the Bank

22 Funding Account was?

23 A. I don't recall.

24 Q. Do you know whether the borrower had access to

25 the Bank Funding Account?

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1 A. I don't recall.

2 Q. But the authorization of transfers from the  
3 Bank Proceeds Account to the Bank Funding Account was  
4 made by you and Corporate Debt Products acting as the  
5 bank agent, correct?

6 MR. CANTOR: Objection.

7 A. I don't recall specifically.

8 Q. (BY MR. DILLMAN) The words of the agreement  
9 talk about, "The Bank Agent shall thereafter remit." I  
10 guess my question is --

11 A. That would have been the function, yes.

12 Q. The bank agent referred to here was the group  
13 that we talked about: You, Mr. Wenmohs --

14 A. Yes.

15 Q. -- Mr. Bolio, and Mr. Naval?

16 A. Yes.

17 Q. And to be sure, Mr. Naval's role here was  
18 fairly ministerial, was it not?

19 A. Correct.

20 Q. If there were any decisions to be made,  
21 analysis to be undertaken, that was done by you and  
22 Mr. Wenmohs and Mr. Bolio?

23 A. Correct.

24 Q. Turn to the disbursement agreement, 2.2.1,  
25 which is at page 4. This has a listing of the accounts.

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1 Do you see that?

2 A. Yes.

3 Q. And you recall having at least understood how  
4 these accounts worked at the time?

5 A. Yes.

6 Q. And if I go one, two, three, four -- five rows  
7 down, I see the Bank Proceeds Account, and it appears to  
8 me to reflect a movement into the Bank Funding Account  
9 by the bank agent. Am I reading that correctly?

10 MR. CANTOR: I'm sorry. Where are you  
11 reading?

12 Q. (BY MR. DILLMAN) It says Bank Proceeds  
13 Account, and read across, it says Depository; Bank  
14 Agent; Pledgees, Bank Agent. Do you see that?

15 A. Could you repeat your question, please.

16 Q. Sure. Let me just draw your attention rather  
17 than ask a question right now, to draw your attention,  
18 because I see you were reading something else, to the  
19 fifth row down --

20 A. Uh-huh.

21 Q. -- where it says Proceeds Account, Bank  
22 Proceeds Account.

23 A. Yes.

24 Q. And if we go over to the right, it says  
25 Depository, Bank Agent.

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1 A. Uh-huh.

2 Q. What does that mean, "depository"?

3 A. I don't recall. I don't know.

4 Q. Does that mean that those funds are under the  
5 control of the bank agent?

6 A. I don't know. I'd have to look and see if  
7 there is a defined term for "depository."

8 Q. Well, looking at 2 point -- referring back to  
9 2.6.1(b), which we previously talked about, that says  
10 that the Bank Agent shall move funds from the Bank  
11 Proceeds Account to the Bank Funding Account, does that  
12 help you to perhaps refresh your recollection that  
13 "depository" here means that the Bank Proceeds Account  
14 is under the control of the bank agent?

15 A. That's the conclusion I would reach now, but I  
16 don't know specifically what "depository" means.

17 Q. Okay. Do you know what "pledgees" mean?

18 A. To who the -- who has an interest, security  
19 interest, in that account.

20 Q. Okay. So according to this chart, the bank  
21 agent is both the depository and the pledgee of the Bank  
22 Proceeds Account, correct?

23 A. Yes.

24 Q. And if we move down to the next row, it says,  
25 Funding Account, Bank Funding Account. The disbursement

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1 A. It is provided to the borrower.

2 Q. And provided to the funding -- various funding  
3 agents?

4 A. I believe so, yes.

5 Q. So provided to the retail funding agent as  
6 well as the resort funding agent?

7 A. Specifically, I don't know who it went to.

8 Q. Okay. At the time that the Advance  
9 Confirmation Notice is sent out, had BofA approved the  
10 advance --

11 MR. CANTOR: Objection.

12 Q. -- as proper for disbursement?

13 A. Yes.

14 Q. And while this particular document is signed  
15 by Ms. Brown, in Corporate Debt Products, Ms. Brown did  
16 not issue any Advance Confirmation Notices without the  
17 approval of -- prior approval of Corporate Debt  
18 Products; is that right?

19 A. Typically not.

20 Q. May have gotten double negatives there.

21 Typically -- typically, she did not issue  
22 these without the prior approval of Corporate Debt  
23 Products, correct?

24 A. Correct.

25 Q. All right. Now, you became aware at some

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1 point that -- strike that.

2 First National Bank of Nevada was a lender

3 under the resort loan, was it not?

4 A. I believe it was.

5 Q. It was both a revolving lender and a term loan

6 lender?

7 A. Yes.

8 Q. You became -- and both an initial and a delay

9 draw term loan lender?

10 A. Yes.

11 Q. You became aware at some point that the FDIC

12 had repudiated First National Bank of Nevada's

13 obligation under the credit -- the resort loan, right?

14 A. We were informed that, yes.

15 Q. That the FDIC had taken over First National

16 Bank of Nevada?

17 A. Yes. And they then had repudiated, yes.

18 Q. I just -- I will occasionally prompt you for

19 a -- for a verbal.

20 Let me place in front of you what has

21 previously been marked as Exhibit 486. A document

22 you've previously seen?

23 A. Yes.

24 Q. This is a document from Mr. Scott. Mr. Scott

25 was BofA's counsel?

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1 A. Yes.

2 Q. And it attaches a letter from the FDIC  
3 repudiating the First National Bank of Nevada  
4 obligations under the resort loan, correct?

5 MR. CANTOR: Objection. You can answer.

6 A. Yes.

7 Q. (BY MR. DILLMAN) Mr. Scott, in his e-mail,  
8 says, in the end of the first paragraph, "FDIC has  
9 accordingly elected to disaffirm the commitment."

10 By that he meant they were defaulting on their  
11 obligations, they were -- First National Bank of Nevada  
12 was defaulting on its obligations; it would no longer  
13 make any payments under this loan. Correct?

14 MR. CANTOR: Objection.

15 A. That's consistent with the letter from the  
16 FDIC.

17 Q. (BY MR. DILLMAN) That was your understanding?

18 A. That was my understanding.

19 Q. The -- below the second -- well, about in the  
20 middle of Mr. Scott's e-mail, he summarizes the various  
21 positions that First National Bank of Nevada held. Do  
22 you see that?

23 A. Yes.

24 Q. Did you confirm that these were accurate?

25 A. I did not.

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1 Q. Do you have any reason to believe that they're  
2 not?

3 A. I have no reason to believe they're not  
4 accurate.

5 Q. All right. And this reflects a \$10 million  
6 revolving loan commitment?

7 A. Yes.

8 Q. A \$1.666 million delay draw commitment?

9 A. It's a Term A commitment. I don't recall what  
10 was delay draw and what was funded.

11 Q. You recall that the -- the delay draw was  
12 approximately one-half of the funded?

13 A. I don't recall specifically, but --

14 Q. Okay.

15 A. But this indicates that the Term A commitment  
16 was \$1,666,666, yes.

17 Q. And assuming that that was delay draw  
18 commitment, there was, at this point in time,  
19 \$11,666,000 of financing for the Las Vegas project that  
20 was no longer available?

21 A. That was my understanding, yes.

22 Q. Did anyone step up to take over the First  
23 National Bank of Nevada's commitment?

24 A. Which commitment? The funded or the unfunded?

25 Q. Well, the funded commitment has already been



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1 funded, right?

2 A. Correct.

3 Q. So --

4 A. Not to my knowledge.

5 Q. All right. Did BofA, to your knowledge, seek

6 to have this -- seek to have anyone -- get anyone to

7 step in to take over the First National Bank of Nevada's

8 unfunded commitment?

9 A. I don't remember.

10 Q. Did the other lenders on the revolving

11 facility agree to share the \$10 million that was

12 previously committed by First National Bank of Nevada in

13 any pro rata share?

14 A. Not that I recall.

15 Q. Did BofA agree to take over any part of the --

16 any part of the revolving loan commitment?

17 A. Not that I recall, no.

18 Q. How about the term loan?

19 A. No.

20 Q. So as of -- at least as of January 2nd, 2009,

21 there was a \$11.6 million hole in the funding for the

22 project, correct?

23 MR. CANTOR: Objection. Go ahead.

24 A. There was 11.6 million less available.

25 Q. (BY MR. DILLMAN) Yeah. And was there any

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1 discussion about how that shortfall was going to be made  
2 up?

3 A. I don't recall the specific discussions we had  
4 around that.

5 Q. Any discussions within BofA as to whether or  
6 not -- what the impact of the default of First National  
7 Bank of Nevada on its commitment under the resort loan  
8 was?

9 MR. CANTOR: Objection.

10 A. I don't recall any specific discussions about  
11 it.

12 Q. (BY MR. DILLMAN) Any discussions about  
13 whether or not this was a default?

14 A. I don't recall.

15 Q. Any question in your mind that when a lender  
16 says it's not going to pay its loan obligations, that  
17 it's defaulted on its obligations under the credit  
18 agreement?

19 MR. CANTOR: Objection; calls for a legal  
20 conclusion.

21 A. A lender defaulting would typically be -- it  
22 wouldn't necessarily default the agreement, but it would  
23 cause them to be deemed a defaulting lender. This is a  
24 case where their obligation to fund was wiped out by the  
25 FDIC. So I'm not -- I'm not sure that was deemed a

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1 defaulting lender.

2 Q. (BY MR. DILLMAN) Any conversations within

3 BofA on that topic?

4 A. I don't recall any specific conversations

5 about it.

6 Q. There was no question in your mind that the

7 First National Bank of Nevada's commitment was not going

8 to be met?

9 A. Correct.

10 Q. By the Bank of Nevada or anyone else?

11 A. Correct. After receipt of the letter from the

12 FDIC.

13 Q. And, therefore, that the -- that the

14 obligations of the First National Bank of Nevada were

15 not going to be met?

16 A. Yes.

17 Q. And that they, therefore, were a defaulting

18 lender?

19 MR. CANTOR: Objection.

20 A. I don't recall if the resort agreement credit

21 agreement had defaulting lender provisions or not.

22 Q. (BY MR. DILLMAN) Did you make any effort at

23 any time to determine what the impact was, if any, of

24 the notification by the FDIC that payments of First

25 National Bank of Nevada's commitments would not be made?

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1 Did you have any discussions as to what the impact of  
2 that was on the resort loan?

3 A. Again, I don't recall what we talked about at  
4 that point on this matter.

5 Q. Any discussions on what the impact of that  
6 would be under the Master Disbursement Agreement?

7 A. I don't recall what discussions we had about  
8 this.

9 Q. Do you recall having any discussions  
10 whatsoever?

11 MR. CANTOR: Objection; asked and  
12 answered.

13 A. On this topic, I don't recall any specific  
14 discussions.

15 Q. (BY MR. DILLMAN) And did you or anyone, to  
16 the best of your knowledge, at BofA make any effort to  
17 determine whether the FDIC's notice resulted in the  
18 failure of any conditions precedent under the Master  
19 Disbursement Agreement?

20 A. Could you repeat that?

21 Q. Sure.

22 MR. DILLMAN: Could you read it back,  
23 (Requested text was read.)

24 A. I don't recall any -- what, specifically, we  
25 discussed about -- about this.

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1 Q. (BY MR. DILLMAN) This whole FDI -- excuse me.

2 The whole First Bank of Nevada issue had been

3 brewing for some time, had it not?

4 MR. CANTOR: Objection.

5 A. I don't recall, other than receiving the

6 letter from the FDIC, for how long it had been brewing

7 or what I recalled about it. I just -- I do remember

8 receiving the letter, though.

9 (Deposition Exhibit 886 marked.)

10 Q. (BY MR. DILLMAN) I'll place in front of you

11 Exhibit 886. This is a letter from -- an e-mail from

12 yourself to a group of folks dated July 28, 2008. It

13 refers to a Mutual of Omaha takeover. Take some -- take

14 whatever time you need to review this.

15 My question to you is, does this have anything

16 to do, as far as you know, with the First National Bank

17 of Nevada's commitments under the resort loan?

18 A. Okay. I've read this. Can you repeat the

19 question, please?

20 Q. Sure. Did this have anything to do with the

21 First National Bank of Nevada's commitments under the

22 resort loan?

23 A. Yes.

24 Q. How so?

25 A. It appears we were discussing at what point we

1 would need to be concerned and that we were -- when we  
2 had to have a resolution, because their unfunded  
3 commitment was not going to be drawn for some time in  
4 the future.

5 Q. What is Bank of -- excuse me.

6 Mutual of Omaha -- of Omaha, what did that  
7 have to do with National Bank of Nevada, as far as you  
8 understood it?

9 A. I understood from what I -- reading this  
10 article, that they were potentially taking over First  
11 National Bank of Nevada.

12 Q. And you didn't think that that was an issue at  
13 this point because the delay draw term loan and the  
14 revolving loan would not be funded, if at all, until at  
15 some point later on?

16 A. Well, didn't know if it was -- I wasn't sure  
17 if it had -- it was a definite deal and -- and by taking  
18 over First National of Nevada, what that actually meant  
19 and how it specifically would affect their commitment to  
20 the -- to the resort loan.

21 Q. Okay.

22 (Deposition Exhibit 887 marked.)

23 Q. 887 is an Exhibit -- excuse me -- is an e-mail  
24 dated July 29, 2008. It's from you to Dana Colee.

25 A. Uh-huh.

1 Q. Who is Dana Colee?

2 A. I don't recall at this point who she is.

3 Q. Do you know who Michael Mooney is?

4 A. I don't remember.

5 Q. Do you know which Nebraska bank she is

6 referring to here?

7 A. I do not.

8 Q. Do you believe it is the First National Bank

9 of Nevada, one of those "N" states?

10 MR. CANTOR: Objection; calls for

11 speculation.

12 A. I don't know.

13 Q. (BY MR. DILLMAN) Okay. You apparently did at

14 the time, though, right?

15 A. I would assume so, based on my response.

16 (Deposition Exhibit 888 marked.)

17 Q. I've placed in front of you Exhibit 888. 888

18 is an e-mail from Mr. Bolio that's copied to you. It's

19 dated August 5th, 2008, and it attaches an e-mail from

20 Mr. Bewley. Who is Bill Bewley?

21 A. Bill Bewley was the senior vice president and

22 treasurer at Fontainebleau Resorts.

23 Q. Mr. Bewley -- Mr. Bewley's e-mail to Mr. Bolio

24 says, "Attached for your information is a notice from

25 the FDIC concerning First National Bank of Nevada.

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1     Apparently they have some of our loan? Do you believe  
2     that any action needs to be made on this?"

3             And Mr. Bolio responds up above, "Per Jeff's  
4     voicemail, attached is the letter from the FDIC," and he  
5     goes on.

6             Did BofA take any action as a result of this  
7     notice from the FDIC that's attached?

8     A. I don't recall.

9     Q. Did it ever take any action with respect to  
10    the FDIC's repudiation of Bank of Nevada's commitment  
11    under the resort loan?

12            MR. CANTOR: Objection.

13    A. I'm not sure I understand what "any action"  
14    means.

15    Q. (BY MR. DILLMAN) Did it do anything? Did  
16    it -- did it declare a default? Did it seek to get any  
17    replacement proceeds? Did it take any action on their  
18    schedules? Did it do anything, or did it just ignore  
19    it?

20    A. Did not ignore it. We did exclude the  
21    unfunded commitment from an available -- from available  
22    sources.

23    Q. Anything else?

24    A. Not that I recall.

25    Q. So you determined that the funds were not



1 available for the project, right?

2 A. The unfunded, yes. That's correct.

3 Q. Right. The unfunded, the 11.666?

4 A. Right.

5 Q. And you excluded on the -- that from the

6 in-balance test?

7 A. I believe so, yes.

8 Q. Never declared a default?

9 A. No.

10 Q. Never sought to recoup the funds?

11 MR. CANTOR: Objection.

12 A. There weren't funds to recoup. They hadn't

13 been advanced.

14 Q. (BY MR. DILLMAN) Did you ever submit a proof

15 of claim to the -- to the FDIC?

16 MR. CANTOR: Objection. Go ahead.

17 A. I don't know.

18 Q. (BY MR. DILLMAN) You understand that in

19 Exhibit 486, in the letter that was attached to Bank of

20 America from the FDIC, it states, in bolded letters,

21 "You may determine that the Receiver's decision to

22 disaffirm the Agreement gives you a claim against the

23 receivership estate. If so, you must" -- underline

24 must -- "request a Proof of Claim in writing, together

25 with proof thereof, no later than 30 days from the

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1 Signature Date of this letter." Did you?

2 A. I don't recall.

3 Q. Do you recall any discussions around that  
4 issue or on that topic?

5 A. I don't recall.

6 (Deposition Exhibit 889 marked.)

7 Q. Exhibit 889 is an e-mail from Mr. Varnell to,  
8 among others, yourself. It's dated October 15, 2008.  
9 It attaches a -- strike that. Attaches nothing.

10 The second e-mail in the chain is from Mr. --  
11 how do you pronounce his name?

12 A. Fuad.

13 Q. Fuad. In-house counsel at BofA?

14 A. Correct.

15 Q. Who says, "In case you needed any  
16 confirmation, the FDIC is now saying that the First  
17 National Bank of Nevada will not fund draws for  
18 Fontainebleau." Do you see that?

19 A. Yes.

20 Q. Help you to recall that, as early as  
21 October 15, 2008, you understood that the First National  
22 Bank of Nevada commitments under the resort loan would  
23 not be met?

24 A. Yes.

25 Q. Do you recall what the Second Mortgage

1 Proceeds Account was?

2 A. The account where the fundings under the  
3 second mortgage notes resided.

4 Q. And was there any significance in that account  
5 being exhausted?

6 A. Once that account's exhausted, then funding  
7 for the project moves to the next set of accounts.

8 Q. Which would be?

9 A. I don't recall specifically.

10 Q. Okay. The initial term loan?

11 A. By "initial term loan," the one that was  
12 funded at closing?

13 Q. Yes.

14 A. Yes.

15 (Deposition Exhibit 890 marked.)

16 Q. Exhibit 890 is an e-mail dated October 1st --  
17 excuse me -- October 17, 2008, attaching a letter from  
18 Wells Fargo dated October 6, 2008, advising BofA that  
19 the Second Mortgage Proceeds Account had been exhausted.

20 A. Uh-huh.

21 Q. Advising BofA, among others.

22 A. Uh-huh.

23 Q. You were aware of this at the time?

24 A. Yes.

25 Q. You were copied on this e-mail?

1 A. I am.

2 Q. And is it your understanding that, as of  
3 October 6, 2008, the proceeds for funding of the  
4 construction of the Las Vegas project would be coming  
5 next from the initial term loan funded at the closing of  
6 the project?

7 A. Yes.

8 Q. Did you have any involvement, pre-closing, in  
9 reviewing budgets for the construction of the project?

10 A. Not directly, from what I recall.

11 Q. Did you attend road shows?

12 A. No. Perhaps a bank meeting, but I don't  
13 recall the road show, per se.

14 Q. You understood that there was a budget for the  
15 project?

16 A. Yes.

17 Q. You understood that the budget for the -- that  
18 the financing was connected to the budget?

19 A. Yes.

20 Q. A certain amount of financing was raised on  
21 the anticipation and expectation of the bank group that  
22 the budget would be a certain amount as represented by  
23 the borrowers?

24 A. Yes.

25 Q. That budget changed over time?

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1 A. Yes.

2 Q. Specifically, in May of 2008, the borrower

3 dumped about \$200 million of change orders on Bank of

4 America, correct?

5 A. Yes.

6 Q. Now, were these change orders that you had

7 been apprised of prior to May/June 2008?

8 A. That I don't recall.

9 Q. Do you remember being surprised that you were

10 being provided change orders in that amount?

11 A. I don't remember.

12 Q. Do you remember doing anything to determine

13 when those change orders were first generated?

14 A. Personally, no. I -- other than requesting

15 IVI to -- the construction consultant to -- to, you

16 know, review them.

17 Q. To review them in order --

18 A. The change -- the change orders.

19 Q. Right. To review the change orders to

20 determine when the extra costs that were reported in

21 those change orders had become known to the borrower?

22 MR. CANTOR: Objection.

23 A. No. To when they became known to them.

24 Q. (BY MR. DILLMAN) When they became known to

25 IVI?

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1 question was, whether or not there was additional equity  
2 to -- that was made available to pay for the  
3 \$200 million of change orders in May of 2008, that  
4 didn't have anything to do with whether or not the  
5 borrower had been timely in reporting the change orders,  
6 did it?

7 MR. CANTOR: Objection.

8 A. We reviewed the information that we got.  
9 Again, when the borrower reported it to us was when they  
10 determined those costs were confirmed and known to them.

11 Q. (BY MR. DILLMAN) And you would agree with me  
12 that whether or not there was equity or not had nothing  
13 to do with whether those costs were reported timely,  
14 correct?

15 MR. CANTOR: Objection.

16 A. Again, the borrower reported it when they  
17 deemed it was a reportable event, and all we did was  
18 review what we'd received, when we received it. We  
19 didn't have knowledge beforehand, that I recall, that  
20 there were any costs, that this 200 million was coming,  
21 other than when we saw it on the report.

22 Q. (BY MR. DILLMAN) Right. And so when you saw  
23 it for the first time on the report, did you make any  
24 efforts at all to determine when the borrower first  
25 learned of these costs?

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1 A. I don't remember.

2 Q. Would it surprise you to know that, in one  
3 instance, \$41 million was known to the borrower in June  
4 of 2007 and not reported?

5 MR. CANTOR: Objection.

6 A. I don't know that that occurred or not.

7 Q. (BY MR. DILLMAN) I understand you don't know;  
8 may be part of the problem here.

9 My question is, if you had known that --

10 MR. CANTOR: Move to strike.

11 Q. -- would you -- would that have at all  
12 bothered you, that \$41 million of the \$200 million of  
13 change orders reported in May of 2008 were known to the  
14 borrower in June of 2007 --

15 MR. CANTOR: Objection.

16 Q. -- and were unreported?

17 A. If we're speculating, then if the borrower  
18 knew it was reportable and didn't, yes. If the borrower  
19 wasn't -- had not confirmed whether it met the  
20 requirements to report, then -- then perhaps not.

21 Q. Okay. And the reason that it would have been  
22 important is because borrower integrity and honesty is  
23 important, right?

24 MR. CANTOR: Objection.

25 A. Yes. That's in any case.

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1 Q. (BY MR. DILLMAN) Right. Right. I mean, it's  
2 of paramount importance to a financial institution like  
3 BofA to ensure that the people that it's doing business  
4 with, or particularly that it's loaning money to, are  
5 trustworthy people?

6 A. Yes.

7 Q. And if the borrower had not reported, just to  
8 use the example that I just provided, \$41 million in  
9 change orders for over a year, that would be -- if you  
10 learned about that, that would be cause for some  
11 concern?

12 MR. CANTOR: Objection.

13 A. Again, if -- if, in their opinion, it was  
14 reportable and they did not, then yes. But if they had  
15 not determined it wasn't reportable or not, then -- then  
16 a little bit less of a concern.

17 Q. (BY MR. DILLMAN) Let me give you Exhibit 216  
18 previously marked. We've been talking about  
19 \$200 million of change orders coming down in May  
20 of 2008.

21 This document that was sent to you by  
22 Mr. Freeman on May 28, 2006, contains or is the initial  
23 notification by the borrower that these 201 million of  
24 change orders would be submitted, was it not?

25 A. Uh-huh. As I recall, yes.



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1 Q. And from this point forward, you don't recall  
2 having undertaken any steps to determine when these  
3 change orders were first known to the borrower. Fair?

4 A. I don't recall. That's fair.

5 Q. I'm sorry?

6 A. I don't recall.

7 (Deposition Exhibit 891 marked.)

8 Q. Let me place in front of you Exhibit 891. 891  
9 is a document, the first page of which is entitled  
10 "Owner Change Order, Fontainebleau Resorts." It's  
11 Change Order Number 13.

12 I take it this is not a document that you've  
13 previously seen?

14 A. Correct.

15 Q. And this change order is for -- you see the  
16 description down here that I've highlighted on my copy.  
17 It says, "Structural Drawing Drawing Updates from Bid  
18 Set" --

19 A. Yes.

20 Q. -- at the middle of the page, and it has an  
21 amount, \$41,568,038.

22 A. Yes.

23 Q. And it's signed by Deven Kumar on June 4th,  
24 2008. Do you see that?

25 A. I do.

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1 Q. And if you turn to Exhibit 2A, the Bates stamp  
2 number that ends in 833 --

3 MR. CANTOR: None of my copy has Bates  
4 numbers.

5 A. Mine doesn't, either.

6 Q. (BY MR. DILLMAN) No, no. I'm sorry.  
7 Exhibit -- Exhibit 216.

8 A. 216?

9 Q. Yes, sir. I referred to the tab in my  
10 notebook, Exhibit 2A. It's Exhibit 216.

11 A. Okay.

12 Q. And if you turn to the Bates number ending in  
13 833 --

14 A. Okay.

15 Q. -- line 51 refers to podium, structural  
16 drawing revisions, structural steel only --

17 A. Yes.

18 Q. -- \$41,568,038.

19 A. Yes.

20 Q. Do you see that?

21 A. Uh-huh.

22 Q. And that's the same -- exact same amount in  
23 the document that we've marked as 891. Yes?

24 A. Yes.

25 Q. And if you look at the -- the second page in

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1 the change order package, it's a letter from Leo  
2 Estrada, at Turnberry West, to Mr. Kumar. Do you see  
3 that?

4 A. Okay. Third page. Yes.

5 Q. And do you see in the first paragraph it says,  
6 "Please see attached Change Order Number 13 regarding  
7 the update to the Structural Steel costs associated with  
8 this project"? It goes on to say, "The costs associated  
9 with these added values have been analyzed based on the  
10 progress drawings and shop drawings received starting  
11 April 20, 2007, through June 21, 2007." Do you see  
12 that?

13 A. I do.

14 Q. And if you turn two pages in, you'll see a  
15 change order request dated June 21st, 2007, from  
16 W&W Steel?

17 A. Yes.

18 Q. For the amount that we've been talking about,  
19 \$41,568,038. Do you see that?

20 A. Yes, I do.

21 Q. Would it have been important information for  
22 you to know, in May of 2008, that when Mr. Freeman  
23 submitted Exhibit 216 to you, that one of the major  
24 change orders for \$48,568,038 had actually been the  
25 result of drawings -- progress drawings and shop

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1 drawings received between April 20, 2007, and June 21,  
2 2007, and was the subject of a joint change order  
3 request by the contractor in that exact amount dated  
4 June 21st, 2007?

5 MR. CANTOR: Objection. You can answer.

6 A. And your question, again, was?

7 Q. Need it read back?

8 A. Please.

9 (Requested text was read.)

10 A. The primary importance is that the change  
11 order was reported and accounted for at some point. It  
12 would have been seemingly appropriate, based on this, to  
13 have reported it earlier.

14 Q. And you would have wanted to know that the  
15 borrower understood, less than three weeks after this  
16 resort loan closed, that there was a \$41 million change  
17 order that he knew would be required to build this  
18 project?

19 A. Again, it's important to get it reported. It  
20 would have been appropriate to report it at the time  
21 that something like this was known.

22 Q. And the fact that it wasn't reported at the  
23 time that it was known would have given you -- would  
24 have been of concern to you --

25 MR. CANTOR: Objection.

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1 Q. -- would it not?

2 A. I don't know what I would have known at that  
3 point.

4 Q. Wasn't my question.

5 Had you known that \$41 million of change  
6 orders were known to the borrower only weeks after this  
7 credit facility was entered into, but not reported for  
8 nearly a year later, that would have been of concern to  
9 you?

10 MR. CANTOR: Objection.

11 A. It would have been information I would have  
12 wanted to know as why it took that long to report it.

13 Q. (BY MR. DILLMAN) Because timely reporting was  
14 important?

15 A. Yes.

16 Q. And the borrower better have a darn good  
17 reason as to why he waited a year to provide this  
18 information for you -- to you, right?

19 MR. CANTOR: Objection.

20 A. I would want to know why it would have  
21 reported it when it did versus when it became aware of  
22 it.

23 Q. (BY MR. DILLMAN) And you would have  
24 undertaken an effort to determine the answer to that  
25 question?

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1 A. I can only presume I would have.

2 MR. CANTOR: Note an objection to the  
3 last question.

4 Q. (BY MR. DILLMAN) But you didn't undertake any  
5 investigation when the \$200 million was submitted to you  
6 by Mr. Freeman to find out when any of those change  
7 order requests were actually known to the borrower; is  
8 that right?

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

11 A. We did not undertake a request as to why.

12 (Deposition Exhibit 892 marked.)

13 Q. You did have discussions with IVI about these  
14 change orders, though, did you not?

15 A. I don't recall specifically, but I presume I  
16 did. They were significant.

17 Q. Exhibit 892 is an e-mail from Brandon Bolio to  
18 yourself and others dated June 11, 2008. Do you see  
19 that?

20 A. I do see it.

21 Q. You receive this e-mail?

22 A. I'm on the distribution list.

23 Q. And so you assume you received it?

24 A. I'm assuming I received it.

25 Q. Brandon Bolio says to Paul -- could be either

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1 Bonvicino -- well, I guess it is Bonvicino.

2 A. Correct.

3 Q. "Let's have a call once you've had a chance to  
4 digest the supporting information for the 201 million of  
5 additional cost -- costs. Please keep us apprised of  
6 your progress." Do you see that?

7 A. I do.

8 Q. And does this help you to recall that, in  
9 fact, learning about the \$201 million of additional  
10 costs was important to BofA at that time?

11 A. Yes.

12 Q. What conclusions, if any, did you receive  
13 post-digesting?

14 A. Conclusions from IVI?

15 Q. From anybody.

16 A. I don't remember.

17 Q. Further down the page, about the middle, in an  
18 e-mail from Mr. Bolio to Mr. Bonvicino and copied to  
19 yourself, he says, "As you likely know, the Initial Bank  
20 Advance Date for Fontainebleau Las Vegas is  
21 approaching."

22 What was the initial bank advance date?

23 A. I believe that is the date at which the first  
24 funds from the bank facilities are going to be spent on  
25 the project.

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1 Q. In other words, the initial term loan --

2 A. Yes.

3 Q. -- proceeds?

4 He goes on to say, "The Initial Bank Advance

5 Date would have happened this month if not for the

6 XXX million of additional costs/equity."

7 Explain that to me.

8 A. As I recall, this has to do with the

9 200 million of additional cost and the 200 million of

10 additional equity that came into the project.

11 Q. How would that have affected the initial bank

12 advance date?

13 A. Equity proceeds get spent before any debt

14 capital proceeds get spent. So to the extent equity had

15 been received, those proceeds would have been required

16 to be spent prior to any bank proceeds or -- and if the

17 second mortgage proceeds had already been spent, then

18 it's too late. But if they hadn't been exhausted, those

19 would have had to been spent. The equity would have

20 been spent before those would have been spent.

21 Q. He goes on to say, "And we still haven't

22 reached resolution on this month's draw so I don't know

23 when it will happen."

24 What issues were there, in early June of 2008,

25 that BofA was seeking to reach resolution about



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1 regarding draws for the Fontainebleau Las Vegas project?

2 A. I don't remember the specifics. I don't

3 remember what those were.

4 Q. Remember it being issues regarding the

5 propriety of the draws?

6 MR. CANTOR: Objection.

7 A. Not that I recall.

8 Q. (BY MR. DILLMAN) How to account for the

9 draws?

10 A. Again, I don't recall what the specifics were.

11 (Deposition Exhibit 893 marked.)

12 Q. 893 is an e-mail from Mr. Bender to yourself.

13 Mr. Bender was not part of your group?

14 A. Correct.

15 Q. And to be precise, this is an e-mail to both

16 yourself and Mr. Bolio --

17 A. Correct.

18 Q. -- dated June 9, 2008.

19 Mr. Bender attaches a document that appears to

20 be a -- well, I'll let you tell me what this is. Why

21 don't you look at the e-mail and the document and tell

22 me what you recall about this -- the document that's

23 attached.

24 A. As I recall, this was an attempt to modify

25 some of the reporting documents that we were going to be

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1 Q. And you were involved -- "you" being BofA --  
2 was involved in determining how they would be reported  
3 with the borrower?

4 A. Yes.

5 Q. Who, in particular?

6 A. Who, in particular --

7 Q. Who, in particular -- I'm sorry -- at the  
8 borrower? Mr. Freeman?

9 A. Yes.

10 Q. You were involved in those conversations along  
11 with Mr. Bolio?

12 A. Well, in this case, the contact was Kathy  
13 Hernandez, at the borrower, who was one of the people  
14 that generates the reports.

15 Q. I see. Okay. The -- the sheet that's -- or  
16 the exhibit that's attached to Mr. Bolio's e-mail  
17 includes, in part, some recommended revisions to the  
18 Remaining Cost Report?

19 A. Correct.

20 Q. And the Detailed Remaining Cost Report by you  
21 and Mr. Bolio?

22 A. Correct.

23 Q. When Mr. Bolio says, "We have found a workable  
24 solution," do you know what he means by that?

25 A. On how to insert information, these additional

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1 costs and whatnot, into the report, which didn't  
2 contemplate that when they were originally constructed.

3 Q. Did the borrower agree with the manner in  
4 which you had changed or recommending that the Remaining  
5 Cost Report be changed?

6 A. I don't remember if they agreed or not.

7 Q. Was it -- was it typical for you to be  
8 involved with the manner in which the reports were  
9 presented by the borrower? Is that one of the functions  
10 that you saw as BofA's role?

11 A. As part of the initial drafting of the  
12 documents and what reporting documents would go along,  
13 yes. In this case, there was these change orders, and  
14 we had to find a way to account for them, in a form  
15 which previously really wasn't really equipped to  
16 account for them.

17 Q. Why not?

18 A. I don't know.

19 Q. Well, did you anticipate at the outset that  
20 there might be change orders to a construction project?

21 A. Yes.

22 Q. So what was there about these change orders  
23 that required a rethinking about how they were presented  
24 in the Detailed Remaining Cost Reports?

25 A. I don't -- given the -- how extensive these

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1 reports are, I don't recall what we made provisions to  
2 account for and what we didn't and how these costs were  
3 able to fit in or not fit in. I just don't remember.

4 Q. The concerns that IVI had expressed to you in  
5 June of '08 that there were additional known cost  
6 increases that the borrower wasn't telling you --  
7 telling you about, did those same concerns continue  
8 through the time that you left?

9 A. I don't recall specifically, but --

10 Q. You recall that, in late 2008 and early 2009,  
11 IVI was quite concerned about costs that they felt were  
12 not being fully disclosed by the borrower?

13 A. Yes.

14 Q. And you learned about that from IVI?

15 A. Yes.

16 Q. You had internal meetings to discuss those  
17 issues?

18 A. I don't remember.

19 Q. It was of concern to you, wasn't it?

20 MR. CANTOR: Objection.

21 A. Yes.

22 Q. (BY MR. DILLMAN) Here, six months after you  
23 get \$200 million of change orders, six months after IVI  
24 tells you that they're concerned that they don't have  
25 everything and the borrower is not disclosing all the

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1 information, IVI's reporting we still think they're not  
2 reporting all of the known cost increases, that was of  
3 major concern to you, wasn't it?

4 MR. CANTOR: Objection.

5 A. I don't know whether I'd characterize it as  
6 major. It was something that was -- you know, clearly  
7 required our attention.

8 Q. (BY MR. DILLMAN) Well, at any point did you  
9 say enough already to the borrowers, come clean, I'm  
10 tired of hearing that you don't -- that you're not  
11 providing us everything, give us an audit of all of your  
12 costs, anything to that effect?

13 MR. CANTOR: Objection.

14 A. Not that I recall.

15 Q. (BY MR. DILLMAN) Okay. Why not?

16 MR. CANTOR: Objection.

17 A. I don't -- honestly, I don't recall why not.

18 Q. (BY MR. DILLMAN) 20/20 hindsight would have  
19 been a good idea, don't you think?

20 MR. CANTOR: Objection.

21 A. I don't know. You know, had things come out  
22 differently, I don't know. That's -- that's pure  
23 speculation. I don't know what -- you know, what  
24 hindsight would have been at the time.

25 Q. (BY MR. DILLMAN) You know today that in April

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1 A. Yes.

2 Q. -- that you would be leaving?

3 I'm assuming that you did not make the  
4 decision with respect to the February draw?

5 A. Correct.

6 Q. What was your involvement after the January  
7 draw, if at all, with respect to the Las Vegas loan?

8 A. I don't remember anything specific. I mean,  
9 presumably, reading this report, if I did receive it.

10 Q. Whether you received the report or not, you  
11 did make an effort to determine what IVI's thoughts and  
12 conclusions are with respect to the draw request that  
13 you approved in January 2009, didn't you?

14 A. In January?

15 Q. Yes.

16 A. Yes.

17 Q. And you learned at that time that IVI had  
18 concerns about whether or not all of the information of  
19 anticipated costs was being provided by the borrower?

20 A. I recall reading it in one of their reports.

21 I don't recall which date it was, which -- which report  
22 it was, but yes.

23 Q. And was that new information to you when you  
24 read it, or had you had discussions with IVI?

25 A. From the previous discussions we had, yeah.

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1 Q. So -- so while the report that we've marked as  
2 Exhibit 809 is dated January 30, 2009, you had  
3 conversations with IVI prior to that date, during which  
4 they explained to you their concerns about unreported  
5 cost overruns by the borrower?

6 A. Yes.

7 Q. And they also reported to you their concerns  
8 that the LEED credits, L-E-E-D credits, were being  
9 overstated by the borrower?

10 A. As I recall, yes.

11 Q. And that the -- in order to meet the scheduled  
12 completion date, there would need to be acceleration  
13 costs that weren't being reported by the borrower,  
14 either?

15 A. That I don't remember specifically, whether it  
16 was the schedule -- I mean, there was a schedule open  
17 date and then kind of a long stop date which was beyond  
18 that. And I don't recall which of those two dates our  
19 focus was on or the conversations around it.

20 Q. But you do recall that general concern by IVI  
21 that was expressed to Bank of America in the  
22 December/January time frame, correct?

23 A. The general concern?

24 Q. Yes.

25 A. Yes. And it goes back to the e-mail and the

1 conversation that we've looked at previously.

2 Q. And that that concern was -- was refocused in  
3 December of 2008 and January of 2009?

4 A. I don't recall if it was refocused or just a  
5 continuation.

6 Q. Okay.

7 A. I don't recall.

8 Q. You did understand that it was a concern?

9 MR. CANTOR: Objection.

10 A. I understood that IVI had had concerns, yes.

11 Q. (BY MR. DILLMAN) Before approving the January  
12 disbursement, what, if anything, did you do to ensure  
13 that all information necessary to answer those concerns  
14 was obtained?

15 MR. CANTOR: Objection.

16 A. The approval was based on what was required by  
17 the disbursement agreement, and so it would have been  
18 review of information and analysis of information done  
19 as part of the terms of the disbursement agreement.

20 Q. (BY MR. DILLMAN) Okay. That wasn't my  
21 question.

22 My question was, what did you do, if anything,  
23 to ensure that all information necessary to address  
24 IVI's concerns, as you understood them, was obtained --

25 MR. CANTOR: Objection; asked and



1 answered.

2 Q. -- before authorizing the disbursement in

3 January?

4 A. Followed the terms of the disbursement

5 agreement.

6 Q. Anything else?

7 A. Not that I recall.

8 Q. What do you mean by "follow the terms of the

9 disbursement agreement"?

10 A. The terms of the disbursement agreement

11 outlined how disbursements are made. So my

12 determination would have been based on the requirements

13 of the disbursement agreement.

14 Q. And the information that -- excuse me.

15 The concern that IVI was expressing was

16 inconsistent with what you were being told by the

17 borrower, right? Specifically, IVI was concerned that

18 they weren't -- the borrower wasn't providing all

19 information, and the borrower was telling you that they

20 were?

21 MR. CANTOR: Objection.

22 A. The borrower was providing the documentation

23 required to follow the disbursement agreement, and

24 that's what we were reviewing.

25 Q. (BY MR. DILLMAN) Did you understand that as

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1 part of the draw package, the reps and warranties and so  
2 on that the borrower was making, that they were rep'ing  
3 and warranting to the lenders that the Remaining Cost  
4 Report contained all -- all anticipated costs to  
5 complete the project that the borrower was aware of as  
6 of the date it submitted them?

7 A. I don't remember every single rep and  
8 warranty. But if that was one of them, then they -- and  
9 they would have had to have rep'ed to all of them before  
10 we would have made an advance. So, yes.

11 Q. You understood that IVI believed that the  
12 borrower had not provided all anticipated costs to  
13 complete the project in its Remaining Cost Report,  
14 correct?

15 MR. CANTOR: Objection. Objection.

16 A. I understood IVI had concerns, yes.

17 Q. (BY MR. DILLMAN) And that those concerns were  
18 inconsistent with the borrower's representations that  
19 the Remaining Cost Reports were complete and reflected  
20 all anticipated costs to complete the project?

21 MR. CANTOR: Objection.

22 A. We reviewed the information the borrower  
23 provided. If it required the information to be provided  
24 and they provided it, that's what they were rep'ing to  
25 us was the correct information.

1 Q. (BY MR. DILLMAN) I understand that. And you  
2 understood that there was an inconsistency between what  
3 the borrower was rep'ing and warranting and what IVI was  
4 telling you was their belief as to the true facts?

5 MR. CANTOR: Objection.

6 A. What IVI was expressing was their -- their  
7 views, their opinions, yes. It differed from what  
8 reporting the company was providing to us.

9 Q. (BY MR. DILLMAN) And the lenders -- some of  
10 the lenders were expressing the same concerns to you,  
11 correct?

12 A. I don't recall specifically.

13 Q. I'm putting in front of you what I believe is  
14 Exhibit 810, although it's not that easy to read the  
15 exhibit sticker. It's a letter from J.P. Morgan Chase  
16 to Ms. Kimbrough, copied to Brandon Bolio --

17 A. Uh-huh.

18 Q. -- dated February 12, 2009. Do you see that?

19 A. I do.

20 Q. You recall having seen this letter before you  
21 left?

22 A. No.

23 Q. Okay. Do you believe that you did see it and  
24 don't recall it, or do you believe that you didn't see  
25 it?

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1 A. This was either the last day or my  
2 second-to-last day in the office, so I don't -- if I did  
3 see it, I may have read it, but I don't believe I was  
4 actively contributing to any decisions at that point.  
5 So I -- I don't recall seeing it before now.

6 Q. You recall knowing, prior to leaving, of the  
7 concerns expressed in J.P. Morgan's letter, specifically  
8 starting at paragraph 1, where they quote from IVI's  
9 report that, "While the Anticipated Cost Report  
10 indicates the Project is expected to stay within budget,  
11 IVI is concerned that all the subcontractor claims have  
12 not been fully incorporated into the report and  
13 potential acceleration impact to meet the schedule has  
14 not been included." You knew that, right?

15 MR. CANTOR: Are you asking whether he  
16 knew that IVI had expressed it or he knew that  
17 J.P. Morgan is expressing it?

18 MR. DILLMAN: That IVI had.

19 A. I believe that was in IVI's report.

20 Q. (BY MR. DILLMAN) And had been expressed to  
21 you by IVI prior to their issuance of the report?

22 A. Yes.

23 Q. And you also knew that IVI was concerned, as  
24 quoted in this letter, that, "the Anticipated Summary  
25 anticipates a balance contingency of \$50,514,000;

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1     however, IVI is concerned that the anticipated balance  
2     may drop substantially in order to meet the aggressive  
3     schedule. The concern specifically is that all the  
4     subcontractors have not fully incorporated the potential  
5     costs to meet the schedule."

6           You were aware of that in January -- IVI's  
7     concern in January?

8     A. If that was in the January report, then yes.

9     Q. And you were aware of that -- to the extent  
10    that it was in the report, you had been advised of that  
11    previously by IVI?

12    A. I think so.

13    Q. And you were aware, in January of 2009, that  
14    IVI stated that, "it appears that the LEED credits are  
15    tracking behind the projections and the Developer has  
16    begun a detailed audit." And it goes on to say, "The  
17    Developer has provided documentation confirming LEED  
18    approval and the associated financial benefits  
19    accompanied as detailed in Section 6.10 of this report.  
20    However, it appears that the anticipated that the  
21    anticipated LEED credits are tracking behind -- behind  
22    projections, possibly in excess of \$15 million."

23           You were aware of that, right?

24    A. Yes.

25    Q. And you were aware that the developer had

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1 begun a detailed audit of the -- of the LEED credit  
2 issue?

3 A. That's what the developer told us, yes.

4 Q. Okay. Did you ever consider stopping funding  
5 to get to the bottom of these issues that -- that IVI  
6 had -- had flagged?

7 A. I don't recall.

8 Q. Did you ever consider waiting until the LEED  
9 audit was completed before agreeing to disburse funds?

10 A. I don't recall. And -- and if this has to do  
11 with the February report, I would have -- would not have  
12 been involved in that decision anyway.

13 Q. Understood I'm not talking about February  
14 because I do understand that you left in February and  
15 were leaving in February.

16 A. Right.

17 Q. With respect to January and this information  
18 that IVI had provided to you --

19 A. Uh-huh.

20 Q. -- did you consider putting a hold on funding  
21 until the issues IVI had raised were brought to ground?

22 A. I don't remember.

23 Q. Do you recall having considered putting a hold  
24 on funding until the LEED credit audit was completed?

25 A. I don't remember that.

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1 Q. Do you recall having considered putting this  
2 matter to the vote of the banks, the lenders?

3 A. I don't remember.

4 MR. DILLMAN: Let's go ahead and take a  
5 lunch break.

6 THE VIDEOGRAPHER: The time is 12:34.  
7 We're now going off record. This is the end of Tape 2.

8 (Recess from 12:34 p.m. to 1:14 p.m.)

9 THE VIDEOGRAPHER: The time is 1:14 p.m.  
10 We're now back on record. This is the beginning of  
11 Tape 3.

12 Q. (BY MR. DILLMAN) Mr. Susman, I've placed in  
13 front of you what's previously been marked as  
14 Exhibit 851. This is a declaration from Robert Barone.

15 You understand Mr. Barone was with IVI during  
16 the -- your tenure with Bank of America and the  
17 Fontainebleau project?

18 A. Yes.

19 Q. You spoke to Mr. Barone about issues  
20 concerning the project over time, didn't you?

21 A. Yes.

22 Q. Have you ever seen this declaration before?

23 A. I have not.

24 Q. Okay. I just want to -- there's a couple of  
25 things that are said in there I just want to ask you

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1 about. At page 5 of his declaration -- and if you -- if  
2 you need to read the prior provisions, by all means,  
3 please do. But he talks about the concerns expressed in  
4 the January 30 report, prior to paragraph 14.

5 And at paragraph 14, he says, "I had raised  
6 these concerns about the completeness and accuracy of  
7 the additional costs being reported no later than the  
8 last quarter of 2008, but they remained unresolved as of  
9 the date of the January Report."

10 Mr. Barone raised the concerns to BofA that  
11 were set forth in the January 30 report no later than  
12 the last quarter of 2008; isn't that right?

13 A. I don't remember specifically when he raised  
14 them, whether it was to us at the same time he raised  
15 them to the company. So I don't know exactly when he  
16 raised them, but -- but it was before the January 30th  
17 report.

18 Q. Right. And it was -- do you have any reason  
19 to dispute --

20 A. No.

21 Q. -- the claim that Mr. Barone apprised BofA of  
22 IVI's concern in the last quarter of 2008?

23 MR. CANTOR: What claim is that? Because  
24 he doesn't say BofA in this paragraph.

25 A. It doesn't say he raised them to BofA. It



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1 says he raised them.

2 Q. (BY MR. DILLMAN) Do you have any reason to  
3 believe that Mr. Barone did not raise those concerns to  
4 BofA in the last quarter of 2008?

5 A. I have no reason to believe that he did nor  
6 that he didn't.

7 Q. Well, IVI was your consultant, wasn't it?

8 A. Correct.

9 Q. If they're raising concerns, you would expect  
10 them to raise them to the person who hired them,  
11 wouldn't you?

12 MR. CANTOR: Objection.

13 A. They would also raise concerns to -- to the --  
14 to the borrower and the -- and the contractor.

15 Q. (BY MR. DILLMAN) Sure. Do you have any  
16 reason to believe that Mr. Barone did not raise the  
17 concerns set forth in the January report to BofA no  
18 later than the last quarter of 2008?

19 A. I have no reason to believe that he did not do  
20 that.

21 Q. And, therefore, you knew about these concerns  
22 no later than the last quarter of 2008?

23 A. Again, I don't know exactly when I knew about  
24 the concerns, but that would appear to be the case, yes.

25 Q. At paragraph 16 Mr. Barone states, "It is

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1 important to note that under the Disbursement Agreement,  
2 Remaining Costs" -- and he quotes -- "shall, in all  
3 events include the entire amount of any disputed claims  
4 with Contractors, except to the extent that the  
5 Construction Consultant concurs with the Project  
6 Entities that the amount asserted by the relevant  
7 Contractor is in excess of the amount which is  
8 reasonably likely to be due to that contrary" -- excuse  
9 me -- "to that Contractor."

10 Was that your understanding of what the  
11 Remaining Cost Report entailed, at least in part?

12 A. Yes.

13 Q. In paragraph 15, at the bottom, Mr. Barone  
14 said, "IVI had been told that this audit" -- referring  
15 to the LEED audit --

16 A. Where are you, again? I'm sorry.

17 Q. Paragraph 15. Sorry. I moved up. I skipped  
18 up.

19 A. Oh, okay.

20 Q. Last sentence. "IVI had been told that this  
21 audit" -- referring to the LEED audit -- "was in  
22 process, although we were never provided with the  
23 results of that audit."

24 Did you understand that there was a LEED audit  
25 in process?

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1 A. I don't recall.

2 Q. Did you at any time after September 11 speak  
3 to Mr. Freeman on the topic of the Lehman funding of the  
4 retail facility?

5 A. I believe I did, yes.

6 Q. When was the first such conversation?

7 A. I don't know specifically when it was.

8 Q. Was it in September?

9 A. I think so.

10 Q. Prior to the funding? Excuse me. Prior to  
11 the disbursement?

12 A. Prior to the disbursement?

13 Q. For September.

14 A. Yes. That's -- that's likely when that  
15 conversation would have been had.

16 Q. How many conversations did you have with  
17 Mr. Freeman during the month of September on this topic,  
18 that being the Lehman funding of the retail?

19 A. I don't know. I don't remember.

20 Q. More than one?

21 A. I don't remember. I would assume so, but I do  
22 not remember.

23 Q. Why would you assume so?

24 A. It was a rather significant issue and not  
25 everything can be discussed and asked and answered in

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1 one conversation, presumably.

2 Q. Why was it a significant issue?

3 A. It was a rather large investment bank that was

4 potentially going to be insolvent. That in of itself is

5 pretty significant. And the implications it had with

6 the funding of the project, because if the retail

7 lenders weren't able to fund, then the borrower was

8 going -- would have received no funds.

9 Q. Because?

10 A. Of the terms of the disbursement agreement

11 requires one of the -- one of the steps is that the

12 retail lenders have to have submitted their funds to the

13 disbursement agent before all the funds are combined and

14 then released to the borrower.

15 Q. And the result of that, if funds had not

16 been -- if funds had not been provided?

17 A. If even one step, even that step does not --

18 does not happen, then no funds are released.

19 Q. And if no funds are released?

20 A. The borrower does not get access to the funds.

21 Q. And the result of that?

22 MR. CANTOR: Objection.

23 A. Well, they have no access to funds in their

24 account.

25 Q. (BY MR. DILLMAN) And likely the project comes

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1 to a screeching halt?

2 A. They don't have funds to pay their bills.

3 What happens after that, I don't know.

4 Q. Okay. And you considered this to be a big

5 deal at the time?

6 A. It was significant, yes.

7 Q. Material?

8 MR. CANTOR: Objection.

9 A. It was a significant issue to understand if --

10 if the funding was going to be able to occur or not.

11 Q. (BY MR. DILLMAN) An issue material to the

12 success or not of the project?

13 MR. CANTOR: Objection; calls for a legal

14 conclusion.

15 A. It was material with respect to whether we

16 could make advances so the project could continue to be

17 funded.

18 Q. (BY MR. DILLMAN) And, therefore, it was

19 material to the success -- strike that.

20 It was material to whether or not the project

21 would be completed?

22 MR. CANTOR: Objection.

23 A. It would have an impact if the company was not

24 able to find alternate financing for the retail piece.

25 Q. (BY MR. DILLMAN) And you had no expectation

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1 that, in this credit market, with Lehman teetering on  
2 the brink of -- on the brink of bankruptcy, that  
3 Fontainebleau Resorts would have been able to obtain  
4 alternative financing to complete the Fontainebleau  
5 Las Vegas project, did you?

6 MR. CANTOR: Objection; assumes facts not  
7 in evidence, lacks foundation.

8 A. I don't know what funds Fontainebleau would  
9 have been able to find to replace the retail lenders.

10 Q. (BY MR. DILLMAN) You had no expectation at  
11 this time that they would be able to replace that -- the  
12 existing financing, did you?

13 MR. CANTOR: Objection; assumes facts not  
14 in evidence, lacks foundation.

15 A. It was -- it was a relationship separate from  
16 the lending relationship that the lenders had. I don't  
17 know what conversations they had had with the retail  
18 lender, what other access to capital or funding sources  
19 they may have had. So I don't know what to expect other  
20 than it was an issue that Fontainebleau had to address.

21 Q. (BY MR. DILLMAN) Who is -- who is Marisa  
22 Harney, by the way?

23 A. She is -- was at the time the head of Risk  
24 Management. So I had mentioned Doug Keyston before and  
25 his boss Doug Robinson -- not exactly right. At -- at

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1 the point in time this -- I believe this was going on,  
2 certainly during the initial phases of this  
3 relationship, Doug Keyston reported to Marisa Harney.  
4 That's before he reported to Doug Keyston. Sorry, I  
5 messed that up. Doug Keyston reported to Marisa Harney  
6 before he subsequently then reported to Doug Keyston.

7 Q. To Doug Robinson?

8 A. To Doug Robinson. Too many Dougs. Do that  
9 one more time?

10 Q. I gotcha. John Barrett?

11 A. John Barrett was one of Marisa's direct  
12 reports that Doug Keyston then reported to. Marisa  
13 ultimately ran Credit Risk Management. I believe that  
14 was the name of it. I can't remember exactly the name  
15 of the department. And Doug reported, through John, to  
16 Marisa.

17 Q. Did Mr. Keyston, Mr. Barrett, or Ms. Harney  
18 become involved in any way in the potential impact of  
19 the Lehman issues on the Fontainebleau Las Vegas  
20 facility?

21 A. I don't remember specifically, but we would  
22 have -- I would have informed Doug, and I presume he  
23 would have informed his -- his managers.

24 Q. Did you have any conversations with any of  
25 those folks concerning what was going on at the

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1 Las Vegas project during the time of the lead-up to the  
2 Lehman bankruptcy?

3 A. I don't recall specifically, but it would not  
4 have been out of place for those conversations to have  
5 occurred.

6 Q. What about after Lehman filed for bankruptcy?

7 A. Same answer. I don't recall specifically, but  
8 it would not have been uncommon.

9 (Deposition Exhibit 896 marked.)

10 Q. 896 is an e-mail from yourself to Mr. Keyston  
11 dated September 15th, 2008.

12 A. Uh-huh.

13 Q. I will represent to you that that was the date  
14 on which at least I believe Lehman filed bankruptcy.

15 Prior to this -- this e-mail, do you recall  
16 any conversations with Mr. Keyston on the subject of  
17 Lehman bankruptcy and the Fontainebleau Las Vegas  
18 project?

19 A. I don't recall specifically, but it would not  
20 have been uncommon for me to speak with Doug on -- on  
21 matters about the portfolio.

22 Q. You indicate at the top that -- well, three  
23 words: "A big issue."

24 A. Yes.

25 Q. You were referring to the potential impact of



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1 Lehman on the Las Vegas project, were you not?

2 A. Yes.

3 Q. For all the reasons that you just previously  
4 testified to?

5 A. Correct.

6 Q. Did BofA, as far as you know, at any time  
7 consider funding any portion of Lehman's obligations  
8 under the retail facility?

9 A. Not that I'm aware of.

10 Q. Did you review the Intercreditor Agreement to  
11 determine what BofA's rights may or may not be in that  
12 regard?

13 A. I don't recall specifically.

14 Q. Is that likely something that you would have  
15 done or --

16 A. It's likely something I would have done.

17 Q. Did you -- strike that.

18 Did BofA make a determination that it did not  
19 want to fund all or any portion of the Lehman bank --  
20 share of the retail facility?

21 A. I don't know that we considered it in any  
22 significant manner, so I don't know there was really a  
23 decision to make. It was -- it was a separate facility,  
24 and it was not ours, but I don't recall having any  
25 discussions that we would consider funding it.

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1 Q. Okay. You understand that under the  
2 Intercreditor Agreement you had the ability to do so?

3 MR. CANTOR: Objection.

4 A. I don't recall the specific terms of the  
5 Intercreditor Agreement, but we did not fund under the  
6 retail.

7 Q. (BY MR. DILLMAN) And you don't recall having  
8 made a decision one way or the other; is that right?

9 A. Correct.

10 Q. Just recall that you didn't do it?

11 A. We didn't do it.

12 Q. I asked you a minute ago about conversations  
13 with Mr. Freeman.

14 A. Uh-huh.

15 Q. I want to work in time frames here. Do you  
16 recall any conversations with Mr. Freeman, after the  
17 date that Lehman filed for bankruptcy, on the general  
18 topic of Lehman's bankruptcy and its impact on the  
19 Las Vegas project?

20 A. I don't recall any specific conversations.

21 Q. On the general topic of the impact of Lehman's  
22 bankruptcy on the Las Vegas project?

23 A. I don't recall.

24 (Deposition Exhibit 897 marked.)

25 Q. Exhibit 897 is an e-mail from yourself to

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1 Mr. Freeman.

2 A. Uh-huh.

3 Q. You say, "When you have a few minutes, I would  
4 like to have a discussion on a number of topics. The  
5 topics" -- and it goes on to the last one -- "and Lehman  
6 as it relates to the Las Vegas retail component." You  
7 say, "Let me know when you have time to talk and I will  
8 call."

9 Does this help you to recall that you did, in  
10 fact, have a conversation with Mr. Susman on or about  
11 the date that Lehman filed for bankruptcy regarding, in  
12 part, the impact of that bankruptcy on the Las Vegas  
13 project?

14 MR. CANTOR: With Mr. Freeman, you mean.

15 MR. DILLMAN: Whose name did I use this  
16 time?

17 MR. CANTOR: Susman.

18 MR. DILLMAN: Thank you. Yes. Let me  
19 restate the question.

20 Q. (BY MR. DILLMAN) Does this e-mail,  
21 Exhibit 897, help you to recall that you did, in fact,  
22 have a conversation with Mr. Freeman on or about the  
23 date of the Lehman bankruptcy?

24 A. It indicates I wanted to have a phone call  
25 with him. I don't know whether the -- I don't recall

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1 whether the call actually took place or not.

2 Q. Did Mr. Freeman generally return your calls

3 when you made them?

4 A. I'd say generally, yes, if I called.

5 Q. So we know that you called him once on

6 September 11th, and we know that you've asked for a call

7 here on September 15th. Is it your belief that you had

8 at least one call, and perhaps two, with Mr. Freeman

9 in -- leading up to and on the day that Lehman filed for

10 bankruptcy?

11 A. I don't recall if we had a phone call as a

12 result of this e-mail. I just don't remember.

13 Q. Okay. Lehman was a big deal?

14 A. I understand.

15 Q. You wanted to get to the bottom of it?

16 A. We wanted to understand the impact to the --

17 to the funding, yes.

18 Q. Wanted to understand whether the borrower had

19 had any conversations with Lehman?

20 A. Yes.

21 Q. Wanted to find out if Lehman was going to pay

22 or not?

23 A. Yes.

24 Q. Because if -- if there was no payment for the

25 Lehman share, the funding shut down, right?

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1 A. Yes. There would be no disbursement to the --  
2 to the borrower.

3 Q. Right. And these were all big issues that you  
4 wanted to get answers to as soon as possible?

5 A. Yes.

6 Q. Okay. So would it have been your desire to  
7 speak to Mr. Freeman at this time?

8 A. Yes.

9 Q. And is it your assumption that if you, as the,  
10 you know, designated person from BofA to speak to them,  
11 had made such a call, that he would have returned it and  
12 you would have had such a call?

13 MR. CANTOR: Objection.

14 A. Again, I know I wanted to speak to him, as  
15 this e-mail indicates. I just do not recall if the  
16 conversation actually took place or not.

17 Q. (BY MR. DILLMAN) What do you recall of the  
18 one conversation that you -- you said I recall having a  
19 conversation. What do you recall of that?

20 MR. CANTOR: Objection. I'm not sure  
21 that's accurate. But go ahead.

22 A. I recall that -- you know, asking what --  
23 what, if anything, he knew about the prospects of  
24 continuing -- of Lehman's continuing to fund, and I  
25 don't recall what his response was.

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1 Q. (BY MR. DILLMAN) Really? For this big deal

2 to this facility, you don't recall what he told you

3 about the prospects for Lehman to fund?

4 MR. CANTOR: Objection; argumentative.

5 A. I don't remember.

6 Q. (BY MR. DILLMAN) Did you -- who else was on

7 the call?

8 A. I don't remember that, either.

9 Q. Do you recall Mr. Freeman at any time telling

10 you that there were things about the funding of Lehman's

11 portion of the September advance that he couldn't tell

12 you upon advice of counsel?

13 A. I don't recall that.

14 Q. Pretty startling, isn't it, if a borrower did,

15 in fact, tell you that there were things he couldn't

16 tell you because his counsel told him not to? That

17 would have been surprising, wouldn't it?

18 MR. CANTOR: Objection.

19 A. It would depend on the circumstances.

20 Q. (BY MR. DILLMAN) These circumstances.

21 MR. CANTOR: Objection.

22 A. I don't know that -- I don't know what my

23 reaction would have been. I don't recall any -- I don't

24 recall if that -- if that statement was made or not.

25 Q. (BY MR. DILLMAN) Typically, counsel don't

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1 tell you not to say things to other people because those

2 things would be good for you, right?

3 MR. CANTOR: Objection.

4 A. I don't know that.

5 Q. (BY MR. DILLMAN) Mr. Freeman has testified in

6 this case, under penalty of perjury, under oath, that he

7 informed you that there were things that he could not

8 tell you about the September retail -- Lehman's -- the

9 funding of Lehman's portion of the September retail

10 advance because he had been advised not to by counsel.

11 MR. CANTOR: Objection. That

12 mischaracterizes --

13 Q. (BY MR. DILLMAN) Are you disputing that

14 testimony?

15 MR. CANTOR: What testimony? Because it

16 never came out of Jim Freeman's mouth. Objection.

17 A. I don't recall him saying that to me.

18 Q. (BY MR. DILLMAN) Okay. Do you recall him

19 telling you anything in terms of his inability to

20 provide information to you regarding Lehman based upon

21 advice of counsel?

22 A. I do not recall that.

23 Q. Okay. What efforts, if any, did you make with

24 Mr. Freeman to determine who was paying, if anyone,

25 Lehman's portion of the retail advance?

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1 A. I don't know that I asked that question.

2 The -- the proof of funding by the retail lenders was  
3 when the wire from the retail lenders came in or from  
4 the servicer of the retail lenders came in.

5 Q. And --

6 A. And I don't know where the proceeds came from.

7 Q. Had you made --

8 A. The requirement was it came from the retail  
9 lenders.

10 Q. Right. So if it came from somebody else, that  
11 would have violated that particular requirement of the  
12 disbursement agreement, right?

13 MR. CANTOR: Objection.

14 A. That was -- if it did come from somebody else,  
15 that would have not conformed with one of the  
16 provisions, one of the representations.

17 Q. (BY MR. DILLMAN) And would have caused 3.3.23  
18 of the disbursement agreement to fail?

19 MR. CANTOR: Objection; calls for a  
20 hypothetical. Who is the money coming from?

21 Q. (BY MR. DILLMAN) Correct?

22 A. As part of the process, as part of the  
23 requirements, there was a representation by the borrower  
24 that all the representations were correct.

25 Q. Not talking about the representations.



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1 A. I understand.

2 Q. I'm talking about if the monies to pay for the  
3 Lehman portion of the retail facility had not come from  
4 Lehman, that would have violated one of the conditions  
5 precedent to disbursement under the Master Disbursement  
6 Agreement; isn't that right?

7 MR. CANTOR: Objection.

8 A. The language in the -- as I recall, the  
9 language in the disbursement agreement requires it to  
10 come from the retail lenders. And I don't -- I don't  
11 know who the retail lenders necessarily are. It doesn't  
12 necessarily have to come from Lehman, I don't believe,  
13 unless they're a retail lender.

14 Q. (BY MR. DILLMAN) What if it came from me?

15 MR. CANTOR: Objection; incomplete  
16 hypothetical. Under what circumstances is it coming  
17 from you?

18 Q. (BY MR. DILLMAN) And I'll tell you I wasn't a  
19 retail lender, just to clear up any ambiguity there.

20 A. If -- if we knew it didn't come from a retail  
21 lender, based on the certifications and representations  
22 by the borrower, because they couldn't represent that,  
23 then the conditions wouldn't have been met and we  
24 wouldn't have made -- we would not have advanced the  
25 funds.

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1 Q. And if the monies had come from the -- from  
2 Fontainebleau Resorts, as opposed to Lehman, to pay  
3 the -- Lehman's portion of the retail advance, that  
4 wouldn't have come from a retail lender, correct?

5 MR. CANTOR: Objection; incomplete  
6 hypothetical.

7 A. Is your assumption they were not a retail  
8 lender?

9 Q. (BY MR. DILLMAN) Yes. It's my assumption  
10 that Fontainebleau Resorts was not a retail lender. Do  
11 you -- do you -- do you share that assumption with me?

12 A. I don't know who, if any, other -- I don't  
13 know who was a retail lender and who wasn't. The funds,  
14 if they came in the amount requested from the servicer  
15 for the retail lenders or the retail agent, in the  
16 amount we requested, and there was a representation by  
17 the borrower that all the reps and warranties were true  
18 and correct, then we would have made an advance.

19 If any of that hadn't occurred, and  
20 specifically if the representations hadn't been correct,  
21 we wouldn't have made the advance, if they couldn't have  
22 certified to them.

23 Q. And if you knew that Fontainebleau Resorts had  
24 made the payment for Lehman for September and you knew  
25 that Fontainebleau Resorts was not a retail lender,

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1 would you have made the disbursement, even if the  
2 company had given you a rep and warranty that all  
3 conditions precedent had been met?

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

6 A. I don't know how we would have known other  
7 than through the representations made by the borrower.

8 Q. (BY MR. DILLMAN) That wasn't my question,  
9 sir. Do you need it read back?

10 A. No.

11 MR. CANTOR: Probably needs a better  
12 question.

13 A. If we knew for certain that the funds did not  
14 come from the retail lenders, then the requirements of  
15 the disbursement agreement would not have been met.

16 Q. (BY MR. DILLMAN) And you would not have  
17 disbursed, even if the borrower had provided you a  
18 representation and warranty that all the conditions  
19 precedent had been met; isn't that right?

20 MR. CANTOR: Objection; calls for  
21 speculation.

22 A. Since one of the conditions was that the funds  
23 came from retail lenders and they certified to that, I  
24 don't know how we would know otherwise.

25 Q. (BY MR. DILLMAN) Sir, I'm asking you to

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1 assume that you knew that Lehman's portion of the  
2 September retail advance was paid by Fontainebleau  
3 Resorts. I want you to assume that you knew that  
4 Fontainebleau Resorts was not a retail lender under the  
5 retail facility. And I want you to assume that the  
6 borrowers had given you representations and warranties  
7 that all conditions precedent in the Master Disbursement  
8 Agreement had been met.

9 Under those circumstances, would it have been  
10 appropriate, in your estimation, as the senior person at  
11 Corporate Debt Products responsible for this facility,  
12 to fund disbursements in September?

13 MR. CANTOR: Objection.

14 A. No.

15 Q. (BY MR. DILLMAN) Now, with that in mind, what  
16 did you do, if anything, to determine who the retail  
17 lenders were to the retail facility?

18 A. I don't recall doing anything. It was not a  
19 facility to which we were a party.

20 Q. Did you have any information that led you to  
21 believe that Fontainebleau Resorts was a lender to the  
22 retail facility?

23 A. I don't know who and who was not a lender, so  
24 I did not know.

25 Q. Fair enough. But did you have any information

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1 from any source that caused you to believe that  
2 Fontainebleau Resorts was or might be a retail lender  
3 under the retail facility?

4 A. No.

5 Q. What efforts, if any, did you make to  
6 determine whether or not Lehman paid its portion of the  
7 September retail draw amount as opposed to someone other  
8 than Lehman?

9 MR. CANTOR: Objection.

10 A. We didn't. As part of the draw process, we  
11 requested a certain amount from the retail lenders to be  
12 delivered; and that amount that was requested was  
13 delivered.

14 Q. (BY MR. DILLMAN) You did know that one of the  
15 options that Fontainebleau was looking at was  
16 potentially paying Lehman's share if Lehman didn't pay,  
17 right?

18 A. I knew Fontainebleau was looking for  
19 alternatives. I don't know to what extent it included  
20 them funding it.

21 Q. One of the alternatives that it was looking at  
22 was the possibility that it would -- "it" being  
23 Fontainebleau Resorts -- would fund?

24 A. I don't recall if I knew that or not.

25 Q. Okay. Mr. Yunker recalled that.

1 A. Okay.

2 Q. Okay. Is it -- would the fact that Mr. Yunker  
3 testified that those conversations occurred help you to  
4 refresh your recollection at all on this topic?

5 A. Fontainebleau, I know, was looking for  
6 alternatives. Could that have included them funding it?  
7 Yes. I don't recall being told that, but I'm -- but  
8 that could have been one of the alternatives they were  
9 pursuing.

10 Q. Did you have any discussions with Mr. Freeman  
11 or anyone else at Fontainebleau regarding how payments  
12 from Fontainebleau might be structured if Fontainebleau  
13 chose to pay Lehman's portion of the retail facility for  
14 September?

15 A. I don't remember.

16 Q. Let me place in front of you 229, which was  
17 previously marked. 229 is a series of e-mails, the top  
18 one of which is from you to -- excuse me -- Mr. Yunker,  
19 Mr. Howard, and Mr. Varnell, with a copy to Mr. Bolio.  
20 Do you recall this e-mail?

21 A. Vaguely.

22 Q. Did you see it yesterday in preparing for your  
23 deposition?

24 MR. CANTOR: Objection. Direct the  
25 witness not to answer.

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1 Q. (BY MR. DILLMAN) In your e-mail, you refer to  
2 FB funding. Do you see that?

3 A. Yes.

4 Q. You say, "In my opinion there is still one  
5 issue that still needs to be resolved. That is, do we  
6 as the Bank Agent make the unilateral call to interpret  
7 the FB funding as Retail Agent funding (or waive the  
8 condition if interpreted differently) or do we seek  
9 Required Lender consent."

10 A. Uh-huh.

11 Q. Let's parse that out a bit.  
12 FB funding here was funding by Fontainebleau  
13 Resorts?

14 A. Yes.

15 Q. Of the retail facility -- excuse me -- of  
16 Lehman's share of the September draw on the retail  
17 facility, correct?

18 A. Of some portion of the retail facility. I  
19 don't know whose share it was or wasn't.

20 Q. Well, the only share that was at issue on  
21 September 19, 2008, was Fontaine -- was Lehman's, right?

22 A. I presume there was a shortfall and that was  
23 what this was meant to cover.

24 Q. September 15th, Lehman files for bankruptcy.

25 A. Yes.

1 Q. The only reason that any of that has any --  
2 that Lehman's bankruptcy has any impact on your life  
3 under the Las Vegas project is that Lehman's a retail  
4 lender and this may result in them not funding their  
5 commitment under the retail facility, right?

6 A. If the Lehman facility had been syndicated,  
7 other lenders in that might have been hesitant to send  
8 money to Lehman for fear it never made it to the  
9 borrower, and then they would have been deemed to have  
10 been a defaulting lender in that agreement, if that  
11 agreement had defaulting term -- defaulting lender  
12 terms.

13 So I don't know what provisions or who was in  
14 that facility or whose funding they were talking about  
15 making up, but to the extent there was any shortfall,  
16 they were considering, apparently from this, about  
17 acting as, in some point, a funding entity for the  
18 retail loan.

19 Q. Monies from the other retail lenders wouldn't  
20 have gone to Lehman, wouldn't it -- would it?

21 A. It would have gone to Lehman or its servicer.  
22 I'm not exactly sure how that was structured.

23 Q. You know that Lehman had a servicer, right?

24 A. Yes.

25 Q. Trimont?



1 A. Yes.

2 Q. And the whole reason that you have a servicer  
3 is because that's the third-party entity -- at least one  
4 of the reasons is that's the third-party entity to whom  
5 you send funds, right?

6 A. Except I don't know if any of the funds flowed  
7 through Lehman before it got to the servicer. It was  
8 not a facility we were a party to.

9 Q. Would you agree with me that one of the  
10 potential issues was that Lehman would be a part of the  
11 funding deficit?

12 A. Yes.

13 Q. All right. And so when you say "FB funding"  
14 here, you're talking about the possibility that  
15 Fontainebleau Resorts would fund some or all of the  
16 retail draw request for September?

17 A. Yes.

18 Q. And that that funding was an issue that you  
19 needed to interpret?

20 A. Yes.

21 Q. And you needed to determine whether that was  
22 appropriate under the Master Disbursement Agreement?

23 A. Yes.

24 Q. And you concluded that it would not be?

25 A. I don't know what my conclusion was.

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1 Q. You just told me about five, ten minutes ago  
2 that it would have been a violation of the Master  
3 Disbursement Agreement if Fontainebleau had paid for  
4 Lehman and Fontainebleau wasn't a -- a retail lender.

5 A. Based on a number of assumptions, yes.

6 Q. And that was the -- those were the assumptions  
7 that you were applying at this point in time, and the  
8 conclusion that you reached was, if Fontainebleau funded  
9 the retail loan, it would be a violation of one of the  
10 conditions precedent to the Master Disbursement  
11 Agreement, right?

12 MR. CANTOR: Objection.

13 A. The question you asked me earlier was based on  
14 several assumptions. This decision would have been made  
15 on -- and the ultimate decision would have been made on  
16 consulting with counsel and reviewing all of the  
17 appropriate documents, including all of the provisions.

18 Q. (BY MR. DILLMAN) There is no counsel on this  
19 e-mail right here.

20 A. There is not, no.

21 Q. At this point -- at this point in time, on  
22 September 19, 2008, did you have an understanding as to  
23 whether or not funding by the Fontainebleau Resorts of  
24 some or all of the retail draw for September was  
25 appropriate under the Master Disbursement Agreement?

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1 MR. CANTOR: Objection.

2 A. I think, as I stated here, there is an issue  
3 that still needed to be resolved. It was not clear to  
4 me one way or the other, which was why I felt it  
5 required further consideration.

6 Q. (BY MR. DILLMAN) Okay. Well, let's look at  
7 3.3.2 of the Master Disbursement Agreement. I  
8 previously put that in front of you as Exhibit 72.

9 A. What section?

10 Q. 3.3.23. It is at page 39, I believe -- 40.  
11 Excuse me. And it reads "Retail Advances."

12 A. Uh-huh.

13 Q. This is the provision that you were looking  
14 at at this time on September 19, 2008, right?

15 A. It was one of the provisions I was --  
16 provisions we were looking at, yes.

17 Q. The question was, if Fontainebleau Resorts  
18 pays the retail advances or any portion of it for  
19 September, would that violate 3.3.23, right?

20 A. If they were not a retail lender.

21 Q. And if they were not, you concluded that it  
22 would violate this 3.3.23, right?

23 MR. CANTOR: Objection.

24 A. It would have been -- any final decision on  
25 that would have been made in conjunction with counsel.

1 Q. (BY MR. DILLMAN) Of course. But your  
2 understanding and conclusion at this point in time was  
3 that it -- that being September 19, 2008 -- was that it  
4 would have violated this provision if Fontainebleau  
5 Resorts had paid as opposed to the retail lenders?

6 A. I don't know, at the point in time I was  
7 writing this e-mail, I was looking at this provision at  
8 the same time and thinking about this one specifically.  
9 It was clearly an unusual issue and one that required  
10 further investigation and research and discussion in  
11 conjunction with counsel.

12 Q. You eventually came to that conclusion, did  
13 you not?

14 A. What conclusion?

15 Q. That payment by Fontainebleau Resorts would  
16 have violated the 3.3.23.

17 A. I don't recall what our eventual outcome was.  
18 I just don't remember.

19 Q. Okay. One of the issues that you're talking  
20 about here is waive the condition. What condition are  
21 you talking about waiving? I'm back to Exhibit 229.

22 A. The condition that the funds come from the  
23 retail agent, presumably.

24 Q. And how would you go about waiving the  
25 condition?

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1 A. It would have to be -- I'd have to look at the  
2 terms of the disbursement agreement. But, typically, to  
3 alter the agreement, you have to seek consent of  
4 requisite lenders.

5 Q. That's the next part. You say, "Or do we seek  
6 Required Lender consent."

7 A. Right.

8 Q. What's required lender consent?

9 A. It's defined as some percentage of the  
10 lenders, typically, two-thirds or more than 50 percent.  
11 I don't know what -- I don't recall what it was in  
12 this -- in this instance, but it's -- it's some form of  
13 majority of the lenders.

14 Q. What happens if the -- describe for me the  
15 process of seeking required lender consent. How do you  
16 go about that?

17 A. Anytime you're seeking consent to waive a  
18 provision, a waiver would be drafted and circulated to  
19 the lenders for them to consider, and if they were in  
20 agreement, they would sign the consent and return it.  
21 And once the requisite number of -- requisite approval  
22 had been received, then the modification or the waiver  
23 would be deemed to be effective.

24 Q. Did you undertake either a waiver or required  
25 lender consent with respect to the funding issues in

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1 September?

2 A. I do not recall.

3 Q. I'm not aware of any. Are you?

4 A. Again, I don't remember, but --

5 Q. Any reason why you didn't seek required lender  
6 consent on the issues regarding the Lehman -- strike  
7 that.

8 Any reason why you did not seek lender consent  
9 with respect to the disbursement that BofA authorized  
10 for September 2009?

11 MR. CANTOR: Objection.

12 A. Specifically, no, I don't recall why we would  
13 or would not have done that. I mean, we would have,  
14 clearly, if we believed someone other than a retail  
15 lender was going to make an advance and we knew that for  
16 sure.

17 Q. (BY MR. DILLMAN) Well, that would have been  
18 one of the options, to seek required lender consent?

19 A. Yes.

20 Q. Another option would be to simply refuse to  
21 disburse?

22 A. Yes.

23 Q. The e-mail that precedes the top one is from  
24 Mr. Yunker to yourself and Mr. Howard and Mr. Varnell.  
25 And it says -- this is the same day, September 19th.

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1 "Okay. What time works for you to wrap up the Lehman  
2 issue with Jim?"

3 "Jim" here is Jim Freeman?

4 A. Yes.

5 Q. And the Lehman issue is this issue that we've  
6 been talking about, who's going to fund Lehman's share?

7 A. Or do the retail lenders fund, I think, is  
8 probably the way I would recall that.

9 Q. Okay. And the issue specifically discussed  
10 with Mr. Freeman relates to whether or not  
11 Fontainebleau's going to fund, correct?

12 MR. CANTOR: Objection.

13 A. No. As I recall, this was a discussion about  
14 were the retail lenders going to be funding or not.

15 Q. (BY MR. DILLMAN) Well, why didn't you call  
16 Lehman on that rather than Jim?

17 MR. CANTOR: Objection.

18 A. There is no relationship between us and Lehman  
19 with respect to their credit agreement. The -- the  
20 borrower is the one that wanted -- that requested the  
21 second -- a retail facility separate from the resort  
22 facility. And -- and -- and our function as  
23 disbursement agent was outlined in the disbursement  
24 agreement, which was, when the retail funds come in and  
25 all the other conditions have been met as well, we would

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1 release the funds. If -- if there was an issue with  
2 Lehman or the other retail lenders or any retail lenders  
3 funding, that was the company's issue to ferret out.

4 Q. (BY MR. DILLMAN) You certainly had  
5 relationships with Lehman, right?

6 A. I did not.

7 Q. Bank of America did?

8 A. Presumably did.

9 Q. Lots and lots and lots of relationships,  
10 right?

11 MR. CANTOR: Objection.

12 A. I don't know the extent.

13 Q. (BY MR. DILLMAN) Two major financial  
14 institutions in the -- in the world. You had lots of  
15 finance -- lots of relationships with -- with Lehman at  
16 that time, didn't you?

17 MR. CANTOR: Objection.

18 A. I don't know.

19 Q. (BY MR. DILLMAN) Anything that prevented you  
20 from picking up the phone and calling folks at Lehman  
21 and saying, are you going to pay on the retail facility  
22 this month?

23 MR. CANTOR: Objection.

24 A. Nothing prevented me from picking up the phone  
25 and calling, but it would have been to a party to which



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1 we had no contractual relationship with with respect to  
2 their credit facility.

3 Q. (BY MR. DILLMAN) Down at the bottom is an  
4 e-mail from you dated the same day. This is Exhibit<sup>30</sup>  
5 229.

6 A. Uh-huh.

7 Q. To Mr. Howard and Mr. Yunker and Mr. Varnell,  
8 same group. It says -- if you turn to the top of the  
9 next page, it says, "I realize that there are more  
10 questions than answers right now and that we are  
11 formulating a plan to address Lehman and the Retail  
12 Facility." Do you see that?

13 A. Uh-huh.

14 Q. Yes?

15 A. Yes, I see it.

16 Q. What -- what plan were you formulating to  
17 address Lehman and the retail facility?

18 MR. CANTOR: Objection.

19 A. It's will the retail facility fund or not and  
20 what, if anything, we do if they don't fund --

21 Q. (BY MR. DILLMAN) Okay.

22 A. -- which is pretty clear. We don't fund. I  
23 mean, we don't disburse funds.

24 Q. Okay. That doesn't sound like a difficult  
25 plan to formulate; if they don't fund, we won't fund.

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1 Was there more --

2 MR. CANTOR: Objection; argumentative.

3 Q. (BY MR. DILLMAN) Was there more to it than  
4 that?

5 MR. CANTOR: Objection.

6 A. I don't recall.

7 Q. (BY MR. DILLMAN) Okay. You didn't say here,  
8 we're formulating a plan to address the possibility that  
9 Lehman doesn't fund. It says, "We are formulating a  
10 plan to address Lehman and the retail facility." It  
11 seems a little bit broader.

12 Does that help you to recall the plan you were  
13 referring to here was something other than, if -- if the  
14 retail folks don't fund, we're not going to fund?

15 MR. CANTOR: Objection; argumentative.

16 A. I don't recall what the specifics of the plan  
17 to address Lehman and the retail facility were other  
18 than the fact that what would happen if the -- if the  
19 retail facility did not fund, which we wouldn't disburse  
20 funds. Beyond that, I don't recall.

21 Q. (BY MR. DILLMAN) What was your expectation at  
22 the time -- this is in mid-September -- as to whether or  
23 not Lehman would be funding?

24 A. What was my expectation?

25 Q. Yes, sir.

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1 A. As part of my responsibility as industry  
2 leader for Gaming, I participated in calls within --  
3 with the other industry leaders in Corporate Debt  
4 Products about Lehman-related issues; and in September  
5 there was no clear -- there was no consistent response  
6 to whether they were funding their advance requests or  
7 not.

8 So there was no consistent view, so our view  
9 was, we didn't know if they would fund or not. It would  
10 have to be -- we'd have to wait to see if the retail  
11 lenders funded their -- their portion of the advance  
12 request on the date requested.

13 Q. The -- prior to the funding -- do you remember  
14 what the funding date was in September?

15 A. (Witness shakes head from side to side.)

16 Q. Were you refreshed looking through documents  
17 yesterday?

18 A. It's third week, the 25th, 26th, 27th,  
19 somewhere in that time frame.

20 Q. Okay. I'll represent to you that the date  
21 that it was supposed to be funded -- strike that.

22 It was funded on the 26th.

23 A. Of September?

24 Q. Yes, sir.

25 A. Okay.

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1 Q. So prior to that funding, you recall that  
2 there were questions raised by other lenders as to  
3 whether or not Lehman's bankruptcy was an event of  
4 default or otherwise caused conditions to fail,  
5 conditions to disbursement to fail?

6 A. I don't recall specifically. It would not  
7 surprise me, but I do not recall.

8 Q. With all the documents you looked at  
9 yesterday, it doesn't help you to recall?

10 A. No. Again, it would not surprise me if -- if  
11 one or more lenders expressed concern.

12 Q. Like Highland Capital?

13 A. I do recall seeing e-mails from them. I don't  
14 recall what the time frame was, whether it was September  
15 or later.

16 Q. The "him" being Kevin Rourke?

17 MR. CANTOR: I think he said "them."

18 A. Them. I said "them." Sorry.

19 Q. (BY MR. DILLMAN) I thought you said "him."

20 A. No, no.

21 Q. Okay. And those e-mails helped to refresh  
22 your recollection that you had conversations, in fact,  
23 with Highland --

24 A. Yes.

25 Q. -- concerning this facility?

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1 A. Yes.

2 Q. Tell me about those conversations.

3 A. I don't recall the specifics other than there  
4 were questions they had and we would try to facilitate  
5 getting responses from the borrower.

6 Q. Well, there weren't just questions they had.  
7 They were making statements as to what the legal  
8 implications of certain things were, weren't they? They  
9 were saying you have to stop funding?

10 MR. CANTOR: Objection.

11 A. I don't recall telling them -- or them telling  
12 us to stop funding.

13 Q. (BY MR. DILLMAN) All right. Well, we'll get  
14 to that.

15 A. Okay.

16 Q. But you do recall having conversations with  
17 Highland --

18 A. Yes.

19 Q. -- on more than one occasion?

20 A. Yes.

21 Q. And who? Who at Highland?

22 A. I recall the name Kevin Rourke, and I don't  
23 remember -- remember other names at this point.

24 Q. How about Andrei Dorenbaum? Does that name  
25 ring a bell?

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1 A. It does. I believe I received an e-mail  
2 from -- from Andrei. I don't know that I've ever spoken  
3 to him or not. I just don't recall.

4 Q. Exhibit 455, this is an e-mail from you --  
5 from Mr. Dorenbaum to yourself --

6 A. Uh-huh.

7 Q. -- dated September 26, 2008.

8 Do you recall getting this e-mail?

9 A. Yes.

10 Q. Do you recall doing anything as a result of  
11 receiving this e-mail?

12 A. I recall providing this to counsel.

13 Q. Anything else?

14 A. I don't recall specifically anything else.

15 Q. Did you make any effort to determine whether  
16 Highland was correct in its assessment that, as a result  
17 of Lehman's bankruptcy, the financing agreements for the  
18 Las Vegas project were no longer in full force and  
19 effect?

20 A. I don't recall the exact time frame that it  
21 occurred, but I know the full force and effect language  
22 is one of the conditions and representations for making  
23 distributions, and it was represented to us by the  
24 borrower that it was still in full force and effect.

25 Q. And if the borrower had told you it was still

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1 in full force and effect and you knew it to be  
2 otherwise, would you feel compelled to disburse or not  
3 to disburse?

4 MR. CANTOR: Objection; calls for  
5 speculation, incomplete hypothetical.

6 A. I guess I don't know how we would have known  
7 it wasn't unless the borrower represented to us that it  
8 wasn't.

9 Q. (BY MR. DILLMAN) Okay. As a general matter,  
10 if the borrower made representations to you that you  
11 knew to be false, would you rely upon those  
12 representations and disburse, in the face of facts known  
13 to you that contradicted the borrower's representations?

14 MR. CANTOR: Objection.

15 A. No.

16 Q. (BY MR. DILLMAN) Why not?

17 A. If we had facts that things -- that it was not  
18 true, then the representation would not have been true,  
19 so we would not have disbursed.

20 Q. I thought you said you just relied on the  
21 representations of the borrowers.

22 MR. CANTOR: Objection; argumentative.

23 Come on.

24 A. That's the information we had in our  
25 possession.

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1 Q. (BY MR. DILLMAN) Okay. So you rely upon the  
2 information in your possession?

3 A. The facts that -- yes, the facts provided by  
4 the borrower in its certifications that the  
5 representations were correct.

6 Q. Well, one fact is there's representations by  
7 the borrowers. There may be other facts that you're  
8 aware of as well, right?

9 MR. CANTOR: Objection.

10 A. Perhaps there may be.

11 Q. (BY MR. DILLMAN) Okay. Under my  
12 hypothetical, facts that you're aware of that contradict  
13 establish that the borrower's representations are false.  
14 Assume that.

15 In making a decision whether to disburse or  
16 not, you take into account and understood that as the  
17 bank agent you were required to take into account all  
18 the facts known to you, not just blindly adhere to  
19 representations by the borrower, right?

20 A. Correct. We adhere to the terms of the  
21 agreement.

22 Q. The -- I want to stick to the scenario that I  
23 just painted. Okay. If the borrower had made  
24 representations, you had facts demonstrating that those  
25 representations were false, you would not disburse,



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1 would you?

2 A. Correct.

3 Q. You would not blindly rely upon the  
4 representations of the borrower if you knew them to be  
5 false?

6 A. If we had evidence to back up our belief,  
7 then, yes, we would have -- we would have not.

8 Q. And if you had evidence that contradicted the  
9 representations -- strike that -- that was materially  
10 inconsistent with the representations of the borrowers,  
11 would you disburse under those circumstances?

12 MR. CANTOR: Objection.

13 A. It would depend on the degree of  
14 inconsistency.

15 Q. (BY MR. DILLMAN) You would have to look into  
16 it to figure out how inconsistent and whether or not you  
17 could rely upon the borrower's representations in light  
18 of the facts that were known to you?

19 MR. CANTOR: Objection.

20 A. Correct.

21 Q. (BY MR. DILLMAN) Exhibit 455 that we had,  
22 Mr. Dorenbaum says, as a result of the fact that the --  
23 the financing agreements are no longer in full force and  
24 effect, one, no disbursements may be made under the loan  
25 facility, and, two, the borrower should be sent a notice

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1 of breach immediately to protect the lenders' rights and  
2 to ensure that any cure period commence as soon as  
3 possible.

4 Question one, did you stop disbursements?

5 A. No.

6 Q. Why not?

7 A. I don't know that we believed the agreements  
8 to be no longer in full force and effect.

9 Q. And did you send a notice of breach to the  
10 borrower?

11 A. I don't recall.

12 Q. But you did take Mr. Dorenbaum's e-mail  
13 seriously, right?

14 A. Yes.

15 Q. You did the proper investigations to get to  
16 the bottom of whether or not he was correct, right?

17 MR. CANTOR: Objection.

18 A. The concerns raised by Mr. Dorenbaum were --  
19 we provided this to counsel, and it was part of our  
20 ongoing discussions and -- and -- and decision-making  
21 with respect to the facility.

22 Q. (BY MR. DILLMAN) Right. And just because the  
23 borrower represented that the facility was in full force  
24 and effect, that didn't stop you from making sure that  
25 you treated this topic seriously and that you got to the

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1 answer to your question, and he's given it to you at  
2 least twice.

3 A. As disbursement agent, our responsibilities  
4 were outlined under the disbursement agreement; and  
5 those are the duties that we perform.

6 Q. (BY MR. DILLMAN) Did those duties include, as  
7 far as you understood, tracking down information where  
8 you had facts contrary to representations by the  
9 borrower to make sure that you understood what the true  
10 state of affairs were before you disbursed funds?

11 MR. CANTOR: Objection; calls for a legal  
12 conclusion. The document speaks for itself.

13 A. I don't recall all of the duties outlined in  
14 the -- at this point, I don't recall all the duties  
15 outlined in the disbursement agreement. So I don't  
16 recall specifically what my -- at this point, what our  
17 duties were.

18 Q. (BY MR. DILLMAN) Did you undertake -- strike  
19 that.

20 Did you -- in September 2009, did you ask  
21 Mr. Freeman or anyone else at Fontainebleau Resorts  
22 whether Fontainebleau Resorts had paid any or all of  
23 Lehman's share of the September draw under the retail  
24 facility?

25 A. I recall participating in a phone call -- and

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1 I don't exactly remember when it occurred -- when the  
2 question was asked, were the funds -- the retail funds  
3 provided by the retail lenders, and the response from  
4 the company was yes.

5 Q. Who was on this call?

6 A. I know I was, I know Bill Scott was, and I  
7 know Jim Freeman was. I presume there were others, but  
8 I don't recall who they were.

9 Q. And when did this occur?

10 A. Again, it was after the Lehman bankruptcy; but  
11 when, in the subsequent period to that, it occurred, I  
12 don't remember.

13 Q. Presumably, it was after disbursement, right?

14 MR. CANTOR: Objection.

15 A. I don't know.

16 Q. (BY MR. DILLMAN) Okay. One would think that  
17 the funds by the retail lenders would be paid on or  
18 about the date of disbursement, right? It was in that  
19 time period?

20 A. Again, I don't recall when the phone call  
21 happened.

22 Q. Okay. And who initiated the call?

23 A. The best of my recollection, it was either me  
24 or Bill Scott requesting the phone call.

25 Q. Why?

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1 A. To have certain questions like that one

2 specifically to be -- to be answered.

3 Q. And that one was -- say again for me.

4 A. Were the funds provided by the retail -- were

5 the retail funds provided by the retail lenders.

6 Q. And was that the sum and substance of the

7 question that was asked?

8 A. I don't know exactly how it was worded, but

9 that was the intent and purpose of the question.

10 Q. And did you or anyone else on the call from

11 the BofA end say, let me make this very clear; I want to

12 know whether you, Fontainebleau Resorts, paid any

13 portion of the retail draw?

14 A. I don't recall any follow-up questions.

15 Q. Did you or anyone else on the BofA side say,

16 just to be clear, I don't want to have this ambiguous at

17 all; my question is whether anyone other than the

18 designated lenders under the retail facility made any

19 portion of that payment?

20 A. Again, I don't require -- I don't recall the

21 exact wording of the question, but it was something to

22 the effect, did the retail funds come from the retail

23 lenders.

24 Q. And how long did the call last?

25 A. I don't recall.

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1 Q. And what precipitated the call? Why -- why  
2 did you -- why did you -- before I ask that, did you ask  
3 any other questions?

4 A. I don't recall. Presumably, yes, but I just  
5 don't remember.

6 Q. Why presumably? Maybe that was a one-question  
7 call.

8 A. Maybe it was. I just --

9 MR. CANTOR: Objection; argumentative.

10 A. I just don't remember.

11 Q. (BY MR. DILLMAN) Okay. So you had a call.  
12 You don't recall anything else other than this one  
13 question was asked, right?

14 A. Yes.

15 Q. Why were you asking that question?

16 A. It was one of the conditions to an advance.

17 Q. So was this before or after the advance?

18 A. Again, I don't recall.

19 Q. If you were looking at -- if you were looking  
20 to get an answer to a question concerning conditions of  
21 advance, it would not be unreasonable to assume that  
22 that question preceded the advance, because that's your  
23 best recollection?

24 MR. CANTOR: Objection.

25 A. I do not recall when the call happened.

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1 see that?

2 A. Yes. I took this to mean the retail funds.

3 We were not -- as disbursement agent, we were not

4 receiving individual wires from individual retail

5 lenders because, in fact, we didn't know how many -- at

6 some -- we did at some point, but I'm not sure at this

7 point we knew who the retail lenders are, even if there

8 was more than one of them.

9 We would receive one wire in from the servicer

10 for the retail component, and since we knew Lehman was

11 the lead lender, a reference was to -- the way I

12 interpret this, the reference was that it was from the

13 retail side, not specifically Lehman itself, but that it

14 was retail in general.

15 Q. If you look at 237 -- and you don't have to,

16 if you want to take my representation. But the date for

17 funding was September 25, 2008, right, under the Advance

18 Confirmation Notice?

19 A. If you say so.

20 MR. CANTOR: Well, you previously

21 represented to him that it funded on the 26th.

22 MR. DILLMAN: You're welcome to look at

23 it.

24 A. Which exhibit was that?

25 Q. (BY MR. DILLMAN) 257 -- 237. I'm sorry.

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1 A. Not that I recall.

2 Q. Okay. So can we agree that you don't need to  
3 say "or other shortfalls" because you don't have any  
4 information to suggest that there were other shortfalls?

5 MR. CANTOR: Objection. That's not a  
6 question, and you're not agreeing to anything. He'll  
7 give you his answers as they come. Ask a question.

8 Q. (BY MR. DILLMAN) So when you learned that  
9 Ullico was contemplating paying for shortfalls, you  
10 understood it was paying for Lehman's shortfall, if it  
11 occurred, right?

12 MR. CANTOR: Objection; asked and  
13 answered.

14 A. If the shortfall was a Lehman shortfall, then,  
15 yes, I understood that they would agree to cover some  
16 part of that shortfall.

17 Q. (BY MR. DILLMAN) And you learned that they  
18 had covered that shortfall in December?

19 A. That I don't recall specifically.

20 Q. You learned that they had covered that  
21 shortfall in January?

22 A. I don't recall that. I may have. I just  
23 don't remember.

24 Q. Okay. Now, at some point you sent an e-mail  
25 to Mr. Freeman asking him to reaffirm representations



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1 and warranties made in conjunction with the September  
2 advance request. You recall that?

3 A. Yes.

4 Q. Whose idea was that?

5 MR. CANTOR: Objection to the extent that  
6 it calls -- requires you to reveal advice that you may  
7 have received from counsel. If you can answer it  
8 without revealing advice you received from counsel, then  
9 go ahead.

10 A. I don't think I can answer without revealing  
11 advice received from counsel.

12 Q. (BY MR. DILLMAN) What were the concerns that  
13 Bank of America had that caused you to make that request  
14 to Mr. Susman?

15 A. To Mr. Freeman?

16 Q. To Mr. Freeman.

17 A. The initial -- or the advance request is  
18 submitted in -- earlier in the month, and I forget the  
19 exact date the September 1 was submitted. I suspect it  
20 was the 10th through the 12th, in that time frame, which  
21 would have, as I recall, preceded the Lehman bankruptcy  
22 filing.

23 The actual disbursements don't occur until  
24 later in the month, around the 26th, as we've already  
25 talked about. So there was an intervening period of

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1 time where there were some significant events occurring.

2 When the initial package is submitted, that's where the  
3 reps are made. We just wanted to be clear and to be  
4 certain that when we actually released the funds, that  
5 those reps were still valid.

6 Q. Which reps?

7 A. All of them.

8 Q. Which ones were you concerned about?

9 A. All of them.

10 Q. About all of them?

11 A. All of them.

12 Q. Okay. That the -- that the Remaining Cost  
13 Report still accurately reflected all anticipated costs  
14 to complete?

15 A. Again, without looking at all of the reps, if  
16 that was one of the reps, then, yes, that was one of --  
17 if it's on that list, we wanted to make sure everything  
18 was still valid before we released the funds.

19 Q. Did you ever do that previously?

20 A. No.

21 Q. You understood that the Master Disbursement  
22 Agreement provided that the reps and warranties would be  
23 made as of the date of the disbursement?

24 A. Yes.

25 Q. Okay. So under the Master Disbursement

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1 Agreement, it already provided that the reps and  
2 warranties were as of that time?

3 A. Yes.

4 MR. CANTOR: Objection.

5 Q. (BY MR. DILLMAN) So why did you send out an  
6 e-mail saying do something that you already were  
7 required to do under the agreement?

8 MR. CANTOR: Objection; asked and  
9 answered. Go ahead.

10 A. Because significant events had occurred, you  
11 know, more significant than any events that had occurred  
12 between the receipt of a previous advance request and  
13 previous disbursements, that we felt it appropriate.

14 Q. (BY MR. DILLMAN) So as of the date that you  
15 asked for these renewed vows, so to speak, you -- you  
16 considered the Lehman bankruptcy to be a significant  
17 event for this particular project?

18 MR. CANTOR: Objection.

19 A. Yes. The -- the documents didn't contemplate  
20 a lender of this significance filing bankruptcy and what  
21 to do in that case.

22 Q. (BY MR. DILLMAN) Okay. Let's turn to the  
23 Master Disbursement Agreement, 3 point -- specifically,  
24 3.3 that has the conditions precedent. Are you there,  
25 page 33?

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1 A. Yes.

2 Q. Okay. Now, was the 3.3.1 regarding whether  
3 each material contract was in full force and effect a  
4 factor that led you to request the company to reaffirm  
5 its representations and warranties in late September  
6 2008?

7 A. Yes.

8 Q. And what was there about the full force and  
9 effect of the material contracts? Why did you want that  
10 reaffirmed?

11 MR. CANTOR: Objection. He's already  
12 testified that they wanted all of them reaffirmed.

13 A. It is a -- you know, the structure and the  
14 documents all work, presuming all of the contracts are  
15 in effect. And we wanted to, as part of this advance,  
16 to just reaffirm that all the contracts were still in  
17 full force and effect.

18 Q. (BY MR. DILLMAN) And were the consultant  
19 certificates and reports set forth in 3.3.5 -- did you  
20 need those reaffirmed as a result of the Lehman  
21 bankruptcy?

22 MR. CANTOR: Objection; mischaracterizes  
23 the document.

24 A. These are construction-related --

25 Q. (BY MR. DILLMAN) Right.

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1 A. -- documents, so they would not have been  
2 impacted one way or the other by the Lehman bankruptcy.

3 Q. Right. How about 3.3.6?

4 A. It's construction related and would not have  
5 been impacted one way or the other by the Lehman  
6 bankruptcy.

7 Q. How about 3.3.7?

8 A. Yes. We wanted that reaffirmed as well.

9 Q. There was project security? What did the  
10 Lehman bankruptcy have to do with the security  
11 documents?

12 MR. CANTOR: Objection.

13 A. I don't recall specifically at this point.

14 Q. (BY MR. DILLMAN) How about the in-balance  
15 requirement, 3.3.8?

16 A. We wanted all of these reaffirmed.

17 Q. Really? What did the in-balance requirement  
18 have to do with -- excuse me.

19 What did the Lehman bankruptcy have to do with  
20 the in-balance requirement?

21 MR. CANTOR: Objection; argumentative.

22 A. I don't recall the specifics of the in-balance  
23 test, but, again, we wanted it reaffirmed with all the  
24 others.

25 Q. (BY MR. DILLMAN) How about 3.3.9, order,

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1 judgment or decree or any court, arbitrator or  
2 governmental authority purport to enjoin or restrain the  
3 bank lenders of the trustee from making the advances?  
4 Is that somehow implicated by Lehman?

5 A. The bank lenders and the trustee, no.

6 MR. CANTOR: Objection.

7 Q. (BY MR. DILLMAN) How about 3.3.10, violation  
8 of law? Was there something about the Lehman bankruptcy  
9 that you were worried about in terms of violating some  
10 law?

11 MR. CANTOR: Objection; calls for a legal  
12 conclusion.

13 A. Again, our determination was we wanted all of  
14 these reaffirmed.

15 Q. (BY MR. DILLMAN) Even if they didn't apply?  
16 Even if there was no connection between them and the  
17 Lehman bankruptcy?

18 A. They all apply. To what extent the Lehman  
19 bankruptcy impacted them or not, we wanted them  
20 reaffirmed.

21 Q. Did you ever sit down or state to Mr. Freeman,  
22 look, we got this Lehman bankruptcy; we're concerned  
23 about these issues with respect to your -- your reps and  
24 warranties; we just want to make sure that nothing about  
25 Lehman bankruptcy impacts these, and we want to be very

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1 focused about this so it's not just throwing out a  
2 hodgepodge of stuff that may or may not apply? Want to  
3 be very focused; here are the one, two, six -- ten  
4 conditions precedent that we want you to focus on and  
5 reaffirm in your reps and warranties. Anything like  
6 that?

7 MR. CANTOR: Objection.

8 A. Answering that question would reveal  
9 discussions with counsel.

10 Q. (BY MR. DILLMAN) No, it wouldn't. I'm  
11 talking about discussions you had with Freeman or anyone  
12 else at Fontainebleau Resorts, whether your counsel was  
13 on the line or not.

14 A. I don't recall any such discussions, wanting  
15 to just focus on this item or that item. We wanted to  
16 focus on all of the representations.

17 Q. All right. With Mr. Freeman you never  
18 identified any particular representation that you wanted  
19 reaffirmed, correct?

20 MR. CANTOR: Objection.

21 A. I don't recall specifically if we identified  
22 each one of them individually or a handful of them or  
23 not.

24 Q. (BY MR. DILLMAN) Well, your e-mail on it  
25 doesn't identify anything, so let me put Exhibit 75 in

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1 front of you. Do you recall having any communications,  
2 other than Exhibit 75, with Mr. Freeman on this topic?

3 MR. CANTOR: On what topic? I'm sorry.  
4 What's your question again, Kirk?

5 MR. DILLMAN: Can you read it back,  
6 please.

7 (Requested text was read.)

8 MR. CANTOR: Objection.

9 A. I recall in a conversation mentioning that we  
10 were going to provide this -- either this or a letter  
11 for them to reaffirm.

12 Q. (BY MR. DILLMAN) Conversation with  
13 Mr. Freeman?

14 A. Uh-huh.

15 Q. Okay.

16 A. So that he knew this was coming.

17 Q. So that was a conversation that predated this  
18 exhibit, obviously?

19 A. Yes.

20 MR. CANTOR: Predated? Well --

21 A. Well, I don't know when -- if it was the same  
22 day or a day before. I don't know when it was, but,  
23 yes.

24 Q. (BY MR. DILLMAN) Typically, I think of  
25 predated as being before. But you're right. There is



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1 some ambiguity there.

2 You had the conversation before you sent him

3 the e-mail, right?

4 A. I let him know that this would be coming.

5 Q. Okay. Another conversation that you had with

6 Mr. Freeman.

7 Is that -- anything else that you discussed

8 with him there other than keep a look out to your

9 e-mail, something is going to be coming?

10 A. The specifics of the conversation I don't

11 remember.

12 Q. Anybody else on the line?

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

14 Q. Was that the call where you asked him whether

15 the funds had come from the retail lenders?

16 A. I don't remember.

17 MR. DILLMAN: We have to take a break to

18 change the tape.

19 THE VIDEOGRAPHER: The time is 3:09.

20 We're now going off record. This is the end of Tape 3.

21 (Recess from 3:10 p.m. to 3:19 p.m.)

22 THE VIDEOGRAPHER: The time is 3:19 p.m.

23 We're now back on record. This is the beginning of

24 Tape 4.

25 Q. (BY MR. DILLMAN) In late September of 2008,

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1 did you consider the Fontainebleau Las Vegas project to  
2 involve a deteriorating credit?

3 A. I don't recall exactly how we rephrased it,  
4 but clearly it was not the same condition as when we  
5 originally underwrote it.

6 Q. That term mean anything to you, "deteriorating  
7 credit"?

8 A. It means that -- yeah, it does. It means that  
9 it was not -- the prospects and credit quality were not  
10 as strong as they were when we originally underwrote the  
11 transaction.

12 Q. It was on the downhill side?

13 A. Yeah.

14 Q. That was a term of art within BofA,  
15 "deteriorating credit"?

16 A. It's a common term within BofA, yes.

17 (Deposition Exhibit 899 marked.)

18 Q. Let me put in front of you Exhibit 899, which  
19 is an e-mail at the end of September '08 from  
20 Mr. Keyston to yourself, and it has a chain of e-mails  
21 on it.

22 My question is, does this help you to refresh  
23 your recollection that, in fact, the -- the --  
24 Fontainebleau Las Vegas was considered to be a  
25 deteriorating credit by BofA in late September 2008?

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1 A. Yes.

2 Q. And one of the primary -- one of the more  
3 material issues that you saw as part of that analysis  
4 was that Lehman financing on the retail component was  
5 questionable, correct?

6 A. That the financing of the retail component, in  
7 general, was questionable, yes. That's a concern.

8 Q. Actually, if we look below, it says -- and I  
9 quote -- "The more material issue currently is the  
10 Lehman financing of the retail component." Right?

11 A. Where is that?

12 Q. Bottom.

13 A. Oh, I see. Yes. That was from Doug Keyston.  
14 Yes, I do see that.

15 Q. You would agree that that was one of the  
16 material issues in late 2008 -- excuse me -- late  
17 September 2008?

18 A. Yes.

19 Q. Mr. Keyston says, "Did we do well here or were  
20 we wide of the mark? Don't forward."

21 Do you know what he meant by the first  
22 sentence or the first question?

23 A. I don't.

24 Q. Do you know why he asked you not to forward  
25 the e-mail?

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1 A. As -- as industry lead, there were a lot of  
2 conversations that we would have about things in the  
3 portfolio and whatnot, and sometimes we had to do it via  
4 e-mail, and we just agreed that certain things we  
5 wouldn't forward around.

6 Q. What industry were you the lead of?

7 A. Gaming and Leisure.

8 Q. Okay. And you were the lead -- what did that  
9 mean? Top dog?

10 A. It was -- within Corporate Debt Products there  
11 was an industry lead or kind of a group manager for the  
12 people that cover that sector. In my role, I was both  
13 industry lead and also handling clients directly. Most  
14 of my colleagues were not handling clients directly.

15 Q. All right.

16 A. So I did both. I had accounts of my own, and  
17 I was the manager of our group.

18 Q. Industry lead means head of the group?

19 A. Head of the group.

20 Q. So you were head of the Corporate Debt --  
21 Corporate Debt Products Gaming and Leisure group?

22 A. Yes.

23 Q. Is that right?

24 A. For administrative matters, reviews of the  
25 team members, things like that.

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1 Q. Beginning prior to the time of the  
2 disbursement -- we talked about this before -- you  
3 became aware that lenders were wanting to get more  
4 information from -- from the borrower about the Lehman  
5 situation.

6 A. Yes.

7 Q. One of those you recall was Symphony?

8 A. I don't recall specifically.

9 Q. Do you recall that Symphony was one of the  
10 term lenders?

11 A. I don't recall who the term lenders were.

12 Q. Does "Symphony" ring a bell at all?

13 A. No, but --

14 (Deposition Exhibit 900 marked.)

15 Q. Sorry. Looking at Exhibit 902, does this help  
16 you to refresh your recollection?

17 MR. CANTOR: 900?

18 A. 900?

19 Q. (BY MR. DILLMAN) Did I say 900?

20 A. This says 900.

21 Q. Oh, I'm sorry. You're right. There is a  
22 reason why I confused myself on that. All right.

23 Looking at Exhibit 900, does this refresh your  
24 recollection that Symphony was one of the lenders on the  
25 Las Vegas facility?

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1 A. I don't know who all the lenders were.

2 Q. Help you to refresh your recollection that  
3 there were lenders who were very upset about the  
4 company's failure to respond to their inquiries --

5 A. Yes.

6 Q. -- in late September 2008?

7 A. I don't recall the timing exactly, but I do  
8 recall there were lenders that were upset they were not  
9 getting their calls returned by the -- by the borrower.

10 Q. And you sent a letter to the borrower, right?

11 A. Yes.

12 (Deposition Exhibit 901 marked.)

13 Q. That letter is Exhibit 901, is it not?

14 A. It says 901. Yes.

15 Q. Who drafted the letter?

16 A. I believe counsel did.

17 Q. Did you review and approve the letter before  
18 it went out?

19 A. I'm sure I reviewed it.

20 Q. Mr. -- Mr. Naval was not responsible for  
21 approving this letter, was he?

22 A. I don't think so.

23 Q. He just signed it?

24 A. Yeah.

25 Q. Okay. Did the company have a -- have a

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1 meeting pursuant to this or a conference call?

2 A. I don't recall a conference call with

3 the borrow -- sorry -- with the lenders.

4 Q. Pursuant to this letter or at any time?

5 A. Pursuant to this letter, I don't. And I --

6 again, I don't recall even a subsequent conference call

7 with the lenders.

8 Q. Did you make any efforts beyond this letter to

9 precipitate a call between Fontainebleau and the

10 lenders?

11 A. Yes.

12 Q. What did you do?

13 A. Phone calls.

14 Q. To whom?

15 A. To the company, to Mr. Freeman.

16 Q. Anybody else at the company other than

17 Mr. Freeman that you talked to on this topic?

18 A. I don't recall if I spoke with anybody other

19 than Jim about this.

20 Q. Talk to Jim about this before disbursement on

21 September 26th?

22 A. About a meeting with the lenders?

23 Q. A meeting or a call, yes.

24 A. I don't recall specifically when any of those

25 requests were made, but it would have been, you know, my

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1 expectation I would have made the request before we sent  
2 a letter asking for a meeting.

3 Q. You would have called Mr. Freeman and said,  
4 you're going to get a letter asking for a call; let's  
5 see if we can't get that together?

6 A. Yes.

7 Q. Okay. So this is yet another call that you  
8 had with Mr. Freeman prior to the disbursement of funds,  
9 right?

10 A. Yes.

11 Q. In that call did you -- do you recall whether  
12 you discussed who was going to be funding the Lehman  
13 portion of the retail financing?

14 A. I don't recall.

15 Q. This was not the call -- it was not a call in  
16 connection with Exhibit 901 in which you, Mr. Scott, and  
17 Mr. Howard asked Mr. Freeman whether the retail lenders  
18 had funded; is that right?

19 A. I don't know if it was that call or another  
20 call. I don't remember.

21 Q. Unlikely it's this call since this is on  
22 September 22nd --

23 A. Correct.

24 Q. -- and the disbursement was on September 26th,  
25 right?



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1 A. Yeah.

2 MR. CANTOR: Objection.

3 Q. (BY MR. DILLMAN) Did the company set up a --  
4 the company didn't set up a call as a result of the  
5 exhibit?

6 A. I don't recall, but I don't believe so.

7 Q. Did you make a call to Mr. Freeman to the  
8 effect of, come on, we need a call; we've asked for one;  
9 let's get it scheduled?

10 A. I don't remember exactly.

11 Q. Would that have been typical?

12 A. It would have been either from me. It could  
13 have come from one of the client managers. It could  
14 have come from Mr. Howard. It could have come from any  
15 of us.

16 Q. Okay. But it would have been typical for BofA  
17 to follow up on a letter --

18 A. Yes.

19 Q. -- such as Exhibit 901?

20 A. I would expect so, yes.

21 Q. Okay. As the lead on this matter, did you --  
22 were you told what the company's response was to the  
23 follow-up request?

24 MR. CANTOR: Objection.

25 A. I don't recall who told me what.

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1 Q. (BY MR. DILLMAN) Did you get the sense,  
2 towards the end of September 2008, the company was  
3 dodging calls?

4 A. They were clearly -- from information we had  
5 from other lenders, they were not returning their calls.

6 Q. If you're not returning calls, you're dodging  
7 them, right?

8 MR. CANTOR: Is that the definition you  
9 want to use?

10 Q. (BY MR. DILLMAN) That's how you would  
11 understand it, right?

12 A. They were not returning lenders' calls.  
13 That's what we understood from lenders.

14 Q. And was that acceptable for BofA, to have a  
15 borrower on a loan that it was agenting not returning  
16 calls of lenders?

17 A. No.

18 Q. What did you do to make sure that a call  
19 occurred?

20 A. We sent a subsequent letter asking for a call  
21 and had a bit more specifics into it, which was, as I  
22 recall, a compilation of questions we had received from  
23 lenders.

24 Q. And is that Exhibit -- the one I just put in  
25 front of you.

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1 information.

2 Q. (BY MR. DILLMAN) What call were you referring  
3 to?

4 A. I don't know. I don't know.

5 Q. If you look at Exhibit 225, you see that the  
6 call there is set for October 3, 2008, at 11:00 a.m.

7 A. Uh-huh.

8 Q. And you see that your e-mail to Mr. Varnell is  
9 October 3, 2008, at 11:03 a.m.

10 A. Uh-huh.

11 Q. You're referencing here a call relating to  
12 Fontainebleau and Turnberry, right, in your e-mail?

13 MR. CANTOR: Which one? I'm sorry.

14 MR. DILLMAN: The e-mail.

15 A. 224?

16 Q. (BY MR. DILLMAN) 224, yeah.

17 A. Yes.

18 Q. And the call that is -- the subject of the  
19 call that's in 225 is "Discuss Fontainebleau and  
20 Turnberry." Do you see that?

21 A. Yes.

22 Q. Seems like the same call, doesn't it?

23 MR. CANTOR: Objection.

24 A. Again, I don't recall.

25 Q. (BY MR. DILLMAN) Do you recall in this time

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1 period having had a call with Mr. Tria on any topic?

2 A. I don't recall specifically, but that doesn't  
3 mean it didn't occur.

4 Q. Let me show you Exhibit 205. This is an  
5 e-mail dated October 3, same day, from Mr. Howard to  
6 Mr. Blanton, Charles Blanton, and Robyn Roof, R-o-o-f,  
7 with a copy to you.

8 A. Uh-huh.

9 Q. Mr. Blanton is who?

10 A. I don't know.

11 Q. How about Ms. Roof?

12 A. She was in Syndications, in the Loan  
13 Syndications group, on the Syndicate desk. Her function  
14 was kind of that bridge between the market and the  
15 structuring side.

16 Q. The subject line is "Reminder Fontainebleau  
17 Lender Update Call Today." Do you see that?

18 A. Yes, I do.

19 Q. And did you participate in lender update calls  
20 with respect to Fontainebleau or a call internally at  
21 Fontaine -- at Bank of America around this time period?

22 MR. CANTOR: Objection.

23 A. I think this is in reference to the call that  
24 never occurred, that I recall never occurred.

25 Q. (BY MR. DILLMAN) The call that never

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1 occurred. This is the call with the borrower?

2 A. The call with the lenders and the borrower,

3 yes.

4 Q. Okay. And Charles Blanton sends an e-mail

5 that says, "Is today's Fontainebleau call for both

6 public and private side accounts?" Do you see that down

7 at the bottom?

8 A. I do.

9 Q. This was the call that was to be scheduled at

10 the end of the week?

11 A. I believe so, yes.

12 Q. Mr. Howard says, in response, "Call notice was

13 never posted to Intralinks and will be postponed.

14 Company is not ready to have the call."

15 Was it your understanding, on October 3, 2008,

16 the company wasn't ready to have the call with the

17 lender group?

18 A. That's the information David provided.

19 Q. Was that your understanding separate and apart

20 from this e-mail?

21 A. No. I learned it from David, where it says

22 the company was not ready to have the call and is

23 working on a solution.

24 Q. What did Mr. Howard tell you as to why the

25 company was not ready to have the call?

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1 A. I don't recall the specifics of that  
2 conversation. I don't know why -- I don't know what the  
3 rationale was for not having the call.

4 Q. The call was to get questions answered, right?

5 A. Yes.

6 Q. Do you know what solution the company was  
7 working on?

8 A. I do not.

9 Q. Did you ask Mr. Howard?

10 A. I don't recall if I asked him or not.

11 Q. He goes on to say, "They may choose to  
12 communicate in written form versus a call."

13 Did you think that was a good idea?

14 A. Again, it would have been my desire to have a  
15 call; but if the borrower chose to, you know, provide a  
16 written response, then assuming it was a complete  
17 response and answered all the questions, I'm assuming I  
18 would have been fine with it.

19 Q. Mr. Freeman ever express any concern about  
20 being on a lender call with sort of a wide-open forum?

21 A. I don't remember.

22 Q. Help you to recall that Mr. Freeman told you  
23 there were things he couldn't say about the Lehman  
24 funding based upon the advice of counsel?

25 A. I don't remember him saying that.

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1 MR. CANTOR: Objection.

2 Q. (BY MR. DILLMAN) Exhibit 230. Exhibit 230 is  
3 an e-mail from Mr. Howard to yourself and others dated  
4 October 6, 2008.

5 A. Uh-huh.

6 Q. Mr. Howard says, "Understand from Jim that  
7 will be receiving something in writing today."

8 You understand that to refer to the response  
9 to the September 30 letter, do you not?

10 A. I do.

11 Q. You did receive something in writing  
12 eventually, correct?

13 A. Correct.

14 Q. Did you talk to Mr. Freeman before you  
15 received that written memo?

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

17 Q. Did you expect the company to -- strike that.

18 The writing that Mr. Howard was referring to  
19 was in lieu of a -- of a call, right?

20 A. That's what I took this to mean.

21 Q. And did you expect that the company would  
22 address the issues in their writing that you had  
23 raised -- that BofA had raised in the September 30  
24 letter?

25 A. I was hopeful that the response they provided

1 to the compilation of questions that Bank of America  
2 provided would have all been addressed.

3 Q. One of those questions was who funded for  
4 Lehman, right?

5 A. I recall that being one of the questions, yes.

6 Q. And this e-mail chain to which Mr. Howard  
7 appends his top e-mail concerns claims by Highland that  
8 the September retail facility draw was funded by the  
9 equity sponsors. Do you see that?

10 A. I do see it.

11 Q. And Highland points to public reports where  
12 this information was contained. Do you see that?

13 A. Repeat that.

14 Q. Highland refers to public reports in which  
15 this information was contained.

16 A. Yes.

17 Q. Had, in fact, Fontainebleau paid the Lehman  
18 retail draw for September, that would have been of  
19 concern to you at this time, correct?

20 MR. CANTOR: Objection.

21 A. Can you repeat the question.

22 Q. (BY MR. DILLMAN) Had Fontainebleau paid  
23 Lehman's portion of the retail draw for September, that  
24 would have been of concern to you at this time, correct?

25 MR. CANTOR: Objection.



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1 A. If they were not a retail lender.

2 Q. (BY MR. DILLMAN) And if they were not a  
3 retail lender, it would have meant that the -- that  
4 Fontainebleau had violated conditions precedent to  
5 disbursement, correct?

6 MR. CANTOR: Objection.

7 A. They would have not met them.

8 Q. (BY MR. DILLMAN) Would not have met them.  
9 And would have provided you false representations and  
10 warranties, correct?

11 A. If that -- all those assumptions had fallen  
12 into place, yes.

13 Q. And, in fact, had provided you false  
14 representations and warranties in a reaffirmation of  
15 those on September 26, 2008, right?

16 A. Yes.

17 Q. All of that would have been extremely bad news  
18 for this project if that had been the case, right?

19 MR. CANTOR: Objection.

20 A. Funds would -- would have not been disbursed.

21 Q. (BY MR. DILLMAN) Right. So before disbursing  
22 funds in October of 2008, what did you do, if anything,  
23 to get to the bottom of whether or not Fontainebleau  
24 Resorts had funded for Lehman on the September -- for  
25 the September retail facility draw?

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1 A. I don't remember.

2 Q. Shortly after -- in fact, the day after this  
3 e-mail from Mr. Howard saying that a written -- a  
4 writing might be forthcoming, you received Exhibit 77  
5 from Fontainebleau Resorts. Yes?

6 A. Yes.

7 Q. This did not indicate who paid the Lehman  
8 portion of the September retail advance, did it?

9 A. It does not indicate where the specific funds  
10 came from.

11 Q. And your question in the September 30, 2008,  
12 letter, Exhibit 76, specifically asked, if Lehman did  
13 not fund its portion, what were the other sources,  
14 didn't it?

15 A. That was one of the questions we had received  
16 from lenders, yes.

17 Q. And you asked, did Lehman fund its portion,  
18 right?

19 A. That was questions we received from lenders.  
20 That's what we provided to the borrower, yes.

21 Q. And so when the borrower said the retail  
22 portion was funded, that was nonresponsive to the  
23 question that you had asked in Exhibit 76, wasn't it?

24 A. The retail funds -- they say the retail was  
25 funded, and we received the funds from the retail

1 servicer in the amount requested and -- and don't know  
2 who it came from. Presumably, it came from the retail  
3 lenders per the terms of the disbursement agreement.

4 Q. Maybe. But isn't that why you asked the  
5 question? You didn't ask whether it was funded. You  
6 knew it was funded.

7 MR. CANTOR: Objection.

8 A. Let's be clear. I did not ask the question.  
9 These were questions in a letter we provided to the  
10 borrower which was a compilation of questions we had  
11 received from lenders.

12 Q. (BY MR. DILLMAN) And it was part of BofA's  
13 duties as administrative agent, bank agent and/or  
14 disbursement agent to provide such questions to the  
15 borrower, correct?

16 A. Yes, to the extent the lenders have the  
17 ability and the right to pose the questions directly, or  
18 if we receive them, we will pass them on to the  
19 borrower.

20 Q. And you were the person at BofA who was in  
21 charge of this, right?

22 A. Questions coming from investors can be fielded  
23 either by Corporate Debt Products or Syndications.

24 Q. And these questions were fielded, and this  
25 letter was approved by you?

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1 A. Yes.

2 Q. Okay. So your question to the borrowers on  
3 September 30, 2008, "Did Lehman fund its portion of the  
4 requested \$3,789,276 of shared costs funded last Friday  
5 or was this made up from other sources?" assumed that it  
6 was funded, did it not?

7 A. The questions we received from the lenders  
8 which we provided to the company, at least one of the  
9 lenders was asking from what source did the funds come.

10 Q. Because everybody knew that it had been  
11 funded, right?

12 A. Yes. We had received the funds from the  
13 retail -- the retail server.

14 Q. If it hadn't been funded, then there would  
15 have been no disbursement, right?

16 A. If we had not received funds from the retail  
17 servicer, no, the disbursement would not have been made.

18 Q. And disbursement was made?

19 A. Disbursement was made.

20 Q. And the lenders knew that?

21 A. And the lenders knew that.

22 Q. Because you told them, BofA told them?

23 A. Yes. Yeah.

24 Q. So there was no question in anybody's mind  
25 that retail draw for September had been paid in full,

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1 right? That was not a question, on September 30, that  
2 anyone had on their mind?

3 A. The retail funds had come in, and the other  
4 conditions had been met, and we disbursed the funds,  
5 yes.

6 Q. The question that people had on their minds,  
7 as embodied in your September 30 letter, was, did Lehman  
8 fund its portion of the requested amounts or was it made  
9 from other sources, right?

10 A. That's the question, yes.

11 Q. And so when the borrower comes back and says,  
12 in August and September, the retail portion of such  
13 shared costs were funded, that doesn't answer the  
14 question that you asked, does it?

15 A. It does not answer the question in the letter  
16 that we provided. Does not.

17 Q. So I assume that you got on the phone or wrote  
18 a letter or an e-mail to Mr. Freeman and said, you  
19 didn't answer the question; please provide a responsive  
20 answer to the Question Number 2 set forth in Exhibit 76.

21 MR. CANTOR: Objection; argumentative.

22 Q. (BY MR. DILLMAN) Something like that, right?

23 A. I don't recall what follow-up conversations I  
24 had nor do I recall if any of the other lenders, in  
25 response to this posting, reasked any of those

1 questions.

2 Q. Okay. Let's focus on what you did. Did you

3 do anything that you recall?

4 A. I don't remember.

5 Q. To follow up on answer to the Question

6 Number 2 posed in Exhibit 76, did Lehman fund its

7 portion of the September retail draw?

8 A. I don't remember what, if anything, I did.

9 Q. Did anyone else at BofA, to the best of your

10 knowledge, do anything to follow up on that question?

11 A. I don't know what anybody else would or would

12 not have done.

13 Q. Not all the lenders were satisfied with this

14 memo, were they?

15 MR. CANTOR: Objection.

16 A. I don't know if they were or were not. I

17 don't recall.

18 Q. (BY MR. DILLMAN) Were you satisfied with it?

19 A. Again, my preference was to address the

20 questions directly with the lenders so follow-up

21 questions could be asked. If this is what they chose to

22 do, this is what -- you know, this is what they chose to

23 do.

24 Q. Well, BofA was a lender, right?

25 A. Yes.

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1 Q. And one of your jobs was to monitor this

2 credit on behalf of BofA as a lender, not just --

3 A. Yes.

4 Q. -- on behalf of the other lenders for whom you

5 were an agent, right?

6 A. Correct.

7 Q. Okay. So in the process of your effort to

8 monitor this loan on behalf of BofA, you understood that

9 you were basically overseeing and protecting the

10 company's finances, BofA's finances?

11 A. Correct.

12 Q. You took that job seriously?

13 A. Absolutely.

14 Q. And so when the lenders, including BofA, asked

15 the question in Exhibit 76, "Did Lehman fund its share

16 of the retail facility in September?" and you get back

17 the answer, "The September retail portions were paid,"

18 did that satisfy you as the person at BofA responsible

19 for monitoring this credit?

20 A. I don't recall my question being who funded

21 for Lehman or did Lehman fund at all.

22 Q. Of course it was. It was in the letter that

23 you sent out.

24 A. It was a --

25 MR. CANTOR: Objection.

1 A. I believe as I've stated previously, that  
2 letter was a compilation of questions we had received  
3 from lenders and were providing that to the company so  
4 they could be prepared to answer the various questions  
5 received from the lenders. I don't recall that being a  
6 specific question of Bank of America.

7 Q. (BY MR. DILLMAN) If Lehman -- if Lehman had  
8 not paid -- strike that.

9 If someone other than a retail lender had paid  
10 Lehman's portion, you understood that that would prevent  
11 satisfaction of conditions precedent to disbursement and  
12 would have prevented the September disbursement, right?

13 MR. CANTOR: Asked and answered for the  
14 tenth or fifteenth time.

15 A. The requirement is the funds come from a  
16 retail lender.

17 Q. (BY MR. DILLMAN) So why was the answer to  
18 this question not important to you? Did Lehman fund its  
19 portion? Why wasn't that important?

20 MR. CANTOR: Objection; argumentative,  
21 asked and answered.

22 A. I don't know that Lehman funded or didn't  
23 fund. I don't know if there were other retail lenders  
24 in their facility or not. I didn't know if those  
25 lenders funded or didn't fund to make up any shortfalls



1 that might have occurred because of Lehman not funding.

2 Q. (BY MR. DILLMAN) Precisely. And because you  
3 didn't know that, it was important to you, the person  
4 that was monitoring this piece of BofA's balance sheet,  
5 it was important to you to get an answer to that  
6 question so that you could know, on behalf of BofA as a  
7 lender, whether or not there was any improper  
8 disbursements, right?

9 MR. CANTOR: Objection; argumentative.

10 A. There was the requirement that the retail  
11 lenders fund. They did. As far as we knew, they did.  
12 The funds came in in the exact amount we asked for, from  
13 the source we had received it from in the past, being  
14 the servicer, again, in the amount that we asked for.

15 There had been no reason to believe Lehman had  
16 or had not funded. We got the funds we asked for. Had  
17 we not received funds or received short funds, that  
18 would have been a cause for questions because we  
19 wouldn't have made the -- the disbursement.

20 Q. (BY MR. DILLMAN) Then why did you have a call  
21 with Jim Freeman asking him if the retail lenders had  
22 funded?

23 MR. CANTOR: Objection. He just told  
24 you.

25 A. To confirm that the retail lenders did fund --

1 did indeed fund.

2 Q. (BY MR. DILLMAN) Right. As opposed to

3 somebody else, right?

4 A. As opposed to non-retail lenders, yes.

5 Q. Right. So the issue of whether or not retail

6 lenders versus non-retail lenders funding, that was

7 important to you?

8 A. And we asked the question, and he answered it.

9 Q. Did you tell the other lenders that you had

10 asked him the question and what the answer was?

11 A. I don't recall.

12 Q. If it was important information to you, it

13 would have been important information to them, don't you

14 think?

15 A. I don't know.

16 Q. They were asking the question, apparently, in

17 Exhibit 76. You said that Question 2 was born, at least

18 in part, of other lenders' questions, right?

19 A. Yes.

20 Q. So other lenders wanted to know who funded

21 Lehman's portion, right?

22 A. Yes.

23 Q. Did you share with them the fact that you had

24 had a conversation with the company in which they had

25 given you information in this regard?

1 A. I don't recall.

2 Q. Is there any reason why you wouldn't?

3 A. Any reason why I wouldn't what?

4 Q. Share that information, if you -- if you, in  
5 fact, had it.

6 A. Not that I can think of.

7 (Deposition Exhibit 903 marked.)

8 Q. Exhibit 903 is an e-mail from Kevin Rourke to  
9 yourself and others at BofA, copied to others at  
10 Highland. It's dated October 9, 2008. He says, "The  
11 memo posted by the Company doesn't address our concerns,  
12 and Highland requests that a lender call be scheduled  
13 for as soon as possible."

14 You understood that the memo he was referring  
15 to here was the October 7 memo from Fontainebleau  
16 Resorts that is Exhibit 77?

17 A. Yes. That's my assumption.

18 Q. All right. Did you make any effort to get a  
19 call with the bank between the lenders after this --  
20 receiving this e-mail from Mr. Rourke?

21 A. I don't remember.

22 (Deposition Exhibit 904 marked.)

23 Q. Exhibit 904 is an e-mail from Mr. Howard to  
24 yourself dated October 10, 2008, the next day. He  
25 forwards you an e-mail from Andrei Dorenbaum that -- and

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1       prefaces it with the following: "Just was making sure  
2       we had all of Highland's issues." And you see, if you  
3       turn the page, Mr. Rourke's e-mail has three points, the  
4       first two of which relate to 3.3.23 that we've  
5       discussed. Do you see that?

6       A. Uh-huh. I do.

7       Q. And he says, "3.3.23 of the financing  
8       agreement requires confirmation the retail lenders  
9       funded (the remaining -- the remaining lenders need  
10      proof -- wire confirmations, et cetera). Two, if equity  
11      funds for the retail lenders, then this does not satisfy  
12      3.3.23." And he goes on to say, three, "Under  
13      circumstances (Lehman bankruptcy, et cetera) agent must  
14      play a more active role when it has reason to know that  
15      reps/covenants are not satisfied by borrower and retail  
16      lenders."

17      Mr. Dorenbaum's internal e-mail to Kevin  
18      Rourke, who I will represent to you is also at Highland,  
19      Mr. Dorenbaum and Mr. Rourke were both at Highland at  
20      the time --

21      A. Okay.

22      Q. -- is dated October 9, and Mr. Howard forwards  
23      this to you on October 10.

24      A. Uh-huh.

25      Q. This is the first time that you learned that

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1 Highland, like Bank of America, was concerned about the  
2 potential issues of the Lehman bankruptcy regarding the  
3 condition precedent 3.3.23, correct?

4 MR. CANTOR: Objection; lacks foundation.

5 A. I don't know if this is the first time, but  
6 clearly they are expressing that concern in this  
7 message.

8 Q. (BY MR. DILLMAN) Do you recall having learned  
9 from any source prior to October 10, 2008, that Highland  
10 had expressed a concern with respect to 3.3.23?

11 MR. CANTOR: Objection. Just don't --  
12 restrict your answers to -- to people other than  
13 counsel.

14 A. I don't remember if people other than counsel  
15 informed me of that or not.

16 Q. (BY MR. DILLMAN) Exhibit 80 is an e-mail from  
17 Mr. Scott to yourself and others. It attaches an e-mail  
18 from Highland. The e-mail is from Mr. Dorenbaum to  
19 Mr. Scott. Take whatever time you need to read the  
20 e-mail, but my question will focus on the last item  
21 Number 5. Tell me when you're ready.

22 A. Okay.

23 Q. Mr. Dorenbaum, in the last sentence, says,  
24 "Our position is that Lehman is in breach of the  
25 agreement because it failed to fund and thus the

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1 agreement is not in full force and effect."

2 With Mr. Dorenbaum's notification to you of  
3 Highland's position with respect to 3.3.23 as set forth  
4 in this e-mail, what, if any, efforts did you do to  
5 determine whether or not Lehman had, in fact, failed to  
6 fund?

7 MR. CANTOR: Objection.

8 A. I don't recall what -- what we did after  
9 receiving this.

10 Q. (BY MR. DILLMAN) You're aware now that Lehman  
11 failed to fund in September, aren't you?

12 A. I don't recall that they did or they didn't.  
13 I just don't know.

14 Q. You're aware of that. You've been told that,  
15 haven't you?

16 MR. CANTOR: Objection.

17 A. I don't remember. I don't know at what point  
18 that information became known to me.

19 Q. Okay.

20 A. If it did, I don't know what point it did.

21 Q. (BY MR. DILLMAN) Well, I'm not asking you  
22 whether you knew it at the time. We've talked about  
23 that; we'll continue to talk about that.

24 But sitting here today, you know that  
25 Fontainebleau Resorts wired funds to Trimont for the

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1 Lehman portion of the September retail advance, right?

2 You know that?

3 A. Today I do, yes.

4 Q. Right. Following Mr. Dorenbaum's notification  
5 in an e-mail which is attached to Exhibit 80, what did  
6 you do, if anything, to learn the true facts? Those  
7 were that Fontainebleau Resorts did, in fact, pay  
8 Lehman's portion of the September retail advance.

9 MR. CANTOR: Objection.

10 A. I don't recall what actions we did or didn't  
11 take to -- to look into that.

12 Q. (BY MR. DILLMAN) Exhibit 254, an e-mail from  
13 yourself to Mr. Howard.

14 A. This is from -- 254?

15 Q. Excuse me. From Mr. Freeman --

16 A. Yes.

17 Q. -- to Mr. Howard, to yourself, and copy to  
18 others at -- at or associated with Bank of America.

19 A. Uh-huh. Okay.

20 Q. You see this refers to a call with Highland?

21 A. Yes.

22 Q. Help you refresh your recollection that you  
23 knew sometime in October of 2008 that Highland had  
24 actually spoken to Mr. Freeman?

25 A. Yes.

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1 Q. Mr. Freeman says, "I thought it went fine.

2 Let me know what you hear from them. The call was not  
3 contentious. They asked a fair amount about Lehman at  
4 the start, and I told them what I could." You see that?

5 A. I do.

6 Q. Did you follow up with Mr. Freeman after  
7 receiving this e-mail, to ask him what he meant by, "I  
8 told them what I could"?

9 A. I don't recall following up with him. I don't  
10 know --

11 Q. Suggest that there were things that he  
12 couldn't tell them?

13 MR. CANTOR: Objection; argumentative.

14 Q. (BY MR. DILLMAN) Wouldn't you agree?

15 MR. CANTOR: Foundation.

16 A. To be honest, when I first read this, I took  
17 it to mean he told them what he could based on what he  
18 knew. There -- there might have been questions that  
19 Highland asked that he didn't know the answer to and,  
20 therefore, couldn't answer them. That's the way I  
21 interpreted that when I first read it.

22 Q. (BY MR. DILLMAN) This help you refresh your  
23 recollection that Mr. Freeman told you that there were  
24 things about the September retail advance that he  
25 couldn't tell you or others because he had been advised



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1 not to by counsel?

2 MR. CANTOR: Objection.

3 A. I don't remember that conversation.

4 Q. (BY MR. DILLMAN) Exhibit 277 is an e-mail  
5 from yourself to Mr. Freeman, and it forwards a message  
6 or an e-mail from Sven -- Sven Schlolaut. I don't know  
7 if I pronounced that correctly, but it was kind of fun.

8 MR. CANTOR: But it was with great  
9 feeling.

10 Q. (BY MR. DILLMAN) Do you know Mr. Schlolaut?

11 A. I do not.

12 Q. HSH Nordbank, you understand, was a lender  
13 under the credit -- the resort loan?

14 A. My assumption is they were a lender under the  
15 resort credit facility.

16 Q. And Mr. Schlolaut asks you certain  
17 questions -- excuse me -- asks Mr. Naval certain  
18 questions in his e-mail at the bottom, which include --  
19 includes, "What happens if Lehman Brothers fails to  
20 fund? Do we have the right to withhold funding if  
21 Lehman is in default as -- as lender or if completion of  
22 the retail component is questioned?" Do you see that?

23 A. Yes.

24 Q. Basically asking Mr. Naval what are our rights  
25 if -- against the borrower if certain things happen with

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1 respect to Lehman?

2 A. Yes.

3 Q. You then forward this to Mr. Susman, asking  
4 him to respond to --

5 A. Mr. Freeman.

6 Q. Mr. Freeman. Good Lord. Sorry. I apologize.

7 You forward this to Mr. Freeman, asking him to  
8 respond to the questions, right?

9 A. Yes.

10 Q. Now, why would you send a lender to the  
11 borrower and ask the borrower to respond to questions  
12 about rights against the borrower? Seems a little bit  
13 like the fox and the chicken coop, doesn't it?

14 MR. CANTOR: Objection; motion to strike,  
15 argumentative.

16 A. I sent it to the borrower because they would  
17 know what is funded and unfunded under the Lehman  
18 facility or the retail facility, what are the  
19 participants --

20 Q. (BY MR. DILLMAN) Sure.

21 A. -- information we didn't have.

22 Q. How about what happens if Lehman Brothers  
23 fails to fund? Was that something that was more  
24 appropriately responded to by BofA?

25 A. Not necessarily.

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1 Q. How about do we have the right to withhold  
2 funding if Lehman is in default as a lender or if  
3 completion of the retail component is questionable?  
4 Think that that was something that might have been more  
5 appropriately addressed to BofA as opposed to the  
6 borrower?

7 A. Yes.

8 MR. CANTOR: Objection; assumes facts not  
9 in evidence.

10 Q. (BY MR. DILLMAN) Did you make any effort to  
11 answer Sven's questions?

12 A. I don't remember. The only question that --  
13 as I'm looking at this, the only question that would  
14 have been appropriate for BofA or counsel to answer  
15 would have been the one about withholding funds. The  
16 rest of them are appropriate for the company to respond  
17 to, which is why I sent it to them.

18 Q. Exhibit 239, we're fast-forwarding here a bit  
19 to December of 2008.

20 A. Okay.

21 Q. You were still at the helm at Corporate Debt  
22 Products with respect to this facility, right?

23 A. In December 2008, yes.

24 Q. Exhibit 239 is an e-mail from Ms. Brown to  
25 yourself dated December 30. She says, "Jeff, Mac at

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1 Trimont expects Ullico to fund the Lehman piece, but he  
2 has not seen the funds yet."

3 Mac was McLendon Rafeedie?

4 A. I presume that's who -- who her contact at  
5 Trimont was, yes.

6 Q. Do you know that name, McLendon Rafeedie?

7 A. I don't think I've ever spoken to him, but if  
8 that's the name -- it does ring a bell, but I don't know  
9 from exactly where.

10 Q. Says, "Mac at Trimont expects Ullico to fund  
11 the Lehman piece."

12 When you received this, you understood she was  
13 talking about Lehman's portion of the retail facility --

14 A. Correct.

15 Q. -- for December? Okay.

16 And you subsequently learned that Ullico did,  
17 in fact, fund the Lehman portion of the retail facility  
18 for December, correct?

19 A. I believe that's correct.

20 THE WITNESS: Any chance we can take a  
21 quick break?

22 MR. DILLMAN: Yes, by all means. I  
23 apologize. I've been running late.

24 THE VIDEOGRAPHER: The time is 4:27.

25 We're now going off record.

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1 (Recess from 4:27 p.m. to 4:33 p.m.)

2 THE VIDEOGRAPHER: The time is 4:33.

3 We're now back on record.

4 (Deposition Exhibit 905 marked.)

5 Q. (BY MR. DILLMAN) Exhibit 905 is an e-mail  
6 from yourself to Phillip Lynch and Douglas Keyston.

7 A. Yes.

8 Q. Keyston I know. Who is Lynch?

9 A. Phillip Lynch is in Bank of America's  
10 credit -- at the time was in Bank of America's credit  
11 review department.

12 Q. Do you recall -- take whatever time you need  
13 to look at this. Do you recall why you were writing  
14 this e-mail on December 30, 2008, to these gentlemen?

15 A. There was a question by Mr. Lynch, as it  
16 appears below, to both Doug and myself about Lehman's  
17 funding of the retail component of the Las Vegas  
18 project. And so I was responding with what our  
19 experience had been to date.

20 Q. Why was this question being discussed,  
21 apparently, now, or according to Mr. Lynch, earlier in  
22 the month, between you, Mr. Lynch, and Mr. Keyston?

23 A. I don't know.

24 Q. Do you understand why it was relevant at all  
25 to Mr. Lynch's work?

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1 A. As part of credit review -- this is only  
2 speculation. It could have been part of a larger effort  
3 to assess exposure, the bank's exposure to Lehman. I  
4 don't know. There was -- that's just a guess. But I  
5 don't know what drove Phillip Lynch to send this message  
6 in the first place.

7 Q. Okay. In response, you -- in your e-mail, in  
8 the second paragraph, you say, "As we understand, each  
9 month Lehman has funded its share of the advance." Do  
10 you see that?

11 A. Uh-huh.

12 Q. Did you have an understanding one way or the  
13 other as to whether Lehman funded its share of the  
14 September advance?

15 A. As I stated, as we understand, which means we  
16 had -- I didn't have any knowledge to the contrary that  
17 Lehman hadn't funded the retail funds, the retail  
18 advances. And then in December it goes on to say that  
19 that's -- that they're not going to fund.

20 Q. Let's stay with the first part. What  
21 information did you have -- and I appreciate your  
22 statement that you said that this was intended to be --  
23 you don't have any information that it didn't fund.

24 A. Uh-huh.

25 Q. But did you have any information as of

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1 December 30, 2008, that Lehman had, in fact, funded its  
2 share of the September advance under the retail  
3 facility?

4 A. I don't recall what information I had that  
5 confirmed that it did, if I even had information that it  
6 confirmed that it had funded.

7 Q. All right. Now, with -- going on to the next  
8 portion, which you've pointed to, in December your  
9 information was that Lehman was not going to fund and  
10 that Ullico was, right?

11 A. That's what I said here, yes.

12 Q. And did you have any understanding that the  
13 other retail lenders, Ullico and perhaps others, had  
14 assumed Lehman's obligations under the retail facility?

15 A. No.

16 Q. Did you at any time come to believe that  
17 anyone had assumed Lehman's obligations under the retail  
18 facility at any time?

19 MR. CANTOR: Objection.

20 A. I don't recall knowing that any lender -- any  
21 of the retail lenders assumed their -- Lehman's  
22 commitments under the facility.

23 Q. (BY MR. DILLMAN) You knew that Ullico was a  
24 short-term deal, right?

25 MR. CANTOR: Objection.

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1 A. As it was initially presented to us, yes.

2 Q. (BY MR. DILLMAN) Okay. And how did you learn  
3 that?

4 A. Again, I don't recall who told us who the  
5 other lenders in the facility were or that Ullico was  
6 even one or that Ullico was going to fund. I don't know  
7 if it came from -- from the borrower or not. I just --  
8 I don't recall.

9 Q. What did you mean by a "permanent solution"?

10 A. Pardon me?

11 Q. What did you mean by a "permanent solution"?

12 You say -- and I'll read into the record -- "Ullico had  
13 previously told the company that it would fund for  
14 Lehman for a short time until a permanent solution could  
15 be found."

16 A. And your question again?

17 Q. What did you mean by "permanent solution"?

18 A. Oh, I think this was reporting what Ullico had  
19 said.

20 Q. What did you understand Ullico to mean when it  
21 said "permanent solution"?

22 MR. CANTOR: Objection.

23 A. That a solution other than its short-term  
24 commitment or to fund on a short-term basis could be  
25 arranged.



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1 Q. (BY MR. DILLMAN) In other words, that the  
2 funding gap for the Lehman share would be filled on a  
3 permanent basis in some way other than Ullico?

4 MR. CANTOR: Objection. That's not what  
5 he said.

6 A. Until it could be resolved. One of the --  
7 Ullico could decide to fund it on a long-term basis. It  
8 was just until Ullico said they would do it on a  
9 short-term basis until a permanent solution could be  
10 found.

11 Q. (BY MR. DILLMAN) What's a focus credit?

12 A. That was some -- I don't recall exactly what  
13 the criteria was, but my recollection was there were  
14 some credits that were deemed a focus credit. And what  
15 criteria they were to meet that, I don't know, but those  
16 are the ones where, typically, Credit Review would look  
17 at on a more frequent basis. That's the best of my  
18 recollection. I don't recall specifically at this  
19 point.

20 (Deposition Exhibit 906 marked.)

21 Q. Exhibit 906 is an e-mail from Mr. Lynch to  
22 yourself --

23 A. Uh-huh.

24 Q. -- and Mr. Keyston. It is Re: QAR  
25 Discussion. QAR means?

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1 A. I don't remember. I may have at one time, but

2 I don't remember.

3 Q. Quarterly Assessment Report.

4 A. Okay.

5 Q. I'm just looking at the first page of the

6 attachment. If you look at the top -- stay on that page

7 which is Bates-stamped number 827 at the bottom.

8 A. 827, yes.

9 Q. See at the top, it says "Credit Review -

10 Quarterly Assessment Report."

11 A. Okay. Yes, I see that.

12 Q. Were Quarterly Assessment Reports done on all

13 credits?

14 A. This is a Credit Review function. I don't

15 know what the criteria was. Credit Review is a separate

16 department.

17 Q. Different from Risk Management?

18 A. Different from Corporate Debt Products and

19 different from Risk Management, yes.

20 Q. All right. So your efforts on the committee

21 didn't overlap into the corporate -- excuse me --

22 Quarterly Assessment Reports; is that right?

23 A. I don't recall having any input or

24 participation in generating that report.

25 Q. Can you tell me whether or not the -- strike

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1 that.

2 (Deposition Exhibit 907 marked.)

3 Q. Exhibit 907 is an e-mail from yourself to

4 Mr. Howard dated January 14, 2009.

5 A. Uh-huh.

6 Q. He says, in the e-mail that precedes the top

7 e-mail, "Hey, I'm speaking with Vinnie in about ten

8 minutes. Soffer is trying to get them to possibly 'help

9 out' the Lehman/retail situation in LV. Want me to loop

10 you in?"

11 First of all, you recall the -- the e-mail?

12 A. When I see it, yes, I do recall the e-mail.

13 Q. You recall the conversation with Mr. Howard?

14 A. I don't know that I participated in this call

15 or not.

16 Q. Do you recall having discussed the call with

17 Mr. Howard, whether you participated in it or not?

18 A. I don't recall.

19 Q. Did you at any point come to an understanding

20 as to what Mr. Howard meant when he said, "Soffer is

21 trying to get them to possibly help out the

22 Lehman/retail situation in LV"?

23 A. Yes.

24 Q. What did he mean?

25 A. That Vinnie, in the Bank of America Commercial

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1 Real Estate group, which had initially had an interest  
2 and proposed a financing -- ultimately, the Lehman  
3 financing was selected -- but based on that previous  
4 interest, to see if Bank of America's real estate --  
5 Commercial Real Estate group would be interested in  
6 joining the retail credit facility.

7 Q. Stepping in for Lehman, for lack of a more  
8 precise banking term?

9 A. Presumably, yes.

10 Q. Was BofA prepared to do that?

11 A. I don't know.

12 Q. Okay. Did you have any further communications  
13 with respect to that possibility?

14 A. Not that I recall.

15 Q. Do you know why -- was BofA unwilling to  
16 become involved in the retail facility? Do you know?

17 A. I don't know what they decided to do.

18 Q. Exhibit 480 is an e-mail from Ms. Brown that's  
19 copied to yourself, and it says, "Claudia, Brandon has  
20 requested that we hold off on sending the request to  
21 Trimont/Lehman until either he or Jeff Susman gives us  
22 the go ahead."

23 The document that is awaiting, apparently,  
24 your go-ahead is a notice from BofA of approval of  
25 the -- of the January draw request.

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1 A. Uh-huh.

2 Q. Do you know why they were awaiting your  
3 approval in January before sending this off to Lehman?  
4 Just standard operating procedure?

5 A. The draw request -- there must have been some  
6 reason the draw request was not -- was ready to go. It  
7 could have had some errors in it. I don't know what the  
8 specific reason was. But, yeah, they would have -- if  
9 there was a defect in any of the documents, we wouldn't  
10 have provided it to the -- to the retail lenders.

11 Q. You recall that it had -- that you were  
12 concerned about sending off the draw request until the  
13 issues that IVI had raised concerning undisclosed change  
14 orders and so on had been resolved?

15 A. I haven't reread this, but there is an IVI  
16 certification as part of this package. I don't know  
17 what this is in reference to, but I don't know if  
18 specifically IVI raised those concerns and that was the  
19 specific reason why we were holding off sending this  
20 draw request. I just don't remember.

21 Q. Okay.

22 (Deposition Exhibit 908 marked.)

23 Q. Exhibit 908 is an e-mail from yourself to  
24 Mr. Freeman dated October 23, 2008. And you say, "We  
25 have historically posted the monthly draw package to

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1 Intralinks on the same day that we move the funds from  
2 the respective funding accounts to your account. We  
3 would like to begin the post -- to post that information  
4 earlier than the actual draw date." And you asked  
5 whether he has a significant objection to this.

6 A. Uh-huh.

7 Q. Did he have a significant objection?

8 A. I don't recall.

9 Q. Why did you want to begin posting that  
10 information earlier?

11 A. We had -- as I recall, we had been receiving  
12 more questions about the draw information, and in order  
13 to give all the lenders more time with it, we saw no  
14 reason why not -- we couldn't post it earlier than the  
15 date of the transfer of the funds, so just to give the  
16 lenders more time to have a chance to review it.

17 Q. Were there lenders that were complaining that  
18 they didn't have enough time?

19 A. That I don't recall.

20 Q. Was this related in some way to the Lehman  
21 issues that cropped up in September?

22 A. I think, in general, everybody -- all the  
23 lenders were paying closer attention to this and perhaps  
24 having to answer more questions by their management and  
25 credit people, and so the effort was made to provide