Dep. Ex. 917

Bank of America, N.A.
Fontainebleau Las Vegas Project

Summary of Anticipated Cost Reports

IVI Report	Period	Construction Percent Complete[1]	Construction Balance to Complete[1]	Current Contingency Balance		Anticipated Additional Costs[2]	Anticipated Owner Equity Expenditures[2]	Anticipated Contingency Expenditures[2]	Anticipated Contingency Balance[2]
1	1/1/07 - 4/30/07	N/A	N/A	$ 111,039,860	[1]				
2	5/1/07 - 5/31/07	N/A	N/A	$ 111,039,860	[1]				
3	6/1/07 - 6/30/07	8.63%	$ 1,740,394,981	$ 111,039,860	[1]				
4	7/1/07 - 7/31/07	10.62%	$ 1,702,491,144	$ 111,039,860	[1]				
5	8/1/07 - 8/31/07	12.40%	$ 1,668,537,393	$ 111,039,860	[1]				
6	9/1/07 - 9/30/07	14.32%	$ 1,631,931,640	$ 88,300,133	[1]				
7	10/1/07 - 10/31/07	16.54%	$ 1,589,628,852	$ 88,300,133	[1]				
8	11/1/07 - 11/30/07	19.17%	$ 1,539,610,256	$ 88,300,133	[1]				
9	12/1/07 - 12/31/07	21.94%	$ 1,486,826,270	$ 83,649,113	[1]				
10	1/1/08 - 1/31/08	24.39%	$ 1,443,938,199	$ 83,649,113	[1]				
11	2/1/08 - 2/29/08	27.65%	$ 1,381,627,153	$ 77,775,867	[1]				
12	3/1/08 - 3/31/08	30.94%	$ 1,318,837,964	$ 72,243,274	[2]	$ 64,709,322	$ -	$ 64,709,322	$ 7,533,952
13	4/1/08 - 4/30/08	34.77%	$ 1,245,734,282	$ 72,243,274	[2]	$ 64,709,322	$ -	$ 64,709,322	$ 7,533,952
14	5/1/08 - 5/31/08	35.82%	$ 1,347,771,238	$ 77,271,571	[2]	$ 217,191,288	$ 190,265,022	$ 26,926,267	$ 50,345,304
15	6/1/08 - 6/30/08	39.83%	$ 1,263,467,836	$ 77,271,571	[3]	$ 127,771,681	$ 100,845,415	$ 26,926,267	$ 50,345,304
16	7/1/08 - 7/31/08	44.14%	$ 1,173,057,321	$ 77,271,571	[2]	$ 110,420,120	$ 83,663,257	$ 26,756,863	$ 50,514,708
17	8/1/08 - 8/31/08	48.92%	$ 1,072,719,339	$ 77,271,571	[2]	$ 74,877,679	$ 48,120,816	$ 26,756,863	$ 50,514,708
18	9/1/08 - 9/30/08	53.33%	$ 980,128,903	$ 77,271,571	[2]	$ 63,868,403	$ 37,111,541	$ 26,756,863	$ 50,514,708
19	10/1/08 - 10/31/08	57.66%	$ 889,077,993	$ 77,271,571	[2]	$ 53,900,620	$ 27,143,757	$ 26,756,863	$ 50,514,708
20	11/1/08 - 11/30/08	62.45%	$ 788,610,530	$ 77,271,571	[2]	$ 50,514,208	$ 23,757,345	$ 26,756,863	$ 50,514,708
21	12/1/08 - 12/31/08	66.21%	$ 709,548,718	$ 77,271,571	[2]	$ 39,898,610	$ 13,141,748	$ 26,756,863	$ 50,514,708
22	1/1/09 - 1/31/09	70.83%	$ 612,505,695	$ 77,271,571	[2]	$ 61,726,092	$ -	$ 61,726,092	$ 15,545,479
23	2/1/09 - 2/28/09	73.39%	$ 572,216,924	$ 11,994,437	[4]	$ 53,172,979	$ -	$ 53,172,979	$ (41,178,542)

No Anticipated Cost Reports submitted by Turnberry West Construction during this time period

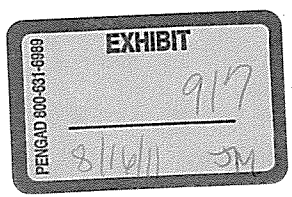
Sources:

[1] Remaining Cost Reports

[2] Turnberry West Construction's Anticipated Cost Reports (values for Current Contingency Balance do not always match values in Remaining Cost Reports)

[3] Value from May 2008 ACR used since the June ACR does not have a summary sheet showing contingency calculation.

[4] Value calculated from February ACR summary sheet; Previous Contingency Balance listed as $76,848,445 and Current Use of Contingency listed as $64,854,008, resulting in a net value of $11,994,437 in Current Contingency.



Dep. Ex. 932

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.

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EXPERT REPORT

OF

SHEPHERD G. PRYOR IV

May 23, 2011

INTRODUCTION

1. I have been retained by Hennigan Dorman LLP, counsel for the Plaintiffs, to provide my opinion on certain banking issues.

2. My opinions are based on my 39 years of experience in banking and my review of the evidence in the case entitled Fontainebleau Las Vegas Contract Litigation, MDL No. 2106, *Avenue CLO Fund, Ltd., et al., Plaintiffs, v. Bank of America, N.A., et al., Defendants*, Case No. 09-CV-01047-KJD-PAL. I reserve the right to revise my opinions if new and material evidence comes to my attention. I also reserve the right to review other expert reports filed in this action and to consider them in the future.

QUALIFICATIONS

3. Over a 39-year career in banking and finance, and in consulting to financial institutions, I have been involved in hundreds of lending transactions across virtually all major

industries. I have been involved in loans to large and small companies and individuals, financing acquisitions, highly leveraged transactions and projects, as well as loans to support the day-to-day operations of a broad variety of companies. At Wells Fargo Bank, I concentrated for several years on large, highly leveraged transactions, generally multibank credits. I was intimately involved in all aspects of their negotiation, structuring, approval, and monitoring. Many of these transactions involved complex corporate structures. The unit that I managed at Wells Fargo Bank was not only involved in the lending function, but also was directly involved in the syndication of multibank loans, both as an agent and as a participant. A more thorough statement of my qualifications is included as Exhibit A.

COMPENSATION

4. My hourly rate is $550. The payment of my fees is not contingent on the opinions I am expressing or on the outcome of this litigation.

SUPPORTING DOCUMENTATION

5. The documents, deposition testimony, and other evidence I have considered are listed in Exhibit B.

ISSUES

6. I have been asked to provide my opinions on the following issues:

   a. Did Bank of America make commercially reasonable efforts and utilize commercially prudent practices in disbursing funds to the Borrowers between September 2008 and April 2009 consistent with industry customs and practices and with the standard of care Bank of America was required to exercise as Bank Agent and Disbursement Agent under the Master Disbursement Agreement dated June 6, 2007 ("Disbursement

Agreement") and as Administrative Agent under the Credit Agreement of the same date?

b. In disbursing funds to the Borrowers between September 2008 and April 2009, did Bank of America act with bad faith, fraud, gross negligence or willful misconduct?

SUMMARY OF OPINIONS

7. Based on my review of the evidence, my opinions are as follows:

a. Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers on a monthly basis from September 2008 through March 2009 knowing that Lehman had failed to fund advances required of it under the Retail Facility;

b. Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers on a monthly basis from December 2008 through March 2009, knowing that the Borrowers in all likelihood had failed to fully disclose all costs that they anticipated would be required to complete the Project;

c. Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers on a monthly basis from December 2008 through March 2009 knowing that First National Bank of Nevada had defaulted on its lending commitments under the

Credit Agreement;

d. Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers in March 2009 knowing that numerous Term Lenders had failed to fund their commitments under the Credit Agreement in March 2009; and

e. Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers in March 2009 (1) knowing that the Borrowers had failed to meet the deadlines for submission of Advance Requests and (2) knowing of the existence of numerous negative conditions surrounding the Borrowers and the Project.

BACKGROUND AND OVERVIEW

The Fontainebleau Project

8. On June 6, 2007 Bank of America, acting as Disbursement Agent and Administrative Agent, and a group of participating lenders entered into a $1.85 billion Credit Agreement with Fontainebleau Resorts entities (the "Borrowers") to finance the construction of a hotel/casino complex, in Las Vegas, NV, the Fontainebleau Resort and Casino in Las Vegas, Nevada (the "Project"). The Project was designed to be a top-rate destination casino resort situated at the north end of the Las Vegas Strip, with 3,800 guest rooms, suites and condominium units; a 100-foot high three-level podium complex (the "Podium") that would house the casino, restaurants and bars, a spa and salon, a live entertainment theater and rooftop pools; a parking garage with capacity of 6,000 vehicles; and a 353,000 square foot convention center. The

Project was also to have 286,500 square feet of retail space including retail shops, restaurants, and a nightclub. The retail space was being developed by indirect subsidiaries of the Borrowers' parent company.

9. The financing for the Project was provided by three separate but interrelated credit facilities that all closed on June 6, 2007:

a. The Credit Facility. The Credit Agreement provided three major facilities: a $700 million Initial Term Loan Facility; a $350 million Delay Draw Facility (together with the Initial Term Loan Facility, the "Term Loan Facility"); and an $800 million Revolving Facility. Bank of America was the Administrative Agent under the Credit Agreement.

b. The Retail Facility. The Retail Facility Agreement provided a revolving credit for $315 million to support the construction of the retail space, $83 million of which was earmarked to fund Shared Costs for the construction of portions of the Project that would be later owned by the developer of the hotel. Lehman was the Retail Agent under the Retail Facility Agreement.

c. Second Mortgage Facility. Wells Fargo Bank, N.A. agreed to act as trustee on an issue of second mortgage bonds in the amount of $675 million.

10. Bank of America served as Disbursement Agent under a Master Disbursement Agreement that controlled the disbursement of funds supplied under the Credit Agreement, the Retail Facility Agreement and the Second Mortgage Facility.

The Credit and Disbursement Agreements

11. As Disbursement Agent, Bank of America had the central duty of collecting and disbursing to the Borrowers the funds loaned under the Credit Agreement, the Retail Facility and the Second Mortgage Facility. Bank of America, in its capacity as both Disbursement Agent and Administrative Agent under the Credit Agreement (aka, "Bank Agent" under the Disbursement Agreement)[1], provided the full agency role for participating lenders with respect to the Term Loan Facility and the Revolving Credit Facility.

12. The real and personal property of the Borrowers was pledged as collateral, shared ratably by the lenders under the Term Loan Facility (the "Term Lenders") and the Revolving Facility (the "Revolving Lenders").

13. Except for equity, which might be increased by the Borrowers, the various debt financings were expected to be the only source of funds for the construction of the Project. The Initial Term Facility and the Second Mortgage Facility were funded at the time of the closing. The Delay Draw Facility, the Revolving Facility and the Retail Facility were available to provide additional funds post-closing.

14. The sale of condos and the ongoing operation of the Project were the primary sources of repayment for the loans. Thus, the major risk for the Lenders was the risk that the Project would not be completed. The risk of completion was increased if each Lender made its own decision whether or not to fund. To reduce this risk, the agreements required the Lenders to fund unless and until either the Disbursement Agent issued a Stop Funding Notice or the Lenders declared a Default under one or more of the facilities. This structure gave the Lenders the

[1] The Disbursement Agreement uses the term "Bank Agent" to mean Bank of America in its capacity as Administrative Agent under the Credit Agreement. Disbursement Agreement ("DA") Ex. A, p. 3.

comfort that other Lenders could not jeopardize the project by unilaterally refusing to fund. If it became necessary to protect the Lenders, all Lenders would stop lending at the same time. In short, Lenders would be able to trust that the process would not discriminate against the interests of any given Lender or group of Lenders.

The Funding Process

15. The Borrowers gained access to funds from the Revolving Facility, the Delay Draw Facility, and the Retail Facility in two steps.

16. After appropriate notice (the "Notice of Borrowing") and subject only to specific conditions precedent in each of the agreements,[2] the Lenders remitted funds to Bank of America as Administrative Agent. For loans used to fund the construction of the Project, known as "Disbursement Agreement Loans," Bank of America (as Administrative Agent) paid the funds into the Bank Proceeds Account. The Borrowers had no access to funds in the Bank Proceeds Account. Direct Loans, on the other hand, made after the Project was completed, were paid into a Direct Funding Account to which the Borrowers did have access.[3]

17. In order to receive funds from the Bank Proceeds Account to pay for construction, the Borrowers were required to submit an "Advance Request" under the Disbursement Agreement.[4] The Advance Request included certain documents certifying progress on the construction project, computing and certifying the "In Balance Test" (described below), and certifying compliance with the conditions precedent under Section 3.3 of the Disbursement Agreement. Bank of America's duties included ensuring that funds were disbursed to the Bank

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[2] Credit Agreement ("CA") §§5.1, 5.2. Pertinent provisions of the Credit Agreement and Disbursement Agreement are collected in Exhibit C.
[3] CA §2.4(c).
[4] DA §2.4.

Funding Account (and ultimately to the Resort Payment Account from which the Borrowers could access funds) only if all of the conditions precedent to disbursement of funds under Section 3.3 of the Disbursement Agreement were satisfied.[5] These conditions included, among other things 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;[6]

b. there was no Default or Event of Default under any of the Financing Agreements;[7]

c. the In Balance Test was satisfied;[8]

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;[9]

e. The Disbursement Agent had not become aware of any information that was inconsistent with and materially adverse when compared with the information that had been provided by the Borrowers in connection with the Project;[10]

f. the Retail Agent and each of the Retail Lenders under the Retail Facility had made all Advances required of them under the Advance Request;[11] and

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[5] DA §§2.4.6, 2.6.2.
[6] DA §3.3.2.
[7] DA §3.3.3.
[8] DA §3.3.8.
[9] DA §3.3.11.
[10] DA §3.3.21.
[11] DA §3.3.23.

g. the Bank Agent shall have received such other documents and evidence as are customary that the Bank Agent may reasonably request to evidence the satisfaction of the other conditions precedent.[12]

18. If all of the applicable conditions precedent for the advance of funds were satisfied, the Disbursement Agreement provided for the Disbursement Agent and the Borrowers to execute and deliver to each of the Funding Agents an Advance Confirmation Notice. Upon receipt of such notice, Bank of America would make the Advances contemplated under the Advance Confirmation Notice, first from the Bank Proceeds Account into the Bank Funding Account[13] and finally to the Resort Payment Account, which the Borrowers could then access.[14]

19. 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 issue a "Stop Funding Notice" to the Borrowers and each Funding Agent, including the Administrative Agent.[15] If a Stop Funding Notice was 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 would have no obligation to fund until the circumstances associated with the Stop Funding Notice were resolved.[16]

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[12] DA §3.3.24.
[13] DA §§2.1.2, 2.4.6, 2.6.1(b).
[14] DA §§2.4.6, 2.6.2.
[15] DA §2.5.1.
[16] CA §2.4(e).

Bank of America's Role and Duties as Disbursement Agent and Administrative Agent

20. The provisions of the Credit Agreement and Disbursement Agreement must be viewed in the context of the applicable customs, practices and standards of care governing such commercial loan transactions. The principles that apply are common throughout the banking industry and apply to loans between a single lender and a borrower, as well as to those among lender groups and borrowers.

21. One of the most critical functions for any commercial loan is the disbursement function, that is, the determination of whether, under all of the available information, the agreed-upon conditions to disbursement of funds to the borrower have been satisfied. A mistake at this point in the lending process may be unrecoverable, as the "money is out the door." To avoid making potentially expensive mistakes, lenders should and do take considerable care in the disbursement process.

22. The single lender is responsible for the full spectrum of mechanical, administrative and judgmental issues with respect to disbursement. No reasonable lender would merely follow mechanical steps with its borrower, uncritically accepting representations, warranties and certifications from its borrower. The lender would make judgments regarding the credibility and reasonableness of all that it received from the borrower. For the protection of the lender's interests, this is a necessary step in the lending process.

23. Large scale projects generally involve multiple lenders. The reasons are twofold: (1) lenders often have restrictions on the amount they are allowed to commit to a single borrower, and (2) lenders of all types, in order to diversify their risk, typically set limits on how large their loan position will be to any single borrower. The fundamentals of credit agreements

do not change with scale. The lenders still must monitor the relationship. If the borrower falls out of compliance, there must be a way to stop the funding and to give the lenders the chance to reassess the value of continuing to fund the project. The critical disbursement function must now protect a group of lenders, rather than just one.

24. In multi-lender transactions, components of the overall process typically are delegated to agent banks, who act on behalf of and for the benefit of all lenders. The assignment of duties and responsibilities to agents must be done in a manner that ensures that all aspects of the lending process are conducted at the same high standard of care that would apply if there was only a single lender. The risks do not disappear, but more likely increase, as the number of lenders increases; and each lender in a multi-lender facility reasonably understands and expects that their appointed agents will properly perform their tasks to the benefit of all lenders.

25. The specific allocation of duties is controlled by the underlying agreements. However, it is worth restating that all of the duties that are necessary to protect the lenders must be allocated to someone. The duties are designed to manage the risks of the lending process. If a duty remains unfulfilled, the lenders will be vulnerable to the risk it was designed to manage. This practice of entrusting agents with the full disbursement function extends back over decades of multibank lending.

26. In large projects, different agency roles often are fulfilled by different entities. One bank may serve as administrative agent and another as disbursement agent. In these cases, it is important to the success of the lending process that there be a clear allocation of their respective duties. In less complex transactions, a single agent might perform both the administrative and disbursement functions. Here, Bank of America performed both roles.

27. Because Bank of America served as both the Administrative Agent (the "Bank Agent" under the Disbursement Agreement) and the Disbursement Agent there would be no conflicts or ambiguities arising from any division of labor between the two agency roles. To eliminate any question, each Funding Agent (including Bank of America as Bank Agent) appointed and authorized Bank of America (as Disbursement Agent) to act on its behalf.[17]

28. As noted above, the final step in the process of lending money is at the point of disbursement. Due to the risks and finality of disbursement, lenders are only willing to join a lending group if they understand that the agent bank will adhere to an appropriate standard of care in deciding whether to disburse funds on behalf of the group.

29. The Disbursement Agreement provided this assurance to the Fontainebleau Lenders. Bank of America, as Disbursement Agent, served as the last line of defense for each of the Lenders to ensure that funds were not improperly transferred to the control of the Borrowers.

30. As an overriding principle, the Disbursement Agreement required Bank of America "to exercise commercially reasonable efforts and utilize commercial prudent practices in the performance of its duties."[18] The Disbursement Agreement further provided that, "[i]f the Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing," it would "exercise such of the rights and powers vested in it...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."[19] Bank of America had the authority to waive conditions precedent,[20] but any such waiver was required to be specific and in

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[17] DA §9.1.
[18] *Id.*
[19] DA §9.2.3.
[20] DA §3.7.2.

writing.[21] I am unaware of any written waivers by Bank of America relevant to the opinions set forth in this report.

31. Bank of America was required under the Disbursement Agreement to determine whether the conditions precedent to disbursement had been met.[22] As Administrative Agent and Disbursement Agent, Bank of America was in the best position to make this determination. It stood at the center of activity among the broad array of entities that were involved in the Fontainebleau Project. Bank of America was best situated to collect information from each of the Lenders and from the Borrowers. It would have been impractical to have had the same level of communication running from the Borrowers to each of the Lenders who participated in the loans. Thus, Bank of America had the best set of information about the Project and the Borrowers and was best able to make determinations and judgments requisite to fulfilling the disbursement function.

32. While Mr. Naval and Ms. Brown were the nominal Administrative and Disbursement Agents, respectively,[23] both described their roles as merely mechanical and ministerial.[24] The Corporate Debt Products group, primarily Mr. Susman and Mr. Bolio, was the central repository of information and made all decisions relating to the disbursement of loan proceeds.[25]

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[21] DA §11.3.
[22] DA §3.3.
[23] Brown Depo., 11:2-9, 13:18-20; Naval Depo., 14:17-25.
[24] Brown Depo., 30:14-31:10, 32:4-6, 32:16-34:4, 35:7-36:2, 36:8-11, 39:8-40:2, 63:22-64:16, 87:21-88:10, 95:17-96:18; Naval Depo., 15:13-16:6, 20:21-22:8, 23:25-24:3, 25:17-21, 27:25-28:7, 29:4-6, 35:18-36:20, 56:10-57:7, 96:8-13, 98:23-99:4.
[25] Bolio Depo., 24:5-12, 26:2-27:25, 28:8-29:2, 30:1-15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 279:9-18; Brown Depo., 30:14-31:10, 32:4-6, 33:10-34:4, 35:7-36:2, 49:7-50:19, 63:22-64:16, 87:21-88:10; Naval Depo., 20:21-22:8, 23:25-24:3, 29:4-6, 56:10-57:7, 58:2-8, 96:8-13,

33. In certain of its filings, Bank of America has emphasized that the Disbursement Agreement provided that the Disbursement Agent was not required to undertake investigations or to seek out facts and, further, that the Disbursement Agent was entitled to rely on certifications made by the Borrowers. While Bank of America did not have an obligation to conduct an investigation to verify each and every representation made by the Borrowers absent contrary information, it did have a responsibility, if it intended to disburse funds, to determine whether all conditions precedent had in fact been met and to reconcile information that was inconsistent with or contrary to the Borrowers' representations and warranties. Participants in agented facilities understand and expect that the agent will not ignore such facts but rather will seek to protect their interests to ensure that disbursements are proper. Indeed, Bank of America's own officers have testified to the same understanding.[26]

34. It is useful to return to some of the principles of lending discussed above. A single lender would not disburse funds in the face of known false certifications by a borrower. For all of the same reasons, no reasonable single lender would ignore facts that raised a question as to the truthfulness of representations and warranties by the borrower. If the information presented by the borrower is inconsistent with or contradicted by other information that the lender has on hand, a reasonable lender would not disburse until all of the inconsistencies or factual discrepancies were addressed to its reasonable satisfaction.

35. Even then, false certificates raise an issue going to the heart of the borrower-lender relationship. If the integrity of the borrower is an issue, prudent lenders will not lend.

98:23-99:4; Susman Depo., 18:21-19:18, 39:18-40:5, 49:22-50:15, 52:2-7, 53:10-22, 59:1-25, 62:14-18, 63:24-64:5, 65:6-17, 68:8-14, 70:8-23, 77:8-24, 243:12-254:1.

[26] Bolio Depo., 164:20-165:12, 174:20-175:18; Susman Depo., 161:25-162:14, 181:9-183:20, 186:7-15, 203:2-9; Varnell Depo., 211:1-212:16; Yunker Depo., 127:16-129:11.

The lender has no meaningful way to assess the risk of an untruthful or misleading borrower. So, when a borrower is discovered to have provided false information during the course of a loan, a lender must reassess the viability of both the project and its relationship with the borrower to determine whether or not to continue the lending relationship.

36. As discussed before, multi-lender credits have the same, if not more risk than single-lender credits. Reasonable disbursement agents of a multi-lender credit typically do not uncritically accept and rely on documentation from a borrower without further inquiry if they are aware of facts contrary to or materially inconsistent with the borrower's representations.

37. The Disbursement Agreement reflects this reality.

a. Section 7.1.3 provides that it is an Event of Default if "any representation, warranty or certification confirmed or made by any of the Project Entities," including "in any Advance Request or other certificate," is "found to have been incorrect when made."[27] As the Disbursement Agent, Bank of America was the party in a position to "find" that representations and warranties were "incorrect" and thus that Events of Default had occurred. If Bank of America had information demonstrating that representations and warranties were "incorrect," it could not blindly rely on them. Such information would establish an Event of Default under the Disbursement Agreement. An Event of Default caused conditions precedent to disbursement to fail,[28] required Bank of America to issue a

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[27] DA §§7.1.3 (a) (made on the Closing Date), (b) (made after the Closing Date but prior to the Initial Bank Advance Date), (c) (made after the Initial Advance Date) and (d) (made in any Material Agreement).
[28] DA §§3.3.2, 3.3.21.

Stop Funding Notice[29] and, in general, required Bank of America to "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."[30]

b. Section 3.3.21 requires as a condition precedent to disbursement that "the Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party…the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole." Again, if Bank of America became aware of information "inconsistent" with representations and warranties by the Borrowers, it could not disburse.

c. Section 3.3.24 further reflects the parties' understanding that Bank of America would reconcile facts inconsistent with representations and warranties made by the Borrower. It provides: "In the case of each Advance from the Bank Proceeds Account, the 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."

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[29] DA §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. The Lenders would have no obligation to fund until the circumstances associated with the Stop Funding Notice were resolved. CA §2.4(e).

[30] DA §9.2.3.

If the only information pertinent to "evidence" the satisfaction of conditions precedent were the certificates provided by the Borrowers, Bank of America would never "reasonably request" other information and this provision would be unnecessary.

38. These provisions are consistent with general industry custom, practice and expectations. If Bank of America failed to issue a Stop Funding Notice and continued to disburse in the face of facts that contradicted or were materially inconsistent with certifications provided by the Borrowers, it would have breached not only the express terms of the Disbursement Agreement but also the standards of commercial reasonableness to which it was held under the Disbursement Agreement.

OPINIONS AND BASES FOR OPINIONS

OPINION 1: Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers on a monthly basis from September 2008 through March 2009 knowing that Lehman had failed to fund advances required of it under the Retail Facility.

Summary

39. Lehman's payment of its share of Retail Advances was a condition precedent to disbursement under the Disbursement Agreement. The Retail Facility, with Lehman Brothers Holdings, Inc. ("Lehman") as Retail Agent, was an integral part of the loan facilities. Funding from this facility supported the construction of the retail (restaurants and stores) space within the hotel/casino complex, a critical component of the overall Project. Lehman also was the largest of the Retail Lenders, responsible for close to $130 million of the undrawn commitment under the Retail Facility at the time it filed for bankruptcy on September 15, 2008.

40. After filing for Chapter 11 protection, Lehman failed to fund the September Advance under the Retail Facility. Instead, Fontainebleau Resorts, LLC ("FBR") funded Lehman's commitment. Lehman further failed to fund monthly advances under the Retail Facility beginning in December 2008 and extending through March 2009, [redacted]

41. Bank of America knew that Lehman's failure to pay Retail Advances was a violation of conditions precedent to the Disbursement Agreement. Bank of America also knew or had substantial reason to know that Lehman did not make advances required of it following its bankruptcy. Despite these facts, Bank of America elected to disburse Term Lender funds from the Bank Proceeds Account to the control of the Borrowers.

Facts

September 2008

42. Lehman was the Retail Agent and the largest lender under the Retail Facility.[31] Among other things, the Retail Facility provided financing to fund construction costs to complete the Podium and the retail component of the Project. Without the financing provided by the Retail Facility, the Project could not have been completed.[32] Funding of Retail Advances by the Retail Lenders was an express condition precedent to Bank of America's disbursement to the Borrowers of funds from the Bank Proceeds Account to the control of the Borrowers.[33]

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[31] Ex. 8; Rafeedie Depo., 14:22-15:12.

[32] Bolio Depo., 40:17-41:10; Freeman Depo., 56:13-57:3; Howard Depo., 39:13-40:6, 111:10-112:7; [redacted]; Kotite Depo., 16:25-17:12, 18:10-15; Varnell Depo., 69:7-69:10; Yunker Depo., 35:22-39:23.

[33] DA §3.3.23; Bolio Depo., 40:17-41:10, 45:7-12, 46:10-47:2, 57:14-58:1; Brown Depo., 47:6-19, 72:16-73:1; Freeman Depo., 56:13-22; Howard Depo., 59:25-60:21, 118:19-22; Kotite Depo., 18:16-19:6; Susman Depo., 145:2-146:24, 154:24-155:2, 250:22-251:7, 258:9-16; Yunker 36:16-37:18.

43. As Disbursement Agent on a multi-agreement facility that included the Retail Facility, Bank of America was obligated to know and understand the terms of the Retail Agreement as they might relate to disbursement issues under the Disbursement Agreement. Indeed, the Credit Agreement provided that Bank of America as Administrative Agent would receive all amendments to the Retail Facility and had the right to purchase the Retail loan upon the Retail Agent's failing to fund under the Retail Intercreditor Agreement.[34]

44. On September 15, 2008, Lehman filed for bankruptcy.[35] Upon filing bankruptcy, Lehman became a "Defaulting Lender" under the Retail Facility.[36] Bank of America understood that Lehman's bankruptcy was material and could be the "death nail" for the Project.[37]

45. [redacted], the Borrowers submitted an Advance Request that included $3,789,276 of funding from the Retail Facility.[38] [redacted].[39]

46. Bank of America learned from Jim Freeman, the CFO of FBR,(the parent of the Borrowers) that FBR was considering funding Lehman's portion of the September Retail Advance.[40] Bank of America concluded from its own analysis that FBR's funding of Lehman's share would cause the condition precedent to funding in Section 3.3.23 of the Disbursement

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[34] CA §6.2(f); Ex. 884.
[35] Ex. 896.
[36] Ex. 8 §1.1, definition of "Defaulting Lender."
[37] Exs. 67, 218, 219, 896, 899; Howard Depo., 39:13-20, 111:10-112:7; Susman Depo., 145:2-147:17, 150:22-151:5, 213:14-21, 221:8-18; Varnell Depo., 69:7-10; Yunker Depo., 35:22-36:15, 38:15-42:9.
[38] Exs. 11, 236.
[39] Exs. 11, 56.
[40] Ex. 73, 204, 475, p. 56; Varnell Depo., 181:10-15, Yunker Depo., 73:6-75:13.

Agreement to fail.[41] Bank of America was also notified of this fact by Highland Capital Management, a Term Lender under the Credit Agreement.[42]

47. Lehman did not fund its share of the September Retail Advance.[43] FBR did.[44] As a result, Lehman became a "Defaulting Lender" under the Retail Facility and caused a "Lender Default."[45]

48. Nonetheless, FBR represented in the September Advance Request[46] and affirmed on September 26[47] that all conditions precedent to disbursement had been satisfied. Bank of America had substantial information contrary to or, at a minimum, inconsistent with these representations. Specifically:

a. McLendon Rafeedie of Trimont Real Estate Advisors ("Trimont"), the servicer on the Retail Facility, testified that he did not keep information from Bank of America and that he believes he informed Jeanne Brown of Bank of America that FBR had funded for Lehman.[48] Ms. Brown subsequently told others at Bank of America that "the Lehman portion [of the September Retail Advance] has arrived," not that Lehman funded its portion.[49]

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[41] Exs. 204, 229; Bolio Depo., 46:10-47:2; Susman Depo., 157:23-162:14, 169:17-20; Yunker Depo., 96:11-20, 97:18-98:6, 110:18-112:12.
[42] Exs. 80, 472, 904.
[43] Exs. 14, 56, 61[redacted].
[44] Exs. 14, 56, 61; Freeman Depo., 75:13-22, 76:23-77:10; [redacted], Kotite Depo., 22:13-16; Rafeedie Depo., 52:3-12; Susman Depo., 264:24-265:3.
[45] CA §1.1, definitions of "Defaulting Lender" and "Lender Default."
[46] Ex. 236.
[47] Ex. 75.
[48] Rafeedie Depo. 34:19-35:18, 53:5-55:14, 62:14-63:9.
[49] Ex. 241.

b. Highland Capital informed Bank of America that an analyst from Merrill Lynch had reported that FBR ("the Fontainebleau equity sponsor") funded for Lehman.[50] Bank of America forwarded this email to Mr. Freeman at FBR but apparently never asked Mr. Freeman whether it was true.[51]

c. Highland also notified Bank of America that, as a result of Lehman's bankruptcy filing, the financing agreements that governed the Project were no longer in "full force and effect" as required under Section 3.3.1(b) of the Disbursement Agreement.[52] Highland further notified Bank of America of a Material Adverse Effect in connection with the Lehman bankruptcy.[53]

d. Bank of America wrote Mr. Freeman on September 30, 2008 requesting a meeting with FBR and all of the Lenders to discuss, among other things, the conditions precedent to disbursement set forth in Sections 3.3.1(b) and 3.3.23 of the Disbursement Agreement.[54] Bank of America specifically asked: "Did Lehman fund its portion of the requested $3,789,276.00 of Shared Costs funded last Friday (9/26/08) or was this made up from other sources? If Lehman did not fund its portion, what were the other sources?"

e. FBR refused to attend a meeting to discuss the questions that had been

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[50] Exs. 78, 81, 459, 834.
[51] Ex. 233; Varnell Depo., 208:1-210:1; Yunker Depo., 117:6-118:22.
[52] Exs. 455, 898.
[53] Ex. 473.
[54] Ex. 76.

asked in writing by Bank of America.[55] Mr. Freeman told Bank of America representatives that FBR did not want to have a call with the Lenders because "we had limitations on what we were and weren't allowed to say, based on our discussions with counsel."[56] Bank of America never followed up with Mr. Freeman to determine what information he was concealing on advice of counsel.[57] Bank of America believed that FBR's refusal to meet was a concern.[58] FBR's refusal to meet because of limitations imposed by counsel on what it could say to its lenders should have been an enormous warning sign to Bank of America.

f. On October 7, Mr. Freeman sent a memo in response to Bank of America's September 30 letter stating, in pertinent part: "In August and September, the retail portion of such shared costs was $5mm and $3.8mm, respectively, all of which was funded."[59] Mr. Freeman's response to Bank of America's September 30 letter clearly was evasive and conveyed to Bank of America everything that it needed to know—that Lehman did not fund its share of the September Retail Advance.

g. Mr. Freeman subsequently referred to the limitations on what he could and couldn't say regarding the Lehman situation in an email to Bank of America regarding a conversation he had had with Highland Capital representatives in which "they asked a fair amount about Lehman at the

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[55] Yunker Depo., 167:17-168:14.
[56] Freeman Depo., 106:11-109:9.
[57] Freeman Depo., 109:15-110:8.
[58] Howard Depo., 106:8-107:14; Susman Depo., 228:1-17; Yunker Depo. 168:15-171:2.
[59] Ex. 77.

start and I told them what I could."[60]

49. Bank of America failed to issue a Stop Funding Notice, apparently failed to request direct and conclusive evidence (from Trimont, Lehman and/or FBR) to establish whether Lehman had paid its share of the September Retail Advance, and instead executed Advance Confirmation Notices and disbursed funds in September 2008[61] and every month thereafter until Bank of America terminated the Revolving Facility in April 2009.

50. On October 23, 2008, Bank of America representatives attended a meeting with the Retail Lenders, not including Lehman.[62] At that meeting, the Retail Lenders informed Bank of America that they were not willing to increase their commitments sufficient to replace Lehman's remaining commitments under the Retail Facility.[63]

December 2008 – March 2009

51. Based on the evidence I have seen, I cannot determine whether Lehman funded Advances under the Retail Facility in October or November 2008. [redacted].[64]

52. [redacted].[65] [redacted]

[60] Ex. 254; Freeman Depo., 105:9-106:10.
[61] Ex. 625.
[62] Ex. 18; [redacted] Kotite Depo., 33:8-23; Yunker Depo., 171:11-172:9.
[63] Ex. 19; Kolben Depo., 72:6-74:7.
[64] Exs. 21, 23, 29, 35, 41; Rafeedie Depo., 66:21-23.
[65] Ex. 61; [redacted]

[redacted].[66]

53. Bank of America has acknowledged that payment of Lehman's share by FBR violated conditions precedent to disbursement set forth in Section 3.3.23 of the Disbursement Agreement.[67] But, beyond that, payment of Lehman's share by anyone other than Lehman, including ULLICO, was prohibited under the language of Section 3.3.23.

54. Bank of America knew that Lehman did not fund advances from December 2008 through March 2009.[68] Bank of America apparently did nothing to determine the circumstances of ULLICO's payments or the existence of commitments to take over Lehman's obligations under the Retail Facility.

Applicable Contract Provisions

55. Lehman's bankruptcy and failure to fund its share of Retail Advances caused various conditions precedent to disbursement set forth in Section 3.3 of the Disbursement Agreement to fail, which should have, individually and together, caused Bank of America to refuse to disburse, including:

a. Section 3.3.2: "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." Article 4 stipulates the Representations and Warranties to be made by the Borrowers on each Advance Date, to the

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[66] Exs. 24, 30, 36, 42, 46; [redacted]; Rafeedie Depo., 79:25-80:7.

[67] Exs. 204, 229; Bolio Depo., 46:10-47:2; Susman Depo., 157:23-162:14, 169:17-20; Yunker Depo., 96:11-20, 97:18-98:6, 110:18-112:12.

[68] Exs. 58, 62, 239, 240, 479, 607, p. 2, 804, 905, 906; Bolio Depo., 83:16-84:12, 90:1-91:21; Rafeedie Depo., 79:25-80:2, 89:24-90:13, 99:20-25, 103:24-104:6; Susman Depo., 270:16-19, 273:7-11.

Disbursement Agent.

(1) 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." As defined in Exhibit A to the Disbursement Agreement, "Financing Agreements" include the Disbursement Agreement and the "Facility Agreements," which in turn includes the Credit Agreement and the Retail Facility Agreement. The representation in Section 4.9.1 therefore could not be true if Lehman was in default of the Retail Facility Agreement. Lehman was in default.

(a) Under the Retail Facility Agreement, "'Lender Default' shall mean 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." Lehman's repeated failure to fund constituted a Lender Default under the terms of the Retail Facility Agreement. Additionally, Lehman's bankruptcy filing rendered it a "Defaulting Lender," which is defined in the Retail Facility Agreement to include "any Lender…that as a result of any voluntary action is the subject (as a debtor) of any action or proceeding…relating to bankruptcy, insolvency, reorganization or relief of debtors…"

(b) Section 2.1.2(c) of the Retail Facility Agreement directs that "Lender [Lehman: individually as a lender, and as Agent] will make Project Future Advances in accordance with the procedures, terms and conditions set forth in the Master Disbursement Agreement." Sections 2.1.2(e)(ii) and (e)(iii) further obligate the Lender to make Future Advances subject to Section 3.5.1 of the Disbursement Agreement, which lists conditions precedent to Shared Cost Advances. Lehman's failure to fund violated these provisions.

(2) Section 4.9.2 contains the representation and warranty that there exists no Default or Event of Default under the Disbursement Agreement. As defined in the Disbursement Agreement a "Default" under any Facility Agreement is a Default under the Disbursement Agreement.[69] Lehman's Default under the Retail Facility Agreement constituted a Default under the Disbursement Agreement. (See discussion regarding Section 3.3.3 below.)

b. Section 3.3.3. "No Default or Event of Default shall have occurred and be continuing." The Disbursement Agreement defined "Event of Default" through its listing in Article 7.

(1) Under Section 7.1.3(c) of the Disbursement Agreement it is an Event of Default for any representations made by any of the

[69] DA Ex. A.

Project Entities connected with any Advance Request to be found to be incorrect in any material respect. Lehman's Default meant that the Representations and Warranties could not be true and correct.

(2) Section 7.1.1 of the Disbursement Agreement listed as an Event of Default, the "occurrence of an 'Event of Default' under and as defined by any one or more of the Facility Agreements…." Lehman's Default under the Retail Facility Agreement created an Event of Default under this provision.

(a) As defined in the Disbursement Agreement, a "Default" or "Event of Default" under the Credit Agreement constitutes respectively a "Default" or "Event of Default" under the Disbursement Agreement.[70] Under Section 8(j) of the Credit Agreement, the breach by "any Person" of a "Material Agreement" constitutes a Default. Schedule 4.24 of the Credit Agreement lists, as Material Agreements, "[t]he 'Financing Agreements' as defined in the Disbursement Agreement."[71] That definition of "Financing Agreements" includes the "Facility Agreements," which in turn includes the "Retail Facility Agreement."

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[70] *Id.*

[71] CA Schedule 4.24.

c. Section 3.3.11. "Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material Adverse Effect." A "Material Adverse Effect" under the Disbursement Agreement includes events or circumstances which "(b) materially and adversely affects the ability of the...Project Entities to construct the Project; (d) materially and adversely affects the ability of the Project Entities to achieve the Opening Date by the Outside Date." Lehman's bankruptcy "materially and adversely" affected the Borrowers' ability to construct the Project and to complete it on time because: (1) the retail portion of the Project was critical to its completion and Lehman was responsible for a significant share of the commitment under the Retail Facility; (2) Lehman's bankruptcy rendered uncertain the availability of its committed funds; (3) conditions in the credit markets made it unlikely that a replacement lender could be found; and (4) Lehman failed to fund its portion of the Advances.

d. Section 3.3.21. "[T]he Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole." This condition failed because the

information that Lehman had failed to fund its portion of Advances and there was no replacement financing was materially and adversely inconsistent with the Borrowers' representations that the Retail Advances had been funded, obscuring the fact that the Retail Lenders had not funded in the manner required by the agreements, but rather Lehman's portion had been funded by others. In addition to the Event of Default created by this representation, the lack of candor on the part of the Borrowers should have been viewed by Bank of America as a warning sign regarding the integrity of the Borrowers, and brings into question whether the lending relationship could safely and prudently continue.

e. Section 3.3.23. "In the case of each Advance from the Bank 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." This condition failed because, as Bank of America knew, Lehman did not make the advances required of it in September 2008 or December 2008 through March 2009.

f. Section 3.3.24. "In the case of each Advance from the Bank Proceeds Account, the 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." Bank of America knew that Lehman did not make the advances required of it in September 2008 or December 2008 through March 2009. Even assuming that the information it had was

equivocal, before funding Bank of America had a duty to obtain "such other documents and evidence as are customary for transactions of this type" in order to "evidence the satisfaction" of Lehman's payment. Once in possession of facts suggesting that a condition precedent had failed, it would be customary for a bank agent to require additional information in order to resolve whether the conditions precedent had actually been met. Bank of America failed to obtain, indeed appears to consciously have avoided obtaining, the "documents and evidence" that would have resolved any latent issues. Parties with such "documents and evidence" would have included Trimont, Lehman, FBR and ULLICO.

56. Additionally, Section 2.6.3 provides, in pertinent part: "The Disbursement Agent shall not release any Advances to the Project Entities until the Trustee has remitted any required Advances from the Second Mortgage Proceeds Account, the Bank Agent has remitted any required Advances from the Bank Proceeds Account, and the Retail Lenders have made any requested Loans under the Retail Facility...." Lehman did not make its requested Loan under the Retail Facility in September 2008, and similarly failed from December 2008 through March 2009, and thus Bank of America "shall not release any Advances to the Project Entities."

Conclusion

57. Bank of America knew and unreasonably failed to act upon facts demonstrating that Lehman did not fund its portion of the Retail Advances in September 2008 and from December 2008 through March 2009. Bank of America was charged with knowing the conditions precedent to disbursement under the Disbursement Agreement and therefore knew and should have known that Lehman's failure to fund created Defaults and Events of Default and

caused various conditions precedent to disbursement to fail, requiring Bank of America to issue a Stop Funding Notice. Bank of America nonetheless chose to disburse funds to the Borrowers. Disbursement under these circumstances was not commercially reasonable or prudent. Bank of America's decisions to disburse from and after September 2008 were willful or, at the very least, grossly negligent.

OPINION 2: Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers on a monthly basis from December 2008 through March 2009, knowing that the Borrowers in all likelihood had failed to fully disclose all costs that they anticipated would be required to complete the Project.

Summary

58. In a project financing, it is critical to lenders that the funds committed for the project are sufficient at the beginning, and remain sufficient throughout the project, to complete it. If the project is not completed, the collateral for the loans is impaired and the value of the loans reduced, in some instances (such as in the Fontainebleau Project) all but eliminated.

59. In connection with each request for disbursement of funds from the Bank Proceeds Account, the Disbursement Agreement required the Borrowers to demonstrate that the funds available to complete the Project equaled or exceeded all anticipated costs necessary to complete it. With each Advance Request, the Borrowers submitted a Remaining Cost Report, which they represented and warranted "reflects all reasonably anticipated Project Costs required to achieve Final Completion." Based on this critical input, the In Balance Report established whether the funds available were sufficient to complete the construction of the Project.

60. Beginning shortly after the financing arrangements for the Project closed and extending through Bank of America's eventual termination of the Revolving Facility, the

Borrowers materially misrepresented the anticipated costs to complete the Project. As early as May 2008, Bank of America knew that the Borrowers in all likelihood had not provided timely and accurate information concerning the increasing costs to complete the Project. Bank of America's concern and the concern of its construction consultant, IVI, escalated through the first quarter of 2009. Bank of America, however, never issued a Stop Funding Notice and never sought to reconcile the information it had from various sources suggesting that the Borrowers were understating the anticipated costs to complete.

61. [redacted] Shortly thereafter, the Borrowers filed for bankruptcy.

Facts

62. As part of the process of submitting Advance Requests, the Borrowers were required to certify that the "In Balance Test" was satisfied. The In Balance Test was satisfied if "Available Funds" from the financing sources were equal to or exceeded the "Remaining Costs" necessary to complete the project, as set forth in the Remaining Cost Report.[72] The Borrowers were required to represent and warrant in each Advance Request that the Remaining Cost Report "reflects all reasonably anticipated Project Costs required to achieve Final Completion."[73]

63. In May 2008, the Project budget was amended and increased by approximately $200 million.[74] In connection with the budget amendment, the Borrower presented Bank of America with $201 million of change orders that had not previously been disclosed.[75]

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[72] DA Ex. A.
[73] DA Ex. C-1.
[74] Ex. 216; Susman Depo., 99:17-25.
[75] Exs. 216, 868, p. 2.

64. Submission of this volume of change orders at a single time should have raised questions at Bank of America. As it turns out, a substantial amount of these change orders had been known to the Borrowers for nearly a year.[76] Jeffrey Susman of Bank of America stated that learning about the $201 million in additional costs was important to Bank of America[77] and acknowledged that he would have wanted to know why the change orders had been withheld for so long.[78] However, Bank of America did nothing to determine whether the change orders reported in May 2008 were known or pending prior to that date or whether there were additional, undisclosed change orders.[79]

65. IVI and Bank of America both believed that there were undisclosed change orders in addition to those that had been reported in May 2008, which would further increase Project costs.[80] The existence of potential additional costs was important information to BofA.[81] However, while Mr. Susman asked the Borrowers' CFO, Jim Freeman, about IVI's concern about additional costs, he could not recall whether he received a response or whether he informed the Lenders of IVI's concern.[82]

66. Instead, Bank of America worked with the Borrowers on how to report the $201 million in additional costs.[83] Bank of America approved disbursement of funds in June 2008 and thereafter.

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[76] Ex. 891; Susman Depo., 99:17-25.
[77] Ex. 892; Susman Depo., 106:8-11.
[78] Susman Depo., 104:5-22.
[79] Susman Depo., 105:4-11.
[80] Ex. 217.
[81] Susman Depo., 115:8-10.
[82] Susman Depo., 114:2-115:24.
[83] Susman Depo., 116:1-117:4.

67. Beginning in the fourth quarter of 2008, representatives of IVI again raised concerns about the completeness and accuracy of the costs and other information being reported to Bank of America by the Borrowers.[84] Bank of America was concerned.[85]

68. Other lenders expressed their concerns. In a December 2008 e-mail, Deutsche Bank raised several issues with Bank of America. Noting "limited visual progress and reduced activity on site," Deutsche Bank asked whether the completion date had been delayed. Referring to reports of cost overruns, Deutsche Bank asked whether the project remained in balance, and whether there were additional unreported cost overruns.[86] Deutsche Bank also reported that the Borrowers had engaged Moelis & Co. (an investment banker) to raise additional equity to pay for cost overruns. Bank of America knew from other sources that the Borrowers were seeking to raise additional capital.[87]

69. Despite the concerns expressed by IVI and the issues identified by Deutsche Bank, Bank of America approved disbursements of funds in December 2008 and January 2009.

70. IVI's concerns continued in January 2009.[88] In IVI's Project Status Report issued in January, it stated: "IVI is concerned that all the subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included."[89] IVI also noted that LEED credits—state sales tax credits for environmentally-friendly construction—were not meeting projections, which would increase costs of

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[84] Ex. 851 ¶ 14; Susman Depo., 135:15-24.
[85] Susman Depo., 119:10-21.
[86] Ex. 493.
[87] Exs. 68, 69; Varnell Depo., 107:17-108:14, 150:10-15; Yunker Depo., 32:5-11, 32:22-33:14, 53:5-22.
[88] Ex. 851 ¶ 14; Susman Depo., 125:1-24, 130:23-132:3.
[89] Ex. 809, p. 7.

construction.[90] IVI believed that more accurate reporting of the LEED credits could increase Project costs by $15 million.[91]

71. The concerns of IVI and Bank of America about the completeness and accuracy of the cost information provided by the Borrowers continued in February 2009.[92] These concerns were some of the reasons that Bank of America referred the Project to its Special Assets Group.[93]

72. On February 20, 2009, Bank of America sent a letter to the Borrowers inquiring about IVI's concerns expressed in the January 30, 2009 report.[94] Bank of America asked whether additional costs existed that were not included in the budgets and remaining cost report, and also asked about LEED credit shortfalls. The Borrowers responded to the February 20, 2009 letter on February 23, 2009.[95] The February 23, 2009 letter, however, did not answer Bank of America's questions.[96] Bank of America then requested a meeting with the Borrowers, but the Borrowers refused, which reinforced Bank of America's concerns about the Borrowers and the status of the project.[97]

73. Despite these concerns, Bank of America approved disbursement of funds in February 2009.

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[90] Ex. 809, p. 22.
[91] Ex. 851, p. 22; Yu Depo., 105:12-23.
[92] Ex. 851 ¶ 17.
[93] Yu Depo., 37:25-38:23.
[94] Ex. 498.
[95] Ex. 811.
[96] Yu Depo., 125:25-126:14.
[97] Yu Depo., 51:12-52:14, 128:1-13.

74. IVI's Project Status Report 22, dated March 3, 2009, reiterated the same concerns as the prior reports.[98] IVI again stated its belief that "all the 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."

75. In early March, IVI concluded that there were additional unreported costs and expressed its skepticism regarding the information the Borrowers were providing.[99] In a March 5, 2009 letter to the Borrowers,[100] IVI stated:

a. There appeared to be a delay in execution of Owner Change Orders;

b. The Borrowers appeared to be excluding future costs from its reports of anticipated costs for the Project;

c. It appeared that the general contractor had committed to work but that the Borrowers had not approved corresponding change orders; and

d. IVI remained concerned about LEED credits.

IVI explained: "At this point in the project, it is hard to believe that there are no additional costs or claims out there."[101]

76. Shortly after receiving the March 5, 2009 letter, the Borrowers acknowledged that they expected significant additional costs to complete the Project, stating that the project was $35 million over budget.[102] Following discussions with IVI, the Borrowers acknowledged that there

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[98] Ex. 600, pp. 7, 22-24.
[99] Ex. 856; Barone Depo., 40:6-41:1.
[100] Ex. 851 ¶¶ 19-25.
[101] Ex. 604.
[102] Ex. 851, ¶ 26.

were even more outstanding costs and agreed to increase the budget by an additional $50 million.[103]

77. On March 11, 2009, the Borrowers submitted an Advance Request that did not include the additional costs that had been disclosed.[104] IVI rejected the Borrowers' March 11, 2009 Advance Request.[105] IVI did so because it did not believe that the information contained in the document was accurate.[106]

78. IVI remained skeptical.[107] The Borrowers had lost IVI's trust.[108] Bank of America understood that IVI continued to have concern that the Borrowers were not accurately reporting cost information and understood that IVI's statements in this regard were inconsistent with what the Borrowers were saying.[109] Although in its communications with Bank of America, IVI raised the possibility of an audit,[110] Bank of America did not direct IVI to conduct an audit to verify the information presented by the Borrowers.[111]

79. In early March 2009, the Borrowers proposed that Bank of America enter into a pre-negotiation agreement with the Borrowers.[112] The request for a pre-negotiation agreement increased Bank of America's concern that the Borrowers were not providing accurate or complete information about the Project.[113]

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[103] Ex. 851, ¶ 26.
[104] Ex. 851 ¶ 27.
[105] Ex. 860.
[106] Barone Depo., 62:10-16.
[107] Ex. 828, pp. 7, 22; Barone Depo., 75:19-76:3.
[108] Barone Depo., 75:19-76-3.
[109] Susman Depo., 128:11-16, 129:1-8.
[110] Ex. 856.
[111] Ex. 861; Barone Depo., 66:6-13.
[112] Ex. 820;
[113] Yu Depo., 179:12-22.

80. IVI ultimately approved a revised Advance Request,[114] which was submitted on March 24, 2009, just a day before the advance date.[115] The In Balance Report submitted at that time showed a positive "in balance" amount of only around $14 million. This amount was less than the $15 million in LEED costs that IVI believed the Borrowers had not reported; and despite months of promises, the LEED audit still had not materialized.[116] IVI's concerns remained unabated.[117]

81. Despite all of these facts and concerns raised by the construction professional Bank of America had hired for just this purpose, Bank of America approved disbursement of funds from December 2008 through March 2009.

Applicable Contract Provisions

82. The Borrowers' failure to fully disclose all costs that they anticipated would be required to complete the Project caused various conditions precedent to disbursement set forth in Section 3.3 of the Disbursement Agreement to fail, which should have, individually and together, caused Bank of America to refuse to disburse, including:

a. Section 3.3.2. "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." Article 4 stipulates the Representations and Warranties to be made by the Borrowers on each Advance Date, to the Disbursement Agent.

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[114] Ex. 862.
[115] Ex. 265; Yu Depo., 199:15-200:5, 210:20-211:20.
[116] Yu Depo., 124:16-20.
[117] Ex. 828, pp. 7, 22.

(1) Section 4.9.2 contains the representation and warranty that there exists no Default or Event of Default. (See discussion regarding Section 3.3.3 below.)

(2) Section 4.14 contains the representation and warranty that the In Balance Test is satisfied as of the Advance Date.

(3) If, at the Advance Date, the In Balance Test is not satisfied, then the representation under 4.14 cannot be true, thus the conditions precedent in Section 3.3.2 are not satisfied.

(4) Section 4.17.2 makes certain representations and warranties about the Remaining Cost Report, including that the information in the Remaining Cost Reports, "with respect to Project Costs previously incurred, is true and correct in all material respects...."[118] This representation could not be true to the extent that the Remaining Cost Reports did not reflect all previous Project Costs.

b. Section 3.3.3. "No Default or Event of Default shall have occurred and be continuing." The Disbursement Agreement defined "Event of Default" through its listing in Article 7.

(1) Under Section 7.1.3(c) of the Disbursement Agreement it is an Event of Default for any representations made by any of the Project Entities connected with any Advance Request to be found to be incorrect in any material respect. The failure of the In

[118] DA §4.17.2(e).

Balance Test meant that the Representations and Warranties could not be true and correct.

(2) Section 7.1.4(a) lists as an Event of Default failure by the Project Entities to perform under various sections, including Section 6.4.

(3) Section 6.4.1(d) permits increases in the budget so long as it does not result in failure of the In Balance Test. The increases in the budget did cause the In Balance Test to fail, creating an Event of Default and violating the conditions precedent of section 3.3.2 (See Representation made at section 4.9.2).

c. Section 3.3.4(a). "Such Advance Request shall request an Advance in an amount sufficient to pay all amounts due and payable for work performed on the Project through the last day of the period covered by such Advance Request...." This provision was violated to the extent that change orders and work had been processed but remained unpaid, according to testimony, for as long as a year.

d. Section 3.3.8. "The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied." This condition precedent was violated at each and every Advance Date where the In Balance Test failed, and certainly for March 2009.

e. Section 3.3.11. "Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material

Adverse Effect." This condition could not be met if the In Balance Test failed, as failure of the In Balance Test would signal that there was insufficient funding to complete the project.

f. Section 3.3.21. "[T]he Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole." The information that the In Balance Test failed would signal that the entire project was in jeopardy, as the committed funding for the Project was projected to be insufficient to complete it.

g. Section 3.3.24. "In the case of each Advance from the Bank Proceeds Account, the 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." Once in possession of facts contrary to the conditions precedent, it would be customary for a bank agent to require additional evidence in order to resolve whether the conditions precedent had actually been met. There were numerous facts that Bank of America possessed that called forth a need for reconciliation. Even in the absence of any further investigation, the terms of the Disbursement Agreement required that the Disbursement Agent issue a Stop Funding Notice and the

Administrative Agent withhold further Advances.

Conclusion

83. Bank of America knew and unreasonably failed to act upon facts demonstrating that the Borrowers had failed to disclose the true anticipated cost to complete the Project, a critical component of the determination of whether to continue disbursing. Bank of America was charged with knowing the conditions precedent to disbursement under the Disbursement Agreement and therefore knew and should have known that the Borrowers' misrepresentation of the Project costs resulted in Defaults and Events of Default and caused various conditions precedent to disbursement to fail, requiring Bank of America to issue a Stop Funding Notice. Bank of America nonetheless chose to disburse funds to the Borrower. Disbursement under these circumstances was not commercially reasonable or prudent. Bank of America's decisions to disburse were willful or, at the very least, grossly negligent.

OPINION 3: Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers on a monthly basis from December 2008 *through March 2009 knowing that First National Bank of Nevada had defaulted on its* lending commitments under the Credit Agreement.

Summary

84. On July 25, 2008 First National Bank of Nevada ("FNB Nevada") was seized by the Federal Deposit Insurance Company ("FDIC"). FNB Nevada was both a Revolving Lender and a Term Lender under the Credit Agreement. The FDIC informed Bank of America no later than December 19, 2008 that it was repudiating FNB Nevada's obligations under the Credit Agreement. Despite this clear and obvious default, Bank of America continued to disburse proceeds.

Facts

85. FNB Nevada was a lender under the Credit Agreement, providing $10 million in Revolving Loans, $1.66 million in Delay Draw Term Loans, and $3.33 in Initial Term Loans (that were fully funded upon closing of the Credit Agreement).[119]

86. On July 25, 2008, FNB Nevada was seized by federal regulators and the FDIC was appointed its Receiver.[120] Bank of America learned this fact shortly thereafter.[121]

87. On October 15, 2008, Mutual of Omaha, who acquired FNB Nevada's retail customers' assets, informed Bank of America that the FDIC was repudiating FNB Nevada's obligations under the Credit Agreement,[122] which the FDIC confirmed in a letter to Bank of America on December 19, 2008.[123]

88. No other lender assumed FNB Nevada's Loan commitments under the Credit Agreement.[124]

89. The FDIC's repudiation caused FNB Nevada to be a "Defaulting Lender" under the Credit Agreement, and its subsequent failure to fund its commitments caused a "Lender Default." Bank of America should have issued a Stop Funding Notice and refused to fund subsequent Advance Requests due to failed conditions precedent. Despite this Lender Default, Bank of America continued to process Advance Requests from December 2008 through March 2009.[125]

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[119] Ex. 660; Yu Depo., 134:10-15; Yunker Depo., 179:10-17.
[120] Exs. 886, 888.
[121] Exs. 82, 886, 888; Bolio Depo., 132:24-133:1; Yunker Depo., 179:10-180:2.
[122] Ex. 889.
[123] Ex. 486; Bolio Depo., 133:2-7; Howard Depo., 200:19-201:4; Yu Depo., 134:16-17.
[124] Yu Depo., 135:2-4.
[125] Exs. 246-252, 622-624, 628, 629, 634-636, 639-642, 654, 655.

Applicable Contract Provisions

90. The FDIC's repudiation of FNB Nevada's Loan commitments under the Credit Agreement caused various conditions precedent to disbursement set forth in Section 3.3 of the Disbursement Agreement to fail, which should have, individually and together, caused Bank of America to refuse to disburse, including:

a. Section 3.3.2. "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." Article 4 stipulates the Representations and Warranties to be made by the Borrowers on each Advance Date, to the Disbursement Agent.

(1) 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." As defined in Exhibit A to the Disbursement Agreement, "Financing Agreements" include the Disbursement Agreement and the "Facility Agreements," which in turn includes the Credit Agreement. This representation could not be true if FNB Nevada was in default of the Credit Agreement.

(a) FNB Nevada was a Defaulting Lender as defined under the Credit Agreement and upon its failure to fund a Lender Default occurred.

(b) Section 2.1(b) of the Credit Agreement binds the Delay Draw Lenders to make the Delay Draw Term Loans. FNB Nevada was a Delay Draw Lender. FNB Nevada defaulted

on this obligation when the FDIC repudiated its obligations to lend.

(c) Section 2.1(c) of the Credit Agreement binds the Revolving Lenders to make Revolving Loans. FNB Nevada was a Revolving Lender. FNB Nevada defaulted on this obligation when the FDIC repudiated its obligations to lend.

(d) With the defaults, the no-default representation failed, thus the conditions precedent under the Disbursement Agreement failed.

(2) Section 4.9.2 contains the representation and warranty that there exists no Default or Event of Default. The existence of a Default by FNB Nevada caused a failure of the conditions precedent under the Disbursement Agreement.(See discussion regarding Section 3.3.3 below.)

b. Section 3.3.3. "No Default or Event of Default shall have occurred and be continuing." Article 7 in the Disbursement Agreement defines "Event of Default."

(1) Under Section 7.1.3 (c), it is an Event of Default for any representations made by any of the Project Entities connected with any Advance Request to be found to be incorrect in any material respect. As set forth above, FNB Nevada's defaults under the

Credit Agreement meant that the Project Entities representations were not true.

(2) Under Section 7.1.1, it is an Event of Default under the Disbursement Agreement if there is "an 'Event of Default' under and as defined by any one or more of the Facility Agreements...." FNB Nevada's Defaults under the Credit Agreement created an Event of Default under the Disbursement Agreement.

(3) A "Default" or "Event of Default" under the Credit Agreement constitutes a "Default" or "Event of Default" under the Disbursement Agreement.[126] Under Section 8(j) of the Credit Agreement, the breach or default by "any Person" of any "term, condition, provision, covenant, representation or warranty contained in any Material Agreement" constitutes a Default. "Material Agreements" under Schedule 4.24 of the Credit Agreement include "[t]he 'Financing Agreements' as defined in the Disbursement Agreement."[127] That definition of "Financing Agreements" includes the "Facility Agreements," which in turn includes the "Credit Agreement."

c. Section 3.3.11. "Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project

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[126] DA Ex. A.
[127] CA Schedule 4.24.

Entities, any of which could reasonably be expected to have a Material Adverse Effect."

(1) A "Material Adverse Effect" under the Disbursement Agreement included any event or circumstance which "(b) materially and adversely affects the ability of the…Project Entities to construct the Project; (c) materially and adversely affects the ability of the Project Entities to achieve the Opening Date by the Outside Date."

(2) While adverse, the repudiation of FNB Nevada's obligations, viewed in isolation, might not have been sufficiently material to the overall Project to cause a Material Adverse Effect on the Project. However, this event added to the increasing body of adverse facts that the Disbursement Agent possessed at the time of each successive Scheduled Advance Date. Certain of these facts individually caused a Material Adverse Effect on the Project. By March 2009, they incontrovertibly represented a Material Adverse Effect, as described in Opinion 5.

d. Section 3.3.21 requires as a condition precedent to disbursement that "the Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party…the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole." Bank of America's knowledge of FNB Nevada's repudiation of

its loan commitments was inconsistent with the Borrowers' representations to the contrary.

Conclusion

91. Bank of America knew and unreasonably failed to act upon the fact that the FDIC had repudiated FNB Nevada's commitments under the Credit Agreement and that no one had stepped in to fill the gap. Bank of America was charged with knowing the conditions precedent to disbursement under the Disbursement Agreement and therefore knew and should have known that the repudiation of FNB Nevada's commitments resulted in Defaults and Events of Default and caused various conditions precedent to disbursement to fail, requiring Bank of America to issue a Stop Funding Notice. Bank of America nonetheless chose to disburse funds to the Borrower. Disbursement under these circumstances was not commercially reasonable or prudent. Bank of America's decisions to disburse were willful or, at the very least, grossly negligent.

OPINION 4: Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers in March 2009 knowing that numerous Term Lenders had failed to fund their commitments under the Credit Agreement in March 2009.

Summary

92. In March 2009, Z Capital Finance LLC, Copper River CLO Ltd, LFC2 Loan Funding LLC, Orpheus Funding LLC, Orpheus Holdings LLC, and Sands Point Funding Ltd (the "Defaulting Term Loan Lenders") failed to fund the March 9, 2009 Notice of Borrowing in breach of their obligations under the Credit Agreement, causing various conditions precedent to funding under the Disbursement Agreement to fail. Bank of America was notified of these

breaches and resulting defaults prior to March 25, 2009. Bank of America nonetheless continued to disburse Term Lender funds to the Borrowers.

Facts

93. The Defaulting Term Loan Lenders were Delay Draw Term Lenders holding approximately $21.6 million in delay draw term loans under the Term Loan Facility.[128]

94. The Defaulting Term Lenders failed to fund their obligations in response to the March 9, 2009 Notice of Borrowing[129] submitted by the Borrowers.[130]

95. Despite the Borrowers declaring the Defaulting Term Lenders to be in default of their obligations under the Credit Agreement,[131] Bank of America failed to do the same and failed to deduct the missing $21.6 million in delay draw term loans from Available Funds in the In Balance Test.[132]

96. Upon failure of the Defaulting Term Lenders to timely fund their obligations, Bank of America should have declared them "Defaulting Lenders" under the Credit Agreement, issued a Stop Funding Notice, and refused to process the March 25, 2009 Advance due to failed conditions precedent.

97. Additionally, had Bank of America not included the $21.6 million of missing obligations from the Defaulting Term Lenders in their review of the In Balance Test, there would have been a negative balance of Available Fund in the In Balance Test, causing the test to fail

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[128] Ex. 660.
[129] Ex. 632.
[130] Exs. 212, 291-B, 470, 487-491, 634, 637, 835; Bolio Depo., 137:4-15, 141:3-15, 144:10-145:5, 145:23, 148:13-25, 149:8-18; Freeman Depo., 279:2-280:8; Howard Depo., 190:18-21; Yu Depo., 168:21-169:4, 267:7-268:23.
[131] Ex. 291-B.
[132] Exs. 212, 492, 825, 864; Yu Depo., 222:16-223:17, 257:7-21.

and precluding Bank of America from disbursing funds to the Borrowers.[133] In a March 23, 2009 letter to Lenders, Bank of America made such an admission: "[T]he exclusion of the $21,666,667 amount from Available Funds would result in a failure to satisfy the In-Balance Test."[134]

98. Bank of America processed the March 25, 2009 Advance and disbursed Term Lender funds even though the Defaulting Term Lenders' obligations remained unfunded and various conditions precedent to funding were unsatisfied.[135]

Applicable Contract Provisions

99. The failure of the Defaulting Term Lenders to fund resulted in the failure of the same conditions precedent to disbursement identified in connection with the FDIC's repudiation of FNB Nevada's commitments.

Conclusion

100. Bank of America knew of and unreasonably failed to act upon the Term Lender Defaults. Bank of America was charged with knowing the conditions precedent to disbursement under the Disbursement Agreement and therefore knew and should have known that the refusal by the Defaulting Term Loan Lenders to fund resulted in Defaults and Events of Default and caused various conditions precedent to disbursement to fail, requiring Bank of America to issue a Stop Funding Notice. Bank of America nonetheless chose to disburse funds to the Borrower. Disbursement under these circumstances was not commercially reasonable or prudent. Bank of America's decisions to disburse were willful or, at the very least, grossly negligent.

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[133] Yu Depo., 226:7-22.
[134] Ex. 212.
[135] Exs. 252, 634-636, 639-642; Brown Depo., 110:19-23; Yu Depo., 133:9-133:23.

OPINION 5: Bank of America failed to exercise commercially reasonable efforts and commercially prudent practices and was, at a minimum, grossly negligent, when it improperly disbursed funds to the Borrowers in March 2009 (1) knowing that the Borrowers had failed to meet the deadlines for submission of Advance Requests and (2) knowing of the existence of numerous negative conditions surrounding the Borrowers and the Project.

Summary

101. The Disbursement Agreement sets forth a schedule for submission, review and approval of Advance Requests. In March 2009, the Borrowers failed to meet the deadlines required by the Disbursement Agreement. Bank of America also disbursed funds, knowing that its construction consultant, IVI, had substantial and long-running concerns that the Borrowers had not fully disclosed the known costs to complete the Project; knowing that Lehman, FNB Nevada and the Defaulting Term Lenders had defaulted on their obligations to fund; and knowing that it was lowering its risk rating for the Borrowers to its near-lowest level. Bank of America's disbursement of funds under these circumstances was commercially unreasonable and imprudent.

Facts

102. The Borrowers submitted an Advance Request on March 11, 2009 with an Advance Date of March 25, 2009.[136] March 11, 2009 was the last date that would comply with the timing requirements of the Disbursement Agreement for an Advance to occur on March 25, 2009. [137]

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[136] Ex. 264; Yu Depo., 175:23-176:1.
[137] *DA §2.4.1.*

103. IVI did not approve the March 11, 2009 Advance Request, a condition to disbursement.[138] IVI rejected the document because it did not believe that the information contained in it was accurate.[139]

104. The Borrowers submitted a revised Advance Request on March 24, 2009, a day before the Scheduled Advance Date of March 25, 2009.[140] IVI approved the revised Advance Request and submitted a Construction Consultant Certificate.[141] Following additional discussions with Bank of America, the Borrowers revised the Advance Request a second time on March 25, 2009, the same day as the Scheduled Advance Date.[142] The In Balance Report included with the second revised March Advance Request showed that the Project was in balance by $14,084,701.[143]

105. By this time, Bank of America was aware of the deteriorating prospects of the Fontainebleau Project, including: communications that indicated lapses in the integrity of the Borrowers, declining sources of funding, difficulty in arranging for replacement funding, cost overruns and a recession that was characterized publicly as the worst economic event since the Great Depression.

106. Bank of America recognized internally the serious and increasing risks the Project presented. When Bank of America's Special Assets Group became involved with the Project in February 2009, the Project had been assigned a risk rating of 8,[144] the first category of concern

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[138] Ex. 860; Barone Depo., 60:24-62:16.
[139] Barone Depo., 62:10-16.
[140] Ex. 265; Yu Depo., 199:15-200:5, 210:20-211:20.
[141] Ex. 862.
[142] Ex. 825; Yu Depo., 203:7-16.
[143] Yu Depo., 205:8-22.
[144] Yu Depo., 41:23-42:1.

on Bank of America's internal risk rating scale, which corresponds to the "special mention" category in United States banking regulations.[145] On March 21, 2009, however, Bank of America projected a downgrade of the Project to risk rating 9,[146] which corresponds to the "substandard" designation under United States banking regulations.[147] Bank of America implemented the downgrade in early April, noting a "high probability of default at the first covenant test date" and a "50% probability that interest coverage will fall below 1.00x in two quarters . . . ."[148]

107. By mid-March, there were increasing questions concerning the sources of funding of the Project. As set forth in Opinion 1, Lehman repeatedly had failed to fund its portion of the Retail Facility. No replacement had been found, and the month-to-month payments by ULLICO [redacted] represented at best a high risk, temporary solution. At the same time, this process also represented a Default each time it occurred. Additionally, as set forth in Opinion 3, the FDIC's repudiation of FNB Nevada's obligations removed those commitments from the available financing sources. Finally, as set forth in Opinion 4, the failure of the Defaulting Term Lenders to fund represented further threats to the overall funding of the Project.

108. On the other side of the ledger, the cost to complete the Project had increased as the Borrowers' credibility in reporting anticipated costs decreased. As set forth in Opinion 2, IVI's concerns about additional unreported costs to complete not only indicated that the numbers being supplied by the Borrowers were unreliable, but also resurfaced issues that should have served as warning signs to Bank of America regarding the integrity of the Borrowers. All of this

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[145] Yu Depo., 40:13-41:2.
[146] Ex. 829; Yu Depo., 250:10-19.
[147] Yu Depo., 40:25-42:4.
[148] Ex. 831.

was occurring at a time of economic stress in the financial markets in general and in the Las Vegas market in particular.

109. Each of these circumstances should have caused Bank of America to refuse to disburse and to issue a Stop Funding Notice. Taken together, they formed a series of failed conditions, Defaults and risks that could not be ignored. Bank of America could not reasonably disburse under these circumstances.

Applicable Contract Provisions

110. The Borrowers' failure to meet the deadlines for disbursement set forth in the Disbursement Agreement and should have caused Bank of America to refuse to disburse.

a. Section 2.4.1 provides: "Each Advance Request shall be delivered to the Disbursement Agent, each Funding Agent and the Construction Consultant not later than the 11th day of each calendar month, but in any event not later than ten Banking Days prior to the Scheduled Advance Date." Only the initial March Advance Request met this deadline.

b. Section 2.4.4 provides that "the Disbursement Agent and the Construction Consultant shall review the Advance Request and attachments…" and notify the Project Entities of any deficiencies within three Banking Days. In addition, the Construction Consultant will conduct its review of the Requested Cost Report and deliver a Construction Consultant Advance Certificate either approving or disapproving the Advance Request, not less than four Banking Days prior to the requested Advance Date. The Disbursement Agent is charged with using reasonable diligence to assure that both the Construction Consultant's review and its own review of the

materials required by this Section 2.4 "is finalized, in each case not less than three Banking Days prior to the Scheduled Advance Date."[149] This provision establishes that the Scheduled Advance Date was to be the determining date, three Banking Days before which all of the reviews were to be completed. The Borrowers' resubmission of the Advance Request on March 24 made this impossible, as the deadline had already passed. Thus the Disbursement Agent could not reasonably approve the Advance Request, as doing so violated the provisions of Section 2.4.4.

c. Section 2.4.5 provides that, in the event changes are required to be made prior to the Advance Date, "the Project Entities may, with the approval of the Disbursement Agent and the Construction Consultant, revise and resubmit such Advance Request to the Disbursement Agent and the Construction Consultant, provided that the Disbursement Agent shall not be required to accept any such updates or revisions, but shall consider their submission in good faith." (Emphasis in original.) Bank of America was required "to use reasonable diligence to review and approve any such supplemental Advance Request and to cause the Construction Consultant to review and approve the same not less than three Banking Days prior to the Scheduled Advance Date."

(1) The Disbursement Agent may allow the Borrower to resubmit its Advance request, so long as the entire approval process can be completed at least three Banking Days prior to the Scheduled

[149] DA § 2.4.4.

Advance Date. Bank of America's allowance of the resubmission violated the timing requirements of Sections 2.4.4. and 2.4.5.

(2) Moreover, the decision to approve occurred at a time when Bank of America knew of failed conditions, defaults and risks demonstrating that the Borrowers could not satisfy the conditions precedent to disbursement.

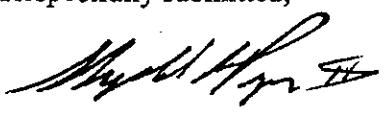
Conclusion

111. Based on the above facts, Bank of America knew and should have known that the Borrowers had failed to comply with the timing requirements for submission of Advance Requests with respect to the March 25, 2009 Scheduled Advance Date. Accordingly, Bank of America could not properly have disbursed. In any event, disbursement under the existing conditions surrounding the Project, the Borrowers and the various Lender defaults was unreasonable. Bank of America's decision to disburse funds to the Borrowers under these circumstances was not commercially reasonable or prudent. Bank of America's decision to disburse was willful or, at the very least, grossly negligent.

ONGOING WORK

112. My work in formulating my opinion is my own, based on my review of court filings, documents, and exhibits that I have relied on and my decades of experience in the financial industry. My work is ongoing. I expect that additional information, including deposition transcripts, exhibits thereto, and other relevant documents will come to my attention going forward. I reserve the right to take such additional information into consideration in any testimony that I give.

Respectfully submitted,



Shepherd G. Pryor IV

Date May 23, 2011

EXHIBIT A

Exhibit A

to

Expert Report of Shepherd G. Pryor IV, dated May 23, 2011

SHEPHERD G. PRYOR IV – Expert Qualifications

1) Over a 39-year career in banking and finance, and in consulting to financial institutions, I have been involved in hundreds of lending transactions across virtually all major industries.

2) I received my A.B. in Economics from Princeton University in 1968 and my M.B.A. in Finance from the Graduate School of Business of the University of Chicago in 1974. My career as a banker spanned the time from 1971 to 1991. I worked with The First National Bank of Chicago from 1971 through 1977, and with Wells Fargo Bank from 1977 through 1991, where I was most recently Senior Vice President and Deputy Group Head for Corporate Banking.

3) During my banking career, I was a lender and a manager of lenders. My corporate lending experience was broadly based, including all types of corporate lending, ranging from commercial paper back-up facilities to highly leveraged transactions. During the late 1980's and early 1990's my activities were concentrated on large corporate lending and highly leveraged transactions. In that period, the unit which I ran effected over 100 highly leveraged transactions. These were generally multibank loans, where Wells Fargo served either as Agent or participant. Due to the significant size of these transactions, I was intimately involved in all aspects of their negotiation, structuring, approval, and monitoring, staying close to the detail of banking. Many of these transactions involved complex corporate structures. The unit that I managed was not only involved in the lending function,

but also was directly involved in the syndication of multibank loans, both as an agent and as participant.

4) I have loaned to large and small companies and individuals, financing acquisitions, highly leveraged transactions, projects, and the continuing operations of a broad variety of companies. These loans have included taking collateral ranging from real estate to machinery and equipment, from accounts receivable to boats and aircraft. I have developed understanding in loan transaction structures and banking industry practices relating to such activity.

5) As a banking/finance industry consultant, I have built credit training programs, written credit policy, and evaluated bank loans and portfolios. I teach finance courses at the MBA level, and have been published on a number of finance and business topics. I currently serve as the Chairman of the Audit Committee of a bank holding company, where I am disclosed as an audit committee financial expert in accordance with requirements of The Sarbanes-Oxley Act of 2002.

6) I teach finance courses to MBA candidates as a Visiting Professor at Keller GSM. In that capacity, I cover subject matter based on my background and expertise, including structuring of financial transactions and their impact, and other financial issues including profitability, liquidity, bankruptcy, letters of credit, factoring, trade finance, short term and long term lending, leasing, use of derivatives, interest rate swaps, cash management.

7) As a consultant, I have conducted projects in other countries, where the success of my projects depended on developing an understanding of how property rights in the particular country would impact the design and evaluation of credit products offered by banks and other financial institutions, and developing methods to determine appropriate policies and

procedures to enable the financial institution to safely offer the products in the particular economy. Examples of credit products that I reviewed in these contexts ranged from large company term and revolving loan facilities, to proto-credit card financing of consumer durables, consumer paper, and even financing the garment trade in Oman.

8) Since 1992, I have served on the boards of three public companies and four private companies. In connection with the public companies, I chair the audit committee of a bank holding company, designated as an "audit committee financial expert (AFCE)" in accordance with requirements of the Sarbanes-Oxley Act of 2002. I am similarly designated as an AFCE in another public company on which I serve as a member of the audit committee. I have chaired numerous special committees on both public and private company boards considering major capital transactions, including sale of the underlying company. Additional duties have included serving as lead director, and chair of a nominating and corporate governance committee, and chair of a compensation committee.

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CAREER SUMMARY

Senior level financial services executive, corporate director, and management consultant: Built and later consolidated a major regional corporate banking center. Structured and negotiated major loan transactions. Evaluated, designed, developed and reengineered critical business processes for major financial institutions. Conducted due diligence for international financial services acquisitions. Provided expert testimony for financial institutions, corporations, and individuals involved in litigation. Served on Boards of Directors of manufacturing, distribution, and financial services companies.

EMPLOYMENT

SHEPHERD G. PRYOR IV MANAGEMENT CONSULTING, CHICAGO, IL **1991-Present**

Independent management consultant. Clients include major financial institutions, Fortune 500 companies and law firms.

- Through Board Resources, a division of TeamWork Technologies, provide consulting services to Boards of Directors and CEOs, devising and implementing corporate governance and strategic solutions.
- Provide litigation support: strategy, analysis, and expert testimony for law firms and their clients in finance-related litigation. Booked over 3000 hours on major cases, including issues of comparative fault, breach of contract, reasonableness of lender and agent actions, reasonableness of 10Q disclosures, reasonableness of director actions, and financial analysis.
- Evaluate, design, develop, and reengineer critical business processes for financial institutions: credit processes and credit training systems, portfolio analysis, product development: US and Middle East.
- Conduct on-site acquisition due diligence (financial services industry): Latin America, Eastern Europe, Far East.
- Conduct arbitrations on securities-related matters for NASD Dispute Resolution, Inc. (through 2005.)

LOBUE ASSOCIATES, INC., GREEN VALLEY, NV **1995-1997**

Senior Consultant, Product Manager. Developed and marketed new product area for the firm. Concentrated on credit-oriented services provided to banks, world-wide.

- Redesigned credit process and credit policy for major Saudi Arabian bank.
- Rationalized Credit Group for major Saudi Arabian bank.
- Rationalized underwriting process for high growth mortgage finance company.

WELLS FARGO & CO. **1977-1991**

Developed broad range of management skills under radically different environments:

- Growth: Built a large regional office from a small base. Entered new markets. Relocated and reorganized the business unit. Absorbed Crocker Bank regional office and assets of closed units.
- Consolidation: Managed the closing, consolidation and downsizing of two of the bank's regional corporate banking markets. Worked with outside consultants to reorganize Corporate Banking Group.

WELLS FARGO BANK, N.A., SAN FRANCISCO, CA (1991)

Senior Vice President, Deputy Group Head (1991)

Responsible for Corporate Banking in the Midwest, Mountain, and Pacific Northwestern States.

- Closed the Chicago office and consolidated it with the San Francisco office.
- Merged the two portfolios; saved 25 staff positions, while maintaining responsibility for original business base of the two offices.
- Managed a staff of 50, including line officers, group controller and group finance units, with a portfolio of over $5.0 billion in commitments and $1.7 billion in outstandings.

WELLS FARGO CORPORATE SERVICES, INC., CHICAGO, IL (1977-1990)

Senior Vice President, Regional Manager (1986-1990)
Vice President (1978-1986)
Assistant Vice President (1977-1978)

- Built the corporate banking business in the Midwest (twelve states). Starting with local staff of 3 and outstanding loan portfolio of $40 million, increased portfolio to $1.1 billion, extended to over 100 major credit customers.
- Managed staff and was also personally active in lending to companies in three diverse markets: middle market, large corporate market, and the specialty market of highly leveraged transactions (HLTs).
- Developed $4.6 billion in new business commitments in four year period. (1986-1989: 118 loan transactions, of which 40 were initial HLTs). Agented three major loans, each supporting $1 billion+ company purchases.
- Grew Chicago Office into one of the largest and most productive within the system, with net profits exceeding $1.5 million per account officer.

THE FIRST NATIONAL BANK OF CHICAGO, CHICAGO, IL **1971-1977**

Developed solid banking background in positions within various bank departments.

Assistant Vice President, Corporate Lending (1975-1977). Extended credit to automotive, construction and farm equipment manufacturers and their dealer networks.
Assistant to the President (1975). Wrote speeches, managed projects, handled internal corporate communications.
Loan Officer, Corporate Lending (1973-1975). Made construction-finance loans to vessel-operating companies (oceangoing and inland waterways).
First Scholar Program (1971-1973). Participated in this highly selective management training program.

UNITED STATES ARMY First Lieutenant **1968-1971**

Graduated Officer Candidate School at head of class. Became Personnel Staff Officer at Fifth U.S. Army Headquarters, Fort Sheridan, IL.

DIRECTORSHIPS/PROFESSIONAL

Taylor Capital Group (Owner of Cole Taylor Bank) (NASD), Chairman Audit Committee (Audit Committee Financial Expert), formerly Chairman of Governance and Nominating Committee, Lead Director, 2003-present.
Ulteig Engineers, Inc. (private engineering firm headquartered in Fargo, ND.) Director, Chairman Compensation Committee, 2009-present.
Hartford Computer Group (private computer service/repair company) Director, 2010-present, Chairman, Special Committee.
Joway Health Industries Group, Inc. (OTCBB), (public, manufacturer and franchisor of products in China), Board Member, and Member, Audit Committee (Audit Committee Financial Expert) 2011-present.
Archibald Candy Corporation (a $160MM manufacturer and retailer of candy), Lead Director, 2002-2005.
HCI Direct Inc (a $150MM manufacturer and direct retailer of hosiery.), Board Member, and Member of the Audit Committee, 2002-2007 (Company was acquired 100% by a private equity investor in 2007.)
Music Arts School (a music school in Highland Park, IL): Founding Board member 2001-2007, Vice President 2001-2002, President 2002-2006.
NASD, public arbitrator, 2001-2007.
Resurrection Home Health Foundation (a fund-raising board in Chicago): Founding Board Member 1985-2004.
Keller Graduate School of Management (a graduate business school): Visiting Professor, teaching International Finance (FI565), M&A (FI561), Managerial Finance (FI515&FI516), Securities (FI560), 1996 - present.
Catholic Health Partners (a major hospital group in Chicago): Member, Planning Committee of the Board of Directors. 1996-1998.
Petrolane Incorporated (a $600 million propane distribution company (NASD) headquartered in Valley Forge, PA): Board Member, Member of the Audit Committee, Co-Chairman of the Special Committee created on September 14, 1994. Company was sold in 2Q95. 1992-1995.
Partners Home Care (a home health care agency in Chicago): Board member 1982-2001, Chairman 1996-2001.
Member, National Association of Corporate Directors, 2002-present.
Co-Author: *Building Value through Strategy, Risk Assessment, and Renewal*, by William J. Hass and Shepherd G Pryor IV, CCH Incorporated, Chicago, 2006.
Co-Author: *The Private Equity Edge: How Private Equity and the World's Top Companies Build Value and Wealth*, by Arthur B. Laffer, William J. Hass, and Shepherd G. Pryor IV, McGraw-Hill, New York, 2009

EDUCATION

M.B.A. - Finance, University of Chicago Graduate School of Business, Chicago, IL, 1974.
A.B. - Economics (*cum laude*), Princeton University, Princeton, NJ, 1968.

Publications authored/co-authored by Shepherd G. Pryor IV

Item	Description
Article	"Effective Investors, Directors, Boards, and Audit Committees Monitor Fundamentals," William J. Hass and Shepherd G. Pryor IV, Turnaround Management, spring 2003 issue, Institutional Investor, NY.
Article	"The Board's Role in Corporate Renewal," William J. Hass and Shepherd G. Pryor IV, Journal of Private Equity, spring 2005 issue, Institutional Investor, NY.
Article	Viewpoint: "Is It Time To Replace your CEO?" William J. Hass and Shepherd G. Pryor IV, Daily Bankruptcy Review, February 2, 2005, Dow Jones & Company, Inc.
Article	"Five Principles for Developing Better Loan Officers," William J. Hass and Shepherd G. Pryor IV, Feb 2, 2005, The Journal of Corporate Renewal.
Article	"Turnaround Corner: When Risk Becomes Reality – Applying a Framework of Cs to Help Manage During a Crisis," William J. Hass and Shepherd G. Pryor IV, ABF Journal, January 2006.
Book	*Board Perspectives: Building Value through Strategy, Risk Assessment, and Renewal*, William J. Hass and Shepherd G. Pryor IV, CCH, Chicago, 2006
Article	"A graphic Tour of Success and Failure in Corporate Renewal," William J. Hass Shepherd G. Pryor IV, and Vern Broders, Journal of Private Equity spring 2006, Institutional Investor, NY.
Article	"Thorough Communication is Crucial for Corporate Renewal," by William J. Hass, and Shepherd G. Pryor, IV, July 1, 2006, The Journal of Corporate Renewal.
Article	"Driving Long-Term Value: What are the Next Steps?" by Shepherd G. Pryor IV, William J. Hass, and Dennis N. Aust., Directors Monthly (National Association of Corporate Directors), December 2006, Vol 30 No12, p1.
Article	"Peel Back the Onion: 12 Basic Principles for Better Cash Flow Planning," by William J. Hass and Shepherd G. Pryor IV, ABF Journal, October 2006, Vol. 4, Number 8, p 92.

Article	"Inertia or Change? Try Continuous Renewal," By Shepherd G. Pryor IV, William J. Hass, and Dennis N. Aust. Journal of Private Equity, spring 2007 issue, Institutional Investor, NY.
Book	*The Private Equity Edge: How Private Equity Players and the World's Top Companies Build Value and Wealth*, Arthur Laffer, William Hass, and Shepherd G. Pryor IV, McGraw Hill, NY, 2009
Book/chapter	*The Valuation Handbook: Valuation Techniques from Today's Top Practitioners,* Rawley Thomas and Benton E. Gup (editors), Chapter 2 by William J. Hass and Shepherd G. Pryor IV., Wiley Finance, NY, 2010
Article	"Profitable opportunities in distressed M&A will increase for the prepared," by William J. Hass and Shep Pryor, Financier Worldwide Magazine, March 2011
Article	"Lessons for Federal, State Governments in GM Bankruptcy," by William J. Hass and Shepherd G. Pryor IV, Dow Jones DBR Small Cap, April 13, 2011

Testimony given by Shepherd G. Pryor IV during the preceding four years from the date hereof:

Type/Date	Description		
Deposition: May 25, 2007	THOMAS E. BARON, LINDA S. BARON, CHRISTOPHER T. MALLAVARAPU, JANET K. MALLAVARAPU, ROBERT V. TRASK, MARY L. TRASK, ROTFL, LLC, a Nevada Limited Liability Company, and ALPHA FOXTROT, LLC, a Nevada Limited Liability Company, Plaintiffs, vs. FAYEZ CHEHAB, WILLIS CHRANS, STEVEN K. BENTLEY, BETTER BUSINESS SYSTEMS OF MONTANA, INC., DONALD MALLETTE, RANDOLPH MARTIN, BANK OF SPRINGFIELD, an Illinois banking corporation, MICHAEL McGLASSON, and JAMES KELLEY, Defendants.	Case No. 3:05-cv-03240	
Deposition: August 22, 2007	IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION PETER S. WILLMOTT, Plaintiff, v. FEDERAL STREET ADVISORS, INC. and BANK OF AMERICA, N.A., Defendants.	Case No. 05 C 1124 Judge Virginia M. Kendall	

Deposition: September 18, 2008, Trial: February 25, 2009	STATE OF ILLINOIS)) SS: COUNTY OF COOK) IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS COUNTY DEPARTMENT - CHANCERY DIVISION FAIRWAY CAPITAL, LLC, a New York Limited Liability Company, Plaintiff, No. 06 CH 27028 No. 07 CH 00938 vs. 1012-1016 CHURCH STREET, LTD.; JOSE A. VENZOR; CYRUS HOMES, INC.; GEORGE KOTSIONIS; CHICAGO TITLE INSURANCE COMPANY, as assignee; *CARMEN'S PIZZA CORP.*; CHANPEN RATANA; ASADO BRAZILIAN GRILL, INC.; BANCO POPULAR OF NORTH AMERICA; CARMEN G. VENZOR; *NONRECORD CLAIMANTS*, and UNKNOWN OWNERS, Defendants.	
Deposition August 17, 2009, Trial August 27, 2009	IN THE IOWA DISTRICT COURT FOR WEBSTER COUNTY CLEMENT AUTO & TRUCK, INC., No. LACV311898 and LARRY CLEMENT. Plaintiffs, v. WELLS FARGO BANK, IOWA, NATIONAL ASSOCIATION, Defendant.	
Deposition, December 12, 2008 Trial December 9,11,14, 2009	IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION --- NATIONAL JOCKEY CLUB, CASE NUMBER 04 C 3743 Plaintiff, vs. FLOYD "CHIP" GANASSI, and CHIP GANASSI GROUP, LLC, Defendant. ---	

EXHIBIT B

Exhibit B

to

Expert report of Shepherd G. Pryor IV, dated May 23, 2011

Documents relied on by Shepherd G. Pryor IV

1. Robert Ambridge Deposition (with exhibits)
2. Robert Barone Deposition (with exhibits)
3. Brandon Bolio Deposition (with exhibits)
4. Jeanne Brown Deposition (with exhibits)
5. James Freeman Deposition (with exhibits)
6. David Howard Deposition (with exhibits)
7. Herbert Kolben Deposition (with exhibits)
8. Albert Kotite Deposition (with exhibits)
9. Devin Kumar Deposition (with exhibits)
10. Ronaldo Naval Deposition (with exhibits)
11. McLendon P. Rafeedie Deposition (with exhibits)
12. Kevin Rourke Deposition (with exhibits)
13. Jeff Susman Deposition (with exhibits)
14. Jon Varnell Deposition (with exhibits)
15. Henry Yu Deposition (with exhibits)
16. Bret Yunker Deposition (with exhibits)
17. Previously marked exhibits 3-5
18. Co-Lending Agreement for Loan Agreement dated as of June 6, 2007 Maximum Loan Amount of $315,000,000 between Lehman Brothers Holdings Inc., as the Agent and a Split note Holder and the parties listed on Exhibit A dated September 24, 2007.
19. Credit Agreement Dated as of June 6, 2007 among Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC, as Borrowers, The Lenders, and Bank of America, N.A. as Administrative Agent et al. (with Exhibits thereto)
20. Intercreditor Agreement (Project Lenders) Bank of America, N.A., as Bank Agent and Wells Fargo Bank, National Association as Trustee, June 6, 2007
21. Intercreditor Agreement (Retail) dated June 6, 2007 between Bank of America, N.A., as the Administrative Agent under the Credit Agreement, Wells Fargo Bank, N.A. as

Trustee under the Second Mortgage indenture, Lehman Brothers Holdings Inc., as Retail Agent and Fontainebleau Las Vegas Retail, LLC with reference to the Master Disbursement Agreement of June 6, 2007

22. Loan Agreement Dated as of June 6, 2007 between Fontainebleau Las Vegas Retail, LLC as Borrwer and Lehman Brothers Holdings Inc., individually and as Agent for one or more Co'Lenders as Lender
23. First Amendment to Loan Agreement and other Loans Documents dated as of September 9, 2007 between Fontainebleau Las Vegas Retail, LLC as Borrower and Lehman Brothers Holdings Inc., individually as Agent for one or more Co-Lenders, as Lender
24. Master Disbursement Agreement among Fontainebleau Las Vegas holdings, LLC, et al. and Fontainebleau Las Vegas II, LLC, Bank of America N.A., as the Bank Agent, Wells Fargo Bank., N.A., as the Trustee, Lehman Brothers Holdings Inc., as the Retail Agent, and Bank of America N.A., as the Disbursement Agent (with exhibits thereto)
25. January 15, 2010 Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing and Declaratory Relief
26. February 4, 2011 Avenue Term Lenders Plaintiffs' Responses to Second Set of Interrogatories From Defendant Bank of America N.A.
27. February 18, 2010 Defendants' Joint Motions to Dismiss the Term Lender Complaints and Supporting Memorandum of Law
28. February 18, 2010 Declaration of Thomas C. Rice in Support of Defendants' Joint Motions to Dismiss the Term Lender Complaints
29. February 18, 2010 Defendant Bank of America, N.A.'s Motion to Dismiss the Term Lenders' Disbursement Agreement Claims and Support Memorandum of Law
30. March 22, 2010 Corrected Joint Opposition to Defendants' Motion to Dismiss the Term Lenders' Claims Against the Revolving Lenders
31. March 22, 2010 Joint Opposition to Defendant Bank of America, N.A.'s Motion to Dismiss the Term Lenders' Disbursement Claims
32. March 22, 2010 Declaration of James B. Heaton, III Opposing Defendants' Joint Motion to Dismiss the Term Lender Complaint
33. April 5, 2010 Defendant Bank of America, N.A.'s Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Term Lenders' Disbursement Agreement Claims
34. April 5, 2010 Reply Memorandum in Further Support of Defendants; Joint Motions to Dismiss the Term Lender Complaints
35. May 28, 2010 MDL Order Number Eighteen: Granting in Part and Denying in Part Motions to Dismiss [DE35]; [DE36]; Requiring Answer to Avenue Complaint; Closing Aurelius Case

EXHIBIT C

Exhibit C

to

Expert Report of Shepherd G. Pryor IV, dated May 23, 2011

The purpose of this Appendix is to provide a quick reference to certain sections of the Credit Agreement ("CA"), Disbursement Agreement ("DA") and the Retail Facility Agreement ("RFA") that are cited in the main report.

Section	Excerpts from Agreements
Credit Agreement	
CA 1.1 Definitions	SECTION 1. DEFINITIONS 1.1Defined Terms. As used in this Agreement, the terms listed in this Section 1.1 shall have the respective meanings set forth in this Section 1.1, provided that to the extent not so listed, each term used in this Agreement shall be used with the meaning set forth for that term in the Disbursement Agreement or to the extent the Disbursement agreement is then not in effect, the Disbursement agreement as of the last day of its effectiveness: …
CA 1.1 Definitions	SECTION 1. DEFINITIONS 1.1 Defined Terms… … "Defaulting Lender" means at any time, (i) any Lender with respect 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 law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up liquidation, dissolution, composition or other relief with respect to it or its debts, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, (iii) any Lender that shall make a general assignment for the benefit of its creditors or (*iv) any Lender that shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due.
CA 1.1 Definitions	SECTION 1. DEFINITIONS 1.1Defined Terms. … "Financing Agreements" means, collectively, this Agreement and the other Loan Documents, the Second Mortgage notes, the Second Mortgage Indenture and the Second Mortgage Upstream Guarantees.

CA 1.1 Definitions	SECTION 1. DEFINITIONS 1.1Defined Terms. … "Material Agreement" means any contract or agreement to which any of the Companies is a party (a) pursuant to which the Companies are reasonably expected to incur obligations or liabilities with a dollar value in excess of $25,000,000 during the term of such contract or agreement, or (b) for which breach, nonperformance, cancellation or failure to renew could reasonably be expected to have a Material Adverse Effect, taking into account any viable replacements or substitutions therefore at the time such determination is made. [See CA Schedule 4.24, which lists Material Agreements as cited in Section 4.24]
CA 2.1 (b), (c)	SECTION 2. AMOUNT AND TERMS OF COMMITMENTS 2.1 Loans and Commitments Generally. Pursuant to this Agreement, the Lenders shall make the Loans described below, (1) on the Closing Date…or thereafter for remittance to the Bank Proceeds Account under the Disbursement Agreement for disbursement in accordance with the Disbursement Agreement… … (b) Delay Draw Term Loans. Subject to the terms set forth herein, each Delay Draw lender severally agrees to make term loan ("Delay Draw Term Loans.") to Borrowers on any Banking Day during the Delay Draw commitment Period in an aggregate principal amount not to exceed the amount of the Delay Draw Commitment of such lender, provided that … (iv) each Delay Draw Term Loan shall be made to the Bank Proceeds Account (and/or shall repay outstanding Revolving Loans to the extent thereof) subject only to the satisfaction of the conditions set forth in Section 5.2 and shall thereafter be disbursed from the Bank Proceeds Account subject only to the conditions set forth in Section 3.3 of the Disbursement Agreement. (c) Revolving Loans. Subject to the terms and conditions hereof, and in reliance upon the applicable representations and warranties set forth herein and in the Disbursement agreement, each Revolving lender severally agrees to make Revolving Loans ("Revolving Loans") to Borrowers from time to time during the Revolving Commitment Period, provided that … The making of Revolving Loans which are Disbursement Agreement Loans to the Bank Proceeds Account shall be subject only to the fulfillment of the applicable conditions set forth in section 5.2, and shall thereafter be disbursed from the Bank Proceeds Account subject only to the conditions set forth in Section 3.3 of the Disbursement Agreement.…
CA 2.4.(e)	SECTION 2. AMOUNT AND TERMS OF COMMITMENTS … 2.4 Procedures for Borrowing: Where Disbursed. … (e) In the event that the proceeds of any Loans deposited in to the Bank Proceeds Account pursuant to subsection (c) above are not disbursed by the Disbursement

	Agent on the Applicable borrowing Date, the proceeds of such Loans shall be held by the Disbursement Agent in accordance with the provisions set forth in the Disbursement Agreement; provided, however, that the proceeds of such Loans shall continue to bear interest and be repayable in accordance with the provisions set forth in this Agreement. In the event that the Administrative Agent receives a Stop Funding Notice from the Disbursement Agent, none of the Administrative Agent and the Lenders shall, or shall have any obligation to, make loans until the circumstances associated with such Stop Funding Notice have been resolved; provided, however, that Borrowers shall be obligated to make any payments due pursuant to Section 2.19 as a result thereof.
CA 4.24 and Schedule 4.24	SECTION 4. REPRESENTATIONS AND WARRANTIES Each Borrower hereby represents and warrants to the Administrative Agent and each Lender that (i) as of the Closing Date, (ii) as of the date of the making of each Direct loan, and (iii) as of the date of the and the issuance or amendment of each Letter of Credit following the Opening Date (other than to the extent issued to support or finance Project Costs pursuant to the Disbursement Agreement): ... 4.24 Performance of Agreements; Material Agreements. None of the Companies (nor, as of the Closing Date, any Loan Party) is in default in the performance...Schedule 4.24 contains a true, correct and complete list of all the Material Agreements in effect on the Closing Date. ... Schedule 4.24 (to the Credit Agreement) MATERIAL AGREEMENTS ... 11. The "Financing Agreements" as defined in the Disbursement Agreement
CA 5.1	SECTION 5. CONDITIONS PRECEDENT ... 5.1 Conditions to Closing Date. The occurrence of the Closing Date is subject to the execution and delivery on or before the Closing Date of each of the instruments, documents and agreements listed on Schedule 1.1, the concurrent issuance of the Second Mortgage notes and the closing of the Retail Facility, and the satisfaction of each of the other conditions precedent described in Section 3.1 of the Disbursement Agreement (unless waived in writing by the Administrative Agent with the consent of all the Lenders). Without limiting the generality of the provisions of the last paragraph of Section 9.3, for purposes of determining compliance with the conditions specified in this Section 5.1 or Section 3.1 of the Disbursement Agreement, each Lender that has signed this Agreement shall be deemed to have consented to, approved or accepted or to be satisfied with, each document or other matter required hereunder or thereunder to be consented to or approved by or acceptable or satisfactory to a Lender unless the Administrative Agent shall have received notice from such Lender prior to the proposed Closing Date specifying its objection thereto.
CA 5.2	SECTION 5. CONDITIONS PRECEDENT ... 5.2 Conditions to Extensions of Credit controlled by Disbursement Agreement. The agreement of each Lender to Make Disbursement Agreement Loans and to issue

	Letters of Credit for the payment of Project Costs pursuant to Section 3.4 of the Disbursement Agreement, is subject only to the satisfaction of the following conditions precedent: (a) Notice of Borrowing. Borrower 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. (b) Letters of Credit. In the case of Letters of Credit, the procedures set forth in Section 3.4 of the Disbursement Agreement shall have been complied with. (c) Drawdown Frequency. Except for Loans made pursuant to Section 3 with respect to Reimbursement Obligations, Loans made pursuant to the Section shall be made no more frequently than once every calendar month unless the Administrative Agent otherwise consents in its sole discretion.
CA 5.3	SECTION 5. CONDITIONS PRECEDENT ... 5.3 Conditions to Extensions of Credit following the opening Date (except for Reserved Amounts). The agreement of each Lender to make Direct Loans, the obligation of the Swing line Lender to make Swing line Loans, and the obligations of the Issuing Lender to make each letter of Credit (other than those requested pursuant to Section 3.4 of the Disbursement Agreement for the financing of project Costs). Is subject to the satisfaction of the following conditions precedent: ... (b) Representations and Warranties. Each of the representations and warranties made by any Loan Party in or pursuant to the Loan Documents shall be true and correct in all material respects on and as of such date as if made on and as of such date, except for representations and warranties expressly stated to relate to a specific earlier date, in which case such representations and warranties shall be true and correct in all material respects as of such earlier date. (c) No Default. No Default of Event of Default shall have occurred and be continuing on such date or immediately after giving effect to the extensions of credit requested to be made on such date. Each borrowing of Loans by and issuance of a letter of Credit on behalf of Borrower under this Section 5.3 shall constitute a representation and warranty by Borrowers as of the date thereof that the conditions contained in this Section 5.3 have been satisfied.
CA6.2(f)	SECTION 6. AFFIRMATIVE COVENANTS Each Borrower hereby agrees that, so long as the Commitments remain in effect...Borrowers shall and shall cause each of the other Companies to, it being understood and agreed that the covenants set forth in the Section 6 shall be of continuous application unless expressly stated below: ... 6.2 Certificates; Other Information. Furnish to Administrative Agent: ... (f) promptly upon receipt, copies of all notices provided to any Company or their Affiliates pursuant to any of the Financing Agreements or the Retail Facility relating material defaults or material delays and promptly upon execution and delivery thereof, copies of all amendments to any of the Financing Agreements or the Retail Facility.

CA 8(j)	SECTION 8. EVENTS OF DEFAULT If any of the following events shall occur and be continuing: ... (j) Any of the Financing Agreements shall terminate or be terminated or canceled, become invalid or illegal or otherwise cease to be in full force and effect prior to its stated expiration date or any Company, any Affiliate of any Borrower or any other person shall breach or default under any term, condition, provisions, covenant, representation or warranty contained in any Material Agreement (after the giving of any applicable notice and the expiration of any applicable grace period); provided, that the occurrence of any of the foregoing events with respect to any Material Agreement (other than any Material Affiliate Agreement) shall constitute an Event of Default hereunder only if the same could reasonably be expected to result in a Material Adverse Effect and the same shall continue unremedied for thirty days after the earlier of (i) the Companies becoming aware of such occurrence or (ii) receipt by the Companies of written notice from the Administrative Agent or any Lender of such occurrence; provided, however, that in the case of any such Material Agreement, if the occurrence is the result of actions or inactions by a party other than a Loan Party, then no Event of Default shall be deemed to have occurred as a result thereof if Borrowers provide written notice to the Administrative Agent immediately upon (but in no event more than five Banking Days after) the Companies becoming aware of, or receiving notice of, such occurrence that the Companies intend to replace such Material Agreement and (x) the Companies obtain a replacement obligor or obligors for the affected party, (y) the Companies enter into a replacement Material Agreement on terms no less beneficial to the Company and the Secured Parties in any material respect than the Material Agreement being replaced within sixty days of such occurrence; provided, however, that the Replacement Material Agreement may required the Companies to pay amounts under the replacement Material Agreement in excess of those that would have been payable under the replaced Material Agreement and (z) such occurrence after considering any replacement obligor and replacement Material Agreement and the time required to implement such replacement, has not had and could not reasonably be expected to have a Material Adverse Effect; provided, further, that a breach, default or termination under any Construction Material Agreement prior to the Completion Date shall constitute and Event of Default hereunder only to the extent such breach, default or termination constitutes a Disbursement Agreement Event of Default;. Or (End of Section 8(j) ...
Disbursement Agreement	
DA 2.1.2	ARTICLE 2 FUNDING - THE ACCOUNTS 2.1 **General Mechanics.** ... 2.1.2 Subsequent Advances. Following the Closing Date each of the Funding Agents shall cause Advances to be made to the Disbursement Agent for disbursement pursuant to the terms of this Agreement upon the satisfaction of only the applicable conditions set forth in Article 3. For the avoidance of doubt, it is agreed that following the Closing Date, the applicable conditions precedent set forth in this Agreement (rather than any conditions precedent set forth in the Facility Agreements) shall

	govern and control the making of Advances until the termination of this Agreement in accordance with Section 11.18.
DA 2.4.1	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.4 **Advance Requests.** 2.4.1 Each Advance under this Agreement shall be requested jointly by the Borrowers, the Issuers and the Retail Affiliate pursuant to an Advance Request substantially in the form of Exhibit C-1 (except as provided in clause (i) of the definition thereof), provided that any Advances which are made solely to finance Other Retail Costs may be requested solely by the Retail Affiliate pursuant to an Advance Request described in clause (ii) of the definition thereof and (ii) any Advances under the Resort Budget that do not involve Advances under the Retail Facility for Shared Costs may be requested solely by the Companies. Each Advance Request shall be delivered to the Disbursement Agent, each Funding Agent and the Construction Consultant not later than the 11th day of each calendar month, but in any event not later than ten Banking Days prior to the Scheduled Advance Date.
DA 2.4.4	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.4 **Advance Requests.** ... 2.4.4 Promptly after delivery of the Advance Request: (a) General Review. The Disbursement Agent and the Construction Consultant shall review the Advance Request and attachments thereto to determine whether all required documentation has been provided, and shall use commercially reasonable efforts to notify the Project Entities of any deficiency within three Banking Days after delivery thereof by the Project Entities, it being acknowledged that any failure to notify the Project Entities of any deficiency in the Advance Request so delivered within the aforesaid time period shall not be deemed an approval thereof. (b) Construction Consultant Work Review and Certificate. In respect of the Advance Request for the initial Advance from the Second Mortgage Proceeds Account and each subsequent Advance, the Construction Consultant shall review the work referenced in the Requested Cost Report, including work estimated to be completed through the applicable Advance Date as such work is being performed. Not later than four Banking Days prior to the requested Advance Date for any such Advance, the Construction Consultant shall deliver to the Disbursement Agent (with a copy to the Project Entities) a Construction Consultant Advance Certificate either approving or disapproving the Advance Request; provided that if the Construction Consultant disapproves one or more particular payments or disbursements to any Contractor or Subcontractor requested by the Advance Request, but the Advance Request otherwise complies with the requirements hereof, then the Advance Request shall be deemed approved with respect to all payments and disbursements requested therein other than the particular payments or disbursements so disapproved. If the Construction Consultant disapproves the Advance Request or any one or more particular payments requested therein, the Construction Consultant shall provide the Project Entities, in reasonable detail, its reasons for such disapproval, however the failure of the Construction Consultant to do so shall not be deemed approval of any

	such payment. (c) Debt Service Notifications. The Bank Agent and the Trustee may deliver notices correcting the amount of the Debt Service due to each of them on the relevant Advance Date to the Disbursement Agent. The Disbursement Agent shall use reasonable diligence to assure that the Construction Consultant performs its review of the materials required by this Section 2.4 and delivers its Construction Consultant Advance Certificate, and that the Disbursement Agent's own review of the materials required by this Section 2.4 is finalized, in each case not less than three Banking Days prior to the Scheduled Advance Date. [emphasis added] In the event that the Construction Consultant approves only a portion of the payments or disbursements requested by the Advance Request or the Disbursement Agent finds any minor or purely mathematical errors or inaccuracies in the Advance Request or supporting materials, the Disbursement Agent may require the Project Entities to revise and resubmit the same.
DA 2.4.5	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.4 **Advance Requests.** ... 2.4.5 Supplementation of Advance Requests. In the event that the Project Entities obtain additional information or documentation or discover any errors in or updates required to be made to any Advance Request prior to the Scheduled Advance Date, the Project Entities may, with the approval of the Disbursement Agent and the Construction Consultant, revise and resubmit such Advance Request to the Disbursement Agent and the Construction Consultant, provided that the Disbursement Agent shall not be required to accept any such updates or revisions, but shall consider their submission in good faith. The Disbursement Agent shall use reasonable diligence to review and approve such supplemental Advance Request and to cause the Construction Consultant to review and approve the same not less than three Banking Days prior to the Scheduled Advance Date.
DA 2.4.6	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.4 **Advance Requests.** ... 2.4.6 Advance Confirmation Notice. When the applicable conditions precedent set forth in Article 3 have been satisfied, the Disbursement Agent shall notify the Project Entities and the Project Entities and the Disbursement Agent shall execute an Advance Confirmation Notice setting forth the amount of the Advances to be made pursuant to each Financing Agreement on the Advance Date and, if requested by any Funding Agent, attaching to the Advance Confirmation Notice to be submitted to such Funding Agent a finalized Advance Request, including all Exhibits, which will reflect any amendments made to the Advance Request since its initial submission. When executed by the Project Entities and the Disbursement Agent (and, to the extent of any Advances for which the conditions precedent set forth in Section 3.5 apply, by the Retail Agent), the Disbursement Agent shall deliver the Advance Confirmation Notice to the Project Entities and each of the Funding Agents. On the Scheduled

	Advance Date, (a) each of the Funding Agents shall make the Advances contemplated by that Advance Confirmation Notice to the relevant Accounts and (b) the Disbursement Agent shall make the resulting transfers amongst the Accounts described in the Advance Confirmation Notice. ... "Funding Agents" means, collectively, the bank Agent, the Trustee and the Retail Agent. **(Disbursement Agreement Exhibit A)**
DA 2.5.1	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.5 **Stop Funding Notices.** 2.5.1 Stop Funding Notices. In the event that (i) the conditions precedent to an Advance have not been satisfied, or (ii) the Controlling Person notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing, then the Disbursement Agent shall notify the Project Entities and each Funding Agent thereof as soon as reasonably possible (a "Stop Funding Notice"). Each Stop Funding Notice shall specify, in reasonable detail, the conditions precedent which the Disbursement Agent has determined have not been satisfied and/or shall attach a copy of any notice of default received by the Disbursement Agent. The Disbursement Agent shall have no liability to the Project Entities arising from any Stop Funding Notice except to the extent arising out of the gross negligence or willful misconduct of the Disbursement Agent.
DA 2.6.1(b)	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.6 Provision of Advances by the Funding Agents and Account Transfers. 2.6.1 Advances and Timing. With respect to each Advance Confirmation Notice issued pursuant to Section 2.4 or Section 2.5, on before 12:00 p.m., New York, New York time on the Advance Date referred to therein: (a) the Trustee shall remit the required Advance from the Second Mortgage Proceeds Account to the Second Mortgage Funding Account; (b) the Bank Agent shall (i) cause the Bank Lenders to remit any required Loans under the Bank Credit Agreement to the Bank Proceeds Account, and (ii) the Bank Agent shall thereafter remit any required Advances under the Bank Credit Agreement from the Bank Proceeds Account to the Bank Funding Account; and (c) the Retail Agent shall cause the Retail Lenders to make loans and shall remit any required Advances under the Retail Facility into the Retail Funding Account; in each case in immediately available funds and as detailed in the Advance Request Transfer Report and Funding Order Report. in each case in immediately available funds and as detailed in the Advance Request Transfer Report and Funding Order Report.
DA 2.6.2	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.6 Provision of Advances by the Funding Agents and Account Transfers.

	2.6.2 Account Transfers. Promptly following its confirmation that the remittances required by Section 2.6.1 have been made, the Disbursement Agent shall make each of the transfers detailed in the final Funding Order Report and Advance Request Transfer Report.
DA 2.6.3	ARTICLE 2 FUNDING - THE ACCOUNTS ... 2.6 Provision of Advances by the Funding Agents and Account Transfers. ... 2.6.3 Concurrent Advances. Neither the Disbursement Agent nor any of the Funding Agents shall be responsible for the failure of any other Funding Agent to make any required Advance. The Disbursement Agent shall not release any Advances to the Project Entities until the Trustee has remitted any required Advances from the Second Mortgage Proceeds Account, the Bank Agent has remitted any required Advances from the Bank Proceeds Account, and the Retail Lenders have made any requested Loans under the Retail Facility, provided that (a) the Retail Agent may waive this Section 2.6.3 in respect of Advances to be provided by the Retail Lenders, and (b) the Controlling Person may waive this Section 2.6.3 in respect of Advances to be provided from the Second Mortgage Proceeds Account or under the Bank Credit Agreement.
DA 3.1.29	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES 3.1 **Conditions Precedent to the Closing Date. The occurrence of the Closing Date** ... 3.1.29 In Balance Requirement. The In Balance Test shall be satisfied.
DA 3.3	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.3 ***Conditions Precedent to Advances by the Trustee and the Bank Agent.*** The obligation (a) of the Trustee to make Advances from the Second Mortgage Proceeds Account to the Second Mortgage Funding Account, and (b) of the Bank Agent to make Advances from the Bank Proceeds Account are each subject to the prior satisfaction of each of the conditions precedent set forth in this Section 3.3:
DA 3.3.2	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.3 **Conditions Precedent to Advances by the Trustee and the Bank Agent...** ... 3.3.2 Representations and Warranties. Each representation and warranty of: (a) Each Project Entity set forth in Article 4 or in any Material Contract shall be true and correct in all material respects as if made on such date (except that any representation and warranty that relates expressly to an earlier date shall be deemed made only as of such earlier date), unless, with respect to any Advance

	prior to the Initial Bank Advance Date, the failure of any such representation and warranty referred to in this clause (a) to be true and correct could not reasonably be expected to result in a Material Adverse Effect; and (b)To the Project Entities' knowledge, each Major Project Participant (other than any Project Entity) set forth in any of the Material Contracts shall be true and correct in all material respects as if made on such date (except that any representation and warranty that relates expressly to an earlier date shall be deemed made only as of such earlier date) unless the failure of any such representation and warranty referred to in this clause (b) to be true and correct could not reasonably be expected to result in a Material Adverse Effect, in each case, as certified by the Project Entities in the relevant Advance Request.
DA 3.3.3	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.3 **Conditions Precedent to Advances by the Trustee and the Bank Agent**... ... 3.3.3 Default. No Default or Event of Default shall have occurred and be continuing.
DA 3.3.4 (a)	3.3.4 Advance Request and Advance Confirmation Notice. (a) Delivery to the Disbursement Agent, each Funding Agent and the Construction Consultant of an Advance Request, together with all then required attachments, exhibits and certificates. Such Advance Request shall request an Advance in an amount sufficient to pay all amounts due and payable for work performed on the Project through the last day of the period covered by such Advance Request and sufficient to pay the amounts required by Section 2.4.2.
DA 3.3.8	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.3 **Conditions Precedent to Advances by the Trustee and the Bank Agent**... ... 3.3.8 In Balance Requirement. The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied.
DA 3.3.11	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.3 **Conditions Precedent to Advances by the Trustee and the Bank Agent**... ... 3.3.11 Material Adverse Effect. Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material Adverse Effect.
DA 3.3.21	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ...

	3.3 **Conditions Precedent to Advances by the Trustee and the Bank Agent**... ... 3.3.21 Adverse Information. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole.
DA 3.3.23	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.3 **Conditions Precedent to Advances by the Trustee and the Bank Agent**... ... 3.3.23 Retail Advances. In 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.
DA 3.3.24	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.3 **Conditions Precedent to Advances by the Trustee and the Bank Agent**... ... 3.3.24 Other Documents. In the case of each Advance from the Bank Proceeds Account, the 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.
DA 3.5.1	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.5 **Conditions Precedent to Advances by the Retail Agent and the Retail Lenders.** 3.5.1 Shared Cost Advances. The obligation of the Retail Agent and the Retail Lenders to make Advances under the Retail Facility for Shared Costs is subject only to the prior satisfaction of the conditions precedent set forth in this Section 3.5.1: (1) Advance Request. The Project Entities shall have requested the payment of amounts payable from the Retail Facility for Shared Costs pursuant to Article 2 (it being understood that the related Advance Request may be amended in any fashion, and omit any attachment to the extent approved by the Controlling Person). (2) No Prohibited Scope Change. There shall not have been any Scope Change to items constituting Shared Costs which is inconsistent with Section 6.2, and the Resort Budget shall not have been amended in a manner with respect to Shared Costs which is materially inconsistent with Section 6.4, except with the consent of the Retail Agent, provided that the Retail Agent and the Retail

	Lender shall not be entitled to refuse to fund pursuant to this Section 3.5.1(2) to the extent that the Project Entities shall have, from a source of funds other than the Retail Facility (or the Project Secured Parties on their behalf), paid for or shall concurrently pay or shall have reserved for payment in the Requested Cost Reports any costs associated with any such inconsistent Scope Change or change in respect of Shared Costs. (3) Advance by Bank Lenders. The Initial Bank Advance Date shall have occurred (or shall concurrently occur) and the Bank Agent shall, on the date specified in the relevant Advance Request, make any Advances required of it pursuant to that Advance Request, (i) without having waived any condition precedent to such Advances, or (ii) to the extent that the Bank Agent waives any such condition, without having received any additional benefit as consideration for such waiver for which the Retail Agent and the Retail Lenders did not receive a pro rata share of the same benefit (it being agreed that the continued progress of the Project shall not, in and of itself, constitute such a benefit). (4) Advance Within Limits. The aggregate principal amount of Advances made to the Retail Affiliate under the Retail Facility for Shared Costs shall not exceed the Retail Lenders Shared Cost Commitment. (5) Documents Enforceable. The Retail Facility Agreement and the Retail Security Documents shall continue to be enforceable in accordance with their respective terms. (6) No Prohibition. No order, judgment or decree of any court, arbitrator or governmental authority shall purport to enjoin or restrain the Retail Lenders from making the Advances to be made by them on the Advance Date. (7) Retail Air Space Lease. The Retail Air Space Lease shall not have been surrendered and shall remain in full force and effect, and the Retail Air Space Lease shall not have been terminated or cancelled for any reason or any circumstances whatsoever (except, in each such case, to the extent converted to a valid fee interest in accordance with the terms thereof). **Notwithstanding any other provision of this Agreement or the Operative Documents to the contrary, (a) there shall be no other conditions to the making of Advances for Shared Costs by the Retail Agent and the Retail Lenders pursuant to the Retail Facility, and the Retail Agent and the Retail Lenders shall make all requested Advances for Shared Costs pursuant to the Retail Facility upon satisfaction of the conditions set forth in this Section 3.5.1 and (b) the Disbursement Agent and the other parties hereto shall not purport to waive the conditions set forth in this Section 3.5 without the prior consent of the Retail Agent.**
DA 3.7.2	ARTICLE 3 CONDITIONS PRECEDENT TO THE CLOSING DATE AND ADVANCES ... 3.7 **Waiver of Conditions.** 3.7.2 At such times as the Bank Agent is the Controlling Person, the Bank Agent shall be entitled to waive the conditions precedent under Section 3.3 without the consent of the other Funding Agents.
DA 4.9.1	ARTICLE 4 REPRESENTATIONS AND WARRANTIES

	The Project Entities make all of the following representations and warranties to and in favor of (a) the Funding Agents, the Lenders and the Disbursement Agent as of the Closing Date, (b) the Disbursement Agent on each Advance Date, and (c) each Project Secured Parties, as of the date of the making of each Advance by that Project Secured Party, in each case except as such representations relate to an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date): ... 4.9 **Defaults.** 4.9.1 There is no default or event of default under any of the Financing Agreements; and ...
DA 4.9.2	ARTICLE 4 REPRESENTATIONS AND WARRANTIES The Project Entities make all of the following representations and warranties... ... 4.9 **Defaults.** ... 4.9.2 There is no Default or Event of Default hereunder.
DA 4.14	ARTICLE 4 REPRESENTATIONS AND WARRANTIES The Project Entities make all of the following representations and warranties... ... 4.14 **In Balance Test**. As of each Advance Date which occurs on or following the initial Advance from the Second Mortgage Proceeds Account, the In Balance Test is satisfied.
DA 4.17.2	ARTICLE 4 REPRESENTATIONS AND WARRANTIES The Project Entities make all of the following representations and warranties... ... 4.17 **Budgets and Remaining Cost Reports.** ... 4.17.2 Each Remaining Cost Report delivered hereunder is in the form attached as Appendix 8 to Exhibit C-1, and sets forth: (a) In column D headed "Resort Budget": (1) for the "Debt Service Through Scheduled Opening Date" line item, the total amount of cash Debt Service anticipated to be accrued in respect of the Indebtedness of the Companies through the Scheduled Opening Date (as in effect from time to time); (2) for each Line Item Category, an amount no less than the total anticipated Project Costs from the commencement through the completion of the work contemplated by such Line Item Category, as determined by the Project Entities. (3) In each other line item, the associated anticipated expenses though Final Completion as determined by the Project Entities.

	The Disbursement Agent shall be entitled to rely on certifications to such effect from the Project Entities or the Construction Consultant in approving any determination made by the Project Entities; (b) In column N, headed "Balance to Complete" an aggregate amount equal to the remaining anticipated Project Costs through the Final Completion Date (which amount is accurate as to each item set forth in such column); (c) In the section headed "In Balance Test Adjustments" for In Balance calculations: (1) the Unallocated Contingency Balance; and (2) the Required Minimum Cash Support, Required Minimum Liquidity Account, and the Required Minimum Excess Revolver Support Amount and any additional Cash Support delivered for the Completion Guarantees; (d) with respect to Project Costs previously incurred, is true and correct in all material respects; and (e) sets forth, as of the date of their delivery, and based on reasonable assumptions as to all legal and factual matters material to the estimates set forth therein, the amount of all reasonably anticipated Project Costs required to achieve Final Completion.
DA 5.4.2	ARTICLE 5 AFFIRMATIVE COVENANTS The Project Entities jointly and severally covenant and agree for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall: ... 5.4 **Notices.** Promptly, upon an officer of such Project Entity acquiring notice or giving notice, or upon an officer of such Project Entity obtaining knowledge thereof, as the case may be, provide to the Disbursement Agent, the Construction Consultant and the Funding Agents written notice of: ... 5.4.2 Any event, occurrence or circumstance which reasonably could be expected to cause the In Balance Test to fail to be satisfied or render the Project Entities incapable of, or prevent the Project Entities from (a) achieving the Opening Date on or before the Scheduled Opening Date, or (b) meeting any material obligation of the Project Entities under the Prime Construction Agreement or the other Material Contracts as and when required hereunder.
DA 6.4.1(d)	ARTICLE 6 NEGATIVE COVENANTS The Project Entities covenant and agree, with and for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall not: ... 6.4 **Resort Budget and Project Schedule Amendments.** Directly or indirectly, amend, modify, allocate, re-allocate or supplement or permit or consent to the amendment, modification, allocation, re-allocation or supplementation of, any of the Line Item Categories or other provisions of the Resort Budget or modify or extend the Scheduled Opening Date except as follows:

	6.4.1 **Permitted Budget Amendments.** ... (d) Increases 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.
DA 6.9.1	ARTICLE 6 NEGATIVE COVENANTS The Project Entities covenant and agree, with and for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall not: ... 6.9 **In Balance Test.** 6.9.1 At any time from and after the initial Advance of funds from the Second Mortgage Proceeds Account, permit the In Balance Test to fail to be satisfied on two consecutive Scheduled Advance Dates, provided that ... [Note: additional qualifications provide some relief for force majeure and allow the Borrower to provide up to $200 million in "Cash Support" to keep the In Balance Test from failing.]
DA 7.1.1	ARTICLE 7 EVENTS OF DEFAULT The Project Entities covenant and agree, with and for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall not: ... 7.1 **Events of Default.** The occurrence of any of the following events shall constitute an event of default ("Event of Default") hereunder: 7.1.1 Other Financing Documents. The occurrence of an "Event of Default" under and as defined by any one or more of the Facility Agreements, provided that from and after the date upon which any such "Event of Default" is cured or waived in accordance with the terms of the applicable Facility Agreement, it shall no longer constitute an Event of Default hereunder. ... "Event of Default" has the meaning given in Section 7.1.
DA 7.1.3	ARTICLE 7 EVENTS OF DEFAULT The Project Entities covenant and agree, with and for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall not: ...

	7.1 **Events of Default.** The occurrence of any of the following events shall constitute an event of default ("Event of Default") hereunder: ... 7.1.3 Representations. (a) Any representation, warranty or certification confirmed or made on the Closing Date pursuant to this Agreement or any Financing Agreement by any of the Project Entities shall be found to have been incorrect in any material respect; or (b) Any representation, warranty or certification confirmed or made by any of the Project Entities in this Agreement on any date following the Closing Date but prior to the Initial Bank Advance Date (including any Advance Request or other certificate submitted with respect to this Agreement) shall be found to have been incorrect when made or deemed to be made, unless the failure of any such representation and warranty to be true and correct could not reasonably be expected to result in a Material Adverse Effect; or (c) Any representation, warranty or certification confirmed or made by any of the Project Entities in this Agreement on or following the Initial Bank Advance Date (including any Advance Request or other certificate submitted with respect to this Agreement) shall be found to have been incorrect when made or deemed to be made in any material respect; or<In March 2009 when the borrower submits an advance request then IVI says no...So a cert submitted by the borrower, BofA knows was not true when made (in a material request)> (d) Any representation, warranty or certification confirmed or made by any of the Project Entities in any Material Contract or any certificate submitted with respect to any Material Contract shall be found to have been incorrect in any material respect when made or deemed to be made except to the extent that any failure to be true and correct could not reasonably be expected to have a Material Adverse Effect.
DA 7.1.4(a)	ARTICLE 7 EVENTS OF DEFAULT The Project Entities covenant and agree, with and for the benefit of the Funding Agents, the Lenders and the Disbursement Agent that until this Agreement is terminated pursuant to Section 11.18, they shall not: ... 7.1 **Events of Default.** The occurrence of any of the following events shall constitute an event of default ("Event of Default") hereunder: ... 7.1.4 Covenants. (a) The Project Entities shall fail to perform or observe any of their respective obligations under Sections 5.1, 5.8, 5.9, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6 or 6.9.1; ...
DA 9.1	ARTICLE 9 THE DISBURSEMENT AGENT 9.1 **Appointment and Acceptance.** Each of the Funding Agents hereby irrevocably appoints and authorizes the Disbursement Agent to act on its behalf hereunder and under the Control Agreements (including any future Control Agreements which may hereafter be executed). The Disbursement Agent accepts such appointments and agrees to exercise commercially reasonable efforts and utilize

	commercially prudent practices in the performance of its duties hereunder consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds.
DA 9.2.3	ARTICLE 9 THE DISBURSEMENT AGENT ... **9.2 Duties and Liabilities of the Disbursement Agent Generally.** ... 9.2.3 Notice of Events of Default. 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 Banking 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.
DA 9.3.2	ARTICLE 9 THE DISBURSEMENT AGENT ... **9.3 Particular Duties and Liabilities of the Disbursement Agent.** ... 9.3.2 Reliance Generally. The Disbursement Agent may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval or other paper or document believed by it on reasonable grounds to be genuine and to have been signed or presented by the proper party or parties. Notwithstanding anything else in this Agreement to the contrary, in performing its duties hereunder, including approving any Advance Requests, making any other determinations or taking any other actions hereunder, the Disbursement Agent shall be entitled to rely on certifications from the Project Entities (and, where contemplated herein, certifications from third parties, including the Construction Consultant) as to satisfaction of any requirements and/or conditions imposed by this Agreement. The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items or to investigate any other facts or circumstances to verify compliance by the Project Entities with their obligations hereunder.
DA 9.10	ARTICLE 9 THE DISBURSEMENT AGENT ... 9.10 **Limitation of Liability**. The Disbursement Agent's responsibility and liability under this Agreement shall be limited as follows: (a) the Disbursement Agent does not represent, warrant or guaranty to the Funding Agents or the Lenders the performance by the Project Entities, the General Contractor, the Construction Consultant, the Architect, or any other Contractor of their respective obligations under the Operative Documents and shall have no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing;... ... Neither the Disbursement Agent nor any of its officers, directors, employees or agents shall be in any manner liable or responsible for any loss or damage arising by reason

	of any act or omission to act by it or them hereunder or in connection with any of the transactions contemplated hereby, including, but not limited to, any loss that may occur by reason of forgery, false representations, the exercise of its discretion, or any other reason, except as a result of their bad faith, fraud, gross negligence or willful misconduct as finally judicially determined by a court of competent jurisdiction.
DA 11.3	ARTICLE 11 MISCELLANEOUS ... 11.3 **Delay and Waiver**. No delay or omission to exercise any right, power or remedy accruing upon the occurrence of any Default or Event of Default or any other breach or default of the Project Entities under this Agreement shall impair any such right, power or remedy of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or in any similar breach or default thereafter occurring, nor shall any waiver of any single Default, Event of Default or other breach or default be deemed a waiver of any other Default, Event of Default or other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party, of any Default, Event of Default or other breach or default under this Agreement or any other Financing Agreement, or any waiver on the part of any of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party, of any provision or condition of this Agreement or any other Operative Document, must be in writing and shall be effective only to the extent in such writing specifically set forth. All remedies, either under this Agreement or any other Financing Agreement or by law or otherwise afforded to any of the Funding Agents, the Lenders, the Disbursement Agent or any other Secured Party, shall be cumulative and not alternative.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Advance Request" means (i) in connection with any Advance from the Equity Funding Account prior to the initial disbursement of funds from the Second Mortgage proceeds Account, a written notice delivered by the Companies pursuant to Section 3.2, (ii) in connection with any Advance under the Retail Facility solely for other Project Costs, a written request by the Retail Affiliate in the required form attached to the Retail Facility Agreement together with each of the applicable reports described in Sections 2.07, 2.09, 2.10 and 2.11, certifying that the amounts requested are due and payable in connection with the applicable retail lease and that all applicable conditions set forth in Section 3.5.2 have been satisfied or waived in accordance with this Agreement, and (iii) in all other cases, an advance request and certificate substantially in the form of Exhibit C-1 hereto.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Available Funds" means, as of each date of determination, the sum of: (a) the Projected Interest Income; *plus* (b) the Anticipated Bonded Condo Deposits; *plus* (c) the balance of the Equity Funding Account; *plus*

	(d) the balance of the Cash Management Account; *plus* (e) the balance of the Second Mortgage Proceeds Account; *plus* (f) the balance of the Bank Proceeds Account; *plus* (g) the Delay Draw Term Loan Availability; *plus* (h) the Bank Revolving Availability *minus* $40,000,000;*plus* (i) the Debt Service Commitment Portion; *plus* (j) the Cash Support Amount (but not in excess of $200,000,000);*plus* (k) the Retail Lenders Shared Cost Commitment *minus* the amount of the Advances theretofore made under the Retail Facility for Shared Costs; *plus* (l) the cash balances then contained in the Resort Payment Account, the Interest Account and the Resort Loss Proceeds Account in each case as adjusted in column C of the Current Available Sources Report.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Controlling Person" means (a) until Exhaustion of the Second Mortgage Proceeds Account, the Trust and (b) thereafter, the Bank Agent.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Default" means (i) any of the events specified in Article 7 whether or not any requirement for the giving of notice, the lapse of time, or both, has been satisfied and (ii) the occurrence of any "Default" under any Facility Agreement.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Event of Default" has the meaning given in Section 7.1
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Facility Agreements" means, collectively, the Bank Credit Agreement, the Second Mortgage Indenture and the Retail Facility Agreement.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Financing Agreements" means, collective, the Disbursement Agreement, the Facility Agreements, the Security Documents, the Disbursement Agent Fee Letter, the bank Agent Fee Letter, the Trustee's fee letters with the Issuers, the Second Mortgage Purchase Agreement, the Second Mortgage Notes and any other loan or security agreements entered into on, prior to or after the Closing Date with the Disbursement Agent r any Funding Agent in connection with the financing of the Project.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ...

	"Funding Agents" means, collectively, the bank Agent, the Trustee and the Retail Agent.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "In Balance Test" means that , at the time of calculation and after giving effect to any requested Advance, Available Funds equal or exceed the Remaining Costs. The In Balance Test is "satisfied" when Available Funds equal or exceed Remaining Costs.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Material Adverse Effect" means any event or circumstance which: (a) has a material adverse effect on the business, assets properties, liabilities (actual or contingent), operations, condition (financial or otherwise) or prospects of (i) as of the Closing Date, Parent and its Subsidiaries, taken as a whole, (ii) the Companies and their Subsidiaries, taken as a whole, or (iii) as of the Closing Date, Turnberry Residential; (b) materially and adversely affects the ability of the Companies and their Subsidiaries, taken as a whole, to perform their respective obligations under the Financing Agreements or of the Project Entities to construct the Project; (c) materially and adversely affects the rights of the Secured Parties under their respective financing Agreement, including the validity, enforceability or priority of the Liens purported to be created under the Security Documents; or (d) materially and adversely affects the ability of the Project Entities to achieve the Opening Date by the outside Date.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Material Agreement " means any contract or agreement to which any of the Companies is a party (a) pursuant to which the Companies are reasonably expected to incur obligations or liabilities with a dollar value in excess of $25,000,000 during the term of such contract or agreement, or (b) for which breach nonperformance, cancellation or failure to renew could reasonably be expected to have a Material Adverse Effect, taking into account any viable replacements or substitutions therefore at the time such determination is made.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Remaining Cost Report" means a report in the form attached to Exhibit C-1 as Appendix 8.
DA Exhibit A (Definitions)	EXHIBIT A TO THE DISBURSEMENT AGREEMENT DEFINITIONS ... "Remaining Costs" means, as of each date of determination, the amount reflected in the Remaining Cost Report prepared as of the most recent date in the row titled

	"Total" under the "In Balance Test Adjustments" section which shall in all events include the entire amount of any disputed claims with Contractors, except to the extent that the Construction Consultant concurs with the Project Entities that the amount asserted by the relevant Contractor is in excess of the amount which is reasonably likely to be due of that Contractor.
Retail Facility Agreement	
RFA 2.1.2(c)	II. GENERAL TERMS Section 2.1 Loan Commitment; Disbursement to Borrower. 2.1.2 Initial Advance; Future Advances. ... (c) Project Future Advances. $145,000,000 of the Loan (the "Maximum Project Future Advance Amount") will not be disbursed as of the Closing Date, but thereafter shall, subject to the conditions set forth in this Section 2.1.2(c) and 2.1.2(e), be advanced by Lender from time to time prior to the Maturity Date (each a "Project Future Advance"). Each Project Future Advance shall be considered an advance of the Loan, shall be added to the unpaid principal balance of the Loan as of the day such Project Future Advance is made for purposes of Borrower's payment obligations under this Loan Agreement, and repayment thereof, together with interest thereon at the Applicable Interest Rate and shall be secured by the Security Instrument and other Collateral given for the Loan. Lender will make Project Future Advances to Borrower in accordance with the procedures, terms and conditions set forth in the Master Disbursement Agreement. In the event that the Master Disbursement Agreement is terminated during the term of the Loan, Lender shall continue to make Project Future Advances in accordance with the same procedures, terms and conditions contained in the Master Disbursement Agreement. ... (e) Additional Conditions with Respect to Future Advances (ii) Lender's obligations to perform in accordance with this Section 2.1.2 and to make any Future Advance in accordance with the terms and provisions of this Agreement or the Master Disbursement Agreement are an independent contract made by Lender to Borrower separate and apart from any other obligation of Lender to Borrower under the other provisions of this Agreement and the other Loan Documents. The obligations of Borrower under this Agreement and the other Loan Documents shall not be reduced, discharged or released because or by reason of any existing or future offset, claim or defense of Borrower, or any other party, against Lender by reason of Lender's failure to perform its obligations under this Section 2.1.2. (iii)Subject to the terms of Section 3.5.1 of the Master Disbursement Agreement with respect to Future Advances for Shared Costs, Lender shall have no obligation to advance any Future Advance at any time during which an Event of Default exists. The making of any advance by Lender at the time when a default or Event of Default has occurred and is then continuing shall not be deemed a waiver or cure by Lender of that default or Event of Default, nor shall Lender's rights and remedies by prejudiced in any manner thereby.
RFA 2.1.4	II. GENERAL TERMS

(RFA is Ex8)	Section 2.1 Loan Commitment; Disbursement to Borrower. 2.1.4 Use of Proceeds. Borrower shall use the proceeds of the Initial Advance to (a) repay and discharge any existing loans relating to the Property (if any), (b) pay all past-due Basic Carrying Costs, if any, with respect to the Property (c) pay costs and expenses incurred in connection with the closing of the Loan, as approved by lender, or (d) fund any working capital requirements of the Property, including with respect to Basic Carrying Costs and (c) fund any Shared Costs or costs incurred with respect to tenant improvement work or leasing commissions and (f) fund any required equity contributions. The balance of the Initial Advance, if any, shall be distributed to Borrower. Borrower shall use the proceeds of each Future Advance in accordance with the terms of this Agreement. ...
RFA 4.1.20 (RFA is Ex8)	IV. REPRESENTATIONS AND WARRANTIES Section 4.1 Borrower Representations. Borrower represents and warrnats as of the Closing Date that: ... 4.1.20 Use of Property. The Property is intended, upon completion of the Future Improvements, to be used for retail and ancillary purposes (including, but not limited to, the operation of restaurants).
RFA Definitions	I. DEFINITIONS: PRINCIPLES OF CONSTRUCTION Section 1.1 Definitions. For all purposes of this Agreement, except as otherwise expressly required or unless the context clearly indicates a contrary intent: ... "Lender Default" shall mean 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.