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

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_______________________________________/

NOTICE OF FILING ON THE PUBLIC RECORD
NON-DEPOSITION EXHIBITS PREVIOUSLY FILED
UNDER SEAL RELATED TO SUMMARY JUDGMENT DOCUMENTS

Defendant Bank of America N.A. ("BANA") hereby gives notice that it is filing on the public record certain documents, previously filed under seal related to BANA's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment in the above-titled case.

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

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

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

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

BANA previously filed under seal the non-deposition exhibits listed below on August 5, 2011, September 9, 2011, and September 27, 2011. In compliance with this Court's Order Approving Joint Proposal, BANA now files the following non-deposition exhibits on the public record:[2]

NON-DEPOSITION EXHIBITS CITED BY BANK OF AMERICA, N.A.			
No.	**Exhibit**	**BATES or Docket Nos.**	**Filing Status**
Non-Deposition Exhibits to Cantor Declaration			
1	Cantor Decl. Ex. 24	No Bates Number	Publicly filed (attached)
2	Cantor Decl. Ex. 25	Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Declaratory Relief, Case 1:09-md-02106-ASG Doc.	Publicly filed (attached)

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

NON-DEPOSITION EXHIBITS CITED BY BANK OF AMERICA, N.A.			
No.	**Exhibit**	**BATES or Docket Nos.**	**Filing Status**
		15	
3	Cantor Decl. Ex. 26	Amended MDL Order Number Eighteen; Granting in Part and Denying in Part Motions to Dismiss [DE 35]; [DE 36]; Requiring Answer to Complaints; Vacating Final Judgment, Case 1:09-md-02106-ASG Doc. 80	Publicly filed (attached)
4	Cantor Decl. Ex. 27	Complaint, *Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al*, No. A-11-637835-B	Publicly filed (attached)
5	Cantor Decl. Ex. 29	Avenue Term Lender Plaintiffs' Amended Responses to Second Set of Interrogatories from Defendant Bank of America, N.A.	Publicly filed with redactions (attached)
6	Cantor Decl. Ex. 30	MON 000044-45	Filed under seal
7	Cantor Decl. Ex. 31	VEN 000803-06	Filed under seal
8	Cantor Decl. Ex. 32	SPT 000179-81	Filed under seal
9	Cantor Decl. Ex. 33	BGD 004016-18	Filed under seal
10	Cantor Decl. Ex. 88	Order Dismissing Parties Without Prejudice Pursuant to Notice of Voluntary Dismissal [DE 65]; Directing Clerk to Take Action, Case 1:09-md-02106-ASG Doc. 68	Publicly filed (attached)
11	Cantor Decl. Ex. 89	No Bates Number	Publicly filed (attached)
12	Cantor Decl. Ex. 90	Answer of Defendant Bank of America, N.A., Case 1:09-md-02106-ASG Doc. 88	Publicly filed (attached)
Non-Deposition Exhibits to Cantor Opposition Declaration			
13	Cantor Opp. Decl. Ex. 28	No Bates Number	Publicly filed (attached)

NON-DEPOSITION EXHIBITS CITED BY BANK OF AMERICA, N.A.			
No.	**Exhibit**	**BATES or Docket Nos.**	**Filing Status**
14	Cantor Opp. Decl. Ex. 29	Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Declaratory Relief, Case 1:09-md-02106-ASG Doc. 15	Publicly filed (attached)
15	Cantor Opp. Decl. Ex. 30	Answer of Defendant Bank of America, N.A., Case 1:09-md-02106-ASG Doc. 88	Publicly filed (attached)
16	Cantor Opp. Decl. Ex. 31	Expert Report of Saul Solomon	Publicly filed with redactions (attached)
17	Cantor Opp. Decl. Ex. 32	VEN 000803-06	Filed under seal
18	Cantor Opp. Decl. Ex. 33	SPT 000179-81	Filed under seal
19	Cantor Opp. Decl. Ex. 34	BGD 004016-18	Filed under seal
20	Cantor Opp. Decl. Ex. 100	BGD 000845-49	Publicly filed (attached)
21	Cantor Opp. Decl. Ex. 101	Complaint, *Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al*, No. A-11-637835-B	Publicly filed (attached)
Non-Deposition Exhibits to Cantor Reply Declaration			
22	Cantor Reply Decl. Ex. 25	BGD 000845-49	Publicly filed (attached)

Date: Miami, Florida
December 4, 2013

By: /s/ Jamie Zysk Isani
Jamie Zysk Isani

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Attorneys for Defendant Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by transmission of Notice of Electronic Filing generated by CM/ECF on December 4, 2013 on all counsel or parties of record on the Service List below:

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

Bloomberg

Highland Shuts Funds Amid `Unprecedented' Disruption (Update3)

By Pierre Paulden - Oct 16, 2008

Oct. 16 (Bloomberg) -- Highland Capital Management LP will close its flagship Highland Crusader Fund and another hedge fund after losses on high-yield, high-risk loans and other types of debt, according to a person with knowledge of the decision.

Highland, whose total assets under management has shrunk to about $35 billion from $40 billion in March, will wind down the Crusader fund and the Highland Credit Strategies Fund over the next three years, said the person, who declined to be named because the decision isn't public. The hedge funds had combined assets of more than $1.5 billion.

The Highland Credit Strategies fund suffered from ``unprecedented market volatility and disruption,'' according to a letter to investors that was obtained by Bloomberg News. Barclays Capital Inc. seized $642 million of leveraged loans from Highland yesterday and is offering the debt for sale in an auction today, according to a person with knowledge of the situation.

Highland, founded by James Dondero and Mark Okada in Dallas in 1993, follows firms including Sailfish Capital Partners LLC and Peloton Partners LLP in closing funds after the seizure in financial markets choked off credit and sent asset values plummeting. The average price of actively traded high-yield, or leveraged, loans has dropped to 71.2 cents on the dollar from 100 cents in June last year, according to Standard & Poor's.

CLOs

Highland, the world's largest non-bank buyer of leveraged loans last year, also manages collateralized loan obligations and in March raised $1 billion to buy distressed loans. CLOs are created by bundling together loans and repackaging them into new securities. Leveraged loans are rated below Baa3 by Moody's Investors Service and BBB- by S&P and are used to fund private-equity acquisitions.

The Markit LCDX, a benchmark credit-default swap index used to hedge against losses on leveraged loans, dropped 1.5 percentage point to a mid-price of 82.5 percent of face value today,

according to Goldman Sachs Group Inc. The index falls as credit risk increases. The index series fell to a record low of 81 on Oct. 10.

Bids for the Barclays auction were due by 2 p.m. today in New York, according to documents obtained by Bloomberg News. The sale will close at 4:30 p.m.

Barclays spokesman Brandon Ashcraft declined to comment.

`Highly Constrained'

The firm plans to sell 20 percent of the Highland Credit Strategies Fund's assets in the next six months and a further 20 percent in the following six months, the letter said. Closing the fund will avoid forced sales that would result in lower prices, the person said.

``The environment is one where the fundamental tools to manage the Credit Strategies funds' trading, hedging, shorting and financing are highly constrained, and in some cases unavailable,'' the letter said.

Highland has a separate closed-end retail fund that is also called the Highland Credit Strategies Fund, which isn't being shut down, the person said. The investment firm manages about $7 billion in mutual funds, including the Highland Distressed Opportunities fund.

The Crusader fund is down more than 30 percent this year, the person said. The fund slumped 14 percent in January after reporting 40 percent gains in 2006 and a 4.5 percent loss in 2007.

Hedge Funds Fall

Hedge funds fell 4.7 percent in September, the worst month for the $1.9 trillion industry since the collapse of Long-Term Capital Management LP in 1998, according to Hedge Fund Research Inc. The drop has dragged the Chicago-based research firm's Weighted Composite Index down 9.4 percent so far this year, on pace for the biggest annual loss since HFR started keeping records in 1990.

Citadel Investment Group Inc.'s biggest hedge fund fell as much as 30 percent this year because of losses on convertible bonds, stocks and corporate debt, two people familiar with the Chicago-based firm said yesterday. Kenneth Griffin, who founded Citadel in 1990, said in a letter to investors this week that returns for the $10 billion Kensington Global Strategies Fund may swing wildly as markets are battered by the global credit crunch.

To contact the reporter on this story: Pierre Paulden in New York at ppaulden@bloomberg.net

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-MD-02106-CIV-GOLD/MCALILEY
[original SDFL action 09-21879]

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION	Case No. 09-CV-01047-KJD-PAL
MDL No. 2106	
AVENUE CLO FUND, LTD., et al.,	
Plaintiffs,	
vs.	
BANK OF AMERICA, N.A., et al.,	
Defendants.	

SECOND AMENDED COMPLAINT FOR BREACH OF CONTRACT, BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, AND DECLARATORY RELIEF

JURY TRIAL DEMANDED

This action is brought by the Plaintiffs, each of which is a lender under a June 6, 2007 Credit Agreement (the "Credit Agreement"), by and among, *inter alia*, Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (together, the "Borrower"), the lenders referred to therein, and Bank of America N.A, in various capacities (in all capacities, "BofA"), against Defendants Bank of America, N.A., Merrill Lynch Capital Corporation, J.P. Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, The Royal Bank of Scotland PLC, Sumitomo Mitsui Banking Corporation, Bank of Scotland, HSH Nordbank AG, MB Financial Bank, N.A., and Camulos Master Fund, L.P. ("Defendants"), in their capacities as lenders under the Credit Agreement, as well as Bank of America, NA, in its capacities as

Administrative Agent under the Credit Agreement and as Disbursement Agent under the related Master Disbursement Agreement.[1] Plaintiffs allege for their complaint as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 12 U.S.C. § 632 because defendants BofA, JPMorgan Chase Bank, N.A. and MB Financial Bank, N.A. are national banking associations organized under the laws of the United States and the action arises out of transactions involving international or foreign banking or other international or foreign financial operations, within the meaning of 12 U.S.C. § 632.

2. Venue in the United States District Court for the District of Nevada is proper because the Project is located in Nevada and many of the acts and transactions at issue occurred in Nevada.

PARTIES

Plaintiffs

3. Plaintiff Avenue CLO Fund, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

4. Plaintiff Avenue CLO II, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

5. Plaintiff Avenue CLO III, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

6. Plaintiff Avenue CLO IV, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

7. Plaintiff Avenue CLO V, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

[1] Capitalized terms not otherwise defined herein have the meaning used in the Credit Agreement or, if applicable, the Disbursement Agreement.

8. Plaintiff Avenue CLO VI, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

9. Plaintiff Brigade Leveraged Capital Structures Fund, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

10. Plaintiff Battalion CLO 2007-I Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

11. Plaintiff Canpartners Investments IV, LLC is a limited liability company formed under the laws of California.

12. Plaintiff Canyon Special Opportunities Master Fund (Cayman), Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

13. Plaintiff Canyon Capital CLO 2004 1 Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

14. Plaintiff Canyon Capital CLO 2006 1 Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

15. Plaintiff Canyon Capital CLO 2007 1 Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

16. Plaintiff Caspian Corporate Loan Fund, LLC is a limited liability company formed under the laws of Delaware.

17. Plaintiff Caspian Capital Partners, L.P. is a limited partnership formed under the laws of Delaware.

18. Plaintiff Caspian Select Credit Master Fund, Ltd. is a company with limited liability formed under the laws of the Cayman Islands.

19. Plaintiff Mariner Opportunities Fund, LP is a limited partnership formed under the laws of Delaware.

20. Plaintiff Mariner LDC is company with limited duration formed under the laws of the Cayman Islands.

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21. Plaintiff Sands Point Funding Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

22. Plaintiff Copper River CLO Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

23. Plaintiff Kennecott Funding Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

24. Plaintiff NZC Opportunities (Funding) II Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

25. Plaintiff Green Lane CLO Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

26. Plaintiff 1888 Fund, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

27. Plaintiff Orpheus Funding LLC is a limited liability company formed under the laws of Delaware.

28. Plaintiff Orpheus Holdings LLC is a limited liability company formed under the laws of Delaware.

29. Plaintiff LFCQ LLC is a limited liability company formed under the laws of Delaware.

30. Plaintiff Aberdeen Loan Funding, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

31. Plaintiff Armstrong Loan Funding, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

32. Plaintiff Brentwood CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

33. Plaintiff Eastland CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

34. Plaintiff Emerald Orchard Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

35. Plaintiff Gleneagles CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

36. Plaintiff Grayson CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

37. Plaintiff Greenbriar CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

38. Plaintiff Highland Credit Opportunities CDO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

39. Plaintiff Highland Loan Funding V, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

40. Plaintiff Highland Offshore Partners, L.P. is a limited partnership formed under the laws of Bermuda.

41. Plaintiff Jasper CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

42. Plaintiff Liberty CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

43. Plaintiff Loan Funding IV LLC is a limited liability company formed under the laws of Delaware.

44. Plaintiff Loan Funding VII LLC is a limited liability company formed under the laws of Delaware.

45. Plaintiff Loan Star State Trust is a trust formed under the laws of the Cayman Islands.

46. Plaintiff Longhorn Credit Funding, LLC is a limited liability company formed under the laws of Delaware.

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47. Plaintiff Red River CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

48. Plaintiff Rockwall CDO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

49. Plaintiff Rockwall CDO II, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

50. Plaintiff Southfork CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

51. Plaintiff Stratford CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

52. Plaintiff Westchester CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

53. Plaintiff ING Prime Rate Trust is a business trust formed under the laws of Massachusetts.

54. Plaintiff ING Senior Income Fund is a statutory trust formed under the laws of Delaware.

55. Plaintiff ING International (II) - Senior Bank Loans Euro is a SICAV (Société d'Investissement à Capital Variable) formed under the laws of Luxembourg.

56. Plaintiff ING Investment Management CLO I, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

57. Plaintiff ING Investment Management CLO II, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

58. Plaintiff ING Investment Management CLO III, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

59. Plaintiff ING Investment Management CLO IV, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

60. Plaintiff ING Investment Management CLO V, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

61. Plaintiff Carlyle High Yield Partners 2008-1, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

62. Plaintiff Carlyle High Yield Partners VI, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

63. Plaintiff Carlyle High Yield Partners VII, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

64. Plaintiff Carlyle High Yield Partners VIII, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

65. Plaintiff Carlyle High Yield Partners IX, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

66. Plaintiff Carlyle High Yield Partners X, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

67. Plaintiff Carlyle Loan Investment, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

68. Plaintiff Centurion CDO VI, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

69. Plaintiff Centurion CDO VII, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

70. Plaintiff Centurion CDO 8, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

71. Plaintiff Centurion CDO 9, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

72. Plaintiff Cent CDO 10 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

73. Plaintiff Cent CDO XI Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

74. Plaintiff Cent CDO 12 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

75. Plaintiff Cent CDO 14 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

76. Plaintiff Cent CDO 15 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

77. Plaintiff Venture II CDO 2002, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

78. Plaintiff Venture III CDO is a company with limited liability incorporated under the laws of the Cayman Islands.

79. Plaintiff Venture IV CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

80. Plaintiff Venture V CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

81. Plaintiff Venture VI CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

82. Plaintiff Venture VII CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

83. Plaintiff Venture VIII CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

84. Plaintiff Venture IX CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

85. Plaintiff Vista Leveraged Income Fund is a company with limited liability incorporated under the laws of the Cayman Islands.

86. Plaintiff Veer Cash Flow, CLO, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

87. Plaintiff Genesis CLO 2007-1 Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

88. Plaintiff ARES Enhanced Loan Investment Strategy III, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

89. Plaintiff Primus CLO I, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

90. Plaintiff Primus CLO II, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

91. Plaintiff Cantor Fitzgerald Securities is a general partnership formed under the laws of New York.

92. Plaintiff Olympic CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

93. Plaintiff Shasta CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

94. Plaintiff Whitney CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

95. Plaintiff San Gabriel CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

96. Plaintiff Sierra CLO II Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

97. Plaintiff Rosedale CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands, BWI.

98. Plaintiff Rosedale CLO II Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands, BWI.

99. Plaintiff SPCP Group, LLC is a limited liability company formed under the laws of Delaware.

100. Plaintiff Stone Lion Portfolio L.P. is a limited partnership formed under the laws of the Cayman Islands.

101. Plaintiff Venor Capital Master Fund, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

Defendants

102. Defendant BofA is a nationally chartered bank with its main office in Charlotte, North Carolina. Under the Credit Agreement and other Loan Documents, BofA acted in several capacities, including as a Revolving Facility lender, as Issuing Lender, and as Swing Line Lender. In addition, BofA served as Administrative Agent to all of the Lenders under the Credit Agreement and as Disbursement Agent to all of the Lenders under the Disbursement Agreement. BofA agreed to fund $100 million under the Revolving Facility.

103. Defendant Merrill Lynch Capital Corporation is a Delaware corporation with a principal place of business in New York. Merrill Lynch Capital Corporation, which is now indirectly owned by BofA, agreed to fund $100 million under the Revolving Facility.

104. Defendant J.P. Morgan Chase Bank, N.A. is a nationally chartered bank with its headquarters in New York, New York. J.P. Morgan Chase Bank, N.A. agreed to fund $90 million under the Revolving Facility.

105. Defendant Barclays Bank PLC is a public limited company in the United Kingdom with its principal place of business in London, England. Barclays Bank PLC agreed to fund $100 million under the Revolving Facility.

106. Defendant Deutsche Bank Trust Company Americas is a New York State-chartered bank with its principal office in New York, New York. Deutsche Bank Trust Company Americas agreed to fund $80 million under the Revolving Facility.

107. Defendant The Royal Bank of Scotland PLC is a banking association organized under the laws of the United Kingdom with a branch in New York, New York. The Royal Bank of Scotland PLC agreed to fund $90 million under the Revolving Facility.

108. Defendant Sumitomo Mitsui Banking Corporation is a Japanese corporation with offices in New York, New York. Sumitomo Mitsui Banking Corporation agreed to fund $90 million under the Revolving Facility.

109. Defendant Bank of Scotland is chartered under the laws of Scotland, with its principal place of business in Edinburgh, Scotland. Bank of Scotland agreed to fund $72.5 million under the Revolving Facility.

110. Defendant HSH Nordbank AG is a German banking corporation with a branch in New York, New York. HSH Nordbank AG agreed to fund $40 million under the Revolving Facility.

111. Defendant MB Financial Bank, N.A. is a nationally chartered bank with its main office in Chicago, Illinois. MB Financial Bank, N.A. agreed to fund $7.5 million under the Revolving Facility.

112. Defendant Camulos Master Fund, L.P. is a Delaware corporation with its principal place of business in Stamford, Connecticut. Camulos Master Fund LP agreed to fund $20 million under the Revolving Facility.

FACTUAL BACKGROUND

THE FONTAINEBLEAU PROJECT

113. Between March and June 2007, Plaintiffs or their predecessors were approached by a syndicate of investment bankers, led by Banc of America Securities and including other affiliates of the Defendants, to participate in a $1.85 billion bank financing (the "Credit Agreement Facility") for the development and construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada (the "Project"). The Project is designed to be a destination casino-resort on the north end of the Las Vegas Strip, situated on approximately 24.4 acres. The Project consists of a 63-story glass skyscraper featuring over 3,800 guest rooms, suites and

condominium units; a 100-foot high three-level podium complex (the "Podium") housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater and rooftop pools; a parking garage with space for more than 6,000 vehicles; and a 353,000 square-foot convention center. The Project is also designed to feature retail space (the "Retail Space") of approximately 286,500 square-feet, including retail shops, restaurants, and a nightclub. The Retail Space is being developed by indirect subsidiaries of the Borrower's parent company (the "Retail Borrowers").

114. The total Project costs were to be funded primarily from cash provided by the developers of the Project, the proceeds of the $1.85 billion bank financing, the proceeds of a $675 million 2nd Mortgage Note offering (the "Second Lien Facility"), and proceeds of a $315 million facility (the "Retail Facility") provided to the Retail Borrowers to finance construction of the retail portion of the Project (including $83 million in certain "Shared Costs" for construction improvements to the Podium which was to be owned by Borrower following completion of construction).

THE CREDIT AGREEMENT AND DISBURSEMENT AGREEMENT

115. On June 6, 2007, the Credit Agreement was entered into among numerous lenders, including Plaintiffs and Defendants, and the Borrower. BofA and its counsel served as the principal architects of the Credit Agreement and related Loan Documents, including the Disbursement Agreement. The Credit Agreement included commitments for three kinds of loans: (a) a $700 million initial term loan facility (the "Initial Term Loan Facility"); (b) a $350 million delay draw term facility (the "Delay Draw Facility," and together with the Initial Term Loan Facility, the "Term Loan Facility"); and $800 million revolving loan facility (the "Revolving Facility"). The Initial Term Loan Facility was funded upon the closing of the Credit Agreement in June 2007. The related Second Lien Facility and Retail Facility closed at the same time.

116. Obligations outstanding under the Term Loan Facility and the Revolving Facility are equally and ratably collateralized by mortgages on the real property comprising the Project

and by security interests on all personal property of the Borrower. The personal property security interests as well as statutory and/or common law rights of setoff also extend to deposit accounts, including the Bank Proceeds Account and the Bank Funding Account established pursuant to the terms of a Master Disbursement Agreement (the "Disbursement Agreement"). The Disbursement Agreement governs disbursement of all funds under the Credit Agreement, the Second Lien Facility and the Retail Facility.

117. Plaintiffs are each lenders under the Term Loan Facility. Lenders under the Term Loan Facility are referred to herein as "Term Lenders." Defendants, including BofA, are each lenders under the Revolving Facility. Lenders under the Revolving Facility are referred to herein as "Revolving Lenders." Although certain of the Revolving Lenders are also Term Lenders, BofA is not a Term Lender. In addition to its capacity as a Revolving Lender, BofA also served as Administrative Agent to all of the Lenders under the Credit Agreement, and as Disbursement Agent to all of the Lenders under the Disbursement Agreement.

118. Each of the lenders who agreed to providing financing under the Credit Agreement relied upon the obligation of the other lenders to comply with their funding obligations under the Credit Agreement. The loans available under the Credit Agreement were the principal source of construction financing for the Project and, along with a completion guaranty and the Retail Facility, were intended to be virtually the only source of construction financing remaining after junior sources (equity and second mortgage bonds) were utilized. Because all lenders would suffer if the amount of financing available for construction proved to be insufficient to complete the Project (and, as a result, their collateral value would be destroyed), the Credit Agreement requires that, in the absence of a Stop Funding Notice (described below) or the termination of a Facility by the Required Lenders following an Event of Default, each Lender is required to continue to make Loans into the Bank Proceeds Account.

119. Consistent with that agreement among the Lenders, the Credit Agreement and other Loan Documents create a two-step mechanism for the Borrower to obtain loan proceeds under the Term Loan Facility and the Revolving Facility prior to the Opening Date of the

Project. Under the first step, the Borrowers must submit to the Administrative Agent a notice of borrowing (the "Notice of Borrowing") specifying the requested loans and designated borrowing date. The Credit Agreement requires that the Administrative Agent promptly notify each lender of a Notice of Borrowing. Once notified, each lender is contractually required to make its pro-rata share of the requested loans available to the Administrative Agent prior to 10:00 AM on the designated borrowing date, subject only to identified conditions precedent. Although Revolving Loans made after construction is completed (referred to in the Credit Agreement as "Direct Loans") are expressly subject to conditions precedent in Section 5.3 of the Credit Agreement (including the requirement that each representation and warranty under the Loan Documents be true and correct and the absence of a Default or Event of Default), Revolving Loans made during construction (referred to as "Disbursement Agreement Loans") and Delay Draw Term Loans are expressly conditioned "**only**" upon the conditions precedent in Section 5.2 of the Credit Agreement (which, unlike Section 5.3, does not include the requirement that each representation and warranty under the Loan Documents be true and correct, nor the absence of a Default or Event of Default). The proceeds of Delay Draw Term Loans and Revolving Loans are, under the first step, deposited into the Bank Proceeds Account.[2]

120. Under the second step, in order to access those funds from the Bank Proceeds Account to pay for the cost of the Project, the Borrowers must submit an advance request (typically monthly) pursuant to the Disbursement Agreement (the "Advance Request"). The Disbursement Agreement establishes: (a) the conditions precedent, which are set forth in Section 3.3 of the Disbursement Agreement, to be satisfied prior to approval of the Advance Request by the Disbursement Agent; (b) the relative sequencing of disbursements from the proceeds of

[2] With respect to the $700 million Initial Term Facility, the funds were deposited into the Bank Proceeds Account on the Closing Date (June 6, 2007), and thus, were made subject to different conditions precedent that those applicable to the Delay Draw Term Loans and Revolving Term Loans.

various facilities and debt instruments; and (c) the obligations of the various agents to make disbursements to the Borrowers of loan proceeds from the Bank Proceeds Account.

121. The Term Lenders are intended third-party beneficiaries of the Disbursement Agreement, which, in pertinent part, governs the disbursement of the funds loaned by the Term Lenders. The Disbursement Agreement expressly provides that BofA is granted security interests in the Bank Proceeds Account, for the benefit of the lenders. (Disbursement Agreement, § 2.3). The Disbursement Agreement states that the provisions of Article 9 (which governs the duties and obligations of BofA as Disbursement Agent) are for the benefit of the Lenders (which includes the Plaintiffs), and that BofA is responsible and liable to the Term Lenders as a consequence of its performance under the Disbursement Agreement. (Disbursement Agreement, § 9.10).

122. As Disbursement Agent and Administrative Agent, BofA assumed responsibility for the proper administration of the construction loans and disbursement of funds to be used by the Borrower to construct the Project. BofA agreed to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties. Disbursement Agreement, § 9.1. BofA's duties included ensuring that funds were disbursed to the Bank Funding Account only if all of the conditions precedent to disbursement of funds under Section 3 of the Disbursement Agreement were satisfied, including that, as of the Advance Date: (a) each representation and warranty of each Project Entity in Article 4 was true and correct as if made on such date; (b) there was no Default or Event of Default under any of the Financing Agreements; (c) the In Balance Test was satisfied; (d) there had been no development or event since the Closing Date that could reasonably be expected to have a Material Adverse Effect on the Project; and (e) the Retail Agent and Retail Lenders under the Retail Facility had made all Advances required of them under the Advance Request. (Disbursement Agreement, §§ 3.3.2, 3.3.3, 3.3.8, 3.3.11, 3.3.23).

123. If all of the applicable conditions precedent for the advance of funds were satisfied, the Disbursement Agreement provided for the Disbursement Agent and the Borrower

to execute an Advance Confirmation Notice and, with respect to the use of funds in the Bank Proceeds Account advanced by the Term Lenders, to deliver the notice to BofA as Administrative Agent. Upon receipt of such notice, BofA would make the advances contemplated under the Advance Confirmation Notice. (Disbursement Agreement, § 2.4.6).

124. If not all of the conditions precedent to an Advance were satisfied, or if the Administrative Agent notified the Disbursement Agent that a Default or Event of Default had occurred, then the Disbursement Agent was required to provide notice (a "Stop Funding Notice") to the Borrowers and each Funding Agent, including the Administrative Agent. (Disbursement Agreement, § 2.5.1). If a Stop Funding Notice were issued, no disbursements could be made, and the funds would remain safely in the Bank Proceeds Account until all of the conditions precedent were satisfied, including the absence of any Default or Event of Default. In addition, the lenders have no obligation to fund until the circumstances associated with the Stop Funding Notice have been resolved. (Credit Agreement § 2.4(e)).

125. Under Section 9.2.3 of the Disbursement Agreement, "if the Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing, the Disbursement Agent shall promptly and in any event within five Business Days provide notice to each of the Funding Agents of the same and otherwise shall exercise such of the rights and powers vested in it by this Agreement and the documents constituting or executed in connection with this Agreement, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs." As noted above, among the powers and duties vested in BofA under the Disbursement Agreement upon receiving notice of a Default or Event of Default was the power and duty to issue a Stop Funding Notice.

LEHMAN'S FAILURE TO FUND UNDER THE RETAIL FACILITY

126. As evidenced by the terms of the Disbursement Agreement, the three "Financing Agreements" covered by that agreement – the Credit Agreement, the Second Mortgage Indenture, and the Retail Facility Agreement – are closely interrelated, and the proceeds

available under each facility were integral to the construction, completion and ultimate success of the Project.

127. As a result of the syndication of the Retail Facility, Lehman Brothers Holdings, Inc. ("Lehman"), which served as Retail Agent, was the largest Retail Lender, responsible for $215 million, or 68.25%, of the Retail Facility. As of the Closing Date, $125.4 million of the Retail Facility was advanced, leaving $189.6 million to be advanced. Much of that sum was earmarked to pay Shared Costs to complete the Podium and to complete the Retail component of the Project. Thus, the successful completion of the overall Project depended heavily on the proceeds to be made available pursuant to Lehman's commitment under the Retail Facility.

128. In September 2008, Lehman filed for bankruptcy protection. According to a proof of claim filed by the Retail Borrower in Lehman's bankruptcy case, beginning in September 2008 and on four occasions thereafter, Lehman failed to honor "its obligation to fund a total of $14,259,409.74 under the Retail Facility," and thereby defaulted in its lending obligations under the Retail Facility Agreement (the "Lehman Defaults"). Those defaults prevented satisfaction of numerous conditions precedent to the approval of Advance Requests, including the following:

- Section 3.3.23 of the Disbursement Agreement requires that "[i]n the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request."
    - Lehman, as Retail Agent and as a Retail Lender, did not make the Advances required of it pursuant to at least five Advance Requests between September 2008 and March 2009.
- Section 3.3.3 of the Disbursement Agreement provides that "[n]o Default or Event of Default shall have occurred and be continuing." A "Default" or "Event of Default" under the Credit Agreement constitutes a "Default" or "Event of

Default" under the Disbursement Agreement. (Disbursement Agreement, Ex. A). Under Section 8(j) of the Credit Agreement, the breach by "any Person" of a "Material Agreement" constitutes an Event of Default (and, prior to the expiration of any notice or other grace period, a Default) if such breach could reasonably be expected to result in a Material Adverse Effect. Schedule 4.24 of the Credit Agreement lists, as Material Agreements, "[t]he 'Financing Agreements' as defined in the Disbursement Agreement." Credit Agreement, Schedule 4.24. That definition of "Financing Agreements" includes the "Facility Agreements," which in turn includes the "Retail Facility Agreement." As stated above, the failure of the Project Entities to receive material amounts of funding and the resulting uncertainty over receiving the balance of Lehman's commitment threatened completion of the Project.

  - Accordingly, Lehman's breach of the Retail Facility was a Default, based upon Section 8(j) of the Credit Agreement.

- Section 3.3.2 requires that each representation and warranty by each Project Entity in Article 4 be true and correct as if made on such date. One such representation is that "[t]here is no default or event of default under any of the Financing Agreements." (Disbursement Agreement, at § 4.9.1).
  - That representation was not true and correct when made on or after September 2008, based upon the Lehman Defaults under the Retail Facility (one of the Financing Agreements).
- Section 3.3.11 requires that, prior to any disbursement, there has been no change in the economics or feasibility of constructing and/or operating the Project, or in the financing condition, business or property of the Borrowers, any of which could reasonably be expected to have a Material Adverse Effect.
  - Lehman's bankruptcy filing, and the uncertainty that Lehman would fulfill its loan commitment or that any other lender would assume Lehman's

commitment under the Retail Facility, threatened the successful completion of the Project and thus could reasonably be expected to have a Material Adverse Effect.

129. BofA, as Disbursement Agent, received notice of the Lehman Defaults from one or more of the Term Lenders. In September and October 2008, at least one of the Term Lenders wrote to BofA and expressed the position that Lehman's failure to comply with its funding obligations under the Retail Facility meant that certain of the conditions precedent to disbursement of funds under Section 3.3 of the Disbursement Agreement were not satisfied. In response, BofA refused to do anything, instead asserting that its function as Disbursement Agent was purely administrative in nature.

130. BofA refused to address the Lehman Defaults in large part because it wished to preserve its ongoing business relationship with the Borrower and its principal indirect owners, including Jeffrey Soffer. For example, BofA was the agent and a lender under a loan facility used to renovate the Fontainebleau Hotel in Miami, which was indirectly owned by the Borrower's indirect parent. BofA also made loans to Turnberry Associates (of which Soffer is a principal) or its affiliates. The close relationship between BofA on the one hand, and the Borrower and related parties on the other, was further evidenced by the fact that the Borrower's chief financial officer, prior to taking that position, worked for eight years at Banc of America Securities (which served as an co-lead arranger and joint underwriter of the Credit Agreement).

131. BofA's refusal to address the Lehman Defaults continued even after Moodys Investment Service announced on November 6, 2008 that it had downgraded the Credit Agreement Facility to B3 from B1. In that announcement, Moodys expressed its opinion that the outlook was "negative" in recognition of the challenges faced by the Borrowers' parent in resolving the potential funding shortfall related to the Lehman Default.

132. In wrongful and willful derogation of its duties and responsibilities as Disbursement Agent and Administrative Agent, BofA approved Advance Requests and issued Advance Confirmation Notices after, and despite notice of, the Lehman Defaults. Likewise,

BofA, as Administrative Agent, made Advances to the Borrowers pursuant to the Advance Requests. In total, those Advances (excluding debt service paid to the Lenders) exceeded $680 million, the last made on or about March 25, 2009 (the "March 25 Advance"). Each approval and/or Advance by BofA following the date it received notice of the Lehman Defaults was improper and constituted bad faith, gross negligence and/or willful misconduct on the part of BofA.

DEFAULT BY FIRST NATIONAL BANK OF NEVADA UNDER CREDIT AGREEMENT

133. On July 25, 2008, First National Bank of Nevada, was closed by the Office of the Comptroller of the Currency. The Federal Deposit Insurance Company ("FDIC") subsequently was appointed as receiver. First National Bank of Nevada had made a commitment of $1,666,666 under the Term Loan Facility and a commitment of $10,000,000 under the Revolving Facility. According to the Borrower, FDIC has repudiated the commitments of First National Bank of Nevada under the Credit Agreement. As a result, beginning in January 2009, the Borrower's calculation of Available Funds under the In Balance Test was therefore reduced by the amount of the total commitment by First National Bank of Nevada ($11,666,666).

134. The FDIC's repudiation of First National Bank of Nevada's commitment constituted, as a matter of law, a breach of that bank's obligation under the Credit Agreement. Such a breach by a party to a Material Agreement (which the Credit Agreement was) was a Default, based upon Section 8(j) of the Credit Agreement. It also prevented the Borrower from satisfying Section 3.3.2 of the Disbursement Agreement, which conditioned any disbursement upon the truth of the Borrower's representations and warranties under Article 4, in particular the representation and warranty pursuant to Section 4.9.1 that there existed no defaults or events of default under any of the Financing Documents.

135. Notwithstanding the fact that the conditions precedent for disbursement under Section 3.3 of the Disbursement Agreement by virtue of the Default resulting from the FDIC's repudiation of the Credit Agreement were not satisfied, BofA wrongfully and willfully continued

to issue Advance Confirmation Notices, and failed to issue a Stop Funding Notice. Instead, the amounts requested by the Borrower continued to be disbursed by BofA.

BofA'S CHANGE OF APPROACH AS DISBURSEMENT AGENT

136. As a result of BofA's acquisition of Merrill Lynch that closed in December 2008, BofA effectively (through its indirect ownership of Merrill Lynch) doubled its level of commitment as a Revolving Lender, and became responsible for $200 million – or 25% – of the total original Revolving Loan commitment.

137. Prior to February 2009, the Borrowers did not request any advances under the Revolving Facility (other than for letters of credit), and instead used proceeds of the Initial Term Loan Facility, the Second Lien Facility and other proceeds to pay Project Costs. As explained above, during that period of time, BofA willfully and wrongfully disregarded its obligations as Disbursement Agent and Administrative Agent, taking the position that its role was purely administrative in nature. That passive approach changed dramatically after February 13, 2009, when the Borrower submitted an Advance Request that included the first request for an Advance under the Revolving Facility, in the amount of $68 million.

138. As a Revolving Lender, BofA was required to finance a portion of that Advance Request, and thus for the first time faced the prospect of sharing loan exposure with the Term Lenders if the Project failed. In response to the Advance Request in February 2009, BofA wrote a detailed letter to the Borrower on Friday, February 20, 2009. BofA began the letter by insisting upon "strict compliance" with the deadline of the 11th day of the month to submit Advance Requests established under Section 2.4.1 of the Disbursement Agreement, despite the fact that three of the previous four Advance Requests, each of which had been accepted, were submitted late, including as recently as October 16, 2008 and November 17, 2008. Commenting on the submission of the Advance Request "at a time of continued deterioration of both the national economy and the Las Vegas marketplace," BofA also raised numerous questions. Among those questions was a request to "comment on the status of the Retail Facility, and the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that

Lehman Brothers Holdings, Inc. will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls." With the Borrower insisting upon disbursement of funds no later than February 25, 2009, BofA demanded that the Borrower supply detailed written responses to the questions by no later than Monday, February 23, 2009 – the very next business day.

139. On February 23, 2009, the Borrower sent a response to BofA. In that letter, the Borrower sidestepped BofA's request for comment on whether it anticipated that Lehman would fund its share of the Retail Facility, or on whether the other Retail Lenders intended to cover any shortfalls. But the Borrower did not (nor could it) deny that Lehman was in default of its obligations.

140. Notwithstanding the unanswered questions, and the fact that numerous conditions to approval of the Advance Request were not satisfied, BofA did not issue a Stop Funding Notice. Instead, it approved the Advance Request and issued an Advance Confirmation Notice. The amounts requested by the Borrower accordingly were disbursed.

THE MARCH 2 AND MARCH 3 NOTICES OF BORROWING

141. On March 2, 2009, the Borrowers issued a notice of borrowing to borrow the entire amount of $350 million available under the Delay Draw Facility and to borrow $670 million available under the Revolving Facility (the "March 2 Notice"). The next day, the Borrowers issued another notice of borrowing to correct a "scrivener's error" made in calculating the amount sought under the Revolving Facility (the "March 3 Notice"), reducing the requested amount to approximately $656 million. Both notices caused the Delay Draw Facility to be fully drawn.

142. As described above, the lenders under the Credit Agreement expressly agreed among themselves and with the Borrower that the Revolving Loans (those that were Disbursement Agreement Loans) and Delay Draw Loans are not, at the time of the borrowing request, conditioned on the absence of any Defaults or Events of Default (as that term is defined in the Credit Agreement), nor conditioned on the truth and correctness of the representations and

warranties in the Loan Documents. Rather, the Delay Draw Facility lenders and the Revolving Facility lenders could refuse to fund their obligations only if their commitments were validly terminated by the Required Lenders of a loan facility in accordance with section 8 of the Credit Agreement following an Event of Default, or pursuant to Section 2.4 of the Credit Agreement, if BofA as Disbursement Agent issued a Stop Funding Notice to the Administrative Agent.

143. As of March 2 and March 3, the Revolving Lenders had not terminated their commitment, and BofA had not issued a Stop Funding Notice. Accordingly, because the Delay Draw Facility was fully drawn, the Revolving Lenders were obligated to fund their commitment. Although BofA submitted the March 2 Notice and the March 3 Notice to the Lenders, it stated that the notices did not comply with the terms of the Credit Agreement. BofA advised the lenders that an *ad hoc* steering committee formed by BofA supported BofA's position.

144. In its correspondence to the Borrowers, BofA took the position that the March 2 Notice and the March 3 Notice did not comply with the Credit Agreement because they contained simultaneous requests for borrowing under both the Delay Draw Facility and the Revolving Facility. A simultaneous request for loans under the two facilities, however, is not prohibited under and is consistent with the Credit Agreement.

145. The pretext for BofA's position was Section 2.1(c)(iii) of the Credit Agreement, which provides that no more than $150 million of Revolving Loans can be outstanding unless the Delay Draw Facility has been "fully drawn." BofA asserted that "fully drawn" meant "fully funded" rather than "fully requested." According to BofA, borrowing under the Revolving Facility is limited to $150 million unless and until each of the Term Lenders fully funded its commitment under the Delay Draw Facility.

146. Significantly, the interpretation of Section 2.1(c)(iii) put forward by BofA in early March 2009 was completely at odds with BofA's historical approval of each prior Advance Request. As noted above, a condition precedent to BofA's approval of any Advance Request is the satisfaction of the "In Balance Test," a critical calculation that demonstrates whether the remaining available financing is sufficient to cover the remaining anticipated costs required to

complete the Project. The In Balance Test is satisfied when "Available Funds" exceed "Required Costs." (Disbursement Agreement, Ex. A). One component of "Available Funds" is "Bank Revolving Availability," defined to mean "***as of each date of determination***, the aggregate principal amount ***available to be drawn on that date*** under the Bank Revolving Facility." (Disbursement Agreement, Ex. A) (emphasis added).

147. Each of the prior Advance Requests approved by BofA was supported by an In Balance Report that included "Bank Revolving Availability" equal to the full amount of the Revolving Facility – $800 million (reduced to $790 million in January 2009 after First National Bank of Nevada went into receivership) – despite the fact that, at such time, the Delay Draw Facility was not fully funded. Had the full amount of the Revolving Facility not been included in each of the prior In Balance Report calculations, the resulting calculations would have demonstrated that the Project was at all times enormously out of balance. As a result, BofA would have been prevented from making any of the prior Advance Requests, and the Project never could have been constructed.

148. In order to allow the full amount of the Revolving Facility to be included in the In Balance calculation, however, BofA had to conclude that the entire Revolving Facility was "available to be drawn on th[e] date" of the In Balance Test determination. BofA could not reach this conclusion unless it interpreted "drawn" to mean "requested." "Drawn" could not mean "funded" because, by virtue of the fact that the Borrower had never previously requested the full amount of the Revolving Facility (an obvious condition precedent to its funding), that amount was never available to be funded as of the date of any Advance Request. On the other hand, because the Revolving Facility at all times remained unfunded, the entire amount was always available to be requested. Thus, the term "drawn," as used in the definition of Bank Revolving Availability, and as applied by BofA when it approved all prior Advance Requests, can only mean "requested."

149. Similarly, only if BofA understood the term "drawn," as used under Section 2.1(c)(iii) in referring to the Delay Draw Facility, to mean "requested" rather than "funded,"

would it have been justified in concluding (as it repeatedly did) that the full amount of the Revolving Facility was "available to be drawn" as of the date of each Advance Request. If BofA understood "drawn" as used in Section 2.1(c)(iii) to mean "funded" rather than "requested," then the Bank Revolving Availability – the amount "available to be drawn on th[e] date" of each In Balance Test – could not have exceeded $150 million unless and until the Delay Draw Loans were fully funded. Until that occurred (which it never did), the In Balance Test would never be satisfied, and there would never be disbursements to fund construction of the Project. That was not the intent of the parties who drafted the Credit Agreement and other Loan Documents.

150. Notwithstanding the fact that satisfaction of the In Balance Test is a condition precedent to any Advance (past, present or future) under the Disbursement Agreement, BofA did not issue a Stop Funding Notice on March 3 or at any time thereafter. Under BofA's new, after-the-fact position that "drawn" means "funded," however, the Borrower had never satisfied the In Balance Test and all prior disbursements were improper. BofA was therefore obligated to (but did not) issue a Stop Funding Notice.

151. Faced with BofA's refusal to process the March 2 Notice and the March 3 Notice, the Borrower issued a revised Borrowing Notice on March 9, 2009, directed solely to the Delay Draw Facility lenders for the full amount of their $350 million commitment (a figure that included the $1,666,666 portion committed by First National Bank of Nevada). That Borrowing Notice was attached to a letter from the Borrower to BofA in which the Borrower asserted that the Lenders were, by their actions or inactions in response to the March 2 Notice and March 3 Notice, in default of the Loan Documents. The Borrower also reiterated its concern that BofA was acting in its own self-interest and against the interest of the Borrower and several of the other lenders.

152. Under section 2.1(b)(iii) of the Credit Agreement, any proceeds of the Delay Draw Facility must be used first to repay any "then outstanding" Revolving Loans. At the time of the March 9 Borrowing Notice, $68 million had been advanced by the Revolving Lenders in February 2009. Thus, as a Revolving Lender, BofA stood to benefit by failing to issue a Stop

Funding Notice prior to March 9, 2009, because such notice would have suspended any Delay Draw Loans otherwise to be used to repay BofA's 25% share of the $68 million of then "outstanding" Revolving Loans.

153. Acting at all times in bad faith and with gross negligence and willful misconduct, BofA processed the March 9 Notice and sent it to all Delay Draw Facility lenders. BofA advised the Lenders that the revised Borrowing Notice complied with the Credit Agreement and that the Delay Draw Lenders were required to fund. In the absence of any Stop Funding Notice that would have suspended their obligation to fund, the Delay Draw Term Lenders could not rely on the failure to fund by the Revolving Lenders, or by any individual Delay Draw Term Lenders or upon the Lehman default. That is because, under Section 2.23(g) of the Credit Agreement, "the obligations of the Lenders to make Term Loans and Revolving Loans . . . are several and not joint. The failure of any Lender to make any Loan . . . shall not relieve any other Lender of its corresponding obligation to do so . . . ." Thus, the Delay Draw Term Lenders were left with no choice but to fund, or else face a claim for breach of contract.

154. Accordingly, on or about March 10, 2009 or thereafter, Plaintiffs complied with their Delay Draw Facility commitments and honored their obligations to fund the Delay Draw Facility. BofA used a portion of those funds to immediately repay itself and the other Revolving Lenders the then-outstanding balance of the $68 million under the Revolving Facility, thereby unjustly enriching BofA and the other Defendants, to the detriment of the Plaintiffs.

155. On March 16, 2009, the Borrower sent another letter to BofA in which it stated its continued belief that the lenders who had not funded were in default of their funding obligations. Shortly thereafter, on March 19, 2009, certain Term Lenders wrote to BofA to demand that the Revolving Lenders, including BofA, honor the March 2 and 3 Notice of Borrowing. They explained why BofA's newly-minted interpretation of "fully drawn" was wrong. They also noted the conflict of interest that BofA had as a result of its Revolving Commitment exposure. The Term Lenders demanded that BofA either correct its conduct or resign. At that time, BofA refused to do either.

THE MARCH 25 ADVANCE

156. On March 11, 2009, the Borrowers sent BofA the March 25 Advance Request, requesting disbursement in the amount of $138 million (of which about $4 million was for debt service under the Credit Agreement). In response, BofA sent correspondence in which it once again reserved the right to demand "strict conformity" with the Disbursement Agreement, and expressed to the Borrower the need to conclude "our review of the substance of those documents." Because BofA used the proceeds of the Delay Draw Loans to repay to itself and the other Revolving Lenders the full amount of the then-outstanding $68 million in Revolving Loans, none of the funds to be disbursed under the March 25 Advance Request included funds to be loaned by the Revolving Lenders. Without its own money on the line, BofA reverted to the laissez-faire approach that it had employed before February 2009, prior to the Borrowers' first request for Revolving Loans.

157. As of no later than March 23, 2009, BofA was on notice, from the Borrower and otherwise, that certain of the Delay Draw Lenders had not funded their portion of the commitment under the Delay Draw Facility in response to the March 9 Notice. Section 1.1 of the Credit Agreement defines a "Lender Default" as "the failure or refusal (which has not been retracted in writing) of a Lender to make available (i) its portion of any Loan required to be made by such Lender hereunder . . . ." As of March 25, the amount of the unfunded commitment totaled about $23.3 million (of which $1.67 million was attributable to First National Bank of Nevada).[3] That unfunded commitment precluded BofA from disbursing any funds pursuant to the March 25 Advance Request for a number of independent reasons.

158. First, because the Credit Agreement, along with the Retail Facility, is one of the Material Agreements on Schedule 4.24, the failure of any Delay Draw Lender to fund its commitment was a Default by virtue of Section 8(j) of the Credit Agreement. (The same was, of

[3] A portion of that amount was subsequently funded, thereby curing any breach with respect to those Term Lenders.

course, true of the failure of the Revolving Lenders to fund on March 3). That meant that at least one of the conditions precedent for disbursement of funds, Section 3.3.3 of the Disbursement Agreement, clearly had not been satisfied.

159. Second, the Borrower could not, based on the failure as of March 25 to fund the $23,333,333 in Term Loans, represent and warrant to be true and correct that no default existed under the Financing Agreements (here, the Credit Agreement), as required under Section 4.9.1 of the Disbursement Agreement. (The same is true based on the failure of the Revolving Lenders to fund). Thus, the Borrower could not satisfy the conditions under Section 3.3.2 of the Disbursement Agreement.

160. Third, under the new interpretation of Section 2.1(c)(iii) of the Credit Agreement adopted by BofA and the other Revolving Lenders, the Revolving Lenders claimed to be relieved of any obligation to fund more than $150 million of their $800 million commitment until the Delay Draw Facility was fully "funded." The position of BofA and the other Revolving Lenders that no more than $150 million of the Revolving Facility was available to fund the Project if any Delay Draw Lender failed to fund its commitment, and the Revolving Lenders' ongoing refusal to fund, clearly constituted a change in the economics or feasibility of constructing the Project that could reasonably be expected to have a Material Adverse Effect, thereby precluding satisfaction of Section 3.3.11 of the Credit Agreement.

161. Fourth, the Borrower could not satisfy the In Balance Test. On March 23, 2009, the Borrowers advised BofA that it would be submitting a calculation of the In Balance Test reflecting a razor-thin cushion of only $13.8 million. That cushion included Available Funds with two components that are, as explained below, incompatible: (a) $750 million in "Bank Revolving Availability"; and (b) $21,666,666 under "Delay Draw Term Loan Availability," which represented the unfunded portion of the Delay Draw Loans (excluding First National Bank of Nevada's portion). Depending on whether "fully drawn" was interpreted to mean "fully funded" or "fully requested," either the $750 million or the $21,666,666 could be included as Available Funds – ***but not both***. If "fully drawn" meant "fully funded," then the "Bank

Revolving Availability" under the In Balance Test could not exceed $150 million unless and until the Delay Draw Facility was in fact fully funded, thereby causing the In Balance Test to fail by a spectacular margin. If, on the other hand, "fully drawn" meant "fully requested," then the $21,666,666 in Term Loans that were requested but not funded would be excluded. That is because "Delay Draw Term Loan Availability" is defined to mean, "as of each date of determination, the ***then undrawn*** portion of the Delay Draw Term Loans." (Disbursement Agreement, Ex. A)(emphasis added). If "drawn" meant "requested," then the "undrawn portion of the Delay Draw Term Loans" was zero as of March 25, 2009. Either way, the Borrower could not satisfy the In Balance Test, a condition to disbursement under Section 3.3.8 of the Disbursement Agreement.

162. In short, there was a myriad of facts – all known to BofA, and none requiring any investigation, additional facts, or exercise of discretion by BofA – that precluded satisfaction of the conditions precedent necessary for BofA to approve the March 25 Advance Request and disburse the proceeds that had been advanced by the Term Lenders. Yet BofA knowingly and intentionally chose to disregard those facts and to shirk its obligations as Disbursement Agent.

163. Instead, in a March 23 letter to Fontainebleau lenders posted on Intralinks, BofA flip-flopped yet again and took an entirely new position: "since the Borrower had requested all of the Delay Draw Term Loans and ***almost*** all of the loans had funded," the Borrowers could now request Revolving Loans in excess of $150 million. Under BofA's new position, "fully drawn" now meant "almost fully funded." Because "almost all" of the Delay Draw Term Loans had funded, BofA opined the entire amount of the Revolving Loan Facility could be used to calculate "Bank Revolving Availability." The letter read in pertinent part:

> Bank of America's position is that since the Borrower has requested all of the Delay Draw Term Loans**, and almost all of the loans have funded** (whether or not the outstanding $21,666,667 is ultimately received), Section 2.1 (c)(iii) ***now*** permits the Borrower to request Revolving Loans **which result in the aggregate amount outstanding under the Revolving Commitments being in excess of $150,000,000**. As a result, we would permit the relevant portion of the Revolving Commitment to be reflected in Available Funds. (Emphasis added)

164. Notably, in its third interpretive iteration, BofA proposed to redefine "fully drawn" to mean "almost fully funded" even though few, if any, of the other Revolving Lenders had indicated that they agreed with BofA's position, let alone unconditionally waived any argument that they were not required to fund the full amount of their commitment because of the failure of certain Delay Draw Term Lenders to fund. The March 23 letter itself recognizes the "divergence of opinions" as of that date among the Revolving Lenders. Indeed, within a week of the disbursement under the March 25 Advance Request, BofA negotiated an Interim Agreement with the Borrower, dated April 1, 2009 and circulated to Term Lenders on April 3, 2009, under which any consent of the Revolving Lenders to treat the Delay Draw Term Loans as "fully drawn" was conditioned upon the Borrowers' agreement to limit any requests under the Revolving Loans in April and May 2009 to the amount of the Advance Requests plus $5 million for each month. Under the Interim Agreement, "Bank Revolving Availability" on the dates of those Advance Requests would have been capped at an amount far less than the total amount of the Commitment.

165. By virtue of the inability of the Borrowers to satisfy numerous conditions under Section 3.3 of the Disbursement Agreement, BofA was not authorized to approve the March 25 Advance Request nor issue an Advance Confirmation Notice, and was instead obligated to issue a Stop Funding Notice. In breach of its duties as Disbursement Agent, BofA issued the Advance Confirmation Notice and, as Administrative Agent, disbursed $134 million in proceeds that had been advanced by the Term Lenders, including Plaintiffs.

EVENTS SUBSEQUENT TO THE MARCH 25 ADVANCE

166. On or about April 13, 2009, shortly after Plaintiffs' funding of the Delay Draw Facility and the release of approximately $134 million of those funds from the Bank Proceeds Account, the Borrowers advised BofA and the Lenders that it could not meet the In Balance Test, based upon a substantial increase in the figure they used to calculate Required Costs.

167. On April 20, 2009, BofA, in its capacity as Administrative Agent, sent a letter to the Borrower, the Lenders and other parties, in which BofA advised that "the Required Facility

Lenders under the Revolving Credit Facility have determined that one or more Events of Default have occurred and are continuing . . . ." BofA did not, in that letter or in response to a letter sent by certain Term Lenders the following day, identify those Events of Default that had been determined to have occurred. To the extent any Events of Default (or Defaults) had in fact occurred and were continuing on that date, any such Events of Default (or Defaults) were known or should have been known to BofA long before March 2009, and BofA breached its duties as Disbursement Agent and Administrative Agent by failing to communicate them to the Term Lenders, failing to issue a Stop Funding Notice, or failing to take any other required action.

168. Pursuant to Section 8 of the Credit Agreement, BofA provided notice that the Revolving Facility commitment was "terminated effectively immediately." Notably, BofA did not purport to make its termination retroactive to a date prior to the March 2 Notice and March 3 Notice, reflecting BofA's understanding that such retroactive termination was not a remedy available under the Credit Agreement or applicable law.

169. On April 21, 2009, the Borrower submitted a Notice of Borrowing (the "April 21 Notice") to BofA, drawing $710 million under the Revolving Facility. In a separate letter sent that same day by Borrower's counsel to BofA, the Borrower disputed the existence of any Events of Default under the Credit Agreement. If the Borrower were able to demonstrate that no Events of Default under the Credit Agreement had occurred or were continuing as of April 20, 2009, then Defendants were not authorized to terminate the commitment, and were obligated to fund $710 million in response to the April 21 Notice. Defendants did not provide such funding.

170. BofA's failure to issue a Stop Funding Notice and its approval of the prior Advance Requests was in bad faith and constituted gross negligence and willful misconduct. BofA promoted its own self-interest, to the detriment of the Term Lenders, by: 1) causing the Revolving Lenders to refuse to fund their Revolving Loans, thereby reducing the collateral available to the Term Lenders; 2) causing the Delay Draw Lenders to fund their Loans, thereby enabling the repayment of $68 million in Revolving Loans and increasing the collateral available to the Revolving Lenders on account of their existing claims arising from previously issued

letters of credit under the Revolving Facility; and 3) causing disbursements to be made from the Bank Proceeds Account to allow for construction to continue on the Project. All of those events dramatically improved the negotiating leverage of BofA and other Revolving Lenders and reduced the negotiating leverage of the Term Lenders, thereby positioning BofA to seek concessions from both the Borrower and the Term Lenders in exchange for providing the funds that already had been committed. Indeed, BofA applied that leverage to negotiate a term sheet with the Borrower, circulated to the Term Lenders in mid-May 2009, under which the Revolving Lenders would have obtained numerous concessions adverse to the interests of the Term Lenders. That proposal failed only because certain of the Revolving Lenders other than BofA were unwilling to advance funds even on those concessionary terms.

171. On or about May 6, 2009, after having succeeded in maximizing its leverage against the Term Lenders, BofA notified the lenders of its resignation as Disbursement Agent and Administrative Agent.

172. As a consequence of Defendants' wrongful and willful refusal to fund and their termination of the Revolving Facility commitments, the Project has been derailed and the value of the collateral securing Plaintiffs' loans has been substantially diminished. Moreover, BofA's failure to perform its obligations as Disbursement Agent and Administrative Agent not only reduced the amount and value of the collateral securing Plaintiffs' loans, but also required Plaintiffs to advance Delay Draw Loans that, but for BofA's failure to satisfy its duties, would have been suspended and ultimately terminated. Accordingly, Plaintiffs have suffered substantial damages in an amount based upon their *pro rata* share of the funds wrongfully disbursed from the Bank Proceeds Account and their *pro rata* share of the Delay Draw Loans for which they seek compensation.

COUNT I
Breach of the Disbursement Agreement Against BofA

173. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

174. The Disbursement Agreement is a valid and binding contract, pursuant to which BofA agreed to act as Bank Agent and Disbursement Agent. The Disbursement Agreement was intended to directly benefit Plaintiffs.

175. Pursuant to the terms of the Disbursement Agreement, BofA had a duty to exercise commercially reasonable efforts and use commercially prudent practices in performing its obligations under the Disbursement Agreement, including its duty to fund Advance Requests if, but only if, all conditions precedent to such funding were met and its corresponding duty to issue Stop Funding Notices if all such conditions were not met or if there existed any Defaults or Events of Default.

176. Beginning with Advance Requests made in September 2008, and continuing through the March 25 Advance Request, BofA materially breached its duties under the Disbursement Agreement by improperly approving Advance Requests that failed to meet one or more of the conditions precedent under Section 3.3 of the Disbursement Agreement, improperly issuing Advance Confirmation Notices, improperly failing to issue Stop Funding Notices as a result of the failure of conditions precedent to these Advance Requests and Defaults, and improperly disbursing funds from the Bank Proceeds Account pursuant to such deficient Advance Requests.

177. In breaching its duties under the Disbursement Agreement as set forth herein, BofA's actions constituted bad faith, gross negligence and willful misconduct, and favored its own interests over those of the Term Lenders.

178. Plaintiffs have suffered injury as a result of those breaches because, as a result of BofA's approval of the Advance Requests and failure to issue Stop Funding Notices, the amount and value of Plaintiffs' collateral has been and continues to be diminished, and Plaintiffs have been required to fund the Delay Draw Loans. BofA's liability to Plaintiffs is not limited under Section 9.10 of the Disbursement Agreement by virtue of the fact that: (a) the limitation of liability does not apply to claims asserted by Plaintiffs; (b) the limitation of liability does not

apply to the conduct of BofA for which BofA is liable; and (c) BofA's bad faith, gross negligence and willful misconduct are not subject to any limitation on liability.

COUNT II
Breach of the Credit Agreement Against All Defendants

179. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

180. The Credit Agreement is a valid and binding contract, pursuant to which the Defendants agreed to fund $790 million under the Revolving Facility.

181. The March 2 Notice and March 3 Notice complied with all applicable conditions under the Credit Agreement. Plaintiffs have performed all obligations required of them under the Credit Agreement.

182. The Revolving Loan Lenders had an obligation, not just to the Borrowers, but also to their co-lenders, to fund in response to the Notices of Borrowing.

183. Pursuant to the terms of the Credit Agreement, the Defendants were, and continue to be, obligated to honor the Notices of Borrowing.

184. In the alternative, in the event that it is judicially determined that, prior to April 21, 2009, no Events of Default under the Credit Agreement occurred that would authorize termination of the Revolving Facility commitment, then Defendants also were required to fund the sum of $710 million under the April 21 Notice.

185. The Defendants' failure to honor the Notices of Borrowing constitutes a material breach of their obligations under the Credit Agreement.

186. By repudiating their obligations to fund under the Revolving Facility, the Defendants have breached the Credit Agreement.

187. Plaintiffs, as parties to the Credit Agreement, are entitled to seek damages against Defendants for their breach of the Credit Agreement.

188. Plaintiffs have suffered injury as a result of the breach because, as a result of the Defendants' refusal to honor their obligation to fund the Revolving Facility, the amount and value of Plaintiffs' collateral has been and continues to be diminished.

COUNT III
For Breach of the Implied Covenant of Good Faith and Fair Dealing Against BofA

189. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

190. The Disbursement Agreement contained an implied covenant of good faith which prohibited BofA, in its capacities as Administrative Agent and Disbursement Agent, from preferring its own interests and the interests of the Revolving Lenders over the interests of the Term Lenders.

191. Defendants owed the implied covenant of good faith to Plaintiffs, who are intended third-party beneficiaries under the Disbursement Agreement.

192. BofA breached the implied covenant of good faith by: (a) preferring its own interests and the interests of the Revolving Lenders (including BofA) over the interests of Term Lenders when it improperly approved Advance Requests, issued Advance Confirmation Notices, failed to issue Stop Funding Notices, and caused the disbursement of funds from the Bank Proceeds Account; and (b) failing to communicate information to the Term Lenders regarding Events of Default that were known of should have been known to BofA.

193. Plaintiffs have suffered injury as a result of BofA's breach of the implied covenant of good faith. BofA's liability to Plaintiffs is not limited under Section 9.10 of the Disbursement Agreement by virtue of the fact that: (a) the limitation of liability does not apply to claims asserted by Plaintiffs; (b) the limitation of liability does not apply to the conduct of BofA for which BofA is liable; and (c) BofA's bad faith, gross negligence and willful misconduct are not subject to any limitation on liability.

COUNT IV
Breach of the Implied Covenant of Good Faith and Fair Dealing Against All Defendants

194. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

195. The Credit Agreement is a valid and binding contract, pursuant to which the Defendants agreed to fund $790 million under the Revolving Facility.

196. The Credit Agreement contains an implied covenant of good faith and fair dealing. The covenant is intended to prevent parties to a contract from destroying or injuring the right of other parties to enjoy the fruits of the contract.

197. Defendants owed Plaintiffs a duty of good faith and fair dealing as parties to the same Credit Agreement.

198. BofA as Administrative Agent and the other Defendants breached the implied covenant by adopting a contrived construction of the Credit Agreement in order to justify their refusal to fund the March 2 Notice and the March 3 Notice.

199. Plaintiffs have performed all obligations required of them under the Credit Agreement.

200. Plaintiffs have suffered injury as a result of the breach of the covenant because, as a result of the Defendants' refusal to honor their obligation to fund under the Revolving Facility, the amount and value of Plaintiffs' collateral has been and continues to be diminished. Furthermore, Plaintiffs have been prevented from receiving the benefits of their bargain under the contract because their ability to obtain repayment on their loans has been endangered.

COUNT V
For Declaratory Relief Against BofA

201. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

202. A dispute has arisen between Plaintiffs and BofA regarding BofA's obligations to Plaintiffs as intended third-party beneficiaries under the Disbursement Agreement. Plaintiffs

contend that BofA has breached that agreement by approving the Advance Requests and by failing to issue a Stop Funding Notice. Plaintiffs are informed and believe and thereon allege that BofA contends that it has acted in good faith and in compliance with its obligations under the Disbursement Agreement.

203. A judicial determination is therefore necessary to resolve this dispute and ascertain the respective rights of the parties with regard to the actions and agreements referenced in this complaint.

COUNT VI
For Declaratory Relief Against All Defendants

204. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

205. A dispute has arisen between Plaintiffs and Defendants regarding their respective rights and obligations under the Credit Agreement. Plaintiffs contend that Defendants have breached this agreement by failing to fund and by terminating their loan commitments under the Revolving Facility. Plaintiffs are informed and believe and thereon allege that Defendants contend that they have acted in good faith and in compliance of their obligations under the Credit Agreement.

206. A judicial determination is therefore necessary to resolve this dispute and ascertain the respective rights of the parties with regard to the actions and agreements referenced in this complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against the Defendants, and each of them,

(a) For compensatory damages in an amount subject to proof at trial.

(b) For a declaration that BofA has breached its contractual duties under the Disbursement Agreement as set forth above entitling Plaintiffs to damages in an amount subject to proof at trial.

(c) For a declaration that Defendants have breached their contractual duties under the Credit Agreement as set forth above entitling Plaintiffs to damages in an amount subject to proof at trial.

(d) For a declaration that Plaintiffs are excused from performance of any obligations owing to Defendants under the Credit Agreement.

(e) For a declaration that any claims asserted by Defendants against the Borrower should be disallowed pursuant to 11 U.S.C. § 502(b).

(e) For an award of the costs of suit including attorneys' fees to the extent available.

(f) For any further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury for all issues so triable.

DATED: January 15, 2010

Respectfully submitted,

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771957

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-MD-2106-CIV-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

This document applies to:

Case No.: 09-CV-23835-ASG
Case No.: 10-CV-20236-ASG
_______________________________________/

AMENDED[1] MDL ORDER NUMBER EIGHTEEN;[2] GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS [DE 35]; [DE 36]; REQUIRING ANSWER TO COMPLAINTS; VACATING FINAL JUDGMENT[3]

I. Introduction

THIS CAUSE is before the Court upon the Revolving Lender Defendants' Motion to Dismiss **[DE 36]** and Bank of America's Motion to Dismiss **[DE 35]** ("the Motions"). Responses and replies were timely filed with respect to both motions, *see* **[DE 50]**; **[DE 52]**; **[DE 56]**; **[DE 57]**, and on May 7, 2010, oral argument was held. I have jurisdiction pursuant to 12 U.S.C. § 632, as it is undisputed that both actions at issue are "suits of a civil nature at common law . . . to which [a] corporation organized under the laws of the United States [is] a party [and which] aris[es] out of transactions involving international or foreign banking." Having considered the relevant submissions, the arguments of the

[1] This Order corrects the inadvertent closure of the Aurelius Action. Count III of the Aurelius Complaint remains pending and the final judgment issued in that case must therefore be vacated.

[2] Although not labeled as such, MDL Order Number Seventeen appears at [DE 74].

[3] All docket entry citations refer to the MDL Master Docket – i.e., Case No.: 09-MD-2106 (S.D. Fla. 2009) – unless otherwise indicated.

parties, the applicable law, and being otherwise duly advised in the Premises, I grant the Motions in part and dismiss certain claims for the reasons that follow.

II. Relevant Factual and Procedural Background[4]

Although the facts giving rise to the claims at issue are detailed in my August 26, 2009 Order Denying Fontainebleau's Motion for Partial Summary Judgment in the Southern District of Florida Action, *see generally Fontainebleau Las Vegas, LLC v. Bank of America*, N.A., 417 B.R. 651 (S.D. Fla. 2009) ("August 26 Order"), I reiterate the relevant factual background here with citations to the operative complaints[5] to ensure that the record clearly demonstrates that the facts and inferences upon which this Order is predicated are drawn only from the operative complaints and the referenced undisputed central documents.

A. <u>The Credit Agreement and Disbursement Agreement</u>

On June 6, 2007, Fontainebleau Las Vegas LLC and affiliated entities ("Fontainebleau") entered into a series of agreements with a number of lenders ("the Lenders") for loans to be used for the construction and development of the Fontainebleau Resort and Casino in Las Vegas, Nevada ("the Project"). (Avenue Compl.[6] at ¶¶ 113-115);

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[4] For purposes of a motion to dismiss, I take as true all factual allegations in the operative complaints and limit my consideration to the four corners of the complaints and any documents referenced in the complaints which are central to the claims. *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1199 (11th Cir. 2007); *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009). To the extent the central documents contradict the general and conclusory allegations of the pleading, the documents govern. *See Griffin*, 496 F.3d at 1206.

[5] *See* note 5, *infra*.

[6] The operative complaint in the case of *Avenue CLO Fund, Ltd.,et al. v. Bank of America, N.A., et al.,* Case No.: 09-CV-23835 **[DE 84]** (S.D. Fla. 2009), will be referred to throughout as the "Avenue Complaint." The operative complaint in the case of *ACP Master Ltd. and Aurelius Capital Master, Ltd. v. Bank of America, N.A., et al.,* Case No.: 10-CV-20236 **[DE**

(Aurelius Compl. at ¶ ¶ 2-4); *see generally* **[DE 37-1]** ("Cr. Agr."); **[DE 37-2]** ("Disb. Agr."). Among the agreements entered into by Fontainebleau and the Lenders were a Credit Agreement and a Disbursement Agreement. (Avenue Compl. at ¶ 115); (Aurelius Compl. at ¶ ¶ 3, 27). It is these two agreements that are the subject of the operative complaints.

In connection with the June 6, 2007 loan transaction, Fontainebleau and the Lenders entered into a Credit Agreement that provided, among other things, for a syndicate of lenders to provide three kinds of loans to Fontainebleau: (a) $700 million initial term loan facility ("the Initial Term Loan"); (b) a $350 million delay draw term loan facility ("the Delay Draw Term Loan"); and (c) an $800 million revolving loan facility ("the Revolving Loan"). (Avenue Compl. at ¶ 115); (Aurelius Compl. at ¶ ¶ 23-24); (Cr. Agmt. at 22, 38). The Plaintiffs proceeding on the Avenue Complaint ("the Avenue Plaintiffs") are comprised of certain term lenders that participated in either the Initial Term Loan and/or the Delay Draw Term Loan. (Avenue Compl. at ¶ ¶ 115, 117). The Plaintiffs proceeding on the Aurelius Complaint ("the Aurelius Plaintiffs") are successors-in-interest to certain Term Lenders that participated in either the Initial Term Loan and/or the Delay Draw Term Loan (Aurelius Compl. at ¶ ¶ 10, 25). Both the Avenue and Aurelius Defendants (collectively "Defendants") are lenders that agreed to fund certain amounts under the Revolving Loan. (Avenue Compl. at ¶ ¶ 102-112); (Aurelius Compl. at ¶ ¶ 11-22). In addition to being a Revolving Lender, Defendant Bank of America also was the Administrative Agent for purposes of the Credit Agreement. (Cr. Agr. at 8).

While the Initial Term Loan was to be made on the date of closing, (Cr. Agmt. at 22),

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27] (S.D. Fla. 2010), will be referred to throughout as the "Aurelius Complaint."

the borrowing of funds under the Delay Draw and Revolving Loans prior to the Project's opening date was governed by a two-step borrowing process set forth in the Credit and Disbursement Agreements. (Aurelius Compl. at ¶ 32-33); (Avenue Compl. at ¶ 119). First, Fontainebleau was required to submit a Notice of Borrowing to the Administrative Agent (i.e., Bank of America) specifying the requested loans and the designated borrowing date. (Aurelius Compl. at ¶ 33); (Avenue Compl. at ¶ 119); (Cr. Agmt. § 2.4(a)). Upon receipt of each Notice of Borrowing, the Administrative Agent was required to notify each lender, as appropriate, so that each lender could, "subject [] to the fulfillment of the applicable conditions precedent set forth in Section 5.2 [of the Credit Agreement]" and in accordance with Section 2.1, make its *pro rata* share of the requested loans available to the Administrative Agent on the borrowing date requested by Fontainebleau. (Cr. Agr. § § 2.1(c); 2.4(b)). Then, "[u]pon satisfaction or waiver of the applicable conditions precedent specified in Section 2.1," Section 2.4(c) of the Credit Agreement called for the proceeds of the loans to be "remitted to the Bank Proceeds Account and made available to [Fontainebleau] in accordance with and upon fulfillment of conditions set forth in the Disbursement Agreement."

The second step in the borrowing process concerns Fontainbleau's access to the funds remitted to the Bank Proceeds Account and is governed by the Disbursement Agreement. To access these funds, Fontainebleau was required to fulfill certain conditions set forth in the Disbursement Agreement – including, but not limited to, the submission of an Advance Request to Defendant Bank of America as Disbursement Agent – at which point the loan proceeds would be disbursed in accordance with the Disbursement Agreement. (Avenue Compl. at ¶ 120); (Aurelius Compl. at ¶ 37); *see also* (Disb. Agr. §

§ 2.4, 3.3).

However, pursuant to Section 2.5.1 of the Disbursement Agreement, Fontainebleau's right to disbursements was not absolute. That section provides that Defendant Bank of America (as Disbursement Agent) was required to issue a Stop Funding Notice "[i]n the event that (i) the conditions precedent to an Advance [set forth in Section 3.3 of the Disbursement Agreement] have not been satisfied, or (ii) [Wells Fargo, N.A. or Bank of America] notifies the Disbursement Agent [Bank of America] that a Default or an Event of Default has occurred and is continuing . . . ." (Disb. Agr. § 2.5.1); (Aurelius Compl. at ¶ 37); (Avenue Compl. at ¶ 124). Under the Disbursement Agreement, the issuance of a Stop Funding Notice has the effect of preventing disbursements from the accounts subject to certain waiver provisions and limited exceptions not at issue. (Disb. Agr. § 2.5.2).

As noted, Defendants' agreement to make Revolving Loans to Fontainebleau is governed by Section 2.1(c) of the Credit Agreement. The first sentence of Section 2.1(c) provides, in pertinent part, that "[s]ubject to the terms and conditions [of the Credit Agreement],[7] each Revolving Lender severally agrees to make Revolving Loans to [Fontainebleau] provided that . . . unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000." (emphasis in original). The second sentence of Section 2.1(c) provides that "[t]he making of Revolving Loans which are Disbursement Agreement Loans shall be subject **only** to the fulfillment of the applicable conditions set

[7] The provision reads "[s]ubject to the terms and conditions hereof." (Cr. Agr. § 2.1(c)). Section 1.2 states that "hereof . . . shall refer to this Agreement as a whole."

forth in Section 5.2." (emphasis in original). Section 5.2 provides, in pertinent part, that "[t]he agreement of each lender to *make* [the Revolving Loans at issue here] . . . is subject only to the satisfaction of following conditions precedent: (a) Borrowers shall have submitted a Notice of Borrowing specifying the amount and Type of the Loans requested, and the making thereof shall be in compliance with the applicable provisions of Section 2 of this Agreement."[8]

B. The March 2009 Notices of Borrowing and Disbursements

On March 2, 2009, Fontainebleau submitted a Notice of Borrowing ("March 2 Notice") to Defendant Bank of America, as Administrative Agent, that simultaneously "request[ed]" the entire amount available under the Delay Draw Term Loan (i.e., $350,000,000) and the Revolving Loan (i.e., $670,000,000).[9] (Aurelius Compl. at ¶ 44); (Avenue Compl. at ¶ 141). At the time of the March 2, 2009 request, approximately $68 million in Revolving Loans had previously been funded and remained outstanding. (Aurelius Compl. at ¶ 45); (Avenue Compl. at ¶ 152). On March 3, 2009, Bank of America, as Administrative Agent, wrote to Fontainebleau rejecting the March 2 Notice, stating that the March 2 Notice did not comply with Section 2.1(c)(iii) of the Credit Agreement, which does not allow the aggregate outstanding principal amount of the Revolving Loans to

[8] The second and third conditions precedent set forth in Section 5.2 are not relevant to the claims at bar.

[9] The Aurelius Complaint alleges that Fontainebleau issued a Notice of Borrowing "drawing" the above-referenced loans on March 2, 2009. (Aurelius Compl. ¶ 44). However, the Notice of Borrowing, which is reproduced in the body of the Complaint, states that Fontainebleau was "requesting a Loan under the Credit Agreement." *Id.* at 11. Where there is a conflict between allegations in a pleading and the central documents, the contents of the documents control. *See* Section III, *infra*.

exceed $150,000,000 unless the Delay Draw Term Loans have been "fully drawn." (Aurelius Compl. ¶ ¶ 50-51); (Avenue Compl. at ¶ ¶ 143-45). On March 3, 2009, Fontainebleau wrote to Bank of America articulating its position that its March 2, 2009 Notice complied with the Credit Agreement because "fully drawn" meant "fully requested," not "fully funded," as Bank of America was contending. (Aurelius Compl. at ¶ ¶ 54-55); (Avenue Compl. at ¶ 141). Thus, according to Fontainebleau, the simultaneous request for the remainder of the Delay Draw Term Loan and the Revolving Loans complied with the Credit Agreement because the Delay Draw Term Loans had been "fully drawn" by virtue of having been "fully requested." *Id.*

On March 3, 2009, Fontainebleau issued another Notice of Borrowing ("the March 3 Notice), which was nearly identical to the March 2 Notice, but purported to correct a "scrivener's error" in the March 2 Notice by reducing the amount of Revolving Loans requested from $670,000,000 to approximately $656 million in order to account for approximately $14 million of Letters of Credit that were outstanding and had not been considered in connection with the March 2 Notice. (Avenue Compl. at ¶ 141); (Aurelius Compl at ¶ 56). On March 4, 2009, Defendant Bank of America rejected the March 3 Notice for the same reason it rejected the March 2 Notice (i.e., the Notice, which simultaneously requested $350,000,000 in Delay Draw Term Loans and Revolving Loans in excess of $150,000,000 in Revolving Loans, did not comply with Section 2.1(c)(iii) because the Delay Draw Term loans had not yet been "fully drawn"). (Aurelius Compl. at ¶ 57); (Avenue Comp. at ¶ 144).

In an attempt to remedy the "fully drawn" issue, Fontainebleau issued yet another Notice of Borrowing on March 9, 2009 ("the March 9 Notice"). (Aurelius Compl. at ¶ 65)

(Avenue Compl. at ¶ 151). The March 9 Notice was directed solely to the Delay Draw Term Loan, requesting the full amount of the $350,000,000 commitment. *Id.* Despite the fact that Bank of America "received notice . . . [i]n September and October 2008 that Lehman [Brothers] fail[ed] to comply with its funding obligations under the Retail Facility" in violation of Section 3.3.3 of the Disbursement Agreement, Defendant Bank of America did not issue a "Stop Funding Notice." (Aurelius Compl. at ¶ ¶ 96-109); (Avenue Compl. at ¶ ¶ 129-133). Instead, it processed the March 9 Notice and sent it to all the Delay Draw Term Lenders, advising them that the March Notice complied with the Credit Agreement and that the Delay Draw Lenders were required to fund. (Aurelius Compl. at ¶ 66); (Avenue Compl. at ¶ 153). Plaintiffs allege that Bank of America "willfully took no action in response to the notice" regarding Lehman Brothers' default, "favor[ed] its own interests over those of the Delay Draw lenders" by failing to issue a Stop Funding Notice, (Aurelius Compl. at ¶ ¶ 109, 151), and failed to act "because it wished to preserve its ongoing business relationship with the Borrower and its principal indirect owners, including Jeffrey Soffer." (Avenue Compl. at ¶ 129-30).

On or about March 10, 2009, Plaintiffs funded their commitments under the Delay Draw Term Loans. In all, the Delay Draw Term Loan Lenders funded approximately $337,000,000 of the $350,00,000 Delay Draw Loan.[10] (Aurelius Compl. ¶ ¶ at 66-67); (Avenue Compl. at ¶ 154). Of these Delay Draw Term Loan proceeds, $68,000,000 were used to repay "then outstanding" Revolving Loans in accordance with Section 2.1(b)(iii) of

[10] The $13 million financing gap resulted from the failure of certain Delay Draw Term Lenders to fund their respective portions of the Delay Draw Term Loans in response to the March 9 Notice. (Avenue Compl. at ¶ 157). This financing gap, however, is irrelevant for purposes in this Order.

the Credit Agreement, of which a twenty-five percent share was attributable to Bank of America as a Revolving Lender. (Avenue Compl. at ¶ ¶ 152-53). Then, on or about March 25, 2009, Bank of America disbursed more than $100,000,000 of the Delay Draw Term Loan proceeds to Fontainebleau pursuant to an Advance Request submitted on March 25, 2009. (Avenue Compl. at ¶ 165); (Aurelius Compl. at ¶ 124). In addition, on or about March 23, 2009, Bank of America sent a letter to Fontainebleau regarding the Revolving Loans; the letter stated that because "almost all of the [Delay Draw Term Loans] have funded . . . Section 2.1(c)(iii) now permits the Borrower to request Revolving Loans which result in the aggregate amount outstanding under the Revolving Commitments being in excess of $150,000,000." (Aurelius Compl. at ¶ 89); (Avenue Compl. at ¶ 163).

C. Events Subsequent to the March 25 Advance

On April 20, 2009, Bank of America, "in its capacity as Administrative Agent, sent a letter to [Fontainebleau], the Lenders and other parties, in which [Bank of America] advised that . . . [it has been] determined that one or more Events of Default have occurred and are occurring" and stating that the Revolving Loan commitments were being "terminated effective immediately" pursuant to Section 8 of the Credit Agreement ("the Termination Notice"). (Aurelius Compl. at ¶ 73); (Avenue Compl. at ¶ ¶ 167-68). According to Plaintiffs, Bank of America was aware of these Events of Default prior to the March 25, 2009 Delay Draw Term Loan disbursement, but failed to take appropriate action (e.g., issuing a Stop Funding Notice). (Aurelius Compl. at ¶ 128); (Avenue Compl. at ¶ 167).

On April 21, 2009, Fontainebleau sent a Notice of Borrowing ("the April 21 Notice") requesting $710,000,000 under the Revolving Loan facility; this Notice of Borrowing was

not honored. (Aurelius Compl. at ¶ ¶ 71-72); (Avenue Compl. at ¶ 169). Subsequent to April 21, 2009, the Project was "derailed and the value of the collateral securing Plaintiffs' loans [was] substantially diminished." (Avenue Compl. at ¶ 172); (Aurelius Compl. at ¶ 153). Plaintiffs allege that they have been damaged by the derailment of the Project, the diminution in the value of their collateral, and the purportedly improper March 25 disbursement of Delay Draw Term Loan proceeds; it is further alleged that these damages were the result of Defendants' improper failure to fund the March 3, 2009 Notice and Bank of America's material breaches of the Credit and Disbursement Agreements. (Aurelius Compl. at ¶ 151-53); (Avenue Compl. at ¶ 172).

Based on these allegations, the Avenue and Aurelius Plaintiffs filed the instant lawsuits in June and September 2009, respectively. The Aurelius Complaint asserts three causes of action. The first is a contract claim against all Defendants for breach of the Credit Agreement as a result of their failure to fund the Notices of Borrowing submitted on or about March 2 and 3, 2009. The second is also a contract claim for breach of the Credit Agreement against all Defendants, but is predicated upon Defendants' failure to fund the April 21, 2009 Notice of Borrowing. The third count also sounds in contract, but asserts a breach of the Disbursement Agreement against Bank of America.

The Avenue Complaint, on the other hand, asserts six causes of action: the first is for breach of the Disbursement Agreement against Bank of America; the second is for breach of the Credit Agreement against all Defendants; the third asserts that Bank of America breached the implied covenant of good faith and fair dealing by favoring its own interests and those of the Revolving Lenders (including itself) over those of the Term Lenders and failing to communicate with the Term Lenders regarding Events of Default;

the fourth alleges that all Defendants breached the implied covenant of good faith and fair dealing by adopting a contrived construction of the Credit Agreement in order to justify their refusal to fund the March 2 and 3 Notices; and finally, the fifth and sixth counts request declaratory relief regarding the parties' rights and obligations vis-a-vis the Credit and Disbursement Agreements. Pursuant to Rule 12(b)(6), Defendants now request dismissal of Plaintiffs' breach of contract and implied covenant claims. *See* **[DE 35]**; **[DE 36]**.

D. The Southern District of Florida Action and the Current MDL Proceedings

When Fontainebleau's project was derailed in Spring 2009, Fontainebleau filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the Southern District of Florida. On the same day that Fontainebleau filed for bankruptcy protection, it commenced an adversary proceeding against the Revolving Lenders (including Bank of America) seeking, among other things, a ruling requiring the Revolving Lenders to "turn over" the approximately $657 million requested via the March 3 Notice to the bankruptcy estate in pursuant to 11 U.S.C. § 542(b) ("the Florida Action"). On June 9, 2009, Fontainebleau filed a Motion for Partial Summary Judgment in the Bankruptcy Court as to its turnover claim, and on June 16, 2009, Defendants filed a Motion to Withdraw the Reference pursuant to 28 U.S.C. § 157(d). On August 4, 2009, I granted Defendants' Motion to Withdraw the Reference in the Florida Action. After permitting the Term Lenders to file an amicus brief, I denied Fontainebleau's motion for partial summary judgment, concluding as a matter of law that, for purposes of the Credit Agreement, "fully drawn" unambiguously means "fully funded." *Fontainebleau Las Vegas, LLC v. Bank of America*,

N.A., 417 B.R. 651, 660 (S.D. Fla. 2009).[11]

In December 2009, the Joint Panel on Multi-District Litigation ("the Panel") heard the Avenue Plaintiffs' motion for centralization of their lawsuit and the Florida Action in the Southern District of New York. Defendants and the Aurelius Plaintiffs objected, requesting that the suits be transferred to the Southern District of Florida for pre-trial proceedings. After considering the parties' positions, the Panel issued an Order finding "that centralization under Section 1407 in the Southern District of Florida will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *In re: Fontainebleau Las Vegas Contract Litigation*, 657 F. Supp. 2d 1374, 1375 (J.P.M.L. 2009). Following the issuance of the Panel's Order, the Avenue Action was transferred to me for pre-trial proceedings. Approximately one month later, the Aurelius Action was also transferred to me as a "tag-along" action in accordance with the Panel's directive. *Id.* at 1374 n.2. As the MDL judge, I now consider the instant motions to dismiss. *See* Rule 7.6, R.P.J.P.M.L. (providing that transferee district court may hear and enter judgment upon a motion to dismiss).

III. Standard of Review

For purposes of deciding a motion to dismiss, my review is limited to the four corners of the operative complaint and any documents referred to therein that are central

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[11] Alternatively, I noted that "even if my conclusion that 'fully drawn' unambiguously means 'fully funded' is in error . . . [Fontainebleau's] reasoning at best suggests that its interpretation is a reasonable one, but not the conclusive one, and requires the denial of partial summary judgment." *Id.* at 661. I further noted that "[e]ven if [Fontainebleau] is correct that the term 'fully drawn' unambiguously means 'fully requested,' I am persuaded by Defendants' arguments that they were entitled to reject the March 2 Notice on the basis of Plaintiffs default" and found there to be "genuine issue[s] of material fact as to whether Borrower was in default as of March 3, 2009." *Id.* at 663-65.

to the claims at issue. *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1199 (11th Cir. 2007); *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009); *see also Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (noting that district courts "may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed"). Where there is a conflict between allegations in a pleading and the central documents, it is "well settled" that the contents of the documents control. *Griffin*, 496 F.3d at 1206 (quoting *Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir. 1940)). Thus, only the contents of the operative complaints and the undisputed central documents will be considered for purposes of this Order.

In determining whether to grant Defendants' motions to dismiss, I must accept all the *factual allegations*[12] in the complaints as true and evaluate all reasonable inferences derived from those facts in the light most favorable to the Plaintiffs. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003); *Hoffend v. Villa*, 261 F.3d 1148, 1150 (11th Cir. 2001). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader[s] are entitled to relief,' in order to 'give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1959 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957)). "Of course, 'a formulaic recitation of the elements of a cause of action will not do.'" *Watts v. Fla. Int'l. Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). "While Rule 12(b)(6) does not permit dismissal

[12] Legal conclusions, on the other hand, need not be accepted as true. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009).

of a well-pleaded complaint simply because it strikes a savvy judge that actual proof of those facts is improbable, the factual allegations must be enough to raise a right to relief above the speculative level." *Watts*, 495 F.3d at 1295 (citing *Twombly*, 550 U.S. at 555) (internal quotation marks omitted)). In other words, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff[s] plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It follows that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n] ' – 'that the pleader is entitled to relief.' " *Id.* at 1950 (quoting Fed.R.Civ.P. 8(a)(2)).

IV. Analysis

A. Breach of Credit Agreement – Counts I and II of the Aurelius Complaint; Count II of the Avenue Complaint

1. *Plaintiffs Lack Standing to Assert Claims for Failure to Fund*

In support of their request for dismissal, Defendants contend that Plaintiffs lack standing to pursue claims based on Defendants' alleged breaches of the Credit Agreement. I agree. "Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (quoting *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000)). Absent an adequate showing of standing, "a court is not free to opine in an advisory capacity about the merits of a plaintiff's

claims." *Id.* The burden of establishing standing is on the Plaintiffs. *Id.* at 976; *see also AT&T Mobility, LLC v. National Ass'n for Stock Car Auto Racing, Inc.*, 494 F.3d 1357, 1360 (11th Cir. 2007)

Pursuant to Article III of the United States Constitution, Plaintiffs "must establish that [they] ha[ve] suffered an injury in fact" to have standing to challenge Defendants' failure to fund under the Credit Agreement.[13] *AT&T Mobility*, 494 F.3d at 1360 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish injury in fact, [Plaintiffs] must first demonstrate that [Defendants] ha[ve] invaded a legally protected interest derived by [Plaintiffs] from the [Credit] Agreement between [Plaintiffs] and [Defendants]." *Id.* (citation and internal quotation marks omitted). The question of whether, for standing purposes, Plaintiffs have "a legally enforceable right" with respect to a contractual covenant is a matter of state law. *Id.* (citation omitted); *see also Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 173 (2d Cir. 2005) (Sotomayor, J.) (citing various cases applying state law to determine whether parties had standing to sue for breach of contract). Accordingly, I must look to New York law[14] to determine whether

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[13] I recognize the parties' position that having "standing" to sue for a breach of a contractual promise is distinct from the concept of Article III standing. **[MTD Hr'g Tr. 3:25 p.m., May 7, 2010]** ("I have always just thought of this as having been innocently mislabeled. I agree with [defense counsel] that when they said standing, what they really meant was the term lenders don't have any contractual right"). While there is case law supporting this contention, the Eleventh Circuit treats the question of whether a party has a "legally enforceable right" with respect to a contractual promise as an Article III issue. *AT&T Mobility, LLC v. National Ass'n for Stock Car Auto Racing, Inc.*, 494 F.3d 1357, 1360 (11th Cir. 2007); *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975-980 (11th Cir. 2005). Accordingly, I treat it as such. I emphasize, however, that this distinction has no bearing on the motions at bar, for Plaintiffs' contract claims must fail if they lack standing, regardless of how the standing issue is framed.

[14] At oral argument, the parties agreed that the question of whether Plaintiffs have a legal right to enforce the Revolving Lenders' promise to fund the loans at issue must be determined pursuant to New York law. **[MTD Hr'g Tr. 3:25 p.m., May 7, 2010]**. In determining

Plaintiffs have standing to assert claims for breach of the Credit Agreement based on Defendants' failure to fund the Revolving Loans pursuant to the March and April Notices of Borrowing. (Cr. Agr. § 10.11) (stating that "rights and obligations of the parties under this agreement shall be governed by, and construed and interpreted in accordance with the law of the State of New York").

Under New York contract law, "[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty"; thus, only intended beneficiaries of a promise "ha[ve] the right to proceed against the promisor" for breach of said promise.[15] Restatement (Second) of Contracts § 304 (1979); *Hamilton v. Hertz Corp.*, 498 N.Y.S. 2d 706, 709 (N.Y. Sup. Ct. 1986) (citing Restatement (Second) of Contracts § 304 (1979)). This well-established rule applies with equal force to both bipartite and multipartite agreements. *See Berry Harvester v. Walter A. Wood Mowing & Reaping Machine Co.*, 152 N.Y. 540, 547 (N.Y. 1897) (holding that a plaintiff may not enforce every promise contained in a multipartite agreement; rather, the specific promise a plaintiff seeks to enforce must have been intended for the plaintiff's benefit). Thus, in the context of a multipartite contract, "the mere fact that [Plaintiffs] signed the agreement is not controlling; they may have enforceable

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and applying the law of New York, I must follow the decisions of the state's highest court, and in the absence of such decisions on an issue, must adhere to the decisions of the state's intermediate appellate courts, unless there is some persuasive indication that the state's highest court would decide the issue otherwise. *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 245 n. 9 (2d Cir. 2007).

[15] While the Plaintiffs and Defendants disagree as to whether Plaintiffs were intended beneficiaries of the Revolving Lenders' promise to fund, both sides appear to agree that one must be an intended beneficiary of a promise in order to have a legal right to enforce it. **[MTD Hr'g Tr. 3:35 p.m. - 3:38 p.m.]**.

rights under some of its provisions and not have enforceable rights under other provisions." *Alexander v. United States,* 640 F.2d 1250, 1253 (Ct. Cl. 1981) (finding that party to agreement was not an intended beneficiary of a certain promise and therefore had no legal right to enforce that promise and noting that *Berry Harvester* is a "leading case" on the subject). In such cases, the "critical inquiry is whether the parties to the agreement intended to give [Plaintiffs] the right to enforce" the promise at issue at issue.[16] Hence, in order to have standing to sue Defendants' for failure to fund the Revolving Loans, Plaintiffs must adequately demonstrate that they are "intended beneficiaries" of Defendants' promise to fund the Revolving Loans under the Credit Agreement.

The question of whether a party is an intended or incidental beneficiary of a particular contractual promise can be determined "as a matter of law" based on the parties' intentions as expressed in the operative agreement. *See generally Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y. 2d 38 (N.Y. 1985) (affirming lower court's

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[16] Although this argument was not raised in its opposition papers, counsel for the Aurelius Plaintiffs asserted at oral argument that Section 260 of New York Jurisprudence (Second) Contracts and Section 297 of the Restatement (Second) of Contracts support the conclusion that all parties to a multipartite agreement are presumed to have a right to enforce every promise contained therein unless a party's right to enforce "is specifically severed." **[MTD Hr'g Tr. 3:38 p.m.]**. Having reviewed these sections, I reject this contention and note that Plaintiffs appear to have conflated two distinct concepts in advancing this argument: the first is whether a party has a legal right to enforce a particular promise; the second is whether the right to enforce a particular promise is held jointly or severally by multiple parties. The issue here is *not* whether Plaintiffs and Fontainebleau have a "joint" or a "several" (i.e., separately enforceable) right to enforce the Revolving Lenders' promise to fund; rather, the question is whether Plaintiffs have *any right whatsoever* to enforce that promise. With respect to this issue, it is clear that the *Berry Harvester* test controls – i.e., "[w]hether the right or privilege conferred by the promise of one party to a tripartite contract belongs to one or both of the other parties depends upon the intention of the parties; the mere fact that there are three parties to the contract does not enlarge the effect of any promise, except as it may extend the advantage to two persons instead of one where that is the intention." 22 N.Y. Jur. 2d *Contracts* § 260 (2010) (citing *Berry Harvester v. Walter A. Wood Mowing & Reaping Machine Co.*, 152 N.Y. 540 (N.Y. 1897)).

determination that, as a matter of law, party was not an intended beneficiary); *see also Berry Harvester*, 152 N.Y. at 547 ("whether the right or privilege conferred by the promise of one party to a tripartite contract belongs to one or both of the other contracting parties depend upon the intention as gathered from the words used . . .").[17] If the contractual language is ambiguous, however, courts may consider the contractual language "in light of the surrounding circumstances" in order to discern the intention of the parties. *Berry Harvester*, 152 N.Y. at 547.

Traditionally, New York law held that "the absence of any duty . . . to the beneficiary [vis-a-vis a particular promise]. . . negate[d] an intention to benefit" the beneficiary. *Fourth Ocean*, 66 N.Y. 2d at 44-45. However, as New York's highest court has noted, that requirement "has been progressively relaxed." *Id.* (citation omitted). Today, the rule is that a beneficiary can establish that he has standing to enforce a particular promise "*only if* no one other than the [beneficiary] can recover if the promisor breaches the [promise] or the contract language . . . clearly evidence[s] an intent to permit enforcement by the third-party." *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 172 (S.D.N.Y. 2009) (citations and internal quotation marks omitted) (emphasis added); *see also Fourth Ocean*, 66 N.Y. 2d at 45 (concluding that a third party to a promise can enforce the promise if "no one other than the third party can recover if the promisor

[17] The fact that some of the cases cited involve third-party beneficiaries that were not actually "parties" to the written agreements at issue does not render the cases inapposite. As I have already explained, it is the intent of the parties with respect to the *individual promise at issue* that is critical. *See Berry Harvester,* 152 N.Y. at 547 ("any party . . . may insist upon the performance of every promise made to him, or for his benefit, by the party or parties who made it"). For example, in a tripartite contract setting where A makes an enforceable promise to B that is expressly intended for the benefit of C, C is a "third-party beneficiary" of that promise notwithstanding the fact that he, she, or it is technically a "party" to the written agreement.

breaches *or* that the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party") (emphasis added).

Here, there is no ambiguity with respect to the promise at issue, which states that "each Revolving Lender severally agrees to make Revolving Loans *to Borrowers* from time to time during the Revolving Commitment Period." (Cr. Agr. § 2.1(c)) (emphasis added). This promise creates a duty on the part of Defendants to make loans *to Fontainebleau* in accordance with the Credit Agreement; it does not establish a duty to the Plaintiffs here or "clearly evidence an intent to permit enforcement by [Plaintiffs]." *Fourth Ocean*, 66 N.Y. 2d at 45. Additionally, it is not the case that "no one other than [Plaintiffs] can recover if [Defendants] breache[d]," *id.,* as Fontainebleau would unquestionably be able to recover if it were able to prove that it suffered damages as a result of Defendants' material breach of the Credit Agreement. While I recognize that "the full performance of [Defendants' purported obligation to fund the Revolving Loans] might ultimately benefit [Plaintiffs]," this, at best, establishes that Plaintiffs were "incidental beneficiaries" of Defendants' promise to Fontainebleau to make Revolving Loans. *Fourth Ocean,* 66 N.Y. 2d at 45; *see also Salzman v. Holiday Inns, Inc.*, 48 N.Y.S. 2d 258, 261 (N.Y. App. Div. 4th Dept. 1975) (finding Holiday Inns, an interim lender, to be an incidental beneficiary of financing agreement between plaintiff and permanent lender because agreement called for the permanent lender to pay money to plaintiff, not Holiday Inns, and further noting that "the typical case of an incidental beneficiary is where A promises B to pay him money for his expenses [and] Creditors of B (though they may incidentally benefit by the performance of A's promise) are not generally allowed to sue A") (citation and internal quotation marks

omitted).[18]

Because New York law requires that one be an "intended beneficiary" of a particular promise in order to have a legal right to enforce that promise, and because Plaintiffs have failed to adequately demonstrate that they were "intended beneficiaries" of Defendants' promise to fund the Revolving Loans at issue, Counts I and II of the Aurelius Complaint and Count II of the Avenue Complaint must be dismissed with prejudice.[19]

2. *Even if Plaintiffs Had Standing to Enforce Defendants' Promises to Fund, Defendants Were Not Obligated to Fund the March Notices of Borrowing*

Even if Plaintiffs had standing to enforce Defendants' promises to fund the Revolving Loans at issue, Plaintiffs have not demonstrated that Defendants breached the Credit Agreement by rejecting the March Notices of Borrowing because: (1) "fully drawn," as used in Section 2.1(c)(iii) of the Credit Agreement, unambiguously means "fully funded"; and (2) the Delay Draw Term Loans had not been "fully drawn" at the time Fontainebleau submitted the March Notices of Borrowing.

Under New York law, a breach of contract claim "cannot withstand a motion to

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[18] Plaintiffs cite to *Deutsche Bank AG v. J.P. Morgan Chase Bank,* 2007 U.S. Dist. LEXIS 71933 (S.D.N.Y. Sept. 27, 2007), in support of the contention that they have a legally enforceable right in Defendants' promise to fund the Revolving Loans. This case fails to buttress Plaintiffs' position regarding standing, as it involved claims for declaratory relief, not breach of contract – claims that have different requirements with respect to standing than the contract claims at bar. *Deutsche Bank*, 2007 U.S. Dist. LEXIS 71933, * 5 (noting that parties were only seeking "declaration[s]"); *compare Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006) (discussing standing requirements in declaratory relief actions) *with Alexander v. United States,* 640 F.2d 1250, 1253 (Ct. Cl. 1981) (discussing standing requirements in context of multi-party contracts). Thus, contrary to Plaintiffs' contention, the *Deutsche Bank* court did not *sub silentio* conclude that lenders are intended beneficiaries of other lenders' promises to fund a borrower's loans.

[19] *See* Section V, *infra* (explaining why the dismissal is with prejudice).

dismiss if the express terms of the contract contradict plaintiff[s'] allegations of breach." *Merit,* No. 08-CV-3496, 2009 WL 3053739, *2 (S.D.N.Y. Sept. 24, 2009) (citing *805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 N.Y. 2d 451, 447 (N.Y. 1983)). Thus, courts are not required to "accept the allegations of the complaint as to how to construe" the agreement at issue. *Merit,* 2009 WL 3053739, *2. Instead, courts must enforce written agreements according to the "plain meaning" of their terms. *Greenfield v. Philles Records*, 98 N.Y. 2d 562, 569 (N.Y. 2002). When interpreting the meaning of contractual provisions, courts are generally required to "discern the intent of the parties to the extent their intent is evidenced by their written agreement." *Int'l Klafter Co. v. Cont. Cas. Co.*, 869 F.2d 96, 100 (2d Cir. 1989) (citing *Slatt v. Slatt*, 64 N.Y. 2d 966, 967 (N.Y. 1985)). Thus, "[i]n the absence of ambiguity, the intent of the parties *must* be determined from their final writing and no parol evidence or extrinsic evidence is admissible." *Id.* (emphasis added) (citation omitted). However, "[e]xtrinsic evidence of the parties' intent may be considered . . . if the agreement is ambiguous, which is an issue of law for the courts to decide." *Greenfield*, 98 N.Y. 2d at 569.

Whether an agreement is "ambigu[ous] is determined by looking within the four corners of the document, not to outside sources." *Kass v. Kass*, 91 N.Y. 2d 554, 556 (N.Y. 1998) (citation omitted).[20] "Consequently, any conceptions or understandings any of the

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[20] Plaintiffs urge me to consider the manner in which the word "drawn" is generally used in New York statutory and case law in order to discern the intended meaning of the phrase "fully drawn," citing to *Hugo Boss Fashions, Inc. v. Fed Ins. Co.*, 252 F.2d 608, 617-18 (2d Cir. 2001) for the proposition that "an established definition provided by state law or industry usage will serve as a default rule . . . unless the parties explicitly indicate, on the face of their agreement, that the term is to have some other meaning." However, as the Second Circuit noted in the sentence preceding the quote excerpted by Plaintiffs, "widespread custom or usage serves to determine the meaning of a *potentially vague term*," not an unambiguous one. *Id.* (emphasis

parties may have had during the duration of the contracts is immaterial and inadmissible." *Int'l Klafter Co.,* 869 F.2d at 100. Under New York law, "[t]he test for ambiguity is whether an objective reading of a term could produce more than one reasonable meaning." *McNamara v. Tourneau, Inc.*, 464 F. Supp. 2d 232, 238 (S.D.N.Y. 2006) (citing *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002)). Thus, "[a] party . . . may not create ambiguity in otherwise clear language simply by urging a different interpretation." *Id.* (citing *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990)).

As I noted in my August 26 Order, a review of the Credit Agreement in its entirety reveals no ambiguity as to the meaning of the term "fully drawn"; to the contrary, an objective and plain reading of the agreement establishes that "fully drawn" in Section 2.1(c)(iii) means "fully funded," and not "fully requested" or "fully demanded," as Plaintiffs suggest. *In re Fontainebleau Las Vegas Holdings, LLC*, 417 B.R. at 660.[21] This

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added). Because the Credit Agreement unambiguously establishes that "fully drawn" means "fully funded," I decline to consider "extrinsic evidence" such as custom, industry usage, or the parties' course of dealing. *Int'l Klafter Co. v. Cont. Cas. Co.*, 869 F.2d at 100; *see also* **[DE 50]** (noting in their opposition to Defendants' Joint Motion to Dismiss that "Term Lenders agree . . . that the parties' course of dealing is not an appropriate consideration in determining, on a motion to dismiss, whether it is reasonable to interpret "drawn" to mean "demanded"). However, it does bear mentioning that even the cases cited by Plaintiffs indicate that, in the context of term loans, "draw" means "fund," as compared to "request" or "demand." *See e.g., Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 2009 WL 2163483, *1, *14 (N.Y. Sup. Ct. July 17, 2009) (concluding that Destiny Holdings was entitled to preliminary injunction requiring Citigroup to fund "pending draw requests," thus indicating that draw means "fund" or "funding" and not "request" or "demand"), *aff'd as modified on other grounds*, 889 N.Y.S. 2d 793 (N.Y. App. Div. 4th Dept. 2009).

[21] While it could be argued that the doctrine of "nonparty preclusion" should apply to preclude Plaintiffs from relitigating the meaning of "fully drawn" given that they filed an amicus brief in the Florida Action regarding the very same issue, this doctrine was not raised by the Plaintiffs and I decline to apply it *sua sponte*. *See Griswold v. County of Hillsborough*, 598 F.3d 1289, 1292 (11th Cir. 2010) (clarifying doctrine of nonparty preclusion in light of recent Supreme Court decisions on the subject).

conclusion comports not only with the plain language of the Credit Agreement, but also with the "structure of the lending facilities, as discerned from the Credit Agreement itself, [which] reflects the parties' intent to employ a sequential borrowing and lending process that places access to Delay Draw Term Loans ahead of Revolving Loans when the amount sought under the Revolving Loan facility was in excess of $150 million." *Id.* at 660.

To support their argument that my prior ruling regarding the unambiguous meaning of "fully drawn" was erroneous, Plaintiffs proffer various hypotheticals purporting to demonstrate that interpreting "fully drawn" to mean "fully funded" would lead to patently unreasonable results that could not have been intended by the parties to the Credit Agreement. Such arguments are not relevant or proper, for "[a]n ambiguity does not exist by virtue of the fact that one of a contract's provisions could be ambiguous under some other circumstances." *Bishop v. National Health Ins. Co.*, 344 F.3d 305, 308 (2d Cir. 2003). To the contrary, contract law is clear insofar as "a court must look to the situation before it, and not to other possible or hypothetical scenarios" when considering a contract in order to determine whether an ambiguity exists. *Id.*; *Donoghue v. IBC USA (Publications), Inc.*, 70 F.3d 206, 215-16 (1st Cir. 1995) (noting that "a party claiming to benefit from ambiguity . . . must show ambiguity in the meaning of the agreement with respect to the very issue in dispute . . . [because] courts consider contentions regarding ambiguity or lack of ambiguity not in the abstract and not in relation to hypothetical disputes that a vivid imagination may conceive but instead in relation to concrete disputes about the meaning of an agreement as applied to an existing controversy").[22]

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[22] Even if I were to consider Plaintiffs' hypotheticals, it would not alter my conclusion regarding the meaning of "fully funded," as the proffered hypotheticals fail to account for critical

In sum, having considered the arguments of the parties regarding the meaning of "fully drawn," I conclude, for the reasons set forth above, as well as those set forth in my August 26 Order – which I expressly incorporate by reference into this Order – that the plain language, purpose, and structure of the Credit Agreement leads to the inexorable conclusion that "fully drawn" unambiguously means "fully funded" *for purposes of Section 2.1(c)(iii)* of the Credit Agreement.[23] Accordingly, even if my conclusion that Plaintiffs lack standing is in error, Plaintiffs' claims for failure to fund the March Notices of Borrowing fail as a matter of law because Defendants had no obligation to make Revolving and Swing

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provisions of the Credit Agreement. For example, the hypothetical set forth in Paragraph 43 of the Aurelius Complaint ignores the existence of Section 5.2(c), entitled "Drawdown Frequency," which vests the Administrative Agent (i.e., Bank of America) with broad discretion to permit Disbursement Agreement loans to be made more frequently than once every calendar month. If Bank of America were to arbitrarily withhold its consent in such a scenario, it would be exposing itself to a potential claim for breach of the implied covenant of good faith and fair dealing. *Dalton v. Educational Testing Service*, 87 N.Y. 2d 384, 389 (N.Y. 1995) (noting that where a "contract contemplates the exercise of discretion, [the implied covenant of good faith] includes a promise not to act arbitrarily or irrationally in exercising that discretion").

[23] While I recognize that "[i]t is reasonable to assume that the same words used in different parts of the instrument are used in the same sense," it is beyond dispute that the very same terms can have different meanings for purposes of a single agreement where "a different meaning is indicated" by the agreement itself. *Johnson v. Colter*, 297 N.Y.S. 345 (N.Y. App. Div. 4th Dept. 1937) (citation omitted). This is especially true in the context of agreements spanning hundreds of pages that cover varying topics. For example, the word "draw" might have a different meaning when used to refer to "drawing" on a letter of credit than when used in reference to "drawing" on different sources of information, "drawing" on a chalkboard, or having "drawn" on a revolving credit facility. Thus, I emphasize that I am not concluding that "draw" must *always* mean "fund" for purposes of the Credit and Disbursement Agreements. Instead, my conclusion is limited to the meaning of "fully drawn" for purposes of Section 2.1(c)(iii). However, I note that a review of other relevant provisions appears to buttress my conclusion that, in the context of Term Loans and Revolving Loans, "fully drawn" unambiguously means "fully funded." For example, Section 5.2(c), entitled "Drawdown Frequency," provides that Disbursement Agreement loans "shall be *made* no more frequently than once every calendar month." (emphasis added). Thus, this provision, which regulates the frequency of "drawdowns" vis-a-vis Revolving and Term Loans, indicates that a "drawdown" is the equivalent of "making" (i.e., funding) a Revolving or Delay Draw Term Loan, and not a "request" or "demand" for such a loan.

Line Loans in excess of $150,000,000 until: (a) the Delay Draw Term Loans were fully funded; or (b) the provisions of Section 2.1(c)(iii) were validly waived.

B. Breach of the Disbursement Agreement Against Bank of America – Count I of the Avenue Complaint and Count III of the Aurelius Complaint

In addition to the Credit Agreement claim discussed above, Plaintiffs have each asserted a contract claim against Bank of America for breach of the Disbursement Agreement. In order to state a claim for breach of contract under New York law,[24] a Plaintiff must adequately allege: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 893 N.Y.S. 2d 237, 239 (N.Y. App. Div. 2d Dept. 2010). Here, Defendant Bank of America does not dispute the existence of a contract, Plaintiffs' performance, or resulting damages. Instead, Bank of America argues that Plaintiffs have failed to adequately allege a breach of the Disbursement Agreement.

In considering Bank of America's argument, I start with Section 2.5.1 of the Disbursement Agreement, which requires Bank of America to issue a Stop Funding Notice "[i]n the event that [] the conditions precedent to an Advance have not been satisfied." The conditions precedent to an Advance are set forth in Section 3.3 of the Disbursement Agreement. One of the conditions set forth in Section 3.3 is that "[n]o Default or Event of Default shall have occurred and be continuing." (Disb. Agr. § 3.3.3). The term "Default" is specifically defined in the Disbursement Agreement as "(i) any of the events specified

[24] Like the Credit Agreement, the Disbursement Agreement also contains a New York choice-of-law clause. (Disb. Agr. § 11.6).

in Article 7 . . . and (ii) the occurrence of any 'Default' under any Facility Agreement." (Disb. Agr., Ex. A at 10). "Facility Agreement" is also specifically defined in the Agreement as "the Bank Credit Agreement, the Second Mortgage Indenture and the Retail Facility Agreement." *Id.* at 12.

In Paragraphs 129-132 of the Avenue Complaint and Paragraphs 103-111 of the Aurelius Complaint, Plaintiffs allege specific facts supporting the reasonable inference that Bank of America, as Disbursement Agent, received notice from a lender in Fall 2008 that Lehman Brothers defaulted under the Retail Facility Agreement and yet failed to issue a Stop Funding Notice. Defendant Bank of America does not dispute this. Instead, Bank of America argues that: (1) the claim is insufficient because the Plaintiffs' "fail[ed] to attach th[e] purported 'notice' or even identify the lender who sent the alleged communications"; and (2) pursuant to Section 9.3.2 of the Disbursement Agreement, Bank of America was "entitled to rely on certifications from [Fontainebleau] as to satisfaction of any requirements and/or conditions imposed by th[e] [Disbursement Agreement]." **[DE 35, pp. 10, 13]**. I reject Bank of America's first argument, for at the Rule 12(b)(6) stage, I must accept all of Plaintiffs' factual allegations in the complaints as true – i.e., Plaintiffs need not support their factual allegations with documentary evidence at this stage of the proceedings. *See Hill*, 321 F.3d at 1335. Bank of America's second argument also fails, as there are no allegations on the face of the operative complaints establishing that Fontainebleau "certif[ied]" that Lehman Brothers had not defaulted under the Retail Facility Agreement.[25]

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[25] At oral argument, I asked whether there is "anything that anyone could point to in the complaint one way or the other that refers to Fontainebleau affirmatively certifying that there was no default"; counsel for Bank of America was unable to reference any such allegation. **[MTD Hr'g Tr. 04:19 p.m.]**.

While it can certainly be inferred that such representations were made given that Fontainebleau submitted various Advance Requests subsequent to the Fall of 2008, inferences of this nature are not appropriately drawn at this stage. To the contrary, it is well-settled that I must evaluate all reasonable inferences *in favor of the Plaintiffs*. *Wilson v. Strong*, 156 F.3d 1131, 1133 (11th Cir. 1998). Because Plaintiffs' complaints adequately allege facts indicating that Bank of America knew of Lehman Brothers' default under the Retail Financing Agreement and failed to issue a Stop Funding Notice in violation of the Disbursement Agreement, Count III of the Aurelius Complaint and Count I of the Avenue Complaint will not be dismissed.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing Against Bank of America – Count III of the Avenue Complaint

Count III of the Avenue Complaint asserts that Bank of America breached the implied covenant of good faith and fair dealing when it "improperly approved Advance Requests, issued Advance Confirmation Notices, failed to issue Stop Funding Notices, [] caused the disbursement of funds from the Bank Proceeds Account; and [] fail[ed] to communicate information to the Term Lenders regarding Events of Default that were known o[r] should have been known to [Bank of America]." (Avenue Compl. at ¶ 192).

While it is well-settled that breach of the implied covenant of good faith gives rise to a stand-alone cause of action under New York law, *see Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275, 305 (S.D.N.Y. 1998) (noting that "[b]reach of the [good faith] covenant gives rise to a cognizable claim"), it is equally settled that "New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts,

is also pled." *Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 81 (2d Cir. 2002). In their opposition papers, the Avenue Plaintiffs acknowledge this rule, but contend that it does not apply because its implied covenant claim is predicated, in part, upon the factual allegation that Bank of America "failed to communicate information regarding defaults," while its Disbursement Agreement claim is not. **[DE 52]**. This argument is not a novel one, and has been roundly rejected by New York courts. *Alter v. Bogoricin*, No. 97-CV-0662, 1997 WL 691332, *1, *7-*8 (S.D.N.Y. Nov. 6, 1997) (rejecting similar argument, dismissing implied covenant claim, and noting that it has been observed that "every court faced with a complaint brought under New York law and alleging both breach of contract and breach of a covenant of good faith and fair dealing has dismissed the latter claim as duplicative").

The critical inquiry in this respect is not whether the two claims are founded upon identical facts, but whether the relief sought by Plaintiffs "is intrinsically tied to the damages allegedly resulting from [the] breach of contract." *Id.* (quoting *Canstar v. J.A. Jones Constr. Co.*, 622 N.Y.S. 2d 730, 731 (App. Div. 1st Dept. 1995)); *Deer Park Enterprises, LLC v. Ail Systems, Inc.*, 870 N.Y.S. 2d 89, 90 (N.Y. App. Div. 2d Dept. 2008). Because the relief sought by Avenue Plaintiffs in connection with their implied covenant claim against Bank of America is "intrinsically tied to the damages allegedly resulting from [the] breach of contract" alleged in Count I, this claim must be dismissed. *Deer Park Enterprises*, 870 N.Y.S. 2d at 90 (reversing lower court's denial of motion to dismiss and concluding that "[a] cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract' ") (quoting *Canstar*, 622 N.Y.S.

2d at 731).

D. <u>Breach of the Implied Covenant of Good Faith and Fair Dealing Against All Defendants – Count IV of the Avenue Complaint</u>

The final claim I must address is the Avenue Plaintiffs' claim against all Defendants for breach of the implied covenant of good faith and fair dealing in connection with the Credit Agreement. In support of this claim, the Avenue Plaintiffs allege that Defendants "breached the implied covenant [of good faith] by adopting a contrived construction of the Credit Agreement in order to justify their refusal to fund the March 2 Notice [of Borrowing] and the March 3 Notice [of Borrowing]." (Avenue Compl. at ¶ 198). Under New York law, claims for breach of the implied covenant of good faith are unsustainable as a matter of law if a plaintiff "seek[s] to imply an obligation of the defendants which [is] inconsistent with the terms of the contract" at issue. *Fitzgerald v. Hudson Nat'l Golf Club*, 783 N.Y.S. 2d 615, 617-18 (N.Y. App. Div. 2d Dept. 2004) (affirming dismissal of implied covenant claim where plaintiff sought to imply an obligation inconsistent with the terms of the contract); *see also Dalton v. Educational Testing Service*, 87 N.Y. 2d 384, 389 (N.Y. 1995). Because I have concluded that the purportedly "contrived construction" of "fully drawn" is, in fact, the correct interpretation, this claim fails as a matter of law, as it seeks to impose an obligation – i.e., a particular construction of the Credit Agreement's terms – that is inconsistent with the terms of the agreement.

V. Conclusion

Based on the foregoing, I conclude that – with the exception of Count I of the Avenue Complaint and Count III of the Aurelius Complaint – all claims asserted by the Plaintiffs warrant dismissal. The dismissal of these claims is *with prejudice* for two

reasons. First, the facts, circumstances, and applicable law indicate that any attempt to amend the dismissed claims would be futile; and second, Plaintiffs have failed to state a claim despite having previously amended their complaints.[26] *Novoneuron Inc. v. Addiction Research Institute, Inc.*, 326 Fed. Appx. 505, 507 (11th. Cir. 2009) (affirming dismissal with prejudice where Plaintiff amended as a matter of right and later decided to litigate the merits of Defendant's motion to dismiss rather than requesting leave to amend); *Butler v. Prison Health Services*, Inc., 294 Fed. Appx. 497, 500 (11th Cir. 2008) ("The district court . . . need not allow an amendment . . . where amendment would be futile.") (cites and quotes omitted).

______I note that I would normally be inclined to afford Plaintiffs an opportunity to amend their complaints to assert claims founded upon contractual promises of which they were the intended beneficiaries (e.g., promises set forth in the Intercreditor Agreement to which the parties alluded during oral argument). However, because the parties have indicated that the promises contained in the Intercreditor Agreement are not germane to this action, **[MTD Hr'g Tr. 3:26 p.m. - 3:28 p.m.]**, I see no reason to invite further amendments.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that:

1. Defendants' Motions to Dismiss **[DE 35]**; **[DE 36]** are GRANTED IN PART AND DENIED IN PART.
2. Counts I and II of the Aurelius Complaint are DISMISSED WITH PREJUDICE.

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[26] The Avenue Complaint was amended twice. The Aurelius Complaint was amended once.

3. Counts II, III, and IV of the Avenue Complaint are DISMISSED WITH PREJUDICE.

4. Count VI of the Avenue Complaint is DISMISSED WITHOUT PREJUDICE AS MOOT.

5. Defendant Bank of America shall Answer Paragraphs 1-178 and 201-203 of the Avenue Complaint **no later than Friday June 18, 2010**.

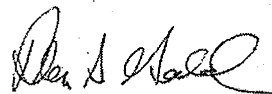
6. Defendant Bank of America shall Answer Paragraphs 1-131 and 146-153 of the Aurelius Complaint **no later than Friday June 18, 2010**.

7. **No later than Friday June 18, 2010**, the Avenue Plaintiffs shall file a Notice with this Court stating whether Count V of the Avenue Complaint seeks declaratory relief pursuant to state or federal law.

8. The Clerk is directed to send a copy of this Amended Order to the Clerk of the Judicial Panel on Multidistrict Litigation.

9. The Final Judgment previously issued in the Aurelius Action, *see* Case No.: 10-CV-20236, **[DE 53]** (S.D. Fla. May 28, 2010), is hereby VACATED.

DONE AND ORDERED IN CHAMBERS at Miami, Florida this 28th day of May, 2010.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Bandstra
Counsel of record

CIVIL COVER SHEET

A-11-637835-B

Clark County, Nevada

XI

Case No. ________________
(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): Brigade Leveraged Capital Structures Fund, Ltd., et al.	Defendant(s) (name/address/phone): Fontainebleau Resorts, LLC, et al.
Attorney (name/address/phone): Randolph Law Firm, P.C. Taylor L. Randolph, Esq., 2045 Village Center Circle, Suite 100, Las Vegas, NV 89134 702-877-1313	Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

Civil Cases

Real Property

- ☐ **Landlord/Tenant**
  - ☐ Unlawful Detainer
- ☐ **Title to Property**
  - ☐ Foreclosure
  - ☐ Liens
  - ☐ Quiet Title
  - ☐ Specific Performance
- ☐ **Condemnation/Eminent Domain**
- ☐ **Other Real Property**
  - ☐ Partition
  - ☐ Planning/Zoning

Torts

Negligence

- ☐ **Negligence – Auto**
- ☐ **Negligence – Medical/Dental**
- ☐ **Negligence – Premises Liability** (Slip/Fall)
- ☐ **Negligence – Other**

- ☐ **Product Liability**
  - ☐ Product Liability/Motor Vehicle
  - ☐ Other Torts/Product Liability
- ☐ **Intentional Misconduct**
  - ☐ Torts/Defamation (Libel/Slander)
  - ☐ Interfere with Contract Rights
- ☐ **Employment Torts** (Wrongful termination)
- ☐ **Other Torts**
  - ☐ Anti-trust
  - ☐ Fraud/Misrepresentation
  - ☐ Insurance
  - ☐ Legal Tort
  - ☐ Unfair Competition

Probate

Estimated Estate Value: ______

- ☐ **Summary Administration**
- ☐ **General Administration**
- ☐ **Special Administration**
- ☐ **Set Aside Estates**
- ☐ **Trust/Conservatorships**
  - ☐ Individual Trustee
  - ☐ Corporate Trustee
- ☐ **Other Probate**

Other Civil Filing Types

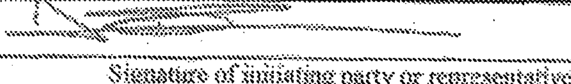
- ☐ **Construction Defect**
  - ☐ Chapter 40
  - ☐ General
- ☐ **Breach of Contract**
  - ☐ Building & Construction
  - ☐ Insurance Carrier
  - ☐ Commercial Instrument
  - ☐ Other Contracts/Acct/Judgment
  - ☐ Collection of Actions
  - ☐ Employment Contract
  - ☐ Guarantee
  - ☐ Sale Contract
  - ☐ Uniform Commercial Code
- ☐ **Civil Petition for Judicial Review**
  - ☐ Foreclosure Mediation
  - ☐ Other Administrative Law
  - ☐ Department of Motor Vehicles
  - ☐ Worker's Compensation Appeal

- ☐ **Appeal from Lower Court** *(also check applicable civil case box)*
  - ☐ Transfer from Justice Court
  - ☐ Justice Court Civil Appeal
- ☐ **Civil Writ**
  - ☐ Other Special Proceeding
- ☐ **Other Civil Filing**
  - ☐ Compromise of Minor's Claim
  - ☐ Conversion of Property
  - ☐ Damage to Property
  - ☐ Employment Security
  - ☐ Enforcement of Judgment
  - ☐ Foreign Judgment – Civil
  - ☐ Other Personal Property
  - ☐ Recovery of Property
  - ☐ Stockholder Suit
  - ☐ Other Civil Matters

III. Business Court Requested (Please check applicable category; *for Clark or Washoe Counties only.*)

- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 90)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art. 8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademarks (NRS 600A)
- ☐ Enhanced Case Mgmt/Business
- ☒ Other Business Court Matters

3/28/11
Date


Signature of initiating party or representative

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Attorney for Plaintiffs

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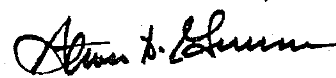

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.; BATTALION CLO 2007-I LTD.; CANPARTNERS INVESTMENTS IV, LLC; CANYON SPECIAL OPPORTUNITIES MASTER FUND (CAYMAN), LTD.; CASPIAN CORPORATE LOAN FUND, LLC; CASPIAN CAPITAL PARTNERS, L.P.; CASPIAN SELECT CREDIT MASTER FUND, LTD.; MARINER LDC; CASPIAN ALPHA LONG CREDIT FUND, L.P.; CASPIAN SOLITUDE MASTER FUND, L.P.; OLYMPIC CLO I LTD.; SHASTA CLO I LTD.; WHITNEY CLO I LTD.; SAN GABRIEL CLO I LTD.; SIERRA CLO II LTD.; ING PRIME RATE TRUST; ING SENIOR INCOME FUND; ING INTERNATIONAL (II) - SENIOR LOANS; ING INVESTMENT MANAGEMENT CLO I, LTD.; ING INVESTMENT MANAGEMENT CLO II, LTD.; ING INVESTMENT MANAGEMENT CLO III, LTD.; ING INVESTMENT MANAGEMENT CLO IV, LTD.; ING INVESTMENT MANAGEMENT CLO V, LTD.; PHOENIX CLO I, LTD.; PHOENIX CLO II, LTD.; PHOENIX CLO III, LTD.; VENTURE II CDO 2002 LIMITED; VENTURE III CDO LIMITED; VENTURE IV CDO LIMITED; VENTURE V CDO LIMITED; VENTURE VI CDO LIMITED; VENTURE VII CDO LIMITED; VENTURE VIII CDO LIMITED; VENTURE IX CDO LIMITED; VISTA LEVERAGED INCOME FUND; VEER CASH FLOW, CLO, LIMITED; MONARCH MASTER FUNDING LTD.; NORMANDY HILL MASTER FUND, L.P.; GENESIS CLO 2007-1 LTD.; SCOGGIN CAPITAL MANAGEMENT II

Case No. A-11-637835-B

Dept, No. XI

COMPLAINT AND JURY DEMAND FOR FRAUD, BREACH OF FIDUCIARY DUTY, NEGLIGENCE AND CONSPIRACY

BUSINESS COURT REQUESTED

1 LLC; SCOGGIN INTERNATIONAL FUND LTD; SCOGGIN WORLDWIDE FUND LTD; SPCP
2 GROUP, LLC; SOLA LTD; SOLUS CORE OPPORTUNITIES MASTER FUND LTD.;
3 STONE LION PORTFOLIO L.P.; VENOR CAPITAL MASTER FUND, LTD.,
4
Plaintiffs,
5
vs.
6
FONTAINEBLEAU RESORTS, LLC;
7 TURNBERRY LTD.; TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P.;
8 TURNBERRY WEST CONSTRUCTION, INC.; JEFFREY SOFFER; ANDREW KOTITE; RAY
9 PARELLO; BRUCE WEINER; GLENN SCHAEFFER; JAMES FREEMAN; DEVEN
10 KUMAR; HOWARD KARAWAN; WHITNEY THIER; UNION LABOR LIFE INSURANCE
11 COMPANY; CROWN LIMITED; CROWN SERVICES (US) LLC; JAMES PACKER; and
12 DOES 1 through 20,
13 Defendants.
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COMPLAINT FOR MISREPRESENTATION, BREACH OF FIDUCIARY DUTY, NEGLIGENCE AND CONSPIRACY

Plaintiffs, by and through their undersigned counsel, allege upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters, as follows:

I. INTRODUCTION

1. This action seeks to recover for the misrepresentations, negligence and breaches of fiduciary duties committed by Defendants on Plaintiffs and their predecessors-in-interest ("Plaintiffs").

2. Plaintiffs are lenders under a June 6, 2007 Credit Agreement (the "Credit Agreement") for the development and construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada (the "Project"). The Project was to include a sixty-three story glass skyscraper featuring over 3,800 guest rooms, suites and condominium units; a 100-foot high, three level podium complex housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater and rooftop pools; a 353,000 square-foot convention center; a high-end retail space including shops and restaurants; and a nightclub.

3. The borrowers under the Credit Agreement were Fontainebleau Las Vegas, LLC ("FBLV") and Fontainebleau Las Vegas II, LLC (the "Borrowers"). The Borrowers were wholly-owned indirect subsidiaries of Defendant Fontainebleau Resorts, LLC ("FBR"), a company founded and substantially owned by Defendant Jeffrey Soffer to develop and operate the Fontainebleau hotels in Miami and Las Vegas. Soffer, FBR and the other individual Defendants who were officers, directors and/or managers of FBR and FBLV (collectively, the "FBR Defendants") directed and controlled the activities of the Borrowers.

4. The general contractor responsible for the construction of the Project was Defendant Turnberry West Construction ("TWC"), an affiliate of Defendant Turnberry Residential Limited Partners, L.P. ("TRLP"). TWC and TRLP were also founded and substantially owned by Soffer and controlled by Soffer, the FBR Defendants and the officers and the individual Defendants who were officers, directors and/or managers of TWC and TRLP (the "Turnberry Defendants").

5. Beginning in March 2007, Soffer and the FBR Defendants solicited Plaintiffs to

1 participate in the Credit Agreement. In various oral and written communications, Soffer and the FBR
2 Defendants repeatedly misrepresented the status of the Project and its anticipated costs. In particular,
3 Defendants represented that the Project budget provided to the lenders, including Plaintiffs,
4 accurately represented all of the anticipated costs to complete the Project, that the construction
5 drawings for the Project were substantially complete, and that Defendants had committed
6 construction contracts in hand for the majority of the work to complete the Project. In fact, none of
7 this was true. As Defendants knew but failed to disclose, their own internal budget for the Project
8 was nearly $100 million more than what was reflected in the budgets provided to the Plaintiffs, the
9 construction drawings were not substantially complete (indeed were never complete), and that the
10 "committed contracts" provided to the Plaintiffs substantially understated the known costs for the
11 work. Had Plaintiffs known the true facts, they would not have agreed to participate in the Credit
12 Agreement.

13 6. Defendants' breaches of their duties to Plaintiffs continued after the Credit Agreement
14 closed. Defendants had a duty to exercise reasonable care to ensure that the Project was managed
15 competently, that it accurately reported the financial condition and progress of construction and that
16 the Project was completed in accordance with the budgets and cost reports provided to Plaintiffs.
17 Defendants did not do so. Instead, Defendants failed to oversee the Project and failed to ensure that
18 lenders received accurate information about its financial condition.

19 7. By 2008, Defendants knew or should have known that the actual cost to complete the
20 Project had escalated by hundreds of millions of dollars, well in excess of the financing available to
21 complete the Project. As Defendants knew, these cost overruns caused numerous conditions
22 precedent to disbursement of funds under the Credit Agreement to fail. Rather than apprise the
23 lenders of these cost overruns and thereby eliminate future funding, the FBR and Turnberry
24 Defendants and others, including defendants James Packer and his companies Crown Limited and
25 Crown Services (US) LLC (the "Packer Defendants"), conspired and agreed to keep this information
26 from the lenders. They accomplished this, in part, through false certifications to the lenders and an
27 elaborate set of double books that hid the true progress, scope and cost of the Project from the
28 lenders.

1 8. When Lehman Brothers Holdings, Inc. ("Lehman"), the biggest lender under the
2 Retail Facility, filed for bankruptcy in September 2008, the FBR and Turnberry Defendants further
3 conspired with each other and with Union Labor Life Insurance Company ("ULLICO") to have
4 ULLICO front Defendants' payment of Lehman's portion of draw requests under the Retail Facility
5 in order to create the false impression that an existing, institutional lender had or would be willing to
6 step in to take over Lehman's commitment. As Defendants knew, such payments by Defendants
7 caused additional conditions precedent to disbursement of funds under the Credit Agreement to fail.
8 Again, had the true facts been disclosed to the lenders, financing under the Credit Agreement would
9 have come to a halt.

10 9. Defendants committed these acts and engaged in these conspiracies at a time when the
11 Borrowers were insolvent and thus when their controlling entities, officers and directors owed
12 fiduciary duties to the creditors of the Borrowers, including Plaintiffs. In reliance on Defendants'
13 misrepresentations, Plaintiffs funded hundreds of millions of dollars of Loans that they would not
14 have funded, and would not have been required to fund, had they known the true facts.

15 10. In early 2009, Defendants' scheme began to unravel. In April 2009, certain of the
16 lenders declared a default under the Credit Agreement, and the Borrowers filed for bankruptcy
17 protection shortly thereafter.

18 11. Plaintiffs bring this action to recover the damages they have incurred as a result of
19 Defendants' misrepresentations and breaches of fiduciary duties.

20 **II. JURISDICTION AND VENUE**

21 12. Jurisdiction is proper in this court because it is a case that is excluded by law from the
22 original jurisdiction of justices' courts. Nev. Const. Art. 6, § 6. The amount in controversy exceeds
23 $10,000, the jurisdictional threshold for District Court. Nev. Rev. Stat. Ann. § 4.370.

24 13. Venue is proper because at least one of the defendants resides in this county. Nev.
25 Rev. Stat. Ann. § 13.040.

26 **III. PARTIES**

27 **A. Plaintiffs**

28 14. Unless otherwise noted, the term "Plaintiff" and "Plaintiffs" shall include Plaintiffs'

1 predecessors in interest.

2 15. Plaintiff Brigade Leveraged Capital Structures Fund, Ltd. is an exempted company
3 with limited liability incorporated under the laws of the Cayman Islands.

4 16. Plaintiff Battalion CLO 2007-I Ltd. is an exempted company with limited liability
5 incorporated under the laws of the Cayman Islands.

6 17. Plaintiff Canpartners Investments IV, LLC is a limited liability company formed
7 under the laws of California.

8 18. Plaintiff Canyon Special Opportunities Master Fund (Cayman), Ltd. is an exempted
9 company with limited liability incorporated under the laws of the Cayman Islands.

10 19. Plaintiff Caspian Corporate Loan Fund, LLC is a limited liability company formed
11 under the laws of Delaware.

12 20. Plaintiff Caspian Capital Partners, L.P. is a limited partnership formed under the laws
13 of Delaware.

14 21. Plaintiff Caspian Select Credit Master Fund, Ltd. is a company with limited liability
15 formed under the laws of the Cayman Islands.

16 22. Plaintiff Mariner LDC is company with limited duration formed under the laws of the
17 Cayman Islands.

18 23. Plaintiff Caspian Alpha Long Credit Fund, L.P. is a limited partnership formed under
19 the laws of Delaware.

20 24. Plaintiff Caspian Solitude Master Fund, L.P. is a limited partnership formed under the
21 laws of Delaware.

22 25. Plaintiff Olympic CLO I Ltd. is a company with limited liability incorporated under
23 the laws of the Cayman Islands.

24 26. Plaintiff Shasta CLO I Ltd. is a company with limited liability incorporated under the
25 laws of the Cayman Islands.

26 27. Plaintiff Whitney CLO I Ltd. is a company with limited liability incorporated under
27 the laws of the Cayman Islands.

28 28. Plaintiff San Gabriel CLO I Ltd. is a company with limited liability incorporated

1 under the laws of the Cayman Islands.

2 29. Plaintiff Sierra CLO II Ltd. is a company with limited liability incorporated under the

3 laws of the Cayman Islands.

4 30. Plaintiff ING Prime Rate Trust is a business trust formed under the laws of

5 Massachusetts.

6 31. Plaintiff ING Senior Income Fund is a statutory trust formed under the laws of

7 Delaware.

8 32. Plaintiff ING International (II) - Senior Loans is a SICAV (Société d'Investissement à

9 Capital Variable) formed under the laws of Luxembourg.

10 33. Plaintiff ING Investment Management CLO I, Ltd. is a company with limited liability

11 incorporated under the laws of the Cayman Islands.

12 34. Plaintiff ING Investment Management CLO II, Ltd. is a company with limited

13 liability incorporated under the laws of the Cayman Islands.

14 35. Plaintiff ING Investment Management CLO III, Ltd. is a company with limited

15 liability incorporated under the laws of the Cayman Islands.

16 36. Plaintiff ING Investment Management CLO IV, Ltd. is a company with limited

17 liability incorporated under the laws of the Cayman Islands.

18 37. Plaintiff ING Investment Management CLO V, Ltd. is a company with limited

19 liability incorporated under the laws of the Cayman Islands.

20 38. Plaintiff Phoenix CLO I, Ltd. is a company with limited liability incorporated under

21 the laws of the Cayman Islands.

22 39. Plaintiff Phoenix CLO II, Ltd. is a company with limited liability incorporated under

23 the laws of the Cayman Islands.

24 40. Plaintiff Phoenix CLO III, Ltd. is a company with limited liability incorporated under

25 the laws of the Cayman Islands.

26 41. Plaintiff Venture II CDO 2002 Limited is a company with limited liability

27 incorporated under the laws of the Cayman Islands.

28 42. Plaintiff Venture III CDO Limited is a company with limited liability incorporated

1 under the laws of the Cayman Islands.

2 43. Plaintiff Venture IV CDO Limited is a company with limited liability incorporated
3 under the laws of the Cayman Islands.

4 44. Plaintiff Venture V CDO Limited is a company with limited liability incorporated
5 under the laws of the Cayman Islands.

6 45. Plaintiff Venture VI CDO Limited is a company with limited liability incorporated
7 under the laws of the Cayman Islands.

8 46. Plaintiff Venture VII CDO Limited is a company with limited liability incorporated
9 under the laws of the Cayman Islands.

10 47. Plaintiff Venture VIII CDO Limited is a company with limited liability incorporated
11 under the laws of the Cayman Islands.

12 48. Plaintiff Venture IX CDO Limited is a company with limited liability incorporated
13 under the laws of the Cayman Islands.

14 49. Plaintiff Vista Leveraged Income Fund is a company with limited liability
15 incorporated under the laws of the Cayman Islands.

16 50. Plaintiff Veer Cash Flow, CLO, Limited is a company with limited liability
17 incorporated under the laws of the Cayman Islands.

18 51. Plaintiff Monarch Master Funding Ltd. is a company with limited liability
19 incorporated under the laws of the Cayman Islands.

20 52. Plaintiff Normandy Hill Master Fund, L.P. is an exempted limited partnership formed
21 under the laws of the Cayman Islands.

22 53. Plaintiff Genesis CLO 2007-1 Ltd. is a company with limited liability incorporated
23 under the laws of the Cayman Islands.

24 54. Plaintiff Scoggin Capital Management II LLC is a limited liability company formed
25 under the laws of Delaware.

26 55. Plaintiff Scoggin International Fund Ltd is a limited liability company formed under
27 the laws of the Cayman Islands.

28 56. Plaintiff Scoggin Worldwide Fund Ltd is a limited liability company formed under the

1 laws of the Cayman Islands.

2 57. Plaintiff SPCP Group, LLC is a limited liability company formed under the laws of
3 Delaware.

4 58. Plaintiff Sola Ltd is an exempted company with limited liability incorporated under
5 the laws of the Cayman Islands.

6 59. Plaintiff Solus Core Opportunities Master Fund Ltd. is an exempted company with
7 limited liability incorporated under the laws of the Cayman Islands.

8 60. Stone Lion Portfolio L.P. is a limited partnership formed under the laws of the
9 Cayman Islands.

10 61. Plaintiff Venor Capital Master Fund, Ltd. is a company with limited liability
11 incorporated under the laws of the Cayman Islands.

12 **B. Defendants**

13 62. Defendant Fontainebleau Resorts, LLC ("FBR") is a Delaware corporation with its
14 principal place of business in Florida.

15 63. Defendant Turnberry Residential Limited Partner, L.P. ("TRLP") is a Delaware
16 limited partnership.

17 64. Defendant Turnberry West Construction, Inc. ("TWC") is a Nevada corporation.

18 65. Defendant Turnberry Ltd. is a Florida limited partnership.

19 66. Defendant Jeffrey Soffer is a citizen of the State of Florida. Soffer was, at all relevant
20 times, the Chairman and CEO of FBR and a member of its Board of Managers. Soffer is also one of
21 two members of the Board of Directors of Fontainebleau Las Vegas Corp. Soffer owns or controls
22 the Turnberry companies. He was, at all relevant times, President, Treasurer, Secretary and Director
23 of TWC. Soffer is the manager of the general partner of both TRLP and Turnberry Ltd.

24 67. Defendant Albert Kotite is a citizen of the State of Florida. Kotite is the Executive
25 Director of FBR and a member of its Board of Managers. Kotite is also one of two members of the
26 Board of Directors of Fontainebleau Las Vegas Corp.

27 68. Defendant Ray Parello is a citizen of the State of Florida. Parello is a member of the
28 Board of Managers of FBR. Parello currently serves as Director of Finance for Turnberry

1 Associates.

2 69. Defendant Bruce Weiner is a citizen of the State of Florida. Weiner is a member of
3 the Board of Managers of FBR.

4 70. Defendant Glenn Schaeffer is a citizen of the State of Nevada. Schaeffer was a
5 member of its Board of Managers of FBR until May 2009.

6 71. Defendant James Freeman is a citizen of the State of Nevada. Freeman was the Senior
7 Vice President and Chief Financial Officer or FBR.

8 72. Defendant Deven Kumar is a citizen of Nevada. Kumar was the Senior Vice President
9 of Development and Finance at FBR.

10 73. Defendant Howard Karawan is a citizen of the State of Nevada. Karawan was the
11 Chief Operating Officer of FBR and was later Chief Restructuring Office of FBLV.

12 74. Defendant Whitney Thier is a citizen of the State of Nevada. Thier was the general
13 counsel of FBR and later counsel to FBLV.

14 75. Defendants FBR, Soffer, Kotite, Parello, Weiner, Schaeffer, Freeman, Kumar,
15 Karawan and Thier are collectively referred to as the FBR Defendants.

16 76. Defendant Union Labor Life Insurance Company ("ULLICO") is a Maryland
17 Corporation, headquartered in Washington, DC.

18 77. Defendant Crown Limited ("Crown") is an Australian company.

19 78. Defendant Crown Services (US) LLC ("Crown Services") is a limited liability
20 company formed under the laws of Nevada. Defendant Crown controls Crown Services.

21 79. Defendant James Packer ("Packer") is a citizen of Australia. Packer is the Executive
22 Chairman of Crown and owns a controlling interest in Crown. Defendants Crown, Crown Services
23 and Packer are collectively referred to as the "Packer Defendants".

24 80. Each of the Defendants has directly or indirectly conducted substantial, continuous,
25 and systematic business in this district, and/or has caused or directed acts to occur in this district out
26 of which Plaintiffs' claims arise. The individual defendants personally participated in the unlawful
27 acts and misconduct asserted herein.

28 81. Plaintiffs are ignorant of the true names and capacities of Doe Defendants 1 through

1 25, inclusive, and therefore sue such defendants by such fictitious names. The Plaintiffs will amend
2 this Complaint to allege their true names and capacities when ascertained. Each of the fictitiously
3 named defendants is responsible in some manner for the occurrences herein alleged, and the
4 Plaintiffs' harm and damages as herein alleged was proximately caused by such defendants. Each of
5 the Doe Defendants is a joint venturer, co-conspirator, and/or participant in the violations and
6 unlawful and tortious actions alleged herein.
7 82. Each of the Defendants acted as the agent, co-conspirator and co-venture partner
8 and/or alter ego of each other Defendant in the furtherance of the joint venture, and each shared in the
9 control and management of the conspiracy alleged herein and in furtherance of the joint venture in a
10 common course of conduct alleged herein. Each Defendant was a direct, necessary and substantial
11 participant in the common enterprise and common course of conduct complained of herein and at all
12 relevant times knew (or was deliberately reckless in not knowing) of its overall contribution to, and
13 furtherance of, their illicit common enterprise, and acted within the scope of its agency as a co-
14 venturer. Each Defendant mutually agreed with every other Defendant on an objective, purpose and
15 course of action to accomplish the wrongful conduct set forth herein, with the intent of injuring
16 Plaintiffs, or with reckless disregard toward Plaintiffs, knowing that such injuries would certainly
17 result.
18 **IV. THE FONTAINEBLEAU PROJECT AND ENTITIES**
19 83. Defendant Soffer is the son of Donald Soffer, a prominent real estate developer who
20 developed, among other projects, the City of Aventura, Florida. In 2005, Soffer and his partners
21 purchased the iconic Fontainebleau Miami Hotel. Soffer conceived of The Fontainebleau Resort and
22 Casino in Las Vegas, Nevada as the first step in the development of upscale Fontainebleau resorts
23 throughout the world.
24 84. The Project was designed to be a destination casino-resort on the north end of the Las
25 Vegas Strip, situated on approximately 24.4 acres. It was to include a 63-story glass skyscraper
26 featuring over 3,800 guest rooms, suites and condominium units; a 100-foot high three-level podium
27 complex housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment
28 theater and rooftop pools; a parking garage with space for more than 6,000 vehicles; and a 353,000

1 square-foot convention center. The Project also was to include approximately 286,500 square-feet of
2 retail space, including retail shops, restaurants, and a nightclub.

3 85. Soffer and Defendant Schaeffer founded FBR in 2005 to develop and operate the
4 Fontainebleau hotels in Miami and Las Vegas. FBR was controlled by a Board of Managers
5 consisting of Defendants Soffer, Schaeffer, Kotite, Parello and Weiner (the "FBR Board of
6 Managers"). The officers of FBR included Defendants Soffer, Freeman, Karawan, Kumar and Thier
7 (the "FBR Ds & Os" and, collectively with FBR and the FBR Board of Managers, the "FBR
8 Defendants").

9 86. FBR created several subsidiaries to develop the Project, including the Borrowers,
10 Fontainebleau Las Vegas Capital Corp. and Fontainebleau Las Vegas Holdings, LLC (the "Project
11 Entities"). Each of the Project Entities was wholly owned, directly or indirectly, by FBR and largely
12 controlled by the FBR Board of Managers. The board of directors of Fontainebleau Las Vegas
13 Capital Corp. consisted of Soffer and Kotite.

14 87. The general contractor for the Project was Defendant Turnberry West Construction
15 ("TWC"). TWC (collectively with TRLP and Turnberry Ltd., the "Turnberry Defendants") is an
16 affiliate of Defendants TRLP and Turnberry Ltd., and was created for the purpose of overseeing the
17 construction of the Project.

18 88. Through his position on the Board of Managers and in the Turnberry Defendants, as
19 well as his ownership interests in the Fontainebleau and Turnberry entities, Soffer personally
20 exercised substantial control over the Project, including decisions regarding Project development,
21 financing and construction.

22 **V. THE CREDIT AGREEMENT FACILITY**

23 89. The Project costs were funded primarily from cash provided by the developers of the
24 Project and the proceeds of three facilities: a $1.85 billion bank financing (the "Credit Agreement
25 Facility"), a $675 million 2nd Mortgage Note offering, and a $315 million facility to finance
26 construction of the retail portion of the Project (the "Retail Facility"). Each of these facilities closed
27 in June 2007.

28 90. The Credit Agreement included the following commitments: a $700 million initial

1 term loan facility (the "Initial Term Loan Facility"); a $350 million delay draw term facility (the
2 "Delay Draw Facility," and together with the Initial Term Loan Facility, the "Term Loan Facility");
3 and an $800 million revolving loan facility. Plaintiffs are each lenders under the Term Loan Facility
4 and are assignees (direct or indirect) of the original Term Lender, Bank of America, N.A. The Initial
5 Term Loan Facility was funded upon the closing of the Credit Agreement in June 2007.

6 91. The Credit Agreement and other loan documents created a two-step mechanism for
7 the Borrowers to obtain access to loan proceeds for the payment of "Project Costs" to construct the
8 Project. The Borrowers first were required to submit to the Administrative Agent a Notice of
9 Borrowing specifying the requested loans and designated borrowing date. A proper Notice of
10 Borrowing obligated the lenders to transfer the requested funds into a Bank Proceeds Account. In
11 order to access the funds in the Bank Proceeds Account to pay for the costs of the Project, the
12 Borrowers were required to submit an Advance Request to the Disbursement Agent pursuant to the
13 terms of a Master Disbursement Agreement, which was executed concurrently with the Credit
14 Agreement.

15 92. Each Advance Request was required to contain, among other things, certifications by
16 the Project Entities, TWC, and others attesting to the accuracy of various information and
17 representations, including: that there was no Default or Event of Default under any of the Financing
18 Agreements; that the Remaining Cost Report set forth all "reasonably anticipated Project Costs
19 required to" complete the Project; that the In Balance Test was satisfied, the critical calculation to
20 determine whether the Borrowers' available resources exceeded the remaining costs to complete the
21 Project, which was the primary security for the loans; that there had been no development or event
22 since the Closing Date that could reasonably be expected to have a Material Adverse Effect on the
23 Project; and that each of the Retail Lenders, including Lehman, had made all advances required of
24 them under the Retail Facility.

25 **VI. DEFENDANTS' PRE-CLOSING MISREPRESENTATIONS AND OMISSIONS**

26 93. In March 2007, Soffer and the other FBR Defendants approached Plaintiffs and their
27 predecessor lenders to secure their participation in the Credit Agreement Facility. In connection with
28 these efforts, Defendants repeatedly represented that (i) the Project budget provided to the lenders

1 was an accurate, good faith and conservative estimate of the amounts needed to complete the Project,
2 including all Project costs, and that the budget allowed for a financial cushion sufficient to complete
3 the Project even if debt and equity sources were insufficient; (ii) the Project Entities had "committed
4 construction contracts" for a large percentage of the work for the Project; and (iii) the construction
5 drawings for the Project, the documents that would define every aspect of the construction, were
6 substantially complete. Without the representations and assurances provided by the FBR Defendants,
7 Plaintiffs and their predecessor lenders never would have agreed to participate in the Credit
8 Agreement Facility.

9 94. Defendants knew or should have known that these representations were not true. The
10 FBR Defendants' made these representations both orally and in writing, including in the following
11 written materials provided to prospective lenders, including Plaintiffs (collectively, the "Offering
12 Materials"):

13 - March 2007 Offering Memorandum. FBR and its arranging banks prepared and
14 provided to potential lenders, including Plaintiffs, a Confidential Offering
15 Memorandum outlining the material facts concerning the Project and related
16 financings. The Offering Memorandum included a letter from FBR, signed by its
17 Senior Vice President and Chief Financial Officer, Jim Freeman, stating in pertinent
18 part that "the information contained in the Confidential Offering Memorandum does
19 not contain any untrue statement of material fact or omit to state a material fact
20 necessary in order to make the statements contained therein, in light of the
21 circumstances under which they were made as part of the overall transaction, not
22 materially misleading."
23 - March 6, 2007 Lender Presentation. On March 6, 2007, FBR and its arranging banks
24 held a Prospective Lenders Meeting at the Intercontinental The Barclay Hotel in New
25 York. The meeting was attended by, among others, Defendants Soffer, Schaeffer,
26 Kotite, Freeman and Weiner. During that meeting, Defendants described the Project
27 and the proposed financing to prospective lenders and provided a written Lender
28 Presentation to meeting participants.

1 95. Defendants knew or should have known that these representations were not true.

2 **A. Defendants Misrepresented that the Budget for the Project Was Sufficient to Complete Construction**

3 96. In the Offering Materials, the FBR Defendants presented a budget for the hard and
4 soft costs to construct the Project of $1.829 billion (the "Construction Budget"). Defendant Freeman
5 presented the Construction Budget at the Lender Meeting. FBR and Freeman represented that the
6 Construction Budget was sufficient to cover all anticipated construction costs, excluding the retail
7 components. FBR explained in the Offering Memorandum that the Construction Budget was the
8 product of "a detailed budgeting and design process" and represented that it was "conservative," with
9 substantial allowance for contingencies.

10 97. At the closing of the Credit Agreement Facility, the FBR Defendants caused FBLV to
11 deliver budgets, including the Construction Budget, to Plaintiffs and the other lenders. FBLV, as
12 directed by Defendants, repeatedly attested to the accuracy of these Budgets, including in the
13 Disbursement Agreement executed by FBLV, among others. Thus, Recital C of the Disbursement
14 Agreement states that the "Construction Budget includes the costs of all elements of the Project,"
15 with certain limited enumerated exceptions. The Disbursement Agreement further provides:

16 Each of the Budgets delivered on the Closing Date:

17 (a) are, to the Project Entities' [including FBLV's] knowledge, as of the date of their
18 delivery, based on reasonable assumptions as to all legal and factual matters material to the estimates set forth therein;

19 (b) are, as of the date of their delivery, consistent with the provisions of the Operative
20 Documents in all material respects;

21 (c) set forth (for each Line Item Category, and in total), as of the date of their delivery, the
22 amount of all reasonably anticipated Project Costs required to achieve Final Completion; and

23 (d) fairly represent, as of the date of their delivery, the Project Entities expectations as to the matters covered thereby.

24 Disbursement Agreement, § 4.17.1.

25 98. The FBR Defendants also caused FBLV to deliver at closing a Remaining Cost Report
26 based upon the Construction Budget. The Remaining Cost Report, as defined in the Credit
27 Agreement and Disbursement Agreement, set forth, line by line, the anticipated budgets for the
28 construction of the Project. The Remaining Costs set forth in this Report provide a key input into the

1 "In Balance Test."

2 99. The In Balance Test measures whether the Available Funds for the project exceed the
3 Remaining Costs. In other words, the In Balance Test establishes whether there are sufficient funds,
4 from cash on hand and funds available from the various loan facilities, to complete the Project. The
5 higher the anticipated costs to complete, as reflected in the Remaining Cost Report, the more cash or
6 financing would be needed to ensure that the In Balance Test did not fail. Thus, the Remaining Cost
7 Report was a crucial document that allowed lenders, including the Plaintiffs, to assess the financial
8 viability and progress of the Project. A failure of the In Balance Test meant that the Lenders'
9 primary source of security was impaired. Accordingly, satisfying the In Balance Test was a
10 condition precedent to Closing and to any Advances under the Disbursement Agreement.

11 100. At Closing and at the direction of the FBR Defendants, FBLV attested to the accuracy
12 of the Remaining Cost Report. Among other things, FBLV represented that:

13 • the budget line items included "for each Line Item Category, an amount no less than
14 the total anticipated Project Costs from the commencement through the completion of
15 the work contemplated by such Line Item Category, as determined by the Project
16 Entities";
17 • the other line items included "the associated anticipated expenses though Final
18 Completion as determined by the Project Entities";
19 • the listing of costs previously incurred "is true and accurate in all material respects";
20 and
21 • the Construction Budget portion of the Remaining Cost Report "sets forth, as of the
22 date of their delivery, and based on reasonable assumptions as to all legal and factual
23 matters material to the estimates set forth therein, the amount of all reasonably
24 anticipated Project Costs required to achieve Final Completion."

25 Disbursement Agreement, § 4.17.2.

26 101. Further, upon Closing, FBLV, at the direction of the FBR Defendants, submitted the
27 Project Entity Closing Certificate, which included similar representations, including:

28 • all of the representations FBLV had made in the financing documents, including the

Credit Agreement and the Disbursement Agreement, were true;

- "The Project Entities have made available to the Construction Consultant true, correct and complete copies of" documents including the Budgets and Plans and that "[s]uch documents contain all material information (and do not contain any misstatements of material information) pertaining to the Project reasonably necessary for the Construction Consultant" to evaluate the project and prepare its own closing certificate;
- the Remaining Cost Report and other cost reports submitted by FBLV on Closing "accurately reflect the status of the Project as of that date"; and
- "the In Balance Test is satisfied."

102. Soffer and the other FBR Defendants were responsible for ensuring that these representations were accurate and that there had been no change in the economic feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project entities, any of which could reasonably be expected to have a material adverse effect on the Project. They did not do so.

103. The FBR Defendants knew or should have known, but failed to disclose to the Lenders, that the representations on Closing were false. Internal cost estimates available to the FBR Defendants, including those set forth in a report FBR commissioned from Cummins LLC in late 2006, showed that the actual costs needed to construct the Project were at least $100 million higher than the budgets provided to the Lenders. The FBR Defendants internally referred to the budget provided to the Lenders as the "Bank Budget" and the actual, higher budget that they hid from the Lenders as "Jeff's Budget," "Soffer's Budget," or the "Real Budget."

104. Soffer told the other FBR Defendants and the Turnberry Defendants that he intended to raise additional equity at some point in the future to cover the anticipated $100 million shortfall. He said that he wanted to wait to do so, however, because he believed that it would be easier and less dilutive of his own equity to raise funds after the financing deal had closed and substantial construction on the Project had been completed.

105. Had the true costs of the Project been reflected in the Remaining Cost Report and the

1 In Balance Test, the Project would have been out of balance as of the Closing Date, and the Credit
2 Facility would not have closed.

3 **B. Defendants Misrepresented that the Construction Drawings for the Project Were Substantially Complete.**

4

5 106. In the Offering Materials and at the Lender Meeting, Soffer and the other FBR
6 Defendants also made specific representations about the status of the construction drawings for the
7 Project. Construction drawings are architectural drawings that are used by the contractors to define
8 the work to be done. The drawings typically include renderings of all aspects of the project,
9 including mechanical, structural, electrical, and interior design elements. Construction drawings are
10 used, among other things, to obtain permits and other approvals. Because they define what will
11 actually be built, completed construction drawings is a critical step in the project budgeting and
12 development process. Construction drawings allow contractors to understand exactly what they will
13 be required to do and so ensure that the construction bids and contracts finalized on the basis of the
14 drawings are accurate and complete, which in turn reduces the likelihood of additional, unanticipated
15 costs. As Defendants knew, representing that the construction drawings were substantially complete
16 would give prospective lenders like Plaintiffs further comfort that the Project was well planned and
17 would stay on budget and on schedule.

18 107. The Offering Memorandum represented the construction drawings for the project as
19 substantially complete:

20 > Construction Drawings ("CDs") at the Fontainebleau Las Vegas are substantially complete with 80% CDs for tower and garage/convention issued on February 1, 2007. 100% CDs for the tower are expected
21 > March 12, 2007. 100% CDs for garage/convention are expected April 4, 2007 and 80% CDs for the podium are expected in April/May 2007.

22

23 108. At the March 6, 2007 lender presentation, Soffer and his team again represented that
24 the construction drawings were "substantially complete," with 80-100% of the drawings to be
25 completed before closing. A "Transaction Update" issued April 18, 2007 confirmed that
26 "Construction Drawings ("CDs")" were "substantially complete."

27 109. At the time of Closing, the FBR Defendants caused FBLV to make further
28 representations regarding the progress and accuracy of construction drawings:

> The Plans and Specifications (a) are, to the Project Entities' knowledge, based on reasonable assumptions as to all legal and factual

1 2 3 4 5

> matters material thereto, (b) are, and except to the extent permitted under Sections 6.1 and 6.2 will be from time to time, consistent with the provisions of the Operative Documents in all material respects, (c) have been prepared in good faith with due care, and (d) fairly represent the Project Entities' expectation as to the matters covered thereby. The Final Plans and Specifications (i) have been prepared in good faith with due care, and (ii) are accurate in all material respects and fairly represent the Project Entities' expectation as to the matters covered thereby.

6 Disbursement Agreement, § 4.31.

7 110. Contrary to the repeated representations by the FBR Defendants, the construction 8 drawings were not "substantially complete." As the FBR Defendants knew or should have known, 9 delays in the design process prior to Closing caused significant delays in the preparation of 10 completed construction drawings. At the time the Offering Memorandum was issued, less than 50% 11 of the drawings for the podium portion of the Project were complete. Indeed, final construction 12 drawings were not complete even as late as 2009.

13 111. Instead of acknowledging the delay in development of final construction drawings, the 14 FBR Defendants directed the architect for the Project "to produce false sets of drawings to maintain 15 the permit process" so that Defendants "could commence construction in order to meet the opening 16 date of November 2009." According to the architects, Bergman, Walls and Associates, Ltd. 17 ("BWA"): "Extensive and useless hours were spent by BWA to create these false documents. For 18 more than 12 months BWA was updating and revising two separate and distinct sets of Construction 19 Documents thus doubling our man-hours. These sets consisted of false permit documents and 20 Construction Documents for the Contractor." The FBR Defendants knew or should have known, but 21 failed to disclose to the Lenders that the construction drawings presented to the Lenders were not the 22 actual construction drawings and that the actual construction drawings were not "substantially 23 complete."

24 **C. Defendants Misrepresented that they Had Substantial Committed Contracts for** 25 **the Construction of the Project.**

26 112. To provide further assurances that the Project would remain on budget and on 27 schedule, Soffer and the other FBR Defendants represented that the Project would enter into 28 "committed contracts" with subcontractors for large portions of the anticipated costs of the Project. The existence of committed contracts was important to prospective lenders because committed

1 contracts reduce the risk of cost overruns by locking in the cost for those elements.

2 113. The Offering Materials stated that the Borrowers would "enter into committed
3 contracts totaling no less than 60% of hard costs prior to closing and 95% of hard costs and 50% of
4 certain FF&E costs prior to the initial advance under the Credit Facilities." In the "Transaction
5 Update" issued April 18, 2007, Defendants again reiterated the promise to enter into committed
6 contracts "totaling no less than 60% of hard costs prior to closing and 95% of hard costs and 50% of
7 certain FF&E costs prior to the initial advance."

8 114. The financing agreements repeated Defendants' representations regarding the
9 committed contracts that the Borrower and its general contractor, Defendant TWC, had entered into.
10 Upon closing, Defendants provided a schedule of the contracts that showed committed contracts
11 totaling more than 60% of Total Hard Costs.

12 115. But as the FBR Defendants knew or should have known, but failed to disclose to the
13 Lenders, there were not committed contracts in place that covered 60% of the hard costs of the
14 Project, at the Closing Date or at any time prior.

15 116. For example, two of the largest contracts listed in the schedule of committed contracts
16 included with the Closing documents were with W & W Steel. W & W Steel had two large
17 subcontracts for steel for different parts of the Project, which, taken together, were worth $231
18 million. Prior to the Closing Date, however, FBLV and TWC knew or should have known that W &
19 W Steel had made crucial miscalculations in the amount of steel needed for the Project, failing to
20 include in their bid ten thousand tons of structural steel needed for construction. Adding the cost of
21 that steel, which was a necessary component of the Project, raised the cost of the W & W Steel
22 contracts by tens of millions of dollars. The FBR Defendants and the Turnberry Defendants had a
23 duty to disclose this information to the lenders prior to Closing, but failed to do so.

24 **VII. DEFENDANTS' POST-CLOSING MISREPRESENTATIONS AND OMISSIONS**

25 **A. Defendants' Scheme**

26 117. After the Closing Date, the cost to complete the Project increased dramatically as a
27 result of Defendants' unilateral and undisclosed decisions to upgrade and expand various aspects of
28 the Project. By mid-2008, Soffer, Kumar and others at FBR and TWC calculated the costs required

1 to complete the construction of the Project at more than $300 million in excess of the Construction
2 Budget provided to the Lenders.

3 118. The FBR Board of Managers was aware of the substantial cost overruns and, in
4 November 2008, required Soffer to provide a "comfort letter" pursuant to which Soffer agreed (1) not
5 to transfer or dispose of specified assets prior to the completion of the Project, including a yacht
6 valued at $178 million, a Boeing 737 jet valued at $57 million and interests in various companies
7 valued at $116 million, and (2) to invest, at the request of the Board of Managers, "in FBR or an
8 affiliate thereof, an aggregate amount [up to $75 million], which investment shall be used solely to
9 fund the costs of [the Project]."

10 119. As a result of the cost overruns, the anticipated cost to fund the Project significantly
11 exceeded the funds available to pay these costs. Had these increases been disclosed to the Lenders, it
12 would have revealed, among other things, that the In Balance Test could not be satisfied. This would
13 have prevented Defendants from accessing any funds under the Credit Agreement and brought the
14 Project to an immediate halt. Instead, those funds would have remained in the Bank Proceeds
15 Account and ultimately been returned to the Plaintiffs and other Lenders who maintained a valid,
16 perfected priority lien on those funds while they remained on deposit.

17 120. Defendants knew or should have known about the substantial cost overruns.
18 Defendants kept the true cost of the Project from the Lenders through two sets of books: one for their
19 own internal use that allowed them to keep track of the actual progress, scope and cost of the Project;
20 and a second set for use with the Lenders that disclosed only the progress, scope and costs that would
21 cause the Project to appear "in balance." In this way, the Defendants were able to secure continued
22 funding under the Credit Agreement Facility while failing to inform the Lenders of the mounting cost
23 overruns.

24 121. Defendants' scheme involved, first and foremost, the manipulation of change orders
25 for the Project. Change orders are directions from a project owner or a general contractor to perform
26 work that is different from and/or in addition to the original scope. In the normal course, change
27 orders are formally approved and reflected in the project budget before the additional or revised work
28 is begun, and certainly before it is completed.

122. Defendants were required to inform the lenders of all approved change orders. Accordingly, if Defendants formally approved the change orders required for the expanded Project, the lenders would discover the enormous cost increases, and Defendants' scheme would be revealed. Defendants knew or should have known, but failed to disclose to Plaintiffs, that there were hundreds of millions of dollars of change orders for work required to complete the Project that were not reflected in the various reports and certifications Defendants made to the lenders. Defendants "pocketed" these change orders, prevailing upon subcontractors to perform the additional work required to complete the Project before a formal change order was approved while, at the same time, delaying the change order approval process so as not to alert the lenders to the additional scope and costs.

123. Defendants failed to inform the Lenders of the actual scope and increased cost of the Project by keeping a duplicate set of books and entries, one for their own internal use to track the actual scope, progress and cost of the Project and another for presentation to the Lenders to secure advances from the Credit Agreement Facility:

- Change Order Logs. Defendants maintained two sets of change order logs. One set accurately tracked all change orders that Defendants had directed subcontractors to execute, regardless of whether the change orders had been put through the formal approval process (the "Actual Change Order Log"). The Actual Change Order Log was used by the Defendants to plan and monitor the progress of the construction of the Project. Defendants did not provide the Actual Change Order Log to the Lenders. Instead, they provided the Lenders a partial change order log that included only those change orders that would continue to misrepresent the Project to be in balance and within the Bank Budget (the "Bank Change Order Log").
- Anticipated Cost Reports. To track the costs required to complete the Project, Defendants maintained Anticipated Cost Reports ("ACRs"). As with the change order logs, Defendants kept two sets of ACRs. The Real ACRs reflected all of the costs Defendants knew would be required to complete the Project, including the "pocketed" change orders. The Bank ACRs consisted of a subset of the Real ACRs.

1 • Budgets. The Defendants' manipulation of the change orders and ACRs carried over
2 into their calculation of the Project budgets. The Bank Budget, based on the Bank
3 ACRs, reflected the original budget presented to the Lenders, as modified by formally
4 approved and disclosed change orders. The Soffer Budget or Real Budget, showed all
5 of the items included in the Bank Budget, plus all of the "pocketed" change orders and
6 real anticipated costs reflected in the Real ACR.

7 124. Defendants tracked the status of the change orders, anticipated costs and budgets in
8 detailed Microsoft Excel spreadsheets. The spreadsheets showed, column by column: (i) the Bank
9 Budget, including changes to the budget that had been formally approved by the lenders; (ii) the
10 additional changes to the Bank Budget contemplated in the Soffer Budget and reflecting the
11 "pocketed" change orders; and (iii) the difference between the two budgets.

12 **B. Defendants' Misrepresentations and Omissions**

13 125. Each month, to obtain release of funds, the Credit Agreement and other loan
14 documents required the Borrower to submit to Plaintiffs' agent, BofA, a "Draw Request," which
15 included budgets, cost reports and various certifications. If the materials provided in the Draw
16 Request showed that the applicable conditions precedent for the advance of funds were satisfied,
17 BofA, the Disbursement Agent, could (assuming it did not have contrary or inconsistent information)
18 release the requested funds to the Borrower. (Disbursement Agreement, § 2.4.6).

19 126. Beginning no later than mid-2007, in connection with the Draw Requests, Defendants
20 made material misrepresentations regarding the status of the Project and provided false, misleading
21 and incomplete information about change order logs, cost reports and budgets, which they
22 represented to be true and complete. These misrepresentations were contained in documents and
23 reports including the following.

24 • Advance Request. The Advance Request was the Borrowers' formal request for funds
25 under the financing agreements. Defendant Freeman executed the Advance Requests
26 on behalf of the Borrowers. In the Advance Request, at the Defendants' direction, the
27 Borrowers attested to the accuracy and completeness of the information regarding
28 budgets and costs that were provided with the Draw Request, including the Remaining

1 Cost Reports, the In Balance Report and the General Contractor's Advance
2 Certificate. Because the information provided by the Borrowers did not disclose the
3 true anticipated costs and budgets for the Project but instead showed the incorrect cost
4 information reflected in the Bank Budget, the Bank Change Order Log and the Bank
5 ACR, Defendants' representations in the Advance Requests were false and omitted
6 material information about the Project.

7 - Remaining Cost Reports. The Remaining Cost Reports were spreadsheets that were
8 supposed to show the anticipated costs to complete the Project. The Remaining Cost
9 Reports did not reflect Defendants' true estimates of Project costs but instead reflected
10 the false information contained in the Bank Change Order Logs and the Bank ACR.

11 - In Balance Report. The In Balance Reports were supposed to show the difference
12 between funds available to the Project (from the Credit Agreement Facility and other
13 sources) and the anticipated remaining costs on the Project, as reflected in the
14 Remaining Cost Reports. Defendants submitted In Balance Reports that reflected
15 incorrect budgets and estimates of anticipated costs and failed to show the actual costs
16 Defendants knew would be needed to complete the Project. Accordingly, the In
17 Balance Reports continued to show that the Project was in balance when in fact the
18 anticipated costs greatly exceeded the available funds to pay for them.

19 - General Contractor Advance Certificate. In the General Contractor Advance
20 Certificates, which were submitted with each Draw Request, TWC certified that its
21 budgets were accurate and complete. Defendant Soffer executed the General
22 Contractor Advance Certificates for October and November 2008. The budgets TWC
23 submitted to the Lenders were based on Defendants' false change orders and cost
24 reports, and the General Contractor Advance Certificates were therefore false and
25 misleading.

26 - Budget Amendment Certificate. The Borrowers were required to request approval for
27 amendments to the Project budgets by submitting Budget Amendment Certificates.
28 The Budget Amendment Certificates, which Defendant Freeman signed, certified that

1 the budgets and cost estimates contained therein were accurate and complete, and
2 based on good faith assumptions. The Budget Amendment Certificates did not reflect
3 Defendants' real budgets (*i.e.*, the Soffer Budget) or their actual good faith estimates
4 of project costs but instead reflected the incorrect Bank Budgets, Bank Change Order
5 Logs and Bank ACRs. In fact, the Soffer Budget was hundreds of millions of dollars
6 higher than the budgets Defendants certified as correct in the Budget Amendment
7 Certificates.

8 • Lender Updates. Defendants periodically held conference calls with Plaintiffs and
9 other lenders in connection with the Draw Requests. On those calls, and in the written
10 "Lender Updates" that Defendants distributed to lenders, Defendants represented that
11 the Bank Budget was the actual budget and failed to inform the lenders of the
12 existence of the Soffer Budget and the fact that, according to Defendants' true cost
13 information, the Project had experienced hundreds of millions of dollars in
14 undisclosed change orders and cost overruns. On these calls, Defendants consistently
15 stated, incorrectly, that the Project was "on time and on budget."

16 127. If Defendants had incorporated accurate and complete information regarding the
17 budgets and costs to complete the Project into the materials submitted in connection with the Draw
18 Requests, they would have shown that the Project was well over budget and could not be completed
19 without significant additional funds. As a result, the In Balance Test would have failed and
20 Borrowers would not have been able to access additional funding under the Credit and Disbursement
21 Agreements.

22 **VIII. PACKER CONSPIRES WITH SOFFER TO CONCEAL THE COST OVERRUNS ON**
23 **THE PROJECT**

24 128. Defendant Crown is an Australian gaming and entertainment company that is
25 controlled by Defendant Packer, who is reported to be the wealthiest man in Australia. Defendant
26 Crown Services is a Nevada-based affiliate of Crown that acted on behalf of Crown in connection
27 with the Project. Todd Nisbet, the Executive Vice President for Design and Construction of Crown,
28 and a principal in Crown Services, along with Packer, had primary responsibility for the Packer

1 Defendants' participation in the Project and was involved on a regular basis in the management and
2 oversight of the Project.

3 129. In April 2007, Crown purchased a 19.6% interest in FBR for $250 million.
4 Thereafter, the Packer Defendants learned that the Project was significantly over budget, that the
5 existing funding for the Project was insufficient to complete the Project and that the FBR and
6 Turnberry Defendants had been misrepresenting the facts concerning the actual status of the Project
7 to the Lenders in order to secure continued funding for the Project under the Loans. The Packer
8 Defendants recognized that if the Lenders learned the truth about the Project, the Lenders would
9 cease funding, and the value of Crown's investment in FBR would plummet.

10 130. Accordingly, in late 2007 or early 2008, the Packer Defendants, including Packer,
11 convened a meeting in Las Vegas with the FBR Defendants, including Soffer, to determine how
12 jointly to proceed. At that meeting and thereafter, and at the direction of Packer, the Packer
13 Defendants agreed and conspired with the FBR Defendants to continue to misrepresent the financial
14 status of the Project to the Lenders and to conceal from the Lenders, including the Plaintiffs, the truth
15 regarding the cost overruns on the Project in order to secure the continued financing for the Project.

16 131. Thereafter, the Packer Defendants continued their involvement in the management and
17 oversight of the Project, including efforts to reduce the cost of the known overruns that were being
18 concealed from the Lenders so as to help delay the Lenders' ultimate discovery of the true facts. As
19 a result, the Packer Defendants actively assisted the FBR Defendants and the Turnberry Defendants
20 in misrepresenting the true financial condition of the Project and in concealing from the lenders the
21 existence and magnitude of the Soffer Budget and the cost overruns.

22 **IX. DEFENDANTS' SCHEME UNRAVELS**

23 132. Without financing sufficient to pay for the true costs of constructing the Project, it was
24 only a matter of time before Defendants' scheme was exposed. Defendants forestalled this result by
25 delaying payment to subcontractors—in some cases until subcontractors threatened to walk off the
26 job—and by raising additional equity. By the summer of 2008, however, as Defendants knew or
27 should have known, the Project was facing a deficit of more than $300 million dollars.

28 133. At a meeting at Soffer's home in Aspen, Colorado held in October 2008 and attended

1 by Kumar and TWC's Chief Executive Officer, Bob Ambridge, Soffer acknowledged that an
2 additional $325 million above and beyond all existing financing and equity contributions would be
3 required to complete the Project. Kumar and Ambridge informed Soffer that they believed the
4 shortfall was much greater, as much as $375 million.

5 134. Again, in January 2009, Soffer acknowledged the existence of the shortfall in a
6 telephone call with Ambridge and Kumar. By mid-February 2009, Kumar and Ambridge explained
7 to Soffer in a meeting in Las Vegas that the shortfall had increased by another $100 million.

8 135. To make matters worse, in September 2008 Lehman Brothers Holdings, Inc.
9 ("Lehman") filed for bankruptcy protection. Lehman was the largest lender under the Retail Facility
10 that provided financing for the construction of the retail portion of the Project. Lehman's
11 bankruptcy, its resulting failure to pay its portion of draws under the Retail Facility as they came due
12 and the prospect that Lehman would fail to fund its remaining commitment under the Retail Facility
13 prevented satisfaction of numerous conditions precedent to the approval of Advance Requests and the
14 disbursement of funds under the Loans. Had disbursements stopped in September 2008, as they
15 should have, all or nearly all of the funds advanced by Plaintiffs would have remained safely in the
16 Bank Proceeds Account and ultimately been recovered.

17 136. Unfortunately, this did not happen. Bank of America ("BofA") failed to take the steps
18 required of it as Administrative and Disbursement Agent under the Credit Agreement to ensure that
19 funding and disbursements did not continue in the face of Lehman's breaches and defaults. And
20 while BofA's breaches were not thereby excused or mitigated, the FBR Defendants, aided by
21 ULLICO, actively concealed the full extent of Lehman's impact on the Project from the Lenders in
22 an effort to increase the likelihood that Loans would continue to be funded and disbursed.

23 137. In September 2008, the FBR Defendants caused FBR (or an affiliate) to pay Lehman's
24 portion of the September 2008 draw request under the Retail Facility. Defendants knew that payment
25 of Lehman's portion of draw requests by FBR would highlight the funding gap created by Lehman's
26 bankruptcy and increase the likelihood that the Lenders would refuse to continue funding.
27 Accordingly, although Freeman advised BofA that FBR had funded Lehman's portion, Thier and the
28 other FBR Defendants took steps to ensure that documents filed publicly during that period,

1 including documents submitted in connection with the Lehman bankruptcy proceedings, concealed
2 that fact from the other lenders.
3 138. In December, Lehman notified the FBR Defendants that it would make no further
4 payments under the Retail Facility.
5 139. In order to further conceal FBR's payment of Lehman's draws, FBR initiated
6 discussions with ULLICO, one of the other lenders under the Retail Facility. ULLICO invested on
7 behalf of union interests and was committed "to serving the needs of unions, union leaders, union
8 employers and union members and their families." Thus, ULLICO's interest in the Project included
9 both its financial commitment as well as the preservation of the jobs of the 3,000 union members
10 working on the Project. Those jobs all would be lost if disbursements under the Loans ceased and the
11 Project was shut down. Although ULLICO was unwilling to take over Lehman's funding obligations
12 under the Retail Facility, in whole or in part, it was willing to make it appear that it had or would in
13 the hopes that BofA might thereby overlook Lehman's breaches and defaults and continue disbursing
14 funds for the Project.
15 140. In order to accomplish this scheme, beginning in December 2008, ULLICO entered
16 into a series of Guaranty Agreements with Soffer, FBR and TRLP. These agreements provided that
17 ULLICO would pay Lehman's portion of the Retail Facility in the first instance but that Soffer, FBR
18 and TRLP would guaranty such payments and reimburse ULLICO within 30 days. By "fronting"
19 payments on behalf of FBR and Soffer, ULLICO helped create a false impression that an existing,
20 institutional lender had or would be willing to step in to take over Lehman's commitment.
21 141. ULLICO fronted Lehman's draw obligations under the Retail Facility in December
22 2008, and January, February and March 2009. Defendants did not disclose the "fronting"
23 arrangement to the Plaintiffs and actively concealed the existence of the Guaranty Agreement from
24 them.
25 142. Had ULLICO, the FBR Defendants and the Turnberry Defendants disclosed the true
26 nature of their scheme to the Lenders, BofA could not have hidden from the conclusion that the
27 conditions precedent to funding under the Loans had not been satisfied, and the Borrowers would not
28 have been able to access Plaintiffs' funds.

143. By early 2009, Defendants were unable to access additional equity funding, and subcontractors were in revolt over delayed payments for completed work. To access additional needed funds, Defendants were forced to disclose some of the additional change orders they had "pocketed" and kept from the Lenders. But while Defendants at this point revealed some of the additional costs, they expressly decided not to expose what TWC's Chief Executive Officer, Bob Ambridge, characterized to Kumar as the "big lie," namely that the Project was massively over budget. Instead, Defendants informed the Lenders of only $60 million in change orders and additional costs and continued to conceal the remaining undisclosed change orders and additional costs and to submit Draw Requests that they new to be materially false.

144. As 2009 wore on, however, Defendants could no longer conceal that the budgets were inaccurate and that the costs to complete the Project were not in line with the incorrect estimates they had provided to the Lenders. On April 13, 2009, the Borrowers advised the Lenders that they could not meet the In Balance Test, based upon an increase of $157 million in the figure they used to calculate anticipated costs on the Project. On April 20, 2009, BofA, acting on behalf of certain of the Lenders, declared a default under the financing agreements. The Borrowers and certain affiliates filed for bankruptcy on June 10, 2009, which itself constitutes a default under the financing agreements.

COUNT I

Fraud/Aiding and Abetting Against the FBR Defendants and the Turnberry Defendants

145. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.

146. To induce Plaintiffs to provide funding for the Project and to enter into the Credit Agreement and Disbursement Agreement, the FBR Defendants misrepresented facts and failed to disclose material facts, as more fully described above. Among other things, the FBR Defendants represented or permitted to be represented:

- that the Bank Budget was an accurate and good faith estimate of the costs the Project would incur to completion and was a "conservative" estimate of such costs;
- that the Bank Budget would support payment of all anticipated construction costs for the Project;

- that the construction drawings for the Project were accurate and "substantially complete"; and
- that FBLV and TWC had entered into committed contracts for 60% of hard costs for the Project.

147. These representations were false. The FBR Defendants omitted the true facts about the Project, including those regarding the existence and nature of the Real Budget, the additional anticipated costs they expected to incur in bringing the Project to completion, the delays in completion of the construction drawings, the fact that the drawings presented to the Plaintiffs were false drawings, and the additional costs that would be incurred under the so-called committed contracts.

148. The Turnberry Defendants were aware of the misrepresentations and omissions made by the FBR Defendants. The Turnberry Defendants intended to and did assist and provide material assistance to the FBR Defendants in making misrepresentations and failing to disclose material facts to Plaintiffs.

149. Unaware of the true facts, and in reliance on the misrepresentations and omissions of the FBR Defendants and the Turnberry Defendants, Plaintiffs provided funding to the Project pursuant to the Credit Agreement and Disbursement Agreement. If Plaintiffs had been aware of the true facts, they would not have agreed to provide the funding and would not have executed the Credit Agreement or the Disbursement Agreement.

150. As a direct and proximate result of the misrepresentations and omissions by the FBR Defendants and the Turnberry Defendants' assistance in these misrepresentations and omissions, Plaintiffs have incurred and continue to incur damages in excess of $10,000.

151. Defendants' acts were performed with oppression, fraud and malice, thereby entitling Plaintiffs to punitive damages in excess of $10,000.

COUNT II

Fraud/Aiding and Abetting Fraud Against the FBR Defendants, the Turnberry Defendants and the Packer Defendants

152. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.

153. To induce Plaintiffs to provide funding for the Project through provision of Advances

1 in response to Notices of Borrowing and Draw Requests, the FBR Defendants and the Turnberry
2 Defendants made intentional misrepresentations of fact and failed to disclose material facts, as more
3 fully described above. Among other things, the FBR Defendants and the Turnberry Defendants
4 represented to Plaintiffs or their agents, in connection with Draw Requests and in other oral and
5 written communications, that:

6 - the Remaining Cost Reports submitted to lenders, including the Plaintiffs, accurately
7 presented all of the costs they expected the Project to incur to completion;
8 - they were not aware of additional anticipated costs on the Project;
9 - the In Balance Report was accurate and the In Balance Test was satisfied;
10 - the Bank Budget was the true budget that accurately presented the Defendants' good
11 faith estimate of all Project costs; and
12 - the Project was "on time and on budget."

13 These representations were false. The FBR Defendants and Turnberry Defendants omitted and
14 concealed the true facts regarding the existence and magnitude of the Real Budget, the additional
15 costs they incurred and expected to incur on the Project; and the existence and dollar value of change
16 orders that had been agreed to without formal approval or disclosure to the lenders, including
17 Plaintiffs.

18 154. Each of the FBR Defendants, the Turnberry Defendants and the Packer Defendants
19 was aware of the misrepresentations and omissions made by the other Defendants. Each of the FBR
20 Defendants, the Turnberry Defendants and the Packer Defendants intended to assist the others in
21 defrauding Plaintiffs and did in fact provide material assistance to them in making misrepresentations
22 and failing to disclose material facts to Plaintiffs.

23 155. Unaware of the true facts, and in reliance on the misrepresentations and omissions of
24 Defendants, Plaintiffs continued to provide funding to the Project through Advances pursuant to the
25 Credit Agreement and Disbursement Agreement. If at any time Plaintiffs and their agents had been
26 aware of the true facts, the conditions precedent to further Advances would not have been satisfied
27 and Plaintiffs would not have been required to provide further funds to the Project.

28 156. As a direct and proximate result of Defendants' fraud and aiding and abetting fraud,

Plaintiffs have incurred and continue to incur damages in excess of $10,000.

157. Defendants' acts were performed with oppression, fraud and malice, thereby entitling Plaintiffs to punitive damages in excess of $10,000.

COUNT III

Fraud/Aiding and Abetting Fraud Re Retail Facility Against the FBR Defendants, the Turnberry Defendants and ULLICO

158. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.

159. To induce Plaintiffs to provide funding for the Project through provision of Advances in response to Notices of Borrowing and Draw Requests, the FBR Defendants and the Turnberry Defendants made intentional misrepresentations of fact and failed to disclose material facts regarding the funding of Lehman's portion of the Retail Facility, as more fully described above. Among other things, ULLICO, the FBR Defendants and the Turnberry Defendants or their agents represented that ULLICO funded the Lehman portion of the Retail Facility. These representations were false.

160. ULLICO, the FBR Defendants and the Turnberry Defendants omitted and concealed the fact that, through the "fronting" arrangement, FBR and Soffer were funding Lehman's portion of the Retail Facility while making it appear that ULLICO was providing such funding.

161. ULLICO, the FBR Defendants and the Turnberry Defendants were aware of the misrepresentations and omissions made by each other. Each ULLICO, the FBR Defendants and the Turnberry Defendants intended to assist each other in defrauding Plaintiffs and did in fact provide material assistance to them in making misrepresentations and failing to disclose material facts to Plaintiffs.

162. Unaware of the true facts, and in reliance on the misrepresentations and omissions of Defendants, Plaintiffs continued to provide funding to the Project through Advances pursuant to the Credit Agreement and disbursement continued to be made under the Disbursement Agreement. If at any time Plaintiffs and their agents had been made aware of the true facts, the conditions precedent to further Advances would not have been satisfied and Plaintiffs would not have provided further funds to the Project.

163. As a direct and proximate result of Defendants' fraud and aiding and abetting fraud, Plaintiffs have incurred and continue to incur damages in excess of $10,000.

1 164. Defendants' acts were performed with oppression, fraud and malice, thereby entitling
2 Plaintiffs to punitive damages in excess of $10,000.

3 **COUNT IV**

4 **Negligent Misrepresentation Against All Defendants**

5 165. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.
6 166. In making the representations described above, and in failing to disclose the material
7 information, Defendants acted with the intent to induce, and did induce, Plaintiffs to provide funding
8 to the Project, to enter into the Credit Agreement and the Disbursement Agreement, and to continue
9 to provide funding pursuant to Advances.
10 167. Defendants made the representations negligently and recklessly, with no reasonable
11 grounds for believing the statements to be true.
12 168. As a direct result of Defendants' negligent and reckless misrepresentations, Plaintiffs
13 have incurred and continue to incur damages in excess of $10,000.
14 169. Defendants' acts were performed with oppression, fraud and malice, thereby entitling
15 Plaintiffs to punitive damages in excess of $10,000.

16 **COUNT V**

17 **Negligence Against the FBR Defendants and the Turnberry Defendants**

18 170. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.
19 171. Defendants were responsible for ensuring that the terms and conditions precedent to
20 funding were being met, that the Project was being managed and administered such that the cost of
21 work would not exceed what was budgeted and financially available, and that the Project would be
22 completed within the approved schedule.
23 172. Defendants also had a duty to ensure that the Project progress was accurately reported,
24 both in terms of cost and schedule, and that the projected cost to complete the work was accurately
25 reflected in the reports to lenders, including the Plaintiffs. Defendants had a duty to ensure accurate
26 reflection of any cost increases or change orders in the various reports provided to Plaintiffs in
27 connection with Draw Requests.
28 173. Defendants failed to exercise reasonable or ordinary care in the discharge of their

1 duties in connection with the Project, and, in fact, were negligent and/or reckless in the performance
2 of their duties and/or acted in bad faith.

3 174. As described in more detail above, among other things, Defendants:

4 • Failed to ensure that the statements made to Plaintiffs in connection with Draw
5 Requests were accurate and complete;
6 • Failed to accurately monitor and report on project budgets and costs;
7 • Failed to ensure the timely reporting of changes to the Project and change orders;
8 • Failed to monitor subcontractors;
9 • Failed to exercise reasonable diligence, oversight, monitoring and review of TWC's
10 project administration and management;
11 • Failed to ensure that Project drawings and plans were substantially complete and
12 updated and that the plans were sufficient to build the Project in accordance with the
13 existing budgets; and
14 • Failed to ensure that the Project had committed contracts as represented to Plaintiffs,
15 and that the committed contracts were in fact "committed."

16 175. As a direct and proximate result of Defendants failure to exercise due care, Plaintiffs
17 have been damaged in an amount in excess of $10,000.

18 **COUNT VI**

19 **Conspiracy to Commit Fraud/Aiding and Abetting Fraud Against All Defendants**

20 176. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.

21 177. Beginning in 2007, Defendants entered into a conspiracy in which they agreed to
22 misrepresent and omit material facts regarding the Project, and to conceal the true facts. Pursuant to
23 that conspiracy, Defendants engaged in the misrepresentations, omissions and other wrongful
24 conduct, as set out above. Each of the Defendants had knowledge of the object and purpose of the
25 conspiracy and intended to and did materially assist the conspiracy.

26 178. As co-conspirators, Defendants are jointly and severely liable for the damages
27 incurred by Plaintiffs as a result of their conduct, in an amount in excess of $10,000.

28 179. Defendants' acts were performed with oppression, fraud and malice, thereby entitling

1 Plaintiffs to punitive damages in excess of $10,000.

2 **COUNT VII**

3 **Breach of Fiduciary Duty – Duty of Loyalty Against the FB D&O Defendants**

4 180. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.

5 181. Defendants Soffer, Kotite, Parello, Weiner, Schaeffer, Freeman, Kumar, Karawan and
6 Thier ("FB D&O Defendants") were directors, managers and/or senior executive officers of the
7 Resort Entities, with management responsibility for those entities. As managers, directors and/or
8 senior executive officers of the Resort Entities, the FB D&O Defendants owed fiduciary duties to the
9 Resort Entities, which fiduciary duties included the duty of loyalty. Additionally, as the Resort
10 Entities were insolvent or within the zone of insolvency, these defendants also owed fiduciary duties
11 to the Resort Entities' creditors, including Plaintiffs.

12 182. As fiduciaries, the FB D&O Defendants were obligated by their duty of loyalty to act
13 in a manner consistent with the best interests of the Resort Entities and its creditors, and with the
14 highest degree of good faith. By virtue of the acts and omissions described herein, the FB D&O
15 Defendants failed to act honestly and in good faith, thereby violating the duty of loyalty to the Resort
16 Entities. Among other things, the FB D&O Defendants misrepresented the financial condition of the
17 Resort Entities, misstated the budgets and anticipated costs of the Project, and concealed the true
18 facts about the budgets and financial condition of the Project.

19 183. As a direct and proximate result of the FB D&O Defendants' actions and omissions,
20 the Plaintiffs have been injured and suffered damages in an amount in excess of $10,000. The FB
21 D&O Defendants are jointly and severally liable for Plaintiffs' losses.

22 184. Defendants' acts were performed with oppression, fraud and malice, thereby entitling
23 Plaintiffs to punitive damages in excess of $10,000.

24 **COUNT VIII**

25 **Breach of Fiduciary Duty – Duty of Care Against the FB D&O Defendants**

26 185. Plaintiffs reallege and incorporate the preceding paragraphs as though fully set out.

27 186. The FB D&O Defendants were directors, managers and/or senior executive officers of
28 the Resort Entities, with management responsibility for those entities. As managers, directors and/or

1 senior executive officers of the Resort Entities, the FB D&O Defendants owed fiduciary duties to the
2 Resort Entities, which fiduciary duties included the duty of care. Additionally, as the Resort Entities
3 were insolvent or within the zone of insolvency, these defendants also owed fiduciary duties to the
4 Resort Entities' creditors, including Plaintiffs.

5 187. As fiduciaries, these defendants were obligated by their duty of care to act at all times
6 on an informed basis, using the amount of care that a reasonable person would use under similar
7 circumstances, and to act with the highest degree of good faith. The FB D&O Defendants failed to
8 exercise the care, diligence, and skill that reasonable persons would exercise under comparable
9 circumstances, and instead acted in a grossly negligent manner, thereby violating their fiduciary
10 duties to the Resort Entities. Among other things, the FB D&O Defendants: failed to oversee the
11 construction of the Project in a manner that contained cost overruns; approved and allowed TWC and
12 others to approve, informally and without proper oversight or disclosure, changes to the Project that
13 greatly increased the Resort Entities' liabilities; operated the Project in accordance with the
14 undisclosed Real Budget, which was hundreds of millions of dollars higher than what was presented
15 to the Plaintiffs and the other lenders, thus making it virtually impossible for the Project to be
16 completed with the funds that were available; and repeatedly misrepresented and omitted material
17 facts regarding budgets, cost overruns and anticipated costs to completion.

18 188. As a direct and proximate result of the FB D&O Defendants' actions and omissions,
19 the Plaintiffs have been injured and suffered damages in an amount in excess of $10,000. The FB
20 D&O Defendants are jointly and severally liable for Plaintiffs' losses.

21 189. Defendants' acts were performed with oppression, fraud and malice, thereby entitling
22 Plaintiffs to punitive damages in excess of $10,000.

23 **PRAYER FOR RELIEF**

24 **WHEREFORE,** Plaintiffs pray that this Court enter judgment in favor of Plaintiffs and
25 against Defendants, and each of them, as follows:

26 (a) For damages in excess of $10,000.

27 (b) For punitive damages in excess of $10,000.

28 (c) For prejudgment interest.

1 (d) For an award of the costs of suit including attorneys' fees to the extent available.

2 (e) For any further relief as this Court deems just and proper.

3 **JURY DEMAND**

4 Plaintiffs demand a trial by jury for all issues so triable.

5 DATED this 25th day of March, 2011.

6

7 Respectfully submitted,

8

9

10 By: ______________________

TAYLOR L. RANDOLPH
11 Bar No. 10194
RANDOLPH LAW FIRM, P.C.
12 2045 Village Center Circle, Suite 100
Las Vegas, Nevada 89134
13 Tel. (702) 233-5597
tr@randolphlawfirm.com
Attorney for Plaintiffs

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U.S. Bankruptcy Court
District of Nevada (Las Vegas)
Adversary Proceeding #: 11-01130-mkn

Assigned to: MIKE K. NAKAGAWA
Demand:

Date Filed: 05/02/11

Nature[s] of Suit: 01 Determination of removed claim or cause

Plaintiff

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** RANDOLPH LAW FIRM, P.C. 2045 VILLAGE CENTER CR., SUITE 100 LAS VEGAS, NV 89134 702-877-1313 Fax : 702-233-5597 Email: tr@randolphlawfirm.com *LEAD ATTORNEY*
BATTALION CLO 2007-I, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
CANPARTNERS INVESTMENTS IV, LLC. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
CANYON SPECIAL OPPORTUNITIES MASTER FUND (CAYMAN), LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
CASPIAN CORPORATE LOAN FUND, LLC. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
CASPIAN CAPITAL PARTNERS, L.P. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
CASPIAN SELECT CREDIT MASTER FUND, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
MARINER LDC X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*

CASPIAN ALPHA LONG CREDIT FUND, L.P. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
CASPIAN SOLITUDE MASTER FUND, L.P. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
OLYMPIC CLO I LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SHASTA CLO I LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
WHITNEY CLO I LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SAN GABRIEL CLO I LTD. X X, X	represented by	**SAN GABRIEL CLO I LTD.** PRO SE
SIERRA CLO II LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
ING PRIME RATE TRUST X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
ING SENIOR INCME FUND X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
ING INTERNATIONAL (II) - SENIOR LOANS X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
ING INVESTMENT MANAGEMENT CLO I, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
ING INVESTMENT MANAGEMENT CLO II, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
ING INVESTMENT MANAGEMENT CLO III, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
ING INVESTMENT MANAGEMENT CLO IV, LTD.	represented by	**TAYLOR L. RANDOLPH** (See above for address)

X
X, X

LEAD ATTORNEY

ING INVESTMENT MANAGEMENT CLO V, LTD.
X
X, X
represented by **TAYLOR L. RANDOLPH**
(See above for address)
LEAD ATTORNEY

PHOENIX CLO I, LTD.
X
X, X
represented by **TAYLOR L. RANDOLPH**
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PHOENIX CLO II, LTD.
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X, X
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PHOENIX CLO III, LTD.
X
X, X
represented by **TAYLOR L. RANDOLPH**
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LEAD ATTORNEY

Venture II CDO 2002 Limited
X
X, X
represented by **TAYLOR L. RANDOLPH**
(See above for address)
LEAD ATTORNEY

Venture III CDO Limited
X
X, X
represented by **TAYLOR L. RANDOLPH**
(See above for address)
LEAD ATTORNEY

VENTURE IV CDO LIMITED
X
X, X
represented by **TAYLOR L. RANDOLPH**
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LEAD ATTORNEY

Venture V CDO Limited
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X, X
represented by **TAYLOR L. RANDOLPH**
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Venture VI CDO Limited
X
X, X
represented by **TAYLOR L. RANDOLPH**
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Venture VII CDO Limited
X
X, X
represented by **TAYLOR L. RANDOLPH**
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LEAD ATTORNEY

Venture VIII CDO Limited
X
X, X
represented by **TAYLOR L. RANDOLPH**
(See above for address)
LEAD ATTORNEY

Venture IX CDO Limited
X
X, X
represented by **TAYLOR L. RANDOLPH**
(See above for address)
LEAD ATTORNEY

Vista Leveraged Income Fund
X
X, X
represented by **TAYLOR L. RANDOLPH**
(See above for address)
LEAD ATTORNEY

VEER CASH FLOW CLO, LIMITED
X
X, X
represented by **TAYLOR L. RANDOLPH**
(See above for address)
LEAD ATTORNEY

MONARCH MASTER FUNDING,
represented by

LTD. X X, X		**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
NORMANDY HILL MASTER FUND, L.P. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
GENESIS CLO 2007-1 LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SCOGGIN CAPITAL MANAGEMENT II, LLC. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SCOGGIN INERNATIONAL FUND, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SCOGGIN WORLDWIDE FUND, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SPCP GROUP, LLC. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SOLA, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
SOLUS CORE OPPORTUNITIES MASTER FUND, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
STONE LION PORTFOLIO LP. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*
VENOR CAPITAL MASTER FUND, LTD. X X, X	represented by	**TAYLOR L. RANDOLPH** (See above for address) *LEAD ATTORNEY*

V.

Defendant

FONTAINEBLEAU RESORTS, LLC. X	represented by	**STEVE MORRIS** MORRIS PICKERING & PETERSON 300 S. 4TH ST #900

X, X		LAS VEGAS, NV 89101 (702) 474-9400 Fax : (702) 474-9422 Email: sm@morrislawgroup.com
TURNBERRY LTD. X X, X	represented by	**STEVE MORRIS** (See above for address)
TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P. X X, X	represented by	**STEVE MORRIS** (See above for address)
TURNBERRY WEST CONSTRUCTION, INC. X X, X	represented by	**STEVE MORRIS** (See above for address)
JEFFREY SOFFER X X, X	represented by	**STEVE MORRIS** (See above for address)
ANDREW KOTITE X X, X	represented by	**ANDREW KOTITE** PRO SE
RAY PARELLO X X, X	represented by	**RAY PARELLO** PRO SE
BRUCE WEINER X X, X	represented by	**BRUCE WEINER** PRO SE
GLENN SCHAEFFER X X, X	represented by	**GLENN SCHAEFFER** PRO SE
JAMES FREEMAN X X, X	represented by	**JAMES FREEMAN** PRO SE
DEVEN KUMAR X X, X	represented by	**DEVEN KUMAR** PRO SE
HOWARD KARAWAN X X, X	represented by	**JEFFREY R. SYLVESTER** 7371 PRAIRIE FALCON RD., SUITE 120 LAS VEGAS, NV 89128 (702) 952-5200 Fax : (702) 952-5205 Email: jeff@sylvesterpolednak.com
WHITNEY THIER X X, X	represented by	**WHITNEY THIER** PRO SE
UNION LABOR LIFE INSURANCE	represented by	**UNION LABOR LIFE INSURANCE**

COMPANY X X, X		**COMPANY** PRO SE
CROWN LIMITED X X, X	represented by	**CROWN LIMITED** PRO SE
CROWN SERVICES (US) LLC. X X, X	represented by	**CRAIG S. DUNLAP** FENNEMORE CRAIG, P.C. 300 S. FOURTH STREET #1400 LAS VEGAS, NV 89101 (702) 692-8000 Email: cdunlap@fclaw.com
JAMES PACKER X X, X	represented by	**JAMES PACKER** PRO SE

Filing Date	#	Docket Text
		Notice of Removal of BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD., BATTALION CLO 2007-I, LTD., CANPARTNERS INVESTMENTS IV, LLC., CANYON SPECIAL OPPORTUNITIES MASTER FUND (CAYMAN), LTD., CASPIAN CORPORATE LOAN FUND, LLC., CASPIAN CAPITAL PARTNERS, L.P., CASPIAN SELECT CREDIT MASTER FUND, LTD., MARINER LDC, CASPIAN ALPHA LONG CREDIT FUND, L.P., CASPIAN SOLITUDE MASTER FUND, L.P., OLYMPIC CLO I LTD., SHASTA CLO I LTD., WHITNEY CLO I LTD., SAN GABRIEL CLO I LTD., SIERRA CLO II LTD., ING PRIME RATE TRUST, ING SENIOR INCME FUND, ING INTERNATIONAL (II) - SENIOR LOANS, ING INVESTMENT MANAGEMENT CLO I, LTD., ING INVESTMENT MANAGEMENT CLO II, LTD., ING INVESTMENT MANAGEMENT CLO III, LTD., ING INVESTMENT MANAGEMENT CLO IV, LTD., ING INVESTMENT MANAGEMENT CLO V, LTD., PHOENIX CLO I, LTD., PHOENIX CLO II, LTD., PHOENIX CLO III, LTD., Venture II CDO 2002 Limited, Venture III CDO Limited, VENTURE IV CDO LIMITED, Venture V CDO Limited, Venture VI CDO Limited, Venture VII CDO Limited, Venture VIII CDO Limited, Venture IX CDO Limited, Vista Leveraged Income Fund, VEER CASH FLOW CLO, LIMITED, MONARCH MASTER FUNDING, LTD., NORMANDY HILL MASTER FUND, L.P., GENESIS CLO 2007-1 LTD., SCOGGIN CAPITAL MANAGEMENT II, LLC., SCOGGIN INERNATIONAL FUND, LTD., SCOGGIN WORLDWIDE FUND, LTD., SPCP GROUP, LLC., SOLA, LTD., SOLUS CORE OPPORTUNITIES MASTER FUND, LTD., STONE LION PORTFOLIO LP., VENOR CAPITAL MASTER FUND,

05/02/2011	1	LTD. against FONTAINEBLEAU RESORTS, LLC., TURNBERRY LTD., TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P., TURNBERRY WEST CONSTRUCTION, INC., JEFFREY SOFFER, ANDREW KOTITE, RAY PARELLO, BRUCE WEINER, GLENN SCHAEFFER, JAMES FREEMAN, DEVEN KUMAR, HOWARD KARAWAN, WHITNEY THIER, UNION LABOR LIFE INSURANCE COMPANY, CROWN LIMITED, CROWN SERVICES (US) LLC., JAMES PACKER. Fee Amount $250. (Attachments: # 1 Exhibit A (coversheet)# 2 Exhibit A# 3 Exhibit B (coversheet)# 4 Exhibit B) (01 (Determination of removed claim or cause) (DUNLAP, CRAIG) (Entered: 05/02/2011)
		Certificate of Service Filed by CRAIG S. DUNLAP on behalf of CROWN SERVICES (US) LLC. (Related document(s) 1 Notice of Removal filed by Plaintiff Venture II CDO 2002 Limited, Plaintiff Venture III CDO Limited, Plaintiff Venture V CDO Limited, Plaintiff Venture VI CDO Limited, Plaintiff Venture VII CDO Limited, Plaintiff Venture VIII CDO Limited, Plaintiff Vista Leveraged Income Fund, Plaintiff Venture IX CDO Limited, Plaintiff BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD., Plaintiff BATTALION CLO 2007-I, LTD., Plaintiff CANPARTNERS INVESTMENTS IV, LLC., Plaintiff CANYON SPECIAL OPPORTUNITIES MASTER FUND (CAYMAN), LTD., Plaintiff CASPIAN CORPORATE LOAN FUND, LLC., Plaintiff CASPIAN CAPITAL PARTNERS, L.P., Plaintiff CASPIAN SELECT CREDIT MASTER FUND, LTD., Plaintiff MARINER LDC, Plaintiff CASPIAN ALPHA LONG CREDIT FUND, L.P., Plaintiff CASPIAN SOLITUDE MASTER FUND, L.P., Plaintiff OLYMPIC CLO I LTD., Plaintiff SHASTA CLO I LTD., Plaintiff WHITNEY CLO I LTD., Plaintiff SAN GABRIEL CLO I LTD., Plaintiff SIERRA CLO II LTD., Plaintiff ING PRIME RATE TRUST, Plaintiff ING SENIOR INCME FUND, Plaintiff ING INTERNATIONAL (II) - SENIOR LOANS, Plaintiff ING INVESTMENT MANAGEMENT CLO I, LTD., Plaintiff ING INVESTMENT MANAGEMENT CLO II, LTD., Plaintiff ING INVESTMENT MANAGEMENT CLO III, LTD., Plaintiff ING INVESTMENT MANAGEMENT CLO IV, LTD., Plaintiff ING INVESTMENT MANAGEMENT CLO V, LTD., Plaintiff PHOENIX CLO I, LTD., Plaintiff PHOENIX CLO II, LTD., Plaintiff PHOENIX CLO III, LTD., Plaintiff VENTURE IV CDO LIMITED, Plaintiff VEER CASH FLOW CLO, LIMITED, Plaintiff MONARCH MASTER FUNDING, LTD., Plaintiff NORMANDY HILL MASTER FUND, L.P., Plaintiff GENESIS CLO 2007-1 LTD., Plaintiff SCOGGIN CAPITAL MANAGEMENT II, LLC., Plaintiff SCOGGIN INERNATIONAL FUND, LTD., Plaintiff SCOGGIN WORLDWIDE FUND, LTD., Plaintiff SPCP GROUP, LLC.,

05/03/2011	2	Plaintiff SOLA, LTD., Plaintiff SOLUS CORE OPPORTUNITIES MASTER FUND, LTD., Plaintiff STONE LION PORTFOLIO LP., Plaintiff VENOR CAPITAL MASTER FUND, LTD..) (Attachments: # 1 Mailing Matrix) (DUNLAP, CRAIG) (Entered: 05/03/2011)
05/03/2011	3	Receipt of Filing Fee for Notice of Removal(11-01130) [cmp,ntcrmvl] (250.00). Receipt number 10642511, fee amount $ 250.00. (U.S. Treasury) (Entered: 05/03/2011)
05/05/2011	4	Stipulation By FONTAINEBLEAU RESORTS, LLC., JEFFREY SOFFER, TURNBERRY LTD., TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P., TURNBERRY WEST CONSTRUCTION, INC. and Between All Parties Filed by STEVE MORRIS on behalf of FONTAINEBLEAU RESORTS, LLC., JEFFREY SOFFER, TURNBERRY LTD., TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P., TURNBERRY WEST CONSTRUCTION, INC. (MORRIS, STEVE) (Entered: 05/05/2011)
05/06/2011	5	Scheduling Conference scheduled for 9/30/2011 at 09:30 AM at MKN-Courtroom 2, Foley Federal Bldg. (ksh) (Entered: 05/06/2011)
05/09/2011	6	Answer to Complaint Filed by JEFFREY R. SYLVESTER on behalf of HOWARD KARAWAN (Related document(s) 1 Notice of Removal(SYLVESTER, JEFFREY) Modified on 5/10/2011 to relate to #1 (DeVaney, HA). (Entered: 05/09/2011)
05/10/2011	7	Certificate of Service Filed by JEFFREY R. SYLVESTER on behalf of HOWARD KARAWAN (Related document(s) 6 Answer to Complaint filed by Defendant HOWARD KARAWAN.) (SYLVESTER, JEFFREY) (Entered: 05/10/2011)
05/10/2011	8	Order Approving Stipulation To Extend Time To Answer Or Otherwise Respond To The Complaint (Related document(s) 4 Stipulation filed by Defendant TURNBERRY WEST CONSTRUCTION, INC., Defendant TURNBERRY LTD., Defendant JEFFREY SOFFER, Defendant FONTAINEBLEAU RESORTS, LLC., Defendant TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P..) (had) (Entered: 05/10/2011)

PACER Service Center

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

______________________________________ /

AVENUE TERM LENDER PLAINTIFFS' AMENDED RESPONSES TO SECOND SET OF INTERROGATORIES FROM DEFENDANT BANK OF AMERICA, N.A.

Pursuant to Federal Rules of Civil Procedure 26 and 33 and the Local Rules for the Southern District of Florida, the Avenue Term Lender Plaintiffs ("Plaintiffs") provide the following Amended Responses to Defendant Bank of America, N.A.'s ("BofA") Second Set of Interrogatories (the "Interrogatories") dated February 4, 2011.

PRELIMINARY STATEMENT

These responses, while based on diligent inquiry and investigation by Plaintiffs, necessarily reflect only the current state of Plaintiffs' knowledge, understanding, and belief, based upon information known to them at this time.

Where a response is made to an interrogatory that seeks information about the actions, knowledge, status or operations of any Defendant(s) or third party in which Plaintiffs was not directly involved, the information provided in such a response is based upon information from documents and testimony gathered during Plaintiffs' investigation of such matters and is believed to be true.

Plaintiffs have not yet completed their investigation and have not completed their preparation for trial. Plaintiffs expect that Defendants may make legal or factual contentions

presently unknown to and unforeseen by Plaintiffs in response to which Plaintiffs may offer different and additional facts. Accordingly, these responses are provided without prejudice to Plaintiffs' right to rely upon and use, at trial or otherwise, any information that it subsequently discovers, or that proves necessary in explanation, response or rebuttal to any contention of any witness, or that was omitted from these responses as a result of mistake, inadvertence, surprise, or oversight; and Plaintiffs reserve the right to further amend or supplement these responses with such information, without in any way obligating it to do so other than as required by law or applicable rules. Each of the following responses is made solely for the purposes of this action.

GENERAL OBJECTIONS

The following General Objections apply to each of the Interrogatories, and shall have the same force and effect as if fully set forth in response to each interrogatory:

1. Plaintiffs object to the Interrogatories to the extent they call for information protected from disclosure by the attorney-client privilege, work product doctrine or any other applicable privilege, doctrine or immunity against disclosure. The inadvertent disclosure by Plaintiffs of any information that may be protected from disclosure by any such privilege, doctrine or immunity shall not constitute a waiver thereof.

2. Plaintiffs object to the Interrogatories to the extent they seek to impose greater obligations than those imposed by the Federal Rules of Civil Procedure and any other applicable statutes, rules and/or case law.

3. Plaintiffs object to the Interrogatories to the extent they call for information that is neither relevant to any claim or defense of any party to this action, nor reasonably calculated to lead to the discovery of admissible evidence.

4. Plaintiffs object to the Interrogatories to the extent they seek speculation about the actions or knowledge of third parties and not Plaintiffs.

5. Plaintiffs object to the Interrogatories to the extent they are overbroad, unduly burdensome and/or oppressive.

6. Plaintiffs object to the Interrogatories to the extent they call for responses based solely on publicly-available information, information that is more readily available to Defendants than Plaintiffs, and/or information that is not within Plaintiffs' possession, custody or control, or information that is available from other, more convenient, sources.

7. Plaintiffs object to the Interrogatories to the extent they are vague, indefinite, ambiguous, unduly repetitious, lack a readily discernable meaning, and/or require Plaintiffs to speculate as to the response sought. Without waiver of these objections, where necessary, Plaintiffs has made reasonable interpretations and respond according to such interpretations.

8. Plaintiffs object to the Interrogatories to the extent they call for conclusions of law.

9. Plaintiffs object to the definitions of "Identify" as overly broad and unduly burdensome to the extent the definitions purport to require Plaintiffs to provide more information that reasonably necessary for BofA to determine the document or communication or notification being referred to.

10. Plaintiffs object to Instruction B as unduly burdensome. Plaintiffs shall provide a joint answer to each interrogatory. However, a representative authorized to sign on behalf of each Plaintiff will verify the responses.

11. Plaintiffs object to Instruction F as unduly burdensome. Plaintiffs further object to Instruction F to the extent it is impossible to comply with. To the extent Plaintiffs do not currently have documents in their possession, custody or control, Plaintiffs will not know their Date, author(s), addressee(s), recipient(s), subject matter or any other information. Plaintiffs may not know whether any documents, now unavailable, exist or existed at one point in time.

12. Plaintiffs object to Instruction G as unduly burdensome and oppressive. Plaintiffs further object to Instruction G to the extent it calls for the production of information protected by the attorney-client privilege or attorney work product doctrine or any other applicable protection. To the extent Plaintiffs relied on any document to answer any interrogatory, all such non-privileged documents have been or will be produced in this litigation and therefore are equally available to BofA.

13. Plaintiffs object to these Interrogatories to the extent that BofA has exceeded the maximum number of interrogatories permitted under the Federal Rules of Civil Procedure.

14. By asserting these objections, Plaintiffs do not waive their right to revise or supplement these objections as may be necessary should new or different information become known to them. These responses and objections are made without in any way waiving, but in all cases reserving:

a. All objections as to competency, relevance, materiality, privilege, and admissibility as evidence for any purpose of any of the information provided herein;

b. The right to object on any ground as to the use of the information provided herein at any trial or hearing in this matter;

c. The right at any time to revise, supplement, correct, or add to the responses.

Each of the above objections is incorporated by reference into each individual response below, as if fully set forth therein.

INTERROGATORY NO. 1:

Do You contend that the Disbursement Agent should have issued a Stop Funding Notice under Section 2.5.1 of the Disbursement Agreement because the conditions precedent to an Advance were not satisfied?

RESPONSE TO INTERROGATORY NO. 1:

Plaintiffs object to Interrogatory No. 1 as vague and ambiguous to the extent it is not limited in time. Plaintiffs further object that their claims and contentions are set out in the operative Complaint in this action, which is incorporated herein. Subject to the foregoing general and specific objections, Plaintiffs respond as follows:

Yes.

INTERROGATORY NO. 2:

If Your response to Interrogatory No. 1 is anything other than an unqualified "No":

(a) state the Date when the Disbursement Agent should have issued the Stop Funding Notice;

(b) identify each Advance for which the conditions precedent were not satisfied; and

(c) for each Advance identified in subpart (b), identify each condition precedent that was not satisfied, and state the reason(s) why such condition precedent was not satisfied.

RESPONSE TO INTERROGATORY NO. 2:

Plaintiff objects to Interrogatory No. 2 on the grounds that it is compound and overbroad. Plaintiffs also object to Interrogatory No. 2 to the extent it calls for the revelation of information protected by the attorney-client privilege, attorney work product doctrine or any other applicable privilege or doctrine. Plaintiffs further object to Interrogatory No. 2 on the grounds that it is unduly burdensome to the extent it requires Plaintiffs to provide every month, day and year on which BofA should have issued a Stop Funding Notice, which it had a continuing obligation to do upon the first failure of a condition precedent to an Advance. Subject to the foregoing general and specific objections, Plaintiffs respond as follows:

Beginning in September 2008 and continuing through March 2009, BofA failed to issue Stop Funding Notices and improperly disbursed Term Lender funds to the Borrowers in breach of its obligations under the Disbursement Agreement. BofA's obligation to issue Stop Funding Notices and to withhold disbursements stemmed, in part, from the following defaults:[1]

- The Lehman Defaults. On September 15, 2008, Lehman filed for bankruptcy. Lehman was the Retail Agent and the largest Retail Lender under the Loan Agreement, dated as of June 6, 2007, between Fontainebleau Las Vegas Retail, LLC as Borrower and Lehman Brothers Holdings Inc., individually and as Agent for one or more Co-Lenders, and as Lender ("Retail Facility"). As such, Lehman's bankruptcy created a hole in the financing for the Project. Andrei Dorenbaum, Assistant General Counsel of Highland Capital Management, LP, a Term Lender, notified Jeff Susman at BofA by email on September 26, 2008 that Lehman's bankruptcy resulted in a breach of the Financing Agreements and prevented any further disbursements being made. That same day Mr. Dorenbaum discussed the issue with Bill Scott, BofA's attorney, who conveyed the conversation to BofA employees including Jeff Susman, Jon Varnell, Bret Yunker, Brandon Bolio, and David Howard. Other Lenders also expressed concern. On October 22, 2008, Sven Schlolaut, Vice President at HSH Nordbank AG, questioned BofA as to whether it had a right to withhold funding if Lehman was in default.

[1] In addition to the defaults listed below, the Plaintiffs contend that the failure by the Revolving Lenders to fund the March Borrowing Notices constituted defaults and breaches that also prevented BofA from disbursing funds. The Court granted the Revolving Lenders' Motion to Dismiss claims arising out of their failure to fund the March Borrowing Notices, and the Plaintiffs have appealed that Order. The Plaintiffs reserve their right to assert such additional defaults and breaches if they are successful on appeal.

- Lehman failed to fund the September 25, 2008 Advance under the Retail Facility, which was funded instead by Fontainebleau Resorts, LLC ("FBR") on September 26, 2008. BofA knew that FBR was considering funding Lehman's obligations and also knew that such funding would cause various conditions precedent to funding under the Disbursement Agreement to fail, thereby preventing any disbursements from being made.
- Jim Freeman of FBR informed BofA that FBR was considering funding Lehman's share of the September Advance. Before and/or shortly after the September Advance was funded, BofA learned that FBR had in fact funded Lehman's share. BofA learned this from, among others, TriMont Real Estate Advisors ("TriMont"), the Servicer under the Retail Facility, certain Term Lenders, including Highland Capital Management, LP,[2] and certain industry analysts, including John Maxwell at Merrill Lynch.[3]
- At a minimum, BofA knew facts that put it on notice that FBR had paid Lehman's share of the September Advance. BofA had no information to suggest that Lehman was paying its obligations under the Retail Facility after it filed for bankruptcy.

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[2] On September 26, 2008, Andrei Dorenbaum emailed Bill Scott, BofA's attorney, and Jeff Susman notifying BofA that according to the current bankruptcy order, Lehman cannot make its payments under the retail facility [redacted] On October 9, Andrei Dorenbaum talked to Bill Scott and discussed the need for confirmation that the retail lenders funded and that equity funding for the retail lenders does not satisfy the conditions precedent to funding. Kevin Rourke then emailed David Howard a summary of that conversation. On October 13, 2008, Mr. Dorenbaum emailed Mr. Scott, notifying BofA that Lehman did not make the September 2008 payment.

[3] On October 3, 2008, a Merrill Lynch analyst, John Maxwell, reported that equity sponsors funded the amount required from Lehman on the retail facility in September, 2008. This email report was forwarded to John Varnell on October 10, 2008 by Kevin Rourke.

Moreover, after the September Advance was paid, the Borrowers and FBR refused to provide answers to express questions from BofA and others regarding the source of funding for Lehman's share of the September Advance. BofA knew that FBR was responding evasively to these questions[4] and that it was doing so on the advice of its counsel. Jim Freeman informed BofA representatives that FBR's counsel had instructed him to limit what information he provided regarding the funding of Lehman's share of the September Advance. Freeman's non-responsive answers to direct questions concerning the funding of Lehman's share of the September Advance informed BofA that someone other than Lehman had funded Lehman's share of the September Advance. BofA's knowledge that FBR's counsel had asked Freeman to limit what he said further informed BofA that FBR's counsel considered the fact of Lehman's non-payment to be prejudicial to FBR's interests. Rather than act on this knowledge as it was required to do under the Disbursement Agreement and in order to create an appearance of plausible deniability, BofA turned a blind eye. BofA knowingly and intentionally refused to demand that Freeman or FBR provide a responsive, non-evasive and truthful answer to the question of who funded Lehman's share of the September Advance and refused to take steps to determine the answer to that question from independent sources. As a result, FBR was permitted to and did pay all or portions of Lehman's obligations under the Retail Facility, as set forth below.

- The Borrowers and FBR also refused to agree to a meeting with the Term Lenders to explain the Lehman funding issue. In light of the information it had from FBR, BofA

[4] On October 9, 2008, Kevin Rourke informed Jeff Susman and David Howard that a memo posted by Fontainebleau did not address Highland's concerns.

understood that this unexplained refusal was a red flag warning that the Borrowers and FBR were concealing the fact that they had paid Lehman's share.

- Consistent with its obligation under the Disbursement Agreement to exercise commercially reasonable efforts and to utilize commercially prudent practices in administering the construction loan and in disbursing funds, BofA had a duty to determine the true facts. BofA had the ability to do so by, among other things, demanding a non-evasive answer from FBR and the Borrowers, by asking TriMont and/or by asking Lehman. It failed to do so and instead continued to disburse Term Lender funds to the Borrowers.

- Lehman further failed to fund monthly advances under the Retail Facility on December 29, 2008, January 26, 2009, February 25, 2009 and March 25, 2009 as required by the December 2008 through March 2009 Advance Requests. These advances were funded in part by ULLICO and in part by FBR. In connection with each such advance, TriMont informed BofA that ULLICO had funded Lehman's share of the advance. BofA knew or should have known that Lehman's failure to fund these advances was a lender default under the Retail Facility that caused various conditions precedent to funding under the Disbursement Agreement to fail. BofA nonetheless continued to disburse Term Lender funds to the Borrowers. [REDACTED] In light of FBR's known concealments in September, BofA had a heightened duty to ensure that FBR was not continuing to fund on behalf of Lehman.

- As described below, Lehman filing for bankruptcy (on September 15, 2008) and every time Lehman failed to fund its commitment under the Retail Facility (on September 25, 2008, December 29, 2008, January 26, 2009, February 25, 2009 and March 25, 2009) resulted in various conditions precedent to funding to fail and obligated BofA to issue a Stop Funding Notice and to refuse to disburse funds. BofA's obligation to do so continued day-to-day since the date of the first of these events.
- In Balance Defaults. Since May, 2008, BofA knew or should have known that the Borrowers were concealing change orders and failing to provide budgets and other required reports for the Project that accurately reflected the anticipated costs to complete construction. Specifically, on May 28, 2008, Borrowers' CFO Jim Freeman sent Jeff Susman, John Varnell and Bret Yunker a change order schedule showing that there were approximately $201 million of change orders that had not previously been disclosed. A large number of these change orders had been known to the Borrowers for nearly a year. BofA did nothing to determine whether the change orders were pending before they were disclosed or whether there were any additional change orders, which both IVI and BofA believed existed.
- In the fourth quarter of 2008, IVI again raised concerns about the completeness and accuracy of the information the Borrowers were reporting to BofA. Lenders also expressed their concerns. On December 15, 2008 MaryKay Coyle, a Managing Director at Deutsche Bank, emailed IVI and BofA questioning how the Project can still be in balance and reporting that she had heard that there were cost overruns and that Moelis had been retained to raise additional equity to fund the overruns. Having

received no response, she followed up about her concerns with BofA by email on December 22, 2008.

- IVI's concerns continued in January and February 2009 as evidenced by IVI's January 30, 2009 Project Status Report. IVI was not only concerned that all the subcontractor claims had not been fully incorporated into the report but also that LEED credits were not meeting projections. IVI believed that reporting the LEED credits accurately could increase the Project costs by $15 million. The Lenders continued to express concern. On February 12, 2009, Mark Costantino, Executive Director of JP Morgan, wrote to BofA concerned about "the status of the analysis of subcontractor costs and potential cost overruns and the investigation of the LEED credits." BofA was also concerned and sent a letter to the Borrowers on February 20, 2009 inquiring about IVI's concerns. Borrowers' response to BofA's letter, however, failed to answer BofA's questions. Borrowers further refused to meet with BofA and the Lenders, strengthening BofA's concerns about the status of the Project and the Borrowers' veracity.
- IVI repeated its concerns in its March 3, 2009 report stating that "all subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included" and that "the LEED credits are tracking behind projections." IVI's skepticism regarding the information that the Borrowers were providing was further expressed in a letter to the Borrowers dated March 5, 2009, in which IVI explained: "At this point in the project, it is hard to believe that there are no additional costs or claims out there." Shortly thereafter, the Borrowers reported that the Project was $35 million over budget and, after further discussions with IVI, ultimately increased this amount to $50 million.

- The Borrowers' March 11, 2009 Advance Request that did not include the additional costs that had been disclosed was rejected by IVI. BofA knew that IVI was still concerned about the Borrowers' failure to accurately report cost information and that IVI's statements were inconsistent with the Borrowers' statements. IVI suggested auditing the Borrowers to certify the information they presented. BofA, however, declined to direct IVI to do so.
- Further increasing BofA's concern that the Borrowers were not providing accurate information, the Borrowers proposed that BofA enter into a pre-negotiation agreement with them in early March 2009.
- IVI approved a revised Advance Request on March 24, 2009, one day before the Scheduled Advance Date. The In Balance Report submitted with that Advance Request reflected a positive "in balance" of approximately $14 million (less that the $15 million in LEED costs that IVI believed the Borrowers had not reported). Nevertheless, BofA approved the Advance Request and disbursed the Term Lenders' money to the Borrowers.
- Only two weeks after BofA distributed approximately $135 million of Term Lender loans on March 25, 2009, the Borrowers provided BofA with change orders and anticipated change orders totaling over $350 million, nearly $190 million of which were admitted to be for previously committed construction costs. Had accurate budget and change order information been reflected in the In Balance Test, it would have shown that the In Balance Test failed.
- As explained below, the failure of the Borrowers to report known cost overruns and the fact accounting for those costs resulted in the Project being out of balance resulted in various conditions precedent to funding to fail and obligated BofA, upon learning

of the cost overruns to issue a Stop Funding Notice and to refuse to disburse funds at latest by December 2008. BofA's obligation to do so continued day-to-day since that time.

- The Bank of Nevada Defaults. First National Bank of Nevada was a Revolving Lender, an Initial Term Lender and a Delay Draw Term Lender under the Credit Agreement dated June 6, 2007 ("Credit Facility"). The Bank of Nevada was seized by federal regulators on July 25, 2008. The Federal Deposit Insurance Corporation was appointed as Receiver. On October 15, 2008, Mutual of Omaha, who acquired Bank of Nevada's retail customers' assets, informed BofA that the FDIC was repudiating the Bank of Nevada's obligations under the Credit Facility, which FDIC confirmed in a letter to BofA on December 19, 2008. Thereafter, Bank of Nevada failed to fund its commitment in connection with the February 13, 2009 and March 9, 2009 Notices of Borrowing. The commencement of the action seeking to appoint FDIC as Bank of Nevada's receiver (on, at the latest, July 25, 2008), the FDIC's repudiation of the Bank of Nevada's obligations (on, at the latest, December 19, 2008), and Bank of Nevada's subsequent failure to fund its obligations (in February and March 2009) each individually constituted a default under and a breach of the Credit Agreement and caused various conditions precedent to funding under the Disbursement Agreement to fail, triggering BofA's obligation to issue a Stop Funding Notice. BofA's obligation to do so continued day-to-day since the date of the first of these events. BofA nonetheless continued to disburse Term Lender funds to the Borrowers. BofA's breach of its duties did not harm the Term Lenders until September 2008 when it began improperly disbursing the Term Lenders' funds.

- The Term Lender Defaults. Z Capital Finance LLC, Copper River CLO Ltd, LFC2 Loan Funding LLC, Orpheus Funding LLC, Orpheus Holdings LLC, and Sands Point Funding Ltd ("Defaulting Term Loan Lenders") were Delay Draw Term Lenders under the Credit Facility. In March 2009, these Defaulting Term Loan Lenders failed to fund the March 9, 2009 Notice of Borrowing in breach of their obligations under the Credit Agreement. BofA was notified of these breaches and resulting defaults by the Defaulting Term Lenders when they refused fund as evidenced by BofA's letters to the Defaulting Term Lenders dated March 9, 2009 and March 12, 2009 confirming that the Defaulting Term Lenders' were not funding. The Defaulting Term Lenders' breaches of the Credit Agreement on March 9, 2009 caused various conditions precedent to funding under the Disbursement Agreement to fail and triggered BofA's obligation to issue a Stop Funding Notice. BofA's obligation to issue a Stop Funding Notice continued day-to-day thereafter until the breaches were cured. BofA nonetheless continued to disburse Term Lender funds to the Borrowers.

The Lehman Defaults, the In Balance Defaults, the Bank of Nevada Defaults, and the Term Lender Defaults (collectively, the "Defaults") each constituted a "Default" and an "Event of Default" under the Disbursement Agreement. An Event of Default under the Disbursement Agreement includes any event listed in Article 7, including the occurrence of an "Event of Default" under any Facility Agreement (which includes the Credit Agreement). A Default under the Disbursement Agreement includes any event listed in Article 7, whether or not any requirement for the giving notice, the lapse of time, or both has been satisfied, and the

occurrence of any "Default" under any Facility Agreement (which includes the Credit Agreement and the Retail Facility Agreement).[5]

- The Disbursement Agreement. Section 7.1.4(a) of the Disbursement Agreement provides that it is an Event of Default if the Project Entities "fail to perform or observe any of their respective obligations under Section[] … 6.4…." Under Section 6.4, the Project Entities covenant and agree that they will not "[d]irectly or indirectly, amend, modify … any Line Item Categories or other provisions of the Resort Budget…" except as provided therein. Under section 6.4.1(d), "[i]ncreases to the aggregate amount budgeted for any Line Item Category in the Resort Budget will only be permitted to the extent the increase does not result in the failure of the In Balance Test to be satisfied." As the Borrowers' additional change orders, which BofA knew or should have known the Borrowers were concealing, increased the budget and caused the In Balance Test to fail, there was an Event of Default under Section 7.1.4(a).
- Section 7.1.3 of the Disbursement Agreement provides that it is an Event of Default if "any representation, warranty or certification confirmed or made . . . by any of the Project Entities . . . shall be found to have been incorrect when made or deemed to be made." As described above, the In Balance Defaults constituted Events of Default under the Disbursement Agreement. As described below, beginning with Lehman's bankruptcy in September 2008 and extending through the Term Lender Defaults in March 2009, the Lehman Defaults, Bank of Nevada Defaults, and Term Lender Defaults constituted, individually and collectively, Defaults and Events of Default

[5] D.A. Ex. A.

under the Credit Agreement and therefore the Disbursement Agreement. The Lehman Defaults, In Balance Defaults, Bank of Nevada Defaults, and Term Lender Defaults also prevented multiple conditions precedent from being met. Each Advance Request submitted by Fontainebleau from and after September 2008 (as well as the re-certification on September 26, 2008), however, certified that no Defaults or Events of Defaults existed and that all conditions precedent to the Advance were satisfied. All such certifications were false and thus constituted Events of Default under Section 7.1.3(c) of the Disbursement Agreement. In addition, on each Advance Date the Project Entities represented and warranted: (1) under section 4.9.1, that there was no default or event of default under any of the Financing Agreements, which as described below was rendered false by the Lehman Defaults, the Bank of Nevada Defaults and the Term Lender Defaults, (2) under section 4.9.2, that there was no Default or Event of Default under the Disbursement Agreement, which was not true upon the occurrence of the In Balance Defaults, the Lehman Defaults, the Bank of Nevada Defaults and/or the Term Lender Defaults as discussed above; (3) under section 4.14, that the In Balance Test was satisfied as of the Advance Date, which was rendered false by the In Balance Defaults; and (4) under section 4.17.2, that the Remaining Cost Reports, "with respect to the Project Costs previously incurred, is true and correct in all material respects…", which was similarly rendered false by the In Balance Defaults. Each false representation constituted another Event of Default under Section 7.1.3(c).

- The Credit Agreement. A "Default" under the Credit Agreement means "any of the events specified in Section 8 whether or not any requirement for the giving of notice, the lapse of time, or both, has been satisfied." An "Event of Default" is "any of the

events specified in Section 8 provided that any requirement for the giving notice, the lapse of time, or both, has been satisfied." Section 8(j) provides that the breach by "any Person" of a "Material Agreement" (which includes the Credit Agreement and the Retail Facility Agreement)[6] constitutes a Default and an Event of Default (after the giving of any applicable notice and the expiration of any applicable grace period); provided the occurrence of such a breach shall only constitute an Event of Default if such breach could reasonably be expected to result in a Material Adverse Effect and continues unremedied for thirty days after the Companies become aware of the breach or the Companies received written notice from the Administrative Agent or any Lender of the breach. Thus, the failure of the Project Entities to receive full funding under the Retail Agreement and the Credit Agreement individually and collectively constituted Defaults under the Credit Agreement. Further, as the failure to obtain commitments to fill the financing holes left by these Defaults threatened the completion of the Project, which was the primary collateral for the repayment of the Term Lender loans, and thus could and would, if not cured, result in a Material Adverse Effect, each of the Defaults individually and collectively constituted Events of Default under the Credit Agreement.

Each of the Defaults also constituted a failure of multiple conditions precedents, requiring BofA to issue Stop Funding Notices upon their occurrence and every day thereafter until and unless cured, and to withhold disbursement of funds, including:

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[6] C.A. Schedule 4.24, ¶ 11.

- Section 3.3.2 provides: "Each representation and warranty of … [e]ach Project Entity set forth in Article 4 … shall be true and correct in all material respects as if made on such date."
- In Section 4.9.1, the Project Entities represent and warrant that "[t]here is no default or event of default under any of the Financing Agreements." The Financing Agreements include the Disbursement Agreement, the Credit Agreement, and the Retail Facility Agreement.[7] The Lehman Defaults constituted a default of the Retail Facility Agreement. The Retail Facility defines "Lender Default" to be "the failure or refusal (which has not been retracted in writing) of a Lender or Co-Lender to make available its portion of any Loan when required to be made by it hereunder." A "Defaulting Lender" is defined, in pertinent part, as "(i) any Lender or Co-Lender with respect to which a Lender Default is in effect" and "(ii) any Lender or Co-Lender that as a result of any voluntary action is the subject (as a debtor) of any action or proceeding (A) under any existing or future law of any jurisdiction… relating to bankruptcy, insolvency, reorganization or relief of debtors …." Similarly, the Term Lender Defaults and the Bank of Nevada Defaults constituted a default under the Credit Agreement. The Credit Agreement defines "Lender Default" as "the failure or refusal (which has not been retracted in writing) of a Lender to make available its portion of any Loan required to be made by such Lender hereunder." It defines "Defaulting Lender" as "(i) any Lender to which a Lender Default is in effect, (ii) any Lender that is the subject (as a debtor) of any action or proceeding (A) under any existing or future laws of any jurisdiction… relating to bankruptcy, insolvency,

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[7] D.A. Ex. A.

reorganization or relief of debtors…." Thus, the Lehman Defaults, the Bank of Nevada Defaults and the Term Lender Defaults rendered false the representation and warranty in Section 4.9.1 and caused the condition of Section 3.3.2 to fail.

- In Section 4.9.2, the Project Entities represented and warranted that "[t]here is no Default or Event of Default hereunder." As discussed above, the Lehman Defaults, the In Balance Defaults, the Bank of Nevada Defaults and the Term Lender Defaults constituted Defaults and Events of Defaults under the Disbursement Agreement. In addition, as discussed above, the inaccuracy of these representations and warranties and the other false certifications by the Project Entities caused Events of Defaults under Section 7.1.3, further causing the condition of Section 3.3.2 to fail.
- Section 4.14 contains the representation and warranty that the In Balance Test is satisfied as of the Advance Date. The In Balance Defaults rendered this representation false, causing Section 3.3.2 to fail.
- Section 4.17.2 makes presentations and warranties about the Remaining Cost Report, including that information in the Remaining Cost Reports, "with respect to Project Costs previously incurred, is true and correct in all material respects…" The In Balance Defaults also rendered this representation false, causing Section 3.3.2 to fail.
- Section 3.3.3 provides: "No Default or Event of Default shall have occurred and be continuing." The Defaults caused the condition of Section 3.3.3 to fail.
- Section 3.3.8 required that the In Balance test be satisfied. BofA knew or should have known that the Borrowers were concealing change orders and failing to provide budgets and other required reports for the Project that accurately reflected the anticipated costs to complete construction, which prevented the satisfaction of the In Balance Test by at the latest the December, 2008 Advance Request. In particular, for

the March 25, 2009 Advance, the In Balance Test was not satisfied, as required under Section 3.3.8. On March 23, 2009, the Borrowers advised BofA that it would be submitting a calculation of the In Balance Test reflecting a razor-thin cushion of only $13.8 million. That cushion included Available Funds with two incompatible components: (a) $750 million in "Bank Revolving Availability"; and (b) $21,666,666 under "Delay Draw Term Loan Availability," which represented the defaulted portion of the Delay Draw Term Loans (excluding First National Bank of Nevada's portion). Depending on whether "fully drawn" was interpreted to mean "fully funded" or "fully requested," either the $750 million or the $21,666,666 could be included as Available Funds – but not both. Further, the Project was in balance by an amount less than the additional $15 million in LEED costs that IVI suspected existed. Thus, the condition set forth in Section 3.3.8 failed.

- Section 3.3.11 provides: "[T]here shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project … any of which could reasonably be expected to have a Material Adverse Effect." The failure of the Project Entities to receive full funding under the Retail Facility Agreement and the Credit Agreement and the failure to obtain commitments to fill the financing holes left by the Defaults threatened the completion of the Project, which was the primary collateral for the repayment of the Term Lender loans, and thus could and would, if not cured, result in a Material Adverse Effect. In addition, by December 2008, the mounting undisclosed cost overruns affected the ability of the Borrowers to construct the Project and amounted to a Material Adverse Effect. Further, starting in 2008, the economic downturn, including the impact of Lehman's bankruptcy, the deteriorating housing market in Las Vegas, and the lack of condominium sales by the Borrowers

changed the economics or feasibility of constructing the Project and amounted to a Material Adverse Effect. This was reflected by the fact that BofA downgraded the project and referred the credit to its special assets group. Accordingly, the Section 3.3.11 condition failed.

- Section 3.3.21 provides: "[T]he Bank Agent shall not have become aware … of any information or other matter affecting … the Project or the transactions contemplated [by the Disbursement Agreement] that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning … the Project, taken as a whole." BofA's knowledge of the Defaults was inconsistent with information disclosed to it by the Borrowers in each Advance Request from and after September 2008 that stated there were no Defaults and that all conditions precedent to the applicable Advance were satisfied. Accordingly, the Section 3.3.21 condition failed.
- Section 3.3.23 provides: "[T]he Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request." Lehman's failure to fund its share of the September and December, 2008 and the January through March 2009 Advances under the Retail Facility caused this condition to fail.
- Section 3.3.24 provides: "[T]he Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." Upon the occurrences of the Lehman Defaults and the In Balance Default, BofA could have and should have requested additional information in order to reconcile the inconsistent facts within its knowledge with the statements

made by the Borrowers. In most instances BofA failed to do this. When BofA did request additional information, such as when it requested information concerning who funded the Lehman share of the September 2008 Advance in a letter dated September 30, 2008 and information concerning cost overruns in a letter dated February 20, 2009, the Borrowers refused to answer the questions, thereby causing this condition to fail.

INTERROGATORY NO. 3:

Do You contend that the Disbursement Agent should have issued a Stop Funding Notice under Section 2.5.1 of the Disbursement Agreement because a Default or an Event of Default occurred?

RESPONSE TO INTERROGATORY NO. 3:

Plaintiffs object to Interrogatory No. 3 as vague and ambiguous to the extent it is not limited in time. Plaintiffs further object to Interrogatory No. 3 because the information sought by this interrogatory is encompassed within the information sought in response to Interrogatory No. 1. Plaintiffs further object that their claims and contentions are set out in the operative Complaint in this action, which is incorporated herein. Subject to the foregoing general and specific objections, Plaintiffs respond as follows:

Yes.

INTERROGATORY NO. 4:

If Your response to Interrogatory No.3 is anything other than an unqualified "No":

(a) state the Date when the Disbursement Agent should have issued the Stop Funding Notice;

(b) identify each Default or Event of Default that should have resulted in a Stop Funding Notice's issuance; and

(c) for each Default or Event of Default identified in subpart (b), describe in detail any notification provided by the Controlling Person or a Lender to the Disbursement Agent, Funding Agent or Bank Agent concerning that Default or Event of Default, and state the Date of such notification.

RESPONSE TO INTERROGATORY NO. 4:

Plaintiff objects to Interrogatory No. 4 on the grounds that it is compound and overbroad. Plaintiffs also object to Interrogatory No. 4 to the extent it calls for the revelation of information protected by the attorney-client privilege, attorney work product doctrine or any other applicable privilege or doctrine. Plaintiffs further object to Interrogatory No. 4 on the grounds that it is unduly burdensome because it requires Plaintiffs to provide every month, day and year on which BofA should have issued a Stop Funding Notice, which it had a continuing obligation to do upon the occurrence of the first Default or Event of Default. Plaintiffs further object to Interrogatory No. 4 on the grounds that it seeks information that is more readily available to BofA than Plaintiffs or information that is available from other, more convenient, sources. Plaintiffs further object to Interrogatory No. 4 because the information sought by this interrogatory is encompassed within the information sought in response to Interrogatory No. 2. Subject to the foregoing general and specific objections, Plaintiffs respond as follows:

Plaintiffs incorporate their response to Interrogatory No. 2 herein by reference.

INTERROGATORY NO. 5:

Do You contend that any Advance by the Disbursement Agent was improper because there was a Default and/or Event of Default under the Disbursement Agreement?

RESPONSE TO INTERROGATORY NO. 5:

Plaintiffs object to Interrogatory No.5 because the information sought by this interrogatory is encompassed within the information sought in response to Interrogatory Nos. 1

and 3. Plaintiffs further object that their claims and contentions are set out in the operative Complaint in this action, which is incorporated herein. Subject to the foregoing general and specific objections, Plaintiffs respond as follows:

Yes.

INTERROGATORY NO. 6:

If Your response to Interrogatory No.5 is anything other than an unqualified "No":

(a) identify each Advance by the Disbursement Agent that you contend was Improper;

(b) identify every Default or Event of Default that you contend made the Advance improper and state the Date on which each such Default or Event of Default occurred; and

(c) identify all notifications from a Lender to the Bank Agent or Disbursement Agent of a Default or Event of Default.

RESPONSE TO INTERROGATORY NO. 6:

Plaintiff objects to Interrogatory No. 6 on the grounds that it is compound and overbroad. Plaintiffs also object to Interrogatory No. 6 to the extent it calls for the revelation of information protected by the attorney-client privilege, attorney work product doctrine or any other applicable privilege or doctrine. Plaintiffs further object to Interrogatory No. 6 on the grounds that it seeks information that is more readily available to BofA than Plaintiffs or information that is available from other, more convenient, sources. Plaintiffs further object to Interrogatory No. 6 because the information sought by this interrogatory is encompassed within the information sought in response to Interrogatory Nos. 2 and 4. Subject to the foregoing general and specific objections, Plaintiffs respond as follows:

Plaintiffs incorporate their response to Interrogatory No. 2 herein by reference.