

Deposition Transcript Excerpts
of Mitchell Sussman
Filed Under Seal

Varnell, Jon 3/17/2011 12:00:00 PM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

3
4 IN RE: FONTAINEBLEAU LAS VEGAS

5
6 CONTRACT LITIGATION

7 MDL No. 2106

8

9

10

11

12

13

14

15 VIDEOTAPED DEPOSITION OF JON VARNELL

16 Los Angeles, California

17 Thursday, March 17, 2011

18

19

20

21 Reported by:

RENEE D. ZEPEZAUER, CRR

22 CSR No. 6275

23 JOB No. 158495

24

25

1 manager, but it's for corporate banking products as
2 opposed to investment banking products which would be
3 pitching high yield M & A advisory equity.

4 Q And when did you be -- when did you take on the
5 job that you've just described?

6 A At the time the B of A Merrill merger came
7 together the gaming group for Bank of America which I
8 was a part of was based in Los Angeles, but at the time
9 of the consolidation with Merrill the gaming group
10 consolidated back to New York and rather than move to
11 New York and continue as an investment banking coverage
12 officer, I took over this job which is the corporate
13 banker, you know, for the same client base. It's just a
14 slightly different focus.

15 Q And you were now a corporate banker as opposed
16 to an investment banker?

17 A That's right.

18 Q And the difference being?

19 A The set of products that I market.

20 Q Difference being?

21 MR. CANTOR: I think he just said it. Go
22 ahead.

23 THE WITNESS: The investment banker's
24 responsible -- first of all, he'll be responsible for
25 the overall relationship, but he will then focus on high

1 yield, high grade products, equity, M and A advisory
2 products, typical traditional investment banking
3 products.

4 So my job is confined to those corporate
5 banking products that involve the bank's balance sheet.

6 BY MR. DILLMAN:

7 Q You referred to the consolidation merger with
8 Merrill.

9 A Uh-huh. Merrill Lynch, yes.

10 Q When did that occur?

11 A The acquisition was in fourth quarter of '08
12 the consol -- I believe the merger closed -- we came
13 together as a group right around February of '09. And
14 my job changed at that point.

15 Q Okay. That's what I was going to ask.

16 A Yeah.

17 Q So prior to February of '09 you were an
18 investment banker in the gaming group at Bank of America
19 based in Los Angeles?

20 A That's right.

21 Q After February of '09 you were a corporate
22 banker in the gaming group at Bank of America Merrill
23 Lynch based in -- at that time you were based in Los
24 Angeles.

25 A That's right.

1 Q And was the corporate banking arm of the gaming
2 group also based in Los Angeles?

3 A I'm the only one, so, yes.

4 Q By definition.

5 A Yes. It's a one-man job.

6 Q Where you are it's based.

7 A Yeah.

8 Q And your card indicates two entities as we
9 mentioned. The first is Bank of America N.A. As of
10 today what is your role within Bank of America N.A.?

11 A Bank of America N.A. is the entity that
12 actually lends money and so that's on my business card
13 because I'm marketing products in which Bank of America
14 lends money.

15 Q Are you employed by Bank of America N.A. in any
16 capacity?

17 A And I have to clarify this, but I believe I'm
18 considered a dual employee of the bank with the K side
19 and in the investment banc. That's been the case in the
20 past, and to be honest, I'm not perfectly sure whether
21 that designation persists today so ...

22 Q To parse that out, it is your belief that as of
23 today you're a dual employee of Bank of America N.A. and
24 of Merrill Lynch Pierce, Fenner & Smith Incorporated?

25 A That's right.

1 Q You're not certain of whether that's true today
2 but you -- that was, in fact, the case prior to the
3 merger with Merrill --

4 A Yes, those are the notion -- I'm sorry.

5 Q That's okay. Prior to the merger with Merrill
6 Lynch?

7 A There's the notion of a dual employee so that
8 employees like us could sign bank documents. We had to
9 have that designation.

10 Q Prior to February of '09 you were a dual
11 employee of Bank of America N.A. and Banc, B-a-n-c, of
12 America Securities; is that correct?

13 A That's right.

14 Q Okay. And for the record, again, people who
15 review this may not be -- certainly will not be as
16 familiar as you are in the industry.

17 A Yes.

18 Q When you say bank with a K versus banc with a C
19 what were you referring to?

20 A I prefer to those products which a traditional
21 commercial bank would offer as opposed to investment
22 bank.

23 Q So in your dual employment role prior to
24 February, '09, you were both for the entity that would
25 provide corporate banking vehicles or investments as

Varnell, Jon 3/17/2011 12:00:00 PM

1 were reasonably contemporary deals. And so, for
2 example, Vinnie Tria would have been on the scene for
3 the Fontainebleau Miami deal, not for Fontainebleau Las
4 Vegas. Ask your question again so I know.

5 Q I just want to make sure that the deal team you
6 gave me was the deal team that related to the
7 Fontainebleau Las Vegas project as opposed to some other
8 project.

9 A Everybody I named --

10 Q Yes.

11 A -- worked on Fontainebleau Las Vegas.

12 Q All right. And some or all --

13 A In some way or another.

14 Q And some or all of the people you named worked
15 on Miami as well?

16 A Some.

17 Q Okay. Were there any other projects that you
18 considered to be part of the -- your portfolio on behalf
19 of your client Fontainebleau?

20 A No. Those were the two.

21 Q Let's stick with Las Vegas.

22 A Okay.

23 Q Above the line you've provided me Mr. Newby,
24 Mr. Yunker, and Mr. Bender.

25 A Yes.

1 Q What was Mr. Newby's role?

2 A Bill was the most senior member of the gaming
3 team and so he took kind of an overseer role and a lead
4 client position. His contacts would certainly be with
5 Jeff Soffer and with Glenn Schaeffer, less so with the
6 lower tiered personnel at Fontainebleau -- at the
7 company. So sort of a -- sort of a traffic cop, but ...

8 Q A client interface guy?

9 A Yes. On a senior basis.

10 Q Was Mr. Freeman part of this team at any point,
11 part of the Fontainebleau team at Bank of America?

12 A Yes.

13 Q And his name is not on the chart. Where would
14 I put it if I were to put his name on this chart as of
15 the date that he left?

16 A Jim worked -- Jim Freeman worked most closely
17 with me and with the product people as we thought about
18 ways to put together the financing package for
19 Fontainebleau Las Vegas.

20 Q Was he above the line?

21 A Yes. Yes.

22 Q And was he a managing director, vice-president
23 or something else?

24 A Jim was either a vice-president -- I believe he
25 was a vice-president.

1 Q In terms of seniority, can you place him

2 between these --

3 A To the left of Bret Yunker. If that gives you

4 the context.

5 Q Sure. If he places in between Jeff Heimann and

6 Bret Yunker in terms of seniority.

7 A Yes.

8 Q Mr. Yunker; what was his role in connection

9 with the Fontainebleau Las Vegas project?

10 A Bret initially supported Jim Freeman conducting

11 heavy analytical work as a vice-president in this role

12 would do. Vice-presidents take direct responsibility

13 for executing deals. A lot of day-to-day work seeing --

14 you know, once a deal is mandated, seeing the documents

15 are correctly drafted and negotiated. And -- and so he

16 supported Jim in that role.

17 Q We're talking now about pre closing; correct?

18 A Yes.

19 Q Did Mr. Yunker -- strike that.

20 Did Mr. Freeman have any role post closing?

21 A No.

22 Q Because he was at Fontainebleau?

23 A Yes.

24 Q Did he -- he left for Fontainebleau prior to

25 the execution of the underlying facilities; correct?

1 A Yes.

2 Q Mr. Yunker, did he have any involvement in the
3 Fontainebleau Las Vegas project post closing?

4 A In terms of what?

5 Q In terms of anything.

6 A Yes. For a while.

7 Q What was his involvement and when?

8 A I don't really -- I can't think of anything in
9 particular. I can't think of involvement generally that
10 there would be after closing.

11 Q I didn't understand that. Generally would
12 Mr. Yunker have involvement post closing in deals that
13 he worked on with you?

14 MR. CANTOR: Object to the form.

15 You can answer.

16 THE WITNESS: Yeah. I'm not -- I don't know
17 how to answer that.

18 BY MR. DILLMAN:

19 Q Okay. In Fontainebleau you recall he had some
20 involvement, you just don't recall sitting here right
21 now what involvement he may have had; is that fair?

22 A Yes.

23 Q We'll perhaps see documents during the course
24 of your deposition that helps refresh your recollection
25 in that regard.

Varnell, Jon 3/17/2011 12:00:00 PM

1 A I'd have to look at a sources and uses, but I
2 don't think that they came in time to finish
3 construction. No, in fact -- they couldn't have because
4 you couldn't close on the condo until the building's
5 done.

6 Q Couldn't get the pinks until the building is
7 done.

8 A That's right. Yeah. So our -- you know, the
9 first repayment source was going to be condo proceeds,
10 you know, as those condos were closed on and people
11 ostensibly moved in.

12 Q In terms of the moneys that were going to be
13 available to pay for the construction, those moneys were
14 equity, the credit facility moneys, and the retail
15 facility moneys?

16 A And high yield.

17 Q Excuse me. And the second mortgage.

18 A Yes.

19 Q Notes.

20 A Yes.

21 Q Post closing, what was your involvement, if
22 any, in the Las Vegas project?

23 A Are we in a time period now where the loans
24 have closed and -- put me in a time frame.

25 Q Sure. What I mean by post closing is after the

1 MR. CANTOR: Object to the form.

2 THE WITNESS: I'm struggling with the word

3 "involvement." There were -- yeah, there were bumps,

4 but -- no, I don't really recall dialing up my

5 involvement as a result.

6 BY MR. DILLMAN:

7 Q What bumps do you recall?

8 A To me the first thing that I can remember is

9 when Lehman collapsed, and it looked like we had a gap

10 in our funding sources.

11 Q Any other bumps?

12 A At what point?

13 Q Any point post closing.

14 A I recall noting that it was becoming -- that --

15 the imbalance test that needed to be satisfied looked

16 like it was starting to get tighter and tighter.

17 Q When did you -- can you put that in --

18 A I would say that was more in a spring of '09

19 time frame.

20 Q Anything else without reference to documents?

21 A Anecdotally I think the condos weren't selling

22 as rapidly and readily as -- as had been anticipated.

23 Q Which, again, didn't impact the construction or

24 completion of the project, but might impact the

25 subsequent payout on the loans from the anticipated

1 condo proceeds?

2 A Yes. Now --

3 Q Go ahead.

4 A Yes. That's right.

5 Q I didn't mean to cut you --

6 A No. That's -- that's what I can say with

7 specificity. Yeah.

8 Q Okay. Did you at any point in time pre or post

9 closing become involved in discussions with respect to

10 the budget for the project, the Las Vegas project?

11 MR. CANTOR: Objection.

12 You can answer.

13 THE WITNESS: Not specifically with the budget.

14 That really wouldn't have been my job.

15 BY MR. DILLMAN:

16 Q Did you become aware at some point that

17 Fontainebleau had exceeded the budget that was provided

18 to the lenders as part of the credit facility?

19 MR. CANTOR: Objection.

20 BY MR. DILLMAN:

21 Q You can answer.

22 A Should I answer?

23 MR. CANTOR: Yeah, you can answer. I'm sorry.

24 Unless I can specifically tell you not to, you can

25 answer.

1 THE WITNESS: The way I remember it is more
2 that imbalance was getting tighter. I can't say that,
3 oh, you know, for example, I can't say that I was aware
4 that suddenly the budget is 200 million over. A project
5 of that size is going to have pieces moving around a
6 little bit and so I don't know at any point in time
7 which element was over budget versus, you know,
8 something that might have been under budget, what might
9 have been handled by contingencies. I just didn't have
10 that kind of command of those details.

11 BY MR. DILLMAN:

12 Q Okay. All right. And I'm not talking about
13 the ebbs and flows of line items and where we get cost
14 savings and where we have a little bit of overage and so
15 on, but -- but something more like what we refer to,
16 something like there's a budget overrun of \$200 million
17 here.

18 A I can't remember any particular number like
19 that.

20 Q And that would have been -- something in that
21 magnitude would have been at least something that you
22 would have taken note of if you had been apprised of it?

23 MR. CANTOR: Objection.

24 THE WITNESS: On a project of two and a half
25 billion or so, I don't know that I would have considered

1 that a fatal overage.

2 BY MR. DILLMAN:

3 Q It would have been important, important to
4 understand?

5 A That's a material number.

6 MR. DILLMAN: Okay. I suspect -- how are we
7 doing on the time? Are we okay?

8 MR. CANTOR: Very long tapes.

9 MR. DILLMAN: Why don't we take a break.

10 THE VIDEOGRAPHER: We're going off the record
11 at 10:46.

12 (Recess.)

13 THE VIDEOGRAPHER: We're on the record at
14 10:55.

15 (Plaintiffs' Exhibit 214 was marked.)

16 BY MR. DILLMAN:

17 Q Mr. Varnell, before the break we were talking
18 about budget increases and so on. You had mentioned
19 \$200 million. I placed in front of you as Exhibit
20 214 --

21 A Actually I didn't mention 200 million. It was
22 said to me.

23 Q We discussed. Whatever. The presentation to
24 lender which I placed in front you, Exhibit 214.

25 A Shall I look at it?

1 Q Does it bring back any recollection that indeed
2 you were involved in more than the way that you've
3 described, and I don't mean to say that that wasn't
4 involved, that you were involved in more substantive and
5 additional ways relating to the \$200 million of
6 changeovers?

7 A Not at all.

8 Q Okay. Did you -- after this point in time, in
9 other words, the May, June time frame did you become
10 aware that Turnberry or Fontainebleau Resorts were
11 seeking additional capital in connection with their --
12 in 2008?

13 MR. CANTOR: Object to the form.

14 You can answer, if you want.

15 BY MR. DILLMAN:

16 Q Let me reask the question. Did you at any
17 point become aware that Fontainebleau Resorts and/or
18 Turnberry were looking for additional capital?

19 A Yes.

20 Q In 2008.

21 A Yes.

22 Q What did you become aware?

23 A What did I become aware of?

24 Q Yeah.

25 A There were ongoing conversations about how down

Varnell, Jon 3/17/2011 12:00:00 PM

1 the road we would take -- we or the company would go
2 public through an IPO. Our view was that we probably
3 needed one more project to be able to describe a viable
4 IPO candidate, and that moreover additional capital
5 would help create cushion for all the projects. That
6 they were undertaking.

7 Q And was there cushion that the company needed
8 for the Miami project and/or the Las Vegas project?

9 A No, I don't remember any specific conversations
10 about that.

11 Q Did you have conversations with Mr. Freeman
12 about this notion of an IPO?

13 A No. This -- I recall conversations more with
14 Glenn Schaeffer.

15 Q Any other -- well, did you have any
16 conversations that -- about different possible capital
17 raises other than an IPO?

18 A Yes. Yes.

19 Q And these were in 2008?

20 A I don't recall if they were in 2008.

21 Q Describe the conversations.

22 A I don't remember when it happened, but Dubai
23 World had executed their deal with MGM on CityCenter and
24 Dubai World had also acquired 50 percent of
25 Fontainebleau Miami. I don't remember the time frame

1 that that was. However, investments by Sovereign Wealth
2 Funds was a very popular source of funding until the
3 crash.

4 Q Any others possible capital raises by the
5 company that you became aware of in '08?

6 A No. I don't remember anything -- any specific
7 conversations.

8 Q You know who Kenny Moelis is?

9 A I do.

10 Q Who is that?

11 A Kenny, a long time -- I believe Kenny ran DLJ's
12 investment banking office in Los Angeles, moved to UBS
13 in Los Angeles, and then left to form his own firm, and
14 Kenny was a long-time fixture in the gaming space as a
15 mergers and acquisitions adviser and at those firms a
16 capital raiser.

17 Q You became aware that Mr. Moelis was involved
18 in some capacity with -- with Fontainebleau Resorts?

19 A Yes.

20 Q And you became aware of that in the
21 September-ish time frame?

22 A I don't remember if it was September.

23 Q Okay. How did you become aware of it?

24 A I thought -- and I don't remember who, but I
25 heard a rumor that Kenny was talking to Fontainebleau.

1 I remember asking Jim about it.

2 Q And what did Mr. Freeman tell you?

3 A Jim described the discussions that they had
4 with Kenny.

5 Q What did he tell you about it?

6 A That Kenny was a long-time friend of Glenn
7 Schaeffer and that I remember taking it as part of this
8 whole notion of going public in an IPO.

9 Q That's how you understood -- that's what you
10 understood Mr. Moelis's involvement would be?

11 A Yes. To advise on capital -- on equity capital
12 raising. And I remember not being surprised that Glenn
13 would reach out to Kenny because he had such a long
14 history.

15 Q Equity capital raising in general or an IPO in
16 particular?

17 A I don't recall the difference at that time.

18 Q I'm going to try and date the Moelis
19 information and I'm going to place Exhibit 218 in front
20 of you --

21 A Okay.

22 Q -- which will at least give us a point in time.

23 (Plaintiffs' Exhibit 218 was marked.)

24 BY MR. DILLMAN:

25 Q 218 is an e-mail from yourself to Mr. Bender,

1 at least the top one is, an e-mail you sent.

2 A Yes.

3 Q The bottom e-mails are e-mails that you also
4 sent.

5 A Yes.

6 Q The first one of which at the bottom is from
7 you to Mr. -- excuse me, Mr. Freeman with a copy to Bret
8 Yunker. And no content -- you have no content except a
9 subject line that says "Kenny Moelis. Question mark."

10 A Yes.

11 Q That was when you first came to learn that
12 there might be some communications going on with Mr. --
13 with Fontainebleau and Moelis or is that a more
14 particularized question?

15 A No. It was when I heard maybe they were
16 talking to Kenny.

17 Q You --

18 A And I was chiding Jim.

19 Q Chiding Jim about meeting with Kenny?

20 A Yes.

21 Q And why were you chiding him?

22 A You know, at this point, you know, this --
23 Schaeffer and Fontainebleau were all important clients
24 to us. We had raised a lot of money for the project and
25 we wanted to continue to be, you know, the sole adviser,

1 investment bank, so forth, to the company.

2 Q Bank of America at this time in the gaming
3 industry wasn't known for equity raises as much as it
4 was financing; correct?

5 A Yes.

6 Q So it didn't surprise you that the company
7 would be going perhaps outside of Bank of America to
8 look for these kind of raises?

9 A No.

10 Q Did you have an opinion about Moelis one way or
11 the other? Positive? Negative?

12 A Positive.

13 Q And you were chiding Mr. Freeman only politely
14 to say, this is business that you could be looking to us
15 to as well? Something along those lines?

16 A Yes.

17 Q And what did you mean when you said -- when you
18 say to Kyle Bender, "Hellfire may soon rain down upon
19 Fontainebleau"?

20 A Doesn't seem so funny now.

21 Q I'm sure it was funny at the time.

22 A I'm forget what movie line. It was a line from
23 a movie that we had been bandying back and forth,
24 whether it was PULP FICTION or something like that. And
25 I was showing Kyle that -- looks like Jim's talking to

1 Kenny and, you know, boy, is he going to pay hell for
2 that, and I used this phrase. But it was in a sarcastic
3 and, you know, it was -- I was alluding to, you know,
4 some banter that we had been enjoying.

5 Q Some movie banter?

6 A Yes.

7 Q I'm sure we can look it up on Google and find
8 out what it was.

9 A Yeah.

10 Q But what was the reason that hellfire would
11 rain down upon Fontainebleau? I assume you didn't
12 literally mean hellfire. But what was the connotation
13 of that line with Kenny Moelis's involvement with
14 Fontainebleau?

15 A It was basically I was aggravated because I was
16 going to have to explain Kenny's arrival on the scene to
17 my own bosses who saw themselves as, you know, Bank of
18 America. And, that, you know, that I was going to be
19 aggravated with Jim and with Glenn for not having sort
20 of tipped me off to that.

21 Q How were you tipped off to this?

22 A I -- it was -- it was chatter at a bank meeting
23 one night. I don't remember exactly who told me.

24 Q They may have put some context on Exhibit 219
25 which I place in front of you.

1 (Plaintiffs' Exhibit 219 was marked.)

2 BY MR. DILLMAN:

3 Q Which is an e-mail from Mr. Bender to you
4 responding to your hellfire e-mail.

5 A Yeah.

6 Q This is an e-mail you got?

7 A Yes.

8 Q Mr. Bender says, "Uggh."

9 A Yes.

10 Q Did you know what Mr. Bender meant when he said
11 "uggh"?

12 A I did.

13 Q What did he mean?

14 A He meant, oh my, God, now we have to explain
15 this to Ron and Evan.

16 Q The "it" again is somebody else is
17 going after --

18 A Yes, a new -- you know how -- well, I shouldn't
19 presume. But investment banking is competitive and
20 language gets colorful when competitors are considered.

21 Q "Uggh" is pretty subdued actually. I could
22 have -- I could have thought of more colorful language
23 presumably so ...

24 A Kyle knew what I meant.

25 Q And your understanding of this was simply here

Varnell, John 3/17/2011 12:00:00 PM

1 potential negative for the Fontainebleau Las Vegas

2 financing?

3 A The issue is whether or not they would continue
4 to fund or whether that funding would have to be found
5 somewhere else.

6 Q With whom did you have discussions on that
7 topic?

8 A I didn't have discussions so much as be copied
9 on e-mails and listen to conference calls.

10 Q You were on conference calls in which that
11 topic was discussed?

12 A Yes.

13 Q Who else was on the call or the calls?

14 A I would point to -- I would point to an
15 addressee list on an e-mail and name those people.

16 Q Let me give you an e-mail and see if that
17 helps. Sorry. This has previously been marked as
18 Exhibit 71.

19 A Okay.

20 Q 71 is an e-mail dated at least top one of which
21 is dated September 19, 2008. It's from Mr. Yunker to
22 Mr. Susman, Mr. Howard, yourself, and copied to Brandon
23 Bolio.

24 A May I ask what day of the week that was.

25 Q You could. I'm not sure I could tell you.

1 Q Whether you have it or not, I just -- my
2 question is: Do you recall having reviewed it?

3 A No.

4 Q At any time after Lehman bankruptcy?

5 A No.

6 Q You were familiar with the provisions of this
7 agreement at one point in time, were you not?

8 A I understand the purpose of the agreement.

9 I -- I don't have the command at all as to what --
10 what's in -- how it's laid out so no.

11 Q The -- let me point your attention to page 40
12 of the agreement. The provisions 3.3.23 entitled
13 "Retail Advances." Do you see that?

14 A I do.

15 Q Read that if you'd like. My question is: Is
16 that one of the provisions that was being discussed by
17 the group that we've -- that we've been talking about?

18 A This subject matter -- it was this type of
19 subject matter that I remember the primary parties
20 discussing and me listening.

21 Q "This" being this particular section?

22 A I don't know. We didn't -- I don't remember
23 references to particular section numbers.

24 Q You recall --

25 A I remember them talking about the retail money

1 coming in and what the conditions were and things like
2 that as part of being able to meet a funding request.

3 Q Do you recall discussions concerning whether or
4 not funding from someone other than one of the retail
5 lenders would be permissible under the conditions of the
6 Master Disbursement Agreement?

7 A I don't remember a specific discussion about --
8 about that personally.

9 Q Do you remember discussions about whether or
10 not FBR Fontainebleau Resorts could pay for Lehman under
11 the retail facility?

12 A I remember hearing about that being discussed
13 as a potential alternative, but never -- I don't recall
14 it being identified as -- as the solution.

15 Q Do you recall there being discussions with this
16 group about whether or not payment by Fontainebleau
17 Resorts would violate any of the conditions to
18 disbursements in the Master Disbursement Agreement?

19 A You know, I don't -- I don't have specific
20 recall of how that particular option was discussed.

21 Q You recall, however, that in general, whether
22 you recall the specifics, that in general there were
23 discussions around the issue of whether or not payment
24 by Fontainebleau Resorts of Lehman's share of the retail
25 advances would violate any of the conditions precedent

1 in the Master Disbursement Agreement?

2 A No. I wouldn't put it that way. I remember of
3 options being discussed, hey, can -- could Fontainebleau
4 itself make up the difference.

5 Q Right. And the question then being, could it,
6 means could it consistent with the Master Disbursement
7 Agreement?

8 A But I don't -- yeah, I don't remember
9 specifically whether it was addressed in that context or
10 whether, in fact, they had the wherewithal to do it.

11 Q You don't recall whether the question was, hey,
12 do they have the ability to do it or, hey, do they have
13 the right to do it; is that --

14 A Right.

15 Q Okay. Do you recall having discussions with
16 anyone regarding Fontainebleau Resorts' ability to make
17 payments for Lehman under their retail facility?

18 A No. I wouldn't -- it wouldn't have been
19 something that I would have been working on or pursuing
20 at the time. Because I had people who were -- whose job
21 it was to interpret and opine on such things.

22 Q Including Mr. Yunker who helped draft this
23 agreement?

24 A No. Bret -- though Bret was exceedingly
25 knowledgeable in the documents and so forth, it wasn't

1 his job to make that determination either.

2 Q But he was a person who you would look to as
3 somebody, as you said, exceedingly knowledgeable about
4 these documents?

5 MR. CANTOR: Objection.

6 THE WITNESS: I wasn't looking to anyone.

7 BY MR. DILLMAN:

8 Q You would agree with me that Mr. Yunker was
9 exceedingly knowledgeable about the documents,
10 specifically the Master Disbursement Agreement?

11 A Bret had significant involvement in its
12 preparation. I'm not sure what "exceedingly
13 knowledgeable" means. But, he was -- yeah, I think Bret
14 would be a reliable source of what was in the document.

15 Q Any discussions regarding whether or not the
16 Lehman bankruptcy was a material adverse event that
17 might prohibit funding under the -- the disbursement
18 agreement?

19 A No. I don't remember specific conversations
20 about that. I don't remember it going in that
21 direction.

22 Q Any discussions as to whether or not Lehman's
23 failure to meet its obligations under the
24 credit facility -- the retail facility was a default
25 that would preclude funding under the disbursement

1 agreement?

2 MR. CANTOR: Objection.

3 You can answer.

4 THE WITNESS: Oh. No. At this point we -- we
5 didn't know whether Lehman was going to fund or not so
6 that -- I don't know that we took it those several steps
7 further and tried to understand. I just -- we just --
8 the most I remember is us wondering if Lehman was going
9 to fund. And if not, what's the company going to do to
10 make up the difference.

11 BY MR. DILLMAN:

12 Q No questions like if it doesn't fund, what does
13 that mean? Just whether it's going to fund or not and
14 you stopped there?

15 MR. CANTOR: Objection.

16 THE WITNESS: In terms of how we were -- we
17 were looking at it, we were just, gee, if Lehman doesn't
18 fund, where's the company going to -- how's the company
19 going to assemble its -- its draw request.

20 BY MR. DILLMAN:

21 Q Bank of America had a decision that it was
22 going to have to make at the end of September and that
23 was whether to disburse funds or not; right?

24 A Yes.

25 Q In that regard Bank of America had to make a

1 decision as to whether or not funding by Lehman or not
2 was an event that would -- that would preclude
3 disbursement; right?

4 A I don't know.

5 MR. CANTOR: Objection.

6 BY MR. DILLMAN:

7 Q One would think that at the end of the month
8 making the decision about whether or not to disburse
9 that B of A would look to whether or not Lehman's
10 funding in whatever way it was or wasn't made impacted
11 the obligation that it had to disburse under the
12 disbursement agreement.

13 MR. CANTOR: Objection.

14 THE WITNESS: I don't know.

15 BY MR. DILLMAN:

16 Q You don't know whether those conversations were
17 going on?

18 A They probably were.

19 Q Okay. But if they were, they weren't going on
20 with you?

21 A No. Because my opinion wouldn't matter in that
22 case.

23 Q Who ultimately was the person responsible for
24 making that decision whether to disburse or not?

25 A Yeah. Jeff Susman had responsibility for that.

1 Now, he did -- and I would expect that he would rely on
2 counsel to help him -- help guide him in the
3 interpretation of the agreement and the ultimate
4 dispensation of it.

5 Q Who -- who did he report -- strike that.

6 Did Mr. Susman as far as you understood the
7 structure need to get sign-off from anybody on the
8 decision --

9 A I don't know -- I don't know whether he needed
10 formal sign-off. I'm sure he talked to his counsel and
11 needed to report internally.

12 Q Okay. We can put counsel discussions aside
13 because B of A has taken the position its not relying on
14 any advice of counsel in this case.

15 MR. CANTOR: Well, what we've taken the
16 position is that we're not asserting a reliance on
17 counsel defense.

18 MR. DILLMAN: We can quibble over that, but
19 reliance of counsel's off the table.

20 THE WITNESS: Okay.

21 BY MR. DILLMAN:

22 Q Let's assume that for this. What is there --
23 who else, if anyone, would you assume Mr. Susman would
24 need to consult with before making a decision whether to
25 disburse or not at the end of September?

1 A I don't know that he had to consult with
2 anyone. For all I knew he had final say.

3 Q Okay. All right. We -- I take it that I'd be
4 correct in saying that one person he didn't need to
5 consult with in that regard was you; is that right?

6 A He did not -- he didn't need my sign-off for
7 his final determination.

8 Q Whether he needed it or not, he did not get
9 your sign-off on whether or not to disburse --

10 A No.

11 Q -- in September; is that right?

12 A That's right.

13 (Plaintiffs' Exhibit 229 was marked.)

14 THE WITNESS: May I.

15 BY MR. DILLMAN:

16 Q You may. I keep telling you those are yours.

17 Exhibit 229 is an e-mail dated September 19,
18 same day as the -- as Exhibit 228. It is the same group
19 and indeed it is the e-mail that is next in the chain of
20 the ones that we looked at for 228.

21 A Uh-huh.

22 Q An e-mail that you received?

23 A Yes.

24 Q Mr. Susman says to the group, "In my opinion
25 there is still one issue that still needs to be

1 resolved, that is, do we as the bank agent make the
2 unilateral call to interpret the FB funding as retail
3 agent funding (or waive the condition if interpreted
4 differently) or do we seek required lender consent?"

5 Do you see that?

6 A Uh-huh. Yes. Yeah.

7 Q FB funding, do you interpret that as I do to
8 mean funding by Fontainebleau Resorts?

9 A I do. Yes, I do.

10 Q Does this help you recall that there were, in
11 fact, discussions as to whether or not funding by
12 Fontainebleau results -- Resorts would violate any
13 conditions under the Master Disbursement Agreement?

14 A Yeah. I remember the potential for
15 Fontainebleau making up the differences being discussed.

16 Q And specifically -- I'm sorry. Did I cut you
17 off?

18 A No.

19 Q Okay. If you turn to page 40 of the Master
20 Disbursement Agreement 3.3.23 that we were previously
21 looking at. Do you see it refers to funding by the
22 retail agent and the retail lenders?

23 A Yes.

24 Q And if you go back to this e-mail Exhibit 229
25 do you see where Mr. Susman's -- he's asking about

1 whether the Fontainebleau funding would be funding as
2 retail agent.

3 A Yes.

4 Q Does that help you to recall that what he's
5 asking right -- in this e-mail is whether if
6 Fontainebleau funded it would be a violation of 3.3.23?

7 MR. CANTOR: Objection. Your question is
8 whether that refreshes his memory that that's what was
9 going on?

10 MR. DILLMAN: Yeah.

11 THE WITNESS: This isn't making me recall
12 specific conversations. Now I'm seeing the e-mails that
13 I'm copied on. And it looks like Jeff is doing his job,
14 but I don't remember a conversation in which this topic
15 was specifically taken up.

16 BY MR. DILLMAN:

17 Q Require conversations about possible waivers of
18 conditions precedent?

19 A I certainly don't remember anything like that.

20 Q As far as you know no conditions precedent were
21 waived; is that right?

22 MR. CANTOR: Objection.

23 THE WITNESS: I don't know.

24 BY MR. DILLMAN:

25 Q Are you aware of any?

1 A I'm not aware of any, no.

2 Q He goes on to ask, "Or do we seek required

3 lender consent?"

4 A I see that.

5 Q Do you know what that refers to?

6 A Yes.

7 Q What does that refer to?

8 A Well, required lender consent is where a survey

9 of the lenders on a particular matter is taken and

10 whether sufficient lenders approve whatever action is

11 being contemplated. So I know it broadly. What it

12 means. What required lender consent means.

13 Q Were you involved in the decision to request

14 Fontainebleau to reaffirm its reps and warranties with

15 respect to the September draw request?

16 A I was not.

17 Q Do you understand that that occurred?

18 A Yes.

19 Q How did you come to that understanding?

20 A Review -- I saw some e-mails yesterday to that

21 effect.

22 Q Other than seeing things yesterday, had you

23 been aware of that fact?

24 A I don't really remember that episode of Jim

25 being asked to reaffirm until I saw it yesterday

1 described in e-mails.

2 Q And you saw that in those e-mails that you had

3 been copied in them?

4 A Yes.

5 Q Didn't bring back any recollections?

6 A Not beyond what I read in those e-mails. I

7 don't -- it didn't -- it didn't cause me to remember

8 specific conversations on the point.

9 Q Do you know what specifically caused Bank of

10 America to seek reaffirmation from Mr. Freeman?

11 A No, I can't say that I do.

12 Q Any specific concern that was motivating them

13 in that regard?

14 MR. CANTOR: Objection.

15 THE WITNESS: When was the reaffirmation?

16 BY MR. DILLMAN:

17 Q Let me show you what's previously been marked

18 as Exhibit 75.

19 A Okay. Okay.

20 Q 75 is two e-mails.

21 A Yeah.

22 Q Both from Mr. -- excuse me, one from

23 Mr. Susman, one from Mr. Freeman, both dated

24 September 26 on the topic of reaffirming reps and

25 warranties by the company.

1 Q Why not?

2 A I just don't -- I don't remember calling up Jim

3 and saying, hey, everybody's talking about you.

4 Q Why not?

5 A Why don't I remember it?

6 Q Why didn't you call up -- strike that.

7 Is it conceivable and you just don't remember

8 that you did call Mr. Freeman and say, look, there's

9 people that are saying that you paid for Lehman; is that

10 true or not?

11 A Oh, it is conceivable, yeah.

12 Q Okay.

13 A Yeah.

14 Q And you don't recall whether you did or you

15 didn't; correct?

16 A No, I don't recall whether I did or I didn't.

17 Q Therefore you don't recall what his answer was

18 if you had the conversation.

19 A That's right.

20 Q You did, in fact, however know that the --

21 there were public reports out there that FBR had paid

22 Lehman's share?

23 MR. CANTOR: Objection.

24 THE WITNESS: You know, I didn't remember that,

25 but I was shared an e-mail yesterday that reminded me

1 that there was some conjecture out there.

2 BY MR. DILLMAN:

3 Q And you learned that at least in -- from one
4 source, from e-mails that you were provided from
5 Highland.

6 A Yes.

7 Q Highland was one of the lenders to the
8 facility?

9 A Yes.

10 Q One of the lenders for whom B of A -- that B of
11 A represented as the administrative agent?

12 MR. CANTOR: Objection. Calls for legal
13 conclusion.

14 THE WITNESS: They were in which facility?

15 BY MR. DILLMAN:

16 Q They were in the term loan.

17 A In the term loan. And we were admin agent on
18 the term loan? Yes.

19 Q And B of A represented them as disbursement
20 agent.

21 MR. CANTOR: Objection.

22 THE WITNESS: Yes.

23 (Plaintiffs' Exhibit 230 was marked.)

24 BY MR. DILLMAN:

25 Q And here was the lender telling you that and

1 let me just place in front of you Exhibit 290 -- I'm

2 sorry. 230. Did I put 290 on there?

3 A Oh, 290.

4 Q Yeah. Let me change that. Because that would

5 be completely wrong.

6 This will be 230. You received that e-mail

7 from Mr. David -- to Mr. Howard. Excuse me.

8 A Yes, I did. Yes, I did.

9 Q And Mr. Howard forwards an e-mail from Kevin

10 Rourke of Highland.

11 A Yes.

12 Q Did you know Mr. Rourke?

13 A No.

14 Q Have you since come to know Mr. Rourke?

15 A No, I haven't.

16 Q Mr. Rourke informs Mr. Howard -- well, he

17 states, "Today's Chapter 11 filing by Lehman's

18 commercial paper subsidiary, combined with public

19 reports that Lehman's 4 million portion of the September

20 retail facility draw was actually funded by the equity

21 sponsors underscores the questions and concerns we

22 discussed with you last week. Management's continued

23 evasiveness is not acceptable. Please advise when a

24 lender call will be held."

25 A Okay.

1 Q Do you recall at some point in time the
2 understanding that there was lender dissatisfaction with
3 the company's response to inquiries about, among other
4 things, who paid the Lehman retail advance?

5 A I knew there was Highland dissatisfaction. I
6 can't say for any other lenders.

7 Q Mr. Howard responds that -- up above he
8 understands -- understand from Jim that we'll be
9 receiving something in writing today. Do you see that?

10 A Yes.

11 Q You understood that to mean that you'd be
12 receiving something in writing addressing the concerns
13 that were expressed in Mr. Rourke's e-mail that he had
14 attached?

15 MR. CANTOR: Objection.

16 THE WITNESS: That's how -- that's how I read
17 that.

18 BY MR. DILLMAN:

19 Q And did you, to the best of your knowledge,
20 ever receive anything from Jim Freeman or anyone else at
21 FBR answering the question of whether or not the public
22 reports concerning Lehman's -- the payment of Lehman's
23 portion of the September retail facility were true or
24 not?

25 A No. I don't remember Jim responding to that in

1 an e-mail to me.

2 Q And, again, knowing that the lenders were
3 concerned about this issue, knowing that there were
4 public reports out there, would it have been your
5 practice to call up Mr. Freeman to say, "We need an
6 answer to this -- these questions"?

7 MR. CANTOR: Objection.

8 THE WITNESS: I don't know that there were --
9 there was lender -- dissatisfaction among lenders. I
10 knew there was dissatisfaction among this particular
11 lender, and I thought it was important that Jim see what
12 had been -- how this particular lender was pressing its
13 case.

14 BY MR. DILLMAN:

15 Q And so you forwarded this to Jim?

16 A I don't know.

17 Q When you say you thought it was important for
18 Jim to see how this particular lender was pressing its
19 case, what did you mean?

20 A Meaning we knew that this lender had been vocal
21 in its concerns, and I wanted Jim to know, you know,
22 what we were hearing.

23 Q So you told him about Highland's concerns?

24 A No. I don't know.

25 Q Well, if you wanted Jim to know, what did you

1 do to make your desires into reality?

2 MR. CANTOR: Objection.

3 THE WITNESS: I don't remember.

4 BY MR. DILLMAN:

5 Q Okay. But you do remember wanting him to know?

6 A Yeah.

7 Q Consistent with that, is it reasonable to

8 assume that you did let him know?

9 MR. CANTOR: Objection.

10 THE WITNESS: I don't -- I don't remember doing

11 so.

12 BY MR. DILLMAN:

13 Q All you had to do in order to let him know was

14 to pick up the phone or sit down at a keyboard and

15 either forward this e-mail or give him words to tell him

16 that Highland was upset because they weren't being given

17 this information; right?

18 MR. CANTOR: Objection.

19 THE WITNESS: I don't remember doing that.

20 MR. DILLMAN: We got to change the tape here so

21 let's take a break.

22 THE VIDEOGRAPHER: We are off the record at

23 2:27.

24 (Recess.)

25 THE VIDEOGRAPHER: We are back on the record at

1 2:29. This marks the beginning of media No. 3 in the
2 deposition of Jon Varnell.

3 BY MR. DILLMAN:

4 Q Exhibit 80 is -- previously marked Exhibit 80.

5 We have microphone difficulties here. Just a
6 second.

7 Okay. Exhibit 80 is an e-mail from Bill Scott
8 to among others yourself, transmitting an e-mail from
9 Andrei Dorenbaum of Highland. An e-mail that you
10 received.

11 A Okay. Yes.

12 Q The e-mail for Mr. Dorenbaum reflects a concern
13 that if Fontainebleau Resorts paid on behalf of Lehman
14 that that would violate the very section that we just
15 looked at 3.3.23 of the Master Disbursement Agreement,
16 and he explains why he believes that in five different
17 numbered points.

18 A Yes.

19 Q Does this help you to recall that you had
20 discussions in the September and October time frame
21 regarding whether or not payment by Fontainebleau
22 Resorts would violate this particular condition
23 precedent in the Master Disbursement Agreement?

24 A Not me. I wasn't getting too involved in
25 interpreting whether or not that would be a violation of

1 the disbursement agreement.

2 Q Coupled with the information that we've seen
3 that Fontainebleau Resorts had, in fact, made the
4 payments for -- for Lehman, did this give you any --

5 A I learned that yesterday to be true.

6 Q -- coupled with the facts that we had -- in
7 terms of what you knew that there was public reports out
8 there that that had occurred, did those two facts
9 concern you at all?

10 MR. CANTOR: Objection.

11 BY MR. DILLMAN:

12 Q That the reports were that Fontainebleau had
13 paid on the one hand and that certain lenders contended
14 that payment by Fontainebleau would be a violation of
15 the condition precedent.

16 A No.

17 Q Did you tell anybody make sure that we got this
18 one covered?

19 A No.

20 Q Okay. Whoever was handling that, Mr. Susman
21 you assumed would be handling it, and you left them to
22 their own devices?

23 A Yes.

24 Q You participated in a phone call at some point
25 with the retail lender group, did you not?

Varnell, Jon 3/17/2011 12:00:00 PM

1 Q What was the purpose of the call as you

2 understood it?

3 A What I remember is that the retail lenders

4 wanted to hear from the admin agent's point of view that

5 the project was going okay, just that -- I think they

6 wanted to gain -- gain comfort from our continuing

7 comfort with -- with the credit.

8 Q Did you give them that comfort?

9 A I think we -- we -- I don't remember what --

10 exactly what we said. But by and large I think we --

11 we -- yeah, I don't think we flagged anything -- I think

12 we did give them that comfort.

13 Q Why were you on this call?

14 MR. CANTOR: Objection. I'm sorry. You can

15 answer.

16 THE WITNESS: Yeah. I think Sonny Kotite

17 looked to me as a senior banker, someone who could speak

18 authoritatively in broad terms on how the project was

19 going.

20 BY MR. DILLMAN:

21 Q Mr. Kotite asked that you be on the call?

22 A Yes. Sandra King Bodnar is Sonny's admin

23 agent -- or admin assistant.

24 Q Mr. Freeman was on the call?

25 A Probably -- I don't know. I don't recall. I

1 construction thus far." Do you see that?

2 A I do.

3 Q Do you remember sending this to Mr. Freeman?

4 A How are these two -- how is the top one related
5 to the next one?

6 Q They were attached to one another
7 electronically.

8 A They were?

9 Q That's -- you will notice that they have a
10 Bates stamped that runs sequentially and they come in
11 little electronic files that say this document runs from
12 page X to page Y.

13 A Have you seen that?

14 MR. CANTOR: What he's talking about is the
15 numbers down here are sequential.

16 THE WITNESS: Oh, I see. Okay.

17 MR. CANTOR: And so, therefore, it sounds like
18 what he's saying is right.

19 THE WITNESS: I sent this as an attachment to
20 this.

21 BY MR. DILLMAN:

22 Q That would be your testimony for me to --
23 that's my question. They come -- they are a document.
24 B of A produced this package as a document. I believe,
25 if we go back and we can confirm that, but I believe

1 that the second two pages --

2 A How did I get this?

3 Q Now, see, you're asking all my questions.

4 You're just blowing my -- my cover here.

5 A Okay.

6 Q How did you get this?

7 A I don't know.

8 Q Why are you sending it to Mr. Freeman?

9 A Assuming I did? I don't know how I got this.

10 But if I did, I -- because it's public information, it's

11 describing public information, I feel comfortable

12 sending it to Jim letting him to know what people are

13 saying about his company.

14 Q Why is this an issue? Why are you -- why are

15 you discussing with Mr. Freeman or forwarding him

16 information in mid October regarding what people are

17 saying about his company?

18 MR. CANTOR: Objection.

19 THE WITNESS: I would do that all the time.

20 BY MR. DILLMAN:

21 Q Is this important information?

22 MR. CANTOR: Objection.

23 THE WITNESS: I don't know. Jim would be the

24 judge of that.

25 BY MR. DILLMAN:

1 Q Lots of people say there's lots of press about
2 Fontainebleau at this time; right?

3 A I don't know that there's lots of press about
4 Fontainebleau. There's a blurb here in the press.

5 Q Every gaming analyst in the country says
6 something about Fontainebleau every month at this time;
7 right?

8 A I don't -- probably. I don't know.

9 Q Of course they do.

10 A I don't remember.

11 Q They're analysts.

12 MR. CANTOR: Objection.

13 BY MR. DILLMAN:

14 Q If they're in the gaming sector, one of the
15 things they're reporting about is the biggest project
16 that's going up at the time or one of the biggest which
17 is Fontainebleau Resorts.

18 A Yeah. Fontainebleau had public securities so
19 they would be regularly covered, yes.

20 Q Right. So you didn't send Jim Freeman every
21 report you ever saw from any analyst regarding
22 Fontainebleau; right?

23 A No, I didn't need to.

24 Q Okay. Right. You sent him this one.

25 A Yes.

1 Q You sent him this one forwarded from Andrei
2 Dorenbaum that reads, "FYI, re Fontainebleau equity
3 sponsored funding for retail commitment."

4 MR. CANTOR: What's the question?

5 BY MR. DILLMAN:

6 Q Right?

7 A Yes.

8 Q You sent him that to advise him that there were
9 people out there that were saying that equity paid.

10 MR. CANTOR: Objection.

11 THE WITNESS: I think I sent this because we
12 wondered why Highland was agitating, and I said maybe
13 this is why they believe that.

14 BY MR. DILLMAN:

15 Q Okay. You were wondering internally or you
16 were wondering with Mr. Freeman?

17 A I think both the client and us were wondering
18 why Highland was agitating. So ...

19 Q Okay. Agitating about payments by
20 Fontainebleau Resorts?

21 A About -- I'm trying to remember what Highland.
22 I seem to remember that they had questioned us about the
23 disbursement or the -- let's see. When is this? The
24 16th -- about the September disbursement.

25 Q Yes, they had. And we saw that e-mail where

1 they --

2 A Right.

3 Q -- suggested that payment by Fontainebleau

4 Resorts would violate a condition precedent to this,

5 make this disbursement improper; right?

6 A Yes.

7 Q Okay. You knew that at this time?

8 A I knew that Highland was agitating.

9 Q Right.

10 A Yes.

11 Q And you had discussions about that agitation

12 with -- internally at B of A?

13 A Yes.

14 Q With Mr. Freeman?

15 A Yes.

16 Q Sent Mr. Freeman this information saying here's

17 the rumors that are out there or here's what people are

18 saying about whether you paid.

19 A This was from a Highland -- somebody from

20 Highland; right?

21 Q No. This actually is from you. You're

22 attaching something --

23 A Okay. But I'm attaching an e-mail from

24 Highland.

25 Q Yes.

1 A And on the implication being this is why
2 Highland -- maybe this is why Highland was agitating.

3 Q Okay. Mr. Freeman, Highland's agitating claims
4 that we shouldn't have disbursed, if you paid. Did you
5 pay? Is that a question you ever asked?

6 A No. Not necessarily.

7 Q Want to find out at all about whether or not
8 perhaps the disbursement that you made was improper?

9 A No, it's not my job.

10 Q All right. Whose job was it?

11 A Jeff Susman's.

12 Q Okay. So that would have been his job to call
13 Mr. Freeman and say, "Did you pay?"

14 MR. CANTOR: Objection.

15 THE WITNESS: I don't know how -- what Jeff was
16 doing.

17 BY MR. DILLMAN:

18 Q I know you don't.

19 A In terms of those.

20 Q But in terms of whose job it was at B of A to
21 find out whether or not this claim by Highland was true
22 or not, that would have been Jeff Susman's job?

23 A It wouldn't have been my job.

24 MR. CANTOR: Objection.

25 BY MR. DILLMAN:

Varnell, Jon 3/17/2011 12:00:00 PM

1 Q Okay. And if it was -- if it was anybody's job
2 as far as you know based upon the structure and the
3 players involved and so on, that would have been
4 Mr. Susman's job?

5 MR. CANTOR: Objection.

6 THE WITNESS: I don't know that Jeff had a job
7 to investigate that. So he was responsible for opining
8 on the suitability of the draw request and whether it
9 qualified as a, you know, as a suitable disbursement.

10 BY MR. DILLMAN:

11 Q Yes, he was.

12 A Yeah.

13 Q Yes, he was. And if he had information that
14 suggested that it wasn't a suitable disbursement, was it
15 your understanding that he simply would turn a blind eye
16 to that and not follow up?

17 MR. CANTOR: Objection. Calls for a legal
18 conclusion.

19 THE WITNESS: No. I believe Jeff would
20 undertake whatever he needed to satisfy himself that he
21 had a legitimate draw.

22 BY MR. DILLMAN:

23 Q And if there was information -- based on what
24 you know about Mr. Susman and his practice and so on,
25 the quality of his work, if there was information that

Varnell, Jon 3/17/2011 12:00:00 PM

1 he had that suggested that there were conditions that
2 might have been violated, information that he needed in
3 order to nail that down, you would expect him to get
4 that information?

5 A Yes, I sure would.

6 Q As a -- as an executive at B of A you would
7 expect that that's how B of A handled itself in these
8 kinds of facilities?

9 MR. CANTOR: Objection.

10 THE WITNESS: I think we -- I -- yeah, I think
11 we have a reputation for enforcing documents and acting
12 in good faith as admin agent.

13 BY MR. DILLMAN:

14 Q And you know that the other lenders are
15 depending upon B of A as their agent to do so.

16 A I understand that.

17 Q And also that -- that the lenders expected if B
18 of A comes across information that is contrary or brings
19 into some doubt representations by the company, that
20 they will track that down to find out what the true
21 information and facts are?

22 MR. CANTOR: Objection.

23 THE WITNESS: I expect -- my experience with
24 Jeff was that he did his job capably and satisfactorily.
25 So I don't know -- wouldn't know what to say beyond that

Yu, Henry 4/7/2011 12:00:00 PM

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

3 In Re: Banker Case No.:
4 FONTAINEBLEAU LAS VEGAS 09-21481-BKC-AJC
HOLDINGS, LLC, et al., MDL 02106

5
Debtors.

6
FONTAINEBLEAU LAS VEGAS LLC, Adv. Pro. No.:

7
Plaintiff, 09-01621-AP-AJC

8
vs.

9
BANK OF AMERICA, N.A.,

10 et al.,

11 Defendants.

12 _____

13
14
15 VIDEOTAPED DEPOSITION OF HENRY YU

16 Thursday, April 7, 2011

17 New York, New York

18 9:37 a.m.

19

20

21 Reported By:
Josephine H. Fassett

22

23 JOB No. 160451

24

25

1 Q Have you ever been deposed before?

2 A Yes.

3 Q On how many occasions?

4 A A couple. I don't recall exactly how
5 many times.

6 Q In connection with your duties and
7 responsibilities at Bank of America or in other
8 capacities?

9 A Once in other capacities, the rest for
10 Bank of America.

11 Q Have you had a chance to meet with
12 your counsel before this deposition?

13 A Yes.

14 Q You had a chance to discuss with him
15 the procedures we're about to embark upon?

16 A Yes.

17 Q Do you have any questions before we
18 begin?

19 A No.

20 Q All right. You understand that this
21 lawsuit is one brought by my clients, a number of
22 term lenders in the Las Vegas Credit Facility?

23 A Yes.

24 Q And they brought this case against
25 your employer Bank of America?

1 A Yes.

2 Q Okay. Did you do anything to prepare
3 for this deposition here today?

4 A I met with Dan Cantor and Ken Murata
5 yesterday.

6 Q Anything else?

7 A That was it.

8 Q How long did you meet with them?

9 A We started sometime in the morning and
10 ended late in the afternoon.

11 Q Did you review any documents?

12 A Dan and Ken showed me several
13 documents.

14 Q Any of those help to refresh your
15 recollection of the events that occurred in the
16 past?

17 A Those are just the documents that we
18 looked at, and nothing else came up.

19 Q Did any of the documents that you
20 looked at help refresh your recollection concerning
21 any events that occurred in the past?

22 A I don't believe so.

23 Q Did you speak with anyone other than
24 your counsel concerning your deposition here today?

25 A No.

1 Q Did you speak with any person who you
2 understood to have been deposed in this case
3 previously?

4 A No.

5 Q Did you review any transcripts?

6 A No.

7 Q Did you review any discovery
8 responses?

9 A No.

10 Q Are you -- what is your current --
11 strike that.

12 By whom are you currently employed,
13 Mr. Yu?

14 A Bank of America.

15 Q What is your position?

16 A I'm a senior vice president in the
17 Special Assets Group.

18 Q How long have you been a senior vice
19 president in the Special Assets Group?

20 A I joined the Special Assets Group in
21 the fourth quarter of 1986, and I believe I became a
22 senior vice president sometime in the early 1990s.

23 Q And have been that since continuously?

24 A No.

25 Q What other positions have you held?

1 A I retired from the bank in the fourth
2 quarter of 1998. Was asked to rejoin the bank in
3 the fourth quarter of 2000. Retired again in the
4 second quarter of 2004. Was asked to rejoin the
5 bank fourth quarter of 2007. Retired again, I think
6 around August of 2008. Was asked to rejoin the bank
7 again around November of 2008. And that brings me
8 to the present.

9 Q From November of 2008 until the
10 present, have you been a senior vice president in
11 the Special Assets Group?

12 A Yes.

13 Q What is the Special Assets Group?

14 A The Special Assets Group work on
15 situations where we believe the borrower may have
16 problems repaying its obligations or that the
17 borrower may be unwilling to repay its obligations.

18 Q How big is the Special Asset Group
19 now?

20 A You mean in terms of how many people?

21 Q Yes.

22 A I would believe there would be
23 hundreds of people, but most of them work on what we
24 call middle market deals. I am in the group that
25 deals with large corporate workouts in North

Yu, Henry 4/7/2011 12:00:00 PM

1 America, and that group may be, it's about 30, 40,
2 50 people.

3 Q Do you typically work on more than one
4 deal at a time?

5 A Yes.

6 Q Currently how many deals are you
7 working on?

8 A Currently two or three.

9 Q Is one of them Fontainebleau?

10 A Yes.

11 Q Have you worked continuously on
12 Fontainebleau since you began your assignment on
13 that matter?

14 A No. I started working on
15 Fontainebleau in the middle of February of 2009.

16 Q My question was: Have you been
17 working continuously on Fontainebleau since the time
18 that you began working on it? So it's from February
19 2009 to the present, have you at all times had
20 Fontainebleau Las Vegas as one of the matters that
21 you've been working on?

22 A Yes.

23 Q What are your current responsibilities
24 with respect to Fontainebleau Las Vegas?

25 A I am acting as the client for

Yu, Henry 4/7/2011 12:00:00 PM

1 O'Melveny.

2 Q What does that mean?

3 A Right now practically everything
4 happening on Fontainebleau is related to litigation,
5 and so I am the businessperson at the bank
6 responsible for how the litigation is going to be
7 handled.

8 Q What are the other matters that you're
9 currently working on?

10 A That is something that the bank does
11 not normally disclose.

12 Q Okay. What are the other matters that
13 you're currently working on?

14 MR. CANTOR: Why do you need to know
15 that and how is it remotely relevant to this
16 case?

17 MR. DILLMAN: Let me get at it perhaps
18 a different way.

19 MR. CANTOR: Okay.

20 BY MR. DILLMAN:

21 Q On the other matters that -- on the
22 other matters that you're currently working on, are
23 you the client in connection with litigation or do
24 your job duties include other matters?

25 A Not all of the other matters are

1 litigation related.

2 Q Okay. There's only one or two, right?

3 You said you were working on two or three matters?

4 A Correct.

5 Q Okay. So of the one or two -- how

6 many are you working on, one or two additional?

7 A You could say two.

8 Q All right. Of those two, are either

9 of them matters in which you are a client on behalf

10 of the Bank of America in connection with

11 litigation?

12 A No.

13 Q Okay. When you joined Bank of

14 America -- rejoined for the third time, in August of

15 '08, did your -- excuse me -- in November of '08,

16 did you understand that Fontainebleau Las Vegas was

17 one of the matters that you would be working on?

18 A No.

19 Q What was your understanding as to why

20 the Bank of America asked you to come out of

21 retirement in November of 2008?

22 A Couple reasons.

23 The first was that when I came out of

24 retirement in 2007, I was asked to come back to work

25 on certain problems, and those problems are

1 continuing, so the bank asked me to come back and
2 continue working on those.

3 The second reason was there was a
4 major blowup, if you will, in the corporate world
5 around that time that the bank wanted me to come
6 back to handle.

7 Q When you came back, were you assigned
8 to any particular matter?

9 A Yes.

10 Q How many matters were you assigned to
11 at the time that you came back?

12 A There was one major matter, and
13 several minor ones.

14 Q These were all, however, in the --
15 under the general rubric of large corporate
16 workouts?

17 A Yes.

18 Q At the time that you began working on
19 the Fontainebleau Las Vegas matter, how many other
20 matters were you working on?

21 A There were probably two or three major
22 matters, and maybe a couple of minor ones.

23 Q When you say "two or three major," did
24 that include Fontainebleau Las Vegas or were those
25 in addition to?

1 Who is the account officer who
2 requested Special Assets to get involved as a result
3 of a letter from Chase?

4 A Brennan Bolio?

5 Q At that time -- strike that.

6 And what was the specific concern
7 raised by Chase that caused Special Asset Groups to
8 be contacted, if you know?

9 A If I remember correctly, in a monthly
10 report that IVI had produced around the end of 2008,
11 maybe early 2009, they pointed out that they were
12 not entirely confident that what Fontainebleau was
13 projecting to be LEEDs credits, and that is credits
14 apparently would come from the building being green,
15 would be all available.

16 Q The concern was that the LEED credits
17 might not all be available?

18 A Right.

19 Q Okay.

20 A That's my recollection.

21 Q What was there about credits not being
22 available that was of sufficient concern to Chase to
23 have Mr. Bolio contact the Special Assets Groups?

24 MR. CANTOR: Object to the form. You
25 can answer.

1 THE WITNESS: I'm sorry?

2 MR. CANTOR: I object to the form of

3 the question, but you can answer.

4 A Could you rephrase the question?

5 Q I'll just have it reread. If you
6 don't understand it, I'll be happy to clarify any
7 question you have.

8 (Whereupon, the requested portion was
9 read back by the Reporter:

10 "Question: What was there about
11 credits not being available that was of
12 sufficient concern to Chase to have Mr. Bolio
13 contact the Special Assets Groups?")

14 A Are you asking me to speculate on
15 Brandon's frame of mind when he contacted the
16 Special Assets Group?

17 Q I'm asking you to testify as to the
18 understanding within the Special Asset Group as to
19 why the LEED credit issue was of sufficient
20 importance to potentially warrant the utilization of
21 what I understand from your testimony to be scarce
22 resources of the Special Asset Groups at that time.

23 A I believe there were two reasons from
24 my perspective.

25 One was that apparently up to that

1 time IVI had not raised issues of any consequence
2 that were not resolved before they issued the
3 monthly reports.

4 The second reason is that when you
5 have a participant in a deal actually write a letter
6 to you that it's not a usual circumstance.

7 Q Did you come to have an understanding
8 of the concerns that Chase had with respect to the
9 LEED credit issue?

10 A What timeframe are you referring to?

11 Q At any timeframe.

12 A Well, that would be hard to say,
13 because obviously that happened quite a while ago
14 and a lot of things have happened since then.

15 Q My question, though, has to do with
16 Chase's concern.

17 Did you at any time come to understand
18 what the concern that Chase had with respect to the
19 LEED credit issues that caused it to contact
20 Mr. Bolio?

21 MR. CANTOR: The concern that was
22 expressed in the letter you mean?

23 MR. DILLMAN: Yes.

24 BY MR. DILLMAN:

25 Q Or otherwise, but that topic, that

1 issue.

2 A Well, as I said, I have had lots of
3 contacts with Chase since February of 2009 and a
4 whole number of issues have been discussed, so I
5 don't know how to answer that question.

6 Q Upon getting involved in the
7 Fontainebleau Las Vegas matter, did you have an
8 understanding that there were issues involving LEED
9 credits that were potentially significant?

10 A After I got involved, that was one of
11 the issues that repeatedly came up and we tried
12 repeatedly to get answers from Fontainebleau.

13 Q And was one of the concerns that you
14 had was that you weren't getting sufficient answers
15 from Fontainebleau over time?

16 A It would be correct to say that I was
17 very frustrated at the level of information we were
18 getting.

19 Q And was this a concern to your
20 knowledge that Chase shared with you?

21 A Yes.

22 Q Who did Mr. Bolio contact at Special
23 Asset Groups after getting this letter from Chase,
24 if you know?

25 A I don't know.

1 something is in special assets.

2 Q Okay.

3 A So someone has to go turn on the field
4 or flag. Is that what you're asking?

5 Q No, but that would certainly be
6 responsive. But no, I'm asking more about, you
7 know, a form, Special Asset Groups involvement in
8 this signed off by the necessary and appropriate
9 people, you know, sent to whatever person that
10 processes such forms, that kind of a process.

11 A Yes.

12 Q There is?

13 A There is.

14 Q And did that occur here?

15 A Yes, I believe it did.

16 Q Describe the process for me.

17 A The -- as I said, the bank has various
18 computer systems and there are various operational
19 groups that would have the security access to put in
20 information into those databases. So when an
21 account transfers between the normal stream, if you
22 will, of account officer work into Special Assets,
23 there's a form that specifically say that, that is
24 sent to the operational people so they can turn the
25 flags on and off so that from that point onwards a

1 different group of people would be allowed to enter
2 information.

3 Q Who made the decision to have Special
4 Asset Groups at Bank of America become involved in
5 the Fontainebleau Las Vegas matter?

6 A The decision resides in the Special
7 Assets Group. So, for example, in -- like I said,
8 in most situations the account officer would be the
9 one requesting help and it is up to the head of
10 Special Assets, or whoever he delegates that
11 responsibility to, to accept the handover, if you
12 will, of the account. That decision could be based
13 on a number of factors. One is the circumstances of
14 the particular deal. The second one is whether
15 Special Assets has the manpower to take it on.

16 So that situation is something that
17 both the account officer and the Special Assets
18 officer work together on the handover process.

19 In very rare situations -- in very
20 rare situations, and I have not seen such situations
21 since probably the 1990s, an account officer would
22 try to hang on to an account when the Special Assets
23 Group thinks that it should be in Special Assets.
24 In those situations the decision is with the head of
25 Special Assets to say "This account does not belong

1 to you anymore, it's going to be in Special Assets."

2 Those are extremely rare and, again, my recollection

3 is I haven't seen one since the 1990s.

4 Q Fontainebleau was not one of those?

5 A Fontainebleau was not one of those.

6 Q So when Fontainebleau -- who made the

7 decision on behalf of the Special Asset Group to

8 take on the responsibility at whatever level it was

9 taken on for Fontainebleau Las Vegas?

10 A Tom Biaggi.

11 Q And what was, if you know, what was

12 the basis for the decision to take Fontainebleau on

13 as a Special Asset Group project?

14 A As I said, Tom was contacted by Mark

15 Cohen. Tom, Mark and I have known each other for a

16 very long time. I think I met Mark back in the late

17 1980s. And I think Tom would have been similar. We

18 have a lot of respect for Mark. And when he's

19 concerned, he usually has a very good reason. So

20 that's one reason.

21 The second reason, as I said, we have

22 gotten the letter from JPMorgan Chase. We also have

23 a very healthy respect for the workout group at

24 Chase. And, again, if they are concerned, then we

25 definitely think that the matters need some more

1 looking into. So again, it goes back to those two
2 events.

3 Q Run back the tape recorder of the
4 conversation that you had with Mr. Cohen and
5 Mr. Biaggi.

6 A Are you asking me a question?

7 Q Yes. I ask you to run back the tape
8 recorder, in other words, tell us what happened
9 during the conversation --

10 A I did not talk to Mark.

11 Q -- between you and Mr. Biaggi.

12 A As I said, Mark contacted Tom, so I
13 don't know what they said to each other other than
14 that Tom told me that Mark said that someone in Bank
15 of America Special Assets should look into
16 Fontainebleau.

17 Q I thought -- I apologize. I thought
18 you had said that you and Mr. Biaggi and Mr. Cohen
19 spoke.

20 A No. I said --

21 Q That's not correct?

22 A No, I said Tom, Mark and I knew each
23 other for a very long time.

24 Q No, you did say that, before that I
25 thought you had said you had spoken.

1 A No.

2 Q But that's not the case; is that

3 right?

4 A No.

5 Q Okay. All right. I apologize, I may

6 have misheard you.

7 You said the Special Asset Groups gets

8 involved in situations where it believes the

9 borrower may have problems repaying obligations or

10 may be unwilling to repay obligations. Was that a

11 circumstance that existed upon Special Asset Groups

12 getting involved in the Fontainebleau Las Vegas

13 matter?

14 A No.

15 Q So, as far as you know, the only, the

16 two -- the two factors that played into the decision

17 to get involved were, one, the issues raised by

18 Chase; two, the issues raised by Deutsche Bank?

19 A Right.

20 Q Did Mr. Bolio indicate his preference

21 to have Special Asset Groups involved?

22 A I don't remember enough to say whether

23 it's a preference, so I don't know what the basis of

24 your question is.

25 Q The basis of my question is simply to

1 find out whether Mr. Bolio indicated that he would
2 like to have Special Asset Groups involved?

3 A He requested that Special Assets Group
4 consult with him. There were a couple of reasons
5 for that. One was that his boss, Jeff Sussman, had
6 just been -- I guess was in the process of leaving
7 the bank, and Brian Corum was coming in to replace
8 him. So even on the account officer's side, it was
9 someone new coming in anyway. So to the extent that
10 any advice from Special Assets Group is useful, that
11 would be a good time for someone to come in and
12 help.

13 And then the second reason was that he
14 had gotten the concerns from IVI. And -- and in
15 addition to all that, there is a global set of
16 issues, if you will, that obviously the American
17 economy was not doing well at that point in time.
18 The Las Vegas situation economically was not good.
19 The fact that Fontainebleau had problems selling
20 condos at that point in time. So in addition to
21 kind of the micro factors affecting just
22 Fontainebleau, there were also some macro factors
23 that would be of concern.

24 Q Fontainebleau in your estimation was a
25 troubled project when you got involved?

Yu, Henry 4/7/2011 12:00:00 PM

1 A Fontainebleau, when I got involved,
2 there were concerns on the macro level that, as I
3 said, the American economy was not doing well at
4 that time. Las Vegas was not doing well. There
5 were concerns about how Fontainebleau will be able
6 to -- whether Fontainebleau would be able to do as
7 well as they had hoped at the beginning of the
8 project. So yes, there were those kind of global
9 macro concerns other than, as I said before, the
10 LEEDs credits IVI was getting concerned about.

11 Q When Special Asset Groups first got
12 involved with Fontainebleau Las Vegas, at what level
13 were they involved?

14 A Advisory.

15 Q Is that typical that you come in at
16 the advisory level?

17 A Yes.

18 Q Would it be unusual to come in at
19 advisory hybrid or direct?

20 A In the circumstances that
21 Fontainebleau was at advisory would have been
22 appropriate. Obviously another situation, let's
23 say, for example, a company had just filed
24 bankruptcy without any forewarning, then obviously
25 it would have been more appropriate for Special

1 Assets Group to come in and take it over direct.
2 But at that point in time, when we were looking at
3 Fontainebleau, again, we were -- we had some
4 concerns about the macro factors. IVI had pointed
5 out that there may some issues with the LEEDs
6 credits. And if I remember correctly, the order of
7 magnitude of those LEED credits were like 20 million
8 dollars or so. So in the context of a 3 billion
9 dollar project, that is not a very material number.
10 So at that point in time, if I remember correctly,
11 the risk rating on Fontainebleau was still just a
12 special mention.

13 Q What does "special mention" mean?

14 A The American banking Regulators have a
15 classification system on credits. Special mention
16 is the first category of concern, if you will. It
17 suggests that there is something that should be paid
18 more close attention to from special mention, then
19 you have substandard, you have doubtful, and then
20 you have loss.

21 Q And do those categories correspond to
22 any particular risk rating that BofA applies to
23 credits?

24 A Yes.

25 Q What is this, what is the

1 corresponding risk rating to special mention?

2 A Eight.

3 Q Substandard?

4 A Nine.

5 Q Doubtful?

6 A Ten.

7 Q It don't get any higher than that,

8 does it?

9 MR. CANTOR: Yeah.

10 A Loss is 11.

11 Q Eleven, okay. I'd been told that you

12 only went to 10. Okay, so loss is 11?

13 A Yeah, but loss is loss.

14 Q Loss is loss.

15 A That's true, I don't know we actually

16 assign 11. Loss is loss.

17 Q Okay. And risk -- Risk Rating 10, in

18 fact, assumes that there will be a loss, doesn't it?

19 A Risk Rating 10 doubtful says there is

20 a high probability of loss but the amount and the

21 timing cannot be ascertained.

22 Q When you got involved -- strike that.

23 When Special Asset Groups got involved

24 with the Fontainebleau project, it was at a risk

25 rating of 8?

1 A I believe that's correct.

2 Q Ultimate -- subsequently it was moved

3 to Risk Rating 9?

4 A Yes.

5 Q This was within the first quarter of

6 '09?

7 A I believe so.

8 Q I take it it's 10 now?

9 A It's 11.

10 Q Eleven.

11 A Or loss.

12 Well, let me correct that. Sorry. It

13 was 10 and 11, because it was not a total loss.

14 Mr. Icahn did put in some money, so there was some

15 recoveries.

16 Q At what level -- strike that.

17 Do you know how the bank carried its

18 loans on its books for Fontainebleau Las Vegas when

19 you got involved?

20 MR. CANTOR: Object to the form. You

21 can answer.

22 A Yeah, I mean it was 8.

23 Q In terms of how it marked it on its

24 books.

25 A That is actually a very complicated

1 question, so I'm going to take a few minutes to
2 explain.

3 The bank can hold funded loan amounts
4 in a couple of ways. One is to mark it to market
5 and one is based on what is called Financial
6 Accounting Standard 114, which is a discounted cash
7 flow analysis. Both of those only apply to --
8 primarily to funded outstandings. When I got
9 involved, there was no funded outstandings on
10 Fontainebleau Las Vegas. We only had approximately
11 \$13 million of letters of credit outstanding, and
12 you do not mark unfunded undrawn letters of credit,
13 to market, it's just not done. That I am aware of.
14 So it was basically just a risk rating-based system.

15 FAS 114 also applies primarily to
16 funded outstandings. Because in the case of letters
17 of credit you don't even know when it's going to be
18 drawn, if ever. So you can't really do a discounted
19 cash flow. So again, it goes back to, it was just a
20 risk rating.

21 Does that answer your question?

22 Q I just want to make sure you were
23 done. I didn't know if you were pausing or you were
24 done.

25 It does, at least for the period that

1 there was unfunded obligations by BofA, but at some
2 point BofA funded, correct?

3 A BofA funded when the beneficiaries
4 drew on those letters of credit after Fontainebleau
5 filed bankruptcy I believe.

6 Q BofA funded in February when the
7 borrower drew down on the revolver, correct?

8 A Oh, I'm sorry. Sorry, sorry, sorry,
9 sorry. Yes.

10 Q Okay. At that point --

11 A BofA drew down in February, that's
12 correct.

13 Q Actually, the borrower drew down?

14 A The borrower drew down.

15 Q BofA funded?

16 A BofA funded.

17 Q At that point -- at that point in time
18 how did BofA mark on its books its funded
19 obligation?

20 A Those funded obligations were drew
21 down in the last week of February, I believe. And
22 was repaid the last week in March I believe. So
23 they were only outstanding for a month, and whatever
24 the risk rating was at that time would have applied.

25 Q Okay. Let's assume that it was an 8,

Yu, Henry 4/7/2011 12:00:00 PM

1 of Special Asset Group involvement?

2 A Yes, I believe it was around that time

3 that we told Brandon that his own involvement was no

4 longer necessary.

5 Q Why?

6 A Because the commitment was terminated.

7 Q I don't understand the significance of

8 that in terms of why it would become direct.

9 Actually, I think I do, but I'd like you to explain

10 it.

11 A As I said before, Fontainebleau was a

12 little unusual in that Brandon stayed on longer than

13 normal. And a lot of that was because he had worked

14 on the -- worked on the account for a while and we

15 did not want to lose that knowledge and experience

16 administrating the revolver. But once the revolver

17 was terminated, a lot of those duties changed, and

18 then analysts in the Special Assets Group became

19 available, so we, Brendon, was relieved of his

20 responsibilities of continuing to help out in

21 essence the Special Assets Group.

22 Q I think it's Brandon, by the way?

23 A Brandon. Sorry.

24 Q Between February when you became

25 involved and April 20 when the revolver was

Yu, Henry 4/7/2011 12:00:00 PM

1 terminated, was there an advisory hybrid level of
2 involvement by the Special Asset Group or did you
3 just go straight from advisory to direct?

4 A No, it went through hybrid. In
5 February and for a certain amount of time I believe
6 in March, Doug Keyston was still the risk officer.
7 So if you remember my definition of advisory to
8 advisor hybrid, the changeover would be the time
9 when I'd go from concurring on credit actions with
10 Doug as the approver to me ticking over as approver
11 and Doug approval no longer would be necessary.

12 Q Did that happen?

13 A I believe it did, yes.

14 Q When?

15 A Again, I -- my recollection is that it
16 was sometime in March.

17 Q Why?

18 A Because it was becoming more obvious
19 that this was not a business-as-usual deal.

20 Q Why was it becoming more obvious?

21 A The main thing that will stick in my
22 mind, and I remember this point in time, was that
23 when I first started getting involved, I called up
24 Jim Freeman the CFO and asked to meet with Jim and
25 said that I want to come introduce myself, and, by

Yu, Henry 4/7/2011 12:00:00 PM

1 the way, I understand that IVI had raised certain
2 questions that have not been answered, so I'd like
3 to come talk to you about those. And Jim basically
4 refused to meet with me, so that to us indicates
5 that it was not business as usual.

6 Q What do you mean "not business as
7 usual"?

8 A Business as usual would be a situation
9 where the account relationship is still on a very
10 cordial basis and we were still working on an
11 amenable basis with the borrower.

12 Q It was not just a personality issue,
13 right, I mean it's something more of a business
14 nature that's the business as usual?

15 A Well, I have never met Jim. I had a
16 very polite call with him. I couldn't -- I mean,
17 that's no reason for it to be a -- a personality
18 issue. When the borrower CFO declined to meet with
19 a bank officer, there's an indication that it's not
20 a usual situation.

21 Q Something's going on?

22 A Something's going on.

23 Q And was it that concern by you that
24 something was going on that caused the Special Asset
25 Group involvement to go from advisory to advisory

1 hybrid?

2 A Yes.

3 Q And was that your recommendation?

4 A Yes.

5 Q Was it based on anything more than the

6 CFO's refusal to meet with you, were there other

7 things that went into that decision process?

8 A Well, you have the whole set of things

9 that were happening at that time with IVI saying

10 that they were not getting their questions answered.

11 And the fact that the CFO wouldn't even talk to me,

12 again, would indicate that a firmer approach, if you

13 will, may be in order.

14 Q You say IVI was saying they were not

15 getting questions answered. Did this extend beyond

16 the LEED issue as you understood it in March?

17 A My recollection is that it was mainly

18 around the LEED issue at that point in time.

19 Q Mainly other issues also or --

20 A I don't recall, there might have been

21 other issues, but that's the one that comes to mind.

22 Q And the -- and that existed at the

23 time that Special Asset Groups got involved as an

24 advisory level, right?

25 A Yes.

Yu, Henry 4/7/2011 12:00:00 PM

1 Q They go on here, and you don't quote
2 exactly from this page in the -- in your report, but
3 they go on to say: Additionally it appears that the
4 LEED credits are tracking behind projections and the
5 developer has begun a detailed audit. IVI will
6 continue to discuss this with the developer. Do you
7 see that?

8 A Yes.

9 Q That's the LEED credit issue that you
10 previously testified to?

11 A Yes.

12 Q And in your Declaration you describe
13 IVI's observation that it appears that the
14 anticipated LEED credits are tracking behind
15 projections possibly in excess of \$15 million,
16 correct?

17 A Yes.

18 Q Did you understand -- did you have any
19 conversations with IVI concerning their -- the basis
20 behind their concern that the LEED credits were
21 tracking behind projections possibly in excess of
22 \$15 million?

23 A Yes.

24 Q What did they tell you?

25 A I do not recall the specifics.

1 Q Do you recall that they told you that
2 the borrower was engaged in an audit of their LEED
3 credits?

4 A Yes.

5 Q At this time in January of 2009 --
6 excuse me.

7 A February.

8 Q In February of 2009 when you'd first
9 gotten involved.

10 A Yes.

11 Q Did they indicate to you what that
12 audit consisted of?

13 A I do not recall.

14 Q How long it would take?

15 A I do not recall.

16 Q What they anticipated the results to
17 be?

18 A I do not recall.

19 Q Okay. And, as you indicate in your
20 Declaration at the bottom of page 10, any LEED
21 credit shortfall would increase the project's cost,
22 correct?

23 MR. CANTOR: Paragraph 10.

24 MR. DILLMAN: What did I say?

25 MR. CANTOR: Page.

1 THE WITNESS: Page.

2 MR. DILLMAN: Thank you.

3 A Yes.

4 Q In Paragraph 11 you say: On February
5 13 Fontainebleau submitted its February advance
6 request. I show you what's been previously marked
7 as Exhibit 263 is that document, is it not?

8 A (Reviews.) Yes.

9 Q This was submitted before or after you
10 became involved, do you recall?

11 A It was submitted right around the
12 time, I cannot recall specifically whether it was
13 shortly before or it was shortly after.

14 Q You became aware of it, but -- when
15 you first became involved; is that fair?

16 A Yes.

17 Q The Advance Request is dated February
18 13. Had you seen these kinds of documents before in
19 projects where you had been involved?

20 A Other projects?

21 Q Yes, sir.

22 A No.

23 Q Before -- well, at some point in
24 February, did you review the Disbursement Agreement
25 and the credit facility for purposes of determining

1 that the documentation and sequencing of both
2 funding requests and advance requests?

3 A Yes.

4 Q So you were familiar with those
5 shortly after you became involved?

6 A Yes.

7 Q And you understood that an Advance
8 Request was provided by the -- by the borrower on
9 certain dates of the month, that funding was to
10 occur on certain dates of the month, and that in
11 between things happened between request and funding?

12 A Yes.

13 Q All right.

14 MR. DILLMAN: We are getting to the
15 end of this tape, and I think it's probably a
16 good time to break for lunch, if that's okay.

17 MR. CANTOR: Okay.

18 THE VIDEOGRAPHER: This marks the end
19 of Media No. 2 of the deposition of Mr. Henry
20 Yu. We are off the record at approximately
21 12:20 p.m.

22 (Whereupon, off the record.)

23 (Whereupon, lunch recess.)

24

25

Yu, Henry 4/7/2011 12:00:00 PM

1 Q Told by whom?

2 A Jim Freeman.

3 Q Were you told the timeframe in which
4 they would be completed?

5 A I don't recall.

6 Q Was it important to you to understand
7 what the amount of the LEED credit issue was?

8 A Yes.

9 Q Did you at any point ask Mr. Freeman
10 to get the audit completed by some date certain so
11 that you would have that information sooner rather
12 than later?

13 A I don't recall if we gave him any
14 deadlines but we told him that those should be done
15 as soon as possible.

16 Q Did you indicate to him that funds
17 would be held up unless he got the LEED audit
18 information done before any particular disbursement?

19 A I don't recall.

20 Q You don't recall ever having done
21 that, right?

22 A I don't recall ever stating it in a
23 way that says, if you do not provide this
24 information, it's a default under the agreement so
25 that we can move over funds.

1 Q Did you ever say in sum or substance:
2 Unless and until you provide us this information on
3 the LEED credits, we cannot assess your advance
4 requests sufficient to allow us to authorize
5 disbursements?

6 A I think it would be accurate to say
7 that that's the kind of communications we were
8 having.

9 Q The "we" here is you and Mr. Freeman?

10 A The lender group and Mr. Freeman.

11 Q I'm talking about you meaning Mr. Yu
12 or BofA. Did you have those conversations with
13 Mr. Freeman?

14 A I don't recall any specific
15 conversations that just had myself and Jim. But as
16 the steering committee we had those conversations.
17 For example, I believe we would have covered things
18 like that at the March meeting in Las Vegas.

19 Q "Things like that" being the LEED
20 audit issue?

21 A LEEDs audit issue, how the project was
22 doing in terms of the questions that IVI would have.

23 Q And in March did you or anyone in your
24 presence indicate to Mr. Freeman or anyone else at
25 the Fontainebleau Resorts that unless the LEED audit

1 issues were determined and resolved, the -- that
2 BofA would not be in a position to properly review
3 and thus recommend disbursements for the month of
4 March?

5 MR. CANTOR: Objection. Assumes facts
6 not in evidence. You can answer.

7 A I don't recall.

8 Q You don't recall that conversation
9 ever having occurred?

10 A I don't recall whether a conversation
11 in those terms occurred.

12 Q Sum or substance, sir.

13 A I recall repeatedly asking Jim to make
14 sure that he supplies IVI with all the information
15 that IVI needed so that they can do a certification.

16 Q Did you ever tell Mr. Freeman or
17 anyone else in sum or substance that unless the
18 LEEDs audit were completed prior to disbursement, at
19 the time for disbursement, that disbursements
20 couldn't be made because BofA wouldn't have
21 sufficient information to know whether or not the In
22 Balance Report was accurate or not?

23 MR. CANTOR: Objection. Asked and
24 answered. Also lacks foundation and assumes
25 facts not in evidence. Go ahead.

1 A Again, we reminded Mr. Freeman many
2 times that before funds could be disbursed, IVI has
3 to certify the in balance and so he should provide
4 IVI with whatever information IVI asks to be able to
5 do their job.

6 Q Did the question of LEEDs credits that
7 you testified existed when you first became involved
8 in the Las Vegas facility continue through the time
9 that you, that you BofA, terminated the revolver in
10 late April of 2009?

11 MR. CANTOR: Objection. Go ahead.

12 A I don't recall.

13 Q Do you recall the issue of LEED
14 credits ever having been revolved in your mind?

15 A No.

16 Q And I believe I asked you this, but to
17 make sure: You're not aware of Fontainebleau ever
18 having completed the audit that IVI referred to in
19 various reports that it issued; is that right?

20 A Right.

21 (Letter dated February 12, 2009 marked
22 as Exhibit 810, as of this date.)

23 BY MR. DILLMAN:

24 Q 810, just confirm for me, if you
25 would, sir, that this is the letter from Chase that

1 you previously referred to when you said that there
2 was a letter from Chase that was one of the factors
3 that caused the Special Asset Group -- Asset Group
4 to be become involved in the Fontainebleau Las Vegas
5 project?

6 A (Reviews.)

7 That's right.

8 Q Okay. Mr. Freeman responded to
9 Mr. Washington's letter on February 20, 2009,
10 correct?

11 A I believe.

12 Q Excuse me. February 23, 2009.

13 A Are you showing me an exhibit?

14 Q I'm not, I'm asking you a question.

15 A I'm sorry, what was the question

16 again?

17 Q Mr. Freeman responded to
18 Mr. Washington's letter that we just looked at,
19 Exhibit 498, on February 23, 2009 as reflected in
20 your Declaration at Paragraph 13.

21 A Yes.

22 (Letter dated February 23, 2009 marked
23 as Exhibit 811, as of this date.)

24 BY MR. DILLMAN:

25 Q Exhibit 811 is a copy of that

1 response, correct?

2 A (Reviews.)

3 Yes.

4 Q Was that response satisfactory in your
5 opinion?

6 MR. CANTOR: Objection. You can
7 answer.

8 A No.

9 Q Why not?

10 A Do you want to go line by line?

11 Q No, in general.

12 It didn't address the questions you'd
13 asked, did it?

14 A No.

15 Q Okay.

16 A And that was not all of them.

17 Q And that was in general at least part
18 of the problem you had with the letter?

19 A That's right, and that's why we kept
20 asking for more information.

21 Q And, in fact, that same day Bank of
22 America sent Fontainebleau a letter requesting a
23 conference call among Fontainebleau and the lenders?

24 A Yes.

25 Q And that -- what was Fontainebleau's

Yu, Henry 4/7/2011 12:00:00 PM

1 response?

2 A I believe they sent a letter basically
3 refusing to hold a call.

4 Q Now, you indicated earlier that one of
5 the concerns that you had about Fontainebleau, about
6 the Fontainebleau project arose out of the
7 borrower's failure or refusal to meet with the
8 lenders, do you recall that?

9 A I said one of the concerns I had was
10 that they refused to meet with me as opposed to the
11 lenders. I say that because apparently other
12 lenders have met with Fontainebleau.

13 Q Well, did Mr. Freeman's refusal to
14 meet with you occur before or after your February 23
15 request, BofA's February 23 request to meet with
16 Fontainebleau?

17 A I believe it was before.

18 Q Within using the February -- strike
19 that.

20 How long after you became involved
21 with Fontainebleau did Mr. Freeman refuse to meet
22 with you?

23 A Very soon after.

24 Q Within days?

25 A Within days.

Yu, Henry 4/7/2011 12:00:00 PM

1 Q And when Fontainebleau refused to
2 participate in a call with the lenders after the
3 February 23 request, what was BofA's response?

4 A We continued to ask for either a
5 conference call or a meeting.

6 Q Did your individual level of concern
7 increase with this additional instance of the
8 borrower refusing to meet with the lenders?

9 A I don't recall.

10 Q You indicated that it was a bad sign
11 that borrowers refuse to meet with the lenders,
12 right?

13 A Right.

14 Q Repeated refusals to meet with lenders
15 is even worse, right?

16 MR. CANTOR: Objection. Go ahead.

17 A I think repeated refusals is just
18 being consistent with the first refusal.

19 Q Okay. So you saw that as a state of
20 mind not as a passing fancy?

21 MR. CANTOR: Object to the form. Go
22 ahead.

23 A As I said, the second refusal is just
24 being consistent with the first refusal, I don't
25 know if that qualifies under the wording that you

Yu, Henry 4/7/2011 12:00:00 PM

1 had.

2 Q Okay. And this second refusal
3 consistent with the first gave you even more
4 concern, right?

5 A It did not reduce my concern.

6 Q It showed you that the first one
7 wasn't just a bad day by Mr. Freeman but there
8 seemed to be a pattern of the borrower refusing to
9 meet with the lenders?

10 A Refusing to meet with me, yes.

11 Q And now on February 24th the lender
12 group, right?

13 A The lender group, asset group. As I
14 said a few minutes ago, my understanding was that
15 Jim was still meeting individually with lenders.

16 Q In February BofA sent out a request to
17 draw down on the revolver loan, right?

18 MR. CANTOR: BofA?

19 MR. DILLMAN: Excuse me.

20 BY MR. DILLMAN:

21 Q Fontainebleau.

22 A Fontainebleau submitted a notice, yes.

23 Q To draw down on the revolver, not on
24 the term loan?

25 A You mean the Delay Draw Term Loan?

1 BofA to pay back 68 million dollars to the
2 revolvers; is that right?

3 A And also to make money available to
4 the project, yes.

5 Q I'm not asking "and also." Right?
6 Now we're just talking about money to the delay
7 draw -- to the revolvers.

8 A Yes.

9 Q Okay. What events occurred that
10 caused you to conclude in the exercise of your
11 judgment that it was appropriate to pay back the
12 revolvers even though all the delay draw funds
13 hadn't been received?

14 A If my recollection is correct, out of
15 350 million dollars, about 330 had come in. And at
16 that point in time, for the project to continue, a
17 decision has to be made whether any money should be
18 disbursed. And I made a decision that if all the
19 other conditions required for money to be disbursed
20 were met, such as the IVI certificate, all the
21 events, requests, documents, and all the other
22 conditions have been met, then funds could be
23 released.

24 Q And by funds being released you're
25 talking about at least in part funds to repay the

1 revolver \$68 million loan from February?

2 A Yes.

3 Q And that decision was made at the same
4 time as the decision that it was proper to release
5 funds that had been requested by the borrower as
6 part of their Advance Request for March?

7 A Yes, that's my recollection.

8 Q Okay. And was it your understanding
9 that -- strike that.

10 Bank of Nevada, they were a revolver
11 at one point?

12 A National -- First National Bank of
13 Nevada I think.

14 Q Was a revolver?

15 A Yes.

16 Q FDIC repudiated their obligation?

17 A That's correct.

18 Q At some point Bank of America
19 concluded that they no longer should be considered
20 to be available funds for purposes of the revolver?

21 A Yes.

22 Q In February when the \$68 million
23 request from the borrower went out, Bank of Nevada
24 was not considered to be available funds for
25 purposes of funding the project, right?

1 A Right.

2 Q Who paid their 10 million -- their

3 portion of the 68 million dollar request?

4 A I don't believe anybody did.

5 Q So the 68 million minus -- the amount

6 paid was 68 million minus Bank of Nevada's share?

7 A No. They were not part of --

8 Q It had to be one or the other.

9 A No. They were not part of the

10 denominator. So it is 68 million divided by the

11 revolvers that had active commitments at that point

12 in time, which excluded First National Bank of

13 Nevada.

14 Q Okay. So, in effect, its portion was

15 pro rata allocated among all the revolvers based

16 upon their percentage interest in the -- or their

17 percentage commitment in the revolver?

18 A When the FDIC repudiated that

19 contract, they were not considered part of the

20 revolver.

21 Q Right.

22 A So when -- so it's up to you how you

23 want to describe it, but what happened was they were

24 not part of the denominator.

25 Q The effective result from that was

1 that -- let's just take BofA. BofA paid more with
2 respect to the February 68 million dollar request
3 than it would have paid had Bank of Nevada remained
4 as a revolver lender?

5 A Yes.

6 Q And each of the other remaining
7 revolving lenders paid more than they would have?

8 A Yes.

9 Q Okay. I put in front of you Exhibit
10 499.

11 Is this a document you've seen
12 previously?

13 A Yes.

14 Q It's a draft of the Project Status
15 Report from IVI for the month of February?

16 A Yes.

17 Q This draft was sent to you by
18 Mr. Bolio?

19 A Yes.

20 Q And he was soliciting comments from
21 the group that included yourself?

22 A Yes.

23 Q You reviewed this?

24 A I believe I did.

25 Q You understand that IVI subsequently

1 issued a Project Status Report No. 22?

2 A I don't recall, but I believe they
3 did.

4 Q And with respect to your Declaration
5 at Paragraph 18, you indicate that that Report No.
6 22 stated that, quote: The anticipated contingency
7 summary anticipates a balance contingency of
8 \$15,545,000. However, IVI is concerned that the
9 anticipated balance may drop substantially in order
10 to meet the aggressive schedule. This is of concern
11 specifically as all of the subcontractors have not
12 fully disclosed the potential cost to meet the
13 schedule.

14 You were aware that this was a concern
15 of IVI's in late February of 2009? Yes?

16 A Yes.

17 Q In fact, this remained, continued to
18 be a concern of IVI's from January of '09, right?

19 A Yes.

20 Q You were also aware that as stated
21 below IVI remained concerned that all the
22 subcontractor claims have not been fully
23 incorporated into the report and potential
24 acceleration impact to meet the schedule has not
25 been included?

1 A Yes.

2 Q You were also aware that IVI remained
3 concerned that the LEED credits are tracking behind
4 projections and that the amount disclosed by the --
5 by the developer had not yet been audited?

6 A Yes.

7 Q And you also were aware that the work
8 on the podium would need to be accelerated to meet
9 the aggressive target for that part of the project?

10 A Yes.

11 Q And when we talk about acceleration
12 that means more costs, right?

13 A Most likely.

14 Q Because in order to build things
15 quicker, you need to have more people and more
16 overtime, right?

17 A Most likely.

18 Q Well, when you talk about acceleration
19 costs and construction, that's what you're referring
20 to, aren't you?

21 A Yes.

22 Q So each of these items would result
23 potentially in an increase in the anticipated cost
24 to complete the construction of the project?

25 A Yes.

1 (Letter dated March 3, 2009 marked as
2 Exhibit 813, as of this date.)

3 BY MR. DILLMAN:

4 Q Okay. You mentioned earlier funding
5 requests made by the borrower in -- in early March.
6 Exhibit 813 is the initial funding request submitted
7 by Fontainebleau Resorts to Bank of America on March
8 3, 2009.

9 A Yes.

10 Q Bank of America took issue with this
11 request, correct?

12 A Can we backtrack? Are you saying that
13 this exhibit is what Fontainebleau sent Bank of
14 America?

15 Q I'm sorry. This is what Bank of
16 America sent to Fontainebleau.

17 A Yes.

18 Q I misspoke.
19 You disagreed with the request for
20 the -- that Fontainebleau had made for the reasons
21 set forth in Exhibit 813?

22 MR. CANTOR: Object to the form. You
23 can answer.

24 A Could you repeat the question?

25 Q Sure.

1 MR. DILLMAN: Read it back.

2 (Whereupon, the requested portion was

3 read back by the Reporter:

4 "Question: You disagreed with the

5 request that Fontainebleau had made for the

6 reasons set forth in Exhibit 813?")

7 A The letter says what it says.

8 Q Were you involved in the decision to

9 send this letter to Fontainebleau?

10 A Yes.

11 Q And the decision was that

12 Fontainebleau's submission on March 3, 2009 had not

13 been appropriate, right?

14 A Right.

15 Q And you were not going to process the

16 notice on behalf of the other lenders, right?

17 A Right.

18 Q And the reason that you considered it

19 to be not appropriate was for the reasons set forth

20 in this letter?

21 A Right.

22 Q Now, before you made that -- strike

23 that.

24 Shortly after the March 3rd letter,

25 you sent a letter to Mr. Freeman. And if I can find

1 a sticker, I'm going to put it in front of you and
2 confirm that.

3 (Letter dated March 4, 2009 marked as
4 Exhibit 814, as of this date.)

5 BY MR. DILLMAN:

6 Q Correct?

7 A Yes.

8 Q And Exhibit 814 is that letter?

9 A Yes.

10 Q Dated March 4, 2009?

11 A Yes.

12 Q You start off by saying: I'm an
13 officer within Bank of America Special Asset Group
14 with responsibility for Fontainebleau Nevada. The
15 tone of the letter makes it sound like you and he
16 had never spoken before. Is -- that wouldn't be
17 correct, would it?

18 A That would not be correct.

19 Q Okay. You go on to say: We have
20 formed an ad hoc steering committee with other
21 lenders under the Credit Agreement constituting a
22 majority in interest of the lenders under the Credit
23 Agreement. The ad hoc steering committee was
24 comprised of whom, do you recall?

25 A I can name certain members, I don't

1 know if I can name the complete list. So it would
2 include Bank of America, JPMorgan Chase, Deutsche
3 Bank, Highland Capital, and maybe there are others.

4 Q You say in your letter that all of
5 the -- excuse me.

6 You say: The Steering Committee
7 unanimously concurred that your loan notice does not
8 conform to the requirements of the Credit Agreement.
9 Do you see that?

10 A Yes.

11 Q That wasn't exactly true at the time,
12 was it?

13 A It was true.

14 Q Highland didn't agree, did they?

15 A It did.

16 Q Do you recall Kevin Rourke sending you
17 an e-mail saying Highland was taking no position one
18 way or the other with respect to the position of
19 BofA in its March 3rd letter?

20 A That e-mail arrived after I send this
21 letter. Kevin had a conference call when we
22 discussed the issue was in concurrence.

23 Q Did you at any point -- and when did
24 the e-mail arrive that Mr. -- Mr. Rourke -- in which
25 Mr. Rourke told you that he was taking no position

Yu, Henry 4/7/2011 12:00:00 PM

1 one way or the other?

2 A I do not recall, but I recall that it
3 was after I sent this letter, otherwise, I would not
4 have said unanimous.

5 Q You again call for a meeting with
6 Mr. Freeman in Exhibit 814?

7 A Yes.

8 Q What was his response?

9 A I don't recall, but it should be in my
10 Declaration.

11 Q You don't recall sitting here?

12 A I'm sorry?

13 Q Sitting here you don't recall what his
14 response was?

15 A I don't specifically recall, no.

16 Q Okay. We'll get there.

17 In your letter to him you attach a
18 list of topics that you want to discuss with him at
19 a lender meeting, do you see that?

20 A Yes.

21 Q Many of the same topics that you
22 previously or that were previously set forth in a
23 letter to Mr. Freeman?

24 A Yes.

25 Q Had you at this point received

Yu, Henry 4/7/2011 12:00:00 PM

1 adequate answers in your opinion to these questions?

2 A Well, the fact that these question's
3 are still here means that we have not received
4 adequate answers.

5 Q Exhibit 602. Sorry. Is a letter that
6 same day from IVI to Mr. Bolio that is update to
7 supplement information provided in the Project
8 Status Report No. 22. Why was a, if you know, why
9 was a supplement provided only days after the
10 Project Status Report was issued?

11 A The way the schedule works is that the
12 monthly report reflects events of the month before,
13 but IVI continues to have conversations with
14 Fontainebleau. So if they found out anything that
15 they think is material, subsequent to the issuance
16 of the report, they bring it to our attention.

17 Q And is it your understanding that IVI
18 did in fact have a meeting with Fontainebleau after
19 the date of its Status Report No. 22 and prior to
20 the date of this letter?

21 A Yes. At -- I think it's dated in
22 Paragraph 2 in this letter.

23 Q The date of the meeting?

24 A Yes, March 1st and 2nd.

25 Q Were you at that meeting?

Yu, Henry 4/7/2011 12:00:00 PM

1 A No.

2 Q Other than this letter, did you
3 receive any download of what occurred at that
4 meeting?

5 A I don't recall.

6 Q Did you talk with Mr. Barone
7 concerning the issues set forth in his Status Report
8 No. 22?

9 A Yes.

10 Q Did you talk with Mr. Bonvicino?

11 A Yes.

12 Q Did you talk to them about the issues
13 set forth in their supplement which is Exhibit 602?

14 A Yes.

15 Q Did you understand after talking with
16 them that the LEEDs issues still hadn't been
17 resolved?

18 A That's correct.

19 Q And that they still believed there was
20 a \$15 million decrease in credits that wasn't being
21 reported?

22 A Yes.

23 Q Or shortfall of credits?

24 A Yes.

25 Q Exhibit 604.

1 On March 5th, 2009 you wrote to Mr. --
2 excuse me -- Mr. Barone wrote to Mr. Kumar, correct?

3 A Was there a question?

4 Q There was, but that's okay. I thought
5 you were reading the letter so I didn't want to
6 interrupt your concentration.

7 A Oh, sorry.

8 Q On March 5th Mr. Barone sent a letter
9 to Mr. Kumar, correct?

10 A Correct.

11 Q You received that letter?

12 A (Reviews.)

13 Q Whether you were copied on it or were
14 a recipient, you in fact received it in connection
15 with your duties on behalf of Bank of America for
16 the Fontainebleau project?

17 A Yeah, I believe I did.

18 Q And you're certainly familiar with the
19 letter, right?

20 A Am I sitting here familiar with the
21 letter?

22 Q Or you were familiar with it when you
23 wrote your Declaration --

24 A Right.

25 Q -- on July 1st, 2007, right?

1 A Right.

2 Q Okay. And at that time you

3 specifically noted at the bottom of page 1 IVI's

4 conclusion that there appears to be a delay in the

5 execution of owner change orders which it seems to

6 have gotten larger recently. Do you see that?

7 A Yes.

8 Q That's not a good thing, is it?

9 A No.

10 Q It means that the budget for the

11 project is going up?

12 A I don't specifically recall whether I

13 drew such a conclusion, but it was not a good thing.

14 Q Well, if there's additional owner

15 change orders that haven't been previously disclosed

16 and that means that the anticipated costs for

17 completion are going to go up, not down, right?

18 MR. CANTOR: Objection. You can

19 answer.

20 A If you read the sentence here it says:

21 There appears to be a delay in the execution of

22 owner change orders.

23 Q Yes.

24 A That does not necessarily mean that

25 those owner change orders have not been floating

1 around but that they just have not been executed.

2 Q Okay. Well, it was your understanding
3 that IVI was aware of these change orders but they
4 just hadn't been executed?

5 A I believed what IVI was saying was
6 that they were seeing that there was certain owner
7 change orders that were getting delayed in
8 execution, yes.

9 Q And that IVI had not previously seen?

10 A I don't recall if that's the way it
11 was.

12 Q You don't?

13 A I mean, I don't recall if it is a fact
14 that IVI had not seen owner change orders or whether
15 IVI has seen the owner change orders but that they
16 were just not executed. Executed meaning I -- I
17 read it as say someone signed it.

18 Q All right. Not seeing the change
19 orders would be certainly worse than having seen
20 them but just not having seen a signature on them,
21 wouldn't you agree?

22 A I would agree.

23 Q Because if there's a delay in
24 presenting change orders to IVI that means there's
25 going to be a delay in the lender's understanding of

1 Did you have a better more full
2 understanding of this back in 2009?

3 A I don't recall.

4 Q Did you do anything to try and get a
5 better understanding of it?

6 MR. CANTOR: Objection.

7 A As I said, we repeatedly asked
8 Fontainebleau to make sure that they supply IVI with
9 all the information that IVI needs, and if that
10 included why the worst case seems to be what it is,
11 they have to explain it to IVI.

12 Q Okay. No, my question was: Did you
13 do anything to get a better understanding of what
14 this sentence that I just read meant, and that would
15 be an understanding from Mr. Barone since he wrote
16 the sentence?

17 A I do not recall.

18 Q Okay. So when it says "all the
19 anticipated additional costs have now been included
20 in TCW's latest requisition as a credit entry
21 labeled TW Construction Commitments Against POCs.
22 You didn't have any independent understanding of the
23 significance of that; is that right?

24 MR. CANTOR: Objection.

25 A Are you saying me sitting here today

1 or at that point in time?

2 Q At that point in time.

3 A I do not recall.

4 Q Okay. Sitting here today.

5 A Sitting here today, again, it's an
6 elaboration in a sense of what the previous
7 sentences said.

8 Q Okay. Is it a good thing or a bad
9 thing that the anticipated additional costs have
10 been included in TWC's latest requisition? Is that
11 generally a good thing for the bank or a bad thing
12 for the bank in the context of this facility?

13 A Generally it would not be a good thing
14 that there's no additional contingency.

15 Q And that's how you read this?

16 A Yes.

17 Q Okay. And he goes on to say: It
18 seems that TWC -- you understand that was Turnberry
19 West Construction?

20 A Yes.

21 Q The contractor on the project?

22 A Yes.

23 Q Has already committed all the
24 anticipated additional costs into their project as
25 subcontractor change orders in Fontainebleau Las

1 Vegas has not signed the owner change orders. Do
2 you see that?

3 A You mean the first sentence of the
4 second paragraph?

5 MR. CANTOR: No.

6 Q Yes, sir. The second-to-last sentence
7 of the top paragraph.

8 A Second-to-last sentence of the first
9 paragraph?

10 Q Yeah.

11 A Okay, I see that.

12 Q It seems that TWC has already
13 committed all the anticipated additional costs. Do
14 you see that?

15 A Yes.

16 Q Do you have an understanding sitting
17 here today the significance of that?

18 A I don't know what you mean by
19 "significance."

20 Q What does it mean?

21 A It says what it says.

22 Q Is it a good thing or bad thing for
23 the bank?

24 A As I said before, if that leaves no
25 room for additional contingencies, it's not a good

1 thing.

2 Q And he goes on to say that this leads
3 us to believe that FBLB and TWC are not on the same
4 page with respect to the owner change orders, which
5 needs to be resolved, and that the entire picture
6 regarding additional pending costs are not being
7 fully shown. Do you see that?

8 A Yes.

9 Q Now, that's a bit terrifying for a
10 bank, isn't it?

11 A It is definitely a concern.

12 Q And this was not the first time this
13 concern had been expressed by Mr. Barone, this was a
14 theme that he was banging on from the beginning of
15 2009 forward.

16 MR. CANTOR: Objection.

17 Q Right?

18 A I don't know -- let me reword that.

19 My recollection is that Barone's
20 concerns evolved over time, so I don't know if
21 that's his view from the beginning of 2009.

22 Q Fair enough. They evolved and
23 increased his level of concern, right?

24 A That would be accurate.

25 Q Okay. And Mr. Barone at one point

1 talked about doing an audit of the change orders for
2 the project, do you recall that?

3 A Yes.

4 Q Did you discuss how much that might
5 be?

6 A I do not recall.

7 Q Or how long it would take?

8 A I do not recall.

9 Q Okay. You understood it would be a
10 matter of weeks, not months?

11 MR. CANTOR: Objection. Lacks
12 foundation.

13 A I do not recall.

14 Q Okay. We'll get there in a minute
15 where Mr. Barone says it would be weeks.

16 Did you ever consider on behalf of
17 BofA as the agent on this facility to say "we're not
18 going to do any disbursements on this until we get
19 to the bottom of these questions"?

20 A My recollection is that we kept
21 reminding Jim Freeman and Fontainebleau that they
22 had to supply IVI with all the information that IVI
23 needed to be able to issue IVI's certificate. And
24 that IVI certificate is one of the conditions for
25 funding.

1 Q You knew that IVI had and continued to
2 have concerns about the -- about the information
3 that it wasn't being shown through April of 2009,
4 right?

5 MR. CANTOR: Objection.

6 A I believe the picture changed
7 considerably in April, so I think you may need to
8 describe the phase between, let's say February and
9 March differently from what happened in April.

10 Q You knew that IVI certainly up through
11 the end of March, maybe April is a different set of
12 factors, but up through the end of March IVI
13 continued to have concerns that the entire picture
14 regarding additional pending costs were not being
15 fully shown?

16 A Throughout March IVI was concerned and
17 Bank of America was concerned and we kept asking
18 Fontainebleau to make sure that they supply IVI with
19 all the information they needed to do their job.

20 Q Okay. Well, the borrower was the one
21 that was not showing stuff to IVI, that's the
22 concern that Mr. -- that Mr. Barone had was that the
23 borrower was not coming clean, right?

24 A IVI is expressing a concern that they
25 may not be getting all the information they needed.

1 Q Okay. So simply asking the borrower,
2 "please give them all the information," when Barone
3 has been saying for some time "they're not giving it
4 to me," cause you some level of distrust --

5 A Yes.

6 Q -- and concern about the integrity of
7 the borrower?

8 A What do you mean by integrity?

9 Q Some distrust of the borrower, let's
10 put it that way.

11 A We were concerned that the borrower is
12 not giving IVI all the information IVI needed.

13 Q Right. And so simply saying to
14 somebody who you don't trust, do the right thing,
15 might not necessarily result in the right thing
16 being done, right?

17 MR. CANTOR: Objection.

18 Argumentative.

19 You can answer, if you can find a
20 question in there.

21 A Are you suggesting -- I don't know
22 what you're suggesting or asking.

23 Q Okay. Was there anything preventing
24 BofA as far as you understood it from saying we're
25 not going to disburse funds, and unless and until we

1 get to the bottom of these concerns that IVI has
2 expressed and the way that's going to be done is
3 with an audit of the change orders as Mr. Barone has
4 suggested?

5 MR. CANTOR: Objection. Calls for a
6 legal conclusion.

7 You can answer, to the best of your
8 understanding.

9 A The documents describe what is
10 supposed to happen. We did our best to follow what
11 the documents say.

12 Q Did you understand that you were
13 required, obligated under the documents to disburse
14 funds even if you had a level of concern and
15 distrust over whether or not the borrower was being
16 forthright in the amount of change orders that it
17 was presenting to your construction consultant?

18 MR. CANTOR: Objection. Calls for a
19 legal conclusion.

20 You can answer to the extent you had
21 an understanding.

22 A The documents say what they say. The
23 way you phrased it was, do you have an obligation to
24 do certain things when you have a certain level of
25 distrust, I think you have to read the documents if

1 that's the way the documents state it. I don't
2 believe that's the way the documents are stated.

3 Q How do you believe -- what did you
4 understand at the time that you were the Special
5 Asset Group Senior Vice President on this credit,
6 did you understand that BofA had an obligation to
7 disburse funds in March of 2009, even if it had
8 concerns regarding the honesty of the borrower and
9 whether or not it had disclosed all of the
10 information that it had to your construction
11 consultant?

12 A My understanding was that there were a
13 number of conditions that have to be met, including
14 the consultant issuing a certificate, and if all
15 those conditions are met, including the construction
16 consultant certificate, then the documents say we're
17 supposed to do what we're supposed to do.

18 Q And if BofA had concerns that the
19 borrower was not being honest, was not being
20 forthright in the information that was provided and
21 yet there was a construction consultant certificate
22 that was signed off on, is it your testimony that
23 BofA was nonetheless obligated to disburse?

24 MR. CANTOR: Objection. Calls for a
25 legal conclusion. It's an incomplete

1 hypothetical.

2 Go ahead, give it a shot.

3 A The documents laid out our legal
4 duties and I'd just refer you back to the documents.

5 Q I'm talking about Mr. Henry Yu who was
6 the BofA man on the scene, so to speak, for Special
7 Asset Groups at the time. The man who made the
8 decision to disburse. Right? Isn't that right?

9 A That's correct.

10 Q Okay. When you made the decision to
11 disburse, was it your understanding that despite any
12 concerns regarding -- relating to the honesty of the
13 borrower and whether or not they were being
14 forthright in the production of information, that
15 you nonetheless were obligated to fund to
16 disburse -- excuse me -- so long as you had, among
17 other things, a construction certificate signed off
18 by the construction consultant?

19 MR. CANTOR: Objection. Go ahead.

20 A Our legal obligations are laid out in
21 the documents. We acted in accordance to what
22 documents say were our responsibilities.

23 Q Right, and that's not my question. My
24 question was: Was it your understanding, Mr. Henry
25 Yu, wherever that understanding came from, the

1 documents or otherwise, that you, that BofA was
2 obligated to disburse funds, despite any concerns it
3 might have had about the honesty of the borrower and
4 whether or not full information was being provided,
5 so long as the various documents, including a
6 construction consultant certificate, were received?

7 A We're --

8 MR. CANTOR: Objection. Same
9 objections. Go ahead.

10 A We're going around in circles. You
11 have asked your question many times. I have given
12 you my answer many times. We can keep doing this or
13 we can move on.

14 Q You haven't given me an answer. You
15 told me --

16 MR. CANTOR: Objection.

17 Q -- to look to the documents. Okay?
18 I'm asking you, Mr. Henry Yu, without recourse of
19 the documents or anything else, whatever your
20 understanding was, you can tell me you didn't have
21 an understanding, I don't know what it was.

22 Was it your understanding in late
23 March of 2009 that when you made the decision to
24 disburse, that you were obligated to disburse given
25 what you had received from the construction

1 consultants and otherwise, even if you had a concern
2 about the honesty of the borrower and about the
3 completeness of the information the borrower had
4 provided?

5 MR. CANTOR: Objection.

6 A Again, I think we've covered this
7 question many times. I'm not changing my answer.
8 You can keep asking the same question and I'm going
9 to keep giving you the same answer.

10 Q Except you keep pointing to the
11 documents.

12 A Right.

13 Q Is that --

14 MR. CANTOR: He believes he's given
15 you an answer. If you disagree, you can go
16 to the court.

17 BY MR. DILLMAN:

18 Q I'm asking your understanding, I'm not
19 asking what the document say. Your understanding,
20 Henry Yu's understanding.

21 A My understanding is that the documents
22 say, laid out a set of conditions of, if all those
23 conditions are met, our obligation is to fund
24 according to the documents. The document doesn't
25 say, if there's an earthquake in Japan, you don't

1 have to do it, or if there's a tsunami, you don't
2 have to do it. The documents say what it says.

3 Q All right. And, to the extent that
4 the documents don't say and -- strike that.

5 And unless the documents said
6 something about BofA's conclusion as to the
7 integrity and honesty and forthrightness of the
8 borrower, that was not a consideration that you
9 would take into account; fair statement?

10 MR. CANTOR: Objection.

11 A If you are positing a hypothetical
12 that says: One of the conditions is that you have
13 to totally trust the borrower and there's no trace
14 of doubt about any information that the borrower
15 gave us, that's a totally hypothetical that you have
16 just inserted into the process.

17 Q That's not my question, sir.

18 A Again, I'm going back to, we followed
19 what was in the documents.

20 Q Okay. And was it your understanding
21 that the borrower's integrity entered into that at
22 all unless, except as otherwise expressly stated in
23 the documents?

24 MR. CANTOR: Objection.

25 A The documents say what it says, and we

1 read our obligations as what the documents say.

2 MR. DILLMAN: All right. Let's take a

3 break.

4 MR. CANTOR: Okay.

5 MR. DILLMAN: We have to change the

6 tape.

7 THE VIDEOGRAPHER: This marks the end

8 of Media No. 3 of the deposition of Mr. Henry

9 Yu. We are off the record at approximately

10 2:52 p.m.

11 (Whereupon, off the record.)

12 (Whereupon, resumed.)

13 THE VIDEOGRAPHER: We are back on the

14 record at approximately 3:01 p.m., and this

15 marks the beginning of Media No. 4 of the

16 deposition of Mr. Henry Yu.

17 (Letter dated March 6, 2009 marked as

18 Exhibit 815, as of this date.)

19 (Letter dated March 9, 2009 marked as

20 Exhibit 816, as of this date.)

21 BY MR. DILLMAN:

22 Q Mr. Yu, I've placed in front of you

23 Exhibit 815. It's a letter from Mr. Freeman to

24 yourself dated March 6, 2009. This followed upon a

25 request by you to meet with Fontainebleau, correct?

1 A Yes.

2 Q And in this letter Mr. Freeman says
3 he's not going to meet with you until basically you
4 agree to fund his -- the revolver commitment that
5 they set on March 3rd, something like that, right?

6 A Something like that, right.

7 Q He says: Once funding has occurred,
8 we will welcome the opportunity to meet with the
9 representatives of all constituents of lenders to
10 discuss the project and to resume the working
11 relationship we've always enjoyed with the lenders.

12 What was your reaction to his refusal to meet?

13 A I don't recall.

14 Q It wasn't exactly what you thought on
15 an appropriate borrower response was to a request by
16 a lender to meet, was it?

17 A No.

18 Q Shortly after that, Mr. Freeman
19 submitted a revised notice of borrowing requesting
20 \$350 million from the delay draw term lenders but no
21 component from the revolvers, right?

22 A Right.

23

24 Q And Exhibit 815 is that request?

25 A Sixteen.

Yu, Henry 4/7/2011 12:00:00 PM

1 MR. CANTOR: 16.

2 Q 816. Oh, thank you.

3 Correct, 816 is that request?

4 A Yes.

5 Q Bank of America concluded that this
6 was an appropriate request?

7 MR. CANTOR: Object to the form. Go
8 ahead, you can answer.

9 A The lenders did.

10 Q Bank of America processed the request,
11 right?

12 A Yes.

13 Q Bank of America refused to process the
14 request on March 3rd for the reasons set forth in
15 the letter from Mr. Washington, correct?

16 A Correct.

17 Q All right. This request Bank of
18 America did process and at least in part was paid by
19 some of the delay draw term lenders, correct?

20 A Yes.

21 Q A subset of delay draw term lenders
22 did not pay in March, right?

23 A Yes.

24 Q That included Z Capital and a series
25 of funds that were managed by Guggenheim?

Yu, Henry 4/7/2011 12:00:00 PM

1 A Yes.

2 Q The total amount of those unpaid
3 amounts in March was approximately \$21,666,000?

4 A That sounds about right.

5 Q Indeed Z Capital for 11,666,000 never
6 paid; is that right?

7 A That's right.

8 Q And the Guggenheim funds aggregating
9 \$10 million paid at some point in early to mid
10 April?

11 A My recollection would be early April
12 or late March.

13 Q After March 25th one way or the other?

14 A Right.

15 Q Mr. Freeman's refusal to meet with
16 your letter to him dated March 10 of 2009? 2009.

17 MR. CANTOR: You can give us that
18 version.

19 MR. DILLMAN: Huh?

20 MR. CANTOR: You can give us that
21 version.

22 MR. DILLMAN: It wouldn't of much
23 help, believe me. Just to show you.

24 MR. CANTOR: Been there, done that.

25

1 BY MR. DILLMAN:

2 Q And that letter is -- we've marked as

3 Exhibit 819.

4 A (Reviews.)

5 That's right.

6 (Letter dated March 10, 2009 marked as

7 Exhibit 819, as of this date.)

8 MR. DILLMAN: Now, I will note for the

9 record --

10 MR. CANTOR: 817.

11 MR. DILLMAN: No, I marked it 819

12 because --

13 MR. CANTOR: On purpose, okay.

14 MR. DILLMAN: -- because the reporter

15 goes down with the numbers -- excuse me --

16 across with the numbers, I typically go down.

17 MR. CANTOR: Okay.

18 MR. DILLMAN: We'll catch up to it

19 sooner or later.

20 MR. CANTOR: Got it.

21 BY MR. DILLMAN:

22 Q And that was your letter to

23 Mr. Freeman?

24 A Yes.

25 Q Is that right?

1 Now, in this letter March 10th you
2 indicate that the determination that the Notices of
3 Borrowing did not comply with the terms of the
4 Credit Agreement was unanimously supported by the
5 members of the Steering Committee, and you list
6 those as including Highland Capital, right?

7 A Yes.

8 Q Now, as of March 10, you had received
9 Mr. York's -- Rourke's -- excuse me -- e-mail saying
10 that Highland Capital had not agreed and, in fact,
11 taking no position on whether or not BofA was
12 correct in its assessment of the March 3rd funding?

13 A The sentence says "was unanimously,"
14 and I believe I was referring to the March 4th
15 letter I sent to Mr. Freeman.

16 Q At this date you knew it was not
17 Highland's position that they had supported that,
18 right?

19 A I don't recall, but the sentence here
20 referred to March 4th.

21 Q You don't recall what?

22 A I don't recall if on March 10th --

23 Q You don't recall what?

24 A I was -- I have not finished my
25 sentence.

1 Q Yeah, I know.

2 A I don't recall on March 10th where we
3 were with Highland.

4 (E-mail Exchange sent 3/14/2009 marked
5 as Exhibit 817, as of this date.)

6 BY MR. DILLMAN:

7 Q Well, let's look at 817, which was a
8 March 4 e-mail from Mr. Rourke to yourself, in which
9 Mr. Rourke states at the bottom: Finally, Highland
10 does not express any opinion on the legal
11 interpretation of the Credit Agreement that was
12 attributed to the ad hoc Steering Committee in your
13 letter to the company. Do you see that?

14 A Yes.

15 Q And you understood that he was
16 referring here to your letter to the company
17 indicating that BofA would not process the March 3rd
18 request?

19 A Right. And as you just read, he
20 referred to a letter that I sent, so again that's
21 why I think my memory was correct that I got this
22 after I sent the letter.

23 Q Sure, you got it on March 4th?

24 A Yes.

25 Q Now on March 10th you said, you told

1 Mr. Freeman that there was unanimous consent
2 unanimously supported by the members of the Steering
3 Committee the decision to not process the March
4 3rd --

5 A Yes.

6 Q -- request, right?

7 A On March 4th.

8 Q On the March 4th what?

9 A I was just adding to your sentence.

10 You said on March 10th you told Mr. Freeman that
11 there was unanimous support of that determination
12 and I said I was referring to March 4th, not March
13 10th. You kept going to March 10th and I kept
14 pointing you to March 4th.

15 Q The fact was there wasn't unanimous
16 consent, was there?

17 A The fact was on March 4th it was.

18 Q Because Highland said yes and then
19 changed its mind?

20 A When I sent the letter, I have not
21 gotten this communication from Mr. Rourke. So when
22 I sent my letter, it was unanimous, past tense.

23 Q Because Mr. Rourke --

24 A I can't go back and correct something
25 that was sent, no, that was not re-sent.

1 Q On March 4th that very same day
2 Mr. Rourke said "by the way, I don't unanimously
3 consent," right?

4 A Whatever time this was, yes, that was
5 his statement. And, as I pointed out to you, I was
6 referring to the letter that I sent him on March
7 4th, which was before I got this one.

8 Q You were referring to that in the
9 March 10 letter?

10 A Yes.

11 Q Don't you think it's a little
12 misleading to tell Mr. Freeman on March 10th six
13 days after Mr. Rourke had said "I don't consent,"
14 that the determination that these notices of
15 borrowing did not comply with the terms of the
16 credit agreement was unanimously supported by the
17 members of the Steering Committee?

18 MR. CANTOR: Objection.

19 Q Don't you think that's a little
20 misleading?

21 MR. CANTOR: Objection.

22 Argumentative.

23 Q Just a little?

24 MR. CANTOR: Objection.

25 A I believe I was stating what was the

1 state of affairs at the time I sent the March 4th
2 letter.

3 Q And you don't find anything misleading
4 then in your letter to Mr. Freeman; is that right?

5 MR. CANTOR: Objection. Asked and
6 answered.

7 A You have to ask Mr. Freeman whether it
8 was misleading.

9 Q You don't find anything about it
10 misleading; is that right?

11 A I don't.

12 Q Now, Mr. -- your letter to Mr. Freeman
13 demanding a meeting in Las Vegas on March 17th,
14 that's the Exhibit 819, attaches the identical or at
15 least very similar set of issues that had been now
16 attached to at least one, or perhaps two other
17 letters, right?

18 A Right.

19 Q Is it safe to say then that as of
20 March 10, 2009 you in your mind didn't have
21 sufficient answers to these questions?

22 A That's right.

23 Q And shortly thereafter on March 11
24 Fontainebleau submits an Advance Request that's been
25 marked as 264 and placed in front of you, right?

1 A Right.

2 Q And that request sought an amount of
3 137,925,000 and change. It says, "retail amount
4 requested zero," do you know why that was?

5 A I don't recall.

6 Q Did you have an understanding as to
7 whether or not retail facility was required to pay
8 shared costs in some amount in connection with this
9 Advance Request?

10 A I don't recall what the retail share
11 cost was in March.

12 Q And what role did you have, if any, in
13 determining whether or not this Advance Request --
14 strike that -- whether or not funds should be
15 disbursed as requested by this Advance Request?

16 A What my role was was to make sure that
17 Brandon Bolio and Jeanne Brown have all the
18 information that they normally would require
19 including, for example, the certificate from IVI and
20 other reports that are required out of the project
21 before said requests can be approved. But I did not
22 personally look at all the reports.

23 Q What team at Bank of America -- I
24 don't mean a formal team -- but what group of
25 people, other than yourself, Mr. Bolio and

1 Ms. Brown, were responsible for determining any
2 aspect of whether or not the Advance Request should
3 be funded?

4 A Other than the teams at Jeanne Brown's
5 unit and at Brandon's unit, because I don't know if
6 Brandon has any administrative help at his unit. At
7 Bank of America would be myself and at times we
8 would consult with in-house counsel.

9 Q Okay, is that it?

10 A Yes.

11 Q In terms of the team?

12 A That's it.

13 Q You recall that there was, as with all
14 advance requests and In Balance Report that was
15 provided by the borrower?

16 A Yes.

17 Q That In Balance Report showed a
18 positive in balance of \$42 million approximately?

19 A Yes.

20 (In Balance Report dated February 28,
21 2009 marked as Exhibit 818, as of this date.)

22 BY MR. DILLMAN:

23 Q Exhibit 818 is that In Balance Report
24 submitted with the March 11 Advance Request, right?

25 A Yes.

1 Q Now after or around the time that this
2 Advance Request was submitted, the borrower
3 conditionally agreed to meet; do you recall that?

4 A Yes.

5 Q Conditioned upon the execution of a
6 prenegotiation agreement?

7 A Correct.

8 (E-mail Exchange sent 3/11/2009 marked
9 as Exhibit 820, as of this date.)

10 BY MR. DILLMAN:

11 Q And Exhibit 820 is a copy of the draft
12 prenegotiation agreement that the borrower required
13 as a condition of meeting, yes?

14 A Yes.

15 Q What was your reaction to Exhibit 820?

16 A I did not think it was appropriate.

17 Q Why not?

18 A Because it included the concept of a
19 standstill.

20 Q What do you mean "the concept of a
21 standstill"?

22 A Well, Section 1 entitled Standstill, I
23 believe, if we signed this document, would limit our
24 actions if we find something out during the meeting
25 that are actionable.

Yu, Henry 4/7/2011 12:00:00 PM

1 Q At any point prior to receiving
2 Exhibit 820, had you or to the best of your
3 knowledge anyone at the Bank of America spoken to
4 Fontainebleau Resorts about defaults or potential
5 defaults under the credit facility?

6 A I don't recall.

7 Q Do you have any idea why Fontainebleau
8 Resorts would send you a prenegotiation agreement
9 of -- with a Standstill provision in it, as of this
10 date, March 11, 2009?

11 A No.

12 Q Did it strike you as a little strange
13 that here you are asking for a meeting to discuss
14 the project and they were saying "you can't use
15 anything we say to -- to bring an action for default
16 against us"?

17 A I find it objectionable, yes.

18 Q Did it provide some additional concern
19 that they were -- perhaps there was information that
20 they had that they hadn't fully shared with you?

21 A It is a continuation of the behavior
22 of not providing information, that's correct.

23 Q And you refused -- "you" being Bank of
24 America and others -- refused to go forward with the
25 meeting conditioned upon execution of this document?

Yu, Henry 4/7/2011 12:00:00 PM

1 A Correct.

2 Q There were no further negotiations by
3 you with respect to the terms of this agreement, you
4 just rejected it out of hand; is that right?

5 A We rejected it out of hand, correct.

6 Q Ultimately you did meet with the
7 borrower on March 17?

8 A On or about March 17, yes. In fact, I
9 believe it was March 20.

10 (Letter dated March 16, 2009 marked as
11 Exhibit 821, as of this date.)

12 BY MR. DILLMAN:

13 Q And Exhibit 821 is a letter from you
14 to Mr. Freeman confirming that meeting on -- on --
15 excuse me -- March 20th, right?

16 A (Reviews.)

17 Yes.

18 Q On the second page of Exhibit 821 you
19 say: Finally, we acknowledge receipt of the Advance
20 Request and supporting information last week. That
21 would be the March 11 Advance Request, yes?

22 A Yes.

23 Q You go on: We have conducted the
24 general review of the documentation required by
25 Section 2.4.4 of the Master Disbursement Agreement

1 to in Paragraph 2 of this Construction Consultant
2 Advance Certificate except as noted in 3.C, D and E
3 above. Right?

4 A That's right.

5 Q You understood that according to IVI
6 the errors contained in the March 11 Advance Request
7 called out by them in Paragraphs 3.D, C and E were
8 material?

9 A Yes.

10 Q And the same statement is made in I
11 that the undersigned has not discovered any material
12 error in the matter set forth in the current Advance
13 Request or current supporting certificates except as
14 noted in 3.C, D and E?

15 A You mean L.

16 Q Is that an L? You're right, it is an
17 L. I need to borrow your glasses for that I think.

18 A No, I just read K was above, so.

19 Q The Braille method of reading?

20 MR. CANTOR: Please don't make any
21 assumptions like that in the future.

22 BY MR. DILLMAN:

23 Q Now, to your -- well, are you aware of
24 any certificate by IVI over the course of this
25 entire project prior to March 2009 having contained

1 statements that in effect IVI believes that there
2 were material errors contained in the Advance
3 Requests submitted by the borrowers?

4 A My recollection is this was the first
5 time IVI has pointed out this kind of thing.

6 Q And that was a serious matter?

7 A Yes.

8 Q When your construction consultant
9 tells you that the borrower has made material
10 misstatements in its Advance Certificate, you take
11 that seriously?

12 A Yes.

13 Q Did you demand an explanation from
14 Fontainebleau as to how and why it made material
15 misstatements to its lenders in the Advance Request?

16 A Yes.

17 Q What -- to whom did you direct that
18 question?

19 A This was dated March 19. We met with
20 many individuals from Fontainebleau the day after,
21 March 20th, and we asked that question to everybody
22 present from Fontainebleau side.

23 Q What did they say?

24 A They would work with IVI and make sure
25 that whatever information IVI needed and whatever

1 corrections need to be made will be made.

2 Q Hadn't the borrower been saying that
3 for now three months that they work with IVI and
4 provide them the information that they needed?

5 A Three months meaning January, February
6 and March?

7 Q Yes.

8 A If your statement was the borrower has
9 not been able to answer some of IVI's questions
10 since January, I believe that was correct.

11 MR. DILLMAN: Let's take a quick
12 break.

13 THE VIDEOGRAPHER: The time is
14 approximately 3:43 p.m., and we are going off
15 the record.

16 (Whereupon, off the record.)

17 (Whereupon, resumed.)

18 THE VIDEOGRAPHER: The time is
19 approximately 3:50 p.m. and we are back on
20 the record.

21 BY MR. DILLMAN:

22 Q Mr. Yu, at some point in this March
23 period you went on vacation, right?

24 A I think so.

25 Q Okay. Let me mark as Exhibit 823,

1 just so we can figure the dates out here.

2 (E-mail Exchange dated March 12, 2009

3 marked as Exhibit 823, as of this date.)

4 BY MR. DILLMAN:

5 Q It's an e-mail from you dated March

6 12, most of it's redacted, but there is a little

7 sliver there that says "By the way, just to make

8 sure you guys know, I will be on vacation from March

9 24 through 27 and will be difficult to get ahold

10 of." Do you see that?

11 A Yes.

12 Q Did you go on that vacation, or were

13 you gone for that period?

14 A I believe I did.

15 Q Where'd you go?

16 A I was playing at the senior nationals.

17 Q Badminton?

18 A Badminton.

19 Q How'd you do?

20 A I was probably third. I don't

21 remember.

22 Q Should I say congratulations or I'm

23 sorry?

24 A I was satisfied.

25 Q I would be too. Of course I'd be

1 satisfied to survive at badminton.

2 After the meeting in Las Vegas,

3 Fontainebleau submitted a second Advance Request for

4 March, do you recall that?

5 A Yes.

6 Q And ask you to confirm that Exhibit

7 265 is that second request.

8 A (Reviews.) Yes.

9 Q This was submitted on March 24th?

10 A The date stamp appears to be March

11 23rd.

12 Q Okay. What are you looking at?

13 A I'm looking at page 9, the top left

14 corner.

15 Q The signature pages?

16 A Yes.

17 Q And that would -- appears to be a fax

18 dated March 23 of signature from Mr. Freeman, right?

19 A Yes.

20 Q Now you say in your Declaration that

21 on March 24 -- this is at Paragraph 33 -- on March

22 24 Fontainebleau revised its Advance Request and

23 supporting documentation. Did you determine at that

24 time that while the fax letter or fax cover here

25 says March 23 that in fact it was submitted on March

1 24?

2 A (Reviews.)

3 I cannot recall at this time why
4 there's a difference between the 23rd and the 24th.

5 Q Do you believe that given the fact
6 that you were submitting your Declaration under
7 penalty of perjury to a court that you would have
8 made the necessary -- would have taken the necessary
9 steps to confirm that the date was in fact March
10 24th and therefore do you believe that the date was
11 March 24th?

12 A Could you repeat your question?

13 Q Sure. Let me shorten it, how's that?

14 Based on your declaration, do you
15 believe the date was March 24th?

16 A At the time of the declaration, my
17 recollection was the 24th, but looking at it now,
18 according to this date stamp, it appears to be the
19 23rd. Again, I do not recall why I said the 24th.
20 It could be that I did not personally receive it on
21 the 23rd but I got it on the 24th. Again, I think
22 around that time I was either on vacation or about
23 to go on vacation, so I could well have not seen it
24 until the 24th.

25 Q You were on vacation on the 24th,

1 right?

2 A That's what the previous e-mail said,
3 yes.

4 Q Okay. And so --

5 A So it could have gotten to me on the
6 24th when I was not at home.

7 Q Well, your Declaration that you
8 provided to the court.

9 A Right.

10 Q Which was drafted in the first
11 instance by your counsel says: On March 24, 2009,
12 Fontainebleau revised its Advance Request and
13 supporting documentation.

14 A Uh-hum.

15 Q The -- on July 1, 2009, the date that
16 you signed this, the events in March were certainly
17 much fresher in your mind, correct?

18 A Right.

19 Q And at that point you had the
20 resources of the counsel that were assisting you in
21 drafting this declaration as well, correct?

22 A Correct.

23 Q And you knew that you were submitting
24 it under penalty of perjury to a court?

25 A Correct.

1 Q Based on all that, do you believe that
2 the date set forth in your declaration of March 24,
3 2009 is correct?

4 A Based on that I would believe the 24th
5 is correct.

6 Q The Advance Request -- and let's, to
7 keep things demarcated, I'm going to refer to the
8 March 11 Advance Request and the March 24 Advance
9 Request. Okay?

10 A Okay.

11 Q All right. So, the March 24 Advance
12 Request, according to your declaration, projected
13 additional costs associated with Fontainebleau's
14 decision to delay the project scheduled opening date
15 from October 1, 2009 to November 1, 2009, including,
16 one, an \$88,854,000 construction cost increase; two,
17 a 21,747,000 debt service increase; and three, a \$5
18 million condo selling cost decrease. Do you see
19 that?

20 A Yes.

21 Q Do you know what the decrease for
22 condo selling costs resulted from?

23 A My recollection is that that was
24 because they have given up hope of selling the
25 condos, so any associated costs would be gone.

1 Q And the 88, almost \$89 million
2 construction cost increase, do you know what the
3 major components of that were?

4 A I do not recall.

5 Q Did it concern you that as of this
6 date, March 24th, 2009, and some approximate two
7 weeks after the submission of the Advance Request,
8 the first Advance Request on March 11, that there
9 were projected to be an increase in construction
10 costs of an additional 89 million that weren't
11 previously disclosed?

12 A Yes.

13 Q Did IVI approve this Advance Request?

14 A I don't remember when they approved,
15 but at some point before the March funding they did
16 approve.

17 Q And when you say "approved," did they
18 submit a Construction Consultant Certificate of the
19 sort that we previously looked at where they had
20 indicated material errors for the March 11 request?

21 A At some point they sent in a
22 certificate that was in conformance of what was
23 required under the documents.

24 Q Which would have been a Construction
25 Consultant Certificate?

1 A Yes.

2 Q And they set that -- sent something,
3 they sent that certificate in for the March 24th
4 Advance Request?

5 MR. CANTOR: Objection. Go ahead.

6 A At some point before funding we
7 received a compliant certificate from IVI.

8 Q You refer in your Declaration to an In
9 Balance Report that was part of the March 24 Advance
10 Request that showed an in balance of -- excuse me --
11 a positive in balance number of \$13,785,000. Let me
12 just put in front of you Exhibit 824 and ask you if
13 this is a copy of that In Balance Report.

14 (In Balance Report dated February 28,
15 2009 marked as Exhibit 824, as of this date.)

16 (Appendix I to Budget/Schedule
17 Amendment marked as Exhibit 825, as of this
18 date.)

19 BY MR. DILLMAN:

20 Q Is it?

21 A What was the question?

22 Q Yes, it was. I said, let me hand you
23 Exhibit 824 and ask you if that's a copy of that In
24 Balance Report?

25 A Yes.

1 Q Thanks.

2 A Starting to fade here.

3 Q If you need to take a break, let me
4 know. I mean, we can take more frequent breaks if
5 you'd like.

6 A Keep going.

7 Q In Paragraph 24 of your Declaration
8 you refer to a second revision to the supporting
9 documentation for its March 2009 Advance Request, do
10 you see that?

11 A Yes.

12 Q You indicate that this was submitted
13 on March 25th, 2009. Exhibit 825 is that Appendix 1
14 to Budget and Schedule Amendments set of revised
15 documents, correct?

16 A Yes.

17 MR. CANTOR: Wait, I'm sorry. Unless
18 I missed something, you're referring to the
19 document that's referred to in Paragraph 34?

20 MR. DILLMAN: Correct.

21 MR. CANTOR: Which, according to the
22 declaration, was annexed as Exhibit 23, and I
23 would only note -- maybe, I could be wrong
24 about the number -- the document itself has a
25 court stamped document on the top of it that

1 says Doc 103-24. I don't know -- I don't
2 know if that is a meaningful discrepancy or
3 not, but I just want to --

4 MR. DILLMAN: I believe it was loaded
5 into the system in pieces.

6 MR. CANTOR: Is that right? Okay.

7 MR. DILLMAN: So that was -- that's
8 why there's a page 2 of 18 whereas there was
9 also a page, you know, I think you'll find a
10 page 2 of 18 to his declaration as well.

11 MR. CANTOR: Okay.

12 MR. DILLMAN: One way or the other,
13 and so that we don't have to include the
14 entire forest.

15 MR. CANTOR: No, I didn't -- I just --
16 I don't want him -- I want him to give a more
17 thoughtful answer and not simply assume that,
18 you know, it's correct. I don't think you're
19 trying to mislead him, I'm just saying, you
20 know.

21 THE WITNESS: I think all Kirk said
22 was this was Appendix 1 to the Budget
23 Schedule Amendment, which was just reading
24 off the title, and I said yes.

25 MR. CANTOR: Okay.

1 BY MR. DILLMAN:

2 Q And this was the document that you
3 referred to when you said in your Declaration on
4 March 25th, 2009, Fontainebleau submitted a second
5 revision to the supporting documentation for its
6 March 2009 Advance Request, correct?

7 A I don't recall.

8 Q If you look at this document and you
9 go to the in-balance test on the -- one, two,
10 three -- fourth page, you'll see that the in balance
11 positive/negative is 14,084,701?

12 A Yes.

13 Q You recall that that was the final
14 in-balance test in March, the final results of the
15 in-balance test in March.

16 A My recollection was the final number
17 was around 14 million, yes.

18 Q Okay. And that was higher than the
19 March 24th Advance Request In Balance Report, right?

20 A Slightly, yes.

21 Q It went from 13,8 to 14 and change?

22 A Yes.

23 Q Do you know why it was higher?

24 A I do not recall.

25 Q And looking at that, that in balance

1 number, does that cause you now to refresh your
2 recollection that indeed Exhibit 825 was what you
3 were referring to in Paragraph 34 of your
4 Declaration?

5 A It doesn't, but the easy way is to
6 look at what Exhibit 23 was and just match them up.

7 Q I think you're looking at it.

8 A Then it is.

9 Q But -- okay. But without looking at
10 that exhibit you can't tell me?

11 A I cannot recall.

12 Q And in part -- well, do you recall
13 that there was a different submission after the
14 March 24 Advance Request by Fontainebleau Resorts?
15 In other words, that which is referred to in
16 Paragraph 34 of your Declaration, do you recall
17 that?

18 A I recall that there were at least one,
19 maybe more, maybe at least two I should say,
20 revisions to the in-balance test during that period
21 of time when IVI was working very intensely with
22 Fontainebleau to make sure the number's correct.

23 Q And do you recall that the final one
24 in the series didn't have the -- all of the
25 documentation and so on as we see in Exhibit 265

1 labeled Advance Requests Certificate Date, you know,
2 all the formalities of a typical Advance Request?

3 A I'm sorry, what was the question?

4 Q Did you recall that the final in the
5 series of submissions by Fontainebleau in March did
6 not have all of the formalities of the prior two,
7 did not have the sort of standard Advance Request
8 formalities that we've seen in the prior ones?

9 A I think it was amending what I
10 previously submitted. So if they did not completely
11 replace all the pages, it was because those pages
12 didn't have changes in it.

13 Q Did IVI approve the -- well, the
14 submission that you refer to in Paragraph 34 of your
15 Declaration?

16 A At some point before funding IVI
17 issued a Construction Consultant Certificate that
18 was in compliance with the documents.

19 Q With respect to -- I think you already
20 told me that IVI did so with respect to the
21 submission referred to in Paragraph 33 of your
22 complaint -- of your Declaration, which we've called
23 the March 24 Advance Request.

24 MR. CANTOR: I don't think he said
25 that.

1 A Yeah, I don't think I said that.

2 Q No. Okay. I'm pretty sure you did

3 but --

4 MR. CANTOR: I think he actually gave
5 you the same answer he just gave you, you may
6 be assuming what that means.

7 MR. DILLMAN: May very well be.

8 A Yes.

9 Q Okay.

10 A What I said was at some point before
11 funding IVI issued the certificate.

12 Q All right. Whether it was -- whether
13 there was more than one, or not, you believed that
14 IVI provided a Construction Consultant Certificate
15 at some time prior to funding that covered the March
16 24 Advance Request as it might be changed by the
17 submission that you referred to in Paragraph 34 of
18 your Declaration?

19 A At some point IVI issued a
20 Construction Consultant Certificate that covered the
21 Advance Request for the funding in March.

22 Q Okay. And just to be clear. The
23 Advance Request for the funding in March was the
24 March 24 certificate as supplemented by the March
25 25th submission that you refer to in Paragraph 34 of

1 your Declaration; is that right?

2 A I don't know if you are adding to what
3 my recollection is. My recollection is that at some
4 point in March all the conditions for funding were
5 satisfied, including a Construction Consultant
6 Certificate from IVI.

7 Q Okay. I got that. My question was a
8 little different, and let me see if I can hone in on
9 that.

10 When you -- when BofA disbursed, it
11 was disbursing pursuant to some request by the
12 borrower, right?

13 A Right.

14 Q Now, am I correct that BofA believed
15 that the request it was disbursing for was the March
16 24, 2009 request as it might be supplemented by the
17 March 25th submissions referred to in Paragraph 34
18 of your Declaration?

19 A As I sit here today, I cannot recall
20 all the documents that was part of the package of
21 required documents and when exactly they came in.
22 So when you label something March 24th or March
23 25th, I cannot answer that because I cannot
24 remember.

25 Q Okay. Well --

1 A And all I'm saying is, my recollection
2 was that at some point before funding I determined
3 that all the conditions required for funding,
4 including the Construction Consultant Certificate,
5 have been delivered.

6 Q And the In Balance Report that was
7 part of the package that was delivered that you
8 understood to be operative for the disbursement that
9 you authorized was an In Balance Report that showed
10 a positive balance of \$14,084,701?

11 A That's my recollection, approximately
12 \$14 million.

13 Q It was not an in balance request that
14 showed a positive balance of 13 million and change?

15 A 13.8 million is actually fairly close
16 to 14 million, and I said my recollection is that
17 the final IVI number was around \$14 million. The
18 final in balance number was around \$14 million).

19 Q Okay. Thank you.

20 Do you know when the disbursements
21 were made?

22 A In March?

23 Q Yes, sir.

24 A Of 2009?

25 Q Yep.

1 A It would be around March 25th, 26th.

2 Q Do you know when it was?

3 A Not exactly, I do not recall.

4 Q The requested advance date was March

5 25th, you realize that, right? If we look at 264,

6 that's --

7 A 265 or 264?

8 Q 264. It's the March 24 Advance

9 Request.

10 THE WITNESS: That's 265.

11 MR. CANTOR: There you go. I don't

12 know where your copy is.

13 THE WITNESS: It got to be in here

14 somewhere.

15 MR. CANTOR: Don't worry, you can work

16 of this, that's fine.

17 BY MR. DILLMAN:

18 Q So 264.

19 A The requested advance date is March

20 25th.

21 Q Do you have any reason to believe that

22 the disbursements were made on some date other than

23 the requested advance date?

24 A On my declaration it said that, on

25 Paragraphs 34, that on March 25th Fontainebleau

1 submitted a revised set of documents.

2 Q Right. And we've looked at those, at
3 least --

4 A And so we would not have approved the
5 release of funds until we got the final documents.

6 So I don't know operationally, and again, I don't
7 have any specific recollection, so I'm just raising
8 a question. I don't know operationally if -- if we
9 were just getting documents on the 25th whether we
10 also advanced on the 25th. If operationally that
11 was feasible, then I don't have a reason to believe
12 why we would not advance on the 25th.

13 Q Okay. But weren't at the bank --

14 A I was --

15 Q -- on either of those days, were you?

16 A No.

17 Q At the -- from where you were offsite,
18 were you involved in the back and forth about
19 disburse or not disburse over the 24th, 25th, 26th
20 time period if it went that late?

21 A No, because I would be playing my
22 matches and I would doubt that I would be involved
23 in those conversations.

24 Q Before you left on vacation, you sent
25 a letter out to the -- to the lenders via

1 Intralinks, do you recall that?

2 A Yes.

3 Q And that's Exhibit 212; is that right?

4 A That's right.

5 Q And on this date you hadn't received

6 yet the March 24 Advance Request and certainly not

7 the March 25th submission; fair statement?

8 A Fair statement.

9 Q Did you -- had you at this point

10 received the Construction Consultant Certificate,

11 couldn't have, right?

12 A I have to check the date of that but

13 unlikely.

14 Q I'm sorry, were you done?

15 A I was done.

16 Q Okay. This letter to the lenders is

17 dated March 23, 2009, like I said, I'd like you to

18 confirm, it did go to Intralinks, yes?

19 A Yes.

20 Q And you say in the first paragraph:

21 There are two issues which may impact this

22 calculation. The calculation being the in balance

23 calculation?

24 A Uh-hum. Yes.

25 Q You say: There is a divergence of

1 opinions as to the reading of 2.1(c)3 of the Credit
2 Agreement. Let me just ask you: Who was on -- who
3 was on the differing sides of this, of these, of
4 this opinion?

5 A Now Bank of America obviously was on
6 one side.

7 Q Yep. Who was on the other side?

8 A And on -- I do not recall specifically
9 who was on the other side.

10 Q Was it divergence of opinions within
11 BofA?

12 A No.

13 Q Well, you say that BofA's position is
14 that since the borrower has requested all the Delay
15 Draw Term Loans and almost all of the loans are
16 funded whether or not the outstanding 21,666,000 is
17 ultimately received, Section 2.1(c)3 now permits the
18 borrower to request revolving loans which result in
19 the aggregate amount outstanding under the revolving
20 commitment being in excess of \$150 million. You
21 say: As a result we would permit the relevant
22 portion of the revolving commitment to be reflected
23 in available funds.

24 A Yes.

25 Q So there's a couple of things that

1 seem to be going on here.

2 One of which is, if the Delay Draw
3 Term Loans had fully funded then we would include
4 the remaining revolving commitments as part of
5 available funds?

6 A Yes.

7 Q If they didn't fund at all, we
8 wouldn't include the revolving commitment in the --
9 to be reflected in available funds?

10 A If they were requested and not funded,
11 then I believe that would be the case. Because if
12 the borrower had requested the funds -- let me, let
13 me backtrack.

14 What happened was that there was a
15 request for initially the entire amount of the
16 delayed draw, and the available amount under the
17 revolver, we determined that that was not a valid
18 request. Because under the documents the amount of
19 the revolver that could be drawn until the delay
20 draw loans have been fully funded was limited, so
21 they could not have requested the amount they did.

22 Subsequently Fontainebleau requested
23 the full availability under the delay draw of \$350
24 million. And the Delay Draw Term Loan lenders
25 funded all of that except for about \$20 million, as

1 you said, \$21 million.

2 At that point in time the question
3 that people had differing opinions on was whether
4 the 350 minus 21 was sufficient to satisfy 2.1(c)3.

5 Bank of America's position was, yes,
6 that was sufficient to satisfy 2.1(c)3, but there
7 were other lenders that were of the opinion that
8 because the \$21.7 million had not come in, that
9 2.1(c)3 had not been satisfied.

10 So, for example, if a request comes in
11 in April for a drawing on the revolver exceeding
12 \$150 million, that would be an invalid notice of
13 borrowing. Bank of America's position on March 23rd
14 was that we were satisfied that although there was a
15 shortfall of 21.7 million dollars, we would consider
16 Section 2.1(c)3 to be satisfied. So that on April
17 1st, if there was a compliant notice of borrowing on
18 the revolver for the full amount of then available,
19 Bank of America would fully fund this portion.
20 That's what the first paragraph says.

21 Q Okay. Let me ask you to clarify a
22 couple things there.

23 Because I -- my -- my prior question
24 was: Was it Bank of America's position that -- and
25 I just want to break this into three different

1 BY MR. DILLMAN:

2 Q Did you have any opinion at the time
3 or understanding at the time in March of '09 as to
4 whether or not the failure by term lenders to fund
5 their obligations under the credit facility was a
6 breach of their obligations under the credit
7 facility?

8 A I think it asks for the same legal
9 conclusion as your previous question.

10 Q My question is your understanding.
11 You either had one or you didn't?

12 A I do not recall.

13 MR. CANTOR: He already answered that
14 actually.

15 BY MR. DILLMAN:

16 Q You don't recall?

17 A I do not recall.

18 Q You say below that -- you say: We
19 request that any lender which does not support these
20 interpretations. Let me just -- when you say "these
21 interpretations," what part of point 2 is an
22 interpretation in your assessment, I mean what are
23 you interpreting there?

24 A As I said in Paragraph 1 --

25 Q Paragraph 2. I'm sorry, Paragraph 2.

1 I'm focusing on Paragraph 2.

2 A Well, these interpretations refer to
3 everything above.

4 Q Right. I'm not interested in
5 Paragraph 1, just Paragraph 2.

6 A Okay.

7 Q What interpretations are included in
8 Paragraph 2 that you were seeking when you were
9 requesting lenders who did not support them to
10 notify you?

11 A There could be two ways to treat the
12 \$21.7 million.

13 Q Okay.

14 A One is to include them in available
15 funds, and the second one is to not include them in
16 available funds.

17 Q And if you included them the -- there
18 would be a positive in balance according to the
19 schedules provided by the borrowers, and if you
20 didn't include them, there would be a negative
21 balance, correct?

22 A Correct.

23 Q Okay. And what portion of any
24 agreement were you interpreting in deciding that the
25 better interpretation was to allow these amounts to

1 be included as opposed to excluding them?

2 MR. CANTOR: Objection. Foundation.

3 Go ahead.

4 A The facts were that we fully
5 anticipated that Guggenheim would fund, it was just
6 a matter of mechanics of them getting the funds
7 wired to Bank of America. So if you consider the
8 fact that if Guggenheim funds were coming in, then
9 the in balance would be positive anyway.

10 Q Okay. We'll get there in a minute,
11 but my question was different.

12 What interpretation are you making in
13 point two, are you -- let me ask you it this way:
14 Is there any interpretation going on? Are you
15 interpreting some provision of an agreement or was
16 this just sort of loose language when you said
17 "anybody who doesn't support these interpretations,
18 please let me know"?

19 A I don't know what you mean by "loose
20 language."

21 Q Okay. Interpretation means that
22 you're rendering a decision or an opinion on a
23 particular text typically. I am interpreting
24 something. Okay? Was there any text that went into
25 your conclusion of how treatment of unfunded delay

Yu, Henry 4/7/2011 12:00:00 PM

1 draw commitments should go forward or are you simply
2 saying under these circumstances we've elected to
3 treat them as remaining available funds?

4 A From a nonlawyer point of view, I
5 think your letter categorization would be reasonable
6 way of looking at it from my perspective.

7 Q All right. I mean, if you -- if there
8 was some provision in the Credit Facility Agreement
9 or the Disbursement Agreement that you said, but I'm
10 looking at this provision and I'm interpreting it in
11 a manner that said these should be treated as
12 available funds, I'd like to know.

13 A I cannot point you to such a paragraph
14 in the documents.

15 Q Okay. Now, you said Guggenheim, you
16 had information that Guggenheim said that it was
17 coming in and there was just some logistics that
18 they were not able to get it to BofA?

19 A Right.

20 Q Tell me about that.

21 A I think at some point you will find in
22 the documents that I actually send Guggenheim an
23 e-mail that says "Why did some of your funds not
24 wire?" And I believe I had a conversation with
25 Guggenheim, with Guggenheim saying "Yes, we're

Yu, Henry 4/7/2011 12:00:00 PM

1 rounding up all the parties, all our investors, and
2 we intend to send those funds, and as they come in,
3 we have been sending them, that's why you already
4 got some and the rest are coming."

5 Q And that was in April that those
6 communications occurred?

7 MR. CANTOR: Objection.

8 A No.

9 Q Or some date after March 25th,
10 correct?

11 A No, I believe some of that could have
12 been before March 25th, I don't recall specifically
13 when.

14 Q As of March 25th, did you have any
15 communications with Guggenheim on this topic?

16 MR. CANTOR: Objection. Asked and
17 answered.

18 A I do not recall the specific dates of
19 the communications. I believe there may be some
20 e-mail, and you can look at when that was dated.
21 But my recollection is that sometime in late March I
22 have -- I had those communications with Guggenheim.

23 Q And the communications related to they
24 were rounding up funds, they hadn't gotten them from
25 all their funds, right?

1 A Right.

2 Q Right. And any other communications
3 with Guggenheim, other than those as set forth in
4 that e-mail or those series of e-mails, that would
5 lead you to believe on March 25th that the
6 Guggenheim fund -- Guggenheim was going to be paying
7 its commitment?

8 MR. CANTOR: Objection. He didn't
9 testify that his communications with
10 Guggenheim were limited to e-mails.

11 A They had phone calls I believe.

12 Q Any other communications other than
13 those surrounding the e-mails that you've testified
14 about?

15 A Are you asking me if I ever talked to
16 Guggenheim about other issues?

17 Q No. These issues about whether
18 they're going to pay.

19 MR. CANTOR: So he's testified that
20 there had been phone calls and --

21 MR. DILLMAN: Counsel, counsel.

22 MR. CANTOR: -- e-mails. I mean, do
23 you mean smoke signals?

24 MR. DILLMAN: I'd be happy to put you
25 in that chair if you want to testify.

1 MR. CANTOR: Go for it.

2 A It's the same answer. I had
3 communications with Guggenheim about the fundings,
4 and those were the communications.

5 Q Okay. And I'm trying to get now to
6 make sure that we get these sort of cabined, because
7 the communications and e-mail -- the e-mails that
8 you're talking about was after March 25th, 2009.

9 MR. CANTOR: Objection. Misstates the
10 record. Lacks foundation.

11 Q Correct?

12 A I don't recall the specific dates. I
13 recall having conversations with someone with
14 Guggenheim -- at Guggenheim about when the fund's
15 coming in.

16 Q And this was before you wrote your
17 March 23, 2009 letter, or after?

18 A I don't recall.

19 Q Would it make -- would typically if
20 Guggenheim had said we're paying, wouldn't that have
21 been something that you would have wanted to inform
22 the other lenders about that in fact there's not a
23 21.666 million dollar shortfall but rather it's
24 smaller than that because Guggenheim's gonna pay?

25 MR. CANTOR: Objection.

Yu, Henry 4/7/2011 12:00:00 PM

1 A Are you asking me to speculate whether
2 I would have done it that way?

3 Q Isn't as a representative of BofA who
4 is representing it, who is signing things as
5 disbursement agent and as administrative agent in
6 that time period, placing a letter on Intralinks for
7 all the lenders to see, wouldn't you typically have
8 wanted them to know that while there's at least
9 apparently a \$21 million shortfall, don't worry, the
10 Guggenheim money is coming in, so that's going to be
11 okay?

12 MR. CANTOR: Objection.

13 Q Isn't that something you think they'd
14 want to know?

15 MR. CANTOR: Objection.

16 A I don't know whether they want to know
17 that, but I was not going to put something like that
18 in unless I was sure and I didn't want to speculate.

19 Q Okay. So you weren't sure as of the
20 writing of this letter whether Guggenheim was paying
21 or not?

22 A Until the money comes in, you're never
23 sure.

24 Q All right. And it would have been
25 speculation for you to conclude otherwise, right?

Yu, Henry 4/7/2011 12:00:00 PM

1 MR. CANTOR: Objection.

2 Q I just used your words, but you didn't
3 want to speculate, right?

4 A I would not want to add in the forum
5 of Intralinks call out any particular lender and
6 describe conversations that I have had with that
7 lender, I do not think that would be appropriate.

8 Q How about just saying, my information
9 is that the full 21 million is not going to be
10 outstanding, that in fact some portion of it is
11 going to be paid in this amount without naming
12 names?

13 MR. CANTOR: Objection.

14 A Well, if I -- if I -- if I say the
15 amount, people could tell who that was, so I don't
16 think it was appropriate for me to do it that way.

17 Q And, as you said, you weren't sure
18 what's coming in, right?

19 MR. CANTOR: Objection. Asked and
20 answered.

21 A Well, again, as I said before, until
22 something happened, there's always a chance that
23 it's not going to happen.

24 Q Did you talk to Guggenheim while you
25 were playing badminton between the 24th and the

Yu, Henry 4/7/2011 12:00:00 PM

1 Q That's Exhibit 213. That was an
2 important letter in the history of the Fontainebleau
3 Las Vegas project?

4 A Yes.

5 Q It certainly got the attention of
6 BofA, didn't it?

7 A Yes.

8 Q And it specifically got your
9 attention?

10 A Yes.

11 Q Mr. Freeman says that, on the second
12 page: Please be advised that one or more events,
13 occurrences or circumstances have occurred which
14 reasonably could be expected to cause the in-balance
15 test to fail to be satisfied or render the project
16 entities incapable of, or prevent the project
17 entities from, A, achieving the opening date on or
18 before the scheduled opening dated; or B, meeting
19 one or more material obligations under the prime
20 construction agreement or the other material
21 contracts as and when required thereunder.

22 You had a meeting after this,
23 receiving this letter with the borrower, did you
24 not?

25 A I believe we had a meeting with the

Yu, Henry 4/7/2011 12:00:00 PM

1 borrower several days after.

2 Q And when you say "we," who is part of
3 that meeting, do you know?

4 A My recollection was that the members
5 of the steering committee was invited and the
6 steering committee was expanded for the purpose of
7 that meeting.

8 Q When did that meeting occur?

9 A I believe on April 17th.

10 Q Where was the meeting?

11 A New York.

12 Q Okay. There was a presentation handed
13 out at the meeting, presentation materials?

14 A It was a presentation that started out
15 without handouts, and I requested handouts, and that
16 was complied with.

17 Q Okay. Before that meeting, the April
18 17th meeting and -- excuse me, let me start over.

19 Between April 13 when you received
20 Mr. Freeman's letter and April 17 when you had the
21 meeting in New York, are there any other meetings or
22 telephone calls between BofA and Fontainebleau
23 Resorts that you're aware of?

24 A I believe we called and tried to find
25 out more about this letter.

Yu, Henry 4/7/2011 12:00:00 PM

1 MR. DILLMAN: I don't -- I'll let you
2 reminisce over old times while they're doing
3 that.

4 Thanks.

5 BY MR. DILLMAN:

6 Q

7

8

9

10 A

11 Q

12

13

14 A

15

16 Q

17

18

19

20 A

21 Q

22

23

24 A

25 Q Do you recall coming away with an

Yu, Henry 4/7/2011 12:00:00 PM

1 Q What did the borrower say that led you
2 to the conclusion that there was no way that they
3 could meet their obligations as they came due?

4 A They stated that they would not make
5 any payments on the 675 million dollars of second
6 mortgage notes. Those would be totally wiped out.
7 And that they are asking the senior lenders to
8 convert, I believe, approximately 40 percent of the
9 senior debt to equity. So the fact that they
10 declared that they have no way and no intention of
11 ever paying the second mortgage notes by itself,
12 satisfy the condition that they would not be able to
13 meet the -- their debt obligations when they come
14 due.

15 Q When the -- when was the -- when were
16 the second mortgage notes due, as far as you
17 understood?

18 A I do not recall.

19 Q Not around the corner, right, sometime
20 down?

21 A Not around the corner.

22 Q Okay. Sometime after the opening?

23 A It would be definitely after the
24 opening.

25 Q Okay. And that was not until -- the

Yu, Henry 4/7/2011 12:00:00 PM

1 Did IVI continue to work with the
2 borrower after April 20, 2009 to determine what the
3 additional costs were to complete the project?

4 A Yes.

5 Q For how long did IVI continue that?

6 A For considerable amount of time.

7 Q Exhibit 828 is a Project Status Report
8 by IVI. It's Report No. 23 dated April 23, 2009.

9 Do you know why this report was issued
10 after the date that BofA had terminated its --
11 strike that -- the revolving lenders had terminated
12 the revolving facility?

13 A Because certain lenders, including
14 Bank of America, continue to explore ways whereby
15 the project could be built and the debt repaid.

16 Q You say in your -- in your Declaration
17 of Paragraph 42 that on April 23, 2009, based upon
18 the new information received from Fontainebleau, IVI
19 issued Project Status Report No. 23. Do you know
20 what new information they received other than the
21 draft anticipated cost report that you and I just
22 looked at a moment ago?

23 A I don't recall.

24 Q Did they receive change orders and so
25 on prior to April 23, 2009?

Yu, Henry 4/7/2011 12:00:00 PM

1 A I do not recall specifically what they
2 were getting.

3 Q Exhibit 298 is entitled Cost to
4 Complete Review by IVI dated May 15, 2009. Did Bank
5 of America request IVI to do this report?

6 A Yes.

7 Q For what purpose?

8 A As I said, certain lenders, including
9 Bank of America, continued to explore ways whereby
10 the project can be completed and the senior debt
11 that were outstanding be repaid.

12 Q Okay. What point in time did BofA
13 conclude that that was not a path that it was
14 prepared to spend any more time going down?

15 MR. CANTOR: Objection.

16 A I'm sorry, could you repeat the
17 question?

18 Q At point -- is BofA still pursuing
19 possible efforts in that regard with the borrower?

20 A You mean as I sit here today?

21 Q Yes.

22 A Well, no, because the borrower is no
23 longer in the picture.

24 Q Right. At what point did BofA
25 determine that it was not going to continue those

1 efforts any further?

2 MR. CANTOR: Objection. Go ahead.

3 MR. DILLMAN: Overruled.

4 MR. CANTOR: It wouldn't be the first

5 time you've acted like a judge today.

6 A I believe Bank of America stopped

7 exploring ways to finish a project and get the

8 senior debt repaid at the mediation, which was some

9 time after the bankruptcy filing I believe.

10 Q You recommended in -- before you went

11 on vacation that the project, the Fontainebleau

12 project be downgraded to RR-9, Risk Rating 9, do you

13 recall that?

14 A Yes.

15 Q Why?

16 A The main reason was Fontainebleau is

17 what is called a shared national credit, which means

18 that it is above a certain dollar amount threshold

19 and it involved a certain number or more of

20 regulated banks. So the examiners are coming in in

21 late March and April to look at, among other

22 situations, Fontainebleau, and that prompted us to

23 make sure that the risk rating was correct, and at

24 that time we decided to downgrade it to substandard.

25 Q What events existed on February 21st,

1 2009 that caused you to conclude that it should be
2 downgraded to a Risk Rating 9?

3 A February 21st?

4 Q May 21st.

5 A Oh, May 21st. May 21st?

6 MR. CANTOR: That's not right either.

7 MR. DILLMAN: Did I get like two

8 months in a row wrong?

9 BY MR. DILLMAN:

10 Q What caused you to conclude as of
11 March 21st, 2009 that Fontainebleau should be
12 downgraded to a Risk Rating 9?

13 A By March 21st we have had the meeting
14 in Las Vegas on March 20th when the borrower
15 declined to answer a lot of questions and would not
16 talk about a whole number of things. So to be
17 prudent in this circumstance, and those
18 circumstances, we decided that substandard is more
19 appropriate than a special mention classification.

20 (E-mail Exchange sent 3/21/2009 marked
21 as Exhibit 829, as of this date.)

22 BY MR. DILLMAN:

23 Q And just so that we -- the record's
24 clear. I'm going to put in front of you 829 which
25 is your e-mail to Mr. Corum and Mr. Brandon Bolio

1 indicating that you're projecting a downgrade Risk
2 Rating 9 for the second quarter before you went on
3 vacation the next week, and that's dated March --
4 excuse me -- yeah, March 21st. Do you see that?

5 A Yes.

6 Q That is an e-mail that you sent?

7 A Yes.

8 (E-mail Exchange sent 3/30/2009 marked
9 as Exhibit 830, as of this date.)

10 BY MR. DILLMAN:

11 Q Exhibit 830 is an e-mail from
12 Mr. Corum. It says, in pertinent part, given
13 funding of DDTL earlier this month -- that's the
14 Delay Draw Term Loan, correct?

15 A Yes.

16 Q -- an expected request to draw the
17 full 800 million revolver in early April, which as
18 of this time you fully expected --

19 A Yes.

20 Q -- the debtor to do, right, the
21 borrower?

22 A Yes.

23 Q This could be a battle for the cash
24 collateral by the banks. And in parentheses, in the
25 event of a default, which is entirely possible, in

1 the company. So a battle for the cash collateral by
2 the banks and the company in the event of a default
3 which is entirely possible is sort of a different
4 way of reading that sentence, correct?

5 MR. CANTOR: Objection, but go ahead.

6 A I'm sorry, what's your question again?

7 Q No, no, let me strike that.

8 What was the -- was it your assessment
9 at that time that it was entirely possible that
10 there would be an event of default in the near
11 future?

12 A I think it was certainly possible.

13 Q How about entirely possible?

14 A Entirely possible is still possible.

15 Q Was it your assessment that there was
16 a likelihood of a default with respect to the
17 Fontainebleau project as of this date March 30,
18 2009?

19 A I do not recall if I made an
20 assessment that's likely, but we definitely thought
21 it was possible.

22 Q And did you understand what Mr. Corum
23 meant by "a battle for the cash colla -- for the
24 cash collateral by the banks and the company"?

25 A My understanding of that would mean

Yu, Henry 4/7/2011 12:00:00 PM

1 in the in-balance test?

2 MR. CANTOR: Objection. Go ahead.

3 A I think you asked that question
4 before, and my judgment was, until a lender has
5 officially repudiated his obligation to lend, and
6 has told us definitively that it would never honor
7 that obligation, they should be included.

8 Q Down below in the e-mail that she's
9 responding to or that -- from you that follows below.
10 it, in point two it says, for Z Capital position,
11 there was a question at the meeting whether Barclays
12 had stepped into Z Capital's shoes on the Delay Draw
13 Term Loan commitment. Barclays just confirmed to me
14 this morning that they have not. Do you see that?

15 A Yes.

16 Q At this point in time when you said
17 "stepped into Z Capital's shoes," did you understand
18 that Z Capital no longer intended to pay on the
19 Delay Draw Term Loan?

20 A No. What I was referring to was that
21 apparently Barclays had bought into some of the
22 Z Capital positions.

23 Q Yes.

24 A And that all this says was Barclays,
25 it was not -- Fontainebleau was not one of the

1 A I only heard about --

2 MR. CANTOR: Well, respond -- respond

3 to his question, don't reveal any

4 conversations that you had with Bill or any

5 other lawyer.

6 THE WITNESS: Right.

7 A I only heard from Highland and, as I

8 said, potentially another term lender. Now, there

9 was some questions as to how the April retail

10 facility was funded and we continued to pursue the

11 company on those issues.

12 Q Did you make any efforts to determine
13 what knowledge BofA had internally on those issues?

14 A I don't recall.

15 MR. DILLMAN: I don't have any further

16 questions.

17 MR. CANTOR: I have a couple quick

18 ones. Sorry, Henry.

19 EXAMINATION BY

20 MR. CANTOR:

21 Q Do you recall earlier today you were
22 talking with Mr. Dillman about Guggenheim funding
23 the March 25th Advance Request?

24 A Yes.

25 Q Okay. And you told Mr. Dillman that

1 there were some e-mails and telephone calls, right?

2 A I believe there was at least one
3 e-mail and I think there was at least one phone
4 call.

5 Q And the e-mail was -- well, withdrawn.

6 What do you recall the e-mail to
7 consist of?

8 A I think I was asking Guggenheim why we
9 have not gotten wires from some of their funds.

10 MR. CANTOR: Stickers, Kirk.

11 MR. DILLMAN: Yeah.

12 (E-mail sent 3/12/2009 marked as

13 Exhibit 835, as of this date.)

14 BY MR. CANTOR:

15 Q I'm going to show you a document
16 that's been marked as Exhibit 835, and let me ask
17 you: Is that the e-mail to which you were
18 referring?

19 A This was what I was referring to.

20 Q And the date on this e-mail is what?

21 A March 12th.

22 Q March 12th, and does this refresh your
23 recollection as to when the phone calls between you
24 and representatives of Guggenheim occurred?

25 A It would be around that time.

1 Q Okay.

2 MR. CANTOR: I have nothing further.

3 MR. DILLMAN: Well, let me hand you

4 Exhibit 491.

5 FURTHER EXAMINATION BY

6 MR. DILLMAN:

7 Q Exhibit 491 is an e-mail from

8 Mr. Bolio that attaches a letter dated March 12th,

9 2009 to Miss Trinh, T-r-i-n-h, at Guggenheim. The

10 letter is from Mr. Naval and it itemizes, I'm

11 guessing, \$10 million of commitments for the Delay

12 Draw Term Loan, and it says: Please confirm our

13 understanding that the foregoing lenders do not

14 intend to fund in response to the company's request.

15 Do you see that?

16 A Yes.

17 Q As of March 12th, 2009, did you

18 understand that Guggenheim had informed BofA that it

19 did not intend to fund on behalf of these particular

20 parties?

21 MR. CANTOR: Objection. Assumes facts

22 not in evidence. Go ahead, you can answer.

23 A My recollection was that Guggenheim

24 was chasing after its investors to get the money in,

25 but that they were not funding on behalf of the

1 investors.

2 Q And that as of March 24 there had been
3 no commitment by Guggenheim or the investors to
4 fund; isn't that correct?

5 A Could you repeat the question?

6 Q As of March 24, 2009, there had been
7 no commitment by Guggenheim or the investors listed
8 on the letter from Mr. Naval to fund their Delay
9 Draw Term Loan commitment; isn't that correct?

10 A My recollection is that around that
11 time Guggenheim was still chasing after its
12 investors.

13 Q And, in fact, as reflected by
14 Mr. Bolio in his e-mail, BofA did not know what the
15 funding status and intention of the lenders
16 described in Mr. Naval's letter were; isn't that
17 right?

18 A As I said, as of March 24th Guggenheim
19 was still requesting funds from their investors.

20 Q And as of that date still had not
21 received them?

22 A And as of that date have not received
23 them.

24 Q And does this help you refresh your
25 recollection, Exhibit 491, that while you were at

Yunker, Brett 3/1/2011 12:00:00 PM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re: CASE NO. 09-21481-BKC-AJC
FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION



VIDEOTAPED DEPOSITION of BRET YUNKER,
a witness herein, taken by the Plaintiff, pursuant
to Article 31 of the Civil Practice Law & Rules of
Testimony, 7 Times Square, New York, New York,
beginning at 9:00 a.m. on Tuesday, March 1, 2011,
held at the above-mentioned time and place before
SARA FREUND, a Shorthand Reporter and a Notary
Public of the State of New York.

JOB No. 157278

Yunker, Brett 3/1/2011 12:00:00 PM

1 the retail lending group that was partaking in the
2 retail facility.

3 Q. And what did you do to set up a
4 mechanism on a monthly basis to obtain continued
5 funding from the retail lending group?

6 A. There is a document called a
7 "disbursement agreement," the purpose of which was
8 to allow the company to obtain funds on a monthly
9 basis from the different sets of lenders.
10 Initially, on the resort side, they were obtaining
11 monies from themselves. We closed an equity
12 funding account. So, on a monthly basis, they were
13 going to, out of the resort's facilities, fund out
14 of the equity account until it was exhausted.
15 Then, that would transition into the bondholder's
16 account, the second mortgage notes proceeds
17 account. Then, when that was exhausted, it would
18 go into the funded first lien term loan account,
19 and then it would go into the additional unfunded
20 monies. Alongside that, by virtue of the nature of
21 the retail facility which was financing, I think,
22 300,000 square feet of retail space within the
23 unbuild building, we created a mechanism where they
24 would fund their pro rata share of costs. We came
25 up with a formula on a monthly basis wherein, let's

Yunker, Brett 3/1/2011 12:00:00 PM

1 say, for example, a hundred dollars of construction
2 costs are going to be the advance request for the
3 month. If it was a 90/10 split, 90 cents would
4 come out of the resort pool of capital and ten
5 cents would come out of the retail pool of capital.

6 Q. That was the mechanism to assure funding
7 from the retail facility?

8 A. Yes.

9 Q. And it was a disbursement agreement?

10 A. That's right.

11 Q. I had asked you -- and I wasn't quite
12 sure what you meant by your answer -- but I had
13 asked you what was there about the Lehman
14 bankruptcy that caused you to become more involved
15 in the Fontainebleau Las Vegas facility, and you
16 described the retail facility and the role and part
17 it played in the total financing, the fact that it
18 was disbursed pursuant to a disbursement agreement.

19 I don't think you got to the point, and this is why
20 I got more involved. I appreciate the background
21 and information. I just want to make sure we get
22 back on track.

23 A. By virtue of that funding relationship
24 and reliance on some funds from a Lehman-syndicated
25 bank facility, the client reached out, I think,

1 immediately after Lehman had filed that weekend and
2 said, We need to start exploring contingency plans
3 for if there is a problem with Lehman funding the
4 advance request later that month.

5 Q. When you say "client," who are you
6 referring to specifically?

7 A. Fontainebleau Resorts.

8 Q. Even more specifically.

9 MR. CANTOR: Do you mean humans?

10 Because Fontainebleau Resorts is an entity.

11 MR. DILLMAN: Yes, I meant humans.

12 A. I believe the first contact was made by
13 Jim Freeman.

14 Q. To you?

15 A. I don't know. It may have been me; it
16 may have been one of my colleagues.

17 Q. When you say one of your colleagues, are
18 you talking about the credit side as one of your
19 colleagues, or are you talking about some other
20 group?

21 A. It could have been the credit side, or
22 it could have been someone in my group.

23 Q. Do you recall the circumstances
24 surrounding when Mr. Freeman or anyone else at
25 Fontainebleau first reached out to BofA in

1 connection with the possible contingency plans as a
2 result of the Lehman bankruptcy?

3 MR. CANTOR: Objection, if you know.

4 Q. Can you repeat the question?

5 (Whereupon, this portion of the
6 testimony was read back.)

7 A. The circumstances had been that Lehman
8 had filed for bankruptcy.

9 Q. Yes, thank you. I understand now your
10 question. Do you have anymore particular
11 information about the call or the meeting that
12 first engaged people outside of the credit group at
13 BofA into the Fontainebleau facility as a result of
14 the Lehman bankruptcy?

15 MR. CANTOR: You mean separate and apart
16 of what he was a part of?

17 Q. Do you have any information?

18 A. I'm still not understanding. Do I
19 recall --

20 Q. Do you have any information concerning
21 the first contact of Fontainebleau Las Vegas with
22 BofA on the issue of possible contingency plans
23 regarding Fontainebleau Las Vegas arising out of
24 the Lehman Brothers bankruptcy?

25 MR. CANTOR: Objection to the form.

Yunker, Brett 3/1/2011 12:00:00 PM

1 A. In terms of how they asked us to
2 communicate?

3 Q. Yes.

4 A. It could have been a phone call; it
5 could have been an e-mail. I don't recall what the
6 first contact was from the company to BofA.

7 Q. What was your sense of what the company
8 was requesting of BofA in that initial time period
9 leading up to the Lehman filing?

10 MR. CANTOR: Objection.

11 A. Was that leading up to the Lehman filing
12 or after the Lehman filing?

13 Q. Whenever Fontainebleau first contacted
14 BofA, as far as you were aware.

15 A. As far as I was aware was after they had
16 filed for bankruptcy.

17 Q. And what was the nature of Fontainebleau
18 Las Vegas's request of BofA?

19 A. The nature of the request was Lehman had
20 underwrote the retail facility. Lehman and that
21 bank group was part of this funding mechanism on a
22 monthly basis, which I believe happened towards the
23 end of every month. So looking forward, I think
24 the Lehman bankruptcy was in the middle of the
25 month, looking forward a couple of weeks, the

Yunker, Brett 3/1/2011 12:00:00 PM

1 company was perspective thinking that there may
2 be a problem with that funding request, so they
3 were reaching out to us to advise us that there may
4 be an issue, and we just need to start exploring
5 solutions, and they were going to start exploring
6 solutions.

7 Q. You explored solutions together?

8 A. I don't believe we offered solutions,
9 but we certainly listened to the company as they
10 represented what potentially could happen at the
11 end of the month, not knowing in the middle of the
12 month what could happen at the end of the month.

13 Q. Who, other than yourself, got called
14 into the loan that wasn't previously working on it,
15 as you understood it, in a very involved manner
16 during this Lehman bankruptcy period?

17 A. I don't think there was anyone else
18 called in that hadn't already been part of the deal
19 team.

20 Q. Why you?

21 A. Why me?

22 MR. CANTOR: Object to the form. You
23 can answer.

24 A. I was part of the Client Management Team
25 that communicates with clients when they want to

1 explore potential solutions to problems with
2 existing financing agreements.

3 Q. Who did you report to at that time?

4 A. I reported to Bill Newby, who was
5 running the Gaming Group, although I think he had
6 already been told that he was let go. So, I'm not
7 sure exactly when he left relative to that time
8 period.

9 Q. Was there any other client rep at BofA
10 involved with Fontainebleau other than yourself and
11 Mr. Newby?

12 A. Yes.

13 Q. Who else?

14 A. John Varnell.

15 Q. Did Mr. Varnell get called into the
16 Fontainebleau facility as a result of the Lehman
17 bankruptcy?

18 A. Called into the facility or the
19 dialogue?

20 Q. Yes, exactly.

21 A. Yes.

22 Q. And was he previously very involved, as
23 far as you understood it?

24 MR. CANTOR: Object to the form.

25 A. Previously, as we structured the deal

1 and closed the deal or between closing?

2 Q. Post closing.

3 A. I know that he had dialogue with the
4 company, but I don't think there was anything
5 actionable that required a lot of work.

6 Q. The reason I ask you is, you mentioned
7 that other than the Credit Team, you were the only
8 one that you were aware of that got pulled into the
9 dialogue surrounding the Lehman bankruptcy. It
10 sounds like Mr. Varnell also got pulled in at that
11 time.

12 A. Yes. I apologize if I misspoke earlier.
13 I said myself and my team members.

14 Q. Who else was on your team?

15 A. John Varnell and Kyle Bender.

16 Q. Did Mr. Varnell report to you?

17 A. No, he's senior to me.

18 Q. What about Mr. Bender?

19 A. Kyle reported to me, or to the extent
20 you can report to -- I don't think I had direct
21 subordinates, but he was junior to me.

22 Q. Had you, prior to the Lehman bankruptcy,
23 been involved in any discussions concerning draw
24 requests regarding the Fontainebleau facility?

25 A. Not to my knowledge.

1 Q. Did you, in any way, monitor the
2 construction of the project?

3 A. Nothing outside of ordinary course,
4 how-is-it-going-type of dialogue, but nothing
5 beyond that.

6 Q. Have you been involved at all in the
7 disbursement of funds?

8 A. No.

9 Q. From the Lehman bankruptcy until the
10 time that you became disengaged, to use your words,
11 once the strategic asset group was put in place,
12 what was your involvement with respect to the
13 Fontainebleau Las Vegas facility?

14 MR. CANTOR: Objection.

15 Mischaracterizes as to when he was less
16 involved. But you could answer the question.

17 A. Beginning with when they initially
18 contacted us, however that was, following Lehman's
19 filing, there was a lot of dialogue with the
20 company and internally around the prospective ideas
21 on what would happen at the end of the month and
22 would the funding request go through at the end of
23 September.

24 Q. After September finished, October,
25 November, December, what was your involvement with

1 A. I believe I had a conversation or two
2 with Jim Freeman and, potentially, Glenn Schaeffer
3 about Moelis raising equity.

4 Q. When?

5 A. I don't recall.

6 Q. Pre 2009?

7 A. I believe it was pre 2009.

8 Q. In the late fourth quarter of 2008, that
9 time frame?

10 A. That time frame generally sounds
11 accurate.

12 Q. What did they tell you?

13 A. That they had engaged Moelis to raise
14 equity.

15 Q. Nothing more?

16 A. That's all I recall about what they were
17 attempting to do.

18 Q. Did they indicate how much they were
19 seeking to raise?

20 A. I don't recall a specific amount.

21 Q. Did you see any presentations?

22 A. I don't recall seeing a presentation.

23 MR. CANTOR: Objection to form.

24 Q. Did you see any materials associated
25 with the company's, Fontainebleau Resort's, efforts

1 to raise additional equity with or through Moelis?

2 A. I don't recall seeing any materials.

3 Q. With respect to the Lehman bankruptcy, I

4 believe it was you who suggested perhaps Moelis can

5 fund? Do you recall seeing e-mails to that effect?

6 MR. CANTOR: Objection.

7 A. I don't recall.

8 Q. Perhaps Moelis could fund for Lehman?

9 A. No, I don't recall that at all.

10 Q. Did you have any understanding in the

11 September 2008 time frame of any involvement of

12 Moelis with any Fontainebleau entity?

13 A. I don't recall when they got involved.

14 I don't recall when they got involved, so I can't

15 say that September 2008 they were involved.

16 Q. BofA raises equity for companies, does

17 it not?

18 A. BofA does, yes.

19 Q. You knew Mr. Freeman from his days at

20 BofA?

21 A. Yes, I did.

22 Q. You would consider Mr. Freeman to be a

23 friend?

24 A. Yes, I would.

25 Q. Good friend?

1 A. Yes, I would.

2 Q. You've known Mr. Schaeffer for a while,
3 correct?

4 A. Yes.

5 Q. Consider him to be a friend?

6 A. Yes, I guess.

7 Q. When they told you in the late 2008 time
8 frame that they were seeking equity through Moelis,
9 did you ask, What's wrong with me; why not BofA?

10 MR. CANTOR: Objection.

11 Q. We can help you here?

12 A. I don't recall asking that question.

13 The thought may have crossed my mind. BofA does
14 raise equity, but it's not a core competency of the
15 firm; so, it made sense to me that they would
16 select someone like Moelis for that type of equity
17 capital risk.

18 Q. Did you or anyone, to your knowledge,
19 make any pitch to Fontainebleau to assist in their
20 efforts to raise equity at any time post closing?

21 A. Not that I recall.

22 Q. You understood in September of 2008 that
23 Lehman's bankruptcy had potentially catastrophic
24 effects for the Fontainebleau Las Vegas facility,
25 did you not?

1 MR. CANTOR: Object to the form.

2 A. For which facility?

3 Q. For the project, let's put it that way.

4 A. I understood that the Lehman bankruptcy
5 had potentially catastrophic effects for all banks,
6 all capital markets, all companies in the industry
7 that I covered, and so to the extent Fontainebleau
8 falls within that, yes, it had potentially damaging
9 effects on Fontainebleau in general.

10 Q. And this project in particular?

11 A. As for this project in particular, I
12 understood that there was this retail facility, and
13 I understood there could be complications with
14 funding going forward by virtue of Lehman's
15 bankruptcy.

16 Q. You understood that if the retail
17 facility wasn't funded, that the project would shut
18 down?

19 MR. CANTOR: Objection.

20 A. I did not understand that there was a
21 direct correlation to the shutting off of that
22 funding and the project shutting down per se.

23 Q. But you understood the funds couldn't be
24 disbursed from the resort facility if full funds
25 haven't been received on the retail facility,

Yunker, Brett 3/1/2011 12:00:00 PM

1 right?

2 A. Yes. So, I don't know if it means that
3 the project must be shut down if the retail funding
4 doesn't occur. I think that would mean that the
5 entity couldn't obtain funds out of the resort
6 facility if the retail funding didn't occur. But I
7 can't jump to the exact conclusion of the project
8 shutting down at that point.

9 Q. The financing shuts down.

10 A. The financing shuts down. That's
11 different from the project shutting down.

12 Q. Fair enough. And the borrowers would
13 not have access to any of the funds in either the
14 retail facility or the resort facility if the
15 retail facility were not paid on a current basis?

16 MR. CANTOR: Object to the form. You
17 can answer.

18 A. Yes, that's my understanding.

19 Q. And as an experienced banking
20 professional, you understood that there would be
21 very little interest in continuing to fund the Las
22 Vegas project if there was a hole in the retail
23 financing as a result of Lehman's refusal or
24 failure to pay its share of that facility?

25 MR. CANTOR: Interest from who? You can

Yunker, Brett 3/1/2011 12:00:00 PM

1 answer if you understand.

2 A. By virtue of -- it depends on the state
3 of the capital markets. By virtue of what was
4 happening in the capital markets at that time, and
5 what was happening in Las Vegas with operating
6 trends, yes, I understood that raising additional
7 capital by virtue of macro events occurring at the
8 time would be very challenging for Fontainebleau.

9 Q. And the current lenders to the
10 Fontainebleau project would not have agreed to
11 continue funding that loan if there wasn't
12 financing in place to complete the project,
13 including the retail space, correct?

14 MR. CANTOR: Objection.

15 A. Could you restate the question?

16 Q. You understood that if there was not
17 funding in place to complete the retail space, in
18 other words, if the project didn't have financing
19 to complete it in its entirety, that the existing
20 lenders on the resort facility would not agree to
21 continue funding into a facility where completion
22 of construction was not assured?

23 MR. CANTOR: Object to the form.

24 A. Correct, if the project was out of
25 balance, lenders were not going to want to continue

Yunker, Brett 3/1/2011 12:00:00 PM

1 funding a project that was out of balance in terms
2 of cost exceed sources to complete.

3 Q. You, at one point, said, and this was
4 before Lehman's filing, "Lehman may be the death
5 nail for FB." Do you recall that e-mail? You saw
6 that in preparation?

7 A. Yes, I do.

8 Q. Interesting mixed metaphor there. Did
9 you mean the death knell or the last nail?

10 A. I believe this e-mail took place over
11 the course of a weekend where Lehman had filed
12 bankruptcy. I believe Bank of America had merged
13 with Merrill Lynch, so Merrill Lynch had almost
14 gone under. Everyone had seen what had happened
15 with Bear. So, in the general context of capital
16 markets not being available to companies to raise
17 additional capital to the extent they needed it,
18 and in terms of what it meant for Las Vegas, trends
19 were already starting to fall off, in a general
20 context the Lehman filing was a massive event in
21 the capital markets that was going to cause
22 problems for all companies in general and
23 potentially specifically for Fontainebleau.

24 (Whereupon, Exhibit 67 was marked for
25 identification.)

Yunker, Brett 3/1/2011 12:00:00 PM

1 Q. We've marked as Exhibit 67 an e-mail
2 chain that starts at the top with an e-mail from
3 you to Mr. Varnell, and the e-mail that I'm
4 interested in is the one that follows that at the
5 bottom -- actually, two down. It is from you to
6 Mr. Varnell and Mr. Bender, and it has the words
7 that I just previously indicated, "Lehman may be
8 the death nail for FB. I think they still needed
9 to fund around \$150 million for retail hard and
10 soft costs." Mr. Varnell and Mr. Bender are both
11 on your team, as you've indicated?

12 A. Yes.

13 Q. Had you, at this point, been pulled into
14 the Fontainebleau facility, or were these just
15 comments that you were making as sort of an
16 outsider looking in at this point?

17 A. I believe I was just an outsider looking
18 in at this point given that weekend's events.

19 Q. I think that Lehman filed on Monday.
20 They may have actually technically filed on Sunday,
21 but it was right around that time that Lehman
22 filed?

23 A. Yes, I thought it was that weekend.

24 Q. I think as a technical matter, you're
25 right, it was a weekend. People look at the Lehman

1 filing date as September 15th. Had you, prior to
2 Lehman's filing, been contacted by anybody at BofA
3 to become more closely involved in the
4 Fontainebleau Las Vegas facility?

5 A. Not that I recall.

6 Q. Had any discussions with anybody at
7 Fontainebleau Resorts?

8 MR. CANTOR: Object to the form.

9 A. About Lehman's bankruptcy?

10 Q. About stuff that was going on.

11 A. I don't recall any contact from the
12 company about Lehman before they filed.

13 Q. What did you mean when you said "may be
14 the death nail for Fontainebleau"?

15 MR. CANTOR: Objection. I think he just
16 answered that.

17 Q. Let me go back. Because you gave an
18 answer that stated that the capital markets were in
19 a bit of shambles and so on and the potential of
20 the impact. Why did you think that the capital
21 market issues, as you previously described them,
22 might represent the death nail for Fontainebleau?

23 MR. CANTOR: Objection.

24 A. I don't recall the exact context of what
25 I was thinking in terms of the immediacy of the

1 potential problems that would fall out of Lehman's
2 filing, or if I was looking completely forward to
3 even if this project gets open, it's never going to
4 be able to repay the amount of debt that's going to
5 exist assuming it gets open. So, in the sense that
6 this is going to be, maybe not today, but if it
7 opens, given the amount of debt on the asset, there
8 is going to need to be some type of restructuring
9 at some point.

10 Q. Did you have those thoughts in the
11 September time period, that even if Fontainebleau
12 were able to survive the Lehman issue, that it
13 would never be able to pay the debt that was on the
14 project even if it were open?

15 A. I thought that they would have a hard
16 time servicing the debt post opening, yes.

17 Q. Did you think that pre-closing?

18 A. Pre-closing, no.

19 Q. What occurred between June of '07 and
20 September of '08 that caused you to change your
21 opinion on this issue?

22 A. The housing market began to collapse.
23 Trends in Las Vegas began to worsen severely. I
24 think the equity markets were off 50, 60, 70
25 percent, and Bear Stearns almost went under, and

Yunker, Brett 3/1/2011 12:00:00 PM

1 then Lehman went under and we were merging with
2 Merrill. So, any large development or any large
3 real estate project, in my mind, was going to have
4 an extremely hard time -- any levered, large real
5 estate project was going to have a hard time
6 servicing its debt in that environment.

7 Q. If the project is up and running, it
8 would be servicing the debt, presumably, in the pro
9 formas that were done pre-closing, be servicing the
10 debt based upon the cash flow from the project,
11 correct?

12 MR. CANTOR: Objection.

13 A. Pre-closing?

14 Q. Pre-closing.

15 A. Yes.

16 Q. The understanding was that once the
17 project was up and running, Fontainebleau would be
18 servicing its debt through cash flow from the
19 project, correct?

20 A. That's exactly right. We raised this
21 financing in early to mid 2007.

22 Q. And what was there about the prospects
23 of the cash flow from the business that you felt in
24 2008, now threatened the likelihood that
25 Fontainebleau would be able to service its debt?

Yunker, Brett 3/1/2011 12:00:00 PM

1 A. Two pieces: One was the large condo
2 element to the project. So, the trends in 2006
3 into 2007, there were very strong trends in terms
4 of selling condos in the Las Vegas market. Those
5 had started to slow down severely going into 2008,
6 so a large part of the pro forma analysis in 2007
7 was, there was expected to be a large amount of
8 condo proceeds soon after the project opened to pay
9 down debt. And then, secondly, in terms of
10 operating cash flows that come out of the casino
11 and the hotel, those were built off of trends in
12 2005, 2006 and 2007 in Las Vegas that also reversed
13 into 2008. So, the combination of those two
14 factors with a highly-levered project meant that,
15 in my mind, that it was going to be difficult for
16 them to service their debt, assuming they got
17 opened.

18 Q. The loans traded, did they not?

19 A. Yes.

20 Q. And you had access to information what
21 the various pieces of the Fontainebleau Las Vegas
22 project were trading at, did you not?

23 A. Access to -- I didn't have direct
24 access. I don't sit on a trading desk, so I didn't
25 have a Bloomberg or anything that sat there

1 understand it, have to be mark to market or funds
2 have to be mark to market? What sort of credit
3 rating needs to be achieved or underachieved in
4 order to make that happen?

5 A. I think that's a function not only of
6 the credit rating but also the life of the
7 commitment for that credit rating category. So,
8 the first question is, if you were into those
9 higher risk categories, so, let's say, five, six,
10 seven, eight, nine, once you've gotten into that
11 zone, my understanding is that if you have a loan
12 in excess of that house guideline, then that's when
13 it needs to start getting marked.

14 Q. So, to be clear, on a scale of one to
15 nine, one is best, nine is worst?

16 A. That's correct.

17 Q. And if you get into the five, six,
18 seven, eight, nine area, you say you mark to market
19 if you have a loan that exceeds the house limit --

20 A. A house guideline or a house limit. So,
21 for example, if it's a risk rate of five, and the
22 house limit is \$100 million, my understanding is if
23 you have \$120 million, you need to start marking it
24 to market. If it's less than a hundred, you may
25 not need to mark it to market because it's under

1 the house guidelines.

2 Q. You know what the house guidelines were
3 in the March 2009 time frame for five, six, seven,
4 eight, nine?

5 A. I don't recall specifically.

6 Q. It is the case that a loan in excess of
7 \$500 million that is in the seven, eight, nine
8 frame or risk category would have to be mark to
9 market; isn't that right?

10 MR. CANTOR: Objection. Just to be
11 clear, he testified he only knows what the
12 state is today.

13 MR. DILLMAN: Is there an objection
14 here?

15 MR. CANTOR: Yes, there is. It's
16 mischaracterizing his prior testimony. It's
17 a confusing question. Assumes facts not in
18 evidence. It's fattening -- a bunch of
19 problems.

20 A. You said a loan. Just to be clear, it's
21 BofA's commitment size within a loan facility. So
22 if the loan facility is 500 and BofA only holds
23 100, I'm speaking to BofA's commitment within that
24 facility. So, if you're question was if BofA had a
25 commitment of \$500 million, or was your question is

1 the loan size \$500 million?

2 Q. My question was the loan size.

3 A. The loan size is not the primary
4 determinant. It's the BofA's commitment.

5 Q. Is it the amount that's being funded or
6 is it the amount of the commitment that governs?

7 A. My understanding is that it's the amount
8 of the commitment.

9 Q. So, if I funded \$50 million into a \$200
10 million commitment, it's the \$200 million that
11 governs?

12 A. That's correct. That's my
13 understanding. Again, I'm not in the Credit
14 Product Group.

15 Q. This is based upon your experience at
16 BofA over a long career, correct?

17 A. Yes. Although, for almost my entire
18 career, we didn't have the credit deterioration
19 that we saw in late 2008.

20 Q. You got a real quick course in credit
21 risk and how BofA handles it during that on-the-job
22 training, so to speak?

23 A. That's right.

24 Q. What sense did you have as to the amount
25 of the BofA commitment for a category seven loan

Yunker, Brett 3/1/2011 12:00:00 PM

1 risk that would require a mark to market treatment?

2 MR. CANTOR: When, by the way? What
3 time frame are we talking about?

4 MR. DILLMAN: March of 2009.

5 A. It would likely be a low number in terms
6 of what would qualify for having to go mark to
7 market, assuming my understanding of how mark to
8 market works is correct. So, it was probably -- if
9 you had a commitment in excess of \$25 million, then
10 you would need to look at mark to market.

11 (Whereupon, Exhibit 68 was marked for
12 identification.)

13 Q. Mr. Yunker, I placed in front of you
14 Exhibit 68, which is an e-mail chain. Beginning at
15 the top, there's an e-mail from Mr. Varnell to
16 yourself. It's regarding -- the subject matter is,
17 "Lehman Brothers bonds trade sharply lower, CDS off
18 wide point." Mr. Varnell says to you, "Maybe
19 Moelis and Company can step in and advance the
20 funds." This is in response to your e-mail to him
21 on September 11 that says, "If Lehman goes away, FB
22 may not have funding for their retail." Let's
23 start with the lower one. I think you described
24 this. You believed that Fontainebleau might not
25 have funding for their retail if Lehman went away

Yunker, Brett 3/1/2011 12:00:00 PM

1 because the capital markets were in such disarray
2 at that time that financing for the Lehman piece of
3 the retail facility may very well not exist.

4 A. That's fair to say, yes.

5 Q. Mr. Varnell responds, "Maybe Moelis and
6 Company can step in and advance the funds." Does
7 that help you to recall conversations in this time
8 period, in the first half of September, regarding
9 Moelis and Fontainebleau?

10 A. It sounds like the context of these
11 e-mails is that Moelis had, in fact, been engaged
12 by the company to explore raising equity, and I
13 believe Mr. Varnell is making a flip comment that
14 maybe Moelis can step in on behalf of Lehman.

15 Q. Does this help refresh your recollection
16 that you knew at the time that the company was, in
17 fact, seeking either financing and equity through
18 Moelis ?

19 A. Yes. The context of this e-mail
20 suggests that during this time frame they had
21 engaged Moelis to seek equity. I don't
22 specifically recall when they had engaged Moelis.

23 Q. Does it help you recall any
24 conversations that you may have had with the
25 company, with Fontainebleau or any else for that

1 matter, on the possibility of Moelis stepping in to
2 fund?

3 MR. CANTOR: Object to the form. If you
4 understand.

5 A. I'm sorry, could you repeat the
6 question?

7 Q. Does this e-mail help you recall any
8 conversations you had with anyone regarding the
9 possibility for Moelis stepping in to fund Lehman's
10 portion of the retail facility?

11 A. Nothing beyond what I stated previously
12 in terms of I know that Moelis was engaged at some
13 point to raise equity.

14 (Whereupon, Exhibit 69 was marked for
15 identification.)

16 Q. On the same topic of financing or
17 potential financing, I placed in front of you
18 Exhibit 69. This is a document that you reviewed
19 in preparation of your deposition, isn't it?

20 MR. CANTOR: Objection. There's no
21 Bates number. Could you tell me where this
22 document comes from?

23 MR. DILLMAN: I can't.

24 MR. CANTOR: Has it been produced in
25 this action?

1 MR. DILLMAN: Yes, it has.

2 MR. CANTOR: Do you know by whom?

3 MR. DILLMAN: I'm assuming that it's
4 from one of the mammoth data bases,
5 electronic productions that we received from
6 Fontainebleau and/or Turnberry and that were
7 not Bates stamped, not marked, but they were
8 produced, and we all have access to them.

9 MR. CANTOR: Okay.

10 Q. Did you review this in preparation for
11 your deposition here today?

12 A. I did not.

13 Q. Let me identify, for the record, it is
14 an e-mail chain that, in fairness to you, doesn't
15 appear to be to or from you, and as your counsel
16 points out, doesn't have a Bates number, and
17 therefore, it wasn't produced by BofA in this
18 action, but it was produced by, it is my belief,
19 one of the Fontainebleau/Turnberry parties. It
20 refers to, in the top e-mail, a BofA/ML meeting in
21 New York. Do you see that?

22 A. Yes.

23 Q. For Thursday, October 2nd. This is in
24 2008, immediately on the heels of Lehman's filing
25 and immediately on the heels of the funding of the

1 Las Vegas facility in September, correct?

2 A. Yes.

3 Q. Does this help you recall a meeting that
4 you attended in New York that includes Mr.
5 Sturzenegger and, of course, Vinnie Tria, as it
6 says down in the e-mail at the bottom, "From Bank
7 of America, attendees will be Ron Sturzenegger,
8 Bret Yunker and, of course, Vinnie Tria." Does it
9 help you recall such a meeting?

10 A. Yes.

11 Q. Who is Vinnie Tria?

12 A. Vinnie Tria is a commercial banker in
13 Florida that had client coverage responsibility for
14 Turnberry.

15 Q. If you turn the page, it appears that
16 the attendees for Turnberry's side will be Ray
17 Parello, Sonny Kotite and Patrick Powers. Do you
18 see that at the top?

19 A. Yes, I do.

20 Q. Did they, in fact, attend the meeting?

21 A. I recall Ray being there. I'm pretty
22 sure I recall Sonny being there, but I can't say
23 for sure, and I don't remember, if Patrick was in
24 attendance.

25 Q. Who is Mr. Sturzenegger?

Yunker, Brett 3/1/2011 12:00:00 PM

1 A. Ron was above Bill.

2 Q. Tell me about this meeting.

3 A. This meeting was with Turnberry, and
4 Turnberry had been working with Merrill Lynch to
5 raise additional funds at the Turnberry level, and
6 I think it was primarily focused on equity at
7 Turnberry to continue funding, from my
8 understanding and my recollection, Turnberry
9 businesses, which included condos, malls and other
10 real estate ventures. And, of course,
11 Fontainebleau was a large investment of the
12 Turnberry entities and the Soffer Family.

13 Q. So, the meeting included, as far as you
14 understood it, discussions regarding equity raised
15 for, in part, the Fontainebleau Las Vegas project?

16 MR. CANTOR: Objection.

17 A. It was equity to be raised by Turnberry,
18 and, potentially, some of that equity could go
19 towards Fontainebleau.

20 Q. How long did the meeting last?

21 A. My recollection is it was an hour to two
22 hours.

23 Q. Where?

24 A. I believe it was at One Bryant Park, our
25 offices, BofA offices right here in New York.

1 was there.

2 Q. Why, to your understanding, were both
3 BofA and Merrill Lynch at this meeting?

4 A. Because both sides of the firm had
5 relationships, and this was a very important client
6 of both sides of the firm, BofA and Merrill Lynch.
7 So, I think both sides, and driven by Vinnie Tria
8 on the Turnberry side locally, were looking for a
9 way to help out a client.

10 Q. I'm told by our videographer that we're
11 running out of time on this tape, so let's take a
12 break.

13 VIDEOGRAPHER: This marks the end of
14 media number one of the deposition of Mr.
15 Bret Yunker. We're off the record at
16 approximately 10:28 a.m.

17 We're back on the record at
18 approximately 10:36 a.m. This marks the
19 beginning of media number two of the
20 deposition of Bret Yunker.

21 (Whereupon, Exhibit 70 was marked for
22 identification.)

23 Q. Mr. Yunker, I have marked as Exhibit 70
24 and placed in front of you a series of e-mails, the
25 top one of which is from yourself to Mr. Howard,

1 Mr. Cokinos and is dated September 11, 2008. This
2 follows on from the e-mail that we most recently
3 looked at which talked about if Lehman goes away
4 Fontainebleau may not have funding for their
5 retail, and the conversation continues in these
6 e-mails. You understood in early September that
7 there was somewhere in the order of \$190 million of
8 Lehman obligations in connection with the retail
9 facility?

10 A. When we say "Lehman obligations," the
11 retail facility needed to be funded, it appears by
12 these e-mails, approximately \$190 million more
13 dollars. I don't think at this time I knew how
14 much of that facility Lehman was responsible for.

15 Q. Did you ever have an understanding of
16 how much of that facility it was responsible for?

17 A. Later on, past this date, as we began
18 discussions with the company, I believe I was told,
19 or they indicated, how much Lehman held of the
20 facility relative to other lenders in that lending
21 syndicate.

22 Q. How much?

23 A. I don't recall the specific amount, but
24 I believe it was roughly half.

25 Q. Approximately \$90 to \$100 million?

Yunker, Brett 3/1/2011 12:00:00 PM

1 A. Based on these numbers, that math sounds
2 right to me.

3 Q. Who is Mr. Cokinos?

4 A. He is the head of High Yield Capital
5 Markets, so he had worked on the original
6 Fontainebleau bond deal.

7 Q. Why is he weighing in at this time? Or
8 better asked, why did you copy him on your e-mail
9 down below?

10 A. I don't recall exactly why I copied him,
11 but there could have been two reasons to copy him:
12 One is, he used to work at Lehman, so, maybe I was
13 trying to get an understanding from him a better
14 understanding of what was happening at Lehman and
15 if this was really heading to a terrible place.
16 And the other reason could just be he was generally
17 involved with Fontainebleau, and so I was letting
18 him know what I knew at that time.

19 Q. And Mr. Howard, why was he involved?

20 A. David Howard was part of our Loan
21 Syndications Group at that time, so he had also
22 worked on the original transaction syndicating the
23 term loan facilities of the revolver.

24 Q. Why is he involved at this time period
25 with the upheaval of Lehman in connection with this

Yunker, Brett 3/1/2011 12:00:00 PM

1 facility?

2 MR. CANTOR: Objection. You can answer.

3 A. Again, perspective, just knowing that
4 there is potentially a problem at this point with
5 the retail facility, I was looking ahead to
6 potential issues under the bank facility that would
7 impact the bank group; so, I think I was trying to
8 get ahead on those issues internally so that we
9 could start working on the problem, to the extent
10 there was going to be one.

11 Q. Did Mr. Cokinos remain involved in the
12 dialogue on what to do about Fontainebleau in light
13 of the Lehman issues?

14 A. I don't recall him being very involved
15 at all. It was mostly David Howard because David
16 was part of the Loan Syndications Group. There was
17 really nothing to do with the bond holders at that
18 point.

19 Q. And Mr. Howard remained involved?

20 A. Yes, he did.

21 Q. In what way?

22 A. His involvement was dialogue with the
23 company around the potential problem and potential
24 solutions, and he was also involved internally in
25 terms of how to respond to requests from lenders

1 September draw.

2 Q. And those were conversations that you
3 had with the company, that possibility, correct?

4 MR. CANTOR: Objection. Can I hear the
5 question again?

6 Q. Let me restate it. You had
7 conversations with Mr. Freeman concerning the
8 possibility of Fontainebleau Resorts, or some
9 affiliate, funding Lehman's portion of the
10 September draw?

11 A. Yes. As part of contingency planning
12 throughout that mid September through the funding
13 date, the company explored a variety of
14 alternatives as to what could play out on that day,
15 and I believe that the company funding on their
16 behalf in some fashion was discussed.

17 Q. With the company?

18 A. With the company, yes.

19 Q. Mr. Freeman?

20 A. With Mr. Freeman, I believe so, yes.

21 Q. And discussed internally at BofA?

22 A. To the best of my recollection, yes.

23 Q. In fact, it was part of the analysis
24 that BofA was doing internally to determine whether
25 conditions precedent would be problematic if

1 Fontainebleau funded on behalf of Lehman, was it
2 not?

3 A. I believe that was part of the analysis,
4 yes.

5 Q. Why were you and Mr. Howard and perhaps
6 others looking at the condition precedent issue?
7 What was your purpose of looking at that in the
8 September time frame?

9 A. That in order to fund an advance
10 request, all the conditions precedent had to be
11 fulfilled or the disbursement agent would not fund
12 that month's advances.

13 Q. So, you were determining whether
14 disbursement would be appropriate if various
15 scenarios occurred?

16 A. That's correct.

17 Q. And one of the scenarios that you were
18 looking at to determine whether funding would be
19 appropriate was -- and this was funding under the
20 disbursement agreement --

21 A. That's correct.

22 Q. -- was if Fontainebleau paid Lehman's
23 share as opposed to Lehman paying Lehman's share?

24 A. That's correct.

25 Q. And you had conversations with Mr.

1 Howard, Mr. Susman and others on that topic, did
2 you not?

3 A. I believe they were both aware of that,
4 yes.

5 Q. That wasn't quite my question. You had
6 conversations with them on that topic?

7 A. I believe we all had conversations about
8 that topic.

9 Q. It wasn't just that they were aware;
10 they were involved.

11 MR. CANTOR: Objection to form.

12 A. I believe we all had conversations about
13 that potential scenario.

14 Q. Did you believe that the term lenders in
15 the September, October time period, that the term
16 loans were underwater?

17 MR. CANTOR: Objection.

18 A. Did I believe that they were underwater?
19 What does "underwater" mean?

20 Q. Let me ask you. Since you used that
21 phrase in an e-mail, what did you mean when you
22 used that?

23 A. Underwater, to me, means they are
24 trading below par, and as you look forward into the
25 future, they may never achieve par again.

1 Q. That was the opinion that you had with
2 respect certainly to the term loans in September
3 and October 2008, correct?

4 A. Yes, by virtue of what we discussed
5 earlier in terms of capital markets and the impact
6 on the project.

7 Q. And to the extent that the revolving
8 lenders were required to fund any commitments under
9 the revolving facility, your opinion was that that
10 loan was underwater, as well, correct?

11 MR. CANTOR: Objection.

12 A. I don't remember having a specific
13 opinion in September and October 2008 about the
14 revolving commitment.

15 Q. Did you see it any differently than the
16 term loan?

17 MR. CANTOR: Objection. He just
18 answered you.

19 A. I don't remember specifically thinking
20 about the value of the revolver commitments at that
21 time period.

22 Q. But I believe you told us that it was
23 your opinion at that time that the borrower would
24 not be able to fund its financing after the project
25 was completed, and you went through all of the

Yunker, Brett 3/1/2011 12:00:00 PM

1 Q. What plan were you formulating in this
2 time period to address Lehman and the retail
3 facility?

4 MR. CANTOR: Objection.

5 A. I think you may need to ask Jeff in
6 terms of how broad his concept of "we" was.

7 Q. Let me re-ask the question. Were you
8 involved in conversations concerning a possible
9 plan to address -- or plans -- to address Lehman
10 and the retail facility as referred to here by Mr.
11 Susman?

12 A. Yes.

13 Q. What conversations were you involved
14 with?

15 A. Conversations with the company as they
16 laid out potential scenarios for what could happen
17 on the advance date in terms of Lehman's ability to
18 fund on that date.

19 Q. What were those potential scenarios?

20 A. One potential scenario was that Lehman
21 would fund, and the advance request would be
22 satisfied at that point because it had happened
23 just like every other advance request, and we had
24 received the funds from the retail agent on behalf
25 of the retail facility lending group.

Yunker, Brett 3/1/2011 12:00:00 PM

1 Q. Business as usual.

2 A. Business as usual was one of the

3 scenarios, yes.

4 Q. Did you think that that was likely?

5 A. From the company's representations, yes.

6 They had told us that Lehman was selectively

7 funding commitments at that time.

8 Q. Did they tell you that Lehman had

9 committed to fund this one?

10 A. They said that they did not know at that

11 time.

12 Q. What were the other potential scenarios?

13 A. Other potential scenarios were -- we

14 didn't have access to that retail lending group,

15 but I believe one of the other scenarios was

16 potential lenders within that group stepping up on

17 behalf of Lehman and funding their share of the

18 commitment.

19 Q. You had no conversations with any of the

20 retail lenders as to whether they were prepared to

21 or willing to do that?

22 A. Not that I recall.

23 Q. The information that you had at that

24 time was that the retail lenders were not prepared

25 to step up and fund for Lehman; isn't that right?

Yunker, Brett 3/1/2011 12:00:00 PM

1 MR. CANTOR: Objection.

2 A. I don't recall having that information.

3 I recall the company representing that that could

4 have been one possible solution. And then the

5 third of the three company-presented solutions

6 would be some form of loan or temporary funding

7 between Fontainebleau through Lehman into the

8 retail lending group. And I didn't know if that

9 meant Fontainebleau becoming part of that lending

10 syndicate or how that would work, but

11 Fontainebleau, on a temporary basis, funding on

12 behalf of Lehman to fulfill the retail agent's

13 funding of the retail facility's obligation under

14 the disbursement agreement.

15 Q. And you discussed this third alternative

16 -- can we call it equity funding?

17 MR. CANTOR: Objection.

18 A. I don't think I would characterize it as

19 equity funding because there is another specific

20 mechanism in the disbursement agreement that

21 specifically addressed equity funding and how that

22 would come in from Fontainebleau, and I think there

23 is a repayment mechanism where if they couldn't

24 access a normal course advance request, there was a

25 temporary funding procedure where Fontainebleau

Yunker, Brett 3/1/2011 12:00:00 PM

1 could inject capital to fulfill that month's -- I'm
2 talking Fontainebleau Resorts -- into Fontainebleau
3 Las Vegas, they can temporarily fulfill the advance
4 request, and then if they got the conditions back
5 in line the next month, then we would refund that
6 obligation backup that funding that Fontainebleau
7 Resorts had put into Fontainebleau Las Vegas could
8 get repaid at a future time. So, I don't recall us
9 specifically addressing that equity-type mechanism
10 as a potential fix.

11 Q. What you just described as a potential
12 equity funding is in the disbursement agreement?

13 A. Yes.

14 Q. And it kicks in, if at all, if there's
15 been a failure of condition precedence that had
16 prevented an advance request from being funded?

17 A. That's right.

18 Q. You assisted in the review of the
19 disbursement agreement on behalf of BofA prior to
20 closing, correct?

21 A. Yes, I did.

22 Q. You were involved to some extent in the
23 drafting of it, were you not?

24 A. Yes, I was.

25 Q. Particularly, were there aspects of the

Yunker, Brett 3/1/2011 12:00:00 PM

1 disbursement agreement that you focused upon?

2 A. I focused on almost the entire document.

3 In particular, we had to spend a lot of time
4 working through how these advance requests would
5 work by virtue of the uniqueness of this retail
6 facility being part of the financing and needing to
7 obtain funds on a monthly basis on some pro rata
8 mechanism from the retail lenders.

9 (Whereupon, Exhibit 72 was marked for
10 identification.)

11 Q. This is a copy of the disbursement
12 agreement that includes exhibits only, Exhibit 1,
13 which is the definitions because all the
14 definitions are included in the exhibit. It does
15 not include, I'll represent, other exhibits that
16 were attached to the disbursement agreement. Take
17 whatever time you need. I just want you to confirm
18 that this is the document that you assisted in
19 drafting and reviewing on behalf of BofA. I
20 believe that this is the executed copy.

21 A. Yes. This looks like the executed copy.

22 Q. And the provision that you were just
23 speaking of is Section 3.8, correct?

24 A. Which provision were we discussing
25 specifically?

1 Q. You were talking about the equity
2 funding provision in the event of failure of
3 conditions precedent that prevented an advance from
4 being funded.

5 A. Yes, I was.

6 Q. And I believe from your testimony you
7 said that you were not discussing with the
8 borrowers, specifically with Mr. Freeman, an equity
9 funding pursuant to paragraph 3.8, but were
10 discussing a payment by Fontainebleau Resorts or
11 Fontainebleau Las Vegas or some Fontainebleau
12 entity on behalf of Lehman for Lehman's portion of
13 the September draw; is that a fair statement?

14 MR. CANTOR: Objection.

15 A. I would re-characterize it by saying
16 that the company was discussing that as a potential
17 scenario as they were dealing with the retail
18 lending group as to how to fulfill that condition
19 precedent to the advance request.

20 Q. Right. But you were having discussions
21 with the company about that as a potential
22 scenario, fair enough?

23 MR. CANTOR: Objection.

24 A. I don't recall if you used equity in
25 there, but I would say that the company working on

1 a funding mechanism within the retail lending
2 group, yes, that was discussed.

3 Q. We were talking about the funding by the
4 company would not have been within the retail
5 funding group, right? I thought you distinguished
6 that the potential for the retail lenders to fund
7 in their entirety, including Lehman, was one
8 option.

9 A. Right.

10 Q. The possibility for the retail lenders
11 to fund the entire amount, but where Lehman
12 wouldn't actually contribute any, would be another
13 possibility?

14 A. Yes.

15 Q. And then, the retail lenders to fund
16 everything but Lehman's portion, Lehman's portion
17 to be funded by the company, that was the third
18 option?

19 MR. CANTOR: Objection.

20 A. Yes. Through the retail lending group,
21 that Fontainebleau would fund through the retail
22 lending group. Any funds that came in from the
23 retail lending group were debt of Fontainebleau Las
24 Vegas. So, if Fontainebleau Las Vegas took \$5
25 million in from the lending group, and they funded

1 it, that was a \$5 million debt obligation of
2 Fontainebleau Las Vegas to the retail lenders. So,
3 if Fontainebleau Resorts was putting capital in
4 somehow through the retail lending group, that
5 would be evidenced as debt of Fontainebleau Las
6 Vegas, the borrower.

7 Q. However it was evidenced and whatever
8 accounts it was paid through, however it was
9 structured, the point was going to be, at least for
10 this third scenario, money is coming from the
11 company, not from Lehman.

12 MR. CANTOR: Object to the form.

13 A. Money is coming from the company through
14 the retail agent, yes.

15 Q. And by "through the retail agent," what
16 do you mean by that?

17 A. We didn't know exactly how the company
18 would effect that. Would they become a lender to
19 themselves? Could they temporarily make a loan to
20 Lehman and Lehman put that money into the pool of
21 monies that the retail lender sent over? We didn't
22 understand what form the company was working out
23 with that lending group as to how that capital
24 would be evidenced between the company, Lehman and
25 the retail lenders.

1 Q. But you knew, at least in this third
2 scenario, that it wouldn't be coming from Lehman.
3 The source of the funds would not be Lehman; it
4 would be the company.

5 A. Yes. Potentially, had that scenario
6 played out, yes, we understood that scenario could
7 play out where the funds that the retail lenders
8 sent to the disbursement agent, there may be a
9 mechanism where part of those funds had come from
10 Fontainebleau through Lehman and through the retail
11 lending group. When I say "Fontainebleau," I'm
12 thinking of Fontainebleau Resorts, not
13 Fontainebleau Las Vegas.

14 Q. Did it make a difference to you whether
15 it was Resorts or Las Vegas?

16 A. It makes a difference in the sense that
17 I think Fontainebleau Las Vegas probably didn't
18 have any ability to lend money to anyone to do
19 anything at that point. I think all of
20 Fontainebleau's uses of their funds had to be
21 through this advance request, so I don't see how
22 Fontainebleau Las Vegas could have done an advance
23 request to get funds to lend Lehman or the retail
24 lenders. So, de facto, it had to come from the
25 parent, which had no restrictions on the use of

1 funds.

2 Q. In these conversations with Mr. Freeman,
3 it was clear that to the extent that this third
4 scenario was played out, the money was going to
5 come from Fontainebleau Resorts, not Fontainebleau
6 Las Vegas.

7 A. That's right.

8 Q. Did it make any difference to you
9 whether the money came in the form of a loan, or
10 otherwise, to Lehman, versus simply Fontainebleau
11 Resorts writing a check to Trimont, the servicer
12 who ran the retail facility, for Lehman's portion
13 of the September draw?

14 MR. CANTOR: Objection.

15 A. I don't recall us parsing through to
16 that level of detail as to the form of obligation
17 between Fontainebleau Resorts and Lehman and the
18 retail lenders, depending on the different form it
19 could have took, if that would have impacted our
20 view of the satisfaction of the condition precedent
21 to the advance request.

22 Q. Did you have discussions as to whether
23 or not Fontainebleau could just simply step up and
24 pay the amount for Lehman -- shove people out of
25 the way and say, Here's my check; I'm paying Lehman

1 share?

2 A. I don't recall specific discussions
3 around Fontainebleau directly wiring money to the
4 disbursement agent outside of that retail lending
5 group.

6 Q. "Outside of that retail lending group,"
7 what does that mean?

8 MR. CANTOR: Objection. Asked and
9 answered. Give it to him again.

10 A. It sounds like your question is, say, \$5
11 million was due from that retail lending group as
12 part of the advance request, did we ever talk about
13 \$3 coming from the retail lenders as a wire-in and
14 then \$2 coming from Fontainebleau Resorts directly,
15 such that the disbursement agent received two
16 separate wires: one from the retail agent and one
17 from Fontainebleau, instead of one wire where all
18 \$5 came directly from the retail agent. I don't
19 recall discussing two separate wires.

20 Q. Well, the disbursement agents are going
21 to receive one wire. It's going to come from the
22 servicer, right?

23 A. That was how it was supposed to work
24 under the disbursement agreement. You asked, did
25 we ever talk about Fontainebleau cutting a direct

Yunker, Brett 3/1/2011 12:00:00 PM

1 check to us, "us" being the disbursement agent.

2 Q. My apologies. I obviously assumed a
3 fact that I didn't make clear in my question. Was
4 it important to you in your analysis whether
5 Fontainebleau Resorts simply cut a check to Trimont
6 for the Lehman portion, or whether it went through
7 some other mechanisms to funnel the money in a
8 different way, same source, Fontainebleau Resorts,
9 but to Trimont?

10 A. Are you asking was it important to me if
11 the retail agent got funds directly from
12 Fontainebleau, or if they needed to get funds
13 indirectly from Fontainebleau before they received
14 the funds that they needed, potentially, to fill
15 the gap from Lehman?

16 Q. Let's use names, okay, because titles
17 could be confusing and I don't want it to be
18 confusing. You understood that Trimont was the
19 servicer of the retail facility?

20 A. Yes. I'm not sure when I came to
21 understand that, but at some point that name came
22 into being. I don't know when I learned that
23 Trimont was the retail agent, but I'm aware that
24 they were the retail agent, yes.

25 Q. And that indeed that's where the wires

1 came from when the retail facility wired money to
2 BofA under the disbursement agreement for
3 disbursement?

4 A. Yes.

5 Q. So, did it matter to you in your
6 analysis of these issues in the September time
7 frame, whether the monies coming into Trimont were
8 wired by Fontainebleau to Trimont on behalf of
9 Lehman for the Lehman portion, or whether they came
10 through some other means which routed them through
11 a different entity that got to Trimont?

12 MR. CANTOR: Objection.

13 A. I'm still not understanding the
14 distinction between how funds get to the retail
15 lending group before Trimont sends them to BofA in
16 terms of did Fontainebleau lend the money as part
17 of the lending syndicate? Could they have become a
18 lender? I don't know if they could have become a
19 lender under that loan agreement at that time. Did
20 Fontainebleau loan money to Lehman, and then Lehman
21 put their share of that funding request in? I
22 don't know that either of those scenarios were of
23 particular importance, to my understanding, of
24 fulfilling the disbursement agreement conditions
25 precedent, which were that the disbursement agent

1 receive a wire from the retail agent for their
2 share of that month's cost.

3 Q. And was it important where the retail
4 lending agent got the money in your analysis?

5 MR. CANTOR: Objection to form.

6 A. My analysis was that if the retail
7 lending group provided the retail agent the funds,
8 then that condition was satisfied. As to how the
9 retail lenders got the funds, I don't know that
10 that was a critical issue for the disbursement
11 agent to understand.

12 Q. You said you were looking at whether the
13 retail lenders provided the money to the retail
14 agent, correct?

15 A. Yes.

16 Q. Again, let's put names to titles.

17 Retail agent: Trimont.

18 A. Yes.

19 Q. So, the question in your mind was
20 whether the retail lenders funded the proceeds to
21 Trimont.

22 A. Yes.

23 Q. "Retail lenders" is a defined term under
24 the disbursement agreement, is it not?

25 A. Yes.

1 Q. And it means, to put names to it, at
2 that time, Lehman, ULLICO, Sumitomo, National City?

3 A. Correct. At that time when we closed,
4 but any bank facility can be syndicated at any
5 time.

6 Q. At that time, in September 2008, retail
7 lenders included Lehman, ULLICO, Sumitomo and
8 National City?

9 A. Okay.

10 Q. Correct?

11 MR. CANTOR: Objection.

12 A. I believe that was the status of the
13 syndicate at that point in time.

14 Q. So, as long as the monies came from
15 those lenders to Trimont and then sent to BofA as
16 disbursement agent, it was the conclusion of you
17 and your group at BofA that that would satisfy
18 conditions precedent?

19 A. In my view, yes. I can't speak for the
20 rest of the BofA group.

21 Q. And based on that, if the funds came
22 from people other than Lehman, Sumitomo, National
23 City and ULLICO, they wouldn't be coming from the
24 retail lenders, would they?

25 MR. CANTOR: Objection.

Yunker, Brett 3/1/2011 12:00:00 PM

1 A. That's correct. If Trimont had received

2 --

3 MR. CANTOR: Finish your answer.

4 A. That's correct. When they collect -- I

5 assume when they go out and get their wires every

6 month, to say, Hey, everyone bring in their wires;

7 we need to fund over to the resort facility agent,

8 if those wires weren't coming from the retail

9 lenders, then, potentially, that condition is not

10 being satisfied.

11 Q. And you had those conversations with

12 your group -- the BofA group that was analyzing

13 these issues in September of 2008, did you have

14 discussions about whether or not, if monies

15 received from Fontainebleau, who was not part of

16 the retail lenders, that that would be a potential

17 violation of the conditions precedent to

18 disbursement?

19 A. I believe we discussed that as a

20 potential violation.

21 Q. And did you discuss that with

22 Fontainebleau, specifically Mr. Freeman?

23 A. I don't recall specifically discussing

24 that with Mr. Freeman.

25 Q. He was coming to you with these

Yunker, Brett 3/1/2011 12:00:00 PM

1 potential scenarios to get BofA's advice and input
2 on what would and wouldn't work, right?

3 MR. CANTOR: Objection.

4 A. I believe he was coming to us providing
5 information as to their ongoing discussions with
6 Lehman and the retail lending group as to the
7 uncertainty of the funding request.

8 Q. But this wasn't just FYI. He wasn't
9 just giving you this as, I just want you to know
10 what I'm doing out there or what I'm thinking. He
11 wanted BofA, as his bank, to provide him insight,
12 their opinions on whether any of these would
13 present any potential problems, right?

14 MR. CANTOR: Objection.

15 A. Yes. The context of those discussions
16 could be would this be problematic, but I don't
17 recall it being this is the plan, can we do this.

18 Q. And in the spirit of analyzing things,
19 letting them know whether it would be problematic
20 or not, I assume you told Fontainebleau that it
21 would be problematic if Fontainebleau would fund
22 the proceeds into the retail facility that would
23 then transmit it to BofA's disbursement agent?

24 MR. CANTOR: Objection mischaracterizes
25 his testimony. Asked and answered.

Yunker, Brett 3/1/2011 12:00:00 PM

1 A. I don't recall specifically indicating
2 to the company that that scenario would not allow
3 us to fund.

4 Q. But you understood that it presented
5 potential problems?

6 A. Yes.

7 Q. Any reason why you didn't tell the
8 company that, Boy, guys, if you do it that way, you
9 got potential problems that you need to be aware
10 of?

11 MR. CANTOR: Objection.

12 A. Again, I don't recall if we told them or
13 not, so we may have told them it was problematic,
14 we may not have.

15 Q. As a conscientious banker, someone
16 looking out for the best interest of both his
17 company and of the borrowers who he represents,
18 don't you think it would have been important for
19 you to provide that information to Fontainebleau
20 that one of the alternatives they were looking at
21 created potential problems under the disbursement
22 agreement, potential breaches or failures of
23 conditions precedent to funding?

24 MR. CANTOR: Objection. Asked and
25 answered, calls for speculation.

1 A. Again, I don't recall what we
2 communicated to the company.

3 Q. Is it fair to say that if you thought it
4 was important to the company, unless you thought it
5 was confidential or otherwise, you would have told
6 them about it?

7 MR. CANTOR: Objection. Calls for
8 speculation.

9 A. I don't recall what we told the company
10 with respect to that scenario.

11 Q. I understand that. You were not trying
12 to hide information from the company, correct, at
13 this time?

14 MR. CANTOR: Objection.

15 A. We were not trying to hide information
16 from the company.

17 Q. You were trying to work with them. I
18 mean, there was a major problem here. Lehman went
19 bankrupt, and it could have disastrous
20 consequences. You wanted to help the company
21 through this as best you could, right?

22 A. We wanted to respond to a problem, and
23 as they were working through solutions, give them
24 our perspective as soon as we knew what they were
25 going to do if it would fulfill the conditions

1 precedent to taking the advance at the end of the
2 month.

3 Q. You weren't going to try to help figure
4 out how to get out of this problem? You were just
5 responding to their proposals? You weren't doing
6 any independent thinking about how they might be
7 able to solve this problem under these various
8 scenarios of who's funding?

9 MR. CANTOR: Objection. Argumentative,
10 compound.

11 A. I don't recall proactively attempting to
12 find solutions to the Lehman problem because from
13 our perspective the Lehman problem was the
14 company's problem with the retail lending group,
15 not BofA's problem.

16 Q. Where was BofA's problem if this retail
17 facility wasn't funded?

18 MR. CANTOR: Objection. Argumentative,
19 asked and answered.

20 Q. As a practical matter, it was very much
21 BofA's problem if the retail facility didn't fund.

22 MR. CANTOR: Objection.

23 A. I have a hard time drawing that
24 conclusion at that point in time because BofA was
25 completely unfunded.

1 Q. BofA didn't have any of its money on the
2 table yet.

3 A. Right. So, you're saying it's very much
4 BofA's problem.

5 Q. Fair enough. I appreciate and
6 understand your answer. So, because BofA didn't
7 have any of its money on the table, it wouldn't
8 have been BofA's problem if the financing stopped
9 for the project and the project effectively shut
10 down?

11 A. Right. So, I disagree with your
12 characterization that it was very much BofA's
13 problem if it didn't fund. It actually could have
14 been very much to BofA's benefit at that time to
15 stop funding.

16 Q. And how would that be?

17 A. Because funding would have stopped and
18 they had an unfunded commitment.

19 Q. In a project that in your assessment
20 was, at least for the term lenders, underwater?

21 MR. CANTOR: Objection.

22 A. The public market assessment and my
23 assessment of if it ever got opened, the term
24 lenders were underwater.

25 Q. And given the fact that it might have

1 been to BofA's advantage, one way or the other, you
2 didn't engage in efforts to try and solve the
3 company's problems or potential problems created by
4 the Lehman bankruptcy but simply reacted to
5 potential solutions provided by them; is that a
6 fair statement?

7 MR. CANTOR: Objection. Asked and
8 answered. You could answer again.

9 A. Yes. Our role, to the best of my
10 recollection, was we were largely reacting to the
11 scenarios they were representing as they were
12 working through the issue with the retail lending
13 group.

14 (Whereupon, Exhibit 73 was marked for
15 identification.)

16 Q. I placed in front of you Exhibit 73,
17 which is an e-mail chain. At the top, it's from
18 Mr. Kotzin, and that's spelled, for the record,
19 K-O-T-Z-I-N. Who is Mr. Kotzin?

20 A. Justin Kotzin worked for John Cokinos.

21 Q. What was Mr. Kotzin's involvement, if
22 any, in the efforts to respond to the potential
23 scenarios that Mr. Freeman had presented to BofA?

24 A. He had little to no involvement in
25 responding to those issues.

1 Q. And Mr. Cokinos' involvement?

2 A. He had little to no involvement.

3 Q. The second e-mail in the chain is one
4 from you to Mr. Kotzin dated September 19th. Do
5 you know why you're writing him at all? You bring
6 him into this loop.

7 A. I don't recall. He was involved with
8 the original bond transaction and -- yes, that's
9 it.

10 Q. You say to Mr. Kotzin, "They" -- you're
11 referring Fontainebleau Las Vegas?

12 A. Yes.

13 Q. "Only need \$4 million from Lehman for
14 retail cost this month. Jim can put money down
15 from up top to solve the gap if when Lehman fails
16 to fund." Do you see that?

17 A. Yes, I do.

18 Q. Jim is Jim Freeman?

19 A. Yes.

20 Q. Mr. Freeman told you that he could put
21 the money down from up top in order to solve the
22 Lehman funding gap, if there was one?

23 MR. CANTOR: Objection.

24 A. I don't know what Jim told me in terms
25 of his ability to comply with the agreements at

1 that point in time by putting the money from
2 Fontainebleau Resorts into Fontainebleau Las Vegas.
3 I believe the context of this e-mail is that
4 Fontainebleau Resorts had enough liquidity to
5 effect a temporary solution with the retail lending
6 group because they had enough money; they had more
7 than \$4 million to find a way to work it out with
8 the retail lending group, if that was the scenario
9 that played out later in the month.

10 Q. What you're saying here is that
11 Fontainebleau Resorts has the ability. Whether it
12 has the legal right or not, you're not addressing
13 right here?

14 A. Right. I think I was speaking to they
15 have the liquidity.

16 Q. It's suggesting, certainly by your
17 e-mail, that you talked to Mr. Freeman on or before
18 September 19th about the possible scenario of
19 Fontainebleau Resorts paying from up top, in your
20 words, funding from Fontainebleau Resorts the
21 Lehman portion of the retail funding draw for
22 September?

23 MR. CANTOR: Objection.

24 A. Yes. As one of the scenarios discussed
25 with the company, they indicated an ability that

1 they had the liquidity to meet that funding gap in
2 terms of liquidity.

3 Q. Using it as book ends, I think you said
4 you didn't have any conversations with the company
5 on these kinds of issues before Lehman filed,
6 right?

7 A. Not that I recall.

8 Q. So, in the four or five-day period from
9 the filing, which you recall as being on the
10 weekend, and it may very well have been, to the
11 19th, how many conversations with Mr. Freeman did
12 you participate in?

13 A. I don't recall the number of
14 conversations.

15 Q. More than one?

16 A. It was very likely more than one
17 conversation for that entire week, yes.

18 Q. More than ten?

19 MR. CANTOR: Objection.

20 A. I don't know that it was more than ten.
21 I would probably say that it was less than ten, but
22 I don't know.

23 Q. Was it at least several? I'm just
24 trying to get a sense were you talking to him every
25 day, twice a day, once a week?

1 MR. CANTOR: Object to the form. You
2 could answer.

3 A. My best guess is that there was a
4 conversation, one or two conversations a day or a
5 conversation every other day. It seems like there
6 were a few conversations during that week with the
7 company.

8 Q. What did you do to determine which of
9 the potential scenarios, in fact, played out at the
10 end of September?

11 MR. CANTOR: Objection. What did he do
12 when?

13 Q. At any point in time, other than perhaps
14 in preparation of your deposition here today.

15 MR. CANTOR: Leave aside anything that
16 lawyers told you.

17 MR. DILLMAN: No, no.

18 Q. I'm asking you, what did you do, other
19 than in preparation for your deposition, whether it
20 was, I went to consult a lawyer or not? We may not
21 get into the content of that, but I want to know
22 what you did, if anything, to determine who and how
23 paid Lehman's share of the September retail
24 advance?

25 MR. CANTOR: Kirk, I'm not trying to be

1 difficult; I'm trying to understand the
2 question. Are you saying the September
3 advance has already been made. Now, what did
4 you do from that point forward to figure out
5 how the money came to get there?

6 Q. At any point, starting in September 1st
7 of 2008 to the present, what did you do to
8 determine which of the potential scenarios Mr.
9 Freeman had outlined to you, in fact, occurred, or
10 perhaps some other scenario had occurred, at the
11 end of September with respect to Lehman's funding
12 of its portion of the retail facility advance?

13 MR. CANTOR: Object to the form. You
14 could answer.

15 A. Beyond written and verbal communication
16 with the company that they had fulfilled the
17 condition precedent to the disbursement agreement
18 that would require funding on behalf of the
19 disbursement agent on the advance request date, I
20 don't recall doing specific investigation as to the
21 sources of funds on Trimont's behalf as to how they
22 got the funds that they wired to BofA.

23 Q. Put aside investigation. Did you ask a
24 question?

25 A. I believe that after the funding date,

1 as people continued to speculate despite the
2 company's representations that they had complied
3 with the disbursement agreement, there was
4 continuing speculation as to how they had complied.

5 I believe the questions were asked in a written
6 format to the company on behalf of the lending
7 group and BofA.

8 Q. One of those questions -- this was a
9 letter?

10 A. Yes.

11 Q. Written by?

12 A. I believe it was from Jeff Susman or the
13 agency group, the admin agent group that also sits
14 in Dallas with Jeff Susman.

15 Q. You don't recall the individual?

16 A. I don't recall his name.

17 Q. We'll get there. Was that person
18 involved in any of the discussions that you were
19 having in September around the issue of possible
20 scenarios?

21 A. If it came from the agency group, likely
22 not. That's a very -- they're not involved in
23 decision making beyond once boxes are checked they
24 do things.

25 Q. And the letter that you're referring to

1 is a letter that went to the company?

2 A. Yes.

3 Q. Asking, among other things, who paid?

4 A. I believe that was one of the questions,
5 yes.

6 Q. Were you involved in the lead-up to that
7 letter being sent to the company?

8 MR. CANTOR: Object to the form.

9 A. I don't recall drafting that letter. I
10 recall being part of the internal bank discussions
11 around concerns as to how the funding took place on
12 the advance date.

13 Q. Who was expressing concerns about that
14 at BofA?

15 MR. CANTOR: Objection.

16 A. I think Jeff Susman was expressing
17 concern. I don't recall anyone else expressing
18 concern.

19 Q. And you understood this through
20 conversations with Mr. Susman?

21 A. I believe so. That's my recollection.

22 Q. Who else was involved in these
23 discussions?

24 A. John Varnell was likely involved. David
25 Howard may have been involved in parts of them and

1 external counsel.

2 Q. What external counsel?

3 A. Sheppard Mullin.

4 Q. Mr. Scott?

5 A. Yes.

6 Q. Did you share Mr. Susman's concern?

7 A. Yes. It was unclear to me how the
8 retail lenders had effected that funding. So, if
9 the question is, did I know how they had achieved
10 their funding? Yes, I shared that question with
11 Mr. Susman.

12 Q. Your characterization of Mr. Susman's
13 interest was one of concern. My question is, did
14 you share that concern?

15 MR. CANTOR: Object to the form.

16 A. I shared that same uncertainty. If
17 uncertainty is the same as concern, yes.

18 Q. A lot of things in life I'm uncertain
19 about, but they don't concern me in the least. It
20 sounds like this was something that concerned Mr.
21 Susman beyond certainty. Did he explain to you why
22 it concerned him?

23 A. Yes. I think his concern was if the
24 funds had not come directly from the retail
25 lenders, was the condition being satisfied by the

Yunker, Brett 3/1/2011 12:00:00 PM

1 company that they had represented to us had been
2 satisfied.

3 Q. And, in fact, at some point, BofA
4 requested the borrower to re-affirm affirmations
5 that were made in the September advance request?

6 A. That sounds accurate, yes.

7 Q. Was the purpose of that to flush out
8 this issue of who is paying?

9 A. I believe part of the purpose was to
10 quell concerns not only from BofA but other lenders
11 as to compliance with the condition precedent
12 regarding the retail funding, as well as other
13 concerns that I think lenders were raising with
14 respect to different conditions precedent
15 potentially being violated. So, I think it was a
16 blanket request of the company to reaffirm all the
17 reps and warranties that the disbursement agent
18 relied on when they made the funding available on
19 the advance request date.

20 Q. But the concern that was specifically --
21 you mentioned other conditions precedent that other
22 lenders pointed out. The condition precedent that
23 you were most concerned about was the condition
24 that might have been violated by paying them from
25 someone else out of the retail lender group?

1 MR. CANTOR: Objection.

2 A. I believe that that was Jeff's primary

3 concern.

4 Q. And a concern that you shared?

5 MR. CANTOR: Objection.

6 A. A concern that I shared, yes.

7 Q. And that was 3.3.23 of the disbursement

8 agreement, correct?

9 A. I believe that's the condition, yes.

10 Q. Do you need to look at that to confirm

11 that? I suspect that you've looked at it recently.

12 A. Yes, that's it.

13 Q. Based on this concern, BofA sends to a

14 Fontainebleau entity -- and we'll get to it in a

15 minute. I don't want to misstate who it went to,

16 but I believe it was Fontainebleau Las Vegas -- a

17 letter asking for certain information?

18 A. I believe so, yes.

19 Q. Was there a follow-up call to that

20 letter?

21 A. A follow-up call to the company --

22 Q. Bad question. Did the company ever get

23 back in writing to respond to any of those

24 questions?

25 MR. CANTOR: Specifically to the letter,

1 you mean?

2 MR. DILLMAN: Yes.

3 A. I believe they eventually did respond in
4 writing to that letter.

5 Q. To BofA?

6 A. To BofA on behalf of the lending
7 syndicate; I think BofA as admin agent.

8 Q. That was posted on IntraLinks?

9 A. I believe so, yes.

10 Q. IntraLinks is a site that, depending on
11 whether you're public or private, you could access
12 it to get, among other things, important
13 communications?

14 A. Correct.

15 Q. The company didn't answer any of the
16 questions that BofA had asked in its letter, did
17 it?

18 MR. CANTOR: Objection.

19 A. I don't know if the format of their
20 response followed each question with a specific
21 answer, but the response, from what I recall,
22 sought to address the questions that had been laid
23 out to the company.

24 Q. Do you know whether BofA's letter was
25 posted on IntraLinks?

1 A. Whether BofA's question letter was
2 posted on IntraLinks?

3 Q. Yes.

4 A. I do not know. I don't believe it was.

5 Q. Why not?

6 A. I don't know.

7 Q. Between the time that the company issued
8 its written response and it was posted on
9 IntraLinks and the time that BofA sent out the
10 questions to the company, were there any
11 communications, written or oral, between the
12 company and BofA regarding the issues that were
13 raised in BofA's letter?

14 A. I don't recall the specifics of any
15 communication, but I believe there was concern on
16 behalf of the company, at least orally, as to the
17 need to have a conference call with the lending
18 syndicate to let people just have an open forum in
19 terms of asking whatever questions they want of the
20 company, including answering whatever questions had
21 been in that BofA letter.

22 Q. Was there a communication, oral or in
23 writing, between the company on the one hand and
24 BofA on the other, discussing the answers to the
25 various questions that were raised in BofA's

1 letter?

2 A. Not that I recall.

3 Q. The letter solicited such a call, did it
4 not, from between BofA and the company?

5 A. In terms of directly asking inside the
6 letter we must have a phone call to discuss these
7 issues?

8 Q. Solicited. I don't know if "must" was a
9 word that was used. Something more like a pre-call
10 to discuss these issues -- something like that?

11 MR. CANTOR: Are you saying was that in
12 the letter? Objection.

13 Q. You recall that, right?

14 A. I don't recall what the letter requested
15 in terms of any pre-calls with BofA or mandating
16 that a call be had with the lending syndicate at
17 that point. I think these were -- from what I
18 recall, the questions were these are the questions
19 that we would like to have answered; "we" being
20 BofA and the lending syndicate.

21 Q. Regardless of what the letter did or
22 didn't say about a follow-up call, was there a
23 follow-up call between BofA and the company to
24 discuss the specific answers or information that
25 would answer the questions that were in the letter?

Yunker, Brett 3/1/2011 12:00:00 PM

1 A. I don't recall any organized phone calls
2 to go through that question list.

3 Q. How about an unorganized phone call?

4 A. I don't recall any conversations with
5 the company going through that question list.

6 Q. Do you recall anyone, BofA or otherwise,
7 expressing dissatisfaction with the company's
8 response that was placed on IntraLinks?

9 MR. CANTOR: Object to the form.

10 A. I don't recall dissatisfaction with the
11 company's response on IntraLinks.

12 Q. One of the questions in that letter was
13 who paid the September draw request from Lehman,
14 right?

15 A. That sounds accurate, yes.

16 Q. Did the letter that the company provided
17 answer that question?

18 A. I believe the letter said that the
19 retail agent and the retail lenders funded their
20 share of the advance request on the advance.

21 Q. And that didn't exactly answer the
22 question, did it?

23 MR. CANTOR: Objection.

24 A. The company's representation was that
25 the retail agent and the retail lenders had funded

Yunker, Brett 3/1/2011 12:00:00 PM

1 the wire that came from Trimont in that letter.

2 Q. And that, as far as you were concerned,
3 was the end of the issue? There was no further
4 need to get any clarity on it?

5 A. From my perspective, yes.

6 Q. Any effort to find out whether
7 Fontainebleau Resorts made the payment?

8 MR. CANTOR: Objection.

9 A. Not that I know of.

10 Q. Did you understand the representation in
11 the letter from the company that was placed on
12 IntraLinks was tantamount to a representation that
13 Fontainebleau had not made the payments on behalf
14 of Lehman?

15 MR. CANTOR: Objection.

16 A. Can you repeat that?

17 Q. Did you understand that the
18 representations by the company made in the letter
19 that was posted on IntraLinks was tantamount to a
20 representation that FBR had not made payments in
21 September on behalf of Lehman's portion of the
22 September advance?

23 A. I don't know what the company's
24 perspective was with respect to how they viewed
25 complying with that condition and how they moved

1 funds through the retail lending group.

2 Q. So, with respect to the three scenarios
3 that you previously told us about, you didn't have
4 any clarity, as a result of the letter that the
5 company sent out, as to whether or not the company
6 had funded Lehman's portion, did you?

7 A. I did not, no.

8 Q. Did you make any effort to get clarity
9 on that issue at any time after receiving the
10 letter?

11 A. Not that I recall.

12 Q. Did anybody at BofA, as far as you know,
13 make any subsequent efforts to try to get clarity
14 on that issue?

15 A. As far as I know and recall, I don't
16 know of anyone doing that.

17 Q. Did anyone pick up the phone, as far as
18 you know, call Mr. Freeman and say, Please tell us
19 whether or not Fontainebleau Resorts paid Lehman's
20 portion of the September draw?

21 A. I don't recall that specifically
22 happening.

23 Q. Do you recall anything around that issue
24 where BofA made some attempt to ask the specific
25 question to a specific individual with knowledge of

1 FBR?

2 MR. CANTOR: Objection.

3 A. I don't recall that specifically
4 happening.

5 MR. DILLMAN: I think we're running out
6 of time, and it's about lunch; so why don't
7 we take a break?

8 VIDEOGRAPHER: This marks the end of
9 media number two of the deposition of Mr.
10 Bret Yunker. We're off the record at
11 approximately 11:56 a.m.

12 We're back on the record at
13 approximately 1 p.m., and this marks the
14 beginning of media number three of the
15 deposition of Mr. Bret Yunker. We're back on
16 the record.

17 Q. Good afternoon, Mr. Yunker. Prior to
18 the break, we were talking at some point about the
19 potential scenarios that BofA was discussing with
20 Fontainebleau Resorts, specifically with Mr.
21 Freeman, and you mentioned potential retail lenders
22 as being one of the solutions.

23 A. Yes.

24 Q. And as I recall, it was that perhaps one
25 or more of the existing retail lenders would step

1 in to fund the Lehman shares; is that right?

2 A. I believe that was the idea in

3 September, yes.

4 Q. Did you, as part of your investigation
5 into the potential scenarios that Mr. Freeman was
6 raising, review whether or not funding by potential
7 retail lenders on behalf of Lehman would create any
8 sort of issue with the condition precedent to
9 disbursement?

10 MR. CANTOR: Object to the form.

11 A. To my knowledge, I don't recall
12 specifically looking into that issue with the
13 internal group that was looking at the issue.

14 Q. You mentioned, and we talked previously,
15 about Condition 3.3.23. Let me direct your
16 attention in the disbursement agreement to Section
17 3.3.3: "No default or event of default solely
18 occurred and be continuing"?

19 A. Yes, I see that.

20 Q. I can work you through the definitions,
21 but I'll represent to you that when you work
22 through them, this would include the default retail
23 facility.

24 A. Okay.

25 Q. Lehman's failure to pay its portion of

1 any advance as they came due, you understand would
2 be a default under that facility, do you not?

3 MR. CANTOR: Objection. Calls for a
4 legal conclusion. You can answer.

5 A. I don't understand that. In the context
6 of a default, I typically think of a default on the
7 borrower's side.

8 Q. You understand that the failure to pay
9 advances as they're due is defined as lender
10 default in the retail facility?

11 MR. CANTOR: Objection.

12 A. I don't understand the retail facility.
13 I haven't reviewed that document.

14 Q. Is it fair enough to say that in
15 connection with your analysis of the potential
16 funding scenarios that were provided to you by Mr.
17 Freeman, that you did not consider the issue of
18 whether or not the failure by Lehman to pay,
19 regardless of who else might have paid on its
20 behalf, was a default under the retail facility and
21 thus a failure of a condition precedent under the
22 disbursement agreement?

23 A. I don't recall exploring that issue and
24 reviewing the retail loan facility documents to see
25 if Lehman's failure to fund would be deemed a

Yunker, Brett 3/1/2011 12:00:00 PM

1 borrower default under the retail lender agreement.
2 Q. If Lehman had, in fact, failed to pay,
3 and some other person, whether FBR or one of the
4 retail lenders, had stepped into their place, you
5 would certainly expect BofA to determine whether or
6 not that would be a default under the retail
7 facility, would you not?

8 MR. CANTOR: Objection.

9 A. BofA wasn't the agent under the retail
10 facility, so I don't think BofA was in a position
11 to determine what a default was under the retail
12 loan facility.

13 Q. BofA was a disbursement agent?

14 A. Right.

15 Q. As a disbursement agent, they were in a
16 position to determine whether there was a default
17 under the retail facility based on facts that were
18 open to them, were they not?

19 MR. CANTOR: Objection.

20 A. Not to my knowledge. Again, BofA wasn't
21 party to the retail loan facility. BofA was party
22 to the disbursement agreement, but BofA wasn't
23 party to the retail loan facility. I think the
24 borrower's compliance with the retail loan
25 facility, as disbursement agent BofA was depending

Yunker, Brett 3/1/2011 12:00:00 PM

1 upon the representations that the company was
2 making with respect to that facility.

3 Q. With respect to that BofA was depending,
4 this was BofA as disbursement agent?

5 A. Yes.

6 Q. Did you have conversations with the
7 disbursement agent folks with respect to the time
8 period of the Lehman bankruptcy?

9 A. I don't believe I did.

10 Q. What do you base your statement on that
11 BofA would have done X, Y and Z with respect to the
12 disbursement facility?

13 MR. CANTOR: Objection.

14 A. BofA, acting as disbursement agent, the
15 purpose of the disbursement agreement was to set up
16 a check list of items for the agent acting in that
17 capacity to go through on a monthly basis to make
18 sure each condition had been satisfied to the
19 extent that it could be and they could determine
20 that it was, and if they were all satisfied they
21 would advance funds.

22 Q. So, do you know whether any efforts were
23 made at this time period, the September 2008 time
24 period, by the disbursement agent to determine
25 whether or not funding by someone other than Lehman

Yunker, Brett 3/1/2011 12:00:00 PM

1 to?

2 A. Not that I recall, no.

3 Q. Nothing that they affirmed with respect

4 to the September advance in this e-mail would

5 relate to any funding that occurred three days

6 later, would it?

7 MR. CANTOR: Objection. Calls for legal

8 conclusion, calls for speculation.

9 A. Well, what is Section 11.2 of the

10 disbursement agreement say that they're repping to?

11 Q. You got it in front of you.

12 A. So, is the question, does this

13 representation, given the fact that the retail

14 advance had not been made, does this affirm that

15 the retail transaction advance had been made? No,

16 it's impossible if it was past the date.

17 Q. Exactly. Or if the condition precedent

18 that might implicate that advance were met. None

19 of that could be affirmed if, in fact, my

20 representation to you is correct, which is that

21 this was three days before the advance.

22 A. Taking that as fact, yes.

23 Q. Are you aware of any other efforts by

24 BofA to have the company affirm anything with

25 respect to the September advance from the retail

Yunker, Brett 3/1/2011 12:00:00 PM

1 facility?

2 A. I believe, and I don't know the order,
3 but the same Friday there was a phone call with the
4 company where they were asked to make either the
5 same representations or speak to the ability to
6 make the advance -- to fulfill the advance request
7 completely.

8 Q. And this is the same Friday, being
9 Friday, the 26th?

10 A. Yes. I believe that's the case. I
11 believe there was a phone call from the company
12 that day.

13 Q. By whom?

14 A. By Bank of America team members, I
15 believe it was Jeff Susman. It could have been
16 member from his team on the phone call. I don't
17 know if David Howard was on the phone. I don't
18 know if I was on the phone. I believe I was copied
19 on the call-in. So, I may have been on the phone
20 call, but I don't recall being on it.

21 Q. And during that call, you understood
22 from your conversations with the people at BofA,
23 including Mr. Sussman, that the purpose was to get
24 further assurances from Mr. Freeman that the
25 representations in the September advance request

1 were still correct and accurate?

2 A. That's correct.

3 Q. Was there any discussion of BofA leading
4 up to that call that you were involved in to the
5 effect that one of the things that we want to get
6 some insight in is who is paying Lehman's share?

7 A. I believe that continued to be a
8 question, as it had been laid out by the company
9 that that was a possible scenario; so, it was
10 likely a question that people were asking at BofA.

11 Q. Was it a question that, based on your
12 conversations at BofA leading up to that call, you
13 understood would be one of the topics raised?

14 A. I believe that's logical to conclude
15 that that would have been a question that BofA
16 would like some clarity around as part of this
17 advance request.

18 Q. And indeed, BofA made that request in
19 the letter that I earlier asked you about, correct?

20 A. Yes.

21 (Whereupon, Exhibit 76 was marked for
22 identification.)

23 Q. Let me put in front of you Exhibit 76,
24 which I believe to be the letter that we previously
25 discussed. Mr. Yunker, Exhibit 76 is, in fact, a

1 letter that you previously testified about, is it
2 not?

3 A. I believe so, yes.

4 Q. One of the questions that is posed at
5 the bottom of page 1 is, ".2, Did Lehman fund its
6 portion of the requested at \$3,789,276 of shared
7 costs funded last Friday (9/26/08), or was this
8 made up from other sources?" Then it goes on, "If
9 Lehman did not fund its portion, what were the
10 other sources?" Do you see that?

11 A. Yes, I do.

12 Q. The letter up above talks about
13 arranging a call with you, meaning Mr. Freeman, "to
14 discuss questions we have received from syndicate
15 members." Does looking at this letter help you
16 recall whether such a call actually ever took
17 place?

18 A. I don't have specific recollection of
19 that organized call with Jim to go through these
20 questions.

21 (Whereupon, Exhibit 77 was marked for
22 identification.)

23 Q. Exhibit 77 is the company's response
24 that was posted to IntraLinks that you previously
25 testified about; is that right?

1 A. That's correct.

2 Q. Looking at this letter, does it help you
3 recall any conversations with Mr. Freeman or anyone
4 else at Fontainebleau on the topic of who paid
5 Lehman's share of the September draw?

6 A. It doesn't allow me to recall any
7 specific conversations that happened around this
8 time with respect to who had funded Lehman's share.

9 Q. You previously testified that the letter
10 Mr. Freeman provided in response to what we've now
11 marked as Exhibit 76, stated that the retail agent
12 and the retail lenders paid the September draw
13 request on the retail facility. Do you recall
14 testifying to that?

15 MR. CANTOR: Objection.

16 A. I'm sorry, one more time. We go back to
17 76 in terms of what questions were asked here?

18 Q. Let me ask it in a little different and
19 an easier way. With respect to number 2 in Exhibit
20 76, how was that answered in Exhibit 77?

21 A. That question does not appear to be
22 specifically addressed in this letter to the maker.

23 Q. This is the only response that you
24 received from the company with respect to the
25 questions that are asked in Exhibit 76; isn't that

1 right?

2 A. Yes, the only response, to my knowledge.

3 Q. And the only response with respect to
4 the item number 2 question?

5 A. Yes.

6 Q. Who paid for Lehman?

7 A. To my knowledge, yes.

8 Q. And, again, with reference to Exhibits
9 76 and 77, did you or anyone else at BofA, to the
10 best of your knowledge, make any effort whatsoever
11 to track down the answer to the question that Mr.
12 Naval posed on September 30, 2008, specifically,
13 who paid Lehman share?

14 A. I don't recall any specific follow-up.

15 Q. You understood that there were people
16 who believed it was Fontainebleau who paid Lehman's
17 share.

18 A. I understood that there was uncertainty,
19 and that's why we were asking the question as to
20 who had provided those funds.

21 Q. More than uncertainty, you understood
22 that there were people who were stating that it was
23 the Fontainebleau equity sponsors who had made the
24 payment on behalf of Lehman for the September
25 retail advance?

1 A. At what point did I understand that?

2 Q. This very point in time: September,

3 October.

4 A. I don't recall on September 30th, if
5 people had asserted that Fontainebleau had funded
6 those payments. I recall that at some point there
7 were independent observers that were making
8 statements believing that they had information that
9 Fontainebleau had made those payments. I don't
10 recall the exact time period of those assertions.

11 Q. Let me put one such assertion dated
12 October 1st, the next day.

13 (Whereupon, Exhibit 78 was marked for
14 identification.)

15 Q. Exhibit 78 is an e-mail from Mr. Rourke
16 to Mr. Dorenbaum. It means all Highland people,
17 dated October 10th.

18 A. Did you just say October 1st?

19 Q. I misspoke.

20 In BofA's production, you're listed as
21 the custodian of this document. I don't see your
22 name anywhere on it. I'm just wondering if you
23 know or recall how you got it?

24 A. I don't recall how I got it.

25 Q. Do you recall getting it?

1 A. I do recall getting it, yes.

2 Q. Do you recall understanding that Merrill
3 Lynch analysts was telling people that the
4 Fontainebleau equity sponsors had funded the amount
5 required from Lehman under the retail credit
6 facility due this month, \$4 million? That's
7 specifically answering number 5 in the e-mail.

8 A. I'm sorry, what was the question?

9 Q. You understood in October 10, 2008, that
10 Merrill Lynch analysts were stating that
11 Fontainebleau equity sponsors had funded the amount
12 required from Lehman under the retail credit
13 facility due in September?

14 A. Yes. I understood that the Merrill
15 Lynch research analyst stated that.

16 Q. Do you know Mr. Maxwell?

17 A. I don't.

18 Q. Is Mr. Maxwell still with your company
19 now?

20 A. He is not.

21 Q. This was one of the sources of
22 information that suggested that maybe Fontainebleau
23 equity had paid for the Lehman advance.

24 A. This is a source, yes. I don't know if
25 there were multiple sources.

1 Q. Were there other sources?

2 A. Not to my knowledge.

3 Q. What did you do, if anything, to follow
4 up on this information, other than as you
5 previously testified?

6 A. I don't believe I did anything specific.

7 Q. Did you task anybody to track it down?

8 A. No, not that I recall.

9 Q. Mr. Naval had sent out a letter and
10 received a response from the company?

11 A. Yes.

12 Q. Other than that, anything that BofA did
13 or attempted to do to determine whether or not
14 statements such as this by Mr. Maxwell were true or
15 not?

16 A. Not that I recall.

17 Q. Any effort to have the company affirm,
18 as we previously saw was done on September 26th,
19 that the proceeds used to pay the Lehman facility,
20 the Lehman portion of the retail facility, in
21 September came from Lehman and not from
22 Fontainebleau?

23 A. Not that I recall.

24 (Whereupon, Exhibit 79 was marked for
25 identification.)

1 Q. I meant to ask you earlier. This e-mail
2 at the top of the page dated September 1, 2008,
3 from yourself to Mr. Varnell and Mr. Bender, is a
4 series of e-mails, many of which are redacted, that
5 began from a source that we previously looked at,
6 which is the discussion between Mr. Dorenbaum and
7 the Sheppard Mullin counsel regarding whether or
8 not Lehman's bankruptcy was a material adverse
9 event, and those two e-mails are on pages 84 and 85
10 of this exhibit?

11 A. Yes.

12 Q. The part about this that expands a
13 little bit from the one we previously looked at is
14 your concise statement in your e-mail at the top
15 that, "This is BS." What was BS?

16 MR. CANTOR: Objection. To the extent
17 what you were commenting on there was the
18 previous e-mail from Mr. Scott and advice
19 that Mr. Scott was giving you, I would direct
20 the witness not to answer. If that refers to
21 something other than what Mr. Scott was
22 telling you in the previous e-mail, you can
23 answer.

24 A. I don't know what he was telling us, so
25 I can't respond.

1 Q. Do you remember having a different view,
2 a strong different view, on issues relating to
3 material adverse event than others on the BofA team
4 who were discussing this issue in the September
5 time frame?

6 MR. CANTOR: You can answer that
7 question by excluding different views that
8 counsel, either inside or outside, had. If
9 you had different views from other bankers,
10 you can answer that question.

11 A. Specifically with reference to the MAE,
12 I don't recall having a lot of discussion around
13 that specific issue, although I very well may have
14 had a different view than the bankers at BofA as to
15 if that condition had been tripped.

16 Q. What is your view and what was their
17 view?

18 A. I don't recall if they had a view. I'm
19 just perspective saying that I could have had a
20 different view than they did.

21 Q. Sitting here today, do you recall a
22 difference of opinion on the material adverse event
23 issue?

24 MR. CANTOR: Objection. Asked and
25 answered.

1 A. I don't recall having a lot of
2 discussion around the MAE issue in particular.

3 Q. Was there any significant disagreement
4 at BofA with respect to any of the issues
5 surrounding the various possible scenarios that
6 were outlined by Mr. Freeman?

7 MR. CANTOR: Again, limiting to the
8 bankers.

9 A. Within the bankers' discussions of the
10 different conditions precedent, there were likely
11 different views as to the company's compliance with
12 those conditions.

13 Q. And sitting here today, do you have any
14 recollection of who held what views?

15 A. I don't recall specifically.

16 Q. As you said, that it was possible that
17 you had different views from the other bankers on
18 the MAE, it's possible that there may have been
19 different views on the potential scenarios?

20 A. True. There were a number of issues
21 that we were working through, so it's very feasible
22 that people had different views of those different
23 issues.

24 Q. None that you can recall sitting here?

25 A. None specifically.

1 (Whereupon, Exhibit 80 was marked for
2 identification.)

3 Q. Exhibit 80 is an e-mail, at least the
4 first in the chain, from Mr. Scott to, among
5 others, yourself. He is passing on or forwarding
6 an e-mail from Andrei Dorenbaum of Highland, and
7 that e-mail begins on the second page of this
8 exhibit. I want to direct your attention there,
9 and when you're ready let me know.

10 A. One second, I'm just reading.

11 Q. Did you discuss any of the questions or
12 the points listed in Mr. Dorenbaum's e-mail -- and
13 there are five of them -- among your banking group
14 that was looking into this issue in the September,
15 October time period?

16 MR. CANTOR: After receiving the e-mail?

17 MR. DILLMAN: Yes.

18 A. After receiving this e-mail, I don't
19 recall any specific conversations, but we very well
20 may have discussed this e-mail at some point.

21 Q. Did you discuss within your group how to
22 respond to Mr. Dorenbaum's questions or points?

23 A. We may have discussed that; I don't
24 specifically recall.

25 Q. Do you recall having discussed sharing

1 with Mr. Dorenbaum your views with respect to
2 various conditions precedent issues, specifically
3 3.3.23?

4 A. I don't recall specifically discussing
5 that.

6 Q. Any reason why you would not discuss
7 that with Mr. Dorenbaum that you can think of?

8 MR. CANTOR: Objection.

9 A. Not that I can think of sitting here
10 today.

11 Q. Is that the kind of information that you
12 would expect, the kind of views you would expect to
13 be shared with other members of the lending group?

14 MR. CANTOR: Objection.

15 A. Could you repeat that question?

16 Q. Would you expect to share your views on
17 conditions precedent, including 3.3.23, with other
18 members of the lending group if they inquired?

19 MR. CANTOR: Objection.

20 A. My personal views or BofA's views?

21 Q. Let's start with your personal views.

22 A. I don't think I was under any obligation
23 to share my personal views of these conditions with
24 individual lenders in the banking syndicate.

25 Q. What about BofA's views?

1 come it is that you didn't do anything to track
2 this down further?

3 MR. CANTOR: Objection.

4 A. I think we're mixing issues here a
5 little bit. Could you repeat the question?

6 Q. I'll just withdraw the question.

7 Who was responsible for setting up
8 lender calls with the borrower if lenders desired
9 to have a call?

10 A. Typically, that would be the
11 Syndications Group would initiate that discussion,
12 and the admin agent -- there is an agency person
13 that actually posts the request through IntraLinks.

14 Q. It would come within BofA?

15 A. Yes.

16 Q. Come within the administrative agent?

17 A. The administrative agent would call in
18 that information to IntraLinks.

19 Q. Who would be the person responsible for
20 fielding requests from lenders and setting up calls
21 with the borrower?

22 A. That's typically the Syndications Group
23 in Charlotte, who has direct dialogue with most of
24 the other banks, although sometimes they call
25 directly to the credit officers in Dallas to ask

1 questions. So, it could be either Dallas or
2 Charlotte answering questions from other lenders.

3 Q. And in Charlotte, we're talking about
4 Mr. Howard and the Syndications Group?

5 A. That's correct.

6 Q. Who else worked on the Fontainebleau Las
7 Vegas project in the Syndications Group that you're
8 aware of?

9 A. I believe there were some sales folks
10 involved in originally selling the loan. I don't
11 recall their names. Al Bacchi is one of the sales
12 guys, I think.

13 Q. B-A-C-C-H-I?

14 A. Yes. Joe Simon potentially; Robin Roof.
15 So, those were the names that were part of the
16 sales syndicate function in Charlotte.

17 Q. Those were the people that were in the
18 Syndications Group that was, at least, structurally
19 set up to interface with the other syndicate
20 members on the resort loan?

21 A. That's correct.

22 Q. Occasionally, the Dallas group headed by
23 Mr. Susman would become involved in those
24 conversations; is that right?

25 A. That's right, yes.

1 Q. Occasionally would you?

2 A. I don't recall being on calls with

3 investors or lenders directly.

4 (Whereupon, Exhibit 81 was marked for

5 identification.)

6 Q. Exhibit 81, which I've placed in front

7 of you, is an e-mail from Kevin Rourke to David

8 Howard, and it refers at the end of the top e-mail

9 is dated October 6, 2008. It asks, "Please advise

10 when a lender call will be held." You understood

11 that Highland and other lenders were asking to get

12 a lender call with the borrower.

13 A. Yes.

14 Q. That was referred to, in fact, in the

15 letter from Mr. Naval that we previously looked at.

16 A. Yes.

17 Q. Did a lender call ever occur around the

18 issues of, we'll call it, the Lehman issues in the

19 September, October time frame?

20 A. I don't believe so.

21 Q. Why not?

22 A. I believe the company didn't want to

23 have a call, an open-ended call, with the lenders.

24 Q. A borrower, under circumstances like

25 this, wouldn't you expect that they'd want to clear

1 the air with their lenders to make them feel like
2 things were okay?

3 A. Potentially, yes.

4 Q. Did you have any understanding why the
5 company, is it fair to say, refused to have a call
6 with its lenders?

7 A. I don't know the specific reasons why
8 they didn't want to have a phone call.

9 Q. Is it fair to say that they refused to
10 have a phone call?

11 MR. CANTOR: Objection.

12 A. A phone call did not take place, so it's
13 fair to say that they did not want to have a phone
14 call.

15 Q. And BofA, as the syndicate leader,
16 certainly desired on behalf of the syndicate
17 members to have that call, having been requested by
18 a number of banks, didn't it?

19 A. Yes. I believe the people in Charlotte
20 that were getting phone calls from Highland and
21 potentially others thought that it would be easier
22 to just have one phone call.

23 Q. And a phone call from the borrower, as
24 opposed to BofA, who is not the borrower?

25 A. That's correct.

1 Q. You would expect that they would have
2 pushed on the company to get this call in process?

3 MR. CANTOR: Objection.

4 A. It would make sense to request the
5 company have a phone call if we were getting phone
6 calls from lenders.

7 Q. Any discussions that you were part of
8 questioning why the company wasn't stepping up and
9 agreeing to a lender call?

10 A. I don't recall anything specifically as
11 to why the company wasn't having a phone call.

12 Q. Isn't that a little bit of an issue of
13 concern if the company is refusing to talk to its
14 lenders?

15 MR. CANTOR: Objection.

16 Q. Raise some red flags?

17 A. It can be a concern.

18 Q. Particularly under these circumstances,
19 where you've got one of the major lenders to the
20 retail facility having filed for bankruptcy.
21 You've got issues surrounding who made their
22 payments. You've got representations and
23 affirmations by the company that appear to be
24 contrary to the information that others are
25 providing to you. With all of those circumstances,

1 was the company's refusal to have a lender call a
2 red flag?

3 MR. CANTOR: Objection.

4 Q. A cause of concern?

5 A. I believe to some at BofA it was a cause
6 of concern.

7 Q. Was it to you?

8 A. It wasn't to me personally, I don't
9 believe.

10 Q. I don't mean personally as in your
11 personal life. Who was it a concern to, that
12 you're aware of?

13 A. I believe it was a concern to Jeff
14 Susman and David Howard.

15 Q. And did you have conversations with them
16 around this issue?

17 A. I don't recall.

18 Q. How did you come to believe that it was
19 of concern to Mr. Susman and Mr. Howard?

20 A. That's the best of my recollection. I
21 don't recall anything specific.

22 Q. Based upon conversations that you had,
23 you got the sense that they were concerned about
24 the company's failure or refusal to hold a lender
25 call?

1 MR. CANTOR: Objection.

2 A. I believe so, yes, that's what I recall.

3 VIDEOGRAPHER: This marks the end of
4 media number 3 of the deposition of Mr. Bret
5 Yunker. We're off the record at
6 approximately 2:16 p.m.

7 We're back on the record at
8 approximately 2:27 p.m. And this marks the
9 beginning of media number 4 of the deposition
10 of Mr. Bret Yunker.

11 Q. Mr. Yunker, I'm placing in front of what
12 has previously been marked as Exhibit 18. It's a
13 meeting agenda titled "Draft" of a meeting in Las
14 Vegas on October 23, 2008. It lists as one of the
15 participants yourself. Do you see that?

16 A. Yes, I do.

17 Q. Did you attend this meeting?

18 A. Yes, I did.

19 Q. Do you recall it?

20 A. Yes, I do.

21 Q. What was the purpose of this meeting?

22 A. The purpose of this meeting, as I
23 understood it, was to update the retail lending
24 group on the status of the project, and then walk
25 through the status of their loan at the time, do a

1 tour of the sales center that was across the street
2 and then there is a tour of the site, which I don't
3 believe I attended.

4 Q. When you say "update them," who is the
5 them?

6 A. The company was updating the retail
7 lending syndicate.

8 Q. And BofA was there because?

9 A. The company requested us to be there.

10 Q. Did you or anyone else of BofA make any
11 sort of presentation?

12 A. Not that I recall.

13 Q. Did, in fact. Mr. Howard and Mr.
14 Varnell attend with you?

15 A. I think Mr. Varnell. I don't recall
16 David being there, but he may have. I think it was
17 just John there.

18 Q. Prior to September 1, 2008, you would
19 not have found yourself with these guys at
20 meetings; is that fair to say?

21 MR. CANTOR: Objection.

22 Q. Post closing, pre September 1, 2008?

23 A. I don't think there would have been a
24 purpose for such a meeting, thus I couldn't find
25 myself in a meeting for which there was no purpose.

1 Q. As you described it, to purpose was to
2 let the retail lenders know what was going on with
3 the resort?

4 A. First was, to let them know what was
5 going on with the project in terms of construction,
6 general updates, leasing out the retail, etc., etc.

7 Q. And those were the sort of topics you
8 would discuss throughout the project?

9 A. Presumably, yes. Those were discussed
10 throughout the project, and any retail lender could
11 call the company and get an update at any time.

12 Q. And you haven't been involved in those
13 conversations prior to October 23?

14 MR. CANTOR: Objection.

15 A. No, not with the retail lenders, no.

16 Q. You said that was part of what was
17 discussed, which was to give the retail lenders an
18 update on the project?

19 A. Yes, that's right.

20 Q. What else?

21 A. They also discussed the status of their
22 loan.

23 Q. So, they provided an update?

24 A. I believe the company provided an
25 update, and then some of the retail lenders

Yunker, Brett 3/1/2011 12:00:00 PM

1 discussed their perspectives on the status of that
2 loan.

3 Q. In preparing for your deposition here
4 today, did you review any materials which refreshed
5 your recollection on the discussions during this
6 October 23, 2008 meeting?

7 A. I did not review any materials specific
8 to that meeting, other than there was one memo, I
9 think, from one of the retail banks.

10 Q. From Sumitomo?

11 A. I don't recall if it was that bank.

12 Q. Did that help to refresh your
13 recollection as to what occurred at the meeting?

14 A. Not much, it wasn't terribly detailed,
15 from what I recall seeing.

16 Q. Exhibit 19, which was previously marked,
17 is that the document that you're referring to?

18 MR. CANTOR: For what it's worth, you
19 said Sumitomo.

20 MR. DILLMAN: I did indeed. It was
21 National C. Thank you.

22 A. This is a Nat City memo. Yes, I believe
23 this is the memo I saw.

24 Q. Specifically Bates stamp ending 71, the
25 bullet beginning October 23, 2008, is the portion

Yunker, Brett 3/1/2011 12:00:00 PM

1 you reviewed, right?

2 A. I believe so, yes.

3 Q. Anything stated in that that does not
4 comport with your recollection of what was said at
5 the meeting?

6 MR. CANTOR: Objection. Assuming he has
7 one.

8 A. I believe it's generally consistent with
9 what I recall from that meeting.

10 Q. You recall that there was not sufficient
11 interest by the retail lenders, other than Lehman,
12 to cover the full amount of the Lehman obligations?

13 A. Those were statements made by the other
14 banks in that meeting. I don't know how much of
15 that was posturing within the meeting within a bank
16 group as to who was going to do what, but I believe
17 those statements were made in that context at that
18 meeting.

19 Q. You didn't have a reason to doubt their
20 correctness, did you?

21 MR. CANTOR: Objection. He just gave
22 you a reason.

23 A. No. I had a very good reason to doubt
24 it. Because banks within a bank syndicate may do
25 something -- depending on the size of their

1 commitment within that facility, they may be
2 posturing in a meeting like that, and they may
3 ultimately do something else.

4 Q. Anything could happen.

5 A. So, that was the reason I doubted what
6 they were saying as to if they would step up to the
7 full amount of Lehman.

8 Q. You doubted, or you didn't necessarily
9 take them at their word?

10 A. I didn't necessarily take them at their
11 word, which is a form of doubt to me.

12 Q. Did you believe, leaving that meeting,
13 that the retail lenders, other than Lehman, would
14 ultimately step up and pay all of Lehman's
15 commitment on the retail facility?

16 A. I don't recall what I believed coming
17 out of that meeting.

18 Q. You did hear the retail lenders asking
19 Fontainebleau as to whether or not Fontainebleau
20 would be prepared to put in additional equity, did
21 you not?

22 A. I don't recall that specific discussion.

23 Q. Were there discussions about
24 Fontainebleau taking over the commitment on the
25 retail facility?